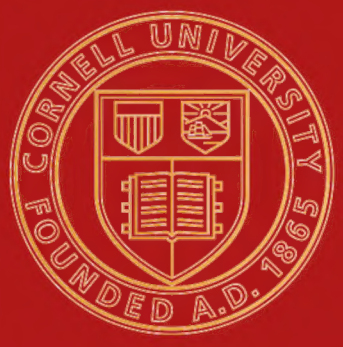


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WILLIAM MACK, LL.D.

EDITOR-IN-CHIEF

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more than to any other man is due the existence of the Cyclopedia of Law and Procedure. His was the idea; his was the plan; and his has been the business ability and energetic management, as organizer and president of The American Law Book Company, which have made possible the successful publication of these volumes, which are therefore respectfully dedicated to him.

William Mack.

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Of the Baltimore Bar

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I. DEFINITIONS.

A. Tenancy in Common. Tenancy in common is the holding of an estate in land by several persons, by several and distinct titles, and there need be unity of possession only,[1] but perhaps an entire disunion of interest, of title, and of

1. Manhattan Real Estate, etc., Assoc. *v.* Cudlipp, 80 N. Y. App. Div. 532, 535, 80 N. Y. Suppl. 993.

Another definition is: "Tenancy in common, in the strict sense of the term, is where two or more persons are entitled to land in such a manner that they have an undivided possession but several freeholds, i. e.: no one of them is entitled to the exclusive possession of any particular part of the land, each being entitled to occupy the whole in common with the others, or to receive his share of the rents and profits." Rapalje & L. L. Dict. tit. "Tenancy in Common" [*quoted* in Carver *v.* Fennimore, 116 Ind. 236, 239, 19 N. E. 103].

In a mere expectancy there can be no tenancy in common, for in order to create the

time.[2] Possession under a tenancy in common is *per my* and not *per tout*, and as each tenant owns an undivided fraction, he cannot know where that fraction is until a division has been made.[3] While definitions of tenancy in common generally relate to tenancy in common in real property, this tenancy can exist in personalty as well as in realty.[4]

B. Tenant in Common.[5] Tenants in common are such as hold by several and distinct titles, but by unity of possession; because none knoweth his own severalty, and therefore they all occupy promiscuously.[6] The qualities of their estate may be different, the shares may be unequal; the modes of acquisition of title may be unlike; and the only unity between them be that of possession.[7] Each is entitled before severance to an interest in every inch of the soil; [8] but no one of them is entitled to the exclusive possession of any particular part of the

object of a tenancy in common there must be an actual estate in possession. Betts *v.* Betts, 4 Abb. N. Cas. (N. Y.) 317, 353.

The difference between an estate in common and a right of common is that the first is a corporeal hereditament, while the last appears from its very definition to be an incorporeal hereditament. The first is the land itself; the other a profit which a man hath in the land of another. Crawford *v.* Neff, 3 Walk. (Pa.) 57, 61.

Tenancies in common differ from sole estates merely in unity of possession. Crawford *v.* Neff, 3 Walk. (Pa.) 57, 61.

Unity of possession is an essential attribute of tenancy in common. Blessing *v.* House, 3 Gill & J. (Md.) 290, 307; Laughlin *v.* O'Reily, 92 Miss. 121, 125, 45 So. 193; Sutton *v.* Jenkins, 147 N. C. 11, 16, 60 S. E. 643; Lilliansky oldt *v.* Goss, 2 Utah 292, 297; Bulger *v.* Woods, 3 Pinn. (Wis.) 460, 463. It is the only unity recognized between tenants in common. Bush *v.* Gamble, 127 Pa. St. 43, 50, 17 Atl. 865.

The ownership of land by one and of the house thereon by the other does not create a community of property, under the civil code. Javier *v.* Javier, 6 Philippine 493, 495.

2. Silloway *v.* Brown, 12 Allen (Mass.) 30, 36 [*quoting* 2 Blackstone Comm. 191]; Taylor *v.* Millard, 118 N. Y. 244, 249, 23 N. E. 376, 6 L. R. A. 667.

There can be no tenancy in a mere actual possession by one. There must be some right or title to the possession, and not the mere actual possession, to create a cotenancy. Lilliansky oldt *v.* Goss, 2 Utah 292, 297.

3. Taylor *v.* Millard, 118 N. Y. 244, 250, 23 N. E. 376, 6 L. R. A. 667.

4. Freeman Coten. § 88 [*citing* Haven *v.* Mehlgarten, 19 Ill. 91; Livingston *v.* Lynch, 4 Johns. Ch. (N. Y.) 573]. And see *infra*, II, A.

5. **Distinction between joint tenants and tenants in common** see JOINT TENANCY, 23 Cyc. 484.

6. 2 Blackstone Comm. 191 [*quoted* in Hunter *v.* State, 60 Ark. 312, 318, 30 S. W. 42; Griswold *v.* Johnson, 5 Conn. 363, 365; Gittings *v.* Worthington, 67 Md. 139, 153, 9 Atl. 228; Silloway *v.* Brown, 12 Allen (Mass.) 30, 36; Gould *v.* Eagle Creek Sub-District No. 3, 8 Minn. 427, 431; Tilton *v.* Vail, 42 Hun (N. Y.) 638, 640; Coster *v.* Lorillard, 14 Wend. (N. Y.) 265, 337; O'Bryan *v.* Brown, (Tenn. Ch. App. 1898) 48 S. W. 315, 316.

Other definitions are: "Those that come to the land by several titles, or by one title and several rights." 5 Bacon Abr. 240.

"Such as hold by several and distinct titles, but by unity of possession." 1 Bouvier L. Dict. 574 [*quoted* in Lagow *v.* Neilson, 10 Ind. 183, 185].

"They which have lands or tenements in fee simple, fee tail, or for term of life, &c. and they have such lands or tenements by several titles, and not by a joint title, and none of them know of this his several, but they ought by the law to occupy these lands or tenements in common, and *pro indiviso* to take the profits in common." Coke Litt. tit. "Of Tenants in Common," lib. 3, c. 4, § 292 [*quoted* in Blessing *v.* House, 3 Gill & J. (Md.) 290, 307].

"They who hold by several titles, or by one title on several rights; and they have several freeholds, and their right is several." Haysman *v.* Moon, 7 Mod. 430, 437, 87 Eng. Reprint 1337.

Where one rents land for the purpose of having a single crop raised on it, of which the lessor is to have a part for the use of the land and the cultivator a part for his labor, and there is no evidence that it was the intention that the relation of landlord and tenant should exist between them, the parties are to be considered as tenants in common in the crop. Ponder *v.* Rhea, 32 Ark. 435, 437.

One who owns mineral rights is not a cotenant with the owner of the surface. Hutchinson *v.* Kline, 199 Pa. St. 564, 49 Atl. 312. But the proprietors of a mining ditch and owners of mining rights are tenants in common of real estate. Bradley *v.* Harkness, 26 Cal. 69. And after such a ditch has been abandoned and its flow turned into another stream, a tenant in common, in the absence of contractual or statutory limitations, may recapture and use his proportion of the water for irrigating or other purposes. Meagher *v.* Hardenbrook, 11 Mont. 385, 28 Pac. 451.

7. Sullivan *v.* Sullivan, 4 Hun (N. Y.) 198, 200 [*reversed* on other grounds in 66 N. Y. 37].

8. Martin *v.* Bowie, 37 S. C. 102, 15 S. E. 736.

land, each being entitled to occupy the whole in common with the others or to receive his share of the rents and profits.[9]

C. Coparcenary or Parcenary. An estate in coparcenary is an estate acquired by two or more persons, usually females,[10] by descent from the same ancestor;[11] parceners or coparceners[12] being defined as 'several persons taking lands, or any undivided share of lands, held for an estate of inheritance by descent,'[13] all the coparceners, whatever their number, constituting but one heir and having but one estate among them.[14] The estate arose according to the course of common law in the case of descent of realty to female heirs, and according to particular custom, as for instance the gavelkind custom of the county of Kent, to male heirs, being in the latter instance an exception to the rule of primogeniture.[15] The estate resembles joint tenancy more closely than tenancy in common, having the same three unities of title, possession, and interest as the former, and in addition generally the unity of time. But there is no survivorship, in which respect the estate partakes more of a tenancy in common.[16] The estate never arose by purchase, but only by descent, therein differing from the other cotenancies.[17] Whilst joint tenancies refer to persons, coparcenary refers to the estate; their right of possession is in common, each may alien her share and the alienees will hold as tenants in common; their respective shares descend severally to their respective heirs.[18] They had the same remedy in equity for an account as tenants in common.[19] This estate, although formerly recognized in a few of the older states of the Union,[20] is now generally abolished, in many instances by statutes which change such estates into tenancies in common.[21]

II. CREATION, EXISTENCE, AND TERMINATION.

A. Creation and Existence. At common law a tenancy in common could be created only expressly or by necessary implication,[22] and the inclination of the courts was to construe conveyances as creating joint tenancies rather than tenancies

9. Carver *v.* Fennimore, 116 Ind. 236, 19 N. E. 103.

10. Chitty Descents 76 [*cited* in Freeman Coten. § 79].

Males are in some instances made parceners by direct descent from their common ancestor, and in other instances they become parceners by being heirs to a female parcener. Freeman Coten. § 77. See also 2 Blackstone Comm. 187; Coke Litt. §§ 241, 242, 254, 265.

11. Burrill L. Dict. tit. "Estates in Coparcenary."

12. **So called** because they may be constrained to make partition. 2 Blackstone Comm. 189.

13. Preston Abstracts Title 68 [*quoted* in Freeman Coten. § 77].

14. Hoffar *v.* Dement, 5 Gill (Md.) 132, 46 Am. Dec. 628; 2 Blackstone Comm. 187; Coke Litt. 163.

15. Leigh *v.* Shepherd, 2 B. & B. 465, 6 E. C. L. 230; Harris *v.* Nichols, Cro. Eliz. 19, 78 Eng. Reprint 285; Johnstone *v.* Baber, 25 L. J. Ch. 899, 39 Eng. L. & Eq. 189; Buller *v.* Exeter, 1 Ves. 340, 27 Eng. Reprint 1069; 2 Blackstone Comm. 187; 1 Chitty Descents 76 *et seq.*, 182; 4 Kent Comm. 366.

Since 3 & 4 Wm. IV, c. 106, where persons take under a will insufficient to annex the incident of coparcenary to the devise so taken, they take as joint tenants and not as coparceners, taking by devise and not by descent. Baker *v.* Williams, 19 Cox C. C. 81, 79 L. T. Rep. N. S. 343; Berens *v.* Fellowes, 56 L. T. Rep. N. S. 391, 35 Wkly. Rep. 356.

16. Hoffar *v.* Dement, 5 Gill (Md.) 132, 46 Am. Dec. 628; Coke Litt. 163*b*, 164*a*; 2 Cruise Dig. 391, tit. XIX, §§ 5, 6; 4 Kent Comm. 366.

17. 2 Blackstone Comm. 188.

18. 4 Kent Comm. (13th ed.) 366; 1 Preston Estates 138.

19. O'Bannon *v.* Roberts, 2 Dana (Ky.) 54; Drury *v.* Drury, 1 Ch. Rep. 49, 21 Eng. Reprint 504; 1 Eq. Cas. Abr. tit. "Account," A, 1 note.

20. See O'Bannon *v.* Roberts, 2 Dana (Ky.) 54; Graham *v.* Graham, 6 T. B. Mon. (Ky.) 561, 17 Am. Dec. 166; Gilpin *v.* Hollingsworth, 3 Md. 190, 56 Am. Dec. 737; Hoffar *v.* Dement, 5 Gill (Md.) 132, 46 Am. Dec. 628; Stevenson *v.* Cofferin, 20 N. H. 150.

21. See the statutes of the several states. And see Stevenson *v.* Cofferin, 20 N. H. 150 (under Rev. St. c. 129, § 3); 4 Kent Comm. (13th ed.) 367; 1 Washburn Real Prop. 414, 415.

In Canada the estate is abolished by Consol. St. c. 82, § 38.

22. Jackson *v.* Livingston, 7 Wend. (N. Y.) 136; Pruden *v.* Paxton, 79 N. C. 446, 28 Am Rep. 333; Fisher *v.* Wigg, 1 P. Wms. 14, 24 Eng. Reprint 275. See also 2 Reeves Real Prop. § 685.

in common, but the modern tendency is to import an intention in favor of a tenancy in common whenever the expressions in a conveyance or the acts of the parties permit such a construction;[23] and generally under the statutes of the respective states, and by judicial construction, estates which would have been joint at common law are made estates in common.[24] Thus a tenancy in common springs up whenever an estate in real or personal property is owned concurrently by two or more persons under a conveyance or under circumstances which do not either expressly or by necessary implication call for some other form of cotenancy.[25]

23. See JOINT TENANCY, 23 Cyc. 485, 486.

24. See JOINT TENANCY, 23 Cyc. 485, 486.

25. *Alabama.*—Hendricks *v.* Clemmons, 147 Ala. 590, 41 So. 306; Colbey-Hinkley Co. *v.* Jordan, 146 Ala. 634, 41 So. 962; Newbold *v.* Smart, 67 Ala. 326.

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Washington.—Anderson *v.* Snowden, 44 Wash. 274, 87 Pac. 356.

West Virginia.— Davis *v.* Settle, 43 W. Va. 17, 26 S. E. 557.

Wisconsin.—Ashland Lodge No. 63 I. O. O. F. *v.* Williams, 100 Wis. 223, 75 N. W. 954; Richards *v.* Koenig, 24 Wis. 360; Wright *v.* Sperry, 21 Wis. 331; Higgins *v.* Riddell, 12 Wis. 587; Welch *v.* Sackett, 12 Wis. 243;

It is held that a tenancy in common may be created by will,[26] by descent,[27]

Hungerford *v.* Cushing, 8 Wis. 332; Challefoux *v.* Ducharme, 8 Wis. 287.

United States.— Davis *v.* Chapman, 36 Fed. 42; Aspen Min., etc., Co. *v.* Rucker, 28 Fed. 220; Austin *v.* Rutland R. Co., 17 Fed. 466, 21 Blatchf. 358; Robison *v.* Codman, 20 Fed. Cas. No. 11,970, 1 Sumn. 121; Stillman *v.* White Rock Mfg. Co., 23 Fed. Cas. No. 13,446, 3 Woodb. & M. 588.

Canada.— Lewis *v.* Allison, 30 Can. Sup. Ct. 173; Kerr *v.* Connell, 2 N. Brunsw. 133; Wiggins *v.* White, 2 N. Brunsw. 97; Brady *v.* Arnold, 19 U. C. C. P. 42, 48; Leech *v.* Leech, 24 U. C. Q. B. 321; Colver *v.* MacKlem, 11 U. C. Q. B. 513.

See 45 Cent. Dig. tit. "Tenancy in Common," § 5 *et seq.*

The proprietors of a mining ditch are tenants in common of real estate. Bradley *v.* Harkness, 26 Cal. 69.

A conveyance to one under an agreement to hold for himself and others makes the vendee tenant in common with the others. Davis *v.* Givens, 71 Mo. 94; Anderson *v.* Snowden, 44 Wash. 274, 87 Pac. 356. *Compare* Morris *v.* Roseberry, 46 W. Va. 24, 32 S. E. 1019.

Conveyance by trustees under mistake as to authority to convey the entire tract makes the vendor and vendee tenants in common. Grimes *v.* Little, 56 Ga. 649.

Trading property for a slave see Cheek *v.* Wheatley, 3 Sneed (Tenn.) 484.

The question as to the existence of a tenancy in common is for the jury where there is evidence tending to prove such a relationship. Inglis *v.* Webb, 117 Ala. 387, 23 So. 125; Rucker *v.* Wheeler, 127 U. S. 85, 8 S. Ct. 1142, 32 L. ed. 102. Thus whether or not a tenancy in common exists in crops is a question for the jury where an alleged agreement upon which such claim is founded is by parol or ambiguous. Bromley *v.* Miles, 51 N. Y. App. Div. 95, 64 N. Y. Suppl. 353.

A sealed agreement merely to pay a share of crops in return for work, labor, and materials does not *per se* create a tenancy in common, in the absence of statute. Patten *v.* Heustis, 26 N. J. L. 293.

Tenancy in common in timber.—Where an agreement is made that one of the parties shall find timber and the other shall manufacture it into some article and they shall each then be entitled to some aliquot part of the articles so manufactured, or where an agreement is made that one party is to supply the timber and the other shall do some work and labor thereon, and they are then to receive proportionate shares thereof, the beneficiaries under said agreement are tenants in common and not partners, and each has a right to dispose only of his own interest therein. White *v.* Brooks, 43 N. H. 402; Kerr *v.* Connell, 2 N. Brunsw. 133; Wiggins *v.* White, 2 N. Brunsw. 97. A sale of standing timber on designated land, to be cut and removed at a specified rate, vests the exclusive title to the timber in the purchasers, and leaves the exclusive title to the land in the sellers, and does not make the purchasers and sellers tenants in common in either the land or the timber. Dexter *v.* Lathrop, 136 Pa. St. 565, 20 Atl. 545. *Compare* Wheeler *v.* Carpenter, 107 Pa. St. 271. Where there is no joint undivided interest in the whole property, and separate interests are dependent on surveys that should have been ordered by plaintiff, plaintiff, having failed to order a survey, cannot take advantage of its own fault for the creation of a cotenancy; and it cannot sue as a cotenant for timber taken from the unsurveyed tract. U. S. *v.* Northern Pac. R. Co., 6 Mont. 351, 12 Pac. 769.

Tenancy in common in waters see Bailey *v.* Rust, 15 Me. 440; Richards *v.* Koenig, 24 Wis. 360; Stillman *v.* White Rock Mfg. Co., 23 Fed. Cas. No. 13,446, 3 Woodb. & M. 538; Austin *v.* Rutland R. Co., 17 Fed. 466, 21 Blatchf. 358. The mere privilege of drawing water for a conveyed business so long as the grantee should carry on the business, the grantee paying share of repairing expenses, does not create a tenancy in common in the right to use the water. Shed *v.* Leslie, 22 Vt. 498.

Tenancy in common in ditch see Vannest *v.* Fleming, 79 Iowa 638, 44 N. W. 906, 18 Am. St. Rep. 387, 8 L. R. A. 277; Lehi Irr. Co. *v.* Moyle, 4 Utah 327, 9 Pac. 867. An agreement for several ownership of water in a ditch, for use on the several lands of the respective owners, does not create a tenancy in common. Telluride *v.* Davis, 33 Colo. 355, 80 Pac. 1051.

26. See WILLS. And see cases cited *infra*, note 28.

27. *Alabama.*— Fles *v.* Rosser, 162 Ala. 504, 50 So. 287; Inglis *v.* Webb, 117 Ala. 387, 23 So. 125; Ohmer *v.* Boyer, 89 Ala. 273, 7 So. 663.

Connecticut.— Wooster *v.* Hunts Lyman Iron Co., 38 Conn. 256.

Illinois.— Brumback *v.* Brumback, 198 Ill. 66, 64 N. E. 741; Kotz *v.* Belz, 178 Ill. 434, 53 N. E. 367.

Indiana.— McPheeters *v.* Wright, 124 Ind. 560, 24 N. E. 734, 9 L. R. A. 176; Kidwell *v.* Kidwell, 84 Ind. 224; Centreville, etc., Turnpike Co. *v.* Jarrett, 4 Ind. 213.

Iowa.— German *v.* Heath, 139 Iowa 52, 116 N. W. 1051; Bowen *v.* Duffie, 66 Iowa 88, 23 N. W. 277.

Kentucky.— Kidd *v.* Bell, (1909) 122 S. W. 232.

Louisiana.— Meyer *v.* Schurbruck, 37 La. Ann. 373.

Maryland.— Hoffar *v.* Dement, 5 Gill 132, 46 Am. Dec. 628.

Michigan.— Fenton *v.* Miller, 94 Mich. 204, 53 N. W. 957.

New York.— Cruger *v.* McLaury, 41 N. Y. 219 [*affirming* 51 Barb. 642]; Phelan *v.* Kelly, 25 Wend. 389. *Compare* Jackson *v.* O'Donaghy, 7 Johns. 247.

Porto Rico.— Soriano *v.* Arrese, 1 Porto Rico Fed. 198, 201.

Texas.— McDougal *v.* Bradford, 80 Tex. 558, 16 S. W. 619; Rowland *v.* Murphy, 66

and the relation may be brought into existence by purchase, sale, or conveyance.[28]

Tex. 534, 1 S. W. 658; Kirby *v.* Blake, (Civ. App. 1909) 115 S. W. 674.

See 45 Cent. Dig. tit. "Tenancy in Common," § 6.

A widow and children are tenants in common with the cotenants of the deceased. McClure *v.* Colyear, 80 Cal. 378, 22 Pac. 175.

The widow and the heirs are tenants in common until assignment of dower. Wooster *v.* Hunts Lyman Iron Co., 38 Conn. 256; Montague *v.* Selb, 106 Ill. 49. And a widow holding as dowress and as guardian *in socage* of minor heirs is tenant in common with the other heirs. Knolls *v.* Barnhart, 71 N. Y. 474.

A husband, heir at law of wife, thus having undivided interest in realty, holds as tenant in common with the other owners. Thompson *v.* Sanders, 113 Ga. 1024, 39 S. E. 419.

In the Hawaiian Islands if a contingent remainder vests in an only child and upon the death of the child the property vests in the parents, they are, by statute, tenants in common. Booth *v.* Baker, 10 Hawaii 543. On the death of one partner his representatives become tenants in common with the survivor. Un Wong, Admr. *v.* Kan Chu *et al.*, 5 Hawaii 225.

Surviving husband and heirs of wife.— Property purchased during the lifetime of a wife, in which she has an interest, creates, upon her death, a tenancy in common between her surviving husband and her surviving children. Rowland *v.* Murphy, 66 Tex. 534, 1 S. W. 658. But the heirs of the deceased wife, and her surviving husband, are not tenants in common in the wife's realty, he being entitled to the exclusive possession thereof as tenant by the curtesy. Martin *v.* Castle, 193 Mo. 183, 91 S. W. 930.

The remainder-men of a life-tenant upon her death became tenants in common with one who had owned all of the common land excepting the life-interest and the remainder thereof, and who had purchased the life-interest. Austin *v.* Rutland R. Co., 17 Fed. 466, 21 Blatchf. 358.

At common law tenancy in common could not arise by descent. Jackson *v.* Livingston, 7 Wend. (N. Y.) 136; Pruden *v.* Paxton, 79 N. C. 446, 28 Am. Rep. 333; Fisher *v.* Wigg, 1 P. Wms. 14, 24 Eng. Reprint 275. See also 2 Reeves Real Prop. § 685.

28. *Alabama.*— Ohmer *v.* Boyer, 89 Ala. 273, 7 So. 663; Smith *v.* Rice, 56 Ala. 417.

California.— Reed *v.* Spicer, 27 Cal. 57.

Georgia.— McRae *v.* Dutton, 95 Ga. 267, 22 S. E. 149; Grimes *v.* Little, 56 Ga. 649; Bazemore *v.* Davis, 55 Ga. 504.

Hawaii.— Hayselden *v.* Wahineaea, 10 Hawaii 10.

Illinois.— Haven *v.* Mehlgarten, 19 Ill. 91.

Iowa.— Gilmore *v.* Jenkins, 129 Iowa 686, 106 N. W. 193.

Kansas.— Erskin *v.* Wood, 77 Kan. 577, 95 Pac. 413.

Kentucky.— Craig *v.* Taylor, 6 B. Mon. 457, holding that a deed to two persons by one common boundary stating the particular interests conveyed to each makes them tenants in common.

Maine.— Brown *v.* Bates, 55 Me. 520, 92 Am. Dec. 613.

Massachusetts.— Higbee *v.* Rice, 5 Mass. 344, 4 Am. Dec. 63.

Missouri.— McCaul *v.* Kilpatrick, 46 Mo. 434.

Nebraska.— Schuster *v.* Schuster, 84 Nebr. 98, 120 N. W. 948.

New Jersey.— Jenkins *v.* Jenkins, (Ch. 1886) 5 Atl. 134.

New York.— Ferris *v.* Nelson, 60 N. Y. App. Div. 430, 69 N. Y. Suppl. 999; St. Paul's Church *v.* Ford, 34 Barb. 16; Hosford *v.* Merwin, 5 Barb. 51; Mumford *v.* McKay, 8 Wend. 442, 24 Am. Dec. 34, holding that where crops were raised in partnership and a moiety of the land was conveyed to a stranger, such conveyance created a tenancy in common in the crops.

North Carolina.— Parker *v.* Vick, 22 N. C. 195; Cloud *v.* Webb, 14 N. C. 317.

Pennsylvania.— Coleman's Appeal, 62 Pa. St. 252; Caines *v.* Grant, 5 Binn. 119; Bambaugh *v.* Bambaugh, 11 Serg. & R. 191.

South Carolina.— Green *v.* Cannady, 77 S. C. 193, 57 S. E. 832; Harvin *v.* Hodge, Dudley 23. See also Fuller *v.* Missroom, 35 S. C. 314, 14 S. E. 714.

Tennessee.— Cheek *v.* Wheatley, 3 Sneed 484.

Wisconsin.— Richards *v.* Koenig, 24 Wis. 360; Welsh *v.* Sackett, 12 Wis. 243.

United States.— Gratz *v.* Land, etc., Imp. Co., 82 Fed. 381, 27 C. C. A. 305, 40 L. R. A. 393.

England.— Bryan *v.* Twigg, L. R. 3 Ch. 183, 37 L. J. Ch. 249, 16 Wkly. Rep. 298; *In re* Pickworth, [1899] 1 Ch. 642, 68 L. J. Ch. 324, 80 L. T. Rep. N. S. 212; *In re* Atkinson, [1892] 3 Ch. 52, 61 L. J. Ch. 504, 66 L. T. Rep. N. S. 717, 40 Wkly. Rep. 666; *In re* Yates, [1891] 3 Ch. 53, 64 L. T. Rep. N. S. 819, 39 Wkly. Rep. 573 [*disapproving* Shepherdson *v.* Dale, 12 Jur. N. S. 156, 13 L. T. Rep. N. S. 699]; Surtees *v.* Surtees, L. R. 12 Eq. 400, 25 L. T. Rep. N. S. 288, 19 Wkly. Rep. 1043; Ryves *v.* Ryves, L. R. 11 Eq. 539, 40 L. J. Ch. 252; Heasman *v.* Pearse, L. R. 11 Eq. 522, 40 L. J. Ch. 258, 24 L. T. Rep. N. S. 864, 19 Wkly. Rep. 673 [*affirmed* in L. R. 7 Ch. 275, 41 L. J. Ch. 705, 26 L. T. Rep. N. S. 299, 20 Wkly. Rep. 271]; Hodges *v.* Grant, L. R. 4 Eq. 140, 36 L. J. Ch. 935, 15 Wkly. Rep. 607; Rigden *v.* Vallier, 3 Atk. 731, 2 Ves. 252, 26 Eng. Reprint 1219; Haws *v.* Haws, 3 Atk. 524, 26 Eng. Reprint 1102, 1 Ves. 13, 27 Eng. Reprint 859, 1 Wils. C. P. 165, 95 Eng. Reprint 552; Ridout *v.* Pain, 3 Atk. 486, 26 Eng. Reprint 1080; Sheppard *v.* Gibbons, 2 Atk. 441, 26 Eng. Reprint 666; Ulrich *v.* Litchfield, 2 Atk. 373, 26 Eng. Reprint 625; Owen *v.* Owen, 1 Atk. 494, 26 Eng. Reprint 313; Leak *v.* Macdowall, 32 Beav. 28, 55 Eng. Reprint 11; Patterson *v.* Rowland, 28 Beav. 347, 54 Eng. Reprint 399; Haddelsey

It is not the form of instrument which determines the existence of the relation,

v. Adams, 22 Beav. 266, 2 Jur. N. S. 724, 25 L. J. Ch. 826, 52 Eng. Reprint 1110; *In re* Tiverton Market Act, 20 Beav. 374, 1 Jur. N. S. 487, 24 L. J. Ch. 657, 3 Wkly. Rep. 118, 52 Eng. Reprint 647; Ive *v.* King, 16 Beav. 46, 16 Jur. 489, 21 L. J. Ch. 560, 51 Eng. Reprint 693; Campbell *v.* Campbell, 4 Bro. Ch. 15, 29 Eng. Reprint 755; Armstrong *v.* Eldridge, 3 Bro. Ch. 215, 29 Eng. Reprint 497; Jolliffe *v.* East, 3 Bro. Ch. 25, 29 Eng. Reprint 387; Edwards *v.* Champion, 3 De G. M. & G. 202, 1 Eq. Rep. 419, 23 L. J. Ch. 123, 1 Wkly. Rep. 497, 52 Eng. Ch. 202, 43 Eng. Reprint 80; Gordon *v.* Atkinson, 1 De G. & Sm. 478, 63 Eng. Reprint 1156; Lanphier *v.* Buck, 2 Dr. & Sm. 484, 11 Jur. N. S. 837, 34 L. J. Ch. 650, 12 L. T. Rep. N. S. 660, 6 New Rep. 196, 13 Wkly. Rep. 767, 62 Eng. Reprint 704; Oakley *v.* Young, 3 Eq. Cas. Abr. 536; Kenworthy *v.* Ward, 1 Eq. Rep. 389, 11 Hare 196, 17 Jur. 1047, 1 Wkly. Rep. 493, 45 Eng. Ch. 196, 68 Eng. Reprint 1245; *Re* Grove, 3 Giffard 575, 9 Jur. N. S. 38, 6 L. T. Rep. N. S. 376, 66 Eng. Reprint 537; Taaffe *v.* Conmee, 10 H. L. Cas. 64, 8 Jur. N. S. 919, 6 L. T. Rep. N. S. 666, 11 Eng. Reprint 949; Trevor *v.* Trevor, 1 H. L. Cas. 239 [*affirming* 13 Sim. 108, 6 Jur. 863, 11 L. J. Ch. 417, 36 Eng. Ch. 108, 60 Eng. Reprint 42]; Jones *v.* Randall, 1 Jac. & W. 100, 20 Rev. Rep. 237, 37 Eng. Reprint 313; Harrison *v.* Barton, 1 Johns. & H. 287, 7 Jur. N. S. 519, 30 L. J. Ch. 213, 3 L. T. Rep. N. S. 614, 9 Wkly. Rep. 177, 70 Eng. Reprint 756; Lyon *v.* Coward, 10 Jur. 486, 15 L. J. Ch. 460, 15 Sim. 287, 38 Eng. Ch. 287, 60 Eng. Reprint 628; Pearce *v.* Edmeades, 3 Jur. 245, 8 L. J. Exch. 61, 3 Y. & C. Exch. 246; Shepherdson *v.* Dale, 12 Jur. N. S. 156, 13 L. T. Rep. N. S. 693; Hand *v.* North, 10 Jur. N. S. 7, 33 L. J. Ch. 556, 9 L. T. Rep. N. S. 634, 3 New Rep. 239, 12 Wkly. Rep. 229; Booth *v.* Alington, 3 Jur. N. S. 835, 27 L. J. Ch. 117, 5 Wkly. Rep. 811; Bird *v.* Swales, 2 Jur. N. S. 273, 4 Wkly. Rep. 227; *In re* Jones, 47 L. J. Ch. 775, 26 Wkly. Rep. 828; Atty.-Gen. *v.* Sidney Sussex College, 38 L. J. Ch. 656; Sutcliffe *v.* Howard, 38 L. J. Ch. 472; *Re* Moore, 31 L. J. Ch. 368, 6 L. T. Rep. N. S. 43, 10 Wkly. Rep. 315; Grant *v.* Winbolt, 23 L. J. Ch. 282, 2 Wkly. Rep. 151; Eales *v.* Cardigan, 8 L. J. Ch. 11, 9 Sim. 384, 16 Eng. Ch. 384, 59 Eng. Reprint 405; Woodgate *v.* Atkins, 9 L. J. Ch. O. S. 166; *Re* Flower, 62 L. T. Rep. N. S. 216; *Re* Quirk, 61 L. T. Rep. N. S. 364, 37 Wkly. Rep. 796; Jones *v.* Jones, 44 L. T. Rep. N. S. 642, 29 Wkly. Rep. 786; Crosthwaite *v.* Dean, 40 L. T. Rep. N. S. 837; Apsey *v.* Apsey, 36 L. T. Rep. N. S. 941; Garland *v.* Brown, 10 L. T. Rep. N. S. 292; Draycott *v.* Wood, 8 L. T. Rep. N. S. 304, 2 New Rep. 55; Bateman *v.* Roach, 9 Mod. 104, 88 Eng. Reprint 344; Doe *v.* Prestwidge, 4 M. & S. 178, 18 Rev. Rep. 436, 105 Eng. Reprint 800; Coe *v.* Bigg, 1 New Rep. 536; Hamell *v.* Hunt, Prec. Ch. 163, 24 Eng. Reprint 79; Taggart *v.* Taggart, 1 Sch. & Lef. 84; Bridge *v.* Yates, 12 Sim. 645, 35 Eng. Ch. 545, 59 Eng. Reprint 1281; Peters *v.* Dipple, 12 Sim. 101, 35 Eng. Ch. 86; Woodgate *v.* Unwin, 4 Sim. 129, 6 Eng. Ch. 129, 58 Eng. Reprint 50; Barker *v.* Lea, Turn. & R. 413, 24 Rev. Rep. 85, 12 Eng. Ch. 413, 37 Eng. Reprint 1160; Peiton *v.* Banks, 1 Vern. Ch. 65, 23 Eng. Reprint 314; Thickness *v.* Vernon, 1 Vern. Ch. 32, 23 Eng. Reprint 287; Stones *v.* Heurtley, 1 Ves. 165, 27 Eng. Reprint 959; Marryat *v.* Townly, 1 Ves. 102, 27 Eng. Reprint 918; Crooke *v.* De Vandes, 11 Ves. Jr. 330, 32 Eng. Reprint 1115; Bolger *v.* Mackell, 5 Ves. Jr. 509, 31 Eng. Reprint 707; Perry *v.* Woods, 3 Ves. Jr. 204, 30 Eng. Reprint 970; Gant *v.* Lawrence, Wightw. 395; Chatfield *v.* Berchtoldt, 18 Wkly. Rep. 887; Alt *v.* Gregory, 3 Wkly. Rep. 630 [*affirmed* in 8 De G. M. & G. 221, 2 Jur. N. S. 577, 4 Wkly. Rep. 436, 57 Eng. Ch. 172, 44 Eng. Reprint 375]; Alt *v.* Gregory, 3 Wkly. Rep. 630 [*affirmed* in 8 De G. M. & G. 221, 2 Jur. N. S. 577, 4 Wkly. Rep. 436, 57 Eng. Ch. 172, 44 Eng. Reprint 375].

See 45 Cent. Dig. tit. "Tenancy in Common," § 8.

A deed in trust for a woman and the heirs of her deceased husband creates an estate in common. Bazemore *v.* Davis, 55 Ga. 504. Similarly land conveyed to a trustee on trust for the benefit of life-tenants, "and upon the death of the survivor then in trust to be absolutely vested in such issue of their present marriage as may be living," creates a tenancy in common in the remainder-men taking the land. Fuller *v.* Missroon, 35 S. C. 314, 14 S. E. 714.

Deeds made under a decree void as to some heirs make the grantee a tenant in common with those whose titles were not divested. Downing *v.* Ford, 9 Dana (Ky.) 391.

Where a deed is not sufficient to convey the interests of one of the grantors, he becomes a tenant in common with the vendee therein. Cloud *v.* Webb, 14 N. C. 317.

Conveyance of part of a tract of land less than the whole thereof without designating its locality creates a tenancy in common between the grantor and the grantee (Gordon *v.* San Diego, 101 Cal. 522, 36 Pac. 18, 40 Am. St. Rep. 73 [*affirming* (1893) 32 Pac. 885]; Lawrence *v.* Ballou, 37 Cal. 518; Schenk *v.* Evoy, 24 Cal. 104; Fisher *v.* Wailehua, 16 Hawaii 154; Gill *v.* Grand Tower Min., etc., Co., 92 Ill. 249; Nowlen *v.* Hall, 128 Mich. 274, 87 N. W. 222; McCaul *v.* Kilpatrick, 46 Mo. 434; Anderson *v.* Donelson, 1 Yerg. (Tenn.) 197; Ashland Lodge No. 63 I. O. O. F. *v.* Williams, 100 Wis. 223, 75 N. W. 954, 69 Am. St. Rep. 912; McNiel *v.* McNiel, 4 Nova Scotia 33), and the conveyance of an estate in common by the respective deeds of the tenants in common to several grantees creates a tenancy in common between such grantees (Reed *v.* Spicer, 27 Cal. 57); but a grant of a part of property, in severalty, to be assigned from a certain described tract, does not create a tenancy in common (U. S. *v.* Northern Pac. R. Co., 6 Mont. 351, 12 Pac. 769).

but the concurrent rights in the same property at the same time, and the tenancy

A sale of standing timber on designated land, to be cut and removed at a specified rate, vests the exclusive title to the timber in the purchasers, and leaves the exclusive title to the land in the sellers, and does not make the purchasers and sellers tenants in common in either the land or the timber. Dexter *v.* Lathrop, 136 Pa. St. 565, 20 Atl. 545 [*distinguishing* Wheeler *v.* Carpenter, 107 Pa. St. 271].

A purchase of encumbered property may make the purchaser a tenant in common with others owning an interest therein. Conn *v.* Conn, 58 Iowa 747, 13 N. W. 51; Root *v.* Stow, 13 Metc. (Mass.) 5; Herbert *v.* Odlin, 40 N. H. 267; Stoddard *v.* Weston, 3 Silv. Sup. (N. Y.) 13, 6 N. Y. Suppl. 34.

A purchaser of the share of a tenant in common becomes a tenant in common with the remaining owner or owners. Hewlett *v.* Owens, 51 Cal. 570; Stark *v.* Barrett, 15 Cal. 361; Barnum *v.* Landon, 25 Conn. 137; Oviatt *v.* Sage, 7 Conn. 95; Fischer *v.* Eslaman, 68 Ill. 78; Stevens *v.* Reynolds, 143 Ind. 467, 41 N. E. 931, 52 Am. St. Rep. 422; Pope *v.* Brassfield, 110 Ky. 128, 61 S. W. 5, 22 Ky. L. Rep. 1613; Downing *v.* Ford, 9 Dana (Ky.) 391; Bell *v.* Layman, 1 T. B. Mon. (Ky.) 39, 15 Am. Dec. 83; Estey *v.* Boardman, 61 Me. 595; Liscomb *v.* Root, 8 Pick. (Mass.) 376; Cook *v.* Clinton, 64 Mich. 309, 31 N. W. 317, 8 Am. St. Rep. 816; Alsobrook *v.* Eggleston, 69 Miss. 833, 13 So. 850; Childs *v.* Kansas City, etc., R. Co., 117 Mo. 414, 23 S. W. 373; Prentice *v.* Janssen, 79 N. Y. 478 [*affirming* 14 Hun 548]; Biglow *v.* Biglow, 75 N. Y. App. Div. 98, 77 N. Y. Suppl. 716; Messing *v.* Messing, 64 N. Y. App. Div. 125, 71 N. Y. Suppl. 717; Archibald *v.* New York Cent., etc., R. Co., 1 N. Y. App. Div. 251, 37 N. Y. Suppl. 336 [*affirmed* in 157 N. Y. 574, 52 N. E. 567]; Earnshaw *v.* Myers, 1 N. Y. Suppl. 901; Northrop *v.* Wright, 24 Wend. (N. Y.) 221; St. John *v.* Standring, 2 Johns. (N. Y.) 468; Battle *v.* John, 49 Tex. 202; Hawkins *v.* Hobson, (Tex. Civ. App. 1909) 123 S. W. 183; Hess *v.* Webb, (Tex. Civ. App. 1908) 113 S. W. 618; Heilbron *v.* St. Louis Southwestern R. Co., (Tex. Civ. App. 1908) 113 S. W. 610, 979; McAllen *v.* Raphael, 11 Tex. Civ. App. 116, 32 S. W. 449; Kane *v.* Garfield, 60 Vt. 79, 13 Atl. 800; Spencer *v.* Austin, 38 Vt. 258; Vermont L. & T. Co. *v.* Cardin, 19 Wash. 304, 53 Pac. 164; Wright *v.* Sperry, 21 Wis. 331. *Compare* Weld *v.* Oliver, 21 Pick. (Mass.) 559; York *v.* Hutcheson, 37 Tex. Civ. App. 367, 83 S. W. 895. Thus where land owned by an adult and infants was sold, and the purchaser conveyed to a third person the timber thereon, the third person was a tenant in common with those who succeeded to the infants' right to avoid their conveyance, and he could go on the premises and appropriate a part at least of the timber. Hatton *v.* Bodan Lumber Co., (Tex. Civ. App. 1909) 123 S. W. 163. But where one in adverse possession purchases the undivided interest of one of several co-claimants, merely to protect himself against litigation, as is known to the other claimants, he does not hold as tenant in common with such claimants (Cooper *v.* Great Falls Cotton Mills Co., 94 Tenn. 588, 30 S. W. 353), and the conveyances by a tenant in common of a portion of the common estate by metes and bounds cannot in any event operate, contrary to the expressed declarations and intentions of the parties, to convey an estate in common, instead of an estate in severalty; and a creditor of the grantee who levies his execution upon an undivided share of the whole common estate acquires no title as tenant in common by virtue of such levy (Soutter *v.* Porter, 27 Me. 405). Similarly where some of the heirs of the deceased owner conveyed their interest to a grantee, the latter became a tenant in common with the other heirs, and a subsequent conveyance by the grantee to a third person of a specified number of acres of the land was effective as against the other heirs or their grantee as a conveyance of the grantee's interest therein only. Hawkins *v.* Hobson, (Tex. Civ. App. 1909) 123 S. W. 183.

Cotenant's deed of whole property.— If one cotenant sells and conveys the entire property to a stranger without the knowledge or consent of his cotenant the purchaser does not thereby become a cotenant with the remaining owner. Boggess *v.* Meredith, 16 W. Va. 1. The purchaser's title is a nullity and the sale is void. Starnes *v.* Quin, 6 Ga. 84. Thus a deed from one of several cotenants to a person in exclusive possession, conveying all the property, does not make the grantee a cotenant with the other holders of a legal title so as to render his possession not adverse. Frick *v.* Sinon, 75 Cal. 337, 17 Pac. 439, 7 Am. St. Rep. 177; King *v.* Carmichael, 136 Ind. 20, 35 N. E. 509, 43 Am. St. Rep. 303. It is held, however, that one who assumes to purchase from one of two tenants in common the entire interest of both, the other not sanctioning the sale, becomes himself a tenant in common with the other to the extent that the latter may hold him liable if he converts the whole to his exclusive use (Sims *v.* Dame, 113 Ind. 127, 15 N. E. 217), and a father, to whom after he has conveyed lands in common to his children, one of them reconveys his interest, although by a deed purporting to convey the entire tract, is held to thereby become a tenant in common with his other children (Stevens *v.* Wait, 112 Ill. 544).

Judicial sale.— A purchaser at a judicial sale of the interest of a tenant in common will occupy the place of him whose title he acquired. Leonard *v.* Scarborough, 2 Ga. 73; Fischer *v.* Eslaman, 68 Ill. 78; Battle *v.* John, 49 Tex. 202; Wright *v.* Sperry, 21 Wis. 331. But see Johnson *v.* Moser, 72 Iowa 523, 34 N. W. 314; McCormick *v.* Bishop, 28 Iowa 233.

The conveyance of an undivided interest in crops creates the relation of tenants in common between the seller and buyer. McAllen

can arise by pledge or mortgage,[29] by legislative grant,[30] by prescription,[31] by judgment or decree,[32] by levy or execution,[33] or by confusion or intermingling of goods,

v. Raphael, 11 Tex. Civ. App. 116, 32 S. W. 449; Vermont L. & T. Co. *v.* Cardin, 19 Wash. 304, 53 Pac. 164. *Compare* Nevels *v.* Kentucky Lumber Co., 108 Ky. 550, 56 S. W. 969, 22 Ky. L. Rep. 247, 49 L. R. A. 416.

A purchase with common funds constitutes the purchasers tenants in common. McRea *v.* Dutton, 95 Ga. 267, 22 S. E. 149; Roberts *v.* Remy, 56 Ohio St. 249, 46 N. E. 1066. This is the case where there is a purchase of lands by a partnership with partnership funds. Greene *v.* Graham, 5 Ohio 264.

The contemporaneous concurrent grant of the same property to different persons makes them tenants in common. Bambaugh *v.* Bambaugh, 11 Serg. & R. (Pa.) 191; Fuller *v.* Missroon, 35 S. C. 314, 14 S. E. 714; Young *v.* De Bruhl, 11 Rich. (S. C.) 638, 73 Am. Dec. 127.

The assignment of an interest in a chattel mortgage creates a tenancy in common. Earll *v.* Stumpf, 56 Wis. 50, 13 N. W. 701; McNiel *v.* McNiel, 4 Nova Scotia 33; Leech *v.* Leech, 24 U. C. Q. B. 321.

Facts held not to establish a cotenancy by a tax purchaser in land sold for delinquent taxes see Sheean *v.* Shaw, 47 Iowa 411.

29. Smith *v.* Rice, 56 Ala. 417 (holding that where a tenancy in common in the crop is created between the owner or tenant of the land and the cultivator on shares of the crop, and the owner or tenant of the land subsequently mortgages his interest in said crops, the mortgagee becomes a tenant in common in said crops with the cultivators thereof, until after division thereof has been made); Brown *v.* Bates, 55 Me. 520, 92 Am. Dec. 613. But see Barteau *v.* Merriam, 52 Minn. 222, 53 N. W. 1061.

The concurrent execution and delivery of two chattel mortgages makes the mortgagees tenants in common of the property, and in a suit for the conversion thereof they may, and if required by defendant they must, bring their action jointly. Welch *v.* Sackett, 12 Wis. 243.

Pledgee of share of cotenant.— Where a warehouseman owns part of a larger uniform mass, as wheat in an elevator, and pledges his share therein by issuing and delivering his own warehouse receipt, the pledgee becomes tenant in common with the other owners. Hartford Nat. Exch. Bank *v.* Wilder, 34 Minn. 149, 24 N. W. 699.

A mortgage of the interest of a cotenant or a foreclosure of such mortgage usually creates the relationship of cotenancy between the mortgagee or the purchaser at such sale, and the mortgagor's cotenants. Smith *v.* Rice, 56 Ala. 417; Young *v.* Williams, 17 Conn. 393; Conn *v.* Conn, 58 Iowa 747, 13 N. W. 51; Brown *v.* Bates, 55 Me. 520, 92 Am. Dec. 613; Nowlen *v.* Hall, 128 Mich. 274, 87 N. W. 222; Moreland *v.* Strong, 115 Mich. 211, 73 N. W. 140, 69 Am. St. Rep. 553; McAllen *v.* Raphael, 11 Tex. Civ. App. 116, 32 S. W. 449; Vermont L. & T. Co. *v.* Cardin, 19 Wash. 304, 53 Pac. 164; Wright *v.* Sperry, 21 Wis. 331. *Compare* Barteau *v.* Merriam, 52 Minn. 222, 53 N. W. 1061. Such newly created cotenant by purchase is entitled to the use and occupation of the common property. Moreland *v.* Strong, 115 Mich. 211, 73 N. W. 140, 69 Am. St. Rep. 553. The distinction between tenancy in common and joint tenancy as applied to purchasers or mortgagees disapproved see Harrison *v.* Barton, 1 Johns. & H. 287, 7 Jur. N. S. 519, 30 L. J. Ch. 213, 3 L. T. Rep. N. S. 614, 9 Wkly. Rep. 177, 70 Eng. Reprint 756. *Compare* Brown *v.* Bates, 55 Me. 520, 92 Am. Dec. 613.

A mortgagee of an interest in crops may become a tenant in common with the owners of the other interests therein; and his cotenants have no right to infringe upon or interfere with his interests in the crop. Arthur *v.* Chicago, etc., R. Co., 61 Iowa 648, 17 N. W. 24; Porter *v.* Stone, 70 Miss. 291, 12 So. 208; McAllen *v.* Raphael, 11 Tex. Civ. App. 116, 32 S. W. 449; Vermont L. & T. Co. *v.* Cardin, 19 Wash. 304, 53 Pac. 164.

30. Haven *v.* Mehlgarten, 19 Ill. 91; Higbee *v.* Rice, 5 Mass. 344, 4 Am. Dec. 63; Young *v.* De Bruhl, 11 Rich. (S. C.) 638, 73 Am. Dec. 127; Challefoux *v.* Ducharme, 8 Wis. 287. But see Rice *v.* Osgood, 9 Mass. 38.

31. Inglis *v.* Webb, 117 Ala. 387, 23 So. 125; Brock *v.* Benness, 29 Ont. 468.

32. McRea *v.* Dutton, 95 Ga. 267, 22 S. E. 149; Coleman's Appeal, 62 Pa. St. 252; Dorn *v.* Beasley, 7 Rich. Eq. (S. C.) 84. But see Gray *v.* Kauffmann, 82 Tex. 65, 17 S. W. 513.

Deed under void decree.— Where a decree against several heirs is void as to some, the deed made thereunder makes the grantee a tenant in common with those whose titles were not divested by the decree and deed. Downing *v.* Ford, 9 Dana (Ky.) 391.

33. Young *v.* Williams, 17 Conn. 393; Leonard *v.* Scarborough, 2 Ga. 73; Strickland *v.* Parker, 54 Me. 263 (holding that by levying on a judgment debtor's undivided part of a marine railway and land on which it is located, the judgment creditor becomes tenant in common with the other owners); Barney *v.* Leeds, 51 N. H. 253 (holding that where a creditor causes the estate of his debtor, of greater value than the homestead right of the latter therein, to be set off on execution, subject to such homestead right, the creditor and the debtor, after the levy of the creditor's execution, and before any proceedings by either for a separation and assignment of their respective interests, are tenants in common of the estate).

Where executions are levied upon land by two or more creditors at the same time each acquires by levy a title to an undivided moiety of the land, which they hold as tenants in common. Cutting *v.* Rockwood, 2 Pick. (Mass.) 443; Shove *v.* Dow, 13 Mass. 529; Wiswall *v.* Wilkins, 5 Vt. 87.

by consent or without the owner's fault.[34] The estate may come to the tenants in common in different parcels or by different instruments,[35] and the tenants may hold by different tenures,[36] and the tenancy in common may be created in all kinds of property, real and personal,[37] and it may be of an inchoate, as well as of a perfect, right.[38] The law will not construe a coöwnership or occupancy of property to be a tenancy in common, where another kind of tenancy is called for by the expressed intention of the parties or by the circumstances surrounding the case.[39] A cotenancy and the proportionate amounts of interests therein

34. Low *v.* Martin, 18 Ill. 286; Tufts *v.* McClintock, 28 Me. 424, 48 Am. Dec. 501; Van Liew *v.* Van Liew, 36 N. J. Eq. 637; Morgan *v.* Gregg, 46 Barb. (N. Y.) 183; Moore *v.* Erie R. Co., 7 Lans. (N. Y.) 39. And see CONFUSION OF GOODS, 8 Cyc. 574, note 28.

Confusion of grain by the bailee thereof of various bailors, without express agreement, but according to custom, creates a tenancy in common therein between said bailors. Lawrence *v.* Ballou, 37 Cal. 518; Gill *v.* Grand Tower Min., etc., Co., 92 Ill. 249; Arthur *v.* Chicago, etc., R. Co., 61 Iowa 648, 17 N. W. 24; Nelson *v.* Brown, 53 Iowa 555, 5 N. W. 719; Hall *v.* Pillsbury, 43 Minn. 33, 44 N. W. 673, 19 Am. St. Rep. 209, 7 L. R. A. 529. The pledgee of part of a uniform mass, as wheat in an elevator, is a tenant in common therein. Hartford Nat. Exch. Bank *v.* Wilder, 34 Minn. 149, 24 N. W. 699.

A special agent commingling his own property with that of his principal cannot thus, without his principal's consent, create a tenancy in common. Hall *v.* Page, 4 Ga. 428, 48 Am. Dec. 235.

35. Wright *v.* Wright, 59 How. Pr. (N. Y.) 176.

36. Wright *v.* Wright, 59 How. Pr. (N. Y.) 176; Putnam *v.* Ritchie, 6 Paige (N. Y.) 390.

37. Cheek *v.* Wheatley, 3 Sneed (Tenn.) 484; Waggoner *v.* Snody, 98 Tex. 512, 85 S. W. 1134.

Tenancy in common in a slave see Cheek *v.* Wheatley, 3 Sneed (Tenn.) 484.

Tenancy in common in an option see Varley Duplex Magnet Co. *v.* Ostheimer, 159 Fed. 655, 86 C. C. A. 523.

A homestead may be owned and occupied by husband and wife as tenants in common under statutes. Thorn *v.* Thorn, 14 Iowa 49, 81 Am. Dec. 451; Lozo *v.* Sutherland, 38 Mich. 168; Horn *v.* Tufts, 39 N. H. 478; McClary *v.* Bixby, 36 Vt. 254, 84 Am. Dec. 684.

38. Wilkins *v.* Burton, 5 Vt. 76.

39. *California.*— Fairchild *v.* Mullan, 90 Cal. 190, 27 Pac. 201; Tully *v.* Tully, 71 Cal. 338, 12 Pac. 246.

Colorado.— Telluride *v.* Davis, 33 Colo. 355, 80 Pac. 1051, 108 Am. St. Rep. 101.

Connecticut.— Wooster *v.* Hunts Lyman Iron Co., 38 Conn. 256.

Indiana.— Pulse *v.* Osborn, (App. 1901) 60 N. E. 374; Anderson School Tp. *v.* Milroy Lodge F. & A. M. No. 139, 130 Ind. 108, 29 N. E. 411, 30 Am. St. Rep. 206; Centreville, etc., Turnpike Co. *v.* Jarett, 4 Ind. 213.

Iowa.— Willcuts *v.* Rollins, 85 Iowa 247, 52 N. W. 199; Johnson *v.* Moser, 72 Iowa 523, 34 N. W. 314; McCormick *v.* Bishop, 28 Iowa 233.

Maine.— Soper *v.* Lawrence Brothers Co., 98 Me. 268, 56 Atl. 908, 99 Am. St. Rep. 397; Abbott *v.* Wood, 13 Me. 115.

Massachusetts.— Hurd *v.* Cushing, 7 Pick. 169; Rice *v.* Osgood, 9 Mass. 38.

Minnesota.— Barteau *v.* Merriam, 52 Minn. 222, 53 N. W. 1061.

Missouri.— Martin *v.* Castle, 193 Mo. 183, 91 S. W. 930; Badger Lumber Co. *v.* Stepp, 157 Mo. 366, 57 S. W. 1059.

Montana.— U. S. *v.* Northern Pac. R. Co., 6 Mont. 351, 12 Pac. 769.

Nebraska.— Barr *v.* Lamaster, 48 Nebr. 114, 66 N. W. 1110, 32 L. R. A. 451.

New Hampshire.— Wiggin *v.* Wiggin, 43 N. H. 561, 80 Am. Dec. 192.

New Jersey.— Patten *v.* Heustis, 26 N. J. L. 293.

New York.— Strong *v.* Harris, 84 Hun 314, 32 N. Y. Suppl. 349; Matter of Lent, 1 Misc. 264, 22 N. Y. Suppl. 917.

Ohio.— Lockwood *v.* Mills, 3 Ohio 21.

Pennsylvania.— Enyard *v.* Enyard, 190 Pa. St. 114, 42 Atl. 526, 70 Am. St. Rep. 623; Dexter *v.* Lathrop, 136 Pa. St. 565, 20 Atl. 545; McAdam *v.* Orr, 4 Watts & S. 550; Seitzinger *v.* Ridgway, 4 Watts & S. 472; Ross *v.* McJunkin, 14 Serg. & R. 364.

Philippine.— Liuanag *v.* Yu-Sonquian, 5 Philippine 147.

Tennessee.— Cooper *v.* Great Falls Cotton Mill Co., 94 Tenn. 588, 30 S. W. 353.

Texas.— Roller *v.* Reid, 87 Tex. 69, 26 S. W. 1060; Gray *v.* Kauffman, 82 Tex. 65, 17 S. W. 513; York *v.* Hutcheson, 37 Tex. Civ. App. 367, 83 S. W. 895.

Vermont.— Shed *v.* Leslie, 22 Vt. 498; Willard *v.* Strong, 14 Vt. 532, 39 Am. Dec. 240.

Washington.— Anderson *v.* Snowden, 44 Wash. 274, 87 Pac. 356; Houghton *v.* Callahan, 3 Wash. 158, 28 Pac. 377.

West Virginia.— Morris *v.* Roseberry, 46 W. Va. 24, 32 S. E. 1019.

Wyoming.— Gilland *v.* Union Pac. R. Co., 6 Wyo. 185, 43 Pac. 508.

Trustees of a town in whom the title of land becomes vested hold the fee as a unity having no separable title or interest available of being converted into a tenancy in common. Augusta *v.* Perkins, 3 B. Mon. (Ky.) 437.

Surface and mineral rights.— Where one person owns the metal and mineral rights in land and another owns the fee to the surface, they are not tenants in common. Adams *v.* Briggs Iron Co., 7 Cush. (Mass.) 361; Vir-

having been shown they will be presumed, in the absence of evidence to the contrary, to continue.[40]

B. Severance and Termination. Tenancy in common being dependent upon unity of possession,[41] whenever that unity is destroyed, the tenancy terminates.[42] Thus, the tenancy is dissolved by uniting all the titles and interests in one tenant by purchase or otherwise, which brings the whole to one severalty,[43] by ouster of one tenant in common by his cotenant,[44] by sale or conveyance of the common property to a third person[45] and the ascertainment of the share of each cotenant,[46] by the destruction of the common property,[47] or by making partition between the several tenants in common which gives them all respective severalties, either by proceedings in partition,[48] or by amicable agreement and division.[49] But until actual severance of the common property the tenancy in

ginia Coal, etc., Co. *v.* Kelly, 93 Va. 332, 24 S. E. 1020.

Where an inheritance consisted of city lots which are described in plats as separate, each lot constitutes a separate holding unless rented, occupied, or otherwise charged in common with others. Butler *v.* Roys, 25 Mich. 53, 12 Am. Rep. 218.

40. Simon *v.* Richard, 42 La. Ann. 842, 8 So. 629; Clayton *v.* McCay, 143 Pa. St. 225, 22 Atl. 754; Gilmer *v.* Beauchamp, 40 Tex. Civ. App. 125, 87 S. W. 907.

41. See *supra*, I, A; II, A.

42. Norman *v.* Corbley, 32 Mont. 195, 79 Pac. 1059.

Occupancy in severalty may be consistent with a tenancy in common. Matter of New York, 41 Misc. (N. Y.) 134, 83 N. Y. Suppl. 951.

43. Hinds *v.* Terry, Walk. (Miss.) 80; Jackson *v.* Burtis, 14 Johns. (N. Y.) 391.

Where a cotenant purchases the joint property at a sale in partition under a decree of court, the cotenancy is thereby severed. Stephens *v.* Ells, 65 Mo. 456.

44. Vasquez *v.* Ewing, 24 Mo. 31, 66 Am. Dec. 694, ouster under a judgment for possession.

45. Davis *v.* Cass, 72 Miss. 985, 18 So. 454, sale to the state for taxes.

Conveyance with reservation by one cotenant.— Where a tenant in common conveyed his interest by a deed providing that the land should be used only as a park, and reserving a right to work a mine thereon, and the other cotenant conveyed to the same grantee without reservation, the grantor who made the reservation had the sole and exclusive right to work the mine, and did not hold the right in common with the other cotenant. New Haven *v.* Hotchkiss, 77 Conn. 168, 58 Atl. 753. But where a tenant in common conveyed his interest in the premises, reserving mineral rights, to a cotenant, the tenancy in common in the mineral rights was not disturbed, and in the absence of an open, notorious assertion of claim by the vendee to the minerals and some direct interference with or denial of the vendor's rights therein, the vendor was justified in assuming that the vendee's holding of the land was in accordance with the terms of his deed, and there was no such ouster as to set limitations in motion against the vendor's interest in the mineral rights. Moragne *v.* Doe, 143 Ala. 459, 39 So. 161, 111 Am. St. Rep. 52.

An agreement by heirs to give their interest in land to the widow, one of them to procure tax title and convey the land to her, divests them of their interest as tenants in common, although, after the tax title is procured, she agrees that the one procuring it shall have the land, and although no actual conveyance was made to the widow. Howe *v.* Howe, 90 Iowa 582, 58 N. W. 908.

The sale of the common estate under a power severs the tenancy, even though one of the tenants in common therein repurchase the estate from the vendee. Jackson *v.* Burtis, 14 Johns. (N. Y.) 391.

The sale of a part of the common property does not sever the cotenancy in the balance thereof. Wright *v.* Wright, 59 How. Pr. (N. Y.) 176; James *v.* James, (Tenn. Ch. App. 1901) 62 S. W. 184.

If a cotenant conveys an undivided interest equal to or greater than that which he possesses in said common property, he thereby severs his relationship thereto. Lopez *v.* Ilustre, 5 Philippine 567. Where a member of a partnership owning land in common dies, and his cotenant therein conveys an undivided half thereof, merely describing himself as surviving partner, he thereby severs his relationship of cotenancy in said land. Gillett *v.* Gaffney, 3 Colo. 351.

46. Palmer *v.* Stryker, 12 N. Y. Suppl. 737.

The sale of the common property for taxes to several persons other than the tenants in common, the claim in severalty by each of them being recognized by the others of them, severs the tenancy in common. Davis *v.* Cass, 72 Miss. 985, 18 So. 454.

47. See Hinds *v.* Terry, Walk. (Miss.) 80.

If the interests of tenants in common are sold under execution and purchased by different parties, there is no destruction of the common ownership amounting to a severance of the tenancy in common. Hinds *v.* Terry, Walk. (Miss.) 80.

48. See PARTITION, 30 Cyc. 145.

49. McKeithen *v.* Pratt, 53 Ala. 116; Gafford *v.* Stearns, 51 Ala. 434; Whitten *v.* Hanson, 35 Me. 435; Primm *v.* Walker, 38 Mo. 94; Lobdell *v.* Stowell, 51 N. Y. 70. But see Campbell *v.* Shivers, 1 Ariz. 161, 25 Pac. 540.

common continues,[50] a mere agreement to sever without actual severance being insufficient.[51] Nor can a tenancy in common be severed by words in a deed, uncertain and ambiguous.[52] Ordinarily one tenant in common cannot himself take his own share without the consent of his cotenant and thus sever the tenancy in common;[53] but when the common property is personalty divisible by weight, measure, or number into portions identical in quality and value one tenant in common may take his own proportion and thus make a valid partition.[54] The tenants in common may transfer their respective interests to other persons at different periods without a destruction of the tenancy in common, unless the unity of possession be destroyed by the act of the parties,[55] and where two persons are owners of a chattel indivisible in its nature, a sale by one of them of his share does not sever the tenancy;[56] nor does the fact that the subject of a tenancy, which has descended to the cotenants as tenants in common, is handed over to them in different parcels or by different instruments destroy the tenancy in common.[57] The fact that one tenant in common furnishes no money to aid in defending the title in a suit brought against his cotenant in possession does not amount to an abandonment of the former's title,[58] and mere lapse of time does not dissolve a cotenancy.[59] Where a partial division is rightfully made each tenant in common holds his own assigned portion in severalty and remains a tenant in common of the undivided residue.[60]

III. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF COTENANTS AND INCIDENTS OF RELATION.

A. Fiduciary Relation of Cotenants Inter Se. While it is held that in the absence of some equitable reason to the contrary, tenants in common do

The insertion of a clause in a deed in common that the several owners shall occupy separate parts of the common property does not sever the cotenancy therein; nor does the sale of a part of the common property sever the tenancy in common in the balance thereof. Dallagher *v.* Dallagher, 171 Mass. 503, 50 N. E. 1043.

Where tenants in common of a quantity of grain agreed to a division thereof to settle the portion belonging to one, the apportionment operates as a severance of the tenancy in common. Lobdell *v.* Stowell, 51 N. Y. 70.

50. Louisville, etc., R. Co. *v.* Hart, 119 Ind. 273, 21 N. E. 753, 4 L. R. A. 549.

A tenancy in common to a water ditch, arising under a deed, is not severed by claiming under a promise or parol license from a third person, where the deed and promise appear to be parts of the same transaction. Campbell *v.* Shivers, 1 Ariz. 161, 25 Pac. 540.

51. Burton *v.* Morris, 3 Harr. (Del.) 269 (holding that an agreement between tenants in common that each shall have, collect, receive, and enjoy the ground-rents of certain lots held in common, to him, his heirs and assigns forever, and clear from the other, did not sever the tenancy in common, there being no words of conveyance); Louisville, etc., R. Co. *v.* Hart, 119 Ind. 273, 21 N. E. 753, 4 L. R. A. 549. But see Howe *v.* Howe, 90 Iowa 582, 58 N. W. 908, holding that an agreement by heirs to give their interest in land to the widow, one of them to procure tax title and convey the land to her, divests them of their interest as tenants in common, although, after the tax title is procured, she agrees that the one procuring it shall have the land, and although no actual conveyance was made to the widow.

Unexecuted agreement.— An agreement to sever the property upon one tenant in common giving a note for his share does not amount to a severance of the tenancy, the tenant in common having failed to give the note in accordance with the agreement. Barnes *v.* Bartlett, 15 Pick. (Mass.) 71.

52. Dallagher *v.* Dallagher, 171 Mass. 503, 50 N. E. 1043.

53. Pickering *v.* Moore, 67 N. H. 533, 32 Atl. 828, 68 Am. St. Rep. 695, 31 L. R. A. 698.

54. Pickering *v.* Moore, 67 N. H. 533, 32 Atl. 828, 68 Am. St. Rep. 695, 31 L. R. A. 698; Moore *v.* Erie R. Co., 7 Lans. (N. Y.) 39; Channon *v.* Lusk, 2 Lans. (N. Y.) 211; Fobes *v.* Shattuck, 22 Barb. (N. Y.) 568; Tripp *v.* Riley, 15 Barb. (N. Y.) 333. And see Nelson *v.* Brown, 53 Iowa 555, 5 N. W. 719.

55. Hinds *v.* Terry, Walk. (Miss.) 80, where the interests of the tenants in common were sold under execution and purchased by different parties.

56. St. John *v.* Standring, 2 Johns. (N. Y.) 468.

57. Wright *v.* Wright, 59 How. Pr. (N. Y.) 176.

58. Gosselin *v.* Smith, 154 Ill. 74, 39 N. E. 980. But see Potter *v.* Herring, 57 Mo. 184.

59. Yarwood *v.* Johnson, 29 Wash. 643, 70 Pac. 123.

60. McKeithen *v.* Pratt, 53 Ala. 116; Gafford *v.* Stearns, 51 Ala. 434; Fiquet *v.* Allison, 12 Mich. 328, 86 Am. Dec. 54; Lobdell *v.* Stowell, 51 N. Y. 70.

not stand in a strictly fiduciary relation toward each other,[61] and that where tenants in common are not partners and there is no relation of mutual trust and confidence between them, such as requires a disclosure from one to the other of matters within his knowledge that may affect the price or value of the respective shares they may deal with each other like other owners of separate property,[62] their relation is to an extent quasi-fiduciary,[63] and one cotenant guilty of fraud may not avail himself of the advantage thereof, to the disadvantage of his cotenant.[64] Tenants in common by descent occupy a confidential relation toward each other by operation of law, as to the joint property, and the same reciprocal duties are imposed as if a joint trust were created by contract between them or by the act of a third person, and their mutual duties and obligations to sustain and protect the common interest will be vindicated and enforced in a court of equity as a trust; and they and those claiming under them, with notice, cannot assume a hostile attitude toward each other in reference to the common property.[65] Even where the cotenants acquired their interests by a joint con-

61. Streeter *v.* Shultz, 45 Hun (N. Y.) 406 [*affirmed* in 127 N. Y. 652, 27 N. E. 857]; Kennedy *v.* De Trafford, [1897] A. C. 180, 66 L. J. Ch. 413, 76 L. T. Rep. N. S. 427, 45 Wkly. Rep. 671.

Tenants in common of a vessel who are not jointly in the employment of purchasing or building ships for sale do not stand in such relation of mutual trust and confidence toward each other in respect to the sale of such vessel that each is bound in his dealings with the other to communicate all the information of facts within his knowledge which may affect the price or value. A different rule may prevail in respect to any contract for the use or employment of the common property, in which relation they may be deemed to place confidence mutually in each other. In dealing with each other in matters of purchase and sale, each may act upon the knowledge that he has without communicating it; but there must be no studied efforts to prevent the other from coming to the truth, nor any false suggestions or representation. Matthews *v.* Bliss, 22 Pick. (Mass.) 48.

A tenant in common is not trustee for his cotenant; he need not keep possession for him, nor protect the common property excepting while he is in possession thereof, and then he is only liable for profits derived from his cotenant's share thereof; when he parts with the possession of the common property he parts with its liabilities. Saunders *v.* Gatlin, 21 N. C. 86.

62. Matthews *v.* Bliss, 22 Pick. (Mass.) 48, holding also that in a suit between cotenants for the recovery of damages for misrepresentation of the value of the plaintiff's share in a vessel, evidence tending to prove that the full value of said share had been paid by defendant to plaintiff was admissible to disprove fraud and was proper for the consideration of the jury, although the price for which the vessel was sold by defendant was strong, although not conclusive evidence of its value.

63. Walker *v.* Evans, 98 Mo. App. 301, 71 S. W. 1086; Burhans *v.* Van Zandt, 7 N. Y. 523; Smith *v.* Smith, 150 N. C. 81, 63 S. E. 177; Earll *v.* Stumpf, 56 Wis. 50, 13 N. W. 701.

Where a tenant in common buys or sells the common property or anything appurtenant or necessary thereto, the cost or proceeds of which are properly chargeable to the common property, or are properly to be credited thereto, and the purchase or sales price by the bargaining cotenant is not fairly disclosed to his cotenants, or is concealed from them, the presumptions of law are against the tenant in common so failing to make disclosure or concealing, as the case may be. King *v.* Wise, 43 Cal. 628; Garr *v.* Boswell, 38 S. W. 513, 18 Ky. L. Rep. 814.

Where there was an agreement between tenants in common for the purchase of the common property at a certain price for their benefit at a foreclosure sale under a mechanic's lien, and said property was purchased at a lesser price for the benefit of the purchaser, he was accountable to his cotenant for the cotenant's share of the abatement so obtained. Phelps *v.* Reeder, 39 Ill. 172.

64. Calkins *v.* Worth, 117 Ill. App. 478 [*affirmed* in 215 Ill. 78, 74 N. E. 81]; Garr *v.* Boswell, 38 S. W. 513, 18 Ky. L. Rep. 814; Lewis *v.* Jacobs, 153 Mich. 664, 117 N. W. 325; Clevenger *v.* Mayfield, (Tex. Civ. App. 1905) 86 S. W. 1062.

Where one tenant in common unduly delays recording the title deed, another grantee in common may compel him to have it recorded. Smith *v.* Cole, 39 Hun (N. Y.) 248 [*affirmed* in 109 N. Y. 436, 17 N. E. 356].

Purchase and sale.— A part-owner of realty negotiating a sale thereof, for himself and as agent of his cotenant therein, and not disclosing the true purchase-price to said cotenant is liable to account to said cotenant for any amount out of which he may have thus been defrauded. Calkins *v.* Worth, 117 Ill. App. 478 [*affirmed* in 215 Ill. 78, 74 N. E. 81]. But selling the common property at two thousand dollars profit about a year after its purchase by one of the tenants in common is no evidence of fraud in an action thirteen years thereafter where there is no evidence that the other cotenants had asked to be permitted to share in the transaction. Francis *v.* Million, 80 S. W. 486, 26 Ky. L. Rep. 42.

65. *Arkansas.*— Clements *v.* Cates, 49 Ark. 242, 4 S. W. 776.

veyance, both going into possession, the relation between them may be one of equal trust and confidence;[66] and so, although they come to their titles by different grants they may, by a course of behavior, create the same confidential relationship on the principle that particular persons in contracts shall not only transact *bona fide* between themselves, but shall not transact *mala fide* in respect to other persons, who stand in such a relation to either as to be affected by the contract or the consequences of it.[67] It has been held that the defrauding tenant in common cannot rely upon mere lapse of time to defeat his cotenants' rights.[68]

B. Use and Enjoyment of Premises — 1. Right of Entry. Each tenant in common has the right of entry, and of ingress and egress,[69] which right is several as well as common, and therefore may be conferred by one cotenant without the consent of the others,[70] and for which under proper circumstances a writ of entry may be maintained by one tenant in common against the other.[71] The writ

New York.—Van Horne *v.* Fonda, 5 Johns. Ch. 388.

Ohio.— Lesslie *v.* Worthington, Wright 628.

Tennessee.— Tisdale *v.* Tisdale, 2 Sneed 596, 64 Am. Dec. 775.

England.— *In re* Biss, [1903] 2 Ch. 40.

See 45 Cent. Dig. tit. "Tenancy in Common," § 22.

Relocation of mining claim.— Evidence that one of the cotenants in a mining camp gave a description of such claim, after the discovery of valuable rock in the neighborhood, to his brother who took the necessary steps for the relocation of the claim by the cotenant in the name of his brother, was held to be sufficient to sustain a finding of fraud. Yarwood *v.* Johnson, 29 Wash. 643, 70 Pac. 123.

66. Harrison *v.* Winston, 2 Tenn. Ch. 544.

67. Hoyt *v.* Lightbody, 98 Minn. 189, 108 N. W. 843, 116 Am. St. Rep. 389; Freeman Coten. § 151. But see Shaver *v.* Radley, 4 Johns. Ch. (N. Y.) 310, holding that where one takes possession of land as one of a number of devisees, and subsequently learns that the devisor's title was invalid, and takes a lease from the true owner at an annual rent, the lease is taken free of any trust in favor of the other devisees.

The principle is based upon a community of interest in a common title, which creates such a relation of trust and confidence between the parties that it would be inequitable to permit one of them to do anything to the prejudice of the other, in reference to the property so situated (Hoyt *v.* Lightbody, 98 Minn. 189, 108 N. W. 843, 116 Am. St. Rep. 358; Rothwell *v.* Dewees, 2 Black (U. S.) 613, 17 L. ed. 309), and it is frequently applied with the same force and reason as to persons standing in a direct fiduciary relation to others (Davis *v.* Cass, 72 Miss. 985, 18 So. 454; Carpenter *v.* Carpenter, 131 N. Y. 101, 29 N. E. 1013, 27 Am. St. Rep. 569; Knolls *v.* Barnhart, 71 N. Y. 474; Allen *v.* Arkenburgh, 2 N. Y. App. Div. 452, 37 N. Y. Suppl. 1032 [*affirmed* in 158 N. Y. 697, 53 N. E. 1122]; Cecil *v.* Clark, 47 W. Va. 402, 35 S. E. 11, 81 Am. St. Rep. 802, 44 W. Va. 659, 30 S. E. 216). In any event whether there is a fiduciary relation between tenants in common or not, there must not be any studied effort on the part of either to prevent the other from coming into knowledge of the truth. Matthews *v.* Bliss, 22 Pick. (Mass.) 48.

68. Pillow *v.* Southwest Virginia Imp. Co., 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep. 804. But see Francis *v.* Million, 80 S. W. 486, 26 Ky. L. Rep. 42; holding that the fact that a tenant in remainder purchased land at a judicial sale, which he sold a year later for two thousand dollars, is not evidence that the original sale was fraudulent as to the purchaser's cotenants who did not ask to be permitted to enjoy the benefit of the transaction for nearly thirteen years thereafter. *Compare* Kennedy *v.* Bateman, 27 Grant Ch. (U. C.) 380.

69. Lee *v.* Follensby, 80 Vt. 182, 67 Atl. 197.

An entry made by or for the benefit of a stranger, under fraudulent or unfair circumstances, canot be supported as against the one truly entitled to entry. Yarwood *v.* Johnson, 29 Wash. 643, 70 Pac. 123.

Adverse possession alone will not take away a right of entry between tenants in common, the entry being considered for the benefit of all. Midford *v.* Hardison, 7 N. C. 164.

70. Lee *v.* Follensby, 80 Vt. 182, 67 Atl. 197.

71. Williams *v.* Gray, 3 Me. 207, 14 Am. Dec. 234, redemption from tax-sale.

Parties.—Where suit is brought against a tenant in common in possession for the right of entry, all desiring benefit of a recovery must be made parties thereto. Keith *v.* Keith, 39 Tex. Civ. App. 363, 87 S. W. 384.

Right of entry to make crops.—Where the owner of land has contracted with another for the raising of crops in such a manner that they become tenants in common therein, there is a qualified interest in the land permitting ingress and egress for the proper enforcement of the rights of said cotenants in the premises. Delaney *v.* Root, 99 Mass. 546, 97 Am. Dec. 52. But the right of entry of a cotenant in the land does not in itself entitle him to the grain grown thereon not then divided or set apart. Baker *v.* Lewis, 150 Pa. St. 251, 24 Atl. 616. Under the Alabama code of 1896, section 2760, persons jointly contributing to the raising of crops have been held to hold them by such a tenancy in common as to entitle them to a lien

cannot be maintained as against a redeeming cotenant in favor of a cotenant failing to make tender of his contribution of the amount for which the land was sold for non-payment of taxes, nor where there is an actual ouster of the other cotenants or some act deemed by law equivalent thereto;[72] nor where the cotenant's entry is under claim of the whole property,[73] and a tenant in common is not entitled to an action against his cotenant for entry and exclusive occupation of the common property.[74]

2. Equal Right to Use and Enjoyment. Each tenant in common is equally entitled to the use, benefit, and possession of the common property, and may exercise acts of ownership in regard thereto,[75] the limitation of his right being

for their respective shares. Hendricks *v.* Clemmons, 147 Ala. 590, 41 So. 306.

72. Watkins *v.* Eaton, 30 Me. 529, 50 Am. Dec. 637; Cutts *v.* King, 5 Me. 482; Beall *v.* McMenemy, 63 Nebr. 70, 88 N. W. 134, 93 Am. St. Rep. 427; Armijo *v.* Neher, 11 N. M. 645, 72 Pac. 12.

73. Gill *v.* Fauntleroy, 8 B. Mon. (Ky.) 177.

74. Porter *v.* Hooper, 13 Me. 25, 29 Am. Dec. 480.

75. *Alabama.*— Newbold *v.* Smart, 67 Ala. 326.

Arkansas.— Bertrand *v.* Taylor, 32 Ark. 470.

Connecticut.—Adams *v.* Manning, 51 Conn. 5.

Georgia.— Haden *v.* Sims, 127 Ga. 717, 56 S. E. 989; Daniel *v.* Daniel, 102 Ga. 181, 28 S. E. 167.

Hawaii.— Lui *v.* Kaleikini, 10 Hawaii 391; Mahoe *v.* Puka, 4 Hawaii 485.

Illinois.— Boley *v.* Barutio, 120 Ill. 192, 11 N. E. 393.

Iowa.—Young *v.* Gammel, 4 Greene 207.

Kentucky.— Bell *v.* Layman, 1 T. B. Mon. 39, 15 Am. Dec. 83.

Maine.— Carter *v.* Bailey, 64 Me. 458, 18 Am. Rep. 273; Hutchinson *v.* Chase, 39 Me. 508, 63 Am. Dec. 645; Knox *v.* Silloway, 10 Me. 201.

Massachusetts.— Peabody *v.* Minot, 24 Pick. 329.

Michigan.— McElroy *v.* O'Callaghan, 112 Mich. 124, 70 N. W. 441; Clow *v.* Plummer, 85 Mich. 550, 48 N. W. 795; Wilmarth *v.* Palmer, 34 Mich. 347; Everts *v.* Beach, 31 Mich. 136, 18 Am. Rep. 169.

Minnesota.— Strong *v.* Colter, 13 Minn. 82.

Mississippi.— Porter *v.* Stone, 70 Miss. 291, 12 So. 208.

Missouri.— Ragan *v.* McCoy, 29 Mo. 356; Watson *v.* Union Red, etc., Gravel Co., 50 Mo. App. 635.

New Jersey.— Swallow *v.* Swallow, 31 N. J. Eq. 390.

New York.— Hudson *v.* Swan, 83 N. Y. 552; Osborn *v.* Schenck, 83 N. Y. 201; Rodermund *v.* Clark, 46 N. Y. 354; Simonson *v.* Lauck, 105 N. Y. App. Div. 82, 93 N. Y. Suppl. 965; McCarthy *v.* McCarthy, 40 Misc. 180, 81 N. Y. Suppl. 660; Matter of Lucy, 4 Misc. 349, 24 N. Y. Suppl. 352; Erwin *v.* Olmsted, 7 Cow. 229. See also Moore *v.* Goedel, 34 N. Y. 527 [*affirming* 7 Bosw. 591], holding that where a declaration alleges damages resulting from an overflow of water caused by a cotenant's negligence in leaving a faucet open, the burden is upon plaintiff to prove such negligence; because, the cotenant being equally entitled to the possession of the common property, there is no presumption that defendant was in sole possession at the time of the happening of the alleged damages.

Pennsylvania.— Kline *v.* Jacobs, 68 Pa. St. 57; Heil *v.* Strong, 44 Pa. St. 264; Underwood's Estate, 5 Pa. Co. Ct. 621; Norris *v.* Gould, 15 Wkly. Notes Cas. 187. See also Keisel *v.* Earnest, 21 Pa. St. 90, holding that proof of a lease to a tenant in common for a certain year is no evidence of a lease for the following year, where the lessee thereunder was a tenant in common and therefore entitled to occupancy.

Rhode Island.—Almy *v.* Daniels, 15 R. I. 312, 4 Atl. 753, 10 Atl. 654, holding that evidence that plaintiff has had the use and benefit of the common property fully equal to his share is inadmissible, because he has the right to the use and occupation of the whole property and cannot be limited therein to any particular part.

Vermont.—Avery *v.* Hall, 50 Vt. 11; Walker *v.* Pierce, 38 Vt. 94; Bates *v.* Marsh, 33 Vt. 122; Johnson *v.* Tilden, 5 Vt. 426.

Virginia.— Newman *v.* Newman, 27 Gratt. 714.

Wisconsin.— Higgins *v.* Riddell, 12 Wis. 587.

United States.— Bohlen *v.* Arthurs, 115 U. S. 482, 6 S. Ct. 114, 29 L. ed. 454, holding that a tenant in common cutting and removing timber cannot maintain an action of replevin against such of his cotenants therein who seize and hold it, because they have each and equally a right of possession.

England.— Beer *v.* Beer, 12 C. B. 60, 16 Jur. 223, 21 L. J. C. P. 124, 74 E. C. L. 60; Goodwyn *v.* Spray, Dick. 667, 21 Eng. Reprint 431; Denys *v.* Shuckburgh, 5 Jur. 21, 4 Y. & C. Exch. 42; Griffies *v.* Griffies, 8 L. T. Rep. N. S. 758, 11 Wkly. Rep. 943; Tyson *v.* Fairclough, 2 Sim. & St. 142, 25 Rev. Rep. 175, 1 Eng. Ch. 142, 57 Eng. Reprint 300; Hole *v.* Thomas, 7 Ves. Jr. 580, 6 Rev. Rep. 195, 32 Eng. Reprint 237.

Canada.— Freeman *v.* Morton, 3 Nova Scotia 340; Baker *v.* Casey, 17 Grant Ch. (U. C.) 195.

See 45 Cent. Dig. tit. "Tenancy in Common," § 62 *et seq.*

In a water right, the right to a unity of possession must extend to the right of user.

that he is bound to so exercise his rights in the property as not to interfere with the rights of his cotenant.[76] It follows that a tenant in common of land has no right to use force and violence to exclude his cotenant from entry on the common

and a tenant in common may change the point of diversion of water or his place of use of the water, if he does not infringe the rights of his cotenants. Telluride *v.* Davis, 33 Colo. 355, 80 Pac. 1051, 108 Am. St. Rep. 101.

Timber.— In the absence of conduct on his part amounting to an ouster or waste an occupying cotenant is not chargeable with the value of timber cut by him from the common property during his occupation. Nevels *v.* Kentucky Lumber Co., 108 Ky. 550, 56 S. W. 969, 22 Ky. L. Rep. 247, 94 Am. St. Rep. 388, 49 L. R. A. 416; Strong *v.* Richardson, 19 Vt. 194; Munsie *v.* Lindsay, 10 Ont. Pr. 173; Rice *v.* George, 20 Grant Ch. (U. C.) 221; Griffin *v.* Patterson, 45 U. C. Q. B. 536, 591. But see Gillum *v.* St. Louis, etc., R. Co., 5 Tex. Civ. App. 338, 23 S. W. 717. So where a life-owner of common land cuts and uses a few hundred dollars' worth of timber for the use of a sawmill owned by the tenants in common, but leaving an abundance of timber for all purposes. Dodd *v.* Watson, 57 N. C. 48, 72 Am. Dec. 577. See also Adamson *v.* Adamson, 17 Ont. 407. A tenant in common may sell marketable timber growing on the common land if such action does not amount to waste. The proper remedy of his cotenants may be to compel an accounting. Hodges *v.* Heal, 80 Me. 281, 14 Atl. 11, 6 Am. St. Rep. 199; Kimball *v.* Sumner, 62 Me. 305; Bradley *v.* Boynton, 22 Me. 287, 39 Am. Dec. 582; Mee *v.* Benedict, 98 Mich. 260, 57 N. W. 175, 39 Am. St. Rep. 543, 22 L. R. A. 641; Gillum *v.* St. Louis, etc., R. Co., 4 Tex. Civ. App. 622, 23 S. W. 716.

Demand for possession not notice to quit. —A demand by a tenant in common upon his cotenant to be let into possession is not a notice to quit in the absence of statute to the contrary. Carpentier *v.* Webster, 27 Cal. 524.

Personal property.— The general rule is that each cotenant is equally entitled to possession of personal property, and that one in actual possession thereof had a right to maintain such possession against his cotenants, unless otherwise provided by statute. Blewett *v.* Coleman, 40 Pa. St. 45 (holding that a tenant in common has no right to seize ores mined by the lessee of his cotenant); Earll *v.* Stumpf, 56 Wis. 50, 13 N. W. 701. See Penn *v.* Butler, 19 Fed. Cas. No. 10,930, 4 Dall. 354 (where it was held that the survivor of joint payees of bonds was, on the death of one of said payees, entitled to retain possession thereof as against the executor of said deceased); Baker *v.* Casey, 17 Grant Ch. (U. C.) 195 (where an injunction restraining the proceedings of part-owners of a schooner in sole possession from excluding their cotenant therefrom was refused where there was no allegation that there had been any dispute as to the employment of the vessel). The only remedy of the cotenants to acquire possession is to take possession when a fit opportunity presents itself (Southworth *v.* Smith, 27 Conn. 355, 71 Am. Dec. 72; Carter *v.* Bailey, 64 Me. 548, 18 Am. Rep. 273; Estey *v.* Boardman, 61 Me. 595. See Tallman *v.* Barnes, 54 Wis. 181, 11 N. W. 478; Fennings *v.* Grenville, 1 Taunt. 241; Freeman *v.* Morton, 3 Nova Scotia 340); or by partition (Thompson *v.* Silverthorne, 142 N. C. 12, 54 S. E. 782, 115 Am. St. Rep. 727; Powell *v.* Hill, 64 N. C. 169). The tenants in common in possession may lawfully control the property, and may employ another to care for the property who may be entitled to a lien thereon dependent on possession, for pay for his services. Williamson *v.* Moore, 10 Ida. 749, 80 Pac. 227.

76. Byam *v.* Bickford, 140 Mass. 31, 2 N. E. 687 (holding that one tenant in common may, without becoming liable in trespass, remove a building erected by his cotenants without his consent on the common property, which erection excludes him from the portion of the common property on which said building is erected); Adams *v.* Briggs Iron Co., 7 Cush. (Mass.) 361; Newton *v.* Newton, 17 Pick. (Mass.) 201 (holding that a cotenant may not prevent his cotenant from sending a servant into a common well to clean it, even though the well does not require cleaning); Country Club Land Assoc. *v.* Lohbauer, 187 N. Y. 106, 79 N. E. 844 [*affirming* 110 N. Y. App. Div. 875, 97 N. Y. Suppl. 11]; Beach *v.* Child, 13 Wend. (N. Y.) 343; Woods *v.* Early, 95 Va. 307, 28 S. E. 374, holding that a tenant in common in a building cannot erect a wall along the middle of a hall, which is the only means of access to two offices, if the erection interferes with the rights of his cotenants.

The owner of an undivided interest in a mining claim has no right to use any part thereof to the exclusion of his cotenants therein. Laesch *v.* Morton, 38 Colo. 171, 87 Pac. 1081; Mills *v.* Hart, 24 Colo. 505, 52 Pac. 680, 65 Am. St. Rep. 241; Daniel *v.* Daniel, 102 Ga. 181, 28 S. E. 167; Williams *v.* Rogers, 110 Mich. 418, 68 N. W. 240; Butte, etc., Consol. Min. Co. *v.* Montana Ore Purchasing Co., (Mont. 1898) 55 Pac. 112; Morrison *v.* Morrison, 122 N. C. 598, 29 S. E. 901; Sweeney *v.* Hanley, 126 Fed. 97, 61 C. C. A. 153. And one tenant in common has no right to seize to his own uses ores mined by a lessee of his cotenant. Blewett *v.* Coleman, 40 Pa. St. 45. Upon judicial sale of the undivided portion of a mining claim the sheriff cannot legally eject defendants if they submit to the vendor's common occupancy of the property. Bullion Min. Co. *v.* Croesus Gold, etc., Min. Co., 2 Nev. 168, 90 Am. Dec. 526.

Water rights.—A tenant in common has no right, by means of a dam erected on other lands of which he is sole seized, to flow the land owned in common without the consent

property, even though such entry be with the purpose of doing an act that may be tortious;[77] and neither an action at law nor in equity can ordinarily be maintained between cotenants for the exclusive possession of the common property or for the sole enjoyment of the profits thereof, even though the one in possession refuses to deliver sole possession to his cotenant, or defendant forcibly took it from plaintiff's possession; if a tenant in common desires to have sole and exclusive possession of his interest in the common property he can only seek his remedy in partition.[78] If a tenant in common recovers or holds sole possession because of some necessary and proper expenditure for the common benefit he may be entitled to sole possession until after contribution,[79] and it is competent for tenants in common to agree among themselves that one of them shall have sole or exclusive possession of the common property, and such an agreement is valid and enforceable.[80] There is no liability on the part of a cotenant to his fellows

of his cotenants and to their injury; nor can he, by grant of the land of which he is so sole seized, convey such right of flowage to his grantee. Hutchinson *v.* Chase, 39 Me. 508, 63 Am. Dec. 645; Great Falls Co. *v.* Worster, 15 N. H. 412; Odiorne *v.* Lyford, 9 N. H. 502, 32 Am. Dec. 387. He may not, to the injury of his cotenants therein, divert the water from an aqueduct or a mill owned in common (Pillsbury *v.* Moore, 44 Me. 154, 69 Am. Dec. 91; Blanchard *v.* Baker, 8 Me. 253, 23 Am. Dec. 504; McLellan *v.* Jenness, 43 Vt. 183, 5 Am. Rep. 270), nor may he stop up a ditch owned in common and thereby overflow his cotenants' land; even though the damaged parties fail to repair the ditch, the duty to repair being equal between the cotenants (Adams *v.* Manning, 51 Conn. 5; Moss *v.* Rose, 27 Oreg. 595, 41 Pac. 666, 50 Am. St. Rep. 743), nor build a pier which interferes with his cotenants (Beach *v.* Child, 13 Wend. (N. Y.) 343). Interference with the cotenant's right in a salmon fishery is ground for an action on the case between them. Duncan *v.* Sylvester, 24 Me. 482, 41 Am. Dec. 400, holding, however, that trespass *quare clausum* was not maintainable between tenants in common of a fishery where one of them cut away and set adrift the fishing nets of the other. But a cotenant may change the place of use of the water or the point of diversion thereof if it does not damage or infringe the rights of his coöwners (Telluride *v.* Davis, 33 Colo. 355, 80 Pac. 1051, 108 Am. St. Rep. 101; Moffett *v.* Brewer, 1 Greene (Iowa) 348); and a tenant in common in water rights of a ditch has the right, in the absence of contractual or statutory limitation, to recapture and use his proportion of the water for any lawful purposes, after the original uses of the ditch have been abandoned, and its flow turned into another stream (Meagher *v.* Hardenbrook, 11 Mont. 385, 28 Pac. 451). If tenants in common convey a mill and water privilege and in said conveyance give to the grantee thereunder the right and privilege to flow any land owned by them, the subsequent grantees of said land holding under them cannot complain against such flowage. Howard *v.* Bates, 8 Metc. (Mass.) 484.

77. Com. *v.* Lakeman, 4 Cush. (Mass.) 597; Com. *v.* Oliver, 2 Pars. Eq. Cas. (Pa.) 420.

78. *Alabama.*— Smith *v.* Rice, 56 Ala. 417.
California.— Balch *v.* Jones, 61 Cal. 234.
Georgia.— Thompson *v.* Sanders, 113 Ga. 1024, 39 S. E. 419.
Iowa.— Stern *v.* Selleck, 136 Iowa 291, 111 N. W. 451; Conover *v.* Earl, 26 Iowa 167.
Kentucky.— Chinn *v.* Respass, 1 T. B. Mon. 25; Lewis *v.* Night, 3 Litt. 223; Carlyle *v.* Patterson, 3 Bibb 93.
Maine.— Carter *v.* Bailey, 64 Me. 458, 18 Am. Rep. 273; Witham *v.* Witham, 57 Me. 447, 99 Am. Dec. 787.
Michigan.— McElroy *v.* O'Callaghan, 112 Mich. 124, 70 N. W. 441.
Minnesota.— Person *v.* Wilson, 25 Minn. 189.
Missouri.— Miller *v.* Crigler, 83 Mo. App. 395; Kelley *v.* Vandiver, 75 Mo. App. 435; Sharp *v.* Benoist, 7 Mo. App. 534.
Montana.— Harrigan *v.* Lynch, 21 Mont. 36, 52 Pac. 642; Sharp *v.* Benoist, 7 Mo. App. 534.
New Hampshire.— Pickering *v.* Moore, 67 N. H. 533, 32 Atl. 828, 68 Am. St. Rep. 695, 31 L. R. A. 698.
New York.— Osborn *v.* Schenck, 83 N. Y. 201; Rodermund *v.* Clark, 46 N. Y. 354; Fosgate *v.* Herkimer Mfg., etc., Co., 12 Barb. 352 [*affirming* 9 Barb. 287, and *affirmed* in 12 N. Y. 580]; Beecher *v.* Bennett, 11 Barb. 374; Tyler *v.* Taylor, 8 Barb. 585; Farr *v.* Smith, 9 Wend. 338, 24 Am. Dec. 162; St. John *v.* Standring, 2 Johns. 468.
North Carolina.— Thompson *v.* Silverthorne, 142 N. C. 12, 54 S. E. 782, 115 Am. St. Rep. 727; Powell *v.* Hill, 64 N. C. 169; Cain *v.* Wright, 50 N. C. 282, 72 Am. Dec. 551; Bonner *v.* Latham, 23 N. C. 271.
Pennsylvania.— Heller *v.* Hufsmith, 102 Pa. St. 533.
Texas.— Davidson *v.* Wallingford, 88 Tex. 619, 32 S. W. 1030.
Vermont.— Deavitt *v.* Ring, 73 Vt. 298, 50 Atl. 1066; Booth *v.* Adams, 11 Vt. 156, 34 Am. Dec. 680; Tubbs *v.* Richardson, 6 Vt. 442, 27 Am. Dec. 570.
Compare Cole *v.* Broom, Dudley (S. C.) 7.

79. Blodgett *v.* Hildreth, 8 Allen (Mass.) 186; Gregg *v.* Patterson, 9 Watts & S. (Pa.) 197. But see Young *v.* Gammel, 4 Greene (Iowa) 207, holding otherwise where the non-contributing cotenant was an infant.

80. Hudson *v.* Swan, 7 Abb. N. Cas. (N. Y.) 324 [*reversed* on other grounds in 83

for natural wear and tear resulting from lapse of time and proper use of the common property; there is liability only for damages in tort arising from negligence, misuse, or abuse thereof;[81] in case of loss of the common property following a wrongful detention thereof by one of the tenants in common therein, but without negligence or other wrong-doing on the part of the tenant in common so wrongfully detaining the common property, his cotenant therein is entitled to some, if no more than nominal damages, but not to the extent of the full value of his share.[82] Statutes are liberally construed to further the rights of cotenants in the enjoyment of the common property.[83]

C. Possession and Seizin — 1. Right to Possession. A tenant in common has an interest in the possession of every part of the property,[84] and from the nature of the estate must necessarily be in possession of the whole,[85] and a tenant

N. Y. 552] (where the owners of a trotting horse agreed that one of their number should retain possession of such horse for the purpose of training and driving it, and that he should have a lien thereon for his expenses); Corbett *v.* Lewis, 53 Pa. St. 322 (where common owners of personal property agreed that if some of them would furnish supplies for manufacture they should have exclusive sale of the manufactured article); Longwell *v.* Bentley, 3 Grant (Pa.) 177.

Such a permissive holding is not adverse. Rhea *v.* Craig, 141 N. C. 602, 54 S. E. 408. And see *infra*, III, C, 3, b. This rule applies to realty as well as to personalty, and the relation of the one holding possession under the agreement toward his cotenants is the same as that of any stranger to them thus holding except as it may, in rare cases, be modified by the relationship of cotenancy. Harry *v.* Harry, 127 Ind. 91, 26 N. E. 562; Calvert *v.* Pewee Valley, 25 S. W. 5, 15 Ky. L. Rep. 644; O'Connor *v.* Delaney, 53 Minn. 247, 54 N. W. 1108, 39 Am. St. Rep. 601; Early *v.* Friend, 16 Gratt. (Va.) 21, 78 Am. Dec. 649. The cotenant cannot while holding possession under contract from the others litigate his right of possession by virtue of the cotenancy as contradistinguished from his right of possession under the contract. Hershey *v.* Clark, 27 Ark. 527.

81. Trammell *v.* McDade, 29 Tex. 360; Bodkin *v.* Arnold, 48 W. Va. 108, 35 S. E. 980. See also Hall *v.* Fisher, 20 Barb. (N. Y.) 441.

82. Clow *v.* Plummer, 85 Mich. 550, 48 N. W. 795; Shearin *v.* Riggsby, 97 N. C. 216, 1 S. E. 770.

83. *California.*—Wagoner *v.* Silva, 139 Cal. 559, 73 Pac. 433; Smith *v.* Stearns Rancho Co., 129 Cal. 58, 61 Pac. 662; Carpentier *v.* Mitchell, 29 Cal. 330.

Massachusetts.— Hastings *v.* Hastings, 110 Mass. 280.

Montana.— Butte, etc., Consol. Min. Co. *v.* Montana Ore Purchasing Co., 25 Mont. 41, 63 Pac. 825.

South Carolina.— Bannister *v.* Bull, 16 S. C. 220.

South Dakota.— Mather *v.* Dunn, 11 S. D. 196, 76 N. W. 922, 74 Am. St. Rep. 788.

Virginia.—Allen *v.* Gibson, 4 Rand. 468.

84. *California.*— Hart *v.* Robertson, 21 Cal. 346; Touchard *v.* Crow, 20 Cal. 150, 81 Am. Dec. 108; Covillaud *v.* Tanner, 7 Cal. 38.

Connecticut.— Robinson *v.* Roberts, 31 Conn. 145; Smith *v.* Starkweather, 5 Day 207; Bush *v.* Bradley, 4 Day 298; Hillhouse *v.* Mix, 1 Root 246, 1 Am. Dec. 41.

Georgia.— Greenfield *v.* McIntyre, 112 Ga. 691, 38 S. E. 44; Sanford *v.* Sanford, 58 Ga. 259.

Indiana.— Chesround *v.* Cunningham, 3 Blackf. 82.

Kentucky.— Craig *v.* Taylor, 6 B. Mon. 457; King *v.* Bullock, 9 Dana 41.

Massachusetts.— Butrick *v.* Tilton, 141 Mass. 93, 6 N. E. 563.

Minnesota.— Sherin *v.* Larson, 28 Minn. 523, 11 N. W. 70.

Nevada.— Brown *v.* Warren, 16 Nev. 228.

New Mexico.— De Bergere *v.* Chaves, (1908) 93 Pac. 762.

North Carolina.—Yancey *v.* Greenlee, 90 N. C. 317.

North Dakota.— Griswold *v.* Minneapolis, etc., R. Co., 12 N. D. 435, 97 N. W. 538, 102 Am. St. Rep. 572.

South Carolina.— Bannister *v.* Bull, 16 S. C. 220.

Tennessee.— Jones *v.* Phillips, 10 Heisk. 562; Hammett *v.* Blount, 1 Swan 385; Turner *v.* Lumbrick, Meigs 7.

Vermont.— Johnson *v.* Tilden, 5 Vt. 426; Wiswell *v.* Wilkins, 4 Vt. 137.

Virginia.—Allen *v.* Gibson, 4 Rand. 468.

United States.— Hardy *v.* Johnson, 1 Wall. 371, 17 L. ed. 502; Whittle *v.* Bookwalter, 55 Fed. 919; French *v.* Edwards, 9 Fed. Cas. No. 5,098, 5 Sawy. 266, 7 Reporter 68; LeFranc *v.* Richmond, 15 Fed. Cas. No. 8,209, 5 Sawy. 601.

The dispossession of a tenant in common by a cotenant, by force or fraud, cannot affect the dispossessed party's rights as between the cotenants in the premises. Fisher *v.* Seymour, 23 Colo. 542, 49 Pac. 30; Brown *v.* Hogle, 30 Ill. 119; Warren *v.* Henshaw, 2 Aik. (Vt.) 141. But the defrauded cotenant is said to have no remedy excepting in equity. Weakly *v.* Hall, 13 Ohio 167, 42 Am. Dec. 194.

Each cotenant may have his several action of trespass quare against a stranger. Longfellow *v.* Quimby, 29 Me. 196, 48 Am. Dec. 525.

85. *California.*— Ord *v.* Chester, 18 Cal. 77.

Kentucky.— Gossom *v.* Donaldson, 18 B. Mon. 230, 68 Am. Dec. 723.

Maine.— Knox *v.* Silloway, 10 Me. 201.

in common is entitled to possession of the common property as against all the world save his cotenants;[86] and no one can complain of the exclusive use of the common property by one tenant in common except his cotenant.[87]

2. Possession of One as Possession of All. The entry and possession of one tenant in common is presumed to be for the benefit of all; and will, in the absence of statute to the contrary, be regarded as the possession of all the cotenants, until rendered adverse by some act or declaration by him repudiating their interest in the property,[88] and statutes that might be construed against such presumption

New York.— Country Club Land Assoc. *v.* Lohbauer, 187 N. Y. 106, 79 N. E. 844 [*affirming* 110 N. Y. App. Div. 875, 97 N. Y. Suppl. 11].

Rhode Island.—Almy *v.* Daniels, 15 R. I. 312, 4 Atl. 753, 10 Atl. 654.

A cotenant cannot be ejected for occupying more than what would be his share of the premises on partition. Daniel *v.* Daniel, 102 Ga. 181, 28 S. E. 167.

86. *Alabama.*— Moore *v.* Walker, 124 Ala. 199, 26 So. 984; Smith *v.* Rice, 56 Ala. 417.

Arkansas.— Burgett *v.* Williford, 56 Ark. 187, 19 S. W. 750, 35 Am. St. Rep. 96.

California.—Wittenbreck *v.* Wheadon, 128 Cal. 150, 60 Pac. 664, 79 Am. St. Rep. 32; Williams *v.* Sutton, 43 Cal. 65; Hart *v.* Robertson, 21 Cal. 346; Stark *v.* Barrett, 15 Cal. 361; Lick *v.* O'Donnell, 3 Cal. 59, 58 Am. Dec. 383.

Colorado.—Weese *v.* Barker, 7 Colo. 178, 2 Pac. 919.

Iowa.— Howe *v.* Howe, 90 Iowa 582, 58 N. W. 908.

Kentucky.—Chinn *v.* Respass, 1 T. B. Mon. 25; Lewis *v.* Night, 3 Litt. 223; Carlyle *v.* Patterson, 3 Bibb 93.

Louisiana.— Moreira *v.* Schwan, 113 La. 643, 37 So. 542.

Massachusetts.— King *v.* Dickerman, 77 Mass. 480; Rawson *v.* Morse, 4 Pick. 127.

Minnesota.— Strong *v.* Colter, 13 Minn. 82.

Nevada.— Hoopes *v.* Meyer, 1 Nev. 433.

New York.— Moore *v.* Goedel, 34 N. Y. 527 [*affirming* 7 Bosw. 591]; Erwin *v.* Olmsted, 7 Cow. 229.

North Carolina.— Cain *v.* Wright, 50 N. C. 282, 72 Am. Dec. 551; Bonner *v.* Latham, 23 N. C. 271.

Pennsylvania.— Orbin *v.* Stevens, 13 Pa. Super. Ct. 591.

South Carolina.— Martin *v.* Quattlebam, 3 McCord 205.

Texas.— McGrady *v.* McRae, 1 Tex. App. Civ. Cas. § 1036.

Wisconsin.— Earll *v.* Stumpf, 56 Wis. 50, 13 N. W. 701.

As against trespasser.— One of several tenants in common of land is entitled to possession of the whole tract as against a mere trespasser. Winborne *v.* Elizabeth City Lumber Co., 130 N. C. 32, 40 S. E. 825; Thames *v.* Jones, 97 N. C. 121, 1 S. E. 692; Lafoon *v.* Shearin, 95 N. C. 391; Yancey *v.* Greenlee, 90 N. C. 317; Green *v.* Graham, 5 Ohio 264; Mather *v.* Dunn, 11 S. D. 196, 76 N. W. 922, 74 Am. St. Rep. 788; Wright *v.* Dunn, 73 Tex. 293, 11 S. W. 330; Thompson *v.* Johnson, (Tex. Civ. App. 1900) 56 S. W. 591. Where one cotenant maintains an action for possession against a trespasser, the recovery inures to the benefit of all the cotenants. Newman *v.* State Bank, 80 Cal. 368, 22 Pac. 261, 13 Am. St. Rep. 169, 5 L. R. A. 467; Keith *v.* Keith, 39 Tex. Civ. App. 363, 87 S. W. 384.

87. Heilbron *v.* St. Louis Southwestern R. Co., (Tex. Civ. App. 1908) 113 S. W. 610.

88. *Alabama.*— Long *v.* Grant, 163 Ala. 507, 50 So. 914; Sumner *v.* Hill, 157 Ala. 230, 47 So. 565; Inglis *v.* Webb, 117 Ala. 387, 23 So. 125; Williams *v.* Avery, 38 Ala. 115. But see Brown *v.* Floyd, 163 Ala. 317, 50 So. 995, holding that the fact that possession of one tenant in common is the possession of all is not a defense for trespass by one tenant in common against the possession and person of another, holding the actual possession and claiming the entire property.

California.— McNeil *v.* San Francisco First Cong. Soc., 66 Cal. 105, 4 Pac. 1096; Aguirre *v.* Alexander, 58 Cal. 217; McCauley *v.* Harvey, 49 Cal. 497; Varni *v.* Devoto, 10 Cal. App. 304, 101 Pac. 934.

Georgia.— Thompson *v.* Sanders, 113 Ga. 1024, 39 S. E. 419.

Illinois.— Blackaby *v.* Blackaby, 185 Ill. 94, 56 N. E. 1053; Ball *v.* Palmer, 81 Ill. 370 (holding that a coheir residing with the ancestor at the time of his death is presumed to hold for the benefit of the other coheirs); Swartwout *v.* Evans, 37 Ill. 442; Brown *v.* Graham, 24 Ill. 628 (holding that therefore where one tenant in common is in possession of indivisible personal property, and his cotenant out of possession sells his interest, the possession of the one in possession becomes that of the purchaser).

Indiana.— Elliott *v.* Frakes, 90 Ind. 389; Patterson *v.* Nixon, 79 Ind. 251; Nicholson *v.* Caress, 76 Ind. 24; Manchester *v.* Doddridge, 3 Ind. 360.

Iowa.— Weare *v.* Van Meter, 42 Iowa 128, 20 Am. Rep. 616.

Kansas.— Schoonover *v.* Tyner, 72 Kan. 475, 84 Pac. 124.

Kentucky.— Vermillion *v.* Nickell, (1908) 114 S. W. 270; Bloom *v.* Sawyer, 121 Ky. 308, 89 S. W. 204, 28 Ky. L. Rep. 349; Gill *v.* Fauntleroy, 8 B. Mon. 177; Taylor *v.* Cox, 2 B. Mon. 429; Poage *v.* Chinn, 4 Dana 50.

Maine.— Thornton *v.* York Bank, 45 Me. 158; Bird *v.* Bird, 40 Me. 398. *Compare* Gilman *v.* Stetson, 18 Me. 428.

Massachusetts.—Whiting *v.* Dewey, 15 Pick. 428; Shumway *v.* Holbrook, 1 Pick. 114, 11 Am. Dec. 153; Brown *v.* Wood, 17 Mass. 68; Barnard *v.* Pope, 14 Mass. 434, 7

have been held to have no operation as between tenants in common; [89] and so

Am. Dec. 225. But see Cummings *v.* Wyman, 10 Mass. 464.

Michigan.— Nowlen *v.* Hall, 128 Mich. 274, 87 N. W. 222.

Minnesota.— Lindley *v.* Groff, 37 Minn. 338, 34 N. W. 26; Strong *v.* Colter, 13 Minn. 82.

Mississippi.— Iler *v.* Routh, 3 How. 276.

Missouri.— Chapman *v.* Kullman, 191 Mo. 237, 89 S. W. 924; Coberly *v.* Coberly, 189 Mo. 1, 87 S. W. 957; Stevens *v.* Martin, 168 Mo. 407, 68 S. W. 347; Whitaker *v.* Whitaker, 157 Mo. 342, 58 S. W. 5; Benoist *v.* Rothschild, 145 Mo. 399, 46 S. W. 1081; Hutson *v.* Hutson, 139 Mo. 229, 40 S. W. 886; Colvin *v.* Hauenstein, 110 Mo. 575, 19 S. W. 948; Bernecker *v.* Miller, 40 Mo. 473, 93 Am. Dec. 309 (holding that if any of a number of cotenants, less than the whole, be turned out of possession, and the other thereof still remain in possession, such possession continues for the benefit of all of said cotenants); Rozier *v.* Griffith, 31 Mo. 171.

Montana.— Southmayd *v.* Southmayd, 4 Mont. 100, 5 Pac. 318.

New Hampshire.— Blake *v.* Milliken, 14 N. H. 213.

New York.— Allen *v.* Arkenburgh, 2 N. Y. App. Div. 452, 37 N. Y. Suppl. 1032; Beal *v.* Miller, 3 Thomps. & C. 564; Constantine *v.* Van Winkle, 6 Hill 177.

North Carolina.— Mott *v.* Carolina Land, etc., Co., 146 N. C. 525, 60 S. E. 423; Dobbins *v.* Dobbins, 141 N. C. 210, 53 S. E. 870, 115 Am. St. Rep. 682; Hardee *v.* Weathington, 130 N. C. 91, 40 S. E. 855; Conkey *v.* John L. Roper Lumber Co., 126 N. C. 499, 36 S. E. 42; Tharpe *v.* Holcomb, 126 N. C. 365, 35 S. E. 608; Covington *v.* Stewart, 77 N. C. 148; Linker *v.* Benson, 67 N. C. 150; Saunders *v.* Gatlin, 21 N. C. 86; Cloud *v.* Well, 15 N. C. 290, 25 Am. Dec. 711.

Ohio.— Hogg *v.* Beerman, 41 Ohio St. 81, 52 Am. Rep. 71.

Oregon.— Moss *v.* Rose, 27 Oreg. 595, 41 Pac. 666, 50 Am. St. Rep. 743.

Pennsylvania.— Stull *v.* Stull, 197 Pa. St. 243, 47 Atl. 240; Hart *v.* Gregg, 10 Watts 185, 36 Am. Dec. 166 (holding that where possession by one coheir continued for twenty-one years, such possession would not bar the other heirs in the absence of an adverse holding); Beam *v.* Gardner, 18 Pa. Super. Ct. 245.

Philippine.— Wolfson *v.* Reyes, 8 Philippine 364.

Porto Rico.— Ortiz de Rodriguez *v.* Vivoni, 1 Porto Rico Fed. 487; Soriano *v.* Arrese, 1 Porto Rico Fed. 198.

South Carolina.— Richardson *v.* Day, 20 S. C. 412; Cole *v.* Broom, Dudley 7; Villard *v.* Robert, 1 Strobh. Eq. 393; Gray *v.* Givens, Riley Eq. 41, 2 Hill Eq. 511.

Tennessee.— Marr *v.* Gilliam, 1 Coldw. 488; Elliott *v.* Holder, 3 Head 698; Cunningham *v.* Roberson, 1 Swan 138.

Texas.— Myers *v.* Frey, 102 Tex. 527, 119 S. W. 1142 [*affirming* (Civ. App. 1908) 113 S. W. 592]; Terrell *v.* Martin, 64 Tex. 121; Alexander *v.* Kennedy, 19 Tex. 488, 70 Am. Dec. 358; Franks *v.* Hancock, 1 Tex. Unrep. Cas. 554; Garcia *v.* Illg, 14 Tex. Civ. App. 482, 37 S. W. 471; Noble *v.* Hill, 8 Tex. Civ. App. 171, 27 S. W. 756.

Vermont.—Avery *v.* Hall, 50 Vt. 11; Howe Scale Co. *v.* Terry, 47 Vt. 109; Buckmaster *v.* Needham, 22 Vt. 617; Johnson *v.* Tilden, 5 Vt. 426.

Washington.— Cedar Canyon Consol. Min. Co. *v.* Yarwood, 27 Wash. 271, 67 Pac. 749, 91 Am. St. Rep. 841.

West Virginia.— Parker *v.* Brast, 45 W. Va. 399, 32 S. E. 269.

United States.— Clymer *v.* Dawkins, 3 How. 674, 11 L. ed. 778; Baker *v.* Whiting, 2 Fed. Cas. No. 787, 3 Sumn. 475.

England.— *Ex p.* Machell, 1 Rose 447, 2 Ves. & B. 216, 35 Eng. Reprint 301.

Canada.— Handley *v.* Archibald, 30 Can. Sup. Ct. 130; Harris *v.* Mudie, 7 Ont. App. 414, 30 U. C. C. P. 484; Dumble *v.* Larush, 25 Grant Ch. (U. C.) 552, 27 Grant Ch. (U. C.) 187. *Compare* Hartley *v.* Maycock, 28 Ont. 508.

See 45 Cent. Dig. tit. "Tenancy in Common," § 29.

Mineral lands.— Moragne *v.* Doe, 143 Ala. 459, 39 So. 161, 111 Am. St. Rep. 52; Southmayd *v.* Southmayd, 4 Mont. 100, 5 Pac. 318.

Even though a tenant in common in possession takes all the profits without sharing with his cotenants, the presumption in the text applies. Thornton *v.* York Bank, 45 Me. 158.

The possession of the husband of a cotenant, recognizing the cotenancy, is the possession of all. Mott *v.* Carolina Land, etc., Co., 146 N. C. 525, 60 S. E. 423. And the entry of a husband on the common property in the right of his wife inures to the benefit of her cotenants. Young *v.* Adams, 14 B. Mon. (Ky.) 127, 58 Am. Dec. 654. But a married woman living with her husband on the premises is not estopped as a tenant in common from setting up adverse title in him. Cooper *v.* Fox, 67 Miss. 237, 7 So. 342.

A grantee of the interests or a part of the interests of one cotenant is presumed to hold under the terms of such grant. Moragne *v.* Doe, 143 Ala. 459, 39 So. 161, 111 Am. St. Rep. 52; Joyce *v.* Dyer, 189 Mass. 64, 75 N. E. 81, 109 Am. St. Rep. 603; Elder *v.* McClaskey, 70 Fed. 529, 17 C. C. A. 251 [*reversing* 47 Fed. 154]. Thus a licensee of a cotenant or the purchaser of an undivided interest is presumed to hold his possession in recognition of the cotenancy, although such presumption is rebuttable. Bucknam *v.* Bucknam, 30 Me. 494; Cook *v.* Clinton, 64 Mich. 309, 31 N. W. 317, 8 Am. St. Rep. 816; Alsobrook *v.* Eggleston, 69 Miss. 833, 13 So. 850.

The possession of one coparcener, eo nomine, as coparcener, is the possession of the others. Manchester *v.* Doddridge, 3 Ind. 360; Robertson *v.* Robertson, 2 B. Mon. (Ky.) 235, 38 Am. Dec. 148.

89. Gregg *v.* Roaring Springs Land, etc.,

strong is the presumption that ordinarily if a tenant in common is in possession in a dual character, his right to possession will be attributed to the cotenancy in preference to his other capacity.[90] Thus property having descended to heirs, it is presumed that the possession and management thereof by one is for the benefit of all; and such possession will not be deemed to be adverse to, but in consonance with the rights of, the other heirs and will inure to their benefit,[91] and so as to distributees; [92] and the entry of one cotenant claiming by virtue of a common estate is sufficient to give his cotenants seizin according to their respective titles, unless there is a visible adverse seizin of some part of the land that has ripened into a title.[93] The rule has no application where persons are apparently but not actually tenants in common.[94]

3. Ouster and Adverse Possession — a. Rule Stated. Tenants in common may oust each other of the possession of land, and statutes of limitations will run against the claims of and under the ousted cotenants from the time of such ouster,[95] and acts of disseizin by one tenant in common of his cotenants, with notice thereof to the disseizees, evidence an adverse holding and the statute of

Co., 97 Mo. App. 44, 70 S. W. 920; Metz *v.* Metz, 48 S. C. 472, 26 S. E. 787.

90. Mellon *v.* Reed, 114 Pa. St. 647, 8 Atl. 227. *Compare* Valentine *v.* Healey, 158 N. Y. 369, 52 N. E. 1097, 43 L. R. A. 667.

The possession of the owner of a mortgage, who is at the same time the owner of an undivided interest in the mortgaged premises, will be presumed to be by virtue of his cotenancy and not that of his mortgage, unless it was acquired by virtue of said mortgage and so retained. Mellon *v.* Reed, 114 Pa. St. 647, 8 Atl. 227.

Holding over under lease.— The relationship of landlord and tenant is not readily inferable between tenants in common. Boley *v.* Barutio, 24 Ill. App. 515. If, however, a tenant in common lease the undivided interest of his cotenants in the common property and after the expiration of such lease expressly or impliedly admits that he is continuing to hold under such lease or does some act from which such a fact might be fairly inferred, his possession will be presumed to be under his lease, as that of any other tenant holding over in the absence of sufficient rebutting evidence. O'Connor *v.* Delaney, 53 Minn. 247, 54 N. W. 1108, 39 Am. St. Rep. 601; Carson *v.* Broady, 56 Nebr. 648, 77 N. W. 80, 71 Am. St. Rep. 691; Early *v.* Friend, 16 Gratt. (Va.) 21, 78 Am. Dec. 649; Rockwell *v.* Luck, 32 Wis. 70.

91. Iler *v.* Routh, 3 How. (Miss.) 276; Stull *v.* Stull, 197 Pa. St. 243, 47 Atl. 240.

Title before death of ancestor.— If a part of the supposed heirs of a presumptively dead owner of land claim as against their supposed coheirs therein under a tax deed procured before the presumption of death arose, the rule is otherwise. Webster *v.* Webster, 55 Ill. 325.

92. Elliott *v.* Holder, 3 Head (Tenn.) 698.

93. Brown *v.* Wood, 17 Mass. 68; Thomas *v.* Hatch, 23 Fed. Cas. No. 13,899, 3 Sumn. 170.

94. Gilman *v.* Stetson, 18 Me. 428. See also Webster *v.* Webster, 55 Ill. 325.

95. *California.*— Casserly *v.* Alameda County, 153 Cal. 170, 94 Pac. 765.

District of Columbia.— Morris *v.* Wheat, 11 App. Cas. 201.

Hawaii.— Nakuaimanu *v.* Halstead, 4 Hawaii 42.

Illinois.— Chicago, etc., R. Co. *v.* Tice, 232 Ill. 232, 83 N. E. 818.

Indiana.— Dumont *v.* Dufore, 27 Ind. 263.

Kansas.— See Rand *v.* Huff, (App. 1897) 51 Pac. 577 [*affirmed* in (1898) 53 Pac. 483].

Kentucky.— Larman *v.* Huey, 13 B. Mon. 436.

Maine.— Richardson *v.* Richardson, 72 Me. 403.

Massachusetts.— Parker *v.* Proprietors Merrimack River Locks, etc., 3 Metc. 91, 37 Am. Dec. 121.

Michigan.— Campau *v.* Dubois, 39 Mich. 274.

Mississippi.— Iler *v.* Routh, 3 How. 276.

Missouri.— Hoffstetter *v.* Blattner, 8 Mo. 276.

New York.— Tarplee *v.* Sonn, 109 N. Y. App. Div. 241, 96 N. Y. Suppl. 6; Jackson *v.* Brink, 5 Cow. 483.

North Carolina.—Woodlief *v.* Woodlief, 136 N. C. 133, 48 S. E. 583.

Oregon.—Northrop *v.* Marquam, 16 Oreg. 173, 18 Pac. 449.

Texas.— Peeler *v.* Guilkey, 27 Tex. 355.

United States.— Rickard *v.* Williams, 7 Wheat. 59, 5 L. ed. 398; Dexter *v.* Arnold, 7 Fed. Cas. No. 3,859, 2 Sumn. 152.

See 45 Cent. Dig. tit. "Tenancy in Common," § 30 *et seq.*

The North Carolina rule is that a presumption of adverse holding arises after twenty years' continuous sole possession. The seven years' limitations prescribed in the North Carolina code, Civ. Proc. § 141, as to acts of adverse possession under color of title, is not applicable to the possession and claim of adverse holding between cotenants. Jeter *v.* Davis, 109 N. C. 458, 13 S. E. 908; Hampton *v.* Wheeler, 99 N. C. 222, 6 S. E. 236; Breden *v.* McLaurin, 98 N. C. 307, 4 S. E. 136; Page *v.* Branch, 97 N. C. 97, 1 S. E. 625, 2 Am. St. Rep. 281; Hicks *v.* Bullock, 96 N. C. 164, 1 S. E. 629.

Analogy to landlord and tenant.— There is a strong analogy between the relations be-

limitations begins to run at the time of such disseizin and notice,[96] unless there be statutes to the contrary.[97] But a tenant in common will not be presumed to

tween landlords and tenants and those of tenants in common, and therefore if one in possession ousts the other or denies his tenure such act makes the possession adverse. Grant *v.* Paddock, 30 Oreg. 312, 47 Pac. 712; Willison *v.* Watkins, 3 Pet. (U. S.) 43, 7 L. ed. 596.

Estoppel from claiming benefit as cotenant.—Where one of two tenants in common claims exclusive right to a moiety of the land and his possession thereof continues until after the statute of limitations applies, he is estopped from claiming his interest as tenant in common in the residue. Gregg *v.* Blackmore, 10 Watts (Pa.) 192.

Common title including uninclosed lands.—Where title by adverse possession is established by one tenant in common against his cotenant the deed, will, patent, or other instrument under which both claimed originally operates in favor of the claimant by adverse possession as color of title, so as to extend his possession to uninclosed lands. Broom *v.* Pearson, (Tex. Civ. App. 1904) 81 S. W. 753; Russell *v.* Tennant, 63 W. Va. 623, 60 S. E. 609, 129 Am. St. Rep. 1024.

Purchase at tax-sale.— Limitations will not run in favor of a purchasing cotenant of a tax title until after a refusal of contribution by his cotenant. Phillips *v.* Wilmarth, 98 Iowa 32, 66 N. W. 1053. And a cotenant purchasing his cotenant's interest at an irregular and invalid tax-sale, which vests him with a lien only upon the property, receiving sufficient rent to reimburse himself before the expiration of a time in which his lien might ripen into a title, must apply the rents for such reimbursement and may not permit the statute of limitations to run in his favor. Davis *v.* Chapman, 24 Fed. 674.

Attornment of tenants of land to one coöwner will not start the statute of limitations running in his favor as against the other coöwner thereof unless such attornment is made with the latter's consent. Scofield *v.* Douglass, (Tex. Civ. App. 1895) 30 S. W. 817.

The burden of proof is on him claiming title to the common property, because the other cotenants have the benefit of the presumptions in their favor. Parker *v.* Brast, 45 W. Va. 399, 32 S. E. 269. The one having burden of proof must show an actual ouster or a presumption thereof or a non-recognition of the rights of the other cotenants by the one in possession. Mott *v.* Carolina Land, etc., Co., 146 N. C. 525, 60 S. E. 423.

96. *Alabama.*— Inglis *v.* Webb, 117 Ala. 387, 23 So. 125; Brady *v.* Huff, 75 Ala. 80.

Arkansas.— Brewer *v.* Keeler, 42 Ark. 289.

California.—Webb *v.* Winter, (1901) 65 Pac. 1028.

Georgia.— Cain *v.* Furlow, 47 Ga. 674.

Illinois.— Steele *v.* Steele, 220 Ill. 318, 77 N. E. 232; Boyd *v.* Boyd, 176 Ill. 40, 51 N. E. 782, 68 Am. St. Rep. 169; Littlejohn *v.* Barnes, 138 Ill. 478, 28 N. E. 980; Burgett *v.* Taliaferro, 118 Ill. 503, 9 N. E. 334.

Indiana.— Grubbs *v.* Leyendecker, 153 Ind. 348, 53 N. E. 940; Wright *v.* Kleyla, 104 Ind. 223, 4 N. E. 16.

Kentucky.— Bloom *v.* Sawyer, 121 Ky. 308, 89 S. W. 204, 28 Ky. L. Rep. 349; Rose *v.* Ware, 115 Ky. 420, 74 S. W. 188, 24 Ky. L. Rep. 2321, 76 S. W. 505, 25 Ky. L. Rep. 947; Gillaspie *v.* Osburn, 3 A. K. Marsh. 77, 13 Am. Dec. 136.

Michigan.—Weshgyl *v.* Schick, 113 Mich. 22, 71 N. W. 323.

Mississippi.—Alsobrook *v.* Eggleston, 69 Miss. 833, 13 So. 850; Iler *v.* Routh, 3 How. 276.

Missouri.— Chapman *v.* Kullman, 191 Mo. 237, 89 S. W. 924; Whitaker *v.* Whitaker, 157 Mo. 342, 58 S. W. 5.

New Mexico.—Armijo *v.* Neher, 11 N. M. 645, 72 Pac. 12.

North Carolina.— St. Peter's Church *v.* Bragaw, 144 N. C. 126, 56 S. E. 688, 10 L. R. A. N. S. 633.

Ohio.— Payne *v.* Cooksey, 8 Ohio S. & C. Pl. Dec. 407, 7 Ohio N. P. 90.

Pennsylvania.— Rider *v.* Maul, 46 Pa. St. 376.

Texas.— Mayes *v.* Manning, 73 Tex. 43, 11 S. W. 136; Golson *v.* Fielder, 2 Tex. Civ. App. 400, 21 S. W. 173.

Vermont.— Roberts *v.* Morgan, 30 Vt. 319; Buckmaster *v.* Needham, 22 Vt. 617.

West Virginia.—Parker *v.* Brast, 45 W. Va. 399, 32 S. E. 269.

Wisconsin.— Saladin *v.* Kraayvanger, 96 Wis. 180, 70 N. W. 1113; Stewart *v.* Stewart, 83 Wis. 364, 53 N. W. 686, 35 Am. St. Rep. 67; Sydnor *v.* Palmer, 29 Wis. 226.

United States.—Clymer *v.* Dawkins, 3 How. 674, 11 L. ed. 778; Willison *v.* Watkins, 3 Pet. 43, 7 L. ed. 596.

Canada.— Van Velsor *v.* Hughson, 45 U. C. Q. B. 252, 9 Ont. App. 390.

That the husband of a cotenant has performed such acts may be proven. Ashford *v.* Ashford, 136 Ala. 631, 34 So. 10, 96 Am. St. Rep. 82.

A tax deed when coupled with possession is sufficient color of title to put the statute of limitations into operation. Craven *v.* Craven, 68 Nebr. 459, 94 N. W. 604.

The attachment of the entire land as that of the tenant in common in possession by his creditors is such an act of ouster as will start the running of the statute of limitations. Elsenheimer *v.* Sieck, 8 Ohio Dec. (Reprint) 101, 5 Cinc. L. Bul. 645.

Adverse possession under a void deed is not a good defense to an action of ejectment for an undivided interest in an estate held in common. Stewart *v.* Stewart, 83 Wis. 364, 53 N. W. 686, 35 Am. St. Rep. 67. See also Sparks *v.* Bodensick, 72 Kan. 5, 82 Pac. 463.

97. Stern *v.* Selleck, 136 Iowa 291, 111 N. W. 451.

have title by virtue of the bar of the statute of limitations in a less period than fixed by such statutes, after the absence or removal of disabilities.[98]

b. What Constitutes Ouster or Adverse Possession — (i) *In General.* Ouster is not necessarily a physical eviction. It may exist if there be possession of or under the adverse claimant, attended with such circumstances as to evidence a claim of exclusive right and title, and a denial of the rights of the other cotenants, and if such possession continues uninterruptedly for the statutory period after the time that knowledge thereof is, in law, chargeable to those out of possession, it may become indefeasible.[99] But before a tenant in common can rely on an

98. Conkey *v.* John L. Roper Lumber Co., 126 N. C. 499, 36 S. E. 42; Neely *v.* Neely, 79 N. C. 478; Gray *v.* Givens, Riley Eq. (S. C.) 41, 2 Hill Eq. 511; Smith *v.* Kincaid, 10 Humphr. (Tenn.) 73; Van Velsor *v.* Hughson, 45 U. C. Q. B. 252, 9 Ont. App. 390.

If there be disability or no right of entry on the part of those intended by said act to have been disseized, at the time of an act of disseizin, limitations first begin to run against them after the right of entry has accrued, or disability is removed. Dobbins *v.* Dobbins, 141 N. C. 210, 53 S. E. 870, 115 Am. St. Rep. 682; Marr *v.* Gilliam, 1 Coldw. (Tenn.) 488; Merryman *v.* Hoover, 107 Va. 485, 59 S. E. 483; McNeely *v.* South Penn Oil Co., 58 W. Va. 438, 52 S. E. 480. *Compare* Mott *v.* Carolina Land, etc., Co., 146 N. C. 525, 60 S. E. 423. But not where the claim of ownership is made under an ancestor who was not under disability at said time. Dobbins *v.* Dobbins, 141 N. C. 210, 53 S. E. 870, 115 Am. St. Rep. 682. An infant cotenant is not chargeable with notice. Northrop *v.* Marquam, 16 Oreg. 173, 18 Pac. 449.

99. *Alabama.*— Gulf Red Cedar Lumber Co. *v.* Crenshaw, 148 Ala. 343, 42 So. 564; Jellerson *v.* Pettus, 132 Ala. 671, 32 So. 663; Inglis *v.* Webb, 117 Ala. 387, 23 So. 125; Brady *v.* Huff, 75 Ala. 80; Abercrombie *v.* Baldwin, 15 Ala. 363.

California.— Feliz *v.* Feliz, 105 Cal. 1, 38 Pac. 521; Alvarado *v.* Nordholt, 95 Cal. 116, 30 Pac. 211; Winterburn *v.* Chambers, 91 Cal. 170, 27 Pac. 658; Aguirre *v.* Alexander, 58 Cal. 21; Colman *v.* Clements, 23 Cal. 245; Mills *v.* Tukey, 22 Cal. 373, 83 Am. Dec. 74.

Connecticut.—Wooster *v.* Hunts Lyman Iron Co., 38 Conn. 256; Newell *v.* Woodruff, 30 Conn. 492.

Illinois.— Steele *v.* Steele, 220 Ill. 318, 77 N. E. 232; Kotz *v.* Belz, 178 Ill. 434, 53 N. E. 367; Ball *v.* Palmer, 81 Ill. 370. See also Dawson *v.* Edwards, 189 Ill. 60, 59 N. E. 590, holding that mere failure to pay the cotenants for their interest in the common property, as agreed, is not sufficient to rebut evidence of an adverse holding after the expiration of the period of limitations and a mesne conveyance and a reconveyance to said debtor.

Indiana.— Grubbs *v.* Leyendecker, 153 Ind. 348, 53 N. E. 940; Elliott *v.* Frakes, 90 Ind. 389; McCrum *v.* McCrum, 36 Ind. App. 636, 76 N. E. 415.

Iowa.—Blankenhorn *v.* Lenox, 123 Iowa 67, 98 N. W. 556; Murray *v.* Quigley, 119 Iowa 6, 92 N. W. 869, 97 Am. St. Rep. 276; Casey *v.* Casey, 107 Iowa 192, 77 N. W. 844, 70 Am. St. Rep. 190; Van Ormer *v.* Harley, 102 Iowa 150, 71 N. W. 241; Sorenson *v.* Davis, 83 Iowa 405, 49 N. W. 1004; Knowles *v.* Brown, 69 Iowa 11, 28 N. W. 409; Laraway *v.* Larue, 63 Iowa 407, 19 N. W. 242; Burns *v.* Byrne, 45 Iowa 285; Conover *v.* Earl, 26 Iowa 167.

Kansas.— Squires *v.* Clark, 17 Kan. 84; Rand *v.* Huff, (App. 1897) 51 Pac. 577 [*affirmed* in (1898) 53 Pac. 483].

Kentucky.— Rose *v.* Ware, 115 Ky. 420, 74 S. W. 188, 24 Ky. L. Rep. 2321, 76 S. W. 505, 25 Ky. L. Rep. 947; Barret *v.* Coburn, 3 Metc. 510; Russell *v.* Mark, 3 Metc. 37; Taylor *v.* Cox, 2 B. Mon. 429.

Maine.—Wheeler *v.* Wheeler, 33 Me. 347; Colburn *v.* Mason, 25 Me. 434, 43 Am. Dec. 292.

Maryland.— Van Bibber *v.* Frazier, 17 Md. 436.

Massachusetts.— Bennett *v.* Clemence, 6 Allen 10; Lefavour *v.* Homan, 3 Allen 354; Bigelow *v.* Jones, 10 Pick. 161; Cummings *v.* Wyman, 10 Mass. 464; Leonard *v.* Leonard, 10 Mass. 281.

Michigan.— Williams *v.* Rogers, 110 Mich. 418, 68 N. W. 240.

Minnesota.— Cameron *v.* Chicago, etc., R. Co., 60 Minn. 100, 61 N. W. 814, holding that one tenant in common retaining the exclusive possession and refusing to purchase and pay for the interest of his cotenant is an ouster.

Mississippi.— Cooper *v.* Fox, 67 Miss. 237, 7 So. 342; Iler *v.* Routh, 3 How. 276.

Missouri.— Chapman *v.* Kullman, 191 Mo. 237, 89 S. W. 924; Whitaker *v.* Whitaker, 157 Mo. 342, 58 S. W. 5; Hutson *v.* Hutson, 139 Mo. 229, 40 S. W. 886; Childs *v.* Kansas City, etc., R. Co., (1891) 17 S. W. 954; Peck *v.* Lockridge, 97 Mo. 549, 11 S. W. 246; Lapeyre *v.* Paul, 47 Mo. 586; Warfield *v.* Lindell, 38 Mo. 561, 90 Am. Dec. 443; Robidoux *v.* Cassilegi, 10 Mo. App. 516.

Montana.—Ayotte *v.* Nadeau, 32 Mont. 498, 81 Pac. 145; Butte, etc., Consol. Min. Co. *v.* Montana Ore-Purchasing Co., (1898) 55 Pac. 12.

Nebraska.—Craven *v.* Craven, 68 Nebr. 459, 94 N. W. 604; Beall *v.* McMenemy, 63 Nebr. 70, 88 N. W. 134, 93 Am. St. Rep. 427; Carson *v.* Broady, 56 Nebr. 648, 77 N. W. 80, 71 Am. St. Rep. 691.

New York.— Wright *v.* Saddler, 20 N. Y. 320; Merolla *v.* Lane, 122 N. Y. App. Div. 535, 107 N. Y. Suppl. 439; Tarplee *v.* Sonn, 109 N. Y. App. Div. 241, 96 N. Y. Suppl. 6; Zapf *v.* Carter, 70 N. Y. App. Div. 395, 75 N. Y. Suppl. 197; Sweetland *v.* Buell, 89 Hun 543,

ouster of his cotenants, he must claim the entire title to the land in himself, and must hold the exclusive and adverse possession against every other person, thus

35 N. Y. Suppl. 346 [*affirmed* in 164 N. Y. 541, 58 N. E. 663, 79 Am. St. Rep. 676]; Koke *v.* Balken, 73 Hun 145, 25 N. Y. Suppl. 1038 [*affirmed* in 148 N. Y. 732, 42 N. E. 724]; Humbert *v.* Trinity Church, 24 Wend. 587; Jackson *v.* Tibbits, 9 Cow. 241.

North Carolina.— Mott *v.* Carolina Land, etc., Co., 146 N. C. 525, 60 S. E. 423; St. Peter's Church *v.* Bragaw, 144 N. C. 126, 56 S. E. 688, 10 L. R. A. N. S. 633; Rhea *v.* Craig, 141 N. C. 602, 54 S. E. 408; Bullin *v.* Hancock, 138 N. C. 198, 50 S. E. 621; Woodlief *v.* Woodlief, 136 N. C. 133, 48 S. E. 583; Shannon *v.* Lamb, 126 N. C. 38, 35 S. E. 232; Roscoe *v.* John L. Roper Lumber Co., 124 N. C. 42, 32 S. E. 389; Morrison *v.* Morrison, 122 N. C. 598, 29 S. E. 901; Lenoir *v.* Valley River Min. Co., 113 N. C. 513, 18 S. E. 73 (holding that ownership under color of title and the operation of the statute of limitations may be shown in ejectment); Lenoir *v.* Valley River Min. Co., 106 N. C. 473, 11 S. E. 516; Anders *v.* Anders, 31 N. C. 214; Hargrove *v.* Powell, 19 N. C. 97 (holding that refusal to admit the right of a cotenant subsequent to demise laid may give rise to an inference of ouster at the time of the demise); Cloud *v.* Webb, 15 N. C. 290, 25 Am. Dec. 711.

Oregon.— Mattis *v.* Hosmer, 37 Oreg. 523, 62 Pac. 17, 632.

Pennsylvania.— Rohrbach *v.* Sanders, 212 Pa. St. 636, 62 Atl. 27; Maul *v.* Rider, 51 Pa. St. 377; Bennet *v.* Bullock, 35 Pa. St. 364; Craig *v.* Craig, 8 Pa. Cas. 357, 11 Atl. 60; Law *v.* Patterson, 1 Watts & S. 184; Lodge *v.* Patterson, 3 Watts 74, 27 Am. Dec. 335; Milliken *v.* Brown, 10 Serg. & R. 188; Frederick *v.* Gray, 10 Serg. & R. 182.

South Carolina.— Burnett *v.* Crawford, 50 S. C. 161, 27 S. E. 645; Annely *v.* De Saussure, 26 S. C. 497, 2 S. E. 490, 40 Am. St. Rep. 725; Jefcoat *v.* Knotts, 13 Rich. 50; Gray *v.* Bates, 3 Strobh. 498; Gray *v.* Givens, Riley Eq. 41, 2 Hill Eq. 511.

Tennessee.— Hubbard *v.* Wood, 1 Sneed 279.

Texas.— Moody *v.* Butler, 63 Tex. 210; Baily *v.* Trammell, 27 Tex. 317; Alexander *v.* Kennedy, 19 Tex. 488, 493, 70 Am. Dec. 358; Cryer *v.* Andrews, 11 Tex. 170; Honea *v.* Arledge, (Civ. App. 1909) 120 S. W. 508; Frey *v.* Myers, (Civ. App. 1908) 113 S. W. 592; Keith *v.* Keith, 39 Tex. Civ. App. 363, 87 S. W. 384; Madison *v.* Matthews, (Civ. App. 1902) 66 S. W. 803; Newcomb *v.* Cox, 27 Tex. Civ. App. 583, 66 S. W. 338; Garcia *v.* Illg, 14 Tex. Civ. App. 482, 37 S. W. 471.

Vermont.— Chandler *v.* Ricker, 49 Vt. 128; Holley *v.* Hawley, 39 Vt. 525, 94 Am. Dec. 350; Brock *v.* Eastman, 28 Vt. 658, 67 Am. Dec. 733; Carpenter *v.* Thayer, 15 Vt. 552.

Washington.— Cox *v.* Tompkinson, 39 Wash. 70, 80 Pac. 1005.

West Virginia.— Russell *v.* Tennant, 63 W. Va. 623, 60 S. E. 609, 129 Am. St. Rep. 1024; Oneal *v.* Stimson, 61 W. Va. 551, 56 S. E. 889; Justice *v.* Lawson, 46 W. Va. 163, 33 S. E. 102; Parker *v.* Brast, 45 W. Va. 399, 32 S. E. 269; Davis *v.* Settle, 43 W. Va. 17, 26 S. E. 557; Cooey *v.* Porter, 22 W. Va. 120.

Wisconsin.— McCann *v.* Welch, 106 Wis. 142, 81 N. W. 996; Stewart *v.* Stewart, 83 Wis. 364, 53 N. W. 686, 35 Am. St. Rep. 67.

United States.—Clymer *v.* Dawkins, 3 How. 674, 11 L. ed. 778; Elder *v.* McClaskey, 70 Fed. 529, 17 C. C. A. 251 [*reversing* 47 Fed. 154].

England.— Doe *v.* Prosser, Cowp. 217, 98 Eng. Reprint 1052.

Canada.— Zwicker *v.* Morash, 34 Nova Scotia 555 (holding that the occupying of the common land by a structure such as to necessarily exclude the cotenants amounts to an ouster); Mason *v.* Norris, 18 Grant Ch. (U. C.) 500; Van Velsor *v.* Hughson, 45 U. C. Q. B. 252, 9 Ont. App. 390.

See 45 Cent. Dig. tit. "Tenancy in Common," § 42 *et seq.*

Not suffering a cotenant to enter and occupy the common property by virtue of the cotenancy is an ouster. Norris *v.* Sullivan, 47 Conn. 474; Barret *v.* Coburn, 3 Metc. (Ky.) 510; Gill *v.* Fauntleroy, 8 B. Mon. (Ky.) 177; Bracket *v.* Norcross, 1 Me. 89; Jordan *v.* Surghnor, 107 Mo. 520, 17 S. W. 1009; Vandyck *v.* Van Beuren, 1 Cai. (N. Y.) 84.

Demand and refusal.—A demand for possession by one of the cotenants by virtue of the cotenancy, and a refusal of such demand, is an ouster, but otherwise if the demand is based upon an independent claim of title. Meredith *v.* Andres, 29 N. C. 5, 45 Am. Dec. 504. See also Wooster *v.* Hunts Lyman Iron Co., 38 Conn. 256.

Facts held insufficient to prove ouster or adverse holding as between cotenants.—A claim not including the entire common property, but only an undivided portion thereof (Chapman *v.* Kullman, 191 Mo. 237, 89 S. W. 924; Edwards *v.* Bishop, 4 N. Y. 61; Earnshaw *v.* Myers, 1 N. Y. Suppl. 901; Clymer *v.* Dawkins, 3 How. (U. S.) 674, 11 L. ed. 778); in the absence of notice to his cotenants of adverse holding or of a demand for admission and a refusal thereof, the possession, control, payment of taxes or expenses, or the improvement of the common property by one cotenant therein (Miller *v.* Myers, 46 Cal. 535; Wooster *v.* Hunts Lyman Iron Co., 38 Conn. 256; Newell *v.* Woodruff, 30 Conn. 492; Donason *v.* Barbero, 230 Ill. 138, 82 N. E. 620; Blackaby *v.* Blackaby, 185 Ill. 94, 56 N. E. 1053; McMahill *v.* Torrence, 163 Ill. 277, 45 N. E. 269; Hudson *v.* Coe, 79 Me. 83, 8 Atl. 249, 1 Am. St. Rep. 288; Colburn *v.* Mason, 25 Me. 434, 43 Am. Dec. 292; Dahlem *v.* Abbott, 146 Mich. 605, 110 N. W. 47; Perkins *v.* Eaton, 64 N. H. 359, 10 Atl. 704; Madison *v.* Matthews, (Tex. Civ. App. 1902) 66 S. W. 803; Chandler *v.* Ricker, 49 Vt. 128; Boggess *v.* Meredith, 16 W. Va. 1), even under a deed from a stranger to one of the tenants in common and the recording of

repudiating the relation of cotenancy,[1] for an ouster of one tenant in common by his cotenant is not to be presumed in the absence of some open notorious act of ouster and adverse possession, and possession by a tenant in common is not adverse as to his cotenants until they are so informed, either by express notice or by acts of such an open, notorious, and hostile character as to be notice in themselves, or sufficient to put the cotenants upon inquiry which if diligently pursued will lead to actual knowledge,[2] the acts and declarations of a tenant in common,

said deed (Thornton *v.* York Bank, 45 Me. 158; Holley *v.* Hawley, 39 Vt. 525, 94 Am. Dec. 350); a mere claim under a deed (Edwards *v.* Bishop, 4 N. Y. 61); the claim made to the son of a living tenant in common that claimant had more right in the premises than he, the son, had (Campau *v.* Campau, 45 Mich. 367, 8 N. W. 85); the distribution of lands by a probate court only authorized by statute to distribute undivided portions thereof (Mitchell *v.* Hazen, 4 Conn. 495, 10 Am. Dec. 169); a mere demand and refusal to be let into possession (Carpentier *v.* Mendenhall, 28 Cal. 484, 87 Am. Dec. 135); direct or indirect purchase of an outstanding title (English *v.* Powell, 119 Ind. 93, 21 N. E. 458); and admission of possession of demanded premises and the remark that "it is hard to pay twice" (Colburn *v.* Mason, 25 Me. 434, 43 Am. Dec. 292).

Facts held sufficient to prove ouster or adverse holding as between cotenants.—Acts or matters *in pais* (Russell *v.* Tennant, 63 W. Va. 623, 60 S. E. 609, 129 Am. St. Rep. 1024); adverse possession for a long time under a purchase and claim in entirety (Illg *v.* Garcia, 92 Tex. 251, 47 S. W. 717; Clymer *v.* Dawkins, 3 How. (U. S.) 674, 11 L. ed. 778); acceptance of a deed of the whole property, duly acknowledged and recorded, from one who has no title, and claiming and exercising the rights of sole ownership under a denial of any other person's right in the premises (Thornton *v.* York Bank, 45 Me. 158; Holley *v.* Hawley, 39 Vt. 525, 94 Am. Dec. 350); refusal to give up a moiety, and declaration that the one in possession would first litigate his rights (Marcy *v.* Marcy, 6 Metc. (Mass.) 360); purchase of outstanding title with claim of sole ownership thereunder (Clark *v.* Crego, 47 Barb. (N. Y.) 599 [*affirmed* in 51 N. Y. 646]); demand to be let into possession and refusal, together with sale of the entire property by one cotenant therein and delivery of possession to the grantee thereunder (Wright *v.* Saddler, 20 N. Y. 320); and assumption of ownership and sale of the common property (Dyckman *v.* Valiente, 42 N. Y. 549).

1. *Alabama.*— Courtner *v.* Etheredge, 149 Ala. 78, 43 So. 368; Stevenson *v.* Anderson, 87 Ala. 228, 6 So. 285; Cotten *v.* Thompson, 25 Ala. 671.

California.— Carpentier *v.* Mendenhall, 28 Cal. 484, 87 Am. Dec. 135.

Connecticut.—Wooster *v.* Hunts Lyman Iron Co., 38 Conn. 256.

Georgia.— Roumillot *v.* Gardner, 113 Ga. 60, 38 S. E. 362, 53 L. R. A. 729.

Illinois.— Carpenter *v.* Fletcher, 239 Ill. 440, 88 N. E. 162; Donason *v.* Barberò, 230 Ill. 138, 82 N. E. 620; Comer *v.* Comer, 119 Ill. 170, 8 N. E. 796.

Indiana.— King *v.* Carmichael, 136 Ind. 20, 35 N. E. 509, 43 Am. St. Rep. 303; English *v.* Powell, 119 Ind. 93, 21 N. E. 458.

Iowa.— Van Ormer *v.* Harley, 102 Iowa 150, 71 N. W. 241; Smith *v.* Young, 89 Iowa 338, 56 N. W. 506.

Kansas.— Schoonover *v.* Tyner, 72 Kan. 475, 84 Pac. 124.

Maine.— Hudson *v.* Coe, 79 Me. 83, 8 Atl. 249, 1 Am. St. Rep. 288 (holding slight acts of ownership on wild lands insufficient); Colburn *v.* Mason, 25 Me. 434, 43 Am. Dec. 292.

Michigan.— Butcher *v.* Butcher, 137 Mich. 390, 100 N. W. 604.

Missouri.— Benoist *v.* Rothschild, 145 Mo. 399, 46 S. W. 1081; McQuiddy *v.* Ware, 67 Mo. 74.

New Hampshire.— Perkins *v.* Eaton, 64 N. H. 359, 10 Atl. 704.

New Mexico.— Neher *v.* Armijo, 9 N. M. 325, 54 Pac. 236.

New York.— Edwards *v.* Bishop, 4 N. Y. 61; Northrop *v.* Wright, 24 Wend. 221.

Ohio.— Elsenheimer *v.* Sieck, 8 Ohio Dec. (Reprint) 101, 5 Cinc. L. Bul. 645.

Pennsylvania.—Phillips *v.* Gregg, 10 Watts 158, 36 Am. Dec. 158; Tanney *v.* Tanney, 24 Pittsb. Leg. J. N. S. 43 [*affirmed* in 159 Pa. St. 277, 28 Atl. 287, 39 Am. St. Rep. 678].

Tennessee.— Elliott *v.* Holder, 3 Head 698.

Texas.—Wingo *v.* Rudder, (1910) 124 S. W. 899; Teal *v.* Terrell, 58 Tex. 257; Niday *v.* Cochran, 42 Tex. Civ. App. 292, 93 S. W. 1027.

Vermont.—Avery *v.* Hall, 50 Vt. 11; Chandler *v.* Ricker, 49 Vt. 128; Leach *v.* Beattie, 33 Vt. 195.

Virginia.— Buchanan *v.* King, 22 Gratt. 414.

United States.— Zeller *v.* Eckert, 4 How. 289, 11 L. ed. 979; Bradstreet *v.* Huntington, 5 Pet. 402, 440, 8 L. ed. 170; McClung *v.* Ross, 5 Wheat. 116, 5 L. ed. 46; Barr *v.* Gratz, 4 Wheat. 213, 4 L. ed. 553.

England.— Denys *v.* Shuckburgh, 5 Jur. 21, 4 Y. & C. Exch. 42.

See 45 Cent. Dig. tit. "Tenancy in Common," § 42 *et seq.*

2. *Alabama.*—Sumner *v.* Hill, 157 Ala. 230, 47 So. 565; Cramton *v.* Rutledge, 157 Ala. 141, 47 So. 214; Courtner *v.* Etheredge, 149 Ala. 78, 43 So. 368; Gulf Red Cedar Lumber Co. *v.* Crenshaw, 148 Ala. 343, 42 So. 564; Moragne *v.* Doe, 143 Ala. 459, 39 So. 161. 111 Am. St. Rep. 52; Inglis *v.* Webb, 117 Ala. 387, 23 So. 125; Sibley *v.* Alba, 95 Ala. 191, 10 So. 831; Fielder *v.* Childs, 73 Ala. 567.

intended to show his adverse holding so as to entitle him to the benefit of the

Arkansas.— McKneely *v.* Terry, 61 Ark. 527, 33 S. W. 953; Brewer *v.* Keeler, 42 Ark. 289.

California.— Faubel *v.* McFarland, 144 Cal. 717, 78 Pac. 261; Webb *v.* Winter, (1901) 65 Pac. 1028; Plass *v.* Plass, 121 Cal. 131, 53 Pac. 448; Gregory *v.* Gregory, 102 Cal. 50, 36 Pac. 364; Gage *v.* Downey, 94 Cal. 241, 29 Pac. 635; *In re* Grider, 81 Cal. 571, 22 Pac. 908; McClure *v.* Colyear, 80 Cal. 378, 22 Pac. 175; Oglesby *v.* Hollister, 76 Cal. 136, 18 Pac. 146, 9 Am. St. Rep. 177; Aguirre *v.* Alexander, 58 Cal. 21; Olney *v.* Sawyer, 54 Cal. 379; Packard *v.* Johnson, 51 Cal. 545; Miller *v.* Myers, 46 Cal. 535; Bornheimer *v.* Baldwin, 42 Cal. 27; Carpentier *v.* Gardiner, 29 Cal. 160; Owen *v.* Morton, 24 Cal. 373; Colman *v.* Clements, 23 Cal. 245; Baumgarten *v.* Mitchell, 10 Cal. App. 48, 101 Pac. 43.

Connecticut.—Wooster *v.* Hunts Lyman Iron Co., 38 Conn. 256. But see Adams *v.* Manning, 51 Conn. 5.

Delaware.— Milbourn *v.* David, 7 Houst. 209, 30 Atl. 971.

District of Columbia.— Morris *v.* Wheat, 11 App. Cas. 201.

Florida.— Coogler *v.* Rogers, 25 Fla. 853, 7 So. 391.

Georgia.— Harriss *v.* Howard, 126 Ga. 325, 55 S. E. 59; Morgan *v.* Mitchell, 104 Ga. 596, 30 S. E. 792; Morris *v.* Davis, 75 Ga. 169; Boyd *v.* Hand, 65 Ga. 468.

Hawaii.— Smith *v.* Hamakua Mill Co., 13 Hawaii 717; Nakuaimanu *v.* Halstead, 4 Hawaii 42.

Illinois.— Donason *v.* Barbero, 230 Ill. 138, 82 N. E. 620; Waterman Hall *v.* Waterman, 220 Ill. 569, 77 N. E. 142, 4 L. R. A. N. S. 776; Steele *v.* Steele, 220 Ill. 318, 77 N. E. 232; Comer *v.* Comer, 119 Ill. 170, 8 N. E. 796; Cooter *v.* Dearborn, 115 Ill. 509, 4 N. E. 388; Stevens *v.* Wait, 112 Ill. 544; Nicoll *v.* Scott, 99 Ill. 529; Lavelle *v.* Strobel, 89 Ill. 370; Ball *v.* Palmer, 81 Ill. 370; Busch *v.* Huston, 75 Ill. 343; Noble *v.* McFarland, 51 Ill. 226.

Indiana.—Wilmore *v.* Stetler, 137 Ind. 127, 34 N. E. 357, 36 N. E. 856, 45 Am. St. Rep. 169; Myers *v.* Jackson, 135 Ind. 136, 34 N. E. 810; Peden *v.* Cavins, 134 Ind. 494, 34 N. E. 7, 39 Am. St. Rep. 276; English *v.* Powell, 119 Ind. 93, 21 N. E. 458; Bender *v.* Stewart, 75 Ind. 88; Bowen *v.* Preston, 48 Ind. 367; Doe *v.* McCleary, 2 Ind. 405.

Iowa.— Curtis *v.* Barber, 131 Iowa 400, 108 N. W. 755, 117 Am. St. Rep. 425; Bader *v.* Dyer, 106 Iowa 715, 77 N. W. 469, 68 Am. St. Rep. 332; Van Ormer *v.* Harley, 102 Iowa 150, 71 N. W. 241; Smith *v.* Young, 89 Iowa 338, 56 N. W. 506; Willcuts *v.* Rollins, 85 Iowa 247, 52 N. W. 199; Sorenson *v.* Davis, 83 Iowa 405, 49 N. W. 1004; Knowles *v.* Brown, 69 Iowa 11, 28 N. W. 409; Laraway *v.* Larue, 63 Iowa 407, 19 N. W. 242; Moore *v.* Antill, 53 Iowa 612, 6 N. W. 14; Hume *v.* Long, 53 Iowa 299, 5 N. W. 193; Burns *v.* Byrne, 45 Iowa 285.

Kansas.— Sparks *v.* Bodensick, 72 Kan. 5, 82 Pac. 463.

Kentucky.— Bush *v.* Fitzgeralds, (1910) 125 S. W. 716; Kidd *v.* Bell, (1900) 122 S. W. 232; Hamilton *v.* Steele, (1909) 117 S. W. 378; Vermillion *v.* Nickell, (1908) 114 S. W. 270; Barret *v.* Coburn, 3 Metc. 510; Russell *v.* Mark, 3 Metc. 37; Young *v.* Adams, 14 B. Mon. 127, 58 Am. Dec. 654; Gill *v.* Fauntleroy, 8 B. Mon. 177; Taylor *v.* Cox, 2 B. Mon. 429; Coleman *v.* Hutchenson, 3 Bibb 209, 6 Am. Dec. 649; Baker *v.* Royal Lead, etc., Co., 107 S. W. 704, 32 Ky. L. Rep. 982.

Louisiana.— Simon *v.* Richard, 42 La. Ann. 842, 8 So. 629; Gosselin *v.* Abat, 3 La. 549.

Maine.— Mansfield *v.* McGinnis, 86 Me. 118, 29 Atl. 956, 41 Am. St. Rep. 532; Hudson *v.* Coe, 79 Me. 83, 8 Atl. 249, 1 Am. St. Rep. 288; Billings *v.* Gibbs, 55 Me. 238, 92 Am. Dec. 587; Bird *v.* Bird, 40 Me. 398; Small *v.* Clifford, 38 Me. 213.

Maryland.—Van Bibber *v.* Frazier, 17 Md. 436; Lloyd *v.* Gordon, 2 Harr. & M. 254.

Massachusetts.— Joyce *v.* Dyer, 189 Mass. 64, 75 N. E. 81, 109 Am. St. Rep. 603; Parker *v.* Proprietors of Merrimack River Locks, etc., 3 Metc. 91, 3 Am. Dec. 121; Burghardt *v.* Turner, 12 Pick. 534.

Michigan.— Loranger *v.* Carpenter, 148 Mich. 549, 112 N. W. 125; Weshgyl *v.* Schick, 113 Mich. 22, 71 N. W. 323; Campau *v.* Campau, 44 Mich. 31, 5 N. W. 1062.

Mississippi.— Gardiner *v.* Hinton, 86 Miss. 604, 38 So. 779, 109 Am. St. Rep. 726; Bentley *v.* Callaghan, 79 Miss. 302, 30 So. 709; Jonas *v.* Flanniken, 69 Miss. 577, 11 So. 319.

Missouri.— Chapman *v.* Kullman, 191 Mo. 237, 89 S. W. 924; Coberly *v.* Coberly, 189 Mo. 1, 87 S. W. 957; Golden *v.* Tyer, 180 Mo. 196, 79 S. W. 143; Whitaker *v.* Whitaker, 157 Mo. 342, 58 S. W. 5; Benoist *v.* Rothschild, 145 Mo. 399, 46 S. W. 1081; Minton *v.* Steele, 125 Mo. 181, 28 S. W. 746; Comstock *v.* Eastwood, 108 Mo. 41, 18 S. W. 39; La Riviere *v.* La Riviere, 77 Mo. 512; Warfield *v.* Lindell, 38 Mo. 561, 90 Am. Dec. 443; Robidoux *v.* Cassilegi, 10 Mo. App. 516.

Montana.—Ayotte *v.* Nadeau, 32 Mont. 498, 81 Pac. 145; Southmayd *v.* Southmayd, 4 Mont. 100, 5 Pac. 318.

New Hampshire.— Brooks *v.* Fowle, 14 N. H. 248.

New Jersey.— Foulke *v.* Bond, 41 N. J. L. 527.

New York.— Millard *v.* McMullin, 68 N. Y. 345; Merolla *v.* Lane, 122 N. Y. App. Div. 535, 107 N. Y. Suppl. 439; Hamershlag *v.* Duryea, 38 N. Y. App. Div. 130, 56 N. Y. Suppl. 615; Stoddard *v.* Weston, 3 Silv. Sup. 13, 6 N. Y. Suppl. 34; Beal *v.* Miller, 3 Thomps. & C. 564; Constantine *v.* Van Winkle, 6 Hill 177; Butler *v.* Phelps, 17 Wend. 642; Jackson *v.* Brink, 5 Cow. 483.

North Carolina.— Mott *v.* Carolina Land, etc., Co., 146 N. C. 525, 60 S. E. 423; Rhea *v.* Craig, 141 N. C. 602, 54 S. E. 408; Deans *v.* Gay, 132 N. C. 227, 43 S. E. 643; Hardee *v.* Weathington, 130 N. C. 91, 40 S. E. 855; Shannon *v.* Lamb, 126 N. C. 38, 35 S. E.

statute of limitations, being construed more strongly against him than such

232; Gaylord *v.* Respass, 92 N. C. 553; Withrow *v.* Biggerstaff, 82 N. C. 82; Day *v.* Howard, 73 N. C. 1; Linker *v.* Benson, 67 N. C. 150; Wagstaff *v.* Smith, 39 N. C. 1; Anders *v.* Anders, 31 N. C. 214 (holding that the rule applies even in the case of a tenant in common holding over after a partition); Saunders *v.* Gatlin, 21 N. C. 86; Hargrove *v.* Powell, 19 N. C. 97. See also Midford *v.* Hardison, 7 N. C. 164, holding that mere adverse possession does not deprive tenants in common of right of entry. *Compare* Cloud *v.* Webb, 15 N. C. 290, 25 Am. Dec. 711.

Ohio.— Hogg *v.* Beerman, 41 Ohio St. 81, 52 Am. Rep. 71; Youngs *v.* Heffner, 36 Ohio St. 232; Payne *v.* Cooksey, 8 Ohio S. & C. Pl. Dec. 407, 7 Ohio N. P. 90.

Oregon.— Mattis *v.* Hosmer, 37 Oreg. 523, 62 Pac. 17, 632; Wheeler *v.* Taylor, 32 Oreg. 421, 52 Pac. 183, 67 Am. St. Rep. 540.

Pennsylvania.— Maul *v.* Rider, 51 Pa. St. 337; Tulloch *v.* Worrall, 49 Pa. St. 133; Forward *v.* Deetz, 32 Pa. St. 69; Keyser *v.* Evans, 30 Pa. St. 507; Workman *v.* Guthrie, 29 Pa. St. 495, 72 Am. Dec. 654; Peck *v.* Ward, 18 Pa. St. 506; Frederick *v.* Gray, 10 Serg. & R. 182; Richards *v.* Richards, 31 Pa. Super Ct. 509; Devlin's Estate, 5 Pa. Dist. 125, 17 Pa. Co. Ct. 433, 12 Montg. Co. Rep. 126.

Porto Rico.— Soriano *v.* Arrese, 1 Porto Rico Fed. 198.

South Carolina.— Powers *v.* Smith, 80 S. C. 110, 61 S. E. 222; Green *v.* Cannady, 77 S. C. 193, 57 S. E. 832; Coleman *v.* Coleman, 71 S. C. 518, 51 S. E. 250; Burnett *v.* Crawford, 50 S. C. 161, 27 S. E. 645; McGee *v.* Hall, 26 S. C. 179, 1 S. E. 711; Villard *v.* Robert, 1 Strobh. Eq. 393.

South Dakota.— Barrett *v.* McCarty, 20 S. D. 75, 104 N. W. 907.

Tennessee.— Buck *v.* Williams, 10 Heisk. 264; Hilton *v.* Duncan, 1 Coldw. 313; Elliott *v.* Holder, 3 Head 698; Hubbard *v.* Wood, 1 Sneed 279; Terrill *v.* Murry, 4 Yerg. 104; Gross *v.* Washington, (Ch. App. 1896) 38 S. W. 442.

Texas.— Broom *v.* Pearson, 98 Tex. 469, 85 S. W. 790, 86 S. W. 733; Phillipson *v.* Flynn, 83 Tex. 580, 19 S. W. 136; McDougal *v.* Bradford, 80 Tex. 558, 16 S. W. 619; St. Louis, etc., R. Co. *v.* Prather, 75 Tex. 53, 12 S. W. 969; Moody *v.* Butler, 63 Tex. 210; Peeler *v.* Guilkey, 27 Tex. 355; Baily *v.* Trammell, 27 Tex. 317; Alexander *v.* Kennedy, 19 Tex. 488, 493, 70 Am. Dec. 358; Franks *v.* Hancock, 1 Tex. Unrep. Cas. 554; Niday *v.* Cochran, 42 Tex. Civ. App. 292, 93 S. W. 1027; Keith *v.* Keith, 39 Tex. Civ. App. 363, 87 S. W. 384; Newcomb *v.* Cox, 27 Tex. Civ. App. 583, 66 S. W. 338; Gist *v.* East, 16 Tex. Civ. App. 274, 41 S. W. 396; House *v.* Williams, 16 Tex. Civ. App. 122, 40 S. W. 414; Garcia *v.* Illg, 14 Tex. Civ. App. 482, 37 S. W. 471; Scofield *v.* Douglass, (Tex. Civ. App. 1895) 30 S. W. 817; Noble *v.* Hill, 8 Tex. Civ. App. 171, 27 S. W. 756; Beall *v.* Evans, 1 Tex. Civ. App. 443, 20 S. W. 945.

Vermont.— Roberts *v.* Morgan, 30 Vt. 319; Buckmaster *v.* Needham, 22 Vt. 617; Catlin *v.* Kidder, 7 Vt. 12.

Virginia.— Pillow *v.* Southwest Virginia Imp. Co., 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep. 804; Hannon *v.* Hannah, 9 Gratt. 146.

Washington.— Stone *v.* Marshall, 52 Wash. 375, 100 Pac. 858.

West Virginia.— Oneal *v.* Stimson, 61 W. Va. 551, 56 S. E. 889; Reed *v.* Bachman, 61 W. Va. 452, 57 S. E. 769, 123 Am. St. Rep. 996; Clark *v.* Beard, 59 W. Va. 669, 53 S. E. 597; Justice *v.* Lawson, 46 W. Va. 163, 33 S. E. 102; Cooey *v.* Porter, 22 W. Va. 120; Boggess *v.* Meredith, 16 W. Va. 1.

Wisconsin.— McCann *v.* Welch, 106 Wis. 142, 81 N. W. 996; Saladin *v.* Kraayvanger, 96 Wis. 180, 70 N. W. 1113; Stewart *v.* Stewart, 83 Wis. 364, 53 N. W. 686, 35 Am. St. Rep. 67; Sydnor *v.* Palmer, 29 Wis. 226. But see Roberts *v.* Decker, 120 Wis. 102, 97 N. W. 519, holding that the rule that mere possession without notice is not adverse has no application to a case where one is in possession, under a claim of right founded on a conveyance, and his grantors never acknowledged or knew of a claim of cotenancy.

United States.— Union Consol. Silver Min. Co. *v.* Taylor, 100 U. S. 37, 25 L. ed. 541; Zeller *v.* Eckert 4 How. 289, 11 L. ed. 979; Clymer *v.* Dawkins, 3 How. 674, 11 L. ed. 778; Bradstreet *v.* Huntington, 5 Pet. 402, 8 L. ed. 170; McClung *v.* Ross, 5 Wheat. 116, 5 L. ed. 46; Elder *v.* McClaskey, 70 Fed. 529, 17 C. C. A. 251 [*reversing* 47 Fed. 154] (holding, however, that this rule has no application unless the possession was avowedly begun as that of a tenant in common or under a deed which defined the possession as such); Van Gunden *v.* Virginia Coal, etc., Co., 52 Fed. 838, 3 C. C. A. 294; Baker *v.* Whiting, 2 Fed. Cas. No. 787, 3 Sumn. 475; Dexter *v.* Arnold, 7 Fed. Cas. No. 3,859, 2 Sumn. 152; Scott *v.* Evans, 21 Fed. Cas. No. 12,529, 1 McLean 486.

Canada.— Doe *v.* Marks, 5 N. Brunsw. 659; Harris *v.* Mudie, 7 Ont. App. 414 [*affirming* 30 U. C. C. P. 484]; Hartley *v.* Maycock, 28 Ont. 508; Kennedy *v.* Bateman, 27 Grant Ch. (U. C.) 380; Mason *v.* Norris, 18 Grant Ch. (U. C.) 500.

See 45 Cent. Dig. tit. "Tenancy in Common," §§ 32, 49.

The question of ouster is usually a question for the jury. Hamby *v.* Folsam, 148 Ala. 221, 42 So. 548; LaFountain *v.* Dee, 110 Mich. 347, 63 N. W. 220; Warfield *v.* Lindell, 38 Mo. 561, 90 Am. Dec. 443; Beall *v.* McMenemy, 63 Nebr. 70, 88 N. W. 134, 93 Am. St. Rep. 427; Jackson *v.* Whitbeck, 6 Cow. (N. Y.) 632, 16 Am. Dec. 454; Keyser *v.* Evans, 30 Pa. St. 507; Blackmore *v.* Gregg, 2 Watts & S. (Pa.) 182; Marr *v.* Gilliam, 1 Coldw. (Tenn.) 488; Purcell *v.* Wilson, 4 Gratt. (Va.) 16. The jury may presume notice from facts and circumstances. Carpentier *v.* Mendenhall, 28 Cal. 484, 87 Am. Dec. 135; Rohrbach *v.* Sanders, 212 Pa. St. 636, 62 Atl. 27; Peeler *v.* Guilkev, 27 Tex. 355; Van

acts and declarations would have been construed had there been no privity.[3] Thus acts of a tenant in common or those claiming under him, in relation to the common property, consistent with his interests by virtue of the cotenancy therein, cannot give rise to the presumption of an adverse possession as against his cotenants,[4] and the entry and possession of one cotenant being ordinarily deemed not adverse to them, unless notice is clearly brought to them that he claims the entire tract as exclusive owner, and unless his previous actual possession and cultivation of a small part of the tract was such as to support the statute of limitations as to the entire tract. Hess *v.* Webb, (Tex. Civ. App. 1908) 113 S. W. 618.

An infant is not chargeable with notice. Northrop *v.* Marquam, 16 Oreg. 173, 18 Pac. 449.

Where a tenant in common of land enters thereon and cuts timber, he is presumed to enter under his legal title, there being no evidence of any ouster of the cotenants. Whiting *v.* Dewey, 15 Pick. (Mass.) 428; Shumway *v.* Holbrook, 1 Pick. (Mass.) 114, 11 Am. Dec. 153; Strong *v.* Richardson, 19 Vt. 194. Where a cotenant pays taxes on the common land, takes timber therefrom and feeds cattle thereon, such acts are consistent with his interest therein and hence do not constitute adverse possession as against his cotenant. McQuiddy *v.* Ware, 67 Mo. 74; Griffies *v.* Griffies, 8 L. T. Rep. N. S. 758, 11 Wkly. Rep. 943.

3. *Connecticut.*— Newell *v.* Woodruff, 30 Conn. 492.

Illinois.— Ball *v.* Palmer, 81 Ill. 370.

Kentucky.— Barret *v.* Coburn, 3 Metc. 510.

Maryland.—Van Bibber *v.* Frazier, 17 Md. 436.

Massachusetts.— Burghardt *v.* Turner, 12 Pick. 534.

North Carolina.— Tharpe *v.* Holcomb, 126 N. C. 365, 35 S. E. 608.

Oregon.— Minter *v.* Durnham, 13 Oreg. 470, 11 Pac. 231.

Pennsylvania.— Forward *v.* Deetz, 32 Pa. St. 69; Peck *v.* Ward, 18 Pa. St. 506.

Texas.—Alexander *v.* Kennedy, 19 Tex. 488, 70 Am. Dec. 358; Franks *v.* Hancock, 1 Tex. Unrep. Cas. 554; Garcia *v.* Illg, 14 Tex. Civ. App. 482, 37 S. W. 471; Noble *v.* Hill, 8 Tex. Civ. App. 171, 27 S. W. 756.

Wisconsin.— Challefoux *v.* Ducharme, 8 Wis. 287.

4. *California.*— Christy *v.* Spring Valley Water Works, 97 Cal. 21, 31 Pac. 1110; Tabler *v.* Peverill, 4 Cal. App. 671, 88 Pac. 994.

Connecticut.—White *v.* Beckwith, 62 Conn. 79, 25 Atl. 400.

Illinois.— Brumback *v.* Brumback, 198 Ill. 66, 64 N. E. 741; Blackaby *v.* Blackaby, 185 Ill. 94, 56 N. E. 1053; McMahill *v.* Torrence, 163 Ill. 277, 45 N. E. 269.

Indiana.— Sanford *v.* Tucker, 54 Ind. 219.

Iowa.— Frye *v.* Gullion, 143 Iowa 719, 121 N. W. 563; German *v.* Heath, 139 Iowa 52, 116 N. W. 1051.

Massachusetts.— Ingalls *v.* Newhall, 139 Mass. 268, 30 N. E. 96 (where the erection of a light, easily removable structure by one of the cotenants, with a pump within a sur-

Gunden *v.* Virginia Coal, etc., Co., 52 Fed. 838, 3 C. C. A. 294. And if the tendency of the alleged acts be such that a jury may fairly infer therefrom an intention to oust the other cotenants, all other requisites concurring, such acts may be held to be acts of ouster or disseizin. Zapf *v.* Carter, 70 App. Div. 395, 75 N. Y. Suppl. 197.

Water rights see Shannon *v.* Lamb, 126 N. C. 38, 35 S. E. 232; Mattis *v.* Hosmer, 37 Oreg. 523, 62 Pac. 17, 632; Justice *v.* Lawson, 46 W. Va. 163, 33 S. E. 102; McCann *v.* Welch, 106 Wis. 142, 81 N. W. 996. The erection of a wharf by one cotenant on a portion of a water lot owned in common, and his sole occupancy of the wharf, amounts to an ouster, because the structure is in its nature permanent and is suited for only one purpose and is essentially a unit and incapable of separate occupancy. Annely *v.* De Saussure, 26 S. C. 497, 2 S. E. 490, 40 Am. St. Rep. 725; Zwicker *v.* Morash, 34 Nova Scotia 555.

But the vendee of a tenant in common setting up a claim in his own right to the whole tract of land is in no relation to the tenants in common or those claiming under them, imposing on him the obligation of giving notice either actually or constructively as a condition precedent to the assertion of a hostile claim. Gardiner *v.* Hinton, 86 Miss. 604, 109 Am. St. Rep. 726, 38 So. 779.

A declaration of such intention to a stranger is not sufficient unless brought to the knowledge of the cotenant sought to be ousted. Loranger *v.* Carpenter, 148 Mich. 549, 112 N. W. 125; Warfield *v.* Lindell, 30 Mo. 272, 77 Am. Dec. 614.

A tenant in common holding the common property mistakenly, believing herself to be the sole owner, her cotenants sharing said belief, holds adversely. Wheeler *v.* Taylor, 32 Oreg. 421, 52 Pac. 183, 67 Am. St. Rep. 540.

An actual verbal claim of adverse ownership to a cotenant personally is not necessary to prove an ouster by one in possession doing overt acts indicating a hostile claim. Casey *v.* Casey, 107 Iowa 192, 77 N. W. 844, 70 Am. St. Rep. 190; Dunlap *v.* Griffith, 146 Mo. 283, 47 S. W. 917.

Taking with knowledge of cotenancy.— Where a grantee takes title with knowledge, and in recognition of the existing cotenancy, even on condition that the part of the land that he has taken shall be subsequently partitioned to him, such taking will merely have the same effect as if said possession had been so taken by the vendor himself. Chiles *v.* Jones, 7 Dana (Ky.) 528.

A purchaser of the interest of an heir in a tract of land of the deceased ancestor becomes a tenant in common with the other heirs, and after his purchase his possession is

the entry and possession of all, mere possession by one cotenant cannot operate as an ouster or disseizin as against his cotenants,[5] even when attended with the

rounding wall, his leasing of the structure, collecting of the rents and payment of the taxes was held not to amount to an ouster of the other cotenants, who used the house and pump as they found convenient); Burghardt *v.* Turner, 12 Pick. 534 (holding that it requires very clear evidence of the adverse possession of uninclosed woodland to raise a presumption of ouster); Higbee *v.* Rice, 5 Mass. 344, 4 Am. Dec. 63.

Michigan.— Pierson *v.* Conley, 95 Mich. 619, 55 N. W. 387.

Mississippi.—Alsobrook *v.* Eggleston, 69 Miss. 833, 13 So. 850.

Missouri.— McQuiddy *v.* Ware, 67 Mo. 74.

South Dakota.— Barrett *v.* McCarty, 20 S. D. 75, 104 N. W. 907.

Texas.— Madison *v.* Matthews, (Civ. App. 1902) 66 S. W. 803; Garcia *v.* Illg, 14 Tex. Civ. App. 482, 37 S. W. 471.

Virginia.— Lagoria *v.* Dozier, 91 Va. 492, 22 S. E. 239; Hannon *v.* Hannah, 9 Gratt. 146.

West Virginia.— Clark *v.* Beard, 59 W. Va. 669, 53 S. E. 597.

United States. —McClaskey *v.* Barr, 47 Fed. 154 [*reversed* on other grounds in 70 Fed. 529, 17 C. C. A. 251].

But evidence of such acts is competent to go to the jury where the issue is one of adverse possession. Ashford *v.* Ashford, 136 Ala. 631, 34 So. 10, 96 Am. St. Rep. 82; Robidoux *v.* Cassilegi, 10 Mo. App. 516; Susquehanna, etc., R., etc., Co. *v.* Quick, 61 Pa. St. 328; Bolton *v.* Hamilton, 2 Watts & S. (Pa.) 294, 37 Am. Dec. 509.

The derivation of benefit from the common property, by a tenant in common, without in any way interfering with his cotenant's use or enjoyment thereof, or in any way affecting its value, neither gives rise to a presumption of adverse use, nor is such cotenant entitled to an accounting. Ragan *v.* McCoy, 29 Mo. 356; Howe Scale Co. *v.* Terry, 47 Vt. 109.

5. *Alabama.*— Cramton *v.* Rutledge, 156 Ala. 141, 47 So. 214; Layton *v.* Campbell, 155 Ala. 220, 46 So. 775, 130 Am. St. Rep. 17; Inglis *v.* Webb, 117 Ala. 387, 23 So. 125.

California.— McCauley *v.* Harvey, 49 Cal. 497 (holding that undisturbed possession as a tenant in common without acts of exclusion, equivalent to an ouster, is insufficient to create the benefit of the statute of limitations); Owen *v.* Morton, 24 Cal. 373. *Compare* Alvarado *v.* Nordholt, 95 Cal. 116, 30 Pac. 211.

Delaware.— Milbourn *v.* David, 7 Houst. 209, 30 Atl. 971.

Georgia.— Morgan *v.* Mitchell, 104 Ga. 596, 30 S. E. 792.

Illinois.— Carpenter *v.* Fletcher, 239 Ill. 440, 88 N. E. 162.

Indiana.— Peden *v.* Cavins, 134 Ind. 494, 34 N. E. 7, 39 Am. St. Rep. 276.

Iowa.— Sires *v.* Melvin, 135 Iowa 460, 113 N. W. 106; Casey *v.* Casey, 107 Iowa 192, 77 N. W. 844, 70 Am. St. Rep. 190; Bader *v.* Dyer, 106 Iowa 715, 77 N. W. 469, 68 Am. St. Rep. 332; Van Ormer *v.* Harley, 102 Iowa 150, 71 N. W. 241; Smith *v.* Young, 89 Iowa 338, 56 N. W. 506; Alexander *v.* Sully, 50 Iowa 192; Flock *v.* Wyatt, 49 Iowa 466.

Kansas.— Rand *v.* Huff, 6 Kan. App. 922, 51 Pac. 577 [*affirmed* in (1898) 53 Pac. 483].

Kentucky.— Greenhill *v.* Biggs, 85 Ky. 155, 2 S. W. 774, 8 Ky. L. Rep. 825, 7 Am. St. Rep. 579; McSurley *v.* Venters, 104 S. W. 365, 31 Ky. L. Rep. 963.

Maine.— Mansfield *v.* McGinniss, 86 Me. 118, 29 Atl. 956, 41 Am. St. Rep. 532; Colburn *v.* Mason, 25 Me. 434, 43 Am. Dec. 292.

Massachusetts.— Joyce *v.* Dyer, 189 Mass. 64, 75 N. E. 81, 109 Am. St. Rep. 603.

Michigan.— Dahlem *v.* Abbott, 146 Mich. 605, 110 N. W. 47; Nowlen *v.* Hall, 128 Mich. 274, 87 N. W. 222; Weshgyl *v.* Schick, 113 Mich. 22, 71 N. W. 323.

Minnesota.— Lindley *v.* Groff, 37 Minn. 338, 34 N. W. 26; Berthold *v.* Fox, 13 Minn. 501, 97 Am. Dec. 243.

Mississippi.— Iler *v.* Routh, 3 How. 276.

Missouri.— Seibert *v.* Hope, 221 Mo. 630, 120 S. W. 770; Dunlap *v.* Griffith, 146 Mo. 283, 47 S. W. 917; Long *v.* McDow, 87 Mo. 197; Warfield *v.* Lindell, 30 Mo. 272, 77 Am. Dec. 614.

New York.— Kathan *v.* Rockwell, 16 Hun 90; Northrop *v.* Wright, 24 Wend. 221; Clapp *v.* Bromagham, 9 Cow. 304; Jackson *v.* Tibbits, 9 Cow. 241.

North Carolina.— Rhea *v.* Craig, 141 N. C. 602, 54 S. E. 408; Day *v.* Howard, 73 N. C. 1.

Oregon.—Wheeler *v.* Taylor, 32 Oreg. 421, 52 Pac. 183, 67 Am. St. Rep. 540.

Pennsylvania.— Peck *v.* Ward, 18 Pa. St. 506; Berg *v.* McLafferty, 9 Pa. Cas. 135, 12 Atl. 460.

Porto Rico.— Ortiz Rodriguez *v.* Vivoni, 1 Porto Rico Fed. 487, 489.

South Carolina.— Coleman *v.* Coleman, 71 S. C. 518, 51 S. E. 250; Burnett *v.* Crawford, 50 S. C. 161, 27 S. E. 645; Metz *v.* Metz, 48 S. C. 472, 26 S. E. 787; Gray *v.* Givens, Riley Eq. 41, 2 Hill Eq. 511. But see Powers *v.* Smith, 80 S. C. 110, 61 S. E. 222.

Tennessee.— Smith *v.* Kincaid, 10 Humphr. 73.

Texas.— Illg *v.* Garcia, 92 Tex. 251, 47 S. W. 717; Gist *v.* East, 16 Tex. Civ. App. 274, 41 S. W. 396; House *v.* Williams, 16 Tex. Civ. App. 122, 40 S. W. 414; Noble *v.* Hill, 8 Tex. Civ. App. 171, 27 S. W. 756.

Vermont.— Buckmaster *v.* Needham, 22 Vt. 617; Catlin *v.* Kidder, 7 Vt. 12.

Virginia.— Johnston *v.* Virginia Coal, etc., Co., 96 Va. 158, 31 S. E. 85; Fry *v.* Payne, 82 Va. 759, 1 S. E. 197.

West Virginia.— Russell *v.* Tennant, 63 W. Va. 623, 60 S. E. 609, 129 Am. St. Rep. 1024; Oneal *v.* Stimson, 61 W. Va. 551, 56 S. E. 889; Logan *v.* Ward, 58 W. Va. 366, 52 S. E. 398, 5 L. R. A. N. S. 156; Justice *v.* Lawson, 46 W. Va. 163, 33 S. E. 102; Davis *v.* Settle, 43 W. Va. 17, 26 S. E. 557.

exclusive receipt of rents and profits,[6] and mere lapse of time or mere delay on the part of a tenant in common not in possession, in failing to demand admission to joint possession or a share of the rents and profits, is not sufficient to evidence an adverse holding by the one in possession.[7] But very long undisturbed possession may give rise to such a presumption of ouster or grant as between cotenants as to warrant the submission of the question of ouster to the jury,[8] and ouster

Canada.— Meyers *v.* Doyle, 9 U. C. C. P. 371. See Hill *v.* Grander, 1 U. C. Q. B. 3.

6. *Georgia.*— Morgan *v.* Mitchell, 104 Ga. 596, 30 S. E. 792.

Illinois.— Carpenter *v.* Fletcher, 239 Ill. 440, 88 N. E. 162; Todd *v.* Todd, 117 Ill. 92, 7 N. E. 583.

Massachusetts.— Higbee *v.* Rice, 5 Mass. 344, 4 Am. Dec. 63.

Missouri.— Rodney *v.* McLaughlin, 97 Mo. 426, 9 S. W. 726; Warfield *v.* Lindell, 30 Mo. 272, 77 Am. Dec. 614.

Pennsylvania.— Lewitzky *v.* Sotoloff, 224 Pa. St. 610, 73 Atl. 936; Bolton *v.* Hamilton, 2 Watts & S. 294, 37 Am. Dec. 509; Morris *v.* Vanderen, 1 Dall. 64, 1 L. ed. 38; Sanders' Estate, 41 Pa. Super. Ct. 77. *Compare* Milliken *v.* Brown, 10 Serg. & R. 188.

South Carolina.— McGee *v.* Hall, 26 S. C. 179, 1 S. E. 711.

Texas.—Alexander *v.* Kennedy, 19 Tex. 488, 70 Am. Dec. 358.

See 45 Cent. Dig. tit. "Tenancy in Common," § 36.

But it is evidence to go to the jury upon that point. Bolton *v.* Hamilton, 2 Watts & S. (Pa.) 294, 37 Am. Dec. 509. And allowing a tenant in common to be in exclusive possession and to so receive the rents and profits of the common property to his own use without accounting for a long time has been held sufficient for a presumption of an actual ouster by the jury. Robidoux *v.* Cassilegi, 10 Mo. App. 516.

The use of waters owned in common, by one of the cotenants therein, will be presumed to be in maintenance of and not adverse to the relationship of cotenancy. Moss *v.* Rose, 27 Oreg. 595, 41 Pac. 666, 50 Am. St. Rep 743. But see Adams *v.* Manning, 51 Conn. 5. In a suit between cotenants for damages caused by water escaping from the common premises, there is no presumption, between them, of its exclusive occupancy, in the absence of evidence of such occupancy, as they are each equally entitled thereto. Moore *v.* Goedel, 34 N. Y. 527 [*affirming* 7 Bosw. 591].

7. *California.*—Plass *v.* Plass, 121 Cal. 131, 53 Pac. 448.

Connecticut.— Bryan *v.* Atwater, 5 Day 181, 5 Am. Dec. 136.

Delaware.— See Milbourn *v.* David, 7 Houst. 209, 30 Atl. 971.

Illinois.— Ball *v.* Palmer, 81 Ill. 370.

Indiana.— Peden *v.* Cavins, 134 Ind. 494, 34 N. E. 7, 39 Am. St. Rep. 276; Manchester *v.* Doddridge, 3 Ind. 360.

Iowa.— Bader *v.* Dyer, 106 Iowa 715, 77 N. W. 469, 68 Am. St. Rep. 332; Flock *v.* Wyatt, 49 Iowa 466; Burns *v.* Byrne, 45 Iowa 285.

Kentucky.— Chambers *v.* Pleak, 6 Dana 426, 32 Am. Dec. 78.

Louisiana.— Simon *v.* Richard, 42 La. Ann. 842, 8 So. 629.

Massachusetts.— Le Favour *v.* Homan, 3 Allen 354; Parker *v.* Proprietors Merrimack River Locks, etc., 3 Metc. 91, 37 Am. Dec. 121; Rickard *v.* Rickard, 13 Pick. 251.

Michigan.— La Fountain *v.* Dee, 110 Mich. 347, 68 N. W. 220; Dubois *v.* Campau, 28 Mich. 304. *Compare* Campau *v.* Dubois, 39 Mich. 274.

Missouri.—Warfield *v.* Lindell, 38 Mo. 561, 90 Am. Dec. 443; Warfield *v.* Lindell, 30 Mo. 272, 77 Am. Dec. 614; Robidoux *v.* Cassilegi, 10 Mo. App. 516.

New York.— Abrams *v.* Rhoner, 44 Hun 507; Woolsey *v.* Morss, 19 Hun 273; Kathan *v.* Rockwell, 16 Hun 90; Butler *v.* Phelps, 17 Wend. 642; Jackson *v.* Whitbeck, 6 Cow. 632, 16 Am. Dec. 454; Vandyck *v.* Van Beuren, 1 Cai. 84.

North Carolina.— Mott *v.* Carolina Land, etc., Co., 146 N. C. 525, 60 S. E. 423; Whitaker *v.* Jenkins, 138 N. C. 476, 51 S. E. 104; Woodlief *v.* Woodlief, 136 N. C. 133, 48 S. E. 583; Locklear *v.* Bullard, 133 N. C. 260, 45 S. E. 580; Page *v.* Branch, 97 N. C. 97, 1 S. E. 625, 2 Am. St. Rep. 281; Lafoon *v.* Shearin, 95 N. C. 391; Neely *v.* Neely, 79 N. C. 478; Covington *v.* Stewart, 77 N. C. 148; Day *v.* Howard, 73 N. C. 1; Linker *v.* Benson, 67 N. C. 150; Thomas *v.* Garvan, 15 N. C. 223, 25 Am. Dec. 708.

Ohio.— Schulte *v.* Beineka, 6 Ohio S. & C. Pl. Dec. 529, 4 Ohio N. P. 207.

Pennsylvania.— Rider *v.* Maul, 46 Pa. St. 376; Workman *v.* Guthrie, 29 Pa. St. 495, 72 Am. Dec. 654; Bolton *v.* Hamilton, 2 Watts & S. 294, 37 Am. Dec. 509; Mehaffy *v.* Dobbs, 9 Watts 363; Frederick *v.* Gray, 10 Serg. & R. 182; Carothers *v.* Dunning, 3 Serg. & R. 373.

South Carolina.—Villard *v.* Robert, 1 Strobh. Eq. 393; Gray *v.* Givens, Riley Eq. 41, 2 Hill Eq. 511.

Tennessee.— Marr *v.* Gilliam, 1 Coldw. 488.

Texas.— Gray *v.* Kauffman, 82 Tex. 65, 17 S. W. 513.

Virginia.— Purcell *v.* Wilson, 4 Gratt. 16.

West Virginia.— Reed *v.* Bachman, 61 W. Va. 452, 57 S. E. 769, 123 Am. St. Rep. 996; Logan *v.* Ward, 58 W. Va. 366, 52 S. E. 398, 5 L. R. A. N. S. 156; Parker *v.* Brast, 45 W. Va. 399, 32 S. E. 269.

Wisconsin.— Sydnor *v.* Palmer, 29 Wis. 226.

England.— Culley *v.* Doe, 11 A. & E. 1008, 9 L. J. Q. B. 283, 3 P. & D. 539, 39 E. C. L. 527; Doe *v.* Prosser, Cowp. 217, 98 Eng. Reprint 1052.

See 45 Cent. Dig. tit. "Tenancy in Common," § 33.

8. Susquehanna, etc., R., etc., Co. *v.* Quick, 61 Pa. St. 328.

may be proven by a claim of exclusive right accompanying possession,[9] as where the adverse character of the possession of the one is actually known to the others, or where it is so open and notorious in its hostility and exclusiveness as to put the others on notice,[10] and an entry upon the whole of the land by one tenant in common who takes exclusive possession of the entire property and receives the rents, income, and profits thereof, without accounting for any part thereof, or any demand upon him so to do, under circumstances evidencing an intention to claim sole ownership, amounts to an actual ouster.[11] If the occupancy or possession of the common property is permissive or under an agreement, express or implied, between the cotenants, recognizing the rights of the cotenants not in possession,[12] or if there be no knowledge of the existence of a cotenancy,[13] or if

9. *Alabama.*— Layton *v.* Campbell, 155 Ala. 220, 46 So. 775, 130 Am. St. Rep. 17; Ashford *v.* Ashford, 136 Ala. 631, 34 So. 10, 96 Am. St. Rep. 82; Johnson *v.* Toulmin, 18 Ala. 50, 52 Am. Dec. 212.

Iowa.— Knowles *v.* Brown, 69 Iowa 11, 28 N. W. 409.

Kentucky.— Gill *v.* Fauntleroy, 8 B. Mon. 177.

Maine.— Small *v.* Clifford, 38 Me. 213.

Texas.— Illg *v.* Garcia, 92 Tex. 251, 47 S. W. 717.

10. Oliver *v.* Williams, 163 Ala. 376, 50 So. 937; Ashford *v.* Ashford, 136 Ala. 631, 34 So. 10, 96 Am. St. Rep. 82; Weshgyl *v.* Schick, 113 Mich. 22, 71 N. W. 323; Misenheimer *v.* Amos, 221 Mo. 362, 120 S. W. 602; Cox *v.* Tompkinson, 39 Wash. 70, 80 Pac. 1005.

11. *Alabama.*— Johnson *v.* Toulmin, 18 Ala. 50, 52 Am. Dec. 212.

California.— Owen *v.* Morton, 24 Cal. 373.

Missouri.— Nalle *v.* Parks, 173 Mo. 616, 73 S. W. 596; Warfield *v.* Lindell, 38 Mo. 561, 90 Am. Dec. 443.

Montana.— Harrigan *v.* Lynch, 21 Mont. 36, 52 Pac. 642.

New York.— Woolsey *v.* Morss, 19 Hun 273; Jackson *v.* Whitbeck, 6 Cow. 632, 16 Am. Dec. 454.

North Carolina.— Dobbins *v.* Dobbins, 141 N. C. 210, 53 S. E. 870, 115 Am. St. Rep. 682; Covington *v.* Stewart, 77 N. C. 148; Black *v.* Lindsay, 44 N. C. 467.

Pennsylvania.— Rider *v.* Maul, 46 Pa. St. 376; Workman *v.* Guthrie, 29 Pa. St. 495, 72 Am. Dec. 654; Law *v.* Patterson, 1 Watts & S. 184; Mehaffy *v.* Dobbs, 9 Watts 363.

Tennessee.—Marr *v.* Gilliam, 1 Coldw. 488; Hubbard *v.* Wood, 1 Sneed 279.

West Virginia.— Rodgers *v.* Miller, 55 W. Va. 576, 47 S. E. 354.

See 45 Cent. Dig. tit. "Tenancy in Common," § 36.

Taking and recording a deed.— If the cotenant in possession takes and records a deed to the whole property from a stranger, such act will not constitute an ouster unless accompanied by a hostile claim of which the cotenants out of possession have knowledge, and by such acts of possession as are inconsistent with the continuance of a cotenancy. Winterburn *v.* Chambers, 91 Cal. 170, 27 Pac. 658; Towery *v.* Henderson, 60 Tex. 291, 297 [*citing* 3 Washburn Real Prop. (14th ed.) p. 142]; Holley *v.* Hawley, 39 Vt. 525, 94 Am. Dec. 350. But possession of one tenant in common, asserting an exclusive right to the land under a deed conveying the same to him by specific description, is adverse to his cotenants having notice of the deed by registration. Morgan *v.* White, 50 Tex. Civ. App. 318, 110 S. W. 491. And possession of a specific part of a tract of land under a deed to such specific portion is notice to the occupant's cotenants of the larger tract that he is holding such specific portion adversely to them. Toole *v.* Renfro, (Tex. Civ. App. 1908) 114 S. W. 450.

Operation of a mine without the consent of the operator's cotenants therein, and appropriation of the proceeds without an accounting thereof, will constitute ouster and adverse possession. Harrigan *v.* Lynch, 21 Mont. 36, 52 Pac. 642.

12. Curtis *v.* Barber, 131 Iowa 400, 108 N. W. 755, 117 Am. St. Rep. 425; Old South Soc. *v.* Wainwright, 156 Mass. 115, 30 N. E. 476; Winter *v.* Stevens, 9 Allen (Mass.) 526.

If there are any facts showing the recognition of a cotenancy, by the tenant in common claiming adversely, such recognition should be construed most strongly in favor of the other cotenant. Van Ormer *v.* Harley, 102 Iowa 150, 71 N. W. 241; Mead *v.* Mead, 82 S. W. 598, 26 Ky. L. Rep. 777; Fuller *v.* Swensberg, 106 Mich. 305, 64 N. W. 463, 58 Am. St. Rep. 481; Hutson *v.* Hutson, 139 Mo. 229, 40 S. W. 886; Burnett *v.* Crawford, 50 S. C. 161, 27 S. E. 645; Metz *v.* Metz, 48 S. C. 472, 26 S. E. 787. But where adverse possession has ripened into title, recognition of title in the former owner will not operate to revest title in him. Cole *v.* Lester, 48 Misc. (N. Y.) 13, 96 N. Y. Suppl. 67. Thus the title acquired by adverse possession is not affected by a subsequent offer by the adverse possessor to buy the outstanding title. Frick *v.* Simon, 75 Cal. 337, 17 Pac. 439, 7 Am. St. Rep. 177.

13. Van Bibber *v.* Frazier, 17 Md. 436; Allen *v.* Carter, 8 Pick. (Mass.) 175; Wheeler *v.* Taylor, 32 Oreg. 421, 52 Pac. 183, 67 Am. St. Rep. 540; Johnson *v.* Burslem, 2 L. J. Ch. O. S. 168, 26 Rev. Rep. 212.

But a good title by adverse possession may be acquired by the grantee of one cotenant believing that he has acquired the sole ownership of the property by virtue of said grant, and so occupying said property to the knowl-

damage arising from an unauthorized use of the property may be considered of but very slight or no consequence, so that it is equivocal whether or not there was an intention to commit an ouster,[14] such acts will not be regarded as acts of disseizin. Possession under adverse claim may be proven by parol, although, under statutes requiring certain formalities in the conveyance of land, such evidence may not be sufficient to prove title.[15]

(II) *Unauthorized Conveyance of More Than Cotenant's Share as Ouster.* An unauthorized or unratified sale or conveyance of the whole property or any specific part thereof by metes and bounds by one tenant in common, followed by entry by the grantee thereunder and his exclusive possession thereof, under adverse claim of title to the whole or some specific part by metes and bounds, amounts to an ouster of the other cotenants;[16] and such a conveyance

edge of his cotenant. Laraway *v.* Larue, 63 Iowa 407, 19 N. W. 242.

14. Ewer *v.* Livell, 9 Gray (Mass.) 276.

15. Blankenhorn *v.* Lenox, 123 Iowa 67, 98 N. W. 556; Rand *v.* Huff, (Kan. App. 1897) 51 Pac. 577 [*affirmed* in (1898) 53 Pac. 483]; Craig *v.* Craig, 8 Pa. Cas. 357, 11 Atl. 60.

16. *Alabama.*— Gulf Red Cedar Lumber Co. *v.* Crenshaw, 148 Ala. 343, 42 So. 564; Fielder *v.* Childs, 73 Ala. 567.

California.— Frick *v.* Sinon, 75 Cal. 337, 17 Pac. 439, 17 Am. St. Rep. 177; McLeran *v.* Benton, 73 Cal. 329, 14 Pac. 879, 2 Am. St. Rep. 814; Tully *v.* Tully, (1886) 9 Pac. 841; Unger *v.* Mooney, 63 Cal. 586, 49 Am. Rep. 100.

Delaware.— Burton *v.* Morris, 3 Harr. 269.

Georgia.— Bowman *v.* Owens, 133 Ga. 49, 65 S. E. 156; Morgan *v.* Mitchell, 104 Ga. 596, 30 S. E. 792; Cain *v.* Furlow, 47 Ga. 674; Horne *v.* Howell, 46 Ga. 9.

Hawaii.— Kuanalewa *v.* Kipi, 7 Hawaii 575.

Illinois.— Chicago, etc., R. Co. *v.* Tice, 232 Ill. 232, 83 N. E. 818; Steele *v.* Steele, 220 Ill. 318, 77 N. E. 232; Dawson *v.* Edwards, 189 Ill. 60, 59 N. E. 590; Boyd *v.* Boyd, 176 Ill. 40, 51 N. E. 782, 68 Am. St. Rep. 169; Burgett *v.* Taliaferro, 118 Ill. 503, 9 N. E. 334; Goeway *v.* Urig, 18 Ill. 238.

Iowa.— Murray *v.* Quigley, (1902) 92 S. W. 869; Bader *v.* Dyer, 106 Iowa 715, 77 N. W. 469, 68 Am. St. Rep. 332; Leach *v.* Hall, 95 Iowa 611, 64 N. W. 790; Kinney *v.* Slattery, 51 Iowa 353, 1 N. W. 626. See also Blankenhorn *v.* Lenox, 123 Iowa 67, 98 N. W. 556.

Kansas.— Scantlin *v.* Allison, 32 Kan. 376, 4 Pac. 618.

Kentucky.— Bloom *v.* Sawyer, 121 Ky. 308, 89 S. W. 204, 28 Ky. L. Rep. 349; Rose *v.* Ware, 115 Ky. 420, 74 S. W. 188, 24 Ky. L. Rep. 2321, 76 S. W. 505, 25 Ky. L. Rep. 947; Adkins *v.* Whalin, 87 Ky. 153, 7 S. W. 912, 10 Ky. L. Rep. 17, 12 Am. St. Rep. 470; Greenhill *v.* Biggs, 85 Ky. 155, 2 S. W. 774, 8 Ky. L. Rep. 825, 7 Am. St. Rep. 579; Gill *v.* Fauntleroy, 8 B. Mon. 177 O'Mara *v.* Lilly, 53 S. W. 516, 21 Ky. L. Rep. 951.

Maine.— Soper *v.* Lawrence Bros. Co., 98 Me. 268, 56 Atl. 908, 99 Am. St. Rep. 397; Bird *v.* Bird, 40 Me. 398.

Maryland.— Merryman *v.* Cumberland Paper Co., 98 Md. 223, 56 Atl. 364; Rutter *v.* Small, 68 Md. 133, 11 Atl. 698, 6 Am. St. Rep. 434.

Massachusetts.— Joyce *v.* Dyer, 189 Mass. 64, 75 N. E. 81, 109 Am. St. Rep. 603; Kittredge *v.* Proprietors Merrimack River Locks, etc., 17 Pick. 246, 28 Am. Dec. 296; Bigelow *v.* Jones, 10 Pick. 161; Marcy *v.* Marcy, 6 Metc. 360.

Michigan.— Payment *v.* Murphy, 141 Mich. 626, 104 N. W. 1111; Brigham *v.* Reau, 139 Mich. 256, 102 N. W. 845; Fuller *v.* Swensberg, 106 Mich. 305, 64 N. W. 463, 58 Am. St. Rep. 481; Highstone *v.* Burdette, 61 Mich. 54, 27 N. W. 852.

Minnesota.— Sanford *v.* Safford, 99 Minn. 380, 109 N. W. 819, 116 Am. St. Rep. 432; Hanson *v.* Ingwaldson, 77 Minn. 533, 80 N. W. 702, 77 Am. St. Rep. 692.

Mississippi.— Gardiner *v.* Hinton, 86 Miss. 604, 38 So. 779, 109 Am. St. Rep. 726.

Missouri.— Campbell *v.* Laclede Gas Light Co., 84 Mo. 352; Miller *v.* Bledsoe, 61 Mo. 96 (holding that where one takes possession under a deed of warranty for the whole tract, supposing that he takes a fee absolute and there is nothing to show the contrary, his act amounts to such a disclaimer as to entitle him to the benefit of the statutes of limitations); Vasquez *v.* Ewing, 24 Mo. 31, 66 Am. Dec. 694.

Nebraska.— Carson *v.* Broady, 56 Nebr. 648, 77 N. W. 80, 71 Am. St. Rep. 691.

New Hampshire.— Thompson *v.* Gerrish, 57 N. H. 85; Hatch *v.* Partridge, 35 N. H. 148.

New Jersey.— Foulke *v.* Bond, 41 N. J. L. 527.

New Mexico.— Neher *v.* Armijo, 9 N. M. 325, 54 Pac. 236, 11 N. M. 67, 66 Pac. 517.

New York.— Hamerschlag *v.* Duryea, 172 N. Y. 622, 65 N. E. 1117; Sweetland *v.* Buell, 164 N. Y. 541, 56 N. E. 663, 79 Am. St. Rep. 676 [*affirming* 89 Hun 543, 35 N. Y. Suppl. 346]; Baker *v.* Oakwood, 123 N. Y. 16, 25 N. E. 312, 10 L. R. A. 387; Wright *v.* Saddler, 20 N. Y. 320; Constantine *v.* Van Winkle, 6 Hill 177; Jackson *v.* Smith, 13 Johns. 406; Bogardus *v.* Trinity Church, 4 Paige 178; Town *v.* Needham, 3 Paige 545, 24 Am. Dec. 246.

North Carolina.— Mott *v.* Carolina Land, etc., Co., 146 N. C. 525, 60 S. E. 423; Bullin *v.* Hancock, 138 N. C. 198, 50 S. E. 621; Woodlief *v.* Woodlief, 136 N. C. 133, 48 S. E. 583; Shannon *v.* Lamb, 126 N. C. 38, 35 S. E. 232; Roscoe *v.* John L. Roper Lumber Co., 124

of the entire estate coupled with possession by the grantee and notice to the other cotenants, actual or presumed, or open, hostile, exclusive, and notorious acts of ownership, constitutes adverse possession which may ripen into a valid title by prescription.[17] It is held in some cases, however, that if a stranger grantee of the others, unless the grantee enters claiming the entire title (Leach *v.* Hall, 95 Iowa 611, 64 N. W. 790. See also Harriss *v.* Howard, 126 Ga. 325, 55 S. E. 59), and a tenant in common having mortgaged his interest, and being permitted by the grantee to remain in possession, has a right to occupy in common with his cotenants or in severalty, and his occupation in severalty will not amount to a disseizin of the grantee (Colton *v.* Smith, 11 Pick. (Mass.) 311, 22 Am. Dec. 375; Scottish-American Mortg. Co. *v.* Bunckley, 88 Miss. 641, 41 So. 502, 117 Am. St. Rep. 763), and, although a tenant in common mortgaged the whole estate, there was no constructive ouster where he remained in actual possession and the jury found, on the evidence, that there was no intention on his part to oust his cotenants (Moore *v.* Collishaw, 10 Pa. St. 224). Even where a tenant in common mortgages the whole property and the mortgagees enter under a foreclosure, this may not amount to an ouster of and an adverse possession against the cotenant. Leach *v.* Beattie, 33 Vt. 195. See also Hodgdon *v.* Shannon, 44 N. H. 572.

An analogous principle obtains as to personalty only, however, if such transfer amounts to a denial of the non-vending cotenant's rights in the premises or a destruction of the subject-matter, or is adverse to such cotenant. Arthur *v.* Gayle, 38 Ala. 259; Dyckman *v.* Valiente, 42 N. Y. 549; Brown *v.* Burnap, 17 N. Y. App. Div. 129, 45 N. Y. Suppl. 149; Worsham *v.* Vignal, 5 Tex. Civ. App. 471, 24 S. W. 562; Sanborn *v.* Morrill, 15 Vt. 700, 40 Am. Dec. 701. The mere sale of a chattel by one tenant in common is held not to amount to a conversion unless it operates altogether to deprive his companion of his property therein. Mayhew *v.* Herrick, 7 C. B. 229, 13 Jur. 1078, 18 L. J. C. P. 179, 62 E. C. L. 229.

Reconveyance to grantor.— A reconveyance by one of a number of tenants in common by a deed purporting to convey the entire tract to one who had theretofore conveyed said tract to said tenants in common is not a disseizin. Stevens *v.* Wait, 112 Ill. 544. *Compare* Naylor *v.* Foster, 44 Tex. Civ. App. 599, 99 S. W. 114.

17. *Hawaii.*—Kuanalewa *v.* Kipi, 7 Hawaii 575.

Indiana.— Grubbs *v.* Leyendecker, 153 Ind. 348, 53 N. E. 940.

Kentucky.— Bloom *v.* Sawyer, 121 Ky. 308, 89 S. W. 204, 28 Ky. L. Rep. 349.

Massachusetts.— Joyce *v.* Dyer, 189 Mass. 64, 75 N. E. 81, 109 Am. St. Rep. 603.

Michigan.— Payment *v.* Murphy, 141 Mich. 626, 104 N. W. 1111; Brigham *v.* Reau, 139 Mich. 256, 102 N. W. 845.

New York.— Hamershlag *v.* Duryea, 38 N. Y. App. Div. 130, 56 N. Y. Suppl. 615; Sweetland *v.* Buell, 89 Hun 543, 35 N. Y.

N. C. 42, 32 S. E. 389; Ferguson *v.* Wright, 113 N. C. 537, 18 S. E. 691; Ward *v.* Farmer, 92 N. C. 93; Baird *v.* Baird, 21 N. C. 524, 31 Am. Dec. 399.

Ohio.— Payne *v.* Cooksey, 8 Ohio S. & C. Pl. Dec. 407, 7 Ohio N. P. 90. See also Ward *v.* Ward, 30 Ohio Cir. Ct. 615.

Pennsylvania.— Wilson *v.* Collishaw, 13 Pa. St. 276; Culler *v.* Motzer, 13 Serg. & R. 356, 15 Am. Dec. 604.

South Carolina.— Sudduth *v.* Sumeral, 61 S. C. 276, 39 S. E. 534, 85 Am. St. Rep. 883; Odom *v.* Weathersbee, 26 S. C. 244, 1 S. E. 890; Gray *v.* Bates, 3 Strobh. 498; Elliott *v.* Morris, Harp. Eq. 281.

Tennessee.— Weisinger *v.* Murphy, 2 Head 674.

Texas.— Hardy Oil Co. *v.* Burnham, (Civ. App. 1909) 124 S. W. 221; Naylor *v.* Foster, 44 Tex. Civ. App. 599, 99 S. W. 114; Garcia *v.* Illg, 14 Tex. Civ. App. 482, 37 S. W. 471; Byers *v.* Carll, 7 Tex. Civ. App. 423, 27 S. W. 190; Lewis *v.* Terrell, 7 Tex. Civ. App. 314, 26 S. W. 754. But see Noble *v.* Hill, 8 Tex. Civ. App. 171, 27 S. W. 756.

Vermont.— Leach *v.* Beattie, 33 Vt. 195; Roberts *v.* Morgan, 30 Vt. 319.

Virginia.— Johnston *v.* Virginia Coal, etc., Co., 96 Va. 158, 31 S. E. 85.

West Virginia.— Bennett *v.* Pierce, 40 S. E. 395, 50 W. Va. 604; Talbot *v.* Woodford, 48 W. Va. 449, 37 S. E. 580; Parker *v.* Brast, 45 W. Va. 399, 32 S. E. 269.

Wisconsin.— McCann *v.* Welch, 106 Wis. 142, 81 N. W. 996.

United States.— Bradstreet *v.* Huntington, 5 Pet. 402, 8 L. ed. 170; Elder *v.* McClaskey, 70 Fed. 529, 17 C. C. A. 251 [*reversing* 47 Fed. 154].

See 45 Cent. Dig. tit. "Tenancy in Common," § 39.

Even though the grantee has knowledge of the cotenancy, if he takes a conveyance to the entire common property he is not *prima facie* assumed as regarding himself as a cotenant where the circumstances are such as to bring home to the cotenants of the grantor the adverse character of the grantee's holding, if said cotenants paid proper attention to their rights. Kalamakee *v.* Wharton, 16 Hawaii 228.

The contents of the deed is not the only matter to be taken into account in determining the character of the occupancy; whether it is adverse or not depends upon the circumstances of the case affected by the relationship of cotenancy. Sparks *v.* Bodensick, 72 Kan. 5, 82 Pac. 463.

Possession by the vendee may be tacked to that of the vendor to whom he surrendered the property through inability to pay therefor. Talbott *v.* Woodford, 48 W. Va. 449, 37 S. E. 580.

A mortgage executed by a tenant in common is not equivalent to a disseizin of the

entire tract from one of the tenants in common enters into possession with notice of the cotenancy he must, in order to acquire the entire title by operation of the statute of limitations, prove an actual ouster the same as would have been required of his grantor had he remained in possession.[18] A quitclaim deed of the entire tract is not a disseizin;[19] nor is the making of a deed for the whole property by a cotenant to a stranger unless actual adverse possession is taken thereunder,[20] and unless followed by actual entry and adverse possession, an actual ouster is not constituted as to the devisor's or grantor's cotenants by a conveyance by metes and bounds.[21] Conveyance of the interest of one cotenant is not an ouster of the other cotenants, even though the grantee so taking said interest did not know of the other interests,[22] and where one takes a deed of the interest of one tenant in common to the land, the other tenants in common therein are thereby disentitled from maintaining an action for the recovery of the possession of the land until said grantee shall have thereafter ousted them.[23]

(III) *OUSTER AS EVIDENCED BY PLEADINGS.* Pleadings may evidence an ouster or adverse holding. Thus a pleaded denial of plaintiff's interest, coupled with an allegation of title and possession in defendant cotenant, is sufficient proof of

Suppl. 346 [*affirmed* in 164 N. Y. 541, 58 N. E. 663, 79 Am. St. Rep. 676].

North Carolina.— St. Peter's Church *v.* Bragaw, 144 N. C. 126, 56 S. E. 688, 10 L. R. A. N. S. 633.

Virginia.— Johnston *v.* Virginia Coal, etc., Co., 96 Va. 158, 31 S. E. 85.

West Virginia.— Parker *v.* Brast, 45 W. Va. 399, 32 S. E. 269.

See 45 Cent. Dig. tit. "Tenancy in Common," § 39.

And see cases cited *supra*, note 16.

The sole and exclusive occupation of a part of the granted land by the grantee under a deed of warranty given by one tenant in common in possession, the residue remaining vacant, is an act of disseizin and puts the grantee into possession of the whole. Thomas *v.* Pickering, 13 Me. 337.

If ouster is admitted by the pleadings no evidence of holding by virtue of the tenancy in common is admissible. Billings *v.* Gibbs, 55 Me. 238, 92 Am. Dec. 587. And see *infra*, note 24 *et seq.*

18. *California.*— Packard *v.* Johnson, 51 Cal. 545.

Indiana.— Sims *v.* Dame, 113 Ind. 127, 15 N. E. 217.

Iowa.— Sorenson *v.* Davis, 83 Iowa 405, 49 N. W. 1004.

New York.— Hamershlag *v.* Duryea, 38 N. Y. App. Div. 130, 56 N. Y. Suppl. 615.

North Carolina.— Roscoe *v.* John L. Roper Lumber Co., 124 N. C. 42, 32 S. E. 389.

Texas.— Kirby *v.* Hayden, 44 Tex. Civ. App. 207, 99 S. W. 746.

Virginia.— Buchanan *v.* King, 22 Gratt. 414.

West Virginia.— McNeeley *v.* South Penn Oil Co., 52 W. Va. 616, 44 S. E. 508, 62 L. R. A. 562.

Where one holding the entire title for life as devisee of his deceased sole cotenant, remainder to his heirs, undertook to convey the whole of the estate to one of his heirs only, the grantee will not be allowed in equity to hold adversely to the other heirs. Hicks *v.* Bullock, 96 N. C. 164, 1 S. E. 629.

19. Moore *v.* Antill, 53 Iowa 612, 6 N. W. 14; Hume *v.* Long, 53 Iowa 299, 5 N. W. 193.

20. Inglis *v.* Webb, 117 Ala. 387, 23 So. 125; Garcia *v.* Illg, 14 Tex. Civ. App. 482, 37 S. W. 471; Parker *v.* Brast, 45 W. Va. 399, 32 S. E. 269; Saladin *v.* Kraayvanger, 96 Wis. 180, 70 N. W. 1113. But see Neher *v.* Armijo, 9 N. M. 325, 54 Pac. 236, 11 N. M. 67, 66 Pac. 517.

Evidence of intention.— Acceptance of a deed asserting title to the whole property furnishes evidence of the intention to make entry adversely. Larman *v.* Huey, 13 B. Mon. (Ky.) 436.

The registration of such a deed is not a disseizin. Hardee *v.* Weathington, 130 N. C. 91, 40 S. E. 855.

The mere assertion of the entire title by a purchaser from one tenant in common without adverse possession and without knowledge of such claim on the part of the other cotenants does not amount to an ouster of the latter. New York, etc., Land Co. *v.* Hyland, 8 Tex. Civ. App. 601, 28 S. W. 206.

Where the cotenancy is recognized by the grantee under a deed from less than the whole number of cotenants to the entire land or a specific part thereof described by metes and bounds, the occupancy and exclusive enjoyment of the entire land is not an ouster or a disseizin. Price *v.* Hall, 140 Ind. 314, 39 N. E. 941, 49 Am. St. Rep. 196; Van Ormer *v.* Harley, 102 Iowa 150, 71 N. W. 241. A grantee of one of two cotenants of land cannot maintain ejectment against the other cotenant, the cotenants having recognized each other's possession. Tansman *v.* Faris, 59 Cal. 663.

21. Phillips *v.* Tudor, 10 Gray (Mass.) 78, 69 Am. Dec. 306; Porter *v.* Hill, 9 Mass. 34, 6 Am. Dec. 22; Hannon *v.* Hannah, 9 Gratt. (Va.) 146. *Compare* Weisinger *v.* Murphy, 2 Head (Tenn.) 674.

22. Curtis *v.* Barber, 131 Iowa 400, 108 N. W. 755, 117 Am. St. Rep. 425.

23. House *v.* Fuller, 13 Vt. 165, 37 Am. Dec. 580.

ouster,[24] and under statutes prescribing that general issue pleas or other pleas to the merits shall be taken as admission of defendant being in possession of the premises sued for, for the purposes of the action, it is held that the pleas of not guilty and statute of limitations are equivalent to an ouster,[25] and refusal to recognize any title in plaintiff and a denial of such title by defendant in his answer may be sufficient ouster to maintain suit even under a statute requiring a proof of actual ouster.[26] An ouster, merely evidenced by the pleadings, relates to the time of the filing of the pleadings and not to the time alleged in such pleadings to be the time when adverse possession began,[27] and if there be no proof of ouster except as appears in the pleadings, plaintiff can recover damages only from the date of the institution of the suit.[28] But on the other hand it is held that where a statute requires proof of an actual ouster, proof of demandant's title as tenant in common will not entitle him to a judgment where defendant has pleaded nul disseizin.[29] It has been held that if cotenancy is denied there is no necessity for any stronger proof of ouster than against any other party.[30]

(IV) *NOTICE OF ADVERSE HOLDING.* Notice of adverse holding need not be actual, direct, formal, verbal, or written notice.[31] It may be inferred where the possession is of such a hostile and unequivocal character and is so openly manifested that a man of ordinary diligence would discover it;[32] and it may even be constructive notice;[33] and notice of an adverse holding may be by pleadings in an appropriate action between the cotenants; but such notice may not arise

24. *Arkansas.*— Brewer *v.* Keller, 42 Ark. 289.

Maine.— Billings *v.* Gibbs, 55 Me. 238, 92 Am. Dec. 587. But see Cutts *v.* King, 5 Me. 482.

Michigan.— Fenton *v.* Miller, 108 Mich. 246, 65 N. W. 966.

New Hampshire.— Lyford *v.* Thurston, 16 N. H. 399.

New York.— Peterson *v.* De Baum, 36 N. Y. App. Div. 259, 55 N. Y. Suppl. 249. But see Gilman *v.* Gilman, 111 N. Y. 265, 18 N. E. 849.

Compare Rawson *v.* Morse, 4 Pick. (Mass.) 127.

25. Noble *v.* McFarland, 51 Ill. 226; Lyford *v.* Thurston, 16 N. H. 399; St. Louis, etc., R. Co. *v.* Prather, 75 Tex. 53, 12 S. W. 969.

26. Minton *v.* Steele, 125 Mo. 181, 28 S. W. 746; Jordan *v.* Surghnor, 107 Mo. 520, 17 S. W. 1009, answer admitting withholding possession from plaintiff.

If defendant merely denies plaintiff's title he admits ouster; if he does not deny plaintiff's title it should be admitted, and ouster should be denied. Withrow *v.* Biggerstaff, 82 N. C. 82.

27. Fenton *v.* Miller, 108 Mich. 246, 65 N. W. 966.

The implied admission does not carry admission of the date of ouster alleged in the petition. La Riviere *v.* La Riviere, 77 Mo. 512.

28. Miller *v.* Myers, 46 Cal. 535; Huff *v.* McDonald, 22 Ga. 131, 68 Am. Dec. 487.

29. Cutts *v.* King, 5 Me. 482; Fenton *v.* Miller, 94 Mich. 204, 53 N. W. 957; Gilman *v.* Gilman, 111 N. Y. 265, 18 N. E. 849.

An answer denying knowledge or information sufficient to form a belief as to plaintiff's interest and an allegation of title and possession in defendant cotenant amounts to proof of ouster, within the provision of a statute requiring such proof. Peterson *v.* De Baun, 36 N. Y. App. Div. 259, 55 N. Y. Suppl. 249.

30. Peterson *v.* Laik, 24 Mo. 541, 69 Am. Dec. 441; Leech *v.* Leech, 24 U. C. Q. B. 321.

Proof of finding of adverse holding for a less period than that alleged is sufficient proof of ouster. Grant *v.* Paddock, 30 Oreg. 312, 47 Pac. 712.

31. *California.*— Unger *v.* Mooney, 63 Cal. 586, 49 Am. Rep. 100.

Kentucky.— Greenhill *v.* Biggs, 85 Ky. 155, 2 S. W. 774, 8 Ky. L. Rep. 825, 7 Am. St. Rep. 579.

Missouri.— Peck *v.* Lockridge, 97 Mo. 549, 11 S. W. 246.

Pennsylvania.—Lodge *v.* Patterson, 3 Watts 74, 27 Am. Dec. 335.

United States.— Elder *v.* McClaskey, 70 Fed. 529, 17 C. C. A. 251 [*reversing* 47 Fed. 154].

See 45 Cent. Dig. tit. "Tenancy in Common," § 49.

32. Hutson *v.* Hutson, 139 Mo. 229, 40 S. W. 886; Wheeler *v.* Taylor, 32 Oreg. 421, 52 Pac. 183, 67 Am. St. Rep. 540; Holley *v.* Hawley, 39 Vt. 525, 94 Am. Dec. 350.

Slight acts may not be sufficient to give such notice. Courtner *v.* Etheredge, 149 Ala. 78, 43 So. 368; Curtis *v.* Barber, 131 Iowa 400, 108 N. W. 755, 117 Am. St. Rep. 425.

33. Ames *v.* Howes, 19 Ida. 756, 93 Pac. 35; McCrum *v.* McCrum, 36 Ind. App. 636, 76 N. E. 415; Payne *v.* Cooksey, 8 Ohio S. & C. Pl. Dec. 407, 7 Ohio N. P. 90; Puckett *v.* McDaniel, 8 Tex. Civ. App. 630, 28 S. W. 360.

The recording of a mortgage of the whole land by one cotenant is not such constructive notice. Leach *v.* Beattie, 33 Vt. 195.

from pleadings in a case in which controverted questions of title could not be fully determined.[34]

c. Tacking Possession. Possession by those claiming under a disseizing tenant in common may be tacked to the disseizor's possession so as to perfect title as against the cotenants disseized,[35] and if the adverse possession has ripened into a title, recognition of the former owner will not operate to revest title in him.[36] But where a person, having acquired a specific interest in a particular tract of land, has taken possession of the whole, with a view of acquiring the additional interest, merely by holding possession of it under a claim of ownership, he does not convey such possession to a vendee, to whom he sells the interest described, and such vendee cannot, for the purpose of aiding himself in the acquisition by prescription of property not included in his title, add his vendor's possession to his own, there being no privity between him and his vendor in that respect.[37] Where there are several tenants in common of land of whom all but one are in possession and before the statutory period has run the latter acquires another undivided share from or under one of those in possession, the statute runs as to both shares from the time the last one was acquired.[38]

d. Waiver or Abandonment by Disseizor; Survivorship. After the commencement of the running of the statute, or after the expiration of the term of the respective statutes of limitations and the vesting of rights thereunder, such benefits cannot be lost except by some act of abandonment.[39] Where, however, a tenant in common in possession recognizes his cotenants' right in the land, a presumption arises that he then ceases to be an adverse holder, no matter how hostile his possession may previously have been, and the recognition has the effect to put all the tenants in common in seizin and possession of their respective shares,[40] and a presumption of an adverse holding may be rebutted by evidence

34. Donason *v.* Barbero, 230 Ill. 138, 82 N. E. 620; Tarplee *v.* Sonn, 109 N. Y. App. Div. 241, 96 N. Y. Suppl. 6.

35. Cole *v.* Lester, 48 Misc. (N. Y.) 13, 96 N. Y. Suppl. 67; Wheeler *v.* Taylor, 32 Oreg. 421, 52 Pac. 183, 67 Am. St. Rep. 540, holding that where one of several cotenants is given a deed of the land from the tenant in possession who was holding adversely to the others, all believing that the latter was the sole owner, the subsequent possession of the grantee under his deed might be tacked to the possession of his grantor so as to create a bar by limitation against the remaining cotenants. See also Wilson *v.* Williams, 52 Miss. 487.

36. Cole *v.* Lester, 48 Misc. (N. Y.) 13, 96 N. Y. Suppl. 67.

37. Sibley *v.* Pierson, 125 La. 478, 51 So. 502.

38. Hill *v.* Ashbridge, 20 Ont. App. 44.

39. Horne *v.* Horne, 38 Nova Scotia 404.

The mere acceptance of a deed by the one so entitled to an alleged interest of one of the tenants in common is not such an act of abandonment. York *v.* Hutcheson, 37 Tex. Civ. App. 367, 83 S. W. 895.

40. Sparks *v.* Bodensick, 72 Kan. 5, 82 Pac. 463; Venable *v.* Beauchamp, 3 Dana (Ky.) 321, 28 Am. Dec. 74; Alsobrook *v.* Eggleston, 69 Miss. 833, 13 So. 850; Illg *v.* Garcia, 92 Tex. 251, 47 S. W. 717; House *v.* Williams, 16 Tex. Civ. App. 122, 40 S. W. 414.

He cannot occupy inconsistent positions in relation to his cotenants, such as recognizing the interests of some of them and claiming that he has ousted others of them. Schoonover *v.* Tyner, 72 Kan. 475, 84 Pac. 124.

The mere fact that a dispossessed cotenant resided as a member of the family of his disseizing cotenant did not affect the adverse possession. Feliz *v.* Feliz, 105 Cal. 1, 38 Pac. 521.

Purchase of title.—Where a tenant in possession of property claiming adversely to the world buys title thereto to quiet his own title, such purchase does not constitute a waiver or abandonment of his disseizin or of that of those claiming with him as cotenants, provided such purchase does not carry with it a recognition of the disseized cotenancy. Unger *v.* Mooney, 63 Cal. 586, 49 Am. Rep. 100; Barr *v.* Chapman, 11 Ohio Dec. (Reprint) 862, 30 Cinc. L. Bul. 264. And see *infra*, III, D, 2. The presumption arising from the acceptance of a conveyance of the original title to that portion may be overcome by evidence that the possession he then had continued under the claim of an exclusive right, and with the intention to exclude other owners of the original title, although cotenants, from any right or interest therein. Cook *v.* Clinton, 64 Mich. 309, 31 N. W. 317, 8 Am. St. Rep. 816. The purchase of the undivided interest of one of several co-claimants by one in adverse possession, merely to protect himself against litigation, as is known to the other claimants, is not a recognition of the cotenancy, nor does the purchaser hold as tenant in common with such claimants. Cooper *v.* Great Falls Cotton Mills Co., 94 Tenn. 588, 30 S. W. 353. See also Frick *v.* Simon, 75 Cal. 337, 17 Pac. 439, 7 Am. St. Rep. 177.

of a subsequent acknowledgment of a cotenancy in the premises.[41] But after abandonment of the cotenancy, or perfection of title by adverse possession, such evidence may not be sufficient to rebut such presumption arising from a long-continued, notorious, and peaceable occupation under a new purchase.[42] If any disseizors less than the whole number in possession abandon the land, the abandonment inures to the benefit of those remaining in possession and not of the disseizees,[43] and a sole survivor of joint disseizors in common entitled to the disseized land becomes solely entitled thereto.[44]

e. Ouster and Adverse Possession as Question of Law or Fact. The question as to whether or not undisputed acts of tenants in common amounted to a disseizin of their cotenants so as to start the operation of the statute of limitations is held to be a question for the court and not for the jury,[45] and the rule is the same as to a question involving adverse possession where the elements going to make up adverse possession are not in evidence.[46] Where the facts in relation to an ouster are conflicting and the finding of some of them would justify the presumption of an ouster they are properly submitted to a jury,[47] so as to the lapse of time, or what constitutes reasonable time.[48] Whether a lease, proven to be executed with the knowledge of a tenant in common of the demised property, was executed adversely or merely for the purposes of convenience of the parties is properly submitted to a jury, and if the evidence on that point is conflicting the finding of the jury thereon is conclusive.[49]

A requested instruction as to what would constitute a break in the continuity of possession which fails to state the length of time or nature of such possession, whether permissive or otherwise, is properly refused. Rhea *v.* Craig, 141 N. C. 602, 54 S. E. 408.

41. Thornton *v.* York Bank, 45 Me. 158; Garcia *v.* Illg, 14 Tex. Civ. App. 482, 37 S. W. 471.

Recognition of the cotenancy by the bringing of an action in ejectment in the joint names of the cotenants, and entry of judgment therein, interrupts the running of the statutes of limitations in favor of the tenant in possession. Handley *v.* Archibald, 30 Can. Sup. Ct. 130.

42. Johnson *v.* Toulmin, 18 Ala. 50, 52 Am. Dec. 212; Potter *v.* Herring, 57 Mo. 184; Cole *v.* Lester, 48 Misc. (N. Y.) 13, 96 N. Y. Suppl. 67. See also Frick *v.* Simon, 75 Cal. 337, 17 Pac. 439, 7 Am. St. Rep. 177.

43. Allen *v.* Holton, 20 Pick. (Mass.) 458.

44. Kauhikoa *v.* Hobron, 5 Hawaii 491; Allen *v.* Holton, 20 Pick. (Mass.) 458.

It is not competent for the disseizors to qualify their joint tenancy and limit it to a tenancy in common to the prejudice of the disseizee. Putney *v.* Dresser, 2 Metc. (Mass.) 583.

45. Hendricks *v.* Musgrove, 183 Mo. 300, 81 S. W. 1265.

46. Inglis *v.* Webb, 117 Ala. 387, 23 So. 125; Morris *v.* Davis, 75 Ga. 169.

47. *Alabama.*— Hamby *v.* Folsam, 148 Ala. 221, 42 So. 548.

Arkansas.— Trapnall *v.* Hill, 31 Ark. 345.

Iowa.— Knowles *v.* Brown, 69 Iowa 11, 28 N. W. 409.

Kentucky.— Gill *v.* Fauntleroy, 8 B. Mon. 177.

Michigan.— Patrick *v.* Kalamazoo Y. M. C. A., 120 Mich. 185, 79 N. W. 208; La Fountain *v.* Dee, 110 Mich. 347, 63 N. W. 220; Fenton *v.* Miller, 94 Mich. 204, 53 N. W. 987; Highstone *v.* Burdette, 54 Mich. 329, 20 N. W. 64.

Mississippi.— Corbin *v.* Cannon, 31 Miss. 570; Harmon *v.* James, 7 Sm. & M. 111, 45 Am. Dec. 296.

Missouri.— Warfield *v.* Lindell, 38 Mo. 561, 90 Am. Dec. 443.

Nebraska.— Beall *v.* McMenemy, 63 Nebr. 70, 88 N. W. 134, 93 Am. St. Rep. 427.

New York.— Clark *v.* Crego, 47 Barb. 599; Jackson *v.* Whitbeck, 6 Cow. 632, 16 Am. Dec. 454.

North Carolina.— Johnson *v.* Swain, 44 N. C. 335.

Pennsylvania.— Keyser *v.* Evans, 30 Pa. St. 507; Workman *v.* Guthrie, 29 Pa. St. 495, 72 Am. Dec. 654; Blackmore *v.* Gregg, 2 Watts & S. 182; Craig *v.* Craig, 8 Pa. Cas. 257, 11 Atl. 60.

Tennessee.— Marr *v.* Gilliam, 1 Coldw. 488.

Virginia.— Purcell *v.* Wilson, 4 Gratt. 16.

England.— Doe *v.* Prosser, Cowp. 217, 98 Eng. Reprint 1052; Peaceable *v.* Read, 1 East 568, 102 Eng. Reprint 220.

See 45 Cent. Dig. tit. "Tenancy in Common," § 52.

Whether the relationship of landlord and tenant exists between cotenants is a question of fact for the jury. Boley *v.* Barutio, 24 Ill. App. 515 [*affirmed* in 120 Ill. 192, 11 N. E. 393].

48. Ela *v.* Ela, 70 N. H. 163, 47 Atl. 414; Burnett *v.* Crawford, 50 S. C. 161, 27 S. E. 645.

49. Comstock *v.* Eastwood, 108 Mo. 41, 18 S. W. 39.

So as to the question of tenancy under an agreement, where the agreement is so ambiguous in itself that parol testimony must be had in relation thereto. Bromley *v.* Miles, 51 N. Y. App. Div. 95, 64 N. Y. Suppl. 353.

f. Action to Determine Validity of Adverse Claim. A tenant in common is allowed, under statute, in some jurisdictions, to maintain an action for the determination of the validity of an adverse claim of title by a cotenant.[50]

D. Purchase or Discharge of Outstanding Interest, Title, or Claim — 1. Outstanding Interests, Title, or Claims in General — a. Right to Purchase or Discharge and Effect Thereof. A tenant in common has the right to relieve the common property from a lien or encumbrance,[51] and may make a valid tender of payment of the whole mortgage debt on behalf of his cotenants,[52] and acts of this nature done in relation to the general interest in the whole common property are presumed to have been done *bona fide* for the common benefit,[53] and generally a purchase by a cotenant of an outstanding title being presumed to be for the benefit of all the parties in interest is not void, passing title subject to the rights of other cotenants.[54] But one tenant in common will not be permitted to inequitably acquire title to the common property, solely for his own benefit or to the exclusion of his cotenants,[55] the general rule being that the purchase or extinguishment of an outstanding title to, encumbrance upon, or claim against the common property by one tenant in common inures to the benefit of all the coöwners,[56] who may

50. See the statutes of the several states. And see Ross *v.* Heintzen, 36 Cal. 313; Elliott *v.* Frakes, 71 Ind. 412; Gilmer *v.* Beauchamp, 40 Tex. Civ. App. 125, 87 S. W. 907.

51. Simonson *v.* Lauck, 105 N. Y. App. Div. 82, 93 N. Y. Suppl. 965 (holding that as each tenant in common has the right to remove an encumbrance from the common property, a mortgagee refusing a tender of the full amount due on the mortgage on behalf of a cotenant in the mortgaged property and an assignment to such cotenant cannot complain that the other cotenants, not objecting to the foreclosure of said mortgage, did not receive notice of a motion for an order of an assignment of the mortgage and the discontinuance of the action); Green *v.* Walker, 22 R. I. 14, 45 Atl. 742; Deavitt *v.* Ring, 73 Vt. 298, 50 Atl. 1066.

52. Gentry *v.* Gentry, 1 Sneed (Tenn.) 87, 60 Am. Dec. 137.

But the mortgagee cannot be compelled to take part of the mortgage debt for the release of a moiety. Frost *v.* Frost, 3 Sandf. Ch. (N. Y.) 188.

53. Jester *v.* Davis, 109 N. C. 458, 13 S. E. 908; Hampton *v.* Wheeler, 99 N. C. 222, 6 S. E. 236; Breden *v.* McLaurin, 98 N. C. 307, 4 S. E. 136; Page *v.* Branch, 97 N. C. 97, 1 S. E. 625, 2 Am. St. Rep. 281; Hicks *v.* Bullock, 96 N. C. 164, 1 S. E. 629; Richards *v.* Richards, 31 Pa. Super. Ct. 509; Weaver *v.* Akin, 48 W. Va. 456, 37 S. E. 600; Hall *v.* Clark, 44 W. Va. 659, 30 S. E. 216.

54. Morrison *v.* Roehl, 215 Mo. 545, 114 S. W. 981.

55. *California.*— Mandeville *v.* Solomon, 39 Cal. 125.

Michigan.— Ream *v.* Robinson, 128 Mich. 92, 87 N. W. 115.

Minnesota.— Oliver *v.* Hedderly, 32 Minn. 455, 21 N. W. 478.

New York.— Collins *v.* Collins, 13 N. Y. Suppl. 28 [*affirmed* in 131 N. Y. 648, 30 N. E. 863].

Texas.— Duke *v.* Reed, 64 Tex. 705.

Washington.— Cedar Canyon Consol. Min. Co. *v.* Yarwood, 27 Wash. 271, 67 Pac. 749.

See 45 Cent. Dig. tit. "Tenancy in Common," § 55 *et seq.*

Redemption.— The purchase of mortgaged premises sold under the mortgage for the purpose of effecting a redemption after an understanding between the cotenants that one of them should make such redemption and take to himself an assignment of the purchaser's certificate of sale is treated in equity as a redemption, and as not divesting the non-purchasing cotenant of his estate. Edmonds *v.* Mounsey, 15 Ind. App. 399, 44 N. E. 196; Holterhoff *v.* Mead, 36 Minn. 42, 29 N. W. 675.

56. *Alabama.*— Courtner *v.* Etheredge, 149 Ala. 78, 43 So. 368; Jones *v.* Matkin, 118 Ala. 341, 24 So. 242.

Arkansas.— Clements *v.* Cates, 49 Ark. 242, 4 S. W. 776.

California.— Stevenson *v.* Boyd, 153 Cal. 630, 96 Pac. 284, 19 L. R. A. N. S. 525; Calkins *v.* Steinbach, 66 Cal. 117, 4 Pac. 1103; Olney *v.* Sawyer, 54 Cal. 379; Mandeville *v.* Solomon, 39 Cal. 125. *Compare* Tully *v.* Tully, (1886) 9 Pac. 841.

Colorado.— Mills *v.* Hart, 24 Colo. 505, 52 Pac. 680, 65 Am. St. Rep. 241 (patent to mineral land); Hodgson *v.* Fowler, 24 Colo. 278, 50 Pac. 1034 [*reversing* 7 Colo. App. 378, 43 Pac. 462]; Fisher *v.* Seymour, 23 Colo. 542, 49 Pac. 30. But see Gillett *v.* Gaffney, 3 Colo. 351.

Illinois.— Carpenter *v.* Fletcher, 239 Ill. 440, 88 N. E. 162; Boyd *v.* Boyd, 176 Ill. 40, 51 N. E. 782, 68 Am. St. Rep. 169; McChesney *v.* White, 140 Ill. 330, 29 N. E. 709; Burgett *v.* Taliaferro, 118 Ill. 503, 9 N. E. 334; Montague *v.* Selb, 106 Ill. 49; Bracken *v.* Cooper, 80 Ill. 221; Busch *v.* Huston, 75 Ill. 343; Titsworth *v.* Stout, 49 Ill. 78, 95 Am. Dec. 577; Phelps *v.* Reeder, 39 Ill. 172; Ott *v.* Flinspach, 143 Ill. App. 61; Mauzey *v.* Dazey, 114 Ill. App. 652. See also Fischer *v.* Eslaman, 68 Ill. 78.

Indiana.— Ryason *v.* Dunten, 164 Ind. 85, 73 N. E. 74; McPheeters *v.* Wright, 124 Ind. 560, 24 N. E. 734, 9 L. R. A. 176; Moon *v.* Jennings, 119 Ind. 130, 20 N. E. 748, 21 N. E.

within a reasonable time elect to avail themselves of the benefit of the purchase of the outstanding interest or conflicting claim or the removal of the encumbrance

471, 12 Am. St. Rep. 383; Elston *v.* Piggott, 94 Ind. 14; Wilson *v.* Peelle, 78 Ind. 384; Bender *v.* Stewart, 75 Ind. 88; Ladd *v.* Kuhn, 27 Ind. App. 535, 61 N. E. 747.

Iowa.— Shell *v.* Walker, 54 Iowa 386, 6 N. W. 581; Fallon *v.* Chidester, 46 Iowa 588, 26 Am. Rep. 164; Weare *v.* Van Meter, 42 Iowa 128, 20 Am. Rep. 616. But see Alexander *v.* Sully, 50 Iowa 192; Sullivan *v.* McLenans, 2 Iowa 437, 65 Am. Dec. 780.

Kentucky.— Gossom *v.* Donaldson, 18 B. Mon. 230, 68 Am. Dec. 723; Thruston *v.* Masterson, 9 Dana 228; Lee *v.* Fox, 6 Dana 171; Venable *v.* Beauchamp, 3 Dana 321, 28 Am. Dec. 74. *Compare* Larman *v.* Huey, 13 B. Mon. 436.

Maine.— Coburn *v.* Page, 105 Me. 458, 74 Atl. 1026, 134 Am. St. Rep. 575; Vaughan *v.* Bacon, 15 Me. 455, 33 Am. Dec. 628 (holding that the acceptance by one of several tenants in common of a relinquishment and yielding up by disseizor of all of said tenant's right, seizin, possession, and betterments which the disseizor had in and to the proportion of that tenant in said premises, inures to the benefit of all the tenants respectively, and prevents the operation of the statute of limitations prior to such acceptance); Williams *v.* Gray, 3 Me. 207, 14 Am. Dec. 234.

Michigan.— Nowlen *v.* Hall, 128 Mich. 274, 87 N. W. 222; Retan *v.* Sherwood, 120 Mich. 496, 79 N. W. 692.

Minnesota.— Hoyt *v.* Lightbody, 98 Minn. 189, 108 N. W. 843, 116 Am. St. Rep. 358.

Mississippi.— Beaman *v.* Beaman, 90 Miss. 762, 44 So. 987; Wyatt *v.* Wyatt, 81 Miss. 219, 32 So. 317; Wise *v.* Hyatt, 68 Miss. 714, 10 So. 37; Hignite *v.* Hignite, 65 Miss. 447, 4 So. 345, 7 Am. St. Rep. 673.

Missouri.— Kohle *v.* Hobson, 215 Mo. 213, 114 S. W. 952; Mahoney *v.* Nevins, 190 Mo. 360, 88 S. W. 731; Hinters *v.* Hinters, 114 Mo. 26, 21 S. W. 456; Dillinger *v.* Kelley, 84 Mo. 561; Paul *v.* Fulton, 25 Mo. 156; Jones *v.* Stanton, 11 Mo. 433.

Nebraska.— Carson *v.* Broady, 56 Nebr. 648, 77 N. W. 80, 71 Am. St. Rep. 691; Brown *v.* Homan, 1 Nebr. 448.

Nevada.— Boskowitz *v.* Davis, 12 Nev. 446.

New Jersey.— Ennis *v.* Hutchinson, 30 N. J. Eq. 110.

New York.— Knolls *v.* Barnhart, 71 N. Y. 474; Swinburne *v.* Swinburne, 28 N. Y. 568; Graham *v.* Laddington, 19 Hun 246; Hackett *v.* Patterson, 16 N. Y. Suppl. 170 (holding that the renewal of the lease for a safety vault by a cotenant to the exclusion of his cotenants therein inured to the benefit of said cotenants); Jackson *v.* Creal, 13 Johns. 116; Van Horne *v.* Fonda, 5 Johns. Ch. 409; Burrell *v.* Bull, 3 Sandf. Ch. 15. See also Carpenter *v.* Carpenter, 131 N. Y. 101, 29 N. E. 1013, 27 Am. St. Rep. 569. *Compare* Streeter *v.* Shultz, 45 Hun 406 [*affirmed* in 127 N. Y. 652, 27 N. E. 857].

North Carolina.— Threadgill *v.* Redwine, 97 N. C. 241, 2 S. E. 526; Page *v.* Branch, 97 N. C. 97, 2 S. E. 625, 2 Am. St. Rep. 281; Grim *v.* Wicker, 80 N. C. 343; Pitt *v.* Petway, 34 N. C. 69; Saunders *v.* Gatlin, 21 N. C. 86.

Oregon.— Crawford *v.* O'Connell, 39 Oreg. 153, 64 Pac. 656; Dray *v.* Dray, 21 Oreg. 59, 27 Pac. 223.

Pennsylvania.— Whitehead *v.* Jones, 197 Pa. St. 511, 47 Atl. 978; Enyard *v.* Enyard, 190 Pa. St. 114, 42 Atl. 526, 70 Am. St. Rep. 623; McGranighan *v.* McGranighan, 185 Pa. St. 340, 39 Atl. 951; Davis *v.* King, 87 Pa. St. 261; Duff *v.* Wilson, 72 Pa. St. 442; Keller *v.* Auble, 58 Pa. St. 410, 98 Am. Dec. 297; Maul *v.* Rider, 51 Pa. St. 337; Lloyd *v.* Lynch, 28 Pa. St. 419, 70 Am. Dec. 137; Weaver *v.* Wible, 25 Pa. St. 270, 64 Am. Dec. 696; Ligget *v.* Bechtol [*cited* in Smiley *v.* Dixon, 1 Penr. & W. 439, 440]; Berg *v.* McLafferty, 9 Pa. Cas. 135, 12 Atl. 460; Richards *v.* Richards, 31 Pa. Super. Ct. 509; McGranighan *v.* McGranighan, 6 Pa. Dist. 33, 19 Pa. Co. Ct. 75; Hite *v.* Hite, 21 Pa. Co. Ct. 97.

South Dakota.— Johnson *v.* Brauch, 9 S. D. 116, 68 N. W. 173, 62 Am. St. Rep. 857.

Tennessee.— Tisdale *v.* Tisdale, 2 Sneed 596, 64 Am. Dec. 775; Gentry *v.* Gentry, 2 Sneed 87, 60 Am. Dec. 137; Hall *v.* Calvert, (Ch. App. 1897) 46 S. W. 1120.

Texas.— Anderson *v.* Clauch, (1887) 6 S. W. 760; Rippetoe *v.* Dwyer, 49 Tex. 498.

Vermont.— House *v.* Fuller, 13 Vt. 165, 37 Am. Dec. 580; Braintree *v.* Battles, 6 Vt. 395.

Virginia.— Buchanan *v.* King, 22 Gratt. 414.

Washington.— Cedar Canyon Consol. Min. Co. *v.* Yarwood, 27 Wash. 271, 67 Pac. 749, 91 Am. St. Rep. 841. But see Burnett *v.* Ewing, 39 Wash. 45, 80 Pac. 855.

West Virginia.— Flat Top Grocery Co. *v.* Bailey, 62 W. Va. 84, 57 S. E. 302; Reed *v.* Bachman, 61 W. Va. 452, 57 S. E. 769, 123 Am. St. Rep. 996; Weaver *v.* Akin, 48 W. Va. 456, 37 S. E. 600; Gilchrist *v.* Beswick, 33 W. Va. 168, 10 S. E. 371.

Wisconsin.— Rountree *v.* Denson, 59 Wis. 522, 18 N. W. 518.

United States.— Rothwell *v.* Dewees, 2 Black 613, 17 L. ed. 309; Flagg *v.* Mann, 9 Fed. Cas. No. 4,847, 2 Sumn. 486; Russell *v.* Beebe, 21 Fed. Cas. No. 12,153, Hempst. 704.

See 45 Cent. Dig. tit. "Tenancy in Common," § 53 *et seq.*

Mines and wells.— The purchase of a conflicting or outstanding claim in relation to a mine or well generally inures to the benefit of the cotenants. Mills *v.* Hart, 24 Colo. 505, 52 Pac. 680, 65 Am. St. Rep. 241; Franklin Min. Co. *v.* O'Brien, 22 Colo. 129, 43 Pac. 1016, 55 Am. St. Rep. 118; Cedar Canyon Consol. Min. Co. *v.* Yarwood, 27 Wash. 271, 67 Pac. 749, 91 Am. St. Rep. 841. Legal interest on the amount of money invested has been held to be proper compensation for the use of the land purchased. Cecil *v.* Clark, 49 W. Va. 459, 39 S. E. 202.

Mortgage sale.— The purchase, by a tenant in common, of the common property at a

from the common property.[57] Similarly if by any fraudulent means the title to property is taken or acquired by one of several persons who are entitled to its ownership in common, he, upon timely and proper complaint of the injured persons, will be declared to hold the title as trustee for their benefit, or the title will be declared to be in all of them in common;[58] and where a third person

foreclosure sale, or the purchase of the equity of redemption by a tenant in common claiming under a mortgagee, inures to the benefit of the cotenants therein on their timely election. Hodgson *v.* Fowler, 24 Colo. 278, 50 Pac. 1034 [*reversing* 7 Colo. App. 378, 43 Pac. 462]; Bracken *v.* Cooper, 80 Ill. 221; Wyatt *v.* Wyatt, 81 Miss. 219, 32 So. 317; Knolls *v.* Barnhart, 71 N. Y. 474. *Compare* Streeter *v.* Shultz, 45 Hun (N. Y.) 406 [*affirmed* in 127 N. Y. 652, 27 N. E. 857].

Purchase by relative.— Acquiescence in an unfulfilled plan whereby title to common property should be purchased by relatives of a tenant in common cannot defeat the interest of such tenant in common in the premises purchased by his cotenant. Richards *v.* Richards, 31 Pa. Super. Ct. 509.

The purchasing cotenant holds as a constructive trustee. Ryason *v.* Dunten, 164 Ind. 85, 73 N. E. 74. And the same rule applies to those holding under a cotenant. Culmore *v.* Medlenka, (Tex. Civ. App. 1898) 44 S. W. 676.

Where part of an adjoining tract overlapped the common property and one of the tenants in common by consent of all, and with the advice of common counsel, purchased the entire adjoining tract, such purchase was made for the benefit of the common owners only to the extent of the overlapping part, and upon said purchaser being reimbursed proportionally as to that part the tenants in common would be entitled to their respective portions thereof on partition. Gass *v.* Waterhouse, (Tenn. Ch. App. 1900) 61 S. W. 450.

57. *Alabama.*— Savage *v.* Bradley, 149 Ala. 169, 43 So. 20, 123 Am. St. Rep. 30.

California.— Mandeville *v.* Solomon, 39 Cal. 125.

Colorado.— Franklin Min. Co. *v.* O'Brien, 22 Colo. 129, 43 Pac. 1016, 55 Am. St. Rep. 118.

Illinois.— Goralski *v.* Kostuski, 179 Ill. 177, 53 N. E. 720, 70 Am. St. Rep. 98; Walker *v.* Warner, 179 Ill. 16, 53 N. E. 594, 70 Am. St. Rep. 85; Burr *v.* Mueller, 65 Ill. 258.

Indiana.— Ryason *v.* Dunten, 164 Ind. 85, 73 N. E. 74; Turpie *v.* Lowe, 158 Ind. 314, 62 N. E. 484, 92 Am. St. Rep. 1310; Stevens *v.* Reynolds, 143 Ind. 467, 41 N. E. 931, 52 Am. St. Rep. 422.

Kentucky.— Francis *v.* Million, 80 S. W. 486, 26 Ky. L. Rep. 42.

Massachusetts.— Blodgett *v.* Hildreth, 8 Allen 186.

Missouri.— Nalle *v.* Parks, 173 Mo. 616, 73 S. W. 596; Potter *v.* Herring, 57 Mo. 184; Picot *v.* Page, 26 Mo. 398; Jones *v.* Stanton, 11 Mo. 433.

Nebraska.— Craven *v.* Craven, 68 Nebr. 459, 94 N. W. 604.

Nevada.— Boskowitz *v.* Davis, 12 Nev. 446.

New Jersey.—Weller *v.* Rolason, 17 N. J. Eq. 13.

New York.— Carpenter *v.* Carpenter, 131 N. Y. 101, 29 N. E. 1013, 27 Am. St. Rep. 569; Koke *v.* Balken, 73 Hun 145, 25 N. Y. Suppl. 1038, 148 N. Y. 732, 42 N. E. 724; Van Horne *v.* Fonda, 5 Johns. Ch. 388.

Oregon.— Crawford *v.* O'Connell, 39 Oreg. 153, 64 Pac. 656.

Pennsylvania.— Duff *v.* Wilson, 72 Pa. St. 442.

Rhode Island.— Green *v.* Walker, 22 R. I. 14, 45 Atl. 742.

Texas.— Niday *v.* Cochran, 42 Tex. Civ. App. 292, 93 S. W. 1027; McFarlin *v.* Leaman, (Civ. App. 1895) 29 S. W. 44.

Virginia.— Hall *v.* Caldwell, 97 Va. 311, 33 S. E. 596.

West Virginia.— Flat Top Grocery Co. *v.* Bailey, 62 W. Va. 84, 57 S. E. 302; Morris *v.* Roseberry, 46 W. Va. 24, 32 S. E. 1019; Gilchrist *v.* Beswick, 33 W. Va. 168, 10 S. E. 371.

Wisconsin.—Atkinson *v.* Hewett, 63 Wis. 396, 23 N. W. 889.

United States.— Rothwell *v.* Dewees, 2 Black 613, 17 L. ed. 309.

See 45 Cent. Dig. tit. "Tenancy in Common," § 55 *et seq.*

Such election may be made by way of cross bill. Smith *v.* Osborne, 86 Ill. 606.

An unreasonable delay in making election to claim benefit until the condition of the property or circumstances of the parties are changed amounts to an abandonment of the right to elect. Morris *v.* Roseberry, 46 W. Va. 24, 32 S. E. 1019.

58. *Massachusetts.*— Matthews *v.* Bliss, 22 Pick. 48.

Michigan.— Ream *v.* Robinson, 128 Mich. 92, 87 N. W. 115, where one purchased at a mortgage foreclosure sale, knowing that one of the tenants in common of land who had paid more than her share of the mortgage debt regarded him as a cotenant, and thereupon claimed to have quitclaimed the land to his son prior to the foreclosure proceedings, and the facts were held to authorize a decree setting aside the quitclaim deed and declaring the parties tenants in common.

New York.— Graham *v.* Luddington, 19 Hun 246, a judgment and deed to lands owned in common, procured by fraud, held to be void as against cotenants.

Oregon.— Dray *v.* Dray, 21 Oreg. 59, 27 Pac. 223, holding that inducing a cotenant to deed his interest in the common property, sold at a judicial sale, under promise of redemption thereof; permitting time for redemption to expire and taking a deed thereto from the execution purchaser, makes such deed constructively fraudulent and such title inures

obtains title to the common property by a fraudulent agreement with one of the cotenants therein, such third person is liable to the other cotenant for the value of his share therein; or such title may be declared void.[59] A cotenant who purchases a conflicting title, or his successor, having notice of all the facts, will not be permitted in the contest over the title, in which the other coöowners claim that the purchase of the conflicting title inures to their benefit, to question the common title of the cotenants where such claim would be inequitable,[60] nor can he, in an action against him by his cotenants to be let into possession, justify an ouster of plaintiff by setting up an outstanding title purchased by him while in possession under the common title, although such title, so purchased, be the true one.[61] Nor can he set up a title from the owners of the land as against a possessory title under which he has exclusive possession and his cotenants are claiming their proportional shares;[62] and he cannot set up a sheriff's deed on the foreclosure of an outstanding mortgage as against his cotenant.[63] Where a coparcener claiming under an ancestor who had a defective title falsely states the consideration in his deed for the purchase of an outstanding title and conceals the fact of purchase from his coparceners, he is not allowed to rely upon lapse of time to defeat their right to the benefit of such purchase.[64] There can be no foreclosure of an outstanding encumbrance on the common property between cotenants, unless plaintiff can show that defendants are liable for the entire incumbrance and that he is not liable for any part of such claim.[65]

b. Extent and Qualification of Rule. The rule above stated[66] is qualified in some cases which hold that the purchase of an outstanding interest must be interpreted according to surrounding circumstances,[67] and that the rule obtains only

to the benefit of such tenants in common.

Pennsylvania.— McGranighan *v.* McGranighan, 185 Pa. St. 340, 39 Atl. 951 (the purchase of the common property at judicial sale after misleading cotenants therein, poor and inexperienced in business, to believe that only those having money could save their shares); Maul *v.* Rider, 51 Pa. St. 377 (holding that if several persons agree to the purchase of property in common and one of them fraudulently has said property conveyed to himself, he holds the title thereto as trustee for his cotenants whether or not he undertook to act as their agent).

Texas.— See Clevenger *v.* Mayfield, (Civ. App. 1905) 86 S. W. 1062.

The relocation of land by a coöwner taking unfair advantage of information imparted to him by a cotenant therein was held to be a mere subterfuge to defraud the cotenants therein. Yarwood *v.* Johnson, 29 Wash. 643, 70 Pac. 123.

But the mere claim of fraud, without the institution of some proceeding for the purpose of avoiding it, is not sufficient to give the claimant a legal interest in the common property. Staples *v.* Bradley, 23 Conn. 167, 60 Am. Dec. 630.

59. Burrell *v.* Bull, 3 Sandf. Ch. (N. Y.) 15; Logan *v.* Oklahoma Mill Co., 14 Okla. 402, 79 Pac. 103.

A secret agreement between a cotenant and a purchaser of property to be sold at a certain price, whereby the cotenant actually making the sale is to own a share of the common property upon payment of a proportionate share of the purchase-price, is voidable at the complaint of the other cotenant. Small *v.* Robinson, 9 Hun (N. Y.) 418.

Rent may be recovered from the time of the delivery of deeds of the interest of one tenant in common, if said deeds were obtained by fraud. Zapp *v.* Miller, 109 N. Y. 51, 15 N. E. 889.

But mere neglect on the part of such purchaser to inquire into the state of the title may not be sufficient to create fraud. Ft. Scott *v.* Schulenberg, 22 Kan. 648.

60. Inglis *v.* Webb, 117 Ala. 387, 23 So. 125; Cedar Canyon Consol. Min. Co. *v.* Yarwood, 27 Wash. 271, 67 Pac. 749, 91 Am. St. Rep. 841.

61. Olney *v.* Sawyer, 54 Cal. 379; Alexander *v.* Sully, 50 Iowa 192; Venable *v.* Beauchamp, 3 Dana (Ky.) 321, 28 Am. Dec. 74; Van Horne *v.* Fonda, 5 Johns. Ch. (N. Y.) 388; Saladin *v.* Kraayvanger, 96 Wis. 180, 70 N. W. 1113.

62. Phelan *v.* Kelly, 25 Wend. (N. Y.) 389.

63. McPheeters *v.* Wright, 124 Ind. 560, 24 N. E. 734, 9 L. R. A. 176; Moy *v.* Moy, 89 Iowa 511, 56 N. W. 668.

64. Pillow *v.* Southwest Imp. Co., 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep. 804.

65. Holmes *v.* Holmes, 129 Mich. 412, 89 N. W. 47, 95 Am. St. Rep. 444; Cornell *v.* Prescott, 2 Barb. (N. Y.) 16; Deavitt *v.* Ring, 73 Vt. 298, 50 Atl. 1066; Burnett *v.* Ewing, 39 Wash. 45, 80 Pac. 855.

66. See *supra*, III, D, 1.

67. Mandeville *v.* Solomon, 39 Cal. 125; Sparks *v.* Bodensick, 72 Kan. 5, 82 Pac. 463; Stubblefield *v.* Hanson, (Tex. Civ. App. 1906) 94 S. W. 406.

Use of relationship.—Whether or not the cotenant used the cotenancy, or any title, right, or claim in relation thereto, to acquire

where the relation of tenancy in common exists in strictness, and where the relation is such as to require mutual trust and confidence,[68] some cases going to the extent of holding that the mutual obligation arises only where the parties have acquired the property by the same instrument or act of the parties or of law,[69] and that persons acquiring unconnected interests in the same subject by distinct purchases, although it may be under the same title, are probably not bound to any greater protection of one another's interests than would be required between strangers.[70] But, by the weight of authority, where a relationship of confidence is shown to exist, it is not necessary that the several titles shall be held by the same conveyance or by the same act of law.[71] A purchase by one tenant in common

the outstanding title should be considered. Myers *v.* Reed, 17 Fed. 401, 9 Sawy. 132.

Indebtedness of purchaser to cotenant.— The mere fact that the purchaser is indebted to his cotenant does not of itself give the creditor tenant an interest in such purchase. King *v.* Wilson, 54 N. J. Eq. 247, 34 Atl. 394; Lewis *v.* Robinson, 10 Watts (Pa.) 354.

68. *Arkansas.*— Britton *v.* Handy, 20 Ark. 381, 73 Am. Dec. 497.

California.— Gunter *v.* Laffan, 7 Cal. 588. See also Tully *v.* Tully, 71 Cal. 338, 12 Pac. 246.

Indiana.— Ryason *v.* Dunten, 164 Ind. 85, 73 N. E. 74; Stevens *v.* Reynolds, 143 Ind. 467, 41 N. E. 931, 52 Am. St. Rep. 422; Elston *v.* Piggott, 94 Ind. 14.

Massachusetts.— Matthews *v.* Bliss, 22 Pick. 48.

Missouri.— Smith *v.* Washington, 11 Mo. App. 519.

New York.—Van Horne *v.* Fonda, 5 Johns. Ch. 388.

North Carolina.— Jackson *v.* Baird, 148 N. C. 29, 61 S. E. 632, 19 L. R. A. N. S. 591.

Pennsylvania.— Reinboth *v.* Zerbe Run Imp. Co., 29 Pa. St. 139.

Tennessee.— King *v.* Rowan, 10 Heisk. 675.

Texas.— Rippetoe *v.* Dwyer, 49 Tex. 498; Roberts *v.* Thorn, 25 Tex. 728, 78 Am. Dec. 552; Niday *v.* Cochran, 42 Tex. Civ. App. 292, 93 S. W. 1027.

Wisconsin.— Frentz *v.* Klotsch, 28 Wis. 312.

See 45 Cent. Dig. tit. "Tenancy in Common," § 56 *et seq.*

69. King *v.* Rowan, 10 Heisk. (Tenn.) 675; Roberts *v.* Thorn, 25 Tex. 728, 78 Am. Dec. 552; Niday *v.* Cochran, 42 Tex. Civ. App. 292, 93 S. W. 1027.

If the cotenant does not complain, a stranger to whom the purchasing cotenant stands in no relation of trust and confidence cannot complain. Burgett *v.* Williford, 56 Ark. 187, 19 S. W. 750, 35 Am. St. Rep. 96.

70. *Alabama.*— Given *v.* Troxel, (1905) 39 So. 578.

Indiana.— Ryason *v.* Dunten, 164 Ind. 85, 73 N. E. 74; Jennings *v.* Moon, 135 Ind. 168, 34 N. E. 996.

Michigan.— Holmes *v.* Holmes, 129 Mich. 412, 89 N. W. 47, 95 Am. St. Rep. 444; Watkins *v.* Green, 101 Mich. 493, 60 N. W. 44; Sands *v.* Davis, 40 Mich. 14.

Minnesota.— Barteau *v.* Merriam, 52 Minn. 222, 53 N. W. 1061.

Missouri.— Potter *v.* Herring, 57 Mo. 184.

Texas.— Fielding *v.* White, (Civ. App. 1895) 32 S. W. 1054.

Virginia.— Buchanan *v.* King, 22 Gratt. 414.

Washington.— Burnett *v.* Ewing, 39 Wash. 45, 80 Pac. 855.

Wisconsin.— Frentz *v.* Klotsch, 28 Wis. 312.

United States.— Myers *v.* Reed, 17 Fed. 401, 9 Sawy. 132.

England.— Kennedy *v.* De Trafford, (1897) A. C. 180, 66 L. J. Ch. 413, 76 L. T. Rep. N. S. 427, 45 Wkly. Rep. 671.

See 45 Cent. Dig. tit. "Tenancy in Common," § 56 *et seq.*

Acquiring different estates.—Where one tenant in common, under a deed conveying the grantor's equitable interest, acquires the outstanding legal title, such legal title does not inure to the benefit of his said cotenant (Nalle *v.* Thompson, 173 Mo. 595, 73 S. W. 599; Kershaw *v.* Simpson, 46 Wash. 313, 89 Pac. 889), nor where the grantee of one, a stranger to the common title, who had purchased the property at a foreclosure sale, thereafter purchased the legal title of one of the cotenants at a time when the foreclosure was not complete, by reason of the time to redeem not having expired, so that the estate of the grantee of the purchaser at the foreclosure sale was that of a mortgagee before foreclosure, only an equitable estate or interest in which the right to hold and enforce his interest for his own benefit was fixed in the absence of redemption; and where said grantee did no act on which a merger of said equitable estate and said legal estate could be predicated (Given *v.* Troxel, (Ala. 1905) 39 So. 578 [*distinguishing* Jones *v.* Matkin, 118 Ala. 341, 24 So. 242]; Horton *v.* Maffitt, 14 Minn. 289, 100 Am. Dec. 222).

Title from government.— It seems that the principle that the purchase by one cotenant inures to the benefit of all does not apply to a title acquired from the United States in the absence of fraud or special contract. Sullivan *v.* McLenans, 2 Iowa 437, 65 Am. Dec. 780.

71. *Illinois.*— Montague *v.* Selb, 106 Ill. 49.

Iowa.— Phillips *v.* Wilmarth, 98 Iowa 32, 66 N. W. 1053; Leach *v.* Hall, 95 Iowa 611, 64 N. W. 790.

Kentucky.— Owings *v.* McClain, 1 A. K. Marsh. 230.

New Jersey.— United New Jersey R., etc.,

does not inure to the benefit of a cotenant whenever for any reason the tenancy has terminated,[72] and the same principle applies whenever the outstanding interest is acquired before the creation of the relationship of cotenancy,[73] or where the title claimed in common is a nullity,[74] or where the outstanding title is acquired by one whose claim to the common property is not in recognition of or subservient to the title of the other tenants in common therein;[75] and since the principle that the one in possession acts on behalf of all with whom he has a common interest in the property is based largely on the special circumstances under and intentions with which the act alleged or claimed to have been done for the benefit of all was performed, and as presumption generally enters very largely into the determination of the intention with which the act was done, it necessarily follows that if there be direct evidence, making presumption unnecessary, the question of common interest will be determined on the evidence adduced and not on the general rule based on presumption.[76] Thus the purchase of a reversion by one cotenant is not adverse to the interest of his termor cotenant;[77] nor is the purchase by one cotenant of a life-estate adverse to the interests of the cotenants in the remainder;[78] nor, the evidence not showing distinctly that the purchase was made on behalf of the cotenants, does the purchase by one of them of certain land excepted from the conveyance under which they acquired title from one who had bought in both tracts at tax-sale, create a trust.[79] The purchase of an outstanding title

Co. *v.* Consolidated Fruit Jar Co., (Ch. 1903) 55 Atl. 46.

South Dakota.— Johnson *v.* Brauch, 9 S. D. 116, 68 N. W. 173, 62 Am. St. Rep. 857.

West Virginia.— Cecil *v.* Clark, 44 W. Va. 659, 30 S. E. 216.

See 45 Cent. Dig. tit. "Tenancy in Common," § 55 *et seq.*

72. Johnson *v.* Toulmin, 18 Ala. 50, 52 Am. Dec. 212; Jackson *v.* Burtis, 14 Johns. (N. Y.) 391; Reinboth *v.* Zerbe Run Imp. Co., 29 Pa. St. 139; *In re* Biss, (1903) 2 Ch. 40, 48; Hunter *v.* Allen, (1907) 1 Ir. R. 212. See also Alexander *v.* Sully, 50 Iowa 192; Coleman *v.* Coleman, 3 Dana (Ky.) 398, 28 Am. Dec. 86; Sweetland *v.* Buell, 89 Hun (N. Y.) 543, 35 N. Y. Suppl. 346 [*affirmed* in 164 N. Y. 541, 58 N. E. 663, 79 Am. St. Rep. 676].

Purchase after lapse of period of redemption.—Where land is owned by tenants in common and sold for payment of taxes, and the period of redemption has fully elapsed, the purchase of the land by one of the tenants in common will not inure to the benefit of all of them. Jonas *v.* Flanniken, 69 Miss. 577, 11 So. 319; Jackson *v.* Burtis, 14 Johns. (N. Y.) 391; Wells *v.* Chapman, 4 Sandf. Ch. (N. Y.) 312 [*affirmed* in 13 Barb. 561]; Sutton *v.* Jenkins, 147 N. C. 11, 60 S. E. 643; Reinboth *v.* Zerbe Run Imp. Co., 29 Pa. St. 139; Kirkpatrick *v.* Mathiot, 4 Watts & S. (Pa.) 251; Keele *v.* Cunningham, 2 Heisk. (Tenn.) 288.

Cotenancy having been severed by a sale under a decree of partition to one of the cotenants therein, and taxes, constituting a lien at time of said sale, having been subsequently paid by said purchaser, it was held that he made such payment in the character of purchaser. Stephens *v.* Ells, 65 Mo. 456.

73. *Alabama.*— Given *v.* Troxel, (1905) 39 So. 578.

Arkansas.— Brittin *v.* Handy, 20 Ark. 381, 73 Am. Dec. 497.

Illinois.—Webster *v.* Webster, 55 Ill. 325.

Indiana.— Elston *v.* Piggott, 94 Ind. 14; Hatfield *v.* Mahoney, 39 Ind. App. 499, 79 N. E. 408, 1086.

Kentucky.— Sneed *v.* Atherton, 6 Dana 276, 32 Am. Dec. 70.

Minnesota.— See Hoyt *v.* Lightbody, 98 Minn. 189, 108 N. W. 843, 116 Am. St. Rep. 358.

Mississippi.— Jonas *v.* Flanniken, 69 Miss. 577, 11 So. 319.

Nebraska.— Mills *v.* Miller, 4 Nebr. 441.

See 45 Cent. Dig. tit. "Tenancy in Common," § 56 *et seq.*

74. Bornheimer *v.* Baldwin, 42 Cal. 27; Burhans *v.* Van Zandt, 7 Barb. (N. Y.) 91 [*reversed* on other grounds in 7 N. Y. 523, Seld. Notes 31]; Niday *v.* Cochran, 42 Tex. Civ. App. 292, 93 S. W. 1027; Cecil *v.* Clark, 44 W. Va. 659, 30 S. E. 216. But see Clements *v.* Cates, 49 Ark. 242, 4 S. W. 776, holding that a cotenant may be liable to account as trustee where he purchases an outstanding title, even though the title derived by him and his cotenants from a common ancestor be defective or void.

75. Smith *v.* Hamakua Mill Co., 13 Hawaii 716; Niday *v.* Cochran, 42 Tex. Civ. App. 292, 93 S. W. 1027.

76. Gillett *v.* Gaffney, 3 Colo. 351; Larman *v.* Huey, 13 B. Mon. (Ky.) 436; Streeter *v.* Shultz, 45 Hun (N. Y.) 406 [*affirmed* in 127 N. Y. 652, 27 N. E. 857]; Phelan *v.* Kelly, 25 Wend. (N. Y.) 389; Watson *v.* Watson, 198 Pa. St. 234, 47 Atl. 1096; Watson *v.* Watson, 31 Pittsb. Leg. J. N. S. (Pa.) 91.

77. Ramberg *v.* Wahlstrom, 140 Ill. 182, 29 N. E. 727, 33 Am. St. Rep. 227; Kershaw *v.* Simpson, 46 Wash. 313, 89 Pac. 889.

78. McLaughlin *v.* McLaughlin, 80 Md. 115, 30 Atl. 607; Fox *v.* Coon, 64 Miss. 465, 1 So. 629.

79. Brickell *v.* Earley, 115 Pa. St. 473, 8 Atl. 623.

by a tenant in common to purchase peace does not inure to the benefit of his cotenants who were made his co-defendants but failed to join him in the defense.[80]

c. Contribution; Lien. The liability of cotenants as between themselves, for the payment of liens against the common estate, is proportionate to their respective interests.[81] Therefore the purchase or discharge of an encumbrance, lien, or outstanding title for the benefit of the common property entitles him who so purchases to contribution from each of his cotenants to the expense which releases the common interest from embarrassment or perfects the title thereto, the right of the non-purchasing cotenants to share in the benefit of a purchase being dependent on their election, within a reasonable time, to bear their portion of the expenses necessarily incurred in said purchase. They cannot ordinarily share in the benefit of the purchase without contributing or tendering their proportionate shares of the cost and expense,[82] such contribution being

80. Asher *v.* Howard, 70 S. W. 277, 24 Ky. L. Rep. 961.

81. Oliver *v.* Lansing, 57 Nebr. 352, 77 N. W. 802.

82. *Alabama.*— Newbold *v.* Smart, 67 Ala. 326; Thomas *v.* Hearn, 2 Port. 262.

California.— Stevenson *v.* Boyd, 153 Cal. 630, 96 Pac. 284, 19 L. R. A. N. S. 525; McCord *v.* Oakland Quicksilver Min. Co., 64 Cal. 134, 27 Pac. 863, 49 Am. Rep. 686; Mandeville *v.* Solomon, 39 Cal. 125.

Colorado.— Franklin Min. Co. *v.* O'Brien, 22 Colo. 129, 43 Pac. 1016, 55 Am. St. Rep. 118.

Florida.—Walker *v.* Sarven, 41 Fla. 210, 25 So. 885.

Illinois.— Salem Nat. Bank *v.* White, 159 Ill. 136, 42 N. E. 312; Smith *v.* Osborne, 86 Ill. 606; Wilton *v.* Tazwell, 86 Ill. 29; Busch *v.* Huston, 75 Ill. 343; Burr *v.* Mueller, 65 Ill. 258; Titsworth *v.* Stout, 49 Ill. 78, 95 Am. Dec. 577; Ott *v.* Flinspach, 143 Ill. App. 61; Querney *v.* Querney, 127 Ill. App. 75; Case *v.* Case, 103 Ill. App. 177.

Indiana.— Stevens *v.* Reynolds, 143 Ind. 467, 41 N. E. 931, 52 Am. St. Rep. 422; Moon *v.* Jennings, 119 Ind. 130, 20 N. E. 748, 21 N. E. 471, 12 Am. St. Rep. 383.

Iowa.—Austin *v.* Barrett, 44 Iowa 488; Flinn *v.* McKinley, 44 Iowa 68. *Compare* Koboliska *v.* Swehla, 107 Iowa 124, 77 N. W. 576.

Kansas.— Farmers' Nat. Bank *v.* Robinson, (1898) 53 Pac. 762.

Kentucky.— Lee *v.* Fox, 6 Dana 171; Venable *v.* Beauchamp, 3 Dana 321, 28 Am. Dec. 74; Asher *v.* Howard, 70 S. W. 277, 24 Ky. L. Rep. 961.

Maine.— Coburn *v.* Page, 105 Me. 458, 74 Atl. 1026, 134 Am. St. Rep. 575; Moore *v.* Gibson, 53 Me. 551; Reed *v.* Bachelder, 34 Me. 205.

Maryland.— Darcey *v.* Bayne, 105 Md. 365, 66 Atl. 434, 10 L. R. A. N. S. 863.

Massachusetts.— Blodgett *v.* Hildreth, 8 Allen 186; Dickinson *v.* Williams, 11 Cush. 258, 59 Am. Dec. 142.

Minnesota.— Fritz *v.* Ramspott, 76 Minn. 489, 79 N. W. 520; Ohio Iron Co. *v.* Auburn Iron Co., 64 Minn. 404, 67 N. W. 221; Oliver *v.* Hedderly, 32 Minn. 455, 21 N. W. 478.

Mississippi.— Harrison *v.* Harrison, 56 Miss. 174.

Missouri.— Kohle *v.* Hobson, 215 Mo. 213, 114 S. W. 952; Mahoney *v.* Nevins, 190 Mo. 360, 88 S. W. 731; Jones *v.* Stanton, 11 Mo. 433; Schneider Granite Co. *v.* Taylor, 64 Mo. App. 37, holding that one who has paid a judgment rendered in a suit to enforce a special tax bill may maintain an action for contribution against his coöwners who were not made parties to the suit.

Nebraska.— Craven *v.* Craven, 68 Nebr. 459, 94 N. W. 604; Carson *v.* Broady, 56 Nebr. 648, 77 N. W. 80, 71 Am. St. Rep. 691.

Nevada.— Boskowitz *v.* Davis, 12 Nev. 446.

New Jersey.—Weller *v.* Rolason, 17 N. J. Eq. 13.

New York.— Quackenbush *v.* Leonard, 9 Paige 334; Van Horne *v.* Fonda, 5 Johns. Ch. 388; Burrell *v.* Bull, 3 Sandf. Ch. 15.

North Carolina.— Holt *v.* Couch, 125 N. C. 456, 34 S. E. 703, 74 Am. St. Rep. 648.

Oregon.— Crawford *v.* O'Connell, 39 Oreg. 153, 64 Pac. 656.

Pennsylvania.— McGranighan *v.* McGranighan, 6 Pa. Dist. 33, 19 Pa. Co. Ct. 75; Hite *v.* Hite, 21 Pa. Co. Ct. 97.

Rhode Island.— Green *v.* Walker, 22 R. I. 14, 45 Atl. 742.

Tennessee.— Gass *v.* Waterhouse, (Ch. App. 1900) 61 S. W. 450.

Texas.— Niday *v.* Cochran, 42 Tex. Civ. App. 292, 93 S. W. 1027; McFarlin *v.* Leaman, (Civ. App. 1895) 29 S. W. 44; Branch *v.* Makeig, 9 Tex. Civ. App. 399, 28 S. W. 1050. See also Thomas *v.* Morrison, (Civ. App.) 46 S. W. 46, holding that where an attorney, recovering land for a client under an agreement to convey a certain portion thereof to said attorney for his services, was compelled to buy an outstanding claim because of the client's fraudulent acts, the attorney was entitled to contribution according to their respective shares. *Compare* Peak *v.* Brinson, 71 Tex. 310, 11 S. W. 269.

Virginia.— Grove *v.* Grove, 100 Va. 556, 42 S. E. 312; Ballou *v.* Ballou, 94 Va. 350, 26 S. E. 840, 64 Am. St. Rep. 773; Pillow *v.* Southwest Imp. Co., 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep. 804.

Washington.— Kershaw *v.* Simpson, 46 Wash. 313, 89 Pac. 889; Burnett *v.* Kirk, 39 Wash. 45, 80 Pac. 855; Cedar Canyon Consol. Min. Co. *v.* Yarwood, 27 Wash. 271, 67 Pac. 749, 91 Am. St. Rep. 841.

West Virginia.— Morris *v.* Roseberry, 46 W. Va. 24, 32 S. E. 1019; Ward *v.* Ward, 40

proportionate to the respective interests; [83] and although the purchasing tenant in common cannot purchase an outstanding interest against his cotenant, he is nevertheless entitled to hold his deed as security for the money paid.[84] A tenant in common relieving the common property from a mortgage, lien, or charge for the joint benefit of the tenants in common is entitled to an equitable lien by subrogation, and to contribution from his respective cotenants out of their respective interests in the common property.[85] The foregoing rules are

W. Va. 611, 29 L. R. A. 449, 21 S. E. 746, 52 Am. St. Rep. 911.

Wisconsin.— McLaughlin *v.* Curts, 27 Wis. 644, holding that payment of a mortgage on common property before sale, given by the tenants thereof for their joint debt, entitles the cotenant so paying before sale to contribution. *Compare* Tipping *v.* Robbins, 71 Wis. 507, 37 N. W. 427.

United States.— Rothwell *v.* Dewees, 2 Black 613, 7 L. ed. 309.

Canada.— *In re* Curry, 25 Ont. App. 267 [*affirming* 17 Ont. Pr. 379].

See 45 Cent. Dig. tit. "Tenancy in Common," § 59 *et seq.*

But see Norris *v.* Hill, 1 Mich. 202 (holding that, although the owners of the three quarters of a water power be compelled to purchase a piece of land to secure to the proprietors of the power the right to flow it, yet a court of equity will not decree contribution by the owner of the remaining quarter); Boskowitz *v.* Davis, 12 Nev. 446 (holding that the principle applies only where the purchasing cotenant desires payment and conducts himself accordingly and where he does not act as though he had intended his expenditure to be a gratuity to his cotenants).

Too long delay to contribute to the purchase-price abandons all benefits. Morris *v.* Roseberry, 46 W. Va. 24, 32 S. E. 1019.

Even though a claim therefor would be barred by limitations in an independent action brought for such contribution, in partition proceedings contribution will be enforced against a cotenant. Querney *v.* Querney, 127 Ill. App. 75.

Right as affected by agreement.— The purchasing cotenant is not entitled to contribution from his cotenants where he has entered into an arrangement whereby a third party, in consideration of such purchase, became solely liable for contribution to the purchaser. Mills *v.* Miller, 4 Nebr. 441.

One tenant in common of an estate in expectancy has no right to discharge a burden on the estate in the hands of a life-tenant in possession, and to demand contribution from his cotenants therein, except where it is necessary to prevent a destruction of the expectancy. Harrison *v.* Harrison, 56 Miss. 174.

A tenant in common of an equity of redemption paying the whole mortgage debt cannot seek contribution from his cotenants personally, but can merely foreclose their interests if they fail to pay their share. Lyon *v.* Robbins, 45 Conn. 513.

The right does not pass to a mortgagee of the cotenant's interest under a mortgage conveying his undivided interest in the common property. Oliver *v.* Lansing, 57 Nebr. 352, 77 N. W. 802.

There is no personal claim beyond said lien against said cotenant or his estate after his decease. McLaughlin *v.* Curts, 27 Wis. 644.

Interest.— If a tenant in common claims contribution because of the purchase of an outstanding lien, claim, or title, he is not entitled to the payment of statutory punitive interest generally provided for purchasers of like claims, liens, or titles, but only to the ordinary legal rate of interest. Phipps *v.* Phipps, 47 Kan. 328, 27 Pac. 972. If he purchases adjoining land, thus coming into possession of a necessary easement of way, he may be entitled, under the circumstances of the case, to legal interest on the purchase-price of the land, if the tort be waived and an accounting had. Cecil *v.* Clarke, 49 W. Va. 459, 39 S. E. 202.

83. Titsworth *v.* Stout, 49 Ill. 78, 95 Am. Dec. 577.

The rule is enforced against the husband or wife of a cotenant so purchasing an outstanding interest, encumbrance, or conflicting claim or tendering money therefor or in satisfaction thereof, and such husband or wife will be entitled to contribution the same as a cotenant might otherwise be. Smith *v.* Smith, 68 Iowa 608, 27 N. W. 780; Perkins *v.* Smith, 37 S. W. 72, 18 Ky. L. Rep. 509; Beaman *v.* Beaman, 90 Miss. 762, 44 So. 987; Chace *v.* Durfee, 16 R. I. 248, 14 Atl. 919.

84. McCrary *v.* Glover, 100 Ga. 90, 26 S. E. 102; Chace *v.* Durfee, 16 R. I. 248, 14 Atl. 919. But see Jennings *v.* Moon, 135 Ind. 168, 34 N. E. 996.

One who has paid more than his share of the purchase-price of the property comes within the rule, even though it be admitted that such expenditures, not being for the extinguishment of any lien, do not entitle him to a lien by subrogation. Funk *v.* Seehorn, 99 Mo. App. 587, 74 S. W. 445.

85. *Alabama.*— Newbold *v.* Smart, 67 Ala. 326.

Arkansas.— Moore *v.* Woodall, 40 Ark. 42.

California.— Calkins *v.* Steinbach, 66 Cal. 117, 4 Pac. 1103.

Illinois.— Glos *v.* Clark, 97 Ill. App. 609 [*reversed* on other grounds in 199 Ill. 147, 65 N. E. 135]; Griffith *v.* Robinson, 14 Ill. App. 377.

Indiana.— Moon *v.* Jennings, 119 Ind. 130, 20 N. E. 748, 21 N. E. 471, 12 Am. St. Rep. 383; Eads *v.* Retherford, 114 Ind. 273, 16 N. E. 587, 5 Am. St. Rep. 611.

Iowa.— Oliver *v.* Montgomery, 42 Iowa 36.

Maine.— Moore *v.* Gibson, 53 Me. 551.

Massachusetts.— Hurley *v.* Hurley, 148

not applicable to such a purchase by one at a time prior to becoming a tenant in common with the others,[86] and the right does not attach where a mortgage debt is paid after its discharge; [87] nor where there is a primary duty on another to have discharged the lien and it does not appear that such payment was made because of the failure of the party primarily liable to make it; [88] nor where a claim for contribution is stale, because of laches or limitations.[89] Notice, actual or constructive, of the purchase of an outstanding title must be brought home to a cotenant before his right to contribute thereto is lost.[90] An action at law may be maintained between cotenants for the recovery of money expended by some of them for the removal of a joint lien or encumbrance, where sanctioned by statute or public policy.[91] A presumption of repudiation of a transaction in relation to, or of abandonment of, a cotenancy may arise where a cotenant has for a long time failed to do any act of ownership in relation to the common property or has failed to contribute or offer contribution toward the purchase of some outstanding interest.[92]

2. Extinguishment of Tax Claim and Purchase of Tax Title — a. Right to Extinguish or Purchase, and Effect Thereof. One tenant in common may redeem for himself and for his cotenants the common land sold for taxes.[93] The purchase of the outstanding tax title for the entire property, by or for the tenant in common, operates as a payment of the tax and an extinguishment of the tax title,[94] and the deed given to one of the tenants in common, who was the purchaser, simply acts as a discharge of the taxes assessed on the land.[95] The rules above stated in relation to the purchase of outstanding interests generally [96] apply with full force to the acquisition of tax titles by one or more cotenants less than the whole number; thus if one or more of several tenants in common redeem from or purchase the property at a tax-sale, either by themselves or through a third person, the title thus acquired inures to the benefit

Mass. 444, 19 N. E. 545, 2 L. R. A. 172; Blodgett *v.* Hildreth, 8 Allen 186.

Minnesota.— Fritz *v.* Ramspott, 76 Minn. 489, 79 N. W. 520.

Mississippi.— Davidson *v.* Wallace, 53 Miss. 475, so holding, although there is no express agreement.

Missouri.— Mahoney *v.* Nevins, 190 Mo. 360, 88 S. W. 731.

Nebraska.— Oliver *v.* Lansing, 57 Nebr. 352, 77 N. W. 802.

New Jersey.— Thiele *v.* Thiele, 57 N. J. Eq. 98, 40 Atl. 446.

Rhode Island.— Green *v.* Walker, 22 R. I. 14, 45 Atl. 742.

Texas.— Niday *v.* Cochran, 42 Tex. Civ. App. 292, 93 S. W. 1027; Branch *v.* Makeig, 9 Tex. Civ. App. 399, 28 S. W. 1050.

Vermont.— Deavitt *v.* Ring, 73 Vt. 298, 50 Atl. 1066.

Virginia.— Grove *v.* Grove, 100 Va. 556, 42 S. E. 312.

Wisconsin.— Connell *v.* Welch, 101 Wis. 8, 76 N. W. 596; McLaughlin *v.* Curts, 27 Wis. 644.

United States.— McClintock *v.* Fontaine, 119 Fed. 448.

The lien may be enforced against the cotenant's grantee. Young *v.* Bigger, 73 Kan. 146, 84 Pac. 747.

86. Carson *v.* Broady, 56 Nebr. 648, 77 N. W. 80, 71 Am. St. Rep. 691; Downey *v.* Strouse, 101 Va. 226, 43 S. E. 348.

87. Rentz *v.* Eckert, 74 Conn. 11, 49 Atl. 203.

88. Booth *v.* Booth, 114 Iowa 78, 86 N. W. 51.

89. Peak *v.* Brinson, 71 Tex. 310, 11 S. W. 269.

90. Niday *v.* Cochran, 42 Tex. Civ. App. 292, 93 S. W. 1027.

91. Dickinson *v.* Williams, 11 Cush. (Mass.) 258, 59 Am. Dec. 142.

92. Johnson *v.* Toulmin, 18 Ala. 50, 52 Am. Dec. 212; Mandeville *v.* Solomon, 39 Cal. 125; Nalle *v.* Parks, 173 Mo. 616, 73 S. W. 596.

93. Horner *v.* Ellis, 75 Kan. 675, 90 Pac. 275, 121 Am. St. Rep. 446; Halsey *v.* Blood, 29 Pa. St. 319. And see cases cited *infra*, the following notes.

94. *Michigan.*— Sleight *v.* Roe, 125 Mich. 585, 85 N. W. 10.

Minnesota.— Easton *v.* Scofield, 66 Minn. 425, 69 N. W. 326.

Mississippi.— Falkner *v.* Thurmond, (1898) 23 So. 584.

West Virginia.— Cecil *v.* Clark, 49 W. Va. 459, 39 S. E. 202; Parker *v.* Brast, 45 W. Va. 399, 32 S. E. 269; Curtis *v.* Borland, 35 W. Va. 124, 12 S. E. 1113; Battin *v.* Woods, 27 W. Va. 58.

Wisconsin.— Hannig *v.* Mueller, 82 Wis. 235, 52 N. W. 98.

See 45 Cent. Dig. tit. "Tenancy in Common," § 60 *et seq.*

95. Cocks *v.* Simmons, 55 Ark. 104, 17 S. W. 594, 29 Am. St. Rep. 28; Downer *v.* Smith, 38 Vt. 464.

96. See *supra*, III, D, 1, a.

of their cotenants,[97] particularly where there are circumstances of unfair advantage or double dealing,[98] or where the redeeming cotenant allowed the taxes to become

97. *Alabama.*— Russell *v.* Bell, 160 Ala. 480, 49 So. 314; Johns *v.* Johns, 93 Ala. 239, 9 So. 419; Donnor *v.* Quartermas, 90 Ala. 164, 8 So. 715, 24 Am. St. Rep. 778.

Arkansas.— Burgett *v.* Williford, 56 Ark. 187, 19 S. W. 750, 35 Am. St. Rep. 96; Cocks *v.* Simmons, 55 Ark. 104, 17 S. W. 594, 29 Am. St. Rep. 28.

California.— Emeric *v.* Alvarado, 90 Cal. 444, 27 Pac. 356.

District of Columbia.—Alexander *v.* Douglass, 6 D. C. 247.

Illinois.— Lomax *v.* Gindele, 117 Ill. 527, 7 N. E. 483; Bracken *v.* Cooper, 80 Ill. 221.

Indiana.— English *v.* Powell, 119 Ind. 93, 21 N. E. 458.

Iowa.— Cooper *v.* Brown, 143 Iowa 482, 122 N. W. 144; Funson *v.* Bradt, 105 Iowa 471, 75 N. W. 337; Van Ormer *v.* Harley, 102 Iowa 150, 71 N. W. 241; Willcuts *v.* Rollins, 85 Iowa 247, 52 N. W. 199; Clark *v.* Brown, 70 Iowa 139, 30 N. W. 46; Shell *v.* Walker, 54 Iowa 386, 6 N. W. 581; Sheean *v.* Shaw, 47 Iowa 411; Fallon *v.* Chidester, 46 Iowa 588, 26 Am. Rep. 164; Flinn *v.* McKinley, 44 Iowa 68.

Kansas.— Muthersbaugh *v.* Burke, 33 Kan. 260, 6 Pac. 252.

Louisiana.— Duson *v.* Roos, 123 La. 835, 49 So. 590, 131 Am. St. Rep. 375.

Maine.—Williams *v.* Gray, 3 Me. 207, 14 Am. Dec. 234.

Michigan.— Dahlem *v.* Abbott, 146 Mich. 605, 110 N. W. 47; Richards *v.* Richards, 75 Mich. 408, 42 N. W. 954; Butler *v.* Porter, 13 Mich. 292; Page *v.* Webster, 8 Mich. 263, 77 Am. Dec. 446.

Mississippi.— Harrison *v.* Harrison, 56 Miss. 174; Allen *v.* Poole, 54 Miss. 323.

New Hampshire.— Barker *v.* Jones, 62 N. H. 497, 13 Am. St. Rep. 413.

New Jersey.— Roll *v.* Everett, (1908) 71 Atl. 263.

New York.— Knolls *v.* Barnhart, 71 N. Y. 474.

North Carolina.— Smith *v.* Smith, 150 N. C. 81, 63 S. E. 177.

Oregon.— Minter *v.* Durham, 13 Oreg. 470, 11 Pac. 231, holding also that in a suit, between cotenants, where title is claimed through a tax-sale, evidence is admissible to show the amount of rents collected by such grantee.

Pennsylvania.— Davis *v.* King, 87 Pa. St. 261.

South Dakota.— Barrett *v.* McCarty, 20 S. D. 75, 104 N. W. 907.

Vermont.—Willard *v.* Strong, 14 Vt. 532, 39 Am. Dec. 240.

Washington.— Stone *v.* Marshall, 52 Wash. 375, 100 Pac. 858.

West Virginia.—Parker *v.* Brast, 45 W. Va. 399, 32 S. E. 269; Cecil *v.* Clark, 44 W. Va. 659, 30 S. E. 216; Bottin *v.* Woods, 27 W. Va. 58.

Wisconsin.— Miller *v.* Donahue, 96 Wis. 498, 71 N. W. 900.

See 45 Cent. Dig. tit. "Tenancy in Common," § 60.

Even though the tax certificate was acquired before he became such tenant in common, or although he be the assignee of one so acquiring said certificate, the rule applies. Tice *v.* Derby, 59 Iowa 312, 13 N. W. 301; Flinn *v.* McKinley, 44 Iowa 68.

The grantee of a cotenant purchasing the common property at a tax-sale cannot avail himself as against the other cotenant of the benefit of a statute providing that actual occupation for a certain time after such sale shall bar all suits to recover the land for defect in the proceedings. Jonas *v.* Flanniken, 69 Miss. 577, 11 So. 319.

Purchase with rents and profits.—Where a tenant in common applied the rents and profits in his hands to the purchase of an outstanding tax certificate and took a deed to himself thereunder, he is not allowed to invoke the protection of the statute of limitations applicable to tax-sales. Bender *v.* Stewart, 75 Ind. 88.

Purchase for or through strangers.—An agreement with a stranger that a cotenant will bid in the common property for the benefit of the stranger or that a stranger will purchase it for the benefit of a cotenant therein, in whole or in part, does not vary the rule so far as the interests of the cotenants are concerned (Fields *v.* Farmers', etc., Bank, 110 Ky. 257, 61 S. W. 258, 22 Ky. L. Rep. 1708; Holterhoff *v.* Mead, 36 Minn. 42, 29 N. W. 675; Tanney *v.* Tanney, 24 Pittsb. Leg. J. N. S. (Pa.) 43 [*affirmed* in 159 Pa. St. 277, 28 Atl. 287, 39 Am. St. Rep. 678]); nor can such interest be defeated by the mere fact that one of the cotenants acquiesced in a plan by which his own children, through another person, were to purchase the property, which plan was never carried out (Richards *v.* Richards, 31 Pa. Super. Ct. 509).

The taking of an assignment of a tax deed by one of the tenants in common gives him no independent title as against his cotenants. Lloyd *v.* Lynch, 28 Pa. St. 419, 70 Am. Dec. 137.

An intervener under a quitclaim deed, or an assignee with knowledge, from one not entitled to claim the benefit of the tax deed against the cotenants cannot be in any better position than his grantor. Conn *v.* Conn, 58 Iowa 747, 13 N. W. 51 (holding that where a wife mortgaged her homestead, including her share inherited from a deceased child, and the mortgage was subsequently foreclosed, the purchaser at the mortgage sale became a tenant in common with the surviving heirs, and could not acquire a tax title to the prejudice of his cotenants; and an intervener holding under a quitclaim deed from him had no better right); Phipps *v.* Phipps, 47 Kan. 328, 27 Pac. 972.

98. *Illinois.*— Brown *v.* Hogle, 30 Ill. 119, holding that to become a purchaser of the

delinquent,[99] the rule being based on community of interest in a common title between parties having a common possession and a common interest in the safety thereof,[1] and payment of all taxes by one tenant in common inures to the benefit of all.[2] Where, however, cotenants are permitted to protect their respective interests by the payment of the taxes thereon, the several interests of the cotenants may be sold for non-payment of their respective shares of the taxes, although their cotenants may have paid the taxes on their own respective shares.[3] Rents and profits must be applied to the payment of tax claims against the common property in preference to permitting any statutes of limitations to apply as between the cotenants.[4] Where the relation of tenancy in common does not exist at the time of the acquirement of the outstanding tax title, the rule does not apply,[5] and one owning an undivided interest in land, adversely claiming title to the whole and being in actual possession thereof, may purchase a tax title without

common property for his exclusive benefit after permitting it to be sold for taxes, is fraud on the part of such purchaser.

Iowa.— Van Ormer *v.* Harley, 102 Iowa 150, 71 N. W. 241.

Michigan.— Dubois *v.* Campau, 24 Mich. 360.

Minnesota.— Holterhoff *v.* Mead, 36 Minn. 42, 29 N. W. 675, holding that one of two cotenants of lands sold at foreclosure sale, having acquired a legal title thereto on an undertaking with his cotenant that it should be held for the common benefit, cannot divest the latter of his equity in the lands by a tax title, acquired at his own request through a third person with money furnished by himself.

Mississippi.— Cohea *v.* Hemingway, 71 Miss. 22, 14 So. 734, 42 Am. St. Rep. 449; Hardy *v.* Gregg, (1887) 2 So. 358.

Texas.—Branch *v.* Makeig, 9 Tex. Civ. App. 399, 28 S. W. 1050.

See 45 Cent. Dig. tit. "Tenancy in Common," § 60 *et seq.*

Vendue title does not revive tenancy in common that had been previously severed in fact. Willard *v.* Strong, 14 Vt. 532, 39 Am. Dec. 240.

Where a statute declares that a tax title can only be attacked for actual fraud, a tenant in common in possession with his fellows may purchase such title and hold it, at law, as against them. Mills *v.* Tukey, 22 Cal. 373, 83 Am. Dec. 74.

99. Phipps *v.* Phipps, 47 Kan. 328, 27 Pac. 972; Delashmutt *v.* Parrent, 39 Kan. 548, 18 Pac. 712; Dubois *v.* Campau, 24 Mich. 360.

1. Hoyt *v.* Lightbody, 98 Minn. 189, 108 N. W. 843, 116 Am. St. Rep. 358.

Even where there is a statute, which if literally construed might be taken to avoid this rule, such statute is usually liberally construed in favor of the non-redeeming cotenants, and the rule upheld. Alexander *v.* Light, 112 La. 925, 36 So. 806; Hoyt *v.* Lightbody, 98 Minn. 189, 108 N. W. 843, 116 Am. St. Rep. 358; Easton *v.* Scofield, 66 Minn. 425, 69 N. W. 326; Smith *v.* Smith, 150 N. C. 81, 63 S. E. 177; Clark *v.* Lindsay, 47 Ohio St. 437, 25 N. E. 422, 9 L. R. A. 740; Barrett *v.* McCarty, 20 S. D. 75, 104 N. W. 907. Such statutes, however, have not always been so liberally construed in favor of cotenants as where the statute declares that deeds for taxes can be attacked only for actual fraud, and it has been held that under statutes declaring a tax deed duly executed *prima facie* evidence of all facts stated therein, or giving conclusive effect to tax deeds, the statute must prevail at law, although in equity the purchase might be regarded as a trust. Johns *v.* Johns, 93 Ala. 239, 9 So. 419; Mills *v.* Tukey, 22 Cal. 373, 83 Am. Dec. 74.

2. West Chicago Park Com'rs *v.* Coleman, 108 Ill. 591; Chickering *v.* Faile, 38 Ill. 342; Davis *v.* King, 87 Pa. St. 261.

Mere lapse of time does not vary the rule. White *v.* Beckwith, 62 Conn. 79, 25 Atl. 400.

The one in possession should pay the taxes. Cole *v.* Cole, 57 Misc. (N. Y.) 490, 108 N. Y. Suppl. 124. *Compare* Oglesby *v.* Hollister, 76 Cal. 136, 18 Pac. 146, 9 Am. St. Rep. 177.

A tenant in common for life is bound to pay according to the proportion of his interest in the life-tenancy. Anderson *v.* Greble, 1 Ashm. (Pa.) 136.

3. Ronkendorff *v.* Taylor, 4 Pet. (U. S.) 349, 7 L. ed. 882.

4. Bender *v.* Stewart, 75 Ind. 88; Minter *v.* Durham, 13 Oreg. 470, 11 Pac. 231; Davis *v.* Chapman, 24 Fed. 674.

5. Howe *v.* Howe, 90 Iowa 582, 58 N. W. 908; Davis *v.* Cass, 72 Miss. 985, 18 So. 454; Willard *v.* Strong, 14 Vt. 532, 39 Am. Dec. 240. See also Stoll *v.* Griffith, 41 Wash. 37, 82 Pac. 1025.

Tax title before creation of cotenancy.— Where a presumption of death arose and some of the heirs of the supposed deceased asserted a title against their coheirs in possession and holding under a tax title obtained before the arising of said presumption, it was held that those in possession will be protected therein. Webster *v.* Webster, 55 Ill. 325. Where a purchaser of tax title assigns his tax certificate to one who subsequent to such assignment becomes a tenant in common, such assignee is not barred from claiming the benefit of such assignment, except as he may be estopped from taking title thereunder to the prejudice of his cotenants. Flinn *v.* McKinley, 44 Iowa 68; Weare *v.* Van Meter, 42 Iowa 128, 20 Am. Rep. 616. *Compare* Hoyt *v.* Lightbody, 98 Minn. 189, 108 N. W. 843, 116 Am. St. Rep. 358.

its inuring to the benefit of his alleged cotenant.[6] Where neither an alleged cotenant, nor any one in privity with him, questions the validity of the tax deed, the deed will not be declared void merely on the ground of tenancy in common.[7] It is not necessary that a tenant in common, seeking to avail himself of possession and payment of taxes by his cotenant should show, to establish the fact of his cotenancy, that the conveyance under which said cotenants claim passed an absolute title.[8]

b. Contribution; Lien. Each cotenant being, in the absence of statute or agreement, equally bound to keep the taxes paid, one paying all is entitled to reimbursement with interest according to the respective proportionate shares of the cotenants,[9] and one tenant in common who redeems the property from taxes or purchases a tax title has a claim against his coöwners for contribution according to their respective shares,[10] even though the land was not listed for

6. Willcuts *v.* Rollins, 85 Iowa 247, 52 N. W. 199. See also Alexander *v.* Sully, 50 Iowa 192.

7. Burgett *v.* Williford, 56 Ark. 187, 19 S. W. 750, 35 Am. St. Rep. 96; Boynton *v.* Veldman, 131 Mich. 555, 91 N. W. 1022; Miller *v.* Donahue, 96 Wis. 498, 71 N. W. 900.

8. West Chicago Park Com'rs *v.* Coleman, 108 Ill. 591.

9. *Arkansas.*— Haines *v.* McGlone, 44 Ark. 79.

Illinois.— Cheney *v.* Ricks, 187 Ill. 171, 58 N. E. 234; Morgan *v.* Herrick, 21 Ill. 481; Glos *v.* Clark, 97 Ill. App. 609 [*reversed* on other grounds in 199 Ill. 147, 65 N. E. 135].

Indiana.— Schissel *v.* Dickson, 129 Ind. 139, 28 N. E. 540; Eads *v.* Retherford, 114 Ind. 273, 16 N. E. 587, 5 Am. St. Rep. 611.

Iowa.—Hipp *v.* Crenshaw, (1883) 17 N. W. 660; Flinn *v.* McKinley, 44 Iowa 68; Oliver *v.* Montgomery, 39 Iowa 601.

Kentucky.— Montgomery *v.* Montgomery, 119 Ky. 761, 78 S. W. 465, 80 S. W. 1108, 25 Ky. L. Rep. 1682.

Massachusetts.— Dewing *v.* Dewing, 165 Mass. 230, 42 N. E. 1128; Hurley *v.* Hurley, 148 Mass. 444, 19 N. E. 545, 2 L. R. A. 172; Kites *v.* Church, 142 Mass. 586, 8 N. E. 743.

Minnesota.— Hoyt *v.* Lightbody, 98 Minn. 189, 108 N. W. 843, 116 Am. St. Rep. 358; Van Brunt *v.* Gordon, 53 Minn. 227, 54 N. W. 1118.

Missouri.— Bates *v.* Hamilton, 144 Mo. 1, 45 S. W. 641, 66 Am. St. Rep. 407; Stephens *v.* Ells, 65 Mo. 456.

New York.—Arthur *v.* Arthur, 76 N. Y. App. Div. 330, 78 N. Y. Suppl. 486; Cole *v.* Cole, 57 Misc. 490, 108 N. Y. Suppl. 124; McAlear *v.* Delaney, 19 N. Y. Wkly. Dig. 252.

Pennsylvania.— Devlin's Estate, 5 Pa. Dist. 125, 17 Pa. Co. Ct. 433, 12 Montg. Co. L. Rep. 126.

Virginia.— Lagorio *v.* Dozier, 91 Va. 492, 22 S. E. 239, holding that such payment being but the performance of a duty, no ouster can be inferred therefrom. But see Downey *v.* Strouse, 101 Va. 226, 43 S. E. 348.

United States.— McClintock *v.* Fontaine, 119 Fed. 448.

Contribution to remainder-men.—A tenant in common of an estate in expectancy has no right to demand contribution of his cotenants therein for discharging a lien on the estate in the hands of a life-tenant except where such discharge is necessary to prevent a destruction of the expectancy, and if such payment is so necessary then the fact that the paying remainder-men reside with the life-tenant is immaterial. Harrison *v.* Harrison, 56 Miss. 174; Zapp *v.* Miller, 109 N. Y. 51, 15 N. E. 889.

A tenant in common who has paid the entire purchase-price and is in possession, collecting the rents and profits and not accounting therefor, is not bound to pay the taxes assessed to his cotenant. Oglesby *v.* Hollister, 76 Cal. 136, 18 Pac. 146, 9 Am. St. Rep. 177.

10. *Alabama.*— Donnor *v.* Quartermas, 90 Ala. 164, 8 So. 715, 24 Am. St. Rep. 778.

Arkansas.—Cocks *v.* Simmons, 55 Ark. 104, 17 S. W. 594, 29 Am. St. Rep. 28.

District of Columbia.—Alexander *v.* Douglass, 6 D. C. 247.

Florida.— Williams *v.* Clyatt, 53 Fla. 987, 43 So. 441.

Illinois.— Burgett *v.* Taliaferro, 118 Ill. 503, 9 N. E. 334.

Indiana.—Schissel *v.* Dickson, 129 Ind. 139, 28 N. E. 540; Eads *v.* Retherford, 114 Ind. 273, 16 N. E. 587, 5 Am. St. Rep. 611; Hatfield *v.* Mahoney, 39 Ind. App. 499, 79 N. E. 408, 1086.

Iowa.— Phillips *v.* Wilmarth, 98 Iowa 32, 66 N. W. 1053; Austin *v.* Barrett, 44 Iowa 488; Flinn *v.* McKinley, 44 Iowa 68; Oliver *v.* Montgomery, 39 Iowa 601.

Kentucky.— Montgomery *v.* Montgomery, 119 Ky. 761, 78 S. W. 465, 80 S. W. 1108, 25 Ky. L. Rep. 1682.

Louisiana.— Hake *v.* Lee, 106 La. 482, 31 So. 54.

Maine.—Williams *v.* Gray, 3 Me. 207, 14 Am. Dec. 234.

Massachusetts.— Hurley *v.* Hurley, 148 Mass. 444, 19 N. E. 545, 2 L. R. A. 172.

Mississippi.—Davidson *v.* Wallace, 53 Miss. 475.

New Jersey.— Roll *v.* Everett, 73 N. J. Eq. 697, 71 Atl. 263.

Ohio.— Clark *v.* Lindsey, 47 Ohio St. 437, 25 N. E. 422, 9 L. R. A. 740.

assessment according to technical accuracy;[11] but if an assessment be void, the payment thereof by one tenant in common creates no liability on the part of the non-paying cotenants.[12] The cotenant paying a valid tax claim is entitled to hold the common property till the cotenants pay their proportionate part of such expenditures,[13] being entitled to a lien upon the property until full contribution,[14] which should include not merely the amount necessary to redeem from the tax, but all proper expenses growing out of the proceeding.[15] The right does not attach to the refund of a tax assessment paid on the joint property during the partnership of the cotenants therein;[16] and the right to contribution or reimbursement cannot be enforced when such claim would be inconsistent with a former act of the claimant of such a character as under the circumstances ought to prevent or estop him from claiming said right;[17] or as against a purchaser without notice of the right to make such a claim, nor can such a claim be made a charge upon the land;[18] and where a cotenant having purchased the common

Tennessee.—Gass *v.* Waterhouse, (Ch. App. 1900) 61 S. W. 450.

Vermont.—Wilmot *v.* Hurlburt, 67 Vt. 671, 32 Atl. 861.

Wisconsin.—Allen *v.* Allen, 114 Wis. 615, 91 N. W. 218.

See 45 Cent. Dig. tit. "Tenancy in Common," § 60.

Such claim may be enforced in equity. Fritz *v.* Ramspott, 76 Minn. 489, 79 N. W. 520; Richards *v.* Richards, 31 Pa. Super. Ct. 509. Therefore, where a tenant in common seeks to have a tax deed for the common property to a cotenant set aside as a cloud on the title, he is compelled to tender to his cotenant holding said deed the amount paid for him in redemption of the land, together with taxes subsequently paid thereon with interest. Koboliska *v.* Swehla, 107 Iowa 124, 77 N. W. 576; Farmers' Nat. Bank *v.* Robinson, (Kan. 1898) 53 Pac. 762; Morris *v.* Roseberry, 46 W. Va. 24, 32 S. E. 1019. The tender need not be more than the share due from him so tendering. Winter *v.* Atkinson, 28 La. Ann. 650.

Writ of entry.— Until the tender of his share of taxes by a cotenant he cannot maintain a writ of entry against the cotenant so paying the taxes. Watkins *v.* Eaton, 30 Me. 529, 50 Am. Dec. 637.

Limitations will not run against the cotenants until refusal to contribute. Phillips *v.* Wilmarth, 98 Iowa 32, 66 N. W. 1053.

The lien may be enforced against a grantee of a cotenant who takes title by a quitclaim deed. Young *v.* Bigger, 73 Kan. 146, 84 Pac. 747.

11. Eads *v.* Retherford, 114 Ind. 273, 16 N. E. 587, 5 Am. St. Rep. 611.

12. Eads *v.* Retherford, 114 Ind. 273, 16 N. E. 587, 5 Am. St. Rep. 611; Cole *v.* Cole, 57 Misc. (N. Y.) 490, 108 N. Y. Suppl. 124.

13. Hurley *v.* Hurley, 148 Mass. 444, 19 N. E. 545, 2 L. R. A. 172; Wilmot *v.* Lathrop, 67 Vt. 671, 32 Atl. 861.

14. *Arkansas.*— Moore *v.* Woodall, 40 Ark. 42.

Illinois.— Wilton *v.* Tazwell, 86 Ill. 29; Phelps *v.* Reeder, 39 Ill. 172.

Indiana.— Ryason *v.* Dunten, 164 Ind. 85, 73 N. E. 74.

Iowa.— Hipp *v.* Crenshaw, (1883) 17 N. W. 660; Stover *v.* Cory, 53 Iowa 708, 6 N. W. 64; Oliver *v.* Montgomery, 42 Iowa 36.

Massachusetts.— Hurley *v.* Hurley, 148 Mass. 444, 19 N. E. 545, 2 L. R. A. 172.

New Jersey.— Roll *v.* Everett, 73 N. J. Eq. 697, 71 Atl. 263; Thiele *v.* Thiele, 57 N. J. Eq. 98, 40 Atl. 446.

Ohio.— Clark *v.* Lindsey, 47 Ohio St. 437, 25 N. E. 422, 9 L. R. A. 740.

Tennessee.— Tisdale *v.* Tisdale, 2 Sneed 596, 64 Am. Dec. 775.

Texas.— Branch *v.* Makeig, 9 Tex. Civ. App. 399, 28 S. W. 1050.

Washington.— Stone *v.* Marshall, 52 Wash. 375, 100 Pac. 858.

Wisconsin.— Saladin *v.* Kraayvanger, 96 Wis. 180, 70 N. W. 1113.

United States.— McClintock *v.* Fontaine, 119 Fed. 448.

See 45 Cent. Dig. tit. "Tenancy in Common," § 61.

Payment of taxes as sole owner.— Payment of taxes in the capacity of sole owner by one believing himself to be such owner does not entitle him to a lien. Van Ormer *v.* Harley, 102 Iowa 150, 71 N. W. 241; O'Hara *v.* Quinn, 20 R. I. 176, 38 Atl. 7.

15. Alexander *v.* Douglass, 6 D. C. 247; Fallon *v.* Chidester, 46 Iowa 588, 26 Am. Rep. 164; Clark *v.* Lindsey, 47 Ohio St. 437, 25 N. E. 422, 9 L. R. A. 740; Allen *v.* Allen, 114 Wis. 615, 91 N. W. 218.

16. Clark *v.* Platt, 39 N. Y. App. Div. 670, 58 N. Y. Suppl. 361; Connell *v.* Welch, 101 Wis. 8, 76 N. W. 596.

17. Van Ormer *v.* Harley, 102 Iowa 150, 71 N. W. 241; Wistar's Appeal, 125 Pa. St. 526, 17 Atl. 460, 11 Am. St. Rep. 917; O'Hara *v.* Quinn, 20 R. I. 176, 38 Atl. 7.

Where persons, claiming adversely, paid taxes they cannot seek reimbursement from their cotenants after their cotenants' right has been established in ejectment, as the payment will be presumed to have been made in the right of said adverse claimants and for their own benefit. Wistar's Appeal, 125 Pa. St. 526, 17 Atl. 460, 11 Am. St. Rep. 917.

18. Stover *v.* Cory, 53 Iowa 708, 6 N. W. 64. *Compare* Oliver *v.* Montgomery, 42 Iowa 36.

Such equities are inferior to that of a bona fide mortgagee after the purchase of

property under a decree of partition and subsequently paid taxes constituting a lien thereon, it is held that such payment having been made by him in the character of purchaser and not of cotenant, he is not entitled to contribution.[19] The claim for contribution may be pleaded as a set-off in an action between the cotenants.[20]

3. PURCHASING COTENANT'S INTEREST. Although a tenant in common may not buy an outstanding paramount title so as to oust his cotenant, yet there is no reason why he may not buy in the independent interest of another tenant in common,[21] and a purchase by one cotenant of the interest of another does not inure to the benefit of all the remaining tenants in common.[22] The tenant of a tenant in common is not estopped from purchasing the titles of the other cotenants.[23]

E. Repairs, Improvements, and Expenses For Care and Management of Property — 1. DUTY AND RIGHT TO REPAIR. Tenants in common are not as such agents for each other, nor are they bound to protect each other's interests and to prevent them from deteriorating in value; the duty to repair is equal;[24] and where a cotenant improves the common property at his own expense, thereby putting it to its only beneficial use, he is not liable to his cotenant for trespass.[25] If there be authority, by agreement or otherwise, to improve the property at the expense of the cotenants therein, then the cotenant so improving will be entitled to contribution from his cotenants if he act prudently and in good faith; and under such circumstances the cotenant so improving will not be held responsible to the others for mere errors of judgment either as to the character of the improvement or the construction thereof.[26]

2. CONTRIBUTION FOR EXPENSES; SERVICES — a. Rule Stated. Tenants in common are not ordinarily entitled to charge each other for services rendered in the care and management of the common property, in the absence of statute or special agreement to the contrary, or of such facts as evidence a mutual under-

the whole property at a tax-sale by one tenant in common. Atkinson *v.* Hewett, 63 Wis. 396, 23 N. W. 889.

19. Stephens *v.* Ells, 65 Mo. 456.

20. Fritz *v.* Ramspott, 76 Minn. 489, 79 N. W. 520; Kean *v.* Connelly, 25 Minn. 222, 23 Am. Rep. 458; Starks *v.* Kirschgraber, 134 Mo. App. 211, 113 S. W. 1149; Schneider Granite Co. *v.* Taylor, 64 Mo. App. 37.

21. Snell *v.* Harrison, 104 Mo. 158, 16 S. W. 152; Woodlief *v.* Woodlief, 136 N. C. 133, 48 S. E. 583.

22. First Nat. Bank *v.* Bissell, 4 Fed. 694, 2 McCrary 73 [*affirmed* in 114 U. S. 252, 5 S. Ct. 851, 29 L. ed. 126].

Buying at public sale.— The doctrine that a purchase of an outstanding title by one joint tenant will be held to be for the benefit of his cotenants, and not adverse to them, has no application to a case where the tenant buys the interests of his cotenants at a public sale, and thereby obtains or attempts and claims to obtain their title. Peck *v.* Lockridge, 97 Mo. 549, 11 S. W. 246. *Compare* Quackenbush *v.* Leonard, 9 Paige (N. Y.) 334.

23. Catlin *v.* Kidder, 7 Vt. 12.

24. Wolfe *v.* Childs, 42 Colo. 121, 94 Pac. 292, 126 Am. St. Rep. 152; Adams *v.* Manning, 51 Conn. 5; Taylor *v.* Baldwin, 10 Barb. (N. Y.) 582 [*affirmed* in 10 Barb. 626]; Moss *v.* Rose, 27 Oreg. 595, 41 Pac. 666, 50 Am. St. Rep. 743.

The tenant in possession should pay for ordinary repairs. Cole *v.* Cole, 57 Misc. (N. Y.) 490, 108 N. Y. Suppl. 124.

Statutory power in selectmen for the making of repairs to mills, mill-dams, or flumes owned by cotenancy when the privilege of the water is so owned, and to charge the repairs in proportion to the respective interests of the cotenants, must be strictly exercised, and does not empower the selectmen either to make such repairs or assessments other than by statute provided, or as against any one not especially in such statute designated. Roberts *v.* Peavey, 27 N. H. 477.

25. Johnson *v.* Conant, 64 N. H. 109, 7 Atl. 116.

26. Nelson *v.* Clay, 7 J. J. Marsh. (Ky.) 138, 23 Am. Dec. 387; Holt *v.* Couch, 125 N. C. 456, 34 S. E. 703, 74 Am. St. Rep. 648; Reed *v.* Jones, 8 Wis. 421.

The care required to be exercised in relation to the common property, if movable, is analogous to that of a bailee without hire; that is, ordinary care; it is not enough to show that the one in possession used the same care as he did in regard to his separate property, as there is no evidence as to whether or not such care amounted to ordinary care. Guillot *v.* Dossat, 4 Mart. (La.) 203, 6 Am. Dec. 702.

A declaration to a disinterested person by the tenant in common operating the common property that he is doing so entirely at his own expense is not sufficient to prove a contract on his part not to make any demand

standing that such payment shall be made.[27] But one cotenant by agreement, express or implied, with the other may become entitled to contribution for services rendered or expenditures made in the management and care of the common property,[28] and a tenant in common is held to be entitled to contribution for expenditures absolutely necessary for the benefit and preservation of the common

for such expenditures against his cotenants. Danforth *v.* Moore, 55 N. J. Eq. 127, 35 Atl. 410.

27. *Arkansas.*— Dunavant *v.* Fields, 68 Ark. 534, 60 S. W. 420, holding that a devisee was entitled to reimbursement for actual expenses in making improvements, but not for his services in so doing in the absence of an agreement therefor.

Florida.—Anderson *v.* Northrop, 44 Fla. 472, 33 So. 419; Fuller *v.* Fuller, 23 Fla. 236, 2 So. 426.

Maryland.— Hamilton *v.* Conine, 28 Md. 635, 92 Am. Dec. 724.

Michigan.— Gay *v.* Berkey, 137 Mich. 658, 100 N. W. 920.

New Jersey.— Switzer *v.* Switzer, 57 N. J. Eq. 421, 41 Atl. 486; Hattersley *v.* Bissett, 52 N. J. Eq. 693, 30 Atl. 86.

New York.— Barry *v.* Colville, 129 N. Y. 302, 29 N. E. 307 [*affirming* 13 N. Y. Suppl. 4]; Central Trust Co. *v.* New York Equipment Co., 87 Hun 421, 34 N. Y. Suppl. 349; Cole *v.* Cole, 57 Misc. 490, 108 N. Y. Suppl. 124; Franklin *v.* Robinson, 1 Johns. Ch. 157.

Pennsylvania.— Croasdale *v.* Von Boyneburgk, 206 Pa. St. 15, 55 Atl. 770; Thompson *v.* Newton, 8 Pa. Cas. 118, 7 Atl. 64, oil wells.

Vermont.— Redfield *v.* Gleason, 61 Vt. 220, 17 Atl. 1075, 15 Am. St. Rep. 889.

See 45 Cent. Dig. tit. "Tenancy in Common," § 93.

28. *Alabama.*— Russell *v.* Russell, 62 Ala. 48; Strother *v.* Butler, 17 Ala. 733.

California.— Thompson *v.* Salmon, 18 Cal. 632.

Illinois.— Mix *v.* White, 36 Ill. 484; Haven *v.* Mehlgarten, 19 Ill. 91, holding that absent cotenants of a ferry privilege, which required the owners to construct and maintain the ferry in proper repair for public use, having knowledge of repairs made thereon and no demand having been made upon them for payment therefor, are liable to contribute toward such repairs made by their cotenants.

Iowa.— Sears *v.* Munson, 23 Iowa 380.

Louisiana.— Percy *v.* Millaudon, 6 Mart. N. S. 616, 17 Am. Dec. 196.

Maine.— Jordan *v.* Soule, 79 Me. 590, 12 Atl. 786.

Maryland.— Ranstead *v.* Ranstead, 74 Md. 378, 22 Atl. 405.

Massachusetts.— Carroll *v.* Carroll, 188 Mass. 558, 74 N. E. 913; Wheeler *v.* Wheeler, 111 Mass. 247 (an agreement by heirs to live together on the estate, and pay the debts, taxes, and expenses of the common living); Field *v.* Craig, 8 Allen 357; Dodge *v.* Wilkinson, 3 Metc. 292; Gardner *v.* Cleveland, 9 Pick. 334; Gwinneth *v.* Thompson, 9 Pick. 31, 19 Am. Dec. 350; Converse *v.* Ferre, 11 Mass. 325.

Michigan.— Gay *v.* Berkey, 137 Mich. 658, 100 N. W. 920; Boyce *v.* Boyce, 124 Mich. 696, 83 N. W. 1013.

Minnesota.— Oliver *v.* Hedderly, 32 Minn. 455, 21 N. W. 478.

New York.— Matter of Robinson, 40 N. Y. App. Div. 23, 57 N. Y. Suppl. 502; Gedney *v.* Gedney, 19 N. Y. App. Div. 407, 46 N. Y. Suppl. 590 [*affirmed* in 160 N. Y. 471, 55 N. E. 1]; Moore *v.* Erie R. Co., 7 Lans. 39; Grannis *v.* Cook, 3 Thomps. & C. 299; Cole *v.* Cole, 57 Misc. 490, 108 N. Y. Suppl. 124.

Tennessee.— Gass *v.* Waterhouse, (Ch. App. 1900) 61 S. W. 450.

Vermont.— Redfield *v.* Gleason, 61 Vt. 220, 17 Atl. 1075, 15 Am. St. Rep. 889; Fisher *v.* Kinaston, 18 Vt. 489; Kidder *v.* Rixford, 16 Vt. 169, 42 Am. Dec. 504.

Wisconsin.— Clark *v.* Plummer, 31 Wis. 442.

See 45 Cent. Dig. tit. "Tenancy in Common," §§ 93, 97.

On an agreement between cotenants that one of them should make a sale of the common property and receive a commission, it was held that he was entitled to the commission upon his being the procuring cause of the sale. McCreery *v.* Green, 38 Mich. 172.

Such an agreement is usually liberally construed (Gould *v.* Hayne, 54 Fed. 951. See also Beezley *v.* Crossen, 14 Oreg. 473, 13 Pac. 306) in the light of the relationship existing between them. Thus, an agreement between tenants in common to work the land for one third of the proceeds will be construed to be an agreement of hire and not of lease. Moreland *v.* Strong, 115 Mich. 211, 73 N. W. 140, 69 Am. St. Rep. 553. An agreement by two tenants in common to share the expense of fencing includes expenses of a survey necessary to determine the boundary of the land. Gould *v.* Hayne, *supra*. But there is no recovery for the expense of increasing the size of a flume without a contract therefor. Middlebury Electric Co. *v.* Tupper, 70 Vt. 603, 41 Atl. 582.

Interest.—Where there is an agreement that from the proceeds of a sale the expenditures made by the tenants in common, respectively, on the property shall first be paid to them respectively, as debts, such expenditures will not bear interest from the time when they were made to the time of such agreement. Danforth *v.* Moore, 55 N. J. Eq. 127, 35 Atl. 410.

Where several persons purchase an estate to be held in common, and one pays the purchase-money, the one so paying is entitled to sustain a bill for contribution or may set up such claim in mitigation of damages. Mix *v.* White, 36 Ill. 484; Higham *v.* Harris, 108 Ind. 246, 8 N. E. 255; Brown *v.* Budd, 2 Ind. 442; Burrell *v.* Bull, 3 Sandf. Ch. (N. Y.) 15; Whitehead *v.* Jones, 197 Pa. St. 511, 47 Atl. 978. But such right does not

property,[29] and the right is even extended to charge the cotenant with a just proportion of the reasonable expenses incurred fairly and in good faith for the

accrue until suit for partition, until which time limitations does not apply. Grove *v.* Grove, 100 Va. 556, 42 S. E. 312; Ballou *v.* Ballou, 94 Va. 350, 26 S. E. 840, 64 Am. St. Rep. 733; Tompkins *v.* Mitchell, 2 Rand. (Va.) 428.

A claim for repairs to the common estate after the death of a cotenant cannot be prosecuted against the decedent's estate, but it may be prosecuted against the decedent's heirs or personal representatives. Sears *v.* Munson, 23 Iowa 380; De Grange *v.* De Grange, 96 Md. 609, 54 Atl. 663.

Set-off.—Where a judgment is obtained under a contract for payment for services in relation to the common land, out of the sale thereof, and there is a set-off by some of the cotenants to said claim, the judgment should provide for an allowance of such set-off. Cotton *v.* Rand, (Tex. Civ. App. 1898) 51 S. W. 55; Galveston, etc., R. Co. *v.* Stockton, 15 Tex. Civ. App. 145, 38 S. W. 647; Vermont L. & T. Co. *v.* Cardin, 19 Wash. 304, 53 Pac. 164.

Limitations.—A claim of a cotenant for services, under an express contract authorizing him to deduct a certain sum in the fall of each year from the rents of the common property for his services, without right to incur any debts against the common property, was subject to limitations. Rosamond *v.* Rosamond, (Tex. Civ. App. 1909) 120 S. W. 520.

29. *Arkansas.*— Dunavant *v.* Fields, 68 Ark. 534, 60 S. W. 420; Bowman *v.* Pettit, 68 Ark. 126, 56 S. W. 780.

Illinois.— Gardner *v.* Diederichs, 41 Ill. 158; Haven *v.* Mehlgarten, 19 Ill. 91; Griffith *v.* Robinson, 14 Ill. App. 377.

Iowa.— Sullivan *v.* Brennan, 94 Iowa 743, 63 N. W. 678.

Kentucky.— Hotopp *v.* Morrison Lodge No. 76, 110 Ky. 987, 63 S. W. 44, 23 Ky. L. Rep. 418; Vermillion *v.* Nickell, (1908) 114 S. W. 270.

Louisiana.— Percy *v.* Millaudon, 6 Mart. N. S. 616, 17 Am. Dec. 196.

Maine.—Williams *v.* Coombs, 88 Me. 183, 33 Atl. 1073.

Massachusetts.— Dodge *v.* Wilkinson, 3 Metc. 292; Gwinneth *v.* Thompson, 9 Pick. 31, 19 Am. Dec. 350.

New York.— Gedney *v.* Gedney, 19 N. Y. App. Div. 407, 46 N. Y. Suppl. 590 [*affirmed* in 160 N. Y. 471, 55 N. E. 1]; Grannis *v.* Cook, 3 Thomps. & C. 299. See also Wood *v.* Merritt, 2 Bosw. 368.

Pennsylvania.— Dech's Appeal, 57 Pa. St. 467; Devlin's Estate, 5 Pa. Dist. 125, 17 Pa. Co. Ct. 433, 12 Montg. Co. Rep. 126.

Philippine.—Trinidad *v.* Ricafort, 7 Philippine 449.

Rhode Island.— Raftery *v.* Monahan, 22 R. I. 558, 48 Atl. 940.

Texas.— Cotton *v.* Coit, (Civ. App. 1895) 30 S. W. 281 [*reversed* on other grounds in 88 Tex. 414, 31 S. W. 1061].

Vermont.— Strong *v.* Hunt, 20 Vt. 614.

Wisconsin.— Stewart *v.* Stewart, 90 Wis. 516, 63 N. W. 886, 48 Am. St. Rep. 949; Clark *v.* Plummer, 31 Wis. 442.

England.— *In re* Cook, [1896] 1 Ch. 923; 65 L. J. Ch. 654, 74 L. T. Rep. N. S. 652, 44 Wkly. Rep. 646.

See 45 Cent. Dig. tit. "Tenancy in Common," § 97.

But see Stickley *v.* Mulrooney, 36 Colo. 242, 87 Pac. 547, holding a cotenant not entitled to contribution out of a fund in court paid on an order of court in an action for an accounting for expenditures made in relation to the common property after such payment into court.

Where costs are incurred by a tenant in common in a necessary and proper suit for the benefit of the common property or the owners thereof in common as such, he is entitled to contribution. Bowman *v.* Pettit, 68 Ark. 126, 56 S. W. 780; Estill *v.* Francis, 89 S. W. 172, 28 Ky. L. Rep. 225; Gregg *v.* Patterson, 9 Watts & S. (Pa.) 197; McClintock *v.* Fontaine, 119 Fed. 448; Gage *v.* Mulholland, 16 Grant Ch. (U. C.) 145. This rule has been held to apply against one who allowed his cotenant to take the hazards and labor of litigation relating to the property owned in common, and accepted the results of such litigation, even though he did not want the suit brought or prosecuted, or was inactive pending its course. Estill *v.* Francis, 89 S. W. 172, 28 Ky. L. Rep. 225.

Defending title.—A tenant in common in sole possession will ordinarily be allowed for necessary counsel fees paid in defending a suit to protect the property. Hitchcock *v.* Skinner, Hoffm. (N. Y.) 21. See also Hume *v.* Howard, (Tex. Civ. App. 1898) 48 S. W. 202. And it has been held that where moneys have been expended in defending the title and improving the common property under an agreement between the cotenants to pay said expenditures, a lien attaches to the common property in favor of the one so making said expenditures. Bowman *v.* Pettit, 68 Ark. 126, 56 S. W. 780. But attorneys employed by part of the tenants in common of an estate, to protect the estate, cannot recover any part of the compensation from the others, altnough the services inure to the benefit of all. Mayfield *v.* McKnight, (Tenn. Ch. App. 1899) 56 S. W. 42. A presumption of law in favor of consent may, however, arise. Barton *v.* Gray, 48 Mich. 164, 12 N. W. 30; Taylor *v.* Baldwin, 10 Barb. (N. Y.) 582 [*affirmed* in 10 Barb. 626].

Ky. St. (1903) § 489, allowing costs, fees, and other expenses incurred by one coparcener or joint owner does not apply to expenses incurred in defending the joint title in unsuccessful suits brought by third persons. Francis *v.* Million, 80 S. W. 486, 26 Ky. L. Rep. 42.

The payment of taxes as ground for contribution see *supra*, III, D, 2, b.

The cotenant is not entitled to contribution as a matter of right, but purely from a

benefit of the common property or such as were from necessity dispensed for the common estate,[30] even though the conduct of the paying tenant may not have been strictly equitable.[31] But one cotenant in common is ordinarily not responsible to his cotenant for the cost of improvements or repairs upon the common property unless he so agreed or ratified the act of making them or unless it is shown that the improvements or repairs were absolutely necessary to the enjoyment or preservation of the property.[32] Where the expenditures do not

desire of the court to do justice between all the parties. Ballou *v.* Ballou, 94 Va. 350, 26 S. E. 840, 64 Am. St. Rep. 733.

Non-payment of contribution does not constitute abandonment, since contribution is enforceable. Gosselin *v.* Smith, 154 Ill. 74, 39 N. E. 980.

Tenants in common having warranted the soundness of the common property sold by them, one of them, upon the property proving defective, paying for said defect without suit is entitled to contribution. Davis *v.* Burnett, 49 N. C. 71, 67 Am. Dec. 263.

Woodland or arable land.— The general rule that tenants in common are entitled to contribution, as above announced, is said not to apply to woodland or arable land. Beaty *v.* Bordwell, 91 Pa. St. 438; Dech's Appeal, 57 Pa. St. 467; Anderson *v.* Greble, 1 Ashm. 136; Ward *v.* Ward, 40 W. Va. 611, 21 S. E. 746, 52 Am. St. Rep. 911, 29 L. R. A. 449.

Ordinarily the husband or wife of the cotenant having so expended money is entitled to contribution. Perkins *v.* Smith, 37 S. W. 72, 18 Ky. L. Rep. 509; Chace *v.* Durfee, 16 R. I. 248, 14 Atl. 919.

Expenses after decease or before cotenancy. — There can be no claim against the estate of a deceased cotenant for repairs or improvements made on the common property after his decease; such a claim, if any, must be made against his successors in the cotenancy (De Grange *v.* De Grange, 96 Md. 609, 54 Atl. 663), nor can there be any claim as against cotenants for expenditures before the commencement in fact of the cotenancy (Pulse *v.* Osborn, (Ind. App. 1901) 60 N. E. 374; Lasby *v.* Crewson, 21 Ont. 255), and so of repairs made before acquiring title (Davis *v.* Sawyer, 66 N. H. 34, 20 Atl. 100).

30. *California.*—McCord *v.* Oakland Quicksilver Min. Co., 64 Cal. 134, 27 Pac. 863, 49 Am. Rep. 686.

Connecticut.— Fowler *v.* Fowler, 50 Conn. 256.

Hawaii.— Kanakamaikai *v.* Pahulio, 12 Hawaii 1.

Massachusetts.— Gardner *v.* Cleveland, 9 Pick. 334; Gwinneth *v.* Thompson, 9 Pick. 31, 19 Am. Dec. 350.

Michigan.— Loomis *v.* O'Neal, 73 Mich. 582, 41 N. W. 701.

Mississippi.— Davidson *v.* Wallace, 53 Miss. 475.

New Jersey.— Lloyd *v.* Turner, 70 N. J. Eq. 425, 62 Atl. 771.

North Carolina.— Peyton *v.* Smith, 22 N. C. 325.

Pennsylvania.—Anderson *v.* Greble, 1 Ashm. 136.

Philippine.—Trinidad *v.* Ricafort, 7 Philippine 449.

Rhode Island.— Raftery *v.* Monahan, 22 R. I. 558, 48 Atl. 940.

Texas.— Broom *v.* Pearson, (Civ. App. 1904) 81 S. W. 753 [*affirmed* in 98 Tex. 469, 85 S. W. 790, 86 S. W. 733]; Cotton *v.* Coit, (Civ. App. 1895) 30 S. W. 281 [*reversed* on other grounds in 88 Tex. 414, 31 S. W. 1061].

Vermont.— Kidder *v.* Rixford, 16 Vt. 169, 42 Am. Dec. 504.

Canada.— *In re* Curry, 25 Ont. App. 267.

See 45 Cent. Dig. tit. "Tenancy in Common," § 97 *et seq.*

Where a suit is brought by third parties because of damages arising out of *bona fide* improvements for the benefit of the common property each cotenant therein must contribute toward the amount of such damage in proportion to his proprietary interest in the common property. Dodge *v.* Wilkinson, 3 Metc. (Mass.) 292.

Money paid to an agent for collection of rents is allowable as a credit. Collins *v.* Collins, 8 N. Y. App. Div. 502, 40 N. Y. Suppl. 902.

31. Russell *v.* Defrance, 39 Mo. 506; Dettering *v.* Nordstrom, 148 Fed. 81, 78 C. C. A. 157. But see Conrad *v.* Starr, 50 Iowa 470, holding that where money had been raised by a mortgage for the purpose of improving the common property and a tenant expending the money misapplied it, he could not recover from his cotenants for any improvements he had made.

32. *Alabama.*— Merchants' Bank *v.* Foster, 124 Ala. 696, 27 So. 513.

Colorado.— Rico Reduction, etc., Co. *v.* Musgrave, 14 Colo. 79, 23 Pac. 458; Neuman *v.* Dreifurst, 9 Colo. 228, 11 Pac. 98.

Georgia.— Bazemore *v.* Davis, 55 Ga. 504.

Illinois.— Chambers *v.* Jones, 72 Ill. 275.

Indiana.— Harry *v.* Harry, 127 Ind. 91, 26 N. E. 562.

Iowa.— Frye *v.* Gullion, 143 Iowa 719, 121 N. W. 563; Cooper *v.* Brown, 143 Iowa 482, 122 N. W. 144.

Louisiana.— Moreira *v.* Schwan, 113 La. 643, 37 So. 542 (applying rent of storehouse toward expense of plaintiff after notice to cease such application); Conrad *v.* Burbank, 25 La. Ann. 112; Morgan *v.* Morgan, 23 La. Ann. 502; Becnel *v.* Becnel, 23 La. Ann. 150; Smith *v.* Wilson, 10 La. Ann. 255.

Maine.— Reed *v.* Bachelder, 34 Me. 205.

Massachusetts.— Calvert *v.* Aldrich, 99 Mass. 74, 96 Am. Dec. 693; Doane *v.* Badger, 12 Mass. 65; Converse *v.* Ferre, 11 Mass. 325; Carver *v.* Miller, 4 Mass. 559.

inure to the common benefit of the common estate there is no contribution.[33] Where a tenant in common may recover contribution for necessary repairs, it is

Michigan.— Stackable *v.* Stackable, 65 Mich. 515, 32 N. W. 808.

Minnesota.—Walter *v.* Greenwood, 29 Minn. 87, 12 N. W. 145.

Mississippi.— Bennett *v.* Bennett, 84 Miss. 493, 36 So. 452.

Missouri.— Picot *v.* Page, 26 Mo. 398.

Nevada.—Welland *v.* Williams, 21 Nev. 230, 29 Pac. 403.

New Hampshire.—Wiggin *v.* Wiggin, 43 N. H. 561, 80 Am. Dec. 192; Stevens *v.* Thompson, 17 N. H. 103.

New York.— Havey *v.* Kelleher, 36 N. Y. App. Div. 201, 56 N. Y. Suppl. 889 (erecting buildings as a private business venture without consent of cotenants, and insuring the common property in his own name); Myers *v.* Bolton, 89 Hun 342, 35 N. Y. Suppl. 577; Coakley *v.* Mahar, 36 Hun 157; Ford *v.* Knapp, 31 Hun 522 [*reversed* on other grounds in 102 N. Y. 135, 6 N. E. 283, 55 Am. Rep. 782]; Scott *v.* Guernsey, 60 Barb. 163 [*affirmed* in 48 N. Y. 106]; Taylor *v.* Baldwin, 10 Barb. 582 [*affirmed* in 10 Barb. 626]; Cole *v.* Cole, 57 Misc. 490, 108 N. Y. Suppl. 124; Mumford *v.* Brown, 6 Cow. 475, 16 Am. Dec. 440.

Oregon.— Beezley *v.* Crossen, 14 Oreg. 473, 13 Pac. 306.

Pennsylvania.— Dech's Appeal, 57 Pa. St. 467; Crest *v.* Jack, 3 Watts 238, 27 Am. Dec. 353; Devlin's Estate, 5 Pa. Dist. 125, 17 Pa. Co. Ct. 433, 12 Montg. Co. L. Rep. 126.

Philippine.— Javier *v.* Javier, 6 Philippine 493.

South Carolina.— Thurston *v.* Dickinson, 2 Rich. Eq. 317, 46 Am. Dec. 56; Hancock *v.* Day, McMull. Eq. 298; Thompson *v.* Bostick, McMull. Eq. 75.

Vermont.— Middlebury Electric Co. *v.* Tupper, 70 Vt. 603, 41 Atl. 582.

Virginia.— Ballou *v.* Ballou, 94 Va. 350, 26 S. E. 840, 64 Am. St. Rep. 733.

Washington.— Minder *v.* Mottaz, 37 Wash. 474, 79 Pac. 996.

West Virginia.—Ward *v.* Ward, 40 W. Va. 611, 21 S. E. 746, 52 Am. St. Rep. 911, 29 L. R. A. 449.

Wisconsin.— Reed *v.* Jones, 8 Wis. 421.

England.— Leigh *v.* Dickeson, 15 Q. B. D. 60, 54 L. J. Q. B. 18, 52 L. T. Rep. N. S. 790, 33 Wkly. Rep. 538; Hill *v.* Hickin, [1897] 2 Ch. 579, 66 L. J. Ch. 717, 77 L. T. Rep. N. S. 127, 46 Wkly. Rep. 137; *In re* Cook, [1896] 1 Ch. 923, 65 L. J. Ch. 654, 74 L. T. Rep. N. S. 652, 44 Wkly. Rep. 646; *In re* Jones, [1893] 2 Ch. 461, 62 L. J. Ch. 996, 69 L. T. Rep. N. S. 45, 3 Reports 498; Heath *v.* Bostock, 5 L. J. Exch. 20.

See 45 Cent. Dig. tit. "Tenancy in Common," § 97 *et seq.* And see cases cited *infra*, this and the following notes.

Repairs and improvements made without the cotenant's consent, and before he acquired title, cannot be made the basis of contribution. Davis *v.* Sawyer, 66 N. H. 34, 20 Atl. 100.

Reimbursement for expenditures for immediate necessary repairs to a vessel in a foreign port see Hill *v.* Crocker, 87 Me. 208, 32 Atl. 878, 47 Am. St. Rep. 321. Reimbursement for money expended for repairs on a vessel in a home port denied see Benson *v.* Thompson, 27 Me. 470, 46 Am. Dec. 617.

Unless the amount of increase in income is apparent from the evidence no allowance can be made for such expenditures. Walter *v.* Greenwood, 29 Minn. 87, 12 N. W. 145.

Where a cotenant leases his moiety to another, the tenant under the lease cannot, in an action for partition, charge his landlord for repairs made during the tenancy upon the property, in the absence of a special agreement for compensation. Schmidt *v.* Constans, 82 Minn. 347, 85 N. W. 173, 83 Am. St. Rep. 437. See also Grannis *v.* Cook, 3 Thomps. & C. (N. Y.) 299.

Tenants in common cannot erect buildings on the joint or common property, and charge the other cotenants with their share of the expense, although they knew of the erecting and did not object. Crest *v.* Jack, 3 Watts (Pa.) 238, 27 Am. Dec. 353; Javier *v.* Javier, 6 Philippine 493.

An insurance premium, in the absence of a showing that it was paid for the common benefit, cannot be the basis of contribution. Farrand *v.* Gleason, 56 Vt. 333. A coöwner holding the common property adversely and insuring it cannot have reimbursement. Gilroy *v.* Richards, 26 Tex. Civ. App. 355, 63 S. W. 664.

Clearing a portion of the common land without the assent or knowledge of the cotenant and without substantially benefiting it thereby see Kidder *v.* Rixford, 16 Vt. 169, 42 Am. Dec. 504.

Statutes giving compensation for improvements to a defendant are held not to be applicable to cases of tenancy in common. Morris *v.* McKay, 40 Mich. 326; Sands *v.* Davis, 40 Mich. 14; Martin *v.* O'Conner, 37 Mich. 440; Holt *v.* Couch, 125 N. C. 456, 34 S. E. 703, 74 Am. St. Rep. 648.

One tenant in common of a mining claim, who without the consent of the cotenants incurs expenses in prospecting, cannot demand contribution from the cotenants; but a tenant operating a mine may, when called on to account for the profits, set off as against a non-operating tenant the cost of improvements, on his showing that the improvements were necessary and enhanced the value of the common property. Wolfe *v.* Childs, 42 Colo. 121, 94 Pac. 292, 126 Am. St. Rep. 152.

33. Pickering *v.* Pickering, 63 N. H. 468, 3 Atl. 744; Weller *v.* Rolason, 17 N. J. Eq. 13. But see Ruffners *v.* Lewis, 7 Leigh (Va.) 720, 30 Am. Dec. 513.

No part of costs, fees, or other expenses incurred by one cotenant of common property in relation thereto is chargeable to the other cotenants in the absence of statute or agreement unless they are for the benefit of the

held that he cannot do so except on notice and an opportunity to the others to unite in making the repairs, unless they are made under such circumstances as excuse a want of notice.[34] No distinction is made in regard to the right of a cotenant to recover contribution for sums expended in making necessary repairs upon the common property, between one who at the time of making such expenditures had legal title, and one who at that time was in fact the owner of an undivided portion of the premises, having completed a contract of purchase, agreed upon all the terms, and gone into possession, but who had not then received his deed.[35] A tenant in common cannot enforce contribution if he asserts ownership of the entire title as against his cotenants.[36]

b. Basis and Amount of Contribution. A cotenant expending more than his proportionate share under circumstances which entitle him to contribution may recover from his cotenants ratably the amount of such overpayment,[37] and

common property. Haywood *v.* Daves, 80 N. C. 338; Croasdale *v.* Von Boyneburgk, 206 Pa. St. 15, 55 Atl. 770; Paine *v.* Slocum, 56 Vt. 504. See also Rogers *v.* White, 6 Me. 193. A deed by several tenants in common in litigation to one of their number in trust, to take such steps as he shall judge to be necessary and proper to discharge all encumbrances upon or claim against the said land, does not provide, either in express terms or by necessary implication, for the payment of the fees of an attorney for services rendered in the litigation. Gordon *v.* McCulloh, 66 Md. 245, 7 Atl. 457. But where expenses were incurred in a necessary action of ejectment it was held that the tenant in common so expending moneys and thus gaining possession would not be compelled to let his tenants in common into possession of their undivided moiety until they paid or tendered him one half of the expense of said action, and he might retain possession of the whole. Gregg *v.* Patterson, 9 Watts & S. (Pa.) 197.

The repairs or improvements must have been made for the common benefit. Where either repairs or improvements are made for the sole benefit of the person paying therefor, under the belief on the part of said person that he is the sole owner of the common property, he is not entitled to contribution. Nahaolelua *v.* Kaaahu, 10 Hawaii 662; Alleman *v.* Hawley, 117 Ind. 532, 20 N. E. 441; Becnel *v.* Becnel, 23 La. Ann. 150 (placing improvements on a plantation to aid in securing the crop, where one of the common owners remains on the common property and cultivates it); Stephens *v.* Ells, 65 Mo. 456 (purchasing joint property at a partition sale which at said time is subject to a lien for taxes, and subsequently paying said taxes); Gregg *v.* Patterson, 9 Watts & S. (Pa.) 197 (erecting buildings and making valuable improvements by one who believes that he is the sole owner of the common property); German Sav., etc., Soc. *v.* Tull, 136 Fed. 1, 69 C. C. A. 1. See also Bodkin *v.* Arnold, 48 W. Va. 108; 35 S. E. 980.

34. Hill *v.* Crocker, 87 Me. 208, 32 Atl. 878, 47 Am. St. Rep. 321; Benson *v.* Thompson, 27 Me. 470, 46 Am. Dec. 617; Doane *v.* Badger, 12 Mass. 65; Stevens *v.* Thompson, 17 N. H. 103.

Where, under a statute providing that an owner of an undivided interest in certain land may pay his share of the whole tax thereon and thus relieve his interest from the tax, such a coöwner pays the tax of a cotenant's share without request, there is no contribution. Wilson *v.* Sanger, 57 N. Y. App. Div. 323, 68 N. Y. Suppl. 124.

35. Williams *v.* Coombs, 88 Me. 183, 33 Atl. 1073; Dech's Appeal, 57 Pa. St. 467; Anderson *v.* Greble, 1 Ashm. (Pa.) 136.

36. Burgett *v.* Taliaferro, 118 Ill. 503, 9 N. E. 334; Foster *v.* Weaver, 118 Pa. St. 42, 12 Atl. 313, 4 Am. St. Rep. 573; German Sav., etc., Soc. *v.* Tull, 136 Fed. 1, 69 C. C. A. 1.

A disseizor, although chargeable with the rental value of his cotenant's share, whether or not he has received any rent therefor, is not entitled to contribution for any improvements. Hannah *v.* Carver, 121 Ind. 278, 23 N. E. 93; Rippe *v.* Badger, 125 Iowa 725, 101 N. W. 642, 106 Am. St. Rep. 336; Austin *v.* Barrett, 44 Iowa 488; Van Denberg *v.* Brat, 2 Cai. (N. Y.) 303; Gregg *v.* Patterson, 9 Watts & S. (Pa.) 197. See also Mateer *v.* Jones, (Tex. Civ. App. 1907) 102 S. W. 734; Strong *v.* Hunt, 20 Vt. 614; Stewart *v.* Stewart, 90 Wis. 516, 63 N. W. 886, 48 Am. St. Rep. 949. But it appears that where such a disseizor claims the whole title mistakenly, but in good faith, he is entitled to an allowance for his improvements from the rents of the common property. Duke *v.* Reed, 64 Tex. 705. It is held that if a suit is brought by a tenant in common against a cotenant claiming adversely, in good faith, for plaintiff's share of the rental value, such plaintiff is not entitled to share in the enhanced rental value resulting from improvements made by defendant. Carver *v.* Fennimore, 116 Ind. 236, 19 N. E. 103.

37. *Iowa.*— Koboliska *v.* Swehla, 107 Iowa 124, 77 N. W. 576.

Kansas.— Young *v.* Bigger, 73 Kan. 146, 84 Pac. 747.

Maine.— Rogers *v.* White, 6 Me. 193.

Massachusetts.— Gwinneth *v.* Thompson, 9 Pick. 31, 19 Am. Dec. 350.

Mississippi.— Bennett *v.* Bennett, 84 Miss. 493, 36 So. 452.

Nebraska.— Oliver *v.* Lansing, 57 Nebr. 352, 77 N. W. 802.

a tenant in common, being entitled to contribution for services, repairs, and improvements, is not entitled to have his cotenants contribute therefor more than their proportionate share, according to the respective interests of the parties; in the case of improvements to the common property the basis of calculation for contribution is the value added to the land by the improvements; and if the added value exceeds the cost, then he is only entitled to have his cotenants contribute their proportionate share of the cost.[38] The amount of contribution to which a tenant in common is entitled will, in the absence of statute or an agreement to the contrary, be limited to a proportionate share of the benefit derived by his cotenants from the expenditures for which he is so entitled, provided such share does not exceed the amount of such expenditures.[39] If the expenditures are made without the consent of the other cotenants, or over their objections, his reimbursements for such expenditures may be limited to the amount of income and profit received by him from the common property.[40]

c. Right to Contribution as Dependent Upon Sharing Rents and Profits, and Conversely. Where a tenant in common claims contribution from his cotenants for improvements made by him, he must share with them the rents and profits received by him;[41] and, conversely, if he is called upon for an accounting of the rents and profits, he is entitled to be allowed for advances properly and reasonably made by him for repairs and improvements, and for principal and interest on the encumbrances paid by him, if any, with interest from the time the advances

Virginia.— Grove *v.* Grove, 100 Va. 556, 42 S. E. 312.

38. *Alabama.*— Horton *v.* Sledge, 29 Ala. 478.

Michigan.— Eighmey *v.* Thayer, 135 Mich. 682, 98 N. W. 734, 66 L. R. A. 915.

Tennessee.— Broyles *v.* Waddel, 11 Heisk. 32.

Vermont.— Strong *v.* Hunt, 20 Vt. 614.

Wisconsin.— Stewart *v.* Stewart, 90 Wis. 516, 63 N. W. 886, 48 Am. St. Rep. 949; Phœnix Lead Min., etc., Co. *v.* Sydnor, 39 Wis. 600.

Limited to expenditure.— The amount a tenant in common incurring expenses in making improvements on the common property may recover from his cotenant must be based on the expenditure, and not on the fair market value of the improvement, or on what they are reasonably worth. Contaldi *v.* Errichetti, 79 Conn. 273, 64 Atl. 211.

39. *Hawaii.*— Kanakamaikai *v.* Pahulio, 12 Hawaii 1; Nahaolelua *v.* Kaaahu, 10 Hawaii 662.

Illinois.— Heppe *v.* Szczepanski, 209 Ill. 88, 70 N. E. 737, 101 Am. St. Rep. 221.

Kansas.— Phipps *v.* Phipps, 47 Kan. 328, 27 Pac. 972.

Louisiana.— Toler *v.* Bunch, 34 La. Ann. 997.

Massachusetts.— Gwinneth *v.* Thompson, 9 Pick. 31, 19 Am. Dec. 350.

Michigan.— Eighmey *v.* Thayer, 135 Mich. 682, 98 N. W. 734, 66 L. R. A. 915.

New Mexico.— Armijo *v.* Neher, 11 N. M. 645, 72 Pac. 12.

Pennsylvania.— Anderson *v.* Greble, 1 Ashm. 136.

Vermont.—Farrand *v.* Gleason, 56 Vt. 633; Strong *v.* Hunt, 20 Vt. 614.

Partial contribution for unnecessary improvements.—Where a tenant in common in repairing the common property makes unnecessary improvements, or repairs of an unnecessary character, he is not entitled to full contribution; but, under the circumstances of the case, he may be entitled to partial contribution. Middlebury Electric Co. *v.* Tupper, 70 Vt. 603, 41 Atl. 582.

So where a cotenant pays taxes upon the premises and the interest on a mortgage thereon during the lifetime of a widow in possession thereof entitled to dower therein, but which had not been admeasured, he can only recover from his cotenants the share of such taxes and interest paid for their benefit, but not the share thereof paid for the benefit of the widow for which she was liable. Arthur *v.* Arthur, 76 N. Y. App. Div. 330, 78 N. Y. Suppl. 486.

40. Williams *v.* Coombs, 88 Me. 183, 33 Atl. 1073.

41. *District of Columbia.*—Alexander *v.* Douglass, 6 D. C. 247.

Michigan.— Eighmey *v.* Thayer, 135 Mich. 682, 98 N. W. 734, 66 L. R. A. 915.

New Mexico.— Neher *v.* Armijo, 9 N. M. 325, 54 Pac. 236, 11 N. M. 67, 66 Pac. 517.

Texas.— Duke *v.* Reed, 64 Tex. 705.

Virginia.— Graham *v.* Pierce, 19 Gratt. 28, 100 Am. Dec. 658.

England.—Williams *v.* Williams, 68 L. J. Ch. 528, 81 L. T. Rep. N. S. 163; Kenrick *v.* Mountsteven, 48 Wkly. Rep. 141.

Canada.— Rice *v.* George, 20 Grant Ch. (U. C.) 221.

Where one made improvements believing himself, in good faith, to be the sole owner, he was held not to be entitled to be proportionately reimbursed by his cotenant; he only had the right to such reimbursement as he may have received from the rents and profits. Gregg *v.* Patterson, 9 Watts & S. (Pa.) 197.

He must consent to be charged with occupation rent, if he claims payment for im-

are made.[42] Evidence of a declaration to a disinterested person by a tenant in common so making the expenditures that he is operating the common property entirely at his own expense is not sufficient to establish a contract by him not to make any demand on account of his expenses.[43]

d. Right as Affected by Statute. The ordinary rule that statutes in contravention of common right are strictly construed is peculiarly applicable to tenants in common.[44] So a statute providing for allowance for improvements or betterments to purchasers making improvements under the belief that they have a good title has no application to the case of tenants in common;[45] nor has a statute giving compensation for improvements to a defendant in ejectment after a certain number of years.[46] But a statute authorizing defendants in ejectment, in certain cases, to recover the value of their permanent improvements on the land, has been held to apply to an action in which plaintiff recovers an undivided interest as cotenant of defendant.[47]

e. Remedies. Contribution is recoverable either by bill in equity,[48] or in some states in an ordinary civil action.[49] The question of the right to contribution must be raised in some direct proceeding for that purpose, and cannot be adjudicated collaterally in some other suit;[50] and the claim must be made within a

provements. Rice *v.* George, 20 Grant Ch. (U. C.) 221.

42. *Massachusetts.*— Dewing *v.* Dewing, 165 Mass. 230, 42 N. E. 1128; Backus *v.* Chapman, 111 Mass. 386.

New Hampshire.— Pickering *v.* Pickering, 63 N H. 468, 3 Atl. 744.

New York.— Hannan *v.* Osborn, 4 Paige 336.

North Carolina.— Holt *v.* Couch, 125 N. C. 456, 34 S. E. 703, 74 Am. St. Rep. 648.

Pennsylvania.— Anderson *v.* Greble, 1 Ashm. 136.

Texas.— Eastham *v.* Sims, 11 Tex. Civ. App. 133, 32 S. W. 359.

Virginia.— Ruffner *v.* Lewis, 7 Leigh 720, 30 Am. Dec. 513.

West Virginia.— See Bodkin *v.* Arnold, 48 W. Va. 108, 35 S. E. 980.

Wisconsin.— Tipping *v.* Robbins, 71 Wis. 507, 37 N. W. 427.

United States.—Davis *v.* Chapman, 36 Fed. 42; Austin *v.* Rutland R. Co., 17 Fed. 466, 21 Blatchf. 358.

43. Danforth *v.* Moore, 55 N. J. Eq. 127, 35 Atl. 410.

44. See cases cited *infra*, this and the following notes.

Where treble damages were provided by statute for the cutting and conversion of timber trees growing on the lands of another, and a subsequent statute provided that if a tenant in common cut or removed any timber without the written consent of his cotenant, the injured person should have every remedy that he would have against an entire stranger, it was held that the penalty provided in the first-named statute was not by the second statute extended to an action in relation to a cotenancy. Central Trust Co. *v.* New York Equipment Co., 87 Hun (N. Y.) 421, 34 N. Y. Suppl. 349; Wheeler *v.* Carpenter, 107 Pa. St. 271.

A statute providing that necessary repairs to be made in any mill, mill dam, or flume owned by joint tenants or tenants in common, when the privilege of the water is owned jointly or in common, shall be made by such owners in proportion to their respective interests, said statute further providing for the submission of the matter to selectmen, was held not to apply to the case of tenants in common not being also cotenants of the water power necessary to work such mill. Roberts *v.* Peavey, 27 N. H. 477.

45. Holt *v.* Couch, 125 N. C. 456, 34 S. E. 703, 74 Am. St. Rep. 648.

46. Morris *v.* McKay, 40 Mich. 326; Sands *v.* Davis, 40 Mich. 14; Martin *v.* O'Connor, 37 Mich. 440, under Comp. Laws, §§ 6252–6253.

47. Phœnix Lead Min., etc., Co. *v.* Sydnor, 39 Wis. 600, under Rev. St. c. 141, §§ 30–33.

48. McDearman *v.* McClure, 31 Ark. 559; Kenopsky *v.* Davis, 27 La. Ann. 174; Ward *v.* Ward, 40 W. Va. 611, 21 S. E. 746, 52 Am. St. Rep. 911, 29 L. R. A. 449.

Equity usually affords the sole remedy between cotenants or their assignees for advances made, in the absence of statute. Arey *v.* Hall, 81 Me. 17, 16 Atl. 302, 10 Am. St. Rep. 232. See also Wood *v.* Merritt, 2 Bosw. (N. Y.) 368.

49. Fowler *v.* Fowler, 50 Conn. 256.

The remedy at common law against a cotenant refusing to unite in making repairs was not in assumpsit, but by writ de reparatione facienda, sued out before the repairs were made, in which proceeding an appropriate order was entered, requiring them to be made at the expense of all the tenants. Cooper *v.* Brown, 143 Iowa 482, 122 N. W. 144.

50. Brown *v.* Budd, 2 Ind. 442; Stevens *v.* Thompson, 17 N. H. 103; Mayfield *v.* McKnight, (Tenn. Ch. App. 1899) 56 S. W. 42; Morris *v.* Roseberry, 46 W. Va. 24, 32 S. E. 1019.

The personal representatives of a deceased cotenant should be made parties to a suit for contribution. Venable *v.* Beauchamp, 3 Dana (Ky.) 321, 28 Am. Dec. 74.

reasonable time, otherwise it may be barred by laches.[51] Where there is neither an agreement, a consent, nor a ratification for making expenditures on the common property, or a statute to the contrary, the remedy for a tenant in common who makes expenditures on the common property is to have the part improved set aside to him on a partition, or, this being impracticable, to obtain an equitable allowance for necessary expenditures, or sale in lieu of partition;[52] in which event equity will direct an account and suitable compensation for such improvements.[53] A tenant in common so making expenditures should be allowed to equitably set them off against the income.[54] An injunction may issue to restrain the execution on a judgment in ejectment until after payment for improvements.[55]

f. Lien. Necessary improvements, expenditures, or services in relation to the common property for the common benefit may create an equitable lien between cotenants in the premises.[56] But special circumstances must be shown to bring

51. German *v.* Heath, 139 Iowa 52, 116 N. W. 1051.

52. *Hawaii.*— Nahaolelua *v.* Kaaahu, 10 Hawaii 662.

Indiana.—Alleman *v.* Hawley, 117 Ind. 532, 20 N. E. 441.

Iowa.— Van Ormer *v.* Harley, 102 Iowa 150, 71 N. W. 241.

Kentucky.—Armstrong *v.* Bryant, 16 S. W. 463, 13 Ky. L. Rep. 128.

New Jersey.— Danforth *v.* Moore, 55 N. J. Eq. 127, 35 Atl. 410.

Texas.— Mahon *v.* Barnett, (Civ. App. 1897) 45 S. W. 24; Calhoun *v.* Stark, 13 Tex. Civ. App. 60, 35 S. W. 410.

Virginia.— Ballou *v.* Ballou, 94 Va. 350, 26 S. E. 840, 64 Am. St. Rep. 733.

West Virginia.—Williamson *v.* Jones, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L. R. A. 694.

Purchase of cotenant's share.—Where a tenant in common made improvements on his half interest, purchased the other tenant's interest, and gave purchase-money notes therefor, thus taking to himself the entire title to the property, he could not have an artificial division thereof into half interests, with himself alone, against the holders of the notes before foreclosure thereof. Burge *v.* Chestnut, (Ky. 1909) 121 S. W. 989.

Money raised on mortgage by all the cotenants, expended for permanent improvement of the common property, remaining unpaid at the time of the sale of said property, should be allowed in equity, but not in excess of the amount actually expended or of the proceeds of the sale of the property so improved, and such allowance should be charged proportionately to the respective interests in the common property. *In re* Cook, [1896] 1 Ch. 923, 65 L. J. Ch. 654, 74 L. T. Rep. N. S. 652, 44 Wkly. Rep. 646; *In re* Jones, [1893] 2 Ch. 461, 62 L. J. Ch. 996, 69 L. T. Rep. N. S. 45, 3 Reports 498; Watson *v.* Gass, 51 L. J. Ch. 480, 45 L. T. Rep. N. S. 582, 30 Wkly. Rep. 286.

53. *District of Columbia.*—Alexander *v.* Douglass, 6 D. C. 247.

Georgia.— Turnbull *v.* Foster, 116 Ga. 765, 43 S. E. 42; Bazemore *v.* Davis, 55 Ga. 504.

Mississippi.— Nelson *v.* Leake, 25 Miss. 199.

New Hampshire.— Pickering *v.* Pickering, 63 N. H. 468, 3 Atl. 744.

North Carolina.— Holt *v.* Couch, 125 N. C. 456, 34 S. E. 703, 74 Am. St. Rep. 648.

Texas.— Branch *v.* Makeig, 9 Tex. Civ. App. 399, 28 S. W. 1050.

Virginia.— Ballou *v.* Ballou, 94 Va. 350, 26 S. E. 840, 64 Am. St. Rep. 733; Ruffners *v.* Lewis, 7 Leigh 720, 30 Am. Dec. 513.

West Virginia.—Ward *v.* Ward, 50 W. Va. 517, 40 S. E. 472. See also 29 L. R. A. 452 note.

54. *Alabama.*— Pegram *v.* Barker, 115 Ala. 543, 22 So. 131.

Massachusetts.— Dewing *v.* Dewing, 165 Mass. 230, 42 N. E. 1128.

Minnesota.— Kean *v.* Connelly, 25 Minn. 222, 33 Am. Rep. 458.

New York.— Hannan *v.* Osborn, 4 Paige 336.

Tennessee.— Tyner *v.* Fenner, 4 Lea 469.

West Virginia.— Bodkin *v.* Arnold, 48 W. Va. 108, 35 S. E. 980.

United States.— Davis *v.* Chapman, 36 Fed. 42.

England.— Pascoe *v.* Swan, 27 Beav. 508, 5 Jur. N. S. 1235, 29 L. J. Ch. 159, 1 L. T. Rep. N. S. 17, 8 Wkly. Rep. 130, 54 Eng. Reprint 201.

55. Russell *v.* Defrance, 39 Mo. 506.

56. *Arkansas.*— Drennen *v.* Walker, 21 Ark. 539.

Kentucky.— Hotopp *v.* Morrison Lodge No. 76, 110 Ky. 987, 63 S. W. 44, 23 Ky. L. Rep. 418; Burch *v.* Burch, 82 Ky. 622; Alexander *v.* Ellison, 79 Ky. 148.

Michigan.— Patrick *v.* Young Men's Christian Assoc., 120 Mich. 185, 79 N. W. 208.

Mississippi.— Bennett *v.* Bennett, 84 Miss. 493, 36 So. 452; Davidson *v.* Wallace, 53 Miss. 475.

New York.— Jones *v.* Duerk, 25 N. Y. App. Div. 551, 49 N. Y. Suppl. 987; Green *v.* Putnam, 1 Barb. 500; Bowen *v.* Kaughran, 1 N. Y. St. 121.

Texas.— Torrey *v.* Martin, (1887) 4 S. W. 642; Branch *v.* Makeig, 9 Tex. Civ. App. 399, 28 S. W. 1050; Robinson *v.* Moore, 1 Tex. Civ. App. 93, 20 S. W. 994. See also Curtis *v.* Poland, 66 Tex. 511, 2 S. W. 39.

West Virginia.—Ward *v.* Ward, 40 W. Va. 611, 21 S. E. 746, 52 Am. St. Rep. 911, 29 L. R. A. 449.

See 45 Cent. Dig. tit. "Tenancy in Common," §§ 94, 99. And see *supra*, III, D, 1, c; III, D, 2, b.

such claim within the rights of a lien,[57] and a tenant in common is not entitled to a lien for common expenses on the interests of his cotenants when it can neither be ascertained of what the expense consists nor to which of several tracts comprising the common estate it pertains,[58] nor is he entitled to such lien for money paid out for the support of his cotenant.[59] The lien, if it exists, may be waived,[60] and cotenants may contract with each other for the improvement of the common property and waive the rights of lien both for themselves and their subcontractors.[61]

F. Rent, Income, and Profits — 1. Collection and Application of Rents. Any of the cotenants may collect the rent for the common property,[62] and may apply it to pay a proper charge on the common property; but he has no right to apply it to charges disconnected with said common ownership.[63] If rents, income,

In the case of personal property where the tenant in common may lawfully control the same, he in possession has a right to employ another to care for the property, who will have a lien dependent on possession for the payment of such services. Williamson *v.* Moore, 10 Ida. 749, 80 Pac. 227; Taylor *v.* Baldwin, 10 Barb. (N. Y.) 582 [*affirmed* in 10 Barb. 626]; Ward *v.* Ward, 40 W. Va. 611, 21 S. E. 746, 52 Am. St. Rep. 911, 29 L. R. A. 449, lien. See also Torrey *v.* Martin, (Tex. Sup. 1887) 4 S. W. 642.

Compelling contribution in equity is not creating a lien. Williams *v.* Coombs, 88 Me. 183, 33 Atl. 1073.

A lien may follow the estate even into the hands of a purchaser without notice. Cotton *v.* Rand, (Tex. Civ. App. 1898) 51 S. W. 55.

Priority of lien for improvements as against subsequent mortgagee.— The lien for an equitable share of the cost of improvements on the common property by a tenant in common with the consent of his cotenant therein, before the execution of a mortgage of the share of the consenting tenant, takes priority of such mortgage. Stenger *v.* Edwards, 70 Ill. 631; Gardner *v.* Diederichs, 41 Ill. 158.

Liability of wife.— There is no personal liability of a wife, in relation to a contract by the husband, for improvements on their common property; and no mechanic's lien attaches to her interest therein, unless otherwise provided by statute. Smith *v.* O'Donnell, 15 Misc. (N. Y.) 98, 36 N. Y. Suppl. 480.

57. Taylor *v.* Baldwin, 10 Barb. (N. Y.) 582 [*affirmed* in 10 Barb. 626].

58. Cotton *v.* Coit, (Tex. Civ. App. 1895) 30 S. W. 281 [*reversed* on other grounds in 88 Tex. 414, 31 S. W. 1061].

59. Branch *v.* Makeig, 9 Tex. Civ. App. 399, 28 S. W. 1050.

60. Westmoreland Guarantee Bldg., etc., Assoc. *v.* Connor, 216 Pa. St. 543, 65 Atl. 1089.

A conveyance from one coparcener to another coparcener of his undivided interest in the common land does not pass his preëxisting demand against his coparceners or their interests in the land for improvements put on the land, unless such demand is expressly released or transferred in the conveyance. Ward *v.* Ward, 50 W. Va. 517, 40 S. E. 472.

61. Westmoreland Guarantee Bldg., etc., Assoc. *v.* Connor, 216 Pa. St. 543, 65 Atl. 1089.

62. Miner *v.* Lorman, 70 Mich. 173, 38 N. W. 18; Foster *v.* Magee, 2 Lans. (N. Y.) 182; Decker *v.* Livingston, 15 Johns. (N. Y.) 479. But see Harrison *v.* Barnby, 5 T. R. 246, 2 Rev. Rep. 584, 101 Eng. Reprint 138, holding that a terre-tenant holding under two tenants in common may not pay the whole rent to one after notice from the other not to do so; if such payment be made to one tenant in common after such notice, the other may distrain for his share.

Where the letting is joint the lessee cannot be obliged to pay part of the rent to each tenant. Griffin *v.* Clark, 33 Barb. (N. Y.) 46; De Coursey *v.* Guarantee Trust, etc., Co., 81 Pa. St. 217. But see Barnum *v.* Landon, 25 Conn. 137.

Collects as owner.— Where one coöwner of property collects the rents or profits of the whole he does so not in the capacity of agent, but in that of owner, in the absence of statute or agreement to the contrary. Van Ormer *v.* Harley, 102 Iowa 150, 71 N. W. 241; Kennedy *v.* De Trafford, [1897] A. C. 180, 66 L. J. Ch. 413, 76 L. T. Rep. N. S. 427, 45 Wkly. Rep. 671. And a tenant in common receiving rents and profits from the common property in excess of his share is not a trustee of such moneys received by him but merely a debtor therefor; unless there be a statute, a waiver, an acquiescence, or an agreement, express or implied, to the contrary. St. John *v.* Coates, 63 Hun (N. Y.) 460, 18 N. Y. Suppl. 419 [*affirmed* in 140 N. Y. 634, 35 N. E. 891]; Shearman *v.* Morrison, 149 Pa. St. 386, 24 Atl. 313; Stehman *v.* Campbell, 4 Pa. Dist. 441. There is no lien on his beneficial interest as against a purchaser without notice. British Mut. Inv. Co. *v.* Smart, L. R. 10 Ch. 567, 44 L. J. Ch. 695, 32 L. T. Rep. N. S. 849, 23 Wkly. Rep. 800. And see *infra*, III, F, 2, c, text and note 84.

63. *Indiana.*—Ryason *v.* Dunten, 164 Ind. 85, 73 N. E. 74, holding, however, that there is no compulsion, in the absence of agreement express or implied, or of statute, to so apply.

Michigan.—Miner *v.* Lorman, 70 Mich. 173, 38 N. W. 18.

New York.— Griffin *v.* Clark, 33 Barb. 46; Cole *v.* Cole, 57 Misc. 490, 108 N. Y. Suppl. 124; Hannan *v.* Osborn, 4 Paige 336.

Oregon.— Minter *v.* Durham, 13 Oreg. 470, 11 Pac. 231.

or profits be collected and proper liens or charges against the common estate be discharged, in the absence of proof to the contrary it will be presumed that such payments were made from the amounts collected; so that if a mortgage or lien theretofore held by a tenant in common or one in privity with him be so discharged during the cotenancy, such discharge will be presumed to be for the benefit of all the cotenants therein, and a claim arising therefrom will be available to the cotenant so claiming in an accounting only,[64] and such cotenant is entitled to no lien therefor in the premises.[65] It is the duty of a cotenant to apply the income from the common property to the reimbursement of himself for money expended by him in purchasing the interest of his cotenants at tax-sales, and he must so apply it and may not permit the statute to run against them.[66]

2. Liability of Cotenants For Rents and Profits — a. Rule Stated. In the absence of statute or agreement to the contrary, a tenant in common, while merely in possession of the common property, not excluding his cotenants, nor denying them equal enjoyment, cannot be charged with rent for use and occupation,[67]

England.— Williams *v.* Williams, 68 L. J. Ch. 528, 81 L. T. Rep. N. S. 163.

A presumption may arise that rent has been so applied. Downey *v.* Strouse, 101 Va. 226, 43 S. E. 348.

If the collecting cotenant is warned not to use income or rent so collected, or the common property for certain purposes, and nevertheless so uses it, he may be held liable for rental from the date that he has been notified to cease the application of the fund or the use of said property in such manner. Boley *v.* Barutio, 24 Ill. App. 515 [*affirmed* in 120 Ill. 192, 11 N. E. 393]; Moreira *v.* Schwan, 113 La. 643, 37 So. 542. A tenant in common claiming rents and applying them, with the acquiescence of her cotenants, to the extinguishment of an encumbrance, is not entitled on an accounting for the rents to a credit for the payment made on account of said encumbrance after her authority so to pay had been revoked. Switzer *v.* Switzer, 57 N. J. Eq. 421, 41 Atl. 486. The receiver of a tenant in common is not entitled to an order of court directing the other cotenant not to collect rents from the common property. Tyson *v.* Fairclough, 2 Sim. & St. 142, 25 Rev. Rep. 175, 1 Eng. Ch. 142, 57 Eng. Reprint 300.

64. Knolls *v.* Barnhart, 71 N. Y. 474. See also Barnes *v.* Barnes, 72 S. W. 282, 24 Ky. L. Rep. 1732.

65. Stenger *v.* Edwards, 70 Ill. 631; Hannan *v.* Osborn, 4 Paige (N. Y.) 336.

66. Kean *v.* Connelly, 25 Minn. 222, 33 Am. Rep. 458; Davis *v.* Chapman, 24 Fed. 674.

67. *Alabama.*— Fielder *v.* Childs, 73 Ala. 567; Terrell *v.* Cunningham, 70 Ala. 100; Newbold *v.* Smart, 67 Ala. 326.

Arkansas.— Cannon *v.* Stevens, 88 Ark. 610, 115 S. W. 388; Hamby *v.* Wall, 48 Ark. 135, 2 S. W. 705, 3 Am. St. Rep. 218; Bertrand *v.* Taylor, 32 Ark. 470.

California.—Pico *v.* Columbet, 12 Cal. 414, 73 Am. Dec. 550.

Connecticut.— Southwork *v.* Smith, 27 Conn. 355, 71 Am. Dec. 72. See also Barnum *v.* Landon, 25 Conn. 137.

Delaware.— *In re* Journey, 7 Del. Ch. 1, 44 Atl. 795, holding that heirs at law, to whom property descends previous to a sale thereof under a will, are in the position of other cotenants in contracting with each other for the use and occupation of the common property or maintaining actions against each other therefor.

Georgia.— Elam *v.* Moorefield, 33 Ga. 167.

Hawaii.—Peterson *v.* Kaanaana, 10 Hawaii 384; Hawaiian Commercial, etc., Co. *v.* Waikapu Sugar Co., 9 Hawaii 75.

Illinois.— Fraser *v.* Gates, 118 Ill. 99, 1 N. E. 817; Cheney *v.* Ricks, 87 Ill. App. 388 [*affirmed* in 187 Ill. 171, 58 N. E. 234]; Boley *v.* Barutio, 24 Ill. App. 515 [*affirmed* in 120 Ill. 192, 11 N. E. 393]; Sconce *v.* Sconce, 15 Ill. App. 169.

Indiana.— Ryason *v.* Dunten, 164 Ind. 85, 73 N. E. 74; Davis *v.* Hutton, 127 Ind. 481, 26 N. E. 187, 1006; Crane *v.* Waggoner, 27 Ind. 52, 89 Am. Dec. 493; McCrum *v.* McCrum, 36 Ind. App. 636, 76 N. E. 415.

Iowa.— Van Ormer *v.* Harley, 102 Iowa 150, 71 N. W. 241; Belknap *v.* Belknap, 77 Iowa 71, 41 N. W. 568.

Kentucky.— Fightmaster *v.* Beasly, 7 J. J. Marsh. 410; Nelson *v.* Clay, 7 J. J. Marsh. 138, 23 Am. Dec. 387; Hixon *v.* Bridges, 38 S. W. 1046, 18 Ky. L. Rep. 1068.

Louisiana.— Toler *v.* Bunch, 34 La. Ann. 997; Balfour *v.* Balfour, 33 La. Ann. 297; Morgan *v.* Morgan, 23 La. Ann. 502; Becnel *v.* Becnel, 23 La. Ann. 150.

Maine.— Carter *v.* Bailey, 64 Me. 458, 18 Am. Rep. 273.

Maryland.— McLaughlin *v.* McLaughlin, 80 Md. 115, 30 Atl. 607; Israel *v.* Israel, 30 Md. 120, 96 Am. Dec. 571.

Massachusetts.— Brown *v.* Wellington, 106 Mass. 318, 8 Am. Rep. 330; Munroe *v.* Lake, 1 Metc. 459; Sargent *v.* Parsons, 12 Mass. 149.

Michigan.— Owings *v.* Owings, 150 Mich. 609, 114 N. W. 393; Wilmarth *v.* Palmer, 34 Mich. 347; Everts *v.* Beach, 31 Mich. 136, 18 Am. Rep. 169.

Minnesota.— Hause *v.* Hause, 29 Minn. 252, 13 N. W. 43; Kean *v.* Connelly, 25 Minn. 222, 33 Am. Rep. 458; Holmes *v.* Williams, 16 Minn. 164, holding the cotenant not liable where he has no knowledge of his cotenant's

and where a tenant in common does not claim more than his proportionate share, and does not receive rents or profits for more than said share, and does not prevent his tenant in common from occupying the property or receiving or enjoying his proportionate share of the rents and profits, his cotenant is not entitled to recover

title and no demand of possession thereunder has been made on him.

Mississippi.— Bennett *v.* Bennett, 84 Miss. 493, 36 So. 452; Iler *v.* Routh, 3 How. 276.

Missouri.— Childs *v.* Kansas City, etc., R. Co., (1891) 17 S. W. 854; Ragan *v.* McCoy, 29 Mo. 356; Rogers *v.* Penniston, 16 Mo. 432.

Montana.— Ayotte *v.* Nadeau, 32 Mont. 498, 81 Pac. 145.

New Hampshire.— Berry *v.* Whidden, 62 N. H. 473; Webster *v.* Calef, 47 N. H. 289.

New Jersey.— Lloyd *v.* Turner, 70 N. J. Eq. 425, 62 Atl. 771; Rose *v.* Cooley, (Ch. 1906) 62 Atl. 867; Sailer *v.* Sailer, 41 N. J. Eq. 398, 5 Atl. 319; Swallow *v.* Swallow, 31 N. J. Eq. 390; Buckelew *v.* Snedeker, 27 N. J. Eq. 82; Izard *v.* Bodine, 11 N. J. Eq. 403, 69 Am. Dec. 595.

New York.— Barry *v.* Coville, 129 N. Y. 302, 29 N. E. 307 [*affirming* 13 N. Y. Suppl. 4]; Adams *v.* Bristol, 126 N. Y. App. Div. 660, 111 N. Y. Suppl. 231; Willes *v.* Loomis, 94 N. Y. App. Div. 67, 87 N. Y. Suppl. 1086; Biglow *v.* Biglow, 75 N. Y. App. Div. 98, 77 N. Y. Suppl. 716; Valentine *v.* Healey, 86 Hun 259, 33 N. Y. Suppl. 246; Joslyn *v.* Joslyn, 9 Hun 388; Wilcox *v.* Wilcox, 48 Barb. 327 (husband occupying in right of wife); Woolever *v.* Knapp, 18 Barb. 265; Cole *v.* Cole, 57 Misc. 490, 108 N. Y. Suppl. 124; Matter of Lucy, 4 Misc. 349, 24 N. Y. Suppl. 352; McMurray *v.* Rawson, 3 Hill 59.

North Carolina.— Roberts *v.* Roberts, 55 N. C. 128.

Ohio.— West *v.* Weyer, 46 Ohio St. 66, 18 N. E. 537, 15 Am. St. Rep. 552.

Pennsylvania.— Kline *v.* Jacobs, 68 Pa. St. 57; Coleman's Appeal, 62 Pa. St. 252; Thompson *v.* Newton, 8 Pa. Cas. 118, 7 Atl. 64, 2 Pa. Co. Ct. 362; Wells *v.* Becker, 24 Pa. Super. Ct. 174; Spellbrink's Estate, 3 Pa. Dist. 807, 15 Pa. Co. Ct. 506; Underwood's Estate, 5 Pa. Co. Ct. 621; Keller *v.* Lamb, 10 Kulp 246; Jevons *v.* Kline, 9 Kulp 305; Kennedy's Estate, 1 Lack. Leg. N. 135; Norris *v.* Gould, 15 Wkly. Notes Cas. 187.

Rhode Island.— Almy *v.* Daniels, 17 R. I. 543, 23 Atl. 637, 15 R. I. 312, 4 Atl. 753, 10 Atl. 654, rule applied to use of adjoining sidewalk. See also Knowles *v.* Harris, 5 R. I. 402, 73 Am. Dec. 77.

South Carolina.— Buck *v.* Martin, 21 S. C. 590, 53 Am. Rep. 702; Jones *v.* Massey, 14 S. C. 292; Lyles *v.* Lyles, 1 Hill Eq. 76; Volentine *v.* Johnson, 1 Hill Eq. 49; Murray *v.* Stevens, Rich. Eq. Cas. 205.

Tennessee.— Schneider *v.* Taylor, 16 Lea 304; Tyner *v.* Fenner, 4 Lea 469, holding that in order to compel an account a profit must be shown over and above the mere use.

Texas.— Autry *v.* Reasor, 102 Tex. 123, 108 S. W. 1162, 113 S. W. 748; Neil *v.* Schackelford, 45 Tex. 119; Morris *v.* Morris, 47 Tex. Civ. App. 244, 105 S. W. 242; Mahon *v.* Barnett, (Civ. App. 1897) 45 S. W. 24; Calhoun *v.* Stark, 13 Tex. Civ. App. 60, 35 S. W. 410; Bennett *v.* Virginia Ranch, etc., Co., 1 Tex. Civ. App. 321, 21 S. W. 126; Ring *v.* Smith, 1 Tex. App. Civ. Cas. § 1115; McGrady *v.* McRae, 1 Tex. App. Civ. Cas. § 1036. See also Anderson *v.* Clanch, (1887) 6 S. W. 760, where, under an agreement between cotenants that one of them should manage the common property and deduct reasonable compensation for the rents, it was held in an accounting that defendant was not chargeable with use and occupation.

Virginia.— Ballou *v.* Ballou, 94 Va. 350, 26 S. E. 840, 64 Am. St. Rep. 733. See also Newman *v.* Newman, 27 Gratt. 714.

West Virginia.— Ward *v.* Ward, 40 W. Va. 611, 21 S. E. 746, 52 Am. St. Rep. 911, 29 L. R. A. 449.

Wisconsin.— Bulger *v.* Woods, 3 Pinn. 460.

England.— Beer *v.* Beer, 12 C. B. 60, 16 Jur. 223, 21 L. J. C. P. 124, 74 E. C. L. 60 (holding that if a cotenant merely has the sole enjoyment of the common property, even though by his own industry and capital he makes such enjoyment profitable and takes the whole of the said profit, he does not receive more than comes to his just share); McMahon *v.* Burchell, 1 Coop. t. Cott. 457, 47 Eng. Reprint 944, 2 Phil. 127, 22 Eng. Ch. 127, 41 Eng. Reprint 889, 5 Hare 322, 26 Eng. Ch. 322, 67 Eng. Reprint 936; Griffies *v.* Griffies, 8 L. T. Rep. N. S. 758, 11 Wkly. Rep. 943.

Canada.— Guptill *v.* Ingersoll, 2 N. Brunsw. Eq. 252; Munsie *v.* Lindsay, 10 Ont. Pr. 173; *In re* Kirkpatrick, 10 Ont. Pr. 4; Rice *v.* George, 20 Grant Ch. (U. C.) 221; Bates *v.* Martin, 12 Grant Ch. (U. C.) 490. See also Adamson *v.* Adamson, 17 Ont. 407; Griffin *v.* Patterson, 45 U. C. Q. B. 536.

See 45 Cent. Dig. tit. "Tenancy in Common," § 83 *et seq.*

Such occupation may be considered and made an equitable set-off against the occupying tenant's claim for repairs. Davis *v.* Chapman, 36 Fed. 42.

A bill merely showing occupancy by the defendant and forbearance to occupy on the part of the complainant cannot be maintained. Angelo *v.* Angelo, 146 Ill. 629, 35 N. E. 229; Ayotte *v.* Nadeau, 32 Mont. 498, 81 Pac. 145.

If the common property was unoccupied without the fault of any of the tenants in common then, on an accounting between them, none of them should be charged for the use of the property. Farrand *v.* Gleason, 56 Vt. 633.

Cultivation and crops.—A tenant in common merely holding and cultivating the land and taking the entire produce thereof with the knowledge and consent of his cotenant and without an agreement in relation thereto cannot, in the absence of statute or agree-

from him any parts of such rents or profits received.[68] But a cotenant may be held liable where there is a statute or an agreement express or implied to that effect,[69] or where the relation of the cotenant solely occupying the whole of the

ment to the contrary, be held liable for such use and occupation. McCrary *v.* Glover, 100 Ga. 90, 26 S. E. 102; Webster *v.* Calef, 47 N. H. 289. See also Vass *v.* Hill, (N. J. Ch.) 21 Atl. 585; West *v.* Weyer, 46 Ohio St. 66, 18 N. E. 537, 15 Am. St. Rep. 552; McMahon *v.* Burchell, 3 Hare 97, 67 Eng. Reprint 312, 1 Coop. t. Cott. 457, 47 Eng. Reprint 944, 2 Phil. 127, 22 Eng. Ch. 127, 41 Eng. Reprint 889. Crops grown upon the common estate by one tenant in common of the land vest in and become the property of the occupying tenant, in the absence of agreement or statute to the contrary. The other cotenants have no property therein. In cases of exclusion, where there is a liability of the occupying tenant, it usually extends only to an accounting for what he has received beyond his share. There is no property or lien in the produce. Kennon *v.* Wright, 70 Ala. 434; Bird *v.* Bird, 15 Fla. 424, 21 Am. Rep. 296; Creed *v.* People, 81 Ill. 565; Becnel *v.* Becnel, 23 La. Ann. 150; Moreland *v.* Strong, 115 Mich. 211, 73 N. W. 140, 69 Am. St. Rep. 553; Harris *v.* Gregg, 17 N. Y. App. Div. 210, 45 N. Y. Suppl. 364; LeBarren *v.* Babcock, 46 Hun (N. Y.) 598 [*affirmed* in 122 N. Y. 153, 25 N. E. 253, 19 Am. St. Rep. 488, 9 L. R. A. 625]; Shearin *v.* Riggsbee, 97 N. C. 216, 1 S. E. 770; Darden *v.* Cowper, 52 N. C. 210, 75 Am. Dec. 461. See also Morgan *v.* Long, 73 Miss. 406, 19 So. 98, 55 Am. St. Rep. 541; Keisel *v.* Earnest, 21 Pa. St. 90; Bates *v.* Martin, 12 Grant Ch. (U. C.) 490. *Compare* Wickoff *v.* Wickoff, (N. J. Ch. 1889) 18 Atl. 74.

68. Scantlin *v.* Allison, 32 Kan. 376, 4 Pac. 618; Bennett *v.* Bennett, 84 Miss. 493, 36 So. 452; Ragan *v.* McCoy, 29 Mo. 356; Joslyn *v.* Joslyn, 9 Hun (N. Y.) 388, under 1 Rev. St. p. 750, § 9.

If the common property admits of use and occupation by several, and one of the tenants in common uses and occupies less than his just share and proportion of the common property, so as in no way to hinder or exclude the other tenants in common from, in like manner, using and occupying their just share and proportion, he does not receive more than comes to his just share and proportion in the meaning of Code, c. 100, § 14. Dodson *v.* Hays, 29 W. Va. 577, 2 S. E. 415.

69. *Delaware.*— *In re* Journey, 7 Del. Ch. 1, 44 Atl. 795.

Illinois.— Boley *v.* Barutio, 120 Ill. 192, 11 N. E. 393; Elliott *v.* Knight, 64 Ill. App. 87.

Indiana.— McCrum *v.* McCrum, 36 Ind. App. 636, 76 N. E. 415.

Maine.— Richardson *v.* Richardson, 72 Me. 403.

Massachusetts.— Backus *v.* Chapman, 111 Mass. 386 (under Gen. St. c. 134, § 18); Field *v.* Craig, 8 Allen 357.

Michigan.— Fuller *v.* Sweet, 30 Mich. 237, 18 Am. Rep. 122.

New Hampshire.— Porter *v.* Ayer, 66 N. H. 400, 29 Atl. 1027.

New York.— Willes *v.* Loomis, 94 N. Y. App. Div. 67, 87 N. Y. Suppl. 1086; Myers *v.* Bolton, 89 Hun 342, 35 N. Y. Suppl. 577 [*modified* in 157 N. Y. 393, 52 N. E. 114]; Burrell *v.* Bull, 3 Sandf. Ch. 15.

North Carolina.— See Pitt *v.* Petway, 34 N. C. 69.

Pennsylvania.— Lancaster *v.* Flowers, 208 Pa. St. 199, 57 Atl. 526; Clayton *v.* McCay, 143 Pa. St. 225, 22 Atl. 754; Kline *v.* Jacobs, 68 Pa. St. 57; Corbett *v.* Lewis, 53 Pa. St. 322; Keller *v.* Lamb, 10 Kulp 246.

Rhode Island.— Hazard *v.* Albro, 17 R. I. 181, 20 Atl. 834.

See 45 Cent. Dig. tit. "Tenancy in Common," § 83 *et seq.*

A tenant in common holding over under a contract from his cotenants is liable for rent the same as a stranger would be if holding over. Harry *v.* Harry, 127 Ind. 91, 26 N. E. 562; O'Connor *v.* Delaney, 53 Minn. 247, 54 N. W. 1108, 39 Am. St. Rep. 601; Carson *v.* Broady, 56 Nebr. 648, 77 N. W. 80, 71 Am. St. Rep. 691; Valentine *v.* Healey, 158 N. Y. 369, 52 N. E. 1097, 43 L. R. A. 667; Early *v.* Friend, 16 Gratt. (Va.) 21, 78 Am. Dec. 649; Rockwell *v.* Luck, 32 Wis. 70; Leigh *v.* Dickeson, 15 Q. B. D. 60, 54 L. J. Q. B. 18, 52 L. T. Rep. N. S. 790, 33 Wkly. Rep. 538. And rental value is properly taken to continue the same as rent fixed in a rental agreement where there is no evidence to the contrary and the issue is between the parties thereto. Harry *v.* Harry, 127 Ind. 91, 26 N. E. 562; Clayton *v.* McCay, 143 Pa. St. 225, 22 Atl. 754. But if a tenant in common has been holding under an agreement to pay rent and continues in possession after the expiration of the lease, but makes no claim to be exclusively entitled to the possession or offers possession of his cotenant's share to said cotenant, then he is presumed not to be holding in the character of lessee but of that of tenant in common, and is not liable for rent, in the absence of statute to the contrary; and statutes providing for liability for tenants holding over are liberally construed in his favor. Dresser *v.* Dresser, 40 Barb. (N. Y.) 300; Mumford *v.* Brown, 1 Wend. (N. Y.) 52, 19 Am. Dec. 461. The presumption is otherwise if he, after the expiration of the lease, treats it as though it were in force and continues to discharge the obligation thereby imposed upon him. Carson *v.* Broady, 56 Nebr. 648, 77 N. W. 80, 71 Am. St. Rep. 691.

Question for jury.—Whether or not the relationship of landlord and tenant in the common property exists between tenants in common is, under a conflicting state of facts, a question for the jury. Chapin *v.* Foss, 75 Ill. 280; Boley *v.* Barutio, 24 Ill. App. 515.

The untenantability of the premises is no defense to an action for rent, under an express contract of rental. Kline *v.* Jacobs, 68 Pa. St. 57.

common property is fiduciary,[70] and where the common property is occupied adversely, or to the exclusion of the other common owners, by some of the cotenants, those so occupying are liable for so much of the rental value and the value of the profits thereof as exceed their proportionate share.[71] If the nature of

An action of distraint may be maintained between tenants in common. Luther *v.* Arnold, 8 Rich. (S. C.) 24, 62 Am. Dec. 422.

Burden of proof.—Where a contract was alleged for the erection of a building, and a division of rents after defendant should have reimbursed himself from the rents to the extent of one half the cost of the building, it is incumbent upon plaintiff to prove such reimbursement. Ayotte *v.* Nadeau, 32 Mont. 498, 81 Pac. 145.

A statute apparently creating liability is held not to apply to appropriation of products of the joint property by a cotenant therein in exclusive possession thereof without exclusion of his cotenants. Kean *v.* Connelly, 25 Minn. 222, 33 Am. Rep. 458. And under a statute providing for an accounting between cotenants for more than a cotenant's share of the rents and profits no recovery can be had for such products of the land as the cotenant in possession takes therefrom for his own use. Joslyn *v.* Joslyn, 9 Hun (N. Y.) 388.

Exclusive use as sufficient consideration to support a promise to pay rent see Ayotte *v.* Nadeau, 32 Mont. 498, 81 Pac. 145.

70. Tarleton *v.* Goldthwaite, 23 Ala. 346, 58 Am. Dec. 296; Tyler *v.* Cartwright, 40 Mo. App. 378; Bates *v.* Martin, 12 Grant Ch. (U. C.) 490.

71. *District of Columbia.*— Williams *v.* Gardner, 2 MacArthur 401.

Illinois.— McParland *v.* Larkin, 155 Ill. 84, 39 N. E. 609; Chambers *v.* Jones, 72 Ill. 275.

Indiana.— Carver *v.* Coffman, 109 Ind. 547, 10 N. E. 567; Crane *v.* Waggoner, 27 Ind. 52, 89 Am. Dec. 493. See also McCrum *v.* McCrum, 36 Ind. App. 636, 76 N. E. 415.

Iowa.— Rippe *v.* Badger, 125 Iowa 725, 101 N. W. 642, 106 Am. St. Rep. 336; Dodge *v.* Dodge, 85 Iowa 77, 52 N. W. 2; Austin *v.* Barrett, 44 Iowa 488; Sears *v.* Sellew, 28 Iowa 501.

Kentucky.— Vermillion *v.* Nickell, (1908) 114 S. W. 270.

Maine.— Richardson *v.* Richardson, 72 Me. 403.

Massachusetts.— Munroe *v.* Luke, 1 Metc. 459.

Michigan.— Fenton *v.* Wendell, 116 Mich. 45, 74 N. W. 384, 72 Am. St. Rep. 502. See also Wilmarth *v.* Palmer, 34 Mich. 347.

Minnesota.— Cook *v.* Webb, 21 Minn. 428, holding that an action therefor is in the nature of a common-law action of trespass for mesne profits.

Missouri.— Bates *v.* Hamilton, 144 Mo. 1, 45 S. W. 641, 66 Am. St. Rep. 407; Falconer *v.* Roberts, 88 Mo. 574; Starks *v.* Kirchgraber, 134 Mo. App. 211, 113 S. W. 1149.

Montana.—Ayotte *v.* Nadeau, 32 Mont. 498, 81 Pac. 145.

Nebraska.— Schuster *v.* Schuster, 84 Nebr. 98, 120 N. W. 948; Names *v.* Names, 48 Nebr. 701, 67 N. W. 751.

New Jersey.— Vass *v.* Hill, (Ch. 1891) 21 Atl. 585; Edsall *v.* Merrill, 37 N. J. Eq. 114.

New York.— Zapp *v.* Miller, 109 N. Y. 51, 15 N. E. 889 (holding that a tenant in common fraudulently obtaining deeds to the common property is liable for rent therein from the time of the delivery of the deeds); Willes *v.* Loomis, 94 N. Y. App. Div. 67, 87 N. Y. Suppl. 1086. See also Myers *v.* Bolton, 89 Hun 342, 35 N. Y. Suppl. 577 [*reversed* on other grounds in 157 N. Y. 393, 52 N. E. 114] (holding that where property was leased to and in possession of a firm, and it was devised to the firm and others, and remained in the possession and sole occupancy of the firm after the devise, the partners were liable to account to their cotenants for the rents accruing after the death of the lessor).

Ohio.— Converse *v.* Farwell, 1 Ohio Dec. (Reprint) 141, 2 West. L. J. 501, holding that one so occupying incurs the responsibility of a trustee; and if he negligently accepts notes instead of money for the rents, and said notes remain unpaid until after the insolvency of the maker thereof, he, so accepting the notes, must account in money for the rent to his cotenants, and he cannot require them to take the notes received by him.

Pennsylvania.— Keisel *v.* Earnest, 21 Pa. St. 90; Schreiber *v.* National Transit Co., 21 Pa. Co. Ct. 657.

Rhode Island.— Almy *v.* Daniels, 15 R. I. 312, 4 Atl. 753, 10 Atl. 654.

South Carolina.— Pearson *v.* Carlton, 18 S. C. 47; Jones *v.* Massey, 14 S. C. 292.

Tennessee.— Renshaw *v.* Tullahoma First Nat. Bank, (Ch. App. 1900) 63 S. W. 194, holding that a tenant in common claiming ownership of the entire property as against the cotenant and taking exclusive possession, must account for rents received during the period of exclusion in excess of the increased value of the premises due to his improvement.

Texas.— Autry *v.* Reasor, 102 Tex. 123, 108 S. W. 1162, 113 S. W. 748; Duke *v.* Reed, 64 Tex. 705; Osborn *v.* Osborn, 62 Tex. 495; Stephens *v.* Hewitt, (Civ. App. 1903) 77 S. W. 229; Eastham *v.* Sims, 11 Tex. Civ. App. 133, 32 S. W. 359.

Vermont.— Hayden *v.* Merrill, 44 Vt. 336, 8 Am. Rep. 372.

West Virginia.— Cecil *v.* Clark, 49 W. Va. 459, 39 S. E. 202 (holding that possession having been taken of a coal mine by one tenant in common thereof to the exclusion of his cotenants and the mine having been leased to a third party under a royalty, the excluded cotenant might require an accounting to him for his just proportion of such royalty as the proper measure of damages after such waste); Williamson *v.* Jones, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. Rep. 891, 38

the property be such as not to admit of its use and occupation by more than one, and it is occupied by one of the tenants in common only; or if, although capable of occupation by more than one, it is yet so used and occupied as in effect to exclude the others, he so occupying will be held accountable to the others for the rents and profits.[72] Furthermore, if a tenant in common actually receives more than his share of the rents and profits for or on the common property, or some specific part thereof, such tenant is bound to account therefor proportionately to the respective shares of his cotenants, even though his possession and enjoyment of the common property be non-exclusive as to his cotenants;[73] and

L. R. A. 694; Ward *v.* Ward, 40 W. Va. 611, 21 S. E. 746, 52 Am. St. Rep. 911, 29 L. R. A. 449.

United States.—McGahan *v.* Rondout Bank, 156 U. S. 218, 15 S. Ct. 347, 39 L. ed. 403.

England.— Pascoe *v.* Swan, 27 Beav. 508, 5 Jur. N. S. 1235, 29 L. J. Ch. 159, 1 L. T. Rep. N. S. 17, 8 Wkly. Rep. 130, 54 Eng. Reprint 201.

Canada.— McIntosh *v.* Ontario Bank, 19 Grant Ch. (U. C.) 155.

See 45 Cent. Dig. tit. "Tenancy in Common," § 84 *et seq.*

Compare Clark *v.* Jones, 49 Cal. 618.

They cannot offset their improvements against the rent if they held adversely, even believing in good faith their own title to be the better. Bodkin *v.* Arnold, 48 W. Va. 108, 35 S. E. 980.

The collection of rents or profits is not an act of ouster in itself, but it may amount to an act of ouster in connection with other acts in relation to the common property. Morgan *v.* Mitchell, 104 Ga. 596, 30 S. E. 792; Busch *v.* Huston, 75 Ill. 343; Robidoux *v.* Cassilegi, 10 Mo. App. 516; Linker *v.* Benson, 67 N. C. 150; Bolton *v.* Hamilton, 2 Watts & S. (Pa.) 294, 37 Am. Dec. 509; Lagorio *v.* Dozier, 91 Va. 492, 22 S. E. 239. See also Moreira *v.* Schwan, 113 La. 643, 37 So. 542. And the mere fact of a tenant in common having occupied the common property will not of itself make him liable for an occupation rent; for the effect of such a rule would be that a tenant in common by merely keeping out of the actual occupation of the premises might convert his cotenant into his bailiff and prevent him from occupying the premises, excepting upon the payment of rent. Lyles *v.* Lyles, 1 Hill Eq. (S. C.) 76.

The non-occupying cotenants may jointly or severally have an account, not only of the rents received but also of those which would have been realized by prudent management. Chambers *v.* Jones, 72 Ill. 275.

A tenant of land claiming under a tenant in common adversely to other tenants in common will, in respect to rents and profits, be treated as tenant in common of the latter, and hence will not be charged with profits, which he has not received, if he has acted in good faith with a view to make the property profitable. Ruffners *v.* Lewis, 7 Leigh (Va.) 720, 30 Am. Dec. 513.

A decree in partition ousting certain cotenants from possession being reversed on appeal five years later and the ousted cotenants being decreed one half of the property, a suit in equity for an accounting against the one remaining in possession was held to be proper. Bates *v.* Hamilton, 144 Mo. 1, 45 S. W. 641, 66 Am. St. Rep. 407.

Where a tenant in common solely operated the common property under a mistake of law as to his alleged superior title he was held to account for the fair annual rental of the property with legal interest, less taxes paid by him. Nott *v.* Owen, 86 Me. 98, 29 Atl. 943, 41 Am. St. Rep. 525; Ruffners *v.* Lewis, 7 Leigh (Va.) 720, 30 Am. Dec. 513; Bodkin *v.* Arnold, 48 W. Va. 108, 35 S. E. 980.

A receiver may be appointed in case of ouster between cotenants (Sandford *v.* Ballard, 33 Beav. 401, 10 Jur. N. S. 251, 33 L. J. Ch. 450, 55 Eng. Reprint 423), excepting in cases where the coöwnership of the mine is really a copartnership; in which event it may be necessary to ask for a dissolution as part of the remedy before equity will entertain such a bill (Roberts *v.* Eberhardt, Kay 148, 23 L. J. Ch. 201, 2 Wkly. Rep. 125, 69 Eng. Reprint 63).

72. *Nebraska.*— Names *v.* Names, 48 Nebr. 701, 67 N. W. 751.

New Jersey.— Wickoff *v.* Wickoff, (Ch. 1889) 18 Atl. 74; Izard *v.* Bodine, 11 N. J. Eq. 403, 69 Am. Dec. 595.

Rhode Island.— Knowles *v.* Harris, 5 R. I. 402, 73 Am. Dec. 77.

Vermont.— Hayden *v.* Merrill, 44 Vt. 336, 8 Am. Rep. 372.

Virginia.— Newman *v.* Newman, 27 Gratt. 714; Graham *v.* Pierce, 19 Gratt. 28, 100 Am. Dec. 658; Early *v.* Friend, 16 Gratt. 21, 78 Am. Dec. 649.

Wisconsin.— McKinley *v.* Weber, 37 Wis. 279.

England.— Pascoe *v.* Swan, 27 Beav. 508, 5 Jur. N. S. 1235, 29 L. J. Ch. 159, 1 L. T. Rep. N. S. 17, 8 Wkly. Rep. 130, 54 Eng. Reprint 201.

But only for the time of actual exclusive occupation.— Baylor *v.* Hopf, 81 Tex. 637, 17 S. W. 230.

Where a cotenant had no means of obtaining his just share without at the same time taking that of his cotenants, it was held that the value of the share of his cotenants as he found it was a just basis of account. Coleman's Appeal, 62 Pa. St. 252.

73. *Alabama.*— McCaw *v.* Barker, 115 Ala. 543, 22 So. 131; Pope *v.* Harkins, 16 Ala. 321.

California.— Abel *v.* Love, 17 Cal. 233.

Georgia.— Shiels *v.* Stark, 14 Ga. 429.

Illinois.— Regan *v.* Regan, 192 Ill. 589, 61

it is immaterial that said rents or profits so received accrued from a portion of the

N. E. 842; Woolley *v.* Schrader, 116 Ill. 29, 4 N. E. 658, under 1 Starr & C. c. 2, § 2, cl. 1.

Indiana.— Schissel *v.* Dickson, 129 Ind. 139, 28 N. E. 540, under Rev. St. (1881) § 288.

Iowa.— German *v.* Heath, 139 Iowa 52, 116 N. W. 1051.

Maine.— Cutler *v.* Currier, 54 Me. 81, under St. (1848) c. 61, § 1.

Massachusetts.— Peck *v.* Carpenter, 7 Gray 283, 66 Am. Dec. 477; Sargent *v.* Parsons, 12 Mass. 149.

Michigan.— Eighmey *v.* Thayer, 135 Mich. 682, 98 N. W. 734, 66 L. R. A. 915, holding that a tenant in common receiving the rents and profits is bound to account to his cotenants therefor, although ignorant of their title, and although he expended them in supporting his grantor according to contract with him.

Montana.— Ayotte *v.* Nadeau, 32 Mont. 498, 81 Pac. 145.

New Hampshire.— Gage *v.* Gage, 66 N. H. 282, 29 Atl. 543, 28 L. R. A. 829, holding the obligation to so account to be part of the community of duty produced by the community of interest.

New Jersey.— Lloyd *v.* Turner, 70 N. J. Eq. 425, 62 Atl. 771; Buckelew *v.* Snedeker, 27 N. J. Eq. 82.

New York.— Clark *v.* Platt, 39 N. Y. App. Div. 670, 58 N. Y. Suppl. 361; Gedney *v.* Gedney, 19 N. Y. App. Div. 407, 46 N. Y. Suppl. 590 [*affirmed* in 160 N. Y. 471, 55 N. E. 1] (where an agreement having been made between tenants in common, each owning one half of the real property, that each should collect one half of the rents, one of them having collected more than one half of the rents was held liable to the other); Roseboom *v.* Roseboom, 15 Hun 309 [*affirmed* in 81 N. Y. 356]; Wright *v.* Wright, 59 How. Pr. 176.

North Carolina.— Northcot *v.* Casper, 41 N. C. 303.

Pennsylvania.— Keisel *v.* Earnest, 21 Pa. St. 90.

Rhode Island.— White *v.* Eddy, 19 R. I. 108, 31 Atl. 823; Hazard *v.* Albro, 17 R. I. 181, 20 Atl. 834; Almy *v.* Daniels, 15 R. I. 312, 4 Atl. 753, 10 Atl. 654.

South Carolina.— Pearson *v.* Carlton, 18 S. C. 47.

Tennessee.— Renshaw *v.* Tullahoma First Nat. Bank, (Ch. App., 1900) 63 S. W. 194.

Texas.— Logan *v.* Robertson, (Civ. App. 1904) 83 S. W. 395.

Virginia.— Early *v.* Friend, 16 Gratt. 21, 78 Am. Dec. 649.

West Virginia.— Cecil *v.* Clark, 49 W. Va. 459, 39 S. E. 202.

England.— Clegg *v.* Clegg, 3 Giffard 322, 8 Jur. N. S. 92, 31 L. J. Ch. 153, 5 L. T. Rep. N. S. 441, 10 Wkly. Rep. 75, 66 Eng. Reprint 433.

Canada.— *Re* Kirkpatrick, 10 Ont. Pr. 4; Rice *v.* George, 20 Grant Ch. (U. C.) 221.

See 45 Cent. Dig. tit. "Tenancy in Common," § 83 *et seq.*

Mines and minerals.— A tenant in common quarrying and removing, or removing minerals or other products of mines or wells from the common property, thereby becomes liable to account to his cotenants for their damages and profits, if any, of the transactions, according to their proportionate shares thereof. McCord *v.* Oakland Quicksilver Min. Co., 64 Cal. 134, 27 Pac. 863, 49 Am. Rep. 686; Murley *v.* Ennis, 2 Colo. 300; Huff *v.* McDonald, 22 Ga. 131, 68 Am. Dec. 487; Richardson *v.* Richardson, 72 Me. 403; Childs *v.* Kansas City, etc., R. Co., 117 Mo. 414, 23 S. W. 373; Gregg *v.* Roaring Springs Land, etc., Co., 97 Mo. App. 44, 70 S. W. 920; Smith *v.* Woodman, 28 N. H. 520; Switzer *v.* Switzer, 57 N. J. Eq. 421, 41 Atl. 486; Abbey *v.* Wheeler, 170 N. Y. 122, 62 N. E. 1074; Cosgriff *v.* Dewey, 21 N. Y. App. Div. 129, 47 N. Y. Suppl. 255 [*affirmed* in 164 N. Y. 1, 58 N. E. 1, 79 Am. St. Rep. 620]; St. John *v.* Coates, 63 Hun (N. Y.) 460, 18 N. Y. Suppl. 419 [*affirmed* in 140 N. Y. 634, 35 N. E. 891]; Johnston *v.* Price, 172 Pa. St. 427, 33 Atl. 688; Winton Coal Co. *v.* Pancoast Coal Co., 170 Pa. St. 437, 33 Atl. 110; Given *v.* Kelly, 85 Pa. St. 309; Irvine *v.* Hanlin, 10 Serg. & R. (Pa.) 219; Cecil *v.* Clark, 44 W. Va. 659, 30 S. E. 216; Williamson *v.* Jones, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L. R. A. 694; McDodrill *v.* Pardee, etc., Lumber Co., 40 W. Va. 564, 21 S. E. 878; Clegg *v.* Clegg, 3 Giffard 322, 8 Jur. N. S. 92, 31 L. J. Ch. 153, 5 L. T. Rep. N. S. 441, 10 Wkly. Rep. 75, 66 Eng. Reprint 433; Denys *v.* Shuckburgh, 5 Jur. 21, 4 Y. & C. Exch. 42; Curtis *v.* Coleman, 22 Grant Ch. (U. C.) 561; Goodenow *v.* Farquhar, 19 Grant Ch. (U. C.) 614. And the one leasing the common property is only entitled to his proportionate share of the rents and profits thereof. Barnum *v.* Landon, 25 Conn. 137. If there be no damage to the interests of the respective cotenants, and if they have no interests in the profits arising from the operation of the common property by one cotenant, then they cannot charge the operating cotenant therefor in an accounting. Clark *v.* Jones, 49 Cal. 618; Cosgriff *v.* Dewey, 21 N. Y. App. Div. 129, 47 N. Y. Suppl. 255 [*affirmed* in 164 N. Y. 1, 58 N. E. 1, 79 Am. St. Rep. 620].

In Pennsylvania, under the act of June 24, 1895 (Pamphl. Laws 237), payment of rent by one tenant in common to the others may be settled in a partition proceeding. Heft's Estate, 9 Kulp 337.

The cotenant must have received more than his share, not merely on a single article, but of the entire profits of the estate, after deducting all reasonable charges; and in an action against him therefor, it must appear that the balance is due to plaintiff in said action, not to the other cotenants; and the same rule applies as to contribution for expenditures. Gowen *v.* Shaw, 40 Me. 56;

common property or a partial use thereof, instead of all,[74] or whether or not the production of rents or profits was caused by the acts of such occupying tenant,[75] and where an arrangement has been made between cotenants, merely for convenience, that each shall collect his proportionate part of the rents, there is no estoppel on the part of either of them to claim his share of excess collected by the other.[76] But if a tenant in common receives rent, income, or profits from a

Hardy *v.* Sprowl, 33 Me. 508; Shepard *v.* Richards, 2 Gray (Mass.) 424, 61 Am. Dec. 473.

If a proper set-off be declared, and it is found that plaintiff's share is insufficient to satisfy such a set-off, defendant should be allowed judgment for the excess. Dewing *v.* Dewing, 165 Mass. 230, 42 N. E. 1128.

Rent paid in permanent improvements on the land is not chargeable as profits received by the cotenant. Hannan *v.* Osborn, 4 Paige (N. Y.) 336; Walker *v.* Humbert, 55 Pa. St. 407.

The grantee of the interest of one tenant in common must account for the income of so much of the common property as was productive at the time of his purchase and taking possession, even though it was rendered productive by the occupying cotenant of whom he purchased. Hancock *v.* Day, McMull. Eq. (S. C.) 69, 36 Am. Dec. 293.

A mortgagee in possession of the common property by virtue of a mortgage given by one tenant in common is in no better position than his grantor, and therefore he is accountable to the other cotenants for the income in his hands before any application can be made thereof to the mortgage. Fuher *v.* Buckeye Supply Co., 5 Ohio S. & C. Pl. Dec. 187, 7 Ohio N. P. 420. See also McIntosh *v.* Ontario Bank, 19 Grant Ch. (U. C.) 155.

Tenants in common may each maintain a separate action for their respective shares of the excess of rents and profits received by virtue or under claim of the cotenancy. Smith *v.* Wiley, 22 Ala. 396, 58 Am. Dec. 262; Barnum *v.* Landon, 25 Conn. 137.

Where a tenant in common gives credit for the rental or sale of the property under circumstances where he should have demanded cash, he will be chargeable as though he had received cash in the premises. Hammer *v.* Johnson, 44 Ill. 192; Denys *v.* Shuckburgh, 5 Jur. 21, 4 Y. & C. Exch. 42.

If insurance money be paid to a tenant in common who has insured solely for his own benefit, without any interference with the rights of his cotenants, the tenant insuring is entitled to appropriate the insurance money to his own benefit. McIntosh *v.* Ontario Bank, 20 Grant Ch. (U. C.) 24. But if it be apparent that the insurance was for the common benefit he must account therefor. Starks *v.* Sikes, 8 Gray (Mass.) 609, 69 Am. Dec. 270; Briggs *v.* Call, 5 Metc. (Mass.) 504. Conversely, he is not entitled to contribution for insurance money paid by him in the absence of a showing that such payment was for the common benefit. Farrand *v.* Gleason, 56 Vt. 633.

The widow of a tenant in common of real estate cannot be charged with amounts received by him, he having in his lifetime received an undue share of the rents and profits of the common estate, and died after the filing of a bill for an accounting against him. Allen *v.* Bayliss, 2 MacArthur (D. C.) 180.

Liability of heir.— An action of account by a tenant in common for rents collected by the heirs' common ancestor during his lifetime should not be entertained, although an action for rents collected by the heirs would lie. Brittinum *v.* Jones, 56 Ark. 624, 20 S. W. 520. In the absence of statute or agreement to the contrary, claims and judgments against a decedent's estate should not be charged in an accounting between heirs of said decedent, even though the administrator of said estate be a tenant in common with such heirs; because such claims and judgments are properly chargeable against the estate in the hands of the administrator and not against heirs. Havey *v.* Kelleher, 36 N. Y. App. Div. 201, 56 N. Y. Suppl. 889.

Where a statute provides for a measure of damages arising out of sole occupation of property, such statute is enforceable. Knowles *v.* Harris, 5 R. I. 402, 73 Am. Dec. 77.

74. Wickoff *v.* Wickoff, (N. J. Ch. 1889) 18 Atl. 74; Joslyn *v.* Joslyn, 9 Hun (N. Y.) 388; Holmes *v.* Best, 58 Vt. 547, 5 Atl. 385, so holding even though the portion so rented does not exceed the portion that such lessor would be entitled to on partition. But see Scantlin *v.* Allison, 32 Kan. 376, 4 Pac. 618; Ragan *v.* McCoy, 29 Mo. 356.

75. Stephens *v.* Taylor, (Tex. Civ. App. 1896) 36 S. W. 1083.

Damages recovered by one tenant in common in trespass in relation to the common property inure to the benefit of his cotenants and they can compel an accounting. Becnel *v.* Waguespack, 40 La. Ann. 109, 3 So. 536.

What the leasehold would be worth in the open market is the proper test to determine whether one has received more than an equal share, and where the sole issue is the assessment of a proper rent, it is immaterial what elements may have contributed to the increase of rental value. Shiels *v.* Stark, 14 Ga. 429. See also McCrum *v.* McCrum, 36 Ind. App. 636, 76 N. E. 415. Proof that increase in rental value of the common property was due to improvements made by defendant, where there is no offer to prove the amount of such increase, is immaterial. Walter *v.* Greenwood, 29 Minn. 87, 12 N. W. 145.

76. Fenton *v.* Miller, 116 Mich. 45, 74 N. W. 384, 72 Am. St. Rep. 502; Switzer *v.* Switzer, 57 N. J. Eq. 421, 14 Atl. 486; Gedney *v.* Gedney, 160 N. Y. 471, 55 N. E. 1.

third person in excess of his share, in good faith, he is generally held liable to account therefor only for what he has actually received more than his just share or proportion, and not for the rental value of the property or what he might have received,[77] and if the occupying cotenant merely occupies the common land with-

77. *Alabama.*— McCaw *v.* Barker, 115 Ala. 543, 22 So. 131.

California.— Howard *v.* Throckmorton, 59 Cal. 79; Abel *v.* Love, 17 Cal. 233.

Connecticut.— Barnum *v.* Landon, 25 Conn. 137.

Georgia.— Huff *v.* McDonald, 22 Ga. 131, 68 Am. Dec. 487.

Illinois.— Regan *v.* Regan, 192 Ill. 589, 61 N. E. 842; Stenger *v.* Edwards, 70 Ill. 631; Cheney *v.* Ricks, 87 Ill. App. 388 [*affirmed* in 187 Ill. 171, 58 N. E. 234].

Iowa.— Van Ormer *v.* Harley, 102 Iowa 150, 71 N. W. 241; Reynolds *v.* Wilmeth, 45 Iowa 693.

Kentucky.— Talbott *v.* Todd, 5 Dana 190; Hixon *v.* Bridges, 38 S. W. 1046, 18 Ky. L. Rep. 1068.

Maryland.— Hamilton *v.* Conine, 28 Md. 635, 92 Am. Dec. 724.

Massachusetts.— Dewing *v.* Dewing, 165 Mass. 230, 42 N. E. 1128; Mayhew *v.* Durfee, 138 Mass. 584; Shepard *v.* Richards, 2 Gray 424, 61 Am. Dec. 473.

Michigan.— Miner *v.* Lorman, 70 Mich. 173, 38 N. W. 18; Fuller *v.* Sweet, 30 Mich. 237, 18 Am. Rep. 122.

Missouri.— Bates *v.* Hamilton, 144 Mo. 1, 45 S. W. 641, 66 Am. St. Rep. 407.

New Jersey.— Barrell *v.* Barrell, 25 N. J. Eq. 173.

New York.— Adams *v.* Bristol, 126 N. Y. App. Div. 660, 111 N. Y. Suppl. 231; Clark *v.* Platt, 39 N. Y. App. Div. 670, 58 N. Y. Suppl. 361; Roseboom *v.* Roseboom, 15 Hun 309 [*affirmed* in 81 N. Y. 356]; Dresser *v.* Dresser, 40 Barb. 300; Woolever *v.* Knapp, 18 Barb. 265; Matter of Lucy, 4 Misc. 349, 24 N. Y. Suppl. 352; Wright *v.* Wright, 59 How. Pr. 176; Burrell *v.* Bull, 3 Sandf. Ch. 15.

North Carolina.— Northcot *v.* Casper, 41 N. C. 303.

Pennsylvania.— North Pennsylvania Coal Co. *v.* Snowden, 42 Pa. St. 488, 82 Am. Dec. 530; Keisel *v.* Earnest, 21 Pa. St. 90; Jevons *v.* Kline, 9 Kulp 305.

Rhode Island.— White *v.* Eddy, 19 R. I. 108, 31 Atl. 823; Almy *v.* Daniels, 15 R. I. 312, 4 Atl. 753, 10 Atl. 654.

South Carolina.— Griffin *v.* Griffin, 82 S. C. 256, 64 S. E. 160; Cain *v.* Cain, 53 S. C. 350, 31 S. E. 278, 69 Am. St. Rep. 863; Pearson *v.* Carlton, 18 S. C. 47; Jones *v.* Massey, 14 S. C. 292; Volentine *v.* Johnson, 1 Hill Eq. 49.

Tennessee.— Renshaw *v.* Tullahoma First Nat. Bank, (Ch. App. 1900) 63 S. W. 194.

Texas.— Mahon *v.* Barnett, (Civ. App. 1897) 45 S. W. 24; Gillum *v.* St. Louis, etc., R. Co., 4 Tex. Civ. App. 622, 23 S. W. 716.

Vermont.— Hayden *v.* Merrill, 44 Vt. 336, 8 Am. Rep. 372.

Virginia.— Moorman *v.* Smoot, 28 Gratt. 80; Early *v.* Friend, 16 Gratt. 21, 78 Am. Dec. 649; Ruffners *v.* Lewis, 7 Leigh 720, 30 Am. Dec. 513.

West Virginia.— Cecil *v.* Clark, 49 W. Va. 459, 39 S. E. 202; Williamson *v.* Jones, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L. R. A. 694; Ward *v.* Ward, 40 W. Va. 611, 21 S. E. 746, 52 Am. St. Rep. 911, 29 L. R. A. 449.

United States.— McGahan *v.* Rondout Nat. Bank, 156 U. S. 218, 15 S. Ct. 347, 39 L. ed. 403; Dangerfield *v.* Caldwell, 151 Fed. 554, 81 C. C. A. 400.

England.— Henderson *v.* Eason, 17 Q. B. 701, 16 Jur. 518, 21 L. J. Q. B. 82, 79 E. C. L. 701; Beer *v.* Beer, 12 C. B. 60, 16 Jur. 223, 21 L. J. C. P. 124, 74 E. C. L. 60; Montgomery *v.* Swan, 9 Ir. Ch. 131; Leake *v.* Cordeaux, 4 Wkly. Rep. 806.

Canada.— *Re* Kirkpatrick, 10 Ont. Pr. 4; Curtis *v.* Coleman, 22 Grant Ch. (U. C.) 561; McIntosh *v.* Ontario Bank, 20 Grant Ch. (U. C.) 24; Goodenow *v.* Farquhar, 19 Grant Ch. (U. C.) 614.

See 45 Cent. Dig. tit. "Tenancy in Common," § 83 *et seq.*

See also note to Gage *v.* Gage, 28 L. R. A. 829.

The burden is upon plaintiff to show the net amount of rent received. Gowen *v.* Shaw, 40 Me. 56; Joslyn *v.* Joslyn, 9 Hun (N. Y.) 388. The proving of contracts of rent fixing the amount to be paid to defendant *prima facie* meets said burden and shifts the onus of proving what he did not receive upon defendant. Tarleton *v.* Goldthwaite, 23 Ala. 346, 58 Am. Dec. 296.

Pasturage.— Under a statute that recovery may be had for rents and profits received from the common estate "according to the justice and equity of the case," it is held that recovery might be had for pasturage. West *v.* Weyer, 46 Ohio St. 66, 18 N. E. 537, 15 Am. St. Rep. 552.

Duty to keep accounts.— If a tenant in common is in a position where he may be required to account, it is his duty to keep accurate accounts of his income, expenses, and receipts; and upon failing to do so his cotenants will be entitled to prove such items by expert testimony, or the amount of rent to be charged by evidence of the rental value of the common property. McCaw *v.* Barker, 115 Ala. 543, 22 So. 131; Boyce *v.* Boyce, 124 Mich. 696, 83 N. W. 1013; Bates *v.* Hamilton, 144 Mo. 1, 45 S. W. 641, 66 Am. St. Rep. 407; Cain *v.* Cain, 53 S. C. 350, 31 S. E. 278, 69 Am. St. Rep. 863. Partial accounts stated and rendered to each other are inadmissible, unless the litigant so offering said account will consent to open the whole state of accounts between the parties. Prentiss *v.* Roberts, 49 Me. 127. In the absence of statute or rule to the contrary, or of objection properly made, vouchers with

but any ouster of his fellows he should, if liable for rent, be charged only with rent for so much of the land as was capable of producing rent when he took possession, and he should neither be charged with rent for the land rendered productive by him nor is he entitled to allowance for improvements.[78]

b. Interest; Costs. A tenant in common coming into possession of more than his just share and proportion of the rents, income, or profits, is not, in the absence of some wrongful conduct on his part in regard thereto, chargeable with interest on the shares of his cotenants.[79] The rule is otherwise if the withholding is wrongful, as where the cotenant holds adversely, or after demand and refusal;[80] and a cotenant holding adversely may be liable for the interest on the income, rents, and profits collected and withheld, although he has received no such interest.[81] A tenant in common wrongfully failing to account is usually personally liable for the costs incurred in an action at law or in equity.[82]

the usual affidavit of verification are sufficient *prima facie* proof of the matters in issues therein contained. *In re* Curry, 25 Ont. App. 267 [*affirming* 17 Ont. Pr. 379].

Claim of cotenant personal.— The share of such tenant in common in the income of the common property is a debt due to himself from the cotenant who receives such income and does not pass to his grantee upon the sale of his interest in the premises, or to his devisee or heir at law upon his death. Hannan *v.* Osborn, 4 Paige (N. Y.) 336. But if, pending a suit by several alleged tenants in common against a cotenant for establishment of title and rents, one of plaintiffs quitclaims to the other, the rents due to the former pass to the latter. La Master *v.* Dickson, 17 Tex. Civ. App. 473, 43 S. W. 911.

The lessee of the interest of one tenant in common, occupying the whole estate and not attorning to the other tenants in common, to whose occupation of said estate he has never objected, is in the same position as his lessor. Badger *v.* Holmes, 6 Gray (Mass.) 118.

Where an estate is divided between three devisees, one of whom receives designated realty, on which he enters and enjoys the rents and profits, and all three are tenants in common in the remainder in certain proportions, the income from the remainder should be divided among the three in proportion to their shares as tenants in common. Moseley *v.* Bolster, 201 Mass. 135, 87 N. E. 606.

78. Shiels *v.* Stark, 14 Ga. 429; Carver *v.* Fennimore, 116 Ind. 236, 19 N. E. 103; Hancock *v.* Day, McMull. Eq. (S. C.) 298; Thompson *v.* Bostick, McMull. Eq. (S. C.) 75. See Baylor *v.* Hopf, 81 Tex. 637, 17 S. W. 230.

The true measure of damages is based on the idea of compensation for the actual loss sustained by plaintiff in being deprived of the use of his possession. Even though defendant, with knowledge of plaintiff's title, actually believed that he, defendant, had the better title, such holding could not be called *bona fide*, because it arose from ignorance of the law, and not from ignorance of the fact. Bodkin *v.* Arnold, 48 W. Va. 108, 35 S. E. 980.

79. Cheney *v.* Ricks, 87 Ill. App. 388 [*affirmed* in 187 Ill. 171, 58 N. E. 234], where he was awaiting the determination of an adverse claim.

80. *Alabama.*— Tarleton *v.* Goldthwaite, 23 Ala. 346, 58 Am. Dec. 296.

Kentucky.— Barnes *v.* Barnes, 72 S. W. 282, 24 Ky. L. Rep. 1732.

Missouri.— Bates *v.* Hamilton, 144 Mo. 1, 45 S. W. 641, 66 Am. St. Rep. 407.

New York.— Scott *v.* Guernsey, 60 Barb. 163 [*affirmed* in 48 N. Y. 106].

North Carolina.— Jolly *v.* Bryan, 86 N. C. 457.

Pennsylvania.— Sieger *v.* Sieger, 209 Pa. St. 65, 58 Atl. 140 (interest charged from the time when money should have been paid over after allowing a reasonable time for settlement); McGowan *v.* Bailey, 179 Pa. St. 470, 36 Atl. 325.

Virginia.— Early *v.* Friend, 16 Gratt. 21, 78 Am. Dec. 649.

West Virginia.— Vance *v.* Evans, 11 W. Va. 342.

81. Bates *v.* Hamilton, 144 Mo. 1, 45 S. W. 641, 66 Am. St. Rep. 407; Armijo *v.* Neher, 11 N. M. 645, 72 Pac. 12; White *v.* Eddy, 19 R. I. 108, 31 Atl. 823.

Where a statute provided that a tenant in common platting the common lands and paying taxes thereon should receive certain moneys, and one of the cotenants so platted the lands and paid the taxes and received the moneys he was not liable to his cotenant for any part of the moneys so received. Howard *v.* Donahue, 60 Cal. 264.

One in possession of common land believing himself to be the sole owner is not entitled to be reimbursed for a proportionate share of the cost of substantial and valuable improvements made thereon by him; he may only reimburse himself out of rents and profits received. Gregg *v.* Patterson, 9 Watts & S. (Pa.) 197.

Demand unnecessary.— Where a tenant in common retains the portion of the proceeds of the common property to which his cotenant is entitled, for an unreasonable time, he is chargeable with interest, although no demand has been made for such portion. McGowan *v.* Bailey, 179 Pa. St. 470, 36 Atl. 325.

82. Croasdale *v.* Von Boyneburgk, 206 Pa. St. 15, 55 Atl. 770.

c. Lien. The claim of one tenant in common against his cotenant for rent, income, or profits being only a personal charge,[83] it is generally held that no lien attaches to the interest of a cotenant in the common property for income, rents, and profits collected by such cotenant; [84] and no such lien attaches as against a *bona fide* purchaser of the interest of such cotenant.[85] In some cases, however, an equitable lien is recognized,[86] which is superior to a claim of general creditors,[87] but inferior to a deed of trust to secure a vendor's lien.[88] But even where such a claim is called an equitable lien, it is nevertheless held that it is only a personal charge upon the debtor tenant.[89] A statute giving a lien for rent on growing crops in possession of a lessee has no application to crops belonging to a cotenant in possession by virtue of such cotenancy.[90]

G. Agreements and Conveyances Between Cotenants. Tenants in common may contract with each other concerning the use of the common property,[91] and agreements between them, their heirs, personal representatives, and

83. Pape *v.* Schofield, 77 Hun (N. Y.) 236, 28 N. Y. Suppl. 340 [*affirmed* in 145 N. Y. 598, 40 N. E. 164].

84. *Alabama.*— Newbold *v.* Smart, 67 Ala. 326.

Arkansas.— Dunavant *v.* Fields, 68 Ark. 534, 60 S. W. 420; McKneely *v.* Terry, 61 Ark. 527, 33 S. W. 953; Brittinum *v.* Jones, 56 Ark. 624, 20 S. W. 520; Hamby *v.* Wall, 48 Ark. 135, 2 S. W. 705, 3 Am. St. Rep. 218; Bertrand *v.* Taylor, 32 Ark. 470.

Georgia.— Pope *v.* Tift, 69 Ga. 741.

Illinois.— Stenger *v.* Edwards, 70 Ill. 631.

Maryland.— Flack *v.* Gosnell, 76 Md. 88, 24 Atl. 414, 35 Am. St. Rep. 413, 16 L. R. A. 547.

Mississippi.— Burns *v.* Dreyfus, 69 Miss. 211, 11 So. 107, 30 Am. St. Rep. 539.

New York.— See Scott *v.* Guernsey, 60 Barb. 163 [*affirmed* in 48 N. Y. 106].

South Carolina.— Vaughan *v.* Lanford, 81 S. C. 282, 62 S. E. 316, 128 Am. St. Rep. 912; Cain *v.* Cain, 53 S. C. 350, 31 S. E. 278, 69 Am. St. Rep. 863.

Texas.— Kalteyer *v.* Wipff, 92 Tex. 673, 52 S. W. 63; La Master *v.* Dickson, 17 Tex. Civ. App. 473, 43 S. W. 911.

West Virginia.— Williamson *v.* Jones, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L. R. A. 694.

See 45 Cent. Dig. tit. "Tenancy in Common," §§ 81, 87.

85. Flack *v.* Gosnell, 76 Md. 88, 24 Atl. 414, 35 Am. St. Rep. 413, 16 L. R. A. 547; Burns *v.* Dreyfus, 69 Miss. 211, 11 So. 107, 30 Am. St. Rep. 539. See also Beck *v.* Kallmeyer, 42 Mo. App. 563.

86. Pitman *v.* Smith, 135 N. Y. App. Div. 904, 120 N. Y. Suppl. 193; Wright *v.* Wright, 59 How. Pr. (N. Y.) 176; Flach *v.* Zanderson, (Tex. Civ. App. 1905) 91 S. W. 348. See Pape *v.* Schofield, 77 Hun (N. Y.) 236, 28 N. Y. Suppl. 340 [*affirmed* in 145 N. Y. 598, 40 N. E. 164].

Coparceners see Beck *v.* Kallmeyer, 42 Mo. App. 563; Scott *v.* Guernsey, 60 Barb. (N. Y.) 163 [*affirmed* in 48 N. Y. 106]; Wright *v.* Wright, 59 How. Pr. (N. Y.) 176.

87. Matter of Lucy, 4 Misc. (N. Y.) 349, 24 N. Y. Suppl. 352.

88. Flach *v.* Zanderson, (Tex. Civ. App. 1905) 91 S. W. 348.

89. Matter of Lucy, 4 Misc. (N. Y.) 349, 24 N. Y. Suppl. 352; Hannan *v.* Osborn, 4 Paige (N. Y.) 336. See Pope *v.* Tift, 69 Ga. 741.

90. Kennon *v.* Wright, 70 Ala. 434.

91. *Alabama.*— Long *v.* Grant, 163 Ala. 507, 50 So. 914.

California.— Hewlett *v.* Owens, 51 Cal. 570.

Delaware.— Burton *v.* Morris, 3 Harr. 269.

Hawaii.— Burrows *v.* Paaluhi, 4 Hawaii 464.

Maine.— Smith *v.* Smith, 98 Me. 597, 57 Atl. 999; Whitten *v.* Hanson, 35 Me. 435.

Minnesota.— Schmidt *v.* Constans, 82 Minn. 347, 85 N. W. 173, 83 Am. St. Rep. 437.

Montana.—Ayotte *v.* Nadeau, 32 Mont. 498, 81 Pac. 145.

New York.— Beecher *v.* Bennett, 11 Barb. 374; Hudson *v.* Swan, 7 Abb. N. Cas. 324 [*reversed* on other grounds in 83 N. Y. 552].

Pennsylvania.— Coleman's Appeal, 62 Pa. St. 252; Coleman *v.* Blewett, 43 Pa. St. 176; Blewett *v.* Coleman, 40 Pa. St. 45; Coleman *v.* Coleman, 19 Pa. St. 100, 57 Am. Dec. 641.

Texas.— Carleton *v.* Hausler, 20 Tex. Civ. App. 275, 49 S. W. 118; Gurley *v.* Dickason, 19 Tex. Civ. App. 203, 46 S. W. 53.

Vermont.— Turner *v.* Waldo, 40 Vt. 51.

See 45 Cent. Dig. tit. "Tenancy in Common," § 25 *et seq.*

They may exchange equities. Anonymous, Lofft 43, 98 Eng. Reprint 523.

Cotenants may appoint each other agent. Fargo *v.* Owen, 79 Hun (N. Y.) 181, 29 N. Y. Suppl. 611. And where one tenant in common acts in relation to the common property as the agent of the other, he is answerable to such other as principal. Redington *v.* Chase, 44 N. H. 36, 82 Am. Dec. 189; Switzer *v.* Switzer, 57 N. J. Eq. 421, 41 Atl. 486; Thompson's Appeal, 101 Pa. St. 225.

Heirs at law may contract with each other in relation to the use and occupation of the common property descending to them previous to its sale as directed by the testator. *In re* Journey, 7 Del. Ch. 1, 44 Atl. 795. Under an understanding between heirs of an undivided estate that each is to manage in the interest of all some specified part of

assigns, are as binding as if between strangers, if they do not otherwise conflict with the relationship of tenancy in common,[92] and the rights of the respective parties are held to be enforceable either at law or in equity, for purposes of offense or defense.[93]

H. Estoppel Between Cotenants as to Common Title. A tenant in common must act consistently in relation to the title under which he claims,[94]

the estate, one of such heirs is not to be regarded as an agent, whose whole time must be given to such interests during the continuance of the employment, to the exclusion of his care for any separate enterprises of his own. Pierce *v.* Pierce, 55 Mich. 629, 22 N. W. 81.

Conveyances.— One cotenant may legally convey to his cotenant an interest in land by the ordinary mode of conveyance. McClure *v.* McClure, 1 Phila. (Pa.) 117. And one of the cotenants becoming sole owner of the common property and the rents issuing therefrom, from a joint lease, is entitled to maintain such proceedings. Griffin *v.* Clark, 33 Barb. (N. Y.) 46.

An agreement to divide the proceeds of sale between them is not a conveyance of land, or a contract to convey land within registration acts. Strong *v.* Harris, 84 Hun (N. Y.) 314, 32 N. Y. Suppl. 349; Lenoir *v.* Valley River Min. Co., 113 N. C. 513, 18 S. E. 73.

An agreement between cotenants with a power of sale with an interest is not a mere power of attorney, but in the nature of a contract conveying the entire interest in the land for the purpose stated. Carleton *v.* Hausler, 20 Tex. Civ. App. 275, 49 S. W. 118. And so as to personalty. Barnes *v.* Bartlett, 15 Pick. (Mass.) 71; Corbett *v.* Lewis, 53 Pa. St. 322.

In a sale of personal property between cotenants there is no warranty of title. Danforth *v.* Moore, 55 N. J. Eq. 127, 35 Atl. 410; Gurley *v.* Dickason, 19 Tex. Civ. App. 203, 46 S. W. 53.

92. Coleman *v.* Blewett, 43 Pa. St. 176; Coleman *v.* Grubb, 23 Pa. St. 393; Niles *v.* Carlton, 83 Vt. 261, 75 Atl. 266.

Where several grantees in common of the right to take oil from land conveyed a part of their respective interests to several others under deeds containing certain limitations, the limitations were held to be enforceable. Thompson's Appeal, 101 Pa. St. 225. *Compare* Coleman's Appeal, 62 Pa. St. 252.

The word "minerals" in a deed of partition between cotenants has been held to exclude "free stone" unless it is mined; it has been held that "mining" depends on the intention of the parties. Darvill *v.* Roper, 3 Drew. 294, 3 Eq. Rep. 1004, 24 L. J. Ch. 779, 3 Wkly. Rep. 467, 61 Eng. Reprint 915; Bell *v.* Wilson, 2 Dr. & Sm. 395, 34 L. J. Ch. 572, 12 L. T. Rep. N. S. 529, 6 New Rep. 81, 13 Wkly. Rep. 708, 62 Eng. Reprint 671 [*affirmed* in L. R. 1 Ch. 303, 12 Jur. N. S. 263, 35 L. J. Ch. 337, 14 L. T. Rep. N. S. 115, 14 Wkly. Rep. 493].

93. *Alabama.*— Fullington *v.* Kyle Lumber Co., 139 Ala. 242, 35 So. 852.

Massachusetts.— Keay *v.* Goodwin, 16 Mass. 1.

New York.— Beecher *v.* Bennett, 11 Barb. 374; Hudson *v.* Swan, 7 Abb. N. Cas. 324 [*reversed* on other grounds in 83 N. Y. 552].

North Carolina.— Bond *v.* Hilton, 44 N. C. 308, 59 Am. Dec. 552.

Tennessee.— Currens *v.* Lauderdale, 118 Tenn. 496, 101 S. W. 431.

See 45 Cent. Dig. tit. "Tenancy in Common," § 25 *et seq.*

Enforceable against grantee.—An agreement between cotenants may be enforceable against the grantee of one of them. Jones *v.* Rose, 96 Md. 483, 54 Atl. 69; St. John *v.* Coates, 63 Hun (N. Y.) 460, 18 N. Y. Suppl. 419 [*affirmed* in 140 N. Y. 634, 35 N. E. 891].

The leasing tenant in common may distrain against his lessee cotenant. Luther *v.* Arnold, 8 Rich. (S. C.) 24, 62 Am. Dec. 422.

Tenants in common may vest each other with the right of survivorship by deed *inter partes*, but they cannot convert their holding into a technical joint tenancy, so as to divest themselves of the right of partition as tenants in common. Truesdell *v.* White, 13 Bush (Ky.) 616.

The relationship of cotenancy will be considered in the construction of a contract between the cotenants. Mylin *v.* King, 139 Ala. 319, 35 So. 998; Goldsborough *v.* Martin, 86 Md. 413, 38 Atl. 934; McCreery *v.* Green, 38 Mich. 172.

94. *Alabama.*— Steed *v.* Knowles, 84 Ala. 205, 3 So. 897.

Georgia.— Ralph *v.* Ward, 109 Ga. 363, 34 S. E. 610.

Indiana.— Millis *v.* Roof, 121 Ind. 360, 23 N. E. 255.

Kansas.— Schoonover *v.* Tyner, 72 Kan. 475, 84 Pac. 124.

Maryland.— Funk *v.* Newcomer, 10 Md. 301.

New Hampshire.— Great Falls Co. *v.* Worster, 15 N. H. 412; Blake *v.* Milliken, 14 N. H. 213.

New York.— Siglar *v.* Van Riper, 10 Wend. 414.

North Carolina.— Mott *v.* Carolina Land, etc., Co., 146 N. C. 525, 60 S. E. 423; Woodlief *v.* Woodlief, 136 N. C. 133, 48 S. E. 583.

Pennsylvania.— Sinclair *v.* Baker, 1 Del. Co. 305.

Texas.— Powers *v.* Minor, 87 Tex. 83, 26 S. W. 1071.

Canada.— Leech *v.* Leech, 24 U. C. Q. B. 321.

The recitals in a joint deed by tenants in common must be taken as relating only to the several property of each grantor respectively; therefore they will not be estopped from showing any error or mistake that may have been thus committed in relation

and cannot assail that title,[95] nor can he litigate his own right of possession of the common property, against his cotenant therein, whilst holding possession under a contract from said cotenant;[96] and conversely, if he claims ouster of his cotenants, he cannot afterward, in a suit between the same parties, claim his original interest as tenant in common.[97] A tenant in common is estopped from claiming under the common title if he has granted away his own rights and ignored the rights of his cotenants in the common property.[98] But a tenant in common, in possession under a title other than that of cotenancy, is not estopped from setting up an adverse possession based on such other title,[99] as where he has acquired title to the whole after his entry;[1] nor, under such circumstances, should the mere purchase of a title of an alleged cotenant, to quiet title, work an estoppel.[2]

I. Respective Interests of Cotenants. Where a conveyance to purchasers of a tenancy in common is silent as to the interest of each, such interests are ordinarily presumed to be equal.[3] But such presumption is rebuttable.[4] There is a presumption that purchasers of a common estate hold shares therein in proportion to their contribution to the purchase-price, if the contributions to the purchase-price be shown to have been unequal; but if the deed to purchasers does not show their respective interests in the common property, the presumption arising from the deed may be overcome by the presumption arising from the amount of contribution.[5] It has been held that the possession of a cotenant is ordinarily notice to a purchaser of the whole interest that such cotenant may have in the estate.[6] But mere possession by one who appears of record to be a

to the title of the others of them respectively. Sunderlin *v.* Struthers, 47 Pa. St. 411. A joint conveyance with warranty by tenants in common has been held to be an estoppel as against one of them who held a mortgage from the other. Durham *v.* Alden, 20 Me. 228, 37 Am. Dec. 48.

95. *Arkansas.*— Hershey *v.* Clark, 27 Ark. 527.

District of Columbia.— Morris *v.* Wheat, 11 App. Cas. 201.

Maryland.— Funk *v.* Newcomer, 10 Md. 301.

Massachusetts.— Flagg *v.* Mann, 14 Pick. 467; Porter *v.* Hill, 9 Mass. 34, 6 Am. Dec. 22.

Mississippi.— Baker *v.* Richardson, (1909) 50 So. 447; Jonas *v.* Flanniken, 69 Miss. 577, 11 So. 319.

New York.—Burhans *v.* Van Zandt, 7 Barb. 91 [*reversed* on other grounds in 7 N. Y. 523, Seld. 31]; Phelan *v.* Kelly, 25 Wend. 389; Jackson *v.* Streeter, 5 Cow. 529.

Texas.— Gray *v.* Kauffman, 82 Tex. 65, 17 S. W. 513. *Compare* York *v.* Hutcheson, 37 Tex. Civ. App. 367, 83 S. W. 895.

Vermont.— Braintree *v.* Battles, 6 Vt. 395.

Washington.— Cedar Canyon Consol. Min. Co. *v.* Yarwood, 27 Wash. 271, 67 Pac. 749.

96. Hershey *v.* Clark, 27 Ark. 527; Jackson *v.* Creal, 13 Johns. (N. Y.) 116. But see Tully *v.* Tully, 71 Cal. 338, 12 Pac. 246, holding that if the title be apparently one creating a tenancy in common, but not really creating such tenancy, the party claiming thereunder may litigate his own rights as against that of his apparent cotenant, and he is not estopped from setting up a good title subsequently acquired by him.

97. Williams *v.* Sutton, 43 Cal. 65; Gregg *v.* Blackmore, 10 Watts (Pa.) 192.

98. Reed *v.* Spicer, 27 Cal. 57.

99. Cooper *v.* Fox, 67 Miss. 237, 7 So. 342 (married woman cotenant setting up title in her husband); Washington *v.* Conrad, 2 Humphr. (Tenn.) 562.

1. Chamberlain *v.* Ahrens, 55 Mich. 111, 20 N. W. 814; Neher *v.* Armijo, 9 N. M. 325, 54 Pac. 236; Gilmer *v.* Beauchamp, 40 Tex. Civ. App. 125, 87 S. W. 907.

2. Vasquez *v.* Ewing, 24 Mo. 31, 66 Am. Dec. 694; Zapf *v.* Carter, 70 N. Y. App. Div. 395, 75 N. Y. Suppl. 197; Naylor *v.* Foster, 44 Tex. Civ. App. 599, 99 S. W. 114; York *v.* Hutcheson, 37 Tex. Civ. App. 367, 83 S. W. 895.

3. Keuper *v.* Mette, 239 Ill. 586, 88 N. E. 218; Markoe *v.* Wakeman, 107 Ill. 251; Gerting *v.* Wells, 103 Md. 624, 64 Atl. 298, 433; Campau *v.* Campau, 44 Mich. 31, 5 N. W. 1062.

4. Adams *v.* Leavens, 20 Conn. 73; Shiels *v.* Stark, 14 Ga. 429; Jackson *v.* Moore, 94 N. Y. App. Div. 504, 87 N. Y. Suppl. 1101; Gilmer *v.* Beauchamp, 40 Tex. Civ. App. 125, 87 S. W. 907; Cage *v.* Tucker, 14 Tex. Civ. App. 316, 37 S. W. 180.

Damage proportioned to interests.— Damages caused to adjoining lands by the overflow of a reservoir owned in common are assessed in proportion to the respective proprietary interests in said reservoir, even though such damages were caused by repairs or improvements made on such reservoir under a subscription agreement between the several parties interested therein, in which the amounts to be paid respectively were not proportionate to the respective interests. Dodge *v.* Wilkinson, 3 Metc. (Mass.) 292.

5. Bittle *v.* Clement, (N. J. Ch. 1903) 54 Atl. 138. *Compare* Anderson *v.* Clanch, (Tex. 1887) 6 S. W. 760.

6. Allen *v.* Anthony, 1 Meriv. 282, 15 Rev. Rep. 113, 35 Eng. Reprint 679.

tenant in common in the premises is not notice of a parol partition or agreement for a partition so as to affect the rights of those claiming under him without notice.[7] The respective interests of the cotenants cannot be determined in an action for rent, but only in some possessory action.[8] Where title to part of a tract is adversely acquired by a stranger, the portion thus lost will be the common loss according to the respective interests of the coöwners.[9]

J. Remedies, Actions, and Proceedings — 1. Account[10] — a. Nature and Grounds of Remedy in General. At common law if one tenant in common occupied, and took the whole profits, the other had no remedy against him whilst the tenancy in common continued, unless he was put out of possession, when he might have his ejectment, or unless he appointed the other to be his bailiff as to his undivided moiety, and the other accepted that appointment, when an action of account would lie, as against a bailiff of the owner of the entirety of an estate.[11] But accounting between tenants in common may be now had either by bill in equity[12] or by an action of account, at law, under the statute of Anne;[13] and statutes based thereon and substantially similar thereto, which provide that an action of account may be maintained by one tenant in common against the other for receiving more than his just share or proportion;[14] and in an action for possession by tenants

7. Ralph *v.* Ward, 109 Ga. 363, 34 S. E. 610; Allday *v.* Whitaker, 66 Tex. 669, 1 S. W. 794.

8. Miller *v.* Miller, 7 Pick. (Mass.) 133, 19 Am. Dec. 264; Ayotte *v.* Nadeau, 32 Mont. 498, 81 Pac. 145; Blake *v.* Milliken, 14 N. H. 213.

9. Pipkin *v.* Allen, 29 Mo. 229.

10. Equitable accounting see *infra,* III, J, 1, d.

11. *Maine.*— Carter *v.* Bailey, 64 Me. 458, 18 Am. Rep. 273; Estey *v.* Boardman, 61 Me. 595.

Pennsylvania.— Irvine *v.* Hanlin, 10 Serg. & R. 219; Kennedy's Estate, 1 Lack. Leg. N. 135.

Vermont.— Hayden *v.* Merrill, 44 Vt. 336, 8 Am. Rep. 372; McCrillis *v.* Banks, 19 Vt. 442.

England.— Henderson *v.* Eason, 17 Q. B. 701, 16 Jur. 518, 21 L. J. Q. B. 82, 79 E. C. L. 701; Beer *v.* Beer, 12 C. B. 60, 16 Jur. 223, 21 L. J. C. P. 124, 74 E. C. L. 60; Wheeler *v.* Horne, Willes 208.

Canada.— Freeman *v.* Morton, 3 Nova Scotia 340; Gregory *v.* Connolly, 7 U. C. Q. B. 500.

See also Peterson *v.* Kaanaana, 10 Hawaii 384.

12. See *infra,* III, J, 1, d.

13. St. 4 Anne, c. 16, § 27.

For full consideration of the statute of Anne see Henderson *v.* Eason, 17 Quebec Q. B. 701 [*reversing* 12 Quebec Q. B. 986]. See also Kennedy's Estate, 1 Lack. Leg. N. (Pa.) 135; Gregory *v.* Connolly, 7 U. C. Q. B. 500.

The statute has been held not to be in force in some jurisdictions. See Pico *v.* Columbet, 12 Cal. 414, 73 Am. Dec. 550; Shiels *v.* Stark, 14 Ga. 429; Ayotte *v.* Nadeau, 32 Mont. 498, 81 Pac. 145.

Concurrent jurisdiction.—As a general rule statutes giving equity jurisdiction in matters of account between cotenants do not deprive the law courts of their jurisdiction, where there are no other special circumstances for the interference of equity and the issues between the parties litigant are simple. Carter *v.* Bailey, 64 Me. 458, 18 Am. Rep. 273; Blood *v.* Blood, 110 Mass. 545; Winton Coal Co. *v.* Pancoast Coal Co., 170 Pa. St. 437, 33 Atl. 110. But if the interest of plaintiff and the amount to which he is entitled cannot be determined without an accounting, a court of equity may assume jurisdiction. Dyckman *v.* Valiente, 42 N. Y. 549.

14. *Arkansas.*— Trapnall *v.* Hill, 31 Ark. 345.

Connecticut.— Brady *v.* Brady, 82 Conn. 424, 74 Atl. 684.

Georgia.— Neel *v.* Morris, 73 Ga. 406; Shiels *v.* Stark, 14 Ga. 429.

Illinois.— Woolley *v.* Schrader, 116 Ill. 29, 4 N. E. 658; Henson *v.* Moore, 104 Ill. 403; Stenger *v.* Edwards, 70 Ill. 631.

Indiana.— Schissel *v.* Dickson, 129 Ind. 139, 28 N. E. 540; McCrum *v.* McCrum, 36 Ind. App. 636, 76 N. E. 415.

Maine.— Cutler *v.* Currier, 54 Me. 81.

Michigan.— Moreland *v.* Strong, 115 Mich. 211, 73 N. W. 140, 69 Am. St. Rep. 553.

Minnesota.— Shepard *v.* Pettit, 30 Minn. 119, 14 N. W. 511.

Missouri.— Beck *v.* Kallmeyer, 42 Mo. App. 563.

Montana.— Ayotte *v.* Nadeau, 32 Mont. 498, 81 Pac. 145; Harrigan *v.* Lynch, 21 Mont. 36, 52 Pac. 642.

New York.— Gedney *v.* Gedney, 160 N. Y. 471, 55 N. E. 1; Hudson *v.* Swan, 83 N. Y. 552; Osborn *v.* Schenck, 83 N. Y. 201; Dyckman *v.* Valiente, 42 N. Y. 549; Cosgriff *v.* Dewey, 21 N. Y. App. Div. 129, 47 N. Y. Suppl. 255 [*affirmed* in 164 N. Y. 1, 58 N. E. 1, 79 Am. St. Rep. 620]; Wright *v.* Wright, 59 How. Pr. 176 (holding that an action of account may be maintained where a tenant in common receives the entire sales price for the common property); Hannan *v.* Osborn, 4 Paige 336.

North Carolina.— Roberts *v.* Roberts, 55 N. C. 128.

out of possession the court may appoint a reference to state an account between the parties.[15] Under the statute of Anne and similar statutes the action of account may be had independently of any express agreement appointing the receiver of the rents, profits, or income bailiff of his cotenants.[16] If the tenant in common receiving profits has committed waste or other tort, his cotenants may waive the tort and require an accounting,[17] and upon the ratification of a sale of personal

Rhode Island.— Almy *v.* Daniels, 15 R. I. 312, 4 Atl. 753, 10 Atl. 654.

Vermont.— Hayden *v.* Merrill, 44 Vt. 336, 8 Am. Rep. 372 (holding, however, that the case must be brought within the statute by proper allegations); Leach *v.* Beattie, 33 Vt. 195.

West Virginia.— Dodson *v.* Hays, 29 W. Va. 577, 2 S. E. 415.

England.— Thomas *v.* Thomas, 5 Exch. 28, 14 Jur. 180, 19 L. J. Exch. 175, 1 L. M. & P. 229; Denys *v.* Shuckburgh, 5 Jur. 21, 4 Y. & C. Exch. 42.

Canada.— Frost *v.* Disbrow, 12 N. Brunsw. 73; Wiggins *v.* White, 2 N. Brunsw. 97.

See note to Gage *v.* Gage, 28 L. R. A. 829.

Tenants for years.— A statutory action of account between cotenants may be inapplicable to tenants for years; in such a statute the words "real estate" may be held to have no application to "chattels real." Wells *v.* Becker, 24 Pa. Super. Ct. 174.

Statutory and common-law bailiff distinguished.— The cotenant receiving more than his just share or proportion *ipso facto* makes him bailiff under the statute, but he is not answerable thereunder as a bailiff would have been at common law for what he might have made in the absence of wilful default. Irvine *v.* Hanlin, 10 Serg. & R. (Pa.) 219. See also Huff *v.* McDonald, 22 Ga. 131, 68 Am. Dec. 487; Hudson *v.* Coe, 79 Me. 83, 8 Atl. 249, 1 Am. St. Rep. 288; Wright *v.* Wright, 59 How. Pr. (N. Y.) 176.

Where there are more than two tenants in common, one cannot recover rents or profits in an action to account against another; it is a case for chancery. Wiswell *v.* Wilkins, 4 Vt. 137.

Such a statute may include cases of personal occupancy as well as receipt of rent. McParland *v.* Larkin, 155 Ill. 84, 39 N. E. 609; Cutler *v.* Currier, 54 Me. 81; West *v.* Weyer, 46 Ohio St. 66, 18 N. E. 537, 15 Am. St. Rep. 552; Lancaster *v.* Flowers, 208 Pa. St. 199, 57 Atl. 526; Keller *v.* Lamb, 10 Kulp (Pa.) 246; Hazard *v.* Albro, 17 R. I. 181, 20 Atl. 834; Knowles *v.* Harris, 5 R. I. 402, 73 Am. Dec. 77. Proof of a valid contract of rental, fixing rental price, is *prima facie* evidence to charge defendant cotenant in an action of account with said price. Tarleton *v.* Goldthwaite, 23 Ala. 346, 58 Am. Dec. 296.

If a sealed agreement not in itself creating the relationship of tenancy in common between the parties who are not otherwise tenants in common be the cause of action, then covenant and not account is the proper remedy. Patten *v.* Heustis, 26 N. J. L. 293.

Waste.— A statute for an accounting may not be applicable in a case of waste between cotenants. Cecil *v.* Clark, 47 W. Va. 402, 35 S. E. 11, 81 Am. St. Rep. 802.

Under Rhode Island Rev. St. 209, § 1, the remedy of account between tenants in common extends, in the case of exclusive users of the property, to fair rental value, irrespective of profits made or which might have been made, or of losses suffered in such use during the term of exclusive operation. Knowles *v.* Harris, 5 R. I. 402, 73 Am. Dec. 77.

Mining.— Where a statute required that an accounting shall be for "what is justly and equitably due," damages based on a royalty for mining were held to be proper. Fulmer's Appeal, 128 Pa. St. 24, 18 Atl. 493, 15 Am. St. Rep. 662.

15. Smith *v.* Smith, 150 N. C. 81, 63 S. E. 177.

16. Huff *v.* McDonald, 22 Ga. 131, 68 Am. Dec. 487; Hayden *v.* Merrill, 44 Vt. 336, 8 Am. Rep. 372; Wheeler *v.* Horne, Willes 208; Gregory *v.* Connolly, 7 U. C. Q. B. 500.

At common law there is no liability so to account unless there was an actual appointment as bailiff or agent; nor is there, at common law, a lien for moneys so received. Crow *v.* Mark, 52 Ill. 332; Gregg *v.* Roaring Springs Land, etc., Co., 97 Mo. App. 44, 70 S. W. 920; Izard *v.* Bodine, 11 N. J. Eq. 403, 69 Am. Dec. 595; Kennedy's Estate, 1 Lack. Leg. N. (Pa.) 135; Cain *v.* Cain, 53 S. C. 350, 31 S. E. 278, 69 Am. St. Rep. 863; Kalteyer *v.* Wipff, 92 Tex. 673, 52 S. W. 63; La Master *v.* Dickson, 17 Tex. Civ. App. 473, 43 S. W. 911; Williamson *v.* Jones, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L. R. A. 694; Gregory *v.* Connolly, 7 U. C. Q. B. 500.

17. *Connecticut.*— Oviatt *v.* Sage, 7 Conn. 95.

Nebraska.— Names *v.* Names, 48 Nebr. 701, 67 N. W. 751.

New York.— Harris *v.* Gregg, 17 N. Y. App. Div. 210, 45 N. Y. Suppl. 364.

North Carolina.— See Darden *v.* Cowper, 52 N. C. 210, 75 Am. Dec. 461.

Virginia.— Moorman *v.* Smoot, 28 Gratt. 80; Graham *v.* Pierce, 19 Gratt. 28, 100 Am. Dec. 658.

West Virginia.— Cecil *v.* Clarke, 49 W. Va. 459, 39 S. E. 202.

England.— Job *v.* Potton, L. R. 20 Eq. 84, 44 L. J. Ch. 262, 32 L. T. Rep. N. S. 110, 23 Wkly. Rep. 588.

Mines.—An action of accounting has been permitted between cotenants where defendant had worked mines on the common property, on the theory that such action was not for use and occupation but rather for deporting a part of the common property. Abbey *v.* Wheeler, 170 N. Y. 122, 62 N. E. 1074.

property an accounting has been allowed.[18] An action to compel an account of the rents and profits of land or the proceeds of the sale thereof will not lie where one of the parties has a mere equitable interest, and the other of them has a legal title in the land.[19] Before an accounting can be had a cotenancy must be shown to have existed,[20] and the burden is upon plaintiff, where he seeks an accounting of rents and profits from his cotenant for use and occupation of the common property, to show their exclusive possession, or the derivation of some profit by defendant amounting to more than defendant's share.[21] As the issue, in the absence of statute to the contrary, in an action of account is, in the first instance, whether there shall be an accounting or not it is immaterial, until after said issue shall have been determined, whether or not one of the cotenants had made profits out of the common estate.[22] An action of account has been held not to be maintainable for the produce that the occupying cotenant had taken for his own benefit.[23] Contribution has been permitted to be recovered in an ordinary civil action between tenants in common,[24] and by way of set-off or in mitigation of damages.[25] If defendant has ousted plaintiff, plaintiff must establish his right at law before he can recover mesne profits,[26] and defendant is not liable for wear and tear arising from proper use of the property, only for damage arising from negligence or misuse; and if liable because of abuse and misuse of the property, then in estimating the damages the improvements in the nature of general repairs made by defendant should be taken into consideration.[27]

b. Demand as Condition Precedent. A tenant in common is entitled to a

18. Oviatt *v.* Sage, 7 Conn. 95.

19. Cearnes *v.* Irving, 31 Vt. 604.

Appointment of coöwner as trustee.— The coöwner of a mine may, in a suit to recover his interest therein and in the ores extracted therefrom, have defendant declared a trustee of the legal title for his benefit to the extent of his interest. Mills *v.* Hart, 24 Colo. 505, 52 Pac. 680, 65 Am. St. Rep. 241.

20. Palmer *v.* Rich, [1897] 1 Ch. 134, 66 L. J. Ch. 69, 75 L. T. Rep. N. S. 484, 45 Wkly. Rep. 205; *In re* Jackson, 34 Ch. D. 732, 56 L. J. Ch. 593, 56 L. T. Rep. N. S. 562, 35 Wkly. Rep. 646; Bone *v.* Pollard, 24 Beav. 283, 53 Eng. Reprint 367; Harrison *v.* Barton, 1 Johns. & H. 287, 7 Jur. N. S. 519, 30 L. J. Ch. 213, 3 L. T. Rep. N. S. 614, 9 Wkly. Rep. 177, 70 Eng. Reprint 756; Robinson *v.* Preston, 4 Jur. N. S. 186, 4 Kay & J. 505, 27 L. J. Ch. 395, 70 Eng. Reprint 211.

Acts of ownership by the alleged tenants in common in various parts of the land indifferently must be shown in order to establish a tenancy in common by use and enjoyment. Tisdall *v.* Parnell, 14 Ir. C. L. 1.

21. Fuller *v.* Sweet, 30 Mich. 237, 18 Am. Rep. 122; Rose *v.* Cooley, (N. J. Ch. 1906) 62 Atl. 867; Barrell *v.* Barrell, 25 N. J. Eq. 173. But see Shepard *v.* Pettit, 30 Minn. 119, 14 N. W. 511, holding that in a suit between tenants in common for the conversion of logs cut from the common property, there is no burden on plaintiff to prove that defendant converted more than his share, unless otherwise provided by statute. *Compare* Barnum *v.* Landon, 25 Conn. 137, holding that the allegation, in a suit between cotenants for a share of the rent received by one of them, that defendant has taken more than his share is unnecessary, because defendant is liable to account for whatever share of the rent he may have received.

Minority as sufficient evidence of want of consent to appropriation of profits see Cutler *v.* Currier, 54 Me. 81.

22. Hawley *v.* Burd, 6 Ill. App. 454, holding such testimony inadmissible.

23. Joslyn *v.* Joslyn, 9 Hun (N. Y.) 388 (where under a statute authorizing an action of account or assumpsit between cotenants, it was held that the right of recovery was limited to a proportionate amount of the net actual receipts, and did not include what had been taken from the common property and applied to the use of the occupying cotenant therein); Dresser *v.* Dresser, 40 Barb. (N. Y.) 300; Dodson *v.* Hays, 29 W. Va. 577, 2 S. E. 415.

Expenditures.— Accounting has been held to be the proper remedy for the recovery of necessary expenditures for repairs or improvements by way of reimbursement from profits. Backus *v.* Chapman, 111 Mass. 386; Carver *v.* Miller, 4 Mass. 559. And see *infra*, III, J, 1, c.

24. Fowler *v.* Fowler, 50 Conn. 256; Kites *v.* Church, 142 Mass. 586, 8 N. E. 743; Schneider Granite Co. *v.* Taylor, 64 Mo. App. 37; Wood *v.* Merritt, 2 Bosw. (N. Y.) 368.

Contribution by owners of vessel see Arey *v.* Hall, 81 Me. 17, 16 Atl. 302, 10 Am. St. Rep. 232; Andrew *v.* New Jersey Steamboat Co., 11 Hun (N. Y.) 490; Wood *v.* Merret, 2 Bosw. (N. Y.) 368.

25. Backus *v.* Chapman, 111 Mass. 386; Burrell *v.* Bull, 3 Sandf. Ch. (N. Y.) 15.

26. Izard *v.* Bodine, 11 N. J. Eq. 403, 69 Am. Dec. 595.

27. Bodkin *v.* Arnold, 48 W. Va. 108, 35 S. E. 980.

demand for an accounting within a reasonable time before an action can be maintained therefor;[28] on refusal to comply with which accounting will lie.[29]

c. Crediting Expenditures For Common Benefit. Expenditures made in good faith under circumstances justifying them should be credited to the cotenant so making said expenditures in a suit for an accounting;[30] and such expenditures are a proper subject for accounting,[31] and may be availed of by way of recoupment or set-off.[32] If they be made for permanent improvements, then it will depend upon the circumstances of the particular case whether such improvements will be allowed for to the extent of their full value,[33] or only to the extent of the rents,

28. Barnum *v.* Landon, 25 Conn. 137; Ela *v.* Ela, 70 N. H. 163, 47 Atl. 414; West *v.* Weyer, 46 Ohio St. 66, 18 N. E. 537, 15 Am. St. Rep. 552.

29. Johnston *v.* Price, 172 Pa. St. 427, 33 Atl. 688.

A joint owner in possession is the agent of the joint coöwners, and is accountable to them for their portion of the rent from the date when he is notified thus to account. Moreira *v.* Schwan, 113 La. 643, 37 So. 542; Ayotte *v.* Nadeau, 32 Mont. 498, 81 Pac. 145.

30. *Alabama.*— Gayle *v.* Johnston, 80 Ala. 395, credit for necessary advances to make a crop.

District of Columbia.—Alexander *v.* Douglass, 6 D. C. 247.

Illinois.— Cheney *v.* Ricks, 187 Ill. 171, 58 N. E. 234.

Kentucky.—Armstrong *v.* Bryant, 16 S. W. 463, 13 Ky. L. Rep. 128.

Louisiana.— Sharp *v.* Zeller, 114 La. 549, 38 So. 449; Moreira *v.* Schwan, 113 La. 643, 37 So. 542.

Massachusetts.— Dewing *v.* Dewing, 165 Mass. 230, 42 N. E. 1128; Carver *v.* Miller, 4 Mass. 559.

Michigan.— Boyce *v.* Boyce, 124 Mich. 696, 83 N. W. 1013; Moreland *v.* Strong, 115 Mich. 211, 73 N. W. 140, 69 Am. St. Rep. 553.

Minnesota.— Kean *v.* Connelly, 25 Minn. 222, 33 Am. Rep. 458. But see Walter *v.* Greenwood, 29 Minn. 87, 12 N. W. 145, holding that proof of the moneys due for improvements unaccompanied by proof of the amount of the increase of income arising from such improvements is immaterial.

Missouri.— Bates *v.* Hamilton, 144 Mo. 1, 45 S. W. 641, 66 Am. St. Rep. 407.

New Hampshire.— Pickering *v.* Pickering, 63 N. H. 468, 3 Atl. 744.

New Jersey.— Switzer *v.* Switzer, 57 N. J. Eq. 421, 41 Atl. 486; Cooper *v.* Cooper, 9 N. J. Eq. 566.

New York.— Collins *v.* Collins, 8 N. Y. App. Div. 502, 40 N. Y. Suppl. 902; Hannan *v.* Osborn, 4 Paige 336.

Pennsylvania.— Luck *v.* Luck, 113 Pa. St. 256, 6 Atl. 142; Dech's Appeal, 57 Pa. St. 467; Anderson *v.* Greble, 1 Ashm. 136; Grubb *v.* Grubb, 30 Leg. Int. 241.

Tennessee.— Sutton *v.* Sutton, (Ch. App. 1900) 58 S. W. 891.

Virginia.— Graham *v.* Pierce, 19 Gratt. 28, 100 Am. Dec. 658 (operating lead mines); Ruffners *v.* Louis, 7 Leigh 720, 30 Am. Dec. 513.

Wisconsin.— Gerndt *v.* Conradt, 117 Wis. 15, 93 N. W. 804; Tipping *v.* Robbins, 71 Wis. 507, 37 N. W. 427.

England.— Job *v.* Potton, L. R. 20 Eq. 84, 44 L. J. Ch. 262, 32 L. T. Rep. N. S. 110, 23 Wkly. Rep. 588.

Canada.— *In re* Curry, 25 Ont. App. 267 [*affirming* 17 Ont. Pr. 379].

Such credits must ordinarily be based on actual expenditures, if such expenditures be less than the value of the increment, in preference to being based on the fair market value of the increment or on its reasonable worth. Contaldi *v.* Errichetti, 79 Conn. 273, 64 Atl. 211.

In developing a mine expenses properly incurred may be allowed despite the inequitable conduct of the cotenant accounting. Dettering *v.* Nordstrom, 148 Fed. 81, 78 C. C. A. 157; Job *v.* Potton, L. R. 20 Eq. 84, 44 L. J. Ch. 262, 32 L. T. Rep. N. S. 110, 23 Wkly. Rep. 588. See also McCord *v.* Oakland Quicksilver Min. Co., 64 Cal. 134, 27 Pac. 863, 49 Am. Rep. 686, developing a mine and buying in an outstanding paramount title. But it has been held that after money has been paid into court in a suit for an accounting, if defendants without the consent of plaintiffs expend money in developing or prospecting mining property owned in common by the parties litigant, then they are not entitled to contribution therefor out of the fund in court. Stickley *v.* Mulrooney, 36 Colo. 242, 87 Pac. 547.

One adversely holding the common property until a constructive trust was declared by the court should have no compensation for his care of the property. Anderson *v.* Northrop, 44 Fla. 472, 33 So. 419.

The principle applies to interest on the indebtedness of a tenant in common to his cotenant for purchase-price of the land. Volentine *v.* Johnson, 1 Hill Eq. (S. C.) 49.

31. Carver *v.* Miller, 4 Mass. 559; Cotton *v.* Coit, (Tex. Civ. App. 1895) 30 S. W. 381.

Where one tenant in common sowed a piece of land with grain on the common ground, and while the grain was growing, the tenants by agreement divided the land held in common, and the land upon which the grain was growing was set to the other tenant who harvested the crop, the tenant who sold the grain had a legal claim for the expense and it was a proper subject of accounting between them. Kidder *v.* Rixford, 16 Vt. 169, 42 Am. Dec. 504.

32. Dewing *v.* Dewing, 165 Mass. 230;, 42 N. E. 1128; Backus *v.* Chapman, 111 Mass. 386.

33. Turnbull *v.* Foster, 116 Ga. 765, 43

profits, and income collected from the common property.[34] Thus it has been held that where money has been expended in the making of necessary repairs on the common property which without such repairs was untenantable, and thereby it became rentable and income-paying, the cotenant claiming for the improvements is accountable for all the rents and profits, but is permitted to reimburse himself for said necessary expenditures only to the extent of the rents and profits in his hands.[35] Generally the occupying cotenant should be allowed for his improvements to the common property to the extent that they enhance the value of the property, if they are made in good faith and not adversely.[36] Rents, profits, and income received by him should, between the cotenants, be regarded as paid *pro tanto* by the increased value thus imparted, and he should be charged only with such rents, profits, and income as were due on the property in its unimproved condition,[37] the rents due to the improvements being left to the tenant who made them,[38] he, however, being chargeable with rent of such portion of the common property as has been rendered productive by the labor of the non-occupying tenant.[39] If the occupying tenant excludes the other under claim of ownership to the whole he must account for rent received during the period of exclusion in excess of the enhanced value of the premises due to improvements.[40] In a final accounting between cotenants the party chargeable should be credited, among other credits, if any, with all payments made to his cotenants as a part of the common fund; even though at any time he so paid over more than the amount then due, nevertheless he should be properly credited therewith and such payments should be so pleaded and proved.[41] But a tenant in common is not entitled to be reim-

S. E. 42; Holt *v.* Couch, 125 N. C. 456, 34 S. E. 703, 74 Am. St. Rep. 648. See also Williams *v.* Williams, 68 L. J. Ch. 528, 81 L. T. Rep. N. S. 163; Kenrick *v.* Mountsteven, 48 Wkly. Rep. 141.

A purchaser of the interest of one tenant in common in possession of the land is bound to account for the income of so much thereof as was productive at the time of his purchase and taking possession, although it was rendered productive by the occupying tenant of whom he purchased. Hancock *v.* Day, McMull. Eq. (S. C.) 298.

34. Williams *v.* Coombs, 88 Me. 183, 33 Atl. 1073.

35. McCaw *v.* Barker, 115 Ala. 543, 22 So. 131; Williams *v.* Coombs, 88 Me. 183, 33 Atl. 1073; Cooper *v.* Cooper, 9 N. J. Eq. 566.

36. *Hawaii.*— Nahaolelua *v.* Kaaahu, 10 Hawaii 662.

Iowa.—Van Ormer *v.* Harley, 102 Iowa 150, 71 N. W. 241.

Kansas.— Phipps *v.* Phipps, 47 Kan. 328, 27 Pac. 972.

Kentucky.— Graham *v.* Graham, 6 T. B. Mon. 561, 17 Am. Dec. 166; McClanahan *v.* Henderson, 2 A. K. Marsh. 388, 12 Am. Dec. 412.

Michigan.— Patrick *v.* Kalamazoo Y. M. C. A., 120 Mich. 185, 79 N. W. 208.

North Carolina.— Holt *v.* Couch, 125 N. C. 456, 34 S. E. 703, 74 Am. St. Rep. 648.

West Virginia.—Williamson *v.* Jones, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L. R. A. 694.

Canada.— Rice *v.* George, 20 Grant Ch. (U. C.) 221.

But see Middlebury Electric Co. *v.* Tupper, 70 Vt. 603, 41 Atl. 582, holding cotenants not liable to contribute for permanent improvements.

37. Hannah *v.* Carver, 121 Ind. 278, 23 N. E. 93; Carver *v.* Fennimore, 116 Ind. 236, 19 N. E. 103; Van Ormer *v.* Harley, 102 Iowa 150, 71 N. W. 241; Nahaolelua *v.* Kaaahu, 10 Hawaii 662; Cain *v.* Cain, 53 S. C. 350, 31 S. E. 278, 69 Am. St. Rep. 863; Holt *v.* Robertson, McMull. Eq. (S. C.) 475; Thompson *v.* Bostick, McMull. Eq. (S. C.) 75; Hancock *v.* Day, McMull. Eq. (S. C.) 69, 36 Am. Dec. 293; Volentine *v.* Johnson, 1 Hill Eq. (S. C.) 49; Williamson *v.* Jones, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L. R. A. 694.

38. Shiels *v.* Stark, 14 Ga. 429; Raftery *v.* Monahan, 22 R. I. 558, 48 Atl. 940; Annely *v.* De Saussure, 26 S. C. 497, 2 S. E. 490, 40 Am. St. Rep. 725; Early *v.* Friend, 16 Gratt. (Va.) 21, 78 Am. Dec. 649.

If all the profits are due to the improvements only, made in good faith and not under an adverse holding, then those not sharing in the costs thereof are not entitled to any share of the profits. Nelson *v.* Clay, 7 J. J. Marsh. (Ky.) 138, 23 Am. Dec. 387.

39. Volentine *v.* Johnson, 1 Hill Eq. (S. C.) 49.

40. Renshaw *v.* Tullahoma First Nat. Bank, (Tenn. Ch. App. 1900) 63 S. W. 194.

41. Schettler *v.* Smith, 34 N. Y. Super. Ct. 17; Kidder *v.* Rixford, 16 Vt. 169, 42 Am. Dec. 504.

Where tenants in common consume the rents and profits of the common property themselves, what they so received should be considered on an accounting. Buck *v.* Martin, 21 S. C. 590, 53 Am. Rep. 702. See also Cain *v.* Cain, 53 S. C. 350, 31 S. E. 278, 69 Am. St. Rep. 863.

bursed for expenses incurred where there is no showing that they were for the common benefit,[42] or where they were made after the revocation of authority to cotenants so to make said expenditures if such revocation be equitably sufficient;[43] or where the expenditures were made during the time of a precedent estate for the benefit of the precedent tenancy only,[44] and no allowance should be made for expenditures extraneous to the subject-matter.[45] In those jurisdictions which permit a judgment in favor of defendant for such amount as may be justly due him, a judgment should be allowed for defendant for the balance due him in an action of accounting where it appears that the net profits from the common property are less than the amount properly expended by him for the common benefit.[46] Infancy may be shown to prove want of consent to appropriations.[47]

d. Equitable Accounting. Equity has jurisdiction, under a proper bill setting out sufficient facts, to require an accounting between cotenants.[48] But such a bill must set forth some equity, such as the need for discovery or the absence of remedy at law or the involvement of some question of account, and the rights of the complainant in equity must be clear,[49] for although some courts seem to hold broadly that equity has jurisdiction in matters of account between tenants in common, or that it has concurrent jurisdiction with courts of law in such matters,[50] courts of equity generally require special circumstances in matters of accounting between tenants in common before they will act; and where the account is simple or can be readily determined such account has been held not to be sufficient for the intervention of chancery;[51] and it is generally laid down that equity will not,

42. Miner *v.* Lorman, 70 Mich. 173, 38 N. W. 18; Pickering *v.* Pickering, 63 N. H. 468, 3 Atl. 744; Hall *v.* Fisher, 20 Barb. (N. Y.) 441; Farrand *v.* Gleason, 56 Vt. 633.

43. Switzer *v.* Switzer, 57 N. J. Eq. 421, 41 Atl. 486.

44. Booth *v.* Booth, 114 Iowa 78, 86 N. W. 51; Zapp *v.* Miller, 109 N. Y. 51, 15 N. E. 889.

One purchasing the interest of a tenant in common at a foreclosure sale becomes tenant in common with the other cotenants, for the purposes of an accounting between them from the time of his deed and not from the date of mortgage; and no charges should be embraced for expenditures prior to date of said time. Davis *v.* Chapman, 24 Fed. 674.

45. Beezley *v.* Crossen, 14 Oreg. 473, 13 Pac. 306.

No allowance for payment of taxes on a void assessment.— See Cole *v.* Cole, 57 Misc. (N. Y.) 490, 108 N. Y. Suppl. 124.

46. Dewing *v.* Dewing, 165 Mass. 230, 42 N. E. 1128; Raftery *v.* Monahan, 22 R. I. 558, 48 Atl. 940.

47. Cutler *v.* Currier, 54 Me. 81.

48. Hollahan *v.* Sowers, 111 Ill. App. 263; Whiton *v.* Spring, 74 N. Y. 169; Dyckman *v.* Valiente, 42 N. Y. 549; Sherman *v.* Ballou, 8 Cow. (N. Y.) 304. See also Butte, etc., Consol. Min. Co. *v.* Montana Ore Purchasing Co., 25 Mont. 41, 63 Pac. 825, holding that where a statute conferred equity jurisdiction, and was subsequently amended so as to confer new rights on another class of cotenants, and a cotenancy was created after the passage of the original act, and before said amendment thereto became operative, such cotenant was entitled to the benefit of the original act as the amendment thereto was only prospective in its operation.

Filing bill not a ratification of a lease.— Where one cotenant undertakes to lease the common property and a bill is subsequently filed denying the title of the lessor and the validity of the lease, but nevertheless praying for discovery and an accounting of profits received by virtue of one of the terms of the lease, such action is not in itself a ratification of the lease. McNeely *v.* South Penn Oil Co., 58 W. Va. 438, 52 S. E. 480.

A mortgagee of the share of a tenant in common may maintain a bill for accounting against the mortgagor and his cotenants therein. Bentley *v.* Bates, 4 Jur. 552, 9 L. J. Exch. 30, 4 Y. & C. Exch. 182.

49. Moreira *v.* Schwan, 113 La. 643, 37 So. 542; Blood *v.* Blood, 110 Mass. 545; Morgan *v.* Long, 73 Miss. 406, 19 So. 98, 55 Am. St. Rep. 541; Harrington *v.* Florence Oil Co., 178 Pa. St. 444, 35 Atl. 855.

If an accounting be necessary to fix the interest of a coöwner in personal property that has been converted by his cotenants, an equitable action may be maintained. Carter *v.* Bailey, 64 Me. 458, 18 Am. Rep. 273; Whiton *v.* Spring, 74 N. Y. 169; Dyckman *v.* Valiente, 42 N. Y. 549; Newfan *v.* Newman, 27 Gratt. (Va.) 714; Ruffners *v.* Lewis, 7 Leigh (Va.) 720, 30 Am. Dec. 513.

50. *Georgia.*— Neel *v.* Morris, 73 Ga. 406.

Illinois.— Henson *v.* Moore, 104 Ill. 403.

New Jersey.— Martin *v.* Martin, (Ch. 1892) 23 Atl. 822.

New York.—Dyckman *v.* Valiente, 42 N. Y. 549.

Pennsylvania.—Harrington *v.* Florence Oil Co., 178 Pa. St. 444, 35 Atl. 855.

Vermont.— Leach *v.* Beattie, 33 Vt. 195.

51. *California.*— Pico *v.* Columbet, 12 Cal. 414, 73 Am. Dec. 550.

in the absence of statute, assume jurisdiction of an accounting unless there are special circumstances making the action at law for an account an inadequate remedy.[52] A bill for an account may be sustained without previously recovering possession;[53] but equity will not, in the absence of statute, entertain a suit for an accounting of profits by one not in possession until after the determination of the question of title in a pending suit at law,[54] or where the amount claimed to be due is fixed and certain, or where a valuation is to be made and there is no further reason for the interposition of equity.[55] There is no statutory equitable jurisdiction unless the case comes within the statute; thus if a statute gives jurisdiction in certain matters between tenants in common, equity has no jurisdiction if the parties intended to become tenants in common, but are not actually such tenants.[56]

2. Assumpsit — a. In General. One cotenant under agreement with the other, express or implied, may recover in assumpsit for services rendered or expenditures made,[57] or for money received for the common property,[58] or for a liquidated amount due under a contract between the parties,[59] and if an account be adjusted or stated, debt or assumpsit lies.[60] If a cotenant, as cotenant, wrong-

Maine.— Carter *v.* Bailey, 64 Me. 458, 18 Am. Rep. 273.

Massachusetts.— Blood *v.* Blood, 110 Mass. 545.

New York.— Dyckman *v.* Valiente, 42 N. Y. 549.

Vermont.—Wiswell *v.* Wilkins, 4 Vt. 137.

Limitations are the same at law and in equity in an action of accounting where there is concurrent jurisdiction at law and in equity. St. John *v.* Coates, 63 Hun (N. Y.) 460, 18 N. Y. Suppl. 419 [*affirmed* in 140 N. Y. 634, 35 N. E. 891].

52. Merchant's Bank *v.* Foster, 124 Ala. 696, 27 So. 513; Pegram *v.* Barker, 115 Ala. 543, 22 So. 131; Pico *v.* Columbet, 12 Cal. 414, 73 Am. Dec. 550; Carter *v.* Bailey, 64 Me. 458, 18 Am. Rep. 273; Blood *v.* Blood, 110 Mass. 545.

Moneys received by one cotenant as the agent of the other for the sale of his interest to a third party are not held in trust by said agent so as to entitle the principal to maintain a suit in equity for an accounting, the proper remedy being a suit at law to recover the amount alleged to be due. Garside *v.* Norval, 1 Alaska 19. *Compare* Clark *v.* Jones, 49 Cal. 618.

53. Johnson *v.* Burslem, 2 L. J. Ch. O. S. 168, 26 Rev. Rep. 212.

54. Swearingen *v.* Barnsdall, 210 Pa. St. 84, 59 Atl. 477.

55. Pegram *v.* Barker, 115 Ala. 543, 22 So. 131; Martin *v.* Martin, (N. J. Ch.) 23 Atl. 822.

Where the use and occupancy of the common property has been under an agreement, and the only question is as to the extent of interest in the common property, an action of assumpsit is not ousted merely by a statutory granting of jurisdiction to a court of equity in similar cases. Winton Coal Co. *v.* Pancoast Coal Co., 170 Pa. St. 437, 33 Atl. 100.

56. Flagg *v.* Mann, 14 Pick. (Mass.) 467.

Nor where a statute or its intended application is unconstitutional.— North Pennsylvania Coal Co. *v.* Snowden, 42 Pa. St. 488, 82 Am. Dec. 530.

57. *Alabama.*— Russell *v.* Russell, 62 Ala. 48; Strother *v.* Butler, 17 Ala. 733.

Illinois.— Haven *v.* Mehlgarten, 19 Ill. 91.

Kentucky.—Alexander *v.* Ellison, 79 Ky. 148.

Massachusetts.— Gwinneth *v.* Thompson, 9 Pick. 31, 19 Am. Dec. 350.

Pennsylvania.— Beaty *v.* Bordwell, 91 Pa. St. 438.

A sealed agreement to pay a share of the crops for work and labor thereupon does not *per se* create a tenancy in common. Covenant is the proper remedy on such a cause of action. Patten *v.* Heustis, 26 N. J. L. 293.

Woodland or arable land.— The rule has been held not to extend to woodland or arable land at common law. Alexander *v.* Ellison, 79 Ky. 148; Carver *v.* Miller, 4 Mass. 559; Beaty *v.* Bordwell, 91 Pa. St. 438; Gregg *v.* Patterson, 9 Watts & S. (Pa.) 197; Bowles' Case, 11 Coke 79*b*, 77 Eng. Reprint 1252. See also 4 Kent Comm. (13th ed.) 370.

Set-off.—An assumpsit for destruction and carrying away of timber trees is maintainable, but a similar claim cannot be pleaded in set-off by defendant, as it is not a mutual debt and demand and tenants in common cannot join in such an action. Mooers *v.* Bunker, 29 N. H. 420; Smith *v.* Woodman, 28 N. H. 520. Taxes constitute an equity of set-off. Kean *v.* Connelly, 25 Minn. 222, 33 Am. Rep. 458.

58. Hudson *v.* Coe, 79 Me. 83, 8 Atl. 249, 1 Am. St. Rep. 288; Miller *v.* Miller, 7 Pick. (Mass.) 133, 19 Am. Dec. 264 (on sale of trees); Stone *v.* Aldrich, 43 N. H. 52; Brinckerhoff *v.* Wemple, 1 Wend. (N. Y.) 470 (damages for land taken by eminent domain).

Even though plaintiff had alienated his interest in the common land after liability attached, assumpsit might be maintained. Blake *v.* Milliken, 14 N. H. 213.

59. Burnham *v.* Best, 10 B. Mon. (Ky.) 227; Kites *v.* Church, 142 Mass. 586, 8 N. E. 743.

60. Hamilton *v.* Conine, 28 Md. 635, 92 Am. Dec. 724; Jones *v.* Harraden, 9 Mass. 540 note; Dyckman *v.* Valiente, 42 N. Y.

fully exceeds his rights, and assumes an unauthorized control over the share of the other cotenant, his cotenant may ratify the wrongful act and recover his share of the proceeds thereof, or he may still claim the interest of a cotenant as against the wrong-doer or any one holding under him.[61] Where a tenant in common sells more than his share of the common property with the consent of his cotenant, an action for money had and received may be maintained against him because of his implied agency;[62] and where the tort of conversion has been committed between tenants in common, the damaged party may waive the tort, elect to ratify the sale or other act of the cotenant, and bring assumpsit.[63] Each tenant in common has an equal right to the possession and use of the common property, and assumpsit cannot be maintained between the cotenants for their respective shares of interest therein in the absence of statute, unless there has been a sale or destruction of said property, or some act has been committed inconsistent with the common ownership or amounting to a denial of the right of plaintiff therein;[64]

549; Jackson *v.* Moore, 94 N. Y. App. Div. 504, 87 N. Y. Suppl. 1101. See also Ranstead *v.* Ranstead, 74 Md. 378, 22 Atl. 405.

Even though there be statutory relief in equity and no express promise. Fanning *v.* Chadwick, 3 Pick. (Mass.) 420, 15 Am. Dec. 233.

The burden is on plaintiff to prove the account stated. Baxter *v.* Hozier, Arn. 519, 5 Bing. N. Cas. 288, 8 L. J. C. P. 169, 7 Scott 233, 35 E. C. L. 161.

61. Harris *v.* Umsted, 79 Ark. 499, 96 S. W. 146; Barry *v.* Baker, 93 S. W. 1061, 29 Ky. L. Rep. 573.

62. Murley *v.* Ennis, 2 Colo. 300; Dickinson *v.* Williams, 11 Cush. (Mass.) 253, 59 Am. Dec. 142; Haven *v.* Foster, 9 Pick. (Mass.) 112, 19 Am. Dec. 353; Shaw *v.* Grant, 2 N. Brunsw. 110. See also Frost *v.* Disbrow, 12 N. Brunsw. 73.

Against vendee.— It has been held that such action may be maintained against the vendee. Stone *v.* Aldrich, 43 N. H. 52.

63. *Alabama.*— Fielder *v.* Childs, 73 Ala. 567; Cowles *v.* Garrett, 30 Ala. 341; Tankersley *v.* Childers, 23 Ala. 781; Smyth *v.* Tankersley, 20 Ala. 212, 56 Am. Dec. 193.

California.—Williams *v.* Chadbourne, 6 Cal. 559.

Colorado.— Murley *v.* Ennis, 2 Colo. 300.

Kentucky.— Taylor *v.* Perkins, 1 A. K. Marsh. 253.

Maine.— Carter *v.* Bailey, 64 Me. 548, 18 Am. Rep. 273; Moses *v.* Ross, 41 Me. 360, 66 Am. Dec. 250.

Massachusetts.— Briggs *v.* Call, 5 Metc. 504; Miller *v.* Miller, 7 Pick. 133, 19 Am. Dec. 264.

Michigan.—Williams *v.* Rogers, 110 Mich. 418, 68 N. W. 240; Tuttle *v.* Campbell, 74 Mich. 652, 42 N. W. 384, 16 Am. St. Rep. 652; Loomis *v.* O'Neal, 73 Mich. 582, 41 N. W. 701; Fiquet *v.* Allison, 12 Mich. 328, 86 Am. Dec. 54.

Nebraska.— Perry *v.* Granger, 21 Nebr. 579, 33 N. W. 261.

New Hampshire.— White *v.* Brooks, 43 N. H. 402; Stone *v.* Aldrich, 43 N. H. 52; Kenniston *v.* Ham, 29 N. H. 501; Blake *v.* Milliken, 14 N. H. 213.

New York.— Harris *v.* Gregg, 17 N. Y. App. Div. 210, 45 N. Y. Suppl. 364; Small *v.* Robinson, 9 Hun 418.

Pennsylvania.—Winton Coal Co. *v.* Pancoast Coal Co., 170 Pa. St. 437, 33 Atl. 110; Browning *v.* Cover, 108 Pa. St. 595.

Virginia.— Moorman *v.* Smoot, 28 Gratt. 80.

Timber.— If no question is made as to the title of the land, a tenant in common selling trees therefrom and receiving property in payment will be liable to his cotenants in an action for money had and received. Miller *v.* Miller, 7 Pick. (Mass.) 133, 19 Am. Dec. 264; White *v.* Brooks, 43 N. H. 402; Blake *v.* Milliken, 14 N. H. 213; Holt *v.* Robertson, McMull. Eq. (S. C.) 475. A suit for accounting is not the proper method of ascertaining the damage to the interest of one cotenant by the wrongful cutting of the timber on the part of the other, in the absence of statutes or equitable reason. U. S. *v.* Northern Pac. R. Co., 6 Mont. 351, 12 Pac. 769. See also McGahan *v.* Rondout Nat. Bank, 156 U. S. 218, 15 S. Ct. 347, 39 L. ed. 403.

Tenants in common cannot join against a cotenant in actions of assumpsit for value of timber. Mooers *v.* Bunker, 29 N. H. 420.

Defenses that might be urged in tort are available in assumpsit on waiver of tort. Gilmore *v.* Wilbur, 12 Pick. (Mass.) 120, 22 Am. Dec. 410.

Defendant cannot be heard to complain of such waiver as it redounds to his benefit. Miller *v.* Miller, 7 Pick. (Mass.) 133, 19 Am. Dec. 264.

64. *Arkansas.*— Bertrand *v.* Taylor, 32 Ark. 470.

Louisiana.— Becnel *v.* Becnel, 23 La. Ann. 150.

Maine.—Richardson *v.* Richardson, 72 Me. 403; Gowen *v.* Shaw, 40 Me. 56.

Michigan.—Wilmarth *v.* Palmer, 34 Mich. 347.

New York.— Joslyn *v.* Joslyn, 9 Hun 388; McCarthy *v.* McCarthy, 40 Misc. 180, 81 N. Y. Suppl. 660.

Pennsylvania.— Wells *v.* Becker, 24 Pa. Super. Ct. 174.

Wisconsin.—Bulger *v.* Woods, 3 Pinn. 460.

Canada.— Doyle *v.* Taylor, 2 N. Brunsw. 201.

Assumpsit will not lie where question of title to real estate is involved. Kran *v.* Case, 123 Ill. App. 214.

nor in the absence of an agreement, express or implied.[65] Special assumpsit for a share of the rents, profits, or income is not maintainable unless the case is brought fully within the statute both by the pleadings and the evidence,[66] and a declaration in assumpsit founded on a statute should be special on the statute and not merely under the common counts.[67]

b. For Rents and Profits. Ordinarily the only remedy between cotenants and those standing in fiduciary relations to them to recover a portion of rents received by either, or moneys properly expended for the common benefit, is by a bill in equity or an action of account at law either under the statute of Anne or some other statutory provision.[68] Thus it is held that a tenant in common cannot, independently of statute, and in the absence of an agreement, express or implied, maintain assumpsit against his cotenant who has received more than his share of the rents, profits, and income of the estate, the remedy being an action of account;[69] nor ordinarily, in the absence of statute, if the rents and profits were received at a time when the one receiving them was not asserting title in himself.[70] But such an action is allowed in some jurisdictions, sometimes being permitted by statute;[71] and if there is an express or implied agreement by

Money paid by a tenant in common to his cotenant for ore, under a mistaken idea that the exclusive title to the land from which the ore was taken was in him so receiving said money, is not recoverable in assumpsit, the proper remedy being account rendered. Irvine *v.* Hanlin, 10 Serg. & R. (Pa.) 219.

65. *Illinois.*— Kran *v.* Case, 123 Ill. App. 214.

Indiana.— Harry *v.* Harry, 127 Ind. 91, 26 N. E. 562.

Maine.— Gowen *v.* Shaw, 40 Me. 56.

New Hampshire.— Webster *v.* Calef, 47 N. H. 289; Wiggin *v.* Wiggin, 43 N. H. 561, 80 Am. Dec. 192.

New York.— Central Trust Co. *v.* New York Equipment Co., 87 Hun 421, 34 N. Y. Suppl. 349, pledgee caring for and selling pledged property.

Texas.— Ring *v.* Smith, 1 Tex. App. Civ. Cas. § 1115.

Virginia.— Ballou *v.* Ballou, 94 Va. 350, 26 S. E. 840, 64 Am. St. Rep. 733, holding that assumpsit cannot be maintained by one tenant against his cotenants for any part of moneys expended by him for improvements or repairs without their assent or request.

An offer to buy or sell the common property is not sufficient foundation on which to base an action of assumpsit, between the tenants in common against the cotenant in possession. Whitmore *v.* Alley, 46 Me. 428.

66. Dyer *v.* Wilbur, 48 Me. 287; Moses *v.* Ross, 41 Me. 360, 66 Am. Dec. 250; Smith *v.* Woodman, 28 N. H. 520.

67. Smith *v.* Woodman, 28 N. H. 520.

68. Whiton *v.* Spring, 74 N. Y. 169; Sherman *v.* Ballou, 8 Cow. (N. Y.) 304; Denys *v.* Shuckburgh, 5 Jur. 21, 4 Y. & C. Exch. 42.

69. *Alabama.*— Fielder *v.* Childs, 73 Ala. 567.

Illinois.— Crow *v.* Mark, 52 Ill. 332; Kran *v.* Case, 123 Ill. App. 214.

Indiana.— McCrum *v.* McCrum, 36 Ind. App. 636, 76 N. E. 415.

Kentucky.— Talbott *v.* Todd, 5 Dana 190.

Maine.— See Maguire *v.* Pingree, 30 Me. 508.

Michigan.—Wilmarth *v.* Palmer, 34 Mich. 347.

Tennessee.— Terrell *v.* Murray, 2 Yerg. 384.

Texas.— Ring *v.* Smith, 1 Tex. App. Civ. Cas. § 1115; McGrady *v.* McRae, 1 Tex. App. Civ. Cas. § 1036.

Vermont.— McCrillis *v.* Banks, 19 Vt. 442.

England.— Thomas *v.* Thomas, 5 Exch. 28, 14 Jur. 180, 19 L. J. Exch. 175, 1 L. M. & P. 229.

Canada.— Frost *v.* Disbrow, 12 N. Brunsw. 73.

The theory of liability in such a case is not based upon the existence of a promise, either implied or expressed. Kran *v.* Case, 123 Ill. App. 214.

Unless there be an account settled and balance agreed on it is held that assumpsit cannot be maintained. Frost *v.* Disbrow, 12 N. Brunsw. 73. See also *infra*, note 72.

Where a tenant in common leases his interest and collects rents therefor without interference with the rights of his cotenants in the premises assumpsit does not lie. Scantlin *v.* Allison, 32 Kan. 376, 4 Pac. 618.

70. Ryason *v.* Dunten, 164 Ind. 85, 73 N. E. 74.

71. *Alabama.*— Price *v.* Pickett, 21 Ala. 741.

Maine.— Hudson *v.* Coe, 79 Me. 83, 8 Atl. 249, 1 Am. St. Rep. 288; Richardson *v.* Richardson, 72 Me. 403; Carter *v.* Bailey, 64 Me. 458, 18 Am. Rep. 273; Cutler *v.* Currier, 54 Me. 81 (holding that assumpsit may be maintained even though defendant did not occupy the whole of the common estate); Dyer *v.* Wilbur, 48 Me. 287; Moses *v.* Ross, 41 Me. 360, 66 Am. Dec. 250; Gowen *v.* Shaw, 40 Me. 56; Buck *v.* Spofford, 31 Me. 34.

Massachusetts.—Dickinson *v.* Williams, 11 Cush. 258, 59 Am. Dec. 142. See Thayer *v.* Brewer, 15 Pick. 217; Brigham *v.* Eveleth, 9 Mass. 538.

Missouri.— Rogers *v.* Penniston, 16 Mo. 432.

New Hampshire.— Gage *v.* Gage, 66 N. H. 282, 29 Atl. 543, 28 L. R. A. 829.

New York.— Wright *v.* Wright, 59 How.

an occupying cotenant to pay rent, assumpsit will lie for the recovery thereof.[72] The burden is on plaintiff to show actual receipt by defendant of more than his share,[73] and in order to support such an action it must appear that defendant has received more than his share, not merely of a single article of produce but of the entire profits of the estate, after deducting all reasonable charges; and that the balance is due to plaintiff, and not to other cotenants.[74]

3. Tort Actions — a. In General; Trover. Actions in tort may be maintained between cotenants where plaintiff has been ousted or kept out of possession of the common property, or where there has been some denial or impairment of his right in the common property, or where it is so provided by statute.[75] As

Pr. 176; Cochran *v.* Carrington, 25 Wend. 409.

Pennsylvania.— Steele *v.* McGill, 172 Pa. St. 100, 33 Atl. 146; Winton Coal Co. *v.* Pancoast Coal Co., 170 Pa. St. 437, 33 Atl. 110; Borrell *v.* Borrell, 33 Pa. St. 492; Gillis *v.* McKinney, 6 Watts & S. 78.

Texas.— McGrady *v.* McRae, 1 Tex. App. Civ. Cas. § 1036.

A disseizee of lands cannot bring assumpsit against the disseizor, his cotenant, for rents and profits received after disseizin. Richardson *v.* Richardson, 72 Me. 403.

If title to the land is in issue assumpsit will not lie. Miller *v.* Miller, 7 Pick. (Mass.) 133, 19 Am. Dec. 264. But see Hudson *v.* Coe, 79 Me. 83, 8 Atl. 249, 1 Am. St. Rep. 288, holding that such action will not be defeated on account of a dispute raised by defendant concerning the title, provided plaintiff was owner in the estate, and was not disseized at the date when the income was received in money by defendant.

It may be for a share of the taxes paid upon the common property. Kites *v.* Church, 142 Mass. 586, 8 N. E. 743.

Assumpsit lies after the termination of the cotenancy against one who during said relationship received more than his share of the income, although he denied said relationship. Blake *v.* Milliken, 14 N. H. 213.

Adjustment for payment of moneys between cotenants under the mistaken belief that the title of the common property was in one of the cotenants is by way of accounting and not of assumpsit. Irvine *v.* Hanlin, 10 Serg. & R. (Pa.) 219.

72. Chapman *v.* Duffy, 20 Colo. 471, 79 Pac. 746 (oral agreement); Blanton *v.* Vanzant, 2 Swan (Tenn.) 276.

Agreement between heirs, pending sale.— Where a statute provides for assumpsit for use and occupation against the cotenants, the heirs at law to whom property descends may, prior to its sale as by the testator directed, contract with each other for use and occupation, or maintain action against each other therefor. *In re* Journey, 7 Del. Ch. 1, 44 Atl. 795; Richardson *v.* Richardson, 72 Me. 403.

The adverse holding of land by a cotenant does not render him liable to his cotenants for the use and occupation of the land, because where the holding is adverse there is no relation of landlord and tenant. Wilmarth *v.* Palmer, 34 Mich. 347.

Occupants of land obtaining title to an undivided share during their occupancy and continuing the same were not chargeable by their cotenants for use and occupation after acquiring said title. Bigelow *v.* Bigelow, 75 N. Y. App. Div. 98, 77 N. Y. Suppl. 716.

73. Gowen *v.* Shaw, 40 Me. 56.

Recovery is limited to the proportionate share of the net amount actually received; none can be had for what the occupying cotenant takes from the land for his own use, and there is no presumption that the amount of rent received by a tenant in common for the rental of a portion of the common property equals the full annual rental value of the whole of said property. Joslyn *v.* Joslyn, 9 Hun (N. Y.) 388.

74. Hudson *v.* Coe, 79 Me. 83, 8 Atl. 249, 1 Am. St. Rep. 288; Shepard *v.* Richards, 2 Gray (Mass.) 424, 61 Am. Dec. 473; Winton Coal Co. *v.* Pancoast Coal Co., 170 Pa. St. 437, 33 Atl. 110; Southwest Coal, etc., Co. *v.* Warden, 1 Pa. Cas. 102, 1 Atl. 421. *Compare* Walker *v.* Humbert, 55 Pa. St. 407.

75. *Alabama.*—Steiner *v.* Tranum, 98 Ala. 315, 13 So. 365; Sullivan *v.* Lawyer, 72 Ala. 74; Russell *v.* Russell, 62 Ala. 48; Arthur *v.* Gayle, 38 Ala. 259; Smythe *v.* Tankersley, 20 Ala. 212, 56 Am. Dec. 193; Perminter *v.* Kelly, 18 Ala. 716, 54 Am. Dec. 177.

Arkansas.— Trapnall *v.* Hill, 31 Ark. 345.

California.— Carpenter *v.* Mitchell, 29 Cal. 330.

Connecticut.— See Oviatt *v.* Sage, 7 Conn. 95.

Georgia.— King *v.* Neel, 98 Ga. 438, 25 S. E. 513, 58 Am. St. Rep. 311; Starnes *v.* Quin, 6 Ga. 84.

Illinois.— Benjamin *v.* Stremple, 13 Ill. 466.

Iowa.— Conover *v.* Earl, 26 Iowa 167.

Kentucky.— Bell *v.* Layman, 1 T. B. Mon. 39, 15 Am. Dec. 83.

Maine.— Davis *v.* Poland, 102 Me. 192, 66 Atl. 380, 10 L. R. A. N. S. 212; Strickland *v.* Parker, 54 Me. 263; Symonds *v.* Harris, 51 Me. 14, 81 Am. Dec. 553; Pillsbury *v.* Moore, 44 Me. 154, 69 Am. Dec. 91; Wheeler *v.* Wheeler, 33 Me. 347; Maddox *v.* Goddard, 15 Me. 218, 33 Am. Dec. 604; Herrin *v.* Eaton, 13 Me. 193, 29 Am. Dec. 499.

Maryland.—Winner *v.* Penniman, 35 Md. 163, 6 Am. Rep. 385; Dailey *v.* Grimes, 27 Md. 440.

Massachusetts. — Needham *v.* Hill, 127 Mass. 133; Goell *v.* Morse, 126 Mass. 480; Delaney *v.* Root, 99 Mass. 546, 97 Am. Dec. 52; Hunting *v.* Russell, 2 Cush. 145; Weld *v.* Oliver, 21 Pick. 559.

each tenant in common is entitled to the possession, use, and enjoyment of the common property, the general rule is that a tenant in common cannot maintain

Michigan.—Williams *v.* Rogers, 110 Mich. 418, 68 N. W. 240; Clow *v.* Plummer, 85 Mich. 550, 48 N. W. 795; McClure *v.* Thorpe, 68 Mich. 33, 35 N. W. 829; Grove *v.* Wise, 39 Mich. 161; Bray *v.* Bray, 30 Mich. 479; Ripley *v.* Davis, 15 Mich. 75, 9 Am. Dec. 262; Webb *v.* Mann, 3 Mich. 139.

Minnesota.— Shepard *v.* Pettit, 30 Minn. 119, 14 N. W. 511; Person *v.* Wilson, 25 Minn. 189; Gould *v.* Eagle Creek School Sub-Dist. No. 3, 8 Minn. 382.

Mississippi.— Corbin *v.* Cannon, 31 Miss. 570; Harmon *v.* James, 7 Sm. & M. 111, 45 Am. Dec. 296.

Missouri.— Falconer *v.* Roberts, 88 Mo. 574.

Montana.— Butte, etc., & B. Consol. Min. Co. *v.* Montana Ore Purchasing Co., 25 Mont. 41, 63 Pac. 825.

Nebraska.— Reed *v.* McRill, 41 Nebr. 206, 59 N. W. 775; Perry *v.* Granger, 21 Nebr. 579, 33 N. W. 261.

New Hampshire.— Pickering *v.* Moore, 67 N. H. 533, 32 Atl. 828, 68 Am. St. Rep. 695, 31 L. R. A. 698; Redington *v.* Chase, 44 N. H. 36, 82 Am. Dec. 189; White *v.* Brooks, 43 N. H. 402; Great Falls Co. *v.* Worster, 15 N. H. 412; Blake *v.* Milliken, 14 N. H. 213; Chesley *v.* Thompson, 3 N. H. 9, 14 Am. Dec. 324.

New Jersey.— Roston *v.* Morris, 25 N. J. L. 173.

New York.— Stall *v.* Wilbur, 77 N. Y. 158; Lobdell *v.* Stowell, 51 N. Y. 70; Dyckman *v.* Valiente, 42 N. Y. 549; Peterson *v.* De Baun, 36 N. Y. App. Div. 259, 55 N. Y. Suppl. 249; LeBarron *v.* Babcock, 46 Hun 598 [*affirmed* in 122 N. Y. 153, 25 N. E. 253, 19 Am. St. Rep. 488, 9 L. R. A. 625]; Moore *v.* Erie R. Co., 7 Lans. 39; Channon *v.* Lusk, 2 Lans. 211; Green *v.* Edick, 66 Barb. 564 [*reversed* on other grounds in 56 N. Y. 613]; Benedict *v.* Howard, 31 Barb. 569; Flint *v.* Frantzman, 1 Silv. Sup. 547, 5 N. Y. Suppl. 523; Adams *v.* Loomis, 7 N. Y. St. 592; Patten *v.* Neal, 62 How. Pr. 158; White *v.* Osborn, 21 Wend. 72; Farr *v.* Smith, 9 Wend. 338, 24 Am. Dec. 162; Hyde *v.* Stone, 9 Cow. 230, 18 Am. Dec. 501. *Compare* Osborn *v.* Schenck, 83 N. Y. 201.

North Carolina.—Waller *v.* Bowling, 108 N. C. 289, 12 S. E. 990, 12 L. R. A. 261; Johnson *v.* Swain, 44 N. C. 335; Pitt *v.* Petway, 34 N. C. 69; Guyther *v.* Pettijohn, 28 N. C. 388, 45 Am. Dec. 499.

Ohio.— Morgan *v.* Hudnell, 52 Ohio St. 552, 40 N. E. 716, 49 Am. St. Rep. 741, 27 L. R. A. 862.

Oklahoma.— Logan *v.* Oklahoma Mill Co., 14 Okla. 402, 79 Pac. 103.

Oregon.— Rosenau *v.* Syring, 25 Oreg. 386, 35 Pac. 844; Yamhill Bridge Co. *v.* Newly, 1 Oreg. 173.

Pennsylvania.— Bush *v.* Gamble, 127 Pa. St. 43, 17 Atl. 865; Given *v.* Kelly, 85 Pa. St. 309; Coursin's Appeal, 79 Pa. St. 220; Reep *v.* Wagner, 21 Pa. Super. Ct. 268, throwing furniture of a tenant in common off of the common realty which he had been occupying by the consent of his cotenants, and which he had temporarily left without any intention of abandoning it.

South Carolina.— Jefcoat *v.* Knotts, 13 Rich. 50.

South Dakota.— Grigsby *v.* Day, 9 S. D. 585, 70 N. W. 881; Wood *v.* Steinau, 9 S. D. 110, 68 N. W. 160.

Tennessee.— Rains *v.* McNairy, 4 Humphr. 356, 40 Am. Dec. 651.

Texas.— St. Louis, etc., R. Co. *v.* Prather, 75 Tex. 53, 12 S. W. 969; Roberts *v.* Roberts, (Civ. App. 1907) 99 S. W. 886.

Vermont.— Lewis *v.* Clark, 59 Vt. 363, 8 Atl. 158; Aiken *v.* Smith, 21 Vt. 172. See also Bates *v.* Marsh, 33 Vt. 122; Barton *v.* Burton, 27 Vt. 93.

Virginia.— Lowe *v.* Miller, 3 Gratt. 205, 46 Am. Dec. 188, the appropriation of a chattel destroyed by use to the exclusive use of one of the cotenants therein.

Wisconsin.— Sullivan *v.* Sherry, 111 Wis. 476, 87 N. W. 471, 87 Am. St. Rep. 890 (holding that where the licensee of a tenant in common, without consent of his cotenant, takes timber from the common property, appropriating it exclusively to his own use, this amounts to ouster and wrongful conversion of the property of the non-consenting cotenant, and the licensee is liable in trespass or trover); Ashland Lodge No. 63, I. O. O. F. *v.* Williams, 100 Wis. 223, 75 N. W. 954, 69 Am. St. Rep. 912; Wood *v.* Noack, 84 Wis. 398, 54 N. W. 785; Earll *v.* Stumpf, 56 Wis. 50, 13 N. W. 701; Warren *v.* Aller, 1 Pinn. 479, 44 Am. Dec. 406.

Canada.— McIntosh *v.* Port Huron Petrified Brick Co., 27 Ont. App. 262 (where the removal of a brick-making machine from the jurisdiction by tenants in common was held sufficient ground for an action for conversion of the interest of a cotenant therein); McLellan *v.* McDougall, 28 Nova Scotia 237; Brady *v.* Arnold, 19 U. C. C. P. 42; Rathwell *v.* Rathwell, 26 U. C. Q. B. 179; Culver *v.* Macklem, 11 U. C. Q. B. 513.

See 45 Cent. Dig. tit. "Tenancy in Common," § 109 *et seq.*

Forcible entry and detainer.— An action has been maintained between tenants in common for forcible entry and detainer. Presbrey *v.* Presbrey, 13 Allen (Mass.) 281. But such action is not maintainable before severance or partition. Lick *v.* O'Donnell, 3 Cal. 59, 58 Am. Dec. 383. And in unlawful detainer there can be no decree or judgment of restitution and possession as against a cotenant in the absence of evidence that defendant denies or refuses any of plaintiff's rights. Lee Chuck *v.* Quan Wo Chong, 91 Cal. 593, 28 Pac. 45. See, generally, FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1141.

No demand is necessary before bringing action in a suit where one is guilty of conversion. Williams *v.* Rogers, 110 Mich. 418, 68 N. W. 240. Thus in the absence of statutory requirements no demand need be alleged

a tort action against his cotenants in the absence of statute or agreement to the contrary, or of some act of destruction of the common property, or acts equivalent thereto, or a hostile appropriation of the common property by or through cotenants less than the whole number thereof, so as to exclude, destroy, or ignore the interests of their fellows therein;[76] and actions in tort, such as trover, are generally not

against a tort-feasing cotenant in an action against him by his cotenants for cutting timber on the common property. Mooers *v.* Bunker, 29 N. H. 420.

Changing the form of the common property in order to put it to its general and profitable application is not such destruction thereof as to create a right of action between tenants in common. Fennings *v.* Grenville, 1 Taunt. 241, 9 Rev. Rep. 760. But see Redington *v.* Chase, 44 N. H. 36, 82 Am. Dec. 189.

Use on sale of hay as ground for trover see Lewis *v.* Clark, 59 Vt. 363, 8 Atl. 158.

A railroad company entering upon and appropriating land by consent of one cotenant therein only is liable to the other cotenant for trespass. Rush *v.* Burlington, etc., R. Co., 57 Iowa 201, 10 N. W. 628.

76. *Alabama.*—Smith *v.* Rice, 56 Ala. 417; Perminter *v.* Kelly, 18 Ala. 716, 54 Am. Dec. 177. See also Moore *v.* Walker, 124 Ala. 199, 26 So. 984, holding that trover cannot be maintained by a tenant in common against his cotenants for a thing still in his possession.

Arkansas.— Bertrand *v.* Taylor, 32 Ark. 470.

California.—Lee Chuck *v.* Quan Wo Chong, 91 Cal. 593, 28 Pac. 45; Williams *v.* Chadbourne, 6 Cal. 559.

Colorado.— Omaha, etc., Smelting, etc., Co. *v.* Tabor, 13 Colo. 41, 21 Pac. 925, 16 Am. St. Rep. 185, 5 L. R. A. 236.

Connecticut.— Newell *v.* Woodruff, 30 Conn. 492; Webb *v.* Danforth, 1 Day 301.

Georgia.— Glynn County Bd. of Education *v.* Day, 128 Ga. 156, 57 S. E. 359; Hall *v.* Page, 4 Ga. 428, 48 Am. Dec. 235.

Illinois.— Murray *v.* Haverty, 70 Ill. 318; Swartwout *v.* Evans, 37 Ill. 442; Benjamin *v.* Stremple, 13 Ill. 466.

Iowa.— See Maxwell *v.* Wilson, 76 Iowa 31, 39 N. W. 926.

Kansas.— Smith-McCord Dry-Goods Co. *v.* Burke, 63 Kan. 740, 66 Pac. 1036, holding replevin not maintainable against cotenant or the joint agent of the tenants in common.

Kentucky.— Roberts *v.* McGraw, 11 Bush 26; Fightmaster *v.* Beasly, 7 J. J. Marsh. 410; Bell *v.* Layman, 1 T. B. Mon. 39, 15 Am. Dec. 83; Chinn *v.* Respass, 1 T. B. Mon. 25; Lewis *v.* Night, 3 Litt. 223; Carlyle *v.* Patterson, 3 Bibb 93.

Louisiana.— A. Wilbert's Sons Lumber, etc., Co. *v.* Patureau, 44 La. Ann. 355, 10 So. 782.

Maine.— Estey *v.* Boardman, 61 Me. 595; Kilgore *v.* Wood, 56 Me. 150, 96 Am. Dec. 404; Boobier *v.* Boobier, 39 Me. 406; Wheeler *v.* Wheeler, 33 Me. 347; Herrin *v.* Eaton, 13 Me. 193, 29 Am. Dec. 499.

Massachusetts.— Blood *v.* Blood, 110 Mass. 545; Brightman *v.* Eddy, 97 Mass. 478; Bryant *v.* Clifford, 13 Metc. 138; Reed *v.* Howard, 2 Metc. 36; Weld *v.* Oliver, 21 Pick. 559; Cutting *v.* Rockwood, 2 Pick. 443.

Michigan.— McElroy *v.* O'Callaghan, 112 Mich. 124, 70 N. W. 441; Clow *v.* Plummer, 85 Mich. 550, 48 N. W. 795.

Minnesota.— Kean *v.* Connelly, 25 Minn. 222, 33 Am. Rep. 458; Strong *v.* Colter, 13 Minn. 82.

Mississippi.— Hinds *v.* Terry, Walk. 80.

Missouri.— Painter *v.* Painter, (App. 1910) 124 S. W. 561; Kelley *v.* Vandiver, 75 Mo. App. 435; Sheffler *v.* Mudd, 71 Mo. App. 78; Sharp *v.* Benoist, 7 Mo. App. 534.

New Hampshire.— Johnson *v.* Conant, 64 N. H. 109, 7 Atl. 116 (holding that the enlargement of a ledge for the improvement of a flume, thus putting the ledge to its only beneficial use, is not such a disregard of a cotenant's rights as to entitle him to maintain trespass against his cotenants so improving the property); Ballou *v.* Hale, 47 N. H. 347, 93 Am. Dec. 438; Carr *v.* Dodge, 40 N. H. 403 (holding that there is no action of trover between cotenants in crops until after a separation or severance by the parties, such conversion as goes to the destruction of the crops or the entire exclusion of the cotenant from the enjoyment of his right and interest therein).

New Jersey.— Roston *v.* Morris, 25 N. J. L. 173; Boston Franklinite Co. *v.* Condit, 19 N. J. Eq. 394.

New York.— Gates *v.* Bowers, 169 N. Y. 14, 61 N. E. 993, 88 Am. St. Rep. 530; Gilman *v.* Gilman, 111 N. Y. 265, 18 N. E. 849; Hudson *v.* Swan, 83 N. Y. 552; Osborn *v.* Schenck, 83 N. Y. 201; Dyckman *v.* Valiente, 42 N. Y. 549; Hayes *v.* Kerr, 40 N. Y. App. Div. 348, 57 N. Y. Suppl. 1114; Hayes *v.* Kerr, 40 N. Y. App. Div. 348, 57 N. Y. Suppl. 1114; Harris *v.* Gregg, 17 N. Y. App. Div. 210, 45 N. Y. Suppl. 364; Brown *v.* Burnap, 17 N. Y. App. Div. 129, 45 N. Y. Suppl. 149; Barrowcliffe *v.* Cummins, 66 Hun 1, 20 N. Y. Suppl. 787; Benedict *v.* Howard, 31 Barb. 569; Tinney *v.* Stebbins, 28 Barb. 290; Tyler *v.* Taylor, 8 Barb. 585; Stafford *v.* Azbell, 8 Misc. 316, 28 N. Y. Suppl. 733 [*affirmed* in 155 N. Y. 669, 49 N. E. 1104]; Hudson *v.* Swan, 7 Abb. N. Cas. 324 [*reversed* on other grounds in 83 N. Y. 552]; Van Doren *v.* Balty, 11 Hun 239; White *v.* Osborn, 21 Wend. 72; Farr *v.* Smith, 9 Wend. 338, 24 Am. Dec. 162; Mumford *v.* McKay, 8 Wend. 442, 24 Am. Dec. 34; Gilbert *v.* Dickerson, 7 Wend. 449, 22 Am. Dec. 592; Hyde *v.* Stone, 7 Wend. 354, 22 Am. Dec. 582; Sheldon *v.* Skinner, 4 Wend. 525, 21 Am. Dec. 161; Mersereau *v.* Norton, 15 Johns. 179; Wilson *v.* Reed, 3 Johns. 175; St. John *v.* Standring, 2 Johns. 468. *Compare* Knope *v.* Nunn, 151 N. Y. 506, 45 N. E. 940, 56 Am. St. Rep. 642.

maintainable between tenants in common, whilst the common property is still in possession of either of them by virtue of his cotenancy therein.[77] But this rule does not apply where the right exists in the respective tenants in common to take or demand their respective shares of the common personal property because it is alike in quality and value and readily divisible by tale, measurement, or weight, and one tenant in common therein takes his share thereof without his cotenant's consent or makes due demand for his respective share therein and is refused; or where a division of the common personal property has been made according to the respective interests of the cotenants therein, and one cotenant takes all of the common personal property thus divided and refuses to deliver to his cotenant his share, if the existence of all the conditions requisite to such a

North Carolina.— Thompson *v.* Silverthorne, 142 N. C. 12, 54 S. E. 782, 115 Am. St. Rep. 727; Shearin *v.* Riggsbee, 97 N. C. 216, 1 S. E. 770; Grim *v.* Wicker, 80 N. C. 343; Cain *v.* Wright, 50 N. C. 282, 72 Am. Dec. 551; Pitt *v.* Petway, 34 N. C. 69 (holding that, although selling and taking out of the state may be equivalent to "destruction," nevertheless selling and keeping in the state is not equivalent to destruction); Bonner *v.* Latham, 23 N. C. 271; Lucas *v.* Wasson, 14 N. C. 398, 24 Am. Dec. 266; Campbell *v.* Campbell, 6 N. C. 65.

Oregon.— Yamhill Bridge Co. *v.* Newby, 1 Oreg. 173.

Pennsylvania.— Heller *v.* Hufsmith, 102 Pa. St. 533; Walworth *v.* Abel, 52 Pa. St. 370; Blewett *v.* Coleman, 40 Pa. St. 45; Bennet *v.* Bullock, 35 Pa. St. 364; Keisel *v.* Earnest, 21 Pa. St. 90; Agnew *v.* Johnson, 17 Pa. St. 373, 55 Am. Dec. 565.

South Carolina.— Gibson *v.* Vaughn, 2 Bailey 389, 23 Am. Dec. 143 (holding that no action of trespass lies between cotenants for the mere removal of a fixture from the common land); Martin *v.* Quattlebam, 3 McCord 205.

South Dakota.— Grigsby *v.* Day, 9 S. D. 585, 70 N. W. 881.

Tennessee.— Cowan *v.* Buyers, Cooke 53, 5 Am. Dec. 668. See also Rains *v.* McNairy, 4 Humphr. 356, 40 Am. Dec. 651.

Texas.— Eastham *v.* Sims, 11 Tex. Civ. App. 133, 32 S. W. 359; Worsham *v.* Vignal, 5 Tex. Civ. App. 471, 24 S. W. 562.

Vermont.— Deavitt *v.* Ring, 73 Vt. 298, 50 Atl. 1066; Kane *v.* Garfield, 60 Vt. 79, 13 Atl. 800; Lewis *v.* Clark, 59 Vt. 363, 8 Atl. 158; Spaulding *v.* Orcutt, 56 Vt. 218; Turner *v.* Waldo, 40 Vt. 51; Wait *v.* Richardson, 33 Vt. 190, 78 Am. Dec. 622; Barton *v.* Burton, 27 Vt. 93; White *v.* Morton, 22 Vt. 15, 52 Am. Dec. 75; Bradley *v.* Arnold, 16 Vt. 382; Sanborn *v.* Morrill, 15 Vt. 700, 40 Am. Dec. 701; Hurd *v.* Darling, 14 Vt. 214; Owen *v.* Foster, 13 Vt. 263; Booth *v.* Adams, 11 Vt. 156, 34 Am. Dec. 680; Ladd *v.* Hill, 4 Vt. 164.

Wisconsin.— Earll *v.* Stumpf, 56 Wis. 50, 13 N. W. 701; McKinley *v.* Weber, 37 Wis. 279; Bulger *v.* Woods, 3 Pinn. 460; Warren *v.* Aller, 1 Pinn. 479, 44 Am. Dec. 406.

United States.— Bohlen *v.* Arthurs, 115 U. S. 482, 6 S. Ct. 114, 29 L. ed. 454; Goldsmith *v.* Smith, 21 Fed. 611.

England.— Jacobs *v.* Seward, L. R. 5 H. L. 464, 41 L. J. C. P. 221, 27 L. T. Rep. N. S. 185 [*affirming* 18 Wkly. Rep. 953]; Job *v.* Potton, L. R. 20 Eq. 84, 44 L. J. Ch. 262, 32 L. T. Rep. N. S. 110, 23 Wkly. Rep. 588; Barton *v.* Williams, 5 B. & Ald. 395, 7 E. C. L. 219, 106 Eng. Reprint 1235; Heath *v.* Hubbard, 4 East 110, 4 Esp. 205, 102 Eng. Reprint 771; Farrar *v.* Beswick, 5 L. J. Exch. 225, 1 M. & W. 682, Tyrw. & G. 1053; Haywood *v.* Davies, 1 Salk. 4, 91 Eng. Reprint 4; Martyn *v.* Knowllys, 8 T. R. 145, 101 Eng. Reprint 1313.

Canada.—Wiggins *v.* White, 2 N. Brunsw. 97; Brittain *v.* Parker, 12 Nova Scotia 589; Elliott *v.* Smith, 3 Nova Scotia 338; Brady *v.* Arnold, 19 U. C. C. P. 42; Rathwell *v.* Rathwell, 26 U. C. Q. B. 179; Culver *v.* Macklem, 11 U. C. Q. B. 513; Petrie *v.* Taylor, 3 U. C. Q. B. 457. *Compare* Freeman *v.* Morton, 3 Nova Scotia 340.

See 45 Cent. Dig. tit. "Tenancy in Common," § 100 *et seq.*

Sale of common property.— One tenant in common of personal property is not liable in an action of trover at the suit of his cotenant for selling the common property. Olin *v.* Martell, 83 Vt. 130, 74 Atl. 1060.

77. *Alabama.*— Moore *v.* Walker, 124 Ala. 199, 26 So. 984; Perminter *v.* Kelly, 18 Ala. 716, 54 Am. Dec. 177.

Connecticut.— Harris *v.* Ansonia, 73 Conn. 359, 47 Atl. 672.

Kansas.— Smith-McCord Dry-Goods Co. *v.* Burke, 63 Kan. 740, 66 Pac. 1036.

Maine.— Carter *v.* Bailey, 64 Me. 458, 18 Am. Rep. 273; Estey *v.* Boardman, 61 Me. 595; Dain *v.* Cowing, 22 Me. 347, 39 Am. Dec. 585.

Massachusetts.—Weld *v.* Oliver, 21 Pick. 559.

Michigan.— Parke *v.* Nixon, 141 Mich. 267, 104 N. W. 597. See also Clow *v.* Plummer, 85 Mich. 550, 48 N. W. 795; Aldine Mfg. Co. *v.* Barnard, 84 Mich. 632, 48 N. W. 280.

Minnesota.— Strong *v.* Colter, 13 Minn. 82.

New Jersey.— Roston *v.* Morris, 25 N. J. L. 173.

New York.— Osborn *v.* Schenck, 83 N. Y. 201; Rodermund *v.* Clark, 46 N. Y. 354; Gilbert *v.* Dickerson, 7 Wend. 449, 22 Am. Dec. 592; Hyde *v.* Stone, 9 Cow. 230, 18 Am. Dec. 501; Wilson *v.* Reed, 3 Johns. 175.

North Carolina.— Shearin *v.* Riggsbee, 97 N. C. 216, 1 S. E. 770.

right of division be shown;[78] and after severance and retention of all of the subject-matter thereof by one of the parties, trover may be maintained against him if he wrongfully withholds the share of the demandant, because his possession is merely that of bailee.[79] Even though trees cut by one cotenant of land without the consent of the others become personal property on being so severed, they nevertheless remain the property of the cotenants; and one of them converting the logs is liable to his cotenants for the conversion, as in the case of other personal property.[80] No action of trover can be maintained for the selling of personal property owned in common, either against its vendor or vendee, where the vendor was a tenant in common therein duly authorized to sell,[81] and an action is not maintainable between tenants in common to recover an interest in an article manufactured from part of the materials or property that had been owned in common by plaintiff and defendant, and converted by the latter, where the character or identity of the original article has been lost.[82]

b. For Crops and Timber. The general rule is that one tenant in common cannot maintain trespass or trover against his cotenants in crops, until after a separation or severance thereof or until after such a conversion thereof as goes to their destruction, or the exclusion of the complainant from the enjoyment of his right and interest therein.[83] The application of the rule, however, has not been uniform; the several cases taking different views in relation to acts in the premises, and some of them decided directly under statutes, and others ruled by the special circumstances of the particular cases, have allowed trover or trespass to

Pennsylvania.— Keisel *v.* Earnest, 21 Pa. St. 90.

Vermont.— Spaulding *v.* Orcutt, 56 Vt. 218.

See 45 Cent. Dig. tit. "Tenancy in Common," § 65 *et seq.*

Where the bailee of hypothecated stock became a tenant therein before suit, an action by a cotenant therein in replevin could not be maintained against him. Barrowcliffe *v.* Cummins, 66 Hun (N. Y.) 1, 20 N. Y. Suppl. 787.

78. *California.*—Adams *v.* Thornton, 5 Cal. App. 455, 90 Pac. 713.

Maine.—Weeks *v.* Hackett, 104 Me. 264, 71 Atl. 858, 129 Am. St. Rep. 390, 19 L. R. A. N. S. 1201.

Michigan.— Loomis *v.* O'Neal, 73 Mich. 582, 41 N. W. 701.

New Hampshire.— Pickering *v.* Moore, 67 N. H. 533, 32 Atl. 828, 68 Am. St. Rep. 695, 31 L. R. A. 698.

New York.— Stall *v.* Wilbur, 77 N. Y. 158; Channon *v.* Lusk, 2 Lans. 211; Fobes *v.* Shattuck, 22 Barb. 568; Lobdell *v.* Stowell, 37 How. Pr. 88 [*affirmed* in 51 N. Y. 70]. See also McCarthy *v.* McCarthy, 40 Misc. 180, 81 N. Y. Suppl. 660.

Utah.— Manti City Sav. Bank *v.* Peterson, 33 Utah 209, 93 Pac. 566, 126 Am. St. Rep. 817.

See 45 Cent. Dig. tit. "Tenancy in Common," § 70 *et seq.*

Wool from a whole flock, not shown to be of one grade, is not property such as is readily divisible in portions absolutely alike in quality and value, and its retention therefore by one or two joint owners of it does not necessarily constitute a conversion. Dear *v.* Reed, 37 Hun (N. Y.) 594.

Under a statute providing that cotenants may maintain actions against each other for their respective shares of easily divisible property after a demand in writing, demand and refusal is sufficient for the bringing of an action, without the destruction of the common property or a conversion thereof to defendant's own use. Wood *v.* Noack, 84 Wis. 398, 54 N. W. 785.

79. Fiquet *v.* Allison, 12 Mich. 328, 86 Am. Dec. 54; Lobdell *v.* Stowell, 51 N. Y. 70; Seldon *v.* Hickock, 2 Cai. (N. Y.) 166.

80. Shepard *v.* Pettit, 30 Minn. 119, 14 N. W. 511; Hinson *v.* Hinson, 120 N. C. 400, 27 S. E. 80; Walker *v.* Humbert, 55 Pa. St. 407; Brittain *v.* Parker, 12 Nova Scotia 589.

81. Hewlett *v.* Owens, 51 Cal. 570.

82. Redington *v.* Chase, 44 N. H. 36, 82 Am. Dec. 189; Andrew *v.* New Jersey Steamboat Co., 11 Hun (N. Y.) 490.

83. *New Hampshire.*— Carr *v.* Dodge, 40 N. H. 403.

New Jersey.— Roston *v.* Morris, 25 N. J. L. 173.

North Carolina.— Shearin *v.* Riggsbee, 97 N. C. 216, 1 S. E. 770.

Pennsylvania.— Keisel *v.* Earnest, 21 Pa. St. 90.

Vermont.— Deavitt *v.* Ring, 73 Vt. 298, 50 Atl. 1066.

Canada.— Brady *v.* Arnold, 19 U. C. C. P. 42; Rathwell *v.* Rathwell, 26 U. C. Q. B. 179; Wemp *v.* Mormon, 2 U. C. Q. B. 146.

Grass growing on the land when severed by one tenant is not governed by the same rule as other crops, it not being the product of his labor, and the severance from the soil gives him no title to the hay on which he may recover in trover against a cotenant. Le Barren *v.* Babcock, 46 Hun (N. Y.) 598 [*affirmed* in 122 N. Y. 153, 25 N. E. 253, 19 Am. St. Rep. 488, 9 L. R. A. 625].

be brought.[84] The respective shares of grain, where they can be easily determined by weight or measure, may be severed, taken, and sold by the respective owners thereof; but if a tenant in common takes all of the common property and deprives his cotenants of its use or benefit, or a stranger so takes the common property or negligently destroys it, it amounts to conversion, and trover will lie,[85] either as against a cotenant or a purchaser from the cotenant; [86] and under extraordinary circumstances an injunction may lie.[87] The complaining cotenant may, however, waive the tort and bring assumpsit.[88] Where a tenant in common, after a division of a crop of fruit, carried away the entire crop and refused to divide it with his cotenants, replevin is maintainable.[89]

c. Waste. Acts by less than all of the cotenants that go to the destruction or to the permanent injury of the property constitute waste,[90] for which they

84. *Alabama.*— Sullivan *v.* Lawler, 72 Ala. 74.

Massachusetts.— Delaney *v.* Root, 99 Mass. 546, 97 Am. Dec. 52.

Nebraska.— Reed *v.* McRill, 41 Nebr. 206, 59 N. W. 775.

New Hampshire.— Ballou *v.* Hale, 47 N. H. 347, 93 Am. Dec. 438.

New York.— Le Barren *v.* Babcock, 46 Hun 598 [*affirmed* in 122 N. Y. 153, 25 N. E. 253, 19 Am. St. Rep. 488, 9 L. R. A. 625]; Channon *v.* Lusk, 2 Lans. 211; Lobdell *v.* Stowell, 37 How. Pr. 88 [*affirmed* in 51 N. Y. 70].

Vermont.— Lewis *v.* Clark, 59 Vt. 363, 8 Atl. 158.

Canada.— McLellan *v.* McDougall, 28 Nova Scotia 237; Brady *v.* Arnold, 19 U. C. C. P. 42; Culver *v.* Macklem, 11 U. C. Q. B. 513.

So where timber is unlawfully cut and removed.— Clow *v.* Plummer, 85 Mich. 550, 48 N. W. 795. See also Trout *v.* Kennedy, 47 Pa. St. 387; Wilson *v.* Reed, 3 Johns. (N. Y.) 175. The liability of a tenant in common of land, valuable for its timber, who cuts the timber, believing he was the owner of all of it, is for the value of the share of the other tenant of the timber in the tree at the time it was cut, with interest. Paepcke-Leicht Lumber Co. *v.* Collins, 85 Ark. 414, 108 S. W. 511.

For merely reaping and harvesting, trespass or trover cannot be brought. Jacobs *v.* Seward, L. R. 5 H. L. 464, 41 L. J. C. P. 221, 27 L. T. Rep. N. S. 185 [*affirming* 18 Wkly. Rep. 953]; Brady *v.* Arnold, 19 U. C. C. P. 42; Culver *v.* Macklem, 11 U. C. Q. B. 513.

Animals damage feasant.—A tenant in common has been permitted to maintain an action of case against his cotenants for allowing his animals to run at large and damage crops. McGehee *v.* Peterson, 57 Ala. 333.

85. Arthur *v.* Chicago, etc., R. Co., 61 Iowa 648, 17 N. W. 24; Hall *v.* Pillsbury, 43 Minn. 33, 44 N. W. 673, 19 Am. St. Rep. 209, 7 L. R. A. 529; Harris *v.* Gregg, 17 N. Y. App. Div. 210, 45 N. Y. Suppl. 364; Channon *v.* Lusk, 2 Lans. (N. Y.) 211; Nowlen *v.* Colt, 6 Hill (N. Y.) 461, 41 Am. Dec. 756; Adams *v.* Meyers, 1 Fed. Cas. No. 62, 1 Sawy. 306.

If grain be delivered at the storehouse of a stranger, merely for the purpose of delivering it and not for the purpose of its storage with other grain, then such storage without the knowledge or consent of the owner so delivering it does not make him a tenant in common in the whole mass of grain after its confusion; and he may sue after demand and refusal, for its restoration to him or for its conversion. Morgan *v.* Gregg, 46 Barb. (N. Y.) 183.

Refusal to sever.—A cotenant in a crop may be entitled to severance, and a refusal to sever may give a good cause of action. Fiquet *v.* Allison, 12 Mich. 328, 86 Am. Dec. 54.

86. Brown *v.* Wellington, 106 Mass. 318, 8 Am. Rep. 330; Logan *v.* Oklahoma Mill Co., 14 Okla. 402, 79 Pac. 103.

87. Bates *v.* Martin, 12 Grant Ch. (U. C.) 490. See, generally, *infra*, III, J, 4, b.

88. Loomis *v.* O'Neal, 73 Mich. 582, 41 N. W. 701. And see, generally, *supra*, III, J, 2, a.

89. Adams *v.* Thornton, 5 Cal. App. 455, 90 Pac. 713; Hall *v.* Pillsbury, 43 Minn. 33, 44 N. W. 673, 19 Am. St. Rep. 209, 7 L. R. A. 529; Nowlen *v.* Colt, 6 Hill (N. Y.) 461, 41 Am. Dec. 756; Adams *v.* Meyers, 1 Fed. Cas. No. 62, 1 Sawy. 306.

90. Nevels *v.* Kentucky Lumber Co., 108 Ky. 550, 56 S. W. 969, 22 Ky. L. Rep. 247, 94 Am. St. Rep. 388, 49 L. R. A. 416; Shepard *v.* Pettit, 30 Minn. 119, 14 N. W. 511; Dodd *v.* Watson, 57 N. C. 48, 72 Am. Dec. 577.

Mining.—An action for waste or in the nature of waste may be maintainable for the penetration and opening of the soil, although it is not waste to dig in mines or pits already opened, the produce of which have become part of the profit of the land. Ayotte *v.* Nadeau, 32 Mont. 498, 81 Pac. 145; Coleman's Appeal, 62 Pa. St. 252; Heil *v.* Strong, 44 Pa. St. 264; Williamson *v.* Jones, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L. R. A. 694; Tipping *v.* Robbins, 71 Wis. 507, 37 N. W. 427.

Extraction of coal from land without consent of the other cotenants as waste see Cecil *v.* Clark, 44 W. Va. 659, 30 S. E. 216; Job *v.* Potton, L. R. 20 Eq. 84, 44 L. J. Ch. 262, 32 L. T. Rep. N. S. 110, 23 Wkly. Rep. 588. But the mere working of, or licensing the right to, work a coal mine is not waste. Job *v.* Potton, *supra*.

The excavation and removal of rock from the common property may constitute waste. Childs *v.* Kansas City, etc., R. Co., 117 Mo. 414, 23 S. W. 373; Cosgriff *v.* Dewey, 21 N. Y. App. Div. 129, 47 N. Y. Suppl. 255 [*affirmed*

may be sued in an action on the case or a statutory action of waste,[91] in which, if the statute allows, double or threefold damages may be recovered.[92] If a tenant in common has become liable to his cotenants for damages for waste, they may waive the tort and require an accounting at law or in equity.[93] A statute, per-

in 164 N. Y. 1, 58 N. E. 1, 79 Am. St. Rep. 620], Smith *v.* Sharpe, 44 N. C. 91, 57 Am. Dec. 574.

Boring for petroleum oil and taking it from the land as waste see Williamson *v.* Jones, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L. R. A. 694; McDodrill *v.* Pardee, etc., Lumber Co., 40 W. Va. 564, 21 S. E. 878.

Mill fixtures.— Damaging or taking away, except for the common benefit, saws, water wheels, and other fixtures in a mill owned in common is in the nature of waste. Linton *v.* Wilson, 3 N. Brunsw. 223. But the taking of fixtures and implements of a mill out of use for want of repairs, and their temporary use by one cotenant and the destruction of some rotten timber belonging thereto, by him, is not destructive waste. Dodd *v.* Watson, 57 N. C. 48, 72 Am. Dec. 577.

Cutting down and clearing woodland to the injury of a cotenant therein is waste (Nevels *v.* Kentucky Lumber Co., 108 Ky. 550, 56 S. W. 969, 22 Ky. L. Rep. 247, 94 Am. St. Rep. 388, 49 L. R. A. 416; Elwell *v.* Burnside, 44 Barb. (N. Y.) 447; Johnson *v.* Johnson, 2 Hill Eq. (S. C.) 277, 29 Am. Dec. 72), especially where one tenant in common so committing waste claims the whole of the land adversely to his cotenants therein (Dodge *v.* Davis, 85 Iowa 77, 52 N. W. 2).

Clearing of all the arable land owned in common and wearing it out by a succession of crops and not leaving sufficient timber to repair fences are not such injuries as the law will remedy by an action on the case in the nature of waste, but that the injured cotenant must seek his remedy either by an action of account or a bill in equity for an accounting. Darden *v.* Cowper, 52 N. C. 210, 75 Am. Dec. 461.

Removal of tort-feasor's property.— Unless all of the cotenants concur in waste, a nonconcurring cotenant will not be restrained from removing the tort-feasor's property from the land. Durham, etc., R. Co. *v.* Wawn, 3 Beav. 119, 4 Jur. 764, 43 Eng. Ch. 119, 49 Eng. Reprint 47.

91. *Georgia.*— Shiels *v.* Stark, 14 Ga. 429.

Maine.— Hubbard *v.* Hubbard, 15 Me. 198, plaintiff held entitled to recover without proving who the other cotenants were. See also Moody *v.* Moody, 15 Me. 205, holding that it is no defense to an action to prevent the commission of waste and to recover damages by an heir against his coheirs that the whole of the common property will be required to satisfy the claims of the creditors of the intestate thereof.

Minnesota.— Booth *v.* Sherwood, 12 Minn. 426, holding that ordinarily trespass does not lie for misfeasance on the part of a cotenant for injuries to the common property, but an action on the case may be had.

New York.— Hoolihan *v.* Hoolihan, 193 N. Y. 197, 85 N. E. 1103; Cosgriff *v.* Dewey, 21 N. Y. App. Div. 129, 47 N. Y. Suppl. 255 [*affirmed* in 164 N. Y. 1, 58 N. E. 1, 79 Am. St. Rep. 620]; Elwell *v.* Burnside, 44 Barb. 447.

North Carolina.— Hinson *v.* Hinson, 120 N. C. 400, 27 S. E. 80; Smith *v.* Sharpe, 44 N. C. 91, 57 Am. Dec. 574.

South Carolina.— Holt *v.* Robertson, McMull. Eq. 475. See Thompson *v.* Bostick, McMull. Eq. 75.

Texas.—Camoron *v.* Thurmond, 56 Tex. 22.

Virginia.— Newman *v.* Newman, 27 Gratt. 714; Graham *v.* Pierce, 19 Gratt. 28, 100 Am. Dec. 658.

West Virginia.— Hall *v.* Clark, 47 W. Va. 402, 35 S. E. 11; Williamson *v.* Jones, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L. R. A. 694; McDodrill *v.* Pardee, etc., Lumber Co., 40 W. Va. 564, 21 S. E. 878.

Canada.— Freeman *v.* Morton, 3 Nova Scotia 340.

See 45 Cent. Dig. tit. "Tenancy in Common," § 69.

A writ of estrepement by one tenant in common against another for the prevention of the cutting and the removal of timber from the common property may be opened and defendant allowed to remove the timber under proper security. Hensel *v.* Wright, 10 Pa. Co. Ct. 416.

Payment to one cotenant for waste committed is a good defense to an action by the other tenants in common for such waste. Grossman *v.* Lauber, 29 Ind. 618.

An entry, claiming title, is prima facie evidence of a cotenancy for the purposes of an action for damages for cutting timber on the land. Blake *v.* Milliken, 14 N. H. 213.

92. *Maine.*— Mills *v.* Richardson, 44 Me. 79; Dwinell *v.* Larrabee, 38 Me. 464.

Massachusetts.— Jenkins *v.* Wood, 145 Mass. 494, 14 N. E. 512, limiting, however, the operation of the statute to cases of known and recognized tenancies in common.

Michigan.— Clow *v.* Plummer, 85 Mich. 550, 48 N. W. 795.

New York.— Hoolihan *v.* Hoolihan, 119 N. Y. App. Div. 925, 104 N. Y. Suppl. 551.

Pennsylvania.— Bush *v.* Gamble, 127 Pa. St. 43, 17 Atl. 865; Wheeler *v.* Carpenter, 107 Pa. St. 271.

See 45 Cent. Dig. tit. "Tenancy in Common," §§ 68, 69.

But see McCord *v.* Oakland Quicksilver Min. Co., 64 Cal. 134, 27 Pac. 863, 49 Am. Rep. 686.

Limitations.— If such statute provides for the recovery of treble damages an action thereunder is not necessarily within a statute limiting actions for penalties to one year. Adams *v.* Palmer, 6 Gray (Mass.) 338.

93. Darden *v.* Cooper, 52 N. C. 210, 75 Am. Dec. 461; Cecil *v.* Clark, 44 W. Va. 659, 30

mitting suit between cotenants for waste and fixing the measure of damages, authorizes an action for waste committed during the cotenancy, even though the tenancy in common has terminated before the institution of the suit.[94] If some of the cotenants joining in a suit for the cutting of timber are estopped from recovering the full penalty which they might have recovered but for said estoppel, then a verdict for less than the full penalty is proper, since the right of action being joint, the assessment of damages must be accordingly.[95] The ordinary rule of valuation in an accounting between tenants in common as to the removal of timber by some of them in the absence of statute or agreement to the contrary is the value of the timber while growing.[96] In an action in the nature of waste occasioned by abuse and misuse of property by a cotenant, and his failure to make tenantable repairs, such improvements as defendant has made in the nature of general repairs should be considered in estimating the amount of damages.[97]

d. Ejectment — (i) *In General.* One tenant in common may maintain ejectment against a cotenant.[98] But such action cannot be maintained between them merely because one of them is occupying more than what would be his share of the common property on a division or partition thereof.[99] There must

S. E. 216; McGahan *v.* Rondout Nat. Bank, 156 U. S. 218, 15 S. Ct. 347, 39 L. ed. 403; Brittain *v.* Parker, 12 Nova Scotia 589. See also Goodwyn *v.* Spray, Dick. 667, 21 Eng. Reprint 431.

Mining.—Account will also apply to the mining of lands or the operating of oil wells and the selling of the produce thereof by a tenant in common without the consent of the cotenants therein, or after they have refused to join him as well as to other cases of waste; as the action is not one for the recovery for use and occupation but rather for a part of the estate that has been taken and carried away. Childs *v.* Kansas City, etc., R. Co., 117 Mo. 414, 23 S. W. 373; Switzer *v.* Switzer, 57 N. J. Eq. 421, 41 Atl. 486; Abbey *v.* Wheeler, 58 N. Y. App. Div. 451, 69 N. Y. Suppl. 432 [*reversed* on other grounds in 170 N. Y. 122, 62 N. E. 1074]; Cosgriff *v.* Dewey, 21 N. Y. App. Div. 129, 47 N. Y. Suppl. 255 [*affirmed* in 164 N. Y. 1, 58 N. E. 1, 79 Am. St. Rep. 620]; McCabe *v.* McCabe, 18 Hun (N. Y.) 153; Irvine *v.* Hanlin, 10 Serg. & R. (Pa.) 219; Graham *v.* Pierce, 19 Gratt. (Va.) 28, 100 Am. Dec. 658; McNeely *v.* South Penn Oil Co., 58 W. Va. 438, 52 S. E. 480; Cecil *v.* Clarke, 49 W. Va. 459, 39 S. E. 202; Curtis *v.* Coleman, 22 Grant Ch. (U. C.) 561. The mortgagee of one cotenant's share in a mine may maintain a bill for an accounting against his mortgagor and the other cotenants therein. Bentley *v.* Bates, 9 L. J. Exch. 30, 4 Jur. 552, 4 Y. & C. 182. Taking possession of the common property under a claim to the whole thereof under an execution sale, and converting the products thereof, is sufficient ground for an accounting to a prior mortgagee of the remaining cotenant. McGahan *v.* Rondout Nat. Bank, 156 U. S. 218, 15 S. Ct. 347, 39 L. ed. 403.

A just proportion of royalty received on a lease of the common property executed by one cotenant for the purposes of mining and the removal of coal is a proper measure of damages for such waste. Cecil *v.* Clark, 44 W. Va. 659, 30 S. E. 216.

94. Hoolihan *v.* Hoolihan, 119 N. Y. App. Div. 925, 104 N. Y. Suppl. 551, holding that a statute creating an action of waste between cotenants and permitting treble damages or partition authorizes such action for waste committed during the cotenancy, even after the extinguishment of plaintiff's interest in the land.

95. Haley *v.* Taylor, 77 Miss. 867, 28 So. 752, 78 Am. St. Rep. 549.

96. Dodge *v.* Davis, 85 Iowa 77, 52 N. W. 2. See also Clow *v.* Plummer, 85 Mich. 550, 48 N. W. 795; Walling *v.* Burroughs, 43 N. C. 60.

97. Bodkin *v.* Arnold, 48 W. Va. 108, 35 S. E. 980.

98. Ricks *v.* Pope, 129 N. C. 52, 39 S. E. 638.

One tenant in common having enfeoffed his interest to his cotenant may be ejected by the latter. Heatherley *v.* Weston, 2 Wils. C. P. 232, 95 Eng. Reprint 783.

Ejectment may be maintained against a creditor of a cotenant who has levied upon more than the share of his debtor. Chapman *v.* Gray, 15 Mass. 439.

That plaintiff can on partition obtain satisfaction of his interests from the remainder of the estate belonging to the other heirs is no defense in such action. Mahoney *v.* Middleton, 41 Cal. 41; Petit *v.* Flint, etc., R. Co., 114 Mich. 362, 72 N. W. 238.

An equity arising from the purchase of an outstanding interest by a tenant in common cannot be enforced in ejectment. Retan *v.* Sherwood, 120 Mich. 496, 79 N. W. 692.

One of several coparceners may bring ejectment on her separate demise. Jackson *v.* Sample, 1 Johns. Cas. (N. Y.) 231.

Plaintiff cotenant unable to recover because of lack of suitable evidence see Llewellyn *v.* Llewellyn, 201 Mo. 303, 100 S. W. 40; Goldsmith *v.* Smith, 21 Fed. 611.

99. Lick *v.* O'Donnell, 3 Cal. 59, 58 Am. Dec. 383; Daniel *v.* Daniel, 102 Ga. 181, 28 S. E. 167; Moreira *v.* Schwan, 113 La. 643, 37 So. 542.

be evidence of an ouster, or eviction, or of some act equivalent thereto, to support the action,[1] and recovery may be had only on proof of actual ouster, or on evidence from which the jury can infer an actual ouster.[2] Moreover, to maintain the action,

1. *California.*— Lee Chuck *v.* Quan Wo Chong, 91 Cal. 593, 28 Pac. 45; Owen *v.* Morton, 24 Cal. 373.

Colorado.— See Mills *v.* Hart, 24 Colo. 505, 52 Pac. 680, 65 Am. St. Rep. 241.

Connecticut.— Norris *v.* Sullivan, 47 Conn. 474; Newell *v.* Woodruff, 30 Conn. 492; Clark *v.* Vaughan, 3 Conn. 191.

Florida.— Gale *v.* Hines, 17 Fla. 773.

Georgia.— McCrary *v.* Glover, 100 Ga. 90, 26 S. E. 102; Lawton *v.* Adams, 29 Ga. 273, 74 Am. Dec. 59.

Illinois.— Graham *v.* Ford, 125 Ill. App. 578.

Indiana.—Vance *v.* Schroyer, 77 Ind. 501.

Iowa.— Stern *v.* Selleck, 136 Iowa 291, 111 N. W. 451.

Kentucky.— Chiles *v.* Conley, 9 Dana 385.

Louisiana.— Moreira *v.* Schwan, 113 La. 643, 37 So. 542.

Maine.— Porter *v.* Hooper, 13 Me. 25, 29 Am. Dec. 480; Cutts *v.* King, 5 Me. 482; Williams *v.* Gray, 3 Me. 207, 14 Am. Dec. 234.

Massachusetts.— King *v.* Dickerman, 11 Gray 480; Dewey *v.* Brown, 2 Pick. 387.

Michigan.— Gower *v.* Quinlan, 40 Mich. 572.

Missouri.— Llewellyn *v.* Llewellyn, 201 Mo. 303, 100 S. W. 40; Jordon *v.* Surghnor, 107 Mo. 520, 17 S. W. 1009.

Nevada.— Bullion Min. Co. *v.* Croesus Gold, etc., Min. Co., 2 Nev. 168, 90 Am. Dec. 526.

New York.— Gilman *v.* Gilman, 111 N. Y. 265, 18 N. E. 849; Peterson *v.* De Baun, 36 N. Y. App. Div. 259, 55 N. Y. Suppl. 249; Edwards *v.* Bishop, 4 N. Y. 61; Earnshaw *v.* Myers, 49 Hun 608, 1 N. Y. Suppl. 901; Arnot *v.* Beadle, Lalor 181.

North Carolina.— Jones *v.* Cohen, 82 N. C. 75; Halford *v.* Tetherow, 47 N. C. 393.

Ohio.—White *v.* Sayre, 2 Ohio 110.

South Carolina.— Jones *v.* Massey, 14 S. C. 292; Jones *v.* Massey, 9 S. C. 376; Volentine *v.* Johnson, 1 Hill Eq. 49.

Vermont.—Avery *v.* Hall, 50 Vt. 11; Johnson *v.* Tilden, 5 Vt. 426; Warren *v.* Henshaw, 2 Aik. 141. See House *v.* Fuller, 13 Vt. 165, 37 Am. Dec. 580, where rule was applied to the case of a disseizor who subsequently purchased the interest of one of the tenants in common.

Washington.— Mabie *v.* Whittaker, 10 Wash. 656, 39 Pac. 172.

United States.— Clay *v.* Field, 115 U. S. 260, 6 S. Ct. 36, 29 L. ed. 375; Barnitz *v.* Casey, 7 Cranch 456, 3 L. ed. 403.

Canada.—Van Velsor *v.* Hughson, 9 Ont. App. 390, 45 U. C. Q. B. 252.

See 45 Cent. Dig. tit. "Tenancy in Common," § 102.

Such as total denial of plaintiff's right of possession. Falconer *v.* Roberts, 88 Mo. 574; Jones *v.* De Lassus, 84 Mo. 541.

In ejectment, if cotenancy is denied by plaintiff, there is no necessity for any stronger proof of ouster than against any other party. Peterson *v.* Laik, 24 Mo. 541, 69 Am. Dec. 441.

After ratification of a sale of land the ratifying cotenant is estopped from maintaining ejectment against his cotenant's grantee. Nalle *v.* Thompson, 173 Mo. 595, 73 S. W. 599.

The possession of a mortgagee cotenant will be considered *prima facie* to be by virtue of the cotenancy and not under the mortgage. Mellon *v.* Reed, 114 Pa. St. 647, 8 Atl. 227.

One claiming under a cotenant by virtue of the cotenancy cannot set up an adverse title without any other change in the title after partition. Jackson *v.* Creal, 13 Johns. (N. Y.) 116.

Cotenancy must be alleged and proved before a denial of rights or acts amounting to an ouster can be required of plaintiff. Sherin *v.* Larson, 28 Minn. 523, 11 N. W. 70.

2. *Alabama.*— Foster *v.* Foster, 2 Stew. 356; Jones *v.* Perkins, 1 Stew. 512.

Arkansas.— Trapnall *v.* Hill, 31 Ark. 345.

Connecticut.— Norris *v.* Sullivan, 47 Conn. 474.

Georgia.— Lawton *v.* Adams, 29 Ga. 273, 74 Am. Dec. 59.

Indiana.— Frakes *v.* Elliott, 102 Ind. 47, 1 N. E. 195; Vance *v.* Schroyer, 77 Ind. 501.

Maryland.— Hammond *v.* Morrison, 33 Md. 95.

Mississippi.— Corbin *v.* Cannon, 31 Miss. 570; Harmon *v.* James, 7 Sm. & M. 111, 45 Am. Dec. 296.

Missouri.— Childs *v.* Kansas City, etc., R. Co., 117 Mo. 414, 23 S. W. 373; Falconer *v.* Roberts, 88 Mo. 574.

New Jersey.— Den *v.* Bordine, 20 N. J. L. 394.

New York.— North Greig Church *v.* Johnson, 66 Barb. 119; Clason *v.* Rankin, 1 Duer 337; Whiteman *v.* Hyland, 16 N. Y. Suppl. 8.

North Carolina.— Johnson *v.* Swain, 44 N. C. 335.

Ohio.— Penrod *v.* Danner, 19 Ohio 218.

Vermont.— Carpenter *v.* Thayer, 15 Vt. 552; Johnson *v.* Tilden, 5 Vt. 426.

Virginia.— Taylor *v.* Hill, 10 Leigh 457.

Washington.— Mabie *v.* Whittaker, 10 Wash. 656, 39 Pac. 172.

United States.— Barnitz *v.* Casey, 7 Cranch 456, 3 L. ed. 403; Goldsmith *v.* Smith, 21 Fed. 611.

England.— Peaceable *v.* Read, 1 East 568, 102 Eng. Reprint 220.

See 45 Cent. Dig. tit. "Tenancy in Common," § 102.

Acts of ouster to support action see Cameron *v.* Chicago, etc., R. Co., 60 Minn. 100, 61 N. W. 814 (the wrongful retention of exclusive possession after a demand from one tenant in common of the other that the

defendant cotenant must be actually in possession.[3] Adverse possession by one tenant in common against his cotenants for the statutory period will bar his right to recover possession.[4]

(II) *Title to Support Action; Capacity to Sue.* In ejectment between cotenants plaintiff must recover on the strength of his own title,[5] the burden being upon him to show his own right and title, and also to rebut *prima facie* evidence of title in defendant, if there be any.[6] A cotenant in possession, holding and claiming the common property as his sole property adversely to the rights of his cotenants therein for a sufficient period for said adverse claim to ripen into a title, has a sufficient title to enable him to subsequently maintain an action in his own name for the recovery of the possession of said property.[7] A valid agreement among cotenants or by their authority as to occupying portions of the common property in severalty is binding until rescinded, and possession may be recovered against a cotenant by ejectment.[8]

latter purchase and pay for the interest of said demandant, and refusal of the tenant in common in possession so to do); North Greig Church *v.* Johnson, 66 Barb. (N. Y.) 119 (entering upon the common property under claim of exclusive ownership, locking the door of a building thereon thus excluding the cotenants, and keeping possession); Watts *v.* Owens, 62 Wis. 512, 22 N. W. 720 (entering upon land under a void deed and setting up adverse possession as against a cotenant therein).

A finding of demand and refusal to be let into possession does not of itself amount to the finding of an ouster. Carpentier *v.* Mendenhall, 28 Cal. 484, 87 Am. Dec. 135.

3. Mahoney *v.* Middleton, 41 Cal. 41; Carpentier *v.* Mendenhall, 28 Cal. 484, 87 Am. Dec. 135; Owen *v.* Morton, 24 Cal. 373; Collier *v.* Corbett, 15 Cal. 183; Llewellyn *v.* Llewellyn, 201 Mo. 303, 100 S. W. 40; Earnshaw *v.* Myers, 1 N. Y. Suppl. 901; Wetherington *v.* Williams, 134 N. C. 276, 46 S. E. 728.

4. *Illinois.*— Lavelle *v.* Strobel, 89 Ill. 370.

Indiana.— Doe *v.* McCleary, 2 Ind. 405.

New York.— Fosgate *v.* Herkimer Mfg., etc., Co., 12 Barb. 352 [*affirming* 9 Barb. 287]; Jackson *v.* Brink, 5 Cow. 483.

North Carolina.— Mott *v.* Carolina Land, etc., Co., 146 N. C. 525, 60 S. E. 423; Lenoir *v.* Valley River Min. Co., 106 N. C. 473, 11 S. E. 516; Gaylord *v.* Respass, 92 N. C. 553.

Pennsylvania.— Rider *v.* Maul, 46 Pa. St. 376.

Tennessee.— Marr *v.* Gilliam, 1 Coldw. 488.

The defense that no actual ouster has been shown is only available to a cotenant. Arnot *v.* Beadle, Lalor (N. Y.) 181.

5. *California.*— Owen *v.* Morton, 24 Cal. 373.

Illinois.— Fischer *v.* Eslaman, 68 Ill. 78.

Kansas.— Horner *v.* Ellis, 75 Kan. 675, 90 Pac. 275, 121 Am. St. Rep. 446.

Missouri.— Primm *v.* Walker, 38 Mo. 94.

North Carolina.— Den *v.* Cartwright, 15 N. C. 487.

Texas.— Waggoner *v.* Snody, (1905) 85 S. W. 1134; Davidson *v.* Wallingford, 88 Tex. 619, 32 S. W. 1030.

One claiming by adverse possession has the burden of proving such claim. Inglis *v.* Webb, 117 Ala. 387, 23 So. 125.

In a joint and several suit by tenants in common those showing sufficient title may recover, although others failing to show sufficient title do not recover. Greenfield *v.* McIntyre, 112 Ga. 691, 38 S. E. 44. But if a joint action is brought for the recovery of land and one of plaintiffs fails to show title or right of entry and possession, plaintiffs cannot recover. De Vaughn *v.* McLeroy, 82 Ga. 687, 10 S. E. 211.

An agreement that a third person should have a portion of the profits arising from the sale of certain lands was held to give no sufficient rights to the lands to maintain ejectment, but the third person had only an interest in the proceeds after sale. Seitzinger *v.* Ridgway, 4 Watts & S. (Pa.) 472.

A defendant without title cannot object in an action of trespass to try title to said action by one showing title to an undivided interest. Gray *v.* Kauffman, 82 Tex. 65, 17 S. W. 513.

Where two only, of a number of executors, deeded certain property to a legatee under a power in the will to the executors to deed such property to said legatee, it was nevertheless held that irrespective of the deed such legatee was entitled to bring an action for possession against one holding adversely. Hall *v.* Haywood, 77 Tex. 4, 13 S. W. 612.

An undivided interest in a partition wall is not sufficient foundation for maintaining an ejectment suit against one who placed a building on the half of the land adjoining that of plaintiff on which the wall stood before its destruction. Duncan *v.* Rodecker, 90 Wis. 1, 62 N. W. 533; Stevens *v.* Ruggles, 23 Fed. Cas. No. 13,408, 5 Mason 221.

6. Davidson *v.* Wallingford, 88 Tex. 619, 32 S. W. 1030.

7. *Kentucky.*— Russell *v.* Mark, 3 Metc. 37.

Michigan.— La Fountain *v.* Dee, 110 Mich. 347, 68 N. W. 220; Highstone *v.* Burdette, 54 Mich. 329, 20 N. W. 64.

Missouri.— Comstock *v.* Eastwood, 108 Mo. 41, 18 S. W. 39.

New York.— Jackson *v.* Whitbeck, 6 Cow. 632, 16 Am. Dec. 454.

Tennessee.— Marr *v.* Gilliam, 1 Coldw. 488.

8. Throckmorton *v.* Burr, 5 Cal. 400; Lui *v.* Kaleikini, 10 Hawaii 391.

(III) *DEMAND.* There is no necessity for a prior demand of possession by a tenant in common where his cotenant takes a deed to the whole estate and claims it thereunder, or commits some act equivalent to an ouster.[9] The commencement of the action is sufficient demand.[10]

(IV) *EXTENT OF RECOVERY; JUDGMENT.* Upon a finding for plaintiff the court should define the extent of plaintiff's interest,[11] and the effect of judgment for plaintiff is to put plaintiff in possession with defendant,[12] and to entitle plaintiff to possession of his undivided portion of the common property and to his share of the mesne rents and profits if so by statute provided, but not to sole possession of any specific portion.[13] He can recover no more than his own portion of the common estate where he has not disseized his cotenants, together with such further damages as may be by statute provided,[14] and his judgment must be subject to the rights of defendant cotenants.[15] Under proper circumstances allowance or reimbursement may be made to defendant for a proper proportion of the money paid by him while in possession on account of mortgages, taxes, and interest on the common property and repairs and improvements thereon.[16] Statutes permitting recovery of value for permanent improvements by defendants in ejectment apply to actions by a cotenant; and the court will apportion expense of improvements proportionately.[17]

e. Trespass — (I) *IN GENERAL.* In the absence of statute or agreement to the contrary, trespass can be maintained between cotenants where, and only where, there has been an ouster.[18] Where the circumstances warrant, case is

9. Hebrard *v.* Jefferson Gold, etc., Min. Co., 33 Cal. 290; Harrison *v.* Taylor, 33 Mo. 211, 82 Am. Dec. 159; Clark *v.* Crego, 47 Barb. (N. Y.) 599; Aiken *v.* Smith, 21 Vt. 172; Johnson *v.* Tilden, 5 Vt. 426.

10. Fenton *v.* Miller, 116 Mich. 45, 74 N. W. 384, 72 Am. St. Rep. 502.

11. Mahoney *v.* Middleton, 41 Cal. 41; Lillianskyoldt *v.* Goss, 2 Utah 292; Marshall *v.* Palmer, 91 Va. 344, 21 S. E. 672, 50 Am. St. Rep. 838.

12. Withrow *v.* Biggerstaff, 82 N. C. 82.

13. *California.*— Carpentier *v.* Mendenhall, 28 Cal. 484, 87 Am. Dec. 135.

Georgia.— Logan *v.* Goodall, 42 Ga. 95.

Kansas.— King *v.* Hyatt, 51 Kan. 504, 32 Pac. 1105, 37 Am. St. Rep. 304.

Kentucky.— Young *v.* Adams, 14 B. Mon. 127, 58 Am. Dec. 654.

Massachusetts.— Dewing *v.* Dewing, 165 Mass. 230, 42 N. E. 1128; Backus *v.* Chapman, 111 Mass. 386; Shepard *v.* Richards, 2 Gray 424, 61 Am. Dec. 473.

Missouri.— Childs *v.* Kansas City, etc., R. Co., (1891) 17 S. W. 954; Falconer *v.* Roberts, 88 Mo. 574.

New York.— Jones *v.* De Coursey, 12 N. Y. App. Div. 164, 42 N. Y. Suppl. 578 [*affirmed* in 161 N. Y. 627, 55 N. E. 1096].

Rhode Island.— Knowles *v.* Harris, 5 R. I. 402, 73 Am. Dec. 77.

Texas.— Puckett *v.* McDaniel, 8 Tex. Civ. App. 630, 28 S. W. 360; Bennett *v.* Virginia Ranch, etc., Co., 1 Tex. Civ. App. 321, 21 S. W. 126.

Vermont.— Hayden *v.* Merrill, 44 Vt. 336, 8 Am. Rep. 372.

Virginia.— Marshall *v.* Palmer, 91 Va. 344, 21 S. E. 672, 50 Am. St. Rep. 838.

United States.— Clay *v.* Field, 115 U. S. 260, 6 S. Ct. 36, 29 L. ed. 375.

See 45 Cent. Dig. tit. "Tenancy in Common," § 115.

Interest.— If the statute provides for an allowance of interest on retained money had and received for the use of another, such interest should be allowed. Armijo *v.* Neher, 11 N. M. 645, 72 Pac. 12.

14. Stevens *v.* Ruggles, 23 Fed. Cas. No. 13,408, 5 Mason 221.

15. Jones *v.* De Lassus, 84 Mo. 541; Marshall *v.* Palmer, 91 Va. 344, 21 S. E. 672, 50 Am. St. Rep. 838.

16. Bodkin *v.* Arnold, 48 W. Va. 108, 35 S. E. 980; Stewart *v.* Stewart, 90 Wis. 516, 63 N. W. 886, 48 Am. St. Rep. 949. And see generally *supra*, III, E, 2.

Reimbursing third person.— Where a third person obtaining a deed covering the share of one tenant in common entered into possession of the entire common property and made improvements thereunder under the *bona fide* belief that he held a good title thereto, and subsequently the other cotenant brought ejectment against him for said cotenant's share and recovered, it was held that said third party was entitled to be reimbursed by plaintiff so succeeding. Strong *v.* Hunt, 20 Vt. 614.

17. Phœnix Lead Min., etc., Co. *v.* Sydnor, 39 Wis. 600.

18. *Alabama.*— Foster *v.* Foster, 2 Stew. 356; Jones *v.* Perkins, 1 Stew. 512.

Kentucky.— Jones *v.* Chiles, 8 Dana 163.

Maine.— Mills *v.* Richardson, 44 Me. 79; Duncan *v.* Sylvester, 13 Me. 417, 29 Am. Dec. 512 (holding that cutting away, casting off, or setting adrift cotenants' fishing nets was not a ground for trespass between cotenants); Porter *v.* Hooper, 13 Me. 25, 29 Am. Dec. 480.

Massachusetts.— Bennett *v.* Clemence, 6 Allen 10; Arnold *v.* Stevens, 1 Metc. 266;

maintainable between the cotenants,[19] and thus for indirect injuries by cotenants to the interest or estate of a tenant in common in the common property, he usually has his action of case against the tort-feasors;[20] but case is held to be not maintainable for part of the whole profits arising from the common land, retained by one of the cotenants thereof.[21] Trespass for mesne profits will lie between cotenants.[22] In an action of trespass between tenants in common the admission of plaintiff's right and an offer to account is no defense.[23]

(II) *To Try Title.* An ousted cotenant may determine his right to possession in an action of trespass to try title.[24] In such an action by a tenant in

Allen *v.* Carter, 8 Pick. 175; Keay *v.* Goodwin, 16 Mass. 1. See also Hunting *v.* Russell, 2 Cush. 145.

New Hampshire.— Boynton *v.* Hodgdon, 59 N. H. 247; Thompson *v.* Gerrish, 57 N. H. 85; Wood *v.* Griffin, 46 N. H. 230.

New York.— King *v.* Phillips, 1 Lans. 421; Erwin *v.* Olmsted, 7 Cow. 229.

Pennsylvania.— Bush *v.* Gamble, 127 Pa. St. 43, 17 Atl. 865; Filbert *v.* Hoff, 42 Pa. St. 97, 82 Am. Dec. 493; McGill *v.* Ash, 7 Pa. St. 397.

South Carolina.— Harman *v.* Gartman, Harp. 430, 18 Am. Dec. 659; Martin *v.* Quattlebam, 3 McCord 205.

Vermont.— Wait *v.* Richardson, 33 Vt. 190, 78 Am. Dec. 622; Booth *v.* Adams, 11 Vt. 156, 34 Am. Dec. 680.

Canada.— Freeman *v.* Morton, 3 Nova Scotia 340; Wemp *v.* Mormon, 2 U. C. Q. B. 146, holding that if entry be made on the land of one who is a cotenant with the other in the crops on said land, the owner of the land cannot maintain trespass against his cotenant in the crop for entering the land merely to remove his share of the crop.

See 45 Cent. Dig. tit. "Tenancy in Common," § 103.

Possession under a void tax deed is not sufficient to authorize trespass as against a tenant in common, having the legal title to an undivided interest and hence entitled to possession. Todd *v.* Lunt, 148 Mass. 322, 19 N. E. 522.

There is no liability in trespass against a tenant in common who removes a building from the common land erected without his consent by his cotenant. Byam *v.* Bickford, 140 Mass. 31, 2 N. E. 687; Esson *v.* Mayberry, 1 Nova Scotia 186.

Trespass quare clausum fregit cannot ordinarily be maintained between them. Jones *v.* Chiles, 8 Dana (Ky.) 163; Duncan *v.* Sylvester, 13 Me. 417, 29 Am. Dec. 512; Wait *v.* Richardson, 33 Vt. 190, 78 Am. Dec. 622. Thus the general rule is that trespass *quare clausum fregit* or trover will not lie between cotenants for entering on land owned in common by them, and removing timber therefrom. Kane *v.* Garfield, 60 Vt. 79, 13 Atl. 800; Wait *v.* Richardson, *supra.* But see Mills *v.* Richardson, 44 Me. 79.

Effect of agreement.— Whether or not an agreement amounting to less than a technical termination or a technical severance of the common estate or a technical partition thereof is sufficient to warrant an action of trespass between the cotenants has been variously determined. See McPherson *v.* Seguine, 14 N. C. 153, holding trespass not maintainable between tenants in common even after a parol partition. The better rule appears to be that where there is a lawful agreement between all of the cotenants giving to some of them the right of exclusive occupation, possession, or enjoyment of the common property, and such rights are infringed by or under the grantors thereof, an appropriate action in tort should be maintainable, as if the wrong had been committed by a stranger. Keay *v.* Goodwin, 16 Mass. 1; Turner *v.* Waldo, 40 Vt. 51; O'Hear *v.* De Goesbriand, 33 Vt. 593, 80 Am. Dec. 653, a severance in fact by an agreement for sole occupation, where it was held that trespass was maintainable for the same acts which would constitute trespass in a stranger.

19. McGehee *v.* Peterson, 57 Ala. 333; Arthur *v.* Gayle, 38 Ala. 259; Parke *v.* Kilham, 8 Cal. 77, 68 Am. Dec. 310; Booth *v.* Sherwood, 12 Minn. 426 (action on the case, in the nature of waste); Anders *v.* Meredith, 20 N. C. 339, 34 Am. Dec. 376.

20. Odiorne *v.* Lyford, 9 N. H. 502, 32 Am. Dec. 387 (where one tenant in common of a mill property owned a several estate below said common estate and erected a dam on the several estate, in consequence of which the common property was flooded to the injury of his cotenant therein, and the injured cotenant was permitted to maintain an action on the case in the premises); Chesley *v.* Thompson, 3 N. H. 9, 14 Am. Dec. 324; Beach *v.* Child, 13 Wend. (N. Y.) 343. But see Darden *v.* Cowper, 52 N. C. 210, 75 Am. Dec. 461.

Where the common property has been misused by the wasting of the waters of an aqueduct over and above the proper share of the waster thereof an action on the case is maintainable. McLellan *v.* Jenness, 43 Vt. 183, 5 Am. Rep. 270.

Where one tenant in common allowed his animals to run at large and damage crops on the common property, case may be brought. McGehee *v.* Peterson, 57 Ala. 333; Morgan *v.* Hudnell, 52 Ohio St. 552, 40 N. E. 716, 49 Am. St. Rep. 741, 27 L. R. A. 862.

21. Chambers *v.* Chambers, 10 N. C. 232, 14 Am. Dec. 585.

22. Wait *v.* Richardson, 33 Vt. 190, 78 Am. Dec. 622; Goodtitle *v.* Tombs, 3 Wils. C. P. 118, 95 Eng. Reprint 965.

23. McGill *v.* Ash, 7 Pa. St. 397.

24. Williams *v.* Sutton, 43 Cal. 65; Murray *v.* Stevens, Rich. Eq. Cas. (S. C.) 205; St. Louis, etc., R. Co. *v.* Prather, 75 Tex.

common against an adverse holder under a tax deed, plaintiff may recover the entire tract even though the conveyance to him of his interest is by a particular description;[25] but plaintiffs, in trespass to try title, cannot recover the entire property as against a defendant who has acquired title by adverse possession against some of the coöwners who are not parties to the suit.[26] If a tenant in common sues to recover the entire tract in trespass to try title, his petition cannot be taken as either a repudiation or an affirmance of his cotenant's acts in selling portions of the tract by metes and bounds.[27]

4. Equitable Jurisdiction[28] — a. In General. In matters concerning cotenants equity jurisdiction will not attach excepting under some equitable principle. The mere existence of the relation is insufficient.[29] If, however, some moving principle is shown to apply, equity will interfere in cotenancy matters as in others,[30] and may specifically enforce contracts[31] or cancel them,[32] and equity may interfere in cases between cotenants in relation to the purchase of outstanding claims or title, to set aside deeds to third parties, and declare the rights of the respective cotenants;[33] and where a tenant in common has sold the entire common estate to an absent stranger, equity has entertained a bill of a cotenant against the vendor and the vendee, as an absent defendant, for the confirmation of the sale and a decree to plaintiff for his share of the purchase-money;[34] and has entertained

53, 12 S. W. 969; Gilmer *v.* Beauchamp, 40 Tex. Civ. App. 125, 87 S. W. 907; Hintze *v.* Krabbenschmidt (Tex. Civ. App. 1897) 44 S. W. 38.

Possession when the trespass was committed is essential to support the action. Harvin *v.* Hodge, Dudley (S. C.) 23.

By grantee by metes and bounds.— Trespass to try title may be maintained by a tenant in common asserting title by metes and bounds, against one who shows no title. Gray *v.* Kauffman, 82 Tex. 65, 17 S. W. 513.

25. McDonald *v.* Hamblen, 78 Tex. 628, 14 S. W. 1042.

26. Boone *v.* Knox, 80 Tex. 642, 16 S. W. 448, 26 Am. St. Rep. 767.

27. Zimpleman *v.* Power, 38 Tex. Civ. App. 263, 85 S. W. 69. See also Stubblefield *v.* Hanson, (Tex. Civ. App. 1906) 94 S. W. 406.

28. **Equitable accounting** see *supra*, III, J, 1, d.

29. *Alaska.*— Garside *v.* Norval, 1 Alaska 19.

Maine.— Carter *v.* Bailey, 64 Me. 458, 18 Am. Rep. 273.

Massachusetts.—Blood *v.* Blood, 110 Mass. 545.

New Jersey.— Martin *v.* Martin, (Ch.) 23 Atl. 822.

New York.— Van Bergen *v.* Van Bergen, 3 Johns. Ch. 282, 8 Am. Dec. 511.

Ohio.— Weakly *v.* Hall, 13 Ohio 167, 42 Am. Dec. 194.

Pennsylvania.— Orbin *v.* Stevens, 13 Pa. Super. Ct. 591.

South Carolina.—Murray *v.* Stevens, Rich. Eq. Cas. 205.

Canada.— Bates *v.* Martin, 12 Grant Ch. (U. C.) 490.

30. *Alabama.*— Johns *v.* Johns, 93 Ala. 239, 9 So. 419.

Arkansas.— Trapnall *v.* Hill, 31 Ark. 345.

Georgia.— Smith *v.* King, 50 Ga. 192.

Massachusetts.— Field *v.* Craig, 8 Allen 357; May *v.* Parker, 12 Pick. 34, 22 Am. Dec. 393.

Vermont.— Walker *v.* Pierce, 38 Vt. 94.

Wisconsin.— Saladin *v.* Kraayvanger, 96 Wis. 180, 70 N. W. 1113.

United States.— Union Mill, etc., Co. *v.* Dangberg, 81 Fed. 73; Goldsmith *v.* Smith, 21 Fed. 611.

A tender must be made with a bill in equity to dissolve a cloud on title arising from the purchase of an outstanding title by a cotenant. Morris *v.* Roseberry, 46 W. Va. 24, 32 S. E. 1019.

Sale in lieu of partition.— Equity may, in the absence of a remedy at law, entertain a bill at the instance of a cotenant, for the sale of the common property in lieu of partition, where a partition is impracticable for the purpose of making an equitable allowance out of the proceeds to such complainant, where he has made proper expenditures on the common property for the common benefit. Drennen *v.* Walker, 21 Ark. 539; Van Ormer *v.* Harley, 102 Iowa 150, 71 N. W. 241; Danforth *v.* Moore, 55 N. J. Eq. 127, 35 Atl. 410.

Equity will not permit tenants in common by descent to assume a hostile attitude toward each other in reference to the common property, as their relation is a confidential one by operation of law. Tisdale *v.* Tisdale, 2 Sneed (Tenn.) 596, 64 Am. Dec. 775.

31. *In re* Coates St., 2 Ashm. (Pa.) 12, holding that a lawful agreement for mutual releases between cotenants about to make partition will, even after such partition, be enforced between them.

32. Sires *v.* Sires, 43 S. C. 266, 21 S. E. 115, holding that an action for the cancellation of a recorded deed under a power in a will, alleged to be unauthorized, without consideration and fraudulent, may be maintained by cotenants not in possession, even in the absence of actual ouster.

33. Eads *v.* Retherford, 114 Ind. 273, 16 N. E. 587, 5 Am. St. Rep. 611; Mahoney *v.* Nevins, 190 Mo. 360, 88 S. W. 731.

34. Pollard *v.* Coleman, 4 Call (Va.) 245.

a bill by a tenant in common in possession for the establishment of boundaries.[35] It may enforce an equitable lien to secure proper contribution for a cotenant who has removed encumbrances from the common property or otherwise properly expended moneys for the common benefit;[36] or it may declare a cotenant so expending moneys to be an assignee in equity for the purpose of compelling contribution;[37] and if an entire lien debt be due from one cotenant to another the latter may maintain foreclosure proceedings.[38] Equity will not permit the purchase of an outstanding claim or title for the purpose of defeating a cotenant's rights in the common property, where fiduciary relations or a relationship of confidence is shown to exist between them in relation thereto;[39] but where a tenant in common invokes equity against his cotenants to share the benefit of the purchase of an outstanding claim or to share the benefit of a bargain in relation to the common property or title, the complainant must show that he has promptly paid or tendered payment of his proportionate share of the expenses incident to said transaction and properly chargeable to the cotenancy,[40] or that he is ready and willing within a reasonable time to bear his share of such expenses.[41] No equitable lien arising from the purchase of an outstanding title applies in equity against the common property in the hands of a *bona fide* purchaser for value, without notice, where the party seeking such lien has been guilty of laches or fraud.[42]

b. Injunction[43] — (i) *In General.* An injunction may issue to restrain an interference by a tenant in common with his cotenant's rights in the enjoyment of the common property, or the interference with such rights by a stranger,[44] or against the exercise of exclusive ownership in the premises without the consent of the cotenants,[45] or the threatened or continued breach of a lawful agreement between the cotenants.[46] But jurisdiction of equity in granting injunction is

35. Cushing *v.* Miller, 62 N. H. 517.

36. *Illinois.*— Titsworth *v.* Stout, 49 Ill. 78, 95 Am. Dec. 577.

Indiana.— Moon *v.* Jennings, 119 Ind. 130, 20 N. E. 748, 21 N. E. 471, 12 Am. St. Rep. 383.

Maine.— Williams *v.* Coombs, 88 Me. 183, 33 Atl. 1073.

Michigan.— Norris *v.* Hill, 1 Mich. 202.

Mississippi.— Allen *v.* Poole, 54 Miss. 323.

Pennsylvania.— Richards *v.* Richards, 31 Pa. Super. Ct. 509.

37. Green *v.* Walker, 22 R. I. 14, 45 Atl. 742.

38. Holmes *v.* Holmes, 129 Mich. 412, 89 N. W. 47, 95 Am. St. Rep. 444; Burnett *v.* Ewing, 39 Wash. 45, 80 Pac. 855.

39. United New Jersey R., etc., Co. *v.* Consolidated Fruit Jar Co., (N. J. Ch. 1903) 55 Atl. 46.

40. Kershaw *v.* Simpson, 46 Wash. 313, 89 Pac. 889; Spalding *v.* Lewis, 42 Wash. 528, 85 Pac. 255.

41. Niday *v.* Cochran, 42 Tex. Civ. App. 292, 93 S. W. 1027.

He may be compelled to account to his cotenants for his proportion of such expenses. Glos *v.* Clark, 97 Ill. App. 609 [*reversed* on other grounds in 199 Ill. 147, 65 N. E. 135]; Arey *v.* Hall, 81 Me. 17, 16 Atl. 302, 10 Am. St. Rep. 232.

42. Ryason *v.* Dunten, 164 Ind. 85, 73 N. E. 74.

43. **To restrain waste** see *infra*, III, J, 4, b, (II).

44. Binswanger *v.* Henninger, 1 Alaska 509 (appropriating the entire proceeds of a mine); Smith *v.* Stearns Rancho Co., 129 Cal. 58, 61 Pac. 662; Van Bergen *v.* Van Bergen, 3 Johns. Ch. (N. Y.) 282, 8 Am. Dec. 511.

A tenant in common in sole possession of a ferry may maintain a bill for an injunction against another ferry being operated within limitations prohibited by law. Fortain *v.* Smith, 114 Cal. 494, 46 Pac. 381.

Trespass committed in the exercise of a servitude created by one tenant in common of the property without the consent of his cotenant justifies equitable interference. Jackson *v.* State Belt Electric St. R. Co., 7 North. Co. Rep. (Pa.) 286.

Interfering with water rights see Union Mill, etc., Co. *v.* Dangberg, 81 Fed. 73; Stillman *v.* White Rock Mfg. Co., 23 Fed. Cas. No. 13,446, 3 Woodb. & M. 538.

45. *Colorado.*— Mills *v.* Hart, 24 Colo. 505, 52 Pac. 680, 65 Am. St. Rep. 241.

Georgia.— Daniel *v.* Daniel, 102 Ga. 181, 28 S. E. 167.

Michigan.—Williams *v.* Rogers, 110 Mich. 418, 68 N. W. 240.

Montana.— Butte, etc., Consol. Min. Co. *v.* Montana Ore Purchasing Co., 25 Mont. 41, 63 Pac. 825; Red Mountain Consol. Min. Co. *v.* Esler, 18 Mont. 174, 44 Pac. 523; Anaconda Copper Min. Co. *v.* Butte, etc., Min. Co., 17 Mont. 519, 43 Pac. 924.

North Carolina.— Morrison *v.* Morrison, 122 N. C. 598, 29 S. E. 901.

See 45 Cent. Dig. tit. "Tenancy in Common," § 104.

46. Fullington *v.* Kyle Lumber Co., 139 Ala. 242, 35 So. 852.

sparingly exercised,[47] and equity will not ordinarily interfere in matters of cotenancy where no fiduciary relations exist between the tenants in common and there is ample remedy at law;[48] and thus in the absence of statute or agreement to the contrary a tenant in common cannot, ordinarily by injunction, exclude his cotenant from the enjoyment of the common property.[49] In such a case complainant must, in order to obtain relief by injunction, prove a right to the sole enjoyment and possession of the entire premises as against defendant; if it be shown that defendant is a tenant in common with plaintiff and is merely exercising his right of the use and occupation of the common property, the latter cannot succeed.[50] But it has been held that the rule is different where a bill is pending for a partition of the premises;[51] and that an injunction may issue against execution on a judgment in ejectment until after payment for improvements;[52] and although it is not ordinarily competent for an equity court to interfere by injunction merely because one tenant in common holds exclusive possession of the entire estate, where he does not prevent his cotenants therein from entering and enjoying the possession with him, even in such case, under peculiar equitable circumstances, an injunction may issue.[53] It is no defense to a bill for injunction between cotenants to restrain trespass that plaintiff has trespassed on defendant's interest; such matter can only be considered in framing the relief.[54]

(II) *To Restrain Waste.* If the circumstances warrant, tenants in common may enjoin each other from waste or appropriating the entire proceeds of the common property.[55] Thus an injunction may issue as between cotenants where there is an injury to the common property amounting to waste, tending

47. Obert *v.* Obert, 5 N. J. Eq. 397.

48. Mason *v.* Norris, 18 Grant Ch. (U. C.) 500; Bates *v.* Martin, 12 Grant Ch. (U. C.) 490.

49. Thompson *v.* Sanders, 113 Ga. 1024, 39 S. E. 419; Leatherbury *v.* McInnis, 85 Miss. 160, 37 So. 1018; People *v.* Golding, 55 Misc. (N. Y.) 425, 106 N. Y. Suppl. 821.

50. Hihn *v.* Pack, 18 Cal. 640; Glynn County Bd. of Education *v.* Day, 128 Ga. 156, 57 S. E. 359; Country Club Land Assoc. *v.* Lohbauer, 187 N. Y. 106, 79 N. E. 844 [*affirming* 110 N. Y. App. Div. 875, 97 N. Y. Suppl. 11]. See Baker *v.* Casey, 19 Grant Ch. (U. C.) 537; Christie *v.* Saunders, 2 Grant Ch. (U. C.) 670.

51. Lassert *v.* Salyerds, 17 Grant Ch. (U. C.) 109.

52. Russell *v.* Defrance, 39 Mo. 506.

53. Baker *v.* Casey, 17 Grant Ch. (U. C.) 195; Bates *v.* Martin, 12 Grant Ch. (U. C.) 490.

54. Knickerbocker Ice Co. *v.* Forty-second St., etc., R. Co., 48 N. Y. Super. Ct. 489.

55. *Alaska.*— Binswanger *v.* Henninger, 1 Alaska 509.

Colorado.— Mills *v.* Hart, 24 Colo. 505, 52 Pac. 680, 65 Am. St. Rep. 241.

Georgia.— Daniel *v.* Daniel, 102 Ga. 181, 28 S. E. 167.

Michigan.—Williams *v.* Rogers, 110 Mich. 418, 68 N. W. 240; Fenton *v.* Miller, 108 Mich. 246, 65 N. W. 966.

Mississippi.— Leatherbury *v.* McInnis, 85 Miss. 160, 37 So. 1018.

Montana.— Butte, etc., Consol. Min. Co. *v.* Montana Ore Purchasing Co., 25 Mont. 41, 63 Pac. 825; Harrigan *v.* Lynch, 21 Mont. 36, 52 Pac. 642.

North Carolina.— Morrison *v.* Morrison, 122 N. C. 598, 29 S. E. 901.

Oregon.— Grant *v.* Paddock, 30 Oreg. 312, 47 Pac. 712.

South Dakota.— Wood *v.* Steinau, 9 S. D. 110, 68 N. W. 160.

Texas.— Tignor *v.* Toney, 13 Tex. Civ. App. 518, 35 S. W. 881.

After a bill for partition a joint tenant will be restrained on the complaint of his cotenant from committing waste, although the general principle is that injunction will not lie between cotenants for its commission. Lassert *v.* Salyerds, 17 Grant Ch. (U. C.) 109.

Malicious destruction may be a ground to stay waste. Hole *v.* Thomas, 7 Ves. Jr. 589, 6 Rev. Rep. 195, 32 Eng. Reprint 237.

Mining.—An injunction may issue to restrain waste or the appropriation of the entire proceeds of the common mining property by a tenant in common thereof. Binswanger *v.* Henninger, 1 Alaska 509; Butte, etc., Consol. Min. Co. *v.* Montana Ore Purchasing Co., 25 Mont. 41, 63 Pac. 825; Anaconda Copper Min. Co. *v.* Butte, etc., Min. Co., 17 Mont. 519, 43 Pac. 924; Tipping *v.* Robbins, 71 Wis. 507, 37 N. W. 427; Goodenow *v.* Farquhar, 19 Grant Ch. (U. C.) 614; Dougall *v.* Foster, 4 Grant Ch. (U. C.) 319. And it is immaterial, in an action by tenants in common to restrain a cotenant from exercising exclusive ownership over the common property, that defendant's work enhances the value thereof. Harrigan *v.* Lynch, 21 Mont. 36, 52 Pac. 642. So as to quarrying stone by the lessee of a cotenant. Goodenow *v.* Farquhar, 19 Grant Ch. (U. C.) 614. But in the absence of wilful or unnecessary injury or destruction, caused by negligence or unskilfulness, one tenant in common will not, at the instance of his cotenants, be enjoined from prosecuting the business of mining on

to destroy the chief value thereof to the party complaining,[56] or to restrain waste, where a statute provided that an action of waste may lie between cotenants;[57] but such jurisdiction is sparingly exercised,[58] and equity will not ordinarily enjoin waste at the suit of a tenant in common against his cotenants except where it is destructive of the inheritance, or such cotenant is insolvent, or there is some other special equitable reasons for interfering.[59]

5. Construction of Statutes Relating to Actions Involving Cotenancy. The rights and remedies of cotenants have been considerably modified by statutes

their common claim. McCord *v.* Oakland Quicksilver Min. Co., 64 Cal. 134, 27 Pac. 863, 49 Am. Rep. 686. This rule is subject to modification according to respective statutes (see Harrigan *v.* Lynch, 21 Mont. 36, 52 Pac. 642); or according to the peculiar circumstances of the particular case, as where it is alleged that the complaining party owns the larger interest in said claim, that it is being worked without the consent and against the wishes of plaintiff, and that defendant is not dividing the proceeds thereof in good faith, thus bringing defendant within the terms of a statute in relation to exclusive ownership (Red Mountain Consol. Min. Co. *v.* Esler, 18 Mont. 174, 44 Pac. 523). It is not waste for a tenant in common therein to get, or license to get, a coal mine in the ordinary course of working; such workings are not a trespass where less than the proper share of said cotenant was taken. It is a matter of accounting on the basis of the value of the coal at the pit's mouth less all costs of getting and receiving it. Job *v.* Potton, L. R. 20 Eq. 84, 44 L. J. Ch. 262, 32 L. T. Rep. N. S. 110, 23 Wkly. Rep. 588.

56. Stout *v.* Curry, 110 Ind. 514, 11 N. E. 487; Leatherbury *v.* McInnis, 85 Miss. 160, 37 So. 1018, 107 Am. St. Rep. 274. And see *infra*, this note.

Timber.—As a general rule a tenant in common in timber lands has no right to cut the timber thereon without the consent of his coöwners if such cutting amounts to waste; and an injunction may issue restraining him from so doing. Stout *v.* Curry, 110 Ind. 514, 11 N. E. 487; Dodge *v.* Davis, 85 Iowa 77, 52 N. W. 2; Cotten *v.* Christen, 110 La. 444, 34 So. 597; State *v.* Judge of Fourth Judicial Dist. Ct., 52 La. Ann. 103, 26 So. 769; Wilbert's Sons Lumber, etc., Co. *v.* Patureau, 44 La. Ann. 355, 10 So. 782; Johnson *v.* Johnson, 2 Hill Eq. (S. C.) 277, 29 Am. Dec. 72. And equity will enjoin a tenant in common from stripping the land of its timber pending a bill in equity. Bradley *v.* Reed, 3 Fed. Cas. No. 1,785; Proudfoot *v.* Bush, 7 Grant Ch. (U. C.) 518. But an injunction will not be granted to prevent the cutting of timber on the premises not amounting to waste, in the absence of other equitable reasons (Hihn *v.* Peck, 18 Cal. 640; Brittain *v.* Parker, 12 Nova Scotia 589); nor may a bill for partition and for an injunction against cutting timber trees on land owned in common be sustained where the only allegation in relation to the reasons therefor is that timber had been cut on the common land and sold by defendants, and there is neither averment of insolvency of defendants nor that the amount of timber so cut exceeded defendants' share (Hihn *v.* Peck, 18 Cal. 640). If it appear, in the case of a writ forbidding the cutting and removal of timber, that such timber had been cut on land owned by the parties in common, the court may open the writ and allow defendant to remove the timber cut, under proper security given by defendant for the protection of plaintiff (Hensal *v.* Wright, 10 Pa. Co. Ct. 416). Even if no injunction issue except in cases of actual destruction, nevertheless where a tenant in common is also trustee under a will of the interest of the owner of another moiety therein, and in breach of the trust cuts timber thereon for his own benefit, such action will be enjoined. Christie *v.* Saunders, 2 Grant Ch. (U. C.) 670. In the absence of a showing of irregularity in the value of timber growing in different parts of the common tract, an injunction should only restrain the destruction of more than defendant's share. Leatherbury *v.* McInnis, 84 Miss. 160, 37 So. 1018, 107 Am. St. Rep. 274.

57. *Michigan.*—Fenton *v.* Miller, 108 Mich. 246, 65 N. W. 966.

North Carolina.— Morrison *v.* Morrison, 122 N. C. 598, 29 S. E. 901.

Oregon.— Grant *v.* Paddock, 30 Oreg. 312, 47 Pac. 712.

South Dakota.— Wood *v.* Steinau, 9 S. D. 110, 68 N. W. 160.

Texas.— Tignor *v.* Toney, 13 Tex. Civ. App. 518, 35 S. W. 881.

58. Obert *v.* Obert, 5 N. J. Eq. 397.

In the absence of negligence, or wilful or negligent injury or destruction, injunction will not issue. McCord *v.* Oakland Quicksilver Min. Co., 64 Cal. 134, 27 Pac. 863, 49 Am. Rep. 686; Jackson *v.* Beach, (N. J. Ch. 1886) 3 Atl. 375. It is intimated that ordinarily no injunction lies except in cases of actual destruction. Christie *v.* Saunders, 2 Grant Ch. (U. C.) 670.

59. Hihn *v.* Peck, 18 Cal. 640; Stout *v.* Curry, 110 Ind. 514, 11 N. E. 487; Carter *v.* Bailey, 64 Me. 458, 18 Am. Rep. 273; Duvall *v.* Waters, 1 Bland (Md.) 569, 18 Am. Dec. 350; Blood *v.* Blood, 110 Mass. 545; Vose *v.* Singer, 4 Allen (Mass.) 226, 81 Am. Dec. 696.

Injunction denied against the keeping of a liquor saloon on the common property where no special injury is shown; and there is nothing to show that the injury to said property is irreparable or that a continuance of the alleged abuse is threatened and im-

in the respective jurisdictions, and cases apparently divergent are so because of such statutory changes.[60] Statutes conferring jurisdiction in equity,[61] or at law,[62] in actions or proceedings relating to tenants in common, are liberally construed,[63] as are statutes in relation to the joinder or non-joinder of parties,[64] and statutes relating to amount of damages, extent of recovery, and the granting of remedies for the benefit of cotenants have been so construed as to maintain and further their respective rights as those of owners in severalty.[65]

6. Limitations. Although statutes of limitation may apply in matters between tenants in common, the time for the commencement of the running of the statute is intended to be fixed by the courts at such a period as will not deprive a tenant in common of the advantage of any presumption in his favor, or of any rightful

minent see Oglesby Coal Co. *v.* Pasco, 79 Ill. 164.

60. See the statutes of the several states. And see Hazen *v.* Wight, 87 Me. 233, 32 Atl. 887; Mills *v.* Richardson, 44 Me. 79; Proctor *v.* Proctor, 182 Mass. 415, 63 N. E. 797; Hastings *v.* Hastings, 110 Mass. 280; Adams *v.* Palmer, 6 Gray (Mass.) 338; Shepard *v.* Pettit, 30 Minn. 119, 14 N. W. 511; Blake *v.* Milliken, 14 N. H. 213; Bush *v.* Gamble, 127 Pa. St. 43, 17 Atl. 865; Bohlen *v.* Arthurs, 115 U. S. 482, 6 S. Ct. 114, 29 L. ed. 454.

Conflict of laws.—Where a tortious act is done in relation to water by a tenant in common or tenants in common therein, injuriously affecting the rights of their cotenants, the law governing is that of the state within the borders of which the injurious act is done. Stillman *v.* White Rock Mfg. Co., 23 Fed. Cas. No. 13,446, 3 Woodb. & M. 538.

61. May *v.* Parker, 12 Pick. (Mass.) 34, 22 Am. Dec. 393.

Where the parties litigant are not tenants in common, but intended to become such, a statute conferring equitable jurisdiction in matters between tenants in common cannot be exercised. Flagg *v.* Mann, 14 Pick. (Mass.) 467.

62. *California.*—Wagoner *v.* Silva, 139 Cal. 559, 73 Pac. 433.

Connecticut.— Fowler *v.* Fowler, 50 Conn. 256.

Illinois.— Benjamin *v.* Stremple, 13 Ill. 466, trover.

Missouri.— Falconer *v.* Roberts, 88 Mo. 574 (ejectment); Rogers *v.* Penniston, 16 Mo. 432.

Pennsylvania.— Bush *v.* Gamble, 127 Pa. St. 43, 17 Atl. 865, trespass between cotenants for the wrongful cutting and removing of timber trees.

Wisconsin.— Wood *v.* Noack, 84 Wis. 398, 54 N. W. 785, for the severance of easily divisible property.

Forcible entry and detainer see Presbrey *v.* Presbrey, 13 Allen (Mass.) 281; Allen *v.* Gibson, 4 Rand. (Va.) 468.

63. Richardson *v.* Richardson, 72 Me. 403; Hayden *v.* Merrill, 44 Vt. 336, 8 Am. Rep. 372.

Concurrent remedies.— Statutes conferring jurisdiction on equity courts have been held not to deprive the law courts of their jurisdiction in the premises, but merely to give concurrent remedies. Fanning *v.* Chadwick, 3 Pick. (Mass.) 420, 15 Am. Dec. 233; Harrington *v.* Florence Oil Co., 178 Pa. St. 444, 35 Atl. 855; Winton Coal Co. *v.* Pancoast Coal Co., 170 Pa. St. 437, 33 Atl. 110.

If a cotenant is deprived of certain rights by statute, equity may nevertheless grant him relief. Johns *v.* Johns, 93 Ala. 239, 9 So. 419.

Water rights.—Where a statute confers jurisdiction on equity in all disputes between tenants in common where there is no adequate remedy at law, equity has jurisdiction to maintain a bill complaining of the use of water by a cotenant of a mill in another mill where he has sole ownership, to the derogation of the rights of his coöwners in the first-named mill. May *v.* Parker, 12 Pick. (Mass.) 34, 22 Am. Dec. 393.

64. See Smith *v.* Stearns Rancho Co., 129 Cal. 58, 61 Pac. 662 (joinder in injunction against interference by adverse claimant); Lee Chuck *v.* Quan Wo Chong, 91 Cal. 593, 28 Pac. 45; Ross *v.* Heintzen, 36 Cal. 313; Presbrey *v.* Presbrey, 13 Allen (Mass.) 281; Bannister *v.* Bull, 16 S. C. 220; Mather *v.* Dunn, 11 S. D. 196, 76 N. W. 922, 74 Am. St. Rep. 788 (the words "united in interest" construed to apply to tenants in common, so as to require their joinder in an action); Karren *v.* Rainey, 30 Utah 7, 83 Pac. 333; Boley *v.* Allred, 25 Utah 402, 71 Pac. 869; Allen *v.* Gibson, 4 Rand. (Va.) 468.

65. McDodrill *v.* Pardee, etc., Lumber Co., 40 W. Va. 564, 21 S. E. 878.

Statutes providing for punitive damages held not to be enforceable as between cotenants see Richardson *v.* Richardson, 64 Me. 62; Jenkins *v.* Woods, 145 Mass. 494, 14 N. E. 512; Bush *v.* Gamble, 127 Pa. St. 43, 17 Atl. 865; Wheeler *v.* Carpenter, 107 Pa. St. 271. *Compare* Mills *v.* Richardson, 44 Me. 79.

Statutes held inapplicable between tenants in common see Barnum *v.* Landon, 25 Conn. 137; Elliott *v.* Frakes, 90 Ind. 389; Patterson *v.* Nixon, 79 Ind. 251; Hastings *v.* Hastings, 110 Mass. 280; King *v.* Dickerman, 11 Gray (Mass.) 480; Adams *v.* Palmer, 6 Gray (Mass.) 336; Gregg *v.* Roaring Springs Land, etc., Co., 97 Mo. App. 447, 70 S. W. 920; Wharton *v.* Wilkerson, 92 N. C. 407; North Pennsylvania Coal Co. *v.* Snowden, 42 Pa. St. 488, 82 Am. Dec. 530; Tipping *v.* Robbins, 64 Wis. 546, 25 N. W. 713; Bohlen *v.* Arthurs, 115 U. S. 482, 6 S. Ct. 114, 29 L. ed. 454.

advantage to which he is fairly entitled because of the relationship of cotenancy.[66] Unless such statutes are clearly applicable to cases of cotenancy, they will not be so applied.[67] But it has been held that the statute of limitations applies, as between cotenants, to an accounting,[68] and a cotenant receiving the income of lands owned in common is not a trustee of the moneys received by him, but a mere debtor to whom the ordinary rules of limitations apply,[69] and where the tenant in common in possession and sole enjoyment of the common property receives the rents and profits of it to his own use claiming them as his own, the statute of limitations will run against the right of the other to claim an accounting from the time of an ouster or of a demand and refusal to account; in the absence of such ouster or demand and refusal the collection of rents and profits will be regarded as an act of agency.[70]

IV. RIGHTS AND LIABILITIES OF COTENANTS AS TO THIRD PERSONS.

A. Authority of Cotenants to Bind Each Other — 1. RULE STATED.

Under ordinary circumstances neither tenant in common can bind the estate or person of the other by any act in relation to the common property, not previously authorized or subsequently ratified,[71] for cotenants do not sustain the relation

66. Adams *v.* Palmer, 6 Gray (Mass.) 338; Saunders *v.* Gatlin, 21 N. C. 86; Wagstaff *v.* Smith, 17 N. C. 264.

Destruction of chattel.—A claim, between cotenants, for the destruction of a chattel, is ordinarily within the operation of the statute of limitations. Saunders *v.* Gatlin, 21 N. C. 86.

67. Pope *v.* Brasfield, 110 Ky. 128, 61 S. W. 5, 22 Ky. L. Rep. 1613, holding that the doctrine, that in a matter against parceners or joint tenants, some of whom are under no disability, the statute runs against all, cannot be applied as against cotenants, as they own severally, and might sue severally.

Statutes held applicable see Alvarado *v.* Nordholt, 95 Cal. 116, 30 Pac. 211; Dawson *v.* Edwards, 189 Ill. 60, 59 N. E. 590; Culler *v.* Motzer, 13 Serg. & R. (Pa.) 356, 15 Am. Dec. 604; McCann *v.* Welch, 106 Wis. 142, 81 N. W. 996.

Statutes held to be inapplicable see Cooter *v.* Dearborn, 115 Ill. 509, 4 N. E. 388; Stern *v.* Selleck, 136 Iowa 291, 11 N. W. 451; Jonas *v.* Flanniken, 69 Miss. 577, 11 So. 319; Brooks *v.* Fowle, 14 N. H. 248; Mott *v.* Carolina Land, etc., Co., 146 N. C. 525, 60 S. E. 423; Tharpe *v.* Holcomb, 126 N. C. 365, 35 S. E. 608; Jeter *v.* Davis, 109 N. C. 458, 13 S. E. 908; Hampton *v.* Wheeler, 99 N. C. 222, 6 S. E. 236; Breden *v.* McLaurin, 98 N. C. 307, 4 S. E. 136; Page *v.* Branch, 97 N. C. 97, 1 S. E. 625; Hicks *v.* Bullock, 96 N. C. 164, 1 S. E. 629; Tanney *v.* Tanney, 24 Pittsb. Leg. J. N. S. (Pa.) 43 [*affirmed* in 159 Pa. St. 277, 28 Atl. 287, 39 Am. St. Rep. 678]; Metz *v.* Metz, 48 S. C. 472, 26 S. E. 787; Van Velsor *v.* Hughson, 45 U. C. Q. B. 252 [*affirmed* in 9 Ont. App. 390].

68. Jolly *v.* Bryan, 86 N. C. 457; Wagstaff *v.* Smith, 39 N. C. 1; Keller *v.* Lamb, 202 Pa. St. 412, 51 Atl. 982; Corbett *v.* Laurens, 5 Rich. Eq. (S. C.) 301.

69. St. John *v.* Coates, 63 Hun (N. Y.) 460, 18 N. Y. Suppl. 419 [*affirmed* in 140 N. Y. 634, 35 N. E. 891].

70. *Georgia.*— Huff *v.* McDonald, 22 Ga. 131, 68 Am. Dec. 487.

North Carolina.— Jolly *v.* Bryan, 86 N. C. 457; Northcot *v.* Casper, 41 N. C. 303; Wagstaff *v.* Smith, 39 N. C. 1.

South Carolina.— Corbett *v.* Laurens, 5 Rich. Eq. 301.

Tennessee.— Terrill *v.* Murry, 4 Yerg. 104.

Canada.— *Re* Kirkpatrick, 10 Ont. Pr. 4.

If jurisdiction be concurrent at law and in equity, then the legal bar of limitations applies in equity; not as a matter of law but as a matter of comity. But limitations applicable at law ought never to operate, in equity, to extinguish plaintiff's smaller claim as against defendant's set-off for a larger amount. Talbott *v.* Todd, 5 Dana (Ky.) 190.

71. *Alabama.*— Mylin *v.* King, 139 Ala. 319, 35 So. 998; Johnston *v.* Jones, 85 Ala. 286, 4 So. 748.

Arkansas.— Friar *v.* Baldridge, 91 Ark. 133, 120 S. W. 989, holding that an agreement by one tenant to resell the land or to rescind the contract of purchase would not bind his cotenant.

California.— Mahoney *v.* Van Winkel, 21 Cal. 552; Pearis *v.* Covillaud, 6 Cal. 617, 65 Am. Dec. 543. See also Crary *v.* Campbell, 24 Cal. 634.

Connecticut.— Barnum *v.* Landon, 25 Conn. 137.

Illinois.—Appell *v.* Appell, 235 Ill. 27, 85 N. E. 205; Chappell *v.* McKnight, 108 Ill. 570; Murray *v.* Haverty, 70 Ill. 318.

Iowa.—Anderson *v.* Acheson, 132 Iowa 744, 110 N. W. 335; Blackledge *v.* Davis, 129 Iowa 591, 105 N. W. 1000; Forrest Milling Co. *v.* Cedar Falls Mill Co., 103 Iowa 619, 72 N. W. 1076.

Louisiana.—Kenopski *v.* Davis, 27 La. Ann. 174.

Maine.— Longfellow *v.* Quimby, 29 Me. 196, 48 Am. Dec. 525. *Compare* Rogers *v.* White, 6 Me. 193.

Maryland.— Eakle *v.* Clark, 30 Md. 322.

Massachusetts.— Johnson *v.* Stevens, 7

of principal and agent to each other nor are they partners and the rule which

Cush. 431; Miller *v.* Miller, 7 Pick. 133, 19 Am. Dec. 264.

Michigan.—Walker *v.* Marion, 143 Mich. 27, 106 N. W. 400; Tuttle *v.* Campbell, 74 Mich. 652, 42 N. W. 384, 16 Am. St. Rep. 652; Richey *v.* Brown, 58 Mich. 435, 25 N. W. 386.

Minnesota.— Loveridge *v.* Coles, 72 Minn. 57, 74 N. W. 1109.

Missouri.— Nalle *v.* Thompson, 173 Mo. 595, 73 S. W. 599; Kansas City Hydraulic Press Brick Co. *v.* Pratt, 114 Mo. App. 643, 93 S. W. 300; Walker *v.* Evans, 98 Mo. App. 301, 71 S. W. 1086.

New Jersey.— King *v.* Wilson, 54 N. J. Eq. 247, 34 Atl. 394.

New York.—Whiton *v.* Spring, 74 N. Y. 169; Jackson *v.* Moore, 94 N. Y. App. Div. 504, 87 N. Y. Suppl. 1101; Knope *v.* Nunn, 81 Hun 349, 30 N. Y. Suppl. 896 [*affirmed* in 151 N. Y. 506, 45 N. E. 940, 56 Am. St. Rep. 642]; Dobson *v.* Kuhnla, 66 Hun 627, 20 N. Y. Suppl. 771; St. Paul's Church *v.* Ford, 34 Barb. 16; Gock *v.* Keneda, 29 Barb. 120; Matter of New York, 41 Misc. 134, 83 N. Y. Suppl. 951; Jackson *v.* Moore, 6 Cow. 706.

North Carolina.— Mitchem *v.* Wallace, 150 N. C. 640, 64 S. E. 901; Lenoir *v.* Valley River Min. Co., 113 N. C. 513, 18 S. E. 73; Causee *v.* Anders, 20 N. C. 388.

Ohio.— Thomason *v.* Dayton, 40 Ohio St. 63.

Oregon.— Beezley *v.* Crossen, 14 Oreg. 473, 13 Pac. 306.

Pennsylvania.— Mercur *v.* State Line, etc., R. Co., 171 Pa. St. 12, 32 Atl. 1126; McKinley *v.* Peters, 111 Pa. St. 283, 3 Atl. 27; Workman *v.* Guthrie, 29 Pa. St. 495, 72 Am. Dec. 654; Agnew *v.* Johnson, 17 Pa. St. 373, 55 Am. Dec. 565; Heeter *v.* Lyon, 5 Pa. Super. Ct. 260.

Rhode Island.— Dexter Lime Rock Co. *v.* Dexter, 6 R. I. 353.

Tennessee.—Vaughan *v.* Cravens, 1 Head 108, 73 Am. Dec. 163.

Texas.— Thomas *v.* Morse, 80 Tex. 289, 16 S. W. 48; Torrey *v.* Martin, (1887) 4 S. W. 642; Kirby *v.* Hayden, 44 Tex. Civ. App. 207, 99 S. W. 746; Hintze *v.* Krabbenschmidt, (Civ. App. 1897) 44 S. W. 38; Gillum *v.* St. Louis, etc., R. Co., 4 Tex. Civ. App. 622, 23 S. W. 716.

Virginia.— Kemper *v.* Ewing, 25 Gratt. 427.

Wisconsin.— Tipping *v.* Robbins, 64 Wis. 546, 25 N. W. 713.

United States.—Williams *v.* Morrison, 28 Fed. 872.

England.— Durham, etc., R. Co. *v.* Wawn, 3 Beav. 119, 4 Jur. 764, 43 Eng. Ch. 119, 49 Eng. Reprint 47.

See 45 Cent. Dig. tit. "Tenancy in Common," § 119 *et seq.*

One tenant cannot grant or create an easement in the common property without the precedent authority or subsequent ratification of the other tenants in common. Pfeiffer *v.* State University, 74 Cal. 156, 15 Pac. 622; Marshall *v.* Trumbull, 28 Conn. 183, 73 Am Dec. 667; Charleston, etc., R. Co. *v.* Fleming, 118 Ga. 699, 45 S. E. 664; Forrest Milling Co. *v.* Cedar Falls Mill Co., 103 Iowa 619, 72 N. W. 1076; Baker *v.* Willard, 171 Mass. 220, 50 N. E. 620, 68 Am. St. Rep. 445, 40 L. R. A. 754; St. Louis *v.* Laclede Gas-Light Co., 96 Mo. 197, 9 S. W. 581, 9 Am. St. Rep. 334; McBeth *v.* Trabue, 69 Mo. 642; Hallett *v.* Parker, 68 N. H. 598, 39 Atl. 433; Palmer *v.* Palmer, 150 N. Y. 139, 44 N. E. 966, 55 Am. St. Rep. 653; Crippen *v.* Morss, 49 N. Y. 63; Ferson's Appeal, 96 Pa. St. 140; Jackson *v.* State Belt Electric St. R. Co., 7 North. Co. Rep. (Pa.) 286; Daniels *v.* Almy, 18 R. I. 244, 27 Atl. 330; Charleston, etc., R. Co. *v.* Leech, 33 S. C. 175, 11 S. E. 631, 26 Am. St. Rep. 667; Scott *v.* State, 1 Sneed (Tenn.) 629; Mabie *v.* Matteson, 17 Wis. 1. *Compare* Valentine *v.* Healey, 173 N. Y. 391, 70 N. E. 913 [*reversing* 77 N. Y. App. Div. 635, 79 N. Y. Suppl. 1149]. Where a cotenant's sole deed attempting to convey timber on the common property was invalid as to his cotenants, a provision of the deed attempting to convey a right of way to and from the timber, and a right to enter the land to cut and remove logs, was also inoperative. Lee *v.* Follensby, 83 Vt. 35, 74 Atl. 327. But a claim to an easement of an elevated road by prescription as against tenants in common is not defeated because of the infancy of one of the tenants in common, on the ground that the prescriptive right cannot be given without the concurrence of all the tenants in common, under the rule that a tenant in common can for his part release the easements of light, air, and access, and transfer that title to a railway in the street. Taggart *v.* Manhattan R. Co., 57 Misc. (N. Y.) 184, 109 N. Y. Suppl. 38. A widow's conveyance of a right of way over her husband's land could not affect the interest of his children as his heirs at law, her relation to the land remaining that of tenant in common with the children, her interest having imposed upon it the easement coextensive with her one-third interest. Foster *v.* Foster, 81 S. C. 307, 62 S. E. 320.

Repairs.— There is no implied authority in one cotenant to improve or deal with the common property at the expense of the other tenants without their previous authority or subsequent ratification, upon the principle that no man has a right to improve the property of another against his consent and charge him with the expenses. Converse *v.* Ferre, 11 Mass. 325; Taylor *v.* Baldwin, 10 Barb. (N. Y.) 582 [*affirmed* in 10 Barb. 626]. If such consent is unreasonably withheld, it seems that a cotenant may repair the common property at the expense of all the owners in common, if such repairs are necessary for the preservation of the common property. Taylor *v.* Baldwin, *supra*. And see *supra*, III, E, 1.

Mortgage or lien.— The ownership in a tenancy in common being in severalty, a mortgage or lien placed upon the interest of one of the cotenants creates no lien upon the un-

prevents them from binding each other applies with greater force after expiration

divided portions owned by the others of them; they cannot thus interfere with each other's interests. Torrey *v.* Cook, 116 Mass. 163; Moreland *v.* Strong, 115 Mich. 211, 73 N. W. 140, 69 Am. St. Rep. 553; Porter *v.* Stone, 70 Miss. 291, 12 So. 208; Jolliffe *v.* Maxwell, 3 Nebr. (Unoff.) 244, 91 N. W. 563; Stoddard *v.* Weston, 3 Silv. Sup. (N. Y.) 13, 6 N. Y. Suppl. 34. Thus where land is conveyed to a woman and her infant children, she may create a lien thereon affecting her interest, but not the interests of the minors. Leavell *v.* Carter, (Ky. 1908) 112 S. W. 1118. But if the deed creating a cotenancy is not recorded until after the recording of a mortgage by the owner of record, it may be that the mortgage is a lien upon the entire property. Atkinson *v.* Hewett, 63 Wis. 396, 23 N. W. 889. The surrender of mortgaged common property by one tenant in common only surrenders his part thereof. Vermont L. & T. Co. *v.* Cardin, 19 Wash. 304, 53 Pac. 164.

Pledge.— One tenant in common of a chattel cannot pledge his cotenant's interest without previous authority or subsequent ratification. Frans *v.* Young, 24 Iowa 375.

A contract of sale by one cotenant disposing of his interest in mining lands does not bind his cotenants to accept a royalty reserved to the vendor. Mercur *v.* State Line, etc., R. Co., 171 Pa. St. 12, 32 Atl. 1126.

Sign boards.—A contract by a tenant in common, giving permission to one to erect sign and bill boards on the land, is not binding on the cotenants. Walker *v.* Marion, 143 Mich. 27, 106 N. W. 400.

Lien for materials.— One tenant in common cannot without authority charge interest of his cotenant with a lien for materials furnished for the improvement of the common property. Van Riper *v.* Morton, 61 Mo. App. 440.

License to enter.—A tenant in common cannot give a license to enter, as against his cotenant. Moore *v.* Moore, (Cal. 1893) 34 Pac. 90. But a licensee of one tenant in common, for entry, may entitle the occupier under such license to a notice to quit before he is liable to any action for occupation under said license, and the ejectment or battery of such occupier by a tenant in common, without notice, may amount to a tort for which such tenant in common may be liable. Ord *v.* Chester, 18 Cal. 77; McGarrell *v.* Murphy, 1 Hilt. (N. Y.) 132; Causee *v.* Anders, 20 N. C. 388; Taylor *v.* Stockdale, 3 McCord (S. C.) 302, holding that trespass to try the title will not lie. If one having no interest in the common property grants a permit in relation thereto, and title to an interest therein is subsequently cast upon such licensor by descent, the permit so given is not binding upon the owners of the other interests therein. Duke *v.* Postal Tel. Cable Co., 71 S. C. 95, 50 S. E. 675.

Mines and minerals.— A tenant in common cannot license a stranger to prosecute mining on the common estate so as to bind a dissenting cotenant, even though a statute declares a license irrevocable after a valuable discovery. Tipping *v.* Robbins, 71 Wis. 507, 37 N. W. 427. Such a license extends only to the licensor's interest (Omaha, etc., Smelting, etc., Co. *v.* Tabor, 13 Colo. 41, 21 Pac. 925, 16 Am. St. Rep. 185, 5 L. R. A. 236), and to that extent only is valid (Williams *v.* Morrison, 28 Fed. 872). A tenant in common may not enter into any agreement in relation to the mines that would unduly prejudice the interests of his cotenants; he can only convey or contract in relation to such interests as he may own therein (McKinley *v.* Peters, 111 Pa. St. 283, 3 Atl. 27), and fraud of a tenant in common or his agent cannot affect the rights of the other cotenants in the premises (Fisher *v.* Seymour, 23 Colo. 542, 49 Pac. 30; Yarwood *v.* Johnson, 29 Wash. 643, 70 Pac. 123).

Timber.— No license, by one cotenant alone, to cut timber from land owned in common passes the legal title to such timber to the purchaser; the interest which he acquires can only be asserted in equity (Burt, etc., Lumber Co. *v.* Clay City Lumber Co., 111 Ky. 725, 64 S. W. 652, 23 Ky. L. Rep. 1019; McDodrill *v.* Pardee, etc., Lumber Co., 40 W. Va. 564, 21 S. E. 878; Baker *v.* Whiting, 2 Fed. Cas. No. 787, 3 Sumn. 475) unless the tenants in common are partners in the premises (Baker *v.* Wheeler, 8 Wend. (N. Y.) 505, 24 Am. Dec. 66). The non-consenting cotenants may maintain trover against the vendee or licensee. Fleming *v.* Katahdin Pulp, etc., Co., 93 Me. 110, 44 Atl. 378; Sullivan *v.* Sherry, 111 Wis. 476, 87 N. W. 471, 87 Am. St. Rep. 890; Duff *v.* Bindley, 16 Fed. 178. And see *infra*, IV, B, 1, c. And where one tenant in common without authority sells all the timber on the land, his cotenant is entitled to recover from him and from purchasers with notice of the cotenancy his share of the value of the timber taken. Collier *v.* Cameron, (Tex. Civ. App. 1909) 117 S. W. 915. But trespass *quare clausum fregit* cannot be maintained. Wait *v.* Richardson, 33 Vt. 190, 78 Am. Dec. 622. See also Hunting *v.* Russell, 2 Cush. (Mass.) 145. A tenant in common authorizing a licensee to cut timber on the common land, without the consent of his cotenants, can nevertheless maintain assumpsit for his share against said licensee. Kenniston *v.* Ham, 29 N. H. 501. If a tenant in common licenses a stranger to cut timber, and delivers it to defendant, and subsequently sues jointly with his cotenants for such conversion, the action is properly nonsuited. Ramsey *v.* Brown, (Pa.) 17 Atl. 207. A minor tenant in common cannot, without the assent of his cotenants, grant a license to enter and cut timber from the common property. Richey *v.* Brown, 58 Mich. 435, 25 N. W. 386. Where a part of the cotenants license the cutting of timber by a third person, from the land owned in common, neither the licensee acting under said license nor those claiming under him are in a position to claim adversely in the

of the cotenancy.[72] A contract by one tenant in common in relation to the whole estate being voidable at the election of his cotenants not joining in said contract.[73] But the contracting cotenant may himself be bound.[74] Even where some previous authority or agency is conferred upon a tenant in common, his acts must be strictly within the authority,[75] third persons dealing with a tenant in common being bound at their peril to ascertain his authority to bind his coöwners.[76] It appears, however, that where one of two tenants in common of land directs some act to be done in relation thereto in reasonable appreciation of imminent danger to the land and the act is accordingly done, the other tenant in common cannot recover against the doer of said act in tort,[77] and acts done by one tenant in common in relation to the common interest are presumed to have been done by authority or for the benefit of his cotenants, if there be any circumstances upon which to base such a presumption.[78]

2. Lease; Rescission or Surrender. A tenant in common not authorized thereto by his cotenants cannot execute a lease that will bind them without

premises as against the tenants in common not joining in such license. Gulf Red Cedar Lumber Co. *v.* Crenshaw, 148 Ala. 343, 42 So. 564.

Employment of a third person.— Evidence that a tenant in common acting for himself and his cotenant employed plaintiff's services is admissible to prove joint liability on the part of said cotenants. Clifford *v.* Meyer, 6 Ind. App. 633, 34 N. E. 23.

72. Benoist *v.* Rothschild, 145 Mo. 399, 46 S. W. 1081; Stephens *v.* Ells, 65 Mo. 456. See also Benjamin *v.* American Tel., etc., Co., 196 Mass. 454, 82 N. E. 681.

73. *Georgia.*— Sewell *v.* Holland, 61 Ga. 608.

Missouri.— Benoist *v.* Rothschild, 145 Mo. 399, 46 S. W. 1081.

New York.— Knope *v.* Nunn, 151 N. Y. 506, 45 N. E. 940, 56 Am. St. Rep. 642.

Washington.— Vermont L. & T. Co. *v.* Cardin, 19 Wash. 304, 53 Pac. 164.

Wisconsin.— Martens *v.* O'Connor, 101 Wis. 18, 76 N. W. 774.

See 45 Cent. Dig. tit. "Tenancy in Common," § 119 *et seq.*

Redemption of land by payment to one of several cotenants cannot avail as against the other of them in the absence of previous authority or subsequent ratification affirming such payment. Maddox *v.* Bramlett, 84 Ga. 84, 11 S. E. 128.

Location of road.— One tenant in common cannot bind the others by an agreement relative to the location of a road over the common land or the assessment of damages in relation thereto; nor can he apply for a jury of condemnation without the joinder of his cotenants in the application (Morrison *v.* Clark, 89 Me. 103, 35 Atl. 1034, 56 Am. St. Rep. 395; Merrill *v.* Berkshire, 11 Pick. (Mass.) 269), nor can he accept a sum awarded by commissioners in condemnation so as to conclude his cotenants; they will still remain entitled to compensation for their respective interests (Ruppert *v.* Chicago, etc., R. Co., 43 Iowa 490).

Presumptions of authority.— Although each cotenant holds in severalty and holds his separate property, except as modified by the tenancy in common, as any other property might be held, nevertheless certain presumptions and rules of law arise from the intimate relationship between the coöwners growing out of the cotenancy and the nature of the common property; therefore it is that where one cotenant employs someone to do some proper and necessary work on or in relation to the common property it will be presumed, when there is no showing to the contrary, that said employment is by the consent of the other cotenants or that such consent was expected, at the time of said employment, to have been obtained. Barton *v.* Gray, 48 Mich. 164, 12 N. W. 30.

74. Baum *v.* McAfee, (Tex. Civ. App. 1910) 125 S. W. 984.

75. Gillham *v.* Walker, 135 Ala. 459, 33 So. 537, holding that authority to a tenant in common by his cotenants to deliver a deed does not warrant him in entering into a contract with the vendee therein to perform certain acts extraneous to the deed.

Notice revoking an agency in a cotenant for the collection of rents and their application to the satisfaction of an encumbrance, together with the filing of a bill by the notifier for an accounting for rents and profits, was held sufficient to revoke such authority, even though such notice purported to revoke a non-executed power of attorney. Switzer *v.* Switzer, 57 N. J. Eq. 421, 41 Atl. 486.

76. Breaux *v.* Albert Hanson Lumber Co., 125 La. 421, 51 So. 444.

77. Crary *v.* Campbell, 24 Cal. 634.

78. Schwartz *v.* McQuaid, 214 Ill. 357, 73 N. E. 582, 105 Am. St. Rep. 112 (lease by one tenant in common of the whole property without objection by his cotenant, for several months); Valentine *v.* Healey, 1 N. Y. App. Div. 502, 37 N. Y. Suppl. 287 [*reversed* on other grounds in 158 N. Y. 369, 52 N. E. 1097, 43 L. R. A. 667]; Lagorio *v.* Dozier, 91 Va. 492, 22 S. E. 239 (receipt of profits and payment of taxes).

Thus an entry upon land owned in common, under a license from one of the cotenants, will be presumed to be under the cotenancy and not adverse thereto. Berthold *v.* Fox, 13 Minn. 501, 97 Am. Dec. 243. But presumption of adverse holding may arise where the entry is under claim of the whole prop-

subsequent ratification,[79] even though the tenant in common attempting so to lease is in possession of the whole land;[80] nor can he bind his cotenants by a surrender of a lease without their authority;[81] and any number of the cotenants less than the whole of them are incompetent to bind their non-rescinding cotenants by the rescission of a lease.[82] A tenant in common may, however, let his own share of the common property, and the lessee on entry will have the same right in relation to the other cotenants that his lessor had;[83] and where there has been no objection by the cotenants not executing the lease to the occupancy by the lessee of the one who executed it, and his cotenants knew of such occupancy and made no objection to such lease and directed the lessee to enter and hold possession and pay rent for several months, the knowledge and consent of the coöwners will be presumed.[84] Payment of rent to one cotenant is a defense to a claim therefor by another of them who has ratified the demise.[85] A sealed lease signed by a cotenant for himself and as agent of his cotenants is not void, and the lessee taking possession thereunder is liable on his covenant for rent.[86] If one cotenant executes a lease purporting to cover the whole of the common property, containing a clause for the payment of certain damages in the event of the non-use of the property according to the terms of the lease, and subsequently an accounting is demanded for rents and profits, any sums so paid for non-use under the terms of said lease do not constitute part of the damages or part of the rents and profits, in the absence of ratification of the lease by the cotenants claiming the benefit of the accounting.[87]

3. Release or Settlement. Upon the question of the effect of a release by one tenant in common upon the rights of a cotenant, the cases are not in harmony. Thus it is held that while, from the bare relation of cotenancy, the law does not imply authority of one of the cotenants to bind the other to his prejudice,[88] whenever the cause of action existing in favor of any number of cotenants is joint the release of one bars an action by the others,[89] and that one tenant in common can settle or release the claim of all tenants in common for trespass upon the common

erty. Gill *v.* Fauntleroy, 8 B. Mon. (Ky.) 177.

79. Tainter *v.* Cole, 120 Mass. 162; Lee *v.* Livingston, 143 Mich. 203, 106 N. W. 713; Mussey *v.* Holt, 24 N. H. 248, 55 Am. Dec. 234; King *v.* Wilson, 54 N. J. Eq. 247, 34 Atl. 394.

Representatives of a deceased copartner, being tenants in common with his survivor, are not bound merely by said survivor's lease. Un Wong *v.* Kan Chu, 5 Hawaii 225.

A husband and wife owning part of a tract as community property and the remainder thereof as community property in common with another, the executing of a lease by the husband without the concurrence of his wife or the other cotenant was held to be invalid. Snyder *v.* Harding, 34 Wash. 286, 75 Pac. 812.

An oil and gas lease made by a tenant in common to a stranger is void as against his cotenants. But it is valid as between the parties even while the premises remain undivided. Zeigler *v.* Brenneman, 237 Ill. 15, 86 N. E. 597.

80. Moreland *v.* Strong, 115 Mich. 211, 73 N. W. 140, 69 Am. St. Rep. 553. But see Foster *v.* Magee, 2 Lans. (N. Y.) 182.

81. Edmonds *v.* Mounsey, 15 Ind. App. 399, 44 N. E. 196.

82. Augusta Nat. Bank *v.* Bones, 75 Ga. 246. But see Hooks *v.* Forst, 165 Pa. St. 238, 30 Atl. 846.

83. *California.*— Crary *v.* Campbell, 24 Cal. 634.

Massachusetts.— Rawson *v.* Morse, 4 Pick. 127; Keay *v.* Goodwin, 16 Mass. 1.

Minnesota.— Berthold *v.* Fox, 13 Minn. 501, 97 Am. Dec. 243.

Pennsylvania.— Hayden *v.* Patterson, 51 Pa. St. 261.

Wisconsin.— Tipping *v.* Robbins, 71 Wis. 507, 37 N. W. 427.

See 45 Cent. Dig. tit. "Tenancy in Common," § 123.

84. Schwartz *v.* McQuaid, 214 Ill. 357, 73 N. E. 582, 105 Am. St. Rep. 112; Stuart *v.* Mattern, 141 Mich. 686, 105 N. W. 35.

85. Phelps *v.* Conant, 30 Vt. 277.

But a claim under a bill for discovery and an accounting, expressly denying the title of defendant and the validity of a lease executed by him, for rentals received by virtue of an agreement in said lease, does not amount to a ratification of said lease by plaintiff entitling him to share in the benefit thereof. McNeely *v.* South Penn Oil Co., 58 W. Va. 438, 52 S. E. 480.

86. Harms *v.* McCormick, 132 Ill. 104, 22 N. E. 511.

87. McNeely *v.* South Penn Oil Co., 58 W. Va. 438, 52 S. E. 480.

88. Churchill *v.* Lammers, 60 Mo. App. 244. And see *supra*, note 71.

89. Churchill *v.* Lammers, 60 Mo. App. 244.

property,[90] and that thus, where cotenants join in an action *ex delicto* for trespass committed upon the common property, a release by one tenant in common from all liability for the trespass, as well for his cotenant as for himself, such settlement and release binds both tenants in common.[91] On the other hand the rule is laid down that the ownership of the several interests are so far distinct that, after suit instituted, one cotenant can neither settle the action nor execute a release without the previous authority or the subsequent ratification of his cotenants, so as to prevent them from proceeding with the suit, or as in anywise to bind them or their respective rights, although of course the recovery in such a suit must be limited to the extent of the right of the parties entitled to maintain it.[92] Thus it is held that liability for trespass on land cannot be avoided by showing payment in settlement therefor to one tenant in common of the land without the knowledge or consent of his cotenants;[93] and one tenant in common may maintain trespass for cutting and carrying away timber from the common property, although the wrong-doer has paid the other tenants in common;[94] and a release and settlement of damages for trespass on land executed by one of the cotenants does not bar the others;[95] and where two tenants in common of chattels join in an action for the conversion of the property, one cannot release or settle the action so as to deprive his cotenant of his remedy;[96] but the action may proceed in the name of both for the benefit of the one not releasing, or an amendment can be made by striking out the name of the one releasing.[97] Where one cotenant brings a suit for his portion of the damage sustained by the common property, the release of the other tenant is no discharge.[98] If a tenant in common releases an insurer of the common property on receipt of his share of the loss, his cotenant may either recover from him the full amount of such cotenant's loss, in the proportion of the insurance to the loss, or he may adopt the adjustment and sue in assumpsit for his share of the money had and received.[99]

4. Notice to One Cotenant as Notice to All. Ordinarily notice to one cotenant in relation to the title is not binding on his fellows therein.[1] But where they are jointly pursuing a common enterprise as tenants in common notice to one, in the premises, is notice to all; so, where one of them is acting as agent for his fellows, notice to such agent, in the premises, is notice to them.[2]

5. Estoppel and Ratification. Tenants in common, being owners of several interests, may ratify the acts of each other or acquiesce therein; and generally such ratification or acquiescence with full knowledge of material facts is effective;[3]

90. Hodges *v.* Heal, 80 Me. 281, 14 Atl. 11, 6 Am. St. Rep. 199

91. Bradley *v.* Boynton, 22 Me. 287, 39 Am. Dec. 582; Decker *v.* Livingston, 15 Johns (N. Y.) 479; Austin *v.* Hall, 13 Johns. (N. Y.) 286, 7 Am. Dec. 376.

92. Jackson *v.* Moore, 94 N. Y. App. Div. 504, 87 N. Y. Suppl. 1101.

93. Wagoner *v.* Silva, 139 Cal. 559, 73 Pac. 433.

94. Longfellow *v.* Quimby, 29 Me. 196, 48 Am. Dec. 525.

95. Gillum *v.* St. Louis, etc., R. Co., 4 Tex. Civ. App. 622, 23 S. W. 716; Tallman *v.* Barnes, 54 Wis. 181, 11 N. W. 478.

96. Gock *v.* Keneda, 29 Barb. (N. Y.) 120.

97. Gock *v.* Keneda, 29 Barb. (N. Y.) 120.

98. Wilson *v.* Gamble, 9 N. H. 74.

99. Briggs *v.* Call, 5 Metc. (Mass.) 504.

1. Wiswall *v.* McGown, 2 Barb. (N. Y.) 270 [*affirmed* in 10 N. Y. 465]; Parker *v.* Kane, 4 Wis. 1, 65 Am. Dec. 283.

2. Neff *v.* Elder, 84 Ark. 277, 105 S. W. 260; Ward *v.* Warren, 82 N. Y. 265.

3. Davidson *v.* Coon, 125 Ind. 497, 25 N. E. 601, 9 L. R. A. 584 (acquiescence in a voluntary partition by quitclaim deed); Primm *v.* Walker, 38 Mo. 94 (acquiescence in the division of a larger tract into many smaller lots); Streeter *v.* Shultz, 45 Hun (N. Y.) 406 [*affirmed* in 127 N. Y. 652, 27 N. E. 857] (acquiescence in the purchase of an outstanding title for the sole benefit of the purchaser); Whitehead *v.* Seanor, 197 Pa. St. 511, 47 Atl. 978 (conduct amounting to a waiver of the benefit of an adjudication and the recognition of a cotenancy).

Confirming or ratifying unauthorized conveyance see Johnston *v.* Jones, 85 Ala. 286, 4 So. 748; Ryason *v.* Dunten, 164 Ind. 85, 73 N. E. 74; Johnson *v.* Stevens, 7 Cush. (Mass.) 431; Dall *v.* Brown, 5 Cush. (Mass.) 289; Stuart *v.* Mattern, 141 Mich. 686, 105 N. W. 35; Nalle *v.* Parks, 173 Mo. 616, 73 S. W. 596; Nalle *v.* Thompson, 173 Mo. 595, 73 S. W. 599; Wheeler *v.* Taylor, 32 Oreg. 421, 52 Pac. 183, 67 Am. St. Rep. 540; Phelps *v.* Conant, 30 Vt. 277.

Acquiescence in a conveyance by metes and bounds see Currens *v.* Lauderdale, 118 Tenn. 496, 101 S. W. 431. See also Davidson *v.*

and after such ratification or acquiescence the ratifying parties and their respective grantees are estopped from denying the effect thereof.[4] A tenant in common is estopped from nullifying a material act in relation to the common property of which he has accepted and retained the benefit, with full knowledge of all material circumstances in relation thereto, or which he has ratified or in which he has acquiesced; and so is his grantee or licensee;[5] and he may be estopped if he has advised or urged such act.[6] But mere absence for a long time,[7] or the use of the name of a tenant in common as party in a suit concerning the common property, without such tenant's knowledge or authority, is not sufficient to estop him from asserting his interest in the land;[8] nor is he estopped by unauthorized declarations or acts of his cotenants;[9] and a cotenant is not ordinarily estopped because of an alleged fraud, which failed of results.[10] A tenant in common is not estopped, in the absence of fraud, from insisting upon his rights as such because of mere silence on his part, unless there was a legal duty upon him to speak or act in the premises and such silence caused injury to the party seeking the benefit of an estoppel as against him;[11] nor is he estopped from avoiding a sheriff's deed to his cotenant by accepting a part of the purchase-money, in the absence of a fair disclosure of surrounding circumstances by said purchasing cotenant.[12] An estoppel operating against one tenant in common in relation to the common property may be defeated by an assertion of the rights of his non-estopped cotenants.[13]

Coon, 125 Ind. 497, 25 N E. 601, 9 L. R. A. 584.

A bill for discovery and an accounting for rentals under an unauthorized lease and expressly denying the title of the lessor and the validity of the lease does not amount to a ratification thereof. McNeely *v.* South Penn Oil Co., 58 W. Va. 438, 52 S. E. 480.

4. *California.*— Mandeville *v.* Solomon, 39 Cal. 125.

Connecticut.— Goodwin *v.* Keney, 49 Conn. 563; Oviatt *v.* Sage, 7 Conn 95.

Indiana.— Ryason *v.* Dunten, 164 Ind. 85, 73 N. E. 74.

Missouri.— Potter *v.* Herring, 57 Mo. 184; Warfield *v.* Lindell, 38 Mo. 561, 90 Am. Dec. 443.

Pennsylvania.— Lancaster *v.* Flowers, 208 Pa. St. 199, 57 Atl. 526; Workman *v.* Guthrie, 29 Pa. St. 495, 72 Am. Dec. 654.

5. *Indiana.*— Jennings *v.* Moon, 135 Ind. 168, 34 N. E. 996.

Maryland.— Jones *v.* Rose, 96 Md. 483, 54 Atl 69.

Missouri.— Nalle *v.* Thompson, 173 Mo. 595, 73 S. W. 599.

New York.— Beecher *v.* Bennett, 11 Barb. 374; Cornell *v.* Prescott, 2 Barb. 16; Ten Eick *v.* Simpson, 1 Sandf. Ch. 244.

Pennsylvania.— Ramsey *v.* Brown, (1889) 17 Atl. 207; Thompson's Appeal, 101 Pa. St. 225; Ferson's Appeal, 96 Pa. St. 140.

Tennessee.— Currens *v.* Lauderdale, 118 Tenn. 496, 101 S. W. 431.

Texas.— Trammell *v.* McDade, 29 Tex. 360; McKey *v.* Welch, 22 Tex. 390.

Vermont.— Phelps *v.* Conant, 30 Vt. 277.

One acting under a deed conveying property in common is estopped from denying the title of his cotenant and claiming the whole land by title paramount. Funk *v.* Newcomer, 10 Md. 301.

6. Crownover *v.* Randle, 21 La. Ann. 469.

7. Tice *v.* Derby, 59 Iowa 312, 13 N. W. 301.

8. Keaton *v.* Pennington, 11 S. W. 198, 10 Ky. L. Rep. 931.

9. *Iowa.*— Ruppert *v.* Chicago, etc., R. Co., 43 Iowa 490.

North Carolina.— Lenoir *v.* Valley River Min. Co., 106 N. C. 473, 11 S. E. 516.

Pennsylvania.— Ferson's Appeal, 96 Pa. St. 140.

Rhode Island.— Dexter Lime-Rock Co. *v.* Dexter, 6 R. I. 353.

West Virginia.— McNeely *v.* South Penn Oil Co., 58 W. Va. 438, 52 S. E. 480.

Recitals in deeds see Gordon *v.* San Diego, 101 Cal. 522, 36 Pac. 18, 40 Am. St. Rep. 73, 32 Pac. 885; Frost *v.* Courtis, 172 Mass. 401, 52 N. E. 515; Thomason *v.* Dayton, 40 Ohio St. 63; Woods *v.* Early, 95 Va. 307, 28 S. E. 374.

10. Richards *v.* Richards, 31 Pa. Super. Ct. 509.

11. Mora *v.* Murphy, 83 Cal. 12, 23 Pac. 63; Cooper *v.* Brown, 143 Iowa 482, 122 N. W. 144; Van Ormer *v.* Harley, 102 Iowa 150, 71 N. W. 241; King *v.* Reehling, 1 Dauph. Co. Rep. (Pa.) 137.

Withdrawing from the common property under a mistake as to the title thereof see Davenport *v.* Turpin, 43 Cal. 597.

Standing by whilst cotenant or his licensee made improvements see Sanford *v.* Tucker, 54 Ind. 219.

Failing to object to an unlawful conveyance by cotenant see Truth Lodge No. 213 A. F. & A. M. *v.* Barton, 119 Iowa 230, 93 N. W. 106, 97 Am. St. Rep. 303; Great Falls Co. *v.* Worster, 15 N. H. 412; Newman *v.* Newman, 27 Gratt. (Va.) 714.

12. Tanney *v.* Tanney, 24 Pittsb. Leg. J. N. S. (Pa.) 43 [*affirmed* in 159 Pa. St. 277, 28 Atl. 287, 39 Am. St. Rep. 678].

13. Mabie *v.* Matteson, 17 Wis. 1.

6. Joint Contracts; Leases. Tenants in common may bind themselves jointly concerning the common property.[14] At common law tenants in common, their rights and title being several, could not make a joint lease, and must in ejectment declare on their several leases of their several parts;[15] but cotenants may now let jointly, and where the letting is joint, one cotenant can demand and receive the whole rent.[16]

B. Sale or Conveyance — 1. By One Cotenant of More Than His Share — a. Rule Stated. One tenant in common cannot, unless specially authorized to do so, sell or dispose of more than his own interest,[17] nor can a tenant in common

14. Clifford *v.* Meyer, (Ind. App. 1893) 33 N. E. 127, 6 Ind. App. 633, 34 N. E. 23; Wilkinson *v.* Fleming, 2 Ohio 301; Massie *v.* Long, 2 Ohio 287, 15 Am. Dec. 547.

15. Wilkinson *v.* Hall, 1 Bing. N. Cas. 713, 1 Hodges 170, 6 L. J. C. P. 82, 1 Scott 675, 27 E. C. L. 831; Haysman *v.* Moon, 7 Mod. 430, 87 Eng. Reprint 1337; Burne *v.* Cambridge, 1 M. & Rob. 539; Heatherley *v.* Weston, 2 Wils. C. P. 232, 95 Eng. Reprint 783. See also Doe *v.* Errington, 1 A. & E. 750, 3 L. J. K. B. 215, 3 N. & M. 646, 28 E. C. L. 349, 110 Eng. Reprint 1394; Midgley *v.* Lovelace, Carth. 289, 90 Eng. Reprint 771; Wallace *v.* McLaren, 1 M. & R. 516, 31 Rev. Rep. 334, 17 E. C. L. 685.

16. Codman *v.* Hall, 9 Allen (Mass.) 335; Miner *v.* Lorman, 70 Mich. 173, 38 N. W. 18; Griffin *v.* Clark, 33 Barb. (N. Y.) 46; Sherman *v.* Ballou, 8 Cow. (N. Y.) 304; Decker *v.* Livingston, 15 Johns. (N. Y.) 479.

17. Hewlett *v.* Owens, 51 Cal. 570; Fleming *v.* Katahdin Pulp, etc., Co., 93 Me. 110, 44 Atl. 378; Kemper *v.* Ewing, 25 Gratt. (Va.) 427; Wiggins *v.* White, 2 N. Brunsw. 97. *Compare* Watson *v.* Union Red, etc., Gravel Co., 50 Mo. App. 635.

If merely employed to manage the common property, a cotenant cannot sell the whole thereof. Strickland *v.* Parker, 54 Me. 263; Watson *v.* Union Red, etc., Gravel Co., 50 Mo. App. 635.

He cannot employ an agent to sell the whole property. Lipscomb *v.* Watrous, 3 App. Cas. (D. C.) 1.

A cotenant cannot without authority sell the right to cut logs from the land owned in common so as to pass the legal title to the purchaser, and the interest which the purchaser acquires can be asserted only in equity. Burt, etc., Lumber Co. *v.* Clay City Lumber Co., 111 Ky. 725, 64 S. W. 652, 23 Ky. L. Rep. 1019.

One coparcener cannot convey severally, they must all join. Leyman *v.* Abeel, 16 Johns. (N. Y.) 30.

If the purchaser holds adversely, the other cotenants may bring ejectment against him for their respective parts, or may affirm the sale and sue the vendor in assumpsit for their respective parts of the purchase-money. Murley *v.* Ennis, 2 Colo. 300.

A tenant in common of a chattel cannot lawfully sell more than his own interest therein. People *v.* Marshall, 8 Cal. 51; Carter *v.* Bailey, 64 Me. 458, 18 Am. Rep. 273; Kilgore *v.* Wood, 56 Me. 150, 96 Am. Dec. 404; Dain *v.* Cowing, 22 Me. 347, 39 Am. Dec. 585; Weld *v.* Oliver, 21 Pick. (Mass.) 559; Sharp *v.* Benoist, 7 Mo. App. 534; White *v.* Osborn, 21 Wend. (N. Y.) 72; Farr *v.* Smith, 9 Wend. (N. Y.) 338, 24 Am. Dec. 162; Hyde *v.* Stone, 9 Cow. (N. Y.) 230, 18 Am. Dec. 501; Wilson *v.* Reed, 3 Johns. (N. Y.) 175; Logan *v.* Oklahoma Mill Co., 14 Okla. 402, 79 Pac. 103; Newman *v.* Newman, 27 Gratt. (Va.) 714; Barton *v.* Williams, 5 B. & Ald. 395, 7 E. C. L. 219, 106 Eng. Reprint 1235; Mayhew *v.* Herrick, 7 C. B. 229, 13 Jur. 1078, 18 L. J. C. P. 179, 62 E. C. L. 229; Farrar *v.* Beswick, 5 L. J. Exch. 225, 1 M. & W. 685, Tyrw. & G. 1053; Mason *v.* Norris, 18 Grant Ch. (U. C.) 500. Therefore the buyer may refuse to receive property so sold for lack of title in the seller. Nevels *v.* Kentucky Lumber Co., 108 Ky. 550, 56 S. W. 969, 22 Ky. L. Rep. 247, 94 Am. St. Rep. 388, 49 L. R. A. 416. But so long as waste is not committed a tenant in common may sell marketable timber growing on the land, the purchaser taking a good title; the remedy of the other cotenants, if any, being an accounting at law or in equity. Gillum *v.* St. Louis, etc., R. Co., 5 Tex. Civ. App. 338, 23 S. W. 717.

Timber.— A tenant in common in a tract of timber land has no right to sell more than his interest therein, and if he does so the buyer takes subject to the right of the other cotenants to partition. Nevels *v.* Kentucky Lumber Co., 108 Ky. 550, 56 S. W. 969, 22 Ky. L. Rep. 247, 49 L. R. A. 416, 94 Am. St. Rep. 388; Hunter *v.* Hodgson, (Tex. Civ. App. 1906) 95 S. W. 637; McDodrill *v.* Pardee, etc., Lumber Co., 40 W. Va. 564, 21 S. E. 878; Allen *v.* Anthony, 1 Meriv. 282, 15 Rev. Rep. 113, 35 Eng. Reprint 679. He may not cut and sell logs from the land without the consent of his cotenants, so as to divest them of their interest (Nevels *v.* Kentucky Lumber Co., 108 Ky. 550, 56 S. W. 969, 22 Ky. L. Rep. 247, 94 Am. St. Rep. 388, 49 L. R. A. 416; State *v.* Judge Fourth Judicial Dist. Ct., 52 La. Ann. 103, 26 So. 769), nor convey his undivided interest in timber on the common property so as to injuriously affect the rights of his cotenants (Gillum *v.* St. Louis, etc., R. Co., 5 Tex. Civ. App. 338, 23 S. W. 717). Where one of several cotenants cuts and removes timber under an alleged license from his cotenants, the burden is on him to show that said license was unconditional and not limited by the reservation of a lien on the lumber. Prentiss *v.* Roberts, 49 Me. 127. That defendant was servant of an

bar or postpone the rights of his cotenants by such conveyance or act *in pais*,[18] particularly where he is acting in fraud of the rights of his cotenants;[19] and a sale, conveyance of, or covenant to convey property held in common, by the deed of one tenant in common, whatever it may purport to convey, can have no effect upon the title and interest of his cotenants in the absence of prior authority or subsequent ratification, express or implied, and it carries only the undivided interest of the grantor, whatever the description.[20] But if a tenant in common

occupying tenant in common was no defense in a suit under a statute for cutting and carrying away wood without notice to the cotenants therein (Hazen *v.* Wight, 87 Me. 233, 32 Atl. 887); and the right of action of one cotenant against the other for cutting timber on the common property is not affected by the fact that the complaining party has theretofore been guilty of a like offense (Blake *v.* Milliken, 14 N. H. 213); nor does the acceptance by a cotenant of his proportion of the price of a sale of timber show that such sale was authorized by him (Dwinell *v.* Larrabee, 38 Me. 464). There is no necessity of an allegation in the declaration of the kind of trees that have been cut, and if such an allegation be made there is no necessity of offering evidence to sustain it. Maxwell *v.* Maxwell, 31 Me. 184, 50 Am. Dec. 657.

Water rights.— A cotenant, in the absence of special authority, cannot transfer any greater interest in an appropriation of water for irrigating purposes, appurtenant to the estate, than is commensurate to his own interest. Crary *v.* Campbell, 24 Cal. 634; Forrest Milling Co. *v.* Cedar Falls Mill Co., 103 Iowa 619, 72 N. W. 1076; Beers *v.* Sharpe, 44 Oreg. 386, 75 Pac. 717.

A grantee of a tenant in common of land cannot maintain ejectment against his grantor's cotenants, they having recognized each other's possession. Wittenbrock *v.* Wheadon, 128 Cal. 150, 60 Pac. 664, 79 Am. St. Rep. 32 (holding that a purchaser of the land from one tenant in common cannot, merely because of such purchase, eject the cotenants therein who had not joined in the deed); Tansman *v.* Faris, 59 Cal. 663.

18. *California.*— Gates *v.* Salmon, 35 Cal. 576, 95 Am. Dec. 139.

Connecticut.— Griswold *v.* Johnson, 5 Conn. 363.

Illinois.— Stookey *v.* Carter, 92 Ill. 129.

Massachusetts.— Rising *v.* Stannard, 17 Mass. 282; Baldwin *v.* Whiting, 13 Mass. 57; Varnum *v.* Abbot, 12 Mass. 474, 7 Am. Dec. 87; Bartlet *v.* Harlow, 12 Mass. 348, 7 Am. Dec. 76; Porter *v.* Hill, 9 Mass. 34, 6 Am. Dec. 22.

Michigan.— Petit *v.* Flint, etc., R. Co., 114 Mich. 362, 72 N. W. 238.

Nevada.— Hoopes *v.* Meyer, 1 Nev. 433.

New Hampshire.— Great Falls Co. *v.* Worster, 15 N. H. 412; Jeffers *v.* Radcliff, 10 N. H. 242.

New Jersey.— Boston Franklinite Co. *v.* Condit, 19 N. J. Eq. 394.

Pennsylvania.— McKinley *v.* Peters, 111 Pa. St. 283, 3 Atl. 27; Coursin's Appeal, 79 Pa. St. 220.

Tennessee.— Jewett *v.* Stockton, 3 Yerg. 492, 24 Am. Dec. 594.

Texas.— Good *v.* Coombs, 28 Tex. 34; McKey *v.* Welch, 22 Tex. 390.

Wisconsin.— Smith *v.* Clarke, 7 Wis. 551.

Canada.— McLellan *v.* McDougall, 28 Nova Scotia 237.

See 45 Cent. Dig. tit. "Tenancy in Common," § 130 *et seq.*

Upon delivery of a deed of the common land by one cotenant and purchase-money bond and mortgage taken in his own name his cotenants may recover their share of the purchase-price from him even though the bond has not been paid. Knope *v.* Nunn, 81 Hun (N. Y.) 349, 30 N. Y. Suppl. 896 [*affirmed* in 151 N. Y. 506, 45 N. E. 940, 56 Am. St. Rep. 642].

19. Small *v.* Robinson, 9 Hun (N. Y.) 418.

The defrauded cotenant is entitled to a pro rata share of the profits thus received. Garr *v.* Boswell, 38 S. W. 513, 18 Ky. L. Rep. 814.

20. *California.*— Gordon *v.* San Diego, 101 Cal. 522, 36 Pac. 18, 40 Am. St. Rep. 73, (1893) 32 Pac. 885.

Colorado.— Gillett *v.* Gaffney, 3 Colo. 35.

Connecticut.— Adams *v.* Manning, 51 Conn. 5; Mitchell *v.* Hazen, 4 Conn. 495, 10 Am. Dec. 169.

Georgia.— Sewell *v.* Holland, 61 Ga. 608.

Iowa.— Tice *v.* Derby, 59 Iowa 312, 13 N. W. 301.

Kentucky.— Burt, etc., Lumber Co. *v.* Clay City Lumber Co., 111 Ky. 725, 64 S. W. 652, 23 Ky. L. Rep. 1019; Chiles *v.* Jones, 7 Dana 528. See Daniel *v.* Bratton, 1 Dana 209.

Louisiana.— Crownover *v.* Randle, 21 La. Ann. 469.

Maine.— Fleming *v.* Katahdin Pulp, etc., Co., 93 Me. 110, 44 Atl. 378; Moore *v.* Gibson, 53 Me. 551.

Massachusetts.— Marks *v.* Sewall, 120 Mass. 174; Tainter *v.* Cole, 120 Mass. 162; Matthews *v.* Bliss, 22 Pick. 48.

Michigan.— Wright *v.* Kaynor, 150 Mich. 7, 113 N. W. 779; Dumas *v.* Geer, 144 Mich. 377, 108 N. W. 84; Moreland *v.* Strong, 115 Mich. 211, 73 N. W. 140, 69 Am. St. Rep. 553; Palmer *v.* Williams, 24 Mich. 328, holding that an owner of real property in common with others, but in whose name the title to the whole has been put, and who holds as trustee for all parties, has no authority to sell without their knowledge and consent.

Minnesota.— Loveridge *v.* Coles, 72 Minn. 57, 74 N. W. 1109.

Missouri.— Childs *v.* Kansas City, etc., R. Co., (1891) 17 S. W. 954.

is duly authorized to sell the entire common property, and he makes a contract of sale, then his cotenants and their grantees with notice are bound thereby;[21] and even an unauthorized lease or conveyance of an interest in land by a tenant in common is good as against himself and those claiming under him and is voidable at the election of his cotenants and those claiming under them, only in so far as it operates to their prejudice, being valid against everyone unless so avoided.[22]

Nebraska.— Jackson *v.* O'Rorke, 71 Nebr. 418, 98 N. W. 1068; Jolliffe *v.* Maxwell, 3 Nebr. (Unoff.) 244, 91 N. W. 563.

New Hampshire.— White *v.* Brooks, 43 N. H. 402.

New York.— Partridge *v.* Eaton, 63 N. Y. 482; Edwards *v.* Bishop, 4 N. Y. 61; Sherman Lime Co. *v.* Glens Falls, 42 Misc. 440, 87 N. Y. Suppl. 95 [*reversed* on other grounds in 101 N. Y. App. Div. 269, 91 N. Y. Suppl. 994]; Cuyler *v.* Bradt, 2 Cai. Cas. 326; Ten Eick *v.* Simpson, 1 Sandf. Ch. 244.

North Carolina.— See Locke *v.* Alexander, 9 N. C. 155, 11 Am. Dec. 750.

Pennsylvania.— Browning *v.* Cover, 108 Pa. St. 595; Keisel *v.* Earnest, 21 Pa. St. 90.

Philippine.— Lopez *v.* Ilustre, 5 Philippine 567.

South Carolina.— Coleman *v.* Coleman, 71 S. C. 518, 51 S. E. 250; Duke *v.* Postal Tel. Cable Co., 71 S. C. 95, 50 S. E. 675; Charleston, etc., R. Co. *v.* Leech, 33 S. C. 175, 11 S. E. 631, 26 Am. St. Rep. 667.

Tennessee.— Currens *v.* Lauderdale, 118 Tenn. 496, 101 S. W. 431.

Texas.— Hunter *v.* Hodgson, (Civ. App. 1906) 95 S. W. 637; Broom *v.* Pearson, (Civ. App. 1904) 81 S. W. 753 [*modified* in 98 Tex. 469, 85 S. W. 790, 86 S. W. 733].

Utah.— Manti City Sav. Bank *v.* Peterson, 33 Utah 209, 93 Pac. 566, 126 Am. St. Rep. 817.

Vermont.— Bigelow *v.* Topliff, 25 Vt. 273, 60 Am. Dec. 264.

Virginia.— Woods *v.* Early, 95 Va. 307, 28 S. E. 374; Kemper *v.* Ewing, 25 Gratt. 427.

West Virginia.— Parker *v.* Brast, 45 W. Va. 399, 32 S. E. 269.

England.— Heath *v.* Hubbard, 4 East 101, 4 Esp. 205, 102 Eng. Reprint 771.

Canada.— Shaw *v.* Grant, 2 N. Brunsw. 196; Wiggins *v.* White, 2 N. Brunsw. 179; McIntosh *v.* Ontario Bank, 19 Grant Ch. (U. C.) 155.

See 45 Cent. Dig. tit. "Tenancy in Common," § 130 *et seq.*

A lease by one tenant in common of the right to take oysters without the consent of his cotenant does not give the lessee an exclusive right as against subsequent lessees of the cotenant; and it is immaterial that the first lessee expended money and labor in making the bed productive. Mott *v.* Underwood, 73 Hun (N. Y.) 509, 26 N. Y. Suppl. 307 [*affirmed* in 148 N. Y. 463, 42 N. E. 1048, 51 Am. St. Rep. 711, 32 L. R. A. 270].

A cotenant selling the whole tract of land without authority from his coöwners is not a trustee for his cotenants for their share of the purchase-money, as the legal title of the cotenants not assenting to the sale remains in the land, and they have their remedy at law. Milton *v.* Hogue, 39 N. C. 415.

21. Michenor *v.* Reinach, 49 La. Ann. 360, 21 So. 552; Cline *v.* Stradlee, (Tenn. Ch. App. 1898) 48 S. W. 272 (sale by cotenant and repurchase for himself); Cecil *v.* Clark, 49 W. Va. 459, 39 S. E. 202; McWhinne *v.* Martin, 77 Wis. 182, 46 N. W. 118.

A third person with notice taking title to said property holds as a trustee for the former vendee. Lesslie *v.* Worthington, Wright (Ohio) 628.

Authority to sell cannot be proven by declarations of the alleged agent made in the absence of the principal alleged to be bound. Lipscomb *v.* Watrous, 3 App. Cas. (D. C.) 1.

22. *California.*— Wittenbrock *v.* Wheadon, 128 Cal. 150, 60 Pac. 664, 79 Am. St. Rep. 32; Hager *v.* Spect, 52 Cal. 579; Stark *v.* Barrett, 15 Cal. 361.

Kentucky.— Nevels *v.* Kentucky Lumber Co., 108 Ky. 550, 56 S. W. 969, 22 Ky. L. Rep. 247, 94 Am. St. Rep. 388, 49 L. R. A. 416; Ballentine *v.* Joplin, 105 Ky. 70, 48 S. W. 417, 20 Ky. L. Rep. 1062.

Massachusetts.— Kimball *v.* Commonwealth Ave. St. R. Co., 173 Mass. 152, 53 N. E. 274; Frost *v.* Courtis, 172 Mass. 401, 52 N. E. 515; Nichols *v.* Smith, 22 Pick. 316; De Witt *v.* Harvey, 4 Gray 486; Johnson *v.* Stevens, 7 Cush. 431; Varnum *v.* Abbot, 12 Mass. 474, 7 Am. Dec. 87.

Michigan.— Moreland *v.* Strong, 115 Mich. 211, 73 N. W. 140, 69 Am. St. Rep. 553; Benedict *v.* Torrent, 83 Mich. 181, 47 N. W. 129, 21 Am. St. Rep. 589, 11 L. R. A. 278; Richey *v.* Brown, 58 Mich. 435, 25 N. W. 386; Campau *v.* Godfrey, 18 Mich. 27, 100 Am. Dec. 133.

Mississippi.— Kenoye *v.* Brown, 82 Miss. 607, 35 So. 163, 100 Am. St. Rep. 645.

Missouri.— Benoist *v.* Rothschild, 145 Mo. 399, 46 S. W. 1081; Primm *v.* Walker, 38 Mo. 94.

New Hampshire.— Hallett *v.* Parker, 68 N. H. 598, 39 Atl. 433; Whitton *v.* Whitton, 38 N. H. 127, 75 Am. Dec. 163.

New Jersey.— Boston Franklinite Co. *v.* Condit, 19 N. J. Eq. 394; Holcomb *v.* Coryell, 11 N. J. Eq. 548.

Pennsylvania.— McKinley *v.* Peters, 111 Pa. St. 283, 3 Atl. 27.

Rhode Island.— Crocker *v.* Tiffany, 9 R. I. 505.

Texas.— Wade *v.* Boyd, 24 Tex. Civ. App. 492, 60 S. W. 360.

Vermont.— McElroy *v.* McLeay, 71 Vt. 396, 45 Atl. 898.

Virginia.— Woods *v.* Early, 95 Va. 307, 28 S. E. 374.

West Virginia.— Boggess *v.* Meredith, 16 W. Va. 1.

Wisconsin.— Martens *v.* O'Connor, 101 Wis. 18, 76 N. W. 774.

Parol evidence is admissible to show authorization or ratification of a sale by one cotenant of the entire property so as to create the necessary privity between parties to an accounting.[23] A purchaser from a cotenant with notice, actual or constructive, of the character of his title is bound by such notice, and will be limited in his holding to the actual interest of his grantor.[24]

b. Ratification; Estoppel. An unauthorized sale or conveyance of the whole property by one tenant in common may be ratified by the others.[25] The non-consenting cotenant may be estopped from denying the passage of title to the vendee if he does any act to ratify or confirm the sale;[26] and although the unauthorized sale of a chattel by a tenant in common therein does not affect his cotenant's interest, it operates against the vendor as an estoppel.[27] A tenant in common claiming under a sale of or contract in relation to the whole property, by his cotenant, or approving and adopting such sale or contract, ratifies it; and if the moneys due thereunder have been paid to the contracting cotenant in accordance with the terms of such sale or contract, his cotenant cannot recover against the vendee or obligor therein.[28]

c. Remedies of Non-Consenting Cotenants. The non-consenting cotenant may recover the value of his undivided interest in such property, or may claim cotenancy therein with the vendee;[29] and may usually follow the property in the hands of a purchaser or recover its value from the wrong-doer;[30] and as the sale of the common property by a tenant in common therein, or one claiming under him, without the consent of his cotenants, does not pass title of the non-consenting cotenants' interest, they may maintain trover against the purchaser of the common property for his subsequent conversion,[31] and the purchaser may,

United States.— Lamb *v.* Wakefield, 14 Fed. Cas. No. 8,024, 1 Sawy. 251.

See 45 Cent. Dig. tit. "Tenancy in Common," § 132 *et seq.*

If the complaining cotenant has been guilty of laches, the conveyance will be upheld even against him. Ryason *v.* Dunten, 164 Ind. 85, 73 N. E. 74.

Lessee cannot take advantage of non-consent. If the cotenants who do not consent to a lease by one of their number of the whole property do not interfere with such lessee he cannot avoid the lease because of said non-consent. Colorado Fuel, etc., Co. *v.* Pryor, 25 Colo. 540, 57 Pac. 51; Moreland *v.* Strong, 115 Mich. 211, 73 N. W. 140, 69 Am. St. Rep. 553; Martens *v.* O'Connor, 101 Wis. 18, 76 N. W. 774.

23. Oviatt *v.* Sage, 7 Conn. 95.

24. Parker *v.* Brast, 45 W. Va. 399, 32 S. E. 269.

25. Osborn *v.* Schenck, 83 N. Y. 201.

The unauthorized sale of a chattel by one tenant in common may be ratified by his cotenants, or they may continue to hold their interest therein. Rogers *v.* White, 6 Me. 193; Osborn *v.* Schenck, 83 N. Y. 201. See also Beecher *v.* Bennett, 11 Barb. (N. Y.) 374.

Retention of the common property by the cotenant refusing to ratify a sale thereof is not the basis of an action for conversion. Rodermund *v.* Clark, 46 N. Y. 354.

26. Nalle *v.* Parks, 173 Mo. 616, 73 S. W. 596.

27. Trammell *v.* McDade, 29 Tex. 360.

28. Musser *v.* Hill, 17 Mo. App. 169; Perry *v.* Granger, 21 Nebr. 579, 33 N. W. 261; Phelps *v.* Conant, 30 Vt. 277.

29. Nevels *v.* Kentucky Lumber Co., 108 Ky. 550, 56 S. W. 969, 22 Ky. L. Rep. 247, 94 Am. St. Rep. 388, 49 L. R. A. 416; Ballentine *v.* Joplin, 105 Ky. 70, 48 S. W. 417, 20 Ky. L. Rep. 1062; Benedict *v.* Torrent, 83 Mich. 181, 47 N. W. 129, 21 Am. St. Rep. 589, 11 L. R. A. 278; Richey *v.* Brown, 58 Mich. 435, 25 N. W. 386; Ashland Lodge No. 63 I. O. O. F. *v.* Williams, 100 Wis. 223, 75 N. W. 954, 69 Am. St. Rep. 912.

Bill against absent defendant.—A bill may be filed against an absent defendant and his grantor for confirmation of a sale, and a decree against the vendor for a share of the purchase-money, where a tenant in common has sold the common property to said absent defendant. Pollard *v.* Coleman, 4 Call (Va.) 245.

30. *Georgia.*— Starnes *v.* Quin, 6 Ga. 84.

Massachusetts.— Weld *v.* Oliver, 21 Pick. 559.

New York.— Ferris *v.* Nelson, 60 N. Y. App. Div. 430, 69 N. Y. Suppl. 999, tenants in common by devise.

Oklahoma.— Logan *v.* Oklahoma Mill Co., 14 Okla. 402, 79 Pac. 103.

Pennsylvania.— Coursin's Appeal, 79 Pa. St. 220.

See 45 Cent. Dig. tit. "Tenancy in Common," § 132 *et seq.*

Reinvested proceeds of unauthorized sale. — The proceeds of an unauthorized sale by one cotenant of the entire common property cannot be followed by another cotenant into a business in which such proceeds have been invested, so as to entitle the wronged cotenant to an accounting. Coursin's Appeal, 79 Pa. St. 220.

31. *Georgia.*— Starnes *v.* Quin, 6 Ga. 84.

Kentucky.— Nevels *v.* Kentucky Lumber Co., 108 Ky. 550, 56 S. W. 969, 22 Ky. L.

in equity, be held to be a trustee for the non-consenting cotenants.[32] A cotenant receiving the entire sales price must account therefor and if without authority he sells the common property for credit he must account therefor as though he had sold it for cash,[33] and the same principle applies where instead of selling for credit the sale is made in exchange of property.[34] If a tenant in common authorized or ratified the sale of the common property by his cotenant, he may maintain an action against the purchaser for his share of the price.[35]

2. Of Cotenant's Undivided Interest.[36] A tenant in common may convey his undivided interest, or may mortgage it or act in relation thereto as its owner so long as he does not prejudice the rights of his cotenants in the premises,[37] even

Rep. 247, 94 Am. St. Rep. 388, 49 L. R. A. 416.

Maine.— Miller *v.* Thompson, 60 Me. 322.

Pennsylvania.— Coursin's Appeal, 79 Pa. St. 220; Agnew *v.* Johnson, 17 Pa. St. 373, 55 Am. Dec. 565.

Texas.— Worsham *v.* Vignal, 5 Tex. Civ. App. 471, 24 S. W. 562.

Vermont.— White *v.* Morton, 22 Vt. 15, 52 Am. Dec. 75.

United States.— Duff *v.* Bindley, 16 Fed. 178.

Canada.— McLellan *v.* McDougall, 28 Nova Scotia 237, purchaser at a sheriff's sale reselling part of his purchase held liable.

The sale of the entire common property by the mortgagee of one cotenant, with notice to the purchaser, terminates the cotenancy, and the vendee is a joint tort-feasor with the vendor. Van Doren *v.* Balty, 11 Hun (N. Y.) 239.

Recovery is limited to plaintiff's equitable interest. Gerndt *v.* Conradt, 117 Wis. 15, 93 N. W. 804.

Mere demand for payment in order to save further trouble and expense, of a vendee with knowledge or with information of the demandant's title, was held neither to ratify the sale nor to constitute a waiver of the right of action against said vendee. Weld *v.* Oliver, 21 Pick. (Mass.) 559.

32. Ennis *v.* Hutchinson, 30 N. J. Eq. 110.

Where there is ample remedy at law, this will not be done. Mason *v.* Norris, 18 Grant Ch. (U. C.) 500.

33. Hammer *v.* Johnson, 44 Ill. 192; Walker *v.* Evans, 98 Mo. App. 301, 71 S. W. 1086; Wright *v.* Wright, 59 How. Pr. (N. Y.) 176. *Compare* Rogers *v.* White, 6 Me. 193.

But the price received by the grantor is not held by him as trustee for his cotenants. Milton *v.* Hogue, 39 N. C. 415.

34. Miller *v.* Miller, 7 Pick. (Mass.) 133, 19 Am. Dec. 264.

Mortgagees of some of the cotenants receiving the rents of the mortgaged property must account to the others of them for their respective shares thereof. McIntosh *v.* Ontario Bank, 20 Grant Ch. (U. C.) 24.

35. Oviatt *v.* Sage, 7 Conn. 95; Putnam *v.* Wise, 1 Hill (N. Y.) 234, 37 Am. Dec. 309.

Reconveyance of note; surrender.— Where a tenant in common made an authorized sale of the entire common property and accepted a note therefor, and subsequently purchased it for himself from the makers of the note, and surrendered the note to them, they were not liable at the suit of the vendor's cotenants, the cotenants' remedy being against the vendor. Cline *v.* Stradlee, (Tenn. Ch. App. 1898) 48 S. W. 272. See also Mills *v.* Hart, 24 Colo. 505, 52 Pac. 680, 65 Am. St. Rep. 241; Hodgson *v.* Fowler, 24 Colo. 278, 50 Pac. 1034; Cecil *v.* Clark, 44 W. Va. 659, 30 S. E. 216.

36. **As creating a tenancy in common between purchaser and other cotenants** see *supra*, II, A.

As severing the tenancy between the seller and his cotenants see *supra*, II, B.

37. *California.*— Middlecoff *v.* Cronise, 155 Cal. 185, 100 Pac. 232; Stark *v.* Barrett, 15 Cal. 361; People *v.* Marshall, 8 Cal. 51.

Connecticut.— Barnum *v.* Landon, 25 Conn. 137.

Kansas.— Jones *v.* Way, 78 Kan. 535, 97 Pac. 437, 18 L. R. A. N. S. 1180.

Maryland.— Reinicker *v.* Smith, 2 Harr. & J. 421.

Michigan.— Mee *v.* Benedict, 98 Mich. 260, 57 N. W. 175, 39 Am. St. Rep. 543, 22 L. R. A. 641; Ruppe *v.* Steinbach, 48 Mich. 465, 12 N. W. 658; Campau *v.* Campau, 44 Mich. 31, 5 N. W. 1062.

New Jersey.— King *v.* Wilson, 54 N. J. Eq. 247, 34 Atl. 394.

New York.— Mersereau *v.* Norton, 15 Johns. 179.

Philippine.— Lopez *v.* Ilustre, 5 Philippine 567.

Rhode Island.— Crocker *v.* Tiffany, 9 R. I. 505.

South Carolina.— Boyce *v.* Coster, 4 Strobh. Eq. 25.

Vermont.— McElroy *v.* McLeay, 71 Vt. 396, 45 Atl. 898.

See 45 Cent. Dig. tit. "Tenancy in Common," § 133 *et seq.*

One tenant in common may enfeoff another. Heatherley *v.* Weston, 2 Wils. C. P. 232, 95 Eng. Reprint 783.

If a tenant in common conveys a certain share of his interest of the common property, less than his whole interest, or if he conveys a certain number of acres less than his proportionate number of acres in the whole property, it will operate to convey a proportionate share in the whole tract and the tenancy in common of said grantor is not severed, although said grantee therein may be entitled to rights and remedies incident to the tenancy in common. Moragne *v.* Doe, 143 Ala. 459, 39 So. 161, 111 Am. St. Rep. 52; Campau *v.* Campau, 44 Mich. 31, 5 N. W.

though the common estate can be partitioned only by sale;[38] or consists of two or more separate tracts,[39] and the same rule obtains in the case of chattels owned in common.[40] But the grantees under a conveyance by one cotenant, cannot,

1062; Great Falls Co. *v.* Worcester, 15 N. H. 412; Gratz *v.* Land, etc., Imp. Co., 82 Fed. 381, 27 C. C. A. 305, 40 L. R. A. 393. Such a conveyance is not void but passes the conveyed interest of the grantor. McLeran *v.* Benton, 73 Cal. 329, 14 Pac. 879, 2 Am. St. Rep. 814; Omaha, etc., Smelting, etc., Co. *v.* Taber, 13 Colo. 41, 21 Pac. 925, 16 Am. St. Rep. 185, 5 L. R. A. 236; Walker *v.* Sarven, 41 Fla. 210, 25 So. 885; Phipps *v.* Phipps, 47 Kan. 328, 27 Pac. 972; Hamilton *v.* Conine, 28 Md. 635, 92 Am. Dec. 724; Moreland *v.* Strong, 115 Mich. 211, 73 N. W. 140, 69 Am. St. Rep. 553; Fritz *v.* Ramspott, 76 Minn. 489, 79 N. W. 520; Flynn *v.* Herye, 4 Mo. App. 360; Stoddard *v.* Weston, 3 Silv. Sup. (N. Y.) 13, 6 N. Y. Suppl. 34; Coles *v.* Coles, 15 Johns. (N. Y.) 159, 8 Am. Dec. 231; Thompson's Appeal, 101 Pa. St. 225; Harlan *v.* Central Phosphate Co., (Tenn. Ch. App.) 62 S. W. 614; Cotton *v.* Rand, (Tex. Civ. App. 1898) 51 S. W. 55; Chandler *v.* Ricker, 49 Vt. 128; Clymer *v.* Dawkins, 3 How. (U. S.) 674, 11 L. ed. 778; Allen *v.* Anthony, 1 Meriv. 282, 15 Rev. Rep. 113, 35 Eng. Reprint 679; McDearmid *v.* McDearmid, 15 Can. L. J. N. S. 112. And the subsequent grantees of said grantor cannot be heard to complain thereof. Stark *v.* Barrett, 15 Cal. 361; Howard *v.* Bates, 8 Metc. (Mass.) 484. But if the purchaser buys from a tenant in common in possession who is accountable to his cotenants for the income of the common property, the purchaser must account for the income of so much thereof as was productive at the time of the purchase and taking possession, regardless of the fact that it had been rendered productive by his grantee. Hancock *v.* Day, McMull. Eq. (S. C.) 298. The right of the grantee is sufficiently protected by subrogating him to the rights of the grantor on partition as to the interest conveyed. Hunter *v.* Hodgson, (Tex. Civ. App. 1906) 95 S. W. 637. The recording of a mortgage of such an interest does not amount to constructive notice of a claim to exclusive ownership. Davidson *v.* Coon, 125 Ind. 497, 25 N. E. 601, 9 L. R. A. 584.

Recording conveyance.— In the absence of statute to the contrary there is no necessity for recording conveyances of the common estate as between tenants in common. Great Falls Co. *v.* Worster, 15 N. H. 412.

Form of conveyance.— A conveyance by a tenant in common to a stranger must be of the same character as though an estate in severalty were thereby intended to be conveyed; if the intention be to convey a fee, then words of inheritance or perpetuity must be used, unless otherwise provided by statute. Rector *v.* Waugh, 17 Mo. 13, 57 Am. Dec. 251. See also Freeman Coten. § 193.

Conveyance by one out of possession.— If a law be in force forbidding or avoiding conveyances made by one out of possession, it is equally applicable to cotenants as to others; but tenants in common are favored by the presumption that possession of one is possession of all. Freeman Coten. § 192 [*citing* Bird *v.* Bird, 40 Me. 398; Constantine *v.* Van Winkle, 6 Hill (N. Y.) 177].

Purchase by cotenant.— The purchase by one tenant in common of land, of the interest of one of his cotenants therein, with knowledge that said interest has already been sold by a parol sale to another of his cotenants therein, disentitles the said vendee with notice from any interest in such purchased property, at least until after he shall have placed the first vendee thereof *in statu quo*. Haines *v.* McGlone, 44 Ark. 79.

What passes by deed.— An equitable claim for improvements upon the land will not pass by a deed of all the grantors' "right, title, and interest" in and to the land. Curtis *v.* Poland, 66 Tex. 511, 2 S. W. 39. Nor will a cotenant's right of subrogation because of his payment of more than his share of a lien on the entire property thus pass. Oliver *v.* Lansing, 57 Nebr. 352, 77 N. W. 802. Where an attorney in fact conveyed a certain tract of land and subsequently an undivided one-half interest therein was conveyed to him personally, and not as attorney, a subsequent conveyance by him of a portion thereof, as attorney for one of his coöwners, merely passed the interest of his principal, and did not affect his own. Eason *v.* Weeks, (Tex. Civ. App. 1907) 104 S. W. 1070.

A foreclosure of a chattel mortgage of an undivided interest in personal property held by cotenants, acquiesced in by the mortgagor, cannot be attacked by one holding an interest in the property as cotenant. Julian *v.* Yeoman, 25 Okla. 448, 106 Pac. 956, 27 L. R. A. N. S. 618.

38. Horgan *v.* Bickerton, 17 R. I. 483, 23 Atl. 23, 24 Atl. 772.

39. Shepherd *v.* Jernigan, 51 Ark. 275, 10 S. W. 765, 14 Am. St. Rep. 50; Green *v.* Arnold, 11 R. I. 364, 23 Am. Rep. 466; Crocker *v.* Tiffany, 9 R. I. 505; Peterson *v.* Fowler, 73 Tex. 524, 11 S. W. 534.

The sale does not operate as a partition of the common property. Broom *v.* Pearson, (Tex. Civ. App. 1904) 81 S. W. 753.

40. *Arkansas.*— Carle *v.* Wall, (1891) 16 S. W. 293; Titsworth *v.* Frauenthal, 52 Ark. 254, 12 S. W. 498.

Maine.— McArthur *v.* Lane, 15 Me. 245.

Missouri.— Sharp *v.* Benoist, 7 Mo. App. 534.

New York.— Hudson *v.* Swan, 83 N. Y. 552.

Oregon.— Phipps *v.* Taylor, 15 Oreg. 484, 16 Pac. 171.

Texas.— Worsham *v.* Vignal, 5 Tex. Civ. App. 471, 24 S. W. 562.

Vermont.— Sanborn *v.* Morrill, 15 Vt. 700, 40 Am. Dec. 701.

Washington.— Vermont L. & T. Co. *v.* Cardin, 19 Wash. 304, 53 Pac. 164.

by subsequent dealings between themselves, in any way affect the interests of the other cotenants therein, without notice to them,[41] and it has been held that one tenant in common cannot so dispose of his interest in the soil to one person and his interest in the minerals to another person as to prejudice the rights of his cotenants therein.[42] As the purchaser from a cotenant merely takes such cotenant's interest, he takes subject to the equities of the other cotenants,[43] although the rule is held to be otherwise in the absence of notice.[44]

3. Conveyance by Metes and Bounds. One tenant in common cannot, as against and to the prejudice of his cotenants or those claiming under them, devise or convey a part of the common property in severalty by metes and bounds so as to convey any undivided interest in the whole estate, nor can such devise or conveyance be held good as to his cotenants for any portion of the land embraced therein, without a partition; he can only devise or convey, or except from devise or conveyance, an undivided share of his whole interest constituting an aliquot part of the whole estate;[45] nor can he put the purchaser thereof in exclusive

41. Porter *v.* Stone, 70 Miss. 291, 12 So. 208; Roll *v.* Everett, 72 N. J. Eq. 20, 65 Atl. 732.

42. Adam *v.* Briggs Iron Co., 7 Cush. (Mass.) 361; Boston Franklinite Co. *v.* Condit, 19 N. J. Eq. 394.

43. *Arkansas.*— Bowman *v.* Pettit, 68 Ark. 126, 56 S. W. 780.

Georgia.— Turnbull *v.* Foster, 116 Ga. 765, 43 S. E. 42.

Massachusetts.— Marks *v.* Sewall, 120 Mass. 174; Torrey *v.* Cook, 116 Mass. 163; Weld *v.* Oliver, 21 Pick. 559.

Michigan.— Moreland *v.* Strong, 115 Mich. 211, 73 N. W. 140, 69 Am. St. Rep. 553.

Missouri.— Beck *v.* Kallmeyer, 42 Mo. App. 563.

New York.— Matter of Lucy, 4 Misc. 349, 24 N. Y. Suppl. 352.

Texas.— Cotton *v.* Rand, (Civ. App. 1893) 51 S. W. 55.

Utah.— Manti City Sav. Bank *v.* Peterson, 33 Utah 209, 93 Pac. 566, 126 Am. St. Rep. 817.

A grantee of a coparcener takes only an inchoate title to a lot afterward assigned in partition. Flynn *v.* Herye, 4 Mo. App. 360.

If prior to his taking he has a lien created by contract, such lien continues. Hudson *v.* Swan, 7 Abb. N. Cas. (N. Y.) 324 [*reversed* on other grounds in 83 N. Y. 552].

44. Nalle *v.* Thompson, 173 Mo. 595, 73 S. W. 599 (holding that the assignee of a cotenant who purchased the common property at a judicial sale for his own interest only cannot be affected by proceedings between his grantor and his grantor's cotenant for the enforcement of such cotenant's rights as against such grantor, and especially not if such grantee had no notice of the equity of his grantor's cotenant at the time of the grant); Atkinson *v.* Hewett, 63 Wis. 396, 23 N. W. 889).

45. *California.*— Gates *v.* Salmon, 35 Cal. 576, 95 Am. Dec. 139.

Connecticut.— Hartford, etc., Ore Co. *v.* Miller, 41 Conn. 112; Marshall *v.* Trumbull, 28 Conn. 183, 73 Am. Dec. 667; Griswold *v.* Johnson, 5 Conn. 363.

Indiana.— Warthen *v.* Siefert, 139 Ind. 233, 38 N. E. 464.

Maine.— Duncan *v.* Sylvester, 24 Me. 482, 41 Am. Dec. 400.

Maryland.— Carroll *v.* Norwood, 1 Harr. & J. 100.

Massachusetts.—Peabody *v.* Minot, 24 Pick. 329; Blossom *v.* Brightman, 21 Pick. 285; Varnum *v.* Abbot, 12 Mass. 474, 7 Am. Dec. 87; Porter *v.* Hill, 9 Mass. 34, 6 Am. Dec. 22.

Missouri.— Barnhart *v.* Campbell, 50 Mo. 597; McCaul *v.* Kilpatrick, 46 Mo. 434.

New Hampshire.— Whitton *v.* Whitton, 38 N. H. 127, 75 Am. Dec. 163; Great Falls Co. *v.* Worster, 15 N. H. 412 (holding that such a conveyance will not prevent a third person from purchasing the share of the other cotenant, in the same manner as if the conveyance had never been made); Jeffers *v.* Radcliff, 10 N. H. 242.

New York.— Hunt *v.* Crowell, 2 Edm. Sel. Cas. 385.

Ohio.— Dennison *v.* Foster, 9 Ohio 126, 34 Am. Dec. 429.

Texas.— Dorn *v.* Dunham, 24 Tex. 366.

See 45 Cent. Dig. tit. "Tenancy in Common," § 135 *et seq.*

An attempt by a cotenant to parcel out mineral rights in their nature indivisible is voidable as to the other cotenants at their election. Adam *v.* Briggs Iron Co., 7 Cush. (Mass.) 361; Boston Franklinite Co. *v.* Condit, 19 N. J. Eq. 394.

The question as to the effect of a conveyance by metes and bounds usually arises where there is conflict for the exclusive possession of the property or a part thereof between the grantor's cotenants, and the grantee by metes and bounds. Such conveyance may be avoided in so far as it interferes with the non-conveying cotenant's rights. Soutter *v.* Porter, 27 Me. 405; Phillips *v.* Tudor, 10 Gray (Mass.) 78, 69 Am. Dec. 306; Peabody *v.* Minot, 24 Pick. (Mass.) 329; Bartlet *v.* Harlow, 12 Mass. 348, 7 Am. Dec. 76; Great Falls Co. *v.* Worster, 15 N. H. 412.

The leasing of a whole field owned in common by one of the tenants in common therein cannot deprive his cotenants of the right to use the common property, and no trespass will lie for the lawful exercise of the non-

possession of the portion conveyed,[46] and such grantee takes subject to the rights of the remaining cotenants.[47] A conveyance by metes and bounds to a stranger without the knowledge and consent of the grantor's cotenants does not make such stranger a cotenant so as to give him the absolute right to have the portion of the entire tract assigned to him.[48] But such a devise or conveyance is valid between the devisor or grantor, and the devisees or grantees, and those claiming by or under them respectively, although inoperative as to the rights of the devisor's or grantor's cotenants and those claiming by or under them,[49] who alone can avoid it,[50] and that only if it prejudices them,[51] the effect of the conveyance by the tenant in common of his share by metes and bounds being to pass the devisor's or grantor's proportional interest in the part described by the deed; [52]

leasing cotenant's rights in the premises. Harman *v.* Gartman, Harp. (S. C.) 430, 18 Am. Dec. 659.

The court will not presume an allotment of land to the vendee, within specific metes and bounds, in the absence of evidence of a partition. There is no presumption of partition from the mere fact of the sale by metes and bounds of a portion of the common property. Holt *v.* Robertson, McMull. Eq. (S. C.) 475.

Specific amount of timber.— A cotenant's deed, attempting to convey all the sawed timber standing on a described portion of the property, was inoperative as against his cotenant; he being unauthorized to convey by his sole deed an interest in a part of the common property. Lee *v.* Follensby, 83 Vt. 35, 74 Atl. 327.

46. *Connecticut.*— Hinman *v.* Leavenworth, 2 Conn. 244 note.

Indiana.— Mattox *v.* Hightshue, 39 Ind. 95.

Maine.—Staniford *v.* Fullerton, 18 Me. 229.

Texas.— Good *v.* Coombs, 28 Tex. 34; Dorn *v.* Dunham, 24 Tex. 366; Stuart *v.* Baker, 17 Tex. 417.

Wisconsin.— Shepardson *v.* Rowland, 28 Wis. 108.

See 45 Cent. Dig. tit. "Tenancy in Common," § 135 *et seq.*

47. Mora *v.* Murphy, 83 Cal. 12, 23 Pac. 63; Stark *v.* Barrett, 15 Cal. 361.

Equity will protect a devisee or grantee by metes and bounds if it can do so without prejudice to cotenants of the devisor or of the grantor; and it has been held that where the common property is of uniform value and a portion thereof has been conveyed by metes and bounds by warranty deed, equity would require that the land to which another cotenant was entitled should be set off out of the portion of the tract not thus conveyed. Beale *v.* Johnson, 45 Tex. Civ. App. 119, 99 S. W. 1045; Furrh *v.* Winston, 66 Tex. 521, 1 S. W. 527; Wells *v.* Heddenberg, 11 Tex. Civ. App. 3, 30 S. W. 702; McNeil *v.* McDougall, 28 Nova Scotia 296.

Such as the right of partition of the whole lot. Stark *v.* Barrett, 15 Cal. 361.

48. Boggess *v.* Meredith, 16 W. Va. 1.

The conveyance operates as an estoppel as to the conveying cotenant and his privies. Varnum *v.* Abbott, 12 Mass. 474, 7 Am. Dec. 87; McKey *v.* Welch 22 Tex. 390.

49. *California.*— Stark *v.* Barrett, 15 Cal. 361.

Kentucky.—Young *v.* Adams, 14 B. Mon. 127, 58 Am. Dec. 654.

Maine.— Duncan *v.* Sylvester, 24 Me. 482, 41 Am. Dec. 400.

New Hampshire.—Whitton *v.* Whitton, 38 N. H. 127, 75 Am. Dec. 163.

Texas.— March *v.* Huyter, 50 Tex. 243; McKey *v.* Welch, 22 Tex. 390; McAllen *v.* Raphael, 11 Tex. Civ. App. 116, 32 S. W. 449. See also Wade *v.* Boyd, 24 Tex. Civ. App. 492, 60 S. W. 360.

Virginia.— Cox *v.* McMullin, 14 Gratt. 82.

United States.— Lamb *v.* Wakefield, 14 Fed. Cas. No. 8,024, 1 Sawy. 251.

See 45 Cent. Dig. tit. "Tenancy in Common," § 135 *et seq.*

Action for non-delivery.— The owner of an undivided interest in land selling the whole thereof or a part thereof by metes and bounds, without authority, is liable in damages to the vendee for a failure to deliver it. Nevins *v.* Thomas, 80 Tex. 596, 16 S. W. 332.

50. *Connecticut.*— Goodwin *v.* Keney, 49 Conn. 563.

Massachusetts.— Benjamin *v.* American Tel., etc., Co., 196 Mass. 454, 82 N. E. 681; Frost *v.* Courtis, 172 Mass. 401, 52 N. E. 515; Dall *v.* Brown, 5 Cush. 289; Nichols *v.* Smith, 22 Pick. 316.

New Hampshire.— Great Falls Co. *v.* Worster, 15 N. H. 412.

Texas.— Talkin *v.* Anderson, (1892) 19 S. W. 350; Camoron *v.* Thurmond, 56 Tex. 22.

Virginia.—Woods *v.* Early, 95 Va. 307, 28 S. E. 374.

See 45 Cent. Dig. tit. "Tenancy in Common," § 135 *et seq.*

51. Kenoye *v.* Brown, 82 Miss. 607, 35 So. 163, 100 Am. St. Rep. 645; Barnhart *v.* Campbell, 50 Mo. 597; Holcomb *v.* Coryell, 11 N. J. Eq. 548.

A release to such vendee confirms the previous conveyance. Johnson *v.* Stevens, 7 Cush. (Mass.) 431.

Necessity of notice of election to avoid.— There is no necessity on the part of non-consenting cotenants to notify grantee that they elect to avoid such conveyance. Duncan *v.* Sylvester, 24 Me. 482, 41 Am. Dec. 400.

52. *California.*— Mahoney *v.* Middleton, 41 Cal. 41; Stark *v.* Barrett, 15 Cal. 361.

Maryland.— Reinicker *v.* Smith, 2 Harr. & J. 421.

Mississippi.— Kenoye *v.* Brown, 82 Miss. 607, 35 So. 163, 100 Am. St. Rep. 645.

Missouri.— Primm *v.* Walker, 38 Mo. 94.

and to entitle the grantee and those claiming under him to the rights of the grantor in the portion thus conveyed.[53]

C. Actions and Proceedings — 1. In General; Amount of Recovery. As to the recovery by a tenant in common suing for possession of land against a stranger, the authorities are in conflict.[54] It is held in many cases that one tenant in common may recover in ejectment or trespass the entire common property as against a stranger.[55] On the other hand, there are cases that restrict recovery

New York.— Edwards *v.* Bishop, 4 N. Y. 61. *Compare* Hunt *v.* Crowell, 2 Edm. Sel. Cas. 385.

Ohio.— Dennison *v.* Foster, 9 Ohio 126, 34 Am. Dec. 429. *Compare* White *v.* Sayre, 2 Ohio 110, dissenting opinion.

Philippine.— Lopez *v.* Ilustre, 5 Philippine 567.

Tennessee.— Jewett *v.* Stockton, 3 Yerg. 492, 24 Am. Dec. 594.

See 45 Cent. Dig. tit. "Tenancy in Common," § 135.

Compare Steele *v.* Steele, 220 Ill. 318, 77 N. E. 232; Young *v.* Edwards, 33 S. C. 404, 11 S. E. 1066, 26 Am. St. Rep. 689, 10 L. R. A. 55.

53. March *v.* Huyter, 50 Tex. 243; McAllen *v.* Raphael, 11 Tex. Civ. App. 116, 32 S. W. 449. See also Starnes *v.* Quin, 6 Ga. 84.

Upon a subsequent partition the grantee is estopped from claiming interest in any parcel of the common property except in that parcel specifically conveyed, and he cannot take any portion of said parcel not within the metes and bounds described. Kenoye *v.* Brown, 82 Miss. 607, 35 So. 163, 100 Am. St. Rep. 645. See also Hunt *v.* Crowell, 2 Edm. Sel. Cas. (N. Y.) 385; Young *v.* Edwards, 33 S. C. 404, 11 S. E. 1066, 26 Am. St. Rep. 689, 10 L. R. A. 55.

54. See Williams *v.* Coal Creek Min., etc., Co., 115 Tenn. 578, 93 S. W. 572, 112 Am. St. Rep. 878, 6 L. R. A. N. S. 710. And see cases cited *infra*, the following notes.

55. *California.*— Chipman *v.* Hastings, 50 Cal. 310, 19 Am. Rep. 655; Williams *v.* Sutton, 43 Cal. 65; Treat *v.* Reilly, 35 Cal. 129; Rowe *v.* Bacigalluppi, 21 Cal. 633; Mahoney *v.* Van Winkle, 21 Cal. 552; Hart *v.* Robertson, 21 Cal. 346; Touchard *v.* Crow, 20 Cal. 150, 81 Am. Dec. 108; Stark *v.* Barrett, 15 Cal. 361. But see Throckmorton *v.* Burr, 5 Cal. 400.

Colorado.— Field *v.* Tanner, 32 Colo. 278, 75 Pac. 916; Weese *v.* Barker, 7 Colo. 178, 2 Pac. 919.

Connecticut.— Smith *v.* Starkweather, 5 Day 207; Bush *v.* Bradley, 4 Day 298.

Hawaii.— Godfrey *v.* Rowland, 17 Hawaii 577.

Kansas.— Horner *v.* Ellis, 75 Kan. 675, 90 Pac. 275, 121 Am. St. Rep. 446, so held in an action against a defendant holding the common property by a voidable tax deed upon payment of the lien for taxes.

Michigan.— Lamb *v.* Lamb, 139 Mich. 166, 102 N. W. 645, under statute.

Minnesota.— Sherin *v.* Larson, 28 Minn. 523, 11 N. W. 70.

Montana.— Hopkins *v.* Noyes, 4 Mont. 550, 2 Pac. 280, so holding, even though the title of the cotenants not joining as plaintiffs be defective.

Nevada.— Brown *v.* Warren, 16 Nev. 228; Sharon *v.* Davidson, 4 Nev. 416.

New Mexico.—De Bergere *v.* Chaves, (1908) 93 Pac. 762.

North Carolina.— Winbore *v.* Elizabeth City Lumber Co., 130 N. C. 32, 40 S. E. 825. See Morehead *v.* Hall, 126 N. C. 213, 35 S. E. 428 (holding that failure to show the ownership of a moiety of the common property not owned by either of the parties will not disentitle plaintiff from the recovery of his own interest as against a stranger to the title); Gilchrist *v.* Middleton, 107 N. C. 663, 12 S. E. 85; Thames *v.* Jones, 97 N. C. 121, 1 S. E. 692; Lafoon *v.* Shearin, 95 N. C. 391; Yancey *v.* Greenlee, 90 N. C. 317.

North Dakota.— Griswold *v.* Minneapolis, etc., R. Co., 12 N. D. 435, 97 N. W. 538, 102 Am. St. Rep. 572.

South Dakota.— Mather *v.* Dunn, 11 S. D. 196, 76 N. W. 922, 74 Am. St. Rep. 788.

Texas.—Waggoner *v.* Snody, 98 Tex. 512, 85 S. W. 1134 [*reversing* 36 Tex. Civ. App. 514, 82 S. W. 355]; Gray *v.* Kauffman, 82 Tex. 65, 17 S. W. 513; Wright *v.* Dunn, 73 Tex. 293, 11 S. W. 330; Johnson *v.* Schumacher, 72 Tex. 334, 12 S. W. 207; Ney *v.* Mumme, 66 Tex. 268, 17 S. W. 407; Moore *v.* Stewart, (1887) 7 S. W. 771; Contreras *v.* Haynes, 61 Tex. 103; Pilcher *v.* Kirk, 60 Tex. 162; Sowers *v.* Peterson, 59 Tex. 216; Hintze *v.* Krabbenschmidt, (Civ. App. 1897) 44 S. W. 38; Marlin *v.* Kosmyroski, (Civ. App. 1894) 27 S. W. 1042; Bennett *v.* Virginia Ranch, etc., Co., 1 Tex. Civ. App. 321, 21 S. W. 126. But see Boone *v.* Knox, 80 Tex. 642, 16 S. W. 448, 26 Am. St. Rep. 767, holding that where defendant is not a mere trespasser a tenant in common is not entitled to recover against such defendant for other tenants in common not parties.

Vermont.— Bigelow *v.* Rising, 42 Vt. 678; Robinson *v.* Sherwin, 36 Vt. 69; Hibbard *v.* Foster, 24 Vt. 542; Johnson *v.* Tilden, 5 Vt. 426.

West Virginia.—Voss *v.* King, 33 W. Va. 236, 10 S. E. 402.

United States.—Hardy *v.* Johnson, 1 Wall. 371, 17 L. ed. 502; French *v.* Edwards, 9 Fed. Cas. No. 5,098, 5 Sawy. 266, 7 Reporter 68; Le Franc *v.* Richmond, 15 Fed. Cas. No. 8,209, 5 Sawy. 601.

Canada.— Scott *v.* McNutt, 2 Nova Scotia Dec. 118.

See 45 Cent. Dig. tit. "Tenancy in Common," § 147.

But if by agreement between tenants in common one is permitted to have the exclusive use and possession of a part of the land

to the interests of plaintiff only and do not permit recovery by them for themselves and their cotenants who are not made parties plaintiff to the suit.[56] Thus it is held that the recovery of a tenant in common, who, with his cotenant, has been disseized by a stranger, is limited to the interest of such tenant in common, and after recovery he holds in common with the disseizor.[57] Even if the recovery of the whole be permitted it must be in subordination to the rights of possession of cotenants,[58] provided, however, that before the cotenants can successfully claim the right of possession they must pay or tender to their successful fellow their due proportion of the expenses properly incurred for the recovery of the possession for their common benefit.[59] The same rule applies in the case of a judgment in an action of ejectment in a suit between cotenants or coparceners.[60] In actions for damages for injury to property or detention thereof, a tenant in common is entitled to recover only his share of the damages to the whole property,[61] and in a suit for land plaintiff may only recover his proportionate part of the rents.[62] It has been held that a recovery of a tenant in common suing for a conversion of a chattel is limited to his share or interest therein.[63]

which they own together, while the other has such use and possession of other lands so owned, then either may recover for any injury done to that which he has right exclusively to use or possess. Gulf, etc., R. Co. *v.* Wheat, 68 Tex. 133, 3 S. W. 455.

56. *Alabama.*— Stodder *v.* Powell, 1 Stew. 287.

Georgia.— Sanford *v.* Sanford, 58 Ga. 259, code provision.

Kentucky.— Russell *v.* Mark, 3 Metc. 37; Daniel *v.* Bratton, 1 Dana 209; Frazier *v.* Spear, 2 Bibb 385. But see King *v.* Bullock, 9 Dana 41.

Massachusetts.— Butrick *v.* Tilton, 141 Mass. 93, 6 N. E. 563.

Missouri.— Baber *v.* Henderson, 156 Mo. 566, 57 S. W. 719, 79 Am. St. Rep. 540. See also State *v.* Staed, 64 Mo. App. 453.

New York.—Hasbrouck *v.* Bunce, 3 Thomps. & C. 309 [*reversed* on other grounds in 62 N. Y. 475]. But see Sparks *v.* Leavy, 1 Rob. 530, 19 Abb. Pr. 364.

Pennsylvania.— Mobley *v.* Bruner, 59 Pa. St. 481, 98 Am. Dec. 360; Dawson *v.* Mills, 32 Pa. St. 302; Agnew *v.* Johnson, 17 Pa. St. 373, 55 Am. Dec. 565.

South Carolina.— Bannister *v.* Bull, 16 S. C. 220 (a case where the owners of one third of the common property refused to join as plaintiffs and were joined as defendants); Watson *v.* Hill, 1 McCord 161; Perry *v.* Middleton, 2 Bay 462; Perry *v.* Walker, 2 Bay 461; McFadden *v.* Haley, 2 Bay 457, 1 Am. Dec. 653.

Tennessee.—Williams *v.* Coal Creek Min., etc., Co., 115 Tenn. 578, 93 S. W. 572, 112 Am. St. Rep. 878, 6 L. R. A. N. S. 710; Hughes *v.* Woodard, (Ch. App. 1900) 63 S. W. 191.

Virginia.—Marshall *v.* Palmer, 91 Va. 344, 21 S. E. 672, 50 Am. St. Rep. 838. But see Allen *v.* Gibson, 4 Rand. 468.

United States.—Whittle *v.* Artis, 55 Fed. 919; Stevens *v.* Ruggles, 23 Fed. Cas. No. 13,408, 5 Mason 221.

See 45 Cent. Dig. tit. "Tenancy in Common," § 154.

Where a tenant in common recovers in ejectment against disseizors, he can only hold for himself and not for the benefit of his cotenants. Gilman *v.* Stetson, 18 Me. 428.

Where a compromise verdict is rendered in favor of one cotenant, amounting to less than he claims as his share, he does not take the land in trust for the benefit of the vendees at a sheriff's sale of the share of a bankrupt co-plaintiff claiming cotenancy who took no interest in the proceedings. Mayes *v.* Rust, 42 Tex. Civ. App. 423, 94 S. W. 110.

57. Baber *v.* Henderson, 156 Mo. 566, 57 S. W. 719, 79 Am. St. Rep. 540.

58. *California.*— Stark *v.* Barrett, 15 Cal. 361.

New Mexico.— De Bergere *v.* Chaves, 93 Pac. 762.

Texas.— Keith *v.* Keith, 39 Tex. Civ. App. 363, 87 S. W. 384; Marlin *v.* Kosmyroski, (Civ. App. 1894) 27 S. W. 1042.

United States.— Hardy *v.* Johnson, 1 Wall. 371, 17 L. ed. 502.

Canada.— Scott *v.* McNutt, 2 Nova Scotia Dec. 118.

59. Gregg *v.* Patterson, 9 Watts & S. (Pa.) 197.

60. Robertson *v.* Robertson, 2 B. Mon. (Ky.) 235, 38 Am. Dec. 148; Jones *v.* De Lassus, 84 Mo. 541.

61. *Alabama.*— Birmingham R., etc., Co. *v.* Oden, 146 Ala. 495, 41 So. 129; Lowery *v.* Rowland, 104 Ala. 420, 16 So. 88.

California.— Muller *v.* Boggs, 25 Cal. 175; Clark *v.* Huber, 20 Cal. 196.

Mississippi.— Haley *v.* Taylor, 77 Miss. 867, 28 So. 752, 78 Am. St. Rep. 549.

Missouri.— Eastin *v.* Joyce, 85 Mo. App. 433.

Texas.— Naugher *v.* Patterson, 9 Tex. Civ. App. 168, 28 S. W. 582.

Canada.— Brittain *v.* Parker, 12 Nova Scotia 589.

62. Muller *v.* Boggs, 25 Cal. 175; Logan *v.* Robertson, (Tex. Civ. App. 1904) 83 S. W. 395.

63. Fielder *v.* Childs, 73 Ala. 567; Rolette *v.* Parker, 1 Ill. 350; Bush *v.* Gamble, 127 Pa. St. 43, 17 Atl. 865; Brittain *v.* Parker, 12 Nova Scotia 589.

Statute allowing punitive damages see Richardson *v.* Richardson, 64 Me. 62.

2. Parties — a. Joinder of Plaintiffs — (i) *Actions in Which Cotenants Need Not Join.* A tenant in common may maintain an action without the joinder of his cotenants where such action is for the protection of his several interest,[64] and where his cotenant is wrongfully maintaining an adverse position or is not interested in the recovery,[65] and where a statute provides that tenants in common, or any number less than all, may jointly or severally commence any action, it is not necessary to make such tenants in common parties plaintiff on whose behalf no recovery is or should be sought.[66] Even where the rule is that an action should be jointly brought by the cotenants, the tendency of the American courts has been to permit a separate action in the absence of a plea

64. *Alabama.*— McGhee *v.* Alexander, 104 Ala. 116, 16 So. 148 (for enforcement of vendor's lien by vendor of his own undivided interest); Tankersley *v.* Childers, 23 Ala. 781.

California.— Ross *v.* Heintzen, 36 Cal. 313.

Connecticut.— Barnum *v.* Landon, 25 Conn. 137; Central Mfg. Co. *v.* Hartshorne, 3 Conn. 199.

Indiana.— Bowser *v.* Cox, 3 Ind. App. 309, 29 N E. 616, 50 Am. St. Rep. 274, proportion of rent.

Iowa.— Arthur *v.* Chicago, etc., R. Co., 61 Iowa 648, 17 N. W. 24, injury to property divisible on demand.

Kentucky.— Pope *v.* Brassfield, 110 Ky. 128, 61 S. W. 5, 22 Ky. L. Rep. 1613. See also Gaines *v.* Buford, 1 Dana 481; Doe *v.* Botts, 4 Bibb 420; Innis *v.* Crawford, 4 Bibb 241.

Maine.— Longfellow *v.* Quimby, 29 Me. 196, 48 Am. Dec. 525, trespass *quare clausum.*

Minnesota.— Peck *v.* McLean, 36 Minn. 228, 30 N. W. 759, 1 Am. St. Rep. 665.

New Hampshire.— Blake *v.* Milliken, 14 N. H. 213; Chesley *v.* Thompson, 3 N. H. 9, 14 Am. Dec. 324.

New York.— Stall *v.* Wilbur, 77 N. Y. 158 (refusal to deliver property divisible on demand, or conversion thereof); Jackson *v.* Moore, 94 N. Y. App. Div. 504, 87 N. Y. Suppl. 1101; Soule *v.* Mogg, 35 Hun 79 (several interest in check); Gilbert *v.* Dickerson, 7 Wend. 449, 22 Am. Dec. 592.

Pennsylvania.— De Coursey *v.* Guarantee Trust, etc., Co., 81 Pa. St. 217 (distraint for several share of rent); Cook *v.* Brightly, 46 Pa. St. 439 (several portion of ground-rent); Agnew *v.* Johnson, 17 Pa. St. 373, 55 Am. Dec. 565.

Tennessee.— Johnson *v.* Harris, 5 Hayw. 113.

Texas.— Gulf, etc., R. Co. *v.* Wheat, 68 Tex. 133, 3 S. W. 455 (agreement for exclusive use by one cotenant); Allday *v.* Whitaker, 66 Tex. 669, 1 S. W. 794; Cotton *v.* Coit, (Civ. App. 1895) 30 S. W. 281 (for determination of plaintiff's interest, and an accounting); Smith *v.* Powell, 5 Tex. Civ. App. 373, 23 S. W. 1109.

Utah.— Boley *v.* Allred, 25 Utah 402, 71 Pac. 869.

Washington.— See Vermont L. & T. Co. *v.* Cardin, 19 Wash. 304, 53 Pac. 164.

Wyoming.— Gilland *v.* Union Pac. R. Co., 6 Wyo. 185, 43 Pac. 508.

United States.— Hall *v.* Leigh, 8 Cranch 50, 3 L. ed. 484; Jewett *v.* Cunard, 13 Fed. Cas. No. 7,310, 3 Woodb. & M. 277.

England.— Roberts *v.* Holland, [1893] 1 Q. B. 665, 62 L. J. Q. B. 621, 5 Reports 370, 41 Wkly. Rep. 494.

See 45 Cent. Dig. tit. "Tenancy in Common," § 143 *et seq.*

Trespass to try title to respective interest see Hines *v.* Trantham, 27 Ala. 359; Johnson *v.* Schumacher, 72 Tex. 334, 12 S. W. 207.

Separate demise of cotenant see Jackson *v.* Sample, 1 Johns. Cas. (N. Y.) 231; Hayden *v.* Patterson, 51 Pa. St. 261.

Any one or more of several heirs at law entitled as tenants in common to a reversionary estate in land may sue for injuries thereto, but the recovery will be limited to the proportion of damages those suing are entitled to. Lowery *v.* Rowland, 104 Ala. 420, 16 So. 88; Scott *v.* McNutt, 2 Nova Scotia Dec. 118.

65. *Alabama.*— Milner *v.* Milner, 101 Ala. 599, 14 So. 373.

Georgia.— King *v.* Neel, 98 Ga. 438, 25 S. E. 513, 58 Am. St. Rep. 311; Starnes *v.* Quin, 6 Ga. 84.

Iowa.— Conover *v.* Earl, 26 Iowa 167.

Maine.— Strickland *v.* Parker, 54 Me. 263; Lothrop *v.* Arnold, 25 Me. 136, 43 Am. Dec. 256.

Massachusetts.— Goell *v.* Morse, 126 Mass. 480; Weld *v.* Oliver, 21 Pick. 559.

Michigan.—Wight *v.* Roethlisberger, 116 Mich. 241, 74 N. W. 474.

New Hampshire.— Lyman *v.* Boston, etc., R. Co., 58 N. H. 384; White *v.* Brooks, 43 N. H. 402.

New York.— Jackson *v.* Moore, 94 N. Y. App. Div. 504, 87 N. Y. Suppl. 1101; Griffin *v.* Clark, 33 Barb. 46.

Ohio.— Morgan *v.* Hudnell, 52 Ohio St. 552, 40 N. E. 716, 49 Am. St. Rep. 741, 27 L. R. A. 862.

Pennsylvania.—Agnew *v.* Johnson, 17 Pa. St. 373, 55 Am. Dec. 565.

South Carolina.— Harrelson *v.* Sarvis, 39 S. C. 14, 17 S. E. 368.

A tenant in common permitting a conversion of the common property is not a necessary plaintiff in a suit by his cotenants to recover damages for the conversion. Sullivan *v.* Sherry, 111 Wis. 476, 87 N. W. 471, 87 Am. St. Rep. 890.

66. Karren *v.* Rainey, 30 Utah 7, 83 Pac. 333. See also Morehead *v.* Hall, 126 N. C. 213, 35 S. E. 428.

in abatement for the non-joinder of the cotenants; although, if all of the cotenants were not joined as parties plaintiff, such non-joinder might be taken advantage of in the measure of damages.[67] All of the cotenants need not join for the recovery of the common property as against a stranger,[68] and tenants in common may maintain separate actions of ejectment to recover their respective portions.[69] Where a demise is by tenants in common or one of their number duly authorized to manage and care for the property and to collect the rents, a tenant in common may sue for the whole rents, without the joinder of his cotenants; [70] but all desiring benefit of a recovery must be made parties plaintiff.[71] If a tenant in common, in the absence of statute or agreement to the contrary, recovers damages for injury

67. Starnes *v.* Quin, 6 Ga. 84; Frazier *v.* Spear, 2 Bibb (Ky.) 385; Eastin *v.* Joyce, 85 Mo. App. 433; Cummings *v.* Masterson, 42 Tex. Civ. App. 549, 93 S. W. 500; Logan *v.* Robertson, (Tex. Civ. App. 1904) 83 S. W. 395.

68. *Alabama.*—Lecroix *v.* Malone, 157 Ala. 434, 47 So. 725; Stodder *v.* Powell, 1 Stew. 287.

Alaska.— Binswanger *v.* Henninger, 1 Alaska 509.

Maine.— Jewett *v.* Whitney, 43 Me. 242; Boobier *v.* Boobier, 39 Me. 406.

Massachusetts.— Dewey *v.* Brown, 2 Pick. 387.

New Hampshire.—Hyde *v.* Noble, 13 N. H. 494, 38 Am. Dec. 508.

Pennsylvania.— Shamburg *v.* Moorehead, 4 Brewst. 92.

South Dakota.— Mather *v.* Dunn, 11 S. D. 196, 76 N. W. 922, 74 Am. St. Rep. 788.

Texas.— Mitchell *v.* Mitchell, 80 Tex. 101, 15 S. W. 705; Harber *v.* Dyches, (1890) 14 S. W. 580; Bounds *v.* Little, 75 Tex. 316, 12 S. W. 1109; Carley *v.* Parton, 75 Tex. 98, 12 S. W. 950; Pilcher *v.* Kirk, 55 Tex. 208; May *v.* Slade, 24 Tex. 205; Grassmeyer *v.* Beeson, 18 Tex. 753, 70 Am. Dec. 309; Croft *v.* Rains, 10 Tex. 520; Kirby *v.* Blake, (Civ. App. 1909) 115 S. W. 674; Caruthers *v.* Hadley, (Civ. App. 1908) 115 S. W. 80; Keith *v.* Keith, 39 Tex. Civ. App. 363, 87 S. W. 384; Hintze *v.* Krabbenschmidt, (Civ. App. 1897) 44 S. W. 38.

Vermont.— Bigelow *v.* Rising, 42 Vt. 678.

West Virginia.—Voss *v.* King, 33 W. Va. 236, 10 S. E. 402.

One devisee can sue an adverse occupant of the common property in the names of himself and his cotenants therein. Young *v.* Pate, 3 Dana (Ky.) 306.

69. *California.*— Covillaud *v.* Tanner, 7 Cal. 38.

Connecticut. — Robinson *v.* Roberts, 31 Conn. 145.

Georgia.— Sanford *v.* Sanford, 58 Ga. 259.

Kentucky.—Craig *v.* Taylor, 6 B. Mon. 457.

North Carolina.— Morehead *v.* Hall, 126 N. C. 213, 35 S. E. 428.

Tennessee.— Hammett *v.* Blount, 1 Swan 385.

See 45 Cent. Dig. tit. "Tenancy in Common," § 147.

In the event of a sale of the common property by one cotenant and delivery of possession to the vendee, and refusal by him to permit the other cotenant to exercise his rights therein, the cotenant so excluded may either bring ejectment against said vendee or waive the tort, affirm the sale, and bring an action of assumpsit against said vendor. Murley *v.* Ennis, 2 Colo. 300.

Mines and minerals.— Under proper circumstances ejectment may be maintained against one excluding the coöwner of a mine or well from possession. Hebrard *v.* Jefferson Gold, etc., Min. Co., 33 Cal. 290; Muller *v.* Boggs, 25 Cal. 175; Rowe *v.* Bacigalluppi, 21 Cal. 633; Mahoney *v.* Van Winkle, 21 Cal. 552; Hart *v.* Robertson, 21 Cal. 346; Clark *v.* Huber, 20 Cal. 196; Touchard *v.* Crow, 20 Cal. 150, 81 Am. Dec. 108; Stark *v.* Barrett, 15 Cal. 361; Waring *v.* Crow, 11 Cal. 366; Smith *v.* Starkweather, 5 Day (Conn.) 207; Bush *v.* Bradley, 4 Day (Conn.) 298; Bullion Min. Co. *v.* Crœsus Gold, etc., Min. Co., 2 Nev. 168, 90 Am. Dec. 526; Hardy *v.* Johnson, 1 Wall. (U. S.) 371, 17 L. ed. 502. But a tenant in common cannot dispossess one in possession under his cotenant, except possibly after notice or other act terminating the cotenancy or the leave or license. Ord *v.* Chester, 18 Cal. 77.

Each tenant in common is entitled to maintain ejectment according to his own capacity, regardless of the disabilities of their cotenants. Harrelson *v.* Sarvis, 39 S. C. 14, 17 S. E. 368; McFarland *v.* Stone, 17 Vt. 165, 44 Am. Dec. 325; Merryman *v.* Hoover, 107 Va. 485, 59 S. E. 483.

One tenant becoming sole owner.—Where by assignment of the interest of a cotenant one of the tenants in common becomes the sole owner of leased property, such assignee may sue in his own name under a statute to recover possession by summary proceedings. De Coursey *v.* Guarantee Trust, etc., Co., 81 Pa. St. 217.

70. Fargo *v.* Owen, 79 Hun (N. Y.) 181, 29 N. Y. Suppl. 611; Griffin *v.* Clark, 33 Barb. (N. Y.) 46.

The lessee of a part of the coöwners is liable for rent on a contract to the survivors of a common owner, even if he did not execute the lease. Codman *v.* Hall, 9 Allen (Mass.) 335.

71. Lee Chuck *v.* Quan Wo Chong, 91 Cal. 593, 28 Pac. 45; Presbrey *v.* Presbrey, 13 Allen (Mass.) 281; Jones *v.* De Coursey, 12 N. Y. App. Div. 164, 42 N. Y. Suppl. 578 [*affirmed* in 161 N. Y. 627, 55 N. E. 1096]; Keith *v.* Keith, 39 Tex. Civ. App. 363, 87 S. W. 384.

to the entire estate, such recovery inures to the benefit of all of the cotenants therein, respectively, and an accounting therefor may be compelled.[72] But a judgment in favor of a tenant in common does not prevent his cotenant from recovering from the trespasser the damages he has sustained by such trespass.[73]

(II) *Actions in Which Joinder Is Necessary.* It is held that tenants in common should join in all actions for injuries to the common estate, whether *ex contractu* or *ex delicto*;[74] and so as to an action of assumpsit or for the recovery of a purchase-price of the common property, upon the waiver of a tort;[75] and a suit for the use and occupation of the common land, to recover rent, must be by the tenants in common jointly and not separately,[76] as must be also an action to recover the surplus in the hands of the mortgagee, after foreclosure by him of the whole common property under a power;[77] or for the recovery of an obligation due to the tenants in common jointly, unless such of them as are not made parties plaintiff have relinquished their interest in such obligation,[78] and the parties interested must join in an action by coparceners before a severance of their estate

72. Becnel *v.* Waguespac, 40 La. Ann. 109, 3 So. 536; Bigelow *v.* Rising, 42 Vt. 678.

73. Gillum *v.* St. Louis, etc., R. Co., 4 Tex. Civ. App. 622, 23 S. W. 716.

74. *Georgia.*— Carmichael *v.* Jordon, 131 Ga. 514, 62 S. E. 810.

Maine.— Lothrop *v.* Arnold, 25 Me. 136, 43 Am. Dec. 256; Haskell *v.* Jones, 24 Me. 222; Bradley *v.* Boyton, 22 Me. 287, 39 Am. Dec. 582.

Massachusetts.— Gilmore *v.* Wilbur, 12 Pick. 120, 22 Am. Dec. 410; May *v.* Parker, 12 Pick. 34, 22 Am. Dec. 393; Merrill *v.* Berkshire, 11 Pick. 269; Daniels *v.* Daniels, 7 Mass. 135.

Mississippi.—Armstrong *v.* Cannady, (1903) 35 So. 138; Haley *v.* Taylor, 77 Miss. 867, 28 So. 752, 78 Am. St. Rep. 549.

Missouri.— Lane *v.* Dobyns, 11 Mo. 105; Smoot *v.* Wathen, 8 Mo. 522; Miller *v.* Crigler, 83 Mo. App. 395; State *v.* Staed, 64 Mo. App. 453.

New Hampshire.—White *v.* Brooks, 43 N. H. 402.

New York.— De Puy *v.* Strong, 37 N. Y. 372, 3 Keyes 603, 4 Transcr. App. 239, 4 Abb. Pr. N. S. 340; Jackson *v.* Moore, 94 N. Y. App. Div. 504, 87 N. Y. Suppl. 1101; Hill *v.* Gibbs, 5 Hill 56; Low *v.* Mumford, 14 Johns. 426, 7 Am. Dec. 469.

North Carolina.— Cain *v.* Wright, 50 N. C. 282, 72 Am. Dec. 551.

Ohio.— Morgan *v.* Hudnell, 52 Ohio St. 552, 40 N. E. 716, 49 Am. St. Rep. 741, 27 L. R. A. 862.

Texas.— Texas, etc., R. Co. *v.* Smith, 35 Tex. Civ. App. 351, 80 S. W. 247; Galveston, etc., R. Co. *v.* Stockton, 15 Tex. Civ. App. 145, 38 S. W. 647; Naugher *v.* Patterson, 9 Tex. Civ. App. 168, 28 S. W. 582.

Wisconsin.— Tipping *v.* Robbins, 71 Wis. 507, 37 N. W. 427; Earll *v.* Stumpf, 56 Wis. 50, 13 N. W. 701.

See 45 Cent. Dig. tit. "Tenancy in Common," § 146.

Nuisance see Tucker *v.* Campbell, 36 Me. 346; Low *v.* Munford, 14 Johns. (N. Y.) 426, 7 Am. Dec. 469.

Tort in the nature of waste see Bullock *v.* Hayward, 10 Allen (Mass.) 460.

Injuries to personalty see State *v.* True, 25 Mo. App. 451; Dubois *v.* Glaub, 52 Pa. St. 238.

Trespass quare clausum see Gent *v.* Lynch, 23 Md. 58, 87 Am. Dec. 558; Austin *v.* Hall, 13 Johns. (N. Y.) 286, 7 Am. Dec. 376; Winters *v.* McGhee, 3 Sneed (Tenn.) 128; Rowland *v.* Murphy, 66 Tex. 534, 1 S. W. 658; May *v.* Slade, 24 Tex. 205; Esson *v.* Mayberry, 1 Nova Scotia 186.

Cutting timber see Bradley *v.* Boyton, 22 Me. 287, 39 Am. Dec. 582; Armstrong *v.* Canaday, (Miss. 1903) 35 So. 138; Haley *v.* Taylor, 77 Miss. 867, 28 So. 752, 78 Am. St. Rep. 549; Blake *v.* Milliken, 14 N. H. 213.

The common-law rule of joinder in assumpsit may be abrogated by statute. Bucknam *v.* Brett, 35 Barb. (N. Y.) 596.

But persons whose rights are subordinate to those of plaintiffs are not necessarily parties. Spanish Fork *v.* Hopper, 7 Utah 235, 26 Pac. 293.

A defense against one of the cotenants is good as against all of them, if an injury to the common estate is a joint one. Lowery *v.* Rowland, 104 Ala. 420, 16 So. 88.

75. Gilmore *v.* Wilbur, 12 Pick. (Mass.) 120, 22 Am. Dec. 410; Putnam *v.* Wise, 1 Hill (N. Y.) 234, 37 Am. Dec. 309; Irwin *v.* Brown, 35 Pa. St. 331.

76. Dorsett *v.* Gray, 98 Ind. 273; Webb *v.* Conn, 1 Litt. (Ky.) 82, 13 Am. Dec. 225; Blanton *v.* Vanzant, 2 Swan (Tenn.) 276; Doe *v.* Errington, 1 A. & E. 750, 3 L. J. K. B. 215, 3 N. & M. 646, 28 E. C. L. 349, 110 Eng. Reprint 1394; Midgley *v.* Lovelace, Carth. 289, 90 Eng. Reprint 771; Wallace *v.* McLaren, 1 M. & R. 516, 31 Rev. Rep. 334, 17 E. C. L. 685; Burne *v.* Cambridge, 1 M. & Rob. 539.

But where all of the cotenants excepting one died, it has been held that the action of assumpsit for the use and occupation of the common property survived to the survivor. Central Mfg. Co. *v.* Hartshorne, 3 Conn. 199.

77. Halliday *v.* Manton, 29 R. I. 205, 69 Atl. 847; Clapp *v.* Pawtucket Sav. Inst., 15 R. I. 489, 8 Atl. 697, 2 Am. St. Rep. 915.

78. Suydam *v.* Combes, 15 N. J. L. 133; Coster *v.* New York, etc., R. Co., 6 Duer (N. Y.) 43; McGrady *v.* McRae, 1 Tex. App. Civ. Cas. § 1036.

upon a warranty to the ancestor.[79] Tenants in common are not united in interest within the meaning of a statute requiring such persons to join in an action for the recovery of property.[80] The owner of an undivided interest in property cannot sue in replevin to recover possession thereof. All the owners must be joined.[81] The failure to prove that plaintiffs are the sole tenants in common of the premises in an action which must be brought jointly precludes recovery in the absence of statute to the contrary.[82]

(III) *ACTIONS IN WHICH JOINDER IS PERMISSIVE.* Tenants in common may join in a suit for the recovery of the common property,[83] in an action of waste,[84] for a nuisance,[85] for trespass or an injunction where so provided by statute,[86] and for a restraining order against execution in ejectment, where they are entitled to repayment for improvements, even though all of them were not parties defendant in the ejectment suit.[87] They may join in an action for an injury to realty or personalty even if each of them is in separate possession of separate parts of the common property,[88] in covenant or assumpsit for money had and received, to recover rents or share of income,[89] or in distraint for rent,[90] or for conversion of the common property.[91]

(IV) *ACTIONS WHICH COTENANTS CANNOT MAINTAIN JOINTLY.* As the interest of the tenants in common are several and not joint they cannot, at the common law, jointly maintain a real action in relation to the entire common property; but they must sever, in the absence of statute to the contrary.[92] The

Especially after a plea in abatement. Gilbert *v.* Dickerson, 7 Wend. (N. Y.) 449, 22 Am. Dec. 592; Goodspeed *v.* Wasatch Silver Lead Works, 2 Utah 263.

79. Tapscott *v.* Williams, 10 Ohio 442, holding that the estate of coparceners differs in some respects from that of tenants in common, so that in many cases the rules applicable to joint tenancies as contra-distinguished from tenancies in common prevail.

80. Mather *v.* Dunn, 11 S. D. 196, 76 N. W. 922, 74 Am. St. Rep. 788.

81. McCabe *v.* Black River Transp. Co., 131 Mo. App. 531, 110 S. W. 606.

Replevin for grain raised by the tenants in common cannot be maintained by one of them as against third persons. Carle *v.* Wall, (Ark. 1891) 16 S. W. 293; Titsworth *v.* Frauenthal, 52 Ark. 254, 12 S. W. 498; McArthur *v.* Lane, 15 Me. 245; Vermont L. & T. Co. *v.* Cardin, 19 Wash. 304, 53 Pac. 164.

82. Texas, etc., R. Co. *v.* Smith, 35 Tex. Civ. App. 351, 80 S. W. 247.

83. *California.*— Goller *v.* Fett, 30 Cal. 481.

District of Columbia.—Wheat *v.* Morris, 21 D. C. 11.

Illinois.—West Chicago Park Com'rs *v.* Coleman, 108 Ill. 591.

Mississippi.— Corbin *v.* Cannon, 31 Miss. 570.

Nevada.—Alford *v.* Dewin, 1 Nev. 207.

New Mexico.— Neher *v.* Armijo, 9 N. M. 325, 54 Pac. 236.

United States.— Hicks *v.* Rogers, 4 Cranch 165, 2 L. ed. 583.

But if the action be speculative merely, it has been held that one tenant in common cannot maintain an action of trespass to try title for the benefit of all. Cromwell *v.* Holliday, 34 Tex. 463.

84. Greenly *v.* Hall, 3 Harr. (Del.) 9.

85. Parke *v.* Kilham, 8 Cal. 77, 68 Am. Dec. 310, diversion of water.

86. Wagoner *v.* Silva, 139 Cal. 559, 73 Pac. 433; Smith *v.* Stearns Rancho Co., 129 Cal. 58, 61 Pac. 662.

87. Russell *v.* Defrance, 39 Mo. 506.

88. Louisville, etc., R. Co. *v.* Hart, 119 Ind. 273, 21 N. E. 753, 4 L. R. A. 549; Ramsay *v.* Brown, (Pa.) 17 Atl. 207; Johnson *v.* Goodwin, 27 Vt. 288.

89. Price *v.* Pickett, 21 Ala. 741; Kidwell *v.* Kidwell, 84 Ind. 224.

Heirs.—Although the heirs may sue jointly or severally, less than the whole number of them cannot sue jointly. Kimball *v.* Sumner, 62 Me. 305; Blake *v.* Milliken, 14 N. H. 213.

90. Jones *v.* Gundrim, 3 Watts & S. (Pa.) 531.

91. Blake *v.* Milliken 14 N. H. 213; Steele *v.* McGill, 172 Pa. St. 100, 33 Atl. 146; Sullivan *v.* Sherry, 111 Wis. 476, 87 N. W. 471, 87 Am. St. Rep. 890; Welch *v.* Sackett, 12 Wis. 243.

Where the common property has been mortgaged to secure a debt of one of the cotenants on his promise of reimbursement to his cotenants for any consequent loss, and the mortgage has been foreclosed, a joint action was maintained by said cotenants against the one in default. Steele *v.* McGill, 172 Pa. St. 100, 33 Atl. 146.

Tenants in common may support a joint action against an administrator who has wrongfully received rents, profits, and crops from the common property. Kidwell *v.* Kidwell, 84 Ind. 224.

92. *California.*— Throckmorton *v.* Burr, 5 Cal. 400.

Kentucky.— Briscoe *v.* McGee, 2 J. J. Marsh. 370.

Massachusetts.— Rehoboth *v.* Hunt, 1 Pick. 224.

rule is the same in actions of account, unless parties plaintiff are partners;[93] in actions of assumpsit, brought under statutes, in the nature of account;[94] in actions for fraud in the sale of property;[95] and so as to an action to set aside separate deeds made at different times, of the respective interests, to a common vendee.[96] At common law they could not join in ejectment;[97] but this rule has been changed in many states, sometimes by statute and sometimes by judicial decisions.[98]

b. Defendant. In actions relating to cotenants, all parties necessary to the determination of an issue should be made either parties plaintiff or parties defendant.[99] But where there is a purchase of property in common, each purchaser is liable only for his share of the purchase-price and he should not be sued jointly with the purchaser of any other share or interest in said property, nor should a judgment go against him for the unpaid purchase-money of such other share.[1] An agreement by tenants in common for the performance of services in relation to the common property being joint, the liability is joint; and therefore all of the tenants in common should be made parties defendant;[2] and where a tort has been committed by one tenant in common, for himself and as agent for his cotenants, within the scope of his agency, all of the said cotenants are liable and may be made parties defendant,[3] and in an action sounding in tort either all or any of the tort-feasors may be sued.[4] Where a statute provides that tenants in common, or any number less than all, may jointly or severally defend any

New Hampshire.— Stevenson *v.* Cofferin, 20 N. H. 150; Rand *v.* Dodge, 12 N. H. 67.

New York.— Decker *v.* Livingston, 15 Johns. 479.

Three heirs cannot sue jointly if there be four of them. Kimball *v.* Sumner, 62 Me. 305.

93. McPherson *v.* McPherson, 33 N. C. 391, 53 Am. Dec. 416; McCreary *v.* Ross, 7 Watts (Pa.) 483; Cotton *v.* Coit, (Tex. Civ. App. 1895) 30 S. W. 281.

94. Mooers *v.* Bunker, 29 N. H. 420.

95. Baker *v.* Jewell, 6 Mass. 460, 4 Am. Dec. 162.

96. Jeffers *v.* Forbes, 28 Kan. 174.

97. De Johnson *v.* Sepulbeda, 5 Cal. 149; Hillhouse *v.* Mix, 1 Root (Conn.) 246, 1 Am. Dec. 41; Doe *v.* Buford, 1 Dana (Ky.) 481; Mantle *v.* Wollington, Cro. Jac. 166, 79 Eng. Reprint 145.

98. See the statutes of the several states. And see Wheat *v.* Morris, 21 D. C. 11; Swett *v.* Patrick, 11 Me. 179; Corbin *v.* Cannon, 31 Miss. 570; Gray *v.* Givens, 26 Mo. 291; Poole *v.* Fleeger, 11 Pet. (U. S.) 185, 9 L. ed. 680, 955.

Actions for the recovery of mining claims may be maintained by the tenants in common severally or jointly, even though their undivided interests have been acquired at different times. Binswanger *v.* Henninger, 1 Alaska 509; Goller *v.* Fett, 30 Cal. 481. The amount due to each cotenant for the working of the common property is a several debt due to himself alone. Hall *v.* Fisher, 20 Barb. (N. Y.) 441.

99. *Connecticut.*— Barnum *v.* Landon, 25 Conn. 137.

Kentucky.—Venable *v.* Beauchamp, 3 Dana 321, 28 Am. Dec. 74.

Missouri.— Nalle *v.* Thompson, 173 Mo. 595, 73 S. W. 599.

New York.— Coster *v.* New York, etc., R. Co., 6 Duer 43.

England.— Fallowes *v.* Williamson, 11 Ves. Jr. 306, 32 Eng. Reprint 1106. And see cases cited *infra*, the following notes.

The mortgagee of one tenant in common is a necessary party in a suit for an accounting between the cotenants. Howard *v.* Throckmorton, 59 Cal. 79.

One who has been a tenant in common but has divested himself of his title therein is not a proper party defendant in an ordinary suit in relation thereto. Lewis *v.* Night, 3 Litt. (Ky.) 223; Peterson *v.* Fowler, 73 Tex. 524, 11 S. W. 534. See Barnum *v.* Landon, 25 Conn. 137.

Accounting.— In an action of accounting only such tenant in common as has received more than his share of the profits is a proper party defendant; if any of the tenants in common be partners, such partnership may be a proper party defendant; usually each tenant in common resisting an accounting should be made a separate party defendant in a separate suit. McPherson *v.* McPherson, 33 N. C. 391, 53 Am. Dec. 416.

1. Lallande *v.* Wentz, 18 La. Ann. 289.

2. Matter of Robinson, 40 N. Y. App. Div. 23, 57 N. Y. Suppl. 502.

3. Elliott *v.* McKay, 49 N. C. 59.

Nuisance.— Ordinarily the use of the common property, so as to create a nuisance, is not within the power of any cotenant so as to bind the others in damages for such nuisance; and therefore liability for such nuisance ordinarily attaches only to the actual tort-feasor. Simpson *v.* Seavey, 8 Me. 138, 22 Am. Dec. 228.

4. Low *v.* Mumford, 14 Johns. (N. Y.) 426, 7 Am. Dec. 469.

Negligence.—While it is ordinarily the rule that tenants in common should all be made defendants in an action for negligence respecting the premises owned by them, yet it is not necessary nor even proper to do so where the negligence complained of is the act of one

action it is not necessary to make such tenants in common parties defendant against whom no remedy is sought;[5] and it seems that, although the general rule is that a tenant in common cannot maintain an action of trespass in respect to the common land he may separately defend the position and the possession of the land held in common.[6] It is not necessary to make those tenants in common parties defendant, against whom no relief is sought in ejectment.[7]

3. LIMITATIONS. A bar by virtue of the statute of limitations against some of the tenants in common does not operate as against the others because their respective interests are several and not joint;[8] and where such a bar exists, a recovery in an action for the recovery of land can only go as to the interest of the tenant in common against whom the bar does not apply.[9] Generally the right of all the cotenants will be saved from the operation of the statute of limitations by any cause that will prevent its running against any of them.[10] One cotenant cannot, after limitations have applied, revive a debt, so as to create any new liability therefor as against his cotenants.[11]

TENANCY IN COPARCENARY. See TENANCY IN COMMON, *ante*, p. 5.

TENANT. In the broadest sense, a purchaser of an estate in the land or building hired;[1] one who holds or possesses lands or tenements by any kind of title, either in fee, for life, for years, or at will;[2] one who holds or possesses lands or tenements by a kind of title;[3] one who holds or possesses lands by any kind of right.[4] In a more restricted sense, one who has possession of the premises of another in subordination to that other's title, and with his consent;[5] the party to whom a lease is made;[6] one who holds or occupies under another person;[7] one who has the occupation or temporary possession of the lands or tenements whose title is in another; correlative to landlord;[8] one who has an occupation or temporary possession of lands or tenements, whose title is in another; one who has possession of any place; a dweller, an occupant;[9] one who has the occupation or temporary possession of lands or tenements whose title is in another;[10] one who occupies land or premises of another, in subordination to that other's title and with his assent, express or implied.[11] (Tenant: In General, see LANDLORD AND

in possession or control of the common property. Baker *v.* Fritts, 143 Ill. App. 465.

5. Karren *v.* Rainey, 30 Utah 7, 83 Pac. 333.

6. Esson *v.* Mayberry, 1 Nova Scotia 186.

7. Waring *v.* Crow, 11 Cal. 366. See also Fosgate *v.* Herkimer Mfg., etc., Co., 12 Barb. (N. Y.) 352 [*affirming* 9 Barb. 287, and *affirmed* in 12 N. Y. 580].

8. Chipman *v.* Hastings, 50 Cal. 310; Williams *v.* Sutton, 43 Cal. 65; Pope *v.* Brassfield, 110 Ky. 128, 61 S. W. 5, 22 Ky. L. Rep. 1613; Johnson *v.* Schumacher, 72 Tex. 334, 12 S. W. 207; McFarland *v.* Stone, 17 Vt. 165, 44 Am. Dec. 325.

9. Johnson *v.* Schumacher, 72 Tex. 334, 12 S. W. 207.

10. Gourdine *v.* Theus, 1 Brev. (S. C.) 326.

11. Buck *v.* Spofford, 40 Me. 328.

1. Bowe *v.* Hunking, 135 Mass. 380, 383, 46 Am. Rep. 471.

2. Bouvier L. Dict. [*quoted* in Clift *v.* White, 12 N. Y. 519, 527]. See also Walker *v.* McCusker, 71 Cal. 594 597, 12 Pac. 723; Hosford *v.* Ballard, 39 N. Y. 147, 151.

3. McAdam Landl. & Ten. [*quoted* in Fuchs *v.* Cohen, 19 N. Y. Suppl. 236, 22 N. Y. Civ. Proc. 269, 29 Abb. N. Cas. 56, where it was held that under a statute requiring the applicant in forcible entry and detainer to present "a written petition describing the premises and the interest therein of the petitioner," a description of the occupant as "tenant" is not sufficiently definite].

4. Webster Dict. [*quoted* in Woolsey *v.* State, 30 Tex. App. 346, 347, 17 S. W. 546].

A person must have some estate be it ever so little, such as that of a tenant at will or on sufferance, to be a tenant. Occupation as servant or licensee does not make one a tenant. Presby *v.* Benjamin, 169 N. Y. 377, 380, 62 N. E. 430, 57 L. R. A. 317.

5. Lightbody *v.* Truelsen, 39 Minn. 310, 313, 40 N. W. 67.

6. Becker *v.* Becker, 13 N. Y. App. Div. 342, 349, 43 N. Y. Suppl. 17; Jackson *v.* Harsen, 7 Cow. (N. Y.) 323, 326, 17 Am. Dec. 517.

7. Birks *v.* Allison, 13 C. B. N. S. 12, 23, 106 E. C. L. 11.

8. Webster Dict. [*quoted* in Place *v.* St. Paul Title Ins., etc., Co., 67 Minn. 126, 129, 69 N. W. 706, 64 Am. St. Rep. 404].

9. Webster Dict. [*quoted* in Woolsey *v.* State, 30 Tex. App. 346, 347, 17 S. W. 546].

10. Webster Dict. [*quoted* in Birks *v.* Allison, 13 C. B. N. S. 12, 23, 106 E. C. L. 11].

11. Wood Landl. & Ten. [*quoted* in Alex-

TENANT, 24 Cyc. 845. By the Curtesy, see CURTESY, 12 Cyc. 1001. In Common, see TENANCY IN COMMON, *ante*, p. 1. Joint, see JOINT TENANCY, 23 Cyc. 482. Life, see ESTATES, 16 Cyc. 614.)

TENANTABLE REPAIR. See 20 Cyc. 1259 note 38.

TENANT AT SUFFERANCE. One who comes into possession by a lawful demise and, after his term is ended, continues wrongfully and holds over;[12] one who having entered under a lawful title holds over without right and by reason of the laches of his landlord, after the termination of the interest;[13] one who, having come into possession by right, holds over without right;[14] one who at first came in by lawful demise or title, and, afterward, continues wrongfully in possession;[15] one who comes to the possession of lands or tenements by a lawful title, but keeps them afterward without any title at all;[16] one who originally comes in by right, but continues by wrong;[17] one that comes into possession of land by lawful title, but holdeth over by wrong, after the determination of his interest.[18] (See LANDLORD AND TENANT, 24 Cyc. 1041.)

TENANT AT WILL. One who holds lands or tenements let to him by another at the will of the lessor;[19] one who enters into the possession of land, etc., of another lawfully, but for no definite term or purpose, and whose possession is

ander *v.* Gardner, 123 Ky. 552, 554, 96 S. W. 818, 29 Ky. L. Rep. 958, 124 Am. St. Rep. 378; Adams *v.* Gilchrist, 63 Mo. App. 639, 645; Dixon *v.* Ahern, 19 Nev. 422, 426, 14 Pac. 598; Forrest *v.* Durnell, 86 Tex. 647, 650, 26 S. W. 481; Francis *v.* Holmes, (Tex. Civ. App. 1909) 118 S. W. 881, 883].

Held not to include an under-tenant, in a statute relating to distress for rent. Coles *v.* Marquand, 2 Hill (N. Y.) 447, 449. But see Farwell *v.* Jameson, 23 Ont. App. 517, 522, where the statute included subtenant and assignees of the tenant.

"Cropper" distinguished see Burgie *v.* Davis, 34 Ark. 179, 182; Harrison *v.* Ricks, 71 N. C. 7, 10, 11; Strain *v.* Gardner, 61 Wis. 174, 181, 21 N. W. 35.

Lodger distinguished see White *v.* Maynard, 111 Mass. 250, 253, 15 Am. Rep. 28; Linwood Park Co. *v.* Van Dusen, 63 Ohio St. 183, 200, 58 N. E. 576 [*citing* 1 McAdam Landl. & Ten. 621].

"Tenant in possession" see Walker *v.* McCusker, 1 Cal. 594, 596, 12 Pac. 723; Harris *v.* Reynolds, 13 Cal. 514, 517, 73 Am. Dec. 600; Whithed *v.* St. Anthony, etc., El. Co., 9 N. D. 224, 227, 83 N. W. 238, 81 Am. St. Rep. 562, 50 L. R. A. 254.

"Tenant of the freehold" see Culpeper County *v.* Gorrell, 20 Gratt. (Va.) 484, 511.

12. Godfrey *v.* Walker, 42 Ga. 562, 574.

13. Kunzie *v.* Wixom, 39 Mich. 384, 387.

14. Allen *v.* Carpenter, 15 Mich. 25, 34 [*citing* Coke Litt. 57*b*; 2 Blackstone Comm. 150], holding that the term as used in the statute providing that "all estates at will and at sufferance may be determined by either party, by three months' notice given to the other party," is not used in a sense which would entitle any one holding over wrongfully to the statutory notice.

15. Livingston *v.* Tanner, 12 Barb. (N. Y.) 481, 484 [*citing* 2 Blackstone Comm. 150; 4 Kent Comm. 116; Crabb Law Real Prop.].

16. Pleasants *v.* Claghorn, 2 Miles (Pa.) 302, 304.

17. Coke Litt. [*quoted* in Hanson *v.* Johnson, 62 Md. 25, 29, 50 Am. Rep. 199].

18. Kent Comm. [*quoted* in Fielder *v.* Childs, 73 Ala. 567, 577; Johnson *v.* Donaldson, 17 R. I. 107, 108, 20 Atl. 242]. See also Kellogg *v.* Kellogg, 6 Barb. (N. Y.) 116, 130.

Examples of this kind of tenure usually given are a lessee for a term of years or for the life of another person who holds the possession of the lands or tenements after his term or estate has expired. It is in effect nothing more than the continuance of a possession lawfully taken after the title under which it was taken has ended. Pleasants *v.* Claghorn, 2 Miles (Pa.) 302, 304.

If the lessee of a tenant for life is in possession at the time of the life-tenant's death, and continues to hold over, he becomes a tenant by sufferance; but if the lessee is not in possession, or does not hold over, the mere recognition of a lease previously made does not constitute such tenancy. Wright *v.* Graves, 80 Ala. 416, 420 [*citing* Taylor Landl. & Ten. § 113].

Such tenant is not a trespasser. Bright *v.* McOuat, 40 Ind. 521, 525 [*citing* Washburn Real Prop.].

Distinguished from "tenant at will." Willis *v.* Harrell, 118 Ga. 906, 909, 45 S. E. 794.

Creation of estate by act of the parties, and holding over, is necessary to make one a tenant at sufferance, and where one holds over after the termination of an estate cast upon him by operation of law, he is not a tenant at sufferance but a trespasser. Pattison *v.* Dryer, 98 Mich. 564, 566, 57 N. W. 814.

19. Spalding *v.* Hall, 6 D. C. 123, 125 [*citing* 2 Blackstone Comm. 145; 4 Kent Comm. 110], and adding: "But this definition gives a very imperfect idea of the rights and obligations of a landlord and tenant, between whom a tenancy at will subsists. A tenancy at will arose in every case where one man leased lands or tenements to another, and no fixed period of time was agreed upon at which the occupancy thereof should cease."

subject to the determination of the landlord at any time he sees fit to put an end to it;[20] one who enters into the possession of the lands or tenements of another, lawfully, but for no definite term or purpose, but whose possession is subject to termination by the landlord at any time he sees fit to put an end to it.[21] (See LANDLORD AND TENANT, 24 Cyc. 1036.)

TENANT BY THE CURTESY. See CURTESY, 12 Cyc. 1001.

TENANT FACTORY. As defined by the New York Labor Law, a building, separate parts of which are occupied and used by different persons, companies, or corporations, and one or more of which parts is so used as to constitute in law a factory.[22]

TENANT FOR LIFE. One to whom lands or tenements are granted or devised, or to which he derives title by operation of law for the term of his own life, or the life of another.[23] (See ESTATES, 16 Cyc. 614.)

TENANT IN FEE SIMPLE. See ESTATES, 16 Cyc. 601.

TENANT'S FIXTURES. In its strict legal definition, a term understood to signify things which are affixed to the freehold of the demised premises, but which nevertheless the tenant is allowed to disannex and take away, provided he seasonably exert his right to do so.[24]

TEN CLEAR DAYS. See CLEAR DAYS, 7 Cyc. 188.

TEND. To move in a certain direction; to be directed, as to any end, object, or purpose; to aim; to have or give leaning; to exert activity, to influence; to serve as a means; to contribute.[25]

TEN DAYS' ADVERTISING. A notice published at least ten times, and on ten distinct days.[26]

20. Robb *v.* San Antonio St. R. Co., 82 Tex. 392, 394, 18 S. W. 707; Emerson *v.* Emerson, (Tex. Civ. App. 1896) 35 S. W. 425, 426.

21. Wood Landl. & Ten. [*quoted* in Thompson *v.* Baxter, 107 Minn. 122, 124, 119 N. W. 797, 21 L. R. A. N. S. 575].

He is called "tenant at will because he hath no certain nor sure estate, for the lessor may put him out when he please." Thompson *v.* Baxter, 107 Minn. 122, 124, 119 N. W. 797, 21 L. R. A. N. S. 575 [*citing* Wood Landl. & Ten. 43]; Post *v.* Post, 14 Barb. (N. Y.) 253, 258 [*citing* Coke Litt. § 68; 2 Cruise 269; 4 Kent Comm. 110]; Barry *v.* Smith, 1 Misc. (N. Y.) 240, 243, 23 N. Y. Suppl. 129 [*citing* McAdam Landl. & Ten. 35].

It includes one who is placed on land without any terms prescribed or rent reserved, and has a mere occupancy. Stoltz *v.* Kretschmar, 24 Wis. 283, 285 [*citing* 4 Kent Comm. 114]. "If one, with the consent of the owner, is let into, or remains in possession, under circumstances not showing an intention to create a freehold interest, or a tenancy from year to year, he is a tenant at will. A vendee let in under an oral agreement of purchase, is a tenant at will," and a parol gift of land creates a mere tenancy at will, which may be revoked or disaffirmed by the donor. Collins *v.* Johnson, 57 Ala. 304, 307 [*citing* 1 Washburn Real Prop. 511].

A person who enters and holds land under a contract to buy it is to be regarded at law as at least a tenant at will. Jones *v.* Jones, 2 Rich. (S. C.) 542.

A tenant holding over is not a tenant at will, unless he holds over at the express or implied consent of the landlord. Benfey *v.* Congdon, 40 Mich. 283, 285.

Distinguished from "tenant at sufferance" see Willis *v.* Harrell, 118 Ga. 906, 909, 45 S. E. 794.

22. People *v.* Eno, 134 N. Y. App. Div. 527, 530, 119 N. Y. Suppl. 600; Minsky *v.* Weller, 63 Misc. (N. Y.) 244, 245, 116 N. Y. Suppl. 628.

23. *In re* Hyde, 41 Hun (N. Y.) 72, 75; Hyde *v.* Gage, 11 N. Y. Civ. Proc. 155, 159.

24. Wall *v.* Hinds, 4 Gray (Mass.) 256, 270, 64 Am. Dec. 64, where the term was held to include gas and water pipes.

25. Webster Dict. [*quoted* in Hogue *v.* State, 93 Ark. 316, 322, 124 S. W. 783, where it is said: "To say that a thing tends or has a tendency to establish a certain state of facts is not a declaration as to the weight to be given to it, but is a mere statement that it is directed toward or moves in the direction of a certain result, the degree of its force not being mentioned. To say that a circumstance tends to prove the issue is no more than saying that it may be considered for the purpose of determining the issue"].

"The statement that there has been evidence 'tending to show' a particular fact, is equivalent to a statement that evidence has been offered relating to such fact. The force and effect of the evidence is in no sense suggested by the term. . . . The word 'tending' . . . in its primary sense . . . means direction or course towards any object, effect, or result — drift." White *v.* State, 153 Ind. 689, 691, 692, 54 N. E. 763 [*citing* Webster Int. Dict. 1484].

"Tends to expose" see Turton *v.* New York Recorder, 3 Misc. (N. Y.) 314, 318, 22 N. Y. Suppl. 766.

26. Maxwell *v.* Burns, (Tenn. Ch. App. 1900) 59 S. W. 1067, 1071, where such was held to be the meaning of the phrase as used

TENDED LINE. A line with a single hook fastened to any object upon the banks or upon the ice.[27]

in a decree for the sale of personalty of a decedent's estate "after ten days' advertising." "An advertisement on one day ten days prior to the sale would certainly not be 'ten days' advertising,' nor would a publication three times within that time be 'ten days' advertising.'"

27. State *v.* Stevens, 69 Vt. 411, 414, 38 Atl. 80, where such was held to be the meaning of the term as used in a statute imposing a penalty upon certain fishing, except fishing through the ice with not more than fifteen tended lines.

TENDER

By Alva R. Hunt*

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Of Performance as Condition Precedent to Action by:
Buyer of Goods For Breach of Contract, see SALES, 35 Cyc. 619.
Buyer of Goods to Recover Price Paid, see SALES, 35 Cyc. 607.
Seller of Goods For Price or Value Thereof, see SALES, 35 Cyc. 531.
Of Performance by Buyer of Goods, Allegations in Declaration, Complaint, or Petition in Action For Breach of Contract, see SALES, 35 Cyc. 624.
Of Performance of:
Agreement of Accord, see ACCORD AND SATISFACTION, 1 Cyc. 314, 315.
Contract For Services as Condition Precedent to Action by Servant For Wrongful Discharge, see MASTER AND SERVANT, 26 Cyc. 997.
Services by Servant, see MASTER AND SERVANT, 26 Cyc. 1018.
Of Price of:
Goods Sold, see SALES, 35 Cyc. 271.
Land Sold, see VENDOR AND PURCHASER.
Of Principal, Suspension of Interest by, see INTEREST, 22 Cyc. 1555.
Of Property Alleged to Have Been Converted, see TROVER AND CONVERSION.
Of Purchase-Money For Goods Sold Conditionally, see SALES, 35 Cyc. 671.
Of Refunding Bond as Condition Precedent to Action on Administration Bond, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1286.
Of Rent, see LANDLORD AND TENANT, 24 Cyc. 1191.
Of Services of Pilot, see PILOTS, 30 Cyc. 1615.
Of Taxes:
As Discharging Lien, see TAXATION, 37 Cyc. 1148.
As Prerequisite to Injunction or Other Relief Against Assessment, see TAXATION, 37 Cyc. 1271.
Or Purchase-Money as Condition Precedent to Attack on Tax Title, see TAXATION, 37 Cyc. 1496.
Of Witness' Fees and Expenses on Service of Subpœna, see WITNESSES.

I. DEFINITION.

Tender is an offer to perform a contract, or to pay money, coupled with a present ability to do the act.[1] It imports, not merely the readiness and the

1. Cockrill *v.* Kirkpatrick, 9 Mo. 697, 704. Other definitions are: "A means given to the debtor to discharge himself from his obligation, by placing the thing to be delivered

ability to pay or perform at the time and place mentioned in the contract, but also the actual production of the thing to be paid or delivered over, and an offer of it to the person to whom the tender is to be made;[2] and the act of tender must be such that it needs only acceptance by the one to whom it is made to complete the transaction. It is the act of one party in offering that which he admits to be due and owing, but which does not meet the approval of the other party, and therefore is not accepted and appropriated by him in satisfaction of the demand.[3] The term therefore implies a refusal.[4]

II. NECESSITY OR AVAILABILITY.

A. Necessity. Where acts to be performed by the parties to a contract are mutual and dependent, or where the existence of a right in one claiming it is dependent upon the performance of duties on his part, as by the payment of money or delivery of goods, tender of performance by him is necessary to enable him to sue to enforce the right.[5]

at the risk of the creditor." Smith *v.* Richardson, 11 Rob. (La.) 516, 520.

"An offer to pay a debt or to perform a duty." 9 Bacon Abr. tit. "Tender."

"An offer by a debtor to his creditor of the amount of the debt." Rapalje & L. L. Dict. [*quoted* in Salinas *v.* Ellis, 26 S. C. 337, 344, 2 S. E. 121].

"The offer of a sum of money in satisfaction of a debt or claim by producing and showing the amount to the creditor, or party claiming and expressing verbally a willingness to pay it." Tompkins *v.* Batie, 11 Nebr. 147, 152, 7 N. W. 747, 38 Am. Rep. 361 [*citing* Worcester Dict.].

"An offer to perform an act which the party offering is bound to perform." McClain *v.* Batton, 50 W. Va. 121, 130, 40 S. E. 509.

As applicable to the case of mutual and concurrent promises, the word "tender" does not mean the same kind of offer as when it is used in reference to the payment or offer to pay an ordinary debt due in money, where the money is offered to the creditor who is entitled to receive it and nothing further remains to be done, and the transaction is completed and ended; but it only means a readiness and willingness, accompanied with an ability on the part of one of the parties, to do the acts which the agreement requires him to perform, provided the other will concurrently do the things which he is required by it to do, and a notice by the former to the latter of such readiness. Such readiness, ability, and notice are sufficient evidence of, and indeed imply, an offer or tender in the ordinary sense of the term. It is not an absolute unconditional offer to do or transfer anything at all events, but it is, in its nature, conditional only, and dependent on, and to be performed only in case of, the readiness of the other party to perform his part of the agreement. Smith *v.* Lewis, 26 Conn. 110, 119 [*quoted* in Clark *v.* Weis, 87 Ill. 438, 441, 29 Am. Rep. 60 (*citing* as illustrations Smith *v.* Lamb, 26 Ill. 396, 79 Am. Dec. 381; Hough *v.* Rawson, 17 Ill. 588)].

2. Holmes *v.* Holmes, 12 Barb. (N. Y.) 137, 144 [*affirmed* in 9 N. Y. 525].

The term imports more than a mere offer, however, for there may be an offer without a tender. Sewell *v.* Willcox, 5 Rob. (La.) 83. See *infra*, II, B, 2, 4.

3. Barker *v.* Brink, 5 Iowa 481, 484.

4. Mohn *v.* Stoner, 11 Iowa 30, 31; Barker *v.* Brink, 5 Iowa 481, 484.

Payment distinguished.— Payment implies an acceptance and appropriation of that which is offered by one party to the other; whereas tender is the act of one party, in offering that which he admits to be due and owing, but which is not accepted by the creditor. The tender does not discharge or satisfy the debt, whereas payment does Barker *v.* Brink, 5 Iowa 481, 484.

Payment into court distinguished.— The payment of money into court, under order, is more than a simple tender. A tender is an offer to pay by the debtor before suit, and cannot be made after suit brought. It is purely *ex parte*. If it is not accepted the debtor must retain his money, and if established on plea, the only effect is to stop interest thenceforward on the amount tendered. But a payment into court is different. It is not *ex parte*, but done by order of the court, which represents both parties, and whose orders bind plaintiff as well as defendant. Black *v.* Rose, 14 S. C. 274, 277 [*quoted* in Salinas *v.* Ellis, 26 S. C. 337, 345, 2 S. E. 121].

5. *Colorado.*— People *v.* Henderson, 12 Colo. 369, 21 Pac. 144; Wason *v.* Major, 10 Colo. App. 181, 50 Pac. 741.

Illinois.— Briscoe *v.* Allison, 43 Ill. 291.

Indiana.—Bundy *v.* Summerland, 142 Ind. 92, 41 N. E. 322; Smith *v.* Rude Bros. Mfg. Co., 131 Ind. 150, 30 N. E. 947; Hyland *v.* Central Iron Co., 129 Ind. 68, 28 N. E. 308, 13 L. R. A. 515; Hyland *v.* Brazil Block Coal Co., 128 Ind. 335, 26 N. E. 672; Logansport *v.* Case, 124 Ind. 254, 24 N. E. 88; Morrison *v.* Jacoby, 114 Ind. 84, 14 N. E. 546, 15 N. E. 806; South Bend *v.* Notre Dame, 69 Ind. 344.

Iowa.— Morrison *v.* Hershire, 32 Iowa 271.

Kansas.— Garnett Bank *v.* Ferris, 55 Kan. 120, 39 Pac. 1042; Chicago, etc., R. Co. *v.* Atchison County, 54 Kan. 781, 39 Pac. 1039; Wilson *v.* Longendyke, 32 Kan. 267, 4 Pac. 361; Smith *v.* Woodleaf, 21 Kan. 717; Haga-

B. Demands Upon Which Tender May Be Made. At common law, wherever there is a debt or duty due and the thing due is either certain, or capable of being made so by mere computation,[6] or where a given sum in money is to be paid in specific articles, or where payment is to be made in specific articles or services at a stipulated rate,[7] a tender of the debt or duty may be made; and a tender may also be made where the damages have been liquidated by an award,[8] and where the damages, in case plaintiff establishes a right to any damages, can be merely nominal, as far as the damages are concerned a judicial inquiry is entirely unnecessary, and a tender of such damages may be made.[9] But at common law a tender is not allowed where the amount of the compensation is unliquidated, whether the right to the compensation is based upon a breach of a contract, or is one arising out of a tort.[10] This rule has been changed by

man *v.* Cloud County Com'rs, 19 Kan. 394; Lawrence *v.* Killam, 11 Kan. 499.

Kentucky.— Thompson *v.* Lexington, 104 Ky. 165, 46 S. W. 481, 20 Ky. L. Rep. 457.

Louisiana.— Bryant *v.* Stothart, 46 La. Ann. 485, 15 So. 76.

Maine.— Bisbee *v.* Ham, 47 Me. 543.

Maryland.— Dentzel *v.* City, etc., R. Co., 90 Md 434, 45 Atl. 201; Allegany County *v.* Union Min Co., 61 Md. 545.

Massachusetts. — Mansfield *v.* Hodgdon, 147 Mass. 304, 17 N. E. 544; Thurston *v.* Blanchard, 22 Pick. 18, 33 Am. Dec. 700; Conner *v.* Henderson, 15 Mass. 319, 8 Am. Dec. 103.

Michigan. — Tisdale *v.* Auditor-Gen., 85 Mich 261, 48 N. W. 568; Albany, etc., Min. Co *v.* Auditor-Gen., 37 Mich. 391; Pillsbury *v.* Humphrey, 26 Mich. 245; Merrill *v.* Humphrey, 24 Mich. 170; Conway *v.* Waverly Tp. Bd., 15 Mich. 257.

Mississippi.— Mobile, etc., R. Co. *v.* Moseley, 52 Miss. 127.

New York.—McMichael *v.* Kilmer, 76 N. Y. 36; Nelson *v.* Plimpton Fireproof Elevating Co., 55 N. Y. 480; Dunham *v.* Pettee, 8 N. Y. 508; Tonge *v.* Newell, 16 N. Y. App. Div. 500, 44 N. Y. Suppl. 906; Anderson *v.* Sherwood, 56 Barb. 66; Crist *v.* Armour, 34 Barb. 378; Porter *v.* Rose, 12 Johns. 209, 7 Am. Dec. 306. See also Allen *v.* Corby, 59 N. Y. App. Div. 1, 69 N. Y. Suppl. 7.

North Dakota.—Douglas *v.* Fargo, 13 N. D. 467, 101 N. W. 919.

Oklahoma.— State Nat. Bank *v.* Carson, (1897) 50 Pac. 990.

Texas.— Schloss *v.* Atchison, etc., R. Co., 85 Tex. 601, 22 S. W. 1041; McPherson *v.* Johnson, 69 Tex. 484, 6 S. W. 798; Murray *v.* Gulf, etc., R. Co., 63 Tex. 407, 51 Am. Rep. 650; Scogins *v.* Perry, 46 Tex. 111; De la Garza *v.* Booth, 28 Tex. 478, 91 Am. Dec. 328; De Witt *v.* Dunn, 15 Tex. 106.

Wisconsin.—Wisconsin Cent. R. Co. *v.* Lincoln County, 67 Wis. 478, 30 N. W. 619.

United States.—Albuquerque Nat. Bank *v.* Perea, 147 U. S. 87, 13 S. Ct. 194, 37 L. ed. 91; German Nat. Bank *v.* Kimball, 103 U. S. 732, 26 L. ed. 469; Gay *v.* Alter, 102 U. S. 79, 26 L. ed. 48.

See 45 Cent. Dig. tit. "Tender," § 5.

6. Green *v.* Shurtliff, 19 Vt. 592; Solomon *v.* Bewicke, 2 Taunt. 317.

A tender may be pleaded in an action upon a bare covenant for the payment of money. Johnson *v.* Clay, 1 Moore C. P. 200, 7 Taunt. 486, 2 E. C. L. 459.

7. Ferguson *v.* Hogan, 25 Minn. 135.

8. Taylor *v.* Brooklyn El. R. Co., 7 N. Y. Suppl. 625 [*affirmed* in 119 N. Y. 561, 23 N. E. 1106].

9. Cernahan *v.* Chrisler, 107 Wis. 645, 83 N. W. 778.

10. *Colorado.*— Denver, etc., R. Co. *v.* Harp, 6 Colo. 420.

Illinois.— Gregory *v.* Wells, 62 Ill. 232; Cilley *v.* Hawkins, 48 Ill. 308; Bock *v.* Weigant, 5 Ill. App. 643.

Massachusetts.— Lawrence *v.* Gifford, 17 Pick. 366.

Missouri.— Joyner *v.* Bentley, 21 Mo. App. 26.

Pennsylvania.— Roberts *v.* Beatty, 2 Penr. & W. 63, 21 Am. Dec. 410.

Texas.— Breen *v.* Texas, etc., R. Co., 50 Tex. 43.

Vermont.— McDaniels *v.* Rutland Bank, 29 Vt. 230, 70 Am. Dec. 406; Green *v.* Shurtliff, 19 Vt. 592.

England.—Davys *v.* Richardson, 21 Q. B. D. 202, 57 L. J. Q. B. 409, 59 L. T. Rep. N. S. 765, 36 Wkly. Rep. 728; Dearles *v.* Barrett, 2 A. & E. 82, 3 Dowl. P. C. 13, 4 N. & M. 200, 29 E. C. L. 58, 111 Eng. Reprint 32.

See 45 Cent. Dig. tit. "Tender," § 3.

Illustrations.—So a tender cannot be made of a sum as compensation for the breach of a contract to lease land (Cilley *v.* Hawkins, 48 Ill. 308); for the sale of land, or to make repairs (Dearles *v.* Barrett, 2 A. & E. 82, 3 Dowl. P. C. 13, 4 N. & M. 200, 29 E. C. L. 58, 111 Eng. Reprint 32]; or for the breach of a contract of marriage, or of a bond, or, in short, of anything save the payment of a definite sum of money, where, after the breach, the situation of the parties or the value of the thing or duty is uncertain, or has changed or is subject to a change (see Green *v.* Shurtliff, 19 Vt. 592).

After a breach of contract to deliver a given quantity of specific articles, unless the damages are capable of being reduced to a certainty by computation, a tender cannot be made, either of the articles or of money as damages. Day *v.* Lafferty, 4 Ark. 450.

A promissory note payable in "current bank notes" is not a contract to pay money, and after a breach, the amount due being indefinite, a tender cannot be made. See McDowell *v.* Keller, 4 Coldw. (Tenn.) 258.

statute in many jurisdictions; the general effect of which is to permit defendant to relieve himself from liability for costs in an action for unliquidated damages by tendering sufficient amends for the injury complained of.[11]

C. When Failure to Make Tender Excused or Waived. A formal tender is unnecessary if the party to whom performance is due be absent from the place of performance, in those cases where his presence is necessary;[12] nor is a formal tender necessary if, at the time for performance, the party to whom performance is due fails[13] or refuses[14] to perform on his part, unless a request

11. See the statutes of the several states. And see the following cases:

Colorado.— Leis *v.* Hodgson, 1 Colo. 393.

Illinois.— Frantz *v.* Rose, 89 Ill. 590 (construing Rev. St. (1874) c. 79, § 51); Dunbar *v.* De Boer, 44 Ill. App. 615; Beach *v.* Jeffrey, 1 Ill. App. 283.

Maine.— Brown *v.* Neal, 36 Me. 407, construing Rev. St. c. 115, § 22, as amended.

Massachusetts. — Viall *v.* Carpenter, 16 Gray 285, construing Rev. St. c. 105, § 12.

New York.— Clement *v.* New York Cent., etc., R. Co., 9 N. Y. Suppl. 601 (construing Code Civ. Proc. § 731); Clark *v.* Hallock, 16 Wend. 607; Slack *v.* Brown, 13 Wend. 390; People *v.* Sternburg, 1 Den. 635 (construing 2 Rev. St. § 21).

Vermont.— Green *v.* Shurtliff, 19 Vt. 592; Hart *v.* Skinner, 16 Vt. 138, 42 Am. Dec. 500.

See also COSTS, 11 Cyc. 71 *et seq.*

Such statutes are strictly construed, being in derogation of the common law. See Lawrence *v.* Gifford, 17 Pick. (Mass.) 366; Joyner *v.* Bentley, 21 Mo. App. 26. Thus a statute allowing a tender of amends where a trespass is committed through negligence or mistake was held not to apply where the entry upon the land was made in pursuance of defective proceedings for laying out a road (Brown *v.* Neal, 36 Me. 407. See also Viall *v.* Carpenter, 16 Gray (Mass.) 285), and conversion for the wrongful delivery of goods was held not to fall within the statutes authorizing a tender of "damages for a casual or involuntary injury to property." Clement *v.* New York Cent., etc., R. Co., 9 N. Y. Suppl. 601.

12. Lehman *v.* Collins, 69 Ala. 127; Smith *v.* Ryan, 88 Ky. 636, 11 S. W. 647, 11 Ky. L. Rep. 128; Southworth *v.* Smith, 7 Cush. (Mass.) 391; Gilmore *v.* Holt, 4 Pick. (Mass.) 258; Hale *r.* Patton, 60 N. Y. 233, 19 Am. Rep. 168; Houbie *r.* Volkening, 49 How. Pr. (N. Y.) 169; Noyes *v.* Clark, 7 Paige (N. Y.) 179, 32 Am. Dec. 620. But see Crawford *v.* Paine, 19 Iowa 172, holding that the absence of the creditor from the state was no excuse for the failure to tender payment, inasmuch as under Rev. St. § 1816, a debtor may make a tender by letter.

But ignorance of the creditor's place of residence is no excuse for not making a tender. Samuel *v.* Allen, 98 Cal. 406, 33 Pac. 273; Sage *r.* Ranney, 2 Wend. (N. Y.) 532.

It is the debtor's duty to make inquiries for the creditor of those most likely to know his whereabouts. Lehman *v.* Moore, 93 Ala. 186, 9 So. 590; Bancroft *v.* Sawin, 143 Mass. 144, 9 N. E. 539.

13. Allen *v.* Pennell, 51 Iowa 537, 2 N. W. 385.

14. *Alabama.*— Root *v.* Johnson, 99 Ala. 90, 10 So. 293; Henry *v.* Allen, 93 Ala. 197, 9 So. 579; McKleroy *v.* Tulane, 34 Ala. 78.

California.— Cleary *v.* Folger, (1893) 33 Pac. 877; Sheplar *v.* Green, 96 Cal. 218, 31 Pac. 42.

Colorado.— Montelius *v.* Atherton, 6 Colo. 224.

Connecticut.— Ashburn *v.* Poulter, 35 Conn. 553.

Illinois.— Scott *v.* Beach, 172 Ill. 273, 50 N. E. 196; Dulin *v.* Prince, 124 Ill. 76, 16 N. E. 242; Lyman *v.* Gedney, 114 Ill. 388, 29 N. E. 282, 55 Am. Rep. 871; Engesette *v.* McGilvray, 63 Ill. App. 461; Nathan *v.* Rehkopf, 57 Ill. App. 212; Bucklen *v.* Hasterlik, 51 Ill. App. 132.

Indiana.— Adams Express Co. *v.* Harris, 120 Ind. 73, 21 N. E. 340, 16 Am. St. Rep. 315, 7 L. R. A. 214; Blair *v.* Hamilton, 48 Ind. 32.

Iowa.—Veeder *v.* McMurray, 70 Iowa 118, 29 N. W. 818; Hopwood *v.* Corbin, 63 Iowa 218, 18 N. W. 911; Williams *v.* Triplett, 3 Iowa 518.

Kansas.— Chinn *v.* Bretches, 42 Kan. 316, 22 Pac. 426; Thompson *v.* Warner, 31 Kan. 533, 3 Pac. 339.

Kentucky.— Tyler *v.* Onzts, 93 Ky. 331, 20 S. W. 256, 14 Ky. L. Rep. 321; Stapp *v.* Phelps, 7 Dana 296; Dorsey *v.* Barbee, Litt. Sel. Cas. 204, 12 Am. Dec. 296; Tibbs *v.* Timberlake, 4 Litt. 12; Dorsey *v.* Cock, 4 Bibb 45.

Louisiana.— Sonia Cotton Oil Co. *v.* The Red River, 106 La. 42, 30 So. 303, 87 Am. St. Rep. 293; Ware *v.* Berlin, 43 La. Ann. 534, 9 So. 490.

Maine.— Dinsmore *r.* Savage, 68 Me. 191; Mattocks *v.* Young, 66 Me. 459.

Massachusetts. — Murray *v.* Mayo, 157 Mass. 248, 31 N. E. 1063; Gilmore *v.* Holt, 4 Pick. 258.

Michigan.— Moore *v.* Smith, 95 Mich. 71, 54 N. W. 701; Lacy *v.* Wilson, 24 Mich. 479.

Minnesota. — Vaughan *v.* McCarthy, 59 Minn. 199, 60 N. W. 1075; Long *v.* Miller, 46 Minn. 13, 48 N. W. 409; Brown *v.* Eaton, 21 Minn. 409; Gill *r.* Newell, 13 Minn. 462.

Missouri.— Whelan *v.* Reilly, 61 Mo. 565; Deichmann *v.* Deichmann, 49 Mo. 107; Harwood *v.* Diemer, 41 Mo. App. 48; MacDonald *v.* Wolff, 40 Mo. App. 302; McManus *v.* Gregory, 16 Mo. App. 375.

Nebraska.— Graham *v.* Frazier, 49 Nebr. 90, 68 N. W. 367; Smith *v.* Gibson, 25 Nebr. 511, 41 N. W. 360.

which he has no right to make is complied with,[15] or if he is unable to perform,[16] or does or suffers anything to be done with the thing to be delivered by him which renders certain a failure of performance on his part when the day arrives.[17] Similarly a tender is waived where the tenderee makes any declaration which amounts to a repudiation of the contract, or takes any position which would render a tender, so long as the position taken by him is maintained, a vain and idle ceremony;[18] as where he expressly declares that he will not accept the tender if it is

New York.— Blewett *v.* Baker, 58 N. Y. 611; Morange *v.* Morris, 3 Abb. Dec. 314, 3 Keyes 48, 32 How. Pr. 178; Simonson *v.* Lauck, 105 N. Y. App. Div. 82, 93 N. Y. Suppl. 965; Allen *v.* Corby, 59 N. Y. App. Div. 1, 69 N. Y. Suppl. 7; Cleveland *v.* Rothwell, 54 N. Y. App. Div. 14, 66 N. Y. Suppl. 241; Anderson *v.* Sherwood, 56 Barb. 66; Stone *v.* Sprague, 20 Barb. 509; Zeitlin *v.* Arkaway, 26 Misc. 761, 56 N. Y. Suppl. 1058.

Oregon.— Clarno *v.* Grayson, 30 Oreg. 111, 46 Pac. 426.

Rhode Island.— Lee *v.* Stone, 21 R. I. 123, 42 Atl. 717.

South Dakota.— McPherson *v.* Fargo, 10 S. D. 611, 74 N. W. 1057, 66 Am. St. Rep. 723; Brace *v.* Doble, 3 S. D. 110, 52 N. W. 586.

Tennessee.— Bradford *v.* Foster, 87 Tenn. 4, 9 S. W. 195.

Texas.— Bluntzer *v.* Dewees, 79 Tex. 272, 15 S. W. 29; Woldert *v.* Arledge, 4 Tex. Civ. App. 692, 23 S. W. 1052; Bessling *v.* Hoyle, 1 Tex. App. Civ. Cas. § 287.

Virginia.— White *v.* Dobson, 17 Gratt. 262.

West Virginia.— Poling *v.* Parsons, 38 W. Va. 80, 18 S. E. 379.

Wisconsin.— Maxon *v.* Gates, 112 Wis. 196, 88 N. W. 54; Hoffman *v.* Van Diemen, 62 Wis. 362, 21 N. W. 542; Wright *v.* Young, 6 Wis. 127, 70 Am. Dec. 453.

United States.— Pollock *v.* Brainard, 26 Fed. 732; Calhoun *v.* Vechio, 4 Fed. Cas. No. 2,310, 3 Wash. 165.

See 45 Cent. Dig. tit. "Tender," §§ 6, 7.

Time of refusal.— The refusal must be at or before the time of performance, to constitute a waiver. Columbia Bank *v.* Hagner, 1 Pet. (U. S.) 455, 7 L. ed. 219. See also Newman *v.* Baker, 10 App. Cas. (D. C.) 187.

15. Ford *v.* Stroud, 150 N. C. 362, 64 S. E. 1; Amsden *v.* Atwood, 68 Vt. 322, 35 Atl. 311; Dickinson *v.* Dutcher, Brayt. (Vt.) 104; Jones *v.* Tarlton, 1 Dowl. P. C. N. S. 625, 6 Jur. 348, 11 L. J. Exch. 267, 9 M. & W. 675.

As by refusing, until an unlawful claim is paid, to receive any part of tender. Northern Colorado Irr. Co. *v.* Richards, 22 Colo. 450, 45 Pac. 423 (where the tenderee demanded the payment of certain illegal royalties); Gorham *v.* Farson, 119 Ill. 425, 10 N. E. 1; Indiana Bond Co. *v.* Jameson, 24 Ind. App. 8, 56 N. E. 37; Hamilton *v.* McLaughlin, 145 Mass. 20, 12 N. E. 424; Hoyt *v.* Sprague, 61 Barb. (N. Y.) 497. But see Bolton *v.* Gifford, 45 Tex. Civ. App. 140, 100 S. W. 210.

16. *Indiana.*— Nesbit *v.* Miller, 125 Ind. 106, 25 N. E. 148.

Iowa.— Auxier *v.* Taylor, 102 Iowa 673, 72 N. W. 291.

Massachusetts.— Lowe *v.* Harwood, 139 Mass. 133, 29 N. E. 538.

Minnesota.— Taylor *v.* Read, 19 Minn. 372; Bennett *v.* Phelps, 12 Minn. 326.

New York.— Baumann *v.* Pinckney, 118 N. Y. 604, 23 N. E. 916; Hartley *v.* James, 50 N. Y. 38; Delavan *v.* Duncan, 49 N. Y. 485; Bunge *v.* Koop, 48 N. Y. 225, 8 Am. Rep. 546; Morange *v.* Morris, 3 Abb. Dec. 314, 3 Keyes 48, 32 How. Pr. 178; Beier *v.* Spaulding, 92 Hun 388, 36 N. Y. Suppl. 1056; Whitaker *v.* Burrows, 71 Hun 478, 24 N. Y. Suppl. 1011; Karker *v.* Haverly, 50 Barb. 79; Wheaton *v.* Baker, 14 Barb. 594; Marshall *v.* Wenninger, 20 Misc. 527, 46 N. Y. Suppl. 670; Baker *v.* Robbins, 2 Den. 136; Foote *v.* West, 1 Den. 544; Lawrence *v.* Taylor, 5 Hill 107.

See 45 Cent. Dig. tit. "Tender," §§ 6, 7.

17. *Iowa.*— Auxier *v.* Taylor, 102 Iowa 673, 72 N. W. 291.

Massachusetts.— Lowe *v.* Harwood, 139 Mass. 133, 29 N. E. 538.

Minnesota.— Wyvell *v.* Jones, 37 Minn. 68, 33 N. W. 43; Bennett *v.* Phelps, 12 Minn. 326.

New York.— Davis *v.* Van Wyck, 64 Hun 186, 18 N. Y. Suppl. 885.

Pennsylvania.— Scott *v.* Patterson, 1 Pa. Dist. 603.

18. *Georgia.*— Ansley *v.* Hightower, 120 Ga. 719, 48 S. E. 197.

Indiana.— Blair *v.* Hamilton, 48 Ind. 32.

Iowa.— Williams *v.* Triplett, 3 Iowa 518.

Kansas.— Piazzek *v.* Harman, 79 Kan. 855, 98 Pac. 771.

Kentucky.— Dorsey *v.* Barbee, Litt. Sel. Cas. 204, 12 Am. Dec. 296; Dorsey *v.* Cock, 4 Bibb 45.

Louisiana.— State *v.* Webster Parish Police Jury, 120 La. 163, 45 So. 47, 124 Am. St. Rep. 430, 14 L. R. A. N. S. 794.

Maine.— Duffy *v.* Patten, 74 Me. 396; Mattocks *v.* Young, 66 Me. 459.

Minnesota.— Gill *v.* Newell, 13 Minn. 462.

Missouri.— Deichmann *v.* Deichmann, 49 Mo. 107.

Nebraska.— Graham *v.* Frazier, 49 Nebr. 90, 68 N. W. 367.

Pennsylvania.— Hampton *v.* Speckenagle, 9 Serg. & R. 212, 11 Am. Dec. 704.

South Dakota.— McPherson *v.* Fargo, 10 S. D. 611, 74 S. W. 1057, 66 Am. St. Rep. 723.

Washington.— Weinberg *v.* Naher, 51 Wash. 591, 99 Pac. 736, 22 L. R. A. N. S. 956.

United States.— Columbia Bank *v.* Hagner, 1 Pet. 455, 7 L. ed. 219.

See 45 Cent. Dig. tit. "Tender," § 48.

The position taken by the unwilling party must be maintained until the time for performance. Scribner *v.* Schenkel, 128 Cal.

made,[19] or in any way obstructs or prevents a tender,[20] as by declaring positively that nothing is due him,[21] by admitting that a tender would be fruitless,[22] by declaring the contract to be at an end,[23] or in a threatening tone ordering plaintiff off the premises.[24] But in any case before it can be said that a formal tender is waived, the tenderee must have placed himself in such position as would make a tender an unnecessary act.[25] And a plaintiff, before he can recover damages for the breach, or what he has parted with under the contract, must show, not only the facts constituting the waiver of the formal tender, but that he was able and willing, at the time fixed, to perform on his part,[26] except in those cases where a tender is rendered unnecessary by the previous declaration, act, or omission of the other party.[27] A formal technical tender is not dispensed with by a mere assertion, without more, of a lien or claim in excess of the actual amount due, for a tender of the proper sum might be accepted.[28] There cannot be a waiver unless the tenderee is present and has an opportunity to object to the tender,[29] nor can there be a waiver when he is present, if the facts are not disclosed to him.[30]

250, 60 Pac. 860; Crist *v.* Armour, 34 Barb. (N. Y.) 378.

19. *Georgia.*— Arnold *v.* Empire Mut. Annuity, etc., Ins. Co., 3 Ga. App. 685, 60 S. E. 470.

Illinois.— Gillespie *v.* Fulton Oil, etc., Co., 236 Ill. 188, 86 N. E. 219.

Indiana.— Blair *v.* Hamilton, 48 Ind. 32.

Iowa.— Williams *v.* Triplett, 3 Iowa 518.

Kentucky.— New York L. Ins. Co. *v.* Clopton, 7 Bush 179, 3 Am. Rep. 290; Dorsey *v.* Barbdee, Litt. Sel. Cas. 204, 12 Am. Dec. 296; Tibbs *v.* Timberlake, 4 Litt. 12; Dorsey *v.* Cock, 4 Bibb 45.

Maine.— Duffy *v.* Patten, 74 Me. 396; Mattocks *v.* Young, 66 Me. 459.

Maryland.— Buel *v.* Pumphrey, 2 Md. 261, 56 Am. Dec. 714.

Massachusetts.— Gilman *v.* Cary, 198 Mass. 318, 84 N. E. 312.

Michigan.— Witt *v.* Dersham, 146 Mich. 68, 109 N. W. 25.

Missouri.— See Austen *v.* St. Louis Transit Co., 115 Mo. App. 146, 91 S. W. 450.

New Jersey.— Trenton St. R. Co. *v.* Lawlor, 74 N. J. Eq. 828, 71 Atl. 234, 74 Atl. 668.

New York.— Simonson *v.* Lauck, 105 N. Y. App. Div. 82, 93 N. Y. Suppl. 965; Klinck *v.* Kelly, 63 Barb. 622; Vaupell *v.* Woodward, 2 Sandf. Ch. 143.

North Carolina.— Martin *v.* Fayetteville Bank, 131 N. C. 121, 42 S. E. 558.

West Virginia.— Poling *v.* Parsons, 38 W. Va. 80, 18 S. E. 379; Koon *v.* Snodgrass, 18 W. Va. 320.

See 45 Cent. Dig. tit. "Tender," § 48.

20. Nelson *v.* Plimpton Fireproof El. Co., 55 N. Y. 480; Traver *v.* Halsted, 23 Wend. (N. Y.) 66; Franchot *v.* Leach, 5 Cow. (N. Y.) 506; Coit *v.* Ambergate, 7 A. & E. N. S. 127; Hochster *v.* De la Tour, 2 E. & B. 678, 17 Jur. 972, 22 L. J. Q. B. 455, 1 Wkly. Rep. 469, 75 E. C. L. 678.

As by refusing to render account of what is due. Roby *v.* Skinner, 34 Me. 270; McSweeney *v.* Kay, 15 Grant Ch. (U. C.) 432.

Rendering a false account will excuse tender. Meaher *v.* Howes, (Me. 1887) 10 Atl. 460.

Declining an offer of immediate payment on an offer to pay then or at a future time was held to be equivalent to a tender. U. S. Life Ins. Co. *v.* Lesser, 126 Ala. 568, 28 So. 646.

21. Lacy *v.* Wilson, 24 Mich. 479.

22. Ronaldson, etc., Co. *v.* Bynum, 122 La. 637, 48 So. 152; Jackson *v.* Jacob, 3 Bing. N. Cas. 869, 3 Hodges 219, 6 L. J. C. P. 315, 5 Scott 79, 32 E. C. L. 399.

23. Oelrichs *v.* Artz, 21 Md. 524; Post *v.* Garrow, 18 Nebr. 682, 26 N. W. 580. See Union Inv. Assoc. *v.* Geer, 64 Ill. App. 648.

24. Williams *v.* Patrick, 177 Mass. 160, 58 N. E. 583.

25. Jewett *v.* Earle, 53 N. Y. Super. Ct. 349; Sanford *v.* Savings, etc., Soc., 80 Fed. 54.

26. Lamar *v.* Sheppard, 84 Ga. 561, 10 S. E. 1084; Nelson *v.* Plimpton Fireproof El. Co., 55 N. Y. 480; Traver *v.* Halsted, 23 Wend. (N. Y.) 66; Franchot *v.* Leach, 5 Cow. (N. Y.) 506; Robison *v.* Tyson, 46 Pa. St. 286; Hochster *v.* De la Tour, 2 E. & B. 678, 17 Jur. 972, 22 L. J. Q. B. 455, 1 Wkly. Rep. 469, 75 E. C. L. 678.

27. Lowe *v.* Harwood, 139 Mass. 133, 29 N. E. 538; Brown *v.* Davis, 138 Mass. 458; Crist *v.* Armour, 34 Barb. (N. Y.) 378; Frost *v.* Clarkson, 7 Cow. (N. Y.) 24; Lovelock *v.* Franklin, 8 Q. B. 371, 10 Jur. 246, 15 L. J. Q. B. 146, 55 E. C. L. 371; Ford *v.* Tiley, 6 B. & C. 325, 9 D. & R. 443, 5 L. J. K. B. O. S. 169, 30 Rev. Rep. 339, 13 E. C. L. 154.

28. Loewenberg *v.* Arkansas, etc., R. Co., 56 Ark. 439, 19 S. W. 1051; Indiana Bond Co. *v.* Jameson, 24 Ind. App. 8, 56 N. E. 37; Hoyt *v.* Sprague, 61 Barb. (N. Y.) 497; Llado *v.* Morgan, 23 U. C. C. P. 517; McBride *v.* Bailey, 6 U. C. C. P. 523; Kendal *v.* Fitzgerald, 21 U. C. Q. B. 585; Buffalo, etc., R. Co. *v.* Gordon, 16 U. C. Q. B. 283.

But demanding an exorbitant price for repairs done on a ship and giving notice that it will not be surrendered unless such price be paid dispenses with a tender. Watson *v.* Pearson, 9 Jur. N. S. 501, 8 L. T. Rep. N. S. 395, 11 Wkly. Rep. 702.

29. Sloan *v.* Petrie, 16 Ill. 262.

30. Waldron *v.* Murphy, 40 Mich. 668.

III. FORM, REQUISITES, AND SUFFICIENCY.

A. Amount — 1. RULE STATED. Nothing short of an offer of everything that the creditor is entitled to receive is sufficient, and a debtor must at his peril tender the entire sum due,[31] including all necessary expenses incurred or damages suffered by the creditor by reason of the default of the debtor,[32] and a mistake in tendering an amount less than the sum due is the misfortune of the tenderer,[33] and the position of the parties remains the same as if no tender had been made.[34]

31. *Alabama.*— Eversole *v.* Addington, 156 Ala. 575, 46 So. 849; Smith *v.* Anders, 21 Ala. 782.

Arkansas.— Burr *v.* Daugherty, 21 Ark. 559.

California.— Shafer *v.* Willis, 124 Cal. 36, 56 Pac. 635; San Pedro Lumber Co. *v.* Reynolds, 111 Cal. 588, 44 Pac. 309.

Florida.— Chandler *v.* Wright, 16 Fla. 510.

Georgia.— Smith *v.* Pilcher, 130 Ga. 350, 60 S. E. 1000.

Illinois.— Cheney *v.* Roodhouse, 135 Ill. 257, 25 N. E. 1019 [*modifying* 32 Ill. App. 49].

Indiana.— Bailey *v.* Troxell, 43 Ind. 432.

Iowa.— Brandt *v.* Chicago, etc., R. Co., 26 Iowa 114. See also Metropolitan Nat. Bank *v.* Commercial State Bank, 104 Iowa 682, 74 N. W. 26; McWhirter *v.* Crawford, 104 Iowa 550, 72 N. W. 505, 73 N. W. 1021.

Kansas.— Sanford *v.* Bartholomew, 33 Kan. 38, 5 Pac. 429.

Kentucky.— Haddix *v.* Wilson, 3 Bush 523.

Maryland.— Baltimore F. Ins. Co. *v.* Loney, 20 Md. 20; Fridge *v.* State, 3 Gill & J. 103, 20 Am. Dec. 463.

Massachusetts.— Chapin *v.* Chapin, (1894) 36 N. E. 746; Boyden *v.* Moore, 5 Mass. 365.

Minnesota.— Kingsley *v.* Anderson, 103 Minn. 510, 115 N. W. 642, 116 N. W. 112; Spoon *v.* Frambach, 83 Minn. 301, 86 N. W. 106; Dickerson *v.* Hayes, 26 Minn. 100, 1 N. W. 83.

Missouri.— Detweiler *v.* Breckenkamp, 83 Mo. 45.

New Hampshire.— Fisher *v.* Willard, 20 N. H. 421.

New York.— Graham *v.* Linden, 50 N. Y. 547; Campbell *v.* Abbott, 60 Misc. 93, 111 N. Y. Suppl. 782; Wicks *v.* London and Lancashire Fire Ins. Co., 111 N. Y. Suppl. 65; Grussy *v.* Schneider, 50 How. Pr. 134; McLean *v.* Walker, 10 Johns. 471.

Ohio.— Hoppe, etc., Bottling Co. *v.* Sacks, 11 Ohio Cir. Ct. 3, 5 Ohio Cir. Dec. 306.

Pennsylvania.—Wolverton's Appeal, 5 Atl. 612; Coleman *v.* Ross, 46 Pa. St. 180; Lowrie *v.* Verner, 3 Watts 317.

Texas.— Henry *v.* Sansom, (Civ. App. 1896) 36 S. W. 122.

Virginia.— Shobe *v.* Carr, 3 Munf. 10.

West Virginia.— Shank *v.* Groff, 45 W. Va. 543, 32 S. E. 248.

United States.— Leitch *v.* Union R. Transp. Co., 15 Fed. Cas. No. 8,224.

England.— Dixon *v.* Clark, 5 C. B. 365, 5 D. & L. 155, 16 L. J. C. P. 237, 57 E. C. L. 365.

See 45 Cent. Dig. tit. "Tender," § 21 *et seq.*

Attorney's fees.— The amount stipulated in a note for attorney's fees in case of default must be tendered to an attorney who holds the note for collection. Rouyer *v.* Miller, 16 Ind. App. 519, 44 N. E. 51, 45 N. E. 674. But an attorney's charges need not be tendered if not stipulated for. Kinton *v.* Braithwaite, 5 Dowl. P. C. 101, 2 Gale 48, 5 L. J. Exch. 165, 1 M. & W. 310, Tyrw. & G. 945. See also *infra*, III, A, 2, note 42.

Tender by or to agent.—Where an agent was sent to tender a certain sum to a creditor who demanded a larger sum, and the agent thereupon offered the balance at his own risk, the tender was held good. Read *v.* Goldring, 2 M. & S. 86, 105 Eng. Reprint 314. But where an agent is sent to demand a specific sum for an unliquidated claim, an offer to him of a less sum is not a valid tender. Chipman *v.* Bates, 5 Vt. 143.

A tender of a sum actually due on a bond with a penalty, although less than the penalty, is sufficient. Tracy *v.* Strong, 2 Conn. 659.

32. *Michigan.*— Stickney *v.* Parmenter, 35 Mich. 237; Thurber *v.* Jewett, 3 Mich. 295.

Minnesota.—Wyatt *v.* Quinby, 65 Minn. 537, 68 N. W. 109; Gorham *v.* National L. Ins. Co., 62 Minn. 327, 64 N. W. 906; Nopson *v.* Horton, 20 Minn. 268; Spencer *v.* Levering, 8 Minn. 461.

New York.— Equitable L. Assur. Co. *v.* Von Glahn, 107 N. Y. 637, 13 N. E. 793; Hargous *v.* Lahens, 3 Sandf. 213.

Pennsylvania.—Allen *v.* Union Bank, 5 Whart. 420.

South Carolina.— McClendon *v.* Wells, 20 S. C. 514.

See 45 Cent. Dig. tit. "Tender," § 21 *et seq.*

The insignificance of the deficiency does not make any difference. A shortage of forty-one cents has been held fatal. Boyden *v.* Moore, 5 Mass. 365. So where the deficiency was seventy-one cents on a demand amounting to six hundred and forty-nine dollars and forty-four cents the tender was held not good. Wright *v.* Beherns, 39 N. J. L. 413.

33. Shuck *v.* Chicago, etc., R. Co., 73 Iowa 333, 35 N. W. 429; Helphrey *v.* Chicago, etc., R. Co., 29 Iowa 480; Brandt *v.* Chicago, etc., R. Co., 26 Iowa 114; Shotwell *v.* Dennman, 1 N. J. L. 202; Baker *v.* Gasque, 3 Strobh. (S. C.) 25; Patnote *v.* Sanders, 41 Vt. 66, 98 Am. Dec. 564.

34. Smith *v.* Pilcher, 130 Ga. 350, 60 S. E. 1000.

Furthermore, the tenderer must name the sum which he wishes to tender,[35] unless perhaps the exact sum and interest is tendered so that the tenderee may easily satisfy himself that the amount is correct.[36] Where the amount due is within the exclusive knowledge of the creditor, and the creditor on demand neglects or refuses to indicate the correct amount that is due, the debtor may tender so much as he thinks is justly due, and if less than the true amount, the tender nevertheless will be good;[37] and the same rule obtains where the tenderee deprives the tenderer of the means of ascertaining the exact amount due.[38]

2. Interest and Costs. The amount tendered must be sufficient to cover both principal and interest, if the obligation upon which the tender is made carries interest;[39] and the tender must include interest up to, and including, the last day of grace;[40] and a tender, made after action has been commenced, in order to bar the recovery of subsequent interest and costs, must be of such sum as will cover the amount due, with interest to the day of the tender, and such costs as have accrued in the action up to that time,[41] the costs to be included in the sum

35. Knight *v.* Abbot, 30 Vt. 577; Alexander *v.* Brown, 1 C. & P. 288, 12 E. C. L. 173. But see Conway *v.* Case, 22 Ill. 127, holding that where the bag containing the money was thrown upon a counter and the tenderee did not offer to count it, the tender was sufficient upon the evidence of the agent who made the offer, to the effect that it was his belief that there was sufficient coin in the bag to pay the amount due.

36. State *v.* Spicer, 4 Houst. (Del.) 100.

37. Shannon *v.* Howard Mut. Bldg. Assoc., 36 Md. 383; Nelson *v.* Robson, 17 Minn. 284.

38. Downing *v.* Plate, 90 Ill. 268.

39. *Connecticut.*— People's Sav. Bank *v.* Norwalk, 56 Conn. 547, 16 Atl. 257.

Indiana.— Hamar *v.* Dimmick, 14 Ind. 105.

Louisiana.— Louisiana Molasses Co. *v.* Le Sassier, 52 La. Ann. 1768, 2070, 28 So. 217, 223.

Massachusetts.—Weld *v.* Elliot Five Cents Sav. Bank, 158 Mass. 339, 33 N. E. 519; City Bank *v.* Cutter, 3 Pick. 414.

New York.—Woodworth *v.* Morris, 56 Barb. 97; Globe Soap Co. *v.* Liss, 36 Misc. 199, 73 N. Y. Suppl. 153.

South Carolina.— McClendon *v.* Wells, 20 S. C. 514.

United States.— Hus *v.* Kempf, 12 Fed. Cas. No. 6,943, 10 Ben. 231.

England.— Suse *v.* Pompe, 8 C. B. N. S. 538, 7 Jur. N. S. 166, 30 L. J. C. P. 75, 3 L. T. Rep. N. S. 17, 9 Wkly. Rep. 15, 98 E. C. L. 538; Gibbs *v.* Fremont, 9 Exch. 25, 17 Jur. 820, 22 L. J. Exch. 302, 1 Wkly. Rep. 482.

See 45 Cent. Dig. tit. "Tender," § 21 *et seq.*

Waiver of objection.—An objection that interest was not tendered is waived by refusing the tender solely upon another ground. Christenson *v.* Nelson, 38 Oreg. 473, 63 Pac. 648. And the objection that the sum tendered did not include interest cannot be raised if the creditor in his complaint claimed interest only from a date subsequent to the tender. Rudulph *v.* Wagner, 36 Ala. 698.

Usurious interest need not be tendered. Shiver *v.* Johnston, 62 Ala. 37.

40. Smith *v.* Merchant's, etc., Bank, 14 Ohio Cir. Ct. 199, 8 Ohio Cir. Dec. 176.

41. *Alabama.*— Smith *v.* Anders, 21 Ala. 782.

Connecticut.— Studwell *v.* Cooke, 38 Conn. 549.

Illinois.— Sweetland *v.* Tuthill, 54 Ill. 215; McDaniel *v.* Upton, 45 Ill. App. 151.

Indiana.— Chicago, etc., R. Co. *v.* Woodard, 159 Ind. 541, 65 N. E. 577.

Iowa.—Young *v.* McWaid, 57 Iowa 101, 10 N. W. 291; Barnes *v.* Greene, 30 Iowa 114; Freeman *v.* Fleming, 5 Iowa 460.

Louisiana.— Louisiana Molasses Co. *v.* Le Sassier, 52 La. Ann. 2070, 28 So. 217; McMaster *v.* Brander, 15 La. 206.

Maine.— Marshall *v.* Wing, 50 Me. 62.

Massachusetts.— Emerson *v.* Gray, 10 Gray 351; Whipple *v.* Newton, 17 Pick. 168; Hampshire Manufacturers' Bank *v.* Billings, 17 Pick. 87.

Michigan.— Stickney *v.* Parmenter, 35 Mich. 237.

Minnesota.— Seeger *v.* Smith, 74 Minn. 279, 77 N. W. 3.

New Hampshire.— Thurston *v.* Blaisdell, 8 N. H. 367.

New Jersey.— State Bank *v.* Holcomb, 7 N. J. L. 193, 11 Am. Dec. 549.

New York.— Eaton *v.* Wells, 22 Hun 123 [*affirmed* in 82 N. Y. 576]; Globe Soap Co. *v.* Liss, 36 Misc. 199, 73 N. Y. Suppl. 153; Bernstein *v.* Levy, 34 Misc. 772, 68 N. Y. Suppl. 833; People *v.* Banker, 8 How. Pr. 258; Rockefeller *v.* Weiderwax, 3 How. Pr. 382; Edwards *v.* Farmer's F., etc., Ins. Co., 21 Wend. 467; Retan *v.* Drew, 19 Wend. 304; Farr *v.* Smith, 9 Wend. 338, 24 Am. Dec. 162; Hunter *v.* Le Conte, 6 Cow. 728.

Ohio.— Burt *v.* Dodge, 13 Ohio 131.

Pennsylvania.—McDowell *v.* Glass, 4 Watts 389; George *v.* Sunday, 1 Woodw. 364.

South Carolina.—Broughton *v.* Richardson, 2 Rich. 64; Hinchy *v.* Foster, 3 McCord 428.

Vermont.— Cree *v.* Lord, 25 Vt. 498.

United States.— Lichtenfels *v.* The Enos B. Phillips, 53 Fed. 153; Hus *v.* Kempf, 12 Fed. Cas. No. 6,943, 10 Ben. 231.

England.—Walsh *v.* Southworth, 6 Exch. 150, 20 L. J. M. C. 165, 2 L. M. & P. 91.

Canada.— Garforth *v.* Cairns, 9 Can. L. J. N. S. 212.

See 45 Cent. Dig. tit. "Tender," § 26.

tendered, comprehending everything accrued at the time of the tender or which must necessarily be expended by plaintiff in disposing of the matter of record, and such other items as plaintiff would be entitled to enter in the judgment.[42] Although a debtor does not in his estimate of the amount due include any interest, yet if, as a matter of fact, he tenders enough money to cover the actual debt and interest, the tender is good;[43] and if a contract for the payment of money at a certain time does not mention interest, a tender on the due day, of the principal without interest, is good.[44]

3. Tender of More Than Is Due and Demand For Change[45] — a. In General. Where a debtor offers in payment, as the sum due, a larger sum than is actually due, or such larger sum is offered in payment of a less sum and he does not expressly or impliedly request any change to be returned, the tender is not objectionable, for a tender of a greater sum includes the less sum;[46] but it is held that a

When an action is deemed to be commenced see Actions, 1 Cyc. 747.

A failure upon request to state the amount of the costs, where they are fixed by statute, will not excuse a failure to tender the full amount. Willey *v.* Laraway, 64 Vt. 566, 25 Atl. 435. But a plaintiff upon request is bound to furnish information as to the costs, where the costs incurred are peculiarly within his knowledge; but where defendant with knowledge of the commencement of the suit made no inquiry, it was held that plaintiff was under no obligation to inform him that he had summoned witnesses Smith *v.* Wilbur, 35 Vt. 133

Waiver of claim for costs.— If, at the time of making a tender of the amount of the debt, the debtor does not know that a suit has been commenced and the creditor does not inform him of that fact, nor make any claim for costs, but refuses to accept the amount tendered solely on the ground that it is insufficient to pay the debt, it is a waiver of all claims for costs. Jones *v.* Ames, Smith (Ind.) 133; Haskell *v.* Brewer, 11 Me. 258; Hull *v.* Peters, 7 Barb. (N. Y.) 331. See Vreeland *v.* Waddell, 93 Wis. 107, 67 N. W. 51, where no demand was made for the excuse of keeping certain property, and a tender of the debt alone was held sufficient.

42. Shutes *v.* Woodard, 57 Mich. 213, 23 N. W. 775; Mjones *v.* Yellow Medicine County Bank, 45 Minn. 335, 47 N. W. 1072; Seeligson *v.* Gifford, (Tex. Civ. App. 1907) 100 S. W. 213; Sorrel *v.* Gifford, (Tex. Civ. App. 1907) 100 S. W. 212; Bolton *v.* Gifford, 45 Tex. Civ. App. 140, 100 S. W. 210; Strusguth *v.* Pollard, 62 Vt. 157, 19 Atl. 228 (holding that the sum tendered must include not only the costs accrued but the costs of a nonsuit); Hoyt, etc., Co. *v.* Smith, 4 Wash. 640, 30 Pac. 664.

A slight deficiency will defeat the purpose of the tender, which must cover all the costs, the doctrine *de minimis non curat lex* not applying. Wright *v.* Behrens, 39 N. J. L. 413.

Attorney's fee.—Where the instrument sued on provides for payment of attorney's fees, the tender must include such fees. Seeligson *v.* Gifford, (Tex. Civ. App. 1907) 100 S. W. 213; Sorrel *v.* Gifford, (Tex. Civ. App. 1907) 100 S. W. 212; Bolton *v.* Gifford, 45 Tex. Civ. App. 140, 100 S. W. 210. See also *supra*, III, A, 1, note 31. Thus where a mortgage provides for a reasonable attorney's fee, a tender after a bill is filed should include an offer to pay a reasonable fee for service already performed. Fuller *v.* Brown, 167 Ill. 293, 47 N. E. 202; Smith *v.* Jackson, 153 Ill. 399, 39 N. E. 130; Oakford *v.* Brown, 68 Ill. App. 239. But where there is an attempt to foreclose by advertisement, and the notice is withdrawn because it is imperfect, the mortgagee is not entitled to demand the attorney's fee. Collar *v.* Harrison, 30 Mich. 66. If foreclosure proceedings are not binding upon the mortgagor or a subsequent encumbrancer, such person not bound need not tender the attorney's fee or the cost of the foreclosure. Catterlin *v.* Armstrong, 101 Ind. 258; Gage *v.* Brewster, 31 N. Y. 218; Vroom *v.* Ditmas, 4 Paige (N. Y.) 526; Benedict *v.* Gilman, 4 Paige (N. Y.) 58.

Where the statute allows an attachment before the maturity of the debt and a writ is issued and sustained, a tender when the debt falls due must include the costs of the attachment. Audenreid *v.* Hull, 45 Mo. App. 202.

Where a plaintiff, in good faith, has subpœnaed his witnesses in the usual mode, and has placed himself under a legal liability to pay them if they attend, he is entitled to a tender of their fees, and it makes no difference whether he has actually paid or tendered the witnesses their fees or not. Smith *v.* Wilbur, 35 Vt. 133.

43. Rudulph *v.* Wagner, 36 Ala. 698.

44. Connell *v.* Mulligan, 13 Sm. & M. (Miss.) 388; Hines *v.* Strong, 46 How. Pr. (N. Y.) 97 [*affirmed* in 56 N. Y. 670].

45. **Tender of fare to carrier and demand for change** see Carriers, 6 Cyc. 547.

46. *Illinois.*— North Chicago St. R. Co. *v.* Le Grand Co., 95 Ill. App. 435.

Indiana.— Patterson *v.* Cox, 25 Ind. 261.

Michigan.— Hanscom *v.* Hinman, 30 Mich. 419.

New York.— Zeitlin *v.* Arkaway, 26 Misc. 761, 56 N. Y. Suppl. 1058.

North Carolina.—Wilson *v.* Duplin Tel. Co., 139 N. C. 395, 52 S. E. 62.

Texas.— Odom *v.* Carter, 36 Tex. 281; Houston, etc., R. Co. *v.* Campbell, (Civ. App. 1897) 40 S. W. 431.

tender of a larger amount than is due coupled with an express or implied request for change is bad.[47]

b. Waiver of Objection. The objection to a demand that change be furnished is waived if the tender is refused upon some other ground, as where a larger sum is demanded,[48] or where the tender is refused unless a certain amount be agreed upon as the sum due on a separate account,[49] or upon the ground that money offered was depreciated;[50] and it seems that a mere refusal to accept the amount tendered without specific objection that change is demanded waives the objection and validates the tender.[51]

4. Tender of Balance Over Offset. A legal tender cannot be made of the difference between the amount of an obligation for the payment of money and an offset,[52] particularly where the counter demand is unlawful.[53]

5. Tender on Several Demands. A person indebted upon two or more demands held by the same creditor may make a tender of one entire sum upon all the demands.[54] But if the tender is refused on the ground that the amount offered

England.—Dean *v.* James, 4 B. & Ad. 547, 1 N. & M. 303, 2 L. J. K. B. 94, 24 E. C. L. 241, 110 Eng. Reprint 561; Wade's Case, 5 Coke 114*a*, 77 Eng. Reprint 232; Bevan *v.* Rees, 7 Dowl. P. C. 510, 3 Jur. 608, 8 L. J. Exch. 263, 5 M. & W. 306; Douglas *v.* Patrick, 3 T. R. 683, 1 Rev. Rep. 793, 100 Eng. Reprint 802.

See 45 Cent. Dig. tit. "Tender," § 24.

The money tendered must be susceptible of the proper division, otherwise a tender might be made in such a way that it would be physically impossible for the creditor to take what is due and return the difference. Betterbee *v.* Davis, 3 Campb. 70, 13 Rev. Rep. 755. See Robinson *v.* Cook, 6 Taunt. 336, 16 Rev. Rep. 624, 1 E. C. L. 642. See also Hubbard *v.* Chenango Bank, 8 Cow. (N. Y.) 88.

47. Patterson *v.* Cox, 25 Ind. 261; Perkins *v.* Beck, 19 Fed. Cas. No. 10,984, 4 Cranch C. C. 68; Dean *v.* James, 4 B. & Ad. 547, 2 L. J. K. B. 94, 1 N. & M. 303, 24 E. C. L. 241, 110 Eng. Reprint 561; Betterbee *v.* Davis, 3 Campb. 70, 13 Rev. Rep. 755; Blow *v.* Russell, 1 C. & P. 365, 12 E. C. L. 217; Bevan *v.* Rees, 7 Dowl. P. C. 510, 3 Jur. 608, 8 L. J. Exch. 263, 5 M. & W. 306; Brady *v.* Jones, 2 D. & R. 305, 16 E. C. L. 87; Robinson *v.* Cook, 6 Taunt. 336, 16 Rev. Rep. 624, 1 E. C. L. 642.

Offering property of a greater value than the amount of the chattel note, with a demand for the difference in money, is not a good tender. Lamb *v.* Lathrop, 13 Wend. (N. Y.) 95, 27 Am. Dec. 174.

48. People's Furniture, etc., Co. *v.* Crosby, 57 Nebr. 282, 77 N. W. 658, 73 Am. St. Rep. 504; Richardson *v.* Jackson, 9 Dowl. P. C. 715, 10 L. J. Exch. 303, 8 M. & W. 298; Bevans *v.* Rees, 7 Dowl. P. C. 510, 3 Jur. 608, 8 L. J. Exch. 263, 5 M. & W. 306; Cadman *v.* Lubbock, 5 D. & R. 289, 3 L. J. K. B. O. S. 41, 16 E. C. L. 235; Saunders *v.* Graham, Gow. 121, 5 E. C. L. 891; Black *v.* Smith, Peake N. P. 88, 3 Rev. Rep. 661.

49. Bevan *v.* Rees, 7 Dowl. P. C. 510, 3 Jur. 608, 8 L. J. Exch. 263, 5 M. & W. 306.

50. Lohman *v.* Crouch, 19 Gratt. (Va.) 331.

51. Gradle *v.* Warner, 140 Ill. 123, 29 N. E. 1118.

52. Rand *v.* Harris, 83 N. C. 486; Pershing *v.* Feinberg, 203 Pa. St. 144, 52 Atl. 22; Greenhill *v.* Hunton, (Tex. Civ. App. 1902) 69 S. W. 440; Searles *v.* Sadgrave, 5 E. & B. 639, 2 Jur. N. S. 21, 25 L. J. Q. B. 15, 4 Wkly. Rep. 53, 85 E. C. L. 639. But see Smith *v.* Curtiss, 38 Mich. 393; Dedekam *v.* Vose, 7 Fed. Cas. No. 3,729, 3 Blatchf. 44, where it was held that in admiralty a tender of freight charges less a certain sum for damages done to the goods was a sufficient tender.

An offer to pay an amount due for towage, less damages done certain barges other than the one for which the towage was claimed, is insufficient. L'Hommedieu *v.* The H. L. Dayton, 38 Fed. 926.

Effect of tender of difference.—A tender of the difference between the amount due and a counter-claim is an admission that the amount tendered is due upon the contract sued upon; but the tender does not preclude proof of the counter-claim. Young *v.* Borzone, 26 Wash. 4, 66 Pac. 135, 421.

53. Sager *v.* Tupper, 35 Mich. 134.

54. Johnson *v.* Cranage, 45 Mich. 14, 7 N. W. 188; Thetford *v.* Hubbard, 22 Vt. 440.

Where a creditor has separate demands against several persons an offer of one sum for the debts of all will not support a plea that a certain portion of the sum was tendered for the debt of one. Strong *v.* Harvey, 3 Bing. 307, 4 L. J. C. P. O. S. 57, 11 Moore C. P. 72, 11 E. C. L. 153 [*explained* in Hall *v.* Norwalk F. Ins. Co., 57 Conn. 105, 17 Atl. 356].

Interest coupons in the hands of the holder of the bond and not negotiated are not distinct debts, and a tender to the holder of the bond of the entire amount of the principal and interest is not a tender on two demands. Bailey *v.* Buchanan County, 115 N. Y. 297, 22 N. E. 155, 6 L. R. A. 562.

Where a person was indebted on different demands to several persons separately, and when they were together he tendered them one sum sufficient to satisfy all their demands, which they refused to receive on the ground that more was due, it was held to be a good tender. Black *v.* Smith, Peake N. P. 88, 3 Rev. Rep. 661.

is not sufficient to pay all the claims, and the amount offered is insufficient in fact, the tender will not be good as to any of the separate demands.[55] Conversely, a debtor may pay his debts separately, and may therefore designate upon what debt the money tendered is to apply;[56] and if there is a statute permitting a tender to be made after an action is commenced, and several distinct claims have been included in the complaint, a tender of the amount of one of the claims with costs of the action is a tender *pro tanto* under the statute.[57]

6. Waiver of Objection to Amount. An objection to the amount of a tender must be taken at the time the tender is made, otherwise it is waived;[58] and where the sum tendered is less than the sum due and the tender is refused by the creditor on some ground other than that the amount is too small, as where it is claimed that the contract is forfeited,[59] the tenderee waives the objection to the insufficiency of the amount;[60] but it has been held that if a tender of a certain sum is refused without assigning any reason and the sum offered is too small there is no waiver of the objection to the amount.[61] A waiver of the objection that the amount tendered is too small does not preclude the tenderee from recovering the whole amount due, nor will the acceptance of a less sum than is due preclude the recovery of the balance.[62]

B. Manner — 1. In General. The tenderer must do and offer everything that is necessary on his part to complete the transaction, and must fairly make known his purpose without ambiguity.[63] The tender must be made in good faith,[64] and must be definite and certain in character,[65] so as to leave no reasonable doubt that the tenderer intended at the time to make full and unconditional payment;[66] and the tenderee must be given an opportunity for intelligent action,[67] and to make an examination or inquiries pertaining to his rights in connection

55. People's Sav. Bank *v.* Norwalk, 56 Conn. 547, 16 Atl. 257; Shuck *v.* Chicago, etc., R. Co., 73 Iowa 333, 35 N. W. 429; Hardingham *v.* Allen, 5 C. B. 793, 12 Jur. 584, 17 L. J. C. P. 198, 57 E. C. L. 793.

56. Nelson *v.* Robson, 17 Minn. 284; Salinas *v.* Ellis, 26 S. C. 337, 2 S. E. 121.

57. Carleton *v.* Whitcher, 5 N. H. 289.

58. Lampley *v.* Weed, 27 Ala. 621; Kentucky Chair Co. *v.* Com., 49 S. W. 197, 20 Ky. L. Rep. 1279; Browning *v.* Crouse, 40 Mich. 339.

59. Thayer *v.* Meeker, 86 Ill. 470; Flanders *v.* Chamberlain, 24 Mich. 305; Bradshaw *v.* Davis, 12 Tex. 336.

60. *Arkansas.*— Bender *v.* Bean, 52 Ark. 132, 12 S. W. 180, 241.

California.— Oakland Sav. Bank *v.* Applegarth, 67 Cal. 86, 7 Pac. 139, 476.

Colorado.— Northern Colorado Irr. Co. *v.* Richards, 22 Colo. 450, 45 Pac. 423.

Iowa.— Sheriff *v.* Hull, 37 Iowa 174; Guengerich *v.* Smith, 36 Iowa 587.

Michigan.— Hill *v.* Carter, 101 Mich. 158, 59 N. W. 413.

Mississippi.— Connell *v.* Mulligan, 13 Sm. & M. 388.

New Hampshire.— Ricker *v.* Blanchard, 45 N. H. 39.

Pennsylvania.— Brewer *v.* Fleming, 51 Pa. St. 102.

South Carolina.— Smith *v.* Stinson, 1 Brev. 1.

Tennessee.— Graves *v.* McFarlane, 2 Coldw. 167.

Wisconsin.— Gauche *v.* Milbrath, 94 Wis. 674, 69 N. W. 999.

This rule is made statutory in some states. See the statutes of the several states. And see Latimer *v.* Capay Valley Land Co., 137 Cal. 286, 70 Pac. 82.

61. McWhirter *v.* Crawford, 104 Iowa 550, 72 N. W. 505, 73 N. W. 1021; Chicago, etc., R. Co. *v.* Northwestern Union Packet Co., 38 Iowa 377. But see Hayward *v.* Munger, 14 Iowa 516.

62. Patnote *v.* Sanders, 41 Vt. 66, 98 Am. Dec. 564; Carpenter *v.* Welch, 40 Vt. 251.

63. Proctor *v.* Robinson, 35 Mich. 284; Lilienthal *v.* McCormick, 117 Fed. 89, 54 C. C. A. 475.

A court of equity will not supply a defect in a tender against a rule of law. Taylor *v.* Reed, 5 T. B. Mon. (Ky.) 36 (holding that if a party pretends to avail himself of the plea of tender in equity, because he could not make it at law, he ought to be held to as great strictness as he would be held at law); Arrowsmith *v.* Van Harlingen, 1 N. J. L. 26; Shields *v.* Lozear, 22 N. J. Eq. 447. See Shotwell *v.* Dennman, 1 N. J. L. 174; Gammon *v.* Stone, 1 Ves. 339, 30 Eng. Reprint 1068.

64. Doak *v.* Bruson, 152 Cal. 17, 91 Pac. 1001; Selby *v.* Hurd, 51 Mich. 1, 16 N. W. 180; McPherson *v.* Wiswell, 16 Nebr. 625, 21 N. W. 391; Fisk *v.* Holden, 17 Tex. 408.

65. Grace *v.* Means, 129 Ga. 638, 59 S. E. 811.

66. Pulsifer *v.* Shepard, 36 Ill. 513; Eastland *v.* Longshorn, 1 Nott & M. (S. C.) 194.

67. Wiltshire *v.* Smith, 3 Atk. 89, 26 Eng. Reprint 854, 9 Mod. 441, 88 Eng. Reprint 561. See Harris *v.* Mulock, 9 How. Pr. (N. Y.) 402.

with the transaction in which the tender is being made; [68] and the tenderer must ordinarily declare upon what account the tender is made.[69]

2. Actual Offer. In making a tender there must be an actual offer by the tenderer to pay.[70] An announcement without more of an intention of making a tender is not sufficient,[71] nor is an assertion of readiness [72] or willingness to pay sufficient.[73]

3. Ability to Perform. In making a tender, the tenderer must have it in his power, at the time of his offer, to pay the amount due; [74] and must have title to the thing tendered; [75] and the actual ability to deliver the money must not only exist, but it must be made to appear at the time of the tender.[76] Mere

A tender made in the street has been held not good when the creditor, by reason of the place, was without means of ascertaining the amount due. Waldron *v.* Murphy, 40 Mich. 668; Chase *v.* Welsh, 45 Mich. 345, 7 N. W. 895. But where a debtor pulled out his pocket-book and offered to pay if the creditor would go into a public house near by, the tender was held good. Read *v.* Goldring, 2 M. & S. 86, 105 Eng. Reprint 314.

68. Root *v.* Bradley, 49 Mich. 27, 12 N. W. 896; Chase *v.* Welsh, 45 Mich. 345, 7 N. W. 895; Waldron *v.* Murphy, 40 Mich. 668; Proctor *v.* Robinson, 35 Mich. 284; Bakeman *v.* Pooler, 15 Wend. (N. Y.) 637.

69. Warner *v.* Harding, Latch. 69, 82 Eng. Reprint 279.

70. *Georgia.*— Angier *v.* Equitable Bldg., etc., Assoc., 109 Ga. 625, 35 S. E. 64.

Illinois.— Liebbrandt *v.* Myron Lodge No. One O. F. O. C., 61 Ill. 81.

Iowa.— Eastman *v.* Rapids Dist. Tp., 21 Iowa 590.

Minnesota.— Deering Harvester Co. *v.* Hamilton, 80 Minn. 162, 83 N. W. 44.

Oregon.— Smith *v.* Foster, 5 Oreg. 44.

Pennsylvania.— Sheredine *v.* Gaul, 2 Dall. 190, 1 L. ed. 344.

Texas.— Rogers *v.* People's Bldg., etc., Assoc., (Civ. App. 1900) 55 S. W. 383.

Vermont.— Bowen *v.* Holly, 38 Vt. 574; Barney *v.* Bliss, 1 D. Chipm. 399, 12 Am. Dec. 696.

See 45 Cent. Dig. tit. "Tender," § 29.

Facts insufficient to constitute offer see Winne *v.* Colorado Springs Co., 3 Colo. 155; Sharpe *v.* Kennedy, 51 Ga. 257; Steele *v.* Biggs, 22 Ill. 643; Phœnix Ins. Co. *v.* Overman, 21 Ind. App. 516, 52 N. E. 771; Shoemaker *v.* Porter, 41 Iowa 197; Jones *v.* Mullinix, 25 Iowa 198; Eastman *v.* Rapids Dist. Tp., 21 Iowa 590; McInerney *v.* Lindsay, 97 Mich. 238, 56 N. W. 603; Chase *v.* Welsh, 45 Mich. 345, 7 N. W. 895; Harmon *v.* Magee, 57 Miss. 410; Butts *v.* Burnett, 6 Abb. Pr. N. S. (N. Y.) 302; Hornby *v.* Cramer, 12 How. Pr. (N. Y.) 490; Ladd *v.* Patten, 14 Fed. Cas. No. 7,973, 1 Cranch C. C. 263; Ryder *v.* Townsend, 7 D. & R. 119, 4 L. J. K. B. O. S. 27, 16 E. C. L. 272. See J. H. North Furniture, etc., Co. *v.* Davis, 86 Mo. App. 296, where a deposit of money with a justice was held not a tender at common law; nor one under the statute, since not made to the constable, as required therein.

71. Stone *v.* Billings, 167 Ill. 170, 47 N. E. 372 [*affirming* 63 Ill. App. 371].

Publishing a notice in a paper that bonds will be paid at a certain time and place other than that named in the bond is not a tender. Kelley *v.* Phenix Nat. Bank, 17 N. Y. App. Div. 496, 45 N. Y. Suppl. 533.

72. *Alabama.*— Cowan *v.* Harper, 2 Stew. & P. 236.

Indiana.— Pratt *v.* Graff, 15 Ind. 1; McKernon *v.* McCormick, 2 Ind. 318.

Kentucky.— Mitchell *v.* Gregory, 1 Bibb 449, 4 Am. Dec. 655.

Louisiana.— Bacon *v.* Smith, 2 La. Ann. 441, 46 Am. Dec. 549.

North Carolina.— North *v.* Mallett, 3 N. C. 151.

Tennessee.— Nixon *v.* Bullock, 9 Yerg. 414.

Texas.— Dumas *v.* Hardwick, 19 Tex. 238.

Vermont.— Barney *v.* Bliss, 1 D. Chipm. 399, 12 Am. Dec. 696.

Wisconsin.— Hunter *v.* Warner, 1 Wis. 141.

England.— Scott *v.* Franklin, 15 East 428, 104 Eng. Reprint 906; Sucklinge *v.* Coney, Noy 74, 74 Eng. Reprint 1041.

See 45 Cent. Dig. tit. "Tender," § 29 *et seq.*

73. Adams *v.* Friedlander, 37 La. Ann. 350; McIntyre *v.* Carver, 2 Watts & S. (Pa.) 392, 37 Am. Dec. 519.

In Louisiana a tender must be made in the manner provided in Code Pr. art. 407. Mechanics', etc., Bank *v.* Barnett, 27 La. Ann. 177; Thompson *v.* Edwards, 23 La. Ann. 183. See *infra*, III, B, 5.

74. Selby *v.* Hurd, 51 Mich. 1, 16 N. W. 180.

75. Reed *v.* Newburgh Bank, 6 Paige (N. Y.) 337.

But if the offer is accepted, the question of a tenderer's title is material only so far as it affects his ability to make a valid transfer. Eslow *v.* Mitchell, 26 Mich. 500; Champion *v.* Joslyn, 44 N. Y. 653.

A tender of notes which were borrowed for the purpose of tendering them back to the original transferrer was held good. Bell *v.* Ballance, 12 N. C. 391.

76. Berger *v.* Peterson, 78 Ill. 633; De Wolfe *v.* Taylor, 71 Iowa 648, 33 N. W. 154; Selby *v.* Hurd, 51 Mich. 1, 16 N. W. 180; Fuller *v.* Little, 7 N. H. 535. See Pinney *v.* Jorgenson, 27 Minn. 26, 6 N. W. 376, where it was held that it was error to exclude evidence that the tenderer then had the money with him.

Merely stating, "I will pay you the money I offered you yesterday," where the money

ability to pay on the day fixed for payment is not sufficient,[77] nor is an ability to borrow;[78] but the money must be in the creditor's immediate control ready for delivery,[79] that is to say in his immediate possession or within convenient reach.[80]

4. Actual Production of Thing Tendered — a. In General. In order to make a valid tender of either money or chattels, the thing to be tendered must be actually produced and offered to the party entitled thereto, a mere offer to pay being insufficient;[81] and the tenderer must place the money or property in such a posi-

was in a desk near by, was held not sufficient. It ought to appear that the money was there, capable of immediate delivery. Glasscott *v.* Day, 5 Esp. 48, 8 Rev. Rep. 828.

Where concurrent acts are to be performed, a refusal to perform by one party will ordinarily discharge the other, but before he will be entitled to claim the benefit of actual performance he must show upon his part that at the time for performance he was actually able to perform, for otherwise the performance by him would not be prevented by the declaration of the other party. Eddy *v.* Davis, 40 Hun (N. Y.) 637 [*affirmed* in 116 N. Y. 247, 22 N. E. 362]; Mills *v.* Huggins, 14 N. C. 58.

77. Myers *v.* Byington, 34 Iowa 205.

78. Sargent *v.* Graham, 5 N. H. 440, 22 Am. Dec. 469; Eastland *v.* Longshorn, 1 Nott & M. (S. C.) 194.

But where a third person was present with the money and joined in the offer the tender was held sufficient (Mathis *v.* Thomas, 101 Ind. 119); and an offer by a third person to go upstairs and fetch a certain sum which the debtor had offered to pay his creditor, where the offer was refused, has been held to constitute a tender (Harding *v.* Davis, 2 C. & P. 77, 31 Rev. Rep. 654, 12 E. C. L. 460).

79. Steel *v.* Biggs, 22 Ill. 643; Wyllie *v.* Matthews, 60 Iowa 187, 14 N. W. 232; Niederhauser *v.* Detroit Citizens' St. R. Co., 131 Mich. 550, 91 N. W. 1028; Thompson *v.* Hamilton, 5 U. C. Q. B. O. S. 111; Clerk *v.* Wadleigh, 10 Quebec Super. Ct. 456.

80. Wynkoop *v.* Cowing, 21 Ill. 570.

Possession insufficient to validate tender. —A statement by a debtor that he can get the money in five minutes (Breed *v.* Hurd, 6 Pick. (Mass.) 356), or that he can get it the next morning (Blair *v.* Hamilton, 48 Ind. 32), does not constitute tender; nor does an offer to pay a certain sum if the creditor would go to a certain bank (Stakke *v.* Chapman, 13 S. D. 269, 83 N. W. 261), and where it appeared by evidence that at the time of making the offer the debtor did not have the money but could have got it in another city, the tender was held bad. Dungan *v.* Mutual Ben. L. Ins. Co., 46 Md. 469. But on the other hand a refusal to receive the amount of a debt, on a statement by the debtor that he had the money in the bank in the same building, has been held to dispense with the actual production of the money (Smith *v.* Old Dominion Bldg., etc., Assoc., 119 N. C. 257, 26 S. E. 40), and where the tenderer has money in another bank in the same town and could have produced it, the tender was also held good (Steckel *v.* Standley, 107 Iowa 694, 77 N. W. 489); and it has even been held that where a mortgagee, after commencing foreclosure proceedings, demanded payment of the mortgage debt, a promise to pay as soon as the money could be obtained from the bank a few miles distant was a valid tender (Sharp *v.* Todd, 38 N. J. Eq. 324).

If the debtor intends to pay with a check, it must be drawn at the time; an offer to draw a check is not a tender. Dunham *v.* Jackson, 6 Wend. (N. Y.) 22. But see Link *v.* Mack, 25 Misc. (N. Y.) 615, 56 N. Y. Suppl. 115.

Offer in writing.— The same ability to produce the money is required where the tender under the statute may be made in writing. Hyams *v.* Bamberger, 10 Utah 3, 36 Pac. 202. See *infra*, III, B, 5.

81. *Alabama.*— Camp *v.* Simon, 34 Ala. 126.

Arkansas.— Burr *v.* Dougherty, 21 Ark. 559.

California.— People *v.* Harris, 9 Cal. 571.

Illinois.— Liebbrandt *v.* Myron Lodge No. One O. F. O. C., 61 Ill. 81.

Indiana.—Schrader *v.* Wolfin, 21 Ind. 238.

Iowa.— Holt *v.* Brown, 63 Iowa 319, 19 N. W. 235; Shoemaker *v.* Porter, 41 Iowa 197.

Louisiana.— Bacon *v.* Smith, 2 La. Ann. 441, 46 Am. Dec. 549.

Maine.— Brown *v.* Gilmore, 8 Me. 107, 22 Am. Dec. 223.

Michigan.— Chase *v.* Welsh, 45 Mich. 345, 7 N. W. 895.

Minnesota.— Deering Harvester Co. *v.* Hamilton, 80 Minn. 162, 83 N. W. 44.

New York.— Lewis *v.* Mott, 36 N. Y. 395; Leask *v.* Dew, 102 N. Y. App. Div. 529, 92 N. Y. Suppl. 891; Strong *v.* Blake, 46 Barb. 227; Bolton *v.* Ainsler, 95 N. Y. Suppl. 481, 482; Cashman *v.* Martin, 50 How. Pr. 337; Bakeman *v.* Pooler, 15 Wend. 637.

Rhode Island.— Potter *v.* Thompson, 10 R. I. 1.

Virginia.— Moore *v.* Harnsberger, 26 Gratt. 667.

West Virginia.— Shank *v.* Groff, 45 W. Va. 543, 32 S. E. 248.

Wisconsin.— Babcock *v.* Perry, 8 Wis. 277; Hunter *v.* Warner, 1 Wis. 141.

See 45 Cent. Dig. tit. "Tender," § 29.

The object of requiring the actual production of the money is said to be that the sight of it will tend to induce the party to whom it is offered to accept it, thereby preventing litigation. Holladay *v.* Holladay, 13 Oreg. 523, 11 Pac. 260, 12 Pac. 821; Finch *v.* Brook, 1 Bing. N. Cas. 253, 2 Hodges 97, 4 L. J. C. P. 1, 1 Scott 511, 27 E. C. L. 628;

tion that his control over it is relinquished for a sufficient time to enable the tenderee, if he so desires, to reduce it to possession by merely reaching out and laying hold of the money or thing;[82] and a person is not bound to say whether or not he will accept the money or thing until it is produced.[83]

b. Counting Out Money. If a tender is made of the proper amount it is not necessary for the tenderer to count it out,[84] particularly where the counting out is waived by the tenderee refusing to receive the money,[85] it being the duty of the party who is to receive it to take it out and count it.[86]

c. Waiver. The actual production of the money is dispensed with if the party is ready and willing to pay the same, but is prevented by the party to whom it is due expressly saying that it need not be produced, as he would not accept it,[87] or if he declares that he will not receive it,[88] or refuses to remain until it is pro-

Kraus *v.* Arnold, 7 Moore C. P. 59, 17 E. C. L. 508.

An offer to do full equity is not sufficient. Ailey *v.* Burnett, 134 Mo. 313, 33 S. W. 1122, 35 S. W. 1137.

Where the amount due was exclusively within the knowledge of the creditor, an application to know the amount due and an offer to pay on being informed was held a sufficient tender. Shannon *v.* Howard Mut. Bldg. Assoc., 36 Md. 383.

An offer by letter to pay the money due is no tender, although the creditor's attorney treated it as a tender, and wrote, in answer, "I decline your tender, and shall file the bill" (Powney *v.* Blomberg, 8 Jur. 746, 13 L. J. Ch. 450, 14 Sim. 179, 37 Eng. Ch. 179, 60 Eng. Reprint 325), and a valid tender is not made by going with the proper amount to the office of the creditor's attorney, and on finding no one there, writing a letter stating that he can have the money by calling for it (Middleton *v.* Scott, 3 Ont. L. Rep. 26).

82. Sands *v.* Lyons, 18 Conn. 18.

83. Bakeman *v.* Pooler, 15 Wend. (N. Y.) 637.

84. Breed *v.* Hurd, 6 Pick. (Mass.) 356; Behaly *v.* Hatch, Walk. (Miss.) 369, 12 Am. Dec. 570; Wheeler *v.* Knaggs, 8 Ohio 169.

It will not do to have it in a pocket or place about the person, concealed from the party. Strong *v.* Blake, 46 Barb. (N. Y.) 227; Bakeman *v.* Pooler, 15 Wend (N. Y.) 637; Farnsworth *v.* Howard, 1 Coldw. (Tenn.) 215.

The money should be placed within convenient reach of the creditor. Hartsock *v.* Mort, 76 Md. 281, 25 Atl. 303; Curtiss *v.* Greenbanks, 24 Vt. 536.

If held in the hand and actually offered to the creditor the tender is good (Raines *v.* Jones, 4 Humphr. (Tenn.) 490), and where the money offered was held in the hand but not exposed, the tender was held good (Reynolds *v.* Allan, 10 U. C. Q. B. 350).

Where the money offered was contained in a handkerchief held in the debtor's hand, the amount and kind of money being stated to the creditor, the tender was good. Davis *v.* Stonestreet, 4 Ind. 101.

85. King *v.* King, 90 Va. 177, 17 S. E. 894. See Appleton *v.* Donaldson, 3 Pa. St. 381.

86. Behaly *v.* Hatch, Walk. (Miss.) 369, 12 Am. Dec. 570; Thorne *v.* Mosher, 20 N. J. Eq. 257; Wade's Case, 5 Coke 114*a*, 77 Eng. Reprint 232; Read *v.* Goldring, 2 M. & S. 86, 105 Eng. Reprint 314.

Lord Coke said: "The feoffee may tender the money in purses or bags, without shewing or telling the same, for he doth that which he ought, viz. to bring the money in purses or bags, which is the usual manner to carry money in, and then it is the part of the party that is to receive it to put it out and tell it." Coke Litt. 208*a*.

87. Brown *v.* Gilmore, 8 Me. 107, 22 Am. Dec. 223; Westmoreland, etc., Natural Gas Co. *v.* De Witt, 130 Pa. St. 235, 18 Atl. 724, 5 L. R. A. 731; King *v.* King, 90 Va. 177, 17 S. E. 894; Wallis *v.* Glynn, Coop. 282, 10 Eng. Ch. 282, 35 Eng. Reprint 559, 19 Ves. Jr. 380, 34 Eng. Reprint 559; Dickinson *v.* Shee, 4 Esp. N. P. 67; Kraus *v.* Arnold, 7 Moore C. P. 59, 17 E. C. L. 508.

88. *Alabama.*— Odum *v.* Rutledge, etc., R. Co., 94 Ala. 488, 10 So. 222; Rudulph *v.* Wagner, 36 Ala. 698. See Birmingham Paint, etc., Co. *v.* Crampton, (1905) 39 So. 1020.

Connecticut.— Hall *v.* Norwalk F. Ins. Co., 57 Conn. 105, 17 Atl. 356.

Delaware.— Wood *v.* Bangs, 2 Pennew. 435, 48 Atl. 189.

Iowa.— Austin *v.* Smith, (1906) 109 N. W. 289; Steckel *v.* Standley, 107 Iowa 694, 77 N. W. 489.

Kentucky.— Dorsey *v.* Barbee, Litt. Sel. Cas. 204, 12 Am. Dec. 296.

Louisiana.— McStea *v.* Warren, 26 La. Ann. 453.

Massachusetts.— Hazard *v.* Loring, 10 Cush. 267.

Minnesota.—Pinney *v.* Jorgenson, 27 Minn. 26, 6 N. W. 376; Scott *v.* St. Paul, etc., R. Co., 21 Minn. 322.

Mississippi.— Wesling *v.* Noonan, 31 Miss. 599.

Missouri.— Stephenson *v.* Kilpatrick, 166 Mo. 262, 65 S. W. 773; Westlake *v.* St. Louis, 77 Mo. 47, 46 Am. Rep. 4; Johnson *v.* Garlichs, 63 Mo. App. 578; Walsh *v.* St. Louis Exposition, etc., Assoc., 101 Mo. 534, 14 S. W. 722.

New Jersey.— Thorne *v.* Mosher, 20 N. J. Eq. 257.

New York.— Stone *v.* Sprague, 20 Barb. 509; Bellinger *v.* Kilts, 6 Barb. 273; Slingerland *v.* Morse, 8 Johns. 474.

duced,[89] or repulses the debtor,[90] or makes some unjustifiable demand as a condition of accepting the tender.[91] So an actual production is waived where, the debtor being about to produce, the tenderee refused to receive, not on the ground that the tender is not produced, but upon some other and distinct ground,[92] or refuses to deal with the debtor, referring him to an attorney of the tenderee;[93] or where the agent to whom the offer is made denies having authority to receive the money, when he in fact has such authority.[94] Where a debtor goes to the place designated for payment, at the time appointed, with the money or thing to deliver it, and the person who is to receive it is not present, the money or thing need not be produced.[95] But the actual production of the money is held not to be dispensed with by a bare refusal to receive the sum proposed and demanding more;[96] and it is held that in order to establish a waiver there must be an existing capacity to perform.[97]

5. Tender in Writing; Statutory Provisions. At common law a mere written proposal to pay a sum of money if unaccompanied with production of the money or thing to be tendered is not a good tender.[98] But under statute, in some states,

North Carolina.— Terrell *v.* Walker, 65 N. C. 91.

Pennsylvania.— Brewer *v.* Fleming, 51 Pa. St. 102; Appleton *v.* Donaldson, 3 Pa. St. 381; Hanna *v.* Phillips, 1 Grant 253; Eckman *v.* Hildebrand, 1 Lanc. L. Rev. 21.

Tennessee.— Memphis City Bank *v.* Smith, 110 Tenn. 337, 75 S. W. 1065; Farnsworth *v.* Howard, 1 Coldw. 215.

Texas.— Price *v.* McCoy, 1 Tex. App. Civ. Cas. § 181.

Vermont.— Cobb *v.* Hall, 33 Vt. 233; Dickinson *v.* Dutcher, Brayt. 104; Morton *v.* Wells, 1 Tyler 381.

Virginia.— Lohman *v.* Crouch, 19 Gratt. 331.

United States.— Barker *v.* Parkenhorn, 2 Fed. Cas. No. 993, 2 Wash. 142.

See 45 Cent. Dig. tit. "Tender," § 53.

In California, Civ. Code, § 1496, provides that the thing tendered need not be produced unless accepted (Latimer *v.* Capay Valley Land Co., 137 Cal. 286, 70 Pac. 82), and the actual production is waived unless demanded at the time (Green *v.* Barney, (1894) 36 Pac. 1026).

Question for jury.—Whether the actual production of the money or thing was dispensed with is a question of fact to be determined by the jury. Guthman *v.* Kearn, 8 Nebr. 502, 1 N. W. 129; Finch *v.* Brook, 1 Bing. N. Cas. 253, 2 Hodges 97, 4 L. J. C. P. 1, 1 Scott 70, 2 Scott 511, 27 E. C. L. 628; Read *v.* Goldring, 2 M. & S. 86, 105 Eng. Reprint 314; 2 Greenleaf Ev. 602. See also Milburn *v.* Milburn, 4 U. C. Q. B. 179, where it was held that it was for the jury to determine whether the tenderee had an opportunity to determine if a sufficient sum was offered him.

89. Sands *v.* Lyons, 18 Conn. 18; Leatherdale *v.* Sweepstone, 3 C. & P. 342, 14 E. C. L. 600.

90. Wing *v.* Davis, 7 Me. 31 (where the debtor, with the money, was refused admission by the creditor to his house); Sharp *v.* Todd, 38 N. J. Eq. 324; Mesrole *v.* Archer, 3 Bosw. (N. Y.) 376.

91. Parker *v.* Perkins, 8 Cush. (Mass.) 318.

92. *Arkansas.*— Bender *v.* Bean, 52 Ark. 132, 12 S. W. 180, 241; Nick *v.* Rector, 4 Ark. 251.

Illinois.—Ventres *v.* Cobb, 105 Ill. 33; Hanna *v.* Ratekin, 43 Ill. 462.

Michigan.— Lacy *v.* Wilson, 24 Mich. 479.

Minnesota.— Wesling *v.* Noonan, 31 Miss. 599.

North Carolina.— Abrams *v.* Suttles, 44 N. C. 99.

Pennsylvania.— Wagenblast *v.* McKean, 2 Grant 393.

Texas.— Haney *v.* Clark, 65 Tex. 93.

Washington.—Weinberg *v.* Naher, 51 Wash. 591, 99 Pac. 736, 22 L. R. A. N. S. 956.

West Virginia.— Koon *v.* Snodgrass, 18 W. Va. 320.

See 45 Cent. Dig. tit. "Tender," § 53.

Compare also Packard *v.* Mobile, 151 Ala. 159, 43 So. 963.

93. Ashburn *v.* Poulter, 35 Conn. 553; Finch *v.* Brook, 1 Bing. N. Cas. 253, 2 Hodges 97, 4 L. J. C. P. 1, 1 Scott 70, 2 Scott 511, 27 E. C. L. 628; *Ex p.* Banks, 2 De G. M. & G. 936, 22 L. J. Bankr. 73, 1 Wkly. Rep. 57, 51 Eng. Ch. 731, 42 Eng. Reprint 1138.

94. Smith *v.* Old Dominion Bldg., etc., Assoc., 119 N. C. 257, 26 S. E. 40.

95. Morton *v.* Wells, 1 Tyler (Vt.) 381.

96. *Maine.*— Brown *v.* Gilmore, 8 Me. 107, 22 Am. Dec. 223.

New York.— Dunham *v.* Jackson, 6 Wend. 22.

Pennsylvania.— See Wagenblast *v.* McKean, 2 Grant 393.

Tennessee.— Farnsworth *v.* Howard, 1 Coldw. 215.

England.— Thomas *v.* Evans, 10 East 101, 10 Rev. Rep. 229, 103 Eng. Reprint 714; Dickinson *v.* Shee, 4 Esp. 67; Kraus *v.* Arnold, 7 Moore C. P. 59, 17 E. C. L. 508. But see Black *v.* Smith, Peake N. P. 88, 3 Rev. Rep. 661.

See 45 Cent. Dig. tit. "Tender," § 53.

But see Lamar *v.* Sheppard, 84 Ga. 561, 10 S. E. 1084.

97. Leask *v.* Dew, 102 N. Y. App. Div. 529, 92 N. Y. Suppl. 891.

98. Angier *v.* Equitable Bldg., etc., Assoc.,

an offer in writing to pay a definite sum of money, or to deliver a particular thing, may take the place of an actual production and proffer of the money to be paid or thing to be delivered.[99] Such statutory written offer dispenses merely with the actual production of the money or thing,[1] and in all other respects the common law prevails.[2]

C. Medium. A tender of money in satisfaction of an obligation payable in money, to be unobjectionable, must be made in whatever form of money is, at the time, legal tender for the payment of debts.[3] But objection to a tender of bank-bills or other money not legal tender, but which is lawful money,[4] current and circulating at par,[5] is deemed to be waived, if at the time the money is offered objection be not taken that the money is not legal tender; [6] and similarly, although the general rule is that an offer of a bank check for the amount due is not a good

109 Ga. 625, 35 S. E. 64; Brill *v.* Grand Trunk R. Co., 20 U. C. C. P. 440.

99. See the statutes of the several states. And see Holt *v.* Brown, 63 Iowa 319, 19 N. W. 235; Casady *v.* Bosler, 11 Iowa 242; Holladay *v.* Holladay, 13 Oreg. 523, 11 Pac. 260, 12 Pac. 821; Ladd *v.* Mason, 10 Oreg. 308; Chielovich *v.* Krauss, (Cal. 1886) 11 Pac. 781.

1. Shugart *v.* Pattee, 37 Iowa 422; McCourt *v.* Johns, 33 Oreg. 561, 53 Pac. 601; Holladay *v.* Holladay, 13 Oreg. 523, 11 Pac. 260, 12 Pac. 821; Ladd *v.* Mason, 10 Oreg. 308; Hyams *v.* Bamberger, 10 Utah 3, 36 Pac. 202.

2. Kuhns *v.* Chicago, etc., R. Co., 65 Iowa 528, 22 N. W. 661; Holladay *v.* Holladay, 13 Oreg. 523, 11 Pac. 260, 12 Pac. 821.

3. Martin *v.* Bott, 17 Ind. App. 444, 46 N. E. 151; Buchegger *v.* Shultz, 13 Mich. 40, 14 Am. L. Reg. 95; Juilliard *v.* Greenman, 110 U. S. 421, 4 S. Ct. 122, 28 L. ed. 204; Knox *v.* Lee, 12 Wall. (U. S.) 457, 20 L. ed. 287; Polglass *v.* Oliver, 2 Cromp. & J. 15, 1 L. J. Exch. 5, 2 Tyrw. 89.

What constitutes legal tender see PAYMENT, 30 Cyc. 1212.

Money order misnaming tenderee.—Where, in answer to a letter demanding payment, the debtor sent a money order in which the creditor was described by the wrong name, the tender was held bad, even though the creditor was informed at the post-office that he could have the money by signing the order in the name of the payee. Gordon *v.* Strange, 1 Exch. 477, 11 Jur. 1019.

4. Wilson *v.* McVey, 83 Ind. 108; Martin *v.* Bott, 17 Ind. App. 444, 46 N. E. 151.

5. Ward *v.* Smith, 7 Wall. (U. S.) 447, 19 L. ed. 207.

If a tender is made in depreciated bank-notes, the refusal to accept may be presumed to arise from the fact of such depreciation. Cockrill *v.* Kirkpatrick, 9 Mo. 697.

6. *Alabama.*— Seawell *v.* Henry, 6 Ala. 226.

Arkansas.— Harriman *v.* Meyer, 45 Ark. 37.

Delaware.—Wood *v.* Bangs, 2 Pennew. 435, 48 Atl. 189; Corbit *v.* Smyrna Bank, 2 Harr. 235, 30 Am. Dec. 635.

Florida.— Spann *v.* Baltzell, 1 Fla. 301, 46 Am. Dec. 346.

Illinois.— New Hope Delaware Bridge Co. *v.* Perry, 11 Ill. 467, 52 Am. Dec. 443; Keyes *v.* Jasper, 5 Ill. 305.

Kentucky.— Jones *v.* Overstreet, 4 T. B. Mon. 547.

Massachusetts.— Snow *v.* Perry, 9 Pick. 539; Hallowell, etc., Bank *v.* Howard, 13 Mass. 235.

Michigan.— Koehler *v.* Buhl, 94 Mich. 496, 54 N. W. 157; Beebe *v.* Knapp, 28 Mich. 53; Lacy *v.* Wilson, 24 Mich. 479; Fosdick *v.* Van Husan, 21 Mich. 567; Welch *v.* Frost, 1 Mich. 30, 48 Am. Dec. 692.

Missouri.— Cockrill *v.* Kirkpatrick, 9 Mo. 697; Williams *v.* Rorer, 7 Mo. 556.

New Hampshire.— Brown *v.* Simons, 44 N. H. 475; Cummings *v.* Putnam, 19 N. H. 569.

Ohio.— Jennings *v.* Mendenhall, 7 Ohio St. 257; Wheeler *v.* Knaggs, 8 Ohio 169.

Tennessee.— Greenwald *v.* Roberts, 4 Heisk. 494; McDowell *v.* Keller, 4 Coldw. 258; Noe *v.* Hodges, 3 Humphr. 162; Cooley *v.* Weeks, 10 Yerg. 141; Lowry *v.* McGhee, 8 Yerg. 242; Ball *v.* Stanley, 5 Yerg. 199, 26 Am. Dec. 263.

Vermont.— Curtiss *v.* Greenbanks, 24 Vt. 536.

United States.— U. S. Bank *v.* Georgia Bank, 10 Wheat. 333, 6 L. ed. 334.

England.— Gillard *v.* Wise, 5 B. & C. 134, 7 D. & R. 523, 4 L. J. K. B. O. S. 88, 29 Rev. Rep. 190, 11 E. C. L. 399, 108 Eng. Reprint 49; Grigsby *v.* Oakes, 2 B. & P. 526; Tiley *v.* Courtier, 2 Cromp. & J. 16 note; Polglass *v.* Oliver, 2 Cromp. & J. 15, 2 Tyrw. 89, 1 L. J. Exch. 5; Brown *v.* Saul, 4 Esp. 267; Lockyer *v.* Jones, Peake N. P. 180 note, 3 Rev. Rep. 682 note; Owenson *v.* Morse, 7 T. R. 64, 101 Eng. Reprint 856; Wright *v.* Reed, 3 T. R. 554, 100 Eng. Reprint 729.

See 45 Cent. Dig. tit. "Tender," § 46 *et seq.*

An objection to the medium of payment cannot be disregarded, although the real motive for refusing the tender is to get rid of the contract. Decamp *v.* Feay, 5 Serg. & R. (Pa.) 323, 9 Am. Dec. 372.

An order on a third person and the balance in money is not a good tender whatever the objection may be. Hall *v.* Appel, 67 Conn. 585, 35 Atl. 524.

Tender to agent.— Where an agent or clerk authorized to receive payment fails to object to current bank-bills on the ground that they

tender,[7] if the tender of the check is refused, not on the ground that it is not legal tender, but upon some other ground,[8] as that it is not drawn for the sum the creditor demands,[9] or that it is not made in time,[10] the objection to the check is waived and the tender is good as far as the medium of payment is concerned, and this rule extends to drafts[11] and certificates of deposit.[12] However, mere silence on the part of the tenderee as to his reason for refusing the tender does not constitute a waiver of the objection that the tender is made by check;[13] and so also there is no waiver if the creditor is not present at the time to object.[14]

D. Time and Place — 1. Time — a. In General. At common law a tender of money which a party is bound to pay at a certain time and place must be made on the day fixed for payment, and not thereafter.[15] This rule in some states has been changed by statute,[16] in others by the decisions of the courts;[17] and the general rule now is that in case of money demands where the amount is liquidated, or capable of being made so by mere computation, and the damages are merely the interest, a tender may be made after default at any time before action.[18] But

are not legal tender the objection is waived and the tender is good. People *v.* Mayhew, 26 Cal. 655; Hoyt *v.* Byrnes, 11 Me. 475; Ward *v.* Smith, 7 Wall. (U. S.) 447, 19 L. ed. 207. But see Welch *v.* Frost, 1 Mich. 30, 48 Am. Dec. 692.

7. *Colorado.*— Larsen *v.* Breene, 12 Colo. 480, 21 Pac. 498.

District of Columbia.— Barbour *v.* Hickey, 2 App. Cas. 207, 24 L. R. A. 763.

Illinois.— Harding *v.* Commercial Loan Co., 84 Ill. 251; Sloan *v.* Petrie, 16 Ill. 262.

Mississippi.— Collier *v.* White, 67 Miss. 133, 6 So. 618.

Nebraska.— Te Poel *v.* Shutt, 57 Nebr. 592, 78 N. W. 288.

New York.— Matter of Collyer, 124 N. Y. App. Div. 16, 108 N. Y. Suppl. 600; Volk *v.* Olsen, 54 Misc. 227, 104 N. Y. Suppl. 415; Block *v.* Garfiel, 30 Misc. 821, 61 N. Y. Suppl. 918; Rumpf *v.* Schiff, 109 N. Y. Suppl. 51; Martin *v.* Clover, 17 N. Y. Suppl. 638; Grussy *v.* Schneider, 50 How. Pr. 134.

Virginia.— See Poague *v.* Greenlee, 22 Gratt. 724.

8. Walsh *v.* St. Louis Exposition, etc., Assoc., 101 Mo. 534, 14 S. W. 722.

A certified check is not ordinarily the equivalent of money for the purposes of a tender. Hobbs *v.* Ray, 96 S. W. 589, 29 Ky. L. Rep. 999. But the tender of a certified check in payment of a debt is sufficient, where no objection is made to the form in which the tender is made. Germania L. Ins. Co. *v.* Potter, 124 N. Y. App. Div. 814, 109 N. Y. Suppl. 435 [*reversing* 57 Misc. 204, 107 N. Y. Suppl. 912].

A tender of an uncertified check is sufficient if it is not objected to on the ground that it is uncertified. Bunte *v.* Schumann, 46 Misc. (N. Y.) 593, 92 N. Y. Suppl. 806.

9. *Iowa.*— Shay *v.* Callanan, 124 Iowa 370, 100 N. W. 55.

Maryland.— Bonaparte *v.* Thayer, 95 Md. 548, 52 Atl. 496; McGrath *v.* Gegner, 77 Md. 331, 26 Atl. 502, 39 Am. St. Rep. 415.

Nebraska.— Ricketts *v.* Buckstaff, 64 Nebr. 851, 90 N. W. 915.

New York.— Mitchell *v.* Vermont Copper Min. Co., 67 N. Y. 280 [*affirming* 40 N. Y. Super. Ct. 406].

Pennsylvania.— Pershing *v.* Feinberg, 203 Pa. St. 144, 52 Atl. 22.

England.— Jones *v.* Arthur, 8 Dowl. P. C. 442, 4 Jur. 859.

If a tender is made in the form of a check in a letter and no objection is made to the medium but only to the *quantum* of the tender, it is good if actually sufficient in amount. Jones *v.* Arthur, 8 Dowl. P. C. 442, 4 Jur. 859. See Lampasas Hotel, etc., Co. *v.* Home Ins. Co., 17 Tex. Civ. App. 615, 43 S. W. 1081.

Demanding that the check be drawn in a particular way has been held to be no waiver of the objection that money is not tendered. Murphy *v.* Gold, etc., Tel. Co., 3 N. Y. Suppl. 804.

10. Kollitz *v.* Equitable Mut. F. Ins. Co., 92 Minn. 234, 99 N. W. 892; Duffy *v.* O'Donovan, 46 N. Y. 223.

11. Shay *v.* Callanan, 124 Iowa 370, 100 N. W. 55; Hidden *v.* German Sav., etc., Soc., 48 Wash. 384, 93 Pac. 668.

12. Gradle *v.* Warner, 140 Ill. 123, 29 N. E. 1118.

13. Jennings *v.* Mendenhall, 7 Ohio St. 257.

14. Sloan *v.* Petrie, 16 Ill. 262.

15. Maynard *v.* Hunt, 5 Pick. (Mass.) 240; Dewey *v.* Humphrey, 5 Pick. (Mass.) 187; Suffolk Bank *v.* Worcester Bank, 5 Pick. (Mass.) 106; City Bank *v.* Cutter, 3 Pick. (Mass.) 414; Dixon *v.* Clark, 5 C. B. 365, 5 D. & L. 155, 16 L. J. C. P. 237, 57 E. C. L. 365; Cotton *v.* Godwin, 9 Dowl. P. C. 763, 10 L. J. Exch. 243, 7 M. & W. 147; Whitlock *v.* Squire, 10 Mod. 81, 88 Eng. Reprint 636; Poole *v.* Crompton, 5 Dowl. P. C. 468; Hume *v.* Peploe, 8 East 168, 9 Rev. Rep. 399, 109 Eng. Reprint 306; Dobie *v.* Larkin, 10 Exch. 776, 3 Wkly. Rep. 247; Poole *v.* Thumbridge, 6 L. J. Exch. 74, 2 M. & W. 223.

16. See the statutes of the several states. And see Suffolk Bank *v.* Worcester Bank, 5 Pick. (Mass.) 106; City Bank *v.* Cutter, 3 Pick. (Mass.) 414, citing Mass. Rev. St. c. 100, § 14.

17. Tracy *v.* Strong, 2 Conn. 659.

18. Rudulph *v.* Wagner, 36 Ala. 698; Loughborough *v.* McNevin, 74 Cal. 250, 14 Pac. 369, 15 Pac. 773, 5 Am. St. Rep. 435;

a tender cannot be made after default where the damages are unliquidated,[19] where time is of the essence of the contract,[20] or where a forfeiture has been declared,[21] or if the time for tendering is limited by statute;[22] and a promise to pay in chattels, or in anything of a fluctuating value, must be strictly complied with as to time, and a tender of the thing to be paid cannot be made before or after the day fixed for payment.[23] Where an executory contract is silent as to the time of performance, a tender must be made within a reasonable time.[24]

b. Time of Day. To make a tender good as to time of day, the general rule is that the tenderer must, at the latest time, on the last day of the term of the contract, before the sun sets, produce the money or goods and offer to comply with the contract,[25] and the tender must be made a sufficient length of time before

Young *v.* Daniels, 2 Iowa 126, 63 Am. Dec. 477. See Walker *v.* Barnes, 1 Marsh. 36, 5 Taunt. 240, 15 Rev. Rep. 655, 1 E. C. L. 131; Leftley *v.* Mills, 4 T. R. 170, 100 Eng. Reprint 955.

19. Day *v.* Lafferty, 4 Ark. 450. See also Loughborough *v.* McNevin, 74 Cal. 250, 14 Pac. 369, 15 Pac. 773, 5 Am. St. Rep. 435.

20. Kentucky Distilleries, etc., Co. *v.* Warwick Co., 109 Fed. 280, 48 C. C. A. 363. See also Loughborough *v.* McNevin, 74 Cal. 250, 14 Pac. 369, 15 Pac. 773, 5 Am. St. Rep. 435.

21. Sylvester *v.* Holasek, 83 Minn. 362, 86 N. W. 336; Whiteman *v.* Perkins, 56 Nebr. 181, 76 N. W. 547; Bayley *v.* Duvall, 2 Fed. Cas. No. 1,139, 1 Cranch C. C. 283.

After a debt has been satisfied by a sale of property pledged as security a tender comes too late. Loomis *v.* Stave, 72 Ill. 623.

22. Clower *v.* Fleming, 81 Ga. 247, 7 S. E. 278; Thomas *v.* Nichols, 127 N. C. 319, 37 S. E. 327.

23. Toulmin *v.* Sager, 42 Ala. 127; Powe *v.* Powe, 42 Ala. 113; White *v.* Prigmore, 29 Ark. 208; Day *v.* Lafferty, 4 Ark. 450; Stucker *v.* Miller, 5 Litt. (Ky.) 235; Mingus *v.* Pritchet, 14 N. C. 78; Wales *v.* Cooke, 13 N. C. 183.

24. *Indiana.*— Conklin *v.* Smith, 7 Ind. 107, 63 Am. Dec. 416.

Massachusetts.— Atwood *v.* Cobb, 16 Pick. 227, 26 Am. Dec. 657.

Nebraska.— Coleridge Creamery Co. *v.* Jenkins, 66 Nebr. 129, 92 N. W. 123.

New York.— Bass *v.* White, 65 N. Y. 565.

Pennsylvania.— Roberts *v.* Beatty, 2 Penr. & W. 63, 21 Am. Dec. 410.

Tennessee.— Jones *v.* Peet, 1 Swan 293.

England.— Ellis *v.* Thompson, 1 H. & H. 131, 7 L. J. Exch. 185, 3 M. & W. 445.

What is a reasonable time is to be determined in each case by a view of all the facts and circumstances attending the transaction. Roberts *v.* Mazeppa Mill Co., 30 Minn. 413, 15 N. W. 680.

A failure to formally withdraw the offer after the expiration of a reasonable time will not validate a tender made thereafter. Bowen *v.* McCarthy, 85 Mich. 26, 48 N. W. 155.

25. *Kentucky.*— Duckham *v.* Smith, 5 T. B. Mon. 372; Williams *v.* Johnson, Litt. Sel. Cas. 84, 12 Am. Dec. 275; Kendal *v.* Talbot, 1 A. K. Marsh. 321; Johnson *v.* Butler, 4 Bibb 97; Colyer *v.* Hutchings, 2 Bibb 404; Jouett *v.* Wagnon, 2 Bibb 269, 5 Am. Dec. 602.

Maine.— Wing *v.* Davis, 7 Me. 31; Aldrich *v.* Albee, 1 Me. 120, 10 Am. Dec. 45.

Mississippi.— Bates *v.* Bates, Walk. 401, 12 Am. Dec. 572.

Rhode Island.— Hall *v.* Whittier, 10 R. I. 530.

Tennessee.— Tiernan *v.* Napier, 5 Yerg. 410.

Vermont.— Sweet *v.* Harding, 19 Vt. 587; Mortin *v.* Wells, 1 Tyler 381.

England.— Lancashire *v.* Kellingworth, Comyns 116, 92 Eng. Reprint 991, 1 Ld. Raym. 686, 91 Eng. Reprint 1357, 12 Mod. 529, 88 Eng. Reprint 1498, 3 Salk. 242, 91 Eng. Reprint 862; Wade's Case, 5 Coke 114*a*, 77 Eng. Reprint 232, 2 Coke Litt. 202*a*; Tinckler *v.* Prentice, 4 Taunt. 549, 13 Rev. Rep. 684.

See 45 Cent. Dig. tit. "Tender," § 17.

Tender before hour for closing business.— Upon the question whether a tender must be made at a convenient time before the expiration of an earlier hour than sunset, which by custom and usage in a particular business is the time limited for closing the daily business, it has been held that where a contract provided for the delivery of stock on a specified day, the tender made at the uttermost convenient time of the day fixed, before the usual time of shutting the books, was good. Lancashire *v.* Kellingworth, Comyns 116, 92 Eng. Reprint 991, 1 Ld. Raym. 686, 91 Eng. Reprint 1357, 12 Mod. 529, 88 Eng. Reprint 1498, 3 Salk. 242, 91 Eng. Reprint 862. But in a similar later case where it appeared that there was more business that day than could be transacted before the regular closing hour, and for that reason the books were again opened after that hour, a transfer made before the regular closing hour was held not a good tender. The court held that the general rule, which is that a tender must be made at the uttermost convenient time of the day, ought not to be broken through, except in cases of necessity, and that in the present case there was no necessity to break through it, because, as the books were again opened in the afternoon, the tender ought to have been made at the uttermost convenient time before the shutting of the books in the afternoon. Lancashire *v.* Kellingworth, Comyns

the sun sets so that the money may be counted or the goods examined by daylight;[26] but where no place for delivery is stipulated, it is held that a tender may be made at any time before midnight;[27] and a tender of specific articles in payment of a debt made after sunset where the creditor had been absent through the day has been held good.[28] If it happens that the parties meet at the place at an earlier hour of the last day, a tender may be made at that time.[29]

c. Premature Tender. A premature tender is generally held to be unavailable for most purposes.[30] But where payment may be made "on or before" a day named,[31] or within a certain time,[32] a tender may be made at any time after the date of the contract.

d. Tender After Action Brought. At common law a tender must be made by a debtor before the commencement of the action to recover the thing due.[33] By statute in some states, however, tender after suit is allowed, usually up to the commencement of trial,[34] in which event, however, it can be made only in

116, 92 Eng. Reprint 991, 1 Ld. Raym. 686, 91 Eng. Reprint 1357, 12 Mod. 529, 88 Eng. Reprint 1498, 3 Salk. 242, 91 Eng. Reprint 862; Rutland *v.* Batty, Str. 777, 93 Eng. Reprint 842.

26. Aldrich *v.* Albee, 1 Me. 120, 10 Am. Dec. 45; Doe *v.* Paul, 3 C. & P. 613, 14 E. C. L. 744.

27. Smith *v.* Walton, 5 Houst. (Del.) 141; McClartey *v.* Gokey, 31 Iowa 505; Startup *v.* Macdonald, 12 L. J. Exch. 477, 6 M. & G. 593, 7 Scott N. R. 269, 46 E. C. L. 593. See also Sweet *v.* Harding, 19 Vt. 587. *Compare* Williams *v.* Johnson, Litt. Sel. Cas. (Ky.) 84, 12 Am. Dec. 275; Croninger *v.* Crocker, 62 N. Y. 151.

28. Avery *v.* Stewart, 2 Conn. 69, 7 Am. Dec. 240.

29. Aldrich *v.* Albee, 1 Me. 120, 10 Am. Dec. 45; Hall *v.* Whittier, 10 R. I. 530; Startup *v.* Macdonald, 12 L. J. Exch. 477, 6 M. & G. 593, 7 Scott N. R. 269, 46 E. C. L. 593; Wade's Case, 5 Coke 144*a*, 77 Eng. Reprint 232.

30. *California.*— Rhorer *v.* Bila, 83 Cal. 51, 23 Pac. 274.

Connecticut.—Abbe *v.* Goodwin, 7 Conn. 377.

Indiana.— Bowen *v.* Julius, 141 Ind. 310, 40 N. E. 700; Abshire *v.* Corey, 113 Ind. 484, 15 N. E. 685.

Maine.— Portland *v.* Atlantic, etc., R. Co., 74 Me. 241. But see Eaton *v.* Emerson, 14 Me. 335.

Massachusetts.— Saunders *v.* Frost, 5 Pick. 259, 16 Am. Dec. 394; Kingman *v.* Pierce, 17 Mass. 247.

Missouri.— Illingworth *v.* Miltenberger, 11 Mo. 80.

Montana.— Schultz *v.* O'Rourke, 18 Mont. 418, 45 Pac. 634.

Nebraska.— Moore *v.* Kime, 43 Nebr. 517, 61 N. W. 736.

New Jersey.— Tillou *v.* Britton, 9 N. J. L. 120.

New York.— Ellis *v.* Craig, 7 Johns. Ch. 7.

Wisconsin.— See Moore *v.* Cord, 14 Wis. 213.

England.— Brown *v.* Cole, 9 Jur. 290, 14 L. J. Ch. 167, 14 Sim. 427, 37 Eng. Ch. 427, 60 Eng. Reprint 424.

See 45 Cent. Dig. tit. "Tender," § 14.

But see Quynn *v.* Whetcroft, 3 Harr. & M. (Md.) 136, 1 Am. Dec. 375.

According to the civil law, where a distant day of payment is given exclusively for the benefit of the debtor, the latter may make a tender of the amount due, before the time fixed for payment. Ellis *v.* Craig, 7 Johns. Ch. (N. Y.) 7, Pothier Obl. Pt. II, c. 3, art. 3.

31. Brent *v.* Fenner, 4 Ark. 160; Barbee *v.* Inman, 4 Blackf. (Ind.) 420; Sanders *v.* Burk, (Va. 1895) 22 S. E. 516.

The phrases "in sixty days," "in sixty days from date," "in sixty days from day of the date," are held to mean that the debt falls due the number of days mentioned after the date of the contract, and a tender cannot be made before the end of the period. Henry *v.* Jones, 8 Mass. 453.

32. Buffum *v.* Buffum, 11 N. H. 451; Gilman *v.* Moore, 14 Vt. 457.

33. *Nebraska.*— Whiteman *v.* Perkins, 56 Nebr. 181, 76 N. W. 547.

New Jersey.— Levan *v.* Sternfield, 55 N. J. L. 41, 25 Atl. 854.

New York.— Jackson *v.* Law, 5 Cow. 248.

North Carolina.— Winningham *v.* Redding, 51 N. C. 126; Murray *v.* Windley, 29 N. C. 201, 47 Am. Dec. 324.

South Carolina.— Fishburne *v.* Sanders, 1 Nott & M. 242.

Tennessee.— Miller *v.* Andrews, 3 Coldw. 380.

Texas.— Berry *v.* Davis, 77 Tex. 191, 13 S. W. 978, 19 Am. St. Rep. 748; Simon *v.* Allen, 76 Tex. 398, 13 S. W. 296.

See 45 Cent. Dig. tit. "Tender," § 18.

Where an action has been discontinued and another commenced, a tender made after the discontinuance and before the commencement of the second action is a tender before the action. Johnson *v.* Clay, 1 Moore C. P. 200, 7 Taunt. 486, 2 E. C. L. 459; 3 Bl. Comm. 304, note 19. A tender by plaintiff of the amount due on a judgment, before it is pleaded as a set-off, is a tender before action, although made after the action was commenced; a set-off or counter-claim being not in litigation until it is pleaded. Hassam *v.* Hassam, 22 Vt. 516.

34. See the statutes of the several states. And see Sweetland *v.* Tuthill, 54 Ill. 215;

the particular classes of cases mentioned in the statute;[35] and where the statute provides that a tender can only be made before the commencement of the trial, after the trial it comes too late;[36] and a statute authorizing a tender at any time before judgment is held not applicable to cases where plaintiff is bound to make a tender previous to suit to have a standing in court.[37] A tender after action commenced does not bar the farther prosecution of the action, but if otherwise sufficient it stops interest and subjects plaintiff to subsequent costs.[38]

e. Waiver of Objection to Time. Where a tender comes too late, a refusal solely upon some collateral ground is a waiver of the objection that the tender was not made in time;[39] and similarly where both parties treat a debt as then due, the tender being refused upon some other ground, the tenderee cannot defend on the ground that at the time of the tender the debt was not due.[40]

2. Place — a. Where Place Is Appointed. If, by contract, money is to be paid or goods are to be delivered at a certain place, a tender may,[41] and must,[42] be made at that place, and a tender at the place is sufficient, although the one to whom it is to be made be absent at the time.[43] A tender to the person at a place other than the one designated is good unless objected to on that ground.[44]

b. Where no Place Is Appointed. At common law with respect to the payment of money, or portable articles, where the time but no place of payment is specified, and no place of payment is fixed by law, the rule is that the tenderer must seek the tenderee and make a tender to him wherever he can be found,[45] and a tender anywhere to the person of the tenderee is good,[46] the tenderer being

Call *v.* Lothrop, 39 Me. 434; Snyder *v.* Quarton, 47 Mich. 211, 10 N. W. 204; Le Flore *v.* Miller, 64 Miss. 204, 1 So. 99; Kelly *v.* West, 36 N. Y. Super. Ct. 304; Hull *v.* Peters, 7 Barb. (N. Y.) 331; Brown *v.* Ferguson, 2 Den. (N. Y.) 196; Powers *v.* Powers, 11 Vt. 262.

35. Stover *v.* Chasse, 9 Misc. (N. Y.) 45, 29 N. Y. Suppl. 291.

36. Houston *v.* Sledge, 101 N. C. 640, 8 S. E. 145, 2 L. R. A. 487; Pell *v.* Chandos, (Tex. Civ. App. 1894) 27 S. W. 48. And see Babcock *v.* Culver, 46 Vt. 715.

A tender of notes in pursuance of an agreement to accept notes made after the action was commenced is not a tender after action brought. Emmons *v.* Myers, 7 How. (Miss.) 375. See Heirn *v.* Carron, 11 Sm. & M. (Miss.) 361, 49 Am. Dec. 65.

37 Farquhar *v.* Iles, 39 La. Ann. 874, 2 So. 791.

38. See Sweetland *v.* Tuthill, 54 Ill. 215; Wagner *v.* Heckenkamp, 84 Ill. App. 323; Columbian Bldg. Assoc. *v.* Crump, 42 Md. 192; Le Flore *v.* Miller, 64 Miss. 204, 1 So. 99.

39. Hanna *v.* Ratekin, 43 Ill. 462; Adams *v.* Helm, 55 Mo. 468; Buck *v.* Burk, 18 N. Y. 337; Cythe *v.* La Fontain, 51 Barb. (N. Y.) 186; Gould *v.* Banks, 8 Wend. (N. Y.) 562, 24 Am. Dec. 90. But see Friess *v.* Rider, 24 N. Y. 367, 82 Am. Dec. 308.

40. Wyckoff *v.* Anthony, 90 N. Y. 442 [*affirming* 9 Daly 417].

41. Logan *v.* Hartwell, 5 Kan. 649.

42. Price *v.* Cockran, 1 Bibb (Ky.) 570; Adams *v.* Rutherford, 13 Oreg. 78, 8 Pac. 896; Roberts *v.* Beatty, 2 Penr. & W. (Pa.) 63, 21 Am. Dec. 410; Saunderson *v.* Bowes, 14 East 500, 104 Eng. Reprint 693.

If the obligation be a note, a tender at the place designated is necessary, although the note is not there. McCauley *v.* Leavitt, 10 Utah 91, 37 Pac. 164.

If the obligation provides for payment at one of two or more places, the debtor must give the creditor reasonable notice of his election. Aldrich *v.* Albee, 1 Me. 120, 10 Am. Dec. 45; Barrett *v.* Eller, 51 N. C. 550.

Equity will not supply a defect in a tender made in a wrong place. King *v.* Finch, 60 Ind. 420.

43. Eaton, etc., R. Co. *v.* Hunt, 20 Ind. 457; Balme *v.* Wambaugh, 16 Minn. 116; Mahan *v.* Waters, 60 Mo. 167; Judd *v.* Ensign, 6 Barb. (N. Y.) 258. But see Smith *v.* Smith, 25 Wend. (N. Y.) 405, 2 Hill 351.

But calling with the money when the creditor is absent and leaving a note stating the object of the visit, where it does not appear that the note was received, is no tender. Rothwell *v.* Gettys, 11 Humphr. (Tenn.) 135.

Where a debt may be paid in specific articles, readiness at the time and place designated is a good tender, although the creditor is not present. Mingus *v.* Pritchet, 14 N. C. 78; Barney *v.* Bliss, 1 D. Chipm. (Vt.) 399, 12 Am. Dec. 696.

44. Union Mut. L. Ins. Co. *v.* Union Mills Plaster Co., 37 Fed. 286, 3 L. R. A. 90; Cropp *v.* Hambleton, Cro. Eliz. 48, 78 Eng. Reprint 310.

45. Berley *v.* Columbia, etc., R. Co., 82 S. C. 232, 64 S. E. 397; Startup *v.* Macdonald, 12 L. J. Exch. 477, 6 M. & G. 593, 7 Scott N. R. 269, 46 E. C. L. 593; Cranley *v.* Hillary, 2 M. & S. 120, 105 Eng. Reprint 327.

46. Bates *v.* Bates, Walk. (Miss.) 401, 12 Am. Dec. 572; Hunter *v.* Le Conte, 6 Cow. (N. Y.) 728; Slingerland *v.* Morse, 8 Johns. (N. Y.) 474.

required to exercise due diligence and good faith to find the tenderee;[47] and the money or portable articles must be tendered at the tenderee's residence if it can be found;[48] but the tenderer is not bound to go out of the state to find the tenderee.[49] If the obligation be a merchant's payable on demand in goods, or a mechanic's payable in his wares, the law implies that the warehouse, store, or shop, as the case may be, is the place agreed upon by the parties for tender.[50] If the article is ponderous, the tenderer before the day of tender must ascertain from the tenderee where he will receive it;[51] and if the creditor cannot be found, or if he refuses to appoint any place, or to appoint a reasonable place, the debtor may himself select any suitable and reasonable place and make a delivery there, with notice to the creditor, if he can be found.[52]

c. Deposit in Bank or Other Depository. A deposit in a bank or other

47. Lehman *v.* Moore, 93 Ala. 186, 9 So. 590; Bancroft *v.* Sawin, 143 Mass. 144, 9 N. E. 539; Leaird *v.* Smith, 44 N. Y. 618. See Southworth *v.* Smith, 7 Cush. (Mass.) 391; Howard *v.* Holbrook, 9 Bosw. (N. Y.) 237.

48. *Illinois.*— Borah *v.* Curry, 12 Ill. 66.

Indiana.— Taylor *v.* Meek, 4 Blackf. 388.

Kentucky.— Galloway *v.* Smith, Litt. Sel. Cas. 132; Wilmouth *v.* Patton, 2 Bibb 280; Grant *v.* Groshon, Hard. 85, 3 Am. Dec. 725; Letcher *v.* Taylor, Hard. 79; Littell *v.* Nichols, Hard. 66; Chambers *v.* Winn, Ky. Dec. 166, 2 Am. Dec. 713.

Minnesota.— Morey *v.* Enke, 5 Minn. 392.

Missouri.— Dameron *v.* Belt, 3 Mo. 213.

New Hampshire.— Miles *v.* Roberts, 34 N. H. 245.

New York.— Grussy *v.* Schneider, 55 How. Pr. 188; Stoker *v.* Cogswell, 25 How. Pr. 267; Smith *v.* Smith, 25 Wend. 405; La Farge *v.* Rickert, 5 Wend. 187, 21 Am. Dec. 209; Goodwin *v.* Holbrook, 4 Wend. 377.

North Carolina.— Mingus *v.* Pritchet, 14 N. C. 78.

Ohio.— Wagers *v.* Dickey, 17 Ohio 439, 49 Am. Dec. 467.

Pennsylvania.— Barr *v.* Myers, 3 Watts & S. 295; Roberts *v.* Beatty, 2 Penr. & W. 63, 21 Am. Dec. 410.

Rhode Island.— Hall *v.* Whittier, 10 R. I. 530.

Vermont.— Morton *v.* Wells, 1 Tyler 381.

See 45 Cent. Dig. tit. "Tender," §§ 11, 12.

The place of residence at the time the contract was made is the place where tender should be made unless the tenderer has knowledge of a change thereof. Borah *v.* Curry, 12 Ill. 66; Barker *v.* Jones, 8 N. H. 413. See Wiggin *v.* Wiggin, 43 N. H. 561, 80 Am. Dec. 192; Veazey *v.* Whitehouse, 10 N. H. 409; Pickering *v.* Pickering, 6 N. H. 120.

49. *Iowa.*— Young *v.* Daniels, 2 Iowa 126, 63 Am. Dec. 477. But see Crawford *v.* Paine, 19 Iowa 172.

Maine.— Howard *v.* Miner, 20 Me. 325.

Massachusetts.— Tasker *v.* Bartlett, 5 Cush. 359.

Minnesota.— Gill *v.* Bradley, 21 Minn. 15.

Mississippi.— Jones *v.* Perkins, 29 Miss. 139, 64 Am. Dec. 136.

New York.— Houbie *v.* Volkening, 49 How. Pr. 169.

Pennsylvania.— Santee *v.* Santee, 64 Pa. St. 473; Allshouse *v.* Ramsay, 6 Whart. 331, 37 Am. Dec. 417.

See 45 Cent. Dig. tit. "Tender," § 11.

And see Beatty *v.* Brown, 101 Ala. 695, 14 So. 368; Gardner *v.* Black, 98 Ala. 638, 12 So. 813; Trimble *v.* Williamson, 49 Ala. 525.

50. Dunn *v.* Marston, 34 Me. 379; Mason *v.* Briggs, 16 Mass. 453; Rice *v.* Churchill, 2 Den. (N. Y.) 145; Goodwin *v.* Holbrook, 4 Wend. (N. Y.) 377; Hughes *v.* Prewitt, 5 Tex. 264. See also Dandridge *v.* Harris, 1 Wash. (Va.) 326, 1 Am. Dec. 465.

51. *Maine.*— Bean *v.* Simpson, 16 Me. 49, holding that if the debtor does not inquire of his creditor where he will receive the article, a readiness at his own dwelling-house on the day appointed will not avail him as a defense.

Minnesota.— Morey *v.* Enke, 5 Minn. 392.

New Hampshire.— Wiggin *v.* Wiggin, 43 N. H. 561, 80 Am. Dec. 192; Miles *v.* Roberts, 34 N. H. 245; Currier *v.* Currier, 2 N. H. 75, 9 Am. Dec. 43.

New York.— La Farge *v.* Rickert, 5 Wend. 187, 21 Am. Dec. 209; Sheldon *v.* Skinner, 4 Wend. 525, 21 Am. Dec. 161; Barns *v.* Graham, 4 Cow. 452, 15 Am. Dec. 394.

North Carolina.— England *v.* Witherspoon, 2 N. C. 361.

Pennsylvania.— Stewart *v.* Morrow, 1 Grant 204; Roberts *v.* Beatty, 2 Penr. & W. 63, 21 Am. Dec. 410.

Texas.— Deel *v.* Berry, 21 Tex. 463, 73 Am. Dec. 236.

Wisconsin.— Mallory *v.* Lyman, 3 Pinn. 443, 4 Chandl. 143.

England.— Cheney's Case, 3 Leon. 260, 74 Eng. Reprint 672.

See 45 Cent. Dig. tit. "Tender," §§ 11, 12.

Where a creditor on removing from the state leaves an agent, it is the duty of the debtor to call upon the agent to appoint a place. Santee *v.* Santee, 64 Pa. St. 473.

The fact that the creditor is domiciled abroad does not absolve the debtor from the duty of making an inquiry as to where he will receive the goods. White *v.* Perley, 15 Me. 470; Bixby *v.* Whitney, 5 Me. 192.

A creditor need not wait for a request but may appoint the place immediately after the execution of the note upon which tender is to be made. Aldrich *v.* Albee, 1 Me. 120, 10 Am. Dec. 45.

52. Howard *v.* Miner, 20 Me. 325; Miles *v.* Roberts, 34 N. H. 245.

designated place of payment on the day fixed of the amount due is a good tender if the obligation is payable at such bank or depository,[53] but not otherwise.[54]

E. Necessity That Tender Be Unconditional — 1. In General. Where a person is to perform an act, the obligation to perform which is independent of any precedent or concurrent act to be performed by the other party, as where money is to be paid in liquidation of a debt, or the object is to discharge the tenderer of the obligation, the money or thing to be delivered must be tendered unconditionally,[55] and a tender accompanied with some condition, performance of which is impossible,[56] or which the tenderer has no right to make,[57] as where a sum is offered "as a settlement," [58] or in full discharge, or as payment in full,[59]

53. Redman *v.* Murrel, 117 La. 516, 42 So. 49; Carley *v.* Vance, 17 Mass. 389; Riley *v.* Cheesman, 75 Hun (N. Y.) 387, 27 N. Y. Suppl. 453; Hill *v.* Place, 7 Rob. 389, 5 Abb. Pr. N. S. 18, 36 How. Pr. 26; Miller *v.* New Orleans Bank, 5 Whart. (Pa.) 503, 34 Am. Dec. 571; Cheney *v.* Libby, 134 U. S. 68, 10 S. Ct. 498, 33 L. ed. 818; Wallace *v.* McConnell, 13 Pet. (U. S.) 136, 10 L. ed. 95; Cheney *v.* Bilby, 74 Fed. 52, 20 C. C. A. 291.

54. Cassville Roller Mill Co. *v.* Ætna Ins. Co., 105 Mo. App. 146, 79 S. W. 720.

A deposit with a justice of the peace for plaintiff is held not to be a tender. J. H. North Furniture, etc., Co. *v.* Davis, 86 Mo. App. 296.

55. *Alabama.*— Odum *v.* Rutledge, etc., R. Co., 94 Ala. 488, 10 So. 222.

Arkansas.— Cole *v.* Moore, 34 Ark. 582.

California.— Perkins *v.* Maier, etc., Brewery, 134 Cal. 372, 66 Pac. 482; Jones *v.* Shuey, (1895) 40 Pac. 17.

Connecticut.— Sanford *v.* Bulkley, 30 Conn. 344.

Florida.— Lindsay *v.* Matthews, 17 Fla. 575.

Georgia.— Morris *v.* Continental Ins. Co., 116 Ga. 53, 42 S. E. 474; Elder *v.* Johnson, 115 Ga. 691, 42 S. E. 51; De Graffenreid *v.* Menard, 103 Ga. 651, 30 S. E. 560.

Illinois.— Pulsifer *v.* Shepard, 36 Ill. 513; Connecticut Mut. L. Ins. Co. *v.* Stinson, 86 Ill. App. 668.

Indiana.— Storey *v.* Krewson, 55 Ind. 397, 23 Am. Rep. 668; Rose *v.* Duncan, 49 Ind. 269.

Iowa.— Breja *v.* Pryne, 94 Iowa 755, 64 N. W. 669; Hopkins *v.* Gray, 51 Iowa 340, 1 N. W. 637.

Kansas.— Crane *v.* Renville State Bank, 73 Kan. 287, 85 Pac. 285; Shaw *v.* Sears, 3 Kan. 242.

Kentucky.— Nantz *v.* Lober, 1 Duv. 304; Samuels *v.* Simmons, 60 S. W. 937, 22 Ky. L. Rep. 1586.

Maine.— Brown *v.* Gilmore, 8 Me. 107, 22 Am. Dec. 223.

Massachusetts.— Chapin *v.* Chapin, (1894) 36 N. E. 746.

Michigan.— See Parks *v.* Allen, 42 Mich. 482, 4 N. W. 227.

Mississippi.— Harmon *v.* Magee, 57 Miss. 410.

Missouri.— Ruppel *v.* Missouri Guarantee Sav., etc., Assoc., 158 Mo. 613, 59 S. W. 1000; Henderson *v.* Cass County, 107 Mo. 50, 18 S. W. 992; Kitchen *v.* Clark, 1 Mo. App. 430.

Nebraska.— Schrandt *v.* Young, 62 Nebr. 254, 86 N. W. 1085; Te Poel *v.* Shutt, 57 Nebr. 592, 78 N. W. 288; McEldon *v.* Patton, 4 Nebr. (Unoff.) 259, 93 N. W. 938.

New Jersey.— Bidwell *v.* Garrison, (Ch. 1897) 36 Atl. 941.

New York.— Cornell *v.* Hayden, 114 N. Y. 271, 21 N. E. 417; Persons *v.* Gardner, 122 N. Y. App. Div. 167, 106 N. Y. Suppl. 616; Cromwell *v.* Burr, 12 N. Y. St. 132; Heelas *v.* Slevin, 53 How. Pr. 356; Cashman *v.* Martin, 50 How. Pr. 337.

North Carolina.— Rives *v.* Dudley, 56 N. C. 126, 67 Am. Dec. 231.

Ohio.— Redfern *v.* Uluery, 12 Ohio Cir. Ct. 87, 5 Ohio Cir. Dec. 435.

Pennsylvania.— Wagenblast *v.* McKean, 2 Grant 393; Eckman *v.* Hildebrand, 1 Lanc. L. Rev. 21.

South Carolina.— Smith *v.* Keels, 15 Rich. 318.

South Dakota.— Brace *v.* Doble, 3 S. D. 110, 52 N. W. 586.

Texas.— Flake *v.* Nuse, 51 Tex. 98.

Vermont.— Holton *v.* Brown, 18 Vt. 224, 46 Am. Dec. 148.

Wisconsin.— Mann *v.* Roberts, 126 Wis. 142, 105 N. W. 785; Elderkin *v.* Fellows, 60 Wis. 339, 19 N. W. 101; Hunter *v.* Warner, 1 Wis. 141.

United States.— Coghlan *v.* South Carolina R. Co., 32 Fed. 316; Boulton *v.* Moore, 14 Fed. 922, 11 Biss. 500.

England.— Greenwood *v.* Sutcliffe, [1892] 1 Ch. 1, 61 L. J. Ch. 59, 65 L. T. Rep. N. S. 797, 40 Wkly. Rep. 241; Jennings *v.* Major, 8 C. & P. 61, 34 E. C. L. 610; Mitchell *v.* King, 6 C. & P. 237, 25 E. C. L. 412; Peacock *v.* Dickerson, 2 C. & P. 51, 12 E. C. L. 445; Brady *v.* Jones, 2 D. & R. 305, 16 E. C. L. 87.

See 45 Cent. Dig. tit. "Tender," § 33.

56. Brink *v.* Freoff, 40 Mich. 610; Balme *v.* Wambaugh, 16 Minn. 116; Malone *v.* Wright, 90 Tex. 49, 36 S. W. 420 [*modifying* (Civ. App. 1896) 34 S. W. 455].

57. Odum *v.* Rutledge, etc., R. Co., 94 Ala. 488, 10 So. 222; Rives *v.* Dudley, 56 N. C. 126, 67 Am. Dec. 231; Flake *v.* Nuse, 51 Tex. 98.

58. Martin *v.* Bott, 17 Ind. App. 444, 46 N. E. 151; Mitchell *v.* King, 6 C. & P. 237, 25 E. C. L. 412.

59. *Illinois.*— Hess *v.* Peck, 111 Ill. App. 111.

is invalid. But the tenderer may upon making a tender accompany it with a declaration, not a condition, that it satisfied the debt,[60] if the expression used amounts to no more than an assertion of what the tenderer claims to be due;[61] and a tender of performance may be accompanied by such conditions as to acceptance as are, by the contract, conditions precedent to be performed by the party to whom the tender is made,[62] and which therefore the tenderer has a clear right to exact;[63] and where mutual and concurrent acts are to be performed, the word "tender," as used in such connection, does not mean the same kind of offer as where it is used with reference to an offer to pay an ordinary debt due in money; but it only means readiness and willingness, accompanied with ability to do the thing required, and notice of a readiness to perform providing the other party will concurrently do the thing which he is requested to do,[64] and it has been held that a tender may be made conditional upon proof being produced that the party holding the claim has a right to receive payment, if circumstances exist which reasonably induce a belief in the tenderer that the tenderee has not such a right.[65] A creditor, accepting money tendered conditionally, assents to the condition, and cannot accept the money and reject the conditions on which it was tendered.[66]

2. Amount Offered Must Be Admitted to Be Due; Payment Under Protest. The sum tendered must be admitted by the tenderer to be due.[67] It has been held,

Maine.— Brown *v.* Gilmore, 8 Me. 107, 22 Am. Dec. 223.

Minnesota.— Moore *v.* Norman, 52 Minn. 83, 53 N. W. 809, 38 Am. St. Rep. 526, 18 L. R. A. 359.

Missouri.— Henderson *v.* Cass County, 107 Mo. 50, 18 S. W. 992.

Nebraska.— Tompkins *v.* Baltic, 11 Nebr. 147, 7 N. W. 747, 38 Am. Rep. 361.

Nevada.— State *v.* Carson City Sav. Bank, 17 Nev. 146, 50 Pac. 703.

New York.— Noyes *v.* Wyckoff, 114 N. Y. 204, 21 N. E. 158; Shiland *v.* Loeb, 58 N. Y. App. Div. 565, 69 N. Y. Suppl. 11; Brooklyn Bank *v.* De Grauw, 23 Wend. 342, 35 Am. Dec. 569; Wood *v.* Hitchcock, 20 Wend. 47.

Tennessee.— Love *v.* Smith, 4 Yerg. 117.

Vermont.— Draper *v.* Hitt, 43 Vt. 439, 5 Am. Rep. 292; Miller *v.* Holden, 18 Vt. 337.

Wisconsin.— Elderkin *v.* Fellows, 60 Wis. 339, 19 N. W. 101.

United States.—Hepburn *v.* Auld, 1 Cranch 321, 2 L. ed. 122.

England.— Henwood *v.* Oliver, 1 Q. B. 409, 1 G. & D. 25, 10 L. J. Q. B. 158, 41 E. C. L. 601; Hough *v.* May, 4 A. & E. 954, 2 Harr. & W. 33, 5 L. J. K. B. 186, 6 N. & M. 535, 31 E. C. L. 415, 111 Eng. Reprint 1042; Strong *v.* Harvey, 3 Bing. 304, 11 Moore C. P. 72, 4 L. J. C. P. O. S. 57, 11 E. C. L. 153; Evans *v.* Judkins, 4 Campb. 156; Sutton *v.* Hawkins, 8 C. & P. 259, 34 E. C. L. 722; Gordon *v.* Cox, 7 C. & P. 172, 32 E. C. L. 557; Peacock *v.* Dickerson, 2 C. & P. 51, 12 E. C. L. 445; Cheminant *v.* Thornton, 2 C. & P. 50, 12 E. C. L. 444; Thomas *v.* Evans, 10 East 101, 10 Rev. Rep. 229, 103 Eng. Reprint 714; Field *v.* Newport, etc., R. Co., 3 H. & N. 409, 27 L. J. Exch. 396.

See 45 Cent. Dig. tit. "Tender," § 33.

Offering a sum as a half year's rent was held to be conditional, for if taken it would have been an admission of the amount of rent due. Hastings *v.* Thorley, 8 C. & P. 573, 34 E. C. L. 899. But see Jones *v.* Bridgman, 39 L. T. Rep. N. S. 500.

60. Foster *v.* Drew, 39 Vt. 51; Preston *v.* Grant, 34 Vt. 201; Bowen *v.* Owen, 11 Q. B. 130, 11 Jur. 972, 17 L. J. Q. B. 5, 63 E. C. L. 130; Robinson *v.* Ferreday, 8 C. & P. 752, 34 E. C. L. 1001.

61. Foster *v.* Drew, 39 Vt. 51; Preston *v.* Grant, 34 Vt. 201.

62. Wendell *v.* New Hampshire Bank, 9 N. H. 404; Wheelock *v.* Tanner, 39 N. Y. 481; Engelbach *v.* Simpson, 12 Tex. Civ. App. 188, 33 S. W. 596 (where a vendor's lien was expressly retained in the conveyance, and a tender of the amount secured by the lien, upon condition that the vendor furnish a release of the lien, was held good); Harding *v.* Giddings, 73 Fed. 335, 19 C. C. A. 508. See Wadleigh *v.* Phelps, 149 Cal. 627, 87 Pac. 93. And see *infra*, note 74.

Where an order by a creditor on a bailee is necessary before the bailee will surrender the property, a tender of the debt may be made conditional upon receiving such an order. Johnson *v.* Cranage, 45 Mich. 14, 7 N. W. 188.

63. Odum *v.* Rutledge, etc., R. Co., 94 Ala. 488, 10 So. 222.

64. Smith *v.* Lewis, 26 Conn. 110; Taylor *v.* Mathews, 53 Fla. 776, 44 So. 146; Shouse *v.* Doane, 39 Fla. 95, 21 So. 807; Cook *v.* Doggett, 2 Allen (Mass.) 439; Hampton *v.* Speckenagle, 9 Serg. & R. (Pa.) 212, 11 Am. Dec. 704; Washburn *v.* Dewey, 17 Vt. 92.

65. Kennedy *v.* Moore, 91 Iowa 39, 58 N. W. 1066.

66. Bahrenburg *v.* Conrad Schopp Fruit Co., 128 Mo. App. 526, 107 S. W. 440; Bull *v.* Parker, 2 Dowl. P. C. N. S. 345, 7 Jur. 282, 12 L. J. Q. B. 93.

67. Kuhns *v.* Chicago, etc., R. Co., 65 Iowa 528, 22 N. W. 661; Latham *v.* Hartford, 27 Kan. 249; Wood *v.* Hitchcock, 20 Wend. (N. Y.) 47; Simmons *v.* Wilmott, 3 Esp. 91. See Elderkin *v.* Fellows, 60 Wis. 339, 19 N. W. 101.

however, that a tender under protest, reserving the right to dispute the amount due, if it does not impose any conditions on the tenderee, is good.[68]

3. Tender Conditioned Upon the Surrender of Evidence of Indebtedness or Security. An offer of the amount due on a negotiable instrument is held not a good tender where its acceptance is made conditional on the surrender of the instrument,[69] although there is authority to the contrary,[70] and to the effect that demanding a negotiable instrument but not making its surrender a condition to the tender of the money due thereon does not make a tender conditional and therefore invalid.[71] It is held that where there is no dispute as to the amount due, a tender may be made by an accommodation indorser of a note,[72] or by an accepter of a bill,[73] to depend upon the surrender of the note or bills. A tender of the amount of a mortgage debt may be coupled with a condition that the mortgagee surrender the mortgage and note or bond, or execute a release, cancellation, or satisfaction of the mortgage.[74]

4. Demanding Receipt or Discharge. A debtor cannot insist upon a receipt in full in respect to the particular claim upon which the tender is made, or a receipt in full for all demands, and if he does so he vitiates the tender;[75] nor can the offer be made conditional upon the debtor receiving a discharge.[76] A tender is held to be vitiated by coupling it with a demand for a receipt for the sum offered,[77] unless,

68. Atchison, etc., R. Co. *v.* Roberts, 3 Tex. Civ. App. 370, 22 S. W. 183 (where freight charges were tendered under protest); Sweny *v.* Smith, L. R. 7 Eq. 324, 38 L. J. Ch. 446; Scott *v.* Uxbridge, etc., R. Co., L. R. 1 C. P. 596, 12 Jur. N. S. 602, 35 L. J. C. P. 293, 13 L. T. Rep. N. S. 596, 14 Wkly. Rep. 893; Manning *v.* Lunn, 2 C. & K. 13, 61 E. C. L. 13; Peers *v.* Allen, 19 Grant Ch. (U. C.) 98. See Greenwood *v.* Sutcliffe, [1892] 1 Ch. 1, 61 L. J. Ch. 59, 65 L. T. Rep. N. S. 797, 40 Wkly. Rep. 241 (where the debtor, on making a tender to a mortgagee in possession, reserved the right to review their account); Thorpe *v.* Burgess, 8 Dowl. P. C. 603 (where the debtor in offering a sum said "that it was more than was due, but that plaintiff might take it all," and the tender was held good).

69. Storey *v.* Krewson, 55 Ind. 397, 23 Am. Rep. 668; Fales *v.* Russell, 16 Pick. (Mass.) 315; Baker *v.* Wheaton, 5 Mass. 509, 4 Am. Dec. 71; Moore *v.* Norman, 52 Minn. 83, 53 N. W. 809, 38 Am. St. Rep. 526, 18 L. R. A. 359; Benson Bank *v.* Hove, 45 Minn. 40, 47 N. W. 449; Holton *v.* Brown, 18 Vt. 224, 46 Am. Dec. 148.

70. Strafford *v.* Welch, 59 N. H. 46; Heywood *v.* Hartshorn, 55 N. H. 476; Halpin *v.* Phenix Ins. Co., 118 N. Y. 165, 23 N. E. 482; Bailey *v.* Buchanan County, 115 N. Y. 297, 22 N. E. 155, 6 L. R. A. 562. See Wilder *v.* Seelye, 8 Barb. (N. Y.) 408; Hansard *v.* Robinson, 7 B. & C. 90, 9 D. & R. 860, 5 L. J. K. B. O. S. 242, 14 E. C. L. 50, 108 Eng. Reprint 659.

71. Buffum *v.* Buffum, 11 N. H. 451. See Moore *v.* Vail, 13 N. J. Eq. 295.

72. Osterman *v.* Goldstein, 32 Misc. (N. Y.) 676, 66 N. Y. Suppl. 506 [*reversing* on other grounds 31 Misc. 501, 64 N. Y. Suppl. 555].

73. Hansard *v.* Robinson, 7 B. & C. 90, 9 D. & R. 860, 5 L. J. K. B. O. S. 242, 14 E. C. L. 50, 108 Eng. Reprint 659.

74. See Mortgages, 27 Cyc. 1407.

75. *Alabama.*— Commercial F. Ins. Co. *v.* Allen, 80 Ala. 571, 1 So. 202.

Arkansas.— Jacoway *v.* Hall, 67 Ark. 340, 55 S. W. 12.

Colorado.— Butler *v.* Hinckley, 17 Colo. 523, 30 Pac. 250.

Iowa.— West *v.* Farmers' Mut. Ins. Co., 117 Iowa 147, 90 N. W. 523, holding that Code (1873), § 3063, providing that a tenderer may demand a receipt for the money tendered, did not authorize him to demand a receipt in full.

Massachusetts.— Thayer *v.* Brackett, 12 Mass. 450.

New York.— Wood *v.* Hitchcock, 20 Wend. 47.

South Carolina.— Siter *v.* Robinson, 2 Bailey 274.

United States.— Hepburn *v.* Auld, 1 Cranch 321, 2 L. ed. 122; Perkins *v.* Beck, 19 Fed. Cas. No. 10,984, 4 Cranch C. C. 68.

England.— Bowen *v.* Owen, 11 Q. B. 130, 11 Jur. 972, 17 L. J. Q. B. 5, 63 E. C. L. 130; Finch *v.* Miller, 5 C. B. 428, 57 E. C. L. 428; Griffith *v.* Hodges, 1 C. & P. 419, 12 E. C. L. 246; Foord *v.* Noll, 2 Dowl. P. C. N. S. 617, 12 L. J. C. P. 2; Glasscott *v.* Day, 5 Esp. 48, 8 Rev. Rep. 828; Higham *v.* Baddely, Gow. 213; Cole *v.* Blake, Peake N. P. 179, 3 Rev. Rep. 681.

See 45 Cent. Dig. tit. "Tender," § 34.

Receipt required by law.— Where the statute requires a receipt to be given, as in the case of the payment of taxes, a tender of the amount due will relieve the taxpayer from a liability for penalties, even though made conditional upon a receipt being furnished. State *v.* Central Pac. R. Co., 21 Nev. 247, 30 Pac. 686.

76. Richardson *v.* Boston Chemical Laboratory, 9 Metc. (Mass.) 42.

77. Sanford *v.* Bulkley, 30 Conn. 344; Roosevelt *v.* Bull's Head Bank, 45 Barb. (N. Y.) 579; Holton *v.* Brown, 18 Vt. 224, 46 Am. Dec. 148. See Kitchen *v.* Clark, 1 Mo. App. 430. But see Brock *v.* Jones, 16

as is the case in a few jurisdictions, a statute exists which allows a demand for a receipt.[78]

F. By Whom Made — 1. In General. A tender to be valid must be made by the debtor or someone representing him,[79] and a tender by a stranger to the contract is invalid.[80] But a tender may be made by an attorney, agent, or other person authorized to make it on behalf of the debtor,[81] and a tender may be made for an infant by his guardian; [82] and where the right to make a tender does not cease upon the death of a person, a tender may be made by his personal representatives, after qualification,[83] but not before.[84] A third person who has for a consideration agreed to pay the debt of another may tender the amount of the debt; [85] but where a tender is made by a third person, the creditor must be informed on whose behalf it is made, and if he is not so informed the tender is invalid.[86]

2. Joint Debtor. A tender may be made by one of two or more joint debtors,[87] and it seems that a joint tender of a gross sum by debtors bound severally is good.[88]

Tex. 461 (criticizing this rule); Jones *v.* Arthur, 8 Dowl. P. C. 442, 4 Jur. 859 (where a check was inclosed in a letter with the request that a receipt be sent back, and the tender was held good for the reason that the check was placed beyond the control of the debtor).

Waiver.— By failing at the time to object to a tender on the ground that a receipt is demanded and assigning another reason for refusing is a waiver of the objection that a receipt was required. People *v.* Edwards, 56 Hun (N. Y.) 377, 10 N. Y. Suppl. 335; Richardson *v.* Jackson, 9 Dowl. P. C. 715, 10 L. J. Exch. 303, 8 M. & W. 298; Cole *v.* Blake, Peake N. P. 179, 3 Rev. Rep. 681; Lockridge *v.* Lacey, 30 U. C. Q. B. 494.

A tender, coupled with a demand for a receipt for a larger sum than has been paid, is not a sufficient tender. Rude *v.* Levy, 43 Colo. 482, 96 Pac. 560, 127 Am. St. Rep. 123, 24 L. R. A. N. S. 91.

78. West *v.* Farmers' Mut. Ins. Co., 117 Iowa 147, 90 N. W. 523, holding, however, that such a statute does not permit a demand for a receipt in full. See State *v.* Central Pac. R. Co., 21 Nev. 247, 30 Pac. 686.

79. Mahler *v.* Newbaur, 32 Cal. 168, 91 Am. Dec. 571; McDougald *v.* Dougherty, 11 Ga. 570; Rowell *v.* Jewett, 73 Me. 365; Harris *v.* Jex, 66 Barb. (N. Y.) 232; Jones *v.* Moore, 1 Edw. (N. Y.) 632. But see Brown *v.* Dysinger, 1 Rawle (Pa.) 408, holding that a tender of money for an infant by his uncle is good, although not appointed guardian at the time of tender.

Assignees and receivers of bankrupts may make a tender of the amount due upon liens upon the bankrupt's property belonging to the estate. Davies *v.* Dow, 80 Minn. 223, 83 N. W. 50. But an assignment in insolvency does not deprive the debtor of his right of making a tender of the amount due upon a lien upon property belonging to the estate. Trimble *v.* Williamson, 49 Ala. 525, holding also that a judgment creditor may redeem, providing his lien attached before the bankruptcy. See Davies *v.* Dow, 80 Minn. 223, 83 N. W. 50.

80. Mahler *v.* Newbaur, 32 Cal. 168, 91 Am. Dec. 571; McDougald *v.* Dougherty, 11 Ga. 570; Sinclair *v.* Learned, 51 Mich. 335, 16 N. W. 672; Harris *v.* Jex, 66 Barb. (N. Y.) 232.

Tenders held to be by stranger and thus invalid see McDougald *v.* Dougherty, 11 Ga. 570; Watkins *v.* Ashwicke, Cro. Eliz. 132, 78 Eng. Reprint 389.

An inhabitant of a town or other political subdivision whose property is liable to seizure and sale to satisfy a poor rate has such a direct interest as will entitle him to make a tender of the amount due therefor. Kincaid *v.* Brunswick School Dist. No. 4, 11 Me. 188.

81. Arnold *v.* Empire Mut. Annuity, etc., Ins. Co., 3 Ga. App. 685, 60 S. E. 470 (under express statutory provision); Wyllie *v.* Matthews, 60 Iowa 187, 14 N. W. 232; Keystone Lumber, etc., Mfg. Co. *v.* Jenkinson, 69 Mich. 220, 37 N. W. 198.

A tender may be made by one joint agent for all. St. Paul Div. No. 1 S. O. T. *v.* Brown, 11 Minn. 356.

Waiver.— An objection that the agent making the tender did not produce his authority is waived unless proof of his authority is called for at the time of the tender. Lampley *v.* Weed, 27 Ala. 621; Couthway *v.* Berghaus, 25 Ala. 393.

82. Watkins *v.* Ashwicke, Cro. Eliz. 132, 78 Eng. Reprint 389. See Brown *v.* Dysinger, 1 Rawle (Pa.) 408.

A master to whom a minor is apprenticed cannot make a tender for him, a parent being alive. See Com. *v.* Kendig, 1 Serg. & R. (Pa.) 366.

83. Sharp *v.* Garesche, 90 Mo. App. 233; Rearich *v.* Swinehart, 11 Pa. St. 233, 51 Am. Dec. 540.

84. McDougald *v.* Dougherty, 11 Ga. 570, where a tender made by the widow before she was appointed an administratrix was held bad.

85. Bell *v.* Mendenhall, 71 Minn. 331, 73 N. W. 1086.

86. Mahler *v.* Newbaur, 32 Cal. 168, 91 Am. Dec. 571.

87. Winter *v.* Atkinson, 28 La. Ann. 650. But see Bender *v.* Bean, 52 Ark. 132, 12 S. W. 180, 241.

88. See Hall *v.* Norwalk F. Ins. Co., 57 Conn. 105, 17 Atl. 356.

3. Ratification of Unauthorized Tender. A tender by a person acting without authority may be ratified.[89]

G. To Whom Made — 1. In General. A tender must in general be made to the creditor,[90] to the person designated in the contract,[91] or to one duly authorized to receive tender;[92] and where an obligation has been assigned, the tender must be made to the assignee, provided the debtor has notice of the assignment.[93] Money due the estate of a deceased person may be tendered to the executor or administrator as the case may be.[94]

2. To Agent, Attorney, or Servant. A tender to an agent authorized to receive payment has the same effect as a tender to the principal,[95] although the

89. Kincaid *v.* Brunswick School Dist. No. 4, 11 Me. 188 (holding, however, that the operation of this rule should be limited to cases in which the tenderee has recognized the tender and impliedly accepted it); Forderer *v.* Schmidt, 154 Fed. 475, 84 C. C. A. 426.

90. Hornby *v.* Cramer, 12 How. Pr. (N. Y.) 490. See Grussy *v.* Schneider, 55 How. Pr. (N. Y.) 188, where the debtor was advised in advance that the one to whom he made the tender was not authorized to receive the money.

A court of equity will not supply the defect in a tender where it is made to the wrong party. King *v.* Finch, 60 Ind. 420.

Tender to real, not ostensible, creditor.— Where plaintiff was indebted to defendant, and the latter conspired with a third person to defraud plaintiff by inducing him to execute a bill of sale to the third person by representing that it was a mortgage, a tender made by plaintiff in order to obtain possession of the property conveyed by the bill of sale was properly made to defendant, who was the beneficiary of the fraud. Harris *v.* Staples, (Tex. Civ. App. 1905) 89 S. W. 801.

The fact that the creditor was deaf, and could only be made to understand by signs and movements of the lips, did not disqualify him from receiving a tender. Roberson *v.* Clevenger, 111 Mo. App. 622, 86 S. W. 512.

91. Te Poel *v.* Shutt, 57 Nebr. 592, 78 N. W. 288.

92. Boyce *v.* Prichett, 6 Dana (Ky.) 231. And see *infra*, III, G, 2.

A tender of anything due a corporation should be made to the officer authorized to receive it, although there seems to be no uniform rule or custom relative to what officer of a corporation has such authority. A tender to an officer of a corporation acting in place of its treasurer has been held to be a sufficient tender to the corporation (Louisville R. Co. *v.* Williams, 109 S. W. 874, 33 Ky. L. Rep. 168), and a tender to a president, of the amount due upon an assessment upon the stock, was held good, where made at the office of the company and no objection was made that the president had no authority to represent the company (Mitchell *v.* Vermont Copper Min. Co., 67 N. Y. 280 [*affirming* 40 N. Y. Super. Ct. 406]), and a tender to a local secretary and treasurer of a building and loan association was held good (Smith *v.* Old Dominion Bldg., etc., Assoc., 119 N. C. 257, 26 S. E. 40), and where the superintendent and general manager of a company was the only agent with whom a third person contracted, the superintendent was the one to whom a tender could be made by the third person (Birmingham Paint, etc., Co. *v.* Crampton, (Ala. 1905) 39 So. 1020).

93. Flanigan *v.* Seelye, 53 Minn. 23, 55 N. W. 115. But see Smith *v.* Kelley, 27 Me. 237, 46 Am. Dec. 595.

A tender to the payee of a note after he has transferred it is bad. Goss *v.* Emerson, 23 N. H. 38.

If an assignee refuses a tender and it is within the power of the assignor to perform, a tender should then be made to him. Dustan *v.* McAndrew, 10 Bosw. (N. Y.) 135 [*affirmed* in 44 N. Y. 72].

94. Parker *v.* Lincoln, 12 Mass. 16; Ratcliff *v.* Davies, Cro. Jac. 244, 79 Eng. Reprint 210.

A tender to a person before he qualifies as executor is not good. Todd *v.* Parker, 1 N. J. L. 45.

95. Dunlop *v.* Funk, 3 Harr. & M. (Md.) 318; Goodland *v.* Blewith, 1 Campb. 477, 10 Rev. Rep. 731; Moffat *v.* Parsons, 1 Marsh. 55, 5 Taunt. 307, 15 Rev. Rep. 506, 1 E. C. L. 164; Harper *v.* Peterson, 14 U. C. C. P. 538.

The debtor can elect whether to tender to the agent or to the creditor. Hoyt *v.* Hall, 3 Bosw. (N. Y.) 42. See Hoyt *v.* Byrnes, 11 Me. 475.

The burden of proving the agency, if denied, is upon the debtor. See Garnett *v.* Meyers, 65 Nebr. 280, 91 N. W. 400, 94 N. W. 803; Smith *v.* Kidd, 68 N. Y. 130, 23 Am. Rep. 157.

If the agent be instructed not to receive the money until certain conditions are complied with, which conditions if annexed to the acceptance by the principal would not justify his refusing, a tender to the agent is good. Crawford *v.* Osman, 94 Mich. 533, 54 N. W. 284.

Tender to bank.— If the evidence of an obligation is lodged with a bank to be surrendered on receiving payment, a tender may be made to the bank. Mahan *v.* Waters, 60 Mo. 167; Adams *v.* Hackensack Imp. Commission, 44 N. J. L. 638, 43 Am. Rep. 406; Cheney *v.* Libby, 134 U. S. 68, 10 S. Ct. 498, 33 L. ed. 818. If not lodged with the bank, any sum received by the bank to be

debtor believed the agent to be the real party in interest.[96] Similarly a tender may be made to an attorney with whom the demand has been lodged for collection,[97] but not to an attorney whose authority is so restricted as not to include a power to accept tender,[98] although a tender to an attorney who is in fact adequately authorized is sufficient even though he disclaims authority.[99] But the tender as in other cases must be of the full amount of the debt.[1] The general rule is that a tender to a clerk in a store, of the amount due for goods purchased at such store, is equivalent to a tender to the proprietor;[2] but a tender to a mere servant without actual or apparent authority to receive the money is insufficient,[3] notwithstanding the fact that the tenderee is at the time absent from the state.[4]

3. To Joint Creditor. A tender of the joint debt to one of several joint creditors is a tender to all,[5] and if a person who is indebted to creditors severally in different sums tenders a gross sum to all of them assembled together, and the tender is objected to upon the ground of insufficiency of amount, other

applied on the instrument is received as the agent of the payer. Ward *v.* Smith, 7 Wall. (U. S.) 447, 19 L. ed. 207. Where a bank inadvertently gave the maker of a note payable at the bank notice of the time of its maturity, the note being there as a special deposit and not for collection, a tender to the bank was held insufficient. King *v.* Finch, 60 Ind. 420.

A tender to the creditor's family has been held good under circumstances indicating that the creditor intended to render tender impossible. Judd *v.* Ensign, 6 Barb. (N. Y.) 258.

Authority of agent to collect or receive payment see Principal and Agent, 31 Cyc. 1368.

96. Conrad *v.* Grand Grove U. A. O. D., 64 Wis. 258, 25 N. W. 24.

97. *Louisiana.*— Billiot *v.* Robinson, 13 La. Ann. 529; Mudd *v.* Stille, 6 La. 17.

Massachusetts.— McIniffe *v.* Wheelock, 1 Gray 600.

Minnesota.— Salter *v.* Shove, 60 Minn. 483, 62 N. W. 1126.

New Hampshire.— Thurston *v.* Blaisdell, 8 N. H. 367.

New York.— Osterman *v.* Goldstein, 31 Misc. 501, 64 N. Y. Suppl. 555 [*reversed* on other grounds in 32 Misc. 676, 66 N. Y. Suppl. 506]; Jackson *v.* Crafts, 18 Johns. 110.

See 45 Cent. Dig. tit. "Tender," § 10. See also Attorney and Client, 4 Cyc. 947 text and note 92.

Tender to attorney's clerk.— Where an attorney demands that payment be made at his office, a tender to his clerk in the office in his absence is good. Wilmot *v.* Smith, 3 C. & P. 453, M. & M. 238, 31 Rev. Rep. 732, 14 E. C. L. 659; Kinton *v.* Braithwaite, 5 Dowl. P. C. 101, 2 Gale 48, 5 L. J. Exch. 165, 1 M. & W. 310, Tyrw. & G. 945. But where the attorney wrote that the money "must be paid to me," a tender to a clerk who said he could not take the money as his employer was out was held bad. Watson *v.* Hetherington, 1 C. & K. 36, 47 E. C. L. 36. And it is held that where a managing clerk disclaims authority to receive payment, a tender to the clerk is insufficient. Finch *v.* Boning, 4 C. P. D. 143, 40 L. T. Rep. N. S. 484, 27 Wkly. Rep. 872; Bingham *v.* Allport, 2 L. J. K. B. 86, 1 N. & M. 398.

If an attorney is at home, sick, the debtor should either make a tender to the person in charge of the office or call at the abode of the attorney or upon the creditor. Francis *v.* Deming, 59 Conn. 108, 21 Atl. 1006.

Costs imposed as a condition of opening up a default may be tendered to the attorney. Wolff *v.* Canadian Pac. R. Co., 89 Cal. 332, 26 Pac. 825.

98. Tuthill *v.* Morris, 81 N. Y. 94.

99. McIniffe *v.* Wheelock, 1 Gray (Mass.) 600. But see Wilmot *v.* Smith, 3 C. & P. 453, M. & M. 238, 31 Rev. Rep. 732, 14 E. C. L. 659.

1. Chipman *v.* Bates, 5 Vt. 143.

2. Hoyt *v.* Byrnes, 11 Me. 475; Moffat *v.* Parsons, 5 Taunt. 307, 15 Rev. Rep. 506, 1 E. C. L. 164.

Where a creditor demanded that payment be made at his office it was held that such demand amounted to authority for the clerk there to receive payment. Kinton *v.* Braithwaite, 5 Dowl. P. C. 101, 2 Gale 48, 5 L. J. Exch. 165, 1 M. & W. 310, Tyrw. & G. 945.

Although a clerk was instructed not to receive the money because the claim had been placed with an attorney for collection, the tender was held good. Moffat *v.* Parsons, 1 Marsh. 55, 5 Taunt. 307, 15 Rev. Rep. 506, 1 E. C. L. 164.

3. Thurber *v.* Jewett, 3 Mich. 295; Jewett *v.* Earle, 53 N. Y. Super. Ct. 349. But see Anonymous, 1 Esp. 349.

4. McGuire *v.* Bradley, 118 Ill. App. 59.

5. Flanigan *v.* Seelye, 53 Minn. 23, 55 N. W. 115; Carman *v.* Pultz, 21 N. Y. 547; Wyckoff *v.* Anthony, 9 Daly (N. Y.) 417; Dawson *v.* Ewing, 16 Serg. & R. (Pa.) 371; Prescott *v.* Everts, 4 Wis. 314.

A tender to one cotenant is a tender to all (Loddiges *v.* Lister, 1 L. T. Rep. N. S. 548), and where tenants in common appeared and contested certain proceedings without objecting that it should have been against them severally, a tender in such proceedings to one was held good (Dyckman *v.* New York, 5 N. Y. 434).

objections to the tender are waived, and if the amount be in fact sufficient the tender is good.[6]

H. Tender of Specific Articles. Where the debt is payable in specific articles, the debtor must, at the time of payment, have the articles at the place of payment,[7] set apart and separated for identification;[8] and it is not enough that the tenderer has a large quantity at the place of tender,[9] whether the tenderee is there to receive them or not,[10] and the tenderee must be given a reasonable time and opportunity to ascertain his rights and examine the articles if he requests it.[11] If the debt is payable in either of two kinds of property, the tender must be wholly of one kind or of the other,[12] if payable in several kinds, the tender must be made of all the kinds and not of some only.[13] Property required by law to be surveyed, inspected, or sealed must be surveyed, inspected, or sealed before it is tendered.[14]

IV. KEEPING TENDER GOOD.

A. Necessity. Where the debt remains after the tender, a tender of money to be available to the party tendering must be kept good, otherwise it is abandoned,[15] and a tender of money must be kept good if it is to be made the basis for

6. Black *v.* Smith, Peake N. P. 88, 3 Rev. Rep. 661.

7. *Connecticut.*— Smith *v.* Loomis, 7 Conn. 110.

District of Columbia.— Hughes *v.* Eschback, 7 D. C. 66.

Iowa.— Spafford *v.* Stutsman, 9 Iowa 128; Williams *v.* Triplett, 3 Iowa 518; Games *v.* Manning, 2 Greene 251.

Kentucky.— Mitchell *v.* Gregory, 1 Bibb 449, 4 Am. Dec. 655.

Maine.— Bates *v.* Churchill, 32 Me. 31; Veazy *v.* Harmony, 7 Me. 91.

Missouri.— McJilton *v.* Smizer, 18 Mo. 111.

New Hampshire.— Bailey *v.* Simonds, 6 N. H. 159, 25 Am. Dec. 454.

New York.— Wheelock *v.* Tanner, 39 N. Y. 481.

North Carolina.— Patton *v.* Hunt, 64 N. C. 163.

Texas.— Cherry *v.* Newby, 11 Tex. 457.

Vermont.— Barney *v.* Bliss, 1 D. Chipm. 399, 12 Am. Dec. 696.

Custom and usage may be proven to determine whether a proper tender of chattels has been made, in the absence of definite provision in the contract. Clark *v.* Baker, 11 Metc. (Mass.) 186, 45 Am. Dec. 199. Thus if it is the custom to call at the shop of a mechanic for articles manufactured by him, it is a sufficient tender if the article is ready on the day and set out in his shop. Downer *v.* Sinclair, 15 Vt. 495.

A tender of a certificate of inspection for lumber lying on the bank of a river was held insufficient, the certificate being evidence only that the lumber had been inspected, not that the lumber was at the place at the time of the tender. Thompson *v.* Gaylard, 3 N. C. 326.

8. Smith *v.* Loomis, 7 Conn. 110; Games *v.* Manning, 2 Greene (Iowa) 251; Bates *v.* Churchill, 32 Me. 31; Veazy *v.* Harmony, 7 Me. 91; Cherry *v.* Newby, 11 Tex. 457. But see Armstrong *v.* Tait, 8 Ala. 635, 42 Am. Dec. 656; Hughes *v.* Prewitt, 5 Tex. 264.

The property may be pointed out or designated by setting it aside and tagging it, so that the payee may pursue and recover the property itself. Hughes *v.* Eschback, 7 D. C. 66; Bates *v.* Bates, Walk. (Miss.) 401, 12 Am. Dec. 572; McConnel *v.* Hall, Brayt. (Vt.) 223.

9. Wyman *v.* Winslow, 11 Me. 398, 26 Am. Dec. 542; Coffin *v.* Reynolds, 21 Minn. 456; Barns *v.* Graham, 4 Cow. (N. Y.) 452, 15 Am. Dec. 394; Newton *v.* Galbraith, 5 Johns. (N. Y.) 119.

Where a note was for the payment of ten cows and calves, driving eleven cows and calves into a lot without making any separation of the ten was held not a tender, although the debtor stated that he was ready to pay the note. Bates *v.* Bates, Walk. (Miss.) 401, 12 Am. Dec. 572.

Where the thing to be paid was hay, it was held that it need not be weighed and specially turned out if a sufficient quantity was at the place set apart and appropriated for the payment of the note. Leballister *v.* Nash, 24 Me. 316.

10. Barney *v.* Bliss, 1 D. Chipm. (Vt.) 399, 12 Am. Dec. 696.

11. Isherwood *v.* Whitmore, 2 Dowl. P. C. N. S. 548, 7 Jur. 535, 12 L. J. Exch. 318, 11 M. & W. 347.

12. Townsend *v.* Wells, 3 Day (Conn.) 327.

13. Thompson *v.* Gaylard, 3 N. C. 326.

14. Jones *v.* Knowles, 30 Me. 402; Elkins *v.* Parkhurst, 17 Vt. 105.

15. *Alabama.*— Odum *v.* Rutledge, etc., R. Co., 94 Ala. 488, 10 So. 222; McCalley *v.* Otey, 90 Ala. 302, 8 So. 157.

Arkansas.— Kelly *v.* Keith, 85 Ark. 30, 106 S. W. 1173; Cole *v.* Moore, 34 Ark. 582.

Colorado.— Burlock *v.* Cross, 16 Colo. 162, 26 Pac. 142.

Florida.— Matthews *v.* Lindsay, 20 Fla. 962.

Georgia.— Gray *v.* Angier, 62 Ga. 596.

Illinois.— Rankin *v.* Rankin, 216 Ill. 132, 74 N. E. 763; Aulger *v.* Clay, 109 Ill. 487; Pulsifer *v.* Shepard, 36 Ill. 513; Stow *v.* Russell, 36 Ill. 18; Webster *v.* Pierce, 35

affirmative relief by the tenderer who, either as plaintiff or defendant, invokes the equitable powers of the court.[16] But if a lien is discharged by a tender, the tenderer desiring the benefit of it may rely upon the tender without showing that it was kept good,[17] and the same rule applies where a contract or lease has been terminated by the tender.[18] A tender of specific articles, however, unlike a tender of money, need not be kept good.[19] Sureties are discharged as a general

Ill. 158; Chicago Mar. Bank *v.* Rushmore, 28 Ill. 463; Sloan *v.* Petrie, 16 Ill. 262; Mason *v.* Stevens, 91 Ill. App. 623; McDaniel *v.* Upton, 45 Ill. App. 151; Dunbar *v.* De Boer, 44 Ill. App. 615.

Indiana.— Wilson *v.* McVey, 83 Ind. 108.

Iowa.— Rainwater *v.* Hummell, 79 Iowa 571, 44 N. W. 814; Long *v.* Howard, 35 Iowa 148; Jones *v.* Mullinix, 25 Iowa 198; Mohn *v.* Stoner, 14 Iowa 115; Barker *v.* Brink, 5 Iowa 481.

Kansas.— Saum *v.* La Shell, 45 Kan. 205, 25 Pac. 561.

Kentucky.— McCulloch *v.* Scott, 13 B. Mon. 172, 56 Am. Dec. 561; Lloyd *v.* O'Rear, 59 S. W. 483, 22 Ky. L. Rep. 1000.

Maine.— McPheters *v.* Kimball, 99 Me. 505, 59 Atl. 853.

Maryland.— Maulsby *v.* Page, 105 Md. 24, 65 Atl. 818.

Michigan.— Browning *v.* Crouse, 40 Mich. 339.

Minnesota.— Balme *v.* Wambaugh, 16 Minn. 116.

Mississippi.— Tishimingo Sav. Inst. *v.* Buchanan, 60 Miss. 496.

New York.— Nelson *v.* Loder, 132 N. Y. 288, 30 N. E. 369 [*affirming* 55 Hun 173, 7 N. Y. Suppl. 849]; Tuthill *v.* Morris, 81 N. Y. 94; Dodge *v.* Fearey, 19 Hun 277; Warbury *v.* Wilcox, 2 Hilt. 121; Craig *v.* Robinson, 33 Misc. 779, 67 N. Y. Suppl. 969; Osterman *v.* Goldstein, 32 Misc. 676, 66 N. Y. Suppl. 506 [*reversing* 31 Misc. 501, 64 N. Y. Suppl. 555]; Starke *v.* Myers, 24 Misc. 577, 53 N. Y. Suppl. 650; Rumpf *v.* Schiff, 109 N. Y. Suppl. 51.

North Carolina.— Tate *v.* Smith, 70 N. C. 685.

Oregon.—Anderson *v.* Griffith, 51 Oreg. 116, 93 Pac. 934.

Pennsylvania.— Sharpless *v.* Dobbins, 1 Del. Co. 25.

Virginia.— Lohman *v.* Crouch, 19 Gratt. 331; Shumaker *v.* Nichols, 6 Gratt. 592; Call *v.* Scott, 4 Call 402.

Washington.— Andrews *v.* Uncle Joe Diamond Broker, 44 Wash. 668, 87 Pac. 947.

West Virginia.—Shank *v.* Groff, 45 W. Va. 543, 32 S. E. 248.

Wisconsin.— Musgat *v.* Pumpelly, 46 Wis. 660, 1 N. W. 410.

United States.— Bissell *v.* Heyward, 96 U. S. 580, 24 L. ed. 678; Beardsley *v.* Beardsley, 86 Fed. 16, 29 C. C. A. 538; Illinois *v.* Illinois Cent. R. Co., 33 Fed. 730; Coghlan *v.* South Carolina R. Co., 32 Fed. 316.

England.— Gyles *v.* Hall, 2 P. Wms. 378, 24 Eng. Reprint 774.

See 45 Cent. Dig. tit. "Tender," § 55.

But see Ashley *v.* Rocky Mountain Tel. Co., 25 Mont. 286, 64 Pac. 765.

A tender may be abandoned by subsequently failing to insist upon it. Fry *v.* Russell, 35 Mich. 229; Davis *v.* Nelson, 73 Vt. 328, 50 Atl. 1094; Barker *v.* Parkenhorn, 2 Fed. Cas. No. 993, 2 Wash. 142.

Where a composition agreement is set up as a defense to a common-law action on the original obligation, and tender thereunder is shown, the tender need not be kept good, where refused. Rosenzweig *v.* Kalichman, 56 Misc. (N. Y.) 345, 106 N. Y. Suppl. 860.

16. *Arkansas.*— Schearff *v.* Dodge, 33 Ark. 340.

Georgia.— McGehee *v.* Jones, 10 Ga. 127.

Illinois.— O'Riley *v.* Suver, 70 Ill. 85; Blain *v.* Foster, 33 Ill. App. 297.

Iowa.— Long *v.* Howard, 35 Iowa 148.

Minnesota.—Murray *v.* Nickerson, 90 Minn. 197, 95 N. W. 898; Dunn *v.* Hunt, 63 Minn. 484, 65 N. W. 948.

Missouri.— Ruppel *v.* Missouri Guarantee, etc., Assoc., 158 Mo. 613, 59 S. W. 1000.

New York.— Nelson *v.* Loder, 132 N. Y. 288, 30 N. E. 369; Werner *v.* Tuch, 127 N. Y. 217, 27 N. E. 845, 24 Am. St. Rep. 443.

Pennsylvania.— Summerson *v.* Hicks, 134 Pa. St. 566, 19 Atl. 808.

Vermont.— Perry *v.* Ward, 20 Vt. 92.

Wisconsin.— Smith *v.* Phillips, 47 Wis. 202, 2 N. W. 285.

United States.— Illinois *v.* Illinois Cent. R. Co., 33 Fed. 730.

See 45 Cent. Dig. tit. "Tender," § 55.

But see Cannon *v.* Handley, 72 Cal. 133, 13 Pac. 315.

17. *Illinois.*— McPherson *v.* James, 69 Ill. App. 337.

Michigan.— Stewart *v.* Brown, 48 Mich. 383, 12 N. W. 499; Daugherty *v.* Byles, 41 Mich. 61; Potts *v.* Plaisted, 30 Mich. 149; Eslow *v.* Mitchell, 26 Mich. 500; Moynahan *v.* Moore, 9 Mich. 9, 77 Am. Dec. 468.

Minnesota.— Norton *v.* Baxter, 41 Minn. 146, 42 N. W. 865, 16 Am. St. Rep. 679, 4 L. R. A. 305.

New York.— Kortright *v.* Cady, 21 N. Y. 343, 78 Am. Dec. 145.

Oregon.— Christenson *v.* Nelson, 38 Oreg. 473, 63 Pac. 648.

Washington.— Thomas *v.* Seattle Brewing, etc., Co., 48 Wash. 560, 94 Pac. 116, 125 Am. St. Rep. 945, 15 L. R. A. N. S. 1164; Andrews *v.* Hoeslich, 47 Wash. 220, 91 Pac. 772, 125 Am. St. Rep. 896, 18 L. R. A. N. S. 1265.

18. Parker *v.* Gortatowsky, 129 Ga. 623, 59 S. E. 286.

19. Garrard *v.* Zachariah, 1 Stew. (Ala.) 272; Mitchell *v.* Merrill, 2 Blackf. (Ind.) 87, 18 Am. Dec. 128; Mitchell *v.* Gregory, 1 Bibb (Ky.) 449, 4 Am. Dec. 655; McPherson *v.* Wiswell, 16 Nebr. 625, 21 N. W. 391.

rule by a valid rejected tender made to the creditor, although it is not kept good.[20]

B. Manner — 1. In General. To keep a tender good, the party making it must keep the money so that he can produce it when demanded,[21] and a tender of money must be kept good in money.[22] The identical money tendered need not be kept, it being sufficient if similar current funds are kept on hand in readiness,[23] and before an action is commenced or a defense interposed based on a tender, the tender may be kept good by the tenderer keeping the money in his possession.[24] But the tenderer must not use the money, and if by so doing his readiness to pay at all times is impaired, using the money amounts to a withdrawal of the tender,[25] and some cases seem to go even further and to hold that subsequent use of the funds tendered vitiates the tender irrespective of the question of the impairment

But the tenderer cannot abandon the property (Gayle *v.* Suydam, 24 Wend. (N. Y.) 271); he is bound to care for it, and may retain possession for the tenderee or store the goods for him (Dustan *v.* McAndrew, 44 N. Y. 72; Sheldon *v.* Skinner, 4 Wend. (N. Y.) 525, 21 Am. Dec. 161).

The tenderee must resort to the specific articles tendered, and the person in whose possession they are holds them as bailee and at the tenderee's risk. Fordyce *v.* Hathorn, 57 Mo. 120; Slingerland *v.* Morse, 8 Johns. (N. Y.) 474.

If the thing tendered be a note, bond, mortgage, deed, or other instrument, defendant must plead that he has always been and still is ready with the money or thing tendered, and it must be in court on the trial. Fannin *v.* Thomason, 50 Ga. 614; Sanders *v.* Peck, 131 Ill. 407, 25 N. E. 508; Gayle *v.* Suydam, 24 Wend. (N. Y.) 271; Brooklyn Bank *v.* De Grauw, 23 Wend. (N. Y.) 342, 35 Am. Dec. 569; Racine County Bank *v.* Keep, 13 Wis. 209.

20. See Principal and Surety, 32 Cyc. 573.

21. *Alabama.*— McCalley *v.* Otey, 90 Ala. 302, 8 So. 157.

Florida.— Matthews *v.* Lindsay, 20 Fla. 962.

Georgia.— Gray *v.* Angier, 62 Ga. 596.

Illinois.— Aulger *v.* Clay, 109 Ill. 487.

Minnesota.— Dunn *v.* Hunt, 63 Minn. 484, 65 N. W. 948.

Missouri.— Voss *v.* McGuire, 26 Mo. App. 452.

New Jersey.— Stockton *v.* Dundee Mfg. Co., 22 N. J. Eq. 56.

New York.— Dodge *v.* Fearey, 19 Hun 277.

Virginia.— Call *v.* Scott, 4 Call 402.

United States.— Coghlan *v.* South Carolina R. Co., 32 Fed. 316.

See 45 Cent. Dig. tit. "Tender," § 57.

It must be a continuing readiness; a mere willingness is not sufficient. Shugart *v.* Pattee, 37 Iowa 422; Dunn *v.* Hunt, 63 Minn. 484, 65 N. W. 948.

Where a tender of a check was refused, and pending a suit the bank failed, it was held that the tender was not kept good, even though the check was certified and it had been kept for the tenderee. Larsen *v.* Breene, 12 Colo. 480, 21 Pac. 498.

Where more was tendered than was actually due, only the amount actually due need be kept good (Abel *v.* Opel, 24 Ind. 250. See also Tucker *v.* Buffum, 16 Pick. (Mass.) 46), and a decree need not be for more than the actual amount due, although the tender was of a greater sum, where the plea is an offer to pay the amount found due. (Glos *v.* Goodrich, 175 Ill. 20, 51 N. E. 643.

22. Aulger *v.* Clay, 109 Ill. 487; Browning *v.* Crouse, 40 Mich. 339.

23. McCalley *v.* Otey, 90 Ala. 302, 8 So. 157; Dunn *v.* Hunt, 63 Minn. 484, 65 N. W. 948; Colby *v.* Stevens, 38 N. H. 191; Thompson *v.* Lyon, 40 W. Va. 87, 20 S. E. 812. But see Sanders *v.* Bryer, 152 Mass. 141, 25 N. E. 86, 9 L. R. A. 255; Roosevelt *v.* Bull's Head Bank, 45 Barb. (N. Y.) 579.

24. Loughridge *v.* Iowa Life, etc., Assoc., 84 Iowa 141, 50 N. W. 568; Rice *v.* Kahn, 70 Wis. 323, 35 N. W. 465.

25. *Alabama.*—Frank *v.* Pickens, 69 Ala. 369.

Arkansas.— See Woodruff *v.* Trapnall, 12 Ark. 640.

Georgia.— Gray *v.* Angier, 62 Ga. 596; Steed *v.* Loveless, 52 Ga. 323; Fannin *v.* Thomason, 50 Ga. 614.

Illinois.— Healy *v.* Protection Mut. F. Ins. Co., 213 Ill. 99, 72 N. E. 678; Aulger *v.* Clay, 109 Ill. 487; Thayer *v.* Meeker, 86 Ill. 470; Stow *v.* Russell, 36 Ill. 18.

Kentucky.— Nantz *v.* Lober, 1 Duv. 304.

Maine.— Rowell *v.* Jewett, 73 Me. 365.

Maryland.— Columbian Bldg. Assoc. *v.* Crump, 42 Md. 192.

Massachusetts.— Sanders *v.* Bryer, 152 Mass. 141, 25 N. E. 86, 9 L. R. A. 255.

Missouri.— Voss *v.* McGuire, 26 Mo. App. 452.

New Hampshire.— Bailey *v.* Metcalf, 6 N. H. 156.

New Jersey.— See Shields *v.* Lozear, 22 N. J. Eq. 447.

New York.— Werner *v.* Tuch, 127 N. Y. 217, 27 N. E. 845, 24 Am. St. Rep. 443; Hills *v.* Place, 48 N. Y. 520, 8 Am. Rep. 568; Nelson *v.* Loder, 55 Hun 173, 7 N. Y. Suppl. 849 [*affirmed* in 132 N. Y. 288, 30 N. E. 369]; Burr *v.* Stanley, 4 Edw. 27.

Pennsylvania.— Miller *v.* New Orleans Bank, 5 Whart. 503, 34 Am. Dec. 571; McConnell *v.* Nolan, 4 Wkly. Notes Cas. 509.

Vermont.— See Curtiss *v.* Greenbanks, 24 Vt. 536.

of the debtor's ability to pay.[26] A tender is abandoned by requesting a return, and receiving back the money tendered,[27] or departing with the property,[28] or destroying it.[29]

2. Depositing Money. It is not necessary that a person who makes a tender should keep the money on his person ready to be paid the instant it is demanded.[30] He may deposit it in a bank or other place for safe-keeping,[31] in some states express statutory authority to do so being found.[32] But the deposit if in bank must be special,[33] and such deposit does not place the money at the risk of the tenderee.[34]

C. Effect of Subsequent Demand and Refusal to Pay. A tender is not kept good if the tenderer after making it refuses to comply with a subsequent request by the tenderee for the thing tendered, and the prior tender becomes of no avail.[35] The rules in relation to a subsequent demand as avoiding a prior

United States.— Bissell *v.* Heyward, 96 U. S. 580, 24 L. ed. 678; Cheney *v.* Bilby, 74 Fed. 52, 20 C. C. A. 291.

England.— Gyles *v.* Hall, 2 P. Wms. 378, 24 Eng. Reprint 774.

See 45 Cent. Dig. tit. "Tender," § 57.

Money tendered in payment of one bond, when refused, cannot be used in making a tender upon a second bond, a third, etc. Quynn *v.* Whetcroft, 3 Harr. & M. (Md.) 352.

Where money is borrowed for the purpose of making a tender, and on its being refused, it is returned to the lender, the tender is not kept good. Park *v.* Wiley, 67 Ala. 310; Middle States Loan, etc., Co. *v.* Hagerstown Mattress Upholstery Co., 82 Md. 506, 33 Atl. 886; Dunn *v.* Hunt, 63 Minn. 484, 65 N. W. 948.

Where a bank, after making a tender, mingled the money with its other funds and used it in its ordinary business, it was held that the tender was not kept good. Roosevelt *v.* Bull's Head Bank, 45 Barb. (N. Y.) 579.

26. Sanders *v.* Bryer, 152 Mass. 141, 25 N. E. 86, 9 L. R. A. 255; Hills *v.* Place, 48 N. Y. 520, 8 Am. Rep. 568; Roosevelt *v.* Bull's Head Bank, 45 Barb. (N. Y.) 579; Murphy *v.* Gold, etc., Tel. Co., 3 N. Y. Suppl. 804; Bissell *v.* Heyward, 96 U. S. 580, 24 L. ed. 678.

27. Illinois *v.* Illinois Cent. R. Co., 33 Fed. 730.

28. Currie *v.* White, 7 Rob. (N. Y.) 637.

29. Gayle *v.* Suydam, 24 Wend. (N. Y.) 271; Brooklyn Bank *v.* De Grauw, 23 Wend. (N. Y.) 342, 35 Am. Dec. 569.

30. See cases cited *infra,* the following notes.

31. Dunn *v.* Hunt, 63 Minn. 484, 65 N. W. 948; Ritchie *v.* Ege, 58 Minn. 291, 59 N. W. 1020.

32. See the statutes of the several states. And see Thompson *v.* San Francisco Super. Ct., 119 Cal. 538, 51 Pac. 863; Kerr *v.* Moore, 6 Cal. App. 305, 92 Pac. 107; Righetti *v.* Righetti, 5 Cal. App. 249, 90 Pac. 50; Ridpath *v.* Evening Express Co., 4 Cal. App. 361, 88 Pac. 287; Young *v.* Daniels, 2 Iowa 126, 63 Am. Dec. 477; Walker *v.* Brown, 12 La. Ann. 266; Stakke *v.* Chapman, 13 S. D. 269, 83 N. W. 261.

A personal tender may nevertheless be made (Sayward *v.* Houghton, 119 Cal. 545, 51 Pac. 853, 52 Pac. 44), and kept good (see Wolff *v.* Canadian Pac. R. Co., 123 Cal. 535, 56 Pac. 453), according to the rules of common law.

33. Boyce *v.* Pritchett, 6 Dana (Ky.) 231; Nelson *v.* Loder, 55 Hun (N. Y.) 173, 7 N. Y. Suppl. 849 [*affirmed* in 132 N. Y. 288, 30 N. E. 369]. And see Crain *v.* McGoon, 86 Ill. 431, 29 Am. Rep. 37. *Compare* Riley *v.* Cheesman, 75 Hun (N. Y.) 387, 27 N. Y. Suppl. 453.

A payer of a note payable at a bank, who calls at the bank on the due day ready to pay it, but does not find the instrument there, may make a special deposit of the money there, to meet the note when presented. See Wallace *v.* McConnell, 13 Pet. (U. S.) 136, 10 L. ed. 95.

34. Benton *v.* Roberts, 2 La. Ann. 243; Dent *v.* Dunn, 3 Campb. 296, 13 Rev. Rep. 809.

The money is subject to attachment by garnishee or trustee process. Stowell *v.* Reed, 16 N. H. 20, 41 Am. Dec. 714.

35. *Alabama.*— Frank *v.* Pickens, 69 Ala. 369.

Connecticut.— Rose *v.* Brown, Kirby 293, 1 Am. Dec. 22.

Illinois.— Carr *v.* Miner, 92 Ill. 604; Sloan *v.* Petrie, 16 Ill. 262.

Iowa.— Rainwater *v.* Hummell, 79 Iowa 571, 44 N. W. 814; Hambel *v.* Tower, 14 Iowa 530.

Kentucky.— Nantz *v.* Lober, 1 Duv. 304.

Maine.— Lyon *v.* Williamson, 27 Me. 149.

Maryland.— Columbian Bldg. Assoc. *v.* Crump, 42 Md. 192.

Massachusetts.— Town *v.* Trow, 24 Pick. 168.

Michigan.— Fry *v.* Russell, 35 Mich. 229.

Missouri.—Voss *v.* McGuire, 26 Mo. App. 452; Cupples *v.* Galligan, 6 Mo. App. 62.

New York.— Manning *v.* Harris, 2 Johns. 24, 3 Am. Dec. 386.

North Carolina.— Tate *v.* Smith, 70 N. C. 685.

Tennessee.—Walters *v.* McAllister, 4 Hayw. 299.

United States.— Barker *v.* Parkenhorn, 2 Fed. Cas. No. 993, 2 Wash. 142.

See 45 Cent. Dig. tit. "Tender," § 56.

If a tender takes away a right to damages on account of the non-payment of the debt, a subsequent demand and refusal may restore the right. See Manning *v.* Harris, 2 Johns. (N. Y.) 24, 3 Am. Dec. 386.

tender are, however, very strict;[36] and to effect this result there must be an actual subsequent demand[37] by the tenderee or by an agent duly authorized to accept the tender[38] upon the tenderer or someone duly authorized by him to receive the tender,[39] for the precise sum tendered,[40] and legally due.[41] The demand must be at a reasonable time or place, and if either the time or place is unreasonable the debtor is entitled to a reasonable opportunity to comply.[42]

V. EFFECT OF TENDER.

A. In General. Ordinarily a tender of money does not operate as a satisfaction of the debt,[43] and is no bar to an action thereon;[44] the effect, when the tender is maintained, being to discharge the debtor from a liability for interest subsequent to the tender,[45] or damages that would accrue by reason of non-performance,[46] and costs afterward incurred.[47] A tender of money does not, unless

36. Town *v.* Trow, 24 Pick. (Mass.) 168.

37. Berthold *v.* Reyburn, 37 Mo. 586; Edwards *v.* Yeates, R. & M. 360, 21 E. C. L. 766.

A demand before the tender is of no effect. **Brandon *v.* Newington,** 3 Q. B. 915, 3 G. & D. 194, 7 Jur. 60, 12 L. J. Q. B. 20, 43 E. C. L. 1035.

38. Coles *v.* Bell, 1 Campb. 478 note, 10 Rev. Rep. 731 note; Core *v.* Callaway, 1 Esp. 115. See Pimm *v.* Grevill, 6 Esp. 95.

39. Town *v.* Trow, 24 Pick. (Mass.) 168; Berthold *v.* Reyburn, 37 Mo. 586.

If the tender was made in behalf of joint debtors, a subsequent application to one of them for the money is sufficient. Peirse *v.* Bowles, 1 Stark 323, 18 Rev. Rep. 775, 2 E. C. L. 127.

40. Spybey *v.* Hide, 1 Campb. 181.

If a larger sum is demanded the debtor may disregard it. Mahan *v.* Waters, 60 Mo. 167; Thetford *v.* Hubbard, 22 Vt. 440; Rivers *v.* Griffiths, 5 B. & Ald. 630, 1 D. & R. 215, 22 Rev. Rep. 505, 7 E. C. L. 344, 106 Eng. Reprint 1321.

If more is tendered than is due, the debtor need only demand the sum due. Dean *v.* James, 4 B. & Ad. 547, 2 L. J. K. B. 94, 1 N. & M. 303, 24 E. C. L. 241, 110 Eng. Reprint 561.

Where the tender has the effect of stopping the interest, the demand must be for the principal alone. Mahan *v.* Waters, 60 Mo. 167.

41. Coore *v.* Callaway, 1 Esp. 115.

42. Strafford *v.* Welch, 59 N. H. 46; Sharp *v.* Todd, 38 N. J. Eq. 324; Gibbs *v.* Stead, 8 B. & C. 528, 6 L. J. K. B. O. S. 378, 15 E. C. L. 261, 108 Eng. Reprint 1138. See Town *v.* Trow, 24 Pick. (Mass.) 168.

A demand after sunset has been held an unreasonable hour. Tucker *v.* Buffum, 16 Pick. (Mass.) 46.

43. *California.*— Colton *v.* Oakland Sav. Bank, 137 Cal. 376, 70 Pac. 225.

Connecticut.— Saunders *v.* Denison, 20 Conn. 521.

Illinois.— Independent Credit Co. *v.* South Chicago City R. Co., 121 Ill. App. 595.

Iowa.— Sheriff *v.* Hull, 37 Iowa 174; Guengerich *v.* Smith, 36 Iowa 587; Long *v.* Howard, 35 Iowa 148; Johnson *v.* Triggs, 4 Greene 97.

Massachusetts.— Town *v.* Trow, 24 Pick. 168.

Michigan.— Cowles *v.* Marble, 37 Mich. 158.

Mississippi.— Memphis Mach. Works *v.* Aberdeen, 77 Miss. 420, 27 So. 608.

Missouri.— Ruppel *v.* Missouri Guarantee Sav., etc., Assoc., 158 Mo. 613, 59 S. W. 1000; McGuire *v.* Brockman, 58 Mo. App. 307; Raymond *v.* McKinney, 58 Mo. App. 303.

New Hampshire.— Howard *v.* Hunt, 57 N. H. 467; Haynes *v.* Thom, 28 N. H. 386; Willard *v.* Harvey, 5 N. H. 252. See Reynolds *v.* Libbey, Smith 197.

New York.— Kelly *v.* West, 36 N. Y. Super. Ct. 304; Hill *v.* Place, 7 Rob. 389, 5 Abb. Pr. N. S. 18; Jackson *v.* Crafts, 18 Johns. 110; Raymond *v.* Bearnard, 12 Johns. 274, 7 Am. Dec. 317.

North Carolina.— Charlotte Bank *v.* Davidson, 70 N. C. 118.

Oregon.— Bartel *v.* Lope, 6 Oreg. 321.

Pennsylvania.— Cornell *v.* Green, 10 Serg. & R. 14; Johnson *v.* Hocker, 1 Dall. 406, 1 L. ed. 197.

South Carolina.— Smith *v.* Stinson, 1 Brev. 1.

Tennessee.— Chaffin *v.* Crutcher, 2 Sneed 360.

Texas.— Hoskins *v.* Dougherty, 29 Tex. Civ. App. 318, 69 S. W. 103.

United States.— Mitchell *v.* Roberts, 17 Fed. 776, 5 McCrary 425.

See 45 Cent. Dig. tit. "Tender," § 61.

44. McJilton *v.* Smizer, 18 Mo. 111; Haynes *v.* Thom, 28 N. H. 386; Kelly *v.* West, 36 N. Y. Super. Ct. 304; People *v.* Sternburg, 1 Den. (N. Y.) 635; Manny *v.* Harris, 2 Johns. (N. Y.) 24, 3 Am. Dec. 386.

But where a tender may be made upon an accord, a tender according to the terms agreed will bar an action on the original demand. Whitsett *v.* Clayton, 5 Colo. 476.

45. See INTEREST, 22 Cyc. 155.

46. Town *v.* Trow, 24 Pick. (Mass.) 168; Curtiss *v.* Greenbanks, 24 Vt. 536; Wallace *v.* McConnell, 13 Pet. (U. S.) 136, 10 L. ed. 95.

47. See COSTS, 11 Cyc. 71.

The effect of a tender for damages resulting from a tort, allowed under the statutes in some of the states, is restricted solely to the right to costs. See Spaulding *v.* Warner, 57 Vt. 654; Adams *v.* Morgan, 39 Vt. 302;

accepted, vest any title thereto in the party to whom the tender is made,[48] nor is an unaccepted tender such a part performance as will take a contract out of the statute of frauds.[49]

B. On Collateral Benefits, Securities, and Liens. Although a creditor by refusing to accept does not forfeit his right to the thing tendered, he does lose all collateral benefits or securities.[50] Thus a valid legal tender of the amount of a lien debt, such as a mortgage lien on real estate,[51] chattels,[52] a tax lien,[53] a mechanic's lien,[54] or the lien of a pledge [55] discharges the lien and leaves the creditor to his personal claim against the debtor,[56] although the rule seems to be otherwise as to the lien of a judgment.[57] A tender in full performance of the secured contract discharges a surety.[58]

C. As Admission of Liability. A tender is ordinarily an admission of an amount due equal to the sum tendered,[59] even though the tender is insufficient in

Smith *v.* Wilbur, 35 Vt. 133. *Compare* Miller *v.* Gable, 30 Ill. App. 578.

48. Thompson *v.* Kellogg, 23 Mo. 281; Stowell *v.* Read, 16 N. H. 20, 41 Am. Dec. 714. But see McLeod *v.* Powe, 12 Ala. 9.

49. Ormsby *v.* Graham, 23 Iowa 202, 98 N. W. 724; Wisconsin, etc., R. Co. *v.* McKenna, 139 Mich. 43, 102 N. W. 281; Hershey Lumber Co. *v.* St. Paul Sash, Door, etc., Co., 66 Minn. 449, 69 N. W. 215; Edgerton *v.* Hodge, 41 Vt. 676.

50. Hill *v.* Carter, 101 Mich. 158, 59 N. W. 413; Caruthers *v.* Humphrey, 12 Mich. 270; Frost *v.* Yonkers Sav. Bank, 70 N. Y. 553, 26 Am. Rep. 627; Tiffany *v.* St. John, 65 N. Y. 314, 22 Am. Rep. 612; Kortright *v.* Cady, 21 N. Y. 343, 78 Am. Dec. 145.

51. See MORTGAGES, 27 Cyc. 1408.

52. See CHATTEL MORTGAGES, 7 Cyc. 69.

53. See TAXATION, 37 Cyc. 1159.

54. Moynahan *v.* Moore, 9 Mich. 9, 77 Am. Dec. 468; Schwab *v.* Loubat, 1 Month. L. Bul. (N. Y.) 45, under the Mechanic's Lien Law of 1875, c. 379, § 18.

Deposit in court as discharging mechanic's lien see MECHANICS' LIENS, 27 Cyc. 284.

55. See PLEDGES, 31 Cyc. 852.

56. *Arkansas.*— Schearff *v.* Dodge, 33 Ark. 340.

Michigan.— Gordon *v.* Constantine Hydraulic Co., 117 Mich. 620, 76 N. W. 142.

New York.— Post *v.* Arnot, 2 Den. 344; Merritt *v.* Lambert, 7 Paige 344.

South Carolina.— Salinas *v.* Ellis, 26 S. C. 337, 2 S. E. 121.

Wisconsin.— Moore *v.* Cord, 14 Wis. 231.

United States.— Mitchell *v.* Roberts, 17 Fed. 776, 5 McCrary 425.

57. See JUDGMENTS, 23 Cyc. 1466.

58. See PRINCIPAL AND SURETY, 32 Cyc. 172.

59. *Alabama.*— Birmingham, etc., R. Co. *v.* Maddox, 155 Ala. 292, 46 So. 780; Birmingham Paint, etc., Co. *v.* Crampton, (1905) 39 So. 1020.

Colorado.— Supply Ditch Co. *v.* Elliott, 10 Colo. 327, 15 Pac. 691, 3 Am. St. Rep. 586; Denver, etc., R. Co. *v.* Harp, 6 Colo. 420.

Delaware.— Ellison *v.* Simmons, 6 Pennew. 200, 65 Atl. 591.

Illinois.— Monroe *v.* Chaldeck, 78 Ill. 429; Toledo, etc., R. Co. *v.* Beals, 137 Ill. App. 430; Mason *v.* Uedelhofen, 102 Ill. App. 116 [*affirmed* in 201 Ill. 465, 66 N. E. 364]; La Salle County *v.* Hatheway, 73 Ill. App. 95; Illinois Ins. Co. *v.* Manchester F. Assur. Co., 77 Ill. App. 673; Chicago, etc., R. Co. *v.* Hogan, 56 Ill. App. 577; James T. Hair Co. *v.* Hichcox, 45 Ill. App. 504; McDaniel *v.* Upton, 45 Ill. App. 151; Beach *v.* Jeffery, 1 Ill. App. 283.

Iowa.—Ahrens *v.* Fenton, 138 Iowa 559, 115 N. W. 233; Metropolitan Nat. Bank *v.* Commercial St. Bank, 104 Iowa 682, 74 N. W. 26; Rainwater *v.* Hummell, 79 Iowa 571, 44 N. W. 814; Wilson *v.* Chicago, etc., R. Co., 68 Iowa 673, 27 N. W. 916; Martin *v.* Whisler, 62 Iowa 416, 17 N. W. 593; Wolmerstadt *v.* Jacobs, 61 Iowa 372, 16 N. W. 217; Rump *v.* Schwartz, 56 Iowa 611, 10 N. W. 99; Shugart *v.* Pattee, 37 Iowa 422; Babcock *v.* Harris, 37 Iowa 409; Wright *v.* Howell, 35 Iowa 288; Fisher *v.* Moore, 19 Iowa 84; Burton *v.* Hintrager, 18 Iowa 348; Brayton *v.* Delaware County, 16 Iowa 44; Frink *v.* Coe, 4 Greene 555, 61 Am. Dec. 141; Johnson *v.* Triggs, 4 Greene 97. See Turpin *v.* Gresham, 106 Iowa 187, 76 N. W. 680.

Kansas.— Latham *v.* Hartford, 27 Kan. 249.

Kentucky.— Slack *v.* Price, 1 Bibb 272.

Louisiana.— Davis *v.* Millaudon, 17 La. Ann. 97, 87 Am. Dec. 517.

Massachusetts.— Currier *v.* Jordan, 117 Mass. 260; Bacon *v.* Charlton, 7 Cush. 581; Huntington *v.* American Bank, 6 Pick. 340.

Nebraska.— Phœnix Ins. Co. *v.* Readinger, 28 Nebr. 587, 44 N. W. 864; Cobbey *v.* Knapp, 23 Nebr. 579, 37 N. W. 485; Murray *v.* Cunningham, 10 Nebr. 167, 4 N. W. 319, 953.

New York.— Eaton *v.* Wells, 82 N. Y. 576; Roosevelt *v.* New York, etc., R. Co., 45 Barb. 554; Slack *v.* Brown, 13 Wend. 390.

North Carolina.— Brown *v.* Fink, 48 N. C. 378.

Oregon.— Simpson *v.* Carson, 11 Oreg. 361, 8 Pac. 325.

Pennsylvania.—Wagenblast *v.* McKean, 2 Grant 393; Bailey *v.* Bucher, 6 Watts 74.

Vermont.—Woodward *v.* Cutter, 33 Vt. 49.

Wisconsin.— Schnur *v.* Hickcox, 45 Wis. 200.

United States.— Cain *v.* Garfield, 4 Fed. Cas. No. 2,293, 1 Lowell 483.

England.— Seaton *v.* Benedict, 5 Bing. 187, 2 M. & P. 301, 6 L. J. C. P. O. S. 208, 15

form,[60] or is made in a case where a valid legal tender cannot be made;[61] and it dispenses with proof of everything that would otherwise be necessary to enable plaintiff to recover upon the obligation or cause of action sued upon to the extent of the sum admitted to be due.[62] But a tender is not an admission of liability beyond the amount tendered,[63] nor does it necessarily admit all the alleged grounds for recovery.[64] Evidence that a tender was made under a mistaken belief by the tenderer that the sum tendered was due has been held to be admissible to rebut the inference that a debt was thereby admitted,[65] and it has been held that if more was tendered than is admitted by the plea to be due, the tender is not conclusive as to the surplus,[66] and that notwithstanding a tender it may be shown that the debt was paid before tender made.[67] A distinction is made between a tender in a suit and a tender which has been made before trial but not relied upon in the pleadings of the party who made it, nor the money brought into court, the former being held an admission of liability and conclusive, while the latter, although held to be an admission of liability, is not conclusive.[68]

D. With Regard to Refusal or Acceptance. The unconditional accept-

E. C. L. 534; Willis *v.* Langridge, 2 Harr. & W. 250; Johnson *v.* Clay, 1 Moore C. P. 200, 7 Taunt. 486, 2 E. C. L. 459; Cox *v.* Brain, 3 Taunt. 95.

See 45 Cent. Dig. tit. "Tender," § 60.

As dispensing with written promise to pay debts of another.—A plea of tender admits defendant's liability on the contract or cause of action to which the plea relates, so that a promise to pay the debt of another need not be proved to be in writing. Middleton *v.* Brewer, Peake N. P. 15, 3 Rev. Rep. 643.

A tender authorized by statute has the same force and effect when pleaded as a tender at common law. Miller *v.* Gable, 30 Ill. App. 578; Beach *v.* Jeffery, 1 Ill. App. 283; Bacon *v.* Charlton, 7 Cush. (Mass.) 581.

A plea of tender will not cure a defect in a complaint failing to allege demand (Letcher *v.* Taylor, Hard. (Ky.) 79), and a tender and plea to have the effect of an admission must accord strictly with the cause of action set forth in the complaint (Southern Mut. Ins. Co. *v.* Pike, 34 La. Ann. 825).

Effect on right to interpose counter-claim.—A plea of tender does not preclude defendant from establishing a counter-claim. Ahrens *v.* Fenton, 138 Iowa 559, 115 N. W. 233; La Rault *v.* Palmer, 51 Wash. 664, 99 Pac. 1036, 21 L. R. A. N. S. 354; Young *v.* Borzone, 26 Wash. 4, 66 Pac. 135, 421.

60. Denver, etc., R. Co. *v.* Harp, 6 Colo. 420; Ahrens *v.* Fenton, 138 Iowa 559, 115 N. W. 233; Eaton *v.* Wells, 82 N. Y. 576; Roosevelt *v.* New York, etc., R. Co., 45 Barb. (N. Y.) 554, 30 How. Pr. 226.

61. Cilley *v.* Hawkins, 48 Ill. 308; Taylor *v.* Chicago, etc., R. Co., 76 Iowa 753, 40 N. W. 84; Frink *v.* Coe, 4 Greene (Iowa) 555, 61 Am. Dec. 141; Roosevelt *v.* New York, etc., R. Co., 45 Barb. (N. Y.) 554, 30 How. Pr. 226.

Such a tender will not save costs. Denver, etc., R. Co. *v.* Harp, 6 Colo. 420. See Breen *v.* Texas, etc., R. Co., 50 Tex. 43.

62. Price *v.* Jester, 137 Ill. App. 565; Miller *v.* Gable, 30 Ill. App. 578; Metropolitan Nat. Bank *v.* Commercial State Bank, 104 Iowa 682, 74 N. W. 26; Noble *v.* Fagnant, 162 Mass. 275, 38 N. E. 507; Bacon *v.* Charlton, 7 Cush. (Mass.) 581; Willis *v.* Langridge, 2 Harr. & W. 250. *Compare* Spence *v.* Owen County, 117 Ind. 573, 18 N. E. 513, where no evidence was given to the jury of the amount which was alleged to have been tendered by defendant, and it was held that plaintiff could not complain on account of the verdict being for a less sum.

It precludes defendant from introducing evidence of contributory negligence on the part of plaintiff, either as to the merits of the action or in mitigation of damages. Bacon *v.* Charlton, 7 Cush. (Mass.) 581.

Judgment unnecessary.—A plaintiff is entitled to the amount admitted to be due by the plea and brought into court, without a judgment, but he may take a judgment where a judgment is essential to his right. Wolmerstadt *v.* Jacobs, 61 Iowa 372, 16 N. W. 217.

63. Hinds *v.* Cottle, 143 Mass. 310, 9 N. E. 654; Howlett *v.* Holland, 6 Gray (Mass.) 418.

64. Griffin *v.* Harriman, 74 Iowa 436, 38 N. W. 139.

65. Ashuelot R. Co. *v.* Cheshire R. Co., 60 N. H. 356.

66. Abel *v.* Opel, 24 Ind. 250.

67. Hill *v.* Carter, 101 Mich. 158, 59 N. W. 413.

68. Mackey *v.* Kerwin, 222 Ill. 371, 78 N. E. 817 [*quoting* with approval Hunt Tender, § 400, where it is said as to tender before trial not relied upon in the pleadings, that "such tender is an admission of liability, but it is not conclusive. Its weight is to be considered by the court or jury over against a subsequent denial of all liability or an assertion of a liability for a less sum than tendered. The defendant is not precluded from stating the reasons or object in making the tender; that it was his desire to close the transaction and avoid litigation, or that, at the time, he thought the tender was necessary to save certain rights, or that it was made under the mistaken belief that the sum was due"]; Ashuelot R. Co. *v.* Cheshire R. Co., 60 N. H. 356.

ance of a tender ordinarily constitutes payment and discharges the debtor.[69] But to have this effect there must be an express acceptance,[70] or such conduct on the part of the tenderee as would in law be construed as an acceptance, as where a tenderee with whom money has been left against his will refuses to surrender it.[71] Moreover, the acceptance of a smaller sum than is legally due does not necessarily satisfy the whole debt, and may be considered a payment *pro tanto*;[72] but, if the claim be unliquidated, or is one about which there is a *bona fide* dispute as to the amount due, and a tender is made of a sum upon an express or implied condition that if received it must be in full satisfaction and it is accepted, it is taken subject to the conditions attached,[73] and the creditor cannot, against the consent of the debtor, prescribe the terms of acceptance,[74] and no protest, so long as the condition is insisted upon, can vary the result.[75] An acceptance of a tender is a waiver of the objection that it comes too late,[76] or to an objection to the place of tender or to the quality of the money tendered;[77] and acceptance after a forfeiture is a waiver of the forfeiture and of the effects thereof.[78]

E. Tender of Specific Articles.[79] A tender of specific articles upon an obligation payable in specific articles vests title to the property tendered in the tenderee and discharges the tenderer from liability on the obligation.[80] The

69. Thompson *v.* Kellogg, 23 Mo. 281. And see cases cited *infra*, the following notes.

70. Thompson *v.* Kellogg, 23 Mo. 281.

Merely intimating a willingness to receive money is not enough without actual reception. Thompson *v.* Kellogg, 23 Mo. 281.

71. Rogers *v.* Rutter, 11 Gray (Mass.) 410.

72. Chicago, etc., R. Co. *v.* Kamman, 19 Ill. App. 640; Myers *v.* Byington, 34 Iowa 205; Duluth Chamber of Commerce *v.* Knowlton, 42 Minn. 229, 44 N. W. 2; Patnote *v.* Sanders, 41 Vt. 66, 98 Am. Dec. 564; Carpenter *v.* Welch, 40 Vt. 251.

73. *Illinois.*— Jenks *v.* Burr, 56 Ill. 450.

Iowa.— Cotter *v.* O'Connell, 48 Iowa 552.

Kansas.— Latham *v.* Hartford, 27 Kan. 249.

Massachusetts.— Donohue *v.* Woodbury, 6 Cush. 148, 52 Am. Dec. 777.

Missouri.— Lee *v.* Dodd, 20 Mo. App. 271.

New York.— Fuller *v.* Kemp, 138 N. Y. 231, 33 N. E. 1034, 20 L. R. A. 785.

See 45 Cent. Dig. tit. "Tender," § 65.

74. Perin *v.* Cathcart, 115 Iowa 553, 89 N. W. 12; Adams *v.* Helm, 55 Mo. 468; St. Joseph School Bd. *v.* Hull, 72 Mo. App. 403; Hoyt *v.* Sprague, 61 Barb. (N. Y.) 497; McDaniels *v.* Lapham, 21 Vt. 222.

Receiving a sum offered on conditions, without words of dissent, is an assent *de facto* and binds the party. Donohue *v.* Woodbury, 6 Cush. (Mass.) 148, 52 Am. Dec. 777; McDaniels *v.* Rutland Bank, 29 Vt. 230, 70 Am. Dec. 406; McDaniels *v.* Lapham, 21 Vt. 222.

75. Hanson *v.* Todd, 95 Ala. 328, 10 So. 354; Rosema *v.* Porter, 112 Mich. 13, 70 N. W. 316; Preston *v.* Grant, 34 Vt. 201.

If the condition is waived by the debtor the rule is otherwise. Gassett *v.* Andover, 21 Vt. 342. See Perin *v.* Cathcart, 115 Iowa 553, 89 N. W. 12.

76. Emery *v.* Langley, 1 Ida. 694; Stow *v.* Russell, 36 Ill. 18; Adams *v.* Helm, 55 Mo. 468.

77. Bickle *v.* Beseke, 23 Ind. 18. See Lampasas Hotel, etc., Co. *v.* Home Ins. Co., 17 Tex. Civ. App. 615, 43 S. W. 1081, where a draft was sent and retained.

78. Leighton *v.* Shapley, 8 N. H. 359; West *v.* Crary, 47 N. Y. 423; Patchin *v.* Pierce, 12 Wend. (N. Y.) 61.

79. Effect of specific tender in contracts of sale see SALES, 35 Cyc. 169.

80. *California.*— Lamott *v.* Butler, 18 Cal. 32, holding, however, that fraud takes the case out of the operation of the rule.

Connecticut.— Saunders *v.* Denison, 20 Conn. 521.

District of Columbia.— Hughes *v.* Eschbach, 7 D. C. 66.

Georgia.— Fannin *v.* Thomason, 50 Ga. 614.

Indiana.— West *v.* Chase, 3 Ind. 301; Mitchell *v.* Merrill, 2 Blackf. 87, 18 Am. Dec. 128. See also Schrader *v.* Wolfin, 21 Ind. 238.

Iowa.— Hambel *v.* Tower, 14 Iowa 530; Spafford *v.* Stutsman, 9 Iowa 128; Williams *v.* Triplett, 3 Iowa 518; Games *v.* Manning, 2 Greene 251.

Kentucky.— Mitchell *v.* Gregory, 1 Bibb 449, 4 Am. Dec. 655.

Maine.— Leballister *v.* Nash, 24 Me. 316; Wyman *v.* Winslow, 11 Me. 398, 26 Am. Dec. 542; Yeazy *v.* Harmony, 7 Me. 91.

Massachusetts.— Robbins *v.* Luce, 4 Mass. 474.

Mississippi.— Bates *v.* Bates, Walk. 401, 12 Am. Dec. 572.

Missouri.—McJilton *v.* Smizer, 18 Mo. 111.

Nebraska.— McPherson *v.* Wiswell, 16 Nebr. 625, 21 N. W. 391.

New Hampshire.— Bailey *v.* Simonds, 6 N. H. 159, 25 Am. Dec. 454. But see Weld *v.* Hadley, 1 N. H. 295.

New York.— Hayden *v.* Demets, 53 N. Y. 426; Des Arts *v.* Leggett, 16 N. Y. 582; Lamb *v.* Lathrop, 13 Wend. 95, 27 Am. Dec. 174; Barns *v.* Graham, 4 Cow. 452, 15 Am. Dec. 394; Singerland *v.* Morse, 8 Johns. 474.

tenderer, if the tender is refused, becomes the bailee of the tenderee,[81] who, if the goods are withheld, may maintain replevin or trover therefor as he may elect;[82] and although, after tender and the consequent arising of the bailment relation, the tenderer in breach of his duty as bailee allows the articles to be lost or destroyed, this will not affect the result that the debt is paid by the tenderer,[83] although the rule seems to be otherwise where the tenderer after the tender is refused treats the property as his own and sells it.[84]

VI. PLEADING, PAYING MONEY INTO COURT, AND PROCEDURE THEREUPON.

A. Pleading Tender — 1. NECESSITY. A litigant relying upon a tender before suit must plead it,[85] and it cannot at common law be proved under a general issue or denial,[86] although under statute in some of the states evidence of a tender may be given under the general issue.[87] Where the tender is collateral to the action, as having operated to extinguish or suspend plaintiff's title to the specific property sued for, or right to the possession, it need not be pleaded.[88] A tender which was not pleaded in an action in a lower court cannot be pleaded in the appellate court.[89]

2. NATURE OF PLEA. A plea of tender is a plea in bar of costs and damages

Pennsylvania.— Case *v.* Green, 5 Watts 262, 30 Am. Dec. 311.

South Dakota.— Dowagiac Mfg. Co. *v.* Higinbotham, 15 S. D. 547, 91 N. W. 330.

Texas.— Cherry *v.* Newby, 11 Tex. 457; Dewees *v.* Lockhart, 1 Tex. 535.

Vermont.— Curtiss *v.* Greenbanks, 24 Vt. 536; Downer *v.* Sinclair, 15 Vt. 495; Dewey *v.* Washburn, 12 Vt. 580; Barney *v.* Bliss, 1 D. Chipm. 399, 12 Am. Dec. 696.

United States.— Mitchell *v.* Roberts, 17 Fed. 776, 5 McCrary 425.

See 45 Cent. Dig. tit. "Tender," § 60 *et seq.*

A tender of specific articles is analogous to a consignation under the civil law, where the debtor is discharged. See Sheldon *v.* Skinner, 4 Wend. (N. Y.) 525, 21 Am. Dec. 161.

81. Rix *v.* Strong, 1 Root (Conn.) 55; Lamb *v.* Lathrop, 13 Wend. (N. Y.) 95, 27 Am. Dec. 174; Slingerland *v.* Morse, 8 Johns. (N. Y.) 474; Curtiss *v.* Greenbanks, 24 Vt. 536.

82. Rix *v.* Strong, 1 Root (Conn.) 55; Hughes *v.* Eschback, 7 D. C. 66; Mitchell *v.* Gregory, 1 Bibb (Ky.) 449, 4 Am. Dec. 655; Bates *v.* Bates, Walk. (Miss.) 401, 12 Am. Dec. 572.

83. Gilman *v.* Moore, 14 Vt. 457.

84. Mayfield *v.* Cotton, 21 Tex. 1.

85. *Alabama.*— Park *v.* Wiley, 67 Ala. 310.

California.— Meredith *v.* Santa Clara Min. Assoc., 56 Cal. 178; Hegler *v.* Eddy, 53 Cal. 597.

District of Columbia.— Hughes *v.* Eschback, 7 D. C. 66.

Iowa.— Barker *v.* Brink, 5 Iowa 481.

Massachusetts.—Carley *v.* Vance, 17 Mass. 389.

New York.— Sidenberg *v.* Ely, 90 N. Y. 257, 43 Am. Rep. 163, 11 Abb. Pr. N. S. 354; Hill *v.* Place, 36 How. Pr. 26.

Pennsylvania.— Wagenblast *v.* McKean, 2 Grant 393; Sheredin *v.* Gaul, 2 Dall. 190, 1 L. ed. 344; Sharpless *v.* Dobbins, 1 Del. Co. 25; Vosburg *v.* Reynolds, 8 Luz. Leg. Reg. 283.

United States.— Boulton *v.* Moore, 14 Fed. 922, 11 Biss. 500.

See 45 Cent. Dig. tit. "Tender," § 68.

But see Hill *v.* Carter, 101 Mich. 158, 59 N. W. 413.

Before imparlance.—A tender at common law should be pleaded in form before any imparlance. Sharpless *v.* Dobbins, 1 Del. Co. (Pa.) 25. But see Tiernan *v.* Napier, 5 Yerg. (Tenn.) 410, where the plea was allowed after a judgment on a writ of inquiry was set aside.

86. Robinson *v.* Batchelder, 4 N. H. 40; York *v.* Newland, 10 Humphr. (Tenn.) 330. See Schrader *v.* Dolfein, 21 Ind. 238.

It must be specially pleaded in a justice's court as well as in a court of record. Seibert *v.* Kline, 1 Pa. St. 38; Griffin *v.* Tyson, 17 Vt. 35.

87. See the statutes of the several states. And see Brickett *v.* Wallace, 98 Mass. 528; Warren *v.* Nichols, 6 Metc. (Mass.) 261; Colby *v.* Stevens, 38 N. H. 191; Clough *v.* Clough, 26 N. H. 24; Bliss *v.* Houghton, 16 N. H. 90; Davis *v.* Nelson, 73 Vt. 328, 50 Atl. 1094; Spaulding *v.* Warner, 57 Vt. 654; Adams *v.* Morgan, 39 Vt. 302; Smith *v.* Wilbur, 35 Vt. 133; Woodcock *v.* Clark, 18 Vt. 333; Powers *v.* Powers, 11 Vt. 262; Pratt *v.* Gallup, 7 Vt. 344; May *v.* Brownell, 3 Vt. 463.

88. Woodcock *v.* Clark, 18 Vt. 333; McDaniels *v.* Reed, 17 Vt. 674; Powers *v.* Powers, 11 Vt. 262. And see Jones *v.* Rahilly, 16 Minn. 320; Macon *v.* Owens, 1 Brev. (S. C.) 69.

89. *Illinois.*— McDaniel *v.* Upton, 45 Ill. App. 151.

Iowa.— Johnson *v.* Triggs, 4 Greene 97.

Massachusetts.— Grover *v.* Smith, 165 Mass. 132, 42 N. E. 555, 52 Am. St. Rep. 506; Brickett *v.* Wallace, 98 Mass. 528.

Pennsylvania.— Seibert *v.* Kline, 1 Pa. St. 38.

Vermont.— Chipman *v.* Bates, 5 Vt. 143.

occurring subsequently to the rejection of the tender,[90] and in some cases is held to be a plea in bar of the action.[91] It was originally considered in the nature of a dilatory plea and was construed with strictness, but is now considered a plea to the merits.[92]

3. Manner of Pleading, and Sufficiency of Allegations — a. In General. In pleading tender there must be allegations of all facts necessary to establish a legal tender,[93] and the circumstances of the tender should be pleaded with particularity.[94] A refusal must be alleged as the refusal as well as the tender is traversable;[95] and in equity, if the tender is the foundation of the cause of action, without which the suit could not be maintained, the complaint must aver all the facts which are necessary in pleading a tender at law.[96] A plea of tender to a part of an entire claim is not good, without in the same plea, in some way, disposing of the residue of the claim by alleging payment, set-off, or that no more

90. Brent *v.* Fenner, 4 Ark. 160; Ayres *v.* Pease, 12 Wend. (N. Y.) 393; Huntington *v.* Ziegler, 2 Ohio St. 10. See Lilienthal *v.* McCormick, 86 Fed. 100.

In Vermont a tender of amends and costs under the statute (Gen. St. c. 25, § 44) is not the subject of a plea in bar; its effect is only on the subsequent costs (Adams *v.* Morgan, 39 Vt. 302; Smith *v.* Wilbur, 35 Vt. 133); and in scire facias against the recognizer on an appeal-bond a tender affects only the claim for additional costs (Holmes *v.* Woodruff, 20 Vt. 97).

91. Wheeler *v.* Woodward, 66 Pa. St. 158; Sheehan *v.* Rosen, 12 Pa. Super. Ct. 298.

A tender and refusal after suit brought is, as a plea, no bar of the action generally (Haughton *v.* Leary, 20 N. C. 14); but only of further maintenance of the action (Ireland *v.* Montgomery, 34 Ind. 174).

92. Tiernan *v.* Napier, 5 Yerg. (Tenn.) 410; Kilwick *v.* Maidman, 1 Burr. 59; Moore *v.* Smith, 1 H. Bl. 369.

93. Cothran *v.* Scanlan, 34 Ga. 555; Indiana Bond Co. *v.* Jameson, 24 Ind. App. 8, 56 N. E. 37; Towles *v.* Carpenter, 62 W. Va. 151, 57 S. E. 365.

94. Duff *v.* Fisher, 15 Cal. 375; Towles *v.* Carpenter, 62 W. Va. 151, 57 S. E. 365; Harding *v.* York Knitting Mills, 142 Fed. 228.

A plea of readiness and willingness is not sufficient. Heine *v.* Treadwell, 72 Cal. 217, 13 Pac. 503; Englander *v.* Rogers, 41 Cal. 420. See also Smith *v.* Loomis, 7 Conn. 110; Newby *v.* Rogers, 40 Ind. 9; Dickerson *v.* Hayes, 26 Minn. 100, 1 N. W. 834; Barney *v.* Bliss, 1 D. Chipm. (Vt.) 399, 12 Am. Dec. 696.

There must be an allegation of actual production of the money and an offer of it, or an excuse for its non-production. McGehee *v.* Jones, 10 Ga. 127; Indiana Bond Co. *v.* Jameson, 24 Ind. App. 8, 56 N. E. 37; Dickerson *v.* Hayes, 26 Minn. 100, 1 N. W. 834. See McNeil *v.* Sun, etc., Bldg., etc., Co., 75 N. Y. App. Div. 290, 78 N. Y. Suppl. 90, where it is held that a denial of an allegation that a sum was "duly tendered" raises an issue.

Where a formal tender could not be made, as where the payee did not attend at the place to receive the money, such fact, together with a readiness at the place, must be alleged. Commonwealth Bank *v.* Hickey, 4 Litt. (Ky.) 225.

If the thing to be performed is a specific act, a special performance must be averred. Tinney *v.* Ashley, 15 Pick. (Mass.) 546, 26 Am. Dec. 620.

Allegation of tender held sufficient see Lowe *v.* Yolo County Consol. Water Co., 8 Cal. App. 167, 96 Pac. 379; Askew *v.* Thompson, 129 Ga. 325, 58 S. E. 854.

95. Indiana Bond Co. *v.* Jameson, 24 Ind. App. 8, 56 N. E. 37; Towles *v.* Carpenter, 62 W. Va. 151, 57 S. E. 365; Lancashire *v.* Kellingworth, Comyns 116, 92 Eng. Reprint 991, 1 Ld. Raym. 686, 91 Eng. Reprint 1357, 12 Mod. 529, 88 Eng. Reprint 1498, 3 Salk. 242, 91 Eng. Reprint 862; Lea *v.* Exelby, Cro. Eliz. 888, 78 Eng. Reprint 1112; Huish *v.* Philips, Cro. Eliz. 754, 78 Eng. Reprint 986.

96. *Georgia.*— Cothran *v.* Scanlan, 34 Ga. 555; McGehee *v.* Jones, 10 Ga. 127.

Kentucky.— Taylor *v.* Reed, 5 T. B. Mon. 36.

Maine.— Lumsden *v.* Manson, 96 Me. 357, 52 Atl. 783.

New Jersey.— Shields *v.* Lozear, 22 N. J. Eq. 447.

United States.— Sheets *v.* Selden, 7 Wall. 416, 19 L. ed. 166.

Strictness in alleging tender in equity.— It is frequently stated that the same strictness in alleging a tender is not required in equity as at law, but the confusion arises as a result of the courts failing to distinguish between those cases where the tender is important only as bearing upon the question of costs, where the rights of the party is not dependent upon a tender, and those cases where the tender affects a particular result, such as the discharge of a lien, where it is the very foundation upon which the right to relief rests. See Glos *v.* Goodrich, 175 Ill. 20, 51 N. E. 643; Livingston County Bd. *v.* Henneberry, 41 Ill. 179; Webster *v.* French, 11 Ill. 254; Binford *v.* Boardman, 44 Iowa 53; Breitenbach *v.* Turner, 18 Wis. 140.

A plea of an offer to do equity required in some jurisdictions is not a plea of tender, but a mere averment of a willingness. It does not take the place of a tender which ought to be made before suit. Dotterer *v.* Freeman, 88 Ga. 479, 14 S. E. 863.

than the sum tendered was ever due; otherwise the residue will stand admitted and the plea would be bad as alleging an offer of a part only.[97]

b. Particular Allegations — (I) *PLACE.* The place where the tender was made must be set out with particularity.[98]

(II) *TIME.* The time a tender was made must be alleged with definiteness,[99] and that it was made before the action was commenced,[1] unless the tender is one authorized by statute to be made after action brought, in which case there must be an averment of a tender of a specific amount upon the debt and a certain amount for costs.[2]

(III) *MEDIUM AND AMOUNT.* The precise amount offered must be alleged if the tender was in money,[3] and the money tendered must be described sufficiently so that its nature may be determined.[4] In case of chattels tendered,

97. Dixon *v.* Clark, 5 C. B. 365, 5 D. & L. 155, 16 L. J. C. P. 237, 57 E. C. L. 365; Bauld *v.* Fraser, 34 Nova Scotia 178. But see Cotton *v.* Godwin, 9 Dowl. P. C. 763, 10 L. J. Exch. 243, 7 M. & W. 147; Tyler *v.* Bland, 1 Dowl. P. C. N. S. 608, 11 L. J. Exch. 257, 9 M. & W. 338.

98. Kendal *v.* Talbot, 1 A. K. Marsh. (Ky.) 321; Trabue *v.* Kay, 4 Bibb (Ky.) 226; Colyer *v.* Hutching, 2 Bibb (Ky.) 404; Jouett *v.* Wagnon, 2 Bibb (Ky.) 269, 5 Am. Dec. 602. See also Harding *v.* York Knitting Mills, 142 Fed. 228.

99. *Georgia.*— Cothrans *v.* Mitchell, 54 Ga. 498.

Mississippi.— Lanier *v.* Trigg, 6 Sm. & M. 641, 45 Am. Dec. 293.

Ohio.—Vance *v.* Blair, 18 Ohio 532, 51 Am. Dec. 467.

Virginia.— Downman *v.* Downman, 1 Wash. 26.

West Virginia.— Shank *v.* Groff, 45 W. Va. 543, 32 S. E. 248.

Where the declaration did not disclose when the debt sued for fell due or from what time it bore interest, a plea of tender was held good which averred a willingness to pay said sum ever since it became due. Shepherd *v.* Wysong, 3 W. Va. 46.

An averment of tender "on or about the first day of March" has been held good as against a general demurrer. Haile *v.* Smith, 113 Cal. 656, 45 Pac. 872.

Time of day.— If the allegations show that the tenderee was present, it is sufficient to state that the tender was made to him on a certain day; but if the party who was to receive was absent from the place of performance, the pleader must allege the tender to have been made at the uttermost convenient time of the day fixed for performance. Duckham *v.* Smith, 5 T. B. Mon. (Ky.) 372; Jouett *v.* Wagnon, 2 Bibb (Ky.) 269, 5 Am. Dec. 602; Tiernan *v.* Napier, 5 Yerg. (Tenn.) 410; Savary *v.* Goe, 21 Fed. Cas. No. 12,388, 3 Wash. 140; Lancashire *v.* Kellingworth, Comyns 116, 92 Eng. Reprint 991, 1 Ld. Raym. 686, 91 Eng. Reprint 1357, 12 Mod. 529, 88 Eng. Reprint 1498, 3 Salk. 242, 91 Eng. Reprint 862; Halsey *v.* Carpenter, Cro. Jac. 359, 79 Eng. Reprint 308; Tinckler *v.* Prentice, 4 Taunt. 549, 13 Rev. Rep. 684. A plea that he was at the place ready to pay during three hours before the setting of the sun and at the setting of the sun, on the day of payment, but no one came has been held sufficient. Walter *v.* Dewey, 16 Johns. (N. Y.) 222.

1. Cope *v.* Bryson, 60 N. C. 112; Winningham *v.* Redding, 51 N. C. 126; Jacobs *v.* Oren, 30 Oreg. 593, 48 Pac. 431.

2. Eaton *v.* Wells, 82 N. Y. 576; Walsh *v.* Southworth, 6 Exch. 150, 20 L. J. M. C. 165, 2 L. M. & P. 91. See Young *v.* McWaid, 57 Iowa 101, 10 N. W. 291.

3. *Alabama.*— Chapman *v.* Lee, 55 Ala. 616, holding that a plea of tender of the principal, without showing any legal reason why the interest was not also tendered, is bad on demurrer.

Indiana.— Goss *v.* Bowen, 104 Ind. 207, 2 N. E. 704; Bothwell *v.* Millikan, 104 Ind. 162, 2 N. E. 959, 3 N. E. 816; Soice *v.* Huff, 102 Ind. 422, 26 N. E. 89; Bailey *v.* Troxell, 43 Ind. 432.

Minnesota.— Dickerson *v.* Hayes, 26 Minn. 100, 1 N. W. 834; St. Paul Div. No. 1 S. T. *v.* Brown, 9 Minn. 157.

New Hampshire.— Ffrost *v.* Butler, 58 N. H. 146.

New York.— Sussman *v.* Mason, 10 Misc. 20, 30 N. Y. Suppl. 542; People *v.* Banker, 8 How. Pr. 258.

England.—Smith *v.* Manners, 5 C. B. N. S. 632, 5 Jur. N. S. 549, 28 L. J. C. P. 220, 94 E. C. L. 632.

Where more than one sum is sued for the plea should state upon which account the tender was made. Robinson *v.* Ward, 8 Q. B. 920, 10 Jur. 409, 15 L. J. Q. B. 271, 55 E. C. L. 920.

It must be alleged that the sum tendered was sufficient or was the amount due. Conger *v.* Hutchinson, 6 U. C. Q. B. O. S. 644.

An allegation of a tender of the amount due and interest on that sum at seven per cent from the due date to the time of the tender was held sufficiently specific in an action by a creditor to redeem land of his debtor sold upon execution. Prescott *v.* Everts, 4 Wis. 314.

Where the obligation was payable in United States currency, and Canadian money was tendered, it was held that the amount offered must be alleged to be equal in value of a certain sum of the currency of the United States at the date of the tender. White *v.* Baker, 15 U. C. C. P. 292.

4. *California.*— Magraw *v.* McGlynn, 26 Cal. 420, holding that it is not enough to

they must be so described that they can be distinguished and known.[5] If the articles were to be of a certain value, or a sum of money was payable in chattels, the value must be stated positively,[6] and, if they were to be appraised, an appraisal according to the contract must be alleged.[7]

(IV) *CONTINUING READINESS.* If the debt or duty is discharged by a tender, or the tender is relied upon as a defense to a foreclosure of a lien or the enforcement of some collateral right, it is sufficient without more, to plead the tender and refusal,[8] and in pleading a tender of chattels it is not necessary to plead a continuing readiness to pay.[9] But where the debt or duty remains after a tender and refusal, it is not enough for the party who pleads the tender, in an action to recover the debt, or damages for a failure to perform the duty, to plead the tender and refusal alone, but he must plead that ever since the tender he has at all times been and still is ready and willing to pay the money or perform the duty,[10] and where it is necessary to keep the tender good, the rule in equity in reference to pleading continued readiness to pay is no less strict than at law.[11]

(V) *PROFERT IN CURIA.* Where the debt or duty is not discharged by a tender and refusal, and the tender is made the ground of the cause of action or defense, the tenderer must plead in addition to a continuing readiness a *profert in curia*, that is, that the money has already been brought into court or is now

allege that a certain sum in money or lawful money was tendered, as the term "money" includes everything that circulates as money whether a legal tender or not, and if a particular kind of money was to be paid, the plea should show that the kind plaintiff was entitled to receive was tendered.

Indiana.— Goss *v.* Bowen, 104 Ind. 207, 2 N. E. 704.

Mississippi.— Bonnell *v.* Covington, 7 How. 322, holding that where a note is payable in bank-notes, there must be an allegation that those tendered were current.

Virginia.—Downman *v.* Downman, 1 Wash. 26.

Washington.— Ralph *v.* Lomer, 3 Wash. 401, 28 Pac. 760.

If the notes of a particular bank are to be paid, it is sufficient to allege a tender of the notes without alleging they were at par. Smith *v.* Elder, 7 Sm. & M. (Miss.) 507. But if bank-notes were tendered upon a note payable in good bank-notes, there must be an averment that they were of par value. Smith *v.* Elder, 7 Sm. & M. (Miss.) 507; McNairy *v.* Bell, 1 Yerg. (Tenn.) 502, 24 Am. Dec. 454.

5. Smith *v.* Loomis, 7 Conn. 110; Nichols *v.* Whiting, 1 Root (Conn.) 443; Lilienthal *v.* McCormick, 86 Fed. 100.

6. Johnson *v.* Butler, 4 Bibb (Ky.) 97.

7. Stockton *v.* Creager, 51 Ind. 262; Bohannons *v.* Lewis, 3 T. B. Mon. (Ky.) 376.

8. Hunter *v.* Le Conte, 6 Cow. (N. Y.) 728.

9. *Indiana.*— Mitchell *v.* Merrill, 2 Blackf. 87, 18 Am. Dec. 128.

Kentucky.— Mitchell *v.* Gregory, 1 Bibb 449, 4 Am. Dec. 655.

New York.— Slingerland *v.* Morse, 8 Johns. 474.

Texas.— Dewees *v.* Lockhart, 1 Tex. 535.

Vermont.— Barney *v.* Bliss, 1 D. Chipm. 399, 12 Am. Dec. 696.

See 45 Cent. Dig. tit. "Tender," § 70.

But see Nixon *v.* Bullock, 9 Yerg. (Tenn.) 414; Walters *v.* McAllister, 4 Hayw. (Tenn.) 299.

10. *Alabama.*— Terrell Coal Co. *v.* Lacey, (1901) 31 So. 109; McCalley *v.* Otey, 90 Ala. 302, 8 So. 157.

Florida.— Caruthers *v.* Williams, 21 Fla. 485.

Georgia.— Cothrans *v.* Mitchell, 54 Ga. 498; Cothran *v.* Scanlan, 34 Ga. 555.

Illinois.—Wright *v.* McNeely, 11 Ill. 241.

Indiana.—Wilson *v.* McVey, 83 Ind. 108.

Iowa.— Shugart *v.* Pattee, 37 Iowa 422; Barker *v.* Brink, 5 Iowa 481.

Maine.— Lyon *v.* Williamson, 27 Me. 149.

Massachusetts.— Town *v.* Trow, 24 Pick. 168.

Mississippi.— Besancon *v.* Shirley, 9 Sm. & M. 457; Lanier *v.* Trigg, 6 Sm. & M. 641, 45 Am. Dec. 293.

New Hampshire.— Brown *v.* Simons, 45 N. H. 211.

New York.—Wilder *v.* Seelye, 8 Barb. 408; Lamb *v.* Lathrop, 13 Wend. 95, 27 Am. Dec. 174.

South Carolina.— Walker *v.* Walker, 17 S. C. 329.

Tennessee.—Miller *v.* McKinney, 5 Lea 93.

United States.— The Walter W. Pharo, 29 Fed. Cas. No. 17,124, 1 Lowell 437.

See 45 Cent. Dig. tit. "Tender," § 70.

Readiness to pay same kind of money.— The plea must show that defendant has been and still is ready to pay the same kind of money as that tendered. Hardin *v.* Titus, Dall. (Tex.) 622.

11. Cothran *v.* Scanlan, 34 Ga. 555.

In a suit to redeem, an allegation that plaintiff has "always since the making of the tender aforesaid, been ready and willing to pay said sum of money, so tendered as aforesaid, to said defendant, and said plaintiff still is ready and willing so to do, and now brings the same into court for that purpose, and hereby offers to pay the same," was held sufficient. Thompson *v.* Foster, 21 Minn. 319.

brought into court ready to be paid.[12] The *profert in curia* is not a traversable part of the plea.[13]

4. Joinder of Pleas. A plea of tender of a sum due upon a contract and a denial of the right of action for the sum are inconsistent pleas and must not be joined;[14] but in an action for damages where the statute allows a tender to be made and pleaded defendant may deny that plaintiff was damaged and also plead a tender of amends.[15]

B. Demurrer, Reply, or Motion to Make Definite. A plea of tender must be met by plaintiff by a reply, otherwise it will be admitted,[16] although it

12. *Alabama.*— Booth *v.* Comegys, Minor 201. See also Christian *v.* Niagara F. Ins. Co., 101 Ala. 634, 14 So. 374; McCalley *v.* Otey, 90 Ala. 302, 8 So. 157; Caldwell *v.* Smith, 77 Ala. 157.

Colorado.—Westcott *v.* Patton, 10 Colo. App. 544, 51 Pac. 1021.

Florida.— Franklin *v.* Ayer, 22 Fla. 654; Caruthers *v.* Williams, 21 Fla. 485; Forcheimer *v.* Holly, 14 Fla. 239; Spann *v.* Baltzell, 1 Fla. 301, 44 Am. Dec. 346.

Indiana.— Goss *v.* Bowen, 104 Ind. 207, 2 N. E. 704; Conwall *v.* Pumphrey, 9 Ind., 135, 68 Am. Dec. 611; Ausem *v.* Byrd, 6 Ind. 475.

Iowa.— Shugart *v.* Pattee, 37 Iowa 422.

Kentucky.— Harris *v.* Campbell, 4 Dana 586; Slack *v.* Price, 1 Bibb 272.

Maine.— Gilpatrick *v.* Ricker, 82 Me. 185, 19 Atl. 165; Lyon *v.* Williamson, 27 Me. 149.

Maryland.— Soper *v.* Jones, 56 Md. 503; Karthaus *v.* Owings, 6 Harr. & J. 134.

Massachusetts.— Brickett *v.* Wallace, 98 Mass. 528; Warren *v.* Nichols, 6 Metc. 261; Carley *v.* Vance, 17 Mass. 389.

New Jersey.—Neldon *v.* Roof, 55 N. J. Eq. 608, 38 Atl. 429.

New York.— Shiland *v.* Leob, 58 N. Y. App. Div. 565, 69 N. Y. Suppl. 11; Hill *v.* Place, 7 Rob. 389, 5 Abb. Pr. N. S. 18, 36 How. Pr. 26; Cronin *v.* Epstein, 1 N. Y. Suppl. 69 [*affirmed* in 15 Daly 50, 2 N. Y. Suppl. 709]; Simpson *v.* French, 25 How. Pr. 464; Eddy *v.* O'Hara, 14 Wend. 221; Ayres *v.* Pease, 12 Wend. 393.

Oregon.— Jacobs *v.* Oren, 30 Oreg. 593, 48 Pac. 431.

Pennsylvania.— Sheredine *v.* Gaul, 2 Dall. 190, 1 L. ed. 344; Sharpless *v.* Dobbins, 1 Del. Co. 25.

Tennessee.— Miller *v.* McKinney, 5 Lea 93.

Virginia.— Robinson *v.* Gaines, 3 Call 243.

Washington.— Ralph *v.* Lomer, 3 Wash. 401, 28 Pac. 760.

England.— Horne *v.* Lewin, 1 Ld. Raym. 639, 91 Eng. Reprint 1328.

See 45 Cent. Dig. tit. "Tender," § 71.

Construction of plea.— A plea that "defendant now brings the money into court" means that the money was brought in with the answer. Neldon *v.* Roof, 55 N. J. Eq. 608, 38 Atl. 429.

Plaintiff does not waive the right to object that the plea of tender does not allege payment into court, by going to trial. Becker *v.* Boon, 61 N. Y. 317.

When objection to plea must be taken.— The objection to the plea on the ground that it did not contain an allegation of payment into court must be taken at the trial. After judgment it comes too late. Diebold Safe, etc., Co. *v.* Holt, 4 Okla. 479, 46 Pac. 512.

13. Platner *v.* Lehman, 26 Hun (N. Y.) 374.

14. *Connecticut.*— Hatch *v.* Thompson, 67 Conn. 74, 34 Atl. 770.

Iowa.— Brayton *v.* Delaware County, 16 Iowa 44.

Louisiana.— Davis *v.* Millaudon, 17 La. Ann. 97, 87 Am. Dec. 517.

Maryland.— Union Bank *v.* Ridgely, 1 Harr. & G. 324.

New York.— Livingston *v.* Harrison, 2 E. D. Smith 197.

England.— Alderson *v.* Dodding, Barnes Notes 359, 94 Eng. Reprint 954; Dobie *v.* Tarkan, 10 Exch. 776, 3 Wkly. Rep. 247; Orgill *v.* Kemshead, 4 Taunt. 459; Jenkins *v.* Edwards, 5 T. R. 97, 101 Eng. Reprint 55; Maclellan *v.* Howard, 4 T. R. 194, 100 Eng. Reprint 969; Dowgall *v.* Bowman, 3 Wils. C. P. 145, 95 Eng. Reprint 980.

Denial and tender of smaller sum.— Under the statute allowing a defendant to set up as many defenses as he may have, it was held that a denial of an alleged employment and a tender of a smaller sum than that claimed was not so inconsistent as to prevent their being pleaded in the same answer. Clarke *v.* Lyon County, 7 Nev. 75.

15. Gerring *v.* Manning, Barnes Notes 366, 94 Eng. Reprint 957; Martin *v.* Kesterton, W. Bl. 1089, 96 Eng. Reprint 643.

16. Davis *v.* Henry, 63 Miss. 110.

A denial of a tender of a sum alleged under a videlicet has been held not to put in issue a tender of any greater or less sum than that specified. Marks *v.* Lahee, 3 Bing. N. Cas. 408, 6 L. J. C. P. 69, 4 Scott 137, 32 E. C. L. 193.

Where a plea of tender is of a sum, being sufficient amends, plaintiff should reply denying the tender of the amount, or alleging its insufficiency, and not that defendant did not tender sufficient amends. Williams *v.* Price, 3 B. & Ad. 695, 1 L. J. K. B. 258, 23 E. C. L. 306, 110 Eng. Reprint 254.

A reply alleging that accrued costs were not included in the amount tendered has been held good. Hampshire Manufacturers' Bank *v.* Billings, 17 Pick. (Mass.) 87.

A replication that before the tender a larger sum was owing and was demanded and refused is no answer to a plea of tender of a smaller sum. Brandon *v.* Newington, 3 Q. B. 915, 3 G. & D. 194, 7 Jur. 60, 12 L. J. Q. B. 20, 43 E. C. L. 1035.

has been held that the absence of a formal traverse to a plea of tender is cured by verdict.[17] If a plea of tender is insufficient, as where it imports a conditional tender,[18] or fails to state the time with certainty,[19] or that defendant was always ready and willing since the tender to pay the money,[20] or it is shown by the complaint that a tender was necessary and it is not pleaded,[21] the defect should be taken advantage of by demurrer.[22] Where the allegations are indefinite and uncertain, a motion may be made to make them more definite and certain.[23]

C. Paying Money Into Court — 1. Necessity — a. In General. A tender which in order to be effective must be kept good [24] must be supported by bringing the money into court at the time of pleading the tender,[25] upon an order of

17. Soper *v.* Jones, 56 Md. 503.

18. Hall *v.* Norwalk F. Ins. Co., 57 Conn. 105, 17 Atl. 356.

19. Haile *v.* Smith, 113 Cal. 656, 45 Pac. 872.

20. Lanier *v.* Trigg, 6 Sm. & M. (Miss.) 641, 45 Am. Dec. 293; Clough *v.* Clough, 26 N. H. 24.

21. Brickett *v.* Wallace, 98 Mass. 528; Rennyson *v.* Reifsnyder, 11 Pa. Co. Ct. 157.

22. Gardner *v.* Black, 98 Ala. 638, 12 So. 813; Skipwith *v.* Morton, 2 Call (Va.) 277.

23. Bateman *v.* Johnson, 10 Wis. 1.

24. See *supra*, IV, A.

25. *Alabama.*— Commercial Bank *v.* Crenshaw, 103 Ala. 497, 15 So. 741; Commercial F. Ins. Co. *v.* Allen, 80 Ala. 571, 1 So. 202; Park *v.* Wiley, 67 Ala. 310; Daughdrill *v.* Sweeney, 41 Ala. 310; Booth *v.* Comegys, Minor 201.

Arkansas.— Kelly *v.* Keith, 85 Ark. 30, 106 S. W. 1173 (holding that actual payment is necessary); Cole *v.* Moore, 34 Ark. 582; Schearff *v.* Dodge, 33 Ark. 340; Hamlett *v.* Tallman, 30 Ark. 505.

Delaware.— Cullen *v.* Green, 5 Harr. 17.

Florida.— Franklin *v.* Ayer, 22 Fla. 654; Matthews *v.* Lindsay, 20 Fla. 962; Spann *v.* Baltzell, 1 Fla. 301, 46 Am. Dec. 346.

Georgia.— Mason *v.* Crom, 24 Ga. 211.

Illinois.— O'Riley *v.* Suver, 70 Ill. 85; De Wolf *v.* Long, 7 Ill. 679; Vallette *v.* Bilinski, 68 Ill. App. 361 [*affirmed* in 167 Ill. 564, 47 N. E. 770].

Indiana.— Smith *v.* Felton, 85 Ind. 223; Hazelett *v.* Butler University, 84 Ind. 230; Evansville, etc., R. Co. *v.* Marsh, 57 Ind. 505; Clark *v.* Mullenix, 11 Ind. 532; Phœnix Ins. Co. *v.* Overman, 21 Ind. App. 516, 52 N. E. 771.

Iowa.—West *v.* Farmers' Mut. Ins. Co., 117 Iowa 147, 90 N. W. 523; Deacon *v.* Central Iowa Inv. Co., 95 Iowa 180, 63 N. W. 673; Long *v.* Howard, 35 Iowa 148; Phelps *v.* Kathron, 30 Iowa 231; Jones *v.* Mullinix, 25 Iowa 198; Eastman *v.* Rapids Dist. Tp., 21 Iowa 590; Hayden *v.* Anderson, 17 Iowa 158; Freeman *v.* Fleming, 5 Iowa 460.

Kansas.— Arthur *v.* Arthur, 38 Kan. 691, 17 Pac. 187.

Kentucky.— Haddix *v.* Wilson, 3 Bush 523; Jarboe *v.* McAtee, 7 B. Mon. 279; Slack *v.* Price, 1 Bibb 272.

Maine.— Gilpatrick *v.* Ricker, 82 Me. 185, 19 Atl. 165.

Maryland.— Soper *v.* Jones, 56 Md. 503.

Massachusetts.— Warren *v.* Nichols, 6 Metc. 261.

Michigan.— Browning *v.* Crouse, 40 Mich. 339.

Minnesota.— Balme *v.* Wambaugh, 16 Minn. 116.

Missouri.— Mahan *v.* Waters, 60 Mo. 167. But see Klein *v.* Keyes, 17 Mo. 326.

Nebraska.—Portsmouth Sav. Bk. *v.* Yeiser, 81 Nebr. 343, 116 N. W. 38; Clark *v.* Neumann, 56 Nebr. 374, 76 N. W. 892.

New Hampshire.— Felker *v.* Hazelton, 68 N. H. 304, 38 Atl. 1051; Allen *v.* Cheever, 61 N. H. 32; Frost *v.* Flanders, 37 N. H. 549; Bailey *v.* Metcalf, 6 N. H. 156.

New Jersey.—Whittaker *v.* Belvidere Roller-Mill Co., 55 N. J. Eq. 674, 38 Atl. 289; Neldon *v.* Roof, 55 N. J. Eq. 608, 38 Atl. 429; Shields *v.* Lozear, 22 N. J. Eq. 447.

New York.—Werner *v.* Tuch, 127 N. Y. 217, 27 N. E. 845, 24 Am. St. Rep. 443; Halpin *v.* Phenix Ins. Co., 118 N. Y. 165, 23 N. E. 482; Becker *v.* Boon, 61 N. Y. 317; Riley *v.* Cheesman, 75 Hun 387, 27 N. Y. Suppl. 453; Wilder *v.* Seelye, 8 Barb. 408; Hill *v.* Place, 7 Rob. 389, 36 How. Pr. 267, 5 Abb. Pr. N. S. 18; Livingston *v.* Harrison, 2 E. D. Smith 197; Weil *v.* Lippman, 55 Misc. 443, 105 N. Y. Suppl. 516; Railway Advertising Co. *v.* Posner, 31 Misc. 783, 65 N. Y. Suppl. 226; Halsey *v.* Flint, 15 Abb. Pr. 367; Bronson *v.* Chicago, etc., R. Co., 40 How. Pr. 148; Brown *v.* Ferguson, 2 Den. 196; Brooklyn Bank *v.* De Grauw, 23 Wend. 342, 35 Am. Dec. 569; Retan *v.* Drew, 19 Wend. 304; Eddy *v.* O'Hara, 14 Wend. 221.

North Carolina.— Parker *v.* Beasley, 116 N. C. 1, 21 S. E. 955, 33 L. R. A. 231; State *v.* Briggs, 65 N. C. 159; Murray *v.* Windley, 29 N. C. 201, 47 Am. Dec. 324.

Pennsylvania.—Wagenblast *v.* McKean, 2 Grant 393; Bailey *v.* Bucher, 6 Watts 74; Sheredine *v.* Gaul, 2 Dall. 190, 1 L. ed. 344; Eckman *v.* Hildebrand, 1 Lanc. Bar 41; Seatington-Bangor Slate Syndicate *v.* Server, 12 Montg. Co. Rep. 162.

South Carolina.— Fishburne *v.* Sanders, 1 Nott & M. 242.

Tennessee.— Keys *v.* Roder, 1 Head 19.

Texas.— Tooke *v.* Bonds, 29 Tex. 419; Brock *v.* Jones, 16 Tex. 461.

Vermont.— Perry *v.* Ward, 20 Vt. 92; Wing *v.* Hurlburt, 15 Vt. 607, 40 Am. Dec. 695; Pratt *v.* Gallup, 7 Vt. 344.

Virginia.— Shumaker *v.* Nichols, 6 Gratt. 592; Robinson *v.* Gaines, 3 Call 243.

West Virginia.— Gilkeson *v.* Smith, 15 W. Va. 44.

Wisconsin.— Rice *v.* Kahn, 70 Wis. 323,

court.[26] The rule applies to justices' courts,[27] to courts of admiralty,[28] and to all inferior courts exercising civil jurisdiction;[29] and the practice extends to actions for the recovery of an unliquidated sum in cases where the statute permits a tender to be made;[30] and generally if a tender and refusal is made the basis of a proceeding, or of a cause of action at law or in equity, in cases where, but for the tender and refusal, the right to relief at the time of commencing the action or proceeding would not have existed, the amount tendered must be brought into court.[31] But where the right to relief is not dependent upon a tender and refusal, it is not necessary to bring the money into court,[32] and if a sum is tendered which, in an action by the tenderer upon the obligation, is a proper set-off in behalf of the tenderee, the money need not be brought in.[33]

b. Where Lien Is Discharged by Tender. Where a lien or any security is discharged by a tender and refusal, such tender may be pleaded as a defense in an action based upon such collateral right without bringing the money into

35 N. W. 465; Smith *v.* Phillips, 47 Wis. 202, 2 N. W. 285.

United States.—Wallace *v.* McConnell, 13 Pet. 136, 10 L. ed. 95; Coghlan *v.* South Carolina R. Co., 32 Fed. 316; Boardman *v.* Bethel, 3 Fed. Cas. No. 1,585; Bounty *v.* Kerrin, 3 Fed. Cas. No. 1,697*a*.

See 45 Cent. Dig. tit. "Tender," § 79.

The object of bringing money into court upon a plea of tender is to keep the tender good, and place the money where the party entitled to it may receive it at any time. Johnson *v.* Triggs, 4 Greene (Iowa) 97; Becker *v.* Boon, 61 N. Y. 317.

A statute authorizing a tender to be made in writing does not change the rule in this respect. Shugart *v.* Pattee, 37 Iowa 422; Warrington *v.* Pollard, 24 Iowa 281, 95 Am. Dec. 727; Mohn *v.* Stoner, 14 Iowa 115; Johnson *v.* Triggs, 4 Greene (Iowa) 97.

It is a matter of practice to be dealt with summarily by the court and not a question to be litigated at the trial. Gilpatrick *v.* Ricker, 82 Me. 185, 19 Atl. 165; Platner *v.* Lehman, 26 Hun (N. Y.) 374; Sheriden *v.* Smith, 2 Hill (N. Y.) 538; Newton *v.* Allis, 16 Wis. 197.

Where the tenderee has put it out of his power to perform on his part, the tender need not be kept good by payment into court. Furber *v.* National Metal Co., 118 N. Y. App. Div. 263, 103 N. Y. Suppl. 490.

Where the tenderer has no means of knowing the amount due, an averment of that fact and of readiness and willingness to pay may be sufficient without actual payment into court. Pierce *v.* Halsell, 90 Miss. 171, 43 So. 83; Moore *v.* Brown, 46 Tex. Civ. App. 523, 103 S. W. 242.

26. *Illinois.*— Hammer *v.* Kaufman, 39 Ill. 87.

Massachusetts.— Hart *v.* Goldsmith, 1 Allen 145.

Minnesota.— Davidson *v.* Lamprey, 16 Minn. 445.

New Jersey.— Levan *v.* Sternfeld, 55 N. J. L. 41, 25 Atl. 854.

New York.— Baker *v.* Hunt, 1 Wend. 103.

North Carolina.— Murray *v.* Windley, 29 N. C. 201, 47 Am. Dec. 324.

Pennsylvania.— Harvey *v.* Hackley, 6 Watts 264.

See 45 Cent. Dig. tit. "Tender," § 85.

27. McDaniel *v.* Upton, 45 Ill. App. 151; Nelson *v.* Smith, 26 Ill. App. 57; Phelps *v.* Town, 14 Mich. 374; Seibert *v.* Kline, 1 Pa. St. 38; Keyes *v.* Roder, 1 Head (Tenn.) 19.

In Alabama Rev. Code, § 2648, requiring a plea of tender to be accompanied by a payment into court, is held not to apply to actions before a justice. Jonson *v.* Nabring, 50 Ala. 392.

28. The Serapis, 37 Fed. 436.

29. Brickett *v.* Wallace, 98 Mass. 528, action for rent in police court having civil jurisdiction.

30. Dunbar *v.* De Boer, 44 Ill. App. 615. See Solomon *v.* Bewicke, 2 Taunt. 317.

31. *Alabama.*— Commercial Bank *v.* Crenshaw, 103 Ala. 497, 15 So. 741; Daughdrill *v.* Sweeney, 41 Ala. 310.

Illinois.— De Wolf *v.* Long, 7 Ill. 679; Doyle *v.* Teas, 5 Ill. 202.

Missouri.—Woolner *v.* Levy, 48 Mo. App. 469.

New Hampshire.— Frost *v.* Flanders, 37 N. H. 549; Bailey *v.* Metcalf, 6 N. H. 156.

New Jersey.— Shields *v.* Lozear, 22 N. J. Eq. 447.

New York.—Werner *v.* Tuch, 127 N. Y. 217, 27 N. E. 845, 24 Am. St. Rep. 443 [*affirming* 52 Hun 269, 5 N. Y. Suppl. 219].

Vermont.— Perry *v.* Ward, 20 Vt. 92.

West Virginia.— Shank *v.* Groff, 45 W. Va. 543, 32 S. E. 248.

See 45 Cent. Dig. tit. "Tender," § 81.

But see Ritchie *v.* Ege, 58 Minn. 291, 59 N. W. 1020.

32. *Alabama.*— Beebe *v.* Buxton, 99 Ala. 117, 12 So. 567; McCalley *v.* Otey, 90 Ala. 302, 8 So. 157; Miller *v.* Louisville, etc., R. Co., 83 Ala. 274, 4 So. 842, 3 Am. St. Rep. 722; Carlin *v.* Jones, 55 Ala. 624.

Indiana.— Ruckle *v.* Barbour, 48 Ind. 274.

Iowa.— Hayward *v.* Munger, 14 Iowa 516.

Missouri.—Whelen *v.* Reilly, 61 Mo. 565.

Montana.—Ashley *v.* Rocky Mountain Bell Tel. Co., 25 Mont. 286, 64 Pac. 765.

Wisconsin.— Mankel *v.* Belscamper, 84 Wis. 218, 54 N. W. 500; Breitenbach *v.* Tanner, 18 Wis. 140.

33. Schwartz *v.* Germania L. Ins. Co., 18 Minn. 448.

court.[34] But where a tender and refusal is held not to extinguish a lien unless kept good, the money must be brought into court at the time of commencing an action or interposing a defense based upon the tender,[35] and even where a lien is discharged by a tender and refusal, if the tender is made the basis of affirmative relief, either by plaintiff or defendant, the money must be brought into court.[36]

c. Effect of Failure to Pay. Bringing money into court is a requirement for plaintiff's benefit,[37] and he is entitled to have it brought in before he takes issue on the plea,[38] and a plea of tender with *profert in curia* without the *profert* being made good by the actual deposit of the money in court is bad,[39] and the pleading may be returned by plaintiff,[40] or the plea stricken from the record,[41] or the allegation of tender from the answer,[42] and judgment entered on the plea.[43] But this can be done only where the plea or tender goes to the whole issue, and a judgment as for want of a plea which goes only to a part of the cause of action will be set aside as irregular,[44] and in such case a motion should be made to strike out the plea of tender.[45] Plaintiff may also apply for an order directing the money to be brought into court *nunc pro tunc*, and in default thereof that the plea be stricken,[46] and if after trial and the issue of tender found for defendant, it appears that the money has not been brought into court, plaintiff is entitled to judgment.[47] Where a plea of tender with *profert in curia* goes only to the question of interest and costs and the money has not been brought in, the court on its own motion may interfere to save its own time from waste on immaterial issues,[48] a failure to make good the *profert in curia* being an irregularity to be dealt with summarily by the court.[49]

d. Waiver. Payment into court being a requirement in favor of plaintiff, he may waive it,[50] as by neglecting to bring the irregularity to the attention of

34. Loughborough *v.* McNevin, 74 Cal. 250, 14 Pac. 369, 15 Pac. 773, 5 Am. St. Rep. 435; Hill *v.* Carter, 101 Mich. 158, 59 N. W. 413; Moynahan *v.* Moore, 9 Mich. 9, 77 Am. Dec. 408; Cass *v.* Higenbotam, 100 N. Y. 248, 3 N. E. 189; Kortright *v.* Cady, 21 N. Y. 343, 78 Am. Dec. 145; Exchange F. Ins. Co. *v.* Norris, 74 Hun (N. Y.) 527, 26 N. Y. Suppl. 823; Simpson *v.* French, 25 How. Pr. (N. Y.) 464; Willis *v.* Sweet, 20 Nova Scotia 449.

Where an administrator tenders to an heir the amount due him, an action on his bond cannot be maintained, even though he does not bring the amount tendered into court. Potter *v.* Cummings, 18 Me. 55.

35. Roberts *v.* White, 146 Mass. 256, 15 N. E. 568; Landis *v.* Saxton, 89 Mo. 375, 1 S. W. 359; Woolner *v.* Levy, 48 Mo. App. 469; Campbell *v.* Seeley, 38 Mo. App. 298; Musgat *v.* Pumpelly, 46 Wis. 660, 1 N. W. 410.

36. Werner *v.* Tuch, 127 N. Y. 217, 27 N. E. 845, 24 Am. St. Rep. 443; Foster *v.* Mayer, 70 Hun (N. Y.) 265, 24 N. Y. Suppl. 46. But see Wagenblast *v.* McKean, 2 Grant (Pa.) 393.

37. Storer *v.* McGaw, 11 Allen (Mass.) 527.

38. Shepherd *v.* Wysong, 3 W. Va. 46.

39. *Alabama.*—Alexander *v.* Caldwell, 61 Ala. 543.

Colorado.—Westcott *v.* Patton, 10 Colo. App. 544, 51 Pac. 1021.

Illinois.— Knox *v.* Light, 12 Ill. 86.

Iowa.— Deacon *v.* Central Iowa Inv. Co., 95 Iowa 180, 63 N. W. 673.

Maine.— Gilpatrick *v.* Ricker, 82 Me. 185, 19 Atl. 165.

New Jersey.— Earle *v.* Earle, 16 N. J. L. 273; Stockton *v.* Dundee Mfg. Co., 22 N. J. Eq. 56.

New York.— Gray *v.* Green, 9 Hun 334; Hennion *v.* Kipp, 22 Misc. 437, 50. N. Y. Suppl. 760; Sheriden *v.* Smith, 2 Hill 538.

West Virginia.— Gilkenson *v.* Smith, 15 W. Va. 44.

Wisconsin.—Alexander *v.* Oneida County, 76 Wis. 56, 45 N. W. 21.

40. Platner *v.* Lehman, 26 Hun (N. Y.) 374; Simpson *v.* French, 25 How. Pr. (N. Y.) 464.

41. Knox *v.* Light, 12 Ill. 86.

42. Conwell *v.* Claypool, 8 Blackf. (Ind.) 124.

43. Monroe *v.* Chaldeck, 78 Ill. 429; Supreme Tent K. M. *v.* Hammers, 81 Ill. App. 560; Ryerson *v.* Kitchell, 2 N. J. L. 168; Becker *v.* Boon, 61 N. Y. 317; Chapman *v.* Hicks, 2 Cromp. & M. 633, 2 Dowl. P. C. 641, 3 L. J. Exch. 219; Pether *v.* Shelton, Str. 638, 93 Eng. Reprint 750.

44. Chapman *v.* Hicks, 2 Cromp. & M. 633, 2 Dowl. P. C. 641, 3 L. J. Exch. 219.

45. Morrison *v.* Jacoby, 114 Ind. 84, 14 N. E. 546, 15 N. E. 806; Conwell *v.* Claypool, 8 Blackf. (Ind.) 124.

46. Richmond, etc., R. Co. *v.* Blake, 49 Fed. 904.

47. Claflin *v.* Hawes, 8 Mass. 261; Rosenbaum *v.* Greenbaum, 31 Misc. (N. Y.) 787, 65 N. Y. Suppl. 212; Fallon *v.* Farber, 28 Misc. (N. Y.) 197, 59 N. Y. Suppl. 11.

48. Gilpatrick *v.* Ricker, 82 Me. 185, 19 Atl. 165.

49. Gilpatrick *v.* Ricker, 82 Me. 185, 19 Atl. 165.

50. Storer *v.* McGaw, 11 Allen (Mass.) 527.

the court and taking issue on the plea of tender.[51] The waiver has been held, however, to be merely of the right to sign judgment as for want of a plea, or to have the plea summarily stricken out, and plaintiff may object to the irregularity upon motion for an order requiring the money to be brought in,[52] or he may at the trial object to the introduction of any evidence in support of the plea of tender, or ask that the jury be instructed to disregard the evidence of a tender, or that instructions be given as to the consequences of the money not being in court.[53] If the money is brought in before plaintiff moves for relief the irregularity is cured,[54] and there is held to be no waiver of the defect of failure to pay into court by retaining the answer for the purpose of replying to the other defenses.[55]

2. Time of Payment. The payment into court should generally be made when the tender is pleaded.[56] In some states, however, the matter is regulated by statutes prescribing the time when payment into court must be made, in which case a compliance with the statute is sufficient.[57]

3. Amount to Be Paid. In keeping good a tender made before suit the tenderer should pay into court the same amount as was tendered;[58] but where the tender is made, after action brought, the costs of the action already incurred must be brought into court along with the amount of plaintiff's demand admitted to be due by the plea.[59]

4. Medium of Payment. Where a plea is of a tender of legal tender money, the money brought in must be a legal tender,[60] although not necessarily the identical money that was tendered;[61] and where money is tendered, a certificate of

51. *Maine.*— Gilpatrick *v.* Ricker, 82 Me. 185, 19 Atl. 165.

Massachusetts.—Storer *v.* McGaw, 11 Allen 527; Warren *v.* Nichols, 6 Metc. 261.

Michigan.—Wetherbee *v.* Kusterer, 41 Mich. 359, 2 N. W. 45.

New Hampshire.— Heywood *v.* Hartshorn, 55 N. H. 476.

New Jersey.— Earle *v.* Earle, 16 N. J. L. 273. But see Whittaker *v.* Belvidere Roller-Mill Co., 55 N. J. Eq. 674, 38 Atl. 289.

New York.— Wilson *v.* Doran, 110 N. Y. 101, 17 N. E. 688; Smith *v.* Slosson, 89 Hun 568, 35 N. Y. Suppl. 547; Platner *v.* Lehman, 26 Hun 374; Roosevelt *v.* New York, etc., R. Co., 45 Barb. 554, 30 How. Pr. 226; Wood *v.* Rabe, 52 N. Y. Super. Ct. 479; Knight *v.* Beach, 7 Abb. Pr. N. S. 241; Sheriden *v.* Smith, 2 Hill 538.

Tennessee.— Rogers *v.* Tindall, 99 Tenn. 356, 42 S. W. 86, holding that where money has been tendered the failure to bring it into court is waived if the plea is not demurred to on that ground.

West Virginia.— Shepherd *v.* Wysong, 3 W. Va. 46.

52. Knox *v.* Light, 12 Ill. 86.

53. Freeman *v.* Fleming, 5 Iowa 460. See also Monroe *v.* Chaldeck, 78 Ill. 429; Dunbar *v.* De Boer, 44 Ill. App. 615.

54. Gilpatrick *v.* Ricker, 82 Me. 185, 19 Atl. 165; Platner *v.* Lehman, 26 Hun (N. Y.) 374; Knight *v.* Beach, 7 Abb. Pr. N. S. (N. Y.) 241.

55. Becker *v.* Boon, 61 N. Y. 317; Johnson *v.* Gillette, 16 Misc. (N. Y.) 431, 39 N. Y. Suppl. 733. See Wilson *v.* Doran, 110 N. Y. 101, 17 N. E. 688, where it was held that a failure to return the answer when it contained several defenses was not a waiver of the statutory notice.

56. Commercial Bank *v.* Crenshaw, 103 Ala. 497, 15 So. 741; Warren *v.* Nichols, 6 Metc. (Mass.) 261; Heywood Boot, etc., Co. *v.* Ralph, 82 Hun (N. Y.) 418, 31 N. Y. Suppl. 263; Gilkeson *v.* Smith, 15 W. Va. 44.

57. See the statutes of the several states. And see cases cited *infra*, this note.

In Kansas it is sufficient if deposited at the trial or when ordered by the court. Arthur *v.* Arthur, 38 Kan. 691, 17 Pac. 187; German-American Ins. Co. *v.* Johnson, 4 Kan. App. 357, 45 Pac. 972.

In Oklahoma it is sufficient if payment be made when ordered by the court. Gray *v.* Styles, 6 Okla. 455, 49 Pac. 1083. See Durham *v.* Linderman, 10 Okla. 570, 64 Pac. 15.

58. Frank *v.* Pickens, 69 Ala. 369; Martin *v.* Bott, 17 Ind. App. 444, 46 N. E. 151; Beaver *v.* Whiteley, 3 Pa. Co. Ct. 613; The Serapis, 37 Fed. 436.

59. *Illinois.*— Rogers Grain Co. *v.* Jansen, 117 Ill. App. 137.

Iowa.—Warrington *v.* Pollard, 24 Iowa 281, 95 Am. Dec. 727.

Massachusetts.—Whipple *v.* Newton, 17 Pick. 168.

New York.— Retan *v.* Drew, 19 Wend. 304.

Ohio.— Burt *v.* Dodge, 13 Ohio 131.

Pennsylvania.— Summerson *v.* Hicks, 142 Pa. St. 344, 21 Atl. 875; Beaver *v.* Whiteley, 3 Pa. Co. Ct. 613.

United States.— Lichtenfels *v.* The Enos B. Phillips, 53 Fed. 153; The Good Hope, 40 Fed. 608; The Serapis, 37 Fed. 436.

The costs of a nonsuit must be included. Strusguth *v.* Pollard, 62 Vt. 157, 19 Atl. 228.

60. Shelby *v.* Boyd, 3 Yeates (Pa.) 321; Downman *v.* Downman, 1 Wash. (Va.) 26.

61. Colby *v.* Stevens, 38 N. H. 191.

If a specific kind of money was offered, the kind must be stated in the plea and a profert made of that very money, if defend-

deposit for the same, payable either to the order of the clerk or to the creditor, cannot be brought in,[62] nor a check;[63] but if a bank check was tendered, the tender may be kept good in money, and the money, not the check, brought into court;[64] and, although the tender was in money, objection that a check instead of money was paid into court comes too late after final decree and upon petition for rehearing.[65] It is a general rule that ponderous specific articles which have been tendered need not be brought into court;[66] but it is otherwise, where the property is not cumberous but such as a man carries about on his person,[67] and where notes, bonds, or mortgages are offered in satisfaction of a debt, the tender must be kept good, and the tender pleaded with *profert in curia* and the securities brought into court. Owing to the peculiar nature of the property the tender is held not to be governed by the rules applicable to specific chattels, but is like a tender of money.[68]

5. Notice of Payment. In some jurisdictions notice of payment into court must be given plaintiff's attorney,[69] and if notice is not given the plea is irregular.[70] But plaintiff, by proceeding without objecting that no notice was served, waives the irregularity,[71] although the service of such notice is not waived by a failure to return, or otherwise raise the question before trial, where the answer contains other defenses that must be met.[72]

6. To Whom Paid. The money must be delivered to the clerk of the court,[73] and his custody is that of the court.[74] If a statute so provides payment may be to the court itself,[75] and in a justice's court where a tender is pleaded, the money is paid direct to the justice in open court.[76] If a statute directs that the money be deposited in a bank or with a trust company, or with a constable or other officer, it must be deposited with the person or depositary designated.[77] If money, deposited with a clerk, does not become a fund in court, by reason of not being brought in, in support of a tender, or in compliance with an order of the court, where such an order is necessary, the clerk does not receive it officially, but receives it, it is held, merely as the agent of the depositor,[78] and

ant desires the benefit of any subsequent depreciation. Downman *v.* Downman, 1 Wash. (Va.) 26; Pong *v.* Lindsay, Dyer 82*a*, 73 Eng. Reprint 178. But see Jeter *v.* Littlejohn, 7 N. C. 186.

62. Smith *v.* Merchants', etc., Bank, 14 Ohio Cir. Ct. 199, 8 Ohio Cir. Dec. 176. *Contra*, Steckel *v.* Standley, 107 Iowa 694, 77 N. W. 489.

63. Lewis *v.* Larson, 45 Wis. 353.

64. Wright *v.* Robinson, 84 Hun (N. Y.) 172, 32 N. Y. Suppl. 463.

65. Bradford *v.* Foster, 87 Tenn. 4, 9 S. W. 195.

66. Spann *v.* Baltzell, 1 Fla. 301, 44 Am. Dec. 346; Mitchell *v.* Merrill, 2 Blackf. (Ind.) 87, 18 Am. Dec. 128; Patton *v.* Hunt, 64 N. C. 163.

67. Harris *v.* Campbell, 4 Dana (Ky.) 586.

68. Harris *v.* Campbell, 4 Dana (Ky.) 586; Emmons *v.* Myers, 7 How. (Miss.) 375; Brooklyn Bank *v.* De Grauw, 23 Wend. (N. Y.) 342, 35 Am. Dec. 569; Patton *v.* Hunt, 64 N. C. 163.

69. Wilson *v.* Doran, 110 N. Y. 101, 17 N. E. 688; Taylor *v.* Brooklyn El. R. Co., 7 N. Y. Suppl. 625 [*affirmed* in 119 N. Y. 561, 23 N. E. 1106]; Brown *v.* Ferguson, 2 Den. (N. Y.) 196; Sheriden *v.* Smith, 2 Hill (N. Y.) 538; Dixon *v.* Clark, 5 C. B. 365, 5 D. & L. 155, 16 L. J. C. P. 237, 57 E. C. L. 365. See also Platner *v.* Lehman, 26 Hun (N. Y.) 374.

In Missouri where, under the statute, the money may be paid to a constable, no notice is required. Crawford *v.* Armstrong, 58 Mo. App. 214. The rules governing a tender at common law are not applicable to a tender under the statute. Voss *v.* McGuire, 26 Mo. App. 452.

70. Sheriden *v.* Smith, 2 Hill (N. Y.) 538.

71. Wilson *v.* Doran, 110 N. Y. 101, 17 N. E. 688; Platner *v.* Lehman, 26 Hun (N. Y.) 374; Shepherd *v.* Wysong, 3 W. Va. 46.

72. Wilson *v.* Doran, 110 N. Y. 101, 17 N. E. 688; Becker *v.* Boon, 61 N. Y. 317.

73. Walters-Cates *v.* Wilkinson, 92 Iowa 129, 60 N. W. 514; Phelps *v.* Town, 14 Mich. 374; Mahan *v.* Waters, 60 Mo. 167; Dirks *v.* Juel, 59 Nebr. 353, 80 N. W. 1045.

A deposit of money with an auditor on a trial before him, or with a referee, is not a deposit in court. Becker *v.* Boon, 61 N. Y. 317; Wing *v.* Hurlburt, 15 Vt. 607, 40 Am. Dec. 695.

74. Currie *v.* Thomas, 8 Port. (Ala.) 293.

75. Arthur *v.* Arthur, 38 Kan. 691, 17 Pac. 187.

76. Phelps *v.* Town, 14 Mich. 374.

77. Griffith *v.* Jackson, 45 Mo. App. 165; Kansas City Transfer Co. *v.* Neiswanger, 27 Mo. App. 356; Voss *v.* McGuire, 26 Mo. App. 452.

78. Sowle *v.* Holdridge, 25 Ind. 119; Commercial Inv. Co. *v.* Peck, 53 Nebr. 204, 73

the money thus deposited may under these circumstances at any time be withdrawn by him.[79]

7. Effect.[80] A plea of tender and bringing the money into court is an admission of plaintiff's cause of action to the extent of the amount alleged to have been tendered, and brought into court, and dispenses with the necessity for all that proof which plaintiff would otherwise be required to produce in order to recover the amount brought in,[81] and defendant cannot thereafter object to the form of the action,[82] or that the action was prematurely brought;[83] and where tender and payment is of the difference between plaintiff's demand and set-off, it admits that the entire demand is due.[84] But tender and payment into court does not admit liability for more than what is tendered or all alleged grounds of recovery, and defendant may interpose any consistent defense, showing that he is not liable in a greater sum.[85]

8. Withdrawal of Money Paid In — a. By Tenderer. A party pays money into court on a tender at his peril,[86] for the money paid in belongs absolutely to the party for whose account it is paid, and remains subject to his order, and the tenderer cannot ordinarily withdraw it,[87] even though the money was paid by

N. W. 452, 68 Am. St. Rep. 598; Mazyck *v.* McEwen, 2 Bailey (S. C.) 28.

79. Hammer *v.* Kaufman, 39 Ill. 87.

80. **Effect of a tender and deposit of money in court on costs** see Costs, 11 Cyc. 71.

Effect of tender as an admission of liability generally see *supra*, V, C.

81. *Colorado.*— Supply Ditch Co. *v.* Elliott, 10 Colo. 327, 15 Pac. 691, 3 Am. St. Rep. 586.

Illinois.— Sweetland *v.* Tuthill, 54 Ill. 215; Cilley *v.* Hawkins, 48 Ill. 308, holding that it admits that the amount pleaded and brought into court is due plaintiff, although the verdict be for less.

Iowa.— Babcock *v.* Harris, 37 Iowa 409; Wright *v.* Howell, 35 Iowa 288.

Massachusetts.— Currier *v.* Jordan, 117 Mass. 260; Bacon *v.* Charlton, 7 Cush. 581; Huntington *v.* American Bank, 6 Pick. 340.

Missouri.— Wells *v.* Missouri-Edison Electric Co., 108 Mo. App. 607, 84 S. W. 204; Voss *v.* McGuire, 26 Mo. App. 452.

Nebraska.— Murray *v.* Cunningham, 10 Nebr. 167, 4 N. W. 319, 953.

New York.— Wilson *v.* Doran, 110 N. Y. 101, 17 N. E. 688; Wiener *v.* Auerbach, 98 N. Y. Suppl. 686; Spalding *v.* Vandercook, 2 Wend. 431; Johnston *v.* Columbian Ins. Co., 7 Johns. 315.

North Carolina.— Eason *v.* Sutton, 20 N. C. 622.

Ohio.— Huntington *v.* Ziegler, 2 Ohio St. 10.

Oregon.— Oregon R., etc., Co. *v.* Oregon Real Estate Co., 10 Oreg. 444.

Pennsylvania.— Bailey *v.* Bucher, 6 Watts 74.

England.— Cox *v.* Brain, 3 Taunt. 95.

See 45 Cent. Dig. tit. "Tender," § 90.

A failure to bring money into court does not make the admission any less distinct and unequivocal. Roosevelt *v.* New York, etc., R. Co., 45 Barb. (N. Y.) 554, 30 How. Pr. 226. And see *supra*, V, C.

82. Bailey *v.* Bucher, 6 Watts (Pa.) 74.

83. Giboney *v.* German Ins. Co., 48 Mo. App. 185.

84. Williamson *v.* Baley, 78 Mo. 636.

85. *Iowa.*— Griffin *v.* Harriman, 74 Iowa 436, 38 N. W. 139. And see Warrington *v.* Pollard, 24 Iowa 281, 95 Am. Dec. 727.

Missouri.— Voss *v.* McGuire, 26 Mo. App. 452.

Nevada.— Clarke *v.* Lyon County, 7 Nev. 75.

New York.— Wilson *v.* Doran, 110 N. Y. 101, 17 N. E. 688; Heller *v.* Katz, 62 Misc. 266, 114 N. Y. Suppl. 806.

North Carolina.— Brown *v.* Fink, 48 N. C. 378; Eason *v.* Sutton, 20 N. C. 622.

Oregon.—Simpson *v.* Carson, 11 Oreg. 361, 8 Pac. 325.

United States.— Donnell *v.* Columbian Ins. Co., 7 Fed. Cas. No. 3,987, 2 Sumn. 366; Snow *v.* Miles, 22 Fed. Cas. No. 13,146, 3 Cliff. 608.

See 45 Cent. Dig. tit. "Tender," § 90.

Where there are two or more counts set out in the declaration, a deposit, without specifying to which count the deposit is to be applied, is an admission of a liability for the sum deposited on some one of the counts, but it is not an admission of a liability on any particular count, nor of a liability on all. Hubbard *v.* Knous, 7 Cush. (Mass.) 556.

86. Taylor *v.* Brooklyn El. R. Co., 119 N. Y. 561, 23 N. E. 1106, tender of amends for a wrong.

87. *Indiana.*— Lynch *v.* Jennings, 43 Ind. 276; Sowle *v.* Holdridge, 20 Ind. 204; Reed *v.* Armstrong, 18 Ind. 446; Munk *v.* Kanzler, 26 Ind. App. 105, 58 N. E. 543.

Missouri.— Griffith *v.* Jackson, 45 Mo. App. 165; Kansas City Transfer Co. *v.* Neiswanger, 27 Mo. App. 356; Voss *v.* McGuire, 26 Mo. App. 452.

New York.— Halpin *v.* Phenix Ins. Co., 118 N. Y. 165, 23 N. E. 482; Mela *v.* Geis, 3 N. Y. Civ. Proc. 152; Murray *v.* Bethune, 1 Wend. 191.

North Carolina.— Parker *v.* Beasley, 116 N. C. 1, 21 S. E. 955, 33 L. R. A. 231.

Oregon.— Oregon R., etc., Co. *v.* Oregon Real Estate Co., 10 Oreg. 444.

mistake,[88] except perhaps in case of fraud;[89] and even if the parties proceed to trial and it then turns out that nothing is due,[90] and verdict is for the tenderer,[91] it belongs to the party for whom it was paid in, absolutely, and no part of it will be ordered repaid to defendant whatever may be the fate of the action.[92] But as the money belongs to the party for whom it is brought in, so it is at his risk,[93] unless the money tendered is deposited in such a manner that it does not become a court fund, in which case it is at the risk of the person making the deposit, and if lost, the loss falls upon him,[94] and in such case the depositor may withdraw the money at any time before the court has recognized it as a fund under its control.[95]

b. By Tenderee. Payment into court is payment to plaintiff;[96] and it is

Pennsylvania.— Wheeler *v.* Woodward, 66 Pa. St. 158.

South Carolina.— Black *v.* Rose, 14 S. C. 274.

Wisconsin.— Stolze *v.* Milwaukee, etc., R. Co., 113 Wis. 44, 88 N. W. 919, 90 Am. St. Rep. 833; Fox *v.* Williams, 92 Wis. 320, 66 N. W. 357.

United States.— Ye Seng Co. *v.* Corbitt, 9 Fed. 423, 7 Sawy. 368.

England.— Le Grew *v.* Cooke, 1 B. & P. 332; Cox *v.* Robinson, Str. 1027, 93 Eng. Reprint 1011.

See 45 Cent. Dig. tit. "Tender," § 89.

Costs paid into court to render a witness competent are absolutely and irrevocably paid. Clement *v.* Bixler, 3 Watts (Pa.) 248.

88. Phelps *v.* Town, 14 Mich. 374; Vaughan *v.* Barnes, 2 B. & P. 392.

89. Vaughan *v.* Barnes, 2 B. & P. 392.

90. Roosevelt *v.* New York, etc., R. Co., 45 Barb. (N. Y.) 554, 30 How. Pr. 226.

91. Rhodes *v.* Andrews, (Ark. 1890) 13 S. W. 422; Taylor *v.* Brooklyn El. R. Co., 119 N. Y. 561, 23 N. E. 1106 [*affirming* 7 N. Y. Suppl. 625].

92. *Arkansas.*— Rhodes *v.* Andrews, (1890) 13 S. W. 422.

Illinois.— Sweetland *v.* Tuthill, 54 Ill. 215.

Missouri.— Kansas City Transfer Co. *v.* Neiswanger, 27 Mo. App. 356.

New York.— Mann *v.* Sprout, 185 N. Y. 109, 77 N. E. 1018, 5 L. R. A. N. S. 561; Taylor *v.* Brooklyn El. R. Co., 119 N. Y. 561, 23 N. E. 1106 [*affirming* 7 N. Y. Suppl. 625]; Cass *v.* Higenbotam, 100 N. Y. 248, 3 N. E. 189; Becker *v.* Boon, 61 N. Y. 317; Logue *v.* Gillick, 1 E. D. Smith 398; Heller *v.* Katz, 62 Misc. 266, 114 N. Y. Suppl. 806; Slack *v.* Brown, 13 Wend. 390; Murray *v.* Bethune, 1 Wend. 191.

Pennsylvania.— Berkheimer *v.* Geise, 82 Pa. St. 64; Jenkins *v.* Cutchens, 2 Miles 65; Sharpless *v.* Dobbins, 1 Del. Co. 25.

South Carolina.— Black *v.* Rose, 14 S. C. 274.

Wisconsin.— Fox *v.* Williams, 92 Wis. 320, 66 N. W. 357; Schnur *v.* Hickcox, 45 Wis. 200.

United States.— Califarno *v.* MacAndrews, 51 Fed. 300; Coghlan *v.* South Carolina R. Co., 32 Fed. 316; The Rossend Castle, 30 Fed. 462.

England.— Fisher *v.* Kitchingman, Barnes Notes 284, 94 Eng. Reprint 917; Knapton *v.* Drew, Barnes Notes 279, 94 Eng. Reprint 915; Vaughan *v.* Barnes, 2 B. & P. 392; Le Grew *v.* Cooke, 1 B. & P. 332; Broadhurst *v.* Baldwin, 4 Price 58.

See 45 Cent. Dig. tit. "Tender," § 89.

But see Ahrens *v.* Fenton, 138 Iowa 559, 115 N. W. 233 (holding that where, after defendant's payment into the court by way of tender, and before judgment, plaintiff's right of action is extinguished by a finding of the jury that plaintiff is indebted to defendant on a counter-claim to a larger amount, plaintiff is not entitled to judgment on the tender, and it is proper to order the return of the money to defendant); Coltrane *v.* Peacock, (Tex. Civ. App. 1905) 91 S. W. 841.

But where a statute permits defendant, except in certain cases, to pay into court a sum of money by way of compensation or amends, and provides that plaintiff may then reply by accepting the money in full satisfaction, or allege that the money paid is insufficient to satisfy his claim, in which event, if the issue is found for defendant, defendant shall be entitled to his costs, and plaintiff to so much of the sum paid into court as shall be found for him, the effect of a plea of tender, thereunder, is to admit defendant's liability, limiting the issue to the question of amount only, the money paid into court being retained until the issue is decided and then paid over to plaintiff to the extent of the amount found due him. Palatine Ins. Co. *v.* O'Brien, 107 Md. 341, 68 Atl. 484, 16 L. R. A. N. S. 1055. Under Code Pub. Gen. Laws, art. 75, §§ 20, 21.

In equity the rule is held to be the same as at law. Fox *v.* Williams, 92 Wis. 320, 66 N. W. 357; Cæsar *v.* Capell, 83 Fed. 403. But see Putnam *v.* Putnam, 13 Pick. (Mass.) 129; Dunn *v.* Hunt, 76 Minn. 196, 78 N. W. 1110.

93. Sowle *v.* Holdridge, 20 Ind. 204. See Taylor *v.* Lancaster, 33 Gratt. (Va.) 1. *Compare* Larsen *v.* Breene, 12 Colo. 480, 21 Pac. 498, where a certified check was tendered and deposited and pending the trial the bank failed, and it was held that as an acceptance of the check would have operated only as a conditional payment, the loss must be borne by the one depositing it.

94. Hammer *v.* Kaufman, 39 Ill. 87.

95. Hammer *v.* Kaufman, 39 Ill. 87.

96. Ahrens *v.* Fenton, 138 Iowa 559, 115 N. W. 233.

generally held that money brought into court on a plea of tender in an action to recover a debt may be withdrawn by plaintiff at any time, and the balance, if any, recovered,[97] although plaintiff replies that the tender was not made before action,[98] or that the amount is insufficient;[99] but if the money is brought into court upon a plea setting up a conditional tender, where a conditional tender can be made, a withdrawal of the money amounts to an acceptance of the tender as made,[1] and it is sometimes held that the tender itself is conditional upon acceptance extinguishing the whole demand, in which case if the money is withdrawn the balance cannot be recovered.[2] Withdrawing the money is a waiver of all objections to the money.[3]

D. Evidence. The burden of proving a tender rests upon the party alleging a tender,[4] and tenders being *stricti juris*, nothing being presumed in their favor,[5] the evidence thereof should be full, clear, and satisfactory, so as to leave no reasonable doubt that the one to whom it was made understood it at the time to be a present, absolute, and unconditional tender in payment of the debt or claim.[6] The tenderer must prove that he was able, ready, and willing to pay;[7] must prove

97. McKercher *v.* Curtis, 35 Mich. 478 (withdrawal after an appeal); Lackner *v.* American Clothing Co., 112 N. Y. App. Div. 438, 98 N. Y. Suppl. 376; Beil *v.* Supreme Council A. L. H., 42 N. Y. App. Div. 168, 58 N. Y. Suppl. 1049; Traynor *v.* White, 44 Wash. 560, 87 Pac. 823; The Rossend Castle, 30 Fed. 462; Ye Seng Co. *v.* Corbitt, 9 Fed. 423, 7 Sawy. 368.

Withdrawing the money is no ground for a dismissal of an appeal (McCalley *v.* Otey, 103 Ala. 469, 15 So. 945), nor for a summary dismissal in the lower court (Humphrey *v.* Merritt, 51 Ind. 197. See Higgins *v.* Halligan, 46 Ill. 173).

98. LeGrew *v.* Cooke, 1 B. & P. 332.

99. Bostrom *v.* Gibson, 111 Ill. App. 457; Murphy *v.* Gold, etc., Tel. Co., 3 N. Y. Suppl. 804. But see Alexander *v.* Patten, 1 Fed. Cas. No. 171, 1 Cranch C. C. 338.

1. Wells *v.* Robb, 9 Bush (Ky.) 26; Haeussler *v.* Duross, 14 Mo. App. 103.

2. Gardner *v.* Black, 98 Ala. 638, 12 So. 813; Hanson *v.* Todd, 95 Ala. 328, 10 So. 354; Turner's Sons *v.* Lee Gin, etc., Co., 98 Tenn. 604, 41 S. W. 57, 38 L. R. A. 549.

3. Wells *v.* Robb, 9 Bush (Ky.) 26.

4. McCalley *v.* Otey, 99 Ala. 584, 12 So. 406, 42 Am. St. Rep. 87; Park *v.* Wiley, 67 Ala. 310; Tuthill *v.* Morris, 81 N. Y. 94; North Pennsylvania R. Co. *v.* Adams, 54 Pa. St. 94, 93 Am. Dec. 677; Richardson *v.* Baker, 52 Vt. 617.

Evidence of another tender is inadmissible. Redhead *v.* Wyoming Cattle Inv. Co., 126 Iowa 410, 102 N. W. 144.

Evidence of an excuse for not making tender will not support a plea of tender. Sharp *v.* Colgan, 4 Mo. 29.

A waiver of a tender cannot be established by requiring defendant to state whether, if made, he would have received it. Bluntzer *v.* Dewees, 79 Tex. 272, 15 S. W. 29. But evidence of a waiver of tender has been held competent to support a plea of tender. Holmes *v.* Holmes, 9 N. Y. 525. And see Woolner *v.* Hill, 93 N. Y. 576.

Parol evidence of a tender in a justice's court, made for the purpose of charging plaintiff with costs, is inadmissible. The tender must be proven by the record. Seibert *v.* Kline, 1 Pa. St. 38.

5. King *v.* Finch, 60 Ind. 420; Shotwell *v.* Dennman, 1 N. J. L. 202.

6. *Alabama.*— Butler *v.* Hannah, 103 Ala. 481, 15 So. 641.

Georgia.— Hudson *v.* Goff, 77 Ga. 281, 3 S. E. 152, holding that evidence that the party furnished money to his attorney with which to make a tender is not of itself proof that a tender was made.

Illinois.— Pulsifer *v.* Shepard, 36 Ill. 513.

Michigan.— Adams *v.* Greig, 126 Mich. 582, 85 N. W. 1078; Engle *v.* Hall, 45 Mich. 57, 7 N. W. 239; Proctor *v.* Robinson, 35 Mich. 284; Potts *v.* Plaisted, 30 Mich. 149.

Minnesota.— Davies *v.* Dow, 80 Minn. 223, 83 N. W. 50; Benson Bank *v.* Hove, 45 Minn. 40, 47 N. W. 449.

New Jersey.— Arrowsmith *v.* Van Harlingen, 1 N. J. L. 29.

United States.— McCormiek *v.* Lilienthal, 117 Fed. 89, 54 C. C. A. 475.

See 45 Cent. Dig. tit. "Tender," § 96 *et seq.*

Evidence beyond a reasonable doubt is not required. Kerney *v.* Gardner, 27 Ill. 162.

7. Pulsifer *v.* Shepard, 36 Ill. 513; Otis *v.* Barton, 10 N. H. 433.

Where no money was produced, but the debtor informed the creditor that he then had the money ready to pay, it was held error to exclude evidence that the debtor had the money with him ready to pay. Pinney *v.* Jorgenson, 27 Minn. 26, 6 N. W. 376.

Evidence that the debtor is financially able to pay is not sufficient. See Hawley *v.* Mason, 9 Dana (Ky.) 32, 33 Am. Dec. 522.

Evidence that the debtor had at the time money on deposit in a bank is not good. Myers *v.* Byington, 34 Iowa 205.

Evidence that a third party would have loaned the money for the purpose of the tender is insufficient, unless it be also proven that the third party was present with the money and said he would let the debtor have it for that purpose. Sargent *v.* Graham, 5 N. H. 440, 22 Am. Dec. 469; Harding *v.* Davis, 2 C. & P. 77, 31 Rev. Rep. 654, 12 E. C. L. 460.

the time where the tender was made,[8] and, if money was tendered, the debtor must show that he had the exact amount or more at hand,[9] and the kind of money tendered,[10] and that the tenderee had authority to accept the tender,[11] and the burden of proof is upon the person alleging a tender to show that he has kept the tender good.[12] If chattels were tendered, the debtor or vendor must show that he was ready with them at the time and place of delivery, and that they were set apart or otherwise designated,[13] and that they were of the kind in which the debt was payable.[14] An actual offer must be proven and not a mere proposition to pay,[15] and a refusal by the creditor must be shown.[16]

E. Trial. Where the facts are in dispute, it is for the jury to say whether a tender was made,[17] or waived,[18] or made to the wrong person,[19] or whether the sum tendered was in full satisfaction and received on those terms,[20] or was made to buy peace,[21] and, generally, the question as to whether a tender was made conditionally is for the jury.[22] But the question whether the money has been brought into court is for the court to determine as an act done in its presence and shown by the records,[23] and where the facts bearing upon a question of tender

That a statute authorized the tender to be made in writing does not change the rule. Ladd *v.* Mason, 10 Oreg. 308.

A refusal to receive the money does not dispense with the necessity of showing an existing ability to make payment by having the money within convenient reach. Wynkoop *v.* Cowing, 21 Ill. 570.

If a tender was made by a bank check it must be proven that the tenderer had sufficient funds on deposit to meet it. Poague *v.* Greenlee, 22 Gratt. (Va.) 724.

8. Braumann *v.* Vanderpoel, 26 Misc. (N. Y.) 786, 56 N. Y. Suppl. 216.

9. Benson Bank *v.* Hove, 45 Minn. 40, 47 N. W. 449. See Appleton *v.* Donaldson, 3 Pa. St. 381.

Particularity as to amount.— Proof of a tender of £20, 9*s.*, 6*d.*, in bank-notes and silver has been held sufficient to support a plea of tender of £20. Dean *v.* James, 4 B. & Ald. 547, 2 L. J. K. B. 94, 1 N. & M. 303, 24 E. C. L. 241, 110 Eng. Reprint 561. But a plea of tender of £16 will not be supported by proof of a tender of £15, 16*s.*, although no more than the latter sum was due. John *v.* Jenkins, 1 Cromp. & M. 227, 2 L. J. Exch. 83, 3 Tyrw. 170.

10. Koehler *v.* Buehl, 94 Mich. 496, 54 N. W. 157.

Evidence of a tender of a note due from plaintiff to defendant will not support a plea of a tender of money. Cary *v.* Bancroft, 14 Pick. (Mass.) 315, 25 Am. Dec. 393.

11. Stevens *v.* Taylor, (Tex. Civ. App. 1907) 102 S. W. 791.

12. McCalley *v.* Otey, 99 Ala. 584, 12 So. 406, 42 Am. St. Rep. 87; Long *v.* Howard, 35 Iowa 148.

13. Hambel *v.* Tower, 14 Iowa 530; Burns *v.* Welch, 8 Yerg. (Tenn.) 117.

If a note of a third party was tendered, the proof must show that it was indorsed according to agreement, or in absence of an agreement that it was indorsed so as to transfer title. See Eichholtz *v.* Taylor, 88 Ind. 38.

If the statute requires goods to be inspected, surveyed, or gaged, that the statute was complied with must be shown. Jones *v.* Knowles, 30 Me. 402.

14. Hawley *v.* Mason, 9 Dana (Ky.) 32, 33 Am. Dec. 522.

15. Shotwell *v.* Dennman, 1 N. J. L. 202.

16. Adams *v.* Greig, 126 Mich. 582, 85 N. W. 1078.

The declaration of the party, made at the time of the tender, is inadmissible to go to the jury. Mahone *v.* Reeves, 11 Ala. 345.

An entry of an offer and refusal in a day-book kept for the purpose of entering daily transactions, made by a clerk of plaintiff's attorney, since deceased, is admissible in evidence to prove a tender. Marks *v.* Lahee, 3 Bing. N. Cas. 408, 6 L. J. C. P. 69, 4 Scott 137, 32 E. C. L. 193.

17. Nedow *v.* Porter, 122 Mich. 456, 81 N. W. 256; Howell *v.* Listowell Rink, etc., Co., 13 Ont. 476.

18. Wheelden *v.* Lowell, 50 Me. 499; Schayer *v.* Commonwealth Loan Co., 163 Mass. 322, 39 N. E. 1110; Guthman *v.* Kearn, 8 Nebr. 502, 1 N. W. 129.

Whether a tender of the full amount was waived is for the jury. Nelson *v.* Robson, 17 Minn. 284.

19. Wilson *v.* Doran, 110 N. Y. 101, 17 N. E. 688.

20. Jenks *v.* Burr, 56 Ill. 450.

21. Nye *v.* Chase, 50 Vt. 306.

22. Eckstein *v.* Reynolds, 7 A. & E. 80, 6 L. J. K. B. 198, 2 N. & P. 256, 34 E. C. L. 66, 112 Eng. Reprint 401; Marsden *v.* Goode, 2 C. & K. 133, 61 E. C. L. 133.

23. Knox *v.* Light, 12 Ill. 86; Gilpatrick *v.* Ricker, 82 Me. 185, 19 Atl. 165; Neldon *v.* Roof, 55 N. J. Eq. 608, 38 Atl. 429.

Where the tender is made under a statute by depositing the money in court the court will inform itself whether the money has been brought in without the aid of a jury. Newton *v.* Ellis, 16 Wis. 197.

A failure to find that the tender had been kept good has been held to be immaterial when the money tendered has been brought into court. Anderson *v.* Moore, 145 Ill. 61, 33 N. E. 848.

are uncontroverted, the question whether a tender has been made is purely a question of law.[24]

F. Judgment. If after money has been brought into court on a tender, plaintiff elects to take the money tendered, the money will be ordered paid over to him and a judgment entered dismissing the action.[25] So if plaintiff takes issue on the plea of tender and fails to prove any more to be due than the sum tendered and brought into court such tender bars the right to a judgment for plaintiff for the amount tendered. Defendant is entitled to a judgment and plaintiff to the sum paid in.[26] If plaintiff proves liability for more than the amount tendered, he may have judgment for the balance or for the whole amount, the amount tendered being credited as a payment on the judgment.[27]

TENDER. In reference to railroads, the small car carrying water and fuel for the engine, and to which the first passenger or freight car of the train is usually coupled.[1] (Tender: In Law, see TENDER, *ante*, p. 127.)

TEN DOLLAR BILL. A bank-bill of the denomination of ten dollars, or a treasury note of the same denomination.[2] (See BANK-BILL, 5 Cyc. 226.)

TENEMENT. In modern use, a term signifying rooms let in houses, or such part of a house as is separately occupied by a single family or person, in contradistinction from the whole house.[3] (Tenement: As Dwelling, see ARSON, 3 Cyc.

24. Wheelock *v.* Tanner, 39 N. Y. 481.

25. Monroe *v.* Chaldeck, 78 Ill. 429; Griffiths *v.* Ystradyfodwg School Bd., 24 Q. B. D. 307, 59 L. J. Q. B. 116, 62 L. T. Rep. N. S. 151, 38 Wkly. Rep. 425.

26. *Alabama.*— Syson *v.* Hieronymus, 127 Ala. 482, 28 So. 967; Foster *v.* Napier, 74 Ala. 393.

Colorado.— Supply Ditch Co. *v.* Elliott, 10 Colo. 327, 15 Pac. 691, 3 Am. St. Rep. 586.

Illinois.— Leonard *v.* Patton, 106 Ill. 99; Cilley *v.* Hawkins, 48 Ill. 308.

Indiana.— Reed *v.* Armstrong, 18 Ind. 446.

Iowa.— In Wright *v.* Howell, 35 Iowa 288 (plaintiff averred a tender of four hundred dollars, but upon the trial a balance was found to be due from defendant and a judgment against defendant was held erroneous); Warrington *v.* Pollard, 24 Iowa 281, 95 Am. Dec. 727. But see Gray *v.* Graham, 34 Iowa 425.

Kansas.— Elder *v.* Elder, 43 Kan. 514, 23 Pac. 600.

Michigan.—Wetherbee *v.* Kusterer, 41 Mich. 359, 2 N. W. 45.

Mississippi.— Memphis Mach. Works *v.* Aberdeen, 77 Miss. 420, 27 So. 608.

New York.— Wilson *v.* Doran, 39 Hun 88; Cleveland *v.* Tobey, 36 Misc. 319, 73 N. Y. Suppl. 544; Fallon *v.* Farber, 30 Misc. 626, 62 N. Y. Suppl. 742; Cagliostro *v.* Corporale, 26 Misc. 818, 56 N. Y. Suppl. 1027; Dakin *v.* Dunning, 7 Hill 30, 42 Am. Dec. 33.

North Carolina.— Pollock *v.* Warwick, 104 N. C. 638, 10 S. E. 699.

Ohio.— Foote *v.* Palmer, Wright 336. See Fuller *v.* Pelton, 16 Ohio 457.

Pennsylvania.— Cornell *v.* Green, 10 Serg. & R. 14; Sheehan *v.* Rosen, 12 Pa. Super. Ct. 298; Beaver *v.* Whiteley, 3 Pa. Co. Ct. 613; Sharpless *v.* Dobbins, 1 Del. Co. 25.

South Carolina.— Shiel *v.* Randolph, 4 McCord 146.

England.— Smith *v.* Vale, 2 Esp. 607; Elliot *v.* Callow, 2 Salk. 597, 91 Eng. Reprint 506.

27. *Georgia.*— Bennett *v.* Odom, 30 Ga. 940.

Illinois.— Dickinson *v.* Boyd, 82 Ill. App. 251.

Indiana.— Barnes *v.* Bates, 28 Ind. 15; Reed *v.* Armstrong, 18 Ind. 446; Martin *v.* Bott, 17 Ind. App. 444, 46 N. E. 151.

Iowa.—Ahrens *v.* Fenton, 138 Iowa 559, 115 N. W. 233.

Maine.— Call *v.* Lothrop, 39 Me. 434; Dresser *v.* Witherle, 9 Me. 111.

New Jersey.— New Brunswick State Bank *v.* Holcomb, 7 N. J. L. 193, 11 Am. Dec. 549.

New York.— Goldstein *v.* Stern, 9 N. Y. Suppl. 274; Murphy *v.* Gold, etc., Tel. Co., 3 N. Y. Suppl. 804; Dakin *v.* Dunning, 7 Hill 30, 42 Am. Dec. 33.

Texas.— Erie Tel., etc., Co. *v.* Grimes, 82 Tex. 89, 17 S. W. 831.

Washington.— Traynor *v.* White, 44 Wash. 560, 87 Pac. 823.

Wisconsin.— Lewis *v.* Larson, 45 Wis. 353; Schnur *v.* Hickcox, 45 Wis. 200.

See 45 Cent. Dig. tit. "Tender," § 91.

A finding for a less sum than the amount paid in imports a finding against the tender. Berkheimer *v.* Geise, 82 Pa. St. 64.

1. Winkler *v.* Philadelphia, etc., R. Co., 4 Penn. (Del.) 80, 86, 53 Atl. 90.

2. State *v.* Freeman, 89 N. C. 469, 472.

3. Com. *v.* Hersey, 144 Mass. 297, 298, 11 N. E. 116. See also Young *v.* Boston, 104 Mass. 95, 104; Nicholls *v.* Malim, [1906] 1 K. B. 272, 277, 75 L. J. K. B. 140, 94 L. T. Rep. N. S. 161, 54 Wkly. Rep. 404.

The term is applicable, both in public and legal usage, to the parts of a building leased without the land upon which the building stands, as well as to an entire building. Miller *v.* Benton, 55 Conn. 529, 544, 13 Atl. 678; Taylor *v.* Hart, 73 Miss. 22, 30, 18 So. 546, 30 L. R. A. 716.

987 note 23. Building Regulations as Denial of Equal Protection of Law, see CONSTITUTIONAL LAW, 8 Cyc. 1062. Municipal Building Regulations, see MUNICIPAL CORPORATIONS, 28 Cyc. 736. Restrictive Covenants Against Building, see COVENANTS, 11 Cyc. 1078 note 73.)

TENEMENT FACTORY. As defined by the English Factory and Workshop Act of 1901, a factory where mechanical power is supplied to different parts of the same building occupied by different persons for the purpose of any manufacturing process or handicraft, in such manner that those parts constitute in law separate factories.[4]

TENEMENT-HOUSE. A community-house occupied by persons of small means, the distinguishing characteristics of which are the use in common of certain facilities by people crowded into insufficient space and deprived of many of the essentials of privacy, decency, and health;[5] a house with distinct tenements or homes, which separate different families or persons occupy as tenants;[6] a building having tenements occupied by poor families;[7] a building, the different rooms or parts of which are let for residence purposes by the possessor to others, as distinct tenements, so that each tenant, as to the room or rooms occupied by him, would sustain to the common landlord the same relation that the tenant occupying a whole house would to his landlord;[8] a house or block of buildings divided into dwellings occupied by separate families;[9] often in modern usage, an inferior dwelling-house rented to poor persons, or a dwelling erected for the purpose of being rented.[10]

"**It may consist of a single room or of** contiguous rooms, or of rooms upon different stories, if such rooms are controlled by a single person and are used in connection with each other. The fact (if it were so) that one of the rooms was occupied and used as a shop, and another for a living room or kitchen, by the same person, would not make these rooms distinct tenements." Com. *v.* Clynes, 150 Mass. 71, 72, 22 N. E. 436.

Tenement for unlawful sale of intoxicating liquors see INTOXICATING LIQUORS, 23 Cyc. 177 text and note 92.

For other definitions of the term see PROPERTY, 32 Cyc. 658.

4. Brass *v.* London County Council, [1904] 2 K. B. 336, 339, 68 J. P. 365, 73 L. J. K. B. 841, 2 Loc. Gov. 809, 91 L. T. Rep. N. S. 344, 20 T. L. R. 464, 53 Wkly. Rep. 27. See also Toller *v.* Spiers, [1903] 1 Ch. 362, 368, 67 J. P. 234, 72 L. J. Ch. 191, 1 Loc. Gov. 193, 87 L. T. Rep. N. S. 578, 19 T. L. R. 119, 51 Wkly. Rep. 330.

5. Lignot *v.* Jaekle, 72 N. J. Eq. 233, 238, 65 Atl. 221, where such was held to be the meaning of the term in a covenant against the erection of a "tenement-house." See also Kitching *v.* Brown, 180 N. Y. 414, 73 N. E. 241, 70 L. R. A. 742.

6. Musgrave *v.* Sherwood, 53 How. Pr. (N. Y.) 311, 315.

"**Boarding-house**" **and** "**hotel**" **distinguished** see Musgrave *v.* Sherwood, 54 How. Pr. (N. Y.) 338, 358.

7. Kitchings *v.* Brown, 37 Misc. (N. Y.) 439, 441, 75 N. Y. Suppl. 768 [*citing* Worcester Dict.].

Apartment house distinguished see Kitchings *v.* Brown, 92 N. Y. App. Div. 160, 162, 87 N. Y. Suppl. 75 [*affirming* 37 Misc. 439, 75 N. Y. Suppl. 768]; White *v.* Collins Bldg., etc., Co., 82 N. Y. App. Div. 1, 4, 81 N. Y. Suppl. 434, holding that a covenant not to erect a tenement-house on premises is not violated by the erection thereon of an "apartment house."

"**Tenement houses . . . commonly speaking are the poorest class of apartment-houses,** they are generally poorly built, without sufficient accommodations for light and ventilation, and are overcrowded; the middle rooms often receive no daylight, and it is no uncommon thing for several families to be crowded into one of those dark and unwholesome rooms. Bad air, want of sunlight, and filthy surroundings work the physical ruin of the wretched tenants, while their mental and moral condition is equally lowered. Attempts to reform the evils of tenement life have been going on for some time in many of the great cities of the world." International Cyclopædia [*quoted* in Kitchings *v.* Brown, 37 Misc. (N. Y.) 439, 441, 75 N. Y. Suppl. 768].

8. Linwood Park Co. *v.* Van Dusen, 63 Ohio St. 183, 200, 58 N. E. 576; Rose *v.* King, 49 Ohio St. 213, 227, 30 N. E. 267, 15 L. R. A. 160.

A four-story building, occupied by three families living in separate apartments on the second floor, and by two families living in separate apartments on the third floor, numbering sixteen persons, all tenants of one owner, is a tenement-house within the meaning of a statute making it the duty of any owner of any tenement-house to provide a convenient exit therefrom in case of fire. Rose *v.* King, 49 Ohio St. 213, 227, 30 N. E. 267, 15 L. R. A. 160.

9. Century Dict. [*quoted* in Rose *v.* King, 49 Ohio St. 213, 227, 30 N. E. 267, 15 L. R. A. 160].

10. Webster Dict. [*quoted* in Boyd *v.* Kerwin, 15 N. Y. Suppl. 721; Musgrave *v.* Sherwood, 54 How. Pr. (N. Y.) 338, 358]. See also Kitchings *v.* Brown, 37 Misc. (N. Y.) 439, 441, 75 N. Y. Suppl. 768.

TENEMENTUM. A term in the statute *de donis* which has been construed to extend to everything savoring of the realty.[11]

TENENDUM. Literally, "to hold; to be holden." The name of that formal part of a deed which is characterized by the words "to hold."[12] (See DEEDS, 13 Cyc. 551.)

TENENS DOMINO DEBITA SERVITIA TENETUR, ET DOMINUS INVICEM TENENTI PROTECTIONEM ET JURA SUA OMNIA. A maxim meaning "A tenant is bound to pay rent to his landlord, and the landlord to protect the tenant in all his rights under him."[13]

TENENS NIL FACERE POTEST, PROPTER OBLIGATIONEM HOMAGII QUOD VERTATUR DOMINO AD EXHÆREDATIONEM. A maxim meaning "A tenant, by force of the obligation by which he takes his title, can do no act which may operate to disinherit his landlord."[14]

TENET; TENUIT. Literally, "he holds; he held."[15]

TENN. The well-known and almost universal abbreviation for the name of the state of Tennessee.[16]

TENNESSEE MONEY. The notes of banks issued under the authority of Tennessee.[17]

TENON. To cut or fit for the insertion of a mortise.[18]

TENOR. An exact copy of an instrument;[19] an exact copy of a writing, set forth in the words and figures of it.[20] (Tenor: Pleading Defamatory Matter in

Statutory definition see Grimmer *v.* Tenement House Department, 134 N. Y. App. Div. 896, 898, 119 N. Y. Suppl. 812; White *v.* Collins Bldg., etc., Co., 82 N. Y. App. Div. 1, 6, 81 N. Y. Suppl. 434; Kitchings *v.* Brown, 37 Misc. (N. Y.) 439, 440, 75 N. Y. Suppl. 768.

11. Blackwell *v.* Wilkinson, Jeff. (Va.) 73, 79.

12. Black L. Dict.

13. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].

14. Morgan Leg. Max. [*citing* Coke Litt. 65].

15. Black L. Dict., adding: "In the Latin forms of the writ of waste against a tenant, these words introduced the allegation of tenure. If the tenancy still existed, and recovery of the land was sought, the former word was used, (and the writ was said to be 'in the *tenet*.') If the tenancy had already determined the latter term was used, (the writ being described as 'in the *tenuit*,') and then damages only were sought."

"**The word 'tenet'** in a writ always implies a tenant of the freehold." McKee *v.* Straub, 2 Binn. (Pa.) 1, 3.

16. Elliott *v.* Jordan, 7 Baxt. (Tenn.) 376, 378.

17. Taylor *v.* Neblett, 4 Heisk. (Tenn.) 491, 494. But see Searcy *v.* Vance, Mart. & Y. (Tenn.) 225, where it is said: "Nothing but gold or silver constitutes Tennessee money."

"**Tenessee bank notes**" compared and distinguished see Taylor *v.* Neblett, 4 Heisk. (Tenn.) 491, 494; Searcy *v.* Vance, Mart. & Y. (Tenn.) 225, 226; Gamble *v.* Hatton, Peck (Tenn.) 130.

18. Webster New Int. Dict. See Sarven *v.* Hall, 21 Fed. Cas. No. 12,370, 11 Blatchf. 295, 300, 6 Fish. Pat. Cas. 495, also defining "tenoned."

19. Thomas *v.* State, 103 Ind. 419, 426, 2 N. E. 808; State *v.* Chinn, 142 Mo. 507, 512, 44 S. W. 245; State *v.* Pullens, 81 Mo. 387, 392; State *v.* Page, 19 Mo. 213, 217; Fogg *v.* State, 9 Yerg. (Tenn.) 392, 394.

20. Bouvier L. Dict. [*quoted* in St. Lawrence Tp. *v.* Furman, 171 Fed. 400, 402, 96 C. C. A. 356]; Webster Dict. [*quoted* in Miller *v.* State, (Tex. Cr. App. 1896) 34 S. W. 267, 268].

Imports identity.— State *v.* Townsend, 86 N. C. 676, 679.

Imports an exact copy.— Teague *v.* State, 86 Ark. 126, 129, 110 S. W. 224; McDonnell *v.* State, 58 Ark. 242, 248, 24 S. W. 105 [*citing* Webster Dict.; Maxwell Cr. Proc.]; People *v.* Tilden, 242 Ill. 536, 538, 90 N. E. 218, 134 Am. St. Rep. 341; State *v.* Atkins, 5 Blackf. (Ind.) 458; Com. *v.* Wright, 1 Cush. (Mass.) 46, 65; State *v.* Fenly, 18 Mo. 445, 454 [*citing* 3 Chitty Cr. L. 1040].

Common and usual signification said to require only a statement of the import or substance of the instrument, as distinguished from the technical signification. Beeson *v.* Beeson, 1 Harr. (Del.) 466, 472.

Distinguished from: "Purport" see State *v.* Atkins, 5 Blackf. (Ind.) 458; State *v.* Callendine, 8 Iowa 288, 296; Com. *v.* Wright, 1 Cush. (Mass.) 46, 65; State *v.* Chinn, 142 Mo. 507, 512, 44 S. W. 245; State *v.* Pullens, 81 Mo. 387, 392; State *v.* Fenly, 18 Mo. 445, 454; Dana *v.* State, 2 Ohio St. 91, 94; Fogg *v.* State, 9 Yerg. (Tenn.) 392, 394; St. Lawrence Tp. *v.* Furman, 171 Fed. 400, 402, 96 C. C. A. 356. "Purport and effect" see Teague *v.* State, 86 Ark. 126, 129, 110 S. W. 224; State *v.* Bonney, 34 Me. 383, 384. "Substance" see Solomon *v.* Lawson, 8 Q. B. 823, 839, 10 Jur. 796, 15 L. J. Q. B. 253, 55 E. C. L. 823; Wright *v.* Clements, 3 B. & Ald. 503, 506, 22 Rev. Rep. 465, 5 E. C. L. 292, 106 Eng. Reprint 746. "Substantially"

Action For Libel or Slander, see LIBEL AND SLANDER, 25 Cyc. 447. Pleading Written Instrument In Hæc Verba, see PLEADING, 31 Cyc. 65. Setting Out Writing in Indictment — In General, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 354; For Criminal Libel, see LIBEL AND SLANDER, 25 Cyc. 577; For Forgery, see FORGERY, 19 Cyc. 1397.)

TENOR EST PACTIO CONTRA COMMUNEM FEUDI NATURAM AC RATIONEM, IN CONTRACTU INTERPOSITA. A maxim meaning "Tenure is a compact contrary to the common nature and reason of the fee, put into a contract." [21]

TENOR EST QUI LEGEM DAT FEUDO. A maxim meaning "It is the tenor of the feudal grant which regulates its effect and extent." [22]

TENOR INVESTITURÆ EST INSPICIENDUS. A maxim meaning "The tenor of an investiture is to be scrutinized." [23]

TENT. In the ordinary acceptation of the word, a pavilion, portable lodge, or canvas house, enclosed with walls of cloth and covered with the same material.[24] (Tent: Right of City to Prohibit Erection Within Fire Limits, see MUNICIPAL CORPORATIONS, 28 Cyc. 742 note 89.)

TENTATIVE TRUST. A suggested or proposed trust, not completed or consummated.[25] (See TRUSTS.)

TENTERDEN'S ACT. The statute of 9 Geo. IV, c. 14, taking its name from Lord Tenterden, which is an extension of the statute of frauds.[26] (See FRAUDS, STATUTE OF, 20 Cyc. 195.)

TENURE.[27] In its technical sense, the manner whereby lands or tenements are holden, or the service that the tenant owes to his lord; [28] the estate in the land; [29] the mode by which one holds an estate in land.[30] (Tenure: Of Office, see Cross-References Under TERM, *post*, p. 184. Of Ownership of Property, see Cross-References Under TITLE, *post*, p. 336.)

see Edgerton *v.* State, (Tex. Cr. App. 1902) 70 S. W. 90, 91.

As used in pleadings alleging that the instruments are set out according to their tenor the term binds a party to a strict recital. Com. *v.* Stevens, 1 Mass. 203, 204.

"Tenor of the bill" used in reference to a bill of exchange relates merely to the time and manner of payment. Lindley *v.* Waterloo First Nat. Bank, 76 Iowa 629, 631, 41 N. W. 381, 2 L. R. A. 709, 14 Am. St. Rep. 254.

"The tenor of the will" means its purport and effect, as opposed to the exact words thereof. Jones *v.* Casler, 139 Ind. 382, 390, 38 N. E. 812, 47 Am. St. Rep. 274 [*citing* Thornton L. Lost Wills 147].

21. Peloubet Leg. Max. [*citing* Wright Tenures 21].

22. Black L. Dict. [*citing* Broom Leg. Max.].

23. Morgan Leg. Max. [*citing* Wright Tenures].

24. Killman *v.* State, 2 Tex. App. 222, 224, 28 Am. Rep. 432.

Held to be a building within the meaning of a restriction in a deed against the erection of buildings other than dwellings to cost a specified sum see Blakemore *v.* Stanley, 159 Mass. 6, 7, 33 N. E. 689.

"House" distinguished see Callahan *v.* State, 41 Tex. 43, 45.

25. Matter of U. S. Trust Co., 117 N. Y. App. Div. 178, 180, 102 N. Y. Suppl. 271.

26. Black L. Dict.

27. **Derived from the Latin** *tenere* — **to hold.** State *v.* Harrison, 113 Ind. 434, 446, 16 N. E. 384, 3 Am. St. Rep. 663.

28. Bard *v.* Grundy, Ky. Dec. 168, 169.

29. Bard *v.* Grundy, Ky. Dec. 168, 169.

30. Bothin *v.* California Title Ins., etc., Co., 153 Cal. 718, 722, 96 Pac. 500 [*citing* Anderson L. Dict.; Bouvier L. Dict.], where it is said that while such is the meaning of the term, it imports any kind of holding from mere possession to the owning of the inheritance.

"The most common tenure by which lands are held in this country is 'fee simple,' which is an absolute tenure of land to a man and his heirs forever without rendering service of any kind." Bard *v.* Grundy, Ky. Dec. 168, 169.

A term of very extensive signification; which may import a mere possession, and may include every holding of an inheritance. Richman *v.* Lippincott, 29 N. J. L. 44, 59.

"Tenure of his patent" see Bard *v.* Grundy, Ky. Dec. 168, 169.

In reference to office the term has been construed to include the duration of the term of office, in addition to the manner of holding. People *v.* Waite, 9 Wend. (N. Y.) 58. See also People *v.* Bissell, 49 Cal. 407, 412 [*quoted* in Territory *v.* Ashenfelter, 4 N. M. 85, 103, 12 Pac. 879], where the word is construed as meaning "term."

A constitutional provision that "the General Assembly shall not create any office the 'tenure' of which shall be longer than four years" does not prevent one who holds an office created by the general assembly the term of which is four years, from holding over after the expiration of his term, until the successor be elected and qualified. State *v.* Harrison, 113 Ind. 434, 446, 16 N. E. 384, 3 Am. St. Rep. 663.

TERCERONES. In the Spanish and French West Indies, the production of a white person and a mulatto.[31] (See COLORED PERSONS, 7 Cyc. 400; MULATTO, 29 Cyc. 51; NEGRO, 29 Cyc. 661; QUADROON, 32 Cyc. 1276; QUINTERONES, 32 Cyc. 1395.)

TERM or **TERMS.**[32] In its general signification, words, phrases, and expressions by which the definite meaning of language is conveyed and determined;[33] in the plural form, in its restricted and legal sense, and as used chiefly in reference to contracts, the conditions, limitations, and propositions which comprise and govern the acts which the contracting parties agree expressly or impliedly to do or not to do;[34] conditions, propositions stated, or provisions made, which when assented to or accepted by another, settle the contract and bind the parties;[35] conditions; propositions; stipulations.[36] As applied to time, a fixed period, a determined or prescribed duration;[37] the time for which anything lasts; any limited time.[38] In reference to tenancies, the duration or extent of the interest

31. Daniel *v.* Guy, 19 Ark. 121, 131.

32. **Derived from the Latin *terminus*, a** limit or boundary. Hurd *v.* Whitsett, 4 Colo. 77, 89.

The word is susceptible of a very varied signification dependent on the subject-matter spoken of where, or in the sentence in which, it is used. Hutchinson *v.* Lord, 1 Wis. 286, 313, 60 Am. Dec. 381. See also Pilcher *v.* English, 133 Ga. 496, 502, 66 S. E. 163.

"Term" and "terms" distinguished see Hurd *v.* Whitsett, 4 Colo. 77, 89.

33. Hurd *v.* Whitsett, 4 Colo. 77, 84.

34. Hurd *v.* Whitsett, 4 Colo. 77, 84.

"In its legal signification, as applied to any instrument, it is generally employed to state a result or conclusion, and not the condition or stipulation. For example, it is frequently found in points, arguments, and pleadings, thus: the agreement, though it does not expressly, yet in terms it does, etc.; thus giving the effect of all its provisions." Walsh *v.* Mehrback, 5 Hun (N. Y.) 448, 449.

As employed in respect to leases the word embraces the covenants and conditions which impose, confer and limit the respective obligations and rights of the landlord and tenant during the continuance of the tenancy; such as the extent and manner of the use of the premises; quiet enjoyment; rent and its amount, mode and time of payment; repairs; payment of taxes, and the like express or implied agreements. Hurd *v.* Whitsett, 4 Colo. 77, 84.

35. Hutchinson *v.* Lord, 1 Wis. 286, 313, 60 Am. Dec. 381. See also Walsh *v.* Mehrback, 5 Hun (N. Y.) 448, 449; Ceranto *v.* Trimboli, 63 W. Va. 340, 343, 60 S. E. 138.

"Used in the civil law to denote 'the space of time granted to the debtor for discharging his obligation;' these are express terms resulting from the positive stipulations of the agreement, as 'where one undertakes to pay a certain sum on a certain day,' and also terms which tacitly result from the nature of the things which are the object of the engagement, or from the place where the act is agreed to be done. For instance, if a builder engage to construct a house for me, I must allow a reasonable time for fulfilling his engagement." Bouvier L. Dict. [*quoted* in Hutchinson *v.* Lord, 1 Wis. 286, 313, 60 Am. Dec. 381].

36. Worcester Dict. [*quoted* in Platter *v.* Elkhart County, 103 Ind. 360, 378, 2 N. E. 544].

Construed as meaning "compensation" in an act of appropriation reciting that the railroad company "having attempted and failed, and being unable to agree with the respondent in regard to the terms of, or in regard to the compensation therefor" see Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 116 Ind. 578, 587, 19 N. E. 440.

Held to include "rates or charges" as used in a statute providing that a person or corporation operating a railroad shall give to all persons reasonable and equal terms, benefits, etc., see State *v.* Central Vermont R. Co., 81 Vt. 463, 467, 71 Atl. 194, 130 Am. St. Rep. 1065.

Imposing a reasonable limitation in time for the completion of the work, is within the meaning of the word as used in a statute providing that when the people have voted a subscription in aid of a railroad, the county court shall make it "on such terms as they may deem advisable." West Virginia, etc., R. Co. *v.* Harrison County Ct., 47 W. Va. 273, 279, 34 S. E. 786.

"On terms the most advantageous to the public" see People *v.* Carr, 5 Silv. Sup. (N. Y.) 302, 303, 23 N. Y. Suppl. 112.

"Terms and condition" see O'Brien *v.* Moffitt, 133 Ind. 660, 669, 33 N. E. 616, 36 Am. St. Rep. 566; Rokes *v.* Amazon Ins. Co., 51 Md. 512, 519, 34 Am. Rep. 323; State *v.* Fawcett, 58 Nebr. 371, 376, 78 N. W. 636; Eureka Elastic Paint Co. *v.* Bennett-Hedgpeth Co., 85 S. C. 486, 488, 67 S. E. 738.

"Terms cash" see Lawder, etc., Co. *v.* Albert Mackie Grocery Co., 97 Md. 1, 10, 54 Atl. 634, 62 L. R. A. 795; George *v.* Joy, 19 N. H. 544, 546; Wellauer *v.* Fellows, 48 Wis. 105, 109, 4 N. W. 114; Nelson *v.* Patrick, 2 C. & K. 641, 643, 61 E. C. L. 641.

"Terms of attachment" see Casey *v.* Holmes, 10 Ala. 776, 789.

"Terms of sale" see Platter *v.* Elkhart County, 103 Ind. 360, 378, 2 N. E. 544.

37. State *v.* Tallman, 24 Wash. 426, 430, 64 Pac. 759; State *v.* Twichell, 9 Wash. 530, 533, 38 Pac. 134.

38. Webster Dict. [*quoted* in State *v.* Sayre, 118 Ala. 1, 52, 24 So. 89]. See also Com. *v.* Homer, 5 Metc. (Mass.) 555, 557, where it was held that, under a statute providing that a person who is lawfully impris-

in the premises acquired by the tenant from his landlord by the terms of his lease.[39] Also a limit; a boundary.[40] (Term or Terms: For Years, see LANDLORD AND TENANT, 24 Cyc. 958. Imposition of — On Affirmance of Judgment, see APPEAL AND ERROR, 3 Cyc. 422; On Allowance of Service of Demurrer After Expiration of Time, see PLEADING, 31 Cyc. 276; On Granting Continuance, see CONTINUANCES IN CIVIL CASES, 9 Cyc. 151; CONTINUANCES IN CRIMINAL CASES, 9 Cyc. 207; On Granting Leave to Amend Pleading, see EQUITY, 16 Cyc. 348; PLEADING, 31 Cyc. 377; On Granting Order of Substitution, see ATTORNEY AND CLIENT, 4 Cyc. 955; On Granting or Refusing Change of Venue, see CRIMINAL LAW, 12 Cyc. 260; VENUE; On Granting or Refusing Injunction, see INJUNCTIONS, 22 Cyc. 960; On Granting or Refusing New Trial, see NEW TRIAL, 29 Cyc. 1013; On Granting Stay of Proceedings Pending Appeal, see APPEAL AND ERROR, 2 Cyc. 895; Review of Discretion of Lower Court as to, see APPEAL AND ERROR, 3 Cyc. 336. Of Agency of Broker, see FACTORS AND BROKERS, 19 Cyc. 192. Of Agreement — As Question of Fact in Suit to Enforce Mechanic's Lien, see MECHANICS' LIENS, 27 Cyc. 422; Evidence as to in Suit to Enforce Mechanic's Lien, see MECHANICS' LIENS, 27 Cyc. 410. Of Annuity, see ANNUITIES, 2 Cyc. 461. Of Appointment as Official Newspaper, see NEWSPAPERS, 29 Cyc. 700. Of Charter-Party, see SHIPPING, 36 Cyc. 56. Of Composition With Creditors, see BANKRUPTCY, 5 Cyc. 356. Of Contract — As to Services or Materials in Lien Claim or Statement, see MECHANICS' LIENS, 27 Cyc. 175; Bill of Particulars as to, see PLEADING, 31 Cyc. 574; Certainty to Enforce Specifically, see SPECIFIC PERFORMANCE, 36 Cyc. 587; Effect of Custom to Explain, see CUSTOMS AND USAGES, 12 Cyc. 1081; Of Sale of Goods, Construction of, see SALES, 35 Cyc. 110; Statement of in Memorandum Required by Statute of Frauds, see FRAUDS, STATUTE OF, 20 Cyc. 258; Variance Between Allegations and Proof as to, in Suit to Enforce Mechanic's Lien, see MECHANICS' LIENS, 27 Cyc. 404; With Municipal Corporation, see MUNICIPAL CORPORATIONS, 28 Cyc. 655. Of Copyright, see COPYRIGHT, 9 Cyc. 929, 975. Of Court — In General, see COURTS, 11 Cyc. 726; Amendment of Pleading at Subsequent, see PLEADING, 31 Cyc. 407; Application For New Trial at Special or Trial, see NEW TRIAL, 29 Cyc. 922 note 14; Averment as to in Caption of Indict-

oned for certain causes mentioned, who breaks prison and escapes, may be punished by imprisonment for one year in addition to the unexpired portion of the term, the statute does not include a person who is imprisoned for trial, or for want of bail and the like.

Applied to a number of years the word imports a succession of years; an unbroken period of time. Gaillard *v.* Gaillard, 23 Miss. 152, 153; Lincoln *v.* Warren, 19 Vt. 170, 171; Royalton *v.* Bethel, 10 Vt. 22, 25.

"Any term of years" see *Ex p.* Seymour, 14 Pick. (Mass.) 40, 43.

"For a term of years" see Com. *v.* Evans, 16 Pick. (Mass.) 448, 450.

"Term of court" defined see COURTS, 11 Cyc. 726.

"Term of office" defined see OFFICERS, 29 Cyc. 1395.

"Term of the insurance" see Bangs *v.* Skidmore, 21 N. Y. 136, 140; Raegener *v.* Willard, 44 N. Y. App. Div. 41, 45, 60 N. Y. Suppl. 478.

"Term-time" see Brown *v.* Plott, 129 N. C. 272, 273, 40 S. E. 45.

39. Grizzle *v.* Pennington, 14 Bush (Ky.) 115, 116.

"The word . . . when used in respect to tenancies has in law a distinct and technical definition, signifying time, duration, and it means not only the limitation of the estate granted as to time; e. g., for life, for years, for a year, a month and the like, as may be specified in the lease; but it signifies the estate also, and interest that passes by the lease." Hurd *v.* Whitsett, 4 Colo. 77, 84 [*citing* Bouvier L. Dict.; Burrill L. Dict.; Taylor Landl. & Ten. § 16; Greenleaf Cruise, tit. 8, § 6]. See also Baldwin *v.* Thibadeau, 17 N. Y. Suppl. 532, 534, 28 Abb. N. Cas. 14; Weander *v.* Claussen Brewing Assoc., 42 Wash. 226, 228, 84 Pac. 735, 114 Am. St. Rep. 110 [*citing* Taylor Landl. & Ten. 16].

Frequently applied to a lease for a term of years, because its duration or continuance is bounded, limited, and determined. Austin *v.* Huntsville Coal, etc., Co., 72 Mo. 535, 542, 37 Am. Rep. 446 [*citing* Taylor Landl. & Ten. § 11]; Gay Mfg. Co. *v.* Hobbs, 128 N. C. 46, 48, 38 S. E. 26, 83 Am. St. Rep. 661; Delaware, etc., R. Co. *v.* Sanderson, 109 Pa. St. 583, 591, 1 Atl. 394, 58 Am. Rep. 743; Delaware, etc., R. Co. *v.* Sanderson, 2 C. Pl. (Pa.) 203, 209. See also Sanderson *v.* Scranton, 105 Pa. St. 469, 472.

40. Beus *v.* Shaughnessy, 2 Utah 492, 500.

As used in a power of attorney empowering the grantee of the power to grant, bargain and sell land or any part thereof "on such terms as to him shall seem meet," the word empowered the attorney in fact to sell on reasonable credit. Carson *v.* Smith, 5 Minn.

ment, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 234; Designation of in Declaration, Complaint, Petition, or Statement, see PLEADING, 31 Cyc. 94; Designation of in Process, see PROCESS, 32 Cyc. 432; District Courts of United States, see COURTS, 11 Cyc. 951; District of Columbia Courts, see COURTS, 11 Cyc. 964; Effect of Demand For Jury at Previous, see JURIES, 24 Cyc. 168; For Declaring Forfeiture of Bail, see BAIL, 5 Cyc. 128; For Docketing Cause on Appeal, see APPEAL AND ERROR, 2 Cyc. 877; For Filing Cases For Appeal, see APPEAL AND ERROR, 3 Cyc. 60; For Proceedings to Set Aside or Vacate Award, see ARBITRATION AND AWARD, 3 Cyc. 761, 762; For Removal of Cause From One State Court to Another, see COURTS, 11 Cyc. 995; For Taking Appeal, see APPEAL AND ERROR, 2 Cyc. 797; CRIMINAL LAW, 12 Cyc. 825; For Transmission and Filing of Record on Appeal, see APPEAL AND ERROR, 3 Cyc. 117; For Trial in General, see TRIAL; For Trial in Criminal Prosecution, see CRIMINAL LAW, 12 Cyc. 498; For Trial of Bastardy Proceedings, see BASTARDS, 5 Cyc. 665; Motion to Retax Cause After Close of, see COSTS, 11 Cyc. 163; Power of Special Judge After Adjournment of, see JUDGES, 23 Cyc. 564; Prescribing by Legislature as Encroachment on Judiciary, see CONSTITUTIONAL LAW, 8 Cyc. 823; Term Fees, see COSTS, 11 Cyc. 111; To Which Return of Process Should Be Made, see PROCESS, 32 Cyc. 432; Validity of Judgment Rendered After Time For Adjournment of, see JUDGMENTS, 23 Cyc. 676. Of Court at Which — Bill of Exceptions Must Be Presented, see APPEAL AND ERROR, 3 Cyc. 38; CRIMINAL LAW, 12 Cyc. 853; Demand For Jury Must Be Made, see JURIES, 24 Cyc. 163; Indictment Must Be Found, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 196; Judgment May Be Amended, Opened, or Vacated, see JUDGMENTS, 23 Cyc. 860, 861, 901, 902; Process May Be Amended, see PROCESS 32 Cyc. 536. Of Credit For Goods Sold, see SALES, 35 Cyc. 267. Of Employment — In General, see MASTER AND SERVANT, 26 Cyc. 972; Of Minister, see RELIGIOUS SOCIETIES, 34 Cyc. 1146; Of Seaman, see SEAMEN, 35 Cyc. 1186; Of Teacher, see SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 1079. Of Foreclosure Sale, see MORTGAGES, 27 Cyc. 1699. Of Imprisonment — In General, see CRIMINAL LAW, 12 Cyc. 967; For Contempt, see CONTEMPT, 9 Cyc. 52; Granting of Pardon After Service or Expiration of, see PARDONS, 29 Cyc. 1564; In Reformatory, see REFORMATORIES, 34 Cyc. 1007; Statement of in Sentence, see CRIMINAL LAW, 12 Cyc. 779. Of Judicial Sale, see JUDICIAL SALES, 24 Cyc. 26. Of Lease — In General, see LANDLORD AND TENANT, 24 Cyc. 902; Of Mine, see MINES AND MINERALS, 27 Cyc. 693; Of Railroad, see RAILROADS, 33 Cyc. 398; Oil, Gas, or Salt Lease, see MINES AND MINERALS, 27 Cyc. 722. Of License to Use Patent, see PATENTS, 30 Cyc. 957. Of Note on Renewal, Effect of Change in as to Discharge of Mortgage Debt, see MORTGAGES, 27 Cyc. 1411. Of Office — In General, see OFFICERS, 29 Cyc. 1395; Abatement of Mandamus Proceedings by Expiration of, see MANDAMUS, 26 Cyc. 420, 421; Commencement or Expiration of, as Determining Time to Bring Quo Warranto Proceedings, see QUO WARRANTO, 32 Cyc. 1432; Expiration of Pending Action By or Against Officer, see ABATEMENT AND REVIVAL, 1 Cyc. 119; Mandamus Against Officer After Expiration of, see MANDAMUS, 26 Cyc. 180; Powers of Justices of the Peace After Expiration of, see JUSTICES OF THE PEACE, 24 Cyc. 492. Of Office of — Appointee to Fill Vacancy in Office of Justice of the Peace, see JUSTICES OF THE PEACE, 24 Cyc. 413; Assignee For Benefit of Creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 227; Attorney-General, see ATTORNEY-GENERAL, 4 Cyc. 1025; Bank Officer, see BANKS AND BANKING, 5 Cyc. 454, 578; Board of Public Works, see MUNICIPAL CORPORATIONS, 28 Cyc. 482; Building Department Officer, see MUNICIPAL CORPORATIONS, 28 Cyc. 539; Chief or Superintendent of Police, see MUNICIPAL CORPORATIONS, 28 Cyc. 491; City Marshal, see MUNICIPAL CORPORATIONS, 28 Cyc.

78, 77 Am. Dec. 539. But it does not authorize the attorney in fact to take bonds in payment of the purchase-money. Paul *v.* Grimm, 165 Pa. St. 139, 148, 30 Atl. 721, 44 Am. St. Rep. 648.

Held to mean "boundary, limit, or extent of the grant," in a statute providing that a railroad company may agree with the public authorities as to the manner, terms, and conditions under which a railroad may be

494; Clerk of Court, see CLERKS OF COURTS, 7 Cyc. 202; County Officer, see COUNTIES, 11 Cyc. 423; Court Commissioner, see COURT COMMISSIONERS, 11 Cyc. 625; Educational Board or Officer, see SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 859, 864; Executor or Administrator, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 74; Guardian, see GUARDIAN AND WARD, 21 Cyc. 50; Health Officer, see HEALTH, 21 Cyc. 385; Highway Officer, see STREETS AND HIGHWAYS, 37 Cyc. 214; Hospital Officer, see HOSPITALS, 21 Cyc. 1108; Judge, see JUDGES, 23 Cyc. 513; Jury Commissioner, see JURIES, 24 Cyc. 211; Justice of the Peace, see JUSTICES OF THE PEACE, 24 Cyc. 411; Municipal Officer in General, see MUNICIPAL CORPORATIONS, 28 Cyc. 423; Notary, see NOTARIES, 29 Cyc. 1073; Officer of Religious Society, see RELIGIOUS SOCIETIES, 34 Cyc. 1132; Police Commissioner or Board, see MUNICIPAL CORPORATIONS, 28 Cyc. 487; Policeman, see MUNICIPAL CORPORATIONS, 28 Cyc. 503; Poor Officer, see PAUPERS, 30 Cyc. 1069; Prosecuting or District Attorney, see PROSECUTING AND DISTRICT ATTORNEYS, 32 Cyc. 292; Railroad Commissioner, see RAILROADS, 33 Cyc. 49; Receiver, see RECEIVERS, 34 Cyc. 168; Receiver of Railroad, see RAILROADS, 33 Cyc. 615; Register of Deeds, see REGISTER OF DEEDS, 34 Cyc. 1018; School-District Board or Officer, see SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 888; Sheriff or Constable, see SHERIFFS AND CONSTABLES, 35 Cyc. 1496, 1512; State Officer, Agent, or Employee in General, see STATES, 36 Cyc. 859; Street or Sewer Department Officer, see MUNICIPAL CORPORATIONS, 28 Cyc. 558; Tax Assessor, see TAXATION, 37 Cyc. 978; Tax Collector, see TAXATION, 37 Cyc. 1195; Town Officer, see TOWNS; Trustee, see TRUSTS; Trustee Under Railroad Mortgage, see RAILROADS, 33 Cyc. 507; United States Commissioner, see UNITED STATES COMMISSIONERS; United States Marshal, see UNITED STATES MARSHALS; United States Officer, see UNITED STATES. Of Partnership — In General, see PARTNERSHIP, 30 Cyc. 417; Limited Partnership, see PARTNERSHIP, 30 Cyc. 758. Of Patent, see PATENTS, 30 Cyc. 915. Of Payment For Goods Sold — Evidence to Aid Construction of Contract of Sale as to, see SALES, 35 Cyc. 122; Variance Between Allegations and Proof as to, in Action For Price or Value, see SALES, 35 Cyc. 562. Of Payment For Work and Materials as Determining Right to Mechanic's Lien, see MECHANICS' LIENS, 27 Cyc. 70. Of Receiver's Sale, see RECEIVERS, 34 Cyc. 317. Of Redemption From Mortgage Foreclosure, see MORTGAGES, 27 Cyc. 1862. Of Risk Under Insurance Policy, see ACCIDENT INSURANCE, 1 Cyc. 239; EMPLOYERS' LIABILITY INSURANCE, 15 Cyc. 1039; FIDELITY INSURANCE, 19 Cyc. 518; FIRE INSURANCE, 19 Cyc. 673; LIFE INSURANCE, 25 Cyc. 742; MARINE INSURANCE, 26 Cyc. 595. Of Sale — By Order of Court of Decedent's Estate, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 766; By Trustee, see TRUSTS; Of County Bonds, see COUNTIES, 11 Cyc. 570; Of Land For Taxes, see TAXATION 37 Cyc. 1361; Of Mortgaged Premises, Directions as to in Judgment or Decree of Foreclosure, see MORTGAGES, 27 Cyc. 1653; On Execution, see EXECUTIONS, 17 Cyc. 1253; Parol Evidence Secondary to Written Evidence of, see EVIDENCE, 17 Cyc. 488; Under Foreclosure of Lien or Mortgage on Railroad, see RAILROADS, 33 Cyc. 587; Under Power in Mortgage, see MORTGAGES, 27 Cyc. 1481. Of School, see SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 1124. Of Service as — Grand Juror, see GRAND JURIES, 20 Cyc. 1332; Juror, see JURIES, 24 Cyc. 263. Of Tenancy From — Month to Month Created by Tenant Holding Over, see LANDLORD AND TENANT, 24 Cyc. 1036; Year to Year Created by Tenant Holding Over, see LANDLORD AND TENANT, 24 Cyc. 1033. Of Trust, see TRUSTS. Reformation, see REFORMATION OF INSTRUMENTS, 34 Cyc. 1033. Technical in Pleading, see PLEADING, 31 Cyc. 78. Used in — Describing Property Mortgaged, Construction and Operation of, see MORTGAGES, 27 Cyc. 1134; Statutes, see STATUTES, 36 Cyc. 968.

TERM-FEES. See COSTS, 11 Cyc. 111.

TERMINAL. Forming the terminus or extremity.[41] (Terminal: Companies,

built and constructed on a certain highway see Cleveland, etc., R. Co. *v.* Cincinnati, Ohio Prob. 269, 278.

41. Webster New Int. Dict.

"Terminal facilities, as understood by those operating railroads, do not include

Mandamus to, see MANDAMUS, 26 Cyc. 375. Facilities — Condemnation of Land For, see EMINENT DOMAIN, 15 Cyc. 592; Regulation by State of Charges For, see COMMERCE, 7 Cyc. 450 note 94.)

TERMINATING SOCIETY. See BUILDING AND LOAN SOCIETIES, 6 Cyc. 121.

TERMINATION. Bound; limit in space or extent.[42] (Termination: Of Action, see ACTIONS, 1 Cyc. 757. Of Agency — In General, see PRINCIPAL AND AGENT, 31 Cyc. 1292; For Insurance Company, see INSURANCE, 22 Cyc. 1428; Of Broker, see FACTORS AND BROKERS, 19 Cyc. 192; Of Factor, see FACTORS AND BROKERS, 19 Cyc. 117; Of Husband For Wife, see HUSBAND AND WIFE, 21 Cyc. 1424. Of Alimony, see DIVORCE, 14 Cyc. 788. Of Annuity, see ANNUITIES, 2 Cyc. 461. Of Apprenticeship, see APPRENTICES, 3 Cyc. 561. Of Association, see ASSOCIATIONS, 4 Cyc. 315. Of Authority of — Arbitrator, see ARBITRATION AND AWARD, 3 Cyc. 629; Executor or Administrator, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 145; Guardian, see GUARDIAN AND WARD, 21 Cyc. 50; INSANE PERSONS, 22 Cyc. 1145; Guardian Ad Litem, see INFANTS, 22 Cyc. 669; Officer of Religious Society, see RELIGIOUS SOCIETIES, 34 Cyc. 1133; Person in Representative or Official Capacity Pending Action, see ABATEMENT AND REVIVAL, 1 Cyc. 118; Trustee, see TRUSTS. Of Bailment, see BAILMENTS, 5 Cyc. 204. Of Building and Loan Association, see BUILDING AND LOAN SOCIETIES, 6 Cyc. 160. Of Cause on Appeal and Error in Mandamus Proceedings, see MANDAMUS, 26 Cyc. 508. Of Charitable Trust, see CHARITIES, 6 Cyc. 971. Of Charter of Franchise For Turnpike or Toll Road, see TOLL ROADS. Of Contract — In General, see CONTRACTS, 9 Cyc. 593; Effect as Specific Performance, see SPECIFIC PERFORMANCE, 36 Cyc. 631; For Water Rights by Abandonment of Canal, see CANALS, 6 Cyc. 280; Of Employment, Construction of, see MASTER AND SERVANT, 26 Cyc. 1048; Of Sale of Goods, see SALES, 35 Cyc. 119. Of Corporate Existence — In General, see CORPORATIONS, 10 Cyc. 1270; Of Railroad Company, see RAILROADS, 33 Cyc. 76. Of Cotenancy, see JOINT TENANCY, 23 Cyc. 487; TENANCY IN COMMON, *ante*, p. 13. Of Coverture, Effect on Antenuptial Liabilities of Wife, see HUSBAND AND WIFE, 21 Cyc. 1213. Of Curatorship, see ABSENTEES, 1 Cyc. 204, 207. Of Easement — In General, see EASEMENTS, 14 Cyc. 1185; In Party-Wall, see PARTY-WALLS, 30 Cyc. 779. Of Employment — Affecting Right of Attorney to Lien, see ATTORNEY AND CLIENT, 4 Cyc. 983; Of Servant or Employee, see MASTER AND SERVANT, 26 Cyc. 980. Of Exemption From Taxation, see TAXATION, 37 Cyc. 900. Of Grant of Public Aid to Railroads, see RAILROADS, 33 Cyc. 86. Of Guardianship — Action by Guardian After, see GUARDIAN AND WARD, 21 Cyc. 192; Pending Suit, Effect of, see GUARDIAN AND WARD, 21 Cyc. 206. Of Homestead, see HOMESTEADS, 21 Cyc. 465. Of Insurable Interest, see LIFE INSURANCE, 25 Cyc. 711. Of Joint Stock Company, see JOINT STOCK COMPANIES, 23 Cyc. 479. Of Landlord's Estate, Effect on Tenancy, see LANDLORD AND TENANT, 24 Cyc. 1340. Of Lease — For Term of Years, see LANDLORD AND TENANT, 24 Cyc. 960; Of Railroad, see RAILROADS, 33 Cyc. 396. Of Liability For Support of Children on Divorce, see DIVORCE, 14 Cyc. 814. Of License — In General, see LICENSES, 25 Cyc. 625; In Respect to Real Property, see LICENSES, 25 Cyc.

tracks other than those used in making up trains." Jacksonville, etc., R. Co. *v.* Louisville, etc., R. Co., 150 Ill. 480, 483, 37 N. E. 924.

"**Terminal point,**" in reference to an interstate shipment, is the place of consignment, or the point at which the carriage of one common carrier ends, and that of another begins. Great Northern R. Co. *v.* Walsh, 47 Fed. 406, 409.

"**Terminals**" **used on cars** run by electrical power see FUSE, 20 Cyc. 868 note 55.

42. Century Dict.

"**The voyage is understood to be terminated,** when the vessel arrives at her port of destination, and has been moored there in safety for twenty-four hours." Gracie *v.* Marine Ins. Co., 8 Cranch (U. S.) 75, 82, 3 L. ed. 492.

Distinguished from "expiration" in reference to a lease see Kramer *v.* Amberg, 15 Daly (N. Y.) 205, 207, 4 N. Y. Suppl. 613.

"**Termination of his employment**" see Edelsohn *v.* Singer Mfg. Co., 1 Misc. (N. Y.) 166, 167, 20 N. Y. Suppl. 655.

"**Termination of the prosecution**" see Wright *v.* Donaldson, 158 Pa. St. 88, 91, 27 Atl. 867.

"**Termination of this agreement**" see

645; To Use Street, see MUNICIPAL CORPORATIONS, 28 Cyc. 889. Of Lien of — Agistor, see ANIMALS, 2 Cyc. 320; Judgment, see JUDGMENTS, 23 Cyc. 1402; Judgment of United States Court, see JUDGMENTS, 23 Cyc. 1362 note 69; Vendor, see VENDOR AND PURCHASER. Of Life-Estate, see ESTATES, 16 Cyc. 644. Of Main Action — Allegation of in Suit For Wrongful Attachment, see ATTACHMENTS, 4 Cyc. 855; As Condition Precedent to Suit For Wrongful Attachment, see ATTACHMENT, 4 Cyc. 838. Of Marriage Relation, see DIVORCE, 14 Cyc. 556; MARRIAGE, 26 Cyc. 899. Of Membership in Association, see ASSOCIATIONS, 4 Cyc. 302; BUILDING AND LOAN SOCIETIES, 6 Cyc. 126. Of Mining Partnership, see MINES AND MINERALS, 27 Cyc. 762. Of Ministerial Office or Relation, see RELIGIOUS SOCIETIES, 34 Cyc. 1146. Of Mission or Office of Ambassadors, see AMBASSADORS AND CONSULS, 2 Cyc. 362. Of Office in General, see OFFICERS, 29 Cyc. 1403. Of Partnership, see PARTNERSHIP, 30 Cyc. 650. Of Patent, see PATENTS, 30 Cyc. 915. Of Plaintiff's Title or Interest as Abating Suit by, see ABATEMENT AND REVIVAL, 1 Cyc. 116. Of Power, see POWERS, 31 Cyc. 1051. Of Prosecution, Liability For Malicious Prosecution as Dependent on, see MALICIOUS PROSECUTION, 26 Cyc. 55. Of Receivership — In General, see RECEIVERS, 34 Cyc. 168; Of Railroad, see RAILROADS, 33 Cyc. 621. Of Reference, see REFERENCES, 34 Cyc. 801. Of Relation — Of Attorney and Client, see ATTORNEY AND CLIENT, 4 Cyc. 952; Of Carrier and Passenger, see CARRIERS, 6 Cyc. 541; Of Landlord and Tenant, Effect on Right to Distrain, see LANDLORD AND TENANT, 24 Cyc. 1285; Of Master and Servant, see MASTER AND SERVANT, 26 Cyc. 1086. Of Right — Of Railroad Company to Use Highway, see RAILROADS, 33 Cyc. 201; To Child's Services and Earnings, see PARENT AND CHILD, 29 Cyc. 1626, 1627; To Use Street, see MUNICIPAL CORPORATIONS, 28 Cyc. 889. Of Risk Under Insurance Policy, see FIRE INSURANCE, 19 Cyc. 673; MARINE INSURANCE, 26 Cyc. 599, 600. Of Suit — Involuntary, see DISMISSAL AND NONSUIT, 14 Cyc. 425; Voluntary, see DISMISSAL AND NONSUIT, 14 Cyc. 394. Of Suretyship, see PRINCIPAL AND SURETY, 32 Cyc. 74. Of Tax Lien, see TAXATION, 37 Cyc. 1147. Of Tenancy — Allegation as to in Action For Rent, see LANDLORD AND TENANT, 24 Cyc. 1214; As Affecting Adverse Possession Against Landlord, see ADVERSE POSSESSION, 1 Cyc. 1061; In Dower, see DOWER, 14 Cyc. 1016. Of Title, Estoppel of Tenant to Show, see LANDLORD AND TENANT, 24 Cyc. 951. Of Title or Right to Trade-Mark and Trade-Name, see TRADE-MARKS AND TRADE-NAMES. Of Testamentary Trust, see WILLS. Of Trust, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 224; TRUSTS. Of War, see WAR.)

TERMINEM QUOD TENETUR TENEMENTO NON FIT HOMAGII, FIT TAMEN INDE FIDELITATIS SACRAMENTUM. A maxim meaning "There is no oath of homage for a tenement held for a term, but only an oath of fealty." [43]

TERMINER. See COURT OF OYER AND TERMINER, 11 Cyc. 630.

TERM INSURANCE. See LIFE INSURANCE, 25 Cyc. 699.

TERMINUS. In reference to a railway, the extreme point at either end of a railway; also, the buildings for offices, etc., at the extremity of a railway.[44] (Terminus: As Determining Whether Transportation Is Interstate, see COMMERCE, 7 Cyc. 417. Compliance With Statute as to in Condemnation Proceedings, see EMINENT DOMAIN, 15 Cyc. 817. Of Highway, see STREETS AND HIGHWAYS, 37 Cyc. 116. Of Private Road, see PRIVATE ROADS, 32 Cyc. 368. Of Railroad, see RAILROADS, 33 Cyc. 121.)

TERMINUS ANNORUM CERTUS DEBET ESSE ET DETERMINATUS. A maxim meaning "A term of years ought to be certain and determinate." [45]

Johnson *v.* Union Switch, etc., Co., 59 N. Y. Super. Ct. 169, 172, 13 N. Y. Suppl. 612.

43. Morgan Leg. Max. [*citing* Coke Litt. 69*b*].

44. Imperial Dict. [*quoted* in Goyeau *v.* Great Western R. Co., 25 Grant Ch. (U. C.) 62, 64].

Terminus a quo see PRIVATE RIGHT OF WAY, 32 Cyc. 362 note 12.

Terminus ad quem see PRIVATE RIGHT OF WAY, 32 Cyc. 362 note 12.

45. Black L. Dict. (2d ed.) [*citing* Coke Litt. 45]; Bouvier L. Dict. [*citing* Coke Litt. 45].

TERMINUS ET FEODUM NON POSSUNT CONSTARE SIMUL IN UNA EADEMQUE PERSONA. A maxim meaning "A term and the fee cannot both be in one and the same person at the same time." [46]

TERRÆ LEGEM AMITTENTES PERPETUAM INFAMIÆ NOTAM INDE MERITO INCURRUNT. A maxim meaning "Those who do not observe the law of the land justly ought to bear the brand of infamy." [47]

TERRA MANENS VACUA OCCUPANTI CONCEDITUR. A maxim meaning "Land lying unoccupied is given to the first occupant." [48]

TERRA STERILIS, EX VI TERMINI, EST TERRA INFŒCUNDA, NULLUM FERENS FRUCTUM. A maxim meaning "Sterile land is by force of the term barren, bearing no fruit." [49]

TERRA TRANSIT CUM ONERE. A maxim meaning "Land passes with the incumbrances." [50]

TERRE-TENANT. In a general sense, one who is seized or actually possessed of lands as the owner thereof.[51] In a scire facias on mortgage or judgment, in a more restricted sense, one, other than the debtor, who becomes seized or possessed of the debtor's lands, subject to the lien thereof;[52] one in whom the title to the encumbered estate has vested.[53] (Terre-Tenant: As Party Defendant in Proceedings by Scire Facias to Revive Judgment, see JUDGMENTS, 23 Cyc. 1455. Defense by to Revival of Judgment, see JUDGMENTS, 23 Cyc. 1444.)

TERRIBLE. In its ordinary signification, frightful; adapted to excite terror; dreadful.[54]

TERRIER. The ecclesiastical instrument directed by the bishop to ascertain the glebe lands of the church, and the portions of tithes out of the parish.[55]

TERRITORIAL. A term used to signify connection with, or limitation with reference to, a particular country or territory.[56] (Territorial: Courts — In General, see COURTS, 11 Cyc. 954; Jurisdiction to Issue Writs of Prohibition, see PROHIBITION, 32 Cyc. 623; Necessity of Statement of Facts on Appeal From, see APPEAL AND ERROR, 2 Cyc. 1078 note 22. Jurisdiction, see COURTS, 11 Cyc. 661, 681, 684.)

46. Black L. Dict. See also Newall *v.* Wright, 3 Mass. 138, 141, 3 Am. Dec. 98; Colthirst *v.* Bejushin, Plowd. 21, 29, 75 Eng. Reprint 33.

47. Morgan Leg. Max. [*citing* 3 Coke Inst. 221].

48. Black L. Dict. [*citing* Geary *v.* Barecroft, 1 Sid. 346, 347, 82 Eng. Reprint 1148].

49. Peloubet Leg. Max. [*citing* 2 Coke Inst. 665].

50. Bouvier L. Dict. [*citing* Coke Litt. 231; Broom Leg. Max. 437, 630].

51. Hulett *v.* Mutual L. Ins. Co., 114 Pa. St. 142, 146, 6 Atl. 554.

52. Hulett *v.* Mutual L. Ins. Co., 114 Pa. St. 142, 146, 6 Atl. 554.

53. Eberhart's Appeal, 39 Pa. St. 509, 512, 80 Am. Dec. 536.

Includes all who are in possession, deriving title under the judgment debtor, such as heirs, devisees, or alienees, after the judgment. Polk *v.* Pendleton, 31 Md. 118, 123.

Not every one who happens to be in possession of land is a terre-tenant. There can be no terre-tenant, who is not a purchaser of the estate, mediately or immediately, from the debtor while it was bound by the judgment; and, when he has taken title thus bound, he must in ejectment show how the lien of it has been discharged, whether by payment, release, or efflux of time. Dengler *v.* Kiehner, 13 Pa. St. 38, 41, 53 Am. Dec. 441.

54. Denver, etc., R. Co. *v.* Roller, 100 Fed. 738, 754, 41 C. C. A. 22, 49 L. R. A. 77.

55. Potts *v.* Durant, Anstr. 789, 796, 4 Rev. Rep. 864.

56. Black L. Dict.

"Territorial jurisdiction" defined see Bouvier L. Dict. [*quoted* in Phillips *v.* Thralls, 26 Kan. 780, 781].

Territorial marshal is neither a federal, nor a district, nor a township officer. *Ex p.* Duncan, 1 Utah 81, 88.

TERRITORIES

By Charles Sumner Lobingier
Judge of the Court of First Instance, Manila, Philippine Islands*

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CROSS-REFERENCES

For Matters Relating to:
District of Columbia, see DISTRICT OF COLUMBIA, 14 Cyc. 526.
Indians, see INDIANS, 22 Cyc. 109.
State, see STATES, 36 Cyc. 820.
Territorial Courts, see COURTS, 11 Cyc. 954.
United States, see UNITED STATES.

I. DEFINITION, NATURE, AND CLASSIFICATION.

A. Definition and Nature. By a division older than the federal constitution itself the American domain is recognized as consisting of "states" and "territories belonging to the United States," [1] and the same division is recognized in the constitution,[2] and by the courts.[3] Particular subdivisions of territory

1. See Clinton *v.* Englebrecht, 13 Wall. (U. S.) 434, 441, 20 L. ed. 659 (holding that as early as 1784 an ordinance was adopted by the congress of the confederation providing for the division of all the territory ceded or to be ceded, into states, with boundaries ascertained by the ordinance. These states were severally authorized to adopt for their temporary government the constitution and laws of any one of the states, and provision was made for their ultimate admission by delegates into the congress of the United States); *Ex p.* Morgan, 20 Fed. 298, 304 [*citing* Schouler Hist. U. S. 98] (where the court says: "We find a continental resolution of October 10, 1780, to be the foundation of our territorial system. This declares that the 'demesne or territorial lands shall be disposed of for the common benefit of the United States and be settled and formed into distinct republican states, which shall become members of the federal Union and have the same rights of sovereignty, freedom, and independence as other states'").

2. U. S. Const. art. 4, § 3.

"It is remarkable how silent the Constitution is on the subject of a Territory so called, that is, an organized government within the Union, but not of it. Once only does the word 'territory' occur in the Constitution, and then it is the 'territory or other property,' of which Congress is to 'dispose': none of these being very apt expressions to describe political legislation for a territorial government." 7 Op. Atty.-Gen. 574.

3. See Loughborough *v.* Blake, 5 Wheat. (U. S.) 317, 319, 5 L. ed. 98, where Chief Justice Marshall, construing the phrase the

belonging to the United States have come to be known specifically as "territories," [4] a term often loosely used,[5] and defined to be political subdivisions of the outlying dominion of the United States,[6] the relation of which to the general

"United States," observes: "Does this term designate the whole, or any particular portion of the American empire? Certainly, this question can admit of but one answer. It is the name given to our great republic, which is composed of states and territories. The District of Columbia, or the territory west of Missouri, is not less within the United States, than Maryland or Pennsylvania"

4. See Reynolds *v.* People, 1 Colo. 179; Territory *v.* O'Connor, 5 Dak. 397, 41 N. W. 746, 3 L. R. A. 355; Territory *v.* Scott, 3 Dak. 357, 20 N. W. 401; Treadway *v.* Schnauber, 1 Dak. 236, 46 N. W. 464; Brunswick First Nat. Bank *v.* Yankton County, 101 U. S. 129, 25 L. ed. 1046; *Ex p.* Morgan, 20 Fed. 298.

5. Peck Steamship Co. *v.* New York, etc., Steamship Co., 2 Porto Rico Fed. 109, 127.

6. Brunswick First Nat. Bank *v.* Yankton County, 101 U. S. 129, 133, 25 L. ed. 1046 [*quoted* in People *v.* Daniels, 6 Utah 288, 292, 22 Pac 159, 5 L. R. A. 444].

Other definitions are: "An outlying province of the national government." Territory *v.* O'Connor, 5 Dak. 397, 41 N. W. 746, 748, 3 L. R. A. 355.

"A portion of the country not included within the limits of any state, and not yet admitted as a state into the Union, but organized under the laws of congress, with a separate legislature, under a territorial governor and other officers appointed by the president and senate of the United States." *Ex p.* Morgan, 20 Fed. 298, 305 [*quoted* in Kopel *v.* Bingham, 211 U. S. 468, 475, 29 S. Ct. 190, 53 L. ed. 286].

"Mere dependencies of the United States, exercising delegated powers." People *v.* Daniels, 6 Utah 288, 291, 22 Pac. 159, 5 L. R. A. 444.

"Portions of the United States not yet created into states." Territory *v.* Long Bell Lumber Co., 22 Okla. 890, 897, 99 Pac. 911.

"A territory is . . . a vast municipal or public corporation created by congress, and deriving all its powers from the source of its creation. It is a great body politic and corporate, invested with subordinate legislative powers, to facilitate the due and proper administration of its own internal affairs, and to promote the general welfare of the municipality." Treadway *v.* Schnauber, 1 Dak. 236, 46 N. W. 464, 475.

The domain of the Cherokee nation has been held to be neither a state nor a territory. It has an autonomy but it does not come within the meaning of either a state or territory, but is a part of what is called "Indian country." *Ex p.* Morgan, 20 Fed. 298. *Compare* Peck Steamship Line *v.* New York, etc., Steamship Co., 2 Porto Rico Fed. 109, 127. On the other hand a statute in reference to a certificate by the governor of a state or territory annexed to certain deeds has been held to include the Cherokee nation. Whitsett *v.* Forehand, 79 N. C. 230, 232.

Chronological table of territories

Organized

	Name	Date	Organic Act
1	Northwest Territory	1787	Ordinance of 1787
2	Territory South of the River Ohio.	1790	1 U. S. St. at L. 123
3	Mississippi	1798	1 " " " 549
4	Indiana	1800	2 " " " 58
5	Orleans	1804	2 " " " 283
6	Louisiana	1805	2 " " " 331
7	Michigan	1805	2 " " " 309
8	Illinois	1809	2 " " " 514
9	Missouri	1812	2 " " " 743
10	Alabama	1817	3 " " " 371
11	Arkansas	1819	3 " " " 493
12	Florida	1822	3 " " " 654
13	Wisconsin	1836	5 " " " 10
14	Iowa	1838	5 " " " 235
15	Oregon	1848	9 " " " 323
16	Minnesota	1849	9 " " " 403
17	New Mexico	1850	9 " " " 446
18	Utah	1850	9 " " " 453
19	Washington	1853	10 " " " 172
20	Nebraska	1854	10 " " " 277
21	Kansas	1854	10 " " " 277
22	Colorado	1861	12 " " " 172
23	Nevada	1861	12 " " " 209
24	Dakota	1861	12 " " " 239
25	Arizona	1863	12 " " " 664
26	Idaho	1863	12 " " " 808
27	Montana	1864	13 " " " 85
28	Wyoming	1868	15 " " " 178

government is much the same as that which counties bear to the several states.[7] Although the term is sometimes used as not including all the territorial possessions of the United States, but only the portions thereof organized and exercising governmental functions under act of congress,[8] it may now be considered as applicable to any political unit subject exclusively to the federal government whose power thereover it is held to be that makes the subdivision a "territory" rather than its geographical location,[9] or the particular form of government with which it is, more or less temporarily, invested.[10] Nor does the term "territory" apply solely to embryo states.[11] Alaska is one of the territories of the

Chronological table of territories (*Continued*)

	Name	Date	Organic Act
Organized			
29	District of Columbia	1871	16 U. S. St. at L. 419
30	Alaska	1884	23 " " " c. 53
31	Oklahoma	1890	26 " " " " 182
32	Porto Rico	1900	(Apr. 12) 31 " " " " 191
33	Hawaii	1900	(Apr. 30) 31 " " " p. 141
34	Philippines	1902	32 " " " 691
35	Panama Canal Zone	1904	(temporary) 33 " " " 429
Unorganized			
36	Indian Territory	1889	(U. S. court estab.) 25 U. S. St. at L. 783
		1890	(boundary fixed) 26 " " " 81
37	Guam.		
38	Tutuila.		

See McAllister *v.* U. S., 141 U. S. 174, 185 note, 11 S. Ct. 949, 35 L. ed. 693; Clinton *v.* Englebrecht, 13 Wall. (U. S.) 434, 441–445, 20 L. ed. 659.

The term "state" does not include territories within the contemplation of the federal constitution. Seton *v.* Hanham, R. M. Charlt. (Ga.) 374; Hepburn *v.* Ellzey, 2 Cranch (U. S.) 445, 452, 2 L. ed. 332. Nor is a territory a "state" within the meaning of the judiciary acts (Smith *v.* U. S., 1 Wash. Terr. 262, 268; *In re* Murphy, 5 Wyo. 297, 303, 40 Pac. 398; Miners Bank *v.* Iowa, 12 How. (U. S.) 1, 6, 13 L. ed. 867; Scott *v.* Jones, 5 How. (U. S.) 343, 377, 12 L. ed. 181; New Orleans *v.* Winter, 1 Wheat. (U. S.) 91, 94, 4 L. ed. 44; Darst *v.* Peoria, 13 Fed. 561, 564); nor within the meaning of an act forbidding the transfer of lottery tickets "from one state to another" (U. S. *v.* Ames, 95 Fed. 453, 455). But it is held that a territory is included within the term "state" as used in the federal pilotage and seamen's acts (The Abercorn, 26 Fed. 877, 879 [*affirmed* in 28 Fed. 384]; The Ullock, 19 Fed. 207, 212, 9 Sawy. 634; *In re* Bryant, 4 Fed. Cas. No. 2,067, Deady 118, 121; The Panama, 18 Fed. Cas. No. 10,702, Deady 27, 31, 1 Oreg. 418); in the National Banking Act (Silver Bow County *v.* Davis, 6 Mont. 306, 310, 12 Pac. 688 [*affirmed* in 139 U. S. 438, 11 S. Ct. 594, 35 L. ed. 210]); and in the phrase "the States of the Union" as that phrase is used in the consular convention of Feb. 23, 1853, with France (De Geofroy *v.* Riggs, 133 U. S. 258, 260, 10 S. Ct. 295, 33 L. ed. 642).

7. Brunswick First Nat. Bank *v.* Yankton County, 101 U. S. 129, 133, 25 L. ed. 1046.

8. *In re* Lane, 135 U. S. 443, 10 S. Ct. 760, 34 L. ed. 219, holding that it is so used in 25 U. S. St. at L. 658, c. 120 [U. S. Comp. St. (1901) p. 3630], making certain acts criminal, but exempting the territories from the operation of such act.

9. The notion that a territory must be contiguous to the continental domain passed away with the annexation of Hawaii and its organization as a territory if not indeed with the acquisition of Alaska. With the (now) prospective admission of New Mexico and Arizona into the Union the last of the "contiguous" territories will have disappeared, and the territorial law of the future must deal with "outlying possessions." As their territorial status appears likely to be permanent or at least indefinite the formation of a colonial or territorial department for the better and uniform administration of these possessions would seem to be imperative. At present the Philippines are under the authority of the war department, Porto Rico, Hawaii, and Alaska under the interior, and Guam and Tutuila under the navy department.

10. Binns *v.* U. S., 194 U. S. 486, 491, 24 S. Ct. 816, 48 L. ed. 1087; Peck Steamship Line *v.* New York, etc., Steamship Co., 2 Porto Rico Fed. 109, 127.

District of Columbia.— "All that part of the territory of the United States included within the limits of the District of Columbia" (16 U. S. St. at L. 419, c. 62), has been treated since the beginning of the nineteenth century as a public corporation with all the powers of a territory. Yet its forms of government during that period has varied from that of a municipality to that of a fully organized territory with legislative and executive as well as judicial branches. See Metropolitan R. Co. *v.* District of Columbia, 132 U. S. 1, 10 S. Ct. 19, 33 L. ed. 231; Barnes *v.* District of Columbia, 91 U. S. 540, 23 L. ed. 440.

11. Peck Steamship Line *v.* New York, etc., Steamship Co., 2 Porto Rico Fed. 109, 128,

United States,[12] and the Philippines have been judicially declared a territory of the United States,[13] as has also been Porto Rico.[14]

B. Classification and Status — 1. In General. Territories have not all exactly the same status and have been classified into incorporated and unincorporated territories,[15] incorporated territories being those which have become part of the United States proper, and not merely a part of its domain, and which are entitled to the benefits of the constitution, including the first ten amendments, and which are held to be as much a part of the United States as are the states

where it is said that whether it is founded or not, congress is possessed of a fear that the word "teritory" has something in it that imports a promise of statehood to the section of country so characterized; but that history does not support this fear, because California became a state in 1850 without ever having been a territory, and the Indian territory has just been given an enabling act, without ever having been organized. And see Downes *v.* Bidwell, 182 U. S. 244, 21 S. Ct. 770, 45 L. ed. 1088. *Compare* Nelson *v.* U. S., 30 Fed. 112.

A contrary view is taken in Territory *v.* O'Connor, 5 Dak. 397, 41 N. W. 746, 749, 3 L. R. A. 355, where the court observes that "it has sometimes been said that the territory is an 'embryo state,'" and in Territory *v.* Scott, 3 Dak. 357, 20 N. W. 401, the same court said: "The ultimate purpose is that every portion of its territory shall, as soon as practicable, be organized into states which shall take their equal place and part in the Union. The territorial condition is but a necessary incident of immaturity. Every essential element of statehood is there, and the policy of the government has always been to employ this period as one of preparation by clothing the territories with the paraphernalia and investing them with many of the duties and privileges of statehood." Similarly in *Ex p.* Morgan, 20 Fed. 298, 305, it is said that a territory, under the constitution and laws of the United States, is an inchoate state, a portion of the country not included in the Union, but organized under the laws of congress, with a separate legislature, under a territorial governor and other officers appointed by the president and senate of the United States. These expressions, although entirely *obiter*, and necessarily nothing more than mere personal opinion, find some support in the language used in Shively *v.* Bowlby, 152 U. S. 1, 14 S. Ct. 548, 38 L. ed. 331. But all of these decisions were rendered before the latest annexation of Spanish territory and the organization of the territory of Hawaii, disclosing a different policy on the part of congress.

12. Binns *v.* U. S., 194 U. S. 486, 491, 24 S. Ct. 816, 48 L. ed. 1087; The Coquitlam *v.* U. S., 163 U. S. 346, 352, 16 S. Ct. 1117, 41 L. ed. 184.

13. The Diamond Rings, 183 U. S. 176, 179, 22 S. Ct. 59, 46 L. ed. 138 (where it is said that by the third article of the treaty Spain ceded to the United States the archipelago known as the Philippine Islands, and the Philippines thereby ceased, in the language of the treaty, "to be Spanish." They came under the complete and absolute sovereignty and dominion of the United States, and so became territory of the United States over which civil government could be established); Matter of Patterson, 1 Philippine 97, per Arellano, C. J.

The present status of the Philippines corresponds to that of Florida during the early period of American sovereignty thereover. U. S. *v.* Dorr, 2 Philippine 269, 276 [*affirmed* in 195 U. S. 138, 24 S. Ct. 808, 49 L. ed. 128]. *Compare* Lincoln *v.* U. S., 197 U. S. 419, 25 S. Ct. 455, 49 L. ed. 816; American Ins. Co. *v.* 356 Bales of Cotton, 1 Pet. (U. S.) 511, 7 L. ed. 242.

14. Kopel *v.* Bingham, 211 U. S. 468, 476, 29 S. Ct. 190, 53 L. ed. 286; Downes *v.* Bidwell, 182 U. S. 244, 287, 21 S. Ct. 770, 45 L. ed. 1088. See also 1 Op. Atty.-Gen. Porto Rico 83, declaring U. S. Rev. St. (1878) §§ 5539, 5544 [U. S. Comp. St. (1901) pp. 3720, 3721], extending the rule of credit for good behavior to federal prisoners in prisons of "any state or territory" applicable to Porto Rico.

Porto Rico has been de facto and de jure American territory since April 11, 1899. Ponce *v.* Roman Catholic Apostolic Church, 210 U. S. 296, 309, 28 S. Ct. 737, 52 L. ed. 1068.

"Porto Rico is substantially a territory of the United States, over which all the general laws of Congress properly applicable to territories, and not in terms locally inapplicable, are in full force and effect. . . . It would appear that Porto Rico is in fact more of an organized territory than some of the older jurisdictions, because it has what no other territory, save Hawaii, has; that is, a separate court of the United States, presumably to enforce United States laws as a part of its jurisdiction, wholly distinct from the local insular courts, which form a complete and ample local system in themselves." Peck Steamship Line *v.* New York, etc., Steamship Co., 2 Porto Rico Fed. 109, 129, an action for damages under the federal antitrust act.

15. Rasmussen *v.* U. S., 197 U. S. 516, 25 S. Ct. 514, 49 L. ed. 862 (where, however, the court indicates its disapproval of the classification); Downes *v.* Bidwell, 182 U. S. 244, 21 S. Ct. 770, 45 L. ed. 1088. And see 41 Am. L. Rev. 254, article by David K. Watson.

The classification corresponds roughly to the division of the British colonies into (1) crown, royal or provincial; and (2) self-governing or charter colonies. See Tarring Law Relating to Colonies 69 *et seq.*

themselves;[16] and unincorporated territories being those which have not been made part of the United States for all purposes,[17] and to which federal legislation does not uniformly extend.[18] But none of them is in any sense foreign,[19] nor is any of them sovereign,[20] save in the sense that in the absence of statutory authorization it is immune from suits by private individuals in its own courts.[21] The territory is a body politic, however, and may maintain suits in its own name,[22] and may make contracts.[23]

2. Status of Inhabitants; Naturalization. The treaty of cession may or may not extend the rights of citizenship to the inhabitants of the newly acquired territory, but in either event full participation in political power can only be conferred by act of congress.[24] But even in the absence of naturalization such

16. Silver Bow County *v.* Davis, 6 Mont. 306, 12 Pac. 688.

Alaska is an incorporated territory. Rasmussen *v.* U. S., 197 U. S. 516, 25 S. Ct. 514, 49 L. ed. 862.

17. See cases cited *infra*, this note.

Hawaii.— On the question whether Hawaii was incorporated by the annexation resolution of July 7, 1898, the court, in Hawaii *v.* Mankichi, 190 U. S. 197, 23 S. Ct. 787, 47 L. ed. 1016, was divided, two of the justices concurring in the majority opinion, held to the negative, while the writer of the opinion, together with the dissenting justices, held in the affirmative.

Orleans, Porto Rico, and the Philippines.— The territory of Orleans was not incorporated for customs purposes until several years after the passage of the organic act, and the same was true for a time of Porto Rico and still is of the Philippines. Downes *v.* Bidwell, 182 U. S. 244, 21 S. Ct. 770, 45 L. ed. 1088. And see U. S. Rev. St. (1878) § 1891, which, while providing that the federal constitution and laws not locally inapplicable shall be in force in the territories, is expressly excepted from the Philippine bill, section 1, and a similar provision is contained in the Porto Rico organic act of April 12, 1900, section 9.

18. 41 Am. L. Rev. 254, article by David K. Watson.

19. Lincoln *v.* U. S., 197 U. S. 419, 25 S. Ct. 455, 49 L. ed. 816.

The Philippines are not "another country" within the meaning of the Cuban commercial treaty. Faber *v.* U. S., 157 Fed. 140.

Porto Ricans entering the United States directly are not "passengers from a foreign port" within the meaning of the federal American laws. Gonzales *v.* Williams, 192 U. S. 1, 24 S. Ct. 177, 48 L. ed. 317.

20. *Colorado.*— Reynolds *v.* People, 1 Colo. 179.

Idaho.— Stevenson *v.* Moody, 2 Ida. (Hasb.) 260, 12 Pac. 902.

Montana.— Territory *v.* Lee, 2 Mont. 124.

Utah.— People *v.* Daniels, 6 Utah 288, 22 Pac. 159, 5 L. R. A. 444.

Washington.— Smith *v.* U. S., 1 Wash. Terr. 262.

United States.— Brunswick First Nat. Bank *v.* Yankton County, 101 U. S. 129, 25 L. ed. 1046; Snow *v.* U. S., 18 Wall. 317, 21 L. ed. 784. See also 16 Op. Atty.-Gen. 114.

21. Beachy *v.* Lamkin, 1 Ida. 50; Fisk *v.* Cuthbert, 2 Mont. 593; Langford *v.* King, 1 Mont. 33.

Judgment for costs cannot be rendered against the territory without express authority. Beachy *v.* Lamkin, 1 Ida. 50; Territory *v.* Doty, 1 Pinn. (Wis.) 396.

Porto Rico by virtue of the act of congress of April 12, 1900, c. 191 (31 U. S. St. at L. 77), is vested with sufficient attributes of sovereignty to exempt it from liability to process from the courts of a state, although it is authorized to sue and be sued. Richmond *v.* People, 51 Misc. (N. Y.) 202, 99 N. Y. Suppl. 743.

22. See cases cited *infra*, this note.

The action can be brought only at the instance of a public officer authorized by statute, and a private individual has no implied right to use the territory's name for such purpose, nor will the bare averment that territorial officers have refused to bring such action justify the individual in so doing. Territory *v.* De Wolfe, 13 Okla. 454, 74 Pac. 98.

The right to sue includes the right to appeal from any judgment by which the territory is aggrieved. Territory *v.* Hildebrand, 2 Mont. 426.

Condition precedent.— The territorial act requiring the auditor, in a letter of instructions to the attorney-general, to bring suit to specify the amount of indebtedness included therein, is merely directory, and compliance therewith is not a condition precedent to suing. Territory *v.* Branford, 1 N. M. 360.

23. Woolfolk *v.* Woolman, 6 Mont. 1, 9 Pac. 445, holding that under an act providing that public printing should be paid for at the rates paid by the federal government, the rate current at the time of making the contract governs, although lower than at the time of the enactment.

24. Downes *v.* Bidwell, 182 U. S. 244, 21 S. Ct. 770, 45 L. ed. 1088 (holding that an alien people cannot be incorporated into the United States by a mere cession); American Ins. Co. *v.* 356 Bales of Cotton, 1 Pet. (U. S.) 511, 7 L. ed. 242. And see, generally, Citizens, 7 Cyc. 142.

Under the Treaty of Paris, article IX, Spanish subjects, natives of the Peninsula, residing in the territory over which Spain by the treaty relinquished or ceded her sovereignty, might remain in such territory or remove therefrom, retaining in either

inhabitants are not aliens,[25] and their property rights remain unaffected by the cession.[26] Naturalization is now provided for the inhabitants of the non-contiguous territory of the United States.[27] It can be conferred, however, only by a court of or in the United States.[28]

event all their rights of property, including the right to sell or dispose of such property, or of its proceeds; and they also had the right to carry on their industry, commerce, and professions, being subject in respect thereof to such laws as are applicable to other foreigners. In case they remained in the territory they might preserve their allegiance to the crown of Spain by making, before a court of record, within a year from the date of the exchange of ratifications of the treaty, a declaration of their decision to preserve such allegiance; in default of which declaration they were held to have renounced it and to have adopted the nationality of the territory in which they resided. Section 4 of the Philippine bill provides: "That all inhabitants of the Philippine Islands continuing to reside therein who were Spanish subjects on the eleventh day of April, eighteen hundred and ninety-nine, and then resided in said Islands, and their children born subsequent thereto, shall be deemed and held to be citizens of the Philippine Islands and as such entitled to the protection of the United States, except such as shall have elected to preserve their allegiance to the Crown of Spain in accordance with the provisions of the treaty of peace." Substantially the same language is used in the organic act of Porto Rico, section 7, with the added designation of such inhabitants, together with resident citizens as "the People of Porto Rico." A peninsular Spaniard residing in the Philippines at the time of the treaty and who departed soon after, although, as he claimed, for temporary purposes only, was held thereby to have lost his right to claim Philippine citizenship, and with it the right to practice law in the Archipelago. Bosque *v.* U. S., 209 U. S. 91, 28 S. Ct. 501, 52 L. ed. 698 [*affirming* 1 Philippine 88]. But a child under parental authority whose father made no declaration of intention to retain Spanish citizenship under Treaty of Paris, article IX, is a citizen of the Philippine Islands and qualified to enroll for the bar examination. Matter of Arnaiz, 9 Philippine 705, 6 Off. Gaz. 549. The son of a Spaniard born in Cuba, but who was of age on April 11, 1899, and made no declaration of intention to claim Spanish citizenship is likewise a citizen of the Philippine Islands and entitled to enroll for such examination. Matter of Villapol, 9 Philippine 706, 6 Off. Gaz. 550. And in Soriano *v.* Arrese, 1 Porto Rico Fed. 196, the act of congress (27 U. S. St. at L. 252 [U. S. Comp. St. (1901) p. 706]), authorizing suits *in forma pauperis* by citizens was construed to embrace Porto Ricans. But seamen born in the Philippines are not "citizens" within the meaning of the Federal Laws. 23 Op. Atty.-Gen. 400.

25. Gonzales *v.* Williams, 192 U. S. 1, 24 S. Ct. 177, 48 L. ed. 317, holding that citizens of Porto Rico, whose permanent allegiance is due to the United States, who live in the peace of the dominion of the United States; the organic law of whose domicile was enacted by the United States, and is enforced through officials sworn to support the constitution of the United States, are not "aliens," and upon their arrival by water at the ports of our mainland are not "alien immigrants" within the meaning and intent of the act of 1891.

26. Leitensdorfer *v.* Webb, 20 How. (U. S.) 176, 15 L. ed. 891; Strother *v.* Lucas, 12 Pet. (U. S.) 410, 9 L. ed. 1137; American Ins. Co. *v.* 356 Bales of Cotton, 1 Pet. (U. S.) 511, 7 L. ed. 242.

Estates forfeited prior to the treaty of 1783 were not thereby revested in their former owners. McGregor *v.* Comstock, 16 Barb. (N. Y.) 427 [*affirmed* in 17 N. Y. 162].

27. Naturalization Law of 1906 (Act June 29, 1906, c. 3592, § 30), which provides that all persons not citizens who owe permanent allegiance to the United States, may be admitted to citizenship after five years' residence in American territory and without renouncing allegiance to a foreign sovereignty. He must, however, unless physically incapacitated, be able to speak English (section 8), declare his intention at least two years prior to his admission, and become for a time a resident of "a state or organized territory."

28. 1 Op. Atty.-Gen. Porto Rico 179. See also Act June 29, 1906, c. 3592, § 3.

The Insular courts of Porto Rico are not competent to take declarations of intention to become citizens. 1 Op. Atty.-Gen. Porto Rico 179.

American citizenship cannot be acquired in the Philippines in the absence of legislation. Matter of Bosque, 1 Philippine 88 [*affirmed* in 209 U. S. 91, 28 S. Ct. 501, 52 L. ed. 698].

Naturalization of a child follows that of the parent. Battistini *v.* Belaval, 1 Porto Rico Fed. 213. *Compare* 1 Op. Atty.-Gen. Porto Rico 95. And see, generally, CITIZENS, 7 Cyc. 139. The son of a Frenchman, claiming French citizenship and who has been treated by government officials as such, never having exercised political rights in Porto Rico, although he has resided there most of his life, will be considered a Frenchman. Battistini *v.* Belaval, *supra.*

Citizenship of a wife follows that of the husband (Martinez de Hernandez *v.* Casañas, 2 Porto Rico Fed. 519; Rodriguez *v.* Vivoni, 1 Porto Rico Fed. 493. And see, generally, CITIZENS, 7 Cyc. 141); and as the wife takes the status of the husband she also acquires his domicile (Marimon *v.* Pelegri, 1 Porto Rico 225).

II. BOUNDARIES.

The boundaries of a territory are usually fixed in the organic act or in the treaty of cession,[29] which must be resorted to for determining proprietary, as well as sovereign, rights of the federal government in such territory.[30] But failure to so fix them will not impair the government's title, especially where the description is insufficient for identification and the boundaries have been practically identified by concurrent action of the interested nations,[31] and the omission of some of the technical terms used in ordinary conveyances of real estate will not impair the government's title.[32]

III. GOVERNMENT.

A. Form; Organic Acts. A provisional government of newly acquired territory may be established by congress or, even before congress acts, by the executive and military authorities.[33] The laws of such a government abrogate

Citizenship cannot be acquired by mere declaration of intent or by holding office, although the subject may thereby have lost his former nationality. Ortiz de Rodriguez *v.* Vivoni, 1 Porto Rico Fed. 493.

29. See the acts and treaties of the United States.

A treaty with an Indian tribe setting apart a reservation for them but not excluding it from the territorial boundaries of Montana was held to make it a part of and subject to the control of said territory for the purpose of division into counties, although the previous Indian treaties had excluded such reservations from territorial jurisdiction. Yellowstone County *v.* Northern Pac. R. Co., 10 Mont. 414, 25 Pac. 1058. But where the organic act reserves an Indian reservation from the boundaries of a territory, a subsequent act of the territorial legislature establishing a county so as to include such reservation is void. State *v.* Thayer, 22 Nebr. 413, 35 N. W. 200.

The territory of Orleans extended westward to the Sabine (Territory *v.* Durossat, 2 Mart. (La.) 119), and included the village of Montesano near Baton Rouge (Newcombe *v.* Skipwith, 1 Mart. (La.) 151).

Suits by the United States against a state to determine the boundaries between the state and territory of the United States are properly brought in equity and not at law. U. S. *v.* Texas, 143 U. S. 621, 12 S. Ct. 488, 36 L. ed. 285.

On a libel of a vessel for killing fur-bearing animals in Alaskan waters, contrary to U. S. Rev. St. (1878) § 1956, the *locus* was found to be less than twelve miles from land and accordingly in such waters. U. S. *v.* The Alexander, 60 Fed. 914.

Relation back of decision as to boundary. —A decision of the federal supreme court that a certain county belongs to Oklahoma and not to Texas relates back six years to the time when by act of congress the question was left in abeyance until it should be so decided, and property in said county is subject to taxation in Oklahoma for a period preceding such decision. Sweet *v.* Boyd, 6 Okla. 699, 52 Pac. 939.

Where a nation acquires territory separated by a river from that of another nation, each part extends to the thread of the stream if it does not appear which had prior possession of the latter, but when the claim to the territory is founded on grant instead of occupancy, the boundary depends upon the proper construction of the grant. Corfield *v.* Coryell, 6 Fed. Cas. No. 3,230, 4 Wash. 371. And see INTERNATIONAL LAW, 22 Cyc. 1719 *et seq.*

30. Kinkead *v.* U. S., 150 U. S. 483, 14 S. Ct. 172, 37 L. ed. 1152, holding that under the Alaska cession treaty of March 30, 1867 (15 U. S. St. at L. 539), especially section 6, title to immovable buildings erected by the Russian-American company upon land belonging to the Russian government passed to the United States; and the fact that commissioners appointed by the respective governments to effect a transfer of the property reported such buildings as "private individual property" did not conclude the acquiring government since their powers were merely ministerial.

The third article of the Louisiana Purchase Treaty ceased to be effective after the admission of Louisiana into the Union. St. Francis Roman Catholic Church Cong. *v.* Martin, 4 Rob. (La.) 62.

Conditions precluding the incorporation of newly acquired territory into the Union without consent of congress may be inserted into the treaty of cession and become the supreme law upon its ratification. Downes *v.* Bidwell, 182 U. S. 244, 21 S. Ct. 770, 45 L. ed. 1088.

31. Wilson *v.* Shaw, 204 U. S. 24, 27 S. Ct. 233, 51 L. ed. 351.

32. Wilson *v.* Shaw, 204 U. S. 24, 27 S. Ct. 233, 51 L. ed. 351.

For an instance of rectification of mistake in fixing boundaries of ceded territory see Treaty of Washington of Nov. 7, 1900, 31 U. S. St. at L. 1942, supplementing the Treaty of Paris.

33. *California.*— People *v.* Folsom, 5 Cal. 373.

Florida.— Inerarity *v.* Curtis, 4 Fla. 175.

New Mexico.— Ward *v.* Broadwell, 1 N. M. 75; Leitensdorfer *v.* Webb, 1 N. M. 34.

Oregon.— Baldro *v.* Tolmie, 1 Oreg. 176.

Washington.— Watts *v.* U. S., 1 Wash. Terr. 288.

those previously existing and inconsistent therewith.[34] The permanent government of newly acquired territory is usually effected through the passage by congress of an "Organic Act," which bears for such territory much the same relation as a constitution for a state.[35] Among the notable of these have been the Ordinance of 1787, providing for the government of the Northwest Territory,[36] the Organic Act for Porto Rico of April 12, 1900, known as the Foraker Law,[37] and the

United States.— Downes *v.* Bidwell, 182 U. S. 244, 21 S. Ct. 770, 45 L. ed. 1088; Leitensdorfer *v.* Webb, 20 How. 176, 15 L. ed. 891.

See 45 Cent. Dig. tit. "Territories," § 7.

34. Ward *v.* Broadwell, 1 N. M. 75; Leitensdorfer *v.* Webb, 1 N. M. 34. *Compare* Baldro *v.* Tolmie, 1 Oreg. 176.

35. *Dakota.*— Territory *v.* O'Connor, 5 Dak. 397, 41 N. W. 746, 3 L. R. A. 355, holding that the organic acts of the several territories from the earliest history of the country have been of the same general character, and are framed after and founded upon the constitution of the United States itself, and are singularly like the early state constitutions, and the division into and the separation of the three great departments, and the grants of power thereto, are much the same in character and distribution. See also Territory *v.* Scott, 3 Dak. 357, 20 N. W. 401; Treadway *v.* Schnauber, 1 Dak. 236, 46 N. W. 464.

Florida.— Ponder *v.* Graham, 4 Fla. 23, where it is said, however, that an organic act is a mere grant while a state constitution is a limitation.

Idaho.— Stevenson *v.* Moody, 2 Ida. (Hasb.) 260, 12 Pac. 902; Taylor *v.* Stevenson, 2 Ida. (Hasb.) 180, 9 Pac. 642; People *v.* Maxon, 1 Ida. 330; Moore *v.* Koubly, 1 Ida. 55.

Montana.— Territory *v.* Burgess, 8 Mont. 57, 19 Pac. 558, 1 L. R. A. 808.

New Mexico.— *In re* Atty.-Gen., 2 N. M. 49.

Utah.— People *v.* Daniels, 6 Utah 288, 22 Pac. 159, 5 L. R. A. 444; Williams *v.* Clayton, 6 Utah 86, 21 Pac. 398; People *v.* Clayton, 4 Utah 421, 11 Pac. 206; Winters *v.* Hughes, 3 Utah 443, 24 Pac. 759; *Ex p.* Duncan, 1 Utah 81.

Washington.— Bloomer *v.* Todd, 3 Wash. Terr. 599, 19 Pac. 135, 1 L. R. A. 111; Watts *v.* U. S., 1 Wash. Terr. 288.

Wisconsin.— Smith *v.* Odell, 1 Pinn. 449.

United States.— Guthrie Nat. Bank *v.* Guthrie, 173 U. S. 528, 19 S. Ct. 513, 43 L. ed. 796; Brunswick First Nat. Bank *v.* Yankton County, 101 U. S. 129, 25 L. ed. 1046.

See 45 Cent. Dig. tit. "Territories," § 11 *et seq.*

The territorial legislature cannot pass a valid act inconsistent with the organic law. Taylor *v.* Stevenson, 2 Ida. (Hasb.) 180, 9 Pac. 642; Moore *v.* Koubly, 1 Ida. 55; Casanovas *v.* Hord, 8 Philippine 125, 5 Off. Gaz. 268; Gaspar *v.* Molina, 5 Philippine 197, 3 Off. Gaz. 651; People *v.* Daniels, 6 Utah 288, 22 Pac. 159, 5 L. R. A. 444; Winters *v.* Hughes, 3 Utah 443, 24 Pac. 759; *Ex p.* Duncan, 1 Utah 81; Bloomer *v.* Todd, 3 Wash. Terr. 599, 19 Pac. 135, 1 L. R. A. 111; Smith *v.* Odell, 1 Pinn. (Wis.) 449; Jack *v.* People, 132 U. S. 643, 10 S. Ct. 194, 33 L. ed. 459 [*affirming* 4 Utah 438, 11 Pac. 213]; Clayton *v.* Utah, 132 U. S. 632, 10 S. Ct. 190, 33 L. ed. 455 [*affirming* 4 Utah 421, 11 Pac. 206]; Ferris *v.* Higley, 20 Wall. (U. S.) 375, 22 L. ed. 383.

36. See cases cited *infra*, this note.

This enactment has been called "the most famous statute in American history" and was passed by the Continental Congress to govern the relations between the Northwest Territory and the Confederation, just as those of the different states to each other were given by the articles of confederation which, rather than the constitution, framed later, are to be consulted in construing the ordinance. La Plaisance Bay Harbor Co. *v.* Monroe, Walk. (Mich.) 155. The provisions of the ordinance have been superseded by the federal or state constitutions operative in the same territory. Strader *v.* Graham, 10 How. (U. S.) 82, 13 L. ed. 337; Permoli *v.* New Orleans Municipality No. 1, 3 How. (U. S.) 589, 11 L. ed. 739; Pollard *v.* Hagan, 3 How. (U. S.) 212, 11 L. ed. 565. But see Spooner *v.* McConnell, 22 Fed. Cas. No. 13,245, 1 McLean 337. Article 5 of the ordinance guaranteed to the people of Michigan territory as established by the act of congress of January 11, 1805, the right, which not even the federal government could abridge, to form a constitution and state government whenever the population thereof should reach sixty thousand free inhabitants, and the exercise of this right was a condition precedent to admission into the Union. Scott *v.* Detroit Young Men's Soc., 1 Dougl. (Mich.) 119.

The "Permanent Constitution and State Government" mentioned in the ordinance of 1787 to be formed by each of the states organized in the Northwest Territory means a new government in place of the territorial one and a constitution instead of the ordinance; such constitution was to be not for a part but for the whole of each. La Plaisance Bay Harbor Co. *v.* Monroe, Walk. (Mich.) 155.

37. Luzunaris *v.* Pastor Diaz, 1 Porto Rico 472; Bonin *v.* Registrar of Property, 1 Porto Rico 315; Luz Eléctrica *v.* El. Pueblo, 1 Porto Rico 305; *Ex p.* Acevedo, 1 Porto Rico 275; Bravo *v.* Franco, 1 Porto Rico 242. See Marimón *v.* Pelegri, 1 Porto Rico 225.

Religious freedom.— Religious processions cannot be interfered with by the government when peaceably conducted. 1 Op. Atty.-Gen. Porto Rico 16. The Porto Rican government may regulate but not prohibit the tolling of church bells. 1 Op. Atty.-Gen. Porto Rico 68.

"Philippine Bill" of July 1, 1902, which ratified prior executive acts and provided a complete government for the Islands.[38]

B. Power of United States Congress to Legislate — 1. In General. Congress has plenary power over the territories unlimited by the restrictions of the constitution, so long as they remain in a territorial condition,[39] and may

Freedom of the press.—A Spanish law requiring copies of each issue of newspapers to be furnished in the act of publication to the government authorities results in a censorship and cannot be enforced under American legislation. 1 Op. Atty.-Gen. Porto Rico 28. Nor can newspaper libel be punished by seizure of the paper. 1 Op. Atty.-Gen. Porto Rico 89.

Right of assembly.—A meeting of laborers merely to demand an increase of wages is not unlawful. 1 Op. Atty.-Gen. Porto Rico 124.

38. 32 U. S. St. at L. 691. See Lincoln *v.* U. S., 197 U. S. 419, 25 S. Ct. 455, 49 L. ed. 816.

The ratification of prior executive acts recited in section 2 of the act is confined to those performed in accordance with the provisions of the order of July 12, 1898, and does not include the collection of duties after the ratification of the Treaty of Paris. Lincoln *v.* U. S., 197 U. S. 419, 25 S. Ct. 455, 49 L. ed. 816.

The guaranties contained in this section (5) which constitutes the bill of rights for the Philippines, must be interpreted similarly to corresponding provisions previously existing. Serra *v.* Mortiga, 204 U. S. 470, 27 S. Ct. 343, 51 L. ed. 571; Kepner *v.* U. S., 195 U. S. 100, 24 S. Ct. 797, 49 L. ed. 114. The guaranty of protection does not require the government to furnish arms to municipalities, nor does prohibition of "excessive bail" apply to a bond given to obtain firearms. Philippine Islands *v.* Punzalan, 7 Philippine 546, 5 Off. Gaz. 218.

Prohibition of ex post facto laws applies only to criminal statutes; not to provisions relative to civil remedies like habeas corpus. Paynaga *v.* Wolfe, 2 Philippine 146; Mekin *v.* Wolfe, 2 Philippine 78. Act 518 defining brigandage was not retroactive. U. S. *v.* Diaz, 2 Philippine 124, 1 Off. Gaz. 542. But an act increasing the subsidiary punishment authorized by an existing law is void as to a crime committed before the former's passage. U. S. *v.* Ang Kan Ko, 6 Philippine 376, 4 Off. Gaz. 571.

Prohibition in the Philippine bill of "slavery" and "involuntary servitude" is not criminally self-operating (U. S. *v.* Cabanag, 8 Philippine 64, 5 Off. Gaz. 261); and notwithstanding the prohibition of "imprisonment for debt" a criminal sentence which includes indemnity to the aggrieved party must be enforced by imprisonment in case of non-payment (U. S. *v.* Miranda, 2 Philippine 606, 610, 1 Off. Gaz. 911).

Proceedings for deportation of agitators under act 265 are valid and may be enforced by the collector of customs without the intervention of the courts. Matter of Patterson, 1 Philippine 93.

39. *Alaska.*— U. S. *v.* Binns, 1 Alaska 553 [*affirmed* in 194 U. S. 486, 24 S. Ct. 816, 48 L. ed. 1087].

Arizona.— Territory *v.* Blomberg, 2 Ariz. 204, 11 Pac. 671.

California.— People *v.* Folsom, 5 Cal. 373.

Colorado.— Deitz *v.* Central, 1 Colo. 323.

Dakota.— Territory *v.* O'Connor, 5 Dak. 397, 41 N. W. 746, 3 L. R. A. 355; Territory *v.* Scott, 3 Dak. 357, 20 N. W. 401; Treadway *v.* Schnauber, 1 Dak. 236, 46 N. W. 464.

Idaho.— Stevenson *v.* Moody, 2 Ida. (Hasb.) 260, 12 Pac. 902; Taylor *v.* Stevenson, 2 Ida. (Hasb.) 180, 9 Pac. 642.

Louisiana.— State *v.* New Orleans Nav. Co., 11 Mart. 309.

Montana.— Territory *v.* Burgess, 8 Mont. 57, 19 Pac. 558, 1 L. R. A. 808; Territory *v.* Lee, 2 Mont. 124.

Oklahoma.—Allen *v.* Reed, 10 Okla. 105, 60 Pac. 782, 63 Pac. 867.

Oregon.— Edwards *v.* The Panama, 1 Oreg. 418, 18 Fed. Cas. No. 10,702.

Texas.— Sawyer *v.* El Paso, etc., R. Co., 49 Civ. App. 106, 108 S. W. 718.

Utah.— People *v.* Daniels, 6 Utah 288, 22 Pac. 159, 5 L. R. A. 444; People *v.* Clayton, 4 Utah 421, 11 Pac. 206 [*affirmed* in 132 U. S. 632, 10 S. Ct. 190, 33 L. ed. 455].

Wisconsin.— Territory *v.* Doty, 1 Pinn. 396.

Wyoming.— Downes *v.* Parshall, 3 Wyo. 425, 26 Pac. 994; Territory *v.* Nelson, 2 Wyo. 346; Wagner *v.* Harris, 1 Wyo. 194.

United States.— Shively *v.* Bowlby, 152 U. S. 1, 14 S. Ct. 548, 38 L. ed. 331; Boyd *v.* Nebraska, 143 U. S. 135, 169, 12 S. Ct. 375, 36 L. ed. 103 [*reversing* 31 Nebr. 682, 48 N. W. 739, 51 N. W. 602]; McAllister *v.* U. S., 141 U. S. 174, 181, 11 S. Ct. 949, 35 L. ed. 693; Church of Jesus Christ, etc., Corp. *v.* U. S., 136 U. S. 1, 42, 10 S. Ct. 792, 34 L. ed. 478; Murphy *v.* Ramsey, 114 U. S. 15, 44, 5 S. Ct. 747, 29 L. ed. 47; Brunswick First Nat. Bank *v.* Yankton County, 101 U. S. 129, 25 L. ed. 1046; Cross *v.* Harrison, 16 How. 164, 193, 14 L. ed. 889; Benner *v.* Porter, 9 How. (U. S.) 235, 13 L. ed. 119; American Ins. Co. *v.* 356 Bales of Cotton, 1 Pet. 511, 7 L. ed. 242. See also Kansas *v.* Colorado, 206 U. S. 46, 89, 27 S. Ct. 655, 51 L. ed. 965; Binns *v.* U. S., 194 U. S. 486, 491, 24 S. Ct. 816, 48 L. ed. 1087; U. S. *v.* Kagama, 118 U. S. 375, 6 S. Ct. 1109, 30 L. ed. 228; Snow *v.* U. S., 18 Wall. (U. S.) 317, 21 L. ed. 784; U. S. *v.* Nelson, 29 Fed. 202 [*affirmed* in 30 Fed. 112].

See 45 Cent. Dig. tit. "Territories," § 8.

Control over elective franchise.— "It rests with Congress to say whether, in a given case, any of the people, resident in the Territory, shall participate in the election of its officers or the making of its laws; and it

legislate for them as a state does for the municipal organizations,[40] and may annul the acts of a territorial legislature either directly,[41] or indirectly, by passing inconsistent legislation,[42] and may not only abrogate laws of the territorial legislatures but may legislate directly for the local government.[43] It may make a void act of the territorial legislature valid, and a valid act void.[44] But the power of congress may, therefore, take from them any right of suffrage it may previously have conferred, or at any time modify or abridge it, as it may deem expedient. The right of local self-government, as known to our system as a constitutional franchise, belongs, under the Constitution, to the States and to the people thereof, by whom that Constitution was ordained, and to whom by its terms all power not conferred by it upon the government of the United States was expressly reserved. The personal and civil rights of the inhabitants of the Territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of government, State and National; their political rights are franchises which they hold as privileges in the legislative discretion of the Congress of the United States." Murphy *v.* Ramsey, 114 U. S. 15, 44, 5 S. Ct. 747, 29 L. ed. 47. *Compare* Bloomer *v.* Todd, 3 Wash. Terr. 599, 19 Pac. 135, 1 L. R. A. 111.

The federal government has power to reserve waters of a territorial river so as to exempt them from appropriation even under laws passed by the state which succeeds the territory. Winters *v.* U. S., 207 U. S. 564, 22 S. Ct. 207, 52 L. ed. 340.

40. Brunswick First Nat. Bank *v.* Yankton County, 101 U. S. 129, 25 L. ed. 1046.

41. *Dakota.*—Territory *v.* O'Connor, 5 Dak. 397, 41 N. W. 746, 3 L. R. A. 355. See also Territory *v.* Scott, 3 Dak. 357, 20 N. W. 401.

Indian Territory.—McAllaster *v.* Edgerton, 3 Indian Terr. 704, 64 S. W. 583.

Montana.— Territory *v.* Lee, 2 Mont. 124.

New Mexico.— Baca *v.* Perez, 8 N. M. 187, 42 Pac. 162; Chavez *v.* Luna, 5 N. M. 183, 21 Pac. 344; Garcia *v.* Territory, 1 N. M. 415.

Philippine.— Organic Act Cong. July 1, 1902, § 86; Comp. Acts Phil. Comm. p. 45.

Utah.— U. S. *v.* Church of Jesus Christ, etc., 5 Utah 361, 15 Pac. 473; People *v.* Douglass, 5 Utah 283, 14 Pac. 801.

Wyoming.— Wagner *v.* Harris, 1 Wyo. 194.

United States.— Brunswick First Nat. Bank *v.* Yankton County, 101 U. S. 129, 25 L. ed. 1046; Hornbuckle *v.* Toombs, 18 Wall. 648, 21 L. ed. 966.

See 45 Cent. Dig. tit. "Territories," § 8 *et seq.*

42. *New Mexico.*— Baca *v.* Perez, 8 N. M. 187, 42 Pac. 162.

Oklahoma.— Allen *v.* Reed, 10 Okla. 105, 60 Pac. 782, 63 Pac. 867; Finch *v.* U. S., 1 Okla. 396, 33 Pac. 638.

Wisconsin.— Territory *v.* Doty, 1 Pinn. 396.

Wyoming.— Territory *v.* Nelson, 2 Wyo. 346.

United States.—Coulter *v.* Stafford, 56 Fed. 564, 6 C. C. A. 18. *Compare* American Ins. Co. *v.* 356 Bales of Cotton, 1 Fed. Cas. No. 302*a*, 1 Pet. 516 note, 7 L. ed. 244.

See 45 Cent. Dig. tit. "Territories," § 8 *et seq.*

This power of congress has been very rarely exercised in most of the territories and never perhaps in the history of Dakota. Territory *v.* O'Connor, 5 Dak. 397, 41 N. W. 746, 3 L. R. A. 355. *Compare* Territory *v.* Scott, 3 Dak. 357, 20 N. W. 401.

Congressional acts must relate to the same subject in order, impliedly, to displace territorial legislation (Davis *v.* Beason, 133 U. S. 333, 10 S. Ct. 299, 33 L. ed. 637), and the congressional acts must conflict with the territorial (*In re* Murphy, 5 Wyo. 297, 40 Pac. 398). An act naming court commissioners by the legislature does not conflict with an act of congress providing for the appointment of all district officers by the governor (People *v.* Clayton, 5 Utah 598, 18 Pac. 628), and the act of congress of March 3, 1887 (24 U. S. St. at L. 635, c. 397, U. S. Comp. St. (1901) p. 3635), for the punishment of incest in the territories did not by implication repeal the Washington statute relating to that crime (*In re* Nelson, 69 Fed. 712).

That territorial acts are required to be submitted to congress for its approval or disapproval will not render them void unless approved; they remain in force in the absence of express annulment (Territory *v.* Doty, 1 Pinn. (Wis.) 396. And see Sperling *v.* Calfee, 7 Mont. 514, 19 Pac. 204; Clinton *v.* Englebrecht, 13 Wall. (U. S.) 434, 20 L. ed. 659); and the presumption is that they have been properly submitted (Chavez *v.* Luna, 5 N. M. 183, 190, 21 Pac. 344).

That the executive department of the federal government takes possession of a part of a territory and excludes local officers from exercising their functions therein does not displace the territorial jurisdiction conferred by the organic act. Watts *v.* U. S., 1 Wash. Terr. 288.

43. Brunswick First Nat. Bank *v.* Yankton County, 101 U. S. 129, 25 L. ed. 1046.

44. Allen *v.* Reed, 10 Okla. 105, 60 Pac. 782, 63 Pac. 867; Godbe *v.* Salt Lake, 1 Utah 68; Brunswick First Nat. Bank *v.* Yankton County, 101 U. S. 129, 25 L. ed. 1046. But see Treadway *v.* Schnauber, 1 Dak. 236, 46 N. W. 464.

Repeal as declaration of validity.— The repeal by congress of a territorial act is not necessarily a declaration of its validity. Williams *v.* Clayton, 6 Utah 86, 21 Pac. 398.

An act of the territorial legislature which requires the ratification of congress to make it valid cannot thereafter be repealed or modified without the consent of congress. Martin *v.* Territory, 8 Okla. 41, 56 Pac. 712; Irwin *v.* Irwin, 3 Okla. 186, 41 Pac. 369.

over territories may be limited by treaty,[45] and an act of congress passed subsequent to a treaty of cession cannot affect titles perfected thereunder,[46] or by lack of authority, express or implied, to legislate on the subject, for instance to alienate territory of the United States.[47]

2. Applicability of Federal Acts and Constitution. The constitution of the United States does not, as a whole, extend automatically to newly acquired territory, only certain of its limitations are in force there without the express action of congress.[48] Furthermore in the absence of an expression of such intent the acts of congress do not extend to newly acquired territory.[49] *A fortiori* where the territories are expressly excepted from the operation of an act, the act does not apply thereto.[50] On the other hand federal acts may be extended either separately and expressly or by a general provision in the organic law or elsewhere,[51] and in some cases congress has provided that the laws of a particular state shall be extended to a territory,[52] and such an extension usually carries with it the judicial construction of such laws by the highest court of the state of their

45. See Wilson *v.* Wall, 6 Wall. (U. S.) 83, 18 L. ed. 724 [*reversing* 34 Ala. 288].

46. Wilson *v.* Wall, 6 Wall. (U. S.) 83, 18 L. ed. 727 [*reversing* 34 Ala. 288].

47. See Dred Scott *v.* Sandford, 19 How. (U. S.) 393, 15 L. ed. 691. See also an article in the North American Review (vol. 179, pp. 282–300), for August, 1904, "Can Congress Grant Independence to the Filipinos?"

48. Dorr *v.* U. S., 195 U. S. 138, 24 S. Ct. 808, 49 L. ed. 128 [*affirming* 2 Philippine 269, 272]; Downes *v.* Bidwell, 182 U. S. 244, 21 S. Ct. 770, 45 L. ed. 1088; *Ex p.* Acevedo, 1 Porto Rico 275.

Jury trial.— It has been held that the first amendment to the federal constitution guaranteeing the liberty of speech, the press and religion, was in force in Porto Rico, but not the fifth and sixth amendments relating to jury trials. *Ex p.* Acevedo, 1 Porto Rico 275. Nor were these last-named amendments extended to Hawaii so as to displace existing criminal procedure, by the resolution of July 7, 1898 (30 U. S. St. at L. 750). Hawaii *v.* Mankichi, 190 U. S. 197, 23 S. Ct. 787, 47 L. ed. 1016.

49. Hoffman *v.* Pawnee County, 3 Okla. 325, 41 Pac. 566; American Ins. Co. *v.* 350 Bales of Cotton, 1 Pet. (U. S.) 511 note, 7 L. ed. 242, 1 Fed. Cas. No. 302*a*; The Amiable Lucy *v.* U. S., 6 Cranch (U. S.) 330, 3 L. ed. 239; Corbus *v.* Leonhardt, 114 Fed. 10, 51 C. C. A. 636, holding that the provision of U. S. Rev. St. (1878) § 858 [U. S. Comp. St. (1901) p. 659], that in actions by or against personal representatives or guardians neither party may testify as to transactions with decedent or ward is inapplicable to territorial courts.

The retention of the former customs duties between Hawaii and the United States by the annexation resolution was constitutional. Crossman *v.* U. S., 105 Fed. 608.

50. *In re* Lane, 135 U. S. 443, 10 S. Ct. 760, 34 L. ed. 219, holding, however, that in the act of congress of Feb. 9, 1889 (25 U. S. St. at L. 685, c. 120 [U. S. Comp. St. (1901) p. 3630]), for the punishment of rape, the exception of "the territories" from its operation applies only to those regions in which an organized civil government has been established, and not to the district of Oklahoma.

51. Wynn-Johnson *v.* Shoup, 194 U. S. 496, 24 S. Ct. 820, 48 L. ed. 1091; Binns *v.* U. S., 194 U. S. 486, 24 S. Ct. 816, 48 L. ed. 1087; Meydenbauer *v.* Stevens, 78 Fed. 787; The Louisa Simpson, 15 Fed. Cas. No. 8,533, 2 Sawy. 57; U. S. *v.* Carr, 25 Fed. Cas. No. 14,730, 3 Sawy. 302; U. S. *v.* Seveloff, 27 Fed. Cas. No. 16,252, 2 Sawy. 311, all of which cases relate to Alaska.

52. Ardmore Coal Co. *v.* Bevil, 61 Fed. 757, 10 C. C. A. 41; Eddy *v.* Lafayette, 49 Fed. 798, 1 C. C. A. 432.

Alaska.— The laws of Oregon were, for a time, extended over Alaska. See Kohn *v.* McKinnon, 90 Fed. 623; U. S. *v.* Clark, 46 Fed. 633; *In re* Can-ah-couqua, 29 Fed. 687; Kie *v.* U. S., 27 Fed. 351 [*affirmed* in U. S. *v.* Nelson, 29 Fed. 202 (*affirmed* in 30 Fed. 112)].

Indian Territory.— Certain laws of Arkansas published in Mansfield's Digest and not locally inapplicable or in conflict with the acts of congress were extended over the Indian Territory. Pace *v.* J. S. Merrill Drug Co., 2 Indian Terr. 218, 48 S. W. 1061; Missouri, etc., R. Co. *v.* Wise, 101 Tex. 459, 109 S. W. 112 [*affirming* (Civ. App. 1907) 106 S. W. 465]; Belt *v.* Gulf, etc., R. Co., 4 Tex. Civ. App. 231, 22 S. W. 1062.

Oklahoma.— The criminal laws of Nebraska were provisionally adopted for Oklahoma. See U. S. *v.* Pridgeon, 153 U. S. 48, 14 S. Ct. 746, 38 L. ed. 631 [*answering* questions certified in *In re* Pridgeon, 57 Fed. 200]. Certain laws of Kansas were also extended to Oklahoma. See Finch *v.* U. S., 1 Okla. 396, 33 Pac. 638.

Adoption of procedure in civil cases from a state to a territory includes garnishment proceedings (Pace *v.* J. S. Merrill Drug Co., 2 Indian Terr. 218, 48 S. W. 1061); and also provision for damages arising from death by negligence (Ardmore Coal Co. *v.* Bevil, 61 Fed. 757, 10 C. C. A. 41).

Such extension does not operate retroactively in the absence of a clear expression of such intent. *In re* Can-ah-couqua, 29 Fed. 687.

origin.[53] But where a state statute adopting the common law is extended over a territory, it is not the decisions of the state but those of the federal supreme court which determine what the common law is.[54]

C. Force of Laws of Former Sovereignty. In accordance with the principles of international law the laws of the former sovereignty continue in force in territory acquired by the United States, except so far as inconsistent with or repealed by the laws of the new sovereignty,[55] the rule applying with particular force to laws affecting commercial transactions, personal property rights, and domestic relations.[56]

D. Distribution of Powers — 1. In General. The triple division of governmental powers has usually been observed in constituting the civic framework for the territories and possessions of the United States.[57] In Alaska, however, as well as in the smaller possessions like Guam, Tutuila, and the Panama Canal Zone, the legislative branch is wanting, while in the Philippines the executive officers are all *ex-officio* members of the upper legislative house.[58]

2. Executive. The executive power is generally vested in a governor,[59] who is clothed with the ordinary powers of appointing[60] and removing territorial

53. Kohn *v.* McKinnon, 90 Fed. 623.

54. Missouri, etc., R. Co. *v.* Wilhoit, 6 Indian Terr. 534, 98 S. W. 341; Missouri, etc., R. Co. *v.* Wise, 101 Tex. 459, 109 S. W. 112 [*affirming* (Civ. App. 1907) 106 S. W. 465]. *Compare* El Paso, etc., R. Co. *v.* Smith, (Tex. Civ. App. 1908) 108 S. W. 988.

55. Wagner *v.* Kenner, 2 Rob. (La.) 120; *In re* Chavez, 149 Fed. 73, 80 C. C. A. 451 (New Mexico); Strother *v.* Lucas, 12 Pet. (U. S.) 410, 9 L. ed. 1137 (Louisiana); American Ins. Co. *v.* 356 Bales of Cotton, 1 Pet. (U. S.) 511, 7 L. ed. 242 (Florida); Philippine Sugar Estates Development Co. *v.* U. S., 39 Ct. Cl. 225 (Philippines); Marmion *v.* Pelegri, 1 Porto Rico 225.

The common law was held to prevail in Oklahoma territory, although that region was never subject to British sovereignty. McKennon *v.* Winn, 1 Okla. 327, 33 Pac. 582, 22 L. R. A. 501.

56. Wagner *v.* Kenner, 2 Rob. (La.) 120; *In re* Chavez, 149 Fed. 73, 80 C. C. A. 451; Philippine Sugar Estates Development Co. *v.* U. S., 39 Ct. Cl. 225.

57. See Territory *v.* O'Connor, 5 Dak. 397, 41 N. W. 746, 3 L. R. A. 355; Spencer *v.* Sully County, 4 Dak. 474, 33 N. W. 97; Rupert *v.* Alturas County, 2 Ida. (Hasb.) 19, 2 Pac. 718; Hedges *v.* Lewis, etc., County, 4 Mont. 280, 1 Pac. 748.

58. See Binns *v.* U. S., 194 U. S. 486, 24 S. Ct. 816, 48 L. ed. 1087.

A parallel situation exists in the British colonies. See Tarring Law relating to Colonies, p. 69.

59. See U. S. Rev. St. (1878) §§ 1841 *et seq.*, 1877.

The territorial governor's powers are limited by the acts of congress (Territory *v.* Lee, 2 Mont. 124; 1 Op. Atty.-Gen. 408), and continue till a state government is established (Scott *v.* Detroit Young Men's Soc., 1 Dougl. (Mich.) 119).

A territorial governor who acts without compensation as a treasury disbursing officer in constructing public buildings is not entitled to the benefits of a subsequent federal statute providing compensation for disbursing agents. Meriwether *v.* U. S., 22 Ct. Cl. 332.

60. U. S. Rev. St. (1878) § 1841 *et seq.*; Organic Act Porto Rico, § 33. And see Smith *v.* Odell, 1 Pinn. (Wis.) 449.

The legislature cannot take the power away where it is vested in the governor by the organic act. Taylor *v.* Stevenson, 2 Ida. (Hasb.) 180, 9 Pac. 642; Williams *v.* Clayton, 6 Utah 86, 21 Pac. 398; People *v.* Jack, 4 Utah 438, 11 Pac. 213 [*affirmed* in 132 U. S. 643, 10 S. Ct. 194, 33 L. ed. 459]; People *v.* Clayton, 4 Utah 421, 11 Pac. 206 [*affirmed* in 132 U. S. 632, 10 S. Ct. 190, 33 L. ed. 455]; *Ex p.* Duncan, 1 Utah 81. But the grant of such power does not prevent the legislature from regulating or even abolishing the office after once creating it. Territory *v.* Rodgers, 1 Mont. 252. *Compare* Lee *v.* Uinta County, 3 Wyo. 52, 31 Pac. 1045. Nor from declaring it vacant and temporarily filling it. People *v.* Van Gaskin, 5 Mont. 352, 6 Pac. 30.

Confirmation of appointment is required: In the Philippines by the commission; in Porto Rico by the executive council; in the continental territories by the legislature. See Territory *v.* Rodgers, 1 Mont. 252.

Appointment of canal commissioners.— A provision of an organic act for the appointment of all civil officers by the executive does not include canal commissioners; it embraces only those officers in whom a portion of the sovereignty is vested or to whom the enforcement of territorial laws is committed. U. S. *v.* Hatch, 1 Pinn. (Wis.) 182. *Compare* People *v.* Clayton, 5 Utah 598, 18 Pac. 628, court commissioners.

An act of congress giving the governor alone power to fill vacancies by death or resignation does not authorize him to appoint the successor of an official appointed to fill a vacancy and whose term has expired. Fiske *v.* Breeden, 2 N. M. 70; Territory *v.* Stokes, 2 N. M. 63; *In re* Atty.-Gen., 2 N. M. 49. *Compare* Territory *v.* Rodgers, 1 Mont. 252.

officers,[61] granting pardons,[62] and exercising general supervisory functions.[63] There are also provided other administrative officers, such as a territorial secretary,[64] treasurer,[65] auditor,[66] attorney-general,[67] marshal,[68] and similar functionaries.[69]

The port and pilot regulations established by military authority in Porto Rico remain in force where not expressly repealed, and the governor is empowered thereby to appoint a captain of the port of San Juan. 1 Op. Atty.-Gen. Porto Rico 44, 90.

61. See Cole *v.* Territory, 5 Ariz. 137, 48 Pac. 217, holding that a territorial statute authorizing the governor in his discretion to remove any territorial officer appointed by him or his predecessor, nothing appearing to the contrary in the organic act, is valid; likewise an act conferring such power in the case of every official whose term is not fixed.

Power of removal where term of office is fixed.— The governor has no implied power to remove a territorial judge whose term is fixed by law. Territory *v.* Ashenfelter, 4 N. M. 85, 12 Pac. 879. But such power was vested in the president under U. S. Rev. St. (1878) § 1768, since repealed. McAllister *v.* U. S., 141 U. S. 174, 11 S. Ct. 949, 35 L. ed. 693.

Whether such power of removal is executive or judicial see Territory *v.* Cox, 6 Dak. 501; State *v.* Shannon, 7 S. D. 319, 64 N. W. 175.

62. See *infra*, this note.

In Porto Rico all pardoning power, including that formerly exercised by the courts and injured parties, is vested in the governor. Organic Act, § 17; 1 Op. Atty.-Gen. Porto Rico 187. The power to grant an absolute pardon includes the power to grant a conditional one, and to commute a sentence. 1 Op. Atty.-Gen. Porto Rico 169.

63. See *infra*, this note.

The control of the insular police of Porto Rico is vested in the commanding officer thereof, subject to the direction of the governor. 1 Op. Atty.-Gen. Porto Rico 70.

Opening street.— The governor's administrative jurisdiction over municipal officials is one to be extended rather than restricted, since it saves cost and delay of litigation, as in the opening of a street. 1 Op. Atty.-Gen. Porto Rico 91.

64. U. S. *v.* Smith, 27 Fed. Cas. No. 16,321, 1 Bond 68.

Five of the members of the Philippine commission are *ex-officio* heads of departments and are styled secretaries.

65. Cole *v.* Territory, 5 Ariz. 137, 48 Pac. 217; Thompson *v.* Territory, 10 Okla. 409, 62 Pac. 355; Jack *v.* Utah, 132 U. S. 643, 10 S. Ct. 194, 33 L. ed. 459 [*affirming* 4 Utah 438, 11 Pac. 213].

66. People *v.* Clayton, 4 Utah 421, 11 Pac. 206 [*affirmed* in 132 U. S. 632, 10 S. Ct. 190, 33 L. ed. 455].

Validity of act creating office.— An act creating the office of territorial auditor may be valid, although it contains a provision for popular election which is void because inconsistent with the organic act. People *v.* Clayton, 4 Utah 421, 11 Pac. 206 [*affirmed* in 132 U. S. 632, 10 S. Ct. 190, 33 L. ed. 455]; People *v.* Jack, 4 Utah 438, 11 Pac. 213 [*affirmed* in 132 U. S. 643, 10 S. Ct. 194, 33 L. ed. 459].

In the territory of Idaho this official was known as the controller. Crutcher *v.* Cram, 1 Ida. 372.

The office of auditor is not a township, district, or county office but a territorial one. Clayton *v.* Utah, 132 U. S. 632, 10 S. Ct. 190, 33 L. ed. 455; Jack *v.* People, 132 U. S. 643, 10 S. Ct. 194, 33 L. ed. 459. See also People *v.* Van Gaskin, 5 Mont. 352, 6 Pac. 30.

Drawing warrants.— The auditor should draw a warrant for a territorial official salary to no one but the official himself. King *v.* Hawkins, 2 Ariz. 358, 16 Pac. 434.

67. 1 Op. Atty.-Gen. Porto Rico 115, holding that the attorney-general will not intervene in matters pending in courts except when charged by law with the duty of so doing.

Reimbursement for rent of office.— Where the attorney-general is provided with offices in the territorial capital he is not entitled to reimbursement for the rental of quarters elsewhere. Territory *v.* Grant, 3 Wyo. 241, 21 Pac. 693.

68. U. S. *v.* Tidball, 3 Ariz. 384, 29 Pac. 385; Johnson *v.* U. S., Morr. (Iowa) 423; Nelson *v.* Clayton, 2 Utah 299.

The marshal is neither a federal, district, nor township officer, but a territorial one. *Ex p.* Duncan, 1 Utah 81.

69. See *infra*, this note.

Loan commissioners, provided for by an Arizona statute, although amended and approved by an act of congress, derive their authority from the territory, and are governed by the general law thereof which empowers a majority of three or more to act. Schuerman *v.* Arizona, 184 U. S. 342, 22 S. Ct. 406, 46 L. ed. 580.

Territorial printer.—An act providing that all public printing shall be done by a certain company does not create the office of public printer. Guthrie Daily Leader *v.* Cameron, 3 Okla. 677, 41 Pac. 635.

Army officers have been held ineligible to territorial offices. Hill *v.* Territory, 2 Wash. Terr. 147, 7 Pac. 63. In the Philippines, however, many officers of the regular army have been detailed for civil positions and are still holding offices like that of governor in the non-christian provinces. In Guam under American sovereignty, the governor has invariably been a naval officer.

Legislative control.— The salaries and terms of territorial officers are under the control of the legislature except as fixed by the organic act. Lee *v.* Uinta County, 3 Wyo. 52, 31 Pac. 1045. *Compare* Davidson *v.* Carson, 1 Wash. Terr. 307.

In the Philippines all civil officials are paid from revenue raised in the archipelago. In the continental territories they must be

The powers and duties of such officers are for the most part identical with those of the corresponding positions in the state governments.[70]

3. Legislative. The plenary legislative power which congress possesses over the territories and possessions of the United States [71] may be exercised by that body itself,[72] or, as is much more often the case, it may be delegated to a local agency,[73] such as a legislature, the organization of which proceeds upon much the same lines as in the several states or in congress, which is often taken as the model,[74] and whose powers are limited by the organic act; [75] but within the scope of such

paid from the federal treasury. U. S. *v.* Smith, 5 Am. L. Reg. 269, pursuant to U. S. Rev. St. (1878) § 1855; Osborn *v.* Clark, 1 Ariz. 397, 25 Pac. 797.

70. See *infra*, this note.

Duties and powers of officers as to public debts and securities.— See Utter *v.* Franklin, 7 Ariz. 300, 64 Pac. 427; Gage *v.* McCord, 5 Ariz. 227, 51 Pac. 977; Leader Printing Co. *v.* Nicholas, 6 Okla. 302, 50 Pac. 1001; Murphy *v.* Utter, 186 U. S. 95, 22 S. Ct. 776, 46 L. ed. 1070; Lawrence County *v.* Jewell, 100 Fed. 905, 41 C. C. A. 109.

Disbursements.— Territorial funds cannot as a rule be paid except in pursuance of an appropriation by law. People *v.* Territory, 2 Colo. 97. But it has been held to be the duty of the territorial auditor to issue a warrant for expense in connection with the care of insane persons or convicts, although there is no such appropriation. Johnson *v.* Cameron, 2 Okla. 266, 37 Pac. 1055; Nelson *v.* Clayton, 2 Utah 299; Donnellan *v.* Nicholls, 1 Wyo. 61. But such a warrant cannot be drawn against a fund for another year than that in which the services were rendered. Garcia *v.* Territory, 10 N. M. 43, 61 Pac. 207. Payment should be made only to the creditor or his legal representative. King *v.* Hawkins, 2 Ariz. 358, 16 Pac. 434; 1 Op. Atty.-Gen. Porto Rico 75, 180.

Order of payment of claim.— Warrants drawn by the territory for indebtedness subsequent to the funding act were required to be paid in their order. Lamkin *v.* Sterling, 1 Ida. 92.

Fire companies.—A territorial statute appropriating money for the compensation of fire companies was held a valid exercise of police power and to continue in force after the organization of a state government. Cutting *v.* Taylor, 3 S. D. 11, 51 N. W. 949, 15 L. R. A. 691.

71. See *supra*, III, B, 1.

72. See *supra*, III, B, 1. And see cases cited *infra*, this note.

In legislating for Alaska congress has exercised the combined powers of a federal and a territorial body, and the Alaska code enacted by it is to be construed like the act of a legislature. Allen *v.* Myers, 1 Alaska 114. In imposing license-fees upon certain lines of business by the Alaskan penal code congress is not limited by Const. art. 1, § 8, requiring "excises" to be uniform throughout the United States, the fees being rather local taxes imposed under the plenary power of congress to defray expenses of territorial government. Wynn-Johnson *v.* Shoup, 194 U. S. 496, 24 S. Ct. 820, 48 L. ed. 1091; Binns *v.* U. S., 194 U. S. 486, 24 S. Ct. 816, 48 L. ed. 1087. Congress is the only lawmaking power for Alaska. U. S. *v.* Nelson, 29 Fed. 202.

73. Sawyer *v.* El Paso, etc., R. Co., (Tex. Civ. App. 1908) 108 S. W. 718.

President.— Congress has power to authorize the president to regulate or prohibit the introduction of distilled spirits into the district of Alaska under penalties prescribed by 15 U. S. St. at L. 241. The Louisa Simpson, 15 Fed. Cas. No. 8,533, 2 Sawy. 57.

Philippine commission.— Congress could lawfully delegate legislative power to the Philippine commission, a purely appointive body, which for more than seven years was the sole legislative body in the archipelago. It is now the upper house of the Philippine legislature. U. S. *v.* Ling Su Fan, 10 Philippine 104, 6 Off. Gaz. 368; Gaspar *v.* Molina, 5 Philippine 197, 3 Off. Gaz. 651. See Door *v.* U. S., 195 U. S. 138, 24 S. Ct. 808, 49 L. ed. 128 [*affirming* 2 Philippine 269].

Under the ordinance of 1787 the governor and judges of the Northwest Territory had power to adopt laws from other states. Cochran *v.* Loring, 17 Ohio 409. So also in Arkansas territory. See Organic Act, § 5; Territory *v.* O'Connor, 5 Dak. 397, 41 N. W. 746, 3 L. R. A. 355; Territory *v.* Scott, 3 Dak. 357, 20 N. W. 401.

74. See *infra*, this note.

One of the first acts of the recently organized Philippine assembly was the adoption of the rules of the federal house of representatives. The plan of working through committees, and even the office of speaker, were borrowed from the same body.

Right of legislator to hold other public office.— In the absence of express inhibition a member of such a legislature may hold any other public office. 1 Op. Atty.-Gen. Porto Rico 9. But the Philippine electoral law (Act 1852, § 5) prohibits a member of the assembly from "holding any office under the government of the Philippine Islands."

Length of session.— The "sixty days' duration" prescribed for the session of a territorial legislature means sixty consecutive days from the beginning of the session; not sixty continuous working days. Maricopa County *v.* Osborn, 4 Ariz. 331, 40 Pac. 313 [*overruling* Cheyney *v.* Smith, 3 Ariz. 143, 23 Pac. 680]. See also People *v.* Clayton, 5 Utah 598, 18 Pac. 628. The Philippine Bill (§ 7) prescribes annual sessions of the legislature continuing not exceeding ninety days (Sundays and holidays not included).

75. See *supra*, III, A.

act it has complete authority to legislate,[76] subject as has been seen to the power of congress to annul its work.[77] Thus a territorial legislature has the power to create and regulate corporations,[78] charter and regulate municipalities,[79] pass laws regulating the sale of intoxicating liquors,[80] and other articles "deemed

76. Elliott *v.* Lochnane, 1 Kan. 126; Mercer *v.* Williams, Walk. (Mich.) 85; U. S. *v.* Ling Su Fan, 10 Philippine 104, 6 Off. Gaz. 368; Gasper *v.* Molina, 5 Philippine 197, 3 Off. Gaz. 651; Dorr *v.* U. S., 195 U. S. 138, 24 S. Ct. 808, 49 L. ed. 128 [*affirming* 2 Philippine 269].

Such power continues even after the passage of an act admitting the territory into the Union, and until the legislature is superseded by a body elected under the new constitution (State *v.* Hitchcock, 1 Kan. 178, 81 Am. Dec. 503), so far as it is not repugnant to the state constitution (Stoughton *v.* State, 5 Wis. 291. *Compare* Leitensdorfer *v.* Webb, 1 N. M. 34). And this is especially true where such law is recognized by the constitutional convention (Gilchrist *v.* Helena, etc., R. Co., 58 Fed. 708), or by the legislature (Ward *v.* Broadwell, 1 N. M. 75).

Where extra or extended sessions are not expressly authorized an act passed after the time fixed for the regular session is void. Treadway *v.* Schnauber, 1 Dak. 236, 46 N. W. 464.

Expenditures. — The congressional enactment (U. S. Rev. St. (1878) §§ 1855, 1888), providing for the salaries of members and officers of the legislature, has been held not to preclude it from employing and paying other subordinates than those named in the act. Baca *v.* Perez, 8 N. M. 187, 42 Pac. 162; Braithwaite *v.* Cameron, 3 Okla. 630, 38 Pac. 1084. But see Stevenson *v.* Moody, 2 Ida. (Hasb.) 260, 12 Pac. 902. The compensation cannot, however, exceed the amount fixed by the federal law. Osborn *v.* Clark, 1 Ariz. 397, 25 Pac. 797.

77. See *supra*, III, B, 1.

78. *Arizona.*— Bashford-Burmister Co. *v.* Agua Fria Copper Co., (1894) 35 Pac. 983.

Colorado.—Cowell *v.* Colorado Springs Co., 3 Colo. 82.

Michigan.—Swan *v.* Williams, 2 Mich. 427.

Missouri.— Douglas *v.* State Bank, 1 Mo. 24; Riddick *v.* Amelin, 1 Mo. 5.

Montana.— Carver Mercantile Co. *v.* Hulme, 7 Mont. 566, 19 Pac. 213.

New York.—Williams *v.* Michigan Bank, 7 Wend. 539; Michigan Bank *v.* Williams, 5 Wend. 478.

United States.— Wells *v.* Northern Pac. R. Co., 23 Fed. 469, 10 Sawy. 441; Wells *v.* Oregon, etc., R. Co., 15 Fed. 561, 8 Sawy. 600, change of name.

But see Allen *v.* Pegram, 16 Iowa 163, where a bank chartered by the territorial legislature of Nebraska was held to have acquired no corporate powers until such charter was confirmed by the United States.

A corporation created by such an act is a territorial and not a federal corporation and therefore cannot sue as the latter in the United States courts. Adams Express Co. *v.* Denver, etc., R. Co., 16 Fed. 712, 4 McCrary 77.

A foreign corporation doing any substantial local business must comply with the domestic laws. 1 Op. Atty.-Gen. Porto Rico 24; Philippine Act 1459, § 68, as amended by Act 1506, § 1. But a corporation operating a cable between Porto Rico and Jamaica is not doing business within the former. 1 Op. Atty.-Gen. Porto Rico 107.

Industrial corporations.— Under U. S. Rev. St. (1878) § 1889, authorizing territories to incorporate by general law associations for industrial pursuits, a mercantile business for the sale of goods, mining supplies, etc., may be incorporated (Bashford-Burmister Co. *v.* Agua Fria Copper Co., (Ariz. 1894) 35 Pac. 983. *Compare* Carver Mercantile Co. *v.* Hulme, 7 Mont. 566, 19 Pac. 213), as may be also an express company (Wells *v.* Northern Pac. R. Co., 23 Fed. 469, 10 Sawy. 441), and a street railway corporation (Central Trust Co. *v.* Warren, 121 Fed. 323, 58 C. C. A. 289).

79. *Colorado.*— Deitz *v.* Central, 1 Colo. 323.

Dakota.— Elk Point *v.* Vaughn, 1 Dak. 113, 46 N. W. 577.

Kansas.— State *v.* Young, 3 Kan. 445; Burnes *v.* Atchison, 2 Kan. 454.

Montana.— People *v.* Butte, 4 Mont. 174, 1 Pac. 414, 47 Am. Rep. 346.

Ohio.— Myers *v.* Manhattan Bank, 20 Ohio 283.

Washington.— Alger *v.* Hill, 2 Wash. 344, 27 Pac. 922.

Wyoming.—Wagner *v.* Harris, 1 Wyo. 194.

United States.— Rogers *v.* Burlington, 3 Wall. 654, 18 L. ed. 79; Vincennes University *v.* Indiana, 14 How. 268, 14 L. ed. 416.

An act of congress limiting the municipal indebtedness to four per cent of the value of the taxable property is a restriction not alone upon the municipality but also upon the territorial legislature. Guthrie *v.* New Vienna Bank, 4 Okla. 194, 38 Pac. 4 [*overruling* Guthrie *v.* Territory, 1 Okla. 188, 31 Pac. 190, 21 L. R. A. 841].

A territorial legislature may pass an act creating a commission to investigate claims against municipalities arising before their legal creation and for the payment of such as should finally be allowed by the courts after a report of such commission. Guthrie Nat. Bank *v.* Guthrie, 173 U. S. 528, 19 S. Ct. 513, 43 L. ed. 796.

Time of presentment of claims against municipalities.— Under an act of congress providing that on the entry of a town-site on the public domain pursuant to such act the execution of the trust for the occupants therein created should be conducted under regulations prescribed by the territorial legislature, the latter may fix a period within which the claim of a beneficiary must be asserted. Cofield *v.* McClellan, 1 Colo. 370.

80. Territory *v.* Connell, 2 Ariz. 339, 16 Pac. 209; Territory *v.* O'Connor, 5 Dak. 397,

injurious to the health or morals of the community," [81] locate the seat of government,[82] and in general, to legislate upon all subjects within the police power of the territory.[83] Such a body cannot delegate its legislative power,[84] nor, under the federal act,[85] grant "any special or exclusive privilege," [86] nor can it impair

41 N. W. 746, 3 L. R. A. 355, local option laws. See also Thornton *v.* Territory, 3 Wash. Terr. 482, 17 Pac. 896; The Louisa Simpson, 15 Fed. Cas. No. 8,533, 2 Sawy. 57.

81. Territory *v.* Guyott, 9 Mont. 46, 22 Pac. 134.

82. Territory *v.* Scott, 3 Dak. 357, 20 N. W. 401.

But under an organic act authorizing the legislature to "change" the seat of government it was held to have no power to "permanently locate" the same. *In re* Seat of Government, 1 Wash. Terr. 115.

83. See cases cited *infra*, this note.

Continuing laws.—Where the laws of another state have been temporarily extended over the territory by congress the legislature may continue the same. *Ex p.* Larkin, 1 Okla. 53, 25 Pac. 745, 11 L. R. A. 418.

Electoral qualifications.—A territorial legislature may prescribe the qualifications of electors, consistently with acts of congress. Wooley *v.* Watkins, 2 Ida. (Hasb.) 590, 22 Pac. 102; Innis *v.* Bolton, 2 Ida. (Hasb.) 442, 17 Pac. 264 (Mormon test oath); Davis *v.* Beason, 133 U. S. 333, 10 S. Ct. 299, 33 L. ed. 637. *Compare* Matter of Loucks, 13 Hawaii 17.

Federal officers within the territory may be vested by the legislature with certain duties without creating a new territorial office. Chumasero *v.* Potts, 2 Mont. 242.

Civil remedies.—A territorial legislature may provide for the remedy of attachment (Cochran *v.* Loring, 17 Ohio 409); replevin (Ward *v.* Broadwell, 1 N. M. 75); and prohibition (People *v.* House, 4 Utah 369, 10 Pac. 838).

Marriages between Indians and white persons may be prohibited by a territorial legislature. Wilbur *v.* Bingham, 8 Wash. 35, 41, 35 Pac. 407, 40 Am. St. Rep. 886.

Divorces may be granted by a territorial legislature. Higbie *v.* Higbie, 4 Utah 19, 5 Pac. 693. But see Maynard *v.* Hill, 125 U. S. 190, 8 S. Ct. 723, 31 L. ed. 654. It may also confer and regulate the jurisdiction of probate courts to grant divorces. Irwin *v.* Irwin, 3 Okla. 186, 41 Pac. 369, 2 Okla. 180, 37 Pac. 548; Kenyon *v.* Kenyon, 3 Utah 431, 24 Pac. 829; Whitmore *v.* Harden, 3 Utah 121, 1 Pac. 465 [*overruling* Cast *v.* Cast, 1 Utah 112].

Crimes.—The Philippine legislature has power to enact a law punishing libel as a crime and also providing for civil damages. Dorr *v.* U. S., 195 U. S. 138, 24 S. Ct. 808, 49 L. ed. 128 [*affirming* 2 Philippine 269]. A territorial statute punishing as a misdemeanor the cutting of timber on school lands, the title to which remains in the United States, is valid. Hodgen *v.* U. S., Morr. (Iowa) 218; Chalfont *v.* U. S., Morr. (Iowa) 214.

Rate of interest.—A territorial legislature may provide a different rate of interest in certain counties from that allowed in others. Guild *v.* Deadwood First Nat. Bank, 4 S. D. 566, 57 N. W. 499.

Mining claims.—An act providing "for the forfeiture of placer mines held by aliens" in a territory is void as interfering with the disposal of the public domain. Territory *v.* Lee, 2 Mont. 124. See also King *v.* Thomas, 6 Mont. 409, 12 Pac. 865; Vansickle *v.* Haines, 7 Nev. 249; Newcomb *v.* Smith, 2 Pinn. (Wis.) 131, 1 Chandl. 71. But a territorial legislature may require the locator's declaratory statement. O'Donnell *v.* Glenn, 8 Mont. 248, 19 Pac. 302.

Patents, copyrights, and trade-marks.—Patents cannot be issued by the government of Porto Rico, although Spanish patents valid at the ratification of the Treaty of Paris are paramount, at least during the period of their effectiveness. But trade-marks are not exclusively the subject of federal legislation, and the Spanish laws governing the same remain in force in Porto Rico. 1 Op. Atty.-Gen., Porto Rico 32, 75, 182–184. In the Philippines, however, not only trade-marks but also patents and copyrights continue to be issued by the insular government and regulated by its legislation. See Philippine Act 666.

School lands may be sold under the authority of the territorial legislature. Stout *v.* Hyatt, 13 Kan. 232.

84. Thalheimer *v.* Maricopa County, 11 Ariz. 430, 94 Pac. 1129; Winters *v.* Hughes, 3 Utah 438, 24 Pac. 907; Thornton *v.* Territory, 3 Wash. Terr. 482, 17 Pac. 896.

Acts held not to constitute improper delegation.—Authorizing submission to local popular vote of the question of prohibiting the sale of intoxicating liquors is not an improper delegation of legislative power (Thalheimer *v.* Maricopa County, 11 Ariz. 430, 94 Pac. 1129; Territory *v.* O'Connor, 5 Dak. 397, 41 N. W. 746, 3 L. R. A. 355), nor is the submission of a city charter (People *v.* Butte, 4 Mont. 174, 1 Pac. 414, 47 Am. Rep. 346), nor authorizing commissioners to locate the territorial capital (Territory *v.* Scott, 3 Dak. 357, 20 N. W. 401).

85. 24 U. S. St. at L. 170.

86. Elk Point *v.* Vaughn, 1 Dak. 113, 46 N. W. 577; Guthrie Daily Leader *v.* Cameron, 3 Okla. 677, 41 Pac. 635; Guthrie Nat. Bank *v.* Guthrie, 173 U. S. 528, 19 S. Ct. 513, 43 L. ed. 796.

A game law does not confer a "special privilege" because restricted in its operation to five counties. Hayes *v.* Territory, 2 Wash. Terr. 286, 5 Pac. 927.

Ferries and pilots.—A territorial act providing for the exclusive licensing of ferries is a valid exercise of the police power and not a grant of a private charter or special privilege. Evans *v.* Hughes County, 6 Dak.

the obligation of a contract, the constitutional prohibition against such a proceeding being in full force in the territories.[87]

IV. SUBSTANTIVE LAWS AND PARTICULAR RELATIONS.

A. Contracts — 1. In General. In the territories of the Philippines and Porto Rico contracts are governed generally by the provisions of the code,[88] and are enforceable only between the parties thereto and their legal successors unless there be a stipulation in favor of a third party,[89] and even if a stipulation in favor of a third party is included and he fails to give notice of its acceptance, it may be revoked.[90]

102, 50 N. W. 720; Nixon *v.* Reid, 8 S. D. 507, 67 N. W. 57, 32 L. R. A. 315. So also of pilotage regulations. The Ullock, 19 Fed. 207, 9 Sawy. 634; The Panama, 18 Fed. Cas. No. 10,702, Deady 27, 1 Oreg. 418.

Application of general law to subject-matter of special law.—Whether a general law can be made applicable to the subject-matter in regard to which a special law is enacted by a territorial legislature is a matter which rests in the judgment of the legislature itself. State *v.* Hitchcock, 1 Kan. 178, 81 Am. Dec. 503.

87. Northern Pac. R. Co. *v.* Carland, 5 Mont. 146, 3 Pac. 134, as by imposing a tax upon corporate property exempted by the act of incorporation.

Bankruptcy.— A territorial act providing that the acceptance of a dividend from an assignor shall release him from further liability on the claim is valid. Downes *v.* Parshall, 3 Wyo. 425, 26 Pac. 994.

88. See cases cited *infra,* this and the following notes.

Form.—Although Philippine Civ. Code, art. 1280, requires certain contracts to "appear in a public instrument" an action may be maintained on a verbal agreement covering the same subject. Thunga Chui *v.* Que Bentec, 2 Philippine 561. *Compare* Arán *v.* Echalecu, 1 Porto Rico 91.

Consideration.— If a real and valid cause (consideration) is proved, a false statement regarding the same does not vitiate the contract notwithstanding the provisions of Porto Rico Civ. Code, art. 1276. Franco *v.* Miranda, 1 Porto Rico 310.

Mistake which will vitiate a contract must inhere in the circumstances thereof; fraud must be clearly proved. Joy *v.* Banco Territorial, 1 Porto Rico 409.

Execution.— Porto Rico Civ. Code, art. 1259, requiring ratification by the principal of all contracts executed in his name by another do not apply where the agent has express authority. Voigt *v.* Registrar of Property, 1 Porto Rico 175. A notary's certificate that he was present and saw the signatures affixed to a private document is not sufficient as against third parties, the making of such certificate not being part of his duties. Valdes *v.* Del Valle, 1 Porto Rico 25.

Interpretation.— Porto Rico Civ. Code, art. 1283, excluding from the scope of a contract matters not within the apparent intention of the parties applied see Cayol *v.* Balseiro, 1 Porto Rico 253.

Commodatum.— One who receives perishable goods with the obligation to restore them must return goods of the same quality and amount. Nieto *v.* Ayuntamiento, 1 Porto Rico 184, under Civ. Code, art. 1753.

Depositum.— A depository can be relieved for the loss and destruction of the deposit only by some fortuitous event. Pou *v.* Agrait, 1 Porto Rico 101, under Civ. Code, art. 1758 *et seq.* *Compare* Civ. Code, art. 1183.

Aleatory contracts.—Conditions of an aleatory nature duly inserted and mutually accepted by the parties are valid and enforceable. Esbrí *v.* Serrallés, 1 Porto Rico 321 [*reversed* on other grounds in 200 U. S. 103, 26 S. Ct. 176, 50 L. ed. 391].

Participation in a lottery is not punishable under the laws of Porto Rico, and the government is obligated to return the price paid for tickets in the Provincial lottery suppressed by General Orders 17 of 1898. Chevremont *v.* People, 1 Porto Rico 431.

Purchase and sale.— Delivery is essential to a complete contract of purchase and sale. Bartolomey *v.* Cardy, 1 Porto Rico 169. Its rules apply to personal as well as real property. Valdés *v.* López, 1 Porto Rico 53. Upon expiration of the time for redemption fixed by such a contract the vendee becomes the absolute owner. Cobián *v.* Rivera, 1 Porto Rico 498; Bonin *v.* Registrar of Property, 1 Porto Rico 315; Porto Rico Civ. Code, art. 1509.

A lease of real property cannot limit or lessen the interest of heirs thereto. Bazán *v.* Esquiaga, 1 Porto Rico 307. Mere acceptance of possession by the lessor does not waive his right to damages for breach of the lease. Barnés *v.* Mora, 1 Porto Rico 179. Claims for rent are preferred only as regards personal property which actually belongs to the lessee and only in case he is indebted. Schira *v.* Arzuaga, 1 Porto Rico 143. See also Van Syckel *v.* Registrar of Property, 1 Porto Rico 12.

Where it is inherently apparent that a fixed time of performance is intended it is not immediately demandable under Civ. Code, art. 1113. Nieto *v.* Ayuntamiento, 1 Porto Rico 184.

89. Porto Rico Civ. Code, art. 1257; 4 Manresa Comm. Civ. Code, p. 580; French Civ. Code, art. 1165; 2 Dalloz Annot. Codes, p. 1079 *et seq.*

90. Lopez *v.* Registrar of Property, 1 Porto Rico 224.

2. Insurance. Contracts of insurance are governed by the code of commerce. The policy is the law of the contract but the insurer may waive its conditions and the policy may be transferred without his consent.[91] Invasion and insurrection must cause the loss in order to relieve the insurer,[92] but incendiarism vitiates the policy if caused by the insured; otherwise if done without his instigation or knowledge.[93] Mere signing of the application and payment of the first premium on a life insurance policy do not bind the insurer to issue the policy, or entitle the applicant to recover where the authority of the special agent or the making of the contract are not sufficiently proved.[94] Forfeiture of policy for nonpayment of premiums may be waived by receipt of subsequent instalments.[95]

3. Partnership. The rules regulating the partnership relation in the United States proper [96] apply generally to partnerships in the territories of the Philippines and Porto Rico.[97] A contract of partnership is valid and binding on the partners if the essential contractual requisites were observed whatever may be its form and conditions, provided they are not expressly prohibited by the code of commerce,[98] the provisions of which latter code prevail over those of the civil code in determining the rights of creditors of individual partners as regards partnership property.[99] Industrial partners are liable to third parties for firm debts[1] and

A stipulation that a certain sum shall be paid to a third party on a debt due him from one of the parties is not a stipulation *pour autrui* within the meaning of this principle, but is for the benefit of the stipulating party. Egan *v.* Fireman's Ins. Co., 27 La. Ann. 368; Saltenberry *v.* Loucks, 8 La. Ann. 95; Tiernan *v.* Martin, 2 Rob. (La.) 523; Eades *v.* Atlantic, Gulf & Pacific Co., decided in court first instance of Manila, November, 1908. See, generally, Contracts, 9 Cyc. 380.

91. Gonzalez *v.* Font, 1 Porto Rico 41.

A policy on merchandise covers goods substituted for those sold. Rodriguez *v.* North German F. Ins. Co., 1 Porto Rico Fed. 235. But not new buildings added to that insured. Martin *v.* Royal Ins. Co., 1 Porto Rico Fed. 324.

In Porto Rico the proceeds of a fire insurance policy pass with the mortgage of the insured property. Bravo *v.* Gomez, 1 Porto Rico Fed. 303.

92. Martin *v.* Royal Ins. Co., 1 Porto Rico Fed. 324.

Failure to give notice of loss required by code of commerce, article 765, will not relieve the insurer from liability, although if additional loss results therefrom the insured will be held responsible proportionately; notice within twenty days after loss has been held reasonable. Milland *v.* North Germanic Maritime Ins. Co., 3 Porto Rico Fed. 343.

The arbitration clause in a fire policy is valid but is waived by the insurer's refusal to pay and the agent's statement that for want of proof he could not "go on" amounts to such a refusal. Chang *v.* Royal Exch. Assur. Corp., 8 Philippine 399, 5 Off. Gaz. 546.

Negotiations for settlement may waive limitations fixed by the policy and the general statutes of limitations. Miller *v.* Northern Assur. Co., 1 Porto Rico Fed. 420 [*affirmed* in 203 U. S. 597, 27 S. Ct. 775, 51 L. ed. 333].

93. Miller *v.* Northern Assur. Co., 1 Porto Rico Fed. 420 [*affirmed* in 203 U. S. 597, 27 S. Ct. 775, 51 L. ed. 333].

94. Badger *v.* New York L. Ins. Co., 7 Philippine 381, 5 Off. Gaz. 145.

95. Rivera *v.* Sun L. Ins. Assur. Co., 1 Porto Rico Fed. 351, 455.

96. See Partnership, 30 Cyc. 334.

97. See cases cited *infra*, this and the following notes.

A silent partnership without corporate name or public announcement of membership is one of *cuentas en participacion*. Bourns *v.* Carman, 7 Philippine 117. But merely paying a bookkeeper five per cent of firm profits in the way of salary does not constitute him a partner. Fortis *v.* Hermanos, 6 Philippine 100, 4 Off. Gaz. 378.

Anonymous mercantile partnerships cannot indirectly purchase their own shares by selling goods to a shareholder and appropriating his shares if the price is not paid. Union Farmaceutica Filipina *v.* Icasiano, 9 Philippine 319, 6 Off. Gaz. 4. But a managing director who purchases the shares of a stock-holder through an agent is not bound to disclose his identity or his intention of making an advantageous sale of the corporate property. Strong *v.* Gutierrez, 6 Philippine 680, 688–90, 5 Off. Gaz. 72.

98. Rocafort *v.* Estape, 1 Porto Rico 211.

99. Banco Espanol *v.* Registrar of Property, 1 Porto Rico 163. *Compare* Nadal *v.* Registrar of Property, 1 Porto Rico 120.

Civil partnerships in mercantile form, organized under the civil code, are subject only to those provisions of the code of commerce which relate to the particular form of organization adopted. Compania Agricola de Ultramar *v.* Reyes, 4 Philippine 2, 13, 2 Off. Gaz. 567.

1. La Compania Maritima *v.* Munoz, 9 Philippine 326, 6 Off. Gaz. 72.

A firm organized to operate a sugar plantation is a civil as distinguished from a mercantile partnership and each member is liable *pro rata* and not *in solido*. Co-Pitco *v.* Yulo, 8 Philippine 544, 5 Off. Gaz. 595.

A firm organized to buy and sell merchandise is mercantile and governed by the code

cannot escape such liability by agreeing among themselves that one partner shall assume all debts.[2] A liquidating partner has authority to sell any of the assets of the expired partnership.[3]

B. Domestic Relations — 1. Marriage and Divorce. The civil marriage is now recognized both in the Philippines[4] and in Porto Rico,[5] and divorce in some form may now be granted in both territories.[6] The grounds vary, in the Philippines, the sole ground being adultery,[7] while in Porto Rico divorce may be granted for personal violence.[8] The civil courts have jurisdiction of the pro-

of commerce. Prautch *v.* Hernandez, 1 Philippine 707.

A limited partner who interferes unduly in firm affairs will, as to creditors, be considered a general partner. Matter of Sucessores De Jose Hernaiz, 3 Porto Rico Fed. 202.

A special or silent partner who gives individual security for a firm loan is as much a debtor as the general partners. American Colonial Bank *v.* Cabrera, 3 Porto Rico Fed. 14 [*affirmed* in 214 U. S. 224, 29 S. Ct. 623, 53 L. ed. 974].

2. Re Doriay Anguera, 1 Porto Rico Fed. 350.

A clause in the articles of a collective partnership limiting liability to the amount of capital invested is invalid. Sunico *v.* Chuidian, 9 Philippine 625, 6 Off. Gaz. 318. Defendant held to be a collective partnership see Wahl *v.* Donaldson, 5 Philippine 11, 4 Off. Gaz. 216.

3. Armstrong *v.* Alvardo, 2 Porto Rico Fed. 33.

Liquidation of partnerships see Bauermann *v.* Casas, 10 Philippine 386, 6 Off. Gaz. 664; Guevara *v.* De Campo, 7 Philippine 104; Machuca *v.* Chuidian, 2 Philippine 210.

4. Philippine Gen. Ord. 68, § 5.

Only a judge or clergyman can celebrate the marriage. U. S. *v.* Mina, 6 Philippine 78.

No common-law marriage, or one without the intervention of a functionary, has ever been recognized in the Philippines (Enriquez *v.* Enriquez, 8 Philippine 565, 5 Off. Gaz. 665); but where parties live together as husband and wife the presumption is that they were legally married (U. S. *v.* Villafuerte, 4 Philippine 476, 3 Off. Gaz. 574, 589).

A marriage celebrated after the promulgation of the order is governed thereby. Lerma *v.* Mamaril, 9 Philippine 118, 5 Off. Gaz. 912; Aguilar *v.* Lazaro, 4 Philippine 735, 4 Off. Gaz. 209.

Breach of promise.— No recovery is permitted for breach of marriage promise based on carnal connection. Batarra *v.* Marcos, 7 Philippine 156, 4 Off. Gaz. 763. *Compare* Fidelino *v.* Legarda, 4 Philippine 285, 4 Off. Gaz. 495.

5. Porto Rico Organic Act, § 8. See also U. S. *v.* Vega, 3 Porto Rico Fed. 480.

The phrase "all persons lawfully married in Porto Rico" as used in this section is not restricted to those who contracted marriage there. 1 Op. Atty.-Gen. Porto Rico 54.

Foreign clergyman may solemnize marriage in Porto Rico. 1 Op. Atty.-Gen. Porto Rico 163.

Marriage according to law of domicile valid.— Legally married residents of Porto Rico have all the rights and privileges conferred by law upon those contracting the civil and religious marriage, regardless of the place where the marriage was celebrated, if in accordance with the law of that place. Marmión *v.* Pelegri, 1 Porto Rico 225. But the making of a newspaper order in which civil marriage is denounced as "civil concubinage," however reprehensible, is not indictable in the United States. U. S. *v.* Vega, 3 Porto Rico Fed. 480.

Marriage is not merely a private relationship; it is a public institution as well, and upon its purity and integrity is based the welfare of society. Bravo *v.* Franco, 1 Porto Rico 242.

6. See cases cited *infra*, the following notes.

7. Ibanez *v.* Ortiz, 5 Philippine 325, 4 Off. Gaz. 324; Benedicto *v.* De la Rama, 3 Philippine 34, 2 Off. Gaz. 166 [*reversed* on other grounds in 201 U. S. 303, 26 S. Ct. 485, 50 L. ed. 765]. See also Willard's Notes Spanish Civ. Code (1904), pp. 11–20.

The provisions of the Spanish civil code, arts. 42–107, were suspended by Governor-General Weyler a few months after the promulgation of the code in the Philippines and the provisions of the *partidas* are the only ones now in force there in respect to divorce. Ibanez *v.* Ortiz, 5 Philippine 325, 4 Off. Gaz. 324; Benedicto *v.* De la Rama, 3 Philippine 34, 2 Off. Gaz. 166 [*reversed* on other grounds in 201 U. S. 303, 26 S. Ct. 485, 50 L. ed. 765].

Condonation is a valid defense. Benedicto *v.* De la Rama, 3 Philippine 34, 2 Off. Gaz. 166 [*reversed* on other grounds in 201 U. S. 303, 26 S. Ct. 485, 50 L. ed. 765]. But a mere pardon for the offense is insufficient; the union of the parties must continue. Garrosi *v.* Dastas, 1 Porto Rico 290; Bravo *v.* Franco, 1 Porto Rico 242.

8. Luzunaris *v.* Pastor Diaz, 1 Porto Rico 472, where, however, it was held that personal violence was not proven.

A divorce granted in accordance with the lex domicilii is valid elsewhere. Marimón *v.* Pelegrí, 1 Porto Rico 225. *Compare* 1 Op. Atty.-Gen. Porto Rico 63.

The organic act of April 12, 1900, contains the divorce law of the island (Marimón *v.* Pelegrí, 1 Porto Rico 225); and so enlarges the provisions of the military order of the preceding year that religious as well as civil marriages are now subject to dissolution (Luzunaris *v.* Pastor Diaz, 1 Porto Rico 472).

ceeding,[9] and may grant alimony *pendente lite*.[10] Under the Spanish law all property of either spouse is presumed to belong to the conjugal partnership,[11] which latter may be liquidated in the divorce proceeding;[12] but the dissolution of the conjugal partnership is a prerequisite to liquidation,[13] and a married woman is not entitled to her part of the conjugal profits until the marriage has been dissolved,[14] and then only as to matrimonial property or that acquired during matrimony.[15]

2. Legitimation of Issue. An action lies at the instance of a natural child to compel acknowledgment by the parent.[16] An acknowledgment in a public document is not necessary, and proof may be made in any form recognized by law.[17]

The intention of congress in giving to Porto Rico a system of laws relating to marriage and divorce was to assimilate the same in principle and application to those existing in continental United States, to be applied and interpreted in accordance with American jurisprudence. Bravo *v.* Franco, 1 Porto Rico 242; Marimón *v.* Pelegrí, 1 Porto Rico 225.

The action cannot be maintained in conjunction with criminal prosecution for adultery, although the latter is the basis of the action. Garrosi *v.* Dastas, 1 Porto Rico 290.

9. See cases cited *infra*, this note.

The courts of first instance of the Philippines have original jurisdiction. Ibañez *v.* Ortiz, 5 Philippine 325, 4 Off. Gaz. 324; Benedicto *v.* De la Rama, 3 Philippine 34, 2 Off. Gaz. 166 [*reversed* on other grounds in 201 U. S. 303, 26 S. Ct. 485, 50 L. ed. 765]. But this is only since the abolition of the Spanish procedure under which actions for divorce were invariably brought in the ecclesiastical courts, which exercised jurisdiction in cases of civil marriage or any other form of marriage, such as marriages under foreign laws. The civil tribunals had jurisdiction of divorce suits and suits for nullity of marriage in these cases, and not only had jurisdiction of the main suit but they were also given jurisdiction of the proceedings for alimony *pendente lite*. Yangco *v.* Rohde, 1 Philippine 404.

10. Lanzuela Santos *v.* Sweeney, 4 Philippine 79, 2 Off. Gaz. 545.

But not where the fact of marriage is denied. Yangco *v.* Rohde, 1 Philippine 404, 1 Off. Gaz. 123.

In an action for the annulment of marriage on the ground of non-age, brought by the wife against the husband, where the relief was denied, an award of twenty-five dollars a month from the commencement of the action for the support of the wife was held proper. Lerma *v.* Mamaril, 9 Philippine 118, 5 Off. Gaz. 912.

11. Lim. *v.* Garcia, 7 Philippine 320, 5 Off. Gaz. 104; Alfonso *v.* Natividad, 6 Philippine 240, 4 Off. Gaz. 461. See also Leonardo *v.* Santiago, 7 Philippine 401, 5 Off. Gaz. 148.

It cannot in any way be encumbered without the consent of the wife (Amadeo *v.* Registrador de la Propredad, 1 Porto Rico 452, under Porto Rico Rev. Code, art. 159), and the proceeds of a loan negotiated by a husband on the wife's property with her consent belong to the partnership, as well as a house in which the same are invested (Palanca *v.* Smith, 9 Philippine 131, 5 Off. Gaz. 914).

The husband is obliged to defray the reasonable and necessary expenses of the wife in the defense of her right, but no more. Caamano *v.* Cancel, 1 Porto Rico 269.

12. De la Rama *v.* De la Rama, 7 Philippine 745, 5 Off. Gaz. 252.

13. Catalan *v.* Uriarte, 1 Porto Rico 237.

14. Daslas Garrosi *v.* Garrosi, 1 Porto Rico Fed. 230.

15. Caamano *v.* Cancel, 1 Porto Rico 269.

Ascertainment and administration.— Conjugal property cannot be ascertained by computing profits of each year of partnership's existence. De la Rama *v.* De la Rama, 7 Philippine 745, 5 Off. Gaz. 252. The husband is the administrator of the dissolved partnership or, in case of his death, his administrator (Enriquez *v.* Victoria, 10 Philippine 10, 6 Off. Gaz. 360), and the inventory must include the husband's capital, dowry, widow's *bienes parafarnales*, and all property acquired during the marriage and possessed by the spouses at the time of the dissolution (De la Rama *v.* De la Rama, 7 Philippine 745, 5 Off. Gaz. 252; Parado *v.* Lagera, 7 Philippine 395, 5 Off. Gaz. 146; Alfonso *v.* Natividad, 6 Philippine 240, 4 Off. Gaz. 461). Mere administration of the wife's property by the husband, although with her consent, does not deprive the wife of ownership. Rodriguez *v.* De la Cruz, 8 Philippine 665, 5 Off. Gaz. 710.

16. Spanish Civ. Code, arts. 135, 136, 137.

The mere fact of birth, without the conditions prescribed in the code, confers no such right. Buenaventura *v.* Urbano, 5 Philippine 1, 4 Off. Gaz. 213; Benedicto *v.* De la Rama, 4 Philippine 746, 4 Off. Gaz. 212; Infante *v.* Figueras, 4 Philippine 738, 4 Off. Gaz. 210; Mendoza *v.* Ibañez, 4 Philippine 666, 4 Off. Gaz. 567.

An action to compel acknowledgment in case of rape cannot be maintained until final sentence of conviction has been imposed on the father. Benedicto *v.* De la Rama, 4 Philippine 746, 4 Off. Gaz. 212. In such an action evidence of the relations between the mother and the supposed father prior to the birth of the child, or that defendant was the father of the child, is inadmissible. Buenaventura *v.* Urbano, 5 Philippine 1, 4 Off. Gaz. 213; Infante *v.* Figueras, 4 Philippine 738, 4 Off. Gaz. 210.

17. Aviles *v.* Lange, 1 Porto Rico 350. *Compare* Cosio *v.* Pili, 10 Philippine 72, 6

The right of legitimation conferred by the code accrues to children born and acknowledged prior to its promulgation,[18] and proof of birth is itself sufficient to give the natural child a certain status.[19] An action also lies at the instance of a legitimate child to compel support.[20]

C. Wills, Administration, and Guardianship. In the territories of the Philippines and Porto Rico wills are governed by much the same rules which determine their validity in the United States proper,[21] probate being conclusive only as to testamentary capacity and due execution,[22] and not determining the validity of testamentary provisions[23] nor who is entitled to share in the estate.[24] Administration proceedings according to the American system obtain in the Philippines,[25] and administrators and executors may be appointed with like

Off. Gaz. 621; Llorente *v.* Rodriguez, 3 Philippine 697, 2 Off. Gaz. 535.

18. Mijares *v.* Nery, 3 Philippine 195, 2 Off. Gaz. 387.

19. Llorente *v.* Rodriguez, 3 Philippine 697, 703, 2 Off. Gaz. 535.

Under the law in force prior to the civil code proof of maternity was sufficient to require acknowledgment by the mother. Buenaventura *v.* Urbano, 5 Philippine 1, 4 Off. Gaz. 213; Llorente *v.* Rodriguez, 3 Philippine 697, 2 Off. Gaz. 535.

Proof of acknowledgment held insufficient see Capistrano *v.* Gabino, 8 Philippine 135; Buenaventura *v.* Urbano, 5 Philippine 1, 4 Off. Gaz. 213; Benedicto *v.* De la Rama, 4 Philippine 746, 4 Off. Gaz. 212; Mendoza *v.* Ibañez, 4 Philippine 666, 4 Off. Gaz. 567.

A father does not, merely by marrying the mother of his illegitimate child, recognize it. Siguiong *v.* Siguiong, 8 Philippine 5.

Presumption of capacity to marry.—Where parentage is proven capacity of parents to marry at the time is presumed. Aviles *v.* Lange, 1 Porto Rico 350; *Ex p.* Classen, 1 Porto Rico 193.

20. Spanish Civ. Code, art. 114 (2).

The child may sue for support where the father has abandoned it and is about to leave the country, notwithstanding a local statute fixing the manner in which the support is to be furnished. Rodriguez *v.* Cueli, 1 Porto Rico Fed. 272.

21. See, generally, WILLS. And see also Benedicto *v.* Javellana, 10 Philippine 197, 6 Off. Gaz. 710 (holding that a legatee is not entitled to his full share of the estate until the decedent's debts have been paid); Sahagun *v.* Gorostiza, 7 Philippine 347 (holding tnat a will is valid in the Philippines when executed pursuant to Code Civ. Proc. § 618, although the formal requirements of the civil code have not been met; but the provisions of the latter relative to heirs by force or law, etc., still govern); Enriquez *v.* Barrio, 5 Philippine 232 (holding that where in the division of an estate among three heirs two of them are given twenty shares of stock in a corporation which afterward declares a stock dividend of one share for every two of the original, these new shares, not constituting an actual increase of capital, belong to the two heirs to the exclusion of the third); Valera *v.* Purugganan, 4 Philippine 719, 4 Off. Gaz. 179 (holding that it is immaterial that the notary who assisted in the execution was a brother of the principal beneficiary); Castañeda *v.* Alemany, 3 Philippine 426, 2 Off. Gaz. 366 (holding that if a will is properly signed it is not material that it was typewritten in the office of the attorney for the testatrix).

A will can be executed only in the name of the testator; the signature of another, even at testator's request, is insufficient. Guison v. Concepción, 5 Philippine 551, 4 Off. Gaz. 156; *Ex p.* Arcenas, 4 Philippine 700, 4 Off. Gaz. 568; *Ex p.* Santiago, 4 Philippine 692, 4 Off. Gaz. 507.

Failure of the subscribing witnesses to identify their signatures at the trial is not fatal. Valera *v.* Purugganan, 4 Philippine 719, 4 Off. Gaz. 179; Fernando *v.* Villalon, 3 Philippine 386, 2 Off. Gaz. 502. Nor is an explainable contradiction among such witnesses as to the hour of the execution. Matter of Garces, 1 Philippine 156. It is sufficient that the testator and the witnesses might have seen each other sign. Jaboneta *v.* Gustilo, 5 Philippine 541, 5 Off. Gaz. 31.

An olographic will must not only be signed by the testator but must, notwithstanding the provisions of Code Civ. Proc. § 7, be drafted on stamped paper. Fernando *v.* Villalon, 3 Philippine 386, 2 Off. Gaz. 502.

Where a surviving husband is also a devisee the undivided portion assigned to him as such must be considered an integral part of his right to usufruct. Chingen *v.* Argüelles, 7 Philippine 296.

A clause prohibiting the resort to legal proceedings is binding solely on the voluntary legatees; it does not affect heirs by force of law, i. e., legitimate descendants or, in their absence ascendants, and the surviving spouse. Cruz *v.* Cruz, 1 Porto Rico 152.

A partition inter vivos is without prejudice to the rights of the heirs by force of law. Cruz *v.* Cruz, 1 Porto Rico 152.

22. Castañeda *v.* Alemany, 3 Philippine 426, 2 Off. Gaz. 366.

23. Castañeda *v.* Alemany, 3 Philippine 426, 2 Off. Gaz. 366.

24. Pimentel *v.* Palanca, 5 Philippine 436, 441, 4 Off. Gaz. 59.

25. Timbol *v.* Manalo, 6 Philippine 254, 4 Off. Gaz. 596, holding that these proceedings apply even to wills executed, although not carried into effect, before the promulgation of the present code of civil procedure.

Liability of heirs for decedent's debts.—Prior to the present code of civil procedure

duties and powers.[26] A system of voluntary administration is also permitted, but all heirs and legatees must join therein.[27] All claims against decedents' estates including questions of heirship and legitimacy must be determined in the administration proceedings;[28] but the mere fact that one of the parties to a suit is decedent's personal representative does not give the court administering the estate exclusive jurisdiction relative to the ownership of property claimed by such representative.[29] Proceedings for the appointment and removal of guardians are also in force.[30]

heirs who accepted the inheritance without benefit of inventory became liable for decedent's debts. Ortiz *v.* Aramburo, 8 Philippine 98, 5 Off. Gaz. 264. Heirs are now no longer liable; suits must be brought against the personal representative. Pavia *v.* De la Rosa, 8 Philippine 70. In Porto Rico the heirs assume the personality of their ancestor respecting all rights, active and passive, transmissible from him, but not as regards intransmissible rights like those of agency. Brunet *v.* Goico, 1 Porto Rico 157. See also Atilano *v.* Lopez, 1 Porto Rico 288; Domenech *v.* Registrar of Property, 1 Porto Rico 218.

One who takes over the decedent's property must pay the widow her half and is not relieved therefrom by the failure of part of the heirs to sign an agreement to that effect. Alcala *v.* Salgado, 7 Philippine 151, 4 Off. Gaz. 762.

A petition cannot include the administration of two different decedents, nor can one administrator be appointed for them. Sy Hong Eng *v.* Sy Lioc Suy, 10 Philippine 209, 6 Off. Gaz. 511.

Administration may be refused where the parties have so handled their property and so many years have elapsed that administration could not be granted. Sy Hong Eng *v.* Sy Lioc Suy, 10 Philippine 209, 6 Off. Gaz. 511. *Compare* Nepomuceno *v.* Carlos, 9 Philippine 194, 5 Off. Gaz. 1020; Mendiola *v.* Mendiola, 7 Philippine 71, 4 Off. Gaz. 746.

26. Escueta *v.* Sy-Juilliong, 5 Philippine 405, 4 Off. Gaz. 56 (holding that in the Philippines the personal representative is not liable for legal services rendered the estate); Perez *v.* Aguerria, 1 Porto Rico Fed. 443 (holding that a grant of letters in one jurisdiction does not authorize the grantee to act there officially in the absence of express statutory sanction).

The personal representative may maintain an action to recover property belonging to the estate (Javier *v.* Javier, 6 Philippine 493, 4 Off. Gaz. 655; Alfonso *v.* Natividad, 6 Philippine 240); but not for decedent's death by wrongful act (To Guioc-Co. *v.* Del Rosario, 8 Philippine 546, 5 Off. Gaz. 596).

A subpœna must be issued in order to bring in books and documents at the instance of an administrator in an action against a third party. A mere order is insufficient. Chanco *v.* Madrilejos, 9 Philippine 356, 6 Off. Gaz. 41.

The estate is not liable for legal services rendered the personal repesentative unless it appears that he was such at the time and received them in such capacity. Sy Chung-Quiong *v.* Sy-Tiong Tay Cuansi, 10 Philippine 141, 6 Off. Gaz. 444.

Appeal and not action to set aside the order for appointment of an administrator is the proper remedy of the party dissatisfied with such order. Pimentel *v.* Palanca, 5 Philippine 436, 4 Off. Gaz. 59. Without a motion for a new trial the supreme court will not review the evidence (Zaragoza *v.* Viademonte, 10 Philippine 23, 6 Off. Gaz. 506); but no bill of exceptions is provided for, only the original will and a certified copy of the evidence (Querido *v.* Florendo, 3 Philippine 342, 2 Off. Gaz. 281); and neither an order of court allowing the appeal nor a particular form of words announcing the intention to take it is necessary (Calderon *v.* McMicking, 10 Philippine 261, 650, 6 Off. Gaz. 559, 763). The appeal cannot be perfected without a bond (Calderon *v.* McMicking, 10 Philippine 261, 6 Off. Gaz. 539; Hernaez *v.* Norris, 2 Philippine 85); and where a trial court fails to fix time for filing the bond the supreme court will do so (Chung Kiat *v.* Lim Kio, 8 Philippine 297; Abello *v.* Kock de Monasterio, 2 Philippine 188, 2 Off. Gaz. 512). The mother of a minor legatee under the will may appeal in his behalf notwithstanding the withdrawal of the appeal by the executor. Del Rosario *v.* Del Rosario, 2 Philippine 321.

27. Alonso *v.* Lagdameo, 7 Philippine 75.

Payment to an executor will not discharge an obligation imposed by a will to pay the heirs. Ruiz *v.* Lopez, 1 Porto Rico 418.

28. Benedicto *v.* Javellana, 10 Philippine 197, 6 Off. Gaz. 711; Cosio *v.* Pili, 10 Philippine 72, 6 Off. Gaz. 622; Pimental *v.* Palanca, 5 Philippine 436, 4 Off. Gaz. 59.

A conjugal partnership, dissolved by the death of the husband, must be liquidated in the administration of his estate. Pending such liquidation the personal representative is the proper custodian of the partnership property. Alfonso *v.* Natividad, 6 Philippine 241, 4 Off. Gaz. 461.

If the widow's rights are affected by a probated will, the question must be determined in an ordinary action and not in special proceedings. Sahagun *v.* Gorostiza, 7 Philippine 347.

The committee has no jurisdiction on claims originating in post-mortem transactions, but the court itself may after due notice determine such claims. Escueta *v.* Sy-Juilliong, 5 Philippine 405, 4 Off. Gaz. 56; Philippine Trading Co. *v.* Crossfield, 5 Philippine 400, 4 Off. Gaz. 56.

29. Bauermann *v.* Casas, 10 Philippine 386, 6 Off. Gaz. 665.

30. See cases cited *infra*, this note.

V. REMEDIES, ACTIONS, AND PROCEEDINGS.

A. Remedies — 1. Enumerated; Retention of Former Remedies. In most of the territorial possessions acquired from Spain some at least of the remedies provided by the Spanish procedure have been retained, although many have been abolished.[31] While the system known as equity was not indigenous to Spanish-speaking countries and has never been transplanted there as a whole, yet, in the application of equitable remedies as well as extraordinary legal ones, the rule prevails that there must be an absence of adequate relief in the ordinary course of law.[32] The Spanish law provided an elaborate plan for conciliation and

An order declaring a person non compos mentis is appealable, but the right to appeal is waived by written consent to such order after its rendition. Garcia *v.* Sweeney, 5 Philippine 344, 4 Off. Gaz. 9.

Guardians are removable for grounds enumerated in Code Civ. Proc. § 574. Alemany *v.* Moreno, 5 Philippine 172, 4 Off. Gaz. 138. An order annulling the appointment of guardians is appealable, and where the parties thus removed give notice and tender a sufficient bond the appeal should be allowed. Alemany *v.* Sweeney, 2 Philippine 654, 1 Off. Gaz. 857. Such an order must be reviewed by simple appeal and not with bill of exceptions. Moreno Francisco *v.* Gruet, 1 Philippine 218, 1 Off. Gaz. 530.

31. Ivancich *v.* Odlin, 1 Philippine 288, 1 Off. Gaz. 504, holding that, although the new Philippine code of civil procedure enacted in 1901 expressly repeals all codes and statutes "prescribing the procedure in civil actions," the remedial provisions of article 584 of the code of commerce continue in force.

In some cases, while the name has been changed, the remedy provided is substantially identical with the old. Thus the injunction is practically equivalent to the *interdicto prohibitorio*, and the attachment to the embargo, and *recurso de queja*, while abolished (Obras Pias *v.* Regidor, 2 Philippine 151), is similar to the remedy provided by Code Civ. Proc. § 499 (Somes *v.* Crossfield, 8 Philippine 283, 284, 5 Off. Gaz. 462).

Former remedies to recover possession of real property see Mendoza *v.* Nabong, 9 Philippine 681, 6 Off. Gaz. 276; Ledesma *v.* Marcos, 9 Philippine 618, 6 Off. Gaz. 226; Alvarez *v.* Montinola, 1 Philippine 624, 1 Off. Gaz. 3; Hermitaño *v.* Clarito, 1 Philippine 613; Rivera *v.* De Guzman, 1 Philippine 289, 1 Off. Gaz. 341; Espiritu *v.* Deseo, 1 Philippine 227, 1 Off. Gaz. 490; Feced *v.* Abella, 1 Philippine 150.

Voluntary proceedings for survey and demarcation see Pozadas *v.* Martinez, 1 Philippine 366, 1 Off. Gaz. 429; Simpao *v.* Dizon, 1 Philippine 261, 1 Off. Gaz. 498; Warner *v.* Pasay, 1 Philippine 227.

Other proceedings authorized by Spanish code see Regalado *v.* De los Santos, 1 Philippine 663, 1 Off. Gaz. 61; Roa *v.* Veloso, 1 Philippine 644, 1 Off. Gaz. 60; Garcia *v.* Ruiz, 1 Philippine 634, 1 Off. Gaz. 59; Regalado *v.* Luchsinger, 1 Philippine 622, 1 Off. Gaz. 513; Saul *v.* Hawkins, 1 Philippine 275, 1 Off. Gaz. 500; Zulueta *v.* Zulueta, 1 Philippine 254, 1 Off. Gaz. 495.

Under the Spanish system there was no lis pendens until the complaint had been answered. Quiros *v.* Tan-Guinlay, 5 Philippine 675, 4 Off. Gaz. 307.

In criminal proceedings the Spanish procedure is preserved except as modified by subsequent legislation. Under the Spanish law of criminal procedure in force prior to the American occupation the judgment of the court was always in writing. It contained a statement of the facts which appeared from the evidence, the conclusions of law which the judge drew from those facts, and the penalty imposed upon defendant. These all were contained in one document. There were not two documents or two proceedings, one corresponding to the verdict rendered by the jury in the criminal procedure in the United States and the other corresponding to the imposition of the penalty by the judge. According to the former procedure it was not necessary that either the judge or the prisoner should be present in court when the judgment was entered. It was sufficient that the judgment, signed by the judge, was filed in the court and afterward read to the prisoner. U. S. *v.* Baluyut, 5 Philippine 129. The Spanish system was inquisitorial; the American is accusatorial. Under the inquisitorial system of criminal procedure a judgment rendered by a court of first instance in a criminal case did not become final until the supreme court of the district to which the trial court belonged had approved the judgment, as the law required every decision, either of acquittal or conviction, to be reviewed by the supreme court, whether the parties appealed or not. Consequently, in case of the reversal of the judgment of the trial court, whether on review or appeal, it was the decision of the supreme court which was executed. U. S. *v.* Samio, 3 Philippine 691, 2 Off. Gaz. 534.

32. Manotoc *v.* McMicking, 10 Philippine 119, 6 Off. Gaz. 625 (mandamus); Desola *v.* Willoughby, 1 Porto Rico Fed. 344.

Under the Spanish practice a party could not resort to judicial proceedings unless administrative remedies had first been exhausted. Roura *v.* Insular Government, 8 Philippine 214, 5 Off. Gaz. 625. The same rule obtains now in applying immigration laws. Lo Po *v.* McCoy, 8 Philippine 343, 5 Off. Gaz. 478.

arbitration, but the repeal of the procedural provisions on this subject has been held to nullify the substantive.[33] Summary remedies, not involving a breach of the peace, are sometimes permitted,[34] and habeas corpus is one of the most fundamentally important of the remedies introduced with the American sovereignty,[35] the writ lying only to determine the legality of the detention;[36] and prohibition,[37]

Provisions of the present code of procedure for equitable relief against judgments apply to those rendered before that code took effect. Veloso *v.* Pacheco, 1 Philippine 271, 1 Off. Gaz. 498.

That a vessel was purchased with funds of another than the one registered as owner neither gives the former a legal or equitable title under the Philippine law nor raises a resulting trust in his favor. Martinez *v.* Martinez, 1 Philippine 647, 1 Off. Gaz. 268.

33. Cordoba *v.* Conde, 2 Philippine 445.

A clause in a contract providing for arbitration by private arbitrators has been held void as ousting the courts of jurisdiction, although the clause provided that the award might be made a rule of court. Wahl *v.* Donaldson, 2 Philippine 303. But an agreement to submit a controversy to arbitrators or commissioners upon whose report a judgment could be rendered was upheld, and the trial court was not permitted to reject the report in so far as it responded to the stipulation. Siping *v.* Cacob, 10 Philippine 717, 6 Off. Gaz. 855.

34. See cases cited *infra*, this note.

Forfeiture of property for taxes may be "due process of law" but a statute providing for it must be construed strictly. Desola *v.* Willoughby, 1 Porto Rico Fed. 344.

Taking possession of property by force, however clear the right, is not usually justifiable. Bago *v.* Garcia, 5 Philippine 524, 4 Off. Gaz. 145.

35. Andres *v.* Wolfe, 5 Philippine 60, 4 Off. Gaz. 222; Paynaga *v.* Wolfe, 2 Philippine 146; Mekin *v.* Wolfe, 2 Philippine 74; *Ex p.* Acevedo, 1 Porto Rico 275.

When writ is available.— The writ is not available to correct mere errors, one judge having no authority in habeas corpus proceedings to review errors, real or supposed, of law or of fact committed by another judge (Yambert *v.* McMicking, 10 Philippine 95, 6 Off. Gaz. 366; Andres *v.* Wolfe, 5 Philippine 60, 4 Off. Gaz. 222; Carrington *v.* Peterson, 4 Philippine 134, 3 Off. Gaz. 115; Repide *v.* Peterson, 3 Philippine 276, 2 Off. Gaz. 213; Banayo *v.* Municipal President, 2 Philippine 413, 1 Off. Gaz. 632; Matter of Prautch, 1 Philippine 132), nor should one judge interfere by writ of habeas corpus with the trial of a prisoner by another judge (Yambert *v.* McMicking, 10 Philippine 95, 6 Off. Gaz. 366; Collins *v.* Wolfe, 4 Philippine 534, 3 Off. Gaz. 401), and an order of court within the limits of its jurisdiction will not, although erroneous, be set aside in habeas corpus proceedings (Repide *v.* Peterson, 3 Philippine 276, 2 Off. Gaz. 213).

36. Villa *v.* Allen, 2 Philippine 436, 1 Off. Gaz. 748; *Ex p.* Diaz, 1 Porto Rico 475; *Ex p.* Acevedo, 1 Porto Rico 275.

There was the analogous proceeding of manifestation in early Spanish jurisprudence (Walton Civil Law of Spain and Spanish America (1900), preface, p. 498), but this appears never to have reached the insular possessions. See 20 Juridical Review 102, article by C. S. Lobingier.

The writ was introduced into the Philippines by military order of Gen. Otis; in Porto Rico it was incorporated into the act of congress of April 12, 1900 (Foraker law).

Return to writ.— Detention under order of military tribunal prior to promulgation of present Philippine code of civil procedure is a good return. Mekin *v.* Wolfe, 2 Philippine 74; Matter of Carr, 1 Philippine 514, 1 Off. Gaz. 392; Matter of Calloway, 1 Philippine 11. But detention by order of municipal president or council is not. Banayo *v.* Municipal President, 2 Philippine 413, 1 Off. Gaz. 630.

The writ will not be granted by United States courts to release prisoners held by authority except in cases authorized by U. S. Rev. St. (1878) § 753 [U. S. Comp. St. (1901) p. 592]; Matter of Carlo, 1 Porto Rico Fed. 216.

Writ allowed: To obtain custody of child from mother superior of convent see Reyes *v.* Alvarez, 8 Philippine 723, 5 Off. Gaz. 795. To release one committed for contempt in failing to pay a judgment see Sixto *v.* Sarria, 2 Porto Rico Fed. 168.

Appeal was not provided in the Philippines prior to the passage of Act 654; but its provisions are not *ex post facto*. Mekin *v.* Wolfe, 2 Philippine 74.

So long as the petitioner has an adequate remedy such as appeal it seems that the writ should never issue. Yambert *v.* McMicking, 10 Philippine 95, 6 Off. Gaz. 366.

Suspension of the writ is authorized by the Philippine Bill (§ 5, par. 7). Barcelon *v.* Baker, 5 Philippine 87, 4 Off. Gaz. 88.

37. Manila Nav. Co. *v.* Quintero, 6 Philippine 405, 4 Off. Gaz. 578 (writ allowed where respondent consented, although the prayer might have been construed as one for injunction); Blanco *v.* Ambler, 3 Philippine 735, 2 Off. Gaz. 492 (to arrest further proceedings under a void order appointing a receiver); Encarnación *v.* Ambler, 3 Philippine 623, 2 Off. Gaz. 490 (to prevent enforcement by contempt proceedings of injunction in aid of such order); Yangco *v.* Rohde, 1 Philippine 404, 1 Off. Gaz. 123 (to prevent allowance of alimony *pendente lite*, where marriage was denied).

Where final judgment has already been rendered by the court whose action is sought to be restrained and there is no averment of intended future action, the writ will be denied. Rafferty *v.* Judge of First Instance, 7 Philippine 164, 4 Off. Gaz. 766.

certiorari,[38] quo warranto,[39] and injunction, the Spanish *interdicto prohibitorio*,[40] are all available remedies; and mandamus likewise is available where no adequate remedy exists in the ordinary course of law.[41] In addition to the abovenamed

The writ does not lie to correct errors. Rubert *v.* Sweeney, 4 Philippine 473; Felizardo *v.* Justice of the Peace, 3 Philippine 635, 2 Off. Gaz. 529; Dy Chuan Leng *v.* Ambler, 1 Philippine 535; Ivancich *v.* Odlin, 1 Philippine 284, 1 Off. Gaz. 504.

A preliminary injunction may be issued in aid of the writ. Enriquez *v.* Ambler, 2 Philippine 137, 142.

Appeal in order to displace prohibition must constitute an adequate remedy. Yangco *v.* Rohde, 1 Philippine 404, 1 Off. Gaz. 123.

38. Springer *v.* Odlin, 3 Philippine 348, 2 Off. Gaz. 327.

The essential grounds are excess of jurisdiction and absence of adequate remedy. Springer *v.* Odlin, 3 Philippine 344, 2 Off. Gaz. 327. It is the proper remedy for a void order appointing a receiver, although appeal lies (Rocha *v.* Crossfield, 6 Philippine 355, 4 Off. Gaz. 569; Blanco *v.* Ambler, 3 Philippine 358, 735, 2 Off. Gaz. 281, 492; Yangco *v.* Rohde, 1 Philippine 404), but appeal is generally an adequate remedy (Springer *v.* Odlin, *supra*). Refusal of a judge to hear witnesses, while erroneous, is not ground for certiorari (Reyes *v.* Roxas, 1 Philippine 625), nor is the fixing of an excessive amount for a supersedeas bond (Araneta *v.* Gustilo, 2 Philippine 60).

Procedure for this writ must be commenced by formal complaint; a petition modeled on criminal briefs being insufficient. U. S. *v.* Siatong, 5 Philippine 463.

One who is not a party to an election contest cannot maintain a certiorari proceeding in the supreme court for a review of the judgment therein. Abendan *v.* Llorente, 10 Philippine 216, 6 Off. Gaz. 532.

Petition held not defective in failing to allege whether a receiver whose appointment was sought to be set aside was appointed before or after the commencement of petitioner's action see Blanco *v.* Ambler, 3 Philippine 358, 2 Off. Gaz. 281.

39. See Acosta *v.* Flor, 5 Philippine 18. And see also cases cited *infra*, this note.

The relator, if a private individual, should show that he is entitled to the office (Acosta *v.* Flor, 5 Philippine 18; Pettingill *v.* Vidal, 1 Porto Rico Fed. 448), and that respondent refuses to surrender it (Pettingill *v.* Vidal, *supra*).

Under the election law (Act 1582) now in force in the Philippines the defeated party is provided with a summary mode of contesting the elections for reasons connected with quo warranto on these grounds. Navarro *v.* Gimenez, 10 Philippine 226, 6 Off. Gaz. 535.

40. De Guzman *v.* Fabie, 1 Philippine 140; Peck Steamship Line *v.* New York, etc., Steamship Co., 2 Porto Rico Fed. 109.

Injunction granted: To prevent the expropriation of private property without compensation see Wilson *v.* Arecibo, 2 Porto Rico Fed. 278; Compagnie Des Sucreries *v.* Ponce, etc., R. Co., 2 Porto Rico Fed. 176. To prevent threatened strike see Compagnies des Sucreries *v.* Iglesias, 2 Porto Rico Fed. 16. To prevent exportation of cartridges from Porto Rico to San Domingo, although forbidden only by executive proclamation pursuant to congressional resolution providing no penalty see U. S. *v.* Fondeur, 3 Porto Rico Fed. 412.

Injunction denied: To prevent libel and slander see Puig *v.* Sagrera, 2 Porto Rico Fed. 37. To stay proceedings pending an appeal from an order overruling a demurrer to a criminal complaint see Fuster *v.* Johnson, 1 Philippine 670. To prevent an enforcement of judgments rendered by local courts with appropriate jurisdiction see Aguirre *v.* Ezquiaga, 2 Porto Rico Fed. 139. Against judicial orders see Garces *v.* Franceschi, 1 Porto Rico 84. As to property not in litigation see Matter of MacDougall, 3 Philippine 70, 2 Off. Gaz. 50. To prevent opening of road where road has already been opened see Hermanos *v.* San German, 1 Porto Rico Fed. 502.

Where the act sought to be enjoined has already been committed the writ will usually be refused; but if the case is one where a writ of prohibition lies, a preliminary injunction may be granted in aid thereof to prevent the occurrence of consequences of the original act. Santa Rosa *v.* La Laguna, 3 Philippine 206, 2 Off. Gaz. 111. And the supreme court may grant a preliminary injunction on appeal (Watson *v.* Enriquez, 1 Philippine 480, 1 Off. Gaz. 380); but only in connection with a proceeding properly pending there (Diokno *v.* Reyes, 7 Philippine 385, 5 Off. Gaz. 178). Where the supreme court grants an injunction it will not dismiss the action without giving defendant leave to sue for the damages incurred. Macatangay *v.* San Juan de Bocboc, 9 Philippine 19, 5 Off. Gaz. 851. The damages must, however, be specially pleaded. Somes *v.* Crossfield, 9 Philippine 13, 5 Off. Gaz. 849.

In Porto Rico the writ may be granted without bond, especially when sought by the sovereign. People *v.* New York, etc., Steamship Co., 1 Porto Rico Fed. 242.

Appealability of order relating to injunction.— Neither an order granting a preliminary injunction nor one denying a motion to dissolve it is appealable. Go-Quico *v.* Manila, 1 Philippine 507, 1 Off. Gaz. 384. Nor is an order dissolving such an injunction superseded by filing a bill of exceptions. Teco *v.* Ventura, 1 Philippine 499; Watson *v.* Enriquez, 1 Philippine 480, 1 Off. Gaz. 380. But the trial court may continue the injunction in force until the appellate court acts. Watson *v.* Enriquez, 1 Philippine 480, 1 Off. Gaz. 380.

41. Manotoc *v.* McMicking, 10 Philippine

remedies the writ of attachment, which corresponds to the Spanish embargo,[42]

119, 6 Off. Gaz. 625; Fajardo *v.* Llorente, 6 Philippine 427, 4 Off. Gaz. 634; Hoey *v.* Baldwin, 1 Philippine 551, 557, 558, 1 Off. Gaz. 47 (holding that neither the right to sue a municipality for salary nor the fact that its disbursing officer is under bond is sufficient to prevent the issue of mandamus against the latter); Mullenhoff *v.* Humacao Dist. Ct., 1 Porto Rico 491.

The objection of other adequate remedy may be raised by demurrer. Hoey *v.* Baldwin, 1 Philippine 551.

That applicant may resort to habeas corpus does not make mandamus unavailable. Collins *v.* Wolfe, 4 Philippine 534, 3 Off. Gaz. 401; Trinidad *v.* Sweeney, 4 Philippine 531, 3 Off. Gaz. 603.

Pleading.— In the Philippines mandamus is a civil action subject to the ordinary rule of procedure; the complaint may be demurred to and the averments are those of the ordinary pleading. Hoey *v.* Baldwin, 1 Philippine 551, 1 Off. Gaz. 47. The act sought to be compelled must be clearly specified (Mullenhoff *v.* Humacao Dist. Ct., 1 Porto Rico 491), and the right must be clear (Manotoc *v.* McMicking, 10 Philippine 119, 6 Off. Gaz. 625).

The writ cannot be used to control discretion (Merchant *v.* Del Rosario, 4 Philippine 316, 3 Off. Gaz. 487), to compel a judge to continue proceedings terminated at applicant's request (Hontiveros *v.* Abreu, 10 Philippine 213, 6 Off. Gaz. 512), to compel the entry of a default (Merchant *v.* Del Rosario, 4 Philippine 316, 3 Off. Gaz. 487), or to compel a government disbursing officer to pay money which by order of the auditor has been returned to the insular treasury (Hoey *v.* Baldwin, 5 Philippine 209, 3 Off. Gaz. 653).

The writ may be used to compel issue of execution (Macondray *v.* Quintero, 6 Philippine 429, 4 Off. Gaz. 603; Findlay *v.* Ambler, 3 Philippine 690, 2 Off. Gaz. 491; Bonaplata *v.* Ambler, 2 Philippine 392, 1 Off. Gaz. 607), or the allowance of an appeal (Trinidad *v.* Sweeney, 4 Philippine 531, 3 Off. Gaz. 603; Alemany *v.* Sweeney, 2 Philippine 654, 1 Off. Gaz. 857); to compel the signing of a bill of exceptions (Cedre *v.* Jenkins, 5 Philippine 647, 5 Off. Gaz. 446; Garcia *v.* Ambler, 4 Philippine 81, 2 Off. Gaz. 545; Gonzaga *v.* Norris, 1 Philippine 334, 1 Off. Gaz. 346); to compel a municipality to issue a license to an owner to construct a terrace over land subject to public easement (Ayala de Roxas *v.* Manila, 9 Philippine 215, 5 Off. Gaz. 1177); to provide for the payment of a judgment against such municipality (Horton *v.* Aguadilla, 1 Porto Rico Fed. 457); and to compel reinstatement of a member wrongfully expelled from an association (Cortes *v.* Manila Jockey Club, 6 Philippine 501, 4 Off. Gaz. 655).

In mandamus against a corporation the directors are proper defendants. Cortes *v.* Manila Jockey Club, 6 Philippine 501, 4 Off. Gaz. 655.

The writ will not issue against the judge of an abolished court but applicant may be allowed to join as parties by amendment officials of the court to which the case has been transferred. Hernaez *v.* Norris, 2 Philippine 83.

Practice.—The remedy provided by the Philippine code of civil procedure for obtaining the judge's certificate to a bill of exceptions resembles the Spanish "*recourso de queja*" and does not admit of a demurrer or dilatory plea as in an ordinary mandamus proceedings. Cedre *v.* Jenkins, 5 Philippine 647, 5 Off. Gaz. 446. The practice of allowing the clerk of the supreme court to issue an order to show cause on presentation of the writ is criticized. Garcia *v.* Sweeney, 4 Philippine 751, 4 Off. Gaz. 9.

42. Lopez *v.* Alvarez, 9 Philippine 28, 5 Off. Gaz. 899; Joaquin *v.* Avellano, 6 Philippine 551, 4 Off. Gaz. 698; Repide *v.* Peterson, 3 Philippine 276, 2 Off. Gaz. 213; U. S. *v.* Regalado, 1 Philippine 125; Garces *v.* Franceschi, 1 Porto Rico 84.

Jurisdiction to grant attachment is vested in a judge of the supreme court of the Philippines in a cause pending therein as well as in the court of first instance. Compañia General de Tabacos *v.* Trinchera, 7 Philippine 708, 5 Off. Gaz. 239. But the United States court for Porto Rico cannot issue an attachment on the property of a non-resident (Ortiz *v.* Alcalá del Olmo, 2 Porto Rico Fed. 95 [*affirmed* in 214 U. S. 173, 29 S. Ct. 552, 53 L. ed. 955]; *Re* Rule Ten, 1 Porto Rico Fed. 450); especially where the action sounds in tort and the service is substituted consisting of attachment of property within the district (Ortiz *v.* Alcalá del Olmo, *supra*). A territorial statute authorizing the attachment of a non-resident's property without bond is not repugnant to the fourteenth amendment to the federal constitution. Central L. & T. Co. *v.* Campbell Commission Co., 173 U. S. 84, 19 S. Ct. 346, 43 L. ed. 623.

The following property is not subject to attachment or garnishment: Money in a court clerk's possession *ex-officio* (Springer *v.* Odlin, 3 Philippine 344, 2 Off. Gaz. 327), public money in the hands of an administrative officer (Horton *v.* Aguadilla, 1 Porto Rico Fed. 457; 1 Op. Atty.-Gen., Porto Rico 75, 159, 180), or the salary of a member of legislature (*Re* Garnishment of Pay, etc., 1 Porto Rico Fed. 405).

Grounds may be set forth in the alternative. Pepperell *v.* Taylor, 5 Philippine 536, 4 Off. Gaz. 154. That a debtor left his former residence without notifying the creditor and that in a Spanish-speaking country he signed his name Enrique instead of Henry do not show fraud in contradicting the debt. Miller *v.* Jones, 9 Philippine 648, 6 Off. Gaz. 267.

Effect of levy.— Levy of the attachment does not change the character of a debt or give the creditor a preference not previously enjoyed. Martinez *v.* Holliday, 1 Philippine 194, 1 Off. Gaz. 526. Hence a levy on prop-

supplementary proceedings,[43] replevin,[44] action for specific performance,[45] and accounting, are all available.[46]

2. Receivers.[47] Receivers may be appointed upon the usual grounds,[48] but

erty of one not liable for the claim sued on cannot be sustained. Mendoza *v.* Nabong, 9 Philippine 681, 6 Off. Gaz. 275; Sammons *v.* Favila, 9 Philippine 552, 6 Off. Gaz. 184; Uy Piaoco *v.* Osmeña, 9 Philippine 299, 6 Off. Gaz. 264; Guillermo *v.* Matienzo, 8 Philippine 368, 373, 5 Off. Gaz. 544.

Release.— The release of an attachment annuls all proceedings thereunder (Menendez *v.* Gordils, 1 Porto Rico 125), and in effect determines that the property is not liable for defendant's debts (Grahan *v.* Banco Territorial, 1 Porto Rico 171); but the release of an attachment on property of an estate for want of proof that the heir had accepted the inheritance without inventory adjudicates no question of ownership or priority (Menendez *v.* Gordils, 1 Porto Rico 125).

The bond can be enforced only to the extent of the attached property's value; where such value is not proved there can be no recovery. Crame Sy Panco *v.* Gonzaga, 10 Philippine 646, 6 Off. Gaz. 951. Attorney's fees for securing discharge of attachment are proper items of recovery on the bond. Dragon *v.* De la Cavada, 9 Philippine 461, 6 Off. Gaz. 170. A possessory title, although subsequent to an attachment under which the property is sold, is not prior to the purchaser's title. Parés *v.* Reynes, 2 Porto Rico Fed. 402.

43. Manotoc *v.* McMicking, 10 Philippine 119, 6 Off. Gaz. 625.

The judgment debtor cannot be committed for contempt in supplementary proceedings for failure to pay judgment. Sixto *v.* Sarria, 2 Porto Rico Fed. 168.

44. Artacho *v.* Pangasinan Provincial Bd., 4 Philippine 670, 3 Off. Gaz. 625.

One of several heirs who have arranged an extrajudicial partition of the estate may replevy his portion of the personalty. Pisarrillo *v.* Ladia, 10 Philippine 58, 6 Off. Gaz. 363.

45. Central Altagracia *v.* Javierre, 3 Porto Rico Fed. 256, where specific performance was granted indirectly.

A decree has been denied for execution of a notarial instrument, in accordance with an agreement, notwithstanding civil code 1279, on the ground that if incomplete the court would not complete it; if complete the remedy in damages would be adequate. Puente *v.* Miranda, 1 Porto Rico Fed. 478.

46. Bocanegra *v.* Graham, 1 Porto Rico Fed. 73, holding that an action at law for accounting yet lies, although largely superseded by a bill of equity.

The assignee of a partner is entitled to an accounting from the remaining partners and another who has taken over the firm property. Jackson *v.* Blum, 1 Philippine 4. *Compare* Walcott *v.* Hanaford, 2 Porto Rico Fed. 444.

A stock-holder is not entitled to an accounting until he has exhausted all available means within the corporation. Wilson *v.* Central Altagracia, 2 Porto Rico Fed. 429.

Simple interest only is allowed in accounting unless otherwise agreed. New Colonial Co. *v.* Canovanas Sugar Factory, 2 Porto Rico Fed. 195.

47. See, generally, Receivers, 34 Cyc. 1.

48. International Banking Corp. *v.* Corrales, 10 Philippine 435, 6 Off. Gaz. 700; Repide *v.* Peterson, 3 Philippine 276, 2 Off. Gaz. 213; Fritze *v.* Esperanza Cent. Sugar Co., 3 Porto Rico Fed. 459; Antongiorgi *v.* Gandia, 2 Porto Rico Fed. 35 (receiver appointed to take charge of an estate pending judicial determination of genuineness of alleged will); Porto Rico Co. *v.* Alsop, 1 Porto Rico Fed. 337; Western Electric Co. *v.* Mayaguez Electric Light Co., 1 Porto Rico Fed. 309; Joffé *v.* Fernandez, 1 Porto Rico Fed. 299 (where it appeared that firm debts were unpaid and firm property not accounted for, and a receiver was appointed, although suspension of payment had been decreed, complainants not participating therein); Lothrop *v.* Collazo, 1 Porto Rico Fed. 131 (holding that the commission of permissive waste by a mortgagee is a proper ground for appointing a receiver).

Application and grounds.—An unsworn averment of insolvency is not sufficient upon which to base the appointment (Valenton *v.* Murciano, 3 Philippine 537, 2 Off. Gaz. 434), nor are general charges of mismanagement on the part of corporate officers (Wilson *v.* Central Altagracia, 2 Porto Rico Fed. 429), and similarly affidavits relating to conditions existing more than two months before the application are insufficient (Lothrop *v.* Collazo, 1 Porto Rico Fed. 128). A receiver will not be appointed merely to preserve crops which are not in issue in the proceeding. Valenton *v.* Murciano, 3 Philippine 537, 2 Off. Gaz. 434.

Notice of application in Kentucky for appointment of a receiver of property in Porto Rico was held insufficient when presented in Porto Rico only two weeks in advance, it being doubtful, moreover, if a United States judge can appoint a receiver or grant an injunction out of his district. Lothrop *v.* Collazo, 1 Porto Rico Fed. 128.

Where the appointment is without jurisdiction prohibition lies to prevent enforcement of injunction in aid of such appointment (Encarnación *v.* Ambler, 3 Philippine 623, 2 Off. Gaz. 490. *Compare* Blanco *v.* Ambler, 3 Philippine 735), and mandamus also lies to compel the issue of an execution against property of the judgment debtor in such receiver's hands (Findlay *v.* Ambler, 3 Philippine 690, 2 Off. Gaz. 491).

Appeal does not lie from an order of the United States court for Porto Rico appointing a receiver or granting an injunction. Lothrop *v.* Collazo, 1 Porto Rico Fed. 134.

the power of appointment is exercised with reluctance.[49] The applicant must have a lien or other interest in the property,[50] and a receivership cannot be substituted for bankruptcy proceedings so as to sequester the property in favor of certain general creditors and prevent levy of execution at the instance of others.[51]

3. Special Actions and Proceedings — a. Relating to Real Property. Under the Spanish law, which still prevails in part in some of the insular possessions, title to real estate is tried by the "*accion reivindicatoria*," [52] and possession is recovered by the proceeding known as "*desahucio*," [53] the latter having been superseded in the Philippines, however, by the American remedy of forcible entry and detainer.[54] Proceedings to register title under a system similar to the

49. Bonaplata *v.* Ambler, 2 Philippine 392, 1 Off. Gaz. 607; Lothrop *v.* Collazo, 1 Porto Rico Fed. 134.

50. Strong *v.* Van Buskirk-Crook Co., 10 Philippine 190, 6 Off. Gaz. 450; Molina *v.* De la Riva, 7 Philippine 302, 5 Off. Gaz. 102; Rocha *v.* Crossfield, 6 Philippine 355, 4 Off. Gaz. 569; Findlay *v.* Ambler, 3 Philippine 690, 2 Off. Gaz. 491; Encarnación *v.* Ambler, 3 Philippine 623; Bonaplata *v.* Ambler, 2 Philippine 392, 1 Off. Gaz. 607.

51. Strong *v.* Van Buskirk-Crook Co., 10 Philippine 190, 6 Off. Gaz. 450; Bonaplata *v.* Ambler, 2 Philippine 392, 1 Off. Gaz. 607.

52. See cases cited *infra*, this note.

This or a corresponding action is still available in the Philippines. Ledesma *v.* Marcos, 9 Philippine 618, 6 Off. Gaz. 226; Bishop of Cebu *v.* Mangaron, 6 Philippine 286.

Plaintiff must prove his ownership of the property which must also be clearly identified. Pagan *v.* Ayuntamiento de Añasco, 1 Porto Rico 264.

The action must be brought against some one in possession. Ledesma Artau *v.* Amador, 1 Porto Rico 116. But see Pagan *v.* Ayuntamiento de Añasco, 1 Porto Rico 264.

The rule that the occupant with any title cannot be ousted except by showing a better one has no application where each party relies upon facts or documents independent of those relied upon by the other. Criado *v.* Battistini, 1 Porto Rico 462.

Judgment for plaintiff does not necessarily require a return of crops gathered or indemnity. Criado *v.* Battistini, 1 Porto Rico 462.

53. Roman Catholic Apostolic Church *v.* Ilocos Certain Municipalities, 10 Philippine 1, 6 Off. Gaz. 359; Mendoza *v.* Nabong, 9 Philippine 681, 6 Off. Gaz. 275; Ledesma *v.* Marcos, 9 Philippine 618, 6 Off. Gaz. 226; Roman Catholic Apostolic Church *v.* Cuyapo, 9 Philippine 457, 5 Off. Gaz. 119; Roman Catholic Apostolic Church *v.* Tarlac, 9 Philippine 450, 6 Off. Gaz. 118; Barlin *v.* Ramirez, 7 Philippine 41, 5 Off. Gaz. 130; Villar *v.* Manila, 6 Philippine 655, 4 Off. Gaz. 713; Arabes *v.* Urian, 6 Philippine 527; Bishop of Cebu *v.* Mangaron, 6 Philippine 286 *et seq.*; Tambunting *v.* Manila, 5 Philippine 590, 4 Off. Gaz. 287; Alvarez *v.* Montinola, 1 Philippine 624, 1 Off. Gaz. 3; Hermitano *v.* Clarito, 1 Philippine 609; Rivera *v.* De Guzman, 1 Philippine 289, 1 Off. Gaz. 341; Espiritu *v.* Deseo, 1 Philippine 225, 1 Off. Gaz. 490; Feced *v.* Abella, 1 Philippine 150.

Incidental questions tending to impair plaintiff's possession are not determined. Cobian *v.* Rivera, 1 Porto Rico 498; Bazan *v.* Ezquiaga, 1 Porto Rico 307; Vidal *v.* Mercado, 1 Porto Rico 302.

Only the rights of parties to the suit can be concluded. Elizaburu *v.* Mollfulleda, 1 Porto Rico 395; Ledesma Artau *v.* Quiñones, 1 Porto Rico 359.

Plaintiffs must be in possession or entitled thereto. Lopez de Victoria *v.* Acevedo Rodriguez, 1 Porto Rico 221; Sanchez *v.* Ferrer, 1 Porto Rico 114. But he need not show a complete title provided he has a better one than defendant. Cobian *v.* Rivera, 1 Porto Rico 498.

Defendants may be precarious occupants by sufferance. Cobian *v.* Rivera, 1 Porto Rico 498; Elzaburu *v.* Mollfulleda, 1 Porto Rico 395; Ledesma Artau *v.* Quiñones, 1 Porto Rico 359; Bazan *v.* Ezquiaga, 1 Porto Rico 307; Vidal *v.* Mercado, 1 Porto Rico 302.

54. See cases cited *infra*, this note.

The justice of the peace has exclusive original jurisdiction where the action is commenced within one year from the loss of possession. Deveza *v.* Guinoo, 1 Philippine 589, 1 Off. Gaz. 511; Philippine Code Civ. Proc. § 80. After the year the remedy must be sought through a different action in the court of first instance. Taguinot *v.* Tanay, 9 Philippine 396, 6 Off. Gaz. 152; Alonso *v.* Placer, 5 Philippine 71, 4 Off. Gaz. 223.

Questions of title cannot be determined. Ty Laco Cioco *v.* Muro, 9 Philippine 100, 5 Off. Gaz. 909; Pascual *v.* Angeles, 4 Philippine 604, 4 Off. Gaz. 320. But evidence of title may be received "solely for the purpose of determining character and extent of possession and damages for detention" (Act 1627, § 3), and a document introduced to show the relation of landlord and tenant is not inadmissible merely because it tends to prove title (Francisco *v.* Tabada, 9 Philippine 568, 6 Off. Gaz. 317).

Notice.—An action brought before the expiration of the period of thirty days for giving the required notice is premature. Co-Tiongco *v.* Co-Tiongco, 6 Philippine 46, 4 Off. Gaz. 363; Joaquin *v.* Espinosa, 5 Philippine 219, 3 Off. Gaz. 654. *Compare* Enriquez *v.* Watson, 6 Philippine 114, 4 Off. Gaz. 446. But failure to give the required notice cannot first be raised on appeal. Iturralde *v.* Evangelista, 7 Philippine 588, 5 Off. Gaz. 278.

Parties.—Any one having the right of possession may maintain the action (Pascual *v.*

Torrens system prevailing in a number of the states are in force;[55] but unlike the American statutory rule, the lien of attachments or executions has no preference over unrecorded deeds.[56] The fact of possession may, however, be the subject of record under what is known as a "possessory information,"[57] and under the recording acts a failure to record an instrument does not affect ownership adversely unless prejudicial to third persons.[58] In addition to the

Angeles, 4 Philippine 604, 4 Off. Gaz. 320); but a simple action for damages against an occupant who unlawfully detains the premises will not lie in favor of a lessee never in possession (Donaldson *v.* Smith, 2 Philippine 766, 1 Off. Gaz. 476). A redemptioner whose time has expired is a proper defendant (Patricio *v.* Aragon, 4 Philippine 615, 4 Off. Gaz. 529); but an action against a lessee's agent who happens to be in possession cannot conclude the lessee's rights (Co-Tiongco *v.* Co-Guia, 1 Philippine 210, 1 Off. Gaz. 472). It seems that occupants of distinct parcels cannot be joined as defendants. Santos *v.* Limuco, 5 Philippine 15, 4 Off. Gaz. 217.

Verification of complaint.—While the original complaint must be verified a new one on appeal need not be. Francisco *v.* Tabada, 9 Philippine 568, 6 Off. Gaz. 317; Tarrosa *v.* Pearson, 6 Philippine 644.

A balance due for repairs is not a defense to the action where the lessee is entitled to retain a sufficient part of the rent to reimburse him for repairs and fails to show that he has not done so. Cruz *v.* Co-Cuaco, 4 Philippine 489, 3 Off. Gaz. 539.

The measure of damages recoverable is the fair rental value. Sparrevohn *v.* Fisher, 2 Philippine 676, 2 Off. Gaz. 2. They do not include waste (Veloso *v.* Ang Seng Teng, 2 Philippine 622, 1 Off. Gaz. 835), or possible profits (Sparrevohn *v.* Fisher, 2 Philippine 676, 2 Off. Gaz. 2).

Judgment for possession: Affirmed see Roxas *v.* Mijares, 9 Philippine 259, 6 Off. Gaz. 110. Reversed see Santiago *v.* Quimson, 10 Philippine 707, 6 Off. Gaz. 955; Salmo *v.* Icaza, 10 Philippine 485, 6 Off. Gaz. 705.

55. Aguirre *v.* Villaba, 10 Philippine 701, 6 Off. Gaz. 854; Cabañas *v.* Director of Lands, 10 Philippine 393, 6 Off. Gaz. 762; Baldovino *v.* Amenos, 9 Philippine 537, 6 Off. Gaz. 180; Capellania de Tambobong *v.* Cruz, 9 Philippine 145, 5 Off. Gaz. 953; Lopez *v.* Alvarez, 9 Philippine 28, 5 Off. Gaz. 899; Manila *v.* Roman Catholic Church, 8 Philippine 763 [*citing* Barlin Ramirze, 7 Philippine 41]; Capellania de Tambobong *v.* Antonio, 8 Philippine 683, 5 Off. Gaz. 787; Cariño *v.* Insular Government, 8 Philippine 150, 155, 4 Off. Gaz. 751; Liong-Wong-Shih *v.* Sunico, 8 Philippine 91, 5 Off. Gaz. 284; Order of Dominicans *v.* Insular Government, 7 Philippine 98, 4 Off. Gaz. 749; Ker *v.* Cauden, 6 Philippine 732, 4 Off. Gaz. 732; Inchausti *v.* Commanding Gen., 6 Philippine 556, 572, 5 Off. Gaz. 368; Paez *v.* Berenguer, 6 Philippine 521, 5 Off. Gaz. 557; Modesto *v.* Leyva, 6 Philippine 186; Merchant *v.* Lafuente, 5 Philippine 638, 4 Off. Gaz. 239; Compañia Gen. de Tabacos *v.* Topiño, 4 Philippine 33, 1 Off. Gaz. 544.

Recording and the effect thereof in Porto Rico see Hidalgo *v.* Garcia de la Torre, 1 Porto Rico 495; Alvarez *v.* Registrar of Property, 1 Porto Rico 478; Criado *v.* Battistini, 1 Porto Rico 462; Amadeo *v.* Registrar of Property, 1 Porto Rico 452; Caneja *v.* Registrar of Property, 1 Porto Rico 405; Perez *v.* Registrar of Property, 1 Porto Rico 373; López *v.* Bird, 1 Porto Rico 361; Ledesma *v.* Quiñones, 1 Porto Rico 359; Parra *v.* Registrar of Property, 1 Porto Rico 343; Bonin *v.* Registrar of Property, 1 Porto Rico 315; Ginorio *v.* Registrar of Property, 1 Porto Rico 312; Goico *v.* Registrar of Property, 1 Porto Rico 295; Schulze *v.* Bayron, 1 Porto Rico 250; Finlay *v.* Registrar of Property, 1 Porto Rico 247; Benvenuti *v.* Registrar of Property, 1 Porto Rico 233; Domenech *v.* Registrar of Property, 1 Porto Rico 218; Lomo *v.* Registrar of Property, 1 Porto Rico 209; Voigt *v.* Registrar of Property, 1 Porto Rico 202; Martinez *v.* Registrar of Property, 1 Porto Rico 188; Bolivar *v.* Registrar of Property, 1 Porto Rico 149; Acevedo *v.* Registrar of Property, 1 Porto Rico 137; Cremades *v.* Registrar of Property, 1 Porto Rico 134; Hermida *v.* Registrar of Property, 1 Porto Rico 123; Colonial Company *v.* Registrar of Property, 1 Porto Rico 109; Piñero *v.* Registrar of Property, 1 Porto Rico 107; Martinez *v.* Bayrón, 1 Porto Rico 105; Mullfulleda *v.* Registrar of Property, 1 Porto Rico 78; Valdés *v.* Del Valle, 1 Porto Rico 25; Van Syckel *v.* Registrar of Property, 1 Porto Rico 12.

An indebtedness evidenced by public documents takes priority over subsequent judgments. Soler *v.* Alzoua, 8 Philippine 539, 5 Off. Gaz. 594 [*citing* Gochuico *v.* Ocampo, 7 Philippine 15; Peterson *v.* Newberry, 6 Philippine 260, 5 Off. Gaz. 85; Olivares *v.* Hoskyn, 2 Philippine 689, 1 Off. Gaz. 915; Martinez *v.* Holliday, 1 Philippine 194, 1 Off. Gaz. 526].

56. Fabian *v.* Smith, 8 Philippine 496, 5 Off. Gaz. 576 [*citing* Peterson *v.* Newberry, 6 Philippine 260, 5 Off. Gaz. 85; Olivares *v.* Hoskyn, 2 Philippine 689, 1 Off. Gaz. 915; Martinez *v.* Holliday, 1 Philippine 194, 1 Off. Gaz. 526].

57. Trinidad *v.* Ricafort, 7 Philippine 449, 5 Off. Gaz. 196; Garcia *v.* Hipolito, 5 Philippine 503, 5 Off. Gaz. 30; Lim-Chingco *v.* Terariray, 5 Philippine 120, 3 Off. Gaz. 687.

58. Boncan *v.* Smith, 9 Philippine 109, 5 Off. Gaz. 858; Capellania de Tambobong *v.* Antonio, 8 Philippine 683, 5 Off. Gaz. 787; Fabian *v.* Smith, 8 Philippine 496, 5 Off. Gaz. 576; Fabian *v.* Smith, 8 Philippine 496, 5 Off. Gaz. 576; Macke *v.* Camps, 7 Philippine 553; Panganiban *v.* Cuevas, 7 Philippine 477; Bourns *v.* Carman, 7 Philippine 117; Balpiedad *v.* Insular Government, 6

proceedings above enumerated, the remedies of partition [59] and foreclosure [60] are also available.

b. Bankruptcy. Bankruptcy proceedings may be brought under the federal statutes in Porto Rico.[61] In the Philippines the former bankruptcy proceeding has been abolished.[62]

B. Civil Procedure — 1. Parties. Where the American procedure has been adopted the action must be brought in the name of the real party in interest,[63] and

Philippine 135; Cacnio *v.* Baens, 5 Philippine 742; Merchant *v.* Lafuente, 5 Philippine 638; Garcia *v.* Hipolito, 5 Philippine 503; Frankel *v.* Clarke, 5 Philippine 349; Felizardo *v.* Imus Justice of Peace, 3 Philippine 635; Araullo *v.* Araullo, 3 Philippine 567; Repide *v.* Astuar, 2 Philippine 757; Olivares *v.* Hoskyn, 2 Philippine 689; Aldeguer *v.* Hoskyn, 2 Philippine 500; Machuca *v.* Chuidian, 2 Philippine 210; Barrios *v.* Dolor, 2 Philippine 44; Feced *v.* Abella, 1 Philippine 150; Vidal *v.* Banco Territorial, 1 Porto Rico 204; Auffant *v.* Valdecilla, 1 Porto Rico 87.

59. Zamora Gonzaga *v.* Martinez, 9 Philippine 489, 6 Off. Gaz. 154; Pilapil *v.* Ponciano, 8 Philippine 190; Mendiola *v.* Mendiola, 7 Philippine 71, 4 Off. Gaz. 746; Toribio *v.* Toribio, 5 Philippine 520; Pavia *v.* Iturralde, 5 Philippine 176; Araullo *v.* Araullo, 3 Philippine 567, 2 Off. Gaz. 463; *Ex p.* Gutman, 1 Porto Rico 272; Alers *v.* Registrar of Property, 1 Porto Rico 160; Acosta *v.* Olivas, 1 Porto Rico 15.

Parties.— All coöwners must be joined as parties. Ruguian *v.* Ruguian, 9 Philippine 527, 6 Off. Gaz. 178; Del Rosario *v.* Del Rosario, 2 Philippine 321; De Lara *v.* De Lara. 2 Philippine 294. Also the party in possession. Sanidad *v.* Cabotaje, 5 Philippine 204.

60. Limpangco *v.* Mercado, 10 Philippine 508, 6 Off. Gaz. 736; Warner *v.* Jaucian, 9 Philippine 503, 6 Off. Gaz. 174; Canales *v.* Gonzalez, 3 Porto Rico Fed. 461; Sixto *v.* Diaz, 3 Porto Rico Fed. 208; Lothrop *v.* Collazo, 1 Porto Rico Fed. 137.

Foreclosure under the Spanish system is a mere summary or executive proceeding requiring defendant to pay the debt or present a certificate for its cancellation. Claims *pro* and *con* cannot be asserted or a complete decree rendered as between the parties. Forteza *v.* Principe, 1 Porto Rico Fed. 368; Nadal *v.* Ramos, 1 Porto Rico Fed. 363; Kortright *v.* Cruz de Godines 1 Porto Rico Fed. 174. A decree in such proceedings does not operate either as an estoppel or by way of *res adjudicata* to defeat an action by a second mortgagee for a marshaling of assets. Bertran *v.* Mullenhoff, 2 Porto Rico Fed. 31. But in Porto Rico default in payment of annual interest as required by the mortgage authorizes foreclosure, although the principal is not due. Lothrop *v.* Collazo, 1 Porto Rico Fed. 137. Sale proceedings under the Spanish procedure outlined see Obras Pias *v.* Paterno, 7 Philippine 310, 5 Off. Gaz. 174.

An appeal from an interlocutory order, admitted as to one particular owner only, does not prevent the execution of a deed of sale. Obras Pias *v.* Regidor, 2 Philippine 151.

The venue of the foreclosure action under the Philippine code, § 294, is the province in which the land is situated; but a proceeding to foreclose a chattel lien is not so restricted. Molina *v.* De la Riva, 7 Philippine 302.

The United States court for Porto Rico has no jurisdiction of a foreclosure suit unless the amount due when the bill is filed exceeds one thousand dollars exclusive of interests and costs. Lineau *v.* Marí Hermanos, 2 Porto Rico Fed. 104.

Decree against decedent.— A decree obtained upon service by publication against a decedent is void. Asuncion *v.* Nieto, 4 Philippine 97, 3 Off. Gaz. 495.

61. *Re* Rauchenplat, 1 Porto Rico Fed. 461; *Re* Sucesores de Jose Hernais, 1 Porto Rico Fed. 385; *Re* Doria, 1 Porto Rico Fed. 350; Comelin *v.* Schultze, 1 Porto Rico Fed. 289; *In re* Sobrinos de Armas, 1 Porto Rico Fed. 256; Cerecedo *v.* Jaffe, 1 Porto Rico Fed. 53.

An alleged fraudulent conveyance may now be attacked only in bankruptcy proceedings. Will *v.* Tornabells, 3 Porto Rico Fed. 125.

Suspension of payments.— The code of commerce, arts. 871 *et seq.*, also provides for a method of voluntary bankruptcy known as "suspension of payments," which appears to have been extensively resorted to in Porto Rico. Schulze *v.* Bayron, 1 Porto Rico 250; Aran *v.* Echalecu, 1 Porto Rico 91; Pizá *v.* Homar, 1 Porto Rico 63; Hernaiz *v.* Jordan, 1 Porto Rico 50; Banco Espanol *v.* Sanchez Schalecu, 1 Porto Rico 49; *Ex p.* Colon, 1 Porto Rico 9.

62. Philippine Code Civ. Proc. §§ 523, 524.

63. Abiera *v.* Orin, 8 Philippine 193 (holding that the personal representative cannot sue to enforce a contract made by the decedent in behalf of his children); International Banking Corp. *v.* Montagne, 6 Philippine 667. But see Castano *v.* Lobingier, 9 Philippine 310, 314, where the court says: "This court has never been called upon to decide whether the prosecution of an action by an agent, with power of attorney from his principal (a proper and usual mode of procedure under the Spanish Code), has been abolished by the new Code of Civil Procedure."

Gratuitous assignee.— Where it appears at the trial that plaintiff is a gratuitous assignee of a cause of action, the assignor and real party in interest may be substituted. Brocal *v.* Molina, 5 Philippine 507, 4 Off. Gaz. 141.

A married woman in Porto Rico must sue

defendants may be natural or judicial persons.[64] Necessary parties may be joined at any stage of the controversy,[65] and proper parties by order of court[66]

by her next friend. Garrosi *v.* Garrosi, 1 Porto Rico Fed. 230.

Persons jointly interested as coöwners may sue as such under the provisions of civil code, articles 392, 1669, although not as partners. Smith *v.* Lopez, 5 Philippine 78, 4 Off. Gaz. 518.

64. Fleming *v.* Lorcha "Neustra Sra. del Carmen," 7 Philippine 200; Philippine Shipping Co. *v.* Vergara, 6 Philippine 281; U. S. *v.* Smith, 5 Philippine 85; Ivancich *v.* Odlin, 1 Philippine 284, 1 Off. Gaz. 504.

Partnership.— An unregistered commercial partnership may be a *de facto* entity (Hung-Man-Yoc *v.* Kieng-Chiong-Seng, 6 Philippine 498); and its members may sue jointly as individuals (Yu Bunuan *v.* Marcaida, 10 Philippine 265, 6 Off. Gaz. 577; Prautch *v.* Jones, 8 Philippine 1, 5 Off. Gaz. 254), and the partnership may recover on contract made for its benefit by an individual partner (Tuason *v.* Zamora, 2 Philippine 305). Commercial partnerships *en comandita* whose articles are not recorded in mercantile registry have no judicial personalty. Ang Seng Quen *v.* Te Chico, 7 Philippine 541; Hung-Man-Yoc *v.* Kieng-Chiong-Seng, 6 Philippine 498; Prautch *v.* Hernandez, 1 Philippine 705. Persons dealing with partners in their joint capacity are estopped to question the latter's right to sue (Prautch *v.* Jones, 8 Philippine 1, 5 Off. Gaz. 254; Ang-Seng-Quen et al. *v.* Te Chico et al., 7 Philippine 541, 5 Off. Gaz. 217; Smith *v.* Lopez, 5 Philippine 78, 4 Off. Gaz. 518; Compania Agricola de Ultramar *v.* Reyes, 4 Philippine 2, 2 Off. Gaz. 567; Prautch *v.* Dolores Hernandez de Goyenechea, 1 Philippine 705); and, in an action by one of three surviving partners to recover a debt due the late firm, an objection that plaintiff has no legal capacity to sue is not an equivalent to an objection for a defect of parties (Tan Siu Pic *v.* Tan Siuco, 5 Philippine 516, 4 Off. Gaz. 143).

A foreign corporation may maintain an action for damages without filing articles in mercantile register. Dampfschiffs Rhederei Union *v.* La Compania Transatlantica, 8 Philippine 766, 5 Off. Gaz. 712; Jonas Brook Bros. *v.* Froelich, 8 Philippine 580, 5 Off. Gaz. 781.

Heirs and representatives.— In Porto Rico where the ancestor could sue the heir may. New Colonial Co. *v.* Canonvanas Sugar Factory, 1 Porto Rico Fed. 286. But where the will gives the executor power to collect debts he may sue therefor. Martin *v.* Royal Ins. Co., 1 Porto Rico Fed. 322. Uniting executor and heirs as plaintiff on an insurance policy constitutes misjoinder. Martin *v.* Royal Ins. Co., *supra*.

Registration of title.— Only a claimant to property has any standing in a proceeding to register it. Roxas *v.* Cuevas, 8 Philippine 469, 5 Off. Gaz. 561; Couto *v.* Cortes, 8 Philippine 459, 5 Off. Gaz. 559.

The admiralty practice of suing a ship is not in force in the Philippines. Heath *v.* The San Nicolas, 7 Philippine 532.

Suit against government agent.— While the government cannot be sued *eo nomine* its agent may be, in order to prevent a miscarriage of justice. Monagas *v.* Lieberth, 1 Porto Rico Fed. 315.

65. Sanidad *v.* Cabotaje, 5 Philippine 204, 4 Off. Gaz. 139, where even after a cause had reached the supreme court, it was remanded for an amendment of the complaint in order to include an omitted although necessary party.

Partition proceedings.— A provision permitting joinder as defendant of one who refuses to sue does not apply to partition proceedings. Toribio *v.* Toribio, 5 Philippine 520, 4 Off. Gaz. 144.

Appearance of the attorney-general, in a proceeding to register land claimed by the government, renders it unnecessary to summon the director of lands. Pamintuan *v.* Insular Government, 8 Philippine 485, 5 Off. Gaz. 698.

Defect of parties is waived if not objected to by demurrer or answer. Waite *v.* Williams, 5 Philippine 571, 4 Off. Gaz. 161; Tan Siu Pic *v.* Tan Siuco, 5 Philippine 516, 4 Off. Gaz. 143.

66. Rubert *v.* Luengo, 8 Philippine 554, 5 Off. Gaz. 663, holding that in an action by an unpaid vendor to establish his preference against an attachment creditor the common debtor is properly joined.

Occupants of distinct tracts of land cannot be joined as defendants to the same forcible entry and detainer proceedings. Santos *v.* Limuco, 5 Philippine 15, 4 Off. Gaz. 217.

An action may be dismissed as to an unnecessary defendant and prosecuted as to the others. Martinez de Hernandez *v.* Bertran, 3 Porto Rico Fed. 66.

A defendant who wishes others joined with him should move promptly. Colon *v.* Fernandez, 3 Porto Rico Fed. 488.

A bill in aid of execution, although ancillary to the main case, should include the parties to whom defendant claims to have sold. Torrens *v.* Perez, 2 Porto Rico Fed. 350.

Where defendant dies after final judgment in the trial court appeal may be prosecuted against his administrators. Guioc-Co. *v.* Del Rosario, 7 Philippine 126, 4 Off. Gaz. 751; Axarraga *v.* Cortes, (unreported Philippine case) No. 2,834.

Partners.— Both the partnership and its members may be joined as defendants in the same action, but the property of the latter cannot be seized for firm debts until partnership property is exhausted. Sunico *v.* Chuidian, 9 Philippine 625, 6 Off. Gaz. 318; La Compania Maritima *v.* Munoz, 9 Philippine 326, 6 Off. Gaz. 75. In an action against a partnership an answer in the firm-name by one of the two partners is properly consid-

Only those duly joined as necessary or proper parties are affected by the judgment.[67]

2. Process. The American rules concerning process and the service thereof [68] apply generally to process in the courts of the territories.[69]

3. Pleading — a In General; Amendment. The rules of pleading in the territorial possessions are usually those of the reformed procedure; [70] in the Philippines the only pleadings allowed being the complaint, answer, and demurrer, all of which must be liberally construed.[71] Amendments to pleadings are allowed on liberal terms,[72] even in the supreme court.[73]

b. Complaint. The facts constituting the cause of action should be fully stated in clear and precise language,[74] and where facts are within pleader's

ered. Martinez *v.* Cordoba, 5 Philippine 545, 4 Off. Gaz. 155. But in an action against a partnership an individual partner is not entitled to be made a party independently of the firm. Hongkong Bank *v.* Jurado, 2 Philippine 671, 1 Off. Gaz. 930.

Intervention.— An unpaid vendor of merchandise sold to a partnership which retains it is entitled to intervene in proceedings to liquidate such partnership. Torres *v.* Genato, 7 Philippine 204, 5 Off. Gaz. 23. A petition for intervention by heirs of stock-holders in defendant company will be allowed, the petitioners alleging a trust agreement by virtue of which nothing would be found due in the foreclosure suit. New Colonial Co. *v.* Canovanas Sugar Factory, 1 Porto Rico Fed. 283.

67. Acasio *v.* Albano, 10 Philippine 410, 6 Off. Gaz. 828; Rodriguez *v.* De la Cruz, 8 Philippine 665, 5 Off. Gaz. 710.

One who appears and whose liability is shown is bound by the judgment, although named as plaintiff. Ang Seng Quen *v.* Te Chico, 7 Philippine 541, 5 Off. Gaz. 217.

Judgment as affecting heir of deceased coöwner.— A judgment in an action against one of two coöwners without the intervention of the other's personal representative will not affect the heirs of the deceased coöwner. Smith *v.* Lopez, 5 Philippine 78, 4 Off. Gaz. 518.

68. Civil process see Process, 32 Cyc. 412. Criminal process see Criminal Law, 12 Cyc. 297 *et seq.*

69. Yrizarry *v.* Sabater, 1 Porto Rico Fed. 183, holding that service upon a non-resident defendant in an action *in personam* is void; but where he has property within the jurisdiction and an attorney in fact residing therein, service on the latter may be sufficient in an action *in rem*.

Service upon partner.— In the United States court for Porto Rico service upon a partner binds the firm but does not authorize a personal judgment against the partner not served. Ruffer *v.* Patxot, 1 Porto Rico Fed. 357. Where defendant is a commercial partnership in liquidation and there is no liquidator, process may be served upon any partner. Hongkong Bank *v.* Jurado, 2 Philippine 671, 1 Off. Gaz. 930.

Criminal process.— A policeman who, without warrant, arrests for a misdemeanor one who has committed none is himself guilty of a crime. U. S. *v.* Alexander, 8 Philippine 29; U. S. *v.* Ventosa, 6 Philippine 385, 4 Off. Gaz. 573. It seems that the clause in the Philippine Bill, § 5, which forbids warrants to issue except on probable cause, etc., applies only to cases where arrest without warrant is not allowed; at any rate irregularities in issue of warrant cannot first be objected to after trial. U. S. *v.* Wilson, 4 Philippine 317, 3 Off. Gaz. 366.

70. U. S. *v.* Ney, 8 Philippine 146, 5 Off. Gaz. 271 (holding that subscription of names of others than parties or attorneys is impliedly prohibited); Pabón *v.* Purón, 3 Porto Rico Fed. 206 (holding that the court may order confused and interlined pleadings to be rewritten).

A bill of particulars may be ordered in actions for libel and slander. Central Altagracia *v.* Wilson, 3 Porto Rico Fed. 365; Siebert *v.* Vivoni, 3 Porto Rico Fed. 161.

71. Philippine Code Civ. Proc. §§ 89, 106.

These pleadings are applicable in certiorari proceedings. U. S. *v.* Siatong, 5 Philippine 463.

Supplemental pleadings are allowed (Philippine Code Civ. Proc. § 105), but not after final judgment and order directing execution (Molina *v.* De la Riva, 8 Philippine 569, 5 Off. Gaz. 666), and a supplemental complaint alleging subsequently existing facts cannot cure the error of prematurely commencing the action (Limpangco *v.* Mercado, 10 Philippine 508, 6 Off. Gaz. 735).

72. Fianza *v.* Reavis, 7 Philippine 610 (holding that permitting amendments to conform to facts proved is proper); Gsell *v.* Yap-Jue, 6 Philippine 143; Garrosi *v.* Garrosi, 1 Porto Rico Fed. 230 (holding that a proposed amendment alleging that since commencing the action, which was for conjugal property, a divorce had been granted, and asking the reference of an account is proper); Garrosi *v.* Garrosi, 1 Porto Rico Fed. 228 (holding that an amendment to a petition for removal to the United States court for Porto Rico may be allowed therein to correct a merely defective averment).

A rule to file a bill of particulars is sufficiently complied with by an amended answer which, although crudely drawn, gives plaintiff the desired information. Siebert *v.* Vivoni, 3 Porto Rico Fed. 247.

73. De la Rosa *v.* Arenas, 7 Philippine 556, 5 Off. Gaz. 221.

74. Braga *v.* Millora, 3 Philippine 458, 2 Off. Gaz. 431 (holding that an averment that plaintiff is the "owner" of the property in

knowledge he should so state.[75] The contract sued on may be set out in the complaint.[76]

c. Demurrer. Demurrers are allowed upon much the same grounds as in the courts of the United States proper.[77] Only facts well pleaded are admitted by the demurrer,[78] and the admission cannot be used against the demurrant as evidence.[79] A demurrer to an entire pleading should be overruled if any part is sufficient,[80] and a demurrer should be overruled where, after a careful reading of the complaint, the court is convinced that it cannot intelligently pass upon the issues without having the facts before it.[81] The ruling on demurrer is not

question is a conclusion of law); Miller *v.* Royal Ins. Co., 1 Porto Rico Fed. 320 (holding that the failure to state a cause of action may be raised at any stage).

A defective averment as to interest is cured by introduction of proper evidence. Frankel *v.* Clarke, 5 Philippine 349, 4 Off. Gaz. 17.

Incorporation of counts.—While each cause of action must be complete other counts may be incorporated by reference (Lo Sui *v.* Wyatt, 5 Philippine 496, 4 Off. Gaz. 125), and an exhibit attached to the original complaint and referred to in an amended one will be construed as if attached to the latter, although actually omitted (Cancino *v.* Valdéz, 3 Philippine 429, 2 Off. Gaz. 367).

Negligence may be charged in general terms. Villard *v.* New York, etc., Steamship Co., 1 Porto Rico Fed. 265.

Damages implied by law from wrongful acts need not be specifically averred. Zuzuarregui *v.* Martinez, 2 Porto Rico Fed. 1.

In an action by an heir to recover his share of a debt due an ancestor plaintiff need not aver that he has been judicially declared an heir. Sixto *v.* Sarria, 1 Porto Rico Fed. 181.

A formal complaint in ejectment may be required to be reformed so as to test the truth of answer's averment as to *res judicata*. Souffront de Fleurian *v.* La Compagnie Des Sucreries, 3 Porto Rico Fed. 88.

Misjoinder of causes is not prohibited in the Philippines; only misjoinder of parties. Rubert *v.* Luengo, 8 Philippine 554, 5 Off. Gaz. 663; Santos *v.* Limuco, 5 Philippine 15, 4 Off. Gaz. 217. A suit to annul a possessory title on the ground of fraud, to correct or cancel the registration, to recover the land and secure an accounting may be brought in equity and is not multifarious. Parés *v.* J. Reynes, 2 Porto Rico Fed. 402.

Complaints held sufficient see Cancino *v.* Valdéz, 3 Philippine 429, 2 Off. Gaz. 367 (holding that a description of land is sufficient as against a demurrer if it states the *pueblo*, *barrio*, *sitios*, area, and boundaries); Alemany *v.* Sweeney, 2 Philippine 654, 1 Off. Gaz. 857 (holding that the complaint need not specify the statute governing the case).

75. Miller *v.* Royal Ins. Co., 1 Porto Rico Fed. 320.

The first pleading in trespass, showing the character of the property injured and the manner and extent of the injury, is sufficient against a bill of particulars, especially when unaccompanied by affidavits showing the necessity thereof. St. Johns Gas Co. *v.* San Juan, 1 Porto Rico Fed. 166.

76. Villar *v.* New York, etc., Steamship Co., 1 Porto Rico Fed. 265.

The contract evidencing an unlawful combination for which action is brought under the anti-trust act need not be set out in the complaint. Peck Steamship Line *v.* New York, etc., Steamship Co., 2 Porto Rico Fed. 109.

77. See cases cited *infra*, this and the following notes. And see, generally, PLEADING, 31 Cyc. 269.

Ambiguity is a ground for demurrer under Philippine Code Civ. Proc. § 91 (6). In the Porto Rican federal court it seems that a demurrer on this ground will not be allowed where a bill of particulars would suffice. Central Altagracia *v.* Wilson, 3 Porto Rico Fed. 250; Martinez de Hernandez *v.* Bertran, 2 Porto Rico Fed. 4. Where the complaint states the cause of action, overruling a demurrer on the ground of ambiguity is not reversible error. Cabreros *v.* Prospero, 5 Philippine 693, 4 Off. Gaz. 310.

Prescription cannot be raised by demurrer, although apparent on the face of complaint. Domingo *v.* Osorio, 7 Philippine 405.

The right to amend after demurrer sustained cannot be denied. Molina *v.* La Electricista, 6 Philippine 519. Where plaintiff refuses to so amend, judgment should be rendered in favor of defendants for costs, and that plaintiff take nothing. Cancino *v.* Valdéz, 3 Philippine 429, 2 Off. Gaz. 367.

78. Gavieres *v.* Peña, 10 Philippine 472, 6 Off. Gaz. 833.

A demurrer to a complaint for libel does not admit the innuendo. Stokes *v.* Dooley, 3 Porto Rico Fed. 1.

79. Liquete *v.* Dario, 5 Philippine 221, 4 Off. Gaz. 187.

80. Yu Bunuan *v.* Marcaida, 10 Philippine 265, 6 Off. Gaz. 577; Rodriguez *v.* Vivoni, 1 Porto Rico Fed. 487.

The demurrer reaches only the pleading to which it is directed; affidavits, admissions, or other extraneous matter cannot be considered. Santos *v.* Yturralde, 6 Philippine 554, 4 Off. Gaz. 699; Rodriguez *v.* Vivoni, 1 Porto Rico Fed. 487.

A demurrer to a bill to enjoin an action at law will be held in abeyance until such action is disposed of, where it is alleged in the bill that plaintiff in the law action has failed to make certain payments under the contract sued on so as to coerce defendant in said action, who is complainant in the bill, into paying the account. Esteves *v.* Sucrerie Central Coloso, 2 Porto Rico Fed. 442.

81. Wilson *v.* Arecibo, 2 Porto Rico Fed. 278.

appealable.[82] An answer filed while a demurrer is pending overrules and withdraws the demurrer.[83]

d. Answer. Averments of the complaint are deemed admitted unless specifically denied in the answer,[84] and when the answer is insufficient judgment may be rendered on the pleadings.[85] Defenses must as a rule be specifically pleaded,[86] although a general denial may be sufficient.[87] But a denial stating merely a legal conclusion is insufficient; [88] and although the papers are informal and designated as a motion they may be sufficient as an answer.[89]

4. Evidence — a. General Rules. The common-law system of evidence pre-

82. Averia *v.* Reboldera, 10 Philippine 316, 6 Off. Gaz. 552.

83. Flores *v.* Flores, 7 Philippine 323, 5 Off. Gaz. 165; Megatinge *v.* La Electricista, 2 Philippine 182.

So under the equity practice an answer to an entire bill overrules plea to same. Garrosi *v.* Garrosi, 1 Porto Rico Fed. 230.

84. Molina *v.* De la Riva, 6 Philippine 12; Alemany *v.* Sweeney, 3 Philippine 114, 2 Off. Gaz. 110. See also Villegas *v.* De Diego, 1 Porto Rico Fed. 378, holding that an averment in the answer that all statements in the first pleading are untrue is bad.

Necessity of sworn denial.— Under the code of civil procedure, section 103, defendant's failure to deny under oath a written instrument sued on and set out in the complaint admits defendant's power to execute it, the authority of the agent by whom it purports to be signed, and the genuineness of the signature. Merchant *v.* International Banking Corp., 6 Philippine 314, 4 Off. Gaz. 487. But this rule requiring sworn denial does not apply to indorsements (Heinszen *v.* Jones, 5 Philippine 27, 4 Off. Gaz. 217), nor to actions against heirs or assigns of the maker (Lim-Chingco *v.* Terariray, 5 Philippine 120, 51 Off. Gaz. 691).

An answer in equity in the United States court for Porto Rico is a mere denial if not under oath; if sworn to, more than one witness is necessary to prove the case. Fajardo *v.* Costa, 1 Porto Rico Fed. 119.

Rules relative to answers apply to the court of land registration. Cabañas *v.* Director of Lands, 10 Philippine 393, 6 Off. Gaz. 762.

Under the Porto Rican code of civil procedure, section 89, defendants must plead within ten days from service, and the time cannot be extended by moving to join additional defendants. Colon *v.* Fernandez, 3 Porto Rico Fed. 488. A party will not be allowed, at a late stage in the proceedings, to withdraw a plea to the merits in order to file a dilatory one. Bocanegra *v.* Graham, 1 Porto Rico Fed. 73.

85. Vasquez *v.* Florence, 5 Philippine 183; Alemany *v.* Sweeney, 3 Philippine 114, 2 Off. Gaz. 110.

Answer by partner in firm-name.—Where one of two partners files an answer in the firm's name the court may properly consider it. Martinez *v.* Cordoba, 5 Philippine 545, 4 Off. Gaz. 155.

86. Maxilom *v.* Tabotabo, 9 Philippine 390, 6 Off. Gaz. 77; Domingo *v.* Osorio, 7 Philippine 405; Aldeguer *v.* Hoskyn, 2 Philippine 500, 1 Off. Gaz. 727, defense of prescription.

One who relies on a tax title must aver every fact necessary to show compliance with statute. Garcia *v.* Nevarez, 1 Porto Rico Fed. 513.

A defense admitted from the answer to an amended complaint is waived, although set up in the original answer. Ortiz *v.* Aramburo, 8 Philippine 98, 5 Off. Gaz. 264.

One defense does not affect another but may be inconsistent therewith, under the Philippine practice, which is derived from California. Castle *v.* Go-Juno, 7 Philippine 144, 5 Off. Gaz. 50.

A counter-claim need not, in the Philippines, arise from or be connected with the cause of action stated in the complaint. Feliciano *v.* Del Rosario, 6 Philippine 70, 4 Off. Gaz. 375. But a counter-claim cannot first be pleaded on appeal from a justice's court. Belzunce *v.* Fernandez, 10 Philippine 452, 6 Off. Gaz. 832; Evangelista *v.* Tabayuyong, 7 Philippine 607, 5 Off. Gaz. 280.

A cross bill alleging that a certain lease has merged in a later partnership agreement between the parties is proper. Van Syckel *v.* Sobrinos de Ezquiaga, 3 Porto Rico Fed. 169.

A disclaimer in an action to cancel a mortgage is sufficient if it relates to all the land affected. Kortright *v.* Cruz de Godiness, 1 Porto Rico Fed. 174.

87. Roman Catholic Apostolic Church *v.* Badoc, 6 Philippine 345 (holding that under Act 1376, giving the supreme court original jurisdiction in controversies over church property, defendant may plead a general denial); Lorenzo *v.* Navarro, 5 Philippine 505, 4 Off. Gaz. 140 (holding that defendant may prove under a general denial that the contract sued on as a lease was in fact one of sale); Heinszen *v.* Jones, 5 Philippine 27, 4 Off. Gaz. 217; Feced *v.* Abella, 1 Philippine 150.

Plaintiff's corporate capacity or other legal personalty is put in issue by a mere general denial. La Compania Cia Gen. de Tabacos *v.* Trinchera, 7 Philippine 689, 5 Off. Gaz. 239. And failure to offer proof on such point is fatal, although defendant pleads a counter-claim against plaintiff. La Compania Cia Gen. de Tabacos *v.* Trinchera, *supra*; Castle *v.* Go-Juno, 7 Philippine 144, 5 Off. Gaz. 50.

88. Perez *v.* Aguerria, 1 Porto Rico Fed. 443.

89. Gitt *v.* Moore, 5 Philippine 559, 4 Off. Gaz. 159.

vails throughout practically all the territorial possessions, although that system is a product of trial by jury, and it has been adopted even in the Philippines, where juries have never been employed.[90] The court is not confined in its consideration to the evidence offered by the parties, but may call additional witnesses;[91] and admission of improper evidence is not reversible error if judgment is supported by competent evidence;[92] but where evidence improperly admitted produces a wrong result, it is ground for reversal.[93] The burden of proof as to any particular point or issue rests on the party who would fail if no evidence were offered thereon,[94] but the order of proof is not important,[95] and facts which are judicially noticed need not be proved,[96] nor those facts which are presumed,[97]

90. Philippine Code Civ. Proc. § 274 *et seq.*

These provisions apply to criminal as well as to civil cases. U. S. *v.* Gonzalez, 10 Philippine 66, 6 Off. Gaz. 324; U. S. *v.* Alvarez, 1 Philippine 351. Gen. Ord. 58 (the code of criminal procedure) contains certain sections (55, 62) relative to evidence in criminal prosecutions.

Possessory information is *prima facie* evidence that claimant holds as owner. Manila *v.* Del Rosario, 5 Philippine 227.

Executive orders are prima facie evidence of currency values under Act 1045, § 3. Gaspar *v.* Molina, 5 Philippine 197.

Accused's statements as to his age should be accepted until disproved by other evidence. U. S. *v.* Roxas, 5 Philippine 375.

91. U. S. *v.* Base, 9 Philippine 48, 5 Off. Gaz. 856; U. S. *v.* Cinco, 8 Philippine 388, 5 Off. Gaz. 534. *Compare* U. S. *v.* Vizquera, 4 Philippine 380, 3 Off. Gaz. 371.

92. Paez *v.* Berenguer, 8 Philippine 454, 4 Off. Gaz. 692; Larson *v.* Brodek, 8 Philippine 383, 5 Off. Gaz. 507; Casalla *v.* Enage, 6 Philippine 475, 4 Off. Gaz. 624; U. S. *v.* Sison, 6 Philippine 421, 4 Off. Gaz. 602; Germann *v.* Yangco, 5 Philippine 717, 4 Off. Gaz. 345; Panaguiton *v.* Watkins, 5 Philippine 539; U. S. *v.* Osborn, 4 Philippine 352, 3 Off. Gaz. 368; U. S. *v.* Lescano, 2 Philippine 47, 3 Off. Gaz. 191.

93. Infante *v.* Fegueras, 4 Philippine 738, 4 Off. Gaz. 210.

Only evidence actually admitted in the case in judgment can be considered. Dayrit *v.* Gonzalez, 7 Philippine 182, 5 Off. Gaz. 53; U. S. *v.* Tanjuanco, 1 Philippine 116. But see U. S. *v.* Padlan, 7 Philippine 517, 5 Off. Gaz. 209.

94. Comelin *v.* Schultze, 1 Porto Rico Fed. 289; Cayol *v.* Balseiro, 1 Porto Rico 253.

95. U. S. *v.* Ramos, 1 Philippine 81.

96. Barreto *v.* Reyes, 10 Philippine 489, 6 Off. Gaz. 706; Strong *v.* Gutierrez, 6 Philippine 680, 5 Off. Gaz. 72 [*reversed* on other grounds in 213 U. S. 419, 29 S. Ct. 521, 53 L. ed. 853]; U. S. *v.* Tubig, 3 Philippine 244, 2 Off. Gaz. 202; U. S. *v.* Karelsen, 3 Philippine 223, 2 Off. Gaz. 170; Villa *v.* Allen, 2 Philippine 436, 1 Off. Gaz. 748.

Judicial notice of Spanish law.— The United States supreme court will take judicial notice of the Spanish law as it exists in the insular possessions. Ponce *v.* Roman Catholic Apostolic Church, 210 U. S. 296, 28 S. Ct. 737, 52 L. ed. 1068.

Judicial notice cannot be taken of local customs (Patriarca *v.* Orate, 7 Philippine 390), nor of the length of a "*braza realenga*" (Villar *v.* Manila, 6 Philippine 655, 4 Off. Gaz. 713).

97. Delgado *v.* Riesgo, 10 Philippine 428, 6 Off. Gaz. 670; Velasco *v.* Masa, 10 Philippine 279, 26 Off. Gaz. 732; Villanueva *v.* Roque, 10 Philippine 270, 6 Off. Gaz. 890; U. S. *v.* Jamero, 10 Philippine 137, 6 Off. Gaz. 671; U. S. *v.* Paguia, 10 Philippine 90, 6 Off. Gaz. 707; Azarraga *v.* Rodriguez, 9 Philippine 637, 6 Off. Gaz. 546; U. S. *v.* Soriano, 9 Philippine 445, 6 Off. Gaz. 314; Pyle *v.* Johnson, 9 Philippine 249; U. S. *v.* Del Socorro, 8 Philippine 759; U. S. *v.* Cockrill, 8 Philippine 742; Navales *v.* Rias, 8 Philippine 508, 5 Off. Gaz. 662; Lutz *v.* Collector of Customs, 8 Philippine 492, 5 Off. Gaz. 575; Mendoza *v.* Fulgencio, 8 Philippine 243, 5 Off. Gaz. 459; Ayala de Roxas *v.* Case, 8 Philippine 197; Veloso *v.* Veloso, 8 Philippine 83; U. S. *v.* Lugo, 8 Philippine 80, 5 Off. Gaz. 263; U. S. *v.* Navarro, 7 Philippine 713; Gabriel *v.* Bartolomé, 7 Philippine 699; Leonardo *v.* Santiago, 7 Philippine 401, 5 Off. Gaz. 148; U. S. *v.* Orosa, 7 Philippine 247; U. S. *v.* Weems, 7 Philippine 241, 5 Off. Gaz. 58; Torres *v.* Genato, 7 Philippine 204, 5 Off. Gaz. 23; Sparrevohn *v.* Bachrach, 7 Philippine 194, 5 Off. Gaz. 8; U. S. *v.* Ago-Chi, 6 Philippine 227, 5 Off. Gaz. 84; Alo *v.* Rocamora, 6 Philippine 197; Cacnio *v.* Baens, 5 Philippine 746; Pascual *v.* Angeles, 4 Philippine 604, 4 Off. Gaz. 320; U. S. *v.* Lopena, 4 Philippine 224, 3 Off. Gaz. 251; U. S. *v.* Aliño, 4 Philippine 181, 3 Off. Gaz. 246; Campañía Gen. de Tabacos *v.* Topiño, 4 Philippine 33; U. S. *v.* Embate, 3 Philippine 640, 2 Off. Gaz. 610; Co-Boo *v.* Lim-Tian, 3 Philippine 186, 2 Off. Gaz. 465; U. S. *v.* Navarro, 3 Philippine 143, 2 Off. Gaz. 551; U. S. *v.* Melchor, 2 Philippine 588, 1 Off. Gaz. 834; U. S. *v.* Fitzgerald, 2 Philippine 419, 1 Off. Gaz. 649; U. S. *v.* Regis, 2 Philippine 113; U. S. *v.* Luciano, 2 Philippine 96, 1 Off. Gaz. 398; Martinez *v.* Martinez, 1 Philippine 647, 1 Off. Gaz. 268; U. S. *v.* Alvarez, 1 Philippine 351, 1 Off. Gaz. 348; U. S. *v.* Ropiñan, 1 Philippine 294; U. S. *v.* Bertucio, 1 Philippine 47; Nadal *v.* Ramos, 1 Porto Rico Fed. 363; Garrosi *v.* Garrosi, 1 Porto Rico Fed. 228.

Presumption arising from failure to testify or from suppression of evidence.— It is presumed that evidence wilfully suppressed would be adverse. Cason *v.* Rickards, 5

nor those admitted,[98] nor need proof be adduced as to facts which the adverse party is estopped to deny.[99]

b. Admissibility. The two fundamental rules of admissibility that evidence must be relevant to the material issues raised by the pleadings,[1] and must be the best obtainable, are in full force in the Philippines. Under the latter hearsay is excluded,[2] the rule being subject, however, to the usual exceptions based principally on the ground of trustworthiness; as in the case of declarations against

Philippine 611, 4 Off. Gaz. 236; U. S. *v.* Navarro, 3 Philippine 633, 2 Off. Gaz. 436. But see Ang Seng Quen *v.* Te Chico, 7 Philippine 541, 5 Off. Gaz. 217. But no unfavorable presumption arises from the mere nonappearance of a witness not shown to have been wilfully kept away (Modesto *v.* Leyva, 6 Philippine 186; U. S. *v.* Abuan, 2 Philippine 130. But see Ballester *v.* Legaspi, 5 Philippine 722), nor from failure of accused to testify (U. S. *v.* Navarro, 3 Philippine 143, 2 Off. Gaz. 551), nor from his objection to his wife's testifying against him (U. S. *v.* Melchor, 2 Philippine 588, 1 Off. Gaz. 834).

Presumption of innocence does not prevail under the Spanish law. U. S. *v.* Alvarez, 1 Off. Gaz. 348.

Presumption juris et de jure in adverse possession see Pamintuan *v.* Insular Government, 8 Philippine 485, 5 Off. Gaz. 698.

98. U. S. *v.* Dones, 8 Philippine 172.

99. Hijos de I. de la Rama *v.* Robles, 8 Philippine 712, 5 Off. Gaz. 844; Macke *v.* Camps, 7 Philippine 553, 5 Off. Gaz. 20; Tuason *v.* Uson, 7 Philippine 85; Barlin *v.* Ramirez, 7 Philippine 41, 5 Off. Gaz. 130; Behn *v.* Rosatzin, 5 Philippine 660, 4 Off. Gaz. 292; Pascual *v.* Angeles, 4 Philippine 604, 4 Off. Gaz. 320; Campbell *v.* Bahn, 3 Philippine 590, 2 Off. Gaz. 469 [*affirmed* in 205 U. S. 403, 27 S. Ct. 502, 51 L. ed. 857].

Estoppel to deny title.— It seems that one who procures the registration of title in the name of his brother's children is estopped to deny title. Broce *v.* Broce, 4 Philippine 611, 3 Off. Gaz. 622.

In order to create an estoppel it must be shown that the party claiming it relied and acted to his injury upon the conduct of the other party. Fabie *v.* Manila, 10 Philippine 64, 6 Off. Gaz. 364; Trinidad *v.* Ricafort, 7 Philippine 449, 5 Off. Gaz. 196. And see, generally, ESTOPPEL, 16 Cyc. 671.

A tenant is estopped to impeach his landlord's title, and the rule applies to a curate in possession of church property to administer it. Tuason *v.* Uson, 7 Philippine 85; Barlin *v.* Ramirez, 7 Philippine 41, 5 Off. Gaz. 130.

A maker of a promissory note who tells a prospective purchaser that it is valid and he will pay it is estopped from afterward claiming against such purchaser that note is invalid because given for a gambling debt. Rodriguez *v.* Martinez, 5 Philippine 67.

An admission reciting ownership of land by a municipality by signing a resolution is competent evidence against the signer but does not estop him from overcoming it. Oas *v.* Roa, 7 Philippine 20, 4 Off. Gaz. 734.

1. Roxas *v.* Aguirre, 9 Philippine 475, 6 Off. Gaz. 120; Evangelista *v.* Tabayuyong, 7 Philippine 607, 5 Off. Gaz. 280; Frankel *v.* Clarke, 5 Philippine 349, 4 Off. Gaz. 17; Lim-Chingco *v.* Terariray, 5 Philippine 120, 3 Off. Gaz. 687; Infante *v.* Figueras, 4 Philippine 738, 4 Off. Gaz. 210; Espiritu *v.* Deseo, 1 Philippine 225, 1 Off. Gaz. 490; U. S. *v.* Ramos, 1 Philippine 192, 6 Off. Gaz. 708.

Photographs of scenes and objects relating to the controversy are admissible upon proper identification and proof of accuracy, but not unauthenticated maps which are mere expressions of opinion. Manila *v.* Cabangis, 10 Philippine 151, 6 Off. Gaz. 507.

2. Richmond *v.* Anchuelo, 4 Philippine 596, 3 Off. Gaz. 605; U. S. *v.* Santiago, 4 Philippine 439, 3 Off. Gaz. 527 (holding that a statement by a detective that he had received information of gambling at a certain place is inadmissible); U. S. *v.* Dayutal, 4 Philippine 93, 3 Off. Gaz. 48 (holding that a statement of an employer as to the number of his employees according to the verbal report of his foreman is inadmissible); Pastor *v.* Gaspar, 2 Philippine 592, 1 Off. Gaz. 875; Cruz *v.* Joaquin, 2 Philippine 503; Ismael *v.* Guanzon, 2 Philippine 347, 1 Off. Gaz. 591; U. S. *v.* Tanjuanco, 1 Philippine 374.

A self-serving statement by a party is inadmissible. Lim-Chingco *v.* Terarirary, 5 Philippine 120, 3 Off. Gaz. 687; Richmond *v.* Anchuelo, 4 Philippine 596, 3 Off. Gaz. 605.

A report of the marine inquiry board as to the cause of a collision is not admissible to prove negligence. Ortiz *v.* Compañía Marítima, 7 Philippine 507, 5 Off. Gaz. 208.

The fact that a document is executed by or before municipal officers will not render it admissible if in fact it is hearsay. Order of Dominicans *v.* Insular Government, 7 Philippine 98, 4 Off. Gaz. 749; Ismael *v.* Guanzon, 2 Philippine 347, 1 Off. Gaz. 591; U. S. *v.* Tanjuanco, 1 Philippine 374.

The record of preliminary investigation before a justice of the peace is not admissible as such upon the trial of the accused in the court of first instance. U. S. *v.* Manalo, 6 Philippine 364, 4 Off. Gaz. 570; U. S. *v.* Candelaria, 4 Philippine 543, 4 Off. Gaz. 169; U. S. *v.* Caligagan, 2 Philippine 433, 1 Off. Gaz. 665; U. S. *v.* Abuan, 2 Philippine 130; U. S. *v.* Capisonda, 1 Philippine 575. *Compare* U. S. *v.* Vallesteros, 6 Philippine 401.

Pawn-tickets as evidence.— In an action to recover jewelry alleged to have been delivered as security for a loan, pawn-tickets are admissible to show that at the time of such delivery the jewelry was in a pawnshop. Salonga *v.* Concepcion, 3 Philippine 563, 2 Off. Gaz. 513.

interest,[3] admissions by a party or one identified in interest with him,[4] confessions,[5] *res gestæ*,[6] and dying declarations.[7] There are also the common exceptions based on the ground of necessity or convenience, as in the case of matters of public and general interest,[8] pedigree,[9] entries by decedents,[10] or by one party

3. Tauguinot *v.* Tanay, 9 Philippine 396, 6 Off. Gaz. 152; Leonardo *v.* Santiago, 7 Philippine 401, 5 Off. Gaz. 148.

This rule refers to admissions by one not a party. Oas *v.* Roa, 7 Philippine 20, 4 Off. Gaz. 734.

A public instrument executed by a party is admissible in evidence against him and cannot be overcome except by other evidence of greater weight. Naval *v.* Enriquez, 3 Philippine 669, 2 Off. Gaz. 610.

A vendor's declaration subsequent to conveyance is not admissible to disparage his title. Soriano *v.* Arrese, 1 Porto Rico Fed. 194.

4. Oas *v.* Roa, 7 Philippine 20, 4 Off. Gaz. 734; Manila *v.* Del Rosario, 5 Philippine 227, 4 Off. Gaz. 189.

A rental contract executed by defendant's deceased husband is admissible against her claim of title. Lerma *v.* De la Cruz, 7 Philippine 581, 5 Off. Gaz. 236.

An admission by an attorney in one case is not evidence against his client in another. De la Rama *v.* Benedicto, 5 Philippine 512, 4 Off. Gaz. 142.

A letter written by defendant in an action to register title to land, admitting the claims of the adverse party, is receivable against defendant. Luchsinger *v.* Melliza, 9 Philippine 376, 6 Off. Gaz. 151.

5. U. S. *v.* Sotelo, 1 Philippine 544, 1 Off. Gaz. 46; Philippine Provisional Law, art. 52 (2). See also U. S. *v.* Estabillo, 9 Philippine 668, 6 Off. Gaz. 272; U. S. *v.* Morales, 8 Philippine 300, 5 Off. Gaz. 465.

But such confession is not admissible against a co-defendant. U. S. *v.* Estabillo, 9 Philippine 668, 6 Off. Gaz. 272; U. S. *v.* Paete, 6 Philippine 105, 5 Off. Gaz. 70; U. S. *v.* Candelaria, 4 Philippine 543, 4 Off. Gaz. 169; U. S. *v.* Lim Tico, 4 Philippine 440, 3 Off. Gaz. 408; U. S. *v.* Castillo, 2 Philippine 17.

A voluntary plea of guilty, although withdrawn the next day, is competent evidence against the accused at the trial. U. S. *v.* Alonso, 8 Philippine 78. But not if made ignorantly. U. S. *v.* Tolosa, 5 Philippine 616.

Treason.— Under the act of congress of March 8, 1902, section 9, an extrajudicial confession is insufficient to convict of treason. U. S. *v.* De los Reyes, 3 Philippine 349, 2 Off. Gaz. 364; U. S. *v.* Magtibay, 2 Philippine 703, 1 Off. Gaz. 932.

In all cases the corpus delicti must be proved independent of the confession. U. S. *v.* De la Cruz, 2 Philippine 148, 3 Off. Gaz. 38.

What constitutes a confession.— Mere silence or refusal to deny or explain does not constitute a confession (U. S. *v.* Muyot, 2 Philippine 177), nor do admissions made while testifying (U. S. *v.* Magtibay, 2 Philippine 703, 1 Off. Gaz. 932); and a statement by the accused in his testimony that the deceased was killed by another while bound does not amount to a confession that the deceased was bound when killed by the accused (U. S. *v.* Valdez, 1 Philippine 238, 1 Off. Gaz. 476).

After the conspiracy has terminated the confession of a conspirator is not admissible against the others. U. S. *v.* Empeinado, 9 Philippine 613, 6 Off. Gaz. 225.

Confession must be voluntary. By the express terms of a Philippine statute (Act 619 (4) a confession is not admissible against the accused unless it be first shown to the satisfaction of the court that it was freely and voluntarily made. This act has been construed in U. S. *v.* Gorospe, 9 Philippine 394, 6 Off. Gaz. 79; U. S. *v.* Almeda, 8 Philippine 266, 5 Off. Gaz. 445; U. S. *v.* Mercado, 6 Philippine 332, 5 Off. Gaz. 36; U. S. *v.* Jose, 6 Philippine 211; U. S. *v.* Guzman, 5 Philippine 630, 5 Off. Gaz. 35; U. S. *v.* De la Cruz, 5 Philippine 24, 3 Off. Gaz. 541; U. S. *v.* Gregorio, 4 Philippine 443, 3 Off. Gaz. 527; U. S. *v.* Ramos, 4 Philippine 389, 3 Off. Gaz. 372; U. S. *v.* Caballeros, 4 Philippine 350, 3 Off. Gaz. 315; U. S. *v.* Lozada, 4 Philippine 226, 3 Off. Gaz. 450; U. S. *v.* De la Cruz, 2 Philippine 148; U. S. *v.* Baluyut, 1 Philippine 451, 1 Off. Gaz. 359. Although this is a special law it applies to all confessions. U. S. *v.* Alameda, 5 Philippine 266, 5 Off. Gaz. 445; U. S. *v.* De la Cruz, 5 Philippine 24. It is not sufficient that the confession appears to have been voluntary if in fact it was forced. U. S. *v.* Mercado, 6 Philippine 332, 5 Off. Gaz. 86.

A confession learned through an interpreter is inadmissible. U. S. *v.* Chu Chio, 8 Philippine 269, 5 Off. Gaz. 446.

When objection to confession raised.— Objection to admissibility of confessions may be raised at any stage, even in the supreme court. U. S. *v.* Alameda, 8 Philippine 266, 5 Off. Gaz. 445; U. S. *v.* Pascual, 2 Philippine 457, 1 Off. Gaz. 706.

6. U. S. *v.* David, 3 Philippine 128.

7. U. S. *v.* Montes, 6 Philippine 443, 5 Off. Gaz. 88; U. S. *v.* Palanca, 5 Philippine 269, 4 Off. Gaz. 193.

This rule exists in the Philippines only by virtue of judicial decisions; there has been no statutory adoption as in the case of most of the other leading Anglo-American rules of evidence.

8. Ayala de Roxas *v.* Case, 8 Philippine 197.

9. U. S. *v.* Roxas, 5 Philippine 375, holding that the accused's own statements as to his age is *prima facie* sufficient.

This includes age, which may be proved by the baptismal certificate. U. S. *v.* Gloria, 3 Philippine 333, 2 Off. Gaz. 326; U. S. *v.* Bergantino, 3 Philippine 118, 2 Off. Gaz. 109. But such certificates may be contradicted. Basa *v.* Arquiza, 5 Philippine 187.

10. Tan Machan *v.* De la Trinidad, 3 Philippine 684, 2 Off. Gaz. 473.

or his clerk against the other,[11] or in public records.[12] Opinions are not generally evidence,[13] except in subjects requiring expert testimony.[14] Secondary evidence of the contents of a writing is generally inadmissible unless the writing is proved to have been lost,[15] and the parol evidence rule is likewise in force in the Philippines.[16] The usual privilege attaching to professional communications also applies in the Philippines,[17] and marital communications cannot be the subject of testimony by one spouse for or against the other without the latter's consent,[18] except in a prosecution for a crime committed or a civil action by one against the other.[19] Parties, or their assignors or beneficiaries, to any proceeding upon

The entries must first be authenticated. Nolan *v.* Salas, 7 Philippine 1. *Compare* U. S. *v.* Dayutal, 4 Philippine 93, 3 Off. Gaz. 48.

11. See cases cited *infra*, this note.

In the federal court for Porto Rico a stranger to the suit may be compelled to produce books and papers if it clearly appears that they are material. Norwich Union F. Ins. Soc. *v.* Gomez, 1 Porto Rico Fed. 498.

In the Philippines there is no provision of law for compelling the production of books and papers other than by subpœna *duces tecum*.

Account books are not admissible to show decrease of sales, in an action for the infringement of a trade-mark, without first showing defendant's responsibility for such decrease. Garrido *v.* Asencio, 10 Philippine 691, 6 Off. Gaz. 797; La Sociedad "Germinal" *v.* Nubla, 10 Philippine 18, 6 Off. Gaz. 548. But that account books are not kept in accordance with the code of commerce is no ground for exclusion. Behn *v.* Rosatzin, 5 Philippine 660, 4 Off. Gaz. 292; Tan Machan *v.* de la Trinidad, 3 Philippine 684, 2 Off. Gaz. 473.

Entries in the course of duty especially enjoined by law are *prima facie* evidence of the facts therein recited. Philippine Code Civ. Proc. § 315; Cal. Code Civ. Proc. § 1920. *Compare* Philippine Civ. Code, art. 1218.

12. Cacnio *v.* Baens, 5 Philippine 742.

Record of title deeds in the register's office are *prima facie* evidence of the area of the land included. Mendoza *v.* Fulgencio, 8 Philippine 243.

A baptismal certificate may be contradicted, and is contradicted by admission, on the part of one offering it, of facts inconsistent with its recitals. Basa *v.* Arquiza, 5 Philippine 187.

Where one party introduces a part of the court record the other is entitled to offer the balance. Matias *v.* Alvarez, 10 Philippine 398, 6 Off. Gaz. 666.

13. Manila *v.* Rodriguez, 7 Philippine 292, 5 Off. Gaz. 101; Pastor *v.* Gaspar, 2 Philippine 592, 10 Off. Gaz. 875.

Opinion as to sanity and handwriting.— Opinion as to sanity may be given by an intimate acquaintance or a subscribing witness; also by the former an opinion as to handwriting may be given. Philippine Code Civ. Proc. §§ 276, 298 (9, 10).

Opinion evidence generally see EVIDENCE, 17 Cyc. 25.

14. U. S. *v.* Mercado, 4 Philippine 304, 3 Off. Gaz. 365.

Even such testimony is not conclusive on the courts. U. S. *v.* Trono, 3 Philippine 213, 3 Off. Gaz. 296 [*affirmed* in 199 U. S. 521, 26 S. Ct. 121, 50 L. ed. 292]; Benitez *v.* Martinez, 1 Porto Rico 379.

15. Pastor *v.* Gaspar, 2 Philippine 592, 1 Off. Gaz. 875.

Evidence held sufficient to show execution of deed afterward lost see Espino *v.* Espino, 9 Philippine 41, 5 Off. Gaz. 854.

Contents may be established by notary's copy or by a subscribing witness where proof of loss is sufficient. Timbol *v.* Manalo, 6 Philippine 254, 4 Off. Gaz. 596.

Proof of loss held insufficient see Araujo *v.* Celis, 6 Philippine 223.

Admission of copy of letter held proper see Benedicto *v.* Grindrod, 6 Philippine 179, 4 Off. Gaz. 458.

Transcript of auditor's book.— Under Philippine Act 1402, § 69, a transcript of the insular auditor's books is admissible even in a criminal prosecution, provided the accused has the opportunity of cross-examining the maker of the transcript. U. S. *v.* Hazley, 9 Philippine 384, 6 Off. Gaz. 43.

Even a self-serving balance of account may be admissible where another witness with the account books before him verifies the items thereof. Cassells *v.* Reid, 9 Philippine 580, 6 Off. Gaz. 219.

There is no vested right in the rules of evidence, and the contents of lost instruments executed before the enactment of the present code are provable thereunder, although the previous rule was a different one. Aldeguer *v.* Hoskyn, 2 Philippine 500, 1 Off. Gaz. 727. *Compare* Ayala de Roxas *v.* Case, 8 Philippine 197, 5 Off. Gaz. 272.

16. Muguruza *v.* International Banking Corp., 10 Philippine 346, 6 Off. Gaz. 634.

Evidence that two of the makers of a promissory note were sureties does not infringe the rule. Tan Machan *v.* De la Trinidad, 3 Philippine 684, 2 Off. Gaz. 473.

17. Philippine Code Civ. Proc. §§ 3, 383 (4).

Where the client himself discloses the information while testifying, the attorney must answer whether or not said information is correct and may be imprisoned for refusing. Jones *v.* Harding, 9 Philippine 279, 6 Off. Gaz. 144.

18. Ortiz *v.* Aramburo, 8 Philippine 98, 5 Off. Gaz. 204; Salonga *v.* Concepcion, 3 Philippine 563, 2 Off. Gaz. 513.

19. U. S. *v.* Melchor, 2 Philippine 588, 1 Off. Gaz. 834.

Illegal marriage is a crime against the law-

a claim against a person under disability or the estate of a deceased, cannot testify as to occurrences before the disability or death.[20]

c. Weight and Sufficiency — (I) *In Civil Cases.* In civil cases a preponderance only of the evidence is sufficient to determine the result, but such preponderance does not depend merely upon the number of witnesses.[21]

(II) *In Criminal Cases.* In criminal prosecutions the evidence must be sufficient to establish guilt beyond a reasonable doubt.[22] The evidence of a single

ful spouse, and such testimony is admissible in a prosecution therefor. U. S. *v.* Orosa, 7 Philippine 247.

20. Philippine Code Civ. Proc. § 383 (7), taken from Cal. Code Civ. Proc. § 1880 (3). See also Maxilom *v.* Tabotabo, 9 Philippine 390, 6 Off. Gaz. 77; Fajardo de Salazar *v.* Costa, 1 Porto Rico Fed. 119.

The provision is not applicable to an action against a partnership and will not exclude conversation with a deceased partner. Fortis *v.* Gutierrez, 6 Philippine 100, 4 Off. Gaz. 378.

The federal statute embodying the rule, U. S. Rev. St. (1878) § 858 [U. S. Comp. St. (1901) p. 659], does not apply to territorial courts. Corbus *v.* Leonhardt, 114 Fed. 10, 51 C. C. A. 636.

21. Gavieres *v.* Tavera, 1 Philippine 71, holding that a receipt by the creditor for an amount about equal to the balance claimed is sufficient evidence of payment, especially after long lapse of time through the creditor's laches.

The trial court may wholly disregard certain testimony if the circumstances justify. U. S. *v.* Vargas, 5 Philippine 136, 4 Off. Gaz. 520; U. S. *v.* Ramirez, 4 Philippine 549, 4 Off. Gaz. 170; U. S. *v.* Gregorio, 4 Philippine 443, 3 Off. Gaz. 527.

Marriage must be proved by actual celebration; birth of children is insufficient. Enriquez *v.* Enriquez, 8 Philippine 565.

Where land sought to be registered is nearly seven times as large as that described in applicant's deed, evidence to establish natural boundaries must be clear and convincing. Pamintuan *v.* Insular Government, 8 Philippine 512.

Proof of alleged acknowledgment of natural child held insufficient see Capistrano *v.* Gabino, 8 Philippine 135.

Evidence held insufficient see Manila *v.* Insular Government, 10 Philippine 327, 6 Off. Gaz. 584 (holding that leasing land and receiving rent therefor is not sufficient evidence of title); Morey *v.* Layco, 10 Philippine 258, 6 Off. Gaz. 538 (holding that documents issued by a collector of customs relative to the ownership of a vessel are not conclusive against the real owner); Ayala de Roxas *v.* Case, 8 Philippine 197, 5 Off. Gaz. 272 (holding that to establish a right of way by prescription more is necessary than the memory of living witnesses); Yusay *v.* Valdez, 1 Philippine 384, 1 Off. Gaz. 445 (holding that issues of a newspaper dated October 6 naming accused as editor did not prove that he was such on August 25 preceding).

22. U. S. *v.* Posoc, 10 Philippine 711, 6 Off. Gaz. 799; U. S. *v.* Samonte, 10 Philippine 642, 6 Off. Gaz. 743; U. S. *v.* Lim Sip, 10 Philippine 627, 6 Off. Gaz. 933; U. S. *v.* Marin, 10 Philippine 481, 6 Off. Gaz. 732; U. S. *v.* Floirendo, 8 Philippine 325, 5 Off. Gaz. 496; U. S. *v.* Magno, 8 Philippine 314, 5 Off. Gaz. 493; U. S. *v.* Santa Maria, 6 Philippine 224, 3 Off. Gaz. 251; U. S. *v.* Gutierrez, 4 Philippine 493, 3 Off. Gaz. 541; U. S. *v.* Gregorio, 4 Philippine 443, 3 Off. Gaz. 527; U. S. *v.* Magsambol, 4 Philippine 413, 3 Off. Gaz. 390; U. S. *v.* Lopena, 4 Philippine 224, 3 Off. Gaz. 251; U. S. *v.* Aliño, 4 Philippine 181, 3 Off. Gaz. 246; U. S. *v.* Trinidad, 4 Philippine 152, 3 Off. Gaz. 142; U. S. *v.* Bosito, 4 Philippine 100, 3 Off. Gaz. 112; U. S. *v.* Embate, 3 Philippine 640, 2 Off. Gaz. 610; U. S. *v.* Trillanes, 3 Philippine 270, 2 Off. Gaz. 416; U. S. *v.* Reyes, 3 Philippine 3, 2 Off. Gaz. 7; U. S. *v.* Lozada, 2 Philippine 496, 1 Off. Gaz. 870; U. S. *v.* Douglass, 2 Philippine 461, 1 Off. Gaz. 708; U. S. *v.* Balboa, 2 Philippine 165; U. S. *v.* Viloria, 1 Philippine 682; U. S. *v.* Jose, 1 Philippine 402, 1 Off. Gaz. 355; U. S. *v.* Antonio, 1 Philippine 251, 1 Off. Gaz. 480; U. S. *v.* Samarin, 1 Philippine 239, 1 Off. Gaz. 479.

Falsification.— Denial of genuineness of signature by a party whose name is attached thereto makes a *prima facie* case of falsification. U. S. *v.* Viloria, 1 Philippine 682.

Identification by sound of voice was held sufficient where the witness was intimately acquainted with the accused for many years. U. S. *v.* Manabat, 7 Philippine 209, 5 Off. Gaz. 24.

A letter carried by the accused is not evidence against him unless it appears that he knew its contents. U. S. *v.* Onti, 4 Philippine 78, 2 Off. Gaz. 614.

Treason.— The acceptance or possession of a commission in the insurgent forces is not sufficient to convict of treason. U. S. *v.* Villariño, 5 Philippine 697, 5 Off. Gaz. 37; U. S. *v.* De los Reyes, 3 Philippine 349, 2 Off. Gaz. 364; U. S. *v.* Magtibay, 2 Philippine 703, 1 Off. Gaz. 932. *Compare* U. S. *v.* Gacer, 4 Philippine 660; U. S. *v.* De la Serna, 4 Philippine 448, 3 Off. Gaz. 528; U. S. *v.* Nuñez, 4 Philippine 441, 3 Off. Gaz. 408. But acceptance of commission from conspirators is evidence of connection with the crime. U. S. *v.* Bautista, 6 Philippine 581, 4 Off. Gaz. 706.

Testimony of the accused must be weighed according to the same rules as that of other witnesses. U. S. *v.* Bolar, 1 Philippine 423, 1 Off. Gaz. 355.

Defense of alibi supported by testimony of witnesses is entitled to little weight when the identity of the accused as perpetrators of the crime is established by eye-witnesses.

witness may be sufficient to convict,[23] although in some cases corroboration is necessary,[24] especially where the one witness is an accomplice[25] or contradicts himself in different parts of his testimony.[26] Circumstantial evidence may be sufficient to convict,[27] but it must exclude every reasonable hypothesis other than guilt.[28]

5. Trial — a. Jury. In the unincorporated territories trial by jury is not a constitutional right, and the introduction of the jury system is discretionary with the legislative power.[29] In Porto Rico the jury system has been introduced by legislation both in the territorial and in the federal courts,[30] the jurors being the

U. S. *v.* Pascua, 1 Philippine 631, 1 Off. Gaz. 49.

23. U. S. *v.* Garcia, 8 Philippine 598; U. S. *v.* Cabamngan, 7 Philippine 191; Cacnio *v.* Baens, 5 Philippine 742; U. S. *v.* Bastas, 5 Philippine 251, 4 Off. Gaz. 726; U. S. *v.* De la Cruz, 4 Philippine 438, 3 Off. Gaz. 513; U. S. *v.* Santa Cruz, 1 Philippine 726; U. S. *v.* Dacotan, 1 Philippine 669; U. S. *v.* Asiao, 1 Philippine 304; U. S. *v.* Cabe, 1 Philippine 265, 1 Off. Gaz. 493; U. S. *v.* Samarin, 1 Philippine 239; U. S. *v.* Ramos, 1 Philippine 81.

Convictions based upon such testimony alone see U. S. *v.* Butardo, 9 Philippine 246, 5 Off. Gaz. 1076; U. S. *v.* Ocampo, 5 Philippine 339, 4 Off. Gaz. 8, 4 Philippine 400, 3 Off. Gaz. 372; U. S. *v.* Balisacan, 4 Philippine 545, 4 Off. Gaz. 169; U. S. *v.* Aguasa, 4 Philippine 274, 3 Off. Gaz. 363.

24. U. S. *v.* Garcia, 8 Philippine 598, 5 Off. Gaz. 738; U. S. *v.* Cabamngan, 7 Philippine 191, 5 Off. Gaz. 54; U. S. *v.* Flores, 6 Philippine 420; U. S. *v.* Mamintud, 6 Philippine 374; U. S. *v.* Santa Cruz, 1 Philippine 726.

Crimes held to require more evidence than the testimony of one witness: Treason. U. S. *v.* De los Reyes, 3 Philippine 349; U. S. *v.* Magtibay, 2 Philippine 703, 1 Off. Gaz. 932. Perjury. U. S. *v.* Lozano, 7 Philippine 142, 4 Off. Gaz. 753; U. S. *v.* McGovern, 4 Philippine 451, 3 Off. Gaz. 410; U. S. *v.* Antonio, 1 Philippine 251, 1 Off. Gaz. 480. Rape. U. S. *v.* Flores, 6 Philippine 420, 4 Off. Gaz. 581; U. S. *v.* Mamintud, 6 Philippine 374. But see U. S. *v.* Ramos, 1 Philippine 81, holding that the testimony of prosecutrix that she has been raped is evidence of all the elements of that crime.

25. U. S. *v.* Monzones, 8 Philippine 579, 5 Off. Gaz. 669; U. S. *v.* Padlan, 7 Philippine 517, 5 Off. Gaz. 209; U. S. *v.* Dadacay, 6 Philippine 1, 5 Off. Gaz. 38; U. S. *v.* Quiamson, 5 Philippine 444, 4 Off. Gaz. 70; U. S. *v.* Yu-To Chay, 4 Philippine 613, 4 Off. Gaz. 176; U. S. *v.* Lim Tico, 4 Philippine 440, 3 Off. Gaz. 408; U. S. *v.* Aguasa, 4 Philippine 274, 3 Off. Gaz. 363; U. S. *v.* De la Cruz, 4 Philippine 126; U. S. *v.* Magtibay, 2 Philippine 703.

26. U. S. *v.* Garcia, 8 Philippine 598.

27. U. S. *v.* Bautista, 6 Philippine 581, 4 Off. Gaz. 706; U. S. *v.* Castillo, 6 Philippine 453, 4 Off. Gaz. 688; U. S. *v.* Cruz, 4 Philippine 252, 3 Off. Gaz. 452; U. S. *v.* Maano, 2 Philippine 718, 2 Off. Gaz. 30; U. S. *v.* Miranda, 2 Philippine 606, 1 Off. Gaz. 911; U. S. *v.* Cajayon, 2 Philippine 570, 2 Off. Gaz. 157; U. S. *v.* Perez, 2 Philippine 171; U. S. *v.* Santos, 1 Philippine 222, 3 Off. Gaz. 473.

28. U. S. *v.* Baltazar, 8 Philippine 592, 5 Off. Gaz. 670; U. S. *v.* Villos, 6 Philippine 510, 4 Off. Gaz. 689; U. S. *v.* Un Che Sat, 5 Philippine 274, 3 Off. Gaz. 721; U. S. *v.* Palanca, 5 Philippine 269, 4 Off. Gaz. 193; U. S. *v.* Bosito, 4 Philippine 100, 3 Off. Gaz. 112; U. S. *v.* De la Pata, 3 Philippine 612, 2 Off. Gaz. 485; U. S. *v.* Reyes, 3 Philippine 3, 2 Off. Gaz. 7; U. S. *v.* Decusin, 2 Philippine 536, 1 Off. Gaz. 730; U. S. *v.* Douglass, 2 Philippine 461, 1 Off. Gaz. 708.

29. Dorr *v.* U. S., 195 U. S. 138, 24 S. Ct. 808, 49 L. ed. 128 [*affirming* 2 Philippine 269]; Hawaii *v.* Mankichi, 190 U. S. 197, 23 S. Ct. 787, 47 L. ed. 1016, holding that trial and conviction by a jury not unanimous was permissible during the interval between the passage of the congressional resolution providing for annexation and the organic act.

A United States army officer quartered in the Philippines comes within the operation of the rule and is not entitled to a jury trial. U. S. *v.* Carrington, 5 Philippine 725 [*reversed* on other grounds in 208 U. S. 1, 28 S. Ct. 203, 52 L. ed. 367].

Even a preliminary investigation is not necessary in cases triable only in the court of first instance of Manila. U. S. *v.* Wilson, 4 Philippine 317, 3 Off. Gaz. 366.

The Spanish system, in force in the Philippines, gave the right to the accused to be tried before judges, who acted in effect as a court of inquiry and whose judgments were not final until passed in review before the *audiencia* or supreme court, with right of final review and power to grant a new trial for errors of law in the supreme court at Madrid. To this system the Philippine commission, in executing the power conferred by the orders of the president and sanctioned by the act of congress of July 1, 1902 [32 U. S. St. at L. 691], has added a guaranty of the right of the accused to be heard by himself and counsel, to demand the nature and cause of the accusation against him, to have a speedy and public trial, to meet the witnesses against him face to face, and to have compulsory process to compel the attendance of witnesses in his behalf. Dorr *v.* U. S., 195 U. S. 138, 24 S. Ct. 808, 49 L. ed. 128.

30. See cases cited *infra*, this and the following notes.

sole judges of the facts.[31] The law providing for jury trials cannot be invoked by those already sentenced under a former law not calling for trial by jury.[32]

b. Presence of Judge and Party. The rule that the judge must be personally present at every stage of the trial is modified in the Philippines by permitting him to prepare his judgment after he has left the province where the trial was held and to remit the same to the clerk for publication.[33] But the accused in criminal cases must be present throughout the trial,[34] and in civil cases the parties are entitled to be present.[35]

c. Witnesses. Subpœna may be issued to secure the attendance of witnesses,[36]

The grand jury is a competent tribunal before which an oath may be taken and the foreman may administer it. U. S. *v.* Cruz, 1 Porto Rico Fed. 445.

31. San Juan Light, etc., Co. *v.* Segura, 1 Porto Rico Fed. 507.

Jurors as judges of law.—Under Porto Rico Pen. Code, § 264, the jurors are also the judges of the law in libel cases and should therefore determine when doubtful whether the words used are libelous. Stokes *v.* Dooley, 3 Porto Rico Fed. 1.

32. 1 Op. Atty.-Gen. Porto Rico 156.

33. Philippine Act 867, §§ 13, 14. And see U. S. *v.* Baluyut, 5 Philippine 129, 3 Off. Gaz. 676.

Objection of coram non judice found contradicted by the record see U. S. *v.* Garcia, 8 Philippine 416, 5 Off. Gaz. 549.

The rule applies to criminal as well as civil cases. U. S. *v.* Baluyut, 5 Philippine 129, 133, where the court in declaring that this act did not conflict with due process of law said: "It is undoubted that when the judgment is promulgated in the presence of defendant he has the right to do everything which he could do if the judge were personally present in court. He can present a motion for a new trial, or present any other motion which he desires to make. He can then, or within fifteen days thereafter, give notice of an appeal from the judgment. In fact, there is no right whatever which he can not exercise, if he could have exercised such right were the judge personally present. . . . In two provinces in the Islands courts are held only once a year; in most of them only twice a year. The want of such a law as this would in many cases prolong the imprisonment of defendant for six months, and in some cases a year. It is no answer to this to say that a judge should not leave the province until he has decided all the cases submitted to him. The judges at large of the courts of first instance, and the other judges of that court, are by law subject to the orders of the secretary of finance and justice as to where and when they shall hold court, and their ability to stay in a province until all cases are decided does not depend on their own will."

The sentence must be pronounced by the judge in open court, aside from the exceptions provided by this act, but the failure to do so will not require a vacation of the sentence; the cause will merely be remanded for a proper promulgation. U. S. *v.* Karelsen, 3 Philippine 223, 2 Off. Gaz. 170.

The trial judge need not hear the witnesses but may decide the case upon oral evidence taken before another. U. S. *v.* Macavinta, 8 Philippine 447, 5 Off. Gaz. 556; Ortiz *v.* Aramburo, 8 Philippine 98, 5 Off. Gaz. 264.

34. Gen. Ord. 58, § 41.

Failure to arraign the accused, read the complaint to him, or inform him of his right to counsel constitutes reversible error. U. S. *v.* Palisoc, 4 Philippine 207, 3 Off. Gaz. 363.

But at the hearing in the supreme court the accused need not be present. U. S. *v.* Lewis, 2 Philippine 193.

It is not sufficient to appoint counsel; he must be required to act, and if he fails to appear the sentence must be reversed. U. S. *v.* Gimeno, 1 Philippine 236, 1 Off. Gaz. 475.

Separate trial.—Any one of several jointly charged with a felony may demand a separate trial (Gen. Ord. 58, § 33) and proceedings in one of such trials have no effect upon the others either as to prosecution or defense. Villa *v.* Allen, 2 Philippine 436, 1 Off. Gaz. 748. But where the accused expressly consents to the joint trial of two cases in which he is defendant he cannot predicate error therefor on appeal (U. S. *v.* Zafra, 5 Philippine 460, 4 Off. Gaz. 74), and the rendition of a single sentence against several accused, part of whom were tried separately, is not, in the absence of objection at the time, reversible error (U. S. *v.* Fernandez, 9 Philippine 269, 5 Off. Gaz. 1180).

The trial may be conducted in a prison if no objection is raised in the trial court. U. S. *v.* Mercado, 4 Philippine 304, 3 Off. Gaz. 365.

35. Paez *v.* Berenguer, 8 Philippine 454, 5 Off. Gaz. 557, holding, however, that the exclusion of a party along with other witnesses is non-judicial where the testimony given during his absence is substantially a repetition of that given while he was present.

Failure of defendant to appear at trial after notice is such negligence as will prevent vacation of adverse judgment. Flores *v.* Flores, 7 Philippine 323, 5 Off. Gaz. 165.

36. Philippine Code Civ. Proc. § 68,402; Act Cong. March 2, 1901, relative to Porto Rico.

Subpœna duces tecum.—A justice of the peace may require a merchant to bring his books but not a registrar of property to produce official records (Ap. Atty.-Gen., 4 Off. Gaz. 770), nor the president of the provincial board of health to appear as an expert witness (Op. Atty.-Gen., 3 Off. Gaz. 85).

and these are not disqualified by reason of interest,[37] or any other fact not amounting to mental incapacity,[38] and circumstances formerly disqualifying are now considered merely as affecting credibility;[39] but the character of witnesses or of testimony may justify the court in disregarding the testimony.[40] At the request of either party the testimony must be taken down in writing,[41] except in courts of justices of the peace[42] and it may also be taken by deposition.[43]

d. Continuance. Continuances are largely in the discretion of the trial judge,[44]

Costs of witnesses subpœnaed but not used cannot be taxed against the adverse party. Rodriguez *v.* North German F. Ins. Co., 1 Porto Rico Fed. 233.

Witness' fees and expenses.— In Porto Rico witnesses are not entitled to *per diems* en route (Rodriguez *v.* North German F. Ins. Co., 1 Porto Rico Fed. 233), nor to mileage in hearings before a United States commissioner (U. S. *v.* Butler, 1 Porto Rico Fed. 411).

It is the litigant's duty and not the court's to provide the witnesses; hence it is not error to refuse to appoint surveyors to make a plan of property the ownership of which is in dispute Gonzaga *v.* De Canete, 3 Philippine 394, 2 Off. Gaz. 346.

Exclusion of witnesses from the court room during testimony of another may be ordered (Gen. Ord. 58, § 39), but it is discretionary (U. S. *v.* Sison, 6 Philippine 421, 4 Off. Gaz. 602).

37. U. S. *v.* Sarter, 8 Philippine 737, 4 Off. Gaz. 444; Gonzaga *v.* De Canete, 3 Philippine 394, 2 Off. Gaz. 346.

Testimony of accused like that of any other witness must be considered. U. S. *v.* Patala, 2 Philippine 752. But he cannot be required to testify against himself (Gen. Ord. 58, § 56) even so as to aggravate the punishment. U. S. *v.* Luzon, 4 Philippine 343, 3 Off. Gaz. 387; U. S. *v.* Navarro, 3 Philippine 143, 2 Off. Gaz. 551.

Accomplices may be competent witnesses and conviction may be based on their testimony alone. U. S. *v.* Ocampo, 5 Philippine 339, 4 Off. Gaz. 8, 4 Philippine 400, 3 Off. Gaz. 372; U. S. *v.* Baliscan, 4 Philippine 545, 4 Off. Gaz. 169; U. S. *v.* Aguasa, 4 Philippine 274, 4 Off Gaz. 363. But as a rule the courts require corroboration thereof. U. S. *v.* Monzones, 8 Philippine 579, 5 Off. Gaz. 669; U. S. *v.* Dadacay, 6 Philippine 1, 5 Off. Gaz. 38; U. S. *v.* Quiamson, 5 Philippine 444, 4 Off. Gaz. 70; U. S. *v.* Yo-To Chay, 4 Philippine 613, 4 Off. Gaz. 176; U. S. *v.* Lim Tico, 4 Philippine 440, 3 Off. Gaz. 408; U. S. *v.* Aguasa, 4 Philippine 274, 3 Off. Gaz. 363; U. S. *v.* De la Cruz, 4 Philippine 126, 3 Off. Gaz. 132; U. S. *v.* Magtibay, 2 Philippine 703. And see *supra*, V, B, 4, c, (II).

38. Miller *v.* Jones, 9 Philippine 648, 6 Off. Gaz. 267; Merchant *v.* International Banking Corp., 9 Philippine 554, 6 Off. Gaz. 184; Guzman *v.* X, 9 Philippine 112, 5 Off. Gaz. 912; Mellado *v.* Tacloban, 9 Philippine 92, 5 Off. Gaz. 857; U. S. *v.* Ortiz, 8 Philippine 752; Lopez *v.* Tan Tioco, 8 Philippine 693, 5 Off. Gaz. 790; Veloso *v.* Veloso, 8 Philippine 83; Aldaz *v.* Gay, 7 Philippine 268; Tuason *v.* Uson, 7 Philippine 85; Lichauco *v.* Martinez, 6 Philippine 594, 5 Off. Gaz. 89; Nicholas *v.* José, 6 Philippine 589, 4 Off. Gaz. 708; Behn *v.* Rosatzin, 5 Philippine 660, 4 Off. Gaz. 292; Parrado *v.* Jo-Juayco, 4 Philippine 710, 4 Off. Gaz. 472; De Guzman *v.* Rivera, 4 Philippine 620, 4 Off. Gaz. 530; Compañía Gen. de Tabacos *v.* Topiño, 4 Philippine 33, 2 Off. Gaz. 717; U. S. *v.* Capisonda, 1 Philippine 575.

39. U. S. *v.* Yu-To Chay, 4 Philippine 613, 4 Off. Gaz. 176.

40. U. S. *v.* Vargas, 5 Philippine 136, 4 Off. Gaz. 520; U. S. *v.* Ramirez, 4 Philippine 549, 4 Off. Gaz. 170.

41. Loreto *v.* Herrera, 10 Philippine 354, 6 Off. Gaz. 587.

Formerly there was no provision requiring this. Gonzaga *v.* De Cañete, 3 Philippine 394, 2 Off. Gaz. 346.

42. Philippine Act 1627, § 13.

43. Philippine Code Civ. Proc. § 355 *et seq.*

Even in criminal cases these may be taken on behalf of the accused. Gen. Ord. 58, § 60.

A United States consul is authorized to take depositions in foreign countries to be used in actions in the Philippine courts. Chanco *v.* Madrilejos, 5 Philippine 319, 3 Off. Gaz. 723.

A municipal president has no authority to take depositions. Ismael *v.* Guanzon, 2 Philippine 347, 1 Off. Gaz. 591.

In controversies over church property, under act 1376, giving the supreme court original jurisdiction there, the time for taking testimony will not begin to run until the court has indicated its willingness to hear the same or appoint a commissioner. Roman Catholic Apostolic Church *v.* Badoc, 7 Philippine 566.

Perpetuation of testimony is not a sufficient proceeding in which to obtain a declaration of heirs. Alonso *v.* Lagdameo, 7 Philippine 75.

In Porto Rico the formal legalization of letters rogatory received from Spain may be omitted. 1 Op. Atty.-Gen. Porto Rico 18.

44. Remo *v.* Espinosa, 10 Philippine 136, 6 Off. Gaz. 444; Lichauco *v.* Lim, 6 Philippine 271, 5 Off. Gaz. 86; U. S. *v.* Jarandilla, 6 Philippine 139, 4 Off. Gaz. 594 (holding that motion for continuance after trial of a criminal cause to procure evidence which apparently might have been produced at the trial is properly denied); Miranda *v.* Navotas, 2 Philippine 667, 1 Off. Gaz. 891; Veloso *v.* Ang Seng Teng, 2 Philippine 622, 1 Off. Gaz. 835; U. S. *v.* Salvador, 2 Philippine 549, 1 Off. Gaz. 740; Obras Pias *v.* Regidor, 2 Philippine 151 (holding that the trial of a civil cause need not be suspended in order to commence a criminal prosecu-

and the denial of continuance is not subject to exception, although the other party may have been willing to allow a continuance.[45]

e. New Trial. New trials may be granted on the grounds prescribed by statute,[46] such as accident or surprise,[47] fraud,[48] insufficiency of evidence,[49] and newly discovered evidence,[50] and unless another judge is designated the new trial may be held before the same judge.[51] A motion for a new trial does not preclude a second one on a different ground;[52] but a new trial will not be granted in the supreme court on the same facts presented in the lower court.[53]

6. JUDGMENT — a. In General. Judgments must ordinarily be based on findings of fact,[54] but they may under proper circumstances be rendered on the

tion for the same fact unless the complaint has been admitted by a competent court); U. S. *v.* Torrente, 2 Philippine 1.

Where the accused is charged with giving false testimony in a civil cause not yet terminated the criminal trial need not be suspended pending such termination. U. S. *v.* Gemora, 8 Philippine 19.

Stipulations for continuance need not be disregarded because one of the parties has cited his witnesses. Loreto *v.* Herrera, 10 Philippine 354, 6 Off. Gaz. 587.

Absence of the accused from the hearing in the supreme court will not justify a continuance there. U. S. *v.* Lewis, 2 Philippine 193.

45. Pellicena *v.* Gonzalez, 6 Philippine 50, 4 Off. Gaz. 364.

46. Philippine Code Civ. Proc. § 145.

That the trial judge died before signing the bill of exceptions is not a ground for a new trial. Osmeña *v.* Gorordo, 5 Philippine 37.

Where items of damages are not satisfactorily shown cause may be remanded for correction in that particular only. Brodek *v.* Larson, 8 Philippine 425, 5 Off. Gaz. 536.

A motion for a new trial may be entertained and decided after the term notwithstanding the first clause of Code Civ. Proc. § 145. Herman *v.* Crossfield, 7 Philippine 259, 5 Off. Gaz. 60; Santos *v.* Villafuerte, 5 Philippine 739, 4 Off. Gaz. 359.

Form.—A prayer for an amendment of the judgment, inserted at the end of a bill of exceptions, will not be treated as a motion for a new trial. Ismael *v.* Ganzon, 1 Philippine 454, 1 Off. Gaz. 591.

Notice of order overruling motion.—A party is not entitled to notice of the order overruling his motion for a new trial. Chaves *v.* Linan, 1 Philippine 448, 1 Off. Gaz. 452.

Where the applicant has allowed himself to be in default of answer for six weeks, a motion for a new trial will be denied. Dougherty *v.* Evangelista, 7 Philippine 37, 4 Off. Gaz. 735. But a new trial has been granted on affidavits impeaching the testimony of a witness for the prosecution, although it did not appear that diligence had been used to procure the attendance of the affiants at the trial. U. S. *v.* Singuimuto, 3 Philippine 176, 2 Off. Gaz. 384.

47. See Dougherty *v.* Evangelista, 7 Philippine 37, 4 Off. Gaz. 735. *Compare* California-Manila Lumber Commercial Co. *v.* Garchitorena, 2 Philippine 628.

48. See cases cited *infra*, this note.

Fraud.— Defendant seeking a new trial on the ground of fraud must establish not only the fraud but a good defense. Behn *v.* Arnalot Hermanos, 7 Philippine 742, 5 Off. Gaz. 251.

49. Tanchoco *v.* Suarez, 6 Philippine 491; Cacnio *v.* Baens, 5 Philippine 742; Santos *v.* Villafuerte, 5 Philippine 739; Bryan, etc., Co. *v.* American Bank, 5 Philippine 672; Tan Siu Pic *v.* Tan Siuco, 5 Philippine 516; Lorenzo *v.* Navarro, 5 Philippine 505; Co-Yengco *v.* Reyes, 4 Philippine 709; De la Cruz *v.* Garcia, 4 Philippine 680; Aznar *v.* Norris, 3 Philippine 636; Alcantara *v.* Montenegro, 3 Philippine 440; De Leon *v.* Naval, 3 Philippine 258; Philippine Sugar Estates Dev. Co. *v.* Rosario, 2 Philippine 651; Pastor *v.* Gaspar, 2 Philippine 592; Aldeguer *v.* Hoskyn, 2 Philippine 500; Ismael *v.* Ganzon, 1 Philippine 454; Veloso *v.* Pacheco, 1 Philippine 271; Behn *v.* Campbell, 205 U. S. 403, 27 S. Ct. 502, 51 L. ed. 857.

50. See cases cited *infra*, this note.

Nature of the new evidence.— Newly discovered evidence must be such as would probably change the result (U. S. *v.* Macalalad, 9 Philippine 1, 5 Off. Gaz. 846; U. S. *v.* Hernandez, 5 Philippine 429; U. S. *v.* Alvarez, 3 Philippine 24, 20 Off. Gaz. 199; U. S. *v.* Zamora, 2 Philippine 582, 1 Off. Gaz. 831; Aldeguer *v.* Hoskyn, 2 Philippine 500, 1 Off. Gaz. 727; U. S. *v.* Tengco, 2 Philippine 189, 1 Off. Gaz. 546); and it must also be such as could not have been produced at the trial (Banal *v.* Safont, 8 Philippine 276, 5 Off. Gaz. 474; U. S. *v.* Palanca, 5 Philippine 269, 4 Off. Gaz. 193; U. S. *v.* Zamora, 2 Philippine 582, 1 Off. Gaz. 831; U. S. *v.* Tengco, 2 Philippine 189, 1 Off. Gaz. 546; U. S. *v.* Torrente, 2 Philippine 1; U. S. *v.* De Leon, 1 Philippine 188, 1 Off. Gaz. 468; U. S. *v.* Jenjua, 1 Philippine 51; Soriano *v.* Arrese, 1 Porto Rico Fed. 194).

The acquittal of accused on appeal disposes of the motion for a new trial because of newly discovered evidence. U. S. *v.* Douglass, 2 Philippine 461, 1 Off. Gaz. 708.

This ground is inapplicable to special proceedings. Chung Kiat *v.* Lim Kio, 8 Philippine 297.

51. Gonzaga *v.* De Canete, 3 Philippine 394, 3 Off. Gaz. 346.

52. Garcia *v.* Balonao, 8 Philippine 465, 5 Off. Gaz. 560.

53. "Nuestra Sra. del Carmen," 7 Philippine 200, 5 Off. Gaz. 56.

54. Salmo *v.* Icaza, 10 Philippine 485, 6 Off. Gaz. 705; Manila *v.* Insular Government, 9 Philippine 71, 5 Off. Gaz. 905 (holding

pleadings,[55] by consent,[56] or by default.[57] A judgment of dismissal should be rendered where the material averments of the complaint are not established;[58] but a judgment of dismissal when plaintiff rests after offering evidence which might support a judgment is erroneous.[59]

that a statement that a party's ownership is proven does not constitute a finding of fact); International Banking Corp. *v.* Martinez, 8 Philippine 427, 5 Off. Gaz. 551 (holding that a mere statement that the amount in controversy is due constitutes a conclusion of law and is insufficient); Fidelino *v.* Legarda, 4 Philippine 285, 4 Off. Gaz. 495; Enriquez *v.* Enriquez, 3 Philippine 746, 2 Off. Gaz. 542; Braga *v.* Millora, 3 Philippine 458, 2 Off. Gaz. 431; Pastor *v.* Gaspar, 2 Philippine 592, 1 Off. Gaz. 875.

Cases to which rule applies.— This requirement as to findings applies to court of land registration (Manila *v.* Insular Government, 9 Philippine 71, 5 Off. Gaz. 905), but not to criminal cases (U. S. *v.* De la Cruz, 9 Philippine 278, 6 Off. Gaz. 114).

Findings held sufficient see Mina *v.* Lustina, 9 Philippine 678, 6 Off. Gaz. 275 (holding that a finding that the averments of the complaint were not proven is sufficient to support a judgment for defendant); Ismael *v.* Guanzon, 2 Philippine 347, 1 Off. Gaz. 591 (holding that a finding in an action for converting sugar cane that one defendant cut and ground it is sufficient to show that he alone appropriated it).

In an action for professional services the finding need not specify the services rendered. Early *v.* Sy-Giang, 4 Philippine 727, 730, 4 Off. Gaz. 207.

Finding as condition precedent to suit on attachment bond.— A finding that the attachment was wrongful is a condition precedent to a suit on the attachment bond. Belzunce *v.* Fernandez, 10 Philippine 452, 6 Off. Gaz. 832.

The findings may pass upon all the evidence. Modesto *v.* Leyva, 6 Philippine 186. But the failure to cover every issue of fact will not require a reversal if the facts found are sufficient to support the judgment. Pastor *v.* Gaspar, 2 Philippine 592, 1 Off. Gaz. 875.

55. See cases cited *infra*, this note.

Effect of motion for judgment on pleadings.— A motion by plaintiff for a judgment on pleadings admits all material averments of the answer, and these will not be construed so as to favor plaintiff. Bauermann *v.* Casas, 10 Philippine 386, 6 Off. Gaz. 665; La Yebana Co. *v.* Seville, 9 Philippine 210, 5 Off. Gaz. 1073.

If the answer contains a general denial judgment cannot be rendered on the pleadings. Roman Catholic Apostolic Church *v.* Badoc, 6 Philippine 345.

56. See De Tavera *v.* Holy Roman Catholic Apostolic Church, 10 Philippine 371, 6 Off. Gaz. 638, holding, however, that the supreme court is without jurisdiction to enter a consent decree in a case in which all the interested parties have not given their consent.

A commissioner's report pursuant to a stipulation for judgment thereon cannot be rejected. Siping *v.* Cacob, 10 Philippine 717, 6 Off. Gaz. 855.

57. Wolfson *v.* Chinchilla, 8 Philippine 467, 5 Off. Gaz. 560.

Default may be entered upon failure to appear and need not be delayed until expiration of time to answer. Wolfson *v.* Chinchilla, 8 Philippine 467, 5 Off. Gaz. 560; Behn *v.* Arnalot Hermanos, 7 Philippine 742, 5 Off. Gaz. 251.

If a demurrer is on file, default cannot be entered. Simon *v.* Castro, 6 Philippine 335, 4 Off. Gaz. 532. But the filing of a demurrer when defendant is already in default will not prevent judgment against him. Noel *v.* Lasala, 5 Philippine 260, 4 Off. Gaz. 192.

Judgment by default must be supported by proof of all essential facts. Camps *v.* Paterno, 9 Philippine 229, 5 Off. Gaz. 1072; Sua Tico *v.* Gemora, 6 Philippine 515, 4 Off. Gaz. 691.

Mandamus will not lie to compel entry of default. Merchant *v.* Del Rosario, 4 Philippine 316, 3 Off. Gaz. 487.

Vacation of default is discretionary with the trial court. Waite *v.* Rogers, 10 Philippine 94, 6 Off. Gaz. 366; Wahl *v.* Donaldson, 5 Philippine 11, 4 Off. Gaz. 216; Quiros *v.* Carman, 4 Philippine 722, 4 Off. Gaz. 180; California-Manila Lumber Commercial Co. *v.* Garchitorena, 2 Philippine 628, 1 Off. Gaz. 855. Application to vacate must be based on a showing of diligence and a meritorious defense. Dougherty *v.* Evangelista, 7 Philippine 37, 4 Off. Gaz. 735; Adela *v.* Judge of Ilocos Sur. Court of First Instance, 6 Philippine 674, 4 Off. Gaz. 728; Lerma *v.* Antonio, 6 Philippine 236; Wahl *v.* Donaldson, 2 Philippine 301; Almadin *v.* Almadin, 1 Philippine 748, 1 Off. Gaz. 142. The default should be vacated if defendant was not actually notified (Fressell *v.* Agustin, 8 Philippine 529, 5 Off. Gaz. 592), or was misled (Salazar *v.* Salazar, 8 Philippine 183). Where, on account of the judge's absence, no decree could have been entered, a default may be set aside and a defective pleading authorizing it, corrected. New York, etc., Steamship Co. *v.* Porto Rico, 1 Porto Rico Fed. 240. *Compare* People *v.* New York, etc., Steamship Co., 1 Porto Rico Fed. 245.

58. Manila *v.* Del Rosario, 5 Philippine 227, 4 Off. Gaz. 189.

59. Villar *v.* Manila, 3 Philippine 681, 2 Off. Gaz. 612.

The dismissal of a criminal cause cannot now be effected without the court's consent, although private prosecutions were formerly in vogue. 1 Op. Atty.-Gen. Porto Rico 185.

In Porto Rico a motion for a *nolle prosequi* of an indictment should be granted when made under authority of the secretary of the treasury and the attorney-general. U. S. *v.*

b. Scope. The relief awarded need not follow the prayer but should be such as the facts justify,[60] and the court may grant part of the relief prayed and deny the remainder.[61] In criminal cases a judgment of conviction may be rendered for an offense different from that charged in the complaint if included in the latter; [62] but the offense found must be included in the charge,[63] in which case the supreme court may convict thereof without a new trial,[64] or the cause may be remanded for the filing of a new complaint,[65] and the first acquittal is not a bar to the prosecution under the new complaint.[66]

c. Form. That a judgment is expressed in English, although such is not the official language, is not reversible error.[67] In the Philippines judgments must be rendered in terms of local currency.[68] In Porto Rico judgments on claims antedating May 1, 1900, may be rendered in United States money at the current rate of exchange.[69]

d. Effect; Res Adjudicata. The usual rule prevails that a judgment is *res*

Merritt, 1 Porto Rico Fed. 203; U. S. *v.* Dunlap, 1 Porto Rico Fed. 112.

60. International Banking Corp. *v.* Martinez, 10 Philippine 242, 6 Off. Gaz. 632.

61. Tipton *v.* Cenjor, 6 Philippine 64, 4 Off. Gaz. 435; Siojo *v.* Diaz, 5 Philippine 614, 5 Off. Gaz. 33.

Upon a debt payable by instalments judgment can be rendered only for those due when the action was commenced. Guerra *v.* Blanco, 9 Philippine 222, 5 Off. Gaz. 1118; La Yebana Co. *v.* Sevilla, 9 Philippine 210, 5 Off. Gaz. 1073; Artadi *v.* Chu Baco, 8 Philippine 677, 5 Off. Gaz. 711; Compania Gen. de Tabacos *v.* Araza, 7 Philippine 455, 5 Off. Gaz. 197. But in an action of ejectment and to recover rentals an amendment was allowed in the supreme court so as to include subsequent rents. Iturralde *v.* Garduno, 9 Philippine 605, 6 Off. Gaz. 544; Iturralde *v.* Magcauas, 9 Philippine 599, 6 Off. Gag. 542.

An explanatory order supplying an omission from the judgment of a litigated point is proper after the judgment has been signed. Bolivar *v.* Lauza, 1 Porto Rico 38.

62. U. S. *v.* Reyes, 10 Philippine 423, 6 Off. Gaz. 669; U. S. *v.* Peralta, 8 Philippine 200, 5 Off. Gaz. 457; U. S. *v.* Cabanag, 8 Philippine 64; U. S. *v.* Solis, 7 Philippine 195, 5 Off. Gaz. 55; U. S. *v.* Vegara, 3 Philippine 432, 2 Off. Gaz. 504; U. S. *v.* Quevengco, 2 Philippine 412, 1 Off. Gaz. 630; U. S. *v.* Quevengco, 2 Philippine 412; U. S. *v.* Sweet, 2 Philippine 131; U. S. *v.* Paddit, 1 Philippine 426, 1 Off. Gaz. 356; U. S. *v.* De los Reyes, 1 Philippine 375.

Thus under a charge of murder the accused may be convicted of homicide (U. S. *v.* Asilo, 4 Philippine 175, 3 Off. Gaz. 144; U. S. *v.* Baguiao, 4 Philippine 110, 3 Off. Gaz. 80; U. S. *v.* Saadlucap, 3 Philippine 437, 2 Off. Gaz. 505; U. S. *v.* Idica, 3 Philippine 313, 2 Off. Gaz. 419; U. S. *v.* De Jesus, 2 Philippine 514, 1 Off. Gaz. 814; U. S. *v.* Macalintal, 2 Philippine 448, 1 Off. Gaz. 666; U. S. *v.* Dinsing, 1 Philippine 738, 1 Off. Gaz. 143; U. S. *v.* Yacat, 1 Philippine 443, 1 Off. Gaz. 448), and under a complaint charging homicide the accused may be convicted of illegally discharging firearms (U. S. *v.* Andrada, 5 Philippine 464, 4 Off. Gaz. 75; U. S. *v.* Pineda, 4 Philippine 223, 3 Off. Gaz. 230; U. S. *v.* Sabio, 2 Philippine 485, 1 Off. Gaz. 726), or of assault (U. S. *v.* Taguibao, 1 Philippine 16).

A charge of brigandage will support a conviction for robbery in a band (U. S. *v.* Dinglasan, 5 Philippine 695, 5 Off. Gaz. 36; U. S. *v.* Macasadia, 5 Philippine 602, 4 Off. Gaz. 235; U. S. *v.* De la Cruz, 4 Philippine 430, 3 Off. Gaz. 526; U. S. *v.* Ortega, 4 Philippine 314, 3 Off. Gaz. 366; U. S. *v.* Rama, 3 Philippine 716, 2 Off. Gaz. 538; U. S. *v.* Feliciano, 3 Philippine 422, 2 Off. Gaz. 365); but not, it seems, of simple robbery (U. S. *v.* Ginete, 3 Philippine 641, 2 Off. Gaz. 530; U. S. *v.* De la Cruz, 3 Philippine 573, 2 Off. Gaz. 439), nor of theft (U. S. *v.* Manique, 3 Philippine 675, 2 Off. Gaz. 564).

63. U. S. *v.* De Guzman, 8 Philippine 21; U. S. *v.* De los Santos, 5 Philippine 565, 5 Off. Gaz. 69; U. S. *v.* De Torres, 5 Philippine 501, 4 Off. Gaz. 126; U. S. *v.* Nubla, 4 Philippine 456, 3 Off. Gaz. 499; U. S. *v.* Nery, 4 Philippine 158, 3 Off. Gaz. 82; U. S. *v.* Ayao, 4 Philippine 114, 3 Off. Gaz. 113; U. S. *v.* Pascua, 1 Philippine 631, 1 Off. Gaz. 49; U. S. *v.* Sevilla, 1 Philippine 143.

64. U. S. *v.* Ginete, 3 Philippine 641, 2 Off. Gaz. 530; U. S. *v.* De Jesus, 2 Philippine 514, 1 Off. Gaz. 814; U. S. *v.* Yacat, 1 Philippine 443, 1 Off. Gaz. 448.

65. De la Cruz *v.* Wolf, 2 Philippine 184; U. S. *v.* Vega, 2 Philippine 167; U. S. *v.* Tagle, 1 Philippine 626, 1 Off. Gaz. 39.

66. U. S. *v.* Manique, 3 Philippine 675, 2 Off. Gaz. 564.

67. Gaspar *v.* Molina, 5 Philippine 197, 3 Off. Gaz. 651. *Compare* U. S. *v.* Cernias, 10 Philippine 682, 6 Off. Gaz. 494; Mesia *v.* Mazo, 8 Philippine 587, 5 Off. Gaz. 669.

68. **Philippine Act 1045 — Notwithstanding the cause of action accrued before the statute took effect** the rule still applies. Behn *v.* Rosatzin, 5 Philippine 660, 4 Off. Gaz. 292; Gaspar *v.* Molina, 5 Philippine 197, 3 Off. Gaz. 651.

If rendered in Mexican currency it may be changed on appeal to Philippines. Causin *v.* Ricamora, 5 Philippine 31, 4 Off. Gaz. 218.

Judgment expressed in pesos will be construed to mean currency then established by law. Dougherty *v.* Evangelista, 7 Philippine 37, 4 Off. Gaz. 735.

69. Cayol *v.* Balseiro, 1 Porto Rico 253. See also Serralies *v.* Esbri, 200 U. S. 103, 26

adjudicata as to future actions for the same cause;[70] but the subject-matter must be identical and the question determined must be directly involved,[71] and only parties to the action are concluded.[72] Similarly a sentence of conviction or acquittal is a bar to further prosecution for the same offense.[73] The rendition

S. Ct. 176, 50 L. ed. 391 [*reversing* 1 Porto Rico 321].

70. Tanguinlay *v.* Quiros, 10 Philippine 360, 6 Off. Gaz. 636; Merchant *v.* International Banking Corp., 9 Philippine 554, 6 Off. Gaz. 184; Rafferty *v.* Judge Court of First Instance, 7 Philippine 164, 4 Off. Gaz. 766; Shepard *v.* Pesquera, 1 Porto Rico Fed. 516; Van Syckle *v.* Montilla, 1 Porto Rico Fed. 75. But see Enriquez *v.* Watson, 1 Philippine 44, 1 Off. Gaz. 380, where a judgment of eviction was held to have lost its executory force by remaining unexecuted for a considerable time during which defendants were recognized as tenants.

Even an administrative decision of a Spanish governor-general is *res adjudicata* if not appealed from. Roura *v.* Insular Government, 8 Philippine 214, 5 Off. Gaz. 625.

In forcible entry and detainer cases the judgment is not conclusive in a subsequent action. Maguyon *v.* Agra, 7 Philippine 4.

A reservation in a judgment determines or affects no questions. Belzunce *v.* Fernandez, 10 Philippine 452; Remigro *v.* Rigata, 6 Off. Gaz. 1503; Menendez *v.* Gordils, 1 Porto Rico 125. *Compare* Almeida *v.* Abaroa, 8 Philippine 178.

71. O'Connell *v.* Mayuga, 8 Philippine 422, 5 Off. Gaz. 551; Enriquez *v.* Watson, 6 Philippine 84, 4 Off. Gaz. 377; Regalado *v.* Luchsinger, 5 Philippine 625, 4 Off. Gaz. 237; Balatbat *v.* Tanjutco, 2 Philippine 182.

72. Acasio *v.* Albano, 10 Philippine 410, 6 Off. Gaz. 828.

73. U. S. *v.* Montiel, 7 Philippine 272, 5 Off. Gaz. 61; U. S. *v.* Capurro, 7 Philippine 24, 4 Off. Gaz. 743; U. S. *v.* Solis, 6 Philippine 676, 5 Off. Gaz. 55; U. S. *v.* Flemister, 5 Philippine 650, 4 Off. Gaz. 289 [*affirmed* in 207 U. S. 372, 28 S. Ct. 129, 52 L. ed. 252]; U. S. *v.* Ballentine, 4 Philippine 672, 3 Off. Gaz. 722; U. S. *v.* Tubig, 3 Philippine 244, 2 Off. Gaz. 202; U. S. *v.* Colley, 3 Philippine 58, 2 Off. Gaz. 83; Grafton *v.* U. S., 206 U. S. 333, 27 S. Ct. 749, 51 L. ed. 1084; Mendezona *v.* U. S., 195 U. S. 158, 24 S. Ct. 808, 49 L. ed. 136; Kepner *v.* U. S., 195 U. S. 100, 24 S. Ct. 797, 49 L. ed. 114.

One who has been convicted by court martial cannot afterward be tried for the same offense by the civil courts of the Philippines. U. S. *v.* Tubig, 3 Philippine 244, 2 Off. Gaz. 202; U. S. *v.* Colley, 3 Philippine 58, 2 Off. Gaz. 83; Grafton *v.* U. S., 206 U. S. 333, 27 S. Ct. 749, 51 L. ed. 1084 [*reversing* 6 Philippine 55, 5 Off. Gaz. 430].

Dismissal of information, although on mere grounds that prosecution should have been by indictment, operates as acquittal where the jury were sworn upon an information one count of which was valid. U. S. *v.* Fernandez, 1 Porto Rico Fed. 453.

An acquittal by a justice of the peace for a misdemeanor bars a subsequent trial by the court of first instance, although the accused was not present. U. S. *v.* Parcon, 6 Philippine 632.

The dismissal of a complaint for defective statement without ordering a new complaint to be filed is a bar to further prosecution but is not technically double jeopardy (Julia *v.* Sotto, 2 Philippine 247), but a dismissal of a void prosecution will not preclude the filing of a new complaint (U. S. *v.* Salvador, 6 Philippine 439, 4 Off. Gaz. 611; U. S. *v.* Arceo, 6 Philippine 29; U. S. *v.* Morales, 6 Philippine 403, 4 Off. Gaz. 578).

Identity of defenses.— Conviction of attempt against the authorities bars prosecution for assault arising from the same act (U. S. *v.* Montiel, 9 Philippine 162, 5 Off. Gaz. 1116); but conviction of robbery in armed band will not bar prosecution for brigandage, although the robbery is identical in each case (U. S. *v.* De los Santos, 7 Philippine 580, 5 Off. Gaz. 236); nor will prosecution for maintaining a cockpit without license bar another for defrauding the government of money collected to pay for such license (U. S. *v.* Gallego, 10 Philippine 222, 6 Off. Gaz. 534). A prosecution under a municipal ordinance will not bar one for the same act constituting a distinct offense under the penal code. U. S. *v.* Garcia Gavieres, 10 Philippine 694, 6 Off. Gaz. 797 [*distinguishing* Grafton *v.* U. S., 6 Philippine 55, 5 Off. Gaz. 430 (*reversed* in 206 U. S. 333, 27 S. Ct. 749, 51 L. ed. 1084) and *citing* U. S. *v.* Flemister, 5 Philippine 650, 4 Off. Gaz. 289 (*affirmed* in 107 U. S. 372, 28 S. Ct. 129, 52 L. ed. 252)]; U. S. *v.* Chan-Cun-Chay, 5 Philippine 385, 4 Off. Gaz. 42. Conviction by the supreme court of a consummated offense with which the accused was charged does not constitute double jeopardy, although the conviction below was for the frustrated offense only. U. S. *v.* Berry, 5 Philippine 409, 4 Off. Gaz. 485.

An appeal by the convict waives the defense of former jeopardy and the appellate court may increase the sentence. U. S. *v.* Reyes, 10 Philippine 423, 6 Off. Gaz. 669; Flemister *v.* U. S., 5 Philippine 650, 4 Off. Gaz. 289 [*affirmed* in 207 U. S. 372, 28 S. Ct. 129, 52 L. ed. 252]; U. S. *v.* Paynaga, 4 Philippine 472, 3 Off. Gaz. 392; U. S. *v.* Herrman, 4 Philippine 307, 3 Off. Gaz. 312; U. S. *v.* Flemister, 4 Philippine 300, 3 Off. Gaz. 386; U. S. *v.* Trono, 3 Philippine 213, 2 Off. Gaz. 296 [*affirmed* in 199 U. S. 521, 26 S. Ct. 121, 50 L. ed. 292]. Nor does an appeal by the prosecution from an order sustaining a demurrer place the accused again in jeopardy. U. S. *v.* Ramirez, 9 Philippine 67, 71, 5 Off. Gaz. 1068; U. S. *v.* Ballentine, 4 Philippine 672, 3 Off. Gaz. 722; U. S. *v.* Perez, 1 Philippine 203. But an appeal from a sentence of acquittal does have that effect and is not permitted. Kepner *v.* U. S., 195 U. S. 100, 24 S. Ct. 797, 49 L. ed. 114 [*re-*

of a judgment creates no lien upon the property of the judgment debtor in the absence of a statute so providing.[74]

e. Vacation. Vacation of judgments after the term at which they were rendered is not usually permitted.[75]

7. Costs. Costs ordinarily follow the result of the suit.[76] But under the Philippine code,[77] the court has power for special reasons to adjudge that either party shall pay the costs of an action or that the same shall be divided as may be equitable.[78]

8. Execution. The procedure as to levy [79] and sale [80] is similar to that prevailing in American jurisdictions. The filing of a bill of exceptions operates to stay execution unless otherwise ordered by the trial court.[81]

versing 1 Philippine 397, 927, 1 Off. Gaz. 353, and *overruling* U. S. *v.* Luzon, 2 Philippine 380; U. S. *v.* Atienza, 1 Philippine 736, 1 Off. Gaz. 550].

How plea of double jeopardy raised.— The plea of double jeopardy must be raised in the trial court (U. S. *v.* Perez, 1 Philippine 203), and must be specific as to conviction or acquittal; a mere general averment of jeopardy is insufficient (U. S. *v.* Garcia Gavieres, 10 Philippine 694, 6 Off. Gaz. 797. *Compare* U. S. *v.* Cusi, 10 Philippine 413, 6 Off. Gaz. 829).

74. Peterson *v.* Newberry, 6 Philippine 260, 5 Off. Gaz. 85; Fernandez *v.* Esmoris, 1 Porto Rico Fed. 483.

75. Perez *v.* Sweeney, 8 Philippine 157, 5 Off. Gaz. 284 [apparently *overruling* Garcia *v.* Hipolito, 2 Philippine 732, 2 Off. Gaz. 33]; Perez *v.* Fernandez, 1 Porto Rico Fed. 152.

76. Parrado *v.* Jo-Juayco, 4 Philippine 712; Pou *v.* Agrait, 1 Porto Rico 101.

Costs distinguished from fees see Knight *v.* McMicking, 2 Philippine 698, 2 Off. Gaz. 21.

Costs in disbarment proceedings see *In re* Adriatico, 7 Philippine 173, 5 Off. Gaz. 52.

An affidavit of poverty under 27 U. S. St. at L. 252 [U. S. Comp. St. (1901) p. 706] must state that applicant believes himself entitled to relief, the nature of the alleged cause of action and the citizenship of the party. Soriano *v.* Arrese, 1 Porto Rico Fed. 196.

When the judgment contains no special provisions as to costs a supplemental order should not impose them. Bolivar *v.* Lauza, 1 Porto Rico 38.

On appeal an award of costs includes only those in the supreme court (Martinez *v.* Martinez, 1 Philippine 686, 1 Off. Gaz. 98), and these should not be imposed when appellee has not appeared to contest the appeal (Voigt *v.* Rivas, 1 Porto Rico 60).

77. Philippine Code Civ. Proc. § 487.

78. Mendoza *v.* Ibanez, 4 Philippine 666.

79. See cases cited *infra*, this note.

Choses in action are subject to levy. Perez *v.* Sweeney, 8 Philippine 157, 5 Off. Gaz. 284.

The sheriff cannot be compelled by mandamus to levy on specific property. Manotoc *v.* McMicking, 10 Philippine 119, 6 Off. Gaz. 626. *Compare* Gonzales *v.* Banes, 7 Philippine 158, 4 Off. Gaz. 764.

Damages for wrongful levy.—A stranger whose property has been wrongfully levied upon may obtain damages against the sheriff. Code Civ. Proc. § 451. See also Quesada *v.* Artacho, 9 Philippine 104, 5 Off. Gaz. 910. So may his assignee. Waite *v.* Peterson, 8 Philippine 449, 5 Off. Gaz. 556.

The levy creates no lien other than the right to preference under the civil code. Peterson *v.* Newberry, 6 Philippine 260. *Compare* Fernandez *v.* Esmoris, 1 Porto Rico Fed. 483. It is not even prior to an existing unrecorded deed. Boncan *v.* Smith, 9 Philippine 109, 5 Off. Gaz. 858; Fabian *v.* Smith, 8 Philippine 496, 5 Off. Gaz. 576.

Claimant's failure to appear at the sale or otherwise present his claim does not estop him from asserting title. Johnson *v.* Balantacbo, 9 Philippine 647, 6 Off. Gaz. 228.

When the creditor gives the sheriff an indemnity bond against a wrongful levy the former and not the latter becomes liable therefor. Waite *v.* Peterson, 8 Philippine 449, 5 Off. Gaz. 556.

80. Somes *v.* Crossfield, 8 Philippine 284, 5 Off. Gaz. 462, holding that the court may order proceeds of sale deposited with clerk.

Liability of judgment debtor for rent or interest.— The judgment debtor in possession during the period of redemption cannot be required to pay rent (see De la Rosa *v.* Revita Santos, 10 Philippine 148, 6 Off. Gaz. 627), nor interest after a tender of the amount due (Martinez *v.* Campbell, 10 Philippine 626, 6 Off. Gaz. 933).

81. Philippine Code Civ. Proc. § 144. See also Cia. Gen. de Tabacos *v.* Trinchera, 7 Philippine 708, 5 Off. Gaz. 239; Benedicto *v.* De la Rama, 2 Philippine 293, 2 Off. Gaz. 166.

But an order dissolving a preliminary injunction cannot be so superseded. Watson *v.* Enriquez, 1 Philippine 480, 1 Off. Gaz. 380.

Granting a supersedeas is discretionary with the trial judge (Macke *v.* Camps, 5 Philippine 185; Benedicto *v.* De la Rama, 2 Philippine 293), and the supreme court will not grant it after refusal below where no change has occurred meanwhile (Case *v.* Metropole Hotel, 5 Philippine 49, 4 Off. Gaz. 518; Calvo *v.* Gutierrez, 4 Philippine 203, 3 Off. Gaz. 193).

Bond.—A defect in the bond will not require a dismissal of the appeal; it may be amended (Moreno *v.* Gruet, 1 Philippine 217), and certiorari will not lie to review the action of the trial court in fixing the amount of the bond (Araneta *v.* Gustilo, 2 Philippine

9. Appeal — a. In General. Appeal is the usual method of review in a higher tribunal.[82] In the Philippines it lies only from a final order,[83] and if the case has been once appealed from a justice of the peace or municipal court it cannot be appealed from the court of the first instance unless it involves the validity of a statute or municipal ordinance.[84]

b. Steps in Perfecting. Steps in the perfection of an appeal include an

60). A surety on the bond is not released by merely giving notice of withdrawal to the clerk. Compañía Gen. de Tabacos *v.* Tupino, 2 Philippine 142, 1 Off. Gaz. 544.

In Porto Rico a writ of execution should be issued on an executive demand in the absence of the conditions recited in the code of civil procedure, article 1465. Iglesias *v.* Bolivar, 1 Porto Rico 21.

No new issues after return of judgment for execution.—After a judgment is returned to trial court for execution the debtor cannot present new issues on question of liability. Molina *v.* De la Riva, 8 Philippine 569, 5 Off. Gaz. 666.

82. *Ex p.* Parker, 131 U. S. 221, 98 S. Ct. 708, 33 L. ed. 123.

The right is purely statutory, and a litigant has no vested right in a decision by a particular tribunal. U. S. *v.* Miller, 3 Philippine 708, 2 Off. Gaz. 494.

The whole judgment must be appealed from in order that alleged errors may be considered. Gutierrez Hermanos *v.* Vallejo, 8 Philippine 377, 5 Off. Gaz. 502.

"Recurso de casación" was a corresponding method of review under the Spanish procedure in Porto Rico. Lopez *v.* Bird, 1 Porto Rico 361; Catalán *v.* Uriarte, 1 Porto Rico 237; Roig *v.* Sanjurjo, 1 Porto Rico 165; Valdéz *v.* Del Valle, 1 Porto Rico 25; Quintana *v.* Valdivieso, 1 Porto Rico 1.

Writ of error may be sued out from the United States court for Porto Rico; it must be served within sixty days after rendition of judgment in order to stay the judgment. Perez *v.* Fernandez, 1 Porto Rico Fed. 148.

83. Philippine Code Civ. Proc. § 123.

No appeal from interlocutory order or judgment.—"In considering the American authorities it must be borne in mind that probably no one of the statutes therein construed, contained such strong provisions against appeals from interlocutory resolutions as are found in our article 123. The evils resulting from such appeals under the *Ley de Enjuiciamiento Civil* were well known. It was to cure such evils that this article was adopted. It expressly prohibits appeals not only from interlocutory orders but also from interlocutory judgments." Go-Quico *v.* Manila, 1 Philippine 502, 508, 1 Off. Gaz. 384.

What orders are appealable.—An order overruling or sustaining a demurrer is not appealable (Averia *v.* Reboldera, 10 Philippine 316, 6 Off. Gaz. 582; Serrano *v.* Serrano, 9 Philippine 142, 5 Off. Gaz. 952; Fuster *v.* Johnson, 1 Philippine 670, 1 Off. Gaz. 531), nor is an order of dismissal upon plaintiff's failure to amend after demurrer is sustained (Cancino *v.* Valdéz, 3 Philippine 429, 2 Off. Gaz. 367), nor an order granting a new trial (Garcia *v.* Balanao, 8 Philippine 465, 5 Off. Gaz. 560; Gruindrod *v.* Lizarraga, 1 Philippine 515, 1 Off. Gaz. 394; Veloso *v.* Pacheco, 1 Philippine 271, 1 Off. Gaz. 498), nor an order reopening a case after judgment for the introduction of additional evidence (Herman *v.* Crossfield, 7 Philippine 259, 5 Off. Gaz. 60; Quiros *v.* Tan Quinlay, 5 Philippine 675, 4 Off. Gaz. 307), nor an order granting or denying a preliminary injunction or denying a motion to dissolve it (Diokno *v.* Reyes, 7 Philippine 385, 5 Off. Gaz. 178; Compañía Gen. de Tabacos *v.* Tupiño, 2 Philippine 142, 1 Off. Gaz. 544; Dy Chuan Leng *v.* Ambler, 1 Philippine 535; Go-Quico *v.* Manila, 1 Philippine 502, 1 Off. Gaz. 384), an order directing a partition (Ron *v.* Mojica, 8 Philippine 328, 5 Off. Gaz. 497), nor an order vacating the appointment of commissioners in partition (Araullo *v.* Araullo, 3 Philippine 567, 2 Off. Gaz. 463), nor an order directing execution to issue (Molina *v.* De la Riva, 8 Philippine 569, 5 Off. Gaz. 666), nor an order to present an inventory and render account in administration proceedings (Toribio *v.* Toribio, 7 Philippine 526, 5 Off. Gaz. 211). But an order appointing an administrator is appealable (Sy Hong Eng *v.* Sy Lioc Suy, 8 Philippine 594, 5 Off. Gaz. 699), and an appeal lies from an order of the court of first instance dismissing the complaint on the ground that it should have been presented to a justice of the peace (Fajardo *v.* Llorente, 6 Philippine 426, 4 Off. Gaz. 634), and where both parties proceed on the assumption that an order is final, the supreme court may entertain an appeal therefrom, ignoring the question whether the order was in fact appealable (Boydon *v.* Felix, 9 Philippine 597, 6 Off. Gaz. 223).

Disagreement of assessors, who are advisory triers of fact, with the judgment of the trial court will not authorize appeal to the supreme court. U. S. *v.* Trinidad, 7 Philippine 325, 5 Off. Gaz. 480.

A contempt order is not appealable so as to be superseded until final judgment in the principal cause. Repide *v.* Sweeney, 3 Philippine 738, 2 Off. Gaz. 493.

84. Philippine Act 1627, § 16; Act 612, § 4; Gen. Ord. 58, § 43. See also U. S. *v.* Que Bing, 6 Philippine 513, 4 Off. Gaz. 690; Legaspi *v.* Sweeney, 5 Philippine 157, 4 Off. Gaz. 522; Trinidad *v.* Sweeney, 4 Philippine 531, 3 Off. Gaz. 603; U. S. *v.* Jeng, 2 Philippine 179.

The question whether the former code of criminal procedure has been repealed does not involve the constitutionality of a statute. U. S. *v.* Sy-Tay, 1 Philippine 35.

exception to the order complained of,[85] a motion for a new trial, in the absence of which the evidence cannot be reviewed,[86] a bill of exceptions,[87] and an assign-

85. Loreto *v.* Herrera, 10 Philippine 354, 6 Off. Gaz. 587; Sugo *v.* Green, 6 Philippine 744, 5 Off. Gaz. 94; Cacnio *v.* Baens, 5 Philippine 742.

Review of evidence is precluded by failure to except to the order denying a new trial for insufficiency of evidence. Artady *v.* Sanchez, 9 Philippine 10, 5 Off. Gaz. 849; Hijos de I. De la Rama *v.* Robles, 8 Philippine 712, 5 Off. Gaz. 844; Artadi *v.* Chu Baco, 8 Philippine 677, 5 Off. Gaz. 711; Sagasag *v.* Torrijos, 8 Philippine 561, 5 Off. Gaz. 736; Rubert *v.* Luengo, 8 Philippine 554, 5 Off. Gaz. 663; Garcia *v.* Balanao, 8 Philippine 465, 5 Off. Gaz. 560; International Banking Corp. *v.* Martinez, 8 Philippine 427, 5 Off. Gaz. 551.

When order not subject to exception.— An order denying a motion for a new trial is not subject to exception if made on the grounds of accident or surprise (Artadi *v.* Chu Baco, 8 Philippine 677, 5 Off. Gaz. 711), newly discovered evidence (Bryan, etc., Co. *v.* American Bank, 5 Philippine 672, 4 Off. Gaz. 295), or that the judgment "is contrary to the law and to the facts" (Co-Yengco *v.* Reyes, 4 Philippine 709, 4 Off. Gaz. 179).

Time for excepting.— The requirement of the code of civil procedure, section 142, that the exception be taken "forthwith" means within a reasonable time. Fischer *v.* Ambler, 1 Philippine 508. In the following cases the exception was held not to have been presented within a reasonable time: Bryan, etc., Co. *v.* American Bank, 5 Philippine 672, 4 Off. Gaz. 295; Yturralde *v.* Santos, 5 Philippine 485, 4 Off. Gaz. 123; Salcedo *v.* Marcaida, 4 Philippine 267, 3 Off. Gaz. 266; Manila *v.* Marifosque, (unreported Philippine case) No. 2881. An exception taken three days after a motion for a new trial filed ten days after judgment has been held seasonably taken. Sparrevohn *v.* Fisher, 2 Philippine 676, 2 Off. Gaz. 2.

Form.— A motion for a new trial may constitute an exception if presented within a reasonable time. Compañia Gen. de Tabacos *v.* Manila, 6 Philippine 140, 4 Off. Gaz. 392; De la Rosa *v.* Revita, 6 Philippine 112, 4 Off. Gaz. 379; De la Cruz *v.* Garcia, 4 Philippine 680, 5 Off. Gaz. 300. But an exception cannot first be taken in a bill of exceptions. Gustilo *v.* Yusay, 1 Philippine 449, 1 Off. Gaz. 358. Neither exception nor notice of intention to present bill of exceptions need be in writing (Castro *v.* Castro, 5 Philippine 180), and formal notice by appellant of his intention to appeal is not usually required (*Ex p.* Parker, 131 U. S. 221, 9 S. Ct. 708, 33 L. ed. 123).

86. Martinez *v.* Campbell, 10 Philippine 626, 6 Off. Gaz. 933; De la Rama *v.* Sanchez, 10 Philippine 432, 6 Off. Gaz. 832; Remo *v.* Espinosa, 10 Philippine 136, 6 Off. Gaz. 444; Zaragoza *v.* De Viademonte, 10 Philippine 23, 6 Off. Gaz. 505; Eliot *v.* Montemayor, 9 Philippine 693, 6 Off. Gaz. 320; Ayala de Roxas *v.* Maglonso, 8 Philippine 745, 4 Off. Gaz. 459; Roxas *v.* Cuevas, 8 Philippine 469, 5 Off. Gaz. 561; Abiera *v.* Orin, 8 Philippine 193; Parot *v.* Gemora, 7 Philippine 94, 4 Off. Gaz. 748; Tanchoco *v.* Suarez, 6 Philippine 491, 4 Off. Gaz. 652; Eced *v.* Ocampo, 4 Philippine 664, 3 Off. Gaz. 624; Tongco *v.* Manio, 4 Philippine 609, 3 Off. Gaz. 622; Bermejo *v.* Dorado, 4 Philippine 555, 3 Off. Gaz. 604; Enriquez *v.* Enriquez, 3 Philippine 746, 2 Off. Gaz. 542; Tan Machan *v.* Trinidad, 3 Philippine 684, 2 Off. Gaz. 473; Aznar *v.* Norris, 3 Philippine 636, 2 Off. Gaz. 609; Reyes *v.* Campañia Maritima, 3 Philippine 519, 2 Off. Gaz. 559; Alcantara *v.* Montenegro, 3 Philippine 440, 2 Off. Gaz. 506; Domenech *v.* Montes, 3 Philippine 412, 2 Off. Gaz. 347; Gonzaga *v.* Cañete, 3 Philippine 394, 2 Off. Gaz. 346; De Leon *v.* Naval, 3 Philippine 258, 2 Off. Gaz. 308; Co-Tiangco *v.* To-Jamco, 3 Philippine 210, 2 Off. Gaz. 415; Philippine Sugar Estates Dev. Co. *v.* Rosario, 2 Philippine 651, 1 Off. Gaz. 856; California-Manila Lumber Commercial Co. *v.* Garchitorena, 2 Philippine 628, 1 Off. Gaz. 855; Pastor *v.* Gaspar, 2 Philippine 592, 1 Off. Gaz. 875; Figueras *v.* Vy-Tiepco, 2 Philippine 488, 1 Off. Gaz. 869; Ismael *v.* Ganzon, 1 Philippine 454, 1 Off. Gaz. 506; Thunga Chui *v.* Que Bentec, 1 Philippine 356, 1 Off. Gaz. 818. But see De la Rama *v.* De la Rama, 7 Philippine 745, 5 Off. Gaz. 252, where the evidence appears to have been reviewed without such a motion.

A motion in the trial court on the ground of newly discovered evidence will not justify the supreme court in reviewing the alleged newly discovered evidence. Roque *v.* Navarro, 9 Philippine 420, 6 Off. Gaz. 79; Behn *v.* Mitchell, 7 Philippine 420, 5 Off. Gaz. 180; Magallanes *v.* Cañeta, 7 Philippine 161, 4 Off. Gaz. 765.

Criminal cases do not come within the rule which requires a motion for a new trial in order to obtain a review of the evidence. U. S. *v.* De la Cruz, 9 Philippine 276, 6 Off. Gaz. 114.

Where it is claimed that there is no evidence to support a particular finding the court will examine the record to determine whether there is any such evidence. Prautch *v.* Hernandez, 1 Philippine 705.

87. Puruganan *v.* Martin, 8 Philippine 519, 5 Off. Gaz. 735.

If both parties desire a review of the judgment each must present a bill of exceptions. Ullmann *v.* Ullmann, 10 Philippine 459, 6 Off. Gaz. 847; Naval *v.* Benavides, 8 Philippine 250, 5 Off. Gaz. 441.

Nature and purpose of bill of exceptions and manner of preparing it discussed see Garcia De Lara *v.* Gonzalez De Lara, 2 Philippine 294.

In probate proceedings bills of exceptions are not provided for except in appeals from the committee's ruling on claims. Chung Kiat *v.* Lim Kio, 8 Philippine 297. *Compare* Thunga Chui *v.* Que Bentec, 1 Philippine 356, 1 Off. Gaz. 818.

Contents and supplying deficiencies.— The

ment of errors in the absence of which the appeal will be considered as abandoned by the appellant.[88]

c. Matters Considered. While jurisdiction over the subject-matter may be challenged at any stage of the proceeding,[89] no other question may be first raised on appeal,[90] and on appeal the supreme court will not usually disturb findings

bill should not include the supersedeas bond, motions, and affidavits relating thereto or papers used in an abandoned appeal (Compañia Gen. de Tabacos *v.* Tupino, 2 Philippine 142, 1 Off. Gaz. 544), nor arguments of counsel (Alino *v.* Villamor, 2 Philippine 234; Gonzaga *v.* Norris, 1 Philippine 529), but the inclusion of argument and assignment of errors will not justify a dismissal (Moreno *v.* Gruet, 1 Philippine 217, 1 Off. Gaz. 530). The supreme court may authorize the trial court to supply additions to the bill (Ismael *v.* Ganzon, 1 Philippine 454, 1 Off. Gaz. 591), but the trial judge should not sign the bill with the statement that appellee may add such papers as he desires (Compañia Gen. de Tabacos *v.* Tupino, 2 Philippine 142, 1 Off. Gaz. 544). Evidence must be included in the bill where exception is taken on the ground that the findings are not supported thereby (Loreto *v.* Herrera, 10 Philippine 354, 6 Off. Gaz. 587; Prautch *v.* Hernandez, 1 Philippine 705), and the bill must contain all the evidence (Un Pak Leung *v.* Nigorra, 9 Philippine 381, 6 Off. Gaz. 52; Ferrer *v.* Neri, 9 Philippine 324, 6 Off. Gaz. 5; Co-Pitco *v.* Yulo, 8 Philippine 544, 5 Off. Gaz. 595), unless error is assigned on some particular ruling in which case enough evidence must appear to show the relevancy of the exception (Gonzaga *v.* Norris, 1 Philippine 529, 1 Off. Gaz. 346). Failure to state in the bill that it contains all the evidence may be supplied by amendment (Philippine Islands Government *v.* Amechazurra, 10 Philippine 637, 6 Off. Gaz. 742), and even the evidence itself may be so supplied (Garcia *v.* Hipolito, 2 Philippine 732; De la Rama *v.* Mijares, 1 Philippine 585; Del Carmen *v.* Garbanzos, 1 Philippine 532). But a motion to elevate the original record to supply deficiencies alleged but not specified will be denied. Chaves *v.* Linan, 1 Philippine 496, 1 Off. Gaz. 450.

Preparation and presentation.— The bill may be prepared by the parties or by the court (Gonzaga *v.* Norris, 1 Philippine 529, 1 Off. Gaz. 346), and neither a motion for a new trial nor exceptions are essential to the allowance of the bill (Aznar *v.* Norris, 3 Philippine 636, 639, 2 Off. Gaz. 609); but objection of tardy presentation is waived if not made when bill is served (Gomez Garcia *v.* Hipolito, 2 Philippine 732, 2 Off. Gaz. 33; Tabacos *v.* Manila, 6 Philippine 140, 4 Off. Gaz. 392).

The trial judge has no discretion to refuse to sign the bill (Santos *v.* Del Rosario, 5 Philippine 171, 4 Off. Gaz. 522; Fischer *v.* Ambler, 1 Philippine 508), but another judge has no authority to sign (Reyes *v.* Siguion, 4 Philippine 633, 5 Off. Gaz. 160. See also Poizat *v.* Sweeney, 4 Philippine 656), except in case of the death, absence, or inability of the trial judge (Garcia *v.* Ambler, 4 Philippine 81, 2 Off. Gaz. 545; Enriquez *v.* Watson, 3 Philippine 279, 2 Off. Gaz. 213; Ricamora *v.* Trent, 3 Philippine 137, 2 Off. Gaz. 94). Mandamus is available to compel the judge to sign. Somes *v.* Crossfield, 8 Philippine 283, 5 Off. Gaz. 462; Cedre *v.* Jenkins, 5 Philippine 647; Yturralde *v.* Santos, 5 Philippine 485; Herrera *v.* Herrera, 5 Philippine 383; Castro *v.* Castro, 5 Philippine 180; Reyes *v.* Siguion, 4 Philippine 633; Garcia *v.* Ambler, 4 Philippine 81; Aznar *v.* Norris, 3 Philippine 636; Ricamora *v.* Trent, 3 Philippine 137; Fischer *v.* Ambler, 1 Philippine 508; Gonzaga *v.* Norris, 1 Philippine 334, 529.

Time.— The party desiring the bill of exceptions must give notice thereof before the close of the term and within a reasonable time after the judgment. Philippine Code Civ. Proc. § 143. The period of sixty days for filing the certified copy of the bill in the supreme court runs from the date of signing and filing in the trial court and may be extended. Gonzalez *v.* Crisanto, 1 Philippine 629, 1 Off. Gaz. 39. Requirements as to the time of presentation held not to have been complied with see Paez *v.* Berenguer, 6 Philippine 521, 4 Off. Gaz. 692; De la Rosa *v.* Revita, 6 Philippine 112, 4 Off. Gaz. 379; Bryan, etc., Co. *v.* American Bank, 5 Philippine 672; Yturralde *v.* Santos, 5 Philippine 485, 4 Off. Gaz. 123; Salcedo *v.* Marcaida de Farias, 4 Philippine 267, 3 Off. Gaz. 267, 3 Off. Gaz. 266. Motions to dismiss for failure to comply with such requirements overruled see Cia Gen. de Tabacos *v.* Manila, 6 Philippine 140, 5 Off. Gaz. 201; Santos *v.* Villafuerte, 5 Philippine 739, 4 Off. Gaz. 359; Patricio *v.* Aragon, 4 Philippine 615, 4 Off. Gaz. 529; Gomez Garcia *v.* Hipolito, 2 Philippine 732; Gonzalez *v.* Crisanto, 1 Philippine 629. *Compare* Garcia *v.* Ambler, 4 Philippine 81.

88. Supr. Ct. Rule No. 19. See also Capellania de Tambobong *v.* Antonio, 8 Philippine 683, 5 Off. Gaz. 787; Enriquez *v.* Enriquez, 8 Philippine 565, 5 Off. Gaz. 665.

Inserting assignment of errors in the bill of exceptions instead of a brief will not prevent review where no objection is made by appellee before answering brief. Del Rosario *v.* Del Rosario, 2 Philippine 321.

Assignment of error that decision is not supported by evidence will not be considered when no evidence is contained in the bill of exceptions. Manona *v.* Oblero, 5 Philippine 29, 4 Off. Gaz. 213.

89. U. S. *v.* De la Santa, 9 Philippine 22, 5 Off. Gaz. 852; Antipolo *v.* Cainta, 2 Philippine 204.

90. Tipton *v.* Andueza, 5 Philippine 477, 4 Off. Gaz. 326 (want of capacity to sue); U. S. *v.* Cofrada, 4 Philippine 154, 3 Off. Gaz. 141.

of fact where the proper rules for weighing testimony have been observed;[91] but it must give due weight to the fact that the judge who tried the cause saw the witnesses.[92] The supreme court may permit new evidence to be taken,[93] particularly newly discovered evidence.[94]

d. Relief Granted. The supreme court may modify the judgment appealed from,[95] reverse it, and direct a new trial,[96] or affirm it.[97]

Objections as to form or substance of complaint must be raised in the trial court in order to be available on appeal. U. S. *v.* Flores, 9 Philippine 47, 5 Off. Gaz. 856; U. S. *v.* Eusebio, 8 Philippine 574, 5 Off. Gaz. 667; U. S. *v.* Celis, 8 Philippine 378, 385, 394, 408, 5 Off. Gaz. 572, 632, 633, 634; U. S. *v.* Castillo, 6 Philippine 453, 4 Off. Gaz. 688; U. S. *v.* Aldos, 6 Philippine 381, 4 Off. Gaz. 601; U. S. *v.* Paraiso, 5 Philippine 149; Mortiga *v.* Serra, 5 Philippine 34, 4 Off. Gaz. 219 [*affirmed* in 204 U. S. 470, 27 S. Ct. 343, 51 L. ed. 571]; U. S. *v.* Sarabia, 4 Philippine 566, 3 Off. Gaz. 403; U. S. *v.* Cajayon, 2 Philippine 570, 2 Off. Gaz. 157; U. S. *v.* Li-Dao, 2 Philippine 458, 1 Off. Gaz. 705, 930; U. S. *v.* De Villa, 2 Philippine 133, 1 Off. Gaz. 543; U. S. *v.* Mabanag, 1 Philippine 441, 1 Off. Gaz. 358. So generally as to matters of procedure. U. S. *v.* Garcia, 10 Philippine 204, 6 Off. Gaz. 663; Andrews *v.* Morente, 9 Philippine 634, 5 Off. Gaz. 266; Fleming *v.* "Ntra. Sra. del Carmen," 7 Philippine 200, 5 Off. Gaz. 56; Cortes *v.* Manila Jockey Club, 6 Philippine 501, 4 Off. Gaz. 655; U. S. *v.* Dinglasan, 5 Philippine 695, 5 Off. Gaz. 36; U. S. *v.* Cruz, 5 Philippine 575, 5 Off. Gaz. 32; Tan Machan *v.* De la Trinidad, 3 Philippine 684, 2 Off. Gaz. 473.

Even the plea of double jeopardy cannot first be raised in appellate court. U. S. *v.* Perez, 1 Philippine 203.

All objections to both form and substance of judgment should be argued together in one brief. U. S. *v.* Li-Dao, 2 Philippine 458, 1 Off. Gaz. 705, 930.

91. Velasco *v.* Masa, 10 Philippine 279, 6 Off. Gaz. 731.

Findings of a referee, like those of a court, will be sustained unless clearly wrong. Tan Siu Pic *v.* Tan Siuco, 5 Philippine 516, 4 Off. Gaz. 143.

92. Philippine Act 1596, § 1. See also U. S. *v.* Plana, 2 Philippine 9; De la Rama *v.* De la Rama, 201 U. S. 303, 26 S. Ct. 485, 50 L. ed. 765.

93. Philippine Act 1596, § 1. See also Chanco *v.* Madrilejos, 5 Philippine 319, 3 Off. Gaz. 723.

It may also consider evidence improperly excluded below. Lorenzo *v.* Navarro, 5 Philippine 505, 4 Off. Gaz. 120.

Rulings on the admission of evidence are not reviewable unless objection is made at the time and exception taken. De Dios Chua Soco *v.* Veloso, 2 Philippine 658, 1 Off. Gaz. 858, holding also that objection must be made before answer. And offer of evidence is necessary in order to predicate error on its rejection. Ayala de Roxas *v.* Valencia, 5 Philippine 182.

In Porto Rico it is a final prerogative of the trial court to determine in accordance with sound discretion the probatory force of testimony. Vidal *v.* Mercado, 1 Porto Rico 302; Rocafort *v.* Estapé, 1 Porto Rico 211; Yrizarry *v.* Frontera, 1 Porto Rico 139; Arán *v.* Echalecu, 1 Porto Rico 91.

94. Strong *v.* Gutierrez Repide, 6 Philippine 680.

95. Veloso *v.* Eng. Seng Teng, 2 Philippine 622, 1 Off. Gaz. 835.

It may increase the amount of the judgment. Javier *v.* Suico, 6 Philippine 484, 4 Off. Gaz. 635.

In a criminal case the appellate court may increase the sentence. U. S. *v.* Abijan, 1 Philippine 83; Flemister *v.* U. S., 207 U. S. 372, 28 S. Ct. 129, 52 L. ed. 252; Trono *v.* U. S., 199 U. S. 521, 26 S. Ct. 121, 50 L. ed. 292 [*affirming* 3 Philippine 213].

96. Velasco *v.* Masa, 10 Philippine 279, 6 Off. Gaz. 731; Tan Sunco *v.* Santos, 9 Philippine 44, 5 Off. Gaz. 855; Mendoza *v.* Fulgencio, 8 Philippine 243, 5 Off. Gaz. 459; Siojo *v.* Diaz, 5 Philippine 614, 5 Off. Gaz. 33; Cason *v.* Rickards, 5 Philippine 611, 4 Off. Gaz. 236; Regalado *v.* Luchsinger, 1 Philippine 619, 1 Off. Gaz. 513.

Unless manifestly against the weight of the evidence findings of a trial judge will not be reversed. Larson *v.* Brodek, 8 Philippine 383, 5 Off. Gaz. 503; Benemerito *v.* Velasco, 8 Philippine 381, 5 Off. Gaz. 502; Prautch *v.* Jones, 8 Philippine 1; Sugo *v.* Green, 6 Philippine 744, 5 Off. Gaz. 94; Casalla *v.* Enage, 6 Philippine 475, 4 Off. Gaz. 624; Jalandoni *v.* Lizarraga Hermanos, 6 Philippine 471, 4 Off. Gaz. 612; De la Rama *v.* De la Rama, 201 U. S. 303, 26 S. Ct. 485, 50 L. ed. 765.

The trial court is presumed to have considered possible hostility of the government's witnesses toward the accused. U. S. *v.* Chan Lim Alan, 7 Philippine 203, 5 Off. Gaz. 56.

A recital in the judgment regarding a question of fact will prevail over the unsupported statement in brief of counsel. Capule *v.* Capistrano, 5 Philippine 646, 5 Off. Gaz. 36.

Judgments reversed as manifestly against the weight of the evidence see Muyco *v.* Montilla, 7 Philippine 498; Banco Español-Filipino *v.* Peterson, 7 Philippine 409, 5 Off. Gaz. 481.

Where the record failed to disclose whether title in controversy had been recorded under the mortgage law or Torrens system, the cause was remanded for a new trial. Liong-Wong-Shih *v.* Sánico, 8 Philippine 91, 5 Off. Gaz. 283.

97. See cases cited *infra*, this note.

The judgment may be affirmed on other grounds than those on which it was based by the lower court (Fanlo *v.* Rodriguez, 6

C. Criminal Procedure — 1. In General. In the Philippines under a military order prescribing a code of criminal procedure which has continued in force to the present, all public offenses must be prosecuted by complaint or information;[98] and the provision of the English bill of rights requiring that no person charged with the commission of a crime should be brought to trial until after he had been informed in writing fully and plainly of the nature of the offense charged, adopted by the constitution of the United States, and also of the several states, was extended to the Philippines by act 235, the organic law of the Philippines,[99] and the accused is entitled to be confronted with the witnesses against him.[1] But the prosecution is not required to furnish a bill of particulars.[2] Under the Philippine practice the injured party may likewise obtain redress in the criminal proceeding and may file a complaint for that purpose.[3] The accused cannot be required to give any evidence that may aggravate his punishment;[4] but a witness cannot refuse to answer a question which if answered affirmatively would not show guilt.[5]

2. Information or Complaint. Merely formal defects in the complaint, not affecting the merits, are to be disregarded,[6] and that the original complaint was fatally defective in form and substance is not prejudicial if before trial the proper

Philippine 659, 4 Off. Gaz. 726); but this will not prevent the party defeated below from raising in the supreme court a question properly presented by the pleadings and the evidence (De la Rama *v.* Benedicto, 5 Philippine 512, 4 Off. Gaz. 142).

Judgment affirmed by four justices concurring as to the result only see Jover *v.* Insular Government, 10 Philippine 522, 6 Off. Gaz. 864.

98. Philippine Gen. Ord. No. 58, § 3.

The code of civil procedure has no application to a criminal complaint. U. S. *v.* Abuan, 2 Philippine 130.

Punishment.— Banishment is not a "cruel or unusual" punishment (Legarda *v.* Valdez, 1 Philippine 146, 1 Off. Gaz. 509), nor is whipping (Garcia *v.* Territory, 1 N. M. 415), nor death by shooting (Wilkerson *v.* Utah, 99 U. S. 130, 25 L. ed. 345).

99. U. S. *v.* Karelsen, 3 Philippine 223, 2 Off. Gaz. 170.

1. Gen. Ord. 58, § 15 (5). See also U. S. *v.* Castillo, 2 Philippine 17; U. S. *v.* Tanjuanco, 1 Philippine 374.

The right of confrontation is waived by consenting to submit the cause on the record in a previous trial. U. S. *v.* Anastasio, 6 Philippine 413, 4 Off. Gaz. 579.

2. U. S. *v.* Schneer, 7 Philippine 523, 5 Off. Gaz. 210.

Bill of particulars upon which accused was convicted of estafa set out see U. S. *v.* Freeman, 9 Philippine 168, 5 Off. Gaz. 1015.

3. U. S. *v.* Fernandez, 1 Philippine 539.

4. U. S. *v.* Luzon, 4 Philippine 343, 3 Off. Gaz. 387; U. S. *v.* Navarro, 3 Philippine 143, 2 Off. Gaz. 551.

This changes the Spanish law under which it was permissible to require the accused to testify against himself. U. S. *v.* Navarro, 3 Philippine 143, 2 Off. Gaz. 551.

Exception is made, however, in case the testimony has once been taken down in the presence of the accused or his counsel, it then being admissible at a subsequent trial. See Gen. Ord. 58, § 15 (5). Provision is also made for perpetuating the testimony of witnesses for the prosecution. See Gen. Ord. 58, § 62.

5. *In re* Decker, 1 Porto Rico Fed. 381.

6. Gen. Ord. 58, § 10. See also U. S. *v.* Weems, 7 Philippine 241, 5 Off. Gaz. 58 (holding that description of the government as the "Government of the United States in the Philippine Islands" is not prejudicial); U. S. *v.* Howard, 4 Philippine 238, 3 Off. Gaz. 254 (holding that failure of a complaint against several accused persons to specify participation of each, which is afterward shown by the evidence, is not prejudicial, especially in the absence of objection); U. S. *v.* Li-Dao, 2 Philippine 458, 1 Off. Gaz. 705, 930 (holding that failure to name the offense is a non-prejudicial defect); Paraiso *v.* U. S., 207 U. S. 368, 372, 28 S. Ct. 127, 52 L. ed. 249 (where the court says: "The bill of rights for the Philippines giving the accused the right to demand the nature and cause of the accusation against him does not fasten forever upon those islands the inability of the seventeenth century common law, to understand or accept a pleading that did not exclude every misinterpretation capable of occurring to intelligence, fired with a desire to pervert").

Merely because it was not presented by the prosecuting attorney is not a ground for dismissing the complaint. Trinidad *v.* Jarabe, 3 Philippine 518, 2 Off. Gaz. 511. That the complaint was presented by a private individual and is not sworn to is a mere formal defect and will not justify the vacation of the sentence. U. S. *v.* Bibal, 4 Philippine 369, 3 Off. Gaz. 371.

Omission of complainant's signature will not vitiate a conviction. U. S. *v.* Ago-Chi, 6 Philippine 227, 5 Off. Gaz. 84.

It is sufficient to charge an offense in the language of the statute. U. S. *v.* Salcedo, 4 Philippine 234, 3 Off. Gaz. 195. But the use of such language is not essential. U. S. *v.* Vecina, 4 Philippine 529, 3 Off. Gaz. 588; Gen. Ord. 58, § 6 (c).

information was substituted without objection;[7] and where the complaint is formally adopted by the fiscal, it may be treated as an information.[8] Amendments are permitted,[9] and objections to the sufficiency of a complaint are waived if not presented before trial.[10] But where the defect has been raised by demurrer which was overruled, the objection may be renewed later.[11] Only one offense may be charged except where a single punishment is provided for various allied offenses.[12] Accused should be sentenced by the name under which he was arraigned.[13]

3. Demurrer and Answer Thereto. Demurrer lies for insufficiency, duplicity, want of jurisdiction, and non-compliance with the prescribed form,[14] and the prosecuting attorney must file an answer to the demurrer,[15] but the failure to

Complaints for particular crimes held sufficient: Brigandage (see U. S. *v.* Salcedo, 4 Philippine 234, 3 Off. Gaz. 195); *estafa* (see U. S. *v.* Freeman, 9 Philippine 168, 5 Off. Gaz. 1015; U. S. *v.* Ramirez, 9 Philippine 67, 5 Off. Gaz. 1068; U. S. *v.* Karelsen, 3 Philippine 223, 2 Off. Gaz. 170; U. S. *v.* Perez, 1 Philippine 203, 1 Off. Gaz. 469; U. S. *v.* Enriquez, 1 Philippine 179); falsification of documents (see Paraiso *v.* U. S., 207 U. S. 368, 28 S. Ct. 127, 52 L. ed. 249, setting out form of complaint approved); homicide (see U. S. *v.* Li-Dao, 2 Philippine 673, 1 Off. Gaz. 930; U. S. *v.* Dinsing, 1 Philippine 738); robbery (see U. S. *v.* San Pedro, 4 Philippine 405, 3 Off. Gaz. 373; U. S. *v.* Bundoc, 3 Philippine 614, 2 Off. Gaz. 489; U. S. *v.* Gimeno, 3 Philippine 233, 2 Off. Gaz. 202; U. S. *v.* Moerin, 2 Philippine 88, 1 Off. Gaz. 538).

Complaint held fatally defective see U. S. *v.* De Castro, 2 Philippine 616, 1 Off. Gaz. 914, a complaint charging merely that defendant "as municipal president, in consideration of gifts of money, permitted opium joints and gambling houses."

7. U. S. *v.* Mabiral, 4 Philippine 308, 3 Off. Gaz. 313.

8. U. S. *v.* Bailoses, 2 Philippine 49.

The fiscal cannot withdraw prosecution without the court's consent after the beginning of the trial. U. S. *v.* Luciano, 2 Philippine 96.

9. U. S. *v.* Brown, 9 Philippine 89, 5 Off. Gaz. 908; U. S. *v.* De la Cruz, 3 Philippine 331, 2 Off. Gaz. 326; U. S. *v.* De Sosa, 1 Philippine 687.

10. U. S. *v.* Del Rosario, 2 Philippine 127.

Sufficiency of complaint objected to in the appellate court is res adjudicata after the case is remanded. U. S. *v.* Ramos, 1 Philippine 81.

Objections cannot first be raised in the appellate court. U. S. *v.* Mack, 4 Philippine 291, 3 Off. Gaz. 192; U. S. *v.* Howard, 4 Philippine 238, 3 Off. Gaz. 254; U. S. *v.* Manalang, 2 Philippine 64, 1 Off. Gaz. 534; U. S. *v.* Bailoses, 2 Philippine 49. *Compare* Paraiso *v.* U. S., 207 U. S. 368, 28 S. Ct. 127, 52 L. ed. 249.

11. U. S. *v.* De Castro, 2 Philippine 616, 1 Off. Gaz. 914.

12. Gen. Ord. 58, § 11. See also U. S. *v.* Ferrer, 1 Philippine 56, holding that firing two shots which kill one person and wound another constitute distinct crimes and require separate trials.

A complaint charging falsification is not multifarious because a detailed statement of acts constituting the same is set out. U. S. *v.* Paraiso, 5 Philippine 149 [*affirmed* in 207 U. S. 368, 28 S. Ct. 127, 52 L. ed. 249].

But a charge of assault and an attempt against the authorities arising out of the same act may be included in one complaint (U. S. *v.* Montiel, 9 Philippine 162, 5 Off. Gaz. 1116), and a single offense which may be committed by using different means may be charged in the alternative (U. S. *v.* Douglass, 2 Philippine 461, 1 Off. Gaz. 708), and where the penalties for two crimes are identical, the fact that one is charged so as to couple it with the other is immaterial after conviction (U. S. *v.* Santiago, 1 Philippine 545, 1 Off. Gaz. 96).

Conviction under a section of the law defining several allied offenses will be sustained if it appears that the accused is guilty of any. U. S. *v.* Tolentino, 5 Philippine 682. *Compare* U. S. *v.* Dorr, 2 Philippine 332.

Waiver of duplicity and multifariousness results from failure to object in the trial court. U. S. *v.* Kosel, 10 Philippine 409, 6 Off. Gaz. 668; U. S. *v.* Paraiso, 5 Philippine 149 [*affirmed* in 207 U. S. 368, 28 S. Ct. 127, 52 L. ed. 249]; U. S. *v.* Martinez, 2 Philippine 199, 1 Off. Gaz. 547; U. S. *v.* Perez, 2 Philippine 171.

13. U. S. *v.* Bautista, 4 Philippine 188, 3 Off. Gaz. 193.

14. Gen. Ord. 58, § 21.

Purpose of demurrer.— The demurrer of defendant merely raises a question of law with respect to the criminal character of the facts charged. For the purpose of showing that the demurrer should be sustained, the accused should limit himself to facts, admitting them as the basis of the discussion just as they appear from the complaint or information, and should demonstrate that even though these facts be true, nevertheless they would not be punishable under the law. Every allegation which tends to deny them or modify them is irrelevant, because it tends to raise a question of fact, which is not admissible under the peculiar nature of the exception. Consequently, such allegations cannot be considered in passing upon the demurrer. U. S. *v.* Perez, 1 Philippine 203.

15. Gen. Ord. 58, § 22.

file a written answer will not indicate abandonment nor justify a dismissal.[16]

4. PLEA. Pleas of "guilty" or "not guilty" are authorized, but these must be oral.[17] After plea of "not guilty" no further statement may be exacted from the accused,[18] but the court may nevertheless receive evidence in the case.[19] The accused has no absolute right to withdraw a plea of "not guilty" in order to demur,[20] but the court may direct withdrawal of a plea of "guilty" and substitute a plea of "not guilty," and should do so where the former was entered by mistake.[21] Otherwise the denial of such permission is discretionary.[22]

TERROR. Agitating and excessive fear, which usually benumbs the faculties.[1] (Terror: Putting in Fear as Element of Robbery, see ROBBERY, 34 Cyc. 1800.)

TEST. As a noun, something by which to ascertain the truth respecting another thing.[2] As a verb, to bring one to a trial and examination, or to ascertain the truth or the quality or fitness of a thing.[3] (Test: For Holding Office, see OFFICERS, 29 Cyc. 1378. Oath Act, see CONSTITUTIONAL LAW, 8 Cyc. 1110 note 39. Of Article Sold — As Condition Precedent to Passage of Title Thereto, see SALES, 35 Cyc. 283; As Determining Time For Rescission of Contract of Sale by Buyer, see SALES, 35 Cyc. 153; Effect as to Warranty by Seller, see SALES, 35 Cyc. 378; Time and Place For, see SALES, 35 Cyc. 226, 227. Of Care or Negligence by Gratuitous Depositary, see DEPOSITARIES, 13 Cyc. 802. Of Inference or Judgment of Witness, see EVIDENCE, 17 Cyc. 130. Of Opinion Evidence, see EVIDENCE, 17 Cyc. 258. Of Tools, Machinery, Appliances, and Place For Work For Protection of Servant, see MASTER AND SERVANT, 26 Cyc. 1136.)

TESTABLE. Having capacity to make a will; also, capable of being given by will.[4]

TESTACY. See WILLS.

Both the government and the private prosecutor may appeal from an order sustaining the demurrer, and the accused is not placed in double jeopardy thereby. U. S. *v.* Ramirez, 9 Philippine 67, 5 Off. Gaz. 1068; U. S. *v.* Perez, 1 Philippine 203.

16. U. S. *v.* Fernandez, 1 Philippine 539.

17. Gen. Ord. 57, § 24.

These pleas as accepted in American law were unknown to the Spanish law. Under the Spanish law there was what was called "judicial confession," whereby the accused admitted the commission of the act alleged in the complaint, but by so doing defendant did not attempt to characterize the act as criminal, as is the case with a defendant who pleads "guilty" under American law. U. S. *v.* Patala, 2 Philippine 752.

An admission by the accused that he aided a band of brigands but did so through fear of death must be treated as a plea of not guilty. U. S. *v.* Betiong, 2 Philippine 126.

The death penalty may be based upon a plea of guilty alone. U. S. *v.* Talbanos, 6 Philippine 541, 4 Off. Gaz. 695.

18. U. S. *v.* Junio, 1 Philippine 50.

19. U. S. *v.* Rota, 9 Philippine 426, 6 Off. Gaz. 80; U. S. *v.* Talbanos, 6 Philippine 541, 4 Off. Gaz. 695.

20. U. S. *v.* Schneer, 7 Philippine 523, 5 Off. Gaz. 210.

21. U. S. *v.* Paquit, 5 Philippine 635; U. S. *v.* Tolosa, 5 Philippine 616; U. S. *v.* Morales, 5 Philippine 442; U. S. *v.* Patala, 2 Philippine 752.

22. U. S. *v.* Molo, 5 Philippine 412, 4 Off. Gaz. 57.

1. Arto *v.* State, 19 Tex. App. 126, 136 [*citing* Webster Dict.], where it is said the term signifies more than "alarm" or "fright." See also 23 Cyc. 39 text and notes 18, 19.

2. Black L. Dict.

"Its recognized legal meaning in our constitutions is derived from the English Test Acts, all of which related to matters of opinion, and most of them to religious opinion. Such has been the general understanding of the framers of constitutions." Atty.-Gen. *v.* Detroit, 58 Mich. 213, 217, 24 N. W. 887, 55 Am. Rep. 675. See also People *v.* Hoffman, 116 Ill. 587, 606, 5 N. E. 596, 8 N. E. 788, 56 Am. Rep. 793; Rogers *v.* Buffalo, 3 N. Y. Suppl. 671, 674.

Examinations provided for in a civil service act are not such "tests" for office as are contemplated by a constitution. People *v.* Loeffler, 175 Ill. 585, 599, 51 N. E. 785.

"Test accepted" see Ross *v.* Frank, (Cal. App. 1910) 108 Pac. 1025, 1026.

Test of a well see Bennett *v.* Edison Electric Illuminating Co., 26 N. Y. App. Div. 363, 49 N. Y. Suppl. 833.

3. Black L. Dict.

"Testing . . . degrees by the polariscope" see American Sugar Refining Co. *v.* U. S., 211 U. S. 155, 158, 29 S. Ct. 89, 53 L. ed. 129.

"Testing by the polariscope" see Bartram *v.* U. S., 123 Fed. 327, 329.

4. Anderson L. Dict.

TESTAMENT. In common usage, a term exactly synonymous with the words "will" and "last will and testament." [5] (See WILLS.)

TESTAMENTA CUM DUO INTER SE PUGNANTIA REPERIUNTUR, ULTIMUM RATUM EST; SIC EST, CUM DUO INTER SE PUGNANTIA REPERIUNTUR IN EODEM TESTAMENTO. A maxim meaning "When two conflicting wills are found, the last prevails; so it is when two conflicting clauses occur in the same will." [6]

TESTAMENTA LATISSIMAM INTERPRETATIONEM HABERE DEBENT. A maxim meaning "Wills ought to have the broadest interpretation." [7]

TESTAMENTARY. Relating or appertaining to a will or wills; also, relating to administration of the estates of deceased persons.[8]

TESTAMENTARY CAPACITY. See WILLS.

TESTAMENTARY GUARDIAN. See GUARDIAN AND WARD, 21 Cyc. 15.

TESTAMENTARY POWER. See POWERS, 31 Cyc. 1043; WILLS.

TESTAMENTARY TRUSTEE. As defined by the New York Code of Civil Procedure, an expression which includes every person, except an executor and administrator with will annexed, or a guardian who is designated by a will, or by any competent authority, to execute a trust created by a will; and it includes such an executor or administrator, where he is acting in the execution of a trust created by the will, which is separable from his functions as executor or administrator.[9]

TESTAMENTUM EST TESTATIO MENTIS, FACTA NULLO PRÆSENTE METU PERICULI, SED COGITATIONE MORTALITATIS. A maxim meaning "A will is a witnessing of the mind, made in view of the uncertainty of human life, but in no present fear of danger." [10]

TESTAMENTUM EST VOLUNTATES NOSTRA JUSTA SENTENTIA, DE EO QUOD QUIS POST MORTEM SUAM FIERI VELIT. A maxim meaning "A testament is the just expression of one's will concerning that which one wishes done after his death." [11]

"Testable capacity," in a person in whom insanity is not supposed, amounts to nothing more than a knowledge of what he is about, and how he is disposing of his property, and the purpose to do so. Sutton *v.* Sutton, 5 Harr. (Del.) 459, 461.

5. Hill *v.* Hill, 7 Wash. 409, 410, 35 Pac. 360.

6. Black L. Dict. [*citing* Coke Litt. 112].

7. Bouvier L. Dict. [*citing* Jenkins Cent. 81].

8. Century Dict. [*quoted* in *In re* Clemow, [1900] 2 Ch. 182, 191, 69 L. J. Q. B. 522, 82 L. T. Rep. N. S. 550, 48 Wkly. Rep. 541].

In reference to a gift the term means that no title whatever is to vest in the donee until the donor's death. Johnson *v.* Colley, 101 Va. 414, 417, 44 S. E. 721, 99 Am. St. Rep. 884.

"Testamentary condition" means a future and uncertain event upon the existence of which the testator has made his bounty to depend. Matter of Wheeler, 8 N. Y. Leg. Obs. 378, 380 [*citing* 13 Pothier Pandects, p. 265].

"Testamentary disposition" is a disposition which is not to take effect unless the grantor dies; nor until that event (Diefendorf *v.* Diefendorf, 8 N. Y. Suppl. 617, 619), disposition by will (Hill *v.* Hill, 7 Wash. 409, 410, 35 Pac. 360). See also Chestnut St. Nat. Bank *v.* Fidelity Ins., etc., Co., 186 Pa. St. 333, 339, 40 Atl. 486, 65 Am. St. Rep. 860.

"Testamentary instrument" is an instrument which declares the present will of the maker as to the disposal of property after his death, without attempting to declare or create any rights therein prior to such event. Templeton *v.* Butler, 117 Wis. 455, 458, 94 N. W. 306.

9. Matter of Clinton, 12 N. Y. App. Div. 132, 135, 42 N. Y. Suppl. 674; Matter of Clark, 5 Redf. Surr. (N. Y.) 466, 468 (both quoting Code Civ. Proc. § 2514). See also Runk *v.* Thomas, 138 N. Y. App. Div. 789, 123 N. Y. Suppl. 523, 526; Matter of Hazard, 51 Hun (N. Y.) 201, 202, 4 N. Y. Suppl. 701.

Where an executor is directed to sell testator's real estate, and invest the proceeds, and pay the income to his daughter, he is a "testamentary trustee" within N. Y. Code Civ. Proc. § 2514, subd. 6. *In re* Valentine, 1 Misc. (N. Y.) 491, 493, 23 N. Y. Suppl. 289.

To constitute a "testamentary trustee" it is necessary that some express trust be created by the will. Merely calling an executor or guardian a trustee does not make him such. Every executor and every guardian is in a sense a trustee, for he deals with property of others confided to his care. But he is not a trustee in the sense in which that term is used in courts of equity and in statutes. *In re* Hawley, 104 N. Y. 250, 261, 10 N. E. 352.

Distinguished from "executor" see Matter of Anderson, 5 N. Y. Leg. Obs. 302, 303.

10. Morgan Leg. Max. [*citing* Coke Litt. 322].

11. Peloubet Leg. Max. [*citing* Dig. 28, 1, 11.

TESTAMENTUM OMNE MORTE CONSUMMATUM. A maxim meaning "Every will is completed by death." [12]

TESTATOR. See WILLS.

TESTATORIS ULTIMA VOLUNTAS EST PERIMPLENDA SECUNDUM VERAM INTENTIONEM SUAM. A maxim meaning "The last will of a testator is to be thoroughly fulfilled according to his real intention." [13]

TESTATRIX. A female testator.[14] (See WILLS.)

TESTE. See EXECUTIONS, 17 Cyc. 1023; PROCESS, 32 Cyc. 439.

TESTES LUPINARES IN RE LUPINARI ADMITTUM. A maxim meaning "Prostitutes are competent witnesses in a matter concerning a brothel." [15]

TESTES PONDERANTUR, NON NUMERANTUR. A maxim meaning "Witnesses are weighed, not numbered." [16]

TESTES QUI POSTULAT DEBET DARE EIS SUMPTUS COMPETENTES. A maxim meaning "Whoever demands witnesses, must find them in competent provision." [17]

TESTIBUS DEPONENTIBUS IN PARI NUMERO DIGNIORIBUS EST CREDENDUM. A maxim meaning "When the number of witnesses is equal on both sides, the more worthy are to be believed." [18]

TESTIBUS, NON TESTIMONIS, CREDENDEM EST. A maxim meaning "Credence is to be given to the witnesses, not to the testimony." [19]

TESTIFY. To be examined as a witness under oath or affirmation; [20] to give evidence; [21] to bear witness to; to give evidence or testimony of; [22] to make a solemn declaration, verbal or written, to establish some fact; [23] to make a solemn declaration on oath or affirmation for the purpose of establishing or making proof of some fact; [24] to make a statement or declaration in confirmation of some fact; to bear witness; to give evidence or testimony in regard to a case depending before a court or tribunal; to make a solemn declaration under oath or affirmation, before a tribunal, court, judge, or magistrate, for the purpose of proving some fact.[25]

TESTIMONIA PONDERANDA SUNT, NON NUMERANDA. A maxim meaning "Evidence is to be weighed, not enumerated." [26]

TESTIMONIO. In Spanish-American law an attested copy of an instrument; a second original.[27]

12. Bouvier L. Dict. [*citing* Coke Litt. 232].

13. Black L. Dict. [*citing* Coke Litt. 322].

14. Webster Dict. [*quoted* in Walker *v.* Hyland, 70 N. J. L. 69, 78, 56 Atl. 268].

15. Morgan Leg. Max. [*citing* Godb. 37].

16. Morgan Leg. Max. [*citing* Wharton Leg. Max.].

17. Peloubet Leg. Max. [*citing* Jur. Civ.].

18. Bouvier L. Dict. [*citing* 4 Coke Inst. 279].

19. Peloubet Leg. Max. [*citing* Trayner Leg. Max.].

20. Gannon *v.* Stevens, 13 Kan. 447, 459.

21. Mudge *v.* Gilbert, 43 How. Pr. (N. Y.) 219, 221; Bonesteel *v.* Lynde, 8 How. Pr. (N. Y.) 226, 233, where in construing a statute declaring that a party to an action may be examined as a witness and subjected to the same rules of examination as any other witness, to testify either at the trial, or conditionally, or upon commission, it is said "and the reasonable and just interpretation of the words requires that he give evidence in the same manner as other witnesses are bound to do."

22. State *v.* Robertson, 26 S. C. 117, 120, 1 S. E. 443.

23. Webster Dict. [*quoted* in Case *v.* James, 90 Wis. 320, 322, 63 N. W. 237].

24. Webster Dict. [*quoted* in Nash *v.* Hoxie, 59 Wis. 384, 388, 18 N. W. 408].

The term is applicable to depositions as well as proceedings at trial. Buckingham *v.* Barnum, 30 Conn. 358, 359.

25. Worcester Dict. [*quoted* in O'Brien *v.* State, 125 Ind. 38, 44, 25 N. E. 137, 9 L. R. A. 323]. See also State *v.* Murphy, 128 Wis. 201, 213, 107 N. W. 470, where it was said that to limit the meaning of the word to where the witness speaks the truth would involve a highly technical and unusual meaning for the word "testify."

"The word 'testify' comprehends an intelligent, active performance, in which a person, by words or writing, or other comprehensible signs, communicates facts within his own mind to another." Under a statute rendering a husband or wife incompetent to testify against the other upon the trial of an action, etc., a simple appearance for identification cannot be held to be testifying within the meaning of the section. Jacobson *v.* Jacobson, 12 N. Y. Civ. Proc. 198, 202.

"Sworn to testify the whole truth" see Western Union Tel. Co. *v.* Collins, 45 Kan. 88, 91, 25 Pac. 187, 10 L. R. A. 515.

26. Black L. Dict.

27. Burrill L. Dict. See also Guilbeau *v.* Mays, 15 Tex. 410, 414; Titus *v.* Kimbro, 8

TESTIMONY. A statement of facts by witnesses;[28] a statement made under oath in a legal proceeding;[29] the evidence of a witness given under oath;[30] the statement made by a witness under oath,[31] or affirmation;[32] the declaration of a witness under oath or affirmation;[33] a solemn declaration or affirmation made for the purpose of establishing or proving some fact;[34] any species of proof or probative matter legally presented at the trial of an issue by the act of the parties, and through the medium of witnesses, records, documents, concrete objects, etc., for the purpose of inducing belief in the minds of the court or jury as to their contention.[35] (Testimony: In General, see DEPOSITIONS, 13 Cyc. 822; EVIDENCE, 16 Cyc. 849; WITNESSES. Averment of Truth of Expected, in Application For Continuance, see CONTINUANCE IN CRIMINAL CASES, 9 Cyc. 203. Falsity of as Element of Perjury, see PERJURY, 30 Cyc. 1402. Fee of Clerk of Court For Reporting, see CLERKS OF COURTS, 7 Cyc. 209 note 76. Illegality of Agreement to Give, see CONTRACTS, 9 Cyc. 568 note 38. Of Absent Witness, Elements of Affecting Right to Continuance, see CONTINUANCE IN CRIMINAL CASES, 9 Cyc. 174. Of Accomplice or Co-Defendant, see CRIMINAL LAW, 12 Cyc. 445. Of Co-Conspirator, Weight of, see CONSPIRACY, 8 Cyc. 686. Use of Term For "Evidence"—In Certificate of Trial Judge in Allowance on Bill of Exceptions, see APPEAL AND

Tex 210, 213; Edwards *v.* James, 7 Tex. 372, 378; Herndon *v.* Casiano, 7 Tex. 322, 332.

28. Clark *v.* State, 5 Ga. App. 605, 63 S. E. 606, where such is said to be the meaning of the term in legal as well as common usage.

29. *In re* Brown, 92 Iowa 379, 384, 60 N. W. 659 [*citing* Black L. Dict.; Webster Dict.]. See also Poe *v.* State, (Ark. 1910) 129 S. W. 292, 295; Whisler *v.* Whisler, 117 Iowa 712, 715, 89 N. W. 1110.

Oath or affirmation is necessary to make declarations testimony. Peters *v.* U. S., 2 Okla. 116, 120, 33 Pac. 1031; Wyoming L. & T. Co. *v.* W. H. Holliday Co., 3 Wyo. 386, 387, 24 Pac. 193

Implies the usual preliminary qualification of taking an oath to speak the truth. Edelstein *v.* U. S., 149 Fed. 636, 640, 79 C. C. A. 328, 9 L. R. A. N. S. 236.

30. McEntyre *v.* Tucker, 5 Misc. (N. Y.) 228, 229, 25 N. Y. Suppl. 95.

31. Baker *v.* Woodward, 12 Oreg. 3, 17, 6 Pac. 173. See also Lyts *v.* Keevey, 5 Wash. 606, 612, 32 Pac. 534.

The statements of the maker as a witness on the stand, or before a commissioner, not his declarations out of court, nor evidence of them given by another witness on the stand, was held to be the meaning of the term as used in a statute providing that an instrument may be proved by the testimony of the maker thereof. Sledge *v.* Singley, 139 Ala. 346, 349, 37 So. 98.

32. Bouvier L. Dict. [*quoted* in Woods *v.* State, 134 Ind. 35, 43, 33 N. E. 901; Peters *v.* U. S., 2 Okla. 116, 120, 33 Pac. 1031; Com. *v.* Ensign, 35 Pa. Co. Ct. 698, 699].

33. Burrill L. Dict. [*quoted* in Nash *v.* Hoxie, 59 Wis. 384, 388, 18 N. W. 408].

34. Webster Dict. [*quoted* in Woods *v.* State, 134 Ind. 35, 43, 33 N. E. 901].

35. Black L. Dict. [*quoted* in Crooks *v.* Harmon, 29 Utah 304, 306, 81 Pac. 95].

Includes an affidavit.— Woods *v.* State, 134 Ind. 35, 42, 33 N. E. 901.

"Documentary evidence" not included see Barley *v.* Dunn, 85 Ind. 338, 339; Sessengut *v.* Posey, 67 Ind. 408, 412, 33 Am. Rep. 98; McDonald *v.* Elfes, 61 Ind. 279, 284.

Used as synonym for "depositions" see People *v.* Lee Ah Chuck, 66 Cal. 662, 664, 6 Pac. 859.

Does not include the pleadings or other papers filed in the case previous to the trial or hearing. Com. *v.* Ensign, 35 Pa. Co. Ct. 698, 700.

Not synonymous with "evidence."— Harris *v.* Tomlinson, 130 Ind. 426, 427, 30 N. E. 214; Kleyla *v.* State, 112 Ind. 146, 147, 13 N. E. 255; Central Union Tel. Co. *v.* State, 110 Ind. 203, 207, 10 N. E. 922, 12 N. E. 136; McConaha *v.* Carr, 18 Ind. 443; Downs *v.* Downs, 17 Ind. 95, 96; Craggs *v.* Bohart, 4 Indian Terr. 443, 452, 69 S. W. 931; Columbia Nat. Bank *v.* German Nat. Bank, 56 Nebr. 803, 806, 77 N. W. 346. See also Hargrove *v.* State, 117 Ga. 706, 707, 45 S. E. 58; Miller *v.* Wolf, 63 Iowa 233, 235, 18 N. W. 889; Lilly *v.* Russell, 4 Okla. 94, 98, 44 Pac. 212, in which cases, while it was recognized that the terms are not synonymous, it was held that from the connection in which the word "testimony" appeared it should be construed as a synonym of "evidence." But see Jones *v.* Seattle, 51 Wash. 245, 248, 98 Pac. 743, where the term is said in common expression, even of courts, to be synonymous with "evidence."

Distinguished from evidence see Mann *v.* Higgins, 83 Cal. 66, 69, 23 Pac. 206; McEntyre *v.* Tucker, 5 Misc. (N. Y.) 228, 229, 25 N. Y. Suppl. 95; Southern Pine Lumber Co. *v.* Ward, 16 Okla. 131, 145, 85 Pac. 459; Carter *v.* Cummings-Nielson Co., 34 Utah 315, 317, 97 Pac. 334; Crooks *v.* Harmon, 29 Utah 304, 306, 81 Pac. 95; Wyoming L. & T. Co. *v.* W. H. Holliday, 3 Wyo. 386, 387, 24 Pac. 193; U. S. *v.* Lee Huen, 118 Fed. 442, 456.

Included by the broader term "evidence."— Mann *v.* Higgins, 83 Cal. 66, 69, 23 Pac. 206; Ingel *v.* Scott, 86 Ind. 518, 521; McDonald *v.* Elfes, 61 Ind. 279, 284; Gazette Printing Co. *v.* Morss, 60 Ind. 153, 157; Carroll *v.* Bancker, 43 La. Ann. 1078, 1085, 1194, 10 So. 187; Mitchell *v.* Jensen, 29 Utah 346, 357, 81 Pac. 165; Noyes *v.* Pugin, 2 Wash. 653, 661, 27 Pac. 548.

ERROR, 3 Cyc. 108 note 92; In Statement That All Evidence Is Included, see APPEAL AND ERROR, 3 Cyc. 82 note 73.)

TESTIS DE VISU PRÆPONDERAT ALIIS. A maxim meaning "An eye-witness is to be preferred to all others."[36]

TESTIS DICAM DEBET ABIMO, "NON SUM DOCTUS NEC INSTRUCTUS, NEC CURO DE VICTORIA, MODO MINISTRETUR JUSTITIA." A maxim meaning A witness should be able to say from his heart, "I am not informed nor instructed, nor do I care which party be successful, provided justice be done."[37]

TESTIS LUPANARIS SUFFICIT AD FACTUM IN LUPANARI. A maxim meaning "A strumpet is a sufficient witness to a deed committed in a brothel.[38]

TESTIS NEMO IN SUA CAUSA ESSE POTEST. A maxim meaning "No one can be a witness in his own cause."[39]

TESTIS OCULATUS UNUS PLUS VALET QUAM AURITI DECEM. A maxim meaning "One eye-witness is worth more than ten ear-witnesses."[40]

TESTIUM NUMERUS SI NON ADJICITUR, SUO SUFFICIUNT. A maxim meaning "If the number of witnesses is not prescribed, two are sufficient."[41]

TEST OATH. See CONSTITUTIONAL LAW, 1110 note 39.

TETANUS. Locked-jaw.[42]

TEXAS FEVER. See ANIMALS, 2 Cyc. 334.

TEXAS MONEY. A term held not to mean gold or silver.[43] (Texas Money: Parol Evidence as to Meaning of in Written Instrument, see EVIDENCE, 17 Cyc. 684.)

TEXT-BOOK. A book or manual used in teaching; a book for students, containing the principles of a science of any branch of learning;[44] a book to be used as a standard book for a particular branch of study for the use of students.[45] (Text-Book: Authority of Municipal Board of Education to Select, see MUNICIPAL CORPORATIONS, 28 Cyc. 577. Bond of Publisher, see SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 1132. Change of, see SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 1129. Competency as Evidence, see EVIDENCE, 17 Cyc. 421. Contract to Supply, see SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 1131. Mandamus as Remedy to Compel Purchase and Use of, see MANDAMUS, 26 Cyc. 284. Power and Duty to Furnish, see SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 1130. Reading From by — Counsel in Argument, see CRIMINAL LAW, 12 Cyc. 583; Judge in Charging Jury, see CRIMINAL LAW, 12 Cyc. 614. Selection and Adoption For School, see SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 1128.)

TEXTILE. A fabric which is woven or may be woven; a fabric made by weaving.[46]

TEXTILE FABRICS. Those fabrics woven, as carpets, or capable of being woven or formed by weaving.[47]

"Testimony to a material matter" see State *v.* Berliawsky, (Me. 1910) 76 Atl. 938.

36. Morgan Leg. Max. [*citing* 4 Coke Inst. 279].

37. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].

38. Peloubet Leg. Max. [*citing* Moore K. B. 817].

39. Bouvier L. Dict. adding: "Otherwise in England, and in the United States."

40. Black L. Dict. [*citing* 4 Coke Inst. 279].

41. Morgan Leg. Max. [*citing* 4 Coke Inst. 279].

42. Vredenburg *v.* Behan, 33 La. Ann. 627, 634.

43. Roberts *v.* Short, 1 Tex. 373, 383.

44. Webster Dict. [*quoted* in People *v.* Aurora Bd. of Education, 175 Ill. 9, 18, 51 N. E. 633, including writing or copy-books].

45. Stormonth Dict. [*quoted* in People *v.* Aurora Bd. of Education, 175 Ill. 9, 18, 51 N. E. 633].

In the title "an act to provide cheaper text-books, and for district ownership of the same," the term was construed as comprehensive enough to include globes, maps, charts, pens, ink, paper, etc., and all other apparatus and appliances which are proper to be used in the schools in instructing the youth. Affholder *v.* State, 51 Nebr. 91, 92, 70 N. W. 544.

"Text book board" see State *v.* Griffin, 132 Ala. 47, 49, 31 So. 112.

46. Wood *v.* Allen, 111 Iowa 97, 100, 82 N. W. 451.

47. Wood *v.* Allen, 111 Iowa 97, 100, 82 N. W. 451.

As used in a tariff act, held to include embroidered handkerchiefs which are not hemstitched. *In re* Gribbon, 53 Fed. 78, 81.

TEXTURE. Relating to the structure of woven fabric.[48]

THALWEG. A term commonly used by writers on international law in definition of water boundaries between states, meaning the middle or deepest or most navigable channel.[49]

THANKSGIVING DAY. The day appointed and set apart by the president of the United States,[50] by the governor of the state,[51] or by both,[52] as a day of public thanksgiving.[53] (See, generally, HOLIDAYS, 21 Cyc. 440.)

THAT. The equivalent of "in order that"; "to the end that."[54] As used in opposition to "this" in reference to different things before expressed, a demonstrative pronoun which refers to the thing first mentioned.[55]

THE. The article which directs what particular thing or things we are to take or assume as spoken of; determines what particular thing is meant; that is, what particular thing we are to assume to be meant;[56] the article which designates one particular from a class or number, disassociating it from others of the

48. Stratton *v.* Komada, 148 Fed. 125, 126, where the term is said to have no quality relating to liquid.

49. Louisiana *v.* Mississippi, 202 U. S. 1, 49, 26 S. Ct. 408, 50 L. ed. 913, where it is said that the word itself has been taken over into various languages. See also Keokuk, etc., Bridge Co. *v.* People, 145 Ill. 596, 603, 34 N. E. 482; Iowa *v.* Illinois, 147 U. S. 1, 8, 13 S. Ct. 239, 37 L. ed. 55.

50. Milwaukee Harvester Co. *v.* Teasdale, 91 Wis. 59, 64 N. W. 422.

51. Gladwin *v.* Lewis, 6 Conn. 49, 16 Am. Dec. 33.

52. Milwaukee Harvester Co. *v.* Teasdale, 91 Wis. 59, 64 N. W. 422.

53. Gladwin *v.* Lewis, 6 Conn. 49, 16 Am. Dec. 33; National Mut. Ben. Assoc. *v.* Miller, 85 Ky. 88, 94, 2 S. W. 900, 8 Ky. L. Rep. 731. See also Belmont Coal, etc., Co. *v.* Smith, 74 Ala. 206; State *v.* Atkinson, 104 La. 570, 29 So. 279.

The time of the thanksgiving holiday is, practically, as definitely fixed as Christmas or the Fourth of July, in advance of the proclamation. It has been the custom, not departed from in many years, to set apart for thanksgiving the last Thursday in November in each year. So that it can be foreseen with practical certainty that that day will be a non-judicial day. Milwaukee Harvester Co. *v.* Teasdale, 91 Wis. 59, 64 N. W. 422.

The proclamation is but a recommendation. It has not the force of law, nor was it so intended. The duties of fasting and prayer are voluntary, and not of compulsion, and holiday is a privilege, not a duty. In almost every state in the Union a day of thanksgiving is appointed in the fall of the year by the governor, because there is no ecclesiastical authority which would be acknowledged by the various denominations. It is an excellent custom, but it binds no man's conscience or requires him to abstain from labor. Nor is it necessary to a literal compliance with the recommended fast day that all labor should cease, and the day be observed as a sabbath, or as a holiday. It is not so treated by those who conscientiously observe every Friday as a fast day. Richardson *v.* Goddard, 23 How. (U. S.) 28, 43, 16 L. ed. 412.

54. Fackler *v.* Berry, 93 Va. 565, 568, 25 S. E. 887, 57 Am. St. Rep. 819, where the term was so construed, as employed in a will, giving to testator's wife the absolute property "that she may have a permanent home for life."

"That the action be referred" see Fraser *v.* Fraser, [1904] 2 K. B. 245, 248, 73 L. J. K. B. 816, 90 L. T. Rep. N. S. 709, 20 T. L. R. 437, 53 Wkly. Rep. 47.

"That there be, and is hereby, granted" see U. S. *v.* Northern Pac. R. Co., 6 Mont. 351, 362, 12 Pac. 769.

55. Russell *v.* Kennedy, 66 Pa. St. 248, 251 [*citing* Webster Dict.].

In a charter party stipulating that "the steamer is to carry out to New Orleans seven hundred tons measurement of assorted cargo, or more, if that does not make her draw over fourteen feet of water," the relative "that," as ordinarily used in conformity to established rules of language, would relate to what is signified by the antecedent word "more," which, from its own connection or relation to the preceding word "cargo," clearly implied more cargo than seven hundred tons. But to restrict it to that alone would be productive of an irrational result. The only reasonable signification that can be given to this term in view of the subject-matter, and the preceding stipulations of the charter, is to render it the relative of both preceding words. Roberts *v.* Opdyke, 40 N. Y. 259, 270.

56. State *v.* Campbell, 210 Mo. 202, 224, 109 S. W. 706; Noyes *v.* Children's Aid Soc., 70 N. Y. 481, 484, 3 Abb. N. Cas. 36, 16 Alb. L. J. 224 [*citing* Richardson Dict.].

"Yet this article is not always to mean but one. Take the well-worn and well-wearing quotation: 'The man that hath not music in himself, is fit for treason, stratagem, and spoils.' The meaning of the article is not exhausted, when one man is found with no music in himself. 'The man,' means there, 'any man.'" Noyes *v.* Children's Aid Soc., 70 N. Y. 481, 484, 3 Abb. N. Cas. 36, 16 Alb. L. J. 224.

An ambiguous term, in the clause of a will bequeathing "ten shares of the stock" of a railroad company. "The" may refer as well to the stock of the company in general as to the stock owned by the testatrix. Harvard Unitarian Soc. *v.* Tufts, 151 Mass. 76, 78, 23 N. E. 1006, 7 L. R. A. 390.

same class;[57] the word used before nouns, with a specifying or particularizing effect, opposed to the indefinite or generalizing force of "a" or "an";[58] the definite article.[59]

57. Wastl *v.* Montana Union R. Co., 24 Mont. 159, 177, 61 Pac. 9, where such was said to be the sense in which the term was employed in an instruction that, although plaintiff was negligent, he was not precluded from a recovery unless his negligence was the proximate cause of the injury.

58. U. S. *v.* Hudson, 65 Fed. 68, 71. See also People *v.* Hamilton, 27 Misc. (N. Y.) 308, 310, 58 N. Y. Suppl. 584, where "the" used before certain words was said to give those words precise and definite application.

"At most, it is nothing more than a definite adjective, as opposed to an indefinite article." Anundsen *v.* Standard Printing Co., 129 Iowa 200, 206, 105 N. W. 424.

Has sometimes been construed to mean "all of the." Anundsen *v.* Standard Printing Co., 129 Iowa 200, 206, 105 N. W. 424.

59. Hains *v.* Vineberg, 15 Quebec Super. Ct. 1, 4.

A general proposition of law was announced to the jury in an instruction that "an unlawful intent may be inferred from the conduct which shows a reckless disregard of consequences," etc., and the use of the word "the" preceding the word "conduct" did not convey to the mind of the jury the idea that the court was characterizing the conduct of the conductor, who was alleged to have inflicted the injuries for which the suit was brought, as reckless, etc. Citizens' St. R. Co. *v.* Willoeby, 134 Ind. 563, 567, 33 N. E. 627.

"The county," in an indictment where the name of the county was first written out in full and twice thereafter referred to as "the 'county aforesaid,'" was held to be a sufficient designation of the venue, the definite article "the" necessarily referring to the name of the county first mentioned. Sanderlin *v.* State, 2 Humphr. (Tenn.) 315, 319.

The word has received judicial construction in the following phrases: "The administrator" (in statute enabling parties to civil actions to be witnesses therein) see Palmer *v.* Kellogg, 11 Gray (Mass.) 27, 28. "The article" (in contract for transportation by express company) see Wetzell *v.* Dinsmore, 54 N. Y. 496, 499. "The burden" (in charge to jury) see Goodwin *v.* Mortsen, (Tex. Civ. App. 1910) 128 S. W. 1182, 1184. "The company" (in contract) see Tolhurst *v.* Associated Portland Cement Manufacturers, [1903] A. C. 414, 420, 72 L. J. K. B. 834, 89 L. T. Rep. N. S. 196, 19 T. L. R. 677, 52 Wkly. Rep. 143. "The crew" (in shipping articles) see Frazer *v.* Hatton, 2 C. B. N. S. 512, 526, 3 Jur. N. S. 694, 26 L. J. C. P. 226, 5 Wkly. Rep. 632, 89 E. C. L. 512. "The deceased" (in statute) see *In re* Gibbs, [1898] 1 Ch. 625, 628, 67 L. J. Ch. 282, 78 L. T. Rep. N. S. 289, 14 T. L. R. 317, 46 Wkly. Rep. 477. "The men" (in statute regulating operation of mines) see Osterholm *v.* Boston, etc., Consol. Copper, etc., Co., 40 Mont. 508, 107 Pac. 499, 502. "The Model" (as trade-name) see Wormser *v.* Shayne, 111 Ill. App. 556, 564. "The premises" (in written consent to location of saloon required by liquor law (see State *v.* Mateer, 94 Iowa 42, 44, 62 N. W. 684. "The property" (in fire insurance policy) see Born *v.* Home Ins. Co., 110 Iowa 379, 383, 81 N. W. 676, 80 Am. St. Rep. 300. "The same" (in demurrer to pleading) see Terre Haute, etc., R. Co. *v.* Sherwood, 132 Ind. 129, 130, 31 N. E. 781, 32 Am. St. Rep. 239, 17 L. R. A. 339. "The same" (in declaration in trespass on the case) see Hare *v.* Horton, 5 B. & Ad. 715, 729, 3 L. J. K. B. 41, 2 N. & M. 428, 27 E. C. L. 302, 110 Eng. Reprint 954. "The same not to be due" (in contract) see French Spiral Spring Co. *v.* New England Car Trust, 32 Fed. 44, 46.

THEATERS AND SHOWS

By Alexander Karst *

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* Author of "Real Actions," 33 Cyc. 1541; "Slaves," 36 Cyc. 465; "Sodomy," 36 Cyc. 501; "Threats," *post,* p. 285. Joint author of "Religious Societies," 34 Cyc. 1112. Editor of "Seamen," 35 Cyc. 1176.

CROSS-REFERENCES

For Matters Relating to:

Carrying Weapon at Place of Amusement, see WEAPONS.

Conspiracy to Injure Theatrical Production by Hissing, see CONSPIRACY, 8 Cyc. 633 note 32.

Constitutional Law, see CONSTITUTIONAL LAW, 8 Cyc. 871 note 4, 900 note 87.

Copyright of Dramatic or Musical Composition, see COPYRIGHT, 9 Cyc. 961.

Discrimination as to Places of Amusement as Infringing Civil Rights, see CIVIL RIGHTS, 7 Cyc. 171.

Enjoining Actor From Performing For Rival Theater, see INJUNCTIONS, 22 Cyc. 859.

Enticement of Actor to Break Engagement, see MASTER AND SERVANT, 26 Cyc. 1581 note 47.

Forgery of Theater Ticket, see FORGERY, 19 Cyc. 1387.

Imputation Against Actor as Libel or Slander, see LIBEL AND SLANDER, 25 Cyc. 345 note 62.

Literary Property in:

Dramatic Composition, see LITERARY PROPERTY, 25 Cyc. 1489, 1497.

Musical Composition, see LITERARY PROPERTY, 25 Cyc. 1492, 1496.

Obscene Exhibition, see OBSCENITY, 29 Cyc. 1319.

Opera, see OPERA, 29 Cyc. 1495.

Qualified Privilege of Criticism of Public Entertainment, see LIBEL AND SLANDER, 25 Cyc. 402 note 78.

Show on Sunday, see SUNDAY, 37 Cyc. 550.

Theater or Show as Nuisance, see NUISANCES, 29 Cyc. 1183; DISORDERLY HOUSES, 35 Cyc. 488.

Use of School-House For Theatrical Performance, see SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 943 note 1.

I. TERMINOLOGY.[1]

A. Theater. A theater is a house for the exhibition of dramatic performances,[2] a playhouse comprehending the stage, the pit, the boxes, galleries, and orchestra.[3] Although it is held that the word does not necessarily import any-

1. **Exhibition"** defined see 17 Cyc. 1498.
"Show" defined see 36 Cyc. 434.

2. Bell *v.* Mahn, 121 Pa. St. 225, 227, 15 Atl. 523, 6 Am. St. Rep. 786, 1 L. R. A. 364; Com. *v.* Reifsnyder, 3 Pa. Dist. 193, 194, 14 Pa. Co. Ct. 353 [*citing* Webster Dict.]; Com. *v.* Keeler, 3 Pa. Dist. 158, 161; Rowland *v.* Kleber, 1 Pittsb. (Pa.) 68, 71.

A circus is not a theater. Jacko *v.* State, 22 Ala. 73, 74; Com. *v.* Reifsnyder, 3 Pa. Dist. 193, 194, 14 Pa. Co. Ct. 353; Rowland *v.* Kleber, 1 Pittsb. (Pa.) 68, 71.

Within the meaning of the War Revenue Act of 1898 every edifice used for the purpose of dramatic or operatic or other representations, plays, or performances, for admission to which entrance money was received, not including halls rented or used occasionally for concerts or theatrical representations, was regarded as a theater. 30 U. S. St. at L. 448 [U. S. Comp. St. (1901) p. 2287].

"Theatrical" means of or pertaining to a theater or scenic representations resembling the manner of dramatic performers (Century Dict. [*quoted* in State *v.* Morris, (Del. 1910) 76 Atl. 479, 480]); of or pertaining to a theater or scenic or dramatic representations (Webster Dict. [*quoted* in State *v.* Morris, *supra*]); of or pertaining to the theater; of the nature of dramatic or scenic representations; befitting the stage; dramatic (Standard Dict. [*quoted* in State *v.* Morris, *supra*]).

"Theatrical performance," although not ordinarily included in the term "circus," may be if a statute specifically so declares. State *v.* Morris, (Del. 1910) 76 Atl. 479, 480. A musical performance is not a theatrical, nor a dramatic performance, within the meaning of Ohio Rev. St. § 7032*a*, prohibiting any theatrical or dramatic performance of any kind or description on Sunday. State *v.* Fennessy, 10 Ohio Dec. (Reprint) 608, 609, 22 Cinc. L. Bul. 198.

3. Rowland *v.* Kleber, 1 Pittsb. (Pa.) 68, 71. See also Bell *v.* Mahn, 121 Pa. St. 225, 15 Atl. 523, 6 Am. St. Rep. 786, 1 L. R. A. 364.

Other definitions are: "The house in which dramatic compositions are spoken or recited, by persons called actors." Rowland *v.* Kleber, 1 Pittsb. (Pa.) 68, 71.

"A building appropriated to the representation of dramatic spectacles; a place for shows, a play-house." Com. *v.* Cox, 10 Phila. (Pa.) 204.

thing but the stage on which the actors play and the room in which the acting is done and seen,[4] when used in the sense of a show or exhibition it may refer not to the place but to the troupe or to the exhibition itself.[5] Although the term has an extended significance and comprehends a variety of performances, yet it is conceived that all which it does legitimately comprehend partake more or less of the character of the drama. The dramatic performances which are recognized as belonging to a theater are those adapted to the stage with the appropriate scenery for their representation.[6]

B. Circus. A circus is a circular inclosure,[7] with a ring,[8] for the exhibition of games and shows,[9] including feats of horsemanship.[10]

C. Museum. A museum is a building or institution for the cultivation of science or the exhibition of curiosities or works of art.[11] The word is a comprehensive term, and may embrace within its meaning a menagerie as well as many other things.[12]

D. Amusement; Place of Public Amusement. The word "amusement" is synonymous with diversion, entertainment, relaxation, recreation, pastime, and sport;[13] and "places of public amusement" include not only theaters, music halls, and the like, but dance halls,[14] places where horse-racing is held,[15] and in

The stage with its machinery and appurtenances forms an essential element in the definition of the term "theater." Jacko *v.* State, 22 Ala. 73, 74.

4. Lee *v.* State, 56 Ga. 477, 478.

5. Com. *v.* Keeler, 3 Pa. Dist. 158, 161, under the Pennsylvania License Act of 1845.

6. Jacko *v.* State, 22 Ala. 73, 74.

Dramatic, theatrical, or operatic entertainments.— Songs and duets sung by persons in costume may be parts of a dramatic, theatrical, or operatic entertainment and must be so regarded when connected with dialogue and sung in a public place of resort fitted up with a stage, orchestra, etc., for theatrical performances. Society For Reformation of Juvenile Delinquents *v.* Diers, 10 Abb. Pr. N. S. (N. Y.) 216, 221.

7. Rowland *v.* Kleber, 1 Pittsb. (Pa.) 68, 71.

8. Jacko *v.* State, 22 Ala. 73, 74.

9. Com. *v.* Reifsnyder, 3 Pa. Dist. 193, 194, 14 Pa. Co. Ct. 353 [*quoting* Webster Dict.].

The meaning of "circus" may be included in the term "theatrical performances." State *v.* Morris, (Del. 1910) 76 Atl. 479, 480.

A wild west show is not a circus nor is it an "other exhibition" within the meaning of a statute relating to the licensing of "circus and other exhibitions." State *v.* Cody, (Tex. Civ. App. 1909) 120 S. W. 267, 269.

10. Rowland *v.* Kleber, 1 Pittsb. (Pa.) 68, 71.

A circus as contradistinguished from a theater has no stage but a ring; and the performances are of a character that can take place in the circle in the absence of the stage and its appurtenances; hence the term "theater" does not include circus. Jacko *v.* State, 22 Ala. 73, 75. But see State *v.* Morris, (Del. 1910) 76 Atl. 479.

Anciently a circus was an edifice or inclosure used for the exhibition of games and shows to the people, such as the circus maximus. Rowland *v.* Kleber, 1 Pittsb. (Pa.) 68, 71.

Circus performers are liable to penalty imposed by statute upon jugglers and exhibition of shows if they exhibit without license. Downing *v.* Blanchard, 12 Wend. (N. Y.) 383.

11. Black L. Dict.

12. Bostick *v.* Purdy, 5 Stew. & P. (Ala.) 105, 109, where it is said that by tracing the Greek word, from which "museum" is derived, to its root, it is found to signify amusement, or to amuse: and thus, the term "museum," would appear to embrace not only collections of curiosities, for the entertainment of the sight, but also such as would interest, amuse, and instruct the mind.

Eden Musée see New York *v.* Eden Musée American Co., 102 N. Y. 593, 595, 8 N. E. 40.

13. Webster Dict. [*quoted* in Pearson *v.* Seattle, 14 Wash. 438, 442, 44 Pac. 884].

Eden Musée.— N. Y. Laws (1882), c. 410, § 1998, requiring certain amusements to obtain a license before exhibiting, covers the Eden Musée, which is an exhibition of wax figures, with a hall adjacent in which refreshments are served, and orchestral selections of a high character are rendered in a room or alcove which opens, at an elevation, into a large room or hall, and on a level with a high gallery encircling said hall. New York *v.* Eden Musée American Co., 102 N. Y. 593, 595, 8 N. E. 40.

14. Com. *v.* Quinn, 164 Mass. 11, 12, 40 N. E. 1043; Pearson *v.* Seattle, 14 Wash. 438, 442, 44 Pac. 884.

A private dancing school is not within the term "public amusement" (Com. *v.* Gee, 6 Cush. (Mass.) 174, 179); but a dance hall to which the public is admitted on payment of a small fee is a "public amusement" within Pub. St. c. 102, § 116, providing that whoever carries on any public show, amusement, or exhibition without a license shall be fined (Com. *v.* Quinn, 164 Mass. 11, 12, 40 N. E. 1043).

15. Greenberg *v.* Western Turf Assoc., 148 Cal. 126, 128, 82 Pac. 684, 113 Am. St. Rep.

addition to these generally all places where exhibitions are given of a theatrical nature.[16]

E. Minstrelsy.[17] Minstrelsy is the art or occupation of minstrels, singing and playing in the manner of a minstrel, lyrical song and music.[18] The term has acquired a much broader meaning than formerly.[19]

II. REGULATION AND LICENSE.[20]

A. Power to Regulate — 1. PUBLIC AMUSEMENTS IN GENERAL — a. State Regulation. The legislature, where it is not expressly or by necessary implication prohibited either by the federal or state constitution, has power to regulate theaters and other places of amusement both as a legitimate exercise of the taxing power of the state, and also as a part of its police power;[21] and in order to enforce its prohibitory legislation, the state may authorize any person to institute suits, either in his own name or in the name of the people of the state, to recover penalties for violation of such laws.[22] The legislature may regulate to the extent required by the public health, morals, comfort, and general welfare,[23] and thus may, as custodian of the public morals, declare what exhibitions and performances are

216; Grannan *v.* Westchester Racing Assoc., 16 N. Y. App. Div. 8, 19, 44 N. Y. Suppl. 790 [*reversed* on other grounds in 153 N. Y. 449, 47 N. E. 896]. But see U. S. *v.* Buffalo Park, 24 Fed. Cas. No. 14,681, 16 Blatchf. 189, 8 Reporter 582.

16. *In re* Gartenstein, 4 Pa. Dist. 37, 40; Com. *v.* Mehler, 19 Phila. (Pa.) 529; Matter of Hastings, 15 Phila. (Pa.) 420, 422.

A merry-go-round maintained in an inclosure upon a public street where music is furnished free, but a charge is made for riding upon the flying horses is a public amusement. Com. *v.* Bow, 177 Mass. 347, 348, 58 N. E. 1017.

"Jugglers and the exhibition of shows."— Where white persons dressed and disguised as negroes exhibit or perform for gain or profit, singing negro songs, dancing in a grotesque manner, giving mock psychological lectures, mesmerizing each other, and performing feats with chairs on their heads, they come within the prohibition of the statute relative to "jugglers, and the exhibition of shows." Thurber *v.* Sharp, 13 Barb. (N. Y.) 627, 628.

17. **"Concert"** defined see 8 Cyc. 550.

18. Century Dict.

19. New York *v.* Eden Musée American Co., 102 N. Y. 593, 595, 8 N. E. 40.

A performance consisting of songs, glees, recitations, selections from operas and oratorios, and solos, trios, and quartets of various musical instruments is an exhibition of minstrelsy, within the meaning of N. Y. Laws (1872), c. 836, and the hall or room in which they are given is, for the time being, a concert room when fitted up for the purpose, with printed programs issued and tickets sold to all buyers, raised stages or platforms or seats for the spectators, and provided with a man at the door to take the tickets of persons applying for admittance. Society for Reformation of Juvenile Delinquents *v.* Neusbach, 16 N. Y. Wkly. Dig. 349.

20. License generally see LICENSES, 25 Cyc. 593.

21. *California.*—Greenberg *v.* Western Turf Assoc., 140 Cal. 357, 73 Pac. 1050 (holding that St. (1893) p. 220, c. 185, making it unlawful to refuse admission to any opera house, theater, race-course, or other place of public amusement to any adult who presents a ticket of admission, and providing that any person so refused admission shall be entitled to recover his actual damages and one hundred dollars in addition thereto, is a valid regulation established by the state in the exercise of its police power); People *v.* Coleman, 4 Cal. 46, 60 Am. Dec. 581.

Illinois.— People *v.* Steele, 231 Ill. 340, 83 N. E. 236, 121 Am. St. Rep. 321, 14 L. R. A. N. S. 361.

Maryland.— Germania *v.* State, 7 Md. 1.

Massachusetts.— Com. *v.* Colton, 8 Gray 488; Boston *v.* Schaffer, 9 Pick. 415.

New York.— People *v.* King, 110 N. Y. 418, 18 N. E. 245, 6 Am. St. Rep. 389, 1 L. R. A. 293; New York Eden Musée American Co., 102 N. Y. 593, 8 N. E. 40; Wallack *v.* New York, 3 Hun 84, 5 Thomps. & C. 310 [*affirmed* in 67 N. Y. 23].

United States.— License Tax Cases, 5 Wall. 462, 475, 18 L. ed. 497.

See 45 Cent. Dig. tit. "Theaters," § 1 *et seq.*

22. Wallack *v.* New York, 3 Hun (N. Y.) 84, 5 Thomps. & C. 310 [*affirmed* in 67 N. Y. 23].

Complaint.—Where a statute contemplates one offense in the commission of which two classes of offenders may be engaged, a complaint against both is good and states but one cause of action. People *v.* Kolb, 3 Abb. Dec. (N. Y.) 529, 3 Keyes 236, holding that under N. Y. Laws (1839), c. 13, imposing a penalty on managers of theatrical exhibitions carried on without license, and on owners, etc., of buildings let therefor, an offense by both is one and entire, and the penalty for one offense is single; and a complaint against both for a penalty states but one cause of action.

23. Chicago *v.* Powers, 231 Ill. 560, 83 N. E. 240; People *v.* Steele, 231 Ill. 340, 83

harmless and innocent, and what are not, and may regulate or prohibit those considered hurtful to the community,[24] such as horse-racing;[25] may prohibit certain theatrical or other entertainments on Sunday,[26] or the sale of liquor in specified places of amusement;[27] and may make police regulations as to the hours and modes of occupying places of amusement so as to make their use consistent with the peace of the community,[28] or require free and open ingress and egress to and from public amusements,[29] or forbid the appearance of children under certain years on the stage,[30] or their admission to the show without adult

N. E. 236, 121 Am. St. Rep. 321, 14 L. R. A. N. S. 361.

24. Neuendorff *v.* Duryea, 6 Daly (N. Y.) 276, 52 How. Pr. 267.

25. State Racing Commission *v.* Latonia Agricultural Assoc., 136 Ky. 173, 123 S. W. 681, 25 L. R. A. N. S. 905 (holding that horse-racing in public may be regulated by the state under the police power, or may be prohibited altogether); Grannan *v.* Westchester Racing Assoc., 153 N. Y. 449, 47 N. E. 896; People *v.* State Racing Commission, 57 Misc. (N. Y.) 331, 103 N. Y. Suppl. 955.

History of racing legislation in the several states see State Racing Commission *v.* Latonia Agricultural Assoc., 136 Ky. 173, 123 S. W. 681, 25 L. R. A. N. S. 905.

26. People *v.* Hoym, 20 How. Pr. (N. Y.) 76. And see, generally, SUNDAY, 37 Cyc. 550.

27. *In re* Gartenstein, 15 Pa. Co. Ct. 612; State *v.* White, 7 Baxt. (Tenn.) 158.

Question of fact.— The question whether exhibitions on premises licensed for the sale of liquor constitute the house a "theater" or "place of amusement" within the meaning of the act is not to be decided as a point of etymology, but is a broad question of fact, to be determined in view of all the circumstances and surroundings. *In re* Gartenstein, 15 Pa. Co. Ct. 612.

28. Com. *v.* Colton, 8 Gray (Mass.) 488, a statute prohibiting the use of bowling alleys after six o'clock on Saturday afternoon.

29. New York Fire Dept. *v.* Stetson, 14 Daly (N. Y.) 125; Sturgis *v.* Grau, 39 Misc. (N. Y.) 330, 79 N. Y. Suppl. 843.

Under N. Y. Laws (1897), c. 378, § 762, being the charter of the city of New York, providing for the punishment of any manager or employee of a theater who shall allow any obstructions to remain in an aisle thereof, the word "aisle" means the aisle of a theater as actually constructed, and not a theoretical aisle of the minimum width permissible under the building code of the city; and a manager of a theater who allows patrons to occupy stools and chairs in a side aisle of his theater as constructed, and refuses to remove them on notice, is liable to the penalty imposed. Sturgis *v.* Coleman, 38 Misc. 302, 77 N. Y. Suppl. 886. Where a theater has a front and a side entrance, both of which are permitted to be used, and people are permitted to stand in a space necessary for a passageway in the use of the side entrance alone, the manager is liable for the penalty imposed by the above charter (§§ 762, 773), forbidding the manager to cause or permit any person to occupy a passageway during a performance. Sturgis *v.* Hayman, 84 N. Y. Suppl. 126.

Evidence.— To recover the penalty for obstructing passageways in a theater during a performance, it is not necessary to prove that the proprietor or manager knew that any persons were standing in the passageway at the time in question, or that he gave permission to any one to do so, and the evidence is sufficient where it is shown that tickets for the performance were sold by his agents after they knew that the seats in the house were filled, in the absence of evidence that such sale was in opposition to his wishes. New York Fire Dept. *v.* Stetson, 14 Daly (N. Y.) 125; New York Fire Dept. *v.* Hill, 14 N. Y. Suppl. 158, construing Laws (1885), c. 456, § 28. And even where guilty knowledge is the gravamen of the offense, it may be shown that the act complained of was done in pursuance of a general authority given by the proprietor or manager to his servants or agents, which may be implied from circumstances. New York City Fire Dept. *v.* Stetson, 14 Daly (N. Y.) 125. It is competent for the proprietor or manager to show, if he can, that the wrongful act was done in opposition to his wishes; but his disavowal of it is not conclusive, and may be overcome by direct or circumstantial evidence. New York Fire Dept. *v.* Stetson, 14 Daly (N. Y.) 125.

The fact that the proprietor or manager was residing in another state at the time of the violation of the statute will not protect him from liability. New York Fire Dept. *v.* Stetson, 14 Daly (N. Y.) 125.

Where the lessee of a theater lets to another the privilege of giving performances therein, the latter admitting persons who crowd the passageways on occasions of giving performances, and the attention of the lessee is directed by an officer to the violation of the statute imposing a penalty for allowing aisles and passageways of theaters to be crowded, and the lessee promises a compliance thereafter with the statute but the infractions of the law are continued, the lessee is liable for the penalty imposed. New York Fire Dept. *v.* Hill, 14 N. Y. Suppl. 158.

30. State *v.* Mackin, 51 Mo. App. 129; People *v.* Ewer, 141 N. Y. 129, 36 N. E. 4, 38 Am. St. Rep. 788, 25 L. R. A. 794; People *v.* Meade, 10 N. Y. Suppl. 943, 24 Abb. N. Cas. 357.

Even the consent of the mayor will not authorize the appearance of a minor pro-

escort.[31] Ordinarily the courts will not sit in review of the judgment and discretion of the legislative body,[32] or inquire into the reasons which induced the legislature to make the regulation complained of;[33] but a statute cannot be sustained if it is not a valid exercise of police power, but a vexatious and unlawful interference with the rights of private property,[34] or if it prohibits an act which is innocent in character with no tendency to affect, injure, or endanger the public health, morals, or safety,[35] as for instance a statute making it unlawful, after the opening of an exhibition or show, to sell tickets so as to reserve particular seats when not reserved by the sale of tickets therefor previous to the opening,[36] or a statute prohibiting any person from selling tickets to theaters or other public places of amusement for a price higher than that ordinarily charged by the management of such amusement places.[37]

b. Municipal Regulation. The legislature may, subject to constitutional limitations, delegate to a municipal corporation the power to regulate, license, tax, restrain, or prohibit exhibitions, shows, theaters, and other places of amusement,[38] and the incidental power implied in the creation of such a corporation to enact such reasonable ordinances in keeping with its general powers and purposes as may be needful for its well being and not inconsistent with the laws or policy of the state embraces the power to regulate in a reasonable way theaters and other places of amusement,[39] as for instance by sending fire officers to attend performances.[40] The exercise of the police power must, however, be reasonable,[41] and regulating ordinances must not be repugnant to the charter,[42] or authorizing statute,[43] under the general rule that ordinances passed under a general grant of power must be reasonable, consonant with the general powers and purposes of the corporation, and not inconsistent with the laws or policy of the state,[44] and any ordinance not strictly within these limitations is void,[45] and since a

hibited from appearing by a state statute. Matter of Stevens, 70 Hun (N. Y.) 243, 24 N. Y. Suppl. 780; People *v.* Grant, 70 Hun (N. Y.) 233, 24 N. Y. Suppl. 776.

31. People *v.* Flaherty, 122 N. Y. App. Div. 878, 107 N. Y. Suppl. 415; People *v.* Jensen, 99 N. Y. App. Div. 355, 90 N. Y. Suppl. 1062.

Liability of ticket taker.— A ticket taker at a theater is not a person who manages the theater in part within N. Y. Pen. Code, § 290, declaring a person who permits to remain in any theater owned, or kept, or managed by him in whole or in part, any child under the age of sixteen years, unless accompanied by its parent, guilty of a misdemeanor. People *v.* Kings County, 54 Misc. (N. Y.) 8, 105 N. Y. Suppl. 387 [*affirmed* in 122 N. Y. App. Div. 878, 107 N. Y. Suppl. 415 (*affirmed* in 191 N. Y. 525, 84 N. E. 1118)].

32. Neuendorff *v.* Duryea, 6 Daly (N. Y.) 276, 52 How. Pr. 267.

33. Com. *v.* Colton, 8 Gray (Mass.) 488.

34. District of Columbia *v.* Saville, 1 MacArthur (D. C.) 581, 29 Am. Rep. 616.

35. *Ex p.* Quarg, 149 Cal. 79, 84 Pac. 766, 117 Am. St. Rep. 115, 5 L. R. A. N. S. 183.

36. District of Columbia *v.* Saville, 1 MacArthur (D. C.) 581, 29 Am. Rep. 616.

37. *Ex p.* Quarg, 149 Cal. 79, 84 Pac. 766, 117 Am. St. Rep. 115, 5 L. R. A. N. S. 183; People *v.* Steele, 231 Ill. 340, 83 N. E. 236, 14 L. R. A. N. S. 361.

38. Greenberg *v.* Western Turf Assoc., 140 Cal. 357, 73 Pac. 1050; Boston *v.* Schaffer, 9 Pick. (Mass.) 415; People *v.* King, 110 N. Y. 418, 18 N. E. 245, 6 Am. St. Rep. 389, 1 L. R. A. 293.

39. *Ex p.* Quarg, 149 Cal. 79, 84 Pac. 766, 117 Am. St. Rep. 115, 5 L. R. A. N. S. 183; Indianapolis *v.* Miller, 168 Ind. 285, 80 N. E. 626, 8 L. R. A. N. S. 822; Champer *v.* Greencastle, 138 Ind. 339, 35 N. E. 14, 46 Am. St. Rep. 390, 24 L. R. A. 768; Cincinnati *v.* Brill, 5 Ohio S. & C. Pl. Dec. 566, 7 Ohio N. P. 534, where it was held that a city council had the power to prescribe an ordinance providing that it should be unlawful for any person to sell reserved seats for a theatrical or other performance after the doors of the theater should be opened.

40. Norris *v.* McFadden, 159 Mich. 424, 124 N. W. 54, holding that such officers are not trespassers.

41. Duluth *v.* Marsh, 71 Minn. 248, 73 N. W. 962.

Ticket scalping.— A municipal ordinance prohibiting the sale of theater tickets at more than office rates is invalid (Chicago *v.* Powers, 231 Ill. 560, 83 N. E. 240); and a state statute to that effect is unconstitutional (People *v.* Steele, 231 Ill. 340, 83 N. E. 236, 121 Am. St. Rep. 321, 14 L. R. A. N. S. 361). So also of a statute making the sale a misdemeanor. *Ex p.* Quarg, 149 Cal. 79, 84 Pac. 766, 117 Am. St. Rep. 115, 5 L. R. A. N. S. 183.

42. Waters *v.* Leech, 3 Ark. 110.

43. Standard Athletic Club *v.* Cushing, 30 R. I. 208, 74 Atl. 719.

44. Indianapolis *v.* Miller, 168 Ind. 285, 80 N. E. 626, 8 L. R. A. N. S. 822.

45. *California.*— *Ex p.* Quarg, 149 Cal. 79,

municipal corporation has such powers only as are conferred upon it by the legislature, it cannot exercise such power in the absence of the legislative authority, express or implied.[46] Thus while theaters are subject to the police power in some particulars, yet it can by no means be said that the business of conducting a playhouse is in its own nature a nuisance,[47] and, although it is proper that there should be municipal legislation looking to the regulation of those who gather to attend the theater, and although a nuisance may be created by adjoining proprietors by crowds awaiting admission to a place of amusement,[48] it is doubted whether the mere possibility that persons who are awaiting the opening of the theater door may be guilty of rough or immoral conduct, while standing in a gathering, is such an evil that the right to use the entrance should altogether be denied as amounting to a public nuisance; [49] and the validity of an absolutely repressive measure is questioned, and it is held that legislation could scarcely be devised which would not operate with harshness in some circumstances so long as it was directed against the act of the proprietor of the playhouse in merely opening his door to receive patrons.[50]

2. Moving Picture Shows. The power to regulate places of amusement and shows extends to moving picture shows.[51] Thus a city may by ordinance forbid exhibitions of immoral, obscene, or otherwise criminal moving or stationary pictures,[52] and may require the submission of films to the police authorities before

84 Pac. 766, 117 Am. St. Rep. 115, 5 L. R. A. N. S. 183.

Indiana.— Indianapolis *v.* Miller, 168 Ind. 285, 80 N. E. 626, 8 L. R. A. N. S. 822 (holding that a city ordinance requiring all theater entrances for patrons to be on a public street and not on an alley, and requiring the maintenance of an office or other place for the sale of tickets for any part of the building, was unreasonable and not the proper exercise of the city's police power and could not be enforced); Champer *v.* Greencastle, 138 Ind. 339, 35 N. E. 14, 46 Am. St. Rep. 390, 24 L. R. A. 768; Bills *v.* Goshen, 117 Ind. 221, 20 N. E. 115, 3 L. R. A. 261.

Michigan.— *In re* Frazee, 63 Mich. 396, 30 N. W. 72, 6 Am. St. Rep. 310.

Ohio.— Cincinnati *v.* Brill, 5 Ohio S. & C. Pl. Dec. 566, 7 Ohio N. P. 534.

Virginia.— Robinson *v.* Norfolk, 108 Va. 14, 60 S. E. 762, 128 Am. St. Rep. 934, 15 L. R. A. N. S. 294.

See 45 Cent. Dig. tit. "Theaters," § 1 *et seq.*

46. See Municipal Corporations, 28 Cyc. 693.

Construction of charter or statute.— The city charter of Houston, providing that "the city council shall have power to prohibit and punish keepers and inmates of bawdy houses and variety shows, and to segregate and regulate the same, and determine such inmates and keepers to be vagrants," does not authorize an ordinance declaring any place a variety show where persons engage in music, dancing, or plays, and liquor is sold, offered, or given to any person there present, and punishing and keeping of such show by fine. *Ex p.* Bell, 32 Tex. Cr. 308, 22 S. W. 1040, 40 Am. St. Rep. 778.

47. Indianapolis *v.* Miller, 168 Ind. 285, 80 N. E. 626, 8 L. R. A. N. S. 822 [*citing* 1 Hawkins Pleas of the Crown 693; Joyce Law Nuisances, § 115; Wood Nuisances (3d ed.), § 52]. And see, generally, Nuisances, 29 Cyc. 1183.

48. See Indianapolis *v.* Miller, 168 Ind. 285, 80 N. E. 626, 8 L. R. A. N. S. 822 [*citing* Barber *v.* Penlay, [1893] 2 Ch. 447, 62 L. J. Ch. 623, 68 L. T. Rep. N. S. 662, 3 Reports 489; Bellamy *v.* Wells, 60 L. J. Ch. 156, 63 L. T. Rep. N. S. 635, 39 Wkly. Rep. 158].

49. Indianapolis *v.* Miller, 168 Ind. 285, 80 N. E. 626, 8 L. R. A. N. S. 822.

50. Indianapolis *v.* Miller, 168 Ind. 285, 80 N. E. 626, 8 L. R. A. N. S. 822, holding that there may be ground of criticism that the management of a theater should subject its patrons to discomfort in approaching the entrance thereto, but an evil of that nature cannot, under existing law, be corrected by ordinance.

51. Block *v.* Chicago, 239 Ill. 251, 87 N. E. 1011, 130 Am. St. Rep. 219; McKenzie *v.* McClellan, 62 Misc. (N. Y.) 342, 116 N. Y. Suppl. 645; Economopoulos *v.* Bingham, 109 N. Y. Suppl. 728.

A free moving picture show in an ice-cream saloon and candy store to draw trade is not a common show within the meaning and purpose of the charter of the city of New York and city ordinances, such as requires a license to conduct it, and may therefore be conducted without a license so long as it does not amount to a nuisance. Weistblatt *v.* Bingham, 58 Misc. (N. Y.) 328, 109 N. Y. Suppl. 545.

52. Block *v.* Chicago, 239 Ill. 251, 87 N. E. 1011, 130 Am. St. Rep. 219, holding that moving pictures depicting the career of the "James boys" portray exhibitions of crime, and pictures of the "night riders" portray malicious mischief, arson, and murder, and that they are immoral, although they illustrate experiences connected with the history of the country.

Validity of ordinance.— As Chicago city charter, art. 5, c. 45, empowering the city

exhibition,[53] may forbid the exhibition of moving pictures on Sunday,[54] and may provide for the revocation of licenses by the city officials upon cause shown.[55]

B. Licenses and Taxes — 1. By Whom Imposed — a. State. The legislature may within constitutional limitations, either in the exercise of the police power or for the purposes of revenue, impose a license-tax on theaters and other places of amusement, and require them to be licensed by the proper authorities,[56] and may provide a fine for violation of the license law.[57] Such an act may apply both to permanent and established, and to transient or strolling, performances,[58] and the right to license extends to operatic performances,[59] negro or other minstrelsy,[60] merry-go-rounds,[61] flying jennies,[62] and public dance halls.[63] But only those places need be licensed which are within the statute requiring licenses,[64] and where the subject of the statute, as expressed in the title, is licenses in particular specified cases, an enactment requiring a license in cases other than those specified is void.[65]

b. Municipality. As in the case of other occupations,[66] the legislature[66a] may

to prohibit the exhibition of obscene or immoral pictures, has no reference to theaters, their business not being the exhibition of pictures, an ordinance passed in pursuance of the clause, regulating moving picture shows, was not invalid as unreasonable because it did not cover theaters. The ordinance is not special and contains no discrimination against persons of the same class or engaged in the same business; the moving picture business being a separate branch of the amusement business. Block *v.* Chicago, 239 Ill. 251, 87 N. E. 1011, 130 Am. St. Rep. 219.

53. Block *v.* Chicago, 239 Ill. 251, 87 N. E. 1011, 130 Am. St. Rep. 219, holding that an ordinance, making it unlawful to exhibit moving pictures, without first obtaining a permit from the chief of police, after exhibiting the films to him, and making it the chief's duty to refuse the permit if the pictures are immoral or obscene, is not objectionable as discriminating because other persons might be illegally exhibiting immoral or obscene stereopticon or other stationary pictures.

54. Economopoulos *v.* Bingham, 109 N. Y. Suppl. 728. And see, generally, Sunday, 37 Cyc. 550.

55. McKenzie *v.* McClellan, 62 Misc. (N. Y.) 342, 116 N. Y. Suppl. 645; William Fox Amusement Co. *v.* McClellan, 62 Misc. (N. Y.) 100, 114 N. Y. Suppl. 594. And see *infra*, II, B, 6.

56. State *v.* Morris, (Del. 1910) 76 Atl. 479; State *v.* Schonhausen, 37 La. Ann. 42; People *v.* Campbell, 51 N. Y. App. Div. 565, 65 N. Y. Suppl. 114; Wallack *v.* New York, 3 Hun (N. Y.) 84, 5 Thomps. & C. 310 [*affirmed* in 67 N. Y. 23] (holding that Laws (1872), c. 830, requiring the managers and proprietors of places of amusement in the city of New York to procure licenses from the mayor as therein provided, and requiring him to pay over the amounts received by him to the treasurer of the society for the reformation of juvenile delinquents in such city for its use, was constitutional and valid; and that, even if the direction as to the disposition to be made of the license-fees were invalid, the other provisions of the act would not be affected thereby); Downing *v.* Blanchard, 12 Wend. (N. Y.) 383; Pearson *v.* Seattle, 14 Wash. 438, 44 Pac. 884.

A public building although occasionally rented for public amusements is not taxable. Camden *v.* Camden Village Corp., 77 Me. 530, 1 Atl. 689.

Presumption against violation of law.— There is a legal presumption that the manager of an opera has not violated the license statutes and that he has taken out a license as required. Fry *v.* Bennett, 28 N. Y. 324.

57. Nurdlinger *v.* Irvine, 2 Pa. Cas. 235, 4 Atl. 166, holding also that the payment of a fine for a failure to take out a license is not an equivalent for a license, and does not bar a suit to recover the amount of license-fees due.

58. Green *v.* Kousins, 3 Pa. Dist. 302; Com. *v.* Keeler, 3 Pa. Dist. 158; Trapp *v.* White, 35 Tex. 387.

59. Bell *v.* Mahn, 121 Pa. St. 225, 15 Atl. 523, 6 Am. St. Rep. 786, 1 L. R. A. 364.

60. Rowland *v.* Kleber, 1 Pittsb. (Pa.) 68. See also Shelby County Taxing Dist. *v.* Emerson, 4 Lea (Tenn.) 312.

61. Com. *v.* Bow, 177 Mass. 347, 58 N. E. 1017.

62. Mosby *v.* State, 98 Ala. 50, 13 So. 148.

63. Com. *v.* Quinn, 164 Mass. 11, 40 N. E. 1043 (under Pub. Sts. c. 102, §§ 115, 116); Pearson *v.* Seattle, 14 Wash. 438, 44 Pac. 884.

A private school for the teaching of dancing is not within a statute prohibiting the maintenance without license of any public show, amusement, or exhibition, although admittance is charged for on each evening. Com. *v.* Gee, 6 Cush. (Mass.) 174.

64. State *v.* Tilley, 9 Oreg. 125.

65. State *v.* Bowers, 14 Ind. 195.

66. See, generally, Licenses, 25 Cyc. 600, 602.

66a. *Indiana.*— Indianapolis *v.* Miller, 168 Ind. 285, 80 N. E. 626, 8 L. R. A. N. S. 822.

Massachusetts.— Boston *v.* Schaffer, 9 Pick. 415.

Minnesota.— State *v.* Scaffer, 95 Minn. 311, 104 N. W. 139 (holding that a theater is subject to municipal control, although ad-

confer upon a municipal corporation the authority to impose license-fees upon theaters and other public amusements for regulation or taxation, and the power to regulate or prohibit includes the power to license as a means to that end; and in respect to theaters and other public amusements a larger discretion on the part of municipalities is recognized than in the case of ordinary trades and occupations by reason of their liability to degenerate into nuisances, and also because they require more police supervision.[67] Where a license to conduct a house of entertainment is granted by a city ordinance on condition of payment of a certain tax, such payment is a condition precedent to the right to exercise the license, although such tax was illegal.[68] The legislature of a state cannot authorize a city to levy a license-tax upon a show exhibiting beyond its territorial limits, for the sole purpose of raising revenue to defray the general expenses of such city.[69]

c. Delegation of Power by Municipality. Where the power of licensing theaters and other public shows is vested by statute in the councils of a city, that body, being a legislative body, cannot delegate the function to the mayor, so as to render the duty discretionary and not ministerial,[70] unless such power to delegate is also conferred upon the municipality by the legislature.[71] But even though the municipality may have no such authority to delegate the power to the mayor, an ordinance delegating the power is not necessarily wholly void.[72]

mission is free); Duluth *v.* Marsh, 71 Minn. 248, 73 N. W. 962.

Missouri.— Hodkins *v.* McDonald, 123 Mo. App. 566, 100 S. W. 508.

Ohio.— Baker *v.* Cincinnati, 11 Ohio St. 534, sustaining a statute providing that a city council may license exhibitions of shows and performances, and "in granting such license, may exact and receive such sum or sums of money as the council shall think fit and expedient," and an ordinance passed for the purpose, which exacted from plaintiff, as a charge for a license to give theatrical exhibitions for six months, sixty-three dollars and fifty cents, and also a fee of one dollar for the officer issuing the license, the court holding that this was not illegal as being a tax on property.

Pennsylvania.— Titusville *v.* Gahan, 34 Pa. Super. Ct. 624.

Tennessee.— Robertson *v.* Heneger, 5 Sneed 257.

Texas.— *Ex p.* Bell, 32 Tex. Cr. 308, 22 S. W. 1040, 40 Am. St. Rep. 778.

Virginia.— Boer War Spectacle *v.* Com., 107 Va. 653, 60 S. E. 85.

See 45 Cent. Dig. tit. "Theaters and Shows," § 2 *et seq.*

Where a state statute imposes a license for an exhibition which is in effect a license to do an act, and not a tax upon property, the owner is not liable to pay in addition to the sum imposed by the statute any other amount for county levies. Orton *v.* Brown, 35 Miss. 426.

Where a statute expressly prohibits the levy of a license or other tax in specified districts or districts coming within stated descriptions, a license-tax levied in contravention thereof is not collectable. Negrotto *v.* Monett, 49 Mo. App. 286. See also Hodkins *v.* McDonald, 123 Mo. App. 566, 100 S. W. 508.

67. Duluth *v.* Marsh, 71 Minn. 248, 73 N. W. 962; Duluth *v.* Krupp, 46 Minn. 435, 49 N. W. 235; *In re* White, 43 Minn. 250, 45 N. W. 232.

68. Sights *v.* Yarnalls, 12 Gratt. (Va.) 292.

69. Robinson *v.* Norfolk, 108 Va. 14, 60 S. E. 762, 128 Am. St. Rep. 934, 15 L. R. A. N. S. 294, holding that Code (1887), § 1032 (Va. Code (1904), p. 487), providing that the jurisdiction of the corporate authorities of each town and city in criminal matters and for imposing and collecting a license-tax on all shows, performances, and exhibitions shall extend one mile beyond the corporate limits of such town or city, is invalid in so far as it authorizes a city to levy a license-tax on a circus exhibiting beyond its territorial limits for the sole purpose of raising revenue to defray the general expenses of such city.

70. State *v.* Jacob, 8 Ohio Dec. (Reprint) 23, 5 Cinc. L. Bul. 73.

71. *Ex p.* Ryan, 8 Ohio Dec. (Reprint) 299, 7 Cinc. L. Bul. 50, holding that under Rev. St. § 2669, as amended (77 Ohio Laws, p. 74), providing that "the council may provide by ordinance for licensing all exhibitors of shows, etc., and in granting such license may exact such sum as it may think expedient," and that "the council may confer upon, vest in, and delegate to the mayor the authority to grant and issue licenses, and revoke the same," the city council might delegate to the mayor authority to fix the amount of license-fees, within limits fixed by the council.

72. *Ex p.* Ryan, 8 Ohio Dec. (Reprint) 299, 7 Cinc. L. Bul. 50, where an ordinance prohibited unlicensed performances and delegated to the mayor power to grant and issue licenses and it was held that, even if such delegation were not authorized, the ordinance was not rendered entirely void; that in so far as it made the giving of a performance without a license invalid, the ordinance was lawful, and persons who would

2. Discretion as to Granting License. It is well settled on the ground of public policy that the power vested in a public officer to grant or refuse to license theaters and other places of public amusement, unless imperative in terms,[73] is discretionary;[74] and its exercise is not ordinarily controllable by mandamus,[75] nor subject to review by certiorari,[76] and on appeal the court will merely inquire whether a fair legal discretion was exercised,[77] for this discretion must be exercised reasonably and not arbitrarily.[78] When the power relates exclusively to the public welfare or is created for the protection of the public interests, the statute conferring it will be deemed mandatory;[79] and where the statute or ordinance is in express terms mandatory, the officer can exercise no discretion in granting or refusing the license.[80]

3. Construction and Validity of License. Licenses to conduct theatrical exhibitions or other public amusements are construed to embrace within their terms such other entertainments as are of the same general character as those specified.[81] But if not of the same kind they are not within the rule. Thus a license to keep a theater will not protect one who, by contract with the licensee, exhibits therein feats of legerdemain or sleight of hand.[82] Where a person conducts a place of public amusement under a license for nearly a year without objection on the part of the city issuing it, the latter cannot have it declared invalid on the ground that it failed to state the kind of amusement and particular place licensed as required by the ordinance.[83]

4. Duration of License. Where the statute or ordinance specifies the duration of the license, the license of course runs for that time.[84] Unless limited by statute it has been held that a theatrical license runs for one year from the date as of which the fee therefor is paid.[85]

avoid its penalties should pay the license-fee, and sue to recover it back if unlawfully exacted.

73. Com. *v.* Stokley, 12 Phila. (Pa.) 316. And see *infra*, note 80.

74. People *v.* Grant, 126 N. Y. 473, 27 N. E. 964; People *v.* Wurster, 14 N. Y. App. Div. 556, 43 N. Y. Suppl. 1088 (holding that the refusal to grant a first-class theatrical license to an athletic club, on information that the real purpose of the club is to conduct prize-fights, is a proper exercise of the mayor's discretion); People *v.* Grant, 58 Hun (N. Y.) 455, 12 N. Y. Suppl. 879 (holding that under New York City Consol. Act, §§ 1998, 1999, by which certain public exhibitions are prohibited "until a license for the place of such exhibition for such purposes" shall have been obtained, and the mayor is "authorized and empowered to grant such license on receiving for each license" the sum of five hundred dollars, the mayor, in his discretion, may refuse a license to an applicant, although the fee specified is tendered); People *v.* Thacher, 42 Hun (N. Y.) 349; People *v.* New York Bd. of Police, 36 Misc. (N. Y.) 89, 72 N. Y. Suppl. 583.

75. Armstrong *v.* Murphy, 65 N. Y. App. Div. 123, 72 N. Y. Suppl. 473; People *v.* Grant, 58 Hun (N. Y.) 455, 12 N. Y. Suppl. 879.

76. Armstrong *v.* Murphy, 65 N. Y. App. Div. 126, 72 N. Y. Suppl. 475.

77. *In re* Stedman, 14 Phila. (Pa.) 376.

78. Duluth *v.* Marsh, 71 Minn. 248, 73 N. W. 962; *In re* Stedman, 14 Phila. (Pa.) 376.

79. People *v.* Wurster, 14 N. Y. App. Div. 556, 43 N. Y. Suppl. 1088.

80. People *v.* Wurster, 14 N. Y. App. Div. 556, 43 N. Y. Suppl. 1088; Com. *v.* Stokley, 12 Phila. (Pa.) 316, holding that the mayor had no power to refuse to issue a license for a place of amusement on payment of the fee by the applicant under the Pennsylvania act of March 30, 1864 (Purdon Dig. p. 1396), providing that it shall not be lawful to exhibit any tragedy, comedy, opera, etc., or entertainment of the stage, or of vocal or instrumental music, "until a license for such exhibition, performance or entertainment, shall have been first had and obtained from the mayor of the city of Philadelphia, which license shall be granted by him for each and every place or building in which such exhibitions, performances or entertainments are held," etc.

81. Shelby County Taxing Dist. *v.* Emerson, 4 Lea (Tenn.) 312 (holding that a licensee may hire a negro minstrel troupe to give performances without making himself or the troupe liable to an additional tax under a license to keep a "theater, opera house, or concert hall, where theatrical entertainments are given"); Pearson *v.* Seattle, 14 Wash. 438, 44 Pac. 884. See also Jacko *v.* State, 22 Ala. 73.

82. Jacko *v.* State, 22 Ala. 73.

83. Pearson *v.* Seattle, 14 Wash. 438, 44 Pac. 884.

84. See Nurdlinger *v.* Irvine, 2 Pa. Cas. 235, 4 Atl. 166.

85. Nurdlinger *v.* Irvine, 2 Pa. Cas. 235, 4 Atl. 166; Green *v.* Kousins, 3 Pa. Dist.

5. License-Fees — a. By Whom Payable. The lessee of a theater cannot be required to pay a license-tax during the time that he is not in control of the theater even though it had been previously used for theatrical performances without the payment of a license.[86] On the other hand a statute authorizing the levy of a license-tax for carrying on or attending to the business of running an opera house does not authorize a tax against the owner of the building, who does not participate in the occupation carried on by his lessees.[87] Under some statutes the owner and lessee of a house used for theatrical or operatic exhibitions may settle by contract between them which one of them shall pay the license-fee, and the state is bound by the agreement.[88]

b. To Whom Payable. License-taxes imposed on theaters and other amusements, like other license-taxes, are payable to the officer designated in the statute or ordinance imposing the tax;[89] and where the statute or ordinance is silent, the local treasurer or tax collector is the proper party.[90]

c. Amount. What is a reasonable license-fee, under all the circumstances of the case, must be left largely to the sound discretion of the municipal authorities;[91] and unless the amount is so manifestly unreasonable, in view of its purpose as a police regulation, that it is apparent that the police power has been abused and made a pretext for doing what is forbidden, as, for example, imposing a tax, the courts ought not to, and will not, interfere with the municipal discretion.[92] The amount of a license-fee imposed by a municipality must, however, be such as is authorized by the statute granting the power to license.[93] Under an act giving boroughs the power to regulate, license, or prohibit theatrical exhibitions, a borough has the power to impose a *per diem* license-fee upon theatrical exhibitions, and the amount of such a license is not limited to the sum which will reimburse it for the pay of the police officers which it especially delegates to watch the actors during the performance.[94]

6. Revocation of License. In most licensing statutes and ordinances provision is made for revocation of licenses for cause,[95] as for instance for violating

302; Gandy *v.* Oellers, 39 Wkly. Notes Cas. (Pa.) 438. See also Pearson *v.* Seattle, 14 Wash. 438, 44 Pac. 884.

86. Gandy *v.* Oellers, 39 Wkly. Notes Cas. (Pa.) 438, holding that where theatrical performances were given in a theater without payment of the license-fee, and subsequently the house was leased to another person, who applied for a license, and paid the license-fee for one year, requesting a license for one year from the date of payment, the city treasurer had no authority to date back the license so as to make the payment apply to and cover time during which the unlicensed performances were given, and that the new lessee cannot be compelled to pay for time during which he had not control of the house.

87. State *v.* French Opera Assoc., 107 La. 284, 31 So. 630.

88. See Gandy *v.* Oellers, 39 Wkly. Notes Cas. (Pa.) 438.

89. See, generally, Licenses, 25 Cyc. 628.

90. See Com. *v.* Fox, 31 Leg. Int. (Pa.) 84.

91. Duluth *v.* Marsh, 71 Minn. 248, 73 N. W. 962.

Louisiana act of 1882, imposing a license-fee of one thousand dollars for keeping a place for concert, dancing, and variety performances was declared constitutional, inasmuch as the state constitution laid down no such rule and placed no limitation on the taxing power of the legislature. State *v.* Schonhausen, 37 La. Ann. 42.

92. Duluth *v.* Marsh, 71 Minn. 248, 73 N. W. 962, holding that a license-fee of one hundred and twenty-five dollars for six months, for theatrical performances in the city of Duluth, was not unreasonable, or in excess of the police power of the city to license and regulate such performance. See also Mankato *v.* Fowler, 32 Minn. 364, 20 N. W. 361.

93. Standard Athletic Club *v.* Cushing, 30 R. I. 208, 74 Atl. 719.

94. Mahanoy City Borough *v.* Hersker, 40 Pa. Super. Ct. 50.

95. See the several statutes and ordinances. And see People *v.* O'Gorman, 124 N. Y. App. Div. 222, 108 N. Y. Suppl. 737; McKenzie *v.* McClellan, 62 Misc. (N. Y.) 342, 116 N. Y. Suppl. 645; William Fox Amusement Co. *v.* McClellan, 62 Misc. (N. Y.) 100, 114 N. Y. Suppl. 594; Matter of New York, 52 Misc. (N. Y.) 606, 102 N. Y. Suppl. 950.

In New York, in proceedings entitled in the name of the city, to revoke a license to conduct a concert room, brought pursuant to Greater New York Charter, § 1476, Laws (1897), c. 378, p. 520, providing for the revocation of such a license, the petition properly runs in the name of the police commissioner. Matter of New York, 52 Misc. 606, 102 N. Y. Suppl. 950.

Service of the order to show cause why

the Sunday clause,[96] and as a licensee is responsible for the acts of his agents, the license is revocable, although the proscribed performance was given contrary to his orders.[97] But there is a limit to the exercise of the power of revocation, and it must not be arbitrary, tyrannical, or unreasonable;[98] and while within certain limits the discretion of the proper city official to determine when a license shall be revoked will not be controlled by the courts,[99] a general order of revocation, concededly based on an abuse of privilege by a part only of the licensees, is not a valid exercise of the power.[1] A petition to revoke, based not upon knowledge by the petitioner of the facts, but upon belief, grounds for which are given, is sufficient.[2]

7. Repeal of Statute or Ordinance; Recovery of Fees Paid. Statutes and ordinances prohibiting, regulating, or taxing theaters or shows may be expressly or impliedly repealed by statutes relating to the same subject,[3] and a statute or ordinance may be in the nature of a general provision and another passed subsequent thereto serve as a limitation of the former.[4] There is no implied repeal under a later statute or ordinance unless it is inconsistent with and repugnant to the former.[5] Where a license authorizes the licensee to conduct a public amusement and such amusement is subsequently prohibited by law, he may recover back the unearned portion of the license money paid.[6]

8. Indictment For Exhibiting Without License. Under some statutes it is an indictable offense to exhibit without a license.[7] The general rules as to allegations in indictments[8] govern indictments for exhibiting without the required license, which must set forth all the elements of the offense.[9] If charging admission is an element of the offense, averment must be made that a charge was made,[10]

the license should not be revoked should be served personally upon the licensee. Service upon one in charge of the box-office is insufficient. Matter of Sullivan, 31 Misc. (N. Y.) 1, 64 N. Y. Suppl. 586 [*affirmed* in 53 N. Y. App. Div. 637, 66 N. Y. Suppl. 1143].

96. People *v.* O'Gorman, 124 N. Y. App. Div. 222, 108 N. Y. Suppl. 737.

97. Matter of New York, 52 Misc. (N. Y.) 606, 102 N. Y. Suppl. 950.

98. William Fox Amusement Co. *v.* McClellan, 62 Misc. (N. Y.) 100, 114 N. Y. Suppl. 594.

99. William Fox Amusement Co. *v.* McClellan, 62 Misc. (N. Y.) 100, 114 N. Y. Suppl. 594.

1. William Fox Amusement Co. *v.* McClellan, 62 Misc. (N. Y.) 100, 114 N. Y. Suppl. 594, holding that a general order issued by a mayor revoking all licenses granted to moving picture shows, on a showing of causes which did not necessarily affect all such licensees, cannot be sustained.

2. Matter of New York, 52 Misc. (N. Y.) 606, 102 N. Y. Suppl. 950.

3. See cases cited *infra*, notes 4, 5. And see, generally, Licenses, 25 Cyc. 613.

4. Woodward *v.* Turnbull, 4 Ill. 1; Negrotto *v.* Monett, 49 Mo. App. 286, holding that Rev. St. § 1589, authorizing the mayor and aldermen of cities of the fourth class to regulate and license theatrical amusements, is merely limited by section 8193, prohibiting them from levying a license on a performance, "held in an opera house," and is not repealed thereby.

5. Charity Hospital *v.* De Bar, 11 La. Ann. 385 (holding that the act of March 12, 1838, reënacted in 1855, providing that the managers and lessees of theaters shall pay a certain sum annually for the benefit of the charity hospital, was not repealed by the act of 1853, taxing managers and lessees of theaters, since such acts were not irreconcilable); Hodges *v.* Nashville, 2 Humphr. (Tenn.) 61 (holding that Acts (1806), c. 33, § 2, incorporating Nashville, and conferring on it the power to regulate and restrain theatrical amusements, and authorizing the use of the taxing power as a means of restraining them, is not a law to tax theatrical amusements, and is not, therefore, repealed by Acts (1819), c. 51, § 2, relating to taxes on shows, and providing that nothing therein shall be construed so as to tax or prohibit any concerts or any theatrical exhibitions).

6. Pearson *v.* Seattle, 14 Wash. 438, 44 Pac. 884, holding that a licensee may recover back the unearned portion of the money paid him for his license where a city, after issuing the same, authorizing the licensee to conduct public amusements in connection with his saloon, passed an ordinance prohibiting such amusements.

7. See the statutes of the several states. And see cases cited *infra*, note 85.

Under the statutes of Pennsylvania a person may be indicted in the city of Philadelphia for holding a theatrical exhibition without having first obtained a license from the state. Com. *v.* Nixon, 42 Leg. Int. 171.

8. See Indictments and Informations, 22 Cyc. 285.

9. Mosley *v.* State, 98 Ala. 50, 13 So. 148; Pike *v.* Com., 2 Duv. (Ky.) 89; Com *v.* Twitchell, 4 Cush. (Mass.) 74.

10. Mosby *v.* State, 98 Ala. 50, 13 So.

and a sufficient description must be given of the exhibition complained of to show its unlawfulness.[11] An indictment against one person unconnected with others is insufficient where the statute under which the offense is laid inflicts a penalty "on each individual of any company of players or persons whatever," who shall exhibit, etc.[12]

III. Admission and Accommodation; Tickets.[13]

A. Status of Proprietor. The proprietor of a theater exercises absolute control over the house and the audience.[14] The theater is owned by him, is private property, and is governed, so far as the public is concerned, by such rules and regulations as the proprietor may see fit to make. It is in no sense a public enterprise, and is consequently not governed by the same rules which relate to common carriers or other public institutions of a like character.[15] The proprietor derives from the state no authority to carry on his business and may conduct the same precisely as any other private citizen may transact his affairs.[16] It follows that if the proprietor of a theater sees fit to discontinue performances, the public cannot complain.[17] Furthermore the proprietor has the right to decide who shall be admitted to witness the plays he sees fit to produce in the absence of an express statute controlling his action;[18] and if any one applies at the box-office of a theater and desires to purchase tickets of admission and is refused, he has no cause of action against the proprietor of the theater for such refusal.[19]

B. Tickets — 1. Considered as License; Rejection or Expulsion of Ticket-Holder. In the absence of a statute or ordinance to the contrary[20] a theater ticket is merely a revocable license to enter the part of the theater specified on it.[21] If before the holder of a ticket has entered and taken his seat, the proprietor

148. But see Pike *v.* State, 35 Ala. 419, holding otherwise under a former statute.

11. Com. *v.* Twitchell, 4 Cush. (Mass.) 74, where the description was held sufficient.

12. State *v.* Fox, 15 Vt. 22.

13. **Discrimination by reason of race or color** see Civil Rights, 7 Cyc. 171.

Constitutional guaranty of equal protection of laws see Constitutional Law, 8 Cyc. 1074.

14. People *v.* Flynn, 189 N. Y. 180, 82 N. E. 169; Collister *v.* Hayman, 183 N. Y. 250, 76 N. E. 20, 111 Am. St. Rep. 740, 1 L. R. A. N. S. 1188; Luxenberg *v.* Keith, etc., Amusement Co., 64 Misc. (N. Y.) 69, 117 N. Y. Suppl. 979; Purcell *v.* Daly, 19 Abb. N. Cas. (N. Y.) 301.

15. People *v.* Flynn, 114 N. Y. App. Div. 578, 100 N. Y. Suppl. 31 [*quoting* Collister *v.* Hayman, 183 N. Y. 250, 76 N. E. 20, 111 Am. St. Rep. 740, 1 L. R. A. N. S. 1188]; Luxenberg *v.* Keith, etc., Amusement Co., 64 Misc. (N. Y.) 69, 117 N. Y. Suppl. 979; Purcell *v.* Daly, 19 Abb. N. Cas. (N. Y.) 301.

Theaters are not necessities of life, and the proprietors of them may manage their business in their own way. If that way is unfair or unpopular, they will suffer in diminished receipts. Pearce *v.* Spalding, 12 Mo. App. 141 [*citing* Clifford *v.* Brandon, 2 Campb. 358–368, 11 Rev. Rep. 731, and *cited* in Buenzle *v.* Newport Amusement Assoc., 29 R. I. 23, 68 Atl. 721, 14 L. R. A. N. S. 1242].

16. People *v.* Flynn, 189 N. Y. 180, 82 N. E. 169.

17. Purcell *v.* Daly, 19 Abb. N. Cas. (N. Y.) 301.

18. People *v.* Flynn, 189 N. Y. 180, 82 N. E. 169; Luxenberg *v.* Keith, etc., Amusement Co., 64 Misc. (N. Y.) 69, 117 N. Y. Suppl. 979.

19. Purcell *v.* Daly, 19 Abb. N. Cas. (N. Y.) 301.

20. Greenberg *v.* Western Turf Assoc., 140 Cal. 357, 73 Pac. 1050, holding that St. (1893) p. 220, c. 185, making it unlawful to refuse admission to any opera house, theater, race-course, or other place of public amusement to any person over twenty-one years of age who presents a ticket of admission, and providing that any person so refused admission shall be entitled to recover his actual damages and one hundred dollars in addition thereto, is a valid regulation established by the state in the exercise of its police power.

21. *Massachusetts.*— Burton *v.* Scherpf, 1 Allen 133, 79 Am. Dec. 717; McCrea *v.* Marsh, 12 Gray 211, 71 Am. Dec. 745.

Missouri.—Pearce *v.* Spalding, 12 Mo. App. 141.

New York.— People *v.* Flynn, 189 N. Y. 180, 82 N. E. 169; Collister *v.* Hayman, 183 N. Y. 250, 76 N. E. 20, 111 Am. St. Rep. 740, 1 L. R. A. N. S. 1188; Luxenberg *v.* Keith, etc., Amusement Co., 64 Misc. 69, 117 N. Y. Suppl. 979; Purcell *v.* Daly, 19 Abb. N. Cas. 301.

Pennsylvania.— Horney *v.* Nixon, 213 Pa. St. 20, 61 Atl. 1088, 110 Am. St. Rep. 520, 1 L. R. A. N. S. 1184 [*distinguishing* Drew *v.* Peer, 93 Pa. St. 234, where plaintiffs, being colored people, were violently and rudely ejected and injured, and where the suit was for such injury, and not for breach of any contract; and declaring the latter case to be *obiter dictum* in so far as it holds that such a theater ticket is anything more than

revokes the license and, upon the licensee's refusal to leave, with no more force than is necessary for the purpose, excludes him, he cannot maintain an action of tort for the exclusion;[22] being himself a trespasser,[23] although he may maintain an action in a proper case for breach of contract.[24] Thus the holder of a ticket which entitles him to a seat at a given time in a place of amusement, being refused admission, is entitled to recover the amount paid for the ticket and such other expense as he may have been put to directly connected with the issue of the ticket, as for instance expenses necessarily incurred in attending the performance.[25] But the ticket-holder cannot recover compensatory damages for disappointment or limitation suffered by reason of having been denied admission.[26] If, however, unnecessary force is used in refusing admittance to a ticket-holder and expelling him he can recover therefor,[27] and if after having been admitted to a place of

a mere revocable license); Buenzle *v.* Newport Amusement Assoc., 29 R. I. 23, 68 Atl. 721, 14 L. R. A. N. S. 1242 (holding that where plaintiff in civilian clothing purchased a ticket of admission to defendant's dance hall, and thereafter changed his clothing, putting on the uniform of a petty officer in the United States navy, and then returned to the dance hall, presented his ticket, and was refused admission because he was in uniform, the measure of damages in a suit for breach of the contract must be confined to the actual pecuniary loss, and cannot be extended to include mental suffering, even though it appears that plaintiff, other persons being present, felt humiliated by being refused admittance).

England.— Wood *v.* Ledbitter, 14 L. J. Exch. 161, 13 M. & W. 838.

See 45 Cent. Dig. tit. "Theaters and Shows," § 4.

22. *Massachusetts.*— Burton *v.* Scherpf, 1 Allen 133, 79 Am. Dec. 717; McCrea *v.* Marsh, 12 Gray 211, 71 Am. Dec. 745.

New York.— Luxenberg *v.* Keith, etc., Amusement Co., 64 Misc. 69, 117 N. Y. Suppl. 979.

Oregon.— Taylor *v.* Cohn, 47 Oreg. 538, 84 Pac. 388.

Pennsylvania.— Horney *v.* Nixon, 213 Pa. St. 20, 61 Atl. 1088, 110 Am. St. Rep. 520, 1 L. R. A. N. S. 1184, holding that, where a purchaser of a theater ticket refused to leave on request, he became a trespasser, the ticket being a mere license to the purchaser, revocable at pleasure, and, where he was forcibly ejected, his only remedy was by an action on the contract to recover the money paid and the damages resulting therefrom and not an action of tort, and stating, in commenting upon Drew *v.* Peer, 93 Pa. St. 234, that the statement therein that purchasers and holders of tickets for particular seats in a theater had more than a mere license, their rights being more in the nature of a lease, entitling them to peaceable ingress and egress, and exclusive possession of the designated seats during the performance was merely *obiter dictum.*

England.— Wood *v.* Ledbitter, 14 L. J. Exch. 161, 13 M. & W. 838.

See 45 Cent. Dig. tit. "Theaters and Shows," § 4 *et seq.*

In California, under the civil code, section 3294, authorizing exemplary damages in any action for the breach of an obligation not arising from contract, when defendant has been guilty of oppression, fraud, or malice, exemplary damages may be awarded in a proper case in an action under St. (1893) p. 220, c. 185, making it unlawful to refuse admission to places of public amusement, although the statute provides for the recovery in such cases of one hundred dollars in addition to the actual damages. Greenberg *v.* Western Turf Assoc., 140 Cal. 357, 73 Pac. 1050. But the statute does not authorize a person to recover damages for injury sustained to his business by reason of the refusal to admit him to a place of public amusement; and, therefore, in an action based upon a single refusal to admit plaintiff to a race-course, evidence of other refusals was inadmissible, notwithstanding the fact that plaintiff claimed damages to his business of publishing a paper devoted to giving the public news concerning occurrences at the race-courses. Greenberg *v.* Western Turf Assoc., *supra.*

23. Burton *v.* Scherpf, 1 Allen (Mass.) 133, 79 Am. Dec. 717; People *v.* Flynn, 189 N. Y. 180, 82 N. E. 169.

24. Greenberg *v.* Western Turf Assoc., 140 Cal. 357, 73 Pac. 1050; Burton *v.* Scherpf, 1 Allen (Mass.) 133, 79 Am. Dec. 717; Taylor *v.* Cohn, 47 Oreg. 538, 84 Pac. 388. And see cases cited *supra*, the preceding notes.

Complaint.— A complaint alleging that defendant is the proprietor of a theater; that plaintiff purchased of him tickets therefor; that they were presented at the proper time and place, but that defendant refused to allow him to occupy the seats; and that by reason thereof he was damaged, states a cause of action for breach of contract. Taylor *v.* Cohn, 47 Oreg. 538, 84 Pac. 388.

25. People *v.* Flynn, 189 N. Y. 180, 82 N. E. 169; Luxenberg *v.* Keith, etc., Amusement Co., 64 Misc. (N. Y.) 69, 117 N. Y. Suppl. 979.

26. Luxenberg *v.* Keith, etc., Amusement Co., 64 Misc. (N. Y.) 69, 117 N. Y. Suppl. 979; Purcell *v.* Daly, 19 Abb. N. Cas. (N. Y.) 301.

27. Drew *v.* Peer, 93 Pa. St. 234.

Damages recoverable by husband for personal injuries to wife.— Where husband and wife are forcibly ejected from a theater,

amusement under the ticket, the ticket-holder is ejected without good cause he can recover for the humiliation and disgrace;[28] and while exemplary damages may be refused, plaintiff's recovery is not limited to the price of the ticket.[29] If through the mistake of the management tickets are sold to a purchaser for a performance other than that requested and he is seated by the ushers upon that ticket, he can recover damages for wrongful expulsion,[30] and if the expulsion is accompanied with circumstances of insult and aggravation, punitive damages may be allowed.[31] In case of such a mistake in the sale of tickets, however, the management have a right to request the ticket-holder to vacate his seat and take in lieu another seat, there being no other way of correcting the mistake;[32] and if when the ticket-holder is requested to vacate the seat occupied by mistake he becomes disorderly and boisterous so as to interfere with the attention of the other persons in the theater to the play, the management may eject him, using no more force than is necessary for that purpose.[33] But unless he becomes disorderly the management may not eject him from the playhouse.[34]

2. Right of Ticket-Holder to Seat — a. In General. The right of a visitor to a seat at a theater or other place of amusement depends somewhat upon the character of his ticket.[35] If the ticket is not for a reserved seat he may take any seat he finds unoccupied and which has not been previously sold to another;[36] but he cannot take a private box seat, and if he does the proprietor may expel him;[37] nor may he after being notified by the proprietor to vacate it continue to occupy a specially located seat for which an extra charge is made by the management.[38] The neglect of a proprietor of a theater to mark a seat "taken" can give

thereby sustaining personal injuries and impairing the wife's health to such an extent as to deprive the husband of her assistance in his domestic affairs, he may recover not only for injury to himself but also for the loss of his wife's services and any expense he had incurred on her account. Drew *v.* Peer, 93 Pa. St. 234. See, generally, Damages, 13 Cyc. 145.

28. Cremore *v.* Huber, 18 N. Y. App. Div. 231, 45 N. Y. Suppl. 947; Smith *v.* Leo, 92 Hun (N. Y.) 242, 36 N. Y. Suppl. 949, in which it was held that where a person is wrongfully expelled from a hall in which is conducted a dancing school, for admission to which he has paid the price demanded, his damages are not limited to the amount paid for admission, but that he may be compensated for indignity and disgrace or any other damages sustained by him.

Instructions.— Where the evidence is conflicting as to whether a patron of a place of amusement who was ejected with force had forfeited his right to remain, it is proper to refuse an instruction that if he, in his resistance, exceeded the limits of necessary protection, and employed excessive force for such purpose, he thereby became a trespasser, and could not recover; he not having used force other than in resistance of that employed to remove him, and it having been insufficient for that purpose. Cremore *v.* Huber, 18 N. Y. App. Div. 231, 45 N. Y. Suppl. 947. See also Weber-Stair Co. *v.* Fisher, (Ky. 1909) 119 S. W. 195; McGowan *v.* Duff, 14 Daly (N. Y.) 315, 12 N. Y. St. 680.

Arrest of ticket-holder.— Where any person visiting a place of public amusement violates any rule or regulation for the conduct of those in attendance or is guilty of any disturbance or disorder not amounting to a breach of the peace, it will not justify his arrest or any assault or attack on him, although it may justify his expulsion; but the proprietor, or those in his employment before proceeding to eject him, must first require him to leave, and then on his refusal, use such force only as may be necessary to remove him from the place or house. State *v.* Walker, 1 Ohio Dec. (Reprint) 353, 8 West. L. J. 145. A constable or police officer employed to keep order at a place of amusement has no greater or other powers than he would have in any other place, or than a private individual so employed would have in enforcing any rules or regulations for the conduct of persons in attendance. State *v.* Walker, 1 Ohio Dec. (Reprint) 353, 8 West. L. J. 145.

29. Smith *v.* Leo, 92 Hun (N. Y.) 242, 36 N. Y. Suppl. 949.

30. Weber-Stair Co. *v.* Fisher, (Ky. 1909) 119 S. W. 195.

31. Weber-Stair Co. *v.* Fisher, (Ky. 1909) 119 S. W. 195, holding two hundred and fifty dollars not excessive.

32. Powell *v.* Weber-Stair Co., (Ky. 1910) 125 S. W. 255.

33. Powell *v.* Weber-Stair Co., (Ky. 1910) 125 S. W. 255.

34. Powell *v.* Weber-Stair Co., (Ky. 1910) 125 S. W. 255; Weber-Stair Co. *v.* Fisher, (Ky. 1909) 119 S. W. 195.

35. Com. *v.* Powell, 10 Phila. (Pa.) 180. See also Drew *v.* Peer, 93 Pa. St. 234.

36. Com. *v.* Powell, 10 Phila. (Pa.) 180.

37. Lewis *v.* Arnold, 4 C. & P. 354, 19 E. C. L. 551.

38. McGoverney *v.* Staples, 7 Alb. L. J. (N. Y.) 219, holding, however, that in such case the management can only remove the

a stranger no right to a seat which has already been purchased by a third party.[39] The proprietor of a theater has a right to assign particular seats or parts of the place of amusement to different classes or races, so long as no discrimination is shown infringing civil rights.[40]

b. Reserved Seat. If the proprietor of a theater advertises reserved seats for stated performances and refuses to sell certain seats demanded, he is not liable to a tort action therefor.[41] If, however, a ticket is sold for a reserved seat, the ticket-holder has a right to that particular seat, and it is the duty of the proprietor to give it to him.[42] But the proprietor's failure to perform that duty is simply a breach of contract the remedy for which is assumpsit for damages for the breach.[43] Where a person holds a ticket for a particular seat in a theater, and enters, and occupies it, he is not entitled to hold it as against a prior *bona fide* purchaser of a ticket for the same seat where he is requested by the management to occupy another seat equally well located.[44] An ordinance prohibiting the sale of reserved seats after the doors of the theater have been opened is valid.[45]

3. Transfer and Resale of Tickets. A theater ticket being a mere personal license, given by the proprietor to the purchaser to enter and witness the performance,[46] is not salable or transferable by the purchaser, notwithstanding he has a municipal license therefor.[47] The proprietor of a theater may limit tickets of admission to be good only when presented by the purchaser thereof; and, where the transferee of a ticket is refused admission, the original purchaser cannot recover the value of the ticket from the proprietor;[48] nor can the proprietor be

occupant from the seat and not from the building, there being no evidence that he is unruly or disorderly.

39. Com. *v.* Powell, 10 Phila. (Pa.) 180.

40. See Civil Rights, 7 Cyc. 171.

41. Pearce *v.* Spalding, 12 Mo. App. 141. And see *supra*, text and note 19.

42. Horney *v.* Nixon, 213 Pa. St. 20, 61 Atl. 1088, 110 Am. St. Rep. 520, 1 L. R. A. N. S. 1184; Com. *v.* Powell, 10 Phila. (Pa.) 180.

Rights of stock-holders to reserved seats as against lessee of building.— Where the stock-holders of a theater reserve to themselves under their tickets of admission certain seats, and afterward relinquish a portion of them, seeking later on to have them restored to them, but fail to do so before the rights of a lessee to the theater intervene, as against the lessee they are restricted to the use of only those held when the lease was made, even though the remaining seats are seldom fully occupied. Fareira *v.* Riter, 15 Phila. (Pa.) 58.

43. Pearce *v.* Spalding, 12 Mo. App. 141; Horney *v.* Nixon, 213 Pa. St. 20, 61 Atl. 1088, 110 Am. St. Rep. 520, 1 L. R. A. N. S. 1184, where plaintiff had purchased two reserved seats for a performance in a theater, but before the performance the city authorities had ordered certain end seats to be removed, and in the confusion resulting from such removal the seats of plaintiff were sold to other parties, whereupon plaintiff purchased six other seats, and when he presented his tickets was told that he could not be given the seats called for, but he was offered eight other seats further back. On refusal to accept them and becoming noisy, he was invited to go into the corridor, where the money paid for the tickets was tendered, which plaintiff refused to accept, and it was held that an action of trespass for the price of the tickets and for the inconvenience and mortification suffered would not lie. And see *supra*, note 21.

44. Com. *v.* Powell, 10 Phila. (Pa.) 180, holding that an action for an assault could not be maintained against the manager or proprietor of a theater by a person who had entered and taken a seat in that part of the house for which his ticket was sold, and who, being informed by the usher that that particular seat was taken, and, being tendered an equally good seat near by, refused to move and was forcibly ejected, there having been a previous *bona fide* sale to a third party of the seat in question.

45. Cincinnati *v.* Brill, 5 Ohio S. & C. Pl. Dec. 566, 7 Ohio N. P. 534. But see District of Columbia *v.* Saville, 1 MacArthur (D. C.) 591, 29 Am. Rep. 616.

The fact that the tickets were purchased by the seller thereof the day before the performance does not exempt such seller from the operation of an ordinance providing that it shall be unlawful for any person to sell reserved seats for a theatrical performance after the doors of the theater have been opened. Cincinnati *v.* Brill, 5 Ohio S. & C. Pl. Dec. 566, 7 Ohio N. P. 534.

A speculator who buys theatrical tickets becomes in effect an agent of the house, and is liable, the same as the agent in the box office, for the violation of the ordinance. Cincinnati *v.* Brill, 5 Ohio S. & C. Pl. Dec. 566, 7 Ohio N. P. 534.

46. See *supra*, III, B, 1.

47. Collister *v.* Hayman, 71 N. Y. App. Div. 316, 75 N. Y. Suppl. 1102 [*affirmed* in 183 N. Y. 250, 76 N. E. 20, 111 Am. St. Rep. 740, 1 L. R. A. N. S. 1188].

48. Collister *v.* Hayman, 183 N. Y. 250, 76 N. E. 20, 111 Am. St. Rep. 740, 1 L. R.

enjoined from refusing to accept tickets sold on the sidewalk because of a supposed discrimination between parties purchasing in that manner and those purchasing at the theater or at the agencies, with the intention of themselves using the tickets, the requirements of the law being satisfied where no discrimination is made by the proprietors among the persons to whom they have sold.[49] Where, however, by statute, a ticket of admission to a public place of amusement when sold is made an irrevocable license to the purchaser to occupy a place in such place of amusement during the performance, the ticket represents a right of property and is itself a species of property, and therefore transferable, in the absence of stipulations to the contrary.[50] A statute or municipal ordinance prohibiting the sale of theater tickets at more than office rates, known as ticket scalping, is invalid.[51]

IV. INJURIES TO PERSONS ATTENDING AND LOSS OF PROPERTY.

A. Injuries to Persons — 1. Liability of Proprietor of Show — a. Rule Stated. The owner of a place of entertainment is charged with an affirmative positive obligation to know that the premises are safe for the public use,[52] and to furnish adequate appliances for the prevention of injuries which might be anticipated from the nature of the performance,[53] and he impliedly warrants the premises to be reasonably safe for the purpose for which they are designed.[54] He is required to use care and diligence to put and keep the premises and appliances in a reasonably safe condition for persons attending; and if he fails to perform his duty in this respect so that the premises or appliances are in fact unsafe, he may be held liable for personal injuries occasioned thereby,[55] and he will not be

A. N. S. 1188 [*affirming* 71 N. Y. App. Div. 316, 75 N. Y. Suppl. 1102] (holding that a clause in a theater ticket providing that, if sold by the purchaser at the sidewalk, it would be refused at the door, was valid and enforceable as against all subsequent purchasers, where its purpose was to prevent the purchase of tickets by ticket speculators to resell at an advance over the price charged by the management); Purcell *v.* Daly, 19 Abb. N. Cas. (N. Y.) 301.

49. Collister *v.* Hayman, 71 N. Y. App. Div. 316, 75 N. Y. Suppl. 1102 [*affirmed* in 183 N. Y. 250, 76 N. E. 20, 111 Am. St. Rep. 740, 1 L. R. A. N. S. 1188].

50. *Ex p.* Quarg, 149 Cal. 79, 84 Pac. 766, 117 Am. St. Rep. 115, 5 L. R. A. N. S. 183.

51. *Ex p.* Quarg, 146 Cal. 79, 84 Pac. 766, 117 Am. St. Rep. 115, 5 L. R. A. N. S. 183; Chicago *v.* Powers, 231 Ill. 560, 83 N. E. 240; People *v.* Steele, 231 Ill. 340, 83 N. E. 236, 121 Am. St. Rep. 321, 14 L. R. A. N. S. 361.

52. Lusk *v.* Peck, 132 N. Y. App. Div. 426, 116 N. Y. Suppl. 1051 [*affirmed* in 199 N. Y. 546, 93 N. E. 377].

53. Thompson *v.* Lowell, etc., St. R. Co., 170 Mass. 577, 49 N. E. 913, 64 Am. St. Rep. 323, 40 L. R. A. 345.

54. Scott *v.* University of Michigan Athletic Assoc., 152 Mich. 684, 116 N. W. 624, 125 Am. St. Rep. 423, 17 L. R. A. N. S. 234; Weiner *v.* Scherer, 64 Misc. (N. Y.) 82, 117 N. Y. Suppl. 1008.

55. *Massachusetts.*— Thompson *v.* Lowell, etc., St. R. Co., 170 Mass. 577, 49 N. E. 913, 64 Am. St. Rep. 323, 40 L. R. A. 345 (injury at shooting exhibition from defective appliances and arrangements); Schofield *v.* Wood, 170 Mass. 415, 49 N. E. 636 (holding that one who maintains a hall for public exhibitions is liable for injuries sustained by a spectator at a polo game, caused by the giving way of the guard-rail in front of the gallery of the hall, there being evidence that the rail was insufficient to bear the weight of the persons accustomed to lean upon it, and that plaintiff had no notice that the rail was defective, and acted as all other persons in the gallery near the rail had been accustomed to act under similar circumstances, with defendant's knowledge); Oxford *v.* Leathe, 165 Mass. 254, 43 N. E. 92; Currier *v.* Boston Music Hall Assoc., 135 Mass. 414.

Michigan.— Scott *v.* University of Michigan Athletic Assoc., 152 Mich. 684, 116 N. W. 624, 125 Am. St. Rep. 423, 17 L. R. A. N. S. 234, holding that it is not enough to release an athletic association from liability for injury from collapse of a spectators' stand built by it to a spectator who pays for the privilege of being on it that the stand was erected by a competent and experienced builder of good materials, and before use was inspected and pronounced safe by engineers and others competent to perform the work of inspection; but it impliedly contracts that, except for unknown defects, not discoverable by reasonable means, the stand is safe.

Missouri.— King *v.* Ringling, (App. 1910) 130 S. W. 482 (holding that proprietors of the circus, in inviting the public to occupy their tent for their own profit, bind themselves to exercise reasonable care to protect their patrons against injury from other than natural or accidental causes, and must observe care commensurate to the circumstances to protect their patrons against injury; the degree of care which they must

exonerated merely because he had no precise knowledge of the defective condition of the place to which he has invited the public,[56] or because the exhibition where the injury was received was provided and conducted by an independent contractor.[57] When they accept his invitation and pay the prescribed admission fee they have a right to assume that he has furnished a safe place for them to witness the performance.[58] Reasonable care is held to be the measure of duty,[59] and the undertaking of the proprietor is held not to call for an application of the same strict rule of responsibility as in the case of common carriers.[60] He is not an insurer.[61] Furthermore, attendants upon the performance assume the risks

exercise being that which would be expected of an ordinarily careful and prudent person in their position); Nephler *v.* Woodward, 200 Mo. 179, 98 S. W. 488 (defects in an aisle carpet).

New York.— Lusk *v.* Peck, 132 N. Y. App. Div. 426, 116 N. Y. Suppl. 1051 [*affirmed* in 199 N. Y. 546, 93 N. E. 377]; Fox *v.* Buffalo Park, 21 N. Y. App. Div. 321, 47 N. Y. Suppl. 788 [*affirmed* in 163 N. Y. 559, 57 N. E. 1109]; Butcher *v.* Hyde, 10 Misc. 275, 30 N. Y. Suppl. 1073 [*reversed* on other grounds in 152 N. Y. 142, 46 N. E. 305], in which it was held that if the stairs of a theater furnishing means of egress became dangerous, notice of the same to the owner could be implied from the lapse of a very short space of time, twenty-four hours and perhaps less being sufficient, and that it was the duty of the owner to be vigilant in seeing that they were safe.

Rhode Island.— Brown *v.* Batchellor, 29 R. I. 116, 69 Atl. 295.

Virginia.— Washington Luna Park Co. *v.* Goodrich, 110 Va. 692, 66 S. E. 977.

United States.— Stair *v.* Kane, 156 Fed. 100, 84 C. C. A. 126.

England.— Francis *v.* Cockrell, L. R. 5 Q. B. 501, 10 B. & S. 850, 39 L. J. Q. B. 291, 23 L. T. Rep. N. S. 466, 18 Wkly. Rep. 1205.

See 45 Cent. Dig. tit. "Theaters and Shows," § 6.

Scenic railway.— The same degree of care is required for the protection of passengers in operating an ordinary scenic railway in an amusement park as is required of common carriers of passengers, which is the highest degree of care and vigilance possible consistent with the mode of conveyance and its practical operation; and in an action by a passenger for injuries by being thrown from a scenic railway, testimony for plaintiff tending to show that the injury was caused by apparatus wholly under defendant's control while plaintiff was using due care, by the car suddenly slowing or stopping, accompanied by a sound as if something interfered with the car beneath it, raised a *prima facie* presumption of negligence. O'Callaghan *v.* Dellwood Park Co., 242 Ill. 336, 89 N. E. 1005, 134 Am. St. Rep. 331, 26 L. R. A. N. S. 1054. But a passenger on a scenic railway who was warned of the danger of riding thereon assumed the risk of the ride caused by the usual motion of the car, which necessarily jerked when descending inclines, it not appearing that the car jerked in an unusual way or to a greater extent than must have been anticipated by passengers, and the proprietor was not negligent in failing to notify passengers on the scenic railway to hold on to the car, and not fall off. Lumsden *v.* L. A. Thompson Scenic R. Co., 130 N. Y. App. Div. 209, 114 N. Y. Suppl. 421 [*distinguishing* Barrett *v.* Lake Ontario Beach Imp. Co., 174 N. Y. 310, 66 N. E. 968, 61 L. R. A. 829].

Contributing acts of spectators.— Where a spectator at a polo game was injured by the giving way of a guard-rail in front of the gallery, the fact that he was pushed from his seat to the floor below by the acts of spectators behind him does not relieve the owner of the building from liability for maintaining the rail in a defective condition. Schofield *v.* Wood, 170 Mass. 415, 49 N. E. 636.

56. Lusk *v.* Peck, 132 N. Y. App. Div. 426, 116 N. Y. Suppl. 1051 [*affirmed* in 199 N. Y. 546, 93 N. E. 377]; Butcher *v.* Hyde, 10 Misc. (N. Y.) 275, 30 N. Y. Suppl. 1073 [*reversed* on other grounds in 152 N. Y. 142, 46 N. E. 305] (defective stairs).

57. Thompson *v.* Lowell, etc., St. R. Co., 170 Mass. 577, 49 N. E. 913, 64 Am. St. Rep. 323, 40 L. R. A. 345.

58. Lusk *v.* Peck, 132 N. Y. App. Div. 426, 116 N. Y. Suppl. 1051 [*affirmed* in 199 N. Y. 546, 93 N. E. 377].

59. Williams *v.* Mineral City Park Assoc., 128 Iowa 32, 102 N. W. 783, 111 Am. St. Rep. 184, 1 L. R. A. N. S. 427 (grand stand at race-course); King *v.* Ringling, (Mo. App. 1910) 130 S. W. 482 (circus tent); Flanagan *v.* Goldberg, 137 N. Y. App. Div. 92, 122 N. Y. Suppl. 205 (holding that while the proprietors of a moving picture show would be liable for injury to one attending a show by the falling of a board negligently placed by them, they would not be liable for the injury if caused by a board thrown into the room by persons on adjoining premises, unless the proprietors had knowledge that such persons were committing depredations, or had done so, and thereupon negligently failed to protect those invited to the entertainment); Dunning *v.* Jacobs, 15 Misc. (N. Y.) 85, 36 N. Y. Suppl. 453; Heath *v.* Metropolitan Exhibition Co., 11 N. Y. Suppl. 357.

60. Williams *v.* Mineral City Park Assoc., 128 Iowa 32, 102 N. W. 783, 111 Am. St. Rep. 184, 1 L. R. A. N. S. 427.

61. Scott *v.* University of Michigan Athletic Assoc., 152 Mich. 684, 116 N. W. 624; Dunning *v.* Jacobs, 15 Misc. (N. Y.) 85, 36 N. Y. Suppl. 453, holding that the evidence did not show negligence in the construction

peculiar to the form of amusement,[62] or to the character of the habitation,[63] and as in other cases [64] recovery may be barred by contributory negligence.[65]

b. Evidence. In an action against the proprietors of a public amusement for injuries received by a patron, the gravamen of the action is negligence, and plaintiff must show that defendants were guilty of a breach of some duty to him which was the proximate cause of the injury.[66] His evidence must not leave the inference of actionable negligence open to conjecture or speculation, but must show the causal connection between the alleged negligent act and the injury,[67] and must connect defendant with the injury.[68] Under some circumstances the accident itself may be regarded in the absence of explanation as proof of the negligence charged.[69]

of the building where the injuries were sustained by a person in falling from the gallery in a theater, it appearing that he was walking back of the second row of seats when he slipped or stumbled and fell over those in front and over the parapet which with the guard-rail was over three feet high, and the floor had a slope of fifty-five degrees; that he had been in the gallery before, and that the theater had been in use many years and no such accident had ever occurred.

62. Lumsden *v.* L. A. Thompson Scenic R. Co., 130 N. Y. App. Div. 209, 114 N. Y. Suppl. 421, scenic railway.

But one invited by another to witness a shooting exhibition, and who is in the place set apart for spectators, does not assume the risk of injury from defective shooting appliances and arrangements. Thompson *v.* Lowell, etc., St. R. Co., 170 Mass. 577, 49 N. E. 913, 64 Am. St. Rep. 323, 40 L. R. A. 345.

63. King *v.* Ringling, (Mo. App. 1910) 130 S. W. 482, circus tent.

64. See, generally, NEGLIGENCE, 29 Cyc. 507.

65. Johnson *v.* Wilcox, 135 Pa. St. 217, 19 Atl. 939, holding that, where the entrance to a public hall was by a lighted hall and stairway known to plaintiff, he was guilty of contributory negligence in leaving this way and stepping outside the building in the dark upon a platform from which he fell, it having no railing.

Hole in aisle carpet.— Where plaintiff was injured by catching her foot in a hole in a theater aisle carpet as she was being shown to her seat by an usher, she was not negligent in failing to look out for holes in the carpet, in the absence of any warning that they existed, she being entitled to presume that it was safe to follow the usher. Nephler *v.* Woodward, 200 Mo. 179, 98 S. W. 488.

66. King *v.* Ringling, (Mo. App. 1910) 130 S. W. 482, holding that where a circus tent is partially blown down during a very severe windstorm which came up very suddenly, and a patron is injured, the rule of *res ipsa loquitur* does not apply, neither will the inference of negligence arising from the fact that the circus employees before the storm arose had begun pulling up stakes preparatory to taking down the tent, as the burden would be on plaintiff to show that the pulling of the stakes caused the collapse of the tent.

In an action against proprietors of a moving picture show for injuries to one attending the show from the falling of a board, the burden is not upon defendants to show that they were not negligent. Flanagan *v.* Goldberg, 137 N. Y. App. Div. 92, 122 N. Y. Suppl. 205.

Sufficient allegation of negligence see Brown *v.* Batchellor, 29 R. I. 116, 69 Atl. 295 (where the declaration having alleged that, owing to the negligence of defendant's agent in the control of the bicycle, the accident occurred, it was not demurrable because it did not specify in what the negligence consisted); Washington Luna Park Co. *v.* Goodrich, 110 Va. 692, 66 S. E. 977 (where a declaration alleged that defendant amusement company operated a roller coaster consisting of several cars, and that plaintiff, without negligence on his part, having paid his fare, was accepted as a passenger, and, on defendant's invitation, took his place on the coaster, which was so negligently operated by defendant as to collide with another car, resulting in plaintiff's injury).

67. King *v.* Ringling, (Mo. App. 1910) 130 S. W. 482.

68. Harris *v.* Crawley, 161 Mich. 383, 126 N. W. 421 (holding that the fact that one filed a bond to release a merry-go-round from attachment in a suit for injuries to a child falling therefrom did not show that he ran the appliance himself, or that he was necessarily responsible for the negligence of the person operating it, although the bond showed his ownership, and could be used as an admission of ownership, but there must be evidence connecting him with the injury to authorize a judgment against him); Mirsky *v.* Adler, 123 N. Y. Suppl. 816 (holding that plaintiff, in an action for injury from the fall of a piece of iron from a balcony in a theater on a Sunday, does not establish that the theater was under defendant's control at the time, so as to make him liable, from the fact that defendant leased it on Sundays; it not being enough to show that he had a right to use it at the time of the accident, especially in view of the evidence that he had leased it to still another for Sundays).

69. Brown *v.* Batchellor, 29 R. I. 116, 69 Atl. 295 (bicycle performer riding off stage and injuring a spectator); Stair *v.* Kane, 156 Fed. 100, 84 C. C. A. 126 (where a fire extinguisher which was kept unsecured on

c. Negligence a Question of Fact. As in other actions,[70] negligence is a question of fact for the jury upon conflicting evidence.[71] Upon disputed facts the complaint should not be dismissed.[72]

2. Liability of Lessor. An important factor in fixing the liability upon a lessor of a place of amusement is that the premises are intended to be used by the public.[73] If he leases the premises knowing the public use is to continue, he must at least be reasonably assured that they have not deteriorated; that they are still safe for occupancy by the public,[74] and a lease does not absolve him from liability for injury from known defects at the time of lease.[75] Thus when one leases a building to another for the purpose of holding successive public exhibitions with the understanding that the former is to receive the proceeds from the sale of tickets at each exhibition until the rental is paid he must provide safe arrangements for entering and leaving the building, and is liable for personal injuries sustained by reason of his failure to do so;[76] and *a fortiori* he is liable if he holds out to the public that the building is safe.[77] This obligation requires affirmative action on his part, and in order that he may be exculpated to one injured by reason of the decay of the place he vouched for, it must appear that he inspected the property or in some other adequate manner fulfilled his obligation to the public before leasing the same.[78] If the impairment occurs during the tenancy another principle intervenes,[79] and the owner of the demised premises is held liable to third persons only when they are out of repair at the time of lease, in particulars which the landlord, as against third persons, is bound not to allow, but he is not liable where the tenant's use produces the injury.[80]

B. Loss of Property. The manager of a theater is not, in the absence of special agreement, an insurer of his patrons' property, although the property may consist of apparel such as is necessarily or usually worn by the patrons and laid aside by them during the play;[81] and thus the proprietor of a theater

the sill of an open window at the side of the stairway leading to the gallery of a theater, in a place where men and boys, in crowding down the stairway as was usual and likely to happen at the close of a performance, were likely to knock it out of the window, as they in fact did, and it fell and injured plaintiff, who was on the walk below). But see King *v.* Ringling, (Mo. App. 1910) 130 S. W. 482.

70. See, generally, Negligence, 29 Cyc. 632.

71. Schofield *v.* Wood, 170 Mass. 415, 49 N. E. 636; Nephier *v.* Wood, 200 Mo. 179, 98 S. W. 488; Lusk *v.* Peck, 132 N. Y. App. Div. 426, 116 N. Y. Suppl. 1051 [*affirmed* in 199 N. Y. 546, 93 N. E. 377]; Dunning *v.* Jacobs, 15 Misc. (N. Y.) 85, 36 N. Y. Suppl. 453.

Defective guard-rail.— Where plaintiff, a spectator at a polo game, was injured by the giving way of a defective guard-rail in front of the gallery, upon which he and the other spectators were leaning, the question whether he was exercising due care was for the jury, it appearing that he had no notice that the rail was defective. Schofield *v.* Wood, 170 Mass. 415, 49 N. E. 636.

72. Weiner *v.* Scherer, 64 Misc. (N. Y.) 82, 117 N. Y. Suppl. 1008.

73. Camp *v.* Wood, 76 N. Y. 92, 32 Am. Rep. 282; Lusk *v.* Peck, 132 N. Y. App. Div. 426, 116 N. Y. Suppl. 1051 [*affirmed* in 199 N. Y. 546, 93 N. E. 377]; Fox *v.* Buffalo Park, 21 N. Y. App. Div. 321, 47 N. Y. Suppl. 788 [*affirmed* in 163 N. Y. 559, 57 N. E. 1109]. See also Barrett *v.* Lake Ontario Beach Imp. Co., 174 N. Y. 310, 66 N. E. 968, 61 L. R. A. 829.

74. Lusk *v.* Peck, 132 N. Y. App. Div. 426, 116 N. Y. Suppl. 1051 [*affirmed* in 199 N. Y. 546, 93 N. E. 377]. And see cases cited *supra*, note 73.

75. New York Fire Dept. *v.* Hill, 14 N. Y. Suppl. 158. See also McCain *v.* Majestic Bldg. Co., 120 La. 306, 45 So. 258.

76. Oxford *v.* Leathe, 165 Mass. 254, 43 N. E. 92.

77. Camp *v.* Wood, 76 N. Y. 92, 32 Am. Rep. 382, holding that where a person in letting his hall for public purposes held out to the public that it was safe, he was liable for personal injuries where a party stepped off an unguarded piazza, the door upon which occupied the same relative position to an upper flight of stairs as did the street door to the lower flight.

78. Lusk *v.* Peck, 132 N. Y. App. Div. 426, 116 N. Y. Suppl. 1051 [*affirmed* in 199 N. Y. 546, 93 N. E. 377], holding that any other rule might relieve a responsible owner from the duty he owes to the public and shift the burden to an irresponsible tenant.

79. Lusk *v.* Peck, 132 N. Y. App. Div. 426, 116 N. Y. Suppl. 1051 [*affirmed* in 199 N. Y. 546, 93 N. E. 377].

80. Bard *v.* New York, etc., R. Co., 10 Daly (N. Y.) 520, where the lessee changed a balcony, adding to its weight, whereby, when crowded with people, it fell.

81. Pattison *v.* Hammerstein, 17 Misc. (N. Y.) 375, 39 N. Y. Suppl. 1039.

is not liable for the loss of property left by a patron in a theater-box where no eloignment or neglect is shown on the part of the former or any of his servants.[82]

V. Offenses Incident to the Conduct of Public Exhibitions.

The common law, which sanctions prudent theatrical performances, denounces as unlawful such as are demoralizing, licentious, or obscene.[83] In many jurisdictions statutes have been enacted, or ordinances passed under legislative authority, to punish particular offenses in connection with theaters and other places of amusement,[84] as for instance, showing without a license,[85] giving obscene exhibitions,[86] selling reserved seats for a theatrical performance after the doors of the theater have been opened,[87] and similar offenses.[88]

THEATRICAL. Of or pertaining to a theater or scenic representations resembling the manner of dramatic performers;[1] of or pertaining to the theater; of the nature of dramatic or scenic representations; befitting the stage; dramatic;[2] of or pertaining to a theater or scenic or dramatic representations.[3] (See, generally, Theaters and Shows, *ante*, p. 252.)

THEFT. A popular name for larceny;[4] taking property of another from the possession of the owner with intent to defraud;[5] the felonious taking and carrying away of the personal property of another with intent to convert it to the use of the taker without the consent of the owner;[6] the fraudulent taking of property, with intent to deprive the owner of the value of the same and to appropriate it to the use of the person taking it;[7] the fraudulent taking of personal property from another with intent to appropriate the same to the taker's own use.[8] (Theft:

82. Pattison *v.* Hammerstein, 17 Misc. (N. Y.) 375, 39 N. Y. Suppl. 1039, overcoat of patron hung by latter on a hook in the box.

83. Pike *v.* Com., 2 Duv. (Ky.) 89. See Disorderly Houses, 14 Cyc. 488.

84. See the statutes of the several states. And see *infra*, the following notes.

Conspiracy to exclude theatrical critic.— N. Y. Pen. Code, § 168, subd. 5, makes it a misdemeanor for persons to conspire to prevent another from exercising a lawful trade or calling or doing any other lawful act by force, etc., and section 171 provides that no agreement, except to commit a felony, amounts to a conspiracy unless some act besides the agreement be done to affect the other. It was held that an agreement among managers of theaters to refuse admission to a theatrical critic, and his forcible exclusion from the theaters of such parties, did not amount to a conspiracy to do an unlawful act, where the agreement was not made for the purpose of preventing him from exercising his lawful calling as a critic, but the motive was merely a dislike and disapproval of the critic's writings. People *v.* Flynn, 114 N. Y. App. Div. 578, 100 N. Y. Suppl. 31 [*reversing* 49 Misc. 328, 99 N. Y. Suppl. 198, and *affirmed* in 189 N. Y. 180, 82 N. E. 169].

85. *Ex p.* Ryan, 8 Ohio Dec. (Reprint) 299, 7 Cinc. L. Bul. 50, holding that a statute or ordinance providing that it shall be punishable by fine and imprisonment "to exhibit or participate in exhibiting in public any musical performance without a license from the mayor" is directed only at the proprietors of the establishments where the performances are given, and not at the mere performers; the phrase "participate in exhibiting," having reference to a joint owner, manager, or controller. See, generally, *supra*, II, B, 8.

86. See Obscenity, 29 Cyc. 1319.

87. Cincinnati *v.* Brill, 5 Ohio S. & C. Pl. Dec. 566, 7 Ohio N. P. 534.

88. See *supra*, II, B, 1, a, b.

1. Century Dict. [*quoted* in State *v.* Morris, (Del. 1910) 76 Atl. 479, 480].

2. Standard Dict. [*quoted* in State *v.* Morris, (Del. 1910) 76 Atl. 479, 480].

3. Webster Dict. [*quoted* in State *v.* Morris, (Del. 1910) 76 Atl. 479, 480].

4. State *v.* Boyce, 65 Ark. 82, 84, 44 S. W. 1043; Bouvier L. Dict. [*quoted* in People *v.* Donohue, 84 N. Y. 438, 442].

A synonym of larceny see People *v.* Donohue, 84 N. Y. 438, 442 [*citing* 4 Blackstone Comm. 229, 230]; Mathews *v.* State, 36 Tex. 675, 676 [*citing* 4 Blackstone Comm. 230].

Substituted for the term "larceny" in Ontario criminal code see Reg. *v.* Conlin, 1 Can. Cr. Cas. 41, 45.

5. State *v.* Hanley, 70 Conn. 265, 269, 39 Atl. 148.

6. State *v.* Stewart, 6 Pennew. (Del.) 435, 67 Atl. 786, 788.

7. Mullins *v.* State, 37 Tex. 337, 338.

8. Skipworth *v.* State, 8 Tex. App. 135, 138.

Statutory definition see U. S. *v.* Aronce, 12 Philippine 291, 294; U. S. *v.* Decanay, 8 Philippine 617, 619; Cline *v.* State, 43 Tex. 494, 497; Hall *v.* State, 41 Tex. 287; Chance *v.* State, 27 Tex. App. 441, 11 S. W. 457; Sansbury *v.* State, 4 Tex. App. 99, 100; Quitzow *v.* State, 1 Tex. App. 65, 68; Rex *v.*

In General, see BURGLARY, 6 Cyc. 169; EMBEZZLEMENT, 15 Cyc. 486; LARCENY, 25 Cyc. 1; RECEIVING STOLEN GOODS, 34 Cyc. 513; ROBBERY, 34 Cyc. 1795. Liability For Property Stolen From Guest at Hotel, see INNKEEPERS, 22 Cyc. 1082. Liability of Depositary For Loss of Goods by, see DEPOSITARIES, 13 Cyc. 801. Liability on Official Bond For Funds Lost Through, see COUNTIES, 11 Cyc. 447. Payment to Holder of Stolen Bill or Note, see COMMERCIAL PAPER, 7 Cyc. 1036 note 83.)

THEFT BOTE. The offense committed, where the party robbed not only knows the felon, but also takes his goods again, or other amends, upon agreement not to prosecute.[9]

THEFTBOTE EST EMENDA FURTI CAPTA, SINE CONSIDERATIONE CURIÆ DOMINE REGIS. A phrase meaning "Theftbote is the paying money to have stolen goods returned, without respect for public justice."[10]

George, 5 Can. Cr. Cas. 469, 470. See also LARCENY, 25 Cyc. 12.

Distinguished from "embezzlement" see State *v.* Hanley, 70 Conn. 265, 269, 39 Atl. 148; Simco *v.* State, 8 Tex. App. 406, 407; U. S. *v.* Thomas, 69 Fed. 588, 590.

Distinguished from "swindling" see Bink *v.* State, 50 Tex. Cr. 450, 452, 98 S. W. 249, 250, 98 S. W. 863.

By statutory provision the term includes swindling, embezzlement, and all unlawful acquisition of personal property (Counts *v.* State, 37 Tex. 593, 594; Whitworth *v.* State, 11 Tex. App. 414, 428); fraudulent conversion of property by a person having possession thereof by virtue of a contract of hiring or borrowing or other bailment (Purcelly *v.* State, 29 Tex. App. 1, 4, 13 S. W. 993; Brooks *v.* State, 26 Tex. App. 184, 189, 9 S. W. 562 [*citing* Wilson Cr. St. Tex. § 1292]).

"Theft from the person" distinguished see Gage *v.* State, 22 Tex. App. 123, 126, 2 S. W. 638.

"Theft of animals" see Vivian *v.* State, 16 Tex. App. 262, 263.

"Theft on land or afloat" see Spinette *v.* Atlas Steamship Co., 14 Hun (N. Y.) 100, 104.

9. Blackstone Comm. [*quoted* in Watson *v.* State, 29 Ark. 299, 301; Com. *v.* Pease, 16 Mass. 91, 93; Forshner *v.* Whitcomb, 44 N. H. 14, 16; State *v.* Hodge, 142 N. C. 665, 666, 55 S. E. 626, 7 L. R. A. N. S. 709].

As synonymous with "compounding felony" see COMPOUNDING FELONY, 8 Cyc. 493 note 1.

10. Peloubet Leg. Max. [*citing* 3 Coke Inst. 134].

THEFT INSURANCE

By Esten Calhoun Taylor

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CROSS-REFERENCES

For Matters Relating to:

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Liability of Insurer For Loss by Theft:

During Fire, see Fire Insurance, 19 Cyc. 828, 829.

Under Marine Policy, see Marine Insurance, 26 Cyc. 659.

I. DEFINITION.

Theft or burglary insurance may be defined as insurance against loss of property by the depredations of burglars and thieves.[1]

II. COMPANIES.

A. Organization and Status. Companies or associations organized for protection against loss by theft are engaged in insurance business within the provisions of a statute relating to the organization of insurance companies,[2] and are subject to the general insurance laws.[3]

B. Authority to Insure — 1. Domestic Company. Under a statute authorizing domestic insurance companies to insure houses, buildings, and all other kinds of property against loss or damage by fire or "other casualty," an insurance company is authorized to insure against loss by burglary.[4]

1. Black L. Dict. *sub verbo.* "Insurance." Classified as a breach of casualty insurance see Banker's Mut. Casualty Co. *v.* Council Bluffs First Nat. Bank, 131 Iowa 456, 108 N. W. 1046.

2. *In re* Solebury Mut. Protective Soc., 3 Del. Co. (Pa.) 139.

3. State *v.* Vigilant Ins. Co., 30 Kan. 585, 2 Pac. 840.

4. Banker's Mut. Casualty Co. *v.* Council

2. Foreign Company. In the absence of express prohibition a company organized under the laws of one state and authorized to carry on the business of a burglar insurance company may carry on such business in a sister state.[5]

III. The Contract and Liabilities Thereunder.

A. Payment of Premium. After a policy of burglary insurance has been duly executed by the insurer, failure to pay premium does not relieve him from liability under the policy if no demand for payment has been made, and this is true, even though the policy is in the hands of the insurer at the time the loss occurs.[6]

B. Property Covered. Where the assured is indemnified against the loss, by burglary and theft, of certain property, including jewelry, the fact that the policy contained a clause referring to property contained in safes, which was left blank as to amount, does not preclude a recovery for theft of jewelry from a safe.[7]

C. Construction of Contract — 1. In General. The rule that where a policy is susceptible of two constructions the one most favorable to the assured will be adopted is applicable to policies of burglary insurance.[8]

2. General and Special Clauses. A general clause as to the liability of the insurer must be read with reference to a special agreement annexed to the policy.[9]

3. Risks and Causes of Loss — a. In General. An insurer is liable under a burglary policy for a theft committed after entrance into a building effected by such means as would constitute the crime of burglary.[10] It is not necessary that there be visible marks upon the premises of the actual force and violence used in making entry or exit.[11] An insurer is not liable for loss of property taken under claim of ownership.[12]

b. Risks Excepted and Liability Limited. As in the case of other insurance contracts,[13] liability cannot be fixed upon the insurer for losses expressly excepted from the risk,[14] or for an amount in excess of the limit stipulated in the policy;[15] and in the interpretation of exceptions and limitations as to the manner[16] or

Bluffs First Nat. Bank, 131 Iowa 456, 108 N. W. 1046.

5. U. S. Fidelity, etc., Co. *v.* Linehan, 73 N. H. 41, 58 Atl. 956.

6. Roberts *v.* Security Co., [1897] 1 Q. B. 111, 66 L. J. Q. B. 119, 75 L. T. Rep. N. S. 531, 45 Wkly. Rep. 214.

7. Casner *v.* New Amsterdam Casualty Co., 116 Mo. App. 354, 91 S. W. 1001.

8. Bankers' Mut. Casualty Co. *v.* Goffs State Bank, 150 Fed. 78, 80 C. C. A. 32.

Where a policy is written by an insurer, and it has its choice of language in stating the contract, it will be construed strictly against the insurer. Rosenthal *v.* American Bonding Co., 124 N. Y. Suppl. 905.

"Other casualty" as including loss by burglary see Banker's Mut. Casualty Co. *v.* Council Bluffs First Nat. Bank, 131 Iowa 456, 108 N. W. 1046.

9. Wormser *v.* General Acc. Assur. Corp., 94 N. Y. App. Div. 213, 87 N. Y. Suppl. 974. *Compare* Rosenthal *v.* American Bonding Co., 124 N. Y. Suppl. 905. See *infra*, III, C, 3, b.

10. George *v.* Goldsmiths, etc., Burglary Assoc., [1898] 2 Q. B. 136, 67 L. J. Q. B. 807, 78 L. T. Rep. N. S. 813, 14 T. L. R. 435, 46 Wkly. Rep. 557 [*reversed* on other grounds in [1899] 1 Q. B. 595, 68 L. J. Q. B. 365, 80 L. T. Rep. N. S. 248, 15 T. L. R. 230, 47 Wkly. Rep. 474], holding that under a policy insuring "against loss or damage by burglary and housebreaking as hereinafter defined," which then provided that if the property insured "shall be lost by theft following upon actual forcible and violent entry upon the premises," the association shall pay, the insurer was liable for a loss by theft after entry effected by turning the handle of an unlocked door.

11. Rosenthal *v.* American Bonding Co., 124 N. Y. Suppl. 905, holding that defendants were liable under a policy of burglary insurance where the entry was made through an unlocked door, even though the policy provided that "the company shall not be liable unless there are visible marks upon the premises of the actual force and violence used in making entry into said premises or exit therefrom." *Compare* Maryland Casualty Co. *v.* Ballard County Bank, 134 Ky. 354, 120 S. W. 301.

12. Bigus *v.* Pacific Coast Casualty Co., 145 Mo. App. 170, 129 S. W. 982.

13. See the Particular Insurance Titles in this work.

14. Maryland Casualty Co. *v.* Ballard County Bank, 134 Ky. 354, 120 S. W. 301; Graf *v.* National Surety Co., 126 N. Y. Suppl. 616; Katzenstein *v.* Fidelity, etc., Co., 48 Misc. (N. Y.) 496, 96 N. Y. Suppl. 183; Saqui *v.* Stearns, 103 L. T. Rep. N. S. 583, 55 Sol. J. 91, 27 T. L. R. 105, [1910] W. N. 257.

15. Wormser *v.* General Acc. Assur. Corp., 94 N. Y. App. Div. 213, 87 N. Y. Suppl. 974.

16. Maryland Casualty Co. *v.* Ballard

place[17] of the burglary or theft, and as to the amount of liability,[18] the courts have applied the rules governing the construction of insurance policies in general.

4. RIGHT TO REPLACE OR REPAIR. Where there is an agreement to indemnify for money stolen from a safe and for damages done to the premises in an aggregate amount, and the policy reserves the right to repair the damage or replace the damaged article, the insurer is not entitled to replace the damaged property as part payment of its liability, where there has been no claim for damage to the property by the assured.[19]

D. Notice and Proof of Loss. Failure of the assured to comply with a condition requiring proof of loss in writing will defeat his recovery unless such condition is waived.[20]

County Bank, 134 Ky. 354, 120 S. W. 301; Rosenthal *v.* American Bonding Co., 124 N. Y. Suppl. 905; Saqui *v.* Stearns, 103 L. T. Rep. N. S. 583, 55 Sol. J. 91, 27 L. T. R. 105, [1910] W. N. 257.

Forcible and violent entrance.— Defendant by its policy of insurance agreed to indemnify plaintiffs for direct loss by burglary by any person who has made "forcible and violent entrance" upon the premises or exit therefrom, of which force and violence there shall be visible evidence. The policy further provided that the company shall not be liable unless there are visible marks upon the premises of the actual force and violence used. After plaintiffs' store had been opened by their clerks, and the door to the loft unlocked, two persons entered the loft by opening the unlocked door, assaulted one of plaintiffs' clerks, and robbed the store of a quantity of merchandise, and left the premises in the same manner as they entered. It was held that the goods were "feloniously abstracted" by a "forcible and violent entrance" upon the premises, and defendant would be liable on its policy, although there were no visible marks upon the premises of the actual force and violence used in making entry or exit. Rosenthal *v.* American Bonding Co., 124 N. Y. Suppl. 905.

Thief admitted by employee of assured.— Where the policy provided that there shall be no claim for loss by theft, robbery, or misappropriation by members of the assured's household, business staff, or other inmates of the assured's premises, the insurer was not liable for a burglary by third persons who were let into the premises by an employee of the insured who had entered into a plot with such third persons. Saqui *v.* Stearns, 103 L. T. Rep. N. S. 583, 55 Sol. J. 91, 27 T. L. R. 105, [1910] W. N. 257.

Use of tools or explosives.—A bank burglar insurance policy, stipulating that insurer assumes responsibility for the felonious abstraction of money from the bank safe by any person who shall have made entry into the safe by means of tools or explosives directly thereon, and for money forcibly taken from the part of the bank partitioned off by guard-rails for the use of its officers, but exempting the insurer from liability where there is an inner steel burglar-proof chest, unless the money is taken from the chest by an entry effected into it by the use of tools or explosives, directly thereon, and for loss by robbery, commonly known as hold-up, unless the working force is at work in the bank, does not make the insurer liable for loss by hold-up at night, where after the money was put into the safe, and the force at the bank had left, an officer thereof was held up and required to open the bank and safe; the word "tool" referring to burglars' tools and explosives. Maryland Casualty Co. *v.* Ballard County Bank, 134 Ky. 354, 120 S. W. 301.

17. Michaels *v.* New York Fidelity, etc., Co., 128 Mo. App. 18, 105 S. W. 783.

Limitation as to place of loss.—A separate laundry under lock and key in the basement of a flat house, set aside for the use of an occupant of one of the flats, used by him for laundry purposes, for cooking certain articles, and wherein he stored trunks packed with winter clothing, is not within the provisions of a policy of burglary insurance which provides that if the assured is the occupant of an apartment, the insurance covers goods in a locked store-room provided for the exclusive use of the assured by the landlord in the same house. Michaels *v.* New York Fidelity, etc., Co., 128 Mo. App. 18, 105 S. W. 783.

18. Wormser *v.* General Acc. Assur. Corp., 94 N. Y. App. Div. 213, 87 N. Y. Suppl. 974, holding that where the policy provides that the liability of the insurer shall not exceed, under policies of this corporation, separately or together, the sum of one thousand dollars, and a special agreement annexed to the policy provides that the insurer shall not be liable for loss in excess of two hundred and fifty dollars on any one article unless otherwise expressed in the policy, the insurer will not be liable for more than two hundred and fifty dollars for the theft of a single article of jewelry, although such article was worth more than one thousand dollars.

19. Bankers' Mut. Casualty Co. *v.* Goffs State Bank, 150 Fed. 78, 80 C. C. A. 32.

20. Reich *v.* Maryland Casualty Co., 54 Misc. (N. Y.) 585, 104 N. Y. Suppl. 984, holding that where a burglary insurance policy required that the proof of loss should be in writing, duly subscribed and certified to by the assured, etc., the failure of the assured to comply with this condition of the policy would defeat his recovery. See Katzenstein *v.* Fidelity, etc., Co., 48 Misc. (N. Y.) 496, 96 N. Y. Suppl. 183.

IV. ACTIONS UPON THE POLICY.

A. Issues and Proof. Evidence of waiver of conditions as to notice and proof of loss is not admissible under an allegation of performance of such conditions.[21]

B. Pleading. The complaint must show ownership or possession by plaintiff of the property insured and that he has an insurable interest therein.[22]

C. Evidence. To sustain a recovery under the policy of burglary insurance, evidence of the value of the goods stolen must be definite and clear,[23] and must bring the loss by burglary or theft within the terms of the policy.[24] The mere fact that property is missing from a closet where it had been placed is not, standing alone, sufficient evidence to sustain a recovery under a policy insuring against "direct loss by burglary, larceny or theft." [25]

D. Appeal. In an action on a burglary insurance policy, the objection to the insufficiency of the proof of loss may be sufficiently raised by defendant motion to dismiss and its objection to the evidence.[26]

THEIR. Of or belonging to them: Now always preceding the noun, with the value of an attributive adjective.[11]

THEM. A pronoun which, in grammar, comes in instead of repeating the last named persons.[12] (See THEY, *post*, p. 283.)

21. Reich *v.* Maryland Casualty Co., 54 Misc. (N. Y.) 585, 104 N. Y. Suppl. 984.

22. Pearlman *v.* Metropolitan Surety Co., 127 N. Y. App. Div. 539, 111 N. Y. Suppl. 882, holding that a complaint alleging the issuance of a policy to a certain party by defendants and that subsequently, by consent of defendants, it was transferred to plaintiff; that on a certain day property of the kind mentioned in the policy was stolen from the premises named in the policy, does not show ownership or possession by plaintiff or that he has an insurable interest.

23. Pearlman *v.* Metropolitan Surety Co., 127 N. Y. App. Div. 539, 111 N. Y. Suppl. 882, holding that where the evidence is to the effect that from the books kept, it was impossible to accurately determine the goods on hand on any particular day, there can be no recovery under a policy providing that the insurer shall not be liable "if the books and accounts of the assured and daily tally of money are not so kept that the actual loss may be accurately determined therefrom, nor unless said loss shall have been established by competent and conclusive evidence."

24. Mt. Eden Bank *v.* Ocean Acc., etc., Co., 96 S. W. 450, 29 Ky. L. Rep. 765, holding that the insurer was not liable for damage caused by a fire started on the floor of a bank, where the policy was against damage to the vault or to the premises or fixtures caused by a person making an attempt to enter the vault, there being nothing to show that any attempt had been made to get into the vault.

25. Schindler *v.* U. S. Fidelity, etc., Co., 58 Misc. (N. Y.) 532, 109 N. Y. Suppl. 723.

Evidence insufficient to show the falsity of a representation by the assured that a safe door was of a certain thickness see Bankers' Mut. Casualty Co. *v.* Goffs State Bank, 150 Fed. 78, 80 C. C. A. 32.

26. Reich *v.* Maryland Casualty Co., 54 Misc. (N. Y.) 585, 104 N. Y. Suppl. 984.

11. Century Dict.

Construed to import a joint obligation see Cottrell *v.* Hatheway, 108 Mich. 619, 622, 66 N. W. 596.

Construction in different instruments.—Indictment see Young *v.* State, 42 Tex. Cr. 301, 302, 59 S. W. 890.

Will see Sargent *v.* Bourne, 6 Metc. (Mass.) 32, 49.

Effect of omission in the term in an acknowledgment see ACKNOWLEDGMENTS, 1 Cyc. 591 note 46.

Construed in connection with other words.—"During their joint lives" (in marriage settlement) see Smith *v.* Oakes, 14 Sim. 122, 124, 37 Eng. Ch. 122, 60 Eng. Reprint 304. "During their lives" see Dow *v.* Doyle, 103 Mass. 489, 491. "During their natural lives" (in agreement to pay annuity) see Douglas *v.* Parsons, 22 Ohio St. 526. "On their own land" (in statute) see Parker *v.* Cutler Milldam Co., 20 Me. 353, 356, 37 Am. Dec. 56. "Their children" (in life-insurance policy) see Evans *v.* Opperman, 76 Tex. 293, 301, 13 S. W. 312. "'Their' death" (in will) see Jones *v.* Cable, 114 Pa. St. 586, 591, 7 Atl. 791. "Their heirs at law" (in deed) see Crandall *v.* Ahern, 200 Mass. 77, 79, 85 N. E. 886. "Their issue" (in will) see Wright *v.* Gaskill, 74 N. J. Eq. 742, 744, 72 Atl. 108. "Their original width" (in highway law) see Pitser *v.* McCreery, 172 Ind. 663, 678, 88 N. E. 303, 89 N. E. 317. "Their part" (in will) see Andrews *v.* Andrews, 7 Heisk. (Tenn.) 234, 243. "Their proper county" (in statute regulating adoption of children) see Knight *v.* Gallaway, 42 Wash. 413, 414, 85 Pac. 21. "Their roads" (in statute regulating the leasing and running of railroads) see St. Louis, etc., R. Co. *v.* Terre Haute, etc., R. Co., 145 U. S. 393, 402, 12 S. Ct. 953, 36 L. ed. 748.

12. Hamm *v.* Meisenhelter, 9 Watts (Pa.) 349, 351.

THEN. A word which will bear two meanings, as its use shows it to be either a conjunction or an adverb.[13] As an adverb of time, at that time, or immediately afterwards;[14] afterwards; immediately afterwards; at that time;[15] at that time; afterwards, or soon afterwards;[16] at that time, referring to a time specified either past or future.[17] A term which when used as a word of reasoning is said

Construed in will see Sargent *v.* Bourne, 6 Metc. (Mass.) 32, 49.

Construed in statute see People *v.* Zucca, 36 Misc. (N. Y.) 260, 261, 73 N. Y. Suppl. 311.

Construed as "themselves" in deed see Baker *v.* Hunt, 40 Ill. 264, 265, 89 Am. Dec. 346.

"Them all" (in will) see Moye *v.* Moye, 58 N. C. 359, 361.

"To them and their heirs and assigns forever" (in will) see Thomson *v.* Ludington, 104 Mass. 193, 194.

13. National Sewing Mach. Co. *v.* Wilcox, etc., Sewing-Mach. Co., 74 Fed. 557, 559, 20 C. C. A. 654. See also Wood *v.* Schoen, 216 Pa. St. 425, 430, 66 Atl. 79, where both uses of the term are illustrated in a sentence in which the term occurs twice.

14. Dudley *v.* Porter, 16 Ga. 613, 617; Harris *v.* Smith, 16 Ga. 545, 557. See also Gibson *v.* Hardaway, 68 Ga. 370, 378.

"When this term is used in reference to 'time,' it properly relates to some antecedent 'expressed,' rather than to one 'implied.'" Longfellow *v.* Scammon, 21 Me. 108, 110.

As an adverb of time usually relates to some antecedent period or event. Cresson's Estate, 8 Phila. (Pa.) 207, 208.

In its grammatical sense, an adverb of time. Hall *v.* Priest, 6 Gray (Mass.) 18, 24; Beauclerk *v.* Dormer, 2 Atk. 308, 311, 26 Eng. Reprint 588 [*quoted* in Harris *v.* Smith, 16 Ga. 545, 557].

15. Hammond *v.* Ridgely, 5 Harr. & J. (Md.) 245, 260, 9 Am. Dec. 522, where it is said: "And such is its meaning in all surveys; that is, as soon as the surveyor came to the termination of one line he commenced running the next."

16. Worcester Dict. [*quoted* in Burns *v.* Capstick, 62 Mo. App. 57, 59]. See also Ventress *v.* Clayton, (Ala. 1910) 51 So. 763, 764, where it is said: "'Then' does not always imply consecutiveness. Some of its meanings are afterwards; later; at another time."

As used in a plea to count for goods sold and delivered alleging delivery of goods to a named person at request of plaintiff, and that it was "'then,' to wit, on the day and year aforesaid, and before the commencement of the suit, in consideration thereof, agreed," etc., the term is ambiguous and is capable of being construed as meaning "at the same time" or "at a subsequent period." Stead *v.* Poyer, 1 C. B. 782, 783, 786, 14 L. J. C. P. 251, 50 E. C. L. 782.

17. Mangum *v.* Piester, 16 S. C. 316, 329, where it is said: "It has no power in itself to fix a time. It simply refers to a time already fixed." See also Underhill *v.* Roden, 2 Ch. D. 494, 498, 45 L. J. Ch. 266, 34 L. T. Rep. N. S. 227, 24 Wkly. Rep. 574.

Construction in will.— Death of the taker of the estate is referred to by the use of the word with reference to the disposition of the property after the termination of a life-estate (Sanford *v.* Sanford, 58 Ga. 259, 260; Hale *v.* Hobson, 167 Mass. 397, 401, 45 N. E. 913; Proctor *v.* Clark, 154 Mass. 45, 48, 27 N. E. 673, 12 L. R. A. 721; Hall *v.* Wiggin, 67 N. H. 89, 91, 29 Atl. 671; Schwencke *v.* Haffner, 18 N. Y. App. Div. 182, 184, 45 N. Y. Suppl. 937; Tawney *v.* Ward, 1 Beav. 563, 565, 8 L. J. Ch. 319, 17 Eng. Ch. 563, 48 Eng. Reprint 1060); or upon the death of the devisee without issue (Chism *v.* Williams, 29 Mo. 288, 296; Den *v.* Snitche, 14 N. J. L. 53, 59; Miller's Estate, 145 Pa. St. 561, 565, 22 Atl. 1044; Snyder's Appeal, 95 Pa. St. 174, 182).

In reference to a remainder the term relates to the time of enjoyment or of taking effect in possession but not to the time of the vesting of the estate. Farnam *v.* Farnam, 53 Conn. 261, 286, 2 Atl. 325, 5 Atl. 682; Newberry *v.* Hinman, 49 Conn. 130, 132; Williams *v.* Williams, 91 Ky. 547, 555, 16 S. W. 361, 13 Ky. L. Rep. 293; Williamson *v.* Williamson, 18 B. Mon. (Ky.) 329, 375; Middleton *v.* Middleton, 43 S. W. 677, 19 Ky. L. Rep. 1232; Dove *v.* Torr, 128 Mass. 38, 40; Gray *v.* Bridgeforth, 33 Miss. 312, 335; Roosa *v.* Harrington, 171 N. Y. 341, 353, 64 N. E. 1; Connelly *v.* O'Brien, 166 N. Y. 406, 408, 60 N. E. 20; Hersee *v.* Simpson, 154 N. Y. 496, 500, 48 N. E. 890; Haug *v.* Schumacher, 50 N. Y. App. Div. 562, 566, 64 N. Y. Suppl. 310; Canfield *v.* Fallon, 43 N. Y. App. Div. 561, 568, 26 Misc. 345, 57 N. Y. Suppl. 149; Moore *v.* Lyons, 25 Wend. (N. Y.) 119, 144; *In re* Valentine, 13 N. Y. Suppl. 444, 445; Loving *v.* Hunter, 8 Yerg. (Tenn.) 4, 31; Dansen *v.* Hawes, Ambl. 276, 27 Eng. Reprint 185; Hetherington *v.* Oakman, 7 Jur. 570, 571, 2 Y. & Coll. 299, 21 Eng. Ch. 299, 63 Eng. Reprint 131; Reeves *v.* Brymer, 4 Ves. Jr. 693, 698, 31 Eng. Reprint 358.

Construed as denoting order or sequence see Porter *v.* Howe, 173 Mass. 521, 528, 54 N. E. 255; Connelly *v.* O'Brien, 40 N. Y. App. Div. 574, 575, 58 N. Y. Suppl. 45.

Construction in other instruments as referring to time see Schmittdiel *v.* Moore, 101 Mich. 590, 596, 60 N. W. 279 (chattel mortgage); Feller *v.* Lee, 225 Mo. 319, 124 S. W. 1129, 1133 (deed of trust); Schenck *v.* Irwin, 60 Hun (N. Y.) 361, 363, 15 N. Y. Suppl. 55 (statute relating to supplementary proceedings); Westbrooke *v.* Romeyn, 29 Fed. Cas. No. 17,428, Baldw. 196 (deed).

"Then, at any time after" in statute construed as used in the sense of immediately, forthwith, or at once. Matter of Clark, 74 Hun (N. Y.) 294, 296, 26 N. Y. Suppl. 214.

"Then be living" (in will) see Hall *v.* Wiggin, 67 N. H. 89, 91, 29 Atl. 671.

"Who may then be living" (in will) see

to be equivalent to the expression " in that event " or " in that case " or " therefore "; [18] in that event or in that case; [19] in that case; in that event or contingency.[20]

THENCE. From that place.[21]

THEOLOGICAL or RELIGIOUS SEMINARY. A place specifically for the preparation of men for the ministry, or at least for the teaching of religious doctrines.[22] (See SEMINARY, 35 Cyc. 1375.)

THEORETICAL INCH. In reference to water power, a stream of water having a cross-section area at right angles with its flow of one square inch, and moving with a velocity due to the given head.[23]

THEORY OF THE CASE. In reference to pleading, the basis upon which the pleading proceeds, the facts upon which a right of action is claimed to exist in favor of the party asserting them.[24] (Theory of the Case: Estoppel to Allege Error as to, see APPEAL AND ERROR, 3 Cyc. 243. In Action on Account Stated, see ACCOUNTS AND ACCOUNTING, 1 Cyc. 391. In Lower Court, Adherence to in Appellate Court, see APPEAL AND ERROR, 2 Cyc. 670. In Suit For Accounting in Equity, see ACCOUNTS AND ACCOUNTING, 1 Cyc. 437.)

Bigelow *v.* Clap, 166 Mass. 88, 91, 43 N. E. 1037.

Construed in pleading see Wightman *v.* Carlisle, 14 Vt. 296, 299.

"Then and there."— In indictment see Bobel *v.* People, 173 Ill. 19, 26, 50 N. E. 322, 64 Am. St. Rep. 64; Jeffries *v.* Com., 12 Allen (Mass.) 145, 152; State *v.* Price, 11 N. J. L. 203, 210; Fooshee *v.* State, 3 Okla. Cr. 666, 108 Pac. 554, 556; State *v.* Clark, 46 Oreg. 140, 142, 80 Pac. 101; State *v.* Fley, 2 Brev. (S. C.) 338, 347, 4 Am. Dec. 583; Shaw *v.* U. S., 165 Fed. 174, 175, 91 C. C. A. 208. See INDICTMENTS AND INFORMATIONS, 22 Cyc. 321.

In indictment for homicide see HOMICIDE, 21 Cyc. 849.

In indictment for violation of liquor law see INTOXICATING LIQUORS, 23 Cyc. 226 note 44.

"Then being" see *In re* Bauernschmidt, 97 Md. 35, 55, 54 Atl. 637.

"Then due" see Moore *v.* Terry, 66 Ark. 393, 400, 50 S. W. 998.

"Then in force" see State *v.* Scampini, 77 Vt. 92, 113, 59 Atl. 201.

"'Then' in office" see Crook *v.* People, 106 Ill. 237, 246.

"Then living" see Jacobs *v.* Whitney, 205 Mass. 477, 482, 91 N. E. 1009; Van Deusen *v.* Van Deusen, 138 N. Y. App. Div. 357, 359, 122 N. Y. Suppl. 718; Scott's Estate, 37 Pa. Super. Ct. 342, 345; Cooper *v.* Macdonald, L. R. 16 Eq. 258, 271, 42 L. J. Ch. 533, 28 L. T. Rep. N. S. 693, 21 Wkly. Rep. 833.

"Then on hand" see New York Pelton Floor Co. *v.* Tucker, 43 Misc. (N. Y.) 429, 431, 89 N. Y. Suppl. 410.

"'Then' stockholders" see American Grocery Co. *v.* Pratt, 36 N. Y. App. Div. 152, 154, 55 N. Y. Suppl. 467.

"Then surviving" see Davies *v.* Davies, 129 N. Y. App. Div. 379, 383, 113 N. Y. Suppl. 872.

"Then surviving brothers and sisters" see Inderwick *v.* Tatchell, [1903] A. C. 120, 124, 72 L. J. Ch. 393, 88 L. T. Rep. N. S. 399.

18. Dudley *v.* Porter, 16 Ga. 613, 617 (where it is said to be " a particle of inference connecting the consequence with the premises "); Harris *v.* Smith, 16 Ga. 545, 557.

19. Hall *v.* Priest, 6 Gray (Mass.) 18, 24, where it is said: " Such is often its popular signification, and in this sense it is frequently used in legal instruments, to designate limitations of estates, or future contingencies on which they are made to depend."

20. Thran *v.* Herzog, 12 Pa. Super. Ct. 551, 559.

Construed in wills as " in that event " or " in that case." See Bunting *v.* Speek, 41 Kan. 424, 450, 21 Pac. 288, 3 L. R. A. 690; Rose *v.* McHose, 26 Mo. 590, 596; Pintard *v.* Irwin, 20 N. J. L. 497, 505; Corse *v.* Chapman, 153 N. Y. 466, 472, 47 N. E. 812; Hennessy *v.* Patterson, 85 N. Y. 91, 101; Matter of Moloughney, 67 N. Y. App. Div. 148, 150, 73 N. Y. Suppl. 598; Ash *v.* Coleman, 24 Barb. (N. Y.) 645, 647; Barker *v.* Southerland, 6 Dem. Surr. (N. Y.) 220; Coggins' Appeal, 124 Pa. St. 10, 31, 16 Atl. 579, 10 Am. St. Rep. 565; Cable *v.* Cable, 16 Beav. 507, 509, 51 Eng. Reprint 874.

"Than (then) the estate left over" see Behrens *v.* Baumann, 66 W. Va. 56, 60, 66 S. E. 5, 7, 27 L. R. A. N. S. 1092.

"Then to pay after the termination of the life estate" see Matter of Allison, 53 Misc. (N. Y.) 222, 230, 102 N. Y. Suppl. 887.

21. Bradley *v.* Nashville Ins. Co., 3 La. Ann. 708, 709, 48 Am. Dec. 465; Tracy *v.* Harmon, 17 Mont. 465, 467, 43 Pac. 500, where such meaning is applied to the term as used in describing boundaries of land.

"Thence by lands" see Riegelsville Delaware Bridge Co. *v.* Bloom, 48 N. J. L. 368, 369, 7 Atl. 478.

22. Church *v.* Bullock, (Tex. 1908) 109 S. W. 115, 117, 16 L. R. A. N. S. 860.

A "collegiate or theological education" means such academic and theological training as is practicable and suitable to prepare persons to be ministers of the gospel. Shepard *v.* Shepard, 57 Conn. 24, 29, 17 Atl. 173.

23. Jackson Milling Co. *v.* Chandos, 82 Wis. 437, 444, 52 N. W. 759; Janesville Cotton Mills *v.* Ford, 82 Wis. 416, 424, 52 N. W. 764, 17 L. R. A. 564.

24. Pittsburg, etc., R. Co. *v.* Rogers, (Ind. App. 1909) 87 N. E. 28, 31.

THERAPY. The treatment of disease.[25]

THERE. In or at a definite place other than that occupied by the speaker; in that place; at that point.[26]

THEREABOUTS. Nearly; near that number, degree, or quantity.[27]

THEREAFTER. Afterwards, or after that [28]

THEREBY. The equivalent of "in that way";[29] by that means; in consequence of that.[30]

THEREFOR. For that, or this, or it.[31]

The terms "theory" and "theories," as used in a pleading, relate to the basis of liability or the grounds of defense. South Bend Mfg. Co. *v.* Liphart, 12 Ind. App. 185, 39 N. E. 908, 909.

As used in the rule that "only one theory can be contained in a single paragraph" of a pleading, the word "theory" does not apply to the exclusion of additional causes of action, which may be stated in a single paragraph of complaint. State *v.* Petersen, 36 Ind. App. 269, 75 N. E. 602, 603.

25. Stewart *v* Raab, 55 Minn. 20, 21, 56 N. W. 256, where it is said: "And surgery is therapy of a distinctly operative kind."

26. Century Dict.

Used alone, a word of very uncertain meaning.— It must in some way be confined as to locality before it conveys any definite idea. Posey *v.* Denver Nat. Bank, 7 Colo. App. 108, 42 Pac. 684, 686.

"Adverbs of time — as 'where, there, after, from,' &c.— in a devise of a remainder, are construed to relate merely to the time of the enjoyment of the estate, and not the time of the vesting in interest." Doe *v.* Considine, 6 Wall. (U. S.) 458, 475, 18 L. ed. 869.

"There being 135 acres" (description of land in deed) see Roat *v.* Puff, 3 Barb. (N. Y.) 353, 356.

"There be, and thereby is, granted" (in act of congress) see Northern Pac. R. Co. *v.* Majors, 5 Mont. 111, 129, 2 Pac. 322; Board of Trustees *v.* Cuppett, 52 Ohio St. 567, 584, 40 N. E. 792; Denny *v.* Dodson, 32 Fed. 899, 904, 13 Sawy. 68.

"There is hereby appropriated" (in statute) see Humbert *v.* Dunn, 84 Cal. 57, 59, 24 Pac. 111.

"There situate" (in indictment) see State *v.* Kelley, 66 N. H. 577, 580, 29 Atl. 843.

27. Webster Dict. [*quoted* in Dwyer *v.* Rathbone, 2 N. Y. Suppl. 170, 172, holding that in the statement in a pleading that plaintiff's claim amounted to a certain sum "or thereabouts," the claim should be construed as less instead of more than the named sum].

"Of the measurement of 180 tons to 200 tons or thereabouts," as used in a charter party in which plaintiff was described as "of the ship A., of the measurement of 180 to 200 tons, or thereabouts," was a matter of description only and did not amount to a warranty. Barker *v.* Windle, 6 E. & B. 675, 680, 2 Jur. N. S. 1069, 25 L. J. Q. B. 349, 4 Wkly. Rep. 603, 88 E. C. L. 675.

Where a lot of land is conveyed by boundaries, and it is stated in the conveyance that the tract contains certain number of acres or "thereabouts," the whole tract will pass, although it contains more than the specified number of acres. Mann *v.* Pearson, 2 Johns. (N. Y.) 37, 44.

28. State *v.* Ryan, 120 Mo. 88, 108, 22 S. W. 486, 25 S. W. 351.

A broad term.— Pere Marquette R. Co. *v.* Wabash R. Co., 141 Mich. 215, 230, 104 N. W. 650.

In a note payable on demand after a certain date with interest at a certain rate "thereafter," the term limits the interest. Without the use of the term, interest would have run from the date of the note. Larrabee *v.* Southard, 95 Me. 385, 387, 50 Atl. 20.

Construed as not postponing the vesting but referring to the time of enjoyment of property given by will to certain persons for life, and "to be thereafter disposed of as herein provided." Matter of Conger, 40 Misc. (N. Y.) 157, 160, 81 N. Y. Suppl. 733.

Construction in statute see Clark *v.* Ennis, 45 N. J. L. 69, 77; Minneapolis, etc., R. Co. *v.* Doughty, 208 U. S. 251, 258, 28 S. Ct. 291, 52 L. ed. 474.

29. Birmingham R., etc., Co. *v.* Brown, 150 Ala. 327, 331, 43 So. 342, where such is said to be a natural signification of the term.

30. Lieuallen *v.* Mosgrove, 33 Oreg. 282, 289, 54 Pac. 200, 664. See also Daniels *v.* State, 52 Fla. 18, 22, 41 So. 609; Schoepflin *v.* Coffey, 162 N. Y. 12, 16, 56 N. E. 502.

Construed in an instruction in an action for negligence as referring to all that precedes it see Union Rolling Mill Co. *v.* Gillen, 100 Ill. 52, 54.

In the phrase "thereby forfeit," which is not unusual in statutes where the purpose is to declare a certain fact a cause of forfeiture, fine or other legal result, the term means "by reason of" or "because of." Hornbrook *v.* Elm Grove, 40 W. Va. 543, 546, 21 S. E. 851, 28 L. R. A. 416.

31. Webster Dict. [*quoted* in Ercanbrack *v.* Faris, 10 Ida. 584, 588, 79 Pac. 817].

Construed as referring to all the different causes before enumerated in the section of a statute relating to causes of action against a wife, and providing that a suit may be maintained against her, or against her husband, "therefor." See Marcus *v.* Rovinsky, 95 Me. 106, 109, 49 Atl. 420.

Construction in mechanic's lien statute see Central Trust Co. *v.* Richmond, etc., R. Co., 68 Fed. 90, 97, 15 C. C. A. 273, 41 L. R. A. 458.

Construed in section of a city charter relating to assessments for building a sidewalk. Hutchinson *v.* Olympia, 2 Wash. Terr. 314, 5 Pac. 606.

THEREFORE. For that; for that or this reason, referring to something previously stated;[32] for this reason; consequently.[33]

THEREIN. In that place, time, or thing.[34]

THEREOF. Of that;[35] of it.[36]

THEREON. On that.[37]

THERETO. To that.[38]

THERETOFORE. Before then.[39]

THEREUNDER. Under that or this.[40]

THEREUNTO. In its ordinary signification, to that;[41] unto this or that — that is, the particular thing done.[42]

32. Webster Dict. [*quoted* in Thompson *v.* Gilmore, 50 Me. 428, 433].

33. Worcester Dict. [*quoted* in Thompson *v.* Gilmore, 50 Me. 428, 433].

34. Century Dict.

Construed as within the limits of the municipality see *In re* Parkersburg Borough Sts., 124 Pa. St. 511, 525, 17 Atl. 27 (statute giving exclusive power to authorities of borough with reference to streets "therein"); Metcalfe *v.* Seattle, 1 Wash. 297, 301, 25 Pac. 1010 (constitution providing that no municipality shall become indebted beyond one and one-half per cent of its taxable property without the assent of three fifths of the voters "therein" voting).

Larceny in post-office.— In U. S. Rev. St. (1878) § 5478 [U. S. Comp. St. (1901) p. 3696], defining the offense of entering a post-office to commit larceny as forcibly breaking into or attempting to break into any post-office, or building used in part as a post-office with intent to commit larceny therein, the term means "in the post office." U. S. *v.* Williams, 57 Fed. 201, 202. See also U. S. *v.* Saunders, 77 Fed. 170, 171; U. S. *v.* Campbell, 16 Fed. 233, 9 Sawy. 20, both holding that the term refers to the part of the building used for a post-office.

Held to refer to dower and inheritance, as used in an antenuptial contract whereby the wife agreed to accept a certain sum in settlement of her "right of dower and inheritance" in her husband's estate, and relinquish all claim therein, and not to refer to the widow's right to occupy the homestead see Mahaffy *v.* Mahaffy, 63 Iowa 55, 64, 18 N. W. 685; Mahaffy *v.* Mahaffy, 61 Iowa 679, 680, 17 N. W. 46.

"And all proceedings therein" see Cummings *v.* Tabor, 61 Wis. 185, 191, 21 N. W. 72.

35. Griffin *v.* Nicholas, 224 Mo. 275, 291, 123 S. W. 1063; U. S. *v.* Hudson, 65 Fed. 68, 71.

36. U. S. *v.* Hudson, 65 Fed. 68, 71.

According to strict grammatical construction of a sentence the term can only apply to the last antecedent. Perry *v.* Davis, 3 C. B. N. S. 769, 778, 91 E. C. L. 769.

Construction in particular cases.— City ordinance relating to nuisance see Baltimore *v.* Hughes, 1 Gill & J. (Md.) 480, 495, 19 Am. Dec. 243. Statute regulating manufacture and sale of intoxicating liquors see Com. *v.* Bralley, 3 Gray (Mass.) 456, 457. Statute fixing liability of special partners see Haviland *v.* Chace, 39 Barb. (N. Y.) 283, 287. Statute providing for priority of claims of United States in case of assignment by insolvent debtor see U. S. *v.* Hooe, 3 Cranch (U. S.) 73, 91, 2 L. ed. 370. Statute relating to copyright see Werckmeister *v.* Pierce, etc., Mfg. Co., 63 Fed. 445, 454. Will see Fussey *v.* White, 113 Ill. 637, 643.

"A sufficiency thereof" see Smith *v.* McIntire, 83 Fed. 456, 461.

"On or before the maturity thereof" see Bridges *v.* Ballard, 62 Miss. 237, 241.

37. Century Dict.

Same meaning as "on the same," as used in a policy insuring a ship for a voyage to a port on the north side of Cuba, "with the liberty of a second port thereon" see Nicholson *v.* Mercantile Marine Ins. Co., 106 Mass. 399, 400.

Construction in particular cases.— Statute fixing liability of railroad company for injuries resulting from failure to fence track see Jeffersonville, etc., R. Co. *v.* Dunlap, 112 Ind. 93, 103, 13 N. E. 403. Statute fixing rates on railroad see Camden, etc., R., etc., Co. *v.* Briggs, 22 N. J. L. 623, 641. Will see Leddel *v.* Starr, 20 N. J. Eq. 274, 285.

38. Century Dict.

Construed in affidavit of merits (Larocque *v.* Conhaim, 45 Misc. (N. Y.) 234, 237, 92 N. Y. Suppl. 99); contract of shipment (Browne *v.* Paterson, 36 N. Y. App. Div. 167, 173, 55 N. Y. Suppl. 404).

"Or any street, highway, or avenue leading thereto" see Reg. *v.* Brown, 17 Q. B. 833, 837, 21 L. J. M. C. 113, 79 E. C. L. 833.

39. Hume *v.* U. S., 118 Fed. 689, 696, 55 C. C. A. 407.

"Theretofore kept" see Wilson *v.* Crewe Justices, [1905] 1 K. B. 491, 496, 69 J. P. 111, 74 L. J. K. B. 394, 92 L. T. Rep. N. S. 164, 21 T. L. R. 233, 53 Wkly. Rep. 382.

40. Central Trust Co. *v.* Richmond, etc., R. Co., 54 Fed. 723, 724 [*citing* Webster Dict.; Worcester Dict.].

41. Bacon *v.* Davis, 9 Cal. App. 83, 87, 98 Pac. 71, where it is said that it is obviously an elliptical form of expression for the phrase "to do that."

42. Rue *v.* Missouri Pac. R. Co., 74 Tex. 474, 478, 479, 8 S. W. 533, 15 Am. St. Rep. 852, where such meaning was applied to the term as used in a statute providing that conveyances of certain property must be in writing "subscribed and delivered by the party disposing of the same, or by his agent thereunto authorized by writing."

Thereunto belonging.— "These words are, in common speech, of different import, ac-

THEREUPON. A word which is employed to express a cause or condition, or is used as expressive of time.[43] In the first sense, upon that; in consequence of that; by reason of that;[44] upon this or that;[45] upon that or this; on account of that; in consequence of that.[46] As an adverb of time, without delay or lapse of time;[47] immediately without delay;[48] immediately after that; without delay; in sequence, but not necessarily in consequence;[49] immediately; at once; without delay.[50]

cording to the subject of which they are spoken. If we speak of a farm or field with reference to the ownership, we say it belongs to such a one, meaning, thereby, that it is the property of that person; if with reference to any estate of a particular name, we say it belongs to such an estate, as to the Britton Ferry estate, meaning that it is parcel of that estate; if with reference to its locality, we say it belongs to such a parish or township, meaning that it is situate in and part of that parish or township; and so with reference to a manor, we say it belongs to such a manor, meaning that it is situate in or part of that manor, in the ordinary and popular sense of the word 'part,' and not in the strictly legal sense, as part of the demesnes of the manor, or as holden of the manor or of the lord thereof." Doe *v.* Langton, 2 B. & Ad. 680, 691, 22 E. C. L. 285.

43. Hill *v.* Wand, 47 Kan. 340, 342, 27 Pac. 988, 27 Am. St. Rep. 288.

Oftener used in the first sense than in the second see Porphyry Paving Co. *v.* Ancker, 104 Cal. 340, 342, 37 Pac. 1050.

44. Century Dict. [*quoted* in Porphyry Paving Co. *v.* Ancker, 104 Cal. 340, 342, 37 Pac. 1050].

45. Webster Dict. [*quoted* in Dewey *v.* Linscott, 20 Kan. 684, 687].

46. Webster Dict. [*quoted* in Porphyry Paving Co. *v.* Ancker, 104 Cal. 340, 342, 37 Pac. 1050]; Webster Dict.; Worcester Dict. [both *quoted* in Hill *v.* Wand, 47 Kan. 340, 342, 27 Pac. 988, 27 Am. St. Rep. 288].

Used as synonymous with "in consequence thereof" see Groux's Improved Soap Co. *v.* Cooper, 8 C. B. N. S. 800, 814, 98 E. C. L. 800.

47. Bottle Min., etc., Co. *v.* Kern, 9 Cal. App. 527, 533, 99 Pac. 994; Hallam *v.* Huffman, 5 Kan. App. 303, 48 Pac. 602, 603; Putnam *v.* Langley, 133 Mass. 204, 205; Anderson L. Dict. [*quoted* in Hill *v.* Wand, 47 Kan. 340, 342, 27 Pac. 988, 27 Am. St. Rep. 288; Kaufmann *v.* Drexel, 56 Nebr. 229, 232, 76 N. W. 559].

"The word . . . may have different meanings dependent upon the connection in which it is used; but no lexicographer or court has ever allowed it to mean a time 'before' the act upon which it is predicated." Sloan *v.* Loyal Fraternal Home Assoc., 139 Mo. App. 443, 449, 123 S. W. 57.

48. Mansur *v.* County Com'rs, 83 Me. 514, 520, 22 Atl. 358, where it is said: "The word implies close connection, not disconnection."

Used in the sense of "then" see Matter of Cameron, 76 Hun (N. Y.) 429, 434, 27 N. Y. Suppl. 1031.

49. Century Dict. [*quoted* in Porphyry Paving Co. *v.* Ancker, 104 Cal. 340, 342, 37 Pac. 1050]. See also Humbarger *v.* Humbarger, 72 Kan. 412, 415, 83 Pac. 1095, 115 Am. St. Rep. 204.

It is not to be understood as showing that the proposition following such word is intended to be stated as a consequence deducible from what precedes, but only as showing the time at which, or the occasion on which, that which follows the word in question is averred to have taken place. Brown *v.* Mallett, 5 C. B. 600, 614, 12 Jur. 204, 17 L. J. C. P. 227, 57 E. C. L. 599.

"May import the same time or immediately afterwards, or it may be introduced merely to mark the progress of events." Cleal *v.* Elliott, 1 U. C. C. P. 252, 261.

"And thereupon" construed as marking a succession of events. Dennehey *v.* Woodsum, 100 Mass. 195, 197.

50. Webster Dict. [*quoted* in Porphyry Paving Co. *v.* Ancker, 104 Cal. 340, 342, 37 Pac. 1050; People *v.* Inglis, 161 Ill. 256, 262, 43 N. E. 1103; Michigan City First Nat. Bank *v.* Haskell, 23 Ill. App. 616, 618; Dewey *v.* Linscott, 20 Kan. 684, 687; State *v.* De Lea, 36 Mont. 531, 93 Pac. 814, 816; State *v.* Van Wyck, 20 Wash. 39, 47, 54 Pac. 768].

Does not mean "immediately" in a statute providing that it may be stipulated in a submission to arbitration that the submission be entered as an order of the superior court for which purpose it must be filed with the clerk, and the clerk must "thereupon" enter in his register of actions a note of the submission, etc. California Academy of Sciences *v.* Fletcher, 99 Cal. 207, 210, 33 Pac. 855.

Held to mean "then and there," as used in a plea to an action for trespass and false imprisonment alleging that plaintiff had committed a forcible entry and breach of the peace in the presence of the constable and that defendant thereupon gave plaintiff in charge see Derecourt *v.* Corbishley, 5 E. & B. 188, 194, 1 Jur. N. S. 870, 24 L. J. Q. B. 313, 3 Wkly. Rep. 513, 85 E. C. L. 187.

Consideration held referred to by the use of the term in an allegation that plaintiff delivered logs to defendants at their request and that thereupon defendants delivered their agreement to plaintiff see Bean *v.* Ayers, 67 Me. 482, 487.

Provisions before mentioned in statute see Krumeick *v.* Krumeick, 14 N. J. L. 39, 44.

Construction in statute relating to trespass for wrongful distress see Oliver *v.* Phelps, 20 N. J. L. 180, 193.

"Shall thereupon become" see Carey *v.* Monroe, 54 N. J. Eq. 632, 636, 35 Atl. 456.

THEREWITH. A word said to be the equivalent in meaning of the words "with that or this — at the same time." [51]

THERMOSTAT. A self-acting apparatus for the regulation of temperature [52]

THESAURUS COMPETIT DOMINO REGI, ET NON DOMINO LIBERATIS NISI SIT PER VERBA SPECIALIA. A maxim meaning "A treasure belongs to the king, and not to the lord of a liberty, unless it be through special words." [53]

THESAURUS INVENTUS EST VETUS DISPOSITIO PECUNIÆ, ETC., CUJUS NON EXTAT MODO MEMORIA, ADEO UT JAM DOMINUM NON HABEAT. A maxim meaning "Treasure-trove is an ancient hiding of money, etc., of which no recollection exists, so that it now has no owner." [54]

THESAURUS NON COMPETIT REGI, NISI QUANDO NEMO SCIT QUI ABSCONDIT THESAURUM. A maxim meaning "Treasure does not belong to the king, unless no one knows who hid it." [55]

THESAURUS REGIS EST VINCULUM PACIS ET BELLORUM NERVUS. A maxim meaning "The king's treasure is the bond of peace and the sinews of war." [56]

THESE. The plural of "this" and opposed to "those" and relates to the persons or things nearest or last mentioned.[57] (See THIS, *post*, p. 286.)

THEY. The plural pronoun of the third person.[58] (See THEM, *ante*, p. 277.)

THIEF. One who steals.[59]

THIEVING. An adjective which, it is said, imports an act committed, and not merely an inclination to commit it.[60]

THIMBLE or THIMBLES AND BALLS. A game played with thimbles and

51. Zartman-Thalman Carriage Co. *v.* Reid, 99 Mo. App. 415, 418, 73 S. W. 942.

52. Murphey *v.* Weil, 92 Wis. 467, 473, 66 N. W. 532, where it is said to be a word with a definite and certain meaning, both in ordinary parlance and as used by heating engineers.

"It includes the whole apparatus,— as well the expanding strip or strips of metal or other substance upon which the heat first acts as the intermediate wires, magnets, or other apparatus, if any, by which the dampers of the furnace are opened or closed as the strips expand or contract." Murphey *v.* Weil, 92 Wis. 467, 473, 66 N. W. 532.

53. Black L. Dict. [*citing* Fitzherbert Coron. 281].

54. Black L. Dict. [*citing* 3 Coke Inst. 132].

55. Peloubet Leg. Max. [*citing* 3 Coke Inst. 132].

56. Morgan Leg. Max. [*citing* Coke's Case, Godb. 289, 293, 78 Eng. Reprint 169].

57. Illinois Cent. R. Co. *v.* Beebe, 69 Ill. App. 363, 386 [*citing* Worcester Dict.], where the word is distinguished from "those."

Held that while the strict grammatical sense of the demonstrative pronoun "these" calls for the last named or nearest, where the word was qualified by "other" it was made to relate to others than those just mentioned. Russell *v.* Kennedy, 66 Pa. St. 248, 251.

Past acts held referred to by an advertisement which, having recited several incendiary acts then recently committed, offered a reward for information leading to the detection of any perpetrator of "these outrages." There was no reward for detection of crimes afterward committed. Freeman *v.* Boston, 5 Metc. (Mass.) 56, 59.

"These conveyed premises" see McWilliams *v.* McNamara, 81 Conn. 310, 319, 70 Atl. 1043.

58. Century Dict.

Construed as equivalent to "both" or "each" in statute fixing liability for incest see State *v.* Hurd, 101 Iowa 391, 396, 70 N. W. 613.

An agreement by two or more persons that "they" will desist from and discontinue their business is not shown to have been violated by an allegation that one of them has carried on the business, since the word "they" as used in the agreement, would thus be construed to mean that they and each of them would desist from, etc. Lawrence *v.* Kidder, 10 Barb. (N. Y.) 641, 655.

Construed as meaning corporation see Wiley *v.* Towanda, 26 Fed. 594, 595.

Construed in the clause of a will "they to take a life estate only" see Davenport *v.* Collins, (Miss. 1910) 51 So. 449.

59. Little *v.* Barlow, 26 Ga. 423, 425, 71 Am. Dec. 219.

"The term . . . is broad enough in law to cover both compound and simple larceny, and, in common parlance, to include the latter." American Ins. Co. *v.* Bryan, 1 Hill (N. Y.) 25, 28.

Meaning in marine insurance policy see MARINE INSURANCE, 26 Cyc. 659.

As libel or slander see LIBEL AND SLANDER, 25 Cyc. 300.

60. Reynolds *v.* Ross, 42 Ind. 387; Alley *v.* Neely, 5 Blackf. (Ind.) 200, 201, where it is said: "To charge one with being a 'thieving' person is charging him with being guilty of stealing."

As actionable word see LIBEL AND SLANDER, 25 Cyc. 302.

balls, the stake depending on designating a thimble under which a ball has been placed.[61] (See GAMING, 20 Cyc. 887 text and note 71.)

THIN. Slim, small, slender, slight, flimsy.[62]

THING. That which is or may become the object of thought; that which has existence, or is conceived or imagined as having existence; any object, substance, attribute, idea, fact, circumstance, event, etc.[63]

61. State *v.* Red, 7 Rich. (S. C.) 8, 9.

62. Sieling *v.* Clark, 18 Misc. (N. Y.) 464, 467, 41 N. Y. Suppl. 982, where a charge that a case was "thin" was held detrimental to plaintiff.

63. Century Dict. [*quoted* in U. S. *v.* Somers, 164 Fed. 259, 261], where it is said: "A thing may be material or ideal, animate or inanimate, actual, possible, or imaginary."

"This word . . . is of extensive signification, and in common parlance may intend all matters or substances in contradistinction to 'person.'" Ingell *v.* Nooney, 2 Pick. (Mass.) 362, 367, 13 Am. Dec. 434.

Has a far wider signification than the word "article" see U. S. *v.* Somers, 164 Fed. 259, 261.

Applying the maxim of Lord Hale, "The meaning of a word may be ascertained by reference to the meaning of words associated with it," and that of Lord Bacon, "The coupling of words together shows that they are to be understood in the same sense," the term occurring in the phrase "a strike or thing that he cannot control," was construed to mean something of the nature of or analogous to a strike of workmen. Hartje *v.* Keeler, 133 Ill. App. 461, 468, 469. See also Lantry *v.* Mede, 127 N. Y. App. Div. 557, 559, 111 N. Y. Suppl. 833.

The civil law of Spain, after dividing things into those of divine right and those of human right, subdivides the former into things sacred and religious, and the latter (or human) things, into things common, things public, things of a corporation or a university, and things private. Sullivan *v.* Richardson, 33 Fla. 1, 114, 14 So. 692.

"Thing adjudged" is said of that which has been decided by a final judgment, from which there can be no appeal, either because an appeal did not lie, or because the time fixed by law for appealing has elapsed, or because it has been confirmed on an appeal. New Orleans Nat. Banking Assoc. *v.* Adams, 18 Fed. Cas. No. 10,184, 3 Woods 21 [*citing* La. Civ. Code, art. 3556, subd. 31].

"Thing of value" includes: A cat which is kept as a household pet. Ford *v.* Glennon, 74 Conn. 6, 7, 49 Atl. 189. A check. Pawson *v.* Miller, 66 N. Y. App. Div. 12, 13, 72 N. Y. Suppl. 1011. Checks or chips within the meaning of a statute making gaming to consist of play, etc., "for money or other thing of value." Porter *v.* State, 51 Ga. 300, 301. But it does not include a release of a cause of action in tort. Clarke *v.* Stanwood, 166 Mass. 379, 384, 44 N. E. 537, 34 L. R. A. 378.

"Things of value" used as descriptive words in indictment see McCormick *v.* State, 141 Ala. 75, 79, 37 So. 377.

"Thing patented" see Day *v.* Union India-Rubber Co., 7 Fed. Cas. No. 3,691, 3 Blatchf. 488, 491.

"Things belonging to a corporation" within the classification of the Spanish civil law were those belonging exclusively to the inhabitants of any city, town, or castle, or any other place where men reside; and of those things some might be used by any inhabitant of that city, town, or place, and others were for the particular use of the corporation, it being its duty to apply the fruits, produce, or rents to the common benefit of the city or town. Fountains or springs, places for holding markets and fairs, and places for the meetings of the corporation, sandy beaches or grounds on the banks of rivers, and commons or pasture ground belong to the former class, and were for the use of any inhabitant; and flocks, fields, and vineyards, also plantations and lands producing fruit and rent, were of the latter class. Sullivan *v.* Richardson, 33 Fla. 1, 115, 14 So. 692.

"Things common," in the civil law of Spain, are those which belong to birds, beasts and to all living creatures, as being able to make use of them, as well as to men; such are the air, the water from heaven, the sea and its shore. Sullivan *v.* Richardson, 33 Fla. 1, 114, 14 So. 692.

"Things common to all" are "the heaven, the stars, the light, the air, the sea." Domat Civ. L. [*quoted* in Morgan *v.* Nagodish, 40 La. Ann. 246, 252, 3 So. 636].

"Things common to mankind by the law of nature are the air, running water, the sea, and consequently the shores of the sea." Justinian [*quoted* in Morgan *v.* Nagodish, 40 La. Ann. 246, 251, 3 So. 636].

"Things in action" see Canterbury *v.* Marengo Abstract Co., (Ala. 1910) 52 So. 388, 389; Kirk *v.* Roberts, (Cal. 1892) 31 Pac. 620, 622; Gibson *v.* Gibson, 43 Wis. 23, 35, 28 Am. Rep. 527; Henderson *v.* Henshall, 54 Fed. 320, 331, 4 C. C. A. 357. As meaning "choses in action" see Webb *v.* Edwards, 46 Ala. 17, 29.

"Things public," according to the classification of the Spanish civil law, were those which belonged only to mankind. Rivers, ports, harbors and high roads were among things public. Not only might the inhabitants of a place make use of things public, but also strangers could do so. No new mill or any other thing could be built on any part of the river by which its navigation might be impeded, and old buildings, obstructing the common use of things public, might be destroyed or pulled down; neither could any building or thing be erected by which the common use of high roads, squares, or market places, threshing grounds for corn, churches, etc., would be obstructed. Sullivan *v.* Richardson, 33 Fla. 1, 115, 14 So. 692.

THINGS PERSONAL. Things movable, or which may be carried about with and attendant upon a man's person;[64] goods, money, and all other movables, which may attend the owner's person wherever he thinks proper to go.[65] (See PROPERTY, 32 Cyc. 666.)

THINGS REAL. See PROPERTY, 32 Cyc. 655.

THINK. To believe; to consider; to esteem;[66] to cognize; apprehend; grasp intellectually;[67] to call to mind; remember; recollect; to recall anything to mind; exercise recollection; have remembrance;[68] to recollect or call to mind;[69] to form an opinion by reasoning; to judge; to conclude; to believe.[70]

THIRD COUSINS. Those who have a common great-great-grandfather;[71] the children of second cousins.[72] (See COUSINS, 11 Cyc. 1020.)

THIRD OPPOSITION. In the law of Louisiana, an intervention by the owner of property which, when not liable is seized on execution, on which, by giving security, an injunction or prohibition may be granted to stop the sale.[73] (See EXECUTIONS, 17 Cyc. 1364.)

THIRD PERSONS. All persons in the world except parties and privies.[74] (Third Persons: Benefit to as Consideration For Contract, see CONTRACTS, 9 Cyc. 316. Claims of to Property Seized on — Attachment, see ATTACHMENT, 4 Cyc.

64. U. S. *v.* Moulton, 27 Fed. Cas. No. 15,827, 5 Mason 537 [*citing* 2 Blackstone Comm. 24].

65. Blackstone Comm. [*quoted* in People *v.* Brooklyn, 9 Barb. (N. Y.) 535, 546].

Not only includes things movable, but also something more; the whole of which is comprehended under the general name of chattels, which, Sir Edward Coke says, "is a 'French' word, signifying goods." Blackstone Comm. [*quoted* in People *v.* Holbrook, 13 Johns. (N. Y.) 90, 94].

66. Martin *v.* Central Iowa R. Co., 59 Iowa 411, 414, 13 N. W. 424, where it is held that the word sufficiently expressed findings of fact by a jury. See also North Chicago St. R. Co. *v.* Rodert, 203 Ill. 413, 416, 67 N. E. 812, where the term was construed as used in an instruction to a jury.

The substantial equivalent of "believe" see People *v.* Martell, 138 N. Y. 595, 600, 33 N. E. 838.

"We think not," as used by jurors in answering the questions in a special verdict submitted to them, is equivalent to "No." Missouri Pac. R. Co. *v.* Reynolds, 31 Kan. 132, 137, 1 Pac. 150.

67. Century Dict. [*quoted* in Boice *v.* Ulster, etc., R. Co., 120 N. Y. App. Div. 643, 644, 105 N. Y. Suppl. 83].

68. Standard Dict. [*quoted* in Boice *v.* Ulster, etc., R. Co., 120 N. Y. App. Div. 643, 644, 105 N. Y. Suppl. 83].

Mere expression of opinion is not necessarily shown by the use of the term by a witness in giving his testimony. He may use it in the ordinary sense of the word when one is testifying to a fact within his knowledge, but as to the accuracy of which he is not sure. Voisin *v.* Commercial Mut. Ins. Co., 60 N. Y. App. Div. 139, 149, 70 N. Y. Suppl. 147.

69. Webster Dict. [*quoted* in Humphries *v.* Parker, 52 Me. 502, 504; Boice *v.* Ulster, etc., R. Co., 120 N. Y. App. Div. 643, 644, 105 N. Y. Suppl. 83]. See also Galveston, etc., R. Co. *v.* Parrish, (Tex. Civ. App. 1897) 43 S. W. 536.

70. Webster Dict. [*quoted* in Ilges *v.* St. Louis Transit Co., 102 Mo. App. 529, 536, 77 S. W. 93, where it is said that the word has various meanings and that its meaning must be ascertained from the connection in which it is used in a sentence].

"In such manner as they may think proper" see Drummond *v.* Jones, 44 N. J. Eq. 53, 55, 13 Atl. 611.

"Thinks proper" see Berry *v.* Harris, 43 N. H. 376, 377.

"To be 'used' as she may think proper" see Johns *v.* Johns, 86 Va. 333, 336, 10 S. E. 2.

71. People *v.* Clark, 62 Hun (N. Y.) 84, 85, 16 N. Y. Suppl. 473, 695.

72. People *v.* Clark, 62 Hun (N. Y.) 84, 85, 16 N. Y. Suppl. 473, 695.

73. New Orleans *v.* Louisiana Constr. Co., 129 U. S. 45, 46, 9 S. Ct. 223, 32 L. ed. 607 [*citing* La. Pr. Code, arts. 395, 396, 397, 398, 399, 400].

74. Anderson L. Dict. [*quoted* in Balfour *v.* Burnett, 28 Oreg. 72, 74, 41 Pac. 1], adding: "For example, those who are in no way parties to a covenant, nor bound by it, are said to be strangers to the covenant."

"It is difficult to give a very definite idea of 'third persons,' for sometimes those who are not parties to the contract, but who represent the rights of the original parties, as executors, are not to be considered third persons." Bouvier L. Dict. [*quoted* in Balfour *v.* Burnett, 28 Oreg. 72, 74, 41 Pac. 1].

Broad enough to include everybody outside of the immediate parties to the instrument and their privies. *In re* Beckhaus, 177 Fed. 141, 146, 100 C. C. A. 561, so construing the term as used in a statute requiring the recording of a mortgage of chattels left in the possession of the mortgagor "as against the rights and interests of any third person."

Not in all cases synonymous with "stranger."— Balfour *v.* Burnett, 28 Oreg. 72, 74, 41 Pac. 1, applying such construction to the term as used in a statute relating to claims of such persons to lands sold under execution. See also Beard *v.* Federy, 3 Wall. (U. S.) 478, 491, 493, 18 L. ed. 88 [*quoted* in Colorado Fuel Co. *v.* Maxwell Land Grant

724; Execution, see EXECUTIONS, 17 Cyc. 1199. Consideration For Promise to Pay Debt of, see CONTRACTS, 9 Cyc. 319. Contract — For Benefit of, see CONTRACTS, 9 Cyc. 374; Imposing Duty on, see CONTRACTS, 9 Cyc. 388. Effect of Substituted Agreement as to, see CONTRACTS, 9 Cyc. 595. Estoppel to Deny Corporate Powers, see CORPORATIONS, 10 Cyc. 1160. Fraud of Inducing Contract, see CONTRACTS, 9 Cyc. 421. Illegality of Contract as Defense in Favor of, see CONTRACTS, 9 Cyc. 561. Liabilities — In Respect to Mortgaged Chattels, see CHATTEL MORTGAGES, 7 Cyc. 18; Of Corporate Officers to, see CORPORATIONS, 10 Cyc. 920, 933. Necessity of Recording as Against, see CHATTEL MORTGAGES, 6 Cyc. 1068; MORTGAGES, 27 Cyc. 1157. Operation and Effect of Conditional Sales as to, see SALES, 35 Cyc. 675. Performance of Contract Conditional Upon Act or Will of, see CONTRACTS, 9 Cyc. 618. Promise to Answer For Debt or Default of Another — As Collateral Obligations, see GUARANTY, 20 Cyc. 1392; Necessity of Written Memorandum, see FRAUDS, STATUTE OF, 20 Cyc. 160. Right to Object That Contract Was Champertous, see CHAMPERTY AND MAINTENANCE, 6 Cyc. 890. Right to Sue on Contract, see CONTRACTS, 9 Cyc. 374 *et seq.*)

THIRD POSSESSOR. One who buys the mortgaged property without assuming to pay the mortgage.[75] (See, generally, MORTGAGES, 27 Cyc. 1336.)

THIRDS. A general expression which may signify, according to the intent and scope of the instrument, the interest of a widow in any property, whether personal or real, of her deceased husband in case of his intestacy.[76]

THIRTY DAYS. A term held not to be the synonym of "month."[77] (See, generally, TIME, *post*, p. 306.)

THIS. A word which, when referring to the things before stated, refers to the thing last mentioned.[78] (See THOSE, *post*, p. 287.)

Co., 22 Colo. 71, 73, 43 Pac. 556], where under a statute providing that patents issued by the United States shall be conclusive between the United States and said claimant only, and "shall not affect the interest of third persons," it was held that the term did not embrace all persons other than the United States and the claimants, but only those who held superior titles, such as will enable them to resist successfully any action of the government in disposing of the property.

"Third parties," within the meaning of an act requiring that a conditional bill of sale must be recorded in order to be good against third parties, are such creditors as have, in some manner, secured a lien on the property conditionally sold, and not mere ordinary creditors. John Deere Plow Co. *v.* Anderson, 174 Fed. 815, 817, 98 C. C. A. 523.

Statutory definition in mortgage law see Mojica *v.* Fernandez, 9 Philippine 403, 406.

75. Thompson *v.* Levy, 50 La. Ann. 751, 752, 23 So. 913, where it is said: "If one buys real estate by notarial or other act and does not assume the payment of the first mortgage, he is bound only as a third possessor. He must either give up the property or pay the amount for which it was mortgaged. He is limited to one or the other alternative This is the full extent of his responsibility as a purchaser."

76. Thompson *v.* Watts, 2 Johns. & H. 291, 302, 8 Jur. N. S. 760, 31 L. J. Ch. 445, 6 L. T. Rep. N. S. 817, 10 Wkly. Rep. 485, 70 Eng. Reprint 1067.

"**The word 'thirds,' is never used accurately.** It is a sort of expression in common parlance, descriptive of the interest upon an intestacy." Druce *v.* Denison, 6 Ves. Jr. 385, 394, 31 Eng. Reprint 1106 [*quoted* in O'Hara *v.* Dever, 3 Abb. Dec. (N. Y.) 407, 409, 2 Keyes 558; Gail *v.* Gail, 127 N. Y. App. Div. 892, 896, 112 N. Y. Suppl. 96; Hall *v.* Hall, 2 McCord Eq. (S. C.) 269, 314; Thompson *v.* Watts, 2 Johns. & H. 291, 302, 8 Jur. N. S. 760, 31 L. J. Ch. 445, 6 L. T. Rep. N. S. 817, 10 Wkly. Rep. 485, 70 Eng. Reprint 1067]. See also Horsey *v.* Horsey, 1 Houst. (Del.) 438, 440; Yeomans *v.* Stevens, 2 Allen (Mass.) 349, 350, where the term was construed in wills as meaning the interest upon intestacy.

When used in connection with the word "dower" the term has been held to refer to a widow's interest or share in the personal property left by the husband. Gail *v.* Gail, 127 N. Y. App. Div. 892, 896, 112 N. Y. Suppl. 96.

Construed in will as meaning the same thing as dower.— O'Hara *v.* Dever, 3 Abb. Dec. (N. Y.) 407, 409, 2 Keyes 558. See also O'Hara *v.* Dever, 46 Barb. (N. Y.) 609, 614.

77. State *v.* Upchurch, 72 N. C. 146, 148, where the term was so construed in a state constitution giving justices of the peace jurisdiction in criminal actions where the punishment does not exceed imprisonment for one month.

Construed as meaning thirty consecutive periods of twenty-four hours see Cornfoot *v.* Royal Exch. Assur. Corp., [1904] 1 K. B. 40, 44, 9 Aspin. 418, 9 Com. Cas. 80, 73 L. J. K. B. 22, 89 L. T. Rep. N. S. 490, 20 L. T. R. 34, 52 Wkly. Rep. 49.

78. Russell *v.* Kennedy, 66 Pa. St. 248, 251 [*citing* Webster Dict]. See also Sternberger *v.* McSween, 14 S. C. 35, 42.

THOROUGHBRED. As applied to cattle, one whose ancestry on both sides is perfect in blood and duly recorded in the American Herd Book.[79]

THOROUGHFARE. A passage through; a street or way open at both ends and free from any obstruction;[80] a passage through; a passage from one street or opening to another.[81]

THOROUGHLY. In a thorough manner; unqualifiedly; fully; completely.[82]

THOS. See NAMES, 29 Cyc. 269 note 36.

THOSE. A word said to relate to the things most remote or first mentioned.[83] (See THIS, *ante*, p. 286.)

THOUGHT. A term which, it is said, may mean no more than a mere conceit or fancy.[84]

THOUSAND. A term which, it has been held, may be shown by custom to mean one hundred dozen.[85] (See CUSTOMS AND USAGES, 12 Cyc. 1085.)

THREAD. A very slender line applied on a surface;[86] a thin strip of gilded paper often used in Oriental brocaded stuffs;[87] a twisted filament of a fibrous substance, as cotton, flax, silk, or wool, spun out to considerable length;[88] a fine filament or thread-like body of any kind;[89] a small line or twist of any fibrous

"This to certify" at the beginning of a deed is the equivalent of "to all those to whom these presents shall come" (Den *v.* Gifford, 1 N. J. L. 197, 199); and although not in the form usual to deeds is not essentially different from the more usual "this indenture witnesseth" (Brice *v.* Sheffield, 118 Ga 128, 130, 44 S. E. 843).

"This act" see People *v.* Tiphaine, 3 Park. Cr. (N. Y.) 241, 244.

"This day" see Renshaw *v.* Tullahoma First Nat. Bank, (Tenn. Ch. App. 1900) 63 S W. 194, 205; Goldshede *v.* Swan, 1 Exch. 154, 160, 16 L. J. Exch. 284.

"This day sold" see Yick Sung *v.* Herman, 2 Cal. App. 633, 634, 83 Pac. 1089, 1091.

"This my will" see *Re* Sealy, 85 L. T. Rep. N. S. 451, 452.

"This perpetual quit rent" see Cape Colony Public Works Com'r *v.* Logan, [1903] A. C. 355, 359, 72 L. J. P. C. 91, 88 L. T. Rep N. S. 779, 19 T. L. R. 545.

79. Hamilton *v.* Wabash, etc., R. Co., 21 Mo. App. 152, 158.

Simply a descriptive term and a statement that a horse was "thoroughbred" is not a warranty. Burnett *v.* Hensley, 118 Iowa 575, 578, 92 N. W. 678.

80. Webster Dict. [*quoted* in Mankato *v.* Warren, 20 Minn. 144, 150, where it was held that a *cul de sac* may be used and occupied as a street although not a highway].

The term has also been applied to narrow, tortuous tidal streams. Freeman *v.* Sea View Hotel Co., (N. J. Eq.) 40 Atl. 218, 220.

81. Webster Dict. [*quoted* in Wiggins *v.* Tallmadge, 11 Barb. (N. Y.) 457, 462].

A road having no outlet is not, in the ordinary sense of the term, a thoroughfare. Cemetery Assoc. *v.* Meninger, 14 Kan. 312, 315.

82. Century Dict.

"Thoroughly destroyed," as used in a lease giving the lessor or lessee the right to terminate the lease "if the building shall be thoroughly destroyed," was construed as meaning a condition of the building that would admit of no adjustment of the monthly rental, or occupation or use of any portion of the building. Paris Dry Goods Co. *v.* Spring Valley Water Co., 10 Cal. App. 212, 216, 101 Pac. 678.

"Thoroughly dried," as used in a statute providing a remedy for persons injured, by a variance in weight of sole leather from the inspector's marks thereon, was held to mean "suitably and sufficiently dried,— put into a state and condition fit and proper for sale and use." Tenney *v.* How, 24 Pick. (Mass.) 335, 338.

"Thoroughly satisfied," in an instruction that the jury must "be thoroughly satisfied that the accident did not occur in consequence of the carelessness of the plaintiff," was construed as leading the jury to understand that they must not only believe that the weight of the evidence on the subject of contributory negligence was in plaintiff's favor, but that their belief must be so strong as to exclude every reasonable doubt that plaintiff's carelessness did not contribute to his injury. Bradwell *v.* Pittsburgh, etc., R. Co., 139 Pa. St. 404, 413, 20 Atl. 1046.

83. Illinois Cent. R. Co. *v.* Beebe, 69 Ill. App. 363, 386 [*citing* Worcester Dict.].

84. Sloss-Sheffeld Steel, etc., Co. *v.* O'Neal, (Ala. 1910) 52 So. 953, 955, where "belief" is distinguished.

85. Union Water Power Co. *v.* Lewiston, 101 Me. 564, 574, 65 Atl. 67; Coquard *v.* Kansas City Bank, 12 Mo. App. 261, 266; Smith *v.* Wilson, 3 B. & Ad. 728, 732, 1 L. J. K. B. 194, 23 E. C. L. 319, 110 Eng. Reprint 266; Lawson Usages & Customs [*quoted* in McClusky *v.* Klosterman, 20 Oreg. 108, 118, 25 Pac. 366, 10 L. R. A. 785].

86. Haskell Golf Ball Co. *v.* Perfect Golf Ball Co., 143 Fed. 128, 130.

87. Haskell Golf Ball Co. *v.* Perfect Golf Ball Co., 143 Fed. 128, 130.

88. Century Dict. [*quoted* in Haskell Golf Ball Co. *v.* Perfect Golf Ball Co., 143 Fed. 128, 130], adding: "In a specific sense, thread is a compound cord consisting of two or more yarns firmly united together by twisting."

89. Century Dict. [*quoted* in Haskell Golf Ball Co. *v.* Perfect Golf Ball Co., 143 Fed. 128, 130].

or filamentous substance, as flax, silk, cotton, or wool, particularly such as is used for weaving or for sewing; a filament; a small string.[90] In mining, a thin seam, vein, or fissure filled with ore.[91] (See, generally, CUSTOMS DUTIES, 12 Cyc. 1123.)

THREAD OF A STREAM. A line midway between the banks, at the ordinary stage of water, without regard to the channel or the lowest and deepest part of the stream;[92] the middle line of the channel; that is, of the hollow bed of running water, when the water is at its ordinary stages.[93] (See FILUM, 19 Cyc. 532.)

THREATENED INJURY. See INJUNCTIONS, 22 Cyc. 757.

THREATENING. A term which supposes some danger in prospect, but more remote.[94] (See THREATS, *post* p. 289.)

90. Worcester Dict. [*quoted* in Luckemeyer *v.* Magone, 38 Fed. 30, 33].

91. Haskell Golf Ball Co. *v.* Perfect Golf Ball Co., 143 Fed. 128, 130.

As used in Tariff Act relating to cotton cloth in which other than the ordinary warp and filling threads have been introduced in the process of weaving to form figures, the term includes the remnants of threads so introduced, which have been clipped off where they appear at intervals on the back of the fabric. Maclea Co. *v.* U. S., 167 Fed. 688, 689.

"Thread lace" is that manufactured upon a cushion from thread wound on bobbins, moved by hand, and it is equally thread lace whether made of cotton or silk, and whether white or black. Arthur *v.* Lahey, 96 U. S. 112, 114, 24 L. ed. 766.

92. State *v.* Burton, 106 La. 732, 735, 31 So. 291 [*citing* Gould Waters, § 198].

93. Dayton *v.* Cooper Hydraulic Co., 10 Ohio S. & C. Pl. Dec. 192, 205, 7 Ohio N. P. 495.

Means the same thing as "middle of the main channel," which, when applied to rivers as boundaries between states, is equivalent to the expression "middle of the river." Butternuth *v.* St. Louis Bridge Co., 123 Ill. 535, 546, 17 N. E. 439, 5 Am. St. Rep. 545.

94. Eckhardt *v.* Buffalo, 19 N. Y. App. Div. 1, 12, 46 N. Y. Suppl. 204 [*citing* Webster Dict.].

"Threatening character" see U. S. *v.* Simmons, 61 Fed. 640.

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* Author of "Real Actions," 33 Cyc. 1541; "Slaves," 36 Cyc. 465; "Sodomy," 36 Cyc. 501; "Submission of Controversy," 37 Cyc. 346; "Summary Proceedings," 37 Cyc. 528; "Theaters and Shows," *ante*, p. 252. Joint author of "Religious Societies," 34 Cyc. 1112. Editor of "Seamen," 35 Cyc. 1176.

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I. DEFINITION.

A threat is any menace of such a nature and extent as to unsettle the mind of the person on whom it operates, and to take away from his acts that free, voluntary action which alone constitutes consent.[1]

II. ELEMENTS OF OFFENSE.[2]

A. Putting in Fear; Accomplishment of Purpose. Under some statutes, if the threats are intended to intimidate, it is not necessary that the

1. Abbott L. Dict. [*quoted* in State *v.* Brownlee, 84 Iowa 473, 478, 51 N. W. 25; State *v.* Louanis, 79 Vt. 463, 468, 65 Atl. 532].

Another definition is: "A menace, a declaration of one's purpose or intention to work injury to the person, property, or rights of another." Black L. Dict. [*quoted* in State *v.* Cushing, 17 Wash. 544, 555, 50 Pac. 512].

The expression "menaces" in 24 & 25 Vict. c. 96, § 44, making the sending of threatening letters a felony, includes threats of danger to a person by the making of an accusation of misconduct against him, although the accusations are not of criminal but of immoral conduct. Reg. *v.* Tomlinson, [1895] 1 Q. B. 706, 708, 18 Cox C. C. 75, 64 L. J. M. C. 97, 72 L. T. Rep. N. S. 155, 15 Reports 207, 43 Wkly. Rep. 544.

The word "persuasion" is not a substantial substitute for the word "threat." Daniels *v.* Lowery, 92 Ala. 519, 522, 8 So. 352.

If the act intended to be done is not unlawful, the declaration is not a threat. Payne *v.* Western, etc., R. Co., 81 Tenn. 507, 515, 49 Am. Rep. 666.

Mere vulgar and abusive epithets do not constitute threats such as to furnish adequate cause to reduce a killing to the grade of manslaughter. Levy *v.* State, 28 Tex. App. 203, 12 S. W. 596, 19 Am. St. Rep. 826.

The words "threaten to kill" as used in an indictment charging that defendant threatened to kill is equivalent to "threatening to take life" prohibited by statute, and the phrase "threaten to murder" is also equivalent to the proscribed threat. Buie *v.* State, 1 Tex. App. 58, 60.

2. **Constitutionality of statutes** creating the offense has been upheld. State *v.* Good-

person threatened should in fact be intimidated, provided the threats were calculated to do so or put in fear an ordinarily firm and prudent man.[3] Under other statutes, however, the threats must be so made, and under such circumstances, as to operate to some extent on the mind of the one whom it is intended to influence, and induce fear in him.[4] Where, under the statute, the offense consists in the act of maliciously threatening, it is immaterial whether the threats do or do not have the desired effect, and conviction can be had, although the purpose was not accomplished,[5] and notwithstanding the party menaced may not have yielded to the threat.[6] The fact that the threatened person was endeavoring to induce defendant to receive money, for the purpose of accusing him of extortion, and so could not have been moved by fear, will not prevent his conviction for an attempt to extort.[7]

B. Truth or Falsity of Threatened Charge; Justice or Injustice of Offender's Claim. Belief in the guilt of the threatened person on the part of the person making the threats is immaterial under the provisions of some statutes;[8] but the truth of the accusation may be material for the defense, in determining the intent with which defendant made the accusation.[9] Under some statutes the gist of the offense being the intent to extract or gain money or property belonging to another and to which the offender is not entitled,[10] if the person threatened is actually indebted to the offender,[11] or the latter has a good cause of action against the prosecutor,[12] he is not guilty of the offense; but it has been held that

win, 37 La. Ann. 713, 714 (as not violating the constitutional guaranty of liberty of speech); State *v.* McCabe, 135 Mo. 450, 37 S. W. 123, 58 Am. St. Rep. 589, 34 L. R. A. 127 (as not depriving persons of the protection of their property rights, or as not restricting the freedom of speech or publication). See CONSTITUTIONAL LAW, 8 Cyc. 892 text and note 27.

3. State *v.* McGee, 80 Conn. 614, 69 Atl. 1059; State *v.* Bruce, 24 Me. 71.

In Kentucky under Laws (1902), p. 55, c. 25, to prevent "kukluxing," a banding of persons together is necessary to intimidate, alarm, disturb, or injure another, so that the sending of an intimidating letter by one woman to another to blackmail was not an offense thereunder. Com. *v.* Patrick, 127 Ky. 473, 105 S. W. 981, 32 Ky. L. Rep. 343. "Intimidating, alarming, and disturbing any person," denounced in Pub. Laws (1873), p. 35, c. 767, imply the use of physical force or menace, and involve a breach of peace. Embry *v.* Com., 79 Ky. 439.

4. People *v.* Schmitz, (Cal. 1908) 94 Pac. 419, 15 L. R. A. N. S. 717; People *v.* Williams, 127 Cal. 212, 59 Pac. 581; State *v.* Brownlee, 84 Iowa 473, 51 N. W. 25.

A threat of the withdrawal of patronage from wholesale dealers, unless they comply with a certain condition as to patronage, does not amount to coercion, where they are free to comply with the condition, or not, as they see fit. One may bestow his patronage on whomsoever he chooses, and annex any condition to its bestowal he may wish. Macauley *v.* Tierney, 19 R. I. 255, 33 Atl. 1, 61 Am. St. Rep. 770, 37 L. R. A. 455.

5. People *v.* Cadman, 57 Cal. 562; State *v.* Bruce, 24 Me. 71; Com. *v.* Coolidge, 128 Mass. 55.

6. State *v.* Evans, Houst. Cr. Cas. (Del.) 97.

7. People *v.* Gardner, 144 N. Y. 119, 38 N. E. 1003, 43 Am. St. Rep. 741, 28 L. R. A. 699 [*reversing* 73 Hun 66, 25 N. Y. Suppl. 1072].

8. *California.*— People *v.* Choynski, 95 Cal. 640, 30 Pac. 791.

Iowa.— State *v.* De Bolt, 104 Iowa 105, 73 N. W. 499.

Louisiana.— State *v.* Goodwin, 37 La. Ann. 713.

Massachusetts.— Com. *v.* Buckley, 148 Mass. 27, 18 N. E. 577, 1 L. R. A. 624.

Michigan.— People *v.* Whittemore, 102 Mich. 519, 61 N. W. 13.

Minnesota.— State *v.* Coleman, 99 Minn. 487, 110 N. W. 5, 116 Am. St. Rep. 441.

New York.— People *v.* Wickes, 112 N. Y. App. Div. 39, 98 N. Y. Suppl. 163; People *v.* Eichler, 75 Hun 26, 26 N. Y. Suppl. 998.

Ohio.— See Mann *v.* State, 47 Ohio St. 566, 26 N. E. 226, 11 L. R. A. 656.

England.— Reg. *v.* Cracknell, 10 Cox C. C. 408.

See 45 Cent. Dig. tit. "Threats," § 5.

The reason for this is that the guilt or innocence of the person threatened is generally immaterial, the moral turpitude of threatening, for the purpose of obtaining money, to accuse a guilty person of the crime which he has committed being as great as it is to threaten, for a like purpose, an innocent person of having committed a crime. See cases cited *supra*, this note.

9. Mann *v.* State, 47 Ohio St. 566, 26 N. E. 226, 11 L. R. A. 656.

10. See cases cited *infra*, note 20.

11. State *v.* Hammond, 80 Ind. 80, 41 Am. Rep. 791; McMillen *v.* State, 60 Ind. 216; People *v.* Griffin, 2 Barb. (N. Y.) 427; Reg. *v.* Johnson, 14 U. C. Q. B. 569.

12. McMillen *v.* State, 60 Ind. 216. See also Mann *v.* State, 47 Ohio St. 566, 26 N. E. 226, 11 L. R. A. 656, holding that a threat to

a person whose property has been stolen has himself no power to punish the thief without process of law, and cannot claim the right to obtain compensation for the loss of his property by maliciously threatening to accuse him of the offense, or to do an injury to his person or property, with intent to extort property from him.[13]

C. Malice. Under some statutes a malicious intent must be established;[14] but the particular character of the malicious motive is of no consequence;[15] malice may be inferred;[16] and the intent is to be gathered from the effect and purpose of the threat, not from defendant's mental operations.[17]

D. Nature of Threat — 1. In General. To simply threaten is generally not a crime,[18] and mere threats in words not written is not an indictable offense at common law,[19] the intention to extort money or compel the person threatened to do or refrain from doing some lawful act against his will, being a necessary ingredient of the offense;[20] but it is an indictable offense, even at common law, to threaten personal violence or injury to the party menaced if the threat is of such a character as would be calculated to induce a firm and prudent man to part with his money and submit to the demand.[21] The threat must in general be a threat proscribed by the statute,[22] by some unlawful means sufficient to take away free consent.[23]

prosecute may not be unlawful where the demand for compensation is made with threats by the owner upon the offender for criminally destroying property.

13. State *v.* Hollyway, 41 Iowa 200, 20 Am. Rep. 586; State *v.* Bruce, 24 Me. 71.

14. State *v.* Debolt, 104 Iowa 105, 73 N. W. 499; State *v.* Goodwin, 37 La. Ann. 713.

Malicious threats by the owner of stolen property see State *v.* Hollyway, 41 Iowa 200, 20 Am. Rep. 586; State *v.* Bruce, 24 Me. 71, both cited *supra*, note 13.

In Minnesota it is not necessary to prove intent as an independent fact. State *v.* Coleman, 99 Minn. 487, 110 N. W. 5, 116 Am. St. Rep. 441.

15. State *v.* Goodwin, 37 La. Ann. 713.

The word "maliciously," as used in a statute, providing for punishing one who "maliciously threatens to accuse another of any crime," means wilfully and intentionally, and not necessarily with spite and malice toward the threatened person. Com. *v.* Goodwin, 122 Mass. 19.

16. State *v.* Waite, 101 Iowa 377, 70 N. W. 596, holding that in a prosecution for maliciously threatening to accuse the prosecuting witness of a crime in order to compel him to make an affidavit that certain letters purporting to have been written by him at a certain time were fraudulent, malice was properly inferred from evidence that defendant insisted on having the affidavit, and denounced the prosecuting witness and his wife, in their own home, as liars and perjurers, with only a suspicion of guilt on which to base the charge.

17. People *v.* Loveless, 84 N. Y. Suppl. 1114.

Evidence admissible to show intent see *infra*, V, A, 2.

18. Sively *v.* State, 44 Tex. 274; Schultz *v.* State, 135 Wis. 644, 114 N. W. 505, 16 N. W. 259, 571.

19. State *v.* Benedict, 11 Vt. 236, 34 Am. Dec. 688, holding, however, that the person threatened could at common law swear the peace against the offender and obtain redress that way by obtaining security against the commission of the offense threatened. But see Rex *v.* Southerton, 6 East 126, 2 Smith K. B. 305, 8 Rev. Rep. 428, 102 Eng. Reprint 1235.

At common law.— "Whatever was once thought upon the subject, it is now well settled, that mere threats, in words not written, is not an indictable offence at common law." State *v.* Benedict, 11 Vt. 236, 237, 34 Am. Dec. 688. But a threat of imprisonment is a threat of bodily hurt, and would seem to be sufficient. Grimes *v.* Gates, 47 Vt. 594, 19 Am. Rep. 129; Rex *v.* Southerton, 6 East 126, 2 Smith K. B. 305, 8 Rev. Rep. 428, 102 Eng. Reprint 1235; Coke Litt. 253*b*.

20. *Illinois.*— Glover *v.* People, 204 Ill. 170, 68 N. E. 464.

Iowa.— State *v.* Debolt, 104 Iowa 105, 73 N. W. 499; State *v.* Brownlee, 84 Iowa 473, 51 N. W. 25.

Pennsylvania.— See Com. *v.* Campolla, 28 Pa. Super. Ct. 379.

Texas.— Tindale *v.* State, (Cr. App. 1899) 51 S. W. 373; Wilkerson *v.* State, (Cr. App. 1895) 30 S. W. 807.

England.— See Gill's Case, 1 Lew. C. C. 305.

Canada.— Reg. *v.* Lyon, 29 Ont. 497.

21. State *v.* Evans, Houst. Cr. Cas. (Del.) 97; Rex *v.* Southerton, 6 East 126, 2 Smith K. B. 305, 8 Rev. Rep. 428, 102 Eng. Reprint 1235.

22. See the statutes of the several states. And see cases cited *infra*, the following notes.

The Ohio statute includes threats of injury of any kind whatever. See Brabham *v.* State, 18 Ohio St. 485.

23. People *v.* Schmitz, (Cal. 1908) 94 Pac. 419, 15 L. R. A. N. S. 717; State *v.* Pierce, 76 Iowa 189, 40 N. W. 715.

2. Communication.[24] No precise words are needed to convey a threat; any words or acts calculated and intended to cause an ordinary person to fear an injury to person, business, or property being sufficient;[25] and this may be done by innuendo or suggestion,[26] and communicated by signs or by actions as well as by word of mouth;[27] and statutes now exist in all jurisdictions, including England and Canada, making the uttering of threats criminal, whether it be by word of mouth or by writing.[28]

3. Particular Threats — a. Of Criminal Charge. Under the statutes prohibiting the making of threats it is held to be an offense to threaten to charge another with a crime, or to threaten to institute a criminal prosecution,[29] whether for

Lawful persuasion with a malicious motive would not be unlawful. People *v.* Schmitz, (Cal. 1908) 94 Pac. 419, 15 L. R. A. N. S. 717.

24. Sending threatening letter see *infra*, III.

To whom made see *infra*, II, E.

25. State *v.* Stockford, 77 Conn. 227, 58 Atl. 769, 107 Am. St. Rep. 28.

Request as a demand.—A simple "request" to do or not to do a thing, made by one or more of a body of strikers under circumstances calculated to convey a threatening intimidation, with a design to hinder or obstruct employees in the performance of their duties, is not less obnoxious than the use of physical force for the same purpose. A "request" under such circumstances is a direct threat and an intimidation, and will be punished as such. *In re* Doolittle, 23 Fed. 544 [*followed* in *Ex p.* Richards, 117 Fed. 658, 666].

26. State *v.* Coleman, 99 Minn. 487, 110 N. W. 5; People *v.* Thompson, 97 N. Y. 313; People *v.* Gillian, 50 Hun (N. Y.) 35, 2 N. Y. Suppl. 476 [*affirmed* in 115 N. Y. 643, 21 N. E. 1117].

27. Armstrong *v.* Vicksburg, etc., R. Co., 46 La. Ann. 1448, 16 So. 468; Dunn *v.* State, 43 Tex. Cr. 25, 63 S. W. 571.

28. See the statutes. And see the following cases:

California.— People *v.* Schmitz, (1908) 94 Pac. 419, 15 L. R. A. N. S. 717.

Connecticut.— State *v.* McGee, 80 Conn. 614, 69 Atl. 1059.

Iowa.— State *v.* Pierce, 76 Iowa 189, 40 N. W. 715.

Kentucky.— Embry *v.* Com., 79 Ky. 439.

Louisiana.— State *v.* Peters, 37 La. Ann. 730.

Massachusetts.— Com. *v.* Goodwin, 122 Mass. 19.

Missouri.— State *v.* McCabe, 135 Mo. 450, 37 S. W. 123, 58 Am. St. Rep. 589, 34 L. R. A. 127.

New York.— People *v.* Triscoli, 117 N. Y. App. Div. 120, 102 N. Y. Suppl. 328. *Compare* People *v.* Gillette, 124 N. Y. Suppl. 470 [*reversing* 66 Misc. 516, 124 N. Y. Suppl. 420], distinguishing "extortion" and "blackmail."

Ohio.— Mann *v.* State, 47 Ohio St. 566, 26 N. E. 226, 11 L. R. A. 656.

Texas.— Williams *v.* State, 51 Tex. Cr. 1, 100 S. W. 149.

Vermont.— State *v.* Louanis, 79 Vt. 463, 65 Atl. 532.

Wisconsin.— State *v.* Schultz, (1908) 114 N. W. 505.

England.— Reg. *v.* Redman, L. R. 1 C. C. 12, 10 Cox C. C. 159, 11 Jur. N. S. 960, 35 L. J. M. C. 89, 13 L. T. Rep. N. S. 303, 14 Wkly. Rep. 56; Reg. *v.* Robertson, 10 Cox C. C. 9, 13 Jur. N. S. 96, L. & C. 483, 34 L. J. M. C. 35, 11 L. T. Rep. N. S. 386, 13 Wkly. Rep. 101; Reg. *v.* Walton, 9 Cox C. C. 268, 9 Jur. N. S. 259, L. & C. 288, 32 L. J. M. C. 79, 7 L. T. Rep. N. S. 754, 11 Wkly. Rep. 348; Reg. *v.* Jones, 5 Cox C. C. 226; Reg. *v.* Miard, 1 Cox C. C. 22; Reg. *v.* Taylor, 1 F. & F. 511.

Canada.— Reg. *v.* Kempel, 31 Ont. 631; Reg. *v.* Lyon, 29 Ont. 497.

See 45 Cent. Dig. tit. "Threats," § 1.

The words "without any reasonable and probable cause," in 7 & 8 Geo. IV, c. 29, § 8, must be taken to apply to the state of the prisoner's mind at the time of making the demand; and the jury must look at all the circumstances for the purpose of deciding whether at that time the prisoner *bona fide* believed that he had reasonable cause. Reg. *v.* Miard, 1 Cox C. C. 22.

29. *Indiana.*— Eacock *v.* State, 169 Ind. 488, 82 N. E. 1039; Peachee *v.* State, 63 Ind. 399.

Massachusetts.— Com. *v.* Carpenter, 108 Mass. 15.

Ohio.— Jones *v.* State, 14 Ohio Cir. Ct. 363, 7 Ohio Cir. Dec. 716.

Texas.— Williams *v.* State, 51 Tex. Cr. 1, 100 S. W. 149.

Washington.— State *v.* Nethercutt, 48 Wash. 105, 92 Pac. 938.

A false statement that a warrant is issued to arrest a person for a crime, and that it will be served unless money is paid to stay the process, is a threat to accuse a person of a crime. Com. *v.* Murphy, 12 Allen (Mass.) 449.

A threat "to proceed against [a person] criminally" is equivalent to a threat to accuse such person of a crime, within N. Y. Pen. Code, §§ 558, 560. People *v.* Eichler, 75 Hun (N. Y.) 26, 26 N. Y. Suppl. 998.

Any crime or offense which may be prosecuted within the territorial limits of the United States is within Iowa Code, § 3871, providing punishment for maliciously threatening to accuse a person "of a crime or offense, with intent to compel him to do an

arson,[30] assault with intent to commit murder,[31] or rape,[32] bastardy,[33] larceny,[34] perjury,[35] seduction,[36] or violation of the revenue laws.[37] A threat to accuse need not be a threat to accuse before a judicial tribunal, a threat to charge before any third person being enough,[38] as for instance a threat to accuse by newspaper publication,[39] or any other public accusation.[40]

b. To Accuse of Immoral Conduct Tending to Disgrace; Unnatural Offense. The threat may be of a charge of immoral conduct tending to degrade or disgrace the person threatened,[41] as for instance illicit sexual intercourse,[42] or to charge a man with an unnatural crime.[43]

c. Of Arrest. A threat to arrest under a false claim that the threatener was a police officer will justify a conviction;[44] but a threat to arrest a person in a civil proceeding is not a threat to injure his person within the meaning of a statute making the latter threat a criminal offense.[45]

d. Of Injury to Person, Property, or Credit. The threat may be to inflict

act against his will." State *v.* Waite, 101 Iowa 377, 70 N. W. 596.

Accusing of crime is not threatening to accuse of crime. State *v.* Peters, 37 La. Ann. 730, holding that a statute making it a criminal offense to threaten to accuse another of a crime will not support a conviction for accusing one of a crime.

A charge of disorderly conduct is not a charge of crime. State *v.* Dailey, 127 Iowa 652, 103 N. W. 1008.

"Blackmail" and "extortion" compared.— "'Extortion' may be committed by obtaining property from another, with his consent, induced by a wrongful use of fear. N. Y. Pen. L. § 850. And this fear may be induced by a threat to accuse him of a crime. N. Y. Pen. L. § 851. . . . 'Blackmail' may be committed by sending or delivering a letter or writing threatening to accuse another person of a crime, with intent to extort property from him. . . . N. Y. Pen. L. § 856. And then by N. Y. Pen. L. § 857, it is provided that a person who, with intent to extort or gain money or other property, verbally makes such a threat as would be criminal under any of the foregoing sections of the article (commencing with section 850), if made in writing, is guilty of a misdemeanor. The threat under the extortion section may be written or verbal. Under the blackmail section it must be written. The making of a verbal threat such as if in writing would constitute blackmail would be a misdemeanor, under section 857. We can hardly suppose, however, that the making of a verbal threat such as would constitute extortion under sections 850, 851, would be a misdemeanor, because if in writing as well as verbal it would be extortion. It could not have been the design of the Legislature to make the same act both a misdemeanor and a felony punishable by 15 years' imprisonment." People *v.* Gillette, 124 N. Y. Suppl. 470, 471 [*reversing* 66 Misc. 516, 124 N. Y. Suppl. 420]. See also EXTORTION, 19 Cyc. 35.

The gist of the felony defined as "blackmailing" is the extortion of money, chattels, or valuable securities from a person by threatening to expose his crimes or immoralities. It is a method by which the criminal obtains the property of his victim. The end is the same as in larceny, embezzlement, robbery, burglary, or false pretenses; but the means employed are different. Green *v.* State, 157 Ind. 101, 102, 60 N. E. 941. See BLACKMAIL, 5 Cyc. 708.

30. Com. *v.* Goodwin, 122 Mass. 19. See also Com. *v.* Buckley, 145 Mass. 181, 13 N. E. 368.

31. People *v.* Braman, 30 Mich. 460.

32. Matter of Hart, 131 N. Y. App. Div. 661, 116 N. Y. Suppl. 193.

33. State *v.* McGlasson, 88 Iowa 667, 56 N. W. 293.

34. Moore *v.* People, 69 Ill. App. 398.

35 People *v.* Wickes, 112 N. Y. App. Div. 39, 98 N. Y. Suppl. 163.

36. Com. *v.* Dorus, 108 Mass. 488.

37. People *v.* Sexton, 132 Cal. 37, 64 Pac. 107.

38. Rex *v.* Robinson, 2 Lew. C. C. 273, 2 M. & Rob. 14.

39. State *v.* Debolt, 104 Iowa 105, 73 N. W. 499 [*following* State *v.* Lewis, 96 Iowa 286, 65 N. W. 295].

40. State *v.* Louanis, 79 Vt. 463, 65 Atl. 532.

41. People *v.* Tonielli, 81 Cal. 275, 22 Pac. 678; Motsinger *v.* State, 123 Ind. 498, 24 N. E. 342.

"Blackmailing" by means of such threats see Green *v.* State, 157 Ind. 101, 102, 60 N. E. 941, cited *supra*, note 29.

42. Motsinger *v.* State, 123 Ind. 498, 24 N. E. 342; Kistler *v.* State, 54 Ind. 400; People *v.* Wightman, 104 N. Y. 598, 11 N. E. 135. But see Com. *v.* Patrick, 127 Ky. 473, 105 S. W. 981, 32 Ky. L. Rep. 343, where a letter by a wife to an alleged paramour of her husband was held not to be punishable.

43. See ROBBERY, 34 Cyc. 1801 text and note 33.

It was robbery at common law to extort money under the threat of charging one with an unnatural crime. Rex *v.* Donnally, Leach C. C. 229; Rex *v.* Jones, Leach C. C. 164; Rex *v.* Cannon, R. & R. 109 [*cited* in People *v.* Barondess, 61 Hun (N. Y.) 571, 16 N. Y. Suppl. 436, 8 N. Y. Cr. 234].

44. Williams *v.* State, 13 Tex. App. 285, 46 Am. Rep. 237.

45. Com. *v.* Mosby, 163 Mass. 291, 39 N. E. 1030.

injury on the person, property, or calling of the one threatened,[46] as for instance a threat to kill,[47] or to injure a person's business,[48] as by inciting[49] or fostering[50] a strike, or boycott,[51] or a threat to injure a person's credit by publishing him as a bad debtor.[52]

E. To Whom Made.[53] The threat need not be made personally to or in the presence of the one threatened.[54]

III. SENDING THREATENING LETTERS.[55]

A. Nature of Offense. Under many statutes it is a distinct and separate crime for a person to send threatening letters,[56] the crime being defined to be the name of the offense of sending letters containing threats of the kinds recognized by the statutes as criminal.[57] The letter need not be signed,[58] and may contain threats either of the sender or of some other persons,[59] to accuse of a crime,[60] to impute

46. Glover *v.* People, 204 Ill. 170, 68 N. E. 464; State *v.* Ullman, 5 Minn. 13; Schultz *v.* State, 135 Wis. 644, 114 N. W. 505, 116 N. W. 259, 571.

An "unlawful injury," within Cal. Pen. Code, § 519, providing that extortion may be accomplished by a threat to do unlawful injury to property, can include no injury that is not of such character that, if it had been committed as threatened, it would have constituted an actionable wrong, an injury for which suit for the resultant damages could be brought against defendant, or which, if merely threatened, could be enjoined in equity, if the remedy at law were deemed inadequate. People *v.* Schmitz, (Cal. 1908) 94 Pac. 419, 15 L. R. A. N. S. 717.

47. Glover *v.* People, 204 Ill. 170, 68 N. E. 464; State *v.* Logan, 104 La. 760, 29 So. 336; People *v.* Triscoli, 117 N. Y. App. Div. 120, 102 N. Y. Suppl. 328.

48. People *v.* Barondess, (N. Y. 1892) 31 N. E. 240 [*reversing* 61 Hun 571, 16 N. Y. Suppl. 436, 8 N. Y. Cr. 234]; People *v.* Hughes, 19 N. Y. Suppl. 550, 8 N. Y. Cr. 448 [*affirmed* in 137 N. Y. 29, 32 N. E. 1105].

49. People *v.* Barondess, (N. Y. 1892) 31 N. E. 240 [*reversing* 61 Hun 571, 16 N. Y. Suppl. 436, 8 N. Y. Cr. 234].

50. People *v.* Barondess, (N. Y. 1892) 31 N. E. 240 [*reversing* 61 Hun 571, 16 N. Y. Suppl. 436, 8 N. Y. Cr. 234]; People *v.* Weinseimer, 117 N. Y. App. Div. 603, 102 N. Y. Suppl. 579.

Ownership of money demanded immaterial. — Where, after a contract had been let for the plumbing of a building, defendant, who was the president of a local plumbers' union, refused to permit the work to proceed until he was paid a certain sum of money by the contractor, it was immaterial, in a prosecution of defendant for extortion, whether the money which the contractor delivered to defendant was his own or that of the owner of the building. People *v.* Weinseimer, 117 N. Y. App. Div. 603, 102 N. Y. Suppl. 579.

51. People *v.* Hughes, 137 N. Y. 29, 32 N. E. 1105 [*affirming* 19 N. Y. Suppl. 550, 8 N. Y. Cr. 448].

There is, however, a distinction between a threat to do injury to a person's business and a refusal to buy from such person or to handle his goods. The former is unlawful, but as to the latter the law does not consider the refusal as such coercion or threat as to constitute them unlawful. John D. Park, etc., Co. *v.* National Wholesale Druggists' Assoc., 175 N. Y. 1, 67 N. E. 136, 96 Am. St. Rep. 578; Cote *v.* Murphy, 159 Pa. St. 420, 28 Atl. 190, 39 Am. St. Rep. 686, 23 L. R. A. 135. See CONSPIRACY, 8 Cyc. 637 *et seq.*; Martin Labor Unions, § 91.

52. State *v.* McCabe, 135 Mo. 450, 37 S. W. 123, 58 Am. St. Rep. 589, 34 L. R. A. 127; People *v.* Loveless, 84 N. Y. Suppl. 1114.

53. **How communicated** see *supra*, II, D, 2.

54. State *v.* Brownlee, 84 Iowa 473, 51 N. W. 25.

55. **Venue of offense.**— The indictment for sending threatening letters should be found in the county where they are received. Esser's Case, 2 East P. C. 1125. See also CRIMINAL LAW, 12 Cyc. 234.

56. See the statutes of the several states. And see cases cited *infra*, the following notes.

In Kentucky under Laws (1902), p. 55, c. 25, see Com. *v.* Patrick, 127 Ky. 473, 105 S. W. 981, 32 Ky. L. Rep. 343.

57. Black L. Dict. 1171.

Letter by wife to an alleged paramour of her husband was held not to be an offense. Com. *v.* Patrick, 127 Ky. 473, 105 S. W. 981, 32 Ky. L. Rep. 343.

58. People *v.* Cadman, 57 Cal. 562; Robinson's Case, East P. C. 1110.

59. State *v.* Compton, 77 Wis. 460, 46 N. W. 535.

Persons liable.— One may be convicted of the offense not only if he himself wrote the threatening letter, but also if he acted in conjunction with another who did write it. People *v.* Adrogna, 139 N. Y. App. Div. 595, 124 N. Y. Suppl. 68.

60. State *v.* Linthicum, 68 Mo. 66; People *v.* Wightman, 104 N. Y. 593, 11 N. E. 135 [*affirming* 43 Hun 358, 5 N. Y. Cr. 545]; People *v.* Thompson, 97 N. Y. 313; Reg. *v.* Chalmers, 10 Cox C. C. 450, 16 L. T. Rep. N. S. 363, 15 Wkly. Rep. 773; Robinson's Case, East P. C. 1110; Rex *v.* Hickman, 1 Moody C. C. 34; Reg. *v.* Popplewell, 20 Ont. 303.

The privilege of an attorney does not constitute a defense to his prosecution for

disgrace,[61] to cause annoyance,[62] or to do an injury to the person or property of another,[63] and may be for the purpose of obtaining that which in justice and equity the writer of the letter is not entitled to receive.[64] It will not excuse defendant, that he used no set phrase or form of speech,[65] for if in fact it can be found that the purport and natural effect of the latter is to convey a threat, the mere form of words is unimportant.[66]

B. To Whom Sent. The person to whom a threatening letter is sent must in general be the person threatened;[67] but even if the letter be misdirected,[68] or dropped so that the addressee may receive it and he does in fact receive it, it will support a conviction.[69]

IV. INDICTMENT OR INFORMATION.[70]

A. In General. The indictment must allege facts sufficient to show the commission of the crime charged.[71] The indictment must allege to whom,[72] and

threats of a perjury charge. People *v.* Wickes, 112 N. Y. App. Div. 39, 98 N. Y. Suppl. 163.

61. People *v.* Tonielli, 81 Cal. 275, 22 Pac. 678; People *v.* Wightman, 43 Hun (N. Y.) 358, 5 N. Y. Cr. 545 [*affirmed* in 104 N. Y. 598, 11 N. E. 135].

62. State *v.* McCabe, 135 Mo. 450, 37 S. W. 123, 58 Am. St. Rep. 589, 34 L. R. A. 127; People *v.* Loveless, 84 N. Y. Suppl. 1114.

63. People *v.* Cadman, 57 Cal. 562; State *v.* Barr, 28 Mo. App. 84; Reg. *v.* Hill, 5 Cox C. C. 233; Rex *v.* Boucher, 4 C. & P. 562, 19 E. C. L. 650.

To send a threatening letter to another for the purpose of extorting money from him, and menacing him with personal violence or injury in case of his refusal to comply with the demand, of such a character as would be calculated to induce a firm and prudent man to part with his money and submit to it, is an indictable offense at common law. State *v.* Evans, Houst. Cr. Cas. (Del.) 97.

64. People *v.* Choynski, 95 Cal. 640, 30 Pac. 791; Com. *v.* Patrick, 127 Ky. 473, 105 S. W. 981, 32 Ky. L. Rep. 343; Brabham *v.* State, 18 Ohio St. 485; Reg. *v.* Smith, 4 Cox C. C. 42; Rex *v.* Pickford, 4 C. & P. 227, 19 E. C. L. 488; Heming's Case, East P. C. 1116; Reg. *v.* Mason, 24 U. C. C. P. 58.

65. Glover *v.* People, 204 Ill. 170, 68 N. E. 464.

66. People *v.* Thompson, 97 N. Y. 313.

A mere asking of a charity is not a demand within the act, but it must be accompanied with some express or implied threat; a requisition which may operate as a force on the mind of the person to whom it is addressed. Robinson's Case, East P. C. 1110.

67. Reg. *v.* Grimwade, 1 Cox C. C. 67; Reg. *v.* Burridge, 2 M. & Rob. 296. See also Jepson's Case, East P. C. 1115.

68. Reg. *v.* Grimwade, 1 C. & K. 592, 1 Cox C. C. 85, 1 Den. C. C. 30, 47 E. C. L. 592.

69. Rex *v.* Wagstaff, R. & R. 295.

70. **Indictment or information** generally see INDICTMENTS AND INFORMATIONS, 22 Cyc. 157.

71. *Alabama.*— Johnson *v.* State, 152 Ala. 46, 44 So. 670.

California.— People *v.* Schmitz, (1908) 94 Pac. 419, 15 L. R. A. N. S. 717; People *v.* Brennan, 121 Cal. 495, 53 Pac. 1098.

Iowa.— State *v.* Young, 26 Iowa 122.

Michigan.— People *v.* Whittemore, 102 Mich. 519, 61 N. W. 13.

Ohio.— Mann *v.* State, 47 Ohio St. 566, 26 N. E. 226, 11 L. R. A. 656; Smith *v.* State, 25 Ohio Cir. Ct. 22.

Tennessee.— State *v.* Morgan, 3 Heisk. 262.

Vermont.— Grimes *v.* Gates, 47 Vt. 594, 19 Am. Rep. 129.

England.— Rex *v.* Abgood, 2 C. & P. 436, 12 E. C. L. 661.

See 45 Cent. Dig. tit. "Threats," § 9.

For form of indictment see Dunn *v.* State, 43 Tex. Cr. 25, 32, 63 S. W. 571.

Amendment of the indictment, at the close of the evidence for the state, to conform to the proof, by changing the date of the threats on which the indictment is based and the business of the person threatened, is justified, the indictment not being changed in substance, and defendant not being prejudiced thereby. Schultz *v.* State, 135 Wis. 644, 114 N. W. 505, 116 N. W. 259, 571.

Duplicity in an indictment is properly raised by a motion to quash. A demurrer waives the defects. Jones *v.* State, 14 Ohio Cir. Ct. 363, 7 Ohio Cir. Dec. 716.

72. Glover *v.* People, 204 Ill. 170, 68 N. E. 464; Kessler *v.* State, 50 Ind. 229.

But under Md. Code, art. 27, § 395, a demurrer to an indictment under a statute making it a felony to knowingly send or deliver to one, or for the purpose of being sent or delivered part with the possession of, any writing threatening to injure the person or property of any one, with the intent of extorting money, etc., on the ground that the letter set out in the indictment spells the name of the person threatened "Strosbough" when his real name is "Strasbaugh," was properly overruled, it being immaterial whether the indictment contained the name of the person threatened or not. Toomer *v.* State, 112 Md. 285, 76 Atl. 118.

The name of the person to whom the threats were made, however, need not be set out where the body of the complaint shows to whom the threats were made. People *v.* Whittemore, 102 Mich. 519, 61 N. W. 13. And where an indictment for ex-

how [73] the threats were made, and the ownership of the property intended to be extorted,[74] and when the statute makes a certain intent an element of the offense that intent must be averred by a proper allegation.[75] The indictment need not charge the offense in the language of the statute if words of similar import are used,[76] nor need allegations be made that the party against whom the threat was made was innocent of the crime or immorality of which the threat was made.[77]

B. Averment of Nature of Threat. The character of the threat should be set out,[78] as that the threat had been made to impute disgrace [79] or to prosecute for a crime; [80] and the indictment must sufficiently describe the crime of which accusation was threatened.[81] But the indictment need not set out the exact

torting money by means of threats to kill averred that defendant did then and there threaten to kill and murder W, with intent then and there unlawfully and feloniously to extort money from him, the said W, such averment indicated that the threats proceeded from defendant and were within the hearing of W, and the indictment was therefore not objectionable for failure to show to whom the threats were made. Glover *v.* Pople, 204 Ill. 170, 68 N. E. 464. Similarly where an indictment for whitecapping alleged that an envelope containing a threatening letter to one "Jim Owens" was addressed to "Jim Owes," by which accused knowingly and wilfully caused such letter to be sent to "Jim Owens," and the evidence showed that there was no one by the name of "Owes" living at the post-office to which the letter was addressed, there was not such ambiguity in the names as to make the indictment bad. Dunn *v.* State, 43 Tex. Cr. 25, 63 S. W. 571. An indictment which charges that defendant verbally threatened to shoot the prosecuting witness, unless the latter would sign several promissory notes and deliver them to defendant, charges with sufficient certainty that the threats were made to or in the presence of the prosecuting witness. State *v.* Brownlee, 84 Iowa 473, 51 N. W. 25. See also State *v.* Waite, 101 Iowa 377, 70 N. W. 596; State *v.* Asberry, 37 La. Ann. 124.

73. Utterback *v.* State, 153 Ind. 545, 55 N. E. 420; Robinson *v.* Com., 101 Mass. 27.

74. Green *v.* State, 157 Ind. 101, 60 N. E. 941; State *v.* Ullman, 5 Minn. 13. But the ownership need not be stated by a direct allegation if facts are alleged which sufficiently imply ownership. Biggs *v.* People, 8 Barb. (N. Y.) 547.

In England on an indictment for threatening to accuse of an infamous crime, with intent to extort a certain security for money, it has been held not necessary to aver to whom the security belonged. Reg. *v.* Tiddeman, 4 Cox C. C. 387.

75. People *v.* Hoffman, 126 Cal. 366, 58 Pac. 856; Com. *v.* Dorus, 108 Mass. 488; Com. *v.* Moulton, 108 Mass. 307; State *v.* Ullman, 5 Minn. 13; Landa *v.* State, 26 Tex. App. 580, 10 S. W. 218; Tindale *v.* State, (Tex. Cr. App. 1899) 51 S. W. 373.

Under Ohio Rev. St. § 6330, an indictment for threatening to accuse another of a crime punishable by law, which alleged that defendant threatened verbally and in writing to accuse another of burning his own building with intent to defraud, was held to be insufficient to charge a crime under the statute, as the indictment must show that the building was insured, and that defendant threatened to charge the owner with burning it, with intent to prejudice the insurer. Smith *v.* State, 25 Ohio Cir. Ct. 22.

76. *Illinois.*— Glover *v.* People, 204 Ill. 170, 170, 68 N. E. 464.

Iowa.— State *v.* Waite, 101 Iowa 377, 70 N. W. 596.

Louisiana.— State *v.* Goodwin, 37 La. Ann. 713.

New York.— Hewitt *v.* Newburger, 141 N. Y. 538, 36 N. E. 593 [*reversing* 66 Hun 230, 20 N. Y. Suppl. 913].

Ohio.— Ditzler *v.* State, 4 Ohio Cir. Ct. 551, 2 Ohio Cir. Dec. 702.

Texas.— Nelson *v.* State, (Cr. App. 1900) 57 S. W. 645.

See 45 Cent. Dig. tit. "Threats," §§ 9, 10.

77. *Indiana.*— Kessler *v.* State, 50 Ind. 229.

Iowa.— State *v.* Debolt, 104 Iowa 105, 73 N. W. 499.

Missouri.— State *v.* McCabe, 135 Mo. 450, 37 S. W. 123, 58 Am. St. Rep. 589, 34 L. R. A. 127.

New York.— People *v.* Wightman, 104 N. Y. 598, 11 N. E. 135 [*affirming* 43 Hun 358, 5 N. Y. Cr. 545].

Ohio.— Elliott *v.* State, 36 Ohio St. 318.

See 45 Cent. Dig. tit. "Threats," §§ 9, 10.

78. People *v.* Jones, 62 Mich. 304, 28 N. W. 839.

79. People *v.* Tonielli, 81 Cal. 275, 22 Pac. 678; People *v.* Gillian, 50 Hun (N. Y.) 35, 2 N. Y. Suppl. 476 [*affirmed* in 115 N. Y. 643, 21 N. E. 1117].

80. *Georgia.*— Chunn *v.* State, 125 Ga. 789, 54 S. E. 751.

Illinois.— Rank *v.* People, 80 Ill. App. 40.

Massachusetts.— Com. *v.* Dorus, 108 Mass. 488; Com. *v.* Carpenter, 108 Mass. 15.

Michigan.— People *v.* Frey, 112 Mich. 251, 70 N. W. 548.

North Carolina.— State *v.* Harper, 94 N. C. 936.

Ohio.— Smith *v.* State, 25 Ohio Cir. Ct. 22; Jones *v.* State, 14 Ohio Cir. Ct. 363, 7 Ohio Cir. Dec. 716.

See 45 Cent. Dig. tit. "Threats," §§ 9, 10.

81. *Illinois.*— Rank *v.* People, 80 Ill. App. 40.

Kentucky.— Com. *v.* Patrick, 127 Ky. 473, 105 S. W. 981, 32 Ky. L. Rep. 343.

Maine.— State *v.* Robinson, 85 Me. 195, 27 Atl. 99.

words of the threat, it being sufficient that the substance be stated with certainty.[82]

V. EVIDENCE.

A. Admissibility — 1. In General. The general rules of evidence[83] govern as to the admissibility of evidence.[84] Evidence of one letter only is admissible where the indictment contains three counts for three separate threatening letters;[85] and on the trial of an accessary after the fact to a charge of sending threatening letters, in the absence of the principal, the letters so written and sent by the principal are evidence on the trial.[86] The state cannot introduce evidence as to the chastity of the wife at the time of the trial of an indictment of a husband for blackmail by threatening to accuse another of seduction of the wife.[87]

2. On Question of Intent.[88] On the question of intent evidence of the relation of the parties is admissible,[89] as is also evidence that defendant had pro-

Missouri.— State *v.* Sekrit, 130 Mo. 401, 32 S. W. 977.

Ohio.— Mann *v.* State, 47 Ohio St. 556, 26 N. E. 226, 11 L. R. A. 656.

Texas.— Cohen *v.* State, 37 Tex. Cr. 118, 38 S. W. 1005.

See 45 Cent. Dig. tit. "Threats," §§ 9, 10.

Technical accuracy is not, however, required in this respect. Com. *v.* Bacon, 135 Mass. 521; Com. *v.* O'Connell, 12 Allen (Mass.) 451; Com. *v.* Murphy, 12 Allen (Mass.) 449; People *v.* Gillian, 50 Hun (N. Y.) 35, 2 N. Y. Suppl. 476.

82. Glover *v.* People, 204 Ill 170, 68 N. E. 464; State *v.* Lewis, 96 Iowa 286, 65 N. W. 295; State *v.* O'Mally, 48 Iowa 501; Com. *v.* Philpot, 130 Mass. 59; Com. *v.* Goodwin, 122 Mass. 19; Com. *v.* Dorus, 108 Mass. 488; Com. *v.* Moulton, 108 Mass. 307; Grimes *v.* Gates, 47 Vt. 594, 19 Am. Rep. 129.

Threatening letter.— In some jurisdictions an indictment for sending a threatening letter must set out the letter *in haec verba* (Tynes *v.* State, 17 Tex. App. 123; Lloyd's Case, East P. C. 1122), or in substance (Com. *v.* Patrick, 127 Ky. 473, 105 S. W. 981, 32 Ky. L. Rep. 343), while in others a failure to do so is not a fatal defect (Johnson *v.* State, 152 Ala. 46, 44 So. 670; State *v.* Stewart, 90 Mo. 507, 2 S. W. 790).

An innuendo averment is unnecessary where the threat conveyed is plainly indicated. Dunn *v.* State, 43 Tex. Cr. 25, 63 S. W. 571. An innuendo, however, which materially enlarges the sense of the words written is bad, as where the threat was "dam you, if this don't led will," the innuendo being that the meaning was "damn you, if this don't move you, lead will." Atchley *v.* State, 56 Tex. Cr. 569, 120 S. W. 1010.

Variance.— If the indictment does not purport to set out the exact words in which the threat was expressed and the proof is substantially the same as the allegations there is no variance. People *v.* Tonielli, 81 Cal. 275, 22 Pac. 678; Com. *v.* Bacon, 135 Mass. 521; Com. *v.* Goodwin, 122 Mass. 19; Com. *v.* Carpenter, 108 Mass. 15; Dunn *v.* State, 43 Tex. Cr. 25, 63 S. W. 571. That the letter put in evidence in a prosecution for attempt to extort money from another, by threat to injure his property, stated that the money must be put in a certain place, "unbenonce" to any one but the person threatened, while the letter as copied in the indictment stated, that it must be put there "unbinond" to any one, was not a fatal variance. Toomer *v.* State, 112 Md. 285, 76 Atl. 118. But the variance is fatal where extortion by threats of criminal prosecution before a certain justice is alleged, and threats to prosecute before another justice are proved. Strange *v.* State, 33 Tex. Cr. 315, 26 S. W. 406.

83. **Evidence in criminal cases** generally see Criminal Law, 12 Cyc. 379.

84. Toomer *v.* State, 112 Md. 285, 76 Atl. 118 (holding that in a prosecution for threatening to burn another person's property for the purpose of extorting money from him, a state's witness who testified that he had worked in the store of the person threatened, and that after the threatening letter was found he got accused to write a letter so as to compare the handwritings, could not be asked on cross-examination whether any one else than accused was suspected of the offense, as such evidence was not relevant and did not tend to contradict the witness); Reg. *v.* Cracknell, 10 Cox C. C. 408 (where it was stated broadly that, although the prosecutor might be cross-examined with a view to show that he was really guilty of the offense imputed to him, yet no evidence would be allowed to be given, even on cross-examination, by another witness, to prove that the prosecutor was really guilty).

85. Reg. *v.* Ward, 10 Cox C. C. 42.

86. Reg. *v.* Hansill, 3 Cox C. C. 597.

87. McMillen *v.* State, 60 Ind. 216.

88. **Malicious intent** see *supra*, II, C.

89. *Illinois.*— Glover *v.* People, 204 Ill. 170, 68 N. E. 464.

Indiana.— Norris *v.* State, 95 Ind. 73, 48 Am. Rep. 700.

Massachusetts.— Com. *v.* Goodwin, 122 Mass. 19.

New York.— People *v.* Gardner, 144 N. Y. 119, 38 N. E. 1003, 43 Am. St. Rep. 741, 28 L. R. A. 699 [*reversing* 73 Hun 66, 25 N. Y. Suppl. 1072].

Pennsylvania.— Com. *v.* Campolla, 28 Pa. Super. Ct. 379.

cured [90] or attempted to procure [91] the arrest of the complainant, and of the truth of the charge,[92] except where the crime threatened to be charged did not involve any wrong to defendant's.[93]

3. To Show Meaning of Threatening Letter. Parol evidence may be introduced to show the meaning of a threatening letter,[94] and explanatory letters, previous and subsequent to the one threatening, may be received in evidence as explanatory of the letter set forth in the indictment.[95]

B. Weight and Sufficiency. As in other criminal cases the evidence to sustain a conviction must be sufficient to support the charge alleged in the indictment beyond a reasonable doubt.[96]

VI. TRIAL.[97]

A. Questions For Court and For Jury. Questions of fact are for the jury on proper instructions by the court.[98] Thus whether there was or was not a threat is for the jury,[99] as is also the question whether the letter sent was a threatening one,[1] unless by no possible construction it could be held to involve a threat.[2] The question of intent is also for the jury.[3]

B. Instructions. As in other criminal cases instructions must correctly state the law applicable to the facts,[4] and must not invade the province of the

90. People *v.* Whittemore, 102 Mich. 519, 61 N. W. 13.

91. Reg. *v.* Braynell, 4 Cox C. C. 402.

92. Com. *v.* Jones, 121 Mass. 57, 23 Am. Rep. 257; Cohen *v.* State, 37 Tex. Cr. 118, 38 S. W. 1005.

93. Com. *v.* Buckley, 148 Mass. 27, 18 N. E. 577, 1 L. R. A. 624.

94. *Indiana.*— Motsinger *v.* State, 123 Ind. 498, 24 N. E. 342.

Maine.— State *v.* Patterson, 68 Me. 473.

Missouri.— State *v.* Linthicum, 68 Mo. 66.

New York.— People *v.* Gillian, 50 Hun 35, 2 N. Y. Suppl. 476 [*affirmed* in 115 N. Y. 643, 21 N. E. 1117].

England.— Reg. *v.* Hendy, 4 Cox C. C. 243.

See 45 Cent. Dig. tit. "Threats," § 12.

95. Robinson's Case, East P. C. 1110.

Translation.— The admission of the people's translation of a newspaper article referred to in the letter was not prejudicial error in a prosecution for an attempt to extort money by means of a threatening letter, as it tended to explain defendant's motive and object, and as he himself introduced the same article translated with but immaterial variance. People *v.* Tonielli, 81 Cal. 275, 22 Pac. 678.

96. See cases cited *infra*, this note.

Proof to exclude any possible inference of innocence is not required, but only such that the inference of guilt is the only one that can be reasonably drawn from it. People *v.* Adrogna, 139 N. Y. App. Div. 595, 124 N. Y. Suppl. 68.

Evidence held sufficient see People *v.* Weinseimer, 190 N. Y. 537, 83 N. E. 1129; People *v.* Androgna, 139 N. Y. App. Div. 595, 124 N. Y. Suppl. 68; People *v.* Triscoli, 117 N. Y. App. Div. 120, 102 N. Y. Suppl. 328.

Evidence held insufficient see Reg. *v.* Norton, 8 C. & P. 670, 34 E. C. L. 954; Rex *v.* Howe, 7 C. & P. 268, 32 E. C. L. 606; Major's Case, East P. C. 1118.

Circumstantial evidence may be sufficient when direct proof of the intent with which an act was committed is not to be had. State *v.* Debolt, 104 Iowa 105, 73 N. W. 499.

Proof of malicious intent see *supra*, II, C.

Proof of threats not proof of intent.— Threats, however wrongful and malicious, would not constitute the statutory crime, if the intent to extort money or pecuniary advantage be lacking. Therefore proof of the threats, even though conclusive, would not be proof of the specific intent required by statute or justify a presumption that it had accompanied the act. State *v.* Debolt, 104 Iowa 105, 73 N. W. 499.

97. **Trial in criminal cases** generally see Criminal Law, 12 Cyc. 504.

98. State *v.* Louanis, 79 Vt. 463, 65 Atl. 532 (question whether the threat was calculated to disturb a man and unsettle his mind — overcome his mind); Reg. *v.* Carruthers, 1 Cox C. C. 138 (question whether the party into whose hands the letter fell was really the one for whom it was intended); Reg. *v.* Nugent, 8 C. & P. 187, 34 E. C. L. 681.

99. People *v.* Whittemore, 102 Mich. 519, 61 N. W. 13; State *v.* Stewart, 90 Mo. 507, 2 S. W. 790.

1. Reg. *v.* Carruthers, 1 Cox C. C. 138.

2. Reg. *v.* Carruthers, 1 Cox C. C. 138.

3. Reg. *v.* Middleditch, 2 Cox C. C. 313, 1 Den. C. C. 92.

4. See cases cited *infra*, this note.

Instruction held proper see Eacock *v.* State, 169 Ind. 488, 82 N. E. 1039 (an instruction that if the jury should find beyond a reasonable doubt from the evidence that defendant entered into employment not in good faith but for the purpose of extortion he may be found guilty is proper); Com. *v.* Coolidge, 128 Mass. 55 (holding that no exception can be taken to an instruction that if defendant endeavored to obtain money that was justly his due by threats, he would be guilty, but that a threat, made by one whose goods had been stolen, that he would prosecute the sup-

jury.[5] The failure of the court by proper instruction to limit the evidence tending to show defendant guilty of another crime is not error in the absence of a request therefor.[6] A refusal to instruct the jury in relation to defendant's honesty of belief cannot be objected to where the jury replied to a question from the court that defendant did not so honestly believe.[7]

VII. CIVIL LIABILITY.

While mere threats alone are not actionable,[8] threats and consequent damage may be.[9] Threats of bodily hurt, which occasion such interruption or inconvenience as to produce pecuniary damage, are actionable.[10]

THREE. Being the sum of two and one; being one more than two; a cardinal numeral.[1]

posed thief for the offense, if there were grounds to suspect him to be guilty, could not be considered as made maliciously, unless there were other proofs of malice); Com. *v.* Goodwin, 122 Mass. 19 (instruction that whether the language used was or was not a threat to accuse a person of a crime is one of fact for the jury); Oliver *v.* State, (Tex. Cr. App. 1910) 124 S. W. 637 (holding that where the information charged intimidation by threatening words and acts of violence as well as by firing of guns, an instruction as to the use of threatening words was not open to the objection that the information charged that the offense was committed by the firing of guns alone).

Instruction held erroneous see Kistler *v.* State, 64 Ind. 371, instruction that if the jury found defendant guilty of levying blackmail by threatening the prosecutor with seduction, such alleged seduction might be considered upon the question of punishment.

5. People *v.* Choynski, 95 Cal. 640, 30 Pac. 791, holding that in a prosecution under Pen. Code, § 523, providing for the punishment of one who, for the purpose of extortion, sends a letter "expressing or implying, or adapted to imply, any threat such as is specified in section 519," when the letter does not on its face express or imply a threat, the question whether it is "adapted to imply any threat" is for the jury, and an instruction which assumes that it is so adapted is erroneous.

6. Glover *v.* People, 204 Ill. 170, 68 N. E. 464.

7. Com. *v.* Goodwin, 122 Mass. 19.

8. Taft *v.* Taft, 40 Vt. 229, 94 Am. Dec. 389.

Nor is a mere vain fear sufficient; it must be founded upon an adequate threat. Taft *v.* Taft, 40 Vt. 229, 94 Am. Dec. 389; Coke Litt. 253*b*.

Sending pressing and annoying letters by a creditor to his debtor, urging him to pay, is not actionable, unless it is proven that publication has been made of their contents, or some steps taken which could oppress and injure the debtor. Apolinaire *v.* Roca, 43 La. Ann. 842, 9 So. 629.

To warrant an action against one for writing a letter giving information wilfully false, and with the malicious design of annoying plaintiff, and frightening him out of town, the loss or inconvenience sustained must be the direct and reasonable result of the letter and of a reliance upon it, and must consist of something more than mental suffering and annoyance. Taft *v.* Taft, 40 Vt. 229, 94 Am. Dec. 389.

Placing claims for collection with a "bad debt collecting agency" will not give a right of action for damages, if it is not proven that the threats made by the agency to place the debtor's name in the list of names of those who can pay and will not, or the threats made to advertise the account for sale, were carried out. Apolinaire *v.* Roca, 43 La. Ann. 842, 9 So. 629.

9. Grimes *v.* Gates, 47 Vt. 594, 19 Am. Rep. 129.

The declaration must "shew some just cause of feare, for feare of itself is internall and secret." Coke Litt. 253*b* [*quoted* in Grimes *v.* Gates, 47 Vt. 594, 597, 19 Am. Rep. 129].

Complaint held insufficient see Buchanan *v.* Sahlein, 9 Mo. App. 552.

Declaration held sufficient in part and insufficient in part see Grimes *v.* Gates, 47 Vt. 594, 19 Am. Rep. 129.

Action on the case see Grimes *v.* Gates, 47 Vt. 594, 19 Am. Rep. 129; Taft *v.* Taft, 40 Vt. 229, 94 Am. Dec. 389.

Assault see ASSAULT AND BATTERY, 3 Cyc. 1066.

False imprisonment see FALSE IMPRISONMENT, 19 Cyc. 322.

Threatened wrong as actionable see ACTIONS, 1 Cyc. 642 note 2.

10. Grimes *v.* Gates, 47 Vt. 594, 19 Am. Rep. 129; 3 Blackstone Comm. 120; Coke Litt. 253*b*; 2 Comyn Dig. tit. "Battery" D; 1 Swift Dig. 477.

1. Century Dict.

"Once a week during three successive weeks" see Hollister *v.* Vanderlin, 165 Pa. St. 248, 251, 30 Atl. 1002, 44 Am. St. Rep. 657.

"Once a week 'for' three successive weeks" see McKee *v.* Kerr, 192 Pa. St. 164, 168, 43 Atl. 953.

"Publication, for three consecutive weeks" see Loughridge *v.* Huntington, 56 Ind. 253, 259.

"Three-eighths of my estate" see Fisk *v.* M'Niel, 1 How. (Miss.) 535, 543.

THREE-CARD MONTE. A sleight-of-hand game or trick played with three cards, one of which is usually a court card.[2] (See FALSE PRETENSES, 19 Cyc. 391.)

THRESHING-MACHINE. In agriculture, a steam, water, or horse-power machine which in its most complete form beats the grain from the ears of cereals, separates the grain from the straw, and winnows it from the chaff.[3]

THROAT. A term which was held not to be confined to that part of the neck which is scientifically called the throat, but meant that which is commonly called the throat.[4]

THROAT DISEASE. Something more than a temporary inflammation.[5]

THROUGH. From end to end, or from side to side of; into or out of at the opposite, or at another point; between the side or walls of; within;[6] from one side to the opposite side; from one surface or limit to the other surface or limit[7]

"Three story granite building," mentioned in a fire insurance policy, might designate a building with a granite front only, and three stories high in front and rear, though only one story high in the middle. Medina *v.* Builders' Mut. F. Ins. Co., 120 Mass. 225, 226.

"Three weeks before the time of meeting" see *In re* North Whitehall Tp., 47 Pa. St. 156, 160.

"Three weeks successively" see Cunningham's Estate, 73 Cal. 558, 15 Pac. 136 (statute prescribing notice of sale of decedent's real estate); Meredith *v.* Chancey, 59 Ind. 466, 467 (statute prescribing notice of sheriff's sale); Swett *v.* Sprague, 55 Me. 190, 192 (statute requiring notice of hearing); Bachelor *v.* Bachelor, 1 Mass. 256 (order requiring publication of notice of sale); Dayton *v.* Mintzer, 22 Minn. 393, 395 (statute prescribing notice for administrator's sale); Alexander *v.* Alexander, 26 Nebr. 68, 74, 41 N. W. 1065 (statute prescribing notice to probate of will).

"Three years successively" in statute relating to gaining a settlement see Western *v.* Leicester, 3 Pick. (Mass.) 198.

2. Standard Dict. [*quoted* in State *v.* Edgen, 181 Mo. 582, 589, 80 S. W. 942].

The performer throws the card face down upon the table in such a manner as to deceive the eye of the onlooker who is induced to bet that he can pick out the court card. State *v.* Edgen, 181 Mo. 582, 589, 80 S. W. 942.

3. Century Dict.

As used and understood in Nebraska the term has been held to include horse-power. Osborne *v.* McAllister, 15 Nebr. 428, 431, 19 N. W. 510.

A self-feeder is covered by a policy of insurance upon a "threshing outfit." Minneapolis Threshing Mach. Co. *v.* Darnall, 13 S. D. 279, 290, 83 N. W. 266. See FIRE INSURANCE, 19 Cyc. 667 note 66.

Liens for service see Clark *v.* Brown, 141 Cal. 93, 74 Pac. 548; Blackburn *v.* Bell, 125 Cal. 171, 57 Pac. 775; Gorthy *v.* Jarvis, 15 N. D. 509, 108 N. W. 39; Mitchell *v.* Monarch El. Co., 15 N. D. 495, 107 N. W. 1085; Moher *v.* Rasmusson, 12 N. D. 71, 95 N. W. 152; Schouweiler *v.* McCaull, 18 S. D. 70, 99 N. W. 95; Mohr *v.* Clark, 3 Wash. Terr. 440, 19 Pac. 28; Hogue *v.* Lewis County Sheriff, 1 Wash. Terr. 172. See AGRICULTURE, Cyc. Ann. 59–New.

4. Rex *v.* Edwards, 6 C. & P. 401, 25 E. C. L. 494, where the term was so construed in an indictment charging murder by cutting the throat of the deceased.

5. Eisner *v.* Guardian Mut. L. Ins. Co., 3 Cent. L. J. 302, in a proposal for life insurance.

6. Blodgett *v.* Central Vermont R. Co., (Vt. 1909) 73 Atl. 590, 591 [*citing* Webster Int. Dict.].

Carries the notion of passing in and then out. St. Louis, etc., R. Co. *v.* Houck, 120 Mo. App. 634, 644, 97 S. W. 963.

7. Mercer County *v.* Provident Life, etc., Co., 72 Fed. 623, 627, 19 C. C. A. 44, where such was said to be the ordinary meaning of the term.

"Does not always mean from end to end, or from side to side, but frequently means simply 'within.'" Provident Life, etc., Co. *v.* Mercer County, 170 U. S. 593, 603, 18 S. Ct. 788, 42 L. ed. 1156 [*reversing* 72 Fed. 623, 19 C. C. A. 44].

Equivalent to "along" see Com. *v.* Warwick, 185 Pa. St. 623, 637, 40 Atl. 93. See also Brandenburg *v.* Hittel, (Ind. 1894) 37 N. E. 329, 330.

Construed as "into" see Aurora *v.* West, 9 Ind. 74, 85.

Does not mean "into" or "out" only, as used in a conveyance of part of a dwelling reserving the right to pass through said cellar. Choate *v.* Burnham, 7 Pick. (Mass.) 274, 278.

Construed to mean the same as "over" see Hyde Park *v.* Oakwoods Cemetery Assoc., 119 Ill. 141, 147, 7 N. E. 627.

"All through grain" see Richmond *v.* Dubuque, etc., R. Co., 26 Iowa 191, 199.

"From and through the mother" see Blair *v.* Adams, 59 Fed. 243, 246.

"In and through" see Fiske *v.* Wetmore, 15 R. I. 354, 361, 5 Atl. 375, 10 Atl. 627, 629.

"In," "upon," and "through," in a grant of a right of way, speak the intent to concede mere passage. Uhl *v.* Ohio River R. Co., 51 W. Va. 106, 109, 41 S. E. 340.

"Through bill of lading" refers to the usual method in use by connecting companies. New York Standard Oil Co. *v.* U. S., 179 Fed. 614, 621, 103 C. C. A. 172.

"Through elevators" see Gill *v.* Cacy, 49 Md. 243, 247.

"Through joint rates" see Burlington, etc., R. Co. *v.* Dey, 82 Iowa 312, 331, 48 N. W. 98, 31 Am. St. Rep. 477, 12 L. R. A. 436.

THROUGH FREIGHT. That which comes to a railroad company from some other road, or which starts at some point on one line, but in order to reach its destination is turned over to a connecting carrier.[8] As applied to a train, one which does no switching, and neither takes in nor sets out cars at intermediate stations.[9] (See FREIGHT, 20 Cyc. 844.)

THROUGHOUT. Quite through; from one extremity to the other of.[10]

THROWING PLANT. A plant which takes raw silk after it is wound from the cocoon and reeled into hanks, and doubles and twists it into silk threads of varying size and strength, according to the needs of the dyer and weaver.[11]

THROWN INTO BANKRUPTCY. A term which is said of itself to imply an adjudication in bankruptcy.[12]

THRUST. As a noun, a violent push or driving, as with a pointed weapon, or with the hand or foot, or with any instrument.[13] As a transitive verb to push or drive with force; to drive, to force, to impel.[14] As an intransitive verb, to make to push; to attack with a pointed weapon.[15]

THUJA GIGANTEA. The botanical name for the tree popularly known as "red cedar" or "canoe cedar."[16]

THUS. In the way just indicated.[17]

TICKET. In contracts, a slip of paper containing a certificate that the person to whom it is issued, or the holder, is entitled to some right or privilege therein mentioned or described.[18] In reference to elections, the candidates nominated by the respective parties.[19] (Ticket: As Subject of Larceny, see LARCENY, 25 Cyc. 13, 15. Ballot at Election — In General, see ELECTIONS, 15 Cyc. 345; Primary Election, see ELECTIONS, 15 Cyc. 333. For Admission to Theater or Other Place of Public Amusement, see THEATERS AND SHOWS, *ante*, p. 264. For Carriage of Passenger — In General, see CARRIERS, 6 Cyc. 570; SHIPPING, 36 Cyc. 329; Ejection of Passenger For Failure to Produce, see CARRIERS, 6 Cyc. 551; Redemption by Carrier, see CARRIERS, 6 Cyc. 574; Regulation of Carrier as to Producing, see CARRIERS, 6 Cyc. 547. Lottery — Prohibition of Sale or Advertisement of or Dealings in, see LOTTERIES, 25 Cyc. 1644; Regulation of Traffic

"**Through or under us**" used in a covenant see Carleton *v.* Tyler, 16 Me. 392, 393, 33 Am. Dec. 673.

"**Through transportation**" see CARRIERS, 6 Cyc. 481.

8. Hill *v.* Wadley Southern R. Co., 128 Ga. 705, 713, 57 S. E. 795.

9. Oviatt *v.* Dakota Cent. R. Co., 43 Minn. 300, 302, 45 N. W. 436.

10. Webster Dict. [*quoted* in Lloyd *v.* Dollisin, 23 Ohio Cir. Ct. 571, 578].

A suggestion of continuity is carried by the term as used in a statute authorizing a city to build aqueducts in and through the city and to distribute the water "throughout" the city. Quincy *v.* Boston, 148 Mass. 389, 391, 19 N. E. 519.

"**Throughout the State,**" as used in a constitution providing that laws of a general nature shall have uniform operation throughout the state, necessarily implies that in order for a law to partake of the nature of generality, it should by its terms show that it is capable of being applied in any county in the state. Thomas *v.* Austin, 103 Ga. 701, 704, 30 S. E. 627.

11. American Cent. Ins. Co. *v.* Landau, 62 N. J. Eq. 73, 102, 49 Atl. 738.

12. Wilcox *v.* Toledo, etc., R. Co., 45 Mich. 280, 282, 7 N. W. 892.

13. State *v.* Lowry, 33 La. Ann. 1224, 1225 [*citing* Webster Dict.; Worcester Dict.].

14. State *v.* Lowry, 33 La. Ann. 1224, 1225 [*citing* Webster Dict.; Worcester Dict.].

15. State *v.* Lowry, 33 La. Ann. 1224, 1225 [*citing* Webster Dict.; Worcester Dict.].

Definition of "thrusting" as "to attack with a pointed weapon" criticized as unsupported by authority see State *v.* Lowry, 33 La. Ann. 1224, 1225.

16. *In re* Myers, 69 Fed. 237, 238, where it is said: "It is soft, light and but slightly fragrant. It does not take a polish. It is not of the class of woods known as cabinet woods."

17. Daniels *v.* State, 52 Fla. 18, 22, 41 So. 609.

18. Black L. Dict., adding: "Such, for example, are railroad tickets, theater tickets, pawn tickets, lottery tickets, etc."

"**The word . . . has no legal or other fixed and determinate meaning. . . .** There are tickets of various descriptions and for various purposes, such as lottery tickets, play-house tickets, admission tickets, at public exhibitions or private parties, or to a seat in a stage, or for a passage in a steamboat, &c." Allaire *v.* Howell Works Co., 14 N. J. L. 21, 23.

"**Ticket agent**" **of a railroad company** see Slaughter *v.* Canadian Pac. R. Co., 106 Minn. 263, 268, 119 N. W. 398.

19. Gerberich's Nomination, 24 Pa. Co. Ct. 250, 255.

in as Regulation of Interstate Commerce, see COMMERCE, 7 Cyc. 436. Warehouse Receipt, see WAREHOUSEMEN.)

TICKET BROKER. See SCALPER, 35 Cyc. 798; TICKET SPECULATOR.

TICKET SPECULATOR. As used with reference to theater tickets, one who sells at an advance over the price charged by the management.[20] (See THEATERS AND SHOWS, *ante*, p. 264.)

TICKLER. See TELLTALE, 37 Cyc. 1796.

TIDE. The ebb and flow of the sea.[21] (Tide: Ebb and Flow as Test of Navigability, see NAVIGABLE WATERS, 29 Cyc. 289 *et seq.*)

TIDE-LANDS. That portion of the shore or beach, covered and uncovered by the ebb and flow of an ordinary tide;[22] those lands only which are covered and uncovered by the daily flux and reflux of the tides;[23] a descriptive phrase applied to lands covered and uncovered by the ordinary tides;[24] such lands as are covered and uncovered by the flow and ebb of the ordinary or neap tides;[25] that daily covered and uncovered by water by the ordinary ebb and flow of normal tides;[26] the body of land covered and uncovered by the flow and ebb of the ordinary tides;[27] those lands over which the tide ebbs and flows and which are bare at low tide.[28] (Tide-Lands: In General, see NAVIGABLE WATERS, 29 Cyc. 355; PUBLIC LANDS, 32 Cyc. 901. Adverse Possession of, see ADVERSE POSSESSION, 1 Cyc. 994. See also BEACH, 5 Cyc. 677; BOUNDARIES, 5 Cyc. 892; SEASHORE, 35 Cyc. 1278; SHORE, 36 Cyc. 442.)

TIDE-MILL. See MILLS, 27 Cyc. 511.

TIDE-WATER. Water, whether salt or fresh, wherever the ebb and flow of the tide from the sea is felt.[29] (See NAVIGABLE WATERS, 29 Cyc. 289.)

20. Collister *v.* Hayman, 183 N. Y. 250, 254, 76 N. E. 20, 111 Am. St. Rep. 740, 1 L. R. A. N. S. 1188.

21. Black L. Dict.

"The law takes notice of three kinds of tides, viz.: 1. The high spring tides, which are the fluxes of the sea, at those tides which happen at the two equinoctials; 2. The spring tides, which happen twice every month, at the full and change of the moon; 3. The neap, or ordinary tides, which happen at the change and full of the moon, twice in twenty-four hours." Angell Tide Waters [*quoted* in Eichelberger *v.* Mills Land, etc., Co., 9 Cal. App. 628, 639, 100 Pac. 117]. See also Baird *v.* Campbell, 67 N. Y. App. Div. 104, 113, 73 N. Y. Suppl. 617 [*citing* Hale De Jure Maris, c. 6].

22. Pacific Steam Whaling Co. *v.* Alaska Packers' Assoc., 138 Cal. 632, 635, 72 Pac. 161.

Used in the common law sense of the terms "strand," "beach," or "shore" see People *v.* Davidson, 30 Cal. 379, 386.

23. Oakland *v.* Oakland Water Front Co., 118 Cal. 160, 182, 50 Pac. 277.

24. Rondell *v.* Fay, 32 Cal. 354, 364 (where such was said to be the meaning in the legislation of California); Elliott *v.* Stewart, 15 Oreg. 259, 261, 14 Pac. 416; Andrus *v.* Knott, 12 Oreg. 501, 503, 8 Pac. 763; Walker *v.* Marks, 29 Fed. Cas. No. 17,078, 2 Sawy. 152.

Corresponds or is synonymous with "shore" or "beach." Elliott *v.* Stewart, 15 Oreg. 259, 261, 14 Pac. 416; Andrus *v.* Knott, 12 Oreg. 501, 503, 8 Pac. 763.

The phrase, considered as a term of description, is unknown in the law of tide waters, and was put into use in California in the act of May 13, 1861. People *v.* Davidson, 30 Cal. 379, 385.

25. Eichelberger *v.* Mills' Land, etc., Co., 9 Cal. App. 628, 639, 105 Pac. 117.

26. State *v.* Gerbing, 56 Fla. 603, 611, 47 So. 353, 22 L. R. A. N. S. 337 [*citing* 1 Farnham Waters 227]. See also Baer *v.* Moran, 153 U. S. 287, 288, 14 S. Ct. 823, 38 L. ed. 718.

Used in contradistinction to "marsh" lands see People *v.* Morrill, 26 Cal. 336, 358.

It does not include lands permanently submerged. Walker *v.* State Harbor Com'rs, 17 Wall. (U. S.) 648, 650, 21 L. ed. 744.

27. Pearl Oyster Co. *v.* Heuston, 57 Wash. 533, 535, 107 Pac. 349, 832.

28. State *v.* Forrest, 11 Wash. 227, 230, 39 Pac. 684, where it is said that while such must be conceded to be the literal meaning of the term, it has frequently been used in a broader sense in the constitution and legislation of the state of Washington, and has been used to embrace and include the beds of navigable salt waters lying below the line of ordinary low tide.

29. Com. *v.* Vincent, 108 Mass. 441, 447.

"Tidal waters" held not to be confined to those waters where there is a horizontal ebb and flow only, but also might include the cases in which there is only a vertical rise and fall. Yorkshire Rivers Bd. *v.* Tadcaster Rural Dist. Council, 5 Loc. Gov. 1208, 97 L. T. Rep. N. S. 436.

"It is the rise and fall of the water, and not the portion of salt water to fresh, that determines whether a particular portion of a stream is within tide water." Atty.-Gen. *v.* Woods, 108 Mass. 436, 439, 11 Am. Rep. 380.

A grant of land bounded on "tide waters" extends only to ordinary high water mark (Wiswall *v.* Hall, 3 Paige (N. Y.) 313, 318; Oblenis *v.* Creeth, 67 Fed. 303, 304); but in New England such description extends it to

TIE. That which is tied; a knot.[30] As applied to an appointment by election, a state of equality between two or more competitors for the same position.[31] (Tie: Vote — In General, see ELECTIONS, 15 Cyc. 392; At Meeting of City Council, see MUNICIPAL CORPORATIONS, 28 Cyc. 338; In Election of Municipal Officer Affecting Right of Mayor to Vote, see MUNICIPAL CORPORATIONS, 28 Cyc. 408.)

TIED HOUSE. A term applied to an inn or beer-house rented from a person or firm from whom the tenant is, by agreement, compelled to purchase liquors or other commodities to be therein consumed or sold.[32]

TIE UP. A railroad phrase, meaning to cease to work.[33]

TIGHT. As colloquially applied to a note, bond, mortgage, lease, etc., a term which signifies that the clauses providing the creditor's remedy in case of default (as by foreclosure, execution, distress, etc.) are summary and stringent.[34]

TILE. A slab of stone or marble, used with others like it in a pavement or revetment.[35] (Tile: Duty on, see CUSTOMS DUTIES, 12 Cyc. 1119.)

TILL. To the time of; until.[36]

TILLAGE. Husbandry; the cultivation of the land, particularly by the plow.[37] (See HUSBANDRY, 21 Cyc. 719.)

low water mark (Doane *v.* Willcutt, 5 Gray (Mass.) 328, 336, 66 Am. Dec. 369).

30. Wooster *v.* Mullins, 64 Conn. 340, 343, 30 Atl. 144, 25 L. R. A. 694, where it is said: "When provision is made, in regulating legislative procedure, for a casting vote by the presiding officer in case of a tie, the object is to allow him to untie this knot."

31. Wooster *v.* Mullins, 64 Conn. 340, 342, 30 Atl. 144, 25 L. R. A. 694.

32. Stroud Jud. Dict. See also Strong *v.* Woodifield, [1905] 2 K. B. 350, 74 L. J. K. B. 702, 21 T. L. R. 550, 53 Wkly. Rep. 625 [*affirmed* in [1906] A. C. 448, 75 L. J. K. B. 864, 95 L. T. Rep. N. S. 241, 22 T. L. R. 754]; *In re* Chandler's Wiltshire Brewery Co., [1903] 1 K. B. 569, 67 J. P. 119, 72 L. J. K. B. 250, 1 Loc. Gov. 269, 88 L. T. Rep. N. S. 271, 19 T. L. R. 268, 51 Wkly Rep. 573; Southweli *v.* Savill, [1901] 2 K. B. 349, 65 J. P. 649, 70 L. J. K. B. 815, 85 L. T. Rep. N. S. 167, 17 T. L. R. 513, 49 Wkly. Rep. 682; Bradford-on-Avon Union *v.* White, [1898] 2 Q. B. 630, 62 J. P. 533, 67 L. J. Q. B. 643, 78 L. T. Rep. N. S. 758, 14 T. L. R. 447, 46 Wkly. Rep. 603; *In re* London County Council, [1898] 1 Q. B. 387, 61 J. P. 808, 67 L. J. Q. B. 382, 77 L. T. Rep. N. S. 463, 14 T. L. R. 69, 46 Wkly. Rep. 172; Brickwood *v.* Reynolds, [1898] 1 Q. B. 95, 62 J. P. 91, 67 L. J. Q. B. 26, 77 L. T. Rep. N. S. 456, 14 T. L. R. 45, 46 Wkly. Rep. 130; Rice *v.* Noakes, [1900] 1 Ch. 213 [*affirmed* in [1902] A. C. 24, 66 J. P. 147, 71 L. J. Ch. 139, 86 L. T. Rep. N. S. 62, 18 T. L. R. 196, 50 Wkly. Rep. 305; Watney *v.* Musgrave, 5 Ex. D. 241, 44 J. P. 268, 49 L. J. Exch. 493, 42 L. T. Rep. N. S. 690, 28 Wkly. Rep. 491; Bourne *v.* Liverpool, 10 Jur. N. S. 125, 33 L. J. Q. B. 15, 8 L. T. Rep. N. S. 572, 1 New Rep. 425.

33. U. S. *v.* Cassidy, 67 Fed. 698, 728.

34. Black L. Dict.

Construction in claim for patent see Robinson *v.* Sutter, 8 Fed. 828, 830.

"'Tight' and 'sound'" in marine insurance policy see Paddock-Hawley Iron Co. *v.* Providence, etc., Ins. Co., 118 Mo. App. 85, 95, 93 S. W. 358.

"Tight joints" see Albree *v.* Philadelphia Co., 201 Pa. St. 165, 166, 50 Atl. 984.

35. Century Dict. [*quoted* in U. S. *v.* Davis, 54 Fed. 147, 149, 4 C. C. A. 251].

Derivatively, the word means a covering, and hence is applied to such articles as are used for covering roofs, pavements, walls, and the like. The original meaning of the word refers, therefore, to the use made of the article, and not to the material of which it may be composed. In the Encyclopedia Britannica, under the title "Roofing Tiles," it is said: "In the most important temples of ancient Greece the roof was covered with tiles of white marble, fitted together in the most perfect way, so as to exclude rain;" and in a note to this article it is further stated that "marble tiles are said to have been first made by Byzes, of Naxos, about 620 B. C." In Jules Adeline's Art Dictionary, a work of recognized merit, it is stated that "Roman temples were sometimes covered with bronze tiles, laid side by side, while the roofs of Chinese temples generally consist of tiles of crane porcelain, painted green or yellow. The term 'tile' is also applied to plaques of marble, stone, or earthenware, sometimes decorated, sometimes with a uniform surface, which are used to cover walls or pavements. As a rule, they are either square or rectangular. Sometimes, however, they are triangular, or in shape of a lozenge, hexagon, or octagon. They are then capable of very varied combinations." U. S. *v.* Davis, 54 Fed. 147, 149, 4 C. C. A. 251.

As included within the term "earthenware" see EARTHENWARE, 14 Cyc. 1133 note 2.

36. Century Dict.

"To" distinguished see Conawingo Petroleum Refining Co. *v.* Cunningham, 75 Pa. St. 138, 140.

"Till landed" see Pelly *v.* Royal Exch. Assur. Co., 1 Burr. 341, 348, 97 Eng. Reprint 342.

"Till the next term of the court" see De Haven *v.* De Haven, 46 Ind. 296, 298.

"With ten per cent. interest thereon till paid" see Pittman *v.* Barret, 34 Mo. 84, 85.

37. U. S. *v.* Williams, 18 Fed. 475, 478, 9

TILLER OF SOIL. See FARMER, 19 Cyc. 458.

TIMBER. Such stuff as is suitable for building and allied purposes.[38] (Timber: Application of Statute of Frauds — To Agreements in Relation to, see FRAUDS, STATUTE OF, 20 Cyc. 212, 229; To Reservation of Trees on Lands Conveyed, see FRAUDS, STATUTE OF, 20 Cyc. 213. As Included in Real Property Mortgage, see MORTGAGES, 27 Cyc. 1144. As Property — Passing by Execution, see EXECUTIONS, 17 Cyc. 1291 note 41; Subject of Larceny, see LARCENY, 25 Cyc. 70; Subject to Condemnation For Public Use, see EMINENT DOMAIN, 15 Cyc. 603; Subject to Mortgage, see MORTGAGES, 27 Cyc. 1035 note 89; Subject to Replevin, see REPLEVIN, 34 Cyc. 1366. Compensation For on Land Taken For Public Use, see EMINENT DOMAIN, 15 Cyc. 758. Conversion, Damages For, see TROVER AND CONVERSION. Cutting — Action For Damages or Penalty, see TRESPASS; As Trespass by Corporation, see CORPORATIONS, 10 Cyc. 1212; Constituting Waste, see WASTE; Contract For, see LOGGING, 25 Cyc. 1554; Element of Adverse Possession, see ADVERSE POSSESSION, 1 Cyc. 990; Entry For Purpose of Cutting as Constituting Forcible Entry, see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1131 note 89; In Construction, Improvement, and Repair of Highways, see STREETS AND HIGHWAYS, 37 Cyc. 223; Injunction Against, see INJUNCTIONS, 22 Cyc. 832; On Indian Lands, see INDIANS, 22 Cyc. 126; On Land of Another by Servant as Trespass by Master, see MASTER AND SERVANT, 26 Cyc. 1543 note 74; On Public Lands, see PUBLIC LANDS, 22 Cyc. 778. Easement of Way For Removal, see EASEMENTS, 14 Cyc. 1176. Entries, Sales, and Possessory Rights — As to Timber Culture Lands, see PUBLIC LANDS, 32 Cyc. 835; As to Timber Lands, see PUBLIC LANDS, 32 Cyc. 836. Grant to Railroads of Right to Take by United States, see PUBLIC LANDS, 32 Cyc. 998. Location of Mining Claim on Timber and Stone Lands, see MINES AND MINERALS, 27 Cyc. 549. On Mortgaged Property — In General, see MORTGAGES, 27 Cyc. 1246; Injunction to Restrain Cutting, see MORTGAGES, 27 Cyc. 1270. Removal of Land-Marks by Cutting Trees, see BOUNDARIES, 5 Cyc. 974. Reservation of Conveyance of Land, see DEEDS, 13 Cyc. 679. Right of Husband to Sell on Wife's Land, see HUSBAND AND WIFE, 21 Cyc. 1432 note 69. Rights and Liabilities of — Cotenant as to, see TENANCY IN COMMON, *ante*, p. 14; Life-Tenant as to, see ESTATES, 16 Cyc. 627; Purchaser at Tax-Sale as to, see TAXATION, 37 Cyc. 1470; Tenant Under Farm Lease as to Use and Sale of, see LANDLORD AND TENANT, 24 Cyc. 1066; Vendor and Purchaser as to, see VENDOR AND PURCHASER. Rights as to, Within Highway, and Use Thereof For Repair or Construction of Highway, see STREETS AND HIGHWAYS, 37 Cyc. 203. Rights to on Foreclosure Sale, see MORTGAGES, 27 Cyc. 1728. Severance of Trees as Affecting Character of Property as Real or Personal, see PROPERTY, 32 Cyc. 672. Taxation, see TAXATION, 37 Cyc. 780. Title and Right to, of Purchaser of Mortgaged Property at Sale Under Power in Mortgage, see MORTGAGES, 27 Cyc. 1491. Transfer of Standing, see LOGGING, 25 Cyc. 1549.)

TIMBER AND STONE ACT. See PUBLIC LANDS, 32 Cyc. 836.

TIMBER-CULTURE ENTRY. An expression having an accepted and well recognized signification in the acts of congress, in the decisions of the courts, and in common parlance, signifying an entry under the provisions of "An act to encourage the growth of timber on Western prairies."[39] (See PUBLIC LANDS, 32 Cyc. 835.)

Sawy. 374. See also Vigar *v.* Dudman, L. R. 7 C. P. 72, 73; Birch *v.* Stephenson, 3 Taunt. 469, 12 Rev. Rep. 679; BANKRUPTCY, 5 Cyc. 285.

38. Gulf Yellow Pine Lumber Co. *v.* Monk, 159 Ala. 318, 320, 49 So. 248.

For other definitions of the term see LOGGING, 25 Cyc. 1545, 1546 text and notes.

A grant of "timber trees and other trees" held not to pass "fruit trees." Bullen *v.* Denning, 5 B. & C. 842, 847, 8 D. & R. 657, 4 L. J. K. B. O. S. 314, 11 E. C. L. 705, 108 Eng. Reprint 313.

"Timber in process of being wrought into vessels" see Webb *v.* National F. Ins. Co., 2 Sandf. (N. Y.) 497, 504.

39. Hartman *v.* Warren, 76 Fed. 157, 161, 22 C. C. A. 30.

TIME

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* Joint author of "Religious Societies," 34 Cyc. 1112; "Street Railroads," 36 Cyc. 1338.

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I. DEFINITION.

Time has been defined as the measure of duration.[1] The word is expressive both of a precise point or terminus, and of an interval between two points.[2]

II. DIVISION, STANDARD, AND COMPUTATION.

The nature of time is such that it is capable of division,[3] and of the divisions which have been made, the courts will take judicial notice.[4] Although time is generally reckoned forward in such a manner as to make the period a consecutive one,[5] all rules for computing time are purely arbitrary,[6] and despite the assertion of the courts that certainty and uniformity are more desirable than the adoption of any one particular rule, the authorities on the computation of time, especially the early ones, have been in more or less confusion, and very few of the rules for computing time can be said to have a universal application.[7] Likewise time, when it concerns a legal duty, should be fixed with reference to a certain, unvarying, and uniform standard;[8] but different standards have been adopted in different states, it being held in some that the only standard recognized is the meridian of the sun or mean sun time,[9] while in other jurisdictions the courts have taken judicial notice of the common and universal use within such jurisdictions of the standard of time adopted by the railroads of the United States and Canada

1. Black L. Dict. (2d ed.); Bouvier L. Dict.

2. Black L. Dict. (2d ed.).

"From time to time" see 20 Cyc. 852.

"Reasonable time" see 33 Cyc. 1567.

3. Callahan *v.* Hallowell, 2 Bay (S. C.) 8.

The divisions comprehended in the word "time" are dependent upon the context and subject-matter of the statute in which it is used, it being held under some statutes that the word is limited in meaning to a specified day of a given month and year (East Tennessee, etc., R. Co. *v.* Carloss, 77 Ala. 443), or a specified day and hour (Peck *v.* Fair Haven, etc., R. Co., 77 Conn. 161, 58 Atl. 757); while under other statutes, the term is held broad enough to include a month (Warwick, etc., Water Co. *v.* Carr, 24 R. I. 226, 52 Atl. 1030), or half year (Grosse *v.* Barman, 9 Cal. App. 650, 100 Pac. 348).

When used to represent a terminus rather than an interval time is synonymous with "date." Park *v.* Whitney, 148 Mass. 278, 19 N. E. 161.

4. See EVIDENCE, 16 Cyc. 856.

That the Gregorian calendar has been generally adopted is historically known, and when no mention of any other system of reckoning time is made, it will be conclusively presumed that that calendar was used. Engleman *v.* State, 2 Ind. 91, 52 Am. Dec. 494. The act of parliament which corrected the calendar was adopted in the province of Massachusetts during the year 1751. Danvers *v.* Boston, 10 Pick. (Mass.) 513.

Calendar defined see 6 Cyc. 264.

5. Hedderich *v.* State, 101 Ind. 564, 1 N. E. 47, 51 Am. Rep. 768.

6. Aultman, etc., Co. *v.* Syme, 163 N. Y. 54, 57 N. E. 168, 79 Am. St. Rep. 565 [*modifying* 23 N. Y. App. Div. 344, 48 N. Y. Suppl. 231].

Where time is computed from a season instead of a day or month, the whole of the starting period is excluded, and the time does not commence to run until the end of the season. Columbus Fish, etc., Club *v.* W. C. Edwards Co., 32 Quebec Super. Ct. 503 [*reversing* 29 Quebec Super. Ct. 175].

7. Warner *v.* Bucher, 24 Kan. 478; Gray *v.* Worst, 129 Mo. 122, 31 S. W. 585; Dickinson *v.* Lee, 2 Coldw. (Tenn.) 615; State *v.* Beasley, 21 W. Va. 777.

Where a statute prescribing the method of computing time does not limit its application to any specified period (Aultman, etc., Co. *v.* Syme, 163 N. Y. 54, 57 N. E. 168, 79 Am. St. Rep. 565 [*modifying* 23 N. Y. App. Div. 344, 48 N. Y. Suppl. 231]; Vose *v.* Kuhn, 45 Misc. (N. Y.) 455, 92 N. Y. Suppl. 34), it applies to all divisions of time (Grant *v.* Paddock, 30 Oreg. 312, 47 Pac. 712).

8. Henderson *v.* Reynolds, 84 Ga. 159, 10 S. E. 734, 7 L. R. A. 327; Jones *v.* German Ins. Co., 110 Iowa 75, 81 N. W. 188, 46 L. R. A. 860.

9. Henderson *v.* Reynolds, 84 Ga. 159, 10 S. E. 734, 7 L. R. A. 327; Jones *v.* German Ins. Co., 110 Iowa 75, 81 N. W. 188, 46 L. R. A. 860; Texas Tram, etc., Co. *v.* Hightower, 100 Tex. 126, 96 S. W. 1071, 123 Am. St. Rep. 794, 6 L. R. A. N. S. 1046.

True and mean sun time distinguished.— True sun time is obtained by the means of a dial; mean sun time is what is called "standard time." What is known as simple "standard time" — "central time" — is merely the solar time of the ninetieth meridian west of Greenwich, and the difference between standard time and sun time is exactly the same over each meridian. *Ex p.* Parker, 35 Tex. Cr. 12, 29 S. W. 480, 790, holding that no reasonable objection can be urged against the recognition of true sun time as the correct time by which matters, such as the meeting and adjournment of courts, should be regulated.

The presumption is that common time is

in 1883.[10] Where an event is determined to have happened within two points of time, it will be considered as having happened in the middle of the intermediate space of time.[11]

III. YEARS.

A year is a determinate and a well-known period consisting commonly of three hundred and sixty-five days, and in leap years of three hundred and sixty-six.[12] It is interpreted to mean twelve calendar months,[13] and, indeed, a year, twelve months, fifty-two weeks, and three hundred and sixty-five days, all denote the same total period of time.[14] Both at common law and by statute, the word "year," when used in a contract or statute, is ordinarily considered to refer to a calendar year, or the period beginning the first day of January and ending the succeeding thirty-first day of December,[15] but not always so, as its meaning in all cases is dependent upon the subject-matter and the connection in which it is used, and it may mean a period of twelve months beginning on a day other than the first of January,[16] or it may mean a political year, or the period between two

that relied upon where there is nothing to show that a different mode of measuring time has been in common use. Where, therefore, the return of a summons is to be made at an hour named, standard time, the summons should so state; otherwise, it will be presumed that common time was intended. Searles *v.* Averhoff, 28 Nebr. 668, 44 N. W. 872.

Greenwich time.— In England, it was held that the mean sun time of the place, rather than Greenwich time, governed in matters pertaining to the sitting of a court. Curtis *v.* March, 3 H. & N. 866, 4 Jur. N. S. 1112, 28 L. J. Exch. 36. Subsequent to this decision it was provided by statute (43 & 44 Vict. c. 9) that whenever an expression of time occurs in any act of parliament, deed, or other legal instrument, Greenwich mean time is intended, unless otherwise specifically stated, but this statute does not apply to an act requiring bicycle lamps to be lighted one hour after sunset. Gordon *v.* Cann, 63 J. P. 324, 68 L. J. Q. B. 434, 80 L. T. Rep. N. S. 20, 15 T. L. R. 165, 47 Wkly. Rep. 269.

Civic time, or the time kept by the town, has been held to be the standard to be followed in matters relating to the service of process and to be presumptively correct as against the time kept by private individuals. Vermont Steamship Co. *v.* The Abby Palmer, 8 Can. Exch. 470, 10 Brit. Col. 381.

10. State *v.* Johnson, 74 Minn. 381, 77 N. W. 293; Orvik *v.* Casselman, 15 N. D. 34, 105 N. W. 1105.

11. Contee *v.* Dawson, 2 Bland (Md.) 264. And see Erskine *v.* Erskine, 13 N. H. 436, where "late in the month of May" was construed to mean later than the seventeenth day of that month.

12. Guaranty Trust, etc., Co., *v.* Buddington, 27 Fla. 215, 218, 9 So. 246, 12 L. R. A. 770 [*quoting* 2 Blackstone Comm. 140–142]. To the same effect see Redmond *v.* Glover, Dudley (Ga.) 107; Bell *v.* Lamprey, 57 N. H. 168.

It has also been defined as "a period of time." Brown *v.* Anderson, 77 Cal. 236, 238, 19 Pac. 487.

Year of our Lord.— It is provided by statute in some states that the word "year" is equivalent to "year of our Lord" (Sawyer *v.* Steinman, (Iowa 1910) 126 N. W. 1123; Garfield Tp. *v.* Samuel Dodsworth Book Co., 9 Kan. App. 752, 58 Pac. 565; State *v.* Bartlett, 47 Me. 388; Com. *v.* Doran 14 Gray (Mass.) 37); which latter expression "has a well-settled meaning, and indicates a year of the Christian calendar, which begins January 1st and ends with the 31st of the succeeding December" (Garfield Tp. *v.* Samuel Dodsworth Book Co., *supra*).

Estates for years see LANDLORD AND TENANT, 24 Cyc. 958.

Statement and abbreviation of year in indictment see INDICTMENTS AND INFORMATIONS, 22 Cyc. 316.

Tenancy from year to year see LANDLORD AND TENANT, 24 Cyc. 1027.

13. Muse *v.* London Assur. Corp., 108 N. C. 240, 13 S. E. 94; Rex *v.* Peckham, Carth. 406, 90 Eng. Reprint 835. And see Hopkins *v.* Chambers, 7 T. B. Mon. (Ky.) 257.

14. Aultman, etc., Co. *v.* Syme, 163 N. Y. 54, 57 N. E. 168, 79 Am. St. Rep. 565.

15. *Alabama.*— Fretwell *v.* McLemore, 52 Ala. 124.

Georgia.— King *v.* Johnson, 96 Ga. 497, 23 S. E. 500; Atlanta, etc., Air Line R. Co. *v.* Ray, 70 Ga. 674.

Iowa.— Sawyer *v.* Steinman, (1910) 126 N. W. 1123; David *v.* Hardin County, 104 Iowa 204, 73 N. W. 576.

Kansas.— Garfield Tp. *v.* Hubbell, 9 Kan. App. 785, 59 Pac. 600; Garfield Tp. *v.* Samuel Dodsworth Book Co., 9 Kan. App. 752, 58 Pac. 565.

England.— Gibson *v.* Barton, L. R. 10 Q. B. 329, 44 L. J. M. C. 81, 32 L. T. Rep. N. S. 396, 23 Wkly. Rep. 858.

Canada.— *Re* Goulden, 28 Ont. 387; *In re* Asphodel Tp. School Section No. 5, 24 Ont. 682.

16. *California.*— Brown *v.* Anderson, 77 Cal. 236, 19 Pac. 487.

Mississippi.— Thornton *v.* Boyd, 25 Miss. 598.

Rhode Island.— *In re* Providence Voters, 13 R. I. 737.

Texas.— Ætna Ins. Co. *v.* Hawkins, (1910) 125 S. W. 313.

England.— Bartlett *v.* Kirwood, 2 C. L. R.

elections,[17] a year of office,[18] a school year,[19] a fiscal year,[20] an excise year,[21] a year of age,[22] or a theatrical season.[23] A year does not expire until midnight of the last day,[24] and a statute authorizing an act to be done from and after a certain year does not permit of its being done during that year.[25]

IV. MONTHS.

It is conceded that the early common-law rule, established in England and adopted in some of the early decisions in the United States, was that, in the absence of anything indicating a contrary meaning,[26] a month in law means a lunar month, or twenty-eight days.[27] An exception existed in regard to matters arising in the ecclesiastical courts,[28] as well as matters relating to commercial

253, 2 E. & B. 771, 18 Jur. 173, 23 L. J. Q. B. 9, 2 Wkly. Rep. 17, 75 E. C. L. 771.

17. Paris *v.* Hiram, 12 Mass. 262; Thornton *v.* Boyd, 25 Miss. 598.

18. U. S. *v.* Dickson, 15 Pet. (U. S.) 141, 10 L. ed. 689; Rex *v.* Swyer, 10 B. & C. 486, 8 L. J. K. B. O. S. 221, 21 E. C. L. 209, 109 Eng. Reprint 531.

19. Williams *v.* Bagnelle, 138 Cal. 699, 72 Pac. 408.

20. Glasgow *v.* Rowse, 43 Mo. 479; State *v.* State Treasurer, 68 S. C. 411, 47 S. E. 683, holding that fiscal legislation of a legislative body, which is acting under a constitution providing a fiscal year different from the calendar year, should be referred to the constitutional fiscal year, and not the calendar year.

Under a Missouri statute enacted subsequent to the above decision, a fiscal year is identical with the calendar year. State *v.* Appleby, 136 Mo. 408, 37 S. W. 1122; Wilson *v.* Knox County, 132 Mo. 387, 34 S. W. 45, 477.

21. Disbrow *v.* Saunders, 1 Den. (N. Y.) 149.

22. Gibson *v.* People, 44 Colo. 600, 99 Pac. 333 [*followed* in Wilson *v.* People, 44 Colo. 608, 99 Pac. 335], holding that a law which provides that the words "delinquent child" shall include any child "sixteen (16) years of age or under" who violates any law, excludes children who have passed beyond their sixteenth birthday.

23. Grant *v.* Maddox, 16 L. J. Exch. 227, 15 M. & W. 737.

24. Jessup *v.* Carey, 61 Ind. 584.

"On or before."— The word "on" as applied to a particular year ordinarily means "in" or "during," and where a renewal was indorsed on a note by which the payer promised to pay the note "on or before 1904" the note was due and payable on the last day of the year 1904, and any suit to enforce payment prior to that date would be premature. Henry *v.* Levenberg, (Tex. Civ. App. 1910) 128 S. W. 675.

25. United R., etc., Co. *v.* Baltimore, 93 Md. 630, 49 Atl. 655, 52 L. R. A. 772; Sindall *v.* Baltimore, 93 Md. 526, 49 Atl. 645.

26. People *v.* New York, 10 Wend. (N. Y.) 393; Snyder *v.* Warren, 2 Cow. (N. Y.) 518, 14 Am. Dec. 519; Reg. *v.* Chawton, 1 Q. B. 247, 10 L. J. M. C. 55, 4 P. & D. 525, 41 E. C. L. 523; Manufacturers' L. Ins. Co. *v.* Gordon, 20 Ont. App. 309; McIntosh *v.* Vansteinbergh, 8 U. C. Q. B. 248; Dempsey *v.* Dougherty, 7 U. C. Q. B. 313.

27. *Alabama.*— Riddle *v.* Hill, 51 Ala. 224.

Connecticut.— Strong *v.* Birchard, 5 Conn. 357.

Delaware.— State *v.* Jacobs, 2 Harr. 548.

Georgia.— Redmond *v.* Glover, Dudley 107.

Nebraska.— McGinn *v.* State, 46 Nebr. 427, 65 N. W. 46, 50 Am. St. Rep. 617, 30 L. R. A. 450.

New Jersey.— *In re* Ellis, 8 N. J. L. 232.

New York.— Parsons *v.* Chamberlin, 4 Wend. 512; Loring *v.* Halling, 15 Johns. 119; Leffingwell *v.* White, 1 Johns. Cas. 99, 1 Am. Dec. 97; Stackhouse *v.* Halsey, 3 Johns. Ch. 74. And see Jackson *v.* Van Valkenburgh, 8 Cow. 260.

North Carolina.— Satterwhite *v.* Burwell, 51 N. C. 92; Rives *v.* Guthrie, 46 N. C. 84.

Ohio.—White *v.* Lapp, 4 Ohio S. & C. Pl. Dec. 434, 4 Ohio N. P. 31 [*citing* 1 Comyn Dig. B. 617].

Pennsylvania.— *In re* Whittman, 9 Pa. Dist. 47 [*quoting* Coke Litt. 135*b*; 2 Blackstone Comm. 141]; Com. *v.* Stanley, 12 Pa. Co. Ct. 543.

Vermont.— Kimball *v.* Lamson, 2 Vt. 138.

Washington.—Hale *v.* Finch, 1 Wash. Terr. 517.

England.— Tullet *v.* Linfield, 3 Burr. 1455, 97 Eng. Reprint 924; Rex *v.* Peckham, Carth. 406, 90 Eng. Reprint 835; Peterborough *v.* Catesby, 2 Cro. Jac. 166, 79 Eng. Reprint 145; Rex *v.* Adderley, Dougl. (3d ed.) 463, 99 Eng. Reprint 295; Lacon *v.* Hooper, 1 Esp. 246, 6 T. R. 224, 101 Eng. Reprint 522; Cresswell *v.* Harrs, 4 L. J. Ch. O. S. 94, 2 Sim. & St. 476, 1 Eng. Ch. 476, 57 Eng. Reprint 428.

Canada.— Berry *v.* Andruss, 3 U. C. Q. B. 645.

See 45 Cent. Dig. tit. "Time," § 5.

The features of uniformity of period and of divisibility into equal quarterly periods so commended the lunar month to the people of England, that by common acceptance the word "month" was understood to mean in its ordinary use a lunar month, and this meaning was held by the courts to be the one intended by the law-making power when it used it. Guaranty Trust, etc., Co. *v.* Buddington, 27 Fla. 215, 9 So. 246, 12 L. R. A. 770.

28. Guaranty Trust, etc., Co. *v.* Buddington, 27 Fla. 215, 9 So. 246, 12 L. R. A. 770; Redmond *v.* Glover, Dudley (Ga.) 107; Mc-

paper,[29] and *quare impedit*,[30] and the rule was finally abolished as to the construction of acts of parliament by statute in England during the year 1850.[31] In the United States a large majority of the states have enacted statutes defining the meaning of the term,[32] and it is now the rule, both under statute and otherwise, that the word "month," when used without qualification, means a calendar month.[33] The term "calendar month" means a month as designated in the

Ginn *v.* State, 46 Nebr. 427, 65 N. W. 46, 50 Am. St. Rep. 617, 30 L. R. A. 450; Franco *v.* Alvares, 3 Atk. 342, 26 Eng. Reprint 998.

In the civil law, computation by calendar months was adopted. Satterwhite *v.* Burwell, 51 N. C. 92.

29. *Connecticut.*— Strong *v.* Birchard, 5 Conn. 357.

Georgia.— Redmond *v.* Glover, Dudley 107.

Kentucky.— Hardin *v.* Major, 4 Bibb 104.

New York.— Leffingwell *v.* White, 1 Johns. Cas. 99, 1 Am. Dec. 97.

North Carolina.— Satterwhite *v.* Burwell, 51 N. C. 92.

Ohio.— McMurchey *v.* Robinson, 10 Ohio 496.

Pennsylvania.— Thomas *v.* Shoemaker, 6 Watts & S. 179; Shapley *v.* Garey, 6 Serg. & R. 539.

Tennessee.— State Bank *v.* Officer, 3 Baxt. 173.

United States.— Guaranty Trust, etc., Co. *v.* Green Cove Springs, etc., R. Co., 139 U. S. 137, 11 S. Ct. 512, 35 L. ed. 116.

England.— Hart *v.* Middleton, 2 C. & K. 9, 61 E. C. L. 9; Titus *v.* Preston, Str. 652, 93 Eng. Reprint 760. But see Bruner *v.* Moore, [1904] 1 Ch. 305, 73 L. J. Ch. 377, 89 L. T. Rep. N. S. 738, 20 T. L. R. 125, 52 Wkly. Rep. 295.

See 45 Cent. Dig. tit. "Time," § 8.

In matters of contract, the question was one of the intention of the contracting parties at the time they used the word. Lang *v.* Gale, 1 M. & S. 111, 105 Eng. Reprint 42.

30. Strong *v.* Birchard, 5 Conn. 357; Barksdale *v.* Morgan, 4 Mod. 185, 87 Eng. Reprint 338.

31. St. 13 & 14 Vict. c. 21, § 4. And see McGinn *v.* State, 46 Nebr. 427, 65 N. W. 46, 50 Am. St. Rep. 617, 30 L. R. A. 450; White *v.* Lapp, 4 Ohio S. & C. Pl. Dec. 434, 4 Ohio N. P. 31; Guaranty Trust, etc., Co. *v.* Green Cove Springs, etc., R. Co., 139 U. S. 137, 11 S. Ct. 512, 35 L. ed. 116; *In re* Railway Sleepers Supply Co., 29 Ch. D. 204, 54 L. J. Ch. 720, 52 L. T. Rep. N. S. 731, 33 Wkly. Rep. 595.

As to matters of contract, the rule in England still is that the word "month" denotes a lunar month, unless the parties have expressed a contrary intention. Bruner *v.* Moore, [1904] 1 Ch. 305, 73 L. J. Ch. 377, 89 L. T. Rep. N. S. 738, 20 T. L. R. 125, 52 Wkly. Rep. 295; Turner *v.* Barlow, 3 F. & F. 946.

32. See the statutes of the several states. And see Guaranty Trust, etc., Co. *v.* Buddington, 27 Fla. 215, 9 So. 246, 12 L. R. A. 770; McGinn *v.* State, 46 Nebr. 427, 65 N. W. 46, 50 Am. St. Rep. 617, 30 L. R. A. 450.

33. *Alabama.*— Bartol *v.* Calvert, 21 Ala. 42.

California.— Scoville *v.* Anderson, 131 Cal. 590, 63 Pac. 1013; Savings, etc., Soc. *v.* Thompson, 32 Cal. 347; Sprague *v.* Norway, 31 Cal. 173; Gross *v.* Fowler, 21 Cal. 392.

Colorado.— Daly *v.* Concordia F. Ins. Co., 16 Colo. App. 349, 65 Pac. 416.

Connecticut.— Strong *v.* Birchard, 5 Conn. 357; Clark *v.* Ely, 2 Root 380.

Florida.— Maxwell *v.* Jacksonville Loan, etc., Co., 45 Fla. 425, 468, 34 So. 255; Bacon *v.* State, 22 Fla. 46.

Kansas.— Holton *v.* Bimrod, 8 Kan. App. 265, 55 Pac. 505.

Kentucky.— Pyle *v.* Maulding, 7 J. J. Marsh. 202; Robinson *v.* Richardson, 4 J. J. Marsh. 574; Barclay *v.* Hendricks, 4 T. B. Mon. 251; Lawlin *v.* Clay, 4 Litt. 283; Pyle *v.* Cravens, 4 Litt. 17; Cravens *v.* Dyer, 1 Litt. 153; Payne *v.* Wallace, 2 A. K. Marsh. 244.

Maryland.— Baltimore, etc., R. Co. *v.* Pumphrey, 74 Md. 86, 21 Atl. 559; Glenn *v.* Smith, 17 Md. 260.

Massachusetts.— Churchill *v.* Merchants' Bank, 19 Pick. 532; Avery *v.* Pixley, 4 Mass. 460; Hunt *v.* Holden, 2 Mass. 168.

Mississippi.— Mitchell *v.* Woodson, 37 Miss. 567.

Nebraska.— Brown *v.* Williams, 34 Nebr. 376, 51 N. W. 851.

New York.— Ryer *v.* Prudential Ins. Co., 185 N. Y. 6, 77 N. E. 727 [*reversing* 95 N. Y. Suppl. 1158]; Hosley *v.* Black, 28 N. Y. 438.

North Carolina.— Muse *v.* London Assur. Corp., 108 N. C. 240, 13 S. E. 94; State *v.* Upchurch, 72 N. C. 146.

Ohio.—White *v.* Lapp, 4 Ohio S. & C. Pl. Dec. 434, 4 Ohio N. P. 31.

Oklahoma.— Bertwell *v.* Haines, 10 Okla. 469, 63 Pac. 702.

Pennsylvania.— Moore *v.* Houston, 3 Serg. & R. 169; Com. *v.* Chambre, 4 Dall. 143, 1 L. ed 776; Wittmann's Estate, 9 Pa. Dist. 47; Parker's Estate, 14 Wkly. Notes Cas. 566; Gustine *v.* Elliott, 11 Wkly. Notes Cas. 433.

South Carolina.—Williamson *v.* Farrow, 1 Bailey 611, 21 Am. Dec. 492.

Tennessee.— Cook *v.* Shute, Cooke 67.

Vermont.— Kimball *v.* Lamson, 2 Vt. 138.

Virginia.— Brewer *v.* Harris, 5 Gratt. 285.

Wyoming.— Daley *v.* Anderson, 7 Wyo. 1, 48 Pac. 839, 75 Am. St. Rep. 870.

United States.— Guaranty Trust, etc., Co. *v.* Green Cove Springs, etc., R. Co., 139 U. S. 137, 11 S. Ct. 512, 35 L. ed. 116; Sheets *v.* Selden, 2 Wall. 177, 17 L. ed. 822; Hunt *v.* Wickliffe, 2 Pet. 201, 7 L. ed. 397; Gasquet *v.* Crescent City Brewing Co., 49 Fed. 493; Union Bank *v.* Forrest, 24 Fed. Cas. No. 14,356, 3 Cranch C. C. 218.

See 45 Cent. Dig. tit. "Time," §§ 5, 8.

Common usage has adopted the calendar

calendar, without regard to the number of days it may contain;[34] it is to be computed, not by counting days, but by looking at the calendar,[35] and it runs from a given day in one month to a day of the corresponding number in the next month, except where the last month has not so many days, in which event it expires on the last day of that month.[36] When a month is referred to, it will be understood to be of the current year, unless from the connection it is apparent that another is intended;[37] and where an instrument specifies the month in which something is to be done but omits the year, it is to be assumed in the absence of a contrary implication that the month intended is the one named then next ensuing.[38]

periods, and the courts hold that the law-making power should be understood to have used the term in the same sense that the people use it. Guaranty Trust, etc., Co. *v.* Buddington, 27 Fla. 215, 9 So. 246, 12 L. R. A. 770.

Words or circumstances showing contrary intention see Heaston *v.* Cincinnati, etc., R. Co., 16 Ind. 275, 79 Am. Dec. 430, thirty days.

Tenancy from month to month see LANDLORD AND TENANT, 24 Cyc. 1034.

34. Daley *v.* Anderson, 7 Wyo. 1, 48 Pac. 839, 75 Am. St. Rep. 870. And see Proudfoot *v.* Bush, 12 U. C. C. P. 52.

Synonymous terms.—A "calendar month," "not less than a calendar month," and "at least a calendar month," mean precisely the same thing. Whitmann's Estate, 9 Pa. Dist. 47. Neither a lunar nor a calendar month is synonymous with thirty days (State *v.* Upchurch, 72 N. C. 146; Bertwell *v.* Haines, 10 Okla. 469, 63 Pac. 702); and a warrant, made returnable in three months instead of ninety days as required by statute irregular (Waterville *v.* Barton, 64 Me. 321).

The term is inaccurate as applied to a period consisting of two parts of different months, as such a period in strictness consists of portions of two calendar months. Migotti *v.* Colvill, 4 C. P. D. 233, 14 Cox C. C. 305, 48 L. J. C. P. 695, 40 L. T. Rep. N. S. 747, 27 Wkly. Rep. 744.

35. McGinn *v.* State, 46 Nebr. 427, 65 N. W. 46, 50 Am. St. Rep. 617, 30 L. R. A. 450.

Fraction of days disregarded.—A calendar month is made up of a specified number of full, clear, days, and is not to be computed by counting a less number combined with fractions of two other days. *In re* Gregg, 213 Pa. St. 260, 62 Atl. 856. And see, generally, VI, A, 2.

36. *Colorado.*— Daly *v.* Concordia F. Ins. Co., 16 Colo. App. 349, 65 Pac. 416.

Kentucky.— Zeman *v.* Steinberg, 52 S. W. 821, 54 S. W. 178, 21 Ky. L. Rep. 586, 1152 [*following* Lebus *v.* Wayne-Ratteman Co., 21 S. W. 652, 14 Ky. L. Rep. 794].

Louisiana.—Wagner *v.* Kenner, 2 Rob. 120 [*followed* in Wood *v.* Mullen, 3 Rob. 395].

Nebraska.— Glore *v.* Hare, 4 Nebr. 131.

Pennsylvania.— Sock's Estate, 9 Pa. Dist. 101.

Texas.— Campbell *v.* Lane, 25 Tex. Suppl. 93.

Wyoming.— Daley *v.* Anderson, 7 Wyo. 1, 48 Pac. 839, 75 Am. St. Rep. 870.

England.— Migotti *v.* Colvill, 4 P. D. 233, 14 Cox C. C. 305, 48 L. J. C. P. 695, 40 L. T. Rep. N. S. 747, 27 Wkly Rep. 744; Freeman *v.* Read, 4 B. & S. 174, 10 Jur. N. S. 149, 32 L. J. M. C. 226, 8 L. T. Rep. N. S. 458, 11 Wkly. Rep. 802, 116 E. C. L. 174.

See 45 Cent. Dig. tit. "Time," § 5 *et seq.*

The number of days in a month varies, under this rule, and is necessarily limited by the number of days in the month during which the computation begins. Thus a month's notice commencing in a month of thirty days need consist only of that number of days (People *v.* Ulrich, 2 Abb. Pr. (N. Y.) 28; Minard *v.* Burtis, 83 Wis. 267, 53 N. W. 509); and where the month in which the computation begins has thirty-one days, while the month in which it ends has only thirty, a calendar month beginning on the thirtieth will contain one more day than one beginning on the thirty-first, as both must end on the thirtieth (Parkhill *v.* Brighton, 61 Iowa 103, 15 N. W. 853). On account of this variance, a criminal statute providing for a minimum punishment of one month's imprisonment has been held to contemplate thirty days only, as the minimum punishment must be uniform at all times and in all places. McKinney *v.* State, 43 Tex. Cr. 387, 66 S. W. 769. In another jurisdiction the word "month" as used in a sentence of imprisonment has been held to mean twenty-eight days. Com. *v.* Stanley, 12 Pa. Co. Ct. 543.

Applicability of other rules of computation.— Rules employed in computing days have been applied, such as counting the first day (English *v.* Ozburn, 59 Ga. 392 [*following* Jones *v.* Smith, 28 Ga. 41), or excluding it when the word "from" or "after" is used (South Staffordshire Tramways Co. *v.* Sickness, etc., Assur. Assoc., [1891] 1 Q. B. 402, 55 J. P. 168, 60 L. J. Q. B. 47, 63 L. T. Rep. N. S. 807; Castle *v.* Burditt, 3 T. R. 623, 100 Eng. Reprint 768; Toronto Gas Co. *v.* Russell, 6 U. C. Q. B. 567). However, by virtue of the provisions of the New York statute relating to the computation of months, the rule that Sunday is to be excluded when it falls on the last day of the period is not applicable. Ryer *v.* Prudential Ins. Co., 185 N. Y. 6, 77 N. E. 727 [*reversing* 95 N. Y. Suppl. 1158].

37. Tillson *v.* Bowley, 8 Me. 163; Kelly *v.* Gilman, 29 N. H. 385, 61 Am. Dec. 648. And see Nettleton *v.* Billings, 13 N. H. 446.

38. Bogard *v.* Barhan, (Oreg. 1910) 108 Pac. 214.

V. WEEKS.

In its most accurate sense, a week is a definite period of time, commencing on Sunday and ending on Saturday,[39] and it is in this sense that it is most frequently employed in statutes and orders of court;[40] but it is also appropriately used to mean seven consecutive days beginning with any day;[41] and the week does not expire until seven full days have elapsed.[42] The question as to which of these two meanings is intended in any particular case is dependent largely upon the context.[43]

VI. DAYS.

A. Length — 1. In General. While, as appears from the definition of the term "day" elsewhere given,[44] there are distinctions, according to the sense in which the term may be used, between natural, artificial, civil, solar, and astronomical days,[45] it may be stated generally that, in the computation of a period of time measured in days and in the construction of the word "day" as used in a contract or statute, the law adopts as the unit of measurement the period of twenty-four hours extending from midnight to midnight.[46]

2. Fractions of Days. It is a general rule that fractions of days are not

39. Ronkendorff *v.* Taylor, 4 Pet. (U. S.) 349, 361, 7 L. ed. 882 [*quoted* in *In re* Tyson, 13 Colo. 482, 490, 22 Pac. 810, 6 L. R. A. 472; *In re* New Orleans, 52 La. Ann. 1073, 1078, 27 So. 592; Steinle *v.* Bell, 12 Abb. Pr. N. S. (N. Y.) 171, 176; Leach *v.* Burr, 188 U. S. 510, 512, 23 S. Ct. 393, 47 L. ed. 567]. To the same effect see Raunn *v.* Leach, 53 Minn. 84, 87, 54 N. W. 1058; Russell *v.* Croy, 164 Mo. 69, 93, 63 S. W. 849.

Another definition is: "Seven days of time. The week commences immediately after 12 o'clock on the night between Saturday and Sunday, and ends at 12 o'clock, seven days, of twenty-four hours each, thereafter." Bouvier L. Dict. [*quoted* in *In re* Tyson, 13 Colo. 482, 489, 22 Pac. 810, 6 L. R. A. 472; Steinle *v.* Bell, 12 Abb. Pr. N. S. (N. Y.) 171, 175].

40. Bird *v.* Burgsteiner, 100 Ga. 486, 28 S. E. 219 [*distinguishing* Boyd *v.* McFarlin, 58 Ga. 208]; Medland *v.* Linton, 60 Nebr. 249, 82 N. W. 866 (holding that a requirement that notice of a tax-sale to be made in November be published commencing the first week in October is met by a publication during the first week of the month as distinguished from the first seven days); Currens *v.* Blocher, 21 Pa. Super. Ct. 30. And see the cases cited *supra*, note 39.

41. Raunn *v.* Leach, 53 Minn. 84, 87, 54 N. W. 1058; Russell *v.* Croy, 164 Mo. 69, 93, 63 S. W. 849; Michel *v.* Taylor, 143 Mo. App. 683, 687, 127 S. W. 949; Evans *v.* Job, 8 Nev. 322, 343; Reg. *v.* Collins, 14 Ont. 613, 617. See also Matter of Coe, 24 U. C. Q. B. 439.

The California code defines a week to be a period of seven consecutive days. Derby *v.* Modesto, 104 Cal. 515, 522, 38 Pac. 900.

42. Michel *v.* Taylor, 143 Mo. App. 683, 127 S. W. 949. See also Russell *v.* Croy, 164 Mo. 69, 63 S. W. 849.

43. Russell *v.* Croy, 164 Mo. 69, 63 S. W. 849 [*distinguishing* Young *v.* Downey, 150 Mo. 317, 51 S. W. 751; Haywood *v.* Russell, 44 Mo. 252]; Leach *v.* Burr, 188 U. S. 510, 23 S. Ct. 393, 47 L. ed. 567.

Sufficiency of publication during successive weeks see Process, 32 Cyc. 486.

Tenancy from week to week see Landlord and Tenant, 24 Cyc. 1036.

44. See 13 Cyc. 262.

45. Miner *v.* Goodyear India Rubber Glove Mfg. Co., 62 Conn. 410, 26 Atl. 643; Fox *v.* Abel, 2 Conn. 541; Pulling *v.* People, 8 Barb. (N. Y.) 384; State *v.* Padgett, 18 S. C. 317. See also 13 Cyc. 262.

"In ordinary speech a day is that space of time in which the earth makes one revolution on its axis. The astronomical day is from noon to noon. The civil day is from midnight to midnight. In the sense of the law a day includes in it the whole twenty-four hours." Miner *v.* Goodyear India Rubber Glove Mfg. Co., 62 Conn. 410, 411, 26 Atl. 643.

What constitutes "night-time" see Burglary, 6 Cyc. 184.

46. *Connecticut.*— Miner *v.* Goodyear India Rubber Glove Mfg. Co., 62 Conn. 410, 26 Atl. 643.

Illinois.— Zimmerman *v.* Cowan, 107 Ill. 631, 47 Am. Rep. 476.

Indiana.— Benson *v.* Adams, 69 Ind. 353, 35 Am. Rep. 220; Cheek *v.* Preston, 34 Ind. App. 343, 72 N. E. 1048.

Louisiana.— State *v.* Michel, 52 La. Ann. 936, 27 So. 565, 78 Am. St. Rep. 364, 49 L. R. A. 218.

New York.— Pulling *v.* People, 8 Barb. 384; Schwab *v.* Mayforth, 1 N. Y. City Ct. 177.

Pennsylvania.— Kane *v.* Com., 89 Pa. St. 522, 33 Am. Rep. 787.

Texas.— Muckenfuss *v.* State, 55 Tex. Cr. 229, 116 S. W. 51, 131 Am. St. Rep. 813, 20 L. R. A. N. S. 783; Haines *v.* State, 7 Tex. App. 30.

See 45 Cent. Dig. tit. "Time," § 10. And see Day, 13 Cyc. 263; Intoxicating Liquors, 23 Cyc. 192; Sunday, 37 Cyc. 540.

recognized in law.[47] Under this rule, it is presumed that acts done on the same day are done at the same time,[48] except where they are required by law to be done in a certain order, in which case it is presumed that the prescribed order is followed;[49] and a person who has a certain period in which to act is entitled to all of the last day, but no more, as the law will not add fractions of days in computing the prescribed time.[50] The rule that a day is an indivisible period of time is,

47. *Alabama.*— Lang *v.* Phillips, 27 Ala. 311.

California.— Cosgriff *v.* San Francisco Election Com'rs, 151 Cal. 407, 91 Pac. 98; Scoville *v.* Anderson, 131 Cal. 590, 63 Pac. 1013 [*distinguishing* Hoyt *v.* San Francisco, etc., R. Co., 87 Cal. 610, 25 Pac. 160, 1066]; Iron Mountain Co. *v.* Haight, 39 Cal. 540; Price *v.* Whitman, 8 Cal. 412.

Colorado.— Smith *v.* Jefferson County, 10 Colo. 17, 13 Pac. 917.

Connecticut.— Miner *v.* Goodyear India Rubber Glove Mfg. Co., 62 Conn. 410, 26 Atl. 643; Sands *v.* Lyon, 18 Conn. 18; Brainard *v.* Bushnell, 11 Conn. 16.

Delaware.—Alrichs *v.* Thompson, 5 Harr. 432.

Illinois.— Levy *v.* Chicago Nat. Bank, 158 Ill. 88, 42 N. E. 129, 30 L. R. A. 380.

Kentucky.— Stuart *v.* Petrie, 138 Ky. 514, 128 S. W. 592.

Massachusetts.—Wiggin *v.* Peters, 1 Metc. 127; Portland Bank *v.* Maine Bank, 11 Mass. 204. And see Clark *v.* Flagg, 11 Cush. 539.

Missouri.— Kimm *v.* Osgood, 19 Mo. 60.

New Jersey.— Thorne *v.* Mosher, 20 N. J. Eq. 257.

New York.— Marvin *v.* Marvin, 75 N. Y. 240; Blydenburgh *v.* Cotheal, 4 N. Y. 418; Middlebrook *v.* Travis, 68 Hun 155, 22 N. Y. Suppl. 672; Phelan *v.* Douglass, 11 How. Pr. 193; Jones *v.* Porter, 6 How. Pr. 286; Clute *v.* Clute, 4 Den. 241; Havens *v.* Dibble, 18 Wend. 655; Rogers *v.* Beach, 18 Wend. 533; Small *v.* McChesney, 3 Cow. 19.

North Carolina.— Metts *v.* Bright, 20 N. C. 311, 32 Am. Dec. 683.

Ohio.— Follett *v.* Hall, 16 Ohio 111, 47 Am. Dec. 365.

Pennsylvania.— Long's Appeal, 23 Pa. St. 297; Neff *v.* Barr, 14 Serg. & R. 166; Hampton *v.* Erenzeller, 2 Browne 18; Slingluff *v.* Ambler, 2 Wkly. Notes Cas. 67.

South Carolina.—Williamson *v.* Farrow, 1 Bailey 611, 21 Am. Dec. 492; Callahan *v.* Hallowell, 2 Bay 8.

Tennessee.— Rogers *v.* Etter, 8 Baxt. 13; Jones *v.* Planters' Bank, 5 Humphr. 619, 42 Am. Dec. 471; Murfree *v.* Cormack, 4 Yerg. 270, 26 Am. Dec. 232; Plowman *v.* Williams, 3 Tenn. Ch. 181.

Utah.— Tilton *v.* Sterling Coal, etc., Co., 28 Utah 173, 77 Pac. 758, 107 Am. St. Rep. 689.

Vermont.— Giddings *v.* Ira, 54 Vt. 346.

Virginia.— Neale *v.* Utz, 75 Va. 480.

United States.— Louisville *v.* Portsmouth Sav. Bank, 104 U. S. 469, 26 L. ed. 775, 11 Fed. 765 note; McGill *v.* U. S. Bank, 12 Wheat. 511, 6 L. ed. 711; U. S. *v.* Edwin S. Hartwell Lumber Co., 142 Fed. 432, 73 C. C. A. 548 [*affirming* 128 Fed. 306].

England.— *In re* Railway Sleepers Supply Co., 29 Ch. D. 204, 54 L. J. Ch. 720, 52 L. T. Rep. N. S. 731, 33 Wkly. Rep. 595; Combe *v.* Pitt, 3 Burr. 1423, 97 Eng. Reprint 907; Field *v.* Jones, 9 East 151, 103 Eng. Reprint 530; Weston *v.* Fidler, 67 J. P. 209, 88 L. T. Rep. N. S. 769.

Canada.— Buskey *v.* Canadian Pac. R. Co., 11 Ont. L. Rep. 1; Sweetland *v.* Neville, 21 Ont. 412; Mitchell *v.* Dobson, 3 Can. L. J. O. S. 185.

See 45 Cent. Dig. tit. "Time," § 53.

The effect of the rule "is to render the day a sort of indivisible point; so that any act, done in the compass of it, is no more referrible to any one, than to any other, portion of it; but the act and the day are coextensive; and therefore the act cannot properly be said to be passed, until the day is passed." Lester *v.* Garland, 15 Ves. Jr. 248, 257, 10 Rev. Rep. 68, 33 Eng. Reprint 748.

Process.— The rule is applicable to matters relating to the issuing of process (Jones *v.* Ealer, 1 Ohio Dec. (Reprint) 385, 8 West. L. J. 500), and the computation of time for the service of pleadings or process (Rusk *v.* Van Benschoten, 1 How. Pr. (N. Y.) 149; Hughes *v.* Patton, 12 Wend. (N. Y.) 234; Columbia Turnpike Road Co. *v.* Haywood, 10 Wend. (N. Y.) 422).

48. Levy *v.* Chicago Nat. Bank, 158 Ill. 88, 42 N. E. 129, 30 L. R. A. 380; Ladley *v.* Creighton, 70 Pa. St. 490; *In re* Boyer, 51 Pa. St. 432, 91 Am. Dec. 129; Hendrickson's Appeal, 24 Pa. St. 363; Long's Appeal, 23 Pa. St. 297; Claason's Appeal, 22 Pa. St. 359; Metzler *v.* Kilgore, 3 Penr. & W. (Pa.) 245, 23 Am. Dec. 76.

As to judgments against the same debtor entered on the same day see JUDGMENTS, 23 Cyc. 1379.

49. Revill *v.* Claxon, 12 Bush (Ky.) 558. And see Clute *v.* Clute, 3 Den. (N. Y.) 263.

50. Hall-Baker Grain Co. *v.* Le Mar, 125 Mo. App. 139, 101 S. W. 1098; Judd *v.* Fulton, 10 Barb. (N. Y.) 117, 4 How. Pr. 298; Keeter *v.* Wilmington, etc., R. Co., 86 N. C. 346; Dowell *v.* Vinton, 1 Tex. App. Civ. Cas. § 327. And see PROCESS, 32 Cyc. 456.

Whole of last day in which to plead see JUDGMENTS, 23 Cyc. 746.

Half day contracted for.—When parties contract for the performance of an act during the first half of any month containing thirty-one days, they contract that it shall be performed by noon of the sixteenth day. Grosvenor *v.* Magill, 37 Ill. 239.

Where a certain period must elapse before rights vest, fractions of days are not counted. Cascade Overseers *v.* Lewis Overseers, 148 Pa. St. 333, 23 Atl. 1003. Thus, under the rule that the age of majority is attained on

however, a mere legal fiction,[51] and is subject to numerous exceptions.[52] The courts will disregard the fiction and take cognizance of the actual time of the happening of an event or the doing of an act, when the actual point of time is important and material,[53] and inquiry in regard to it is essential in order that justice may be done,[54] as where it is necessary to protect a completed act or save a vested right,[55] or to determine the conflicting rights of rival claimants when they depend upon priority in fact.[56] Also the fiction does not apply where it is provided by statute that notice shall be taken of the precise time an official act

the day preceding the twenty-first anniversary of the person's birth (see INFANTS, 22 Cyc. 512), a person must be regarded as of age on the earliest moment of the day preceding the twenty-first anniversary of his birth (State *v.* Clarke, 3 Harr. (Del.) 557; State *v.* Mason, 66 N. C. 636. See also Com. *v.* Howe, 35 Pa. Super. Ct. 554). However, this rule which makes a person born on the eighth day of the month come of age on the seventh day will not avoid a contract by overseers of the poor, reciting that one is bound as an apprentice to the eighth day when he "will arrive at the age of twenty-one years"; but he will be held bound during his minority. Bardwell *v.* Purrington, 107 Mass. 419. A statutory requirement that a prisoner in confinement under an indictment for a capital offense must have a copy of the indictment served on him one entire day before his trial means an undivided day and not parts of two days. Robertson *v.* State, 43 Ala. 325.

51. Tufts *v.* Carradine, 3 La. Ann. 430; Clute *v.* Clute, 4 Den. (N. Y.) 241; Follett *v.* Hall, 16 Ohio 111, 47 Am. Dec. 365; Clarke *v.* Bradlaugh, 7 Q. B. D. 151, 44 L. T. Rep. N. S. 779, 29 Wkly. Rep. 822 [*affirmed* in 8 Q. B. D. 63, 46 J. P. 278, 51 L. J. Q. B. 1, 46 L. T. Rep. N. S. 49, 30 Wkly. Rep. 53]; Roe *v.* Hersey, 3 Wils. C. P. 274, 95 Eng. Reprint 1052.

52. Tufts *v.* Carradine, 3 La. Ann. 430; Maine *v.* Gilman, 11 Fed. 214, holding that the ancient maxim is now chiefly known by its exceptions.

53. Craig *v.* Godfroy, 1 Cal. 415, 54 Am. Dec. 299; Marvin *v.* Marvin, 75 N. Y. 240; Bordentown Banking Co. *v.* Restein, 214 Pa. St. 30, 63 Atl. 451.

Precise time of taking effect of statute see STATUTES, 36 Cyc. 1198, 1199.

54. *Alabama.*— Lang *v.* Phillips, 27 Ala. 311.

California.— People *v.* Beatty, 14 Cal. 566; People *v.* Clark, 1 Cal. 406.

Connecticut.— Brainard *v.* Bushnell, 11 Conn. 16.

Missouri.— Kimm *v.* Osgood, 19 Mo. 60.

New Jersey.— Johnson *v.* Pennington, 15 N. J. L. 188; Gallagher *v.* True American Pub. Co., (Ch. 1909) 71 Atl. 741 [*distinguishing* Doane *v.* Millville Mut. Ins. Co., 45 N. J. Eq. 274, 17 Atl. 625 (*reversing* 43 N. J. Eq. 522, 11 Atl. 739)].

North Carolina.— Metts *v.* Bright, 20 N. C. 311, 32 Am. Dec. 683.

Pennsylvania.— Small's Appeal, 24 Pa. St. 398; Hampton *v.* Erenzeller, 2 Browne 18.

Virginia.— Neale *v.* Utz, 75 Va. 480.

Wisconsin.— Knowlton *v.* Culver, 2 Pinn. 243, 1 Chandl. 214, 52 Am. Dec. 156.

United States.— Louisville *v.* Portsmouth Sav. Bank, 104 U. S. 469, 26 L. ed. 775; Lockett *v.* Hill, 15 Fed. Cas. No. 8,443, 1 Woods 552, 9 Nat. Bankr. Reg. 167; *In re* Richardson, 20 Fed. Cas. No. 11,777, 2 Story 571.

England.— Johnson *v.* Smith, 2 Burr. 950, 97 Eng. Reprint 647; Field *v.* Jones, 9 East 151, 103 Eng. Reprint 530.

See 45 Cent. Dig. tit. "Time," § 53.

Where a Saturday half holiday exists, the court will not disregard the fact that the first part of such day is not a holiday. Jackson Brewing Co. *v.* Wagner, 117 La. 875, 42 So. 356.

55. Hoyt *v.* San Francisco, etc., R. Co., 87 Cal. 610, 25 Pac. 160, 1066; U. S. *v.* Edwin S. Hartwell Lumber Co., 142 Fed. 432, 73 C. C. A. 548 [*affirming* 128 Fed. 306].

In bankruptcy proceedings, when the question is whether an attachment was levied within four months prior to adjudication, the maxim that there are no fractions of a day does not apply in case the exact time when the event occurred was made certain by record. Westbrook Mfg. Co. *v.* Grant, 60 Me. 88, 11 Am. Rep. 181.

56. *Mississippi.*— Biggam *v.* Merritt, 1 Walk. 430, 12 Am. Dec. 576.

Missouri.— Fabien *v.* Grabow, 134 Mo. App. 193, 114 S. W. 80.

New Jersey.— Gallagher *v.* True American Pub. Co., (Ch. 1909) 71 Atl. 741.

New York.— Lemon *v.* Staats, 1 Cow. 592.

North Carolina.— Bates *v.* Hinsdale, 65 N. C. 423.

Pennsylvania.— Lanning *v.* Pawson, 38 Pa. St. 480; Maynard *v.* Esher, 17 Pa. St. 222; Malvin *v.* Sweitzer, 1 Kulp 5; Collins *v.* McKee, 44 Leg. Int. 167.

South Carolina.— Callahan *v.* Hallowell, 2 Bay 8.

United States.— Cincinnati First Nat. Bank *v.* Burkhardt, 100 U. S. 686, 25 L. ed. 766.

England.— Sadler *v.* Leigh, 4 Campb. 195. And see Combe *v.* Pitt, 3 Burr. 1423, 97 Eng. Reprint 907.

Canada.— Beekman *v.* Jarvis, 3 U. C. Q. B. 280.

See 45 Cent. Dig. tit. "Time," § 53.

Conveyance and judgment against grantor entered on same day see JUDGMENTS, 23 Cyc. 1384; MORTGAGES, 27 Cyc. 1174, 1193.

Different executions delivered to officer on same day see EXECUTIONS, 17 Cyc. 1055 note 20.

is done and that a record thereof be made.[57] In no event will the court take cognizance of a fraction of a day unless the particular time is brought to its attention,[58] and the burden of proof rests on the party who asserts that an act or event occurred prior to some other which happened on the same day, to establish what he alleges.[59]

B. Inclusion and Exclusion of First and Last Days — 1. General Rules. Where there is no positive statutory rule on the subject, the courts have, in reckoning, a designated number of days to ascertain the first or last day on which an act may or must be done, expressed themselves as being in favor of effectuating the intention of the parties by looking at the context and subject-matter of the instrument,[60] and of so including or excluding the first and last days as to prevent a forfeiture, if possible.[61] Either the day on which the period begins or the day on which it expires, however, must be included and the other excluded, as it is improper to include or exclude both,[62] an exception compelling the exclusion of both days existing where a statute contemplates so many clear days,[63] or where an act is to be done, or the period is referred to as being between two specified days.[64] The rule which is most commonly adopted, and the one which is prescribed by statute in many jurisdictions, is that the time within which an act is to be done is to be computed by excluding the first day and including

57. Brady *v.* Gilman, 96 Minn. 234, 104 N. W. 897, 113 Am. St. Rep. 622, 1 L. R. A. N. S. 835; Seaman *v.* Eager, 16 Ohio St. 209. And see Mortgages, 27 Cyc. 1197 note 83.

58. Gallagher *v.* True American Pub. Co., (N. J. Ch. 1909) 71 Atl. 741; Hoppock *v.* Ramsey, 28 N. J. Eq. 413; Murfree *v.* Carmack, 4 Yerg. (Tenn.) 270, 26 Am. Dec. 232.

59. Levy *v.* Chicago Nat. Bank, 158 Ill. 88, 42 N. E. 129, 30 L. R. A. 380; Fabien *v.* Grabow, 134 Mo. App. 193, 114 S. W. 80.

60. *California.*— Price *v.* Whitman, 8 Cal. 412.

Connecticut.— Sands *v.* Lyon, 18 Conn. 18.

Minnesota.— Budds *v.* Frey, 104 Minn. 481, 117 N. W. 158.

South Carolina.—Williamson *v.* Farrow, 1 Bailey 611, 21 Am. Dec. 492.

United States.— Taylor *v.* Brown, 147 U. S. 640, 13 S. Ct. 549, 37 L. ed. 313; Neurath *v.* District of Columbia, 17 Ct. Cl. 225.

England.— Pugh *v.* Leeds, Cowp. 714, 98 Eng. Reprint 1323.

61. *Connecticut.*—Weeks *v.* Hull, 19 Conn. 376, 50 Am. Dec. 249; Sands *v.* Lyon, 18 Conn. 18.

South Carolina.— State *v.* Schnierle, 5 Rich. 299; Williamson *v.* Farrow, 1 Bailey 611, 21 Am. Dec. 492.

Texas.— State *v.* Asbury, 26 Tex. 82; O'Connor *v.* Towns, 1 Tex. 107.

United States.— Griffith *v.* Bogert, 18 How. 158, 15 L. ed. 307; Pearpoint *v.* Graham, 19 Fed. Cas. No. 10,877, 4 Wash. 232; Neurath *v.* District of Columbia, 17 Ct. Cl. 225.

England.— *In re* North, [1895] 2 Q. B. 264, 59 J. P. 724, 64 L. J. Q. B. 694, 72 L. T. Rep. N. S. 854, 2 Manson 326, 14 Reports 436.

See 45 Cent. Dig. tit. "Time," § 11.

62. *Alabama.*— Owen *v.* Slatter, 26 Ala. 547, 62 Am. Dec. 745.

Colorado.— Stebbins *v.* Anthony, 5 Colo. 348.

Kentucky.— Sanders *v.* Norton, 4 T. B. Mon. 464.

New York.— Jackson *v.* Van Valkenburgh, 8 Cow. 260.

Pennsylvania.— Sims *v.* Hampton, 1 Serg. & R. 411; Boyer *v.* Northern Cent. R. Co., 1 Pearson 113.

Texas.— McCormick *v.* Jester, (Civ. App. 1909) 115 S. W. 278.

Canada.— Murchison *v.* Canada Farmers' Ins. Co., 8 Ont. Pr. 451; Montreal Bank *v.* Taylor, 15 U. C. C. P. 107.

See 45 Cent. Dig. tit. "Time," § 11.

63. Garvin *v.* Jennerson, 20 Kan. 371; *In re* Railway Sleepers Supply Co., 29 Ch. D. 204, 54 L. J. Ch. 720, 52 L. T. Rep. N. S. 731, 33 Wkly. Rep. 595; Nordheimer *v.* Shaw, 6 Ont. Pr. 14. And see *infra*, VI, B, 2, d, e.

The North Carolina statute, which subjects railroad companies to a penalty for allowing freight to reman unshipped for more than five days, contemplates five full running days, exclusive of the day of delivery and the day of shipment. Branch *v.* Wilmington, etc., R. Co., 88 N. C. 570; Keeter *v.* Wilmington, etc., R. Co., 86 N. C. 346; Branch *v.* Wilmington, etc., R. Co., 77 N. C. 347.

64. *California.*— Todd *v.* Myres, 40 Cal. 355, holding that where, in an action on account for services rendered, the complaint alleges that the services were rendered between two specified days, items occurring on the two days mentioned are not within the allegations of the complaint.

Illinois.— Richardson *v.* Ford, 14 Ill. 332.

Iowa.— Robinson *v.* Foster, 12 Iowa 186.

Massachusetts.—Atkins *v.* Boylston F., etc., Ins. Co., 5 Metc. 439, 39 Am. Dec. 692.

Nebraska.—Weir *v.* Thomas, 44 Nebr. 507, 62 N. W. 871, 48 Am. St. Rep. 741.

New Jersey.— Delaware, etc., R. Co. *v.* Mehrhof Bros. Brick Mfg. Co., 53 N. J. L. 205, 23 Atl. 170.

New York.— Bunce *v.* Reed, 16 Barb. 347. And see *infra*, VI, B, 2, b.

"Between" defined see 5 Cyc. 684.

the last; [65] but of course neither this nor any other rule of computation controls where the provisions of the contract or statute are clear and explicit as to time or the computation thereof.[66] In computing time from or after a certain day, or a given date, or the day on which an act is done, the general rule is to exclude the day of the date, unless a different method of computation is clearly intended,[67]

65. *Alabama.*— Richter *v.* State, 156 Ala. 127, 47 So. 163.

California.— Scoville *v.* Anderson, 131 Cal. 590, 63 Pac. 1013, holding that the code provision applies to acts permitted by law as well as to acts commanded.

Florida.— Savage *v.* State, 18 Fla. 970.

Illinois.— Prior *v.* People, 107 Ill. 628; Pugh *v.* Reat, 107 Ill. 440; Roan *v.* Rohrer, 72 Ill. 582; Harper *v.* Ely, 56 Ill. 179; Bowman *v.* Wood, 41 Ill. 203; People *v.* Hatch, 33 Ill. 9; Waterman *v.* Jones, 28 Ill. 54; Ewing *v.* Bailey, 5 Ill. 420; Colonial Mut. F. Ins. Co. *v.* Ellinger, 112 Ill. App. 302.

Indiana.—Womack *v.* McAhren, 9 Ind. 6; Close *v.* Twibell, (App. 1910) 92 N. E. 377.

Iowa.— Ritchey *v.* Fisher, 85 Iowa 560, 52 N. W. 505.

Kansas.— Crocker *v.* Ball, 10 Kan. App. 364, 59 Pac. 691.

Louisiana.— Rady *v.* New Orleans F. Ins. Patrol, 126 La. 273, 52 So. 491.

Minnesota.— Jaenicke *v.* Fountain City Drill Co., 106 Minn. 442, 119 N. W. 60; Spencer *v.* Haug, 45 Minn. 231, 47 N. W. 794.

Missouri.— Huhn *v.* Lang, 122 Mo. 600, 27 S. W. 345; Hahn *v.* Dierkes, 37 Mo. 574; State *v.* Fleetwood, 143 Mo. App. 698, 127 S. W. 934; Webb *v.* Strobach, 143 Mo. App. 459, 127 S. W. 680.

New York.— Judd *v.* Fulton, 10 Barb. 117, 4 How. Pr. 298; Oswego Commercial Bank *v.* Ives, 2 Hill 355.

Oklahoma.— Baker *v.* Hammett, 23 Okla. 480, 100 Pac. 1114.

Oregon.—Grant *v.* Paddock, (1897) 47 Pac. 712; Carothers *v.* Wheeler, 1 Oreg. 194.

Pennsylvania.— Esler *v.* Peterson, 8 Phila. 303.

South Carolina.— Bigham *v.* Holliday, 52 S. C. 528, 30 S. E. 485.

Tennessee.— Cowan *v.* Donaldson, 95 Tenn. 322, 32 S. W. 457.

Texas.—Ætna L. Ins. Co. *v.* Wimberly, 102 Tex. 46, 112 S. W. 1038, 132 Am. St. Rep. 852, 23 L. R. A. N. S. 759 [*reversing* (Civ. App. 1908) 108 S. W. 778]; Phœnix Ins. Co. *v.* Burton, (Civ. App. 1896) 39 S. W. 319, holding that property which was vacated on the evening of January 1, and burned on the evening of January 10, was not vacant for "more than ten days."

See 45 Cent. Dig. tit. "Time," § 11.

The word "within," when used as to time in a statute, is equivalent to "not beyond." Levert *v.* Read, 54 Ala. 529; Shipman *v.* Grant, 12 U. C. C. P. 395.

66. Northwestern Guaranty Loan Co. *v.* Channell, 53 Minn. 269, 55 N. W. 121; Marvin *v.* Marvin, 75 N. Y. 240.

67. *Alabama.*— Goode *v.* Webb, 52 Ala. 452.

Georgia.— Holt *v.* Richardson, 134 Ga. 287, 67 S. E. 798.

Illinois.— Ewing *v.* Bailey, 5 Ill. 420; Cummins *v.* Holmes, 11 Ill. App. 158.

Kentucky.— Newton *v.* Ogden, 126 Ky. 101, 102 S. W. 865, 31 Ky. L. Rep. 549; Mooar *v.* Covington City Nat. Bank, 80 Ky. 305; Handley *v.* Cunningham, 12 Bush 401; Wood *v.* Com., 11 Bush 220; Chiles *v.* Smith, 13 B. Mon. 460; Claxton *v.* Suter, 13 Ky. L. Rep. 973; Ford *v.* Smith, 13 Ky. L. Rep. 779.

Maine.— Flint *v.* Sawyer, 30 Me. 226; Peables *v.* Hannaford, 18 Me. 106.

Massachusetts.— Bemis *v.* Leonard, 118 Mass. 502, 19 Am. Rep. 470; Perry *v.* Provident L. Ins., etc., Co., 99 Mass. 162; Atkins *v.* Sleeper, 7 Allen 487; Fuller *v.* Russell, 6 Gray 128; Wiggin *v.* Peters, 1 Metc. 127; Bigelow *v.* Willson, 1 Pick. 485.

New Hampshire.— Blake *v.* Crowninshield, 9 N. H. 304; Rand *v.* Rand, 4 N. H. 267.

New Jersey.— McCulloch *v.* Hopper, 7 N. J. L. J. 336; *In re* Evans, 29 N. J. Eq. 571.

New York.— Doe *v.* Smyth, Anth. N. P. 243; Homan *v.* Liswell, 6 Cow. 659.

North Carolina.— Burgess *v.* Burgess, 117 N. C. 447, 23 S. E. 336.

Pennsylvania.— Menges *v.* Frick, 73 Pa. St. 137, 13 Am. Rep. 731; *In re* Goswiler, 3 Penr. & W. 200; Hampton *v.* Erenzeller, 2 Browne 18; Wayne *v.* Duffy, 1 Phila. 367; *In re* Parker, 14 Wkly. Notes Cas. 566.

Rhode Island.— Ordway *v.* Remington, 12 R. I. 319, 34 Am. Rep. 646.

South Carolina.—Lorent *v.* South Carolina Ins. Co., 1 Nott & M. 505.

Texas.— Eyl *v.* State, 37 Tex. Civ. App. 297, 84 S. W. 607.

United States.— Sheets *v.* Selden, 2 Wall. 177, 17 L. ed. 822; Hicks *v.* National L. Ins. Co., 60 Fed. 690, 9 C. C. A. 215.

Canada.— Hanns *v.* Johnston, 3 Ont. 100; Sutherland *v.* Buchanan, 9 Grant Ch. (U. C.) 135; McCrea *v.* Waterloo County Mut. F. Ins. Co., 26 U. C. C. P. 431.

See 45 Cent. Dig. tit. "Time," § 11.

Rule where present interest passes.— In some cases it has been held that an exception exists where a present interest passes on the day the computation begins, as in the case of a lease, and that in such case the first day should be included in the computation. Budds *v.* Frey, 104 Minn. 481, 117 N. W. 158; Nesbit *v.* Godfrey, 155 Pa. St. 251, 25 Atl. 621; Lysle *v.* Williams, 15 Serg. & R. (Pa.) 135; Taylor *v.* Brown, 147 U. S. 640, 13 S. Ct. 549, 37 L. ed. 313; Pearpoint *v.* Graham, 19 Fed. Cas. No. 10,877, 4 Wash. 232.

In England, although the present rule is to construe the day of the date exclusively, a distinction is drawn between the time within which an act may be done and a term limited to a certain time, as the term of a patent, it being held in the latter case that

and in this connection there is no distinction in meaning between "date" and "day of the date." [68] Although a distinction was made in early cases and is still followed in some jurisdictions between computation from an act done and the day on which the act is done, it being held in the former instance that the day of the doing of the act is to be included,[69] this distinction is at present disregarded in most jurisdictions on the ground that, as a day is an indivisible point of time, an act and the day on which it is done are coextensive.[70] Where time is given until a day named, or an act must be performed by or before a certain day, the time does not, in the absence of a contrary intention, include the designated day, and the act must be done prior thereto.[71]

the patent begins at the earliest moment of the first day, and that the first day is reckoned as inclusive. Russell *v.* Ledsam, 9 Jur. 557, 14 L. J. Exch. 353, 14 M. & W. 574.

Whether the day of the happening of a certain event should be included as a basis from which to compute time has been a vexed question for many centuries, and, in consequence of a spirited controversy as to whether it should be included or excluded, and to remove any doubt upon the subject, Gregory IX, in his decretals, introduced the phrase "a year and a day," thus including the first and last day of the term. Holman *v.* De Lin-River Finley Co., 30 Oreg. 428, 47 Pac. 708.

"After" defined see 2 Cyc. 50.

68. Weeks *v.* Hull, 19 Conn. 376, 50 Am. Dec. 249; Oatman *v.* Walker, 33 Me. 67; Houser *v.* Reynolds, 2 N. C. 114, 1 Am. Dec. 551; Sutherland *v.* Buchanan, 9 Grant Ch. (U. C.) 135.

69. *Indiana.*— Jacobs *v.* Graham, 1 Blackf. 392.

Kansas.— Kansas City *v.* Gibson, 66 Kan. 501, 72 Pac. 222.

Kentucky.— Lowry *v.* Stotts, 138 Ky. 251, 127 S. W. 789; Louisville R. Co. *v.* Wellington, 137 Ky. 719, 126 S. W. 370, 128 S. W. 1077; Newton *v.* Ogden, 126 Ky. 101, 102 S. W. 865, 31 Ky. L. Rep. 549 (holding that an election is an act); Com. *v.* Shelton, 99 Ky. 120, 35 S. W. 128, 18 Ky. L. Rep. 30; Mooar *v.* Covington City Nat. Bank, 80 Ky. 305; Handley *v.* Cunningham, 12 Bush 401; Wood *v.* Com., 11 Bush 220; White *v.* Crutcher, 1 Bush 472; Mallory *v.* Hiles, 4 Metc. 53; Chiles *v.* Smith, 13 B. Mon. 460; Lebus *v.* Wayne-Ratterman Co., 21 S. W. 652, 14 Ky. L. Rep. 794; Claxton *v.* Suter, 13 Ky. L. Rep. 973; Ford *v.* Smith, 13 Ky. L. Rep. 779; Geoghegan *v.* Beeler, 7 Ky. L. Rep. 514. See also Irwin *v.* Irwin, 105 Ky. 632, 49 S. W. 432, 20 Ky. L. Rep. 1761.

New Hampshire.— Priest *v.* Tarlton, 3 N. H. 93.

New Jersey.— McCulloch *v.* Hopper, 7 N. J. L. J. 336.

Ohio.— Cunningham *v.* Phillips, Tapp. 152.

Pennsylvania.— Hampton *v.* Erenzeller, 2 Browne 18; Wayne *v.* Duffy, 1 Phila. 367. And see Com. *v.* Maxwell, 27 Pa. St. 444; Ege's Appeal, 2 Watts 283.

United States.— Arnold *v.* U. S., 9 Cranch 104, 3 L. ed. 671; Pearpoint *v.* Graham, 19 Fed. Cas. No. 10,877, 4 Wash. 232.

England.— Rex *v.* Adderley, Dougl. (3d ed.) 463, 99 Eng. Reprint 295; Glassington *v.* Rawlins, 3 East 407, 102 Eng. Reprint 653; Castle *v.* Benditt, 3 T. R. 623, 100 Eng. Reprint 768. But see the later English cases to the contrary cited *infra*, note 70.

See 45 Cent. Dig. tit. "Time," § 11.

70. *Alabama.*— Lang *v.* Phillips, 27 Ala. 311.

Connecticut.—Weeks *v.* Hull, 19 Conn. 376, 50 Am. Dec. 249.

Florida.— Savage *v.* State, 18 Fla. 970.

Massachusetts.— Bemis *v.* Leonard, 118 Mass. 502, 19 Am. Rep. 470 [*distinguishing* Perry *v.* Provident L. Ins., etc., Co., 99 Mass. 162; Atkins *v.* Sleeper, 7 Allen 487; Butler *v.* Fessenden, 12 Cush. 78, and *disapproving* Wheeler *v.* Bent, 4 Pick. 167]; Seekonk *v.* Rehoboth, 8 Cush. 371; Wiggin *v.* Peters, 1 Metc. 127; Bigelow *v.* Willson, 1 Pick. 485.

Michigan.—Warren *v.* Slade, 23 Mich. 1, 9 Am. Rep. 70; Gorham *v.* Wing, 10 Mich. 486.

Minnesota.— Parkinson *v.* Brandenburg, 35 Minn. 294, 28 N. W. 919, 59 Am. Rep. 326.

Missouri.— Kimm *v.* Osgood, 19 Mo. 60; The Mary Blane *v.* Beehler, 12 Mo. 477. *Compare* State *v.* Gasconade County Ct., 33 Mo. 102.

New York.— Phelan *v.* Douglass, 11 How. Pr. 193; Cornell *v.* Moulton, 3 Den. 12; Homan *v.* Liswell, 6 Cow. 659; *Ex p.* Dean, 2 Cow. 605, 14 Am. Dec. 521.

Rhode Island.— Millard *v.* Willard, 3 R. I. 42.

South Carolina.— Corwin *v.* Comptroller-Gen., 6 S. C. 390.

Texas.—Lubbock *v.* Cook, 49 Tex. 96; Burr *v.* Lewis, 6 Tex. 76.

England.— Goldsmiths' Co. *v.* West Metropolitan R. Co., [1904] 1 K. B. 1, 68 J. P. 41, 72 L. J. K. B. 931, 89 L. T. Rep. N. S. 428, 20 T. L. R. 7, 52 Wkly. Rep. 21; Hardy *v.* Ryle, 9 B. & C. 603, 7 L. J. M. C. O. S. 118, 4 M. & R. 295, 17 E. C. L. 271, 109 Eng. Reprint 224; Pellew *v.* Wonford, 9 B. & C. 134, 7 L. J. M. C. O. S. 84, 4 M. & R. 130, 17 E. C. L. 68, 109 Eng. Reprint 50; Young *v.* Higgon, 8 Dowl. P. C. 212, 9 L. J. M. C. 29, 6 M. & W. 49; Webb *v.* Fairmaner, 6 Dowl. P. C. 549, 7 L. J. Exch. 140, 3 M. & W. 473; Lester *v.* Garland, 15 Ves. Jr. 248, 10 Rev. Rep. 68, 33 Eng. Reprint 748.

See 45 Cent. Dig. tit. "Time," § 11.

In Maine the day on which the act is done will be excluded whenever such exclusion will prevent an estoppel or save a forfeiture. Moore *v.* Bond, 18 Me. 142; Windsor *v.* China, 4 Me. 298.

71. *Arkansas.*—Alston *v.* Falconer, 42 Ark. 114.

2. Application of Rules to Particular Acts and Proceedings — a. Enactment and Taking Effect of Statutes. In computing the time after which, under constitutional provisions, a bill becomes a law if not returned by the governor, either the day of its presentment to him or the day of its return is to be excluded, the other included,[72] and the rule generally adopted is to exclude the first, or day of presentment, and include the last day of the prescribed period.[73] In some jurisdictions, when an act is to take effect from and after its passage, the day of its passage is included, and it is held to take effect from the earliest moment of that day;[74] while in others that day is excluded and the act becomes effective the next day.[75] When an act provides that it shall take effect, and be in force, from and after a named day, that day must be excluded from the operation of the act.[76]

b. Private Written Instruments. Although a rule prescribed by statute for computing time by excluding the first day and including the last has been held to apply exclusively to the construction of statutes,[77] it also establishes a convenient canon for the interpretation of contracts, where no different meaning is exhibited by the instrument to be construed;[78] and the general rule that where time is to run from or after a given day or date that day is to be excluded from the computation[79] applies in the construction and interpretation of contracts, and the day the contract is entered into or other day agreed upon for the commencement of its obligations is excluded in determining the time when the contract is in effect,[80] except where the contract manifests a different intention of

Illinois.— Richardson *v.* Ford, 14 Ill. 332; Webster *v.* French, 12 Ill. 302.

Indiana.— Eshelman *v.* Snyder, 82 Ind. 498; Erb *v.* Moak, 78 Ind. 569.

Iowa.— Carver *v.* Seevers, 126 Iowa 669, 102 N. W. 518.

New York.— People *v.* Walker, 17 N. Y. 502.

See 45 Cent. Dig. tit. "Time," § 11.

Contra.— Conway *v.* Smith Mercantile Co., 6 Wyo. 327, 44 Pac. 940, 49 L. R. A. 201.

"Before" defined see 5 Cyc. 679.

72. *In re* Computation of Time, 9 Colo. 632, 21 Pac. 475.

73. *California.*— Iron Mountain Co. *v.* Haight, 39 Cal. 540; Price *v.* Whitman, 8 Cal. 412.

Illinois.— People *v.* Hatch, 33 Ill. 9.

Louisiana.— State *v.* Michel, 52 La. Ann. 936, 27 So. 565, 78 Am. St. Rep. 364, 49 L. R. A. 218.

Missouri.— Beaudean *v.* Cape Girardeau, 71 Mo. 392.

New Hampshire.— *In re* Opinion of Justices, 45 N. H. 607.

South Carolina.— Corwin *v.* Comptroller-Gen., 6 Rich. 390.

See 45 Cent. Dig. tit. "Time," § 13.

74. Mallory *v.* Hiles, 4 Metc. (Ky.) 53; Orth *v.* McCook, 2 Ohio Dec. (Reprint) 624, 4 West. L. Month. 215. And see Statutes, 36 Cyc. 1198.

Day of publication.— Similarly, it has been held, under a statute providing that it shall take effect "from and after its publication," that, in computing the time when it takes effect, the day of its publication is to be included. Leavenworth Coal Co. *v.* Barber, 47 Kan. 29, 27 Pac. 114.

75. Parkinson *v.* Brandenburg, 35 Minn. 294, 28 N. W. 919, 59 Am. Rep. 326; Lorent *v.* South Carolina Ins. Co., 1 Nott & M. (S. C.) 505; King *v.* Moore, Jeff. (Va.) 8; *In re* St. Andrew's Church, 12 U. C. C. P. 399. And see Hill *v.* Kerr, 78 Tex. 213, 14 S. W. 566, holding that under a statute requiring an act to be done within twelve months from its passage, the day of its passage is to be excluded in computing the time.

76. Handley *v.* Cunningham, 12 Bush (Ky.) 401.

77. Cook *v.* Gray, 6 Ind. 335.

78. Dickson *v.* Frisbee, 52 Ala. 165, 23 Am. Rep. 565; Gray *v.* Worst, 129 Mo. 122, 31 S. W. 585.

Day on which lease expires see Landlord and Tenant, 24 Cyc. 1337.

Inclusion and exclusion of days in ascertaining maturity of commercial paper see Commercial Paper, 7 Cyc. 842.

79. See *supra*, VI, B, 1.

80. *Alabama.*— Goode *v.* Webb, 52 Ala. 452.

Illinois.— Protection L. Ins. Co. *v.* Palmer, 81 Ill. 88.

Maine.— Oatman *v.* Walker, 33 Me. 67.

Massachusetts.— Atkins *v.* Sleeper, 7 Allen 487; Buttrick *v.* Holden, 8 Cush. 233; Farwell *v.* Rogers, 4 Cush. 460. *Compare* Perry *v.* Provident L. Ins., etc., Co., 99 Mass. 162, where it is stated that the general rule which excludes the day an act is done applies to a policy of insurance containing stipulations for liability for death resulting in ninety days from the happening of an accident, but in which case it appears that no rule of computation would have brought the death within ninety days.

New Hampshire.— Blake *v.* Crowninshield, 9 N. H. 304. But see Keyes *v.* Dearborn, 12 N. H. 52.

New York.— Mack *v.* Burt, 5 Hun 28; Campbell *v.* International L. Assur. Soc., 4 Bosw. 298; Levison *v.* Stix, 10 Daly 229; Doe *v.* Smyth, Anth. N. P. 243; Thornton *v.* Payne, 5 Johns. 74.

the parties.[81] A contract to do a certain act or to be responsible for loss between two specified days is exclusive of both of the days mentioned;[82] but where performance is to be on or before a certain day, the party is entitled to the whole of that day for performance;[83] and although the words "to" or "until," when used in a contract, are ordinarily exclusive of the day to which they relate, such construction will yield to the manifest intention of the parties.[84] Where a deed or mortgage is required by statute to be recorded within a certain number of days after execution, the period is to be computed by excluding the day of execution and including the day of filing.[85]

c. Judicial Proceedings Generally. It has been stated generally that when any matter of practice or procedure is required by statute or order of court to be done within a certain number of days, the first day is excluded,[86] and that an order giving or extending the time for doing an act in court practice to a specified day includes that day as a part of the time within which the act may be done.[87]

Pennsylvania.— Serrill *v.* Burk, 1 Leg. Gaz. 489.

United States.— Sheets *v.* Selden, 2 Wall. 177, 17 L. ed. 822.

See 45 Cent. Dig. tit. "Time," § 30.

Contra.— Brown *v.* Buzan, 24 Ind. 194.

Option.— Under a contract obligating the purchaser of bonds and stocks to hold them one year and binding the seller to repurchase them, at the option of the purchaser, at the end of one year from the date of the contract, the year must be computed by excluding the day of the date (Weld *v.* Barker, 153 Pa. St. 465, 26 Atl. 239); and where the contract is to convey lands at the option of the purchaser, to be exercised at any time within sixty days from date, the sixtieth day is to be included (Serrill *v.* Burk, 8 Phila. (Pa.) 515).

81. Meeks *v.* Ring, 51 Hun (N. Y.) 329, 4 N. Y. Suppl. 117; Deyo *v.* Bleakley, 24 Barb. (N. Y.) 9; Donaldson *v.* Smith, 1 Ashm. (Pa.) 197. And see People *v.* Robertson, 39 Barb. (N. Y.) 9.

82. Richardson *v.* Ford, 14 Ill. 332; Atkins *v.* Boylston F. & M. Ins. Co., 5 Metc. (Mass.) 439, 39 Am. Dec. 692; Fowler *v.* Rigney, 5 Abb. Pr. N. S. (N. Y.) 182; Cook *v.* Drais, 2 Cinc. Super. Ct. (Ohio) 340.

83. See CONTRACTS, 9 Cyc. 610.

84. Kendall *v.* Kingsley, 120 Mass. 94; McCuaig *v.* Phillips, 10 Manitoba 694.

Acceptance of offer.— Where one has until a certain day to accept, the acceptance may be made on that day, if the offer is still open. Houghwout *v.* Boisaubin, 18 N. J. Eq. 315. Likewise an option which is to close "by" a certain day includes that day. Blalock *v.* Clark, 133 N. C. 306, 45 S. E. 642.

85. Towell *v.* Hollweg, 81 Ind. 154; Miller *v.* Henshaw, 4 Dana (Ky.) 325; Pyle *v.* Maulding, 7 J. J. Marsh. (Ky.) 202.

The time for renewal of a chattel mortgage is computed by excluding the day of filing. McCann *v.* Martin, 15 Ont. L. Rep. 193.

Computation of time for filing of mechanic's lien see MECHANIC'S LIENS, 27 Cyc. 149.

86. Thorne *v.* Mosher, 20 N. J. Eq. 257; Vandenburgh *v.* Van Rensselaer, 6 Paige (N. Y.) 147.

The rule has been applied to an order requiring payment of alimony within a certain number of days (Davis *v.* Davis, 39 Mich. 221); to a statute requiring a statement of costs to be filed within five days (Nicklin *v.* Robertson, 28 Oreg. 278, 42 Pac. 993, 52 Am. St. Rep. 790); and to a submission to arbitration providing that the award shall be made or filed within an agreed number of days (Chapman *v.* Ewing, 78 Ala. 403; Fink *v.* Kink, 8 Iowa 313). When chattels distrained are to be sold in a specified time, the day of seizure is excluded and the day of sale included in the reckoning (Cressey *v.* Parks, 75 Me. 387, 46 Am. Rep. 406; Robinson *v.* Waddington, 13 Q. B. 753, 13 Jur. 537, 18 L. J. Q. B. 250, 66 E. C. L. 753); and in computing the time in which the tenant may replevy, the day on which the distress was made is excluded (McKinney *v.* Reader, 6 Watts (Pa.) 34). However, under the Vermont statute requiring property distrained to be kept four days before posting, and to be posted six days before selling, the day of seizure and of posting are to be included in counting the four and six days respectively. Alger *v.* Curry, 40 Vt. 437.

Computation backward is necessary in some cases (People *v.* Burgess, 153 N. Y. 561, 47 N. E. 889. And see Wilson *v.* Black, 6 Ont. Pr. 130), as in ascertaining whether issues have been made up the number of days required by statute before the term at which the case is tried, and in such event, the first day of the term is excluded and the day of joining issue is included (Dougherty *v.* Porter, 18 Kan. 206). Likewise, in determining whether an order of change of venue has been lodged with the court to which the cause is removed the required number of days before a term to entitle it to be tried at that term, the day of depositing the order should be included, and the first day of the term excluded. Woods *v.* Patrick, Hard. (Ky.) 457.

87. Penn Placer Min. Co. *v.* Schreiner, 14 Mont. 121, 35 Pac. 878; St. Louis Commission Co. *v.* Calloway, 5 Okla. 393, 47 Pac. 1088. *Compare* Barker *v.* Keith, 11 Minn. 65, holding that the word "until," when used in connection with qualifying language,

In computing the statutory period of limitation for the institution of a civil action or a criminal prosecution, the weight of authority favors the exclusion of the day the crime was committed or the cause of action accrued,[88] and the period allowed for pleading is generally computed by excluding the return-day of the summons or other day from which the time begins to run.[89] A statute, general in its terms, and providing that time shall be computed by excluding the first and including the last day applies to the construction of criminal, as well as civil, statutes;[90] but statutes requiring the accused to be served with the venire or list of jurors a certain number of days before trial contemplate entire days, which excludes both the day of service and the day of trial.[91]

d. Notices. In general statutes regulating the subject of notice are to be construed, as respects the computation of time, most liberally in favor of the party affected by the notice.[92] It is an established rule that when notice of so many days is required by statute, order of court, or written instrument before a certain thing is to be done, or a certain event is to occur, the day of giving, serving, or publishing the notice is to be excluded and the last day is to be included, so that if the act is done or the event occurs on the last day it is sufficient.[93] Appli-

is not exclusive of the day to which it relates.

In regard to pleading it has been held that a rule extending the time to plead "to" a specified day means until the meeting of the court on that day and does not include the day. Clark *v.* Ewing, 87 Ill. 344.

Commencement or end of term of court.— Under a statute continuing a term of court "until" the Saturday before the second Monday in July, the interpretation to be placed upon the word "until" is that the last day named is to be included. Montgomery Tract. Co. *v.* Knabe, 158 Ala. 458, 48 So. 501 [*overruling* Johnson *v.* State, 141 Ala. 7, 37 So. 421, 109 Am. St. Rep. 17]. However, a statute allowing a tender of damages and costs to be made at any time until three days before the commencement of the term to which the action is returnable excludes from the period mentioned both the day on which the tender is made and the first day of the term. Willey *v.* Laraway, 64 Vt. 566, 25 Atl. 435.

88. See CRIMINAL LAW, 12 Cyc. 257; LIMITATIONS OF ACTIONS, 25 Cyc. 1291.

Under the bankruptcy act of 1867 which provided that the commencement of proceedings in bankruptcy should dissolve an attachment levied within the preceding four months, the period was computed by excluding the first day. Cooley *v.* Cook, 125 Mass. 406; Richards *v.* Clark, 124 Mass. 491.

89. Neitzel *v.* Hunter, 19 Kan. 221; Mark *v.* Russell, 40 Pa. St. 372; Wayne *v.* Duffy, 1 Phila. (Pa.) 367; Gustine *v.* Elliott, 11 Wkly. Notes Cas. (Pa.) 433; Hollis *v.* Francois, 1 Tex. 118. *Contra*, Claxton *v.* Suter, 13 Ky. L. Rep. 973 (holding that a traverse of the inquisition on a writ of forcible detainer must be filed within three days next after the finding, and in computing the time the day of the finding must be included); Ridout *v.* Orr, 2 Ont. Pr. 231 (holding that the Ontario court rules require the inclusion of both the first and last days); Rose *v.* Johnson, 2 Ont. Pr. 230.

Computation of time for filing of plea or answer see, generally, PLEADING, 31 Cyc. 136.

Where a certain time must elapse between the presentation of a petition and the next term of court, the day the petition was presented must be excluded. Morrison *v.* Morrison, 3 Lanc. L. Rev. (Pa.) 272.

Modification of rule.— In some jurisdictions it is sufficient to compute the time by excluding either the day the period commences or the last day, and including the other. State *v.* Jackson, 4 N. J. L. 373; Hoffman *v.* Duel, 5 Johns. (N. Y.) 232.

90. State *v.* Beasley, 21 W. Va. 777.

Application of rule to filing of bill of exceptions see CRIMINAL LAW, 12 Cyc. 855.

Surrender to preserve appeal.— In computing the number of days within which a convicted person who escaped must surrender himself, in order to preserve his appeal, the day of his escape must be excluded. Hammons *v.* State, 35 Tex. Cr. 17, 29 S. W. 780.

In Kentucky the day judgment was rendered is included in computing the time allowed for the filing of the record with the clerk of the court of appeals (Wood *v.* Com., 11 Bush 220), and the day on which verdict was rendered is included in computing the time which must elapse before sentence may be pronounced (Bush *v.* Com., 80 Ky. 244, 3 Ky. L. Rep. 740).

91. State *v.* McLendon, 1 Stew. (Ala.) 195; Speer *v.* State, 2 Tex. App. 246. *Compare* Adams *v.* State, 35 Tex. Cr. 285, 33 S. W. 354.

92. Hill *v.* Faison, 27 Tex. 428.

93. *Alabama.*— Richter *v.* State, 156 Ala. 127, 47 So. 163.

California.— Wilson *v.* His Creditors, 55 Cal. 476; Misch *v.* Mayhew, 51 Cal. 514.

Illinois.— Wahl *v.* Nauvoo, 64 Ill. App. 17.

Maine.— Page *v.* Weymouth, 47 Me. 238.

Maryland.— Walsh *v.* Boyle, 30 Md. 262.

Michigan.— Gantz *v.* Toles, 40 Mich. 725.

Mississippi.— Mitchell *v.* Woodson, 37 Miss. 567; Hall *v.* Cassidy, 25 Miss. 48.

Missouri.— Hahn *v.* Dierkes, 37 Mo. 574; State *v.* Fleetwood, 143 Mo. App. 698, 127 S. W. 934. And see Schubert *v.* Crowley, 33 Mo. 564.

cation of the rule has been made to notices of hearing,[94] argument,[95] trial,[96] judicial sales and sales under powers contained in mortgages or deeds of trust,[97] special elections,[98] district school meetings,[98a] application for a commission to take depositions,[1]

New York.— Taylor *v.* Corbiere, 8 How. Pr. 385. And see Jackson *v.* Van Valkenburgh, 8 Cow. 260; Irving *v.* Humphreys, Hopk. 364.

England.— Rex *v.* Cumberland, 1 Harr. & W. 16, 4 L. J. M. C. 72, 4 N. & M. 378.

See 45 Cent. Dig. tit. "Time," § 19.

Where the act is to be done by the person to whom notice is given, he has the whole of the last day in which to act, and a forfeiture for his non-action cannot be had until the following day. People *v.* Marsh, 2 Cow. (N. Y.) 493; Hicks *v.* National L. Ins. Co., 60 Fed. 690, 9 C. C. A. 215.

94. Bates *v.* Howard, 105 Cal. 173, 38 Pac. 715; Klein *v.* Tuhey, 13 Ind. App. 74, 40 N. E. 144; Howbert *v.* Heyle, 47 Kan. 58, 27 Pac. 116; Anderson *v.* Baughman, 6 Mich. 298. *Contra,* Beard *v.* Gray, 3 Ch. Chamb. (U. C.) 104.

Day of last publication excluded.— Under Nebr. Comp. St. (1901) § 6322*a*, requiring that notice of hearing on a petition for the adoption of a child shall be published at least ten days prior to the day of hearing, the day of last publication is to be excluded, and the day of the hearing included. Omaha Water Co. *v.* Schamel, 147 Fed. 502, 78 C. C. A. 68.

The Michigan statute, relative to the giving of notice of a hearing on an application to lay out a highway, excludes the day of hearing, and the established rule in the state excludes the day of notice. Cox *v.* Hartford Tp. Highway Com'rs, 83 Mich. 193, 47 N. W. 122; Coquard *v.* Boehmer, 81 Mich. 445, 45 N. W. 996; People *v.* Clay Tp. Highway Com'rs, 38 Mich. 247. The statute relating to the giving of notice of examination on an application for a township ditch also excludes the day of notice and of examination. Lane *v.* Burnap, 39 Mich. 736.

95. Excelsior *v.* Minneapolis, etc., Suburban R. Co., 108 Minn. 407, 120 N. W. 526, 122 N. W. 486, 133 Am. St. Rep. 455, 24 L. R. A. N. S. 1035 [*overruling* Greve *v.* St. Paul, etc., R. Co., 25 Minn. 327].

96. Edward Hines Lumber Co. *v.* Ream, 64 Ill. App. 608; Wilson *v.* Knight, 3 Greene (Iowa) 126; State *v.* Weld, 39 Minn. 426, 40 N. W. 561; Dayton *v.* McIntyre, 5 How. Pr. (N. Y.) 117, 3 Code Rep. 164; Easton *v.* Chamberlin, 3 How. Pr. (N. Y.) 412. See also Phillips *v.* Merritt, 2 Ont. Pr. 233.

As to the New York rule under statute before the adoption of the code see Small *v.* Edrick, 5 Wend. 137 [*distinguished* in Columbia Turnpike Road Co. *v.* Haywood, 10 Wend. 422].

A notice to place a cause on the short cause calendar falls within the same rule. Nelson *v.* Beidler, 134 Ill. App. 655.

97. *California.*— Lemoore Bank *v.* Fulgham, 151 Cal. 234, 90 Pac. 936; Bellmer *v.* Blessington, 136 Cal. 3, 68 Pac. 111. But see Osgood's Estate, Myr. Prob. 153.

Illinois.— Magnusson *v.* Williams, 111 Ill. 450. *Compare* Harper *v.* Ely, 56 Ill. 179. *Contra,* Faulds *v.* People, 66 Ill. 210.

Kansas.— Matthews *v.* Arthur, 61 Kan. 455, 59 Pac. 1067. *Contra,* Northrop *v.* Cooper, 23 Kan. 432.

Kentucky.— Sanders *v.* Norton, 4 T. B. Mon. 464.

Minnesota.—Goenen *v.* Schroeder, 18 Minn. 66; Worley *v.* Naylor, 6 Minn. 192.

New York.— Howard *v.* Hatch, 29 Barb. 297; Bunce *v.* Reed, 16 Barb. 347.

Virginia.— Bowles *v.* Brauer, 89 Va. 466, 16 S. E. 356.

See 45 Cent. Dig. tit. "Time," § 20.

A different view is taken by other authorities which interpret certain statutes to mean that both the day notice is first given and the day of sale are to be excluded (Steuart *v.* Meyer, 54 Md. 454; Goldsworthy *v.* Coyle, 19 R. I. 323, 33 Atl. 466; Lerch *v.* Snyder, 2 Tex. Civ. App. 421, 21 S. W. 183. See also Carlow *v.* Aultman, 28 Nebr. 672, 44 N. W. 873); or that the day of giving notice should be included and the day of sale excluded (Hill *v.* Pressley, 96 Ind. 447 [*distinguishing* Smith *v.* Rowles, 85 Ind. 264]; Hagerman *v.* Ohio Bldg., etc., Assoc., 25 Ohio St. 186; Smith *v.* Tinicum Fishing Co., 1 Del. Co. (Pa.) 127. See also Underwood *v.* Jeans, 4 Harr. (Del.) 201; Meredith *v.* Chancey, 59 Ind. 466); while in one case it has been held that in computing the time of a sheriff's advertisement the day it was published and the day of the sale may both be counted (Manning *v.* Dove, 10 Rich. (S. C.) 395).

98. Brady *v.* Moulton, 61 Minn. 185, 63 N. W. 489; Coe *v.* Caledonia, etc., R. Co., 27 Minn. 197, 6 N. W. 621; State *v.* Fleetwood, 143 Mo. App. 698, 127 S. W. 934; State *v.* Sexton, 141 Mo. App. 694, 125 S. W. 519; State *v.* Cordell, 137 Mo. App. 205, 117 S. W. 655; State *v.* Tucker, 32 Mo. App. 620. And see INTOXICATING LIQUORS, 23 Cyc. 99 note 95.

In New Jersey the method of computation is to include either the day when the notice was given or the day of the election, and to exclude the other day. Stroud *v.* Consumers' Water Co., 56 N. J. L. 422, 28 Atl. 578.

99. See Fletcher *v.* Lincolnville, 20 Me. 439.

In Vermont either the day on which the notice was posted or the day on which the meeting was held will be counted. Mason *v.* Brookfield School Dist. No. 14, 20 Vt. 487. And see Hunt *v.* Norwich School Dist. No. 20, 14 Vt. 300, 39 Am. Dec. 225.

1. Bonney *v.* Cocke, 61 Iowa 303, 16 N. W. 139; Eaton *v.* Peck, 26 Mich. 57; Arnold *v.* Nye, 23 Mich. 286.

Notice to take deposition.— In determining the sufficiency of a notice to take depositions, the day on which the notice was given should be excluded, and that on which the depositions are to be taken should be in-

and notices to quit,[2] as well as statutory notices relative to the support of paupers.[3] Under the peculiar provisions of some statutes, both the day of giving notice and the day of the act or event of which notice is given are excluded,[4] while under other statutes the first day is to be included and the last day excluded.[5] The usual rule of excluding the first day of a period within which an act is to be done and including the last applies where notice is required to be given or served within a specified number of days after a certain act,[6] as where notice of appeal is to be served within a certain number of days after judgment.[7]

e. Process. In ascertaining whether process has been served the required statutory time before the return-day or the day of appearance, the rule frequently adopted is to exclude the day of service and include the return or appearance day.[8] In some jurisdictions, however, the day of service is included and the

cluded (Littleton *v.* Christy, 11 Mo. 390); and it has been held sufficient if either day is counted exclusive, and the other inclusive (Beasley *v.* Downey, 32 N. C. 384). Under an order allowing testimony to be taken on one day's notice, a notice given on one day to take testimony on the next is sufficient. Walsh *v.* Boyle, 30 Md. 262.

2. Higgins *v.* Halligan, 46 Ill. 173; Aiken *v.* Appleby, Morr. (Iowa) 8; McGinnis *v.* Genss, 25 Wash. 490, 65 Pac. 755.

The tenant has the whole of the last day in which to leave, and proceedings to recover possession cannot be rightfully brought until the following day. Cheek *v.* Preston, 34 Ind. App. 343, 72 N. E. 1048; Johnson *v.* Douglass, 73 Mo. 168; Dale *v.* Doddridge, 9 Nebr. 138, 1 N. W. 999; Hungerford *v.* Wagoner, 5 N. Y. App. Div. 590, 39 N. Y. Suppl. 369.

In Pennsylvania the day of service of notice is included in the count. Duffy *v.* Ogden, 64 Pa. St. 240; McGowen *v.* Sennett, 1 Brewst. 397.

3. Windsor *v.* China, 4 Me. 298; Seekonk *v.* Rehoboth, 8 Cush. (Mass.) 371; Monroe *v.* Acworth, 41 N. H. 199.

4. *Arkansas.*— Jones *v.* State, 42 Ark. 93.

Delaware.— *In re* Public Roads, 5 Harr. 174.

Louisiana.— Miller's Succession, 107 La. 561, 32 So. 80.

England.— Reg. *v.* Aberdare Canal Co., 14 Q. B. 854, 14 Jur. 735, 19 L. J. Q. B. 251, 68 E. C. L. 854; Reg. *v.* Shropshire, 8 A. & E. 173, 2 Jur. 807, 7 L. J. M. C. 56, 3 N. & P. 286, 35 E. C. L. 538, 112 Eng. Reprint 803; *In re* Prangley, 4 A. & E. 781, 2 Harr. & W. 65, 6 L. J. K. B. 259, 6 N. & M. 421, 31 E. C. L. 344, 111 Eng. Reprint 977; Zouch *v.* Empsey, 4 B. & Ald. 522, 6 E. C. L. 586, 106 Eng. Reprint 1028.

Canada.— *Re* Ontario Tanners' Supplies Co., 12 Ont. Pr. 563; *In re* Loney, 10 U. C. Q. B. 305.

See 45 Cent. Dig. tit. "Time," § 19.

Statutes requiring notice of town meetings have been held to contemplate the exclusion of the day notice is given and the day of the meeting. Brooklyn Trust Co. *v.* Hebron, 51 Conn. 22; Osgood *v.* Blake, 21 N. H. 550. In Vermont the day on which the meeting was warned is excluded. Pratt *v.* Swanton, 15 Vt. 147.

5. Stewart *v.* Griswold, 134 Mass. 391; Thomas *v.* Afflick, 16 Pa. St. 14. And see Fox *v.* Allenville, etc., Turnpike Co., 46 Ind. 31; Wing *v.* Cleveland, 9 Ohio Dec. (Reprint) 507, 14 Cinc. L. Bul. 190; Dillard *v.* Krise, 86 Va. 410, 10 S. E. 430.

6. Jaenicke *v.* Fountain City Drill Co., 106 Minn. 442, 119 N. W. 60. *Contra*, Batman *v.* Megowan, 1 Metc. (Ky.) 533.

7. Young *v.* Whitcomb, 46 Barb. (N. Y.) 615; Westcott *v.* Platt, 1 Code Rep. (N. Y.) 100; Zell Guano Co. *v.* Hicks, 120 N. C. 29, 26 S. E. 650; Bigham *v.* Holliday, 52 S. C. 528, 30 S. E. 485; Daley *v.* Anderson, 7 Wyo. 1, 48 Pac. 839, 75 Am. St. Rep. 870. And see State *v.* Jones, 11 Iowa 11.

In Louisiana it seems that either one day or the other must be excluded. McDonough *v.* Gravier, 9 La. 531.

8. *Alabama.*— Thrower *v.* Brandon, 89 Ala. 406, 7 So. 442; Garner *v.* Johnson, 22 Ala. 494.

Indiana.— Kerr *v.* Haverstick, 94 Ind. 178; Reigelsberger *v.* Stapp, 91 Ind. 311; Monroe *v.* Paddock, 75 Ind. 422; Moffitt *v.* Bininger, 17 Ind. 195; Kortepeter *v.* Wright, 15 Ind. 456; Blair *v.* Manson, 9 Ind. 357; Blair *v.* Davis, 9 Ind. 236; Martin *v.* Reed, 9 Ind. 180; Womack *v.* McAhren, 9 Ind. 6; Wort *v.* Finley, 8 Blackf. 335. And see Krohn *v.* Templin, 2 Ind. 146.

Kansas.— Schultz *v.* Hine, 39 Kan. 334, 18 Pac. 221; Foster *v.* Markland, 37 Kan. 32, 14 Pac. 452.

Michigan.— Chaddock *v.* Barry, 93 Mich. 542, 53 N. W. 785, limiting the rule, however, to the statute under consideration, which related to the service of summons issued from a justice's court.

Minnesota.— Smith *v.* Force, 31 Minn. 119, 16 N. W. 704.

Missouri.— Sappington *v.* Lenz, 53 Mo. App. 44.

New York.— Matter of Carhart, 67 How. Pr. 216, 2 Dem. Surr. 627; Columbia Turnpike Road *v.* Haywood, 10 Wend. 422.

South Carolina.— Buist *v.* Mitchell, 3 Brev. 485.

Wisconsin.— Young *v.* Krueger, 92 Wis. 361, 66 N. W. 355.

See 45 Cent. Dig. tit. "Time," §§ 22, 23. And see JUSTICES OF THE PEACE, 24 Cyc. 521 note 8; PROCESS, 32 Cyc. 457.

Where service is by publication, the day on which publication is first made is excluded,

return-day excluded,[9] while in other jurisdictions either the day of service or the return-day is included and the other excluded;[10] and in still other jurisdictions, or in the same jurisdiction but under different statutes, it is held that clear days are contemplated, thus rendering necessary the exclusion of both the day of service and the return-day.[11] Where a summons must be made returnable a certain number of days after issue, the day of date is to be excluded in estimating this time.[12]

f. Judgment and Execution. The first day should be excluded and the last included in computing the period which must elapse before a default judgment may be taken,[13] or the period within which a motion to set it aside may be made,[14] and, in general, the day of the rendition of a judgment or decree is excluded in reckoning periods beginning with such rendition.[15] The day on which judgment was entered is excluded in computing the statutory time allowed for the issuance[16] or levy of execution,[17] and the same rule is applicable in construing statutory requirements that a certain period must elapse before execution may be issued.[18] Likewise, in ascertaining the proper time for the return of an execution, the day

and the day on which it is completed is included. Forsyth *v.* Warren, 62 Ill. 68; Vairin *v.* Edmonson, 10 Ill. 270; Beckwith *v.* Douglas, 25 Kan. 229; Gilfillin *v.* Koke, 2 Ohio Dec. (Reprint) 172, 1 West. L. Month. 704. To the same effect see Warner *v.* Bucher, 24 Kan. 478.

9. *Georgia.*— English *v.* Ozburn, 59 Ga. 392; Baxley *v.* Bennett, 33 Ga. 146.

Massachusetts.— Butler *v.* Fessenden, 12 Cush. 78.

Mississippi.—Mitchell *v.* Woodson, 37 Miss. 567; Morrison *v.* Gaillard, 25 Miss. 194.

Nebraska.— Messick *v.* Wigent, 37 Nebr. 892, 56 N. W. 493; White *v.* German Ins. Co., 15 Nebr. 660, 20 N. W. 30.

Ohio.— Barto *v.* Abbe, 16 Ohio 408.

Pennsylvania.— Black *v.* Johns, 68 Pa. St. 83.

Tennessee.— Dickinson *v.* Lee, 2 Coldw. 615.

See 45 Cent. Dig. tit. "Time," § 22.

10. Ogden *v.* Redman, 3 A. K. Marsh. (Ky.) 234; Pollard *v.* Yoder, 2 A. K. Marsh. (Ky.) 264; Day *v.* Hall, 12 N. J. L. 203; Bray *v.* Fen, 8 N. J. L. 303. And see Taylor *v.* Harris, 82 N. C. 25. *Compare* Pedreck *v.* Shaw, 2 N. J. L. 57.

11. Warrington *v.* Tull, 5 Harr. (Del.) 107; Robinson *v.* Foster, 12 Iowa 186; Sallee *v.* Ireland, 9 Mich. 154; Dousman *v.* O'Malley, 1 Dougl. (Mich.) 450; Snell *v.* Scott, 2 Mich. N. P. 108; Fitzhugh *v.* Hall, 28 Tex. 558; O'Connor *v.* Towns, 1 Tex. 107; Trevino *v.* Garza, 1 Tex. App. Civ. Cas. § 821.

12. Ferris *v.* Zeidler, 5 Phila. (Pa.) 529 [*distinguishing* Barber *v.* Chandler, 17 Pa. St. 48, 55 Am. Dec. 533]; Brenner *v.* Dombach, 3 Lanc. Bar (Pa.) Feb. 10, 1872.

13. Brod *v.* Heymann, 3 Abb. Pr. N. S. (N. Y.) 396. *Compare* Scott *v.* Dickson, 1 Ont. Pr. 366.

Under a Virginia statute (Code (1860), c. 16, § 16) the first day was included and the last excluded. Turnbull *v.* Thompson, 27 Gratt. 306.

Confession of judgment.— Under a statute making an offer of judgment effective as regards costs only when made and served ten days before the commencement of the trial, the day of service of the offer must be excluded in the computation of the prescribed period. Mansfield *v.* Fleck, 23 Minn. 61.

Time in general for taking or entering default judgment see JUDGMENTS, 23 Cyc. 754.

14. Reynolds *v.* Missouri, etc., R. Co., 64 Mo. 70.

15. Portland Bank *v.* Maine Bank, 11 Mass. 204; McCormick *v.* Hickey, 56 N. J. Eq. 848, 42 Atl. 1019.

Time for entry of judgment.— Under a code provision that judgments on the decision of the court may be entered after the expiration of four days from the filing of the decision and the service upon the attorney of the adverse party of a copy thereof, four calendar days must elapse after the filing of a decision and notice thereof before judgment can be properly entered. Marvin *v.* Marvin, 75 N. Y. 240.

16. Davidson *v.* Gaston, 16 Minn. 230. And see EXECUTIONS, 17 Cyc. 1006.

Where the period is measured in years the rule is otherwise. Aultman, etc., Co. *v.* Syme, 163 N. Y. 54, 57 N. E. 168, 79 Am. St. Rep. 565.

A revivor of judgment by scire facias comes within the same rule. Lutz's Appeal, 124 Pa. St. 273, 16 Atl. 858; Green's Appeal, 6 Watts & S. (Pa.) 327.

17. Carroll *v.* Salisbury, 28 R. I. 16, 65 Atl. 274.

When date of levy excluded.— In computing the time within which, by statute, an extent on land is to be recorded, the day on which the levy is made is excluded. Berry *v.* Spear, 13 Me. 187.

18. Oswego Commercial Bank *v.* Ives, 2 Hill (N. Y.) 355; Kerr *v.* Bowie, 3 Can. L. J. 110. And see Gass *v.* Schuylkill Iron Co., 2 Leg. Chron. (Pa.) 241, where the rule was applied in calculating the time allowed by law to enter bail for stay of execution.

Under a stipulation that execution should not issue within a designated period the rule is otherwise. Voorhees *v.* Minor, 19 Ohio Cir. Ct. 560, 10 Ohio Cir. Dec. 681.

Under Ga. Code, only the first or last day

of its issue is excluded,[19] and the day from which the reckoning begins is excluded in computing statutory periods allowed to the debtor to relieve himself from the consequences of an execution against his property [20] or person; [21] but the contrary is true in computing a period which must elapse before he may take such steps.[22]

g. Proceedings For Review — (I) *NEW TRIAL.* A person having to or until a certain day to file a motion for new trial or papers connected therewith is entitled to the whole of that day; [23] but as to whether the day judgment or verdict was rendered is included in a period allowed for filing, commencing with that day, there is a conflict of authority, some cases holding that it should be included,[24] and others holding that it should be excluded.[25]

(II) *APPEAL AND ERROR* [26] — (A) *In General.* It is a general rule, not only in jurisdictions where the computation of time is regulated by statute, but in other jurisdictions where it is not so regulated, that, in computing the time given or allowed by statute or order of court for the taking of an appeal or writ of error, and all the proceedings necessary to perfect the same, there should be excluded the date of rendition of the judgment, order, or decree,[27] or

of the period may be counted. Knoxville City Mills Co. *v.* Lovinger, 83 Ga. 563, 10 S. E. 230.

Execution against lands of deceased.— Under a statute of Missouri which allows land to be sold on any judgment against decedent, provided no such sale shall take place until after the expiration of eighteen months from his death, the day from which the eighteen months are to be calculated is to be included. Griffith *v.* Bogert, 18 How. (U. S.) 158, 15 L. ed. 307.

19. Scharff *v.* McGaugh, 205 Mo. 344, 103 S. W. 550; Homan *v.* Liswell, 6 Cow. (N. Y.) 659; Clarke *v.* Garrett, 28 U. C. C. P. 75. But see Ogden *v.* Redman, 3 A. K. Marsh. (Ky.) 234, holding that the day of the teste is to be included, and the day of the return excluded, or *vice versa*. *Contra*, Ryman *v.* Clark, 4 Blackf. (Ind.) 329.

Under the Vermont statute, which requires execution to be returned within a certain number of days from the time of rendering judgment, the day on which the judgment was perfected is to be excluded, even though the execution was issued on the same day. Muzzy *v.* Howard, 42 Vt. 23.

Replevying of execution.— Under a statute providing that any execution on a judgment which could be replevied before such execution issued may be replevied for three months at any time before the sale of the property under the same, where an execution was replevied February 28, an execution on the replevin bond might be issued May 29. Mooar, etc. *v.* Covington City Nat. Bank, 3 Ky. L. Rep. 674.

Demanding possession of attached property.— In the computation of the thirty days, within which property attached on the original writ must be demanded of the attaching officer by the officer holding the execution, the first day on which the party is entitled to take out execution should be excluded. Allen *v.* Carty, 19 Vt. 65.

20. McCarty *v.* McCarty, 19 La. 300.

Time for redemption from execution sale see *infra*, VI, B, 2, h.

Claim of third person.— In reckoning time under a statute requiring a justice of the peace to fix the day of trial within five days after a claim to goods taken in execution is filed, the day on which the claim was filed must be counted. Long *v.* McClure, 5 Blackf. (Ind.) 319.

21. Moore *v.* Bond, 18 Me. 142; Odiorne *v.* Quimby, 11 N. H. 224; Bell *v.* Adams, 10 N. H. 181.

Rights of bail.— Under early statutes and court rules, the bail was entitled to four days, exclusive of the return-day of the writ, in which to surrender his principal. Gillespie *v.* White, 16 Johns. (N. Y.) 117; Cowles *v.* Brawley, 4 Watts (Pa.) 358; McClurg *v.* Bowers, 9 Serg. & R. (Pa.) 24; Ehler *v.* Stœver, 2 Miles (Pa.) 14.

22. *In re* Fortner, 2 Harr. (Del.) 461; Priest *v.* Tarlton, 3 N. H. 93. *Contra*, Judd *v.* Fulton, 10 Barb. (N. Y.) 117, 4 How. Pr. 298.

23. Rogers *v.* Cherokee Iron, etc., Co., 70 Ga. 717; Penn Placer Min. Co. *v.* Schreiner, 14 Mont. 121, 35 Pac. 878.

24. White *v.* Crutcher, 1 Bush (Ky.) 472; Long *v.* Hughes, 1 Duv. (Ky.) 387; Harlan *v.* Braxdale, 35 S. W. 916, 18 Ky. L. Rep. 171; Lane *v.* Shreiner, 1 Binn. (Pa.) 292. And see NEW TRIAL, 29 Cyc. 932.

25. Hathaway *v.* Hathaway, 2 Ind. 513. And see Chicago Label, etc., Co. *v.* Washburn, 15 Ohio Cir. Ct. 510, 8 Ohio Cir. Dec. 113.

26. Notice of appeal, hearing, or argument see *supra*, VI, B, 2, d.

27. *Alabama.*— Boyett *v.* Frankfort Chair Co., 152 Ala. 317, 44 So. 546; Field *v.* Gamble, 47 Ala. 443; Cawlfield *v.* Brown, 45 Ala. 552; Walker *v.* Walker, 42 Ala. 489.

Arkansas.— Connerly *v.* Dickinson, 81 Ark. 258, 99 S. W. 82; Swisher *v.* Hine, 10 Ark. 497.

Indiana.—Wright *v.* Manns, 111 Ind. 422, 12 N. E. 160 [*overruling* Lange *v.* Lammier, (1887) 11 N. E. 33]; Noble *v.* Murphy, 27 Ind. 502; Faure *v.* U. S. Express Co., 23 Ind. 48; Swift *v.* Tousey, 5 Ind. 196. And see Hursh *v.* Hursh, 99 Ind. 500; Glasscock *v.* Boyer, 50 Ind. 391; Crawford *v.* Prairie Creek Ditching Assoc., 44 Ind. 361. *Contra*, Jacobs *v.* Graham, 1 Blackf. 392.

other day from which the time commences to run,[28] and that the last day, or the day on which the appeal is taken, should be included.[29] Under statutes requiring the taking of an appeal or a writ of error, or the filing of papers necessary to perfect the same, a specified number of days before the term at which it is to be heard, the decisions are at variance, some holding that both the day of filing and the first day of the term are to be excluded,[30] others holding that both must be included,[31] while still others hold that either one day or the other

Iowa.— Richey *v.* Fisher, 85 Iowa 560, 52 N. W. 505; Carleton *v.* Byington, 16 Iowa 588.

Kansas.— Smith County *v.* Labore, 37 Kan. 480, 15 Pac. 577.

Louisiana.— Tupery *v.* Edmondson, 29 La. Ann. 850; State *v.* Judge Super. Dist. Ct., 29 La. Ann. 223; Garland *v.* Holmes, 12 Rob. 421.

Maryland.— Calvert *v.* Williams, 34 Md. 672.

Missouri.— Semple, etc., Mfg. Co. *v.* Thomas, 10 Mo. App. 457.

Nebraska.— Chapman *v.* Allen, 33 Nebr. 129, 49 N. W. 926; Glore *v.* Hare, 4 Nebr. 131. And see McKinley *v.* Chapman, 37 Nebr. 378, 55 N. W. 882; Brunck *v.* Wood, 33 Nebr. 639, 50 N. W. 960.

New York.— Young *v.* Whitcomb, 46 Barb. 615; Gallt *v.* Finch, 24 How. Pr. 193; *Ex p.* Dean, 2 Cow. 605, 612 note, 14 Am. Dec. 521.

Oklahoma.— Southern Pine Lumber Co. *v.* Ward, 16 Okla. 131, 85 Pac. 459 [*affirmed* in 208 U. S. 126, 28 S. Ct. 239, 52 L. ed. 420].

Pennsylvania.— Ege's Appeal, 2 Watts 283; Browne *v.* Browne, 3 Serg. & R. 496; Thomas *v.* Premium Loan Assoc., 3 Phila. 425. *Contra,* Agnew *v.* Philadelphia, 2 Phila. 370.

Tennessee.— Carson *v.* Love, 8 Yerg. 215.

Texas.— Lubbock *v.* Cook, 49 Tex. 96; Easton *v.* Wash, (App. 1890) 16 S. W. 788; Bach *v.* Ginacchio, 1 Tex. App. Civ. Cas. § 1315. See also Ramirez *v.* McClane, 50 Tex. 598.

Vermont.— French *v.* Wilkins, 17 Vt. 341.

Wisconsin.— Bennett *v.* Keehn, 67 Wis. 154, 29 N. W. 207, 30 N. W. 112.

United States.— Smith *v.* Gale, 137 U. S. 577, 11 S. Ct. 185, 34 L. ed. 792.

See 45 Cent. Dig. tit. "Time," §§ 27, 28. And see APPEAL AND ERROR, 2 Cyc. 794.

Contra.— Frankfort *v.* Farmers' Bank, 105 Ky. 811, 49 S. W. 811, 20 Ky. L. Rep. 1635; Chiles *v.* Smith, 13 B. Mon. (Ky.) 460 [*overruling* Smith *v.* Cassity, 9 B. Mon. 192, 48 Am. Dec. 420]; Greer *v.* Spencer, 3 Ky. L. Rep. 469.

On appeal from the report of commissioners on claims against an estate, the day when the report is returned to the probate court is to be excluded. Robinson *v.* Robinson, 32 Vt. 738.

Where the appeal is from an award of arbitrators, the day of the entry of the award is to be excluded. Sims *v.* Hampton, 1 Serg. & R. (Pa.) 411; Smaltz *v.* Lake, 2 Phila. (Pa.) 245. *Compare* Frantz *v.* Kaser, 3 Serg. & R. (Pa.) 395.

Return-day of writ of error.— In reckoning the time within which, under a court rule, a writ of error must not be made returnable, the date of issue must be excluded and the return-day included. Doyle *v.* Mizner, 41 Mich. 549, 50 N. W. 392.

On appeal from a settlement by auditors with township officers the time is to be computed by excluding the day of settlement. McCready *v.* McGovern, 1 Kulp (Pa.) 474.

Certiorari.— Under the Georgia statute requiring that writs of certiorari shall be brought within a certain time after rendition of judgment, it is held that the day on which the judgment was rendered should be counted. Barrett *v.* Devine, 60 Ga. 632 [*followed* in Western, etc., R. Co. *v.* Carson, 70 Ga. 388]; Jones *v.* Smith, 28 Ga. 41.

28. Hax *v.* Leis, 1 Colo. 171; State *v.* Ellis, 40 La. Ann. 793, 5 So. 63; Turrentine *v.* Richmond, etc., R. Co., 92 N. C. 642 (day on which term expired); Bushong *v.* Graham, 4 Ohio Cir. Ct. 138, 2 Ohio Cir. Dec. 464. And see Traders' Safe, etc., Co. *v.* Calow, 77 Ill. App. 146; Truax *v.* Clute, 7 N. Y. Leg. Obs. 163. *Contra,* Geoghegan *v.* Beeler, 7 Ky. L. Rep. 514.

29. *Alabama.*— Field *v.* Gamble, 47 Ala. 443; Walker *v.* Walker, 42 Ala. 489.

Indiana.— Faure *v.* U. S. Express Co., 23 Ind. 48.

Iowa.— Ritchey *v.* Fisher, 85 Iowa 560, 52 N. W. 505; Carleton *v.* Byington, 16 Iowa 588.

Nebraska.— Chapman *v.* Allen, 33 Nebr. 129, 49 N. W. 926.

Ohio.— Bushong *v.* Graham, 4 Ohio Cir. Ct. 138, 2 Ohio Cir. Dec. 464.

Oklahoma.— Southern Pine Lumber Co. *v.* Ward, 16 Okla. 131, 85 Pac. 459 [*affirmed* in 208 U. S. 126, 28 S. Ct. 239, 52 L. ed. 420].

See 45 Cent. Dig. tit. "Time," § 27.

Contra.— Chiles *v.* Smith, 13 B. Mon. (Ky.) 460; Garland *v.* Holmes, 12 Rob. (La.) 421; State *v.* Ellis, 40 La. Ann. 793, 5 So. 63; Tupery *v.* Edmondson, 29 La. Ann. 850; State *v.* Judge Super. Dist. Ct., 29 La. Ann. 223.

30. Coleman *v.* Keenan, 76 Ill. App. 315. *Contra,* Chicago, etc., R. Co. *v.* Evans, 39 Ill. App. 261.

Filing of record.— Under a statute providing that where ten, but not twenty days intervene between the last day of the term of the court from which an appeal is taken and the first day of the term of the appellate court, the record shall be filed on or before the tenth day of the term, a record filed on the fifteenth day of the month is not in time if the term begins on the fifth day of the month. Metropolitan Acc. Assoc. *v.* Froiland, 59 Ill. App. 513.

31. Anonymous, 2 N. C. 462.

must be included,[32] and some applying the rule that the first day of the period is to be excluded and the last included.[33] The rule which excludes the first day of the period is also applicable in reckoning the time allowed for the filing of a petition for rehearing.[34]

(B) *Bill of Exceptions.* In ascertaining the time when a period of days given to file or have signed a bill of exceptions expires, the usual rule of excluding the first day and including the last applies;[35] and time given until a designated day generally includes that day,[36] although there is authority to the contrary.[37]

h. Time For Redemption. It is well settled that, in determining within what time a person may redeem, the time allowed by statute for the redemption of lands from a tax, execution, or other judicial sale is exclusive of the day of sale,[38]

32. Albuquerque *v.* Zeiger, 5 N. M. 518, 25 Pac. 787.

The day of taking the appeal must be included. Wheeler *v.* Bent, 4 Pick. (Mass.) 167.

33. Sebree *v.* Smith, 2 Ida. (Hasb.) 357, 16 Pac. 477; St. Louis *v.* Bambrick, 41 Mo. App. 648; Deere *v.* Hucht, 32 Mo. App. 153; Bailey *v.* Lubke, 8 Mo. App. 57. *Compare* Taylor *v.* McKnight, 1 Mo. 120.

34. Barcroft *v.* Roberts, 92 N. C. 249. See also Hutts *v.* Bowers, 77 Ind. 211; Fairbank *v.* Lorig, 4 Ind. App. 451, 29 N. E. 452, 30 N. E. 930.

35. *Alabama.*— Loosse *v.* Vogel, 80 Ala. 308. And see Danforth *v.* Tennessee, etc., R. Co., 99 Ala. 331, 13 So. 51.

Indiana.— Keeler *v.* Heims, 126 Ind. 382, 26 N. E. 61; Hall's Safe, etc., Co. *v.* Rigby, 79 Ind. 150; Rodenwald *v.* Edwards, 77 Ind. 221; Lewis *v.* Wintrode, 76 Ind. 13; Miller *v.* Muir, 63 Ind. 496; Huff *v.* Krause, 63 Ind. 396; Schoonover *v.* Irwin, 58 Ind. 287; Baker *v.* Arctic Ditchers, 54 Ind. 310; State *v.* Thorn, 28 Ind. 306; Lewis Tp. Imp. Co. *v.* Royer, 38 Ind. App. 151, 76 N. E. 1068; Kelly *v.* John, 13 Ind. App. 579, 41 N. E. 1069. And see Overturf *v.* Martin, 170 Ind. 308, 84 N. E. 531.

Iowa.— McCoid *v.* Rafferty, 84 Iowa 532, 51 N. W. 24; Sheldon Bank *v.* Royce, 84 Iowa 288, 50 N. W. 986; Manning *v.* Irish, 47 Iowa 650.

Kentucky.— Cavanaugh *v.* Corchran, 11 Ky. L. Rep. 855, holding that this rule applies with regard to an order of court extending the time for filing a bill of exceptions. But see Louisville R. Co. *v.* Wellington, 137 Ky. 719, 126 S. W. 370, 128 S. W. 1077, holding in accordance with the rule recognized in some jurisdictions (see *supra*, VI, B, 1) that if the computation is made not from a certain date but from an act done, the day on which it is done is to be included and that under a statute requiring a bill of exceptions to be filed within a certain number of days after the judgment becomes final, the day on which a motion for a new trial is overruled, that being the act done, should be counted.

Missouri.— Graham *v.* Deguire, 154 Mo. 88, 55 S. W. 151; Linahan *v.* Barley, 124 Mo. 560, 28 S. W. 84. And see Fulkerson *v.* Murdock, 123 Mo. 292, 27 S. W. 555.

See 45 Cent. Dig. tit. "Time," § 26. And see APPEAL AND ERROR, 3 Cyc. 40.

Service of bill of exceptions.— In computing the ten days in Georgia, within which a bill of exceptions should be served on defendant in error, Ga. Pol. Code (1895), § 4, par. 8, is applicable, and only the first or last day should be counted. Bennett *v.* Ralf, 4 Ga. App. 484, 61 S. E. 887.

36. Thorn *v.* Delany, 6 Ark. 219; Conway *v.* Smith Mercantile Co., 6 Wyo. 327, 44 Pac. 940, 49 L. R. A. 201.

37. Hartman *v.* Ringgenberg, 119 Ind. 72, 21 N. E. 464; Corbin *v.* Ketcham, 87 Ind. 138; Eshelman *v.* Snyder, 82 Ind. 498; Erb *v.* Moak, 78 Ind. 569.

Until next term.— Where time was given "till next term" to file a bill of exceptions, a bill filed on the sixth day of the next term was too late, as "till next term" did not include any part of the next term. De Haven *v.* De Haven, 46 Ind. 296.

38. *Illinois.*— Roan *v.* Rohrer, 72 Ill. 582.

Indiana.— Backer *v.* Pyne, 130 Ind. 288, 30 N. E. 21, 30 Am. St. Rep. 231.

Iowa.— Teucher *v.* Hiatt, 23 Iowa 527, 92 Am. Dec. 440.

Kansas.— Richards *v.* Thompson, 43 Kan. 209, 23 Pac. 106; Cable *v.* Coates, 36 Kan. 191, 12 Pac. 931; English *v.* Williamson, 34 Kan. 212, 8 Pac. 214.

Michigan.— Gorham *v.* Wing, 10 Mich. 486.

Pennsylvania.— Cromelien *v.* Brink, 29 Pa. St. 522.

Tennessee.— Rothwell *v.* Gettys, 11 Humphr. 135; Jones *v.* Planters' Bank, 5 Humphr. 619, 42 Am. Dec. 471.

Canada.—Proudfoot *v.* Bush, 12 U. C. C. P. 52.

See 45 Cent. Dig. tit. "Time," § 29.

Where two periods are added together to make up the time allowed, as where a debtor is given one year to redeem and a creditor three months after the expiration of the year, the day immediately following the expiration of the year is the commencement of the three months' period and is to be included in its computation, as there are no fractions of a day to be considered. Morss *v.* Purvis, 68 N. Y. 225 [*affirming* 2 Hun 542, 5 Thomps. & C. 140]; People *v.* Broome Sheriff, 19 Wend. (N. Y.) 87.

Where animals running at large are impounded under a city ordinance giving the owner the right to redeem within five days, the right of redemption is exclusive of the day of impounding. White *v.* Haworth, 21 Mo. App. 439.

and inclusive of the whole of the last day.[39] Likewise, where a mortgagee does not institute judicial proceedings to foreclose the right of redemption, but takes possession of the premises, the statutory time allowed the mortgagor to redeem is exclusive of the day of entry.[40]

C. Sundays and Holidays — 1. Last Day Falling on Sunday or Holiday — a. Sunday. As Sunday is *dies non* in regard to judicial proceedings,[41] and as the performance of common labor as well as the transaction of ordinary business on that day is generally prohibited by statute,[42] it is a general rule, made so by statute in many jurisdictions, that when the last day of a period of time within which an act is to be done falls on Sunday, that day is excluded from the computation, and the act may be rightfully done on the following day,[43] an exception to the rule existing where the act in question may be lawfully done on Sunday.[44] Although, in a few jurisdictions, the rule is confined in its application to matters of court practice and is held not to apply to the computation of statutory time, except where so provided by the statute itself,[45] it is generally given a much wider operation and is applied, among other things, to the time for performing or

39. Roan *v.* Rohrer, 72 Ill. 582; Teucher *v.* Hiatt, 23 Iowa 527, 92 Am. Dec. 440; Snyder *v.* Warren, 2 Cow. (N. Y.) 518, 14 Am. Dec. 519; Proudfoot *v.* Bush, 12 U. C. C. P. 52.

40. Wing *v.* Davis, 7 Me. 31; Fuller *v.* Russell, 6 Gray (Mass.) 128; Ricker *v.* Blanchard, 45 N. H. 39.

41. See Sunday, 37 Cyc. 583.

42. See Sunday, 37 Cyc. 544.

43. *Arizona.*— Pemberton *v.* Duryea, 5 Ariz. 8, 43 Pac. 220.

Connecticut.— Sands *v.* Lyon, 18 Conn. 18; Picket *v.* Allen, 10 Conn. 146.

Georgia.— Morgan *v.* Perkins, 94 Ga. 353, 21 S. E. 574.

Indiana.— Close *v.* Twibell, (App. 1910) 92 N. E. 377; Kinney *v.* Heuring, 42 Ind. App. 263, 85 N. E. 369.

Iowa.— Conklin *v.* Marshalltown, 66 Iowa 122, 23 N. W. 294, holding, however, that the rule applies only when some act is to be done on the last day.

Maine.— Cressey *v.* Parks, 75 Me. 387, 46 Am. Rep. 406.

Minnesota.— Spencer *v.* Haug, 45 Minn. 231, 47 N. W. 794 [*followed* in Johnson *v.* Merritt, 50 Minn. 303, 52 N. W. 863].

Missouri.— Keys *v.* Keys, 217 Mo. 48, 116 S. W. 537; Webb *v.* Strobach, 143 Mo. App. 459, 127 S. W. 680.

Montana.— Schnepel *v.* Mellen, 3 Mont. 118.

New York.— Broome *v.* Wellington, 1 Sandf. 664; Cock *v.* Bunn, 6 Johns. 326. And see Speidell *v.* Fash, 1 Cow. 234.

Oregon.— Nicklin *v.* Robertson, 28 Oreg. 278, 42 Pac. 993, 52 Am. St. Rep. 790; Carothers *v.* Wheeler, 1 Oreg. 194.

Pennsylvania.— Edmundson *v.* Wragg, 104 Pa. St. 500, 49 Am. Rep. 590; McKinney *v.* Reader, 6 Watts 34; *In re* Goswiler, 3 Penr. & W. 200; Shirk *v.* Railroad Co., 9 Lanc. Bar 198.

Rhode Island.— Barnes *v.* Eddy, 12 R. I. 25.

United States.— Monroe Cattle Co. *v.* Becker, 147 U. S. 47, 13 S. Ct. 217, 37 L. ed. 72; Street *v.* U. S., 133 U. S. 299, 10 S. Ct. 309, 33 L. ed. 631 [*affirming* 24 Ct. Cl. 230]; Pressed Steel Car Co. *v.* Eastern R. Co., 121 Fed. 609, 57 C. C. A. 635.

England.— Morris *v.* Barrett, 7 C. B. N. S. 139, 6 Jur. N. S. 609, 29 L. J. C. P. 102, 1 L. T. Rep. N. S. 38, 8 Wkly. Rep. 45, 97 E. C. L. 139; Lewis *v.* Calor, 1 F. & F. 306.

Canada.— *Re* Simmons, 12 Ont. 505. But see Cline *v.* Cawley, 4 Ont. Pr. 87.

See 45 Cent. Dig. tit. "Time," § 34.

Where the act is to be done by the court, and the last day for performance falls on Sunday, it may be done upon the earliest succeeding day on which the court can perform the duty imposed upon it. Von de Place *v.* Weller, 64 N. J. L. 155, 44 Atl. 874.

Bankruptcy proceedings.— If the last day of the four months next preceding the commencement of proceedings in bankruptcy, an attachment within which is dissolved by the act of 1867, falls on Sunday, it is to be excluded in computing the time. Cooley *v.* Cook, 125 Mass. 406.

44. Barber Asphalt Paving Co. *v.* Muchenberger, 105 Mo. App. 47, 78 S. W. 280 (holding that the last publication of a proposed ordinance may be made on Sunday, as such publication is not within a statute prohibiting the service of process on Sunday); Amis *v.* Kyle, 2 Yerg. (Tenn.) 31, 24 Am. Dec. 463; Hanover F. Ins. Co. *v.* Shrader, 89 Tex. 35, 32 S. W. 872, 33 S. W. 112, 59 Am. St. Rep. 25, 30 L. R. A. 498; Child *v.* Edwards, [1909] 2 K. B. 753, 78 L. J. K. B. 1061, 101 L. T. Rep. N. S. 422, 25 T. L. R. 706. And see Bowles *v.* Brauer, 89 Va. 466, 16 S. E. 356.

What acts on Sunday are lawful see, generally, Sunday, 37 Cyc. 544.

45. *Massachusetts.*— Haley *v.* Young, 134 Mass. 364.

Texas.— Burr *v.* Lewis, 6 Tex. 76.

United States.— Shefer *v.* Magone, 47 Fed. 872.

England.— Peacock *v.* Reg., 4 C. B. N. S. 264, 27 L. J. C. P. 224, 6 Wkly. Rep. 517, 93 E. C. L. 264 [*followed* in Wynne *v.* Ronaldson, 12 L. T. Rep. N. S. 711, 13 Wkly. Rep. 899]; Rowberry *v.* Morgan, 2 C. L. R. 1026, 9 Exch. 730, 18 Jur. 452, 23 L. J. Exch. 191, 2 Wkly. Rep. 431.

tendering performance of a contract,[46] and the time within which a bill should be returned to the legislature by the governor.[47] And although the decisions are not entirely uniform the rule has also been held to apply to pleading,[48] serving process,[49] putting in special bail,[50] the service, publication, and operation of notice,[51] returning an execution,[52] suing out a writ of scire facias to revive a judgment,[53] preparing and serving a statement on motion for a new trial,[54] the filing of a bill of exceptions,[55] transcript,[56] brief,[57] appeal-bond, or undertaking,[58] and

Canada.— McLean *v.* Pinkerton, 7 Ont. App. 490.

See 45 Cent. Dig. tit. "Time," § 34.

In New York the early decisions to this effect (Bissell *v.* Bissell, 11 Barb. 96; Broome *v.* Wellington, 1 Sandf. 664; *Ex p.* Dodge, 7 Cow. 147) have been superseded by the statutory construction law (Laws (1892), c. 677, § 27) which provides that Sunday must be excluded from the reckoning if it is the last day of the period, but this provision is not applicable to a period of months or years (Ryer *v.* Prudential Ins. Co., 185 N. Y. 6, 77 N. E. 727 [*reversing* 95 N. Y. Suppl. 1158]; Benoit *v.* New York Cent., etc., R. Co., 94 N. Y. App. Div. 24, 87 N. Y. Suppl. 951).

46. *Massachusetts.*—Stebbins *v.* Leowolf, 3 Cush. 137, following the decisions of New York, in which state the contract in question was executed.

Nebraska.— Post *v.* Garrow, 18 Nebr. 682, 26 N. W. 580.

New Jersey.— Stryker *v.* Vanderbilt, 27 N. J. L. 68; Warne *v.* Wagenor, (Ch. 1888) 15 Atl. 307.

New York.— Craig *v.* Butler, 83 Hun 286, 31 N. Y. Suppl. 963 [*affirmed* in 156 N. Y. 672, 50 N. E. 962]; Anonymous, 2 Hill 375; Salter *v.* Burt, 20 Wend. 205, 32 Am. Dec. 530.

Ohio.— Barrett *v.* Allen, 10 Ohio 426, applying the rule to a note payable in property.

Pennsylvania.— Hughes *v.* Snyder, 2 Wkly. Notes Cas. 65.

United States.— The Harbinger, 50 Fed. 941 [*affirmed* in 53 Fed. 394, 3 C. C. A. 573]. And see Disney *v.* Furness, 79 Fed. 810.

See 45 Cent. Dig. tit. "Time," § 50.

Compare Mingus *v.* Pritchet, 14 N. C. 78; Whittier *v.* McLennan, 13 U. C. Q. B. 638. *Contra,* Kilgour *v.* Miles, 6 Gill & J. (Md.) 268, holding that performance must be had on Saturday.

The payment of insurance premiums or assessments on Monday, when the last day falls on Sunday, is in time. Northey *v.* Bankers' Life Assoc., 110 Cal. 547, 42 Pac. 1079; Hammond *v.* American Mut. L. Ins. Co., 10 Gray (Mass.) 306. However, the rule is restricted to the allowance of payment to be made on Monday and does not permit of the exclusion of Sunday in computing thirty days of grace from the day of payment. Ætna L. Ins. Co. *v.* Wimberly, 102 Tex. 46, 112 S. W. 1038, 132 Am. St. Rep. 852, 23 L. R. A. N. S. 759 [*reversing* (Civ. App. 1908) 108 S. W. 778].

47. *In re* Computation of Time, 9 Colo. 632, 21 Pac. 475.

48. Pemberton *v.* Duryea, 5 Ariz. 8, 43 Pac. 220; Crane *v.* Crane, 121 Cal. 99, 53 Pac. 433; Borst *v.* Griffin, 5 Wend. (N. Y.) 84; Marks *v.* Russell, 40 Pa. St. 372. *Contra,* Bangor *v.* Somerville, 1 N. J. L. J. 252.

49. Baxley *v.* Bennett, 33 Ga. 146; Turner *v.* Thompson, 23 Ga. 49; State *v.* Stuckey, 78 Mo. App. 533; Gribbon *v.* Freel, 93 N. Y. 93.

The rule is restricted to cases where the act is to be done on Sunday, and does not apply to the computation of a period which must elapse between service and the first day of a term, when the latter falls on Sunday. Robinson *v.* Foster, 12 Iowa 186.

50. Clink *v.* Muskegon Cir. Judge, 58 Mich. 242, 25 N. W. 175; Broome *v.* Wellington, 1 Sandf. (N. Y.) 664.

51. *California.*— Alameda Macadamizing Co. *v.* Huff, 57 Cal. 331.

Iowa.— Holbrook *v.* Mill Owners' Mut. Ins. Co., 86 Iowa 255, 53 N. W. 229.

Louisiana.— Murrell *v.* Lion, 30 La. Ann. 255.

Missouri.— Webb *v.* Strobach, 143 Mo. App. 459, 127 S. W. 680.

Montana.— Schnepel *v.* Mellen, 3 Mont. 118.

See 45 Cent. Dig. tit. "Time," § 43.

Contra.— Shefer *v.* Magone, 47 Fed. 872 [*followed* in Hermann *v.* U. S., 66 Fed. 721].

The New York code provision which excludes Sunday when it is the last day does not apply to notice of trial by jury. Central Bank *v.* Allen, 41 How. Pr. 102.

52. Williams *v.* State, 5 Ind. 235. And see Peck *v.* Cavell, 16 Mich. 9.

53. Lutz's Appeal, 124 Pa. St. 273, 16 Atl. 858.

In Massachusetts, where the statutory time from the rendition of the judgment, during which property attached on mesne process is held subject to execution, expires on Sunday, the lien created by the attachment does not continue through the next day. Alderman *v.* Phelps, 15 Mass. 225.

54. Muir *v.* Galloway, 61 Cal. 498.

55. See APPEAL AND ERROR, 3 Cyc. 41 note 90.

56. See APPEAL AND ERROR, 3 Cyc. 119.

57. Close *v.* Twibell, (Ind. App. 1910) 92 N. E. 377.

58. Robinson *v.* Templar Lodge No. 17 I. O. O. F., 114 Cal. 41, 45 Pac. 998; Jenness *v.* Bowen, 77 Cal. 310, 19 Pac. 522; Brainard *v.* Norton, 14 Ill. App. 643; Monell *v.* Terwilliger, 8 Nebr. 360, 1 N. W. 246. And see JUSTICES OF THE PEACE, 24 Cyc. 677. *Contra, Ex p.* Simpkin, 2 E. & E. 392, 6 Jur. N. S. 141, 29 L. J. M. C. 23, 105 E. C. L. 392.

the taking of other steps necessary to perfect an appeal,[59] redeeming lands from a tax or other judicial sale,[60] as well as to the time within which a justice of the peace must render judgment after submission of the case.[61] The rule has, however, been held not to apply in computing the time limited by statute for the commencement of an action,[62] the time for refiling a chattel mortgage,[63] or filing and enforcing a mechanic's lien,[64] or filing a motion to set aside a default;[65] and where the day fixed for the payment of commercial paper falls on Sunday, the weight of authority is in favor of the view that the preceding day is the day of maturity, at least where the paper is entitled to grace.[66]

b. Holiday.[67] Both at common law and by statute, when the last day of a period in which an act is to be done falls on a legal holiday, that day is excluded and the act may be done on the next succeeding day,[68] and where the next day

59. *Indiana.*— Kinney *v.* Heuring, 42 Ind. App. 263, 85 N. E. 369.

Louisiana.— State *v.* Judge St. Charles Parish Fourth Judicial Dist. Ct., 24 La. Ann. 333; Allen *v.* Their Creditors, 8 La. 221.

New York.— Dorsey *v.* Pike, 46 Hun 112, 13 N. Y. Civ. Proc. 147.

Pennsylvania.— McCready *v.* McGovern, 1 Kulp 474 (appeal from settlement by auditors with township officers); Arms *v.* Leaman, 4 Pa. L. J. Rep. 84 (appeal from award of arbitrators).

Washington.— Spokane Falls *v.* Browne, 3 Wash. 84, 27 Pac. 1077.

Wisconsin.— Buckstaff *v.* Hanville, 14 Wis. 77.

England.— Milch *v.* Frankau, [1909] 2 K. B. 100, 78 L. J. K. B. 560, 100 L. T. Rep. N. S. 1002, 53 Sol. J. 577, 25 T. L. R. 498; Taylor *v.* Jones, 45 L. J. C. P. 110, 34 L. T. Rep. N. S. 131.

Canada.— Hood *v.* Dodds, 19 Grant Ch. (U. C.) 639.

See 45 Cent. Dig. tit. "Time," § 48. And see APPEAL AND ERROR, 2 Cyc. 795 note 53.

Contra.— Dale *v.* Lavigne, 31 Mich. 149; Drake *v.* Andrews, 2 Mich. 203; Johnson *v.* Meyers, 54 Fed. 417, 4 C. C. A. 399.

In Ohio, Rev. St. (1880) § 4951, providing that, if the last day fall on Sunday, it shall be excluded, applies to the filing of a transcript for appeal from a magistrate's court (Redus *v.* Green, 6 Ohio Dec. (Reprint) 1034, 9 Am. L. Rec. 634), but, under former statutes, the rule was otherwise (McLees *v.* Morrison, 29 Ohio St. 155; Taylor *v.* Wallace, 7 Ohio Dec. (Reprint) 328, 2 Cinc. L. Bul. 115).

The time for filing a petition to rehear comes within the same rule. Barcroft *v.* Roberts, 92 N. C. 249.

60. Backer *v.* Pyne, 130 Ind. 288, 30 N. E. 21, 30 Am. St. Rep. 231; English *v.* Williamson, 34 Kan. 212, 8 Pac. 214; Bovey De Laittre Lumber Co. *v.* Tucker, 48 Minn. 223, 50 N. W. 1038; Porter *v.* Pierce, 120 N. Y. 217, 24 N. E. 281, 7 L. R. A. 847 [*affirming* 43 Hun 11]. *Contra,* People *v.* Luther, 1 Wend. (N. Y.) 42.

61. Hodgson *v.* Bartholow Banking-House, 9 Mo. App. 24; Huber *v.* Ehlers, 76 N. Y. App. Div. 602, 79 N. Y. Suppl. 150. *Contra,* Harrison *v.* Sager, 27 Mich. 476; Ready Roofing Co. *v.* Chamberlin, 1 Abb. N. Cas. (N. Y.) 192, 1 N. Y. City Ct. 222.

Judgment by confession.— Under a lease providing that on default for five days a judgment by confession in ejectment may be entered up, the tenant has five full days after the rent is due in which to pay, and where the last day of the five days is Sunday, judgment cannot be entered up until Tuesday. Gregg *v.* Krebs, 5 Pa. Dist. 779, 19 Pa. Co. Ct. 73.

62. *Alabama.*— Allen *v.* Elliott, 67 Ala. 432.

Kentucky.— Lowry *v.* Stotts, 138 Ky. 251, 127 S. W. 789; Geneva Cooperage Co. *v.* Brown, 124 Ky. 16, 98 S. W. 279, 30 Ky. L. Rep. 272, 124 Am. St. Rep. 388.

New York.— Vose *v.* Kuhn, 45 Misc. 455, 92 N. Y. Suppl. 34. And see Ryer *v.* Prudential Ins. Co., 185 N. Y. 6, 77 N. E. 727 [*reversing* 110 N. Y. App. Div. 897, 95 N. Y. Suppl. 1158], where the same result was reached in construing a provision in a life insurance policy that no action could be maintained thereon after six months from the death of the insured.

Wisconsin.— Williams *v.* Lane, 87 Wis. 152, 58 N. W. 77.

England.— Morris *v.* Richards, 46 J. P. 37, 45 L. T. Rep. N. S. 210.

See 45 Cent. Dig. tit. "Time," § 41.

63. Nitchie *v.* Townsend, 2 Sandf. (N. Y.) 299; Paine *v.* Mason, 7 Ohio St. 198.

64. Patrick *v.* Faulke, 45 Mo. 312; Miner *v.* Tilley, 54 Mo. App. 627; Bowes *v.* New York Christian Home, 64 How. Pr. (N. Y.) 509. And see MECHANICS' LIENS, 27 Cyc. 339 note 49.

65. State *v.* Sheehan, 55 Mo. App. 66.

66. See COMMERCIAL PAPER, 7 Cyc. 863, 874, 1056.

67. **Holidays** generally see HOLIDAYS, 21 Cyc. 440.

68. *California.*— *In re* Rose, 63 Cal. 346; Troy Laundry Mach. Co. *v.* Drivers' Independent Laundry Co., (App. 1910) 109 Pac. 36; Rauer's Law, etc., Co. *v.* Standley, 3 Cal. App. 44, 84 Pac. 214.

Illinois.— Balkwill *v.* Bridgeport Wood Finishing Co., 62 Ill. App. 663.

Louisiana.— Catherwood *v.* Shepard, 30 La. Ann. 677; Garland *v.* Holmes, 12 Rob. 421.

Nebraska.— Ostertag *v.* Galbraith, 23 Nebr. 730, 37 N. W. 637.

New Jersey.— Feuchtwanger *v.* McCool, 29 N. J. Eq. 151.

United States.— *In re* Lang, 14 Fed. Cas. No. 8,056, 2 Nat. Bankr. Reg. 480.

is a Sunday, performance may be had on the next secular day.[69] The rule does not apply to the maturity and protest of commercial paper entitled to days of grace.[70]

2. Intervening Sundays and Holidays.[71] It is a general, although perhaps not universal, rule that, in the absence of statutory expression of a contrary intent, intervening Sundays, that is, Sundays which fall on neither the first nor last days, are to be included in computing a period of time,[72] and a similar rule is

England.— Hughes *v.* Griffiths, 13 C. B. N. S. 324, 32 L. J. C. P. 47, 106 E. C. L. 324.

See 45 Cent. Dig. tit. "Time," § 34 *et seq*

But see Cooney *v.* Burt, 123 Mass. 579 (holding that where a specific day is set as the last day, the fact that it is a holiday does not permit the doing of the act after that day); Siegbert *v.* Stiles, 39 Wis. 533.

The fact that the last day is not a judicial day is immaterial, so long as it is a legal day. Bienvenu *v.* Factors', etc., Ins. Co., 28 La. Ann 901.

Saturday half holiday.— In New York the decisions are conflicting as to whether the statutory rule excluding the last day when it falls on a holiday applies to the Saturday half holiday (Reynolds *v.* Palen, 13 N. Y. Civ. Proc. 200, 20 Abb. N. Cas. 11; Fries *v.* Coar, 19 Abb. N. Cas. (N. Y.) 267), but this difficulty of construction has been removed by the statutory construction law which expressly excludes half holidays from the operation of the rule (N. Y. Laws (1892), c. 677, § 27).

69. Crane *v.* Crane, 121 Cal. 99, 53 Pac. 433; Gueringer *v.* His Creditors, 33 La. Ann. 1279.

70. See Commercial Paper, 7 Cyc. 874, 1056.

71. Inclusion of Sundays and holidays in computation of lay days see Shipping, 36 Cyc. 366.

72. *District of Columbia.*— U. S. *v.* Neverson, 1 Mackey 152.

Georgia.—Wilkinson *v.* Castellow, 14 Ga. 122.

Illinois.— Gordon *v.* People, 154 Ill. 664, 39 N. E. 560.

Indiana.—Womack *v.* McAhren, 9 Ind. 6.

Kansas.— Matthews *v.* Arthur, 61 Kan. 455, 59 Pac. 1067.

Maine.— Cressey *v.* Parks, 75 Me. 387, 46 Am. Rep. 406; State *v.* Wheeler, 64 Me. 532. *Compare* Tuttle *v.* Gates, 24 Me. 395.

Massachusetts.— Robbins *v.* Holman, 11 Cush. 26; Thayer *v.* Felt, 4 Pick. 354.

Michigan.—Corey *v.* Hiliker, 15 Mich. 314; Anderson *v.* Baughman, 6 Mich. 298.

Missouri.— State *v.* Green, 66 Mo. 631; Patchin *v.* Bonsack, 52 Mo. 431.

New York.— King *v.* Dowdall, 2 Sandf. 131; Broome *v.* Wellington, 1 Sandf. 664; Brown *v.* Smith, 9 Johns. 84.

North Carolina.— Drake *v.* Fletcher, 50 N. C. 410.

Pennsylvania.— *In re* Goswiler, 3 Penr. & W. 200.

South Carolina.— Craig *v.* U. S. Health, etc., Ins. Co., 80 S. C. 151, 61 S. E. 423.

Texas.—Wood *v.* Galveston, 76 Tex. 126, 13 S. W. 227; Payton *v.* State, 35 Tex. Cr. 508, 34 S. W. 615.

Virginia.— Swift *v.* Wood, 103 Va. 494, 49 S. E. 643; Bowles *v.* Brauer, 89 Va. 466, 16 S. E. 356; Boyd *v.* Com., 1 Rob. 691.

Washington.— Martin *v.* Sunset Tel., etc., Co., 18 Wash. 260, 51 Pac. 376.

United States.— The E. W. Gorgas, 8 Fed. Cas. No. 4,585, 10 Ben. 460; York's Case, 30 Fed. Cas. No. 18,139, 1 Abb. 503.

England.— *Ex p.* Bumps, 5 Dowl. P. C. 713, W. W. & D. 350; *Ex p.* Simpkin, 2 E. & E. 392, 6 Jur. N. S. 141, 29 L. J. M. C. 23, 105 E. C. L. 392; McIntosh *v.* Great Western R. Co., 1 Hare 328, 6 Jur. 454, 11 L. J. Ch. 283, 23 Eng. Ch. 328, 66 Eng. Reprint 1059; Pennewell *v.* Uxbridge, 8 Jur. N. S. 99, 31 L. J. M. C. 92, 5 L. T. Rep. N. S. 685, 10 Wkly. Rep. 319; Asmole *v.* Goodwin, 2 Salk. 624, 91 Eng. Reprint 528.

See 45 Cent. Dig. tit. "Time," § 34 *et seq.*

Rule when period is measured in hours see *infra*, VII.

Contracts and forfeitures.— In the computation of damages for breach of contract, where a day, a week, or a month, or any other definite period, is the agreed standard of measurement, every intervening Sunday must be included and counted (Pressed Steel Car Co. *v.* Eastern R. Co., 121 Fed. 609, 57 C. C. A. 635); and such is also the rule applied in ascertaining the amount of a penalty or forfeiture (Pilot Com'rs *v.* Erie R. Co., 5 Rob. (N. Y.) 366; Keeter *v.* Wilmington, etc., R. Co., 86 N. C. 346; Branch *v.* Wilmington, etc., R. Co., 77 N. C. 347), and of demurrage (Brown *v.* Johnson, C. & M. 440, 11 L. J. Exch. 373, 10 M. & W. 333, 41 E. C. L. 242; Gibbon *v.* Micael's Bay Lumber Co., 7 Ont. 746. And see Shipping, 36 Cyc. 369); but where pay is to be computed by the day, Sundays are not included, unless it has been specially agreed upon (Patterson *v.* Patterson, 2 Pearson (Pa.) 170).

Publication of notice.— This rule is not affected, in its application to requirements that notice be published a certain number of days, by the fact that there are no Sunday publications, for the exception of Sundays in such cases relates simply to the publication and not to the total period of time covered by the publication (Taylor *v.* Palmer, 31 Cal. 240 [*followed* in Miles *v.* McDermitt, 31 Cal. 270]; Ormsby *v.* Louisville, 2 Ky. L. Rep. 66; Curtice *v.* Schmidt, 202 Mo. 703, 101 S. W. 61; St. Joseph *v.* Landis, 54 Mo. App. 315; German Bank *v.* Stumpf, 6 Mo. App. 17); and where the notice is published on week-days for the required number of

applicable where holidays intervene.[73] Sometimes intermediate Sundays and holidays are to be excluded by virtue of express statutory enactment [74] or constitutional provisions, such as those relating to the time a bill must be approved or returned by the governor; [75] and it has been held that the general rule which includes intervening Sundays applies only to periods of time which necessarily include one or more Sundays, and does not apply to a period of less duration than a week; [76] but in many cases wherein the period was shorter than a week this distinction has been either unnoticed or rejected.[77] In computing the number of days of a term of court or in ascertaining a certain day of a term of court, Sundays are to be excluded; [78] and in many instances Sundays as well as other days on which the court did not sit have been excluded from the computation on the ground that the statute prescribing the time contemplated judicial days only,[79]

days, it is unquestionably sufficient (*Ex p.* Fiske, 72 Cal. 125, 13 Pac. 310; Porter *v.* R. J. Boyd Pav., etc., Co., 214 Mo. 1, 112 S. W. 235; Kellogg *v.* Carrico, 47 Mo. 157). In Illinois, however, Sundays are excepted in such cases not only as regards the publication but also in computing the time. Rasmussen *v.* People, 155 Ill. 70, 39 N. E. 606; McChesney *v.* People, 145 Ill. 614, 34 N. E. 431; Chicago *v.* Vulcan Iron Works, 93 Ill. 222; Scammon *v.* Chicago, 40 Ill. 146.

73. Patterson *v.* Gallitzin Bldg., etc., Assoc., 23 Pa. Super. Ct. 54; Chicago, etc., R. Co. *v.* Nield, 16 S. D. 370, 92 N. W. 1069.

A Saturday half holiday is within the rule. Jackson Brewing Co. *v.* Wagner, 117 La. 875, 42 So. 356.

74. *Kentucky.*— Louisville, etc., R. Co. *v.* Turner, 81 Ky. 599, 5 Ky. L. Rep. 647, applying by analogy Civ. Code, § 760, which excludes Sundays from the time allowed by it to the filing of petitions for rehearing, to extension of time for filing such petitions.

Louisiana.— Helmas *v.* Pailet, 126 La. 497, 52 So. 676, Sundays excluded in computing time for taking a suspensive appeal under Code Pr. art. 575.

North Carolina.— Shipman *v.* Mears, 15 N. C. 484.

Wisconsin.— Lowe *v.* Stringham, 14 Wis. 222.

Canada.— Matter of West Riding Election, 31 U. C. Q. B. 409.

The time for obtaining a supersedeas in the United States courts is exclusive of Sundays, by virtue of the express provisions of U. S. Rev. St. (1878) § 1007 [U. S. Comp. St. (1901) p. 714]. Danville *v.* Brown, 128 U. S. 503, 9 S. Ct. 149, 32 L. ed. 507; Brown *v.* Evans, 18 Fed. 56, 8 Sawy. 502; Rutherford *v.* Pennsylvania Mut. L. Ins. Co., 1 Fed. 456, 1 McCrary 120. Sundays are also excluded under another provision of the statute that executions shall not issue within a specified number of days, in any case where a writ of error may be a supersedeas. Danielson *v.* Northwestern Fuel Co., 55 Fed. 49 [*affirmed* in 57 Fed. 916].

Under the English bankruptcy rules, Sundays are excluded in computing the time for appeal from the county court to the chief judge in bankruptcy (*Ex p.* Hall, 16 Ch. D. 501, 50 L. J. Ch. 400, 44 L. T. Rep. N. S. 8, 29 Wkly. Rep. 298; *Ex p.* Hicks, L. R. 20 Eq. 143, 44 L. J. Bankr. 106, 32 L. T. Rep. N. S. 432, 23 Wkly. Rep. 852); but these rules do not apply to appeals from the chief judge to the court of appeal (*Ex p.* Viney, 4 Ch. D. 794, 46 L. J. Bankr. 80, 36 L. T. Rep. N. S. 43, 25 Wkly. Rep. 364).

75. People *v.* Rose, 167 Ill. 147, 47 N. E. 547; People *v.* Hatch, 33 Ill. 9; Stinson *v.* Smith, 8 Minn. 366.

76. Roettger *v.* Riefkin, 130 Ky. 197, 113 S. W. 88; Geneva Cooperage Co. *v.* Brown, 124 Ky. 16, 98 S. W. 279, 30 Ky. L. Rep. 272, 124 Am. St. Rep. 388; State *v.* Michel, 52 La. Ann. 936, 27 So. 565, 49 L. R. A. 218 [*followed* in Fellman *v.* Mercantile Fire, etc., Ins. Co., 116 La. 723, 41 So. 49]; Cowley *v.* McLaughlin, 141 Mass. 181, 4 N. E. 821; Hannum *v.* Tourtellott, 10 Allen (Mass.) 494; Thayer *v.* Felt, 4 Pick. (Mass.) 354; Caupfield *v.* Cook, 92 Mich. 626, 52 N. W. 1031 [*followed* in First Nat. Bank *v.* Williams Milling Co., 110 Mich. 15, 67 N. W. 976]; Drake *v.* Andrews, 2 Mich. 203; Snell *v.* Scott, 2 Mich. N. P. 108.

By rule of court in Canada, Sundays are excluded when the time is less than six days. Lovelace *v.* Harrington, 10 Ont. Pr. 157.

77. See Cressey *v.* Parks, 75 Me. 387, 46 Am. Rep. 406 (four days); Corey *v.* Hiliker, 15 Mich. 314; Taylor *v.* Corbiere, 8 How. Pr. (N. Y.) 385 [*distinguishing* Whipple *v.* Williams, 4 How. Pr. (N. Y.) 28]; Charles *v.* Stansbury, 3 Johns. (N. Y.) 261; Swift *v.* Wood, 103 Va. 494, 49 S. E. 643.

78. Brown *v.* McKee, 1 J. J. Marsh. (Ky.) 471; Read *v.* Com., 22 Gratt. (Va.) 924; Michie *v.* Michie, 17 Gratt. (Va.) 109. *Contra,* Brown *v.* Leet, 136 Ill. 203, 26 N. E. 639.

The number of days in which a court has not transacted business is to be determined by excluding Sundays. Qualter *v.* State, 120 Ind. 92, 22 N. E. 100.

79. *Alabama.*— Robertson *v.* State, 43 Ala. 325.

Kentucky.— O'Brien *v.* Com., 89 Ky. 354, 12 S. W. 471.

Louisiana.— Tupery *v.* Edmondson, 29 La. Ann. 850; State *v.* Boyle, 9 La. Ann. 371 (holding that, unless expressly included by the statute, Sunday must be excluded, when a number of days is allowed an accused); Aubert *v.* Robinson, 6 Rob. 463; Dayton *v.* Natchez Commercial Bank, 6 Rob. 17.

a common illustration of this being found in the exclusion of Sundays in computing the number of days allowed by statute for the filing of a motion for new trial or arrest of judgment.[80] Likewise, intervening Sundays are excluded where working or business days only are manifestly intended to be included in the period of time prescribed by statute,[81] contract,[82] or constitutional provision, such as one limiting the duration of legislative sessions.[83]

D. Twenty-Ninth of February. The English statute [84] which provides that, for certain purposes, the additional day occurring in February during leap-year and the day preceding shall be reckoned as one day, and which has been adopted in some of the United States as part of the common law, applies only to periods measured in years, and where the period is measured in days, the twenty-eighth and twenty-ninth are to be counted as two days.[85]

VII. HOURS.[86]

The general rule that fractions of days are not recognized in law [87] does not apply to acts or proceedings under statutes containing requirements measured in hours.[88] In computing time under such requirements, the hours are to be counted as they move forward in consecutive order,[89] and public holidays,[90] as well as

Missouri.—Wash *v.* Randolph, 9 Mo. 142; Clerks' Sav. Bank *v.* Thomas, 2 Mo. App. 367.

New York.—Anonymous, 2 Hill 375.

See 45 Cent. Dig. tit. "Time," §§ 48, 52.

A rule of court that "where a number of days is limited by these rules, juridical days only shall be understood, and the computation shall be by including one and excluding one," does not refer to the juridical character of any other days than those that begin and end a period. The Mary B. Baird, 97 Fed. 977.

80. *Kentucky.*— Long *v.* Hughes, 1 Duv. 387; Riley *v.* Grace, 33 S. W. 207, 17 Ky. L. Rep. 1007.

Louisiana.— McFarlane *v.* Renaud, 1 Mart. 220.

Missouri.— Maloney *v.* Missouri Pac. R. Co., 122 Mo. 106, 26 S. W. 702; State *v.* Harris, 121 Mo. 445, 26 S. W. 558; Cattell *v.* Dispatch Pub. Co., 88 Mo. 356; Metropolis Nat. Bank *v.* Williams, 46 Mo. 17; State *v.* McGowan, 62 Mo. App. 625; Hosli *v.* Yokel, 57 Mo. App. 622; Lewis *v.* Schwenn, 15 Mo. App. 342.

Ohio.— Littleford *v.* Mercantile Credit Guarantee Co., 4 Ohio S. & C. Pl. Dec. 175, 3 Ohio N. P. 194.

England.— Rex *v.* Elkins, 4 Burr. 2129, 98 Eng. Reprint 110; Hales *v.* Owen, 2 Salk. 625, 91 Eng. Reprint 529.

See 45 Cent. Dig. tit. "Time," § 46. And see NEW TRIAL, 29 Cyc. 932.

Contra.— Van Laer *v.* Kansas Triphammer Brick Works, 56 Kan. 545, 43 Pac. 1134.

81. Neal *v.* Crew, 12 Ga. 93; Rose *v.* Macgregor, 1 D. & L. 583, 8 Jur. 86, 13 L. J. Exch. 110, 12 M. & W. 517. And see Scribner *v.* Whitcher, 6 N. H. 63, 23 Am. Dec. 708.

82. Brooks *v.* Minturn, 1 Cal. 481; Commercial Steamship Co. *v.* Boulton, L. R. 10 Q. B. 346, 3 Aspin. 111, 44 L. J. Q. B. 219, 33 L. T. Rep. N. S. 707, 23 Wkly. Rep. 854.

Under a charter-party which provides that "twelve running days for each one hundred register tons to be allowed to the charterers for loading the ship at the islands; nevertheless in no case shall the charterers have less than thirty or more than eighty days in all, Sundays and holidays excepted," Sundays and holidays are to be included in computing the "twelve running days." Crowell *v.* Farreda, 16 Gray (Mass.) 471.

83. *Ex p.* Cowert, 92 Ala. 94, 9 So. 225; Moog *v.* Randolph, 77 Ala. 597 [*followed* in Sayre *v.* Pollard, 77 Ala. 608]. *Contra*, Maricopa County *v.* Osborn, 4 Ariz. 331, 40 Pac. 313 [*overruling* Cheyney *v.* Smith, 3 Ariz. 143, 23 Pac. 680].

84. 21 Henry III.

85. Brown *v.* Jones, 125 Ind. 375, 25 N. E. 452, 21 Am. St. Rep. 227; Helphenstine *v.* Vincennes Nat. Bank, 65 Ind. 582, 32 Am. Rep. 86 [*overruling* Porter *v.* Holloway, 43 Ind. 35; Kohler *v.* Montgomery, 17 Ind. 220; Craft *v.* State Bank, 7 Ind. 219; Swift *v.* Tousey, 5 Ind. 196]; Harker *v.* Addis, 4 Pa. St. 515.

Application of rule to commercial paper see COMMERCIAL PAPER, 7 Cyc. 842.

86. Hour of entry of judgment see JUSTICES OF THE PEACE, 24 Cyc. 603 note 14, 635 note 55.

Hours of labor see CONSTITUTIONAL LAW, 8 Cyc. 1065; COUNTIES, 11 Cyc. 477.

87. See *supra*, VI, A, 2.

88. *In re* Schnapka, 149 Mich. 309, 112 N. W. 949.

"Several hours" does not mean fractional parts of hours, but means an uncertain number of hours, not less than two. Western Union Tel. Co. *v.* De Andrea, 45 Tex. Civ. App. 395, 100 S. W. 977.

89. Hedderich *v.* State, 101 Ind. 564, 1 N. E. 47, 51 Am. Rep. 768.

Judicial notice of subdivision of day into hours and their order of succession see EVIDENCE, 16 Cyc. 857.

90. State *v.* Green, 66 Mo. 631.

Sundays, are to be included,[91] unless the doing of the act in question on Sunday is prohibited by statute and hence illegal,[92] or unless the statutory requirement is directory and not mandatory.[93]

TIME AS ESSENCE OF CONTRACT. See CONTRACTS, 9 Cyc. 604.

TIME BARGAINS. The result of two distinct and perfectly legal bargains, namely, first, a bargain to buy or sell; and, secondly, a subsequent bargain that the first shall not be carried out.[1]

TIME CHECK. As used in reference to railroad employees, a certificate signed by the master mechanic of an amount due for labor for a specified time.[2]

TIME IMMEMORIAL. See CUSTOMS AND USAGES, 12 Cyc. 1033 text and notes 11, 12.

TIME OF BANKRUPTCY. See BANKRUPTCY, 5 Cyc. 238 note 8, subd. 10.

TIME OF MEMORY. In the common law, that time which, it is said, hath long ago been ascertained by law to commence from the beginning of the reign of Richard I.[3] (See CUSTOMS AND USAGES, 12 Cyc. 1033 text and notes 11, 12.)

TIME OPTION. An offer to sell, accompanied by an agreement to hold such offer open.[4] (See OPTION, 29 Cyc. 1502.)

TIMEPIECE. A term which includes a chronometer.[5]

TIME POLICY. See MARINE INSURANCE, 26 Cyc. 576.

TIME-TABLE. See RAILROADS, 33 Cyc. 664.

TIME TO TIME. See FROM TIME TO TIME, 20 Cyc. 852.

TIMORES VANI SUNT ÆSTIMANDI QUI NON CADUNT IN CONSTANTEM VIRUM. A maxim meaning "Fears which do not affect a brave man are vain."[6]

TINFOIL. Thin sheet metal or thick foil either of pure tin or of an alloy of which tin forms the greater part, used for wrapping up articles, such as drugs and confectionery, which must be kept from moisture or from the air.[7]

TIPPLE. As a noun, in mining parlance, an appliance which tips or upturns a car when the same is run upon it, used for emptying the car.[8] As a verb, to drink spirituous or strong liquors habitually; to indulge in the frequent and improper use of spirituous liquors; especially, to drink frequently without absolute drunkenness;[9] to drink, as strong liquors, in luxury or excess.[10] Worcester defines the

91. Casey *v.* Viall, 17 R. I. 348, 21 Atl. 911; Franklin *v.* Holden, 7 R. I. 215.

92. Link *v.* Clemmens, 7 Blackf. (Ind.) 479; Ridgley *v.* State, 7 Wis. 661 [*followed* in Meng *v.* Winkleman, 43 Wis. 41]; Reg. *v.* Middlesex, 17 L. J. M. C. 111. And see Sheldon *v.* Woodbridge, 2 Root (Conn.) 473.

In Massachusetts Sunday is excluded under the rule compelling its exclusion when the statutory limitation of time is less than a week. Cunningham *v.* Mahan, 112 Mass. 58; Com. *v.* Certain Intoxicating Liquors, 97 Mass. 601; Penniman *v.* Cole, 8 Metc. 496. However, in computing the time under a statute allowing a recovery for injuries sustained by reason of a defect in a highway, when such defect has existed for the space of twenty-four hours, Sunday is to be included, as it is not only morally fit and proper for the highway to be repaired immediately, but it is the imperative duty of the town to cause it to be done. Flagg *v.* Millbury, 4 Cush. 243.

93. Bundy *v.* Maginess, 76 Cal. 532, 18 Pac. 668.

1. Thacker *v.* Hardy, 4 Q. B. D. 685, 689, 48 L. J. Q. B. 289, 39 L. T. Rep. N. S. 595, 27 Wkly. Rep. 158, where it is said: "It is only when the first bargain is entered into upon the understanding that it is not to be carried out, that a time bargain, in the sense of an unenforceable bargain, is entered into. Such bargains are very rare."

2. Burlington Voluntary Relief Dept. *v.* White, 41 Nebr. 547, 553, 59 N. W. 747, 43 Am. St. Rep. 701.

3. 2 Blackstone Comm. 31 [*quoted* in Ackerman *v.* Shelp, 8 N. J. L. 125, 130; *Ex p.* Tice, 32 Oreg. 179, 187, 49 Pac. 1038].

4. Peterson *v.* Chase, 115 Wis. 239, 242, 91 N. W. 687.

5. Le Coutier *v.* London, etc., R. Co., 6 B. & S. 961, 967, 12 Jur. N. S. 266, 35 L. J. Q. B. 40, 13 L. T. Rep. N. S. 325, 14 Wkly. Rep. 80, 118 E. C. L. 961, construing The Carrier's Act (11 Geo. IV, and 1 Wm. IV, c. 68).

6. Bouvier L. Dict. [*citing* 7 Coke 17].

7. Century Dict.

Sheets of tin, something like roofing tin, are not equivalent to tinfoil. Poppenhusen *v.* New York Gutta Percha Comb Co., 19 Fed. Cas. No. 11,282, 4 Blatchf. 253, 255, 2 Fish. Pat. Cas. 80.

8. Boyd *v.* Indian Head Mills, 131 Ala. 356, 357, 31 So. 80.

9. Webster Dict. [*quoted* in State *v.* McNamara, 69 Me. 133, 134].

10. Webster Dict. [*quoted* in State *v.* Mc-

verb as meaning to drink to excess; the habitual practice of drinking spirituous liquors.[11]

TIPPLING HOUSE. See DISORDERLY HOUSES, 14 Cyc. 486; INTOXICATING LIQUORS, 23 Cyc. 179.

TIRED. See NARROW-TIRED WAGON, 29 Cyc. 278 note 7.

TISSUE. A term which, applied to paper, is descriptive of its texture.[12]

TITLE. A prefixed, designating word, phrase or combination of phrases; an initial written or printed designation; the distinguishing name attached to a written production of any kind;[13] the inscription at the beginning of a book intimating the subject of the work and usually the author's and publisher's names;[14] the inscription in the beginning of a book, usually containing the subject of the work, the author's and publisher's names, the date, etc.;[15] an inscription over, or at the beginning of, something, serving as a name by which the thing is known.[16] In cataloguing and quoting, whatever part of the title page serves for precise identification.[17] In reference to an act, that part of an act by which it is known and distinguished from other acts.[18] In reference to property, that which constitutes a just cause of exclusive possession, or which is the foundation of ownership of property.[19] (Title: Abstract of, see ABSTRACTS OF TITLE, 1 Cyc. 212. Acknowledgment of Instrument as Affecting Passing of, see ACKNOWLEDGMENTS, 1 Cyc. 514. Acquisition by Aliens to Real Property, see ALIENS, 2 Cyc. 90. Acquisition of Adverse or Outstanding by — Attorney as Against Client, see ATTORNEY AND CLIENT, 4 Cyc. 958; Joint Tenant, see JOINT TENANCY, 23 Cyc. 492; Life-Tenant, see ESTATES, 16 Cyc. 617; Partner, see PARTNERSHIP, 30 Cyc. 458; Party to Mortgage, see MORTGAGES, 27 Cyc. 1151; Tenant in Common, see TENANCY IN COMMON, *ante*, p. 40. Acquisition of Landlord's by Tenant, see LANDLORD AND TENANT, 24 Cyc. 953. Acquisition of to Lands by Cemetery Association, see CEMETERIES, 6 Cyc. 713. Acquisition or Transfer by — Accession, see ACCESSION, 1 Cyc. 222; Accretion of Alluvion, see NAVIGABLE WATERS, 29 Cyc. 349; Adverse Possession, see ADVERSE POSSESSION, 1 Cyc. 968; Assignment, see ASSIGNMENTS, 4 Cyc. 1; ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 113; Chattel Mortgage, see CHATTEL MORTGAGES, 6 Cyc. 980; Condemnation, see EMINENT DOMAIN, 15 Cyc. 543; Conversion, see CONVERSION, 9 Cyc. 822; Dedication, see DEDICATION, 13 Cyc. 434; Deed, see DEEDS, 13 Cyc. 505; Escheat, see ESCHEAT, 16 Cyc. 548; Escrow, see ESCROWS, 16 Cyc. 560; Exchange of Property, see EXCHANGE OF PROPERTY, 17 Cyc. 829; Finding Lost Goods, see FINDING LOST

Namara, 69 Me. 133, 134; Harney *v.* State, 8 Lea (Tenn.) 113, 119, dissenting opinion].

11. Worcester Dict. [*quoted* in State *v.* McNamara, 69 Me. 133, 134].

As used in a statute, held to mean to sell, to be drank at the place of sale see State *v.* Wilson, 115 Tenn. 725, 738, 91 S. W. 195; Harney *v.* State, 8 Lea (Tenn.) 113, 114. See also Dobson *v.* State, 5 Lea (Tenn.) 271, 274.

"Tippling purposes" see State *v.* McNamara, 69 Me. 133, 135.

12. Draper *v.* Skerrett, 116 Fed. 206, 208, where it is held that the term, neither singly or in combination, can be used as a trademark.

"Tissue paper," as used in Tariff Act of October 1, 1890, par. 419, includes merchandise imported and invoiced as crepe, or crepe tissue, which, according to the finding of the board of general appraisers, is made in a tissue paper mill, and invoiced, advertised, and sold as "tissue." Dennison Mfg. Co. *v.* U. S., 66 Fed. 728.

13. Century Dict. [*quoted* in Freeman *v.* Trade Register, 173 Fed. 419, 423].

May be and often is a name, but in construing a statute providing that the nominees of each party shall be printed on separate tickets underneath the name or title of the party making the nomination, the term was held not to mean "name." Ransom *v.* Black, 54 N. J. L. 446, 457, 24 Atl. 489, 1021, 16 L. R. A. 769.

The "title of an affidavit" embraces its entire heading; that is, the name or style of the court as well as the names of the parties. Bowman *v.* Sheldon, 10 N. Y. Leg. Obs. 339, 340.

14. Stormonth Dict. [*quoted* in Freeman *v.* Trade Register, 173 Fed. 419, 423].

15. Webster Dict. [*quoted* in Freeman *v.* Trade Register, 173 Fed. 419, 423].

16. Worcester Dict. [*quoted* in Freeman *v.* Trade Register, 173 Fed. 419, 423].

17. Standard Dict. [*quoted* in Freeman *v.* Trade Register, 173 Fed. 419, 423].

18. Bouvier L. Dict. [*quoted* in Robinson *v.* State, 15 Tex. 311, 312].

"The title of an act is a label, not an index." Moore *v.* Burdett, 62 N. J. L. 163, 164, 40 Atl. 631.

19. Webster Dict. [*quoted* in Houston *v.* Farris, 71 Ala. 570, 571].

Goods, 19 Cyc. 535; Fraudulent Conveyance, see Fraudulent Conveyances, 20 Cyc. 323; Gift, see Gifts, 20 Cyc. 1189; Inheritance, see Descent and Distribution, 14 Cyc. 1; Lost Instrument, see Lost Instruments, 25 Cyc. 1606; Mortgage, see Mortgages, 27 Cyc. 916; Partition, see Partition, 30 Cyc. 145; Pledge, see Pledges, 31 Cyc. 779; Sale, see Sales, 35 Cyc. 1; Vendor and Purchaser; Will, see Wills. Actions or Other Proceedings to Establish — In General, see Detinue, 14 Cyc. 239; Ejectment, 15 Cyc. 1; Entry, Writ of, 15 Cyc. 1057; Interpleader, 23 Cyc. 1; Possessory Warrant, 31 Cyc. 954; Quieting Title, 32 Cyc. 1296; Real Actions, 33 Cyc. 1541; Replevin, 34 Cyc. 1342; Trespass to Try Title; Allowance of Costs on Trial of, to Real Property, see Costs, 11 Cyc. 47; Claims of Third Persons to Property Attached or Garnished, see Attachment, 4 Cyc. 724; Executions, 17 Cyc. 1199; Garnishment, 20 Cyc. 1130; Death of Party as Ground For Abatement, see Abatement and Revival, 1 Cyc. 52; Jurisdiction in General, see Courts, 11 Cyc. 796; Jurisdiction of Appellate Court, see Appeal and Error, 2 Cyc. 586; Jurisdiction of Court Commissioner, see Court Commissioners, 11 Cyc. 624; Jurisdiction of Equity, see Equity, 16 Cyc. 88; Jurisdiction of Justice's Court, see Justices of the Peace, 24 Cyc. 450. After-Acquired — As Affecting Judgment Lien, see Judgments, 23 Cyc. 1376; Construction and Operation of Contract of Sale, see Vendor and Purchaser; Construction and Operation of Deed, see Deeds, 13 Cyc. 637; Construction and Operation of Mortgage, see Mortgages, 27 Cyc. 1139; Railroads, 33 Cyc. 499; Estoppel to Assert, see Estoppel, 16 Cyc. 689; Of Fraudulent Grantee, see Fraudulent Conveyances, 20 Cyc. 642; Property Subject to Mortgage, see Chattel Mortgages, 6 Cyc. 1039; Mortgages, 27 Cyc. 1040. Allegations of in Action or Suit — By Claimant of Property Adversely Held, see Adverse Possession, 1 Cyc. 1142; By Creditor to Subject Equitable Interest, see Creditors' Suits, 12 Cyc. 40; For Conversion, see Trover and Conversion; For Forcible Entry and Detainer, see Forcible Entry and Detainer, 19 Cyc. 1153; For Injunction, see Injunctions, 22 Cyc. 926; For Negligence, see Negligence, 29 Cyc. 566; For Partition, see Partition, 30 Cyc. 215; For Specific Performance, see Specific Performance, 36 Cyc. 777, 782; For Tort, see Torts; For Trespass, see Trespass; In Equity, see Equity, 16 Cyc. 233; Of Detinue, see Detinue, 14 Cyc. 265; Of Ejectment, see Ejectment, 15 Cyc. 95; Of Replevin, see Replevin, 34 Cyc. 1468; On Bill or Note, see Commercial Paper, 8 Cyc. 119; On Insurance Policy, see Fire Insurance, 19 Cyc. 920; Marine Insurance, 26 Cyc. 718; To Abate Nuisance, see Nuisances, 29 Cyc. 1242; To Foreclose Mortgage, see Mortgages, 27 Cyc. 1596; To Try Title, see Trespass to Try Title. Allegations of in Indictment or Information — In General, see Indictments and Informations, 22 Cyc. 352; For Arson, see Arson, 3 Cyc. 1000; For Burglary, see Burglary, 6 Cyc. 209; For Embezzlement, see Embezzlement, 15 Cyc. 517; For Gaming, see Gaming, 20 Cyc. 905; For Larceny, see Larceny, 25 Cyc. 88; For Receiving Stolen Goods, see Receiving Stolen Goods, 34 Cyc. 521; For Robbery, see Robbery, 34 Cyc. 1803. Bond For — In General, see Vendor and Purchaser; Adverse Possession Under, see Adverse Possession, 1 Cyc. 1098;

For other definitions of the term see Property, 32 Cyc. 678.

Title by limitation and title by prescription to real estate are practically synonymous. Dalton *v.* Rentaria, 2 Ariz. 275, 284, 15 Pac. 37.

"Title by prescription" see Prescription, 31 Cyc. 1165.

"Title by purchase" includes every mode of acquiring an estate except that of inheritance. It includes the mode of acquiring an estate by means of a devise or will as well as by other modes of purchase. Delaney *v.* Salina, 34 Kan. 532, 539, 9 Pac. 271 See also Purchase, 32 Cyc. 1264.

"Title of record" in statute see Shaw *v.* Robinson, 111 Ky. 715, 723, 64 S. W. 620.

Titled. — Land is said to be "titled," within the meaning of the constitution of Texas relative to the grant of state lands, when a patent is issued which on its face is evidence that the state has parted with its right, and conferred it on the patentee. Winsor *v.* O'Connor, 69 Tex. 571, 576, 8 S. W. 519.

"Titled or surveyed" see Truehart *v.* Babcock, 51 Tex. 169, 177.

"Titled lands" see Texas-Mexican R. Co. *v.* Locke, 74 Tex. 370, 403, 12 S. W. 80.

Limitations of Actions on, see LIMITATIONS OF ACTIONS, 25 Cyc. 1036. Color of, see ADVERSE POSSESSION, 1 Cyc. 1082. Compensation For Improvements as Affected by, see IMPROVEMENTS, 22 Cyc. 22. Conclusiveness of Judgment as to — In General, see JUDGMENTS, 23 Cyc. 1319; Not in Issue, see JUDGMENTS, 23 Cyc. 1316. Contribution For Failure of, on Actual Partition of Property, see PARTITION, 30 Cyc. 167. Conveyance For Gambling Consideration, Effect to Pass Title to Grantor's Heirs, see GAMING, 20 Cyc. 938. Covenants of — In General, see COVENANTS, 11 Cyc. 1063; Accrual of Right of Action For Breach, see LIMITATIONS OF ACTIONS, 25 Cyc. 1091; Effect on, of Recovery in Action For Breach, see COVENANTS, 11 Cyc. 1183; Subsequent Perfection of as Defense to Action For Breach, see COVENANTS, 11 Cyc. 1137. Decree in Equity Vesting, see EQUITY, 16 Cyc. 498. Deeds, Deposit as Security as Constituting Equitable Mortgage, see MORTGAGES, 27 Cyc. 987. Defects in — As Affecting Rights of Parties to Contract of Sale of Realty, see VENDOR AND PURCHASER; As Ground For Cancellation or Rescission of Contract or Conveyance, see CANCELLATION OF INSTRUMENTS, 6 Cyc. 287; SALES, 35 Cyc. 136; VENDOR AND PURCHASER. Determination of to Land in Action of Assumpsit, see ASSUMPSIT, ACTION OF, 4 Cyc. 321. Doubtful or Disputed, Effect as to Injunction, see INJUNCTIONS, 22 Cyc. 817. Establishment of After Loss of Records, see RECORDS, 34 Cyc. 611. Estates or Interests in Property, see CHARITIES, 6 Cyc. 895; CURTESY, 12 Cyc. 1001; DOWER, 14 Cyc. 871; EASEMENTS, 14 Cyc. 1134; ESTATES, 16 Cyc. 595; GROUND-RENTS, 20 Cyc. 1367; HOMESTEADS, 21 Cyc. 448; JOINT TENANCY, 23 Cyc. 482; LANDLORD AND TENANT, 24 Cyc. 845; PERPETUITIES, 30 Cyc. 1464; POWERS, 31 Cyc. 1033; TENANCY IN COMMON, *ante*, p. 1; TRUSTS. Estoppel by — Clothing Another With Apparent, see ESTOPPEL, 16 Cyc. 773; Failure to Assert, see ESTOPPEL, 16 Cyc. 761; Renunciation, Disavowal, or Disclaimer of, see ESTOPPEL, 16 Cyc. 757. Evidence — Admissions, see EVIDENCE, 16 Cyc. 979; Ancient Maps and Surveys, see EVIDENCE, 17 Cyc. 445, 446; Best and Secondary, see EVIDENCE, 17 Cyc. 483; Declarations, see EVIDENCE, 16 Cyc. 1166; Judgment as Evidence of, or Link in Chain of as Against Persons Not Parties or Privies, see JUDGMENT, 23 Cyc. 1287; Parol to Establish as Affected by Statute of Frauds, see FRAUDS, STATUTE OF, 20 Cyc. 211; Presumptions, see EVIDENCE, 16 Cyc. 1074; Tax Deed as Evidence of, see TAXATION, 37 Cyc. 1452. Evidence of in Action or Suit — By Mortgagee For Possession of Mortgaged Chattel, see CHATTEL MORTGAGES, 7 Cyc. 32; By Owner of Land Taken For Public Use to Recover Compensation, see EMINENT DOMAIN, 15 Cyc. 1007; For Forcible Entry and Detainer, see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1164; For Partition, see PARTITION, 30 Cyc. 245; For Possession of Real Property, see ENTRY, WRIT OF, 15 Cyc. 1082; For Relief Against Fraudulent Conveyance, see FRAUDULENT CONVEYANCES, 20 Cyc. 783; For Trespass, see TRESPASS; Of Detinue, see DETINUE, 14 Cyc. 250; Of Ejectment, see EJECTMENT, 15 Cyc. 128, 134, 145; Of Replevin, see REPLEVIN, 34 Cyc. 1497, 1501, 1506, 1507; Of Trespass to Try Title, see TRESPASS TO TRY TITLE; Of Trover, see TROVER AND CONVERSION; On Bill or Note, see COMMERCIAL PAPER, 8 Cyc. 227; Petitory Action, see REAL ACTIONS, 33 Cyc. 1554; To Determine Claims of Third Person to Attached Property, see ATTACHMENT, 4 Cyc. 748; To Enforce Mechanics' Liens, see MECHANICS' LIENS, 27 Cyc. 410, 415; To Foreclose Mortgage, see MORTGAGES, 27 Cyc. 1616, 1620; To Quiet Title, see QUIETING TITLE, 32 Cyc. 1369, 1370, 1372; To Recover Dower, see DOWER, 14 Cyc. 990, 992, 994. Evidence of in Criminal Prosecution For — Arson, see ARSON, 3 Cyc. 1008; Causing Injury to Animals, see ANIMALS, 2 Cyc. 435; Driving Away Animals or Removing From Range, see ANIMALS, 2 Cyc. 356; Larceny, see LARCENY, 25 Cyc. 115, 125; Robbery, see ROBBERY, 34 Cyc. 1810; Unlawful Branding or Marking, or Altering or Defacing Brands, see ANIMALS, 2 Cyc. 329. Examination of, Liability of Attorney For Negligence in, see ATTORNEY AND CLIENT, 4 Cyc. 966. Execution as Affected by Ownership of Property, see EXECUTIONS, 17 Cyc. 973. Exemptions as Affected by Ownership of Property, see EXEMPTIONS, 18 Cyc. 1382. Failure of to Share of Partitioned Property, see PARTITION,

30 Cyc. 167. Garnishment as Affected by Ownership of Property, see GARNISHMENT, 20 Cyc. 1010. Indemnity as to Defects in, Adverse Claims and Liens, see INDEMNITY, 22 Cyc. 86. Injunction to Protect, see INJUNCTIONS, 22 Cyc. 821. Insurable Interest, see FIRE INSURANCE, 19 Cyc. 583; MARINE INSURANCE, 26 Cyc. 550. Insurance, see TITLE INSURANCE, *post*, p. 344. Intervention in Attachment to Assert, see ATTACHMENT, 4 Cyc. 725. Jurisdiction of — Appellate Court Affected by, see APPEAL AND ERROR, 2 Cyc. 586; Court Commissioners to Try, see COURT COMMISSIONERS, 11 Cyc. 624; Court of Admiralty to Try, see ADMIRALTY, 1 Cyc. 839; Court of Equity Dependent on, see EQUITY, 16 Cyc. 88; Jury Trial of Questions of in Equitable Action, see JURIES, 24 Cyc. 119. Justices of the Peace as Affected by, see JUSTICES OF THE PEACE, 24 Cyc. 450. Limitations of Actions — On Bond For, see LIMITATIONS OF ACTIONS, 25 Cyc. 1036; On Covenant of Warranty, see LIMITATIONS OF ACTIONS, 25 Cyc. 1091; Successor in as Person Who May Rely on Limitation, see LIMITATIONS OF ACTIONS, 25 Cyc. 1009. Maritime Liens as Affected by Ownership of Vessel, see MARITIME LIENS, 26 Cyc. 757. Marketable, see SPECIFIC PERFORMANCE, 36 Cyc. 632; VENDOR AND PURCHASER. Municipal Tax Title, see MUNICIPAL CORPORATIONS, 28 Cyc. 1727. Necessary to Maintain — Action For Damages For Private Nuisance, see NUISANCES, 29 Cyc. 1257; Action For Injury to Property by Fire, see Railroads, 33 Cyc. 1332; Action For Waste, see WASTE; Action on Negotiable Instrument, see COMMERCIAL PAPER, 8 Cyc. 66; Claim For Improvements or Taxes in Ejectment, see EJECTMENT, 15 Cyc. 224; Detinue, see DETINUE, 14 Cyc. 243; Ejectment, see EJECTMENT, 15 Cyc. 17; Injunction Proceedings, see INJUNCTIONS, 22 Cyc. 817; Intervention in Attachment, see ATTACHMENT, 4 Cyc. 725; Partition Suit, see PARTITION, 30 Cyc. 194; Real Action, see REAL ACTIONS, 33 Cyc. 1542, 1549; Redemption Proceedings, see MORTGAGES, 27 Cyc. 1804; Replevin, see REPLEVIN, 34 Cyc. 1385; Suit to Abate Nuisance, see NUISANCES, 29 Cyc. 1234; Suit to Quiet Title, see QUIETING TITLE, 32 Cyc. 1328; Trespass to Try Title, see TRESPASS TO TRY TITLE; Trover, see TROVER AND CONVERSION; Writ of Entry, see ENTRY, WRIT OF, 15 Cyc. 1069. Necessary to Revive Action on Death of Party, see ABATEMENT AND REVIVAL, 1 Cyc. 86. Of Action After Revival on Death of Party, see ABATEMENT AND REVIVAL, 1 Cyc. 114. Of Affidavit, see AFFIDAVITS, 2 Cyc. 18. Of Assignee For Benefit of Creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 218. Of Bailee, see BAILMENTS, 5 Cyc. 171. Of Bailor, see BAILMENTS, 25 Cyc. 170. Of Bank to Paper Received For Collection, see BANKS AND BANKING, 5 Cyc. 493. Of Bona Fide Purchaser of — Goods, see SALES, 35 Cyc. 345; Land, see VENDOR AND PURCHASER; Negotiable Instrument, see COMMERCIAL PAPER, 7 Cyc. 924. Of Cause, Averment in Caption of Indictment, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 237. Of Child to Property, see PARENT AND CHILD, 29 Cyc. 1654. Of Cotenant, see TENANCY IN COMMON, *ante*, p. 1. Of Court, Averment in Caption of Indictment, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 230. Of Declaration, Complaint, Petition, or Statement, see PLEADING, 31 Cyc. 93. Of Dedicator of Land to Public Use, see DEDICATION, 13 Cyc. 442. Of Defendant as Defense to — Action For Conversion, see TROVER AND CONVERSION; Ejectment, see EJECTMENT, 15 Cyc. 62; Replevin, see REPLEVIN, 34 Cyc. 1414; Trespass, see TRESPASS; Trespass to Try Title, see TRESPASS TO TRY TITLE; Writ of Entry, see ENTRY, WRIT OF, 15 Cyc. 1071. Of Depositor and Depositary, see DEPOSITARIES, 13 Cyc. 800, 806. Of Devisee or Legatee, see WILLS. Of Factor, see FACTORS AND BROKERS, 19 Cyc. 120. Official, Addition to Signature of Indictment, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 252. Of Finder of Lost Goods, see FINDING LOST GOODS, 19 Cyc. 535. Of Grantor in Deed — In General, see DEEDS, 13 Cyc. 527; Mistake as to Affecting Validity, see DEEDS, 13 Cyc. 577. Of Guardian to Property of Ward, see GUARDIAN AND WARD, 21 Cyc. 77. Of Heir or Distributee, see DESCENT AND DISTRIBUTION, 14 Cyc. 102. Of Husband as Element of Right to Dower, see DOWER, 14 Cyc. 892. Of Information, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 277. Of Joint Tenant, see JOINT TENANCY, 23 Cyc. 490. Of Judgment Debtor, see JUDG-

MENTS, 23 Cyc. 1368. Of Landlord, see LANDLORD AND TENANT, 24 Cyc. 923. Of Mortgagee to Purchase-Money Mortgage, see MORTGAGES, 27 Cyc. 1149. Of Mortgagor as Affecting Right to Give Mortgage, see MORTGAGES, 27 Cyc. 1035. Of Motion Papers, see MOTIONS, 28 Cyc. 6. Of Officer to Property Taken Under Execution, see EXECUTIONS, 17 Cyc. 1121. Of Ordinance, see MUNICIPAL CORPORATIONS, 28 Cyc. 378. Of Party Reviving Action on Death of Original Party, see ABATEMENT AND REVIVAL, 1 Cyc. 111. Of Petition For Certiorari, see CERTIORARI, 6 Cyc. 783. Of Plea or Answer, see PLEADING, 31 Cyc. 129. Of Pledgor — In General, see PLEDGES, 31 Cyc. 794; Estoppel to Deny, see PLEDGES, 31 Cyc. 807. Of Process, see PROCESS, 32 Cyc. 429. Of Purchaser — At Execution Sale, see EXECUTIONS, 17 Cyc. 1287; At Foreclosure Sale, see MORTGAGES, 27 Cyc. 1723; At Judicial Sale in General, see JUDICIAL SALES, 24 Cyc. 61; At Partition Sale, see PARTITION, 30 Cyc. 287; At Receiver's Sale, see RECEIVERS, 34 Cyc. 332; At Sale by Order of Court of Decedent's Estate, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 824; At Sale by Trustee, see TRUSTS; At Sale For Enforcement of Assessments and Special Taxes For Public Improvement, see MUNICIPAL CORPORATIONS, 28 Cyc. 1247; At Sale For Enforcement of Mechanic's Lien, see MECHANICS' LIENS, 27 Cyc. 448; At Sale For Enforcement of Pledge, see PLEDGES, 31 Cyc. 883; At Sale For Enforcement of Vendor's Lien, see VENDOR AND PURCHASER; At Sale in Administration of Insolvent Estate, see INSOLVENCY, 22 Cyc. 1303; At Sale of Attached Property, see ATTACHMENT, 4 Cyc. 715; At Sale of Property Assigned For Creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 239; At Tax-Sale, see TAXATION, 37 Cyc. 1468; From Life-Tenant, see ESTATES, 16 Cyc. 636; Of Goods as to Third Persons, see SALES, 35 Cyc. 340; Of Property Subject to Mortgage, see MORTGAGES, 27 Cyc. 1337; Of Riparian Land, see NAVIGABLE WATERS, 29 Cyc. 368; On Redemption From Execution Sale, see EXECUTIONS, 17 Cyc. 1337. Of Receiver — In General, see RECEIVERS, 34 Cyc. 183; Appointed in Action For Dissolution and Accounting of Partnership, see PARTNERSHIP, 30 Cyc. 730; To Property in Supplementary Proceedings, see EXECUTIONS, 17 Cyc. 1462. Of Seller — As Affecting Right to Sell, see SALES, 35 Cyc. 47; Defects Ground For Rescission of Contract, see SALES, 35 Cyc. 136; Misrepresentation of Fraud, see SALES, 35 Cyc. 73; Sufficiency to Support Contract of Sale, see SALES, 35 Cyc. 160. Of State to Land Granted in Aid of Railroads, see PUBLIC LANDS, 32 Cyc. 945. Of Statute, see STATUTES, 36 Cyc. 1017. Of Survivor to Real Property of Firm on Death of Partner, see PARTNERSHIP, 30 Cyc. 625. Of Third Person as Defense to — Action For Conversion, see TROVER AND CONVERSION; Ejectment, see EJECTMENT, 15 Cyc. 65; Replevin, see REPLEVIN, 34 Cyc. 1415; Trespass, see TRESPASS; Trespass to Try Title, see TRESPASS TO TRY TITLE. Of Trustee in — Bankruptcy, see BANKRUPTCY, 5 Cyc. 341; Insolvency, see INSOLVENCY, 22 Cyc. 1283. Of Vendor — Defects Ground For Rescission of Contract, see VENDOR AND PURCHASER; Misrepresentation or Fraud, see VENDOR AND PURCHASER; Sufficiency to Support Contract of Sale, see VENDOR AND PURCHASER. Of Work to Be Copyrighted, Deposit of, see COPYRIGHT, 9 Cyc. 921. Ownership of Property and Incidents Thereof in General, see PROPERTY, 32 Cyc. 676. Parties to Actions as Dependent on, see PARTIES, 30 Cyc. 45, 76. Partition, Effect on, see PARTITION, 30 Cyc. 166. Pleading, see PLEADING, 31 Cyc. 709, 777. Presentation of Question of, or Ownership in Trial Court, Necessity, see APPEAL AND ERROR, 2 Cyc. 670. Privity of Between Claimants as Ground of Relief by Interpleader, see INTERPLEADER, 23 Cyc. 11. Quieting — In General, see QUIETING TITLE, 32 Cyc. 1296; Statutory New Trial as of Right in Actions to Quiet, see NEW TRIAL, 29 Cyc. 1035. Recognition of Superior as Estoppel to Claim Homestead, see HOMESTEADS, 21 Cyc 619. Reference of Questions of in Chancery Case to Master, see EQUITY, 16 Cyc. 437. Registration of, see RECORDS, 34 Cyc. 597. Removal of Cloud, see QUIETING TITLE, 32 Cyc. 1296. Reservation of on Sale of Goods, see SALES, 35 Cyc. 651. Retention of Apparent by Grantor, Effect as Rendering Conveyance Fraudulent, see FRAUDULENT CONVEYANCES, 20 Cyc. 536. Slander

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TITLE BOND. See VENDOR AND PURCHASER.

TITLE COLORABLE. That which is founded on any appearance of reason and justice; that which has the appearance of good faith, but which is not sufficient of itself alone, to transfer the property without the aid of possession and presumption.[20] (See ADVERSE POSSESSION, 1 Cyc. 1082.)

TITLE DEED. See MORTGAGES, 27 Cyc. 987.

20. Diccionario de Escriche [*quoted* in Woodworth *v.* Fulton, 1 Cal. 295, 317].

TITLE INSURANCE

By Alexander Karst*

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CROSS-REFERENCES

For Matters Relating to:

Guaranty, see Guaranty, 20 Cyc. 1392.
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I. Definition and Nature.

Title insurance refers to land or an interest therein,[1] and is an agreement whereby the insurer, for a valuable consideration, agrees to indemnify the assured in a specific amount against loss through defects of title to real estate, wherein the latter has an interest, either as purchaser or otherwise.[2] The con-

1. 42 Cent. L. J. 445 note.

The real subject of title insurance is not the concrete thing, but the interest which the one to be indemnified has in the concrete thing. Foehrenbach *v.* German-American Title, etc., Co., 217 Pa. St. 331, 337, 66 Atl. 561, 12 L. R. A. N. S. 465.

2. Frost Guaranty Ins. §§ 162, 235 [*quoted* in Foehrenbach *v.* German-American Title, etc., Co., 217 Pa. St. 331, 336, 66 Atl. 561, 12 L. R. A. N. S. 465].

Another definition is: "A contract to indemnify against loss through defects in the title to real estate or liens or incumbrances

* Author of "Real Actions," 33 Cyc. 1541; "Slaves," 36 Cyc. 465; "Sodomy," 36 Cyc. 501; "Submission of Controversy," 37 Cyc. 346; "Summary Proceedings," 37 Cyc. 528; "Theaters and Shows," *ante*, p. 252; "Threats," *ante*, p. 289. Joint author of "Religious Societies," 34 Cyc. 1112. Editor of "Seamen," 35 Cyc. 1176.

tract is recognized as a true insurance contract,[3] being limited strictly to indemnity for loss actually suffered,[4] by reason of the defects or encumbrances against which the insurer covenanted to indemnify,[5] and the insurer is not a surety.[6] Title insurance is not mere guesswork, nor is it a wager; it is based upon careful examination of the muniments of title, and the exercise of judgment by skilled conveyancers.[7]

II. INSURABLE INTEREST.

Titles have been held to be the proper subject of insurance within the principle that an interest in any right, duty, or obligation, the impairment of which would tend to a diminution of estate, is a proper subject of insurance,[8] and that an

thereon." 1 Cooley Ins. 12 [*quoted* in Foehrenbach *v.* German-American Title, etc., Co., 217 Pa. St. 331, 336, 66 Atl. 561, 12 L. R. A. N. S. 465].

For form of policy see Purcell *v.* Land Title Guarantee Co., 94 Mo. App. 5, 8, 67 S. W. 726.

Gauranty of title and guaranty of certificate of title distinguished.— Where a certificate of title issued by an insurer to a landowner, as to the title of the latter, recites that the guarantor shall not be liable for damages to exceed a certain sum, and shall defend the guarantee, or his successors or heirs, as to every claim adverse to the title guaranteed, and that if the loss is less than all the land, the company shall only be liable for a proportionate share of the loss, and that the guarantor, in case it makes payments under the certificate, shall be subrogated to the rights of the guarantee, the instrument is a guaranty of title, and is not rendered a mere guaranty of the correctness of the certificate by the additional provision that the company guarantees the certificate to be correct. Purcell *v.* Land Title Guarantee Co., 94 Mo. App. 5, 67 S. W. 726.

3. *Georgia.*— *Ex p.* Calhoun, 87 Ga. 359, 13 S. E. 694.

Minnesota.— Place *v.* St. Paul Title Ins., etc., Co., 67 Minn. 126, 69 N. W. 706, 64 Am. St. Rep. 404; Stensgaard *v.* St. Paul Real Estate Title Ins. Co., 50 Minn. 429, 52 N. W. 910, 17 L. R. A. 575.

New York.— Trenton Potteries Co. *v.* Title Guarantee, etc., Co., 176 N. Y. 65, 68 N. E. 132; Ehmer *v.* Title Guarantee, etc., Co., 156 N. Y. 10, 50 N. E. 420; Glyn *v.* Title Guarantee, etc., Co., 132 N. Y. App. Div. 859, 117 N. Y. Suppl. 424; Graham *v.* Lawyers' Title Ins. Co., 20 N. Y. App. Div. 440, 46 N. Y. Suppl. 1055.

Pennsylvania.— Foehrenbach *v.* German-American Title, etc., Co., 217 Pa. St. 331, 66 Atl. 561, 12 L. R. A. N. S. 465; Wheeler *v.* Real Estate Title Ins., etc., Co., 160 Pa. St. 408, 28 Atl. 849; Gauler *v.* Solicitors' L. & T. Co., 9 Pa. Co. Ct. 634.

United States.— Minnesota Title Ins., etc., Co. *v.* Drexel, 70 Fed. 194, 17 C. C. A. 56.

See also Frost Guaranty Ins. § 235; 1 Cooley Ins. 12.

Ordinary provisions and general nature of title policies see Place *v.* St. Paul Title Ins., etc., Co., 67 Minn. 126, 69 N. W. 706, 64 Am. St. Rep. 404; Stensgaard *v.* St. Paul Real Estate Title Ins. Co., 50 Minn. 429, 52 N. W. 910, 17 L. R. A. 575; Wheeler *v.* Real Estate Title Ins., etc., Co., 160 Pa. St. 408, 28 Atl. 849.

A certificate of title is in effect only a corollary of a guaranty of title. Purcell *v.* Land Title Guarantee Co., 94 Mo. App. 5, 67 S. W. 726.

4. *California.*— Bothin *v.* California Title Ins., etc., Co., 153 Cal. 718, 96 Pac. 500.

Missouri.— Purcell *v.* Land Title Guarantee Co., 94 Mo. App. 5, 67 S. W. 726.

New York.— Trenton Potteries Co. *v.* Title Guarantee, etc., Co., 176 N. Y. 65, 68 N. E. 132; Palliser *v.* Title Ins. Co., 61 Misc. 490, 115 N. Y. Suppl. 545 [*citing* Frost Guaranty Ins. (1st ed.) § 162].

Pennsylvania.—German-American Title, etc., Co. *v.* Citizens' Trust, etc., Co., 190 Pa. St. 247, 42 Atl. 682; Wheeler *v.* Real Estate Title Ins., etc., Co., 160 Pa. St. 408, 28 Atl. 849; Whiteman *v.* Merion Title, etc., Co., 25 Pa. Super. Ct. 320.

United States.— Banes *v.* New Jersey Title Guarantee, etc., Co., 142 Fed. 957, 74 C. C. A. 127; Minnesota Title Ins., etc., Co. *v.* Drexel, 70 Fed. 194, 17 C. C. A. 56.

In this respect it is analogous to a covenant in a deed against encumbrances, and therefore subject to the rules applicable to such a covenant. Palliser *v.* Title Ins. Co., 61 Misc. (N. Y.) 490, 115 N. Y. Suppl. 545.

5. Wheeler *v.* Real Estate Title Ins., etc., Co., 160 Pa. St. 408, 28 Atl. 849; Whiteman *v.* Merion Title, etc., Co., 25 Pa. Super. Ct. 320.

6. Minnesota Title Ins., etc., Co. *v.* Drexel, 70 Fed. 194, 17 C. C. A. 56.

7. Foehrenbach *v.* German-American Title, etc., Co., 217 Pa. St. 331, 66 Atl. 561, 12 L. R. A. N. S. 465, holding, however, that title insurance carries with it the idea of protection against some risk, for if there were no risk there would be no cause for insurance.

The quality of a title is a matter of opinion, as to which even men learned in the law of real estate may differ. A policy of title insurance means the opinion of the company which issues it, as to the validity of the title, backed by an agreement to make that opinion good, in case it should prove to be mistaken, and loss should result in consequence to the insured. Foehrenbach *v.* German-American Title, etc., Co., 217 Pa. St. 331, 66 Atl. 561, 12 L. R. A. N. S. 465.

8. 1 Cooley Ins. 114. See also Gauler *v.* Solicitors' L. & T. Co., 9 Pa. Co. Ct. 634.

insurable interest is at the foundation of contracts of title insurance is held to be evident from the character and the nature of the risk assumed, the value of the interest in such insurance being practically the same as that existing in other insurance of property.[9] As in other cases of insurance the interest must be such that either as mortgagee,[10] owner,[11] or purchaser of ground-rents,[12] the assured would suffer pecuniary loss by reason of the risk insured against, such as the existence of liens or encumbrances,[13] or defects in title.[14]

III. THE CONTRACT.

A. Construction. A contract of title insurance is subject to the same rules of construction as are applicable to other insurance contracts,[15] and must be examined in the light of the purpose or object for which it was made.[16] The whole agreement is to be considered and a liberal construction given;[17] if there is room to doubt the proper construction of the contract the doubt as in other cases of insurance will be resolved in favor of the assured,[18] and such construction will not be given to some provisions as will render other provisions nugatory, if all can be upheld together.[19] In cases of ambiguity all the facts and circumstances under which the contract was made may be considered;[20] but all prior

9. 1 Cooley Ins. 241.

10. Place *v.* St. Paul Title Ins., etc., Co., 67 Minn. 126, 69 N. W. 706, 64 Am. St. Rep. 404; Wheeler *v.* Real Estate Title Ins., etc., Co., 160 Pa. St. 408, 28 Atl. 849.

11. Trenton Potteries Co. *v.* Title Guarantee, etc., Co., 176 N. Y. 65, 68 N. E. 132 [*affirming* 68 N. Y. App. Div. 636, 74 N. Y. Suppl. 170].

12. Gauler *v.* Solicitors' L. & T. Co., 9 Pa. Co. Ct. 634.

13. Minnesota Title Ins., etc., Co. *v.* Drexel, 70 Fed. 194, 17 C. C. A. 56. See also 1 Cooley Ins. 241.

14. Wheeler *v.* Real Estate Title Ins., etc., Co., 160 Pa. St. 408, 28 Atl. 849.

15. Trenton Potteries Co. *v.* Title Guarantee, etc., Co., 50 N. Y. App. Div. 490, 64 N. Y. Suppl. 116. See also Place *v.* St. Paul Title Ins., etc., Co., 67 Minn. 126, 69 N. W. 706, 64 Am. St. Rep. 404; Wheeler *v.* Real Estate Title Ins., etc., Co., 160 Pa. St. 408, 28 Atl. 849; Whiteman *v.* Merion Title, etc., Co., 25 Pa. Super. Ct. 320; Minnesota Title Ins., etc., Co. *v.* Drexel, 70 Fed. 194, 17 C. C. A. 56.

"Adverse to the title hereby guaranteed" construed see Purcell *v.* Land Title Guarantee Co., 94 Mo. App. 5, 67 S. W. 726.

"Tenancy of the present occupants," stated in a title insurance policy as a defect in the title not insured against, will be construed to mean tenancy arising through occupation, or temporary possession by a "tenant," in the ordinary sense of that word, where such intention appears from the whole policy. It does not include a claim of one asserting ownership in fee as against the insured title, and in actual adverse possession when the policy was issued. Place *v.* St. Paul Title Ins., etc., Co., 67 Minn. 126, 129, 69 N. W. 706, 64 Am. St. Rep. 404.

16. Foehrenbach *v.* German-American Title, etc., Co., 217 Pa. St. 331, 66 Atl. 561, 12 L. R. A. N. S. 465.

Contract held entire and not separable.— In an action on a policy of title insurance indemnifying against loss from defects of title, and containing a note with a guaranty to complete certain buildings according to plans, the contract is an entire one under the indemnification covenant, and cannot be divided into one to indemnify against loss from defects of title and another to guaranty that the buildings shall be finished in accordance with plans. Wheeler *v.* Equitable Trust Co., 206 Pa. St. 428, 55 Atl. 1065.

17. Purcell *v.* Land Title Guarantee Co., 94 Mo. App. 5, 67 S. W. 726; Trenton Potteries Co. *v.* Title Guarantee, etc., Co., 50 N. Y. App. Div. 490, 64 N. Y. Suppl. 116; Wheeler *v.* Real Estate Title Ins., etc., Co., 160 Pa. St. 408, 28 Atl. 849.

18. *Minnesota.*— Place *v.* St. Paul Title Ins., etc., Co., 67 Minn. 126, 69 N. W. 706, 64 Am. St. Rep. 404; Quigley *v.* St. Paul Title Ins., etc., Co., 60 Minn. 275, 62 N. W. 287.

Missouri.— Purcell *v.* Land Title Guarantee Co., 94 Mo. App. 5, 67 S. W. 726.

New Jersey.— Economy Bldg., etc., Assoc. *v.* West Jersey Title Co., 64 N. J. L. 27, 44 Atl. 854.

New York.— Trenton Potteries Co. *v.* Title Guarantee, etc., Co., 176 N. Y. 65, 68 N. E. 132; Ehmer *v.* Title Guarantee, etc., Co., 156 N. Y. 10, 50 N. E. 420; Trenton Potteries Co. *v.* Title Guarantee, etc., Co., 50 N. Y. App. Div. 490, 64 N. Y. Suppl. 116.

Pennsylvania.— Wheeler *v.* Real Estate Title Ins., etc., Co., 160 Pa. St. 408, 28 Atl. 849; Gauler *v.* Solicitors' L. & T. Co., 9 Pa. Co. Ct. 634.

United States.— Banes *v.* New Jersey Title Guarantee, etc., Co., 142 Fed. 957, 74 C. C. A. 127; Minnesota Title Ins., etc., Co. *v.* Drexel, 70 Fed. 194, 17 C. C. A. 56.

19. Purcell *v.* Land Title Guarantee Co., 94 Mo. App. 5, 67 S. W. 726; Ocean View Land Co. *v.* West Jersey Title Guaranty Co., 71 N. J. L. 600, 61 Atl. 83.

20. Trenton Potteries Co. *v.* Title Guarantee, etc., Co., 176 N. Y. 65, 68 N. E. 132.

negotiations are merged in the written contract to the extent that evidence thereof is inadmissible which goes to the intention of the parties, as that can be found only in the contract.[21]

B. Warranties and Conditions; Waiver. As in other branches of insurance the assured is generally required to fill out an application blank containing questions pertaining to the desired insurance;[22] and as to warranties and conditions the general principles of other kinds of insurance are applicable.[23] If upon an application for a title policy an untrue answer is given to a question, and the policy provides that an untrue answer avoids the policy, the answer is in the nature of a warranty and the matter of its materiality is not open;[24] but when a policy contains a condition which renders it void at its inception and this is known to the insurer when he issues the policy, he thereby waives the condition,[25] and generally the rules applicable to insurance agents as to the power of waiver of conditions apply.[26] A condition precedent to a right of action upon the policy, which prohibits a recovery unless the assured had contracted to sell the estate or interest covered by the policy, and the title has been declared, by a court of last resort of competent jurisdiction, defective or encumbered by reason of a defect or encumbrance for which the insurer would be liable under the policy, has no application to a case where the land is held by another party in actual adverse possession, and the assured has lost it absolutely by reason of a defect in the insured title.[27]

C. Reformation and Cancellation — 1. In General. Like other contracts,[28] a title policy may in a proper case be reformed.[29] In determining the question whether the facts and circumstances surrounding the transaction are such as to justify or require a reformation of the policy, it becomes necessary to scrutinize closely the contract as written, its nature and purpose, the conditions under which it was made, and the legitimate oral evidence, if any, bearing upon the transaction;[30] and where the whole transaction tends to show that there was no mistake as to the actual terms of the agreement, but that in reducing it to writing the real date as to a part thereof was inadvertently omitted, the trial court should reform the written policy so as to make it conform to the actual agreement of the parties.[31]

21. Banes *v.* New Jersey Title Guarantee, etc., Co., 142 Fed. 957, 74 C. C. A. 127.

22. See Stensgaard *v.* St. Paul Real Estate Title Ins. Co., 50 Minn. 429, 52 N. W. 910, 17 L. R. A. 575. And see cases cited *supra*, the preceding notes.

A question in the application "Last price paid?" calls for the actual, and not a merely nominal, price, the price in money or money's worth. Stensgaard *v.* St. Paul Real Estate Title Ins. Co., 50 Minn. 429, 52 N. W. 910, 17 L. R. A. 575.

23. Stensgaard *v.* St. Paul Real Estate Title Ins. Co., 50 Minn. 429, 52 N. W. 910, 17 L. R. A. 575; Foehrenbach *v.* German-American Title, etc., Co., 217 Pa. St. 331, 66 Atl. 561, 12 L. R. A. N. S. 465. See also 42 Cent. L. J. 445 note.

24. Stensgaard *v.* St. Paul Real Estate Title Ins. Co., 50 Minn. 429, 52 N. W. 910, 17 L. R. A. 575, question concerning the last price paid for the property.

25. Quigley *v.* St. Paul Title Ins., etc., Co., 60 Minn. 275, 62 N. W. 287, where the policy provided that false statements in the application should avoid it, and the applicant stated that there were no encumbrances, when in fact mechanics' liens existed, but as the fact was known to the insurer the statement was held not to avoid the policy.

This principle applied to liability insurance see Liability Insurance, 1910 Cyc. Ann. 2427.

26. Quigley *v.* St. Paul Title Ins., etc., Co., 60 Minn. 275, 62 N. W. 287; Purcell *v.* Land Title Guarantee Co., 94 Mo. App. 5, 67 S. W. 726.

Where a policy of title insurance requires notice of any adverse claim to be given to the insurer, the act of the agent of the insurer, on being informed by the insured of the existence of a mortgage against the property, in stating to insured that it amounts to nothing, and for assured to pay no attention thereto, which is relied on by assured, is a waiver of the provisions requiring notice, which will estop the insurer from urging want of notice of such claim as a defense to an action on the policy. Purcell *v.* Land Title Guarantee Co., 94 Mo. App. 5, 67 S. W. 726.

27. Place *v.* St. Paul Title Ins., etc., Co., 67 Minn. 126, 69 N. W. 706, 64 Am. St. Rep. 404.

28. See Reformation of Instruments, 34 Cyc. 899.

29. Trenton Potteries Co. *v.* Title Guarantee, etc., Co., 176 N. Y. 65, 68 N. E. 132.

30. Trenton Potteries Co. *v.* Title Guarantee, etc., Co., 176 N. Y. 65, 68 N. E. 132.

31. Trenton Potteries Co. *v.* Title Guaran-

2. Return of Premium. Upon the cancellation [32] or amendment of a policy of title insurance by a judicial decree,[33] the holder of the policy is entitled to a return of a proportionate part of the premium paid therefor, measured by the time elapsing between the date of the policy and the date of the decree.[34] The policy-holder is not, however, entitled to the return of that part of the premium which the application for insurance stipulated might be retained by the insurer for its services in investigating the title insured,[35] or of an amount proportioned upon the diminution of risk owing to lapse of time.[36]

IV. Scope of Liability; Risks Insured and Excepted.

A. In General. The sole object of title insurance is to cover possibilities of loss through defects that may cloud or invalidate titles, and it is for the assumption of whatever risk there may be, in such connection, that the premium is paid to, and accepted by, the insurer which issues the policy,[37] the general effect and intent being to insure a valid security both as to title and against encumbrances.[38]

B. Particular Risks and Stipulations. The risks generally insured against are defects in,[39] and unmarketability of,[40] title, and liens or encumbrances;[41] and it is generally provided that in the event of suit founded upon a claim of prior title or encumbrance, the insurer agrees to defend the assured's title for and in behalf of the assured.[42] Under title policies specifying the risks insured, to warrant a recovery it must appear that the loss suffered arose from one of those risks.[43] Thus in an action upon a covenant contained in a title policy,

tee, etc., Co., 176 N. Y. 65, 68 N. E. 132, holding that if there was no mistake in the agreement as made and understood between the parties, and the scrivener, in reducing it to writing, inadvertently omitted an essential element thereof, the court had the right to reform the written contract, and that if, on the other hand, this is regarded as an instance of actual mistake in the making of the contract, then the mistake was mutual, and the reformatory power of the court is properly invoked on that ground, and that in this view of the case the excision of incompetent evidence referred to did not affect the result.

32. See State *v.* Minnesota Title Ins., etc., Co., 104 Minn. 447, 116 N. W. 944, 124 Am. St. Rep. 633, 19 L. R. A. N. S. 639.

33. State *v.* Minnesota Title Ins., etc., Co., 104 Minn. 447, 116 N. W. 944, 124 Am. St. Rep. 633, 19 L. R. A. N. S. 639.

34. State *v.* Minnesota Title Ins., etc., Co., 104 Minn. 447, 116 N. W. 944, 124 Am. St. Rep. 633, 19 L. R. A. N. S. 639, where the policy was canceled and annulled by a judicial decree declaring the insurer insolvent and appointing a receiver to wind up its affairs.

35. State *v.* Minnesota Title Ins., etc., Co., 104 Minn. 447, 116 N. W. 944, 124 Am. St. Rep. 633, 19 L. R. A. N. S. 639.

36. State *v.* Minnesota Title Ins., etc., Co., 104 Minn. 447, 116 N. W. 944, 124 Am. St. Rep. 633, 19 L. R. A. N. S. 639, holding that the risk of loss under a contract of this kind, unlike other insurance, diminishes with the lapse of time, and as the end of the period covered by the policy approaches there is less likelihood of loss, yet to attempt to say from this basis what proportion of the premium has been earned would involve the matter in arbitrary speculation and bring up at an exceedingly unsatisfactory result, since no certain or definite rule could be evolved from that process of reasoning; whereas, on the other hand, to apportion the time during which the policy was in force to that of the unexpired period leaves no room for speculation or conjecture, does not involve an effort to measure the value of the possibility or probability of a loss, and fixes a rule which, if not wholly satisfactory, is at least definite and certain.

37. Foehrenbach *v.* German-American Title, etc., Co., 217 Pa. St. 331, 66 Atl. 561, 12 L. R. A. N. S. 465.

38. Frost Guaranty Ins. § 239.

39. Quigley *v.* St. Paul Title Ins., etc., Co., 60 Minn. 275, 62 N. W. 287; Trenton Potteries Co. *v.* Title Guarantee, etc., Co., 176 N. Y. 65, 68 N. E. 132.

A deed by one not connected by any conveyance with the record title to land does not create any defect in the record title of the record owner, or constitute a cloud on the record title. Bothin *v.* California Title Ins., etc., Co., 153 Cal. 718, 96 Pac. 500.

40. Trenton Potteries Co. *v.* Title Guarantee, etc., Co., 176 N. Y. 65, 68 N. E. 132; Wheeler *v.* Real Estate Title Ins., etc., Co., 160 Pa. St. 408, 28 Atl. 849.

41. Quigley *v.* St. Paul Title Ins., etc., Co., 60 Minn. 275, 62 N. W. 287; Trenton Potteries Co. *v.* Title Guarantee, etc., Co., 176 N. Y. 65, 68 N. E. 132; Wheeler *v.* Real Estate Title Ins., etc., Co., 160 Pa. St. 408, 28 Atl. 849.

42. Quigley *v.* St. Paul Title Ins., etc., Co., 60 Minn. 275, 62 N. W. 287; Ocean View Land Co. *v.* West Jersey Title Guaranty Co., 71 N. J. L. 600, 61 Atl. 83; Wheeler *v.* Real Estate Title Ins., etc., Co., 160 Pa. St. 408, 28 Atl. 849.

43. Taylor *v.* New Jersey Title Guarantee, etc., Co., 68 N. J. L. 74, 52 Atl. 281; Thomas

grounded on the eviction of the assured, to make out a cause of action, the declaration must show either an eviction under a paramount title or possession under a paramount title equivalent to an eviction, and an averment of a claim of title or of eviction under an adverse title is not sufficient.[44] The condition that no claim shall arise unless the assured has been actually evicted under an adverse title insured against is not fulfilled so as to give a right of action by the insured, by an adjudication reversing on appeal a decree confirming the terms of a sale of the lands in question and authorizing a deed therefor, to the assured,[45] although a plaintiff against whom an adverse decree is entered as to his right to the property is not bound to carry his resistance to the decree to the point of waiting to be physically expelled from the premises.[46] The stipulation in a title insurance policy that no right of action shall accrue thereon unless the assured has contracted to sell the land or the interest insured, and a court of last resort has declared the existence of a defect or encumbrance upon the title for which the insurer would be liable under the policy, does not apply where the land is held adversely and the assured has lost it by reason of a defect in the insured title.[47] A policy insuring a purchaser against any defect of title affecting the premises, or the interest of the purchaser therein, or by reason of the unmarketability of the title or by reason of any liens or encumbrances at the date of the policy, but exempting variations between the location of the fences, stoops, and the record lines, is breached by encroachments on the premises arising from the fact that the stoop, door cap, etc., of the adjoining property encroach on the premises.[48]

C. Duration and Termination of Risk. The risks of title insurance end, where the risks of other kinds of insurance begin;[49] and title insurance,

v. Tradesmen's Trust, etc., Fund Co., 21 Pa. Co. Ct. 151, holding that under a policy of title insurance insuring against eviction, liens, and encumbrances, the refusal of an adjoining owner to make compensation for the use of a party-wall on the line between the two premises gives no right of action to the assured, the right to compensation for the use of the party-wall being a mere chose in action, and not a lien or encumbrance which has been or could be put into judgment against the property of the assured, and hence not recoverable in a suit on the policy. See also Cooley Ins. p. 3326.

44. Barton *v.* West Jersey Title, etc., Co., 64 N. J. L. 24, 44 Atl. 871, holding that the assertion of the declaration that a railroad company claimed a lawful right and title to a part of the land, the title of which was insured by defendant, and that said company entered and evicted plaintiff under an adverse title, does not describe an entry or disturbance by paramount title, and so the breach of the covenant sued upon is not disclosed by the declaration. Whether, under the provision of the policy in question, eviction by due process of law was essential to a right of action or not, *quære.*

45. Ocean View Land Co. *v.* West Jersey Title Guaranty Co., 71 N. J. L. 600, 61 Atl. 83.

46. Foehrenbach *v.* German-American Title, etc., Co., 217 Pa. St. 331, 66 Atl. 561, 12 L. R. A. N. S. 465.

47. Place *v.* St. Paul Title Ins., etc., Co., 67 Minn. 126, 69 N. W. 706, 64 Am. St. Rep. 404.

The phrase "tenancy of the present occupants," stated in a title insurance policy as a defect in or objection to the title against which the insurer does not insure, is construed as meaning the tenancy which arises through the occupation or temporary possession of the premises by those who are tenants in the popular sense in which the word "tenant" is used. The phrase does not include the claim of a person who, asserting ownership in fee as against the title insured, is in actual adverse possession at the time the policy is issued. Place *v.* St. Paul Title Ins., etc., Co., 67 Minn. 126, 69 N. W. 706, 64 Am. St. Rep. 404. On the other hand, it is held that where a policy of title insurance excepts claims of tenure by present occupants, together with instruments, liens, encumbrances, judicial proceedings, and pending suits not shown by any public record, the policy covers the record title only, and does not insure against a claim sustainable only by proof of adverse possession. Bothin *v.* California Title Ins., etc., Co., 153 Cal. 718, 96 Pac. 500, holding in this connection that the word "tenure" is a term of extensive signification, and while it means the mode by which one holds an estate in land, it imports any kind of a holding, from mere possession to the owning of the inheritance.

The confirmation of a tax or assessment by a municipal body, which is legally necessary to render the tax or assessment a lien, is not a final judgment or decree upon a lien, within the meaning of the provision in the policy. Taylor *v.* New Jersey Title Guarantee, etc., Co., 70 N. J. L. 24, 56 Atl. 152.

48. Glyn *v.* Title Guarantee, etc., Co., 132 N. Y. App. Div. 859, 117 N. Y. Suppl. 424.

49. Trenton Potteries Co. *v.* Title Guarantee, etc., Co., 176 N. Y. 65, 68 N. E. 132

instead of protecting the assured against matters that may arise during a stated period after the issuance of the policy, is generally designed to save him harmless from any such loss through defects, liens, or encumbrances that may affect or burden his title when he takes it.[50] There is no implied agreement to go beyond the conditions existing at the time the policy is issued and to assume a general liability to indemnify against future encumbrances, municipal or otherwise;[51] and it follows as a general rule therefore that when the assured gets a good title, the covenant of the insurer has been fulfilled, and there is no liability,[52] and a policy insuring against unmarketability by reason of liens charging the property at the date of the policy insures only against liens the rights to which are already inchoate at the date of the policy and not against a future possibility of liens.[53] From the very nature of the contract it usually bears the same date as the deed of the title which it purports to insure, and if, in a given case, there is a discrepancy between these dates, it must be due to some exceptional circumstance, which should be noted in the contract;[54] but it cannot be held as a matter of law that a policy dated subsequent to an assessment and which in terms purports to insure against liens and encumbrances, charging the property at the date of the policy, was intended to cover only such liens and encumbrances as existed when the assured took title;[55] for it is competent for the parties to make any contract to insure the title to property upon such terms as are agreeable to both parties whether the insurance operates upon defects which should come into existence after the delivery of the deeds and the entry into possession or before,[56] and it is the right of the insurer to insure the title to properties against encumbrances existing before the date of the deed or thereafter,[57] or to except or include any risk at its option.[58]

[*quoted* in Palliser *v.* New York Title Ins. Co., 61 Misc. (N. Y.) 490, 115 N. Y. Suppl. 545]; Foehrenbach *v.* German-American Title, etc., Co., 217 Pa. St. 331, 66 Atl. 561, 12 L. R. A. N. S. 465.

50. State *v.* Minnesota Title Ins., etc., Co., 104 Minn. 447, 116 N. W. 944, 124 Am. St. Rep. 633, 19 L. R. A. N. S. 639 (holding that title insurance is to cover a loss subsequent to the date of the policy by reason of the successful assertion of an adverse title or interest in the land insured which existed at the time or before the contract was made); Trenton Potteries Co. *v.* Title Guarantee, etc., Co., 176 N. Y. 65, 68 N. E. 132, 134 [*quoted* in Palliser *v.* New York Title Ins. Co., 61 Misc. (N. Y.) 490, 115 N. Y. Suppl. 545]; Foehrenbach *v.* German-American Title, etc., Co., 217 Pa. St. 331, 66 Atl. 561, 12 L. R. A. N. S. 465 (holding that title insurance is designed to protect the assured, and save him harmless from any loss arising through defects, liens, or encumbrances that may be in existence, affecting the title when the policy is issued, but does not protect against any claim arising after the issuance of the policy).

51. Frost Guaranty Ins. § 239. See also Palliser *v.* New York Title Ins. Co., 61 Misc. (N. Y.) 490, 115 N. Y. Suppl. 545, holding that the rights of the parties must be determined as of the date when the policy was issued.

52. Trenton Potteries Co. *v.* Title Guarantee, etc., Co., 176 N. Y. 65, 68 N. E. 132 [*quoted* in Palliser *v.* New York Title Ins. Co., 61 Misc. (N. Y.) 490, 115 N. Y. Suppl. 545].

53. Wheeler *v.* Real Estate Title Ins., etc., Co., 160 Pa. St. 408, 28 Atl. 849, where the policy on a mortgage insured against loss by defects or unmarketableness of the title or mortgage interest, or because of liens or encumbrances charging the same at the date of the policy, "saving defects" or objections to title "which do or may now exist," including "unmarketability by reason of the possibility of mechanics' and municipal liens," but not "actual losses by reason of such liens."

54. Trenton Potteries Co. *v.* Title Guarantee, etc., Co., 176 N. Y. 65, 68 N. E. 132, holding that the absence of any special note as to the date negatives any intention to take the policy out of the general rule.

55. Trenton Potteries Co. *v.* Title Guarantee, etc., Co., 50 N. Y. App. Div. 490, 64 N. Y. Suppl. 116. But see Trenton Potteries Co. *v.* Title Guarantee, etc., Co., 176 N. Y. 65, 68 N. E. 132, holding that where a title insurance policy was issued on certain property, but not until seven months after the date of the deeds of the property to the insured, the insured was not liable for an assessment for a street opening which became a lien on one of the parcels three months after the insured had taken title thereof, it being the intent of the parties that the policy should only cover encumbrances existing at the time of the taking of the title.

56. Trenton Potteries Co. *v.* Title Guarantee, etc., Co., 50 N. Y. App. Div. 490, 64 N. Y. Suppl. 116.

57. Trenton Potteries Co. *v.* Title Guarantee, etc., Co., 50 N. Y. App. Div. 490, 64 N. Y. Suppl. 116.

58. Fidelity Ins., etc., Co. *v.* Earle, 9 Pa.

V. ACTIONS ON THE POLICY.

A. Right of Action. Title insurance being strictly a contract of indemnity,[59] and not of guaranty,[60] it is not enough in order to establish a right of recovery on the policy that the assured is able to prove the title to be defective or unmarketable; he must go further and show that he has actually suffered loss thereby.[61] Where the risks insured against are specified in the policy, to warrant a recovery thereon plaintiff must show a loss within one of the specified risks.[62]

B. Limitations. Since a title insurance policy is a contract of indemnity,[63] limitations do not commence to run until insured is evicted by the holder of a superior title, although the mortgage under which he is evicted was in existence when the title was insured.[64]

C. Pleading. The general rules of pleading[65] apply to actions on title policies,[66] and the pleader must either aver directly the facts which constitute his cause of action or set forth the circumstances from which those facts necessarily by intendment of law result.[67] An averment that defendant carelessly omitted to certify to a previous encumbrance appearing in the public records

Dist. 198, 23 Pa. Co. Ct. 449, holding that a schedule attached to a policy of title insurance to show liens "which do or may now exist and against which the company does not agree to insure or indemnify" does not profess to set out all the encumbrances of liens which exist against the property as a certificate of search would do, but only specifies those liens or encumbrances which it stipulates shall not be within the protection of the policy; hence if any lien or encumbrance is omitted intentionally from this list, it is not to be inferred that such lien is practically non-existent; the inference goes no further than that the insurer, for reasons not disclosed but sufficient to itself, is willing to assume the risk of any loss resulting to the assured because of the existence of this omitted lien or encumbrance.

A contract by an insurer with one party for the benefit of a third to examine and certify a title is valid and enforceable by the third. Economy Bldg., etc., Assoc. *v.* West Jersey Title Co., 64 N. J. L. 27, 44 Atl. 854.

59. See *supra*, I.

60. Whiteman *v.* Merion Title, etc., Co., 25 Pa. Super. Ct. 320; Banes *v.* New Jersey Title Guarantee, etc., Co., 142 Fed. 957, 74 C. C. A. 127, holding that a contract against loss or damage by reason of defects of title is not, in the absence of express provision, a guaranty that the assured acquired a good legal title, but to entitle him to recover on the policy he must prove some loss or damage.

The distinction is important, for if the contract were one of guaranty, plaintiff, although he may have lost nothing, might have a right to recover; on the other hand, if the contract were one of indemnity alone, he could not recover unless he proved a loss. Wheeler *v.* Equitable Trust Co., 206 Pa. St. 428, 55 Atl. 1065, holding that this is the substance of the decision in Seymour *v.* Tradesmen's Trust, etc., Co., 203 Pa. St. 151, 52 Atl. 125.

61. Purcell *v.* Land Title Guarantee Co., 94 Mo. App. 5, 67 S. W. 726; Trenton Potteries Co. *v.* Title Guarantee, etc., Co., 176 N. Y. 65, 68 N. E. 132; Palliser *v.* New York Title Ins. Co., 61 Misc. (N. Y.) 490, 115 N. Y. Suppl. 545; Wheeler *v.* Equitable Trust Co., 206 Pa. St. 428, 55 Atl. 1065 (holding that where a policy of title insurance indemnified the insured against loss from defects or unmarketability of title and contained in a note to the schedule a guaranty to complete certain buildings according to plans mentioned therein, insured in an action thereon could not show that the houses were not built in accordance with plans without prior proof of actual loss); German-American Title, etc., Co. *v.* Citizens' Trust, etc., Co., 190 Pa. St. 247, 42 Atl. 682; Whiteman *v.* Merion Title, etc., Co., 25 Pa. Super. Ct. 320; Banes *v.* New Jersey Title Guarantee, etc., Co., 142 Fed. 957, 74 C. C. A. 127 (holding that where the guaranty of the policy is against loss or damage by reason of defects of title or encumbrances, it is incumbent on plaintiff to show some loss or damage, and that in this case there was no sufficient proof of such loss or damage); Minnesota Title Ins., etc., Co. *v.* Drexel, 70 Fed. 194, 17 C. C. A. 56.

62. See *supra*, IV, B.

63. See *supra*, I.

64. Purcell *v.* Land Title Guarantee Co., 94 Mo. App. 5, 67 S. W. 726.

65. See PLEADING, 31 Cyc. 1.

66. See Economy Bldg., etc., Assoc. *v.* West Jersey Title Co., 64 N. J. L. 27, 44 Atl. 854.

67. Taylor *v.* New Jersey Title Guarantee, etc., Co., 70 N. J. L. 24, 56 Atl. 152 (holding a count insufficient which alleged an adverse title and an eviction, and left it to mere inference that the latter resulted from the former; such an inference being not a necessary one, that is, an inference of law); Hankey *v.* Real Estate Title Co., 11 Pa. Co. Ct. 320 (complaint held bad on demurrer as failing to disclose any legal cause of action, and because in other respects uncertain, informal, and insufficient).

establishes a complete right of action on a contract to examine and certify the title;[68] and a count which alleges an encumbrance by the lien of unpaid taxes not excepted from the guaranty, plaintiff's contract to sell, and the rejection of the title because of the encumbrance satisfies a clause of the policy making defendant liable if plaintiff should contract to sell and the title should be rejected because of a defect or encumbrance not excepted in the policy;[69] but an averment in a declaration that a person named, purchased land at a tax-sale and ever since has lawfully held the land against plaintiff is not a sufficient averment that plaintiff was evicted under the title conveyed by that sale.[70] A statutory permission to plead the performance of conditions generally does not, in its application to contracts of indemnity, extend to matters which constitute the very loss for which the insurer is to be answerable;[71] but an objection that plaintiff has not alleged the notice and proof of loss and the tender of a conveyance, which are said to be necessary to perfect his right of action, is obviated by the general averment of performance of conditions required of plaintiff, as these matters do not form the gist of the loss;[72] and a complaint in an action on a policy insuring title to real estate, which alleges that, by reason of the premises, insured has suffered damages in a specified sum, is sufficient to permit proof of such damage as is the naturally and legally presumable consequences of the injury done.[73]

D. Evidence — 1. Admissibility. The general rules of evidence[74] apply to actions on title insurance policies.[75] Oral evidence of mistake in the date of the written instrument is always admissible;[76] but testimony of experts in such insurance as to what ought to have been done in the issuance of a policy in question is inadmissible to support the legal conclusion that the policy should have been different in form.[77]

2. Production of Books and Records. It would seem that in a proper case the books and records of the insurer may be procured for evidence under a subpoena *duces tecum*;[78] but the production of books and writings which are the private property of the insurer will not be compelled merely for the information of the public,[79] for the insurer has a vital interest in maintaining the secrecy of these books as a repository of valuable information.[80]

Where the alleged indebtedness is a mere conclusion of the pleader, without the averment of any facts to support it, and indebtedness is not legally shown, the promise to pay is *nudum pactum*. Taylor *v.* New Jersey Title Guarantee, etc., Co., 70 N. J. L. 24, 56 Atl. 152.

68. Economy Bldg., etc., Assoc. *v.* West Jersey Title Co., 64 N. J. L. 27, 44 Atl. 854.

69. Taylor *v.* New Jersey Title Guarantee, etc., Co., 70 N. J. L. 24, 56 Atl. 152.

70. Taylor *v.* New Jersey Title Guarantee, etc., Co., 70 N. J. L. 24, 56 Atl. 152.

71. Taylor *v.* New Jersey Title Guarantee, etc., Co., 70 N. J. L. 24, 56 Atl. 152.

72. Taylor *v.* New Jersey Title Guarantee, etc., Co., 70 N. J. L. 24, 56 Atl. 152.

73. Glyn *v.* Title Guarantee, etc., Co., 132 N. Y. App. Div. 859, 117 N. Y. Suppl. 424, holding that it is not necessary that plaintiff allege in his complaint facts upon which the amount of his damages can be estimated, and that a general allegation of damage is sufficient.

74. See Evidence, 16 Cyc. 821.

75. See Trenton Potteries Co. *v.* Title Guarantee, etc., Co., 176 N. Y. 65, 68 N. E. 132.

76. Trenton Potteries Co. *v.* Title Guarantee, etc., Co., 176 N. Y. 65, 68 N. E. 132.

77. Trenton Potteries Co. *v.* Title Guarantee, etc., Co., 176 N. Y. 65, 68 N. E. 132.

78. See *Ex p.* Calhoun, 87 Ga. 359, 13 S. E. 694.

79. *Ex p.* Calhoun, 87 Ga. 359, 13 S. E. 694, where the disclosure was not sought as testimony for the proof of any alleged fact, but as a substitute in the first instance for the allegation of facts unknown, or not known sufficiently to enable plaintiff to set them forth conformably to general laws applicable to pleading.

80. *Ex p.* Calhoun, 87 Ga. 359, 13 S. E. 694, holding that these abstract books come into existence as the result of private enterprise and labor, and are the private property of the insurer and are used by it in the conduct of its corporate business. They have never been published, and their contents are kept secret, except as disclosed, piecemeal, in furnishing to applicants therefor abstracts of title relating to specified parcels of real estate; and the furnishing of such abstracts is carried on as a business for pay and profit. The value of the books consist mainly in the secrecy of their contents. Were the information which they afford rendered accessible to the public by other means, the demand for it through the one source now available would be diminished, if not destroyed. The monopoly enjoyed by a closely sealed intelligence office would be

E. Amount of Recovery. Title insurance being strictly a contract of indemnity and not of guaranty,[81] the assured is entitled to recover only for the actual loss which has arisen by reason of the defects or encumbrances against which defendant covenanted to indemnify.[82] In a case of total loss of title, there is but one measure to be applied, and that is the value of the property lost;[83] and assured in a policy insuring the title against encroachments is entitled to recover the difference between the value of the property when purchased as it was with encroachments and its value as it would have been if there would have been no such encroachments;[84] but where, by a policy on a mortgage, an insurer agrees to insure from all loss or damage, not exceeding an amount specified, which the assured shall sustain by reason of defects or unmarketability of the title of the assured to the estate, mortgage, or interest described, or because of any liens on it or encumbrances charging the same at the date of the policy, and there is a total loss to the assured by reason of the sale of the property mortgaged under a prior mortgage in existence at the date of the policy, the insurance company is liable only for the actual value of the land, and not for the amount of the mortgage insured.[85] The provisions of such a policy do not constitute the insurer a surety for the mortgage debt, or a guarantor of its payment, nor does the insurer undertake to insure that the property mortgaged is a sufficient security for the debt; what it does undertake to do is to indemnify against loss or damage sustained by reason of defects of title and liens upon the land;[86] but where, under the condition attached to the policy, the insurer has the option to defend the suit, and it elects to defend, it must be held to do so for its own benefit, and must exercise reasonable care; if it fails to do so, it is liable for any loss caused by such failure, and the limitation in the policy of the amount of insurance does not apply.[87] One in possession of land and claiming a title in fee simple who applies in good faith to an insurer which issues to him a policy, and thereafter it is decided in partition proceedings that he has only a half interest in the land, and the assured because thereof voluntarily surrenders the premises to a purchaser at judicial sale, may recover the value from the insurer and it cannot claim that, as he never had title to the half interest, he suffered no loss.[88]

broken, and the losses inflicted by free competition would be instantly felt.

81. See *supra*, I.

82. Purcell *v.* Land Title Guarantee Co., 94 Mo. App. 5, 67 S. W. 726; Trenton Potteries Co. *v.* Title Guarantee, etc., Co., 176 N. Y. 65, 68 N. E. 132; Palliser *v.* New York Title Ins. Co., 61 Misc. (N. Y.) 490, 115 N. Y. Suppl. 545; German-American Title, etc., Co. *v.* Citizens' Trust, etc., Co., 190 Pa. St. 247, 42 Atl. 682; Wheeler *v.* Real Estate Title Ins., etc., Co., 160 Pa. St. 408, 28 Atl. 849; Banes *v.* New Jersey Title Guarantee, etc., Co., 142 Fed. 957, 74 C. C. A. 127; Minnesota Title Ins., etc., Co. *v.* Drexel, 70 Fed. 194, 17 C. C. A. 56.

Where assured contracted to sell the premises, subject to certain assessments specified in the policy, and the vendee refused to take title until certain other assessments not specified were paid, assured cannot maintain an action on the policy until he has paid off the assessments or the premises have been sold in enforcement thereof. Palliser *v.* New York Title Ins. Co., 61 Misc. (N. Y.) 490, 115 N. Y. Suppl. 545.

83. Gauler *v.* Solicitors' L. & T. Co., 9 Pa. Co. Ct. 634, holding that the case at hand was not a case of defective title, or an encumbrance requiring removal, in which plaintiff would be entitled to recover the cost and expenses incurred in curing the defect or removing the encumbrance. The deed of assignment of ground-rent showed that plaintiff paid two hundred and sixty-six dollars and sixty-six cents for it, and the policy covered any loss not exceeding two hundred and sixty dollars, for which amount judgment was given.

84. Glyn *v.* Title Guarantee, etc., Co., 132 N. Y. App. Div. 859, 117 N. Y. Suppl. 424.

85. Whiteman *v.* Merion Title, etc., Co., 25 Pa. Super. Ct. 320.

86. Whiteman *v.* Merion Title, etc., Co., 25 Pa. Super. Ct. 320.

87. Quigley *v.* St. Paul Title Ins., etc., Co., 60 Minn. 275, 62 N. W. 287, holding that where an insurer undertook to defend the interest of assured in the premises against a lien, it was bound to protect him through all stages of the proceeding to enforce the lien, as well after as before judgment therein, or notify him that it could not do so, and furnish him necessary information of the status of the proceeding in time to enable him to protect himself; and if, after giving such notice, the insurer defended the proceeding, but thereafter abandoned the defense, it was necessary for it to give assured another such notice.

88. Foehrenbach *v.* German-American

F. Offsets. Counter-claims are allowed in actions on policies of title insurance,[89] in like manner as in other actions,[90] and as in other actions a claim, in order to be the subject of counter-claim, must be due at the time of trial; [91] but where the answer sets up a counter-claim upon the note of plaintiff not due at the time of the trial, and no objection is made that it is premature, but the case is tried throughout, including the charge of the court, not excepted to, on the theory that it is a proper counter-claim, plaintiff must be held to have waived the objection that the note was not yet due.[92]

VI. TITLE INSURANCE COMPANIES.

A. Organization and Status. The business of title insurance is carried on to-day almost exclusively by insurance companies incorporated under state laws prescribing their powers and limitations and providing for state regulation;[93] and in the insurance laws of the several states these corporations are placed upon substantially the same footing and are made subject to the same rules as apply to other insurance companies excepting so far only as the character of the business transacted by these corporations from that transacted by other insurance companies.[94] In regard to these companies, there are few decisions, because this branch of insurance is modern in origin and because the organization of the companies is of such comparatively recent date that decisions bearing upon their rights and liabilities are still rare.[95]

B. Liability as Abstracter or Conveyancer — 1. COMPARED WITH LIABILITY AS INSURER. Title insurance companies sometimes combine with the business of title insurance the examination of titles and conveyancing and as to the two businesses the duty and liability of the company is radically different.[96] In all matters relating to searching titles and conveyancing the company holds itself out to the public and assumes to discharge the same duties as an individual conveyancer or attorney, and in such transactions its duties and responsibilities

Title, etc., Co., 217 Pa. St. 331, 66 Atl. 561, 12 L. R. A. N. S. 465.

89. See Stensgaard *v.* St. Paul Real Estate Title Ins. Co., 50 Minn. 429, 52 N. W. 910, 17 L. R. A. 575.

90. See RECOUPMENT, SET-OFF, AND COUNTER-CLAIM, 34 Cyc. 618.

91. Stensgaard *v.* St. Paul Real Estate Title Ins. Co., 50 Minn. 429, 52 N. W. 910, 17 L. R. A. 575.

92. Stensgaard *v.* St. Paul Real Estate Title Ins. Co., 50 Minn. 429, 52 N. W. 910, 17 L. R. A. 575.

93. See the statutes of the several states.

Probably Pennsylvania was the first to provide for the incorporation of companies to insure titles, by a statute passed in 1874 and since amended from time to time. See 42 Cent. L. J. 445 note.

In New York five or more persons may form a corporation to examine titles to real property and chattels real, to procure and furnish information in relation thereto, make and guarantee the correctness of searches for all instruments, liens, or charges affecting the same, guarantee or insure the payment of bonds and mortgages and guarantee and insure the owners of real property and chattels real and others interested therein against the loss by reason of defective titles thereto and other encumbrances thereon, and it is provided that such a corporation shall be known as a title guaranty corporation. Wadhams' Consol. Laws N. Y. c. 28, § 170. The act provides for the filing of a certificate of incorporation and specifies the contents thereof (§ 170); the manner of subscription to capital stock (§ 171); the passing of by-laws and the purposes thereof (§ 172); the issue by the superintendent of insurance of a certificate (§ 173); the filing of a certificate with the superintendent of full payment of capital stock (§ 174); and the manner of investment of the capital and funds of the company (§ 176). The act furthermore provides for the merger of corporations of this class (§ 179), and confers additional powers on certain specified title guaranty companies (§ 180).

The business has become very extensive, every considerable city having one or more title companies, which unite the business of examining titles with that of insuring them. The thoroughness which characterizes the work of these companies is attested by the remarkably small number of cases involving title insurance that are to be found in the reports. Vance Ins. 590.

94. Trenton Potteries Co. *v.* Title Guarantee, etc., Co., 50 N. Y. App. Div. 490, 64 N. Y. Suppl. 116.

95. 42 Cent. L. J. 445 note.

96. See Economy Bldg., etc., Assoc. *v.* West Jersey Title Co., 64 N. J. L. 27, 44 Atl. 854; Ehmer *v.* Title Guarantee, etc., Co., 156 N. Y. 10, 50 N. E. 420.

are the same.[97] As insurers of titles, however, these companies enter into contracts of an entirely different nature, contracts wherein the doctrine of skill and care has no application,[98] for where a company issues its policy of insurance guaranteeing that the title is not unmarketable or defective, no question of negligence in searching can arise. The guarantee is absolute, subject only to the conditions of the policy,[99] and to an action on the title policy it is no defense that the conveyancing was done by plaintiff's conveyancer.[1]

2. Exercise of Skill and Care. The obligation devolves upon the company in such cases to exercise ordinary reasonable skill and knowledge of the profession;[2] and liability can only be predicated on negligence and misconduct in the examination.[3]

3. Damages For Negligence. Damages recoverable for negligence in searching and in conveyancing are such as are the natural and necessary result of the negligence,[4] and the company is liable for the full amount of loss caused by the negligence and not merely for the amount of insurance specified in the policy.[5]

In Pennsylvania title insurance companies are not authorized to do conveyancing, draw deeds, write wills, or the like. Gauler *v.* Solicitors' L. & T. Co., 9 Pa. Co. Ct. 634.

97. Renkert *v.* Title Guaranty Trust Co., 102 Mo. App. 267, 76 S. W. 641 (where the company undertook to inform plaintiff concerning the state of the title, in order that he might buy intelligently, and furnished a document purporting to inform him, but which left off a judgment lien, which omission not only tended to mislead plaintiff, but was nearly certain to mislead him, and it was held actionable negligence to furnish such a document, for it was delivered and accepted as one on which a prospective purchaser might base his decision to buy or not); Ehmer *v.* Title Guarantee, etc., Co., 156 N. Y. 10, 50 N. E. 420; Trenton Potteries Co. *v.* Title Guarantee, etc., Co., 50 N. Y. App. Div. 490, 64 N. Y. Suppl. 116; Glyn *v.* Title Guarantee, etc., Co., 132 N. Y. App. Div. 859, 117 N. Y. Suppl. 424, holding that the company must exercise due care in investigating the title and disclose the result, and advise the purchaser as to what course he should take in view of the facts, and that where it undertakes to act for a purchaser of land as a conveyancer, and examines the title, and advises whether it is good and marketable, it is chargeable with knowledge of encroachments on the property, patent on inspection, although such encroachments are apparently not of a character on which to found a claim of title to any part of the premises, since it must advise the purchaser of the exact character of the encroachments, to the end that the purchaser may intelligently determine whether he will accept the title so encumbered. See also Economy Bldg., etc., Assoc. *v.* West Jersey Title Co., 64 N. J. L. 27, 44 Atl. 484.

Duties and liabilities of a searcher of records generally see Abstracts of Title, 1 Cyc. 214 *et seq.*

98. Trenton Potteries Co. *v.* Title Guarantee, etc., Co., 50 N. Y. App. Div. 490, 64 N. Y. Suppl. 116.

99. Trenton Potteries Co. *v.* Title Guarantee, etc., Co., 176 N. Y. 65, 68 N. E. 132. And see Purcell *v.* Land Title Guarantee Co., 94 Mo. App. 5, 67 S. W. 726; Wheeler *v.* Equitable Trust Co., 206 Pa. St. 428, 55 Atl. 1065.

Deeds and encumbrances not of record are not covered. Bothin *v.* California Title Ins., etc., Co., 153 Cal. 718, 96 Pac. 500.

1. Gauler *v.* Solicitors' L. & T. Co., 9 Pa. Co. Ct. 634.

2. Trenton Potteries Co. *v.* Title Guarantee, etc., Co., 50 N. Y. App. Div. 490, 64 N. Y. Suppl. 116.

Application by owner as putting company on notice.— The fact that an application is made for title insurance by one who at the time claims to be the owner is sufficient of itself to put the insurance company on its guard, and ought to be regarded by it as notice that unusual care should be taken in the examination of the title. Foehrenbach *v.* German-American Title, etc., Co., 217 Pa. St. 331, 66 Atl. 561, 12 L. R. A. N. S. 465.

3. Trenton Potteries Co. *v.* Title Guarantee, etc., Co., 50 N. Y. App. Div. 490, 64 N. Y. Suppl. 116 [*citing* Ehmer *v.* Title Guarantee, etc., Co., 156 N. Y. 10, 50 N. E. 420].

4. Ehmer *v.* Title Guarantee, etc., Co., 156 N. Y. 10, 50 N. E. 420.

Duty of assured to reduce damages.— If through mistake of the company in conveying the wrong premises, defendant never had ownership of the property, he is not under any obligation to sell the premises for the highest price obtainable, and thus reduce damages, but defendant is liable for the amount which plaintiff has paid for the property on defendant's advice. Ehmer *v.* Title Guarantee, etc., Co., 156 N. Y. 10, 50 N. E. 420.

5. Quigley *v.* St. Paul Title Ins., etc., Co., 60 Minn. 275, 62 N. W. 287; Ehmer *v.* Title Guarantee, etc., Co., 156 N. Y. 10, 50 N. E. 420 [*cited* in Trenton Potteries Co. *v.* Title Guarantee, etc., Co., 176 N. Y. 65, 68 N. E. 132].

TITLE PAGE. The preliminary page of a book or of a written or printed work of any kind, which contains its full title and particulars as to its authorship, publication, etc.;[1] the first page of a book containing the title;[2] the page at the front of a literary production containing the title;[3] the page containing the title of a book;[4] the page of a book which contains its title.[5]

TITULO. In Spanish law, the cause in virtue of which anything is possessed, and the instrument by which the right is accredited.[6]

TITULUS EST JUSTA CAUSA POSSIDENDI ID QUOD NOSTRUM EST. A maxim meaning "A title is the just right of possessing that which is our own."[7]

TO. A preposition properly applicable to place or position;[8] conveying to the mind the idea of movement towards and actually reaching a specified point or object;[9] a term of exclusion unless, by necessary implication, it is manifestly used in a different sense.[10] Yet it is in common parlance, and sometimes in legal phraseology, applied to time. In regard to time it often indicates a coming or passing into a day, as well as arrival at it.[11] It also has various significations indicating towards, to, and into;[12] direction; connection with; appurtenant.[13]

1. Century Dict. [*quoted* in Freeman *v.* Trade Register, 173 Fed. 419, 423].

2. Stormonth Dict. [*quoted* in Freeman *v.* Trade Register, 173 Fed. 419, 423].

3. Standard Dict. [*quoted* in Freeman *v.* Trade Register, 173 Fed. 419, 423], adding: "In books it usually contains the names of author and publisher and date of publication."

4. Worcester Dict. [*quoted* in Freeman *v.* Trade Register, 173 Fed. 419, 423].

5. Webster Dict. [*quoted* in Freeman *v.* Trade Register, 173 Fed. 419, 423].

6. Escriche Dict. [*quoted* in De Haro *v.* U. S., 5 Wall. (U. S.) 599, 626, 18 L. ed. 681, where it is said: "In Spain and Mexico there are a class of titles (*titulos*), not translative of property"].

"The word . . . is a nomen generalissimum, to be applied as well to title-papers, which convey title, in the usual acceptation of the term, as to those which confer a mere right of occupancy." De Haro *v.* U. S., 5 Wall. (U. S.) 599, 626, 18 L. ed. 681.

"Titulo colorado" is one which a person has when he buys a thing, in good faith, from one whom he believes to be the owner. Doliendo *v.* Biarnesa, 7 Philippine 232, 234.

"Titulo putativo" is one which is supposed to have preceded the acquisition of a thing, although in fact it did not, as might happen when one is in possession of a thing in the belief that it had been bequeathed to him. Doliendo *v.* Biarnesa, 7 Philippine 232, 234.

7. Peloubet Leg. Max. [*citing* Altham's Case, 8 Coke 150*b*, 153*b*, 77 Eng. Reprint 701].

8. Conawingo Petroleum Refining Co. *v.* Cunningham, 75 Pa. St. 138, 140, where the word is distinguished from "till" or "until."

9. Stevens *v.* Ambler, 39 Fla. 575, 579, 23 So. 10; Moran *v.* Lezotte, 54 Mich. 83, 87, 19 N. W. 757.

10. Bouvier L. Dict. [*quoted* in Stough *v.* Reeves, 42 Colo. 432, 437, 95 Pac. 958; Maynes *v.* Gray, 69 Kan. 49, 50, 76 Pac. 443]. See also Garden City *v.* Merchants', etc., Nat. Bank, 8 Kan. App. 785, 60 Pac. 823, 824 [*citing* Anderson L. Dict.]; State *v.* Bushey, 84 Me. 459, 460, 24 Atl. 940; Littleton Bridge Co. *v.* Pike, 72 Vt. 7, 8, 47 Atl. 108.

Used in an exclusive sense see Boise Valley Constr. Co. *v.* Kroeger, 17 Ida. 384, 105 Pac. 1070, 1072, 28 L. R. A. N. S. 968; Stearns *v.* Sweet, 78 Ill. 446, 448; Bloch Queensware Co. *v.* Smith, 107 Mo. App. 13, 15, 80 S. W. 592; Moon *v.* Salt Lake County, 27 Utah 435, 442, 76 Pac. 222.

Used in an inclusive sense see Central of Georgia R. Co. *v.* Union Springs, etc., R. Co., 144 Ala. 639, 646, 39 So. 473, 2 L. R. A. N. S. 144; Houghton County St. R. Co. *v.* Laurium, 135 Mich. 614, 620, 98 N. W. 393; Penn Placer Min. Co. *v.* Schreiner, 14 Mont. 121, 123, 35 Pac. 878; Rex *v.* Knight, 7 B. & C. 413, 415, 6 L. J. M. C. O. S. 19, 1 M. & R. 217, 14 E. C. L. 188, 108 Eng. Reprint 777.

"To," "till," and "until" are synonymous, and are sometimes ambiguous and equivocal in the particular connection in which they occur, and are therefore construed as exclusive or inclusive according as the subject-matter about which they are used may show the intention, in using the words, to have been. Gottlieb *v.* Fred W. Wolf Co., 75 Md. 126, 132, 23 Atl. 198. See also Maynes *v.* Gray, 69 Kan. 49, 50, 76 Pac. 443; State *v.* Benson, 21 Wash. 365, 370, 58 Pac. 217.

Meaning of term in designation of boundaries see BOUNDARIES, 5 Cyc. 869 note 4.

"The words 'from,' 'to,' and 'at,' are taken inclusively, according to the subject-matter." Union Pac. R. Co. *v.* Hall, 91 U. S. 343, 348, 23 L. ed. 428.

11. Conawingo Petroleum Refining Co. *v.* Cunningham, 75 Pa. St. 138, 140.

12. Conawingo Petroleum Refining Co. *v.* Cunningham, 75 Pa. St. 138, 140.

Construed as "in" see Delorme *v.* Ferk, 24 Wis. 201, 203. Or "within" see Chicago *v.* MacChesney, 240 Ill. 174, 176, 88 N. E. 560.

Used in sense of "into" see Waycross Air-Line R. Co. *v.* Offerman, etc., R. Co., 109 Ga. 827, 829, 35 S. E. 275; Hazlehurst *v.* Freeman, 52 Ga. 244, 246; Farmers' Turnpike Road *v.* Coventry, 10 Johns. (N. Y.) 389, 392. See also People *v.* Klammer, 137 Mich. 399, 402, 100 N. W. 600; Mohawk Bridge Co. *v.* Utica, etc., R. Co., 6 Paige (N. Y.) 554, 562.

13. Scales *v.* Masonic Protective Assoc., 70

TOBACCO. A narcotic not generally regarded as an article of food, sold as a

N. H. 490, 491, 48 Atl. 1084, distinguishing the word from "in." See also Balch *v.* Arnold, 9 Wyo. 17, 33, 59 Pac. 434.

In many cases the word has a meaning nearly synonymous with "towards." Moran *v.* Lezotte, 54 Mich. 83, 87, 19 N. W. 757. Used in sense of "towards" see Colledge *v.* Harty, 6 Exch. 205, 211, 20 L. J. Exch. 146.

Known "by" construed as meaning the same as known "to." Com. *v.* Griffin, 105 Mass. 175, 176.

"From the first day of January to the first day of October" construed as "between the first day of January and the first day of October." State *v.* Stone, 20 R. I. 269, 38 Atl. 654.

The phrases "to a moral and reasonable certainty" and "beyond a reasonable doubt," as applied to the quality of proof in a case, are identical in meaning. Austin *v.* State, 6 Ga. App. 211, 212, 64 S. E. 670.

"To be" is sometimes used as synonymous with "to become," "to be made to be." Boisdere *v.* Citizens' Bank, 9 La. 506, 511, 29 Am. Dec. 453.

"Brings evidence to show" distinguished from "brings facts that show." Central R. Co. *v.* Freeman, 75 Ga. 331, 338.

Used in connection with other words.— "To a common purpose" see Gulf, etc., R. Co. *v.* Warner, 89 Tex. 475, 479, 35 S. W. 364. "To a highway" in deed see Buck *v.* Squiers, 22 Vt. 484, 489. "To 'all intents and purposes whatsoever'" in statute see Reg. *v.* St. Leonard, 13 Q. B. 964, 975, 66 E. C. L. 964; Bowyer *v.* Bampton, Str. 1155, 93 Eng. Reprint 1096. "To a road" in conveyance see Sizer *v.* Devereux, 16 Barb. (N. Y.) 160, 166. "'To' and 'along'" in description in deed see Kings County F. Ins. Co. *v.* Stevens, 87 N. Y. 287, 293, 41 Am. Rep. 361. "To and amongst" in will see Doe *v.* Alchin, 2 B. & Ald. 122, 125, 106 Eng. Reprint 311. "To and for the use of" in a state constitution see Rutgers College *v.* Morgan, 71 N. J. L. 663, 670, 60 Atl. 205. "To arrive" in contract for sale of goods see Benedict *v.* Field, 16 N. Y. 595, 597; Fraser *v.* Harbeck, 4 Rob. (N. Y.) 179, 181; Shields *v.* Pettie, 2 Sandf. (N. Y.) 262, 268; Rogers *v.* Woodruff, 23 Ohio St. 632, 636, 13 Am. Rep. 276; Gorrissen *v.* Perrin, 2 C. B. N. S. 681, 700, 3 Jur. N. S. 867, 27 L. J. C. P. 29, 5 Wkly. Rep. 709, 89 E. C. L. 681; Johnson *v.* Macdonald, 6 Jur. 264, 12 L. J. Exch. 99, 9 M. & W. 600. See also ARRIVE, 3 Cyc. 981. "To be charged" in city ordinance see Chicago Union Traction Co. *v.* Chicago, 199 Ill. 484, 546, 65 N. E. 451, 59 L. R. A. 666. "To be commenced" in statute see White *v.* Hunt, 6 N. J. L. 415, 418. "To be defined" see State *v.* Hocker, 36 Fla. 358, 367, 18 So. 767. "'To be' designated from time to time" in statute see *In re* Folsom, 56 N. Y. 60, 65. "To be divided equally" in will see Henry *v.* Thomas, 118 Ind. 23, 30, 20 N. E. 519. "To be divided between them into three parts" in will see Anderson *v.* Parsons, 4 Me. 486, 491. "To be forwarded" in contract of carriage see Fischer *v.* Merchants' Dispatch Transp. Co., 13 Mo. App. 133, 137. "To be inhabited" in statute see Crow *v.* Davis, 91 L. T. Rep. N. S. 88, 92; London County Council *v.* Davis, 77 L. T. Rep. N. S. 693, 696, 14 T. L. R. 113. "To be left till called for" in contract of carriage of goods see Chapman *v.* Great Western R. Co., 5 Q. B. D. 278, 282, 44 J. P. 363, 49 L. J. Q. B. 420, 42 L. T. Rep. N. S. 252, 28 Wkly. Rep. 566. "To be paid" in promissory note see Williams *v.* Sims, 22 Ala. 512, 516. "To be paid" in statute see Bull *v.* Case, 165 N. Y. 578, 580, 59 N. E. 301. "'To be' passed" in bond see Nares *v.* Rowles, 14 East 510, 518, 104 Eng. Reprint 697. "To be prosecuted" in statute see *In re* Shapter, 44 Colo. 547, 554, 99 Pac. 35. "To be proved signature" see Matter of Burbank, 104 N. Y. App. Div. 312, 318, 93 N. Y. Suppl. 866. "To be selected" in conveyance see Donworth *v.* Sawyer, 94 Me. 243, 251, 47 Atl. 521. "To be taken" in contract of sale see Atkinson *v.* Truesdell, 57 N. Y. Super. Ct. 226, 227, 6 N. Y. Suppl. 509. "To be used and disposed of during her life" in will see Powers *v.* Wells, 244 Ill. 558, 569, 91 N. E. 717. "To be 'used' by a certain day" in railroad ticket see Gulf, etc., R. Co. *v.* Looney, 85 Tex. 158, 166, 19 S. W. 1039, 34 Am. St. Rep. 787, 16 L. R. A. 471. "To be used as cabinet warerooms" in lease see Brugman *v.* Noyes, 6 Wis. 1, 10. "To have and to hold" in deed see Wheeler *v.* Wayne County, 132 Ill. 599, 605, 24 N. E. 625. "To her own proper use" in will see Snyder *v.* Snyder, 10 Pa. St. 423, 424. "To her sole and separate use" in deed see Newman *v.* James, 12 Ala. 29, 31. "To her use and behoof forever" in will see Chase *v.* Ladd, 153 Mass. 126, 127, 26 N. E. 429, 25 Am. St. Rep. 614. "To his wife" in will see *In re* Gruendike, 154 Cal. 628, 631, 98 Pac. 1057. "To its natural condition" in ordinances in reference to streets see Cook *v.* North Bergen Tp., 72 N. J. L. 119, 122, 59 Atl. 1035. "To the low water mark" in colonial ordinance see Emerson *v.* Taylor, 9 Me. 42, 43, 23 Am. Dec. 531. "To me known" in acknowledgment see Carolan *v.* Yoran, 104 N. Y. App. Div. 488, 490, 93 N. Y. Suppl. 935. "To, or from, the kilns" see Janes *v.* Fonda, 58 Vt. 453, 454, 3 Atl. 195. "To plaintiff's damage" in pleading see Buer *v.* Prescott, (Tex. 1890) 14 S. W. 138. "To prevent" see Missouri Pac. R. Co. *v.* Eckel, 49 Kan. 794, 800, 31 Pac. 693. "To said city" see Von Hostrup *v.* Madison City, 1 Wall. (U. S.) 291, 297, 17 L. ed. 538. "To the amount of" see Swartley *v.* McCracken, 7 Montg. Co. Rep. (Pa.) 49, 50. "To the amount of stock" in state constitution see McDonnell *v.* Alabama Gold L. Ins. Co., 85 Ala. 401, 407, 5 So. 120. "To the bank" in deed see Thomas *v.* Hatch, 23 Fed. Cas. No. 13,899, 3 Sumn. 170, 179. "'To' the full amount" in statute see Siegman *v.* Maloney, 63 N. J. Eq. 422, 440, 51 Atl. 1003. "To the road" in deed see Goodeno *v.* Hutchinson, 54 N. H. 159, 163.

luxury, but never classed as a "drug."[14] (Tobacco: As Property Subject of Commerce, see COMMERCE, 7 Cyc. 441. Duty on, see CUSTOMS DUTIES, 12 Cyc. 1121. Internal Revenue Tax on, see INTERNAL REVENUE, 22 Cyc. 1648. License-Tax on Dealers in, see LICENSES, 25 Cyc. 617. Prohibition of Smoking in Street Cars by Municipal Ordinance, see MUNICIPAL CORPORATIONS, 28 Cyc. 717 note 73. Sale of as Violation of Sunday Law, see SUNDAY, 37 Cyc. 554. Storage of, see WAREHOUSEMEN.)

TOGETHER. In company, in conjunction, simultaneously; in the same place; in the same time; the one with the other; in or into combination, conjunction, or union; without intermission;[15] in company;[16] into or in union with each other as wholes or parts so as to be combined or joined with each other; conjointly; in the same place or at the same spot, with each other locally, as in company; at the same moment of time, simultaneously, contemporaneously; with one another, mutually, reciprocally.[17] (See LEWDNESS, 25 Cyc. 210.)

TOGETHER WITH. In union, combination, or company with;[18] in company with.[19]

TOILET SOAP. A soap used as a detergent for cleansing purposes only.[20]

TOKEN. A sign or mark;[21] a document or sign of the existence of a fact.[22]

TOLERABLY. A term used to indicate an indifferent condition or state.[23]

TOLERATE. To allow so as not to hinder; to permit as something not wholly approved; to suffer; to endure; to admit.[24]

"To that end" in will see Weber *v.* Bryant, 161 Mass. 400, 402, 37 N. E. 203. "To the road and thence by the road" see Oxton *v.* Groves, 68 Me. 371, 372, 28 Am. Rep. 75. "To the shore" see Whitmore *v.* Brown, 100 Me. 410, 414, 61 Atl. 985. "To the water" in deed see Babson *v.* Tainter, 79 Me. 368, 370, 10 Atl. 63. "'To,' 'upon' or 'along a highway'" in deed see Church *v.* Stiles, 59 Vt. 642, 644, 10 Atl. 674. "To whom it may concern" in guaranty see Sawyer *v.* Hopgood, 13 N. Y. St. 711.

14. State *v.* Ohmer, 34 Mo. App. 115, 120, 124, where it was held that tobacco did not come within the exception in a statutory provision against exposing to sale "any goods, wares, etc. . . . on the first day of the week, commonly called Sunday."

"Leaf tobacco" consists of three classes, "wrappers," "fillers," and "binders." "Wrappers" are leaves suitable for the outside finish of a cigar; "fillers" are leaves that make up the main body of the cigar; and "binders" are the secondary or inside wrapper, and hold together the loose material which constitutes the filling. Falk *v.* Robertson, 137 U. S. 225, 231, 11 S. Ct. 41, 34 L. ed. 645. See also LEAF TOBACCO, 25 Cyc. 170.

15. Century Dict. [*quoted* in Clack *v.* Hadley, (Tenn. Ch. App. 1901) 64 S. W. 403, 407].

16. Webster Dict. [*quoted* in Clack *v.* Hadley, (Tenn. Ch. App. 1901) 64 S. W. 403, 407].

17. Standard Dict. [*quoted* in Clack *v.* Hadley, (Tenn. Ch. App. 1901) 64 S. W. 403, 407].

Fellow servants.— As used in a statute defining fellow servants, the term was construed to mean physical nearness at the time of the injury, coupled with the common purpose of the labors of the two servants. Lukic *v.* Southern Pac. Co., 160 Fed. 135, 137. See also Dryburg *v.* Mercur Gold Min., etc., Co., 18 Utah 410, 423, 55 Pac. 367.

Where a declaration against the owner of a stage coach asserted that the owner undertook to carry the plaintiff, her children and servants, "together" in and by a certain stage, evidence that the whole inside of the coach was taken for the plaintiff and her three daughters and two outside places for her servants, supported the averments. Long *v.* Horne, 1 C. & P. 610, 12 E. C. L. 346.

"Together with all improvements I may hereafter make."— See Aspinwall Mfg. Co. *v.* Gill, 32 Fed. 697, 700.

18. Century Dict. [*quoted* in Clack *v.* Hadley, (Tenn. Ch. App. 1901) 64 S. W. 403, 407].

19. Webster Dict. [*quoted* in Clack *v.* Hadley, (Tenn. Ch. App. 1901) 64 S. W. 403, 407].

20. Park *v.* U. S., 66 Fed. 731, where it is held that the term, as used in a customs act, will not include a "medical soap."

21. State *v.* Green, 18 N. J. L. 179, 181.

22. Bouvier L. Dict. [*quoted* in Jones *v.* State, 50 Ind. 473, 476], adding: "Tokens are either public or general, or privy tokens. They are either true or false."

False token see FALSE PRETENSES, 19 Cyc. 388.

23. York *v.* Everton, 121 Mo. App. 640, 647, 97 S. W. 604, where it is said that while the term is treated by lexicographers as synonymous with "reasonable" it is not always, if ever, so understood.

"Tolerably safe" and "actually dangerous" are not necessarily conflicting terms; indeed, the former frequently, perhaps usually, implies the latter. Stetler *v.* Chicago, etc., R. Co., 49 Wis. 609, 619, 6 N. W. 303, where such implication is illustrated by example.

24. Gregory *v.* U. S., 17 Blatchf. 325, 330, 10 Fed. Cas. No. 5,803.

TOLL. As a noun, a settled, certain and defined sum exacted for the use of a common passage;[25] a tribute or custom paid for passage, or a duty imposed on goods and passengers traveling public roads, bridges, etc.; a tribute for passage; a reasonable sum due to the lord of a fair for things sold there which are tollable;[26] a tax paid for some use or privilege or other reasonable consideration;[27] the consideration for the use of a road or bridge, not compensation for carriage over it;[28] a tribute or custom paid for passage; something taken for a liberty or privilege;[29] the compensation for the use of another's property or of improvements, made by him;[30] a reasonable sum of money due to the owner of the fair or market upon sale of things tollable within the fair or market, or for stallage, piccage, or the like;[31] a compensation or payment in markets and fairs for goods, cattle, etc., bought and sold;[32] a tax paid for some liberty or privilege, particularly for the privilege of passing on a bridge, or a highway, or for that of vending goods in a fair, market, or the like; a liberty to buy and sell within the bounds of a manor; a portion of grain taken by a miller as compensation for grinding;[33] the compensation allowed by law or custom to a miller for grinding grain.[34] As a verb, to bar, defeat, or take away, as to toll an entry into lands is to deny or take

25 Wadsworth *v.* Smith, 11 Me. 278, 283, 26 Am. Dec. 525.

26 Pennsylvania Coal Co. *v.* Delaware, etc., Canal Co., 3 Abb. Dec. (N. Y.) 470, 475, 1 Keyes 72 [*citing* Burrill L. Dict.; Crabb Real Prop. § 683].

27. McNeal Pipe, etc., Co. *v.* Howland, 111 N. C 615, 624, 16 S. E. 857, 20 L. R. A. 743 [*citing* Century Dict.], where it is held that such was the sense of the term in a statute authorizing the taking on execution of the franchise of a company authorized to receive fare or tolls.

28. Pennsylvania R. Co. *v.* Sly, 65 Pa. St. 205, 210 [*citing* Bouvier L. Dict.].

29. Boyle *v.* Philadelphia, etc., R. Co., 54 Pa. St. 310, 314; New York, etc., R. Co. *v.* Pennsylvania, 158 U. S. 431, 435, 15 S. Ct. 896, 39 L. ed. 1043.

30. Sands *v.* Manistee River Imp. Co., 123 U. S. 288, 294, 8 Sup. Ct. 113, 31 L. ed. 149.

31. Coke Inst. [*quoted* in Lockwood *v.* Wood, 6 Q. B. 31, 43, 10 Jur. 158, 13 L. J. Q. B. 365, 51 E. C. L. 31, where the term was held to include "stallage"].

32. Jacob L. Dict. [*quoted* in Pennsylvania Coal Co. *v.* Delaware, etc., Canal Co., 3 Abb. Dec (N. Y.) 470, 477, 1 Keyes 72].

33. Webster Dict. [*quoted* in Pennsylvania Coal Co. *v.* Delaware, etc., Canal Co., 3 Abb. Dec (N. Y.) 470, 477, 1 Keyes 72].

34. Lake Superior, etc., R. Co. *v.* U. S., 93 U. S. 442, 458, 23 L. ed. 965.

"**The derivation of the word,** signifying the cutting or taking off a portion of a thing, points undoubtedly to an immediate payment or exaction, as by a miller from the grain brought for grinding, or by the lord of a fair or market from the prices of articles sold." Pennsylvania Coal Co. *v.* Delaware, etc., Canal Co., 3 Abb. Dec. (N. Y.) 470, 477, 1 Keyes 72.

"**The term applies at common law to a** very large class of dues and exactions which are in the nature of fixed rights, and which cannot be lawfully exceeded. They are generally if not universally connected with some franchise which involves duties as well as privileges of a general or public nature. The right to receive fixed tolls is found in fairs, markets, mills, turnpikes, ferries, bridges and many other classes of interests where the owner of the franchise is obliged to accommodate the public, and the public in turn are protected from extortion by an obligation to pay only regular dues." McKee *v.* Grand Rapids, etc., St. R. Co., 41 Mich. 274, 279, 1 N. W. 873, 50 N. W. 469.

Does not mean such terms of payment as the parties may agree upon.— In reference to tolls charged for carrying coal by a railroad, in order that the charge may be a toll there must be some relation between the payment to be made and the engines, or wagons, or quantity of coal to be conveyed over the line; some measure upon which the rate, or charge, or payment is to be made. South Yorkshire R., etc., Co. *v.* Great Northern R. Co., 22 L. J. Exch. 305, 308, 22 Eng. L. & Eq. 531. See also Field *v.* Newport, etc., R. Co., 3 H. & N. 409, 416, 27 L. J. Exch. 396.

Includes trackage charges paid by one railroad to another for the use of its track, the lessor being in possession of the road. Com. *v.* New York, etc., Coal, etc., Co., 145 Pa. St. 200, 209, 22 Atl. 807.

Distinguished from "tax" see St. Louis Brewing Assoc. *v.* St. Louis, 140 Mo. 419, 429, 37 S. W. 525, 41 S. W. 911; St. Louis *v.* Western Union Tel. Co., 148 U. S. 92, 97, 13 S. Ct. 485, 37 L. ed. 380; Sands *v.* Manistee River Imp. Co., 123 U. S. 288, 294, 8 S. Ct. 113, 31 L. ed. 149; Philadelphia, etc., R. Co. *v.* Pennsylvania, 15 Wall. (U. S.) 232, 278, 21 L. ed. 146.

Distinguished from "transportation charges" see Pennsylvania R. Co. *v.* Sly, 65 Pa. St. 205, 210; Boyle *v.* Pennsylvania, etc., R. Co., 54 Pa. St. 310, 314; Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. Co., 37 Fed. 567, 616, 2 L. R. A. 289; Wallis *v.* London, etc., R. Co., L. R. 5 Exch. 62, 64, 39 L. J. Exch. 57, 21 L. T. Rep. N. S. 675, 1 R. & Can. Tr. Cas. 24, 18 Wkly. Rep. 347. But in railroad legislation the term is often used to express the charge for transportation also. Lake Superior, etc., R. Co. *v.* U. S., 93 U. S. 442, 454, 23 L. ed. 965, 12 Ct. Cl. 35.

The constitutional prohibition of levy of a duty of tonnage by the states does not apply

away the right of entry.[35] (Toll: Bridge, Public Acquisition of, see BRIDGES, 5 Cyc. 1075. Enforcement in Admiralty, see ADMIRALTY, 1 Cyc. 830. For Driving, Floating, or Rafting Logs, see LOGGING, 25 Cyc. 1572. For Improvement of Channel or Stream, see NAVIGABLE WATERS, 29 Cyc. 301. For Use of Improvements in River, Right of State to Take, see COMMERCE, 7 Cyc. 454. For Use of Turnpike or Toll Road, see TOLL ROADS, *post*, p. 363. For Water, see WATERS. Gate, see TOLL ROADS, *post*, p. 363. Laws Affecting Right to Collect as Impairing Obligation of Contract, see CONSTITUTIONAL LAW, 8 Cyc. 969. Regulation as to — Of Bridge, see BRIDGES, 5 Cyc. 1090; Of Canal, see CANALS, 6 Cyc. 278. Right of — Ferry to Collect, see FERRIES, 19 Cyc. 506; Private Bridge Owner to Take, see BRIDGES, 5 Cyc. 1071.)

TOLLE VOLUNTATEM ET ERIT OMNIS ACTUS INDIFFERENS. A maxim meaning "Take away will, and every action will be indifferent."[36]

TOLLITUR ADJUNCTUUM QUUM EXTINCTO SUBJECTUM. A maxim meaning "When the subject is gone, the adjuncts disappear."[37]

TOLLITUR TOTUM PARTE QUACUMQUE INTEGRANTE SUBLATA. A maxim meaning "An integral part being taken away, the whole is taken away."[38]

to a toll charged for the use of artificial facilities constructed on a stream, which is ascertained by the tonnage of the vessel. Huse *v.* Glover, 119 U. S. 543, 549, 7 S. Ct. 313, 30 L. ed. 487.

"**A toll bridge** is a public highway over which everybody, with his goods and vehicles, has the right to pass." McLeod *v.* Savannah, etc., R. Co., 25 Ga. 445, 462. Also referred to as a franchise created for the use and convenience of the traveling public, as a link in the highway system of the country. People *v.* San Francisco, etc., R. Co., 35 Cal. 606, 619.

Toll-gate.— By a not uncommon figure of speech the term is used for the road on which the gate is allowed to be erected. Fayetteville, etc., Turnpike Co. *v.* State, 15 Lea (Tenn.) 578, 580. Used synonymously in statute with "turnpikes" and "toll-bars" (Northam Bridge Co. *v.* London, etc., R. Co., 6 M. & W. 428, 439), and "turnpike-gate" (Barnes *v.* White, 1 C. B. 192, 214, 9 Jur. 181, 14 L. J. M. C. 65, 1 New Sess. Cas. 504, 50 E. C. L. 192).

Toll-house see Schuylkill Nav. Co. *v.* Berks County, 11 Pa. St. 202, 203.

"**Toll service,**" in reference to telephones, is the service rendered by placing at the disposal of the patron at the transmitting station, and the one at the receiving station, instruments connected by electric wires, by means of which the two are enabled to carry on a conversation. Central Union Tel. Co. *v.* Swoveland, 14 Ind. App. 341, 42 N. E. 1035, 1039.

"**Toll-station,**" in reference to long distance telephones, a station where a message is paid for, for talking, at a certain rate of toll, governed by the location or distance of the station at which the party is. Southern Bell Tel., etc., Co. *v.* Parker, 119 Ga. 721, 726, 47 S. E. 194.

"**Toll thorough**" is a toll demandable by an express grant, by custom or prescription, on a public highway, in a public port, or for the use of public property (Charles River Bridge *v.* Warren Bridge, 11 Pet. (U. S.) 420, 583*q*, 9 L. ed. 773, where it is said to be so termed because the party claiming it is presumed to have had no original right to the place where he demands toll. "He must, therefore, show not only his right to toll, by custom, prescription or grant, but must show some consideration for it, some burden on himself, some benefit to the public, or that he, or those under whom he claims, had once a right to the *locus in quo*, which had been commuted for the toll, and this consideration must be applied to the precise spot where toll is claimed"); a toll which is taken for passing over the highway, in consideration of repair or other benefit done by the owner of the toll, but without any interest or claim in the soil (Rex *v.* Nicholson, 12 East 330, 340, 11 Rev. Rep. 398, 104 Eng. Reprint 129); a sum demanded for a passage through a highway or for a passage over a ferry (6 Comyn Dig. 349 [*quoted* in Lake Superior, etc., R. Co. *v.* U. S., 93 U. S. 442, 458, 23 L. ed. 965]). Distinguished from "toll traverse" see Richards *v.* Bennett, 1 B. & C. 223, 234, 2 D. & R. 389, 1 L. J. K. B. O. S. 97, 25 Rev. Rep. 372, 8 E. C. L. 96, 107 Eng. Reprint 83; Pelham *v.* Pickersgill, 1 T. R. 660, 667, 1 Rev. Rep. 348, 99 Eng. Reprint 1306.

"**Toll traverse**" is a toll demanded for passing on or over the private property of the claimant, or using it in any other way (Charles River Bridge *v.* Warren Bridge, 11 Pet. (U. S.) 420, 583*q*, 9 L. ed. 773, where the term is distinguished from "toll thorough"); a toll which originates in the liberty given to pass over the owner's soil (Rex *v.* Nicholson, 12 East 330, 340, 11 Rev. Rep. 398, 104 Eng. Reprint 129).

35. Bouvier L. Dict. [*quoted* in Earnest *v.* Little River Land, etc., Co., 109 Tenn. 429, 441, 75 S. W. 1122].

36. Black L. Dict. [*citing* Bracton, fol. 2].

37. Morgan Leg. Max. [*citing* Branch Leg. Max.].

38. Morgan Leg. Max. [*citing* Ratcliff's Case, 3 Coke 37*a*, 41*a*, 76 Eng. Reprint 713].

TOLL ROADS

By Stanley A. Hackett.*

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* Author of "Time," *ante*, p. 306. Joint author of "Religious Societies," 34 Cyc. 1112; "Street Railroads," 36 Cyc. 1338.

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CROSS-REFERENCES

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Ejectment to Recover Possession of Tollhouse, see EJECTMENT, 15 Cyc. 16 text and note 43.

Impounding of Animals on Turnpike, see ANIMALS, 2 Cyc. 443 note 59.

Rights of Motor Vehicles on Toll Roads, see MOTOR VEHICLES, 28 Cyc. 26.

Roads and Streets Free From Tolls, see MUNICIPAL CORPORATIONS, 28 Cyc. 832; PENT ROADS, 30 Cyc. 1379; PRIVATE ROADS, 32 Cyc. 363; STREETS AND HIGHWAYS, 37 Cyc. 1.

Taxation of Property of Toll Road Company, see TAXATION, 37 Cyc. 852.

Tolls on Passageways Other Than Roads, see ADMIRALTY, 1 Cyc. 830; BRIDGES, 5 Cyc. 1071; CANALS, 6 Cyc. 278; COMMERCE, 7 Cyc. 454; FERRIES, 19 Cyc. 506; LOGGING, 25 Cyc. 1572; NAVIGABLE WATERS, 29 Cyc. 301; RAILROADS, 33 Cyc. 73.

Turnpike Road as Boundary of Municipality, see MUNICIPAL CORPORATIONS, 28 Cyc. 181 text and note 13.

Use of Toll or Turnpike Road by Street Railroad, see STREET RAILROADS, 36 Cyc. 1392.

I. DEFINITION AND NATURE.

A. Definitions — 1. TOLL ROAD OR TURNPIKE ROAD. A toll road or turnpike road is a road or highway over which the public have the right to travel upon payment of toll, and on which the parties entitled to such toll have the right to erect gates and bars to insure its payment.[1] The term is *nomen generalissimum*,[2] and includes plank roads and gravel roads for passage over which tolls may lawfully be charged and their collection enforced by the use of turnpikes or gates.[3] The word "turnpike" alone does not properly mean a road but a gate,[4]

1. Bouvier L. Dict.

Other definitions are: "A road made by individuals, or by a corporation, on which tolls are collected." Worcester Dict. [*quoted* in Neff *v.* Mooresville, etc., Gravel Road Co., 66 Ind. 279, 284].

"A road across which turnpike gates are erected and tolls taken." Northam Bridge, etc., Co. *v.* London, etc., R. Co., 4 Jur. 892, 9 L. J. Exch. 165, 6 M. & W. 428, 438, 1 R. & Can. Cas. 665 [*quoted* in Reg. *v.* Belleau, 7 Can. Sup. Ct. 53, 62].

A public turnpike "is a way which the public have a right to use." Opinion of Justices, 66 N. H. 629, 672, 33 Atl. 1076.

2. State *v.* Hannibal, etc., Gravel Road Co., 138 Mo. 332, 341, 39 S. W. 910, 36 L. R. A. 457.

3. Neff *v.* Mooresville, etc., Gravel Road Co., 66 Ind. 279, 284; State *v.* Hannibal, etc., Gravel Road Co., 138 Mo. 332, 341, 39 S. W. 910, 36 L. R. A. 457; State *v.* Haight, 30 N. J. L. 443, 446 [*affirmed* in 32 N. J. L. 449].

4. State *v.* Haight, 30 N. J. L. 443, 446 [*affirmed* in 32 N. J. L. 449], where the court said: "The word turnpike does not mean road, but it means gate, such as are used to throw across the road, to obstruct travelers' carriages and the like, until the tolls are collected." See also Northam Bridge, etc., Co. *v.* London, etc., R. Co., 4 Jur. 892, 9 L. J. Exch. 165, 6 M. & W. 428, 439, 1 R. & Can. Cas. 665, where it is said that "the words 'turnpikes,' 'toll-gates,' and 'toll-bars,' are used synonymously."

although it is sometimes used in the former sense and the characteristics of a turnpike road attributed to it.[5]

2. Toll.[6] As used in connection with highways, toll has been defined as a duty imposed on goods and passengers traveling public roads.[7]

3. Turnpike Company. A turnpike company is one which has the power to collect tolls from persons passing over their road, and to enforce the collection by erecting turnpikes or gates, or both, to obstruct the passage till the tolls are paid.[8] This definition, as well as that of turnpike road,[9] is broad enough to include companies owning gravel and plank roads for passage over which tolls may be charged.[10]

4. Other Terms.[11] The word "toll-gate" is sometimes used in statutes as synonymous with turnpike-gate,[12] or turnpikes and toll-bars,[13] or as meaning the road on which the gate is allowed to be erected.[14]

B. Origin and Nature. Turnpike roads originated in England independently of statute, about the middle of the eighteenth century, when certain individuals, with a view to the repair of particular roads, subscribed among themselves for that purpose, and erected gates upon the roads, taking tolls from those who passed through them. They were met with violent opposition at first and petitions were presented to parliament against them, whereupon acts were passed for their regulation.[15] As toll, plank, and turnpike roads are established by public authority and are public easements, every person possessing the right to travel thereon upon payment of toll, they are generally regarded as public highways,[16] the only distinction between them and ordinary roads or highways being that the former are constructed and maintained at private expense, and travel

A turnpike is defined as "a gate set across a road, to stop travelers and carriages until toll is paid for the privilege of passage thereon." Black L. Dict.

5. See Derry Tp. Road, 30 Pa. Super. Ct. 538, 540, where it is said that "a turnpike is a public highway, constructed by virtue of public authority and for public purposes."

6. **General definition of toll** see Toll, *ante*, p. 359.

7. Burrill L. Dict. [*quoted* in Pennsylvania Coal Co. *v.* Delaware, etc., Canal Co., 3 Abb. Dec. (N. Y.) 470, 477 (*affirmed* in 31 N. Y. 91)]. And see St. Louis *v.* Green, 7 Mo. App. 468, 476 [*reversed* in 70 Mo. 562], where it is said that "toll is the price of the privilege of travel over that particular highway, and it is a *quid pro quo*."

It has also been defined as "an excise demanded and paid for the privilege of using the way" and construed to exclude charges for transportation. Boyle *v.* Philadelphia, etc., R. Co., 54 Pa. St. 310, 314.

"Intermediate toll" is a term which has been applied to toll which is collected from persons who use a toll road at points between the toll-gates and who do not pass by, through, or around a toll-gate. See Hollingworth *v.* State, 29 Ohio St. 552, 553.

8. Haight *v.* Jersey City, etc., Plank Road Co., 32 N. J. L. 449, 451 [*affirming* 30 N. J. L. 443].

As otherwise defined a turnpike company is "one that owns and receives tolls on a turnpike road." State *v.* Haight, 30 N. J. L. 443, 445 [*affirmed* in 32 N. J. L. 449].

9. See *supra*, I, A, 1.

10. Neff *v.* Mooresville, etc., Gravel Road Co., 66 Ind. 279, 284; State *v.* Hannibal, etc., Gravel Road Co., 138 Mo. 332, 341, 39 S. W. 910, 36 L. R. A. 457; Haight *v.* Jersey City, etc., Plank Road Co., 32 N. J. L. 449, 451 [*affirming* 30 N. J. L. 443].

11. **"Shunpike" defined** see 36 Cyc. 435.

12. Barnes *v.* White, 1 C. B. 192, 214, 9 Jur. 182, 14 L. J. M. C. 65, 1 New Sess. Cas. 504, 50 E. C. L. 192.

13. Northam Bridge, etc., Co. *v.* London, etc., R. Co., 4 Jur. 892, 9 L. J. Exch. 165, 6 M. & W. 428, 439, 1 R. & Can. Cas. 665.

14. Fayetteville, etc., Turnpike Co. *v.* State, 15 Lea (Tenn.) 578, 580.

15. Northam Bridge, etc., Co. *v.* London, etc., R. Co., 4 Jur. 892, 9 L. J. Exch. 165, 6 M. & W. 428, 1 R. & Can. Cas. 665; Reg. *v.* Belleau, 7 Can. Sup. Ct. 53. And see State *v.* Hannibal, etc., Gravel Road Co., 138 Mo. 332, 39 S. W. 910, 36 L. R. A. 457.

Plank roads began in Russia, were introduced into Canada by Lord Lydenham in 1834, and established in New York in 1846. 580th Dist. Road Com'rs *v.* Griffin, etc., Plank Road Co., 9 Ga. 487.

16. *California.*— Blood *v.* McCarty, 112 Cal. 561, 44 Pac. 1025; Blood *v.* Woods, 95 Cal. 78, 30 Pac. 129; People *v.* Davidson, 79 Cal. 166, 21 Pac. 538.

Colorado.— Virginia Canon Toll Road Co., *v.* People, 22 Colo. 429, 45 Pac. 398, 37 L. R. A. 711, holding that the acceptance by the corporation of the franchise to construct the road and the operation thereof constitute a dedication of the same as a public highway.

Connecticut.— State *v.* Maine, 27 Conn. 641, 71 Am. Dec. 89.

Illinois.— Craig *v.* People, 47 Ill. 487.

Indiana.— Neff *v.* Reed, 98 Ind. 341.

upon them is conditioned on the payment of toll,[17] whereas the latter are generally constructed at public expense and are open for free public passage.[18] The question whether or not a road is a toll or an ordinary road is not to be determined by the material of which it is constructed,[19] or its importance,[20] or by the fact that it is so designated in a statute;[21] but the test is whether or not there exists the right to exact tolls.[22]

Kentucky.— Lexington, etc., R. Co. *v.* Applegate, 8 Dana 289, 33 Am. Dec. 497.

Louisiana.— St. Joseph Plank Road Co. *v.* Kline, 106 La. 325, 30 So. 854.

Maryland.— Patapsco Electric Co. *v.* Baltimore, 110 Md. 306, 72 Atl. 1039.

Massachusetts.— Murray *v.* Berkshire County Com'rs, 12 Metc. 455; Pickard *v.* Howe, 12 Metc. 198; Com. *v.* Wilkinson, 16 Pick. 175, 26 Am. Dec. 654.

Michigan.— Flint, etc., R. Co. *v.* Gordon, 41 Mich. 420, 2 N. W. 648; Grand Rapids, etc., R. Co. *v.* Grand Rapids, etc., R. Co., 35 Mich. 265, 24 Am. Rep. 545.

Missouri.— State *v.* Scott County Macadamized Road Co., 207 Mo. 54, 105 S. W. 752; State *v.* Hannibal, etc., Gravel Road Co., 138 Mo. 332, 39 S. W. 910, 36 L. R. A. 457.

Nevada.— State *v.* Lake, 8 Nev. 276.

New York.— Fox *v.* Union Turnpike Co., 59 N. Y. App. Div. 363, 69 N. Y. Suppl. 551; Rogers *v.* Bradshaw, 20 Johns. 735 [*reversing* 20 Johns. 103].

North Carolina.— State *v.* Johnson, 61 N. C. 140. But see Buncombe Turnpike Co. *v.* Baxter, 32 N. C. 222.

Pennsylvania.— Scranton *v.* Laurel Run Turnpike Co., 225 Pa. St. 82, 73 Atl. 1063; People's Tel., etc., Co. *v.* Berks, etc., Turnpike Road, 199 Pa. St. 411, 49 Atl. 284; Pittsburgh, etc., R. Co. *v.* Com., 104 Pa. St. 583; Northern Cent. R. Co. *v.* Com., 90 Pa. St. 300; *In re* Derry Tp. Road, 30 Pa. Super. Ct. 538; Geiger *v.* Perkiomen, etc., Turnpike Road, 11 Montg. Co. Rep. 25; Stevenson's Appeal, 2 Montg. Co. Rep. 73.

Tennessee.— Montgomery County *v.* Clarksville, etc., Turnpike Co., 120 Tenn. 76, 109 S. W. 1152.

United States.— Covington, etc., Turnpike Road Co. *v.* Sandford, 164 U. S. 578, 7 S. Ct. 198, 41 L. ed. 560 [*reversing* (Ky. 1893) 20 S. W. 1031]; Dodge County *v.* Chandler, 96 U. S. 205, 24 L. ed. 625.

See 47 Cent. Dig. tit. "Turnpikes and Toll Roads," § 3.

Rights of public after forfeiture or termination of franchise see *infra*, II, I, 3.

In Rhode Island, although a turnpike road is recognized as a species of highway and becomes a free public highway upon acceptance by the town of a deed of the road (Gardiner *v.* Johnston Town Council, 16 R. I. 94, 12 Atl. 888), it is not deemed a "highway," within the meaning of Gen. Laws, c. 60, § 22, providing that the proprietors of any artificial watercourse, which "has been or shall be made under, through, or by the side of any highway previously existing," shall maintain all necessary bridges over, and fences along, such watercourse (North Providence *v.* Dyerville Mfg. Co., 13 R. I. 45).

Character as street.— The use, as a street, by the citizens of a municipality within which it lies, of a turnpike or plank road, gives it the character of a street, to the extent that its existence as such cannot be questioned by any party other than the company which owns the turnpike or plank road. Simmons *v.* Passaic, 42 N. J. L. 524; State *v.* Fuller, 34 N. J. L. 227. However, toll and turnpike roads have been held not to be within the meaning of statutes relating to the opening, improvement, and vacation of streets. Quinn *v.* Paterson, 27 N. J. L. 35; Wilson *v.* Allegheny City, 79 Pa. St. 272.

Use by automobiles.— Since a turnpike road is a public highway a turnpike company cannot exclude automobiles from passage over its road. Scranton *v.* Laurel Run Turnpike Co., 225 Pa. St. 82, 73 Atl. 1063.

17. *Colorado.*— Virginia Canon Toll Road Co. *v.* People, 22 Colo. 429, 45 Pac. 398, 37 L. R. A. 711.

Connecticut.— State *v.* Maine, 27 Conn. 641, 648, 71 Am. Dec. 89.

Illinois.— Craig *v.* People, 47 Ill. 487.

Indiana.— Shelby County *v.* Castetter, 7 Ind. App. 309, 33 N. E. 986, 34 N. E. 687.

Massachusetts.— Com. *v.* Wilkinson, 16 Pick. 175, 26 Am. Dec. 654.

Missouri.— State *v.* Hannibal, etc., Gravel Road Co., 138 Mo. 332, 39 S. W. 910, 36 L. R. A. 457.

New Hampshire.— State *v.* New Boston, 11 N. H. 407.

Pennsylvania.— Northern Cent. R. Co. *v.* Com., 90 Pa. St. 300.

See 47 Cent. Dig. tit. "Turnpikes and Toll Roads," § 3.

Conversion of road into free public highway see *infra*, II, G, 2.

18. See STREETS AND HIGHWAYS, 37 Cyc. 1 *et seq.*

19. St. Joseph Plank Road Co. *v.* Kline, 106 La. 325, 30 So. 854; State *v.* Haight, 30 N. J. L. 443 [*affirmed* in 32 N. J. L. 449]. And see *supra*, I, A, 1. *Compare* Louisville *v.* Tyler, 111 Ky. 588, 64 S. W. 415, 65 S. W. 125, 23 Ky. L. Rep. 827, 1609, where it is said to be well understood that a turnpike road means a macadam pavement.

20. Reg. *v.* East India, etc., Docks, etc., Co., 1 C. L. R. 496, 2 E. & B. 466, 17 Jur. 1181, 22 L. J. Q. B. 380, 1 Wkly. Rep. 409, 75 E. C. L. 466, 22 Eng. L. & Eq. 113.

21. Northam Bridge, etc., Co. *v.* London, etc., R. Co., 4 Jur. 892, 9 L. J. Exch. 165, 6 M. & W. 428, 1 R. & Can. Cas. 665.

22. Reg. *v.* East India, etc., Docks, etc., Co., 1 C. L. R. 496, 2 E. & B. 466, 17 Jur. 1181, 22 L. J. Q. B. 380, 1 Wkly. Rep. 409, 75 E. C. L. 466, 22 Eng. L. & Eq. 113; Northam Bridge Co. *v.* London, etc., R. Co., 4 Jur. 892, 9 L. J. Exch. 165, 6 M. & W. 428, 1 R. & Can. Cas. 665.

II. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

A. Right to Establish. The right to exact tolls for the use of a road is not a common right but a sovereign prerogative, and an individual or corporation may possess such a right only under and by virtue of a grant or franchise emanating from the state.[23] This right or franchise, however, is not necessarily a corporate one, there being no fundamental objection to its enjoyment by natural persons.[24] The legislature may confer the right with such limitations and restrictions as it sees fit to impose,[25] and while county boards may lawfully grant such a franchise only when duly authorized by statute,[26] and after judicially determining the existence of the jurisdictional facts prescribed by statute,[27] a grant made by

The distinctive mark of a turnpike road is the right of turning back any one who refuses to pay toll. Northam Bridge Co. *v.* London, etc., R. Co., 4 Jur. 892, 9 L. J. Exch. 165, 6 M. & W. 428, 1 R. & Can. Cas. 665.

23. *Alabama.*—Powell *v.* Sammons, 31 Ala. 552.

California.— Blood *v.* Woods, 95 Cal. 78, 30 Pac. 129; Volcano Canon Road Co. *v.* Placer County, 88 Cal. 634, 26 Pac. 513; Truckee, etc., Turnpike Road Co. *v.* Campbell, 44 Cal. 89.

Colorado.— Virginia Canon Toll Road Co. *v.* People, 22 Colo. 429, 45 Pac. 398, 37 L. R. A. 711.

Georgia.— Pike County Justices *v.* Griffin, etc., Plank Road Co., 9 Ga. 475.

Maine.— See Wadsworth *v.* Smith, 11 Me. 278, 26 Am. Dec. 525, holding, however, that, although it seems that a man cannot without legislative authority open a way across his own land and exact tolls for the use of a common passage thereon, he may open a way for his own accommodation and refuse to permit others to use it without just compensation, and that he may receive and retain such compensation not as toll but as the consideration of an agreement between the parties.

Missouri.— State *v.* Louisiana, etc., Gravel Road Co., 116 Mo. App. 175, 92 S. W. 153.

See 47 Cent. Dig. tit. "Turnpikes and Toll Roads," §§ 1–5.

Express grant necessary.— The grant of a power to construct a turnpike road carries with it no implication of authority to collect tolls; this franchise can only be exercised by virtue of an express grant. String *v.* Camden, etc., Turnpike Co., 57 N. J. Eq. 227, 40 Atl. 774.

When state estopped.— Where a turnpike company is allowed, without objection, to expend a large amount of money in extending its road, under authority of a decree of court, the commonwealth is estopped to question the regularity of the proceedings under which such authority was granted. Com. *v.* Bala, etc., Turnpike Co., 153 Pa. St. 47, 25 Atl. 1105.

24. Joy *v.* Jackson, etc., Plank Road Co., 11 Mich. 155; Allen *v.* Smith, (Tenn. Ch. App. 1898) 47 S. W. 206; Payne *v.* Caughell, 24 Ont. App. 556 [*reversing* 28 Ont. 157].

Transfer of franchise by corporation to individuals see *infra*, II, G, 1.

25. Virginia Canon Toll Road Co. *v.* People, 22 Colo. 429, 45 Pac. 398, 37 L. R. A. 711; State *v.* Lake, 8 Nev. 276 (holding further that an act providing for the constructing and maintaining of toll roads applies only to new roads, and gives no right to the owner of an old road, whose franchise is about expiring, to locate it as a new road); O'Brien *v.* Allen, 30 Can. Sup. Ct. 340.

Power of legislature to authorize erection of toll-gates upon streets see MUNICIPAL CORPORATIONS, 28 Cyc. 289 text and note 47.

Road ceded to state by United States.— The act of April 12, 1870 (67 Ohio Laws 46), which by its terms authorizes the collection of intermediate tolls for traveling on that portion of the national road lying in the state of Ohio, does not violate the conditions of the compact under the act of the Ohio general assembly of Feb. 4, 1831, and the act of congress of March 2, 1831, by which that part of the road was ceded to the state by the general government. Hollingworth *v.* State, 29 Ohio St. 552.

26. Blood *v.* Woods, 95 Cal. 78, 30 Pac. 129; People *v.* Horsley, 65 Cal. 381, 4 Pac. 384 (holding that an act granting a franchise to a county to collect tolls upon a public road does not authorize the county to grant the franchise to other persons); El Dorado County *v.* Davison, 30 Cal. 520.

Constitutionality of statute conferring authority.— Cal. St. (1893) p. 359, authorizing the county board of commissioners to grant licenses and franchises to take tolls on public roads whenever, in their judgment, the expenses of maintaining roads as public highways are too great to justify the county in maintaining them, the licensee being required to keep the road in reasonable repair, does not violate Const. art. 11, § 13, forbidding the legislature to grant any private corporation or person power to control county improvements and property. Blood *v.* McCarty, 112 Cal. 561, 44 Pac. 1025. A prior California statute conferring power on the board of supervisors of a particular county to grant franchises was held unconstitutional on the ground that it was not applicable to turnpike corporations generally. Waterloo Turnpike Road Co. *v.* Cole, 51 Cal. 381.

27. Bedell *v.* Scott, 126 Cal. 675, 59 Pac. 210, holding board's record defective in not showing determination of jurisdictional facts.

them is entitled to the same presumption in favor of its validity as any other grant made by any department of the government.[28] Under the statutes of some jurisdictions, certain designated officials may build and operate toll roads,[29] and statutes requiring certain proceedings by or before designated officials must be complied with before a right to build the road exists.[30] A toll-gate erected without lawful authority upon a highway which belongs to the state or the people thereof is a nuisance and is subject to abatement as such.[31] However, the conversion of a free public highway into a toll road may be authorized, the keeping of the road in repair being deemed a sufficient consideration,[32] and *vice versa* a toll road may be converted into a public highway, free of tolls.[33]

B. Turnpike and Toll Road Companies — 1. Incorporation, Stock, and Stock-Holders. Toll, plank, and turnpike road companies are generally incorporated and organized under special acts or general statutes relating to such companies and providing for their organization,[34] and a valid corporation comes into existence upon a substantial compliance with all of the statutory requirements,[35] such as those relating to the making and requisites of articles of association,[36]

28. Truckee, etc., Turnpike Road Co. *v.* Campbell, 44 Cal. 89.

29. St. Joseph Plank Road Co. *v.* Kline, 106 La. 325, 30 So. 854; Payne *v.* Caughell, 24 Ont. App. 556 [*reversing* 28 Ont. 157]; Ancaster Tp. *v.* Durrand, 32 U. C. C. P. 563.

30. Fales *v.* Whiting, 7 Pick. (Mass.) 225, holding that where a turnpike road has not been lawfully laid out, the acceptance by the court of common pleas of the report of a committee appointed by the legislature to lay out the road, stating that the road is well made and fixing the place for the toll-gate, is of no efficacy to establish the road.

A substantial compliance is sufficient. State *v.* Schenkel, 129 Mo. App. 224, 108 S. W. 635.

Appointment of turnpike commissioners see Ludlow *v.* Cleveland, 45 S. W. 660, 20 Ky. L. Rep. 174; State *v.* McClymon, 7 Ohio Dec. (Reprint) 109, 1 Cinc. L. Bul. 116.

31. Eldorado County *v.* Davison, 30 Cal. 520; Wales *v.* Stetson, 2 Mass. 143, 3 Am. Dec. 39; State *v.* Louisiana, etc., Gravel Road Co., 116 Mo. App. 175, 92 S. W. 153.

Abandoned toll-house as nuisance see Nuisances, 29 Cyc. 1183.

Statutory prohibition of erection of toll-gate within municipalities see *infra*, II, D, 2.

32. See *infra*, II, D, 1, b.

33. See *infra*, II, G, 2; II, I, 3.

34. Blanchard *v.* Kaull, 44 Cal. 440 (holding that companies, organized under an act showing that the powers, rights, and liabilities of companies so organized are those of corporations, will be regarded as such, even though the act itself denominates them joint stock companies); Moore *v.* State, 71 Ind. 478 (holding that the provisions of a statute, authorizing the construction of plank, macadamized, and gravel roads are not repealed or impaired by a later statute which authorizes the purchasers of turnpike roads under mortgage sale to organize as incorporated companies).

Time for which corporation may be created.— Although the road will be constructed of stone and gravel, a company is within the exception of a constitutional provision that no corporation, except for municipal purposes, or for the construction of railroads, plank roads, and canals, shall be created for a longer period than thirty years. Canal St. Gravel-Road Co. *v.* Paas, 95 Mich. 372, 54 N. W. 907. However, a legislative intent to create a perpetual corporation will not be implied from provisions conferring upon the company continued succession or a fee simple title to lands which it may condemn; and where the special act under which it is organized does not limit the term of corporate life, the limitations imposed by general incorporation laws apply, and not those of a general act for the incorporation of turnpike companies. State *v.* Cape Girardeau, etc., Gravel Road Co., 207 Mo. 85, 105 S. W. 761; State *v.* Louisiana, etc., Gravel Road Co., 116 Mo. App. 175, 92 S. W. 153.

Consolidation may be had only where there is a statute authorizing it. Thus a statute which authorizes the consolidation of companies theretofore organized does not authorize the consolidation of companies thereafter organized. Shelbyville, etc., Turnpike Co. *v.* Barnes, 42 Ind. 498. Neither can a turnpike company organize for the purpose of buying existing roads owned by different corporations. State *v.* Beck, 81 Ind. 500.

35. State *v.* Beck, 81 Ind. 500; Eastern Plank Road Co. *v.* Vaughan, 14 N. Y. 546.

A sufficient number of petitioners is required under an act providing that county commissioners may authorize the formation of a corporation upon a petition of persons representing three fifths of all the lands within three fourths of a mile of the proposed road. A finding of fact by the commissioners that the number is sufficient is conclusive on collateral attack (State *v.* Needham, 32 Ind. 325); but it is an error of law for the commissioners to entertain and retain jurisdiction where part of the requisite number of petitioners withdraw their names before final action by the board (Hord *v.* Elliott, 33 Ind. 220).

36. Knight *v.* Flatrock, etc., Turnpike Co., 45 Ind. 134; Piper *v.* Rhodes, 30 Ind. 309;

subscriptions,[37] and filing of the articles in each county into or through which the road extends.[38] In the absence of statutory classification, shares in a turnpike company have been held to be real estate,[39] and the rules relating to corporations generally govern the rights and liabilities of shareholders in toll, plank, gravel, and turnpike road companies.[40]

2. Officers and Agents. The powers, duties, and liabilities of officers and agents of corporations of this nature are dependent upon statutes and the principles governing corporations generally.[41] In the absence of special statutory

Covington, etc., Plank-Road Co. *v.* Moore, 3 Ind. 510.

The residence of each and every subscriber of stock must be set forth in the articles, under the Indiana statutes (Busenback *v.* Attica, etc., Gravel Road Co., 43 Ind. 265); but it is not a valid objection that the residence of a few of the subscribers is not stated, where the residence of a number, whose subscriptions amount to the required statutory sum per mile of the proposed road, is stated (Fox *v.* Allensville, etc., Turnpike Co., 46 Ind. 31).

The description of route need not be very specific (Barnhill *v.* Mill Spring, etc., Gravel Road Co., 51 Ind. 354), and a map of the road may be incorporated in the articles (Miller *v.* Wild Cat Gravel Road Co., 57 Ind. 241). Thus an omission of the name of the state and county is not fatal, where the articles state the beginning point in a section, township, and range, as the court may take judicial notice that these are within a county in the state (Turpin *v.* Eagle Creek, etc., Gravel Road Co., 48 Ind. 45); and where the articles describe the proposed road as beginning at a point where two named roads touch each other at a certain corner of a certain section, and the route is described so that its line can be traced to a certain point in a certain section and range, where it terminates, a failure to state the range of the section at the point of beginning will not render the description bad (Estell *v.* Knightstown, etc., Turnpike Co., 41 Ind. 174). Likewise a charter of a company is not void because it cannot be determined from a mere inspection where the road is to be built or established. Reed *v.* Cornwall, 27 Conn. 48.

The insertion of unauthorized provisions does not render the incorporation invalid, but simply renders the company liable to forfeiture of franchise for acts done in pursuance of such provisions. Eastern Plank Road Co. *v.* Vaughan, 14 N. Y. 546.

37. Fox *v.* Allensville, etc., Turnpike Co., 46 Ind. 31 (holding that it is not essential to organization, under the Indiana statute, that the whole amount of the capital stock as fixed by the articles of association shall be subscribed); State *v.* Dillon, 36 Ind. 388; Vansickle *v.* Erdelmeyer, 36 Ind. 262 (holding that articles of association are not invalid because the amounts subscribed might be paid in instalments at one, two, or three years from a certain year, either in money or in labor, and at such times in each year as the directors might determine); Fitch *v.* Poplar Flat, etc., Turnpike Co., 13 S. W. 791, 12 Ky. L. Rep. 79; Hamilton, etc., Road Co. *v.* Townsend, 13 Ont. App. 534.

Conditional subscriptions not authorized see Butternuts, etc., Turnpike Co. *v.* North, 1 Hill (N. Y.) 518.

When subscriptions may be collected.—Although a valid corporation and binding subscription of stock may exist under the Indiana general plank road law of 1849, without directors, the subscriptions cannot be collected until there are directors, except the amount to be paid at the time of subscribing to defray preliminary expenses, provided by the articles or by-laws of the association. Covington, etc., Plank-Road Co. *v.* Moore, 3 Ind. 510.

Effect of change of termini.— Where a company induces subscriptions to its stock by agreeing to construct its road between certain termini, and thereafter procures an act changing the termini, the subscriptions are no longer binding. Manheim, etc., Turnpike, etc., Co. *v.* Arndt, 31 Pa. St. 317.

38. Covington, etc., Plank-Road Co. *v.* Moore, 3 Ind. 510.

Filing of such articles or certificate not required on reorganization see Goodbread *v.* Philadelphia, etc., Turnpike Co., 15 Montg. Co. Rep. (Pa.) 21.

39. Welles *v.* Cowles, 2 Conn. 567.

40. See Corporations, 10 Cyc. 649, 954.

Additional liability.—The liability of stockholders cannot be increased without their consent, by the passage of statutes subsequent to the organization of the company, and the burden of showing the assent of a stock-holder, sought to be charged, is upon the corporation or party seeking to enforce the liability. Ireland *v.* Palestine, etc., Turnpike Co., 19 Ohio St. 369. Under an act providing that the stock-holders shall be jointly and severally liable for the payment of the debts of the company for an amount equal to the stock they have severally subscribed, the stock-holders are liable to the corporation creditors to the full amount of the stock subscribed, and not to the balance unpaid on said stock. Pettibone *v.* McGraw, 6 Mich. 441.

An agreement whereby stock-holders are to pay the amount of the company's liability on a certain judgment, such amount to be refunded to the stock-holders "out of the first moneys received from the proceeds of said road," does not require the company to apply its tolls on the judgment as a condition precedent to its recovery on the agreement. Thompson *v.* Marion, etc., Gravel Road Co., 98 Ind. 449.

41. See Corporations, 10 Cyc. 758, 903.

authority in any one person to call a meeting, a call for a corporate election can only be made by the president and board of directors,[42] although, under the statutes of some states, directors may be elected before the articles of association are filed.[43]

3. Powers, Privileges, and Franchises — a. In General. A toll road or turnpike company acquires its powers from the law creating it, and possesses only such powers as are expressly granted and such as are necessarily incident to the execution of those specifically granted.[44] The franchise of the corporators consists of the right to be a corporate body, while the franchises of the corporation embrace the right to construct and maintain a toll road, build tollhouses, and collect tolls.[45] Such a corporation generally possesses the express or implied power to make necessary contracts,[46] to make a valid equitable assignment of money due it on subscriptions,[47] and acquire and hold by purchase,[48] lease,[49] or condemnation,[50] such real estate as is necessary for its purposes; but its power to borrow or loan money or indorse commercial paper is confined strictly to the authority conferred upon it by statute,[51] as is its power to operate a stage line[52] or contract to carry the United States mail.[53] To be available, a franchise to such a company must be accepted,[54] and its availability lasts only during the

And see Clendenin *v.* Frazier, 1 Ind. 553; Dunningtons *v.* Northwestern Turnpike Road, 6 Gratt. (Va.) 160.

Exercise of discretion.— Where the directors are exercising in good faith a discretion conferred upon them by statute, they will not be restrained by the courts on the application of dissatisfied stock-holders. Bardstown, etc., Turnpike Co. *v.* Rodman, 13 S. W. 917, 12 Ky. L. Rep. 151.

42. Cassell *v.* Lexington, etc., Turnpike Road Co., 9 S. W. 502, 701, 10 Ky. L. Rep. 486.

43. Covington, etc., Plank-Road Co. *v.* Moore, 3 Ind 510.

44. Cynthiana, etc., Turnpike Co. *v.* Hutchinson, 60 S. W. 378, 22 Ky. L. Rep. 1233, holding further that, in determining whether certain powers and privileges exist, a strict construction against the corporation should be adopted when the rights of others are affected.

45. Snell *v.* Chicago, 133 Ill. 413, 24 N. E. 532, 8 L. R. A. 858.

Right to exact tolls see *infra*, III, B, 1.

46. Turley *v.* Grafton Road Co., 8 U. C. Q. B. 579.

47. Miller *v.* Malony, 3 B. Mon. (Ky.) 105.

48. Coleman *v.* San Rafael Turnpike Road Co., 49 Cal. 517; Cynthiana, etc., Turnpike Co. *v.* Hutchinson, 60 S. W. 378, 22 Ky. L. Rep. 1233.

Power to alienate property see *infra*, II, G.

Prima facie a turnpike company has no occasion for any larger interest in land than a way over it, and hence can acquire no greater interest. Wood *v.* Truckee Turnpike Co., 24 Cal. 474. However, it has been held that the purchase of land for the residence of a toll-keeper is within the powers of a turnpike company, even though the land purchased is outside the limits of the road proper and of the strip which it is authorized to acquire by condemnation proceedings. Detroit, etc., Plank-Road Co. *v.* Detroit, 81 Mich. 562, 46 N. W. 12.

49. Crawford *v.* Longstreet, 43 N. J. L. 325.

50. See Eminent Domain, 15 Cyc. 586.

51. Lebanon, etc., Gravel Road Co. *v.* Adair, 85 Ind. 244; Madison, etc., Plank Road Co. *v.* Watertown, etc., Plank Road Co., 7 Wis. 59; Madison, etc., Plank Road Co. *v.* Watertown, etc., Plank Road Co., 5 Wis. 173.

Ratification of loan improperly made.—Under an act making it competent for a majority of the stock-holders, assembled in stockholders' meeting, to authorize the board of directors to execute a promissory note of the company, a note executed by the board of directors without such authority may be validated and ratified by a subsequent resolution, adopted by a majority of the stockholders, levying an assessment to pay the note. Forbes *v.* San Rafael Turnpike Co., 50 Cal. 340.

52. Wiswall *v.* Greenville, etc., Plank Road Co., 56 N. C. 183.

53. Wiswall *v.* Greenville, etc., Plank Road Co., 56 N. C. 183.

Contracts for carrying mails see, generally, Post-Office, 31 Cyc. 990.

54. Welsh *v.* Plumas County, 94 Cal. 368, 29 Pac. 720, holding that the taking possession of an existing public road is not an acceptance of a franchise to construct a toll wagon road. And see Nashville, etc., Turnpike Co. *v.* State, 96 Tenn. 249, 34 S. W. 4, holding that a turnpike company established by special charter cannot avail itself of the provisions of a subsequent general incorporation law until it shows acceptance or user thereunder.

Presumption arising from franchise.— The granting of a license or franchise creates a presumption that the incorporation proceedings were regular. Wellersburg, etc., Plank Road Co. *v.* Bruce, 6 Md. 457. Also evidence of an attempt to substantially comply with a statute authorizing individuals and corporations to establish and operate wagon roads at a fixed rate of toll, and the construction

period of time stated and specified for its duration in the grant or statute authorizing the grant.[55]

b. Exclusive Franchises. A franchise which is not exclusive in its terms does not confer upon the grantee any monopoly of its route and it has no remedy, even though its travel is diverted and profits diminished, against the building, in the immediate vicinity, of a free public highway which public convenience demands,[56] or against the granting of a franchise between the same points to another company,[57] or the building and use of a private road on adjoining lands.[58] However, the courts will protect it against the authorization and establishment, or use without authorization, of "shunpikes," that is, roads connecting with the toll road at points between gates and purposely designed to avoid the payment of tolls,[59] as they also will under statutes prohibiting the authorization of free public highways within a certain distance of the turnpike,[60] or where the terms

at great expense and maintenance of such a road for over fifteen years by a private corporation, under an unchallenged claim of title, which was officially recognized by the county, is *prima facie* evidence of ownership, as against the county. Lawrence County *v.* Deadwood, etc., Toll-Road Co., 11 S. D. 74, 75 N. W. 817.

55. Blood *v.* Woods, 95 Cal. 78, 30 Pac. 129; People *v.* Anderson, etc., Road Co., 76 Cal. 190, 18 Pac. 308; St. Clair County Turnpike Co. *v.* People, 82 Ill. 174; State *v.* Scott County Macadamized Road Co., 207 Mo. 54, 105 S. W. 752 [*affirmed* in 215 U. S. 336, 30 S. Ct. 110, 54 L. ed. —]; Montgomery County *v.* Clarksville, etc., Turnpike Co., 120 Tenn. 76, 109 S. W. 1152.

The period of limitation begins when the road is completed and the right to take full tolls comes into existence. Price *v.* Price, 9 Gratt. (Va.) 45.

An extension of the franchise to collect tolls is effected when the corporate existence of the company is extended (People *v.* Auburn, etc., Turnpike Co., 122 Cal. 335, 55 Pac. 10; People *v.* Pfister, 57 Cal. 532; Aurora, etc., Plank Road Co. *v.* Schrot, 90 Hun (N. Y.) 56, 35 N. Y. Suppl. 602), but a statute authorizing county commissioners to extend franchises applies only to roads in actual operation (Southern Development Co. *v.* Douglass, 26 Nev. 230, 66 Pac. 66).

Termination of charter or franchise by abandonment or revocation see *infra*, II, I.

56. Salem, etc., Turnpike Co. *v.* Lyme, 18 Conn. 451; Curtis *v.* Morehouse Parish, 12 La. Ann. 649; *In re* Derry Tp. Road, 30 Pa. Super. Ct. 538; Hydes Ferry Turnpike Co. *v.* Davidson County, 91 Tenn. 291, 18 S. W. 626; Clarksville, etc., Turnpike Co. *v.* Clarksville, (Tenn. Ch. App. 1896) 36 S. W. 979.

57. Bartram *v.* Central Turnpike Co., 25 Cal. 283; Indian Canon Road Co. *v.* Robinson, 13 Cal. 519; Lafayette Plankroad Co. *v.* New Albany, etc., R. Co., 13 Ind. 90, 74 Am. Dec. 246; Washington, etc., Turnpike Road *v.* Baltimore, etc., R. Co., 10 Gill & J. (Md.) 392; Allen *v.* Buncombe Turnpike Co., 16 N. C. 119. And see CONSTITUTIONAL LAW, 8 Cyc. 968 text and note 59.

A free gravel road may be constructed by another incorporated gravel road company, as the law does not make the charging and collection of tolls obligatory. Crawfordsville, etc., Turnpike Co. *v.* Smith, 89 Ind. 290.

Granting of franchise for railroad bridge near toll-bridge see BRIDGES, 5 Cyc. 1075; CORPORATIONS, 10 Cyc. 1089.

58. Hall *v.* Ragsdale, 4 Stew. & P. (Ala.) 252; Auburn, etc., Plank Road Co. *v.* Douglass, 9 N. Y. 444 [*reversing* 12 Barb. 553]; Greensburg, etc., Turnpike Road Co. *v.* Breidenthal, 1 Phila. (Pa.) 93 (holding that where a public street leads to an open lot of an individual, the court will not enjoin him to close it up, because he and others use it as means of leaving the turnpike road to travel upon a free public street); Commissaires Des Chemins *v.* Penniston, 23 Quebec Super. Ct. 40.

59. *New Hampshire.*— Cheshire Turnpike *v.* Stevens, 10 N. H. 133; Proprietors Third Turnpike Road *v.* Champney, 2 N. H. 199.

New York.— Groton Turnpike Road *v.* Ryder, 1 Johns. Ch. 611. And see *In re* Flatbush Ave., 1 Barb. 286.

Ohio.— Cincinnati, etc., Ave. Co. *v.* Bates, 2 Ohio Cir. Ct. 376, 1 Ohio Cir. Dec. 540.

Pennsylvania.— Greensburg, etc., Turnpike Road Co. *v.* Breidenthal, 1 Phila. 93.

Tennessee.— Hydes Ferry Turnpike Co. *v.* Davidson County, 91 Tenn. 291, 18 S. W. 626; Franklin, etc., Turnpike Co. *v.* Maury County Ct., 8 Humphr. 342.

Canada.— See Montreal Turnpike Trust *v.* Westmount Land Co., 34 Quebec Super. Ct. 5.

See 47 Cent. Dig. tit. "Turnpikes and Toll Roads," § 18.

Actual evasion of the payment of tolls is the distinctive feature of a shunpike and not the intent with which it is constructed and used. White's Creek Turnpike Co. *v.* Davidson County, 3 Tenn. Ch. 396.

60. Campbell Turnpike Co. *v.* Dye, 18 B. Mon. (Ky.) 761, holding that such statutes apply both to roads opened before and subsequently to their passage.

The Kentucky statute does not apply to the construction and operation of another turnpike road as a private enterprise, but only to free public roads. Lincoln County Bd. of Internal Imp. *v.* Stanford, etc., Turnpike Road Co., 91 Ky. 291, 15 S. W. 782, 11 Ky. L. Rep. 884. Neither does it authorize the closing, by order of a county court, of a lateral road which does not divert

of the franchise are exclusive, as such a franchise constitutes a contract, the obligation of which is beyond the power of the state to impair.[61]

C. Public Aid — 1. In General. In the absence of constitutional restrictions the legislature may authorize the granting of public aid to toll road companies,[62] but public aid may only be given to validly organized corporations,[63] and where there is legislative authority therefor.[64] The subscriptions may be made, bonds issued, or taxes levied only in the manner, form, and upon the terms prescribed by existing [65] statutes; [66] and it is essential to the validity of such subscriptions that there shall first be a compliance with statutory conditions precedent, such as the making of private subscriptions to a certain amount.[67] Where all conditions precedent have been complied with, the county official whose duty it is to make the subscription may be compelled by mandamus to do so;[68] while, on the other hand, the courts will restrain the giving of aid contrary to law.[69]

travel from the turnpike (Anderson *v.* Carrich, 3 Ky. L. Rep. 388), nor a lateral road which does not have in one direction any common terminus or place of connection with the turnpike (Shuck *v.* Lebanon, etc., Turnpike Road Co., 9 Bush (Ky.) 168).

A charter contemplating the discontinuance of part of a state road which will be overlapped by the turnpike does not authorize it to be closed up before the turnpike is completed. Adams *v.* Hickory Nut Turnpike Co., 33 N. C. 486.

61. Ratcliffe *v.* Pulaski Turnpike Co., 69 Ark. 264, 63 S. W. 70; Croton Turnpike Road Co. *v.* Ryder, 1 Johns. Ch. (N. Y.) 611; Nashville, etc., Turnpike Co. *v.* Davidson County, 106 Tenn. 258, 61 S. W. 68.

Injunction to secure toll road company in enjoyment of exclusive franchise see INJUNCTIONS, 22 Cyc. 839.

62. Wetumpka *v.* Winter, 29 Ala. 651; Justices Clarke County Ct. *v.* Paris, etc., Turnpike Co., 11 B. Mon. (Ky.) 143; Mitchell *v.* Burlington, 4 Wall. (U. S.) 270, 18 L. ed. 350.

63. Piper *v.* Rhodes, 30 Ind. 309.

Delay in filing articles.—Where a corporation is allowed by statute to commence business as soon as its articles are filed in the county clerk's office, the failure of a company to file articles in the office of the secretary of state within three months after filing them in the county clerk's office, as required by statute, does not invalidate its organization so as to affect the validity of a tax voted to assist in building the turnpike. Walton *v.* Riley, 85 Ky. 413, 3 S. W. 605, 9 Ky. L. Rep. 29.

64. Driftwood Valley Turnpike Co. *v.* Bartholomew County, 72 Ind. 226.

Right of counties to grant aid to corporations generally see COUNTIES, 11 Cyc. 518.

Right of municipal corporations to grant aid to toll road companies see MUNICIPAL CORPORATIONS, 28 Cyc. 1555 text and note 95, 1577 note 63, 1671 text and note 94.

65. Webb *v.* Brandywine Junction Turnpike Co., 55 Ind. 441.

Companies organized after the passage of a statute authorizing public aid are entitled to the benefit of its provisions. Rykers Ridge Turnpike Co. *v.* Scott, 32 Ind. 37.

66. Winchester, etc., Turnpike Road Co. *v.* Clark County Ct., 3 Metc. (Ky.) 140.

Absence of specific provisions.—An order of a county court, by which it is said that it subscribes for so many shares of stock, when concurred in by a competent majority of the court, is binding when no other mode was pointed out, and the court had authority to make the subscription. Justices Clarke County Ct. *v.* Paris, etc., Turnpike Co., 11 B. Mon. (Ky.) 143.

Oversubscription.—Where a state subscribes a certain number of shares in a turnpike company, and afterward it appeared that, in consequence of mistake or fraud, a larger amount had been paid by the state than the actual length of the road required, it cannot recover back the overplus without offering to transfer to the company the excess of shares. Pittsburgh, etc., Turnpike Road Co. *v.* Com., 2 Watts (Pa.) 433.

Conditions imposed by the public authorities, on the giving of such aid, are binding on the turnpike company, upon acceptance of the subscription. Com. *v.* Springfield, etc., Turnpike Co., 10 Bush (Ky.) 254.

An information to forfeit the charter of the company will not lie for alleged irregularities in obtaining public aid. State *v.* Danville, etc., Gravel Road Co., 33 Ind. 133.

The supervision by the public authorities enjoined by some statutes relates to the appropriation of the money given and has no reference to the performance of the work. Wetumpka *v.* Winter, 29 Ala. 651.

67. Clay *v.* Nicholas County Ct., 4 Bush (Ky.) 154.

Absence of record evidence.—Where county commissioners were authorized to subscribe to the stock of a turnpike company, when satisfied that an amount sufficient to complete each mile subscribed to had been taken by private subscription, a subscription by them and a subsequent levy are not invalidated by the fact that their record does not show that they were satisfied as to the fact of such private subscription where it otherwise appeared that the private subscription had been made. Clark *v.* Leathers, 5 S. W. 576, 9 Ky. L. Rep. 558.

68. Banta *v.* Summit Station Turnpike Road Co., 4 Ky. L. Rep. 984.

69. Clark *v.* Leathers, 5 S. W. 576, 9 Ky. L. Rep. 558.

2. Assessments and Taxes — a. Validity and Enforcement. Under statutes providing for the aid of turnpike companies by an assessment of benefits, before an assessment may be ordered, there must be a proper application therefor,[70] and an adjudication by the body ordering the assessment that all preliminary steps have been properly taken.[71] The assessors must be appointed and notified in the manner provided by law,[72] and their report must conform to the act and order under which they receive their appointment.[73] To be valid, a tax or assessment must include all the lands within the prescribed statutory distance of the road,[74] and be made or levied by a body acting within its territorial jurisdiction,[75] and composed of a lawful number regularly convened.[76] However, an assessment

Injunction against collection of tax see *infra*, II, C, 2, b.

70. Glass *v.* Tipton, etc., Turnpike Co., 32 Ind. 376.

71. Barnhill *v.* Mill Spring, etc., Gravel Road Co., 51 Ind. 354.

72. Turpin *v.* Eagle Creek, etc., Gravel Road Co., 48 Ind. 45.

An assessment by appointees of the company is void and confers no right upon the sheriff to collect taxes thereunder. Vanceburg, etc., Turnpike Road Co. *v.* Maysville, etc., R. Co., 117 Ky. 275, 77 S. W. 1118, 25 Ky. L. Rep. 1404.

Presumptions in favor of validity of appointment.— In Indiana it has been held that the order of assessment of the board of commissioners need not name the assessors, who may be presumed to have been previously appointed by another order of the board, and that it will be presumed, without a statement to that effect in the order granting the petition, that the assessors possess the necessary qualifications. Turpin *v.* Eagle Creek, etc., Gravel Road Co., 48 Ind. 45. Also it has been held that where an assessment has been ordered, and the auditor has sworn two assessors who have acted and served as such, it will be presumed, in the absence of anything to the contrary, that they were the proper assessors. Evans *v.* Clermont, etc., Gravel Road Co., 51 Ind. 160.

73. Rice *v.* Danville, etc., Turnpike Road Co., 7 Dana (Ky.) 81.

The assessment should be added to the tax duplicate in the manner directed by the auditor of state. Center, etc., Gravel Road Co. *v.* Black, 32 Ind. 468.

74. Evans *v.* Clermont, etc., Gravel Road Co., 51 Ind. 160; Williams *v.* Greensburgh, etc., Turnpike Co., 42 Ind. 171; Greensburgh, etc., Turnpike Co. *v.* Sidener, 40 Ind. 424; Scott *v.* Mt. Auburn, etc., Turnpike Co., 39 Ind. 271; Greencastle, etc., Turnpike Co. *v.* Albin, 34 Ind. 554; Robbins *v.* Sand Creek Turnpike Co., 34 Ind. 461; New Haven, etc., Turnpike Co. *v.* Bird, 33 Ind. 325 [*following* Turner *v.* Thornton, etc., Gravel Road Co., 33 Ind. 317]; Hardwick *v.* Danville, etc., Gravel Road Co., 33 Ind. 321.

Land in two taxing districts.—At one time it was held in Kentucky that a law authorizing the collection of a tax for the benefit of a turnpike company was not invalidated by the fact that residents of the taxing district created are also residents of, and subject to tax in, another district (Bruce *v.* Vanceburg, etc., Turnpike Road Co., 35 S. W. 112, 18 Ky. L. Rep. 35); but subsequent to this decision, it was provided by statute (Ky. St. (1903) § 4736) that the same property shall be liable for only one turnpike tax, and that where it is situated in more than one taxing district, it shall be taxed in the district in which is the turnpike from which the property or its owner derives the greater benefit, which fact shall be determined by the fiscal court or board of county commissioners. However, if a taxpayer seeks exoneration in any one district, he must obtain the judgment of the fiscal court or county commissioners exempting him. Vanceburg, etc., Turnpike Road Co. *v.* Bruce, 117 Ky. 275, 77 S. W. 1118, 25 Ky. L. Rep. 1404. Under an act providing for the levy of a tax on the lands outside certain cities and towns, to pay for the building of turnpikes, and to keep the same in repair, lands which at the time of the passage of the act were not in any town, but have since been included in one of the towns named, are subject, as to the future, to only such tax as the residue of the citizens of the town are liable. Donnelly *v.* Carpenter, 47 S. W. 336, 20 Ky. L. Rep. 675.

Incorrect listing.— The listing of a small parcel belonging to a township and used for school purposes, in the name of another person instead of the township, will not prevent the collection of the assessment (Hendricks *v.* Gilchrist, 76 Ind. 369), nor is it a valid ground of objection to an assessment, in an action to enjoin its collection, that the lands of persons other than plaintiffs are incorrectly described (Hopkins *v.* Greensburg, etc., Turnpike Co., 46 Ind. 187).

75. Pendleton, etc., Turnpike Co. *v.* Barnard, 40 Ind. 146.

Road in three counties.—Where a proposed road was projected in three counties, and the estimated cost was reported to the auditor of each, a tax apportioned by the auditor of one county without anything to show the appraised value of the land in the other counties is illegal. Sim *v.* Hurst, 44 Ind. 579.

76. Fahlor *v.* Wells County, 101 Ind. 167.

An assessment by more than the lawful number is void. Webb *v.* Brandywine Junction Turnpike Co., 55 Ind. 441.

Action by majority.— Under a statute providing for an assessment of benefits by two of the assessors under certain circumstances, where action was had by two, it will be presumed in the absence of a contrary showing that such circumstances existed as to make

may be corrected and omitted lands added or included by the original [77] assessors,[78] even after the road has been partially or wholly completed.[79] Under statutes making a tax levied for the purpose of aiding in the construction of a turnpike collectable in the same manner as other taxes, it is a lien and may be collected by distraint.[80]

b. Liability, Defenses, and Remedies of Taxpayers. Upon payment of taxes or assessments for the benefit of a turnpike company, the persons so doing, under some statutes, become stock-holders and, in a sense, involuntary subscribers to the stock of the company.[81] Like other stock-holders, their liability is limited to the extent of their subscription.[82] A person affected by an assessment may appeal from the decision of the board of county commissioners upon filing an affidavit in case he is not a party to the proceedings,[83] or he may have the collec-

it proper for two of them to act. Turpin *v.* Eagle Creek, etc., Gravel Road Co., 48 Ind. 45.

77. Webb *v.* Brandywine Junction Turnpike Co., 55 Ind. 441.

78. Barnhill *v.* Mill Spring, etc., Gravel Road Co., 51 Ind. 354; Hopkins *v.* Greensburg, etc., Turnpike Co., 46 Ind. 187; Sand Creek Turnpike Co. *v.* Robbins, 41 Ind. 79.

A board of equalization has no power to assess lands which the assessors have omitted. Manford *v.* Pleasant Grove, etc., Turnpike Co., 42 Ind. 293.

When statute is curative.—An act which merely revives a prior one and validates assessments made thereunder is not curative, and does not legalize assessments illegally made. Searcy *v.* Patriot, etc., Turnpike Co., 79 Ind. 274.

79. Hopkins *v.* Greensburg, etc., Turnpike Co., 46 Ind. 187.

80. Hazzard *v.* Heacock, 39 Ind. 172; Salt Lick, etc., Turnpike Road Co. *v.* Gilfillen, 117 Ky. 223, 77 S. W. 934, 25 Ky. L. Rep. 1319, holding further that a company, which voluntarily fails or neglects to collect the tax from any one person, will not be permitted to collect the amount due from other taxpayers not in default.

Where the act authorizing assessments is repealed, the lien and remedy for collection falls with it, even though the road has been completed on the faith of such assessments. Webb *v.* Brandywine Junction Turnpike Co., 55 Ind. 441; Marion Tp. Gravel Road Co. *v.* Sleeth, 53 Ind. 35. And see Pugh *v.* Miller, 126 Ind. 189, 25 N. E. 1040.

81. Schofield *v.* Henderson, 67 Ind. 258; Vanceburg, etc., Turnpike Road Co. *v.* Maysville, etc., R. Co., 117 Ky. 275, 77 S. W. 1118, 25 Ky. L. Rep. 1404; Salt Lick, etc., Turnpike Road Co. *v.* Gilfillen, 117 Ky. 223, 77 S. W. 934, 25 Ky. L. Rep. 1319. And see Lincoln *v.* State, 36 Ind. 161, holding that assessments, when acquiesced in, entitle the persons so assessed to vote for directors, even though the assessments have not been paid.

The stock should be issued in proportion to the amounts paid by the several subscribers. Clark County *v.* Winchester, etc., Turnpike Road Co., 43 S. W. 716, 19 Ky. L. Rep. 1435.

82. Salt Lick, etc., Turnpike Road Co. *v.* Gilfillen, 117 Ky. 223, 77 S. W. 934, 25 Ky. L. Rep. 1319, holding that where, by the terms of the statute, the liability of the taxpayers is to pay only so much as is required to assist in building the road, their liability is at an end when they have paid such a sum, notwithstanding the fact that the company becomes insolvent through bad management. And see Fall Creek, etc., Gravel Road Co. *v.* Wallace, 39 Ind. 435.

Where excessive taxes have been paid, equity will compel the excess to be refunded. Lewis County, etc., Turnpike Road Co. *v.* Thomas, 3 S. W. 907, 8 Ky. L. Rep. 872.

83. Swindler *v.* Monrovia, etc., Gravel Road Co., 33 Ind. 160; Jones *v.* Theiss, 30 Ind. 311.

Grounds of appeal.— Under the broad provisions of the Indiana statute, an appeal may be taken, among other matters, on the following questions: (1) Whether the company was legally organized; (2) whether it has a valid subscription of three-fifths the cost of the road; and (3) whether the estimate of cost was made by a competent and disinterested engineer. Alexander *v.* McCordsville, etc., Gravel Road Co., 44 Ind. 436.

Proceedings on appeal.— The Indiana statute authorizing such an appeal does not contemplate any pleadings; the landowners have the benefit of all legal objections which they can urge to the assessment without any formal pleading of them, and the issue between the parties is the amount of the assessment, which issue may be tried by a jury. James *v.* Greensboro, etc., Turnpike Co., 47 Ind. 379; Rising Sun, etc., Turnpike Co. *v.* Hamilton, 45 Ind. 382 [*followed* in Rising Sun, etc., Turnpike Co. *v.* Beatty, 45 Ind. 385]. On the trial of the appeal, the articles of association of the company are admissible in evidence without proof of their execution, where it is shown that they have been duly recorded as required by statute. James *v.* Greensboro, etc., Turnpike Co., *supra*. Where, on such appeal, the assessment is reduced, certain sums are ordered to be assessed against certain designated tracts of land, other tracts are ordered to be released from assessment, and the court's action is ordered to be certified to the county auditor with directions to correct the tax duplicate to correspond with the assessment made by the court, such orders of the court do not constitute a judgment, and execution cannot issue thereon. Needham *v.* Gillaspy, 49 Ind. 245.

tion of an illegal assessment restrained by injunction,[84] upon filing a complaint setting forth sufficient facts to entitle him to relief; [85] but he has no right of action against the county treasurer for turning over the tax collected to the company.[86] In an action on a note given for an assessment, the maker is not estopped to set up the illegality of the assessment by his giving the note, unless he did so with knowledge of the illegality; [87] but it is no defense to an action to collect the tax that the directors had borrowed money before the resources of the company met its charter requirement.[88]

D. Location — 1. Of Road — a. In General. It is essential to the establishment and existence of a toll road that there be a location thereof by some appropriate corporate act.[89] However, charter or statutory requirements as to the location of a turnpike road are liberally construed, it being held that the location, whether by the directors or commissioners, is sufficient where the termini are located near those designated in the charter and the general direction of the charter route is followed, even though there is a variation for the purpose of avoiding obstacles or shortening the distance,[90] and that a corporation empowered to build to or from a city may extend its road within the corporate limits.[91] The location may be shown by a plat recorded as required by statute,[92] or by the

A further appeal lies under the Indiana statutes, to the supreme court from the judgment of a circuit court rendered on an appeal from the order of the board of county commissioners. James *v.* Greensboro, etc., Turnpike Co., 47 Ind. 379.

84. Muncie, etc., Turnpike Co. *v.* Keesling, 49 Ind. 184; Webb *v.* Cutsinger, 48 Ind. 246.

Estoppel.— Owners of land illegally assessed are not estopped from suing to restrain the collection of the assessment by the fact that they have stood by and seen the road constructed or have used it after its completion, as they are not called upon to take any action prior to the collection of the assessment and they had a right to infer that the company intended to build the road without collecting such illegal assessments. Hopkins *v.* Greensburg, etc., Turnpike Co., 40 Ind. 44 [*followed* in Pavy *v.* Greensburgh, etc., Turnpike Co., 42 Ind. 400; Williams *v.* Greensburgh, etc., Turnpike Co., 42 Ind. 171].

85. Evans *v.* Clermont, etc., Gravel Road Co., 51 Ind. 160; Knight *v.* Flatrock, etc., Turnpike Co., 45 Ind. 134; Sim *v.* Hurst, 44 Ind. 579 (holding that under a statute requiring the person estimating the cost of the road to "take an oath to perform his duty according to the best of his ability," a complaint which alleges that the engineer did not take an oath that he would discharge his duties "according to and as required by law," is insufficient); Forgey *v.* Northern Gravel Road Co., 37 Ind. 118. And see Couch *v.* Ulster, etc., Turnpike Co., 4 Johns. Ch. (N. Y.) 26.

Reply.—Where the action is based on the ground that lands liable to assessment have been omitted, and an answer is filed setting up a corrected assessment, it is a departure to reply that the lands of plaintiff and other lands within the taxing limits are improperly described. Hopkins *v.* Greensburg, etc., Turnpike Co., 46 Ind. 187.

A collateral attack will not be permitted, in such a proceeding, upon the finding of the board of commissioners regarding the organization of the company, the sufficiency of its articles of association, the estimate of the cost of construction, and the fact that the company has the requisite amount of stock to entitle it to have an assessment of benefits made. Barnhill *v.* Mill Spring, etc., Gravel Road Co., 51 Ind. 354; Evans *v.* Clermont, etc., Gravel Road Co., 51 Ind. 160. *Compare* Rhodes *v.* Piper, 40 Ind. 369.

86. Rhodes *v.* Piper, 47 Ind. 457.

87. Williams *v.* Pendleton, etc., Turnpike Co., 76 Ind. 87; Parsons *v.* Pendleton, etc., Turnpike Co., 59 Ind. 36; Maddy *v.* Sulphur Springs, etc., Turnpike Co., 57 Ind. 148.

88. Vanceburg, etc., Turnpike Road Co. *v.* Maysville, etc., R. Co., 117 Ky. 275, 77 S. W. 1118, 25 Ky. L. Rep. 1404.

89. State *v.* Douglas County Road Co., 10 Oreg. 185.

90. Beckner *v.* Riverside, etc., Turnpike Co., 65 Ind. 468; Williamsport, etc., Turnpike Co. *v.* Hollman, 8 Gill & J. (Md.) 75; Stanwood *v.* Peirce, 7 Mass. 458; Hadley *v.* Harpeth Turnpike Co., 2 Humphr. (Tenn.) 555 (holding further that under the charter in question the directors had power to designate the route after failure of the state engineer to act); Franklin, etc., Turnpike Co. *v.* Campbell, 2 Humphr. (Tenn.) 467.

Change in route as abandonment of franchise see *infra*, II, I, 1.

Designation of route in articles of association see *supra*, II, B, 1.

A temporary location does not exhaust the power of the company (Dunmore Borough's Appeal, (Pa. 1889) 17 Atl. 34), especially where the location made is of less width than that authorized (Commonwealth Title Ins., etc., Co. *v.* Willow Grove, etc., Plank Road Co., 17 Montg. Co. Rep. (Pa.) 76).

91. Wilson *v.* Midway, etc., Turnpike Road Co., 4 Ky. L. Rep. 727; Farmers' Turnpike Road *v.* Coventry, 10 Johns. (N. Y.) 389. *Contra*, Dougall *v.* Sandwich, etc., Plank, etc., Road Co., 12 U. C. Q. B. 59.

92. Callison *v.* Hedrick, 15 Gratt. (Va.) 244.

fence lines and stone walls, or other boundary lines, which mark the outer limits of the road.[93]

b. On Existing Highway. The power of the legislature to authorize the location of a toll road on a highway which has been vacated is undoubted,[94] and as a toll road is a public highway,[95] the conversion of a free public highway into a toll road does not change the character of the road but only the method of maintaining it, hence it is competent for the legislature, either directly or through the medium of lower bodies or boards, to authorize the location of a toll road on an existing highway and the collection of tolls thereon, the keeping of the road in repair being deemed a sufficient consideration for such action.[96] Such grants, however, being in restraint of the common right to use the highway free of tolls, are to be strictly construed and nothing is to be taken by implication.[97] Thus a grant of the right to appropriate part of a highway does not authorize the erection of gates and the collection of tolls,[98] especially under statutes prescribing as a condition precedent to the right to collect tolls, an agreement with the county court or other body;[99] and, in general, all charter or statutory requirements

A certification of a map is valid even though the commissioners were not together at the time of the certification, provided they acted together in designating the route. Estes *v.* Kelsey, 8 Wend. (N. Y.) 555.

93. Commonwealth Title Ins., etc., Co. *v.* Willow Grove, etc., Plank Road Co., 17 Montg. Co. Rep. (Pa.) 76.

94. Carter *v.* Meuli, 122 Cal. 367, 55 Pac. 138. And see Pike County Justices *v.* Griffin, etc., Plank-Road Co., 9 Ga. 475.

In New Jersey it is held that under an act authorizing a turnpike on a public highway, upon the highway being vacated according to law, a vacation for the express purpose of carrying out the act authorizes the location of a turnpike on the highway (Wright *v.* Carter, 27 N. J. L. 76), and that a provision in the charter of a turnpike company that "no gate or turnpike shall be erected or kept on any part of the highway which has heretofore been used as such" does not forbid the erection of a gate on a highway used as such at the date of the charter, but which has since been vacated (State *v.* Passaic Turnpike Co., 27 N. J. L. 217).

95. See *supra*, I, B.

96. *Indiana.*— Carter *v.* Clark, 89 Ind. 238.

Louisiana.— St. Joseph Plank Road Co. *v.* Kline, 106 La. 325, 30 So. 854.

New Hampshire.— State *v.* Hampton, 2 N. H. 22.

New York.— People *v.* Fishkill, etc., Plank Road Co., 27 Barb. 445; Fishkill *v.* Fishkill, etc., Plank Road Co., 22 Barb. 634.

Ohio.— Chagrin Falls, etc., Plank Road Co. *v.* Cane, 2 Ohio St. 419.

Pennsylvania.— Com. *v.* Philadelphia, etc., Turnpike Co., 2 Pa. Dist. 10, 12 Pa. Co. Ct. 275, holding that the power may be delegated to the courts.

Vermont.—Panton Turnpike Co. *v.* Bishop, 11 Vt. 198, holding that where, by the act of incorporation, a committee is appointed to locate the road, and they establish it upon a preëxisting highway, this is equivalent to an express grant to build the road on such highway.

See 47 Cent. Dig. tit. "Turnpikes and Toll Roads," § 42. And see EMINENT DOMAIN, 15 Cyc. 628.

Under the Oregon statutes, a county may lease a road to a corporation to be maintained and repaired for a period not exceeding ten years. Tillamook County *v.* Wilson River Road Co., 49 Oreg. 309, 89 Pac. 958.

Compensation, either to the town or adjoining landowners, is not essential to the validity of such a grant or to the exercise of the rights granted, except when required by statute or agreements made in pursuance of statute. Chagrin Falls, etc., Plank Road Co. *v.* Cane, 2 Ohio St. 419; Barnet *v.* Passumpsic Turnpike Co., 15 Vt. 757.

97. Mahoney *v.* Nuttman, 27 Cal. 342; Pike County Justices *v.* Griffin, etc., Plank-Road Co., 9 Ga. 475 (holding that a limitation of the use of the highway to cases of necessity excludes all idea of the grant of a right to use the whole highway; and that the necessity contemplated was not an absolute, insurmountable necessity, but a reasonable one); Groff *v.* Bird-in-Hand Turnpike Co., 128 Pa. St. 621, 18 Atl. 431, 5 L. R. A. 661 [*affirmed* in 144 Pa. St. 150, 22 Atl. 834]. But see Atty.-Gen. *v.* Bytown, etc., Road Co., 2 Grant Ch. (U. C.) 626.

An action to enjoin the unlawful appropriation and use of a public road by a turnpike company may only be brought by one who is not barred by laches or estoppel (Wenger *v.* Rohrer, 3 Pa. Super. Ct. 596; Sigle *v.* Bird-in-Hand Turnpike Co., 3 Lanc. L. Rev. (Pa.) 258); and in such an action, it is not sufficient to aver such a state of facts merely as would authorize a proceeding in the nature of quo warranto on the part of the state; nor is it sufficient to aver that its action is unlawful or unauthorized, as this is a mere conclusion of law (Palmer *v.* Logansport, etc., Gravel Road Co., 108 Ind. 137, 8 N. E. 905).

98. Com. *v.* Worcester Turnpike Corp., 3 Pick. (Mass.) 327; Wales *v.* Stetson, 2 Mass. 143, 3 Am. Dec. 39.

99. Douglas County Road Co. *v.* Canyonville, etc., Gravel Road Co., 8 Oreg. 102, holding further that the first corporation to appropriate part of the highway does not ac-

relating to the obtaining of the consent of, or making agreements with, certain designated officials must be complied with by the making of agreements within the authority of the officials named.[1] A grant providing for the location of the turnpike on part of an existing highway does not authorize a location for any greater length on such highway;[2] while, on the other hand, a grant to construct the turnpike wholly on the bed of an existing highway does not authorize a departure therefrom.[3] Such a franchise does not vest in the grantee a fee simple title, but only an easement,[4] which is subject to the easement of the public[5] and the jurisdiction of the public authorities.[6]

2. Of Toll-Gates and Tollhouses.[7] A turnpike company possesses the right to erect houses for the accommodation of toll-gatherers within the limits of its road,[8]

quire an exclusive right to collect tolls, but that the county court may confer the right on another corporation which subsequently appropriates part of the highway.

1. State *v.* Louisiana, etc., Gravel Road Co., 116 Mo. App. 175, 92 S. W. 153; Palmer *v.* Ft. Plain, etc., Plank Road Co., 11 N. Y. 376 (holding that an act which authorized the supervisors and commissioners of highways to agree with plank road companies, "upon the compensation and damages to be paid by said company, for taking and using any of the highways of the town," was not repealed by a later act authorizing such companies "to procure by agreement" from the same officers the right to take and use any part of any public highway necessary for the construction," as the one gives authority to agree upon the compensation, the other to grant the right to use the highways of the town); State *v.* Douglas County Road Co., 10 Oreg. 185 (holding that, under the statutes relating to such agreements, the county court can confer no right on a corporation to collect tolls on a public highway which has not been included in the location of the corporate road); Douglas County Road Co. *v.* Abraham, 5 Oreg. 318.

The necessity of consent required by statute is dispensed with by a charter provision authorizing the company to enter upon and take possession of a certain highway. Detroit, etc., Plank Road Co. *v.* Fisher, 4 Mich. 37; Atty.-Gen. *v.* Detroit, etc., Plank Road Co., 2 Mich. 138. However, it has been held that where the charter of a turnpike company authorizes it to construct its road in such a way that a county bridge would form part thereof, the county may sue to restrain the turnpike company from using it as part of their road until the damages were assessed, and the title of the bridge was vested in the company, so that the county might be relieved from the obligation to repair it. Monmouth County *v.* Red Bank, etc., Turnpike Co., 18 N. J. Eq. 91.

A modification or rescission of the contract, with the assent of the company, may be made by the legislature, either by its direct action or by authority conferred upon and exercised by the supervisors and commissioners of the highway. People *v.* Fishkill, etc., Plank Road Co., 27 Barb. (N. Y.) 445.

The company's intention to comply with the agreement may be assumed by the public officials when the company takes possession and assumes control of a certain piece of the highway and a bridge, expends labor, lays down plank, and constructs their road upon and over them in the same manner as they had been doing with the residue of the road before reaching that point. Fishkill *v.* Fishkill, etc., Plank Road Co., 22 Barb. (N. Y.) 634.

2. Sherwood *v.* Weston, 18 Conn. 32.

Evidence of length appropriated.—An inspection certificate, required by law for the purpose of ascertaining the character of the road after it has been constructed, and whether it is a good and substantial road, in conformity with the law, does not furnish exclusive or the best evidence of the length of the road and of the extent to which it has appropriated an existing highway. Fishkill *v.* Fishkill, etc., Plank Road Co., 22 Barb. (N. Y.) 634.

3 Topp *v.* Garrett, 1 Swan (Tenn.) 459.

4. Vernon Shell Road Co. *v.* Savannah, 95 Ga. 387, 22 S. E. 625; Northern Turnpike Road Co. *v.* Smith, 15 Barb. (N. Y.) 355.

5. Walker *v.* Caywood, 31 N. Y. 51; Ireland *v.* Oswego, etc., Plank Road Co., 13 N. Y. 526, holding that a plank road company has no right to exclude the public while the road is being converted from an ordinary highway into a plank road. *Contra*, Nolensville Turnpike Co. *v.* Baker, 4 Humphr. (Tenn.) 315, holding that the effect of the establishment of the turnpike is to abolish the old road.

6. People *v.* Cummings, 166 N. Y. 110, 59 N. E. 703 [*reversing* 53 N. Y. App. Div. 36, 65 N. Y. Suppl. 581]; Walker *v.* Caywood, 31 N. Y. 51; Reg. *v.* Davis, 24 U. C. C. P. 575. *Contra*, Chagrin Falls, etc., Plank Road Co. *v.* Cane, 2 Ohio St. 419.

7. Erection of gates as condition precedent to collection of tolls see *infra*, III, B, 1.

8. Wright *v.* Carter, 27 N. J. L. 76 (holding further that the right should be exercised so as to occasion as little injury as possible to adjoining landowners); Ridge Turnpike Co. *v.* Stoever, 2 Watts & S. (Pa.) 548, 6 Watts & S. 378.

Where the turnpike is located on a highway, the company has no right to erect a tollhouse thereon without the consent of the owners of the land over which the highway passes. Danville, etc., Gravel Road Co. *v.* Campbell, 87 Ind. 57.

and to locate and establish toll-gates at such places [9] and such distances apart as are authorized and prescribed by its charter or by statute.[10] Under some statutes the location is made by certain public officials upon proper application therefor,[11] and it is frequently provided that gates shall not be erected within the corporate limits of municipalities or within a certain distance thereof.[12] According to some authorities, the power of location, when once exercised, is exhausted;[13] while others hold that the charters and statutes governing the company confer, either expressly or impliedly, the power of changing the location

9. Griffen *v.* House, 18 Johns. (N. Y.) 397, holding that a toll-gate erected at a place two and three quarters miles distant from a state line was not placed near that line, within the meaning of the act of incorporation.

Intersection of highway.— The erection of a gate at the intersection of an old highway is not unlawful where that point is within the meaning of the statutory designation. Farmers' Turnpike Road *v.* Coventry, 10 Johns. (N. Y.) 389; People *v.* Denslow, 1 Cai. (N. Y.) 177.

A location within the limits of the road, although outside the traveled portion thereof, is permissible. Maysville, etc., Turnpike Road Co. *v.* Ratliff, 85 Ky. 244, 3 S. W. 148, 8 Ky. L. Rep. 933.

Location on branch roads.— Under an act authorizing a turnpike company to hold and operate the turnpike road then owned by it, together with all the branch roads, and providing that such company may for five continuous miles of its road erect and keep toll-gates thereon, the company may erect toll-gates on all branch roads, as well as on its main road. Rudy *v.* Shelbyville, etc., Turnpike Road Co., 35 S. W. 916, 18 Ky. L. Rep. 180.

10. Central, etc., Road Co. *v.* People, 5 Colo. 39.

Particular charters construed.—A charter authorizing the erection of a toll-gate upon the completion of five miles of road, with the proviso that no one should be erected nearer than one mile from any town on said road, does not require the gates to be precisely five miles apart (Maysville, etc., Turnpike Road Co. *v.* Ratliff, 85 Ky. 244, 3 S. W. 148, 8 Ky. L. Rep. 933; Bryan *v.* Maysville, etc., R. Co., 15 Ky. L. Rep. 448); and this construction is all the more likely to be adopted by the court as the true one, when it coincides with the practical construction given to the charter by the incorporators of the company and acquiesced in by the public officials for a long period of time (Clark's Run, etc., Turnpike Road Co. *v.* Com., 96 Ky. 525, 29 S. W. 360, 16 Ky. L. Rep. 681). The independent provisions of a charter as to the required distance between gates control over dissimilar and inconsistent provisions of another charter incorporated in the first. Louisville, etc., Turnpike Co. *v.* Nashville, etc., Turnpike Co., 2 Swan (Tenn.) 282.

11. McAllister *v.* Albion Plank-Road Co., 11 Barb. (N. Y.) 610.

The statutory authority of the officials must be pursued, and they have no power to authorize a location contrary to statute (Com. *v.* Heare, 2 Mass. 102); nor can their authority be contracted away by other officials (Palmer *v.* Ft. Plain, etc., Plank Road Co., 11 N. Y. 376).

12. Bryan *v.* Maysville, etc., R. Co., 15 Ky. L. Rep. 448 (holding that, under a charter providing that no gate shall be erected within less than two thirds of a mile of any town, the measurement should be made over the road, and not by an air line); Milarkey *v.* Foster, 6 Oreg. 378, 25 Am. Rep. 531.

Charter amendments, which either impose or remove such a restriction, are binding on the company when accepted by it. Snell *v.* Chicago, 133 Ill. 413, 24 N. E. 532, 8 L. R. A. 858; Com. *v.* Covington, etc., Turnpike Road Co., 5 S. W. 743, 9 Ky. L. Rep. 538.

The courts will construe charters and statutes so as to prohibit the location of a gate within a city, unless the enactment is so clear as to be free from doubt, as such gates within a municipality constitute a public inconvenience and interfere with traffic. Stormfeltz *v.* Manor Turnpike Co., 13 Pa. St. 555. Likewise a charter provision authorizing the erection of a gate within two miles of a certain town has been construed to mean within two miles of said town, but not nearer. State *v.* Clarksville, etc., Turnpike Co., 2 Sneed (Tenn.) 88.

The right to maintain a gate after extension of the city limits so as to include the gate in question has been both affirmed (People *v.* Detroit, etc., Plank Road Co., 37 Mich. 195, 26 Am. Rep. 512; Detroit *v.* Detroit, etc., Plank Road Co., 12 Mich. 333; St. Joachim De la Pointe Claire *v.* Point Claire Turnpike Road Co., 24 Can. Sup. Ct. 486), and denied (Snell *v.* Chicago, 133 Ill. 413, 24 N. E. 532, 8 L. R. A. 858; Lower River Road Co. *v.* Riverside, 25 Ohio St. 658).

13. Hartford, etc., Soc. *v.* Hosmer, 12 Conn. 361; State *v.* Norwalk, etc., Turnpike Co., 10 Conn. 157; Snell *v.* Chicago, 133 Ill. 413, 24 N. E. 532, 8 L. R. A. 858; Gourley *v.* Nashville, etc., Turnpike Co., 104 Tenn. 305, 56 S. W. 855; State *v.* Clarksville, etc., Turnpike Co., 2 Sneed (Tenn.) 88; Louisville, etc., Turnpike Co. *v.* Nashville, etc., Turnpike Co., 2 Swan (Tenn.) 282, holding that the location of an established gate cannot be changed, although the company may increase the number of gates up to the number authorized by its charter. In one Tennessee case, however, it was held that the company in question was authorized by legislation enacted subsequently to its incorporation to make a relocation. State *v.* Lebanon, etc., Turnpike Co., (Tenn. Ch. App. 1900) 61 S. W. 1096.

of old gates and adding new ones to meet changing conditions.[14] The power to order the removal of an improperly located gate is conferred upon the courts by some statutes;[15] but to entitle an individual to restrain as a nuisance the location and maintenance of a gate at a particular place, he must show that the action of the company is without authority of law and that it inflicts upon him special injury distinct from that suffered by the public.[16]

E. Right of Way and Other Interests in Land. A toll road or turnpike company has only an easement in its right of way and other land which it occupies where such land has been acquired by condemnation or even by purchase,[17] except where the land has been purchased in fee in pursuance of power conferred by charter or statute,[18] and this easement reverts to the public on the termination of the company's franchise.[19] Except where the toll road is located on an existing public highway,[20] the company has no right to take lands without making compensation therefor, and whatever lawful contracts it makes with the landowner will be enforced both for and against it;[21] but when the easement of the company becomes vested, it has a right to take possession of its right of way and perform

Where the location was made by public authorities, it cannot be afterward changed by the corporation at its discretion. Hartford, etc., Turnpike Corp. *v.* Baker, 17 Pick. (Mass.) 432. Under the New York statutes, an application to the county court to change the location of a toll-gate must be made by all of the commissioners of highways of the town, but if made by two only, the objection that the third has not joined cannot be raised for the first time on appeal. McAllister *v.* Albion Plank-Road Co., 11 Barb. (N. Y.) 610.

14. *Kentucky.*— Maysville, etc., Turnpike Road Co. *v.* Ratliff, 85 Ky. 244, 3 S. W. 148, 8 Ky. L. Rep. 933; Bardstown, etc., Turnpike Co. *v.* Rodman, 13 S. W. 917, 12 Ky. L. Rep. 151 (holding that the president and directors of a company authorized by statute to move any of its gates as they may deem right, and for the interest of the road, cannot, as long as they act in good faith, be restrained from the exercise of the power at the suit of the stock-holders).

Michigan.— Detroit *v.* Detroit, etc., Plank Road Co., 12 Mich. 333.

New Hampshire.— Cheshire Turnpike *v.* Stevens, 10 N. H. 133.

Vermont.— Fowler *v.* Pratt, 11 Vt. 369.

Canada.— Knott *v.* Hamilton, etc., Road Co., 45 U. C. Q. B. 338.

See 47 Cent. Dig. tit. "Turnpikes and Toll Roads," § 130.

The power of removal is not exhausted by one removal of a gate, but may be exercised as often as the interests of the company demand. Com. *v.* Covington, etc., Turnpike Road Co., 5 S. W. 743, 9 Ky. L. Rep. 538.

15. Moule *v.* Macedon, etc., Plank Road Co., 6 How. Pr. (N. Y.) 37.

The removal by a city of a toll-gate, located in accordance with charter authority, amounts to confiscation and will be restrained by injunction. Conestoga, etc., Turnpike Road Co. *v.* Lancaster, 151 Pa. St. 543, 24 Atl. 1092.

Injuries to toll-gates see *infra*, II, H.

16. Maysville, etc., Turnpike Road Co. *v.* Ratliff, 85 Ky. 244, 3 S. W. 148, 8 Ky. L. Rep. 933; Kelley *v.* Cincinnati, etc., Turnpike Co., 7 Ohio Dec. (Reprint) 119, 1 Cinc. L. Bul. 132.

17. Morris *v.* Schollsville Branch Red River Turnpike Road, 6 Bush (Ky.) 671; Lexington, etc., Turnpike Road Co. *v.* McMurtry, 3 B. Mon. (Ky.) 516; Mitchell *v.* Bourbon County, 76 S. W. 16, 25 Ky. L. Rep. 512; Cynthiana, etc., Turnpike Co. *v.* Hutchinson, 60 S. W. 378, 22 Ky. L. Rep. 1233; State *v.* Cape Girardeau, etc., Gravel Road Co., 207 Mo. 85, 105 S. W. 761; State *v.* Hannibal, etc., Gravel Road Co., 138 Mo. 332, 39 S. W. 910, 36 L. R. A. 457; State *v.* New Boston, 11 N. H. 407; Fisher *v.* Coyle, 3 Watts (Pa.) 407. And see EMINENT DOMAIN, 15 Cyc. 1021 text and note 19.

When road is located on public highway see *supra*, II, D, 1, b.

18. Miller *v.* Flemingsburg, etc., Turnpike Co., 109 Ky. 475, 59 S. W. 512, 22 Ky. L. Rep. 1039; Gorham *v.* Lexington, etc., Turnpike Road, 62 S. W. 260, 23 Ky. L. Rep. 10; Langston *v.* Edwards, 54 S. W. 833, 21 Ky. L. Rep. 1277.

19. See *infra*, II, I, 3.

20. See EMINENT DOMAIN, 15 Cyc. 672.

21. Harrison, etc., Turnpike Co. *v.* Roberts, 33 Ind. 246; Blanchard *v.* Maysville, etc., Turnpike Co., 1 Dana (Ky.) 86; Tucker *v.* Bass, 5 Mass. 164; Shippen *v.* Paul, 31 N. J. Eq. 439, holding that a way for a road or turnpike reserved in a deed for lands, and laid down as such on a recorded map of the premises, does not authorize any company to occupy and use it as a turnpike, without making compensation.

Rights of settlers after incorporation.— Upon the location of the road the right of the company in respect to its right of way does not relate back to the filing of the articles of incorporation, so as to make settlers subsequent to that date, although prior to the location of the road, take their lands subject to such right of way. Riddell *v.* Animas Canon Toll Road Co., 5 Colo. 230.

When grant presumed.—Where a turnpike company located its road, with the acquiescence and tacit consent of a canal company owning a canal, along one side of such canal from the water's edge thereof outwardly a

all acts necessary to fulfil the purposes of its incorporation,[22] such as removing encroachments on the road either summarily or by resort to the courts,[23] and doing such grading and excavating as the proper construction and maintenance of the road demand.[24] It may grant the use of its road-bed for street railroad purposes consistent with its public use as a turnpike,[25] or such use may be acquired for street railroad purposes by condemnation proceedings;[26] and, in general, the easement is subject to be taken for a street or other public use [27] upon the payment of compensation.[28] Although the company has no right to interfere with the right of ingress and egress or other rights of adjoining landowners,[29] the road is so much a public highway that abutting owners cannot acquire rights therein by adverse possession.[30]

F. Construction, Maintenance, and Repair — 1. Duty of Company — a. Construction. In constructing a toll or turnpike road, there must be a compliance with charter and statutory requirements [31] relating to the time for construction,[32]

distance of fifty feet, and, with the like acquiescence of the canal company, constructed and enjoyed such turnpike road for a series of years, a court of equity will presume the existence of a grant by the canal company to the turnpike company, of an easement, to the extent of the location thus made by the latter, for the purpose of a turnpike road, although such easement involves a common interest in the two companies in the ground constituting the berme bank of the canal, for the purposes of each respectively. Cincinnati, etc., R. Co. *v.* Zinn, 18 Ohio St. 417.

22. Harrison, etc., Turnpike Co. *v.* Roberts, 33 Ind. 246; Tucker *v.* Tower, 9 Pick. (Mass.) 109, 19 Am. Dec. 350; Estes *v.* Kelsey, 8 Wend. (N. Y.) 555 (holding that the making and filing of a map of the route of the road, as required by law, is not a condition precedent to the right to enter upon lands for the purpose of making the road); Ward *v.* Marietta, etc., Turnpike, etc., Co., 6 Ohio St. 15.

It has no right to lay water pipes in its way, except to maintain the way, or for the benefit of public travel. Spring Grove Ave. Co. *v.* St. Bernard, 1 Ohio S. & C. Pl. Dec. 99, 1 Ohio N. P. 85.

23. Shippen *v.* Paul, 34 N. J. Eq. 314; Estes *v.* Kelsey, 8 Wend. (N. Y.) 555.

Duty to keep road in safe condition for travel see *infra*, II, F, 1, b.

24. See *infra*, II, F, 2, b.

25. Harrison *v.* Mt. Auburn Cable R. Co., 9 Ohio Dec. (Reprint) 805, 17 Cinc. L. Bul. 265; Cincinnati *v.* Columbia, etc., St. R. Co., 9 Ohio Dec. (Reprint) 782, 17 Cinc. L. Bul. 192. And see Street Railroads, 36 Cyc. 1392.

26. See Street Railroads, 36 Cyc. 1392.

27. See Eminent Domain, 15 Cyc. 607, 628.

Right of railroad to cross turnpike see Railroads, 33 Cyc. 258.

28. See Eminent Domain, 15 Cyc. 669.

29. Perkins *v.* Moorestown, etc., Turnpike Co., 48 N. J. Eq. 499, 22 Atl. 180; Auburn, etc., Plank Road Co. *v.* Douglass, 9 N. Y. 444 [*reversing* 12 Barb. 553]; Cincinnati, etc., Ave. Co. *v.* Bates, 2 Ohio Cir. Ct. 376, 1 Ohio Cir. Dec. 540; Spring Grove Ave. Co. *v.* St. Bernard, 1 Ohio S. & C. Pl. Dec. 99, 1 Ohio N. P. 85 (right of abutting owner to lay and maintain water pipes under or along the road); Saul *v.* Frankford, etc., Turnpike Co., 12 Phila. (Pa.) 346, 3 Wkly. Notes Cas. 270; Chestnut Hill, etc., Turnpike Co. *v.* Piper, 15 Wkly. Notes Cas. (Pa.) 55.

Right of abutting owner to build "shun pike" see *supra*, II, B, 3, b.

The abutting owner retains such an interest in the land occupied by the turnpike that he may maintain trespass against one who has plowed it up. Robbins *v.* Borman, 1 Pick. (Mass.) 122.

30. Ulman *v.* Charles St. Ave Co., 83 Md. 130, 34 Atl. 366; Stevenson's Appeal, 2 Pa. Cas. 367, 6 Atl. 266 [*affirming* 2 Montg. Co. Rep. 73].

31. Schutz *v.* Dalles Military Road Co., 7 Oreg. 259, holding that under an act of congress granting to a state certain lands to aid in the construction of a military wagon road and providing that the road shall be constructed with such width, gradation, and bridges as to permit of its regular use as a wagon road, and in such other special manner as the state may prescribe, and under a grant by the state to a corporation which does not particularly prescribe the manner of constructing the road, the undertaking of the company is to construct the road according to the provisions of the state laws for the construction of toll roads by private corporations.

32. Greencastle Southern Turnpike Co. *v.* State, 28 Ind. 382, holding the statute in question to be constitutional.

Extension of time.— The court is not authorized to extend the time limited by charter, by another provision of the charter providing that if the road should become and remain out of repair for twenty-five days, at any one time, a warrant may issue against the corporation from a justice of the peace, and judgment rendered that the toll-gate be opened and remain so, until the repairs are made (State *v.* Nonconnah Turnpike Co., (Tenn. 1875) 17 S. W. 128), nor is the failure of a turnpike company to construct its road in accordance with the requirements of the act of incorporation affected by a subsequent legislative act extending the time for the completion of the road, so as to bar an

as well as those relating to the length [33] and width of the road [34] and the material to be used.[35] In addition to these obligations, the company must, whether required by charter or not, construct bridges over all streams intersecting its road, when such bridges are needed to render passage safe and continuous.[36] The rights and remedies of persons performing work or furnishing material in the construction of the road are dependent upon statute and the terms of their contract, especially where a lien is claimed.[37]

b. Maintenance and Repair. A toll road or turnpike company is not always bound to maintain its road in the same condition as when constructed; [38] but it is obliged, both under statutes and on general principles, to keep its road in generally good repair and in a reasonably safe condition for travel.[39] This duty and obligation of the company attaches, not only to the road proper, but to adjacent

information in respect to portions of the road completed before the passage of such acts, and on which tolls had been collected (People *v.* Kingston, etc., Turnpike Road Co., 23 Wend. (N. Y.) 193, 35 Am. Dec. 551 [*followed* in People *v.* Bristol, etc., Turnpike Road, 23 Wend. (N. Y.) 222]).

Delay as ground of forfeiture of franchise see *infra*, II, I, 1.

33. Green *v.* Beeson, 31 Ind. 7, holding that a statute requiring the road to be not less than five miles in length is not satisfied by the company constructing four miles of road, and buying the right to run an additional mile upon the road of another corporation.

34. Neff *v.* Mooresville, etc., Gravel Road Co., 66 Ind. 279; Ashby *v.* Elsberry, etc., Gravel Road Co., 99 Mo. App. 178, 73 S. W. 229; Schutz *v.* Dalles Military Road Co., 7 Oreg. 259.

A less width than that required by statute at a few points does not prevent there being a substantial performance of statutory requirements, where such narrowing of width is made necessary by the topography of the country. State *v.* Schenkel, 129 Mo. App. 224, 108 S. W. 635.

35. State *v.* Godwinsville, etc., Macadamized Road Co., 49 N. J. L. 266, 10 Atl. 666, 60 Am. Rep. 611; People *v.* Waterford, etc., Turnpike Co., 3 Abb. Dec. (N. Y.) 580, 2 Keyes 327, holding that a statutory provision requiring turnpikes to be bedded with stone, gravel, or such other material as may be found on the line thereof, so as to form a hard surface, requires a hard and durable material, and is not satisfied with ordinary soil, if stone or gravel can be found within one or two miles along the line of the road.

Permissive statutes relating to the substitution of one material for another are not obligatory on the company unless accepted by it, and when accepted as to a portion of its road the state may withdraw its permission as to the remainder. Erin Tp. *v.* Detroit, etc., Plank-Road Co., 115 Mich. 465, 73 N. W. 556.

Power to change surface of existing highway.— The grant to a gravel road corporation of the power to use a public highway carries with it the incidental power of making such changes in the surface as are necessary to convert it into a gravel road. Carter *v.* Clark, 89 Ind. 238.

36. Shelby County Bd. of Internal Imp. *v.* Scearce, 2 Duv. (Ky.) 576; People *v.* Hillsdale Turnpike Road, 23 Wend. (N. Y.) 254; Schutz *v.* Dalles Military Road Co., 7 Oreg. 259; Allen *v.* Smith, (Tenn. Ch. App. 1898) 47 S. W. 206.

Construction of bridges by private capital see, generally, BRIDGES, 5 Cyc. 1069.

Charter construed.— Under a charter providing that all bridges such as towns had not previously been obliged to build and maintain should be built and maintained by the turnpike company, the company is obliged to build bridges only where, by the elevation of the turnpike road, they become necessary over openings for the outlet of water, although none were necessary before, and also where the road passes over such small bridges as had usually been erected by the districts, in the usual mode of repairing highways. Waterbury *v.* Clark, 4 Day (Conn.) 198.

37. Linn *v.* East Eagle, etc., Turnpike Co., 70 S. W. 401, 24 Ky. L. Rep. 978; Com. *v.* Anderson's Ferry, etc., Turnpike Road, 7 Serg. & R. (Pa.) 6; Hill *v.* Ingersoll, etc., Gravel Road Co., 32 Ont. 194. And see State *v.* Jefferson Turnpike Co., 3 Humphr. (Tenn.) 305.

Although the contract is unauthorized and there can be no recovery on it, yet where the company has accepted the work and derived profit therefrom, it is liable on the common counts. Thornton *v.* Sandwich St. Plank Road Co., 25 U. C. Q. B. 591.

A construction bond executed by a turnpike company to the county is for the benefit of the county alone, and no creditor of the turnpike company can maintain an action thereon for a debt due him by the turnpike company. Spradling *v.* McNees, 43 S. W. 765, 19 Ky. L. Rep. 1472.

Contractor not entitled to preference over state see State *v.* Wilkinson, 1 Ohio Dec. (Reprint) 136, 2 West. L. J. 445.

Right of company to statute labor see Streetsville Plank Road Co. *v.* Streetsville, 19 U. C. Q. B. 62.

38. People *v.* Williamsburgh Turnpike Road, etc., Co., 47 N. Y. 586. And see Milford *v.* Cincinnati, etc., Traction Co., 26 Ohio Cir. Ct. 271.

39. *Connecticut.*— Goshen, etc., Turnpike Co. *v.* Sears, 7 Conn. 86.

Georgia.— Davis *v.* Vernon Shell Road Co., 103 Ga. 491, 29 S. E. 475.

untraveled portions under its control,[40] to extensions,[41] and to bridges which form part of its road,[42] and is not taken away or lessened as to that portion of its road which is within the limits of a municipality,[43] or is occupied by a street or steam railroad,[44] or is located upon or adjacent to a public highway.[45] This

Kentucky.— North *v.* Monterey, etc., Turnpike Co., 9 Ky. L. Rep. 326; Ware *v.* Clark's Run, etc., Turnpike Co., 3 Ky. L. Rep. 325.

Maryland.— Baltimore, etc., Turnpike Co. *v.* Cassell, 66 Md. 419, 7 Atl. 805, 59 Am. Rep. 175.

New Jersey.— Shiloh Turnpike Co. *v.* Bates, (Sup. 1910) 76 Atl. 448.

New York.— People *v.* Williamsburgh Turnpike Road, etc., Co., 47 N. Y. 586.

Pennsylvania.— Kreider *v.* Lancaster, etc., Turnpike Co., 162 Pa. St. 537, 29 Atl. 721; Lancaster Ave. Imp. Co. *v.* Rhoads, 116 Pa. St. 377, 9 Atl. 852, 2 Am. St. Rep. 608.

See 47 Cent. Dig. tit. "Turnpikes and Toll Roads," § 57.

But see Rex *v.* Llandilo Dist. Road Com'rs, 2 T. R. 232, 100 Eng. Reprint 126, holding that the making of repairs on a portion of the road, as to which there was no original obligation to repair, imposes no duty to continue the same.

Roads of which the company has not assumed control are not within the rule. Roy *v.* Les Syndics des Chemins, etc., 16 Quebec Super. Ct. 615.

Obstruction of road.— The duty of the company to keep its road in a safe condition for travel empowers and obligates it to remove all posts, trees, or other obstructions which render travel unsafe and inconvenient. Commonwealth Title Ins., etc., Co. *v.* Willow Grove, etc., Plank Road Co., 17 Montg. Co. Rep. (Pa.) 76; Franklin Turnpike Co. *v.* Crockett, 2 Sneed (Tenn.) 263.

40. Stanford, etc., Turnpike Road Co. *v.* Wray, 12 Ky. L. Rep. 45; Wray *v.* Stanford, etc., Turnpike Co., 11 Ky. L. Rep. 54; Baltimore, etc., Turnpike Co. *v.* Hebb, 88 Md. 132, 40 Atl. 879, holding that where the act of incorporation requires the company to keep the turnpike open to the width of sixty-six feet, it is the duty of the company to maintain the whole of this space in a safe condition for travel, which duty is not discharged by leaving open a space sufficient for customary travel.

41. People *v.* Plainfield Ave. Gravel-Road Co., 105 Mich. 9, 62 N. W. 998.

42. Webster *v.* Larned, 6 Metc. (Mass.) 522; People *v.* Plainfield Ave. Gravel-Road Co., 105 Mich. 9, 62 N. W. 998 (holding further that the fact that a bridge is destroyed without any negligence on the part of the company does not relieve it from the duty to rebuild); Allen *v.* Smith, (Tenn. Ch. App. 1898) 47 S. W. 206. *Compare* Canaan *v.* Greenwoods Turnpike Co., 1 Conn. 1, holding that if turnpike companies, when erecting their bridges, insist that the town ought to build and support them, they are not bound to repair them.

A sidewalk which the turnpike company recognizes as part of its bridge, thus inviting its use, must be kept in repair by it. Wayne County Turnpike Co. *v.* Berry, 5 Ind. 286.

A bridge not in the line of road, because the portion of road in which it is situated has never been so completed as to authorize the collection of tolls, need not be kept in repair by the company. State *v.* Morris Turnpike Co., 4 N. J. L. 165, 7 Am. Dec. 579.

Strengthening bridge constructed by railroad.—Where a railroad company contracts with a turnpike company to construct and maintain a bridge for the use of the latter over and above the railroad right of way, and there is nothing to show that the parties contemplate other than a bridge for ordinary turnpike purposes, and such a bridge is built, the expense of reconstructing it to withstand the strain caused by an electric railway afterward built by the turnpike company must be borne by the latter. West Shore R. Co. *v.* Bergen Turnpike Co., 62 N. J. Eq. 109, 49 Atl. 578.

Contribution to cost of rebuilding.—A turnpike company may bind itself to contribute to the cost of the rebuilding of a bridge, on the line of its road, by the county commissioners to whom it has surrendered the bridge. Rush County *v.* Rushville, etc., Gravel Road Co., 87 Ind. 502.

43. Columbia, etc., Turnpike Co. *v.* Vivion, 103 Mo. App. 324, 77 S. W. 89; Fayetteville, etc., R., etc., Co. *v.* Fayetteville, 37 Misc. (N. Y.) 223, 75 N. Y. Suppl. 180.

The rule is otherwise under statutes prohibiting the erection of toll-gates and collection of tolls within the limits of municipalities, and providing for the conversion of that part of a toll road included within a city or village into a public street. Madisonville *v.* Walnut Hills, etc., Turnpike Co., 9 Ohio Dec. (Reprint) 722, 17 Cinc. L. Bul. 30.

The cost of improvements made by the city may be recovered of the company up to the amount necessary to put the road in the condition required by charter (Versailles, etc., Turnpike Co. *v.* Versailles, 10 S. W. 280, 11 S. W. 712, 10 Ky. L. Rep. 844); or, under some statutes, an assessment may be levied against the company (People *v.* Cummings, 166 N. Y. 110, 59 N. E. 703 [*reversing* 53 N. Y. App. Div. 36, 65 N. Y. Suppl. 581]); but a town, as distinguished from a municipality, cannot recover from the company on an implied promise the cost of repairs voluntarily made (Roxbury *v.* Worcester Turnpike Corp., 2 Pick. (Mass.) 41).

44. Winchester, etc., Turnpike Co. *v.* Winchester, 32 S. W. 170, 17 Ky. L. Rep. 573; Mathews *v.* Winooski Turnpike Co., 24 Vt. 480.

45. Com. *v.* Worcester Turnpike Corp., 3 Pick. (Mass.) 327; Marsh *v.* Proprietors Branch Road, etc., 17 N. H. 444; State *v.* Hampton, 2 N. H. 22.

duty has been held not to be dissolved or transferred by a repeal of the charter of the company,[46] or by a sale of the road,[47] or by an unauthorized or incomplete abandonment.[48] Neither is the company's duty to the public affected by an agreement for repairs with another corporation, such as a town or municipality,[49] although such an agreement may be binding upon the parties.[50]

2. Liability For Improper Construction and Maintenance — a. To Public. A toll road or turnpike company which constructs its road in a manner other than that specified in its charter, or fails to keep the same in repair, is subject to a forfeiture of its charter.[51] The company is also liable to indictment both at common law and under statute,[52] it being essential to a conviction, however, that the indictment show a legal duty resting upon defendant to keep the road in repair,[53] together with a non-performance thereof,[54] and be otherwise sufficient;[55]

46. State *v.* New-Boston, 11 N. H. 407, holding that a town through which a part of a turnpike road is located does not, upon a repeal by the legislature of the charter of the turnpike company, become liable to keep the road in repair.

47. Danville *v.* Boyle County Fiscal Ct., 49 S. W. 458, 20 Ky. L. Rep. 1495; Schload *v.* Clay, etc., Turnpike Co., 192 Pa. St. 40, 43 Atl. 415. But see *infra*, II, G, 2.

Where the road is in the exclusive control of a receiver, the company is not charged with the duty of keeping it in repair. Lock *v.* Franklin, etc., Turnpike Co., 100 Tenn. 163, 47 S. W. 133.

48. Reed *v.* Cornwall, 27 Conn. 48; Kenton County Ct. *v.* Bank Lick Turnpike Co., 10 Bush (Ky.) 529; People *v.* Plainfield Ave. Gravel-Road Co., 105 Mich. 9, 62 N. W. 998. But see *In re* Hinkletown Turnpike Co., 1 Lanc. L. Rev. (Pa.) 361.

49. Com. *v.* Worcester Turnpike Corp., 3 Pick. (Mass.) 327.

50. Providence, etc., Turnpike, etc., Co. *v.* Scranton, 1 Lack. Leg. N. (Pa.) 183. *Compare* Fishkill *v.* Fishkill, etc., Plank Road Co., 22 Barb. (N. Y.) 634.

51. See *infra*, II, I, 1.

52. Com. *v.* Hancock Free Bridge Corp., 2 Gray (Mass.) 58 (holding that a corporation owning a turnpike road, and neglecting to keep it in repair, is liable to indictment, although no person liable to the payment of tolls has sustained injury by reason of such want of repair); Waterford, etc., Turnpike *v.* People, 9 Barb. (N. Y.) 161; Susquehannah, etc., Turnpike Road Co. *v.* People, 15 Wend. (N. Y.) 267; White's Creek Turnpike Co. *v.* State, 16 Lea (Tenn.) 24; Fayetteville, etc., Turnpike Co. *v.* State, 15 Lea (Tenn.) 578; Red River Turnpike Co. *v.* State, 1 Sneed (Tenn.) 474; Simpson *v.* State, 10 Yerg. (Tenn.) 525 (proprietors of road); Reg. *v.* Mills, 17 U. C. C. P. 654. And see Corporations, 10 Cyc. 1229.

In some states, however, where a remedy for proceeding against a company which does not keep its road in repair is prescribed by statute, an indictment at common law will not lie. Com. *v.* Frankford, etc., Turnpike Road Co., 9 Pa. Co. Ct. 103; Com. *v.* Swift Run Gap Turnpike Co., 2 Va. Cas. 361. And see Com. *v.* Lancaster, etc., Turnpike Road Co., 2 Lanc. L. Rev. (Pa.) 59.

The president and directors of the company have been held to be indictable, both at common law (State *v.* Patton, 26 N. C. 16. *Contra*, Matlock *v.* State, 48 Ind. 425), and under statute (Kane *v.* People, 3 Wend. (N. Y.) 363). However, in England, the trustees of a turnpike road are not so chargeable with repairs as to be liable to indictment. Reg. *v.* Netherthong, 2 B. & Ald. 179, 106 Eng. Reprint 332; George *v.* Chambers, 2 Dowl. P. C. N. S. 783, 7 Jur. 836, 12 L. J. M. C. 94, 11 M. & W. 149.

53. Com. *v.* Falmouth, etc., Turnpike Road Co., 30 S. W. 883, 17 Ky. L. Rep. 279; State *v.* Godwinsville, etc., Road Co., 49 N. J. L. 266, 10 Atl. 666, 60 Am. Rep. 611; State *v.* New Jersey Turnpike Co., 16 N. J. L. 222; State *v.* McDowell, 84 N. C. 798 (holding that an averment of the particular duty or duties alleged to have been neglected is essential to the sufficiency of the indictment); State *v.* Patton, 26 N. C. 16; Parkinson *v.* State, 2 W. Va. 589.

54. Daviess Gravel Road Co. *v.* Com., 14 Ky. L. Rep. 812 (holding that under Ky. Gen. St. c. 110, § 7, it is necessary to charge that the road remained out of repair for four days); State *v.* Godwinsville, etc., Road Co., 49 N. J. L. 266, 10 Atl. 666, 60 Am. Rep. 611; Com. *v.* Columbia, etc., Turnpike Co., 16 Pa. Co. Ct. 35.

An indictment for closing gates, contrary to an order of turnpike inspectors that they be kept open until certain repairs are made, must charge that the inspectors make an order for repairs, set open the gates, and directed them to be kept open until the repairs were made, and that defendant shut them without permission of the inspectors or two judges of the county court; and the order, stating what repairs the corporation were to make, should be set forth. State *v.* Day, 3 Vt. 138.

55. Parkinson *v.* State, 2 W. Va. 589, holding that it must be charged that the road is in the county where the indictment is found.

An indictment good at common law does not, from the fact that it concludes "against the form of the statute," become an indictment under a statute relative to the same offense and under which the indictment would not be sufficient. Syracuse, etc., Plank Road Co. *v.* People, 66 Barb. (N. Y.) 25.

that the evidence introduced by the prosecution be relevant [56] and sufficient,[57] and that the case be submitted to the jury with proper instructions.[58] Statutory provision is also made in some states for the appointment of inspectors to ascertain whether the road has been constructed in the manner required by law,[59] or kept in a proper state of repair,[60] and, in case the road is found not to be in good repair, for the making of an order, either by the inspectors or by the court upon the return of an inquisition, that the gates be kept open until the repairs are effected.[61] As proceedings of this character, especially when an inquisition is had, are more or less summary in nature, the record of the court or officials making the order must clearly show jurisdiction,[62] and there must be a strict compliance

56. Pigg *v.* Com., 45 S. W. 356, 20 Ky. L. Rep. 104, holding that evidence that a turnpike was unfit for rapid driving is admissible as a circumstance tending to show that it was unfit for public travel.

Judicial notice cannot be taken of the charter of the company if it is not set out (Moore *v.* State, 26 Ala. 88); nor, where the indictment is against several turnpike companies for failing to keep a bridge in repair, can the court take judicial notice that the route of any one of the companies does not go over the bridge (Shelbyville, etc., Turnpike Road Co. *v.* Com., 9 Ky. L. Rep. 244).

57. Pigg *v.* Com., 37 S. W. 82, 18 Ky. L. Rep. 487; People *v.* Branchport, etc., Plank Road Co., 5 Park. Cr. (N. Y.) 604 (holding that the indictment cannot be sustained without proof, not only that the road had been out of repair, but that it continued so to be down to the time of the finding of the indictment); Kimbrough *v.* State, 10 Humphr. (Tenn.) 97 (holding that where one is indicted as the proprietor of a turnpike road, it is not necessary to conviction to produce the charter of the road, but that it is sufficient to prove that he received toll as proprietor); Reg. *v.* Woodstock, etc., Plank, etc., Road Co., 18 U. C. Q. B. 49.

58. Pigg *v.* Com., 37 S. W. 82, 18 Ky. L. Rep. 487, 45 S. W. 356, 20 Ky. L. Rep. 104.

59. Hunter *v.* Burnsville Turnpike Co., 56 Ind. 213, holding it competent for the legislature to provide for the appointment of such inspectors and for making their report conclusive, unless an appeal is taken.

60. Shiloh Turnpike Co. *v.* Bates, (N. J. Sup. 1910) 76 Atl. 448; Suydam *v.* Smith, 52 N. Y. 383, making a distinction between inspectors appointed to ascertain whether the road has been properly constructed and those appointed to determine whether it is kept in proper repair.

Complaint held sufficient as to specification and location of defects see Shiloh Turnpike Co. *v.* Bates, (N. J. Sup. 1910) 76 Atl. 448.

61. Shiloh Turnpike Co. *v.* Bates, (N. J. Sup. 1910) 76 Atl. 448; Suydam *v.* Smith, 52 N. Y. 383; State *v.* Bosworth, 13 Vt. 402.

The effect of such an order is that the gate ordered to be opened cannot be shut and toll demanded until the proper official certifies that the road is in proper repair (Williams *v.* Smith, 6 Cow. (N. Y.) 166; Reg. *v.* Greaves, 46 U. C. Q. B. 200), it not being sufficient to evidence the determination that the road has been fully repaired by an oral declaration (People *v.* Martin, 56 How. Pr. (N. Y.) 516); and under the New Jersey statute, if the company, notwithstanding an order to keep the gates open, exacts toll of travelers, it is liable for a penalty of ten dollars for each offense (Shiloh Turnpike Co. *v.* Bates, (N. J. Sup. 1910) 76 Atl. 448).

Repeal of acts incorporated by reference.— Proceedings to compel a turnpike company to keep its road in repair, when in compliance with the act of incorporation, are not affected by subsequent alteration of other acts which have become a part of it by reference. Lackawaxen Turnpike Co. *v.* Com., 9 Pa. St. 20.

In Tennessee a turnpike company is not an overseer within the meaning of a statute requiring overseers to put up signs at railroad crossings (Louisville, etc., Turnpike Co. *v.* State, 3 Heisk. 129), and the county court has no jurisdiction over turnpikes before forfeiture is declared, except to appoint superintendents, as provided by statute, who have power to order open the gates of a turnpike road which is not in the condition of repair required by the charter (White's Creek Turnpike Co. *v.* Marshall, 2 Baxt. 104). It is also held in this state that a charter providing that a justice of the peace, on information given on oath that a road has been twenty days out of repair, may, on hearing, give judgment opening the gates nearest the point complained of, does not supersede an existing statute (Shannon Code, §§ 1748–1757) giving turnpike commissioners power to condemn a turnpike road in bad repair, and throw open the gates until repairs are made. Allen *v.* Smith, (Tenn. Ch. App. 1898) 47 S. W. 206.

62. Tinton Falls Turnpike Co. *v.* Hance, 64 N. J. L. 480, 45 Atl. 772; Bergen Turnpike Co. *v.* State, 25 N. J. L. 554; State *v.* Williamstown, etc., Turnpike Co., 24 N. J. L. 547; Com. *v.* Cheltenham, etc., Turnpike Co., 2 Binn. (Pa.) 257; Simons *v.* Bustleton, etc., Turnpike Co., 10 Phila. (Pa.) 101. But see Trowbridge *v.* Baker, 1 Cow. (N. Y.) 251, holding that the appointment of a turnpike road commissioner, who gave notice to open a gate, is sufficiently shown by a certificate of the county clerk that it appears from the records that he and another named person were appointed commissioners, although the statute required the appointment of three commissioners.

with all statutory requirements.[63] Where there exists a special statutory remedy for throwing open toll-gates of roads which are not kept in repair, a bill in equity to restrain the collection of tolls will not lie at the instance of the state,[64] nor will the making of repairs be compelled by mandamus;[65] although it seems that officers possessing plenary jurisdiction over toll roads may sue in equity to compel the making of repairs or the opening of the gates,[66] or under some statutes maintain an action for damages.[67]

b. To Individuals. Although, in constructing and maintaining its road and in erecting toll-gates and tollhouses, a toll road company is not generally liable to abutting landowners for injuries caused by necessary excavations, grading, and drainage,[68] yet an abutting owner, who suffers injury by reason of the company's proceeding without or in excess of authority, may maintain his action either for

Notice is essential in such a proceeding. Back River Neck Turnpike Co. *v.* Homberg, 96 Md. 430, 54 Atl. 82.

Remedy against abuse of power or jurisdiction.—Where no appeal is allowed by law (Back River Neck Turnpike Co. *v.* Hamberg, 96 Md. 430, 54 Atl. 82), certiorari will lie to remove the proceedings to a higher court (Wilt *v.* Philadelphia, etc., Turnpike Co., 1 Brewst. (Pa.) 411), or a court of chancery will restrain an abuse of power and, in such a case, a bill against turnpike commissioners, which makes the three active members of the board defendants, is not defective because it does not add the county, or the chairman of the county court, who is an *ex-officio* member of the board (Allen *v.* Smith, (Tenn. Ch. App. 1898) 47 S. W. 206).

63. King *v.* Lebanon, etc., Turnpike Co., 30 S. W. 619, 17 Ky. L. Rep. 126; Francis *v.* Weaver, 76 Md. 457, 25 Atl. 413; Braden *v.* Berry, 20 Wend. (N. Y.) 55 (holding that a notice by a turnpike inspector that a turnpike is out of repair is insufficient, unless it specifies the part of the road which is out of repair); *In re* Delaware County Turnpike Road, 4 Pa. Co. Ct. 101; *In re* Delaware County Turnpike Road, 3 Lanc. L. Rev. (Pa.) 90; Simons *v.* Bustleton, etc., Turnpike Co., 31 Leg. Int. (Pa.) 4; *In re* Frankford, etc., Turnpike Road, 10 Phila. (Pa.) 59. But see *In re* Germantown, etc., Turnpike Co., 1 Leg. Gaz. Rep. (Pa.) 252.

In what particular the road is out of repair need not be stated in the inquisition, provided it is stated that the road is out of repair between certain points. Wilmington, etc., Turnpike Co. *v.* Boyd, 2 Harr. (Del.) 315.

Hearing of evidence.— Under the New Jersey statutes, the court is not obliged to hear evidence, before appointing freeholders to examine the condition of the road, provided a *prima facie* case is stated in the application for appointment (Moorestown, etc., Turnpike Co. *v.* Holman, 63 N. J. L. 519, 43 Atl. 445); nor is it, on an application to close the gates, bound to hear the original complainants or others in opposition thereto, but is authorized to institute an inquiry and proceed in a summary manner to a determination upon such evidence of the repairs having been made as the company produces (State *v.* Trenton, etc., Turnpike Co., 34 N. J. L. 182).

Jurors on an inquest against a turnpike company for failing to keep its road in repair are not disqualified by the fact of being toll payers. Matter of Germantown, etc., Turnpike Co., 8 Phila. (Pa.) 377.

64. Com. *v.* Wellsboro', etc., Plank Road Co., 35 Pa. St. 152.

65. Morgan *v.* Monmouth Plank Road Co., 26 N. J. L. 99; Reg. *v.* Oxford, etc., Turnpike Road Trustees, 12 A. & E. 427, 4 P. & D. 154, 40 E. C. L. 215, 113 Eng. Reprint 873. And see MANDAMUS, 26 Cyc. 380.

66. Detroit, etc., Plank Road Co. *v.* Macomb Cir. Judge, 109 Mich. 371, 67 N. W. 531. And see People *v.* Grand Rapids, etc., Plank Road Co., 67 Mich. 5, 34 N. W. 250, where the suit was instituted by the prosecuting attorney on complaint of the township highway commissioners.

67. See Davis *v.* Vernon Shell Road Co., 103 Ga. 491, 29 S. E. 475; and cases cited *infra*, this note.

Action for damages.— Under some charters and statutes relating to toll road companies, where the default in maintaining the road is not sufficient to authorize a forfeiture of charter, the county turnpike commissioners have the alternative remedy of suing for damages caused by such default. Davis *v.* Vernon Shell Road Co., 103 Ga. 491, 29 S. E. 475. And see Habersham, etc., Turnpike Co. *v.* Taylor, 73 Ga. 552. Also city authorities are entitled to reimbursement for lowering the grade of a street, made necessary by the lowering of the grade of an intersecting turnpike. Baltimore *v.* Baltimore, etc., Turnpike Road, 80 Md. 535, 31 Atl. 420. However, a statute providing for the fining of the company for not complying with an order to repair contemplates criminal proceedings by indictment, and not a civil suit. People *v.* Goshen, etc., Turnpike Road, 11 Wend. (N. Y.) 597.

68. Dexter *v.* Broat, 16 Barb. (N. Y.) 337; Benedict *v.* Goit, 3 Barb. (N. Y.) 459; Ridge Turnpike Co. *v.* Stoever, 6 Watts & S. (Pa.) 578; Stokely *v.* Robbstown Bridge Co., 5 Watts (Pa.) 546; Wenger *v.* Rohrer, 3 Pa. Super. Ct. 596, 40 Wkly. Notes Cas. 109; Baxter *v.* Winooski Turnpike Co., 22 Vt. 114, 52 Am. Dec. 84; Tapsell *v.* Crosskey, 10 L. J. Exch. 188, 7 M. & W. 441.

damages,[69] or for an injunction, where his injury is irreparable.[70] The company is also liable for injuries suffered by travelers on account of the defective condition of the road;[71] but an individual cannot maintain an action of injunction to restrain the collection of tolls while the road is out of repair, such right belonging to the state or public officials alone.[72]

G. Transfer of Road and Franchises — 1. To Corporations or Individuals. The general rule which prohibits the transfer, without legislative permission, of the franchise of the corporators to be a corporation, as distinguished from the franchise of the corporation to exact tolls,[73] has been applied to toll road companies;[74] and it is the rule that either the primary or secondary franchises of a toll road company, or both, together with the property necessary to an enjoyment of the same, can be alienated by deed, mortgage, or lease, or subjected to sale on judicial process, only by virtue of, and in pursuance of, statutory authority.[75] The transfer of the road and franchises, when authorized by the state, may be made to a corporation empowered to receive the same,[76] or it may be made to individuals who may or may not organize a corporation to operate the road, there being no fundamental objection to the operation of the road and the exaction of tolls by individuals;[77] but in either event the purchaser acquires the same but no greater rights and privileges than belonged to the vendor, and he takes

69. *Indiana.*— Strattan *v.* Elliott, 83 Ind. 425 (interference with access to highway); Turner *v.* Rising Sun, etc., Turnpike Co., 71 Ind. 547.

Kentucky.— Kelly *v.* Donahoe, 2 Metc. 482, holding, however, that the injury is to the possession and that an action therefor cannot be maintained by one possessing the right of reversion.

New Jersey.—Whitenack *v.* Tunison, 16 N. J. L. 77.

New York.— Boughton *v.* Carter, 18 Johns. 405.

Pennsylvania.— Ridge Turnpike Co. *v.* Stoever, 6 Watts & S. 378. And see Harp *v.* Glenolden Borough, 28 Pa. Super. Ct. 116.

See 47 Cent. Dig. tit. "Turnpikes and Toll Roads," §§ 60, 66.

70. Snell *v.* Buresh, 123 Ill. 151, 13 N. E. 856; Gillam *v.* Cleghorn, 7 Grant Ch. (U. C.) 83.

71. See *infra*, III, C, 1.

72. Shewmaker *v.* Mackville, etc., Turnpike Co., 35 S. W. 1040, 18 Ky. L. Rep. 221.

73. See Corporations, 10 Cyc. 1090.

74. Virginia Canon Toll Road Co. *v.* People, 22 Colo. 429, 45 Pac. 398, 37 L. R. A. 711; Snell *v.* Chicago, 133 Ill. 413, 24 N. E. 532, 8 L. R. A. 858; Joy *v.* Jackson, etc., Plank Road Co., 11 Mich. 155.

75. *California.*— People *v.* Duncan, 41 Cal. 507; Wood *v.* Truckee Turnpike Co., 24 Cal. 474.

Indiana.— State *v.* Hare, 121 Ind. 308, 23 N. E. 145 (holding that whatever the corporation may voluntarily alienate, its creditors may subject to sale on judicial process); Indianapolis, etc., Gravel Road Co. *v.* State, 105 Ind. 37, 4 N. E. 316.

Kentucky.— Old State Road, etc., Turnpike Co. *v.* Smith, 1 Ky. L. Rep. 125.

Michigan.— James *v.* Pontiac, etc., Plank Road Co., 8 Mich. 91.

Pennsylvania.—Ammant *v.* New Alexandria, etc., Turnpike Road, 13 Serg. & R. 210, 15 Am. Dec. 593.

Compare Campbell *v.* Kingston, etc., Road Co., 18 Ont. App. 286.

Statutory authority to borrow money to be used in the construction of the road, or in paying for materials, and to mortgage the road to secure the payment of the money so borrowed, authorizes the company to accomplish the same result by mortgaging its road to secure the payment of money due a contractor for constructing the road. Greensburgh, etc., Turnpike Co. *v.* McCormick, 45 Ind. 239.

Transfer of whole or part.— It is held that authority to sell any part or section of the road is equivalent to authority to sell the whole (State *v.* Hare, 121 Ind. 308, 23 N. E. 145); while, on the other hand, it is held that authority to sell the whole road and franchise does not authorize the sale of a part (Snell *v.* Chicago, 133 Ill. 413, 24 N. E. 532, 8 L. R. A. 858). However, where a corporation is empowered by statute to mortgage the whole road or any portion thereof, authority given by the board of directors to the president to mortgage the entire road authorizes a mortgage of a part of the road. Greensburgh, etc., Turnpike Co. *v.* McCormick, 45 Ind. 239.

The power of trustees, under English turnpike acts, to sell or mortgage all or a portion of the road must be exercised under, and within the limitation of, their statutory authority. Crewe *v.* Edleston, 1 De G. & J. 93, 3 Jur. N. S. 1061, 58 Eng. Ch. 73, 44 Eng. Reprint 657; Reg. *v.* Fox, 35 L. T. Rep. N. S. 249; Fairtitle *v.* Gilbert, 2 T. R. 169, 1 Rev. Rep. 455, 100 Eng. Reprint 91.

An assignment of a turnpike mortgage, to be valid, must be made with the formalities prescribed by statute. Doe *v.* Jones, 5 Exch. 16, 19 L. J. Exch. 284; Searle *v.* Law, 15 Sim. 95, 38 Eng. Ch. 95, 60 Eng. Reprint 553.

76. State *v.* Hannibal, etc., Gravel Road Co., 37 Mo. App. 496.

77. State *v.* Hare, 121 Ind. 308, 23 N. E.

the road and franchises subject to all the burdens and limitations imposed by the original grant.[78]

2. To Public Authorities.[79] It is competent for the legislature to provide for the freeing of toll and turnpike roads from tolls by authorizing counties, towns, or municipalities, or the governing bodies thereof, to acquire by gift, purchase, lease, contract, or condemnation, such roads as lie within their boundaries,[80] and in response to a popular demand for free roads, such authorization has been made by the legislative bodies of several jurisdictions.[81] The proceedings necessary to the acquisition of toll roads by public authorities are prescribed by statute, with

145; Allen *v.* Smith, (Tenn. Ch. App. 1898) 47 S. W. 206.

An individual does not become a corporation on purchasing the property and franchises of a toll road corporation (Wellsborough, etc., Plank-Road Co. *v.* Griffin, 57 Pa. St. 417), but only becomes vested with a right to organize as a corporation (Snell *v.* Chicago, 133 Ill. 413, 24 N. E. 532, 8 L. R. A. 858).

On failure to organize as a corporation within the time limited by statute, the purchasers do not forfeit the property purchased (Moore *v.* State, 71 Ind. 478), although, on their death, the property does not pass to their heirs, even though the deed is made to the purchasers, their heirs, executors, administrators, and assigns (Snell *v.* Chicago, 133 Ill. 413, 24 N. E. 532, 8 L. R. A. 858).

78. Virginia Canon Toll Road Co. *v.* People, 22 Colo. 429, 45 Pac. 398, 37 L. R. A. 711; Snell *v.* Chicago, 133 Ill. 413, 24 N. E. 532, 8 L. R. A. 858; Clow *v.* Van Loan, 6 Thomps. & C. (N. Y.) 458; Totten *v.* Halligan, 13 U. C. C. P. 567.

Where the franchise has expired by its own limitation before the sale, the purchasers hold the property as private property. *In re* Bergen County, etc., Public Highway, 22 N. J. L. 293.

Covenant to keep in repair.— The lessees of a turnpike road are liable to their lessors on a covenant to keep the road in repair, without a showing that the lessors had been sued, or otherwise damnified, in consequence of the road being out of repair, and in an action for breach of covenant, the measure of damages is the injury sustained by the public by reason of the road being out of repair. Jouitt *v.* Lewis, 4 Litt. (Ky.) 160.

After foreclosure of a mortgage of the road, no right of redemption remains, under the Indiana statute, and the rights of the company which mortgaged the road, as well as the incorporators of the road, are extinguished. Hunter *v.* Burnsville Turnpike Co., 56 Ind. 213.

79. Original establishment and operation by public authorities see *supra*, II, A.

80. Gilson *v.* Rush County, 128 Ind. 65, 27 N. E. 235, 11 L. R. A. 835; Maysville, etc., Turnpike Road Co. *v.* Wiggins, 104 Ky. 540, 47 S. W. 434, 20 Ky. L. Rep. 724 (holding that a statute authorizing the acquisition of a turnpike road by a county does not violate Const. § 179, providing that the general assembly shall not authorize any county to become a stock-holder in, or appropriate money for, any corporation, except for the purpose of constructing or maintaining bridges, turnpike roads, or gravel roads); Salem Turnpike, etc., Bridge Corp. *v.* Essex County, 100 Mass. 282; *In re* Chartiers, etc., Tp. Turnpike Road, 30 Pittsb. Leg. J. N. S. (Pa.) 283.

Joint ownership.—An act authorizing county commissioners to purchase toll roads upon which traction companies have obtained rights of way does not infringe a constitutional prohibition against joint ownership. Ferris *v.* Clermont County, 29 Ohio Cir. Ct. 622.

A by-law of a municipal corporation authorizing the municipality to assume possession of an existing toll road, which is based on the mistaken idea that the rights of the company have ceased to exist, is illegal and will be quashed by the courts. Hamilton, etc., Road Co. *v.* East Flanborough Tp. Corp., 13 Ont. 128.

81. See the statutes of the several states. And see Bardstown, etc., Turnpike Co. *v.* Nelson County, 109 Ky. 800, 60 S. W. 862, 22 Ky. L. Rep. 1457; O'Mahoney *v.* Bullock, 97 Ky. 774, 31 S. W. 878, 17 Ky. L. Rep. 523 (holding that the act of May 3, 1890, authorizing the county court or court of claims and levy of Fayette county to acquire turnpikes from the owners by purchase or lease, and keep the same in repair, free of toll from the public, is not repealed by any of the subsequent general laws in regard to turnpikes and turnpike companies); Andover, etc., Turnpike Corp. *v.* Middlesex County, 18 Pick. (Mass.) 486; Payne *v.* Caughell, 24 Ont. App. 556 [*reversing* 28 Ont. 157].

The statute must be express and particularly refer to turnpike roads, it being held that no right to condemn turnpike roads exists under a statute conferring the right to appropriate lands. *In re* Niagara Falls Park, 14 Ont. App. 65.

A turnpike owned and operated by a railroad company is subject to the operation of such statutes, and proceedings had thereunder make the turnpike a free road until such time as the railroad company is ready to lay down its tracks. Philadelphia, etc., R. Co. *v.* Snyder, 120 Pa. St. 90, 13 Atl. 708 [*affirming* 4 Pa. Co. Ct. 399].

Toll road in several counties or townships. — In Ohio it is held that the authority granted by the act of April 25, 1904 (97 Ohio Law, p. 414), authorizing county commission-

which there must be a compliance,[82] as are also the rights and remedies of persons affected thereby;[83] and where the proceedings conform to statutory requirements they cannot be later attacked on the ground that the parties were actuated with ulterior motives.[84] Where affirmative action is taken by the county or municipality,[85] and a compliance with statutory requirements is had, there is transferred to the county or municipality the use and title of the property, including the toll-gates and the sites used therefor,[86] as well as the duty of maintaining the road

ers to purchase toll roads upon and along which suburban and interurban railroads are constructed, is not limited to the purchase of toll roads having both termini within the county (Ferris *v.* Clermont County, 29 Ohio Cir. Ct. 622); and, under the Vermont statutes, it seems that a road passing through several towns may be acquired by one proceeding (Taylor *v.* Rutland, 26 Vt. 313). However, under the Pennsylvania statutes, no one county can be compelled to pay for any portion of a turnpike road lying within the limits of another county (*In re* Factoryville, etc., Turnpike, etc., Road, 19 Pa. Super. Ct. 613), and, in Canada, one township has no power to authorize another township to take possession of the portion of the toll road which lies within the limits of the first township (Smith *v.* Ancaster Tp. Corp., 27 Ont. 276). Under a statute providing that two or more townships may vote upon the question of purchasing a toll road running into or through such townships, a township which joins in a petition for such election is bound by the joint vote in favor of the purchase, even though the vote in that particular township is against the purchase. Gilson *v.* Rush County, 128 Ind. 65, 27 N. E. 235, 11 L. R. A. 835.

82. Graintree *v.* Norfolk County, 8 Cush. (Mass.) 546; Cincinnati, etc., Turnpike Co. *v.* Cincinnati, 5 Ohio Dec. (Reprint) 299, 4 Am. L. Rec. 325; Little Nestucca Toll Road Co. *v.* Tillamook County, 31 Oreg. 1, 48 Pac. 465, 65 Am. St. Rep. 802; *In re* Factoryville, etc., Turnpike, etc., Road, 19 Pa. Super. Ct. 613 (holding that, under the act of June 2, 1887 (Pamphl. Laws 306, § 5), requiring a map showing definitely the points between which the road is condemned for public use, a map of the entire turnpike road is not required to be attached to the report of the jury of view); *In re* Harrisburg, etc., Turnpike, 2 Dauph. Co. Rep. (Pa.) 51.

83. Andover, etc., Turnpike Corp. *v.* Middlesex County, 18 Pick. (Mass.) 486; Tremainsville Plankroad, etc., Co. *v.* Toledo, 31 Ohio St. 588; *In re* Kensington, etc., Turnpike Co., 97 Pa. St. 260 [*reversing* 12 Phila. 611]; *In re* Factoryville, etc., Turnpike, etc., Road, 19 Pa. Super. Ct. 613.

An appeal may be taken by the owner of the toll road on his filing an affidavit of interest in case he was not a party to the proceedings for the acquisition of the road (Dayton Gravel Road Co. *v.* Tippecanoe County, 131 Ind. 584, 31 N. E. 363); but on such appeal, objection to the regularity of the proceedings cannot be raised for the first time, it being necessary that such objection be made, if made at all, before the final order for the purchase of the road is entered by the county commissioners (Dayton Gravel Road Co. *v.* Tippecanoe County, *supra*; Gilson *v.* Rush County, 128 Ind. 65, 27 N. E. 235, 11 L. R. A. 835).

Where the county breaks its contract to take immediate possession of the road and pay interest from date on the amount finally adjudged in pending condemnation proceedings by dismissing the condemnation proceedings, the turnpike company is entitled to maintain an action to recover the actual value of its property. Bardstown, etc., Turnpike Co. *v.* Nelson County, 109 Ky. 800, 60 S. W. 862, 22 Ky. L. Rep. 1457, 117 Ky. 674, 78 S. W. 851, 25 Ky. L. Rep. 1900.

84. *In re* Kensington, etc., Turnpike Co., 97 Pa. St. 260 [*reversing* 12 Phila. 611]; State *v.* Shrewsbury, 15 Vt. 283.

85. District of Columbia *v.* Krause, 11 App. Cas. (D. C.) 398, holding that the act of congress of March 21, 1871, authorizing the municipal authorities of the District of Columbia to take the property and franchises of a certain turnpike company, and the act of the legislative assembly of the district appropriating a sum for payment of damages to the turnpike company, cannot, of themselves, be held to work a conveyance of the title of the road to the district, especially in the absence of any proof of payment of the money so appropriated.

An acceptance by the city is unnecessary under a statute permitting a turnpike company to "cede" to a city such portions of its road as are within the municipal limits, and the right of cession is not limited to the city limits as existing at the date of the act, but applies to portions of its road lying within the limits as later extended. However, the cession, to be valid, must be without reservation of any rights either on behalf of the company or any of its assignees. Baltimore *v.* Baltimore, etc., Turnpike Road, 80 Md. 535, 31 Atl. 420. Under the Ohio statutes, a turnpike road or a part thereof may be relinquished to county commissioners only with their consent. State *v.* Zanesville, etc., Turnpike Road Co., 16 Ohio St. 308.

86. Nicholas County *v.* Hawkins, 109 Ky. 679, 60 S. W. 524, 22 Ky. L. Rep. 1327; Mitchell *v.* Bourbon County, 76 S. W. 16, 25 Ky. L. Rep. 512. And see Ferris *v.* Clermont County, 29 Ohio Cir. Ct. 622.

A municipality may sell, under Vict. c. 190, § 26, a toll road which it has constructed or purchased, and, as there is no restriction in the act, the sale may be to individuals as well as to corporations. Payne *v.* Caughell, 24 Ont. App. 556. However, the legislature,

thereafter.[87] In condemnation proceedings the actual value of all the property of the toll or turnpike company, including the franchise, is the true criterion of damages,[88] the property of a company whose franchise has expired, or is about to expire, being manifestly of little value,[89] although entitled to some equitable consideration.[90]

H. Injuries to Road and Other Property. Although the rights of a toll road company, as to that portion of its road which is within the limits of a municipality, are subject to the right of the municipal authorities to make improvements [91] in an authorized manner upon notice,[92] where its road is obstructed or its gates destroyed, or its property is otherwise injured or trespassed upon, it is entitled to its action for damages, or injunction in case the injury is irreparable.[93] In

after permitting a turnpike company to surrender to a city a portion of its road lying within the city limits, cannot, against its consent, compel it to take back such portion of its road. Dry Creek, etc., Turnpike Road Co. *v.* Com., 3 Ky. L. Rep. 623.

Bondholders as agents.—When a turnpike road was, by valid legislative acts, placed in the hands of county commissioners, which acts provide that such commissioners shall employ or appoint such agents to make repairs to the road and to keep the gates and collect tolls, as they shall deem advisable, and such commissioners having proceeded under an invalid act of the legislature to surrender the road to the bondholders, such bondholders, on taking possession of the turnpike, do so as, and become, the agents and trustees of the county commissioners, and are to be considered appointed as such. State *v.* Lower River Road Co., 21 Ohio Cir. Ct. 662, 12 Ohio Cir. Dec. 319.

87. Philadelphia *v.* Gowen, 202 Pa. St. 453, 52 Atl. 3 (holding, however, that a city, by acquiring a turnpike road, does not recognize it as any other than the road it was before, and is not obliged to convert it into a fully paved street); State *v.* Shrewsbury, 15 Vt. 283.

Power of municipality to improve acquired turnpike road see MUNICIPAL CORPORATIONS, 28 Cyc. 947 text and note 95.

88. West Chester, etc., Plank Road Co. *v.* Chester County, 182 Pa. St. 40, 37 Atl. 905.

The same rule is applicable where a county contracted with a turnpike company to purchase its road, the value to be fixed in condemnation proceedings instituted by the county, and afterward the county abandoned such proceedings, and the company sued for the value of the road; and in such action, evidence of the market value of the road or its stock is inadmissible. Bardstown, etc., Turnpike Co. *v.* Nelson County, 117 Ky. 674, 78 S. W. 851, 25 Ky. L. Rep. 1900; Chaplin, etc., Turnpike Road Co. *v.* Nelson County, 77 S. W. 377, 25 Ky. L. Rep. 1154.

89. West Chester, etc., Plank Road Co. *v.* Chester County, 182 Pa. St. 40, 37 Atl. 905.

90. *In re* Ransom Tp., etc., Road, 18 Pa. Co. Ct. 417.

91. State *v.* New Brunswick, 30 N. J. L. 395; Providence, etc., Turnpike, etc., Co. *v.* Flanagan, 3 Lack. Leg. N. (Pa.) 295, 2 Lack. Leg. N. 101. And see MUNICIPAL CORPORATIONS, 28 Cyc. 1113.

92. Fayetteville, etc., R., etc., Co. *v.* Fayetteville, 37 Misc. (N. Y.) 223, 75 N. Y. Suppl. 180.

The laying of steam heating pipes in a turnpike within the limits of a municipality, as authorized by the city, will not be enjoined where the injury is not one which cannot be compensated in money. Berks, etc., Turnpike Road *v.* Lebanon Steam Co., 5 Pa. Co. Ct. 354.

93. Straits Turnpike Co. *v.* Hoadley, 11 Conn. 464; Salem Turnpike, etc., Corp. *v.* Hayes, 5 Cush. (Mass.) 458 (holding that the fact that a statutory penalty is provided for does not take away the company's common-law remedy); Ellicottville, etc., Plank Road Co. *v.* Buffalo, etc., R. Co., 20 Barb. (N. Y.) 644; Panton Turnpike Co. *v.* Bishop, 11 Vt. 198 (holding that the company is entitled to its action against a town which has demolished its gates). But see Cunliffe *v.* Whalley, 13 Beav. 411, 51 Eng. Reprint 158, where an application for an injunction against an adjoining landowner building a tunnel beneath the road was refused.

Acquisition and loss of right.—A turnpike company which has failed to finish the construction of a road within the time limited in its charter, and has abandoned a portion of it, has no right to sue for a penalty for injuries to that portion not actually occupied (Hooker *v.* Utica, etc., Turnpike Road Co., 12 Wend. (N. Y.) 371), but a company does not deprive itself of its right to possession and its right to sue for injury thereto by mortgaging the income of its road (Farmers' Turnpike Road *v.* Coventry, 10 Johns. (N. Y.) 389).

Injuries from drainage.—An adjoining landowner may protect himself from an unusual flow of water by damming it up so that it will flow on to the turnpike, and is not liable for the injury caused thereby (Limerick, etc., Turnpike Co.'s Appeal, 80 Pa. St. 425); but a landowner who assists a turnpike company in laying a drain to conduct water on to his land, and acquiesces in such drainage for years, cannot afterward arbitrarily close the drain, and cast the water on to the road, because of increased drainage, or because other parties may have introduced into the drain matter which does not properly belong there (Lancaster Ave. Imp. Co. *v.* Humphreys, 12 Montg. Co. Rep. (Pa.) 66).

addition, an obstruction of a turnpike road is indictable as a public nuisance,[94] and a destruction of, or injury to, toll-gates is indictable as such under some statutes, or as a malicious trespass.[95]

I. Abandonment of Road and Forfeiture of Franchise — 1. Matters Constituting Abandonment or Grounds For Forfeiture.[96] In general the duties or requirements enjoined upon a toll road company by its act of incorporation are conditions attached to the grant of the franchise conferred, and, whether conditions precedent or subsequent to corporate existence, must be substantially performed, or the corporation will subject itself to forfeiture.[97] A failure to literally comply with conditions subsequent is not necessarily a cause of forfeiture, however, as a substantial performance is all that is required.[98] Among the more common matters which *ipso facto* constitute an abandonment or are grounds for an adjudication of forfeiture are failure to construct the road or portions thereof within the time prescribed by law;[99] change in route;[1] construction of the road or erection of toll-gates in a manner substantially different from that prescribed by charter or statute;[2] failure, for an unreasonable length of time or for a longer

Actions to recover penalties under English statutes see Radnorshire County Roads Bd. *v.* Evans, 3 B. & S. 400, 9 Jur. N. S. 890, 32 L. J. M. C. 100, 7 L. T. Rep. N. S. 677, 113 E. C. L. 400; Hyde *v.* Entwistle, 49 J. P. 511, 52 L. T. Rep. N. S. 760.

94. Northern Cent. R. Co. *v.* Com., 90 Pa. St. 300.

95. State *v.* Brumfiel, 83 Ind. 136; Bock *v.* State, 50 Ind. 281.

Intent.— Under one section of the Indiana statute (2 Rev. St. (1876) p. 479, § 66) no malicious purpose or mischievous intent is necessary to constitute the offense. State *v.* Walters, 64 Ind. 226.

On such a prosecution it is not necessary to prove an organization of the turnpike company, nor is it any defense that the gatekeeper refused to allow defendant to pass, although he may have paid toll at another gate. Franklin *v.* State, 85 Ind. 99. However, it is a good defense that the road is out of repair and the company had no right to maintain the toll-gate. State *v.* Flannagan, 67 Ind. 140.

96. **Termination of franchise by expiration of time limited in grant** see *supra*, II, B, 3, a.

97. Darnell *v.* State, 48 Ark. 321, 3 S. W. 365; Com. *v.* Tenth Massachusetts Turnpike Co., 11 Cush. (Mass.) 171; State *v.* Nonconnah Turnpike Co., (Tenn. 1875) 17 S. W. 128.

98. People *v.* Williamsburgh Turnpike Road, etc., Co., 47 N. Y. 586. And see Fishkill *v.* Fishkill, etc., Plank Road Co., 22 Barb. (N. Y.) 634.

Plank road companies do not forfeit their corporate powers or franchises, under the New York statutes, by reason of any acts or omissions on the part of the company, officers, or stock-holders unless the same are wilful and malicious. Belfast, etc., Plank Road Co. *v.* Chamberlain, 32 N. Y. 651. However, the word "malicious," as used in these statutes, is not to be taken in its ordinary sense, but it denotes acts which are wrongful or unauthorized, such as intentional violations by the corporate officers of the trusts and duties imposed upon them. People *v.* Fishkill, etc., Plank Road Co., 27 Barb. (N. Y.) 445.

99. State *v.* Nonconnah Turnpike Co., (Tenn. 1875) 17 S. W. 128. See also *In re* Ransom, etc., Tps. Road, 18 Pa. Co. Ct. 417.

The Indiana statute does not apply to a company formed to own a road previously constructed. State *v.* St. Paul, etc., Turnpike Co., 92 Ind. 42.

Mere delay in constructing the road is not an abandonment of the corporate enterprise, where the company constructs the road as soon as means to do it can be obtained. Gibson *v.* Columbia, etc., Turnpike, etc., Co., 18 Ohio St. 396.

Partial failure.— Where part of the road has been completed within the prescribed time, a forfeiture as to that part cannot be claimed (State *v.* Brownstone, etc., Gravel-Road Co., 120 Ind. 337, 22 N. E. 316), provided it is sufficient in length to authorize the taking of tolls (People *v.* Jackson, etc., Plank Road Co., 9 Mich. 285).

1. State *v.* Huggins, 47 Ind. 586, holding that, under the Indiana statute, where a slight change of route is made, the part of the road which is abandoned is thereby vacated.

Location contrary to a statute prohibiting location on any previously existing toll road or public highway works a forfeiture of franchise. Lyons, etc., Toll Road Co. *v.* People, 29 Colo. 434, 68 Pac. 275.

2. People *v.* Fishkill, etc., Plank Road Co., 27 Barb. (N. Y.) 445; State *v.* Pasumpsic Turnpike Co., 3 Vt. 178, holding that where a turnpike was accepted by a committee appointed for that purpose by the supreme court, it must be presumed that it was originally constructed of proper width, and according to the specifications in the charter, but that a subsequent act of the company in placing their toll-gate where they have no right by law to place it, and keeping it there for a considerable length of time, is a sufficient cause for forfeiture.

Inconvenience to the public resulting from such a deviation from the statute in the construction of the road must be established before a forfeiture will be declared, where the

time than that allowed by statute, to keep the road in repair,[3] provided such failure renders the road unsafe and inconvenient for traveling;[4] and abandonment of the entire road, or a material portion thereof, for a long length of time or for the time named in the statute governing forfeitures.[5] The mere extension of the territorial limits of a city so as to include a portion of a turnpike does not of itself deprive the turnpike of its character, or the owner of its right of property therein.[6]

2. Proceedings to Enforce. Although, under some statutes, the road itself, as distinguished from corporate rights and franchises, may be legally abandoned to the public without a judicial determination of abandonment,[7] or mandamus may issue to compel the tearing down of a tollhouse no longer required for the

proceedings are instituted only after the lapse of a long length of time. People *v.* Williamsburgh Turnpike Road, etc., Co., 47 N. Y. 586.

The favorable report of turnpike commissioners, and the subsequent license of the governor to erect toll-gates, are not a bar to an information in the nature of a quo warranto, charging a non-compliance with the terms of the act in the original construction of the road. People *v.* Bristol, etc., Turnpike Road, 23 Wend. (N. Y.) 222; People *v.* Kingston, etc., Turnpike Road Co., 23 Wend. (N. Y.) 193, 35 Am. Dec. 551.

3. Lee *v.* Barkhampsted, 46 Conn. 213; Crawfordsville, etc., Turnpike Co. *v.* Fletcher, 104 Ind. 97, 2 N. E. 243; State *v.* Pasumpsic Turnpike Co., 3 Vt. 178.

Where a contract with a county to take immediate possession of the road pending condemnation proceedings has been made, the failure of the company to keep the road in repair does not constitute an abandonment. Bardstown, etc., Turnpike Co. *v.* Nelson County, 109 Ky. 800, 60 S. W. 862, 22 Ky. L. Rep. 1457.

What constitutes non-repair.— Negligence is a legal conclusion when the road has been out of repair for more than six years; and a verdict finding that the road has been for that length of time in a broken and worn-out condition for its entire length, and has been and still continues to be entirely unsafe and in an unsafe condition for vehicles to pass over and upon, is sufficient to warrant a forfeiture of the corporate rights and franchises of the company. People *v.* Plymouth Plank Road Co., 32 Mich 248. Failure to rebuild a bridge, for a considerable length of time, thus leaving the road impassable, presents such a state of non-repair as would work a forfeiture at common law, and is also within the meaning of a statute providing for forfeiture, when the company has suspended its business for a year. People *v.* Hillsdale, etc., Turnpike Road, 23 Wend. (N. Y.) 254.

Forfeiture of part of road.— The Indiana statute authorizes the forfeiture for non-repair of less than the whole of the portion of any road which may be within any one county (Central Plank Road Co. *v.* Hannaman, 22 Ind. 484); and under Mich. St. (1848) the completion of five miles of road, by a plank road company, caused the right to take toll to vest in the company, and whatever length might be contemplated by the charter this right to take tolls upon the completed part could not be affected or forfeited by the failure to keep such additional length of road in proper order (People *v.* Jackson, etc., Plank Road Co., 9 Mich. 285).

4. People *v.* Jackson, etc., Plank Road Co., 9 Mich. 285; People *v.* Williamsburgh Turnpike Road, etc., Co., 47 N. Y. 586.

A lease to the county until the turnpike company should have sufficient funds to complete and maintain it does not terminate the company's charter and franchise. Vanceburg, etc., Turnpike Road Co. *v.* Maysville, etc., R. Co., 117 Ky. 275, 77 S. W. 1118, 25 Ky. L. Rep. 1404.

Where the intention to abandon is clearly manifested by the giving of public notice, the abandonment takes place immediately, and the company will be restrained by injunction from closing up the road. Craig *v.* People, 47 Ill. 487.

6. Columbia, etc., Turnpike Co. *v.* Vivion, 103 Mo. App. 324, 77 S. W. 89.

Effect of extension of city limits on location of toll-gate see *supra*, II, D, 2.

7. Western Plank Road Co. *v.* Central Union Tel. Co., 116 Ind. 229, 18 N. E. 14; People *v.* Fishkill, etc., Plank Road Co., 27 Barb. (N. Y.) 445, holding that, although abandonment proceedings under an unconstitutional special act are unavailing, under the general law as to plank roads, a company may abandon portions of its roads, if the stock-holders holding or representing two thirds of the nominal capital of the company sign or consent to it, and that the requisitions of the statute are answered if, after the capital stock is reduced by forfeitures for non-payment of calls, the holders of two thirds of the capital stock so reduced, so sign, and consent.

In Connecticut, county commissioners may, on complying with statutory provisions, discontinue part of a turnpike (Waterbury River Turnpike Co. *v.* Litchfield, 26 Conn. 209); but under Gen. St. (1866) tit. 31, § 93, making it an abandonment if a turnpike company ceases to repair or take tolls for one year, no certificate or other act of the turnpike commissioners is necessary to make the abandonment complete (Lee *v.* Barkhampsted, 46 Conn. 213).

Release of all rights.—An act authorizing a city to grade and pave a street as soon as

purpose of the road,[8] or the county may sue to restrain the collection of toll,[9] a forfeiture of the corporate charter, rights, and franchises for misuser or non-user may exist and be declared only by a judicial determination in a direct proceeding instituted by or on behalf of the state,[10] scire facias being the proper remedy under some statutes,[11] and quo warranto, or proceedings of that nature, under others.[12] However, as all of these proceedings as well as criminal proceedings for non-repair afford separate and distinct relief against different acts or omissions, the existence of any one remedy does not preclude resort to another.[13] In pursuing any of these remedies against a toll road company, it is necessary, especially where a forfeiture is claimed,[14] that the petition state everything necessary to constitute a cause of action;[15] that the evidence received be admissible[16]

a turnpike company had released its interest in the portion of its road occupying the street empowers such company to release both its charter right to operate a turnpike thereon, and the right to maintain a street railway which it had acquired by purchase. West Philadelphia Pass. R. Co. *v.* Philadelphia, etc., Turnpike Road Co., 186 Pa. St. 459, 40 Atl. 787.

An action for damages for abandonment of a gravel road is not maintainable by an individual who has been assessed for public aid in the construction of the road, where he does not allege special or other damage different from that suffered by his neighbors. Stout *v.* Noblesville, etc., Gravel Road Co., 83 Ind. 466.

8. Reg. *v.* Greenlaw Road Trustees, 4 Q. B. D. 447, 48 L. J. Q. B. 409, 40 L. T. Rep. N. S. 555, 27 Wkly. Rep. 800.

9. State *v.* Louisiana, etc., Gravel Road Co., 116 Mo. App. 175, 92 S. W. 153; Montgomery County *v.* Clarksville, etc., Turnpike Co., 120 Tenn. 76, 109 S. W. 1152.

An action to rescind a contract, made by a county with a turnpike company, on the ground of non-compliance with conditions inserted therein, may be maintained by the county. Davies County *v.* Davies Gravel Road Co., 63 S. W. 752, 23 Ky. L. Rep. 711.

10. Western Plank Road Co. *v.* Central Union Tel. Co., 116 Ind. 229, 18 N. E. 14; Kennedy *v.* Crum, 26 S. W. 190, 16 Ky. L. Rep. 257 (holding that, under a statute providing that if a turnpike company is convicted of allowing its road to be out of repair, its charter and franchise shall be adjudged forfeited, the fact of conviction alone does not work a forfeiture, but the court must adjudge it forfeited); Bridge St., etc., Gravel-Road Co. *v.* Hogadone, 150 Mich. 638, 114 N. W. 917 [*followed* in Besson *v.* Crapo Toll Road Co., 150 Mich. 655, 114 N. W. 924]; Detroit *v.* Detroit, etc., Plank Road Co., 43 Mich. 140, 5 N. W. 275; Moore *v.* Schoppert, 22 W. Va. 282.

The company has a right to a jury trial on such a proceeding. Salt Creek Valley Turnpike Co. *v.* Parks, 50 Ohio St. 568, 35 N. E. 304, 28 L. R. A. 769.

11. State *v.* Moore, 19 Ala. 514; Washington, etc., Turnpike Road *v.* State, 19 Md. 239; State *v.* Scott, 2 Swan (Tenn.) 332. And see, generally, SCIRE FACIAS, 35 Cyc. 1149 text and note 26.

12. Darnell *v.* State, 48 Ark. 321, 3 S. W. 365; Covington, etc., Plank Road Co. *v.* Van Sickle, 18 Ind. 244; State *v.* Louisiana, etc., Gravel Road Co., 116 Mo. App. 175, 92 S. W. 153.

13. *Alabama.*— State *v.* Moore, 19 Ala. 514.

Kentucky.— Daviess County *v.* Daviess County Gravel Road Co., 63 S. W. 752, 23 Ky. L. Rep. 711.

Maryland.— Washington, etc., Turnpike Road *v.* State, 19 Md. 239.

Missouri.— State *v.* Louisiana, etc., Gravel Road Co., 116 Mo. App. 175, 92 S. W. 153.

Vermont.— State *v.* Pasumpsic Turnpike Co., 3 Vt. 178.

See 47 Cent. Dig. tit. "Turnpikes and Toll Roads," § 87.

Where one remedy is adequate, as where particular acts of misfeasance can be suppressed or prevented by the infliction of penalties, there should be no forfeiture of the charter, as the attitude of the courts is against forfeitures where other remedies are adequate. Com. *v.* Newport Licking, etc., Turnpike Co., 97 S. W. 375, 29 Ky. L. Rep. 1285, 100 S. W. 871, 30 Ky. L. Rep. 1235.

The certificate of inspectors that a road has been constructed according to the true intent and meaning of the statute is not conclusive against the people, in an action to vacate the charter of the corporation for not constructing and maintaining their road in the manner required by law. People *v.* Waterford, etc., Turnpike Co., 3 Abb. Dec. (N. Y.) 580, 3 Keyes 327; People *v.* Fishkill, etc., Plank Road Co., 27 Barb. (N. Y.) 445.

14. Com. *v.* Newport Licking, etc., Turnpike Co., 97 S. W. 375, 29 Ky. L. Rep. 1285, 100 S. W. 871, 30 Ky. L. Rep. 1235.

15. Com. *v.* Newport Licking, etc., Turnpike Co., 97 S. W. 375, 29 Ky. L. Rep. 1285, 100 S. W. 871, 30 Ky. L. Rep. 1235; People *v.* Jackson, etc., Plank Road Co., 9 Mich. 285; State *v.* Pasumpsic Turnpike Co., 3 Vt. 178.

Replication and rejoinder.—Where a turnpike is rendered impassable by an irresistible cause, and the injury is alleged in the replication as ground of forfeiture, defendants may rejoin, setting out the cause of the injury. People *v.* Hillsdale, etc., Turnpike Road, 23 Wend. (N. Y.) 254.

16. Washington, etc., Turnpike Road *v.* State, 19 Md. 239.

Condition of road.—Where improper maintenance of the road is alleged as a ground of forfeiture, evidence showing the condition of the road from the time of first taking

and unobjectionable; and that proper instructions be given to the jury.[17] Where the action is based, not on usurpation of franchises, but on abandonment or non-user, the burden of proof is on the state.[18]

3. Title to Road After Termination of Franchise. Upon the termination of the franchise of a toll road company by expiration of the time limted for corporate existence or by abandonment, revocation, or forfeiture, the title to the road does not revert to the abutting owners, especially where they have conveyed their rights without reservation or limitation in the first instance;[19] but the title and use of the road reverts to the public, or, more accurately speaking, the road, which has been a public highway during the time tolls were collected, continues to be a public highway disburdened of tolls.[20] Any attempted conveyance of the title by the toll road company thereafter is void and ineffectual,[21] and an attempt on the part of the company to close up the road and use it as private property will be restrained by the courts.[22]

III. Regulation and Use For Travel.

A. Statutory and Municipal Regulation. In the absence of an express relinquishment of the power to regulate,[23] the grant of franchise rights to a toll

tolls to the commencement of the action is admissible (People *v.* Waterford, etc., Turnpike Co., 3 Abb. Dec. (N. Y.) 580, 3 Keyes 327), as is also evidence of specific instances of trouble experienced by travelers on the road (People *v.* Detroit, etc., Plank-Road Co., 131 Mich. 30, 90 N. W. 687), and the company may show that it has kept the road in repair a principal part of the time (People *v.* Royalton, etc., Turnpike Co., 11 Vt. 431), or that it was unable to do so (Washington, etc., Turnpike Road *v.* State, 19 Md. 239).

17. People *v.* Detroit, etc., Plank-Road Co., 125 Mich. 366, 84 N. W. 290, 131 Mich. 30, 90 N. W. 687.

18. State *v.* Haskell, 14 Nev. 209.

19. Kendall *v.* Hillsboro, etc., Turnpike Road, 67 S. W. 376, 23 Ky. L. Rep. 2372; Pontiac Tp. Highway Com'rs *v.* Cobb, 104 Mich. 395, 62 N. W. 554; Tifft *v.* Buffalo, 82 N. Y. 204; Heath *v.* Barmore, 50 N. Y. 302 [*affirming* 49 Barb. 496].

The title to property acquired by condemnation proceedings reverts, under some statutes, to the original owners, when it is abandoned or is no longer used for the purposes for which it was acquired. Morris *v.* Schollsville Branch Red River Turnpike Road, 6 Bush (Ky.) 671; Hooker *v.* Utica, etc., Turnpike Road Co., 12 Wend. (N. Y.) 371.

20. *California.*— People *v.* Anderson, etc., R. Co., 76 Cal. 190, 18 Pac. 308.

Colorado.—Virginia Canon Toll Road Co. *v.* People, 22 Colo. 429, 45 Pac. 398, 37 L. R. A. 711.

Connecticut.—State *v.* Maine, 27 Conn. 641, 71 Am. Dec. 89.

Illinois.— Craig *v.* People, 47 Ill. 487. *Compare* Bryan *v.* East St. Louis, 12 Ill. App. 390.

Michigan.— Pontiac Tp. Highway Com'rs *v.* Cobb, 104 Mich. 395, 62 N. W. 554.

Missouri.— State *v.* Scott County Macadamized Road Co., 207 Mo. 54, 105 S. W. 752; State *v.* Hannibal, etc., Gravel Road Co., 138 Mo. 332, 39 S. W. 910, 36 L. R. A. 457; State *v.* Louisiana, etc., Gravel Road Co., 116 Mo. App. 175, 92 S. W. 153.

Nevada.— State *v.* Dayton, etc., Toll Road Co., 10 Nev. 155; State *v.* Lake, 8 Nev. 276; State *v.* Curry, 6 Nev. 75.

Pennsylvania.— Railroad Co. *v.* Com., 1 Lanc. L. Rev. 310.

Tennessee.—Montgomery County *v.* Clarksville, etc., Turnpike Co., 120 Tenn. 76, 109 S. W. 1152.

See 47 Cent. Dig. tit. "Turnpikes and Toll Roads," § 89.

The rule is otherwise as to plank roads which have been purchased in fee. People *v.* Newburgh, etc., Plank Road Co., 86 N. Y. 1.

Power of legislature to make turnpike free public highway after expiration of franchise see EMINENT DOMAIN, 15 Cyc. 628.

A statutory declaration of the rule is applicable to plank roads abandoned before the act took effect. State *v.* Duff, 80 Wis. 13, 49 N. W. 23.

Adverse possession by company.— Where the charter of a toll road company created a public easement in the use of the road from the date of its construction, and the public continuously availed itself of such easement, subject only to the easement granted to the corporation to take specified tolls during the term of its corporate existence, neither the possession of the original corporation, nor that of its successor, was exclusive as against the public, so as to divest the latter of its rights, by adverse possession. State *v.* Cape Girardeau, etc., Gravel Road Co., 207 Mo. 85, 105 S. W. 761.

21. State *v.* Cape Girardeau, etc., Gravel Road Co., 207 Mo. 85, 105 S. W. 761; State *v.* Louisiana, etc., Gravel Road Co., 116 Mo. App. 175, 92 S. W. 153.

22. Craig *v.* People, 47 Ill. 487.

23. Covington, etc., Turnpike Road Co. *v.* Sandford, 20 S. W. 1031, 14 Ky. L. Rep. 689 [*reversed* on other grounds in 164 U. S. 578, 17 S. Ct. 198, 41 L. ed. 560], holding that a relinquishment as to one company is not

road company by one legislature does not prevent subsequent legislatures from supervising and regulating the exercise of such rights by remedial legislation,[24] by imposing additional burdens,[25] or by limiting the amount of toll to be charged,[26] provided the legislation is of such a character as not to impair the obligation of the contract of the company with the state[27] or the vested rights of citizens who have been exempted from the payment of toll,[28] or to so reduce the revenues of the company as to amount to a taking of property without due process of law.[29] Although such statutes are generally not retroactive in effect,[30] the force of one statute is not impaired by a subsequent statute which neither expressly nor impliedly repeals it;[31] and statutory regulations, such as those relating to the posting of toll rates, must, when valid, be complied with,[32] the company being subject to a penalty for violation of statutory regulations under some statutes,[33] and to indictment under others.[34] A municipal corporation, in attempting to regulate toll road companies, must keep within the scope of its delegated powers.[35]

B. Tolls — 1. Right to Exact. The right to exact tolls is derived from the state,[36] and may be exercised only after a compliance with conditions precedent,[37]

available to subsequently incorporated companies which succeed to its powers.

24. Davis *v.* Vernon Shell Road Co., 103 Ga. 491, 29 S. E. 475.

Regulation of application of tolls.— The power has been exercised by providing that the tolls received by the company shall be applied to the payment of its debts (Buckingham *v.* Zanesville, etc., Turnpike Co., 14 Ohio 24), and there can be no objection to regulations of the application of tolls where the road is operated by the state under compact with the United States, provided the terms of the compact are not violated (State *v.* Hall, 22 Md. 322). In England various local acts have provided for the application of tolls received, the main provisions in such acts being that the tolls shall be applied to the keeping of the road in repair and the payment of interest on money borrowed. Market Harborough Turnpike Trustees *v.* Kettering Highway Bd., L. R. 8 Q. B. 308, 42 L. J. M. C. 137, 28 L. T. Rep. N. S. 446, 21 Wkly. Rep. 737; Bruton Turnpike Trustees *v.* Wincanton Highway Road, L. R. 5 Q. B. 437, 39 L. J. M. C. 155, 22 L. T. Rep. N. S. 605, 18 Wkly. Rep. 1027; Chatham Local Bd. of Health *v.* Rochester Pavement, etc., Com'rs, L. R. 1 Q. B. 24, 12 Jur. N. S. 47, 35 L. J. M. C. 81, 13 L. T. Rep. N. S. 273, 14 Wkly. Rep. 51; Reg. *v.* Hutchinson, 3 C. L. R. 104, 4 E. & B. 200, 18 Jur. 1116, 24 L. J. M. C. 25, 3 Wkly. Rep. 70, 82 E. C. L. 200; Reg. *v.* South Shields Turnpike Road Trustees, 2 C. L. R. 1506, 3 E. & B. 599, 18 Jur. 1115, 23 L. J. M. C. 134, 77 E. C. L. 599; Pardoe *v.* Price, 16 L. J. Exch. 192, 16 M. & W. 451.

25. See Constitutional Law, 8 Cyc. 984 text and note 41.

26. See Constitutional Law, 8 Cyc. 970.

Regulation by county courts and officials.— A charter provision that where the road pays a greater dividend than that allowed by law, the tolls shall be reduced, has been held to confer, by implication, power on the county court to inquire into the facts which, if ascertained, would necessitate a reduction. Bank Lick Turnpike Co. *v.* Phelps, 81 Ky. 613. Under statutory provisions requiring county supervisors to fix the rate of tolls the board of supervisors has no authority to arbitrarily refuse to fix rates, and where it does so refuse it may be compelled by mandamus to do its duty. Stony Hill Turnpike Road Co. *v.* Placer County, 88 Cal. 632, 26 Pac. 513 [*followed* in Volcano Canon Road Co. *v.* Placer County, 88 Cal. 634, 26 Pac. 513].

27. Powell *v.* Sammons, 31 Ala. 552; Davis *v.* Vernon Shell Road Co., 103 Ga. 491, 29 S. E. 475; People *v.* Jackson, etc., Plank Road Co., 9 Mich. 285.

28. Louisville, etc., Turnpike Road Co. *v.* Boss, 44 S. W. 981, 19 Ky. L. Rep. 1954.

29. Covington, etc., Turnpike Road Co. *v.* Sandford, 164 U. S. 578, 17 S. Ct. 198, 41 L. ed. 560 [*reversing* 20 S. W. 1031, 14 Ky. L. Rep. 689].

30. Perkiomen, etc., Turnpike Road *v.* Berks County, 196 Pa. St. 21, 46 Atl. 98.

31. Proctor *v.* Crozier, 6 B. Mon. (Ky.) 268.

32. Nichols *v.* Bertram, 3 Pick. (Mass.) 342; Centre Turnpike Co. *v.* Smith, 12 Vt. 212.

33. See *infra*, III, D, 1.

34. Nashville, etc., Turnpike Co. *v.* State, 96 Tenn. 249, 34 S. W. 4, collecting unauthorized tolls.

Failure to make settlement with county court.— Under Ky. St. (1903) § 4718, the corporation may be indicted for failure to make an annual settlement with the county court, but the indictment, to be sufficient, must substantially follow the wording of the statute. Com. *v.* Houstonville, etc., Turnpike Road Co., 92 S. W. 941, 29 Ky. L. Rep. 132; Com. *v.* Lyons, 76 S. W. 33, 25 Ky. L. Rep. 487.

Criminal responsibility for improper construction and maintenance see *supra*, II, F, 2, a.

35. Milesburg *v.* Green, 22 Wkly. Notes Cas. (Pa.) 180.

36. See *supra*, II, A.

37. Fales *v.* Whiting, 7 Pick. (Mass.) 225, holding that there exists no right to demand

such as the lawful location and erection of gates,[38] completion of the road of the length and in the manner required by law,[39] and keeping the same in repair.[40] However, a compliance with statutory requirements which are not conditions precedent to the collection of tolls is not necessary to authorize such collection;[41] and the right, when once vested, extends to branch as well as main roads,[42] and is not affected by the authorized construction of a railway upon part of the road,[43] or by the neglect of a county board to keep a record of its action in prescribing rates of toll.[44] A company which possesses the right to exact tolls generally may lawfully exercise that right as to a portion of its road within the limits of a municipality,[45] unless restrained by statute or contract with the municipality.[46]

2. Liability and Exemptions — a. In General. As tolls are collectable only at gates, persons who travel on a portion of the road without passing a gate are not liable therefor, unless they avoid a gate and resume travel on the road for the purpose of avoiding payment;[47] and, under the English and Canadian stat-

toll on a road which has not been lawfully laid out even though it has existed as a turnpike road *de facto* for twenty years.

Compliance may be waived or acknowledged, either expressly or impliedly, by subsequent legislation. Hinsdale Bridge, etc., Turnpike Corp. *v.* Warren, 6 N. H. 154; State *v.* Godwinsville, etc., Macadamized Road Co., 44 N. J. L. 496.

38. Waterloo Turnpike Road Co. *v.* Cole, 51 Cal. 381. And see McAllister *v.* Albion Plank Road Co., 11 Barb. (N. Y.) 610. But see Nicholson *v.* Williamstown, etc., Turnpike Co., 28 N. J. L. 142, holding that if the charter of the company does not require the erection of gates, this is not a condition precedent to the right to receive and enforce the payment of tolls, and that the company may if it sees fit dispense with gates entirely and merely station toll-gatherers at different points along the line.

Gate not placed on road.— Toll cannot be lawfully collected at a gate, not placed on the toll road, but placed on a township road which is a continuation of the toll road. Yorkville, etc., Plank Road Co. *v.* Baldwin, 27 U. C. Q. B. 494.

39. State *v.* Curry, 1 Nev. 251; Monmouth County *v.* Red Bank, etc., Turnpike Co., 18 N. J. Eq. 91; Franklin, etc., Turnpike Co. *v.* Campbell, 2 Humphr. (Tenn.) 467; Reg. *v.* Haystead, 7 U. C. Q. B. 9.

The appropriate evidence of the completion of a plank road, or a sufficient proportion thereof, to justify the erection of toll gates and the exaction of toll, is the inspector's certificate, and certificates uncertain in respect to the portion of the road to which they are intended to apply, or as to the fact of the three miles required being consecutive miles, are fatally defective. Hammondsport, etc., Plank Road Co. *v.* Brundage, 13 How. Pr. (N. Y.) 448.

40. Sims *v.* Yazoo, etc., Plank Road Co., 38 Miss. 23; Columbia, etc., Turnpike Co. *v.* Vivion, 103 Mo. App. 324, 77 S. W. 89, holding that the keeping of part of the road in repair is not sufficient. And see Wayne, etc., Turnpike Co. *v.* Moore, 82 Ind. 208.

An order to cease taking tolls on account of the poor condition of the road, when made by a toll road commissioner, without granting a hearing or an opportunity to produce proofs, is unauthorized and void. Bridge St., etc., Gravel-Road Co. *v.* Hogadone, 150 Mich. 638, 114 N. W. 917 [*followed* in Besson *v.* Crapo Toll-Road Co., 150 Mich. 655, 114 N. W. 924].

41. Wayne, etc., Turnpike Co. *v.* Moore, 82 Ind. 208; State *v.* Royster, 10 Ind. 426; Detroit, etc., Plank Road Co. *v.* Fisher, 4 Mich. 37 (holding that the recording of the survey of the road was not a condition precedent to the right to exact toll of travelers using the road); State *v.* Schenkel, 129 Mo. App. 224, 108 S. W. 635.

42. Rudy *v.* Shelbyville, etc., Turnpike Road Co., 35 S. W. 916, 18 Ky. L. Rep. 180.

43. Hooper *v.* Baltimore, etc., Turnpike Road, 34 Md. 521.

44. Georgetown, etc., Road Co. *v.* Hutchinson, 4 Colo. 50.

45. Com. *v.* Newport, etc., Turnpike Co., 97 S. W. 375, 29 Ky. L. Rep. 1285, 100 S. W. 871, 30 Ky. L. Rep. 1235; St. Catherines, etc., Road Co. *v.* Gardner, 21 U. C. C P. 190 [*affirming* 20 U. C. C. P. 107].

46. Greensburg, etc., Turnpike Road Co. *v.* Breidenthal, 1 Phila. (Pa.) 93; Deards *v.* Goldsmith, 40 L. T. Rep. N. S. 328.

The Ohio statute, which makes it unlawful to maintain toll-gates within city limits and to collect tolls thereat (Turnpike Co. *v.* Kelley, 41 Ohio St. 144), does not prohibit the location of gates outside the municipal limits and the collection of tolls thereat for travel on that portion of the road within the city (Springfield, etc., Turnpike Co. *v.* Springfield, 27 Ohio St. 584); and where a gate has been brought within the limits of a city by the enlargement of such limits, the company cannot be enjoined from collecting toll thereat until compensation has been made by the city for its road, the remedy of one using the turnpike being mandamus to compel the city to begin appropriation proceedings (Gates *v.* Cincinnati, etc., Turnpike Co., 6 Ohio S. & C. Pl. Dec. 337, 4 Ohio N. P. 235).

47. *Connecticut.*— Fitch *v.* Lothrop, 2 Root 524.

utes, a person traveling on a toll road or turnpike for a less distance than one hundred yards is not liable for toll, regardless of whether or not he passes through a gate.[48] Exemptions from toll imposed by general statutes do not apply to companies created by special acts,[49] and a person claiming exemption is obliged to state the ground of his claim at the time he attempts to pass a gate,[50] although he does not waive his right by payment under protest.[51] Also an exemption from the payment of tolls is personal, it being considered not to run with the land or descend to one's heirs on his death, regardless of whether it is created by statute [52] or a valid [53] contract.[54]

b. Specific Classes of Persons and Vehicles. The benefit of charter or statutory provisions conferring exemption from all or half toll upon certain classes of persons, vehicles, or vehicles carrying certain burdens is available only to persons within their meaning, hence it is necessary for a person claiming exemp-

Illinois.— Lincoln Ave., etc., Gravel Road Co. *v.* Daum, 79 Ill. 299.

Kentucky.— Lexington, etc., Turnpike Road Co. *v.* Redd, 2 B. Mon. 30. But see Kennedy *v.* Crum, 26 S. W. 190, 16 Ky. L. Rep. 257, where the company in question possessed charter authority to collect toll for travel which did not pass through gates.

North Carolina.— Buncombe Turnpike Co. *v.* Mills, 32 N. C. 30.

Canada.—Vanderlip *v.* Smyth, 32 U. C. C. P. 60.

See 47 Cent. Dig. tit. "Turnpikes and Toll Roads," § 108.

Contra.— Morton Gravel Road Co. *v.* Wysong, 51 Ind. 4.

Compensation from county.— The fact that a portion of a turnpike is used by the traveling public in reaching a free bridge established by a county near the turnpike company's toll bridge does not entitle the company to compensation therefor from the county. Clarksville, etc., Turnpike Co. *v.* Montgomery County, 100 Tenn. 417, 45 S. W. 345.

48. Pope *v.* Langworthy, 5 B. & Ad. 464, 2 L. J. K. B. 170, 1 N. & M. 647 note, 27 E. C. L. 198, 110 Eng. Reprint 862; Bussey *v.* Storey, 4 B. & Ad. 98, 2 L. J. K. B. 166, 1 N. & M. 639, 24 E. C. L. 52, 110 Eng. Reprint 392; Phipson *v.* Harvett, 1 C. M. & R. 473, 4 L. J. Exch. 36, 5 Tyrw. 54; Veitch *v.* Exeter Turnpike Road Trustees, 8 E. & B. 986, 4 Jur. N. S. 584, 27 L. J. M. C. 116, 6 Wkly. Rep. 290, 92 E. C. L. 986; Reg. *v.* Gerard, 3 Jur. N. S. 741, 26 L. J. M. C. 148, 5 Wkly. Rep. 502; Horwood *v.* Powell, 30 L. J. M. C. 203, 4 L. T. Rep. N. S. 372, 9 Wkly. Rep. 659; Major *v.* Oxenham, 5 Taunt. 340, 1 E. C. L. 180; Wilson *v.* Middlesex County Corp., 18 U. C. Q. B. 348.

49. Aurora, etc., Plank Road Co. *v.* Schrot, 90 Hun (N. Y.) 56, 35 N. Y. Suppl. 602.

50. Cleaveland *v.* Ware, 98 Mass. 409.

51. Frankfort, etc., Turnpike Co. *v.* Bradley, 46 S. W. 206, 20 Ky. L. Rep. 560.

52. Pasumpsic Turnpike Co. *v.* Langdon, 6 Vt. 546.

The right to half toll granted to inhabitants returning from market is within the same rule, and is waived if the person carries or brings back the goods of others from the place of market, or goods part of which are his and part belonging to others. Hearsey *v.* Boyd, 7 Johns. (N. Y.) 183.

53. State *v.* Lower River Road Co., 21 Ohio Cir. Ct. 662, 12 Ohio Cir. Dec. 319, holding that a contract between a turnpike company and a village, whereby in consideration of an annual rental of six hundred dollars, paid by the village, the residents of the village were exempted from paying tolls on any part of the turnpike within the village, amounted simply to the collection of toll for that part of the road in a way different from the ordinary way, and was not violative of an agreement to pay the bonds by the tolls collected from the road.

A presumption that the contract was in writing and therefore binding arises where the records of the company have been lost and it appears that the directors of the company refrained for more than twenty years from exacting tolls from the person claiming exemption, who testifies that this was done pursuant to a contract made with the directors of the company at a formal meeting. Pigg *v.* Stacey, 49 S. W. 1065, 20 Ky. L. Rep. 1680. Likewise, in an action on such a contract by the person claiming exemption, evidence on the part of plaintiff that defendants' gatekeeper had permitted plaintiff to pass toll free for a long time after the making of the road is admissible for the purpose of showing acquiescence on the part of defendants in plaintiff's claim. Wadhams *v.* Litchfield, etc., Turnpike Co., 10 Conn. 416.

54. Owingsville, etc., Turnpike Road Co. *v.* Hamilton, 53 S. W. 5, 21 Ky. L. Rep. 815; Mt. Sterling, etc., Turnpike Road Co. *v.* Hamilton, 14 Ky. L. Rep. 720; Anderson *v.* Eminence, etc., Turnpike Co., 14 Ky. L. Rep. 110. *Compare* Lucas *v.* Smithfield, etc., Turnpike Co., 36 W. Va. 427, 15 S. E. 182.

Where descendants are expressly included in a reservation by an owner of land, in granting a right of way for a toll road, that she and her descendants shall have the right to pass without payment of toll through the gate to be located within the tract, the privilege of passing without payment of toll cannot be claimed by descendants more remote than the children who owned the fee subject to the dower interest of their mother, by whom the grant was made. Turpin *v.*

tion to show that the statutory exoneration is applicable and that he is within one of the named classes, such as persons living within a certain distance of a toll-gate;[55] persons going to or from a religious meeting,[56] a blacksmith shop,[57] or a mill;[58] persons traveling upon domestic business of a family;[59] also clergymen,[60] farmers or persons passing to and from the common business of their farm,[61]

Batavia Pike, etc., Bridge Co., 9 Ohio S. & C. Pl. Dec. 668, 7 Ohio N. P. 12.

An exemption of one's "family" does not include married children (Park *v.* Richmond, etc., Turnpike Co., 9 S. W. 252, 423, 10 Ky. L. Rep. 384, 1 L. R. A. 198), nor grandchildren who do not live with the person making the contract (Bardstown, etc., Turnpike Road Co. *v.* Talbott, 11 Ky. L. Rep. 329; Smith *v.* Lexington, etc., Turnpike Road Co., 4 Ky. L. Rep. 628).

Such a contract is not broken by the fact that, after it is made, the county acquired the turnpike by condemnation proceedings, and made a free turnpike out of the road. Mitchell *v.* Bourbon County, 76 S. W. 16, 25 Ky. L. Rep. 512.

55. Canastota, etc., Plank Road Co. *v.* Parkill, 50 Barb. (N. Y.) 601. However, the general New York statutes exempting persons living within a certain distance of toll-gates does not apply to corporations created by special act. Great Western Turnpike Co. *v.* Shafer, 172 N. Y. 662, 65 N. E. 1121 [*affirming* 57 N. Y. App. Div. 331, 68 N. Y. Suppl. 5]; Monticello, etc., Turnpike Road Co. *v.* Leroy, 72 N. Y. App. Div. 241, 76 N. Y. Suppl. 215.

Persons within certain county.—Where a charter amendment authorized the erection of a toll-gate within what had theretofore been a prohibited distance from the county-seat, but provided that the citizens of the county whose most direct route to the county-seat from their respective residences "lies over" a certain dirt road, between which and the town the new gate was to be erected, shall not be required "to pay any other or greater tolls than they now pay by law," the proviso is not restricted to then living citizens of the county, but applies ever in the present tense at the date of the use of the turnpike, and it also applies to citizens of the county whose nearest route to the county-seat is over the dirt road named, although they do not live on that road, and can reach it only by a permissive way. Frankfort, etc., Turnpike Co. *v.* Bradley, 46 S. W. 206, 20 Ky. L. Rep. 560.

56. Skinner *v.* Anderson, 12 Barb. (N. Y.) 648; Lewis *v.* Hammond, 2 B. & Ald. 206, 106 Eng. Reprint 342, holding that an exemption of persons going to and from their proper parochial church does not include a dissenter going to and returning from his proper place of religious worship, situate out of the parish in which he resides.

57. Stratton *v.* Hubbel, 9 Johns. (N. Y.) 357; Stratton *v.* Herrick, 9 Johns. (N. Y.) 356, both cases holding that, to come within the exemption, the principal object of the traveling must be to have blacksmith work done.

58. Bates *v.* Sutherland, 15 Johns. (N. Y.) 510; Chestney *v.* Coon, 8 Johns. (N. Y.) 150.

The word "mills" includes sawmills as well as grist-mills. Hearsey *v.* Pruyn, 7 Johns. (N. Y.) 179.

59. Centre Turnpike Co. *v.* Smith, 12 Vt. 212 (holding that an act of incorporation which exempted from toll all persons traveling upon the "ordinary domestic business of family concerns" did not extend to the case of physicians going to visit their patients); Green Mountain Turnpike Co. *v.* Hemmingway, 2 Vt. 512.

Persons traveling into another town are not within the meaning of some exemptions of this character. Kent *v.* Newburyport Turnpike Corp., 4 Pick. (Mass.) 388; Proprietors Second Turnpike Road *v.* Taylor, 6 N. H. 499.

60. Smith *v.* Barnett, L. R. 6 Q. B. 34, 40 L. J. M. C. 15, 23 L. T. Rep. N. S. 746; Brunskill *v.* Watson, L. R. 3 Q. B. 418, 37 L. J. M. C. 103, 18 L. T. Rep. N. S. 432, 16 Wkly. Rep. 1009; Layard *v.* Ovey, L. R. 3 Q. B. 415, 37 L. J. M. C. 148, 18 L. T. Rep. N. S. 632, 16 Wkly. Rep. 896; Temple *v.* Dickinson, 1 E. & E. 34, 5 Jur. N. S. 363, 28 L. J. M. C. 10, 7 Wkly. Rep. 13, 102 E. C. L. 34.

61. Medford Turnpike Corp. *v.* Torrey, 2 Pick. (Mass.) 538; Nicholson *v.* Williamstown, etc., Turnpike Co., 28 N. J. L. 142, holding that a farmer traveling over a turnpike when he could travel the entire distance over a county road is not exempted.

One who owns two parcels of land or farms on different sides of a toll-gate, and who passes between the same in the ordinary pursuit of agriculture, is within the meaning of such exemption. Camden, etc., Turnpike Co. *v.* Fowler, 24 N. J. L. 205; Newburgh, etc., Turnpike Co. *v.* Belknap, 17 Johns. (N. Y.) 33; Com. *v.* Carmalt, 2 Binn. (Pa.) 235. *Compare* Cummings *v.* Waring, 39 Barb. (N. Y.) 630.

Animals or burdens pertaining to agriculture.—English statutes have exempted from the payment of toll implements of husbandry (Ablert *v.* Pritchard, L. R. 1 C. P. 210, 1 Harr. & R. 274, 12 Jur. N. S. 331, 35 L. J. M. C. 101, 14 L. T. Rep. N. S. 16, 14 Wkly. Rep. 331; Reg. *v.* Malty, 8 E. & B. 712, 4 Jur. N. S. 238, 27 L. J. M. C. 59, 6 Wkly. Rep. 213, 92 E. C. L. 712), horses, sheep, and cattle going to or returning from pasture (Warmby *v.* Deakin, 14 C. B. N. S. 124, 10 Jur. N. S. 98, 32 L. J. M. C. 201, 8 L. T. Rep. N. S. 319, 11 Wkly. Rep. 669, 108 E. C. L. 124; Harrison *v.* Brough, 6 T. R. 706, 101 Eng. Reprint 783), fodder for cattle (Clements *v.* Smith, 3 E. & E. 238, 6 Jur. N. S. 1149, 30 L. J. M. C. 16, 3 L. T. Rep.

scholars,[62] police constables,[63] seafaring persons,[64] officers, soldiers, and volunteers on duty,[65] and carts or carriages employed in royal service.[66] It is also necessary to exemption from toll, under statutes providing that certain classes of persons and vehicles, which pass and repass the same toll-gate several times a day, shall not be obliged to pay more than one toll during one day, that one show himself to be within the meaning of the statute.[67] Although bicycles and bicycle riders are not subject to tolls under charters and statutes authorizing their imposition on carriages, coaches, or vehicles drawn by animals,[68] the rule is otherwise with regard to automobiles.[69] Mail coaches are also liable under such provisions,[70] except where the liability of persons driving such coaches, as well as that of pas-

N. S. 295, 9 Wkly. Rep. 53, 107 E. C. L. 238), and carts, carriages, or wagons conveying manure (Foster *v.* Tucker, L. R. 5 Q. B. 224, 39 L. J. M. C. 72, 22 L. T. Rep. N. S. 124; Richens *v.* Wiggins, 3 B. & S. 953, 9 Jur. N. S. 1055, 32 L. J. M. C. 144, 8 L. T. Rep. N. S. 384, 11 Wkly. Rep. 617, 113 E. C. L. 953; Harrison *v.* James, 2 Chit. 547, 18 E. C. L. 779; Pratt *v.* Brown, 8 C. & P. 244, 34 E. C. L. 714).

62. Lebanon, etc., Turnpike-Road Co. *v.* Adams, 39 S. W. 410, 19 Ky. L. Rep. 79, holding that tolls are collectable for the use of a toll road to convey milk to market, although the vehicle carrying the milk is occupied by no persons other than "scholars going to or returning from school," who, with their vehicle, are by statute exempted from liability.

63. Longland *v.* Andrews, 3 H. & C. 564, 11 Jur. N. S. 412, 34 L. J. Exch. 90, 12 L. T. Rep. N. S. 233, 13 Wkly. Rep. 784.

64. Sharp *v.* Fields, 10 L. T. Rep. N. S. 338.

65. Humphrey *v.* Bethel, L. R. 1 C. P. 215, Harr. & R. 221, 12 Jur. N. S. 212, 35 L. J. M. C. 150, 13 L. T. Rep. N. S. 797, 14 Wkly. Rep. 457; Ward *v.* Gray, 6 B. & S. 345, 11 Jur. N. S. 738, 34 L. J. M. C. 146, 12 L. T. Rep. N. S. 305, 13 Wkly. Rep. 653, 118 E. C. L. 344; Stephenson *v.* Taylor, 1 B. & S. 95, 7 Jur. N. S. 602, 30 L. J. M. C. 145, 4 L. T. Rep. N. S. 243, 9 Wkly. Rep. 600, 101 E. C. L. 95; Hinds *v.* Thring, 36 L. T. Rep. N. S. 216; Teather *v.* Turner, 7 L. T. Rep. N. S. 785, 11 Wkly. Rep. 425.

66. Craig *v.* Nicholas, [1900] 2 Q. B. 444, 64 J. P. 569, 69 L. J. Q. B. 608, 82 L. T. Rep. N. S. 765, 16 T. L. R. 382, 49 Wkly. Rep. 48; Toomen *v.* Reeves, L. R. 3 C. P. 62, 37 L. J. M. C. 49, 17 L. T. Rep. N. S. 149, 16 Wkly. Rep. 83; Westover *v.* Perkins, 2 E. & E. 57, 5 Jur. N. S. 1352, 28 L. J. M. C. 227, 7 Wkly. Rep. 582, 105 E. C. L. 57.

67. Baltimore, etc., Turnpike Co. *v.* Garrett, 50 Md. 68; Owings *v.* Baltimore, etc., Turnpike Road, 5 Harr. & J. (Md.) 84; Fenton *v.* Swallow, 1 A. & E. 723, 28 E. C. L. 338, 110 Eng. Reprint 1383; Hopkins *v.* Thorogood, 2 B. & Ad. 916, 1 L. J. K. B. 56, 22 E. C. L. 383, 109 Eng. Reprint 1383; Gray *v.* Shilling, 2 B. & B. 30, 4 Moore C. P. 371, 6 E. C. L. 24; Jackson *v.* Curwen, 5 B. & C. 31, 7 D. & R. 838, 4 L. J. K. B. O. S. 227, 11 E. C. L. 356, 108 Eng. Reprint 12; Fearnley *v.* Morley, 5 B. & C. 25, 7 D. & R. 832, 4 L. J. K. B. O. S. 225, 11 E. C. L. 353, 108 Eng. Reprint 9; Waterhouse *v.* Keen, 4 B. & C. 200, 6 D. & R. 257, 10 E. C. L. 542, 107 Eng. Reprint 1033; Loaring *v.* Stone, 2 B. & C. 515, 3 D. & R. 797, 2 L. J. K. B. O. S. 66, 9 E. C. L. 227, 107 Eng. Reprint 475; Norris *v.* Poate, 3 Bing. 41, 3 L. J. C. P. O. S. 134, 10 Moore C. P. 293, 11 E. C. L. 29; Niblett *v.* Pottow, 1 Bing. N. Cas. 81, 3 L. J. C. P. 251, 4 Moore & S. 595, 27 E. C. L. 553; James *v.* Dickenson, 14 C. B. N. S. 416, 108 E. C. L. 416; Johnson *v.* Cocksedge, 5 C. B. N. S. 286, 27 L. J. M. C. 314, 94 E. C. L. 286; Chambers *v.* Williams, 7 D. & R. 842, 4 L. J. K. B. O. S. 229, 16 E. C. L. 322; Williams *v.* Sangar, 10 East 66, 103 Eng. Reprint 700; O'Hara *v.* Foley, 3 U. C. Q. B. 216.

68. Murfin *v.* Detroit, etc., Plank-Road Co., 113 Mich. 675, 71 N. W. 1108, 67 Am. St. Rep. 489, 38 L. R. A. 198; Gloucester, etc., Turnpike Co. *v.* Leppee, 62 N. J. L. 92, 40 Atl. 681, 41 L. R. A. 457; String *v.* Camden, etc., Turnpike Co., 57 N. J. Eq. 227, 40 Atl. 774; Simpson *v.* Teignmouth, etc., Bridge Co., [1903] 1 K. B. 405, 85 L. T. Rep. N. S. 726, 18 T. L. R. 104, 234 [*affirmed* in [1903] 1 K. B. 410, 67 J. P. 65, 72 L. J. K. B. 204, 1 Loc. Gov. 235, 88 L. T. Rep. N. S. 117, 19 T. L. R. 222, 51 Wkly. Rep. 545]; Williams *v.* Ellis, 5 Q. B. D. 175, 44 J. P. 394, 49 L. J. M. C. 47, 42 L. T. Rep. N. S. 249, 28 Wkly. Rep. 416; Smith *v.* Kynnersley, 66 J. P. 679. *Contra*, Geiger *v.* Perkiomen, etc., Turnpike Road, 167 Pa. St. 582, 31 Atl. 918, 28 L. R. A. 458 [*reversing* 4 Pa. Dist. 111].

Motor-cycles.— It seems that tolls might be collected from persons using motor-cycles even where such an exaction would not be lawful with regard to ordinary bicycles. See Murfin *v.* Detroit, etc., Plank-Road Co., 113 Mich. 675, 71 N. W. 1108, 67 Am. St. Rep. 489, 38 L. R. A. 198.

69. Murfin *v.* Detroit, etc., Plank-Road Co., 113 Mich. 675, 71 N. W. 1108, 67 Am. St. Rep. 489, 38 L. R. A. 198; Scranton *v.* Laurel Run Turnpike Co., 225 Pa. St. 82, 72 Atl. 1063; Bertles *v.* Lauren Run Turnpike Co., 15 Pa. Dist. 94. And see MOTOR VEHICLES, 28 Cyc. 26.

70. Proctor *v.* Crozier, 6 B. Mon. (Ky.) 268; Dickey *v.* Maysville, etc., Turnpike Road Co., 7 Dana (Ky.) 113; Cincinnati, etc., Turnpike Co. *v.* Neil, 9 Ohio 11; Paris, etc., Road Co. *v.* Babcock, 10 U. C. Q. B. 335.

sengers therein, is governed by contract between the parties,[71] or by compact between the state and the United States.[72]

3. RATE AND AMOUNT. The courts will not permit a company possessing the unrestricted right to impose tolls to make unreasonable charges,[73] nor will it uphold a legislative regulation of amount which is unreasonable as regards the company.[74] Although a toll road company has no right to charge toll for a greater distance of its road than has been constructed,[75] it has, in the absence of restrictive charter or statutory provisions,[76] the right to collect, of a person passing through a gate, toll for the total distance between two gates even though the person has traveled only a portion of that distance.[77] Where a different rate of toll is chargeable on different classes of vehicles, such as wagons, hackney coaches, and pleasure carriages, the class in which a conveyance belongs is to be determined by the ordinary meaning of the vehicles named,[78] and where a conveyance is within both a general and a specific class, it is deemed, for the purpose of toll, to be

71. Powell *v.* Sammons, 31 Ala. 552.

72. Achison *v.* Huddleson, 7 Gill (Md.) 177; Schutz *v.* Dalles Military Road Co., 7 Oreg. 259; Achison *v.* Huddleson, 12 How. (U. S.) 293, 13 L. ed. 993; Neil *v.* Ohio, 3 How. (U. S.) 720, 11 L. ed. 800 [*reversing* 7 Ohio 132, 28 Am. Dec. 623]; Searight *v.* Stokes, 3 How. (U. S.) 151, 11 L. ed. 537.

73. Powell *v.* Sammons, 31 Ala. 552.

A person traveling from the intersection of the road of one company with the road of another company is not, under the Canadian statutes, obliged to pay any higher rate of toll than is paid by persons traveling the whole length of the intersected road. Smith *v.* Wentworth County, 26 Ont. 209.

74. Covington, etc., Turnpike Road Co. *v.* Sandford, 164 U. S. 578, 17 S. Ct. 198, 41 L. ed. 560 [*reversing* 20 S. W. 1031, 14 Ky. L. Rep. 689].

Change in rate.—Authority to increase or reduce the rate of tolls is sometimes conferred upon the company by the legislature (Payne *v.* Caughell, 24 Ont. App. 556 [*reversing* 28 Ont. 157]) to be exercised upon compliance with certain prescribed requirements (Grumbine *v.* State, 60 Md. 355), and to be made applicable to all the gates (Reg. *v.* Bury, etc., Road Trustees, 4 B. & C. 361, 6 D. & R. 369, 10 E. C. L. 615, 107 Eng. Reprint 1093). Also statutes fixing the rate of tolls are sometimes repealed by implication as well as by express words (Southport Plank Road Co. *v.* Russell, 7 N. Y. St. 596); but, where the legislature, in granting the charter of the company, does not reserve the right to alter, amend, or repeal, a subsequent statute changing the rate of toll is not binding on the company until accepted by it (Middlesex Turnpike Co. *v.* Freeman, 14 Conn. 85), and such a subsequent statute authorizing an increase of rates is subject to repeal at any time, as it is a mere gratuity possessing none of the elements of a contract (Bryant Station Turnpike Road Co. *v.* Johnston, 3 Ky. L. Rep. 536). A statute passed on petition of a turnpike company, modifying its charter by permitting it to take larger tolls from carriages carrying mail, is not void for failure to serve notice of such petition on a person who had a contract to carry mail between the towns constituting the termini of the road. Derby Turnpike Co. *v.* Parks, 10 Conn. 522, 27 Am. Dec. 700.

75. McAllister *v.* Albion Plank-Road Co., 11 Barb. (N. Y.) 610.

76. Madison, etc., Plank Road Co. *v.* Reynolds, 3 Wis. 287.

77. Baltimore, etc., Turnpike Road *v.* Routzahn, 65 Md. 113, 4 Atl. 275; Baltimore, etc., Turnpike Co. *v.* Routzahn, 61 Md. 37; Mallory *v.* Austin, 7 Barb. (N. Y.) 626; People *v.* Kingston, etc., Turnpike Road Co., 23 Wend. (N. Y.) 193, 35 Am. Dec. 551; Stuart *v.* Rich, 1 Cai. (N. Y.) 182.

Kentucky statute construed.— Under Gen. St. c. 110, § 3, providing that the rates fixed therein are for gates five miles apart, and in proportion for a less distance, but when there is a fraction of a road, of a mile or more, less than five miles, toll may be charged at the gate next thereto, for the fraction, in proportion that the length bears to five miles, where the distance to a town from a toll-gate and back is one mile, the company is entitled to prepayment from one passing through the gate to the town and back of the toll for the whole distance, going and coming. Rives *v.* Wood, 15 S. W. 131, 12 Ky. L. Rep. 691.

78. See Merrick *v.* Phelps, 5 Conn. 465 (holding that a one-horse wagon, with two full-grown persons in the same, is a "wagon," but not a "loaded wagon"); Burton *v.* Monticello, etc., Turnpike Co., 109 S. W. 319, 33 Ky. L. Rep. 85; Housatonic River Turnpike Corp. *v.* Frink, 15 Pick. (Mass.) 443.

The character of a carriage used for carrying passengers is not changed by the fact that mail is also carried in it. Marselis *v.* Seaman, 21 Barb. (N. Y.) 319.

A mail coach includes a coach which actually carries the public mail over the road under temporary arrangement fairly made with the post-office department, through a deputy postmaster, for the public convenience, and not for the mere purpose of evading the higher rate of toll, and the turnpike company will not be allowed to set up that the contract for carrying the mail does not conform to the directions of the act of con-

within the specific class.[79] In this connection, the words "pleasure carriage" are broad enough to include any vehicle used for the carriage of passengers,[80] such as an automobile.[81]

4. Collection and Enforcement — a. Remedies and Defenses. An action of assumpsit may be brought on an express promise to pay for the use of a toll road;[82] and, in the absence of an express agreement and of a statutory remedy, the common law provides a remedy in the action of *indebitatus assumpsit*.[83] As to the effect of a statutory remedy for collecting tolls, as by detaining the traveler or suing for a penalty, on the common-law right of action, the authorities are at variance, one class of decisions holding that such statutory remedies are merely cumulative,[84] and the other holding that they are exclusive and that the law will not imply a promise to pay for the use of the road, where such statutes exist.[85] Toll may be demanded at a gate in advance;[86] but a statute providing for the detention of travelers until toll is paid does not authorize the stoppage of vehicles carrying the United States mail.[87] Except as to the non-performance of express conditions precedent to the right to collect toll,[88] it is no defense in an action to collect tolls that the company has been guilty of delinquencies or has failed to comply with statutory regulations or requirements.[89]

gress with regard to regular mail contracts. Rhode Island, etc., Turnpike Soc. *v.* Harris, 6 R. I. 224.

"**Carriage**" see 6 Cyc. 351.

"**Coach**" see 7 Cyc. 265.

"**Hackney carriage**" see 21 Cyc. 355.

"**Hackney coach**" see 21 Cyc. 356.

"**Pleasure carriage**" see 31 Cyc. 778.

"**Stage coach**" see 36 Cyc. 812.

79. Middlesex Turnpike Co. *v.* Freeman, 14 Conn. 85.

80. Middlesex Turnpike Co. *v.* Freeman, 14 Conn. 85; Talcott Mountain Turnpike Co. *v.* Marshall, 11 Conn. 185; Middlesex Turnpike Co. *v.* Wentworth, 9 Conn. 371; Pardee *v.* Blanchard, 19 Johns. (N. Y.) 442; Moss *v.* Moore, 18 Johns. (N. Y.) 128; Buncombe Turnpike Co. *v.* Newland, 15 N. C. 463.

81. Scranton *v.* Laurel Run Turnpike Co., 225 Pa. St. 82, 73 Atl. 1063.

82. Beeler *v.* Pittsburgh Farmers', etc., Turnpike Road Co., 14 Pa. St. 162; Dorman *v.* Pittsburgh, etc., Turnpike Road Co., 3 Watts (Pa.) 126. And see Graham *v.* Carroll, 27 W. Va. 790.

83. Nicholson *v.* Williamstown, etc., Turnpike Co., 28 N. J. L. 142; Ayres *v.* Trenton, etc., Turnpike Co., 9 N. J. L. 33; Seward *v.* Baker, 1 T. R. 616, 99 Eng. Reprint. 1283.

During the abandonment of a road, and while the company has no agent on hand to claim or receive toll, the law will not imply a promise to pay toll. Powell *v.* Sammons, 31 Ala. 552.

84. New Albany, etc., Plank Road Co. *v.* Lewis, 49 Ind. 161; Chesley *v.* Smith, 1 N. H. 20; Nicholson *v.* Williamstown, etc., Turnpike Co., 28 N. J. L. 142; Jordan, etc., Plank Road Co. *v.* Morley, 23 N. Y. 552.

85. Russell *v.* Muldraugh's Hill, etc., Turnpike Road Co., 13 Bush (Ky.) 307; Chestnut Hill Turnpike Co. *v.* Martin, 12 Pa. St. 361; Huntingdon, etc., Turnpike Co. *v.* Brown, 2 Penr. & W. (Pa.) 462; Limerick, etc., Turnpike Road Co. *v.* Taggert, 12 Montg. Co. Rep. (Pa.) 97. And see Centre Turnpike Co. *v.* Smith, 12 Vt. 212, holding that the law will not imply a promise where the traveler claimed an exemption, and, on account of such claim, was allowed to pass through the gate without payment of toll.

86. Detroit, etc., Plank Road Co. *v.* Fisher, 4 Mich. 37.

87. Hopkins *v.* Stockton, 2 Watts & S. (Pa.) 163.

88. Little *v.* Danville, etc., Plank-Road Co., 18 Ind. 86.

Defects in a bridge are not necessarily fatal to recovery, provided the bridge was in fact safe, and the defects did not add to the labor of transportation across it. Patterson *v.* Indianapolis, etc., Plank-Road Co., 56 Ind. 20.

89. *Missouri.*— State *v.* Schenkel, 129 Mo. App. 224, 108 S. W. 635.

New Jersey.— Stults *v.* New Brunswick Turnpike Co., 48 N. J. L. 596, 9 Atl. 193; Ayres *v.* Trenton, etc., Turnpike Co., 9 N. J. L. 33.

New York.—Adams *v.* Beach, 6 Hill 271.

Pennsylvania.— Dyer *v.* Walker, 40 Pa. St. 157.

Canada.— Brockville, etc., Plank Road Co. *v.* Crozier, 14 U. C. Q. B. 27.

See 47 Cent. Dig. tit. "Turnpikes and Toll Roads," § 136.

Statute deficient in condemnation provisions.— The fact that a statute, authorizing the construction of a railway on a portion of the bed of a turnpike road, does not provide for the condemnation of the rights of abutting landowners in the fee of such turnpike road, cannot be set up as a defense to an action by the turnpike company for the recovery of tolls. Hooper *v.* Baltimore, etc., Turnpike Road, 34 Md. 521.

Injunction.—A non-compliance with statutory requirements does not generally entitle individuals to an injunction against the collection of tolls, especially where they are not compelled to pay toll and suffer no injury different from that of the general public. Sidener *v.* Haw Creek Turnpike Co., 91 Ind. 186; Roberts *v.* Columbia, etc., Turnpike Co.,

b. Actions. An action to recover tolls is properly brought in the name of the company,[90] in the township where defendant resides, provided the action is before a justice of the peace,[91] and a complaint or petition in the nature of a common count, with the additional averment that plaintiff has complied with all statutory requirements which are conditions precedent to the collection of toll, is sufficient.[92] In such an action plaintiff is required to prove a cause of action and meet the issues raised by the pleadings, but no more;[93] and, after the case has been submitted to the jury with proper instructions,[94] the verdict and judgment should conform to the evidence.[95]

C. Liability For Injuries — 1. Grounds of Liability and Defenses. It is well established, both at common law and by statute, that a toll road or turnpike company is liable in damages for injuries sustained by reason of the non-repair and unsafe condition of its road,[96] its liability in this respect being considered to

98 Tenn. 133, 38 S. W. 587. And see Ritchey *v.* Toronto Roads Co., 23 U. C. Q. B. 62.

90. Beeler *v.* Pittsburgh Farmers,' etc., Turnpike Road Co., 14 Pa. St. 162, holding that this is true, even though a sequestrator has temporary possession of the property of the company.

A lessee of a turnpike gate is entitled to collect tolls and maintain an action therefor. Chesley *v.* Smith, 1 N. H. 20.

When commissioner should sue.—An action to recover tolls from a contractor for carrying United States mail upon that part of the national road which passes through Pennsylvania, under the act of June 13, 1836, must be brought in the name of the commissioner appointed in pursuance of that act. Hopkins *v.* Stockton, 2 Watts & S. (Pa.) 163.

91. Morton Gravel Road Co. *v.* Wysong, 51 Ind. 4.

92. Patterson *v.* Indianapolis, etc., Plank Road Co., 56 Ind. 20.

93. Proprietors Quincy Canal *v.* Newcomb, 7 Metc. (Mass.) 276, 39 Am. Dec. 778 (holding it unnecessary to show that defendant had notice of a change of rate); Belfast, etc., Plank Road Co. *v.* Chamberlain, 32 N. Y. 651 (holding that, unless plaintiff's title to the road is directly challenged by the pleadings, parol proof of corporate existence and use of the road is sufficient); Beeler *v.* Pittsburgh Farmers', etc., Turnpike Road Co., 14 Pa. St. 162 (holding that in a suit by a sequestrator of a turnpike company for tolls due after the sequestration, a due-bill, made by defendant, and in the name of the company, is evidence of an acknowledgment, or promise to pay, sufficient to authorize the suit).

Evidence of the amount expended for repairs on the road is admissible, but its exclusion is not error where there has been introduced evidence of the actual condition of the road at the time in issue. Aurora, etc., Turnpike Co. *v.* Niebruggee, 25 Ind. App. 567, 58 N. E. 864.

94. Aurora, etc., Turnpike Co. *v.* Niebruggee, 25 Ind. App. 567, 58 N. E. 864, holding that, under a statute making non-repair a bar to recovery, it is proper for the court to instruct the jury as to what condition constitutes repair or want of repair.

Use of road without complaint. — When the action is defended on the ground of failure of the company to construct the road in compliance with the requirements of law, the jury may be allowed to take into consideration the fact, if in evidence, that prior to the date involved in the suit, defendant and the traveling public generally traveled the road without complaint. Patterson *v.* Indianapolis, etc., Plank Road Co., 56 Ind. 20.

95. Columbia, etc., Turnpike Co. *v.* Vivion, 103 Mo. App. 324, 77 S. W. 89; Paris, etc., Road Co. *v.* Weekes, 11 U. C. Q. B. 56.

96. *Connecticut.*— Goshen, etc., Turnpike Co. *v.* Sears, 7 Conn. 86.

Maryland.—Baltimore, etc., Turnpike Road *v.* Parks, 74 Md. 282, 22 Atl. 399; Baltimore, etc., Turnpike Road *v.* Crowther, 63 Md. 558, 1 Atl. 279.

Michigan.— Carver *v.* Detroit, etc., Plank Road Co., 61 Mich. 584, 28 N. W. 721.

Missouri.— Ashby *v.* Elsberry, etc., Gravel Road Co., 99 Mo. App. 178, 73 S. W. 229.

New Jersey.—Ward *v.* Newark, etc., Turnpike Co., 20 N. J. L. 323.

Pennsylvania.— Born *v.* Allegheny, etc., Plank Road Co., 101 Pa. St. 334.

Tennessee.— Murfreesboro, etc., Turnpike Co. *v.* Barrett, 2 Coldw. 508.

Vermont. — Davis *v.* Lamoille County Plank Road Co., 27 Vt. 602; Mathews *v.* Winooski Turnpike Co., 24 Vt. 480; Richardson *v.* Royalton, etc., Turnpike Co., 5 Vt. 580, 6 Vt. 496.

See 47 Cent. Dig. tit. "Turnpikes and Toll Roads," § 142. And see Corporations, 10 Cyc. 1222.

Statutory restriction of common-law liability.— The legislature has the right to restrict the common-law liability of toll road companies; and a statute passed in the exercise of this right does not furnish a cumulative remedy, but, to the extent that the restriction applies, supersedes the common-law remedy. Williams *v.* Hingham, etc., Bridge, etc., Corp., 4 Pick. (Mass.) 341.

Want of skill or care is not involved and is not essential to liability in a case where a person, without negligence on his part, is injured by reason of the road not being in the condition required by statute. Wilson *v.* Susquehannah Turnpike Road Co., 21 Barb. (N. Y.) 68.

General damages.—A turnpike corporation is not liable for any general damages which plaintiff may have sustained in carrying on

be greater than that of public authorities for injuries received on free public highways and to be analogous to the liability of a railroad company.[97] Although the liability of the company is only to persons of whom toll is demandable,[98] and does not exist as to portions of its road which it has never operated,[99] nor continue after the road has been sold under valid foreclosure proceedings,[1] it is not affected by the fact that the road was originally a free public highway,[2] or that it is in the same condition as when constructed and approved,[3] nor, on account of its public obligations, can the company relieve itself of liability by delegating its duty to a lessee or contractor.[4] The liability of the company is for unsafe conditions in general, and covers not only holes and defects resulting from improper construction and repair,[5] but also obstructions on or near the traveled portions of the road,[6] and failure to properly guard by fences or other barriers portions of its road which are of a narrower width than that required by statute or which border on a precipice, declivity, stream, or railroad.[7] Of course it is essential to a recovery that the accident be connected with the alleged defect in the road as

his business, whether such damages resulted from his not attempting to travel the road at particular times, by reason of its general badness and insufficiency, or from not being able to travel it as expeditiously, and carry as large loads, as he otherwise might and would have done. Baxter *v.* Winooski Turnpike Co., 22 Vt. 114, 52 Am. Dec. 84.

97. Lancaster Ave. Imp. Co. *v.* Rhoads, 116 Pa. St. 377, 9 Atl. 852, 2 Am. St. Rep. 608; Davis *v.* Lamoille, etc., Plank Road Co., 27 Vt. 602. And see Brookville, etc., Turnpike Co. *v.* Pumphrey, 59 Ind. 78, 26 Am. Rep. 76. *Compare* Baxter *v.* Winooski Turnpike Co., 22 Vt. 114, 52 Am. Dec. 84, where the liability of the company in question was held to be coextensive with that of towns.

98. Williams *v.* Hingham, etc., Bridge, etc., Corp., 4 Pick. (Mass.) 341.

It is sufficient if toll is demandable, although none has been paid because the traveler has not arrived at a gate (Lancaster Ave. Imp. Co. *v.* Rhoads, 116 Pa. St. 377, 9 Atl. 852, 2 Am. St. Rep. 608); or if toll was demanded of the person injured at any gate upon the road, although he was not, at the time of the injury, passing, or intending to pass, through or near any gate (Brown *v.* Winooski Turnpike Co., 23 Vt. 104). Thus, it has been held that where persons riding on a toll road paid toll to a certain point, at which they usually left the road, and, on reaching it, decided, because of darkness and an approaching storm, to continue thereon, they were not thereby rendered trespassers, or precluded from recovering for injuries caused by defects in the road. Mabrey *v.* Cape Girardeau, etc., Gravel Road Co., 92 Mo. App. 596, 69 S. W. 394.

99. Sherwood *v.* Weston, 18 Conn. 32.

1. Wellsborough, etc., Plank-Road Co. *v.* Griffin, 57 Pa. St. 417.

2. Reed *v.* Cornwall, 27 Conn. 48; Davis *v.* Lamoille County Plank Road Co., 27 Vt. 602.

The laying out of a public highway over a turnpike road does not divest the company of its liability for injuries caused by nonrepair, so long as it retains possession of the road and continues to exercise its franchises. Marsh *v.* Proprietors Branch Road, 17 N. H. 444.

3. Lord *v.* Fifth Massachusetts Turnpike Corp., 16 Mass. 106.

4. Lancaster Ave. Imp. Co. *v.* Rhoads, 116 Pa. St. 377, 9 Atl. 852, 2 Am. St. Rep. 608; Campbell *v.* Kingston, etc., Road Co., 18 Ont. App. 286. But see Horstick *v.* Dunkle, 145 Pa. St. 220, 23 Atl. 378, 27 Am. St. Rep. 685, where the liability of the company was not in question, but it was held that an adjoining landowner assumes the duty and liability of the company when he alters the road by agreement or license from the company.

The action of city employees in disturbing the surface of the road for the purpose of taking up water mains is no justification for the road being left out of repair, and does not shift the liability. Baltimore, etc., Turnpike Road *v.* Parks, 74 Md. 282, 22 Atl. 399. Also, if a turnpike company permits town supervisors to lay sidewalks along the line of its road, it is bound either to keep them in such reasonable repair that accidents will not happen on them, or to see that they are altogether removed; and any accident happening through neglect of this duty will subject it to liability therefor. Chartiers, etc., Turnpike Road Co. *v.* Nester, 4 Pa. Cas. 110, 7 Atl. 162.

5. Brookville, etc., Turnpike Co. *v.* Pumphrey, 59 Ind. 78, 26 Am. Rep. 76 (holding that a large hole in the center of the road is necessarily an obstruction to travel); Carver *v.* Detroit, etc., Plank Road Co., 61 Mich. 584, 28 N. W. 721.

6. Eggleston *v.* Columbia Turnpike Road, 82 N. Y. 278 [*affirming* 18 Hun 146].

The letting down of a gate beam upon a passing traveler, although done after the hour at which the gate-keeper was required to collect tolls, renders the company liable for injuries sustained, as the servant in question had the continuous care and management of the gate. Noblesville, etc., Gravel Road Co. *v.* Gause, 76 Ind. 142, 40 Am. Rep. 224.

7. Canton, etc., Turnpike Co. *v.* McIntire, 105 Ky. 185, 48 S. W. 980, 20 Ky. L. Rep. 1107; Mercer County Internal Imp. *v.* Mozier, 15 Ky. L. Rep. 656; Georgetown, etc., Turnpike Road Co. *v.* Cannon, 7 Ky. L. Rep. 379, 12 Ky. L. Rep. 257; Baltimore, etc., Turn-

the cause of the injury,[8] and that plaintiff acted as a reasonably prudent and careful man would have done under the same or similar circumstances;[9] but when it is shown that the road was actually in an unsafe condition, it is no defense that plaintiff's horse took fright and ran away, as the natural propensity of animals to shy and take fright, especially at obstructions, is well known and must be taken into account by the company in constructing its road of proper width and keeping it free of defects;[10] nor is the company's lack of knowledge of the defect or obstruction any defense when it could have discovered the same by the exercise of ordinary care.[11]

pike Co. *v.* Bateman, 68 Md. 389, 13 Atl. 54, 6 Am. St. Rep. 449; Baltimore, etc., Turnpike Co. *v.* Crowther, 63 Md. 558, 1 Atl. 279; Carver *v.* Detroit, etc., Plank-Road Co., 61 Mich. 584, 28 N. W. 721.

Slight descent.— There is no liability on the part of the company in a case where it appears that plaintiff, while driving along a turnpike on a dark night, with a lantern on the east side of his carriage, drove out of the traveled way to the west, where the ground sloped gradually from the road to the surface of the adjacent ground, a descent of three feet, and was injured by being thrown out Speer *v.* Greencastle, etc., Gravel Road Co., 4 Ind. App. 525, 31 N. E. 381.

Duty to indicate danger.— If, in the grading necessary to lay a plank road over a highway, two paths are presented, apparently used by travelers, one quite safe, while the other leads to a dangerous precipice, it is the duty of the company to indicate the danger in a way unmistakable at any time. Ireland *v.* Oswego, etc., Plank Road Co., 13 N Y. 526.

Unprotected railroad crossing.— Where a railroad and a turnpike company have their routes located over and across the same ground, but the railroad's right accrues first by priority of its charter, the turnpike company is responsible for injuries sustained by its travelers occasioned by the want of banisters and other safeguards at the crossing of the railroad, as in such case it is the duty of the turnpike company and not the railroad company to provide the same. Zuccarello *v.* Nashville, etc., R. Co., 3 Baxt. (Tenn.) 364.

8. Baltimore, etc., Turnpike Co. *v.* Bateman, 68 Md. 389, 13 Atl. 54, 6 Am. St. Rep. 449. And see Goshen, etc., Turnpike Co. *v.* Sears, 7 Conn. 86.

9. Speer *v.* Greencastle, etc., Gravel Road Co., 4 Ind. App. 525, 31 N. E. 381; Canton, etc., Turnpike Co. *v.* McIntire, 105 Ky. 185, 48 S. W. 980, 20 Ky. L. Rep. 1107; Monyhan *v.* Detroit, etc., Plank Road Co., 129 Mich. 549, 89 N. W. 372; Wilson *v.* Susquehannah Turnpike Road Co., 21 Barb. (N. Y.) 68; Ham *v.* Troy, etc., Turnpike Co., 2 Silv. Sup. (N. Y.) 593, 6 N. Y. Suppl. 593.

Injured person's knowledge of defect.— Travelers have a right to presume that a turnpike in constant use is kept in good condition, and are not guilty of negligence when driving at a slow pace, unless they know of the defect, or it is so obvious as to be visible to a person of ordinary care. Cox *v.* Westchester Turnpike Road, 33 Barb. (N. Y.) 414. When the traveler knows the dangerous condition of the road, he is bound to use due care (Sale *v.* Aurora, etc., Turnpike Co., 147 Ind. 324, 46 N. E. 669), although it is not negligence for him to travel over a road which he knows to be defective unless it is so dangerous that a person of common prudence would decline the risk (Ashby *v.* Elsberry, etc., Gravel Road Co., 99 Mo. App. 178, 73 S. W. 229), or unless he could have traveled over another equally convenient road (Jonesboro, etc., Turnpike Co. *v.* Baldwin, 57 Ind. 86).

Negligence of third person.—A toll road company, which has failed to perform its duty, is not excused from liability to a traveler who has been injured, by the fact that another person, such as the driver of the vehicle in which plaintiff was riding, was also negligent and is liable. Danville, etc., Turnpike Road Co. *v.* Stewart, 2 Metc. (Ky.) 119. However, the company is not liable where plaintiff is negligent in not avoiding the driver's negligence. Thus, where an intoxicated driver attempts, by rapid driving, to pass a toll-gate without paying toll, and the keeper thereupon lowers the pole, and injures a person in the wagon, the toll company is not liable, in the absence of proof that the passenger was not negligent in failing to do his best to stop the driver. Brannen *v.* Kokomo, etc., Gravel Road Co., 115 Ind. 115, 17 N. E. 202, 7 Am. St. Rep. 411.

A continued approach to a railroad crossing with a horse ordinarily regarded as gentle, after a train is discovered, is not contributory negligence. Lebanon, etc., Turnpike Road Co. *v.* Purdy, 37 S. W. 588, 18 Ky. L. Rep. 612.

10. Brookville, etc., Turnpike Co. *v.* Pumphrey, 59 Ind. 78, 26 Am. Rep. 76; Henderson, etc., Gravel-Road Co. *v.* Cosby, 103 Ky. 182, 44 S. W. 639, 19 Ky. L. Rep. 1851; Lebanon, etc., Turnpike Co. *v.* Purdy, 37 S. W. 588, 18 Ky. L. Rep. 612; Baltimore, etc., Turnpike Co. *v.* Bateman, 68 Md. 389, 13 Atl. 54, 6 Am. St. Rep. 449; Ashby *v.* Elsberry, etc., Gravel Road Co., 99 Mo. App. 178, 73 S. W. 229, in which case the horse was frightened at the presence of cows on the road.

11. Monticello, etc., Turnpike Road Co. *v.* Jones, 69 S. W. 1073, 24 Ky. L. Rep. 821; Born *v.* Allegheny, etc., Plank Road Co., 101 Pa. St. 334.

The Massachusetts statute imposes an absolute liability, and, under it, lack of notice and diligence in discovering defects are immaterial questions. Johnson *v.* Salem Turn-

2. Actions. An action to recover damages for injuries sustained on an unsafe toll road may only be brought within the time limited by statute,[12] and is properly instituted in a county within which the entire road lies, although the business office of the company is elsewhere.[13] To state a cause of action, it is necessary and sufficient for the declaration, petition, or complaint to contain allegations of some duty owing by defendant to plaintiff and a failure to perform that duty, together with an allegation of damage;[14] and in some jurisdictions the complaint or petition must negative contributory negligence.[15] The evidence introduced must conform to the issues raised by the pleadings,[16] and be generally confined to the state of affairs existing at the time and place where the accident occurred;[17] and it must show, in order to authorize a recovery, that the condition of the road was the proximate cause of the injuries received.[18] Where there is any evidence

pike, etc., Bridge Corp., 109 Mass. 522; Yale *v.* Hampden, etc., Turnpike Corp., 18 Pick. 357.

12. Webb *v.* Barton, etc., Consol. Road Co., 26 Ont. 343.

13. Baltimore, etc., Turnpike Road *v.* Crowther, 63 Md. 558, 1 Atl. 279.

14. Bank Lick Turnpike Co. *v.* Broadus, 58 S. W. 778, 22 Ky. L. Rep. 827; Williams *v.* Hingham, etc., Bridge, etc., Corp., 4 Pick. (Mass.) 341 (holding that plaintiff must allege that he is a person from whom toll is demandable); Shadock *v.* Alpine Plank-Road Co., 79 Mich. 7, 44 N. W. 158; Taylor *v.* Haddonfield, etc., Turnpike Co., 65 N. J. L. 102, 46 Atl. 707 (holding that an averment that plaintiff was "lawfully driving along the turnpike road" was adequate to show that he was not a trespasser thereon, but that it did not show any greater duty owing him than to a license); Evans *v.* New Brunswick, etc., Turnpike Co., 59 N. J. L. 3, 34 Atl. 985 (holding that it need not be stated that plaintiff had paid toll before making use of the road; an averment that he was lawfully using the road being sufficient).

Particular acts of negligence need not be alleged, where the accident itself was sufficient to raise a presumption of negligence, as where a traveler is injured by the falling of a toll-gate pole. Hydes Ferry Turnpike Co. *v.* Yates, 108 Tenn. 428, 67 S. W. 69.

Place.— If the company, in pursuance of its charter, has made some alteration in the road, the new part becomes a component part of the old road, so far as the liability of the corporation is concerned, and may be described as one road. Also, it is not necessary to set forth the precise point in the road where the injury happened, but, if necessary, the objection would be cured by verdict. Noyes *v.* White River Turnpike Co., 11 Vt. 531.

Continuando.— It is not competent for a plaintiff to declare with a continuando for injuries occasioned by the obstruction or insufficiency of a highway, or to allege a repetition of such injuries upon divers days and times between a day specified and the commencement of the suit. Baxter *v.* Winooski Turnpike Co., 22 Vt. 114, 52 Am. Dec. 84.

15. Sale *v.* Aurora, etc., Turnpike Co., 147 Ind. 324, 46 N. E. 669; Wilson *v.* Trafalgar, etc., Gravel Road Co., 83 Ind. 326.

16. Noyes *v.* White River Turnpike Co., 11 Vt. 531, holding that a declaration alleging the damages to have been sustained by reason of the road being "out of repair, and the badness thereof," is supported by evidence showing the road insufficient, although it was insufficient in its original construction. And see Richardson *v.* Royalton, etc., Turnpike Co., 6 Vt. 496.

Condition of bridge.— In an action for injuries received because of the defective condition of a turnpike bridge, evidence that the general appearance of the structure indicated neglect and decay is admissible on the question whether the defect could have been discovered by defendant by the use of ordinary care. Pirmann *v.* Newport, etc., Turnpike Co., 71 S. W. 491, 24 Ky. L. Rep. 1341.

17. Ramsey *v.* Rushville, etc., Gravel Road Co., 81 Ind. 394; Baltimore, etc., Turnpike Road *v.* State, 71 Md. 573, 18 Atl. 884; Baltimore, etc., Turnpike Road *v.* Crowther, 63 Md. 558, 1 Atl. 279.

The rule has been relaxed in some cases and evidence admitted to show the condition of the road in the near vicinity (Cox *v.* Westchester Turnpike Road, 33 Barb. (N. Y.) 414), the fact that the place in question had been guarded by railings in former years (Baltimore, etc., Turnpike Co. *v.* Hebb, 88 Md. 132, 40 Atl. 879), the disposition of the horse, which plaintiff was driving, not only before but after the accident (Lebanon, etc., Turnpike Co. *v.* Hearn, 87 Tenn. 291, 10 S. W. 510), and that the road had been out of repair for several days before the accident (Baltimore, etc., Turnpike Road *v.* Parks, 74 Md. 282, 22 Atl. 399). In a case where plaintiff's horse became frightened at a pile of stones allowed to remain beside the road, evidence that other gentle horses had been frightened at the pile was held to be admissible to prove its unusual appearance. Eggleston *v.* Columbia Turnpike Road, 18 Hun (N. Y.) 146 [*reversed* on other grounds in 82 N. Y. 278].

18. Ashby *v.* Elsberry, etc., Gravel Road Co., 99 Mo. App. 178, 73 S. W. 229; Trout *v.* Waynesburg, etc., Turnpike Co., 216 Pa. St. 119, 64 Atl. 900; Hydes Ferry Turnpike Co. *v.* Yates, 108 Tenn. 428, 67 S. W. 69.

Evidence insufficient to establish consent to use of bridge.— In an action for damages resulting from the collapse of a bridge, testimony of plaintiff that he did not inform the toll-gatherer that his load exceeded the

on such points, it is for the jury to pass upon defendant's negligence and the unsafe condition of the road,[19] as well as plaintiff's contributory negligence;[20] and these matters should be submitted to the jury by the court with instructions which correctly define the respective duties of plaintiff and defendant,[21] and which are complete[22] and not misleading.[23]

D. Penalties For Violation of Regulations — 1. Demanding and Collecting Excessive Tolls. Statutes providing for the forfeiture of a specified sum of money by a toll-gatherer who demands and receives more toll than he is authorized to collect are aimed at excessive, rather than wholly unauthorized, tolls, and hence do not cover cases where the person from whom toll is collected is wholly exempt or the toll is wholly unauthorized;[24] nor do they cover cases where the toll-gatherer acts wholly within his rights.[25] To render the toll-gatherer alible, it is necessary that there be a demand as well as a receipt of excessive toll,[26] and that the proceedings in the civil or criminal action brought to recover the penalty be according to law.[27]

authorized weight, and that he frequently drove excessive loads over the bridge without informing the toll-gatherer, not being inquired of as to the weight, is insufficient to establish a consent to his passing over the bridge. Pomeroy *v.* Fifth Massachusetts Turnpike Corp., 10 Pick. (Mass.) 35.

19. *Connecticut.*—Weeks *v.* Connecticut, etc., Turnpike Co., 20 Conn. 134.

Maryland.— Baltimore, etc., Turnpike Road *v.* State, 71 Md. 573, 18 Atl. 884.

Michigan.— Carver *v.* Detroit, etc., Plank-Road Co., 69 Mich. 616, 25 N. W. 183.

Missouri.— Mabrey *v.* Cape Girardeau, etc., Gravel Road Co., 92 Mo. App. 596, 69 S. W. 394.

Pennsylvania.— Born *v.* Allegheny, etc., Plank Road Co., 101 Pa. St. 334; Stewart *v.* Chester, etc., Road Co., 3 Pa. Super. Ct. 86.

See 47 Cent. Dig. tit. "Turnpikes and Toll Roads," § 161.

Railroad crossing near turnpike embankment.— The fact that an unguarded fill on a turnpike was near a railway crossing may be considered, in connection with the fill, in determining whether the turnpike at the fill was in a reasonably safe condition. Lebanon, etc., Turnpike Road Co. *v.* Purdy, 37 S. W. 588, 18 Ky. L. Rep. 612.

20. Weeks *v.* Connecticut, etc., Turnpike Co., 20 Conn. 134; Baltimore, etc., Turnpike Road *v.* State, 71 Md. 573, 18 Atl. 884; Carver *v.* Detroit, etc., Plank-Road Co., 69 Mich. 616, 25 N. W. 183.

21. Henderson, etc., Gravel-Road Co. *v.* Crosby, 103 Ky. 182, 44 S. W. 639, 19 Ky. L. Rep. 1851; Southworth *v.* Stamping Ground Turnpike Co., 91 Ky. 485, 16 S. W. 139, 13 Ky. L. Rep. 41; Baltimore, etc., Turnpike Road *v.* State, 71 Md. 573, 18 Atl. 884.

22. Brown *v.* Cape Girardeau Macadamized, etc., Co., 89 Mo. 152, 1 S. W. 129, holding that an instruction which predicates plaintiff's right to recover on the single fact that the roadway was not properly constructed, without requiring the jury to go further, and find the additional fact that the injury complained of was occasioned by such improper construction, is erroneous.

Criminal liability immaterial.—It is proper to refuse to charge the jury that plaintiff cannot recover unless the defect was such that a criminal indictment would lie against the company therefor. Baltimore, etc., Turnpike Co. *v.* Baterman, 68 Md. 389, 13 Atl. 54, 6 Am. St. Rep. 449.

23. Baltimore, etc., Turnpike Co. *v.* Cassell, 66 Md. 419, 7 Atl. 805, 59 Am. Rep. 175.

Requested instructions inconsistent with evidence.—Where defendant denied that its road was unsafe, and all its proof on the question of condition tended to show that it was safe, it is not entitled to an instruction as to notice of unsafe condition necessary to make it liable. Henderson, etc., Gravel-Road Co. *v.* Cosby, 103 Ky. 182, 44 S. W. 639, 19 Ky. L. Rep. 1851.

The court is authorized to assume, in its instructions, matters which have been admitted, such as the fact that the road was not fenced. Bank Lick Turnpike Co. *v.* Broadus, 58 S. W. 778, 22 Ky. L. Rep. 827.

24. Culbertson *v.* Kinevan, 73 Cal. 68, 14 Pac. 364; Van Buren *v.* Wylie, 56 Mich. 501, 23 N. W. 195; Evans *v.* Newkirk, 3 N. J. L. 433. And see Brown *v.* Rice, 51 Cal. 489.

Such was the law in New York at one time (Norval *v.* Cornell, 16 Johns. (N. Y.) 73; Conklin *v.* Elting, 2 Johns. (N. Y.) 410; Jones *v.* Estis, 2 Johns. (N. Y.) 379. But see Williams *v.* Smith, 6 Cow. (N. Y.) 166); but under the provisions of a later statute it is held that the penalty may be collected for exacting toll from persons exempt from payment (Skinner *v.* Anderson, 12 Barb. (N. Y.) 648.)

25. Kenyon *v.* Seeley, 14 Barb. (N. Y.) 631; Reg. *v.* Brown, 4 U. C. Q. B. 147.

Where plaintiff has paid without objection the sum demanded, and without informing defendant of the distance he has traveled, there can be no recovery. Fox *v.* Francher, 66 Mich. 536, 33 N. W. 416.

The New York statute which imposes a forfeiture on toll-gatherers on turnpikes who exact more than the legal rate of toll applies also to the gatherers of toll on plank roads. Marselis *v.* Seamen, 21 Barb. 319.

26. Culbertson *v.* Kinevan, 73 Cal. 88, 14 Pac. 364.

27. Reg. *v.* Brown, 4 U. C. Q. B. 147.

2. Non-Payment or Evasion of Tolls. Statutes providing for the imposition of a penalty on persons who forcibly or fraudulently pass through or around a toll-gate without paying the legal toll are intended to punish the wrong-doer, rather than to compensate the toll road company,[28] and, being penal in nature, are not to be extended by construction beyond their clear import.[29] To subject a person to such a penalty, it must be shown that plaintiff company has a legal right to exact toll;[30] that defendant is a person subject to the payment of toll and is not within one of the exempted classes;[31] and that his acts are within the terms of the statute.[32] The proper party to sue for the penalty is the toll road company,[33] and it is of course necessary that the complaint state a cause of

The jurisdiction of the court trying the action is determined, as in the case of other money demands, by the amount claimed. Brown *v.* Rice, 52 Cal. 489.

The burden of proving that defendant is not the toll-gatherer for the company is upon defendant after it is shown that he shut the gate and demanded toll of plaintiff. Trowbridge *v.* Baker, 1 Cow. (N. Y.) 251.

28. Monterey, etc., Plank Road Co. *v.* Chamberlain, 32 N. Y. 659.

29. Bridgewater, etc., Plank Road Co. *v.* Robbins, 22 Barb. (N. Y.) 662; Watervliet Turnpike Co. *v.* McKean, 6 Hill (N. Y.) 616. See also Centre Turnpike Co. *v.* Vandusen, 10 Vt. 197.

No greater penalty than that named in the statute may be sued for and collected. Wayne Pike Co. *v.* Bosworth, 91 Ind. 210; Morton Gravel Road Co. *v.* Wysong, 51 Ind. 4.

30. Hunter *v.* Burnsville Turnpike Co., 56 Ind. 213 (holding, however, that the report of a duly appointed inspector that the road has been constructed according to law is conclusive evidence of that fact); Pontiac, etc., Plank-Road Co. *v.* Hilton, 69 Mich. 115, 36 N. W. 739; Gourley *v.* Nashville, etc., Turnpike Co., 104 Tenn. 305, 56 S. W. 855. But see Fredonia, etc., Plank Road Co. *v.* Wait, 27 Barb. (N. Y.) 214, holding it sufficient to entitle the corporation to recover, to prove itself a corporation in possession of the road, and that defendant had incurred the penalty, without showing its right to construct the road and establish its gates.

Non-performance of conditions subsequent which merely present grounds of forfeiture of the company's franchises constitute no defense. Canal St. Gravel-Road Co. *v.* Paas, 95 Mich. 372, 54 N. W. 907.

Plaintiff's title cannot be attacked in such an action on the ground that it was acquired by foreclosure of an invalid mortgage, as the judgment and sale in the foreclosure proceedings are conclusive. Hunter *v.* Brunsville Turnpike Co., 56 Ind. 213.

31. Lancaster Turnpike Co. *v.* Gartland, 6 Phila. (Pa.) 70; Green Mountain Turnpike Co. *v.* Hemmingway, 2 Vt. 512 (holding that the penalty is not incurred by one exempted from toll by his business at the time of passing, although he passed forcibly and without making known his exemption); Pingry *v.* Washburn, 1 Aik. (Vt.) 264, 15 Am. Dec. 676; Reg. *v.* Dawes, 22 U. C. Q. B. 333.

32. Rives *v.* Wood, 15 S. W. 131, 12 Ky. L. Rep. 691; Rome, etc., Road Co. *v.* Stone, 62 Barb. (N. Y.) 601 (holding that an intention not to pay is sufficiently manifested where one insists on passing a gate without paying after notice had been given to him that the credit theretofore given him was discontinued and that he must pay toll whenever he passed); Canastota, etc., Plank Road Co. *v.* Parkhill, 50 Barb. (N. Y.) 601; Dansville, etc., Plank Road Co. *v.* Hull, 27 Barb. (N. Y.) 509; Monterey, etc., Plank Road Co. *v.* Faulkner, 21 Barb. (N. Y.) 212 (holding that one who offers a bank-bill to the toll-gatherer in payment of toll, and refuses to pay in any other manner, does not incur the statutory penalty); Carrier *v.* Schoharie Turnpike Road, 18 Johns. (N. Y.) 56; Reg. *v.* Haystead, 7 U. C. Q. B. 9.

Materiality of intent.—When the traveler was acting entirely within his rights, his intent to evade payment of toll is immaterial (Centre Turnpike Co. *v.* Vandusen, 10 Vt. 197), as is also his good faith, when his acts are within the prohibition of the statute (Detroit, etc., Plank-Road Co. *v.* Mahoney, 68 Mich. 265, 36 N. W. 69). However, under a statute imposing a fine upon a person turning off a turnpike with intention to defraud the company, the question as to whether he turned off *bona fide*, or with a view to avoid paying toll is controlling. Carrier *v.* Schoharie Turnpike Road, 18 Johns. (N. Y.) 56.

What constitutes forcible passing.—Although statutes prohibiting the forcible passing through a gate without payment of toll are held, in one jurisdiction, to contemplate only violent passage (Bridgewater, etc., Plank Road Co. *v.* Robbins, 22 Barb. (N. Y.) 662; Columbia Turnpike *v.* Woodworth, 2 Cai. (N. Y.) 97), it is generally held that actual violence is not necessary to a violation and that it is sufficient if the traveler passes swiftly through the gate against the will and consent of the gatekeeper (Nichols *v.* Bertram, 3 Pick. (Mass.) 342; Detroit, etc., Plank Road Co. *v.* Fisher, 4 Mich. 37; Camden, etc., Turnpike Co. *v.* Fowler, 24 N. J. L. 205).

33. Canal St. Gravel-Road Co. *v.* Paas, 95 Mich. 372, 54 N. W. 907; Monterey, etc., Plank Road Co. *v.* Chamberlain, 32 N. Y. 659, 33 N. Y. 46 (holding that this is true even though the road is in the possession of a lessee); Com. *v.* Metzger, 6 Kulp (Pa.) 408.

The right of the treasurer of a turnpike corporation to maintain such an action, which once existed under the Massachusetts statutes, has been taken away by subsequent

action,[34] and that the evidence introduced be relevant to the issues raised by the pleadings.[35] As in other actions, questions of fact are for the jury to determine.[36]

TOMATE. An Italian word for the tomato, only used in a small territory situated in the north of Italy.[1]

TOMATO. See FRUIT, 20 Cyc. 854 note 67.

TOMB. A monument or tombstone erected in memory of the dead.[2] (Tomb: Stone — In General, see CEMETERIES, 6 Cyc. 719; Liability of Decedent's Estate For, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 439; Testamentary Provision For, see WILLS.)

TON. A certain weight in pounds, or a certain weight or space by which the burden of a ship is estimated;[3] in weight, 2,240 pounds;[4] in commerce, twenty hundred gross or twenty hundred-weight, each hundred consisting of one hundred and twelve pounds.[5] In measurement, forty cubic feet;[6] as applied to the measurement of vessels, one hundred cubic feet of interior space.[7] (See, generally, WEIGHTS AND MEASURES.)

TONIC. A preparation having medicinal qualities;[8] any remedy which improves the tone or vigor of the fibres of the stomach and bowels or of the muscular fibres generally.[9]

TONNAGE. The capacity of a ship or vessel;[10] the capacity of a vessel to carry cargo;[11] the cubical tons or burden of a ship in tons, or the amount of weight

legislation. Gilmore *v.* Skiff, 4 Cush. (Mass.) 503.

34. Hunter *v.* Burnsville Turnpike Co., 56 Ind. 213, holding that where plaintiff had a right to exact toll of travelers who did not pass a gate, the complaint need not allege that defendant passed a gate.

35. Hunter *v.* Burnsville Turnpike Co., 56 Ind. 213; Stipp *v.* Spring Mill, etc., Gravel Road Co., 54 Ind. 16.

Evidence of the illegal location of a gate should not be excluded, as it bears on the right of plaintiff to exact toll of defendant. Gourley *v.* Nashville, etc., Turnpike Co., 104 Tenn. 305, 56 S. W. 855.

36. Dexter, etc., Plank Road Co. *v.* Allen, 16 Barb. (N. Y.) 15; Gourley *v.* Nashville, etc., Turnpike Co., 104 Tenn. 305, 56 S. W. 855.

1. Roncoroni *v.* Gross, 92 N. Y. App. Div. 221, 86 N. Y. Suppl. 1112, where it is held that the term cannot be used as a trade-mark.

2. Langles' Succession, 105 La. 39, 67, 29 So. 739, where such is said to be the meaning of the term among other meanings.

3. Reck *v.* Phœnix Ins. Co., 7 N. Y. Suppl. 492.

"Tons burden" in statute construed see The Brunel, [1900] P. 24, 32, 9 Aspin. 10, 69 L. J. P. & Adm. 8, 81 L. T. Rep. N. S. 500, 48 Wkly. Rep. 243.

4. Roberts *v.* Opdyke, 40 N. Y. 259, 262.

When the term is used to represent, for convenience of calculation, two thousand pounds, the contract should and usually does so state it, as per ton of two thousand pounds. In the absence of such statement the term is construed to have its usual meaning of two thousand two hundred and forty pounds. The Miantinomi, 17 Fed. Cas. No. 9,521, 3 Wall. Jr. 46.

Statutory provisions.—In California twenty hundred-weight constitute a ton (Higgins *v.* California Petroleum, etc., Co., 120 Cal. 629, 630, 52 Pac. 1080); in Missouri a ton of hemp is two thousand pounds (Green *v.* Moffett, 22 Mo. 529, 537); in Pennsylvania two thousand pounds avoirdupois weight constitute a ton (Weaver *v.* Fegley, 29 Pa. St. 27, 70 Am. Dec. 151; Evans *v.* Myers, 25 Pa. St. 114, 116); in New York two thousand pounds avoirdupois constitute a ton (Many *v.* Beekman Iron Co., 9 Paige Ch. (N. Y.) 188, 195).

5. Helm *v.* Bryant, 11 B. Mon. (Ky.) 64, 65.

6. Roberts *v.* Opdyke, 40 N. Y. 259, 262 [*citing* McCulloch Commercial Dict.; Webster Dict.].

7. The Thomas Melville, 62 Fed. 749, 751, 10 C. C. A. 619, where the term is said to have a certain and definite meaning, well settled by custom and by the navigation laws of the United States.

8. U. S. *v.* Iler Brewing Co., 121 Fed. 41, 42, 57 C. C. A. 381.

9. Century Dict. [*quoted* in U. S. *v.* Iler Brewing Co., 121 Fed. 41, 42, 57 C. C. A. 381].

"Among the drugs or preparations which are classed as tonics are 'weak alcoholic beverages in very moderate quantities.'" U. S. *v.* Iler Brewing Co., 121 Fed. 41, 43 57 C. C. A. 381 [*citing* Universal Cyclopedia].

10. Bouvier L. Dict. [*quoted* in Alexander *v.* Wilmington, etc., R. Co., 3 Strobh. (S. C.) 594, 599; Washington *v.* Barnes, 6 D. C. 230, 232], adding: "The duties paid on the tonnage of a ship or vessel are also called tonnage."

11. Thwing *v.* Great Western Ins. Co., 103 Mass. 401, 405, 4 Am. Rep. 567.

which one or several ships will carry;[12] the number of tons burden the ship will carry as estimated and ascertained by the official admeasurement and computation prescribed by the public authority;[13] the contents of the vessel expressed in tons, each of one hundred cubical feet.[14] (Tonnage: Duties — Constitutionality of Municipal Ordinance Imposing, see MUNICIPAL CORPORATIONS, 28 Cyc. 364; Imposed by State as Constituting Interference With Commerce, see COMMERCE, 7 Cyc. 475; On Vessel, see SHIPPING, 36 Cyc. 17.)

TONNAGE DUTY. See DUTY ON TONNAGE, 14 Cyc. 1126; SHIPPING, 36 Cyc. 17; TONNAGE, and Cross-References Thereunder.

TONNAGE RENT. See MINES AND MINERALS, 27 Cyc. 711.

TONNAGE TAX. See COMMERCE, 7 Cyc. 475.

TONTINE INSURANCE. See LIFE INSURANCE, 25 Cyc. 700.

TOOK. See LIBEL AND SLANDER, 25 Cyc. 303; TAKE, 37 Cyc. 665.

TOOL. An instrument of manual operation,[15] apparatus, or utensils, etc.,[16] particularly such as are used by farmers and mechanics;[17] that is, an instrument to be used and managed by the hand instead of being moved and controlled by machinery;[18] any instrument of manual operation;[19] an implement used by the hand in working; a hand instrument necessary to one's trade;[20] any instrument, such as a hammer, saw, plane, file, and the like used in manual arts, to facilitate mechanical operations; any instrument used by craftsman or laborer, at his work; any instrument of use or service.[21] (Tool: As Constituting Baggage, see CARRIERS, 6 Cyc. 666. As Description of Property, see DETINUE, 14 Cyc. 267 note 14. As Material Under Bond of Municipal Contractor, see MUNICIPAL CORPORATIONS, 28 Cyc. 1041. Covered by Fire Insurance Policy, see FIRE INSURANCE, 19 Cyc. 666. Exemption From — Distress For Rent, see LANDLORD AND TENANT,

12. Reck *v.* Phœnix Ins. Co., 7 N. Y. Suppl. 492.

13. The Craigendoran, 31 Fed. 87, 88, where such is said to be the meaning in commercial designation.

The word has long been an official term, intended originally to express the burden that a ship would carry, in order that the various dues and customs levied upon shipping might be imposed according to the size of the vessel, or rather in proportion to her capability of carrying the burden. Wheeling, etc., Transp. Co. *v.* Wheeling, 99 U. S. 273, 284, 25 L. ed. 412; State Tonnage Tax Cases, 12 Wall. (U. S.) 204, 225, 20 L. ed. 370 [both *citing* Homan Dictionary of Commerce and Navigation].

14. Wheeling, etc., Transp. Co. *v.* Wheeling, 99 U. S. 273, 284, 25 L. ed. 412 [*citing* Burroughs Tax.].

15. Oliver *v.* White, 18 S. C. 235, 241; Davidson *v.* Reynolds, 16 U. C. C. P. 140, 141, 2 Can. L. J. N. S. 44; Filschie *v.* Hogg, 35 U. C. Q. B. 94, 102; Black L. Dict. [*quoted* in Kirksey *v.* Rowe, 114 Ga. 893, 895, 40 S. E. 990, 88 Am. St. Rep. 65].

16. Filschie *v.* Hogg, 35 U. C. Q. B. 94, 102.

17. Oliver *v.* White, 18 S. C. 235, 241; Davidson *v.* Reynolds, 2 Can. L. J. N. S. 44, 16 U. C. C. P. 140, 141.

18. Black L. Dict. [*quoted* in Kirksey *v.* Rowe, 114 Ga. 893, 895, 40 S. E. 990, 88 Am. St. Rep. 65, where such is said to be the usual meaning of the word].

19. Spooner *v.* Fletcher, 3 Vt. 133, 137, 21 Am. Dec. 579.

20. English L. Dict. [*quoted* in Kirksey *v.* Rowe, 114 Ga. 893, 895, 40 S. E. 990, 88 Am. St. Rep. 65].

21. Webster Dict. [*quoted* in Adams *v.* New York Bowery F. Ins. Co., 85 Iowa 6, 14, 51 N. W. 1149].

The term has several meanings, and in one sense one person may be the tool of another. In this sense a cashier opening a safe under compulsion by robbers was the tool of the robbers, but not within the meaning of the term as used in an insurance policy against loss of money from a bank "by the use of tools or explosives directly thereupon." Maryland Casualty Co. *v.* Ballard County Bank, 134 Ky. 354, 358, 360, 120 S. W. 301, opinion of Hobson, A. J.

The term embraces those implements which are commonly used by the hand of one man in some manual labor necessary for his subsistence. Bouvier L. Dict. [*quoted* in Boston Belting Co. *v.* Ivens, 28 La. Ann. 695, 696].

A synonym of "instrument" especially when applied to things rather than persons see State *v.* Bowman, 6 Vt. 594, 596.

The term, as used in exemption statutes, is presumed to embrace such implements of husbandry or of manual labor as are usually employed in, and are appropriate to, the business of the several trades or classes of the laboring community, and according to the wants of their respective employments or professions, whether farmer, mechanic, manufacturer, or, in fact, any artisan or laborer, who may require the use of such helps to obtain his living. Wilkinson *v.* Alley, 45 N. H. 551, 552. See also Bouvier L. Dict. [*quoted* in Kirksey *v.* Rowe, 114 Ga. 893, 895, 40 S. E. 990, 88 Am. St. Rep. 65]. As to what is included by the term as used in exemption laws see EXEMPTIONS, 18 Cyc. 1415 *et seq.*

24 Cyc. 1301; Duty, see CUSTOMS DUTIES, 12 Cyc. 1131; Legal Process in General, see EXEMPTIONS, 18 Cyc. 1415. Failure to Use or Use of Defective Tool as Contributory Negligence, see MASTER AND SERVANT, 26 Cyc. 1247. Having Possession of Counterfeiter's Tool, see COUNTERFEITING, 11 Cyc. 307. Liability of Master For Injury to Servant From Defects in or Failure to Furnish, see MASTER AND SERVANT, 26 Cyc. 1097. Possession of Burglar's Tool — As Criminal Offense, see BURGLARY, 6 Cyc. 257; As Evidence in Prosecution, see BURGLARY, 6 Cyc. 239. Presumption as to in Action by Servant For Injuries, see MASTER AND SERVANT, 26 Cyc. 1412.)

TOP. See MINES AND MINERALS, 27 Cyc. 537.

TOP AND BOTTOM DICE. Words which are said to signify no class of acts which can be known by the public or the courts.[22]

TOPMOST STORY. A term which need not necessarily refer to a room contained within four vertical walls.[23]

TOPPED. The term applied to a herd of cattle from which the best cattle had been picked out and only the inferior ones left.[24]

TOPPING. A method of making secure piles of lumber, which consists in placing a hood of boards on the top and wiring them down.[25] As used with respect to the cutting of trees, the cutting off the top of a tree.[26]

TORCH. A word which may be embraced within the meaning of the term "lamp."[27]

TORNADO. A violent storm, distinguished by the vehemence of the wind and its sudden changes;[28] a violent gust of wind, or a tempest distinguished by a whirling, progressive motion, usually accompanied with severe thunder, lightning, and torrents of rain, and commonly of short duration and small breadth; a HURRICANE,[29] *q. v.* (See CYCLONE, 12 Cyc. 1191; CYCLONE INSURANCE, 12 Cyc. 1191; HURRICANE, 21 Cyc. 1117; HURRICANE INSURANCE, 21 Cyc. 1117.)

TORNADO INSURANCE. See CYCLONE INSURANCE, 12 Cyc. 1191; HURRICANE INSURANCE, 21 Cyc. 1117.

TORT-FEASOR. A wrong-doer; one who commits or is guilty of a tort.[30] (See TORTS, *post*, p. 408.)

TORTIOUS. A word said to be convertible with "unlawful."[31] (See, generally, TORTS, *post*, p. 408.)

22. Harland *v.* Territory, 3 Wash. Terr. 131, 155, 13 Pac. 453, where it was held that an indictment charging the carrying on of the swindling game of "top-and-bottom dice" without any other description of such game was too indefinite to support a conviction.

23. Foot *v.* Hodgson, 25 Q. B. D. 160, 161, 55 J. P. 116, 59 L. J. Q. B. 343, holding that a floor or room inclosed on three sides by vertical walls and in front by the sloping roof of a house might constitute the "topmost story" of the house.

24. Griffith *v.* Bergeson, 115 Iowa 279, 280, 88 N. W. 451.

25. Schillo Lumber Co. *v.* Bemben, 139 Ill. App. 628, 629.

26. Unwin *v.* Hanson, [1891] 2 Q. B. 115, 120, 55 J. P. 662, 60 L. J. Q. B. 531, 65 L. T. Rep. N. S. 511, 39 Wkly. Rep. 587, where "lopping" is distinguished.

27. Saltsburg Gas Co. *v.* Saltsburg Borough, 138 Pa. St. 250, 258, 20 Atl. 844, 10 L. R. A. 193.

28. Queens Ins. Co. *v.* Hudnut, 8 Ind. App. 22, 35 N. E. 397, 398, where "tornado" and "hurricane" are said to be synonymous, and where "cyclone" is distinguished.

29. Webster Dict. [*quoted* in Spensley *v.* Lancashire Ins. Co., 54 Wis. 433, 441, 11 N. W. 894].

30. Black L. Dict.

31. Milligan *v.* Brooklyn Warehouse, etc., Co., 34 Misc. (N. Y.) 55, 57, 68 N. Y. Suppl. 774.

TORTS

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Of Causes of Action, see JOINDER AND SPLITTING OF ACTIONS, 23 Cyc. 376.
Of Parties, see PARTIES, 30 Cyc. 111, 121.
Jurisdiction:
Of Admiralty in Actions For Tort, see ADMIRALTY, 1 Cyc. 841.
Of Justice of the Peace, see JUSTICES OF THE PEACE, 24 Cyc. 448.
Liability For Tort as Property Subject to Garnishment, see GARNISHMENT, 20 Cyc. 1003.
Limitation of Action For Tort, see LIMITATIONS OF ACTIONS, 25 Cyc. 963.
Presenting Claim For Tort Against Decedent's Estate, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 454 *et seq.*
Reference in Action For Tort, see REFERENCES, 34 Cyc. 787.
Removal of Action From State to Federal Court, see REMOVAL OF CAUSES, 34 Cyc. 1211.
Right to Jury Trial, see JURIES, 24 Cyc. 108.
Set-Off or Counter Claim:
In General, see RECOUPMENT, SET-OFF, AND COUNTER CLAIM, 34 Cyc. 618.
Of Damages For Tort in Action For Rent, see LANDLORD AND TENANT, 24 Cyc. 1204.
Severance of Action, see CONSOLIDATION AND SEVERANCE OF ACTIONS, 8 Cyc. 611 *et seq.*
Splitting Cause of Action, see JOINDER AND SPLITTING OF ACTIONS, 23 Cyc. 446.
State Laws as Rules of Decision in Federal Courts as to Liability For Tort, see COURTS, 11 Cyc. 895 *et seq.*
Venue of Action, see VENUE.
Torts Connected With Violation of Sunday Laws, see SUNDAY, 37 Cyc. 570, 573.
Torts in Respect To or Arising From Particular Objects, Instrumentalities, or Places:
In General, see ANIMALS, 2 Cyc. 288; BRIDGES, 5 Cyc. 1049; CANALS, 6 Cyc. 267; CARRIERS, 6 Cyc. 352; DRAINS, 14 Cyc. 1018; ELECTRICITY, 15 Cyc. 466; EXPLOSIVES, 19 Cyc. 1; FENCES, 19 Cyc. 466; FERRIES, 19 Cyc. 491; FOOD, 19 Cyc. 1084; GAS, 20 Cyc. 1153; INTOXICATING LIQUORS, 23 Cyc. 309; LEVEES, 25 Cyc. 188; MINES AND MINERALS, 27 Cyc. 516; NAVIGABLE WATERS, 29 Cyc. 285; PARTY-WALLS, 30 Cyc. 770; RAILROADS, 33 Cyc. 1; SLAVES, 36 Cyc. 465; STREET RAILROADS, 36 Cyc. 1338; STREETS AND HIGHWAYS, 37 Cyc. 1; TELEGRAPHS AND TELEPHONES, 37 Cyc. 1601; TOLL ROADS, *ante*, p. 399; WATERS; WEAPONS; WHARVES.
Leased Premises, see LANDLORD AND TENANT, 24 Cyc. 845.
Logs, see LOGGING, 25 Cyc. 1541.
Public Buildings, see COUNTIES, 11 Cyc. 497; MUNICIPAL CORPORATIONS, 28 Cyc. 1307.
Removing Landmark, see BOUNDARIES, 5 Cyc. 974.
Sewers, Drains, and Watercourses in Cities, see MUNICIPAL CORPORATIONS, 28 Cyc. 1312.
Streets, see MUNICIPAL CORPORATIONS, 28 Cyc. 1340; STREETS AND HIGHWAYS, 37 Cyc. 1.
Vessels, see SHIPPING, 36 Cyc. 1.
Waterworks, see WATERS.
Waters and Watercourses, see WATERS.

I. DEFINITION AND DERIVATION.

When the law of the land undertakes to declare and protect rights and establishes a standard of conduct for the purpose, any acts or omissions which disturb or impede the enjoyment of such rights may be treated as legal wrongs or torts.[1]

1. Cooley Torts 4.

The difficulty of defining a tort in accurate phraseology was commented upon by Finch, J., in Rich *v.* New York Cent., etc., R. Co., 87 N. Y. 382, 390, in the following language: "We have been unable to find any accurate and perfect definition of a tort. Between actions plainly *ex contractu* and those as clearly *ex delicto*, there exists what has been termed a border land, where the lines of distinction are shadowy and obscure, and the tort and the contract so approach each other, and become so nearly coincident as to make their practical separation somewhat difficult. (Moak's Underhill on Torts, p. 23.) The text writers either avoid a definition entirely (Addison on Torts), or frame one plainly inperfect (2 Bouvier's L. Dict. 600), or depend upon one which they concede to be inaccurate, but hold sufficient for judicial purposes."

Other definitions are: "Any wrongful act, neglect, or default whereby legal damage is caused to the person, property, or reputation of another." Standard Dict.

"Such wrongs as are in their nature distinguishable from mere breaches of contract, and are often mentioned as of three kinds: viz. nonfeasance, being the omission to do some act which a person is bound to do; misfeasance, being the improper doing of some act which he may lawfully do; or malfeasance, being the commission of some act which is positively unlawful." Abbott L. Dict.

"An act or omission which unlawfully violates a person's right, created by the law and for which the appropriate remedy is a common-law action for damages by the injured person." Burdick Torts 11.

"An act or omission, not a mere breach of contract, and producing injury to another, in the absence of any existing lawful relation of which such act or omission is a natural outgrowth or incident." "A Proposed New Definition of a Tort" by F. H. Cooke, 12 Harvard L. Rev. 335, 336.

"The infringement of a right created otherwise than by contract." Rapalje & L. L. Dict. [*quoted* in Jones *v.* Hunt, 74 Tex. 657, 659, 12 S. W. 832].

"A tortious act consists of the commission or omission of an act by one, without right, whereby another receives some injury, directly or indirectly, in person, property or reputation." Hayes *v.* Massachusetts Mut. L. Ins. Co., 125 Ill. 626, 634, 18 N. E. 322, 1 L. R. A. 303.

"A legal wrong committed upon the person or property independent of contract. It may be either — 1. A direct invasion of some legal right of the individual. 2. The infraction of some public duty by which special damage accrues to the individual. 3. The violation of some private obligation by which like damage accrues to the individual." Ga. Civ. Code (1895), § 3807 [*quoted* in Louisville, etc., R. Co. *v.* Spinks, 104 Ga. 692, 695, 30 S. E. 968; Reid *v.* Humber, 49 Ga. 207, 208].

"An injury or wrong committed, with or without force, to the person or property of another, and such injury may arise by either the nonfeasance, malfeasance or misfeasance of the wrong-doer." Gindele *v.* Corrigan, 129 Ill. 582, 587, 22 N. E. 516, 16 Am. St. Rep. 292.

"The word 'tort' means nearly the same thing as the expression 'civil wrong.' It denotes an injury inflicted otherwise than by a mere breach of contract; or, to be more nicely accurate, a tort is one's disturbance of another in rights which the law has created either in the absence of contract, or in consequence of a relation which a contract has established between the parties." Bishop Non-Contr. Law, § 4 [*quoted* in Louisville, etc., R. Co. *v.* Spinks, 104 Ga. 692, 694, 30 S. E. 968; Galveston, etc., R. Co. *v.* Hennegan 33 Tex. Civ. App. 314, 316, 76 S. W. 452].

Liability for a tort "is based upon the theory, that the party liable has committed a wrong, or neglected some duty. That direct or consequential injury has resulted from the employment of immediate force, or the negligent performance of some legal duty, or in the negligent use of persons or property, whereby an injury has resulted to another." Scammon *v.* Chicago, 25 Ill. 424, 79 Am. Dec. 334.

"A wrong independent of contract." Bouvier L. Dict.; 1 Hill Torts 1. And see Mobile L. Ins. Co *v.* Randall, 74 Ala. 170, 176; Denning *v.* State, 123 Cal. 316, 323, 55 Pac. 1000; International Ocean Tel. Co. *v.* Saunders, 32 Fla. 434, 444, 14 So. 148, 21 L. R. A. 810; Louisville, etc., R. Co. *v.* Spinks, 104 Ga. 692, 694, 30 S. E. 968; Western Union Tel. Co. *v.* Taylor, 84 Ga. 408, 418, 11 S. E. 396, 8 L. R. A. 189; Shirk *v.* Mitchell, 137 Ind. 185, 194, 36 N. E. 850; Clark *v.* Gates, 84 Minn. 381, 383, 87 N. W. 941; Barkley *v.* Williams, 30 Misc. (N. Y.) 687, 688, 64 N. Y. Suppl. 318; Hoehle *v.* Allegheny Heating Co., 5 Pa. Super. Ct. 21, 22; Philadelphia, etc., Steam Tow-Boat Co. *v.* Philadelphia, etc., R. Co., 19 Fed. Cas. No. 11,085. *Compare* Rich *v.* New York Cent., etc., R. Co., 87 N. Y. 382, 390. And see *infra*, III, F.

"Tort is an act or omission (not being merely the breach of a duty arising out of a personal relation, or undertaken by contract) which is related to harm suffered by a determinate person in one of the following ways [including interference with an absolute right whether there be measurable

The word (taken from the French) is derived from the Latin "*torquere*" to twist, "*tortus*" twisted or wrested aside. At one time in common use, it is a mere

actual damage or not]: (a) It may be an act which, without lawful justification or excuse, is intended by the agent to cause harm, and does cause the harm complained of. (b) It may be an act in itself contrary to law, or an omission of specific legal duty, which causes harm not intended by the person so acting or omitting. (c) It may be an act violating an absolute right (especially rights of possession or property) and treated as wrongful without regard to the actor's intention or knowledge. This, as we have seen, is an artificial extension of the general conceptions which are common to English and Roman Law. (d) It may be an act or omission causing harm which the person acting or omitting did not intend to cause, but might and should with due diligence have foreseen and prevented. (e) It may, in special cases, consist merely in not avoiding or preventing harm and which the party was bound absolutely or within limits to avoid or prevent." Pollock Torts 19 [*adopted* in Jaggard Torts 2; and *quoted* in Louisville, etc., R. Co. *v.* Spinks, 104 Ga. 692, 694, 30 S. E. 968; Drum *v.* Miller, 135 N. C. 204, 209, 47 S. E. 421, 102 Am. St. Rep. 528, 65 L. R. A. 890; Galveston, etc., R. Co. *v.* Hennegan, 33 Tex. Civ. App. 314, 316, 76 S. W. 452].

"To attempt a definition which would tell its own story on its face would be hopeless. Indeed no definition, helped out however much by explanation, can convey an adequate notion of the meaning of the word; nothing short of careful study of the specific torts of the law will answer, for there is no such thing as a typical tort, an actual tort, that is to say, which contains all the elements entering into the rest. One tort is as perfect as another; and each tort differs from the others in its legal constituents. But they all have this in common, that there must be a breach of duty paramount, or, as we shall now put it, established by municipal law; and they all lead to an action for damages. These facts must furnish our definition. Accordingly a tort may be said to be, a breach of duty established by municipal law for which a suit for damages can be maintained; or, conversely, the infringement of a private right, or a public as a private right, established by municipal law." Bigelow Torts 64.

For a discussion of the various definitions see Fiero Torts 3-5.

Limited to wrongs giving rise to action at law for damages.— The word "torts" in legal phraseology does not include all wrongful acts done by one person to the injury of another, but only those for which individuals may demand legal redress, or those which give rise to an action at law for damages. Sims *v.* Sims, 77 N. J. L. 251, 252, 72 Atl. 424. And see Wartman *v.* Empire Loan Co., 45 Tex. Civ. App. 469, 101 S. W. 499. No right of action exists at common law in favor of a wife for the enticing away of her husband and the alienation of his affections, and therefore such act does not come within the word "torts" in a statute giving a married woman a right of action in her own name for all torts committed against her or her separate property. Sims *v.* Sims, *supra*. "According to the common understanding of words, breach of trust is a wrong, adultery is a wrong, refusal to pay just compensation for saving a vessel in distress is a wrong. Yet none of these things is a tort. An order may be made compelling restitution from the defaulting trustee; a decree of judicial separation may be pronounced against the unfaithful wife or husband; and payment of reasonable salvage may be enforced against the ship-owner. But the administration of trusts belongs to the law formerly peculiar to the Chancellor's Court; the settlement of matrimonial causes between husband and wife to the law formerly peculiar to the King's Ecclesiastical Courts; and the adjustment of salvage claims to the law formerly peculiar to the Admiral's Court. These things being unknown to the old common law, there can be no question of tort in the technical sense." Pollock Torts (6th ed.) 3.

Acts for which penalty is imposed by statute.— The fact that a statute makes an act wrongful and imposes therefor a penalty to be recovered by civil action does not make the act a tort. It has been held, therefore, that an action under a statute to recover the penalty imposed thereby for receiving usury is not an action of tort within a statute allowing suits "for damages for torts" to be brought in the county in which the injury was inflicted, but is an action of debt, or in the nature of debt, required to be brought in the county of defendant's residence. Wartman *v.* Empire Loan Co., 45 Tex. Civ. App. 469, 471, 101 S. W. 499. In this case it was argued, in effect, that any civil wrong done, which injuriously affects the rights of person or property of another, and which is denounced by statute with a penalty attached which may be recovered by the injured party by way of damages, is a tort. But the court did not concur. "Evidently," said the court, "the term 'civil wrongs' appearing in the definitions [of tort] given, is used in a restricted and not in a broad and comprehensive sense, embracing every wrong for which an action may be maintained. . . . An action of tort, strictly speaking and as it is commonly understood, is one in which the complainant seeks to recover damages for defamation of character, the wrongful and forcibly taking of his property or injury to it, or for unlawful violence inflicted upon his person. Such an action, so far as we are informed, has never been founded and sustained on a wrongful act committed, such as the taking of usury, by the consent of the injured party, or in which he actively participated. To characterize

accident that "tort" as a synonym for wrong has not become part of our current literary language. In Spenser's "Faerie Queene" it is freely used.[2]

II. HISTORY.

As in the primitive stages of racial development force and violence constituted the chief wrongs, society must at an early date have been called upon to settle many of the questions which are now placed under the head of torts, and the comparative antiquity of this branch of jurisprudence seems manifest. While this is of course mere speculation it can be said with reasonable assurance that the conception of a wrong done to the individual far antedated that of a wrong done to the state. At all events, principles applicable to such injuries as assault, battery, false imprisonment, seduction, trespass and conversion, wrongs essentially primitive, are well settled, and the same is true of abuse of process, malicious prosecution, waste, nuisance, and defamation, although the recognition of these injuries must of necessity have dated from a later epoch. Fraud, although a tort of ancient origin, governed by well developed rules, and negligence where the rules are few, are necessarily modern in the larger part of their applications, while unfair competition, interference with contractual rights and with legal remedies, violation of the right of privacy, and conspiracy are yet in process of evolution.[3]

such an act as a tort would seem to be anomalous."

"Tort" as synonymous with "private wrong," "private injury," or "civil wrong" see Rhobidas *v.* Concord, 70 N. H. 90, 47 Atl. 82, 85 Am. St. Rep. 604, 51 L. R. A. 381.

When used in reference to admiralty jurisdiction the term "tort" is not confined to wrongs or injuries committed by direct force, but it includes wrong suffered in consequence of the negligence or malfeasance of others where the remedy at common law is by an action on the case. Smith *v.* Burnett, 10 App. Cas. (D. C.) 469, 482 [*affirmed* in 173 U. S. 430, 19 S. Ct. 442, 43 L. ed. 756]; John Spry Lumber Co. *v.* The C. H. Green, 76 Mich. 320, 327, 43 N. W. 576; Leathers *v.* Blessing, 105 U. S. 626, 630, 26 L. ed. 1192; Philadelphia, etc., R. Co. *v.* Philadelphia, etc., Steam Tow Boat Co., 23 How. (U. S.) 209, 215, 16 L. ed. 433; Jervey *v.* The Carolina, 66 Fed. 1013, 1016.

2. See Pollock Torts 1; Hale Torts 2.

3. The eighth of the Twelve Tables of the Roman Law treats of torts and in its fragmentary form it is as follows: (1) Whoever shall chant a magic spell. . . . (2) If a man maim another, and does not compromise with him, there shall be retaliation in kind. (3) If with a fist or club, a man break a bone of a freeman, the penalty shall be three hundred asses, if of a slave, one hundred and fifty asses. (4) If he does any injury to another, twenty-five asses; if he sings a satirical song, let him be beaten. (5) . . . if he shall have inflicted a loss . . . he shall make it good. (8) Whoever shall blight the crops of another by incantation . . . nor shall thou win over to thyself another's grain. . . . (12) If a thief be caught stealing by night and he be slain, the homicide shall be lawful. (13) If in the daytime the thief defend himself with a weapon one may kill him. (15) . . . with a leather girdle about his naked body, and a platter in his hand. . . . (16) If a man contend at law about a theft not detected in the act. . . . (21) If a patron cheat his client he shall become infamous. (22) He who has been summoned as a witness or acts as *libripens*, and shall refuse to give his testimony, shall be accounted infamous and shall be incapable of acting subsequently as witness. (24) If a weapon slip from a man's hand without his intention of hurling it.

Tort and crime formerly undistinguished. —"The penal Law of ancient communities is not the law of Crimes; it is the law of Wrongs, or, to use the English technical word, of 'Torts.' The person injured proceeds against the wrong-doer by an ordinary civil action, and recovers compensation in the shape of money-damages if he succeeds. If the Commentaries of Gaius be opened at the place where the writer treats of penal jurisprudence founded on the Twelve Tables, it will be seen that at the head of the civil wrongs recognized by the Roman law stood *Furtum* or Theft. Offences which we are accustomed to regard exclusively as crimes are exclusively treated as torts, and not theft only, but assault and violent robbery, are associated by the jurisconsult with trespass, libel and slander. All alike give rise to an Obligation or *vinculum juris*, and were all requited by a payment of money. This peculiarity, however, is most strongly brought out in the consolidated Laws of the Germanic tribes. Without an exception they describe an immense system of money compensations for homicide, and with few exceptions, as large a scheme of compensation for minor injuries. . . . If therefore the criterion of a delict, wrong, or tort be that the person who suffers it, and not the State, is conceived to be wronged, it may be asserted that in the infancy of jurisprudence, the citizen depends

III. NATURE AND ELEMENTS.

A. Breach of Legal Duty. To constitute a tort, the wrong must have amounted to a breach of a legal duty owing by the wrong-doer to the injured

for protection against violence or fraud not on the Law of Crime but on the Law of Tort." "Ancient Law," by Sir Henry Maine 358. A curious illustration is given by Gibbon ("Decline and Fall of the Roman Empire," c. 44), who tells how one Veratius found amusement in rushing through the streets and striking in the face inoffensive travelers, while his attendant purse bearer immediately silenced their claims by the legal tender of twenty-five pieces of copper, about the value of one shilling.

Jewish law.— "No department of Jewish law is more illustrative of the great primitiveness of that system than is the law of torts. This includes a vast number of wrongs and injuries, some of which we might have expected to find treated as crimes. In earliest times the crime of murder was brought under the law of retaliation. Later, a money compensation seems to have been allowed. Under the "Book of Covenant," (Ex. XXI. 12) murder became a crime, but the guilty party had certain rights of asylum. In the case of theft, the criminal element was not distinguished; partly because the ancient saying, "Whoso sheddeth man's blood, by man shall his blood be shed," (Gen. IX. 6) had no counterpart applicable to the case of theft. The thief was, however, compelled to pay to the owner of the stolen property more than the value of the property. If he still retained possession of the stolen ox or ass — for such were the chief articles of value — he must return the beast and another as well; if he had killed or sold it, he forfeited to the owner four or five times its value. There are several other classes of wrongs which were regarded from much the same standpoint. Of these, two are the most important. When property not consisting of cattle, was entrusted to the care of another, and it was stolen, if the thief was discovered, he was compelled to pay double value to the owner. If the thief was not discovered, the question of the bailee's guilt or innocence was determined by some ordeal. (Ex-XXII. 7–9.) When cattle were delivered to another to be cared for, and an ox or a sheep was hurt, killed, or driven away, the herdsman if there were no witness, could clear himself by purgation. If it was clearly a case of theft, restoration had to be made, as the loss was due to the negligence of the herdsman. If the animal was hurt or destroyed by wild beasts, the herdsman was not compelled to make restitution. It is apparent that this is a view of the duties of the bailee which is very similar to the modern conception. An interesting development was the case of injury done to a 'hired thing,' in which case the bailor could not recover. The price of the hire was held to include insurance for damage. In the case of liability for negligence or for damage done by certain animals, there is close resemblance to more modern law. The owner of an ox which was not known to be dangerous was not responsible for the death of a man who had been gored by the ox. He was free of liability upon surrender of the ox, which seems to have been regarded as deodand, inasmuch as it was stoned to death and its flesh was not eaten. But if the ox was known to be dangerous, and was loose through negligence on the part of the owner, the owner was liable for any death caused by the ox. He could redeem himself by payment of a ransom; otherwise he must die. Corresponding regulations were enacted concerning injuries done by animals to one another, and as to wrongs committed by carelessness. In the case of damage feasant, committed by turning beasts loose in another's field or vineyard, the amount which could be recovered might not exceed that of the actual damage. For the determining of this amount, the law provided an easy method. The owner of the beasts must make restitution from the best of his own field or vineyard. (Ex. XXII. 5.) He who kindled a fire whereby the grain of a neighbor was consumed, was obliged to make restitution." Hist. Jur. by Guy Carleton Lee 116–118.

The weregeld.— The lack of a primitive perception of the difference between criminal and civil wrongs is shown when we come to the weregeld. By the law of ancient Greece, where a murder was done under the impulse of a sudden passion or insanity, the culprit, was allowed to choose compensation. In the earlier periods the form such compensation took was that of servile labor for a term of years, generally eight. In later times this was superseded by a money payment. Hist. Jur. by Guy Carleton Lee 169. In England payment of the weregeld was regulated from time to time by royal ordinance, the most complete having been published by Edward the elder (A. D. 901–924). At the head stood the king with 30,000 thrimsas or £500 of the money of the period, half of which went to the king's kindred and half to the state; an archbishop or earl, 15,000, or £250; a bishop or alderman, 8000, or £133, 6s. 8d; a priest or thane, 2,000, or £33, 6s. 8d; a ceorl or common person, 267, or 9s. In a similar way a pecuniary fine of smaller amount would relieve a man from corporal punishment for various minor offenses. "The Kings Peace," by F. A. Inderwick, Q. C. 26; Reeve Hist. Eng. L. vol. 1, p. 28.

Development of the law of torts during the 19th century.— "With a few exceptions, the principles of law applicable to torts remain much as they were in 1800. The most marked change was made by Lord Campbell's Fatal Accidents Act (1846). As the law

party, which duty may exist either independent of or be created by statute.[42] That a mere moral duty has been disregarded or moral right violated and damage suffered in consequence thereof is not sufficient to give rise to an action for tort, where no legal right of plaintiff has been infringed. Such cases the law classifies as "*damnum absque injuria.*"[5] For example, at common law a master owes

stood in 1800, if a passenger was upset in a stage-coach and his leg broken, he could sue the proprietor and recover damages for the pain which he had suffered, the injury done him and the medical and other expenses which had been incurred. But if he was killed outright by the accident, his family and his executors had no redress whatever. They could not even recover his funeral expenses. His right of action was said to be personal and to have died with him. So it was a bad thing pecuniarily for the proprietor of a stage-coach if his passengers recovered from their injuries; it was to his advantage, if there was to be an accident at all, that they should all break their necks. This was put a stop to by Lord Campbell's Act in 1846. Emphasis has been repeatedly laid during the century on the important distinction between an illegal and an irregular distress. In the law of libel, the most interesting feature is the large increase in the number of occasions which the law deems privileged, and the full recognition of the liberty of the press." A Century of Law Reform, by W. Blake Odgers, 8–9.

Defamation see "The History and Theory of the Law of Defamation," by Van Vechten Veeder, 3 Columbia L. Rev. 546; 4 Columbia L. Rev. 33. For a discussion of the remedies for defamation in the middle ages see 2 Pollock & M. Hist. Eng. L. 536.

4. Action for causing death.— For examples of the creation of legal duties by statute reference must be made to the particular subjects involved. The best illustration is probably found in the case of a negligent or wanton killing of a human being. The common law gave no cause of action to the personal representative or next of kin. Carey *v.* Berkshire R. Co., 1 Cush. (Mass.) 474, 48 Am. Dec. 616; The Harrisburg, 119 U. S. 199, 7 S. Ct. 140, 30 L. ed. 358. But by Lord Campbell's act in England (passed in 1846) which has been with various modifications incorporated, it is believed, in the legislation of all the American states, the party who would have been liable had death not ensued may be held responsible in an action for damages. See DEATH, 13 Cyc. 310.

Right of privacy.—Another illustration is afforded in the case of a violation of the so-called right of privacy. It was held by the New York court of appeals in Roberson *v.* Rochester Folding-Box Co., 171 N. Y. 538, 64 N. E. 442, 89 Am. St. Rep. 828, 59 L. R. A. 478, that the publication of plaintiff's picture as an advertisement, without her consent, gave no cause of action. The decision encountered much adverse comment, was not followed in some of the other jurisdictions (see Pavesich *v.* New England L. Ins. Co., 122 Ga. 190, 50 S. E. 68, 106 Am. St. Rep. 104, 69 L. R. A. 101), and by N. Y. Laws (1903), c. 132 (Consol. Laws, c. 6, art. 5), a right of recovery was given. As to infringement of the right of privacy see *infra*, VI, B.

Other illustrations see Billings *v.* Breinig, 45 Mich. 65, 7 N. W. 722 (lights upon vessels); Pauley *v.* Steam Gauge, etc., Co., 131 N. Y. 90, 29 N. E. 999, 15 L. R. A. 194 (fire-escapes).

Creation of rights and remedies by statute see ACTIONS, 1 Cyc. 706 *et seq.*

5. Frayer "Latin Maxims" (3d ed.) 130. And see the following cases:

Florida.—Woodbury *v.* Tampa Water Works Co., 57 Fla. 243, 49 So. 556, 21 L. R. A. N. S. 1034.

Iowa.— Kelly *v.* Chicago, etc., R. Co., 93 Iowa 436, 61 N. W. 957; McMullin *v.* Staples, 36 Iowa 532.

Kentucky.— Bourlier *v.* Macauley, 91 Ky. 135, 15 S. W. 60, 12 Ky. L. Rep. 737, 34 Am. St. Rep. 171, 11 L. R. A. 550.

Louisiana.— Lewis *v.* Huie-Hodge Lumber Co., 121 La. 658, 46 So. 685; Kemp *v.* Nichols, 4 La. Ann. 174.

Maine.— Heywood *v.* Tillson, 75 Me. 225, 46 Am. Rep. 373.

Maryland.— Dunlap *v.* Gipson, 98 Md. 119, 56 Atl. 363.

Massachusetts.— Galligan *v.* Metacomet Mfg. Co., 143 Mass. 527, 10 N. E. 171; Gilmore *v.* Driscoll, 122 Mass. 199, 23 Am. Rep. 312; Bradley *v.* Fuller, 118 Mass. 239.

Michigan.— Tucker *v.* Burt, 152 Mich. 68, 115 N. W. 722, 17 L. R. A. N. S. 510.

Minnesota.— Buck *v.* Latham, 110 Minn. 523, 126 N. W. 278; Baker *v.* Anglim, 74 Minn. 246, 77 N. W. 45; Bohn Mfg. Co. *v.* Hollis, 54 Minn. 223, 55 N. W. 1119, 40 Am. St. Rep. 319, 21 L. R. A. 337.

Missouri.— Glencoe Sand, etc., Co. *v.* Hudson Bros. Commission Co., 138 Mo. 439, 40 S. W. 93, 60 Am. St. Rep. 560, 36 L. R. A. 804; Mann *v.* Chicago, etc., R. Co., 86 Mo. 347; Gordon *v.* Livingston, 12 Mo. App. 267.

New Jersey.— Kahl *v.* Love, 37 N. J. L. 5; Morris, etc., R. Co. *v.* Newark, 10 N. J. Eq. 352.

New York.— National Protective Assoc. *v.* Cumming, 170 N. Y. 315, 63 N. E. 369, 88 Am. St. Rep. 648, 58 L. R. A. 135; Mearns *v.* New Jersey Cent. R. Co., 163 N. Y. 108, 57 N. E. 292; Ashley *v.* Dixon, 48 N. Y. 430, 8 Am. Rep. 559; Ohio, etc., R. Co. *v.* Kasson, 37 N. Y. 218; Strelitzer *v.* Schnaier, 135 N. Y. App. Div. 384, 119 N. Y. Suppl. 977 (application for patent); Roseneau *v.* Empire Circuit Co., 131 N. Y. App. Div. 429, 115 N. Y. Suppl. 511; Pickard *v.* Collins, 23 Barb. 444; Butler *v.* Kent, 19 Johns. 223, 10 Am. Dec. 219; Almy *v.* Harris, 5 Johns. 175.

North Carolina.— Biggers *v.* Matthews, 147

no duty to a servant to give him a certificate or testimonial of character, and therefore no action will lie for his refusal to do so.[6] Where defendant murdered a servant of plaintiff in a house which belonged to the latter, defendant was not liable for the value of the house, which plaintiff declared had become worthless to him.[7] One has no right of action against a merchant for refusal to sell goods.[8] Nor will an action lie, unless such means are used as of themselves constitute a breach of legal duty, for inducing or causing persons not to trade, deal, or contract with another; [9] for inducing another to trade his property; [10] for inducing a person to refrain from making a will in plaintiff's favor [11] or to revoke a will already made; [12] or for holding out false expectations of succeeding to certain property as heir or devisee.[13] In none of the last three cases is the injured party deprived of an existing legal right. Until the testator's death his position is merely that of a possible recipient of a gratuity. But the devisees under a will which, after the testator's demise, has been wrongfully spoliated, may maintain an action, after the probate and record of such will, against the person who

N. C. 299, 61 S. E. 55; McGhee *v.* Norfolk, etc., R. Co., 147 N. C. 142, 60 S. E. 912, 24 L. R. A. N. S. 119.

Ohio.— Lancaster *v.* Hamburger, 70 Ohio St. 156, 71 N. E. 289, 65 L. R. A. 856.

Pennsylvania.— Osborne *v.* Sundheim, 224 Pa. St. 207, 73 Atl. 214; Smith *v.* Johnson, 76 Pa. St. 191.

Rhode Island.— Arnold *v.* Moffitt, 30 R. I. 310, 75 Atl. 502; Paulton *v.* Keith, 23 R. I. 164, 49 Atl. 635, 91 Am. St. Rep. 624.

Vermont.— White *v.* Twitchell, 25 Vt. 620, 60 Am. Dec. 294; Cunningham *v.* Brown, 18 Vt. 123, 46 Am. Dec. 140.

West Virginia.— Pickens *v.* Coal River Boom, etc., Co., 51 W. Va. 445, 41 S. E. 400, 90 Am. St. Rep. 819.

Wisconsin.— Loehr *v.* Dickson, 141 Wis. 332, 124 N. W. 293.

United States.— Citizens' Light, etc., Co. *v.* Montgomery Light, etc., Co., 171 Fed. 553; Brown *v.* Corcoran, 4 Fed. Cas. No. 1,999, 5 Cranch C. C. 610.

England.— Allen *v.* Flood, [1898] A. C. 1, 62 J. P. 595, 67 L. J. Q. B. 258, 77 L. T. Rep. N. S. 717, 46 Wkly. Rep. 258; Mogul Steamship Co. *v.* McGregor, [1892] A. C. 25, 7 Aspin. 120, 56 J. P. 101, 61 L. J. Q. B. 295, 66 L. T. Rep. N. S. 1, 40 Wkly. Rep. 337; Day *v.* Brownrigg, 10 Ch. D. 294, 48 L. J. Ch. 173, 39 L. T. Rep. N. S. 553, 27 Wkly. Rep. 217; Grinnel *v.* Wells, 2 D. & L. 610, 8 Jur. 1101, 14 L. J. C. P. 19, 7 M. & G. 1033, 8 Scott N. R. 741, 49 E. C. L. 1033; Winterbottom *v.* Wright, 11 L. J. Exch. 415, 10 M. & W. 109.

Canada.— Perrault *v.* Gauthier, 28 Can. Sup. Ct. 241.

See also ACTIONS, 1 Cyc. 645 *et seq.*

That motive or malice does not convert into tort an act inherently lawful see *infra*, III, G, 3, a.

6. Cleveland, etc., R. Co. *v.* Jenkins, 174 Ill. 398, 51 N. E. 811, 66 Am. St. Rep. 296, 62 L. R. A. 922; New York, etc., R. Co. *v.* Schaffer, 65 Ohio St. 414, 62 N. E. 1036, 87 Am. St. Rep. 628, 62 L. R. A. 931; Carrol *v.* Bird, 3 Esp. 201, 6 Rev. Rep. 824. See MASTER AND SERVANT, 26 Cyc. 996.

7. Clark *v.* Gay, 112 Ga. 777, 38 S. E. 81

8. Brewster *v.* Miller, 101 Ky. 368, 41 S. W. 301, 19 Ky. L. Rep. 593, 38 L. R. A. 505.

9. Thus it was held that a storekeeper had no right of action against a school teacher and members of a school board because of their maliciously dissuading pupils, by threats and otherwise, not to trade with him; no dishonesty or anything of a reproachful nature being imputed to him. Guethler *v.* Altman, 26 Ind. App. 587, 60 N. E. 355, 84 Am. St. Rep. 313. And for defendant, who sold the same kind of goods as plaintiff, to threaten to discharge his employees if they traded with plaintiff, and to tell him that their pay checks made good for merchandise at its store and not transferable would not be received when they had passed through plaintiff's hands, was not actionable, although having the result intended of injuring plaintiff in his business. Robison *v.* Texas Pine Land Assoc., (Tex. Civ. App. 1897) 40 S. W. 843. A tenant in common who with the others has made a contract to sell the common property is not liable to the purchaser for inducing the others not to consummate the contract. Daly *v.* Cornwell, 34 N. Y. App. Div. 27, 54 N. Y. Suppl. 107. See also *infra*, VI, D, 6, a.

10. Devereaux *v.* Hubbard, 117 Mich. 119, 75 N. W. 450, holding that in the absence of fraudulent misrepresentations one cannot recover damages for being induced to trade his property merely because he was "mentally incapable of reasonably and properly managing and conducting his business affairs," it not being shown that he did not possess sufficient capacity to understand the nature and consequences of his own act.

11. Marshall *v.* De Haven, 209 Pa. St. 187, 58 Atl. 141. Although where one by force and violence prevents another from making a will in favor of a third person, an action lies at the suit of such third person to recover the consequent damage, there can be no recovery where force and violence is not proven. Kelly *v.* Kelly, 10 La. Ann. 622.

12. Hutchins *v.* Hutchins, 7 Hill (N. Y. 104.

13. Alderson *v.* Maddison, 5 Ex. D. 293, 49 L. J. Exch. 801, 43 L. T. Rep. N. S. 349, 29 Wkly. Rep. 105.

spoliated it, to recover damages, including reasonable fees paid attorneys for their services in having the will probated.[14] No legal right is violated where a person purchases from another's debtor property of the latter subject to attachment, and aids such debtor to abscond, where the creditor has no lien on or interest in the property purchased,[15] and there is no cause of action against a finder of property for negligence in caring for the same, for "no law compelleth him that finds a thing to keep it safely." [16] In the absence of a statute or of an easement acquired, no legal right is infringed where the owner of real property is deprived of light, air, or view, or the support of artificial burdens placed upon his land, by the act of an adjoining owner in erecting and maintaining a fence, building, or other structure on his own land, or in excavating on the same with due skill and care to avoid injury.[17] Many other cases may be referred to as illustrating the principle stated at the beginning of this section.[18] And it is the established

14. Taylor *v.* Bennett, 1 Ohio Cir. Ct. 95, 1 Ohio Cir. Dec. 57.

15. *Connecticut.*—Austin *v.* Barrows, 41 Conn. 287.

Maine.— Moody *v.* Burton, 27 Me. 427, 46 Am. Dec. 612.

Massachusetts.— Lamb *v.* Stone, 11 Pick. 527.

New York.— Braem *v.* Merchants' Nat. Bank, 127 N. Y. 508, 28 N. E. 597; Hurwitz *v.* Hurwitz, 10 Misc. 353, 31 N. Y. Suppl. 25.

Rhode Island.— Klous *v.* Hennessey, 13 R. I. 332.

Vermont.— Hall *v.* Eaton, 25 Vt. 458.

See *infra*, VI, F, text and note 58.

16. Mulgrave *v.* Ogden, Cro. Eliz. 219, 78 Eng. Reprint 475. See FINDING LOST GOODS, 19 Cyc. 541.

17. *Illinois.*— Guest *v.* Reynolds, 68 Ill. 478, 18 Am. Rep. 570. And see Tinker *v.* Forbes, 136 Ill. 221, 26 N. E. 503.

Kansas.— Triplett *v.* Jackson, 5 Kan. App. 777, 48 Pac. 931.

Kentucky.— Saddler *v.* Alexander, 56 S. W. 518, 21 Ky. L. Rep. 1835.

Massachusetts.— Keats *v.* Hugo, 115 Mass. 204, 15 Am. Rep. 80.

New Jersey.— Hayden *v.* Dutcher, 31 N. J. Eq. 217.

New York.— Myers *v.* Gemmel, 10 Barb. 537; Levy *v.* Brothers, 4 Misc. 48, 23 N. Y. Suppl. 825; Knabe *v.* Levelle, 23 N. Y. Suppl. 818; Parker *v.* Foote, 19 Wend. 309; Mahan *v.* Brown, 13 Wend. 261, 28 Am. Dec. 461.

Ohio.— Letts *v.* Kessler, 54 Ohio St. 73, 42 N. E. 765, 40 L. R. A. 177.

Virginia.— Tunstall *v.* Christian, 80 Va. 1, 56 Am. Rep. 581.

Wisconsin.— Metzger *v.* Hochrein, 107 Wis. 267, 83 N. W. 308, 81 Am. St. Rep. 841, 50 L. R. A. 305.

Rights and liabilities of adjoining landowners see ADJOINING LANDOWNERS, 1 Cyc. 769 *et seq.*

Under a statute (Ballinger Code Wash. § 5433) which provides that "an injunction may be granted to restrain the malicious erection, by an owner or lessee of land, of any structure intended to spite, injure or annoy an adjoining proprietor; and where any owner or lessee of land has maliciously erected such a structure with such intent, a mandatory injunction will lie to compel its abatement and removal," malice must be shown to warrant an injunction. And see ADJOINING LANDOWNERS, 1 Cyc. 789. Karasek *v.* Peier, 22 Wash. 419, 61 Pac. 33, 50 L. R. A. 345.

18. Disturbance of another's peace and quiet.— The allegation that defendants did procure one S, a spinster, to make an appointment with plaintiff to meet her under the false pretense that said S had something secret to communicate to plaintiff, that plaintiff had gone to the place appointed and that defendants had secreted themselves near and suddenly arose and shouted, blew horns, and rang bells to his disturbance, showed no cause of action. Lakin *v.* Gun, Wright (Ohio) 14. Sliding in a public street accompanied with boisterous conduct is not necessarily unlawful or a public nuisance, and a declaration containing no other averment of negligence or unlawful conduct cannot be sustained. Jackson *v.* Castle, 80 Me. 119, 13 Atl. 49.

Failure to allow sick person to remain in house.— In Tucker *v.* Burt, 152 Mich. 68, 115 N. W. 722, 17 L. R. A. N. S. 510, plaintiff was taken ill with an infectious disease while visiting the janitor in defendant's apartment house, and on learning of the character of the disease defendant ordered her from the flat, accompanying his order with a threat that if it were not executed he would come with an officer and put her out. Unable to hire an ambulance, plaintiff made use of the street cars and by their aid and by walking reached her own home where she was immediately taken worse. It was held that defendant violated no legal duty to plaintiff, so as to render him liable for aggravation of her illness consequent upon her leaving.

Protection of employee from strikers.— An employer does not owe a duty to an employee to protect him from strikers, and an action will not lie for failure to do so. Lewis *v.* Taylor Coal Co., 112 Ky. 845, 66 S. W. 1044, 23 Ky. L. Rep. 2218, 57 L. R. A. 447; John D. Park, etc., Co. *v.* National Wholesale Druggists' Assoc., 50 N. Y. Suppl. 1064.

Refusal of drafted man to serve United States.—Where A was duly drafted into the service of the United States in the first class, and B was drawn in the second class or as

rule that when a lawful act is performed in a proper manner, the party per-

an alternate, and A, although primarily liable to render the service, never responded, but fled the country and secreted himself beyond the control of the proper military authority, in consequence of which neglect and refusal B was compelled to, and did, render said service, it was held that no action for damages could be maintained. Dennis *v.* Larkin, 19 Iowa 434.

Injury from dyed article.—Where defendant dyed certain cloth with an ordinary dye not known at the time to be injurious, a purchaser of the cloth injured by handling it could not recover. Gould *v.* Slater Woolen Co., 147 Mass. 315, 17 N. E. 531.

Failure to apprehend thief.— A railroad conductor who permits a passenger to travel on his train with stolen goods is not liable to the owner thereof, although he is aware that the goods have been stolen, as there is no violation of any duty owed either to the public or to the owner. Randlette *v.* Judkins, 77 Me. 114, 52 Am. Rep. 747.

Interference with business.— Where plaintiff was entitled to all the articles to be manufactured by a certain company, he furnishing the raw materials, it was held that he could maintain no action against one who stopped the machinery of the company and obstructed its operation. Dale *v.* Grant, 34 N. J. L. 142.

Causing discharge of employee.— A patron of a street railway company incurs no liability to a conductor by reporting to the superintendent of the company such conductor's misconduct while on duty, toward a passenger, although in making the report he is prompted by ill-will and a desire to secure the conductor's discharge from the service of the company. Lancaster *v.* Hamburger, 70 Ohio St. 156, 71 N. E. 289, 65 L. R. A. 856. And where a railroad company made a rule that draymen should not enter its warehouse but should receive goods from the platform, whereupon a drayman's employer discharged him, the drayman had no right of action against the company. Donovan *v.* Texas, etc., R. Co., 64 Tex. 519.

Interference with contractual rights, competition in business, etc. see *infra*, VI, D, 6.

Liability of common carrier.— A common carrier is not responsible for the loss of a parcel of valuables which fell out of an open window without any fault on its part, merely because it did not stop the train to recover it. Henderson *v.* Louisville, etc., R. Co., 123 U. S. 61, 8 S. Ct. 60, 31 L. ed. 92.

Where defendant falsely represented that plaintiff would not publish a directory for the year 1885, and third persons were induced thereby to advertise in and subscribe for defendant's directory, it was held that no legal right of plaintiff was invaded, since his intention to publish a directory was not property. Dudley *v.* Briggs, 141 Mass. 582, 6 N. E. 717, 55 Am. Rep. 494.

Injuries to trespasser or licensee.— The owner of land is not liable for injuries received by a trespasser who falls into a pit excavated at a distance from the public highway. Gramlich *v.* Wurst, 86 Pa. St. 74, 27 Am. Rep. 684. Nor does he owe any duty to one entering on his property in search of work to take affirmative measures to ascertain and remedy defects in a machine. Larmore *v.* Crown Point Iron Co., 101 N. Y. 391, 4 N. E. 752, 54 Am. Rep. 718. See NEGLIGENCE, 29 Cyc. 442 *et seq.*

Injury to trespassing animal.— Defendant was not liable to the owner of a horse which ate the leaves of a yew tree growing on defendant's land, the branches of which did not extend over the boundary line. Ponting *v.* Noakes, [1894] 2 Q. B. 281, 58 J. P. 559, 63 L. J. Q. B. 549, 70 L. T. Rep. N. S. 842, 42 Wkly. Rep. 506.

Dangerous or defective premises.— Where defendant, the owner of a building, leased to one B three rooms in the rear overlooking an extension on which there was a skylight, and plaintiff, a child, while visiting B, fell from the window through the skylight and was injured, defendant was not liable, as he owed no duty to plaintiff to maintain a screen across the skylight. Miller *v.* Woodhead, 104 N. Y. 471, 11 N. E. 57. The same rule has been applied to fire-escapes. McAlpin *v.* Powell, 70 N. Y. 126, 26 Am. Rep. 555.

Interruption of flow of percolating waters.— The owner of property who digs a mine or a well is not liable if he interrupts the flow of percolating subterranean waters to his neighbor's injury. Ocean Grove Camp Meeting Assoc. *v.* Asbury Park Com'rs, 40 N. J. Eq. 447, 3 Atl. 168; Acton *v.* Blundell, 13 L. J. Exch. 289, 12 M. & W. 324. See WATERS.

Receipt of wages after assignment.— Where defendant's employers refused to accept an order by him to pay his wages to plaintiff, but nevertheless did pay for some time, when they notified plaintiff that they would do so no longer, and made payment to defendant, the receipt of the wages by defendant was not a tort for which he was liable to plaintiff. McGuire *v.* Kiveland, 56 Vt. 62.

Liability of directors of corporation to creditors.— Where by attachment proceedings, without any fraud or irregularity, certain *bona fide* creditors of an insolvent corporation secured the application of all the corporate assets to the payment of their claims, the fact that the directors of the corporation who had guaranteed the payment of such claims requested and thus induced the creditors to institute attachment suits without giving the said creditors any advantage or rights other than those which, as a matter of law, they already possessed, it was held that such directors were not liable in an action at law to the other creditors of the corporation. No liability is created against one for procuring a third party to do an act which may lawfully be

forming it is not liable for mere incidental consequences injuriously resulting from it to another.[19]

B. Cases of Novel Impression. The fact that no precedent can be found for an action in tort based upon a particular act or omission is to be considered in determining whether the action will lie;[20] but where the violation of a legal right is shown, the novelty of the proceeding will not of itself operate as a bar to redress. It is an ancient maxim that "where there is a right, there is a remedy."[21]

C. Accidental Injuries. There can be no liability for purely accidental

done. Emanuel *v.* Barnard, 71 Nebr. 756, 99 N. W. 666.

Contagious disease.— Where a railroad company in pursuance of a contract to care for its sick employees took charge of an employee afflicted with smallpox and hired a nurse and watchman to care for him, through whose negligence he escaped while delirious and communicated the disease to plaintiff, it was held that the railroad company had assumed to each individual member of the community the duty to prevent the spread of the disease and hence plaintiff had a right of action for damages arising from the breach of such duty. Missouri, etc., R. Co. *v.* Wood, 95 Tex. 223, 66 S. W. 449, 93 Am. St. Rep. 834, (Civ. App. 1902) 68 S. W. 802.

City not liable for escape and death of patient.— A city is not liable for the escape and consequent death of a smallpox patient from the hospital. Richmond *v.* Long, 17 Gratt. (Va.) 375, 94 Am. Dec. 461.

A physician, not being bound to render professional services to everyone who applies, is not liable to an action for arbitrarily refusing to respond to a call, although he is the only physician available. Hurley *v.* Eddingfield, 156 Ind. 416, 59 N. E. 1058, 83 Am. St. Rep. 198, 53 L. R. A. 135.

Other illustrations.— Where the owners of a foundry gave the ashes produced therefrom to the engineer in consideration of his taking them from the furnace after working hours, they were not liable for injuries to a child who fell into them and was burned while they were piled in an open lot near the foundry. Burke *v.* Shaw, 59 Miss. 443, 42 Am. Rep. 370. A written objection by a juror to serving on a jury with another juror, on account of the color of the latter, although frivolous, unwarranted, and unworthy, forms no basis for an action at law for damages, especially where the objection was not accompanied by either abusive language, assault, or defamation of character. McPherson *v.* McCarrick, 22 Utah 232, 61 Pac. 1004.

19. Mason *v.* Illinois Cent. R. Co., 77 S. W. 375, 25 Ky. L. Rep. 1214; Goodale *v.* Tuttle, 29 N. Y. 459; Bellinger *v.* New York Cent. R. Co., 23 N. Y. 42; Radcliff *v.* Brooklyn, 4 N. Y. 195, 53 Am. Dec. 357; People *v.* Albany, 5 Lans. (N. Y.) 524; Delhi *v.* Youmans, 50 Barb. (N. Y.) 316 [*affirmed* in 45 N. Y. 362, 6 Am. Rep. 100]; Norfolk, etc., R. Co. *v.* Gee, 104 Va. 806, 52 S. E. 572, 3 L. R. A. N. S. 111; American Sheet, etc., Co. *v.* Pittsburgh, etc., R. Co., 143 Fed. 789, 75 C. C. A. 47, 12 L. R. A. N. S. 382. For a general discussion of this subject see ACTIONS, 1 Cyc. 645 *et seq.*

20. Rice *v.* Coolidge, 121 Mass. 393, 23 Am. Rep. 279; Ryan *v.* New York Cent. R. Co., 35 N. Y. 210, 91 Am. Dec. 49. In Davis *v.* Minor, 2 U. C. Q. B. 464, 468, where it was held that an action on the case in the nature of conspiracy would not lie against a person for supplanting another in the purchase of goods which had first been contracted for by the latter, the court saying: "No doubt it is not decisive against this action lying, that no precedent of precisely such an action can be found, when the principle upon which it is governed is not new; but if the question seems a doubtful one, and the occasions for such actions must very frequently have arisen, then the absence of any precedent is a strong argument against the action."

21. Woodbury *v.* Tampa Water Works Co., 57 Fla. 243, 49 So. 556, 21 L. R. A. N. S. 1034; Piper *v.* Hoard, 107 N. Y. 73, 13 N. E. 626, 1 Am. St. Rep. 789; Van Pelt *v.* McGraw, 4 N. Y. 110; Graham *v.* Wallace, 50 N. Y. App. Div. 101, 63 N. Y. Suppl. 372; Ring *v.* Ogden, 45 Wis. 303; Western Counties Manure Co. *v.* Lawes Chemical Manure Co., L. R. 9 Exch. 218, 43 L. J. Exch. 171, 23 Wkly. Rep. 5. Thus where plaintiff was induced to marry by defendant's statement that the girl was virtuous, defendant knowing this to be false, judgment for plaintiff was affirmed. "While no precedent is cited for such an action," said the court, "it does not follow that there is no remedy for the wrong, because every form of action when brought for the first time must have been without a precedent to support it. Courts sometimes of necessity abandon their search for precedents and yet sustain a recovery upon legal principles clearly applicable to the new state of facts, although there was no direct precedent for it, because there never had been an occasion to make one. The question, therefore, is not whether there is any precedent for the action, but whether defendant inflicted such a wrong upon plaintiff as resulted in lawful damages." Kujek *v.* Goldman, 150 N. Y. 176, 178, 44 N. E. 773, 55 Am. St. Rep. 670, 34 L. R. A. 156. So where defendant suborned witnesses to testify falsely to defamatory statements concerning plaintiff, neither plaintiff nor defendant being a party to the suit, it was held that "the fact that an action is without a precedent would call upon the court to consider with care the question whether

injuries arising from the doing of a lawful act in a proper manner.[22] The doctrine is applied where defendant is confronted suddenly with deadly peril and acts instinctively or according to his best judgment at the time, even though more mature reflection would have enabled him to adopt a course which would have obviated the injury. Thus where defendant's servant seized a burning lamp and was carrying it from the room where it caught fire, and to save himself threw the lamp from him, and plaintiff, a customer, was injured, it was held that the latter could not recover.[23] And so it has been held that no recovery should be permitted, where one in self-defense fires a pistol at his assailant and wounds a third person.[24]

it is justified by correct principles of law; but if this is found, it is without weight." Rice *v.* Coolidge, 121 Mass. 393, 23 Am. Rep. 279.

22. *Arkansas.*— Bizzell *v.* Booker, 16 Ark. 308.

California.— Stearns *v.* Hooper, 78 Cal. 341, 20 Pac. 734.

Connecticut.— Strouse *v.* Whittlesey, 41 Conn. 559; Morris *v.* Platt, 32 Conn. 75.

Delaware.— Ford *v.* Whiteman, 2 Pennew. 355, 45 Atl. 543.

Indiana.— Wabash, etc., R. Co. *v.* Locke, 112 Ind. 404, 14 N. E. 391, 2 Am. St. Rep. 193.

Louisiana.— New Orleans, etc., R. Co. *v.* McEwen, 49 La. Ann. 1184, 22 So. 675, 38 L. R. A. 134.

Maryland.— Creamer *v.* McIlvain, 89 Md. 343, 43 Atl. 935, 73 Am. St. Rep. 186, 45 L. R. A. 531; Washington, etc., Turnpike Co. *v.* Case, 80 Md. 36, 30 Atl. 571; Gault *v.* Humes, 20 Md. 297.

Massachusetts.— Spade *v.* Lynn, etc., R. Co., 172 Mass. 488, 52 N. E. 747, 70 Am. St. Rep. 298, 43 L. R. A. 832; Brown *v.* Kendall, 6 Cush. 292.

Michigan.—Schroeder *v.* Michigan Car Co., 56 Mich. 132, 22 N. W. 220; Lewis *v.* Flint, etc., R. Co., 54 Mich. 55, 19 N. W. 744, 52 Am. Rep. 790.

Montana.— Hopkins *v.* Butte, etc., Commercial Co., 13 Mont. 223, 33 Pac. 817, 40 Am. St. Rep. 438.

New Hampshire.— Brown *v.* Collins, 53 N. H. 442, 16 Am. Rep. 372.

New York.— Losee *v.* Buchanan, 51 N. Y. 476, 10 Am. Rep. 623; Hollenbeck *v.* Johnson, 79 Hun 499, 29 N. Y. Suppl. 945; Lansing *v.* Stone, 37 Barb. 15; Harvey *v.* Dunlop, Lalor 193; Dygert *v.* Bradley, 8 Wend. 469.

Ohio.— Cleveland City R. Co. *v.* Osborn, 66 Ohio St. 45, 63 N. E. 604.

Pennsylvania.— Wall *v.* Lit, 195 Pa. St. 375, 46 Atl. 4; Stearns *v.* Ontario Spinning Co., 184 Pa. St. 519, 39 Atl. 292, 63 Am. St. Rep. 807, 39 L. R. A. 842; Brown *v.* Susquehanna Boom Co., 109 Pa. St. 57, 1 Atl. 156, 58 Am. Rep. 708; Spencer *v.* Campbell, 9 Watts & S. 32.

Virginia.— Consumer's Brewing Co. *v.* Doyle, 102 Va. 399, 46 S. E. 390.

West Virginia.— Dicken *v.* Liverpool Salt, etc., Co., 41 W. Va. 511, 23 S. E. 582.

Wisconsin.— Miller *v.* Casco, 116 Wis. 510, 93 N. W. 447.

United States.— Parrott *v.* Wells, 15 Wall. 524, 21 L. ed. 206; Dunton *v.* Allan Line Steamship Co., 115 Fed. 250 [*affirmed* in 119 Fed. 590, 55 C. C. A. 541].

See ASSAULT AND BATTERY, 3 Cyc. 1069; NEGLIGENCE, 29 Cyc. 440.

Rule otherwise at common law.— At common law the rule was otherwise. Thus where defendant, a member of a train band, while skirmishing with his company discharged his musket, whereby plaintiff was injured, it was held that a plea that the act was "*casualiter et per infortunium et contra voluntatem suam*" was insufficient, for "no man shall be excused of a trespass . . . except it may be judged utterly without his fault; as if a man by force take my hand and strike you." Weaver *v.* Ward, Hob. 134, 80 Eng. Reprint 284; James *v.* Campbell, 5 C. & P. 372, 24 E. C. L. 611; Leame *v.* Bray, 3 East 593, 102 Eng. Reprint 724; Dickenson *v.* Watson, T. Jones 205, 84 Eng. Reprint 1218; Anonymous, Y. B. 6 Edw. IV, 7, pl. 18. This doctrine continued to prevail in England until Stanley *v.* Powell, [1891] 1 Q. B. 86, 55 J. P. 327, 60 L. J. Q. B. 52, 63 L. T. Rep. N. S. 809, 39 Wkly. Rep. 76, decided in 1891, although in America it was repudiated earlier (1835) in Vincent *v.* Stinehour, 7 Vt. 62, 29 Am. Dec. 145. The modern view is now thoroughly established. See the cases cited *supra*, this note.

An instruction that if the jury found that "the injuries . . . were merely the result of accident" the verdict should be for defendant was held correct. An objection that the phrase "inevitable or unavoidable accident" should have been used was not sustained. Plaintiff's injuries were received while defendant's employee was ejecting a drunken man from the car. The accident was not inevitable in the sense that it must have happened. It was not unavoidable, for if the drunken passenger had not been admitted, the injury would not have occurred. Feary *v.* Metropolitan St. R. Co., 162 Mo. 75, 62 S. W. 452. And see Blythe *v.* Denver, etc., R. Co., 15 Colo. 333, 25 Pac. 702, 22 Am. St. Rep. 403, 11 L. R. A. 615; Henry *v.* Grand Ave. R. Co., 113 Mo. 525, 21 S. W. 214; Sawyer *v.* Hannibal, etc., R. Co., 37 Mo. 240, 90 Am. Dec. 382.

23. Donahue *v.* Kelly, 181 Pa. St. 93, 37 Atl. 186, 59 Am. St. Rep. 632.

24. Morris *v.* Platt, 32 Conn. 75; Paxton *v.* Boyer, 67 Ill. 132, 16 Am. Rep. 615. And

D. Method of Accomplishment; Commission or Omission. Although the wrong is usually one of commission, an act is not an essential element. The tort may consist as well in an omission to fulfil a duty imposed by law.[25]

E. Distinguished From Crime — 1. In General. As will be observed from the definition,[26] a tort consists in the violation of a duty owing to an individual. Therein it differs from a crime, which is a wrong done to the public as such.[27]

2. Merger. By the common law where the same act constituted both a tort and a felony, the private injury was deemed merged in the public wrong. But this principle is no longer in force, nor did it ever apply to misdemeanors.[28]

see Laidlaw *v.* Sage, 158 N. Y. 73, 52 N. E. 679, 44 L. R. A. 216.

25. Injuries may be the result "of nonfeasance . . . the omission of an act which a person ought to do; misfeasance . . . the improper doing of an act which a person might lawfully do; and malfeasance . . . the doing of an act which a person ought not to do at all." Bell *v.* Josselyn, 3 Gray (Mass.) 309, 311, 63 Am. Dec. 741.

Common carriers.— Thus a common carrier who without lawful excuse refuses to transport goods is liable in tort. Chicago, etc., R. Co. *v.* Suffern, 129 Ill. 274, 21 N. E. 824; Pittsburgh, etc., R. Co. *v.* Morton, 61 Ind. 539, 28 Am. Rep. 682. See Carriers, 6 Cyc. 372 *et seq.* And the same is true of carriers of passengers. Nevin *v.* Pullman Palace Car Co., 106 Ill. 222, 46 Am. Rep. 688. See Carriers, 6 Cyc. 535 *et seq.* A railroad company is liable to a passenger for injuries due to a failure to heat its waiting room when required by the weather. St. Louis, etc., R. Co. *v.* Wilson, 70 Ark. 136, 66 S. W. 661, 91 Am. St. Rep. 74. And where there is a negligent failure by the servants of a railroad company to protect a passenger from a drunken fellow passenger, the wrong for which the company is liable is not the tort of the fellow passenger but the negligent omission of the carrier's servants to prevent that tort from being committed. United R., etc., Co. *v.* State, 93 Md. 619, 49 Atl. 923, 86 Am. St. Rep. 453, 54 L. R. A. 942. See Carriers, 6 Cyc. 602.

Innkeepers.— For an innkeeper to refuse unjustifiably to receive a guest constitutes a tort. Watson *v.* Cross, 2 Duv. (Ky.) 147; Cornell *v.* Huber, 102 N. Y. App. Div. 293, 92 N. Y. Suppl. 434. See Innkeepers, 22 Cyc. 1074.

26. See *supra*, I.

27. People *v.* Smith, 5 Cow. (N. Y.) 258; Van Oss *v.* Synon, 85 Wis. 661, 56 N. W. 190. "The difference between crimes and civil injuries is not to be sought for in a supposed difference between their tendencies, but in the difference between the modes wherein they are respectively pursued, or wherein the sanction is applied in the two cases. An offense which is pursued at the discretion of the injured party or his representative is a civil injury. An offense which is pursued by the sovereign or by the subordinates of the sovereign, is a crime." Austin Jurispr. § 17. And see Criminal Law, 12 Cyc. 130.

Private and public wrongs distinguished.— "Wrongs are divisible into two sorts or species: private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed civil injuries; the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appellation of crimes and misdemeanors." 3 Blackstone Comm. 2 [*quoted* in Rhobidas *v.* Concord, 70 N. H. 90, 116, 47 Atl. 82, 85 Am. St. Rep. 604, 51 L. R. A. 381; Huntington *v.* Attrill, 146 U. S. 657, 668, 13 S. Ct. 224, 36 L. ed. 1123]. And see *Ex p.* Hickey, 4 Sm. & M. (Miss.) 751; Tomlin *v.* Hildreth, 65 N. J. L. 438, 47 Atl. 649; and Criminal Law, 12 Cyc. 130.

Nuisance.— If a nuisance affects the rights of a community, it will be considered as public and constitutes a crime, while if the injury is to the private rights of the individual and differs in kind from that sustained by the public, it will furnish grounds for an action in tort. State *v.* Close, 35 Iowa 570; McGhee *v.* Norfolk, etc., R. Co., 147 N. C. 142, 60 S. E. 912, 24 L. R. A. N. S. 119; Com. *v.* Webb, 6 Rand. (Va.) 726. See Nuisances, 29 Cyc. 1152.

Trespass.— Trespass to real or personal property will not, in the absence of a statute to the contrary, constitute a crime unless attended by circumstances amounting to a breach of the peace (Kilpatrick *v.* People, 5 Den. (N. Y.) 277; State *v.* Wheeler, 3 Vt. 344, 23 Am. Dec. 212; Henderson *v.* Com., 8 Gratt. (Va.) 708, 56 Am. Dec. 160; Rex *v.* Storr, 3 Burr. 1698, 97 Eng. Reprint 1053), or unless the acts done while trespassing constitute malicious mischief (Loomis *v.* Edgerton, 19 Wend. (N. Y.) 419; People *v.* Smith, 5 Cow. (N. Y.) 258; State *v.* Briggs, 1 Aik. (Vt.) 226). Nor is conspiracy to commit a trespass *quare clausum fregit* a crime. Rex *v.* Turner, 13 East 228, 104 Eng. Reprint 357.

Condonation or settlement.— While a tort may be condoned, waived, compromised, or settled by the injured party, a crime, as a rule, cannot be. Fleener *v.* State, 58 Ark. 98, 23 S. W. 1; Com. *v.* Slattery, 147 Mass. 423, 18 N. E. 399. See Criminal Law, 12 Cyc. 161.

For comparative antiquity of the conception of tort and crime see *supra*, II.

28. *Florida.*— Williams *v.* Dickenson, 28 Fla. 90, 9 So. 847.

F. Distinguished From Contract — 1. Rule Stated. As has likewise been seen, tort consists in the violation of a right given or the omission of a duty imposed by law. Therein it differs from contract, where right is granted and obligation assumed by agreement of the parties.[29] Hence to determine the form in which redress must be sought, it is necessary to ascertain source or origin. If it be found that right or duty was created independent of the consent of the parties concerned, the action is in tort; if because of such consent, it is on contract.[30] Where the only relation between the parties is contractual, the liability

Kentucky.— Blassingame *v.* Glaves, 6 B. Mon. 38.

New Hampshire.— Pettingill *v.* Rideout, 6 N. H. 454, 25 Am. Dec. 473.

New York.— Mairs *v.* Baltimore, etc., R. Co., 175 N. Y. 409, 67 N. E. 901; Newton *v.* Porter, 5 Lans. 416 [*affirmed* in 69 N. Y. 133, 25 Am. Rep. 152]; Smith *v.* Lockwood, 13 Barb. 209. "Where the violation of a right admits of a civil and also of a criminal prosecution, the one is not merged in the other." Code Civ. Proc. § 1899.

Ohio.— Story *v.* Hammond, 4 Ohio 376.

Tennessee.— Ballew *v.* Alexander, 6 Humphr. 433.

Virginia.—Allison *v.* Farmers' Bank, 6 Rand. 204.

See also Actions, 1 Cyc. 681 *et seq.*

"The source, whence the doctrine took its rise in England, is well known. By the ancient common law, felony was punished by the death of the criminal, and the forfeiture of all his lands and goods to the crown. Inasmuch as an action at law against a person, whose body could not be taken in execution and whose property and effects belonged to the king, would be a useless and fruitless remedy, it was held to be merged in the public offense. Besides, no such remedy in favor of the citizen could be allowed without a direct interference with the royal prerogative. Therefore a party injured by a felony could originally obtain no recompense out of the estate of a felon, nor even the restitution of his own property, except after a conviction of the offender, by a proceeding called an appeal of felony, which was long disused, and wholly abolished by St. 59 Geo. 3, c. 46; or under St. 21 H. 8, c. 11, by which the judges were empowered to grant writs of restitution, if the felon was convicted on the evidence of the party injured or of others by his procurement." Boston, etc., R. Corp. *v.* Dana, 1 Gray (Mass.) 83, 97.

29. *Alabama.*— Mobile L. Ins. Co. *v.* Randall, 74 Ala. 170.

Georgia.— Central R., etc., Co. *v.* Roberts, 91 Ga. 513, 18 S. E. 315; City, etc., R. Co. *v.* Brauss, 70 Ga. 368.

Kentucky.— Randolph *v.* Snyder, (1910) 129 S. W. 562.

Massachusetts.— Sproul *v.* Hemmingway, 14 Pick. 1, 25 Am. Dec. 350.

Michigan.— Necker *v.* Harvey, 49 Mich. 517, 14 N. W. 503.

Missouri.— Roddy *v.* Missouri Pac. R. Co., 104 Mo. 234, 15 S. W. 1112, 24 Am. St. Rep. 333, 12 L. R. A. 746.

New Jersey.— Marvin Safe Co. *v.* Ward, 46 N. J. L. 19.

New York.— Losee *v.* Clute, 51 N. Y. 494, 10 Am. Rep. 638.

Ohio.— Burdick *v.* Cheadle, 26 Ohio St. 393, 20 Am. Rep. 767.

Pennsylvania.— Curtin *v.* Somerset, 140 Pa. St. 70, 21 Atl. 244, 23 Am. St. Rep. 220, 12 L. R. A. 322; Maguire *v.* McGee, 10 Pa. Cas. 171, 13 Atl. 551.

Texas.— Galveston, etc., R. Co. *v.* Hennegan, 33 Tex. Civ. App. 314, 76 S. W. 452.

Wisconsin.— Zieman *v.* Kieckhefer El. Mfg. Co., 90 Wis. 497, 63 N. W. 1021.

England.— Collis *v.* Selden, L. R. 3 C. P. 495, 37 L. J. C. P. 233, 16 Wkly. Rep. 1170; Green *v.* Greenbank, 2 Marsh. 485, 17 Rev. Rep. 529, 4 E. C. L. 496.

30. Central R., etc., Co. *v.* Roberts, 91 Ga. 513, 18 S. E. 315; City, etc., R. Co. *v.* Brauss, 70 Ga. 368; Nevin *v.* Pullman Palace Car Co., 106 Ill. 222, 46 Am. Rep. 688; Knowles *v.* Knowles, 25 R. I. 464, 56 Atl. 775; Galveston, etc., R. Co. *v.* Hennegan, 33 Tex. Civ. App. 314, 76 S. W. 452.

Deceit or breach of contract.— Where plaintiff alleged that defendant had induced him to bid on the construction of a railway by promising to sell rails at a fixed figure saying that he had already procured the rails, it was held an action on contract. Had defendant supplied the rails there would have been no injury and hence the promise could not be separated from the statement of fact. The damage was here caused by non-performance which was the gist of the action. Dawe *v.* Morris, 149 Mass. 188, 21 N. E. 313, 14 Am. St. Rep. 404, 4 L. R. A. 158.

Action against livery-stable keeper or other bailee.—Where plaintiff delivered his horse to defendant, a livery-stable keeper, and it was alleged that defendant had neglected to take due and proper care, by reason whereof the said horse was kicked by other horses, it was held that there was no duty independent of the contract. Here it will be observed that the wrong of defendant consisted merely in the failure to take due care as required by the contract. Legge *v.* Tucker, 1 H. & N. 500, 2 Jur. N. S. 1235, 26 L. J. Exch. 71, 5 Wkly. Rep. 78. The rule is otherwise where defendant has been guilty of an affirmative act in derogation of his contract, as where the bailee of a horse allows a stranger to overdrive it. In such a case he is liable in tort. Pelton *v.* Nichols, 180 Mass. 245, 62 N. E. 1. See Bailments, 5 Cyc. 214; Livery-Stable Keepers, 25 Cyc. 1514.

Contract to prepare remains for burial and shipment.—A complaint in case alleging that plaintiff engaged defendants to prepare the

of one to the other in an action of tort for negligence must be based upon some positive duty which the law imposes because of the relationship or because of the negligent manner in which some act which the contract provides for is done.[31] The question in all cases is whether, if the allegation as to the contract were stricken out, any ground of action would remain.[32]

remains of her husband for burial and shipment by a certain train to leave at a specified time, and that when the hour of leaving had arrived it was discovered that defendants had made no preparation for the shipment of the remains at the time specified, was held demurrable on the ground that no consideration was alleged, defendants being under no duty, independent of contract, to perform the obligation. Newton *v.* Brook, 134 Ala. 269, 32 So. 722.

Injuries to real estate.— One G sold to defendant certain timber with the privilege of entering and cutting the same. Thereafter G conveyed the whole tract of land to plaintiff together with his rights in the contract with defendant. Plaintiff brought suit to recover for injuries done by defendant after the expiration of the contract with G, consisting of cutting a road, flooding lands, and injuring and cutting trees. It was held that the cause of action was in tort, not in contract. Litchfield *v.* Norwood Mfg. Co., 22 N. Y. App. Div. 569, 48 N. Y. Suppl. 496.

Action against broker.— Where defendant was retained by plaintiffs as their broker to sell oil, and as such he made a contract between plaintiffs and one P, and it was alleged in an action on the case that defendant had failed to use reasonable diligence and care, and contriving and intending to injure plaintiffs, delivered the oil to P without requiring cash payment, it was held that the duty of defendant arose from an express contract, and not from his character as broker. Boorman *v.* Brown, 3 Q. B. 511, 2 G. & D. 793, 11 L. J. Exch. 437, 43 E. C. L. 843, 114 Eng. Reprint 603 [*affirmed* in 11 Cl. & F. 1, 8 Eng. Reprint 1003].

Action for wrongful detention of property. — Where plaintiff delivered a picture to defendant, which purported to be by the latter, for the purpose of ascertaining whether it was genuine, and defendant found the picture to be spurious and refused to restore it except upon condition that plaintiff would acknowledge it to be a forgery, it was held that plaintiff might recover in tort on an allegation that he was the owner of the picture and that defendant unlawfully detained it. Bryant *v.* Herbert, 3 C. P. D. 389, 47 L. J. C. P. 670, 39 L. T. Rep. N. S. 17, 26 Wkly. Rep. 898.

31. Dustin *v.* Curtis, 74 N. H. 266, 67 Atl. 220, 11 L. R. A. N. S. 504.

Action by tenant against landlord.— Thus a tenant cannot recover in tort against his landlord for a personal injury due to the landlord's failure to make repairs as provided by contract, unless there is some other breach of duty than the mere failure to perform the covenant to repair. Hamilton *v.* Feary, 8 Ind. App. 615, 35 N. E. 48, 52 Am. St. Rep. 485; Thompson *v.* Clemens, 96 Md. 196, 53 Atl. 919, 60 L. R. A. 580; Tuttle *v.* Gilbert Mfg. Co., 145 Mass. 169, 13 N. E. 465; Graff *v.* Lemp Brewing Co., 130 Mo. App. 618, 109 S. W. 1044; Dustin *v.* Curtis, 74 N. H. 266, 67 Atl. 220, 11 L. R. A. N. S. 504; Schick *v.* Fleischhauer, 26 N. Y. App. Div. 210, 49 N. Y. Suppl. 962; Davis *v.* Smith, 26 R. I. 129, 58 Atl. 630, 106 Am. St. Rep. 691, 66 L. R. A. 478. See LANDLORD AND TENANT, 24 Cyc. 1115.

Where an employer fails to furnish an employee medical attendance, as he has agreed to do, the employee's cause of action is for breach of contract, and not in tort for negligence. Galveston, etc., R. Co. *v.* Hennegan, 33 Tex. Civ. App. 314, 76 S. W. 452.

Breach of contract by physician.— Where a physician who has contracted to treat a person's family for a year refuses to visit a member of the family when sent for, or to undertake the case, the right of action against him is for breach of contract only, and not for tort. Randolph *v.* Snyder, (Ky. 1910) 129 S. W. 562. See PHYSICIANS AND SURGEONS, 30 Cyc. 1575.

Carriers.—A breach by a railroad company of an executory contract, into which it was under no legal duty of entering, to furnish the other contracting party with transportation from one point to another, is not a tort and does not give rise to an action *ex delicto*. Louisville, etc., R. Co. *v.* Spinks, 104 Ga. 692, 30 S. E. 968.

32. Walcott *v.* Canfield, 3 Conn. 194; Whittaker *v.* Collins, 34 Minn. 299, 25 N. W. 632, 57 Am. Rep. 55; Weall *v.* King, 12 East 452, 104 Eng. Reprint 176; Legge *v.* Tucker, 1 H. & N. 500, 2 Jur. N. S. 1235, 26 L. J. Exch. 71, 5 Wkly. Rep. 78.

Principle applied.— Thus where plaintiff conveyed to defendant certain premises, taking back a bond and mortgage for a portion of the purchase-price, which was unrecorded, and defendant sold the property to a third party who took without notice, and defendant refused to pay the bond, it was held that an action was maintainable in tort upon the theory that defendant had destroyed the lien of the security given by him to plaintiff, and converted a portion of the purchase-price received from the third party. Conley *v.* Blinebry, 29 Misc. (N. Y.) 371, 60 N. Y. Suppl. 531. *Compare* Knowles *v.* Knowles, 25 R. I. 464, 56 Atl. 775, where plaintiff's devisor deeded to defendant's intestate a burial lot as security for the latter's indorsement of a note, taking back an agreement to retransfer upon payment, and the note was subsequently merged with other indebtedness, but was not surrendered. It was held that suit would not lie in tort based upon the wrongful act of defendant in subsequently recording the

2. Tort Coincident With Contract.[33] It does not militate against the correctness of the rule just stated that a tort may grow out of or be coincident with a contract,[34] and that suit will lie in tort for an act of misfeasance or malfeasance, although a contractual relation may exist between the parties.[35] "Where there is an employment, which employment itself creates a duty, an action on the case will lie for a breach of that duty, although it may consist in doing something contrary to an agreement made in the course of such employment, by the party upon whom the duty is cast."[36] The rule has frequently been applied in actions against common carriers[37] and other bailees,[38] factors, brokers, and other

deed and for the conversion of the deed. Here the cause of action arose solely by virtue of the breach of the defeasance clause, while in Conley *v.* Blinebry, *supra*, it arose out of the wrongful sale by defendant.

33. **For other cases and illustrations** see *infra*, III, F, 4, a.

34. *Louisiana.*— Schoppel *v.* Daly, 112 La. 201, 36 So. 322.

Massachusetts.— Emmons *v.* Alvord, 177 Mass. 466, 59 N. E. 126.

Michigan.— Church *v.* Anti-Kalsomine Co., 118 Mich. 219, 76 N. W. 383.

Missouri.— Trout *v.* Watkins Livery, etc., Co., 148 Mo. App. 621, 130 S. W. 136; Graff *v.* Lemp Brewing Co., 130 Mo. App. 618, 109 S. W. 1044.

New Hampshire.—Newell *v.* Horn, 45 N. H. 421.

South Carolina.— Welborn *v.* Dixon, 70 S. C. 108, 49 S. E. 232.

Wisconsin.— Van Oss *v.* Synon, 85 Wis. 661, 56 N. W. 190.

35. Louisville, etc., R. Co. *v.* Hine, 114 Ala. 234, 25 So. 857; Central R., etc., Co. *v.* Roberts, 91 Ga. 513, 18 S. E. 315; City, etc., R. Co. *v.* Brauss, 70 Ga. 368; Oliver *v.* Perkins, 92 Mich. 304, 52 N. W. 609; Lynch *v.* Syracuse Rapid Transit R. Co., 66 Misc. (N. Y.) 573, 124 N. Y. Suppl. 169 [*affirmed* in 139 N. Y. App. Div. 925, 124 N. Y. Suppl. 1120].

36. Courtenay *v.* Earle, 10 C. B. 73, 83, 15 Jur. 15, 20 L. J. C. P. 7, 70 E. C. L. 73.

37. See the cases cited *infra*, this note. And see Carriers, 6 Cyc. 448, 513, 565, 588, 626.

Carriers of passengers.— Thus where plaintiff, a passenger on defendant's railroad, was injured by the act of the latter's servant in slamming a door, it was held that "that which caused the injury was not an act of omission, it was not a mere nonfeasance; it was not merely the not taking such care of the plaintiff as by the contract the defendants were bound to take, but it was an act of misfeasance — it was positive negligence in jamming his hand. Contract or no contract he could maintain an action for that. All he would have to prove would be that he was lawfully on the premises of the railway company, and the contract is merely a part of the history of the case." Taylor *v.* Manchester, etc., R. Co., [1895] 1 Q. B. 134, 59 J. P. 100, 64 L. J. Q. B. 6, 71 L. T. Rep. N. S. 596, 14 Reports 34, 11 T. L. R. 27, 43 Wkly. Rep. 120. So, where defendant's servants wrongfully induced plaintiffs, who were passengers on its road, to alight three miles from the proper station, it was held that, although the payment of fare and a consequent duty to carry was pleaded, the cause of action was none the less in tort. "It is the negligence in putting the plaintiffs off the train before the journey was completed, which is complained of, and not a breach of the contract in not carrying them to the end of their journey." Brown *v.* Chicago, etc., R. Co., 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41. See also Gillespie *v.* Brooklyn Heights R. Co., 178 N. Y. 347, 70 N. E. 857, 102 Am. St. Rep. 503, 66 L. R. A. 618 (use of insulting language by conductor to passenger); Lynch *v.* Syracuse Rapid Transit R. Co., 66 Misc. (N. Y.) 573, 124 N. Y. Suppl. 169 [*affirmed* in 139 N. Y. App. Div. 925, 124 N. Y. Suppl. 1120] (ejection of a passenger).

Carriers of goods.— Where the only allegation in an action against a common carrier is that he has failed to deliver the goods, the real ground of complaint is a breach of contract. This is a case of mere nonfeasance. Fleming *v.* Manchester, etc., R. Co., 4 Q. B. D. 81, 39 L. T. Rep. N. S. 555, 27 Wkly. Rep. 481. See also Holland *v.* Southern Express Co., 114 Ala. 128, 21 So. 992; Wamsley *v.* Atlas Steamship Co., 168 N. Y. 533, 61 N. E. 896, 85 Am. St. Rep. 699; Magnin *v.* Dinsmore, 70 N. Y. 410, 26 Am. Rep. 608. It is otherwise, however, where the common carrier is guilty of a misdelivery. This will constitute a tort. Pacific Express Co. *v.* Shearer, 160 Ill. 215, 43 N. E. 816, 52 Am. St. Rep. 324, 37 L. R. A. 177; Illinois Cent. R. Co. *v.* Parks, 54 Ill. 294; McCulloch *v.* McDonald, 91 Ind. 240; Hall *v.* Boston, etc., R. Corp., 14 Allen (Mass.) 439, 92 Am. Dec. 783; Claflin *v.* Boston, etc., R. Co., 7 Allen (Mass.) 341; Price *v.* Oswego, etc., R. Co., 50 N. Y. 213, 10 Am. Rep. 475; Viner *v.* New York, etc., Steamship Co., 50 N. Y. 23; Hawkins *v.* Hoffman, 6 Hill (N. Y.) 588, 41 Am. Dec. 767; Erie Despatch *v.* Johnson, 87 Tenn. 490, 11 S. W. 441.

Action for loss of, or injury to, baggage see Carriers, 6 Cyc. 675.

38. See Bailments, 5 Cyc. 213 *et seq.*

Gratuitous bailment.— Where defendant gratuitously undertook to remove several hogsheads of brandy belonging to plaintiff from one cellar to another, and in doing so one of the hogsheads was broken through negligence, it was held that, although the contract could not have been enforced, yet defendant, having undertaken it, became liable for misfeasance. Coggs *v.* Bernard, 2 Ld. Raym. 909, 1 Smith Lead. Cas. 177, 92 Eng. Reprint 107.

agents,[39] telegraph and telephone companies,[40] physicians and surgeons,[41] and in many other cases.[42]

3. Contract as an Element of Tort. Furthermore "a breach of contract may be so intended and planned; so purposely fitted to time, and circumstances and conditions; so inwoven into a scheme of oppression and fraud; so made to set in motion innocent causes which otherwise would not operate, as to cease to be a mere breach of contract, and become, in its association with the attendant circumstances, a tortious and wrongful act or omission." [43]

39. See Factors and Brokers, 19 Cyc. 144, 214; Principal and Agent, 31 Cyc. 1608.

Conversion of property by agent.— Thus where an agent converts property of his principal which he has agreed to pay over, the principal has his election to sue for a breach of contract or for conversion. Coit *v.* Stewart, 50 N. Y. 17. If an agent parts with the property in a way or for a purpose not authorized he is liable for a conversion, but if he parts with it in accordance with his authority, although at less price, or if he misapplies the avails or takes inadequate for sufficient security, he is not liable for a conversion of the property, but only in an action on the case for misconduct. This was applied where plaintiff had indorsed and delivered a promissory note to defendant for negotiation under instructions not to deliver the same without receiving cash, and defendant had delivered the note to a third person under a promise to discount it and return the money. It was held that defendant's act in permitting the note to go out of his possession was an unlawful interference therewith and constituted a conversion. Laverty *v.* Snethen, 68 N. Y. 522, 23 Am. Rep. 184. Where an agent exchanges property intrusted to him for sale he is liable for conversion. Haas *v.* Damon, 9 Iowa 589.

Fraud of broker.— For a broker employed to sell land to underestimate to his principal an offer which he has received, with intent to appropriate or to help someone else to appropriate the difference between the amount as he states it and the amount actually offered, is an actionable wrong if the fraud succeeds, although "it is true that but for the contract of agency the concealment and misrepresentation might not be a tort." Emmons *v.* Alvord, 177 Mass. 466, 59 N. E. 126.

40. Thus where plaintiff was in the lawful possession of a telephone instrument at his country house, the poles having been furnished by him and the connecting wire by defendant telephone company, and defendant without cause illegally cut the wire connecting the telephone box with its system, it was held, in an action for the illegal and malicious act, that plaintiff was entitled to recover damages separate and apart from his action on the contract between himself and the company. *In re* Cumberland Tel., etc., Co., 116 La. 125, 40 So. 590. See Telegraphs and Telephones, 37 Cyc. 1658.

41. Where a physician contracts to treat a person's family by the year in consideration of monthly payments made to him, and refuses to visit such person's child when sent for, or to undertake the case, the right of action against him is for breach of contract only, and not for tort; but if, after a physician undertakes a case, he is negligent in his treatment, attendance, etc., he is liable to an action in tort. Randolph *v.* Snyder, (Ky. 1910) 129 S. W. 562. See also *infra*, III, F, 4, a; Physicians and Surgeons, 30 Cyc. 1581.

42. See the cases cited *supra*, this section, notes 34, 35.

Conversion by public officer.— An action for conversion will lie to recover money received by defendant as treasurer of a township, although the relation of debtor and creditor exists. It is optional for plaintiff to bring suit in tort or on contract. Monroe Tp. *v.* Whipple, 56 Mich. 516, 23 N. W. 202.

Wrongful delivery of escrow.— Where a deed is delivered to one as an escrow to be kept for future identification as evidence and he puts it on record, an action may be sustained against him by the grantor named therein to recover compensation for all necessary trouble and expense to procure and perpetuate testimony that the deed was never legally delivered. Himes *v.* Keighblingher, 14 Ill. 469.

False and fraudulent warranty on sale of goods see *infra*, III, F, 4, a.

Grantor subsequently fraudulently conveying to another.—Where a grantor of land, with fraudulent intent to defeat the title of his grantee, makes a subsequent conveyance to a third person occupying the position of a *bona fide* purchaser, whereby the title of the original grantee is defeated, he is liable to the latter in tort. Morse *v.* Bates, 99 Mo. App. 560, 74 S. W. 439; Ring *v.* Ogden, 45 Wis. 303. But there is no liability in tort in the absence of such fraudulent intent. Ring *v.* Ogden, *supra*. The principle also applies where a grantor, by a subsequent conveyance to a *bona fide* purchaser, fraudulently defeats and renders worthless a mortgage or deed of trust given as security by his first grantee. Andrews *v.* Blakeslee, 12 Iowa 577.

43. Rich *v.* New York Cent., etc., R. Co., 87 N. Y. 382, 398, per Finch, J. Here plaintiff owned property heavily mortgaged which had depreciated by the removal of defendant's depot. To secure a return of the depot, plaintiff surrendered certain riparian rights. Because of his refusal to consent without compensation to the closing of a street, defendant maliciously broke its agreement and delayed the restoration of the depot to prevent plaintiff from warding off a foreclosure. It also instigated a sale by the mortgagee

4. Election of Remedies[44] — a. Rule Stated. From what has been said, it is seen that in many cases the party injured may bring his action in either form, since the duty violated has been both imposed by law and assumed by agreement.[45] Thus where a bank has improperly refused to honor a depositor's check, an action may be brought against it either in tort or on contract.[46] And an action may frequently be based, at plaintiff's election, either on defendant's fraud or on his breach of warranty. If the former course is adopted, scienter must be proved; but this is not necessary in the latter case.[47] So, where a party has been induced by fraud to enter into a contract and has paid money or delivered goods pursuant thereto, he may either maintain an action of deceit or, after rescinding the contract, he may recover back in an action of assumpsit what he has paid or the reasonable value of what he has delivered.[48] And there may be a right

at which the property was bid off for a small sum. Thereafter the street was closed and the depot restored, the mortgagee having been induced to waive all damages. It was held that the wrongful delay in restoring the depot was a breach of contract. But outside of and beyond this there was an actual and affirmative fraud, a scheme to accomplish a lawful purpose by unlawful means, and that this scheme of oppression and fraud, the breach of contract being only one of the elements, constituted a tort. See also Oliver *v.* Perkins, 92 Mich. 304, 52 N. W. 609.

44. See also Election of Remedies, 15 Cyc. 251.

45. Central R., etc., Co. *v.* Roberts, 91 Ga. 513, 18 S. E. 315; City, etc., R. Co. *v.* Brauss, 70 Ga. 368; McDonald *v.* Eagle, etc., Mfg. Co., 68 Ga. 839; Tompkins *v.* Tigner, 17 Ga. 103; Macon Merchants' Bank *v.* Rawls, 7 Ga. 191, 50 Am. Dec. 394; Trout *v.* Watkins Livery, etc., Co., 148 Mo. App. 621, 130 S. W. 136; De Witt *v.* McDonald, 58 How. Pr. (N. Y.) 411. "Where from a given state of facts the law raises a legal obligation to do a particular act, and there is a breach of that obligation, and a consequential damage, there, although assumpsit may be maintainable upon a promise implied by law to do the act, still an action on the case founded in tort is the more proper form of action, in which the plaintiff in his declaration states the facts out of which the legal obligation arises, the obligation itself, the breach of it, and the damage resulting from that breach." Burnett *v.* Lynch, 5 B. & C. 589, 609, 8 D. & R. 368, 4 L. J. K. B. O. S. 274, 29 Rev. Rep. 343, 11 E. C. L. 597, 108 Eng. Reprint 220 [*quoted* in Holden *v.* Rutland R. Co., 72 Vt. 156, 158, 47 Atl. 403, 82 Am. St. Rep. 926].

Statute.— "When a transaction partakes of the nature both of a tort and a contract, the party complainant may waive the one and rely solely upon the other." Ga. Code, § 3811 [*quoted* in Southwestern R. Co. *v.* Thornton, 71 Ga. 61, 65; Newton Mfg. Co. *v.* White, 53 Ga. 395, 398; Rockwell *v.* Proctor, 39 Ga. 105, 107; Blalock *v.* Phillips, 38 Ga. 216]; and other cases in this state above cited.

46. Atlanta Nat. Bank *v.* Davis, 96 Ga. 734, 23 S. E. 190, 51 Am. St. Rep. 139; J. M. James Co. *v.* Continental Nat. Bank, 105 Tenn. 1, 58 S. W. 261, 80 Am. St. Rep. 857, 51 L. R. A. 255. See Banks and Banking, 5 Cyc. 535.

47. *Arkansas.*— Louisiana Molasses Co. *v.* Ft. Smith Wholesale Grocery Co., 73 Ark. 542, 84 S. W. 1047; Johnson *v.* McDaniel, 15 Ark. 109.

Georgia.— Peel *v.* Bryson, 72 Ga. 331; Manes *v.* Kenyon, 18 Ga. 291; Dye *v.* Wall, 6 Ga. 584.

New Hampshire.— Mahurin *v.* Harding, 28 N. H. 128, 59 Am. Dec. 401.

Vermont.— West *v.* Emery, 17 Vt. 583, 44 Am. Dec. 356.

Wisconsin.— Cameron *v.* Mount, 86 Wis. 477, 56 N. W. 1094, 22 L. R. A. 512.

England.— Williamson *v.* Allison, 2 East 446, 102 Eng. Reprint 439.

See Fraud, 20 Cyc. 89; Sales, 35 Cyc. 443.

Construction of complaint.— Plaintiff alleged that defendant falsely warranted and represented that the lameness of a horse sold by him to plaintiff resulted from an injury while in the pasture and was of a temporary character; that relying upon said warranty and representations plaintiff purchased; that the horse was in fact lame from a diseased gambrel joint which defendant well knew. Plaintiff proved a warranty and breach thereof but gave no evidence tending to show fraud. It was held that the gravamen of the action was fraud, not a breach of warranty, and plaintiff could not recover upon proof of the latter only. Ross *v.* Mather, 51 N. Y. 108, 10 Am. Rep. 562. The mere fact that there was an independent and collateral promise made at the time of the false representations will not turn an action essentially in tort into one on contract. The party may have his election to sue either upon the contract or for the fraud, and in either case so long as it appears that the party is entitled to the remedy he has selected, it can be no objection to the declaration because it appears from it that he was also entitled to another remedy. Ives *v.* Carter, 24 Conn. 391.

48. Dietz *v.* Sutcliffe, 80 Ky. 650; Hanrahan *v.* National Bldg., etc., Assoc., 67 N. J. L. 526, 51 Atl. 480; Hanrahan *v.* National Bldg., etc., Assoc., 66 N. J. L. 80, 48 Atl. 517 [*affirmed* in 68 N. J. L. 730, 54 Atl. 1124]; Crown Cycle Co. *v.* Brown, 39 Oreg. 285, 64 Pac. 451. See Fraud, 20 Cyc. 90.

of election to sue either for conversion of goods or in contract.[49] The right to sue either on contract or in tort frequently arises in actions against common carriers and carriers of passengers, against bailees and innkeepers,[50] and attorneys,[51] physicians and surgeons[52] for damages suffered by clients or patients and due to ignorance, misconduct, or neglect. That the obligation in such cases is imposed by law and not solely assumed by contract is shown by the fact that a recovery may be had, although the services were to be rendered gratuitously.[53] This right

49. See ELECTION OF REMEDIES, 15 Cyc. 255.

Fraud.— Thus where goods have been obtained under a contract induced by fraud, an action lies either on the contract or for the conversion of the goods. Sage *v.* Shepard, etc., Lumber Co., 4 N. Y. App. Div. 290, 39 N. Y. Suppl. 449 [*affirmed* in 158 N. Y. 672, 52 N. E. 1126].

Conversion.— So, where personal property is converted and the wrong-doer sells the same, the owner has his option to sue in tort for the conversion or on contract for money had and received. Steiner *v.* Clisby, 103 Ala. 181, 15 So. 612; Reynolds *v.* Padgett, 94 Ga. 347, 21 S. E. 570; Elgin *v.* Joslyn, 136 Ill. 525, 26 N. E. 1090; St. John *v.* Antrim Iron Co., 122 Mich. 68, 80 N. W. 998. See MONEY RECEIVED, 27 Cyc. 861; TROVER AND CONVERSION. And in some states, where the property is retained by the wrong-doer, the owner may waive the tort and recover its value upon an implied contract of sale. Lehmann *v.* Schmidt, 87 Cal. 15, 25 Pac. 161; Challiss *v.* Wylie, 35 Kan. 506, 11 Pac. 438; Gordon *v.* Bruner, 49 Mo. 570; Moore *v.* Richardson, 68 N. J. L. 305, 53 Atl. 1032; Terry *v.* Munger, 121 N. Y. 161, 24 N. E. 272, 18 Am. St. Rep. 803, 8 L. R. A. 216; Walker *v.* Duncan, 68 Wis. 624, 32 N. W. 689; Young *v.* Marshall, 8 Bing. 43, 21 E. C. L. 437. *Contra*, Quimby *v.* Lowell, 89 Me. 547, 36 Atl. 902; Jones *v.* Hoar, 5 Pick. (Mass.) 285; Grinnell *v.* Anderson, 122 Mich. 533, 81 N. W. 329; Smith *v.* Smith, 43 N. H. 536; Weiler *v.* Kershner, 109 Pa. St. 219. See ASSUMPSIT, ACTION OF, 4 Cyc. 332.

50. *Alabama.*— Louisville, etc., R. Co. *v.* Hine, 121 Ala. 234, 25 So. 857.

Georgia.— Louisville, etc., R. Co. *v.* Spinks, 104 Ga. 692, 30 S. E. 968.

Illinois.— Nevin *v.* Pullman Palace Car Co., 106 Ill. 222, 46 Am. Rep. 688.

Maryland.— Baltimore City Pass. R. Co. *v.* Kemp, 61 Md. 619, 48 Am. Rep. 134.

Missouri.— Trout *v.* Watkins Livery, etc., Co., 148 Mo. App. 621, 130 S. W. 136.

New York.— Carroll *v.* Staten Island R. Co., 58 N. Y. 126, 17 Am. St. Rep. 221; De Wolf *v.* Ford, N. Y. L. J. Nov. 24, 1908, innkeeper.

Vermont.— Holden *v.* Rutland R. Co., 72 Vt. 156, 47 Atl. 403, 82 Am. St. Rep. 926.

England.— Pontifex *v.* Midland R. Co., 3 Q. B. D. 23, 47 L. J. Q. B. 28, 37 L. T. Rep. N. S. 403, 26 Wkly. Rep. 209; Boorman *v.* Brown, 3 Q. B. 511, 2 G. & D. 793, 11 L. J. Exch. 437, 43 E. C. L. 843, 114 Eng. Reprint 603 [*affirmed* in 11 Cl. & F. 1, 8 Eng. Reprint 1003]; Pozzi *v.* Shipton, 8 A. & E. 963, 8 L. J. Q. B. 1, 1 P. & D. 4, 1 W. W. & H. 624, 35 E. C. L. 931, 112 Eng. Reprint 1106; Bretherton *v.* Wood, 3 B. & B. 54, 6 Moore C. P. 141, 9 Price 408, 23 Rev. Rep. 556, 7 E. C. L. 602; Marshall *v.* York, etc., R. Co., 11 C. B. 655, 16 Jur. 124, 21 L. J. C. P. 34, 73 E. C. L. 655; Tattan *v.* Great Western R. Co., 2 E. & E. 844, 6 Jur. N. S. 800, 29 L. J. Q. B. 184, 8 Wkly. Rep. 606, 105 E. C. L. 844.

See BAILMENTS, 5 Cyc. 213 *et seq.*; CARRIERS, 6 Cyc. 448, 513, 565, 588, 626, 675; INNKEEPERS, 22 Cyc. 1094; and see *supra*, III, F, 2.

Carriers of passengers; construction of complaint.— In Busch *v.* Interborough Rapid Transit Co., 187 N. Y. 388, 80 N. E. 197, the complaint alleged that plaintiff became a passenger of defendant, to be carried on one of its cars, and, in consideration of five cents paid, defendant agreed "safely to carry" plaintiff, and "to treat him properly and carefully," and that, after he had passed on to a platform at a station to take a train, defendant, through its employees, in violation "of the terms of said contract," assaulted him. It was held that, although plaintiff might have declared either in contract or tort, this complaint stated a cause of action for breach of contract, and not in tort. On the other hand in Gillespie *v.* Brooklyn Heights R. Co., 178 N. Y. 347, 70 N. E. 857, 102 Am. St. Rep. 503, 66 L. R. A. 618, a complaint by a passenger against a railroad company to recover for injury to feelings because of insulting language used by a conductor was held to state a cause of action for tort. And in Lynch *v.* Syracuse Rapid Transit R. Co., 66 Misc. (N. Y.) 573, 124 N. Y. Suppl. 169 [*affirmed* in 139 N. Y. App. Div. 925, 124 N. Y. Suppl. 1120], a complaint alleging that plaintiff was riding as a passenger on defendant's street car, having paid his fare, and that, without lawful excuse, he was forcibly ejected by defendant's servant, and alleging facts in aggravation of damages, stated a cause of action in tort for assault and battery.

51. Lawall *v.* Groman, 180 Pa. St. 532, 37 Atl. 98, 57 Am. St. Rep. 662; Livingston *v.* Cox, 6 Pa. St. 360. See ATTORNEY AND CLIENT, 4 Cyc. 969, 972.

52. Lane *v.* Boicourt, 128 Ind. 420, 27 N. E. 1111, 25 Am. St. Rep. 442; Randolph *v.* Snyder, (Ky. 1910) 129 S. W. 562; Nelson *v.* Harrington, 72 Wis. 591, 40 N. W. 228, 7 Am. St. Rep. 900, 1 L. R. A. 719; Seare *v.* Prentice, 8 East 348, 103 Eng. Reprint 376. See PHYSICIANS AND SURGEONS, 30 Cyc. 1581.

53. Lawall *v.* Groman, 180 Pa. St. 532, 37

of election may also exist in the case of trespass or wrongful use and occupation of land and in many other cases.[54]

b. Rule Limited. But a right of action in contract cannot be created by waiving a tort,[55] and an action in its nature on contract is not to be converted into one in tort merely by allegations of misconduct or fraud.[56]

c. Finality of Election. As a general rule where plaintiff has once chosen his form of action he is concluded thereby and cannot afterward proceed on a different theory either in the same or in any other suit,[57] but this rule does not

Atl. 98, 57 Am. St. Rep. 662; Philadelphia, etc., R. Co. *v.* Derby, 14 How. (U. S.) 468, 14 L. ed. 502.

54. See, generally, ELECTION OF REMEDIES, 15 Cyc. 254 *et seq.*

Trespass to land.— Thus where defendant's cattle trespassed upon plaintiff's land, it was held that plaintiff might waive the tort and sue for value of pasturage on an implied contract. Norden *v.* Jones, 33 Wis. 600, 14 Am. Rep. 782.

Grantor subsequently conveying to another.— Where a grantor of land by unrecorded deed makes a subsequent conveyance to another person, who takes without notice of the previous transfer, and who records his deed, whereby the title of the first grantee is defeated, such grantor is not liable to the first grantee in tort, unless the subsequent conveyance is made with the intent to defeat the title conveyed by the prior conveyance, but if it is made with such intent he is liable. Ring *v.* Ogden, 45 Wis. 303. See *supra*, III, F, 2 note 42.

Recovery for use and occupation of land see USE AND OCCUPATION.

55. Lockwood *v.* Quackenbush, 83 N. Y. 607.

Illustrations.— "A right of action in contract cannot be created by waiving a tort, and the duty to pay damages for a tort does not imply a promise to pay them, upon which assumpsit can be maintained." Hence where plaintiff and one C went through a form of marriage and lived as man and wife for many years and thereafter plaintiff discovered the existence of a prior and undivorced wife of C, it was held that, although an action might be maintained against C for deceit, none lay for services as housekeeper under an implied contract. Cooper *v.* Cooper, 147 Mass. 370, 17 N. E. 892, 9 Am. St. Rep. 721. A cause of action against the United States for injuries due to the negligence of an employee while running an elevator cannot be brought on contract. Bigby *v.* U. S., 188 U. S. 400, 23 S. Ct. 468, 47 L. ed. 519.

56. Segelken *v.* Meyer, 94 N. Y. 473; Ross *v.* Terry, 63 N. Y. 613.

Illustrations.— Thus where the gravamen of the action was breach of contract for the non-delivery of certain shares of stock, and the complaint contained allegations of fraud as an inducement to plaintiff to enter into the agreement, it was held that these allegations did not affect the nature of the action or the remedy. They were wholly irrelevant and not issuable and could not be tried. Graves *v.* Waite, 59 N. Y. 156. So, where a complaint alleged that plaintiff had consigned goods to defendants, who were commission merchants, for sale; that defendants had received the goods but refused to remit to plaintiff the sum due, and the complaint contained an allegation that defendants "have converted the same to their own use," it was held that the action being upon contract, plaintiff should not have been nonsuited because the pleading contained an unproven allegation adapted to the complaint in an action *ex delicto*. Conaughty *v.* Nichols, 42 N. Y. 83. An action in which the complaint demands judgment for a specific and liquidated sum, with interest, alleged to be due plaintiff and withheld by defendants in violation of the contract under which they collected it, is an action on contract, although it is also alleged that defendants "have wrongfully converted the same to their own use." Van Oss *v.* Synon, 85 Wis. 661, 56 N. W. 190.

57. Terry *v.* Munger, 121 N. Y. 161, 24 N. E. 272, 18 Am. St. Rep. 803, 8 L. R. A. 216; Conrow *v.* Little, 115 N. Y. 387, 22 N. E. 346, 5 L. R. A. 693; Walter *v.* Bennett, 16 N. Y. 250; Townsend *v.* Hendricks, 40 How. Pr. (N. Y.) 143. See ASSUMPSIT, ACTION OF, 4 Cyc. 335; ELECTION OF REMEDIES, 15 Cyc. 262.

If the complaint or petition in terms alleges a cause of action ex delicto and the proof shows breach of contract, express or implied, no recovery can be had, and the action must be dismissed, even though by disregarding the averments of tort and treating them as surplusage there might be left remaining necessary and sufficient allegations, if they stood alone, to show a liability upon the contract. A. F. Shapleigh Hardware Co. *v.* Hamilton, 70 Ark. 319, 68 S. W. 490; Fluty *v.* School Dist., 49 Ark. 94, 4 S. W. 278; Barnes *v.* Quigley, 59 N. Y. 265. In an action to recover back the purchase-money paid upon a contract for the sale of certain stock by defendant to plaintiff on the ground of fraud and a consequent rescission of the contract, the agreement as proved was for the sale of fifty shares for five thousand dollars. Defendant delivered twenty-five shares. No fraud was proved on the trial and defendant moved for a nonsuit. The court at trial term held that the action could not be sustained as one for fraud, but that, as it appeared that defendant had only transferred twenty-five shares, while the agreement was for fifty, plaintiff could recover damages for breach of the contract. This was held error, since the action, if one *ex delicto*, could not be changed to one *ex contractu*. Matthews *v.* Cady, 61 N. Y. 651.

apply where at the time of election he was unaware of the facts which enabled him to choose.[58]

5. Parties and Privies. When the duty violated by defendant was created solely by contract, a cause of action arising out of such violation is limited strictly to the parties to such contract and those in privity with them.[59] No privity of

58. See Election of Remedies, 15 Cyc. 261. Plaintiff brought an action for the contract price of goods sold to F & W, and subsequently discontinued it. Then he brought suit for conversion by defendant's testator, who claimed title under an execution sale. In the second action plaintiff alleged fraud, and a rescission of the contract. It was held that the bringing of the action on contract did not preclude the subsequent action for conversion, it not appearing that at the time the former was brought plaintiff had knowledge of the fraud which entitled him to rescind. Equitable Co-operative Foundry Co. *v.* Hersee, 103 N. Y. 25, 9 N. E. 487.

59. *Missouri.*— Heizer *v.* Kingsland, etc., Mfg. Co., 110 Mo. 605, 19 S. W. 630, 33 Am. St. Rep. 482, 15 L. R. A. 821.

New Jersey.—Conklin *v.* Staats, 70 N. J. L. 771, 59 Atl. 144; Styles *v.* F. R. Long Co., 67 N. J. L. 413, 51 Atl. 710.

New York.— Losee *v.* Clute, 51 N. Y. 494, 10 Am. Rep. 638; Osby *v.* Conant, 5 Lans. 310.

Pennsylvania.—Curtin *v.* Somerset, 140 Pa. St. 70, 21 Atl. 244, 23 Am. St. Rep. 220, 12 L. R. A. 322.

United States.— District of Columbia Nat. Sav. Bank *v.* Ward, 100 U. S. 195, 25 L. ed. 621; Galbraith *v.* Illinois Steel Co., 133 Fed. 485, 66 C. C. A. 359, 2 L. R. A. N. S. 799.

England.— Le Lievre *v.* Gould, [1893] 1 Q B. 491, 57 J. P. 484, 62 L. J. Q. B. 353, 68 L. T. Rep. N. S. 626, 4 Reports 274, 41 Wkly. Rep. 468; Langridge *v.* Levy, 6 L. J. Exch. 137, 2 M. & W. 519 [*affirmed* in 1 H. & H. 325, 7 L. J. Exch. 387, 4 M. & W. 337]; Tollit *v.* Shenstone, 5 M. & W. 283.

Negligence of servant of independent contractor.— Upon this principle one who is injured by the negligence of the servant of an independent contractor cannot recover from the contractor's employer. See Master and Servant, 26 Cyc. 1552 *et seq.*

Improper construction of buildings.—A contractor who uses improper material in the construction of a hotel which when completed is unsafe will not be liable to a guest for an injury caused by such defective construction after the owner has taken possession. Curtin *v.* Somerset, 140 Pa. St. 70, 21 Atl. 244, 23 Am. St. Rep. 220, 12 L. R. A. 322. In another case plaintiff, who was owner of a building, contracted with a company to install therein a sprinkler system according to plans and specifications made a part of the contract, which provided for a tank on the top of the building having a triangular support. The company contracted with defendant for the construction of such support, but in the actual construction a tie member specified in the plans was omitted by defendant. The tank having been placed thereon and filled with water to a weight of eighty-five tons, the support collapsed during a high wind owing to the absence of the tie member required by the contract, and a large loss and damage resulted to plaintiff. It was held that plaintiff could not maintain an action in tort to recover such loss from defendant, whose duty was measured by the requirements of the contract and was enforceable only by the other party to the contract. Galbraith *v.* Illinois Steel Co., 133 Fed. 485, 66 C. C. A. 359, 2 L. R. A. N. S. 799.

Action by master for injury to servant.— A master has no right to recover against a railroad company for a loss of service caused by the injury of a servant through the company's negligence while such servant was a passenger, as the wrong arises out of the contract between the company and the servant to which the master is not a party. Taylor *v.* Manchester, etc., R. Co., [1895] 1 Q. B. 134, 59 J. P. 100, 64 L. J. Q. B. 6, 71 L. T. Rep. N. S. 596, 14 Reports 34, 11 T. L. R. 27, 43 Wkly. Rep. 120; Alton *v.* Midland R. Co., 19 C. B. N. S. 213, 11 Jur. N. S. 672, 34 L. J. C. P. 292, 12 L. T. Rep. N. S. 703, 13 Wkly. Rep. 918, 115 E. C. L. 213. See Master and Servant, 26 Cyc. 1580.

Interference by third persons with relation of master and servant see Master and Servant, 26 Cyc. 1580 *et seq.* And see *infra*, VI, D, 6, b, (I).

Negligence of attorney.— Defendant, an attorney, was employed and paid by a third party to examine and report as to the latter's title to a lot of ground. He certified in writing that the title was good and the property unencumbered. Plaintiff, with whom defendant had no contractual relations, relying upon this certificate, loaned money to the third person taking as security a deed of trust for the lot. It was held that, the obligation of defendant being merely to the third party, plaintiff could not base a claim on the certificate. District of Columbia Nat. Sav. Bank *v.* Ward, 100 U. S. 195, 25 L. ed. 621.

Other illustrations.— Defendant contracted with the postmaster-general to provide a coach to convey the mails. One A, plaintiff's employer, contracted with the postmaster-general to supply horses and coachman. Plaintiff was injured while driving the coach. It was held that such duty as defendant owed arose solely from his contract with the postmaster-general, and plaintiff being neither a party nor a privy thereto, there could be no recovery. Winterbottom *v.* Wright, 11 L. J. Exch. 415, 10 M. & W. 109. An insurer who has been compelled to pay insurance on the life of one whose death has been caused by the unlawful act of defendant has no cause

contract is necessary, however, to sustain an action in tort by an individual specially injured by an act or omission constituting a breach of contract, where it also constitutes an invasion of a legal right of or violation of a legal duty owed to the plaintiff independently of or concurrently with the contract.[60]

of action, since there is neither privity of contract nor any duty owing by defendant to the party insuring. "To open the door of legal redress to wrongs received through the mere voluntary and factitious relation of a contractor with the immediate subject of the injury, would be to encourage collusion and extravagant contracts between men, by which the death of either through the involuntary default of others, might be made a source of splendid profits to the other, and would also invite a system of litigation more portentous than our jurisprudence has yet known." Connecticut Mut. L. Ins. Co. *v.* New York, etc., R. Co., 25 Conn. 265, 275, 65 Am. Dec. 571, per Storrs, J. And see Mobile L. Ins. Co. *v.* Brame, 95 U. S. 754, 24 L. ed. 580.

Statute.— "No privity is necessary to support an action for a tort, but if the tort results from the violation of a duty itself the consequence of a contract, the right of action is confined to the parties and privies to that contract, except in cases where the party would have had a right of action for the injury done, independent of the contract." Ga. Code, § 3812.

60. Lewis *v.* Terry, 111 Cal. 39, 43 Pac. 398, 52 Am. St. Rep. 146, 31 L. R. A. 220; Woodbury *v.* Tampa Water Works Co., 57 Fla. 243, 49 So. 556, 21 L. R. A. N. S. 1034; Thomas *v.* Winchester, 6 N. Y. 397, 57 Am. Dec. 455; Pennsylvania Steel Co. *v.* Elmore, etc., Contracting Co., 175 Fed. 176; and other cases cited *infra*, this note. "Where the action is only for the breach of a contract, only the parties to it, or their privies, can maintain it. Strangers cannot sue for its negligent breach. . . . But where in a given transaction the law puts upon a person the duty to so act that he does not harm others, independent of a contract, he is liable to third parties, even though executing a contract made with a particular person, if he harms others by negligence. The question is, has the defendant broken a duty apart from the contract? If he has simply broken his contract, none can sue him but a party to it; but if he violated a duty to others, he is liable to them." Peters *v.* Johnson, 50 W. Va. 644, 647, 41 S. E. 190, 88 Am. St. Rep. 909, 57 L. R. A. 428.

Fraudulent or negligent construction work. —Where a subcontractor for the construction of concrete piers for a bridge, with knowledge of the use to which the piers were to be put, and that plaintiff, a subcontractor for the iron work, would necessarily place heavy loads and valuable property thereon, wilfully, intentionally, and fraudulently failed properly to mix the concrete and construct the piers in compliance with its contract, and knew the piers were unsafe and insufficient, so that when plaintiff attempted to use them one of them collapsed and injured plaintiff's property, defendant was liable to plaintiff for the damages sustained; defendant's duty being one imposed by law, irrespective of contract. Pennsylvania Steel Co. *v.* Elmore, etc., Contracting Co., 175 Fed. 176.

Manufacture and sale of dangerous articles. —On the same principle one who sells and delivers to another an article which he knows or ought to know may be sold to or used by third persons, and which he knows or ought to know to be inherently dangerous to others by reason of its secret nature or of hidden defects therein, will be liable to third persons who are without fault on their part injured in the use of the same as a proximate consequence of his act or negligence, since there is in such case a violation of duty on his part independent of the contract. He cannot escape liability on the ground of want of privity of contract between him and the person injured. Lewis *v.* Terry, 111 Cal. 39, 43 Pac. 398, 52 Am. St. Rep. 146, 31 L. R. A. 220 (folding bed); Woodward *v.* Miller, 119 Ga. 618, 46 S. E. 847, 100 Am. St. Rep. 188, 64 L. R. A. 932 (buggy); Blood Balm Co. *v.* Cooper, 83 Ga. 457, 10 S. E. 118, 20 Am. St. Rep. 324, 5 L. R. A. 612 (proprietary medicine containing harmful drug); Bishop *v.* Weber, 139 Mass. 411, 1 N. E. 154, 52 Am. Rep. 715 (food); Norton *v.* Sewall, 106 Mass. 143, 8 Am. Rep. 298 (dangerous drug); Wellington *v.* Downer Kerosene Oil Co., 104 Mass. 64 (oil); O'Neill *v.* James, 138 Mich. 567, 101 N. W. 828, 110 Am. St. Rep. 321, 68 L. R. A. 342 (overcharged bottle of champagne cider); Schubert *v.* J. R. Clark Co., 49 Minn. 331, 51 N. W. 1103, 32 Am. St. Rep. 559, 15 L. R. A. 818 (ladder); Lechman *v.* Hooper, 52 N. J. L. 253, 19 Atl. 215; Torgesen *v.* Schultz, 192 N. Y. 156, 84 N. E. 956, 127 Am. St. Rep. 894, 18 L. R. A. N. S. 726 (overcharged bottle of aerated water); Kuelling *v.* Roderick Lean Mfg. Co., 183 N. Y. 78, 75 N. E. 1098, 111 Am. St. Rep. 691, 2 L. R. A. N. S. 303 (farm roller); Devlin *v.* Smith, 89 N. Y. 470, 42 Am. Rep. 311, 11 Abb. N. Cas. 322 (defective scaffold); Coughtry *v.* Globe Woolen Co., 56 N. Y. 124, 15 Am. Rep. 387 (defective scaffold); Thomas *v.* Winchester, 6 N. Y. 397, 57 Am. Dec. 455 (poison labeled as a harmless medicine); Elkins *v.* McKean, 79 Pa. St. 493 (oil); Peters *v.* Johnson, 50 W. Va. 644, 41 S. E. 190, 88 Am. St. Rep. 909, 57 L. R. A. 428 (poisonous drug); Riggs *v.* Standard Oil Co., 130 Fed. 199 (oil); Huset *v.* J. I. Case Threshing Mach. Co., 120 Fed. 865, 57 C. C. A. 237, 61 L. R. A. 303 (threshing machine); Heaven *v.* Pender, 11 Q. B. D. 503, 47 J. P. 709, 52 L. J. Q. B. 702, 49 L. T. Rep. N. S. 357 (defective staging for repairing vessel); George *v.* Skivington, L. R. 5 Exch. 1, 39 L. J. Exch. 8, 21 L. T. Rep. N. S. 495, 18 Wkly. Rep. 118 (harmful compound sold as a hair wash); Langridge *v.* Levy, 6 L. J. Exch. 137, 2

G. Condition of Mind — 1. Motive and Intent Distinguished. To determine what effect shall be given to the state of mind of the party seeking redress and of the wrong-doer, the distinction between motive and intent must be emphasized. The intent is purpose or object in the concrete — the stretching out, such is the figure, of the mind toward the end desired; while the motive is that which inspires that stretching out. Now the intent may be morally culpable, while the motive is good enough; the intent may be to inflict harm, while the motive is one of ordinary self-interest.[61]

2. Motive and Intent of Injured Party.[62] The fact that an action in tort for injury to a legal right may have been brought from malicious motives and with the design of harassing the tort-feasor constitutes no reason for denying redress.[63]

3. Motive of Wrong-Doer — a. Where Act Is Inherently Lawful.[64] In general the existence of an improper motive under which defendant acted will not of itself give a cause of action where no legal right of plaintiff has been infringed. An act legal in itself is not rendered actionable by the motive which induced it.[65]

M. & W. 519 [*affirmed* in 1 H. & H. 325, 7 L. J. Exch. 387, 4 M. & W. 337] (gun). And see Negligence, 29 Cyc. 478 *et seq.*

Remote and proximate cause in such cases see *infra*, IV, A, 5.

61. Bigelow Torts 20.

Thus fraud is established, although defendant may have been actuated by no motive of obtaining any advantage for himself. "It is fraud in law it a party makes representations which he knows to be false, and injury ensues, although the motive from which the representations proceeded may not have been bad, the person who makes such representations is responsible for the consequences." Foster *v.* Charles, 7 Bing. 105, 107, 8 L. J. C. P. O. S. 118, 31 Rev. Rep. 446, 20 E. C. L. 55, per Tindal, C. J.

For a general discussion of this subject see "Motive as an Element in Torts in the Common and in the Civil Law," by F. P. Walton, 22 Harvard L. Rev. 501.

62. **Illegal conduct of plaintiff as a defense** see *infra*, VII, C, 2, e.

63. Ramsey *v.* Gould, 57 Barb. (N. Y.) 398; Macey *v.* Childress, 2 Tenn. Ch. 438. Plaintiff, a riparian proprietor, erected a dam across a stream detaining the water during autumn and spring and thus insuring an equal supply at all times. Defendant, a lower riparian proprietor, opened the gates and let off the accumulated waters. It was held that an injunction could not be sustained. The fact that defendant may have insisted upon his right to the natural flow of the water from a bad motive and for the purpose of annoying plaintiff was immaterial. "Courts," it was said, "have no power to deny to a party his legal right because, it disapproves his motives for insisting upon it." Clinton *v.* Myers, 46 N. Y. 511, 7 Am. Rep. 373.

64. **Necessity for breach of legal duty** see *supra*, III, A.

65. *California.*— J. F. Parkinson Co. *v.* Building Trades Council, 154 Cal. 581, 98 Pac. 1027, 21 L. R. A. N. S. 550; Boyson *v.* Thorn, 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233.

Connecticut.—McCune *v.* Norwich City Gas Co., 30 Conn. 521, 79 Am. Dec. 278.

Iowa.— Kelly *v.* Chicago, etc., R. Co., 93 Iowa 436, 61 N. W. 957.

Kentucky.— Bourlier *v.* Macauley, 91 Ky. 135, 15 S. W. 60, 11 Ky. L. Rep. 737, 34 Am. St. Rep. 171, 11 L. R. A. 550; Chambers *v.* Baldwin, 91 Ky. 121, 15 S. W. 57, 12 Ky. L. Rep. 699, 34 Am. St. Rep. 165, 11 L. R. A. 545.

Louisiana.— Lewis *v.* Huie-Hodge Lumber Co., 121 La. 658, 46 So. 685.

Maine.— Perkins *v.* Pendleton, 90 Me. 166, 38 Atl. 96, 60 Am. St. Rep. 252; Heywood *v.* Tillson, 75 Me. 225, 46 Am. Rep. 373.

Massachusetts.— Bradley *v.* Fuller, 118 Mass. 239; Walker *v.* Cronin, 107 Mass. 555; Randall *v.* Hazelton, 12 Allen 412; Benjamin *v.* Wheeler, 8 Gray 409.

Michigan.— Estey *v.* Smith, 45 Mich. 402, 8 N. W. 83.

Minnesota.— Buck *v.* Latham, 110 Minn. 523, 126 N. W. 278; Bohn Mfg. Co. *v.* Hollis, 54 Minn. 223, 55 N. W. 1119, 40 Am. St. Rep. 319, 21 L. R. A. 337.

Missouri.— Glencoe Sand, etc., Co. *v.* Hudson Bros. Commission Co., 138 Mo. 439, 40 S. W. 93, 60 Am. St. Rep. 560, 36 L. R. A. 804; Hunt *v.* Simonds, 19 Mo. 583.

New York.— Phelps *v.* Nowlen, 72 N. Y. 39, 28 Am. Rep. 93; Clinton *v.* Myers, 46 N. Y. 511, 7 Am. Rep. 373; Strelitzer *v.* Schnaier, 135 N. Y. App. Div. 384, 119 N. Y. Suppl. 977; Roseneau *v.* Empire Circuit Co., 131 N. Y. App. Div. 429, 115 N. Y. Suppl. 511; Delhi *v.* Youmans, 50 Barb. 316 [*affirmed* in 45 N. Y. 362, 6 Am. Rep. 100]; Pickard *v.* Collins, 23 Barb. 444; Mahan *v.* Brown, 13 Wend. 261, 28 Am. Dec. 461.

North Carolina.— Biggers *v.* Matthews, 147 N. C. 299, 61 S. E. 55.

Ohio.— Lancaster *v.* Hamburger, 70 Ohio St. 156, 71 N. E. 289, 65 L. R. A. 856; Frazier *v.* Brown, 12 Ohio St. 294; Smith *v.* Bowler, 2 Disn. 153.

Pennsylvania.— Smith *v.* Johnson, 76 Pa. St. 191; Glendon Iron Co. *v.* Uhler, 75 Pa. St. 467, 15 Am. Rep. 599; Wheatley *v.* Baugh, 25 Pa. St. 528, 64 Am. Dec. 721; Jenkins *v.* Fowler, 24 Pa. St. 308.

Rhode Island.—Arnold *v.* Moffitt, 30 R. I. 310, 75 Atl. 502.

While this principle is well settled, there is a marked tendency to break away from the hard and fast rule that the nature of the act alone will determine its legality or illegality, irrespective of the motive prompting it. This is particularly noticeable in two instances. Thus while the responsibility of a lunatic was thoroughly

Vermont.— Raycroft *v.* Tayntor, 68 Vt. 219, 35 Atl. 53, 54 Am. St. Rep. 882, 33 L. R. A. 225; Wakefield *v.* Fairman, 41 Vt. 339; Woodcock *v.* Bolster, 35 Vt. 632; Harwood *v.* Benton, 32 Vt. 724; Chatfield *v.* Wilson, 28 Vt. 49; Humphrey *v.* Douglass, 11 Vt. 22, 34 Am. Dec. 668.

Wisconsin.— Loehr *v.* Dickson, 141 Wis. 332, 124 N. W. 293; Metzger *v.* Hochrein, 107 Wis. 267, 83 N. W. 308, 81 Am. St. Rep. 841.

United States.— Passaic Print Works *v.* Ely, etc., Dry-Goods Co., 105 Fed. 163, 44 C. C. A. 426.

England.—Allen *v.* Flood, [1898] A. C. 1, 62 J. P. 595, 67 L. J. Q. B. 258, 77 L. T. Rep. N. S. 717, 46 Wkly. Rep. 258; Stevenson *v.* Newnham, 13 C. B. 285, 17 Jur. 600, 22 L. J. C. P. 110, 76 E. C. L. 285; Cotterell *v.* Jones, 11 C. B. 715, 16 Jur. 88, 21 L. J. C. P. 2, 73 E. C. L. 713.

Canada.— Perrault *v.* Gauthier, 28 Can. Sup. Ct. 241.

See 45 Cent. Dig. tit. "Torts," § 4. And see ACTIONS, 1 Cyc. 669.

"**Malicious motives** make a bad act worse; but they cannot make that wrong which, in its own essence, is lawful . . . any transaction which would be lawful and proper if the parties were friends, cannot be made the foundation of an action merely because they happen to be enemies. As long as a man keeps himself within the law by doing no act which violates it, we must leave his motives to Him who searches the heart." Jenkins *v.* Fowler, 24 Pa. St. 308, 310, per Black, J.

"**If a man has a legal right** courts will not inquire into the motive by which he is actuated in enforcing the same. A different rule would lead to the encouragement of litigation, and prevent in many instances a complete and full enjoyment of the right of property which inheres to the owner of the soil. An idle threat to do what is perfectly lawful, or declarations which assert the intentions of the owner might often be construed as evincing an improper motive and a malignant spirit, when in point of fact they merely stated the actual rights of the party. Malice might easily be inferred sometimes from idle and loose declarations, and a wide door be opened by such evidence to deprive an owner of what the law regards as well-defined rights." Phelps *v.* Nowlen, 72 N. Y. 39, 45, 28 Am. Rep. 93, per Miller, J.

"**At the foundation of every tort** must lie some violation of a legal duty, and, therefore, some unlawful act or omission. . . . Whatever, or however numerous or formidable, may be the allegations of conspiracy, of malice, of oppression, of vindictive purpose, they are of no avail; they merely heap up epithets, unless the purpose intended, or the means by which it was to be accomplished, are shown to be unlawful." Rich *v.* New York Cent., etc., R. Co., 87 N. Y. 382, 394.

Injury to bank.— Thus where it was alleged that defendants, maliciously intending to injure plaintiff's bank and bring its bills into discredit and prevent their circulation, had bought up and kept out of circulation a large amount of such bills and notes, refused to exchange them for other funds and demanded and compelled plaintiff to pay specie, it was held on demurrer that the declaration did not disclose a cause of action. "Motive alone," said the court, "is not enough to render the defendants liable for doing those acts, which they had a right to do." South Royalton Bank *v.* Suffolk Bank, 27 Vt. 505.

Injury to third person by refusal to employ or threat to discharge servant.— So, where plaintiff alleged his ownership of a certain house of the rental value of one hundred dollars, which one S was willing to pay, that defendant ordered said S to quit the house, threatening to discharge him from employment unless he did so, and that by similar threats made by defendant to other persons, plaintiff was unable to secure a tenant, it was held that no cause of action existed, since defendant could not be restricted in his right to refuse employment or to retain in his service any person, nor did the motives with which he exercised his right give a cause of action where without them there was none. Heywood *v.* Tillson, 75 Me. 225, 46 Am. Rep. 373.

Unfair competition.— Plaintiff alleged in its petition that it was a manufacturer of calicoes of certain designated brands and styles, which it sold in large quantities, at stated prices, to jobbers in St. Louis; that defendants, who were jobbers in that city, having on hand a limited quantity of calicoes of such brands and styles, issued circulars to retail dealers in which they offered to sell the same as long as their stock should last at prices below those asked and received from jobbers by plaintiff; that such action was taken by defendants, as plaintiff was informed and believed for the purpose of injuring the business of plaintiff, and not for any legitimate trade purposes of their own and that the effect of such action was to injure and destroy plaintiff's trade in St. Louis and the country tributary thereto, and to cause other jobbers to cancel their orders to plaintiff or to compel plaintiff to reduce its prices, thereby causing it loss and damage in a sum stated. It was held that such petition did not state a cause of action. Passaic Print Works *v.* Ely, etc., Dry-Goods Co., 105 Fed. 163, 44 C. C. A. 426.

A person applying for a patent is not responsible for the damages thereby sustained by another to whom the patent issued, al-

established at common law, recent decisions have modified the rule; and the same is true with regard to the erection of spite fences and the draining of subsurface water not flowing in a definite stream.[66] Some of the courts have also departed from the general rule by holding liable in tort one who engages in business for the sole and malicious purpose of interfering with and destroying the business of another.[67]

b. Where Act Is Inherently Unlawful. Nor will the absence of bad motives constitute a defense, where the act is inherently unlawful,[68] although it may prevent the imposition of exemplary or punitive damages.[69]

c. Where Legality Is Dependent on Motive. There are, however, certain torts in which motive plays a predominant part.[70] Thus slander of title, malicious

though he knew he was not entitled when he applied. Strelitzer *v.* Schnaier, 135 N. Y. App. Div. 384, 119 N. Y. Suppl. 977.

Spite fence see Metzger *v.* Hochrein, 107 Wis. 267, 83 N. W. 308, 81 Am. St. Rep. 841.

66. **Erection of spite fences** see *supra*, III, A, text and note 18; ADJOINING LANDOWNERS, 1 Cyc. 789.

For a discussion of the modern tendency see "Law and Morals," by James Barr Ames, 22 Harvard L. Rev. 97.

Responsibility of insane person see *infra*, V, B, 1, a, (III).

Subsurface water see WATERS.

67. Dunshee *v.* Standard Oil Co., (Iowa 1910) 126 N. W. 342; Tuttle *v.* Buck, 107 Minn. 145, 119 N. W. 946, 131 Am. St. Rep. 446, 22 L. R. A. N. S. 599. *Compare infra*, VI, D, 6.

68. *Alabama.*— Sparks *v.* McCreary, 156 Ala. 382, 47 So. 332, 22 L. R. A. N. S. 1224; Lavender *v.* Hall, 60 Ala. 214.

Connecticut.—McCune *v.* Norwich City Gas Co., 30 Conn. 521, 79 Am. Dec. 278.

Illinois.—Parker *v.* Enslow, 102 Ill. 272, 40 Am. Rep. 588; Doremus *v.* Hennessy, 62 Ill. App. 391 [*affirmed* in 176 Ill. 608, 52 N. E. 924, 54 N. E. 524, 68 Am. St. Rep. 203, 43 L. R. A. 797, 802].

Indiana.— Amick *v.* O'Hara, 6 Blackf. 258.

Michigan.— Allison *v.* Chandler, 11 Mich. 542.

Wisconsin.— Dexter *v.* Cole, 6 Wis. 319, 70 Am. Dec. 465.

England.—"In all civil acts the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering." Bessey *v.* Olliot, T. Raym. 467, 83 Eng. Reprint 244.

See 45 Cent. Dig. tit. "Torts," § 4. And see ACTIONS, 1 Cyc. 671.

Trespass.— Defendant pleaded in justification of a trespass that certain corn, the subject thereof, had been set apart as tithes and was in danger of destruction by cattle, whereupon defendant took it to the barn of plaintiff, the owner. It was held that the plea was bad, defendant's motive being immaterial. Had the corn been destroyed, plaintiff might have had his remedy against the owner of the cattle. Anonymous, Y. B. 21 Hen. VIII, 27. See also Kirk *v.* Gregory, 1 Ex. D. 55, 45 L. J. Exch. 186, 34 L. T. Rep. N. S. 488, 24 Wkly. Rep. 614. It is otherwise, however, where the property is in danger of destruction by the elements, for there the law gives an implied license to enter and save, there being no right of redress in the owner against a third party. Proctor *v.* Adams, 113 Mass. 376, 18 Am. Rep. 500. "The fact that the defendants were actuated by no improper motives in doing as they did [trespass to private property] could not be material in a case where only compensative damages were sought to be recovered. That which is, essentially, a trespass, cannot become lawful from being done with good intentions." Bruch *v.* Carter, 32 N. J. L. 554, 562, per Woodhull, J. "Absence of bad faith can never excuse a trespass, although the existence of bad faith may sometimes aggravate it. Every one must be sure of his legal right when he invades the possession of another." Cubit *v.* O'Dett, 51 Mich. 347, 351, 16 N. W. 679, per Cooley, J. See TRESPASS.

Joke.— Where defendant put gunpowder in smoking tobacco in a box on the counter of a store apparently for use, it was held that the fact that he did so as a joke constituted no defense. Parker *v.* Enslow, 102 Ill. 272, 40 Am. Rep. 588.

Motive or intent as accompanying the act see ACTIONS, 1 Cyc. 668 *et seq.*

69. Hussey *v.* Peebles, 53 Ala. 432; Bonnell *v.* Smith, 53 Iowa 281, 5 N. W. 128. See also ACTIONS, 1 Cyc. 672; DAMAGES, 13 Cyc. 105 *et seq.*

70. The difficulty of laying down a hard and fast rule covering all torts is manifest. Prof. Bigelow in his learned treatise has divided specific offenses into two classes. In the first, liability turns, apart from volition, upon the wrong-doer's culpable state of mind. Here are grouped deceit, and its kindred wrong, unfair competition, negligence, slander of title, and malicious prosecution. In the second class the culpability of the wrong-doer's mind is not in issue. Here appear interference with contract, either by procuring a refusal to contract or a breach of contract, seduction, defamation, assault and battery, false imprisonment, trespass, conversion, infringement of patents, trade-marks and copyrights, violation of rights of support and of water rights, nuisance, damage by animals, and damage due to the escape of dangerous things. While it is true that the state of the wrong-doer's mind is an essential element of deceit, slander of title, and malicious prosecution, the placing of negligence in this class seems scarcely justifiable.

prosecution, and unfair competition require an examination into the wrong-doer's state of mind, and the same is true to a limited extent of defamation.[71] And where a cause of action is given by statute, the malice of the wrong-doer may be made an essential ingredient.[72] So, by the weight of authority, where a qualified voter is prevented from voting, there is no cause of action unless the act of the party so preventing was malicious.[73]

4. Intent of Wrong-Doer — a. As to Accomplishment and Nature of Act — (I) *Involuntary Acts.* Where intent is wholly lacking, so that the act is involuntary in the strict sense of the term, there can be no liability.[74]

(II) *Voluntary Acts.* But in cases not of accident a voluntary and unlawful act will result in legal responsibility, although there be no design to commit a wrong.[75] This principle has most frequently been applied in actions

Negligence consists of a failure to exercise that degree of care or skill which circumstances demand? True the law cannot judge of the state of a man's mind except by his manifestations of conduct, and the behavior of the "ordinary man" under like circumstances is to be regarded as the test, for "the mind of the particular person might regard duty as too high or too low, hence the need of a common standard"; and to that extent "the question still is of the mind of a man of that standard." But it requires a far step to reach the conclusion, that "mentality is the test." See Bigelow Torts 109. Nor can we consider the motive with which a breach of contract was procured. The difficulty of classification is more strongly manifested when we come to cases of defamation. In general the state of mind is immaterial. But it is otherwise where qualified privilege and fair comment are interposed in defense.

71. In unfair competition not amounting to the procuring of the breach of an existing contract, the means used not being unlawful in themselves, inquiry is directed to the motive with which defendant acted. Can he justify under the plea of competition? See *infra*, VI, D, 6, a.

In both slander of title and malicious prosecution "malice in fact" is required, although in neither case is this term so restricted that it is construed to mean specific malevolence toward the injured party, being rather negative and consisting in the absence of proper motives. See Libel and Slander, 25 Cyc. 560; Malicious Prosecution, 26 Cyc. 47.

In cases of defamation, the malice involved is "malice in law" and motive is generally immaterial, being a mere matter of legal presumption, yet where the defense of qualified privilege or fair comment on matters of public interest is interposed, malice in fact is made an issue. See Libel and Slander, 25 Cyc. 411.

72. Injury to trees.— Where, in an action for wilfully trimming plaintiff's trees, the court defined the word "wilful" as "the wanton doing of an act without reasonable excuse," an instruction authorizing the recovery of treble damages in the event of the jury finding the injury to have been wilful was not objectionable as not limited to injuries from excessive trimming of the trees. Meyer *v.* Standard Tel. Co., (Iowa 1902) 92 N. W. 720.

Combinations interfering with employment.— While malicious motive or purpose is essential to give rise to a cause of action under Rev. Laws (1905), § 5097, forbidding combinations to interfere with or prevent others from securing employment, the malice is such as the law implies from the fact that the act complained of was unlawful and without justification. Joyce *v.* Great Northern R. Co., 100 Minn. 225, 110 N. W. 975, 8 L. R. A. N. S. 756. See *infra*, VI, D, 6, c.

73. Morris *v.* Colorado Midland R. Co., (Colo. 1910) 109 Pac. 430. See Elections, 15 Cyc. 305, 314.

74. "As if a man by force take my hand and strike you." Weaver *v.* Ward, Hob. 134, 80 Eng. Reprint 284. See *supra*, III, C. And see Assault and Battery, 3 Cyc. 1069; Negligence, 29 Cyc. 440.

75. *Indiana.*— Amick *v.* O'Hara, 6 Blackf. 258.

Maine.— Hobart *v.* Hagget, 12 Me. 67, 28 Am. Dec. 159; Galvin *v.* Bacon, 11 Me. 28, 25 Am. Dec. 258.

Massachusetts.— Carter *v.* Kingman, 103 Mass. 517.

New York.— Boyce *v.* Brockway, 31 N. Y. 490; Etchberry *v.* Levielle, 2 Hilt. 40.

Rhode Island.— Donahue *v.* Shippee, 15 R. I. 453, 8 Atl. 541.

England.— Fowler *v.* Hollins, L. R. 7 Q. B. 616, 20 Wkly. Rep. 868.

Tort and crime distinguished.— The elimination in large part of motive, purpose, and intent when we come to determine the liability of a tort-feasor indicates the important distinction between civil and criminal responsibility. Kirkwood *v.* Miller, 5 Sneed (Tenn.) 455, 73 Am. Dec. 134; Haycraft *v.* Creasy, 2 East 92, 6 Rev. Rep. 380, 102 Eng. Reprint 303; Weaver *v.* Ward, Hob. 134, 80 Eng. Reprint 284. Thus to point an unloaded gun at one who believes it to be loaded will constitute the tort assault, for it is an infringement of the right to a sense of personal security. It is not generally regarded as a crime, the element of intent to injure being lacking. Chapman *v.* State, 78 Ala. 463, 56 Am. Rep. 42; State *v.* Godfrey, 17 Oreg. 300, 20 Pac. 625, 11 Am. St. Rep. 830; McKay *v.* State, 44 Tex. 43. See Assault and Battery, 3 Cyc. 1025, 1067.

for conversion[76] and for trespass to real or personal property;[77] but it also applies in many other cases.[78]

(III) *FRAUD.* The tort fraud furnishes an exception to the last rule. An intent to deceive is essential; the false representation must have been made with

76. *Kansas.*— Lafeyth *v.* Emporia Nat. Bank, 53 Kan. 51, 35 Pac. 805, sale of wrong property under mortgage.

Maine.— Galvin *v.* Bacon, 11 Me. 28, 25 Am. Dec. 258.

Massachusetts.— Carter *v.* Kingman, 103 Mass. 517.

New Jersey.— West Jersey R. Co. *v.* Trenton Car Works Co., 32 N. J. L. 517.

New York.— Boyce *v.* Brockway, 31 N. Y. 490; Williams *v.* Merle, 11 Wend. 80, 25 Am. Dec. 604.

Rhode Island.— Donahue *v.* Shippee, 15 R. I. 453, 8 Atl. 541.

England.— Fowler *v.* Hollins, L. R. 7 Q. B. 616, 20 Wkly. Rep. 868; McCombie *v.* Davies, 6 East 538, 102 Eng. Reprint 1393; Hardman *v.* Booth, 1 H. & C. 803, 9 Jur. N. S. 81, 32 L. J. Exch. 105, 7 L. T. Rep. N. S. 638, 11 Wkly. Rep. 239.

See TROVER AND CONVERSION.

Purchase of property from thief or wrongdoer.—One who in good faith purchases property from a thief believing him to be the rightful owner is liable for conversion. Cooper *v.* Willomatt, 1 C. B. 672, 9 Jur. 598, 14 L. J. C. P. 219, 50 E. C. L. 672. And see Trudo *v.* Anderson, 10 Mich. 357, 81 Am. Dec. 795; Carey *v.* Bright, 58 Pa. St. 70. But "an innocent purchaser of personal property from a wrong-doer shall first be informed of the defect in his title, and have an opportunity to deliver the property to the true owner, before he shall be made liable as a tort-feasor for a wrongful conversion." Gillet *v.* Roberts, 57 N. Y. 28, 34. But no demand is necessary where the innocent purchaser has subsequently sold the property or otherwise exercised an independent act of dominion over it. Pease *v.* Smith, 61 N. Y. 477. And see Gilmore *v.* Newton, 9 Allen (Mass.) 171, 85 Am. Dec. 749. See also TROVER AND CONVERSION.

Selling goods as auctioneer, broker, or agent.— One who acts as an auctioneer, broker, or agent and as such sells goods to which his principal has no title, is liable for conversion to the true owner, although he acts in good faith. Swim *v.* Wilson, 90 Cal. 126, 27 Pac. 33, 25 Am. St. Rep. 110, 13 L. R. A. 605; Kimball *v.* Billings, 55 Me. 147, 92 Am. Dec. 581; Robinson *v.* Bird, 158 Mass. 357, 33 N. E. 391, 35 Am. St. Rep. 495; Koch *v.* Branch, 44 Mo. 542, 100 Am. Dec. 324; Hoffman *v.* Carow, 22 Wend. (N. Y.) 285; Stephens *v.* Elwell, 4 M. & S. 259, 105 Eng. Reprint 830. See TROVER AND CONVERSION.

An execution lien may be enforced against the property even after its removal to another county, and sale to an innocent purchaser; and where he has removed it from the state, he is liable to the lienor for its value to the extent of the lien. Hamilton *v.* Phillips, 120 Ala. 177, 24 So. 587, 74 Am. St. Rep. 29.

77. Hobart *v.* Hagget, 12 Me. 67, 28 Am. Dec. 159 (holding that a purchaser or mortgagee who in good faith takes possession of an article believing that it is the property sold or mortgaged is liable in trespass if his belief prove unfounded, the vendor or mortgagor having intended to sell or mortgage another); Higginson *v.* York, 5 Mass. 341 (holding that an unfounded claim of right is no defense to an action for trespass). See TRESPASS.

Trespass to real estate.—"It is well settled that a trespasser, although misled by a *bona fide* mistake as to his title, or who has taken every precaution to keep within his own lines, cannot escape liability for the injury done, being bound in law to know the limits of his possessions." Blaen Avon Coal Co. *v.* McCulloh, 59 Md. 403, 417, 43 Am. Rep. 560, per Ritchie, J. See also TRESPASS.

78. **Wrongful ejection.**— In Davis *v.* Tacoma R., etc., Co., 35 Wash. 203, 77 Pac. 209, 66 L. R. A. 802, defendant was the owner of a public park. An employee, having been informed that a woman of the criminal classes had entered and gone in a certain direction, went in that direction and finding no other woman there mistook plaintiff for the person meant and requested her to leave the grounds. Discovering his mistake almost immediately, both he and defendant's manager openly apologized. It was held that defendant was liable, whether the words requesting plaintiff's departure were defamatory or not.

Ejection of passengers see CARRIERS, 6 Cyc. 555.

Master and servant; Principal and agent.— Not only may defendant be liable on the ground that the relation of master and servant or principal and agent has existed between him and the wrong-doer (the wrongful act having been done by the latter, within the scope of his authority and with a view to his master's or principal's interest), but responsibility may ensue where, under the scope of authority or view to interest test, defendant would not be held. Instances may arise which justify an application of the doctrine that where one of two innocent persons must suffer from the tortious act of a third, he who gave the aggressor the means of doing the wrong must bear the consequences of the act. In cases where an act was committed without the servant's or agent's actual authority and the master or principal is held under the rule last stated, his intent can have absolutely no bearing. Commonwealth Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. (Pa.) 180, 248. And see Batavia Bank *v.* New York, etc., R. Co., 106 N. Y. 195, 12 N. E. 433, 60 Am. Rep. 440; New York, etc., R. Co. *v.* Schuyler, 34 N. Y. 30.

knowledge of its falsity, or with what the law regards as equivalent to such knowledge, and with the purpose of inducing action.[79]

b. As to Result. The question of intent with regard to the result which may be reached is largely determined by the principles of proximate cause. Whether the act is essentially illegal or constitutes a wrong because of the negligent or improper method of doing it, the tort-feasor will be liable for the consequences under the rules there laid down, and it makes no difference that he did not in fact intend the specific injury which actually occurred[80] or that any injury at all would ensue.[81]

H. Damage. There are two classes of cases of unlawful acts or omissions. In one, there being a distinct legal wrong which in itself constitutes an invasion of another's right, the law will presume that damage follows as a natural and proximate result. Here the wrong in itself gives a right of action. Nothing further is necessary to recovery, although the extent of it may depend upon the evidence.[82] The maxim "*de minimis non curat lex*" is never applied to defeat

Liability of carrier under a bill of lading issued by the agent through fraud or mistake, no goods having been received, see CARRIERS, 6 Cyc. 419.

79. Tindle *v.* Birkett, 171 N. Y. 520, 64 N. E. 210, 89 Am. St. Rep. 822; Eaton, etc., Co. *v.* Avery, 83 N. Y. 31, 38 Am. Rep. 389; Polhill *v.* Walter, 3 B. & Ad. 114, 1 L. J. K. B. 92, 23 E. C. L. 59, 110 Eng. Reprint 43; Foster *v.* Charles, 7 Bing. 105, 8 L. J. C. P. O. S. 118, 31 Rev. Rep. 446, 20 E. C. L. 55. See FRAUD, 20 Cyc. 35.

80. *Illinois.*— Dixon *v.* Scott, 181 Ill. 116, 54 N. E. 897.

Indiana.—Binford *v.* Johnston, 82 Ind. 426, 42 Am. Rep. 508.

Kentucky.—Kentucky Heating Co. *v.* Hood, 133 Ky. 383, 118 S. W. 337, 134 Am. St. Rep. 457, 22 L. R. A. N. S. 588.

Massachusetts.— Hill *v.* Winsor, 118 Mass. 251.

New York.— Munger *v.* Baker, 65 Barb. 539, 1 Thomps. & C. 122; Vandenburgh *v.* Truax, 4 Den. 464, 47 Am. Dec. 268.

Wisconsin.— McNamara *v.* Clintonville, 62 Wis. 207, 22 N. W. 472, 51 Am. Rep. 722.

United States.— Bowas *v.* Pioneer Tow Line, 3 Fed. Cas. No. 1,713, 2 Sawy. 21.

Proximate cause see *infra*, IV, A. And see DAMAGES, 13 Cyc. 28.

81. Peterson *v.* Haffner, 59 Ind. 130, 26 Am. Rep. 81; Kentucky Heating Co. *v.* Hood, 133 Ky. 383, 118 S. W. 337, 134 Am. St. Rep. 457, 22 L. R. A. N. S. 588; Conklin *v.* Thompson, 29 Barb. (N. Y.) 218.

Illustrations.—Thus, where defendant found plaintiff's mare in his, defendant's, field and set his dogs on her, and the mare was bitten, it was held that a request to charge that if the jury believed from the evidence that defendant "used ordinary care and diligence in driving [the mare] from the field; and that he did not intend to injure her," they should find for him was rightly refused, an intent to injure not being essential to the support of the action. Amick *v.* O'Hara, 6 Blackf. (Ind.) 258. So where plaintiff requested the following instruction: "The erection of the slaughter-house of the defendants, if with the intention or presumed knowledge that the use of the same would result injuriously to the plaintiff, was of itself a wrongful act," it was held that a refusal was proper. "Upon the question as to whether an act constitutes a nuisance," said the court, "it is not necessary to inquire into the intention of the person doing the act. The best intentions cannot prevent an act from being a nuisance where it otherwise is such, and the worst intentions cannot make an act a nuisance where it otherwise is not." Bonnell *v.* Smith, 53 Iowa 281, 282, 5 N. W. 128. While plaintiff was talking to a friend who had hold of his arm or coat sleeve, defendant approached and in friendly greeting took hold of the arm of the friend and jerked and pulled him with such force that plaintiff was thrown down and injured. It was held that defendant was responsible. "The defense relied upon," it was said, "has been many times tersely expressed by younger people in the phrase 'I didn't mean to.' Plaintiff was injured through no fault of his own. His right to be secure in person was violated. . . . The evidence supplies grounds for inferring the constructive intent which makes a wrongful act willful. There is no reason why the appellant [defendant] might not have passed without interfering with the person of any one, and his failure to do so implies the willingness to inflict an injury which in fact he did inflict." Reynolds *v.* Pierson, 29 Ind. App. 273, 64 N. E. 484, 485, per Roby, J.

82. Chicago West Div. R. Co. *v.* Rend, 6 Ill. App. 243. "The law tolerates no farther inquiry than whether there has been the violation of a right. If so, the party injured is entitled to maintain his action for nominal damages, in vindication of his right, if no other damages are fit and proper to remunerate him." Webb *v.* Portland Mfg. Co., 29 Fed. Cas. No. 17,322, 3 Sumn. 189, 192. "A man shall have an action against another for riding over his ground, although it do him no damage; for it is an invasion of his property, and the other has no right to come there. So if a man gives another a cuff on the ear, although it cost him nothing, no not so much as a little diachylon, yet he shall have his action, for it is a personal injury." Ashby *v.* White, 2 Ld. Raym. 938,

an action for the positive and wrongful invasion of person or property.[83] Nor will the fact that the result of the wrong-doer's act has proved beneficial to the individual whose legal right has been infringed destroy the cause of action which the latter has.[84] Were the rule otherwise, the injurious acts might be continued unchecked in many instances, until a right was gained through their exercise for the period of prescription.[85] In the second class, the act or omission is not of

955, 92 Eng. Reprint 126, 1 Salk. 19, 91 Eng. Reprint 19, per Holt, L. J.

"As an injury or violation of his right necessarily imports damage, there can be no such thing as an injury without damage. An injury is a wrong; and for the redress of every wrong there is a remedy; a wrong is a violation of one's right; and for the vindication of every right there is a remedy. Want of right and want of remedy are justly said to be reciprocal. Where therefore there has been a violation of a right, the person injured is entitled to an action. If he is entitled to an action, he is entitled at least to nominal damages, or else he would not be entitled to a recovery. Such damages are given, in order to vindicate the right which has been invaded; and such further damages are awarded as are proper to remunerate him for any specific damage which he has sustained. It is upon this principle that a person may sustain an action of trespass for an unauthorized entry upon his land, although he shows no actual specific damage to have thereby accrued to him; or even although the defendant may prove, that such act was beneficial to the plaintiff. The law implies a damage from the injury, or violation of the right of the plaintiff." Parker *v.* Griswold, 17 Conn. 288, 303, 42 Am. Dec. 739, per Storrs, J.

Action for wrong without loss or damage see ACTIONS, 1 Cyc. 660; DAMAGES, 13 Cyc. 14.

Illustrations.— The following are illustrations of the invasion of legal rights constituting in themselves distinct torts, although actual damage is not suffered: Depriving plaintiff of a right to vote. Larned *v.* Wheeler, 140 Mass. 390, 5 N. E. 290, 54 Am. Rep. 483; Ashby *v.* White, 2 Ld. Raym. 938, 92 Eng. Reprint 126, 1 Salk. 19, 91 Eng. Reprint 19. Obstructing a toll road. Seneca Road Co. *v.* Auburn, etc., R. Co., 5 Hill (N. Y.) 170. See TOLL ROADS. Obstructing watercourse. Branch *v.* Doane, 18 Conn. 233; Lincoln *v.* Hapgood, 11 Mass. 350; Jones *v.* Hannovan, 55 Mo. 462; Bower *v.* Hill, 1 Bing. N. Cas. 549, 27 E. C. L. 759. See WATERS. Action by one commoner against another for surcharging a common, it appearing that plaintiff had surcharged to a greater amount than defendant. Hobson *v.* Todd, 4 T. R. 71, 100 Eng. Reprint 900. Refusing a candidate's demand for a poll, it being immaterial that plaintiff would not have been elected. Starling *v.* Turner, 2 Lev. 50, 83 Eng. Reprint 444, 2 Vent. 25, 86 Eng. Reprint 287. Projection of a cornice on defendant's building eighteen inches over plaintiff's land. Harrington *v.* McCarthy, 169 Mass. 492, 48 N. E. 278, 61 Am. St. Rep. 298. See TRESPASS. Overflowing lands. Ellington *v.* Bennett, 59 Ga. 286; Dorman *v.* Ames, 12 Minn. 451. See WATERS. Diverting stream. Parker *v.* Griswold, 17 Conn. 288, 42 Am. Dec. 739. See WATERS. Altering level of sidewalk. Dudley *v.* Tilton, 14 La. Ann. 283. See STREETS AND HIGHWAYS, 37 Cyc. 206, 208, 239 *et seq.*

83. Boody *v.* Watson, 64 N. H. 162, 9 Atl. 794. See ACTIONS, 1 Cyc. 672.

"The degree [of damage] is wholly immaterial; nor does the law, upon every occasion, require distinct proof that an inconvenience has been sustained. For example, if the hand of A. touch the person of B., who shall declare that pain has or has not ensued? The only mode to render B. secure is to infer that an inconvenience has actually resulted. . . . The owner of a horse might be benefitted by a skilful rider taking the horse from the pasture and using him; yet the law would give damages, and under circumstances, very serious damages for such an act. . . . The rule is necessary for the general protection of property; and a greater evil could scarcely befall a country than the rule being frittered away or relaxed in the least, under the idea that, although an exclusive right be violated, the injury is trifling, or indeed nothing at all." Seneca Road Co. *v.* Auburn, etc., R. Co., 5 Hill (N. Y.) 170, 175, per Cowen, J.

84. Fisher *v.* Dowling, 66 Mich. 370, 33 N. W. 521; Jones *v.* Hannovan, 55 Mo. 462; Seneca Road Co. *v.* Auburn, etc., R. Co., 5 Hill (N. Y.) 170; Murphy *v.* Fond du Lac, 23 Wis. 365, 99 Am. Dec. 181. See also ACTIONS, 1 Cyc. 660 note 47; DAMAGES, 13 Cyc. 16.

85. "Wherever any act injures another's right, and would be evidence in future in favor of the wrong-doer, an action may be maintained for an invasion of the right without proof of any specific injury." Mellor *v.* Spateman, 1 Saund. 343, 346 Note 2, 85 Eng. Reprint 495 [*quoted* in Searles *v.* Cronk, 38 How. Pr. (N. Y.) 320, 324; Delaware, etc., Canal Co. *v.* Torrey, 33 Pa. St. 143, 149]. If an unlawful diversion of a stream is suffered for twenty years, it ripens into a right which cannot be controverted. If the party injured cannot be allowed in the meantime to vindicate his right by action, it would depend upon the will of others whether he should be permitted or not to enjoy that species of property. Blanchard *v.* Baker, 8 Me. 253, 23 Am. Dec. 504. See WATERS. Trespass see Searles *v.* Cronk, 38 How. Pr. (N. Y.) 320; TRESPASS. Dixon *v.* Clow, 24 Wend. (N. Y.) 188. Fouling stream see Wood *v.* Waud, 3 Exch. 748, 13 Jur. 742, 18 L. J. Exch. 305. See WATERS.

itself a distinct wrong and can only become so as to any particular individual through injurious consequences proximately resulting therefrom.[86]

IV. EXTENT OF LIABILITY.

A. Proximate Cause[87] **— 1. In General.** In determining liability for a tortious injury, the law regards the proximate and not the remote cause. It looks only to the act or omission from which the result follows in direct sequence without the intervention of a voluntary independent cause and declines to permit further investigation into the chain of events.[88] "It were infinite," said Lord

Overflowing lands. Chapman *v.* Thames Mfg. Co., 13 Conn. 269, 38 Am. Dec. 401. See WATERS. And see ACTIONS, 1 Cyc. 661.

86. Chicago West Div. R. Co. *v.* Rend, 6 Ill. App. 243.

When damage necessary see ACTIONS, 1 Cyc. 666; DAMAGES, 13 Cyc. 16 *et seq.*

Illustrations.—A complaint fails to state a cause of action in alleging that defendant resides with plaintiff's husband, although not married to him, that she assumes his surname, and under such name has executed papers and dealt with tradespeople as his wife; and that such acts have scandalized, annoyed and otherwise injured plaintiff, where there is no allegation that plaintiff has sustained any pecuniary damage by reason of such acts. Hodecker *v.* Strickler, 20 N. Y. App. Div. 245, 46 N. Y. Suppl. 808. Where suit is brought against the cashier of a bank for neglect of duty, if no damage has resulted, although negligence be proved, plaintiff cannot recover even nominal damages. Commercial Bank *v.* Ten Eyck, 48 N. Y. 305. An action cannot be maintained by the owner of a note against the teller of a bank for writing on the face thereof the words "Payment stopped" in pencil as an answer to a demand of payment on the day it became due. The rights of the parties to the note being in no way affected thereby, plaintiff has suffered no damage. McKinley *v.* American Exch. Bank, 7 Rob. (N. Y.) 663. An action in tort for inducing the promisee of a note to indorse it in blank, upon its transfer, by fraudulent representations as to the legal effect of such indorsement, cannot be sustained before actual payment by the indorser. Freeman *v.* Venner, 120 Mass. 424. Where the maker of a note suffered no actual damages by reason of its erroneous protest by a bank caused by the latter's employees being unable to decipher the maker's signature, so that, when he called to pay it, he was informed that they had no note of his for collection and he paid it the day after protest he cannot recover damages from the bank. Lalaurie *v.* Southern Bank, 25 La. Ann. 330.

Fraud see Freeman *v.* McDaniel, 23 Ga. 354; Danforth *v.* Cushing, 77 Me. 182; Morgan *v.* Bliss, 2 Mass. 111; Townsend *v.* Felthousen, 156 N. Y. 618, 51 N. E. 279. And see FRAUD, 20 Cyc. 42.

Negligence see Farrell *v.* Waterbury Horse R. Co., 60 Conn. 239, 21 Atl. 675, 22 Atl. 544; Jones *v.* Texas, etc., R. Co., 125 La. 542, 51 So. 582; Sullivan *v.* Old Colony St. R. Co., 200 Mass. 303, 86 N. E. 511. And see NEGLIGENCE, 29 Cyc. 420.

Defamation see LIBEL AND SLANDER, 25 Cyc. 265 *et seq.*, 353 *et seq.*

87. Functions of court and jury see *infra*, IV, D.

88. *Indiana.*— Louisville, etc., Ferry Co. *v.* Nolan, 135 Ind. 60, 34 N. E. 710.

Iowa.— Bosch *v.* Burlington, etc., R. Co., 44 Iowa 402, 24 Am. Rep. 754.

Louisiana.— Bentley *v.* Fischer Lumber, etc., Co., 51 La. Ann. 451, 25 So. 262; Grant *v.* McDonogh, 7 La. Ann. 447; Gaulden *v.* McPhaul, 4 La. Ann. 79.

Massachusetts.— Kiernan *v.* Metropolitan Constr. Co., 170 Mass. 378, 49 N. E. 648; Lynn Gas, etc., Co. *v.* Meriden F. Ins. Co., 158 Mass. 570, 33 N. E. 690, 35 Am. St. Rep. 540, 20 L. R. A. 297; Freeman *v.* Mercantile Mut. Acc. Assoc., 156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 753; Marble *v.* Worcester, 4 Gray 395.

Minnesota.— Schumaker *v.* St. Paul, etc., R. Co., 46 Minn. 39, 48 N. W. 559, 12 L. R. A. 257; Renner *v.* Canfield, 36 Minn. 90, 30 N. W. 435, 1 Am. St. Rep. 654; Nelson *v.* Chicago, etc., R. Co., 30 Minn. 74, 14 N. W. 360.

New Jersey.— Hammill *v.* Pennsylvania R. Co., 56 N. J. L. 370, 29 Atl. 151, 24 L. R. A. 531; Cuff *v.* Newark, etc., R. Co., 35 N. J. L. 17, 10 Am. Rep. 205.

New York.— Jex *v.* Straus, 122 N. Y. 293, 25 N. E. 478; Pollett *v.* Long, 56 N. Y. 200.

North Carolina.— McGhee *v.* Norfolk, etc., R. Co., 147 N. C. 142, 60 S. E. 912, 24 L. R. A. N. S. 119.

Pennsylvania.—Willis *v.* Armstrong County, 183 Pa. St. 184, 38 Atl. 621; Herr *v.* Lebanon, 149 Pa. St. 222, 24 Atl. 207, 16 L. R. A. 106, 34 Am. St. Rep. 603; Oil Creek, etc., R. Co. *v.* Keighron, 74 Pa. St. 316.

Tennessee.—Wagner *v.* Woolsey, 1 Heisk. 235.

United States.— Louisiana Mut. Ins. Co. *v.* Tweed, 7 Wall. 44, 19 L. ed. 65.

England.— Marsden *v.* City, etc., Assur. Co., L. R. 1 C. P. 232, Harr. & R. 53, 12 Jur. N. S. 76, 35 L. J. C. P. 60, 13 L. T. Rep. N. S. 465, 14 Wkly. Rep. 106; Romney Marsh *v.* Trinity House, L. R. 5 Exch. 204, 39 L. J. Exch. 163, 22 L. T. Rep. N. S. 446, 18 Wkly. Rep. 869 [*affirmed* in L. R. 7 Exch. 247, 41 L. J. Exch. 106, 20 Wkly. Rep. 952]; Wilson *v.* Newport Dock Co., L. R. 1 Exch. 177, 4 H. & C. 232, 12 Jur. N. S. 233, 35 L. J. Exch. 97, 14 L. T. Rep. N. S. 230, 14 Wkly. Rep. 558; Davis *v.* Garrett, 6 Bing. 716, 8 L. J.

Bacon, "for the law to consider the causes of causes, and their impulsions one upon another; therefore, it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree." [89] Proximate cause has been variously defined,[90] and the courts have laid down different tests for determining the proximate cause, the principal of which are the test of natural sequence and the test of probable consequences, or consequences which should have been foreseen.[91] These tests, however, are not entirely satisfactory, and they cannot

C. P. O. S. 253, 4 M. & P. 540, 31 Rev. Rep. 524, 19 E. C. L. 321; Ionides *v.* Universal Mar. Ins. Co., 14 C. B. N. S. 259, 11 Jur. N. S. 18, 32 L. J. C. P. 170, 8 L. T. Rep. N. S. 705, 11 Wkly. Rep. 858, 108 E. C. L. 259; Scott *v.* Shepherd, W. Bl. 892, 96 Eng. Reprint 525, 3 Wils. C. P. 403, 95 Eng. Reprint 1124.

See "Some observations on the Doctrine of Proximate Cause," by Prescott F. Hall, 15 Harvard L. Rev. 541; "Proximate and Remote Cause," 36 Am. St. Rep. 807 note.

Further as to liability for direct consequences and proximate damage see DAMAGES, 13 Cyc. 23, 32.

Violation of statute or ordinance.— One charged with a tort resulting from the violation of a statute or ordinance may show that a compliance would not have prevented the injury complained of, but he cannot show the general inadequacy of the legislation as a means of preventing injury. Conrad *v.* Springfield Consol. R. Co., 240 Ill. 12, 88 N. E. 180, 130 Am. St. Rep. 251. The fact alone that an act of defendant was in violation of a penal statute does not afford ground for the recovery of damages by a third person, unless such act was also the proximate cause of the injury complained of. The Santa Rita, 173 Fed. 413 [*reversed* on other grounds in 176 Fed. 890, 100 C. C. A. 360].

89. Bacon Max. Reg. 1 [*quoted* in Dennis *v.* Larkin, 19 Iowa 434, 436; Marble *v.* Worcester, 4 Gray (Mass.) 395, 411; McClary *v.* Sioux City, etc., R. Co., 3 Nebr. 44, 49, 19 Am. Rep. 631; Ehrgott *v.* New York, 96 N. Y. 264, 282, 48 Am. Rep. 622; Trapp *v.* McClellan, 68 N. Y. App. Div. 362, 365, 74 N. Y. Suppl. 130].

90. Definitions.— "That which immediately precedes and produces the effect." Webster Dict. [*quoted* in Blythe *v.* Denver, etc., R. Co., 15 Colo. 333, 336, 25 Pac. 702, 22 Am. St. Rep. 403, 11 L. R. A. 615; Hoffman *v.* King, 160 N. Y. 618, 629, 55 N. E. 401, 73 Am. St. Rep. 715, 46 L. R. A. 672; Trapp *v.* McClellan, 68 N. Y. App. Div. 362, 365, 74 N. Y. Suppl. 130].

"That from which the effect might be expected to follow without the concurrence of any unusual circumstances." Century Dict. [*quoted* in Trapp *v.* McClellan, 68 N. Y. App. Div. 362, 365, 74 N. Y. Suppl. 130].

"The proximate cause is the *vis major* which intervenes and usurps the place of the primary force, or unites with and overcomes it, so as to become the principal and real cause of the damage sustained; or it is the primary cause, traced back through intervening and intermediate causes, by natural and continuous succession, from the injury resulting to the wrong committed." Pielke *v.* Chicago, etc., R. Co., 5 Dak. 444, 41 N. W. 669, 671; Kelsey *v.* Chicago, etc., R. Co., 1 S. D. 80, 45 N. W. 204.

For other definitions see the note following.

91. "The test of proximate cause is whether the facts constitute a continuous succession of events so linked together that they become a natural whole, or whether the chain of events is so broken that they become independent, and the final result cannot be said to be the natural and probable consequence of the primary cause." Quinlan *v.* Philadelphia, 205 Pa. St. 309, 313, 54 Atl. 1026; Thomas *v.* New Jersey Cent. R. Co., 194 Pa. St. 511, 45 Atl. 344.

"The rule, as a practical one, may be thus stated: Having discovered an efficient, adequate cause, that is to be deemed the true cause, unless some new cause, not incidental to, but independent of the first, shall be found to intervene between it and the result." Marble *v.* Worcester, 4 Gray (Mass.) 395, 412.

"It is not essential that the negligence should be the direct cause of the injury. It suffices that it is the natural and probable cause. It is the natural cause when either it acts directly in producing the injury, or sets in motion other causes so producing it and forming a continuous chain in natural sequence down to the injury; thus linking the negligence with the injury by a chain of natural and consequential causation, although the former may be neither the immediate nor the direct cause of the event. But such causation cannot be proximate cause in law to arouse liability, unless an ordinarily prudent and intelligent person ought, in the exercise of such intelligence, to have foreseen that an injury might probably result from the negligence under like circumstances." Meyer *v.* Milwaukee Electric R., etc., Co., 116 Wis. 336, 339, 93 N. W. 6, per Dodge, J.

"The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market-place. (Scott *v.* Shepherd, W. Bl. 892, 96 Eng. Reprint 525, 3 Wils. C. P. 403,

be applied in all cases. "Indeed," it has been said, "it is impossible by any

95 Eng. Reprint 1124.) The question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury. It is admitted that the rule is difficult of application. But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." Milwaukee, etc., R. Co. *v.* Kellogg, 94 U. S. 469, 474, 24 L. ed. 256 [*quoted* in Pielke *v.* Chicago, etc., R. Co., 5 Dak. 444, 41 N. W. 669, 672; Liming *v.* Illinois Cent. R. Co., 81 Iowa 246, 248, 47 N. W. 66; Missouri Pac. R. Co. *v.* Columbia, 65 Kan. 390, 401, 69 Pac. 338, 58 L. R. A. 399; Lynn Gas, etc., Co. *v.* Meriden F. Ins. Co., 158 Mass. 570, 575, 33 N. E. 690, 35 Am. St. Rep. 540, 20 L. R. A. 297; Hansen *v.* St. Paul Gaslight Co., 82 Minn. 84, 87, 84 N. W. 727; Purcell *v.* St. Paul City R. Co., 48 Minn. 134, 136, 50 N. W. 1034, 16 L. R. A. 203; Haverly *v.* State Line, etc., R. Co., 135 Pa. St. 50, 56, 19 Atl. 1013, 20 Am. St. Rep. 848; Pennsylvania R. Co. *v.* Hope, 80 Pa. St. 373, 21 Am. Rep. 100; Mack *v.* South Bound R. Co., 52 S. C. 323, 336, 29 S. E. 905, 68 Am. St. Rep. 913, 40 L. R. A. 679; Jones *v.* George, 61 Tex. 345, 352, 48 Am. Rep. 280; Atkinson *v.* Goodrich Transp. Co., 60 Wis. 141, 156, 18 N. W. 764, 50 Am. Rep. 352; Brown *v.* Chicago, etc., R. Co., 54 Wis. 342, 359, 11 N. W. 356, 911, 41 Am. Rep. 41; Goodlander Mill Co. *v.* Standard Oil Co., 63 Fed. 400, 405, 11 C. C. A. 253, 27 L. R. A. 583], per Strong, J. It will be observed that in the foregoing quotation two tests are laid down. First, whether there was a continuous succession of events, and second, whether the injury was the natural and probable consequence which should have been foreseen. The first, while the better, is open to criticism in that the court omitted to define the nature of the intervening cause. The second is open to the serious objection that it leads to an inference that the precise form of injury should have been foreseen, whereas it is sufficient that a reasonable man must have anticipated that some injury would have resulted, although its exact nature could not previously have been defined. While the rule as thus modified has received the approval of numerous courts, it may be objected that as a matter of fact a wrong-doer may be responsible for a result which is clearly proximate, although his wrong-doing may have been committed under such circumstances that no reasonable man would have anticipated that any injury would flow.

Natural and probable consequence.— The following cases have adopted as a test whether the injury was of a character likely to follow and which might reasonably have been anticipated as the natural and probable result under ordinary circumstances of the wrongful act: Schmidt *v.* Mitchell, 84 Ill. 195, 25 Am. Rep. 446; Toledo, etc., R. Co. *v.* Muthersbaugh, 71 Ill. 572; Fent *v.* Toledo, etc., R. Co., 59 Ill. 349, 14 Am. Rep. 13; Louisville, etc., R. Co. *v.* Nitsche, 126 Ind. 229, 26 N. E. 51, 22 Am. St. Rep. 582, 9 L. R. A. 750; Binford *v.* Johnston, 82 Ind. 426, 42 Am. Rep. 508; Watson *v.* Dilts, 116 Iowa 249, 89 N. W. 1068, 93 Am. St. Rep. 239, 57 L. R. A. 559; Missouri Pac. R. Co. *v.* Columbia, 65 Kan. 390, 69 Pac. 338, 58 L. R. A. 399; Lake *v.* Milliken, 62 Me. 240, 16 Am. Rep. 456; Stock *v.* Boston, 149 Mass. 410, 21 N. E. 871, 14 Am. St. Rep. 430; Smethurst *v.* Barton Square Independent Cong. Church, 148 Mass. 261, 19 N. E. 387, 12 Am. St. Rep. 550, 2 L. R. A. 695; Derry *v.* Flitner, 118 Mass. 131; Hoadley *v.* Northern Transp. Co., 115 Mass. 304, 15 Am. Rep. 106; Lane *v.* Atlantic Works, 111 Mass. 136; McDonald *v.* Snelling, 96 Mass. 290, 92 Am. Dec. 768; Schumaker *v.* St. Paul, etc., R. Co., 46 Minn. 39, 48 N. W. 559, 12 L. R. A. 257; Campbell *v.* Stillwater, 32 Minn. 308, 20 N. W. 320, 50 Am. Rep. 567; Nelson *v.* Chicago, etc., R. Co., 30 Minn. 74, 14 N. W. 360; Brame *v.* Jackson Light, etc., Co., 95 Miss. 26, 48 So. 728; Poeppers *v.* Missouri, etc., R. Co., 67 Mo. 715, 29 Am. Rep. 518; Brink *v.* Kansas City, etc., R. Co., 17 Mo. App. 177; Gilman *v.* Noyes, 57 N. H. 627; Hughes *v.* McDonough, 43 N. J. L. 459, 39 Am. Rep. 603; Hoffman *v.* King, 160 N. Y. 618, 55 N. E. 401, 73 Am. St. Rep. 715, 46 L. R. A. 672; Mitchell *v.* Rochester R. Co., 151 N. Y. 107, 45 N. E. 354, 56 Am. St. Rep. 604, 34 L. R. A. 781; Swain *v.* Schieffelin, 134 N. Y. 471, 31 N. E. 1025, 18 L. R. A. 385; O'Neill *v.* New York, etc., R. Co., 115 N. Y. 579, 22 N. E. 217, 5 L. R. A. 591; Pollett *v.* Long, 56 N. Y. 200; Behling *v.* Southwest Pennsylvania Pipe Lines, 160 Pa. St. 359, 28 Atl. 777, 40 Am. St. Rep. 724; Ewing *v.* Pittsburgh, etc., R. Co., 147 Pa. St. 40, 23 Atl. 340, 30 Am. St. Rep. 709, 14 L. R. A. 666; West Mahanoy Tp. *v.* Watson, 112 Pa. St. 574, 3 Atl. 866, 56 Am. Rep. 336; Pittsburgh Southern R. Co. *v.* Taylor, 104 Pa. St. 306, 49 Am. Rep. 580; Allegheny *v.* Zimmerman, 95 Pa. St. 287, 40 Am. Rep. 649; Hoag *v.* Lake Shore, etc., R. Co., 85 Pa. St. 293, 27 Am. Rep. 653; Fairbanks *v.* Kerr, 70 Pa. St. 86, 10 Am. Rep. 664; McGrew *v.* Stone, 53 Pa. St. 436; Scott *v.* Hunter, 46 Pa. St. 192, 84 Am. Dec. 542; Pittsburg *v.* Grier, 22 Pa. St. 54, 60 Am. Dec. 65; Neal *v.* Atlantic Refining Co., 4 Pa. Dist. 49, 16 Pa. Co. Ct. 241; Eames *v.* Texas, etc., R. Co., 63 Tex. 660; Jones *v.* George, 61 Tex. 345, 48 Am. Rep. 280; Huber *v.* La Crosse City R. Co., 92 Wis. 636, 66 N. W. 708, 53 Am. St. Rep. 940, 31 L. R. A. 583; Stewart *v.* Ripon, 38 Wis. 584; Haile *v.* Texas, etc.,

general rule to draw a line between those injurious causes of damages which the law regards as sufficiently proximate, and those which are too remote to be the

R. Co., 60 Fed. 557, 9 C. C. A. 134, 23 L. R. A. 774; Mullett *v.* Mason, L. R. 1 C. P. 559, Harr. & R. 779, 12 Jur. N. S. 547, 35 L. J. C. P. 299, 14 L. T. Rep. N. S. 558, 14 Wkly. Rep. 898; Greenland *v.* Chaplin, 5 Exch. 243, 19 L. J. Exch. 293.

Rule criticized.— The fallacy of such a statement consists in this, that "where there is no direct evidence of negligence, the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not. . . . But when it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not." Smith *v.* London, etc., R. Co., L. R. 6 C. P. 14, 21, 40 L. J. C. P. 21, 23 L. T. Rep. N. S. 678, 19 Wkly. Rep. 230, per Channell, B. And see Hammill *v.* Pennsylvania R. Co., 56 N. J. L. 370, 29 Atl. 151, 24 L. R. A. 531. The rule was applied where defendant's servant drove so negligently as to collide with the carriage of a third person whose horse took fright, ran away, and injured plaintiff, and it was held that the negligence of the servant was the proximate cause. McDonald *v.* Snelling, 96 Mass. 290, 92 Am. Dec. 768.

Rule explained and limited.—Where this rule has been adopted it has often been limited by the further statement that "this is not to be understood as requiring that the particular result might have been foreseen, for if the consequences follow in unbroken sequence from the wrong to the injury, without an intervening, efficient cause, it is sufficient if, at the time of the negligence, the wrong-doer might, by the exercise of ordinary care, have foreseen that some injury might result from his negligence." Pullman Palace Car Co. *v.* Laack, 143 Ill. 242, 260, 32 N. E. 285, 18 L. R. A. 215. And see Dixon *v.* Scott, 181 Ill. 116, 54 N. E. 897; Louisville, etc., Ferry Co. *v.* Nolan, 135 Ind. 60, 34 N. E. 710; Dunlap *v.* Wagner, 85 Ind. 529, 44 Am. Rep. 42; Wisecarver *v.* Chicago, etc., R. Co., 141 Iowa 121, 119 N. W. 532; Atchison, etc., R. Co. *v.* Parry, 67 Kan. 515, 73 Pac. 105; Kentucky Heating Co. *v.* Hood, 133 Ky. 383 118 S. W. 337, 22 L. R. A. N. S. 588, 134 Am. St. Rep. 457; United R., etc., Co. *v.* State, 93 Md. 619, 49 Atl. 923, 86 Am. St. Rep. 453, 54 L. R. A. 942; Hill *v.* Winsor, 118 Mass. 251; Higgins *v.* Dewey, 107 Mass. 494, 9 Am. Rep. 63; Schumaker *v.* St. Paul, etc., R. Co., 46 Minn. 39, 48 N. W. 559, 12 L. R. A. 257; Hoepper *v.* Southern Hotel Co., 142 Mo. 378, 44 S. W. 257; Graney *v.* St. Louis, etc., R. Co., 140 Mo. 89, 41 S. W. 246, 38 L. R. A. 633; Miller *v.* St. Louis, etc., R. Co., 90 Mo. 389, 2 S. W. 439; Hammill *v.* Pennsylvania R. Co., 56 N. J. L. 370, 29 Atl. 151, 24 L. R. A. 531; Ehrgott *v.* New York, 96 N. Y. 264, 48 Am. Rep. 622; Drum *v.* Miller, 135 N. C. 204, 47 S. E. 421, 102 Am. St. Rep. 528, 65 L. R. A. 890; Meyer *v.* Milwaukee Electric R., etc., Co., 116 Wis. 336, 93 N. W. 6; Brown *v.* Chicago, etc., R. Co., 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41.

Other definitions and tests.— "That which, in a natural and continuous sequence, unbroken by any new, independent cause, produces that event, and without which that event would not have occurred." Shearman & R. Negl. § 26 [*quoted* in Western R. Co. *v.* Mutch, 97 Ala. 194, 197, 11 So. 894, 38 Am. St. Rep. 179, 21 L. R. A. 316; Bosqui *v.* Sutro R. Co., 131 Cal. 390, 397, 63 Pac. 682; Louisville, etc., Ferry Co. *v.* Nolan, 135 Ind. 60, 65, 34 N. E. 710; Liming *v.* Illinois Cent. R. Co., 81 Iowa 246, 251, 47 N. W. 66; Setter *v.* Maysville, 114 Ky. 60, 69, 69 S. W. 1074, 24 Ky. L. Rep. 828; Dickson *v.* Omaha, etc., R. Co., 124 Mo. 140, 149, 27 S. W. 476, 25 L. R. A. 320, 46 Am. St. Rep. 429; Hudson *v.* Wabash Western R. Co., 101 Mo. 13, 35, 14 S. W. 15; Saxton *v.* Missouri Pac. R. Co., 98 Mo. App. 494, 501, 72 S. W. 717; Glick *v.* Kansas City, etc., R. Co., 57 Mo. App. 97, 104; Lutz *v.* Atlantic, etc., R. Co., 6 N. M. 496, 508, 30 Pac. 912, 16 L. R. A. 819; Leeds *v.* New York Tel. Co., 178 N. Y. 118, 122, 70 N. E. 219; Laidlaw *v.* Sage, 158 N. Y. 73, 99, 52 N. E. 679, 44 L. R. A. 216; Roedecker *v.* Metropolitan St. R. Co., 87 N. Y. App. Div. 227, 231, 84 N. Y. Suppl. 300; Wehner *v.* Lagerfelt, 27 Tex. Civ. App. 520, 523, 66 S. W. 221; Butcher *v.* West Virginia, etc., R. Co., 37 W. Va. 180, 191, 16 S. E. 457, 18 L. R. A. 519; Smith *v.* Kanawha County Ct., 33 W. Va. 713, 718, 11 S. E. 1, 8 L. R. A. 82].

"The inquiry must always be whether there was any intermediate cause, disconnected from the primary fault and self-operating which produced the injury." Bunting *v.* Hogsett, 139 Pa. St. 363, 375, 21 Atl. 31, 33, 34, 23 Am. St. Rep. 192, 12 L. R. A. 268.

"If the damage would not have happened without the intervention of some new cause, the operation of which could not have been reasonably anticipated, it would then be too remote." Gilman *v.* Noyes, 57 N. H. 627, 630 (applied to prevent recovery where defendant had taken down the bars of plaintiff's pasture by reason of which plaintiff's sheep escaped and were destroyed by bears).

"A proximate cause is one in which is involved the idea of necessity. It is one the connection between which and the effect is plain and intelligible; it is one which can be used as a term by which a proposition can be demonstrated, that is, one which can be reasoned from conclusively. A remote cause is one which is inconclusive in reasoning, because from it no certain conclusion can be legitimately drawn. In other words, a remote cause is a cause the connection between which and the effect is uncertain, vague or indeterminate. It does not contain in itself the element of necessity between it and its

foundation of an action." [92] Each case must be decided "largely upon the special facts belonging to it, and often upon the very nicest discriminations." [93] It has been said that the proximate cause is the "efficient cause, the one that necessarily sets the other causes in operation." [94] It is not required that it be the sole

effect. From the remote cause the effect does not necessarily flow. . . . This idea of necessity — the necessary connection between the cause and the effect — is the prime distinction between a proximate and a remote cause. The proximate cause being given, the effect must follow. But although the existence of the remote cause is necessary for the existence of the effect (for unless there has been a remote cause there can be no effect) still the existence of the remote cause does not necessarily imply the existence of the effect. The remote cause being given, the effect may or may not follow." 4 Am. L. Rev. 201, 205 [*quoted* in Seifter *v.* Brooklyn Heights R. Co., 169 N. Y. 254, 258, 62 N. E. 349; Laidlaw *v.* Sage, 158 N. Y. 73, 99, 52 N. E. 679, 44 L. R. A. 216].

Wanton acts and negligence.—A distinction has been drawn between cases of wanton acts and of mere negligence. In the former the natural sequence test is to be applied, in the latter, the rule of probable consequences. Louisville, etc., R. Co. *v.* Nitsche, 126 Ind. 229, 26 N. E. 51, 22 Am. St. Rep. 582, 9 L. R. A. 750; Spade *v.* Lynn, etc., R. Co., 168 Mass. 285, 47 N. E. 88, 60 Am. St. Rep. 393, 38 L. R. A. 512; Drum *v.* Miller, 135 N. C. 204, 47 S. E. 421, 102 Am. St. Rep. 528, 65 L. R. A. 890; Pennsylvania R. Co. *v.* Hope, 80 Pa. St. 373, 21 Am. Rep. 100; Isham *v.* Dow, 70 Vt. 588, 41 Atl. 585, 67 Am. St. Rep. 691, 45 L. R. A. 87; Atkinson *v.* Goodrich Transp. Co., 60 Wis. 141, 18 N. W. 764, 50 Am. Rep. 352. A contrary view is taken by the author of an extended note to Gilson *v.* Delaware, etc., Canal Co., 36 Am. St. Rep. 807, 821, who holds that there is no essential difference between the measure of liability for wilful and negligent torts except perhaps where one wilfully assumes dominion over another's property.

Ordinary consequences.—"The first, and in fact the only inquiry, in all these cases, is, whether the damage complained of is the natural and reasonable result of the defendant's act. It will assume this character if it can be shown to be such a consequence as, in the ordinary course of things, would flow from the act." Mayne Damages 15 [*quoted* in Phillips *v.* Dickerson, 85 Ill. 11, 13, 28 Am. Rep. 607]. In accord Terre Haute, etc., R. Co. *v.* Buck, 96 Ind. 346, 49 Am. Rep. 168; Victorian R. Com'rs *v.* Coultas, 13 App. Cas. 222, 52 J. P. 500, 57 L. J. P. C. 69, 58 L. T. Rep. N. S. 390, 37 Wkly. Rep. 129; The Notting Hill, 9 P. D. 105, 5 Aspin. 241, 53 L. J. P. D. & Adm. 56, 51 L. T. Rep. N. S. 66, 32 Wkly. Rep. 764.

Rule as to proximate cause applied.—Where employees of defendant railroad company ran a train over and severed a line of hose laid across the track for the purpose of conveying water to extinguish a fire on plaintiff's property, and if the hose had remained intact the building would have been saved, it was held that the severing of the hose was the proximate cause of the destruction of the building. Metallic Compression Casting Co. *v.* Fitchburg R. Co., 109 Mass. 277, 12 Am. Rep. 689. A similar rule was applied where a waterworks company had neglected to comply with their agreement to keep a certain head upon the fire plugs. Atkinson *v.* Newcastle, etc., Waterworks Co., L. R. 6 Exch. 404, 20 Wkly. Rep. 35 [*reversed* on other grounds in 2 Exch. Div. 441, 46 L. J. Exch. 775, 36 L. T. Rep. N. S. 761, 25 Wkly. Rep. 794]. The owner of land who has directed an agent to erect a house at a particular place thereon cannot maintain an action against a third person who by false representations as to the true boundary line has induced such agent to erect the house in a different place. The proximate cause of the injury is the breach of duty of the agent. Silver *v.* Frazier, 3 Allen (Mass.) 382, 81 Am. Dec. 662. Where defendant entered plaintiff's close, dug into a bank and carried away gravel, and in consequence thereof a flood which occurred there weeks later carried away a portion of the close with a cider-mill, it was held that plaintiff might recover damages for the whole of such injury. Dickinson *v.* Boyle, 17 Pick. (Mass.) 78, 28 Am. Dec. 281.

92. Scott *v.* Hunter, 46 Pa. St. 192, 195, 84 Am. Dec. 542, per Strong, J.

93. Louisiana Mut. Ins. Co. *v.* Tweed, 7 Wall. (U. S.) 44, 52, 19 L. ed. 65, per Miller, J. See also Fairbanks *v.* Kerr, 70 Pa. St. 86, 89, 10 Am. Rep. 664 (where it is said: "Many cases illustrate, but none define, what is an immediate or what is a remote cause. Indeed, such a cause seems to be incapable of any strict definition which will suit in every case"); Harrison *v.* Berkley, 1 Strobh. (S. C.) 525, 47 Am. Dec. 578; Anderson *v.* Miller, 96 Tenn. 35, 33 S. W. 615, 54 Am. St. Rep. 812, 31 L. R. A. 604.

94. "The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster." Ætna Ins. Co. *v.* Boon, 95 U. S. 117, 130, 24 L. ed. 395. And see Hawthorne *v.* Siegel, 88 Cal. 159, 165, 25 Pac. 1114, 22 Am. St. Rep. 291; Mallen *v.* Waldowski, 203 Ill. 87, 90, 67 N. E. 409; Walrod *v.* Webster County, 110 Iowa 349, 352, 81 N. W. 598, 47 L. R. A. 480; Turner *v.* Nassau Electric R. Co., 41 N. Y. App. Div. 213, 217, 58 N. Y. Suppl. 490; Owen *v.* Cook, 9 N. D. 134, 139, 81 N. W. 285, 47 L. R. A. 646; Danville R., etc., Co. *v.* Hod-

cause.[95] Nor need it be the direct cause.[96] Neither time nor distance controls. The proximate cause is not necessarily that which is nearest in time or place to the result.[97]

2. Intervention of Natural Force — a. In General. It is a well-established principle that the operation of a law of nature intervening between the wrong and the injury will not break the sequence of events,[98] where the effect of the act

nett, 101 Va. 361, 370, 43 S. E. 606; Peltier *v.* Chicago, etc., R. Co., 88 Wis. 521, 527, 60 N. W. 250.

95. See *infra*, IV, B.

96. An instruction that "proximate cause" means "the direct, the immediate, the near cause, or the nearest cause — the direct cause of the accident" is erroneous. Deisenrieter *v.* Kraus-Merkel Malting Co., 97 Wis. 279, 72 N. W. 735. And see Wheeler *v.* Milner, 137 Wis. 26, 118 N. W. 187; Odegard *v.* North Wisconsin Lumber Co., 130 Wis. 659, 110 N. W. 809; Wills *v.* Ashland Light, etc., Co., 108 Wis. 255, 84 N. W. 998.

97. *Colorado.*— Travelers' Ins. Co. *v.* Murray, 16 Colo. 296, 26 Pac. 774, 25 Am. St. Rep. 267.

Indiana.—Louisville, etc., R. Co. *v.* Nitsche, 126 Ind. 229, 26 N. E. 51, 22 Am. St. Rep. 582, 9 L. R. A. 750.

Kansas.— Atchison, etc., R. Co. *v.* Stanford, 12 Kan. 354, 15 Am. Rep. 362.

Maryland.— Baltimore, etc., R. Co. *v.* Reaney, 42 Md. 117.

Massachusetts.— Lynn Gas, etc., Co. *v.* Meriden F. Ins. Co., 158 Mass. 570, 33 N. E. 690, 35 Am. St. Rep. 540, 20 L. R. A. 297; Freeman *v.* Mercantile Mut. Acc. Assoc., 156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 753; Marble *v.* Worcester, 4 Gray 395; Dickinson *v.* Boyle, 17 Pick. 78, 28 Am. Dec. 281.

Missouri.— Holwerson *v.* St. Louis, etc., R. Co., 157 Mo. 216, 57 S. W. 770, 50 L. R. A. 850; Poeppers *v.* Missouri, etc., R. Co., 67 Mo. 715, 29 Am. Rep. 518.

New York.— Davis *v.* Standish, 26 Hun 608.

Ohio.— Adams *v.* Young, 44 Ohio St. 80, 4 N. E. 599, 58 Am. Rep. 789.

Pennsylvania.— Pennsylvania R. Co. *v.* Kerr, 62 Pa. St. 353, 1 Am. Rep. 431.

Wisconsin.— Atkinson *v.* Goodrich Transp. Co., 60 Wis. 141, 18 N. W. 764, 50 Am. Rep. 352; Kellogg *v.* Chicago, etc., R. Co., 26 Wis. 223, 7 Am. Rep. 69. Where the trial court charged as to "direct or proximate cause" that "those words 'direct' and 'proximate' mean about the same thing; mean the cause which naturally produced the accident," it was held error, the court saying: "The direct cause may not be the proximate cause, and the proximate cause may not be the direct cause. Neither time nor distance is essentially a controlling element in determining whether a certain cause of an injury is the proximate cause of such injury." Wills *v.* Ashland Light, etc., Co., 108 Wis. 255, 261, 84 N. W. 998.

United States.—Ætna Ins. Co. *v.* Boon, 95 U. S. 117, 24 L. ed. 395; Henry *v.* Cleveland, etc., R. Co., 67 Fed. 426; Travelers' Ins. Co. *v.* Melick, 65 Fed. 178, 12 C. C. A. 544, 27 L. R. A. 629; Missouri Pac. R. Co. *v.* Moseley, 57 Fed. 921, 6 C. C. A. 641.

"The intermissions existing, the time elapsing, or minor cause intervening, do not affect the conclusion, so that the original cause be continuously operative as the principal factor in producing the final result." Pielke *v.* Chicago, etc., R. Co., 5 Dak. 444, 41 N. W. 669, 671; Kelsey *v.* Chicago, etc., R. Co., 1 S. D. 80, 45 N. W. 204.

Illustrations.— Thus where a collision occurred injuring many persons, and thereafter some one stated in the hearing of plaintiff, a passenger, that another train was approaching from the rear and that there was about to be another collision, whereupon plaintiff left the car, went to the side of the track and was there poisoned by ivy, it was held that the poisoning was proximate. Estes *v.* Missouri Pac. R. Co., 110 Mo. App. 725, 85 S. W. 627. And where a railroad company negligently set on fire a rotten stump standing on its right of way, it was held that "the fact that the fire smouldered awhile in the stump, and, after it was supposed to have been extinguished, broke out again the next day, while it makes the conclusion less obvious that the damage was done by the same fire, does not interpose any new cause, or enable the court to say as matter of law that the causal connection was broken." Haverly *v.* State Line, etc., R. Co., 135 Pa. St. 50, 58, 19 Atl. 1013, 20 Am. St. Rep. 848.

98. *Indiana.*— Louisville, etc., R. Co. *v.* Nitsche, 126 Ind. 229, 26 N. E. 51, 22 Am. St. Rep. 582, 9 L. R. A. 750.

Kansas.— Chicago, etc., R. Co. *v.* McBride, 54 Kan. 172, 37 Pac. 978.

Massachusetts.— Lynn Gas, etc., Co. *v.* Meriden F. Ins. Co., 158 Mass. 570, 33 N. E. 690, 35 Am. St. Rep. 540, 20 L. R. A. 297; Smith *v.* Faxon, 156 Mass. 589, 31 N. E. 687; Stock *v.* Boston, 149 Mass. 410, 21 N. E. 871, 14 Am. St. Rep. 430; Smethurst *v.* Barton Square Independent Cong. Church, 148 Mass. 261, 19 N. E. 387, 12 Am. St. Rep. 550, 2 L. R. A. 695; Salisbury *v.* Herchenroder, 106 Mass. 458, 8 Am. Rep. 354; Dickinson *v.* Boyle, 17 Pick. 78, 28 Am. Dec. 281.

Minnesota.— Schumaker *v.* St. Paul, etc., R. Co., 46 Minn. 39, 48 N. W. 559, 12 L. R. A. 257.

Missouri.— Brink *v.* Kansas City, etc., R. Co., 17 Mo. App. 177.

New Hampshire.— George *v.* Fisk, 32 N. H. 32.

New York.— Pollett *v.* Long, 56 N. Y. 200.

Pennsylvania.— Scott *v.* Hunter, 46 Pa. St. 192, 84 Am. Dec. 542.

South Carolina.— Harrison *v.* Berkley, 1 Strobh. 525, 47 Am. Dec. 578.

or negligence has not ceased to exist when the natural cause intervenes.[99] This presupposes, however, that culpability is established. No liability attaches for

Texas.— Rigdon *v.* Temple Water Works Co., 11 Tex. Civ. App. 542, 32 S. W. 828.

England.— Romney Marsh *v.* Trinity House, L. R. 5 Exch. 204, 39 L. J. Exch. 163, 22 L. T. Rep. N. S. 446, 18 Wkly. Rep. 869 [*affirmed* in L. R. 7 Exch. 247, 41 L. J. Exch. 106, 20 Wkly. Rep. 952]; Siordet *v.* Hall, 4 Bing. 607, 6 L. J. C. P. O. S. 137, 1 M. & P. 561, 29 Rev. Rep. 651, 13 E. C. L. 657; Montoya *v.* London Assur. Co., 6 Exch. 451, 20 L. J. Exch. 254.

Illustrations.— This rule was applied, for example, where defendant had kept a pile of manure near plaintiff's well, and a rain of extraordinary power soaked the manure, ran into the well, and vitiated its contents. Woodward *v.* Aborn, 35 Me. 271, 58 Am. Dec. 699. The doctrine also finds illustration in cases where damages have resulted from a functional disturbance caused by physical shock brought about by defendant's unlawful act or omission. Thus where plaintiff, a passenger on a railroad, was thrown to the floor, cut and bruised, his mental functions subsequently affected, and paralysis finally supervened, it was held that a verdict in his favor which constituted a finding that the paralysis was caused by the rupture of a blood vessel, the result of the shock and injury received, was justified. Bishop *v.* St. Paul City R. Co., 48 Minn. 26, 50 N. W. 927. See also Ehrgott *v.* New York, 96 N. Y. 264, 48 Am. Rep. 622; Davies *v.* McKnight, 146 Pa. St. 610, 23 Atl. 320 (holding that in an action for causing the death of a person by unlawfully furnishing liquor to him, where the testimony tended to show that the deceased in consequence of intoxication so caused, fell into a gutter of water and became thoroughly chilled, and that he at once became sick, exhibiting symptoms of bronchitis, and after two or three days symptoms of pneumonia, the immediate cause of death being pneumonia, and there was medical testimony tending to show that the exposure would be likely to cause pneumonia, the question of the cause of death was for the jury); Hoehle *v.* Allegheny Heating Co., 5 Pa. Super. Ct. 21 (holding that where plaintiff's husband, convalescent from typhoid fever, suffered a relapse into pneumonia, from which he died, immediately after defendant company had wrongfully cut off the fuel gas whereby the patient's room had become suddenly chilled, the breach of duty in turning off the gas was not so remote a cause of the death as required binding instructions for defendant, the question whether defendant's negligence was the proximate cause of the injury being for the jury under all the circumstances of the case). And see DAMAGES, 13 Cyc. 30. So, where the owner of a sea wall had given the owner of several vessels employed in building it the exclusive right to use the wall as a place of safety, and defendant placed his vessel behind the wall and refused to move it, whereby two of the builder's vessels were sunk by a storm not uncommon in the locality, it was held that defendant was responsible for the loss. Derry *v.* Flitner, 118 Mass. 131. And where defendants negligently moored their boats in the channel and entrance to a lock, so that the boats of plaintiffs were stopped outside, and the current rose until plaintiffs' boats were carried over the dam and lost, it was held error for the court to enter judgment for defendants on the ground that the obstruction of the channel was a cause too remote from the rise of the river. Scott *v.* Hunter, 46 Pa. St. 192, 84 Am. Dec. 542. By the weight of authority, if a fire has negligently been started, and wind or water carry the flame, its transmission by these means will not prevent the injury from being regarded as the direct result of the wrong. Louisville, etc., R. Co. *v.* Nitsche, 126 Ind. 229, 26 N. E. 51, 22 Am. St. Rep. 582, 9 L. R. A. 750; Atchison, etc., R. Co. *v.* Stanford, 12 Kan. 354, 15 Am. Rep. 362; Higgins *v.* Dewey, 107 Mass. 494, 9 Am. Rep. 63; Lillibridge *v.* McCann, 117 Mich. 84, 75 N. W. 288, 72 Am. St. Rep. 553, 41 L. R. A. 381; Poeppers *v.* Missouri, etc., R. Co., 67 Mo. 715, 29 Am. Rep. 518; Kuhn *v.* Jewett, 32 N. J. Eq. 647; Hoffman *v.* King, 160 N. Y. 618, 55 N. E. 401, 73 Am. St. Rep. 715, 46 L. R. A. 672; Hays *v.* Miller, 70 N. Y. 112; Webb *v.* Rome, etc., R. Co., 49 N. Y. 420, 10 Am. Rep. 389. *Contra*, Pennsylvania Co. *v.* Whitlock, 99 Ind. 16, 50 Am. Rep. 71; Hoag *v.* Lake Shore, etc., R. Co., 85 Pa. St. 293, 27 Am. Rep. 653; Marvin *v.* Chicago, etc., R. Co., 79 Wis. 140, 47 N. W. 1123, 11 L. R. A. 506. And where water from defendant's tank ran upon adjacent land and froze, it was held that defendant was liable for the injury done by the freezing. Chicago, etc., R. Co. *v.* Hoag, 90 Ill. 339.

99. If property is wrongfully taken from the owner and destroyed by fire the wrongdoer is liable therefor, not from the fact of loss by fire, but from the tort which preceded it. Harper *v.* Dotson, 43 Iowa 232. Where defendant negligently started a fire by sparks from its engine which spread to plaintiff's property, and the station agent and others endeavored to put it out and believed they had done so, and a fresh wind arose and started it anew, and a tenant refused to extinguish it, it was held that the chain of causation was not broken. Wiley *v.* West Jersey R. Co., 44 N. J. L. 247. So, where defendant sold liquor to plaintiff's slave, who became intoxicated, wandered away, and died from exposure, and it was objected that the action of the elements and the acts of the slave intervened, it was held that a verdict for plaintiff should be sustained on the ground that the injurious act of defendant continued in operation up to the time of the slave's death. Harrison *v.* Berkley, 1 Strobh. (S. C.) 525, 47 Am. Dec. 578. See also Gilman *v.* Noyes, 57 N. H. 627 (sheep escaping from

damages sustained by reason of the acts of God and the forces of nature unless one has by his wrongful act or neglect augmented, diverted, or accelerated those forces in such a manner as to injure another.[1]

b. Fright and Mental Anguish. Whether fright or mental anguish can be treated as the operation of a law of nature, so as to permit recovery for injuries immediately due thereto but occasioned primarily by the wrongful act or neglect of the wrong-doer, is a disputed question and the decisions are conflicting. Cases holding in the negative are based on the ground that the injury could not have been anticipated by defendant, and hence does not fall within the rule of proximate cause, or that it would be contrary to public policy to permit recovery where a flood of litigation would ensue of such a character that injuries might be feigned without detection and damages would rest upon mere conjecture.[2]

plaintiff's pasture by reason of defendant's negligence, and afterward destroyed by bears; held a question for the jury "whether it was natural and reasonable to expect that if the sheep were suffered to escape, they would be destroyed in that way"); Lawrence *v.* Jenkins, L. R. 8 Q. B. 274, 42 L. J. Q. B. 147, 28 L. T. Rep. N. S. 406, 21 Wkly. Rep. 577 (where plaintiff's cows strayed upon defendant's close through a gap in a division fence made by the carelessness of defendant's servants in felling a tree upon it, and there fed on the leaves of a yew tree and died in consequence); Lee *v.* Riley, 18 C. B. N. S. 722, 11 Jur. N. S. 822, 34 L. J. C. P. 212, 12 L. T. Rep. N. S. 388, 13 Wkly. Rep. 51, 114 E. C. L. 722 (where defendant's mare strayed into plaintiff's field, through the defect of a fence which defendant was bound to repair, and kicked plaintiff's horse); Powell *v.* Salisbury, 2 Y. & J. 391, 31 Rev. Rep. 607 (failure of defendant to repair his fences, by reason of which plaintiff's horses escaped into defendant's close and were there killed by the falling of a haystack).

Deviation or delay in transportation of goods or passengers.—Where plaintiff shipped certain lime on defendant's barge, and the master deviated unnecessarily from the usual course and during the deviation a tempest wet the lime, it was held that defendant was liable and the cause of loss sufficiently proximate to entitle plaintiff to recover under a declaration alleging defendant's duty to carry the lime without unnecessary deviation. Davis *v.* Garrett, 6 Bing. 716, 8 L. J. C. P. O. S. 253, 4 M. & P. 540, 31 Rev. Rep. 524, 19 E. C. L. 321. But in most jurisdictions, where goods are delayed in transportation by the negligence of the carrier and are subsequently destroyed without its fault, the delay is not regarded as the proximate cause, although loss would not have occurred had the transportation been effected with reasonable promptitude. Hoadley *v.* Northern Transp. Co., 115 Mass. 304, 15 Am. Rep. 106; Denny *v.* New York Cent. R. Co., 13 Gray (Mass.) 481, 74 Am. Dec. 645; Daniels *v.* Ballantine, 23 Ohio St. 532, 13 Am. Rep. 264; Morrison *v.* Davis, 20 Pa. St. 171, 57 Am. Dec. 695; Memphis, etc., R. Co. *v.* Reeves, 10 Wall. (U. S.) 176, 19 L. ed. 909. So, where defendant's train was upset by a gale of wind, and plaintiff was injured, and it appeared that if the train had been running on time the injury would not have occurred, it was held that the delay was not the proximate cause. McClary *v.* Sioux City, etc., R. Co., 3 Nebr. 44, 19 Am. Rep. 631. To the contrary see Read *v.* Spaulding, 30 N. Y. 630, 86 Am. Dec. 426, where it was held that delay was equivalent to deviation and hence that the carrier had become an insurer. And see to the same effect Condict *v.* Grand Trunk R. Co., 54 N. Y. 500; Bostwick *v.* Baltimore, etc., R. Co., 45 N. Y. 712; Michaels *v.* New York Cent. R. Co., 30 N. Y. 564, 86 Am. Dec. 415. See also CARRIERS, 6 Cyc. 443.

1. Axtell *v.* Northern Pac. R. Co., 9 Ida. 392, 74 Pac. 1075. If delay occurs under such circumstances that the carrier has reason to anticipate the destruction of the goods as a probable result therefrom, he will be responsible, although the actual destruction is brought about by means beyond his control. Merchants' Wharf-Boat Assoc. *v.* Wood, 64 Miss. 661, 2 So. 76, 60 Am. Rep. 76. Where a portion of a sand-bank fell and struck plaintiff against a moving train which had been suddenly started without signal, and the wheels of one of the cars passed over him, it was held that the immediate and direct cause of the injury was the falling of the bank, and as this was not the effect or consequence of defendant's act or omission, plaintiff could not recover. Handelun *v.* Burlington, etc., R. Co., 72 Iowa 709, 32 N. W. 4. See ACT OF GOD, 1 Cyc. 758; CARRIERS, 6 Cyc. 377.

2. Argument is not necessary to show the unfortunate effect of these decisions. The first objection can be met by saying that it is an improper application of the test of remoteness. In many of the cases where plaintiff has not been permitted to recover, injury, although not in its precise form, could have been anticipated. It is thoroughly established by modern science that physical disorder may be the direct consequence of nervous shock. To the second objection it may be answered that public policy is invoked for a purpose wholly at variance with the reasons on which it is founded. For courts to deny justice because of the difficulty of administering it amounts to self-stultification. The inconsistency is apparent

Many of the courts, however, have taken the opposite view and have permitted

when we consider that no difficulty has been experienced in cases where damages are "at large" and even mental anguish has been considered a proper ground for damages where an independent cause of action has been found to exist. In reality, it is merely an arbitrary rule. However, the weight of authority is in favor of denying a right to recover for such injury.

Illinois.— Braun *v.* Craven, 175 Ill. 401, 51 N. E. 657, 42 L. R. A. 199; Joch *v.* Dankwardt, 85 Ill. 331; Phillips *v.* Dickerson, 85 Ill. 11, 28 Am. Rep. 607; Haas *v.* Metz, 78 Ill. App. 46.

Indiana.— Gaskins *v.* Runkle, 25 Ind. App. 584, 58 N. E. 740; Cleveland, etc., R. Co. *v.* Stewart, 24 Ind. App. 374, 56 N. E. 917.

Iowa.— Lee *v.* Burlington, 113 Iowa 356, 85 N. W. 618, 86 Am. St. Rep. 379.

Kansas.—Atchison, etc., R. Co. *v.* McGinnis, 46 Kan. 109, 26 Pac. 453.

Kentucky.— Reed *v.* Ford, 129 Ky. 471, 112 S. W. 600, 33 Ky. L. Rep. 1029, 19 L. R. A. N. S. 225.

Maine.— Wyman *v.* Leavitt, 71 Me. 227, 36 Am. Rep. 303.

Massachusetts.— Smith *v.* Postal Tel. Cable Co., 174 Mass. 576, 55 N. E. 380, 75 Am. St. Rep. 374, 47 L. R. A. 323; Spade *v.* Lynn, etc., R. Co., 172 Mass. 488, 52 N. E. 747, 70 Am. St. Rep. 298, 43 L. R. A. 832; White *v.* Sander, 168 Mass. 296, 47 N. E. 90; Spade *v.* Lynn, etc., R. Co., 168 Mass. 285, 47 N. E. 88, 60 Am. St. Rep. 393, 38 L. R. A. 512.

Michigan.— Nelson *v.* Crawford, 122 Mich. 466, 81 N. W. 335, 80 Am. St. Rep. 577.

Minnesota.— Bucknam *v.* Great Northern R. Co., 76 Minn. 373, 79 N. W. 98 [*distinguishing* Purcell *v.* St. Paul City R. Co., 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203]; Keyes *v.* Minneapolis, etc., R. Co., 36 Minn. 290, 30 N. W. 888; Renner *v.* Canfield, 36 Minn. 90, 30 N. W. 435, 1 Am. St. Rep. 654. See *infra*, this note.

Nevada.— Johnson *v.* Wells, 6 Nev. 224, 3 Am. Rep. 245.

New York.— Mitchell *v.* Rochester R. Co., 151 N. Y. 107, 45 N. E. 354, 56 Am. St. Rep. 604, 34 L. R. A. 781; Lehman *v.* Brooklyn City R. Co., 47 Hun 355; Wulstein *v.* Mohlman, 57 N. Y. Super. Ct. 50, 5 N. Y. Suppl. 569.

Pennsylvania.— Huston *v.* Freemansburg Borough, 212 Pa. St. 548, 61 Atl. 1022, 3 L. R. A. N. S. 49; Ewing *v.* Pittsburgh, etc., R. Co., 147 Pa. St. 40, 23 Atl. 340, 30 Am. St. Rep. 709, 14 L. R. A. 666.

United States.— Haile *v.* Texas, etc., R. Co., 60 Fed. 557, 9 C. C. A. 134, 23 L. R. A. 774.

England.— Victorian R. Com'rs *v.* Coultas, 13 App. Cas. 222, 52 J. P. 500, 57 L. J. P. C. 69, 58 L. T. Rep. N. S. 390, 37 Wkly. Rep. 129; The Notting Hill, 9 P. D. 105, 5 Aspin. 241, 53 L. J. P. D. & Adm. 56, 51 L. T. Rep. N. S. 66, 32 Wkly. Rep. 764; Lynch *v.* Knight, 9 H. L. Cas. 577, 5 L. T. Rep. N. S. 291, 11 Eng. Reprint 854.

See DAMAGES, 13 Cyc. 39 *et seq.*

Rule applied.— Thus where plaintiff, a pregnant woman, was standing on a cross walk, and defendant's horse car was negligently driven so that she barely escaped injury, and, although physically uninjured, she became unconscious from fright and a miscarriage resulted, it was held that this was not the "ordinary and natural result of the negligence charged." Mitchell *v.* Rochester R. Co., 151 N. Y. 107, 45 N. E. 354, 56 Am. St. Rep. 604, 34 L. R. A. 781. So, where the words uttered do not constitute slander *per se*, mental anguish will not constitute such damage as will give the party defamed a cause of action. Terwilliger *v.* Wands, 17 N. Y. 54, 72 Am. Dec. 420; Allsop *v.* Allsop, 5 H. & N. 534, 6 Jur. N. S. 433, 29 L. J. Exch. 315, 2 L. T. Rep. N. S. 290, 8 Wkly. Rep. 449. And no action can be sustained for sending an anonymous, threatening letter containing information wilfully false and given with the malicious design of annoying plaintiff and frightening him out of town, unless the loss or inconvenience sustained consist of something more than mental suffering or annoyance. Taft *v.* Taft, 40 Vt. 229, 94 Am. Dec. 389. Nor will an action lie to recover damages for disgrace and disrepute occasioned by the advertisement and sale of property in judicial proceedings instituted to foreclose a fraudulent mortgage. Gore *v.* Condon, 87 Md. 368, 39 Atl. 1042, 67 Am. St. Rep. 352, 40 L. R. A. 382. In Bucknam *v.* Great Northern R. Co., 76 Minn. 373, 79 N. W. 98, the complaint alleged that plaintiff went with her husband into the ladies' waiting room of defendant's railroad station, waiting there for the arrival of her sister, coming on defendant's train, when an employee of defendant, in charge of said waiting room, and authorized to keep it quiet and orderly, supposing that plaintiff's husband, then with her, was not in fact her husband, ordered him to leave said room, and used harsh, violent, and abusive language toward him, and made insulting and threatening demands of him; and thereupon plaintiff suffered a nervous shock, and became faint and sick, and so remained for several days. The language so used by defendant's employee was not addressed to plaintiff, nor was there any physical injury inflicted upon plaintiff's husband or herself, and at no time was she in peril or danger of personal injury by reason of the threats or acts of defendant's employee. It was held that for the language so used an action would not lie in behalf of plaintiff as for a private wrong. The court distinguished this case from Purcell *v.* St. Paul City R. Co., 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203, where it was held that if the negligence of a carrier place a passenger in a position of such apparent imminent peril as to cause fright, and the fright causes nervous convulsions

a recovery in such a case.[3] But in any event, if a cause of action exists independent and illness, the negligence is the proximate cause of the injury, and the injury is one for which an action may be brought.

Inapplicable to assault.— The principle that a cause of action will not lie for mere mental suffering unaccompanied, as some of the courts put it, by "physical contact" would, of course, have no application in cases of assault pure and simple, since this tort consists in an infringement of the right of personal security. See ASSAULT AND BATTERY, 3 Cyc. 1014. And see Caspar *v.* Prosdame, 46 La. Ann. 36, 14 So. 317. The distinction is pointed out in Williams *v.* Underhill, 63 N. Y. App. Div. 223, 226, 71 N. Y. Suppl. 291, where it is said that "the reason for limiting liability in actions for negligence is founded in the principle of law governing such actions, viz., that the measure of damage shall be confined to the natural and probable consequences of the act or omission constituting the cause of action. The distinction between such a case and one founded upon a wilful tort, such as assault, is very clear."

Liability for injuries resulting from a functional disturbance due to physical shock see *supra*, IV, A, 2, a note 98.

3. *California.*— Sloane *v.* Southern California R. Co., 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193.

Georgia.— Head *v.* Georgia Pac. R. Co., 79 Ga. 358, 7 S. E. 217, 11 Am. St. Rep. 434.

Iowa.—Watson *v.* Dilts, 116 Iowa 249, 89 N. W. 1068, 93 Am. St. Rep. 239, 57 L. R. A. 559.

Ohio.— Smith *v.* Pittsburg, etc., R. Co., 23 Ohio St. 10.

South Carolina.— Mack *v.* South Bound R. Co., 52 S. C. 323, 29 S. E. 905, 68 Am. St. Rep. 913, 40 L. R. A. 679.

Texas.— Hill *v.* Kimball, 76 Tex. 210, 13 S. W. 59, 7 L. R. A. 618. See *infra*, this note.

England.—Wilkenson *v.* Downton, [1897] 2 Q. B. 57, 66 L. J. Q. B. 493, 76 L. T. Rep. N. S. 493, 45 Wkly. Rep. 525; Bell *v.* Great Northern R. Co., L. R. 26 Ir. 432.

See "Fright as an Element of Recoverable Damages," 77 Am. St. Rep. 859 note; "Recovery for Damage Resulting From Nervous Shock," 15 Harvard L. Rev. 304.

Illustration.— Thus where defendant, by way of a practical joke, falsely stated to plaintiff that her husband had met with a serious accident by which both of his legs were broken, and in consequence plaintiff suffered a violent nervous shock which rendered her ill, it was held that these facts constituted a good cause of action. Wilkenson *v.* Downton, [1897] 2 Q. B. 57, 66 L. J. Q. B. 493, 76 L. T. Rep. N. S. 493, 45 Wkly. Rep. 525.

Criticism of prevailing rule.— "It is within the common observation of all that fright may, and usually does, affect the nervous system, which is a distinctive part of the physical system, and controls the health to a very great extent, and that an entirely sound body is never found with a diseased nervous organization; consequently one who voluntarily causes a diseased condition of the latter must anticipate the consequences which follow it. The nerves being, as a matter of fact, a part of the physical system, if they are affected by fright to such an extent as to cause physical pain, it seems to us that the injury resulting therefrom is the direct result of the act producing the fright." Accordingly it was held that recovery may be had for nervous prostration from fright caused by defendant in entering plaintiff's home in the night-time. Watson *v.* Dilts, 116 Iowa 249, 252, 89 N. W. 1068, 93 Am. St. Rep. 239, 57 L. R. A. 559. "Why is the accompaniment of physical injury essential? For my own part, I should not like to assume it to be scientifically true that a nervous shock which causes serious bodily illness is not actually accompanied by physical injury, although it may be impossible, or at least difficult, to detect the injury at the time in the living subject. I should not be surprised if the surgeon or the physiologist told us that nervous shock is or may be in itself an injurious affection of the physical organism. Let it be assumed, however, that the physical injury follows the shock, but that the jury are satisfied upon proper and sufficient medical evidence that it follows the shock as its direct and natural effect, is there any legal reason for saying that the damage is less proximate in the legal sense than damage which arises contemporaneously? 'As well might it be said' (I am quoting from the judgment of Palles, C. B., Bell *v.* Great Northern R. Co., L. R. 26 Ir. 432, 439) 'that a death caused by poison is not to be attributed to the person who administered it because the mortal effect is not produced contemporaneously with its administration.' Remoteness as a legal ground for the exclusion of damage in an action of tort means, not severance in point of time, but the absence of direct and natural casual sequence — the inability to trace in regard to the damage the '*propter hoc*' in a necessary or natural descent from the wrongful act. As a matter of experience, I should say that the injury to health which forms the main ground of damages in actions of negligence, either in cases of railway accidents or in running-down cases, frequently is proved, not as a concomitant of the occurrence, but as one of the *sequelæ*." Dulieu *v.* White, [1901] 2 K. B. 669, 677, 70 L. J. K. B. 837, 85 L. T. Rep. N. S. 126, 50 Wkly. Rep. 76, per Kennedy, J.

Texas doctrine.— The Texas courts after a period of doubt seem to have settled on the following doctrine. There can be no recovery for mere fright neither attended nor followed by any other injury. Gulf, etc., R. Co. *v.* Trott, 86 Tex. 412, 25 S. W. 419, 40 Am. St. Rep. 866. But if physical injury (e. g. miscarriage), results from mental shock unaccompanied by physical violence, the rule is otherwise (Hill *v.* Kimball, 76 Tex.

of the fright or mental suffering the latter is then deemed part of the injury and damages are enhanced accordingly.[4]

3. Intervention of Voluntary Act or Neglect. But if the intervening act[5] or negligence of the injured party[6] or of a third person[7] was voluntary, it will be considered to be the proximate cause.

210, 13 S. W. 59, 7 L. R. A. 618), provided such injury ought to have been foreseen as a natural and probable consequence of the wrongful act or omission (Gulf, etc., R. Co. *v.* Hayter, 93 Tex. 239, 54 S. W. 944, 77 Am. St. Rep. 856, 47 L. R. A. 325).

4. *California.*— Sloane *v.* Southern California R. Co., 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193; Razzo *v.* Varni, 81 Cal. 289, 22 Pac. 848.

Iowa.— Parkhurst *v.* Masteller, 57 Iowa 474, 10 N. W. 864.

Massachusetts.— Fillebroun *v.* Hoar, 124 Mass. 580; Canning *v.* Williamstown, 1 Cush. 451.

Minnesota.— Sanderson *v.* Northern Pac. R. Co., 88 Minn. 162, 92 N. W. 542, 97 Am. St. Rep. 509, 60 L. R. A. 403; Larson *v.* Chase, 47 Minn. 307, 50 N. W. 238, 28 Am. St. Rep. 370, 14 L. R. A. 85.

New York.— Hamilton *v.* Third Ave. R. Co., 53 N. Y. 25.

Vermont.— Newell *v.* Whitcher, 53 Vt. 589, 38 Am. Rep. 703.

Washington.— Davis *v.* Tacoma R., etc., Co., 35 Wash. 203, 77 Pac. 209, 66 L. R. A. 802.

Illustrations.— Thus where defendant has trespassed upon a cemetery lot owned by plaintiff and removed the body of plaintiff's child, the jury may award damages for the disregard of the father's feelings. Meagher *v.* Driscoll, 99 Mass. 281, 96 Am. Dec. 759. And where a cause of action for defamation is complete in itself, the injured party may recover for mental suffering. Lombard *v.* Lennox, 155 Mass. 70, 28 N. E. 1125, 31 Am. St. Rep. 528; Van Ingen *v.* Star Co., 1 N. Y. App. Div. 429, 37 N. Y. Suppl. 114 [*affirmed* in 157 N. Y. 695, 51 N. E. 1094].

Recovery of damages for mental anguish and accompanying fright see Damages, 13 Cyc. 39–43.

5. McGhee *v.* Norfolk, etc., R. Co., 147 N. C. 142, 60 S. E. 912, 24 L. R. A. N. S. 119 (holding that where defendant stored dynamite in a wooden building on its right of way, without giving warning, and plaintiff in shooting at a knot hole in the wall exploded the dynamite, the act of plaintiff was the proximate cause of the injury); Scheffer *v.* Washington City Midland, etc., R. Co., 105 U. S. 249, 26 L. ed. 1070 (holding that where plaintiff's intestate had become insane by reason of a railroad wreck caused by the negligence of defendant, and afterward committed suicide, the proximate cause of his death was his own act of self-destruction).

6. *Illinois.*— Scherrer *v.* Baltzer, 84 Ill. App. 126.

Maryland.— Lawson *v.* Price, 45 Md. 123.

Missouri.— State *v.* Powell, 44 Mo. 436.

New York.—Milton *v.* Hudson River Steamboat Co., 37 N. Y. 210; Hogle *v.* New York Cent., etc., R. Co., 28 Hun 363.

Texas.— Jones *v.* George, 61 Tex. 345, 48 Am. Rep. 280.

See Damages, 13 Cyc. 28 *et seq.*

Illustrations.—Where one is aware of the existence of a fire upon the property of another which is likely to spread to and destroy his own property, he is bound to use reasonable care and diligence to prevent it from so spreading. Haverly *v.* State Line, etc., R. Co., 135 Pa. St. 50, 19 Atl. 1013, 20 Am. St. Rep. 848. *Contra,* where the negligence intervening is that of a third person (a tenant) whose attention has been called to the fire and who neglects to extinguish it. Wiley *v.* West Jersey R. Co., 44 N. J. L. 247. So where a fence is unlawfully removed, and the owner neglects to repair, there can be no recovery for the loss of a subsequent crop eaten by cattle entering through the breach. Loker *v.* Damon, 17 Pick. (Mass.) 284. And where one who has suffered personal injuries unreasonably fails to consult a physician or to follow the physician's advice, his negligence is deemed the proximate cause of such consequences as might have been avoided had the physician been employed or his directions obeyed. But the mistake of the physician is not to be attributed to the patient nor will it break the sequence of events. Schmidt *v.* Mitchell, 84 Ill. 195, 25 Am. Rep. 446; Sullivan *v.* Tioga R. Co., 112 N. Y. 643, 20 N. E. 569, 8 Am. St. Rep. 793; Sauter *v.* New York Cent., etc., R. Co., 66 N. Y. 50, 23 Am. Rep. 18; Lyons *v.* Erie R. Co., 57 N. Y. 489. Where, however, defendants unlawfully removed the property of plaintiff from a building occupied by the latter, it was held that "the plaintiff owed no duty to the defendants, and was not called upon to gather up the fragments of his scattered and broken chattels, but was at liberty to leave them where the defendant left them, and look to the latter for their value." Eten *v.* Luyster, 60 N. Y. 252, 260. And where defendant unlawfully cast loose plaintiff's vessel upon the dock, plaintiff's right to recover was not affected by his neglect to take such measures as were in his power to recover and secure it. Heaney *v.* Heeney, 2 Den. (N. Y.) 625.

Duty to prevent or reduce damages see Damages, 13 Cyc. 75, 76 *et seq.*

7. *Connecticut.*— Booth *v.* Sanford, 52 Conn. 481.

Massachusetts.— Clifford *v.* Atlantic Cotton Mills, 146 Mass. 47, 15 N. E. 84, 4 Am. St. Rep. 279; Carter *v.* Towne, 103 Mass. 507; Tutein *v.* Hurley, 98 Mass. 211, 93 Am. Dec. 154; Silver *v.* Frazier, 3 Allen 382, 81 Am. Dec. 662.

New Jersey.— Hughes *v.* McDonough, 43

4. Foreseeable Intervention. "It cannot, however, be considered that in all cases the intervention even of a responsible and intelligent human being will absolutely exonerate a preceding wrong-doer. Many instances to the contrary have occurred, and these are usually cases where it has been found that it was the duty of the original wrong-doer to anticipate and provide against such intervention, because such intervention was a thing likely to happen in the ordinary course of events." [8]

N. J. L. 459, 39 Am. Rep. 603; Cuff *v.* Newark, etc., R. Co., 35 N. J. L. 17, 10 Am. Rep. 205.

New York.— Trapp *v.* McClellan, 68 N. Y. App. Div. 362, 74 N. Y. Suppl. 130; Mars *v.* Delaware, etc., Canal Co., 54 Hun 625, 8 N. Y. Suppl. 107; Parker *v.* Cohoes, 10 Hun 531 [*affirmed* in 74 N. Y. 610]; Crain *v.* Petrie, 6 Hill 522, 41 Am. Dec. 765.

Texas.— Millican *v.* McNeil, (Civ. App. 1899) 50 S. W. 428.

United States.— Goodlander Mill Co. *v.* Standard Oil Co., 63 Fed. 400, 11 C. C. A. 253, 27 L. R. A. 583.

England.— Vicars *v.* Wilcocks, 8 East 1, 103 Eng. Reprint 244.

See Damages, 13 Cyc. 28 *et seq.*; Negligence, 29 Cyc. 499 *et seq.*

Illustrations.— Thus where defendant had stored powder under circumstances which did not render it guilty of maintaining a nuisance, it was not liable for injuries caused by an explosion due to the act of a stranger who entered the magazine and wilfully blew it up. Kleebauer *v.* Western Fuse, etc., Co., 138 Cal. 497, 71 Pac. 617, 94 Am. St. Rep. 62, 60 L. R. A. 377. So, where defendant had negligently allowed a pit to remain open in the highway, it was not liable to a constable thrown into it by a prisoner escaping from custody, for in such a case "the person so intervening acts as a non-conductor, and insulates" the negligence of the town from the injury suffered by the plaintiff. Alexander *v.* New Castle, 115 Ind. 51, 17 N. E. 200. And where a telephone wire attached to a thirty-nine foot chimney extended across the street to the top of a building one hundred feet high, and the boom of a derrick used in hoisting materials struck the wire and pulled the chimney over, and plaintiff was injured by the falling bricks, the negligence of the persons operating the derrick was the intervening and responsible cause. Leeds *v.* New York Tel. Co., 178 N. Y. 118, 70 N. E. 219. In an action against the proprietor of a theater for damages for the refusal of his manager to permit an officer to go upon the stage to serve a writ in plaintiff's behalf on an actor, it was held proper to direct a verdict for defendant, since the cause of plaintiff's injury was the failure of the officer to serve his process. Paulton *v.* Keith, 23 R. I. 164, 49 Atl. 635, 91 Am. St. Rep. 624, 54 L. R. A. 670. And where appellant had sold land which he had purchased at a tax-sale, but the title proving defective, the original owner subsequently recovered the land from the vendee, it was held that appellant was not liable to the original owner for the value of the timber which the vendee had cut while he was in possession, as the proximate cause of the injury to the owner was the act of the vendee, over which appellant had no control. McClanahan *v.* Stephens, 67 Tex. 354, 3 S. W. 312.

Rule applied in defamation.— The rule is also applied where a slander has been repeated or a libel republished. The original defamer is liable only for his individual act, not for the repetition (Elmer *v.* Fessenden, 151 Mass. 359, 24 N. E. 208, 5 L. R. A. 724; Shurtleff *v.* Parker, 130 Mass. 293, 39 Am. Rep. 454; Hastings *v.* Stetson, 126 Mass. 329, 30 Am. Rep. 683; Terwilliger *v.* Wands, 17 N. Y. 54, 72 Am. Dec. 420); unless the first utterance was under such circumstances that its repetition was to be foreseen (Schoepflin *v.* Coffey, 162 N. Y. 12, 56 N. E. 502). And see Libel and Slander, 25 Cyc. 430.

8. Stone *v.* Boston, etc., R. Co., 171 Mass. 536, 540, 51 N. E. 1, 41 L. R. A. 794, per Allen, J. And see the following cases:

Illinois.—Weick *v.* Lander, 75 Ill. 93.

Massachusetts.—McCauley *v.* Norcross, 155 Mass. 584, 30 N. E. 464; Lane *v.* Atlantic Works, 111 Mass. 136; Powell *v.* Deveney, 3 Cush. 300, 50 Am. Dec. 738.

Nebraska.— Hilligas *v.* Kuns, 86 Nebr. 68, 124 N. W. 925, 26 L. R. A. N. S. 284.

New Jersey.— Smith *v.* New York, etc., R. Co., 46 N. J. L. 7.

Pennsylvania.— Koelsch *v.* Philadelphia Co., 152 Pa. St. 355, 25 Atl. 522, 34 Am. St. Rep. 653, 18 L. R. A. 759.

South Carolina.— Harrison *v.* Berkley, 1 Strobh. 525, 47 Am. Dec. 578.

United States.— The Santa Rita, 176 Fed. 890, 100 C. C. A. 360 [*reversing* 173 Fed. 413]; The Joseph B. Thomas, 81 Fed. 578.

England.— Hughes *v.* Macfie, 2 H. & C. 744, 10 Jur. N. S. 682, 33 L. J. Exch. 177, 9 L. T. Rep. N. S. 513, 12 Wkly. Rep. 315; Lynch *v.* Knight, 9 H. L. Cas. 577, 5 L. T. Rep. N. S. 291, 11 Eng. Reprint 854.

See Damages, 13 Cyc. 28 *et seq.*; Negligence, 29 Cyc. 492 *et seq.*

Illustrations.— Thus where defendant, who was building a house, put in use a defective ladder, and a workman fell therefrom and knocked a man below him off a platform, it was held that the defect in the ladder was the proximate cause of the latter's injury. Ryan *v.* Miller, 12 Daly (N. Y.) 77. And where plaintiff, a horseshoer, shod a horse for A, and defendant, with the intent of making A believe that plaintiff's work was badly done, loosened the shoe, a declaration setting forth these facts and averring that plaintiff lost the custom of A stated a cause of action. Hughes *v.* McDonough, 43 N. J. L. 459, 39 Am. Rep. 603. So, where plaintiff, a manu-

5. Intervention of Irresponsible Individual. Where the act of an irresponsible plaintiff or third person intervenes as the direct cause of the damage, the liability of the defendant continues unbroken.[9] In accordance with this prin-

facturer of ice cream, purchased coloring matter manufactured by defendants, which was represented to be harmless, but which contained arsenic, it was held that defendants were liable for loss of custom suffered by plaintiff, since the refusals of the customers to further patronize plaintiff were not such intervening acts as would cut short the chain of events. Swain *v.* Schieffelin, 134 N. Y. 471, 31 N. E. 1025, 18 L. R. A. 385. And where defendant left a horse and cart standing in the street with no one to watch them, he was held liable for any damage done by them, although occasioned by the act of a passer-by who struck the horse. Illidge *v.* Goodwin, 5 C. & P. 190, 24 E. C. L. 520. So, where defendant's servants negligently left a signal torpedo on its railroad track and a boy picked it up, and in playing with it caused it to explode and injure plaintiff, another boy, defendant's negligence was the proximate cause. Harriman *v.* Pittsburgh, etc., R. Co., 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507. And where defendant, in violation of a statute, issued a permit to one M, the owner of a grocery cart, under which M kept the cart standing in the street, the thills being tied with strings, and an ice wagon struck the wheels of the cart and turned it around, and the string broke and one of the thills struck plaintiff's intestate, killing him, defendant was held liable. Cohen *v.* New York, 113 N. Y. 532, 21 N. E. 700, 10 Am. St. Rep. 506, 4 L. R. A. 406. In Clark *v.* Chambers, 3 Q. B. D. 327, 338, 47 L. J. Q. B. 427, 38 L. T. Rep. N. S. 454, 26 Wkly. Rep. 613, defendant had unlawfully placed a barrier set with spikes across a private road and a third party removed it and set it across a foot-path. On a dark night plaintiff walking along the foot-path encountered the barrier and was injured. It was held that the injury was the proximate result of defendant's act. "A man," said Cockburn, J., "who unlawfully places an obstruction across either a public or private way may anticipate the removal of the obstruction, by some one entitled to use the way, as a thing likely to happen; and if this should be done, the probability is that the obstruction so removed will, instead of being carried away altogether, be placed somewhere near." Doctrine applied where defendant has set a spring gun on his property see Bird *v.* Holbrook, 4 Bing. 628, 6 L. J. C. P. O. S. 146, 1 M. & P. 607, 29 Rev. Rep. 657, 13 E. C. L. 667. The principle likewise applies where a person unlawfully sells liquor to one who is injured or who injures a third party while in a condition of drunkenness produced thereby. Thus where defendant, an unlicensed dealer, furnished intoxicating liquor on Sunday to A, whom later, while helpless and unconscious, he placed in a sleigh to which plaintiff's horse was attached, he was liable for the loss of the horse caused by the inability of A to drive. Dunlap *v.* Wagner, 85 Ind. 529, 44 Am. Rep. 42. See also King *v.* Haley, 86 Ill. 106, 29 Am. Rep. 14; Schlosser *v.* State, 55 Ind. 82; Kearney *v.* Fitzgerald, 43 Iowa 580; Mead *v.* Stratton, 87 N. Y. 493, 41 Am. Rep. 386; Bertholf *v.* O'Reilly, 8 Hun (N. Y.) 16 [*affirmed* in 74 N. Y. 509, 30 Am. Rep. 323].

On the other hand, where hoisting shears were held in position by two guys, and a stevedore cast the front guy loose and did not refasten it, and the next day some boys swung on the rear guy and caused the shears to fall and break, when they would not have fallen but for the swinging of the boys, and the swinging of the boys would not have caused them to fall had the stevedore refastened the front guy, it was held that the stevedore was not liable for the injury to the shears by the fall. Tutein *v.* Hurley, 98 Mass. 211, 93 Am. Dec. 154. So, where defendant railroad company had negligently allowed its platform to become saturated with oil and it was subsequently fired by the carelessness of a teamster in dropping a match, causing the destruction of plaintiff's buildings, it was held that defendant was not liable, as the act of the teamster in dropping the match was not to have been anticipated as likely to occur. Stone *v.* Boston, etc., R. Co., 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794. And one who stores dynamite in a wooden building without giving proper warning cannot be expected to anticipate the act of one who shoots at a knot hole in the building and thus causes the dynamite to explode. McGhee *v.* Norfolk, etc., R. Co., 147 N. C. 142, 60 S. E. 912, 24 L. R. A. N. S. 119.

9. Thus where the injured party is an infant *non sui juris* the fact that his wrongful act or neglect has intervened will not exonerate defendant. Lynch *v.* Nurdin, 1 Q. B. 29, 5 Jur. 797, 10 L. J. Q. B. 73, 4 P. & D. 672, 41 E. C. L. 422, 113 Eng. Reprint 1041. It is on this principle that the doctrine of "attractive" or "alluring" nuisance rests, as illustrated by the "turntable" and kindred cases. See, Negligence, 29 Cyc. 463 *et seq.*

Dangerous articles.— One who delivers a carboy of nitric acid to a carrier, without informing him of its contents, is liable for an injury occasioned by the leaking of the acid upon another carrier to whom it is delivered by the first in the ordinary course of business to be carried to its destination. Farrant *v.* Barnes, 11 C. B. N. S. 553, 8 Jur. N. S. 868, 31 L. J. C. P. 137, 103 E. C. L. 553. So where defendant sold pistol cartridges to boys of ten and twelve years of age, who left one of them lying on the floor of their home, where it was picked up and discharged by a six-year-old child, it was held that the negligence of the two purchasers of the cartridges did not break the sequence. This result

ciple, where a wholesale dealer sells to a retailer an article rendered inherently dangerous by act of the vendor, the dangerous quality being secret and undisclosed, as in the case of a sale of poisonous drugs as harmless medicines, a subsequent sale in good faith by the retailer will be considered so far involuntary that the wholesaler's liability will continue.[10] This principle also applies where a manufacturer or dealer sells a machine, gun, or other article, or erects a scaffold or other structure, which is inherently dangerous by reason of secret and undisclosed defects, and the purchaser or a third person is injured in using the same.[11]

6. Intervention of Unconscious Instrument. The liability of the defendant also continues unbroken where the injury is directly caused by an unconscious instrument either set in motion by the wrong-doer, the original force imparted to it not having spent itself,[12] or made effective by his negligence, which continued to be operative at the time the injury occurred.[13]

should have been anticipated by defendant when he sold the cartridges. Binford *v.* Johnston, 82 Ind. 426, 42 Am. Rep. 508. And see Anderson *v.* Settergren, 100 Minn. 294, 111 N. W. 279. Where defendant, the owner of a loaded gun, sent a young girl of the age of thirteen or fourteen to fetch it, with directions to take out the priming, and the girl received the gun and in jest pointed it at plaintiff's son and pulled the trigger, and the gun went off and the bullet struck the son, defendant was held liable. Dixon *v.* Bell, 5 M. & S. 198, 105 Eng. Reprint 1023, 1 Stark. 287, 2 E. C. L. 114, 17 Rev. Rep. 308. In Carter *v.* Towne, 103 Mass. 507, where defendant had sold gunpowder to a child eight years old, it was held that he was not liable for injuries caused to the child by its explosion. This, however, was on the ground that the gunpowder had been in the possession and control of the child's parents for more than a week before the injury occurred and on the day of the accident had been handed to the child by his mother to play with. Hence the wrongful act of the mother intervened.

10. *Georgia.*— Blood Balm Co. *v.* Cooper, 83 Ga. 457, 10 S. E. 118, 20 Am. St. Rep. 324, 5 L. R. A. 612.

Massachusetts.— Norton *v.* Sewall, 106 Mass. 143, 8 Am. Rep. 298.

New York.— Thomas *v.* Winchester, 6 N. Y. 397, 57 Am. Dec. 455.

Pennsylvania.— Elkins *v.* McKean, 79 Pa. St. 493.

West Virginia.— Peters *v.* Johnson, 50 W. Va. 644, 41 S. E. 190, 88 Am. St. Rep. 909, 57 L. R. A. 428.

England.— George *v.* Skivington, L. R. 5 Exch. 1, 39 L. J. Exch. 8, 21 L. T. Rep. N. S. 495, 18 Wkly. Rep. 118.

See Negligence, 29 Cyc. 478 *et seq.* And see *supra*, III, F, 5.

11. *California.*— Lewis *v.* Terry, 111 Cal. 39, 43 Pac. 398, 52 Am. St. Rep. 146, 31 L. R. A. 220.

Georgia.— Woodward *v.* Miller, 119 Ga. 618, 46 S. E. 847, 100 Am. St. Rep. 188, 64 L. R. A. 932.

Massachusetts.— Bishop *v.* Weber, 139 Mass. 411, 1 N. E. 154, 52 Am. Rep. 715; Wellington *v.* Downer Kerosene Oil Co., 104 Mass. 64.

Minnesota.— Schubert *v.* J. R. Clark Co., 49 Minn. 331, 51 N. W. 1103, 32 Am. St. Rep. 559, 15 L. R. A. 818.

New York.— Kuelling *v.* Roderick Lean Mfg. Co., 183 N. Y. 78, 75 N. E. 1098, 111 Am. St. Rep. 691, 2 L. R. A. N. S. 303.

Pennsylvania.— Elkins *v.* McKean, 79 Pa. St. 493.

United States.— Huset *v.* J. I. Case Threshing Mach. Co., 120 Fed. 865, 57 C. C. A. 237, 61 L. R. A. 303.

England.— Heaven *v.* Pender, 11 Q. B. D. 503, 47 J. P. 709, 52 L. J. Q. B. 702, 49 L. T. Rep. N. S. 357; Langridge *v.* Levy, 6 L. J. Exch. 137, 2 M. & W. 519 [*affirmed* in 1 H. & H. 325, 7 L. J. Exch. 387, 4 M. & W. 337].

See Negligence, 29 Cyc. 478 *et seq.*

Article dangerous only when used in combination.—Where the article is in itself harmless and becomes dangerous only by being used in combination with some other article, the vendor, having no knowledge that it is to be used in such combination, is not liable to a third person who purchases the article from the original vendee, and who is injured while using it in such combination, although by mistake a different article was sold from what was intended. Davidson *v.* Nichols, 11 Allen (Mass.) 514.

Tort and contract see *supra*, III, F, 5.

12. Billman *v.* Indianapolis, etc., R. Co., 76 Ind. 166, 40 Am. Rep. 230; Lee *v.* Union R. Co., 12 R. I. 383, 34 Am. Rep. 668. Thus where a cow thrown by an engine struck the ground, bounced, and fell against plaintiff, it was held that the bounce and fall of the cow were not so far the proximate cause of the injury as to isolate defendant's negligence. Alabama Great Southern R. Co. *v.* Chapman, 80 Ala. 615, 2 So. 738. And one who strikes a horse, causing it to run away and collide with another's team, is liable for the injury. Forney *v.* Geldmacher, 75 Mo. 113, 42 Am. Rep. 388. And see Damages, 13 Cyc. 28 *et seq.*; Negligence, 29 Cyc. 499 *et seq.*

13. Thus where defendant's locomotive set fire to a fence, which was burned, and cattle got into plaintiff's field and damaged the crop, it was held that the burning of the fence was the proximate cause. Miller *v.* St. Louis, etc., R. Co., 90 Mo. 389, 2 S. W. 439. And where defendant was the aggressor in a

7. Involuntary Intervention. Nor will the intervening act of the injured person [14] or of some third person [15] which is involuntary and the result of the wrong-doer's act or omission cut short the chain of causation.

8. "The Last Clear Chance." Under what is sometimes referred to as the doctrine of the "last clear chance," where the injured party has been negligent in exposing himself to peril, such negligence on his part will not be regarded as the proximate cause if the wrong-doer either became aware of the peril in time to avoid the commission of the injury [16] or, according to the views of some courts,

fight with a third party with whom he and plaintiff were driving in a wagon, and the team ran away and plaintiff was thrown out and injured, defendant was held liable. Ezell *v.* Outland, 72 S. W. 784, 24 Ky. L. Rep. 1970.

14. This is illustrated where plaintiff has been forced unlawfully to alight from defendant's car and walk to his destination. Injuries suffered by reason thereof are deemed the proximate results of defendant's act. East Tennessee, etc., R. Co. *v.* Lockhart, 79 Ala. 315; Terre Haute, etc., R. Co. *v.* Buck, 96 Ind. 346, 49 Am. Rep. 168; Cincinnati, etc., R. Co. *v.* Eaton, 94 Ind. 474, 48 Am. Rep. 179. *Contra*, Lewis *v.* Flint, etc., R. Co., 54 Mich. 55, 19 N. W. 744, 52 Am. Rep. 790; Brown *v.* Chicago, etc., R. Co., 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41.

Avoiding danger to person.— So where a person wrongfully places another in a position of peril and the latter suffers injury in endeavoring to escape, the former is responsible for the injury. Lund *v.* Tyngsboro, 11 Cush. (Mass.) 563, 59 Am. Dec. 159; Ingalls *v.* Bills, 9 Metc. (Mass.) 1, 43 Am. Dec. 346; Schumaker *v.* St. Paul, etc., R. Co., 46 Minn. 39, 48 N. W. 559, 12 L. R. A. 257; Wilson *v.* Northern Pac. R. Co., 26 Minn. 278, 3 N. W. 333, 37 Am. Rep. 410; Estes *v.* Missouri Pac. R. Co., 110 Mo. App. 725, 85 S. W. 627; Tuttle *v.* Atlantic City R. Co., 66 N. J. L. 327, 49 Atl. 450, 88 Am. St. Rep. 491, 54 L. R. A. 582; Ehrgott *v.* New York, 96 N. Y. 264, 48 Am. Rep. 622; Twomley *v.* Central Park, etc., R. Co., 69 N. Y. 158, 25 Am. Rep. 162; Buel *v.* New York Cent. R. Co., 31 N. Y. 314, 88 Am. Dec. 271; Brown *v.* Chicago, etc., R. Co., 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41; Oliver *v.* La Valle, 36 Wis. 592; Stokes *v.* Saltonstall, 13 Pet. (U. S.) 181, 10 L. ed. 115; Woolley *v.* Scovell, 7 L. J. K. B. O. S. 41, 3 M. & R. 105; Jones *v.* Boyce, 1 Stark. 493, 18 Rev. Rep. 812, 2 E. C. L. 189. The rule is likewise applied where defendant has wrongfully placed a third person in a position of peril and plaintiff has been injured while engaged in the work of rescue. Thus where defendant had negligently allowed an opening in the railing of a bridge over a canal to remain unguarded, it was held liable for the death of a father, drowned while endeavoring to save his son who had fallen through the opening. Gibney *v.* State, 137 N. Y. 1, 33 N. E. 142, 33 Am. St. Rep. 690, 19 L. R. A. 365. And see Negligence, 29 Cyc. 500. In the preceding case the negligence consisted of an omission, that is, a failure originally to construct the bridge properly or permitting it to become dangerous, but the result is the same where the negligence is active, as where a railroad train is driven at a dangerous speed and a person is killed while endeavoring to rescue a child. Eckert *v.* Long Island R. Co., 43 N. Y. 502, 3 Am. Rep. 721. But the principle does not apply unless there was negligence either as to the person whose safety was imperiled or as to the rescuer after his efforts to make the rescue had begun. Jackson *v.* Standard Oil Co., 98 Ga. 749, 26 S. E. 60.

Avoiding danger to property.— In Pittsburgh *v.* Grier, 22 Pa. St. 54, 60 Am. Dec. 65, defendant negligently allowed piles of iron to remain on a public wharf. Plaintiff's steamboat was moored to the wharf. The river afterward rose and the boat struck on the iron. To avoid the danger it was backed into the stream, where it was struck by a floating body and sunk. It was held that defendant was liable.

15. This is most frequently illustrated where defendant's wrongful act or neglect has placed a third person in a position of peril and the endeavors of the latter to escape have injured plaintiff. The involuntary act of the third person is "but a link in the chain of causes of injury of which the defendant is the wrongful author." Ricker *v.* Freeman, 50 N. H. 420, 432, 9 Am. Rep. 267; Lowery *v.* Manhattan R. Co., 99 N. Y. 158, 1 N. E. 608, 52 Am. Rep. 12; Vandenburgh *v.* Truax, 4 Den. (N. Y.) 464, 47 Am. Dec. 268; Chambers *v.* Carroll, 199 Pa. St. 371, 49 Atl. 128; Scott *v.* Shepherd, W. Bl. 892, 96 Eng. Reprint 525, 3 Wils. C. P. 403, 95 Eng. Reprint 1124. Where defendant attempted illegally to chastise a slave, and the latter, in his flight to avoid the chastisement, jumped down a precipice and fractured his leg, defendant was held liable to the owner of the slave for such injuries, since they were the direct consequence of the illegal act. Johnson *v.* Perry, 2 Humphr. (Tenn.) 569. The rule is also applicable where defendant has negligently placed himself in a position of peril and the injury has been caused by the acts of third persons in effecting a rescue. Guille *v.* Swan, 19 Johns. (N. Y.) 381, 10 Am. Dec. 234. Where one has negligently placed himself in a position of peril and acting in sudden emergency makes an error in judgment, he is not thereby relieved from the original negligence if it appreciably contributed to cause injury to another. Schneider *v.* Second Ave. R. Co., 133 N. Y. 583, 30 N. E. 752.

16. *Colorado.*— Hector Min. Co. *v.* Robertson, 22 Colo. 491, 45 Pac. 406.

might have become aware of it had he exercised reasonable care to ascertain whether a peril which was to be anticipated did in fact exist.[17]

9. Arbitrary Rule in Certain Cases. Upon grounds of public policy, the courts of some of the states have adopted an arbitrary rule in certain cases and have established a point at which defendant's liability will cease, although logically the injury is the proximate result. The application of this rule arises most frequently in cases of fires negligently started. Recovery is here allowed in some states only by the owner of property to which the blaze has been immediately communicated.[18]

Indiana.— Wright *v.* Gaff, 6 Ind. 416; Wright *v.* Brown, 4 Ind. 95, 58 Am. Dec. 622; Indianapolis St. R. Co. *v.* Schmidt, 35 Ind. App. 202, 71 N. E. 663, 72 N. E. 478.

Ohio.— Cincinnati, etc., R. Co. *v.* Kassen, 49 Ohio St. 230, 31 N. E. 282, 16 L. R. A. 674; Kerwhaker *v.* Cleveland, etc., R. Co., 3 Ohio St. 172, 62 Am. Dec. 246.

South Carolina.— Farley *v.* Charleston Basket, etc., Co., 51 S. C. 222, 28 S. E. 193, 401.

England.— Tuff *v.* Warman, 5 C. B. N. S. 573, 5 Jur. N. S. 222, 27 L. J. C. P. 322, 6 Wkly. Rep. 693, 94 E. C. L. 573; Davies *v.* Mann, 6 Jur. 954, 12 L. J. Exch. 10, 10 M. & W. 546.

See Negligence, 29 Cyc. 530 *et seq.*

If defendant was guilty of no negligence after discovering plaintiff's peril, plaintiff cannot recover. Evansville, etc., R. Co. *v.* Hiatt, 17 Ind. 102; Evansville, etc., R. Co. *v.* Lowdermilk, 15 Ind. 120.

17. Guenther *v.* St. Louis, etc., R. Co., 108 Mo. 18, 18 S. W. 846; Richmond Traction Co. *v.* Martin, 102 Va. 209, 45 S. E. 886. And see Negligence, 29 Cyc. 531.

18. Van Inwegen *v.* Port Jervis, etc., R. Co., (N. Y. 1900) 58 N. E. 878; Hoffman *v.* King, 160 N. Y. 618, 55 N. E. 401, 73 Am. St. Rep. 715, 46 L. R. A. 672; Frace *v.* New York, etc., R. Co., 143 N. Y. 182, 38 N. E. 102; Read *v.* Nichols, 118 N. Y. 224, 23 N. E. 468, 7 L. R. A. 130; Ryan *v.* New York Cent. R. Co., 35 N. Y. 210, 91 Am. Dec. 49; Pennsylvania R. Co. *v.* Kerr, 62 Pa. St. 353, 1 Am. Rep. 431.

Reason stated.— "Nearly all fires are caused by negligence, in its extended sense. In a country where wood, coal, gas and oils are universally used, where men are crowded into cities and villages, where servants are employed, and where children find their home in all houses, it is impossible, that the most vigilant prudence should guard against the occurrence of accidental or negligent fires. A man may insure his own house, or his own furniture, but he cannot insure his neighbor's building or furniture, for the reason that he has no interest in them. To hold that the owner must not only meet his own loss by fire, but that he must guaranty the security of his neighbors on both sides, and to an unlimited extent, would be to create a liability which would be the destruction of all civilized society. No community could long exist, under the operation of such a principle. In a commercial country, each man, to some extent, runs the hazard of his neighbor's conduct, and each, by insurance against such hazards, is enabled to obtain a reasonable security against loss. To neglect such precaution, and to call upon his neighbor, on whose premises a fire originated, to indemnify him instead, would be to award a punishment quite beyond the offence committed. It is to be considered, also, that if the negligent party is liable to the owner of a remote building thus consumed, he would also be liable to the insurance companies who should pay losses to such remote owners. The principle of subrogation would entitle the companies to the benefit of every claim held by the party to whom a loss should be paid." Ryan *v.* New York Cent. R. Co., 35 N. Y. 210, 216, 91 Am. Dec. 49, per Hunt, J. *Contra*, Martin *v.* New York, etc., R. Co., 62 Conn. 331, 25 Atl. 239 (construing Gen. St. § 3581, providing that liability shall be absolute in the absence of contributory negligence); Fent *v.* Toledo, etc., R. Co., 59 Ill. 349, 14 Am. Rep. 13; Louisville, etc., R. Co. *v.* Nitsche, 126 Ind. 229, 26 N. E. 51, 22 Am. St. Rep. 582, 9 L. R. A. 750; Perley *v.* Eastern R. Co., 98 Mass. 414, 96 Am. Dec. 645; Ingersoll *v.* Stockbridge, etc., R. Co., 8 Allen (Mass.) 438; Hart *v.* Western R. Corp., 13 Metc. (Mass.) 99, 46 Am. Dec. 719; Hoyt *v.* Jeffers, 30 Mich. 181; Hooksett *v.* Concord R. Co., 38 N. H. 242 (construing Rev. St. c. 142, § 8, providing that "every railroad corporation shall be liable for all damages which shall accrue to any person or property within this State by fire or steam from any locomotive or other engine on such road"); Delaware, etc., R. Co. *v.* Salmon, 39 N. J. L. 299, 23 Am. Rep. 214; Adams *v.* Young, 44 Ohio St. 80, 4 N. E. 599, 58 Am. Rep. 789; Atkinson *v.* Goodrich Transp. Co., 60 Wis. 141, 18 N. W. 764, 50 Am. Rep. 352; Kellogg *v.* Chicago, etc., R. Co., 26 Wis. 223, 7 Am. Rep. 69; Milwaukee, etc., R. Co. *v.* Kellogg, 94 U. S. 469, 24 L. ed. 256.

Accumulation of combustible matter.— But where a railroad company has negligently permitted combustible matter to accumulate on its right of way, it will be liable for injuries due to the spread of fire by this means, although there is no proof of negligence in starting the fire. In such cases the tort consists in permitting the inflammable matter to accumulate. Fent *v.* Toledo, etc., R. Co., 59 Ill. 362; Louisville, etc., R. Co. *v.* Nitsche, 126 Ind. 229, 26 N. E. 51, 22 Am. St. Rep. 582, 9 L. R. A. 750; Chicago, etc., R. Co. *v.* McBride, 54 Kan. 172, 37 Pac. 978; Miller *v.* St. Louis, etc., R. Co., 90 Mo. 389, 2 S. W.

B. Concurring Cause.[19] Where the act or neglect of a third person concurs with that of the original wrong-doer, both being efficient causes in producing the injury, the liability of the latter continues,[20] and the same is true if the negligence

439; Delaware, etc., R. Co. *v.* Salmon, 39 N. J. L. 299, 23 Am. Rep. 214; Webb *v.* Rome, etc., R. Co., 49 N. Y. 420, 10 Am. Rep. 389; Haverly *v.* State Line, etc., R. Co., 135 Pa. St. 50, 19 Atl. 1013, 20 Am. St. Rep. 848; Pennsylvania R. Co. *v.* Hope, 80 Pa. St. 373, 21 Am. Rep. 100.

Liability for loss due to fire see NEGLIGENCE, 29 Cyc. 502; RAILROADS, 33 Cyc. 1338. 1347, 1348.

19. Joint and several liability see *infra*, V, B, 2.

20. *Illinois.*— Pullman Palace Car Co. *v.* Laack, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; Carterville *v.* Cook, 129 Ill. 152, 22 N. E. 14, 16 Am. St. Rep. 248, 4 L. R. A. 721; Union R., etc., Co. *v.* Shacklet, 119 Ill. 232, 10 N. E. 896; Peoria *v.* Simpson, 110 Ill. 294, 51 Am. Rep. 683; Wabash, etc., R. Co. *v.* Shacklet, 105 Ill. 364, 44 Am. Rep. 791; Lacon *v.* Page, 48 Ill. 499; Bloomington *v.* Bay, 42 Ill. 503; Joliet *v.* Verley, 35 Ill. 58, 85 Am. Dec. 342; McGary *v.* West Chicago St. R. Co., 85 Ill. App. 610.

Indiana.— Louisville, etc., Ferry Co. *v.* Nolan, 135 Ind. 60, 34 N. E. 710; Beaning *v.* South Bend Electric Co., (App. 1910) 90 N. E. 786.

Kansas.— Kansas City *v.* Slangstrom, 53 Kan. 431, 36 Pac. 706; Atchison *v.* King, 9 Kan. 550; Clay Centre *v.* Jevons, 2 Kan. App. 568, 44 Pac. 745.

Maine.— Allison *v.* Hobbs, 96 Me. 26, 51 Atl. 245; Lake *v.* Milliken, 62 Me. 240, 16 Am. Rep. 456.

Massachusetts.— Hayes *v.* Hyde Park, 153 Mass. 514, 27 N. E. 522, 12 L. R. A. 249; Flagg *v.* Hudson, 142 Mass. 280, 8 N. E. 42, 56 Am. Rep. 674; Eaton *v.* Boston, etc., R. Co., 11 Allen 500, 87 Am. Dec. 730.

Minnesota.— Johnson *v.* Northwestern Tel. Exch. Co., 48 Minn. 433, 51 N. W. 225; Campbell *v.* Stillwater, 32 Minn. 308, 20 N. W. 320, 50 Am. Rep. 567; Johnson *v.* Chicago, etc., R. Co., 31 Minn. 57, 16 N. W. 488; Griggs *v.* Fleckenstein, 14 Minn. 81, 100 Am. Dec. 199; McMahon *v.* Davidson, 12 Minn. 357.

New Hampshire.— Hooksett *v.* Amoskeag Mfg. Co., 44 N. H. 105.

New Jersey.— Cuff *v.* Newark, etc., R. Co., 35 N. J. L. 17, 10 Am. Rep. 205.

New York.— Slater *v.* Mersereau, 64 N. Y. 138; Barrett *v.* Third Ave. R. Co., 45 N. Y. 628; Webster *v.* Hudson River R. Co., 38 N. Y. 260; Creed *v.* Hartmann, 29 N. Y. 591, 86 Am. Dec. 341; Colegrove *v.* New York, etc., R. Co., 20 N. Y. 492, 75 Am. Dec. 418; Chapman *v.* New Haven R. Co., 19 N. Y. 341, 75 Am. Dec. 344.

Oregon.— Strauhal *v.* Asiatic Steamship Co., 48 Oreg. 100, 85 Pac. 230.

Pennsylvania.— Koelsch *v.* Philadelphia Co., 152 Pa. St. 355, 25 Atl. 522, 34 Am. St. Rep. 653, 18 L. R. A. 750; Bunting *v.* Hogsett, 139 Pa. St. 363, 21 Atl. 31, 33, 34, 23 Am. St. Rep. 192, 12 L. R. A. 268; Carlisle *v.* Brisbane, 113 Pa. St. 544, 6 Atl. 372, 57 Am. Rep. 483; North Pennsylvania R. Co. *v.* Mahoney, 57 Pa. St. 187.

Tennessee.— Snyder *v.* Witt, 99 Tenn. 618, 42 S. W. 441.

Texas.— Gulf, etc., R. Co. *v.* McWhirter, 77 Tex. 356, 14 S. W. 26, 19 Am. St. Rep. 756.

West Virginia.— Day *v.* Louisville Coal, etc., Co., 60 W. Va. 27, 53 S. E. 776, 10 L. R. A. N. S. 167.

Wisconsin.— Folsom *v.* Apple River Log-Driving Co., 41 Wis. 602.

United States.— Washington, etc., R. Co. *v.* Hickey, 166 U. S. 521, 17 S. Ct. 661, 41 L. ed. 1101; Brown *v.* Coxe, 75 Fed. 689.

England.— Burrows *v.* March Gas, etc., Co., L. R. 5 Exch. 67, 39 L. J. Exch. 33, 22 L. T. Rep. N. S. 24, 18 Wkly. Rep. 348 [*affirmed* in L. R. 7 Exch. 96, 41 L. J. Exch. 46, 26 L. T. Rep. N. S. 318, 20 Wkly. Rep. 493]; Hughes *v.* Macfie, 2 H. & C. 744, 10 Jur. N. S. 682, 33 L. J. Exch. 177, 9 L. T. Rep. N. S. 513, 12 Wkly. Rep. 315; Mathews *v.* London St. Tramways Co., 52 J. P. 774, 58 L. J. Q. B. 12, 60 L. T. Rep. N. S. 47.

See NEGLIGENCE, 29 Cyc. 496.

Illustrations.— Thus where defendant negligently piled lumber along a gangway, and a team driven by one R was so negligently driven that the wheel caught the end of one of the timbers and threw it down, it was held that "if the timbers were negligently piled by the defendants, the negligence continued until they were thrown down, and (concurring with the action of R) was a direct and proximate cause of the injury sustained by the plaintiff." Pastene *v.* Adams, 49 Cal. 87, 90. So one who fouls a stream is none the less responsible because others have contributed to the same injury. Hill *v.* Smith, 32 Cal. 166; Delaware, etc., Canal Co. *v.* Torrey, 33 Pa. St. 143. See WATERS. And where defendant left barrels of fish brine in a public street, and a third person spilled it, and cattle licked the brine and died, it was held that defendant was liable; the leaving of the barrels of brine in the street being the proximate cause. Henry *v.* Dennis, 93 Ind. 452, 47 Am. Rep. 378. So where the conductor of defendant's car compelled a child, who was a passenger, to stand on the platform, and another passenger, while leaving the car hastily, pushed the child from the platform and the latter was killed, it was held that the wrongful acts of conductor and passenger had concurred in producing the death and that defendant was responsible. Sheridan *v.* Brooklyn City, etc., R. Co., 36 N. Y. 39, 93 Am. Dec. 490, 1 Transcr. App. 49, 34 How. Pr. 217. And where one B, who had a box of tools on his shoulder, was struck by an engine negligently driven by one of defendant's employees, and some of the tools flew through the air and struck plaintiff, it

of defendant concurred with some accidental cause to which plaintiff had not legally contributed.[21] "Where there are two or more possible causes of injury, for one or more of which the defendant is not responsible, the plaintiff, in order to recover, must show by evidence that the injury was wholly or partly the result of that cause which would render the defendant liable. If the evidence in the case leaves it just as probable that the injury was the result of one cause as of the other, the plaintiff cannot recover." [22]

was held that, although the injury was the result of the concurring negligence of B and defendant, the latter was responsible. Hammill *v.* Pennsylvania R. Co., 56 N. J. L. 370, 29 Atl. 151, 24 L. R. A. 531.

Contrary rule in highway cases.—A contrary result has been reached in some states where the injury is the result of a defect in a highway combined with an independent cause for which the defendant municipality is not responsible. Aldrich *v.* Gorham, 77 Me. 287; Spaulding *v.* Winslow, 74 Me. 528; Perkins *v.* Fayette, 68 Me. 152, 28 Am. Rep. 84; Clark *v.* Lebanon, 63 Me. 393; Moulton *v.* Sanford, 51 Me. 127; Moore *v.* Abbot, 32 Me. 46; Wright *v.* Templeton, 132 Mass. 49; Shepherd *v.* Chelsea, 4 Allen (Mass.) 113; Kidder *v.* Dunstable, 7 Gray (Mass.) 104; Rowell *v.* Lowell, 7 Gray (Mass.) 100, 66 Am. Dec. 464; Marble *v.* Worcester, 4 Gray (Mass.) 395. But *compare* Ring *v.* Cohoes, 77 N. Y. 83, 33 Am. Rep. 574, reviewing many authorities and holding that while a municipal corporation is only bound to exercise reasonable skill and diligence in keeping its streets safe for such use as may reasonably be expected, and is not bound to keep them in such a condition that damage may not be caused by horses who have escaped from the control of their drivers and are running away, nevertheless where a horse becomes frightened and unmanageable without any fault on the part of the driver, and this with a culpable defect in the highway produces an injury, the municipality is liable, provided the injury would not have been sustained but for such defect, the fact that the horse was at the time beyond the control of the driver being no defense. See also STREETS AND HIGHWAYS, 37 Cyc. 1.

21. Baldwin *v.* Treenwoods Turnpike Co., 40 Conn. 238, 16 Am. Rep. 33; Beaning *v.* South Bend Electric Co., (Ind. App. 1910) 90 N. E. 786; Ring *v.* Cohoes, 77 N. Y. 83, 33 Am. Rep. 574. Thus if the act of a dog is the sole and proximate cause of the shying of a horse and such shying is not the result of any vicious habit of the horse, the fact that the shying contributed to plaintiff's injury will not prevent a recovery against the owner of the dog. Denison *v.* Lincoln, 131 Mass. 236. A somewhat peculiar view, however, is taken in Cook *v.* Minneapolis, etc., R. Co., 98 Wis. 624, 644, 74 N. W. 561, 67 Am. St. Rep. 830, 40 L. R. A. 457. Here a fire started by defendant's negligence met a fire having no responsible origin and the two united and destroyed property which either would have destroyed had the other not existed. It was held that "no damage in such circumstances can be traced, with reasonable certainty, to wrong-doing as a producing cause. The one traceable to the wrong-doer is superseded by the other cause or condition, which takes the place of it and becomes, in a physical sense, the proximate antecedent of what follows."

22. Grant *v.* Pennsylvania, etc., R. Co., 133 N. Y. 657, 659, 31 N. E. 220. And see Marble *v.* Worcester, 70 Mass. 395; Laidlaw *v.* Sage, 158 N. Y. 73, 52 N. E. 679, 44 L. R. A. 216; Ayres *v.* Hammondsport, 130 N. Y. 665, 29 N. E. 265; Taylor *v.* Yonkers, 105 N. Y. 202, 11 N. E. 642, 59 Am. Rep. 492; Searles *v.* Manhattan R. Co., 101 N. Y. 661, 5 N. E. 66; Ring *v.* Cohoes, 77 N. Y. 83, 33 Am. Rep. 574; Pickard *v.* Collins, 23 Barb. (N. Y.) 444; Mahan *v.* Brown, 13 Wend. (N. Y.) 261, 28 Am. Dec. 461; Consumers' Brewing Co. *v.* Doyle, 102 Va. 399, 46 S. E. 390; Norfolk, etc., R. Co. *v.* Poole, 100 Va. 148, 40 S. E. 627.

Illustrations.—In Leeds *v.* New York Tel. Co., 178 N. Y. 118, 70 N. E. 219, a telephone wire attached to a thirty-nine-foot chimney extended across the street to the top of a building one hundred feet high. The boom of a derrick used in hoisting materials struck the wire and pulled the chimney over. Plaintiff was injured by the falling brick. It was held that "guilty, or responsible, concurrence in causing an injury involves the idea of two, or more, active agencies, co-operating to produce it; either of which must be an efficient cause, without the operation of which the accident would not have happened," and that the negligence of the owner of the chimney was not an efficient concurring cause. In Pollett *v.* Long, 56 N. Y. 200, defendant negligently constructed and maintained a dam which broke away, discharged a large quantity of water into the stream, tore out an intermediate dam and with the volume of water thus increased broke down the dam of K & S, plaintiff's assignors. The trial court charged in substance that for plaintiff to recover, defendant's negligence must have been the sole cause of the injury; that although defendant's dam was defective, if there was sufficient water in the middle pond when it gave way to increase materially the volume and force of the stream the damages for injury to the lower dam would be too remote. This was held error. The question was whether the injury would have occurred in the absence of the break in defendant's dam. "If it would it was not caused by the break, so as to make the defendant liable; if it would not, it was so caused, and the defendant was liable therefor, although other causes tending to produce the result may have been in operation,

C. Accompanying Condition. But where two distinct causes, unrelated in operation, contribute to an injury, one of them being a direct cause and the other merely furnishing the condition or giving rise to the occasion by which the injury was made possible, the former will alone be regarded as responsible for the result.[23]

D. Functions of Court and Jury. It is the province of the jury, under proper instructions, to determine whether the injury is the proximate result of defendant's act or neglect, unless the material facts are not in dispute.[24] If, how-

which would not have produced it in the absence of such break." In Stone *v.* Boston, etc., R. Co., 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794, it was held that where defendant railroad company negligently allowed its platform to become saturated with oil, and it was subsequently fired by the act of a teamster in carelessly dropping a match, resulting in the destruction of plaintiff's buildings, the acts of defendant and the teamster were not concurrent, so as to render defendant liable.

23. Louisville, etc., Ferry Co. *v.* Nolan, 135 Ind. 60, 34 N. E. 710; Missouri Pac. R. Co. *v.* Columbia, 65 Kan. 390, 69 Pac. 338, 58 L. R. A. 399; Stone *v.* Boston, etc., R. Co., 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794; Silver *v.* Frazier, 3 Allen (Mass.) 382, 81 Am. Dec. 662; Lewis *v.* Flint, etc., R. Co., 54 Mich. 55, 19 N. W. 744, 52 Am. Rep. 790.

Illustrations.— In Hope *v.* Fall Brook Coal Co., 3 N. Y. App. Div. 70, 38 N. Y. Suppl. 1040, plaintiff, a night switchman, was injured while coupling an engine to a gondola car. The engine had a light, but just as the car was reached there was an escape of steam from the relief valve of the cylinder or steam chest and also from the piston of the cylinder. This was due to the act of the engineer who reversed his engine to decrease motion. The steam blinded plaintiff as he reached over to make the coupling and his hand was caught between the bumpers. It was held that the cause of the injury was the action of the buffers in coming together and that the escape of the steam was merely a condition. So, where plaintiff was leading a horse behind a wagon, and defendant's dog bit the horse, it was held that "the leading of a horse behind a wagon was simply a condition, and not, in any just sense, a contributory cause of the injury. . . . The law does not pay this respect to the characteristics or prejudices of dogs." Boulester *v.* Parsons, 161 Mass. 182, 36 N. E. 790. The principle may likewise apply where defendant has been guilty of illegal conduct. Thus where defendant's car was driven at a prohibitive rate of speed, although this was evidence of negligence, it was not conclusive. Hanlon *v.* South Boston Horse R. Co., 129 Mass. 310. So, where a tree negligently permitted by a person to remain standing is blown down and strikes a passing car, injuring the motorman, the latter's right to recover is not defeated by the fact that at the time of the accident he was running his car at an illegal rate of speed. Berry *v.* Sugar Notch, 191 Pa. St. 345, 43 Atl. 240.

Sunday travel.— Plaintiff's violation of a statute prohibiting travel on Sunday is not to be regarded as the contributing cause of an injury occurring on that day, due to the act or neglect of defendant. Bridges *v.* Bridges, 93 Me. 557, 45 Atl. 827 (by Act (1895), c. 129, the statutory prohibition against Sabbath breaking shall not be construed to bar "any action for a tort or injury suffered on Sunday"); White *v.* Lang, 128 Mass. 598, 35 Am. Rep. 402; Delaware, etc., R. Co. *v.* Trautwein, 52 N. J. L. 169, 19 Atl. 178, 19 Am. St. Rep. 442, 7 L. R. A. 435; Platz *v.* Cohoes, 89 N. Y. 219, 42 Am. Rep. 286; Carroll *v.* Staten Island R. Co., 58 N. Y. 126, 17 Am. Rep. 221; Baldwin *v.* Barney, 12 R. I. 392, 34 Am. Rep. 670; Sutton *v.* Wauwatosa, 29 Wis. 21, 9 Am. Rep. 534; Philadelphia, etc., R. Co. *v.* Philadelphia, etc., Steam Tow Boat Co., 23 How. (U. S.) 209, 16 L. ed. 433. *Compare*, however, Lyons *v.* Desotelle, 124 Mass. 387; Smith *v.* Boston, etc., R. Co., 120 Mass. 490, 21 Am. Rep. 538; Connolly *v.* Boston, 117 Mass. 64, 19 Am. Rep. 396; Jones *v.* Andover, 10 Allen (Mass.) 18; Bosworth *v.* Swansey, 10 Metc. (Mass.) 363, 43 Am. Dec. 441; Johnson *v.* Irasburgh, 47 Vt. 28, 19 Am. Rep. 111; Holcomb *v.* Danby, 51 Vt. 428. Mass. Gen. Laws (1884), c. 37, § 1, provides that a violation of the statutes relating to observance of the Lord's day shall not constitute a defense to an action for a tort or injury suffered by a person on that day. See SUNDAY, 37 Cyc. 573.

Illegality of plaintiff's conduct as a defense see *infra*, VII, C, 2, c.

Distinction between condition and cause see NEGLIGENCE, 29 Cyc. 496.

24. *Alabama.*— East Tennessee, etc., R. Co. *v.* Lockhart, 79 Ala. 315.

Colorado.— Blythe *v.* Denver, etc., R. Co., 15 Colo. 333, 25 Pac. 702, 22 Am. St. Rep. 403, 11 L. R. A. 615.

Illinois.— Pullman Palace Car Co. *v.* Laack, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; Pullman Palace Car Co. *v.* Bluhm, 109 Ill. 20, 50 Am. Rep. 601.

Iowa.— Crowley *v.* Burlington, etc., R. Co., 65 Iowa 658, 20 N. W. 467, 22 N. W. 918.

Maine.— Lake *v.* Milliken, 62 Me. 240, 16 Am. Rep. 456; Willey *v.* Belfast, 61 Me. 569.

Maryland.— Green Ridge R. Co. *v.* Brinkman, 64 Md. 52, 20 Atl. 1024, 54 Am. Rep. 755.

Massachusetts.— Corey *v.* Havener, 182 Mass. 250, 65 N. E. 69.

Minnesota.— Schumaker *v.* St. Paul, etc., R. Co., 46 Minn. 39, 48 N. W. 559, 12 L. R. A. 257; Savage *v.* Chicago, etc., R. Co., 31

ever, the material facts are not in dispute, when the inference to be drawn is not rendered doubtful the question is for the court.[25]

V. PARTIES.

A. Persons Wronged — 1. THE STATE. Whatever may be the limitations upon the liability of sovereign states or political subdivisions thereof, it is settled that none exist upon their right to sue for a tort committed against their corporate rights.[26] Thus trover lies for timber unlawfully taken from the public lands,[27] and an action may be brought by the state for diverting or fouling a stream.[28]

2. CORPORATIONS. "Corporations, like individuals, constantly maintain actions, the object of which is the recovery of damages for wrongs done to them."[29] Thus a private corporation may sue to recover damages which result from a conspiracy,[30] trespass,[31] nuisance,[32] or libel.[33] And a city, town, or other municipal corporation

Minn. 419, 18 N. W. 272; Griggs *v.* Fleckenstein, 14 Minn. 81, 100 Am. Dec. 199.

Missouri.— Brink *v.* Kansas City, etc., R. Co., 17 Mo. App. 177.

New Hampshire.— Gilman *v.* Noyes, 57 N. H. 627.

New Jersey.— Cox *v.* Pennsylvania R. Co., 76 N. J. L. 786, 71 Atl. 250; Hammill *v.* Pennsylvania R. Co., 56 N. J. L. 370, 29 Atl. 151, 24 L. R. A. 531.

New York.— Ehrgott *v.* New York, 96 N. Y. 264, 48 Am. Rep. 622.

North Carolina.— McGhee *v.* Norfolk, etc., R. Co., 147 N. C. 142, 60 S. E. 912, 24 L. R. A. N. S. 119.

Ohio.—Adams *v.* Young, 44 Ohio St. 80, 4 N. E. 599, 58 Am. Rep. 789.

Pennsylvania.— Quinlan *v.* Philadelphia, 205 Pa. St. 309, 54 Atl. 1026; Davies *v.* McKnight, 146 Pa. St. 610, 23 Atl. 320; Haverly *v.* State Line, etc., R. Co., 135 Pa. St. 50, 19 Atl. 1013, 20 Am. St. Rep. 848; Drake *v.* Kiely, 93 Pa. St. 492; Pennsylvania R. Co. *v.* Hope, 80 Pa. St. 373, 21 Am. Rep. 100; Fairbanks *v.* Kerr, 70 Pa. St. 86, 10 Am. Rep. 664; Scott *v.* Hunter, 46 Pa. St. 192, 84 Am. Dec. 542; Hoehle *v.* Allegheny Heating Co., 5 Pa. Super. Ct. 21.

South Carolina.— Harrison *v.* Berkley, 1 Strobh. 525, 47 Am. Dec. 578.

Texas.— Eames *v.* Texas, etc., R. Co., 63 Tex. 660; Jones *v.* George, 61 Tex. 345, 48 Am. Rep. 280.

Wisconsin.— Deisenrieter *v.* Kraus-Merkel Malting Co., 97 Wis. 279, 72 N. W. 735; Brown *v.* Chicago, etc., R. Co., 54 Wis. 342, 11 N. W. 356, 41 Am. Rep. 41; Kellogg *v.* Chicago, etc., R. Co., 26 Wis. 223, 7 Am. Rep. 69.

United States.— Goodlander Mill Co. *v.* Standard Oil Co., 63 Fed. 400, 11 C. C. A. 253, 27 L. R. A. 583.

25. *Illinois.*— Chicago, etc., R. Co. *v.* Scates, 90 Ill. 586; Weatherford *v.* Fishback, 4 Ill. 170.

Kansas.— Missouri Pac. R. Co. *v.* Columbia, 65 Kan. 390, 69 Pac. 338, 58 L. R. A. 399.

Massachusetts.— Stone *v.* Boston, etc., R. Co., 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794; Gould *v.* Slater Woolen Co., 147 Mass. 315, 17 N. E. 531; Carter *v.* Towne, 103 Mass. 507.

Missouri.— Henry *v.* St. Louis, etc., R. Co., 76 Mo. 288, 43 Am. Rep. 762.

New York.— Van Inwegen *v.* Port Jervis, etc., R. Co., 165 N. Y. 625, 58 N. E. 878; Taylor *v.* Long Island R. Co., 16 N. Y. App. Div. 1, 44 N. Y. Suppl. 820.

North Carolina.— McGhee *v.* Norfolk, etc., R. Co., 147 N. C. 142, 60 S. E. 912, 24 L. R. A. N. S. 119.

Pennsylvania.— Bunting *v.* Hogsett, 139 Pa. St. 363, 21 Atl. 31, 33, 34, 23 Am. St. Rep. 192, 12 L. R. A. 268; South-Side Pass. R. Co. *v.* Trich, 117 Pa. St. 390, 11 Atl. 627, 2 Am. St. Rep. 672; West Mahanoy Tp. *v.* Watson, 112 Pa. St. 574, 3 Atl. 866, 56 Am. Rep. 336; Hoag *v.* Lake Shore, etc., R. Co., 85 Pa. St. 293, 27 Am. Rep. 653; Pennsylvania R. Co. *v.* Kerr, 62 Pa. St. 353, 1 Am. Rep. 431.

England.— Hoey *v.* Felton, 11 C. B. N. S. 142, 8 Jur. N. S. 764, 31 L. J. C. P. 105, 5 L. T. Rep. N. S. 354, 10 Wkly. Rep. 78, 103 E. C. L. 142; Greenland *v.* Chaplin, 5 Exch. 243, 19 L. J. Exch. 293.

See NEGLIGENCE, 29 Cyc. 639.

26. See STATES, 36 Cyc. 907; UNITED STATES.

27. Bolles Wooden-Ware Co. *v.* U. S., 106 U. S. 432, 1 S. Ct. 398, 27 L. ed. 230.

28. Kansas *v.* Colorado, 185 U. S. 125, 22 S. Ct. 552, 46 L. ed. 838; Missouri *v.* Illinois, 180 U. S. 208, 21 S. Ct. 331, 45 L. ed. 497.

29. 6 Thompson Corp. § 7383. And see CORPORATIONS, 10 Cyc. 1036 *et seq.*

30. Ilion Bank *v.* Carver, 31 Barb. (N. Y.) 230. See CORPORATIONS, 10 Cyc. 1336.

31. North Bridgewater Second Cong. Soc. *v.* Waring, 24 Pick. (Mass.) 304; Greenville, etc., R. Co. *v.* Partlow, 14 Rich. (S. C.) 237. See CORPORATIONS, 10 Cyc. 1336.

32. Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 108 U. S. 317, 2 S. Ct. 719, 27 L. ed. 739.

33. Hahnemannian L. Ins. Co. *v.* Beebe, 48 Ill. 87, 95 Am. Dec. 519; Trenton Mut. L., etc., Co. *v.* Perrine, 23 N. J. L. 402, 57 Am. Dec. 400; Mutual Reserve Fund Life Assoc. *v.* Spectator Co., 50 N. Y. Super. Ct. 460; Knickerbocker L. Ins. Co. *v.* Ecclesine, 34

may maintain an action for trespass, conversion, or other tort committed against its property.[34]

3. Individuals. Where the cause of action has not been assigned, or where it is not assignable, the suit must be brought by the individual whose legal rights have been infringed.[35] Where the duty violated has been imposed only by statute, a cause of action is created merely in favor of individuals belonging to the class which the legislature intended to protect. This rule has been applied, for example, where a statute requires railroad engineers to ring or whistle at crossings,[36] or prohibits a change of depot,[37] or makes it a felony for a bank director to receive money on deposit with knowledge of the bank's insolvency,[38] or a misdemeanor knowingly to permit a minor to have firearms in his possession.[39] But

N. Y. Super. Ct. 76, 11 Abb. Pr. N. S. 385, 42 How. Pr. 201 [*affirming* 6 Abb. Pr. N. S. 9]; Shoe, etc., Bank *v.* Thompson, 23 How. Pr. 253 [*affirmed* in 18 Abb. Pr. 413]; Temperance Mut. Ben. Assoc. *v.* Schweinhard, 3 Pa. Co. Ct. 353.

34. Kensington *v.* Philadelphia County, 13 Pa. St. 76; Milwaukee *v.* Herman Zoehrlaut Leather Co., 114 Wis. 276, 90 N. W. 187. See Municipal Corporations, 28 Cyc. 1755.

35. Green *v.* Kimble, 6 Blackf. (Ind.) 552; Kavanagh *v.* Barber, 131 N. Y. 211, 30 N. E. 235, 15 L. R. A. 689.

Nuisance.— Thus as a private nuisance is an injury to the owner or possessor of real property "as respects his dealing with, possessing or enjoying it," one who lives with his wife on premises belonging to her is not entitled to maintain an action to recover for annoyance and discomfort caused by the fumes and vapors of defendant's asphalt manufactory, although his wife and daughter became ill in consequence. Kavanagh *v.* Barber, 131 N. Y. 211, 30 N. E. 235, 15 L. R. A. 689. And see Hughes *v.* Auburn, 161 N. Y. 96, 55 N. E. 389, 46 L. R. A. 636. But see Ft. Worth, etc., R. Co. *v.* Glenn, 97 Tex. 586, 80 S. W. 992, 104 Am. St. Rep. 894, 65 L. R. A. 818. See also Nuisances, 29 Cyc. 1257.

Conversion of debtor's property not under attachment.—After an execution against the goods, etc., of A and his replevin bail B was delivered to the sheriff, C fraudulently converted certain goods of A to his own use, the latter having no other property. An execution was then levied on the property of B who paid a part of the judgment and sued C for said tort. It was held that no action would lie, as plaintiff had no legal interest in the goods when the injury was committed. Green *v.* Kimble, 6 Blackf. (Ind.) 552.

Trespass and waste.—A complaint to recover of defendant for wrongfully entering upon plaintiff's land, cultivating and raising crops without right and committing waste, after plaintiff had acquired title under a will, need not allege that plaintiff had taken possession or had offered to do so. Humphrey *v.* Merritt, 51 Ind. 197.

Possession with assertion of ownership prima facie evidence of title.— In an action for tort to personal property, possession, accompanied by an assertion of ownership, is *prima facie* evidence of property. Documentary evidence is only necessary when the ownership is denied and the production of papers is called for. Bas *v.* Steele, 2 Fed. Cas. No. 1,088, 3 Wash. 381.

36. Everett *v.* Great Northern R. Co., 100 Minn. 309, 111 N. W. 281, 9 L. R. A. N. S. 703, holding that a statute which required an engineer to ring a bell or sound the locomotive whistle while at a crossing was not for the benefit of a person who was driving a team along a street parallel to the railway track near a crossing, but who did not intend to use the crossing.

37. Missouri, etc., R. Co. *v.* Colburn, 90 Tex. 230, 38 S. W. 153 (holding that the purpose of a statute prohibiting a change of railway depot grounds when once established is to promote the interest of the public alone by making permanent places for the transaction of business by such corporations, that it is not for the protection of individual property-owners at such places, and hence a violation does not give a right of action against the railway company in favor of an individual who has bought property and made investments on the faith of the first location, to recover for depreciation in the value of such investments caused by the removal of the depot); House *v.* Houston Waterworks Co., 88 Tex. 233, 31 S. W. 179, 28 L. R. A. 532.

38. Baxter *v.* Coughlin, 70 Minn. 1, 72 N. W. 797, holding that where the statute prohibits the doing of an act or imposes a duty upon one, for the protection of individuals, if he disobeys the prohibition, or neglects to perform the duty, he is liable to those for whose protection the statute was enacted, for any damage resulting proximately from such disobedience or neglect, and therefore an act providing that any bank director who shall receive money on deposit knowing such bank to be unsafe or insolvent, shall be guilty of felony gives a cause of action in favor of one who has deposited money under such circumstances.

39. Where a statute makes it a misdemeanor to aid or knowingly permit a minor under a certain age to violate the prohibition against handling or having in his possession or control any firearms, one who loans a rifle and sells cartridges to a child under that age is liable to one injured by the discharge of the gun while in the infant's hands. Anderson *v.* Settergren, 100 Minn. 294, 297, 111 N. W. 279. And see Binford *v.* Johnston, 82 Ind. 426, 42 Am. Rep. 508.

the fact that injuries have been received by others growing out of the same wrong-doing will not prevent a recovery.[40] Thus in cases of defamation affecting a class or group, where there is personal application of the words to any member thereof he may maintain his action.[41]

4. Assignees. The ancient doctrine which forbade the assignment of choses in action for tort still applies to wrongs against the person or which do not survive death,[42] but not to wrongs such as trespass, conversion, and negligence, where the injury is to property rights.[43] Whether there can be a valid assignment of a "pure naked right to bring an action for fraud, unconnected with any property or thing which had itself a legal existence and value, independent of the right to sue for fraud," is disputed.[44]

B. Persons Culpable — 1. Several Liability — a. Personal Acts or Omissions — (I) *Public Officers.* As a general principle, in cases where the defense of "act of state" cannot be successfully interposed, the public officer will be responsible to the injured party for his personal acts of wrong-doing, although committed by virtue of his office. The doctrine that the United States or a state cannot be sued without its own consent has no application to suits

"The present general, if not universal, trend of American authorities, is to construe legislative enactments of this type as creating a duty to both the public and to private individuals, and to liberally interpret the class of persons for whose benefit the law was made." Anderson *v.* Settergren, *supra*, per Jaggard, J.

40. That more than one person has received special injury from a nuisance will not affect the right of each to bring an action. Francis *v.* Schoellkopf, 53 N. Y. 152. And see Nuisances, 29 Cyc. 1213.

41. Weston *v.* Commercial Advertiser Assoc., 184 N. Y. 479, 77 N. E. 660; Bornmann *v.* Star Co., 174 N. Y. 212, 66 N. E. 723; Gidney *v.* Blake, 11 Johns. (N. Y.) 54. And see Libel and Slander, 25 Cyc. 363.

42. See Abatement and Revival, 1 Cyc. 49 *et seq.*; Assignments, 4 Cyc. 23 *et seq.*

Personal injuries.— Linton *v.* Hurley, 104 Mass. 353; Rice *v.* Stone, 1 Allen (Mass.) 566; Pulver *v.* Harris, 52 N. Y. 73. And see Abatement and Revival, 1 Cyc. 49, 60 *et seq.*; Assignments, 4 Cyc. 24.

Libel and slander.—A chose in action arising out of tort strictly personal, as libel and slander, is not assignable. After verdict in slander, but before judgment entered thereon and while appeal is pending, the claim for damages continues to be a chose in action. Miller *v.* Newell, 20 S. C. 123, 47 Am. Rep. 833. See Abatement and Revival, 1 Cyc. 61; Assignments, 4 Cyc. 24.

43. *California.*— More *v.* Massini, 32 Cal. 590.

Connecticut.—Whitaker *v.* Gavit, 18 Conn. 522.

Iowa.— Everett *v.* Central Iowa R. Co., 73 Iowa 442, 35 N. W. 609.

Mississippi.— Chicago, etc., R. Co. *v.* Packwood, 59 Miss. 280.

New York.— Fulton F. Ins. Co. *v.* Baldwin, 37 N. Y. 648; McKee *v.* Judd, 12 N. Y. 622, 64 Am. Dec. 515; Wickham *v.* Roberts, 112 N. Y. App. Div. 742, 98 N. Y. Suppl. 1092; Baumann *v.* Jefferson, 4 Misc. 147, 23 N. Y. Suppl. 685.

See Abatement and Revival, 1 Cyc. 49 *et seq.*; Assignments, 4 Cyc. 24.

Rule stated.—"The ancient doctrine was that a demand arising out of a tort was not assignable, but the modern cases restrict the principle to torts against the person, or to such as did not survive to the personal representative after death, such, for instance, as slander, assault and battery, seduction, and the like. Torts to property, on the other hand, whereby the estate of a party is destroyed or diminished, are now held assignable either by the act of the party, or by general assignments by operation of law, and the doctrine is recognized both in England and America." Chicago, etc., R. Co. *v.* Packwood, 59 Miss. 280, 282, per Chalmers, C. J. "It is now the general rule in this country that causes of action arising from torts to property, real or personal, or injuries to the decedent's estate by which its value is diminished, survive and go to the executor and are assets in his hands, and such causes of action are assignable. But it is usually held that torts to the person or character, when the injury or damage is confined to the body or the feelings . . . are . . . not assignable." North Chicago St. R. Co. *v.* Ackley, 171 Ill. 100, 105, 49 N. E. 222, 44 L. R. A. 177, per Phillips, C. J.

44. That it is non-assignable see Archer *v.* Freeman, 124 Cal. 528, 57 Pac. 474 (misrepresentations on the purchase of land as to the immediate building of a college in the vicinity and the donation of one hundred thousand dollars to defendant for that purpose); Smith *v.* Thompson, 94 Mich. 381, 54 N. W. 168 (fraud in procuring stock and control of corporation with purpose of wrecking it); Killen *v.* Barnes, 106 Wis. 546, 82 N. W. 536 (misrepresentations as to the safety of a bank whereby one was induced to deposit his money therein). That it is assignable see Metropolitan L. Ins. Co. *v.* Fuller, 61 Conn. 252, 23 Atl. 193, 29 Am. St. Rep. 196 (fraud in procuring surrender and cancellation of life insurance policies); Dean *v.* Chandler, 44 Mo. App. 338 (false representations by

against its officers and agents. Thus the latter are responsible for an unlawful trespass upon real property belonging to plaintiff,[45] for the infringement of a patent,[46] for the seizure of a vessel[47] or of liquors,[48] for the unlawful arrest of a recalcitrant witness while the officer was acting as sergeant-at-arms of the house of representatives,[49] and for the maintenance of a nuisance.[50] But public policy has led to the adoption of a different rule in certain cases, as where defamatory statements are made by legislators in the course of debate,[51] or injuries are inflicted in the proper exercise of the police power.[52] Again, no liability can arise out of the nonfeasance of judicial functions or out of misfeasance therein where jurisdiction exists. The rule applies not only to judges,[53] but to all officers exercising

agent as to purchase-price of mine by which plaintiff's assignor was induced to pay excessive price). See ASSIGNMENTS, 4 Cyc. 23 *et seq.*

45. "No man in this country is so high that he is above the law. . . . All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it. . . . Shall it be said in the face of all this, and of the acknowledged right of the judiciary to decide, in proper cases, statutes which have been passed by both branches of Congress and approved by the President to be unconstitutional, that the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without lawful authority, without process of law, and without compensation, because the President has ordered it and his officers are in possession? If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights." U. S. *v.* Lee, 106 U. S. 196, 220, 27 L. ed. 171.

46. Belknap *v.* Schild, 161 U. S. 10, 16 S. Ct. 443, 40 L. ed. 599; Head *v.* Porter, 48 Fed. 481.

47. The Flying Fish, 2 Cranch (U. S.) 170, 2 L. ed. 243.

48. Bates *v.* Clark, 95 U. S. 204, 24 L. ed. 471.

49. Kilbourn *v.* Thompson, 103 U. S. 168, 26 L. ed. 377.

50. While a county is not liable for a nuisance caused by sewage from a penitentiary, almshouse, and farm maintained for public purposes, it seems that an action lies against the board of supervisors and the officers in control. Lefrois *v.* Monroe County, 162 N. Y. 563, 57 N. E. 185, 50 L. R. A. 206.

51. "And for any Speech or Debate in either House they [United States Senators and Representatives] shall not be questioned in any other Place." U. S. Const. art. 1, § 6. A similar provision is generally found in the various state constitutions. See N. Y. Const. art. 3, § 12. And see LIBEL AND SLANDER, 25 Cyc. 376. But a charge that plaintiff had robbed a bank made by a member of the Legislature when not relevant to proceedings then before the house and while the legislator was standing in a passageway leading to the legislative chambers is not privileged. Coffin *v.* Coffin, 4 Mass. 1, 3 Am. Dec. 189.

52. Train *v.* Boston Disinfecting Co., 144 Mass. 523, 11 N. E. 929, 59 Am. Rep. 113, disinfecting rags. And see TRESPASS.

Necessity must be established. But the necessity of the action must be established. Thus where the statute provides for the summary killing of animals having the glanders, the existence of this disease in the animal killed must be proved by the officer killing, if an action is brought against him therefor. Miller *v.* Horton, 152 Mass. 540, 26 N. E. 100, 23 Am. St. Rep. 850, 10 L. R. A. 116.

53. *Massachusetts.*— White *v.* Morse, 139 Mass. 162, 29 N. E. 539; Pratt *v.* Gardner, 2 Cush. 63, 48 Am. Dec. 652.

New York.— Austin *v.* Vrooman, 128 N. Y. 229, 28 N. E. 477, 14 L. R. A. 138; Landt *v.* Hilts, 19 Barb. 283; Harman *v.* Brotherson, 1 Den. 537; Yates *v.* Lansing, 5 Johns. 282.

Tennessee.—Webb *v.* Fisher, 109 Tenn. 701, 72 S. W. 110, 97 Am. St. Rep. 863, 60 L. R. A. 791.

West Virginia.— Fausler *v.* Parsons, 6 W. Va. 486, 20 Am. Rep. 431.

England.— Fray *v.* Blackburn, 3 B. & S. 576, 113 E. C. L. 576; Ward *v.* Freeman, 2 Ir. C. L. 460; Ackerley *v.* Parkinson, 3 M. & S. 411, 16 Rev. Rep. 317, 105 Eng. Reprint 665.

See JUDGES, 23 Cyc. 567 *et seq.*; JUSTICES OF THE PEACE, 24 Cyc. 421.

Rule stated.— An action cannot be maintained against a justice of the peace, it being alleged that he wilfully and maliciously received a false and groundless complaint, issued his warrant thereon, and tried and convicted plaintiff. "It is a principle lying at the foundation of all well ordered jurisprudence, that every judge, whether of a higher or lower court, exercising the jurisdiction vested in him by law, and deciding upon the rights of others, should act upon his own free, unbiased convictions, uninfluenced by any apprehension of consequences. It is with a view to his qualifications for this duty, as well in regard to his firmness as to his intelligence and impartiality, that he ought to be selected by the appointing power. He is not bound, at the peril of an action for damages, or of a personal controversy, to decide right, in matter either of law or of fact; but to decide according to his own convictions of right, of which his recorded judgment is the best, and must be taken to be conclusive evi-

judicial functions, such as the assessment of property for taxation,[54] the letting of contracts,[55] the passing upon the validity of claims,[56] and acts of a similar nature,[57] although it is otherwise where there is an absence of jurisdiction[58] or where the duties imposed are purely ministerial in their nature.[59] The following have been included in the latter class: Constructing a sewer properly and keeping it in repair,[60] receiving the votes of electors,[61] collecting and returning taxes,[62] "dipping" sheep affected with scab,[63] taking the acknowledgment of a deed or other instrument,[64] granting or refusing a license to sell liquor,[65] investing public funds,[66] and seizing property or person under process.[67] Furthermore, by

dence. Such, of necessity, is the nature of the trust assumed by all on whom judicial power, in greater or lesser measure, is conferred. This trust is fulfilled when he honestly decides according to the conclusions of his own mind in a given case, although there may be great conflict of evidence, great doubts of the law, and when another mind might honestly come to a different conclusion. But in a controverted case, however slight may be the preponderance in one scale, it must lead to a decision as conclusive as if the weight were all in that scale. Now it is manifest that to every controversy there are two sides, and that a decision in favor of one must be against another. And this may extend to every interest which men hold most dear; to property, reputation, and liberty, civil and social; to political and religious privileges; to all that makes life desirable, and to life itself. If an action might be brought against the judge by a party feeling himself aggrieved, the judge would be compelled to put in issue facts in which he has no interest, and the case must be tried before some other judge, who, in his turn, might be held amenable to the losing party, and so on indefinitely. If it be said, that it may be conceded that the action will not lie unless in a case where a judge has acted partially or corruptly, the answer is, that the losing party may always aver that the judge has acted partially or corruptly, and may offer testimony of bystanders or others to prove it; and these proofs are addressed to the court and jury, before whom the judge is called to defend himself, and the result is made to depend not upon his own original conviction,— the conclusion of his own mind, in the decision of the original case,— as by the theory of jurisprudence it ought to do, but upon the conclusions of other minds, under the influence of other and different considerations." Pratt *v.* Gardner, 2 Cush. (Mass.) 63, 68, 48 Am. Dec. 652, per Shaw, C. J.

54. As tax assessors act in a judicial capacity when fixing the value of taxable property, they are not responsible in a civil action where, having jurisdiction, they fail to make an allowance or exemption, or assess at too high a rate. Weaver *v.* Devendorf, 3 Den. (N. Y.) 117; Steele *v.* Dunham, 26 Wis. 393. See TAXATION, 37 Cyc. 978, 984.

55. No liability is incurred in the letting of contracts to the "lowest responsible bidder." The determination of responsibility involves the exercise of a judicial function. East River Gaslight Co. *v.* Donnelly, 93 N. Y. 557.

56. The postmaster-general acts judicially in passing upon the validity of assignments or transfers of claims against his department. Spalding *v.* Vilas, 166 U. S. 483, 16 S. Ct. 631, 40 L. ed. 780.

57. *California.*— De Courcey *v.* Cox, 94 Cal. 665, 30 Pac. 95.

Nebraska.— State *v.* Hastings, 37 Nebr. 96, 55 N. W. 774.

New York.— People *v.* Land Office Com'rs, 149 N. Y. 26, 43 N. E. 418; Hill *v.* Sellick, 21 Barb. 207; Seaman *v.* Patten, 2 Cai. 312.

North Carolina.— Hannon *v.* Grizzard, 99 N. C. 161, 6 S. E. 93.

Wisconsin.— Druecker *v.* Salomon, 21 Wis. 621, 94 Am. Dec. 571.

United States.— Kendall *v.* Stokes, 3 How. 87, 11 L. ed. 506, 833; Gould *v.* Hammond, 10 Fed. Cas. No. 5,638, McAllister 235.

58. Stephens *v.* Wilson, 115 Ky. 27, 72 S. W. 336, 24 Ky. L. Rep. 1832. See JUDGES, 23 Cyc. 567 *et seq.*; JUSTICES OF THE PEACE, 24 Cyc. 423.

59. See JUDGES, 23 Cyc. 571; JUSTICES OF THE PEACE, 24 Cyc. 425.

60. McCarthy *v.* Syracuse, 46 N. Y. 194.

61. Lincoln *v.* Hapgood, 11 Mass. 350; Jeffries *v.* Ankeny, 11 Ohio 372; Ashby *v.* White, 2 Ld. Raym. 938, 92 Eng. Reprint 126, 1 Salk. 19, 91 Eng. Reprint 19. *Contra*, Bevard *v.* Hoffman, 18 Md. 479, 81 Am. Dec. 618. See ELECTIONS, 15 Cyc. 314 *et seq.*

62. Raynsford *v.* Phelps, 43 Mich. 342, 5 N. W. 403, 38 Am. Rep. 189.

63. Bair *v.* Struck, 29 Mont. 45, 74 Pac. 69, 63 L. R. A. 481.

64. People *v.* Bartels, 138 Ill. 322, 27 N. E. 1091.

65. Grider *v.* Tally, 77 Ala. 422, 54 Am. Rep. 65.

66. State *v.* Ruth, 9 S. D. 84, 68 N. W. 189, failure of school and public lands commissioner to make estimate of funds and notify county auditors, thereby causing funds to remain uninvested with consequent loss of interest.

67. In determining the liability of an officer for the seizure of property under a writ, such writs "may be divided into two classes. 1 — Those in which the process or order of the court describes the property to be seized, and which contain a direct command to the officer to take possession of that particular property. Of this class are the writ of replevin at common law, orders of sequestration in chancery, and nearly all the processes of

the weight of authority a distinction exists between judges of the courts of superior or general and those of inferior or limited jurisdiction. Of the former it has been well said: "It is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. . . . Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed. The purity of their motives cannot in this way be the subject of judicial inquiry." [68] Therefore a judge of a court of record of superior or general jurisdiction is not liable to a civil action where the act complained of was committed in the exercise of jurisdiction or constituted merely an excess of jurisdiction, even though it is alleged to have been committed maliciously or corruptly, although there is no immunity where jurisdiction was absolutely lacking and the want of jurisdiction was known.[69] But the judge of a court of

the admiralty courts, by which the *res* is brought before it for its action. 2 — Those in which the officer is directed to levy the process upon property of one of the parties to the litigation, sufficient to satisfy the demand against him, without describing any specific property to be thus taken. Of this class are the writ of attachment, or other mesne process, by which property is seized before judgment to answer to such judgment when rendered, and the final process of execution, elegit, or other writ, by which an ordinary judgment is carried into effect. It is obvious, on a moment's consideration, that the claim of the officer executing these writs, to the protection of the courts from which they issue, stands upon very different grounds in the two classes of process just described. In the first class he has no discretion to use, no judgment to exercise, no duty to perform but to seize the property described. It follows from this, as a rule of law of universal application, that if the court issuing the process had jurisdiction in the case before it to issue that process, and it was a valid process when placed in the officer's hands, and that, in the execution of such process, he kept himself strictly within the mandatory clause of the process, then such writ or process is a complete protection to him, not only in the court which issued it, but in all other courts. And in addition to this, in many cases the court which issued the process will interfere directly to protect its officers from being harassed or interfered with by any person, whether a party to the litigation or not. Such is the habitual course of the court of chancery, operating by injunction against persons who interfere by means of other courts. And instances are not wanting, where other courts have in a summary manner protected their officers in the execution of their mandates. It is creditable, however, to the respect which is paid to the process of courts of competent jurisdiction in this country, that the occasion for the exercise of such a power is very rare. In the other class of writs to which we have referred, the officer has a very large and important field for the exercise of his judgment and discretion. First, in ascertaining that the property on which he proposes to levy, is the property of the person against whom the writ is directed; secondly, that it is the property which, by law, is subject to be taken under the writ; and thirdly, as to the quantity of such property necessary to be seized in the case in hand. In all these particulars he is bound to exercise his own judgment, and is legally responsible to any person for the consequences of any error or mistake in its exercise to his prejudice. He is so liable to plaintiff, to defendant, or to any third person whom his erroneous action in the premises may injure. And what is more important to our present inquiry, the court can afford him no protection against the parties so injured; for the court is in no wise responsible for the manner in which he exercises that discretion which the law reposes in him, and in no one else." Buck *v.* Colbath, 3 Wall. (U. S.) 334, 343, 18 L. ed. 257, per Miller, J. And see Meadow *v.* Wise, 41 Ark. 285; Black *v.* Clasby, 97 Cal. 482, 32 Pac. 564; Rankin *v.* Ekel, 64 Cal. 446, 1 Pac. 895; Boulware *v.* Craddock, 30 Cal. 190; Bodega *v.* Perkerson, 60 Ga. 516; Ilg *v.* Burbank, 59 Ill. App. 291; Symonds *v.* Hall, 37 Me. 354, 59 Am. Dec. 53; Willard *v.* Kimball, 10 Allen (Mass.) 211, 87 Am. Dec. 632; Hallowell, etc., Bank *v.* Howard, 14 Mass. 181; Alvord *v.* Haynes, 13 Hun (N. Y.) 26; Chapman *v.* Douglas, 5 Daly (N. Y.) 244, 15 Abb. Pr. N. S. 421; Wintringham *v.* Lafoy, 7 Cow. (N. Y.) 735; Welsh *v.* Bell, 32 Pa. St. 12; Hunt *v.* Lathrop, 7 R. I. 58.

Liability of officer making arrest with or without process see ARREST, 3 Cyc. 875 *et seq.*; FALSE IMPRISONMENT, 19 Cyc. 339 *et seq.*

Seizure of property see ATTACHMENT, 4 Cyc. 831 *et seq.*; EXECUTIONS, 17 Cyc. 1572; SHERIFFS AND CONSTABLES, 1625 *et seq.*

68. Bradley *v.* Fisher, 13 Wall. (U. S.) 335, 347, 20 L. ed. 646, per Field, J.

69. In Bradley *v.* Fisher, 13 Wall. (U. S.)

inferior or limited jurisdiction is held to a stricter degree of accountability. His powers and duties are usually strictly defined by statute and for disregarding these limitations and acting in excess of his jurisdiction he will be liable to the party injured.[70] This distinction, however, is not universally admitted.[71]

(II) *INFANTS.* It is thoroughly established that infants are liable for their torts;[72] and they have accordingly been held responsible for such wrongs as assault and battery,[73] conversion,[74] trespass to real[75] or personal property,[76] and

335, 351, 20 L. ed. 646, plaintiff, an attorney, had been disbarred for contempt of court, but without having been cited to show cause. Although the proceedings were not in proper form, yet the court had jurisdiction both of the offense and of the offender. In drawing a distinction between acts committed in the exercise of jurisdiction and in excess of jurisdiction on the one hand and without any jurisdiction on the other, it is said: "Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend. Thus, if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offences, jurisdiction over the subject of offences being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority. But if on the other hand a judge of a criminal court, invested with general criminal jurisdiction over offences committed within a certain district, should hold a particular act to be a public offence, which is not by the law made an offence, and proceed to the arrest and trial of a party charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction, no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration, whenever his general jurisdiction over the subject-matter is invoked. Indeed some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction, or that of the court held by him, or the manner in which the jurisdiction shall be exercised. And the same principle of exemption from liability which obtains for errors committed in the ordinary prosecution of a suit where there is jurisdiction of both subject and person, applies in cases of this kind, and for the same reasons." And see JUDGES, 23 Cyc. 568.

Jurisdiction exceeded.— In Lange *v.* Benedict, 73 N. Y. 12, 29 Am. Rep. 80, plaintiff was convicted in a court of superior jurisdiction of an offense for which the penalty was fine or imprisonment. He was sentenced to both. After paying the fine and being released on habeas corpus, the sentence having been vacated, he brought suit against the trial judge. This, it was stated, constituted excess of jurisdiction, but the judge incurred no liability.

70. Thus a justice of the peace who, after finally disposing of a case tried before him, commits a witness to prison for contempt, exceeds his jurisdiction and is liable in damages to the party injured. "Although he had jurisdiction of the subject-matter, he was empowered by law to exercise it only in a particular mode, and under certain limitations." Clarke *v.* May, 2 Gray (Mass.) 410, 412, 61 Am. Dec. 470. See also McClure *v.* Hill, 36 Ark. 268; Glazar *v.* Hubbard, 102 Ky. 68, 42 S. W. 114, 19 Ky. L. Rep. 1025, 80 Am. St. Rep. 340, 39 L. R. A. 210; Waterville *v.* Barton, 64 Me. 321; State *v.* McDaniel, 78 Miss. 1, 27 So. 994, 84 Am. St. Rep. 618, 50 L. R. A. 118; Patzack *v.* Von Gerichten, 10 Mo. App. 424; Truesdell *v.* Combs, 33 Ohio St. 186; Mitchell *v.* Foster, 12 A. & E. 472, 9 L. J. M. C. 95, 4 P. & D. 150, 40 E. C. L. 238, 113 Eng. Reprint 891. And see JUDGES, 23 Cyc. 569; JUSTICES OF THE PEACE, 24 Cyc. 423.

71. *Georgia.*— Calhoun *v.* Little, 106 Ga. 336, 32 S. E. 86, 71 Am. St. Rep. 254, 43 L. R. A. 630.

Indiana.— State *v.* Wolever, 127 Ind. 306, 26 N. E. 762.

New Jersey.— Grove *v.* Van Duyn, 44 N. J. L. 654, 43 Am. Rep. 412.

New York.—Austin *v.* Vrooman, 128 N. Y. 229, 28 N. E. 477, 14 L. R. A. 138.

United States.— Allec *v.* Reece, 39 Fed. 341.

See JUDGES, 23 Cyc. 567 *et seq.*; JUSTICES OF THE PEACE, 24 Cyc. 421 *et seq.*

72. See INFANTS, 22 Cyc. 618.

73. Peterson *v.* Haffner, 59 Ind. 130, 26 Am. Rep. 81; Sikes *v.* Johnson, 16 Mass. 389. See INFANTS, 22 Cyc. 619.

74. Lewis *v.* Littlefield, 15 Me. 233; Vasse *v.* Smith, 6 Cranch (U. S.) 226, 3 L. ed. 207. See INFANTS, 22 Cyc. 619.

75. Scott *v.* Watson, 46 Me. 362, 74 Am. Dec. 457; Huchting *v.* Engel, 17 Wis. 230, 84 Am. Dec. 741. See INFANTS, 22 Cyc. 620.

76. Shaw *v.* Coffin, 58 Me. 254, 4 Am. Rep. 290 (assumpsit for money stolen); Conklin

other specific torts.[77] Nor will their responsibility be affected by the fact that the wrong was committed by direction of parent or guardian,[78] or that the injury was caused by negligence in the management of property under the latter's control.[79] Still "the rule is not an unlimited one, but is to be applied with due regard to the other equally well settled rule, that, with certain exceptions, they are not liable on their contracts; and the dominant consideration is not that of liability for their torts but of protection from their contracts." [80] Thus it has been held that an infant will not be liable in an action of deceit for falsely representing himself to be of full age or in an action for the conversion of the goods which the vendor has been thereby induced to sell.[81] The line of demarcation between tort and contract as applied to infants is well illustrated in the case of bailments. Thus if a horse hired to a minor is killed by overdriving or through neglect, the duty violated arises solely out of his agreement to take proper care. Nor will it be permissible by a trick of pleading to convert an action so essentially one on contract into one in tort.[82] On the other hand, "if the infant does any wilful and positive act, which amounts to the election on his part to disaffirm the contract, the owner is entitled to the immediate possession." [83] Thus if he hire a horse to go to a place agreed, but goes elsewhere or beyond that place, he is guilty of conversion,[84] and if horse or wagon is injured his infancy is no protection.[85]

(III) *INSANE PERSONS.* "It is well settled that, though a lunatic is not punishable criminally, he is liable in a civil action for any tort he may commit. However justly this doctrine may have been originally subject to criticism on the grounds of reason and principle, it is now too firmly supported by the weight of authority to be disturbed." [86] But as "his acts lack the element of intent or intention," compensatory damages are the measure of recovery.[87] Thus a lunatic has been held responsible for the infliction of injuries causing death,[88] and for assault and battery,[89] conversion,[90] trespass,[91] and negligence in the management of his property.[92] It has been questioned whether the general rule

v. Thompson, 29 Barb. (N. Y.) 218 (firecracker thrown by infant causing death of plaintiff's horse); Wheeler, etc., Mfg. Co. *v.* Jacobs, 2 Misc. (N. Y.) 236, 21 N. Y. Suppl. 1006 (replevin for property sold under conditional bill of sale). See INFANTS, 22 Cyc. 620.

77. See INFANTS, 22 Cyc. 618 *et seq.*

78. Humphrey *v.* Douglass, 10 Vt. 71, 33 Am. Dec. 177. See INFANTS, 22 Cyc. 620.

79. McCabe *v.* O'Connor, 4 N. Y. App. Div. 354, 38 N. Y. Suppl. 572 [*affirmed* in 162 N. Y. 600, 57 N. E. 1116], injuries caused by fall of wall on property owned by infant. See INFANTS, 22 Cyc. 620.

80. Slayton *v.* Barry, 175 Mass. 513, 515, 56 N. E. 574, 78 Am. St. Rep. 510, 49 L. R. A. 560, per Morton, J.

81. Slayton *v.* Barry, 175 Mass. 513, 56 N. E. 574, 78 Am. St. Rep. 510, 49 L. R. A. 560; Johnson *v.* Pie, 1 Keb. 905, 83 Eng. Reprint 1312, 1 Lev. 169, 83 Eng. Reprint 353, 1 Sid. 258, 82 Eng. Reprint 1091. *Contra*, Rice *v.* Boyer, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53; Fitts *v.* Hall, 9 N. H. 441; Eckstein *v.* Frank, 1 Daly (N. Y.) 334; Wallace *v.* Morss, 5 Hill (N. Y.) 391. See INFANTS, 22 Cyc. 620, 621, where the conflicting cases are collected.

82. Young *v.* Muhling, 48 N. Y. App. Div. 617, 63 N. Y. Suppl. 181; Moore *v.* Eastman, 1 Hun (N. Y.) 578. See INFANTS, 22 Cyc. 621.

83. Campbell *v.* Stakes, 2 Wend. (N. Y.) 137, 143, 19 Am. Dec. 561, per Walworth, Ch.

84. Homer *v.* Thwing, 3 Pick. (Mass.) 492; Freeman *v.* Boland, 14 R. I. 39, 51 Am. Rep. 340. See INFANTS, 22 Cyc. 622.

85. Churchill *v.* White, 58 Nebr. 22, 78 N. W. 369, 76 Am. St. Rep. 64; Burnard *v.* Haggis, 14 C. B. N. S. 45, 9 Jur. N. S. 1325, 32 L. J. C. P. 189, 8 L. T. Rep. N. S. 320, 11 Wkly. Rep. 644, 108 E. C. L. 45, where the infant, having hired a horse to be ridden on the road, loaned it to a friend who took it off the road, and while endeavoring to jump the animal over a fence killed it.

Liability of infants for torts connected with contracts see INFANTS, 22 Cyc. 620 *et seq.*

86. McIntyre *v.* Sholty, 121 Ill. 660, 664, 13 N. E. 239, 2 Am. St. Rep. 140, per Magruder, J. See INSANE PERSONS, 22 Cyc. 1211.

87. McIntyre *v.* Sholtz, 121 Ill. 660, 664, 13 N. E. 239, 2 Am. St. Rep. 140. See INSANE PERSONS, 22 Cyc. 1212.

88. McIntyre *v.* Sholty, 121 Ill. 660, 13 N. E. 239, 2 Am. St. Rep. 140. See INSANE PERSONS, 22 Cyc. 1211 note 39.

89. Ward *v.* Conatser, 4 Baxt. (Tenn.) 64.

90. Morse *v.* Crawford, 17 Vt. 499, 44 Am. Dec. 349.

91. Cross *v.* Kent, 32 Md. 581.

92. Morain *v.* Devlin, 132 Mass. 87, 42 Am. Rep. 423 (injuries caused by defective

applies to actions for slander and libel. The authorities are very meager. In two states at least it has been held that insanity constitutes a defense.[93] But it seems preferable to hold that the insanity of the defamer bears only on the *quantum* of damages.[94]

(IV) *MARRIED WOMEN.* A married woman is responsible for her torts,[95] although, if they were committed in the presence of the husband, she was presumed at common law to act under his coercion and he alone was liable.[96] This presumption was not absolute and, if disproved, the liability was joint.[97] In the latter case the husband must of course be joined in the action. If there is a recovery, the judgment passes against both. If the wife has a separate estate, it may be taken in execution.[98] "There is no legal presumption that acts done

condition of real property); Cross *v.* Andrews, Cro. Eliz. 622, 78 Eng. Reprint 863. "Since in a civil action for a tort it is not necessary to aver or prove any wrongful intent on the part of the defendant, it is a rule of the common law that although a lunatic may not be punishable criminally, he is liable, in a civil action, for any tort he may commit. And this would appear to be the rule even though the plaintiff at the time of the commission of the tortious act knew that the defendant was insane and might have prevented the commission of the act, or although the insane person was under guardianship at the time, and the property which was the subject of the tort was within the care and management of his guardian." Bushwell The Law of Insanity 355.

Negligence.— Insanity may become of importance where negligence is alleged. Thus where an action was brought on that ground for the loss of a vessel of which defendant was captain, occurring during a storm, recovery was denied where it appeared that defendant was in a state of temporary insanity resulting from his efforts to save his ship. Here the facts made out a strong case in defendant's favor. It was shown that he had been on duty almost continuously for three days and nights and for the last forty-eight hours had been completely exhausted and had taken large doses of quinine. The court refused to consider the question "whether a lunatic or a person mentally incapacitated should be held responsible in all instances for his nonfeasance or failure to act," basing its opinion on the ground that taking the circumstances as a whole no negligence was shown. "What careful and prudent man could do more," it was asked, "than to care for his vessel until overcome by physical and mental exhaustion?" It is evident therefore that this case does not militate against the general rule. Williams *v.* Hays, 157 N. Y. 541, 546, 548, 52 N. E. 589, 68 Am. St. Rep. 797, 43 L. R. A. 253, 143 N. Y. 442, 38 N. E. 449, 42 Am. St. Rep. 743, 26 L. R. A. 153.

93. Irvine *v.* Gibson, 117 Ky. 306, 77 S. W. 1106, 25 Ky. L. Rep. 1418, 111 Am. St. Rep. 251; Bryant *v.* Jackson, 6 Humphr. (Tenn.) 199.

94. Yeates *v.* Reed, 4 Blackf. (Ind.) 463, 32 Am. Dec. 43; McDougald *v.* Coward, 95 N. C. 368. In Dickinson *v.* Barber, 9 Mass. 225, 228, 6 Am. Dec. 58, although the court declined to express an opinion "how far or to what degree, insanity was to be received as an excuse," it was said that "where the derangement was great and notorious, so that the speaking the words could produce no effect on the hearers, it was manifest no damage would be incurred. But where the degree of insanity was slight, or not uniform, the slander might have its effect; and it would be for the jury to judge upon the evidence before them, and measure the damages accordingly." See INSANE PERSONS, 22 Cyc. 1212.

95. Sikes *v.* Johnson, 16 Mass. 389. See HUSBAND AND WIFE, 21 Cyc. 1350. A wife is liable in an action brought against her and her husband jointly for converting to her personal use, wearing apparel stolen from plaintiff and sold and delivered by the thief to her in her husband's absence. Heckle *v.* Lurvey, 101 Mass. 344, 3 Am. Rep. 366.

96. Alexander *v.* Lydick, 80 Mo. 341; Quick *v.* Miller, 103 Pa. St. 67. See HUSBAND AND WIFE, 21 Cyc. 1350, 1351. "A wife cannot commit a trespass, (so as to be made liable to an action,) in the presence of, or in connexion with her husband. In such case, she is supposed to act under his authority, and he alone must be sued." Johnson *v.* McKeown, 1 McCord (S. C.) 578, 579, 10 Am. Dec. 698, per Colcock, J. Where plaintiff was injured by a vicious dog owned by a wife and kept on premises owned by her, but on which she and her husband resided, it was held that he was alone liable. Strouse *v.* Leipf, 101 Ala. 433, 14 So. 667, 46 Am. St. Rep. 122, 23 L. R. A. 622.

97. *Indiana.*— Ball *v.* Bennett, 21 Ind. 427, 83 Am. Dec. 356.

Massachusetts.—Handy *v.* Foley, 121 Mass. 259, 23 Am. Rep. 270.

Missouri.— Dailey *v.* Houston, 58 Mo. 361.

New Hampshire.— Carleton *v.* Haywood, 49 N. H. 314.

New York.— Cassin *v.* Delany, 38 N. Y. 178.

South Carolina.— Edwards *v.* Wessinger, 65 S. C. 161, 43 S. E. 518, 95 Am. St. Rep. 789.

Texas.— McQueen *v.* Fulgham, 27 Tex. 463. See HUSBAND AND WIFE, 21 Cyc. 1351.

98. Smith *v.* Taylor, 11 Ga. 20; Merrill *v.* St. Louis, 83 Mo. 244, 53 Am. Rep. 576. "It will be observed that the law makes a

by a wife in her husband's absence are done under his coercion or control." [99] But by statute in many states the husband is now relieved from responsibility where no coercion, participation, or instigation is established.[1] Where a married woman is incapacitated, as at common law, from binding herself by a contract, neither she nor her husband can be held liable for her tort, merely by waiving the contract out of which her liability has arisen.[2]

(v) *SERVANTS AND AGENTS.* Where the act of a servant or agent is one which he either actually or presumably knows to be wrong, he is personally responsible. "He who commits an unlawful act or an act of misfeasance and positive aggressive wrong to another cannot escape liability therefor upon the ground of his being an agent for another." [3] If, however, he is merely the unconscious instrument of others in committing the injury, he is not personally liable for the consequences,[4] as where a servant or agent receives property from one whom he is entitled to regard as the owner and merely transports it to another.[5]

distinction between a class of cases where the tort is committed by the direction of the husband or by the wife in his presence . . . and in a class of cases where the tort was committed by them jointly, as in the case at bar. In the first named class the husband alone is liable, while in the latter they are both liable, and must be jointly sued." Flesh *v.* Lindsay, 115 Mo. 1, 16, 21 S. W. 907, 37 Am. St. Rep. 374, per Burgess, J. See HUSBAND AND WIFE, 21 Cyc. 1350, 1491, 1544.

99. Heckle *v.* Lurvey, 101 Mass. 344, 345, 3 Am. Rep. 366, per Chapman, J. "For the wife's torts, committed during coverture, the husband is responsible. Such torts may be committed under either of the following circumstances: 1. Where the husband is absent and had no knowledge of the intended act. . . . 2. Where the husband is absent, but where the tort is done under his direction and instigation. . . . 3. Where the husband was present, but the wife acted of her own volition. . . . And 4. Where the tort is committed in the company of the husband, and by his command or encouragement. . . . In the first three cases they are jointly liable, and the wife must be joined. She is in reality the offending party, and if the marriage should be dissolved by divorce or the death of either spouse before judgment recovered, the liability of the husband ceases. He is joined because she cannot be sued alone. But in the last case supposed, the law considers the tort as committed by the husband, and he alone is liable. To exempt her from liability, however, requires the concurrence of his presence and his command. A wrong done by his direction, but not in his company, does not excuse her; nor does his presence, if unaccompanied by his direction." Kosminsky *v.* Goldberg, 44 Ark. 401, 402, per Smith, J. See HUSBAND AND WIFE, 21 Cyc. 1350 *et seq.*

1. Norris *v.* Corkill, 32 Kan. 409, 4 Pac. 862, 49 Am. Rep. 489; Culmer *v.* Wilson, 13 Utah 129, 44 Pac. 833, 57 Am. St. Rep. 713. In New York, for example, a married woman "is liable for her wrongful or tortious acts; her husband is not liable for such acts unless they were done by his actual coercion or instigation; and such coercion or instigation shall not be presumed but must be proved." Consol. Laws, c. 14, § 57. See Strubing *v.* Mahar, 46 N. Y. App. Div. 409, 61 N. Y. Suppl. 799. And see HUSBAND AND WIFE, 21 Cyc. 1352.

2. See HUSBAND AND WIFE, 21 Cyc. 1352.

3. Blue *v.* Briggs, 12 Ind. App. 105, 39 N. E. 885, 886. And see MASTER AND SERVANT, 26 Cyc. 1543; PRINCIPAL AND AGENT, 31 Cyc. 1559 *et seq.*

Rule applied.— Thus the command of the captain of a vessel will be no justification for an unlawful assault committed by the mates upon a sailor. Brown *v.* Howard, 14 Johns. (N. Y.) 119. And a sewing machine agent who takes from a married woman an old machine and a sum of money, both belonging to her husband, in exchange for a new machine, and turns over the old machine to the company, is liable to the husband for conversion. Rice *v.* Yocum, 155 Pa. St. 538, 26 Atl. 698.

4. *Connecticut.*— Bennett *v.* Ives, 30 Conn. 329.

Florida.— Wheeler *v.* Baars, 33 Fla. 696, 15 So. 584.

Kentucky.— Pool *v.* Adkisson, 1 Dana 110.

Maine.— Hazen *v.* Wight, 87 Me. 233, 32 Atl. 887; Richardson *v.* Kimball, 28 Me. 463.

Minnesota.— Clark *v.* Lovering, 37 Minn. 120, 33 N. W. 776.

Missouri.— Buis *v.* Cook, 60 Mo. 391; Swaggard *v.* Hancock, 25 Mo. App. 596.

New York.— Bruff *v.* Mali, 36 N. Y. 200, 1 Transcr. App. 96, 34 How. Pr. 338; Hecker *v.* De Groot, 15 How. Pr. 314.

And see MASTER AND SERVANT, 26 Cyc. 1543; PRINCIPAL AND AGENT, 31 Cyc. 1560 *et seq.*

5. Burditt *v.* Hunt, 25 Me. 419, 43 Am. Dec. 289; Metcalf *v.* McLoughlin, 122 Mass. 84; Nanson *v.* Jacob, 93 Mo. 331, 6 S. W. 246, 3 Am. St. Rep. 531. Thus a carrier who removes goods from the owner's place of deposit under the direction of a person in apparent control and able immediately to assume the actual custody of them and delivers them to such person is not liable to the owner for their conversion. Gurley *v.* Armstead, 148 Mass. 267, 19 N. E. 389, 12 Am. St. Rep. 555, 2 L. R. A. 80. "An agent or servant who acting solely for his prin-

Nor will the servant or agent be responsible to a third party for damages caused by the mere failure properly to perform a duty intrusted to him by the master. The duty is in such case to the master alone.[6]

cipal or master, and by his direction, and without knowledge of any wrong, or being guilty of gross negligence in not knowing of it, disposes of, or assists the master in disposing of, property which the latter has no right to dispose of, is not thereby rendered liable for a conversion of the property." Leuthold *v.* Fairchild, 35 Minn. 99, 27 N. W. 503, 28 N. W. 218, per Gilfillan, C. J.

Knowledge of servant or agent.— If an agent to whom property has been intrusted by his principal returns the property after he knows that his principal has no title, he is guilty of conversion. Powell *v.* Hoyland, 6 Exch. 67, 20 L. J. Exch. 82. A servant who has received a chattel from his master may retain it until he has consulted his master; but if, after consultation, he relies on his master's title and refuses to deliver it to a demanding owner, he is guilty of conversion. Singer Mfg. Co. *v.* King, 14 R. I. 511. Although a person acting under the direction of another as servant is not guilty of conversion merely by carrying articles from place to place without any knowledge of wrong-doing, supposing the articles to belong to or to be rightfully in the possession of the person from whom the same are received, the rule is otherwise when he takes them knowing of the controversy as to the ownership. Smith *v.* Colby, 67 Me. 169. See MASTER AND SERVANT, 26 Cyc. 1543; PRINCIPAL AND AGENT, 31 Cyc. 1560.

6. "A servant or deputy, *quatenus* such, cannot be charged for neglect, but the principal only shall be charged for it; but for a misfeasance an action will lie against a servant or deputy, but not *quatenus* a deputy or servant, but as a wrong-doer." Lane *v.* Cotton, 12 Mod. 472, 488, 88 Eng. Reprint 1458. An agent is liable only to his principal and not to third parties for nonfeasance. Carey *v.* Rochereau, 16 Fed. 87. And see Denny *v.* Manhattan Co., 5 Den. (N. Y.) 639 [*affirming* 2 Den. 115]. See also MASTER AND SERVANT, 26 Cyc. 1544; PRINCIPAL AND AGENT, 31 Cyc. 1559.

An action will not lie against a deputy sheriff to recover money rightfully received by him in that character. The suit must be brought against the sheriff. Colvin *v.* Holbrook, 2 N. Y. 126.

Failure of foreman to warn laborer.—A foreman in charge of the work for a contractor building a sewer is not liable for failure to warn a laborer of the danger of working at a particular point. Burns *v.* Pethcal, 75 Hun (N. Y.) 437, 443, 27 N. Y. Suppl. 499, where the court said: "If the duty omitted by the agent or servant devolved upon him purely from his agency or employment, his omission is only of a duty he owes his principal or master, and the master alone is liable. While if the duty rests upon him in his individual character, and was one that the law imposed upon him independently of his agency or employment, then he is liable."

Defective construction work.— Where defendants were appointed a committee of the board of directors of a corporation to put certain grounds in condition for a game of football, and plaintiff was injured through a defective construction of the grand stand, it was held that the negligence constituted nonfeasance and not misfeasance, and that defendants were not liable. Van Antwerp *v.* Linton, 89 Hun (N. Y.) 417, 35 N. Y. Suppl. 318 [*affirmed* in 157 N. Y. 716, 53 N. E. 1133].

Maintenance of dam.—An agent who merely carries on a mill for the owner's benefit is not liable for the maintenance of a dam at too great a height, whereby the water is set back to the injury of another mill owner, such agent not having constructed the dam. Brown Paper Co. *v.* Dean, 123 Mass. 267.

Misfeasance and not mere nonfeasance.— On the other hand, where an agent received stock for the purpose of transfer only and converted it, it was held that he was guilty, not of mere nonfeasance, but of misfeasance toward the owner entitled to the possession, and was liable to him for conversion. Crane *v.* Onderdonk, 67 Barb. (N. Y.) 47, 56, where the court said: "Although an agent, for nonfeasance and omissions of duty, is not liable, except to his principals, the rule is otherwise when the act complained of is misfeasance. In all such cases he is personally responsible, whether he did the wrong intentionally, or ignorantly by the authority of his principal; for the principal could not confer on him any authority to commit a tort upon the rights or property of another." So, where defendant, an agent, had entire control of the erection of a building for his principal, and one of the workmen, contrary to his orders, removed a portion of the sidewalk, of which fact he was advised, and he failed to replace it, it was held that this was misfeasance for which he was liable. "To say," said the court, "that he only was guilty of a non-feasance — an omission of duty to his principal — does not cover the case. He not only omitted a duty he owed to the traveling public, but by his acts he increased the danger, and every day committed a wrong, and was guilty of a misfeasance, in keeping this walk torn up, and using it as a driveway, in the execution of a particular work which he had entered upon, and of which he had complete superintendence and control. Irrespective of his relation to his principal, he was bound while doing the work to so use the premises, including this sidewalk, as not to injure others. Misfeasance may involve to some extent the idea of not doing; as where an agent, while engaged in the performance of his undertaking, does not do something which it was his duty to do under the circumstances: as,

b. Liability For Acts or Omissions of Another — (i) *THE STATE.* To permit proceedings against the state, unless with its consent, would be tantamount to a denial of sovereignty. The state being paramount there can exist no means of enforcing the court's decrees.[7] It is true that courts of claims have been established but their jurisdiction is carefully circumscribed and frequently a cognizance of tort actions has been withheld.[8] Thus it has been held that the United States cannot be sued for damages arising from the wrongful use of a patented invention,[9] for injuries due to the fall of an elevator in a government building,[10] for the use and occupation of land for a lighthouse,[11] or for the seizure of buildings owned by a private citizen.[12] An identical principle applies to state courts of claims.[13] Nor can the courts of one country assume jurisdiction of the sovereign or ambassador,[14] or the public property of another.[15]

for instance, when he does not exercise that care which a due regard for the rights of others would require. This is not doing, but it is the not doing of that which is not imposed upon the agent merely by his relation to his principal, but of that which is imposed upon him by law as a responsible individual in common with all other members of society. It is the same not doing which constitutes negligence in any relation, and is actionable." Ellis *v.* McNaughton, 76 Mich. 237, 241, 42 N. W. 1113, 15 Am. St. Rep. 308. See also MASTER AND SERVANT, 26 Cyc. 1544; PRINCIPAL AND AGENT, 31 Cyc. 1559, 1560.

Failure to make repairs to principal's property.— Whether an agent in charge of property is liable to third persons for damages caused by a failure to make repairs is in dispute. Some of the courts hold that such failure partakes of the character of misfeasance, and renders him liable (Baird *v.* Shipman, 132 Ill. 16, 23 N. E. 384, 22 Am. St. Rep. 504, 7 L. R. A. 128; Campbell *v.* Portland Sugar Co., 62 Me. 552, 16 Am. Rep. 503; Lough *v.* Davis, 30 Wash. 204, 70 Pac. 491, 94 Am. St. Rep. 848, 59 L. R. A. 802), while others hold that it is a case of mere nonfeasance for which the owner is alone responsible (Dean *v.* Brock, 11 Ind. App. 507, 38 N. E. 829; Feltus *v.* Swan, 62 Miss. 415).

7. Griggs *v.* Light-Boat Upper Cedar Point, 11 Allen (Mass.) 156; The Thomas A. Scott, 10 L. T. Rep. N. S. 726. See STATES, 36 Cyc. 881, 911; UNITED STATES.

8. See COURTS, 11 Cyc. 967.

9. Schillinger *v.* U. S., 155 U. S. 163, 15 S. Ct. 85, 39 L. ed. 108.

10. Bigby *v.* U. S., 188 U. S. 400, 23 S. Ct. 468, 47 L. ed. 519.

11. Hill *v.* U. S., 149 U. S. 593, 13 S. Ct. 1011, 37 L. ed. 862.

12. Langford *v.* U. S., 101 U. S. 341, 25 L. ed. 1010.

13. See STATES, 36 Cyc. 913, 914. Thus where the New York court of claims was given jurisdiction to hear and determine claims for damages alleged to have been sustained "from the canals, or from their use and management," etc., and it was further "provided that the provisions of this act shall not extend to claims arising from damages resulting from the navigation of the canals," had no power to pass upon a claim, the basis of which was that claimant's intestate, while upon a canal boat passing under a bridge, through the negligence of the agents or servants of the state operating the bridge, received injuries causing his death. The damage resulted "from the navigation of the canals," within the meaning of the exception. Locke *v.* State, 140 N. Y. 480, 35 N. E. 1076.

14. De Haber *v.* Portugal, 17 Q. B. 196, 16 Jur. 164, 20 L. J. Q. B. 488, 79 E. C. L. 196; Brunswick *v.* Hanover, 6 Beav. 1, 8 Jur. 253, 13 L. J. Ch. 107, 49 Eng. Reprint 724 [*affirmed* in 2 H. L. Cas. 1, 9 Eng. Reprint 993]. The sultan of Johore, being an independent sovereign, could not be sued in an English court for breach of promise of marriage, unless he elected to waive his privilege. Mighell *v.* Johore, [1894] 1 Q. B. 149, 58 J. P. 224, 63 L. J. Q. B. 593, 70 L. T. Rep. N. S. 84, 9 Reports 447. "As a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction." The Parlement Belge, 5 P. D. 197, 214, 4 Aspin. 234, 42 L. T. Rep. N. S. 273, 28 Wkly. Rep. 642, per Brett, L. J. Where officers and soldiers of Costa Rica committed depredations on plaintiff's plantation in Panama, through an alleged conspiracy between defendant and the governing officials of Costa Rica, defendant and the Costa Rican government could not be regarded as joint tort-feasors. American Banana Co. *v.* United Fruit Co., 166 Fed. 261, 92 C. C. A. 325 [*affirming* 160 Fed. 184, and *affirmed* in 213 U. S. 347, 29 Sup. Ct. 511, 53 L. ed. 826]. See AMBASSADORS AND CONSULS, 2 Cyc. 265, 266; INTERNATIONAL LAW, 22 Cyc. 1716, 1743.

15. Thus an unarmed packet belonging to the sovereign of a foreign state, in the hands of officers commissioned by him and employed

(II) *Corporations* — (A) *Municipal.* The liability of a municipal corporation for the tort of its officers has been thoroughly discussed elsewhere.[16] The view prevails that it "possesses two kinds of powers, one governmental and public, and, to the extent they are held and exercised, is clothed with sovereignty — the other private, and to the extent they are held and exercised, is a legal individual. The former are given and used for public purposes, the latter for private purposes. While in the exercise of the former, the corporation is a municipal government, and while in the exercise of the latter, is a corporate, legal individual." [17] In the performance of the first it enjoys the immunity which the state possesses. Instances of the exercise of governmental functions for which the municipal corporation cannot be held responsible are the collection of taxes, care of dependent and defective classes, preservation of the public health, public instruction, police protection, and the like.[18] As to the second, its status is that of a private individual. Here the municipality acts as a private corporation and

in carrying mails, was not liable to seizure in a suit *in rem* to recover redress for a collision, and this immunity was not lost by reason of the packet also carrying merchandise and passengers for hire. The Parlement Belge, 5 P. D. 197, 4 Aspin. 234, 42 L. T. Rep. N. S. 273, 28 Wkly. Rep. 642. In The Exchange *v.* McFaddon, 7 Cranch (U. S.) 116, 137, 3 L. ed. 287, plaintiff's schooner "The Exchange" was seized under the authority of the Emperor of France and thereafter converted into a ship of war. While in the port of Philadelphia the vessel was libeled at the instance of the former owner. It was held that as a public warship of a foreign sovereign at peace with the United States she was exempt from jurisdiction. "One sovereign," said Chief Justice Marshall, "being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him." An English court, it was held, possessed no jurisdiction to order the destruction of shells belonging to the Mikado of Japan on the ground that they were an infringement of plaintiff's patent. "The goods," said the court, "were the property of the Mikado. They were his property as a sovereign; they were the property of his country; and therefore he is in the position of a foreign sovereign having property here. . . . The Mikado has a perfect right to have these goods; no Court in this country can properly prevent him from having goods which are the public property of his own country." Vavasseur *v.* Krupp, 9 Ch. D. 351, 358, 39 L. T. Rep. N. S. 437, 27 Wkly. Rep. 176, per Brett, L. J.

16. **Liability of municipal corporations for torts** see Municipal Corporations, 28 Cyc. 1256 *et seq.* And see Bryant *v.* St. Paul, 21 Cent. L. J. 33, annotated by W. F. Elliott, "The Doctrine of Respondeat Superior, as Applicable to Municipal Corporations."

Discussion of the legal status of counties and their liability for tort see Markey *v.* Queens County, 154 N. Y. 675, 49 N. E. 71, 39 L. R. A. 46. And see Counties, 11 Cyc. 497 *et seq.*

17. Lloyd *v.* New York, 5 N. Y. 369, 374, 55 Am. Dec. 347, per Foote, J. Here it was added: "Although the difference between the two kinds of powers is plain and marked, yet as they approximate each other, it is oftentimes difficult to ascertain the exact line of distinction. . . . All that can be done probably with safety is, to determine, as each case arises, under which class it falls." See also Lefrois *v.* Monroe County, 162 N. Y. 563, 57 N. E. 185, 50 L. R. A. 206; Maxmilian *v.* New York, 62 N. Y. 160, 20 Am. Rep. 468. And see Municipal Corporations, 28 Cyc. 1256 *et seq.*

18. See Municipal Corporations, 28 Cyc. 1256 *et seq.*

Collection of taxes see Dunbar *v.* Boston, 112 Mass. 75, no liability for illegal arrest. And see Municipal Corporations, 28 Cyc. 1726; Taxation, 37 Cyc. 1278.

Care of dependent and defective classes see Summers *v.* Daviess County, 103 Ind. 262, 2 N. E. 725, 53 Am. Rep. 512 (selection of physician to attend the poor); Lefrois *v.* Monroe County, 162 N. Y. 563, 57 N. E. 185, 50 L. R. A. 206 (penitentiaries and almshouses; creation of nuisance by spread of sewage); Hughes *v.* Monroe County, 147 N. Y. 49, 41 N. E. 407, 39 L. R. A. 33 (injury to employee in an insane asylum while operating mangle); Maxmilian *v.* New York, 62 N. Y. 160, 20 Am. Rep. 468 (negligent driving of ambulance); Richmond *v.* Long, 17 Gratt. (Va.) 375, 94 Am. Dec. 461 (hospitals; no liability for loss of slave who escaped through negligence of attendants and died from exposure). See also Asylums, 4 Cyc. 365; Hospitals, 21 Cyc. 1108; Municipal Corporations, 28 Cyc. 1299, 1306.

Preservation of public health.— In Ogg *v.* Lansing, 35 Iowa 495, 14 Am. Rep. 499, the agent of the defendant city requested plaintiff to assist in removing a corpse of one who had died from smallpox, without giving him notice of the disease or taking any precaution to prevent its communication. Plaintiff communicated the disease to two of his

not as a governing body, as where it maintains docks or wharves,[19] or a market house,[20] operates a ferry,[21] tows vessels,[22] or supplies gas [23] or water.[24] By a parity of reasoning a municipal corporation will not be responsible for a failure to exercise, or misfeasance in exercising, legislative or judicial powers.[25] Thus a municipality is not liable for damages resulting from a collision with one who was riding a bicycle on the sidewalk, merely because it failed to pass an ordinance forbidding the use of its sidewalks for such purpose.[26] Nor is it liable for injury caused by

children who thereafter died. It was held that the city was not responsible. So, in Brown *v.* Vinalhaven, 65 Me. 402, 20 Am. Rep. 709, where one C was employed as nurse in a pest-house maintained by the defendant town, and, after remaining there three weeks, was allowed to depart infected in person and clothing, in consequence of which plaintiff caught the infection, it was held that defendant was not liable. See also Barbour *v.* Ellsworth, 67 Me. 294; HEALTH, 21 Cyc. 406; MUNICIPAL CORPORATIONS, 28 Cyc. 1305.

Public instruction.— The department of public instruction performs duties of a public, not a private, nature and the city is not responsible for its negligence in permitting foul water to run upon a person's premises. Ham *v.* New York, 70 N. Y. 459. See also Hill *v.* Boston, 122 Mass. 344, 23 Am. Rep. 332 (defective stairway); Bigelow *v.* Randolph, 14 Gray (Mass.) 541 (excavation in school yard); Wixon *v.* Newport, 13 R. I. 454, 43 Am. Rep. 35 (injury to pupil from defective heating apparatus); Folk *v.* Milwaukee, 108 Wis. 359, 84 N. W. 420 (injury from sewer gas). And see MUNICIPAL CORPORATIONS, 28 Cyc. 1306, 1309.

Public police protection.—A municipal corporation exercises a governmental function in the preservation of the public peace and public police protection, and therefore it is under no liability to a prisoner who contracts pneumonia after confinement in an unheated room of the jail (Eddy *v.* Ellicottville, 35 N. Y. App. Div. 256, 54 N. Y. Suppl. 800); or for an injury resulting from assault by another prisoner (Davis *v.* Knoxville, 90 Tenn. 599, 18 S. W. 254) or by police officers (Craig *v.* Charleston, 180 Ill. 154, 54 N. E. 184; Calwell *v.* Boone, 51 Iowa 687, 2 N. W. 614, 33 Am. Rep. 154). See MUNICIPAL CORPORATIONS, 28 Cyc. 1299 *et seq.*

Fire department see Wilcox *v.* Chicago, 107 Ill. 334, 47 Am. Rep. 434; Burrill *v.* Augusta, 78 Me. 118, 3 Atl. 177, 57 Am. Rep. 788; Fisher *v.* Boston, 104 Mass. 87, 6 Am. Rep. 196; Hafford *v.* New Bedford, 16 Gray (Mass.) 297; Grube *v.* St. Paul, 34 Minn. 402, 26 N. W. 228; Edgerly *v.* Concord, 62 N. H. 8, 13 Am. Rep. 533 (injuries caused by a horse taking fright at a stream of water thrown from a hydrant by firemen for the purpose of testing its capacity); Smith *v.* Rochester, 76 N. Y. 506. And see MUNICIPAL CORPORATIONS, 28 Cyc. 1303.

Inspection of steam boilers see Mead *v.* New Haven, 40 Conn. 72, 16 Am. Rep. 14.

The removal of ashes and garbage, as well as the sprinkling of streets, has generally been considered as a governmental function. Love *v.* Atlanta, 95 Ga. 129, 22 S. E. 29, 51 Am. St. Rep. 64; McFadden *v.* Jewell, 119 Iowa 321, 93 N. W. 302, 97 Am. St. Rep. 321, 60 L. R. A. 401; Condict *v.* Jersey City, 46 N. J. L. 157; Conelly *v.* Nashville, 100 Tenn. 262, 46 S. W. 565. *Contra*, Quill *v.* New York, 36 N. Y. App. Div. 476, 55 N. Y. Suppl. 889, holding that the removal of ashes and garbage is not the governmental function of abating nuisances, but the private duty which would otherwise rest on the residents and property-owners of the municipality, and consequently the city is liable to one sustaining personal injuries through the negligence of a driver of an ash and garbage cart belonging to its street cleaning department.

Maintenance of highways see MUNICIPAL CORPORATIONS, 28 Cyc. 1340 *et seq.*

19. Kennedy *v.* New York, 73 N. Y. 365, 29 Am. Rep. 169; Willey *v.* Allegheny City, 118 Pa. St. 490, 12 Atl. 453, 4 Am. St. Rep. 608; Pittsburgh *v.* Grier, 22 Pa. St. 54, 60 Am. Dec. 65; Memphis *v.* Kimbrough, 12 Heisk. (Tenn.) 133; Petersburg *v.* Applegarth, 28 Gratt. (Va.) 321, 26 Am. Rep. 357. See MUNICIPAL CORPORATIONS, 28 Cyc. 1309.

20. Suffolk *v.* Parker, 79 Va. 660, 52 Am. Rep. 640. See MUNICIPAL CORPORATIONS, 28 Cyc. 1311.

21. Townsend *v.* Boston, 187 Mass. 283, 72 N. E. 991. See MUNICIPAL CORPORATIONS, 28 Cyc. 1312.

22. Philadelphia *v.* Gavagnin, 62 Fed. 617, 10 C. C. A. 552. See MUNICIPAL CORPORATIONS, 28 Cyc. 1312.

23. Western Sav. Fund Soc. *v.* Philadelphia, 31 Pa. St. 175, 72 Am. Dec. 730.

24. Hand *v.* Brookline, 126 Mass. 324; Wilson *v.* New Bedford, 108 Mass. 261, 11 Am. Rep. 352; McAvoy *v.* New York, 54 How. Pr. (N. Y.) 245; Smith *v.* Philadelphia, 81 Pa. St. 38, 22 Am. Rep. 731. Thus where the city of Boston contracted with plaintiff, the owner of a greenhouse, to supply him with water for steam heating and for his plants, and through negligence in the construction of a sewer in an adjacent street, the supply pipe became uncovered and exposed to the cold, so that the water was frozen and the supply cut off, it was held that the city was liable in tort for the destruction of the plants. Stock *v.* Boston, 149 Mass. 410, 21 N. E. 871, 14 Am. St. Rep. 430. See also MUNICIPAL CORPORATIONS, 28 Cyc. 1287.

25. See MUNICIPAL CORPORATIONS, 28 Cyc. 1262, 1289.

26. Howard *v.* Brooklyn, 30 N. Y. App. Div. 217, 51 N. Y. Suppl. 1058; Jones *v.* Williamsburg, 97 Va. 722, 34 S. E. 883, 47 L. R. A. 294. *Contra*, Hagerstown *v.* Klotz,

coasting,[27] even though a municipal ordinance had been passed permitting coasting on the street in question,[28] or a portion of the public common had been fitted for the purpose by turning water upon it to freeze.[29]

(B) *Charitable, Etc.* Whether a corporation organized for charitable purposes and conducted not for pecuniary profit but for the public welfare shall be held responsible for tort is a mooted question. The cases fall into three classes. In the first, its liability is held to be that of the ordinary private corporation.[30] In the second, all liability for the acts or neglects of servants or agents is denied.[31] In the third due care in the selection of the offending employee is made the test.[32] Similar principles apply where it is sought to hold a non-charitable corporation for the negligence of a physician or surgeon employed by it to render gratuitous treatment.[33]

93 Md. 437, 49 Atl. 836, 86 Am. St. Rep. 437, 54 L. R. A. 940. See MUNICIPAL CORPORATIONS, 28 Cyc. 1289 *et seq.*

27. *Indiana.*— Lafayette *v.* Timberlake, 88 Ind. 330; Faulkner *v.* Aurora, 85 Ind. 130, 44 Am. Rep. 1.

Massachusetts.— Pierce *v.* New Bedford, 129 Mass. 534, 37 Am. Rep. 387.

New Hampshire.— Ray *v.* Manchester, 46 N. H. 59, 88 Am. Dec. 192.

Vermont.—Weller *v.* Burlington, 60 Vt. 28, 12 Atl. 215; Hutchinson *v.* Concord, 41 Vt. 271, 98 Am. Dec. 584.

Wisconsin.— Schultz *v.* Milwaukee, 49 Wis. 254, 5 N. W. 342, 35 Am. Rep. 779.

Contra.— Taylor *v.* Cumberland, 64 Md. 68, 20 Atl. 1027, 54 Am. Rep. 759.

28. Burford *v.* Grand Rapids, 53 Mich. 98, 18 N. W. 571, 51 Am. Rep. 105.

29. Steele *v.* Boston, 128 Mass. 583.

30. "The public is doubtless interested in the maintenance of a great public charity, such as the Rhode Island Hospital is; but it also has an interest in obliging every person and every corporation which undertakes the performance of a duty to perform it carefully, and to that extent, therefore, it has an interest against exempting any such person, and any such corporation from liability for its negligences." Glavin *v.* Rhode Island Hospital, 12 R. I. 411, 425, 34 Am. Rep. 675, per Durfee, C. J.

31. Fire Ins. Patrol *v.* Boyd, 120 Pa. St. 624, 15 Atl. 553, 6 Am. St. Rep. 745, 1 L. R. A. 417. The mere fact that patients who are able to pay are required to do so will not deprive the corporation of its eleemosynary character so as to render it liable to them on account of contract relations. Bequests devoted to charitable purposes if applied to the compensation of injured parties would be "thwarted by negligence for which the donor is in no manner responsible. If, in the proper execution of the trust, a trustee or an employé commits an act of negligence, he may be held responsible for his negligent act; but the law jealously guards the charitable trust fund, and does not permit it to be frittered away by the negligent acts of those employed in its execution. The trustees of this fund could not by their own direct act divert it from the purpose for which it was given, or for which the act of the Legislature authorized the title to be vested in the defendant. It certainly follows that the fund cannot be indirectly diverted by the tortious or negligent acts of the managers of the fund, or their employés, though such acts result in damage to an innocent beneficiary. Those voluntarily accepting the benefit of the charity accept it upon this condition." Downes *v.* Harper Hospital, 101 Mich. 555, 559, 60 N. W. 42, 45 Am. St. Rep. 427, 25 L. R. A. 602, per Grant, J.

32. Hearns *v.* Waterbury Hospital, 66 Conn. 98, 33 Atl. 595, 31 L. R. A. 224; Corbett *v.* St. Vincent's Industrial School, 79 N. Y. App. Div. 334, 79 N. Y. Suppl. 369 [*affirmed* in 177 N. Y. 16, 68 N. E. 997]; Collins *v.* New York Post Graduate Medical School, etc., 59 N. Y. App. Div. 63, 69 N. Y. Suppl. 106; Joel *v.* Woman's Hospital, 89 Hun (N. Y.) 73, 35 N. Y. Suppl. 37; Van Tassell *v.* Manhattan Eye, etc., Hospital, 15 N. Y. Suppl. 620; Powers *v.* Massachusetts Homœpathic Hospital, 109 Fed. 294, 47 C. C. A. 122, 65 L. R. A. 372. See CHARITIES, 6 Cyc. 975. "The funds intrusted to it [the hospital] are not to be diminished by such casualties, if those immediately controlling them have done their whole duty in reference to those who have sought to obtain the benefit of them. . . . If they had made suitable regulations, had selected proper persons to fill the position of surgeons, then, whether those persons neglected to perform their duty or whether another person, as the house pupil, not selected for the office of surgeon, assumed without authority to act as such, and injury has thus resulted, the plaintiff has no remedy against the corporation." McDonald *v.* Massachusetts Gen. Hospital, 120 Mass. 432, 436, 21 Am. Rep. 529, per Devens, J.

Social organizations not included.— The purposes of the Young Men's Christian Association being social as well as charitable, it is not a public charitable corporation, and hence is not exempt from liability for negligence in the construction of a floor in its building. Chapin *v.* Holyoke Y. M. C. A., 165 Mass. 280, 42 N. E. 1130.

33. A steamship company which exercised proper care in the selection of a ship's surgeon is not liable for the latter's negligence. Laubheim *v.* De Koninglyke Neder, etc., Co., 107 N. Y. 228, 13 N. E. 781, 1 Am. St. Rep. 815. Nor is a railroad company liable to employees for the malpractice of surgeons voluntarily furnished where reasonable care

(c) *Private and Non-Charitable.* Whatever may have been the theory at one time respecting the liability of a private non-charitable corporation for its torts, it is now thoroughly established that it stands on the same footing as an individual.[34] Hence it will be held responsible for assault and battery,[35] false imprisonment,[36] fraud,[37] libel,[38] malicious prosecution,[39] negligence,[40] nuisance,[41] and trespass.[42] It makes no difference that the tort is one which involves a wrongful motive or intent. Exemplary damages may be recovered as against an individual.[43] "The interests of the community, and the policy of the law demand that corporations should be divested of every feature of a fictitious character, which shall exempt them from the ordinary liabilities of natural persons, for acts and injuries committed by them and for them. Their immunities for wrongs are no greater than can be claimed by others." [44] Nor will it constitute a defense that the commission of the specific wrong was beyond the scope of the corporate powers. The defense of *ultra vires* cannot be invoked, for the corporation will be responsible "however foreign to its nature, or beyond its granted powers, the wrongful transaction or act may be." [45] But since a corporation can of necessity act only by

has been exercised in selection. Eighmy *v.* Union Pac. R. Co., 93 Iowa 538, 61 N. W. 1056, 27 L. R. A. 296. The result, it has been held, is the same where the expenses are contributed by the employees, the corporation making no profit out of its undertaking. Richardson *v.* Carbon Hill Coal Co., 10 Wash. 648, 39 Pac. 95.

34. *Alabama.*— Jordan *v.* Alabama, etc., R. Co., 74 Ala. 85, 49 Am. Rep. 800.

Delaware.—Wilson *v.* Rockland Mfg. Co., 2 Harr. 67.

Georgia.— Page *v.* Citizens' Banking Co., 111 Ga. 73, 36 S. E. 418, 78 Am. St. Rep. 144, 51 L. R. A. 463.

Illinois.— Chicago, etc., R. Co. *v.* Sykes, 96 Ill. 162.

Kansas.—Wheeler, etc., Mfg. Co. *v.* Boyce, 36 Kan. 350, 13 Pac. 609, 59 Am. Rep. 571.

Maine.— Frankfort Bank *v.* Johnson, 24 Me. 490.

Massachusetts.— Moore *v.* Fitchburg R. Corp., 4 Gray 465, 64 Am. Dec. 83.

Michigan.— Bath *v.* Caton, 37 Mich. 199.

Missouri.— Boogher *v.* Life Assoc. of America, 75 Mo. 319, 42 Am. Rep. 413.

New Jersey.— Trenton Mut. L., etc., Ins. Co. *v.* Perrine, 23 N. J. L. 402, 57 Am. Dec. 400.

New York.— New York, etc., R. Co. *v.* Schuyler, 34 N. Y. 30; Schenectady First Baptist Church *v.* Schenectady, etc., R. Co., 5 Barb. 79.

Pennsylvania.— Fenton *v.* Wilson Sewing Mach. Co., 9 Phila. 189.

England.— Yarborough *v.* Bank of England, 16 East 6, 14 Reports 272, 104 Eng. Reprint 991.

See CORPORATIONS, 10 Cyc. 1203 *et seq.*

35. *Arkansas.*— St. Louis, etc., R. Co. *v.* Hackett, 58 Ark. 381, 24 S. W. 881, 41 Am. St. Rep. 105.

Massachusetts.— Moore *v.* Fitchburg R. Corp., 70 Mass. 465, 64 Am. Dec. 83.

Missouri.— Haehl *v.* Wabash R. Co., 119 Mo. 325, 24 S. W. 737.

New York.— Higgins *v.* Watervliet Turnpike, etc., Co., 46 N. Y. 23, 7 Am. Rep. 293.

South Carolina.— Redding *v.* South Carolina R. Co., 3 S. C. 1, 16 Am. Rep. 681.

See CORPORATIONS, 10 Cyc. 1211, 1213.

36. Lynch *v.* Metropolitan El. R. Co., 90 N. Y. 77, 43 Am. Rep. 141 [*affirming* 24 Hun 506]; Eastern Counties R. Co. *v.* Broom, 6 Exch. 314, 15 Jur. 297, 20 L. J. Exch. 196, 6 R. & Can. Cas. 743. See CORPORATIONS, 10 Cyc. 1217.

37. Scofield Rolling Mill Co. *v.* State, 54 Ga. 635; Peebles *v.* Patapsco Guano Co., 77 N. C. 233, 24 Am. Rep. 447. See CORPORATIONS, 10 Cyc. 1218 *et seq.*

38. Trenton Mut. L., etc., Ins. Co. *v.* Perrine, 23 N. J. L. 402, 57 Am. Dec. 400; Philadelphia, etc., R. Co. *v.* Quigley, 21 How. (U. S.) 202, 16 L. ed. 73. See CORPORATIONS, 10 Cyc. 1215.

39. Boogher *v.* Life Assoc. of America, 75 Mo. 319, 42 Am. Rep. 413; Fenton *v.* Wilson Sewing Mach. Co., 9 Phila. (Pa.) 189. See CORPORATIONS, 10 Cyc. 1216.

40. *Illinois.*— Consolidated Ice Mach. Co. *v.* Keifer, 134 Ill. 481, 25 N. E. 799, 23 Am. St. Rep. 688, 10 L. R. A. 696.

Indiana.— Pittsburgh, etc., R. Co. *v.* Kirk, 102 Ind. 399, 1 N. E. 849, 52 Am. Rep. 675.

Massachusetts.—Hickey *v.* Merchants', etc., Transp. Co., 152 Mass. 39, 24 N. E. 860.

New York.—Weed *v.* Panama R. Co., 17 N. Y. 362, 72 Am. Dec. 474.

United States.— Milwaukee, etc., R. Co. *v.* Arms, 91 U. S. 489, 23 L. ed. 374. See CORPORATIONS, 10 Cyc. 1221.

41. Schenectady First Baptist Church *v.* Schenectady, etc., R. Co., 5 Barb. (N. Y.) 79. See CORPORATIONS, 10 Cyc. 1203 *et seq.*

42. Merrills *v.* Tariff Mfg. Co., 10 Conn. 384, 27 Am. Dec. 682. See CORPORATIONS, 10 Cyc. 1212 *et seq.*

43. Wheeler, etc., Mfg. Co. *v.* Boyce, 36 Kan. 350, 13 Pac. 609, 59 Am. Rep. 571. See CORPORATIONS, 10 Cyc. 1210 *et seq.*

44. Goodspeed *v.* East Haddam Bank, 22 Conn. 530, 544, 58 Am. Dec. 439, per Church, C. J.

45. New York, etc., R. Co. *v.* Schuyler, 34 N. Y. 30, 49, per Davis, J. "Corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no application." Carlisle First Nat.

its agents or servants, its responsibility will be governed by the rule which holds a master only when the act was within the scope of the doer's authority and committed with a view to the master's interest,[46] unless the wrong consisted in the violation of a positive duty placed upon the master by law. In the latter case, the corporation will be held accountable for the act of its employee irrespective of whether the same was within the scope of the employee's apparent powers. This is best illustrated in the case of carriers of passengers.[47]

(III) *EMPLOYERS* — (A) *For Default of Servant or Agent.* For the acts of the servant within the general scope of his employment while engaged in his master's business and done with a view to the furtherance of that business, and the master's interest, the master will be responsible whether the act be done negligently, wantonly, or even wilfully; but if a servant goes outside of his employment and, without regard to his service, acting maliciously or in order to effect some purpose of his own, wantonly commits a trespass or causes damage to another, the master is not responsible, so that the inquiry is whether the wrongful act is in the course of the employment or outside of it and to accomplish a purpose foreign to it. In the latter case the relation of master and servant does not exist

Bank *v.* Graham, 100 U. S. 699, 702, 25 L. ed. 750, per Swayne, J. "The point blank question here is, whether the company, by its agents, and the consent of its corporators, shall continue to carry on its business in any given mode, not contrary to the general course of business in the vicinity, so long as it proves profitable to the company, and when any disaster occurs, be allowed to shield themselves from liability, by a resort to the most literal construction of their charter powers, which they had themselves extended, by a liberal construction of its terms? It would seem that there could be but one answer." Noyes *v.* Rutland, etc., R. Co., 27 Vt. 110, 113, per Redfield, J. See also Central R., etc., Co. *v.* Smith, 76 Ala. 572, 52 Am. Rep. 353; Nims *v.* Mt. Hermon Boys' School, 160 Mass. 177, 35 N. E. 776, 39 Am. St. Rep. 467, 22 L. R. A. 364; Donnelly *v.* Boston Catholic Cemetery Assoc., 146 Mass. 163, 15 N. E. 505; New York, etc., R. Co. *v.* Haring, 47 N. J. L. 137, 54 Am. Rep. 123; Dutton *v.* Greenwood Cemetery Assoc., 80 N. Y. App. Div. 352, 80 N. Y. Suppl. 780; Life, etc., Ins. Co. *v.* Mechanic F. Ins. Co., 7 Wend. (N. Y.) 31; Hutchinson *v.* Western, etc., R. Co., 6 Heisk. (Tenn.) 634. And see CORPORATIONS, 10 Cyc. 1207.

46. "They [corporations] are also liable for the acts of their servants while such servants are engaged in the business of their principal in the same manner and to the same extent that individuals are liable under like circumstances." Carlisle First Nat. Bank *v.* Graham, 100 U. S. 699, 702, 25 L. ed. 750, per Swayne, J. "Because the test of liability of the principal is not whether the agent was authorized to do the particular act which constitutes the negligence or causes the injury, or whether it was done in violation of the principal's orders, but whether it was done while he was engaged in his principal's business, within the scope of his authority. The test is whether the act was done in the prosecution of the master's business, not whether it was done in accordance with his instructions." Gregory *v.* Ohio River R. Co., 37 W. Va. 606, 614, 16 S. E. 819, per Brannon, J. See also St. Louis, etc., R. Co. *v.* Hackett, 58 Ark. 381, 24 S. W. 881, 41 Am. St. Rep. 105; Consolidated Ice Mach. Co. *v.* Keifer, 134 Ill. 481, 25 N. E. 799, 23 Am. St. Rep. 688, 10 L. R. A. 696; Pittsburgh, etc., R. Co. *v.* Kirk, 102 Ind. 399, 1 N. E. 849, 52 Am. Rep. 675; Hickey *v.* Merchants', etc., Transp. Co., 152 Mass. 39, 24 N. E. 860; Moore *v.* Fitchburg R. Corp., 4 Gray (Mass.) 465, 64 Am. Dec. 83; Haehl *v.* Wabash R. Co., 119 Mo. 325, 24 S. W. 737; McCann *v.* Consolidated Traction Co., 59 N. J. L. 481, 36 Atl. 888, 38 L. R. A. 236; Palmeri *v.* Manhattan R. Co., 133 N. Y. 261, 30 N. E. 1001, 28 Am. St. Rep. 632, 16 L. R. A. 136; Mulligan *v.* New York, etc., R. Co., 129 N. Y. 506, 29 N. E. 952, 26 Am. St. Rep. 539, 14 L. R. A. 791; Lynch *v.* Metropolitan El. R. Co., 90 N. Y. 77, 43 Am. Rep. 141 [*affirming* 24 Hun 506]; Mott *v.* Consumers' Ice Co., 73 N. Y. 543; Higgins *v.* Watervliet Turnpike, etc., Co., 46 N. Y. 23, 7 Am. Rep. 293; Weed *v.* Panama R. Co., 17 N. Y. 362, 72 Am. Dec. 474; American Exch. Nat. Bank *v.* Woodlawn Cemetery, 120 N. Y. App. Div. 119, 105 N. Y. Suppl. 305 [*reversed* on other grounds in 194 N. Y. 116, 87 N. E. 107]; Redding *v.* South Carolina R. Co., 3 S. C. 1, 16 Am. Rep. 681; Gregory *v.* Ohio River R. Co., 37 W. Va. 606, 16 S. E. 819. And see CORPORATIONS, 10 Cyc. 1205 *et seq.*

47. Thus, where plaintiff, a woman, while a passenger on defendant's railroad, was kissed by one of its conductors, it was held that, as a carrier is under an obligation to extend protection and courteous treatment to those whom it conveys, defendant was liable, although kissing passengers was clearly not within the scope of the conductor's business, and he could not be considered as acting in the interest of the railroad company when he indulged his amorous propensities. Craker *v.* Chicago, etc., R. Co., 36 Wis. 657, 17 Am. Rep. 504. See also Dwinelle *v.* New York Cent., etc., R. Co., 120 N. Y. 117, 24 N. E. 319, 17 Am. St. Rep. 611, 8 L. R. A. 224;

so as to hold the master for the act.[48] It matters not that he exceeded the powers conferred upon him by his master and that he did an act which the master was not authorized to do so long as he acted in the line of his duty, or, being engaged in the service of the master, attempted to perform a duty pertaining, or which he believed to pertain, to that service.[49] The following, for example, have been held not within the scope of the servant's employment: The act of a railroad employee who throws a bundle containing his soiled clothing from the train, intending his laundress to catch it,[50] or who stops a train, pursues a boy on foot, seizes him, and carries him off;[51] the keeping of a vicious dog by a toll-keeper;[52]

Stewart *v.* Brooklyn, etc., R. Co., 90 N. Y. 588, 43 Am. Rep. 185. And see CARRIERS, 6 Cyc. 600 *et seq.*; CORPORATIONS, 10 Cyc. 1213, 1214.

48. Mott *v.* Consumers' Ice Co., 73 N. Y. 543, 547, per Allen, J. See MASTER AND SERVANT, 26 Cyc. 1525 *et seq.*

Master's liability for torts of slave see SLAVES, 36 Cyc. 484.

49. Lynch *v.* Metropolitan El. R. Co., 90 N. Y. 77, 43 Am. Rep. 141. See also Phelon *v.* Stiles, 43 Conn. 426; Alsever *v.* Minneapolis, etc., R. Co., 115 Iowa 338, 88 N. W. 841, 56 L. R. A. 748; Maier *v.* Randolph, 33 Kan. 340, 6 Pac. 625; Evans *v.* Davidson, 53 Md. 245, 36 Am. Rep. 400; Krulevitz *v.* Eastern R. Co., 143 Mass. 228, 9 N. E. 613; Ellegard *v.* Ackland, 43 Minn. 352, 45 N. W. 715; Potulni *v.* Saunders, 37 Minn. 517, 35 N. W. 379; Stranahan Bros. Catering Co. *v.* Coit, 55 Ohio St. 398, 45 N. E. 634, 4 L. R. A. N. S. 506; Andrus *v.* Howard, 36 Vt. 248, 84 Am. Dec. 680; Enos *v.* Hamilton, 24 Wis. 658; Philadelphia, etc., R. Co. *v.* Derby, 14 How. (U. S.) 468, 14 L. ed. 502. See MASTER AND SERVANT, 26 Cyc. 1525 *et seq.*

"View to master's business."—The distinction between the wrong-doing of the servant or agent committed within the scope of his authority and with a view to his master's business and where these requisites do not exist, is well illustrated by two cases, Palmeri *v.* Manhattan R. Co., 133 N. Y. 261, 266, 30 N. E. 1001, 28 Am. St. Rep. 632, 16 L. R. A. 136, and Mulligan *v.* New York, etc., R. Co., 129 N. Y. 506, 511, 29 N. E. 952, 26 Am. St. Rep. 539, 14 L. R. A. 791. In the first, plaintiff, a woman, bought a ticket at an elevated railway station and passed through the gate to get to the cars. The ticket agent followed her to the platform and charged her with having given him counterfeit money. On her denial and refusal to give him other money in its place, he called her a counterfeiter and attacked her personal reputation. He placed his hand upon her and ordered her not to stir until he had procured a policeman to arrest and search her. After detaining her for a while, he allowed her to leave when he failed to get an officer. Here the master was held liable, it being said that, "though injury and insult are acts in departure from the authority conferred, or implied, nevertheless, as they occur in the course of the employment, the master becomes responsible for the wrong committed." In the second case, plaintiff accompanied by a friend purchased two tickets, giving a five-dollar bill and received the change. A short time before, a detective had left with the ticket agent a circular describing three men who he stated were engaged in passing counterfeit five-dollar bills, telling the agent to look out for these men and if they appeared to have them arrested. Believing plaintiff was one of the counterfeiters the agent procured his arrest. Here it was held that he was not acting within the line of his duty, the court saying: "It is quite clear from the evidence that the agent was first put upon his guard and in fact set in motion, not by any direction from the defendant, but by the police. When he took the bill he knew, or at least believed it to be a counterfeit, but notwithstanding this, he gave the plaintiff defendant's property for it, whereas it was his duty, considering him merely as the agent of the defendant, to refuse it. He did not take the bill in the course of his business as agent, but for the purpose of entrapping persons that he believed to be engaged in the commission of crime. This may have been laudable enough on his part as a citizen, or as a person aiding the police, but he was not acting in the line of his duty as defendant's agent. If he had been cheated or imposed upon by the plaintiff, or if he honestly believed he had been, and then attempted to recover what he had, or supposed he had, lost by the arrest of the plaintiff, it might then be said that he was engaged in the protection of the property and interest of the defendant, and, therefore, acting within the line of his duty. But here a ticket agent of a railroad deliberately takes from a person, applying to purchase a ticket, what he believes to be a counterfeit five-dollar bill, not, of course, in good faith, or in the regular and ordinary course of his business, but for the purpose of aiding the police in the detection of criminals, and then immediately directs the arrest of the person from whom he took the bill, such an act on his part is not binding on his principal."

50. Walton *v.* New York Cent. Sleeping Car. Co., 139 Mass. 556, 559, 2 N. E. 101. In this case the bundle struck plaintiff. It was held that the company was not liable. "There was no evidence," said the court, "that Maxwell [the porter] was employed by the defendant to take care of his own clothing and personal effects."

51. Gilliam *v.* South, etc., R. Co., 70 Ala. 268.

52. Baker *v.* Kinsey, 38 Cal. 631, 99 Am.

the use by a coachman of his master's team for the servant's own pleasure or business;[53] and the forgery of checks and fraudulent entry of the same by a clerk.[54] Although whether the wrongful act of the servant or agent was within the scope of his employment and committed with a view to the master's business is primarily a question of fact, yet if both the facts and the inference to be drawn from them are clear, then the court may take the matter into its own hands.[55] What has been said concerning the liability of the master for the torts of his servant applies where the relation is that of principal and agent. The question is whether the latter's act or neglect is "within the scope of his agency and in the course of his employment."[56] Both the master and the principal, however, may ratify the tort committed on their behalf and thereby incur responsibility if this be done with knowledge of all material facts.[57]

Dec. 438, owner of toll road not responsible in absence of proof of authorization that dog be kept or that it was necessary for the toll-keeper to keep him in order to perform his duties.

53. Fiske *v.* Enders, 73 Conn. 338, 47 Atl. 681; Chicago Consol. Bottling Co. *v.* McGinnis, 51 Ill. App. 325; McCarthy *v.* Timmins, 178 Mass. 378, 59 N. E. 1038, 86 Am. St. Rep. 490; Driscoll *v.* Scanlon, 165 Mass. 348, 43 N. E. 100, 52 Am. St. Rep. 523.

54. Hardy *v.* Chesapeake Bank, 51 Md. 562, 34 Am. Rep. 325.

55. See MASTER AND SERVANT, 26 Cyc. 1576, 1577.

Inference in doubt see Rounds *v.* Delaware, etc., R. Co., 64 N. Y. 129, 21 Am. Rep. 597 (where a boy, while stealing a ride on a railroad train, was kicked off the train by defendant's baggageman); Brennan *v.* Merchant, 205 Pa. St. 258, 54 Atl. 891 (where a boy who climbed on a moving wagon was struck by the driver and fell under the wheels). In this and the preceding case the servant had a right to remove the boy and in so doing would have been acting for his employer. Whether he acted for his employer in adopting such methods or gratified his own malice was a question for the jury. In Craven *v.* Bloomingdale, 171 N. Y. 439, 64 N. E. 169, plaintiff bought a stove for which he paid. The stove being unsatisfactory, it was returned and defendant sent another in its place, which, through error, was marked "C. O. D." Defendant's drivers were under bond and were held personally liable for any money not turned over and goods lost. After the second stove had been delivered the driver demanded payment, and, on plaintiff's refusal either to pay or return the stove, called a policeman and had plaintiff arrested. It was held that it should have gone to the jury to determine whether the driver was acting for defendant or for his own benefit and in order to escape liability. See also Cohen *v.* Dry Dock, etc., R. Co., 69 N. Y. 170; Bergman *v.* Hendrickson, 106 Wis. 434, 82 N. W. 304.

Facts and inference undisputed.— In Guille *v.* Campbell, 200 Pa. St. 119, 49 Atl. 938, 86 Am. St. Rep. 705, 55 L. R. A. 111, a servant was employed to drag bales of cotton from the sidewalk into a wareroom. To frighten away some boys who were interfering with his work, he made a motion as if to throw an iron hook at them. The hook slipped from his hand and struck and injured a boy who was not among those who were interfering. It was held that the direction of the trial court to find for defendant should be affirmed.

56. Pressley *v.* Mobile, etc., R. Co., 15 Fed. 199, 4 Woods 569, per Bruce, J., where it was held that an agent having charge of defendant's real estate and the sale and lease thereof, who brings a charge of grand larceny for spoliation of certain timber lands, is not acting within the scope of his agency. See PRINCIPAL AND AGENT, 31 Cyc. 1581 *et seq.*

Principal responsible see Howe Mach. Co. *v.* Souder, 58 Ga. 64 (libelous advertisement); Lutz *v.* Forbes, 13 La. Ann. 609 (sale of horse affected with glanders which spread among plaintiff's stock). Horse hired by traveling agent and injured through latter's negligence see Ewing *v.* Shaw, 83 Ala. 333, 3 So. 692; Huntley *v.* Mathias, 90 N. C. 101, 47 Am. Rep. 516.

Principal not responsible see Lynch *v.* Florida Cent., etc., R. Co., 113 Ga. 1105, 39 S. E. 411, 54 L. R. A. 411 (assault by defendant's station agent as result of personal quarrel); Callahan *v.* Hyland, 59 Ill. App. 347 (assault on bystander committed by agent in endeavoring to collect disputed account); Donovan *v.* Texas, etc., R. Co., 64 Tex. 519 (slander uttered by agent in giving reasons why certain regulations were made).

57. See MASTER AND SERVANT, 26 Cyc. 1518; PRINCIPAL AND AGENT, 31 Cyc. 1249. In Dempsey *v.* Chambers, 154 Mass. 330, 331, 28 N. E. 279, 26 Am. St. Rep. 249, 13 L. R. A. 219, one M, not a servant of defendant, delivered without authority a load of the latter's coal to plaintiff. Through careless driving M broke a pane of glass in plaintiff's window. Thereafter with knowledge of these facts defendant presented a bill for the coal. This was held a ratification of M's act, establishing the relation of agent from the beginning and rendering defendant liable for the value of the glass. Here it was said: "If we were contriving a new code to-day, we might hesitate to say that a man could make himself a party to a bare tort, in any case, merely by assenting to it after it had been committed. But we are not at liberty to refuse to carry out to its consequences any principle which we believe to have been part of the common law, simply because the

(B) *For Default of Contractor.* An employer is not liable to third persons for the omission or misconduct of a contractor, selected with proper care, who retains "independence of control in employing workmen and in selecting the means of doing the work."[58] But the general rule of non-liability is subject to certain exceptions,[59] among which are the following: (1) Where the employer interferes with the work and acts performed by him or pursuant to his directions occasion the injury;[60] (2) where he possesses a right of control by virtue of his agreement with the contractor over the means to be employed,[61] which is something more than a mere right of approval or rejection of the work,[62] or of enforcing its conformance with the terms of the contract;[63] (3) where the work contracted to be done is inherently unlawful[64] or involves the doing of a wrong;[65] (4) where it is inherently dangerous;[66] (5) where it is in compliance with a duty placed upon the employer by law and which he therefore cannot delegate,[67] or (6) the doing of it casts a

grounds of policy on which it must be justified seem to us to be hard to find, and probably to have belonged to a different state of society." See also Nichols *v.* Bruns, 5 Dak. 28, 37 N. W. 752; Brainerd *v.* Dunning, 30 N. Y. 211; Tynburg *v.* Cohen, 67 Tex. 220, 2 S. W. 734; Gimbel *v.* Gomprecht, (Tex. Civ. App. 1896) 36 S. W. 781.

A receipt by the principal of money obtained through an unauthorized fraudulent sale by the agent does not amount to a ratification unless he knew of the fraud. Herring *v.* Skaggs, 73 Ala. 446. See PRINCIPAL AND AGENT, 31 Cyc. 1253.

58. Uppington *v.* New York, 165 N. Y. 222, 233, 59 N. E. 91, 53 L. R. A. 550, per Vann, J. See also Pye *v.* Faxon, 156 Mass. 471, 31 N. E. 640; Riedel *v.* Moran, etc., Co., 103 Mich. 262, 61 N. W. 509; De Forrest *v.* Wright, 2 Mich. 368; Hexamer *v.* Webb, 101 N. Y. 377, 4 N. E. 755, 54 Am. Rep. 703; King *v.* New York Cent., etc., R. Co., 66 N. Y. 181, 23 Am. Rep. 37; McCafferty *v.* Spuyten Duyvil, etc., R. Co., 61 N. Y. 178, 19 Am. Rep. 267; Blake *v.* Ferris, 5 N. Y. 48, 55 Am. Dec. 304; Clark *v.* Fry, 8 Ohio St. 358, 72 Am. Dec. 590; Bailey *v.* Troy, etc., R. Co., 57 Vt. 252, 52 Am. Rep. 129; Salliotte *v.* King Bridge Co., 122 Fed. 378, 58 C. C. A. 466, 65 L. R. A. 620; Laugher *v.* Pointer, 5 B. & C. 547, 8 D. & R. 550, 4 L. J. K. B. O. S. 309, 11 E. C. L. 579, 108 Eng. Reprint 204; Butler *v.* Hunter, 7 H. & N. 826, 31 L. J. Exch. 214, 10 Wkly. Rep. 214. And see MASTER AND SERVANT, 26 Cyc. 1546 *et seq.*; PRINCIPAL AND AGENT, 31 Cyc. 1193; 40 Can. L. J. 529, 41 Can. L. J. 49, article on "Liability of an Employer for the Torts of an Independent Contractor."

59. "There are certain exceptional cases where a person employing a contractor is liable, which, briefly stated, are: Where the employer personally interferes with the work, and the acts performed by him occasion the injury; where the thing contracted to be done is unlawful; where the acts performed create a public nuisance; and where an employer is bound by a statute to do a thing efficiently and an injury results from its inefficiency." Berg *v.* Parsons, 156 N. Y. 109, 115, 50 N. E. 957, 41 L. R. A. 391, 66 Am. St. Rep. 542, per Martin, J.

60. Norwalk Gaslight Co. *v.* Norwalk, 63 Conn. 495, 28 Atl. 32; Long *v.* Moon, 107 Mo. 334, 17 S. W. 810; Baldwin *v.* Abraham, 57 N. Y. App. Div. 67, 67 N. Y. Suppl. 1079 [*affirmed* in 171 N. Y. 677, 64 N. E. 1118]. See MASTER AND SERVANT, 26 Cyc. 1565.

61. Adams Express Co. *v.* Schofield, 111 Ky. 832, 64 S. W. 903, 23 Ky. L. Rep. 1120; Linnehan *v.* Rollins, 137 Mass. 123, 50 Am. Rep. 287; Singer Mfg. Co. *v.* Rahn, 132 U. S. 518, 10 S. Ct. 175, 33 L. ed. 440. See MASTER AND SERVANT, 26 Cyc. 1547 *et seq.*

62. Uppington *v.* New York, 165 N. Y. 222, 59 N. E. 91, 53 L. R. A. 550; Thomas *v.* Altoona, etc., R. Co., 191 Pa. St. 361, 43 Atl. 215.

63. Harrison *v.* Kiser, 79 Ga. 588, 4 S. E. 320; New Albany Forge, etc., Mill *v.* Cooper, 131 Ind. 363, 30 N. E. 294; Lenderink *v.* Rockford, 135 Mich. 531, 98 N. W. 4; Casement *v.* Brown, 148 U. S. 615, 13 S. Ct. 672, 37 L. ed. 582. See MASTER AND SERVANT, 26 Cyc. 1549.

64. As in the case of excavations unlawfully made in a public street. Babbage *v.* Powers, 130 N. Y. 281, 29 N. E. 132, 14 L. R. A. 398; Ellis *v.* Sheffield Gas Consumers' Co., 2 C. L. R. 249, 2 E. & B. 767, 18 Jur. 146, 23 L. J. Q. B. 42, 2 Wkly. Rep. 19, 75 E. C. L. 767. See MASTER AND SERVANT, 26 Cyc. 1557.

65. See MASTER AND SERVANT, 26 Cyc. 1557, 1558.

66. *Illinois.*— Joliet *v.* Harwood, 86 Ill. 110, 29 Am. Rep. 17.

Iowa.— Wood *v.* Mitchell Independent School Dist., 44 Iowa 27.

Massachusetts.— Wetherbee *v.* Partridge, 175 Mass. 185, 55 N. E. 894, 78 Am. St. Rep. 486; Curtis *v.* Kiley, 153 Mass. 123, 26 N. E. 421.

New York.— Engel *v.* Eureka Club, 137 N. Y. 100, 32 N. E. 1052, 33 Am. St. Rep. 692.

South Dakota.— McCarrier *v.* Hollister, 15 S. D. 366, 89 N. W. 862.

See MASTER AND SERVANT, 26 Cyc. 1559.

67. As in the case where a city, being bound to keep its streets in repair, intrusts the performance of this duty to a contractor. Brusso *v.* Buffalo, 90 N. Y. 679; King *v.* New York Cent., etc., R. Co., 66 N. Y. 181, 23 Am. Rep. 37. See MASTER AND SERVANT, 26 Cyc. 1562.

duty as to the method of performance;[68] and (7) where the employer accepts the work while in a dangerous state and permits it to remain so, and the injury results from its condition.[69]

(IV) *PARTNERS.* "A tort committed by one partner will not bind the partnership or the other copartner, unless it be either authorized or adopted by the firm, or be within the proper scope and business of the partnership."[70] Necessarily each case is a law unto itself, as its decision depends upon the peculiar state of facts shown at the trial. While the value of the following as precedents is doubtful they serve to illustrate the principle. Thus it has been held that the gift by one member of a firm of apothecaries of what he supposed to be a bottle of dandelion, but which was in reality belladonna,[71] an assault and battery committed in taking possession of property mortgaged to the partnership,[72] a malicious prosecution on a charge of larceny of firm property,[73] and a trespass in expelling a tenant and removing his goods[74] were beyond the scope of the partnership business, and that the non-culpable partner was therefore not responsible for the act of his associate.[75] But a contrary result has been reached in cases of conversion,[76] fraud,[77] negligence,[78] slander,[79] and malicious prosecution.[80]

(V) *OWNERS* — (A) *Lessors.* It is generally true that a lessor is not responsible to third persons for injuries caused by the act or omission of a lessee.[81]

68. As in the case of excavations in public streets, when there is a duty to take proper precautions, as by placing lights and barricades, to prevent injuries. Spence *v.* Schultz, 103 Cal. 208, 37 Pac. 220; Colgrove *v.* Smith, 102 Cal. 220, 36 Pac. 411, 27 L. R. A. 590; Wilson *v.* White, 71 Ga. 506, 51 Am. Rep. 269; Blessington *v.* Boston, 153 Mass. 409, 26 N. E. 1113; Woodman *v.* Metropolitan R. Co., 149 Mass. 335, 21 N. E. 482, 14 Am. St. Rep. 427, 4 L. R. A. 213; Houston, etc., R. Co. *v.* Meador, 50 Tex. 77. See MASTER AND SERVANT, 26 Cyc. 1562.

69. Donovan *v.* Oakland, etc., Rapid Transit Co., 102 Cal. 245, 36 Pac. 516; Khron *v.* Brock, 144 Mass. 516, 11 N. E. 748; Vogel *v.* New York, 92 N. Y. 10, 44 Am. Rep. 349. See MASTER AND SERVANT, 26 Cyc. 1566.

70. Graham *v.* Meyer, 10 Fed. Cas. No. 5,673, 4 Blatchf. 129, 134, per Ingersoll, J. See PARTNERSHIP, 30 Cyc. 523 *et seq.*

71. Gwynn *v.* Duffield, 66 Iowa 708, 24 N. W. 523, 55 Am. Rep. 286.

72. Titcomb *v.* James, 57 Ill. App. 296.

73. Marks *v.* Hastings, 101 Ala. 165, 13 So. 297; Rosenkrans *v.* Barker, 115 Ill. 331, 3 N. E. 93, 56 Am. Rep. 169.

74. Grund *v.* Van Vleck, 69 Ill. 478.

75. For other illustrations see PARTNERSHIP, 30 Cyc. 523 *et seq.*

76. *Georgia.*— Welker *v.* Wallace, 31 Ga. 362.

Illinois.— Loomis *v.* Barker, 69 Ill. 360.

Indiana.— Todd *v.* Jackson, 75 Ind. 272; Jackson *v.* Todd, 56 Ind. 406.

Wisconsin.— Gilchrist *v.* Brande, 58 Wis. 184, 15 N. W. 817.

United States.— *In re* Ketchum, 1 Fed. 815. See PARTNERSHIP, 30 Cyc. 525.

77. *Georgia.*— Alexander *v.* State, 56 Ga. 478.

Illinois.— Wolf *v.* Mills, 56 Ill. 360.

Iowa.— Stanhope *v.* Swafford, 80 Iowa 45, 45 N. W. 403.

Massachusetts.— Locke *v.* Stearns, 1 Metc. 560, 35 Am. Dec. 382.

Michigan.— Banner *v.* Schlessinger, 109 Mich. 262, 67 N. W. 116.

New York.— Bradner *v.* Strang, 89 N. Y. 299; Griswold *v.* Haven, 25 N. Y. 595, 82 Am. Dec. 380. Thus where four partners owned certain real property, and one of them negotiated a sale thereof to plaintiff, falsely representing that the lands were oil bearing, and in order to deceive caused petroleum to be scattered over the ground, it was held that all the partners were liable for the fraud. Chester *v.* Dickerson, 54 N. Y. 1, 13 Am. Rep. 550.

United States.— Strang *v.* Bradner, 114 U. S. 555, 5 S. Ct. 1038, 29 L. ed. 248.

See PARTNERSHIP, 30 Cyc. 526.

78. Witcher *v.* Brewer, 49 Ala. 119; Haley *v.* Case, 142 Mass. 316, 7 N. E. 877; Linton *v.* Hurley, 14 Gray (Mass.) 191. See PARTNERSHIP, 30 Cyc. 524.

Firm of attorneys.— For negligence in the prosecution of a suit by one member of a firm of attorneys, each of his fellow partners is liable. Livingston *v.* Cox, 6 Pa. St. 360. See ATTORNEY AND CLIENT, 4 Cyc. 969.

79. Haney Mfg. Co. *v.* Perkins, 78 Mich. 1, 43 N. W. 1073, holding that one partner is liable for slanderous statements made by another, the purpose of which was to aid the firm business by preventing the party slandered from making sales of an article which the partnership was then selling.

80. Page *v.* Citizens' Banking Co., 111 Ga. 73, 36 S. E. 418, 78 Am. St. Rep. 144, 51 L. R. A. 463, holding that a partnership, the individual members thereof, and a person not a member may be joined as defendants in an action for malicious prosecution where the prosecution was instituted as the result of a confederation among them.

81. *Louisiana.*— Thompson *v.* New Orleans, etc., R. Co., 10 La. Ann. 403.

Maine.— Allen *v.* Smith, 76 Me. 335; Stickney *v.* Munroe, 44 Me. 195.

Maryland.— Owings *v.* Jones, 9 Md. 108.

Massachusetts.— Caldwell *v.* Slade, 156

The tenant is not the agent of the landlord in such a sense as to make the latter responsible for the malfeasance and misfeasance of the former, although it has been said that he may be made such, as where he is authorized to make repairs or keep the premises in repair and he does it so inefficiently that third persons are injured. But this rests upon the principles of agency.[82] Where no such authority has been given, and in the absence of an agreement on the landlord's part to make repairs, no responsibility will in general rest upon the owner.[83] It is otherwise, however, where the lessor has participated in the tenant's wrongdoing by leasing premises for a purpose the accomplishment of which by the lessee may reasonably be expected to cause injury;[84] where he derives a benefit

Mass. 84, 30 N. E. 87; Handyside *v.* Powers, 145 Mass. 123, 13 N. E. 462; Stewart *v.* Putnam, 127 Mass. 403; Fiske *v.* Framingham Mfg. Co., 14 Pick. 491.

Nebraska.— Anheuser-Busch Brewing Assoc. *v.* Peterson, 41 Nebr. 897, 60 N. W. 373.

New Hampshire.— Sargent *v.* Stark, 12 N. H. 332.

New Jersey.— Todd *v.* Collins, 6 N. J. L. 127.

New York.— Martin *v.* Pettit, 117 N. Y. 118, 22 N. E. 566, 5 L. R. A. 794; Bard *v.* New York, etc., R. Co., 10 Daly 520; Batterman *v.* Finn, 32 How. Pr. 501.

Vermont.— Pettibone *v.* Burton, 20 Vt. 302.

See LANDLORD AND TENANT, 24 Cyc. 1124 *et seq.*

82. White *v.* Montgomery, 58 Ga. 204.

83. *Illinois.*— Peoria *v.* Simpson, 110 Ill. 294, 51 Am. Rep. 683.

Massachusetts.— Murray *v.* Richards, 1 Allen 414.

Michigan.— Harris *v.* Cohen, 50 Mich. 324, 15 N. W. 493.

Missouri.— Gordon *v.* Peltzer, 56 Mo. App. 599; Deutsch *v.* Abeles, 15 Mo. App. 398.

New York.— Clancy *v.* Byrne, 56 N. Y. 129, 15 Am. Rep. 391; Strauss *v.* Hamersley, 13 N. Y. Suppl. 816; Casey *v.* Mann, 5 Abb. Pr. 91.

Vermont.— Blood *v.* Spaulding, 57 Vt. 422.

See LANDLORD AND TENANT, 24 Cyc. 1127 *et seq.*

Falling snow and ice.— Where the landlord has neither possession nor control of the roof of the leased premises he is not liable for injuries caused to third persons by the falling of snow and ice therefrom. Lee *v.* McLaughlin, 86 Me. 410, 30 Atl. 65, 26 L. R. A. 197; Clifford *v.* Atlantic Cotton Mills, 146 Mass. 47, 15 N. E. 84, 4 Am. St. Rep. 279; Leonard *v.* Storer, 115 Mass. 86, 15 Am. Rep. 76; Shipley *v.* Fifty Associates, 101 Mass. 251, 3 Am. Rep. 346.

84. It has been said that an owner is responsible: (1) If he creates a nuisance and maintains it; (2) if he creates a nuisance and then demises the land with the nuisance thereon; (3) if the nuisance was erected on the land by a prior owner or by a stranger and he knowingly maintains it; or (4) if he has demised premises and covenanted to keep them in repair and omits to repair, and thus they become a nuisance; (5) if he demises premises to be used as a nuisance, or for a business, or in a way, so that they will necessarily become a nuisance. Ahern *v.* Steele, 115 N. Y. 203, 22 N. E. 193, 12 Am. St. Rep. 778, 5 L. R. A. 449. See also Riley *v.* Simpson, 83 Cal. 217, 23 Pac. 293, 7 L. R. A. 622; Kalis *v.* Shattuck, 69 Cal. 593, 11 Pac. 346, 58 Am. Rep. 568. It is evident that in the second and fifth classes, particularly in the latter, the landlord's liability will extend to injuries which are actually the result of the tenant's misfeasance or nonfeasance, although made possible by the antecedent act of the lessor. In the other classes, the landlord is held accountable because his own act or omission has directly produced the injury. See NUISANCES, 29 Cyc. 1204.

Rule applied in other cases.— Where the owner of real estate, on which there is a kiln for drying lumber, leases with knowledge that the kiln will be used by the lessee for that purpose, and knowing or having reason to know that such use will be dangerous to an adjoining house, he is liable to the owner of such adjoining house if it be burned by fire communicated from the kiln while managed by the lessee. Helwig *v.* Jordan, 53 Ind. 21, 21 Am. Rep. 189. And where defendant leased a mill having an overshot wheel which, when put in motion, became an object calculated to frighten horses, it was held that he was liable for injuries to plaintiff caused by the latter's horse having taken fright thereat; nor was it a defense that the mill was then operated by the lessee. House *v.* Metcalf, 27 Conn. 631. "Whoever, for his own advantage, authorizes his property to be used by another in such manner as to endanger and injure unnecessarily the property or rights of others, is answerable for the consequences. Sometimes the liability has been referred to the law of nuisance, but it exists when predicated upon negligence equally as when predicated upon an intentional wrong." Boston Beef Packing Co. *v.* Stevens, 12 Fed. 279, 280, 20 Blatchf. 443, per Wallace, C. J., unsafe building which afterward fell, leased for storage purposes. See also Carson *v.* Godley, 26 Pa. St. 111, 67 Am. Dec. 404, 2 Phila. 138. Where defendant leased premises with knowledge that the lessee intended to use them for a boiler manufactory, it was held that "one who demises his property for the purpose of having it used in such a way as must prove offensive to others, may himself be treated as the author of the mischief," but that it should have been left to the jury to determine "whether, from the nature of the business or otherwise, the defendant knew, or had

from the maintenance of a nuisance by receiving rent;[85] where there are covenants for its continuance;[86] or where the lessor has otherwise made himself a party to the wrong, as by furnishing the material used in the construction of the nuisance.[87]

(B) *Licensors.* The owner is not liable for the acts of a licensee unless they constitute a nuisance which the owner knowingly suffers to remain.[88]

(C) *Bailors.* In general the bailor is not liable to third parties injured by the negligence of the bailee with respect to the article bailed.[89] But the rule is otherwise where the bailor has intrusted a dangerous article to one unfamiliar with its dangerous quality, uninstructed in its use, or incompetent to observe proper care.[90]

2. Joint and Several Liability — a. General Rule. So far as concerns the number of individuals who may be held responsible, torts are either single or joint. The class within which a particular instance of wrong-doing may be placed depends in general, not upon the inherent nature of the tort itself, but upon the method of its accomplishment, for nearly every tort is susceptible of commission by one or many. Where different persons owe the same duty and their acts naturally tend to the same breach of that duty, the wrong may be regarded as joint and both may be held liable.[91] It has been said that oral defamation is a

reason to believe, that the making of steam engine boilers in his shop would be likely to prove injurious to the plaintiff. . . . He cannot be justly charged with the wrong which was actually committed by others, who were not in his employment, unless he knew, or had reason to believe, that he was letting the property for a use which must prove injurious to the plaintiff." Fish *v.* Dodge, 4 Den. (N. Y.) 311, 317, 47 Am. Dec. 254. See also Pickard *v.* Collins, 23 Barb. (N. Y.) 444. And see Landlord and Tenant, 24 Cyc. 1126.

85. Covert *v.* Crawford, 141 N. Y. 521, 36 N. E. 597, 38 Am. St. Rep. 826; Swords *v.* Edgar, 59 N. Y. 28, 17 Am. Rep. 295; Albany *v.* Cunliff, 2 N. Y. 165; New Rochelle Bd. of Health *v.* Valentine, 11 N. Y. Suppl. 112; Waggoner *v.* Jermaine, 3 Den. (N. Y.) 306, 45 Am. Dec. 474; Rosewell *v.* Prior, 1 Ld. Raym. 392, 713, 91 Eng. Reprint 1160, 1375, 2 Salk. 459, 91 Eng. Reprint 396.

86. East Jersey Water Co. *v.* Bigelow, 60 N. J. L. 201, 38 Atl. 631.

87. Riley *v.* Simpson, 83 Cal. 217, 23 Pac. 293, 7 L. R. A. 622. See, generally, Landlord and Tenant, 24 Cyc. 1124 *et seq.*; Nuisances, 29 Cyc. 1204.

88. Where license was given to a third party by defendant, owner of a quarry, to remove stone therefrom, and the licensee stretched a guy rope across the highway so low as to be dangerous to persons passing, it was held that defendant was liable to one who was injured thereby, it appearing that he had known of the existence of the rope and permitted it to remain. Rockport *v.* Rockport Granite Co., 177 Mass. 246, 58 N. E. 1017, 51 L. R. A. 779. See also Nuisances, 29 Cyc. 1201 *et seq.*

89. See Bailments, 5 Cyc. 212.

90. Although on principle this would seem to be clear, it is unfortunate that the cases are not. It is not easy to perceive why the rule applicable to sales of articles rendered inherently dangerous, the dangerous quality being latent (see *supra*, IV, A, 4) is not applicable to the present case. See Euting *v.* Chicago, etc., R. Co., 116 Wis. 13, 42 N. W. 358, 96 Am. St. Rep. 936, 60 L. R. A. 158 (torpedoes exploded by defendant's engineer for his own amusement); Dixon *v.* Bell, 5 M. & S. 198, 105 Eng. Reprint 1023, 1 Stark. 287, 2 E. C. L. 114, 17 Rev. Rep. 308 (gun intrusted to child). Where defendant's foreman loaned a push car to an ignorant Italian laborer for the latter's own use, and through the latter's negligence plaintiff was injured, the case did not go squarely upon the ground stated above, for it was said: "The relation between the Italian and the defendant company is of no consequence. The question was whether there was an omission on the part of the company to discharge the duty which it owed to the plaintiff to see that reasonable care was observed in the use of the push car on its road." Salisbury *v.* Erie R. Co., 66 N. J. L. 233, 50 Atl. 117, 88 Am. St. Rep. 480, 55 L. R. A. 578. Where a servant having his master's carriage and horses in his possession was directed to take them to a certain place, but instead of doing so went on an errand of his own, and on returning drove against and injured plaintiff, it was held that the master was liable on the ground that he had "put it in the servant's power to mismanage the carriage, by entrusting him with it." Sleath *v.* Wilson, 9 C. & P. 607, 612, 2 M. & Rob. 181, 38 E. C. L. 355 [*quoted* in Philadelphia, etc., R. Co. *v.* Derby, 14 How. (U. S.) 468, 14 L. ed. 502]. So where the servant of a carrier has intrusted the management of the vehicle to a stranger, the carrier is liable for the stranger's negligence. Lakin *v.* Oregon Pac. R. Co., 15 Oreg. 220, 15 Pac. 641.

91. Economy Light, etc., Co. *v.* Hiller, 203 Ill. 518, 68 N. E. 72. And see the cases cited under the sections following.

Joint and several liability for particular torts see Assault and Battery, 3 Cyc. 1080; Death, 13 Cyc. 334; False Imprisonment, 19 Cyc. 326; Fraud, 20 Cyc. 95; Libel and Slander, 25 Cyc. 434; Malicious Prosecu-

tort essentially single; that, although two or more utter the same slander, nevertheless "the words of one are not the words of the other." [92] But in stating that a slander cannot be committed jointly, it is evident that the courts spoke with reference to the particular facts before them. The statement does not apply to cases where concert is shown.[93]

b. Distinct Injuries; Lack of Concert. As applicable to the entire range of tort actions, the proposition may be stated that where wrong-doers have not acted in concert, and separate and distinct injuries are caused by the act or neglect of each, the liability is several only.[94] Thus where animals belonging to several owners do damage together, there being a separate trespass or wrong, each owner is generally liable separately only for the injury done by his animal.[95] The fact

TION, 26 Cyc. 68; NEGLIGENCE, 29 Cyc. 565; NUISANCES, 29 Cyc. 1205; TRESPASS; TROVER AND CONVERSION, and other Tort Titles.

92. Economy Light, etc., Co. *v.* Hiller, 203 Ill. 518, 68 N. E. 72; Webb *v.* Cecil, 9 B. Mon. (Ky.) 198, 48 Am. Dec. 423; Patten *v.* Gurney, 17 Mass. 182, 9 Am. Dec. 141; Chamberlain *v.* Goodwin, Cro. Jac. 647, 79 Eng. Reprint 558; Chamberlaine *v.* Willmore, Palm. 313, 81 Eng. Reprint 1099. See LIBEL AND SLANDER, 25 Cyc. 434.

93. "The reason given by the old authorities, that a slander can be the utterance of but a single tongue, is not conclusive. Granting that only one person can speak the slander, still other persons may hire or procure him to utter it. In the case of other torts such persons and the actual perpetrator of the act are joint tort-feasors. Thus, a principal and agent may be jointly sued for the negligence of the latter. . . . There is no reason for any different rule in a slander case. We do not mean to suggest that the repetition by one person of a slander uttered by another is any part of the original slander. On the contrary, they give rise to two distinct causes of action. But if the two slanders were uttered in pursuance of a common agreement between the parties that such slanders should be uttered, then each is jointly liable with the other for their utterance." Green *v.* Davies, 182 N. Y. 499, 506, 75 N. E. 536 [*reversing* 100 N. Y. App. Div. 359, 91 N. Y. Suppl. 470]. See also Green *v.* Davies, 83 N. Y. App. Div. 216, 82 N. Y. Suppl. 54; Forsyth *v.* Edmiston, 5 Duer (N. Y.) 653; Thomas *v.* Rumsey, 6 Johns. (N. Y.) 26, 32, where it is said: "But where several persons join in singing one and the same libellous song, it is an entire offence, and one joint act done by them all." And see Cooley Torts 142.

94. *Colorado.*— Mead *v.* Ph. Zang Brewing Co., 43 Colo. 1, 95 Pac. 284; Livesay *v.* Denver First Nat. Bank, 36 Colo. 526, 86 Pac. 102, 6 L. R. A. N. S. 598.

Iowa.— Wert *v.* Potts, 76 Iowa 612, 41 N. W. 374, 14 Am. St. Rep. 252.

Massachusetts.— Harriott *v.* Plimpton, 166 Mass. 585, 44 N. E. 992.

New York.— Mooney *v.* Third Ave. R. Co., 2 N. Y. City Ct. 366.

Pennsylvania.— Goodman *v.* Coal Tp., 206 Pa. St. 621, 56 Atl. 65.

Rule applied.— Thus where defendant and one D, acting as a patrol, entered an inclosure where certain slaves were, and defendant pursued one and D another, and D struck plaintiff's slave and killed him, it was held that the question was whether defendant either directly or indirectly acted in concert with or contributed to the act of D. Brooks *v.* Ashburn, 9 Ga. 297. So, where each of two parties, acting independently, appropriated to his use a part of plaintiff's pasture, it was held that the liability, if any, against them was several and must be availed of, not in a joint, but in separate actions. Millard *v.* Miller, 39 Colo. 103, 88 Pac. 845. And where plaintiff was directed by a conductor of defendant's line to alight at a place which was dangerous, and in alighting she was thrown by a block of wood which had been placed across a trench by a gas company, it was held that she could not sue both the gas company and the railroad company in a single suit, as there was not a united act of both — "no community of fault." Howard *v.* Union Traction Co., 195 Pa. St. 391, 45 Atl. 1076. So, where A placed a carriage on one side of the street and B, not acting in concert with A, placed a team of horses on the opposite side, and plaintiff was kicked by one of the horses, thrown against A's carriage, and injured both by the stroke and by falling against the carriage, he could not recover jointly against A and B. Bard *v.* Yohn, 26 Pa. St. 482. The separate act of giving an indemnifying bond to an officer by each of a number of creditors pursuing their remedy under separate writs will not constitute such creditors joint tort-feasors, nor will joint liability be established by joining in a single answer. Livesay *v.* Denver First Nat. Bank, 36 Colo. 526, 86 Pac. 102, 6 L. R. A. N. S. 598.

95. *Illinois.*— Westgate *v.* Carr, 43 Ill. 450.

Indiana.— Denny *v.* Correll, 9 Ind. 72.

Iowa.— Cogswell *v.* Murphy, 46 Iowa 44.

New Jersey.— Nierenberg *v.* Wood, 59 N. J. L. 112, 35 Atl. 654.

New York.— Partenheimer *v.* Van Order, 20 Barb. 479; Auchmuty *v.* Ham, 1 Den. 495; Van Steenburgh *v.* Tobias, 17 Wend. 562, 31 Am. Dec. 310.

See ANIMALS, 2 Cyc. 410.

A joint liability, however, may exist, as in the case of a trespass by cattle, which, although owned severally, are under the joint

that it is difficult to separate the injury done by each from that done by the others furnishes no reason for holding that one tort-feasor should be liable for the acts of others with whom he is not acting in concert. Furthermore, if defendant's act was several when it was committed, it cannot be made joint because of a consequence which followed in connection with the result of the same or a similar act done by others.[96] But, although such wrong-doers may not be liable to a joint action at law for damages, the equitable remedy of injunction may be sought against all of them jointly.[97]

c. Connivance and Ratification. It is the general rule that one who counsels, advises, abets, or assists in the commission by another of an actionable wrong is responsible to the injured party for the entire loss or damage.[98] But mere knowl-

control of all the owners. Smith *v.* Jacques, 6 Conn. 530; Ozburn *v.* Adams, 70 Ill. 291; Wilson *v.* White, 77 Nebr. 351, 109 N. W. 367, 124 Am. St. Rep. 852; Harrison *v.* McClellan, 64 Misc. (N. Y.) 430, 118 N. Y. Suppl. 573 [*reversed* on other grounds in 137 N. Y. App. Div. 508, 121 N. Y. Suppl. 822; Sickles *v.* Gould, 51 How. Pr. (N. Y.) 22; Jack *v.* Hudnall, 25 Ohio St. 255, 18 Am. Rep. 298.

A special statute may impose a joint liability where it would otherwise be several only. Worcester County *v.* Ashworth, 160 Mass. 186, 35 N. E. 773, construing Pub. St. c. 102, § 106, as imposing upon the owner of a dog, engaged with other dogs in doing damage to sheep, etc., liability for all the damages so done. But under Pub. St. c. 102, § 93, providing that "every owner or keeper of a dog shall forfeit to any person injured by it double the amount of the damage sustained by him"; the use of the disjunctive "or" indicates a purpose on the part of the legislature that the liability of such owner and keeper be several and not joint. Galvin *v.* Parker, 154 Mass. 346, 28 N. E. 244.

96. Butler *v.* Ashworth, 110 Cal. 614, 43 Pac. 4, 386; Chipman *v.* Palmer, 77 N. Y. 51, 33 Am. Rep. 566; Magee *v.* Pennsylvania, etc., R. Co., 13 Pa. Super. Ct. 187.

Fouling stream.— Thus, since torts several when committed do not become joint by the subsequent union of their consequences, where a dam was filled by deposits of coal dirt from different mines on the stream, some of which were worked by defendants, it was held that defendants were not liable for the combined results of all the deposits. Throwing the dirt into the stream was the tort for which the action was brought, not the deposit in the dam. Little Schuylkill Nav. R., etc., Co. *v.* Richards, 57 Pa. St. 142, 98 Am. Dec. 209. *Compare*, however, Day *v.* Louisville Coal, etc., Co., 60 W. Va. 27, 53 S. E. 776, 10 L. R. A. N. S. 167. Where different parties pollute a stream by the discharge of sewage therein, each from his own premises, and each acting separately and independently of the others, one of the number is not liable for all the injury suffered by another because of the nuisance thus created. Each is liable only to the extent of the wrong committed by him. Chipman *v.* Palmer, 77 N. Y. 51, 33 Am. Rep. 566. See also Sellick *v.* Hall, 47 Conn. 260; Loughran *v.* Des Moines, 72 Iowa 382, 34 N. W. 172; Sloggey *v.* Dilworth, 38 Minn. 179, 36 N. W. 451, 8 Am. St. Rep. 656; Martinowsky *v.* Hannibal, 35 Mo. App. 70; Watson *v.* Colusa-Parrot Min., etc., Co., 31 Mont. 513, 79 Pac. 14; Brennan *v.* Corsicana Cotton-Oil Co., (Tex. Civ. App. 1898) 44 S. W. 588; Lull *v.* The Fox, etc., Imp. Co., 19 Wis. 112. And see WATERS.

Circulating defamatory reports.— Where suit was brought against three defendants for circulating defamatory reports concerning plaintiff, resulting in the breaking of an engagement to marry, it was held that a joint action could not be maintained, it not having been shown that defendants acted in concert. Harriott *v.* Plimpton, 166 Mass. 585, 44 N. E. 992. And see LIBEL AND SLANDER, 25 Cyc. 434.

Maintenance of nuisance.— "It is well settled that each person who acts in maintaining a nuisance is liable for the resulting damage. If he act independently, and not in concert with others, he is liable for the damages which result from his own act only. . . . And the fact that it is difficult to measure accurately the damage which was caused by the wrongful act of each contributor to the aggregate result does not affect the rule, nor make anyone liable for the acts of the others." Harley *v.* Merrill Brick Co., 83 Iowa 73, 78, 48 N. W. 1000, applying the rule where defendant and others operated works which discharged smoke, soot, and gas injurious to health and property, it being held that the liability was single and not joint. See NUISANCES, 29 Cyc. 1205.

97. Miller *v.* Highland Ditch Co., 87 Cal. 430, 25 Pac. 550, 22 Am. St. Rep. 254. And see INJUNCTIONS, 22 Cyc. 916; NUISANCES, 29 Cyc. 1239.

98. *Connecticut.*—Sparrow *v.* Bromage, 83 Conn. 27, 74 Atl. 1070.

Illinois.— Tandrup *v.* Sampsell, 234 Ill. 526, 85 N. E. 331, 17 L. R. A. N. S. 852; Steinhaus *v.* Radtke, 145 Ill. App. 232.

Massachusetts.— Johnson *v.* Scott, 205 Mass. 294, 91 N. E. 302.

Missouri.— Cooper *v.* Johnson, 81 Mo. 483.

New York.— Thorp *v.* Amos, 1 Sandf. Ch. 26. See also MASTER AND SERVANT, 26 Cyc. 1518 *et seq.*; PRINCIPAL AND AGENT, 31 Cyc. 1581 *et seq.*

Rule stated.— "All who aid, command, advise, or countenance the commission of a tort by another, or who approve of it after it is done, if done for their benefit, are liable in the same manner as they would be if they

edge that a tort is being committed against another will not be sufficient to establish liability. There exists no legal duty to disclose.[99] Nor will the mere presence of a person at the commission of a trespass or other wrongful act by another render him liable as a participant.[1] It is also well settled that the liability of one who has not actively participated may be established where the wrongful act is ratified by him.[2] But mere acquiescence in the commission of a tort after the act does not make the person thus acquiescing a party to the wrong or liable therefor as a joint tort-feasor, since, to be liable, he must not only have assented to the wrong, but the act must have been done for his benefit [3] or have been of a nature to benefit him.[4] Ratification will not be established from mere knowledge, approval, or satisfaction.[5] It has been said that "to hold one responsible for a tort not committed by his orders, his adoption of and assent to the same must at all events be clear and explicit, and founded on a clear knowledge of the tort which has been committed." [6] The ratification must be founded on full knowledge

had done the same tort with their own hands." Moir *v.* Hopkins, 16 Ill. 313, 315, 63 Am. Dec. 312. "In all cases he who maliciously procures an injury to be done to another, is a joint wrong-doer and may be sued either alone or jointly with the actor." Ga. Code, § 3873 [*cited* in Graham *v.* Dahlonega Gold Min. Co., 71 Ga. 296]. In an action for procuring the commission of an act of malicious mischief, it must appear that defendant did or said what amounted to a request or direction, in obedience to which it may be inferred that the act was done. Rich *v.* Jakway, 18 Barb. (N. Y.) 357.

Rule applied.— Thus where one sold a mill standing upon the lot of his neighbor and appointed a day for the purchaser to take it away, promising to aid him in its removal if assistance was necessary and the mill was subsequently taken down and removed by the purchaser, it was held that the vendor was liable to an action of trespass, although there was no proof of his being present or aiding in the removal of the building. Wall *v.* Osborn, 12 Wend. (N. Y.) 39. So where plaintiff was arrested wrongfully by two police officers, A and B, and taken to the lock-up, and afterward C, the city marshal, sent him, the assistant marshal, D, taking part in such act, from the lock-up to the railroad station in the custody of another officer, who released him only when on the train and just before it started, it was held that plaintiff could maintain an action against the five officers jointly, but only for the imprisonment between the lock-up and the train. Bath *v.* Metcalf, 145 Mass. 274, 14 N. E. 133, 1 Am. St. Rep. 455. And where a street in front of plaintiff's property was graded without an ordinance authorizing it, and the mayor and the street committee of the common council were present superintending and encouraging the work, a judgment against them as joint tort-feasors was sustained. Reed *v.* Peck, 163 Mo. 333, 63 S. W. 734. One who acquiesces in the erection of a building on his land, knowing that the material has been removed from a building on mortgaged premises, is liable to the mortgagee for its value. Stevens *v.* Smathers, 124 N. C. 571, 32 S. E. 959.

99. Brannock *v.* Bouldin, 26 N. C. 61.

1. Brown *v.* Perkins, 1 Allen (Mass.) 89; Hilmes *v.* Stroebel, 59 Wis. 74, 17 N. W. 539.

Mere permission.— The owner of land is not a joint tort-feasor, so as to be liable to the lessee for the burying of a horse thereon by a third person, where he merely gave him permission to do so, and did not direct or procure the trespass. Fitzwater *v.* Fassett, 199 Pa. St. 442, 49 Atl. 310.

2. *Connecticut.*— Dunn *v.* Hartford, etc., Horse R. Co., 43 Conn. 434.

Illinois.— Reed *v.* Rich, 49 Ill. App. 262.

Iowa.— Brown *v.* Webster City, 115 Iowa 511, 88 N. W. 1070.

Maine.— Stuart *v.* Chapman, 104 Me. 17, 70 Atl. 1069.

Massachusetts.— Dempsey *v.* Chambers, 154 Mass. 330, 28 N. E. 279, 26 Am. St. Rep. 249, 13 L. R. A. 219.

New York.— Brainerd *v.* Dunning, 30 N. Y. 211.

See also MASTER AND SERVANT, 26 Cyc. 1518; PRINCIPAL AND AGENT, 31 Cyc. 1249 *et seq.*

Illegal sale under execution.—Where a sheriff sells the goods of a stranger to the writ and the plaintiffs in the action in which the writ was issued refuse to instruct him not to sell, although knowing the facts, and subsequently receive the proceeds of the sale, this amounts to a ratification of the tort. Brainerd *v.* Dunning, 30 N. Y. 211.

3. Wamsganz *v.* Wolff, 86 Mo. App. 205.

4. Moore *v.* Rogers, 51 N. C. 297.

5. Hyde *v.* Cooper, 26 Vt. 552.

6. Tucker *v.* Jerris, 75 Me. 184, 188. And see Randlette *v.* Judkins, 77 Me. 114, 52 Am. Rep. 747; Cooper *v.* Johnson, 81 Mo. 483; Adams *v.* Freeman, 9 Johns. (N. Y.) 117.

Rule applied.— Thus where one Quimby hired plaintiff's team to go only to B, it was held that the fact that defendant had accompanied him on a trip to N did not render him liable to plaintiff as a trespasser. Hubbard *v.* Hunt, 41 Vt. 376. The fact that a city has authorized its solicitor to appear for and defend an action brought against its police officers for an assault and battery committed by them does not constitute a

of the facts constituting the wrong which has been committed or a purpose without inquiry to take the consequences.[7]

d. Concert of Action. Where two or more are engaged in an unlawful enterprise, each is individually responsible for all injuries committed in its prosecution and this, although the specific injury was done by one of the parties alone. Here the liability of the other is founded upon the concert of action.[8]

e. Contractual Relations. It is for the same reason that a like result is reached where, owing to the contractual relation between parties, the act of one is deemed that of the other, although the original enterprise was not unlawful. Thus it has

ratification. Buttrick *v.* Lowell, 1 Allen (Mass.) 172, 79 Am. Dec. 721.

7. Reed *v.* Rich, 49 Ill. App. 262; Tucker *v.* Jerris, 75 Me. 184; Lewis *v.* Read, 14 L. J. Exch. 295, 13 M. & W. 834. See PRINCIPAL AND AGENT, 31 Cyc. 1253 *et seq.*

Rule stated.— To hold a person liable for a tort which he has not himself committed and which has not been done by his orders, his adoption of or assent to the act, such as will render him liable, must be clear and explicit, and made with a full knowledge of the tort, or at least of the injured party's complaint that the injury has been inflicted on him. Tucker *v.* Jerris, 75 Me. 184. See Cooley Torts 215, 216.

8. *Connecticut.*— Sparrow *v.* Bromage, 83 Conn. 27, 74 Atl. 1070.

Georgia.— Central of Georgia R. Co. *v.* Brown, 113 Ga. 414, 38 S. E. 989, 84 Am. St. Rep. 250.

Illinois.—West Chicago St. R. Co. *v.* Horne, 100 Ill. App. 259 [*affirmed* in 197 Ill. 250, 64 N. E. 331].

Indiana.— Cleveland, etc., R. Co. *v.* Gossett, 172 Ind. 525, 87 N. E. 723; Cleveland, etc., R. Co. *v.* Hilligoss, 171 Ind. 417, 86 N. E. 485; Gunder *v.* Tibbits, 153 Ind. 591, 55 N. E. 762; Boaz *v.* Tate, 43 Ind. 60.

Iowa.— Price *v.* Price, 91 Iowa 693, 60 N. W. 202, 51 Am. St. Rep. 360, 29 L. R. A. 150.

Kentucky.— White *v.* Turner, 1 B. Mon. 130.

Louisiana.— Irwin *v.* Scribner, 15 La. Ann. 583; Wallace *v.* Miller, 15 La. Ann. 449.

Massachusetts.— Hawkesworth *v.* Thompson, 98 Mass. 77, 93 Am. Dec. 137.

New York.— Green *v.* Davies, 182 N. Y. 499, 75 N. E. 536; Creed *v.* Hartman, 29 N. Y. 591, 86 Am. Dec. 341; Mead *v.* Mali, 15 How. Pr. 347 [*affirmed* in 25 Barb. 578]; Williams *v.* Sheldon, 10 Wend. 654.

North Carolina.— Smithwick *v.* Ward, 52 N. C. 64, 75 Am. Dec. 453.

South Carolina.— O'Brien *v.* Bound, 2 Speers 495, 42 Am. Dec. 384.

Tennessee.— Kirkwood *v.* Miller, 5 Sneed 455, 73 Am. Dec. 134.

Wisconsin.—Wyss *v.* Grunert, 108 Wis. 38, 83 N. W. 1095.

United States.— Little *v.* Giles, 118 U. S. 596, 7 S. Ct. 32, 30 L. ed. 269; Pirie *v.* Tvedt, 115 U. S. 41, 5 S. Ct. 1034, 1161, 29 L. ed. 331; Clay *v.* Waters, 161 Fed. 815, 88 C. C. A. 633; Smith *v.* Rines, 22 Fed. Cas. No. 13,100, 2 Sumn. 338.

And see CONSPIRACY, 8 Cyc. 615, 657.

Rule applied.— Thus in an action against supervisors for damages in obstructing the flow of water by a causeway, although parts of it were built at different times and by different defendants, yet as it was done in pursuance of a common design, it was held that the acts of one were the acts of all, and the injury, if any, was the joint act of defendants. Yealy *v.* Fink, 43 Pa. St. 212, 82 Am. Dec. 556. So, two persons unlawfully racing their horses together on a street are jointly liable to one who attempts to cross in front of them, and who, without fault on his part, is run against by one of them and injured, where but for the race there would have been no accident. Hanrahan *v.* Cochran, 12 N. Y. App. Div. 91, 42 N. Y. Suppl. 1031. See also Burnham *v.* Butler, 31 N. Y. 480. And where a horse is hired of the owner by one person, delivered upon his credit to another, and driven to death by the second with the coöperation of the first, who is driving another horse in company with him, they may be held jointly liable by the owner. Banfield *v.* Whipple, 10 Allen (Mass.) 27, 87 Am. Dec. 618. In Daingerfield *v.* Thompson, 74 Va. 136, 36 Am. Rep. 783, three persons at midnight demanded admittance to a restaurant, which was closed but had a light burning within. Admittance being refused, one of them went around to a side door, entered and told the keeper that one of the others wanted to come in. The two others being at the front door, one said, "Fire a salute." The one addressed fired a pistol and the ball went through the door and severely wounded the keeper. There was an ordinance prohibiting the discharge of firearms in the street. It was held that the person firing and the one advising the firing were jointly liable. And in Chicago-Virden Coal Co. *v.* Wilson, 67 Ill. App. 443, it was held that where an embankment was built on the right of way of a railroad company, and a switch was laid over the embankment for the purpose of connecting the main line of the railroad with a coal mine, the work being done by the owners of the coal mine with the consent of the railroad company and for the joint use of both, both might be held responsible for any damage caused thereby. A partnership, the individual members thereof, and a person not a member may be joined as defendants in an action for malicious prosecution instituted as the result of a confederation. Page *v.* Citizens' Banking Co., 111 Ga. 73, 36 S. E. 418, 78 Am. St. Rep. 144, 51 L. R. A. 463.

been held that principal and agent may be jointly sued for the negligence of the latter in the course of his employment resulting in personal injury to plaintiff,[9] and that employer may be joined with employee,[10] partner with partner,[11] lessor with lessee,[12] and coöwner with coöwner.[13]

f. Production of Single Injury. Where, although concert is lacking, the separate and independent acts or negligence of several combine to produce directly a single injury, each is responsible for the entire result, even though his act or neglect alone might not have caused it.[14] It has been said that "to make tort-

9. Phelps *v.* Wait, 30 N. Y. 78; Diamond *v.* Smith, 27 Tex. Civ. App. 558, 66 S. W. 141; Ellis *v.* Stine, (Tex. Civ. App. 1900) 55 S. W. 758. See *supra*, V, B, 1, b, (III), (A); PRINCIPAL AND AGENT, 31 Cyc. 1624.

10. Golden *v.* Northern Pac. R. Co., 39 Mont. 435, 104 Pac. 549; Montfort *v.* Hughes, 3 E. D. Smith (N. Y.) 591; White *v.* Southern R. Co., 146 N. C. 340, 59 S. E. 1042; Hough *v.* Southern R. Co., 144 N. C. 692, 57 S. E. 469; Moreton *v.* Hardern, 4 B. & C. 223, 6 D. & R. 275, 10 E. C. L. 553, 107 Eng. Reprint 1042. See *supra*, V, B, 1, b, (III), (A); MASTER AND SERVANT, 26 Cyc. 1545, 1571.

Partner and employee of firm see Roberts *v.* Johnson, 58 N. Y. 613; Baker *v.* Hagey, 177 Pa. St. 128, 35 Atl. 705, 55 Am. St. Rep. 712.

11. *Illinois.*— Durant *v.* Rogers, 87 Ill. 508.

Massachusetts.— Lothrop *v.* Adams, 133 Mass. 471, 43 Am. Rep. 528.

Michigan.—Oliver *v.* Perkins, 92 Mich. 304, 52 N. W. 609; Haney Mfg. Co. *v.* Perkins, 78 Mich. 1, 43 N. W. 1073.

United States.— Strang *v.* Bradner, 114 U. S. 555, 5 S. Ct. 1038, 29 L. ed. 248.

England.— Moreton *v.* Hardern, 4 B. & C. 223, 6 D. & R. 275, 10 E. C. L. 553, 107 Eng. Reprint 1042.

See *supra*, V, B, 1, b, (IV); PARTNERSHIP, 30 Cyc. 523, 566.

Rule applied.—Where one of the partners of a firm engaged in real estate transactions perpetrates a fraud by scattering petroleum on partnership lands and selling the premises as oil bearing, all are liable, although the others had no connection with, knowledge of, or participation in, the fraud. Chester *v.* Dickerson, 54 N. Y. 1, 13 Am. Rep. 550.

12. Washington Market Co. *v.* Clagett, 19 App. Cas. (D. C.) 12; West Chicago St. R. Co. *v.* Horne, 100 Ill. App. 259 [*affirmed* in 197 Ill. 250, 64 N. E. 331]. See *supra*, V, B, 1, b, (V), (A).

13. Thus owners of a ram who are aware of his butting propensities are jointly liable for damage done by such butting, although it was done while the ram was in a pasture in which he had been placed by one joint owner without the knowledge or consent of the other, and in which pasture the other had no interest. Oakes *v.* Spaulding, 40 Vt. 347, 94 Am. Dec. 404. Where in an action by husband and wife against three corporations, for injuries to the wife caused by her being thrown from a buggy drawn by a horse which was frightened by the falling of a telegraph pole which had rotted at the base, the first count of the declaration charged defendants with being coöwners of the telegraph pole, and the second count charged one with being the owner and the others with using and maintaining it, the effect of the two counts was to charge defendants as joint tort-feasors, with a joint and several liability to plaintiff; and a verdict could properly be found against any or all of them. District of Columbia *v.* Bolling, 4 App. Cas. (D. C.) 397.

14. *California.*— Hillman *v.* Newington, 57 Cal. 56.

Connecticut.— Carstesen *v.* Stratford, 67 Conn. 428, 35 Atl. 276.

Georgia.— Mashburn *v.* Dannenberg Co., 117 Ga. 567, 44 S. E. 97.

Illinois.— Nordhaus *v.* Vandalia R. Co., 242 Ill. 166, 89 N. E. 974 [*affirming* 147 Ill. App. 274]; Economy Light, etc., Co. *v.* Hiller, 203 Ill. 518, 68 N. E. 72.

Indiana.— Cleveland, etc., R. Co. *v.* Gossett, 172 Ind. 525, 87 N. E. 723; Cleveland, etc., R. Co. *v.* Hilligoss, 171 Ind. 417, 86 N. E. 485, 131 Am. St. Rep. 258.

Iowa.— Wisecarver *v.* Chicago, etc., R. Co., 141 Iowa 121, 119 N. W. 532.

Kansas.— Kansas City *v.* Slangstrom, 53 Kan. 431, 36 Pac. 706; Osage City *v.* Larkin, 40 Kan. 206, 19 Pac. 658, 10 Am. St. Rep. 186, 2 L. R. A. 56.

Kentucky.— Probst *v.* Hinesley, 133 Ky. 64, 117 S. W. 389; Clinger *v.* Chesapeake, etc., R. Co., 128 Ky. 736, 109 S. W. 315, 33 Ky. L. Rep. 86, 15 L. R. A. N. S. 998.

Maine.—Allison *v.* Hobbs, 96 Me. 26, 51 Atl. 245.

Massachusetts.— Corey *v.* Havener, 182 Mass. 250, 65 N. E. 69.

Michigan.— Cuddy *v.* Horn, 46 Mich. 596, 10 N. W. 32, 41 Am. Rep. 178.

Missouri.— Berry *v.* St. Louis, etc., R. Co., 214 Mo. 593, 114 S. W. 27.

New Jersey.— Newman *v.* Fowler, 37 N. J. L. 89.

New York.— Martin *v.* Farrell, 66 N. Y. App. Div. 177, 72 N. Y. Suppl. 934; O'Shea *v.* Kirker, 4 Bosw. 120, 8 Abb. Pr. 69; Goldstein *v.* Tunick, 59 Misc. 516, 110 N. Y. Suppl. 905; Bohun *v.* Taylor, 6 Cow. 313.

Tennessee.— Moore *v.* Chattanooga Electric R. Co., 119 Tenn. 710, 109 S. W. 497, 16 L. R. A. N. S. 978.

Texas.— Gulf, etc., R. Co. *v.* McWhirter, 77 Tex. 356, 14 S. W. 26, 19 Am. St. Rep. 755; San Antonio *v.* Mackey, 14 Tex. Civ. App. 210, 36 S. W. 760; Taylor Water Co. *v.* Dillard, 9 Tex. Civ. App. 667, 29 S. W. 662.

Vermont.— Drown *v.* New England Tel., etc., Co., 80 Vt. 1, 66 Atl. 801.

feasors liable jointly there must be some sort of community in the wrong-doing, and the injury must be in some way due to their joint work, but it is not necessary that they be acting together or in concert if their concurring negligence occasions the injury." [15] The rule has been applied where several creditors, acting separately without concert and without knowledge, simultaneously caused their debtor to be arrested wrongfully on their nine several writs and committed to jail, where he was confined upon all of them at the same time; [16] where through the negligence of one contractor water flowed into a cellar from the roof and through the negligence of another contractor water flowed from the street, both bodies of water forming one, which found its way through the walls into plaintiff's building adjacent; [17] where one manufacturer of explosives shipped a case of dualin by plaintiff's line and at the same time another manufacturer shipped "exploders," neither notifying the railroad of the dangerous quality of the goods, it being alleged that the dualin took fire and caused the exploders to explode and that the exploders took fire and caused the dualin to explode; [18] where the owners of three adjacent lots on which there were stores, the front walls of each store interlocking, permitted the walls to remain bulging after a fire and a portion thereof fell and injured plaintiff; [19] and where a passenger is injured by a collision caused by the joint negligence of two carriers.[20] Other illustrations are given in the note.[21]

Virginia.—Walton *v.* Miller, 109 Va. 210, 63 S. E. 458, 132 Am. St. Rep. 908, injuries causing death.

West Virginia.— Day *v.* Louisville Coal, etc., Co., 60 W. Va. 27, 53 S. E. 776, 10 L. R. A. N. S. 167.

United States.— Clay *v.* Waters, 161 Fed. 815, 88 C. C. A. 633.

15. Strauhal *v.* Asiatic Steamship Co., 48 Oreg. 100, 108, 85 Pac. 230.

16. Stone *v.* Dickinson, 5 Allen (Mass.) 29, 81 Am. Dec. 727.

17. Slater *v.* Mersereau, 64 N. Y. 138.

18. Boston, etc., R. Co. *v.* Shanly, 107 Mass. 568.

19. Simmons *v.* Everson, 124 N. Y. 319, 26 N. E. 911, 21 Am. St. Rep. 676. See also Johnson *v.* Chapman, 43 W. Va. 639, 28 S. E. 744.

20. *District of Columbia.*— Washington, etc., R. Co. *v.* Hickey, 5 App. Cas. 436 [*affirmed* in 166 U. S. 521, 17 S. Ct. 661, 41 L. ed. 1101].

Michigan.— Cuddy *v.* Horn, 46 Mich. 596, 10 N. W. 32, 41 Am. Rep. 178.

Minnesota.— Flaherty *v.* Minneapolis, etc., R. Co., 39 Minn. 328, 40 N. W. 160, 12 Am. St. Rep. 654, 1 L. R. A. 680.

Missouri.—Arnett *v.* Missouri Pac. R. Co., 64 Mo. App. 368.

New York.— Barrett *v.* Third Ave. R. Co., 45 N. Y. 628; Colegrove *v.* New York, etc., R. Co., 20 N. Y. 492, 75 Am. Dec. 418.

United States.— The Beaconsfield, 158 U. S. 303, 15 S. Ct. 860, 39 L. ed. 993.

21. Where the center line of a bridge was the boundary line between two towns, both of which were bound to keep the bridge in repair, and plaintiff sustained injuries by reason of the defective condition of the structure, it was held that the liability of the towns was joint. Clapp *v.* Ellington, 87 Hun (N. Y.) 542, 34 N. Y. Suppl. 283 [*affirmed* in 154 N. Y. 781, 49 N. E. 1095]. And where an electric street railway company and a telephone company concurrently maintained two wires so erected that one was likely to fall across the other and cause damage to property, and the wire of the telephone company broke and fell across the trolley wire, thereby becoming charged with electricity, and plaintiff's horse came in contact with the hanging wire and was killed, it was held that the telephone company and the railroad company were jointly liable. McKay *v.* Southern Bell Tel., etc., Co., 111 Ala. 337, 19 So. 695, 56 Am. St. Rep. 59, 31 L. R. A. 589. See also United Electric R. Co. *v.* Shelton, 89 Tenn. 423, 14 S. W. 863, 24 Am. St. Rep. 614. So, where plaintiff alleged that while employed on a steamboat he was injured by the falling of a coal bucket operated by one C, and that C was negligent in using defective machinery, and in operating it, and that the steamboat owner was negligent in not providing him a safe place for work, and in not warning him of the danger, it was held that, as the alleged acts of negligence of C and the steamboat owner, although distinct in themselves, concurred in producing the injury, their liability was joint as well as several. Brown *v.* Coxe, 75 Fed. 689. And where several owners of junior power rights in the waters of a stream, although acting independently of each other, accomplished collectively, by an unlawful and excessive use of water, the diminution of the supply of water, to which the owner of the senior power right was entitled, and it was very difficult or impossible to determine the proportion of the injury caused by the several wrong-doers, it was held that each was severally responsible for the injury caused to the owner of the senior right and might be individually sued for the damages resulting from such injury. Elkhart Paper Co. *v.* Fulkerson, 36 Ind. App. 219, 75 N. E. 283. So where it was alleged that two railroad companies and defendant city had severally made certain excavations, constructed switches, etc., which caused surface water to flood plaintiff's land, it was held that the

g. Comparison of Culpability. The degree of culpability of each of the wrong-doers cannot be compared; nor will their liability be affected by the relative degree of negligence or of the care required.[22] "It is sufficient to support a recovery if the negligence of both be a contributory cause, even though one owes to the person injured a higher degree of care and even though there be different degrees of negligence by each. Either or both are alike responsible."[23]

h. Exemption of Joint Wrong-Doer. The fact that one of the wrong-doers may not be held accountable to the injured party will not operate to exempt the other.[24]

i. Electing the Wrong-Doer. In cases covered by the foregoing rule as generally stated, the injured party may sue one, any, or all of the joint tort-feasors.[25]

entire volume of water produced by their joint and concurring negligence inflicted the injury; that it was inflicted by the combined or joint action of all three of them; and that they were jointly and severally liable. Pickerill *v.* Louisville, 125 Ky. 213, 100 S. W. 873, 30 Ky. L. Rep. 1239.

Concurring cause see *supra*, IV, B.

22. *District of Columbia.*—Washington, etc., R. Co. *v.* Hickey, 5 App. Cas. 436 [*affirmed* in 166 U. S. 521, 17 S. Ct. 661, 41 L. ed. 1101].

Illinois.— Consolidated Ice Mach. Co. *v.* Keifer, 134 Ill. 481, 25 N. E. 799, 23 Am. St. Rep. 688, 10 L. R. A. 696.

Indiana.— Cleveland, etc., R. Co. *v.* Hilligoss, 171 Ind. 417, 86 N. E. 485, 131 Am. St. Rep. 258.

Kentucky.— Probst *v.* Hinesley, 133 Ky. 64, 117 S. W. 389.

Massachusetts.— Johnson *v.* Scott, 205 Mass. 294, 91 N. E. 302.

North Carolina.— Clark *v.* Patapsco Guano Co., 144 N. C. 64, 56 S. E. 858.

Pennsylvania.— Bunting *v.* Hogsett, 139 Pa. St. 363, 21 Atl. 31, 33, 34, 23 Am. St. Rep. 192, 12 L. R. A. 268.

West Virginia.— Johnson *v.* Chapman, 43 W. Va. 639, 28 S. E. 744.

United States.— Brown *v.* Coxe, 75 Fed. 689.

Rule stated.— "Where the negligence of two or more persons directly concurs to produce an injury to another, although one may have undertaken one part of the particular work and another another part, and the negligence occurs in the performance of each of the several parts of the work which directly contributes to produce the injury, all will be liable." Consolidated Ice Mach. Co. *v.* Keifer, 134 Ill. 481, 25 N. E. 799, 23 Am. St. Rep. 688, 10 L. R. A. 696.

23. Sternfels *v.* Metropolitan St. R. Co., 73 N. Y. App. Div. 494, 497, 77 N. Y. Suppl. 309 [*affirmed* in 174 N. Y. 512, 66 N. E. 1117]. See also Henderson *v.* Nassau Electric R. Co., 46 N. Y. App. Div. 280, 61 N. Y. Suppl. 690; Zimmer *v.* Third Avenue R. Co., 36 N. Y. App. Div. 265, 55 N. Y. Suppl. 308; Taylor *v.* Long Island R. Co., 16 N. Y. App. Div. 1, 44 N. Y. Suppl. 820.

24. Taylor Water Co. *v.* Dillard, 9 Tex. Civ. App. 667, 29 S. W. 662. Where defendant suborned a witness to swear falsely to defamatory statements, he was none the less liable because the witness was protected. Rice *v.* Coolidge, 121 Mass. 393, 23 Am. Rep. 279.

25. *Connecticut.*— Sparrow *v.* Bromage, 83 Conn. 27, 74 Atl. 1070.

Georgia.— Graham *v.* Dahlonega Gold Min. Co., 71 Ga. 296.

Illinois.—Nordhaus *v.* Vandalia R. Co., 242 Ill. 166, 89 N. E. 974 [*affirming* 147 Ill. App. 274]; Tandrup *v.* Sampsill, 234 Ill. 526, 85 N. E. 331, 17 L. R. A. N. S. 852; Frank Parmelee Co. *v.* Wheelock, 224 Ill. 194, 79 N. E. 652 [*affirming* 127 Ill. App. 500]; Wilcke *v.* Henrotin, 146 Ill. App. 481 [*affirmed* in 241 Ill. 169, 89 N. E. 329]; Steinhaus *v.* Radtke, 145 Ill. App. 232; Ross *v.* Shanley, 86 Ill. App. 144 [*affirmed* in 185 Ill. 390, 56 N. E. 1105].

Indiana.— Cleveland, etc., R. Co. *v.* Gassett, 172 Ind. 525, 87 N. E. 723; Cleveland, etc., R. Co. *v.* Hilligoss, 171 Ind. 417, 86 N. E. 485, 131 Am. St. Rep. 258; Indianapolis, etc., R. Co. *v.* Warner, 35 Ind. 515; Brady *v.* Ball, 14 Ind. 317.

Iowa.—Wisecarver *v.* Chicago, etc., R. Co., 141 Iowa 121, 119 N. W. 532.

Kansas.— Kansas City *v.* Slangstrom, 53 Kan. 431, 36 Pac. 706.

Kentucky.— Probst *v.* Hinesley, 133 Ky. 64, 117 S. W. 389; Clinger *v.* Chesapeake, etc., R. Co., 128 Ky. 736, 109 S. W. 315, 33 Ky. L. Rep. 86, 15 L. R. A. N. S. 998; Pickerill *v.* Louisville, 125 Ky. 213, 100 S. W. 873, 30 Ky. L. Rep. 1239.

Maine.— Stuart *v.* Chapman, 104 Me. 17, 70 Atl. 1069; Allison *v.* Hobbs, 96 Me. 26, 51 Atl. 245.

Massachusetts.— Corey *v.* Havener, 182 Mass. 250, 63 N. E. 69.

Michigan.— Patterson *v.* Wabash, etc., R. Co., 54 Mich. 91, 19 N. W. 761.

Missouri.— Fulwider *v.* Trenton Gas, etc., Co., 216 Mo. 582, 116 S. W. 508; Berry *v.* St. Louis, etc., R. Co., 214 Mo. 593, 114 S. W. 27.

Montana.— Golden *v.* Northern Pac. R. Co., 39 Mont. 435, 104 Pac. 549.

New Jersey.— Newman *v.* Fowler, 37 N. J. L. 89.

New York.— Clapp *v.* Ellington, 154 N. Y. 781, 49 N. E. 1095 [*affirming* 87 Hun 542, 34 N. Y. Suppl. 283]; Kain *v.* Smith, 80 N. Y. 458; Roberts *v.* Johnson, 58 N. Y. 613; Creed *v.* Hartmann, 29 N. Y. 591, 86 Am. Dec. 341; Tanzer *v.* Breen, 131 N. Y. App. Div. 654, 116 N. Y. Suppl. 110; Usher *v.* Van Vranken, 48 N. Y. App. Div. 413, 63 N. Y. Suppl. 104;

Separate actions may be brought either simultaneously or successively, judgment may be recovered in each, and plaintiff may elect which judgment he will enforce. But the satisfaction of one of the judgments will operate as a satisfaction of all.[26]

j. Function of Court and Jury — (i) *In General.* Whether the wrong-doers had a common purpose or coöperated in the doing of an illegal act is for the jury.[27] Where proceedings are brought against several, the jury is at liberty to find in favor of one or more and against the others[28] or the injured party may

Kirby *v.* Delaware, etc., Canal Co., 90 Hun 588, 35 N. Y. Suppl. 975; Goldstein *v.* Tunick, 59 Misc. 516, 110 N. Y. Suppl. 905; Mead *v.* Mali, 15 How. Pr. 347 [*affirmed* in 25 Barb. 578]; Knickerbacker *v.* Colver, 8 Cow. 111; Low *v.* Mumford, 14 Johns. 426, 7 Am. Dec. 469.

North Carolina.— Hough *v.* Southern R. Co., 144 N. C. 692, 57 S. E. 469.

Rhode Island.— Parmenter *v.* Barstow, 21 R. I. 410, 43 Atl. 1035.

Tennessee.— Moore *v.* Chattanooga Electric R. Co., 119 Tenn. 710, 109 S. W. 497, 16 L. R. A. N. S. 978.

Texas.— Taylor Water Co. *v.* Dillard, 9 Tex. Civ. App. 667, 29 S. W. 662.

Utah.— Groot *v.* Oregon Short Line R. Co., 34 Utah 152, 96 Pac. 1019.

Vermont.— Drown *v.* New England Tel., etc., Co., 80 Vt. 1, 66 Atl. 801.

Virginia.—Walton *v.* Miller, 109 Va. 210, 63 S. E. 458, 132 Am. St. Rep. 908; Staunton Mut. Tel. Co. *v.* Buchanan, 108 Va. 810, 62 S. E. 928.

Washington.— Birkel *v.* Chandler, 26 Wash. 241, 66 Pac. 406.

Wisconsin.— Zeleer *v.* Martin, 84 Wis. 4, 54 N. W. 330.

United States.— The Beaconsfield, 158 U. S. 303, 15 S. Ct. 860, 39 L. ed. 993; Little *v.* Giles, 118 U. S. 596, 7 S. Ct. 32, 30 L. ed. 269; Pirie *v.* Tvedt, 115 U. S. 41, 5 S. Ct. 1034, 29 L. ed. 331; Gawne *v.* Bicknell, 162 Fed. 587; Clay *v.* Waters, 161 Fed. 815, 88 C. C. A. 633; Brown *v.* Coxe, 75 Fed. 689; Gudger *v.* Western North Carolina R. Co., 21 Fed. 81; Keep *v.* Indianapolis, etc., R. Co., 10 Fed. 454, 3 McCrary 302; Smith *v.* Rines, 22 Fed. Cas. No. 13,100, 2 Sumn. 338.

England.— Salmon *v.* Smith, 1 Saund. 207 note 2, 85 Eng. Reprint 209.

Pendency of different actions against joint tort-feasors see Abatement and Revival, 1 Cyc. 35.

26. *Alabama.*— Du Bose *v.* Marx, 52 Ala. 506.

Georgia.— Mashburn *v.* Dannenberg Co., 117 Ga. 567, 44 S. E. 97.

Iowa.— McDonald *v.* Nugen, 118 Iowa 512, 92 N. W. 675, 96 Am. St. Rep. 407.

Kansas.— Westbrook *v.* Mize, 35 Kan. 299, 10 Pac. 881.

Massachusetts.— Corey *v.* Havener, 182 Mass. 250, 63 N. E. 69; McAvoy *v.* Wright, 137 Mass. 207; Savage *v.* Stevens, 128 Mass. 254; Elliott *v.* Hayden, 104 Mass. 180.

Michigan.— Cunningham *v.* O'Connor, 136 Mich. 293, 99 N. W. 25.

Rhode Island.— Parmenter *v.* Barstow, 21 R. I. 410, 43 Atl. 1035.

Tennessee.— Snyder *v.* Witt, 99 Tenn. 618, 42 S. W. 441; Brison *v.* Dougherty, 3 Baxt. 93.

Washington.— Birkel *v.* Chandler, 26 Wash. 241, 66 Pac. 406.

Satisfaction in part.—B & K being joint tort-feasors in the conversion of cotton on which plaintiff had a mortgage, and plaintiff having sued K, he did not waive the tort as to him, and ratify the sale to him by B by subsequently receiving from B a part of the damages sustained. Boyles *v.* Knight, 123 Ala. 289, 26 So. 939.

Satisfaction a discharge.— In case of joint tort feasance satisfaction by any one liable discharges the claim for damages, as the injured person is legally entitled to but one satisfaction. Rogers *v.* Cox, 66 N. J. L. 432, 50 Atl. 143.

Trial against parties appearing.— It is proper to try an action of tort against defendants who have pleaded without waiting for other defendants to appear and plead. Cunningham *v.* Sayre, 21 W. Va. 440.

27. Williams *v.* Townsend, 15 Kan. 563; Reed *v.* Dick, 7 Kan. App. 760, 53 Pac. 486.

28. *California.*— Tompkins *v.* Clay St. R. Co., 66 Cal. 163, 4 Pac. 1165.

District of Columbia.— District of Columbia *v.* Bolling, 4 App. Cas. 397.

Georgia.— Hollingsworth *v.* Howard, 113 Ga. 1099, 39 S. E. 465.

Illinois.— Economy Light, etc., Co. *v.* Hiller, 203 Ill. 518, 68 N. E. 72; West Chicago St. R. Co. *v.* Piper, 165 Ill. 325, 46 N. E. 186; Indianapolis, etc., R. Co. *v.* Hackethal, 72 Ill. 612; Winslow *v.* Newlan, 45 Ill. 145; Frink *v.* Potter, 17 Ill. 406; Murray *v.* Arthur, 98 Ill. App. 331; Chicago, etc., R. Co. *v.* Doan, 93 Ill. App. 247 [*affirmed* in 195 Ill. 168, 62 N. E. 826].

Indiana.— Indianapolis, etc., R. Co. *v.* Warner, 35 Ind. 515; Palmer *v.* Crosby, 1 Blackf. 139; Indianapolis Traction, etc., Co. *v.* Holtzclaw, 40 Ind. App. 311, 81 N. E. 1084.

Iowa.— Young *v.* Gormley, 119 Iowa 546, 93 N. W. 565.

New York.— Kirby *v.* Delaware, etc., Canal Co., 90 Hun 588, 35 N. Y. Suppl. 975; Kenyon *v.* Sherman, 40 N. Y. Super. Ct. 363; Kaufman *v.* People's Cold-Storage, etc., Co., 10 Misc. 53, 30 N. Y. Suppl. 813; Lockwood *v.* Bull, 1 Cow. 322, 13 Am. Dec. 539; Drake *v.* Barrymore, 14 Johns. 166; Lansing *v.* Montgomery, 2 Johns. 382.

Oregon.— Strauhal *v.* Asiatic Steamship Co., 48 Oreg. 100, 85 Pac. 230; Bingham *v.* Lipman, 40 Oreg. 363, 67 Pac. 98.

Pennsylvania.— Baker *v.* Hagey, 177 Pa. St. 128, 35 Atl. 705, 55 Am. St. Rep. 712.

at the trial waive his right to recover against one or more.[29] It has been held, however, that where a joint tort is charged, there can be no recovery on proof of one or more separate torts; a joint tort must be proved in order to sustain the action.[30] An instruction authorizing the jury to find against all defendants, although they believe some of them not guilty, is erroneous.[31] Nor can a joint verdict be allowed to stand as to part of defendants and be set aside as to the others. A judgment is a unit.[32]

(II) *ASSESSING DAMAGES.* Damages must be assessed in a single sum. They cannot be apportioned by the jury among defendants,[33] for the sole inquiry open is what damages plaintiff has sustained, not who ought to pay them.[34] Discrimination according to the relative enormity of the acts of each is not permitted.[35] Should the jury assess different amounts plaintiff should have judgment against all convicted for the largest sum found against any one of them,[36] for where no punitive damages are claimed, plaintiff is entitled to a joint verdict for what the most culpable ought to pay.[37] Where some of defendants in a single suit are only

Tennessee.— Carpenter *v.* Lee, 5 Yerg. 265.

Texas.— San Antonio Gas Co. *v.* Singleton, 24 Tex. Civ. App. 341, 59 S. W. 920.

Vermont.— Wakefield *v.* Fairman, 41 Vt. 339.

Wisconsin.— Wyss *v.* Grunert, 108 Wis. 38, 83 N. W. 1095.

England.— Bretherton *v.* Wood, 3 B. & B. 54, 6 Moore C. P. 141, 9 Price 408, 23 Rev. Rep. 556, 7 E. C. L. 602.

29. Taylor Water Co. *v.* Dillard, 9 Tex. Civ. App. 667, 29 S. W. 662; Groot *v.* Oregon Short Line R. Co., 34 Utah 152, 96 Pac. 1019; Staunton Mut. Tel. Co. *v.* Buchanan, 108 Va. 810, 62 S. E. 928.

Voluntary dismissal as to joint tort-feasor see DISMISSAL AND NONSUIT, 14 Cyc. 411.

30. Goodman *v.* Coal Tp., 206 Pa. St. 621, 56 Atl. 65; Wiest *v.* Electric Traction Co., 200 Pa. St. 148, 49 Atl. 891, 58 L. R. A. 666; Savings Deposit Bank *v.* Reynier, 41 Pa. Super. Ct. 1; Shaughnessy *v.* Pittsburg, 20 Pa. Super. Ct. 609; Hoxie *v.* Nodine, 123 Fed. 379, 61 C. C. A. 223.

31. Decatur *v.* Hamilton, 89 Ill. App. 561.

32. Patterson *v.* Standley, 91 Ill. App. 671.

Contra, by statute.— Under Cal. Code Civ. Proc. § 578, in an action against several tort-feasors, verdict and judgment may be given for or against one or more defendants, and where a verdict is rendered against two or more joint tort-feasors, the granting of a new trial as to one of them does not vacate the verdict and judgment as to the other. Fowden *v.* Pacific Coast Steamship Co., 149 Cal. 151, 86 Pac. 178.

33. *Alabama.*— Layman *v.* Hendrix, 1 Ala. 212.

California.— Marriott *v.* Williams, 152 Cal. 705, 93 Pac. 875, 125 Am. St. Rep. 87; McCool *v.* Mahoney, 54 Cal. 491.

Indiana.— Cleveland, etc., R. Co. *v.* Hilligoss, 171 Ind. 417, 86 N. E. 485, 131 Am. St. Rep. 258; Everroad *v.* Gabbert, 83 Ind. 489; Palmer *v.* Crosby, 1 Blackf. 139; Indianapolis Traction, etc., Co. *v.* Holtzclaw, 40 Ind. App. 311, 81 N. E. 1084.

Iowa.— Wisecarver *v.* Chicago, etc., R. Co., 141 Iowa 121, 119 N. W. 532.

Maine.— Stuart *v.* Chapman, 104 Me. 17, 70 Atl. 1069.

Massachusetts.— Johnson *v.* Scott, 205 Mass. 294, 91 N. E. 302.

New York.— O'Shea *v.* Kirker, 4 Bosw. 120, 8 Abb. Pr. 69; Bohun *v.* Taylor, 6 Cow. 313.

Tennessee.— Moore *v.* Chattanooga Electric R. Co., 119 Tenn. 710, 109 S. W. 497, 16 L. R. A. N. S. 978; Price *v.* Clapp, 119 Tenn. 425, 105 S. W. 864, 123 Am. St. Rep. 730.

England.— Mitchell *v.* Milbank, 6 T. R. 199, 101 Eng. Reprint 510.

Fixing amount of damages.— Where a hack was driven into a hole in a street, and a passenger was injured, and the passenger brought a joint action against the hack company, the one who had made the excavation, and the one under whose orders the excavation was made, it was held that it was proper to charge that, if the jury found against all defendants, they could only assess damages which resulted from their combined acts. Fisher *v.* Tryon, 15 Ohio Cir. Ct. 541, 8 Ohio Cir. Dec. 556.

Joint verdict.— Where, in an action against joint tort-feasors, the verdict as delivered by the jury is that they find for plaintiffs, "and that the money payable to them by the defendants is the sum of $1,000, to wit: $500 by each of the defendants" the trial court can correct the irregularity either by amending the verdict by striking out as surplusage all after the finding of the joint liability — that is to say, after the one thousand dollars, leaving the verdict to stand for that amount, or return the verdict to the jury for correction, requiring them to return a verdict without attempting to apportion the payments as between defendants. Washington Market Co. *v.* Clagett, 19 App. Cas. (D. C.) 12.

34. Halsey *v.* Woodruff, 9 Pick. (Mass.) 555.

35. Hunter *v.* Wakefield, 97 Ga. 543, 25 S. E. 347, 54 Am. St. Rep. 438; McCalla *v.* Shaw, 72 Ga. 458; Carney *v.* Reed, 11 Ind. 417; Westfield Gas, etc., Co. *v.* Abernathy, 8 Ind. App. 73, 35 N. E. 399; Irwin *v.* Fowler, 5 Rob. (N. Y.) 482; Hill *v.* Goodchild, 5 Burr. 2790, 98 Eng. Reprint 465.

36. Beal *v.* Finch, 11 N. Y. 128.

37. Huddleston *v.* West Bellevue, 111 Pa. St. 110, 2 Atl. 200.

liable for compensatory damages, a recovery cannot be had for a greater amount. The injured party in one and the same judgment cannot get compensatory damages against some of the parties and punitive damages against the others.[38] But where all of defendants were actuated by malice, all will be liable for both actual and exemplary damages.[39]

k. Indemnity. Although it is established that a joint wrong-doer who has been forced to respond in damages cannot require indemnification at the hands of his co-tort-feasors,[40] there are two classes of cases which constitute exceptions to the rule: First, where the party claiming indemnity has not been guilty of any fault except technically or constructively;[41] and second, where both parties have been in fault, but not in the same fault, toward the party injured, and the party from whom indemnity is claimed was the primary and efficient cause of the injury.[42] Illustrations of the second class are found in cases "of recovery against municipalities for obstructions to the highways caused by private persons. The fault of the latter is the creation of the nuisance; that of the former the failure to remove it in the exercise of its duty to care for the safety of the public streets. The first was a positive tort and the efficient cause of the injury complained of; the latter the negative tort of neglect to act upon notice, express or implied." [43]

l. Contribution. Where two or more have participated in the commission of a wrong, the general rule is that a right of contribution will not arise in favor of the one held responsible by the injured party.[44] But this rule is restricted to

38. Krug *v.* Pitass, 162 N. Y. 154, 56 N. E. 526, 76 Am. St. Rep. 317; Hoxsie *v.* Nodine, 123 Fed. 379, 61 C. C. A. 223.

39. Reizenstein *v.* Clark, 104 Iowa 287, 73 N. W. 588.

40. Culmer *v.* Wilson, 13 Utah 129, 44 Pac. 833, 57 Am. St. Rep. 713; Atkins *v.* Johnson, 43 Vt. 78, 5 Am. Rep. 260; Union Stock Yards Co. *v.* Chicago, etc., R. Co., 196 U. S. 217, 25 S. Ct. 226, 49 L. ed. 453; Shackell *v.* Rosier, 2 Bing. N. Cas. 634, 2 Hodges 17, 5 L. J. C. P. 193, 3 Scott 59, 29 E. C. L. 695.

Rule applied.— Thus where plaintiff left a hatchway in a sidewalk connected with his premises in an unsafe condition and defendant interfered with the hatchway causing it to be more dangerous, and a traveler on the highway was injured, it was held that, the parties being *in pari delicto*, the owner of the premises had no right to indemnity if compelled to pay damages to the person injured. Churchill *v.* Holt, 131 Mass. 67, 41 Am. Rep. 191.

Indemnity between joint tort-feasors see INDEMNITY, 22 Cyc. 99.

41. "The rule that one of two joint tort-feasors cannot maintain an action against the other for indemnity or contribution, does not apply to a case when one does the act or creates the nuisance and the other does not join therein but is thereby exposed to liability. In such case the parties are not *in pari delicto* as to each other though as to third persons either may be held liable." Oceanic Steam Nav. Co. *v.* Compania Transatlantica Espanola, 134 N. Y. 461, 466, 31 N. E. 987, 30 Am. St. Rep. 685. See also Churchill *v.* Holt, 127 Mass. 165, 34 Am. Rep. 355; and INDEMNITY, 22 Cyc. 99. The exception is frequently applied where judgment has been recovered against a master for injuries sustained by a servant's negligence or wrongful act in which the master has not participated. Smith *v.* Foran, 43 Conn. 244, 21 Am. Rep. 647; Georgia Southern, etc., R. Co. *v.* Jossey, 105 Ga. 271, 31 S. E. 179; Grand Trunk R. Co. *v.* Latham, 63 Me. 177.

Indemnity and contribution distinguished. — "One of two masters, who is compelled to pay damages by reason of his servant's negligence, may have contribution from the other because he has removed a burden common to both. They may recover indemnity of the servant, because as against him they are without fault, and are directly injured by his misconduct." Nashua Iron, etc., Co. *v.* Worcester, etc., R. Co., 62 N. H. 159, 160, per Carpenter.

42. Geneva *v.* Brush Electric Co., 50 Hun (N. Y.) 581, 3 N. Y. Suppl. 595, per Dwight, J.

43. Canandaigua *v.* Foster, 81 Hun (N. Y.) 147, 149, 30 N. Y. Suppl. 686 [*affirmed* on other grounds in 156 N. Y. 354, 50 N. E. 971, 66 Am. St. Rep. 575, 41 L. R. A. 554]. See also Waterbury *v.* Waterbury Traction Co., 74 Conn. 152, 50 Atl. 3; Chesapeake, etc., Canal Co. *v.* Allegany County, 57 Md. 201, 40 Am. Rep. 430; Lowell *v.* Boston, etc., R. Corp., 23 Pick. (Mass.) 24, 34 Am. Dec. 33; Nashua Iron, etc., Co. *v.* Worcester, etc., R. Co., 62 N. H. 159.

Rule applied.— Where defendant contracted with plaintiff, a municipal corporation, to keep a portion of its streets in repair, and in consequence of a defect in a street embraced in the contract, injuries were received by one who recovered judgment against plaintiff, it was held that the latter was entitled to indemnity. Brooklyn *v.* Brooklyn City R. Co., 47 N. Y. 475, 7 Am. Rep. 469.

44. *Illinois.*— Steinhaus *v.* Radtke, 145 Ill. App. 232.

New York.— Weidman *v.* Sibley, 16 N. Y. App. Div. 616, 44 N. Y. Suppl. 1057; Andrews *v.* Murray, 33 Barb. 354.

cases where the joint tort-feasor who has been forced to respond in damages knew or must have known that an act in which he participated was unlawful.[45] Contribution is allowed where he has been held responsible only by implication or legal inference from his relation to the wrong-doer[46] as where one member of a partnership has been forced to pay the entire damages sustained by a third party through the negligence of a servant of the firm. In such a case contribution may be enforced against his co-members.[47]

VI. PARTICULAR TORTS.

A. Infringement of Personal Security — 1. ASSAULT. An assault has been defined as follows: "An assault is any attempt or offer, with force or violence,[48] to do a corporal hurt to another,[49] whether from malice or wantonness,[50] with such circumstances as denote, at the time, an intention to do it,[51] coupled

Pennsylvania.— Boyer *v.* Bolender, 129 Pa. St. 324, 18 Atl. 127, 15 Am. St. Rep. 723.

Texas.— Gulf, etc., R. Co. *v.* Galveston, etc., R. Co., 83 Tex. 509, 18 S. W. 956.

Vermont.— Spalding *v.* Oakes, 42 Vt. 343.

Virginia.— Walton *v.* Miller, 109 Va. 210, 63 S. E. 458, 132 Am. St. Rep. 908.

England.— Merryweather *v.* Nixan, 8 T. R. 186, 101 Eng. Reprint 1337.

Contribution between persons liable ex delicto see CONTRIBUTION, 9 Cyc. 804 *et seq.*

45. Ankeny *v.* Moffett, 37 Minn. 109, 33 N. W. 320; Stone *v.* Hooker, 9 Cow. (N. Y.) 154; Acheson *v.* Miller, 2 Ohio St. 203, 59 Am. Dec. 663. See CONTRIBUTION, 9 Cyc. 805 *et seq.*

Joint attachments.— Thus where two creditors, acting together, attach and sell goods sold by their debtor, under the honest belief that such sale is void, and one of them is compelled to pay a judgment recovered against him by the vendee for wrongful seizure and sale, he may recover contribution from the other. Vandiver *v.* Pollak, 97 Ala. 467, 12 So. 473, 19 L. R. A. 628; Farwell *v.* Becker, 109 Ill. 261, 21 N. E. 792, 16 Am. St. Rep. 267, 6 L. R. A. 400. And see CONTRIBUTION, 9 Cyc. 806.

Joint failure to maintain bridge.— Where two counties maintained a bridge which broke and caused injury to a traveler, who recovered damages in an action for negligence against one of the counties, the latter might recover contribution. Armstrong County *v.* Clarion County, 66 Pa. St. 218, 5 Am. Rep. 368.

Presumption of knowledge.— Where plaintiff, a saloon-keeper, sold liquor to a habitual drunkard, and the latter's wife recovered judgment against plaintiff, who sued defendant, another saloon-keeper, to enforce contribution on the ground that the latter had also sold liquor to the same individual and thus contributed to the injury for which the wife had recovered, it was held that, as the husband was known to be a common drunkard, the presumption was that plaintiff was aware of the wrongfulness of his act, and a right to contribution was denied. Johnson *v.* Torpy, 35 Nebr. 604, 53 N. W. 575, 37 Am. St. Rep. 447.

46. See CONTRIBUTION, 9 Cyc. 807.

47. Bailey *v.* Bussing, 28 Conn. 455; Horbach *v.* Elder, 18 Pa. St. 33; Wooley *v.* Batte, 2 C. & P. 417, 12 E. C. L. 649.

48. "There must be some movement towards physical violence." Cutler *v.* State, 59 Ind. 300, 302. "In order to constitute an assault there must be something more than a mere menace. There must be violence begun to be executed. But where there is a clear intent to commit violence accompanied by acts which if not interrupted will be followed by personal injury, the violence is commenced and the assault is complete. Thus riding after the prosecutor so as to compel him to run into a garden for shelter, to avoid being beaten, was held to be an assault. (Mortin *v.* Shoppe, 3 C. & P. 373, 14 E. C. L. 616.) So where the defendant was advancing in a threatening attitude, with intent to strike the plaintiff, so that his blow would in a second or two have reached the plaintiff, if he had not been stopped, although when stopped he was not near enough to strike, it was held that an assault had been committed. (Stephens *v.* Myers, 4 C. & P. 349, 19 E. C. L. 548.) It is not indispensable to the commission of an assault that the assailant should be at any time within striking distance. If he is advancing with intent to strike his adversary and come sufficiently near to induce a man of ordinary firmness to believe, in view of all the circumstances, that he will instantly receive a blow unless he strike in self-defense or retreat, the assault is complete." People *v.* Yslas, 27 Cal. 630, 633, per Sanderson, J.

49. "Mere words cannot amount to an assault." Hence, no legal injury is committed by attempting to persuade to sexual intercourse. Prince *v.* Ridge, 32 Misc. (N. Y.) 666, 667, 66 N. Y. Suppl. 454.

50. Thus an assault is distinguishable from negligence — a distinction which is important owing to the ruling of some of the courts that for fright or mental suffering, there being no physical injury, damages are recoverable in the former instance (that is, for wanton and intentional wrongs) but not in the latter. Prince *v.* Ridge, 32 Misc. (N. Y.) 666, 667, 66 N. Y. Suppl. 454.

51. The accompanying words may show that plaintiff was not put in any fear. Thus where defendant laying his hand on his sword

with a present ability [52] to carry such intention into effect." [53] This definition is supported by the weight of authority.

2. BATTERY. A battery is a consummated assault.[54] It is "an unlawful touching [55] the person of another [56] by the aggressor himself,[57] or any other substance [58] put in motion by him." [59]

3. FALSE IMPRISONMENT. "False imprisonment consists in the unlawful detention of the person of another for any length of time whereby he is deprived of his personal liberty." [60] An arrest under legal authority will not constitute false imprisonment.[61] But one who acts under an unconstitutional statute is not exonerated thereby.[62] Force or threat of force is essential.[63] If the detention is illegal the motive of the detainer is immaterial,[64] although motive may of course be taken into consideration in determining the question of punitive damages.[65] Merely preventing one from going in a given direction, as along a highway, will not be sufficient, for to hold otherwise would be "to confound partial obstruction and disturbance with total obstruction and detention." [66]

said, "If it were not assize time, I would not take such language," it was held to be no assault. Tuberville *v.* Savage, 1 Mod. 3, 86 Eng. Reprint 684. See also State *v.* Crow, 23 N. C. 375; Blake *v.* Barnard, 9 C. & P. 626, 38 E. C. L. 365.

52. "There must be proof of violence actually offered, and this within such a distance as that harm might ensue if the party was not prevented." People *v.* Lilley, 43 Mich. 521, 525, 5 N. W. 982. "To constitute an assault with a gun or pistol, it is necessary that the gun or pistol should be presented at the party charged to be assaulted, within the distance to which the gun or pistol may do execution." Tarver *v.* State, 43 Ala. 354, 356.

53. Tarver *v.* State, 43 Ala. 354, 356, per Peck, C. J. And see ASSAULT AND BATTERY, 3 Cyc. 1022, 1066 *et seq.*

54. "Every battery includes an assault." Fitzgerald *v.* Fitzgerald, 51 Vt. 420, 422.

55. The degree of force is immaterial except as it may bear upon the *quantum* of damages. "A battery is committed whenever the violence menaced in an assault is actually done, though in ever so small a degree, upon the person." Sweeden *v.* State, 19 Ark. 205, 213. "The wrong here consists, not in the touching, so much as in the manner or spirit in which it is done, and the question of bodily pain and injury is important only as affecting the damages. Thus, to lay hands on another in a hostile manner is a battery, though no damage follows; but to touch another, merely to attract his attention, is no battery, and not unlawful. And to push gently against one, in the endeavor to make way through a crowd, is no battery; but to do so rudely and insolently is, and may justify damages proportioned to the rudeness." 1 Cooley Torts (3d ed.) 281.

56. Actual physical contact with the person is not necessary. Thus it is a battery on the person to strike a horse hitched to the carriage in which plaintiff is riding (Clark *v.* Downing, 55 Vt. 259, 45 Am. Rep. 612. And see Marentille *v.* Oliver, 2 N. J. L. 379), or to drive a carriage against a vehicle occupied by plaintiff at the time (Hopper *v.* Reeve, 1 Moore C. P. 407, 7 Taunt. 698, 2 E. C. L. 554).

57. Scott *v.* State, 118 Ala. 115, 24 So. 414; Goodrum *v.* State, 60 Ga. 509; White *v.* Kellogg, 119 Ind. 320, 21 N. E. 901; Emmons *v.* Quade, 176 Mo. 22, 75 S. W. 103.

58. Murdock *v.* State, 65 Ala. 520 (pouring a mixture of turpentine and pepper over plaintiff); Mercer *v.* Corbin, 117 Ind. 450, 20 N. E. 132, 10 Am. St. Rep. 76, 3 L. R. A. 221 (riding a bicycle against plaintiff); Peterson *v.* Haffner, 59 Ind. 130, 26 Am. Rep. 81 (throwing mortar); Kendall *v.* Drake, 67 N. H. 592, 30 Atl. 524 (striking a rail against which plaintiff was leaning).

59. Kirland *v.* State, 43 Ind. 146, 153, 13 Am. Rep. 386, per Buskirk, J. And see ASSAULT AND BATTERY, 3 Cyc. 1032, 1067.

60. Ga. Civ. Code (1895), § 3851 [*quoted* in Thorpe *v.* Wray, 68 Ga. 359, 367]. And see FALSE IMPRISONMENT, 19 Cyc. 316 *et seq.*

61. Marks *v.* Sullivan, 9 Utah 12, 33 Pac. 224. The retention of a child by one to whose custody it is awarded by a court in habeas corpus proceedings is not an unlawful detention for which the custodian can be held liable in damages, although the order is subsequently set aside on appeal. Lovell *v.* House of Good Shepherd, 14 Wash. 211, 44 Pac. 253. And see FALSE IMPRISONMENT, 19 Cyc. 322.

62. Sumner *v.* Beeler, 50 Ind. 341, 19 Am. Rep. 718; State *v.* Hunter, 106 N. C. 796, 11 S. E. 366, 6 L. R. A. 529. *Contra*, Trammell *v.* Russellville, 34 Ark. 105, 36 Am. Rep. 1.

63. Payson *v.* Macomber, 3 Allen (Mass.) 69; Spoor *v.* Spooner, 12 Metc. (Mass.) 281; State *v.* Lunsford, 81 N. C. 528. And see FALSE IMPRISONMENT, 19 Cyc. 322 *et seq.*

64. Snead *v.* Bonnoil, 166 N. Y. 325, 59 N. E. 899; Limbeck *v.* Gerry, 15 Misc. (N. Y.) 663, 39 N. Y. Suppl. 95. See FALSE IMPRISONMENT, 19 Cyc. 319.

65. Rich *v.* McInerny, 103 Ala. 345, 15 So. 663, 49 Am. St. Rep. 32; Johnson *v.* Bouton, 35 Nebr. 898, 53 N. W. 995; Newburn *v.* Durham, 10 Tex. Civ. App. 655, 32 S. W. 112. And see FALSE IMPRISONMENT, 19 Cyc. 371.

66. "Some confusion seems to me to arise

4. SEDUCTION. Seduction is "the wrong of inducing a female to consent to unlawful sexual intercourse by enticements and persuasions overcoming her reluctance and scruples." [67]

B. Infringement of Right of Privacy. Whether a "right of privacy" exists independent of statute, for the invasion of which by the unauthorized publication of a person's name or picture, for advertising or other purposes, an action lies, is in dispute.[68] It is assumed that the picture or the accompanying

from confounding imprisonment of the body with mere loss of freedom. It is one part of the definition of freedom to be able to go whithersoever one pleases. But imprisonment is something more than the mere loss of this power. It includes the notion of restraint within some limits defined by a will or power exterior to our own." Bird *v.* Jones, 7 Q. B. 742, 743, 9 Jur. 870, 15 L. J. Q. B. 82, 53 E. C. L. 742, per Coleridge, J. And see FALSE IMPRISONMENT, 19 Cyc. 322.

67. Abbott L. Dict. [*quoted* in Hood *v.* Sudderth, 111 N. C. 215, 220, 16 S. E. 397].

Persuasion necessary.— Mere sexual intercourse does not constitute seduction. Insinuating arts must have been employed to overcome the opposition of the seduced. It must have been accomplished by wiles and persuasions and not by force. Marshall *v.* Taylor, 98 Cal. 55, 32 Pac. 867, 35 Am. St. Rep. 144; Delvee *v.* Boardman, 20 Iowa 446; People *v.* Clark, 33 Mich. 112; People *v.* Gumaer, 4 N. Y. App. Div. 412, 39 N. Y. Suppl. 326; Hogan *v.* Cregan, 6 Rob. (N. Y.) 138.

What constitutes seduction and liability therefor see SEDUCTION, 35 Cyc. 1289 *et seq.*

68. The theory that one is entitled to insist on being "let alone" was probably first publicly advanced in an article in 4 Harvard L. Rev. 193, 195 (December, 1890), entitled "The Right of Privacy." Here it was said: "Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right 'to be let alone.' Instantaneous photographs and newspaper enterprises have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.' For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons. . . . Of the desirability — indeed of the necessity — of some such protection, there can, it is believed, be no doubt. The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury. Nor is the harm wrought by such invasions confined to the suffering of those who may be made the subjects of journalistic or other enterprises. In this, as in other branches of commerce, the supply creates the demand." Prior to the publication of this article, while the right of privacy had been tentatively presented to the courts for consideration, the decisions had been based on the theory that there had been violation of property rights. Albert *v.* Strange, 2 De G. & Sm. 652, 13 Jur. 507, 64 Eng. Reprint 293; Gee *v.* Pritchard, 2 Swanst. 402, 19 Rev. Rep. 87, 36 Eng. Reprint 670. In 1895, in Schuyler *v.* Curtis, 147 N. Y. 434, 42 N. E. 22, 49 Am. St. Rep. 671, 31 L. R. A. 286, the New York court of appeals, reversing both the appellate division (64 Hun 594, 19 N. Y. Suppl. 264) and the trial term (15 N. Y. Suppl. 787, 27 Abb. N. Cas. 387), refused to prohibit the erection of a statue of a deceased relative. The previous year United States Circuit Judge Colt, in Corliss *v.* E. W. Walker Co., 64 Fed. 280, 31 L. R. A. 283, while refusing an injunction against the publication of a photograph of a leading inventor on the ground that he was a "public character," intimated that a private individual would be protected on the theory that the right of privacy is an extension of the right of property. In 1899, the supreme court of Michigan, in Atkinson *v.* Doherty, 121 Mich. 372, 80 N. W. 285, 80 Am. St. Rep. 507, 46 L. R. A. 219, refused to restrain the unauthorized use of the name and likeness of a deceased person and took a decided stand against the existence of any "right to be let alone," basing its decision in large part on the Schuyler case, *supra*. But as pointed out by Cobb, J., in Pavesich *v.* New England L. Ins. Co., *infra*, all that was really decided here was that the right of privacy, if any, dies with the person. The point was not squarely presented until Roberson *v.* Rochester Folding-Box Co., 171 N. Y. 538, 64 N. E. 442, 89 Am. St. Rep. 828, 59 L. R. A. 478, decided in 1902. Here the existence of such a right "founded upon the claim that a man has the right to pass through this world, if he wills, without having his picture published, his business enterprises discussed . . . or

words are not defamatory, for the solution of this problem does not in any sense require recourse to the law of libel.

C. Injuries to Reputation; Defamation. By defamation is understood a false publication calculated to bring one into disrepute.[69] If understood through the sense of hearing, it constitutes slander.[70] Spoken words are not essential.[71] If understood through the sense of sight, it constitutes libel.[72] The variety of forms which the latter may assume is apparent. Thus it is libelous to suspend a lamp in the daytime before a person's house, thereby indicating that he keeps

his eccentricities commented upon . . . whether the comment be favorable or otherwise," was denied, although by a divided court. A subsequent statute of that state (Consol. Laws, c. 6, art. 5) has given a cause of action for "the unauthorized use of the name or picture of any person for purposes of trade." This has been held constitutional. Rhodes *v.* Sperry, etc., Co., 193 N. Y. 223, 85 N. E. 1097, 127 Am. St. Rep. 945. In 1905, the supreme court of Georgia, in Pavesich *v.* New England L. Ins. Co., 122 Ga. 190, 50 S. E. 68, 106 Am. St. Rep. 104, 69 L. R. A. 101, reached a conclusion contrary to that of the New York court of appeals in the Roberson case. The next year it was held in Louisiana (Itzkovitch *v.* Whitaker, 117 La. 708, 42 So. 228, 116 Am. St. Rep. 215; Schulman *v.* Whitaker, 117 La. 704, 706, 42 So. 227, 7 L. R. A. N. S. 274) that taking the picture of a person accused of a crime should be postponed until his conviction, unless necessary for the purpose of identification or for detection. Speaking of the right to take the picture of an unwilling person, and to expose it when taken, it was said: "We do not know that it has afforded any ground for litigation, when not exaggerated to the point of impeaching character. Here the purpose goes much further. The picture is to remain as evidence of a damning nature." In 1907, the New Jersey court of chancery, in Edison *v.* Edison Polyform, etc., Co., 73 N. J. Eq. 136, 142, 67 Atl. 392, and the court of errors and appeals in Vanderbilt *v.* Mitchell, 72 N. J. Eq. 910, 67 Atl. 97, 14 L. R. A. N. S. 304, expressed disapproval of the Roberson case, although in the former, Stevens, V.-C., observed: "There must be limits to the so-called right of privacy. It is certain that a man in public life may not claim the same immunity from publicity that a private citizen may. Corliss *v.* E. W. Walker Co., *supra*. And as far as my researches have extended, I do not find that it has yet been decided that injury to property in some form is not an essential element to relief. It may, at times, have been a matter of doubt whether what was called 'property' was really such, and whether the injury thereto, actual or apprehended, was not so 'shadowy' as to be incapable of judicial cognizance, but still the criterion was always injury to property or to property rights." In a recent decision from Rhode Island, after an extended discussion, the court decided to adhere to the conclusion of the majority in the Roberson case, viz., "that the so-called 'right of privacy' has not as yet found an abiding place in our jurisprudence, and, as we view it, the doctrine cannot now be incorporated without doing violence to settled principles of law by which the profession and the public have long been guided." Henry *v.* Cherry, 30 R. I. 13, 73 Atl. 97, 109, 24 L. R. A. N. S. 991. On the other hand, in a late Missouri case, where plaintiff, an infant five years old, brought by next friend an action against defendants, who were jewelers, to recover damages for the publication by them of his picture, without his consent, for the purpose of advertising their business, the action was sustained on the ground that a person has the exclusive right to his picture as a property right of value, and may sue at law for damages for the invasion of such right. Munden *v.* Harris, (Mo. App. 1911) 134 S. W. 1076. See also, as sustaining such a right of action, Foster-Milburn Co. *v.* Chinn, 134 Ky. 424, 120 S. W. 364, 135 Am. St. Rep. 417. That officers of the law are entitled to take and use, for the purpose of identification, photographs of persons confined in jail on a criminal charge see Mabry *v.* Kettering, 89 Ark. 551, 117 S. W. 746, 92 Ark. 81, 122 S. W. 115.

69. 1 Cooley Torts (3d ed.) 266 [*quoted* in Mosnat *v.* Snyder, 105 Iowa 500, 504, 75 N. W. 356; Hollenbeck *v.* Hall, 103 Iowa 214, 216, 72 N. W. 518, 64 Am. St. Rep. 175, 39 L. R. A. 734]. See LIBEL AND SLANDER, 25 Cyc. 225. And see "The History and Theory of the Law of Defamation," by Van Vechten Veeder, 3 Columbia L. Rev. 454; 4 Columbia L. Rev. 33.

70. "Slander is defamation without legal excuse published orally, by words spoken, being the object of the sense of hearing." Newell Slander & Libel 33 [*quoted* in Fredrickson *v.* Johnson, 60 Minn. 337, 340, 62 N. W. 388].

71. There can be no doubt that slander may be committed by singing a defamatory song. Is it not possible also to commit slander by whistling? Suppose an officer of a credit association having charge of the compilation of a list of traders who were financially worthless should be asked on an unprivileged occasion whether the name of a certain merchant appeared therein and should say nothing but should whistle the tune of "He's got 'em on the list" from Gilbert & Sullivan's "Mikado," to one who was acquainted therewith. It is submitted that this would be slander, particularly if followed by special damage. Would not the same be true of a defamatory statement clicked in the Morse code by one telegrapher to another?

72. "A libel is any publication whether in writing, printing, picture, effigy, or other fixed representation to the eye which exposes

a brothel,[73] to fix a gallows against his door,[74] to hang or burn him in effigy,[75] or to exhibit a wax model purporting to represent him as having been tried for murder.[76] Libel and slander are elsewhere treated at length.[77]

D. Infringement of Private Property — 1. Trespass — a. In General. "Trespass in its largest and most extensive sense, signifies any transgression or offense against the law of nature, of society, or of the country in which we live; whether it relates to a man's person, or his property." [78]

b. To Land. As applied to real property it has been defined as "every entry upon the soil of another, in the absence of a lawful authority, without the owner's license." [79] It is a trespass if inanimate objects are thrown upon the land,[80] or if the premises are flooded.[81] It is not essential that the land be inclosed, nor need actual damage be shown.[82] The entry need not be upon the soil itself.[83]

any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." Staub *v.* Van Benthuysen, 36 La. Ann. 467, 468.

73. Jefferies *v.* Duncombe, 2 Campb. 3, 11 East 226, 103 Eng. Reprint 991.

74. Case de Libellis Famosis, 5 Coke 125*a*, 77 Eng. Reprint 250.

75. Johnson *v.* Com., 22 Wkly. Notes Cas. (Pa.) 68; Eyre *v.* Garlick, 42 J. P. 68.

76. Monson *v.* Tussauds, [1894] 1 Q. B. 671, 58 J. P. 524, 63 L. J. Q. B. 454, 70 L. T. Rep. N. S. 335, 9 Reports 177.

77. See Libel and Slander, 25 Cyc. 225.

78. 3 Blackstone Comm. 208 [*quoted* in Grunson *v.* State, 89 Ind. 533, 536, 46 Am. Rep. 178]. "That term, 'in its most extensive signification, includes every description of wrong'" (1 Chitty Pl. 166). Gunn *v.* Fellows, 41 Hun (N. Y.) 257, 259.

79. Norvell *v.* Gray, 1 Swan (Tenn.) 96, 103 [*quoted* in Hornsby *v.* Davis, (Tenn. Ch. App. 1895) 36 S. W. 159, 164], per McKinney, J. See Trespass.

80. And the action not being for negligence, the observance of due care by defendant is no defense. Page *v.* Dempsey, 184 N. Y. 245, 77 N. E. 9, 112 Am. St. Rep. 601, 3 L. R. A. N. S. 1042; Tremain *v.* Cohoes Co., 2 N. Y. 163, 51 Am. Dec. 284; Hay *v.* Cohoes Co., 2 N. Y. 159, 51 Am. Dec. 279; Wheeler *v.* Norton, 92 N. Y. App. Div. 368, 86 N. Y. Suppl. 1095. And see Trespass.

81. Mairs *v.* Manhattan Real Estate Assoc., 89 N. Y. 498. See Trespass; Waters.

82. "Every entry upon the land of another, without lawful authority, is a trespass, though it only be trodden, and whether the land be inclosed or not, and no matter whether any damage be done or not. The gist of the action is the wrongful entry; whatever is done after that is but aggravation of damages. If a man's land be not inclosed, the law encircles it with an imaginary inclosure, to pass which is to break and enter his close. The mere act of breaking through this imaginary boundary constitutes a cause of action, as being a violation of the right of property." Agnew *v.* Jones, 74 Miss. 347, 352, 23 So. 25, per Stockdale, J. See also Dougherty *v.* Stepp, 18 N. C. 371; Bileu *v.* Paisley, 18 Oreg. 47, 21 Pac. 934, 4 L. R. A. 840; Trespass.

83. See Ellis *v.* Loftus Iron Co., L. R. 10 C. P. 10, 44 L. J. C. P. 24, 31 L. T. Rep. N. S. 483, 23 Wkly. Rep. 246, where defendant's horse stretched his neck across the boundary. It is an established maxim that he who owns the soil owns likewise to the heavens and to the center of the earth. Hence placing a shaft from one building to another across a passageway of which plaintiff owns the fee is a trespass, although the shaft passes under a bridge or platform and does not interfere with the use of the passage. Esty *v.* Baker, 48 Me. 495. And see Bybee *v.* State, 94 Ind. 443, 48 Am. Rep. 175.

A bay-window built in the second story about sixteen feet above the sidewalk and projecting three feet and six inches beyond the building line is a public nuisance. Reimer's Appeal, 100 Pa. St. 182, 45 Am. Rep. 373.

Airship or balloon.— Whether it would be trespass to pass over land in an airship or balloon is a question which has been asked several times but never satisfactorily answered. It is conceivable that the problem may possess more than merely academic value. Suppose an anchor works loose unknown to the aeronaut and is dragged through the air a few feet from the ground. It strikes the owner of the property inflicting serious injuries. If the aeronaut was not negligent, it would seem that there could be no recovery, unless on the theory that he was trespassing at the time. On this point of trespass, Lord Ellenborough indulged in a customary doubt. Pickering *v.* Rudd, 4 Campb. 219, 1 Stark. 56, 16 Rev. Rep. 777, 2 E. C. L. 32. But Justice Blackburn later on (Kenyon *v.* Hart, 6 B. & S. 249, 252, 11 Jur. N. S. 602, 34 L. J. M. C. 87, 11 L. T. Rep. N. S. 733, 13 Wkly. Rep. 406, 118 E. C. L. 249) observed: "I understand the good sense of that doubt, though not the legal reason of it." In Wandsworth *v.* United Tel. Co., 13 Q. B. D. 904, 919, 48 J. P. 676, 53 L. J. Q. B. 444, 51 L. T. Rep. N. S. 148, 32 Wkly. Rep. 776, holding that a board of works has not such property in a street as to entitle them to an injunction against the stringing of a telephone wire across it, Bowen, L. J., said: "If the board of works were in the position of simple owners of land, or if land had been vested in them by an ordinary conveyance, I should be ex-

c. To Chattels. Trespass to personalty is complete when there is "an unlawful disturbance by force [84] of another's possession." [85] Possession, actual or constructive, or an immediate right of possession, must be shown by plaintiff. Thus if property is bailed for a definite period the bailor may not maintain an action for a trespass committed during the term.[86] But if the bailor has a right to resume immediate possession he may bring suit. His general property draws to it the possession.[87] Conversely, one who has possession, even though it be wrongful, may not be disturbed unless in the exercise of a superior right. A finder or thief will be protected except as against the owner.[88]

2. Conversion. Any distinct act of dominion wrongfully exerted over the personal property of another in denial of his right or inconsistent with it is a conversion.[89] "The distinction between trespass and conversion is this: that trespass is an unlawful taking — as, for example, the unlawful removal of the property — while conversion is an unlawful taking or keeping in the exercise, legally considered, of the right of ownership." [90] "A conversion may be either 1st, by wrongfully taking a personal chattel; 2d, by some other illegal assumption of ownership, or by illegally using or misusing goods; or 3d, by a wrongful detention." [91] It is not necessary that there should be a manual taking or that it should

tremely loth myself to suggest, or to acquiesce in any suggestion, that an owner of the land had not the right to object to anybody putting anything over his land at any height in the sky." Whether shooting across another's land would be a trespass was doubted by Hawkins, J., in Clifton *v.* Bury, 4 T. L. R. 8, but there seems no reason why it should not be. In Guille *v.* Swan, 19 Johns (N. Y.) 381, 10 Am. Dec. 234, defendant in a balloon descended upon plaintiff's property. A crowd seeing him in peril entered the premises breaking plaintiff's fences and beating down his vegetables and flowers. Defendant was held liable for the acts of the crowd on the theory that he had put himself in such a situation as to invite assistance. Whether he would have been guilty of trespass had he merely sailed through the air over plaintiff's land is not determined. As aerial navigation appears to be within the limits of probability it is not unlikely that the point may one day be presented squarely to the court.

84. Trespass involves the idea of force. It means "a hurtful use of violence which is wrongful. It excludes all varieties of wrongs in which force can neither be perceived nor implied, such as negligence." Castille *v.* Caffery Cent. Refinery, etc., Co., 48 La. Ann. 322, 325, 19 So. 332; Gossin *v.* Williams, 36 La. Ann. 186. And see Trespass.

Manual interference not essential.— But by this is not meant that there need be a manual interference. Trespass lies against one who undertakes to exclude the owner from the possession with which he is vested, as in the case where defendant, a constable, levied an execution on chattels, took an inventory, and obtained security for their forthcoming, saying that if it was not given he would remove the property. Wintringham *v.* Lafoy, 7 Cow. (N. Y.) 735.

Degree of force immaterial.— The degree of force is immaterial except as it bears on the *quantum* of damages. Bruch *v.* Carter, 32 N. J. L. 554.

85. 2 Cooley Torts (3d ed) 839). See Trespass.

86. Dufour *v.* Anderson, 95 Ind. 302; Lunt *v.* Brown, 13 Me. 236; Clark *v.* Carlton, 1 N. H. 110; Ward *v.* Macauley, 4 T. R. 480, 100 Eng. Reprint 1135. See Trespass.

87. White *v.* Brantley, 37 Ala. 430; Staples *v.* Smith, 48 Me. 470. See Trespass.

88. "The peace and good order of society require that persons thus in possession of property, even without any title, should be enabled to protect such possession by appropriate remedies against mere naked wrongdoers." Stowell *v.* Otis, 71 N. Y. 36, 38, per Earl, J. And see Wheeler *v.* Lawson, 103 N. Y. 40, 8 N. E. 360; Guttner *v.* Pacific Steam Whaling Co., 96 Fed. 617. See also Trespass.

89. 2 Cooley Torts (3d ed.) 859 [*quoted* in Budd *v.* Multnomah R. Co., 12 Oreg. 271, 274, 7 Pac. 99, 53 Am. Rep. 355; Ramsby *v.* Beezley, 11 Oreg. 49, 51, 8 Pac. 288]. And see Trover and Conversion.

90. Montgomery Water Power Co. *v.* Chapman, 126 Fed. 68, 72, 61 C. C. A. 124 [*affirmed* in 126 Fed. 372, 61 C. C. A. 347], per Shelby, J. It is said by a distinguished author: "There are two principal differences between the actions of trespass and trover for personalty appropriated by defendant; the first of which is, that in trespass there is always either an original wrongful taking, or a taking made wrongful *ab initio* by subsequent misconduct, while in trover, the original taking is supposed or assumed to be lawful, and often the only wrongs consist in a refusal to surrender a possession which was originally rightful, but the right to which has terminated. The second is, that trespass lies for any wrongful force, but the wrongful force is no conversion where it is employed in recognition of the owner's right, and with no purpose to deprive him of his right, temporarily or permanently." 2 Cooley Torts (3d ed.) 847.

91. Aschermann *v.* Philip Best Brewing Co., 45 Wis. 262, 266.

be shown that defendant applied the chattel to his own use. "The test is, Does he exercise a dominion over it in exclusion or in defiance of the plaintiff's rights?"[92] Mere nonfeasance does not constitute conversion. Conversion like trespass requires a positive tortious act. "Nonfeasance, or neglect of legal duty, mere failure to perform an act made obligatory by contract, or by which property is lost to the owner, will not support the action."[93] In cases of conversion arising out of circumstances not constituting merely a wrongful detention, it is generally held that a demand by the true owner is not essential to the maintenance of an action.[94] According to the prevailing view, the purchase of property from one who has no power to dispose of it constitutes a conversion, and no demand for its return is necessary.[95] Conversion like trespass is an injury to the present right of possession.[96] Thus a finder [97] or a thief [98] may recover from all but the real owner.

3. WASTE. As understood in law, waste "is permanent or lasting injury done or permitted to be done by the holder of a particular estate to the inheritance, or the prejudice of any one who has an interest in the inheritance."[99]

92. Cernahan *v.* Chrisler, 107 Wis. 645, 648, 83 N. W. 778, per Bardeen, J.

93. Bolling *v.* Kirby, 90 Ala. 215, 222, 7 So. 914, 24 Am. St. Rep. 789. And see Davis *v.* Hurt, 114 Ala. 146, 151, 21 So. 468; Sturges *v.* Keith, 57 Ill. 451, 11 Am. Rep. 28; Race *v.* Chandler, 15 Ill. App. 532; Mulgrave *v.* Ogden, Cro. Eliz 219, 78 Eng. Reprint 475. See also TROVER AND CONVERSION.

Loss of property by warehouseman.— Thus there is no conversion where property is intrusted to and lost or destroyed through the negligence of a warehouseman. Davis *v.* Hurt, 114 Ala. 146, 21 So. 468; Ross *v.* Johnson, 5 Burr. 2825, 98 Eng. Reprint 488.

Loss of property by carrier — The same is true where property is lost by a common carrier. Wamsley *v.* Atlas Steamship Co., 168 N. Y. 533, 61 N. E. 896, 85 Am. St. Rep. 699; Magnin *v.* Dinsmore, 70 N. Y. 410, 26 Am. Rep. 608; Salt Springs Nat. Bank *v.* Wheeler, 48 N. Y. 492, 8 Am. Rep. 564.

Misdelivery by carrier.— But an affirmative act of wrong-doing, as where the carrier makes a misdelivery, will constitute conversion. Pacific Express Co. *v.* Shearer, 160 Ill. 215, 43 N. E. 816, 52 Am. St. Rep. 324, 37 L. R. A. 177; Bowlin *v.* Nye, 10 Cush. (Mass.) 416; Price *v.* Oswego, etc., R. Co., 50 N. Y. 213, 10 Am. Rep. 475.

94. "It is believed that all conversions may be divided into four distinct classes. 1. By a wrongful taking; 2. By an illegal assumption of ownership; 3. By an illegal user or misuser; and 4. By a wrongful detention. . . . In the three first named classes, there is no necessity for a demand and refusal, as the evidence arising from the acts of the defendant, is sufficient to prove the conversion. In the latter class alone, is such evidence to be required, as the mere detention of a chattel furnishes no evidence of a disposition to convert it to the holder's use, or to divest the true owner of his property." Glaze *v.* McMillion, 7 Port. (Ala.) 279, 281, per Goldthwaite, J. [*quoted* in Strauss *v.* Schwab, 104 Ala. 669, 672, 16 So. 692]. And see TROVER AND CONVERSION.

95. Heckle *v.* Lurvey, 101 Mass. 344, 3 Am. Rep. 366; Riley *v.* Boston Water Power Co., 11 Cush. (Mass.) 11; Trudo *v.* Anderson, 10 Mich. 357, 81 Am. Dec. 795; Carey *v.* Bright, 58 Pa. St. 70; McCombie *v.* Davies, 6 East 538, 102 Eng. Reprint 1393. But in New York a different doctrine prevails. It is here held that "the rule is a reasonable and just one, that an innocent purchaser of personal property from a wrong-doer shall first be informed of the defect in his title, and have an opportunity to deliver the property to the true owner, before he shall be made liable as a tort feasor for a wrongful conversion." Gillet *v.* Roberts, 57 N. Y. 28, 34. See TROVER AND CONVERSION.

Independent act of dominion by purchaser. — But if the purchaser, although innocent, should exercise an independent act of dominion over the property, as if he sells (Pease *v.* Smith, 61 N. Y. 477) or leases it (Gilmore *v.* Newton, 9 Allen (Mass.) 171, 85 Am. Dec. 749), a demand becomes unnecessary.

96. It is necessary that plaintiff have a present right of possession in the chattel. Forth *v.* Pursley, 82 Ill. 152; Clark *v.* Draper, 19 N. H. 419.

Conversion during term of bailment. — That suit cannot be brought by the bailor where conversion has taken place during a definite term for which the article was bailed see Raymond *v.* Guttentag, 177 Mass. 562, 59 N. E. 446; Gordon *v.* Harpur, 2 Esp. 465, 7 T. R. 9, 4 Rev. Rep. 369, 101 Eng. Reprint 828.

97. Armory *v.* Delamirie, Str. 505, 93 Eng. Reprint 664.

98. Anderson *v.* Gouldberg, 51 Minn. 294, 53 N. W. 636.

99. Price *v.* Ward, 25 Nev. 203, 209, 58 Pac. 849, 46 L. R. A. 459, per Massey, J. See WASTE.

Waste and trespass distinguished.—"Waste and trespass are easily distinguished. Briefly stated, waste is the permanent or lasting injury to the estate by one who has not an absolute or unqualified title thereto. Trespass is an injury to the estate, or the use thereof, by one who is a stranger to the

4. Fraud. "Fraud consists in deception practiced in order to induce another to part with property or to surrender some legal right, and which accomplishes the end designed." [1] The impolicy of attempting a strict definition of fraud is manifest. It may assume so many varieties of form that, subject to certain essential requirements, it is best to allow the greatest freedom to the courts in dealing with each situation as it may arise.[2]

5. Slander of Title. This tort consists in the malicious publication of false statements concerning the title or property of the owner of land or goods, or of their quality, resulting proximately in damage.[3] The term "slander of title," although well established, is misleading. First, the tort is not restricted to oral defamation. "The fact that the publication is written or printed, and not oral, makes no difference in the ground of the action and goes only to the question of dissemination and consequent damage." [4] Second, the statement need not necessarily, although it usually does, relate to title. Hence it is actionable to say that plaintiff's horse was twenty-one years old when he was not more than twelve,[5] or that it was diseased; [6] or that the ore of a mine would suddenly run out.[7] In order to establish a cause of action, malice and special damage must be shown.[8]

6. Interference With Contractual Rights [9] **— a. Prospective Rights — (i)** *In General.* Although the courts are not in accord, the liability of one who interferes to prevent the making of a contract is in general tested by the existence or

title." Price *v.* Ward, 25 Nev. 203, 209, 58 Pac. 849, 46 L. R. A. 459. And see Grubb's Appeal, 90 Pa. St. 228; Cecil *v.* Clark, 49 W. Va. 459, 39 S. E. 202; Williamson *v.* Jones, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L. R. A. 694.

1. 2 Cooley Torts (3d ed.) 905 [*quoted* in Beard *v.* Bliley, 3 Colo. App. 479, 34 Pac. 271, 272; Alexander *v.* Church, 53 Conn. 561, 562, 4 Atl. 103; Fottler *v.* Moseley, 179 Mass. 295, 298, 60 N. E. 788]. And see Fraud, 20 Cyc. 1 *et seq.*

2. Mortlock *v.* Buller, 10 Ves. Jr. 292, 306, 32 Eng. Reprint 857.

In equity a broader interpretation is given to the term, which, it has been said, "properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another." 1 Story Eq. Jur. § 187 [*quoted* in Sears *v.* Hicklin, 13 Colo. 143, 153, 21 Pac. 1022; Larson *v.* Williams, 100 Iowa 110, 118, 63 N. W. 464, 69 N. W. 441, 62 Am. St. Rep. 544; Clay Center *v.* Myers, 52 Kan. 363, 365, 35 Pac. 25; Hatch *v.* Barrett, 34 Kan. 223, 236, 8 Pac. 129; Richardson *v.* Trimble, 38 Hun (N. Y.) 409, 416; Moore *v.* Crawford, 130 U. S. 122, 128, 9 S. Ct. 447, 32 L. ed. 878].

Fraud as redressed by action at law see Fraud, 20 Cyc. 1 *et seq.*

Redress in equity see Equity, 16 Cyc. 81.

3. See Libel and Slander, 25 Cyc. 558 *et seq.*

4. Meyrose *v.* Adams, 12 Mo. App. 329, 332, per Bakewell, J.

5. Wilson *v.* Dubois, 35 Minn. 471, 29 N. W. 68, 59 Am. Rep. 335.

6. Wier *v.* Allen, 51 N. H. 177.

7. Paull *v.* Halferty, 63 Pa. St. 46, 3 Am. Rep. 518.

8. Burkett *v.* Griffith, 90 Cal. 532, 27 Pac. 527, 25 Am. St. Rep. 151, 13 L. R. A. 707; Gott *v.* Pulsifer, 122 Mass. 235, 23 Am. Rep. 322; Kendall *v.* Stone, 5 N. Y. 14. See Libel and Slander, 25 Cyc. 560, 561.

Loss of sale.— "Where loss of sale of a thing disparaged is claimed and relied on as special damages, occasioned by the disparagement, it is indispensable to allege and show a loss of sale to some particular person." Wilson *v.* Dubois, 35 Minn. 471, 473, 29 N. W. 68, 59 Am. Rep. 335.

9. It has been deemed advisable to include under the head of interference with contractual rights, many cases which are usually grouped under conspiracy, boycott, unfair competition, and kindred titles. The reason is that they are, after all, only illustrations of a few underlying principles. The question presented in every instance is, how far the law will afford redress against interference with (1) contracts not in existence and (2) existing contracts. When analyzed, the so-called unfair competition and boycott cases will be seen to fall under one or both of these heads. If goods are sold in packages resembling those in which an established product is put up, or if a trade name is adopted so similar as to be calculated to deceive, it is evident that this falls under the first head. The label or name is merely a means by which the wrong-doer has succeeded in inducing customers not to enter into contractual relations with his competitor. If a labor union threatens to strike unless a non-union employee is discharged, it would appear that this is only a method of procuring the breach of an existing contract. To treat the first under unfair competition and the second under strikes, boycotts, or labor unions seems tantamount to ignoring a very close kinship.

Interference with contract by concerted action of several see Conspiracy, 8 Cyc. 650 *et seq.*

non-existence of a malicious motive. This applies both to contracts of employment and to other agreements.[10]

Interference with the relation of landlord and tenant see LANDLORD AND TENANT, 24 Cyc. 1476.

Strikes and boycotts see LABOR UNIONS, 24 Cyc. 815 *et seq.*

Unfair competition see TRADE-MARKS AND TRADE-NAMES.

10. *California.*— J. F. Parkinson Co. *v.* Santa Clara County Bldg. Trades Council, 154 Cal. 581, 98 Pac. 1027, 21 L. R. A. N. S. 550.

Georgia.—Willis *v.* Muscogee Mfg. Co., 120 Ga. 597, 48 S. E. 177.

Iowa. — Dunshee *v.* Standard Oil Co., (1910) 126 N. W. 342.

Louisiana.— Lewis *v.* Huie-Hodge Lumber Co., 121 La. 658, 46 So. 685.

Maryland.—Willner *v.* Silverman, 109 Md. 341, 71 Atl. 962, 24 L. R. A. N. S. 895.

Massachusetts. — Walker *v.* Cronin, 107 Mass. 555.

Minnesota.—Tuttle *v.* Buck, 107 Minn. 145, 119 N. W. 946, 131 Am. St. Rep. 446, 22 L. R. A. N. S. 599; Joyce *v.* Great Northern R. Co., 100 Minn. 225, 110 N. W. 975, 8 L. R. A. N. S. 756.

New Hampshire.— Huskie *v.* Griffin, 75 N. H. 345, 74 Atl. 595.

United States.—Milwaukee Iron Moulders' Union No. 125 *v.* Allis-Chalmers Co., 166 Fed. 45, 91 C. C. A. 631, 20 L. R. A. N. S. 315; Hopkins *v.* Oxley Stave Co., 83 Fed. 912, 28 C. C. A. 99.

England.— Quinn *v.* Leathem, [1901] A. C. 495, 65 J. P. 708, 70 L. J. P. C. 76, 85 L. T. Rep. N. S. 289, 17 T. L. R. 749, 50 Wkly. Rep. 139; Giblan *v.* National Amalgamated Labourers' Union, [1903] 2 K. B. 600, 72 L. J. K. B. 907, 89 L. T. Rep. N. S. 386, 19 T. L. R. 708.

Canada. — Perrault *v.* Gauthier, 28 Can. Sup. Ct. 241.

Rule stated.— "I regard it as settled in this Commonwealth . . . that an action will lie for depriving a man of custom, that is, of possible contracts, as well when the result is effected by persuasion as when it is accomplished by fraud or force, if the harm is inflicted from malevolence and without some justifiable cause, such as competition in trade." May *v.* Wood, 172 Mass. 11, 14, 51 N. E. 191, per Holmes, J. "The next point is, whether the distinction taken for the defendants between the claim for inducing persons to break contracts already entered into with the plaintiff and that for inducing persons not to enter into contracts with the plaintiff can be sustained, and whether the latter claim is maintainable in law. I do not think that distinction can prevail. There was the same wrongful intent in both cases, wrongful because malicious. There was the same kind of injury to the plaintiff. It seems rather a fine distinction to say that, where a defendant maliciously induces a person not to carry out a contract already made with the plaintiff and so injures the plaintiff, it is actionable, but where he injures the plaintiff by maliciously preventing a person from entering into a contract with the plaintiff, which he would otherwise have entered into, it is not actionable." Temperton *v.* Russell, [1893] L. R. 1 Q. B. 715, 728, 57 J. P. 676, 62 L. J. Q. B. 412, 69 L. T. Rep. N. S. 78, 4 Reports 376, 41 Wkly. Rep. 565, per Esher, M. R. "As a part of the right of acquiring property there resides in every man the right of making contracts for the purchase and sale of property, and contracts for personal services, which amount to the purchase and sale of labor. It makes little difference whether the right that underlies contracts of the latter sort is called a personal right or a property right. It seems to us impossible to draw a distinction between a right of property and a right of acquiring property that will make a disturbance of the latter right any less actionable than a disturbance of the former. In a civilized community, which recognizes the right of private property among its institutions, the notion is intolerable that a man should be protected by the law in the enjoyment of property once it is acquired, but left unprotected by the law in his effort to acquire it. The cup of Tantalus would be a fitting symbol for such a mockery. Our constitution recognizes no such notion." Brennan *v.* United Hatters of North America Local No. 17, 73 N. J. L. 729, 742, 65 Atl. 165, 9 L. R. A. N. S. 254, per Pitney, J. "The mere procurement of a breach of contractual rights is not necessarily actionable. To constitute a cause of action the procurement must be without sufficient justification. A person who, without any motive of injuring a third person or profiting himself at the expense of a third person, honestly and *bona fide* in the interests of a person seeking advice advises him to break a contract with such third person, has sufficient justification." Glamorgan Coal Co. *v.* South Wales Miner's Federation, [1903] 1 K. B. 118, 71 L. J. K. B. 1001, 87 L. T. Rep. N. S. 232, 51 Wkly. Rep. 59. Any legal act done to accomplish real benefit to the actor is not actionable whatever the motive; but an actionable wrong is committed by one who engages in business for the sole and malicious purpose of destroying the business of another, and any act committed by him which materially interferes with the trade of another is unlawful, and where by false representations one prevents sales which otherwise would be consummated, he does an unlawful act because of the malice which prompts it. Dunshee *v.* Standard Oil Co., (Iowa 1910) 126 N. W. 342.

Rule applied.— A petition which states that, pending a contract between plaintiff and a third person, defendant "by some means unknown to the plaintiff" induced such third person, to recede from the contract to plaintiff's damage, but which does

(II) *Competition.* If the interference is prompted merely by a desire to secure personal benefits in the course of business competition, and no unlawful means are resorted to, there can be no liability.[11] It has been said that "one may

not charge fraud or malice on the part of defendant, does not state a cause of action. McCann *v.* Wolff, 28 Mo. App. 447. And where a complaint alleged that defendant railroad company prevented plaintiff from being employed by a certain other railroad company by stating to such company that plaintiff was a labor agitator and connected with the order of railroad telegraphers of North America, and it further alleged in substance that plaintiff was a member of such order, and that he assisted in its organization, it was held that the complaint did not show any such malicious interference with plaintiff's business as to create a common-law liability. Wabash R. Co. *v.* Young, 162 Ind. 102, 69 N. E. 1003, 4 L. R. A. N. S. 1091. So, where a telephone company which had been directed by a subscriber to remove its phone refused to do so and continued to publish his name as that of an existing subscriber, and, when persons who desired such subscriber's business services asked the telephone company to call him over the phone, the company, after making a feint at calling him, replied that he would not answer, it was held that the telephone company, in the absence of malice, was not liable to the subscriber for loss of custom induced by persons so calling him, believing that he was not attending to his business. Cain *v.* Chesapeake, etc., Tel. Co., 3 App. Cas. (D. C.) 546. On the other hand, where plaintiff, an inventor and machinist, entered into a contract with a firm to design and construct for them a machine which would produce certain results, and defendant was employed by the firm as their manager at their factory, and the tests to be made of the machine in order to discover whether or not it satisfied the requirements of the contract were to be made under his supervision, and he maliciously and without good cause persuaded the firm to reject the machine, which they would have accepted but for his conduct, it was held that defendant was liable. Morgan *v.* Andrews, 107 Mich. 33, 64 N. W. 869. In a Tennessee case, however, where defendant, a railroad company, published a notice that it would discharge employees who traded with plaintiff, a merchant, it was held that no action would lie by the merchant, even though the notice was published through malicious motives. Defendant, it was said, might dismiss its employees at will, for good cause, for no cause, or even for a cause morally wrong, and the exercise of this right could not be made unlawful because of the motives which prompted it. Payne *v.* Western, etc., R. Co., 13 Lea (Tenn.) 507, 49 Am. Rep. 666.

Interference with "business" see Sparks *v.* McCrary, 156 Ala. 382, 47 So. 332, 22 L. R. A. N. S. 1224; J. F. Parkinson Co. *v.* Santa Clara County Bldg. Trades Council, 154 Cal. 581, 98 Pac. 1027; De Foor *v.* Stephens, 133 Ga. 617, 66 S. E. 786 (malicious injury by landlord to business of tenant); Southern R. Co. *v.* Chambers, 126 Ga. 404, 55 S. E. 37, 7 L. R. A. N. S. 926; Purington *v.* Hinchliff, 219 Ill. 159, 76 N. E. 47, 109 Am. St. Rep. 322, 2 L. R. A. N. S. 824; Jones *v.* Barmm, 217 Ill. 381, 75 N. E. 505 [*affirming* 119 Ill. App. 475]; Jackson *v.* Stanfield, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 588; Dunshee *v.* Standard Oil Co., (Iowa 1910) 126 N. W. 342; Willner *v.* Silverman, 109 Md. 341, 71 Atl. 962, 24 L. R. A. N. S. 895; Walker *v.* Cronin, 107 Mass. 555; Tuttle *v.* Buck, 107 Minn. 145, 119 N. W. 946, 131 Am. St. Rep. 446, 22 L. R. A. N. S. 599; Lohse Patent Door Co. *v.* Fuelle, 215 Mo. 421, 114 S. W. 997, 128 Am. St. Rep. 492, 22 L. R. A. N. S. 607; Ryan *v.* Burger, etc., Brewing Co., 13 N. Y. Suppl. 660; Delz *v.* Winfree, 80 Tex. 400, 16 S. W. 111, 26 Am. St. Rep. 755; International, etc., R. Co. *v.* Greenwood, 2 Tex. Civ. App. 76, 21 S. W. 559; Citizens' Light, etc., Co. *v.* Montgomery Light, etc., Co., 171 Fed. 553.

11. *California.*— J. F. Parkinson Co. *v.* Santa Clara County Bldg. Trades Council, 154 Cal. 581, 98 Pac. 1027.

Louisiana.— Lewis *v.* Huie-Hodge Lumber Co., 121 La. 658, 46 So. 685.

Minnesota.— Bohn Mfg. Co. *v.* Hollis, 54 Minn. 223, 55 N. W. 1119, 40 Am. St. Rep. 319, 21 L. R. A. 337.

New York.— Roseneau *v.* Empire Circuit Co., 131 N. Y. App. Div. 429, 115 N. Y. Suppl. 511; Jones *v.* Maher, 62 Misc. 388, 116 N. Y. Suppl. 180 (holding that servants may not only strike, but may, by picketing, attempt peaceably to persuade other workmen not to enter the master's employ, and take their vacant places); Tanenbaum *v.* New York Fire Ins. Exch., 33 Misc. 134, 68 N. Y. Suppl. 342.

Pennsylvania.— Cote *v.* Murphy, 159 Pa. St. 420, 28 Atl. 190, 39 Am. St. Rep. 686, 23 L. R. A. 135.

Texas.—Robison *v.* Texas Pine Land Assoc., (Civ. App. 1897) 40 S. W. 843.

United States.— Citizens' Light, etc., Co. *v.* Montgomery Light, etc., Co., 171 Fed. 553.

Canada.— Perrault *v.* Gauthier, 28 Can. Sup. Ct. 241, holding that workmen who in carrying out the regulations of a trade union forbidding them to work at a trade in company with non-union workmen, without threats, violence, intimidation, or other illegal means take such measures as result in preventing a non-union workman from obtaining employment at his trade in establishments where union workmen are engaged, do not thereby incur liability to an action for damages.

Maliciously establishing rival business to ruin plaintiff.— In Tuttle *v.* Buck, 107 Minn. 145, 119 N. W. 946, 131 Am. St. Rep. 446, 22 L. R. A. N. S. 599, it was held that a complaint which stated in substance that defendant, a banker and a man of wealth and in-

without liability induce the customers of another to withdraw their custom from him, in the race of competition, in order that the former may himself get the custom, there being no contract; and it is no matter that such person is injured, and it is no matter that the other party was moved by express intent to injure him, motive being immaterial where the act is not unlawful." [12] This presupposes, however, that unlawful means are not employed, for if such be the case, the liability of defendant is unquestionable.[13]

fluence in the community, maliciously established a barber shop, employed a barber to carry on the business, and used his personal influence to attract customers from plaintiff's barber shop, not for the purpose of serving any legitimate purpose of his own, but for the sole purpose of maliciously injuring plaintiff, whereby plaintiff's business was ruined, stated a cause of action.

12. West Virginia Transp. Co. *v.* Standard Oil Co., 50 W. Va. 611, 624, 40 S. E. 591, 88 Am. St. Rep. 895, 56 L. R. A. 804. And see Roseneau *v.* Empire Cir. Co., 131 N. Y. App. Div. 429, 115 N. Y. Suppl. 511. But see Tuttle *v.* Buck, 107 Minn. 145, 119 N. W. 946, 131 Am. St. Rep 446, 22 L. R. A. N. S. 599.

Rule applied.— Thus no action lies for representing plaintiff's ferry not to be as good as another rival ferry and for inducing and persuading travelers to cross at the other and not at plaintiff's ferry. Johnson *v.* Hitchcock, 15 Johns. (N. Y.) 185. So, where defendants, who were shipowners, for the purpose of securing control of the tea-carrying trade between London and China, offered rebates to the shippers and agents if they would not deal with plaintiff, offered freights at so low a rate as not to repay the shipowner, and persuaded and induced plaintiff's agents to ship only by defendants' vessels, it was held that, as the means were not unlawful and the object only that of protecting and extending their own trade and increasing the profits, defendants were not liable. Mogul Steamship Co. *v.* McGregor, 23 Q. B. D. 598, 58 L. J. Q. B. 465, 61 L. T. Rep. N. S. 820, 37 Wkly. Rep. 756 [*affirmed* in [1892] A. C. 25, 7 Aspin. 120, 56 J. P. 101, 61 L. J. Q. B. 295, 66 L. T. Rep. N. S. 1, 40 Wkly. Rep. 337]. A letter to architects of a building signed by members of a master builders' association, in which they declined to bid on the building if plaintiff's bid should be received in competition, would not authorize a judgment for damages or the issuance of an injunction against such members, since no coercion or intimidation was suggested, and the architects were at liberty to receive bids from numerous builders who had not signed the letter. Master Builders Assoc. *v.* Domascio, 16 Colo. App. 25, 63 Pac. 782. The officers and members of an association of master plumbers are not liable to suit by others engaged in the plumbing business because the association notified dealers in plumbing supplies that the patronage of members of the association would be withdrawn from them if they furnished supplies to others than master plumbers. Here it was said: "Was the desire to free themselves from competition a sufficient excuse in legal contemplation for the sending of the notices? We think the question must receive an affirmative answer. Competition, it has been said, is the life of trade. Every act done by a trader for the purpose of diverting trade from a rival and attracting it to himself is an act intentionally done and, in so far as it is successful, to the injury of the rival in his business, since to that extent it lessens his gains and profits. To hold such an act wrongful and illegal would be to stifle competition. Trade should be free and unrestricted; and hence every trader is left to conduct his business in his own way, and cannot be held accountable to a rival who suffers a loss of profits by anything he may do, so long as the methods he employs are not of the class of which fraud, misrepresentation, intimidation, coercion, obstruction or molestation of the rival or his servants or workmen, and the procurement of violation of contractural relations, are instances." Macauley *v.* Tierney, 19 R. I. 255, 258, 33 Atl. 1, 61 Am. St. Rep. 770, 37 L. R. A. 455. A petition alleging that defendants offered to sell to the retail trade certain goods owned by them, and manufactured by plaintiff at prices lower than those at which plaintiff sold the same style and brand of goods to jobbers, with the intent and purpose of injuring plaintiff's business and not for any legitimate trade purpose is insufficient to state a cause of action. The right to offer property for sale and fix its price is incident to ownership, nor does the motive with which the act is done render it unlawful. Passaic Print Works *v.* Ely, etc., Dry-Goods Co., 105 Fed. 163, 44 C. C. A. 426, 62 L. R. A. 673. Where the owners of a sawmill plant employed a large number of men and operated a general merchandise store for the purpose of selling to its employees, and plaintiff opened up a general mercantile business in the same place, and the manager of defendant company placed notices about the mill stating that, if the employees could not be loyal and buy their supplies from the mill business store to quit and go where they could be satisfied, such acts of defendant constituted simply lawful competition and gave plaintiff no right of action for damages which resulted therefrom. Lewis *v.* Huie-Hodge Lumber Co., 121 La. 658, 46 So. 685. Where a merchant undersells his neighbor, although the latter may suffer damage thereby, it is *damnum absque injuria*. And if he deals unfairly with his own customers it is a matter between him and them, or between him and the state. Gilly *v.* Hirsh, 122 La. 966, 48 So. 422, 20 L. R. A. N. S. 972.

13. See *infra*, VI, D, 6, a, (III).

(III) *UNLAWFUL MEANS.* Competition will furnish no justification for a resort to unlawful means or methods,[14] such as counterfeiting the appearance of another's goods,[15] or of his trade-marks, whether registered or not;[16] the assumption of a trade-name so similar to the other's as to be calculated to deceive;[17]

14. *Alabama.*— Sparks *v.* McCreary, 156 Ala. 382, 47 So. 332, 22 L. R. A. N. S. 1224.

Iowa.— Dunshee *v.* Standard Oil Co., (1910) 126 N. W. 342.

Kentucky.— Standard Oil Co. *v.* Doyle, 118 Ky. 662, 82 S. W. 271, 26 Ky. L. Rep. 544, 111 Am. St. Rep. 331.

Louisiana.— Graham *v.* St. Charles St. R. Co., 47 La. Ann. 1656, 18 So. 707, 49 Am. St. Rep. 436.

Maryland.— Willner *v.* Silverman, 109 Md. 341, 71 Atl. 962, 24 L. R. A. N. S. 895.

Missouri.— Lohse Patent Door Co. *v.* Fuelle, 215 Mo. 421, 114 S. W. 997, 128 Am. St. Rep. 492, 22 L. R. A. N. S. 607; Carter *v.* Oster, 134 Mo. App. 146, 112 S. W. 995.

New Hampshire.— Huskie *v.* Griffin, 75 N. H. 345, 74 Atl. 595.

New Jersey.—Van Horn *v.* Van Horn, 52 N. J. L. 284, 20 Atl. 485, 10 L. R. A. 184.

United States.— Iron Molders' Union No. 125 *v.* Allis-Chalmers Co., 166 Fed. 45, 91 C. C. A. 631, 20 L. R. A. N. S. 315 [*modifying* 150 Fed. 155]; The Lloyd Sabaudo *v.* Cubicciotti, 159 Fed. 191; Hanchett *v.* Chiatovich, 101 Fed. 742, 41 C. C. A. 648 [*affirming* 96 Fed. 681].

England.— Green *v.* Button, 2 C. M. & R. 707, 1 Gale 349, 5 L. J. Exch. 81, Tyrw. & G. 118; Tarleton *v.* McGawley, 1 Peake N. P. 205.

Counterfeiting badges.—Where a hotel proprietor agreed with a livery-stable keeper to convey passengers to his hotel, and employ him to carry all the passengers from the hotel to the station, an action would lie in behalf of the livery-stable keeper against a third person holding himself out as having the patronage of such hotel keeper and using badges having the name of the hotel thereon, thereby inducing passengers to go in his coaches rather than in those of plaintiff. Marsh *v.* Billings, 7 Cush. (Mass.) 322, 54 Am. Dec. 723.

Coercing employees.— A railroad foreman who, prompted by ill-will, dissuades the employees of the company under his charge from dealing with plaintiff, threatening them with discharge from employment if they do so and carrying the threats into effect is liable. Graham *v.* St. Charles St. R. Co., 47 La. Ann. 1656, 18 So. 707, 49 Am. St. Rep. 436. And see *infra*, VI, D, 6, d.

15. *California.*—Weinstocker *v.* Marks, 109 Cal. 529, 42 Pac. 142, 50 Am. St. Rep. 57, 130 L. R. A. 182.

Illinois.— Nokes *v.* Mueller, 72 Ill. App. 431.

Massachusetts.— New England Awl, etc., Co. *v.* Marlborough Awl, etc., Co., 168 Mass. 154, 46 N. E. 386, 60 Am. St. Rep. 377; Marsh *v.* Billings, 7 Cush. 322, 54 Am. Dec. 723.

New Jersey.—Wirtz *v.* Eagle Bottling Co., 50 N. J. Eq. 164, 24 Atl. 658.

New York.— Taendsticksfabriks Aktiebolagat Vulcan *v.* Myers, 139 N. Y. 364, 34 N. E. 904; Munro *v.* Tousey, 129 N. Y. 38, 29 N. E. 9, 14 L. R. A. 245.

Wisconsin.— Oppermann *v.* Waterman, 94 Wis. 583, 69 N. W. 569.

United States.— R. J. Reynolds Tobacco Co. *v.* Allen Bros. Tobacco Co., 151 Fed. 819; Bauer *v.* Order of Carthusian Monks, 120 Fed. 78, 56 C. C. A. 484; Sterling Remedy Co. *v.* Spermine Medical Co., 112 Fed. 1000, 50 C. C. A. 657; Van Hoboken *v.* Mohns, 112 Fed. 528; Chas. E. Hires Co. *v.* Consumers' Co., 100 Fed. 809, 41 C. C. A. 71; Franck *v.* Frank Chicory Co., 95 Fed. 818; Centaur Co. *v.* Neathery, 91 Fed. 891, 34 C. C. A. 118; C. F. Simmons Medicine Co. *v.* Simmons, 81 Fed. 163; Cook, etc., Co. *v.* Ross, 73 Fed. 203; Jennings *v.* Johnson, 37 Fed. 364; Sawyer Crystal Blue Co. *v.* Hubbard, 32 Fed. 388; Frese *v.* Bachof, 9 Fed. Cas. No. 5,110, 14 Blatchf. 432, 13 Off. Gaz. 635; Hostetter *v.* Vowinkle, 12 Fed. Cas. No. 6,714, 1 Dill. 329.

England.— Blofeld *v.* Payne, 4 B. & Ad. 410, 2 L. J. K. B. 68, 1 N. & M. 353, 24 E. C. L. 183, 110 Eng. Reprint 509.

See TRADE-MARKS AND TRADE-NAMES.

16. *California.*—Weinstocker *v.* Marks, 109 Cal. 529, 42 Pac. 142, 50 Am. St. Rep. 59, 30 L. R. A. 182.

Indiana.— Keller *v.* B. F. Goodrich Co., 117 Ind. 556, 19 N. E. 196, 10 Am. St. Rep. 88.

Kentucky.— Rains *v.* White, 107 Ky. 114, 52 S. W. 970, 21 Ky. L. Rep. 742.

Maryland.— Parlett *v.* Guggenheimer, 67 Md. 542, 10 Atl. 81, 1 Am. St. Rep. 416.

New Jersey.— Centaur Co. *v.* Link, 62 N. J. Eq. 147, 49 Atl. 828.

New York.— Taendsticksfabriks Aktiebolagat Vulcan *v.* Myers, 139 N. Y. 364, 34 N. E. 904; Selchow *v.* Baker, 93 N. Y. 59, 45 Am. Rep. 169; Hier *v.* Abrahams, 82 N. Y. 519, 37 Am. Rep. 589; Glen, etc., Mfg. Co. *v.* Hall, 61 N. Y. 226, 19 Am. Rep. 278; Newman *v.* Alvord, 51 N. Y. 189, 10 Am. Rep. 588; Congress, etc., Spring Co. *v.* High Rock Congress Spring Co., 45 N. Y. 291, 6 Am. Rep. 82.

United States.— Ohio Baking Co. *v.* National Biscuit Co., 127 Fed. 116, 62 C. C. A. 116; Kostering *v.* Seattle Brewing, etc., Co., 116 Fed. 620, 54 C. C. A. 76; Sterling Remedy Co. *v.* Spermine Medical Co., 112 Fed. 1000, 50 C. C. A. 657; Lalance, etc., Mfg. Co. *v.* National Enameling, etc., Co., 109 Fed. 317; Johnson *v.* Bauer, 82 Fed. 662, 27 C. C. A. 374; Pennsylvania Salt Mfg. Co. *v.* Myers, 79 Fed. 87; Estes *v.* Leslie, 29 Fed. 91.

See TRADE-MARKS AND TRADE-NAMES.

17. *Connecticut.*— Holmes *v.* Holmes, etc., Mfg. Co., 37 Conn. 278, 9 Am. Rep. 324.

Iowa.— Shaver *v.* Shaver, 54 Iowa 208, 6 N. W. 188, 37 Am. Rep. 194.

coercive measures directed against his customers or employees;[18] harassing and

Massachusetts.—Viano *v.* Baccigalupo, 183 Mass. 160, 67 N. E. 641; Hoxie *v.* Chaney, 143 Mass. 592, 10 N. E. 713, 58 Am. Rep. 149.

New York.— Chas. S. Higgins Co. *v.* Higgins Soap Company, 144 N. Y. 462, 39 N. E. 490, 43 Am. St. Rep. 769, 27 L. R. A. 42; Devlin *v.* Devlin, 69 N. Y. 212, 25 Am. Rep. 173; Pettes *v.* American Watchman's Clock Co., 89 N. Y. App. Div. 345, 85 N. Y. Suppl. 900; Howes Co. *v.* Howes Grain-Cleaner Co., 19 N. Y. App. Div. 625, 46 N. Y. Suppl. 165.

United States.— McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828; Bissell Chilled Plow Works *v.* T. M. Bissell Plow Co., 121 Fed. 357; Peck *v.* Peck Bros. Co., 113 Fed. 291, 51 C. C. A. 251, 62 L. R. A. 81; Le Page Co. *v.* Russia Cement Co., 51 Fed. 941, 2 C. C. A. 555, 17 L. R. A. 354; Celluloid Mfg. Co. *v.* Cellonite Mfg. Co., 32 Fed. 94; Wm. Rogers Mfg. Co. *v.* Rogers, etc., Mfg. Co., 11 Fed. 495; Filkins *v.* Blackman, 9 Fed. Cas. No. 4,786, 13 Blatchf. 440.

England.— Lee *v.* Haney, L. R. 5 Ch. 155, 39 L. J. Ch. 284, 22 L. T. Rep. N. S. 251, 18 Wkly. Rep. 242; Massam *v.* Thorley's Cattle Food Co., 14 Ch. D. 748, 42 L. T. Rep. N. S. 851, 28 Wkly. Rep. 966; Levy *v.* Walker, 10 Ch. D. 436, 48 L. J. Ch. 273, 39 L. T. Rep. N. S. 654, 27 Wkly. Rep. 370; Fullwood *v.* Fullwood, 9 Ch. D. 176, 47 L. J. Ch. 459, 38 L. T. Rep. N. S. 380, 26 Wkly. Rep. 435; Metzler *v.* Wood, 8 Ch. D. 606, 47 L. J. Ch. 625, 38 L. T. Rep. N. S. 544, 26 Wkly. Rep. 577; Croft *v.* Day, 7 Beav. 84, 29 Eng. Ch. 84, 49 Eng. Reprint 994; Accident Ins. Co. *v.* Accident, etc., Ins. Co., 54 L. J. Ch. 104, 51 L. T. Rep. N. S. 597.

See TRADE-MARKS AND TRADE-NAMES.

18. *Alabama.*— Sparks *v.* McCreary, 156 Ala. 382, 47 So. 332, 22 L. R. A. N. S. 1224, holding that a complaint averring that defendant forbade plaintiff and his clerk, in the presence of customers, to sell, and such customers to buy, any of the goods of plaintiff, and threatened the customers that, if they bought, he would take down their names, and they would be required to attend court or to submit to prosecution, and that business was thereby suspended, it not being alleged that defendant was, or acted as, an officer of the law, states a cause of action, for injury to property, for which Const. (1901) § 13, declares that there shall be a remedy.

Indiana.— Jackson *v.* Stanfield, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 588.

Kentucky.— Standard Oil Co. *v.* Doyle, 118 Ky. 662, 82 S. W. 271, 26 Ky. L. Rep. 544, 111 Am. St. Rep. 331.

Louisiana.— Graham *v.* St. Charles St. R. Co., 47 La. Ann. 1656, 18 So. 707, 49 Am. St. Rep. 436.

Massachusetts.—Vegelahn *v.* Guntner, 167 Mass. 92, 44 N. E. 1077, 57 Am. St. Rep. 443, 35 L. R. A. 722; Sherry *v.* Perkins, 147 Mass. 212, 17 N. E. 307, 9 Am. St. Rep. 689.

Michigan.— Beck *v.* Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13, 74 Am. St. Rep. 421, 42 L. R. A. 407.

New York.— Buffalo Lubricating Oil Co. *v.* Standard Oil Co., 106 N. Y. 669, 12 N. E. 826.

United States.— Iron-Molders' Union No. 125 *v.* Allis-Chalmers Co., 166 Fed. 45, 91 C. C. A. 631, 20 L. R. A. N. S. 315 [*modifying* 150 Fed. 155]; The Lloyd Sabaudo *v.* Cubicciotti, 159 Fed. 191; Hanchett *v.* Chiatovich, 101 Fed. 742, 41 C. C. A. 648 [*affirming* 96 Fed. 681].

England.— Quinn *v.* Leathem, [1901] A. C. 495, 65 J. P. 708, 70 L. J. P. C. 76, 85 L. T. Rep. N. S. 289, 17 T. L. R. 749, 50 Wkly. Rep. 139; Tarleton *v.* McGawley, 1 Peake N. P. 205.

Intimidation.— "This principle is that a combination of employers, or a combination of employes, the object of which is to interfere with the freedom of the employer to employ, or of the employe to be employed (in either of which cases there is an interference with the enjoyment of 'probable expectancy,' which the law recognizes as something in the nature of property), by means of such molestation or personal annoyance as would be liable to coerce the person upon whom it was inflicted, assuming that he is reasonably courageous and not unreasonably sensitive, to refrain from employing or being employed, is illegal and founds an action for damages on the part of any person knowingly injured in respect of his 'probable expectancy' by such interference, and also, when the other necessary conditions exist, affords the basis of an injunction from a court of equity." Jersey City Printing Co. *v.* Cassidy, 63 N. J. Eq. 759, 768, 53 Atl. 230, per Stevenson, V. C. Defendant, a voluntary association, organized a subsidiary association known as the "Peddlers' Association" and contributed funds thereto for the purpose of "competing with the peddlers," especially those selling buggies and wagons. The association itself had no property except the fund so contributed, and the majority of its members had no buggies or wagons for sale. Defendant, through its subsidiary organization, entered upon a systematic course of interference with complainant's business of selling buggies and wagons by employing men, usually two, to follow each agent of complainant. They stopped at the same hotels and stables, started out when he started, followed him throughout the day to every prospective customer and interfered with the conversation. They took no vehicles with them and generally offered none in competition, their sole purpose appearing to be to interfere with and prevent sales by complainant's agents by means of interruptions and false statements respecting complainant and its goods and by intimidating and discouraging its agents. It was held that such action was unwarranted upon any ground or claim of competition and was an unlawful attempt to wantonly destroy complainant's

annoying his employees while selling and distributing goods to his customers;[19] causing circulation of false and injurious reports concerning his business;[20] procuring his arrest and prosecution on false charges in connection with his business;[21] or claiming a lien, knowing it to be false, and thereby preventing delivery of goods.[22]

b. Existing Rights — (I) *Contracts of Employment* — (A) *Persuasion.* It is well established that it is an actionable wrong to procure the breach of an existing contract of employment, although the means used do not exceed mere persuasion, provided this is done maliciously.[23] By the weight of authority, the doctrine is not restricted to cases where the relation of master and servant exists. It is sufficient that the contract be one for personal services.[24] This, however, is not universally conceded.[25]

business. Evenson *v.* Spaulding, 150 Fed. 517, 82 C. C. A. 263, 9 L. R. A. N. S. 904.

19. Standard Oil Co. *v.* Doyle, 118 Ky. 662, 82 S. W. 271, 26 Ky. L. Rep. 544, 111 Am. St. Rep. 331; Evenson *v.* Spaulding, 150 Fed. 517, 82 C. C. A. 263, 9 L. R. A. N. S. 904, referred to in the preceding note.

20. Standard Oil Co. *v.* Doyle, 118 Ky. 662, 82 S. W. 271, 26 Ky. L. Rep. 544, 111 Am. St. Rep. 331; Van Horn *v.* Van Horn, 52 N. J. L. 284, 20 Atl. 485, 10 L. R. A. 184; Hanchett *v.* Chiatovich, 101 Fed. 742, 41 C. C. A. 648 [*affirming* 96 Fed. 681].

21. Standard Oil Co. *v.* Doyle, 118 Ky. 662, 82 S. W. 271, 26 Ky. L. Rep. 544, 111 Am. St. Rep. 331.

22. Green *v.* Button, 2 C. M. & R. 707, 1 Gale 349, 5 L. J. Exch. 81, Tyrw. & G. 118.

23. Walker *v.* Cronin, 107 Mass. 555; Bixby *v.* Dunlap, 56 N. H. 456, 22 Am. Rep. 475; Haight *v.* Badgeley, 15 Barb. (N. Y.) 499; Connell *v.* Stalker, 20 Misc. (N. Y.) 423, 45 N. Y. Suppl. 1048 [*affirmed* in 21 Misc. 609, 48 N. Y. Suppl. 77]; Old Dominion Steamship Co. *v.* McKenna, 18 Abb. N. Cas. (N. Y.) 262; Iron Molders' Union No. 125 *v.* Allis-Chalmers Co., 166 Fed. 45, 91 C. C. A. 631, 20 L. R. A. N. S. 315 [*modifying* 150 Fed. 155].

Interference with relation of master and servant see Master and Servant, 26 Cyc. 1580 *et seq.*

24. *Florida.*— Chipley *v.* Atkinson, 23 Fla. 206, 1 So. 934, 11 Am. St. Rep. 367.

Illinois.— London Guarantee, etc., Co. *v.* Horn, 206 Ill. 493, 69 N. E. 526, 99 Am. St. Rep. 185 [*affirming* 101 Ill. App. 355].

Massachusetts.— McGurk *v.* Gronewett, 199 Mass. 457, 85 N. E. 576, 19 L. R. A. N. S. 561; Berry *v.* Donovan, 188 Mass. 353, 74 N. E. 603, 108 Am. St. Rep. 499, 5 L. R. A. N. S. 899; Moran *v.* Dunphy, 177 Mass. 485, 59 N. E. 125, 52 L. R. A. 115, 83 Am. St. Rep. 289.

New Jersey.— Jersey City Printing Co. *v.* Cassidy, 63 N. J. Eq. 759, 53 Atl. 230; Frank *v.* Herold, 63 N. J. Eq. 443, 52 Atl. 152.

New York.— Davis *v.* United Portable Hoisting Engineers, 28 N. Y. App. Div. 396, 51 N. Y. Suppl. 180.

North Carolina.— Haskins *v.* Royster, 70 N. C. 601, 16 Am. Rep. 780.

West Virginia.— Thacker Coal Co. *v.* Burke, 59 W. Va. 253, 53 S. E. 161, 5 L. R. A. N. S. 1091.

United States.—Thomas *v.* Cincinnati, etc., R. Co., 62 Fed. 803.

England.— Read *v.* Friendly Soc. of Operative Stonemasons, [1902] 2 K. B. 732, 66 J. P. 822, 71 L. J. K. B. 994, 87 L. T. Rep. N. S. 493, 19 T. L. R. 20, 51 Wkly. Rep. 115; Bowen *v.* Hall, 6 Q. B. D. 333, 45 J. P. 373, 50 L. J. Q. B. 305, 44 L. T. Rep. N. S. 75, 29 Wkly. Rep. 367; Lumley *v.* Gye, 2 E. & B. 216, 17 Jur. 827, 22 L. J. Q. B. 463, 1 Wkly. Rep. 432, 75 E. C. L. 216.

Canada.— Hewitt *v.* Ontario Copper Lightning Rod Co., 44 U. C. Q. B. 287.

Evidence insufficient.— In an action for damages brought by an attorney charging that defendant maliciously and by false representations persuaded plaintiff's client to violate his contract with him, and to compromise a lawsuit out of court, the client testified that, when he made the compromise, he did not know that the case had been entered and one of his reasons for making it was because he had not heard from plaintiff; that defendant did not know of his contract with plaintiff, and did not mention plaintiff's name. It was held that a verdict for defendant was properly ordered. Ensor *v.* Bolgiano, 67 Md. 190, 9 Atl. 529.

25. Bourlier *v.* Macauley, 91 Ky. 135, 15 S. W. 60, 12 Ky. L. Rep. 737, 34 Am. St. Rep. 171, 11 L. R. A. 550. An employer retained a part of the wages of his employees for medical services. The employees selected a physician and notified the employer to pay their hospital dues to him. The physician issued to the employees certificates entitling them to medical treatment at his hospital. The employer refused to pay the dues to the physician and notified the employees that they would be paid to a hospital and any employee not consenting to such payment would be discharged. It was held that the physician had no cause of action against the employer on the ground that he caused his employees to break their contracts, although his acts were malicious. Banks *v.* Eastern R., etc., Co., 46 Wash. 610, 90 Pac. 1048, 11 L. R. A. N. S. 485. "We think that the important question in an action of this kind is as to the nature of the defendant's act and the means adopted by him to accomplish his purpose. Merely to induce another to leave an employment or to discharge an employee, by persuasion or argument, however whimsical, unreasonable

(B) *Unlawful Means.* There can be no doubt that a cause of action exists where unlawful means such as fraud, intimidation, or defamation have been used.[26]

(C) *Employment at Will.* That the employment should be for a fixed and unexpired period is not required. Contracts terminable at the will of either party are within the rule where the employment would have continued but for the interference.[27]

(II) *CONTRACTS NOT OF EMPLOYMENT* — (A) *Persuasion.* It is a disputed point whether, when the rendering of services is not involved, the case stands upon a different footing. On one hand it is said that "an action cannot, in general, be maintained for inducing a third person to break his contract with the plaintiff; the consequence, after all, being only a broken contract, for which the party to the contract may have his remedy by suing upon it." [28] But the modern

or absurd, is not in and of itself unlawful, and we do not decide that such interference may become unlawful by reason of the defendant's malicious motives, but simply that to intimidate an employer, by threats, if the threats are of such a character as to produce this result, and thereby cause him to discharge an employee whom he desired to retain, and would have retained, except for such unlawful threats, is an actionable wrong." Perkins *v.* Pendleton, 90 Me. 166, 177, 38 Atl. 96, 60 Am. St. Rep. 252, per Wiswall, J.

26. *Illinois.*— O'Brien *v.* People, 216 Ill. 354, 75 N. E. 108, 108 Am. St. Rep. 219 [*affirming* 114 Ill. App. 40].

Iowa.— Hollenbeck *v.* Ristine, 114 Iowa 358, 86 N. W. 377.

Maine.— Perkins *v.* Pendleton, 90 Me. 166, 38 Atl. 96, 60 Am. St. Rep. 252.

Massachusetts.— Plant *v.* Woods, 176 Mass. 492, 57 N. E. 1011, 79 Am. St. Rep. 330, 51 L. R. A. 339; Vegelahn *v.* Guntner, 167 Mass. 92, 44 N. E. 1077, 57 Am. St. Rep. 443, 35 L. R. A. 722; Sherry *v.* Perkins, 147 Mass. 212, 17 N. E. 307, 9 Am. St. Rep. 689.

New York.— Curran *v.* Galen, 152 N. Y. 33, 46 N. E. 297, 57 Am. St. Rep. 496, 37 L. R. A. 802; Johnston Harvester Co. *v.* Meinhardt, 60 How. Pr. 168.

United States.— Allis Chalmers Co. *v.* Reliable Lodge, 111 Fed. 264; Southern R. Co. *v.* Machinists' Local Union No. 14, 111 Fed. 49.

England.— Read *v.* Friendly Soc. of Operative Stonemasons, [1902] 2 K. B. 732, 66 J. P. 822, 71 L. J. K. B. 994, 87 L. T. Rep. N. S. 493, 19 T. L. R. 20, 51 Wkly. Rep. 115.

Rule applied.—A railroad which by bribing the officials of a rival company obtains control of the latter's stock, causes the calling in of engineering parties so as to stop construction work, spreads abroad notices which break down the credit of the contractor and result in the seizure of his tools, and by such means prevents the completion of the road in time to earn a land grant, and then by false representations to the legislature secures a forfeiture of the lands and a subsequent grant to itself, is liable to such contractor for the damage caused by these wrongful acts. Angle *v.* Chicago, etc., R. Co., 151 U. S. 1, 14 S. Ct. 240, 38 L. ed. 55 [*reversing* 39 Fed. 912].

27. *Florida.*— Chipley *v.* Atkinson, 23 Fla. 206, 1 So. 934, 11 Am. St. Rep. 367.

Georgia.— Salter *v.* Howard, 43 Ga. 601.

Illinois.— London Guarantee, etc., Co. *v.* Horn, 206 Ill. 493, 69 N. E. 526, 99 Am. St. Rep. 185 [*affirming* 101 Ill. App. 355].

Maine.— Perkins *v.* Pendleton, 90 Me. 166, 38 Atl. 96, 60 Am. St. Rep. 252.

Maryland.— Lucke *v.* Clothing Cutters', etc., Assembly No. 7,507, K. L., 77 Md. 396, 26 Atl. 505, 39 Am. St. Rep. 421, 19 L. R. A. 408.

Massachusetts.— Berry *v.* Donovan, 188 Mass. 353, 74 N. E. 603, 108 Am. St. Rep. 499, 5 L. R. A. N. S. 899; Moran *v.* Dunphy, 177 Mass. 485, 59 N. E. 125, 83 Am. St. Rep. 289, 52 L. R. A. 115.

New Jersey.— Brennan *v.* United Hatters of North America Local No. 17, 73 N. J. L. 729, 65 Atl. 165, 9 L. R. A. N. S. 254; Noice *v.* Brown, 39 N. J. L. 569; Frank *v.* Herold, 63 N. J. Eq. 443, 52 Atl. 152.

England.— Gunter *v.* Astor, 4 Moore C. P. 12, 21 Rev. Rep. 733, 16 E. C. L. 357.

Contra.— Baker *v.* Metropolitan L. Ins. Co., 64 S. W. 913, 23 Ky. L. Rep. 1174, 55 L. R. A. 271; Raycroft *v.* Tayntor, 68 Vt. 219, 35 Atl. 53, 54 Am. St. Rep. 882, 33 L. R. A. 225; Boyer *v.* Western Union Tel. Co., 124 Fed. 246.

"A distinction has been sought to be made between cases where there was an unexpired time contract, and cases where the services were by the day or by piece; but I do not think that such distinction rests upon any sound reason; because, in cases of piece work or day work, there would remain for the court or the jury to decide whether, in point of fact, the service would have been continued even though it was not provided for by contract, and even though the employer had the right to dismiss the employe and the employe had the right to quit the service of his employer at any time when he saw fit. . . . In such a case the injury to the property and business of the employer would not consist so much in breaking the contract which existed, as in the loss of profits derived from the work of the laborer if he continued in the employment, and the probability or certainty of such loss would be, in each case, a question of fact." Johnston Harvester Co. *v.* Meinhardt, 9 Abb. N. Cas. (N. Y.) 393, 396, per Macomber, J.

28. 2 Cooley Torts 948. And see Boyson *v.* Thorn, 98 Cal. 578, 33 Pac. 492, 21 L. R. A.

tendency is strongly toward the view that contract rights are property, that, as such, they are entitled to protection, and that malicious interference therewith gives a cause of action, although the methods employed are not inherently unlawful.[29] It has been said "that where a party has entered into a contract with another to do or not to do a particular act or acts, he has as clear a right to its performance as he has to his property, either real or personal, and that knowingly to induce the other party to violate it is as distinct a wrong as it is to injure or destroy his property. It is not a sufficient answer to say that he has a remedy against the party who has broken the contract."[30] "There is no distinction

233 (holding that the existence of a malicious motive on defendant's part would not give a cause of action); Bourlier *v.* Macauley, 91 Ky. 135, 15 S. W. 60, 34 Am. St. Rep. 171, 11 L. R. A. 550; Chambers *v.* Baldwin, 91 Ky. 121, 15 S. W. 57, 34 Am. St. Rep. 165, 11 L. R. A. 545; Glencoe Land, etc., Co. *v.* Hudson Bros. Commission Co., 138 Mo. 439, 40 S. W. 93, 60 Am. St. Rep. 560, 36 L. R. A. 804; McCann *v.* Wolff, 28 Mo. App. 447; Swain *v.* Johnson, 151 N. C. 93, 65 S. E. 619, 28 L. R. A. N. S. 615; Davis *v.* Minor, 2 U. C. Q. B. 464.

Inducing breach of contract of sale.—Defendant, by offering a higher price and thereby inducing a third party to sell to him property which he had previously contracted to sell to plaintiff, incurred no liability in the absence of fraud or misrepresentation. "If A. has agreed to sell property to B., C. may at any time before the title has passed induce A. not to let B. have the property, and to sell it to himself, provided he be guilty of no fraud or misrepresentation, without incurring any liability to B.; A. alone, in such case, must respond to B. for the breach of his contract, and B. has no claim upon or relations with C. While, by the moral law, C. is under obligation to abstain from any interference with the contract between A. and B., yet it is one of those imperfect obligations which the law, as administered in our courts, does not undertake to enforce. But if C. makes use of any fraudulent misrepresentations, as to B., to induce A. to violate his contract with him, then there is a fraud, accompanied with damages, which gives B. a cause of action against C.; as if C. fraudulently represents to A. that B. had failed or absconded, or had declared his intentions not to sell to B., and thus induces A. to sell to another." Ashley *v.* Dixon, 48 N. Y. 430, 432, 8 Am. Rep. 559, per Earl, C.

29. Mahoney *v.* Roberts, 86 Ark. 130, 110 S. W. 225; Knickerbocker Ice Co. *v.* Gardiner Dairy Co., 107 Md. 556, 69 Atl. 405, 16 L. R. A. N. S. 746; Wheeler-Stenzel Co. *v.* American Window Glass Co., 202 Mass. 471, 89 N. E. 28; Garst *v.* Charles, 187 Mass. 144, 72 N. E. 839; Tubular Rivet, etc., Co. *v.* Exeter Boot, etc., Co., 159 Fed. 824, 86 C. C. A. 648; Wells, etc., Co. *v.* Abraham, 146 Fed. 190 [*affirmed* in 149 Fed. 408, 79 C. C. A. 228]; Sperry, etc., Co. *v.* Mechanics' Clothing Co., 128 Fed. 800; Heaton-Peninsular Button-Fastener Co. *v.* Dick, 55 Fed. 23, 52 Fed. 667.

Rule stated.—"Our law now recognizes a contract right as property which is to be protected against undue interference by persons not parties to the contract. When a third party intentionally, by the use of any kind of means, causes a breach of the contract involving damage, he is *prima facie* guilty of a tort." Boot *v.* Burgess, 72 N. J. Eq. 181, 188, 65 Atl. 226, per Stevenson, V. C.

30. Raymond *v.* Yarrington, 96 Tex. 443, 451, 72 S. W. 580, 73 S. W. 800, 97 Am. St. Rep. 914, 62 L. R. A. 962 [*reversing* (Civ. App. 1902) 69 S. W. 436], per Caines, C. J.

Rule stated.—"I presume that the principle is this, viz., that the contract confers certain rights on the person with whom it is made, and not only binds the parties to it by the obligation entered into, but also imposes on all the world the duty of respecting that contractual obligation." Temperton *v.* Russell, [1893] 1 Q. B. 715, 730, 57 J. P. 676, 62 L. J. Q. B. 412, 69 L. T. Rep. N. S. 78, 4 Reports 376, 41 Wkly. Rep. 565, per Lopes, L. J.

Rule applied.—Where one adopts a system in his business of employing only non-union workmen and he stipulates in his contract that they shall join no union, interference therewith by outsiders enticing and endeavoring to entice them to join a union will be enjoined; it appearing that such interference is injurious to the employer, and if allowed to continue will ruin his business. Flaccus *v.* Smith, 199 Pa. St. 128, 48 Atl. 894, 85 Am. St. Rep. 779, 54 L. R. A. 640. Where a party is entitled to receive compensation for personal services to be rendered by him, out of the proceeds of certain lands belonging to the other party, which are to be sold, and he dies before he has rendered the services, while his personal representatives are not entitled to specific performance, they may maintain an action at law against such other party, if by his fault their intestate was prevented from performance. Stow *v.* Robinson, 24 Ill. 532.

Pleading.—A complaint alleging that one of the tenants in common of land, who had agreed to sell the property, persuaded and induced "others" of them not to sign the deed, does not show that she prevented the consummation of the contract as the failure to execute the deed by all the parties may have resulted from the refusal of some of them to whom she presented neither persuasion nor inducement. Daly *v.* Cornwell 34 N. Y. App. Div. 27, 54 N. Y. Suppl. 107.

between a defendant's enticing away the plaintiff's servant and a defendant's inducing a third person to break any other contract between him and the plaintiff." [31] This has been applied to contracts for the sale of land [32] and of personalty.[33] Where plaintiff collects and distributes information to its subscribers who agree not to make the same public, an injunction will issue against third parties who induce the subscribers to communicate such information in violation of their agreement.[34] Where a railroad company issues tickets at a special rate under an agreement by which the purchaser contracts not to transfer them, it has been held an actionable wrong to induce the purchaser to break his contract and to sell the tickets to defendant.[35]

(B) *Unlawful Means.* Where the breach has been brought about not by mere persuasion but by fraudulent representations,[36] threats and intimida-

Malicious interference with copartnership contract not shown see McPherson *v.* Kenney, 198 Mass. 350, 84 N. E. 463.

31. Beekman *v.* Marsters, 195 Mass. 205, 210, 80 N. E. 817, 122 Am. St. Rep. 232, 11 L. R. A. N. S. 201.

32. Defendant agreed to convey land to a third person who was indebted to plaintiff on a promissory note, and who had promised the latter to convey the lands to him as security for the payment of the note. The deeds had been executed and placed as escrows in the hands of one B, who was to deliver them when a patent for the land should be obtained from the state. Notwithstanding this arrangement, defendant, knowing that plaintiff relied upon the conveyance for his security, sold the land to an innocent purchaser without notice, intending thereby to deprive plaintiff of his security. It was held that a good cause of action was shown. Andrews *v.* Blakeslee, 12 Iowa 577.

Evidence.— In an action for damages for having induced a party to break a contract he had entered into with plaintiff for the purchase of real estate, under which plaintiff was to furnish a guaranty policy of title to the lot, it was competent for an official of the guaranty company to state that his company had passed on the title to the real estate and was at a particular time ready to issue a guaranty policy thereon. Morehouse *v.* Terrill, 111 Ill. App. 460.

33. Knickerbocker Ice Co. *v.* Gardiner Dairy Co., 107 Md. 556, 69 Atl. 405, 16 L. R. A. N. S. 746; Wheeler-Stenzel Co. *v.* American Window Glass Co., 202 Mass. 471, 89 N. E. 28; Tubular Rivet, etc., Co. *v.* Exeter Boot, etc., Co., 159 Fed. 824, 86 C. C. A. 648. One having a contract with a state, made pursuant to law, to supply for a term of years all of certain text-books adopted by act of the legislature for use in the public schools of the state, may maintain an action for damages against a third person, who, with knowledge of the facts, induces the school boards of counties to purchase books from him and discard those of plaintiff. Heath *v.* American Book Co., 97 Fed. 533.

34. F. W. Dodge Co. *v.* Construction Information Co., 183 Mass. 62, 66 N. E. 204, 97 Am. St. Rep. 412, 60 L. R. A. 810; Chicago Bd. of Trade *v.* Christie Grain, etc., Co., 198 U. S. 236, 25 S. Ct. 637, 49 L. ed. 1031; Illinois Commission Co. *v.* Cleveland Tel. Co., 119 Fed. 301, 56 C. C. A. 205; National Tel. News Co. *v.* Western Union Tel. Co., 119 Fed. 294, 56 C. C. A. 198, 60 L. R. A. 805; Chicago Bd. of Trade *v.* Hadden-Krull Co., 109 Fed. 705 [*affirmed* in 124 Fed. 1017, 59 C. C. A. 680]; Chicago Bd. of Trade *v.* C. B. Thomson Commission Co., 103 Fed. 902; Exchange Tel. Co. *v.* Gregory, [1896] 1 Q. B. 147, 60 J. P. 52, 65 L. J. Q. B. 262, 74 L. T. Rep. N. S. 83 [*affirming* 73 L. T. Rep. N. S. 120].

35. Schubach *v.* McDonald, 179 Mo. 163, 78 S. W. 1020, 101 Am. St. Rep. 452, 65 L. R. A. 136; Kinner *v.* Lake Shore, etc., R. Co., 69 Ohio St. 339, 69 N. E. 614; Bitterman *v.* Louisville, etc., R. Co., 207 U. S. 205, 28 S. Ct. 91, 52 L. ed. 171; Delaware, etc., R. Co. *v.* Frank, 110 Fed. 689; Nashville, etc., R. Co. *v.* McConnell, 82 Fed. 65. *Contra*, New York Cent., etc., R. Co. *v.* Reeves, 41 Misc. (N. Y.) 490, 85 N. Y. Suppl. 28.

36. Benton *v.* Pratt, 2 Wend. (N. Y.) 385, 20 Am. Dec. 623.

Rule applied.—Where plaintiff had entered into a contract to purchase certain property from a third person and defendant by falsely claiming a lien thereon induced the latter to refuse delivery, an action was sustained. Green *v.* Button, 2 C. M. & R. 707, 1 Gale 349, 5 L. J. Exch. 81, Tyrw. & G. 118. So, where defendant, a publisher, had made false statements as to the merit of the work published by plaintiff for the purpose of inducing subscribers thereto to break their contracts with plaintiff and to accept defendant's work instead, and had agreed to indemnify such subscribers against plaintiff's damages for the breach and against the expenses of defending any action brought against them, it was held that, the methods being unfair and plaintiff's remedies at law inadequate, an injunction would issue. American Law Book Co. *v.* Edward Thompson Co., 41 Misc. (N. Y.) 396, 84 N. Y. Suppl. 225. Plaintiff, a manufacturer, sold phonographs to factors or wholesale dealers, who agreed not to sell to any black listed retailer. Defendant, who was a competitor of plaintiff and who was on the black list, procured phonographs from a factor by fraudulently purchasing them through an agent, who posed as an inde-

tion,[37] defamatory statements,[38] or other unlawful means, the existence of a cause of action is conceded.[39]

(c) *Contracts Legally Unenforceable.* Whether the contract must have been enforceable at law in order that a recovery may be allowed for procuring its breach is in dispute. Some cases hold the affirmative,[40] but it seems the better view that a cause of action will exist, although the contract may not be binding in law where it would have been performed by the third party, had not defendant interfered.[41]

c. Malice. The word "malice," whether used in reference to future or existing contracts, is to be understood, not in the sense of spite or personal ill-will, but as the motive which prompts the doing of an intentional injury without justification in law.[42]

pendent dealer. It was held that defendant was liable for having induced the factor by fraudulent means to break his contract with plaintiff. Defendant having also, no fraudulent means being employed, purchased from one E, a retailer, who did not know that defendant was black listed, it was held that defendant was not liable, there being no contract shown between E and plaintiff, or, conceding a contract, no fraud was present. National Phonograph Co. *v.* Edison Bell Consol. Phonograph Co., [1908] 1 Ch. 335, 77 L. J. Ch. 218, 98 L. T. Rep. N. S. 291, 24 T. L. R. 201. Assuming that the contract was broken in both cases, this decision, if it goes to the extent of holding, as it seemingly does, that fraud is necessary, is against the weight of recent English decisions.

37. Doremus *v.* Hennessy, 176 Ill. 608, 52 N. E. 924, 54 N. E. 524, 68 Am. St. Rep. 203, 43 L. R. A. 797, 802; Beattie *v.* Callanan, 82 N. Y. App. Div. 7, 81 N. Y. Suppl. 413.

38. Lally *v.* Cantwell, 30 Mo. App. 524.

39. Where one S had contracted to sell to plaintiffs a quantity of cheese, and defendant, by means of a forged telegram, caused S to believe that plaintiffs did not desire to purchase, whereupon S sold the cheese to defendant, it was held that defendant was liable. Rice *v.* Manley, 66 N. Y. 82, 23 Am. Rep. 30.

40. Thus it has been held that one partner has no right of action against a third party for inducing the other partner to terminate the partnership when such partnership is for no specified term of duration. McGuire *v.* Gerstley, 204 U. S. 489, 27 S. Ct. 332, 51 L. ed. 581 [*affirming* 26 App. Cas. (D. C.) 193]. In another case plaintiff, a real estate broker, procured C to purchase certain real estate, and C contracted with the owner thereof, whereby money deposited by him should be forfeited if C should not close the trade within thirty days. M, claiming to be interested as a broker in the sale, demanded of plaintiff a portion of the commission, and on this being denied, thereafter, with C, induced the owner of the land to refuse to carry out the contract. After the thirty days, the owner conveyed the land to M and the money deposited by C was accepted by the owner as part of the consideration. Thereafter M conveyed to C and plaintiff sued M and C on the ground that they had conspired to induce the owner of the property to break his contract, whereby plaintiff lost his commission, and that the sale and conveyance to C was in reality the same transaction which had been originally procured by the efforts of plaintiff. It was held that, as C was not bound by his contract to consummate the purchase negotiated, he had a right to withdraw and forfeit his deposit, and plaintiff had no cause of action against M and C for the alleged tort. Roberts *v.* Clark, (Tex. Civ. App. 1907) 103 S. W. 417. See also Davidson *v.* Oakes, (Tex. Civ. App. 1910) 128 S. W. 944.

41. Rice *v.* Manley, 66 N. Y. 82, 23 Am. Rep. 30; Benton *v.* Pratt, 2 Wend. (N. Y.) 385, 20 Am. Dec. 623; Quinn *v.* Leathem, [1901] A. C. 495, 65 J. P. 708, 70 L. J. P. C. 76, 85 L. T. Rep. N. S. 289, 17 T. L. R. 749, 50 Wkly. Rep. 139.

42. *Alabama.*— Sparks *v.* McCreary, 156 Ala. 382, 47 So. 332, 22 L. R. A. N. S. 1224.

Arkansas.— Mahoney *v.* Roberts, 86 Ark. 130, 110 S. W. 225.

Illinois.— Morehouse *v.* Terrill, 111 Ill. App. 460.

Maryland.— Knickerbocker Ice Co. *v.* Gardiner Dairy Co., 107 Md. 556, 69 Atl. 405, 16 L. R. A. N. S. 746.

Massachusetts.— McGurk *v.* Cronenwett, 199 Mass. 457, 85 N. E. 576, 19 L. R. A. N. S. 561; Beekman *v.* Marsters, 195 Mass. 205, 80 N. E. 817, 122 Am. St. Rep. 232, 11 L. R. A. N. S. 201.

Minnesota.— Joyce *v.* Great Northern R. Co., 100 Minn. 225, 110 N. W. 975, 8 L. R. A. N. S. 756, construing Rev. Laws (1905), § 5097, prohibiting combinations of employers for the purpose of interfering with or preventing any person from procuring employment. Here it is said that "the unlawfulness of the act gives rise to a presumption of legal malice, which is sufficient to support an action for the wrong."

Missouri.— Lohse Patent Door Co. *v.* Fuelle, 215 Mo. 421, 114 S. W. 997, 128 Am. St. Rep. 492, 22 L. R. A. N. S. 607.

New Jersey.— Van Horn *v.* Van Horn, 52 N. J. L. 284, 20 Atl. 485, 10 L. R. A. 184; Barr *v.* Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881.

North Carolina.— Jones *v.* Stanly, 76 N. C. 355.

West Virginia.— West Virginia Transp.

d. Threats to Discharge or to Strike. The cases are not in accord on the point whether threats to discharge from employment or to call a strike are to be considered as unlawful means in preventing the making of a contract of either class or in procuring its breach. It has been urged that where no contract of employment is violated thereby, an employer may dismiss an employee for good cause, for no cause, or even for a cause morally wrong, and conversely the employee

Co. *v.* Standard Oil Co., 50 W. Va. 611, 40 S. E. 591, 88 Am. St. Rep. 895, 56 L. R. A. 804.

United States.— Bitterman *v.* Louisville, etc., R. Co., 207 U. S. 205, 28 S. Ct. 91, 52 L. ed. 171; Angle *v.* Chicago, etc., R. Co., 151 U. S. 1, 14 S. Ct. 240, 38 L. ed. 55; Tubular Rivet, etc., Co. *v.* Exeter Boot, etc., Co., 159 Fed. 824, 86 C. C. A. 648, holding that where defendant corporation induced another to break a contract to furnish certain machines, plaintiff was entitled to recover from defendant damages sustained thereby, without proof that defendant was actuated by actual malice or ill-will.

Malice defined.— Malice, in the law, is the intentional doing of a wrongful act without justification or excuse, and a wrongful act is any act which in the ordinary course will infringe on the rights of another, to his damage, except it be done in the exercise of an equal or superior right. Brennan *v.* United Hatters of North America, Local No. 17, 73 N. J. L. 729, 65 Atl. 165, 9 L. R. A. N. S. 254. "At common law the remedies for breach of contract were confined to the contracting parties, and limited to direct damage and consequential damages proximately resulting from the act of him who is sued. This general rule admitted of one exception, and that was the right of action against a stranger for wrongfully enticing away a servant in violation of his contract of service with his master. The exception is said to have been based on the ancient statute of laborers. The early English cases limited the action to the enticement of menial servants, but the later cases, beginning with Lumley *v.* Gye, 2 E. & B. 216, 17 Jur. 827, 22 L. J. Q. B. 463, 1 Wkly. Rep. 432, 75 E. C. L. 216, have extended the doctrine beyond menial servants; and by the modern interpretation of this doctrine by the English courts the rule is extended to a malicious interference with any contract. . . . The term 'malicious,' used in this connection, is to be given a liberal meaning. The act is malicious when the thing done is with the knowledge of the plaintiff's rights, and with the intent to interfere therewith. It is a wanton interference with another's contractual rights. Ineffective persuasion to induce another to violate his contract would not, of itself, be actionable, but if the persuasion be used for the purpose of injuring the plaintiff, or benefiting the defendant at the expense of the plaintiff, with a knowledge of the subsistence of the contract, it becomes a malicious act, and if injury ensues from it a cause of action accrues to the injured party." Employing Printers' Club *v.* Doctor Blosser Co., 122 Ga. 509, 516, 50 S. E. 353, 106 Am. St. Rep. 137, 69 L. R. A. 90, per Evans, J. "Malice, as here used, does not merely mean intent to harm, but means an intent to do a wrongful harm and injury. An intent to do a wrongful harm and injury is unlawful, and if a wrongful act is done to the detriment of the right of another it is malicious." O'Brien *v.* People, 216 Ill. 354, 373, 75 N. E. 108, 108 Am. St. Rep. 219 [*affirming* 114 Ill. App. 40], per Wilkin, J.: "It is not necessary that such interference should have been malicious in its character. If it be wrongful, it is equally to be condemned, and just as much in violation of legal right." Accordingly it was held that where a non-union employee is discharged because of a threat by a labor organization that in case he is longer retained it will notify all labor organizations of the city that the business house of the employers is a non-union one and thus subject them to loss, such interference is wrongful and an action will lie. Lucke *v.* Clothing Cutters', etc., Assembly No. 7,507, K. L., 77 Md. 396, 405, 26 Atl. 505, 39 Am. St. Rep. 421, 19 L. R. A. 408.

Malicious interference not established see McPherson *v.* Kenney, 198 Mass. 350, 84 N. E. 463, contract of copartnership. Where a labor union procures the discharge of non-union employees, by threatening a strike, it is not liable where its action is based upon a proper motive such as a purpose to secure only the employment of efficient workmen, or to secure the exclusive employment of its members provided that no unlawful means are employed. National Protective Steam Fitters, etc., Assoc. *v.* Cumming, 170 N. Y. 315, 63 N. E. 369, 88 Am. St. Rep. 648, 58 L. R. A. 135.

Mere knowledge of prior contract.— The mere fact that a purchaser of bonds from a committee authorized to sell at the time of the purchase had knowledge that the committee had previously contracted to sell them to another does not render him liable to such other in damages because of the sellers' breach of contract. Sweeney *v.* Smith, 171 Fed. 645, 96 C. C. A. 91 [*affirming* 167 Fed. 385].

Purchase to prevent performance of contract.— Where defendant sold the standing timber on his land, and plaintiff contracted with the purchasers to saw the same into lumber, and after plaintiff had taken his mill to the land and begun sawing, defendant repurchased the interest of one of the purchasers in the timber, and took an assignment thereof, with intent to prevent plaintiff sawing the timber, and forbade plaintiff sawing it, and obtained an injunc-

has the same right to refuse or quit employment. The exercise of either right cannot be deemed wrong because of underlying motives.[43] But some courts have adopted the test of malicious motive.[44]

E. Interference With Domestic Relations — 1. Injuries to the Husband. As the husband is entitled both to the services and to the companionship or *consortium* of the wife, his unlawful deprivation of these rights gives rise to a cause of action.[45] Hence the husband may sue if she be abducted or enticed from him,[46] if her affections be alienated,[47] for criminal conversation with her,[48] or for

tion restraining the other purchaser and his employees from sawing it, it was held, in an action for damages, that the contract with plaintiff was not a covenant running with title to the timber, and defendant had a legal right to forbid the sawing thereof; and, having such right, his intent was immaterial. Biggers *v.* Matthews, 147 N. C. 299, 61 S. E. 55.

43. National Protective Steam Fitters, etc., Assoc. *v.* Cumming, 170 N. Y. 315, 63 N. E. 369, 88 Am. St. Rep. 648, 58 L. R. A. 135; Payne *v.* Western, etc., R. Co., 13 Lea (Tenn.) 507, 49 Am. Rep. 666; Robinson *v.* Texas Pine Land Assoc., (Tex. Civ. App. 1897) 40 S. W. 843; Milwaukee Iron-Molders' Union No. 125 *v.* Allis-Chalmers Co., 166 Fed. 45, 91 C. C. A. 631, 20 L. R. A. N. S. 315.

Right to lock out.—A combination of manufacturers has the right to lock out all operators connected with an association of employees because of demands which it considers unjust made upon a member. Sinsheimer *v.* United Garment Workers of America, 77 Hun (N. Y.) 215, 28 N. Y. Suppl. 321.

44. Willis *v.* Muscogee Mfg. Co., 120 Ga. 597, 48 S. E. 177 (malice not proven); O'Brien *v.* People, 216 Ill. 354, 75 N. E. 108, 108 Am. St. Rep. 219 [*affirming* 114 Ill. App. 40]; Lewis *v.* Huie-Hodge Lumber Co., 121 La. 658, 46 So. 685.

Rule applied.— A railroad foreman who injures the business of plaintiff by refusing to employ men who deal with him and by discharging employees who do, is liable to plaintiff. "The circumstance that the defendant as the foreman of the company had the power to discharge those designed to be influenced by his communications or statements with respect to the plaintiff, and that defendant had the selection of the labor of the company, tended to make more effective his efforts to injure plaintiff in his business. We recognize the principle urged by the defence, that the employer has the right to employ those he chooses, and the same liberty is allowed as to their discharge. The authority cited by defendant is entitled to full recognition, that one may do business with those he chooses to deal with, and decline, if he pleases, the business of others. . . . It is not the exercise of defendant's choice in selecting or discharging laborers for the company that makes him liable, but he is responsible, because, in exercising that right, he indulges in language, uses threats, and pursues a line of conduct all directed at the plaintiff, and of a character to injure him in his lawful business." Graham *v.* St. Charles St. R. Co., 47 La. Ann. 1656, 1659, 18 So. 707, 49 Am. St. Rep. 436, per Miller, J. Where defendant had threatened that it would discharge from and refuse employment to men who patronized plaintiff, the proprietor of a boarding-house and saloon, did discharge a number of men on that account and instructed its foreman to refuse employment to the patrons of plaintiff, it was held that defendant was not exercising a legal right. "It had the same right," said the court, "to discharge its servants as all masters have under similar conditions. This right was not to dismiss the servants arbitrarily or capriciously, but for reasonable causes only." But it was otherwise with regard to the notice to future employees for defendant "had the right to determine for itself whom it would thereafter employ and the reasons upon which it might act concerned no one but itself." International, etc., R. Co. *v.* Greenwood, 2 Tex. Civ. App. 76, 81, 21 S. W. 559.

45. Blackstone says: "Injuries that may be offered to a person, considered as a husband, are principally three: abduction, or taking away a man's wife; adultery, or criminal conversation with her; and beating or otherwise abusing her." 3 Blackstone Comm. 139. See Husband and Wife, 21 Cyc. 1617 *et seq.*

46. Barnes *v.* Allen, 30 Barb. (N. Y.) 663 [*reversed* on other grounds in 1 Abb. Dec. 111, 1 Keyes 390]. See Husband and Wife, 21 Cyc. 1617 *et seq.*

47. See Husband and Wife, 21 Cyc. 1617 *et seq.*

Abandonment not essential.— Abandonment by the wife is not necessary in order to give a cause of action for alienation of affections. Remaining with the husband "would rather add the provocation of insult to the keenness of suffering. It would continue before him a present, living, irritating, aggravating if not consuming source of grief, which even her absence might in a measure relieve." Heermance *v.* James, 47 Barb. (N. Y.) 120, 126, per Potter, J. See Husband and Wife, 21 Cyc. 1617.

Seduction not essential.— It is not necessary that seduction be shown. Rinehart *v.* Bills, 82 Mo. 534, 52 Am. Rep. 385. See Husband and Wife, 21 Cyc. 1617.

48. See Husband and Wife, 21 Cyc. 1626 *et seq.*

Consent of wife immaterial.— The husband may recover whether the sexual intercourse was with (Yundt *v.* Hartrunft, 41 Ill. 9) or without (Bigaouette *v.* Paulet, 134 Mass. 123, 45 Am. Rep. 307) the consent of the wife. See Husband and Wife, 21 Cyc. 1628.

physical injuries to her which prevent her from fulfilling her marital obligations to him.[49]

2. Injuries to the Wife. Whatever may have been the rule at common law, the wife may now, by the prevailing view, maintain an action for the alienation of the husband's affections.[50] A recovery for criminal conversation, however, has been denied, where alienation of the husband's affections has not been proven,[51] although in some states it is allowed by statute.[52]

3. Injuries to the Parent. The parent who at the time is entitled to the services of the child may maintain an action for their loss if caused by the seduction, enticing away or harboring, assault, negligence, or other wrong of a third person.[53] Primarily this right belongs to the father.[54] But if the father be dead, or if for other reasons the mother is entitled to the earnings and services of the child, the action may be brought by her.[55] Such an action may also be main-

49. *Alabama.*— Birmingham Southern R. Co. *v.* Lintner, 141 Ala. 420, 38 So. 363, 109 Am. St. Rep. 40.

Georgia.— Collins Park, etc., R. Co. *v.* Ware, 112 Ga. 663, 37 S. E. 975.

Massachusetts.— Kelley *v.* New York, etc., R. Co., 168 Mass. 308, 46 N. E. 1063, 60 Am. St. Rep. 397, 38 L. R. A. 631.

New York.— Cregin *v.* Brooklyn Crosstown R. Co., 75 N. Y. 192, 31 Am. Rep. 459.

Pennsylvania.— Nanticoke *v.* Warne, 106 Pa. St. 373.

See Husband and Wife, 21 Cyc. 1525 *et seq.*

50. Nolin *v.* Pearson, 191 Mass. 283, 77 N. E. 890, 114 Am. St. Rep. 605, 4 L. R. A. N. S. 643. See Husband and Wife, 21 Cyc. 1617, 1618.

Rule stated.— "So far forth as the husband is concerned, from time immemorial the law has regarded his right to the conjugal affection and society of his wife as a valuable property, and has compelled the man who has injured it to make compensation. Whatever inequalities of right as to property may result from the marriage contract, husband and wife are equal in rights in one respect, namely, each owes to the other the fullest possible measure of conjugal affection and society; the husband to the wife all that the wife owes to him. Upon principle this right in the wife is equally valuable to her, as property, as is that of the husband to him. Her right being the same as his in kind, degree and value, there would seem to be no valid reason why the law should deny to her the redress which it affords to him. But from time to time courts, not denying the right of the wife in this regard, not denying that it could be injured, have nevertheless declared that the law neither would nor could devise and enforce any form of action by which she might obtain damages. In 3 Blackstone Commentaries 143, the reason of such denial is thus stated: 'The inferior hath no kind of property in the company, care or assistance of the superior, as the superior is held to have in those of the inferior; therefore the inferior can suffer no loss or injury.' Inasmuch as by universal consent it is of the essence of every marriage contract that the parties thereto shall, in regard to this particular matter of conjugal society and affection, stand upon an equality, we are unable to find any support for the denial in this reason, and the right, the injury, and the consequent damage, being admitted, then comes into operation another rule, namely, that the law will permit no one to obtain redress for wrong except by its instrumentality, and it will furnish a mode for obtaining adequate redress for every wrong. This rule, lying at the foundation of all law is more potent than, and takes precedence of, the reason that the wife is in this regard without the pale of the law because of her inferiority." Foot *v.* Card, 58 Conn. 1, 8, 18 Atl. 1027, 18 Am. St. Rep. 258, 6 L. R. A. 829, per Pardee, J.

51. See Husband and Wife, 21 Cyc. 1627. The grounds on which the husband was permitted to recover under like circumstances are "the disgrace which attached to the plaintiff as the husband of the unfaithful wife,— and no such disgrace has ever rested upon the wife, if there was one, of the guilty defendant,— and, of more importance, the danger that a wife's infidelity might not only impose on her husband the support of children not his own, but, still worse, cast discredit upon the legitimacy of those really begotten by him. . . . From this statement as to the grounds or elements constituting this action, it will be seen that the principal ones cannot possibly exist or be involved in a similar action brought by a wife." Kroessin *v.* Keller, 60 Minn. 372, 374, 62 N. W. 438, 51 Am. St. Rep. 533, 27 L. R. A. 685. See also Kuhn *v.* Hemmann, 43 N. Y. App. Div. 108, 59 N. Y. Suppl. 341; Hodecker *v.* Stricker, 39 N. Y. Suppl. 515.

52. See Husband and Wife, 21 Cyc. 1627.

53. See Parent and Child, 29 Cyc. 1637 *et seq.*, 1679; Seduction, 35 Cyc. 1297 *et seq.*

54. King *v.* Southern R. Co., 126 Ga. 794, 55 S. E. 965, 8 L. R. A. N. S. 544. See Parent and Child, 29 Cyc. 1637, 1679; Seduction, 35 Cyc. 1298.

55. Furman *v.* Van Sise, 56 N. Y. 435, 15 Am. Rep. 441; Gray *v.* Durland, 51 N. Y. 424; McGarr *v.* National, etc., Worsted Mills, 24 R. I. 447, 53 Atl. 320, 96 Am. St. Rep. 749, 60 L. R. A. 122. See Parent and Child, 29 Cyc. 1637, 1679; Seduction, 35 Cyc. 1302.

tained in a proper case by one who is not the parent, but who stands *in loco parentis* to the child.[56]

F. Obstruction of Legal Remedies. One who impedes or obstructs another's remedy for the enforcement of a fixed and ascertained right against a third party is responsible for the injury thus occasioned. Thus where a judgment has been recovered, one who fraudulently prevents its collection by removing or assisting in the removal of the debtor or his property beyond the jurisdiction of the court is liable to the judgment creditor.[57] But there is no cause of action where no existing right has been violated, as where defendant fraudulently purchases property belonging to the plaintiff's debtor and aids him to abscond in order to prevent plaintiff from enforcing payment of his debt; since here plaintiff has no lien upon the debtor's property by attachment or otherwise. "The most that can be said is, that he intended to attach the property and the wrongful act of the defendant has prevented him from executing this intention."[58] Nor will an action lie in favor of a party against whom judgment is rendered in a case against one called as a witness on the trial who gave false testimony. Such an action "cannot be maintained, without virtually putting it in the power of every suitor to re-examine every suit, in which he is cast, and to try the witnesses for perjury by instituting against them a civil suit. This course of things would be as interminable as it is in its nature intolerable."[59] The rule applies as well to

56. See PARENT AND CHILD, 29 Cyc. 1670, 1672; SEDUCTION, 35 Cyc. 1303, 1304.

57. Quinby *v.* Strauss, 90 N. Y. 664.

Rule applied — alimony.—An action will lie by a wife, in whose favor alimony has been decreed pending divorce proceedings, against one who has induced and aided the husband to leave the state in order to avoid the payment of the alimony, as to which he was then in default. Hoefler *v.* Hoefler, 12 N. Y. App. Div. 84, 42 N. Y. Suppl. 1035, 4 N. Y. Annot. Cas. 1.

Interference with lien other than by judgment.— The rule applies to fraudulent interference with liens however created. Thus where a person, with the connivance of the owner, converts to his own use farm products subject to an agricultural lien, and places them beyond the reach of the lienee under the statutory proceedings, the latter may, in an action similar to case at common law, recover his damages. Michalson *v.* All, 43 S. C. 459, 21 S. E. 323, 49 Am. St. Rep. 857.

Damage necessary.—A petition which shows that a fraudulent conspiracy between plaintiff's debtor and defendant to withdraw the debtor's property from the claims of creditors failed, and that all the debtor's property was subjected to plaintiff's execution, and which seeks to recover the cost of subjecting the property to his execution, does not state a cause of action. McHale *v.* Heman, 28 Mo. App. 193.

58. Lamb *v.* Stone, 11 Pick. (Mass.) 527, 534. See also Moody *v.* Burton, 27 Me. 427, 46 Am. Dec. 612; Bradley *v.* Fuller, 118 Mass. 239; Wellington *v.* Small, 3 Cush. (Mass.) 145, 50 Am. Dec. 719; Hurwitz *v.* Hurwitz, 10 Misc. (N. Y.) 353, 31 N. Y. Suppl. 25; Klous *v.* Hennessey, 13 R. I. 332; Adler *v.* Fenton, 24 How. (U. S.) 407, 16 L. ed. 696. And see *supra*, III, A, text and note 16.

Rule applied.— Thus where a creditor had placed a note in the hands of an officer for collection, and another, by persuasion, induced the officer not to collect and the debtor not to pay the debt, it was held that the creditor had no ground for an action on the case against such other. Platt *v.* Potts, 35 N. C. 455. And where plaintiffs sued defendant in trespass on the case, alleging that one F was indebted to them; that F had obtained a judgment against defendant for a larger sum than his indebtedness to them; that F, who was insolvent, had agreed with them that they should be paid out of his judgment against defendant, who, having notice thereof, but intending to cheat and wrong plaintiffs, settled with F himself said judgment, and took his receipt for the same, it was held that plaintiffs were not entitled to recover. Carleton *v.* Neal, 19 Ark. 292. But in North Carolina, under the statutes, a person who assists in removing a debtor out of the county of his residence, for the purpose of defrauding his creditors, is liable to an action on the case to the creditors, which will not be barred by a bar of the original action against the debtor; and such liability will accrue, although the person aiding does not convey the debtor and his goods entirely out of the county. The measure of damages is the original debt, and it is not necessary for plaintiff to show that defendant knew of any particular debt. Godsey *v.* Bason, 30 N. C. 260. But merely advising a debtor to leave the county, no matter with what intent, will not amount to giving aid or assistance in removing within the meaning of the statute making any person liable who "shall remove, or shall aid, or assist in removing, any debtor out of the county in which he shall have resided for six months, with an intent," etc. Wiley *v.* McRee, 47 N. C. 349.

59. Cunningham *v.* Brown, 18 Vt. 123, 126, 46 Am. Dec. 140. And see Grove *v.* Brandenburg, 7 Blackf. (Ind.) 234; Gusman *v.* Hearsey, 28 La Ann. 709, 26 Am. Rep. 104; Dun-

the adverse party who has suborned a witness to testify falsely,[60] and to criminal as well as civil proceedings.[61] But where the testimony of the perjurer is defamatory in character, and neither the person defamed nor the suborner was a party to the action, a right of recovery has been recognized.[62]

G. Perversion of Legal Remedies[63]— **1. Malicious Prosecution.** The tort of malicious prosecution consists in the institution of a judicial proceeding from wrongful or improper motives and without probable cause.[64] In order to entitle plaintiff to recover, "three things must concur, viz., 1. The motive of the party instituting or prosecuting the suit or proceeding, must have been malicious; 2, the suit or proceeding complained of must have been instituted without probable cause; and 3, the suit or proceeding must have terminated in the plaintiff's favor."[65] All the authorities concur in permitting an action of malicious prosecution based upon: (1) A previous criminal prosecution; and (2) a civil action, where there has been an interference with the person or property of the present plaintiff.[66] But whether the previous institution of a civil action unattended by any interference with person or property gives a cause of action is disputed. Authorities are about equally divided. Cases answering the question in the negative proceed on the theory that the costs awarded to the successful party are to be regarded as sufficient compensation.[67] On the other hand, attention is

lap *v.* Glidden, 31 Me. 435, 52 Am. Dec. 625; Phelps *v.* Stearns, 4 Gray (Mass.) 105, 64 Am. Dec. 61; Stevens *v.* Rowe, 59 N. H. 578, 47 Am. Rep. 231; Young *v.* Leach, 27 N. Y. App. Div. 293, 50 N. Y. Suppl. 670; Godette *v.* Gaskill, 151 N. C. 52, 65 S. E. 612, 134 Am. St. Rep. 964, 24 L. R. A. N. S. 265; Eyres *v.* Sedgewicke, Cro. Jac. 160, 79 Eng. Reprint 513; Damport *v.* Sympson, Cro. Eliz. 520, 78 Eng. Reprint 769. The injury resulting from perjury in making a false affidavit before the officers of the land-office, whereby affiant was enabled to enter and obtain title as preëmptor to land which had been previously entered by another, and to get such prior entry vacated, is not actionable. Abbott *v.* Bahr, 3 Pinn. (Wis.) 193, 3 Chandl. 210.

60. Peck *v.* Woodbridge, 3 Day (Conn.) 30; Bostwick *v.* Lewis, 2 Day (Conn.) 447; Stevens *v.* Rowe, 59 N. H. 578, 47 Am. Rep. 231; Young *v.* Leach, 27 N. Y. App. Div. 293, 50 N. Y. Suppl. 670; Smith *v.* Lewis, 3 Johns. (N. Y.) 157, 3 Am. Dec. 469.

Contra, by statute.—A cause of action against both the perjured witness and the suborner is given by Me. Rev. St. c. 82, § 137. Landers *v.* Smith, 78 Me. 212, 3 Atl. 463.

61. Taylor *v.* Bidwell, 65 Cal. 489, 4 Pac. 491; Revill *v.* Pettit, 3 Metc. (Ky.) 314; Garing *v.* Frazer, 76 Me. 37.

62. Rice *v.* Coolidge, 121 Mass. 393, 23 Am. Rep. 279.

63. **Bringing unfounded suit** see Actions, 1 Cyc. 648.

64. Newell Malicious Prosecution 6 [*quoted* in Hicks *v.* Brantley, 102 Ga. 264, 268, 29 S. E. 459]. See Malicious Prosecution, 26 Cyc. 1.

Malicious prosecution and false imprisonment distinguished.—The distinction is found in the legality of the imprisonment itself. False imprisonment lies for an illegal arrest and detention. But if the imprisonment is under lawful process, although wrongfully obtained, the tort is malicious prosecution. "The gravamen of the offence of false imprisonment, is the unlawful detention of another, without his consent, and malice is not an essential element thereof; while in an action for malicious prosecution, the essential elements are malice and want of probable cause in the proceeding complained of." Hobbs *v.* Ray, 18 R. I. 84, 85, 25 Atl. 694.

65. Lauzon *v.* Charroux, 18 R. I. 467, 470, 28 Atl. 975; Swepson *v.* Davis, 109 Tenn. 99, 70 S. W. 65, 59 L. R. A. 501. See Malicious Prosecution, 26 Cyc. 8 *et seq.*

66. Griswold *v.* Griswold, 143 Cal. 617, 77 Pac. 672 (arrest under lunacy proceedings); Willard *v.* Holmes, 142 N. Y. 492, 37 N. E. 480 (attachment of property); Lauzon *v.* Charroux, 18 R. I. 467, 28 Atl. 975 (arrest on civil process); Wilkinson *v.* Goodfellow-Brooks Shoe Co., 141 Fed. 218 (bankruptcy proceedings). See Malicious Prosecution, 26 Cyc. 8 *et seq.*

67. *Georgia.*— Mitchell *v.* Southwestern R. Co., 75 Ga. 398.

Iowa.—Wetmore *v.* Mellinger, 64 Iowa 741, 18 N. W. 870, 52 Am. Rep. 465.

Louisiana.— Young *v.* Courtney, 13 La. Ann. 193.

New Jersey.—Andrus *v.* Bay Creek R. Co., 60 N. J. L. 10, 36 Atl. 826; Potts *v.* Imlay, 4 N. J. L. 382, 7 Am. Dec. 603; Taylor *v.* Wilson, 1 N. J. L. 362.

New York.— Paul *v.* Fargo, 84 N. Y. App. Div. 9, 82 N. Y. Suppl. 369.

Pennsylvania.—Muldoon *v.* Rickey, 103 Pa. St. 110, 47 Am. Rep. 117; Mayer *v.* Walter, 64 Pa. St. 283.

Texas.— Smith *v.* Adams, 27 Tex. 28.

See Malicious Prosecution, 26 Cyc. 14 *et seq.*

Investigation of false claim.—A town has no right of action against one who prefers a false claim and cannot recover the expenses incurred in investigating and detecting the fraud. Enfield *v.* Coburn, 63 N. H. 218.

called to the fact that taxable costs are confined within very narrow limits, "and that they fall far short of affording compensation for his necessary expenses to a defendant upon whom has been forced a groundless suit by a litigious and malicious adversary, and they furnish no redress for the injury of which he has been made the victim." [68]

2. Malicious Abuse of Process. "If process, either civil or criminal, is willfully made use of for a purpose not justified by the law, this is abuse for which an action will lie." [69] "It is well to observe the difference between a malicious use and a malicious abuse of process. The former exists when legal process, civil or criminal, is used out of malice and without just cause, but only its regular execution is contemplated. There is a malicious abuse of process where a party, under process legally and properly issued, employs it wrongfully and unlawfully, and not for the purpose it is intended by law to effect." [70] The authorities upon the question of what in law constitutes a cause of action for abuse of process are in a state of some confusion and frequently this action seems to have been confounded with actions for malicious prosecution, although they are essentially different. The test is whether the process has been used to accomplish some unlawful end or to compel defendant to do some collateral thing which he could not legally be compelled to do.[71] Thus in what is probably the leading case, a captain of a vessel was arrested at a time when he could not procure bail and kept until he surrendered the ship's register.[72] Unlike actions for malicious prosecution, it need not be shown that the previous suit or proceeding has terminated.[73]

3. Unauthorized Suit in Another's Name. It is an actionable wrong to bring suit in another's name without authority, whereby injury is sustained. Neither malice nor want of probable cause are essential elements of the cause of action.[74]

68. Lipscomb *v.* Shofner, 96 Tenn. 112, 115, 33 S. W. 818. And see Eastin *v.* Stockton Bank, 66 Cal. 123, 4 Pac. 1106, 56 Am. Rep. 77; Whipple *v.* Fuller, 11 Conn. 582, 29 Am. Dec. 330; McCardle *v.* McGinley, 86 Ind. 538, 44 Am. Rep. 343; Eickhoff *v.* Fidelity, etc., Co., 74 Minn. 139, 76 N. W. 1030; Malicious Prosecution, 26 Cyc. 15.

69. 1 Cooley Torts (3d ed.) 354. See Process, 32 Cyc. 541 *et seq.*

70. Wurmser *v.* Stone, 1 Kan. App. 131, 40 Pac. 993, 994.

71. Doctor *v.* Riedel, 96 Wis. 158, 71 N. W. 119, 65 Am. St. Rep. 40, 37 L. R. A. 580.

72. Grainger *v.* Hill, 4 Bing. N. Cas. 212, 7 L. J. C. P. 85, 5 Scott 561, 33 E. C. L. 675. See also Wanzer *v.* Bright, 52 Ill. 35; White *v.* Apsley Rubber Co., 181 Mass. 339, 63 N. E. 855; Wood *v.* Graves, 144 Mass. 365, 11 N. E. 567, 59 Am. Rep. 95; Foy *v.* Barry, 87 N. Y. App. Div. 291, 84 N. Y. Suppl. 335; Dishaw *v.* Wadleigh, 15 N. Y. App. Div. 205, 44 N. Y. Suppl. 207.

73. Zinn *v.* Rice, 154 Mass. 1, 27 N. E. 772, 12 L. R. A. 288.

74. "In a suit for malicious prosecution, the gist of the action is malice; but there must also exist the want of probable cause. And without the proof of both facts, the action cannot be maintained, though the existence of malice may often be inferred from the want of probable cause. But in an action on the case for damages for prosecuting a suit against the plaintiff without authority, in the name of a third person, the gist of the action is not a want of probable cause; for there may be a good cause of action; but for the improper liberty of using the name of another person in prosecuting a suit, by which the defendant in the action is injured. Nor is the proof of malice essential to the maintenance of such action. If the party supposes he has authority to commence a suit, when in fact he has none, and the nominal plaintiff does not adopt it, the action fails for want of such authority. In such case, though the party supposed he had authority, and acted upon that supposition, without malice, still if the defendant suffers injury by reason of the prosecution of the unauthorized suit against him, he may maintain an action for the actual damages sustained by him, in the loss of time, and for money paid to procure the discontinuance of the suit, but nothing more. Where, however, in addition to a want of authority, the suit commenced was altogether groundless, and was prosecuted with malicious motives — which may be inferred from there existing no right of action, as well as proved in other ways — then, in addition to the actual loss of time and money, the party may recover damages for the injury inflicted on his feelings and reputation." Bond *v.* Chapin, 8 Metc. (Mass.) 31, 33, per Hubbard, J. See also Moulton *v.* Lowe, 32 Me. 466; Foster *v.* Dow, 29 Me. 442; Smith *v.* Hyndman, 10 Cush. (Mass.) 554; Streeper *v.* Ferris, 64 Tex. 12. Where A carried on a suit in the name of B without or against his consent, whereby B was compelled to pay costs, B might maintain an action on the case against A to recover damages for the injury thus sustained. Hackett *v.* McMil-

4. Maintenance and Champerty. "Maintenance [is] an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it," [75] and an action may be maintained at common law to recover damages therefor.[76] Champerty "is a species of maintenance . . . being a bargain with a plaintiff or defendant *campum partire*, to divide the land or other matter sued for between them, if they prevail at law; whereupon the champerter is to carry on the party's suit at his own expense."[77] In New York and other jurisdictions the common-law doctrine in relation to maintenance and champerty has been greatly relaxed and limited.[78]

H. Negligence. "'Negligence' consists in the failure to exercise that degree of care, under given circumstances, which a person of ordinary prudence would exercise under similar circumstances." [79] Strictly speaking it is omission, not commission, and involves a violated duty owing by defendant to plaintiff from which damage has resulted.[80]

I. Nuisance. This tort consists in wrongfully disturbing one in the reasonably comfortable use and enjoyment of his property [81] or in the enjoyment and

lan, 112 N. C. 513, 17 S. E. 433, 21 L. R. A. 862; Metcalf *v.* Alley, 24 N. C. 38.

Construction of statute.—A mistake of a widow of one previously adjudged to be an incompetent as to her right to review guardianship proceedings instituted by one of his relatives, whereby she is led to take an appeal in her own name from the adjudication, does not render her liable to an action for damages, allowed by N. Y. Code Civ. Proc. §§ 1900, 1901, for suing in the name of another; the code provisions being intended to prevent vexatious litigation in the name of another and without consent. Hawes *v.* Dunlop, 136 N. Y. App. Div. 629, 121 N. Y. Suppl. 380.

75. 4 Blackstone Comm. 134 [*quoted* in Vaughan *v.* Marable, 64 Ala. 60, 66; Joy *v.* Metcalf, 161 Mass. 514, 515, 37 N. E. 671]; 2 Story Eq. Jur. § 1048 [*quoted* in Spicer *v.* Jarrett, 2 Baxt. (Tenn.) 454, 457]. And see Champerty and Maintenance, 6 Cyc. 851.

76. Thus where one not interested in defending suits brought upon a patent assisted infringers to defend such suits with money and otherwise, it was held that he was guilty of maintenance and liable to an action for damages at the suit of the patentee. Goodyear Dental Vulcanite Co. *v.* White, 10 Fed. Cas. No. 5,602, 2 N. J. L. J. 150. In an English case defendant caused a writ to be issued in the name of C against plaintiff claiming the penalty imposed by a statute upon any person sitting or voting in the house of commons without having made and subscribed the oath appointed by that act. Defendant gave to C a bond of indemnity against all costs and expenses. C consented to the use of his name but it was proved that he would not have done so but for the bond. It was held that defendant's conduct constituted maintenance and plaintiff might recover all the costs he had been put to in defending C's action. Bradlaugh *v.* Newdegate, 11 Q. B. D. 1, 52 L. J. Q. B. 454, 31 Wkly. Rep. 792. See Champerty and Maintenance, 6 Cyc. 887.

77. 4 Blackstone Comm. 135 [*quoted* in Duke *v.* Harper, 2 Mo. App. 1, 4]; 2 Story Eq. Jur. § 1048 [*quoted* in Spicer *v.* Jarrett, 2 Baxt. (Tenn.) 454, 457]. And see Champerty and Maintenance, 6 Cyc. 850.

78. Fowler *v.* Callan, 102 N. Y. 395, 7 N. E. 169; Sedgwick *v.* Stanton, 14 N. Y. 289, 297, where it is said that "the law of maintenance had its foundation in the existence of a class of nobles, who, by their great power and influence, could overawe the courts and pervert the course of justice." And see Champerty and Maintenance, 6 Cyc. 853.

79. Stedman *v.* O'Neil, 82 Conn. 199, 206, 72 Atl. 923, 22 L. R. A. N. S. 1229, per Prentice, J., where it was added: "It is not what one does, considered of itself and apart from all other considerations, which is to be judged in determining whether there has been an exercise of ordinary care. It is to what he does as related to the circumstances under which he acts that the test is to be applied. The circumstances which thus enter into the problem presented in any given case are necessarily those which are known to the actor, either actually or impliedly. Otherwise the rule would be shorn of all its fairness. Men cannot be expected to govern their actions by what to them lies in the realm of the unknown. Their actions cannot be compared to that of others — to that of the ordinarily prudent man — in respect to the degree of prudence exhibited therein, except upon the common basis of a common knowledge as to the surrounding and attending circumstances, actual or constructive. In this way only can the circumstances be made similar, and the specific man be brought under the same circumstances and conditions as the typical ordinarily prudent one who supplies the standard of comparison. In determining the boundaries of the realm of the unknown, however, negligent ignorance is regarded as the equivalent of knowledge, and what one in the exercise of ordinary care would have discovered, is to be imputed to him as known."

80. See Negligence, 29 Cyc. 400.

81. Lowe *v.* Prospect Hill Cemetery Assoc., 58 Nebr. 94, 107, 78 N. W. 488, 46 L. R. A. 237.

Nuisance an injury to the land.— Nuisance is an injury to the land and not to the per-

exercise of a common right.[82] Where the injury is to a public right, plaintiff in order to recover must show that he has suffered special injury differing in kind and not merely in degree from that suffered by the community at large.[83]

J. Conspiracy. Conspiracy consists in a combination of two or more persons [84] to effect an illegal purpose,[85] or to effect a legal purpose by unlawful means,[86] followed by acts pursuant thereto which of themselves give a right of action. The crime conspiracy is of an essentially different nature from the tort. The unlawful combination is the gist of the criminal offense. Civil actions, however, are based upon the wrongful acts followed by damage, and proof of conspiracy is important only in so far as plaintiff may be entitled: (1) To hold responsible others than the active doers of the injury; and (2) to obtain punitive damages on the theory that the acts were deliberate and intentional. It has been well stated that "an action will not lie for the greatest conspiracy imaginable, if nothing be put in execution; but if the party be damaged, the action will lie." [87]

son. Hence where plaintiff who, it was alleged, suffered discomfort from the fumes of defendant's asphalt works occupied premises owned by his wife, having no lease of or other interest in them, it was held that no cause of action existed. Kavanaugh *v.* Barber, 131 N. Y. 211, 30 N. E. 235, 15 L. R. A. 689. See also Ellis *v.* Kansas City, etc., R. Co., 63 Mo. 131, 21 Am. Rep. 436. *Contra*, Ft. Worth, etc., R. Co. *v.* Glenn, 97 Tex. 586, 80 S. W. 992, 104 Am. St. Rep. 894, 65 L. R. A. 818.

82. See NUISANCES, 29 Cyc. 1143 *et seq.*

83. *Maine.*— Dudley *v.* Kennedy, 63 Me. 465.

Maryland.— Davis *v.* Baltimore, etc., R. Co., 102 Md. 371, 62 Atl. 572.

New Jersey.— Roessler, etc., Chemical Co. *v.* Doyle, 73 N. J. L. 521, 64 Atl. 156.

New York.— Buchholz *v.* New York, etc., R. Co., 148 N. Y. 640, 43 N. E. 76; Flynn *v.* Taylor, 127 N. Y. 596, 28 N. E. 418, 14 L. R. A. 556.

Pennsylvania.— Knowles *v.* Pennsylvania R. Co., 175 Pa. St. 623, 34 Atl. 974, 52 Am. St. Rep. 860.

See NUISANCES, 29 Cyc. 1208 *et seq.*

Contra, in cases of private nuisance.— But this principle "has never been extended to cases where the alleged wrong is done to private property, or the health of individuals is injured, or their peace and comfort in their dwellings is impaired by the carrying on of offensive trades and occupations which create noisome smells or disturbing noises, or cause other annoyances and injuries to persons and property in the vicinity, however numerous or extensive may be the instances of discomfort, inconvenience and injury to persons and property thereby occasioned." Wesson *v.* Washburn Iron Co., 13 Allen (Mass.) 95, 101, 90 Am. Dec. 181, per Bigelow, C. J. See NUISANCES, 29 Cyc. 1143 *et seq.*

84. Two or more persons must combine. Gaunce *v.* Backhouse, 37 Pa. St. 350. See CONSPIRACY, 8 Cyc. 620. Hence it has been held that conspiracy is impossible as between husband and wife, since in law they are but one person. State *v.* Christianbury, 44 N. C. 46. See CONSPIRACY, 8 Cyc. 621 note 4.

Recovery against single defendant.— As the gist of the tort is the injury done, an allegation of conspiracy will not prevent a recovery against one defendant only if it be found that he alone was concerned. Van Horn *v.* Van Horn, 52 N. J. L. 284, 20 Atl. 485, 10 L. R. A. 184; Keit *v.* Wyman, 67 Hun (N. Y.) 337, 22 N. Y. Suppl. 133; Jones *v.* Baker, 7 Cow. (N. Y.) 445; Laverty *v.* Vanarsdale, 65 Pa. St. 507. See CONSPIRACY, 8 Cyc. 647.

85. See CONSPIRACY, 8 Cyc. 648 *et seq.* Thus where defendants entered into a combination for the purpose of restraining competition in the manufacture and sale of an "article or commodity of common use" in violation of the statute (N. Y. Laws (1899), c. 690), it was held that the means employed to carry out this purpose were immaterial so far as establishing a cause of action was concerned. The object was unlawful and nothing might be done in furtherance of it. Rourke *v.* Elk Drug Co., 75 N. Y. App. Div. 145, 77 N. Y. Suppl. 373.

86. See CONSPIRACY, 8 Cyc. 648 *et seq.* This was well illustrated where defendants had combined to drive plaintiff out of business by fraudulent representations as to her personal and business character and standing. Being competitors their object was not necessarily unlawful; but the means employed were. Van Horn *v.* Van Horn, 52 N. J. L. 284, 20 Atl. 485, 10 L. R. A. 184.

87. Savile *v.* Roberts, 1 Ld. Raym. 374, 378, 91 Eng. Reprint 1147, per Holt, C. J. In accord see Dowdell *v.* Carpy, 129 Cal. 168, 61 Pac. 948; Taylor *v.* Bidwell, 65 Cal. 489, 4 Pac. 491; Herron *v.* Hughes, 25 Cal. 555; Brown *v.* Jacobs' Pharmacy Co., 115 Ga. 429, 41 S. E. 553, 90 Am. St. Rep. 126, 57 L. R. A. 547; McHenry *v.* Sneer, 56 Iowa 649, 10 N. W. 234; Garing *v.* Fraser, 76 Me. 37; Kimball *v.* Harman, 34 Md. 407, 6 Am. Rep. 340; Parker *v.* Huntington, 2 Gray (Mass.) 124; Stevens *v.* Rowe, 59 N. H. 578, 47 Am. Rep. 231; Van Horn *v.* Van Horn, 52 N. J. L. 284, 20 Atl. 485, 10 L. R. A. 184; Hutchins *v.* Hutchins, 7 Hill (N. Y.) 104; Laverty *v.* Vanarsdale, 65 Pa. St. 507; Boutwell *v.* Marr, 71 Vt. 1, 42 Atl. 607, 43 L. R. A. 803, 76 Am. St. Rep. 746; Martens *v.* Reilly, 109 Wis. 464, 84 N. W. 840; Smith *v.* Nippert, 76 Wis. 86, 44 N. W. 846, 20 Am. St. Rep. 26.

Conspiracy as a tort see CONSPIRACY, 8 Cyc. 645 *et seq.* See also 7 Columbia L. Rev.

VII. REDRESS.

A. Extrajudicial — 1. RECAPTION. Where personal property has wrongfully been taken, he who is entitled to its immediate possession may, subject to certain limitations, employ the necessary degree of force to regain it.[88] The exact limits, however, within which a right of recaption may be exercised are by no means settled. The circumstances of each case must figure largely in determining the question.[89] It has been held that the original taking must have been unlawful,[90] for while the power to retake is incident to the right to defend, the former is more limited, and will not be sanctioned merely for the purpose of settling disputed titles where peaceful remedies would prove equally efficacious.[91] Recaption includes the right to enter upon the real property of the wrong-doer,[92] although

229, "Conspiracy as a Crime and as a Tort," by Francis M. Burdick.

88. Blades *v.* Higgs, 10 C. B. N. S. 713, 7 Jur. N. S. 1289, 30 L. J. C. P. 347, 4 L. T. Rep. N. S. 551, 100 E. C. L. 713. See ASSAULT AND BATTERY, 3 Cyc. 1053, 1078; TRESPASS.

Recaption of animals wrongfully distrained see ANIMALS, 2 Cyc. 407.

89. Massachusetts has probably gone as far as any of the courts in holding that "a man may defend or regain his momentarily interrupted possession by the use of reasonable force, short of wounding or the employment of a dangerous weapon." Com. *v.* Donahue, 148 Mass. 529, 531, 20 N. E. 171, 12 Am. St. Rep. 591, 2 L. R. A. 623. In accord Heminway *v.* Heminway, 58 Conn. 443, 19 Atl. 766. On the other hand it has been held that the right of recaption is not to be exercised when it involves a breach of the peace for "the law more highly regards the public peace, than the right of property of a private individual, and therefore forbids recaption to be made in a riotous or forcible manner." Bobb *v.* Bosworth, Litt. Sel. Cas. (Ky.) 81, 12 Am. Dec. 273. In accord Hendrix *v.* State, 50 Ala. 148. See also ASSAULT AND BATTERY, 3 Cyc. 1053, 1078.

90. Thus where fifty dollars had been lost and charged to a book-keeper, who thereafter, on receiving money with which to pay the employees, took out that sum with his salary and returned the balance, it was held that the retaking of the fifty dollars from him by force was unlawful. The court said: "Unquestionably, if one takes another's property from his possession without right and against his will, the owner or person in charge may protect his possession, or retake the property, by the use of necessary force. He is not bound to stand by and submit to wrongful dispossession or larceny when he can stop it, and he is not guilty of assault in thus defending his right, by using force to prevent his property from being carried away. But this right of defence and recapture involves two things; first possession by the owner, and, second, a purely wrongful taking or conversion, without a claim of right. If one has entrusted his property to another, who afterwards, honestly though erroneously, claims it as his own, the owner has no right to take it by personal force." Kirby *v.* Foster, 17 R. I. 437, 438, 22 Atl. 1111, 14 L. R. A. 317, per Stiness, J. The better rule seems to be that which recognizes the right to a fresh pursuit in order to regain "momentarily interrupted possession" (see Heminway *v.* Heminway, *supra*) of property wrongfully taken. The use of force under such circumstances appears excusable, for the right here partakes more closely of the nature of defense than the regaining of a possession which has been lost. As applied to such a state of facts, the Massachusetts rule is reasonable. But where the property is either rightfully acquired and wrongfully detained, as in Kirby *v.* Foster, and Hendrix *v.* State, *supra*, or peaceably acquired under a claim of right as in Barnes *v.* Martin, 15 Wis. 240, 82 Am. Dec. 670, the use of force is unlawful. To such cases the language of Blackstone (3 Comm. 4 [*quoted* in Sabre *v.* Mott, 88 Fed. 780, 781]) applies: "If, therefore, he can so contrive as to gain possession of his property again, without force or terror, the law favors and will justify his proceeding." But the right should never be exerted "where such exertion must occasion strife and bodily contention, or endanger the peace of society." And see ASSAULT AND BATTERY, 3 Cyc. 1078.

91. State *v.* Dooley, 121 Mo. 591, 26 S. W. 558.

92. Sterling *v.* Warden, 51 N. H. 217, 12 Am. Rep. 80; Madden *v.* Brown, 8 N. Y. App. Div. 454, 40 N. Y. Suppl. 714; Webb *v.* Beavan, 6 M. & G. 1055, 7 Scott N. R. 936, 46 E. C. L. 1055. See TRESPASS.

Rescission for fraud and recaption.—Where a sale has been induced by fraudulent representations of the purchaser, the vendor, having rescinded, may peaceably enter upon the premises of the vendee and recover his property. Wheelden *v.* Lowell, 50 Me. 499.

Owner the first wrong-doer.—The owner of the property must not be the first wrong-doer. Thus where plaintiff sent his servant with a team to cross defendant's land and the servant on his return, finding the bars at the place where he had entered nailed up, left the team and informed plaintiff, who began tearing down the bars after having been forbidden by defendant, and a fight ensued in which plaintiff was injured, it was held that plaintiff had no right to use force to obtain possession of his property. Newkirk *v.* Sabler, 9 Barb. (N. Y.) 652.

the entry must be made in a reasonable manner [93] and care must be exercised to do "no unreasonable or unnecessary damage." [94]

2. Entry. Peaceable entry upon real property by one entitled thereto is lawful,[95] but if done "with strong hand or multitude of people" it is generally made both a criminal offense and civilly actionable.[96]

3. Distress. At common law the landowner might distrain trespassing cattle and hold them until satisfaction was obtained. In some states, however, the right does not exist, and in many it is regulated by statute.[97]

4. Abatement. A nuisance both public and private may, generally speaking, be abated by one who is injured thereby.[98]

B. Judicial — 1. At Law. At common law redress for a tort may be obtained in actions of trespass and trespass on the case, wherein damages are awarded,[99] and of detinue and replevin whereby the specific article unlawfully taken may be recovered.[1] But the distinction between trespass and case has generally been

Wrongful taking unnecessary.—A wrongful taking is not always required in order that the trespass be excused. It is settled that the vendee of personal property sold while on the land of the vendor has an implied license to enter and remove it. White *v.* Elwell, 48 Me. 360, 77 Am. Dec. 231; Nettleton *v.* Sikes, 8 Metc. (Mass.) 34; Wood *v.* Manley, 11 A. & E. 34, 13 Jur. 1028, 9 L. J. Q. B. 27, 3 P. & D. 5, 39 E. C. L. 43, 113 Eng. Reprint 325. "A license is implied, because it is necessary in order to carry the sale into complete effect: and is therefore presumed to have been in contemplation of the parties. It forms a part of the contract of sale. The seller cannot deprive the purchaser of his property, or drive him to an action for its recovery, by withdrawing his implied permission to come and take it." McLeod *v.* Jones, 105 Mass. 403, 406, 7 Am. Rep. 539, per Wells, J. See Trespass.

93. Drury *v.* Hervey, 126 Mass. 519.

94. Burnham *v.* Jenness, 54 Vt. 272. See Trespass.

95. See Trespass.

96. St. 5 Rich. II, reënacted in many of the states and followed in England by 15 Rich. II, c. 2; 8 Hen. VI, c. 9; 31 Eliz. c. 11; and 21 Jac. I, c. 15. See Forcible Entry and Detainer, 19 Cyc. 1108.

Possession by servant.—The possession of a servant being the possession of the master, the latter may make forcible entry without incurring liability. Bristor *v.* Burr, 120 N. Y. 427, 24 N. E. 937, 8 L. R. A. 710; Kerrains *v.* People, 60 N. Y. 221, 19 Am. Rep. 158; State *v.* Curtis, 20 N. C. 363.

97. See Animals, 2 Cyc. 400 *et seq.*

98. Woolf *v.* Chalker, 31 Conn. 121, 81 Am. Dec. 175; Great Falls Co. *v.* Worster, 15 N. H. 412. See Nuisances, 29 Cyc. 1214 *et seq.*

Right to remove obstructions to easement see Easements, 14 Cyc. 1214.

Abatement of public nuisance.—The individual citizen may not lawfully abate every public nuisance; his right to abate arises only when the nuisance becomes an obstruction to the exercise of his private right. It then becomes as to him a private nuisance. Corthell *v.* Holmes, 87 Me. 24, 32 Atl. 715; Brown *v.* Perkins, 12 Gray (Mass.) 89; Brown *v.* De Groff, 50 N. J. L. 409, 14 Atl. 219, 7 Am. St. Rep. 794. See Nuisances, 29 Cyc. 1215.

99. See Assault and Battery, 3 Cyc. 1079; Case, Action on, 6 Cyc. 681; Fraud, 20 Cyc. 86; Negligence, 29 Cyc. 562 *et seq.*; Trespass; Trover and Conversion.

Case defined and distinguished.—"Case, or more fully, action upon the case, or trespass on the case includes in its widest sense assumpsit and trover, and distinguishes a class of actions in which the writ is framed according to the special circumstances of the case, from the ancient actions, the writs in which, called *brevia formata*, are collected in the *Registrum Brevium*. . . . As used at the present day, case is distinguished from assumpsit and covenant in that it is not founded upon any contract, express or implied; from trover which lies only for unlawful conversion; from detinue and replevin, in that it lies only to recover damages; and from trespass, in that it lies for injuries committed without force, or for forcible injuries which damage the plaintiff consequentially only, and in other respects." Bouvier L. Dict., *sub verbo* "Case."

Trespass and case distinguished.—"The principle is, that where the injury results directly from a forcible act of the defendant, the action of trespass lies; but where the injury is not immediate on the act done, but is consequential only, the remedy is case. The true criterion is, whether the injury proceeds directly or follows consequentially from the act. The distinction is thus well illustrated in the books: If a log is cast into the highway, and while in motion hits another, the injury is immediate, and trespass is the remedy; but if, after the log reaches the highway and becomes stationary a traveler falls over it and is hurt, the injury is consequential, and the remedy is case." Painter *v.* Baker, 16 Ill. 103, 104, per Treat, C. J. See Bouvier L. Dict., *sub verbo* "Trespass."

Detinue, trover, and trespass distinguished see Luke *v.* Marshall, 5 J. J. Marsh. (Ky.) 353.

1. See Detinue, 14 Cyc. 239; Replevin, 34 Cyc. 1342.

abolished even in states where the common-law system of pleading still obtains, and detinue and replevin have been largely superseded by statutory forms of action for the recovery of chattels.[2]

2. In Equity.[3] Relief in equity by injunction is frequently granted where an injury to property rights would be irreparable and money damages would be inadequate,[4] as in cases of repeated or continuing trespasses which might ripen into a prescriptive right.[5] But injunctions have been refused to restrain the publication of a slander or libel,[6] or a threatened physical injury.[7] Nuisances may be ordered abated;[8] contracts procured by fraud may be canceled or reformed;[9] and discovery[10] and an accounting obtained.[11] But in order that

Replevin and detinue distinguished.—"It would seem that the original distinction between replevin and detinue was very similar to that between trespass and trover. Trespass *de bonis asportatis* was brought, not to recover the identical thing taken, but damages for the illegal taking and loss of the same, when such taking was unjust and unlawful, while trover was brought for the unjust detention and conversion of property where the original taking was lawful and proper. So replevin was originally brought to recover the possession of a chattel in specie when the original taking was wrongful, and detinue to recover the article in specie when the original taking was lawful. 3 Blackstone Comm. 144–152. Hence we find that the form of the declaration in trover and detinue are similar, it being alleged in both that the property came to the hands and possession of the defendant by finding." Dame *v.* Dame, 43 N. H. 37, 38, per Sargent, J.

2. See Case, Action on, 6 Cyc. 682; Detinue, 14 Cyc. 240; Replevin, 34 Cyc. 1356.

3. See, generally, Equity, 16 Cyc. 48, 49; Injunctions, 22 Cyc. 825 et *seq.*, 898 *et seq.*

4. See Equity, 16 Cyc. 48; Injunctions, 22 Cyc. 757 *et seq.*, 825 *et seq.*

Trespass to real property.—Equity will not interfere in cases of a naked trespass to real property. But it is otherwise "where the circumstances of the case are so peculiar, as to bring it under the head of quieting a possession, or preventing a multiplicity of actions, or to put the value of the inheritance in jeopardy, or to threaten irreparable mischief." Kerlin *v.* West, 4 N. J. Eq. 449, 452. And see Injunctions, 22 Cyc. 825 *et seq.*

Unfair competition.—In cases of unfair competition equity will restrain the fraudulent imitation of trade-marks, trade-names, wrappers, labels, etc. See Injunctions, 22 Cyc. 844; Trade-Marks and Trade-Names.

Injunction against nuisance see Nuisances, 29 Cyc. 1219 *et seq.*

Injunctions against violation of copyright or infringement of patent see Copyrights, 9 Cyc. 954; Patents, 30 Cyc. 1005.

5. See Injunctions, 22 Cyc. 830 *et seq.*

6. Shoemaker *v.* South Bend Spark Arrester Co., 135 Ind. 471, 35 N. E. 280, 22 L. R. A. 332; Boston Diatite Co. *v.* Florence Mfg. Co., 114 Mass. 69, 19 Am. Rep. 310; Marlin Firearms Co. *v.* Shields, 171 N. Y. 384, 64 N. E. 163. And see Injunctions, 22 Cyc. 900.

7. Montgomery, etc., R. Co. *v.* Walton, 14 Ala. 207. And see Injunctions, 22 Cyc. 899.

8. Equity will entertain a bill to ascertain and settle the proper height of a raised dam, to reduce it to its original height, to perpetually restrain defendant from raising it above that height and from further obstructing the flow of the water. Carlisle *v.* Cooper, 18 N. J. Eq. 241.

Equitable relief in cases of nuisance see Nuisances, 29 Cyc. 1219 *et seq.*

9. See Cancellation of Instruments, 6 Cyc. 286 *et seq.*; Contracts, 9 Cyc. 433 *et seq.*; Fraud, 20 Cyc. 87 *et seq.*; Reformation of Instruments, 34 Cyc. 899.

Contracts induced by fraud.—"Where a party has been induced to enter into a contract by fraud, he has in general, as was said in the case of Wilson *v.* Hundley, 96 Va. 96, 100, 30 S. E. 492, 70 Am. St. Rep. 837, the choice of remedies. He may elect to rescind the contract, if he can restore what he has received in the same state or condition in which he received it, and sue for and recover back the consideration he has paid or given; or, if he has not paid anything, repudiate the contract and rely when sued upon fraud as a complete defense, or he may elect to retain what he has received under the contract and bring an action to recover damages for the injury he has sustained by the deceit." Jordan *v.* Annex Corp., 109 Va. 625, 630, 64 S. E. 1050.

10. See Discovery, 14 Cyc. 306. The plaintiff in an action for personal injuries may maintain a bill of discovery to compel the production of fragments of broken machinery in the possession of the defendant as owner, for the purpose of making an inspection of them as a material element in the proper preparation for a trial of the suit at law. Reynolds *v.* Burgess Sulphite Fibre Co., 71 N. H. 332, 51 Atl. 1075, 93 Am. St. Rep. 535, 57 L. R. A. 949.

Discovery in cases of violated copyrights see Copyrights, 9 Cyc. 958.

11. Regis *v.* Jaynes, 191 Mass. 245, 77 N. E. 774. See Accounts and Accounting, 1 Cyc. 416.

Accounting in cases of violated copyrights, patents, or trade-marks see Copyrights, 9 Cyc. 958; Patents, 30 Cyc. 1024; Trade-Marks and Trade-Names.

relief may be had in equity it must clearly appear that the remedy at law is inadequate.[12]

3. Pleading — a. General Rule. The general rules of pleading apply to tort actions.[13] The declaration must state sufficient facts to enable the court to say upon demurrer whether, if the facts stated are proved, plaintiff is entitled to recover.[14]

12. See Equity, 16 Cyc. 48 *et seq.*; Injunctions, 22 Cyc. 769 *et seq.*, 827 *et seq.*, 898 *et seq.* "Whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury." Buzard *v.* Houston, 119 U. S. 347, 351, 7 S. Ct. 249, 30 L. ed. 451; Shields *v.* McCandlish, 73 Fed. 318.

Recovery of personal property.— Where personal property has been unlawfully taken inasmuch as the action of detinue or replevin will generally afford adequate redress, equity will decline to interfere. Thompson *v.* Vernay, 106 Ill. App. 182; Sultan *v.* Providence Tool Co., 23 Fed. 572. It is otherwise, however, where the property is of such a special and peculiar nature that legal possessory actions with their alternative of damages under certain conditions would be clearly inadequate to assure the return of the chattel in specie. Folsom *v.* McCague, 29 Nebr. 124, 45 N. W. 269 (land contracts); Onondaga Nation *v.* Thacher, 29 Misc. (N. Y.) 428, 61 N. Y. Suppl. 1027 [*affirmed* in 53 N. Y. App. Div. 561, 65 N. Y. Suppl. 1014 (*affirmed* in 169 N. Y. 584, 62 N. E. 1098)] (wampum belts); Orbin *v.* Stevens, 13 Pa. Super. Ct. 591 (battle flag); Fells *v.* Read, 3 Ves. Jr. 70, 30 Eng. Reprint 899 (snuff box). And see Equity, 16 Cyc. 49 *et seq.*

Recovery of land.— For similar reasons equity will usually refuse cognizance of actions for the recovery of real property. Hecht *v.* Colquhoun, 57 Md. 563; Smyth *v.* New Orleans Canal, etc., Co., 141 U. S. 656, 12 S. Ct. 113, 35 L. ed. 891. But it is otherwise where legal remedies afford insufficient redress. Maywood Co. *v.* Maywood, 118 Ill. 61, 6 N. E. 866, encumbrance placed on land after dedication may be set aside and a threatened perversion of the trust thereby prevented. See Equity, 16 Cyc. 52 *et seq.*

13. See Pleading, 31 Cyc. 1 *et seq.*

Pleadings in particular tort actions see Assault and Battery, 3 Cyc. 1080; Case, Action on, 6 Cyc. 695; Conspiracy, 8 Cyc. 673; Copyright, 9 Cyc. 963; Death, 13 Cyc. 340; Detinue, 14 Cyc. 265; False Imprisonment, 19 Cyc. 358; Fraud, 20 Cyc. 95; Libel and Slander, 25 Cyc. 434; Malicious Prosecution, 26 Cyc. 71; Master and Servant, 26 Cyc. 1384, 1571; Negligence, 29 Cyc. 565; Nuisances, 29 Cyc. 1262; Railroads, 33 Cyc. 745, 865, 1053, 1156, 1257, 1351; Replevin, 34 Cyc. 1598; Seduction, 35 Cyc. 1308; Street Railroads, 36 Cyc. 1571; Trespass; Trover and Conversion; and other special titles.

14. Newport News, etc., R., etc., Co. *v.* Nicolopoolos, 109 Va. 165, 63 S. E. 443; Hortenstein *v.* Virginia-Carolina R. Co., 102 Va. 914, 47 S. E. 996. "Every declaration for a tort should describe the property or thing affected with as much certainty as will enable the defendant to see clearly and distinctly for what he is to answer, and when that purpose is answered, the object of description is fully attained." Teague *v.* Griffin, 2 Nott & M. (S. C.) 93, 94, per Johnson, J.

Rule illustrated.— In order to sustain an action by an administrator for an injury sustained by a threat to prosecute any person who should purchase or remove certain personal property offered for sale by the administrator, it must appear that the property was actually offered for sale at a legal sale. Burnap *v.* Dennis, 4 Ill. 478. In an action for tort plaintiff is not required to allege that the damages sustained have not been paid, but his cause of action is fully stated, when he alleges defendant's wrong and the resulting damages. Howerton *v.* Augustine, 130 Iowa 389, 106 N. W. 941. A count in tort which avers that defendant sold petroleum on representation that it was unadulterated and would not generate explosive gas, and that it was adulterated and generated gas which exploded, but which fails to charge fraud or knowledge on the part of defendant, does not show a cause of action. Wilkins *v.* Standard Oil Co., 70 N. J. L. 449, 451, (1904) 57 Atl. 258, 1134. Where an absolute deed was given as security for the grantee's indorsement of the grantor's note and the grantee's heir recorded the deed after payment of the indebtedness secured thereby, an averment of the declaration in an action against him for the wrongful act in recording the deed that it became the duty of the defendant to deliver the mortgage to plaintiff and to do or cause to be done so far as he was able all things necessary to give to plaintiff or to permit him to retain the seizin and possession of the land, did not amount to a demand and refusal to retransfer. Knowles *v.* Knowles, 25 R. I. 464, 56 Atl. 775. In an action by a debtor's bail against one who had fraudulently assisted the debtor to escape, a declaration alleging that the bail was compelled to pay the debt is sufficient without alleging that scire facias had issued against him. March *v.* Wilson, 44 N. C. 143. In an action for the rescue of one taken under a capias ad respondendum, it is not necessary to show that the sheriff had returned the writ and the rescue. Worthington *v.* Filthy, 3 Harr. & M. (Md.) 91.

Torts connected with contracts.— In actions

b. Limit of Recovery. Recovery will be limited to the cause of action set forth in the complaint.[15]

c. Violation of Duty. Where a duty has been violated the existence and breach thereof, as well as damage, must be stated. Thus, where the action is founded on negligence, it must be alleged what duty was owing by defendant to plaintiff, the failure to discharge which caused the injury, and its breach, or such facts as will show the existence of the duty and its breach, directly and positively, and not merely by way of recital.[16]

founded on torts connected with matters of contract, "so much of the contract must be stated as is necessary to make the wrong intelligible, and so much as may in any way qualify the nature and character of the wrong, and nothing more." Newell *v.* Horn, 47 N. H. 379; Webster *v.* Hodgkins, 25 N. H. 128, 135.

15. In an action for injuries to personal property, where the complaint alleged that on a certain day defendant seized plaintiff's buggy while plaintiff's team of horses was attached thereto, and overturned and upset said buggy, causing injury to horses, buggy, and harness and defendant answered by general denial, it was proper for the court to direct the jury to find for defendant if he did not upset the buggy in the manner described by plaintiff, for, under the pleadings, plaintiff could not recover for an injury sustained through any other act of defendant, such as causing the horses to run away. Wilhelm *v.* Donegan, 143 Cal. 50, 76 Pac. 713.

16. Hortenstein *v.* Virginia-Carolina R. Co., 102 Va. 914, 47 S. E. 996. "In every case involving actionable negligence, there are necessarily three elements essential to its existence: 1. The existence of a duty on the part of the defendant to protect the plaintiff from the injury of which he complains; 2. A failure by the defendant to perform that duty; and, 3. An injury to the plaintiff from such failure of the defendant. When these elements are brought together, they unitedly constitute actionable negligence. The absence of any one of these elements renders a complaint bad or the evidence insufficient." Faris *v.* Hoberg, 134 Ind. 269, 274, 33 N. E. 1028, 39 Am. St. Rep. 261, per Hackney, J. In accord Southern Indiana R. Co. *v.* Fine, 163 Ind. 617, 72 N. E. 589; Flint, etc., R. Co. *v.* Stark, 38 Mich. 714.

Wilful injury.—A complaint for wilful injury must charge that the injuries were purposely and intentionally committed, with the intent wilfully and purposely to inflict the injury complained of. Southern R. Co. *v.* McNeeley, 44 Ind. App. 126, 88 N. E. 710, 714.

Alleging wilful negligence.— The charge of wilful, wanton, and reckless negligence includes ordinary negligence which can properly be shown under the pleading. Chicago City R. Co. *v.* O'Donnell, 109 Ill. App. 616 [*affirmed* in 207 Ill. 478, 69 N. E. 882]. Under 22 S. C. St. at L. pp. 693, 694, regulating the practice in actions *ex delicto* and providing that no person need make separate statements in the complaint in such an action, nor elect whether he shall go to trial for actual or other damages, but shall be entitled to submit his whole case to the jury under the instruction of the court, plaintiff may allege an act as negligent and also as wilful and set forth all facts going to make up the history of his alleged wrong. Du Pre *v.* Southern R. Co., 66 S. C. 124, 44 S. E. 580. See NEGLIGENCE, 29 Cyc. 565 *et seq.*

Negativing contributory negligence see NEGLIGENCE, 29 Cyc. 575.

Violation of ordinance.—A complaint for a tortious injury, based on a breach of an ordinance, should allege that the ordinance was duly enacted and still in force and effect, and should at least set out its substance. Cumberland Tel., etc., Co. *v.* Pierson, 170 Ind. 543, 84 N. E. 1088.

Inducing breach of contract.— In an action for maliciously inducing a third party to break its contract with plaintiff, it was not necessary to set out the statements, if any, made by defendant to such third party to induce it to break the contract, since the gist of the action is maliciously or without justifiable cause inducing another to break his contract with plaintiff, and the means by which it is done are immaterial. Nor was it necessary to set out the contract between plaintiff and such third party, where the effect of the contract was sufficiently stated so far as material. Wheeler-Stenzel Co. *v.* American Window Glass Co., 202 Mass. 471, 89 N. E. 28.

Interference with business.— The complaint for wrongful interference with business need not aver that the business was lawful and legitimate; the fact that it was not, if available, being matter of defense. Sparks *v.* McCreary, 156 Ala. 382, 47 So. 332, 22 L. R. A. N. S. 1224. A petition, in an action for unlawful interference with trade, which shows that plaintiff had regularly established routes for retailing oil from tank wagons, that it had supplied its customers with cards, which were displayed when oil was wanted, that defendant hired persons and furnished them with oil wagons to go about the streets soliciting the patronage of plaintiff's customers, and vexing his customers and falsely deprecating its wares, and that defendant caused its drivers to conceal the fact that the wagons and teams and oil were the property of defendant, is broad enough to justify a recovery for an interference with existing contracts between plaintiff and its customers; a "customer" being one with whom business men have repeated

d. Defenses. A similar burden rests upon defendant. If he relies upon a discharge [17] or upon a justification [18] or other matter of confession and avoidance, he must plead specially.[19]

C. Defenses — 1. In General. No attempt will be made to enumerate every defense that may be interposed in tort actions and such as are mentioned here will be discussed merely in general terms. Reference should be made to the particular tort as treated elsewhere.[20] The defendant must have acted in his own right or in right of his principal. One cannot volunteer in another's behalf.[21]

2. Inherent — a. In General. It would scarcely appear necessary to observe that while certain defenses are based upon the very facts which go to make up the tort sought to be established, or on contemporaneous circumstances forming a part of the transaction, other defenses depend on facts entirely *dehors* the occurrence.[22]

b. Necessity. In a restricted class of cases, upon principles of public policy, the law will permit the invasion of rights by private act.[23] In addition to the

or regular dealings, and a customer of a retailer in oils being one to whom the retailer makes sales under contract or without contract. Dunshee *v.* Standard Oil Co., (Iowa 1910) 126 N. W. 342.

17. A subsequent payment of damages for a tort is an affirmative defense in an action therefor, and must be pleaded and proved by defendant, the code, section 3629, providing that any defense seeking to avoid the facts pleaded by the adverse party must be specially pleaded. Howerton *v.* Augustine, 130 Iowa 1389, 106 N. W. 941.

18. Illinois Steel Co. *v.* Novak, 184 Ill. 501, 56 N. E. 966; Olsen *v.* Upsahl, 69 Ill. 273; Grabill *v.* Ren, 110 Ill. App. 587; Norris *v.* Casel, 90 Ind. 143.

19. See Pleading, 31 Cyc. 126 *et seq.*

In Florida, under circuit court rule 71, in actions for torts, the plea of not guilty is a denial of the breach of duty or wrongful act and not of the fact stated, and no other defense than such denial is admissible under that plea, and all other pleas in denial must take issue on some particular fact alleged in the declaration, and under rule 72 all matters in confession and avoidance must be pleaded specially. Jacksonville Electric Co. *v.* Sloan, 52 Fla. 257, 42 So. 516.

Action for wilful or wanton acts.— To a count for wilfulness or wantonness the only proper plea is a general traverse. Louisville, etc., R. Co. *v.* Perkins, 152 Ala. 133, 44 So. 602.

20. See Assault and Battery, 3 Cyc. 1069 *et seq.*; and other special titles.

Accident see *supra*, III, C.

Defenses in general.— Where a promissory note was satisfied in full, and the payee, instead of complying with a promise to return it to the maker, negligently sent it to a bank for collection, with the instruction to protest if not paid, and it was protested, the fact that the note was one which was not subject to protest constituted no valid defense to an action for injury to the credit of the maker actually resulting from the payee's own collection. State Mut. Life, etc., Assoc. *v.* Baldwin, 116 Ga. 855, 43 S. E. 262. The fact that the postmaster-general had ordered the mail addressed to one of two adverse claimants to letters patent to be delivered to the other is no justification for the latter's publishing injurious statements as to the former's claims and rights. Shoemaker *v.* South Bend Spark Arrester Co., 135 Ind. 471, 35 N. E. 280, 22 L. R. A. 332.

21. One doing an act apparently wrong cannot justify on the ground that he is defending the contract rights of another, where he is a mere volunteer and has no authority from such other to do the act. Shaefer *v.* Evangelical Lutheran St. Paul's Church, 68 Kan. 305, 74 Pac. 1119. A passenger on the boat of a navigation company lying at a wharf on premises in possession of defendant contractors, engaged in blasting, is not prevented from recovering for injuries caused by the negligent prosecution of such work by an agreement between the latter and the navigation company that the company should use the wharf at its own peril. Smith *v.* Day, 100 Fed. 244, 40 C. C. A. 366, 49 L. R. A. 108 [*reversing* 86 Fed. 62].

Trover and trespass — Alleging title in stranger.— "It is settled that, in actions of trover and trespass, an answer of title in a stranger without an allegation connecting defendant with such title, is no defense." Stowell *v.* Otis, 71 N. Y. 36, 37; Hanmer *v.* Wilsey, 17 Wend. (N. Y.) 91. See Trespass; Trover and Conversion.

Assault and battery.— But in cases of threatened assault and battery one may act in defense of a third person. See Assault and Battery, 3 Cyc. 1048, 1075.

22. See the sections following.

23. At a public meeting held in anticipation of the immediate approach of the federal army, it was resolved to destroy all intoxicating liquors, and a committee of the citizens was appointed to urge the consent of the owners thereto, in consideration of remuneration from a subsequent special tax therefor. In an action by an owner against certain citizens who had been active upon the occasion, brought to recover the value of his liquors consequently destroyed, it was held that, although necessity defends as lawful what it compels, yet, to justify such destruction of private property, a state of facts must be clearly established sufficient to ex-

cases already considered, the following may be cited as illustrations: The establishment of a quarantine;[24] the removal of infected wall paper;[25] the restraint of insane persons;[26] entry upon land for the purpose of saving property in danger of loss by the elements,[27] although not where the danger to be apprehended arises directly from the act or neglect of a third party, since the owner may have redress against him;[28] entry on premises of another in order to save life;[29] entry upon adjoining lands when a highway becomes obstructed and impassable from temporary causes;[30] and the destruction of buildings to prevent the spread of fire.[31]

cite a well-grounded apprehension of imminent peril not otherwise to be averted. Harrison *v.* Wisdom, 7 Heisk. (Tenn.) 99. Public necessity must exist. Struve *v.* Droge, 10 Abb. N. Cas. (N. Y.) 142, 62 How. Pr. 233; Beach *v.* Trudgain, 2 Gratt. (Va.) 219.

Rule limited.— In an action wherein plaintiff alleged that he had been induced to donate land and take stock in defendant railroad company through the fraudulent representations of its agent, and sought rescission, it was urged in defense that "the public have an interest in these enterprises which rises above the individual rights of a single stock-holder"; that the public interest forbids that one stockholder should thus discharge himself. It was held that "there is no principle known to the law which will enable a party, individual or corporate, to claim immunity for his wrongful acts, done to the injury of another's right, on the ground of public interest." Henderson *v.* San Antonio, etc., R. Co., 17 Tex. 560, 67 Am. Dec. 675. It is clear, however, that, although the case was correctly decided, the principle is too broadly stated.

24. Valentine *v.* Englewood, 76 N. J. L. 509, 71 Atl. 344, 19 L. R. A. N. S. 262.

25. A city physician is not liable for directing the removal of wall-paper smeared with smallpox virus. Seavey *v.* Preble, 64 Me. 120.

26. Any person from the necessity of the case may without warrant arrest and confine an insane person, provided the latter is at the time dangerous to himself or others. A detention of indefinite length is not justifiable. The lunatic must with reasonable speed be placed in the charge of his family or friends or of the proper officer. Look *v.* Dean, 108 Mass. 116, 11 Am. Rep. 323; Keleher *v.* Putnam, 60 N. H. 30, 49 Am. Rep. 304; Colby *v.* Jackson, 12 N. H. 526; Fletcher *v.* Fletcher, 1 E. & E. 420, 5 Jur. N. S. 678, 28 L. J. Q. B. 134, 7 Wkly. Rep. 187, 102 E. C. L. 420. A certificate that in the opinion of two medical examiners plaintiff is "devilish" will not justify his imprisonment in an insane asylum. Washer *v.* Slater, 67 N. Y. App. Div. 385, 73 N. Y. Suppl. 425.

27. "It is a very ancient rule of the common law, that an entry upon land to save goods which are in jeopardy of being lost or destroyed by water, fire, or any like danger, is not a trespass." Hence where defendant went upon plaintiff's beach and removed for the purpose of restoring to its owner, a boat cast ashore by the storm and in danger of being carried off by the sea, he is not a trespasser. Proctor *v.* Adams, 113 Mass. 376, 377, 18 Am. Rep. 500. In accord Drake *v.* Shorter, 4 Esp. 165.

Taking an estray.— One who takes an estray to keep it for the owner is not liable to an action of trover unless he uses the estray or refuses to deliver it upon demand. Wilson *v.* McLaughlin, 107 Mass. 587; Nelson *v.* Merriam, 4 Pick. (Mass.) 249.

28. Thus in trespass where defendant justified because the corn was set apart for tithes, and was in danger of destruction by cattle and defendant took it to the barn of plaintiff who was parson of the vill, it was held that the plea was not good, for if the corn "had been destroyed, the plaintiff would have his remedy against the destroyer." Anonymous, Y. B. 21 Hen. VIII, 27, pl. 5. In accord McCarroll *v.* Stafford, 24 Ark. 224. Although in Kirk *v.* Gregory, 1 Ex. D. 55, 45 L. J. Exch. 186, 34 L. T. Rep. N. S. 488, 24 Wkly. Rep. 614, where an executor brought trespass against the near relative of a deceased person who for the purpose of preserving certain jewelry from the attendants, removed it from one room to another, defendant was held liable, yet it was intimated that had it been proved not merely that the interference was *bona fide* for the preservation of the goods, but that it was reasonably necessary, and that it was carried out in a reasonable manner, it would have constituted a good defense. The case seems to have turned on a failure of proof.

29. While plaintiff and his wife and children were sailing, a violent tempest arose, whereby the boat and occupants were placed in great danger, and, to save them, plaintiff was compelled to moor the boat to defendant's dock. Defendant, by his servant, unmoored the boat, whereupon it was driven on shore by the tempest without plaintiff's fault, and destroyed, and plaintiff and his wife and children were cast into the water and upon the shore, and injured. It was held that plaintiff was entitled to recover. Necessity prevented him from being a trespasser. Ploof *v.* Putnam, 81 Vt. 471, 71 Atl. 188, 130 Am. St. Rep. 1072, 20 L. R. A. N. S. 152.

30. Campbell *v.* Race, 7 Cush. (Mass.) 408, 54 Am. Dec. 728. When the traveler knows of the obstruction, it is his duty to go some other way if there is one reasonably available, but he is not bound to remove obstructions if it would materially delay him. Morey *v.* Fitzgerald, 56 Vt. 487, 48 Am. Rep. 811.

31. *California.*— Surocco *v.* Geary, 3 Cal. 69, 58 Am. Dec. 385, holding that "a house

c. Acts of State. Public officers may avail themselves of the immunity of the sovereign where their acts are authorized or adopted by their own government and result in injury to the citizens or subjects of a foreign nation.[32] But the

on fire, or those in its immediate vicinity which serve to communicate the flames, becomes a nuisance, which it is lawful to abate."

Georgia.— Bishop *v.* Macon, 7 Ga. 200, 50 Am. Dec. 400.

Indiana.— Conwell *v.* Emrie, 2 Ind. 35.

Iowa.— Field *v.* Des Moines, 39 Iowa 575, 28 Am. Rep. 46.

Massachusetts.— Taylor *v.* Plymouth, 8 Metc. 462.

Minnesota.— McDonald *v.* Red Wing, 13 Minn. 38.

New York.— New York *v.* Lord, 17 Wend. 285.

Texas.— Keller *v.* Corpus Christi, 50 Tex. 614, 32 Am. Rep. 613.

United States.— Bowditch *v.* Boston, 101 U. S. 16, 25 L. ed. 980.

England.— Mouse's Case, 12 Coke 63, 77 Eng. Reprint 1341.

Rule stated.— "The principle as it is usually found stated in the books is, that 'if a house in a street be on fire, the adjoining houses may be pulled down to save the city.' But this is obviously intended as an example of the principle, rather than as a precise definition of its limits. The principle applies as well to personal as to real estate; to goods as to houses; to life as to property — in solitude as in a crowded city; in a state of nature as in civil society. It is referred by moralists and by jurists to the same great principle, which justifies the exclusive appropriation of a plank in a shipwreck, though the life of another be sacrificed; with the throwing overboard of goods in a tempest for the safety of the vessel; with the taking of food to satisfy the instant demands of hunger; with trespassing upon the lands of another to escape death from an enemy. It rests upon the maxim '*necessitas inducit privilegium quoad jura privata.*" American Print Works *v.* Lawrence, 21 N. J. L. 248, 257, per Green, C. J.

Rule limited.— The towing of a burning ferry-boat away from a dock at the request of her owners is not within the rule which authorizes one in case of necessity to destroy another's property to prevent spread of fire, and does not excuse the tug, where she breaks adrift through her hawser burning off, and sets fire to a vessel at anchor. Here it was said: "Without calling in question the well-settled principles, that, at common law, any person, in case of actual necessity to prevent the spreading of a fire, may prostrate a building in a block or street, without being responsible in trespass or otherwise, that the sufferer, in such case, has no legal redress for the injury, and that, in case of a danger happening by tempest, a passenger in a vessel, may, if necessary to save the lives of the passengers, throw overboard the goods of another, without being liable in trespass to their owner, I do not think the present case is brought within these principles. It cannot be held that it was necessary to set this schooner on fire in order to prevent the apprehended spread of the fire, if the ferry-boat should be left to burn in the slip, in the sense in which the word 'necessity' is understood in the principle of law referred to. The necessity must be a direct one, an obvious one, a necessarily resulting one. In the case of the building, or of the goods in the vessel, the necessity for the sacrifice, as well as the act of sacrifice, must both of them be direct, in reference to the thing sacrificed. There must be no fault, in either substituting a fancied necessity for a real necessity, or in negligently doing what is done, so that the existence of necessity comes to rest only on the fact of sacrifice, when the sacrifice would not have occurred but for the negligence. In the present case, it was entirely plain, before the towing commenced, that an ordinary hempen hawser would be likely to burn off if the flames should burst out, and it was anticipated that they would burst out. It is not contended, on the part of the steamtug, that, if the hawsers had not successively burnt off, she would not have been able to haul the ferry-boat in safety out of the way of the schooner. It must, therefore, be held to have been negligence on the part of the steamtug to tow the ferry-boat at all with a hempen hawser, and the damage done to the schooner cannot be regarded as unavoidable, however properly the steamtug may have managed the navigation after once getting the ferry-boat out into the river. The risk of the burning of the hawser must be borne by the steamtug and not by the schooner. The steamtug was, therefore, in fault, in allowing the ferry-boat to collide with the schooner and set her on fire, such collision being shown to have been directly the result of towing the burning boat with a hempen hawser." The Clara, 5 Fed. Cas. No. 2,788, 5 Ben. 375, 383 [*affirmed* in 5 Fed. Cas. No. 2,789, 5 Ben. 376 (*affirmed* in 23 Wall. 1, 23 L. ed. 150)], per Blatchford, J.

Compensation by statute.— In some states the statute provides for compensation when buildings are torn down by the proper authorities in order to prevent spread of fire. Taylor *v.* Plymouth, 8 Metc. (Mass.) 462; New York *v.* Lord, 18 Wend. (N. Y.) 126. See 1 Ill. L. Rev. 501, article by Henry C. Hall and John H. Wigmore, "Compensation for Property Destroyed to Stop the Spread of a Conflagration."

32. Americana Banana Co. *v.* United Fruit Co., 166 Fed. 261, 92 C. C. A. 325 [*affirming* 160 Fed. 184, and *affirmed* in 213 U. S. 347, 29 S. Ct. 511, 53 L. ed. 826]. The captors of property belonging to a foreign enemy are not personally liable to the owner thereof, although such property has been adjudged by a prize court not subject to capture. "When the act of a public

authority of the sovereign will not protect a public officer for wrongful acts committed against his fellow subjects or citizens.[33]

d. The Police Power. Acts otherwise tortious are justified if committed by governmental authority in the exercise of police powers and to guard the public morals, safety, or comfort.[34] The following have been held valid exercises of the police power: The arrest of one exposed to smallpox;[35] the exclusion of cattle likely to be affected with anthrax;[36] the destruction of wooden buildings erected within fire limits,[37] of decaying buildings,[38] of damaged grain,[39] or of fishing nets used in violation of statute;[40] compulsory vaccination;[41] the disinfection of rags;[42] prohibition against the carrying of lottery tickets;[43] and the regulation of the height of bill-boards.[44] But "to justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."[45]

officer is authorized or has been adopted by the sovereign power, whatever the immunities of the sovereign, the agent thereafter cannot be pursued." U. S. *v.* Paquete Habana, 189 U. S. 453, 465, 23 S. Ct. 593, 47 L. ed. 900. Principle applied to a seizure of cotton during the Civil war. Lamar *v.* Browne, 92 U. S. 187, 23 L. ed. 650. Defendant, a naval commander stationed off the coast of Africa with instructions to suppress the slave trade, fired the barracoons of plaintiff, a Spaniard, and liberated the slaves. These proceedings were reported to the lords of the admiralty, and the foreign and colonial secretaries of state and were adopted and ratified by them. It was held that the ratification being equivalent to a prior command, defendant was not liable, for his acts were acts of state. Buron *v.* Denman, 2 Exch. 167. Seizure of the property of the deceased rajah of Tanjore by the East India company as an escheat having been ratified by the English government became an act of state. Secretary of State *v.* Kamachee Bore Sahaba, 7 Moore Indian App. 476, 19 Eng. Reprint 388, 13 Moore P. C. 22, 15 Eng. Reprint 9.

33. U. S. *v.* Lee, 106 U. S. 196, 1 S. Ct. 240, 27 L. ed. 171; Mitchell *v.* Harmony, 13 How. (U. S.) 115, 14 L. ed. 75. *Contra*, Wiggins' Case, 3 Ct. Cl. 412.

34. See CONSTITUTIONAL LAW, 8 Cyc. 863 *et seq.*; HEALTH, 21 Cyc. 382.

Police power defined.— "It may be characterized as a power which inheres in the State and in each political division thereof to protect by such restraints and regulations as are reasonable and proper the lives, health, comfort and property of its citizens." Rochester *v.* West, 29 N. Y. App. Div. 125, 128, 51 N. Y. Suppl. 482, per Adams, J. [*affirmed* in 164 N. Y. 510, 58 N. E. 673, 79 Am. St. Rep. 659, 53 L. R. A. 548].

35. Levin *v.* Burlington, 129 N. C. 184, 39 S. E. 822, 55 L. R. A. 396.

36. Smith *v.* St. Louis, etc., R. Co., 181 U. S. 248, 21 S. Ct. 603, 45 L. ed. 847 [*affirming* 20 Tex. Civ. App. 451, 49 S. W. 627].

37. Griffin *v.* Gloversville, 67 N. Y. App. Div. 403, 73 N. Y. Suppl. 684.

38. Fields *v.* Stokley, 99 Pa. St. 306, 44 Am. Rep. 109.

39. Dunbar *v.* Augusta, 90 Ga. 390, 17 S. E. 907.

40. Lawton *v.* Steele, 152 U. S. 133, 14 S. Ct. 499, 38 L. ed. 385 [*affirming* 119 N. Y. 226, 23 N. E. 878, 16 Am. St. Rep. 813, 7 L. R. A. 134, 41 Alb. L. J. 348].

41. Morris *v.* Columbus, 102 Ga. 792, 30 S. E. 850, 66 Am. St. Rep. 243, 42 L. R. A. 175; Com. *v.* Pear, 183 Mass. 242, 66 N. E. 719, 67 L. R. A. 935; State *v.* Hay, 126 N. C. 999, 35 S. E. 459, 78 Am. St. Rep. 691, 49 L. R. A. 588; Jacobson *v.* Massachusetts, 197 U. S. 11, 25 S. Ct. 358, 49 L. ed. 643.

42. Train *v.* Boston Disinfecting Co., 144 Mass. 523, 11 N. E. 929, 59 Am. Rep. 113.

43. *Ex p.* McClain, 134 Cal. 110, 66 Pac. 69, 86 Am. St. Rep. 243, 54 L. R. A. 779.

44. Rochester *v.* West, 164 N. Y. 510, 58 N. E. 673, 79 Am. St. Rep. 659, 53 L. R. A. 548 [*affirming* 29 N. Y. App. Div. 125, 51 N. Y. Suppl. 482].

45. Lawton *v.* Steele, 152 U. S. 133, 137, 14 S. Ct. 499, 38 L. ed. 385, per Brown, J. The Missouri act of Jan. 23, 1872 (1 Wagner St. 251) prohibiting the driving of Texas, Mexican, or Indian cattle into the state between certain dates was not a legitimate exercise of the police powers, although it would have been otherwise if it had prohibited the entry of diseased cattle. Hannibal, etc., R. Co. *v.* Husen, 95 U. S. 465, 24 L. ed. 527. The New York Act (Laws (1862), c. 459, p. 844), authorizing the seizure and sale without judicial process of trespassing animals, was unconstitutional as it deprived the owner of his property without due process of law. Rockwell *v.* Nearing, 35 N. Y. 302.

e. Illegal Conduct of Plaintiff. The voluntary [46] illegal conduct of plaintiff, when a proximate [47] or concurring cause [48] of the injury, is a bar to his recovery.[49]

"A law providing for the inspection of animals whose meats are designed for human food cannot be regarded as a rightful exertion of the police powers of the State, if the inspection prescribed is of such a character, or is burdened with such conditions, as will prevent altogether the introduction into the State of sound meats, the product of animals slaughtered in other States. It is one thing for a State to exclude from its limits cattle, sheep or swine, actually diseased, or meats that, by reason of their condition, or the condition of the animals from which they are taken, are unfit for human food, and punish all sales of such animals or of such meats within its limits. It is quite a different thing for a State to declare . . . that fresh beef, veal, mutton, lamb or pork — articles that are used in every part of this country to support human life — shall not be sold at all for human food within its limits, unless the animal from which such meats are taken is inspected in that State, or, as is practically said, unless the animal is slaughtered in that State." Minnesota *v.* Barber, 136 U. S. 313, 328, 10 S. Ct. 862, 34 L. ed. 455.

46. Illegal conduct induced by defendant's fraud.— Where plaintiff was induced by defendant's fraudulent statements to participate in the Jameson raid against the South African Republic, it was held that a recovery should be permitted for losses sustained. Burrows *v.* Rhodes, [1899] 1 Q. B. 816, 63 J. P. 532, 68 L. J. Q. B. 545, 80 L. T. Rep. N. S. 591, 15 T. L. R. 286, 48 Wkly. Rep. 13.

47. Baker *v.* Portland, 58 Me. 199, 4 Am. Rep. 274; Damon *v.* Scituate, 119 Mass. 66, 20 Am. Rep. 315; Welch *v.* Wesson, 6 Gray (Mass.) 505. Where an action by a bailor for damages for destruction of saloon fixtures and furniture did not involve an alleged transaction between plaintiff and the bailee for the use of such fixtures for the illegal sale of liquor, the fact that the bailment was for the purpose of enabling the bailee to carry on such business illegally was no defense. Coppedge *v.* M. K. Goetz Brewing Co., 67 Kan. 851, 73 Pac. 908.

Proximate cause see *supra*, IV, A.

Unlawful Sunday travel as a defense see *supra*, III, C, note 23.

48. Harris *v.* Hatfield, 71 Ill. 298. "It is the established law that when a plaintiff's own unlawful act concurs in causing the damage that he complains of, he cannot recover compensation for such damage." Heland *v.* Lowell, 3 Allen (Mass.) 407, 408.

Concurring cause see *supra*, IV, B.

49. *Georgia.*— Wallace *v.* Cannon, 38 Ga. 199, 95 Am. Dec. 385.

Idaho.— Deeds *v.* Strode, 6 Ida. 317, 55 Pac. 656, 96 Am. St. Rep. 263, 43 L. R. A. 207.

Illinois.— Toledo, etc., R. Co. *v.* Beggs, 85 Ill. 80, 28 Am. Rep. 613; Chicago, etc., R. Co. *v.* Michie, 83 Ill. 427; Toledo, etc., R. Co. *v.* Brooks, 81 Ill. 245; Frye *v.* Chicago, etc., R. Co., 73 Ill. 399; Devor *v.* Knauer, 84 Ill. App. 184.

Louisiana.— Vernon *v.* Bankston, 28 La. Ann. 710.

Massachusetts.— Sheehan *v.* Boston, 171 Mass. 296, 50 N. E. 543; Smith *v.* Boston, etc., R. Co., 120 Mass. 490, 21 Am. Rep. 538; McGrath *v.* Merwin, 112 Mass. 467, 17 Am. Rep. 119; Way *v.* Foster, 1 Allen 408.

Missouri.— Kitchen *v.* Greenabaum, 61 Mo. 110.

North Carolina.— Turner *v.* North Carolina R. Co., 63 N. C. 522.

Pennsylvania.— Drake *v.* Pennsylvania R. Co., 137 Pa. St. 352, 20 Atl. 994, 21 Am. St. Rep. 883; Tibbs *v.* Brown, 2 Grant 39.

Texas.— Moore *v.* Woodson, (Civ. App. 1909) 116 S. W. 608.

Vermont.— Miller *v.* Lamery, 62 Vt. 116, 20 Atl. 199.

United States.— Hiller *v.* Ladd, 85 Fed. 703, 29 C. C. A. 394.

England.— Hegarty *v.* Shine, L. R. 4 Ir. 288, 14 Cox C. C. 145.

Rule stated.— "The general principle is undoubted, that courts of justice will not assist a person who has participated in a transaction forbidden by statute to assert rights growing out of it, or to relieve himself from the consequences of his own illegal act. Whether the form of the action is in contract or in tort, the test in each case is, whether, when all the facts are disclosed, the action appears to be founded in a violation of law, in which the plaintiff has taken part." Hall *v.* Corcoran, 107 Mass. 251, 253, 9 Am. Rep. 30, per Gray, J.

Participation.— One cannot recover damages for an act in which he actively participated, without being induced so to do by fraud or misrepresentation. Moore *v.* Woodson, (Tex. Civ. App. 1909) 116 S. W. 608; Hiller *v.* Ladd, 85 Fed. 703, 29 C. C. A. 394.

Rule illustrated.—Thus where a sheriff was induced by defendant's misrepresentations to accept a check instead of cash for property sold on execution and, on failure to pay over in cash, was imprisoned for contempt, it was held that he could not recover damages from defendant on the ground that the latter's fraudulent conduct induced him to violate his duty. McLendon *v.* Harrell, 67 Ga. 440. Under a statute making the seller of liquors liable for damage done by the person intoxicated thereby, a hotel-keeper cannot recover from such person for a trespass committed under the influence of liquor which he sold to him. Aldrich *v.* Harvey, 50 Vt. 162, 28 Am. Rep. 501. Where a member of a charivari party serenading a bridal couple with various instruments of noise, including firearms, was negligently shot by another member of the party, there could be no recovery for the injury, as it was the result of an unlawful enterprise in which the parties were jointly engaged. Gilmore *v.* Fuller, 198 Ill. 130, 65 N. E. 84, 60 L. R. A. 286. Where

Thus the publisher of an immoral or otherwise illegal work can maintain no action for a violation of its copyright,[50] and relief against unfair competition will be refused to one who is deceiving the public by fraudulent misstatements contained in his labels, advertisements, or otherwise.[51]

f. License. That the injured party has voluntarily [52] consented to the infliction of the injury is in general a complete defense.[53] But assent cannot be pleaded

plaintiff's son was killed by defendant, and it appeared that defendant's consciousness at the time was impaired, if not destroyed, by injuries previously inflicted by deceased, it was held that "it cannot be true that because an insane man is responsible for his acts, so far as making good any actual damage he inflicts is concerned, that the same is true when the complaint is made by the person, or representative of the person, who has immediately, by the infliction of unprovoked or unnecessary violence, produced the temporary insanity or unconsciousness under which the defendant acted." Jenkins *v.* Hankins, 98 Tenn. 545, 557, 41 S. W. 1028.

Indemnity and contribution between wrongdoers see *supra*, V, B, 2, k, l.

50. Stockdale *v.* Onwhyn, 5 B. & C. 173, 11 E. C. L. 416, 108 Eng. Reprint 65, 2 C. & P. 163, 12 E. C. L. 506, 7 D. & R. 625, 4 L. J. K. B. O. S. 122, 29 Rev. Rep. 207. See COPYRIGHT, 9 Cyc. 909.

51. *Alabama.*— Epperson *v.* Bluthenthal, 149 Ala. 125, 42 So. 863.

Maryland.— Siegert *v.* Abbott, 61 Md. 276, 48 Am. Rep. 101.

Massachusetts.—Connell *v.* Reed, 128 Mass. 477, 35 Am. Rep. 397.

Missouri.— Alden *v.* Gross, 25 Mo. App. 123.

New York.— Fetridge *v.* Wells, 4 Abb. Pr. 144.

United States.— Worden *v.* California Fig Syrup Co., 187 U. S. 516, 23 S. Ct. 161, 47 L. ed. 282; Manhattan Medicine Co. *v.* Wood, 108 U. S. 218, 2 S. Ct. 436, 27 L. ed. 706; Memphis Keeley Inst. *v.* Leslie E. Keeley Co., 155 Fed. 964, 84 C. C. A. 112, 16 L. R. A. N. S. 921; Paris Medicine Co. *v.* W. H. Hill Co., 102 Fed. 148, 42 C. C. A. 227; Krauss *v.* Jos. R. Peebles' Sons Co., 58 Fed. 585.

See TRADE-MARKS AND TRADE-NAMES.

Rule stated.— "Any material misrepresentation in a label or trade-mark as to the person by whom the article is manufactured, or as to the place where manufactured, or as to the materials composing it, or any other material false representation, deprives a party of the right to relief in equity. The courts do not, in such cases, take into consideration the attitude of the defendant. Although the defendant's conduct is without justification, this, in the view of a court of equity, affords no reason for interference." Prince Mfg. Co. *v.* Prince's Metallic Paint Co., 135 N. Y. 24, 38, 31 N. E. 990, 17 L. R. A. 129, per Andrews, J.

Rule illustrated.— Plaintiffs, under the name of "The Fays," pretended to tell fortunes and read minds by supernatural aid. Defendants gave entertainments explaining plaintiffs' tricks and exposing their alleged occult powers. In their advertising notices, although stating it was an exposé, they gave prominence to the words "The Fays," or "The Phays," and plaintiff sought an injunction against the use of these names. It was held that the injunction should be refused, the court saying: "Persons who pretend to tell fortunes are defined to be disorderly persons. (Code Crim. Proc. § 899.) The pretense of occult powers and the ability to answer confidential questions from spiritual aid is as bad as fortune telling and a species of it and is a fraud upon the public." Fay *v.* Lambourne, 124 N. Y. App. Div. 245, 247, 108 N. Y. Suppl. 874 [*affirmed* in 196 N. Y. 575, 90 N. E. 1158].

52. Latter *v.* Braddell, 50 L. J. Q. B. 166, 43 L. T. Rep. N. S. 605, 29 Wkly. Rep. 239 [*affirmed* in 45 J. P. 520, 50 L. J. Q. B. 448, 44 L. T. Rep. N. S. 369, 29 Wkly. Rep. 366]. Where defendants induced deceased while intoxicated to drink large quantities of liquor on a wager, thereby causing his death, it was held that "even in cases where no breach of the peace is involved, and the act to which consent is given is a matter of indifference to public order, the maxim *volenti non fit injuria* presupposes that the party is capable of giving assent to his own injury. If he is divested of the power of refusal by reason of total or partial want of mental faculties, the damage cannot be excused on the ground of consent given. A consent given by a person in such condition is equivalent to no consent at all,— more especially when his state of mind is well known to the party doing him the injury." McCue *v.* Klein, 60 Tex. 168, 169, 48 Am. Rep. 260.

Where no duty to disclose exists.— Consent procured through fraudulent concealment is none the less a defense where there was no duty to disclose. Thus where defendant was charged with infecting plaintiff with venereal disease, it was held that as the latter had consented to the commission of an illegal act, defendant's silence as to his condition did not give a cause of action. Hegarty *v.* Shine, L. R. 4 Ir. 288, 14 Cox C. C. 145.

53. *Georgia.*— Peacock *v.* Terry, 9 Ga. 137.

Illinois.— Illinois Cent. R. Co. *v.* Allen, 39 Ill. 205.

Massachusetts.— Fitzgerald *v.* Cavin, 110 Mass. 153.

Michigan.— Markley *v.* Whitman, 95 Mich. 236, 54 N. W. 763, 35 Am. St. Rep. 558, 20 L. R. A. 55.

South Carolina.— Moses *v.* Dubois, Dudley 209.

And see ASSAULT AND BATTERY, 3 Cyc. 1044, 1070; TRESPASS.

to the commission of a crime or breach of the peace, and, hence, if two persons engage voluntarily in a fight, either can maintain an action against the other for the injuries sustained.[54]

g. Defense of Person.[55] One who believes upon reasonable grounds that he or a third person is in danger of bodily harm may use force against the aggressor sufficient for purposes of protection.[56] But the fact that plaintiff

Rule applied.— In an action by husband and wife for an assault and battery on her, it is a good defense that the act complained of was committed with the consent and at the request of the wife. Pillow *v.* Bushnell, 5 Barb. (N. Y.) 156, 4 How. Pr. 9, 2 Code Rep. 19. An action for causing a writ of habeas corpus to be issued and served upon the party therein alleged to be restrained, without his authority and against his consent, cannot be maintained if it appear that the complaint was made with authority from plaintiff and at his request, expressed either directly to defendant or indirectly through some other person. Linda *v.* Hudson, 1 Cush. (Mass.) 385. In an action brought by the owners of a toll-bridge, in which was a draw for the passage of vessels, for damages for injuries to the draw, it appeared that a general statute required vessels passing through a drawbridge to warp through. It was claimed that by long use plaintiff had licensed vessels to sail through. It was held that defendant was not precluded from setting up the license in defense by reason of the statute; the license being merely a waiver on the part of plaintiff of all claim for damage caused by that mode of passing through, and not affecting the liability of defendant to the penalty for the public offense. Toll Bridge Co. *v.* Betsworth, 30 Conn. 380.

Consent a question for the jury.— In an action of tort, where defendant relies on the defense that the act was a joke, it is a question for the jury whether the parties had been perpetrating practical jokes on each other in such a way that defendant had a right to believe that plaintiff would accept his act as a joke. Wartman *v.* Swindell, 54 N. J. L. 589, 25 Atl. 356, 18 L. R. A. 44.

Consent of patient to operation by physician.— Although a surgeon has obtained the patient's consent to an operation upon the right ear, he is liable for injuries resulting from the performance of an operation upon the left ear unless she had expressly or impliedly consented thereto and whether she had done so was a question for the jury. Mohr *v.* Williams, 95 Minn. 261, 104 N. W. 12, 111 Am. St. Rep. 462, 1 L. R. A. N. S. 439. Consent of patient to operation by physician see PHYSICIANS AND SURGEONS, 30 Cyc. 1576.

54. *Alabama.*— Logan *v.* Austin, 1 Stew. 476.

Indiana.— Adams *v.* Waggoner, 33 Ind. 531, 5 Am. Rep. 230.

Maine.— Grotton *v.* Glidden, 84 Me. 589, 24 Atl. 1008, 30 Am. St. Rep. 413.

Massachusetts.— Com. *v.* Collberg, 119 Mass. 350, 20 Am. Rep. 328.

North Carolina.— White *v.* Barnes, 112 N. C. 323, 16 S. E. 922; Bell *v.* Hansley, 48 N. C. 131; Stout *v.* Wren, 8 N. C. 420, 9 Am. Dec. 653.

Ohio.— Barholt *v.* Wright, 45 Ohio St. 177, 12 N. E. 185, 4 Am. St. Rep. 535.

Wisconsin.— Shay *v.* Thompson, 59 Wis. 540, 18 N. W. 473, 48 Am. Rep. 538. Where one was armed with a revolver in violation of a statute he was liable for injuries he inflicted with the weapon, and it was immaterial that the person injured was consenting to his being so armed and to his use of the revolver. Evans *v.* Waite, 83 Wis. 286, 53 N. W. 445.

England.— Matthew *v.* Ollerton, Comb. 218, 90 Eng. Reprint 438.

Contra.— Goldnamer *v.* O'Brien, 98 Ky. 569, 33 S. W. 831, 17 Ky. L. Rep. 1386, 56 Am. St. Rep. 378, 36 L. R. A. 715; State *v.* Beck, 1 Hill (S. C.) 363, 26 Am. Dec. 190. And see ASSAULT AND BATTERY, 3 Cyc. 1049.

Club rules.— Where defendants and prosecutrix were members of a benevolent society known as the "Good Samaritans," and in accordance with its rules the ceremony of expulsion was performed by suspending prosecutrix from the wall by means of a cord fastened around her waist, it was held that assent to the rules was not a defense. State *v.* Williams, 75 N. C. 134.

55. It has been deemed advisable to place defense of person and property under this head rather than among the forms of redress as is sometimes done. "The right to defend one's own person, the right to defend anyone standing in the relation of husband and wife, parent and child, or master and servant, and the right to defend one's property, are rights given, not for the redress of injuries, but for their prevention. The right is limited strictly to the necessity, and the redress for any injury actually sustained must be sought by suit." 1 Cooley Torts (3d ed.) 62.

56. *Alabama.*— Thomason *v.* Gray, 82 Ala. 291, 3 So. 38.

Illinois.— Ogden *v.* Claycomb, 52 Ill. 365.

Maine.— Rogers *v.* Waite, 44 Me. 275.

Missouri.— O'Leary *v.* Rowan, 31 Mo. 117.

New Hampshire.—Dole *v.* Erskine, 35 N. H. 503.

Rhode Island.— State *v.* Sherman, 16 R. I. 631, 18 Atl. 1040.

See ASSAULT AND BATTERY, 3 Cyc. 1046, 1048, 1073, 1075; DEATH, 13 Cyc. 327.

Rule applied.— Where defendant engaged in a fight with a third person, with whom he and plaintiff were driving in a wagon, and the team ran away and plaintiff was thrown out and injured, it was held that if defendant, acting in self-defense, used only such force as was necessary, he was not liable for

may have used provoking language will constitute no excuse for an assault and battery.[57]

h. Defense of Property. Force, if not excessive, is justified when employed in necessary defense of the possession of property, either real or personal, against the aggressions of an individual,[58] or of an animal.[59]

i. Assumption of Risk. "One who, knowing and appreciating a danger,[60] volun-

the injuries to plaintiff. Ezell *v.* Outland, 72 S. W. 784, 24 Ky. L. Rep. 1970.

Killing attacking animal see Reynolds *v.* Phillips, 13 Ill. App. 557; Perry *v.* Phipps, 32 N. C. 259, 51 Am. Dec. 387; Morris *v.* Nugent, 7 C. & P. 572, 32 E. C. L. 764. And see ANIMALS, 2 Cyc. 417 *et seq.*

57. "The person so assaulted is not deprived of the right of reasonable self-defence, even though he used the insulting language to provoke the assault against which he defends himself. Whatever may have been his purpose in using the abusive language, it can not be made an excuse for the assault. The assault, though thus provoked, is unlawful, and whoever is unlawfully assaulted may use such force as is reasonably necessary to protect himself from harm." Norris *v.* Casel, 90 Ind. 143, 145, per Hammond, J. And see ASSAULT AND BATTERY, 3 Cyc. 1051.

58. Abt *v.* Burgheim, 80 Ill. 92; Gillespie *v.* Beecher, 85 Mich. 347, 48 N. W. 561; Ayres *v.* Birtch, 35 Mich. 501; O'Donnell *v.* McIntyre, 118 N. Y. 156, 23 N. E. 455; Lichtenwallner *v.* Laubach, 105 Pa. St. 366. See ASSAULT AND BATTERY, 3 Cyc. 1070 *et seq.*

Motive immaterial.— The fact that the landowner may have been prompted by a malicious motive is immaterial. "One may resist another in a trespass upon his land whatever the motive in so doing may be. It is not the design of the resister but the act of the trespasser which is wrongful." Slingerland *v.* Gillespie, 70 N. J. L. 720, 723, 59 Atl. 162.

The force applied must be appropriate to the end designed, and therefore, where plaintiff trespassed upon defendant's close and the latter, after requesting him to leave, slapped his face, it was held that a verdict for plaintiff should be sustained. Com. *v.* Clark, 2 Metc. (Mass.) 23. In accord Collins *v.* Renison, Say. 138, 96 Eng. Reprint 830.

Excessive force.—A mere trespass upon another's land by driving a span of horses and a wagon thereon will not justify the landowner in using a dangerous or deadly weapon, and if he shoot and injure the trespasser, he will be liable. Everton *v.* Esgate, 24 Nebr. 235, 38 N. W. 794. But it is otherwise, if the owner has a reasonable apprehension of danger from the intruder. People *v.* Dann, 53 Mich. 490, 19 N. W. 159, 51 Am. Rep. 151; State *v.* Taylor, 82 N. C. 554.

59. *Connecticut.*— Simmonds *v.* Holmes, 61 Conn. 1, 23 Atl. 702, 15 L. R. A. 253.

Illinois.— Lipe *v.* Blackwelder, 25 Ill. App. 119.

Maine.— Gilman *v.* Emery, 54 Me. 460.

New Hampshire.— McIntire *v.* Plaisted, 57 N. H. 606; Aldrich *v.* Wright, 53 N. H. 398, 16 Am. Rep. 339.

New York.— Leonard *v.* Wilkins, 9 Johns. 223.

See ANIMALS, 2 Cyc. 416.

Necessity must exist.— Plaintiff's dog came upon defendant's premises and killed and maimed the latter's hens. Having been driven away, the dog came again and was killed by defendant while running toward the hen-house. It was held that a ruling that the killing of the dog was not justifiable was proper, since although it was found that defendant had reasonable cause to believe that the dog was proceeding to maim and kill other hens, it was not found that reasonable cause existed to believe that it was necessary to kill the dog in order to prevent him from killing the hens. Livermore *v.* Batchelder, 141 Mass. 179, 5 N. E. 275. But in Marshall *v.* Blackshire, 44 Iowa 475, 477, the following instruction was upheld: "It was not necessary that the dog should have been, at the very instant of the shooting, in the act of worrying or killing the defendant's chickens, in order to justify the shooting of it, but if the dog had been worrying or killing the defendant's chickens, upon his premises, and at the time he was killed, his conduct was such as to create in the mind of the defendant a reasonable apprehension of continued or renewed worrying or killing, and while under such apprehension, exercising the care and prudence which reasonable men usually exercise under like circumstances, he shot the dog, the shooting was rightful and the plaintiff cannot recover."

Driving trespassing cattle with dog.— One may drive trespassing cattle from his premises by means of a dog provided he does so in a careful manner. Totten *v.* Cole, 33 Mo. 138, 82 Am. Dec. 157; Davis *v.* Campbell, 23 Vt. 236.

Killing trespassing animals.— The killing of cattle or fowl because they are trespassing is not lawful. The proper remedy is to impound them or bring suit at law. Clark *v.* Keliher, 107 Mass. 406. One is not justified in killing a valuable dog without notice to the owner merely because the dog barks around his house at night or chances on one occasion to leave some tracks on a freshly painted porch or to have been detected in the hen-house where he was not doing any mischief. Bowers *v.* Horen, 93 Mich. 420, 53 N. W. 535, 32 Am. St. Rep. 513, 17 L. R. A. 773.

60. Sullivan *v.* India Mfg. Co., 113 Mass. 396. "The maxim, be it observed, is not '*scienti non fit injuria*' but '*volenti.*' It is plain that mere knowledge may not be a conclusive defence. There may be a perception of the existence of the danger without comprehension of the risk; as where the workman

tarily assumes the risk of it, has no just cause of complaint against another who is primarily responsible for the existence of the danger." [61] This doctrine of the assumption of risk is entirely distinct from that of contributory negligence. The former may be said to arise out of implied contract; the latter is a matter of conduct.[62] Nor does the doctrine of assumption of risk depend entirely upon the

is of imperfect intelligence, or, though he knows the danger, remains imperfectly informed as to its nature and extent." Thomas *v.* Quartermaine, 18 Q. B. D. 685, 696, 51 J. P. 516, 56 L. J. Q. B. 340, 57 L. T. Rep. N. S. 537, 35 Wkly. Rep. 555, per Bowen, L. J. See MASTER AND SERVANT, 26 Cyc. 1196 *et seq.*

Rule applied.— Thus if plaintiff goes upon defendant's premises on which there is a sign "Beware of the dog" and is bitten, he cannot recover. But it is otherwise if plaintiff cannot read. Sarch *v.* Blackburn, 4 C. & P. 297, 19 E. C. L. 523.

Knowledge of some danger not enough.— The mere fact that plaintiff knew there was some danger will not prevent his recovery. "If the defendants desire to succeed on the ground that the maxim '*Volenti non fit injuria*' is applicable, they must obtain a finding of fact 'that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur.'" Osborne *v.* London, etc., R. Co., 21 Q. B. D. 220, 223, 52 J. P. 806, 57 L. J. Q. B. 618, 59 L. T. Rep. N. S. 227, 36 Wkly. Rep. 809; Yarmouth *v.* France, 19 Q. B. D. 647, 57 L. J. Q. B. 7, 36 Wkly. Rep. 281.

61. O'Maley *v.* South Boston Gas Light Co., 158 Mass. 135, 136, 32 N. E. 1119, 47 L. R. A. 161, per Knowlton, J. [*quoted* in Drake *v.* Auburn City R. Co., 173 N. Y. 466, 473, 66 N. E. 121]. See 20 Harvard L. Rev. 14, 91, article by Francis H. Bohlen, "Voluntary Assumption of Risk."

62. "Contributory negligence arises when there has been a breach of duty on the defendant's part, not where *ex hypothesi* there has been none. It rests upon the view that though the defendant has in fact been negligent, yet the plaintiff has by his own carelessness severed the causal connection between the defendant's negligence and the accident which has occurred; and that the defendant's negligence accordingly is not the true proximate cause of the injury. It is for this reason that under the old form of pleading the defence of contributory negligence was raised, in actions based on negligence, under the plea of 'not guilty.' It was said, and said rightly, in Weblin *v.* Ballard, 17 Q. B. D. 122, 50 J. P. 597, 55 L. J. Q. B. 395, 54 L. T. Rep. N. S. 532, 34 Wkly. Rep. 455, that in an inquiry whether the plaintiff has been guilty of contributory negligence, the plaintiff's knowledge of the danger is not conclusive. Obviously such knowledge may have even led him to exercise extraordinary care. But the doctrine of *volenti non fit injuria* stands outside the defence of contributory negligence and is in no way limited by it. In individual instances the two ideas sometimes seem to cover the same ground, but carelessness is not the same thing as intelligent choice, and the Latin maxim often applies when there has been no carelessness at all. A confusion of ideas has frequently been created in accident cases by an assumption that negligence to the many who are ignorant may be properly treated as negligence as regards the one individual who knows and runs the risk, and by dealing with the case as if it turned only on a subsequent investigation into contributory negligence." Thomas *v.* Quartermaine, 18 Q. B. D. 685, 697, 51 J. P. 516, 56 L. J. Q. B. 340, 57 L. T. Rep. N. S. 537, 35 Wkly. Rep. 555, per Bowen, L. J. "Contributory negligence prevents a recovery because the plaintiff, of his own volition, intervenes between the negligence of the defendant and the injury received, so that the former is not the sole cause of the latter. Negligence implies a voluntary act or omission. Upon the assumption that the defendant is guilty of a negligent act and that, intervening between it and the injury, the plaintiff is guilty of a negligent act also which contributes to the injury, as the defendant's negligence is not the sole juridical cause of the accident, the plaintiff cannot recover. The reason does not rest upon contract but on the inherent nature of negligence. As Mr. Wharton says: 'The true ground for the doctrine (of contributory negligence) is that by the interposition of the plaintiff's independent will, the causal connection between the defendant's negligence and the injury is broken' (Wharton Law of Negligence, § 301, and cases cited; Pollock Torts 434). On the other hand the doctrine of assumed risks rests upon a contract impliedly made before the negligent act of the defendant which caused the injury was committed. . . . By assuming the risk, the plaintiff does not intervene but waives. Intervention in order to break the causal connection between the negligent act and the injury must come in between them. The assumption of the risk does not come in between, but is in advance of both." Dowd *v.* New York, etc., R. Co., 170 N. Y. 459, 469, 63 N. E. 541, per Vann, J. The distinction between assumption of risk and contributory negligence has been well pointed out by Thompson as follows: "In order to make a coupling the cars must be thrust together either by a locomotive, or by a propulsion called 'kicking,' or 'shunting,' or by gravity. There is consequently always danger to the brakeman in the operation. If, in making a coupling, he accidentally, and without negligence, slips and falls and passes under a wheel, his injury is ascribed to one of the ordinary risks of employment, which risk he has accepted, and no damages can be recovered for it. But if, instead of using the coupling stick furnished him by the railway company, he undertakes to make the coupling with his hands and in the opera-

relation of master and servant, although it is most frequently applied in such cases where the injury was within the "risks of employment," [63] for, "independently of any relation of master and servant, there may be a voluntary assumption of the risk of a known danger, which will debar one from recovering compensation in case of injury to person or property therefrom, even though he was in the exercise of due care." [64] This defense cannot, however, be pleaded in an action to recover for injuries wilfully inflicted.[65]

j. Contributory Negligence. It is a defense that the injury was produced by the coöperating personal negligence of the injured party,[66] and in some instances the neglect of a third person may be imputed to the injured party so as to preclude recovery by the latter.[67] But this applies only in cases of negligence. Where

tion gets his hand crushed, this is contributory negligence, and consequently no damages can be recovered. The distinction between the two cases is that in the former case the brakeman was not guilty of negligence at all; consequently the expression 'contributory negligence' could not be properly applied to his act, but what he suffered was from a mere accident attending the known danger, the risk of which he had assumed; whereas in the latter case his own negligence and rashness brought upon him the injury which he suffered." Thompson Negl. § 4611.

63. *Massachusetts.*— O'Maley *v.* South Boston Gas Light Co., 158 Mass. 135, 32 N. E. 1119, 47 L. R. A. 161; Scanlon *v.* Boston, etc., R. Co., 147 Mass. 484, 18 N. E. 209, 9 Am. St. Rep. 733.

Missouri.— Harff *v.* Green, 168 Mo. 308, 67 S. W. 576.

New Jersey.— Christensen *v.* Lambert, 67 N. J. L. 341, 51 Atl. 702.

New York.— Drake *v.* Auburn City R. Co., 173 N. Y. 466, 66 N. E. 121; Davidson *v.* Cornell, 132 N. Y. 228, 30 N. E. 573; Hickey *v.* Taaffe, 105 N. Y. 26, 12 N. E. 286.

Pennsylvania.— Moore *v.* Pennsylvania R. Co., 167 Pa. St. 495, 31 Atl. 734.

United States.— Texas, etc., R. Co. *v.* Archibald, 170 U. S. 665, 18 S. Ct. 777, 42 L. ed. 1188.

See MASTER AND SERVANT, 26 Cyc. 1177 *et seq.*

64. Miner *v.* Connecticut River R. Co., 153 Mass. 398, 402, 26 N. E. 994, per Allen, J. In accord Simmons *v.* Seaboard Air-Line R. Co., 120 Ga. 225, 47 S. E. 570; Brownback *v.* Thomas, 101 Ill. App. 81; Fitzgerald *v.* Connecticut River Paper Co., 155 Mass. 155, 29 N. E. 464, 31 Am. St. Rep. 537; Mellor *v.* Merchants' Mfg. Co., 150 Mass. 362, 23 N. E. 100, 5 L. R. A. 792; Grandorf *v.* Detroit Citizens' St. R. Co., 113 Mich. 496, 71 N. W. 844; Atherton *v.* Kansas City Coal, etc., Co., 106 Mo. App. 591, 81 S. W. 223; Kriwinski *v.* Pennsylvania R. Co., 65 N. J. L. 392, 47 Atl. 447; Smith *v.* Day, 100 Fed. 244, 40 C. C. A. 366, 49 L. R. A. 108.

Trespass with knowledge of spring guns.— A trespasser having knowledge that there are spring guns in a wood, although he may be ignorant of the particular spots where they are placed, cannot maintain an action for an injury received in consequence of his accidentally treading on a latent wire thereby causing the gun to be discharged. Ilott *v.* Wilkes, 3 B. & Ald. 304, 22 Rev. Rep. 400, 5 E. C. L. 181, 106 Eng. Reprint 674.

Presumption that streets are safe.— "In the lawful use of the streets of the city, a pedestrian is not bound to hunt for latent obstructions or dangers. He may fairly presume that they are in a reasonably safe condition for use, in the absence of any knowledge to the contrary. If, however, he knows of the existence of the danger, or under the circumstances ought to know of it, and with such knowledge voluntarily runs into the danger, he assumes all risk of such conduct." White *v.* People's R. Co., 6 Pennew. (Del.) 476, 72 Atl. 1059, 1061, per Lore, C. J.

Right of a carrier to limit his liability by contract see CARRIERS, 6 Cyc. 385 *et seq.*, 578 *et seq.*

65. Magar *v.* Hammond, 183 N. Y. 387, 76 N. E. 474, 3 L. R. A. N. S. 1038, 171 N. Y. 377, 64 N. E. 150, clearly a case of assumption of risk, although the court speaks of it as one of contributory negligence.

66. *Illinois.*— Feitl *v.* Chicago City R. Co., 211 Ill. 279, 71 N. E. 991.

Indiana.— Indianapolis, etc., R. Co. *v.* Rutherford, 29 Ind. 82, 92 Am. Dec. 336.

New Jersey.— Bonnell *v.* Delaware, etc., R. Co., 39 N. J. L. 189; Delaware, etc., R. Co. *v.* Toffey, 38 N. J. L. 525.

New York.— Munger *v.* Tonawanda R. Co., 4 N. Y. 349, 53 Am. Dec. 384.

Pennsylvania.— Hanover R. Co. *v.* Coyle, 55 Pa. St. 396.

See MASTER AND SERVANT, 26 Cyc. 1226 *et seq.*; NEGLIGENCE, 29 Cyc. 505 *et seq.*; RAILROADS, 33 Cyc. 742, 823, 981, 1154, 1228, 1341; STREET RAILROADS, 36 Cyc. 1524 *et seq.*; and other special titles.

Contributory negligence of passenger see CARRIERS, 6 Cyc. 635 *et seq.*

67. Abbitt *v.* Lake Erie, etc., R. Co., 150 Ind. 498, 50 N. E. 729; Minster *v.* Citizens' R. Co., 53 Mo. App. 276. See NEGLIGENCE, 29 Cyc. 542.

Joint venture.— Where two are engaged in a joint venture, the negligence of the one will be imputed to the other. Schron *v.* Staten Island Electric R. Co., 16 N. Y. App. Div. 111, 45 N. Y. Suppl. 124.

Carrier and passenger.— The rule laid down in Thorogood *v.* Bryan, 8 C. B. 115, 18 L. J. C. P. 336, 65 E. C. L. 115, that the passenger in a public conveyance so far identifies himself with the driver as to be re-

the injuries are wilfully inflicted, contributory negligence cannot be set up as a defense in an action therefor.[68]

k. Enforcement of Discipline, Regulations, and Order. Reasonable chastisement may be administered by a parent,[69] or one standing *in loco parentis*,[70] as a schoolmaster.[71] The master of a vessel while at sea possesses similar power over seamen,[72] and so, it has been said, does the keeper of a poorhouse over paupers.[73] Using no unnecessary force, a carrier may eject a passenger,[74] and an innkeeper a guest who is disorderly or refuses to pay or to conform to reasonable regulations.[75]

sponsible for the latter's contributory negligence has been repudiated in England (The Bernina, 12 P. D. 58, 56 L. J. P. D. & Adm. 17, 56 L. T. Rep. N. S. 258, 35 Wkly. Rep. 314) and disapproved in the United States (Little *v.* Hackett, 116 U. S. 366, 6 S. Ct. 391, 29 L. ed. 652).

Parent and child.— In the early New York case of Hartfield *v.* Roper, 21 Wend. (N. Y.) 615, 34 Am. Dec. 273, it was held that the negligence of the parent in permitting a child of tender years to play on a public highway might be imputed to the child, the injury not being voluntary on defendant's part or the result of "gross neglect." This doctrine while still followed in New York (McGarry *v.* Loomis, 63 N. Y. 104, 20 Am. Rep. 510; Ihl *v.* Forty-second St., etc., Ferry R. Co., 47 N. Y. 317, 7 Am. Rep. 450) and in a few other states (Meeks *v.* Southern Pac. R. Co., 52 Cal. 602; Leslie *v.* Lewiston, 62 Me. 468; McMahon *v.* Northern Cent. R. Co., 39 Md. 438; Casey *v.* Smith, 152 Mass. 294, 25 N. E. 734, 23 Am. St. Rep. 842, 9 L. R. A. 259), has been repudiated by the great weight of authority (Government St. R. Co. *v.* Hanlon, 53 Ala. 70; Wilmot *v.* McPadden, 78 Conn. 276, 61 Atl. 1069; Ferguson *v.* Columbus, etc., R. Co., 77 Ga. 102; Chicago City R. Co. *v.* Tuohy, 196 Ill. 410, 63 N. E. 997, 58 L. R. A. 270; Fink *v.* Des Moines, 115 Iowa 641, 89 N. W. 28; Mullen *v.* Owosso, 100 Mich. 103, 58 N. W. 663, 43 Am. St. Rep. 436, 23 L. R. A. 693; Newman *v.* Phillipsburg Horse-Car R. Co., 52 N. J. L. 446, 19 Atl. 1102, 8 L. R. A. 842; Erie City Pass. R. Co. *v.* Schuster, 113 Pa. St. 412, 6 Atl. 269, 57 Am. Rep. 471). See NEGLIGENCE, 29 Cyc. 542 *et seq.*

68. Louisville, etc., R. Co. *v.* Perkins, 152 Ala. 133, 44 So. 602; Birmingham R., etc., Co. *v.* Brown, 152 Ala. 115, 44 So. 572; Norris *v.* Casel, 90 Ind. 143; Magar *v.* Hammond, 183 N. Y. 387, 76 N. E. 474, 3 L. R. A. N. S. 1038, 171 N. Y. 377, 64 N. E. 150; Kain *v.* Larkin, 56 Hun (N. Y.) 79, 9 N. Y. Suppl. 89; Hawks *v.* Slusher, (Oreg. 1909) 104 Pac. 883. See NEGLIGENCE, 29 Cyc. 509.

69. Rowe *v.* Rugg, 117 Iowa 606, 91 N. W. 903, 94 Am. St. Rep. 318. See ASSAULT AND BATTERY, 3 Cyc. 1051, 1078; PARENT AND CHILD, 29 Cyc. 1585.

70. State *v.* Alford, 68 N. C. 322.

71. *Alabama.*— Boyd *v.* State, 88 Ala. 169, 7 So. 268, 16 Am. St. Rep. 31.

Connecticut.—Sheehan *v.* Sturges, 53 Conn. 481, 2 Atl. 841.

Indiana.—Vanvactor *v.* State, 113 Ind. 276, 15 N. E. 341, 3 Am. St. Rep. 645.

Maine.— Patterson *v.* Nutter, 78 Me. 509, 7 Atl. 273, 57 Am. Rep. 818.

Vermont.— Lander *v.* Seaver, 32 Vt. 114, 76 Am. Dec. 156.

See ASSAULT AND BATTERY, 3 Cyc. 1078.

72. The Stacey Clarke, 54 Fed. 533; Michaelson *v.* Denison, 17 Fed. Cas. No. 9,523, Brunn. Col. Cas. 63, 3 Day (Conn.) 294. A mutineer, although severely injured by a deadly weapon necessarily used by a master in the suppression of a mutiny, can maintain no action for damages. Roberts *v.* Eldridge, 20 Fed. Cas. No. 11,901, 1 Sprague 54. See SEAMEN, 35 Cyc. 1247 *et seq.*

Rule stated.— "The rule on this subject is well laid down by Abbott. (On Shipping, 125.) By the common law, says he, the master has authority over all the mariners on board the ship, and it is their duty to obey his commands in all lawful matters, relative to the navigation of the ship, and the preservation of good order; and, in case of disobedience or disorderly conduct, he may lawfully correct them in a reasonable manner; his authority, in this respect, being analogous to that of a parent over a child, or a master over his apprentice, or scholar. Such an authority is absolutely necessary to the safety of the ship, and of the lives of the persons on board; but it behoves the master to be very careful in the exercise of it, and not to make his parental power a pretext for cruelty and oppression." Brown *v.* Howard, 14 Johns. (N. Y.) 119, 123, per Thompson, C. J.

73. State *v.* Neff, 58 Ind. 516. See ASSAULT AND BATTERY, 3 Cyc. 1052.

74. Chicago, etc., R. Co. *v.* Herring, 57 Ill. 59; Stone *v.* Chicago, etc., R. Co., 47 Iowa 82, 29 Am. Rep. 458; Putnam *v.* Broadway, etc., R. Co., 55 N. Y. 108, 108 Am. Rep. 190; Sanford *v.* Eighth Ave. R. Co., 23 N. Y. 343, 80 Am. Dec. 286; Murphy *v.* Western, etc., R. Co., 23 Fed. 637. See CARRIERS, 6 Cyc. 549 *et seq.*

Captain and passenger see King *v.* Franklin, 1 F. & F. 360.

75. McHugh *v.* Schlosser, 159 Pa. St. 480, 28 Atl. 291, 39 Am. St. Rep. 699, 23 L. R. A. 574. "If a man comes into a public-house, and conducts himself in a disorderly manner, and the landlord requests him to go out, and he will not, the landlord may turn him out. . . . To do this, the landlord may lay hands on him; and in so doing the landlord is not guilty of any breach of the peace. But if the person resists, and lays hands on the landlord, that is an unjustifiable assault upon the landlord." Howell *v.* Jackson, 6

Nor is liability incurred for causing the removal of one who disturbs the order of a public proceeding.[76]

3. Collateral[77] — a. Abatement by Death. While a purely personal action, such as assault and battery,[78] breach of promise of marriage,[79] criminal conversation,[80] false imprisonment,[81] or malicious prosecution[82] will die with the person,[83] the rule is otherwise where the tort is to property real or personal.[84]

b. Accord and Satisfaction. The fact that there has been an accord and satisfaction may be pleaded specially by the wrong-doer,[85] and it will constitute a complete defense provided it be shown to have been accepted[86] by the party

C. & P. 723, 725, 25 E. C. L. 657, per Parke, B. See Innkeepers, 22 Cyc. 1075.

76. Furr *v.* Moss, 52 N. C. 525; Collier *v.* Hicks, 2 B. & Ad. 663, 9 L. J. K. B. O. S. 300, 9 L. J. M. C. O. S. 138, 22 E. C. L. 278, 109 Eng. Reprint 1290; Garnett *v.* Ferrand, 6 B. & C. 611, 9 D. & R. 657, 5 L. J. K. B. O. S. 221, 30 Rev. Rep. 467, 13 E. C. L. 277, 108 Eng. Reprint 576; Cox *v.* Coleridge, 1 B. & C. 37, 2 D. & R. 86, 25 Rev. Rep. 298, 8 E. C. L. 17, 107 Eng. Reprint 15.

Disturbing divine service.— One who disturbs divine worship may be removed from the church by the application of force sufficient for the purpose, although the person removing him is not an officer. Wall *v.* Lee, 34 N. Y. 141. In accord Haw *v.* Planner, 2 Keb. 124, 84 Eng. Reprint 79; Glever *v.* Hynde, 1 Mod. 168, 86 Eng. Reprint 806. But a priest who is about to administer the sacrament of penance to one who is ill may not forcibly remove from the room one who is lawfully there and who refuses to leave. Cooper *v.* McKenna, 124 Mass. 284, 26 Am. Rep. 667.

77. **Waiver of tort by suit in contract** see *supra*, III, F, 4, c.

78. Hadley *v.* Bryars, 58 Ala. 185.

79. Hovey *v.* Page, 55 Me. 142; Wade *v.* Kalbfleisch, 58 N. Y. 282, 17 Am. Rep. 250.

80. Garrison *v.* Burden, 40 Ala. 513.

81. Harker *v.* Clark, 57 Cal. 245.

82. Clark *v.* Carroll, 59 Md. 180; Conly *v.* Conly, 121 Mass. 550.

83. See Abatement and Revival, 1 Cyc. 60 *et seq.*

Libel see Cummings *v.* Bird, 115 Mass. 346.

Personal injuries from malpractice see Boor *v.* Lowrey, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519.

Right of action for causing death see Death, 13 Cyc. 310 *et seq.*

Seduction see Holliday *v.* Parker, 23 Hun (N. Y.) 71.

84. See Abatement and Revival, 1 Cyc. 50 *et seq.*

Infringement of patent see Illinois Cent. R. Co. *v.* Turrill, 110 U. S. 301, 4 S. Ct. 5, 28 L. ed. 154.

Obstructing flow of stream see Brown *v.* Dean, 123 Mass. 254; Miller *v.* Young, 90 Hun (N. Y.) 132, 35 N. Y. Suppl. 643.

Trover see Nations *v.* Hawkins, 11 Ala. 859; Weare *v.* Burge, 32 N. C. 169.

History of rule.— At common law the maxim *actio personalis moritur cum persona* was applied to all forms of actions *ex delicto* whether for injuries to person or property. This was first changed by the statute 3 Edw. III, c. 7, authorizing actions of trespass *de bonis asportatis* to be maintained by executors where the taking was in the lifetime of their testator. Another act passed in the fifteenth year of the same reign (c. 5) gave the like actions to administrators. It was not until a late period that executors or administrators were enabled to maintain an action for injuries to the real estate of the deceased. Such remedies were given by the statute 3 & 4 Wm. IV, c. 42. Zabriskie *v.* Smith, 13 N. Y. 322, 333, 64 Am. Dec. 551.

85. Singer Mfg. Co. *v.* Greenleaf, 100 Ala. 272, 14 So. 109; Shaw *v.* Chicago, etc., R. Co., 82 Iowa 199, 47 N. W. 1004; Hanley *v.* Noyes, 35 Minn. 174, 28 N. W. 189. See Accord and Satisfaction, 1 Cyc. 305.

Libel — Mutual apologies. — It is a good plea to an action for libel that plaintiff and defendant agreed to accept the publication of mutual apologies in satisfaction and discharge of the causes of action, damages, and costs, and that such apologies were published. Boosey *v.* Wood, 3 H. & C. 484, 11 Jur. N. S. 181, 34 L. J. Exch. 65, 11 L. T. Rep. N. S. 639, 13 Wkly. Rep. 317.

Accord and satisfaction in actions for wrongfully causing death see Death, 13 Cyc. 325.

86. Where a cause of action for obstructing a right of way has accrued, any offer on the part of defendant to remove the obstruction cannot defeat plaintiff's recovery for damages received prior to such offer. McTavish *v.* Carroll, 13 Md. 429.

Trover — Offer to return.—An offer, if unaccepted, to return the chattel is no defense to an action to recover damages for conversion. After the unlawful exercise of acts of dominion in denial of the right of the owner, the latter may abandon the chattel to the converter. Even a return and acceptance of the property will go only to mitigate the damages and not to defeat the action. Norman *v.* Rogers, 29 Ark. 365; Hamilton *v.* Chicago, etc., R. Co., 103 Iowa 325, 72 N. W. 536; Louisville, etc., R. Co. *v.* Lawson, 88 Ky. 496, 11 S. W. 511, 11 Ky. L. Rep. 38; Carpenter *v.* Dresser, 72 Me. 377, 39 Am. Rep. 337; Stickney *v.* Allen, 10 Gray (Mass.) 352; Gibbs *v.* Chase, 10 Mass. 125; Coburn *v.* Watson, 48 Nebr. 257, 67 N. W. 171; Brewster *v.* Silliman, 38 N. Y. 423; Carpenter *v.* Manhattan L. Ins. Co., 22 Hun (N. Y.) 47; Hanmer *v.* Wilsey, 17 Wend. (N. Y.) 91; Stephens *v.* Koonce, 103 N. C. 266, 9 S. E. 315; Baltimore, etc., R. Co. *v.* O'Donnell, 49

wronged or by his authorized agent [87] with knowledge of the facts.[88] But it will be no defense that the injured party has been indemnified by insurance, although he has collected all or a part of such indemnity.[89]

c. Release and Covenant Not to Sue. Both a release of,[90] and a covenant not to sue,[91] a single wrong-doer will operate as a bar so far as he is concerned. But where given to one or more of several joint tort-feasors the effect of a release is different from that of a covenant. The former will operate as a discharge not only of the wrong-doer or wrong-doers to whom it is given, but of all the others,[92]

Ohio St. 489, 32 N. E. 476, 34 Am. St. Rep. 579, 21 L. R. A. 117; Weaver *v.* Ashcroft, 50 Tex. 427. But in England and a few states the wrong-doer is permitted to return the property for the purpose of mitigating damages where the taking was not wilful and the property after the conversion has not suffered injury or deteriorated in value. Bigelow Co. *v.* Heintze, 53 N. J. L. 69, 21 Atl. 109; Rutland, etc., R. Co. *v.* Middlebury Bank, 32 Vt. 639; Farr *v.* Phillips State Bank, 87 Wis. 223, 58 N. W. 377, 41 Am. St. Rep. 40; Warder *v.* Baldwin, 51 Wis. 450, 8 N. W. 257; Churchill *v.* Welsh, 47 Wis. 39, 1 N. W. 398; Hiort *v.* London, etc., R. Co., 4 Ex. D. 188, 48 L. J. Exch. 545, 40 L. T. Rep. N. S. 674, 27 Wkly. Rep. 778; Fisher *v.* Prince, 3 Burr. 1363, 97 Eng. Reprint 876; Gibson *v.* Humphrey, 1 Cromp. & M. 544, 2 L. J. Exch. 234, 2 Tyrw. 588; Pickering *v.* Truste, 7 T. R. 53, 101 Eng. Reprint 850. See DAMAGES, 13 Cyc. 69; TROVER AND CONVERSION.

87. Payment by a third party not a joint tort-feasor with defendant, which is not accepted as satisfaction by the person wronged or by his authorized agent, will constitute no defense. Western Tube Co. *v.* Zang, 85 Ill. App. 63; Wagner *v.* Union Stock Yards, etc., Co., 41 Ill. App. 408; Kentucky, etc., Bridge Co. *v.* Hall, 125 Ind. 220, 23 N. E. 219; Missouri, etc., R. Co. *v.* McWherter, 59 Kan. 345, 53 Pac. 135; Atlantic Dock Co. *v.* New York, 53 N. Y. 64; Thomas *v.* New Jersey Cent. R. Co., 194 Pa. St. 511, 45 Atl. 344; Sieber *v.* Amunson, 78 Wis. 679, 47 N. W. 1126. See ACCORD AND SATISFACTION, 1 Cyc. 316.

88. Singer Mfg. Co. *v.* Greenleaf, 100 Ala. 272, 14 So. 109. Where the truth of matters as to which representations are alleged to have been fraudulently made is as much within the knowledge of one party as of the other, a release will not be set aside. Applied where one who had received personal injuries executed a release upon the statement that they would not be permanent, no artifice having been used to prevent him from ascertaining their true nature. Hayes *v.* East Tennessee, etc., R. Co., 89 Ga. 264, 15 S. E. 361.

89. Western, etc., R. Co. *v.* Meigs, 74 Ga. 857; Kellogg *v.* New York Cent., etc., R. Co., 79 N. Y. 72; Missouri, etc., R. Co. *v.* Fuller, 72 Fed. 467, 18 C. C. A. 641 [*affirmed* in 168 U. S. 707, 18 S. Ct. 944, 42 L. ed. 1215]. See DEATH, 13 Cyc. 364.

90. *Colorado.*— Denver, etc., R. Co. *v.* Sullivan, 21 Colo. 302, 41 Pac. 501.

Illinois.— Papke *v.* G. H. Hammond Co., 192 Ill. 631, 61 N. E. 910.

Maryland.— Spitze *v.* Baltimore, etc., R. Co., 75 Md. 162, 23 Atl. 307, 32 Am. St. Rep. 378; Gunther *v.* Lee, 45 Md. 60, 24 Am. Rep. 504.

New York.— Barrett *v.* Third Ave. R. Co., 45 N. Y. 628.

Pennsylvania.— Gibson *v.* Western New York, etc., R. Co., 164 Pa. St. 142, 30 Atl. 308, 44 Am. St. Rep. 586.

Vermont.— Eastman *v.* Grant, 34 Vt. 387.

United States.— Vandervelden *v.* Chicago, etc., R. Co., 61 Fed. 54. See RELEASE, 34 Cyc. 1042.

Release by former administrator.— In an action for death, defendant is entitled to prove a general release executed by a former administrator. Balsewicz *v.* Chicago, etc., R. Co., 240 Ill. 238, 88 N. E. 734.

91. Chicago *v.* Babcock, 143 Ill. 358, 32 N. E. 271; Ellis *v.* Esson, 50 Wis. 138, 6 N. W. 518, 36 Am. Rep. 830. See RELEASE, 34 Cyc. 1042.

92. *Alabama.*— Smith *v.* Gayle, 58 Ala. 600.

Arkansas.— Montgomery *v.* Erwin, 24 Ark. 540.

California.— Tompkins *v.* Clay St. R. Co., 66 Cal. 163, 4 Pac. 1165; Urton *v.* Price, 57 Cal. 270.

Colorado.— Denver, etc., Co. *v.* Sullivan, 21 Colo. 302, 41 Pac. 501.

Connecticut.— Ayer *v.* Ashmead, 31 Conn. 447, 83 Am. Dec. 154.

Georgia.— Donaldson *v.* Carmichael, 102 Ga. 40, 29 S. E. 135.

Illinois.— Stanley *v.* Leahy, 87 Ill. App. 465; Chapin *v.* Chicago, etc., R. Co., 18 Ill. App. 47.

Iowa.— Long *v.* Long, 57 Iowa 497, 10 N. W. 875; Turner *v.* Hitchcock, 20 Iowa 310.

Louisiana.— Irwin *v.* Scribner, 15 La. Ann. 583.

Maine.— Gilpatrick *v.* Hunter, 24 Me. 18, 41 Am. Dec. 370.

Maryland.— Gunther *v.* Lee, 45 Md. 60, 24 Am. Rep. 504.

Massachusetts.— Aldrich *v.* Parnell, 147 Mass. 409, 18 N. E. 170; Goss *v.* Ellison, 136 Mass. 503; Stone *v.* Dickinson, 5 Allen 29, 81 Am. Dec. 727; Brown *v.* Cambridge, 3 Allen 474.

Minnesota.—Hartigan *v.* Dickson, 81 Minn. 284, 83 N. W. 1091.

New Jersey.— Rogers *v.* Cox, 66 N. J. L. 432, 50 Atl. 143; Spurr *v.* North Hudson County R. Co., 56 N. J. L. 346, 28 Atl. 582.

unless, as held by some of the courts, a cause of action against them is expressly reserved;[93] but a covenant not to sue will affect only the right to redress against the party to whom it is given.[94] "In such case the covenant does not operate as a release of either the covenantee or the other tort-feasors, but the former must resort to his suit for breach of the covenant, and the latter cannot invoke the covenant as a bar to the action against them."[95]

D. Trial — 1. Burden of Proof. Proof by a preponderance of evidence is all that the law requires in actions for tort.[96] Nor by the weight of authority is the rule otherwise where the facts sought to be established constitute a crime.[97]

New York.— Barrett *v.* Third Ave. R. Co., 45 N. Y. 628; Brogan *v.* Hanan, 55 N. Y. App. Div. 92, 66 N. Y. Suppl. 1066; Gross *v.* Pennsylvania, etc., R. Co., 65 Hun 191, 20 N. Y. Suppl. 28; Bronson *v.* Fitzhugh, 1 Hill 185; Knickerbacker *v.* Colver, 8 Cow. 111; Parsons *v.* Hughes, 9 Paige 591.

Pennsylvania.— Williams *v.* Le Bar, 141 Pa. St. 149, 21 Atl. 525; Seither *v.* Philadelphia Tract. Co., 125 Pa. St. 397, 17 Atl. 338, 11 Am. St. Rep. 905, 4 L. R. A. 54.

Vermont.— Chamberlin *v.* Murphy, 41 Vt. 110; Eastman *v.* Grant, 34 Vt. 387; Brown *v.* Marsh, 7 Vt. 320.

United States.— O'Shea *v.* New York Cent., etc., R. Co., 105 Fed. 559, 44 C. C. A. 601.

England.— Cocke *v.* Jennor, Hob. 66, 80 Eng. Reprint 214; Kiffin *v.* Willis, 4 Mod. 379, 87 Eng. Reprint 455.

See Release, 34 Cyc. 1081.

93. *Kansas.*— Edens *v.* Fletcher, 79 Kan. 139, 98 Pac. 784, 19 L. R. A. N. S. 618.

New York.— Gilbert *v.* Finch, 173 N. Y. 455, 66 N. E. 133, 61 L. R. A. 807, 93 Am. St. Rep. 623; Irvine *v.* Millbank, 56 N. Y. 635, 15 Abb. Pr. N. S. 378.

Vermont.— Sloan *v.* Herrick, 49 Vt. 327.

West Virginia.—Bloss *v.* Plymale, 3 W. Va. 393, 100 Am. Dec. 752.

United States.— Carey *v.* Bilby, 129 Fed. 203, 63 C. C. A. 361.

England.— Duck *v.* Mayeu, [1892] 2 Q. B. 511, 57 J. P. 23, 62 L. J. Q. B. 69, 67 L. T. Rep. N. S. 547, 4 Reports 38, 41 Wkly. Rep. 56.

See Release, 34 Cyc. 1082.

Contra.— A reservation of a cause of action against other joint wrong-doers contained in a release given to one is void, being repugnant to the legal effect and operation of the release itself. Gunther *v.* Lee, 45 Md. 60, 24 Am. Rep. 504; McBride *v.* Scott, 132 Mich. 176, 93 N. W. 243, 61 L. R. A. 445, 102 Am. St. Rep. 416; Ellis *v.* Bitzer, 2 Ohio 89, 15 Am. Dec. 534; Williams *v.* Le Bar, 141 Pa. St. 149, 21 Atl. 525; Seither *v.* Philadelphia Tract. Co., 125 Pa. St. 397, 17 Atl. 338, 11 Am. St. Rep. 905, 4 L. R. A. 54; Abb *v.* Northern Pac. R. Co., 28 Wash. 428, 68 Pac. 954, 92 Am. St. Rep. 864, 58 L. R. A. 293; O'Shea *v.* New York, etc., R. Co., 105 Fed. 559, 44 C. C. A. 601.

94. *Illinois.*— Chicago *v.* Smith, 95 Ill. App. 335.

Missouri.— Arnett *v.* Missouri Pac. R. Co., 64 Mo. App. 368.

New York.— Gilbert *v.* Finch, 173 N. Y. 455, 66 N. E. 133, 93 Am. St. Rep. 623, 61 L. R. A. 807.

Vermont.— Chamberlin *v.* Murphy, 41 Vt. 110; Spencer *v.* Williams, 2 Vt. 209, 19 Am. Dec. 711.

Wisconsin.— Ellis *v.* Esson, 50 Wis. 138, 6 N. W. 518, 36 Am. Rep. 830.

England.— Duck *v.* Mayeu, [1892] 2 Q. B. 511, 57 J. P. 23, 62 L. J. Q. B. 69, 67 L. T. Rep. N. S. 547, 4 Reports 38, 41 Wkly. Rep. 56.

95. Chicago *v.* Babcock, 143 Ill. 358, 366, 32 N. E. 271, per Baker, J.

96. See Evidence, 17 Cyc. 755 *et seq.*

Rule applied.— In an action on the case for the purchase of lumber by defendant with notice of plaintiff's lien thereon for the price of the timber, under the general issue the burden was on plaintiff to show that defendant had notice of the lien as alleged in the complaint. Thornton *v.* Dwight Mfg. Co., 137 Ala. 211, 34 So. 187.

97. See Evidence, 17 Cyc. 757.

Assault and battery.—Shaul *v.* Norman, 34 Ohio St. 157.

Seduction.— Nelson *v.* Pierce, 18 R. I. 539, 28 Atl. 806.

Trespass.— Weston *v.* Gravlin, 49 Vt. 507.

Recovery for property destroyed by mob.— Marshall *v.* Buffalo, 50 N. Y. App. Div. 149, 64 N. Y. Suppl. 411.

Libel and slander.— Preponderance of evidence only is required to maintain the defense of the truth of a criminal charge set up in civil actions for libel or slander. "If the words said to be slanderous impute to the plaintiff the commission of a crime, the defendant must fasten upon the plaintiff all the elements of the crime, both in act and intent, and to do this he must furnish evidence enough to overcome, in the minds of the jury, the natural presumption of innocence, as well as the opposing testimony. But to go further, and say that this shall be done by such a degree and quantity of proof as shall suffice to remove from their minds every reasonable doubt that might be suggested, is to import into the trial of civil causes between party and party a rule which is appropriate only in the trial of an issue between the State and a person charged with crime and exposed to penal consequences if the verdict is against him." Ellis *v.* Buzzell, 60 Me. 209, 214, 11 Am. Rep. 204, per Barrows, J. In accord Atlanta Journal *v.* Mayson, 92 Ga. 640, 18 S. E. 1010, 44 Am. St. Rep. 104; McBee *v.* Fulton, 47 Md. 403, 28 Am. Rep. 465; Lewis *v.* Shull, 67 Hun (N. Y.) 543, 22 N. Y. Suppl. 484.

2. Quantum of Proof. It has been said that "in actions *ex delicto* it is not necessary that the plaintiff prove all the material allegations of his declaration. If he prove enough of the material allegations to make out a cause of action he is entitled to recover, even though there are other averments of the declaration which are not proved." [98]

3. Presumptions. The force of the general rule requiring proof by him who asserts is modified in some instances where conclusions are permitted to be drawn from the existence of certain facts. Thus the loss or destruction of bailed property while in the hands of the bailee will cast upon him the burden of proving his freedom from wrong-doing.[99] Again, while negligence is never presumed, yet "when a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of an explanation by the defendant, that the accident arose from want of care." [1] Although malice is an essential ingredient of some

Contra, as to patents — Prior use.—Where suit is brought for the infringement of letters patent and defendant sets up a prior use of the article, such defense must be established beyond a reasonable doubt. Washburn, etc., Mfg. Co. *v.* Wiler, 143 U. S. 275, 12 S. Ct. 450, 36 L. ed. 161.

98. Postal Tel.-Cable Co. *v.* Likes, 225 Ill. 249, 258, 80 N. E. 136 [*affirming* 124 Ill. App. 459], per Scott, C. J. And see Joliet *v.* Johnson, 177 Ill. 178, 52 N. E. 498; Rock Island *v.* Cuinely, 126 Ill. 408, 18 N. E. 753; Louisville, etc., R. Co. *v.* Shires, 108 Ill. 617; Chicago Union Traction Co. *v.* Shedd, 110 Ill. App. 400; Chicago Union Traction Co. *v.* Stanford, 104 Ill. App. 99.

Rule applied — Divisible charges.— In a single count plaintiff charged that the conductor of defendant's west bound car wantonly compelled plaintiff's intestate to jump from the moving car, causing him to fall in a helpless condition on the west bound track and that the motorman of the west bound car wantonly ran over and killed said intestate. It was held that the charges were divisible, and in the absence of demurrer proof of the former charge would warrant a recovery even though the west bound motorman was without fault. Chicago City R. Co. *v.* O'Donnell, 207 Ill. 478, 69 N. E. 882 [*affirming* 109 Ill. App. 616].

Proving precise day.— "It is not essential that, in an action for a tort, the plaintiff must prove the commission thereof on the precise day alleged in the petition." Southern Pine Co. *v.* Smith, 113 Ga. 629, 632, 38 S. E. 960, per Fish, J. In accord Augusta, etc., R. Co. *v.* McElmurry, 24 Ga. 75.

99. Birmingham First Nat. Bank *v.* Newport First Nat. Bank, 116 Ala. 520, 22 So. 976; Willett *v.* Rich, 142 Mass. 356, 7 N. E. 776, 56 Am. Rep. 684; Wintringham *v.* Hayes, 144 N. Y. 1, 38 N. E. 999, 43 Am. St. Rep. 725; Collins *v.* Bennett, 46 N. Y. 490. See Bailments, 5 Cyc. 217.

1. 2 Cooley Torts (3d ed.) 1424. See Negligence, 29 Cyc. 590 *et seq.*

Rule stated.— "What its [the doctrine of *res ipsa loquitur*] final accepted shape will be can hardly be predicted. But the following considerations ought to limit it. (1) The apparatus must be such that in the ordinary instance no injurious operation is to be expected unless from a careless construction, inspection, or user; (2) Both inspection and user must have been at the time of the injury in the control of the party charged; (3) The injurious occurrence or condition must have happened irrespective of any voluntary action at the time by the party injured. It may be added that the particular force and justice of the presumption, regarded as a rule throwing upon the party charged the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him but inaccessible to the injured person." 4 Wigmore Ev. § 2509.

Rule applied see Arkansas Tel. Co. *v.* Ratteree, 57 Ark. 429, 21 S. W. 1059; Judson *v.* Giant Powder Co., 107 Cal. 549, 40 Pac. 1020, 48 Am. St. Rep. 146, 29 L. R. A. 718; Howser *v.* Cumberland, etc., R. Co., 80 Md. 146, 30 Atl. 906, 45 Am. St. Rep. 332, 27 L. R. A. 154; Carmody *v.* Boston Gas Light Co., 162 Mass. 539, 39 N. E. 184; Uggla *v.* West End St. R. Co., 160 Mass. 351, 35 N. E. 1126, 39 Am. St. Rep. 481; Griffen *v.* Manice, 166 N. Y. 188, 59 N. E. 925, 82 Am. St. Rep. 630, 52 L. R. A. 922; Boyd *v.* Portland Electric Co., 41 Oreg. 336, 68 Pac. 810; Bradford Glycerine Co. *v.* Kizer, 113 Fed. 894, 51 C. C. A. 524; The Joseph B. Thomas, 81 Fed. 578.

Rule limited.— "The maxim *res ipsa loquitur* is itself the expression of an exception to the general rule that negligence is not to be inferred but to be affirmatively proved. The ordinary application of the maxim is limited to cases of an absolute duty, or an obligation practically amounting to that of an insurer. Cases not coming under one or both of these heads must be those in which the circumstances are free from dispute and show, not only that they were under the exclusive control of the defendant, but that in the ordinary course of experience no such result follows as that complained of. It is sometimes said that the mere happening of an accident in this class of cases raises a presumption of negligence, but

causes of action, specific malevolence or ill-will toward the injured party is not required to be shown. It is sufficient that a wrongful act is done intentionally without just cause or excuse;[2] and in actions for malicious prosecution malice may be inferred from the want of probable cause.[3]

4. Province of Court and Jury. The general rule prevails in tort as in other actions that where the facts or the inferences to be drawn from them are not disputed, the decision is for the court as matter of law,[4] while disputed facts or inferences are for the jury.[5]

this is hardly accurate. Negligence is never presumed. If it were, it would be the duty of the court, in the absence of exculpatory evidence by the defendant, to direct a verdict for the plaintiff, whereas in these cases the question is for the jury. The accurate statement of the law is not that negligence is presumed but that the circumstances amount to evidence from which it may be inferred by the jury. In cases where the duty is not absolute, like that of a common carrier to exercise the highest care and skill in regard to the safety of a passenger who has committed himself to its charge, but arises in the ordinary course of business, it is essential that it shall appear that the transaction in which the accident occurred was in the exclusive management of the defendant, and all the elements of the occurrence within his control, and that the result was so far out of the usual course that there is no fair inference that it could have been produced by any other cause than negligence. If there is any other cause apparent to which the injury may with equal fairness be attributed, the inference of negligence cannot be drawn." Zahniser *v.* Pennsylvania Torpedo Co., 190 Pa. St. 350, 353, 42 Atl. 707, per Mitchell, J.

2. Casey *v.* Hulgan, 118 Ind. 590, 592, 21 N. E. 322, per Berkshire, J. See Libel and Slander, 25 Cyc. 372.

3. Heap *v.* Parrish, 104 Ind. 36, 3 N. E. 549; Davis *v.* McMillan, 142 Mich. 391, 105 N. W. 862, 113 Am. St. Rep. 585, 3 L. R. A. N. S. 928; Small *v.* McGovern, 117 Wis. 608, 94 N. W. 651. See Malicious Prosecution, 26 Cyc. 51 *et seq.*

Rule stated.— "To maintain an action for a malicious prosecution, two essential elements must occur — malice, and a want of probable cause. The inference of malice may be drawn from a want of probable cause; but such inference is subject to be rebutted by proof that the prosecutor, though not able to show probable cause, instituted the prosecution under an honest belief that the plaintiff was guilty of the offense charged; provided such belief is founded on facts and circumstances, which would produce in the mind of a reasonable and prudent man such serious suspicion of the plaintiff's guilt as to repel the idea that the prosecutor was actuated by malice." Lunsford *v.* Dietrich, 86 Ala. 250, 253, 5 So. 461, 11 Am. St. Rep. 37, per Clopton, J.

4. See Trial.

Fraud.— In an action to recover the value of goods fraudulently purchased, it was shown, without contradiction, that defendants had at the same time purchased on credit from different dealers twice as much goods as they could legitimately handle which they had sold for cash, paying no bills and that they had informed plaintiff's agent of this, stating that they intended to pay no one but plaintiff. It was held that plaintiff was entitled to a direction in his favor. Fruit Dispatch Co. *v.* Russo, 125 Mich. 306, 84 N. W. 308.

Libel.— "In a civil action for libel, where the publication is admitted and the words are unambiguous and admit of but one sense, the question of libel or no libel is one of law which the court must decide." Moore *v.* Francis, 121 N. Y. 199, 202, 23 N. E. 1127, 18 Am. St. Rep. 810, 8 L. R. A. 214, per Andrews, J.

Negligence.— "Where the evidence as to material facts is contradictory, or where the facts are admitted or undisputed, and are such that reasonable men can fairly draw opposite conclusions from them, the question of negligence is for the jury; but where there is no dispute about the facts, and they are such that but one conclusion can fairly be drawn from them by reasonable men, it is the duty of the court to declare that conclusion to the jury. If the evidence is of such a conclusive character that the court, in the exercise of a sound judicial discretion, would be bound to set aside a verdict returned in opposition to it, it is its duty to direct a verdict for the plaintiff or the defendant, as may be proper." Northwestern Fuel Co. *v.* Danielson, 57 Fed. 915, 920, 6 C. C. A. 636, per Sanborn, J.

Trespass to chattels.— In an action of trespass for the wrongful taking of goods under a levy of an execution against a third person where the evidence of both plaintiff and defendant showed without dispute that some of the property taken belonged to plaintiff, it is not improper for the court *ex mero motu*, to instruct the jury that "the undisputed proof is that some of the property was plaintiff's" and when defendants "took possession of said property they were trespassers." Stephenson *v.* Wright, 111 Ala. 579, 20 So. 622.

5. *Alabama.*— Hayes *v.* Mitchell, 69 Ala. 452.

Georgia.— Savannah, etc., R. Co. *v.* Parish, 117 Ga. 893, 45 S. E. 280.

Illinois.—Vrchotka *v.* Rothschild, 100 Ill. App. 268.

Indiana.— Mosier *v.* Stoll, 119 Ind. 244, 20 N. E. 752.

Maryland.— Baltimore Consol. R. Co. *v.* Pierce, 89 Md. 495, 43 Atl. 940, 45 L. R. A. 527.

New York.— McLeod *v.* New York, etc., R.

E. Damages. This subject has been fully considered elsewhere.[6] Generally it may be said that nominal damages will be given whenever a legal right has been violated but no actual damage has been sustained;[7] compensatory damages are awarded for the effects of an injury resulting proximately and not due to any intervening, voluntary cause for which the wrong-doer is not responsible,[8] while many of the courts hold that the jury may in their discretion[9] assess in addition "punitive," "vindictive," or "exemplary" damages or "smart money," in cases where wilfulness, malice, or gross negligence is shown.[10] But in some states the

Co., 72 N. Y. App. Div. 116, 76 N. Y. Suppl. 347.

Wisconsin.— Shaw *v.* Gilbert, 111 Wis. 165, 86 N. W. 188.

United States.— Texas, etc., R. Co. *v.* Gentry, 163 U. S. 353, 16 S. Ct. 1104, 41 L. ed. 186.

See ASSAULT AND BATTERY, 3 Cyc. 1099; DEATH, 13 Cyc. 382; FALSE IMPRISONMENT, 19 Cyc. 373; FRAUD, 20 Cyc. 123; LIBEL AND SLANDER, 25 Cyc. 541; MALICIOUS PROSECUTION, 26 Cyc. 104; NEGLIGENCE, 29 Cyc. 627; NUISANCES, 29 Cyc. 1268; TRESPASS; TRIAL; TROVER AND CONVERSION.

Rule applied.— In an action under Minn. Rev. Laws (1905), § 5097, declaring it unlawful for two or more employers of labor to confer together to prevent any person from procuring employment, evidence was construed and held to show a violation of the statute, unexplained by matters in justification, and sufficient to take the case to the jury. Joyce *v.* Great Northern R. Co., 100 Minn. 225, 110 N. W. 975, 8 L. R. A. N. S. 756. In an action by an artist to recover damages for wrongfully depriving her of works of art by purchase thereof from the government at a sale for unpaid duties through a conspiracy between defendants, whether plaintiff had entered into a scheme with another person to procure a sale of the property and bid it in at a nominal sum, and thereby evade the payment of the government duties as claimed in defense of the action, is a question for the jury, where there is evidence tending to establish the fact. Ladd *v.* Ney, 36 Tex. Civ. App. 201, 81 S. W. 1007.

6. See DAMAGES, 13 Cyc. 1; and special tort titles.

7. *Arkansas.*— Texarkana, etc., R. Co. *v.* Anderson, 67 Ark. 123, 53 S. W. 673.

California.— Learned *v.* Castle, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11.

Missouri.— Jones *v.* Hannovan, 55 Mo. 462.

New York.— New York Rubber Co. *v.* Rothery, 132 N. Y. 293, 30 N. E. 841, 28 Am. St. Rep. 575; Leeds *v.* Metropolitan Gaslight Co., 90 N. Y. 26.

Ohio.— Tootle *v.* Clifton, 22 Ohio St. 247, 10 Am. Rep. 732.

Wisconsin.— Murphy *v.* Fond du Lac, 23 Wis. 365, 99 Am. Dec. 181.

United States.— Webb *v.* Portland Mfg. Co., 29 Fed. Cas. No. 17,322, 3 Sumn. 189.

England.— Marzetti *v.* Williams, 1 B. & Ad. 415, 9 L. J. K. B. O. S. 42, 20 E. C. L. 541, 109 Eng. Reprint 842.

See DAMAGES, 13 Cyc. 14 *et seq.*

8. *Illinois.*— Chapman *v.* Kirby, 49 Ill. 211.

Indiana.— Louisville, etc., R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908.

Maryland.— Sloan *v.* Edwards, 61 Md. 89.

Massachusetts.— McGarrahan *v.* New York, etc., R. Co., 171 Mass. 211, 50 N. E. 610.

New York.— Ehrgott *v.* New York, 96 N. Y. 264, 48 Am. Rep. 622; Eten *v.* Luyster, 60 N. Y. 252.

Pennsylvania.— Brown *v.* Gilmore, 92 Pa. St. 40.

Wisconsin.— McNamara *v.* Clintonville, 62 Wis. 207, 22 N. W. 472, 51 Am. Rep. 722.

See DAMAGES, 13 Cyc. 22 *et seq.*

Extent of liability and proximate cause see *supra*, IV, A.

9. Exemplary damages are not given as a matter of right, and an instruction that tells the jury that as a matter of law the injured party is "entitled" to such damages goes too far. "A party may recover the actual damages inflicted by the wrong-doer, but whether he may have damages in addition thereto, rests largely in the discretion of the jury, under the circumstances, and they should be left free to exercise their judgments in that respect." Wabash, etc., R. Co. *v.* Rector, 104 Ill. 296, 304. In accord St. Louis Consol. Coal Co. *v.* Haenni, 146 Ill. 614, 35 N. E. 162; New Orleans, etc., R. Co. *v.* Burke, 53 Miss. 200, 24 Am. Rep. 689; Snow *v.* Carpenter, 49 Vt. 426; Robinson *v.* Superior Rapid Transit R. Co., 94 Wis. 345, 68 N. W. 961, 59 Am. St. Rep. 896, 34 L. R. A. 205; Day *v.* Woodworth, 24 How. (U. S.) 363, 14 L. ed. 181. See DAMAGES, 13 Cyc. 105 *et seq.*

10. *California.*— Bundy *v.* Maginess, 76 Cal. 532, 18 Pac. 668.

Georgia.— Ratteree *v.* Chapman, 79 Ga. 574, 4 S. E. 684.

Illinois.— Harrison *v.* Ely, 120 Ill. 83, 11 N. E. 334.

New York.— Conners *v.* Walsh, 131 N. Y. 590, 30 N. E. 59.

North Carolina.— Chappel *v.* Ellis, 123 N. C. 259, 31 S. E. 709, 68 Am. St. Rep. 822.

Wisconsin.— Brown *v.* Swineford, 44 Wis. 282, 28 Am. Rep. 582.

United States.— Scott *v.* Donald, 165 U. S. 58, 17 S. Ct. 265, 41 L. ed. 632; Day *v.* Woodworth, 13 How. 363, 14 L. ed. 181.

England.— Huckle *v.* Money, 2 Wils. C. P. 205, 95 Eng. Reprint 768.

See DAMAGES, 13 Cyc. 105 *et seq.*

Theory on which rule rests.— Exemplary damages are given "by way of punishment, for the benefit of the community, and as a restraint to the transgressor." Millard *v.* Brown, 35 N. Y. 297, 300. "Exemplary damages are both punitive and preventive in their purpose, as well as compensatory. They are

doctrine that additional damages may be assessed by way of punishment is denied,[11] although in many of these jurisdictions, malice, wilfulness, oppression, or recklessness may be taken into consideration for the purpose of enhancing damages, which are regarded as compensatory merely, and as a salve for the humiliation or injured feelings of the party wronged.[12] It has been held that

not only intended to compensate the plaintiff for his actual loss, but are also inflicted 'for example's sake, and by way of punishing the defendant.'" Sedgwick Damages 459, 464 [*quoted* in Burns *v.* Campbell, 71 Ala. 271, 293].

Constitutionality.—The rule allowing punitive damages is not in conflict with the constitutional provision forbidding more than one punishment for the same offense. "Conceding that it is against the spirit of the constitution to inflict more than one punishment for the same offense, still, the law which authorizes this action and the recovery therein of punitive damages, is not liable to condemnation. Its object is not to inflict a penalty, but to remunerate for the loss sustained. Every recovery for a personal injury, with or without vindictive damages, operates in some degree as a punishment, but it is a punishment which results from the redress of a private wrong, and does not, therefore, violate either the meaning or spirit of the constitution. . . . The arguments used in opposition to the rule proceed on the erroneous assumption that vindictive damages are inflicted by way of criminal or penal punishment, and are not given by way of compensation for the injury complained of. Such damages may operate by way of punishment, but they are allowed by way of remuneration for the wrong suffered. They are proportioned to the aggravating circumstances and wilful and reckless character of the act which occasioned the injury to the plaintiff. They are discretionary with the jury, as the damages for personal injuries always are. The actual damages which are sustained in such cases cannot be measured or determined by any certain criterion, but have to be fixed by the jury on a proper consideration of all the circumstances of the case. Where the element of wilful negligence, malice, or oppression intervenes, the law permits the jury to give what is termed punitory, vindictive, or exemplary damages; and such damages, although given to recompense the sufferer, do inflict a punishment upon the offender. But such is the effect of every judgment for damages which is rendered in an action for an injury to the person, and there would be as much propriety in the argument that, as damages in such cases always operate as a punishment, the offender, if the act be one for which he is liable to be indicted, will be thereby twice punished for the same offense, as there is that such an effect is produced when the damages are increased and made exemplary on account of the reckless conduct of the offending party." Chiles *v.* Drake, 2 Metc. (Ky.) 146, 151, 74 Am. Dec. 406, per Simpson, C. J. In accord Smith *v.* Bagwell, 19 Fla. 117, 45 Am. Rep. 12.

11. *Massachusetts.*— Barnard *v.* Poor, 21 Pick. 378.

Michigan.— Lucas *v.* Michigan Cent. R. Co., 98 Mich. 1, 56 N. W. 1039, 39 Am. St. Rep. 517; Stuyvesant *v.* Wilcox, 92 Mich. 233, 52 N. W. 465, 31 Am. St. Rep. 580; Detroit Daily Post Co. *v.* McArthur, 16 Mich. 447.

Nebraska.— Riewe *v.* McCormick, 11 Nebr. 261, 9 N. W. 88; Boyer *v.* Barr, 8 Nebr. 68, 30 Am. Rep. 814.

New Hampshire.— Kimball *v.* Holmes, 60 N. H. 163; Bixby *v.* Dunlap, 56 N. H. 456, 22 Am. Rep. 475; Fay *v.* Parker, 53 N. H. 342, 16 Am. Rep. 270.

Washington.— Spokane Truck, etc., Co. *v.* Hoefer, 2 Wash. 45, 51, 25 Pac. 1072, 26 Am. St. Rep. 842, 11 L. R. A. 689.

Objections stated.—"It seems to us that there are many valid objections to interjecting into a purely civil action the elements of a criminal trial, intermingling into a sort of medley or legal jumble two distinct systems of judicial procedure. While the defendant is tried for a crime, and damages awarded on the theory that he has been proven guilty of a crime, many of the time-honored rules governing the trial of criminal actions, and of the rights that have been secured to defendants in criminal actions 'from the time whereof the memory of man runneth not to the contrary,' are absolutely ignored. Under this procedure, the doctrine of presumption of innocence until proven guilty beyond a reasonable doubt finds no lodgment in the charge of the court, but is supplanted by the rule in civil actions of a preponderance of testimony. The fallacy and unfairness of the position is made manifest when it is noted that a person can be convicted of a crime, the penalty for which is unlimited save in the uncertain judgment of the jury, and fined to this unlimited extent for the benefit of an individual who has already been fully compensated in damages on a smaller weight of testimony than he can be in a criminal action proper, brought for the benefit or protection of the state, where the amount of the fine is fixed and limited by law; and, in addition to this, he may be compelled to testify against himself, and is denied the right to meet the witnesses against him face to face under the practice in civil actions of admitting depositions in evidence. Spokane Truck, etc., Co. *v.* Hoefer, 2 Wash. 45, 51, 25 Pac. 1072, 26 Am. St. Rep. 842, 11 L. R. A. 689, per Dunbar, J.

12. Hawes *v.* Knowles, 114 Mass. 518, 19 Am. Rep. 383; Lucas *v.* Michigan Cent. R. Co., 98 Mich. 1, 56 N. W. 1039, 39 Am. St. Rep. 517; Detroit Daily Post Co. *v.* McArthur, 16 Mich. 447; Cooper *v.* Hopkins, 70 N. H. 271, 48 Atl. 100; Kimball *v.* Holmes,

exemplary damages cannot be recovered where the act is punishable as a crime,[13] or that a conviction and punishment may be shown in mitigation.[14] This, however, is not sanctioned by the weight of authority.[15]

F. Conflict of Laws — 1. General Rule. To determine what rule shall be applied when the laws of different jurisdictions are invoked it will be necessary to distinguish between local and transitory actions.[16]

2. Local Actions. A cause of action is local in its nature when the transaction out of which it arose could have occurred in one place only. Redress can be sought there and there alone.[17] Actions brought for the following torts are therefore necessarily local: Diversion of watercourses;[18] obstruction of highways;[19] waste;[20] and trespass or other injuries to real property.[21] Actions of

60 N. H. 163; Bixby *v.* Dunlap, 56 N. H. 456, 22 Am. Rep. 475.

13. Huber *v.* Teuber, 3 MacArthur (D. C.) 484; Wabash Printing, etc., Co. *v.* Crumrine, 123 Ind. 89, 21 N. E. 904; Farman *v.* Lauman, 73 Ind. 568.

14. Sowers *v.* Sowers, 87 N. C. 303; Rhodes *v.* Rodgers, 151 Pa. St. 634, 24 Atl. 1044.

15. Smith *v.* Bagwell, 19 Fla. 117, 45 Am. Rep. 12; Boetcher *v.* Staples, 27 Minn. 308, 7 N. W. 263, 38 Am. Rep. 295; Brown *v.* Evans, 17 Fed. 912, 8 Sawy. 488. See Damages, 13 Cyc. 118.

16. **Local and transitory actions** in general see Venue.

17. "These [local actions] embrace all actions in which the subject or thing sought to be recovered is in its nature local; such as real actions of waste, when brought to recover the place wasted, as well as the damages; and actions of ejectment. . . . Some other actions which do not seek the direct recovery of lands or tenements, are also local, because they arise out of a local subject, or the violation of some local right or interest. Of this class are waste for damages only; trespass *quare clausum fregit*, trespass on the case for injuries to things real, as nuisances to houses or lands; disturbance of right of way, obstruction, or diversion of ancient watercourses. The action of replevin is local, although it is for damages only, and does not rise out of any local subject, because of the necessity of giving a local description to the thing taken." Ackerson *v.* Erie R. Co., 31 N. J. L. 309, 312.

18. Watts *v.* Kinney, 23 Wend. (N. Y.) 484 [*affirmed* in 6 Hill 82].

19. Crook *v.* Pitcher, 61 Md. 510.

20. Cragin *v.* Lovell, 88 N. Y. 258.

21. *Alabama.*— Howard *v.* Ingersoll, 23 Ala. 673.

California.— Marysville *v.* North Bloomfield Gravel Min. Co., 66 Cal. 343, 5 Pac. 507.

Illinois.— Eachus *v.* Illinois, etc., Canal, 17 Ill. 534.

Indiana.— Du Breuil *v.* Pennsylvania Co., 130 Ind. 137, 29 N. E. 909; Indiana, etc., R. Co. *v.* Foster, 107 Ind. 430, 8 N. E. 264.

Massachusetts.— Allin *v.* Connecticut River Lumber Co., 150 Mass. 560, 23 N. E. 581, 6 L. R. A. 416.

New York.— Dodge *v.* Colby, 108 N. Y. 445, 15 N. E. 703; De Courcy *v.* Stewart, 20 Hun 561.

Tennessee.— Nashville, etc., R. Co. *v.* Weaks, 13 Lea 148; Roach *v.* Darmon, 2 Humphr. 425.

Texas.— Morris *v.* Missouri Pac. R. Co., 78 Tex. 17, 14 S. W. 228, 22 Am. St. Rep. 17, 9 L. R. A. 349.

Vermont.— Niles *v.* Howe, 57 Vt. 388.

Wisconsin.— Bettys *v.* Milwaukee, etc., R. Co., 37 Wis. 323.

United States.— McKenna *v.* Fisk, 1 How. 241, 11 L. ed. 117; Livingston *v.* Jefferson, 15 Fed. Cas. No. 8,411, 1 Brock. 203, 4 Hughes 606.

England.— British South Africa Co. *v.* Companhia de Mocambique, [1893] A. C. 602, 63 L. J. Q. B. 70, 69 L. T. Rep. N. S. 604; Doulson *v.* Matthews, 4 T. R. 503, 2 Rev. Rep. 448, 100 Eng. Reprint 1143.

Contra.— Little *v.* Chicago, etc., R. Co., 65 Minn. 48, 52, 67 N. W. 846, 60 Am. St. Rep. 421, 33 L. R. A. 423. Here the prevailing rule was criticised in the opinion of the majority. (Per Mitchell, J.) "An action for damages for injuries to real property is on principle just as transitory in its nature as one on contract or for a tort committed on the person or personal property. The reparation is purely personal, and for damages. Such an action is purely personal, and in no sense real. Every argument founded on practical considerations against entertaining jurisdiction of actions for injuries to lands lying in another state could be urged as to actions on contracts executed, or for personal torts committed, out of the state, at least where the subject-matter of the transaction is not within the state. Take, for example, personal actions on contracts respecting lands which are conceded to be transitory. An investigation of title of boundaries, etc., may be desirable, and often would be essential to the determination of the case, yet such considerations have never been held to render the actions local. Another serious objection to the rule is that under it a party may have a clear, legal right without a remedy where the wrongdoer cannot be found, and has no property within the state where the land is situated. As suggested by plaintiff's counsel, if the rule be adhered to, all that the one who commits an injury to land, whether negligently or willfully, has to do in order to escape liability, is to depart from the state where the tort was committed, and refrain from returning. In such case the owner of the land is absolutely remediless."

replevin are likewise local and in the absence of a statute must be brought where the chattel may be situated.[22]

3. Transitory Actions — a. In General. A transitory action is founded on a wrong which might have been committed anywhere. The following torts, it has been held, give rise to suits of this character: Assault and battery;[23] conversion;[24] death by wrongful act or neglect;[25] false imprisonment;[26] libel;[27] malicious prosecution;[28] injuries to the person;[29] slander;[30] slander of title;[31] trespass or injuries to personal property;[32] and unlawful discrimination by common car-

Trespass and conversion.— Where the petition contains a single count alleging a continuing trespass and the cutting and conversion of timber growing thereon, it was held that the allegation was of a single cause of action in which the trespass upon the land was the principal thing and the conversion of the timber was incidental only and that the entire cause of action was local. Ellenwood *v.* Marietta Chair Co., 158 U. S. 105, 15 S. Ct. 771, 39 L. ed. 913. In accord, the cutting and removal constitute one transaction. American Union Tel. Co. *v.* Middletown, 80 N. Y. 408; Powell *v.* Smith, 42 Pa. St. 126. But otherwise, where defendants cut timber from plaintiff's land in Michigan and converted the timber, it being held that an action for the conversion but not for the trespass would lie in Wisconsin. Tyson *v.* McGuineas, 25 Wis. 656. In accord McGonigle *v.* Atchison, 33 Kan. 726, 7 Pac. 550; Whidden *v.* Seelye, 40 Me. 247, 63 Am. Dec. 661; Moody *v.* Whitney, 34 Me. 563; Greeley *v.* Stilson, 27 Mich. 153.

Conversion after severance.—But an action for the conversion by defendant of oysters severed from the bed by third parties is transitory. Makely *v.* A. Boothe Co., 129 N. C. 11, 39 S. E. 582.

22. Robinson *v.* Mead, 7 Mass. 353. See Replevin, 34 Cyc. 1421.

23. *Kentucky.*— Watts *v.* Thomas, 2 Bibb 458.

Mississippi.— Pullman Palace Car Co. *v.* Lawrence, 74 Miss. 782, 22 So. 53.

New York.— Smith *v.* Bull, 17 Wend. 323.

United States.— The Carolina, 14 Fed. 424.

England.— Rafael *v.* Verelst, W. Bl. 1055, 1058, 96 Eng. Reprint 621, where it was said: "Personal injuries are of a transitory nature, and *sequuntur forum rei.* And though in all declarations of trespass, it is laid '*contra pacem Regis*' yet that is only matter of form, and not traversable." Mostyn *v.* Fabrigas, Cowp. 161, 98 Eng. Reprint 1021; Scott *v.* Seymour, 1 H. & C. 219, 9 Jur. N. S. 522, 32 L. J. Exch. 61, 8 L. T. Rep. N. S. 511, 11 Wkly. Rep. 169.

24. Whidden *v.* Seelye, 40 Me. 247, 63 Am. Dec. 661; Moody *v.* Whitney, 34 Me. 563; Holbrook *v.* Bowman, 62 N. H. 313; Pierrepont *v.* Barnard, 5 Barb. (N. Y.) 364 [*reversed* on other grounds in 6 N. Y. 279]; Tyson *v.* McGuineas, 25 Wis. 656.

25. *Illinois.*— Chicago, etc., R. Co. *v.* Rouse, 178 Ill. 132, 52 N. E. 951, 44 L. R. A. 410.

Indiana.— Burns *v.* Grand Rapids, etc., R. Co., 113 Ind. 169, 15 N. E. 230.

Iowa.— *In re* Coe, 130 Iowa 307, 106 N. W. 743, 114 Am. St. Rep. 416, 4 L. R. A. N. S. 814; Morris *v.* Chicago, etc., R. Co., 65 Iowa 727, 23 N. W. 143, 54 Am. Rep. 39.

Kentucky.— Bruce *v.* Cincinnati R. Co., 83 Ky. 174.

Maryland.— State *v.* Pittsburgh, etc., R. Co., 45 Md. 41.

Massachusetts.— Higgins *v.* Central New England, etc., R. Co., 155 Mass. 176, 29 N. E. 534, 31 Am. St. Rep. 544.

New York.— Robinson *v.* Oceanic Steam Nav. Co., 112 N. Y. 315, 19 N. E. 625, 2 L. R. A. 636; Leonard *v.* Columbia Steam Nav. Co., 84 N. Y. 48, 38 Am. Rep. 491.

Pennsylvania.— Usher *v.* West Jersey R. Co., 126 Pa. St. 206, 17 Atl. 597, 12 Am. St. Rep. 863, 4 L. R. A. 261; Knight *v.* West Jersey R. Co., 108 Pa. St. 250, 56 Am. Rep. 200.

Virginia.— Nelson *v.* Chesapeake, etc., R. Co., 88 Va. 971, 14 S. E. 838, 15 L. R. A. 583.

United States.— Texas, etc., R. Co. *v.* Cox, 145 U. S. 593, 12 S. Ct. 905, 36 L. ed. 829; Dennick *v.* New Jersey Cent. R. Co., 103 U. S. 11, 26 L. ed. 439.

26. Watts *v.* Thomas, 2 Bibb (Ky.) 458; Henry *v.* Sargeant, 13 N. H. 321, 40 Am. Dec. 146; Phillips *v.* Eyre, L. R. 6 Q. B. 1, 10 B. & S. 1004, 40 L. J. Q. B. 28, 22 L. T. Rep. N. S. 869; Mostyn *v.* Fabrigas, Cowp. 161, 98 Eng. Reprint 1021; Rafael *v.* Verelst, W. Bl. 1055, 96 Eng. Reprint 621.

27. Crashley *v.* Press Pub. Co., 179 N. Y. 27, 71 N. E. 258; Machado *v.* Fontes, [1897] 2 Q. B. 231, 66 L. J. Q. B. 542, 76 L. T. Rep. N. S. 588, 45 Wkly. Rep. 565.

28. Williams *v.* Pope Mfg. Co., 52 La. Ann. 1417, 27 So. 851, 78 Am. St. Rep. 390, 50 L. R. A. 816; Shaver *v.* White, 6 Munf. (Va.) 110, 8 Am. Dec. 730.

29. *California.*— Roberts *v.* Dunsmuir, 75 Cal. 203, 16 Pac. 782.

New Jersey.— Ackerson *v.* Erie R. Co., 31 N. J. L. 309.

Texas.— Mexican Nat. R. Co. *v.* Jackson, 89 Tex. 107, 33 S. W. 857, 59 Am. St. Rep. 28, 31 L. R. A. 276; Mexican Cent. R. Co. *v.* Mitten, 13 Tex. Civ. App. 653, 36 S. W. 282.

Vermont.— McLeod *v.* Connecticut, etc., R. Co., 58 Vt. 727, 6 Atl. 648; Graham *v.* Monsergh, 22 Vt. 543.

Wisconsin.— Eingartner *v.* Illinois Steel Co., 94 Wis. 70, 68 N. W. 664, 59 Am. St. Rep. 859, 34 L. R. A. 503.

United States.— Nonce *v.* Richmond, etc., R. Co., 33 Fed. 429.

30. Lister *v.* Wright, 2 Hill (N. Y.) 320.

31. Dodge *v.* Colby, 108 N. Y. 445, 15 N. E. 703.

32. *Illinois.*— Illinois Cent. R. Co. *v.* Swearingen, 33 Ill. 289.

riers.[33] While it is generally conceded that such actions may be brought in any jurisdiction without regard to the locality where the tort actually occurred, this principle is subject to the following restrictions.[34]

b. Acts Wrongful by Lex Loci. The act or omission must have been wrongful, or as it is sometimes put, "not justifiable," [35] by the law of the place where it occurred.[36] Thus it has been said that "if the acts of the parties impose no obli-

Missouri.— Mason *v.* Warner, 31 Mo. 508.

New Hampshire.— Laird *v.* Connecticut, etc., R. Co., 62 N. H. 254, 13 Am. St. Rep. 564.

New Jersey.— Hale *v.* Lawrence, 21 N. J. L. 714, 47 Am. Dec. 190.

New York.— Glen *v.* Hodges, 9 Johns. 67.

United States.— McKenna *v.* Fisk, 1 How. 241, 11 L. ed. 117.

Contra.— Moyer *v.* Canal Co., 12 Phila. (Pa.) 400, action for damages for injuries to barges by the overflow of a canal is local.

33. McDuffee *v.* Portland, etc., R. Co., 52 N. H. 430, 13 Am. Rep. 72.

34. **Exceptions to general rule.**—"It is a general rule that for the purpose of redress it is immaterial where a wrong was committed; in other words, a wrong being personal, redress may be sought for it wherever the wrong-doer may be found. To this there are a few exceptions in which actions are said to be local, and must, therefore, be brought within the country where they arose. As applied to torts, these exceptions may be said to consist of (1) those where the *lex loci delicti* is in direct contravention of the law or policy of the forum; (2) where the remedy prescribed for the tort by the *lex loci delicti* is penal in its character; and (3) statutory torts, where the statute, in creating the liability, at the same time creates a mode of redress peculiar to that State, by which alone the wrong is to be remedied." Southern Pac. Co. *v.* Dusablon, 48 Tex. Civ. App. 203, 106 S. W. 766, per Neill, J.

35. "As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. . . . Secondly, the act must not have been justifiable by the law of the place where it was done." Phillips *v.* Eyre, L. R. 6 Q. B. 1, 28, 10 B. & S. 1004, 40 L. J. Q. B. 28, 22 L. T. Rep. N. S. 869 [*quoted* in Carr *v.* Times, [1902] A. C. 176, 177, 71 L. J. K. B. 361, 85 L. T. Rep. N. S. 144, 17 T. L. R. 657, 50 Wkly. Rep. 257, where it was held that the seizure by a British naval officer of British goods on a British ship in the waters of a foreign sovereign effected under the authority and by the direction of that sovereign cannot be made the subject of legal proceedings in England; Machado *v.* Fontes, [1897] 2 Q. B. 231, 233, 66 L. J. Q. B. 542, 76 L. T. Rep. N. S. 588, 45 Wkly. Rep. 565], per Willes, J.

36. *Alabama.*— Louisville, etc., R. Co. *v.* Williams, 113 Ala. 402, 21 So. 938; Alabama Great Southern R. Co. *v.* Carroll, 97 Ala. 126, 11 So. 803, 38 Am. St. Rep. 163, 18 L. R. A. 433; Kahl *v.* Memphis, etc., R. Co., 95 Ala. 337, 10 So. 661.

Arkansas.— Carter *v.* Goode, 50 Ark. 155, 6 S. W. 719.

Georgia.— Central R. Co. *v.* Swint, 73 Ga. 651; Atlanta, etc Air-Line R. Co. *v.* Tanner, 68 Ga. 384; Western, etc., R. Co. *v.* Strong, 52 Ga. 461; Selma, etc., R. Co. *v.* Lacy, 43 Ga. 461.

Indiana.— Baltimore, etc., R. Co. *v.* Reed, 158 Ind. 25, 62 N. E. 488, 92 Am. St. Rep. 293; Burns *v.* Grand Rapids, etc., R. Co., 113 Ind. 169, 15 N. E. 230; Buckles *v.* Ellers, 72 Ind. 220, 37 Am. Rep. 156.

Iowa.— *In re* Coe, 130 Iowa 307, 106 N. W. 743, 114 Am. St. Rep. 416, 4 L. R. A. N. S. 814; Dorr Cattle Co. *v.* Des Moines Nat. Bank, 127 Iowa 153, 98 N. W. 918; Hyde *v.* Wabash, etc., R. Co., 61 Iowa 441, 16 N. W. 351, 47 Am. Rep. 820.

Kansas.— Hamilton *v.* Hannibal, etc., R. Co., 39 Kan. 56, 18 Pac. 57; Limekiller *v.* Hannibal, etc., R. Co., 33 Kan. 83, 5 Pac. 401, 52 Am. Rep. 523; Atchison, etc., R. Co. *v.* Moore, 29 Kan. 632.

Kentucky.— Louisville, etc., R. Co. *v.* Harmon, 64 S. W. 640, 23 Ky. L. Rep. 871.

Maryland.— State *v.* Pittsburgh, etc., R. Co., 45 Md. 41.

Massachusetts.— Davis *v.* New York, etc., R. Co., 143 Mass. 301, 9 N. E. 815, 58 Am. Rep. 138.

Michigan.— Rick *v.* Saginaw Bay Towing Co., 132 Mich. 237, 93 N. W. 632, 102 Am. St. Rep. 422.

Minnesota.— Herrick *v.* Minneapolis, etc., R. Co., 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771.

Mississippi.— Illinois Cent. R. Co. *v.* Harris, (1901) 29 So. 760; Pullman Palace Car Co. *v.* Lawrence, 74 Miss. 782, 22 So. 53; Chicago, etc., R. Co. *v.* Doyle, 60 Miss. 977.

New Hampshire.— Holbrook *v.* Bowman, 62 N. H. 313.

New York.— Debevoise *v.* New York, etc., R. Co., 98 N. Y. 377, 50 Am. Rep. 683; Leonard *v.* Columbia Steam Nav. Co., 84 N. Y. 48, 38 Am. Rep. 491; McDonald *v.* Mallory, 77 N. Y. 546, 33 Am. Rep. 664; Whitford *v.* Panama R. Co., 23 N. Y. 465; Voshefskey *v.* Hillside Coal, etc., Co., 21 N. Y. App. Div. 168, 47 N. Y. Suppl. 386; Torrance *v.* Buffalo Third Nat. Bank, 70 Hun 44, 23 N. Y. Suppl. 1073; Vandeventer *v.* New York, etc., R. Co., 27 Barb. 244, 6 Abb. Pr. 239.

Ohio.— Alexander *v.* Pennsylvania Co., 48 Ohio St. 623, 30 N. E. 69; Woodard *v.* Michigan, etc., R. Co., 10 Ohio St. 121.

Pennsylvania.— Knight *v.* West Jersey R. Co., 108 Pa. St. 250, 56 Am. Rep. 200.

gations on the one hand and confer no rights on the other, where they occur, no good reason is apparent why they should spring into active existence the moment the parties pass into another jurisdiction, where, if they had occurred therein, such relative rights and obligations would have resulted. An act should be judged by the law of the jurisdiction where it was committed; the party acting or omitting to act must be presumed to have been guided by the law in force at the time and place, and to which he owed obedience; if his conduct according to that law violated no right of another, no cause of action arose, for actions at law are provided to redress violated rights." [37] Where the tort has been committed upon the high seas a right of action therefor must depend upon the laws of the state to which the vessel belongs, unless the matter has been made exclusively subject to federal cognizance, and actions for negligence causing death are not within the exception.[38]

c. Acts Wrongful by Lex Fori. In England it has been held that redress will not be given unless the injury was of such a character that it would have been actionable if suffered in England.[39] But American courts have adopted a more

Tennessee.— East Tennessee, etc., R. Co. *v.* Lewis, 89 Tenn. 235, 14 S. W. 603.

Texas.— Chicago, etc., R. Co. *v.* Thompson, 100 Tex. 185, 97 S. W. 459, 123 Am. St. Rep. 798, 7 L. R. A. N. S. 191; De Harn *v.* Mexican Nat. R. Co., 86 Tex. 68, 23 S. W. 381; Willis *v.* Missouri Pac. R. Co., 61 Tex. 432, 48 Am. Rep. 301; Mexican Cent. R. Co. *v.* Goodman, 20 Tex. Civ. App. 109, 48 S. W. 778.

Vermont.— McLeod *v.* Connecticut River, etc., R. Co., 58 Vt. 727, 6 Atl. 648; Needham *v.* Grand Trunk R. Co., 38 Vt. 294.

Wisconsin.— Rudiger *v.* Chicago, etc., R. Co., 94 Wis. 191, 68 N. W. 661; Eingartner *v.* Illinois Steel Co., 94 Wis. 70, 68 N. W. 664, 59 Am. St. Rep. 859, 34 L. R. A. 503.

United States.— Northern Pac. R. Co. *v.* Babcock, 154 U. S. 190, 14 S. Ct. 978, 38 L. ed. 958; The Scotland, 105 U. S. 24, 26 L. ed. 1001; Smith *v.* Condry, 1 How. 28, 11 L. ed. 35; International Nav. Co. *v.* Lindstrom, 123 Fed. 475, 60 C. C. A. 649; Van Doren *v.* Pennsylvania R. Co., 93 Fed. 260, 35 C. C. A. 282; The Lamington, 87 Fed. 752; Northern Pac. R. Co. *v.* Mase, 63 Fed. 114, 11 C. C. A. 63; The Egyptian Monarch, 36 Fed. 773.

England.— Chartered Mercantile Bank *v.* Netherlands India Steam Nav. Co., 10 Q. B. D. 521, 536, 5 Aspin. 65, 47 J. P. 260, 52 L. J. Q. B. 220, 48 L. T. Rep. N. S. 546, 31 Wkly. Rep. 445; The M. Moxham, 1 P. D. 107, 46 L. J. P. D. & Adm. 17, 34 L. T. Rep. N. S. 559, 24 Wkly. Rep. 650.

37. Alexander *v.* Pennsylvania Co., 48 Ohio St. 623, 636, 30 N. E. 69, per Bradbury, J.

Rule applied.— Where suit was brought for injuries inflicted in New Hampshire by a dog owned and kept by defendant in Massachusetts, and no *scienter* was shown, as required in New Hampshire, it was held that plaintiff had no cause of action, although a Massachusetts statute had abolished the doctrine of *scienter* in that state. Le Forest *v.* Tolman, 117 Mass. 109, 19 Am. Rep. 400. Defendant was engaged in constructing a tunnel under a river between Michigan and Ontario and employed a foreman on each side. In an action for injuries to an employee alleged to be due to negligence in allowing him to enter, without warning, compressed air on the Canadian side, at a higher pressure than that to which he had been accustomed in Michigan, it was held that defendant's liability was to be determined by the law of Canada, although the employee was sent to the Canadian side by direction of the American foreman. Turner *v.* St. Clair Tunnel Co., 111 Mich. 578, 70 N. W. 146, 66 Am. St. Rep. 397, 36 L. R. A. 134.

Crime but not tort by lex loci.—An action in tort for a libel published in Brazil may be maintained in England, although by Brazilian law libel is not a tort but a crime. Machado *v.* Fontes, [1897] 2 Q. B. 231, 66 L. J. Q. B. 542, 76 L. T. Rep. N. S. 588, 45 Wkly. Rep. 565. In accord Scott *v.* Seymour, 1 H. & C. 219, 9 Jur. N. S. 522, 32 L. J. Exch. 61, 8 L. T. Rep. N. S. 511, 11 Wkly. Rep. 169.

38. McDonald *v.* Mallory, 77 N. Y. 546, 33 Am. Rep. 664; La Bourgogne, 210 U. S. 95, 28 S. Ct. 664, 52 L. ed. 973; The Hamilton, 207 U. S. 398, 28 S. Ct. 133, 52 L. ed. 264.

Law of owner's residence.— The law to be applied is that of the owner's residence and not that of the state where the vessel is registered. International Nav. Co. *v.* Lindstrom, 123 Fed. 475, 60 C. C. A. 649.

Death on high seas see DEATH, 13 Cyc. 316. And see 21 Harvard L. Rev. 1, 75 article by G. Philip Wardner, "Enforcement of a Right of Action Acquired Under Foreign Law For Death Upon the High Seas." This article is in answer to the question. "Should a right of action acquired under foreign law for death upon the high seas be enforced by a court of admiralty of the United States?"

39. Carr *v.* Times, [1902] A. C. 176, 71 L. J. K. B. 361, 85 L. T. Rep. N. S. 144, 17 T. L. R. 657, 50 Wkly. Rep. 257; Chartered Mercantile Bank *v.* Netherlands India Steam Nav. Co., 10 Q. B. D. 521, 536, 5 Aspin. 65, 47 J. P. 260, 52 L. J. Q. B. 220, 48 L. T. Rep. N. S. 546, 31 Wkly. Rep. 445; Phillips *v.* Eyre, L. R. 6 Q. B. 1, 10 B. & S. 1004, 40

liberal policy and will administer the *lex loci* unless to do so would require the enforcement of a foreign statute of a penal nature,[40] or the recognition of a cause of action which is contrary to the law, morals, or policy of the *lex fori*.[41] But a

L. J. Q. B. 28, 22 L. T. Rep. N. S. 869; The M. Moxham, 1 P. D. 107, 46 L. J. P. D. & Adm. 17, 34 L. T. Rep. N. S. 559, 24 Wkly. Rep. 650.

Rule applies.— Suit cannot be maintained in England founded on a liability created by the law of Belgium for a collision occurring in that country and caused by the act of a pilot whom the shipowner was compelled to employ and for whom therefore as not being his agent, he was not responsible by English law. The Halley, L. R. 2 P. C. 193, 37 L. J. Adm. 33, 18 L. T. Rep. N. S. 879, 5 Moore P. C. N. S. 263, 16 Wkly. Rep. 998, 16 Eng. Reprint 514.

40. *Indiana.*— Burns *v.* Grand Rapids, etc., R. Co., 113 Ind. 169, 15 N. E. 230; Carnahan *v.* Western Union Tel. Co., 89 Ind. 526, 46 Am. Rep. 175.

Iowa.— Taylor *v.* Western Union Tel. Co., 95 Iowa 740, 64 N. W. 660.

Maryland.— Plymouth First Nat. Bank *v.* Price, 33 Md. 487, 3 Am. Rep. 204.

Massachusetts.— Richardson *v.* New York Cent. R. Co., 98 Mass. 85.

New York.— Bird *v.* Hayden, 1 Rob. 383, 2 Abb. Pr. N. S. 61; Scoville *v.* Canfield, 14 Johns. 338, 7 Am. Dec. 467.

Rhode Island.— Gardner *v.* New York, etc., R. Co., 17 R. I. 790, 24 Atl. 831.

Vermont.— Farr *v.* Briggs, 72 Vt. 225, 47 Atl. 793, 82 Am. St. Rep. 930; Adams *v.* Fitchburg R. Co., 67 Vt. 76, 30 Atl. 687, 48 Am. St. Rep. 800; Blaine *v.* Curtis, 59 Vt. 120, 7 Atl. 708, 59 Am. Rep. 702; McLeod *v.* Connecticut River, etc., R. Co., 58 Vt. 727, 6 Atl. 648.

Virginia.— Nelson *v.* Chesapeake, etc., R. Co., 88 Va. 971, 14 S. E. 838, 15 L. R. A. 583.

Wisconsin.— Bettys *v.* Milwaukee, etc., R. Co., 37 Wis. 323.

United States.— Huntington *v.* Attrill, 146 U. S. 657, 13 S. Ct. 224, 36 L. ed. 1123; Evey *v.* Mexican Cent. R. Co., 81 Fed. 294, 26 C. C. A. 407, 38 L. R. A. 387; Lyman *v.* Boston, etc., R. Co., 70 Fed. 409.

Rule applied.—A statute providing that if any person die from injury received on a railroad the company "shall forfeit and pay for every person or passenger so dying the sum of $5,000" to certain classes of persons, giving a right of action and not requiring proof of damage to plaintiff but only that death was caused by the defect, negligence, or criminal intent mentioned in the statute is penal in its character. Raisor *v.* Chicago, etc., R. Co., 215 Ill. 47, 74 N. E. 69, 106 Am. St. Rep. 153; Matheson *v.* Kansas City, etc., R. Co., 61 Kan. 667, 60 Pac. 747; Dale *v.* Atchison, etc., R. Co., 57 Kan. 601, 47 Pac. 521; O'Reilly *v.* New York, etc., R. Co., 16 R. I. 388, 17 Atl. 171, 906, 19 Atl. 244, 5 L. R. A. 364, 6 L. R. A. 719.

41. *Illinois.*— Chicago, etc., R. Co. *v.* Rouse, 178 Ill. 132, 52 N. E. 951, 44 L. R. A. 410.

Iowa.— Johnson *v.* Chicago, etc., R. Co., 91 Iowa 248, 59 N. W. 66; Morris *v.* Chicago, etc., R. Co., 65 Iowa 727, 23 N. W. 143, 54 Am. Rep. 39; Boyce *v.* Wabash R. Co., 63 Iowa 70, 18 N. W. 673, 50 Am. Rep. 730.

Michigan.— Rick *v.* Saginaw Bay Towing Co., 132 Mich. 237, 93 N. W. 632, 102 Am. St. Rep. 422.

Minnesota.— Powell *v.* Great Northern R. Co., 102 Minn. 448, 113 N. W. 1017; Nicholas *v.* Burlington, etc., R. Co., 78 Minn. 43, 80 N. W. 776; Herrick *v.* Minneapolis, etc., R. Co., 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771.

Mississippi.— Chicago, etc., R. Co. *v.* Doyle, 60 Miss. 977.

Pennsylvania.— Usher *v.* West Jersey R. Co., 126 Pa. St. 206, 17 Atl. 597, 12 Am. St. Rep. 863, 4 L. R. A. 261.

Tennessee.— Nashville, etc., R. Co. *v.* Sprayberry, 8 Baxt. 341, 35 Am. Rep. 705.

Texas.— Mexican Cent. R. Co. *v.* Mitten, 13 Tex. Civ. App. 653, 36 S. W. 282.

Virginia.— Nelson *v.* Chesapeake, etc., R. Co., 88 Va. 971, 14 S. E. 838, 15 L. R. A. 583.

United States.— Huntington *v.* Attrill, 146 U. S. 657, 13 S. Ct. 224, 36 L. ed. 1123; Texas, etc., R. Co. *v.* Cox, 145 U. S. 593, 12 S. Ct. 905, 36 L. ed. 829; Dennick *v.* New Jersey Cent. R. Co., 103 U. S. 11, 26 L. ed. 439; Evey *v.* Mexican Cent. R. Co., 81 Fed. 294, 26 C. C. A. 407, 38 L. R. A. 387; Northern Pac. R. Co. *v.* Mase, 63 Fed. 114, 11 C. C. A. 63; De Brimont *v.* Penniman, 7 Fed. Cas. No. 3,715, 10 Blatchf. 436.

Contra.— The English view is adopted in Wisconsin. Bettys *v.* Milwaukee, etc., R. Co., 37 Wis. 323; Anderson *v.* Milwaukee, etc., R. Co., 37 Wis. 321.

Rule stated.— "To justify a court in refusing to enforce a right of action which accrued under the law of another State, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that, for some other such reason, the enforcement of it would be prejudicial to the general interests of our own citizens." Northern Pac. R. Co. *v.* Babcock, 154 U. S. 190, 198, 14 S. Ct. 978, 38 L. ed. 958, per White, J. By the law of Quebec where the injury to plaintiff occurred, contributory negligence is not a bar to recovery by the employee against his employer, but operates only to reduce damages. Suit was brought in Vermont where contributory negligence is a bar. It was held that Quebec law governed. The court said: "Comity does not require us to take up and enforce the law of a foreign state which is contrary to pure morals, or to abstract justice, or to enforce which would be contrary to our own public policy. The law we are considering is not claimed to be open to either of the first two objections but is claimed to be open to the third, because it is so different from the law of Vermont. Some states having adopted

slight difference of views between the two states, not amounting to a fundamental difference of policy, will not prevent the enforcement of the obligations admitted to have arisen by the law which governed the conduct of the parties.[42] Nor, where a cause of action for a wrong is given by the law of the place where it is committed, will the fact that the remedy differs from that of the forum, prevent a recovery.[43] Thus, where the statutes of the forum and of the *locus* give a right of action for death caused by negligence or wrongful act, plaintiff may recover despite a difference as to the amount of damages allowed,[44] as to the period of limitations, provided that suit be brought within the time fixed by the *lex loci*,[45] or as to the party in whose name the action shall be brought.[46] Where both parties, however, are non-residents and a cause of action arose out of the state in which suit is brought, on grounds of public policy some of the courts decline to assume jurisdiction in the absence of special circumstances.[47] In the absence

this view, declined to administer foreign laws unless closely analogous to their own. . . . But we believe the sounder opinion is that a court should not, in otherwise proper cases, refuse to adopt and apply the law of a foreign state, however unlike the law of its own, unless it be contrary to pure morals, or abstract justice, or unless the enforcement would be of evil example and harmful to its own people and therefore inconsistent with the dignity of the government whose authority is invoked." Morrisette *v.* Canadian Pac. R. Co., 76 Vt. 267, 271, 56 Atl. 1102, per Stafford, J.

42. Walsh *v.* New York, etc., R. Co., 160 Mass. 571, 573, 36 N. E. 584, 39 Am. St. Rep. 514.

43. Mexican Cent. R. Co. *v.* Gehr, 66 Ill. App. 173.

44. "In cases of other than penal actions, the foreign law, if not contrary to our public policy, or to abstract justice or pure morals, or calculated to injure the State or its citizens, shall be recognized and enforced here, if we have jurisdiction of all necessary parties, and if we can see that, consistently with our own forms of procedure and law of trials, we can do substantial justice between the parties. If the foreign law is a penal statute, or if it offends our own policy, or is repugnant to justice or to good morals, or is calculated to injure this State or its citizens, or if we have not jurisdiction of parties who must be brought in to enable us to give a satisfactory remedy, or if under our forms of procedure an action here cannot give a substantial remedy, we are at liberty to decline jurisdiction." Higgins *v.* Central New England, etc., R. Co., 155 Mass. 176, 180, 29 N. E. 534, 31 Am. St. Rep. 544. And see Powell *v.* Great Northern R. Co., 102 Minn. 448, 113 N. W. 1017.

45. Negaubauer *v.* Great Northern R. Co., 92 Minn. 184, 99 N. W. 620, 104 Am. St. Rep. 674; Theroux *v.* Northern Pac. R. Co., 64 Fed. 84, 12 C. C. A. 52.

46. It is no defense that the suit is brought in the name of the widow as such, as required by the *lex loci*, and not by her as administratrix as required by the *lex fori*. Wooden *v.* Western New York, etc., R. Co., 126 N. Y. 10, 26 N. E. 1050, 22 Am. St. Rep. 803, 13 L. R. A. 458. In accord Usher *v.* West Jersey R. Co., 126 Pa. St. 206, 17 Atl. 597, 12 Am. St. Rep. 863, 4 L. R. A. 261; Boston, etc., R. Co. *v.* McDuffey, 79 Fed. 934, 25 C. C. A. 247. Otherwise where the *lex loci* requires suit to be brought by the personal representative and plaintiff sued as widow in accordance with the *lex fori*. Western, etc., R. Co. *v.* Strong, 52 Ga. 461. *Contra*, by the Illinois statute (Laws (1903), p. 217) it is provided that "no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State." Crane *v.* Chicago, etc., R. Co., 233 Ill. 259, 84 N. E. 222. By Ohio Rev. St. § 6134*a*, no action can be maintained in the courts of Ohio for wrongful death occurring in another state unless the person wrongfully killed was a citizen of Ohio. Chambers *v.* Baltimore, etc., R. Co., 207 U. S. 142, 28 S. Ct. 34, 52 L. ed. 143 [*affirming* 73 Ohio St. 16, 76 N. E. 91]. In Texas it is held that the courts will not undertake to adjudicate rights which originated in another state under statutes which differ materially from those of the forum, and that differences in the beneficiaries, procedure, distribution of damages, and periods of limitation are substantial. Mexican Nat. R. Co. *v.* Jackson, 89 Tex. 107, 33 S. W. 857, 59 Am. St. Rep. 28, 31 L. R. A. 276; St. Louis, etc., R. Co. *v.* McCormick, 71 Tex. 660, 9 S. W. 540, 1 L. R. A. 804; Texas, etc., R. Co. *v.* Richards, 68 Tex. 375, 4 S. W. 627.

Actions for death by wrongful act see DEATH, 13 Cyc. 313.

47. Thus the courts of New York declined to assume cognizance of an action for assault and battery committed on board of a British vessel upon the high seas, plaintiff and defendant both being British subjects. Here it was said (per Yates, J.): "It is evident, then, that our Courts may take cognizance of torts committed on the high seas, on board of a foreign vessel where both parties are foreigners; but I am inclined to think it must, on principles of policy, often rest in the sound discretion of the Court to afford jurisdiction or not, according to the circumstances of the case. To say that it can be claimed in all cases, as matter of right, would introduce a principle which might, oftentimes, be attended with manifest disadvantage, and serious injury to our own

of circumstances showing cruelty or great hardship the admiralty courts of the United States cannot be required or allow themselves to entertain jurisdiction of a case where subjects of a foreign government invoke their assistance against a merchant vessel of a foreign government.[48]

4. DEFENSES — a. General Rule. As the existence of a transitory cause of action is primarily determined by the *lex loci*, it follows that the same law must in general govern the defenses which may prevent recovery.[49]

citizens abroad, as well as to foreigners here. Mariners might so annoy the master of a vessel as to break up the voyage, and thus produce great distress and ruin to the owners. The facts in this case sufficiently show the impropriety of extending jurisdiction, because it is a suit brought by one of the mariners against the master, both foreigners, for a personal injury sustained on board of a foreign vessel, on the high seas, and lying in port when the action was commenced, and, for aught that appears in the case, intending to return to their own country, without delay, other than what the nature of the voyage required. Under such circumstances, it is manifest that correct policy ought to have induced the Court below to have refused jurisdiction, so as to prevent the serious consequences which must result from the introduction of a system, with regard to foreign mariners and vessels, destructive to commerce; since it must materially affect the necessary intercourse between nations, by which alone it can be maintained. The plaintiff, therefore, ought to have been left to seek redress in the Courts of his own country, on his return." Gardner *v.* Thomas, 14 Johns. (N. Y.) 134, 137, 7 Am. Dec. 445. See also Robinson *v.* Oceanic Steam Nav. Co., 112 N. Y. 315, 19 N. E. 625, 2 L. R. A. 636; Smith *v.* Crocker, 14 N. Y. App. Div. 245, 43 N. Y. Suppl. 427 [*affirmed* in 162 N. Y. 600, 57 N. E. 1124]; Ferguson *v.* Neilson, 33 N. Y. St. 814. The point was raised but not passed upon in Lister *v.* Wright, 2 Hill (N. Y.) 320. In accord Morris *v.* Missouri Pac. R. Co., 78 Tex. 17, 14 S. W. 228, 22 Am. St. Rep. 17, 9 L. R. A. 349.

Laches.— But where the action "has been pending for a year, and the question as to whether the court should entertain jurisdiction had not been raised by answer, by special motion or during the trial, and we think that while the Supreme Court might, in the exercise of its discretion, have refused to entertain the action, or dismissed it on its own motion, yet the defendant, not being entitled to a dismissal as a matter of right, ought not to be permitted to lie by until the close of the trial, when its probable result could be inferred, and then successfully invoke the exercise of the discretion of the court in his favor." Burdick *v.* Freeman, 120 N. Y. 420, 24 N. E. 949, per Follett, C. J. In accord Morrisette *v.* Canadian Pac. R. Co., 76 Vt. 267, 56 Atl. 1102.

Contra.— Roberts *v.* Knights, 7 Allen (Mass.) 449, 452, where it was said, per Chapman, J.: "The argument *ab inconvenienti*, which is urged on behalf of the defendant, has much force. It is extremely inconvenient to one who is temporarily in a foreign country to be sued by a fellow-countryman in its courts. But it is met by an argument of equal force on the other side. If the plaintiff had no such remedy, he would often be subjected to great hardships. On the whole, it is consonant to natural right and justice that the courts of every civilized country should be open to hear the causes of all parties who may be resident for the time being within its limits." In accord Cofrode *v.* Wayne County Cir. Judge, 79 Mich. 332, 44 N. W. 623, 7 L. R. A. 511; Pullman Palace Car Co. *v.* Lawrence, 74 Miss. 782, 22 So. 53; Knight *v.* West Jersey R. Co., 108 Pa. St. 250, 56 Am. Rep. 200; Eingartner *v.* Illinois Steel Co., 94 Wis. 70, 68 N. W. 664, 59 Am. St. Rep. 859, 34 L. R. A. 503.

The courts of Texas will take jurisdiction of an action brought by residents of a foreign state, against a foreign corporation doing business in Texas. Western Union Tel. Co. *v.* Clark, 14 Tex. Civ. App. 563, 38 S. W. 225; Western Union Tel. Co. *v.* Phillips, 2 Tex. Civ. App. 608, 21 S. W. 638 [*distinguishing* Morris *v.* Missouri Pac. R. Co., 78 Tex. 17, 14 S. W. 228, 22 Am. St. Rep. 17, 9 L. R. A. 349].

48. Panama R. Co. *v.* Napier Shipping Co., 166 U. S. 280, 17 S. Ct. 572, 41 L. ed. 1004; The Belgenland, 114 U. S. 355, 5 S. Ct. 860, 29 L. ed. 152; The Noddleburn, 28 Fed. 855; The Montapedia, 14 Fed. 427; The Carolina, 14 Fed. 424. And see Johnson *v.* Dalton, 1 Cow. (N. Y.) 543, 13 Am. Dec. 564.

Otherwise, however, where the libel is filed by an American citizen. Bolden *v.* Jensen, 70 Fed. 505.

49. *Alabama.*—Alabama Great Southern R. Co. *v.* Carroll, 97 Ala. 126, 11 So. 803, 38 Am. St. Rep. 163, 18 L. R. A. 433.

Illinois.— Mexican Cent. R. Co. *v.* Gehr, 66 Ill. App. 173.

Indiana.— Baltimore, etc., R. Co. *v.* Reed, 158 Ind. 25, 62 N. E. 488, 92 Am. St. Rep. 293.

Iowa.— Dorr Cattle Co. *v.* Des Moines Nat. Bank, 127 Iowa 153, 98 N. W. 918, 102 N. W. 836. But see Johnson *v.* Chicago, etc., R. Co., 91 Iowa 248, 59 N. W. 66.

Kentucky.— Louisville, etc., R. Co. *v.* Whitlow, 43 S. W. 711, 19 Ky. L. Rep. 1931, 41 L. R. A. 614.

Michigan.— Turner *v.* St. Clair Tunnel Co., 111 Mich. 578, 70 N. W. 146, 66 Am. St. Rep. 397, 36 L. R. A. 134.

Mississippi.— Chicago, etc., R. Co. *v.* Doyle, 60 Miss. 977.

Missouri.— Charlton *v.* St. Louis, etc., R. Co., 200 Mo. 413, 98 S. W. 529.

b. Statutes of Limitations. The statute of limitations to be applied is that of the forum where the foreign act affects only the remedy [50] and (1) does not extinguish the right, as in cases where the statute of the *locus* gives a title arising from adverse possession or enjoyment and does not merely limit the remedy as to the time of bringing suit,[51] or (2) is not made an integral part of the cause of action, as where the statute creates a right of action for death caused by negligence or wrongful act, and fixes a period within which the action must be brought.[52]

New Hampshire.— Kimball *v.* Kimball, (1909) 73 Atl. 408; Laird *v.* Connecticut, etc., R. Co., 62 N. H. 254, 13 Am. St. Rep. 564.

New York.— Voshefskey *v.* Hillside Coal, etc., Co., 21 N. Y. App. Div. 168, 47 N. Y. Suppl. 386.

Ohio.— Alexander *v.* Pennsylvania Co., 48 Ohio St. 623, 30 N. E. 69; Knowlton *v.* Erie R. Co., 19 Ohio St. 260, 2 Am. Rep. 395.

Rhode Island.— O'Reilly *v.* New York, etc., R. Co., 16 R. I. 388, 17 Atl. 171, 906, 19 Atl. 244, 5 L. R. A. 364, 6 L. R. A. 719.

Tennessee.— Railway Co. *v.* Lewis, 89 Tenn. 235, 14 S. W. 603.

Texas.— Southern Pac. Co. *v.* Dusablon, 48 Tex. Civ. App. 203, 106 S. W. 766.

Vermont.— Morrisette *v.* Candian Pac. R. Co., 76 Vt. 267, 56 Atl. 1102.

Virginia.— Shaver *v.* White, 6 Munf. 110, 8 Am. Dec. 730.

United States.— Boston, etc., R. Co. *v.* McDuffey, 79 Fed. 934, 25 C. C. A. 247.

Rule illustrated.— Thus where suit was brought in England for acts done by defendant while governor of Jamaica, it was held that a statute of the island of Jamaica making such acts lawful and confirming the same was a defense. Phillips *v.* Eyre, L. R. 6 Q. B. 1, 10 B. & S. 1004, 40 L. J. Q. B. 28, 22 L. T. Rep. N. S. 869. It is a good defense to an action brought in New Hampshire for injuries sustained in Maine while traveling on Sunday that no recovery can be had under the laws of Maine. Beacham *v.* Portsmouth Bridge, 68 N. H. 382, 40 Atl. 1066, 73 Am. St. Rep. 607. A contract made in Indian Territory provided that in consideration of the employment of plaintiff by defendant, the former, if injured, would give the latter thirty days' written notice of any claim, in default of which no suit could be maintained. Plaintiff was injured in Oklahoma where the contract was valid and brought suit in Texas where a statute prohibited such a stipulation. It was held that failure to give notice as required by the contract constituted a good defense. Chicago, etc., R. Co. *v.* Thompson, 100 Tex. 185, 97 S. W. 459, 123 Am. St. Rep. 798, 7 L. R. A. N. S. 191. And where suit was brought in South Carolina for injuries received in North Carolina by plaintiff's minor son through the alleged negligence of defendant, it was held that the law of North Carolina as to the age at which a boy may be guilty of contributory negligence must govern. Bridger *v.* Ashville, etc., R. Co., 27 S. C. 456, 3 S. E. 860, 13 Am. St. Rep. 653.

50. O'Shields *v.* Georgia Pac. R. Co., 83 Ga. 621, 10 S. E. 268, 6 L. R. A. 152; Chicago, etc., R. Co. *v.* Thompson, 100 Tex. 185, 97 S. W. 459, 123 Am. St. Rep. 798, 7 L. R. A. N. S. 191; Union Pac. R. Co. *v.* Wyler, 158 U. S. 285, 15 S. Ct. 877, 39 L. ed. 983; Michigan Ins. Bank *v.* Eldred, 130 U. S. 693, 9 S. Ct. 690, 32 L. ed. 1080; Munos *v.* Southern Pac. Co., 51 Fed. 188, 2 C. C. A. 163; Nonce *v.* Richmond, etc., R. Co., 33 Fed. 429.

Rule stated.— "There are two classes of statutes of limitations: One extinguishes the debt or claim; the other merely bars or prevents the remedy. And, as remedies are regulated only by the law of the place where they are pursued, this class of statutes created by one state does not prevent a remedy which is sought in a foreign state, but in such case the *lex fori* controls." Canadian Pac. R. Co. *v.* Johnston, 61 Fed. 738, 745, 9 C. C. A. 587, 25 L. R. A. 470, per Shipman, J.

Rule applied.— A statute of the forum providing that no action to recover damages for personal injuries shall be maintained unless a written notice shall have been served on the person responsible, within one year after the happening of the event, defeats a recovery where compliance therewith has not been made, although the injury occurred in a state where no such statute is in force. The statute is one of limitation. Arp *v.* Allis-Chalmers Co., 130 Wis. 454, 110 N. W. 386, 8 L. R. A. N. S. 997.

51. *Alabama.*— Howell *v.* Hair, 15 Ala. 194.

Mississippi.— Fears *v.* Sykes, 35 Miss. 633.

North Carolina.— Alexander *v.* Torrence, 51 N. C. 260.

Tennessee.—Waters *v.* Barton, 1 Coldw. 450.

United States.— Campbell *v.* Holt, 115 U. S. 620, 6 S. Ct. 209, 29 L. ed. 483; Townsend *v.* Jemison, 9 How. 407, 13 L. ed. 194; Nonce *v.* Richmond, etc., R. Co., 33 Fed. 429; Boyd *v.* Clark, 8 Fed. 849.

52. Negaubauer *v.* Great Northern R. Co., 92 Minn. 184, 99 N. W. 620, 104 Am. St. Rep. 674; Pittsburg, etc., R. Co. *v.* Hine, 25 Ohio St. 629; Southern Pac. Co. *v.* Dusablon, 48 Tex. Civ. App. 203, 106 S. W. 766; The Harrisburg, 119 U. S. 199, 7 S. Ct. 140, 30 L. ed. 358; International Nav. Co. *v.* Lindstrom, 123 Fed. 475, 60 C. C. A. 649; Boston, etc., R. Co. *v.* Hurd, 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193; Theroux *v.* Northern Pac. R. Co., 64 Fed. 84, 12 C. C. A. 52; Munos *v.* Southern Pac. Co., 51 Fed. 188, 2 C. C. A. 163; Boyd *v.* Clark, 8 Fed. 849. See DEATH, 13 Cyc. 340.

Rule stated.— "The reason upon which this line of decisions is based is that in the enforcement of a liability not existing at common law, and arising by virtue of a statute, the right, as well as the mere remedy, is involved, and that to the statute in question alone, as construed by the Courts of the State of its pas-

5. Measure of Redress. The measure of redress is determined by the *lex fori*,[53] unless the cause of action is founded upon a foreign statute which regulates the amount of the recovery, for when the cause of action did not exist at common law but is created by statute, a limitation upon the measure of recovery fixed by the *lex loci* is binding upon the forum.[54]

6. Procedure. Questions of procedure,[55] including the admissibility of evidence and the burden and method of proof,[56] are governed by the *lex fori*.

TORTURA LEGUM PESSIMA. A maxim meaning "The torture or wresting of laws is the worst kind of torture."[1]

TORTURE. Torments, judicially inflicted; pain by which guilt is punished or confession extorted; pain, anguish, pang;[2] extreme pain, anguish of body or mind; pang, agony, torment.[3] (Torture: As Element of Cruelty to Animals, see Animals, 2 Cyc. 342. In Killing as Element of Murder in First Degree Under

sage, can resort be had, either in the matter of the ascertainment of rights arising thereunder, or remedies provided thereby. The statute itself prescribes just what right it gives, and it can likewise provide the remedy for its enforcement, and the time within which it shall be operative." Brunswick Terminal Co. *v.* Baltimore Nat. Bank, 99 Fed. 635, 638, 40 C. C. A. 22, 48 L. R. A. 625, per Waddill, J.

53. Damages are governed by the *lex fori*. Dorr Cattle Co. *v.* Des Moines Nat. Bank, 127 Iowa 153, 98 N. W. 918, 102 N. W. 836; The Scotland, 105 U. S. 24, 26 L. ed. 1001. *Contra*, Pullman Palace Car Co. *v.* Lawrence, 74 Miss. 782, 22 So. 53.

54. Louisville, etc., R. Co. *v.* Graham, 98 Ky. 688, 34 S. W. 229, 17 Ky. L. Rep. 1229; Powell *v.* Great Northern R. Co., 102 Minn. 448, 113 N. W. 1017; Slater *v.* Mexican Nat. R. Co., 194 U. S. 120, 24 S. Ct. 581, 49 L. ed. 900; Northern Pac. R. Co. *v.* Babcock, 154 U. S. 190, 14 S. Ct. 978, 38 L. ed. 958. *Contra*, Higgins *v.* Central New England, etc., R. Co., 155 Mass. 176, 29 N. E. 534, 31 Am. St. Rep. 544; Wooden *v.* Western, etc., R. Co., 126 N. Y. 10, 26 N. E. 1050, 22 Am. St. Rep. 803, 13 L. R. A. 458. See Death, 13 Cyc. 380.

55. *Georgia.*— Atlanta, etc., Air-line R. Co. *v.* Tanner, 68 Ga. 384.

Iowa.— Dorr Cattle Co. *v.* Des Moines Nat. Bank, 127 Iowa 153, 98 N. W. 918, 102 N. W. 836.

Kentucky.— Louisville, etc., R. Co. *v.* Whitlow, 43 S. W. 711, 19 Ky. L. Rep. 1931, 41 L. R. A. 614.

Minnesota.— Herrick *v.* Minneapolis, etc., R. Co., 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771.

New Hampshire.— Henry *v.* Sargeant, 13 N. H. 321, 40 Am. Dec. 146, whether the action should be trespass or case is a matter relating to the remedy and is to be determined by the *lex fori*.

Pennsylvania.— Knight *v.* West Jersey R. Co., 108 Pa. St. 250, 56 Am. Rep. 200.

Wisconsin.— Eingartner *v.* Illinois Steel Co., 94 Wis. 70, 68 N. W. 664, 59 Am. St. Rep. 859, 34 L. R. A. 503.

United States.— Nonce *v.* Richmond, etc., R. Co., 33 Fed. 429.

England.— Machado *v.* Fontes, [1897] 2 Q. B. 231, 66 L. J. Q. B. 542, 76 L. T. Rep. N. S. 588, 45 Wkly. Rep. 565.

56. Southern R. Co. *v.* McNeeley, 44 Ind. App. 126, 88 N. E. 710, 714; Johnson *v.* Chicago, etc., R. Co., 91 Iowa 248, 59 N. W. 66.

Rule applied.— Plaintiff sought to recover in tort against a common carrier for loss of a steam engine which the latter had agreed to transport from Illinois to Massachusetts and which was destroyed at Chicago. The bill of lading contained a clause exempting defendant from liability. By Illinois law the mere receipt without objection of the bill of lading would not raise a presumption that its terms were assented to, but such assent must be shown by other evidence. By Massachusetts law the receipt of a bill of lading without dissent exempts the carrier, assent to the shipment being inferred. Suit was brought in Massachusetts. It was held that the question whether the shipper was bound by the receipt of such a contract without dissent was one of evidence, and was to be determined by Massachusetts law. "The nature and validity of the special contract set up is the same in both states. It is only a difference in the mode of proof. A presumption of fact in one state is held legally sufficient to prove assent, to the special contract relied on to support the defence. In the other state it is held not to be sufficient. It is as if proof of the contract depended upon the testimony of a witness competent in one place and incompetent in the other." Hoadley *v.* Northern Transp. Co., 115 Mass. 304, 307, 15 Am. Rep. 106.

1. Black L. Dict. [*citing* 4 Bacon Works 434].

2. Johnson Dict. [*quoted* in State *v.* Pugh, 15 Mo. 509, 511].

3. Webster Dict. [*quoted* in State *v.* Pugh, 15 Mo. 509, 511].

The term, in an act punishing cruelty to animals, does not *per se* include the mere fact of driving a sick, sore, lame, or disabled horse, and the driving of such a horse directly to its stable is not an offense, or driving it for exercise, or driving it carefully, in a manner proportioned to its condition, where it has become disabled, lame, or sick on the road. Stage Horse Cases, 15 Abb. Pr. N. S. (N. Y.) 51, 64.

Statutes, see HOMICIDE, 21 Cyc. 720. Sufficiency of Indictment Charging Killing by, see HOMICIDE, 21 Cyc. 856.)

TOTA IN CAUSA CADIT QUI CADIT A SYLLABA. A maxim meaning "He who fails in a syllable, fails in his whole cause." [4]

TOTAL. All; the whole.[5]

TOTAL LOSS. See FIRE INSURANCE, 19 Cyc. 833; MARINE INSURANCE, 26 Cyc. 685.

TOTA RATIO IN CONGENTIBUS ET LIBERIS, FACTI STAT IN VOLUNTATE FACIENTIS. A maxim meaning "In contingencies and on occasions where we are free to act, the reason of our doing depends on the will of the doer." [6]

TOTIDEM VERBIS. Literally "In so many words." [7]

TOTIES QUOTIES. Literally "As often as occasion shall arise." [8] (Toties Quoties: New Right of Action as Sums Become Due, see JOINDER AND SPLITTING OF ACTIONS, 23 Cyc. 444. Subscriptions to Railroad Stock by County, see COUNTIES, 11 Cyc. 520 note 71.)

TOTIUS NAVIS PROPRIETAS CARINÆ CAUSAM SEQUITUR. A maxim meaning "The proprietorship of the whole ship follows the ownership of the keel." [9]

TOTO TEMPORE QUI VITÆ SUÆ PRO LEGITIMO HABEBATUR, NON EST JUSTEM ALIQUEM AUTENATUM POST MORTEM FACERE BASTARDUM; QUI TOTO TEMPORE VITÆ SUÆ PRO LEGITIMO HABEBATUR. A maxim meaning "It is not just to make an elder-born a bastard after his death, who during his life was considered legitimate." [10]

TOTUM PRÆFERTUR UNICUIQUE PARTI. A maxim meaning "The whole is preferable to any single part." [11]

TOUCH. To affect; concern; relate to.[12] In reference to navigation, to come or attain to; to arrive at; to reach.[13]

TOUCH AND STAY. See MARINE INSURANCE, 26 Cyc. 633.

TOUT TEMPS PRIST ET ENCORE PRIST. The clause in a plea of tender meaning that the pleader has always since been ready to pay and still is.[14] (Tout Temps Prist: Plea of in Action to Recover — Damages For Detention of Dower, see DOWER, 14 Cyc. 970; Dower, see DOWER, 14 Cyc. 989.)

4. Morgan Leg. Max. [*citing* Bracton 211].

5. East Texas F. Ins. Co. *v.* Blum, 76 Tex. 653, 663, 13 S. W. 572.

"Total cost of the works" see New Zealand Bank *v.* Simpson, [1900] A. C. 182, 189, 69 L. J. P. C. 22, 82 L. T. Rep. N. S. 102, 16 T. L. R. 211, 48 Wkly Rep. 591.

"Total destruction" as used in fire insurance policy see Corbett *v.* Spring Garden Ins. Co., 155 N. Y. 389, 393, 50 N. E. 282, 41 L. R. A. 318.

"Total disability" see ACCIDENT INSURANCE, 1 Cyc. 269.

"Total estate" in will see Matter of Frankenheimer, 130 N. Y. App. Div. 454, 457, 114 N. Y. Suppl. 975 [*modifying* 60 Misc. 282, 285, 112 N. Y. Suppl. 259].

"Total inability to labor" in constitution and by-laws of relief association see Baltimore, etc., Relief Assoc. *v.* Post, 122 Pa. St. 579, 600, 15 Atl. 885, 9 Am. St. Rep. 147, 2 L. R. A. 44.

"Total or substantial destruction" in lease see Chase *v.* Fleming, 143 Iowa 452, 455, 121 N. W. 1055.

"Total production of coal" see Luhrig Coal Co. *v.* Jones, etc., Co., 141 Fed. 617, 625, 72 C. C. A. 311.

6. Morgan Leg. Max. [*citing* Riley Leg. Max.].

7. Black L. Dict. See also Kernodle *v.* Western Union Tel. Co., 141 N. C. 436, 445, 54 S. E. 423; Murtland *v.* English, 214 Pa. St. 325, 330, 63 Atl. 882, 112 Am. St. Rep. 747.

8. Black L. Dict.

9. Peloubet Leg. Max. [*citing* Dig. 6, 1, 61].

10. Morgan Leg. Max. [*citing* 12 Coke 44].

11. Bouvier L. Dict. [*citing* Ratcliff's Case, 3 Coke 37*a*, 41*a*, 76 Eng. Reprint 713].

12. Century Dict. See also, as illustrative of this sense of the term, American Strawboard Co. *v.* Haldeman Paper Co., 83 Fed. 619, 625, 27 C. C. A. 634.

"Touching," as used in a bill of exceptions, construed as "mentioning" see Gratz *v.* Gratz, 4 Rawle (Pa.) 411, 431.

"Touching patent rights" in statute relating to jurisdiction of federal courts see Marsh *v.* Nichols, 140 U. S. 344, 356, 11 S. Ct. 798, 35 L. ed. 413; St. Paul Plow Co. *v.* Starling, 127 U. S. 376, 378, 8 S. Ct. 1327, 32 L. ed. 251.

13. Worcester Dict. [*quoted* in *In re* Moncan, 14 Fed. 44, 46, 8 Sawy. 350, where it is said that the word and its derivatives is, in a sense, a nautical phrase].

"Plying" distinguished see San Francisco *v.* Talbot, 63 Cal. 485, 487. See also PLY, 31 Cyc. 892.

14. Towles *v.* Carpenter, 62 W. Va. 151, 152, 57 S. E. 365.

TOWAGE

By Edward C. Ellsbree*

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*Author of "Inspection," 22 Cyc. 1363; "Novation," 29 Cyc. 1129; "Obscenity," 29 Cyc. 1314; "Piracy," 30 Cyc. 1626; "Post-Office," 31 Cyc. 970; "Salvage," 35 Cyc. 716. Joint author of "Religious Societies," 24 Cyc. 1112; "Street Railroads," 36 Cyc. 1338.

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CROSS-REFERENCES

For Matters Relating to:
Collision of Tugs or Tows With Other Vessels, see COLLISION, 7 Cyc. 299.
Licensing Tugs as Regulation of Commerce, see COMMERCE, 7 Cyc. 466 note 98.
Pilots, see PILOTS, 30 Cyc. 1607.
Salvage, see SALVAGE, 35 Cyc. 716.
Towage as Salvage Service, see SALVAGE, 35 Cyc. 724.

I. DEFINITION AND NATURE.

Towage is defined to be the act of towing or drawing ships and vessels, usually by means of a smaller steamer called a tug.[1] A towage service may be described as the employment of one vessel to expedite the voyage of another, irrespective of any circumstances of peril,[2] and when nothing more is required than the accelerating her progress,[3] and is confined to vessels that have received no injury or

1. Bouvier L. Dict.
To tow means to drag a vessel forward in the water by means of a rope attached to another vessel, and implies that the act is done by those on board the latter. Ryan *v.* Hook, 34 Hun (N. Y.) 185, 191 [*citing* Webster Dict.; Falconer Marine Dict.]. The tug simply furnishes the means of traction to the tow, which must be steered or navigated by those on board of her. "Navigation" does not mean "towing." Ryan *v.* Hook, *supra*.

2. The Nettie Quill, 124 Fed. 667; McConnochie *v.* Kerr, 9 Fed. 50; The Emily B. Souder, 8 Fed. Cas. No. 4,458, 15 Blatchf. 185; The H. B. Foster, 11 Fed. Cas. No. 6,290, Abb. Adm. 222.
The ordinary contract of towage is one merely covering the furnishing of propelling power to move a boat or vessel from one place to another. The Fox, 15 Fed. 639, 4 Woods 199.

3. The Plymouth Rock, 9 Fed. 413; The Princess Alice, 6 Notes of Cas. 584, 3 W. Rob. 138.
Ordinary towage is service rendered in ex-

damage.[4] It is distinguished from salvage, which implies some degree of danger and some need of extraordinary assistance.[5]

II. STATUTORY REGULATIONS.

A. As to Lights. Steam vessels, when towing other vessels, are required by statute to carry two bright white mast-head lights vertically, in addition to their side-lights, so as to distinguish them from other steam vessels.[6] Sailing vessels in tow of a steamer are required to carry colored lights.[7]

B. As to Foreign Tugs Towing Vessels of the United States. Foreign tugs, towing vessels of the United States, are made liable to a penalty except where the towing is in whole or in part within or upon foreign waters.[8]

III. CONTRACTS.[9]

A. In General. An alleged contract for towage services must be proved before it can be enforced, or either party held liable for its breach.[10] The relation between the parties to such a contract will vary according to the terms thereof,[11] and the liability of each party to the other, as well as to third persons, may be very different in different cases.[12] The interpretation of such a contract, and what are the legal relations between the parties and the relative rights and obli-

pediting an undamaged ship on her voyage. The Kingalock, 1 Spinks 263, 26 Eng. L. & Eq. 506.

Extraordinary towage is service rendered in bringing a disabled ship to a place of safety. The Kingalock, 1 Spinks 263, 26 Eng. L. & Eq. 596.

4. The Cachemire, 38 Fed. 518; The Alaska, 23 Fed. 597; The Plymouth Rock, 9 Fed. 413; McConnochie *v.* Kerr, 9 Fed. 50; The Reward, 1 W. Rob. 174.

5. The Athenian, 3 Fed. 248; Baker *v.* Hemenway, 2 Fed. Cas. No. 770, 2 Lowell 501; The Kingalock, 1 Spinks 263, 26 Eng. L. & Eq. 596.

Towage and salvage.— If there is any intrinsic difference between towage and salvage, it would appear to be only that salvage service must always be that given in rescue or relief of property in imminent peril of loss or deterioration, while towage may be applied merely in aid of a vessel against adverse winds or tides, or in difficult passages, while she is in possession of her ordinary powers of locomotion. The H. B. Foster, 11 Fed. Cas. No. 6,290, Abb. Adm. 222. If the vessel towed was by this means aided in escaping from a present or prospective danger, the service will be regarded as one of salvage, and the towage as merely an incident. If, upon the other hand, the vessel thus assisted was not encompassed by any immediate or probable future peril, such service will be treated as one of towage merely, and compensated as such. The J. C. Pfluger, 109 Fed. 93.

Towage converted into salvage see SALVAGE, 35 Cyc. 725.

6. U. S. Rev. St. (1878) § 4233, rule 4 [U. S. Comp. St. (1901) p. 2894].

A steam tug towing a raft of logs is within this statute, although such raft may not come strictly within U. S. Rev. St. (1878) § 3 [U. S. Comp. St. (1901) p. 4], declaring that "the word 'vessel' includes every description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation on water." U. S. *v.* The Annie S. Cooper, 48 Fed. 703.

7. U. S. Rev. St. (1878) § 4233, rule 8 [U. S. Comp. St. (1901) p. 2895].

Barges that have neither sails nor masts are not "sail-vessels," within U. S. Rev. St. (1878) § 4233, rule 8 [U. S. Comp. St. (1901) p. 2895], requiring sail-vessels to carry colored lights; and, there being no direct statutory duty laid upon them to carry such lights when towed singly, the provision of section 4500 (p. 3060), imposing a penalty in such cases upon barges not having colored lights, as required by law, is of no effect. U. S. *v.* Miller, 26 Fed. 95.

8. U. S. Rev. St. (1878) § 4370 [U. S. Comp. St. (1901) p. 2983].

What constitute "foreign waters."— The waters of the straits of San Juan de Fuca, lying north of the dividing line between the United States and British Columbia, are "foreign waters" within the meaning of the statute. U. S. *v.* The Pilot, 50 Fed. 437, 1 C. C. A. 523 [*reversing* 48 Fed. 319]. And in such a case a British tug is not liable where the towing was done partly on the British side of the straits of San Juan de Fuca, even though it might have been done entirely on the American side, in the absence of any allegation that the British waters were entered collusively or for the purpose of evading the statute. Dunsmuir *v.* Bradshaw, 50 Fed. 440, 1 C. C. A. 525.

9. **Special contracts as affecting liability for loss or injury** see *infra*, V, B, 1, b.

Effect of towage contract as to general average see SHIPPING, 36 Cyc. 391.

10. The Battler *v.* The Savannah, 28 Fed. 927.

11. Sonsmith *v.* The J. P. Donaldson, 21 Fed. 671.

12. Sonsmith *v.* The J. P. Donaldson, 21 Fed. 671.

gations resulting therefrom, are questions of law for the court; and a submission thereof to a jury is error.[13]

B. Validity. If the master of the tug,[14] or the tow,[15] exceeds his authority in making or extending a towage contract, such contract is invalid, and imposes no liability upon either party, unless the other contracting party was ignorant of the master's want of authority.[16] Of course the owner of either vessel may, if he sees fit, ratify such an unauthorized contract.[17] A contract for towage, made by the owners of a vessel, is binding on the owners of the cargo, which, as bailees, the owners of the vessel have authority to represent in all matters necessary to its transportation.[18]

C. Termination. A contract for towage may be terminated by the completion of the service contracted for,[19] or by the act of the master and crew of the tow in rendering further service impossible or unavailing.[20] The contract for

13. Arctic F. Ins. Co. *v.* Austin, 69 N. Y. 470, 25 Am. Rep. 221. *Compare* Symonds *v.* Pain, 6 H. & N. 709, 30 L. J. Exch. 256.

Particular contracts construed see The Flottbek, 112 Fed. 682; The Ravenscourt, 103 Fed. 668; Jones *v.* The American Eagle, 54 Fed. 1010.

14. The Andrew J. White, 108 Fed. 685; The Battler *v.* The Savannah, 28 Fed. 927; The R. F. Cahill, 20 Fed. Cas. No. 11,735, 9 Ben. 352.

The master of a merchant steamer engaged in the transportation of merchandise has no authority to bind the ship by entering into a contract to tow another vessel on a long ocean voyage; and for breach of such a contract, when made and entered upon, he alone is liable. Kimball *v.* The Dispatch, 14 Fed. Cas. No. 7,773. And see Walsh *v.* The Carl Haasted, 28 Fed. Cas. No. 17,113, 3 N. J. L. J. 18. Nor can a ship's husband delegate his powers to the master; and if the latter, in his own name, enters into a contract of towage which is beyond his authority, the fact that the ship's husband assumed to authorize him to do so does not validate the contract so as to make it bind the ship. Kimball *v.* The Dispatch, 14 Fed. Cas. No. 7,773.

Where one obtained possession of boats without the owner's consent or authority, and afterward, in his own name, entered into contracts of towage in regard to such boats, which contracts he subsequently violated, it was held that mere possession, without right, is not even apparent legal authority, and one who deals with the wrong-doer in possession does so at his peril, and no lien against the boats was created by such breach of contract. Foster *v.* The C. E. Conrad, 57 Fed. 256.

15. Botsford *v.* Plummer, 67 Mich. 264, 34 N. W. 569 (where the master of a barge laden with lumber, and lying water-logged at her point of lading, contracted with the captain of a tug for towage to the point of destination, a distance of two hundred and seventy-five miles, at a rate nearly eight times as much as the usual one); The Clan MacLeod, 38 Fed. 447; The Eugene Vesta, 28 Fed. 762; The Charles Allen, 23 Fed. 407; The Martha, Lush. 314.

The master of a boat, after being notified that he is superseded by another, cannot make any contract for its towage, or release from dangers of navigation a tug whose master is notified of his want of authority. The James A. Wright, 13 Fed. Cas. No. 7,190, 3 Ben. 248 [*affirming* 13 Fed. Cas. No. 7,191, 10 Blatchf. 160].

16. The Oceanica, 144 Fed. 301 [*reversed* on other grounds in 170 Fed. 893].

Past towage.— The master of a vessel has authority to enter into a reasonable agreement to pay for past towage. The Wellfield *v.* Adamson, 5 Aspin. 214, 50 L. T. Rep. N. S. 511.

17. Botsford *v.* Plummer, 77 Mich. 31, 43 N. W. 766.

18. The Oceanica, 170 Fed. 893, 96 C. C. A. 69.

19. See the cases cited *infra*, this note.

Illustrations.— A tug employed to tow a schooner from imminent danger of fire took her to an apparently safe berth, and there left her, with the acquiescence of her master, agreeing to return in case of danger, if not otherwise engaged. The fire spreading, the schooner was lost, although the tug returned and used reasonable but unsuccessful effort to rescue her. It was held that the towage contract ended when the schooner was left at her berth, and that the promise to return, being without consideration, no liability attached to the tug for failing to make the rescue. Bothwell *v.* Vessel Owners' Towing Assoc., 3 Fed. Cas. No. 1,687. The master of a ship, desiring to put her aground, entered into a contract with libellant to tow her ashore. When the ship in tow reached a suitable place, her port anchor was let go, and the tug ordered to go astern and draw the stern of the ship to the shore, so that she could be secured in that position, while another of libellant's tugs carried out a kedge-anchor. It was held that the contract of towage did not end when the port anchor was cast, but when the ship was placed in the proper position to be put aground. Wilmington Transp. Co. *v.* The Old Kensington, 39 Fed. 496.

20. See the cases cited *infra*, this note.

Illustrations.— The master of a schooner knowingly engaged a tug of inferior power to tow him to sea from Charleston harbor. In passing down the Swash channel, the schooner being under sail, with a breeze sufficient to take her to sea without the aid of steam power, she negligently ran aground on

towage may also be terminated by subsequent circumstances which elevate the service into salvage.[21]

D. Liability For Breach of Contract. A tug which enters into an agreement to tow a vessel is bound to fulfil such agreement unless prevented by causes to which negligence on her part does not contribute;[22] and for a breach thereof the tug or its owner is liable in damages.[23] If the contract has been partly executed, a suit *in rem* may be maintained to recover damages for its breach;[24] but while the contract remains executory, an action *in rem* does not lie.[25] In such case admiralty will take jurisdiction by a suit *in personam* against the owners.[26]

E. Measure of Damages. The damages recoverable for breach of a towage contract are either such as may fairly and reasonably be considered as arising naturally — that is, according to the usual course of things — from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.[27] If a contract is made under special circumstances,

the north side of the channel, and thereafter negligently lowered her mainsail, making it impossible for the tug to get her off. It was held that the tug did not contribute to the accident, and was not liable for any further service under the contract of towage. Wilson *v.* Charleston Pilots' Assoc., 57 Fed. 227. The master and crew of a coal barge in tow in the Gulf of Mexico gave a distress signal, and lowered a boat, whereupon the master of the tug cut the tow line to rescue the crew The men, on being picked up, stated that the barge was in a sinking condition, and refused to return to her, and the tug, after staying by for an hour or two, but making no effort to save the barge, finally abandoned her. The wind was blowing thirty miles an hour, with a high sea. The crew of the barge consisted of a master, engineer, and three men, and she was provided with engine, boiler, pumps, sails, and anchors, but no motive power. It was held that the quitting of the barge by her master and crew, without the intention of returning, severed the legal relation created by the contract of towage between her and the tug. The W. J. Keyser, 56 Fed. 731, 6 C. C. A. 101.

21. Vanderslice *v.* Newton, 4 N. Y. 130; The Kingalock, 1 Spinks 263, 26 Eng. L. & Eq. 596.

A towage contract should not easily be set aside, and a salvage service substituted for it. The Maréchal Suchet, [1911] P. 1, 26 T. L. R. 660.

22. Wooden *v.* Austin, 51 Barb. (N. Y.) 9; Leo *v.* Cornell Steamboat Co., 85 N. Y. Suppl. 1073.

The physical possibility of completing the contract does not impose on the tug an obligation to do so, provided the danger of the navigation is such as a prudent man would not willingly encounter. Vanderslice *v.* Newton, 4 N. Y. 130.

The freezing of a river is such an act of God as excuses performance of a contract to tow a vessel thereon; and it makes no difference that the party making such contract had reason to apprehend at the time of making it that such an obstruction of navigation would occur before he could perform it. Worth *v.* Edmonds, 52 Barb. (N. Y.) 40.

23. Randerson *v.* Ball, 112 Fed. 1022, 50 C. C. A. 676, holding, however, that there was no implied agreement that the tug should be always in readiness, or always able to work, which would render her liable for damages resulting to respondent because of her failure to be in attendance at all times. And see the cases cited *infra*, this section.

Deviation from course.— A slight deviation from the direct course is not a breach of a contract for towage between two certain points where nothing was said about going direct. The Mary R. McKillop, 23 Fed. 829.

Where the time for commencing the towage service is specified in the contract, and such agreement is broken by the tug, the latter is liable for the damages resulting from causes which would not have arisen had the agreement been performed. Parmalee *v.* Wilks, 22 Barb. (N. Y.) 539.

24. The Somers N. Smith, 159 Fed. 1016; The James McMahon, 13 Fed. Cas. No. 7,197, 10 Ben. 103.

Contract to tow during entire season.— A tug which, after agreeing to tow a vessel during an entire season, abandons her before the end thereof, is liable *in rem* for breach of the contract, and such liability is a matter of admiralty jurisdiction. The Oscoda, 66 Fed. 347; Foster *v.* The G. L. Rosenthal, 57 Fed. 254.

25. The Somers N. Smith, 159 Fed. 1016; The Francesco, 116 Fed. 83; The James McMahon, 13 Fed. Cas. No. 7,197, 10 Ben. 103.

26. Boutin *v.* Rudd, 82 Fed. 685, 27 C. C. A. 526.

27. Parmalee *v.* Wilks, 22 Barb. (N. Y.) 539; Boutin *v.* Rudd, 82 Fed. 685, 27 C. C. A. 526.

In case of a breach of contract by the tow the rule for the measure of damages is the contract price, less the expense necessary to complete the contract. The Vincenz Pinotti, 16 Fed. 926, holding that where the master of the vessel to be towed refuses to state what he paid to other towboats for the same labor, the court will award the contract price as damages.

In case of a breach by a tug of a contract to tow coal barges from one city to another,

communicated to both parties, the damages recoverable for a breach are not only those arising naturally, according to the usual course of things, but also those which would ordinarily follow from a breach under the special circumstances so known and communicated.[28] It is otherwise, however, if the special circumstances are unknown to the party breaking the contract.[29] But a claim for damages against a tug for breach of a towage contract can only be sustained by proof of actual damage resulting.[30]

IV. COMPENSATION.[31]

A. Right to Compensation and Amount Thereof. Towage may occur in the ordinary course of navigation, or may be a means of salvage;[32] and whether it is to be paid for according to a *quantum meruit*, at an agreed price, by wages, or by a salvage compensation must depend upon the circumstances under which it is performed.[33] In a case of simple towage, where no price is agreed upon, only a reasonable compensation is allowed as upon a *quantum meruit*.[34] If a valid and binding contract is made,[35] and the price agreed upon is fair and reason-

where another tug cannot be procured, the measure of damages is the difference between the value of the barges and coal at the two cities. McGovern *v.* Lewis, 56 Pa. St. 231, 94 Am. Dec. 60.

As limited by pleadings.—Where the declaration charges that the injury sustained is the result of the total neglect and refusal of defendant to perform his contract, the damages are limited to such as naturally result from such total neglect and refusal to perform the contract, and they cannot be inflamed by evidence of a negligent performance. Pennsylvania, etc., Steam Nav. Co. *v.* Dandridge, 8 Gill & J. (Md.) 248, 29 Am. Dec. 543.

28. Boutin *v.* Rudd, 82 Fed. 685, 27 C. C. A. 526, holding that a tug owner, who failed for several days to fulfil his contract to go and tow in a small schooner which had broken from her moorings in a gale, and had been found and placed, in a leaky condition, in an unsafe place, was liable for the loss of the schooner, which was driven upon the rocks by a subsequent storm, it appearing that the fact of her danger and her leaky condition was communicated to him at the time of the contract.

29. Boutin *v.* Rudd, 82 Fed. 685, 27 C. C. A. 526.

30. Ball *v.* Randerson, 111 Fed. 212 [*affirmed* in 112 Fed. 1022, 50 C. C. A. 676]; The Oscoda, 70 Fed. 110.

31. **Towage charges as subject to general average** see SHIPPING, 36 Cyc. 391.

32. See SALVAGE, 35 Cyc. 724.

33. Hennessey *v.* The Versailles, 11 Fed. Cas. No. 6,365, 1 Curt. 353.

34. The J. C. Pfluger, 109 Fed. 93; Atlantic Coast Steamboat Co. *v.* The Golden Gate, 57 Fed. 661; The Egypt, 17 Fed. 359; The Emily B. Souder, 8 Fed. Cas. No. 4,458, 15 Blatchf. 185; The Stratton Audley, 23 Fed. Cas. No. 13,529, 3 Ben. 241; Sturgis *v.* The Vickery, 23 Fed. Cas. No. 13,577*a*.

Evidence on question of reasonable value.—On a question of *quantum meruit* for the services of a tugboat, it is not improper to allow plaintiffs suing therefor to prove, as one of the running expenses, the amount and value of coal required for a trip, or to allow them to ask their witness whether the boat could "earn a livelihood" at prices less than were charged. Syson *v.* Hieronymus, 127 Ala. 482, 28 So. 967. But it is proper to refuse to allow witnesses to state whether they would have done the work at prices less than those charged. Syson *v.* Hieronymus, *supra*. So inquiries as to prices customary to be charged should be limited to a general custom. Syson *v.* Hieronymus, *supra*. Under an agreement to tow as reasonable as other tugs will do the same work, recovery is measured by the reasonable value of the work done, and not by what other tugs might have been gotten to do the work for. Syson *v.* Hieronymus, *supra*.

If the service rendered is extraordinary, although not amounting to salvage, something more than the ordinary charges for towing will be allowed. The Emily B. Souder, 8 Fed. Cas. No. 4,458, 15 Blatchf. 185. In determining the compensation under such circumstances, the value of the towing vessel and cargo, the risk incurred, the fact that the vessel was not intended or adapted for towage service, the chance of endangering the towing vessel's insurance, the time spent in, and the danger incurred by, lying by the vessel towed before the towing could commence, and the time spent in deviating from her course, may be considered, although the service rendered does not amount to a salvage service. The Viola, 52 Fed. 172 [*affirmed* in 55 Fed. 829, 5 C. C. A. 283]. And see The J. C. Pfluger, 109 Fed. 93. But the value of the property towed is but slightly considered in determining the compensation to be awarded. The Egypt, 17 Fed. 359.

35. The Wellfield *v.* Adamson, 5 Aspin. 214, 50 L. T. Rep. N. S. 511.

A contract made under a mutual mistake of fact is void *ab initio*. The Salvador, 26 T. L. R. 149.

If facts are suppressed by the master of the tow, which, if known to the tug master, would have materially increased the price asked for the service, the contract is not a binding one, and will be treated as void. The Kingalock, 1 Spinks 263, 26 Eng. L. & Eq.

able,[36] the tug owners are entitled to recover such price, provided the service contracted for is actually rendered;[37] but no subsequent circumstances will entitle the tug to recover more than the contract price,[38] unless thereby the towage service is elevated to a salvage service.[39] In any case the recovery for towage is subject to a counter-claim for damage to the tow caused by the negligence of the tug.[40]

B. Payment. The parties to a towage contract may make any stipulation

596; Dunsmuir *v.* The Ship Harold, 4 Can. Exch. 222.

Charge based on tonnage.—Under an agreement for towage in accordance with a schedule of rates based upon the tonnage of the vessel, the amount of the charge is to be determined by the actual tonnage, as to which the statement of the Lloyd's register, while no doubt generally correct, is not conclusive. The Quevilly, 98 Fed. 635, 39 C. C. A. 196 [*affirming* 95 Fed. 182].

36. See the cases cited *infra*, this note.

If the price agreed upon is exorbitant, the court will not enforce it. The Sophia Hanson, 16 Fed. 144; Boggs *v.* The Loutra, 3 Fed. Cas. No. 1,601. But an agreement fixing the price to be paid for towing a vessel into port will not be set aside as exorbitant, although the price is considerably in excess of customary towage rates, where, owing to the perilous situation of the tow, and the fact that there was no other tug in the vicinity which could have rendered assistance, the service was in the nature of a salvage. The Atkins Hughes, 114 Fed. 410.

37. The Algitha, 17 Fed. 551.

Complete performance rendered impossible.—A contract to tow a vessel for a fixed sum from one place to another, the complete performance of which becomes impossible through no fault of either party, is an indivisible contract; and the owners of a tug rendering towage services under such a contract are not entitled to be paid *pro rata*, or any sum, for the towage actually performed. The Madras, [1898] P. 90, 8 Aspin. 397, 67 L. J. P. D. & Adm. 53, 78 L. T. Rep. N. S. 325; The Salvador, 25 T. L. R. 384, 727, 26 T. L. R. 149. *Compare* McCormick *v.* Jarrett, 37 Fed. 380, where it is intimated that the reasonable value of the towage to the point where the service terminated may be recovered. Where, during the towage service, the tow is sunk by a third vessel, the tug owners have no right of action against such vessel to recover damages for loss of the towage remuneration. Société Anonyme, etc., *v.* Bennetts, 27 T. L. R. 77.

Waiver of breach.—Where a tug is accidentally disabled during the performance of a towage service, the master of the tow may terminate the contract and employ other tugs, but if, on the contrary, he lies by, and again avails himself of the tug's services, after repairs have been made, he waives the breach of contract, and the tug owners are entitled to recover the contract price for the services rendered. The Lady Flora Hastings, 6 Notes of Cas. 550, 3 W. Rob. 118.

Temporary discontinuance of towage.—Where in the course of towage the tug is obliged to cast off, and then returns and completes the towage, the tug owners are entitled to be paid the price agreed upon in the towage contract if the owners of the tow do not prove any damage to have been occasioned to them by the temporary discontinuance of the towage. The Undaunted, 11 P. D. 46, 5 Aspin. 580, 55 L. J. P. D. & Adm. 24, 54 L. T. Rep. N. S. 542, 34 Wkly. Rep. 686. If the owner of the tow does not permit the tug to resume the service, he is liable for the price agreed upon as if the contract had been completely executed. Jewell *v.* Connolly, 11 Quebec Super. Ct. 265.

38. The Kingalock, 1 Spinks 263, 26 Eng. L. & Eq. 596. For example, where the owner of a steamer, on being asked his charge for towing a dredge and two barges between two points on the Ohio river, answered that he was paid one hundred and fifty dollars by another company for a similar service, and was thereupon engaged, there was an implied contract for that sum, and he could not afterward charge by the day for the service, because of delay on account of low water. The Enterprise, 181 Fed. 746.

39. The Kingalock, 1 Spinks 263, 26 Eng. L. & Eq. 596.

40. American Towing, etc., Co. *v.* Baker-Whiteley Coal Co., 111 Md. 504, 75 Atl. 341.

The hirer of a tug is entitled to an allowance for delay caused by the tug's running aground because of an error in navigation. Lynch *v.* Chew, 159 Fed. 182.

Evidence held sufficient to show negligence on part of tug see Keller *v.* Gray, 3 Cal. App. 219, 84 Pac. 847.

Evidence held insufficient to show negligence on part of tug see Neall *v.* P. Dougherty Co., 168 Fed. 415 [*affirmed* in 180 Fed. 394, 103 C. C. A. 540].

Admissibility of evidence.—In an action for towing scows, where defendant claimed that they were lost through plaintiff's negligence, evidence that plaintiff's secretary admitted that the hawser was an improper one and that the loss was due to its use is inadmissible, being only an expression of opinion, the secretary not being shown to be an expert in hawsers. American Towing, etc., Co. *v.* Baker-Whiteley Coal Co., 111 Md. 504, 75 Atl. 341. But one who has been a seafaring man for forty years and a captain for thirty years, and who has had experience in towing all over the world, is competent to testify as an expert as to the sufficiency of a towing hawser. American Towing, etc., Co. *v.* Baker-Whiteley Coal Co., *supra*. Where the only question is whether there has been a ratification of an unauthorized towage contract, evidence that the voyage was injurious to the tow is irrelevant. Botsford *v.* Plummer, 77 Mich. 31, 43 N. W. 766.

they see fit as to time and mode of payment of compensation.[41] If they do not stipulate in this regard, the ordinary rule that payment for services is not due until after the services are rendered will prevail,[42] in the absence of a custom of the port fixing the time of payment.[43]

C. Lien [44] **— 1. In General.** For towage services rendered in the exigencies of navigation there is at least a presumptive lien upon the boat.[45] Whether such presumption arises, or whether the lien exists, depends on the circumstances under which the services are rendered.[46] If it appears that the services were not to be rendered on the credit of the vessel,[47] or that the circumstances or dealings were such as to apprise the tower of that fact,[48] the presumptive lien cannot be upheld. Moreover towage service must be actually rendered in order to carry a lien; an executory contract to perform such service is not sufficient.[49] Nor does the lien attach for a supposed credit given to a vessel unless the service is clearly shown to have been rendered or furnished to the particular vessel to which the credit was given.[50] Such a lien does not oust or supplant the common-law lien

41. The Queen of the East, 12 Fed. 165.

42. Crawford *v.* Collins, 45 Barb. (N. Y.) 269; The Queen of the East, 12 Fed. 165.

43. **In the port of New Orleans** there is a well defined rule or usage that in contracts for round towage the whole towage is payable before the vessel leaves port. The Queen of the East, 12 Fed. 165.

44. **Lien for breach of contract** see *supra*, III, D.

Maritime liens in general see MARITIME LIENS, 26 Cyc. 743.

Assignability of lien see MARITIME LIENS, 26 Cyc. 801.

Loss of lien see MARITIME LIENS, 26 Cyc. 791.

Priorities between towage liens and other liens see MARITIME LIENS, 26 Cyc. 806 note 49.

45. The Tillie A., 84 Fed. 684; Harris *v.* The Elm Park, 50 Fed. 126; The Alabama, 22 Fed. 449; The Queen of the East, 12 Fed. 165; The John Cuttrell, 9 Fed. 777; The Acadia, 1 Fed. Cas. No. 24, Brown Adm. 73; Ward *v.* The Banner, 29 Fed. Cas. No. 17,149; The W. J. Walsh, 30 Fed. Cas. No. 17,922, 5 Ben. 72; Learmouth *v.* The Yuba, 14 Quebec 132. *Contra*, Westrup *v.* Great Yarmouth Steam Carrying Co., 43 Ch. D. 241, 6 Aspin. 443, 59 L. J. Ch. 111, 61 L. T. Rep. N. S. 714, 38 Wkly. Rep. 505.

Services in home port.—A maritime lien attaches for towage services under a contract made in the home port. The Mystic, 30 Fed. 73; The General Cass, 10 Fed. Cas. No. 5,307, Brown Adm. 334. But see Dalzell *v.* The Daniel Kaine, 31 Fed. 746.

46. The Alligator, 161 Fed. 37, 88 C. C. A. 201 [*affirming* 153 Fed. 216].

Burden of proof.— It is for the claimant to prove a personal credit only, or to show circumstances that negative a credit of the vessel. The Erastina, 50 Fed. 126.

Contract made with owner.— No lien for towage furnished a vessel is presumed to arise on a contract made with the owner, and proof is required that the minds of the parties met on a common understanding that such a lien should be created. The Saratoga, 100 Fed. 480. And the rule is not different, where the person contracted with is known to be a partner in the firm which owns the vessel, because he is also acting in the capacity of master, it being within the power of the person furnishing the services to require an agreement for a lien if he intends to rely upon the credit of the vessel. The Saratoga, *supra*. Nor is it sufficient that the party who furnished the towage gave credit, so far as his own intentions were concerned, to the vessel, or would not have furnished them except on the belief that he was acquiring a lien for them. The Columbus, 67 Fed. 553, 14 C. C. A. 522 [*affirming* 65 Fed. 430].

Special and unusual towage.—Where special and unusual towage services, such as conveying the scows of a dredging plant back and forth from the dredges to the dumping place, and moving the dredges from time to time, are rendered pursuant to a contract, any intention to create a lien for the services should be clearly expressed. The Columbus, 67 Fed. 553, 14 C. C. A. 522 [*affirming* 65 Fed. 430].

47. The Alligator, 161 Fed. 37, 88 C. C. A. 201 [*affirming* 153 Fed. 216]; The Saratoga, 100 Fed. 480; The Tillie A., 84 Fed. 684; Knickerbocker Steam Towage Co. *v.* The Sarah Cullen, 49 Fed. 166, 1 C. C. A. 218 [*affirming* 45 Fed. 511]; The J. M. Welsh, 13 Fed. Cas. No. 7,327, 8 Ben. 211.

Evidence held to show towage done on credit of vessel see The Newport, 114 Fed. 713, 52 C. C. A. 415 [*reversing* 107 Fed. 744]; Rogers *v.* A Scow Without a Name, 80 Fed. 736.

48. The Tillie A., 84 Fed. 684.

Knowledge that the boat was chartered, and the necessary implication in such a business as this, that the charterer and not the owner should pay for towage, are sufficient to prevent the creation of a lien (The Mary A. Tryon, 93 Fed. 220; Cornell Steamboat Co. *v.* The Tillie A., 84 Fed. 684), although on the furnisher's books the charge is entered against the vessel "and owners" (McCaldin *v.* The Stroma, 53 Fed. 281, 3 C. C. A. 530 [*affirming* 41 Fed. 599]).

49. The Prince Leopold, 9 Fed. 333, 4 Woods 48.

50. The Alligator, 161 Fed. 37, 88 C. C. A. 201 [*affirming* 153 Fed. 216].

dependent on possession.[51] Statutory liens for towage are given in some states.[52]

2. Property Subject to Lien.[53] The lien attaches to the vessel [54] and freight, or to the vessel, freight, and cargo, as necessity in each particular case may require.[55]

D. Recovery — 1. In General. Towage compensation may be recovered, as a general rule, by an action *in personam*.[56] If a lien exists upon the vessel towed, whether given by the general rules of the maritime law,[57] or by a local statute,[58] it is enforceable in an admiralty proceeding *in rem* by the owner of the vessel rendering the service [59] or by his assignee.[60] A common-law lien for such services may be enforced by a bill in equity in a state court.[61]

2. Costs. In an action in admiralty to recover towage compensation, costs ordinarily follow the decree, unless the court, in the exercise of a sound discretion, perceives reasons for withholding them.[62]

E. Who Entitled to Towage Award. The master and crew of the tug

51. Knapp, etc., Co. *v.* McCaffrey, 177 U. S. 638, 20 S. Ct 824, 44 L. ed. 921 [*affirming* 178 Ill. 107, 52 N. E. 898, 69 Am. St. Rep. 290], holding that one towing a raft of lumber for another has a common-law bailee's lien on the lumber for his services while it is in his possession.

52. See the statutes of the several states; and the cases cited *infra*, this note.

N. Y. Laws (1862), c. 482, includes, among other items for which a vessel may be seized, that of towing. Nelson *v.* Yates, 37 Hun 52 (holding that the expense of raising a sunken canal-boat cannot be included with the expense of towing, for which the statute gives a lien); Crawford *v.* Collins, 45 Barb. 269. This statute is applicable to canal-boats navigating the canals of the state, and in that respect is an enlargement of the provisions of the Revised Statutes which are repealed by it. Nelson *v.* Yates, *supra*; Crawford *v.* Collins, 45 Barb. 269. It is designed to accomplish in the state, to a limited extent, that which has been the maritime law of the civilized world from a very early period, arising out of the necessities of international commerce. Nelson *v.* Yates, *supra*. The statute requires that to constitute a lien, a specification of the same shall be sworn to by the person having the same, his legal representatives, agents, or assigns. Crawford *v.* Collins, *supra*. This specification of lien is required to be filed in the office of the clerk of the county in which the debt shall have been contracted. Crawford *v.* Collins, *supra*. A general agent of a towing company has authority to sign and verify the specification in behalf of his principals, it being an act in the business of his agency; and such signing and verification is the act of his principals. Crawford *v.* Collins, *supra*.

The Pennsylvania act of April 20, 1858, does not give a lien for towing service at the home port. Dalzell *v.* The Daniel Kaine, 31 Fed. 746.

53. See, generally, Maritime Liens, 26 Cyc. 753 *et seq.*

54. What constitutes vessel see Maritime Liens, 26 Cyc. 754 *et seq.*

55. *In re* Alaska Fishing, etc., Co., 167 Fed. 875.

If the master of the towed vessel has no power to bind the cargo the owner of the tug must look to the vessel alone for his compensation. The Eugene Vesta, 28 Fed. 762.

56. Mack Steamship Co. *v.* Thompson, 176 Fed. 499, 100 C. C. A. 57.

57. Mack Steamship Co. *v.* Thompson, 176 Fed. 499, 100 C. C. A. 57; The John Cuttrell, 9 Fed. 777; Kearney *v.* A Pile-Driver, 3 Fed. 246; The W. J. Walsh, 30 Fed. Cas. No. 17,922, 5 Ben. 72.

58. Mack Steamship Co. *v.* Thompson, 176 Fed. 499, 100 C. C. A. 57.

The admiralty court will recognize and enforce by its own procedure a lien given by a local statute for the security of the claim where the provision of the local law does not antagonize or derogate from the principles of the maritime law. Mack Steamship Co. *v.* Thompson, 176 Fed. 499, 100 C. C. A. 57.

59. The John Cuttrell, 9 Fed. 777; Kearney *v.* A Pile-Driver, 3 Fed. 246, although the contract was made with the father of the libellant as the ostensible owner of the vessel.

60. The Emma L. Coyne, 8 Fed. Cas. No. 4,466. See, generally, Maritime Liens, 26 Cyc. 801.

A mortgagee in possession has a right to file a libel *in rem* for earnings from towage. Kearney *v.* A Pile-Driver, 3 Fed. 246.

61. Knapp, etc., Co. *v.* McCaffrey, 177 U. S. 638, 20 S. Ct. 824, 44 L. ed. 921 [*affirming* 178 Ill. 107, 52 N. E. 898, 69 Am. St. Rep. 290].

62. See, generally, Admiralty, 1 Cyc. 908 *et seq.*

Where a sufficient sum is offered and declined, the claimants are entitled to costs. The Raven, 27 Fed. 470; Hine *v.* The Thomas J. Scully, 6 Can. Exch. 318.

Where the suit is to recover compensation and damages, the latter claim only being controverted, the claimants are entitled to costs where it appears that they were at all times willing to pay the contract price, although no formal tender was made. The Sebastian Bach, 12 Fed. 172.

Where the respondents have been restrained from paying the sum due for towage by order of a state court, they are not liable

are not entitled to share in the amount awarded for towage, but it belongs to the owner of the tug.[63]

V. RELATION BETWEEN TUG AND TOW.

A. In General — 1. Reciprocal Duties and Liabilities. In every contract of towage there is implied an engagement that each party, their agents and servants, will perform his duty in completing the contract;[64] that proper skill and diligence will be used on board both the vessel towed and the tug;[65] and that neither, by negligence or by mismanagement, will unnecessarily imperil the other, or increase any risk incidental to the service undertaken.[66] If in the course of the performance of this contract any inevitable accident happens to the one without any default on the part of the other, no cause of action will arise.[67] If, on the other hand, the wrongful act of either occasions any damage to the other, such wrongful act will create a responsibility on the party committing it, if the sufferer has not by any misconduct or unskilfulness on his part contributed to the accident.[68]

2. Duties and Liabilities of Tug to Tow. A tug is neither a common carrier [69]

in costs for the non-payment thereof. Kearney *v.* A Pile-Driver, 3 Fed. 246.

63. The J. C. Pfluger, 109 Fed. 93; McConnochie *v.* Kerr, 9 Fed. 50; Hine *v.* The Thomas J. Scully, 6 Can. Exch. 318.

64. The Inca, 148 Fed. 363, 78 C. C. A. 273; The W. J. Keyser, 56 Fed. 731, 6 C. C. A. 101; The Julia, Lush. 224, 14 Moore P. C. 210, 15 Eng. Reprint 284; Read *v.* The Tug Lillie, 11 Can. Exch. 274.

65. The W. J. Keyser, 56 Fed. 731, 6 C. C. A. 101; The Julia, Lush. 224; Read *v.* The Tug Lillie, 11 Can. Exch. 274. Those on board a tow are entitled to assume that the tug will be navigated with ordinary care and caution so that the tow will not be put in a position of danger. The W. H. No. 1, [1910] P. 199, 79 L. J. P. D. & Adm. 61, 102 L. T. Rep. N. S. 643.

66. The W. J. Keyser, 56 Fed. 731, 6 C. C. A. 101; The Julia, Lush. 224, 14 Moore P. C. 210, 15 Eng. Reprint 284; Read *v.* The Tug Lillie, 11 Can. Exch. 274.

67. The Maréchal Suchet, [1911] P. 1, 26 T. L. R. 660; The Julia, Lush. 224, 14 Moore P. C. 210, 15 Eng. Reprint 284; Read *v.* The Tug Lillie, 11 Can. Exch. 274. And see *infra*, V, A, 2.

Such an accident is one of the necessary risks of the engagement to which each party is subject, and can create no liability on the part of the other. The Julia, Lush. 224, 14 Moore P. C. 210, 15 Eng. Reprint 284.

68. The Julia, Lush. 224, 14 Moore P. C. 210, 15 Eng. Reprint 284, opinion by Lord Kingsdown in the Privy Council.

69. *Illinois.*— Knapp *v.* McCaffrey, 178 Ill. 107, 52 N. E. 898, 69 Am. St. Rep. 290 [*affirmed* in 177 U. S. 638, 20 S. Ct. 824, 44 L. ed. 921].

Kentucky.—Varble *v.* Bigley, 14 Bush 698, 29 Am. Rep. 435.

Maine.— Berry *v.* Ross, 94 Me. 270, 47 Atl. 512.

Maryland.—Pennsylvania, etc., Steam Nav. Co. *v.* Dandridge, 8 Gill & J. 248, 29 Am. Dec. 543.

New York.—Milton *v.* Hudson River Steam-Boat Co., 37 N. Y. 210; Wells *v.* Steam Nav. Co., 2 N. Y. 204, Seld. 132; Emiliusen *v.* Pennsylvania R. Co., 30 N. Y. App. Div. 203, 51 N. Y. Suppl. 606; Arctic F. Ins. Co. *v.* Austin, 54 Barb. 559; Wooden *v.* Austin, 51 Barb. 9; Merrick *v.* Brainard, 38 Barb. 574 [*affirmed* in 34 N. Y. 208]; Parmalee *v.* Wilks, 22 Barb. 539; Tilley *v.* Beverwyck Towing Co., 29 Misc. 581, 61 N. Y. Suppl. 495; Alexander *v.* Greene, 3 Hill 9; Caton *v.* Rumney, 13 Wend. 387.

Pennsylvania.— Brown *v.* Clegg, 63 Pa. St. 51, 3 Am. Rep. 522; Hays *v.* Paul, 51 Pa. St. 134, 88 Am. Dec. 569; Leonard *v.* Hendrickson, 18 Pa. St. 40, 55 Am. Dec. 587; Leech *v.* The Steamboat Miner, 1 Phila. 144; Taylor *v.* Campbell, 1 Pittsb. 459.

United States.— The J. P. Donaldson, 167 U. S. 599, 17 S. Ct. 951, 42 L. ed. 292; The L. P. Dayton, 120 U. S. 337, 7 S. Ct. 568, 30 L. ed. 669; Eastern Transp. Line *v.* Hope, 95 U. S. 297, 24 L. ed. 477; The Margaret *v.* Bliss, 94 U. S. 494, 24 L. ed. 146; The William H. Webb *v.* Barling, 14 Wall. 406, 20 L. ed. 774; The Syracuse *v.* Langley, 12 Wall. 167, 20 L. ed. 382; The New Philadelphia, 1 Black 62, 17 L. ed. 84; The Leader, 181 Fed. 743; J. T. Morgan Lumber Co. *v.* West Kentucky Coal Co., 181 Fed. 271; The El Rio, 162 Fed. 567; The Britannia, 148 Fed. 495; The Kalkaska, 107 Fed. 959, 47 C. C. A. 100; The Lady Wimett, 92 Fed. 399; The W. H. Simpson, 80 Fed. 153, 25 C. C. A. 318; Munks *v.* Jackson, 66 Fed. 571, 13 C. C. A. 641; The E. E. Simpson, 60 Fed. 452, 9 C. C. A. 66; Lane *v.* The A. R. Robinson, 57 Fed. 667; Bust *v.* Cornell Steam-Boat Co., 24 Fed. 188; The M. J. Cummings, 18 Fed. 178; The D. Newcomb, 16 Fed. 274; The Fox, 15 Fed. 639, 4 Woods 199; The Fannie Tuthill, 12 Fed. 446; The James Jackson, 9 Fed. 614; Abbey *v.* The Robert L. Stevens, 1 Fed. Cas. No. 8, 22 How. Pr. (N. Y.) 78; The Angelina Corning, 1 Fed. Cas. No. 384, 1 Ben. 109; Bothwell *v.* Vessel Owners' Towing Assoc., 3 Fed. Cas. No. 1,687; Brawley *v.* The Jim Watson, 4 Fed. Cas. No. 1,817, 2 Bond 356; Dunn *v.* The Young America, 8 Fed. Cas. No. 4,178, 14 Phila. (Pa.) 532; The Enterprise, 8 Fed. Cas.

nor an insurer,[70] and hence the highest possible degree of skill and care is not required of her.[71] On the contrary, the owners of a tug are merely bailees for hire,[72] and, as such, are bound to exercise reasonable skill, care, and diligence in everything relating to the work until it is accomplished;[73] that degree

No. 4,500, 3 Wall. Jr. 58; The Merrimac, 17 Fed. Cas. No. 9,478, 2 Sawy. 586; The Neaffie, 17 Fed. Cas. No. 10,063, 1 Abb. 465; The Princeton, 19 Fed. Cas. No. 11,433*a* [*affirmed* in 19 Fed. Cas. No. 11,434, 3 Blatchf. 54, 12 N. Y. Leg. Obs. 5]; The Stranger, 23 Fed. Cas. No. 13,525, Brown Adm. 281; Ulrich *v.* The Sunbeam, 24 Fed. Cas. No. 14,329; Whitehead *v.* The Tempest, 29 Fed. Cas. No. 17,563*a*.

See 45 Cent. Dig. tit. "Towage," § 4.

Contra.—White *v.* The Mary Ann, 6 Cal. 462, 65 Am. Dec. 523; Bussey *v.* Mississippi Valley Transp. Co., 24 La. Ann. 165, 13 Am. Rep. 120; Clapp *v.* Stanton, 20 La. Ann. 495, 96 Am. Dec. 417; Clapp *v.* Stanton, 18 La. Ann. 683; Creen *v.* Croce, 17 La. Ann. 3; Millaudon *v.* Martin, 6 Rob. (La.) 534; Davis *v.* Houren, 6 Rob. (La.) 255; Smith *v.* Pierce, 1 La. 349; Wood *v.* Harbor Towboat Co., McGloin (La.) 121; Walston *v.* Myers, 50 N. C. 174; Vanderslice *v.* The Superior, 28 Fed. Cas. No. 16,843. And see Ashmore *v.* Pennsylvania Steam Towing, etc., Co., 28 N. J. L. 180, 181, where it was not deemed necessary to decide "the vexed question," as it was there termed.

70. *Maine.*— Berry *v.* Ross, 94 Me. 270, 47 Atl. 512.

New York.— Milton *v.* Hudson River Steam-Boat Co., 37 N. Y. 210; Carpenter *v.* Eastern Transp. Line, 67 Barb. 570; Wooden *v.* Austin, 51 Barb. 9; Tilley *v.* Beverwyck Towing Co., 29 Misc. 581, 61 N. Y. Suppl. 495.

United States.— The J. P. Donaldson, 167 U. S. 599, 17 S. Ct. 951, 42 L. ed. 292; The L. P. Dayton, 120 U. S. 337, 7 S. Ct. 568, 30 L. ed. 669; The Margaret *v.* Bliss, 94 U. S. 494, 24 L. ed. 146; The William H. Webb *v.* Barling, 14 Wall. 406, 20 L. ed. 774; The Leader, 181 Fed. 743; The El Rio, 162 Fed. 567; The Oak, 152 Fed. 973, 82 C. C. A. 327; The Britannia, 148 Fed. 495; The Samuel E. Bouker, 141 Fed. 480; The Startle, 115 Fed. 555; The E. Luckenback, 109 Fed. 487 [*affirmed* in 113 Fed. 1017, 51 C. C. A. 589]; The Kalkaska, 107 Fed. 959, 47 C. C. A. 100; The Lady Wimett, 92 Fed. 399; The Ivanhoe, 64 Fed. 500; The W. H. Simpson, 80 Fed. 153, 25 C. C. A. 318; The E. E. Simpson, 60 Fed. 452, 9 C. C. A. 66; The W. J. Keyser, 56 Fed. 731, 6 C. C. A. 101; The Allie & Evie, 24 Fed. 745; Bust *v.* Cornell Steamboat Co., 24 Fed. 188; The Niagara, 20 Fed. 152; The James P. Donaldson, 19 Fed. 264; The M. J. Cummings, 18 Fed. 178; Abbey *v.* The Robert L. Stevens, 1 Fed. Cas. No. 8, 22 How. Pr. (N. Y.) 78; Bothwell *v.* Vessel Owners' Towing Assoc., 3 Fed. Cas. No. 1,687; Dunn *v.* The Young America, 8 Fed. Cas. No. 4,178, 14 Phila. (Pa.) 532; The Enterprise, 8 Fed. Cas. No. 4,500, 3 Wall. Jr. 58; The Mosher, 17 Fed. Cas. No. 9,874, 4 Biss. 274; The Princeton, 19 Fed. Cas. No. 11,433*a* [*affirmed* in 19 Fed. Cas. No. 11,434, 3 Blatchf. 54, 12 N. Y. Leg. Obs. 5]; Ulrich *v.* The Sunbeam, 24 Fed. Cas. No. 14,329, 1 N. Y. L. J. 1; The W. E. Gladwish, 29 Fed. Cas. No. 17,355, 17 Blatchf. 77.

England.— The Maréchal Suchet, [1911] P. 1, 26 T. L. R. 660; Ward *v.* McCorkill, 7 Jur. N. S. 1257, 30 L. J. Adm. 211, 4 L. T. Rep. N. S. 810, Lush. 335, 15 Moore P. C. 133, 9 Wkly. Rep. 925, 15 Eng. Reprint 444.

Canada.— The William, 4 Quebec 306.

See 45 Cent. Dig. tit. "Towage," § 4.

71. Berry *v.* Ross, 94 Me. 270, 47 Atl. 512; The El Rio, 162 Fed. 567; The Oak, 152 Fed. 973, 82 C. C. A. 327; Pederson *v.* John D. Spreckles, etc., Co., 87 Fed. 938, 31 C. C. A. 308; The W. H. Simpson, 80 Fed. 153, 25 C. C. A. 318; The M. J. Cummings, 18 Fed. 178; The Mosher, 17 Fed. Cas. No. 9,874, 4 Biss. 274; The Princeton, 19 Fed. Cas. No. 11,433*a* [*affirmed* in 19 Fed. Cas. No. 11,434, 3 Blatchf. 54, 12 N. Y. Leg. Obs. 5]; Ulrich *v.* The Sunbeam, 24 Fed. Cas. No. 14,329, 1 N. Y. L. J. 141, and other cases cited *supra*, notes 69, 70.

72. Alexander *v.* Greene, 3 Hill (N. Y.) 9 (and this, although they carry on the towing of boats as a business, holding themselves out as ready to engage for all who may desire their services); Taylor *v.* Campbell, 1 Pittsb. (Pa.) 459; Bust *v.* Cornell Steam-Boat Co., 24 Fed. 188; The D. Newcomb, 16 Fed. 274; The Merrimac, 17 Fed. Cas. No. 9,478, 2 Sawy. 586; The Princeton, 19 Fed. Cas. No. 11,433*a* [*affirmed* in 19 Fed. Cas. No. 11,434, 3 Blatchf. 54, 12 N. Y. Leg. Obs. 5]. *Compare* Wells *v.* Steam Nav. Co., 2 N. Y. 204; Whitehead *v.* The Tempest, 29 Fed. Cas. No. 17,563*a*.

73. *Maine.*— Berry *v.* Ross, 94 Me. 270, 47 Atl. 512.

Maryland.— Pennsylvania, etc., Steam Nav. Co. *v.* Dandridge, 8 Gill & J. 248, 29 Am. Dec. 543.

New York.— Merrick *v.* Brainard, 38 Barb. 574 [*modified* in 34 N. Y. 208]; Tilley *v.* Beverwyck Towing Co., 29 Misc. 581, 61 N. Y. Suppl. 495; Caton *v.* Rumney, 13 Wend. 387.

Pennsylvania.— Brown *v.* Clegg, 63 Pa. St. 51, 3 Am. Rep. 522; Leech *v.* The Steamboat Miner, 1 Phila. 144; Taylor *v.* Campbell, 1 Pittsb. 459.

United States.— Eastern Transp. Line *v.* Hope, 95 U. S. 297, 24 L. ed. 477; The Margaret *v.* Bliss, 94 U. S. 494, 24 L. ed. 146; The Cayuga *v.* Wilson, 16 Wall. 177, 21 L. ed. 354; The Syracuse *v.* Langley, 12 Wall. 167, 20 L. ed. 382; The Leader, 181 Fed. 743; Société des Voiliers Francais *v.* Oregon R., etc., Co., 178 Fed. 324; The El Rio, 162 Fed. 567; The Oak, 152 Fed. 973, 82 C. C. A. 327; The Britannia, 148 Fed. 495; The Inca, 148 Fed. 363, 78 C. C. A. 273; Gilchrist Transp. Co. *v.* Sicken, 147 Fed. 470, 78

of caution and skill which prudent navigators usually employ in similar services.[74] But these are relative terms, and must be understood to be such as are reasonable and proper, and demanded by the peculiar circumstances and emergencies of the case,[75] having due regard to the extent of the voyage and any special hazards incident to the seas to be traversed,[76] which includes, not only proper and safe navigation of the tug on the journey,[77] but the furnishing of safe, sound, and suitable appliances and instrumentalities for the service to be performed,[78] the proper make-up of the tow preparatory to the voyage,[79] and

C. C. A. 12; The Inca, 130 Fed. 36 [*affirmed* in 148 Fed. 363, 78 C. C. A. 273]; The Nettie Quill, 124 Fed. 667; The Jane McCrea, 121 Fed. 932; The Czarina, 112 Fed. 541; Jacobsen *v.* Lewis Klondike Expedition Co., 112 Fed. 73, 50 C. C. A. 121 (holding that the fact that the towing steamer was also engaged in other business did not relieve her from the obligation under her contract to exercise the same degree of care and skill with regard to her tows as would have been required under the circumstances if the towage had been the only purpose of her voyage); The E. Luckenback, 109 Fed. 487 [*affirmed* in 113 Fed. 1017, 51 C. C. A. 589]; The Lady Wimett, 92 Fed. 399; The Florence, 88 Fed. 302; The Ivanhoe, 84 Fed. 500; The W. H. Simpson, 80 Fed. 153, 25 C. C. A. 318; Lane *v.* The A. R. Robinson, 57 Fed. 667; The W. J. Keyser, 56 Fed. 731, 6 C. C. A. 101; The Allie & Evie, 24 Fed. 745; Bust *v.* Cornell Steamboat Co., 24 Fed. 188; The Annie Williams, 20 Fed. 866; The James P. Donaldson, 19 Fed. 264; The M. J. Cummings, 18 Fed. 178; Molenbrock *v.* St. Louis, etc., Packet Co., 16 Fed. 878, 5 McCrary 294; The D. Newcomb, 16 Fed. 274; The Fannie Tuthill, 12 Fed. 446; The James Jackson, 9 Fed. 614; The Adelia, 1 Fed. Cas. No. 79, 1 Hask. 505; The Merrimac, 17 Fed. Cas. No. 9,478, 2 Sawy. 586; The Mosher, 17 Fed. Cas. No. 9,874, 4 Biss. 274; The Stranger, 23 Fed. Cas. No. 13,525, Brown Adm. 281; Ulrich *v.* The Sunbeam, 24 Fed. Cas. No. 14,329, 1 N. Y. L. J. 141; Whitehead *v.* The Tempest, 29 Fed. Cas. No. 17,563*a*.

England.— The Maréchal Suchet, [1911] P. 1, 26 T. L. R. 660; Ward *v.* McCorkill, 7 Jur. N. S. 1257, 30 L. J. Adm. 211, 4 L. T. Rep. N. S. 810, Lush. 335, 15 Moore P. C. 133, 9 Wkly. Rep. 925, 15 Eng. Reprint 444.

Canada.— Sewell *v.* British Columbia Towing, etc., Co., 9 Can. Sup. Ct. 527; Montreal Transp. Co. *v.* The Ship Buckeye State, 12 Can. Exch. 419; The William, 4 Quebec 306.

See 45 Cent. Dig. tit. "Towage," § 4.

Duty continuous.— The duty of a tug to a tow is a continuous one from the time the service commences until it is completed. The Printer, 164 Fed. 314, 90 C. C. A. 246 [*affirming* 155 Fed. 441].

74. The William H. Webb *v.* Barling, 14 Wall. (U. S.) 406, 20 L. ed. 774; J. T. Morgan Lumber Co. *v.* West Kentucky Coal Co., 181 Fed. 271; The El Rio, 162 Fed. 567; The Britannia, 148 Fed. 495; The Samuel E. Bouker, 141 Fed. 480; The W. G. Mason, 131 Fed. 632 [*reversed* on other grounds in 142 Fed. 913, 74 C. C. A. 83]; The Garden City, 127 Fed. 298, 62 C. C. A. 182; The Nettie Quill, 124 Fed. 667; The Startle, 115 Fed. 555; The Czarina, 112 Fed. 541; The Kalkaska, 107 Fed. 959, 47 C. C. A. 100; The Florence, 88 Fed. 302; The Adelia, 1 Fed. Cas. No. 79, 1 Hask. 505; The Brazos, 4 Fed. Cas. No. 1,821, 14 Blatchf. 446; Miller *v.* The Eastern Railroad, 17 Fed. Cas. No. 9,567, 7 Phila. (Pa.) 597; The W. E. Gladwish, 29 Fed. Cas. No. 17,355, 17 Blatchf. 77.

75. Neal *v.* Scott, 25 Ind. 440; Wright *v.* Gaff, 6 Ind. 416; Carpenter *v.* Eastern Transp. Line, 67 Barb. (N. Y.) 570; Société des Voiliers Francais *v.* Oregon R., etc., Co., 178 Fed. 324; Cotton *v.* Almy, 141 Fed. 358, 72 C. C. A. 506; The Temple Emery, 122 Fed. 180; The Jane McCrea, 121 Fed. 932; The Somers N. Smith, 120 Fed. 569; Jacobsen *v.* Lewis Klondike Expedition Co., 112 Fed. 73, 50 C. C. A. 121; The Victoria, 88 Fed. 524; The Frederick E. Ives, 25 Fed. 447; The Adelia, 1 Fed. Cas. No. 79, 1 Hask. 505; The W. E. Gladwish, 29 Fed. Cas. No. 17,355, 17 Blatchf. 77.

If the work undertaken is difficult and perilous, the diligence and skill required are correspondingly great, and must at all times be commensurate with the danger involved. Société des Voiliers Francais *v.* Oregon R., etc., Co., 178 Fed. 324.

If the locality is more than ordinarily dangerous, the tug is held to a proportionately higher degree of care and skill. The Somers N. Smith, 120 Fed. 569; The Adelia, 1 Fed. Cas. No. 79, 1 Hask. 505.

If tugs undertake to handle boats which are known to be old and weak, they are bound to exercise additional caution in their treatment. The Syracuse, 18 Fed. 828.

In the towing of a boat built only for the shallow water of an inland stream, greater care must necessarily be used when venturing upon an ocean voyage than with a vessel fitted for the deep water, not only in the choice of route, to select the one affording the smoothest water and convenient shelter in stormy weather, but in the handling of the tow. Jacobsen *v.* Lewis Klondike Expedition Co., 112 Fed. 73, 50 C. C. A. 121.

76. Carpenter *v.* Eastern Transp. Line, 67 Barb. (N. Y.) 570; The Britannia, 148 Fed. 495.

77. The Britannia, 148 Fed. 495.

78. See *infra*, V, B, 1, a, (I), (C).

79. See *infra*, V, B, 1, a, (I), (D).

the giving of proper instructions as to the management of the tow.[80] These are obligations imposed upon and assumed by the tug from the nature of the employment, and for damage arising from a failure to observe them she cannot escape liability.[81] But if she performs such duties, and damage results to the tow which could not have been prevented by the exercise of reasonable care and skill in the act of towing, she is not liable therefor.[82] Nor is the tug responsible for any injury which may have happened to the tow by reason of a defect or deficiency in her condition, construction, or appointments.[83] Of course the relations between the tug and the tow may be modified by express agreement,[84] or the reasonable implication arising from the circumstances and nature of the employment in a particular case,[85] so as to make the tug the mere servant of the tow and under its direction; in which case the liability of the tug may be limited to the mere point of furnishing a sufficient motive power for the tow, while the whole responsibility as to the time and manner of making the voyage or transportation will rest with the latter.[86]

3. Duties After Disaster — a. Duty of Tug. As a general proposition, a tug whose tow is injured or disabled during the towage service, although without fault on the part of the tug, must use reasonable diligence to assist the tow and shield her from additional injury.[87] She is under obligation to do all that is reasonably within her power, according to the particular circumstances of the

80. The Jane McCrea, 121 Fed. 932.

When a tug assumes control of the tow and its crew, and to give the orders necessary, the time and the sufficiency of the orders fall within the duty of the tug, and if they are insufficient or are given too late, it is negligence on the part of the tug. Hays *v.* Paul, 51 Pa. St. 134, 88 Am. Dec. 569. And see Arctic F. Ins. Co. *v.* Austin, 54 Barb. (N. Y.) 559.

The tug master should also watch his tow when in a dangerous locality to see that his directions are obeyed. The Jane McCrea, 121 Fed. 932. And see *infra*, V, B, 1, a, (I), (G).

81. Berry *v.* Ross, 94 Me. 270, 47 Atl. 512; Carpenter *v.* Eastern Transp. Line, 67 Barb. (N. Y.) 570; Wooden *v.* Austin, 51 Barb. (N. Y.) 9; Tilley *v.* Beverwyck Towing Co., 29 Misc. (N. Y.) 581, 61 N. Y. Suppl. 495; The Margaret *v.* Bliss, 94 U. S. 494, 24 L. ed. 146; The Syracuse *v.* Langley, 12 Wall. (U. S.) 167, 20 L. ed. 382; The El Rio, 162 Fed. 567; The Britannia, 148 Fed. 495; Gilchrist Transp. Co. *v.* Sicken, 147 Fed. 470; The W. H. Simpson, 80 Fed. 153, 25 C. C. A. 318; The M. J. Cummings, 18 Fed. 178. In Winslow *v.* Thompson, 134 Fed. 546, 67 C. C. A. 470, the liability of the tug is stated as follows: "If she fails in such duties, she is liable for the consequences, whatever amount of care she may use in the act of towing, and she is also liable if, having performed such duties, damage results from her negligence in the immediate act of towing, which might have been avoided by reasonable care, notwithstanding the hazards."

82. Carpenter *v.* Eastern Transp. Line, 67 Barb. (N. Y.) 570; Winslow *v.* Thompson, 134 Fed. 546, 67 C. C. A. 470 [*affirming* 130 Fed. 1001]; The W. J. Keyser, 56 Fed. 731, 6 C. C. A. 101; The Maréchal Suchet, [1911] P. 1, 26 T. L. R. 660; Ward *v.* McCorkill, 7 Jur. N. S. 1257, 30 L. J. Adm. 211, 4 L. T. Rep. N. S. 810, Lush. 335, 15 Moore P. C. 133, 9 Wkly. Rep. 925, 15 Eng. Reprint 444.

Inevitable accident, as applied to a case of this description, must be understood to mean an accident which occurs when both parties have endeavored, by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident, and where the proofs show that it occurred in spite of everything that nautical skill, care, and precaution could do. The R. S. Mabey *v.* Atkins, 14 Wall. (U. S.) 204, 20 L. ed. 881; The Delta, 125 Fed. 133.

83. The Merrimac, 17 Fed. Cas. No. 9,478, 2 Sawy. 586. And see *infra*, V, B, 1, a, (II), (B).

84. See *infra*, V, B, 1, b.

85. See *infra*, V, B, 1, a, (II), (A).

86. Sturgis *v.* Boyer, 24 How. (U. S.) 110, 16 L. ed. 591; I—— *v.* The I. M. Lewis, 12 Fed. Cas. No. 6,991; The Merrimac, 17 Fed. Cas. No. 9,478, 2 Sawy. 586.

87. The Czarina, 112 Fed. 541; The Carbonero, 106 Fed. 329, 45 C. C. A. 314 [*affirmed* in 122 Fed. 753]; The Young America, 31 Fed. 749, 24 Blatchf. 479; Abbey *v.* Robert L. Stevens, 1 Fed. Cas. No. 8, 22 How. Pr. (N. Y.) 78.

A tug which abandons a tow after she has grounded, leaving her in a position of danger, is liable for the injury resulting, of which the tug's negligence was a proximate cause. The M. D. Wheeler, 100 Fed. 859.

Although the tow agrees to assume all risks incident to unseaworthiness, it is still the tug's duty, after the tow becomes disabled, to make all reasonable and proper efforts to save her and her cargo, or as much thereof as possible. Any violation of such duty will render the tug or her owner liable, not necessarily for the entire value

occasion and situation, to complete the towage service, or, if this is impracticable, to carry her tow to a place of safety when this can be done.[88] But the tug is only bound to employ those means which are consistent with her own safety.[89] If the tow, while in the custody of the tug, is wrecked and sunk by reason of the latter's negligence, the duty of rescue, if practicable, is upon the tug;[90] but it is otherwise where the tow is sunk without any fault on the part of the tug.[91] Before the tug can be held liable in damages, it must appear that the tow might have been saved in the exercise of good seamanship if the tug had promptly gone to her assistance.[92] Of course there may be circumstances under which, by reason of stress of weather, the only relief which a tug can afford her tow becomes of an extraordinary character, and therefore salvage service, rather than an incident of the towage contract.[93]

b. Duty of Tow. It is the duty of vessels in tow, where an injury ensues, to do all in their power to make the damages as light as possible;[94] but the party in fault has the burden of showing that the actual results of his fault, as they in fact occurred, might have been diminished by such diligence.[95] If the vessel is beached or sunk, the owner is bound to take charge of her within a reasonable time,[96] and, unless it appears that her value is small, and that she is not worth repairing or raising,[97] the owner is negligent if he does not attempt to repair or raise the vessel.[98]

B. Loss of or Injury to Tow — 1. Liabilities — a. In General — (i) *Negligence or Fault of Tug* — (A) *In General.* The owners of a tug are liable for negligence in performing the special duty they have undertaken, and not otherwise.[99] Even if negligent, a tug is not liable therefor where there

of the tow and cargo, but for whatever loss is sustained over and above what would have been sustained if reasonable and proper steps had been taken to save her. McCormick *v.* Jarrett, 37 Fed. 380.

88. The Young America, 31 Fed. 749, 24 Blatchf. 479.

89. The Mosher, 17 Fed. Cas. No. 9,874, 4 Biss. 274, holding that she is not obliged to lay by the tow, when that would endanger herself.

90. The D. Newcomb, 16 Fed. 274.

91. The Swan, 23 Fed. Cas. No. 13,667, 3 Blatchf. 285, holding that where the tow is sunk in a collision without any fault on the part of the tug, the latter's obligation is at an end, and she is under no obligation to mark the wreck by a light or otherwise, so as to prevent injury to other vessels thereby.

92. The Asher J. Hudson, 154 Fed. 354, 83 C. C. A. 143 [*affirming* 145 Fed. 731]; The Carbonero, 122 Fed. 753, 58 C. C. A. 553 [*affirming* 106 Fed. 329, 45 C. C. A. 314]; The Czarina, 112 Fed. 541; Barney Dumping Co. *v.* The R. C. Veit, 56 Fed. 122; The Miranda, 40 Fed. 533 [*affirmed* in 43 Fed. 309].

93. The Carbonero, 106 Fed. 329, 45 C. C. A. 314 [*affirmed* in 122 Fed. 753, 58 C. C. A. 553]. And see Salvage, 35 Cyc. 725.

94. The M. D. Wheeler, 100 Fed. 859; The Gladiator, 79 Fed. 445, 25 C. C. A. 32; The Frank G. Fowler, 8 Fed. 340; The Stranger, 23 Fed. Cas. No. 13,525, Brown Adm. 281.

95. The Gladiator, 79 Fed. 445, 25 C. C. A. 32, holding, however, that if it appears that no efforts were made to mitigate the loss, when there was a reasonable probability that it might be mitigated, this omission, under some circumstances, raises such a presumption as relieves the original wrong-doer from showing by strict proof that the ultimate result could in fact have been avoided.

96. Scott *v.* Cornell Steamboat Co., 59 Fed. 638.

97. Pettie *v.* Boston Tow-Boat Co., 49 Fed. 464, 1 C. C. A. 314.

98. Scott *v.* Cornell Steamboat Co., 59 Fed. 638; Pettie *v.* Boston Tow-Boat Co., 49 Fed. 464, 1 C. C. A. 314, holding that if, under such circumstances, he does not do so, he will not be permitted to profit by his own remissness.

99. Ashmore *v.* Pennsylvania Steam Towing, etc., Co., 28 N. J. L. 180; Arctic F. Ins. Co. *v.* Austin, 54 Barb. (N. Y.) 559; The Ship Josephine *v.* The Tug Farnsworth, 14 Phila. (Pa.) 587; The Burlington *v.* Ford, 137 U. S. 386, 11 S. Ct. 138, 34 L. ed. 731; Baltimore, etc., Barge Co. *v.* Knickerbocker Steam Towage Co., 159 Fed. 755 [*affirmed* in 170 Fed. 444]; Monongahela River Consol. Coal, etc., Co. *v.* O'Neil, 144 Fed. 74, 75 C. C. A. 232; The Samuel E. Bouker, 141 Fed. 480; The O. L. Hallenbeck, 119 Fed. 468 [*affirmed* in 135 Fed. 1022, 68 C. C. A. 676]; The Kalkaska, 107 Fed. 959, 47 C. C. A. 100; Wilson *v.* Sibley, 36 Fed. 379; The Charles Allen, 23 Fed. 407; The Niagara, 20 Fed. 152; The James Jackson, 9 Fed. 614; Powell *v.* The Willie, 2 Fed. 95; The Angelina Corning, 1 Fed. Cas. No. 384, 1 Ben. 109; Brawley *v.* The Jim Watson, 4 Fed. Cas. No. 1,817, 2 Bond 356; The Brazos, 4 Fed. Cas. No. 1,821, 14 Blatchf. 446; The Lyon, 15 Fed. Cas. No. 8,645, Brown Adm. 59; The Neaffie, 17 Fed. Cas. No. 10,063, 1 Abb. 465.

Negligence consists in the want of ordinary skill in navigation, and of the exercise

is no direct causal connection between such negligence and the injury to the tow, which resulted directly from intervening causes.[1]

(B) *Errors of Judgment.* Where the master of a tug is an experienced and competent man, much must be left, as occasion arises, to his judgment and discretion in the management of the tow;[2] and a mere error of judgment on his part will not render the tug liable for the loss of her tow,[3] unless the error was so gross that it would not have been made by a master of ordinary prudence and judgment.[4]

(C) *Manning and Equipping Tug.* A tug owner impliedly undertakes to furnish a seaworthy vessel,[5] of sufficient capacity and power,[6] and properly

of such care and diligence in handling the tow as a man of ordinary prudence would exercise in the preservation of his own property. The Samuel E. Bouker, 141 Fed. 480; The Packer, 28 Fed. 156; The Niagara, 20 Fed. 152. And see *supra*, V, A, 2.

A towboat which voluntarily assumes a needless hazard is responsible for a consequent injury to her tow. Wood *v.* Harbor Towboat Co., McGloin (La.) 121; The Venture, 18 Fed. 462; Gray *v.* The Jessie Russell, 5 Fed. 639; The M. M. Caleb, 17 Fed. Cas. No. 9,680, 4 Ben. 15; The Sea Breeze, 21 Fed. Cas. No. 12,572*a*, 2 Hask. 510.

1. The Startle, 115 Fed. 555; The E. V. McCaulley, 90 Fed. 510, 33 C. C. A. 620 [*affirming* 84 Fed. 500]; The Joggins Raft, 43 Fed. 309 [*affirming* 40 Fed. 533]; The King Kalakau, 43 Fed. 172.

2. The Startle, 115 Fed. 555; The Frederick E. Ives, 25 Fed. 447.

3. The Frederick E. Ives, 169 Fed. 902; The Britannia, 140 Fed. 985, 71 C. C. A. 272 [*affirming* 134 Fed. 948]; The Covington, 128 Fed. 788 [*affirmed* in 140 Fed. 985, 72 C. C. A. 680]; The Garden City, 127 Fed. 298, 62 C. C. A. 182; The Startle, 115 Fed. 555; The Czarina, 112 Fed. 541; The E. Luckenbach, 109 Fed. 487 [*affirmed* in 113 Fed. 1017, 51 C. C. A. 589]; The Taurus, 95 Fed. 699; The Ivanhoe, 84 Fed. 500; The Battler, 72 Fed. 537, 19 C. C. A. 6; The Packer, 28 Fed. 156; The Frederick E. Ives, 25 Fed. 447; Sonsmith *v.* The J. P. Donaldson, 21 Fed. 671 [*modifying* 19 Fed. 264]; The W. E. Gladwish, 29 Fed. Cas. No. 17,355, 17 Blatchf. 77; Whitehead *v.* The Tempest, 29 Fed. Cas. No. 17,563*a*.

Emergency.— A tug is not to be held liable for the loss of a tow merely because her master, in an emergency, did not do precisely what, after the event, others may think would have been best. If he acted with an honest intent to do his duty, and exercised the reasonable discretion of an experienced master, the tug should be exonerated. The Hercules, 73 Fed. 255, 19 C. C. A. 496; The Mohawk, 17 Fed. Cas. No. 9,693, 7 Ben. 139. Where circumstances are evenly balanced, which indicate a choice of action in time of danger, the master's decision in the matter of navigating the vessel is conclusive, and, although he may err in judgment, it is not negligence, if he be competent. Vance *v.* The Wilhelm, 47 Fed. 89 [*affirmed* in 52 Fed. 602].

Choice of route.—Where the propriety of the general course to be taken by a tow from one port to another depends largely upon the season of the year, the state of the weather, the velocity of the wind, the probability of a storm, and the proximity of harbors of refuge, the choice of a route is usually within the discretion of the master of the tug; and if he exercises reasonable judgment and skill in his selection, he will not be held in fault, although the court may be of opinion that the disaster which followed would not have occurred if he had taken another route. The James P. Donaldson, 19 Fed. 264.

4. The Czarina, 112 Fed. 541; The Battler, 72 Fed. 537, 19 C. C. A. 6; The Mohawk, 17 Fed. Cas. No. 9,693, 7 Ben. 139; The W. E. Gladwish, 29 Fed. Cas. No. 17,355, 17 Blatchf. 77.

Test of negligence.— The tug cannot be charged with negligence for a mere mistake of judgment. The test is whether the course of her master is in accord with that which other prudent and intelligent men would have ordinarily deemed necessary under similar circumstances. The Packer, 28 Fed. 156. Hypercritical scrutiny into the conduct of the navigation, after the event of the disaster and in the light of that which has happened, is not the test of negligence, but prudent judgment is to be tested by the circumstances as they appeared to the master at the time he was called to act, and not as they appear to the court after the more critical scrutiny than the master could have given to them. The Wilhelm, 47 Fed. 89.

5. Tebo *v.* Jordan, 67 Hun (N. Y.) 392, 22 N. Y. Suppl. 156; The Lady Pike, 21 Wall. (U. S.) 1, 22 L. ed. 499.

In order to be seaworthy the law does not require a vessel to be capable of withstanding every peril. The Allie & Evie, 24 Fed. 745. Nor that a tug be capable of rescuing her tow in all weather. The Allie & Evie, *supra*. The defense of unseaworthiness is not made out by showing that "a stouter ship might have survived the peril." The Allie & Evie, *supra*.

That a pilot of a tug was not licensed as required by U. S. Rev. St. (1878) §§ 4401, 4427 [U. S. Comp. St. (1901) pp. 3016, 3030], does not render the tug unseaworthy, where the pilot was in fact competent. Tebo *v.* Jordan, 147 N. Y. 387, 42 N. E. 191 [*affirming* 73 Hun 218, 25 N. Y. Suppl. 1070].

6. The Lady Pike, 21 Wall. (U. S.) 1, 22 L. ed. 499; The J. S. T. Stranahan, 165 Fed. 439, 91 C. C. A. 493; The E. T. Williams, 126 Fed. 871 [*affirmed* in 139 Fed. 231, 71 C. C. A. 357]; The Startle, 115 Fed. 555;

equipped with the necessary fittings and appliances,[7] including a proper supply of coal.[8] The tug must also be provided with a sufficient and competent crew,[9] familiar with the channel, its shoals and currents,[10] the state of the

The Allie & Evie, 24 Fed. 745; The James P. Donaldson, 19 Fed. 264; Dunn *v.* The Young America, 8 Fed. Cas. No. 4,178, 14 Phila. (Pa.) 532; The Francis King, 9 Fed. Cas. No. 5,042, 7 Ben. 11; The Merrimac, 17 Fed. Cas. No. 9,478, 2 Sawy. 586; The Maréchal Suchet, [1911] P. 1, 26 T. L. R. 660; The Ratata, [1897] P. 118, 8 Aspin. 236, 66 L. J. P. D. & Adm. 39, 76 L. T. Rep. N. S. 224 [*affirmed* in [1898] A. C. 513, 8 Aspin. 427, 67 L. J. P. D. & Adm. 73, 78 L. T. Rep. N. S. 797, 47 Wkly. Rep. 156]; The Undaunted, 11 P. D. 46, 5 Aspin. 580, 55 L. J. P. D. & Adm. 24, 54 L. T. Rep. N. S. 542, 34 Wkly. Rep. 686. *Compare* Robertson *v.* Amazon Tug, etc., Co., 7 Q. B. D. 598, 4 Aspin. 496, 51 L. J. Q. B. 68, 46 L. T. Rep. N. S. 146, 30 Wkly. Rep. 308.

The very fact that the tug was unable to tow the vessel — i. e. unable to do the work which she contracted to do — is evidence that she was inefficient, or that there was inefficiency or want of care or skill on the part of her master or crew. The Maréchal Suchet, [1911] P. 1, 26 T. L. R. 660.

7. The Lady Pike, 21 Wall. (U. S.) 1, 22 L. ed. 499; Farrell *v.* Port Johnston Towing Co., 156 Fed. 871; The Britannia, 148 Fed. 495; Baker-Whiteley Coal Co. *v.* Neptune Nav. Co., 120 Fed. 247, 56 C. C. A. 83; The M. M. Caleb, 17 Fed. Cas. No. 9,681, 5 Ben. 163; The Maréchal Suchet, [1911] P. 1, 26 T. L. R. 660; The Undaunted, 11 P. D. 46, 5 Aspin. 580, 55 L. J. P. D. & Adm. 24, 54 L. T. Rep. N. S. 542, 34 Wkly. Rep. 686; Ward *v.* McCorkill, 7 Jur. N. S. 1257, 30 L. J. Adm. 211, 4 L. T. Rep. N. S. 810, Lush. 335, 15 Moore P. C. 133, 9 Wkly. Rep. 925, 15 Eng. Reprint 444; The William Samson, 4 Quebec 306.

A tug should be equipped with hawsers of sufficient strength to hold her tow in any weather ordinarily to be anticipated in that navigation, and for any injury resulting from unfitness in this respect the tug is liable. The Nettie, 170 Fed. 526; *In re* Moran, 120 Fed. 556; The Columbia, 109 Fed. 660, 48 C. C. A. 596; The Francis King, 9 Fed. Cas. No. 5,042, 7 Ben. 11. But the fact that a hawser broke under the stress to which it was subjected does not tend to show want of capacity to resist such strains as it should properly have been exposed to. The Ashbourne, 112 Fed. 687 [*affirmed* in 120 Fed. 1018, 56 C. C. A. 678]; The Joggins Raft, 43 Fed. 309 [*affirming* 40 Fed. 533]. The tug will not be held liable, as between the tug and the tow, for the condition and strength of a hawser furnished by the tow, where it is not shown that it was parted by the negligence of the tug (The Echo, 8 Fed. Cas. No. 4,263, 7 Ben. 70), unless the owners of the tug contracted to "find all items of transportation" (The Forfarshire, [1908] P. 339, 11 Aspin. 158, 78 L. J. P. D. & Adm. 44, 99 L. T. Rep. N. S. 587).

Want of proper lights as negligence see [V, B, 1, a, (I), (C)]

Montreal Harbour Com'rs *v.* The Universe, 10 Can. Exch. 352, 31 Quebec Super. Ct. 10.

8. The Frank G. Fowler, 8 Fed. 340; The Undaunted, 11 P. D. 46, 5 Aspin. 580, 55 L. J. P. D. & Adm. 24, 54 L. T. Rep. N. S. 542, 34 Wkly. Rep. 686.

9. The Lady Pike, 21 Wall. (U. S.) 1, 22 L. ed. 499; The Lyon, 15 Fed. Cas. No. 8,645, Brown Adm. 59; The William Samson, 4 Quebec 306.

A vessel which is not commanded by competent officers is unseaworthy. Tebo *v.* Jordan, 67 Hun (N. Y.) 392, 22 N. Y. Suppl. 156.

A tug whose master also acts as pilot and engineer is not properly manned. The Armstrong, 1 Fed. Cas. No. 540, Brown Adm. 130; The Victor, 28 Fed. Cas. No. 16,933, Brown Adm. 449. The responsible character of the occupation of tugs requires that there should be some competent person in charge of their navigation, separate and distinct from the wheelsman, and who has no other duties when the tug is in actual service. The Victor, *supra*.

The want of a competent lookout is a fault of the grossest character (The Rambler, 66 Fed. 355; The Armstrong, 1 Fed. Cas. No. 540, Brown Adm. 130; The John Fretter, 13 Fed. Cas. No. 7,342; The Lyon, 15 Fed. Cas. No. 8,645, Brown Adm. 59; The Morton, 17 Fed. Cas. No. 9,864, 1 Brown Adm. 137; Montreal Harbour Com'rs *v.* The Universe, 10 Can. Exch. 352, 31 Quebec Super. Ct. 10), unless the presence of one would not have availed to prevent the accident (The Nettie Quill, 124 Fed. 667; The Prince Arthur *v.* The Florence, 5 Can. Exch. 218). The master of a tug, when acting as pilot in the wheel-house and at the wheel, is not a sufficient lookout. The Sea Breeze, 21 Fed. Cas. No. 12,572*a*, 2 Hask. 510.

10. Wood *v.* Harbor Towboat Co., McGloin (La.) 121; Berry *v.* Ross, 94 Me. 270, 47 Atl. 512; Carpenter *v.* Eastern Transp. Line, 67 Barb. (N. Y.) 570; The Margaret *v.* Bliss, 94 U. S. 494, 24 L. ed. 146 [*affirming* 16 Fed. Cas. No. 9,068, 5 Biss. 353]; The El Rio, 162 Fed. 567; Baltimore, etc., Barge Co. *v.* Knickerbocker Steam Towage Co., 159 Fed. 755 [*affirmed* in 170 Fed. 442, 444]; The Inca, 148 Fed. 363, 78 C. C. A. 273; Winslow *v.* Thompson, 134 Fed. 546, 67 C. C. A. 470; The Inca, 130 Fed. 36 [*affirmed* in 148 Fed. 363, 78 C. C. A. 273]; The Florence, 88 Fed. 302; The T. J. Schuyler, 41 Fed. 477; The Morton, 17 Fed. Cas. No. 9,864, Brown Adm. 137; The Mosher, 17 Fed. Cas. No. 9,874, 4 Biss. 274 (holding, however, that the responsibility is changed where the channel is shifting); The Zouave, 30 Fed. Cas. No. 18,221, Brown Adm. 110.

Where the United States charters a steam tug for attendance on other vessels, not possessing the power of self-propulsion, engaged in government work, in order to remove them to a place of safety in case of stress of

tides,[11] the proper time of entering upon her service,[12] and, generally, all conditions which are essential to the safe performance of her undertaking.[13] If the tug is derelict in any of these respects, she is subject to an imputation of negligence, and liable for any resulting damage.[14]

(D) *Making Up Tow.* As a general rule it is the duty of a vessel which undertakes to tow other boats to see that the tow is properly made up,[15] and that the lines are sufficient in quality and length, and securely fastened.[16] This is her

weather or accident, not furnishing the crew or pilot of such steam tug, competent knowledge is required on the part of those having the tug in charge of the waters of that portion of the bay in which the boats are working, including the depth of water and channels, and the United States has a right to assume that the master or pilot possesses such knowledge. Charles Warner Co. *v.* U. S., 101 Fed. 884.

11. Berry *v.* Ross, 94 Me. 270, 47 Atl. 512; Carpenter *v.* Eastern Transp. Line, 67 Barb. (N. Y.) 570; The Margaret *v.* Bliss, 94 U. S. 494, 24 L. ed. 146; Baltimore, etc., Barge Co. *v.* Knickerbocker Steam Towage Co., 159 Fed. 755 [*affirmed* in 170 Fed. 442, 444]; The T. J. Schuyler, 41 Fed. 477; The Merrimac, 17 Fed. Cas. No. 9,478, 2 Sawy. 586.

12. Baltimore, etc., Barge Co. *v.* Knickerbocker Steam Towage Co., 159 Fed. 755 [*affirmed* in 170 Fed. 442, 444]; The T. J. Schuyler, 41 Fed. 477.

13. Berry *v.* Ross, 94 Me. 270, 47 Atl. 512; Carpenter *v.* Eastern Transp. Line, 67 Barb. (N. Y.) 570; Germania Ins. Co. *v.* The Lady Pike, 21 Wall. (U. S.) 1, 22 L. ed. 499; Baltimore, etc., Barge Co. *v.* Knickerbocker Steam Towage Co., 159 Fed. 755 [*affirmed* in 170 Fed. 442, 444, 95 C. C. A. 612]; The Florence, 88 Fed. 302; The T. J. Schuyler, 41 Fed. 477; The Lyon, 15 Fed. Cas. No. 8,645, Brown Adm. 59; The Merrimac, 17 Fed. Cas. No. 9,478, 2 Sawy. 586.

14. The T. J. Schuyler *v.* The Isaac H. Tillyer, 41 Fed. 477; The Lyon, 15 Fed. Cas. No. 8,645, Brown Adm. 59. And see the cases cited *supra*, this section.

15. Berry *v.* Ross, 94 Me. 270, 47 Atl. 512; Tilley *v.* Beverwyck Towing Co., 29 Misc. (N. Y.) 581, 61 N. Y. Suppl. 495; The Quickstep *v.* Byrne, 9 Wall. (U. S.) 665, 19 L. ed. 767; The St. Paul, 171 Fed. 606; The Edwin Terry, 162 Fed. 309, 89 C. C. A. 17; The El Rio, 162 Fed. 567; Baltimore, etc., Barge Co. *v.* Knickerbocker Steam Towage Co., 159 Fed. 755 [*affirmed* in 170 Fed. 442, 444, 95 C. C. A. 612]; The Britannia, 148 Fed. 495; The Edwin Terry, 145 Fed. 837 [*reversed* on other grounds in 162 Fed. 309, 89 C. C. A. 17]; Cotton *v.* Almy, 141 Fed. 358, 72 C. C. A. 506; The Julia, 91 Fed. 171; The Florence, 88 Fed. 302; The W. J. Keyser, 56 Fed. 731, 6 C. C. A. 101; The Pres. Briarly, 24 Fed. 478; Bust *v.* Cornell Steamboat Co., 24 Fed. 188; The Bordentown, 16 Fed. 270; The Stranger, 23 Fed. Cas. No. 13,525, Brown Adm. 281; The Sweepstakes, 23 Fed. Cas. No. 13,687, Brown Adm. 509.

A tug master is entitled to exercise his judgment in making up his tow. The Sweepstakes, 23 Fed. Cas. No. 13,687, Brown Adm. 509. A request by the masters of a tow to divide the vessels composing it, and take them separately through a narrow channel, would not create an obligation on the part of the tug to do so. The Sweepstakes, *supra*.

Duties in this respect.— When the master of a tug undertakes to transport a barge, he must supply the means for that purpose. He must not only furnish motive power, but he must direct her location, whether on the port or the starboard side, whether she shall be the inside boat or the outside one, when and how she shall be lashed to other boats, with what fastenings she shall be secured as she is dragged through the water, whether she shall go fast or slow, when, if at all, she shall drop astern, when she shall go to harbor, how long remain there, and what shall be her course of navigation. Eastern Transp. Line *v.* Hope, 95 U. S. 297, 24 L. ed. 477; The Inca, 148 Fed. 363, 78 C. C. A. 273.

Division of tow.— In taking tows of great length a tug is bound, at her own peril, to take precautions, by dividing the tow or getting other help, as may be necessary, to prevent the tows swinging far out of line. O'Brien *v.* New York, etc., Transp. Co., 31 Fed. 494.

16. Berry *v.* Ross, 94 Me. 270, 47 Atl. 512; Tilley *v.* Beverwyck Towing Co., 29 Misc. (N. Y.) 581, 61 N. Y. Suppl. 495; The Quickstep *v.* Byrne, 9 Wall. (U. S.) 665, 19 L. ed. 767; The Edwin Terry, 145 Fed. 837 [*reversed* on other grounds in 162 Fed. 309, 89 C. C. A. 17]; The Florence, 88 Fed. 302; The Pres. Briarly, 24 Fed. 478; Gray *v.* The Jessie Russell, 5 Fed. 639; The Olive Baker, 18 Fed. Cas. No. 10,489, 4 Ben. 173; The Sweepstakes, 23 Fed. Cas. No. 13,687, Brown Adm. 509.

Evidence of damage resulting from the slipping of the tow-line, unexplained, makes a *prima facie* case of negligence. The S. C. Schenk, 158 Fed. 54, 85 C. C. A. 384. The Sweepstakes, 23 Fed. Cas. No. 13,687, Brown Adm. 509.

A vessel using hawsers of great length in towing through narrow channels is bound to use the greatest caution, and must be held responsible for any accident that is caused directly from the unnecessary length of the tow, and must follow such course as not to impede navigation more than would be the case if shorter towing-lines were in use, unless extraordinary conditions of storm or danger compel the maintenance of the long tow-lines, and in such time of storm or danger the care of the tug must be measured by the conditions which exist. The Domingo de Larrinaga, 172 Fed. 264. See also Montreal Harbour Com'rs *v.* The Steamship Uni-

duty whether the tug furnishes the line to the tow or the tow to the tug.[17] But when a tug takes in tow a vessel having on board her own officers and crew, who take control and management of the fastening of the tow-line to their vessel, they are bound to see that it is securely fastened; and the tug is not responsible for any failure in this respect.[18] When the tug has full control of the vessels towed, it is her duty to arrange the order in which they shall be towed,[19] to attend to the leading hawser,[20] and to prescribe the distance apart of different tiers.[21] The tug master is bound to arrange his vessels in tow, with the view of securing the safety of all with whom he contracts; [22] and to this end regard should be had to the character of the vessels,[23] the channels through which they are to pass,[24] and all other matters bearing on their safe transportation.[25] A tug will be held in fault for taking in tow more vessels than she can manage,[26] or in undertaking to tow a vessel in circumstances of such difficulty as to indicate beforehand that the power of a single tug will not be sufficient.[27] So also it is culpable negligence on the part of a tug to undertake to tow a vessel if too heavily loaded.[28]

(E) *Starting Suddenly.* Turning on too much steam, so as to cause a tug to

verse, 10 Can. Exch. 352, 31 Quebec Super. Ct. 10. The use of long tow-lines in New York harbor, while not to be commended, does not render the tug liable for damages caused to her tow by collision with another vessel through the fault of the latter, to which the length of the tow did not contribute. The Domingo de Larrinaga, *supra.*

17. Berry *v.* Ross, 94 Me. 270, 47 Atl. 512; The Quickstep *v.* Byrne, 9 Wall. (U. S.) 665, 19 L. ed. 767. *Compare* Moore *v.* The C. P. Morey, 17 Fed. Cas. No. 9,756, 8 Reporter 583.

18. The Edwin Terry, 162 Fed. 309, 89 C. C. A. 17 [*reversing* 162 Fed. 311, 89 C. C. A. 19]; The H. B. Moore, Jr., 155 Fed. 380; The Lyndhurst, 147 Fed. 110, 77 C. C. A. 336 [*reversing* 129 Fed. 843]; Pederson *v.* John D. Spreckles, etc., Co., 87 Fed. 938, 31 C. C. A. 308.

19. The Edwin Terry, 162 Fed. 309, 89 C. C. A. 17; The Morton, 17 Fed. Cas. No. 9,864, Brown Adm. 137; The Sweepstakes, 23 Fed. Cas. No. 13,687, Brown Adm. 509.

20. The Edwin Terry, 162 Fed. 309, 89 C. C. A. 17.

21. The Edwin Terry, 162 Fed. 309, 89 C. C. A. 17; The Morton, 17 Fed. Cas. No. 9,864, Brown Adm. 137.

22. The Edmund L. Levy, 128 Fed. 683, 63 C. C. A. 235; The Niagara, 20 Fed. 152; The Zouave, 30 Fed. Cas. No. 18,221, Brown Adm. 110.

No boat should be subjected to any unreasonable hazard, or to any danger which she is not reasonably fit to encounter. The Niagara, 20 Fed. 152; The Bordentown, 16 Fed. 270.

When experts differ as to which of two methods is the safer, the master of a steamer engaged in towing boats is not to be deemed guilty of negligence or want of skill because he towed such boats two abreast, instead of in single file, through a dangerous place. Taft *v.* Carter, 59 Barb. (N. Y.) 67.

23. Neal *v.* Scott, 25 Ind. 440; Orhanovich *v.* The America, 18 Fed. Cas. No. 10,568, 14 Phila. (Pa.) 515.

Vessels of heavy draft should be placed behind those of lighter draft. The Morton, 17 Fed. Cas. No. 9,864, Brown Adm. 137; The Sweepstakes, 23 Fed. Cas. No. 13,687, Brown Adm. 509; The Zouave, 30 Fed. Cas. No. 18,221, Brown Adm. 110.

Deeply loaded boats with open decks should not be placed in the front tier, but on the inside, under the protection of other boats. The Ganoga, 130 Fed. 399 [*affirmed* in 135 Fed. 747, 68 C. C. A. 385]; The Niagara, 20 Fed. 152.

Where a vessel known to be a bad steerer is placed behind another vessel, the tug is responsible for a collision between the two. Orhanovich *v.* The America, 4 Fed. 337; Orhanovich *v.* The America, 18 Fed. Cas. No. 10,568, 14 Phila. (Pa.) 515.

When notice is given that a boat is unfit to go in the front tier, those who make up the tow are bound to take notice thereof; and if put in the front tier without the captain's consent, it will be at the risk of the tug. The Niagara, 20 Fed. 152. In The Bordentown, 16 Fed. 270, it was held that a simple objection or protest by the captain of the tow against being put in the hawser tier was not sufficient to relieve him of joint liability, it appearing that his objection was not on the ground that his boat was unfit for that place, and that he did not object to go along with the tow in that position.

24. The Florence, 88 Fed. 302; Orhanovich *v.* The America, 18 Fed. Cas. No. 10,568, 14 Phila. (Pa.) 515.

25. Orhanovich *v.* The America, 18 Fed. Cas. No. 10,568, 14 Phila. (Pa.) 515; The Sweepstakes, 23 Fed. Cas. No. 13,687, Brown Adm. 509.

26. Burgess *v.* Beebe, 3 La. Ann. 668; The Julia, 91 Fed. 171; The George Farrell, 10 Fed. Cas. No. 5,332, 4 Ben. 316.

27. The Helen R. Cooper, 11 Fed. Cas. No. 6,333, 2 Ben. 67 [*affirmed* in 11 Fed. Cas. No. 6,334, 7 Blatchf. 378 (*affirmed* in 14 Wall. 204, 20 L. ed. 881)].

28. Neal *v.* Scott, 25 Ind. 440; Wright *v.* Gaff, 6 Ind. 416; Hays *v.* Paul, 51 Pa. St. 134, 88 Am. Dec. 569. And see Scott *v.* Cornell Steamboat Co., 59 Fed. 638.

start with such speed, and so sudden a jerk, as to wrench the tow-line, is a want of reasonable care and skill.[29]

(F) *Excessive Speed.* It is the duty of a tug to employ such rate of speed only as is reasonably safe to her tow, considering her character and condition.[30]

(G) *Stranding or Running Ashore or Aground.* A tug undertaking to tow a vessel is bound to know the proper and accustomed waterways and channels, the depth of the water, the nature and formation of the bottom, whether in its natural state or changed by excavations, and is responsible for any neglect to observe and be guided by these conditions,[31] whereby the tow is grounded,[32] stranded,[33] or run ashore.[34] But where the stranding or grounding was not caused by negligence on the part of the tug she is not liable therefor.[35]

(H) *Collision.* A tug is bound to use all the care and diligence which prudence and caution require to avoid bringing the tow in collision with objects which may cause its injury or destruction.[36] As a general rule the vessel in tow is under the direction of the tug, and if obedient, and a collision occurs, whether between the

29. Wilson *v.* Sibley, 36 Fed. 379; The E. Luckenback, 23 Fed. 725 [*affirming* 15 Fed. 924].

30. The Delta, 125 Fed. 133; The J. J. Driscoll, 27 Fed. 521; The Syracuse, 23 Fed. Cas. No. 13,718, 6 Blatchf. 238 [*affirmed* in 9 Wall. 672, 19 L. ed. 783]; The Trojan, 24 Fed. Cas. No. 14,184, 8 Ben. 498.

Speed held not excessive.— In towing a schooner about ninety feet in length, and of some eighty-seven tons, gross, with a five-inch manila line, in a smooth bay, six or seven knots an hour is not excessive or dangerous speed. Pederson *v.* Spreckles, 87 Fed. 938, 31 C. C. A. 308.

31. Winslow *v.* Thompson, 134 Fed. 546, 67 C. C. A. 470; The Inca, 130 Fed. 36 [*affirmed* in 148 Fed. 363, 78 C. C. A. 273]; The Henry Chapel, 10 Fed. 777; The Effie J. Simmons, 6 Fed. 639; The Zouave, 30 Fed. Cas. No. 18,221, Brown Adm. 110. See also *supra*, V, B, 1, a, (I), (C).

Duty to watch and warn tow.— It is the duty of the master of the tug to keep watch to see that the tow is following so as to keep inside the channel (The N. and W. No. 2, 102 Fed. 921), and, if he sees the tow steering directly into danger, to warn her against it (The Inca, 130 Fed. 36 [*affirmed* in 148 Fed. 363, 78 C. C. A. 273]; The Atlas, 12 Fed. 798).

Duty to sound.— The tug is bound to know the channel and to keep the tow in the deepest water, and she must resort to sounding where the ordinary lights and landmarks are obscured. The Morton, 17 Fed. Cas. No. 9,864, Brown Adm. 137; The Altair, [1897] P. 105, 8 Aspin. 224, 66 L. J. P. D. & Adm. 42, 76 L. T. Rep. N. S. 263, 45 Wkly. Rep. 622.

Miscalculation.—Where the master of a tug intended to reach a bar at high water, with his tow, and would, if he had done so, have found sufficient water there to take his tow across the bar safely, but miscalculated, and reached the bar after high water, and his tow grounded and was damaged, it was held that such miscalculation was negligence for which the tug was responsible. The Brazos, 4 Fed. Cas. No. 1,821, 14 Blatchf. 446.

32. The Ship Josephine *v.* The Tug Farnsworth, 14 Phila. (Pa.) 587; The Westerly, 171 Fed. 904; Knickerbocker Steam Towage Co. *v.* Baltimore, etc., Barge Co., 170 Fed. 444, 95 C. C. A. 614 [*affirming* 159 Fed. 755]; The Naos, 144 Fed. 292; Winslow *v.* Thompson, 134 Fed. 546, 67 C. C. A. 470 [*affirming* 130 Fed. 1001] (negligence in attempting to pull tow over a bar after grounding); The Vigilant, 8 Fed. 921 (negligent grounding of tug whereby tow also grounded); The Farnsworth, 6 Fed. 307 (grounding caused by slowing down to a pace not sufficient to afford proper steerage way to tow); Dutton *v.* The Express, 8 Fed. Cas. No. 4,209, 3 Cliff. 462.

33. Wormwell *v.* P. Dougherty Co., 173 Fed. 707; The Resolute, 160 Fed. 659, 88 C. C. A. 17 [*affirming* 149 Fed. 1005]; Scully *v.* The Taurus, 63 Fed. 137; The Elfinmere, 39 Fed. 909 (too close approach to lee shore); The Gratitude, 25 Fed. 160 (failure to anchor in fog); Grand Trunk R. Co. *v.* Griffin, 21 Fed. 733; The Vigilant, 10 Fed. 765; Waldie *v.* Fullum, 12 Can. Exch. 325.

34. Vance *v.* The S. S. Wilhelm, 59 Fed. 169, 8 C. C. A. 72 [*reversing* 52 Fed. 602] (bringing tow too near shore); The M. M. Caleb, 17 Fed. Cas. No. 9,683, 10 Blatchf. 467 [*affirming* 17 Fed. Cas. No. 9,681, 5 Ben. 163] (breaking of tug's rudder chain).

35. The Raymond, 178 Fed. 848; The Startle, 115 Fed. 555; American Steel Barge Co. *v.* The Battler, 62 Fed. 612; Wilson *v.* Charleston Pilots' Assoc., 57 Fed. 227; Banks *v.* The E. D. Holton, 55 Fed. 1010; King *v.* The Harry and Fred, 49 Fed. 681 [*affirmed* in 55 Fed. 426, 5 C. C. A. 169]; The Young America, 31 Fed. 749, 24 Blatchf. 479 [*reversing* 26 Fed. 174].

36. The Enterprise, 8 Fed. Cas. No. 4,500, 3 Wall. Jr. 58.

Rules applicable in collision cases.—A vessel engaged in towing is responsible to the tow for at least the same degree of care and diligence as she is bound to exercise to avoid injuring other vessels (Nelson *v.* The Goliah, 17 Fed. Cas. No. 10,106), and hence, where the tow is injured by being brought into collision with another vessel, the question of the tug's liability is to be deter-

tug and her tow,[37] between the tows,[38] or between the tow and a third vessel,[39] the tug will be held responsible for the damage, unless the collision occurred without her fault.[40] But where both vessels are exclusively under the control, direction, and management of the master and crew of the tow, the tug is not liable for a collision.[41] Where those in charge of the vessels, respectively, jointly participate in their control and management, both will be liable if the collision was caused by the fault of both, or either, if it arose from his fault alone.[42] It is no excuse that the collision could not have been prevented at the moment it occurred, if measures of precaution have been neglected which would have rendered the accident less probable.[43] Of course it is the duty of the tow when she is placed in peril by the movements of the tug without any fault on her own part to avoid the collision if she can;[44] but when a vessel is placed in a perilous position through the fault of another vessel she is not to be held to strict rules of navigation.[45]

(I) *Running Against Piers or Docks.* A tug is liable for an injury to her tow by striking against bridge abutments or piers due to negligent navigation by the

mined by the same rules applicable in ordinary cases of collision (Nelson *v.* The Goliah, *supra*). See, generally, COLLISION, 7 Cyc. 299.

37. Wagner *v.* The W. M. Wood, 45 Fed. 774; The Oler, 18 Fed. Cas. No. 10,485, 2 Hughes 12.

38. The Theodore Roosevelt, 154 Fed. 155.

39. Société des Voiliers Francais *v.* Oregon R., etc., Co., 178 Fed. 324; The Lyon, 15 Fed. Cas. No. 8,645, Brown Adm. 59; The Night Watch, 8 Jur. N. S. 1161, 32 L. J. Adm. 47, 7 L. T. Rep. N. S. 396, Lush. 542, 11 Wkly. Rep. 189; The William Samson, 4 Quebec 306.

The tug being the motive power, the law regards her as the dominant mind in the transaction, and makes her responsible for all accidents resulting from not exercising ordinary care. The J. P. Donaldson, 167 U. S. 599, 17 S. Ct. 951, 42 L. ed. 292; The Annie Williams, 20 Fed. 866; The Fannie Tuthill, 12 Fed. 446. A boat in tow being powerless to help herself and wholly under the control of the tug, if it is brought into a collision, the occurrence presents an inference of negligence on the part of the tug. The Delaware, 20 Fed. 797.

Illustrations.—A tug with a tow has been held liable to the latter for the consequences of a collision with another vessel caused by the tug's negligence in entering a crowded harbor (The Syracuse *v.* Langley, 12 Wall. (U. S.) 167, 20 L. ed. 382 [*affirming* 23 Fed. Cas. No. 13,717, 6 Blatchf. 2 (*affirming* 14 Fed. Cas. No. 8,068)]; Nelson *v.* The Goliah, 17 Fed. Cas. No. 10,106), in attempting to pass another vessel in a narrow channel (The Mariel, 32 Fed. 103; The David Morris, 7 Fed. Cas. No. 3,596, Brown Adm. 273), or in passing an anchored vessel (The Ciampa Emilia, 50 Fed. 239, 1 C. C. A. 508 [*affirming* 41 Fed. 57]; The Delaware, 12 Fed. 571; The Lyon, 15 Fed. Cas. No. 8,645, Brown Adm. 59; Nelson *v.* The Goliah, 17 Fed. Cas. No. 10,106); by the omission of customary precautions to avert danger (Reilly *v.* The E. Heipershausen, 56 Fed. 619 [*affirmed* in 63 Fed. 1020, 12 C. C. A. 1]); by failure to exercise vigilance in keeping the tow under observation (The Gorgas, 10 Fed. Cas. No. 5,622, 10 Ben. 541), or in executing a manœuver (The C. Y. Davenport, 6 Fed. Cas. No. 3,527, 3 Ben. 63; The Gorgas, *supra*); by violation of the general rules of navigation in respect to the course to be pursued by vessels approaching each other (Nelson *v.* The Goliah, 17 Fed. Cas. No. 10,106), or in respect to lookouts (Nelson *v.* The Goliah, *supra*), or the display of lights (Nelson *v.* The Goliah, *supra*); by failure to anticipate a change of course of an approaching vessel (Bartelson *v.* The Cynthia, 2 Fed. Cas. No. 1,067); by failure to guard against the effect of the tide (The Delaware, 20 Fed. 797; The Olive Baker, 18 Fed. Cas. No. 10,489, 4 Ben. 173); by failure to give fog signals (The Raleigh, 41 Fed. 527); or by the giving of a wrong signal to an approaching vessel (The Volunteer, 28 Fed. Cas. No. 16,990, Brown Adm. 159).

40. The Van Cott, 152 Fed. 1016; The Columbia, 109 Fed. 660, 48 C. C. A. 596 [*affirming* 103 Fed. 668]; The Three Lights, 21 Fed. 251; Abbey *v.* The Robert L. Stevens, 1 Fed. Cas. No. 8, 22 How. Pr. (N. Y.) 78; The Merrimac, 17 Fed. Cas. No. 9,478, 2 Sawy. 586; Patlen *v.* The Illinois, 18 Fed. Cas. No. 10,798, injury from dangers incident to the navigation of a tow by a hawser.

41. Nelson *v.* The Goliah, 17 Fed. Cas. No. 10,106.

When a vessel in tow has a licensed pilot on board, and his directions are obeyed by the tug, the latter is not responsible for damage occasioned by a collision. Albina Ferry Co. *v.* The Imperial, 38 Fed. 614, 13 Sawy. 639, 3 L. R. A. 234; The Duke of Sussex, 1 Notes of Cas. 161, 1 W. Rob. 270.

42. Nelson *v.* The Goliah, 17 Fed. Cas. No. 10,106.

43. The Syracuse *v.* Langley, 12 Wall. (U. S.) 167, 20 L. ed. 382; Nelson *v.* The Goliah, 17 Fed. Cas. No. 10,106.

44. The Columbia, 109 Fed. 660, 48 C. C. A. 596. And see *infra*, V, B, 1, a, (II), (A).

45. The Columbia, 109 Fed. 660, 48 C. C. A. 596.

tug while passing up or down a river [46] or through a draw.[47] So a tug will be liable to her tow for the damage caused by colliding with a pier, dock, or wharf while negligently attempting to enter [48] or pass out of [49] a harbor, or to effect a landing.[50] If the collision appears to have resulted from unavoidable accident rather than from the negligence of the tug, the latter is not liable.[51] Nor is the tow entitled to recover where it appears that the injury resulted from the negligence of her own master and crew.[52]

(J) *Striking or Running on to Rocks or Other Obstructions.* When the tug has the control of the navigation of both vessels, those in charge must know the channel, the depth of the water, the currents, the tides, and the ascertained obstructions in the locality where they attempt to go.[53] Therefore if the towing vessel negligently strikes an obstruction, the presence of which is well known, or may reasonably be expected, the towed vessel may recover for damages sustained,[54]

46. The Cygnet, 126 Fed. 742, 61 C. C. A. 348; The Julia, 91 Fed. 171; Vessel Owners' Towing Co. *v.* Wilson, 63 Fed. 626, 11 C. C. A. 366; The Venture, 18 Fed. 462; The Mollie Mohler, 17 Fed. Cas. No. 9,701, 2 Biss. 505.

Duty of master.— The master of a steamer which undertakes to tow boats up and down a river where piers of bridges impede the navigation is bound to know the width of his steamer and her tows, and whether, when lashed together, he can run them safely between piers through which he attempts to pass. Germania Ins. Co. *v.* The Lady Pike, 21 Wall. (U. S.) 1, 22 L. ed. 499. He is bound also, if it is necessary for his safe navigation in the places where he chooses to be, to know how the currents set about the piers in different heights of the water, and to know whether at high water his steamer and her tows will safely pass over an obstruction which in low water they could not pass over. Germania Ins. Co. *v.* The Lady Pike, *supra*.

Navigating on wrong side of river.— Even if properly handled, a tug will be held liable for a collision between her tow and a bridge pier due to the fact that the tug was navigating on the wrong side of the river, in violation of the rules. The Three Brothers, 162 Fed. 388.

Breaking mast in passing under bridge.— The master of a tug does not exercise reasonable prudence in attempting to take a tow under the Brooklyn bridge when it is high tide, or nearly so, knowing that at mean high tide there is a margin of safety not exceeding one foot between the mast of the tow and the bridge, and the tug is liable for the damages caused by the breaking of the mast against the bridge. McMillan *v.* Moran, 113 Fed. 755, 51 C. C. A. 445 [*affirming* 107 Fed. 149].

47. The Christiania Baird, 180 Fed. 705 [*affirming* 169 Fed. 217]; The Italian, 127 Fed. 480; The Belle, 110 Fed. 451; The C. F. Roe, 108 Fed. 285; The T. J. Schuyler *v.* The Isaac H. Tillyer, 41 Fed. 477 [*affirming* 35 Fed. 551].

Towing through a drawbridge at night is said to be negligence. Booye *v.* L'Engle, 57 Fed. 306.

Duty of tug in running through draw.— It is the duty of a tug to take her tow alongside or at least to use a short hawser, in running through a draw. Booye *v.* L'Engle, 57 Fed. 306. And it is negligence for a tug to tow a vessel through a draw with a long hawser (Booye *v.* L'Engle, *supra*), especially on a course diagonal to the draw (Booye *v.* L'Engle, *supra*).

48. Gilchrist Transp. Co. *v.* Sicken, 147 Fed. 470, 78 C. C. A. 12; The Potomac, 147 Fed. 293; The Brooklyn, 4 Fed. Cas. No. 1,938, 2 Ben. 547.

49. The J. S. T. Stranahan, 165 Fed. 439, 91 C. C. A. 493 [*affirming* 151 Fed. 364]; The Jonty Jenks, 54 Fed. 1021; The M. A. Lennox, 16 Fed. Cas. No. 8,987, 4 Ben. 190.

50. *In re* Ramsay, 95 Fed. 299 (holding, however, that negligence on the part of the tug was not shown); The Victoria, 88 Fed. 524. And see Richter *v.* The Olive Baker, 40 Fed. 904.

51. The Three Brothers, 170 Fed. 48, 95 C. C. A. 322; The Lady Wimett, 92 Fed. 399 [*affirmed* in 99 Fed. 1004, 40 C. C. A. 212]; Gildersleeve *v.* New York, etc., R. Co., 82 Fed. 763.

Submerged bolt heads.—A pilot navigating a narrow, crowded tidal stream crossed by many bridges is sufficiently occupied in avoiding visible perils and should not be charged with fault because he is unaware of submerged projecting bolt heads in the piling of an abutment which, except in case of an unforeseen emergency, could not cause injury to his tow. The Harlem River No. 2, 180 Fed. 100, 103 C. C. A. 598.

52. McFadden *v.* The Illinois, 16 Fed. Cas. No. 8,784.

53. Baltimore, etc., Barge Co. *v.* Knickerbocker Steam Towage Co., 159 Fed. 755 [*affirmed* in 170 Fed. 442, 444, 95 C. C. A. 612]; The Florence, 88 Fed. 302; Vessel Owners' Towing Co. *v.* Wilson, 63 Fed. 626, 11 C. C. A. 366; Pettie *v.* Boston Tow-Boat Co., 49 Fed. 464, 1 C. C. A. 314; The T. J. Schuyler *v.* The Isaac H. Tillyer, 41 Fed. 477. And see *supra*, V, A, 1, a, (I), (C).

54. The El Rio, 162 Fed. 567; The Inca, 148 Fed. 363, 78 C. C. A. 273; The E. L. Levy, 144 Fed. 666, 75 C. C. A. 468 [*affirming* 108 Fed. 435]; The Nettie Quill, 124 Fed. 667; The John C. Bradley, 74 Fed. 847; The Mascot, 57 Fed. 512, 6 C. C. A. 465 [*affirming* 48 Fed. 917]; Pettie *v.* Boston Tow-Boat Co., 49 Fed. 464, 1 C. C. A.

unless the accident happened while the tug was in the exercise of ordinary care and skill.[55] But it is well settled that a towing vessel is not negligent when the tow strikes an unknown obstruction in a regular channel.[56] She is bound nevertheless in the exercise of reasonable prudence in navigation to follow the usual and customary channels, and to observe the recognized authorities as respects sailing directions;[57] and for any injury to the tow resulting from an unnecessary deviation from the customary channel the tug is liable,[58] although the obstruction causing the accident was previously unknown.[59]

(K) *Navigation Through Ice.* An ordinary engagement of towage is no justification for towing in such ice as makes towage dangerous,[60] or towing in the night-time when the ice cannot be distinguished far enough ahead to avoid injury.[61] But to make a tug liable for keeping on through running ice, it must appear that the error was one which a careful and prudent navigator would not have made in the circumstances.[62] If there is no reason to apprehend danger from the ice

314; The Mary N. Hogan, 35 Fed. 554 [*reversing* 30 Fed. 927]; The Robert H. Burnett, 30 Fed. 214; The Sallie McDevitt *v.* The J. W. Paxson, 29 Fed. 798 [*affirming* 24 Fed. 302]; The C. B. Sanford, 13 Fed. 910; The Adelia, 1 Fed. Cas. No. 79, 1 Hask. 505; The Niagara, 18 Fed. Cas. No. 10,219, 6 Ben. 469; Read *v.* The Tug Lillie, 11 Can. Exch. 274; Courtnay *v.* Canadian Development Co., 8 Brit. Col. 53.

If a tug master is unfamiliar with the channel, his failure to either take a pilot or inquire from persons competent to give him information renders the tug liable for an injury to the tow from striking on a sunken rock, the existence of which was known to navigators familiar with the locality. The Mabel S., 113 Fed. 971.

55. Baltimore, etc., Barge Co. *v.* Knickerbocker Steam Towage Co., 159 Fed. 755 [*affirmed* in 170 Fed. 442, 444, 95 C. C. A. 612]; The Knickerbocker, 138 Fed. 148 [*affirmed* in 145 Fed. 1022, 74 C. C. A. 21]; The Stranger, 23 Fed. Cas. No. 13,525, Brown Adm. 281; Whitehead *v.* Tempest, 29 Fed. Cas. No. 17,563*a*.

56. The Nettie Quill, 124 Fed. 667; The Nathan Hale, 99 Fed. 460, 39 C. C. A. 604; The Pierrepont, 42 Fed. 687; The Mary N. Hogan, 30 Fed. 927 [*reversed* on the facts in 35 Fed. 554]; The James A. Garfield, 21 Fed. 474; The Willie, 2 Fed. 95; The Angelina Corning, 1 Fed. Cas. No. 384, 1 Ben. 109.

The burden of proof is on the tug to show that the tow struck on some object, the presence of which ought not to have been known to the tug. The George Farrell, 10 Fed. Cas. No. 5,332, 4 Ben. 316.

57. The Nathan Hale, 91 Fed. 682 [*reversed* on the facts in 99 Fed. 460, 39 C. C. A. 604].

The master of a tug cannot rely absolutely on the position of a buoy in a harbor, but must watch for changes of its position, and be so familiar with the actual location of an obstruction as to be warned by a change in the position of the buoy. The Hercules, 81 Fed. 218.

58. The Oceanica, 144 Fed. 301 [*reversed* on other grounds in 170 Fed. 893, 96 C. C. A. 69]; The Zouave, 122 Fed. 890; Petrie *v.* The S. W. Morris, 59 Fed. 616; Pettie *v.* Boston Tow-Boat Co., 49 Fed. 464, 1 C. C. A. 314; Rose Brick Co. *v.* The Mascot, 48 Fed. 917; The Frank G. Fowler, 8 Fed. 360.

Departure at risk of tug.— Any unnecessary departure from the customary channel is at the risk of the tug. The Nathan Hale, 91 Fed. 682 [*reversed* on the facts in 99 Fed. 460, 39 C. C. A. 604]; The S. W. Morris, 59 Fed. 616; The Strathay, 27 Fed. 562. The general knowledge that a certain course was the proper course to take in consequence of some obstructions, and that it was the custom uniformly to adhere to that course, is sufficient to put upon the tug the risk of departing from it without reason. The Mascot, 48 Fed. 917 [*affirmed* in 57 Fed. 512, 6 C. C. A. 465]; The Mary N. Hogan, 35 Fed. 554.

Where a tug exercises her option as to the course, she is bound to the strictest care, and must be charged with liability for the loss in the absence of evidence to show that the tow was not properly following. The Triton, 129 Fed. 698, 64 C. C. A. 226.

Excusable departure.— In the case of The Belle, 89 Fed. 879 [*affirmed* in 93 Fed. 833, 25 C. C. A. 623], the tug was excused from liability upon special grounds only, namely, that by various excavations by the government and private parties, the channel had been considerably widened within a few years previous to the disaster and the course of navigation considerably changed, the old route being largely obstructed, thus forcing traffic to the westward.

59. The Nathan Hale, 91 Fed. 682 [*reversed* on the facts in 99 Fed. 460, 39 C. C. A. 604].

60. The Rambler, 66 Fed. 355; The James A. Wright, 13 Fed. Cas. No. 7,190, 3 Ben. 248.

61. The Rambler, 66 Fed. 355.

62. The Mary R. McKillop, 23 Fed. 829; The W. E. Gladwish, 29 Fed. Cas. No. 17,355, 17 Blatchf. 77.

Error of judgment.— Where both tug and tow entered upon the towing with full knowledge of the risk of navigation by reason of ice and the injury to the tow resulted from a mere mistake of judgment upon the part of the tug, she was not responsible. The Packer, 28 Fed. 156. The tug is not to be held liable upon conjecture, nor is negligence to be imputed to those in charge merely be-

the tug is not liable;[63] but if the danger is obvious, the tug is liable for any injury thereby resulting to the tow, unless she exercises that degree of reasonable skill and care which the circumstances require.[64] And especially is this true where the tug continues against the protest of the tow master.[65] If the latter, knowing the circumstances, elects to go through the ice, he assumes the risk of injury,[66] and if the tug is guilty of no negligence, no liability attaches to her therefor.[67] But such assumption of risk does not relieve the tug from the consequences of her own negligence.[68] In the case of an independent contract to tow a boat through ice, or of a contract deliberately made with reference to such circumstances, a tug will not be held liable for starting upon such an undertaking; but only for some negligence or want of due care and skill in the execution of it.[69]

(L) *Stress of Weather.* Tugs are not liable for loss of tows resulting from proceeding into open waters in rough weather, unless the decision of their masters to do so was one which nautical experience and good seamanship would condemn as inexpedient and unjustifiable under the circumstances then prevailing.[70] They are not, however, to be exonerated merely because they acted honestly;[71] it must appear that they acted with an honest intent to do their duty, and in the exercise of the reasonable discretion of experienced navigators.[72] The question is whether the weather conditions were such at the commencement of the voyage as to justify an experienced navigator, exercising ordinary prudence, and familiar with the ordinary conditions of the proposed voyage, to undertake the trip,[73] in view of

cause it appears, after the event, that the accident might not have happened if something had been done which was omitted. The question is whether they did all that other prudent and intelligent men would have ordinarily deemed it necessary to do under the same circumstances. The Packer, *supra.*

63. The General William McCandless, 10 Fed. Cas. No. 5,322, 10 Ben. 453.

64. Monk *v.* Cornell Steamboat Co., 175 Fed. 271; The Phœnix, 143 Fed. 350; The R. G. Townsend, 140 Fed. 217; Price *v.* The Rambler, 66 Fed. 355; The Young America, 31 Fed. 749, 24 Blatchf. 479 [*reversing* 26 Fed. 174]; The U. S. Grant, 28 Fed. Cas. No. 16,804, 7 Ben. 337.

65. The R. G. Townsend, 140 Fed. 217; The Joseph Peene, 130 Fed. 489.

66. The W. E. Gladwish, 29 Fed. Cas. No. 17,355, 17 Blatchf. 77.

Unauthorized assumption of risk.— Where the master of the tow, without authority, agrees to run the risk of ice, and the tug then takes her out, the latter takes all the risk of safe towage, and is liable for the loss of the tow by being cut through by the ice and sunk. The James A. Wright, 13 Fed. Cas. No. 7,190, 3 Ben. 248.

67. The Packer, 28 Fed. 156.

68. Bradley *v.* Lehigh Valley R. Co., 145 Fed. 569 [*affirmed* in 153 Fed. 350, 82 C. C. A. 426]; The Phœnix, 143 Fed. 350; The Packer, 28 Fed. 156.

69. The Alfred and Edwin, 1 Fed. Cas. No. 190, 7 Ben. 137.

70. The Mechanic *v.* Flanigan, 14 Phila. (Pa.) 606; The Nannie Lamberton, 85 Fed. 983, 29 C. C. A. 519; The Hercules, 73 Fed. 255, 19 C. C. A. 496; The Allie & Evie, 24 Fed. 745; The George L. Garlick, 16 Fed. 703.

Choice of route.— Where the propriety of the general course to be taken by a tow from one port to another depends largely on the season of the year, the state of the weather, the velocity of the wind, the probability of a storm, and the proximity of harbors of refuge, the choice of a route is usually within the discretion of the master of the tug; and if he has exercised reasonable judgment and skill in his selection he will not be held in fault, although the court may be of opinion that the disaster which followed would not have occurred if he had taken another route. The James P. Donaldson, 19 Fed. 264. It has been held no breach of duty for a tug to take a raft of logs outside Nantucket shoals, instead of through Vineyard sound, where up to that time only one raft of logs had been taken through Vineyard sound, and that was a much smaller raft than the one in tow, which was of such weight as to sometimes overcome the power of the steamer. The Joggins Raft, 43 Fed. 309 [*affirming* 40 Fed. 533].

71. The Nannie Lamberton, 85 Fed. 983, 29 C. C. A. 519.

72. The Nannie Lamberton, 85 Fed. 983, 29 C. C. A. 519; The Hercules, 73 Fed. 255, 19 C. C. A. 496.

73. *In re* McWilliams, 74 Fed. 648, 20 C. C. A. 580; The Allie & Evie, 24 Fed. 745.

If the weather is fair when the start is made, and there is no reason to anticipate danger, a tug is not liable for injury to or loss of the tow due to rough weather. The Covington, 128 Fed. 788 [*affirmed* in 140 Fed. 985, 72 C. C. A. 680]; The E. Luckenbach, 113 Fed. 1017, 51 C. C. A. 589 [*affirming* 109 Fed. 487]; The Ivanhoe, 84 Fed. 500; The Hercules, 73 Fed. 255, 19 C. C. A. 496 [*reversing* 63 Fed. 268]; The W. J. Keyser, 56 Fed. 731, 6 C. C. A. 101; The Joggins Raft, 43 Fed. 309 [*affirming* 40 Fed. 533]; The Argus, 31 Fed. 481; The Allie & Evie,

the qualities of the tug and the character of the tow.[74] Delay in entering upon the performance of the contract, whereby a tug and her tow are overtaken by a storm, renders the tug liable for the consequences,[75] unless under the circumstances such delay cannot be regarded as the proximate cause of the loss.[76] If prudence requires the tug to take soundings,[77] to anchor her tow,[78] to put back,[79] or to seek shelter [80] she will be responsible for the damages to the tow resulting from a failure to do so.

(M) *Casting Off, Anchoring, or Landing Tow.* The duty of a tug to a tow is a continuous one from the time the service commences until it is completed, and she is not justified in casting off and abandoning the tow,[81] unless the situation

24 Fed. 745; The Snap, 24 Fed. 292; The Charles Allen, 23 Fed. 407.

If bad weather exists, or may reasonably be anticipated when the start is made, the tug is responsible for the damage suffered by her tow. The E. T. Williams, 139 Fed. 231, 71 C. C. A. 357 [*affirming* 126 Fed. 871]; Tucker *v.* Gallagher, 122 Fed. 847; The Ashbourne, 112 Fed. 687 [*affirmed* in 120 Fed. 1018, 56 C. C. A. 678]; The Nannie Lamberton, 85 Fed. 983, 29 C. C. A. 519 [*affirming* 79 Fed. 121]; The Pocahontas, 79 Fed. 122; *In re* McWilliams, 74 Fed. 648, 20 C. C. A. 580 [*affirming* 65 Fed. 251]; Humboldt Lumber Manufacturers' Assoc. *v.* Christopherson, 73 Fed. 239, 19 C. C. A. 481, 46 L. R. A. 264 [*affirming* 60 Fed. 428]; The Hercules, 63 Fed. 268 [*reversed* on the facts in 73 Fed. 255, 19 C. C. A. 496]; Bouker *v.* Smith, 40 Fed. 839; The Bordentown, 40 Fed. 682; The M. J. Cummings, 18 Fed. 178; Mason *v.* The William Murtaugh, 3 Fed. 404; The Blanche Page, 3 Fed. Cas. No. 1,523, 4 Ben. 186; The Merrimac, 17 Fed. Cas. No. 9,478, 2 Sawy. 586.

A low but rising barometer, and cautionary signals displayed, are not alone sufficient to make starting on such a trip negligence, in the absence of all other indications of bad weather. The Allie & Evie, 24 Fed. 745.

A wind blowing at the rate of twenty-two miles an hour is neither a "gale" nor a "storm," but merely a "brisk" wind, and, when from the northeast, need not suspend navigation in New York harbor during its prevalence. The Snap, 24 Fed. 292.

74. *In re* McWilliams, 74 Fed. 648, 20 C. C. A. 580; Bouker *v.* Smith, 40 Fed. 839; The Bordentown, 40 Fed. 682; The M. J. Cummings, 18 Fed. 178; Mason *v.* The William Murtaugh, 3 Fed. 404; The Blanche Page, 3 Fed. Cas. No. 1,523, 4 Ben. 186.

To justify a start in bad weather the case must present exceptional circumstances in the staunch character of the tow itself, and the shortness of the trip; while the tugs should not only have full general fitness for the work, but such a reserve of power for service in emergencies as will fully offset, and prevent, the dangers expected to be met by ordinary tugs and tows in bad weather. *In re* McWilliams, 65 Fed. 251 [*affirmed* in 74 Fed. 648, 20 C. C. A. 580]. In Mason *v.* The William Murtaugh, 3 Fed. 404, it was held that, by reason of open hatches and other openings in the deck of the barge in tow, which was loaded with coal, she was unfit and unseaworthy for a trip across the bay of New York, in the state of the wind and tide then existing; that the unfitness and unseaworthiness were perfectly obvious and presumably known both to the owner of the tow and tug; and that it was negligence to undertake the trip in the weather then existing. And see The Bordentown, 40 Fed. 682. In The W. J. Keyser, 56 Fed. 731, 6 C. C. A. 101, the voyage was commenced at night. The barge was not known by the master of the tug to be in an unseaworthy and unfit condition. The openings in the deck were covered by loose planks. There were hatch covers and tarpaulins aboard the barge to cover the openings, and there was nothing unusual in the weather.

75. Parmalee *v.* Wilks, 22 Barb. (N. Y.) 539.

76. Daniels *v.* Ballantine, 23 Ohio St. 532, 13 Am. Rep. 264.

77. The Adelia, 154 U. S. 593, 14 S. Ct. 1171, 21 L. ed. 672.

78. The Young America, 25 Fed. 207; The Armstrong, 1 Fed. Cas. No. 540, Brown Adm. 130.

79. The James P. Donaldson, 19 Fed. 264.

Tugs held not liable for failure to put back see The Gypsum King, 178 Fed. 61, 101 C. C. A. 555; The Carbonero, 106 Fed. 329, 45 C. C. A. 314 [*affirmed* in 122 Fed. 753, 58 C. C. A. 553]; The Hercules, 73 Fed. 255, 19 C. C. A. 496 [*reversing* 63 Fed. 268]; Hubbell *v.* The Hercules, 55 Fed. 120.

80. The Burlington *v.* Ford, 137 U. S. 386, 11 S. Ct. 138, 34 L. ed. 731; The Frank G. Fowler, 8 Fed. 340.

Tugs held not liable for failure to seek shelter see Vance *v.* The Wilhelm, 52 Fed. 602 [*reversed* on other grounds in 59 Fed. 169, 8 C. C. A. 72]; The Frederick E. Ives, 25 Fed. 447; Philadelphia, etc., R. Co. *v.* New England Transp. Co., 24 Fed. 505.

The master's failure to keep near ports of safety will not render the tug liable, where such failure had nothing to do with the loss of the tow. The Joggins Raft, 43 Fed. 309 [*affirming* 40 Fed. 533].

81. Kenah *v.* The Steam-Tug John Markee, Jr., 14 Phila. (Pa.) 561; Alaska Commercial Co. *v.* Williams, 128 Fed. 362, 63 C. C. A. 92; The O. L. Halenbeck, 110 Fed. 556; Frost *v.* The A. M. Ball, 43 Fed. 170 (holding that where the master of a tug engaged to tow a schooner, and did tow her for a short period, and then, finding that there had been a mistake in the bargain with the schooner, cast

is such as to make such action necessary.[82] In any case notice of the intention to cast off must first be given;[83] and even if the circumstances justify the tug in cutting loose from the tow, she is not justified in deserting the tow without making reasonable efforts to save her,[84] unless it appears that such efforts would have been ineffectual.[85] When a tug finds that she cannot safely deliver her tow at its destination, it is her duty either to notify the owner of the tow and return it to his possession,[86] or to provide a reasonably safe anchorage [87] or mooring place,[88]

off the tow-line, whereupon the schooner, in spite of all her efforts, was carried by the wind and tide against the docks, the tug was liable for the schooner's damage); The Henry Buck, 38 Fed. 611; Gilooley *v.* Pennsylvania R. Co., 10 Fed. Cas. No. 5,448*a*; Gaskin *v.* Calvin, 2 U. C. C. P. 527.

Temporary abandonment to attend to other tows.— If the tow is in good order, well manned, and securely anchored in a proper place, in the absence of special reason to the contrary, it is a common practice for the tug to leave it temporarily, and take other work; and if, during such temporary absence, the tow is swept away by an extraordinary storm, the tug is not liable for the loss. The Battler, 72 Fed. 537, 19 C. C. A. 6 [*reversing* 55 Fed. 1006]; The Mechanic, 9 Fed. 526. But it is said that the practice on the part of towing vessels of casting part of their tows adrift in and in the vicinity of New York harbor, and leaving them while attending to other tows, cannot be justified by custom, even if such custom could be shown. The Etruria, 139 Fed. 925 [*reversed* on other grounds in 147 Fed. 216, 77 C. C. A. 442].

While leaving part of tow at intermediate landing.— A tug cannot expose a boat in its tow to any unnecessary peril in the course of the voyage, while leaving a barge in its tow at an intermediate landing. White *v.* The Lavergne, 2 Fed. 788.

If the crew of the tow cast her off, no recovery can be had against the tug. *In re* Moran, 120 Fed. 556.

82. The John M. Nicol, 63 Fed. 275, 11 C. C. A. 182; The Charles Allen, 23 Fed. 407; Sonsmith *v.* The J. P. Donaldson, 21 Fed. 671 [*affirming* 19 Fed. 264]; The Clematis, 5 Fed. Cas. No. 2,876, Brown Adm. 499; The Loyal *v.* The Challenger, 14 Quebec 135.

To excuse a tug for leaving and remaining away from her tow, there should be proof that the tow was sinking, or past saving, or that the tug was so injured or in such danger that it could not stay or return, or similar condition. *In re* Moran, 120 Fed. 556.

Burden of proof to show excuse.—Where a tug abandons her tow of barges during a storm, the burden is upon the tug to show a sufficient excuse for such abandonment. The Clematis, 5 Fed. Cas. No. 2,876, Brown Adm. 499. Much, however, must be left to the judgment of competent officers in such an emergency, and such judgment formed upon the spot and acted upon in good faith will not be impeached, except upon a clear preponderance of proof that it was erroneous.

The Clematis, 5 Fed. Cas. No. 2,876, Brown Adm. 499.

83. The O. L. Halenbeck, 110 Fed. 556; Frost *v.* The A. M. Ball, 43 Fed. 170; The J. P. Donaldson, 21 Fed. 671 [*affirming* 19 Fed. 264].

When notice immaterial.— The failure to give notice of an intention to cast off the tow-line was held immaterial where notice had previously been given the tow to throw over her anchor. The Thomas Kiley, 23 Fed. Cas. No. 13,925, 5 Ben. 301.

84. Cahill's Appeal, 124 Fed. 63, 59 C. C. A. 579; The O. L. Halenbeck, 110 Fed. 556; The J. L. Hasbrouck, 13 Fed. Cas. No. 7,324, 5 Ben. 244.

85. Cahill's Appeal, 124 Fed. 63, 59 C. C. A. 519.

86. Jones *v.* The American Eagle, 54 Fed. 1010.

87. The Printer, 164 Fed. 314, 90 C. C. A. 246 [*affirming* 155 Fed. 441]; The Flushing, 159 Fed. 570; The Flushing, 134 Fed. 757 [*affirmed* in 145 Fed. 614, 76 C. C. A. 304]; The S. C. Hart, 132 Fed. 536; The Battler, 72 Fed. 537, 19 C. C. A. 6 [*reversing* 55 Fed. 1006]; The P. C. Schultz, 19 Fed. Cas. No. 10,865, 10 Ben. 536, holding that a canal-boat left by a towboat to await its return in order to complete the towing contract at a place which, although safe, cannot be retained, and from which the canal-boat must move to an unsafe place, is not left in a safe place.

A mistake of judgment on the part of the master of a tug in selecting an anchorage for his barges does not render the tug liable for their loss, where such mistake is only manifested by the result, and it appears that the master exercised reasonable skill and judgment in view of the circumstances existing at the time. The Battler, 72 Fed. 537, 19 C. C. A. 6 [*reversing* 55 Fed. 1006].

88. The Governor, 77 Fed. 1000; Jones *v.* The American Eagle, 54 Fed. 1010; Cokeley *v.* The Snap, 24 Fed. 504; Jennings *v.* Muller, 13 Fed. Cas. No. 7,282; The Nellie, 17 Fed. Cas. No. 10,094, 8 Ben. 261.

If the mooring place is ordinarily safe and customarily used for the purpose, the tug is not liable for injury to the tow due to unusual weather conditions. Emiliusen *v.* Pennsylvania R. Co., 30 N. Y. App. Div. 203, 51 N. Y. Suppl. 603; The Alice, 157 Fed. 984; The Media, 132 Fed. 148 [*affirmed* in 135 Fed. 1021, 68 C. C. A. 127]. A tug is not chargeable with negligence in not knowing of a hidden projection, dangerous to her tow, at a landing place selected by such tow, and which, from its evident actual use as a landing place for such a tow, it was rea-

and to keep such watch over the tow as to enable her to render whatever assistance it may need.[89]

(II) *Contributory Negligence of Tow* — (A) *In General.* Where both tug and tow are under the control of the tow's master or pilot, the tug is not responsible to the tow for any injury received while their movements are being thus directed.[90] Conversely where a tow is lashed to the side of a tug, and depends wholly upon her for motive power and steerage, the responsibility for the navigation of both is wholly on the tug, and the tow cannot be guilty of contributory negligence.[91] But when a vessel is towed astern, and is in charge of her own officers and crew, the tug has the right to demand and expect the exercise by them of ordinary care and skill [92] in the performance of all those duties which nautical skill demands in order to properly manage the tow.[93] Thus the law is abundantly settled that the tow is bound to follow the guidance of the tug,[94] to keep as far as

sonable to infer was suitable for the purpose to which it was put. Powell *v.* The Willie, 2 Fed. 95.

89. The Thomas Quigley, 130 Fed. 336, 64 C. C. A. 582 [*affirming* 123 Fed. 161]; The Thomas Purcell, Jr., 92 Fed. 406, 34 C. C. A. 419; Donoghue-Kellogg Mill Co. *v.* The Wasp, 86 Fed. 470; The Governor, 77 Fed. 1000; Jones *v.* The American Eagle, 54 Fed. 1010; Connolly *v.* Ross, 11 Fed. 342; The Elmira, 8 Fed. Cas. No. 4,417.

90. *Michigan.*—Wanner *v.* Mears, 102 Mich. 554, 61 N. W. 2.

Pennsylvania.— Hill *v.* Rogers, 1 Pittsb. 163, holding, however, that in an action on the case against the owners of a tug, on the ground of negligence, for an injury to the boat in tow, it is no defense that the captain of the latter gave directions and advice to the pilot of the tug, which he followed at the time of the happening of the accident in question.

United States.— The John A. Hughes, 158 Fed. 94, 85 C. C. A. 562; Marts *v.* The Oceanic, 74 Fed. 642, 20 C. C. A. 574; The City of Alexandria, 71 Fed. 891; The Olinda, 49 Fed. 682; Albina Ferry Co. *v.* The Imperial, 38 Fed. 614, 13 Sawy. 639, 3 L. R. A. 234; The Edgar Baxter, 8 Fed. Cas. No. 4,278, 8 Ben. 162; Goodwin *v.* The C. Durant, 10 Fed. Cas. No. 5,552; Evans *v.* U. S., 42 Ct. Cl. 287.

England.— The Gypsey King, 5 Notes of Cas. 282, 2 W. Rob. 537; The Duke of Sussex, 1 Notes of Cas. 161, 1 W. Rob. 270.

Canada.— Prince Arthur *v.* Florence, 5 Can. Exch. 151 [*affirmed* in 5 Can. Exch. 218].

91. The Arctic F. Ins. Co. *v.* Austin, 69 N. Y. 470, 25 Am. Rep. 221; Dutton *v.* The Express, 8 Fed. Cas. No. 4,209, 3 Cliff. 462.

92. The Arctic F. Ins. Co. *v.* Austin, 69 N. Y. 470, 25 Am. Rep. 221; The Margaret *v.* Bliss, 94 U. S. 494, 24 L. ed. 146; The Inca, 148 Fed. 363, 78 C. C. A. 273; The Thomas Wilson, 124 Fed. 649; Pederson *v.* Spreckles, 87 Fed. 938, 31 C. C. A. 308; The Jacob Brandow, 39 Fed. 831.

Insecure fastening of tow-line to tow.—A vessel having her own crew aboard is responsible for the fastening of the tow-line to her own bitts, and the tug is not responsible for any negligence in performing such duty. The Edwin Terry, 162 Fed. 311, 89 C. C. A. 19; The Edwin Terry, 162 Fed. 309, 89 C. C. A. 17 [*reversing* 145 Fed. 837]; The H. B. Moore, Jr., 155 Fed. 380; The Lyndhurst, 147 Fed. 110, 77 C. C. A. 336 [*reversing* 129 Fed. 843]; Pedersen *v.* John D. Spreckles, etc., Co., 87 Fed. 938, 31 C. C. A. 308.

93. Stretch *v.* The Margaret, 2 Fed. 255, 2 Flipp. 640.

Illustrations.— If the tow, at a critical point, when about to enter a harbor, carries such sail as to take her out of the control of the towing craft, either as to her headway or course, the tug should not be held at fault for any disaster that ensues. Stretch *v.* The Margaret, 2 Fed. 255, 2 Flipp. 640. So the tow is in fault in hoisting sail so as to obscure the view of the tug's pilot. The W. A. Levering, 36 Fed. 511. Failure of a tow to use fenders while a landing is being effected is negligence, and the tug is not liable for any damage to the tow occasioned by her coming in contact with the wharf. Richter *v.* The Olive Baker, 40 Fed. 904. Where the master of a boat, left by her tug to wait the tug's return to complete the towing contract, at a place from which she is obliged to move for other vessels, moves her to an unsafe place, the tug is not liable for resulting injuries, if she could have been moved to a safe place. The P. C. Schultz, 19 Fed. Cas. No. 10,865, 10 Ben. 536. Want or inattention of a lookout on the tow is a contributory fault (The Mars, 116 Fed. 204; The Sea Breeze, 21 Fed. Cas. No. 12,572*a*, 2 Hask. 510), unless his presence or attention could not have prevented the accident (The Victor, 28 Fed. Cas. No. 16,933, Brown Adm. 449).

94. The Margaret *v.* Bliss, 94 U. S. 494, 24 L. ed. 146; The Inca, 148 Fed. 363, 78 C. C. A. 273; The Thomas Wilson, 124 Fed. 649; The Doris Eckhoff, 50 Fed. 134, 1 C. C. A. 494; The Ciampa Emilia, 46 Fed. 866; The Jacob Brandow, 39 Fed. 831; Stretch *v.* The Margaret, 2 Fed. 255, 2 Flipp. 640; The Sea Breeze, 21 Fed. Cas. No. 12,572*a*, 2 Hask. 510; The Stranger, 23 Fed. Cas. No. 13,525, 1 Brown Adm. 281.

The duty of proper steering devolves upon the tow and the tug cannot be held responsible for any fault of the tow in that regard.

possible in her wake,[95] and to conform to her directions,[96] unless such course would manifestly lead her into danger; [97] and if the master of the tow refuses or neglects such reasonable obedience, or fails in reasonable skill or attention to his duty, the owners of the tug are not to be held responsible for the consequences.[98] But where the tug was at fault, it is no defense that the tow was also negligent,[99] unless the negligence of the latter was the proximate cause of the injury.[1] In situations of danger it is the duty of the tow to use all possible means to avoid injury,[2] and when injury ensues, to do all in its power to make the injury as light as possible.[3]

(B) *Unseaworthiness and Failure to Give Notice Thereof.* A master of a boat,

The Arctic F. Ins. Co. *v.* Austin, 69 N. Y. 470, 25 Am. Rep. 221; Stricker *v.* The Maurice, 128 Fed. 652; The Garden City, 127 Fed. 298, 62 C. C. A. 182; The Columbia, 109 Fed. 660, 48 C. C. A. 596 [*affirming* 103 Fed. 668]; The N. & W. No. 2, 102 Fed. 921; The Jonty Jenks, 54 Fed. 1021; The Jacob Brandow, 39 Fed. 831; Stretch *v.* The Margaret, 2 Fed. 255, 2 Flipp. 640; The Anglo Norman, 16 Fed. Cas. No. 9,174, Newb. Adm. 492; The Merrimac, 17 Fed. Cas. No. 9,478, 2 Sawy. 586; Prince Arthur *v.* Florence, 5 Can. Exch. 151 [*affirmed* in 5 Can. Exch. 218].

95. The Margaret *v.* Bliss, 94 U. S. 494, 24 L. ed. 146; The Inca, 148 Fed. 363, 78 C. C. A. 273; The Doris Eckhoff, 50 Fed. 134, 1 C. C. A. 494; The T. J. Schuyler *v.* The Isaac H. Tillyer, 41 Fed. 477 (holding that a tow that endeavors, while under the control of the tug, to follow as nearly as possible in her wake, is not responsible for any injury happening to her while so doing, occasioned by running against obstructions); The Jacob Brandow, 39 Fed. 831; Stretch *v.* The Margaret, 2 Fed. 255, 2 Flipp. 640; The Sea Breeze, 21 Fed. Cas. No. 12,572*a*, 2 Hask. 510.

96. The Margaret *v.* Bliss, 94 U. S. 494, 24 L. ed. 146; The Inca, 148 Fed. 363, 78 C. C. A. 273; The J. H. De Graff, 66 Fed. 351; The Doris Eckhoff, 50 Fed. 134, 1 C. C. A. 494; The Jacob Brandow, 39 Fed. 831; The Annie Williams, 20 Fed. 866; Dutton *v.* The Express, 8 Fed. Cas. No. 4,209, 3 Cliff. 462; The Anglo Norman, 16 Fed. Cas. No. 9,174, Newb. Adm. 492; The Sea Breeze, 21 Fed. Cas. No. 12,572*a*, 2 Hask. 510.

Presumption of authority.—A barge in tow on a long hawser has a right to assume that a signal from the tug is made by authority. The J. H. De Graff, 66 Fed. 351.

97. The Thomas Wilson, 124 Fed. 649; The J. H. De Graff, 66 Fed. 351; The Altair, [1897] P. 105, 8 Aspin. 224, 66 L. J. P. D. & Adm. 42, 76 L. T. Rep. N. S. 263, 45 Wkly. Rep. 622.

Failure to object.— The master of a towed vessel is not chargeable with contributory negligence in acquiescing in the exposure of such vessel to an unnecessary peril by the tug (The Ashbourne, 112 Fed. 687 [*affirmed* in 120 Fed. 1018, 56 C. C. A. 678]; White *v.* The Lavergne, 2 Fed. 788), unless the danger about to be incurred is very obvious (The Bordentown, 16 Fed. 270; Mason *v.* The William Murtaugh, 3 Fed. 404; White *v.* The Lavergne, 2 Fed. 788).

Where the tug is under the directions of the pilot of the tow, it is the duty of the pilot to order the tug to stop, when fog becomes so dense as to render it dangerous to proceed, and neglect to give such order is contributory negligence, precluding a recovery against the tug for negligently running the tow ashore. Smith *v.* St. Lawrence Towboat Co., L. R. 5 P. C. 308, 2 Aspin. 41, 23 L. T. Rep. N. S. 885, 21 Wkly. Rep. 569. But where the pilot of the tow gives orders to the tug, which orders are disregarded, failure to cast off the tow-line has been held not to be contributory negligence, where it appears that such action would not have prevented the accident. Spaight *v.* Tedcastle, 6 App. Cas. 217, 4 Aspin. 406, 44 L. T. Rep. N. S. 589, 29 Wkly. Rep. 761.

98. Dutton *v.* The Express, 8 Fed. Cas. No. 4,209, 3 Cliff. 462. See the cases cited *supra*, this section.

99. The Julia, 91 Fed. 171; The J. J. Driscoll, 27 Fed. 521; The Annie Williams, 20 Fed. 866; The Merrimac, 17 Fed. Cas. No. 9,478, 2 Sawy. 586; The Adam W. Spies, 70 L. J. P. D. & Adm. 25.

If the proximate cause of the loss of the tow was the negligent steering of the tug, it is no defense to the action within the rule as to contributory negligence, that if plaintiffs had done something which they might, and, perhaps, ought to have done, but omitted to do, the accident would have been avoided. Spaight *v.* Tedcastle, 6 App. Cas. 217, 4 Aspin. 406, 44 L. T. Rep. N. S. 589, 29 Wkly. Rep. 761; Sewell *v.* British Columbia Towing, etc., Co., 9 Can. Sup. Ct. 527. Such an omission ought not to be regarded as contributory negligence if it might in the circumstances which actually happened have been unattended with danger but for the tug's fault, and if it had no proper connection as a cause with the damage which followed. Spaight *v.* Tedcastle, *supra*.

1. Marts *v.* The Oceanic, 74 Fed. 642, 20 C. C. A. 574; The King Kalakau, 43 Fed. 172.

2. The Thomas Wilson, 124 Fed. 649; The Columbia, 109 Fed. 660, 48 C. C. A. 596 [*affirming* 103 Fed. 668]; The Morton, 17 Fed. Cas. No. 9,864, 1 Brown Adm. 137; The Stranger, 23 Fed. Cas. No. 13,525, 1 Brown Adm. 281; The Altair, [1897] P. 105, 8 Aspin. 224, 66 L. J. P. D. & Adm. 42, 76 L. T. Rep. N. S. 263, 45 Wkly. Rep. 622.

3. The Morton, 17 Fed. Cas. No. 9,864, Brown Adm. 137; The Stranger, 23 Fed. Cas. No. 13,525, Brown Adm. 281.

offering his boat to be towed, represents her as seaworthy, or fit for the voyage, and sufficiently strong, staunch, and sound to meet and withstand the ordinary perils to be encountered upon the voyage;[4] and the tug is not liable for damages resulting from the weakness, decay, or leaks of the tow, or other defects which render her unseaworthy,[5] and which are not known or obvious to the master of the tug.[6] But the unseaworthiness of the tow is no defense unless it caused or contributed to the injury.[7] Misrepresentations as to the character or condition of the tow, upon which the tug master relies, and in consequence of which the tow suffers injury, relieve the tug of all liability therefor.[8]

(c) *Acts In Extremis.* The acts and failure to act of the master of the tow after it has been put *in extremis* by the negligence of the tug do not ordinarily constitute contributory negligence even when erroneous.[9]

4. Dady *v.* Bacon, 149 Fed. 401, 79 C. C. A. 221 [*reversing* 133 Fed. 986]; The Inca, 148 Fed. 363, 78 C. C. A. 273; The Edmund L. Levy, 128 Fed. 683, 63 C. C. A. 235; The Victoria, 88 Fed. 524; Mason *v.* The William Murtaugh, 3 Fed. 404; Cramer *v.* Allen, 6 Fed. Cas. No. 3,346, 5 Blatchf. 248.

This rule does not justify any rude, rough, or indifferent handling of the tow, or absolve the tug from the duty of navigating with reasonable care, so as to avoid injurious contacts. The Victoria, 88 Fed. 524; The Deer, 7 Fed. Cas. No. 3,737, 4 Ben. 352.

5. The G. N. Hannold, 166 Fed. 637; The Edwin Terry, 162 Fed. 311, 89 C. C. A. 19; The Edwin Terry, 162 Fed. 309, 89 C. C. A. 17 [*reversing* 145 Fed. 837]; The Printer, 155 Fed. 441; Dady *v.* Bacon, 149 Fed. 401, 79 C. C. A. 221 [*reversing* 133 Fed. 986]; The Edmund L. Levy, 128 Fed. 683, 63 C. C. A. 235; Barney Dumping Co. *v.* The R. C. Veit, 56 Fed. 122; Hubbell *v.* The Hercules, 55 Fed. 120; O'Neil *v.* The I. M. North, 37 Fed. 270; Mason *v.* The William Murtaugh, 3 Fed. 404; The General Geo. G. Meade, 10 Fed. Cas. No. 5,312, 8 Ben. 481; Schurtz *v.* The New York, 21 Fed. Cas. No. 12,492.

The absence of an anchor is a fault on the part of the tow which may render her unseaworthy. The Flushing, 134 Fed. 757 [*affirmed* in 145 Fed. 614, 76 C. C. A. 304]; Cramer *v.* Allen, 6 Fed. Cas. No. 3,346, 5 Blatchf. 248; The J. L. Hasbrouck, 13 Fed. Cas. No. 7,324, 5 Ben. 244; The Thomas Kiley, 23 Fed. Cas. No. 13,925, 5 Ben. 301.

The absence of lights on the towed vessel may be negligence. The M. J. Cummings, 18 Fed. 178. It is an act of negligence for a vessel to lie at anchor in the night without proper lights, and the duty is none the less to exhibit the statutory or customary lights when being propelled by another vessel. The Arctic F. Ins. Co. *v.* Austin, 69 N. Y. 470, 25 Am. Rep. 221. In Silliman *v.* Lewis, 49 N. Y. 379, the tow did not have the light required by law. It was held that this fact alone would raise a presumption of contributory negligence, but that the want of a proper light was not a defense unless it contributed to the injury.

If improper loading or overloading of the tow contributes directly to her loss, the tug, which has been guilty of no negligence, is not liable. Neal *v.* Scott, 25 Ind. 440; Connolly *v.* Ross, 11 Fed. 342. But where a defense is set up that a barge injured by being towed against a sunken pier was too heavily loaded and was too weak, and it is not shown that she was too heavily loaded for a barge which was to perform her voyage without being subjected to the blow which she received, or that she was not sufficiently strong for the voyage she was on, the defense is not available. The Deer, 7 Fed. Cas. No. 3,737, 4 Ben. 352.

6. The Edmund L. Levy, 128 Fed. 683, 63 C. C. A. 235.

Distinction between obvious and hidden defects.— There is an obvious distinction between defects or unfitness for the voyage, which can be seen and must be appreciated, upon the most casual inspection of the boat, and such as cannot be so seen. If the unfitness consists in what is perfectly obvious to the master of the tug when he takes the boat in tow, then the tug undertakes to use a degree of care measured according to the obvious condition of the boat. Wilson *v.* Sibley, 36 Fed. 379; Connolly *v.* Ross, 11 Fed. 342; The William Cox, 9 Fed. 672; Mason *v.* The William Murtaugh, 3 Fed. 404. If the unfitness is not thus obvious, he undertakes only for that degree of care which is proper and necessary for the management of a sound and seaworthy boat (The Syracuse, 18 Fed. 828; Mason *v.* The William Murtaugh, 3 Fed. 404), unless the owner of the tow gives notice of her weakness or unfitness (The Syracuse, 18 Fed. 828; The Bordentown, 16 Fed. 270).

7. Pettie *v.* Boston Tow-Boat Co., 49 Fed. 464, 1 C. C. A. 314; The Workman, 30 Fed. Cas. No. 18,045, 1 Lowell 504.

8. The Coney Island, 115 Fed. 751 (as to draught of tow); King *v.* The Harry & Fred, 55 Fed. 426, 5 C. C. A. 169 [*affirming* 49 Fed. 681].

9. Gilchrist Transp. Co. *v.* Sicken, 147 Fed. 470, 78 C. C. A. 12; The Oceanica, 144 Fed. 301 [*reversed* on other grounds in 170 Fed. 893, 96 C. C. A. 69]; The Kalkaska, 107 Fed. 959, 47 C. C. A. 100; The Strathay, 27 Fed. 562.

Failure to drop anchor, in view of imminent danger, will be deemed an error *in extremis*, and not an act of negligence. The Oceanica, 144 Fed. 301 [*reversed* on other grounds in 170 Fed. 893, 96 C. C. A. 69].

(D) *Assumption of Risk by Tow.* Where the towed vessel consents to a particular method of being towed,[10] or to the use of an unsuitable tow-line,[11] or takes the risk of a particular manœuver,[12] the tug is not liable, in the absence of negligence, for the injuries sustained as a result. So where the tow is discovered to be in a sinking condition, and the tug master promptly offers to take her to a place of safety, which offer is refused by the master of the tow, the tug is relieved of all responsibility for the subsequent sinking of the tow.[13]

(E) *Abandonment of Tow by Crew.* If those in charge of a tow unnecessarily abandon her, and that abandonment contributes materially to her loss, it constitutes negligence and fault on the part of the tow.[14] But where the tow is left under circumstances which involve imminent peril to the lives of those who remain on board of her, they are justified in abandoning her, and are not guilty of contributory negligence in doing so.[15] So if those on board the tow throw off the lines without authority of the master of the towboat, and damage ensue, to that extent the tow is in fault.[16]

b. Under Special Contracts. The owner of a vessel undertaking a towage service may contract for a more restricted[17] or more extensive[18] liability than the law imposes upon him. But a towing vessel cannot relieve itself by contract from liability for the failure to exercise reasonable care and skill in the performance of the service and for the safety of the tow;[19] and an agreement that a vessel shall be towed at her own risk will not exempt the towboat from liability for damages caused by her own negligence.[20] Such a provision refers merely to the

10. The Niagara, 20 Fed. 152, consent of tow master not shown.

A ship which consents to being towed with another vessel to avoid delay, and without any advantage having been taken by the tug, assumes the extra risk of the double tow, and cannot hold the tug liable for an injury she sustains as a result, except on the ground of negligence in the performance of the contract. Stricker *v.* The Maurice, 128 Fed. 652; The Columbia, 109 Fed. 660, 48 C. C. A. 596.

11. Moore *v.* The C. P. Morey, 17 Fed. Cas. No. 9,756, 8 Reporter 583, holding that where a tug took in tow a schooner which undertook to furnish the tow-line, and the tow-line was frozen and stiff, and the tug asked for a better line, but no other was furnished by the schooner, the tug was not liable for any damages resulting to the schooner from the line slipping off the tow post, where the tug's crew did the best they could do under the circumstances.

12. The Startle, 115 Fed. 555; The Andrew J. White, 108 Fed. 685; The Mosher, 17 Fed. Cas. No. 9,874, 4 Biss. 274.

13. The General Geo. G. Meade, 10 Fed. Cas. No. 5,312, 8 Ben. 481.

14. The Pres. Briarly, 24 Fed. 478.

15. Eastern Transp. Line *v.* Hope, 95 U. S. 297, 24 L. ed. 477 [*affirming* 12 Fed. Cas. No. 6,680, 1 Wkly. Notes Cas. (Pa.) 394].

16. The Pres. Briarly, 24 Fed. 478.

17. Wells *v.* Steam Nav. Co., 2 N. Y. 204, Seld. 132; The Merrimac, 17 Fed. Cas. No. 9,478, 2 Sawy. 586.

18. The Wasp, 86 Fed. 470, guaranty of safe delivery.

19. Alaska Commercial Co. *v.* Williams, 128 Fed. 362, 63 C. C. A. 92; The Packer, 28 Fed. 156; The James Jackson, 9 Fed. 614; Deems *v.* Albany, etc., Line, 7 Fed. Cas. No. 3,736, 14 Blatchf. 474; Ulrich *v.* The Sunbeam, 24 Fed. Cas. No. 14,329. *Contra,* The Tasmania, 13 P. D. 110, 6 Aspin. 305, 57 L. J. Adm. 49, 59 L. T. Rep. N. S. 263; The United Service, 9 P. D. 3, 5 Aspin. 170, 53 L. J. P. D. & Adm. 1, 49 L. T. Rep. N. S. 701, 32 Wkly. Rep. 565.

20. *Indiana.*— Wright *v.* Gaff, 6 Ind. 416.

New Jersey.— Ashmore *v.* Pennsylvania Steam Towing, etc., Co., 28 N. J. L. 180.

New York.— Wells *v.* Steam Nav. Co., 8 N. Y. 375; Wooden *v.* Austin, 51 Barb. 9; Alexander *v.* Greene, 7 Hill 533.

Pennsylvania.— Delaware, etc., Steam Towboat Co. *v.* Starrs, 69 Pa. St. 36.

United States.— The Syracuse *v.* Langley, 12 Wall. 167, 20 L. ed. 382 [*affirming* 23 Fed. Cas. No. 13,717, 6 Blatchf. 2]; The Edmund L. Levy, 128 Fed. 683, 63 C. C. A. 235; The Somers N. Smith, 120 Fed. 569; The Jonty Jenks, 54 Fed. 1021; Jones *v.* The American Eagle, 54 Fed. 1010; The Rescue, 24 Fed. 190; The M. J. Cummings, 18 Fed. 178; The Princeton, 19 Fed. Cas. No. 11,434, 3 Blatchf. 54, 12 N. Y. Leg. Obs. 5 [*affirming* 19 Fed. Cas. No. 11,433*a*]; Williams *v.* The Vim, 29 Fed. Cas. No. 17,744*a*; The Forfarshire, [1908] P. 339, 11 Aspin. 158, 78 L. J. P. D. & Adm. 44, 99 L. T. Rep. N. S. 587. *Contra,* The Oceanica, 170 Fed. 893, 894, 96 C. C. A. 69 [*reversing* 144 Fed. 301], where it is said: "The tug being only liable for negligence, if the tow agrees to assume all risks, no risks can be meant except those for which the tug is liable, viz., the consequences of her own negligence. There is no other class of risks upon which the clause can operate as in the case of common carriers, viz., those arising from liability as insurer. Unless construed to cover the tug's negligence, the stipulation is meaningless."

See 45 Cent. Dig. tit. "Towage," § 28.

perils of navigation.[21] The contract must be clearly expressed,[22] and made by someone having authority to do so.[23] The burden of proving such a contract is on the tug,[24] and whether or not it is proved is a question for the jury.[25]

c. Vessels or Persons Liable. A suit *in rem* against a tug can only be sustained by evidence of negligence or breach of obligation on her part with reference to the transaction.[26] Consequently where several tugs are successively engaged in the performance of a towage contract, the liability of each begins from the time she is assigned to the service and commences her duties.[27] So where two tugs act jointly in towing a vessel, each is alone responsible for the consequences of her own negligence;[28] but for their joint negligence they are jointly responsible,[29] notwithstanding the fact that one is acting as a helper, under the orders of the master of the other.[30] Where a tug is used without the consent or knowledge of the owner,[31] or where the master does not use her in the service of the owner, or in the course of his employment,[32] the tug is not liable for damages sustained by the vessel towed. The charterer of a tug is liable for the damage caused to her tow by the inefficiency and negligent management of the tug,[33] unless the

The proper effect of such a contract is to change the burden of proof, and to throw upon the tow the duty of showing that the loss was occasioned by the want of due care on the part of the tug. Ulrich *v.* The Sunbeam, 24 Fed. Cas. No. 14,329.

21. Ashmore *v.* Pennsylvania Steam Towing, etc., Co., 28 N. J. L. 180; Wells *v.* Steam Nav. Co., 8 N. Y. 375; Wooden *v.* Austin, 51 Barb. (N. Y.) 9; Hibernia Ins. Co. *v.* St. Louis, etc., Transp. Co., 120 U. S. 166, 7 S. Ct. 550, 30 L. ed. 621 [*affirming* 17 Fed. 478, 5 McCrary 397].

Danger from ice.— Where a tug refused to take the responsibility for damage for towing a canal-boat through ice in a dangerous passage, the tow cannot recover for injury caused thereby, where the tug was not chargeable with negligence. The Alfred and Edwin, 1 Fed. Cas. No. 190, 7 Ben. 137.

22. The Thomas Kiley, 23 Fed. Cas. No. 13,925, 5 Ben. 301, holding that the fact that an owner of a vessel, in settling for former towage services rendered by the owners of the tug, paid bills rendered which had on them the words, "At the risk of the master and owners of the boat," is not sufficient to warrant the court in holding that those words formed a part of the towage contract in another case, the contract having been made, not by the owner, but by the master of the vessel, and nothing having been said on the subject when the contract was made, and that the contract was an ordinary one of towage.

23. Jones *v.* The American Eagle, 54 Fed. 1010.

24. The Somers N. Smith, 120 Fed. 569; Jones *v.* The American Eagle, 54 Fed. 1010; The James Jackson, 9 Fed. 614.

Evidence held insufficient to show contract at risk of tow see The James Jackson, 9 Fed. 614; Williams *v.* The Vim, 29 Fed. Cas. No. 17,744*a*.

25. Symonds *v.* Pain, 6 H. & N. 709, 30 L. J. Exch. 256.

26. The Syracuse, 36 Fed. 830.

27. The Syracuse, 36 Fed. 830.

The one last appropriated to the service is not liable *in rem* for any previous negligence before she was assigned to her particular part of the service. The E. A. Packer, 22 Fed. 668 [*reversed* on other grounds in 28 Fed. 156].

Where a tug is compelled to turn her tow over to another tug to complete the trip, the latter is liable to the tow for the negligent performance of her duty, although there is no privity of contract between them. The Clematis, 5 Fed. Cas. No. 2,875, Brown Adm. 432.

28. The W. G. Mason, 142 Fed. 913, 74 C. C. A. 83 [*reversing* 131 Fed. 632] (holding that the fact that the two vessels are to be regarded as one for the purpose of the joint undertaking has no bearing upon the question of their respective liabilities *in rem*); The Arturo, 6 Fed. 308. *Compare* The Rescue, 74 Fed. 847; The Emperor, 61 Fed. 990; The Express, 52 Fed. 890, 3 C. C. A. 342; The Bordentown, 40 Fed. 682, in all of which cases it seems to be held that two tugs engaged in towing a ship, under a contract with one having charge of their services, and under the joint and concurrent command of their masters, are to be treated as one vessel or party, so as to make them jointly liable for negligent navigation resulting in damage to the tow.

29. The Anthracite, 168 Fed. 693, 94 C. C. A. 179 [*affirming* 162 Fed. 384]; The Arturo, 6 Fed. 308.

Under the statute for limited liability (U. S. Rev. St. (1878) § 4283 [U. S. Comp. St. (1901) p. 2943]), it might be impossible to recover the whole loss; but to the extent of the value of the tugs there would be a remedy *in rem*. The Arturo, 6 Fed. 308.

The ownership of the tugs would not be material, except as regards the limitation of personal liability. The Arturo, 6 Fed. 308. If the tugs were owned, borrowed, or hired by the contractor their liability *in rem* would be the same. The Arturo, *supra*.

30. The Anthracite, 168 Fed. 693, 94 C. C. A. 179 [*affirming* 162 Fed. 384].

31. Bates *v.* The Madison, 18 Mo. 99.

32. The R. F. Cahill, 20 Fed. Cas. No. 11,735, 9 Ben. 352.

33. The Ratata, [1898] A. C. 513, 8 Aspin.

owner retains the possession and general control, and the direction of the master and crew.[34] While tug owners are responsible to others for the acts of their servants, they cannot hold the latter responsible to themselves for the negligence of each other, resulting in damages to vessels in tow.[35]

2. Actions and Lien For Damages — a. Nature and Form of Remedy. By the weight of authority the claim by a tow against her tug for damages caused by negligent towage is founded in tort, arising out of the duty imposed by law, and independent of any contract made,[36] or consideration paid or to be paid for the towage.[37] Actions for damages for the negligent performance of a towage contract may be either *in personam* or *in rem*.[38] The two forms of action should not be joined, but if no objection is made, the appellate court will not interfere.[39]

b. Jurisdiction.[40] Jurisdiction *in rem* is exclusive in the federal courts, and any act of a state legislature purporting to confer it upon a state court is unconstitutional.[41] On the other hand, jurisdiction over the person in such cases of maritime tort is not exclusively vested in a court of admiralty, but state courts have concurrent jurisdiction.[42]

c. Right of Action. The owner of a vessel under charter may maintain an action against a tug owner employed by the charterer for its injury through negli-

427, 67 L. J. P. D. & Adm. 73, 78 L. T. Rep. N. S. 797, 47 Wkly. Rep. 156.

34. Bissell *v.* Torrey, 60 N. Y. 635 [*affirming* 65 Barb. 188].

35. Davis *v.* Houren, 6 Rob. (La.) 255.

36. Bissel *v.* Torrey, 65 Barb. (N. Y.) 188 [*affirmed* in 60 N. Y. 635]; The John G. Stevens, 170 U. S. 113, 18 S. Ct. 544, 42 L. ed. 969; The Quickstep *v.* Byrne, 9 Wall. (U. S.) 665, 19 L. ed. 767; The W. G. Mason, 142 Fed. 913, 74 C. C. A. 83 [*reversing* 131 Fed. 632]; The Temple Emery, 122 Fed. 180; The Startle, 115 Fed. 555; The M. Vandercook, 24 Fed. 472; The Frank G. Fowler, 17 Fed. 653, 21 Blatchf. 410; The Liberty No. 4, 7 Fed. 226; The Arturo, 6 Fed. 308; The Brooklyn, 4 Fed. Cas. No. 1,938, 2 Ben. 547 (holding that the fact that towage is performed under a contract does not make negligence in performing such towage any the less a tort); The Deer, 7 Fed. Cas. No. 3,737, 4 Ben. 352; Jennings *v.* Muller, 13 Fed. Cas. No. 7,282 (holding that the liability of a tug for injuries to her tow arises from the nature of the service, and exists, although the contract of towage is not made immediately between tug and tow). And see The Clematis, 5 Fed. Cas. No. 2,875, Brown Adm. 432. *Contra*, Goodwin *v.* The C. Durant, 10 Fed. Cas. No. 5,552.

Tort is a proper form of action against the owners of a towboat for the negligence of their agents, although there may be an express contract in regard to the towage. Ashmore *v.* Pennsylvania Steam Towing, etc., Co., 28 N. J. L. 180.

37. The Temple Emery, 122 Fed. 180.

Gratuitous service.— The duty not to be guilty of negligence is imposed by the law, and exists, although the service of towing is gratuitous. The Brooklyn, 4 Fed. Cas. No. 1,938, 2 Ben. 547; The Deer, 7 Fed. Cas. No. 3,737, 4 Ben. 352.

38. Baird *v.* Daly, 57 N. Y. 236, 15 Am. Rep. 488.

39. Atlantic Coast Steamship Co. *v.* Montreal Transp. Co., 12 Can. Exch. 429.

40. See, generally, Admiralty, 1 Cyc. 809 *et seq.*

41. Baird *v.* Daly, 57 N. Y. 236, 15 Am. Rep. 488. See, generally, Maritime Liens, 26 Cyc. 769.

In England and Canada it is held that the admiralty court cannot entertain a cause of damage to a tow, arising from the negligence of the towing vessel, where no collision between vessels occurs. The Robert Pow, Brown & L. 99, 32 L. J. Adm. 164, 9 L. T. Rep. N. S. 237; The Sir S. L. Tilley, 8 Can. L. T. 156. See also The Energy, L. R. 3 A. & E. 48, 39 L. J. Adm. 25, 23 L. T. Rep. N. S. 601, 18 Wkly. Rep. 1009; The Night Watch, 8 Jur. N. S. 1161, 32 L. J. Adm. 47, Lush. 542, 7 L. T. Rep. N. S. 396, Lush. 542, 11 Wkly. Rep. 189. Moreover a tug is not liable to be proceeded against *in rem* for damage unless her owners at the time of the accident are personally liable, and could be proceeded against *in personam* for the damage. The Tasmania, 13 P. D. 110, 6 Aspin. 305, 59 L. T. Rep. N. S. 263, where the injury was caused by collision.

42. Baird *v.* Daly, 57 N. Y. 236, 15 Am. Rep. 488.

The legislation of congress on the whole subject shows that it was intended in personal suits to allow a party to seek redress in the admiralty court, if he sees fit to do so, but not to make such a course compulsory in any case where the common law is competent to give him a remedy. And this jurisdiction saved to the state courts by the judiciary act of 1789 (1 U. S. St. at L. 76, § 9), is not limited, restricted, or qualified by the act of March 3, 1851 (9 U. S. St. at L. 635), "to limit the Liability of Ship Owners," etc., unless appropriate proceedings are taken thereunder by a party interested to avail himself of the benefit thereof; and hence the courts of a state have jurisdiction of an action for damages resulting from the unskilful operation of a tug. Baird *v.* Daly, 57 N. Y. 236, 15 Am. Rep. 488 [*reversing* 4 Lans. 426].

gent towing, even before the expiration of the term of the charter.[43] Where, by the negligence of a tug, the tow and her cargo are damaged or lost, the owners of the cargo may, if they see fit, join with the owners of the tow in an action against the tug,[44] or they may sue separately, at their election.[45] Similarly the bailees of a tow injured by the negligence of a tug may sue the wrong-doing vessel *in rem* in admiralty, and recover the full damages for the injury.[46] So also an insurer may, in the admiralty, maintain such an action for damages against the offending vessel in his own name after payment of the loss,[47] without proof of abandonment or assignment by the assured.[48] But the fact that the tow is insured does not divest the owner of the right of action for damages for her loss, especially in the case of a mere partial insurance.[49] A recovery by the owner of an insured vessel, lost while being towed, will bar another action for the same cause.[50]

d. Pleading and Parties.[51] A libel for damages caused by the negligent performance of a towage contract should state the particular acts of negligence and misconduct on the part of the tug which produced the injury.[52] But an omission to state some facts which prove to be material but which cannot have occasioned any surprise to the opposite party will not be allowed to work any injury to the libellant, if the court can see that there was no design on his part in omitting to state them.[53] There is no doctrine of mere technical variance in the admiralty,[54] and, subject to the rule above stated, it is the duty of the court to extract the real case from the whole record, and decide accordingly.[55] In order that substantial justice may be done, the court will allow amendments to be made,[56] even at the hearing of an appeal, taking care that no injury be done to either party.[57] Where a tow is injured without its own fault, through the negli-

43. Monk *v.* Cornell Steamboat Co., 175 Fed. 271.

44. The City of Hartford *v.* Rideout, 97 U. S. 323, 24 L. ed. 930.

45. The City of Hartford *v.* Rideout, 97 U. S. 323, 24 L. ed. 930; The Liberty No. 4, 7 Fed. 226.

46. White *v.* Bascom, 28 Vt. 268; The Venture, 18 Fed. 462.

47. The Frank G. Fowler, 8 Fed. 360; The Liberty No. 4, 7 Fed. 226.

The insurer in such a case is the party really entitled to the damages, and, as such, the party in whose name action should more properly be brought. The Frank G. Fowler, 8 Fed. 360. There is no privity existing between the insurer and the wrong-doer, and at law he might not maintain an action against him; but in equity the insurer is subrogated to all the rights of the insured, and so acquires his claim against the injuring party. The Liberty No. 4, 7 Fed. 226. And being thus subrogated in all cases where the insured has the right against the authors of the injury, the insurer, on making good the loss, is entitled to enforce the remedy of the insured, although between him and the wrong-doer there is no direct relation or privity of contract upon which to found the action. The recovery is not upon the legal right, but upon the equitable doctrine of subrogation. The Liberty No. 4, *supra*.

48. The Frank G. Fowler, 8 Fed. 360.

49. White *v.* The Mary Ann, 6 Cal. 462, 65 Am. Dec. 523, holding that the insurance company may have the equitable right to the proceeds, or a part of them, but the legal right to bring the action remains with the owner, and this constitutes him, in the view of the law, as much the real party in interest as if he were entitled to the proceeds.

50. White *v.* The Mary Ann, 6 Cal. 462, 65 Am. Dec. 523.

51. See, generally, ADMIRALTY, 1 Cyc. 850 *et seq.*, 853 *et seq.*

52. The Syracuse *v.* Langley, 12 Wall. (U. S.) 167, 20 L. ed. 382; The Quickstep *v.* Byrne, 9 Wall. (U. S.) 665, 19 L. ed. 767.

53. The Syracuse *v.* Langley, 12 Wall. (U. S.) 167, 20 L. ed. 382; The Quickstep *v.* Byrne, 9 Wall. (U. S.) 665, 19 L. ed. 767.

54. The Syracuse *v.* Langley, 12 Wall. (U. S.) 167, 20 L. ed. 382. See ADMIRALTY, 1 Cyc. 861.

55. The Syracuse *v.* Langley, 12 Wall. (U. S.) 167, 20 L. ed. 382.

56. The Morton, 17 Fed. Cas. No. 9,864, Brown Adm. 137. See ADMIRALTY, 1 Cyc. 859.

Averment of negligence.— Where a libel charges that the existence of a sunken pier was known to the tug, and that, instead of avoiding it, the tug towed the barge on it, but does not aver that it was done negligently, and the answer avers that the accident was not the result of any negligence on the part of the tug, and the case is tried on those pleadings, the libellant may amend the libel, by averring negligence, and thus accepting the issue tendered by complainant, and the issue which was in fact tried. The Deer, 7 Fed. Cas. No. 3,737, 4 Ben. 352.

Amendments in matters of form may be made at any time to suit the cause of action actually set forth in the libel. The Enterprise, 8 Fed. Cas. No. 4,500, 3 Wall. Jr. 58.

57. The Morton, 17 Fed. Cas. No. 9,864, Brown Adm. 137.

gence of some one of other vessels, the suit ought to be against all, unless some are clearly not liable, in order that the respective rights of the parties may be determined in a single suit.[58]

e. Evidence[59] — (i) *Presumptions and Burden of Proof.*[60] Unlike the case of common carriers,[61] no presumption of negligence on the part of a tug arises from the mere fact of an injury to her tow,[62] and the burden rests upon the tow to prove that its loss or injury was due to negligence on the part of the tug in order to render the latter liable therefor.[63] But in some cases the undisputed circumstances of the disaster may constitute a *prima facie* case of negligence, and put on the tug the duty of explanation.[64] Where a tug is guilty of negli-

58. The Marshall, 12 Fed. 921.

59. See, generally, Admiralty, 1 Cyc. 882 *et seq.*

60. To show excuse for abandonment of tow see *supra*, V, B, 1, a, (I), (M).

To show special contract see *supra*, V, B, 1, b.

61. Tower not a common carrier see *supra*, V, A, 2.

62. The Burlington *v.* Ford, 137 U. S. 386, 11 S. Ct. 138, 34 L. ed. 731; The William H. Webb *v.* Barling, 14 Wall. (U. S.) 406, 20 L. ed. 774; The El Rio, 162 Fed. 567; The Winnie, 149 Fed. 725, 79 C. C. A. 431 [*reversing* 137 Fed. 166]; The Thomas Wilson, 124 Fed. 649; *In re* Moran, 120 Fed. 556; The W. H. Simpson, 80 Fed. 153, 25 C. C. A. 318; Lane *v.* The A. R. Robinson, 57 Fed. 667; Wilson *v.* Sibley, 36 Fed. 379.

In Louisiana a tug is held to be a common carrier, and hence, in case of injury to the tow, negligence on the part of the tug is presumed, unless disproved. Creen *v.* Croce, 17 La. Ann. 3; Adams *v.* New Orleans Tow-Boat Co., 11 La. 46; Smith *v.* Pierce, 1 La. 349; Wood *v.* Harbor Towboat Co., McGloin 121. See *supra*, V, A, 2 note 69, under the list of "contra" cases.

63. The Mechanic *v.* Flanigan, 14 Phila. (Pa.) 606; The Burlington *v.* Ford, 137 U. S. 386, 11 S. Ct. 138, 34 L. ed. 731; The William H. Webb *v.* Barling, 14 Wall. (U. S.) 406, 20 L. ed. 774; Morris, etc., Dredging Co. *v.* Moran Towing, etc., Co., 163 Fed. 610 [*affirmed* in 177 Fed. 1004, 100 C. C. A. 427]; The El Rio, 162 Fed. 567; The Asher J. Hudson, 154 Fed. 354, 83 C. C. A. 143 [*affirming* 145 Fed. 731]; The Winnie, 149 Fed. 725, 79 C. C. A. 431 [*reversing* 137 Fed. 166]; The Britannia, 148 Fed. 495; The Samuel E. Bouker, 141 Fed. 480; The Thomas Wilson, 124 Fed. 649; *In re* Moran, 120 Fed. 556; The Startle, 115 Fed. 555; The Pencoyd, 113 Fed. 682; The Carbonero, 106 Fed. 329, 45 C. C. A. 314; The Ravenscourt, 103 Fed. 668 [*affirmed* in 109 Fed. 660, 48 C. C. A. 596]; The W. H. Simpson, 80 Fed. 153, 25 C. C. A. 318; Munks *v.* Jackson, 66 Fed. 571, 13 C. C. A. 641; Hubbell *v.* The Hercules, 55 Fed. 120; Richter *v.* The Olive Baker, 40 Fed. 904; The Aurora *v.* The Republic, 25 Fed. 778; The Mary, 14 Fed. 584; The Adelia, 1 Fed. Cas. No. 79, 1 Hask. 505; Brawley *v.* The Jim Watson, 4 Fed. Cas. No. 1,817, 2 Bond 356; The Brazos, 4 Fed. Cas. No. 1,821, 14 Blatchf. 446; Dunn *v.* The Young America, 8 Fed. Cas. No. 4,178, 14 Phila. (Pa.) 532; The W. E. Gladwish, 29 Fed. Cas. No. 17,355, 17 Blatchf. 77.

The burden of proof does not shift during the trial; but the introduction of evidence may give rise to a presumption of fact, and thus put upon a party the burden of explaining a situation from which, in the absence of explanation, his liability would be presumed. The Bronx, 86 Fed. 808.

If a vessel in tow by one tug collides with a vessel in tow by another tug and is injured, and the two tugs are libeled in one proceeding in admiralty to recover damages for the injuries sustained, the burden of proof is on the libellant to establish negligence against each tug separately (The L. P. Dayton, 120 U. S. 337, 7 S. Ct. 568, 30 L. ed. 669); and admissions in the answer on the part of one tug cannot be used against the other tug to relieve the injured vessel of this burden (The L. P. Dayton, *supra*).

64. The Burlington, 137 U. S. 386, 11 S. Ct. 138, 34 L. ed. 731; The William H. Webb *v.* Barling, 14 Wall. (U. S.) 406, 20 L. ed. 774; The E. E. Simpson, 60 Fed. 452, 9 C. C. A. 66; Wilson *v.* Sibley, 36 Fed. 379; Sewell *v.* British Columbia Towing, etc., Co., 9 Can. Sup. Ct. 527.

In cases where no questions are raised as to what caused the accident or the injury, and the circumstances are of such a character as to show that the thing which did happen would not have occurred unless there was negligence upon the part of the person having charge and control of the tug, then the presumption would apply. Pederson *v.* John D. Spreckles, etc., Co., 87 Fed. 938, 31 C. C. A. 308. But the rule does not apply where all the facts as to the cause of the accident are in dispute, and nothing occurred which of itself tends to show that the tug was at fault. Pederson *v.* John D. Spreckles, etc., Co., *supra*.

Where the tugs have accounted for the accident by showing a special emergency, and have definitely described movements not improbable and not necessarily inconsistent with good seamanship, all presumption of negligence from the mere fact of the accident disappears, and the burden is cast upon libellant to establish negligence by a clear preponderance of proof. Baltimore, etc., Barge Co. *v.* Knickerbocker Steam Towage Co., 170 Fed. 442, 95 C. C. A. 612.

Illustrations.—In the following cases the mere happening of the accident was held, under the circumstances, sufficient to cast

gence in navigation, and there is an injury to a vessel in tow, the tug has the burden of proving that the injury was caused by the fault of the tow.[65]

(II) *ADMISSIBILITY.* As regards the adequacy of the tug, the fitness of the weather on starting, as well as regards seaworthiness in general, the question is a practical one of reasonable sufficiency for the particular trip in the judgment of skilful and prudent navigators, and on this question the custom and practice of nautical men is admissible.[66] Any competent evidence on the question of negligence on the part of the tug is admissible.[67] But where the facts from which negligence is sought to be inferred are within the experience of men of common knowledge and education, expert testimony is not proper.[68] Irrelevant evidence is of course inadmissible.[69]

(III) *WEIGHT AND SUFFICIENCY.* Negligence on the part of the tug must be established by a preponderance of the testimony.[70] In order to prove negligence, it is not invariably necessary that the libellant shall show the specific

the burden of proof on the tug to show that she was not at fault: Where the tow is stranded off her proper course. The William H. Webb *v.* Barling, 14 Wall. (U. S.) 406, 20 L. ed. 774; The W. G. Mason, 142 Fed. 913, 74 C. C. A. 83 [*reversing* 131 Fed. 632]; Burr *v.* Knickerbocker Steam Towage Co., 132 Fed. 248, 65 C. C. A. 554; The Kalkaska, 107 Fed. 959, 47 C. C. A. 100; The Meréchal Suchet, [1911] P. 1, 26 T. L. R. 660. Where the tow is stranded or brought into collision in clear weather. The Taurus, 91 Fed. 796; Western Assur. Co. *v.* The Sarah J. Weed, 40 Fed. 844. Where the accident occurs in a customary channel. The James H. Brewster, 34 Fed. 77; The Ellen McGovern, 27 Fed. 868. Where the tow, powerless to help herself, and wholly under the control of the tug, is brought into a collision. The Delaware, 20 Fed. 797. Where the tow is permitted to strike on a hidden (The Resolute, 149 Fed. 1005 [*affirmed* in 160 Fed. 659, 88 C. C. A. 17]; The George Farrell, 10 Fed. Cas. No. 5,332, 4 Ben. 316) or known (The Deer, 7 Fed. Cas. No. 3,737, 4 Ben. 352) obstruction. Where the tow is brought into collision with a moored vessel. Nelson *v.* Goliah, 17 Fed. Cas. No. 10,106. Where the tug springs a leak in smooth water. Phillips *v.* The Sarah, 38 Fed. 252. Where the steering gear and equipment of the tug prove defective, whereby the tow suffers injury. Leech *v.* The Steamboat Miner, 1 Phila. (Pa.) 144; The Acme, 123 Fed. 814. Where the tug leaves her tow to take other employment, and the tow is injured in a sudden storm which might otherwise have been avoided. The W. E. Cheney, 29 Fed. Cas. No. 17,344, 6 Ben. 178. Where the tow, delivered to the tug in good order, reaches her destination in a sinking condition. The Seven Sons, 29 Fed. 543.

65. The Vigilant, 10 Fed. 765; The Blanche Page, 3 Fed. Cas. No. 1,523, 4 Ben. 186; The David Morris, 7 Fed. Cas. No. 3,596, Brown Adm. 273.

66. Baird *v.* Daly, 68 N. Y. 547; The Frederick E. Ives, 25 Fed. 447; The Allie & Evie, 24 Fed. 745.

67. Arctic F. Ins. Co. *v.* Austin, 54 Barb. (N. Y.) 559, holding that, although the omission of the master of a tugboat to give directions as to what is necessary or proper to be done on board of the boat in tow is not clearly negligence on his part, it may go to the jury as a fact bearing on the question of negligence.

68. Bussanicz *v.* Myers, 22 Wash. 369, 60 Pac. 1117.

69. Barnhill *v.* Haigh, 53 Pa. St. 165, holding that where a tug contracted to tow a vessel to a particular point, but instead landed her at another place where she was sunk and lost, evidence that the owner of the tow might have taken possession of her and sold her for half her value was irrelevant and incompetent, since such owner was not bound to rescind or modify his contract with the tug, or to accept his vessel at another place than where it was to be delivered.

Evidence that plaintiff had an insurance on his boat and received a part of his loss from the insurers is inadmissible. Carpenter *v.* Eastern Transp. Line, 67 Barb. (N. Y.) 570.

70. The Edmund L. Levy, 128 Fed. 683, 63 C. C. A. 235; The Narragansett, 20 Fed. 394.

If the proof is equally balanced the libellant cannot recover. The Nellie Flagg, 23 Fed. 671.

When the evidence is conflicting, negligence on the part of the tug will not be inferred from slight circumstances equally consistent with a different theory. The James P. Donaldson, 19 Fed. 264. When the experts differ, a tug will not be held in fault for taking a single schooner through Hell Gate on a hawser two hundred and fifty feet long, in the absence of any special regulation on the subject. Woodberry *v.* The Josephine B., 58 Fed. 813, 7 C. C. A. 495.

Direct evidence of greater weight than opinion evidence.— In considering the weight of evidence, it is a well settled and sound principle of construction that the direct evidence of what was done on a vessel is of much greater weight than the hypothetical evidence of experts or others giving their opinions as to what was done. The Morton, 17 Fed. Cas. No. 9,864, Brown Adm. 137.

The judgment of the tug master as to the proper course in an emergency, when acted

details of negligence, or account for the exact manner in which the injury was inflicted;[71] but the proof must be such as to justify the inference, at least, that such negligence caused, or at least contributed to, the injury, before she can be held liable for the consequent damage.[72] Where the tug is shown to have been at fault she must be held to strict proof of any negligent act on the part of the tow which is claimed to have been contributory.[73]

f. Trial[74] — (I) *INSTRUCTIONS.* The general rules applicable to the giving of instructions in civil actions apply in this class of cases.[75] A requested instruction covered by one already given by the court is properly refused.[76] Error in an instruction may be obviated by a later one covering the same point and correctly stating the law.[77]

(II) *QUESTIONS FOR JURY.* In an action in a state court for damages for injury to a tow, where the evidence is conflicting, the question of negligence,[78] or contributory negligence,[79] is one of fact for the jury, to be determined from

on in good faith, will not be impeached, except on a clear preponderance of proof that it was erroneous. The Clematis, 5 Fed. Cas. No. 2,876, Brown Adm. 499. And see The Frederick E. Ives, 25 Fed. 447.

Testimony contrary to laws of nature.— The estimates of witnesses, and statements as to the effects of the tide, although uncontradicted, go for nothing, when contrary to the laws of nature and to well-known facts of navigation otherwise appearing in the testimony. Western Assur. Co. *v.* The Sarah J. Weed, 40 Fed. 844.

Evidence held sufficient to show negligence on part of tug see The William H. Webb *v.* Barling, 14 Wall. (U. S.) 406, 20 L. ed. 774; Stimson Mill Co. *v.* Moran Co., 175 Fed. 38, 99 C. C. A. 54; Farrell *v.* Port Johnston Towing Co., 156 Fed. 871; The Ferguson, 153 Fed. 366, 82 C. C. A. 442; The Volunteer, 149 Fed. 723, 79 C. C. A. 429; The Inca, 148 Fed. 363, 78 C. C. A. 273 [*affirming* 130 Fed. 36]; The Flushing, 145 Fed. 614, 76 C. C. A. 304 [*affirming* 134 Fed. 757]; Cotton *v.* Almy, 141 Fed. 358, 72 C. C. A. 506; Tucker *v.* Gallagher, 122 Fed. 847; The Temple Emery, 122 Fed. 180; The Somers N. Smith, 120 Fed. 569; *In re* Moran, 120 Fed. 556; The O. L. Halenbeck, 110 Fed. 556; Humboldt Lumber Manufacturers' Assoc. *v.* Christopherson, 73 Fed. 239, 19 C. C. A. 481, 46 L. R. A. 264 [*affirming* 60 Fed. 428]; Knickerbocker Steam Towage Co. *v.* The Emperor, 61 Fed. 990; Jutte *v.* The George Shiras, 61 Fed. 300, 9 C. C. A. 511; The E. E. Simpson, 60 Fed. 452, 9 C. C. A. 66; Booye *v.* L'Engle, 57 Fed. 306; Morse *v.* The Charles Runyon, 56 Fed. 312, 5 C. C. A. 514 [*affirming* 46 Fed. 813]; The Battler, 55 Fed. 1006; The Ellen McGovern, 27 Fed. 868; Bust *v.* Cornell Steamboat Co., 24 Fed. 138.

Evidence held insufficient to show negligence on part of tug see The Patrick McGuirl, 168 Fed. 453; The Pottsville, 164 Fed. 447; Baltimore, etc., Barge Co. *v.* Knickerbocker Steam Towage Co., 159 Fed. 755 [*affirmed* in 170 Fed. 442, 444, 95 C. C. A. 612, 614]; The Flushing, 159 Fed. 570; The Asher J. Hudson, 154 Fed. 354, 83 C. C. A. 143; The Dauntless, 152 Fed. 973, 82 C. C. A. 327 [*affirming* 148 Fed. 1005]; The Samuel E. Bouker, 141 Fed. 480; The Edmund L. Levy, 128 Fed. 683, 63 C. C. A. 235; The Carbonero, 122 Fed. 753, 58 C. C. A. 553; *In re* Moran, 120 Fed. 556; The Startle, 115 Fed. 555; The Pencoyd, 113 Fed. 682; The Ravenscourt, 103 Fed. 668; Lehigh Coal, etc., Co. *v.* The Robert Burnett, 56 Fed. 266; Carpenter *v.* The Clinton, 35 Fed. 672; The Nellie Flagg, 23 Fed. 671.

Evidence held sufficient to show both vessels at fault see The Printer, 164 Fed. 314, 90 C. C. A. 246 [*affirming* 155 Fed. 441].

71. Burr *v.* Knickerbocker Steam Towage Co., 132 Fed. 248, 65 C. C. A. 554.

72. The Thomas Wilson, 124 Fed. 649.

73. The Blanche Page, 3 Fed. Cas. No. 1,523, 4 Ben. 186.

Evidence held insufficient to establish contributory negligence see Wilson *v.* Sibley, 36 Fed. 379; The Osage *v.* Ridgway, 24 Fed. 298.

74. See, generally, ADMIRALTY, 1 Cyc. 887 *et seq.*

75. See the cases cited *infra*, this note.

Instructions held to correctly state the law see Neal *v.* Scott, 25 Ind. 440; Tebo *v.* Jordan, 73 Hun (N. Y.) 218, 25 N. Y. Suppl. 1070 [*affirmed* in 147 N. Y. 387, 42 N. E. 191]; Bust *v.* Cornell Steamboat Co., 24 Fed. 188.

Instructions held erroneous see Carpenter *v.* Eastern Transp. Line, 67 Barb. (N. Y.) 570; Arctic F. Ins. Co. *v.* Austin, 66 Barb. (N. Y.) 257.

76. Wagner *v.* Buffalo, etc., Transit Co., 59 N. Y. App. Div. 419, 69 N. Y. Suppl. 113 [*affirmed* in 172 N. Y. 634, 65 N. E. 1123].

77. Carpenter *v.* Eastern Transp. Line, 67 Barb. (N. Y.) 570.

78. Neal *v.* Scott, 25 Ind. 440; Tebo *v.* Jordan, 67 Hun (N. Y.) 392, 22 N. Y. Suppl. 156 [*reversing* 62 Hun 514, 17 N. Y. Suppl. 80]; Carpenter *v.* Eastern Transp. Line, 67 Barb. (N. Y.) 570; Arctic F. Ins. Co. *v.* Austin, 54 Barb. (N. Y.) 559; Wooden *v.* Austin, 51 Barb. (N. Y.) 9; Tilley *v.* Beverwyck Towing Co., 29 Misc. (N. Y.) 581, 61 N. Y. Suppl. 495; Leo *v.* Cornell Steamboat Co., 85 N. Y. Suppl. 1073.

79. Delaware, etc., Steam Towboat Co. *v.* Starrs, 69 Pa. St. 36.

all the circumstances of the case. The rule is the same in the federal courts where the case is tried before a jury.[80]

g. Damages — (I) *In General.* The damages in a case of this kind cannot be varied by the form of action adopted.[81] They are such as naturally and proximately arise from the non-performance of the contract.[82] In other words, the damages to be awarded are such as were in the contemplation of both parties when the contract was made.[83] When the tow is capable of being rescued, the measure of damages will ordinarily be the cost of rescuing and repairing her,[84] not exceeding the value of the vessel.[85] If the tow and her cargo become a total loss the measure of damages is the actual market value of the same at the time of the loss.[86]

(II) *Division of Damages.* In case of loss of the tow due to concurrent negligence on the part of both tug and tow, the damages should be equally divided

80. Bust *v.* Cornell Steamboat Co., 24 Fed. 188.

81. The Henry Buck, 39 Fed. 211.

82. The Henry Buck, 39 Fed. 211.

The libellant is entitled to indemnity for his actual loss. Pettie *v.* Boston Tow-Boat Co., 49 Fed. 464, 1 C. C. A. 314. But indemnity does not include damages which arise in consequence of the inactivity of the complaining party. Pettie *v.* Boston Tow-Boat Co., *supra.*

Where the injured tow is repaired at the expense of the tug owner, the liability of the tug should be limited to the cost of pumping the tow from the time of the accident till she is taken to the dry dock, the value of any personal property on board the tow, and belonging to the libellant, that is destroyed by the accident, and demurrage from the time of the accident till the time she is let off the ways, after being repaired. O'Hare *v.* The Brilliant, 3 Fed. 719. In such a case, damages for the delay may be all that can be recovered. The James H. Brewster, 34 Fed. 77.

Effect of tug's failure to assist tow when in danger.— Where, after an accident to her tow, a tug fails to take steps to protect her from loss, the tug is liable for whatever loss is sustained over and above what would have been sustained if reasonable and proper efforts had been made. McCormick *v.* Jarrett, 37 Fed. 380.

The cost of hiring another boat during the time reasonably spent in recovering and repairing the injured vessel is a proper item of damages. Leech *v.* The Steamboat Miner, 1 Phila. (Pa.) 144.

83. The Henry Buck, 39 Fed. 211; The Young America, 31 Fed. 749, 24 Blatchf. 479.

The unlawful acts of third persons, although directly induced by the original wrong of the tug, are not to be attributed to the original wrong as a proximate cause of the damage for which a recovery can be had. The Young America, 31 Fed. 749, 24 Blatchf. 479.

The expense of a protest made before unloading will be allowed, although it proves to be unnecessary. The Michael Groh, 17 Fed. Cas. No. 9,522, Brown Adm. 419.

84. Leech *v.* The Steamboat Miner, 1 Phila. (Pa.) 144; The Oceanica, 156 Fed. 306 (double rates for piling water-logged lumber; such charge being customary); Smith *v.* The Bronx, 86 Fed. 808 (holding that where those in charge of a vessel stranded by the fault of her tug refused the offer of the tug owners to pull her off with additional tugs at the next high tide, compensation to be left to the court, the damages for the stranding will be limited to what the vessel and cargo would have sustained if gotten off at the time of such offer); The Henry Buck, 39 Fed. 211; The Michael Groh, 17 Fed. Cas. No. 9,522, Brown Adm. 419 (holding further that the court will not scrutinize very closely items of expense for lighterage, etc., where the master acted in good faith).

Amount paid as salvage.— A vessel, towed aground by the carelessness of a tug, and compelled to pay salvage to another tug for helping to haul her off, is entitled to recover from the former tug as damages the amount so paid. The C. F. Ackerman, 5 Fed. Cas. No. 2,562, 8 Ben. 496. And see O'Connell *v.* The C. R. Stone, 68 Fed. 934.

85. Leech *v.* The Steamboat Miner, 1 Phila. (Pa.) 144.

86. Dowdall *v.* Pennsylvania R. Co., 7 Fed. Cas. No. 4,038, 13 Blatchf. 403; The J. L. Hasbrouck, 13 Fed. Cas. No. 7,326, 14 Blatchf. 30.

Evidence of market value.— In an action against a tug for the loss of a tow, on the question of the actual market value of the boat at the time of her loss, it is competent for plaintiff to testify as to what he paid for her and what he has expended on her. Dowdall *v.* Pennsylvania R. Co., 7 Fed. Cas. No. 4,038, 13 Blatchf. 403.

The fact that the tow was old and unseaworthy should be taken into consideration in estimating her value. Pettie *v.* Boston Tow-Boat Co., 44 Fed. 382; The Workman, 30 Fed. Cas. No. 18,045, 1 Lowell 504.

Place of estimating value of cargo.— In some cases it is held that the measure of damages recoverable from a tug for cargo of the tow lost through the tug's negligence is the market value of such cargo at the port of shipment, together with the carrying expenses incurred. The Oceanica, 156 Fed. 306. In others such value is estimated at the place of delivery, deducting the towage charges. Fox *v.* Hayward, 4 Brewst. (Pa.) 32; Leech *v.* The Steamboat Miner, 1 Phila. (Pa.) 144.

between them.[87] The uncertainty as to the degree of fault and its consequences, where both vessels are chargeable with them, brings the case within the reason of the rule of apportionment.[88]

(III) *Lien For Damages.* A claim for damages arising out of the negligent performance of a towage contract constitutes a lien upon the offending vessel,[89] and in some states such claims are expressly made liens by statute.[90] All parties having liens of this character are entitled to share in the distribution,[91] unless their rights have been forfeited.[92] By the weight of authority, a lien for negligent towage is entitled to priority of payment over liens on the tug for previous repairs or supplies,[93] and for unpaid premiums on insurance.[94] Such liens, in order to

87. J. T. Morgan Lumber Co. *v.* West Kentucky Coal Co., 181 Fed. 271; The Raymond, 180 Fed. 931; The Coleraine, 179 Fed. 977; The Nettie, 170 Fed. 526; The Britannia, 148 Fed. 495; The Flushing, 134 Fed. 757 [*affirmed* in 145 Fed. 614, 76 C. C. A. 304]; The Jane McCrea, 121 Fed. 932; Brown *v.* Cornell Steamboat Co., 110 Fed. 780 [*reversed* on the facts in 121 Fed. 682, 58 C. C. A. 430]; The N. and W. No. 2, 102 Fed. 921; The M. D. Wheeler, 100 Fed. 859; The Gladiator, 79 Fed. 445, 25 C. C. A. 32; O'Connell *v.* The C. R. Stone, 68 Fed. 934; Brand *v.* The Favorite, 50 Fed. 569; The W. A. Levering, 36 Fed. 511; The Wm. Kraft, 33 Fed. 847; Philadelphia, etc., R. Co. *v.* New England Transp. Co., 24 Fed. 505; The Pres. Briarly, 24 Fed. 478; The Syracuse, 18 Fed. 828; The Wm. Murtagh, 17 Fed. 259; Mason *v.* The William Murtaugh, 3 Fed. 404; The J. L. Hasbrouck, 13 Fed. Cas. No. 7,324, 5 Ben. 244 [*affirmed* in 13 Fed. Cas. No. 7,326, 14 Blatchf. 30]; The J. L. Hasbrouck, 13 Fed. Cas. No. 7,326, 14 Blatchf. 30 [*affirming* 13 Fed. Cas. No. 7,325, 6 Ben. 272]; The Morton, 17 Fed. Cas. No. 9,864, Brown Adm. 137; The Sea Breeze, 21 Fed. Cas. No. 12,572*a*, 2 Hask. 510.

Circumstances showing concurrent fault justifying division of damages.— It has been held that it is negligence in both the owner of the tow and the master of the tug to proceed on a voyage with a tow known to both to be unfit to encounter the hazards of the trip. The R. S. Mabey *v.* Atkins, 14 Wall. (U. S.) 204, 20 L. ed. 881; The W. J. Keyser, 56 Fed. 731, 6 C. C. A. 101; The Wm. Kraft, 33 Fed. 847; The Syracuse, 18 Fed. 828; The Wm. Murtagh, 17 Fed. 259; The Bordentown, 16 Fed. 270; Connolly *v.* Ross, 11 Fed. 342; The William Cox, 3 Fed. 645 [*affirmed* in 9 Fed. 672]; Mason *v.* The William Murtaugh, 3 Fed. 404. So it is negligence in both the pilot of a tug and the master of an open loaded boat to attempt to tow such a boat across the bay of New York in a gale of wind. The William Cox, *supra*; Mason *v.* The William Murtaugh, *supra*. But the above rule does not necessarily apply to all trips about New York bay, of open deck coal barges, but only to trips under circumstances of evident hazard. Mason *v.* The Wm. Murtagh, *supra*.

88. Cramer *v.* Allen, 6 Fed. Cas. No. 3,346, 5 Blatchf. 248.

89. The John G. Stevens, 170 U. S. 113, 18 S. Ct. 544, 42 L. ed. 969.

90. Donoghue-Kellogg Mill Co. *v.* The Wasp, 86 Fed. 470, Washington statute.

Under the Missouri statute giving a lien for malperformance of contracts of affreightment, etc., a lien attaches to a steamboat for damages arising from malperformance of a contract of towage. Miles *v.* The Diurnal, 34 Mo. 588.

91. The Battler, 67 Fed. 251.

The liens of the owners of the vessel and cargo against the tug are equal, and they are entitled to share ratably. The Young America, 30 Fed. 789.

Elder lienor entitled to priority over younger lienor.— Where there are several claims for damages, each arising out of negligence in performing a towage contract, and each claimant arrests the vessel at the same time, the elder lienor is entitled to priority over the younger lienor, unless he has waived or postponed his lien. The Frank G. Fowler, 17 Fed. 653, 21 Blatchf. 410 [*reversing* 8 Fed. 331].

92. The Battler, 67 Fed. 251, holding that where the owner of tows lost by a tug invited the insurer of their cargoes to join with him in a suit against the tug, and the insurer refused to do so, but, after the tug's liability had been established by a decree, then filed a separate libel, it had waived its right to share *pro rata* with the original libellant, and was only entitled to the surplus, if any, after his decree was satisfied.

93. The John G. Stevens, 170 U. S. 113, 18 S. Ct. 544, 42 L. ed. 969; The Daisy Day, 40 Fed. 538; The M. Vandercook, 24 Fed. 472. *Contra*, The Glen Iris, 78 Fed. 511; The Gratitude, 42 Fed. 299; The Young America, 30 Fed. 789; The Grapeshot, 22 Fed. 123; The Samuel J. Christian, 16 Fed. 796. The argument of the cases holding the contrary doctrine is that, conceding the damages resulting from collision are entitled to priority over claims for supplies and the like, arising *ex contractu*, still the damages resulting from fault in towage arise substantially from a breach of contract, and are suffered by one who has voluntarily come into contract relations with the towing vessel, as distinguished from one who has exercised no freedom of action, as in a case of collision. And the inference drawn is that the damages, being thus essentially for breach of contract, must rank with ordinary claims arising upon contract, and fall under those arising out of tort, as in collision. See the cases above cited *contra*.

94. The Daisy Day, 40 Fed. 603.

retain their priority, must be enforced with reasonable diligence, having reference to all the circumstances of the case.[95]

h. Costs. In accordance with the general rule in admiralty, the prevailing party in this class of cases is generally entitled to costs.[96] They do not, however, necessarily follow the decree, and may be denied,[97] or apportioned,[98] without regard to the ultimate termination of the proceeding.

C. Loss of or Injury to Tug.[99] A tug is not entitled to indemnity for an injury it may sustain during the performance of a towage service unless such injury is caused by the fault or negligence of the tow.[1] If such is the case, and the tug is not guilty of contributory negligence, the tow is liable for the damages.[2] If both tug and tow are at fault, the damages should be divided.[3] Where two rival tugs were endeavoring to get a line to a vessel, and one of them was injured through the fault of the other, the latter was held liable for the damage sustained.[4]

VI. INJURIES TO THIRD PERSONS.[5]

A. In General. Want of skill and the failure to exercise care in the management of a tow by a tug, whereby injury is caused to third persons [6] or their

95. The Young America, 30 Fed. 789.

What constitutes laches.— The rule of justice and equity in such a case clearly demands that a comparatively brief period of inactivity, where there was full opportunity for attaching the vessel, should be held to constitute laches sufficient to postpone the prior lien in favor of subsequent lienors, who were thus prejudiced by the delay, and by the want of notice. The Young America, 30 Fed. 789. Thus where libellant caused the formal arrest of a tug in proceedings against it for damages to its tow, his release thereof for the purpose of permitting it to engage in its usual business without any keeper on board was such laches as to postpone his lien to those of subsequent materialmen who furnished supplies without notice of his suit. The Young America, *supra*. But in the case of The Frank G. Fowler, 17 Fed. 653, 21 Blatchf. 410, where there was a difference of nineteen days only between the time of the accruing of the two liens for negligence in towage, and the tug laid up each night in New Jersey, and only touched at the city of New York at night to report the work done, and there was also necessary delay in ascertaining the first lienor's damage, it was held that this delay of nineteen days was not such laches as should postpone the first lien to the second.

96. See the cases cited *infra*, this section; and, generally, ADMIRALTY, 1 Cyc. 908.

97. See the cases cited *infra*, this note.

Where the facts seemed to warrant the suit, a libel will be dismissed without costs. The James A. Garfield, 21 Fed. 474. See also The Prince Arthur *v.* The Florence, 5 Can. Exch. 151 [*affirmed* in 5 Can. Exch. 218].

Failure to call attention to specific facts of defense.— Where the answer, although denying negligence, does not call attention to the specific facts on which the defense relies, a dismissal must be without costs. Richter *v.* The Olive Baker, 40 Fed. 904.

Improper conduct.— It is the practice of courts of equity and admiralty, where the conduct of the successful party has been improper, to deny him costs (Pettie *v.* Boston Tow-Boat Co., 49 Fed. 464, 1 C. C. A. 314), and in some cases to impose them upon him (Pettie *v.* Boston Tow-Boat Co., *supra*). But it should be only in a clear case of oppression or of some malpractice that costs should be withheld (Pettie *v.* Boston Tow-Boat Co., 44 Fed. 382 [*reversed* on other grounds in 49 Fed. 464, 1 C. C. A. 314]), as where an extravagant claim is made, and rejected by the court (O'Hare *v.* The Brilliant, 3 Fed. 719). The mere fact of a recovery of a much less sum than that claimed is not a sufficient cause. Pettie *v.* Boston Tow-Boat Co., 44 Fed. 382 [*reversed* on other grounds in 49 Fed. 464, 1 C. C. A. 314].

98. Pettie *v.* Boston Tow-Boat Co., 49 Fed. 464, 468, 1 C. C. A. 314, where it is said: "In deciding questions of costs, courts frequently apportion them so as to cause the costs of one part of the suit to fall upon one party, and those relating to another part to fall upon the other."

99. **Liability of charterer** see SHIPPING, 36 Cyc. 106.

1. Reeves *v.* The Constitution, 20 Fed. Cas. No. 11,659, Gilp. 579.

2. Williamson *v.* McCaldin Bros. Co., 122 Fed. 63, 58 C. C. A. 399 [*affirming* 116 Fed. 400]; The Anglia, 1 Fed. Cas. No. 389, 7 Ben. 190.

3. Walsh *v.* The William W. Wood, 66 Fed. 601.

4. Slyfield *v.* Penfold, 66 Fed. 362, 13 C. C. A. 512 [*affirming* 55 Fed. 1010].

5. **Liability of tug for injuries to other vessels from collisions with tug and vessels in tow** see COLLISION, 7 Cyc. 299.

6. Dunham Towing, etc., Co. *v.* Daudelin, 41 Ill. App. 175 [*affirmed* in 143 Ill. 409, 32 N. E. 258]; Berry *v.* Ross, 94 Me. 270, 47 Atl. 512; Cumberland County *v.* Central Wharf Steam Tow-Boat Co., 90 Me. 95, 37 Atl. 867, 60 Am. St. Rep. 246; McGuire *v.* Moran, 76 N. Y. App. Div. 325, 78 N. Y. Suppl. 422; Feeney *v.* Minisceongo Towing Co., 21 N. Y. Suppl. 325; The J. & J. McCarthy, 61 Fed. 516, 9 C. C. A. 600 [*affirm-*

property,[7] is negligence for which the tug is liable, even though the tow was also at fault.[8] The third party thus injured can recover compensation from either the tow or the tug, if each has been guilty of a fault causing the injury.[9]

B. To Owners of Cargo. Where, by the negligence or fault of a tug, the cargo of the tow is lost or injured, the owner of the cargo is entitled to maintain an action against the tug or her owner for the loss,[10] although there is no privity of contract between them.[11] But if the injury to the cargo is caused by the unseaworthiness of the tow, and the tug is not guilty of negligence, the latter is not liable.[12] If the tug and tow are both negligent, the cargo owner may recover of either his whole damage,[13] unless he has been guilty of contributory negligence in employing a boat obviously unfit for the service, in which case he can recover but half his damages.[14]

TOWARD or TOWARDS. In the direction of;[1] in the direction to; with direction to; in a moral sense, with regard to, regarding; with ideal tendency to; nearly.[2]

TOWBOAT. See TOWAGE, *ante*, p. 553.

TO WIT. A phrase, the office and effect of which, is to particularize what is too general in a preceding sentence, and render clear, and of certain application,

ing 55 Fed. 85]; Abell *v.* The Nathan Hale, 48 Fed. 698. See also Padularoga *v.* Canadian Canning Co., 12 Brit. Col. 468.

Injury held due to negligence of person injured see The John K. Gilkinson, 156 Fed. 868; Pederson *v.* John D. Spreckles, etc., Co., 87 Fed. 938, 31 C. C. A. 308 [*affirming* 81 Fed. 205].

7. Butler-Ryan Co. *v.* Williams, 84 Minn. 447, 88 N. W. 3; The Rambler, 87 Fed. 784 (docking vessel so as to injure another vessel already there); The Hercules, 75 Fed. 274 (to same effect); The Annie Williams, 20 Fed. 866 (sheering tow against another vessel while passing her); Hubbard *v.* Dickie, 39 Nova Scotia 506 (carrying away of fish nets in river).

If the tug's negligence is the proximate cause of the injury, the tug is liable therefor, although the injury is the immediate act of another vessel. Butler-Ryan Co. *v.* Williams, 84 Minn. 447, 88 N. W. 3.

If the tug is not at fault, she is not liable for an injury done to the property of third persons while she is engaged in a towage service. Palmer *v.* New York, etc., Transp. Co., 88 Hun (N. Y.) 509, 34 N. Y. Suppl. 908; The Oscar B., 121 Fed. 978, 58 C. C. A. 316; The Jack Jewett, 23 Fed. 927.

A towboat, with a tow so much beyond her capacity as to disable her powers of locomotion, must bear any resulting injury to another vessel. Burgess *v.* Beebe, 3 La. Ann. 668.

8. Cumberland County *v.* Central Wharf Steam Tow-Boat Co., 90 Me. 95, 37 Atl. 867, 60 Am. St. Rep. 246.

9. Cumberland County *v.* Central Wharf Steam Tow-Boat Co., 90 Me. 95, 37 Atl. 867, 60 Am. St. Rep. 246.

10. Baird *v.* Daly, 57 N. Y. 236, 15 Am. Rep. 488 [*reversing* 4 Lans. 426]; Davidson *v.* Holden, 60 How. Pr. (N. Y.) 327; Bradley *v.* Lehigh Valley R. Co., 145 Fed. 569 [*affirmed* in 153 Fed. 350, 82 C. C. A. 426]; The Liberty No. 4, 7 Fed. 226; The U. S. Grant, 28 Fed. Cas. No. 16,804, 7 Ben. 337.

The owner of the cargo must show negligence on the part of the tug to recover against it for a loss. The mere fact of sinking the cargo is not enough. The W. E. Gladwish, 29 Fed. Cas. No. 17,355, 17 Blatchf. 77.

Effect of Harter Act.—The Harter Act (Act Feb. 13, 1893, 27 U. S. St. at L. 445, c. 105 [U. S. Comp. St. (1901) p. 2946]) has no application to the question of the liability of a tug for damage to the cargo of her tow, which arises upon a contract of towage and not of affreightment. Bradley *v.* Lehigh Valley R. Co., 145 Fed. 569 [*affirmed* in 153 Fed. 350, 82 C. C. A. 426].

11. Baird *v.* Daly, 57 N. Y. 236, 15 Am. Rep. 488 [*reversing* 4 Lans. 426]; Davidson *v.* Holden, 60 How. Pr. (N. Y.) 327.

12. The J. L. Hasbrouck, 13 Fed. Cas. No. 7,324, 5 Ben. 244, holding that the owners of the cargo, if they have a claim against anybody for such damage, must look for it to the owners of the tow.

13. Davidson *v.* Holden, 60 How. Pr. (N. Y.) 327; The Wm. Murtaugh, 17 Fed. 259.

14. The Wm. Murtagh, 17 Fed. 259.

1. Lange *v.* State, 95 Ind. 114, 115, where the word is said to be one of very comprehensive signification, and where such meaning is given to the term as used in a statute making it unlawful to point a firearm "toward" any other person.

2. Webster Dict. [*quoted* in Hudson *v.* State, 6 Tex. App. 565, 576, 32 Am. Rep. 593].

"'Towards' their support and education" see Dixon *v.* Bentley, 50 N. J. Eq. 87, 91, 25 Atl. 194.

"Insulting words or conduct . . . towards a female" see Stewart *v.* State, 4 Tex. App. 519, 524.

"Towards 'and unto'" see Rex *v.* Downshire, 4 A. & E. 232, 237, 5 L. J. Q. B. 50, 5 N. & M. 662, 31 E. C. L. 117.

what might seem otherwise doubtful or obscure;[3] words used to call attention to a more particular specification of what has preceded.[4]

TOWN BOARD. See TOWNS, *post*, p. 618.

TOWN BRIDGE. Generally speaking, a bridge wholly within a town.[5]

TOWN CLERK. A principal officer who keeps the records, issues calls for town meetings, and performs generally the duties of a secretary to the political organization.[6]

TOWN HOUSE. A house or building in which is transacted the public business of a town.[7]

TOWN LAWS. See BY-LAWS, 6 Cyc. 262 note 65.

TOWN-MEETING. See TOWNS, *post*, p. 611.

TOWN OFFICER. See TOWNS, *post*, p. 620.

TOWN PAUPER. A pauper who is supported by a town.[8]

3. Buck *v.* Lewis, 9 Minn. 314, 317, where it is said that the phrase is called *videlicet*.

Proof of allegations under videlicet see PLEADING, 31 Cyc. 705.

4. Webster Dict. [*quoted* in Gilligan *v.* Com., 99 Va. 816, 823, 37 S. E. 962].

When used in a recital in a written contract, the phrase "to wit" has no materiality. Sawyer *v.* Churchill, 77 Vt. 273, 276, 59 Atl. 1014, 107 Am. St. Rep. 762.

5. Bloomer *v.* Bloomer, 128 Wis. 297, 311, 107 N. W. 974.

6. Bouvier L. Dict. [*quoted* in Seamons *v.* Fitts, 21 R. I. 236, 244, 42 Atl. 863].

The term includes "city clerk" under the Rhode Island statute of construction. Rhuland *v.* Waterman, 29 R. I. 365, 71 Atl. 1, 3, 450.

7. French *v.* Quincy, 3 Allen (Mass.) 9, 11, where the term is said to be "broad enough to include all the business for which a town is authorized to erect a building. It is not limited to a hall for town-meetings, but may include offices for all the town-officers, and for the keeping of all the records and documents of the town."

8. Marlborough *v.* Chatham, 50 Conn. 554, 557.

TOWNS

By Henry H. Ingersoll
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CROSS-REFERENCES

For Matters Relating to:
Bounty Contracts, see BOUNTIES, 5 Cyc. 980.
Bridges, see BRIDGES, 5 Cyc. 1049.
Counties, see COUNTIES, 11 Cyc. 325.
Garnishment of Towns, see GARNISHMENT, 20 Cyc. 989.
Highways, see STREETS AND HIGHWAYS, 37 Cyc. 1.
Municipal Corporations, see MUNICIPAL CORPORATIONS, 28 Cyc. 55.
Poor Relief, see PAUPERS, 30 Cyc. 1058.
Schools and School-Districts, see SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 801.
Town Parishes, see RELIGIOUS SOCIETIES, 34 Cyc. 1112.
Townships as School Corporations, see SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 801.
Town-Site Entries of Public Lands, see PUBLIC LANDS, 32 Cyc. 759.

I. DEFINITION, HISTORY, NATURE, AND STATUS.

A. Popular Sense — 1. IN GENERAL. In its popular sense, a town is an aggregation of houses so near one another that the inhabitants may fairly be said to dwell together.[1]

1. *Arkansas.*— Murray *v.* Menefee, 20 Ark. 561, 564.
Colorado.—Garfield County Ct. *v.* Schwarz, 13 Colo. 291, 295, 296, 22 Pac. 783.
Illinois.— Martin *v.* People, 87 Ill. 524, 526; Cleveland, etc., R. Co. *v.* Green, 65 Ill. App. 414, 417.
Iowa.— Steyer *v.* Dwyer, 31 Iowa 20, 21.
Kansas.— Mendenhall *v.* Burton, 42 Kan. 570, 572, 22 Pac. 558.
Kentucky.— Morton *v.* Woodford, 99 Ky. 367, 35 S. W. 1112, 18 Ky. L. Rep. 271.
Louisiana.— Thibodaux *v.* Thibodaux, 46 La. Ann. 1528, 16 So. 450.

2. Generic Term. In this sense the word "town" is frequently used as a generic term,[2] embracing cities,[3] incorporated villages,[4] school-districts,[5] and in fact all kinds of municipal corporations.[6]

Mississippi.— Murphy *v.* State, 66 Miss. 46, 5 So. 626.

New Jersey.— Millville Gas Light Co. *v.* Vineland Light, etc., Co., 72 N. J. Eq. 305, 310, 65 Atl. 504 (holding that the word "town" has no fixed significance in New Jersey and that the courts have uniformly applied its use according to the manifest intention of the legislature); Holmes *v.* Jersey City, 12 N. J. Eq. 299, 305.

Tennessee.— Hope *v.* Deaderick, 8 Humphr. 1, 47 Am. Dec. 597.

England.— London, etc., R. Co. *v.* Blackmore, L. R. 4 H. L. 610, 615, 39 L. J. Ch. 713, 23 L. T. Rep. N. S. 504, 19 Wkly. Rep. 305; Reg. *v.* Cottle, 16 Q. B. 412, 416, 15 Jur. 721, 20 L. J. M. C. 162, 71 E. C. L. 412; Elliott *v.* South Devon R. Co., 2 Exch. 725, 729, 17 L. J. Exch. 262, 2 R. & Can. Cas. 500.

See 45 Cent. Dig. tit. "Towns," § 1.

Other definitions are: "A collection of houses in one neighborhood." Burrill L. Dict. [*quoted* in Klauber *v.* Higgins, 117 Cal. 451, 460, 49 Pac. 466].

"Any collection of houses larger than a village and not incorporated as a city." Webster Dict. [*quoted* in Garfield County Ct. *v.* Schwarz, 13 Colo. 291, 296, 22 Pac. 783, and in Siskiyou Lumber, etc., Co. *v.* Rostel, 121 Cal. 511, 513, 53 Pac. 1118].

May be synonymous with village.— Brown *v.* Grangeville, 8 Ida. 784, 788, 71 Pac. 151.

In this sense it is distinguished from the country, or from a rural population. Denver *v.* Coulehan, 20 Colo. 471, 479, 39 Pac. 425, 27 L. R. A. 751; State *v.* Eidson, 76 Tex. 302, 305, 13 S. W. 263, 7 L. R. A. 733.

Derivation.— "Town" is derived from the Anglo-Saxon word "tun," meaning an inclosure, or collection of houses inclosed by a wall. Anderson L. Dict. [*quoted* in Territory *v.* Stewart, 1 Wash. 98, 104, 23 Pac. 405, 8 L. R. A. 106]; Chicago, etc., R. Co. *v.* Oconto, 50 Wis. 189, 193, 6 N. W. 607, 36 Am. Rep. 840.

2. Tucker *v.* Lincoln County, 90 Minn. 406, 408, 97 N. W. 103; Banta *v.* Richards, 42 N. J. L. 497, 498. "'Town' is the generic term used in this country as embracing all kinds of municipal corporations which have the right to make police rules or regulations controlling all persons and things within certain specified limits." State *v.* Glennon, 3 R. I. 276, 277 [*quoted* in Garfield County Ct. *v.* Schwarz, 13 Colo. 291, 295, 22 Pac. 783]; Burrill L. Dict. [*quoted* in Klauber *v.* Higgins, 117 Cal. 451, 460, 49 Pac. 466]; Tomlins L. Dict. [*quoted* in State *v.* Simmons, 35 Mo. App. 374, 380; Van Riper *v.* Parsons, 40 N. J. L. 1, 4; New York Public Charities, etc., Com'rs *v.* McGurrin, 6 Daly (N. Y.) 349, 355]. "A town is the genus and a borough is the species." 1 Coke Inst. 116 [*quoted* in Klauber *v.* Higgins, 117 Cal. 451, 461, 49 Pac. 466; State *v.* Simmons, 35 Mo. App. 374, 380; Van Riper *v.* Parsons, 40 N. J. L. 1, 4]. "The word 'town,' or 'vill,' is indeed by the alteration of times and language now become a generical term comprehending under it the various species of cities, boroughs, and common towns." 1 Blackstone Comm. 114 [*quoted* in Klauber *v.* Higgins, 117 Cal. 451, 460, 49 Pac. 466; New York Public Charities, etc., Com'rs *v.* McGurrin, 6 Daly (N. Y.) 349, 355].

3. *Indiana.*— State *v.* Gerdink, 173 Ind. 245, 249, 90 N. E. 70.

Minnesota.— Stemper *v.* Higgins, 38 Minn. 222, 225, 37 N. W. 95; Odegaard *v.* Albert Lea, 33 Minn, 351, 353, 23 N. W. 526. But a statute granting local option to "towns and incorporated villages" has been held not to apply to cities. Kleppe *v.* Gard, 109 Minn. 251, 253, 123 N. W. 665.

Montana.— Helena *v.* Kent, 32 Mont. 279, 283, 80 Pac. 258.

New Jersey.— Brown *v.* Union, 62 N. J. L. 142, 144, 40 Atl. 632; Stout *v.* Glen Ridge, 59 N. J. L. 201, 206, 35 Atl. 913; Broome *v.* New York, etc., Tel. Co., 49 N. J. L. 624, 625, 9 Atl. 754; Banta *v.* Richards, 42 N. J. L. 497, 498; Anderson *v.* Trenton, 42 N. J. L. 486, 487; Sutterly *v.* Camden County Ct. of C. Pl., 41 N. J. L. 495, 496; Pell *v.* Newark, 40 N. J. L. 550, 553, 29 Am. Rep. 266; State *v.* Parsons, 40 N. J. L. 1, 4; Fritts *v.* Somerville, 7 N. J. L. J. 90, 91.

Ohio.— Peck *v.* Weddell, 17 Ohio St. 271, 285; Toledo *v.* Yeager, 8 Ohio Cir. Ct. 318, 323, 6 Ohio Cir. Dec. 273. See City, 7 Cyc. 148.

4. Tucker *v.* Lincoln County, 90 Minn. 406, 408, 97 N. W. 103; Stemper *v.* Higgins, 38 Minn. 222, 225, 37 N. W. 95.

But not unincorporated villages.— Truax *v.* Pool, 46 Iowa 256, 257; Illinois Cent. R. Co. *v.* Jordan, 63 Miss. 458, 461.

5. *In re* Opinion of Justices, (N. H. 1910) 75 Atl. 429, 430.

6. Dickinson *v.* Hudson County, 71 N. J. L. 589, 591, 60 Atl. 220 (holding that within a clause of the constitution town "embraces cities, boroughs, towns, villages and townships"); Watervliet *v.* Colonie, 27 N. Y. App. Div. 394, 399, 50 N. Y. Suppl. 487 (defining a town as "a municipal corporation comprising the inhabitants within its boundaries, and formed for the purpose of exercising such powers and discharging such duties of local government and administration of public affairs as have been or may be conferred or imposed upon it by law"); Cathcart *v.* Comstock, 56 Wis. 590, 608, 14 N. W. 833.

But incorporated towns are not included in a statute mentioning "any village, city, county or township." Welch *v.* Post, 99 Ill. 471, 473. See Municipal Corporations, 28 Cyc. 55.

In New York under General Corporation Law (Laws (1890), c. 563), §§ 2, 3; Town Law (Laws (1890), c. 569), § 2; and General Municipal Law (Laws (1892), c. 685), § 1, a "town" is a "municipal corporation." Hempstead *v.* Lawrence, 138 N. Y. App. Div. 473, 122 N. Y. Suppl. 1037.

B. Special Sense in United States and Canada — 1. Origin and History. In the New England states,[7] in certain middle[8] and western[9] states that have derived their institutions from New England, and in certain Canadian provinces,[10] the word "town" is used in a specific and definite sense to designate a well-known unit of local government.[11] In this sense the towns constituted the original units of local government in New England, antedating the organization of counties and forming the constituent elements of the colonies and states.[12] In their essential nature they have remained unchanged, having undergone only such modifications as have been rendered necessary by time and adaption to changed conditions.[13] It is of towns in this special sense that this article treats.

2. Nature and Status. They are involuntary territorial and political divisions, organized for the convenient exercise of portions of the political power of the state.[14] And they are furthermore quasi-municipal corporations, possessing to a certain extent corporate capacity,[15] and vested with the power to assess and collect taxes for the maintenance of schools and of the poor, for the

7. See *infra*, note 12.

8. North Hempstead *v.* Hempstead, 2 Wend. (N. Y.) 109.

9. Wilson *v.* Ulysses Tp., 72 Nebr. 807, 809, 101 N. W. 986, in which it is said: "The idea of the New England town was carried westward with the spread of population, and in nearly every western state the New England town meeting exists, either by itself as the only agency for general local administration outside of unincorporated villages and cities, or side by side with the system of county government by commissioners."

10. Ont. Rev. St. c. 223; *In re* Southampton, 12 Ont. L. Rep. 214.

11. **The township system was introduced into some southern states** during the reconstruction period following the Civil war. Floyd *v.* Perrin, 30 S. C. 1, 8 S. E. 14, 2 L. R. A. 242; Folsom *v.* Ninety-Six Tp., 159 U. S. 611, 16 S. Ct. 174, 40 L. ed. 278.

12. State *v.* Williams, 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465 [*affirmed* in 170 U. S. 304, 18 S. Ct. 617, 42 L. ed. 1047]; Webster *v.* Harwinton, 32 Conn. 131.

Some early towns possessed charters from the crown or royal governors. South Hampton *v.* Fowler, 52 N. H. 225; Readsboro *v.* Woodford, 76 Vt. 376, 57 Atl. 962.

13. State *v.* Williams, 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465 [*affirmed* in 170 U. S. 304, 18 S. Ct. 617, 42 L. ed. 1047].

14. *Massachusetts.*— Coolidge *v.* Brookline, 114 Mass. 592.

Minnesota.— State *v.* Sharp, 27 Minn. 38, 6 N. W. 408.

New Hampshire.— Doolittle *v.* Walpole, 67 N. H. 554, 38 Atl. 19; Eastman *v.* Meredith, 36 N. H. 284, 72 Am. Dec. 302.

New York.— Lorillard *v.* Monroe, 11 N. Y. 392, 62 Am. Dec. 120; Galen *v.* Clyde, etc., Plank Road Co., 27 Barb. 543, 551.

Vermont.— Lynch *v.* Rutland, 66 Vt. 570, 573, 29 Atl. 1015.

Wisconsin.— Chicago, etc., R. Co. *v.* Oconto, 50 Wis. 189, 6 N. W. 607, 36 Am. Rep. 840.

United States.— Bloomfield *v.* Charter Oak Bank, 121 U. S. 121, 129, 7 S. Ct. 865, 30 L. ed. 923, in which it is said: "They are territorial corporations, into which the State is divided by the legislature, from time to time, at its discretion, for political purposes and the convenient administration of government."

See 45 Cent. Dig. tit. "Towns," § 1.

In the middle and western states they are regarded as governmental agencies of the state rather than as constituent elements of it. State *v.* Irvine, 14 Wyo. 318, 84 Pac. 90.

In Illinois "these towns are a species of municipal incorporations, and constitute an integral part of the county, and are closely interwoven with the management of county affairs." Martin *v.* People, 87 Ill. 524, 526.

Town includes township.—Steyer *v.* Dwyer, 31 Iowa 20 (holding that parol evidence is admissible to prove that by known and general usage "town" had acquired a significance extending beyond a mere collection of houses); Herrick *v.* Morrill, 37 Minn. 250, 33 N. W. 849, 5 Am. St. Rep. 841 (holding that the word "town" often means "township," but "township" never means "town," in the sense of a platted village or town site); King *v.* Reed, 43 N. J. L. 186. And see *infra*, I, B, 3.

15. *Connecticut.*— State *v.* Williams, 68 Conn. 131, 167, 35 Atl. 24, 421, 48 L. R. A. 465 [*affirmed* in 170 U. S. 304, 18 S. Ct. 617, 42 L. ed. 1047], in which it is said: "In 1818 the 'town' was a territorial and municipal corporation, exercising the rights of local self-government through a town meeting and officers of its own choosing."

Illinois.— Waltham *v.* Kemper, 55 Ill. 346, 8 Am. Rep. 652.

Maine.— Hooper *v.* Emery, 14 Me. 375.

Massachusetts.— Milford *v.* Godfrey, 1 Pick. 91, 98; Stetson *v.* Kempton, 13 Mass. 272, 7 Am. Dec. 145.

Minnesota.— State *v.* Sharp, 27 Minn. 38, 40, 6 N. W. 408.

New Hampshire.—Wells *v.* Burbank, 17 N. H. 393.

New York.— Lorillard *v.* Monroe, 11 N. Y. 392, 62 Am. Dec. 120; North Hempstead *v.* Hempstead, 2 Wend. 109; Denton *v.* Jackson, 2 Johns. Ch. 320.

Pennsylvania.— Batten *v.* Brandywine, 5 Pa. L. J. 546.

making and repairing of roads and for other local purposes,[16] and with the general control of matters of local concern.[17] A town possesses only such powers and functions, and is subject only to such liabilities as are provided by statute;[18] and the conferring of additional and special powers upon a town does not convert it into a municipal corporation.[19]

3. Township. The word "township" is used in two senses. In one sense it is used to denote a territory six miles square surveyed and platted by the government surveyors, and divided into thirty-six sections;[20] while in another sense it is employed to describe a subdivision of the county, created by the state legislature and vested with certain powers of local government.[21]

Vermont.— Bancroft *v.* Dumas, 21 Vt. 456, 464.

Wisconsin.—Cathcart *v.* Comstock, 56 Wis. 590, 14 N. W. 833; Chicago, etc., R. Co. *v.* Oconto, 50 Wis. 189, 6 N. W. 607, 36 Am. Rep. 840; Eaton *v.* Manitowoc County, 44 Wis. 489, 493; Norton *v.* Peck, 3 Wis. 714.

United States.— Bloomfield *v.* Charter Oak Bank, 121 U. S. 121, 7 S. Ct. 865, 30 L. ed. 923; West Plains Tp. *v.* Sage, 69 Fed. 943, 949, 16 C. C. A. 553.

See 45 Cent. Dig. tit. "Towns," § 1.

Not municipal corporations proper.— Hopple *v.* Brown Tp., 13 Ohio St. 311; Cathcart *v.* Comstock, 56 Wis. 590, 14 N. W. 833; Eaton *v.* Manitowoc County, 44 Wis. 489, 493.

But may be made corporations by express statutory provision.— Floyd *v.* Perrin, 30 S. C. 1, 8 S. E. 14, 2 L. R. A. 242; Folsom *v.* Ninety-Six Tp., 159 U. S. 611, 16 S. Ct. 174, 40 L. ed. 278.

In New Jersey the word "town" is sometimes applied to "places incorporated for local government, under special act, but not clothed with all the powers usually conferred on cities." Banta *v.* Richards, 42 N. J. L. 497, 498.

In New Hampshire towns have been declared by statute to be corporations, but this has been construed not to confer upon them the powers nor to subject them to the duties of ordinary municipal corporations. Eastman *v.* Meredith, 36 N. H. 284, 72 Am. Dec. 302. It includes a place the inhabitants of which are required to pay a tax, and it need not be incorporated. Russell *v.* Dyer, 40 N. H. 173, 184.

"Town" is sometimes synonymous with parish.— Stead *v.* Kaskaskia Commons, 243 Ill. 239, 90 N. E. 654; Richardson *v.* Brown, 6 Me. 355; Brunswick *v.* Dunning, 7 Mass. 445; Dillingham *v.* Snow, 5 Mass. 547.

16. Dillingham *v.* Snow, 5 Mass. 547, 554. See Municipal Corporations, 28 Cyc. 128; Paupers, 30 Cyc. 1058, 1075; Schools and School Districts, 35 Cyc. 870, 998; Streets and Highways, 37 Cyc. 226, 322.

17. Spaulding *v.* Lowell, 23 Pick. (Mass.) 71.

18. *Maine.*— Hooper *v.* Emery, 14 Me. 375.

Nebraska.— Chicago, etc., R. Co. *v.* Klein, 52 Nebr. 258, 71 N. W. 1069.

New Hampshire.— Doolittle *v.* Walpole, 67 N. H. 554, 38 Atl. 19.

New York.— Denton *v.* Jackson, 2 Johns. Ch. 320.

North Dakota.—Vail *v.* Amenia, 4 N. D. 239, 59 N. W. 1092.

Pennsylvania.— Travis *v.* Lehigh Coal, etc., Co., 33 Pa. Super. Ct. 203; Shoe *v.* Nether Providence Tp., 3 Pa. Super. Ct. 137, 39 Wkly. Notes Cas. 437.

Wisconsin.— Mueller *v.* Cavour, 107 Wis. 599, 83 N. W. 944; State *v.* Forest County, 74 Wis. 610, 43 N. E. 551; Eaton *v.* Manitowoc County, 44 Wis. 489.

United States.— Bloomfield *v.* Charter Oak Bank, 121 U. S. 121, 7 S. Ct. 865, 30 L. ed. 923.

See 45 Cent. Dig. tit. "Towns," § 1.

Powers by prescription or long and general usage have sometimes been recognized in the case of towns dating back to colonial times. Spaulding *v.* Lowell, 23 Pick. (Mass.) 71; Willard *v.* Newburyport, 12 Pick. (Mass.) 227.

19. People *v.* Harvey, 142 Ill. 573, 32 N. E. 295; Wells *v.* Burbank, 17 N. H. 393.

20. U. S. Rev. St. (1878) § 2395 [U. S. Comp. St. (1901) p. 1471]; Little *v.* Williams, 88 Ark. 37, 52, 113 S. W. 340; Manistee Lumber Co. *v.* Springfield Tp., 92 Mich. 277, 279, 52 N. W. 468. See Public Lands, 32 Cyc. 799.

21. *Indiana.*— McIlwaine *v.* Adams, 46 Ind. 580, 582; Posey Tp. *v.* Senour, 42 Ind. App. 580, 86 N. E. 440, 441.

Iowa.— Hanson *v.* Cresco, 132 Iowa 533, 537, 109 N. W. 1109 (holding that while a township is not a municipal corporation proper, yet is it a "municipality" within the meaning of Acts (1902), p. 68, c. 108); McCollister *v.* Shuey, 24 Iowa 362, 367.

Michigan.—Wayne County *v.* Detroit, 17 Mich. 390, 401.

Nebraska.—Wilson *v.* Ulysses Tp., 72 Nebr. 807, 812, 101 N. W. 986 [*qualifying* Chicago, etc., R. Co. *v.* Klein, 52 Nebr. 258, 71 N. W. 1069], in which it is said: "A township partakes somewhat of a dual nature. In so far as its inhabitants exert the power of direct local self-government, they resemble municipal corporations acting under charters conferring such powers, but, in so far as the powers which the township exercises are limited and confined to those which properly belong to the government of the state as a whole, and which are merely devolved upon the township as a portion of the state government, they are mere local subdivisions of the state."

North Carolina.— Wittkowsky *v.* Jackson County, 150 N. C. 90, 94, 63 S. E. 275, hold-

It is in this latter sense of the term that it is used as synonymous with the word "town." [22]

II. CREATION, ALTERATION, EXISTENCE, AND POLITICAL FUNCTIONS.

A. Creation and Organization — 1. CREATION. Subject to such constitutional limitations as may exist in the different states,[23] the power to create towns and townships is vested in the legislatures,[24] and as a general rule may be exercised by either general [25] or local [26] statutes. But where a town has had a long existence and legal recognition, it is validated by prescription, and its existence and power are not open to question, either by a private individual [27] or by the state; [28] and a legal status once established is presumed to continue.[29] In some states the power to create townships is delegated to local authorities, such as county boards of supervisors or commissioners.[30] Unless required by the constitution, the consent of residents of the territory is not essential to the validity

ing that townships are not corporate bodies, and under Revisal (1905), § 1318, subd. 30, can exercise only such corporate powers as are authorized by the general assembly; and, while they and other taxing districts are sometimes referred to as quasi-municipal corporations, they are but territorial sections of counties, upon which, for appropriate purposes, power is conferred to perform local governmental functions.

Ohio.— Hopple *v.* Brown Tp., 13 Ohio St. 311, 324.

Pennsylvania.— Pennsylvania R. Co. *v.* Montgomery County Pass. R. Co., 167 Pa. St. 62, 71, 31 Atl. 468, 46 Am. St. Rep. 659, 27 L. R. A. 766 (holding that "townships do not possess municipal powers, and under existing laws their control over the public roads is limited"); Shronk *v.* Penn Tp., 3 Rawle 347, 350; American Tel., etc., Co. *v.* Reed, 15 Pa. Dist. 649, 651, 31 Pa. Co. Ct. 657; Batten *v.* Brandywine, 5 Pa. L. J. 546.

Wisconsin.— Norton *v.* Peck, 3 Wis. 714, 722.

See 45 Cent. Dig. tit. "Towns," § 1.

Other definitions.— "A township is a subdivision of a county for county purposes, more highly organized than a village, and less so than an incorporated city." Abbott L. Dict. [*quoted* in Union Pac. R. Co. *v.* Ryan, 2 Wyo. 408, 418 (*reversed* on other grounds in 113 U. S. 516, 5 S. Ct. 601, 28 L. ed. 1098)].

"Townships are the lowest grade of municipal corporations. They are created for certain specific purposes, and endowed with very limited powers and liabilities." Posey Tp. *v.* Senour, 42 Ind. App. 580, 86 N. E. 440, 441.

It is an involuntary quasi-municipal corporation. Valverde *v.* Shattuck, 19 Colo. 104, 34 Pac. 947, 41 Am. St. Rep. 208.

In South Carolina.— Floyd *v.* Perrin, 30 S. C. 1, 20, 8 S. E. 14, 2 L. R. A. 242, in which it is said: "A township cannot with any propriety be considered as one of the political divisions of the State, for there is nothing in the constitution constituting or recognizing it as such, and there is no act of the legislature investing it with any such character, or with any of the attributes incident to such a condition."

"Township" may include ward (Comstock *v.* Grand Rapids, 54 Mich. 641, 645, 20 N. W. 623), precinct and ward (Whitall *v.* Gloucester County, 40 N. J. L. 302, 304), and may mean school-district (Wallis *v.* Smith, 29 Ark. 354, 356).

"School townships" as distinguished from civil townships exist in some states. McLaughlin *v.* Shelby Tp., 52 Ind. 114, 117.

22. Steyer *v.* Dwyer, 31 Iowa 20, 21; Hutchinson Tp. *v.* Filk, 44 Minn. 536, 537, 47 N. W. 255; Odegaard *v.* Albert Lea, 33 Minn. 351, 353, 23 N. W. 526; Fritts *v.* Somerville, 7 N. J. L. J. 90, 91; Philadelphia, etc., Turnpike Co. *v.* Philadelphia, etc., R. Co., 5 Pa. Dist. 305, 308. See *supra*, I, A, 2, b.

23. Somonauk *v.* People, 178 Ill. 631, 53 N. E. 314. See also State *v.* Cronin, 41 Mont. 293, 109 Pac. 144.

24. People *v.* Cook County, 176 Ill. 576, 52 N. E. 334; Wolf's Appeal, 58 Pa. St. 471; State *v.* Forest County, 74 Wis. 610, 43 N. W. 551; Bloomfield *v.* Charter Oak Bank, 121 U. S. 121, 7 S. Ct. 865, 30 L. ed. 923.

25. People *v.* Hazelwood, 116 Ill. 319, 6 N. E. 480.

26. People *v.* Cook County, 176 Ill. 576, 52 N. E. 334; Riverton, etc., Water Co. *v.* Haig, 58 N. J. L. 295, 33 Atl. 215.

27. Riverton, etc., Water Co. *v.* Haig, 58 N. J. L. 295, 33 Atl. 215.

28. Readsboro *v.* Woodford, 76 Vt. 376, 57 Atl. 962.

29. *In re* Crescent Tp., 31 Pittsb. Leg. J. N. S. (Pa.) 297.

30. Somonauk *v.* People, 178 Ill. 631, 53 N. E. 314; People *v.* Hazelwood, 116 Ill. 319, 6 N. E. 480; State *v.* Cronin, 41 Mont. 293, 109 Pac. 144; State *v.* Forest County, 74 Wis. 610, 43 N. W. 551; Chicago, etc., R. Co. *v.* Oconto, 50 Wis. 189, 6 N. W. 607, 36 Am. Rep. 840.

Must be at least two townships.— The authority to divide a county into townships must be deemed to require that there be always at least two townships in every county. State *v.* Cronin, 41 Mont. 293, 109 Pac. 144.

of a statute creating a town.[31] But when the constitution has such requirement, the legislature has no power to lower or diminish the constitutional standard.[32] So the legislature may pass general laws dividing towns into classes.[33]

2. Organization. Upon the creation of a town, its organization is a ministerial function,[34] which may be delegated to a court[35] or board of local officers.[36] The powers of such a court or board are purely statutory,[37] and substantial compliance with the requirements of the statute is both necessary[38] and sufficient.[39] Unless the statute allows an appeal from or review of the acts of the organizing board or tribunal, its action in the premises is final.[40]

3. Territory Included — a. Nature and Extent. The nature and extent of the territory included in a town are subject to statutory regulation.[41] A common provision of a general nature is that no new township shall comprise less than a certain area.[42] And even in the absence of express statutory requirement, the entire territory comprised within the town must be contiguous.[43] Subject to these limitations, however, the validity of its organization will not be affected by any peculiarity of size[44] or shape.[45]

b. Boundaries — (i) *Original Location.* The original location of town and township boundaries may be made either in the terms of the act of creation[46]

31. Somonauk *v.* People, 178 Ill. 631, 53 N. E. 314; Van Horn *v.* State, 46 Nebr. 62, 64 N. W. 365.

32. State *v.* Munn, 201 Mo. 214, 99 S. W. 1073; State *v.* Russell, 197 Mo. 633, 95 S. W. 870; State *v.* Gibson, 195 Mo. 251, 94 S. W. 513; State *v.* McGowan, 138 Mo. 187, 39 S. W. 771; Van Horn *v.* State, 46 Nebr. 62, 64 N. W. 365; Albert *v.* Twohig, 35 Nebr. 563, 53 N. W. 582; State *v.* Spokane County, 49 Wash. 70, 94 Pac. 897.

33. Travis *v.* Lehigh Coal, etc., Co., 33 Pa. Super. Ct. 203.

34. Somonauk *v.* People, 178 Ill. 631, 53 N. E. 314, holding that action under the statute may be compelled by mandamus.

35. Guebelle *v.* Epley, 1 Colo. App. 199, 28 Pac. 89; People *v.* Garner, 47 Ill. 246; Rousey *v.* Wood, 57 Mo. App. 650.

36. Atty.-Gen. *v.* Page, 38 Mich. 286.

37. Somonauk *v.* People, 178 Ill. 631, 53 N. E. 314; Albert *v.* Twohig, 35 Nebr. 563, 53 N. W. 582.

38. Macey *v.* Carter, 76 Mo. App. 490; Rousey *v.* Wood, 57 Mo. App. 650.

39. Guebelle *v.* Epley, 1 Colo. App. 199, 28 Pac. 89 (holding that it was immaterial that a petition to the county court for the organization of a town was obtained secretly, where there was no provision requiring the publicity of such petition); Somonauk *v.* People, 178 Ill. 631, 53 N. E. 314; People *v.* Garner, 47 Ill. 246; State *v.* Woodbury, 76 Me. 457; State *v.* Kinzer, 20 Nebr. 174, 29 N. W. 307.

Unnecessary recitals in petition will not vitiate. State *v.* Russell, 197 Mo. 633, 95 S. W. 870.

Clerical omissions are not fatal to validity. Rousey *v.* Wood, 63 Mo. App. 460.

Presumption of performance of legal duty in a lawful manner may supply minor details of organization in an existing and recognized town. People *v.* Garner, 47 Ill. 246; Prentiss *v.* Davis, 83 Me. 364, 22 Atl. 246.

40. Atty.-Gen. *v.* Page, 38 Mich. 286.

41. Seabrook *v.* Fowler, 67 N. H. 428, 30 Atl. 414; South Hampton *v.* Fowler, 52 N. H. 225; Schriber *v.* Langlade, 66 Wis. 616, 29 N. W. 547, 554.

Hurd Rev. St. Ohio (1908), c. 139, § 20, tit. "Township Organization," providing that "when in any county under township organization there is any territory coextensive with a city situated therein and which is not included within any organized town, such territory shall constitute a town by the name of such city, and all the provisions of this act shall apply to the town so constituted the same as if it had been organized in the manner provided in this act in the case of organization of new towns," has no application to villages. People *v.* Hitchcock, 148 Ill. App. 456.

42. Jefferson *v.* People, 87 Ill. 503, holding that when a town is divided into several towns, each is a "new town" within the meaning of a statute which provides that no new town shall be created of less territory than seventeen square miles.

Law as to area applies, although petition for formation of a new town was filed before passage of the act. Jefferson *v.* People, 87 Ill. 503.

43. Chicago, etc., R. Co. *v.* Oconto, 50 Wis. 189, 6 N. W. 607, 36 Am. Rep. 840.

But an Indian reservation, or any part of it, may be included within the boundaries of a town, even though it entirely separates other portions of the town from each other. Schriber *v.* Langlade, 66 Wis. 616, 29 N. W. 547, 554.

44. Guebelle *v.* Epley, 1 Colo. App. 199, 28 Pac. 89.

45. Grunert *v.* Spalding, (Wis. 1899) 78 N. W. 606, sustaining the validity of a town over one hundred miles long and in places only two or three miles wide.

46. Winthrop *v.* Readfield, 90 Me. 235, 38 Atl. 93; Seabrook *v.* Fowler, 67 N. H. 428, 30 Atl. 414; Com. *v.* Fullerton, 12 Pa. St. 266.

or in the ministerial act of organization.[47] It is sufficient that the boundaries are described with reasonable certainty.[48] If a stream is called for as a boundary the presumption is that the middle of the stream was intended,[49] unless a different location is clearly expressed.[50] Lines running to the sea do not ordinarily include the seashore;[51] but the sound boundary of Connecticut towns follows the high water mark, crossing bays and harbors, of which objects on the opposite shore are visible to the naked eye.[52] A line between two termini or corners is presumed to be a straight line,[53] unless the contrary is clearly expressed.[54]

(II) *PERAMBULATION.* In some states the selectmen or other officers of adjoining towns are required by statute to go over the common boundary line together at stated intervals and mark such line,[55] the proceeding being known as perambulation.[56]

(III) *ASCERTAINMENT AND ESTABLISHMENT OF DISPUTED BOUNDARIES* — (A) *Jurisdiction.* In the event the officials charged with the perambulation of the boundaries cannot agree,[57] or in case of disputed boundaries from any other cause,[58] the power to settle the dispute is vested in some states in the county board of supervisors,[59] but more frequently in the courts.[60]

(B) *Procedure* — (1) IN GENERAL. The proper proceeding is by petition in conformity with the statute,[61] filed in the name of the town,[62] and accompanied by notice to the other town involved.[63]

47. People *v.* Garner, 47 Ill. 246.

48. Com. *v.* Fullerton, 12 Pa. St. 266, holding that a description by reference to certain rivers, creeks, and farms, without naming the county, is sufficient, and the locality may be ascertained by parol evidence.

49. Stevens *v.* Thatcher, 91 Me. 70, 39 Atl. 282; Warren *v.* Thomaston, 75 Me. 329, 46 Am. Rep. 397; Flynn *v.* Boston, 153 Mass. 372, 26 N. E. 868; State *v.* Canterbury, 28 N. H. 195; Boscawen *v.* Canterbury, 23 N. H. 188; State *v.* Metz, 29 N. J. L. 122.

50. Forest River Lead Co. *v.* Salem, 165 Mass. 193, 42 N. E. 802; East Fishkill *v.* Wappinger, 97 N. Y. App. Div. 7, 89 N. Y. Suppl. 599.

51. Litchfield *v.* Scituate, 136 Mass. 39.

52. Rowe *v.* Smith, 51 Conn. 266, 50 Am. Rep. 16 (holding that in determining whether a bay or harbor is of no greater width than the eye, it is only necessary that the figure of a man can be fairly seen, and that it can be determined whether he is walking or running); Rowe *v.* Smith, 48 Conn. 444.

53. Bremen *v.* Bristol, 66 Me. 354; Henniker *v.* Hopkinton, 18 N. H. 98.

54. Henniker *v.* Hopkinton, 18 N. H. 98.

55. Me. St. (1903) § 108; N. H. St. (1900) c. 52; Small *v.* Lufkin, 56 Me. 30 (construing the Maine statute to impose such duty also upon the officials of organized plantations); Pitman *v.* Albany, 34 N. H. 577; *In re* Chatham, 18 N. H. 227.

Where statutes authorize selectmen to appoint other persons to act for them, the selectmen of different towns may appoint the same persons. Adams *v.* Stanyan, 24 N. H. 405.

The selectmen have no authority to alter the boundaries. Bailey *v.* Rolfe, 16 N. H. 247; Gorrill *v.* Whittier, 3 N. H. 265.

56. See cases cited *supra*, note 55.

57. Bath *v.* Haverhill, 73 N. H. 511, 63 Atl. 307; *In re* Chatham, 18 N. H. 227.

58. Pitman *v.* Albany, 34 N. H. 577.

59. Govers *v.* Westchester County, 171 N. Y. 403, 64 N. E. 193; People *v.* Albany County, 63 How. Pr. (N. Y.) 411.

60. Colvin *v.* Fell, 40 Ill. 418; Bath *v.* Haverhill, 73 N. H. 511, 63 Atl. 307; *In re* Chatham, 18 N. H. 227; Searsburg *v.* Woodford, 76 Vt. 370, 57 Atl. 961.

61. Bath *v.* Haverhill, 73 N. H. 511, 63 Atl. 307; Boscawen *v.* Canterbury, 23 N. H. 188; *In re* Line, 4 Lanc. L. Rev. (Pa.) 269; Searsburg *v.* Woodford, 76 Vt. 370, 57 Atl. 961; Somerset *v.* Glastenbury, 61 Vt. 449, 17 Atl. 748.

Where the proceedings have not been according to the statute, a new petition may be acted upon without reference to the former proceedings. Monmouth *v.* Leeds, 76 Me. 28.

The line cannot be settled by adjoining landowners. Smith *v.* Rockingham, 25 Vt. 645.

62. **A mistake in the charter in the boundary of the township** cannot be corrected in a suit between individuals. Enfield Proprietors *v.* Permit, 5 N. H. 280, 20 Am. Dec. 580.

An individual cannot attack the action of a board of supervisors in establishing town boundaries, in the absence of fraud, collusion, or bad faith on the part of the board. Govers *v.* Westchester County, 171 N. Y. 403, 64 N. E. 193. But see Forest River Lead Co. *v.* Salem, 165 Mass. 193, 42 N. E. 802, holding that a bill in equity against two towns to determine in which plaintiff is liable to be taxed will be entertained where not demurred to.

63. Anonymous, 31 Me. 590; People *v.* Albany County, 63 How. Pr. (N. Y.) 411.

Notice to other parties interested is not required. Boscawen *v.* Canterbury, 23 N. H. 188.

But other persons interested may be made parties upon giving security to pay costs caused by their intervention. Boscawen *v.* Canterbury, 23 N. H. 188.

(2) COMMISSIONERS. The action of the court is taken through the appointment of commissioners,[64] upon whom is imposed the duty of ascertaining the correct boundary [65] and of reporting their findings to the court.[66] The case is then heard upon the report [67] and exceptions filed thereto,[68] and the judgment of a court of competent jurisdiction [69] establishing the boundaries is conclusive.[70]

(3) EVIDENCE. In proceedings to determine town boundaries, the general rules of evidence applicable to other boundary cases will be applied.[71] Furthermore the records of perambulations by the selectmen are admissible,[72] but not conclusive.[73] Other matters admissible in evidence are the boundaries fixed by the proprietors who established the towns [74] and measurements in the deeds of individuals claiming along the town line.[75] So parol evidence is admissible whenever necessary to supplement that of a higher order,[76] and after the lapse of a long period, reputation, hearsay,[77] and acquiescence in the recognized line [78] will be entitled to respect.[79]

(4) COSTS. As a general rule the costs attending the establishment of the correct boundaries will be divided equally among the towns concerned,[80] but

64. Suffield *v.* East Granby, 52 Conn. 175; Lisbon *v.* Bowdoin, 53 Me. 324; Anonymous, 31 Me. 590.

The order appointing commissioners must conform to the statute as to the number of commissioners (Monmouth *v.* Leeds, 76 Me. 28), and in other respects (*In re* Line, 4 Lanc. L. Rev. (Pa.) 269).

A commissioner is not disqualified by the fact that he had previously been employed by one of the towns to run the line in dispute. Winthrop *v.* Readfield, 90 Me. 235, 38 Atl. 93.

Where the commissioners first appointed fail to perform their duty, new ones may be appointed upon a new petition. Lisbon *v.* Bowdoin, 53 Me. 324.

65. **Their duty is to determine the old line,** not to establish a new one. Lisbon *v.* Bowdoin, 53 Me. 324; *In re* Line, 4 Lanc. L. Rev. (Pa.) 269; Searsburg *v.* Woodford, 76 Vt. 370, 57 Atl. 961.

Duty to mark boundary.— It is the duty of the commissioners, not only to ascertain the location of the line, but to mark it on the ground. Bath *v.* Haverhill, 73 N. H. 511, 63 Atl. 307.

66. People *v.* Garner, 47 Ill. 246.

67. **The report must show substantial compliance with all the requirements of the statute** (Lisbon *v.* Bowdoin, 53 Me. 324), but need not show that the commissioners were sworn (Winthrop *v.* Readfield, 90 Me. 235, 38 Atl. 93), although an oath is prescribed by statute (Somerset *v.* Glastenbury, 61 Vt. 449, 17 Atl. 748).

68. **But where it appears the commissioners have not complied with the statute** or with the orders of court, the report should be recommitted. *In re* Line, 4 Lanc. L. Rev. (Pa.) 269.

Under the Maine statute, all findings of the commissioners upon questions of fact and conclusions upon matters of law are final, and the function of the court is only to determine whether the report is legally correct in form and if all the proceedings have been in compliance with the statute. Winthrop *v.* Readfield, 90 Me. 235, 38 Atl. 93; Monmouth *v.* Leeds, 79 Me. 171, 8 Atl. 828 [*qualifying* Monmouth *v.* Leeds, 76 Me. 28]; Bethel *v.* Albany, 65 Me. 200.

In New Hampshire the findings of the commissioners upon matters of fact are conclusive; but if the report is based on error of law, it may be rejected, or if sufficient facts appear in the report to show the true boundary, a decree establishing such as the line may be made upon the report as it stands. Bath *v.* Haverhill, 73 N. H. 511, 63 Atl. 307.

69. **Where the court acted without jurisdiction,** the findings of a report confirmed by it are not conclusive (*In re* Plunkett Creek Tp., 148 Pa. St. 299, 23 Atl. 1041), but are presumed to be correct until declared void (Plunkett's Creek *v.* Shrewsbury, 3 Pa. Dist. 613).

70. Suffield *v.* East Granby, 52 Conn. 175; Colvin *v.* Fell, 40 Ill. 418; Monmouth *v.* Leeds, 76 Me. 28; Bethel *v.* Albany, 65 Me. 200; Bath *v.* Haverhill, 73 N. H. 511, 63 Atl. 307; Pitman *v.* Albany, 34 N. H. 577.

71. Talbot *v.* Copeland, 38 Me. 333; Wesley *v.* Sargent, 38 Me. 315; Bath *v.* Haverhill, 73 N. H. 511, 63 Atl. 307; Whitehouse *v.* Bickford, 29 N. H. 471; U. S. *v.* McKee, 128 Fed. 1002.

Field notes of the government survey will be resorted to in the absence of monuments. U. S. *v.* McKee, 128 Fed. 1002.

72. Com. *v.* Heffron, 102 Mass. 148.

Where conceded to have been obtained by fraud, they are not admissible. Bath *v.* Haverhill, 73 N. H. 511, 63 Atl. 307; Greenville *v.* Mason, 57 N. H. 385.

73. Bailey *v.* Rolfe, 16 N. H. 247.

74. Whitehouse *v.* Bickford, 29 N. H. 471.

75. Talbot *v.* Copeland, 38 Me. 333.

76. Com. *v.* Heffron, 102 Mass. 148; Com. *v.* Fullerton, 12 Pa. St. 266.

77. *In re* Line, 4 Lanc. L. Rev. (Pa.) 269.

78. Forest River Lead Co. *v.* Salem, 165 Mass. 193, 42 N. E. 802; Bath *v.* Haverhill, 73 N. H. 511, 63 Atl. 307; Hunt *v.* Johnson, 19 N. Y. 279.

79. **But recognition of a certain line by adjoining landowners is not conclusive.** Smith *v.* Rockingham, 25 Vt. 645.

80. Campton *v.* Holderness, 25 N. H. 225.

where the objections by one town to the line theretofore established are without reasonable foundation [81] it may be required to pay the entire costs.

B. Abolition. Existing towns may be abolished by the legislature either expressly [82] or by clear implication,[83] or the power may be delegated by the legislature to county boards.[84]

C. Alteration and Creation of New Towns and Townships [85]— **1. In General.** Subject to constitutional restrictions,[86] the legislature has full power to create,[87] abolish, enlarge,[88] diminish,[89] consolidate,[90] and divide [91] towns and otherwise change their boundaries; [92] and may exercise such power directly by either general or local law,[93] or may authorize it to be exercised by local governmental boards [94] or courts,[95] in accordance with general statutory provisions.[96]

But see Bethel *v.* Albany, 65 Me. 200, holding that under the Maine statute the compensation of commissioners is to be paid half by the petitioners and half by the respondents, irrespective of the number of towns in either party.

81. Campton *v.* Holderness, 25 N. H. 225.

82. Atty.-Gen. *v.* McColeman, 144 Mich. 76, 107 N. W. 869.

83. Vandriss *v.* Hill, 58 Kan. 611, 50 Pac. 872; *In re* Wood, 34 Kan. 645, 9 Pac. 758; Bay County *v.* Bullock, 51 Mich. 544, 16 N. W. 896; Montpelier *v.* East Montpelier, 29 Vt. 12, 67 Am. Dec. 748.

84. State *v.* Yankee, 120 Wis. 573, 98 N. W. 533 (holding that such action of the county board will be void unless the statutory provisions are strictly followed); Chicago, etc., R. Co. *v.* Oconto, 50 Wis. 189, 6 N. W. 607, 36 Am. Rep. 840; La Pointe *v.* O'Malley, 47 Wis. 332, 2 N. W. 632.

85. See MUNICIPAL CORPORATIONS, 28 Cyc. 132 *et seq.*

Creation and alteration of new school-districts see SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 831.

Local or special laws relating to creation or alteration see STATUTES, 36 Cyc. 1001.

86. Hyde Park *v.* Chicago, 124 Ill. 156, 16 N. E. 222.

Authority given to the legislature to create townships originally does not necessarily imply power to change them. Grady *v.* Lenoir County, 74 N. C. 101.

87. **The erection or division of towns is an act of municipal organization** rather than a grant of power. Wolf's Appeal, 58 Pa. St. 471.

88. Morris County *v.* Hinchman, 29 Kan. 90 (holding, however, that enlarging a county by the addition of territory on its eastern side cannot *ipso facto* enlarge a township within the county, the eastern boundary of which was the eastern boundary of the county); *In re* Opinion of Justices, 6 Cush. (Mass.) 578.

After the lapse of nearly eighty years, the court will not inquire into the authority of the legislature to make an annexation. Cobb *v.* Kingman, 15 Mass. 197.

89. **A city organized within, but not co-extensive with, a township** remains a part of the township. State *v.* Ward, 17 Ohio St. 543.

90. People *v.* Brayton, 94 Ill. 341; Anderson *v.* Parker, 101 Me. 416, 64 Atl. 771; Atty.-Gen. *v.* McColeman, 144 Mich. 67, 107 N. W. 869.

91. *In re* Greenwood Tp., 3 Grant (Pa.) 261; Montpelier *v.* East Montpelier, 29 Vt. 12, 67 Am. Dec. 748; Montpelier *v.* East Montpelier, 27 Vt. 704.

"Division" consists of the separation of a township into parts. It does not include the idea of the preservation of any previous organization, form, or shape (Livermore *v.* Phillips, 35 Me. 184); nor the vacation of a town and attachment of all its territory to other organized towns (State *v.* Wood County, 61 Wis. 278, 21 N. W. 55); nor a mere change in boundaries (State *v.* Lippels, 133 Wis. 211, 113 N. W. 437).

Legislature may authorize subdivision of towns for certain purposes, as for lighting. Smith *v.* Howell, 60 N. J. L. 384, 38 Atl. 180.

92. **But cannot include in same town tracts entirely separated from each other.**— Chicago, etc., R. Co. *v.* Oconto, 50 Wis. 189, 6 N. W. 607, 36 Am. Rep. 840.

93. Harrison Tp. *v.* Schoolcraft County, 117 Mich. 215, 75 N. W. 456, holding that where, by special act of the legislature, territory is detached from one township and added to another, such townships are thereby excluded from the operation of the general statute authorizing the board of supervisors to alter township boundaries.

The creation and division of towns is not "the enacting of any special or private laws" within the prohibition of the constitution. State *v.* Forest County, 74 Wis. 610, 43 N. W. 551. See STATUTES, 36 Cyc. 1001.

94. Elston *v.* Crawfordsville, 20 Ind. 272; Lones *v.* Harris, 71 Iowa 478, 32 N. W. 464; People *v.* Carpenter, 24 N. Y. 86.

Mandamus will lie to compel division of a township by the board of supervisors in a proper case. Henry *v.* Taylor, 57 Iowa 72, 10 N. W. 308.

95. *In re* Greenwood Tp., 3 Grant (Pa.) 261; *In re* Maccungie Tp., 3 Rawle (Pa.) 459.

96. **In New Hampshire** neither the selectmen nor the court of sessions possesses the power to alter existing towns. Gorrill *v.* Whittier, 3 N. H. 265.

Such laws are prospective only and do not apply to proceedings had before their taking effect. *In re* Alba Tp., 35 Pa. St. 271; *In re* Juniata Tp. Div., 31 Pa. St. 301; *In re* Forks Tp., 16 Leg. Int. (Pa.) 124. But see *In re* Greenwood Tp., 3 Grant (Pa.) 261,

Unless expressly required by the constitution or statutes, such changes may be made without the consent of the people affected.[97] Lands once annexed to a borough cannot relapse to the township, but must be restored by due proceedings; [98] and diversion of a stream by a private individual cannot change a town boundary.[99]

2. Procedure — a. In General. The course of procedure prescribed by the constitution and statutes for the creation, alteration, or division of towns [1] must be substantially followed,[2] or the proceedings will be void; [3] and where provision is made for the submission of the question to a vote of the people this must be done in the manner prescribed.[4]

b. Petition. Proceedings for township changes are usually begun by petition, which must follow the statute in all important particulars,[5] both as to contents [6] and signatures.[7]

c. Notice. It has been said that the inhabitants of a township have a natural right to notice of an application for its division,[8] but a more exact statement of the law is that the provisions of the statute as to notice must be substantially followed, both as to its contents,[9] form,[10] signature,[11] and manner of service or publication.[12]

d. Commissioners or Viewers. In Pennsylvania a preliminary step in the proceeding is the appointment and report of commissioners.[13] The order appointing them must, in the language of the statute, direct them "to inquire into the propriety of granting the prayer of the petitioners," [14] and must direct them to give notice to the inhabitants of the view.[15] Before undertaking to act, the commissioners must give the required notice of the time and place of meeting; [16] they must go near enough to the proposed boundary line to get an intelligent view of it; [17] and they must direct their inquiry into the expediency of granting

holding the act of 1857 applicable to proceedings begun before its passage under the act of 1834.

97. Cicero *v.* Chicago, 182 Ill. 301, 55 N. E. 351; State *v.* Lippels, 133 Wis. 211, 113 N. W. 437.

98. *In re* Newry Borough, 21 Pa. Co. Ct. 465.

99. *In re* Town Boundary Line, 21 R. I. 581, 42 Atl. 870.

1. Statutes regulating procedure in case of towns in the sense of municipal corporations are not applicable. Woosung *v.* People, 102 Ill. 648; Harris *v.* Schryock, 82 Ill. 119.

2. Territory *v.* Armstrong, 6 Dak. 226, 50 N. W. 832; Pelton *v.* Ottawa County, 52 Mich. 517, 18 N. W. 245; *In re* Ryon Tp., 1 Walk. (Pa.) 137.

3. Atty.-Gen. *v.* Rice, 64 Mich. 385, 31 N. W. 203; Smith *v.* Sherry, 54 Wis. 114, 11 N. W. 465.

4. People *v.* Clark County, 234 Ill. 62, 84 N. E. 695; People *v.* Brayton, 94 Ill. 341; State *v.* Mantor, 14 Minn. 437; Maple Lake *v.* Wright County, 12 Minn. 403; *In re* Greenwood Tp., 3 Grant (Pa.) 261.

5. Littell *v.* Vermilion County, 198 Ill. 205, 65 N. E. 78, holding that, although the county board must grant the request of a proper petition, yet the board has authority to determine whether the petition is sufficient to give it jurisdiction.

6. *In re* Maccungie Tp., 3 Rawle (Pa.) 459.

7. People *v.* Gladwin County, 41 Mich. 647, 2 N. W. 904; Russel *v.* Fulton County, 6 Ohio Cir. Ct. 185, 3 Ohio Cir. Dec. 407.

Signers may withdraw names from petition, and if less than the requisite number remain, it cannot be acted upon. Littell *v.* Vermilion County, 198 Ill. 205, 65 N. E. 78.

8. *In re* Stowe Tp. Div., 23 Pa. Super. Ct. 285.

9. Woo Sung *v.* People, 102 Ill. 648.

It need not contain names of petitioners. People *v.* Carpenter, 24 N. Y. 86.

10. Where notice "in writing" is required, it may be printed or engraved. Pelton *v.* Ottawa County, 52 Mich. 517, 18 N. W. 245.

11. Woo Sung *v.* People, 102 Ill. 648.

12. People *v.* Gladwin County, 41 Mich. 647, 2 N. W. 904; People *v.* Carpenter, 24 N. Y. 86, holding that a statement in an affidavit that a notice was left with a person to be posted up, "which was done," is a positive and sufficient averment of the posting.

13. See *infra*, notes 14–26.

14. *In re* Plum Tp. Div., 83 Pa. St. 73; *In re* Bethel Tp., 1 Pa. St. 97; *In re* Maccungie Tp., 3 Rawle (Pa.) 459, holding that it is not error to order inquiry into expediency of making a division "according to the prayer of the petitioners."

Failure to direct such inquiry renders proceeding void, although the report shows it was made. *In re* Harrison Tp., 5 Pa. St. 447.

15. *In re* Bethel Tp., 1 Pa. St. 97.

16. *In re* North Whitehall Tp., 47 Pa. St. 156.

17. *In re* Exeter, etc., Tp. Line, 8 Pa. Co. Ct. 524.

the petition.[18] The report of the commissioners must follow the statute;[19] it must contain an explicit opinion upon the propriety of granting the prayer of the petitioners;[20] and the commissioners are not authorized to adopt a different line that in their judgment will be more desirable.[21] It must also be accompanied by a map or plat showing both the existing lines and also the proposed new lines.[22] The court cannot alter the report, but if convinced of errors and irregularities therein,[23] may recommit it to the same commissioners, or set it aside and order a new view.[24] Upon its appearing that the report is in proper form and is in favor of an alteration in the township boundaries, it becomes the duty of the court to order the change made[25] or to direct an election by the voters affected by the change,[26] according as the statute may prescribe one or the other method of procedure.

e. Validity of Alteration and Collateral Attack. The proper method of testing the validity of alterations in township lines is by a direct proceeding instituted for that purpose,[27] which may be by quo warranto;[28] and courts usually refuse to consider collateral attacks upon such changes.[29]

f. Appeal. Unless expressly allowed by statute,[30] no appeal lies from an order dividing towns or otherwise changing their lines;[31] and in cases of review, or appeal, presumption is indulged in favor of the correctness of the decision of the lower court.[32]

g. Defects Cured by Lapse of Time. Actions to impeach the validity of proceedings to create or alter towns may be barred by express statutes of limitations,[33] or even in the absence of statute, by long acquiescence,[34] or by acqui-

18. *In re* Maccungie Tp. Div., 14 Serg. & R. (Pa.) 67.

19. *In re* Rockdale, etc., Tps. Line, 23 Pa. Co. Ct. 170.

20. *In re* Limestone Tp., 11 Pa. St. 270; *In re* Maccungie Tp. Div., 14 Serg. & R. (Pa.) 67.

21. *In re* Wetmore Tp., 68 Pa. St. 340 [*overruling In re* Warwick Tp., 18 Pa. St. 372, and *approving In re* Green Tp., 9 Watts & S. (Pa.) 22]. *Contra, In re* Paradise Tp., 4 Leg. Gaz. (Pa.) 382.

Second set of commissioners are not confined to approval or rejection of line established by the first set. *In re* Exeter, etc., Tps. Line, 8 Pa. Co. Ct. 524.

22. *In re* Catharine, etc., Tps. Div. Line, 31 Pa. St. 303; *In re* Harrison Tp., 5 Pa. St. 447; *In re* Henderson, etc., Tps., 2 Watts (Pa.) 269.

May adopt a plat used by former viewers. — *In re* Harrison Tp., 5 Pa. St. 447.

Description by natural boundaries has been declared sufficient under the act of March 24, 1803. *In re* Wyalusing Tp., 2 Serg. & R. (Pa.) 402.

23. **Report signed by two of the three commissioners** and confirmed by the court will not be revised upon appeal. *In re* Windsor Tp., 9 Watts (Pa.) 248.

24. *In re* Wetmore Tp., 68 Pa. St. 340 [*overruling In re* Warwick Tp., 18 Pa. St. 372].

25. *In re* Clay, etc., Tps. Div. Line, 33 Pa. St. 366.

26. *In re* North Whitehall Tp., 47 Pa. St. 156.

27. Cicero *v.* Chicago, 182 Ill. 301, 55 N. E. 351; People *v.* Carpenter, 24 N. Y. 86, holding, however, that uncertainty in the order making the alterations may be cured by reference to the applications, notices, and subsequent proceedings.

28. Territory *v.* Armstrong, 6 Dak. 226, 50 N. W. 832.

29. *Illinois.*— People *v.* Vermilion County, 210 Ill. 209, 71 N. E. 368, holding that certiorari does not lie simply upon the statement by the relator that he is a taxpayer and that the taxing officers of the township or county will be put to trouble and expense in and about the collection of taxes from the disconnected territory.

Indiana.— Hiatt *v.* Darlington, 152 Ind. 570, 53 N. E. 825.

Michigan.—Mills *v.* Richland Tp., 72 Mich. 100, 40 N. W. 183.

Missouri.— Rousey *v.* Wood, 63 Mo. App. 460.

Wisconsin.— Spooner *v.* Minong, 104 Wis. 425, 80 N. W. 737; Schriber *v.* Langlade, 66 Wis. 616, 29 N. W. 547, 554. But see Smith *v.* Sherry, 54 Wis. 114, 11 N. W. 465, in which the validity of the alteration is adjudicated in a suit involving the validity of a tax title.

United States.— Bardon *v.* Land, etc., Imp. Co., 157 U. S. 327, 15 S. Ct. 650, 39 L. ed. 719.

See 45 Cent. Dig. tit. "Towns," § 12.

30. Russel *v.* Fulton County, 6 Ohio Cir. Ct. 185, 3 Ohio Cir. Dec. 407.

31. People *v.* Garner, 47 Ill. 246; *In re* Div. Valley Tp., 146 Pa. St. 111, 23 Atl. 222.

32. *In re* Stowe Tp. Div., 23 Pa. Super. Ct. 285; *In re* Springdale Tp., 20 Pa. Super. Ct. 381.

33. Spooner *v.* Minong, 104 Wis. 425, 80 N. W. 737.

34. Cobb *v.* Kingman, 15 Mass. 197; Sherry *v.* Gilmore, 58 Wis. 324, 17 N. W. 252.

escence accompanied by acts creating an estoppel;[35] but it has been held that acquiescence for a few years will not bar quo warranto proceedings by the state to set aside an action clearly illegal.[36]

3. Operation and Effect. A valid alteration of a town or creation of a new town effects a definite and perpetual change in the lines of territorial jurisdiction as established thereby,[37] subject of course to any special provisions or exceptions contained in the statute.[38] Mere change of name, however, works no change in the powers, functions, or liabilities of a town or township.[39] The inhabitants of the new town retain the same status[40] and possess the same rights therein,[41] and the old town and residents thereof lose all powers and rights in the new town except those expressly retained.[42] Officers of the old town resident within the limits of the new are *ipso facto* ousted from office by the change,[43] and officers chosen for the new town to fill vacancies hold only till the end of the term of the corresponding officers in the original town.[44]

4. Adjustment of Preëxisting Rights and Liabilities — a. In General. Within constitutional restrictions, the legislature, as an incident to its power to make territorial changes in towns,[45] possesses full power to make an apportionment of the property, rights, and credits,[46] and of the debts and liabilities[47] of the towns

35. Hiatt *v.* Darlington, 152 Ind. 570, 53 N. E. 825.

36. Atty.-Gen. *v.* Marr, 55 Mich. 445, 21 N. W. 883.

37. Cicero *v.* Chicago, 182 Ill. 301, 55 N. E. 351; Cumberland *v.* Prince, 6 Me. 408; Bodge *v.* Foss, 39 N. H. 406.

Election of landowners.—Where the act dividing a town provided that all persons dwelling on lands adjoining the division line should have liberty to belong, with their lands, to either town, at their election, made within a limited time, this election when made determines the permanent boundary line. Blanchard *v.* Cumberland, 18 Me. 113; Cumberland *v.* Prince, 6 Me. 408.

38. Williams *v.* Poor, 65 Iowa 410, 21 N. W. 753.

Transfer of territory from an old town to a new one does not divest the old town of legal title to land owned by it within the limits of the new. Seabrook *v.* Fowler, 67 N. H. 428, 30 Atl. 414.

Transfer of "all the inhabitants and their estates" lying to the east of a certain line did not operate to transfer uninhabited lands, such as beach lands, within the limits described. Seabrook *v.* Fowler, 67 N. H. 428, 30 Atl. 414.

39. State *v.* Cooper, 101 N. C. 684, 8 S. E. 134.

40. Com. *v.* Brennan, 150 Mass. 63, 22 N. E. 628; Williamsburg Tp. *v.* Jackson Tp., 11 Ohio 37.

41. Atty.-Gen. *v.* McColeman, 144 Mich. 67, 107 N. W. 869.

42. Anderson *v.* Parker, 101 Me. 416, 64 Atl. 771.

43. *In re* Wood, 34 Kan. 645, 9 Pac. 758.

Where a town is divided, it seems the old officers hold over until new ones are elected. Bodge *v.* Foss, 39 N. H. 406. But see People *v.* Wolfert, 6 N. Y. St. 103, holding that annexation of a town to a city under Laws (1886), c. 335, wrought no change in the official status of the supervisor of the town holding office at the time.

44. Matter of Collins, 16 Misc. (N. Y.) 598, 40 N. Y. Suppl. 517.

45. Bristol *v.* New Chester, 3 N. H. 524.

This right of absolute control rests upon the political nature of municipal or quasi-municipal corporations, which are created solely for public purposes and as a part of the governmental machinery of the state, and its exercise is in no wise subject to the wishes of the inhabitants. State *v.* Lake City, 25 Minn. 404.

46. South Portland *v.* Cape Elizabeth, 92 Me. 328, 42 Atl. 503, 69 Am. St. Rep. 502; Harrison *v.* Bridgeton, 16 Mass. 16.

47. *Maine.*— South Portland *v.* Cape Elizabeth, 92 Me. 328, 42 Atl. 503, 69 Am. St. Rep. 502; Winslow *v.* Morrill, 47 Me. 411, holding that the new town cannot be required to pay its portion of the liabilities before the time set for payment by the other part.

Massachusetts.— Needham *v.* Wellesley, 139 Mass. 372, 31 N. E. 732 (holding that where certain expenses are ordered apportioned "on the basis of the average number of scholars in the public schools of legal school age," the apportionment should be on the basis of enrolment, not attendance, and regardless of grade of different schools); Windham *v.* Portland, 4 Mass. 384.

Minnesota.— Kettle River *v.* Bruno, 106 Minn. 58, 118 N. W. 63, holding that the liability of each of two new towns to a parent town to contribute *pro rata* to the indebtedness of the parent town is separate, independent, and not measured by the liability of the other.

New Jersey.— Orvil Tp. *v.* Woodcliff, 64 N. J. L. 286, 45 Atl. 686 (holding that such apportionment may be made by a retroactive statute passed after the division); Carlstadt *v.* Bergen Tp., 60 N. J. L. 360, 37 Atl. 612.

United States.— Morgan *v.* Waldwick, 17 Fed. 286.

See 45 Cent. Dig. tit. "Towns," § 16.

A doubtful liability is validated by twenty years' recognition by the people and officers

involved in the changes;[48] and it may delegate such apportionment to local boards[49] or to the courts.[50] Where no apportionment of liabilities is provided for by statute, the interested towns may adjust their rights and obligations by mutual agreement, which will be binding on the parties to it,[51] although not necessarily upon the holders of the indebtedness apportioned.[52] In the absence of express apportionment, the old corporation retains sole right to all the general corporate property, except that located within the limits of the territory detached,[53] retains all its former powers, rights, and privileges,[54] and remains subject to all its former obligations and duties.[55] So the title to property held in trust by the old town for particular purposes[56] remains undisturbed, even though the property lies in the detached territory.[57] Where one town is constituted the legal successor of another, liability for the existing debts of the old town attaches to the entire territory of the new, including land that was not a part of the old town,[58] unless this is expressly exempted.[59] Responsibility for debts ordinarily attaches to the territory contracting them,[60] and neither change of name,[61] boundary,[62] nor corporate nature,[63] nor transfer to a different county,[64] will relieve of liability

of the towns concerned. Morgan *v.* Waldwick, 17 Fed. 286.

48. See *supra*, notes 45–47.

49. Jamaica *v.* Vance, 96 Ill. App. 598; Rutland *v.* West Rutland, 68 Vt. 155, 34 Atl. 422 (holding an award of commissioners conclusive as to all items that had accrued and were liquidated at the time of the hearing); Emery *v.* Worcester, 137 Wis. 281, 118 N. W. 807; State *v.* McNutt, 87 Wis. 277, 58 N. W. 389 (holding that under Laws (1889), c. 108, the power of apportionment delegated to the county board is not judicial, and its action is open to collateral attack for want of jurisdiction); Knight *v.* Ashland, 61 Wis. 233, 21 N. W. 65.

Agreement by a new township to reimburse an old one for highway expenditures already made is not within statutory authority to divide property and apportion debts. North Allis Tp. *v.* Allis Tp., 142 Mich. 137, 105 N. W. 139.

50. Jamaica *v.* Vance, 96 Ill. App. 598.

51. North Allis Tp. *v.* Allis Tp., 142 Mich. 137, 105 N. W. 139; Partridge *v.* Dennie, 105 Minn. 66, 117 N. W. 234.

52. North Allis Tp. *v.* Allis Tp., 142 Mich. 137, 105 N. W. 139.

53. Towle *v.* Brown, 110 Ind. 65, 10 N. E. 626; State *v.* Lake City, 25 Minn. 404.

54. Randolph *v.* Braintree, 4 Mass. 315.

55. *Michigan.*— Courtright *v.* Brooks Tp. Clerk, 54 Mich. 182, 19 N. W. 945.

Minnesota.— State *v.* Lake City, 25 Minn. 404.

New Jersey.—McCully *v.* Tracy, 66 N. J. L. 489, 49 Atl. 436.

Wisconsin.— Schriber *v.* Langlade, 66 Wis. 616, 29 N. W. 547, 554; Depere *v.* Bellevue, 31 Wis. 120, 11 Am. Rep. 602.

United States.— Susong *v.* Cokesbury Tp., 132 Fed. 567.

See 45 Cent. Dig. tit. "Towns," § 16.

The legislature may designate the portion to which the new name is given as the "old town," and that which retains the old name as the "new town." South Portland *v.* Cape Elizabeth, 92 Me. 328, 42 Atl. 503, 69 Am. St. Rep. 502.

56. **For public schools.**—White *v.* Fuller, 38 Vt. 193. And see *In re* Southampton, 12 Ont. L. Rep. 214, 7 Ont. Wkly. Rep. 334, holding: (1) That schoolhouses are not proper subjects of valuation, title to them being vested in school-boards; and (2) that sidewalks are properly such subjects, for while the freehold is in the crown, the possession and control is in the town.

For support of minister.— Harrison *v.* Bridgeton, 16 Mass. 16.

The legislature may provide that the original town shall hold such property in trust for the inhabitants of both towns. North Yarmouth *v.* Skillings, 45 Me. 133, 71 Am. Dec. 530.

But a meeting-house built by the town before it is divided into parishes becomes, upon such division, the property of the first parish; and the use of it for many years for town meetings, for municipal purposes, gives the town no easement in it. Medford First Parish *v.* Pratt, 4 Pick. (Mass.) 222.

57. Troy *v.* Haskell, 33 N. H. 533.

58. Taylor *v.* Pine Grove Tp., 132 Fed. 565.

59. Taylor *v.* Pine Grove Tp., 132 Fed. 565.

60. Hensley Tp. *v.* People, 84 Ill. 544; Canosia Tp. *v.* Grand Lake Tp., 80 Minn. 357, 83 N. W. 346; Schriber *v.* Langlade, 66 Wis. 616, 29 N. W. 547, 554; Knight *v.* Ashland, 61 Wis. 233, 21 N. W. 65; Mt. Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. ed. 699; Planters', etc., Bank *v.* Huiett Tp., 132 Fed. 627.

Debts of a de facto town devolve upon its constituent elements upon its vacation. Kilkey *v.* How, 105 Wis. 41, 81 N. W. 120, 49 L. R. A. 483.

61. Walnut Tp. *v.* Jordan, 38 Kan. 562, 16 Pac. 812.

62. Walnut Tp. *v.* Jordan, 38 Kan. 562, 16 Pac. 812; Taylor *v.* Pine Grove Tp., 132 Fed. 565.

63. Garfield Tp. *v.* Herman, 66 Kan. 256, 71 Pac. 517; Riley *v.* Garfield Tp., 54 Kan. 463, 38 Pac. 560; Garfield Tp. *v.* Dodsworth, 9 Kan. App. 752, 58 Pac. 565.

64. Susong *v.* Cokesbury Tp., 132 Fed. 567.

for existing obligations. But in certain cases the detached territory has been relieved of liabilities of the original town of a purely corporate nature.[65] The liabilities subject to apportionment include all those that have attached prior to the division, whether absolute or contingent,[66] and whether *ex contractu* or *ex delicto*;[67] but not those contracted subsequent to the territorial change,[68] nor annual charges for light, water, or other expense accruing after the date of the division or alteration.[69] As a general rule liabilities are apportioned among the several divisions into which the town is separated in proportion to the value of property in the respective parts as shown by the last assessment.[70] The mere fact that certain funds were expended within a certain portion does not require that such portion shall assume the entire liability for their payment.[71]

b. Taxation and Funds. All moneys and funds on hand or due to the old town are held and applied for the use of the new ones in equitable ratio,[72] unless expressly apportioned by statute;[73] and before distribution of any fund all legal or equitable charges against it should be paid.[74] Upon the alteration of town boundaries, new territory included within a town becomes thereby subject to taxation in like manner and to the same extent as territory within the original town,[75] even though such taxation is for the purpose of paying preëxisting debts of the original town;[76] and it does not matter that inconsiderable parts of territory left or detached often escape just taxation.[77] Territory detached from a town remains liable for the payment of all taxes properly assessed and levied upon it before its separation;[78] and where still held liable for the old town's debts

65. Vandriss *v.* Hill, 58 Kan. 611, 50 Pac. 872 (holding that where bonds issued by a township are made binding on it only in its corporate capacity, and do not constitute a lien on its real estate, liability for such bonds does not pass to three new townships created out of the territory of that issuing the bonds together with territory from another township); People *v.* Ryan, 19 Mich. 203 (holding that where the organization of a new township severs its territory from the school-district within which it was formerly embraced, the property within the new township is not liable for preëxisting debts of the district contracted for school purposes). And see Kettle River *v.* Bruno, 106 Minn. 58, 118 N. W. 63, holding that the liability is corporate and suggesting difficulties in the enforcement of a portion against detached territory which is united with other territory to make a new town.

66. Gladwin Tp. *v.* Bourrett Tp., 131 Mich. 353, 91 N. W. 618, holding a new township bound by a judgment against an old one in a suit begun before the division, but not concluded until afterward.

Include subscriptions to railroad corporations, etc.— Hensley Tp. *v.* People, 84 Ill. 544.

67. Hunter *v.* Windsor, 24 Vt. 327.

68. Westbrook *v.* Deering, 63 Me. 231; Bulson *v.* Green Island, 80 N. Y. Suppl. 551; Rutland *v.* West Rutland, 68 Vt. 155, 34 Atl. 422, holding that a statute making the new town liable for part of the expenses of erecting a memorial hall "according to plans and specifications that were agreed upon" did not make the new town liable for any portion of the additional cost of the hall due to a change in the plans.

69. Vaughn *v.* Montreal, 124 Wis. 302, 102 N. W. 561.

70. Hensley Tp. *v.* People, 84 Ill. 544; Jamaica *v.* Vance, 96 Ill. App. 598; Hurt *v.* Hamilton, 25 Kan. 76; Emery *v.* Worcester, 137 Wis. 281, 118 N. W. 807.

71. Vanderbeck *v.* Englewood Tp., 39 N. J. L. 345.

72. State *v.* Maik, 113 Wis. 239, 89 N. W. 183; Towle *v.* State, 110 Ind. 600, 10 N. E. 942; Towle *v.* State, 110 Ind. 120, 10 N. E. 941.

Funds in hands of highway commissioners. — Jamaica *v.* Vance, 96 Ill. App. 598.

Taxes levied and due, but not collected.— Stambaugh Tp. *v.* Iron County Treasurer, 153 Mich. 104, 116 N. W. 569; Gladwin Tp. *v.* Bourrett Tp., 131 Mich. 353, 91 N. W. 618; Springwells Tp. *v.* Wayne County Treasurer, 58 Mich. 240, 25 N. W. 329; State *v.* Browne, 56 Minn. 269, 57 N. W. 659; Cooley *v.* State, 74 Ohio St. 252, 78 N. E. 369.

The usual basis of apportionment is the assessed valuation of property, and the number of persons subject to poll tax in the respective portions. Towle *v.* Brown, 110 Ind. 599, 10 N. E. 628; Towle *v.* Brown, 110 Ind. 65, 10 N. E. 626.

73. State *v.* Browne, 56 Minn. 269, 57 N. W. 659; State *v.* Maik, 113 Wis. 239, 89 N. W. 183.

74. Rutland *v.* West Rutland, 68 Vt. 155, 34 Atl. 422.

75. Lake Shore, etc., R. Co. *v.* Smith, 131 Ind. 512, 31 N. E. 196.

76. Lake Shore, etc., R. Co. *v.* Smith, 131 Ind. 512, 31 N. E. 196; State *v.* Elvins, 32 N. J. L. 362.

77. Fender *v.* Neosho Falls Tp., 22 Kan. 305; Susong *v.* Cokesbury Tp., 132 Fed. 567.

78. Chandler *v.* Reynolds, 19 Kan. 249 (holding detached territory not liable to taxation to pay bonds of original town unless such bonds were both authorized and issued

it is subject to its assessment and collection laws, and to no other, for such old debts.[79] A new township formed of parts of old ones is not subject to the local tax laws of any of them;[80] but town territory relapsing by vacation into mere county territory becomes subject to county levies under general law.[81]

c. Enforcement of Rights. Upon the adjustment and liquidation of claims against towns growing out of their division or alteration in their boundaries, mandamus will lie to enforce such claims;[82] and where there has been no such adjustment, resort may be had to mandamus to compel it to be made by the proper parties;[83] or, in case of disagreement, suit may be brought in equity by one town against the other for an accounting and judgment.[84] Assumpsit will lie to recover an amount liquidated by representatives of the two towns,[85] but not to recover taxes collected by the old town and claimed by the new.[86] Upon the extinguishment of a town and the division of its territory among several others, a suit in equity may be maintained by the creditors of the original town to enforce their claims against the corporations succeeding to its property and powers.[87] Contracts for adjustment made between the bodies affected thereby pursuant to statute are not revocable;[88] and the negligence of officers making such adjustment gives no ground for rescission.[89] Payment of a joint obligation is essential to the right of contribution;[90] but where the old town remains solely liable to the creditors for the entire debt, payment by it is not essential to a recovery against the new town of the amount apportioned to it.[91] A claim that an apportionment was made under the wrong assessment is no defense where the amount claimed is less than it would be if made under the right assessment,[92] and a defense sufficient in a state court against an original action therein on town bonds will not avail against an action for contribution in a state court for ratable share of a federal court judgment on such bonds.[93] All such claims are subject to statutes of limitation;[94] but as to a judgment against the old town a portion of which it seeks to enforce against the new one, the statute begins to run only from the time of the payment of the judgment by the old town.[95] Failure for several years to elect officers and to discharge the functions of an organized town will only suspend the enforcement of claims against the town during such time.[96]

d. Actions. Actions begun by the original town before division may be authorized to be prosecuted to judgment by the new town, either in the name of the original plaintiff[97] or in its own name;[98] but a judgment against a vacated

before the detachment); Norwich *v.* Hampden County, 4 Gray (Mass.) 172.

79. Fender *v.* Neosho Falls Tp., 22 Kan. 305; Winslow *v.* Morrill, 47 Me. 411.

80. Com. *v.* Baker, 4 Pa. Co. Ct. 34.

81. Adams *v.* Piscataquis County, 87 Me. 503, 33 Atl. 12.

82. Norwich *v.* Hampden County, 4 Gray (Mass.) 172; Stambaugh Tp. *v.* Iron County Treasurer, 153 Mich. 104, 116 N. W. 569; Courtright *v.* Brooks Tp. Clerk, 54 Mich. 182, 19 N. W. 945; Marathon Tp. *v.* Oregon Tp., 8 Mich. 372.

83. People *v.* Oran, 121 Ill. 650, 13 N. E. 726 [*affirming* 19 Ill. App. 174]; Carlstadt *v.* Bergen Tp. Committee, 60 N. J. L. 360, 37 Atl. 612.

Where county board has been ordered to apportion liabilities, no action may be maintained to enforce them until such apportionment has been made. Emery *v.* Worcester, 137 Wis. 281, 118 N. W. 807.

84. Gladwin Tp. *v.* Bourrett Tp., 131 Mich. 353, 91 N. W. 618; Kettle River *v.* Bruno, 106 Minn. 58, 118 N. W. 63; Ackley *v.* Vilas, 79 Wis. 157, 48 N. W. 257; La Pointe *v.* Ashland, 47 Wis. 251, 2 N. W. 306.

85. South Portland *v.* Cape Elizabeth, 92 Me. 328, 42 Atl. 503, 69 Am. St. Rep. 502.

86. Comins Tp. *v.* Harrisville Tp., 45 Mich. 442, 8 N. W. 44.

87. Mt. Pleasant *v.* Beckwith, 100 U. S. 514, 29 L. ed. 699.

88. Woodridge *v.* Carlstadt, 60 N. J. Eq. 1, 46 Atl. 540.

89. Churchill Tp. *v.* Cummings Tp., 51 Mich. 446, 16 N. W. 805.

90. Canosia Tp. *v.* Grand Lake Tp., 80 Minn. 357, 83 N. W. 346.

91. South Portland *v.* Cape Elizabeth, 92 Me. 328, 42 Atl. 503, 69 Am. St. Rep. 502; Spooner *v.* Minong, 104 Wis. 425, 80 N. W. 737.

92. Ackley *v.* Vilas, 79 Wis. 157, 48 N. W. 257.

93. Grant Tp. *v.* Reno, 107 Mich. 409, 65 N. W. 376.

94. People *v.* Oran, 121 Ill. 650, 13 N. E. 726 [*affirming* 19 Ill. App. 174].

95. Mt. Desert *v.* Tremont, 75 Me. 252.

96. Schriber *v.* Langlade, 66 Wis. 616, 29 N. W. 547, 554.

97. Springfield *v.* Connecticut River R. Co., 4 Cush. (Mass.) 63.

98. Butternut *v.* O'Malley, 50 Wis. 333,

town in a suit begun after its vacation is void.[99] A judgment in a creditor's suit against the original town, rendered after the division, will not constitute *res adjudicata* in a subsequent suit by the old town against the new for apportionment,[1] unless, by the terms of the statute making the division, the old town is constituted the agent for the new as to the adjudication of such liabilities.[2]

III. GOVERNMENT AND OFFICERS.

A. Government in General — 1. POWERS.[3] Although the power of the legislature to make laws governing matters of a general nature is not subject to delegation, yet the legislature may delegate to towns and townships the authority to make laws upon matters of purely local concern.[4] Such grants of authority, however, must be strictly construed,[5] so as to confer upon the towns only those powers expressly granted [6] and such implied powers as are necessary to carry into execution the express powers.[7]

2. LEGISLATIVE CONTROL. The authority to confer powers upon towns and townships likewise implies the authority to revoke them; [8] and even the powers conferred over purely local matters are to be exercised subject to the control of the legislature,[9] which, unless restrained by constitutional limitations,[10] may intervene at any time by direct enactment.[11]

B. Town Meetings — 1. IN GENERAL.[12] Both regular, annual, and special town meetings are subject to regulation by statute,[13] not only as to the business to be transacted,[14] but also as to the manner of conducting them.[15] The authority

7 N. W. 248; La Pointe *v.* O'Malley, 47 Wis. 332, 2 N. W. 632.

The new town thereby becomes liable for the payment of attorney's fees in such actions. Knight *v.* Ashland, 61 Wis. 233, 21 N. W. 65.

99. Clay Dist. Tp. *v.* Buchanan Independent Dist., 63 Iowa 188, 18 N. W. 859.

1. Grant Tp. *v.* Reno Tp., 114 Mich. 41, 72 N. W. 18; Hale *v.* Baldwin Town Bd., 49 Mich. 270, 13 N. W. 586; Pierson *v.* Reynolds, 49 Mich. 224, 13 N. W. 525. But see Gladwin Tp. *v.* Bourrett Tp., 131 Mich. 353, 91 N. W. 618, holding that if trial is had before the division, the judgment will bind the new town, although not rendered until after the division.

A judgment by a town against a village constituting a part thereof is not conclusive upon the village upon its separation from the town. State *v.* Maik, 113 Wis. 239, 89 N. W. 183.

2. Mt. Desert *v.* Tremont, 72 Me. 348.

3. See MUNICIPAL CORPORATIONS, 28 Cyc. 61.

Matters relating to constables see SHERIFFS AND CONSTABLES, 35 Cyc. 1455.

4. *California.*— *Ex p.* Wall, 48 Cal. 279, 17 Am. Rep. 425.

Maine.— Prentiss *v.* Davis, 83 Me. 364, 22 Atl. 246.

New Hampshire.— Stevens *v.* Dimond, 6 N. H. 330.

New York.— Hardenburgh *v.* Lockwood, 25 Barb. 9.

Wisconsin.— Land, etc., Co. *v.* Brown, 73 Wis. 294, 40 N. W. 482, 3 L. R. A. 472.

See 45 Cent. Dig. tit. "Towns," § 20.

5. Webster *v.* Harwinton, 32 Conn. 131; Booth *v.* Woodbury, 32 Conn. 118; Baldwin *v.* North Branford, 32 Conn. 47; Sweeney *v.* Natick, 202 Mass. 539, 88 N. E. 917; Swift *v.* Falmouth, 167 Mass. 115, 45 N. E. 184; Vincent *v.* Nantucket, 12 Cush. (Mass.) 103; People *v.* Weeks, 176 N. Y. 194, 68 N. E. 251.

6. Parker *v.* People, 126 Ill. App. 538 [*affirmed* in 231 Ill. 478, 83 N. E. 282].

7. Murphy *v.* Com., 187 Mass. 361, 73 N. E. 524; Backman *v.* Charlestown, 42 N. H. 125.

Power to borrow money is implied to carry out power expressly conferred. Bennett *v.* Nebagamon, 122 Wis. 295, 99 N. W. 1039.

8. People *v.* Potter, 88 N. Y. App. Div. 239, 85 N. Y. Suppl. 460; Travelers' Ins. Co. *v.* Oswego Tp., 59 Fed. 58, 7 C. C. A. 669 [*reversing* 55 Fed. 361, and *affirmed* in 70 Fed. 225, 17 C. C. A. 77].

9. Travelers' Ins. Co. *v.* Oswego Tp., 59 Fed. 58, 7 C. C. A. 669 [*reversing* 55 Fed. 361, and *affirmed* in 70 Fed. 225, 17 C. C. A. 77].

10. Constitutional provisions will not be construed to deprive the legislature of such power by implication. Land, etc., Co. *v.* Brown, 73 Wis. 294, 40 N. W. 482, 3 L. R. A. 472.

11. State *v.* Columbia Tp., 8 Ohio Cir. Ct. 691, 4 Ohio Cir. Dec. 389; Sullivan's Island Tp. Com'rs *v.* Buckley, 82 S. C. 352, 357, 64 S. E. 163, in which it is said: "The principle of local self-government does not inhere in townships. They have such local rights of government as the Legislature sees fit to confer upon them."

12. Mandamus to compel calling of meeting for election of officers see MANDAMUS, 26 Cyc. 272.

13. Lewis *v.* Eagle, 135 Wis. 141, 115 N. W. 361.

14. Lewis *v.* Eagle, 135 Wis. 141, 115 N. W. 361.

15. Parker *v.* People, 126 Ill. App. 538 [*affirmed* in 231 Ill. 478, 83 N. E. 282].

to make such regulations may be delegated to local governmental bodies,[16] such as county boards; [17] but the statute delegating such powers must be strictly followed, or the regulations made and actions taken under them will be void.[18] Regularity in the organization and action of the town meeting may be questioned only in a direct proceeding instituted for that purpose.[19]

2. Application For Special Meeting. It is essential to the validity of actions taken at a special town meeting that the application for the meeting shall be in conformity to statutory requirements,[20] but substantial compliance with such requirements is regarded as sufficient.[21] The judgment of the officer to whom the application is addressed is conclusive as to the qualifications of the petitioners,[22] except upon a review by a competent tribunal in a direct proceeding authorized by law; [23] but upon the filing of a proper petition his duty to call a meeting is not discretionary, but mandatory.[24]

3. Call, Warrant, or Notice — a. In General. Unless the time, place, and objects of a town meeting are fully prescribed by statute,[25] a proper call is necessary to the validity of its transactions.[26] The usual method of calling a meeting is by warrant of the selectmen,[27] or clerk,[28] addressed to the constable [29] or other person,[30] stating the objects of the meeting,[31] the time and place,[32] and directing the giving of proper notice.[33]

16. Evans *v.* Osgood, 18 Me. 213.

17. People *v.* Orleans County, 65 Hun (N. Y.) 481, 20 N. Y. Suppl. 398.

18. People *v.* Orleans County, 65 Hun (N. Y.) 481, 20 N. Y. Suppl. 398.

19. Parker *v.* People, 126 Ill. App. 538 [*affirmed* in 231 Ill. 478, 83 N. E. 282]; State *v.* Lime, 23 Minn. 521.

20. Southard *v.* Bradford, 53 Me. 389; Evans *v.* Osgood, 18 Me. 213; Loomis *v.* Rogers Tp., 53 Mich. 135, 18 N. W. 596; McVichie *v.* Knight, 82 Wis. 137, 51 N. W. 1094.

21. Insley *v.* Shepard, 31 Fed. 869.

Surplusage does not vitiate. Lyon *v.* Rice, 41 Conn. 245.

Use of the word "freeholders" instead of "qualified voters" did not affect the validity of the meeting. Lewis *v.* Eagle, 135 Wis. 141, 115 N. W. 361.

22. State *v.* Lime, 23 Minn. 521.

23. State *v.* Lime, 23 Minn. 521.

24. Lyon *v.* Rice, 41 Conn. 245.

25. Matter of Smith, 44 Misc. (N. Y.) 384, 89 N. Y. Suppl. 1006; Warwick, etc., Water Co. *v.* Carr, 24 R. I. 226, 52 Atl. 1030.

Notice of all propositions to be considered, other than the election of officers, is usually required, even for the regular annual meeting. People *v.* Bainbridge, 26 Misc. (N. Y.) 220, 56 N. Y. Suppl. 64.

26. Fritz *v.* Crean, 182 Mass. 433, 65 N. E. 832; Reynolds *v.* New Salem, 6 Metc. (Mass.) 340.

27. Com. *v.* Smith, 132 Mass. 289; Reynolds *v.* New Salem, 6 Metc. (Mass.) 340.

Two or more distinct town meetings for distinct purposes may be called by the same warrant. Ford *v.* Clough, 8 Me. 334, 23 Am. Dec. 513; Craigie *v.* Mellen, 6 Mass. 7; Mass. Rev. Laws (1902), § 328.

Seals are not necessary to the validity of warrants. Bucksport *v.* Spofford, 12 Me. 487; Colman *v.* Anderson, 10 Mass. 105.

28. Marden *v.* Champlin, 17 R. I. 423, 22 Atl. 938.

Notice must show clerk acted in his official capacity. McVichie *v.* Knight, 82 Wis. 137, 51 N. W. 1094.

29. Baldwin *v.* North Branford, 32 Conn. 47.

30. **In Connecticut** only a general notice of the meeting is required and it is not necessary that the warning of the town meeting be addressed to any person. Baldwin *v.* North Branford, 32 Conn. 47.

31. Smith *v.* Abington Sav. Bank, 171 Mass. 178, 50 N. E. 545 (holding that an article in a warrant for a town meeting "to see what action the town will take in regard to some system of sewerage, and raise and appropriate money for the same" will warrant a vote of the town to borrow money for the construction of the sewer); Sawyer *v.* Manchester, etc., R. Co., 62 N. H. 135, 13 Am. St. Rep. 541 (holding that under an article in the warrant for a town meeting "to see what sum of money the town will vote to raise and appropriate as a gratuity to" a railroad company, to build a railroad, "said road to be completed on or before" the day specified, the town may lawfully vote a gratuity upon condition that the road "be completed in a reasonable time."

A provision that the warrant shall contain each article to be acted upon at the meeting requires a specific statement of each item of business, and transactions cannot be upheld under the general language of the call "to transact any other business said proprietors may think proper when met." Evans *v.* Osgood, 18 Me. 213.

32. McVichie *v.* Knight, 82 Wis. 137, 51 N. W. 1094.

Warrant giving date for meeting as to day and month, but not year, was sufficient. Gerry *v.* Herrick, 87 Me. 219, 32 Atl. 882.

33. See *infra*, III, B, 4.

A resolution adopted at one meeting stating that no notice was given of a former meeting is not conclusive. People *v.* Parker, 231 Ill. 478, 83 N. E. 282.

b. Time of Notice. Length of notice may be prescribed by statute,[34] or, in the absence of statutory regulations, by reasonable town ordinance;[35] and failure to comply with such requirements as to notice is fatal to the validity of the meeting.[36] If no time is prescribed, reasonable notice must be given.[37] Where notice is required to be given a certain number of days before the meeting, time is usually computed by including the day on which notice is given and excluding the day of the meeting.[38]

c. Posting. Notice is properly given by the posting of either the original warrant[39] or an attested copy thereof[40] at such places as required by statute or town ordinance.[41] The usual requirement is for posting at the town hall,[42] or at the place of meeting,[43] or at a certain number of public places.[44] Such provisions have been construed to require posting, not only at the place named, but also in a position where the notices are likely to be seen.[45] After a meeting has been held, it will be presumed, in the absence of evidence to the contrary, that notices were properly posted.[46]

d. Return. In the absence of statute or ordinance prescribing the manner in which notice of meetings shall be given and what the officer's return shall contain it is not necessary for the return to state the manner in which notice was given.[47] But where the statute or ordinance particularly prescribes what the return shall contain, the requirements must be strictly followed or the meeting will be invalid.[48] The return shall be signed by the officer in his official capacity;[49] but it may bear date any time after notice and before the meeting,[50] or even the

34. McVichie *v.* Knight, 82 Wis. 137, 51 N. W. 1094, holding notice twenty-one days before the meeting bad, where the statute prescribed "not more than twenty" days.

35. **An ordinance requiring three months' notice** for an ordinary town meeting is unreasonable and void. Jones *v.* Sanford, 66 Me. 585.

36. Locke *v.* Lexington Selectmen, 122 Mass. 290; McVichie *v.* Knight, 82 Wis. 137, 51 N. W. 1094; Hubbard *v.* Williamstown, 61 Wis. 397, 21 N. W. 295.

37. **Seven days** has been held reasonable. Rand *v.* Wilder, 11 Cush. (Mass.) 294.

38. Pratt *v.* Swanton, 15 Vt. 147.

Same rule applied where statute requires notice "at least five days inclusive before the meeting is to be held." Brooklyn Trust Co. *v.* Hebron, 51 Conn. 22.

Where notice is required a certain number of days "before the day of meeting," both the day of posting and the day of meeting are excluded. Osgood *v.* Blake, 21 N. H. 550. See TIME, *ante*, p. 318.

39. Norris *v.* Eaton, 7 N. H. 284; Brewster *v.* Hyde, 7 N. H. 206.

40. Brown *v.* Witham, 51 Me. 29.

A by-law requiring posting of intention to call a meeting "whenever it is possible" does not invalidate a meeting where no such notices were posted, but where the warrants for the meeting were properly served. Beals *v.* James, 173 Mass. 591, 54 N. E. 245.

41. See *infra*, notes 42–45.

42. Briggs *v.* Murdock, 13 Pick. (Mass.) 305.

Where the town hall has been burned, notice at the place of meeting is sufficient. Com. *v.* Sullivan, 165 Mass. 183, 42 N. E. 566.

43. Osgood *v.* Blake, 21 N. H. 550.

44. Brown *v.* Witham, 51 Me. 29; Matter of Smith, 44 Misc. (N. Y.) 384, 89 N. Y. Suppl. 1006.

Not necessarily the usual places.— Stoddard *v.* Gilman, 22 Vt. 568.

Houses of public worship are "public places." Scammon *v.* Scammon, 28 N. H. 419.

45. Christ's Church *v.* Woodward, 26 Me. 172; Osgood *v.* Blake, 21 N. H. 550, holding insufficient a notice posted on the inside of the door of the place of meeting, the door being kept closed and locked from the time of posting until the time of meeting.

46. State *v.* Lime, 23 Minn. 521.

47. Bucksport *v.* Spofford, 12 Me. 487; Cottrill *v.* Myrick, 12 Me. 222 [*overruling* Tuttle *v.* Cary, 7 Me. 426]; Ford *v.* Clough, 8 Me. 334, 23 Am. Dec. 513; Rand *v.* Wilder, 11 Cush. (Mass.) 294; Houghton *v.* Davenport, 23 Pick. (Mass.) 235; Briggs *v.* Murdock, 13 Pick. (Mass.) 305.

48. Hamilton *v.* Phipsburg, 55 Me. 193; Fossett *v.* Bearce, 29 Me. 523; Christ's Church *v.* Woodward, 26 Me. 172; State *v.* Williams, 25 Me. 561; Nelson *v.* Pierce, 6 N. H. 194; Cardigan *v.* Page, 6 N. H. 182.

Where statute requires posting in some "public and conspicuous place," a return certifying to a posting in a "public place" is not sufficient. Bearce *v.* Fossett, 34 Me. 575.

A return by the officer that he "caused" notice to be posted is sufficient compliance with a statute directing that town meetings shall be notified by the person to whom the warrant is directed, and that the person who notifies the meeting shall make return on the warrant. Parker *v.* Titcomb, 82 Me. 180, 19 Atl. 162.

49. **A return signed "E. Foster," constable," without the name of the town,** is sufficient. Com. *v.* Shaw, 7 Metc. (Mass.) 52.

50. Bucksport *v.* Spofford, 12 Me. 487;

day of the meeting;[51] and may be amended at any time by the officer while yet in office,[52] or even afterward, upon satisfactory evidence shown to the court of the correctness of the amendment.[53] It has been held that the return may consist of a notice filed in the office of the town clerk, together with an indorsement by the clerk,[54] and also that oral evidence of the clerk may be waived to show compliance with the law.[55] So after the lapse of many years presumption will be indulged in favor of proper notice and return.[56]

4. Notice of Business to Be Transacted. In some states the annual town meeting,[57] or an adjournment thereof,[58] is authorized by statute to transact certain items of business without notice of such objects in the call; and in others the annual meeting may transact any business for which the town is at all competent, without such notice.[59] In other states, however, even the call for the annual meeting must contain a statement of the business to be submitted to it,[60] and in all cases only those actions of a special meeting are valid which are within the objects of the meeting as stated in the call.[61] Such statements, however, are liberally construed,[62] and it is only necessary that the general subject-matter of the business to be transacted be described with reasonable certainty in order to authorize actions upon all propositions that are properly,[63] or even incidentally,[64] embraced within it. But the language of the call cannot be construed to include propositions that are excluded either expressly or by clear implication,[65] nor can force or effect be given to expressions so general as not to convey notice of the subjects to which they relate.[66] A separate article is not necessary for

Williams *v.* Lunenburg School Dist. No. 1, 21 Pick. (Mass.) 75, 32 Am. Dec. 243.

51. Ford *v.* Clough, 8 Me. 334, 23 Am. Dec. 513.

52. Kellar *v.* Savage, 17 Me. 444; Thayer *v.* Stearns, 1 Pick. (Mass.) 109.

53. Bean *v.* Thompson, 19 N. H. 290, 49 Am. Dec. 154.

54. Lewis *v.* Eagle, 135 Wis. 141, 115 N. W. 361.

55. Lewis *v.* Eagle, 135 Wis. 141, 115 N. W. 361.

56. Schoff *v.* Gould, 52 N. H. 512.

57. Smith *v.* Crittenden, 16 Mich. 152; Warwick, etc., Water Co. *v.* Carr, 24 R. I. 226, 52 Atl. 1030; Tuttle *v.* Weston, 59 Wis. 151, 17 N. W. 12.

58. Schoff *v.* Bloomfield, 3 Vt. 472.

59. Thorp *v.* King, 42 Ill. App. 513.

60. Me. Rev. St. (1903) c. 4, § 5; Oyster Bay *v.* Harris, 21 N. Y. App. Div. 227, 47 N. Y. Suppl. 510.

61. *Connecticut.*—Woodward *v.* Reynolds, 58 Conn. 486, 19 Atl. 511; Willard *v.* Killingworth Borough, 8 Conn. 247.

Maine.— Bessey *v.* Unity Plantation, 65 Me. 342; Cornish *v.* Pease, 19 Me. 184.

Massachusetts.—Wood *v.* Quincy, 11 Cush. 487.

New Hampshire.— Gordon *v.* Clifford, 28 N. H. 402; Brackett *v.* Whidden, 3 N. H. 17.

United States.— Bloomfield *v.* Charter Oak Bank, 121 U. S. 121, 7 S. Ct. 865, 30 L. ed. 923.

See 45 Cent. Dig. tit. "Towns," § 28.

Any of the powers conferred or duties imposed may be exercised or performed at a special meeting properly called unless expressly restricted to the annual meeting. Springer *v.* Logan Tp., 58 N. J. L. 588, 33 Atl. 952.

An adjourned meeting may act upon propositions stated in the call for the original meeting. Farrar *v.* Perley, 7 Me. 404.

62. Bull *v.* Warren, 36 Conn. 83; Marden *v.* Champlin, 17 R. I. 423, 22 Atl. 938.

63. *Connecticut.*— Benham *v.* Potter, 77 Conn. 186, 58 Atl. 735.

Maine.— Canton *v.* Smith, 65 Me. 203; Belfast, etc., R. Co. *v.* Brooks, 60 Me. 568; Cornish *v.* Pease, 19 Me. 184; Davenport *v.* Hallowell, 10 Me. 317.

Massachusetts.— Com. *v.* Wentworth, 145 Mass. 50, 12 N. E. 845; Matthews *v.* Westborough, 131 Mass. 521; Sherman *v.* Torrey, 99 Mass. 472; Grover *v.* Pembroke, 11 Allen 88; Alden *v.* Rounseville, 7 Metc. 218; Rand *v.* Wilder, 11 Cush. 294; Avery *v.* Stewart, 1 Cush. 496.

New Hampshire.— Converse *v.* Porter, 45 N. H. 385; Tucker *v.* Aiken, 7 N. H. 113.

Vermont.— Hickok *v.* Shelburne, 41 Vt. 409; Alger *v.* Curry, 40 Vt. 437; Kittredge *v.* Walden, 40 Vt. 211; Blodgett *v.* Holbrook, 39 Vt. 336; Hunneman *v.* Jamaica Fire Dist. No. 1, 37 Vt. 40.

See 45 Cent. Dig. tit. "Towns," § 28.

To choose committee and hear report.— Fuller *v.* Groton, 11 Gray (Mass.) 340; Wood *v.* Quincy, 11 Cush. (Mass.) 487.

64. Cornish *v.* Pease, 19 Me. 184; Com. *v.* Wentworth, 145 Mass. 50, 12 N. E. 845; Pittsburg *v.* Danforth, 56 N. H. 272.

Ordinary means to accomplish object is included in statement of the object itself. Hadsell *v.* Hancock, 3 Gray (Mass.) 526.

65. Statement must not be misleading. Drisko *v.* Columbia, 75 Me. 73.

Proposition to vote same bounty will not authorize voting a larger bounty. Austin *v.* York, 57 Me. 304.

66. Evans *v.* Osgood, 18 Me. 213.

The acceptance of a statutory power or privilege requires specification of the passage

every separate item of business;[67] nor does it matter that different propositions stated require different majorities for their adoption.[68] If the proposition stated is one that is likely to require the raising[69] or appropriation of money,[70] no separate statement of these matters is necessary; but a statement of a proposition to vote a tax for a certain purpose does not authorize a vote to borrow money for such purpose.[71] Where the object is stated to be to choose all necessary officers, it will include not only all officers whose election is directed by law,[72] but also all special officers who may be deemed necessary to carry out the ordinances of the town;[73] and is sufficient to authorize the delegation of the election of school officials to school-districts.[74] So statements of propositions to change school-districts are liberally construed.[75]

5. Place and Time. It is essential to the validity of a town meeting that the place and time stated in the call shall be correct,[76] and also that the meeting shall be held at the place,[77] and kept open during the time,[78] prescribed by statute[79] or valid local ordinance.[80] So where the time and place is authorized to be fixed by the warrant or notice, the meeting must be held at the time and place so fixed.[81] "At" a building named means in the building;[82] but the meeting may, by unanimous consent, be held just outside.[83]

6. Adjournments. A town meeting may be adjourned to another time and place, through exercise of inherent power, by action of the meeting itself,[84] or, where authorized by statute, may be so adjourned by the town board.[85] Notice of the time and place to which adjournment is made should be left at the original place;[86] but it has been held that failure to leave such notice does not invalidate actions of the adjourned meeting, where it does not appear that any one was

of the law in the warrant or call. Locke *v.* Lexington, 122 Mass. 290.

67. Brown *v.* Winterport, 79 Me. 305, 9 Atl. 844.

68. Canton *v.* Smith, 65 Me. 203.

69. Ford *v.* Clough, 8 Me. 334, 23 Am. Dec. 513; Kittredge *v.* North Brookfield, 138 Mass. 286; Westhampton *v.* Searle, 127 Mass. 502; Torrey *v.* Millbury, 21 Pick. (Mass.) 64.

70. Grover *v.* Pembroke, 11 Allen (Mass.) 88; Blackburn *v.* Walpole, 9 Pick. (Mass.) 97.

71. Atwood *v.* Lincoln, 44 Vt. 332. But see Smith *v.* Abington Sav. Bank, 171 Mass. 178, 50 N. E. 545, holding that a vote to borrow money for the construction of a sewer is authorized by an article in a warrant "to see what action the town will take in regard to some system of sewerage, and raise and appropriate money for the same."

72. Deane *v.* Washburn, 17 Me. 100.

73. Spear *v.* Robinson, 29 Me. 531; Sherman *v.* Torrey, 99 Mass. 472; Baker *v.* Shephard, 24 N. H. 208.

74. Kingsbury *v.* Quincy Centre School-Dist., 12 Metc. (Mass.) 99.

75. Alden *v.* Rounseville, 7 Metc. (Mass.) 218; Child *v.* Colburn, 54 N. H. 71; Converse *v.* Porter, 45 N. H. 385; Hall *v.* Calais School Dist. No. 3, 46 Vt. 19; Wyley *v.* Wilson, 44 Vt. 404; Weeks *v.* Batchelder, 41 Vt. 317; Ovitt *v.* Chase, 37 Vt. 196; Moore *v.* Beattie, 33 Vt. 219.

76. **Notice calling meeting at more than one place** is defective. McVichie *v.* Knight, 82 Wis. 137, 51 N. W. 1094.

77. Frantz *v.* Patterson, 123 Ill. App. 13. **Votes cast elsewhere** should be rejected. State *v.* Doyle, 84 Wis. 678, 54 N. W. 1012; State *v.* Waterbury, 79 Wis. 207, 48 N. W. 424.

78. Frantz *v.* Patterson, 123 Ill. App. 13. **Under New York statute** providing that "town meetings shall be kept open for the purposes of voting in the daytime only, between the rising and setting of the sun," a meeting may be kept open from sunrise to sunset, but it is not necessary that it should be. People *v.* Martin, 5 N. Y. 22; People *v.* Austin, 20 N. Y. App. Div. 1, 46 N. Y. Suppl. 526.

79. Auditor-Gen. *v.* Duluth, etc., R. Co., 116 Mich. 122, 74 N. W. 505.

80. **Change of time by board of supervisors** under new law can only be done by action after the law is enacted. People *v.* Weeks, 176 N. Y. 194, 68 N. E. 251. **Ordinance changing place can be adopted only by submission of the proposition to the voters** and vote by ballot on it, and it is not sufficient that a majority of the ballots cast for town officers contained a direction for such change. State *v.* Davidson, 32 Wis. 114.

81. Chamberlain *v.* Dover, 13 Me. 466, 29 Am. Dec. 517.

82. Chamberlain *v.* Dover, 13 Me. 466, 29 Am. Dec. 517.

83. Brown *v.* Winterport, 79 Me. 305, 9 Atl. 844.

84. Chamberlain *v.* Dover, 13 Me. 466, 29 Am. Dec. 517; Reed *v.* Acton, 117 Mass. 384; Atty.-Gen. *v.* Simonds, 111 Mass. 256; Goodel *v.* Baker, 8 Cow. (N. Y.) 286.

85. Wisconsin Cent. R. Co. *v.* Ashland County, 81 Wis. 1, 50 N. W. 937.

86. Chamberlain *v.* Dover, 13 Me. 466, 29 Am. Dec. 517.

misled by such neglect.[87] An adjourned meeting, being merely a continuation of the original, requires no new call or notice,[88] and may transact any business that was included in the original call.[89]

7. Organization and Conduct. A meeting is properly called to order by the clerk [90] or other person designated by statute,[91] and after the reading of the warrant or notice a moderator should be elected [92] and other necessary officers elected or appointed.[93] While in general the meeting should be conducted in accordance with parliamentary procedure,[94] yet it is not necessary to conform to the strict rules of legislative practice; [95] and a large measure of power is conferred upon the moderator of prescribing rules of proceeding, subject to alteration by the town.[96] Where a particular method is prescribed by statute for action upon certain matters, it is essential to the validity of such action that it be taken in the manner prescribed.[97] The mere fact that the moderator,[98] clerk,[99] or other officer was not chosen strictly in accordance with the proper method will not invalidate any action by the *de facto* officers, where it is not shown that injury resulted from the irregularity.[1]

8. Voting and Result. General election laws are usually not intended to apply to town meetings [2] unless expressly so applied; [3] and the manner of voting, and of canvassing and declaring votes at such meetings, is usually prescribed by special statute [4] or town ordinance.[5] A vote will not be invalid because of immaterial irregularities; [6] and invalid proceedings may be ratified at a subsequent town meeting [7] or by the legislature.[8] A majority vote of those present is sufficient for the transaction of ordinary business,[9] but a greater majority may be required by statute for certain purposes.[10] A vote to postpone a proposition indefinitely is equivalent to a complete disapproval thereof.[11] Unless expressly authorized by statute or ordinance, no recount of the votes may be had after the adjournment of the meeting.[12]

9. Reconsideration or Rescission of Vote. Where not regulated by statute [13]

87. Wisconsin Cent. R. Co. *v.* Ashland County, 81 Wis. 1, 50 N. W. 937.

88. Canton *v.* Smith, 65 Me. 203.

89. Canton *v.* Smith, 65 Me. 203; Reed *v.* Acton, 117 Mass. 384.

90. Wheeler *v.* Carter, 180 Mass. 382, 62 N. E. 471.

91. Atty.-Gen. *v.* Crocker, 138 Mass. 214.

92. State *v.* Vershire, 52 Vt. 41.

Moderator may also be a candidate for office unless forbidden by statute. Wheeler *v.* Carter, 180 Mass. 382, 62 N. E. 471.

93. **Presiding officer may appoint tellers.** Wheeler *v.* Carter, 180 Mass. 382, 62 N. E. 471.

Towns have power to choose clerk pro tempore to record proceedings of a meeting as well when there is no town clerk as when he cannot be present. Kellar *v.* Savage, 17 Me. 444.

94. Wood *v.* Milton, 197 Mass. 531, 84 N. E. 332.

95. Wood *v.* Milton, 197 Mass. 531, 84 N. E. 332; Hill *v.* Goodwin, 56 N. H. 441; Kimball *v.* Lamprey, 19 N. H. 215.

96. Hill *v.* Goodwin, 56 N. H. 441.

97. Frantz *v.* Patterson, 123 Ill. App. 13; Atty.-Gen. *v.* Simonds, 111 Mass. 256.

98. State *v.* Vershire, 52 Vt. 41.

Failure of moderator to take oath.—Tucker *v.* Aiken, 7 N. H. 113.

99. Atty.-Gen. *v.* Crocker, 138 Mass. 214.

1. See *supra*, notes 98, 99.

2. State *v.* Avery, 42 Conn. 165; Page *v.* McClure, 79 Vt. 83, 64 Atl. 451.

3. Frantz *v.* Patterson, 123 Ill. App. 13; Matter of Smith, 44 Misc. (N. Y.) 384, 89 N. Y. Suppl. 1006.

4. People *v.* Markiewicz, 225 Ill. 563, 80 N. E. 256 [*affirming* 126 Ill. App. 203]; Dodds *v.* Henry, 9 Mass. 262; People *v.* Armstrong, 116 N. Y. App. Div. 103, 101 N. Y. Suppl. 712; Page *v.* McClure, 79 Vt. 83, 64 Atl. 451.

5. See *supra*, notes 2, 3.

6. Kimball *v.* Lamprey, 19 N. H. 215; Birge *v.* Berlin Iron Bridge Co., 16 N. Y. Suppl. 596; People *v.* Tabor, 21 How. Pr. (N. Y.) 42; Lewis *v.* Eagle, 135 Wis. 141, 115 N. W. 361.

Resolution may be considered together with the statute by which it is authorized and with the warrant for the meeting. Andrews *v.* Prouty, 13 Allen (Mass.) 93.

No defect that vote was taken after portion of voters had retired.— Bean *v.* Jay, 23 Me. 117.

7. Hamilton *v.* Phipsburg, 55 Me. 193.

8. Stuart *v.* Warren, 37 Conn. 225; Potter *v.* Canaan, 37 Conn. 222.

9. Smith *v.* Dedham, 144 Mass. 177, 10 N. E. 782; May *v.* Bermel, 20 N. Y. App. Div. 53, 46 N. Y. Suppl. 622.

10. Allen *v.* State Bank, 15 Ala. 788.

11. Wood *v.* Milton, 197 Mass. 531, 84 N. E. 332.

12. Fritz *v.* Crean, 182 Mass. 433, 65 N. E. 832.

13. **A statute prescribing the time within**

or ordinance, a motion to reconsider is governed by the ordinary rules of parliamentary procedure.[14] As a general rule the vote of a town meeting upon any business proposition may be received at that [15] or any subsequent meeting;[16] but there can be no reconsideration or rescission of a vote which orders the refunding of money wrongfully collected by the town,[17] or ratifies the borrowing of money already obtained,[18] or constitutes an executed contract,[19] or, in fact, of any vote under which private rights have vested before the reconsideration.[20] The rejection at one town meeting of a proposition for a contract does not prevent its subsequent acceptance if continued or renewed.[21]

10. Record of Proceedings — a. In General.[22] The functions of the clerk of a town meeting are purely ministerial, and it is his duty to record the votes as declared by the moderator.[23] A record book of a town or township containing transactions required to be recorded is *prima facie* proof of its contents;[24] and certified copies of the town records are also admissible evidence.[25] The entire records will be construed together,[26] and omissions in certain portions may be supplied by other entries.[27] Where the record reads "at a legal meeting," [28] or at a meeting held "pursuant to" call or warrant,[29] it is generally held to constitute *prima facie* evidence of lawful posting of notice [30] and of all other details of procedure necessary to give validity to the action taken,[31] especially if the record is an ancient one.[32] But some cases hold that such general statements are not sufficient evidence of compliance with all the requirements of a legal meeting,[33] and that the action will be invalid unless the record is amended so as to show the several steps prescribed,[34] or the details are proved by evidence *aliunde*.[35]

b. Amendment. A defective or erroneous town record may be amended so as to show the actual facts and proceedings,[36] even though the change operate

which a motion to reconsider may be made does not make such motion necessary to the validity of the action taken, and the motion cannot be made after the time prescribed. Lewis *v.* Eagle, 135 Wis. 141, 115 N. W. 361.

14. See *infra*, notes 15, 21.

15. Terrett *v.* Sharon, 34 Conn. 105; Getchell *v.* Wells, 55 Me. 433; Morse *v.* Dwight, 13 Allen (Mass.) 163; Denton *v.* Jackson, 2 Johns. Ch. (N. Y.) 320.

16. Withington *v.* Harvard, 8 Cush. (Mass.) 66.

17. Hall *v.* Holden, 116 Mass. 172; Nelson *v.* Milford, 7 Pick. (Mass.) 18.

18. Brown *v.* Winterport, 79 Me. 305, 9 Atl. 844.

19. Jewett *v.* Alton, 7 N. H. 253. And see Allen *v.* Taunton, 19 Pick. (Mass.) 485, holding that where a contract made in pursuance of a vote is performed by the other party before he receives notice of a reconsideration of the vote, such contract is valid and enforceable.

20. Allen *v.* Taunton, 19 Pick. (Mass.) 485.

21. Revere Water Co. *v.* Winthrop, 192 Mass. 455, 78 N. E. 497.

22. Record of election and qualification of officers see *infra*, III, D, 5.

Parol or extrinsic evidence affecting records see Evidence, 17 Cyc. 583.

23. Hill *v.* Goodwin, 56 N. H. 441.

24. Kimball *v.* Lamprey, 19 N. H. 215; Ackerman *v.* Nutley, 70 N. J. L. 438, 57 Atl. 150. And see Sawyer *v.* Manchester, etc., R. Co., 62 N. H. 135, 13 Am. St. Rep. 541, holding the record conclusive evidence of truth of contents unless amended.

25. Hickok *v.* Shelburne, 41 Vt. 409.

26. Wilmot *v.* Lathrop, 67 Vt. 671, 32 Atl. 861.

27. Seward *v.* Revere Water Co., 201 Mass. 453, 87 N. E. 749.

28. Com. *v.* Sullivan, 165 Mass. 183, 42 N. E. 566.

29. Cottrill *v.* Myrick, 12 Me. 222.

30. State *v.* Lime, 23 Minn. 521; Lemington *v.* Blodgett, 37 Vt. 210.

31. *Illinois.*— Parker *v.* People, 126 Ill. App. 538 [*affirmed* in 231 Ill. 478, 83 N. E. 282].

Massachusetts.—Howard *v.* Proctor, 7 Gray 128.

Michigan.—Auditor-Gen. *v.* Longyear, 110 Mich. 223, 68 N. W. 130.

New Hampshire.— Northwood *v.* Barrington, 9 N. H. 369.

Wisconsin.— State *v.* Decatur, 58 Wis. 291, 17 N. W. 20, holding that a statute requiring the clerk to record the request for a special meeting before the meeting is directory merely.

See 45 Cent. Dig. tit. "Towns," § 34.

32. Willey *v.* Portsmouth, 35 N. H. 303.

33. See *infra*, notes 34, 35.

34. Allen *v.* Archer, 49 Me. 346. See *infra*, III, B, 10, b.

35. Bloomfield *v.* Charter Oak Bank, 121 U. S. 121, 7 S. Ct. 865, 30 L. ed. 923.

36. Boston Turnpike Co. *v.* Pomfret, 20 Conn. 590; Allen *v.* Archer, 49 Me. 346; State *v.* Decatur, 58 Wis. 291, 17 N. W. 20. See *infra*, notes 37–50.

A lost document may be supplied by parol evidence. Brownell *v.* Palmer, 22 Conn. 107. And see 17 Cyc. 583.

to make or unmake a contract;[37] but not so as to defeat vested rights of third persons acquired *bona fide* after the existence of the defect and before the amendment.[38] In most jurisdictions the officer whose duty it was to make the original record[39] may, upon his own volition and responsibility,[40] make such amendment, either from his own recollection or upon information derived from others.[41] His authority to do this, however, exists only during his continuance in the office in the discharge of which he made the original record,[42] either during the same or a subsequent term.[43] But in New Hampshire the town records may be amended only by leave of court, upon a showing of the truth of the amendment.[44] Since such an amendment is made upon the responsibility of the court, it may be made by the officer even after he has ceased to hold office;[45] but it should always appear upon the record when, how, and why the amendment was made,[46] and the proper form is to annex the amendment, with the order of court allowing it, to an original record.[47] Where the officer making the original record refuses to make the amendment demanded,[48] or is dead,[49] or has ceased to hold office, the proper process is by mandamus against the officer for the time being to compel the correction.[50]

11. Review of Proceedings. As a general rule the validity of town meetings and proceedings is not open to collateral attack,[51] but may be challenged directly by persons pecuniarily interested in their effect[52] in the court and manner provided by law.[53] The proceedings are usually presumed to have been regular and valid until proved otherwise;[54] and original grounds of attack cannot be laid in the court of error or appeals;[55] but it has been held that an intention to ratify the proceedings of a previous illegal meeting will not be presumed and must be clearly shown.[56] In a proper case a certiorari will be issued to review the proceedings,[57] but not in a case where redress may be granted by other means occasioning less public inconvenience.[58]

C. Town Board — 1. Constitution and Powers. Town boards are created by legislative power[59] and are composed of such officers[60] and endowed with

37. Boston Turnpike Co. *v.* Pomfret, 20 Conn. 590.

38. Sawyer *v.* Manchester, etc., R. Co., 62 N. H. 135, 13 Am. St. Rep. 541; Gibson *v.* Bailey, 9 N. H. 168.

39. Wheeler *v.* Carter, 180 Mass. 382, 62 N. E. 471.

Clerk cannot amend record of proceedings before his election so as to show legality of his election. Taylor *v.* Henry, 2 Pick. (Mass.) 397.

40. Boston Turnpike Co. *v.* Pomfret, 20 Conn. 590.

41. Boston Turnpike Co. *v.* Pomfret, 20 Conn. 590.

42. Chamberlain *v.* Dover, 13 Me. 466, 29 Am. Dec. 517; Hartwell *v.* Littleton, 13 Pick. (Mass.) 229.

43. Boston Turnpike Co. *v.* Pomfret, 20 Conn. 590; Welles *v.* Battelle, 11 Mass. 477.

44. Roberts *v.* Holmes, 54 N. H. 560; Pierce *v.* Richardson, 37 N. H. 306; Cass *v.* Bellows, 31 N. H. 501, 64 Am. Dec. 347; Smith *v.* Messer, 17 N. H. 420; Bishop *v.* Cone, 3 N. H. 513.

45. Pierce *v.* Richardson, 37 N. H. 306; Gibson *v.* Bailey, 9 N. H. 168.

46. Low *v.* Pettengill, 12 N. H. 337.

47. Pierce *v.* Richardson, 37 N. H. 306; Gibson *v.* Bailey, 9 N. H. 168.

48. Boston Turnpike Co. *v.* Pomfret, 20 Conn. 590.

49. Cass *v.* Bellows, 31 N. H. 501, 64 Am. Dec. 347.

50. See Mandamus, 26 Cyc. 251.

51. People *v.* Parker, 231 Ill. 478, 83 N. E. 282 [*affirming* 126 Ill. App. 538]; Osgood *v.* Welch, 19 N. H. 105.

52. State *v.* Middletown Clerk, 24 N. J. L. 124.

53. *In re* Weymouth, 2 Cush. (Mass.) 335.

54. Com. *v.* Brown, 147 Mass. 585, 18 N. E. 587, 9 Am. St. Rep. 736, 1 L. R. A. 620; Gilmore *v.* Holt, 4 Pick. (Mass.) 258.

55. Hart *v.* Holden, 55 Me. 572.

56. Southard *v.* Bradford, 53 Me. 389.

57. State *v.* Kingsland, 23 N. J. L. 85; State *v.* Albright, 20 N. J. L. 644.

58. State *v.* Middletown Clerk, 24 N. J. L. 124.

59. State *v.* Menaugh, 151 Ind. 260, 51 N. E. 117, 357, 43 L. R. A. 408, 418; Buck *v.* Douglass, 74 N. J. L. 300, 65 Atl. 848.

60. *Massachusetts.*—Atty.-Gen. *v.* Hutchinson, 185 Mass. 85, 69 N. E. 1048; Atty.-Gen. *v.* Dole, 168 Mass. 562, 47 N. E. 436.

Michigan.— Laroue *v.* Conway, 118 Mich. 559, 77 N. W. 11; Grondin *v.* Logan, 88 Mich. 247, 50 N. W. 130.

New Hampshire.— Tyler *v.* Flanders, 58 N. H. 371.

New Jersey.— Buck *v.* Douglass, 74 N. J. L. 300, 65 Atl. 848; Ridgefield Park Trustees *v.* Ridgeville Tp. Committee, 61 N. J. L. 433, 39 Atl. 655.

North Carolina.— Ford *v.* Manning, 152 N. C. 151, 67 S. E. 325; Conoley *v.* Harriss, 64 N. C. 662.

such powers in the management of township affairs [61] as may be prescribed by statute. The board is a continuing body, preserving its legal entity, in spite of changes in its individual membership.[62]

2. Meetings, Proceedings, and Orders — a. In General. Such boards may exercise their powers only when assembled in their official capacity in valid meeting.[63] As a general rule all members must have notice and opportunity to attend; [64] but such notice is excused as to a member who is absent from the township and cannot be reached,[65] and formal notice is not essential where all the members of the board are present at the meeting and participate in the proceedings.[66] They may appoint such officers as are necessary for the orderly transaction of business, as a secretary; [67] and their proceedings are subject to the ordinary rules of parliamentary procedure.[68] In the absence of evidence to the contract presumption will be indulged in favor of the validity and regularity of proceedings,[69] but all facts necessary to confer jurisdiction must affirmatively appear.[70]

b. Power of Part of Members. A single member of a town board may perform such ministerial functions of the board as have been delegated to him; [71] but discretionary powers cannot be exercised by one member or any number of members acting or speaking separately or in meeting not duly notified and assembled.[72] A majority of the board,[73] when properly assembled and organized, in either

Pennsylvania.— *In re* Martz, 110 Pa. St. 502, 1 Atl. 419.

Vermont.— Page *v.* McClure, 79 Vt. 83, 64 Atl. 451.

See 45 Cent. Dig. tit. "Towns," § 37.

N. C. Revisal (1905), § 2681, making the justices in each township a board of supervisors, etc., refers to justices who are qualified and acting, and the two qualified and acting justices of a township entitled to four justices, one of whom has resigned and one of whom did not qualify, are the board of supervisors. Ford *v.* Manning, 152 N. C. 151, 67 S. E. 325.

61. *Indiana.*— Coal Creek Tp. Advisory Bd. *v.* Levandowski, (App. 1908) 84 N. E. 346; Lincoln School Tp. *v.* Union Trust Co., 36 Ind. App. 113, 73 N. E. 623, 74 N. E. 272.

New Jersey.— Young *v.* Crane, 67 N. J. L. 453, 51 Atl. 482.

New York.— Comesky *v.* Blackledge, 114 N. Y. App. Div. 834, 100 N. Y. Suppl. 241; Hendrickson *v.* New York, 24 Misc. 231, 52 N. Y. Suppl. 790 [*reversed* on other grounds in 38 N. Y. App. Div. 480, 56 N. Y. Suppl. 580 (*affirmed* in 160 N. Y. 144, 54 N. E. 680)].

Ohio.— State *v.* Wagar, 19 Ohio Cir. Ct. 149, 10 Ohio Cir. Dec. 160.

Pennsylvania.— Lower Merion Tp. *v.* Postal Tel. Cable Co., 25 Pa. Super. Ct. 306, 310, in which it is said: "Township commissioners have no powers but what are expressly granted them, and such implied powers as are necessary to the proper performance of their duties under their expressly granted powers, and the accomplishment of the objects for which they were conferred."

Rhode Island.— Willis *v.* Angell, 19 R. I. 617, 35 Atl. 677.

Canada.— Vickers *v.* Shuniah, 22 Grant Ch. (U. C.) 410.

See 45 Cent. Dig. tit. "Towns," § 37.

When appeal lies from board.— New Marlborough *v.* Berkshire County, 9 Metc. (Mass.) 423.

Courts will not interfere with discretion of board within its legislative powers. Landis Tp. *v.* Millville Gas Light Co., 72 N. J. Eq. 347, 65 Atl. 716.

Towns and the town councils thereof are distinct bodies, with distinct powers. Westerly Waterworks Co. *v.* Westerly, 80 Fed. 611.

62. Harrison Tp. Advisory Bd. *v.* State, 170 Ind. 439, 85 N. E. 18.

63. Blue *v.* Briggs, 12 Ind. App. 105, 39 N. E. 885; Beaver Creek *v.* Hastings, 52 Mich. 528, 18 N. W. 250; Slicer *v.* Elder, 2 Ohio Dec. (Reprint) 218, 2 West. L. Month. 90; Western Wheeled Scraper Co. *v.* Butler Tp., 24 Pa. Super. Ct. 477.

64. Damon *v.* Framingham, 195 Mass. 72, 80 N. E. 644.

65. Young *v.* Webster City, etc., R. Co., 75 Iowa 140, 39 N. W. 234.

66. Barnum State Bank *v.* Goodland, 109 Minn. 28, 122 N. W. 468.

67. St. Joseph First Nat. Bank *v.* St. Joseph Tp., 46 Mich. 526, 9 N. W. 838.

68. **A vote to reconsider** a former resolution is not sufficient, without further action, to rescind it, or prevent it from being followed. Basselin *v.* Pate, 30 Misc. (N. Y.) 368, 63 N. Y. Suppl. 653.

69. Boyce *v.* Auditor-Gen., 90 Mich. 314, 51 N. W. 457.

70. State *v.* Curtis, 86 Wis. 140, 56 N. W. 475.

71. Western Wheeled Scraper Co. *v.* Butler Tp., 24 Pa. Super. Ct. 477.

72. Damon *v.* Framingham, 195 Mass. 72, 80 N. E. 644; Beaver Creek *v.* Hastings, 52 Mich. 528, 18 N. W. 250; Western Wheeled Scraper Co. *v.* Butler Tp., 24 Pa. Super. Ct. 477.

73. *New Hampshire.*— Tyler *v.* Flanders, 58 N. H. 371.

regular or special [74] meeting, constitutes a quorum and may discharge the functions of the board.

3. Records. Town boards speak by their records,[75] which may be made and kept either by a regular, or a temporary clerk.[76] Such records are not required to be kept with formal precision, and presumption is usually indulged in favor of their regularity and sufficiency; [77] but the records are not admissible as to proceedings beyond the jurisdiction of the board.[78]

4. Parol or Extrinsic Evidence of Proceedings. As a general rule, only the records of the board may be consulted for evidence of its proceedings;[79] but parol evidence has been admitted to supplement the records,[80] and where no record was made of the meeting, the action taken has been allowed to be proved by a paper embodying such action subsequently made and signed by the members.[81]

D. Officers — 1. Creation and Abolition of Offices.[82] Within constitutional limitations, the legislature has full power in the creation and abolishing of town offices,[83] and by abolishing a town may thereby oust the officers thereof before their terms provided by the constitution have expired.[84] The towns themselves do not possess the power to create or abolish offices,[85] unless such power has been expressly delegated to them by the constitution or by statute; [86] but a town may refuse by majority vote binding on the minority to exercise its right to representation in the general assembly.[87]

2. Officers in Towns or Townships Containing Cities. Where a city is formed from part of a township [88] or is created within the same limits as a township [89] the city government may, within the city limits, entirely supersede the township government,[90] or it may do so only as to certain officers and functions,[91] and the

New Jersey.— Young *v.* Crane, 67 N. J. L. 453, 51 Atl. 482.

New York.— Matter of Broat, 6 Misc. 445, 27 N. Y. Suppl. 176.

Ohio.— State *v.* Wilkesville Tp., 20 Ohio St. 288.

Wisconsin.— Wisconsin Cent. R. Co. *v.* Ashland County, 81 Wis. 1, 50 N. W. 937.

74. Fox *v.* Fox, 24 Ohio St. 335 (sustaining a permit for cattle to run at large, where granted by the township trustees at a special meeting of the board at which only two were present, one of whom was the person to whom the permit was issued); Slicer *v.* Elder, 2 Ohio Dec. (Reprint) 218, 2 West. L. Month. 91.

75. Fayette County *v.* Chitwood, 8 Ind. 504.

76. St. Joseph First Nat. Bank *v.* St. Joseph Tp., 46 Mich. 526, 9 N. W. 838.

77. Newaygo County Mfg. Co. *v.* Echtinaw, 81 Mich. 416, 45 N. W. 1010; Hendrickson *v.* New York, 24 Misc. (N. Y.) 231, 52 N. Y. Suppl. 790 [*reversed* on other grounds in 38 N. Y. App. Div. 480, 56 N. Y. Suppl. 580 (*affirmed* in 160 N. Y. 144, 54 N. E. 680)]; Bronx Gas, etc., Co. *v.* New York, 17 Misc. (N. Y.) 433, 41 N. Y. Suppl. 358; Rutland *v.* West Rutland, 68 Vt. 155, 34 Atl. 422; Wisconsin Cent. R. Co. *v.* Ashland County, 81 Wis. 1, 50 N. W. 937.

Record of formal actions sufficient, even though no minutes are kept. Scranton, etc., Traction Co. *v.* Delaware, etc., Canal Co., 1 Pa. Super. Ct. 409 [*reversed* on other grounds in 180 Pa. St. 636, 37 Atl. 122].

78. Matlock *v.* Hawkins, 92 Ind. 225; State *v.* Curtis, 86 Wis. 140, 56 N. W. 475.

79. Fayette County *v.* Chitwood, 8 Ind. 504.

80. Rock Creek Tp. *v.* Codding, 42 Kan. 649, 22 Pac. 741; Scranton, etc., Traction Co. *v.* Delaware, etc., Canal Co., 1 Pa. Super. Ct. 409 [*reversed* on other grounds in 180 Pa. St. 636, 37 Atl. 122].

81. West Jersey Traction Co. *v.* Camden Horse R. Co., 52 N. J. Eq. 452, 29 Atl. 333.

82. **Boards of health and sanitary officers** see Health, 21 Cyc. 38 *et seq.*

Highway officers see Streets and Highways, 37 Cyc. 212.

Mandamus as remedy relating to election appointment, removal, and title to office see Mandamus, 26 Cyc. 251 *et seq.*

Officers of towns as school officers see Schools and School-Districts, 35 Cyc. 870.

83. People *v.* Cook County, 176 Ill. 576, 52 N. E. 334; Knowlton *v.* New Boston, 72 N. H. 590, 58 Atl. 509; People *v.* Potter, 40 Misc. (N. Y.) 485, 82 N. Y. Suppl. 649 [*affirmed* in 88 N. Y. App. Div. 239, 85 N. Y. Suppl. 460]; Banks Tp. *v.* Frey, 10 Pa. Co. Ct. 580.

84. *In re* Hinkle, 31 Kan. 712, 3 Pac. 531.

85. Pinney *v.* Brown, 60 Conn. 164, 22 Atl. 430. *Compare* H. P. Cornell Co. *v.* Barber, (R. I. 1910) 76 Atl. 801.

86. People *v.* Tabor, 21 How. Pr. (N. Y.) 42.

87. Opinion of Justices, 15 Mass. 537, 7 Mass. 523.

88. State *v.* Ward, 17 Ohio St. 543.

89. State *v.* Finger, 46 Iowa 25.

90. Rittenhouse *v.* Bigelow, 38 Nebr. 547, 58 N. W. 534, 57 N. W. 387.

91. State *v.* Finger, 46 Iowa 25; State *v.* Ward, 17 Ohio St. 543.

remaining township officers whose functions relate to the entire township must be chosen by vote of the township, including the city.[92]

3. Eligibility of Officers. The qualifications of persons eligible to town offices are usually prescribed by statute,[93] and as a general rule no other or greater qualification will be required than is expressly prescribed.[94] In Maine one may be eligible to a town office, although not a citizen of the United States;[95] but residence in a town is usually essential to qualify one for office-holding in it,[96] and the period of residence required cannot be computed by tacking on to the present period a former residence which had been abandoned.[97] Unless expressly excluded,[98] all persons within the class named as eligible are qualified, even judges or clerks of the election,[99] and persons holding other offices.[1] A provision that no person who has held office for a certain number of terms or years shall be eligible to reëlection operates from the time it takes effect to render ineligible for reëlection persons who have served the number of terms or years stated before that time,[2] but does not prevent such persons from holding over until the election of a successor where there was a failure to elect at the proper time;[3] and a statutory disqualification "hereafter" for a part of a given period refers to a period accruing after the act takes effect.[4] That a person was eligible to hold an office at the time he was elected and began to serve will not authorize him to continue to hold it after his period of eligibility ceases.[5] Acceptance of one town office does not operate as a resignation of another;[6] and a provision that one officer shall not be eligible to another office[7] not only renders him incapable of holding the office, but even of being elected to it.[8]

4. Election or Appointment and Qualification — a. Election or Appointment in General.[9] The whole subject of the selection of town officers, whether by election or appointment,[10] and the time, place, and method of procedure of such selection,[11] are usually definitely and fully prescribed by statute; and an election not held in accordance with the statutes confers no title to office.[12] In some states the elections for town officers are governed by the general election law;[13]

92. State *v.* Finger, 46 Iowa 25; State *v.* Ward, 17 Ohio St. 543.

93. **Qualification for election applies to appointment also.** *In re* Darby Tp., 9 Pa. Dist. 678, 7 Del. Co. 597.

94. Plymouth *v.* Painter, 17 Conn. 585, 44 Am. Dec. 574; State *v.* Bogard, 128 Ind. 480, 27 N. E. 1113.

95. *In re* Opinion of Justices, 70 Me. 560.

96. **A non-resident may be a deputy** township treasurer, at least *de facto*. Auditor-Gen. *v.* Longyear, 110 Mich. 223, 68 N. W. 130.

A statute authorizing the officers in one town to perform certain functions in an adjoining town which has failed to elect officers makes the officers so authorized *de facto* officers for the purpose of performing the functions assigned, although not residents of the town. Strange *v.* Oconto Land Co., 136 Wis. 516, 117 N. W. 1023.

Effect of removal of officer from town see *infra*, III, D, 9.

97. Laimbeer *v.* People, 48 Ill. 490.

98. *Ex p.* Meehan, 1 Leg. Chron. (Pa.) 307.

99. *In re* McKenzie's Election, 2 Pa. Dist. 518; *Ex p.* Walker's Contested Election, 3 Luz. Leg. Reg. (Pa.) 130.

1. *Ex p.* Meehan, 1 Leg. Chron. (Pa.) 307. See Officers, 29 Cyc. 1381.

2. Jeffries *v.* Rowe, 63 Ind. 592.

3. State *v.* Bogard, 128 Ind. 480, 27 N. E. 1113.

4. Jeffries *v.* Rowe, 63 Ind. 592.

5. Jeffries *v.* Rowe, 63 Ind. 592.

6. Atty.-Gen. *v.* Marston, 66 N. H. 485, 22 Atl. 560, 13 L. R. A. 670.

7. **A tax collector** vested with certain official powers until all the taxes on his list are collected is not relieved of such disability to hold another office until he has completed his duties and has been discharged. Atty.-Gen. *v.* Marston, 66 N. H. 485, 22 Atl. 560, 13 L. R. A. 670.

8. People *v.* Purdy, 154 N. Y. 439, 48 N. E. 821, 61 Am. St. Rep. 624 [*affirming* 21 N. Y. App. Div. 66, 47 N. Y. Suppl. 601].

9. **Appointments to fill vacancies** see *infra*, III, D, 10.

10. **Distinction between election and appointment** see Reid *v.* Gorsuch, 67 N. J. L. 396, 51 Atl. 457. See also 15 Cyc. 279.

11. De Armond *v.* State, 40 Ind. 469; Atty.-Gen. *v.* Hutchinson, 185 Mass. 85, 69 N. E. 1048; *In re* Martz's Election, 110 Pa. St. 502, 1 Atl. 419; Travis *v.* Lehigh Coal, etc., Co., 33 Pa. Super. Ct. 203; *In re* Town Officers, 20 R. I. 784, 40 Atl. 6.

12. Com. *v.* Baxter, 35 Pa. St. 263.

Irregularity in election of first officers of town does not affect the validity of subsequent elections. Lones *v.* Harris, 71 Iowa 478, 32 N. W. 464.

13. De Armond *v.* State, 40 Ind. 469.

but in others they are governed by special laws applicable only to town elections.[14] In case of doubt in the statute the courts lean to construction giving election for all principal officers;[15] but not for mere agents or under officers.[16] Provision is usually made for elections at the annual town meeting;[17] but in some states it is competent to elect officers at an adjourned session of the regular annual meeting,[18] or even at a special meeting called for the purpose.[19]

b. Certificate of Election. The vote is usually canvassed by the officers of the meeting or by a board of commissioners,[20] and an officer has no authority to act until he receives a certificate of his election;[21] but a certificate issued by the proper authorities constitutes *prima facie* evidence of his title to the office.[22]

c. Qualification. Before entering upon his duties, an officer must usually take the oath of office,[23] and in some cases is required to give bond and security.[24] Where the person elected has been discharging the duties of the office it will be presumed that he was properly sworn until the contrary is proved;[25] but if it be established that the person elected failed to take the oath of office, he is not an officer *de jure*, and has been held personally liable for his acts.[26]

5. Records and Other Evidence of Election and Qualification.[27] The official records of the town constitute the best evidence of the election and qualification of officers,[28] and oral evidence is not admissible in a collateral proceeding to vary or contradict such records.[29] Nor, as a general rule, is other evidence, either documentary or oral, admissible in a collateral proceeding to supply defective records, until it is shown that the record containing the best evidence is lost or destroyed, or is otherwise inaccessible.[30] An exception is made in special cases in which it is no longer possible to correct the record in the usual way, as through lapse of time or the death of the clerk who made it;[31] but unless a case can be brought within this exception, the proper proceeding is by mandamus to compel the correction of the record.[32] In certain cases, especially those involving the question of whether a person acted in an individual or in an official capacity, the official

14. Williams *v.* Potter, 114 Ill. 628, 3 N. E. 729; Lane *v.* Tilton, 43 Misc. (N. Y.) 214, 88 N. Y. Suppl. 428, holding that the general town election law does not apply to the election of trustees of common lands as such officers exist in only a few towns, where they are governed by local laws.

15. State *v.* Hadley, 64 N. H. 473, 13 Atl. 643; Reid *v.* Gorsuch, 67 N. J. L. 396, 51 Atl. 457.

16. **Commissioners appointed by special act to refund the bonded indebtedness** of a township are mere financial agents and not officers of the township. Travelers' Ins. Co. *v.* Oswego Tp., 59 Fed. 58, 7 C. C. A. 669 [*reversing* 55 Fed. 361, and *affirmed* in 70 Fed. 225, 17 C. C. A. 77].

17. **"At the annual town meeting"** refers to the day on which the ballots are cast in the several election districts, and not to the day thereafter when the town officers meet to canvass the result of the election and transact other business. Matter of Foley, 8 Misc. (N. Y.) 57, 28 N. Y. Suppl. 608.

18. Com. *v.* Hubbard, 24 Pick. (Mass.) 98.

19. State *v.* Bean, 63 N. H. 249.

20. People *v.* Callaghan, 83 Ill. 128.

21. Pratt *v.* Luther, 45 Ind. 250.

22. De Armond *v.* State, 40 Ind. 469; Com. *v.* Baxter, 35 Pa. St. 263.

23. State *v.* Rollins, 65 Vt. 608, 27 Atl. 498. But see Lemington *v.* Blodgett, 37 Vt. 210, holding that the law does not require selectmen to be sworn.

The time mentioned in the statute for taking oath is directory merely. Colman *v.* Anderson, 10 Mass. 105.

24. Briggs *v.* Hopkins, 16 R. I. 83, 13 Atl. 109.

25. Lemington *v.* Blodgett, 37 Vt. 210.

26. Cavis *v.* Robertson, 9 N. H. 524.

27. **Records of town meeting** in general see *supra*, III, B, 10.

28. State *v.* Ferguson, 31 N. J. L. 107; *In re* Prickett, 20 N. J. L. 134.

Clerk may record his own election. Greene *v.* Lunt, 58 Me. 518; Briggs *v.* Murdock, 13 Pick. (Mass.) 305.

An attested copy is admissible. Bearce *v.* Fossett, 34 Me. 575; Abbot *v.* Hermon Third School Dist., 7 Me. 118.

The certificate of the moderator is the proper evidence of the qualification of a town officer sworn in by him at the time of election. Abbot *v.* Hermon Third School Dist., 7 Me. 118.

29. *In re* Prickett, 20 N. J. L. 134; People *v.* Zeyst, 23 N. Y. 140.

30. Bearce *v.* Fossett, 34 Me. 575; *In re* Prickett, 20 N. J. L. 134.

31. Cavis *v.* Robertson, 9 N. H. 524.

32. Cavis *v.* Robertson, 9 N. H. 524; People *v.* Zeyst, 23 N. Y. 140. But see La Pointe *v.* O'Malley, 46 Wis. 35, 50 N. W. 521, in which oral evidence of the officers of election was admitted to supplement the records.

capacity of a town officer is established *prima facie* by evidence that he has openly discharged the functions of the office,[33] or even by the testimony of the officer himself.[34] Statutes requiring the keeping of records of election and qualification of officers are usually construed to be merely directory as to matters of detail,[35] and presumption in favor of regularity of action by officers will supply minor defects in records of election [36] and of qualification.[37]

6. De Facto Officers. An officer *de facto* is one who, under color of election or appointment, assumes an office and performs its functions,[38] although not regularly and constitutionally chosen [39] or qualified.[40] He is to be distinguished, on the one hand, from an officer *de jure*, who is in all respects legally chosen and qualified; [41] and, on the other hand, from a mere usurper of an office without any color of right,[42] or one who holds over wrongfully after his term has expired and his successor has been elected.[43] The acts of an officer *de facto*, within the scope of the office he assumes to occupy, are valid and binding both on the town [44] and on third persons.[45] Neither his title to the office nor the validity of his acts can be attacked collaterally;[46] but his right to the office may be questioned by a quo warranto against him, or in a suit by him the authority to prosecute which is dependent upon his official position.[47]

7. Failure or Refusal to Qualify or Serve. If an officer elect fails to file oath and bond within time required by mandatory statute he will be presumed to have abandoned his office; [48] but not so while an election contest is pending,[49] nor where his time for qualifying is not limited,[50] nor where the statute prescribing time is merely directory.[51] Payment by a town officer elect of a statutory

33. Gilmore *v.* Holt, 4 Pick. (Mass.) 258; State *v.* Ferguson, 31 N. J. L. 107.

34. Com. *v.* McCue, 16 Gray (Mass.) 226.

35. Kellar *v.* Savage, 17 Me. 444. And see Daly *v.* Gubbins, 170 Ind. 105, 82 N. E. 659, holding that Burns Annot. St. (1901) § 4331, requiring the filing of a statement of the election of town trustees in the office of the clerk of the circuit court of the county, is applicable only to the first election held after the organization of the town.

36. Daly *v.* Gubbins, 170 Ind. 105, 82 N. E. 659; Gerry *v.* Herrick, 87 Me. 219, 32 Atl. 882; Hathaway *v.* Addison, 48 Me. 440; Mussey *v.* White, 3 Me. 290; Mason *v.* Thomas, 36 N. H. 302; State *v.* Ferguson, 31 N. J. L. 107. But see Scammon *v.* Scammon, 28 N. H. 419, holding that where the statute requires the election of officers by ballot and by major vote, the records must show compliance with these requirements.

A statement that a person "took the oath of office" is sufficient to import the oath prescribed by law. Scammon *v.* Scammon, 28 N. H. 419.

Officers elected are presumed to be those authorized by statute. Briggs *v.* Murdock, 13 Pick. (Mass.) 305.

37. Greene *v.* Lunt, 58 Me. 518; Kellar *v.* Savage, 17 Me. 444; Mason *v.* Thomas, 36 N. H. 302.

38. Com. *v.* McCue, 16 Gray (Mass.) 226; Atty.-Gen. *v.* Marston, 66 N. H. 485, 22 Atl. 560, 13 L. R. A. 670.

39. Cushing *v.* Frankfort, 57 Me. 541; Yorty *v.* Paine, 62 Wis. 154, 22 N. W. 137.

40. Plymouth *v.* Painter, 17 Conn. 585, 44 Am. Dec. 574; People *v.* Collins, 7 Johns. (N. Y.) 549; Gregg Tp. *v.* Jamison, 55 Pa. St. 468.

41. Plymouth *v.* Painter, 17 Conn. 585, 44 Am. Dec. 574.

42. **Where a court of competent jurisdiction has decided** that one person is entitled to an office *de jure*, another cannot exercise the office *de facto*. Williams *v.* Boynton, 147 N. Y. 426, 42 N. E. 184 [*affirming* 71 Hun 309, 25 N. Y. Suppl. 60].

43. Everroad *v.* Flatrock Tp., 49 Ind. 451; La Pointe *v.* O'Malley, 46 Wis. 35, 50 N. W. 521.

44. Abbot *v.* Chase, 75 Me. 83; Cushing *v.* Frankfort, 57 Me. 541; Gregg Tp. *v.* Jamison, 55 Pa. St. 468.

45. Abbot *v.* Chase, 75 Me. 83; Atty.-Gen. *v.* Marston, 66 N. H. 485, 22 Atl. 560, 13 L. R. A. 670; Roberts *v.* Holmes, 54 N. H. 560; Strange *v.* Oconto Land Co., 136 Wis. 516, 117 N. W. 1023.

46. Baker *v.* Shephard, 24 N. H. 208. See *supra*, notes 38, 45.

47. Plymouth *v.* Painter, 17 Conn. 585, 44 Am. Dec. 574.

48. State *v.* Johnson, 100 Ind. 489; Mussey *v.* White, 3 Me. 290. But see People *v.* Hitchcock, 2 Thomps. & C. (N. Y.) 134, holding that the offices of commissioners appointed under Laws (1873), c. 720, to make subscriptions and issue bonds of a town in exchange for the stock of a certain railroad company, are not vacated by their omission to make and file their official bonds, unless such commissioners neglect to file such bonds for ten days after notice from the supervisor of the town of the provisions of such act.

49. Farwell *v.* Adams, 112 Ill. 57, 1 N. E. 272.

50. Glidden *v.* Towle, 31 N. H. 147.

51. Albaugh *v.* State, 145 Ind. 356, 44

penalty for refusing to serve is no defense to a mandamus to compel service,[52] and due notice of election is equivalent to formal demand for service.[53]

8. Term of Office, Vacancies, and Holding Over. The terms for which town officers shall serve are usually fixed by the constitution[54] or by statute.[55] It is abhorrent to the law, however, that there should be a vacancy in office,[56] and such provisions are usually construed to mean that an incumbent shall hold over until the lawful election and qualification of his successor.[57] The official terms of the first officers of a township accepting incorporation under general law are fixed by the statute in operation at date of acceptance;[58] and where the constitution requires town officers to be elected by the electors or appointed by some local authority, an act extending the term of town officers cannot apply to one already elected.[59] Where the terms of two officers expire and provision is made for the election of only one, the reëlection of one of the incumbents will operate to end the term of the other,[60] and where there is only one vacancy and two officers have an equal right to hold over, neither will be recognized.[61] The erection of a portion of a township into a borough or city operates in some states to create vacancies in those township offices the incumbents of which reside in the city,[62] while in other states such incumbents continue as at least *de facto* township officers.[63]

9. Resignation, Disqualification, and Removal. A town or township office may be vacated by death, resignation, or removal, resignation being either a formal and voluntary surrender of the office,[64] or an informal abandonment by disqualification resulting from change of residence,[65] while removal is the act of superior authority,[66] which is usually the appointing power.[67] It is usually pro-

N. E. 355; Matter of Drury, 39 Misc. (N. Y.) 288, 79 N. Y. Suppl. 498.

52. People *v.* Williams, 145 Ill. 573, 33 N. E. 849, 36 Am. St. Rep. 514, 24 L. R. A. 492.

53. People *v.* Williams, 145 Ill. 573, 33 N. E. 849, 36 Am. St. Rep. 514, 24 L. R. A. 492.

54. **Where no term is specified,** under N. Y. Const. art. 10, § 3, officer holds during pleasure of appointing power. Jarvis *v.* Waterbury, 84 Hun (N. Y.) 462, 32 N. Y. Suppl. 389.

55. **Term of office existing only under colonial patent** and local statutes is not affected by the general town law providing for biennial elections of town officers. Lane *v.* Tilton, 43 Misc. (N. Y.) 214, 88 N. Y. Suppl. 428.

Statute construed.— An act providing that the terms of town officers "shall commence and terminate on the first day of January each year" serves to reduce from two years to one the terms of officers thereafter elected. People *v.* Kings County Clerk, 76 Hun (N. Y.) 71, 27 N. Y. Suppl. 857 [*affirmed* in 142 N. Y. 642, 36 N. E. 884].

56. See *infra*, note 57.

57. State *v.* Wells, 144 Ind. 231, 41 N. E. 461, 43 N. E. 133; Kimberlin *v.* State, 130 Ind. 120, 29 N. E. 773, 30 Am. St. Rep. 208, 14 L. R. A. 858; State *v.* Berg, 50 Ind. 496; Everroad *v.* Flatrock Tp., 49 Ind. 451.

Incumbent holds only until successor takes oath of office and not until he gives bond. *In re* Bradley, 21 N. Y. Suppl. 167 [*affirmed* in 141 N. Y. 527, 36 N. E. 598].

Where the election results in a tie, there is no vacancy, but incumbent holds until tie is decided or office filled in the manner provided by law. State *v.* McMullen, 46 Ind. 307.

58. Reid *v.* Gorsuch, 67 N. J. L. 396, 51 Atl. 457.

59. People *v.* Randall, 151 N. Y. 497, 45 N. E. 841; Lane *v.* Tilton, 43 Misc. (N. Y.) 214, 88 N. Y. Suppl. 428. But an act creating a new town out of part of an old one may provide that the officers of the old town shall continue to serve until the next regular election. People *v.* Hayt, 7 Hun (N. Y.) 39 [*reversed* on other grounds in 66 N. Y. 606]. And see Strange *v.* Oconto Land Co., 136 Wis. 516, 117 N. W. 1023, upholding the validity of St. (1898) § 1152, which provided that where the people of a town fail to elect officers required by law, so that property cannot be assessed for taxation, the county board shall issue a warrant to the assessor and treasurer of an adjoining town, requiring them to assess and collect taxes until an election shall be held.

60. People *v.* Brown, 7 Wend. (N. Y.) 493.

61. Kilburn *v.* Conlan, 56 N. J. L. 349, 29 Atl. 162.

62. Com. *v.* Topper, 219 Pa. St. 221, 68 Atl. 666.

63. Walnut Tp. *v.* Jordan, 38 Kan. 562, 16 Pac. 812.

64. See Officers, 29 Cyc. 1403.

65. See Officers, 29 Cyc. 1404.

"Incapacity" as a ground of vacating office refers to personal defects or incapability. Stewart *v.* Riverside Tp., 68 N. J. L. 571, 53 Atl. 396.

66. **Dismissal of application for removal** is not necessarily a bar to its renewal. People *v.* Eddy, 3 Lans. (N. Y.) 80.

67. Merrick *v.* Arbela Tp. Bd., 41 Mich.

vided by statute that a removal of a township officer from the town shall operate to vacate his office;[68] and, even in the absence of statute, removal generally has this effect.[69] In other cases, however, it has been held that removal in itself does not operate to vacate the office.[70] So in some cases it has been held that a change of boundaries which leaves the residence of the officer outside the township will operate to vacate his office,[71] and in other cases that it will not.[72] Formal resignation should be addressed in writing to the proper officer,[73] but oral declarations by an officer of his intention to remove from the town, accompanied by his actually leaving it, have been held to create a vacancy.[74] It has also been held that a vacancy in office from resignation is not complete on acceptance, but requires appointment and qualification of a successor.[75]

10. Appointment to Fill Vacancies. Authority to appoint to a vacancy in town or township office is derived only from express statutory provisions,[76] and can be exercised only by the officer or board designated,[77] on the condition expressed,[78] and in the manner,[79] and at the time prescribed.[80] Under the statutes of some states, the appointee holds for the remainder of the unexpired term,[81] while in others he holds only until the next annual election.[82]

11. Compensation. In New England the salaries of town officers are usually

630, 2 N. W. 922; *In re* Roaring Brook Tp. Officers, 1 L. T. N. S. (Pa.) 163.

68. Barre *v.* Greenwich, 1 Pick. (Mass.) 129.

69. People *v.* Martin, 178 Ill. 611, 53 N. E. 309; Gage *v.* Dudley, 64 N. H. 437, 13 Atl. 865.

70. Salamanca Tp. *v.* Wilson, 109 U. S. 627, 3 S. Ct. 344, 27 L. ed. 1055.

71. People *v.* Stellwagen, 33 Mich. 1.

72. Stewart *v.* Riverside Tp., 68 N. J. L. 571, 53 Atl. 396.

73. State *v.* Taylor, 26 Nebr. 580, 42 N. W. 729.

74. Matter of Bagley, 27 How. Pr. (N. Y.) 151.

75. Badger *v.* U. S., 93 U. S. 599, 23 L. ed. 991.

76. Cooper *v.* State, 113 Ind. 70, 14 N. E. 912; State *v.* Taylor, 26 Nebr. 580, 42 N. W. 729; *In re* Town Clerk, 10 Pa. Dist. 631; Oregon *v.* Jennings, 119 U. S. 74, 7 S. Ct. 124, 30 L. ed. 323.

77. *Indiana.*— Kimberlin *v.* State, 130 Ind. 120, 29 N. E. 773, 30 Am. St. Rep. 208, 14 L. R. A. 858; Cooper *v.* State, 113 Ind. 70, 14 N. E. 912.

Nebraska.— State *v.* Forney, 21 Nebr. 223, 31 N. W. 802.

New York.— Matter of Smith, 49 Misc. 567, 100 N. Y. Suppl. 179 [*affirmed* in 116 N. Y. App. Div. 665, 101 N. Y. Suppl. 992 (*affirmed* in 188 N. Y. 549, 81 N. E. 1176)]; People *v.* Potter, 40 Misc. 485, 82 N. Y. Suppl. 649 [*affirmed* in 83 N. Y. App. Div. 239, 85 N. Y. Suppl. 460].

Pennsylvania.— Com. *v.* Topper, 219 Pa. St. 221, 68 Atl. 666.

United States.— Oregon *v.* Jennings, 119 U. S. 74, 7 S. Ct. 124, 30 L. ed. 323.

See 45 Cent. Dig. tit. "Towns," § 51.

It is appropriate for the appointing power to name the candidate having the popular majority, where the election has failed to give title to the office by reason of minor irregularity or failure to qualify (*In re* Ridley Tp. Sup'r, 9 Pa. Dist. 732, 8 Del. Co. 22; *In re* Sadsbury Tp., 16 Lanc. L. Rev. (Pa.) 181, 13 York Leg. Rec. 58), and to name a candidate from an unrepresented district (*In re* Washington Tp., 7 North. Co. Rep. (Pa.) 168).

78. *Indiana.*— Kimberlin *v.* State, 130 Ind. 120, 29 N. E. 773, 30 Am. St. Rep. 208, 14 L. R. A. 858.

Massachusetts.— Sprague *v.* Bailey, 19 Pick. 436.

Michigan.— People *v.* Stallwagen, 33 Mich. 1.

New Hampshire.— State *v.* Hadley, 64 N. H. 473, 13 Atl. 643.

Pennsylvania.— Com. *v.* Topper, 219 Pa. St. 221, 68 Atl. 666; *In re* Pittston Tp. Auditors, 8 Kulp 139.

Vermont.— Cummings *v.* Clark, 15 Vt. 653.

See 45 Cent. Dig. tit. "Towns," § 51.

If no vacancy, there can be no appointment (People *v.* Callaghan, 83 Ill. 128; Com. *v.* Baxter, 35 Pa. St. 263; Cummings *v.* Clark, 15 Vt. 653); and a declaration of vacancy by the appointing power is not conclusive (Zeliff *v.* Whritenour, 69 N. J. L. 224, 54 Atl. 560).

79. *Maine.*— Mussey *v.* White, 3 Me. 290.

Massachusetts.— Sprague *v.* Bailey, 19 Pick. 436.

Minnesota.— State *v.* Guiney, 26 Minn. 313, 3 N. W. 977.

Nebraska.— State *v.* Taylor, 26 Nebr. 580, 42 N. W. 729.

New York.— People *v.* Potter, 88 N. Y. App. Div. 239, 85 N. Y. Suppl. 460.

South Carolina.— State *v.* Stickley, 80 S. C. 64, 61 S. E. 211, 128 Am. St. Rep. 855; State *v.* Rice, 66 S. C. 1, 44 S. E. 80.

See 45 Cent. Dig. tit. "Towns," § 51.

80. Heim *v.* State, 145 Ind. 605, 44 N. E. 638; Omro *v.* Kaime, 39 Wis. 468.

81. Com. *v.* Doverspike, 7 Pa. Dist. 122.

82. State *v.* Lehman, 10 Ohio Cir. Ct. 328, 6 Ohio Cir. Dec. 559.

fixed by the towns themselves;[83] but in the other states in which township government exists, the salaries are usually fixed by statute.[84] In all cases where the salaries of officers are fixed by statute, an officer is not entitled to receive or retain any larger amount than that prescribed for any services rendered, however meritorious,[85] nor for any expenses incurred in the execution of his office,[86] even though such additional amount has been contracted for or allowed by the town board;[87] nor can his salary be reduced by action of the local board.[88] Where no salary has been fixed, the officer is not entitled to any compensation,[89] nor can compensation be presumed on the principle of *quantum meruit*,[90] nor from the payment of other officers,[91] nor from the custom of other towns.[92] But where a certain rate of compensation has been fixed, an officer is entitled to pay for time and services reasonably necessary for the performance of the duties imposed by law.[93] An officer is not entitled to the emoluments of his office accruing before his qualification,[94] nor is he entitled to receive pay from the township for services to the county,[95] nor to a double *per diem* allowance for different services to the town on the same day[96] nor for services on the same day to both town and county;[97]

83. Welch *v.* Emerson, 206 Mass. 129, 91 N. E. 1021; Arlington *v.* Peirce, 122 Mass. 270; Rindge *v.* Lamb, 58 N. H. 278; Boyden *v.* Brookline, 8 Vt. 284.

84. Tucker *v.* Barnum, 144 Cal. 266, 77 Pac. 919; Ross *v.* Collins, 106 Ill. App. 396; Travis *v.* Lehigh Coal, etc., Co., 33 Pa. Super. Ct. 203.

85. *Illinois.*— Charleston *v.* McCrory, 36 Ill. 456.

Massachusetts.— Robinson *v.* Wareham, 2 Gray 315. *Compare* Welch *v.* Emerson, 206 Mass. 129, 91 N. E. 1021.

New Hampshire.—Rindge *v.* Lamb, 58 N. H. 278.

New Jersey.— Marr *v.* Bloomfield Tp., 64 N. J. L. 305, 45 Atl. 760.

New York.— Wilson *v.* Bleloch, 125 N. Y. App. Div. 191, 109 N. Y. Suppl. 340 [*affirmed* in 195 N. Y. 592, 89 N. E. 1115]; Annis *v.* McNulty, 116 N. Y. App. Div. 909, 101 N. Y. Suppl. 1111 [*affirming* 51 Misc. 121, 100 N. Y. Suppl. 951]; People *v.* Sippell, 116 N. Y. App. Div. 753, 102 N. Y. Suppl. 69; People *v.* Queensbury Auditors, 24 N. Y. App. Div. 579, 49 N. Y. Suppl. 525 [*affirmed* in 156 N. Y. 689, 50 N. E. 1120]; Ghiglione *v.* Marsh, 23 N. Y. App. Div. 61, 48 N. Y. Suppl. 604.

Rhode Island.— Willis *v.* Angell, 19 R. I. 617, 35 Atl. 677.

Vermont.— Boyden *v.* Brookline, 8 Vt. 284.

See 45 Cent. Dig. tit. "Towns," § 52.

Presumption is against the allowance of both fees and *per diem* for the same services. Matter of Hempstead, 36 N. Y. App. Div. 321, 55 N. Y. Suppl. 345 [*affirmed* in 160 N. Y. 685, 55 N. E. 1101].

86. Dougherty *v.* People, 42 Ill. App. 494; Robinson *v.* Wareham, 2 Gray (Mass.) 315.

87. People *v.* Parker, 231 Ill. 478, 83 N. E. 282 [*affirming* 126 Ill. App. 538]; Congressional Tp. No. 11 *v.* Weir, 9 Ind. 224.

88. Gilligan *v.* Waterford, 91 Hun (N. Y.) 21, 36 N. Y. Suppl. 88; Willis *v.* Angell, 19 R. I. 617, 35 Atl. 677.

89. Beckwith *v.* Farmington, 77 Conn. 318, 59 Atl. 43; White *v.* Levant, 78 Me. 568, 7 Atl. 539; Murphy *v.* Clinton, 182 Mass. 198, 65 N. E. 34; People *v.* Sippell, 116 N. Y. App. Div. 753, 102 N. Y. Suppl. 69.

90. White *v.* Levant, 78 Me. 568, 7 Atl. 539. But see Arlington *v.* Peirce, 122 Mass. 270, holding that an agreement of a town to make compensation may be shown either by previous vote or subsequent action.

91. Boyden *v.* Brookline, 8 Vt. 284.

92. Farnsworth *v.* Melrose, 122 Mass. 268.

93. Outagamie County *v.* Greenville, 77 Wis. 165, 45 N. W. 1090.

94. Albaugh *v.* State, 145 Ind. 356, 44 N. E. 355.

95. Kerlin *v.* Reynolds, 142 Ind. 460, 36 N. E. 693, 41 N. E. 827; Montgomery County *v.* Bromley, 108 Ind. 158, 8 N. E. 923.

96. Wilson *v.* Bleloch, 125 N. Y. App. Div. 191, 109 N. Y. Suppl. 340 [*affirmed* in 195 N. Y. 592, 89 N. E. 1115]. But see Matter of Hempstead, 36 N. Y. App. Div. 321, 55 N. Y. Suppl. 345 [*affirmed* in 160 N. Y. 685, 55 N. E. 1101], holding that while a town clerk is not entitled to a double *per diem* for attending meetings of the same individual under different official names, yet he is entitled to such double pay for attending on the same day meetings of different boards or different committees composed of different individuals.

Under Mass. Rev. Laws, c. 25, § 95, providing that town officers shall receive such compensation as the town may determine, and chapter 12, section 99, declaring that each assessor shall be paid by his town two dollars and fifty cents for every whole day in which he is employed in that service, where a town at its annual meeting voted that the salaries of selectmen, overseers of the poor, assessors, and board of health be one thousand two hundred dollars a year, or four hundred dollars for each individual, and certain of the selectmen served also as assessors, they could not claim additional salary therefor. Welch *v.* Emerson, 206 Mass. 129, 91 N. E. 1021.

97. Kerlin *v.* Reynolds, 142 Ind. 460, 36 N. E. 693, 41 N. E. 827; Posey County *v.* Templeton, 116 Ind. 369, 19 N. E. 183; Mont-

and while he is in default for public funds, no claim for his services is suable against the town.[98] A county officer performing township official duties is not entitled to the fees paid the township officer before abolition of the office.[99] An officer is entitled to fees for making all records within the scope of his official duty,[1] including records of events occurring before his term begins;[2] but, in the absence of contract, not for supplying records lost or destroyed.[3]

12. Authority and Powers — a. In General.[4] Since the whole *modus operandi* of town organization is committed to the legislature, it has power to fix and limit the powers of town officers and to modify them at will.[5] Town and township officers are agents of limited authority, having only those powers which are conferred by statute either expressly,[6] or by necessary implication;[7] and all persons dealing with them must, at their peril, take notice of this limit of authority.[8] Nor can discretionary powers conferred upon a board be exercised by an individual member.[9] But where an officer is vested with the statutory power to perform an act, its performance by him in an unauthorized manner or at an unauthorized time will not relieve the town of responsibility to third persons who dealt with the officer without knowledge of his violation of authority.[10] In some states certain officers are *ex officio* vested by statute with powers and duties regularly belonging to officers in other positions,[11] and the towns are, to a certain extent, authorized to confer upon one officer the powers regularly belonging to another officer;[12] but an officer himself does not possess authority to delegate discretionary power vested in him.[13] Overseers of highways and road commissioners are public officers rather than agents or servants,[14] and, although their functions may be limited to a portion of the town, they may be officers of the town,[15] or of the state.[16]

gomery County *v.* Bromley, 108 Ind. 158, 8 N. E. 923.

98. Heth Tp. *v.* Lewis, 114 Ind. 508, 17 N. E. 113.

99. Debolt *v.* Cincinnati Tp., 7 Ohio St. 237.

1. Lake *v.* Ellsworth, 40 Me. 343.

2. Lake *v.* Ellsworth, 40 Me. 343.

3. Lake *v.* Ellsworth, 40 Me. 343.

4. **Authority to administer oath** see Oath, 29 Cyc. 1300; to serve process see Process, 32 Cyc. 451.

5. People *v.* Cook County, 176 Ill. 576, 52 N. E. 334.

6. *Indiana.*— Indiana Trust Co. *v.* Jefferson Tp., 37 Ind. App. 424, 77 N. E. 63.

Maine.— Moor *v.* Cornville, 13 Me. 293; Bethum *v.* Turner, 1 Me. 111, 10 Am. Dec. 36.

Michigan.— Davis *v.* Kalamazoo Tp., 1 Mich. N. P. 16.

New Hampshire.—Carlton *v.* Bath, 22 N. H. 559.

Ohio.— Hopple *v.* Brown Tp., 13 Ohio St. 311.

Vermont.— St. Albans Treasurer *v.* Gibbs, Brayt. 76; Brackett *v.* State, 2 Tyler 152.

Wisconsin.— Spooner *v.* Washburn County, 124 Wis. 24, 102 N. W. 325.

Power conferred upon board cannot be exercised by individual (Batten *v.* Brandywine Tp., 5 Pa. L. J. 546); nor authority to a certain member by a smaller number (Frankfort *v.* Waldo County, 40 Me. 389).

The first selectman of a town was not legally authorized to forcibly remove the badge of a city policeman directed to perform police duty on private ground in the town. Keane *v.* Main, 83 Conn. 200, 76 Atl. 269.

7. Craig *v.* Leominster, 200 Mass. 101, 85 N. E. 855; Wright *v.* Taplin, 65 Vt. 448, 26 Atl. 1105.

Where major part of officers present are authorized to act, the one officer present may act. Frankfort *v.* Waldo County, 40 Me. 389.

8. Mitchelltree School Tp. *v.* Hall, 163 Ind. 667, 72 N. E. 641; Leet *v.* Shedd, 42 Vt. 277.

A township is not barred by estoppel by acts of township trustee beyond his authority. Indiana Trust Co. *v.* Jefferson Tp., 37 Ind. App. 424, 77 N. E. 63.

9. Batten *v.* Brandywine Tp., 5 Pa. L. J. 546.

10. Chicago Lumber, etc., Co. *v.* Sugar Loaf Tp., 64 Kan. 163, 67 Pac. 630.

11. **In Rhode Island** a warden is vested with the duties and powers of a justice of the peace. Rose *v.* McKie, 145 Fed. 584, 76 C. C. A. 274 [*affirming* 140 Fed. 145].

12. Benjamin *v.* Wheeler, 15 Gray (Mass.) 486, holding that under a statute making the performance of an act by one officer subject to the approbation of another, it is competent for the town to vest the latter officer with power to perform the act.

13. Pinney *v.* Brown, 60 Conn. 164, 22 Atl. 430.

14. McManus *v.* Weston, 164 Mass. 263, 41 N. E. 301, 31 L. R. A. 174.

15. Green *v.* Kleinhans, 14 N. J. L. 473.

16. Lynch *v.* Rutland, 66 Vt. 570, 29 Atl. 1015.

b. Prosecution and Defense of Actions.[17] In the absence of special provision, the governing board of a town or township has authority to represent it in bringing and defending civil actions at law and in equity,[18] and, as an incident to the exercise of such power, may employ counsel;[19] or by statute or local ordinance such power of representing the town may be vested in a general agent[20] or other officer.[21] Officers on whom process is by statute to be served may employ counsel to defend,[22] at least until they can lay the case before the town board or town meeting,[23] and in general officers may employ counsel and institute suits where necessary for the performance of the duties imposed upon them.[24] Except as already stated, however, there is no implied power vested in any town officer, by reason of his position, to institute or defend actions on behalf of the town;[25] nor have any officers the authority to bind the town by a contract employing counsel in a suit in which the town has no direct interest.[26] Criminal prosecutions are a matter of special statutory provision, and authority to institute them is usually vested in separate officers,[27] whose power is limited to that expressly given.[28]

13. Duties and Liabilities.[29] Town and township officers, within the scope of ministerial duties imposed by statute or ordinance, are liable in damages for injuries to third persons by reason of their malfeasance, misfeasance,[30] or even their nonfeasance;[31] and in addition may be liable to the town for statutory penalties.[32] In the discharge of discretionary duties, however, they are not liable to third persons for errors of judgment,[33] but only for acts done mali-

17. **Whether suit should be in name of town or of officers** see *infra*, VII, I.

18. *Connecticut.*— Union *v.* Crawford, 19 Conn. 331.

Maine.— Industry *v.* Starks, 65 Me. 167; Strout *v.* Durham, 23 Me. 483, holding that a town appearing by its selectmen cannot through them question their authority to represent the town.

New Hampshire.— Albany *v.* Abbott, 61 N. H. 157.

New York.— Adee *v.* Arnow, 91 Hun 329, 36 N. Y. Suppl. 1020.

Wisconsin.— Fox Lake *v.* Fox Lake, 62 Wis. 486, 22 N. W. 584; Haner *v.* Polk, 6 Wis. 350.

See 45 Cent. Dig. tit. "Towns," § 54.

May defend action to divide its territory, and apportion its property, debts, and liabilities. Farrel *v.* Derby, 58 Conn. 234, 20 Atl. 460, 7 L. R. A. 776.

Town may ratify action of board in instituting suit without authority. Partridge *v.* Ring, 99 Minn. 286, 109 N. W. 248.

19. Adee *v.* Arnow, 91 Hun (N. Y.) 329, 36 N. Y. Suppl. 1020; Burton *v.* Norwich, 34 Vt. 345; Fox Lake *v.* Fox Lake, 62 Wis. 486, 22 N. W. 584.

20. Knowlton *v.* Plantation No. 4, 14 Me. 20; Burton *v.* Norwich, 34 Vt. 345.

Agent to prosecute or defend suits has no authority to accept or ratify acts of a highway surveyor beyond his duty. Rollins *v.* Chester, 46 N. H. 411.

21. Mt. Vernon *v.* Patton, 94 Ill. 65 (holding that a contract made by such officer with an attorney is valid and binding on the town); Great Barrington *v.* Gibbons, 199 Mass. 527, 85 N. E. 737; Stambaugh Tp. *v.* Iron County Treasurer, 153 Mich. 104, 116 N. W. 569; Comesky *v.* Blackledge, 114 N. Y. App. Div. 834, 100 N. Y. Suppl. 241.

Officer must show that he was duly elected where right to bring suit depends upon his official character. Fossett *v.* Bearce, 29 Me. 523.

22. Bruce *v.* Dickey, 116 Ill. 527, 6 N. E. 435.

23. Cooper *v.* Delavan, 61 Ill. 96.

24. Long *v.* Emsley, 57 Iowa 11, 10 N. W. 280 (holding that a township clerk has authority by reason of his official position to bring suit to recover township funds of which he claims to have been illegally deprived); Burton *v.* Norwich, 34 Vt. 345.

25. Kankakee *v.* Kankakee, etc., R. Co., 16 Ill. App. 542 [*affirmed* in 115 Ill. 88, 3 N. E. 741]; Coak Creek Tp. Advisory Bd. *v.* Levandowsky, (Ind. App. 1909) 86 N. E. 1024; People *v.* Vanderpoel, 35 N. Y. App. Div. 73, 54 N. Y. Suppl. 436.

An officer against whom judgment for damages has been obtained by a third party for an official act is not authorized to appeal at the expense of the town. People *v.* Esopus Auditors, 74 N. Y. 310.

26. Sheldon *v.* Bennington, 67 Vt. 580, 32 Atl. 497.

27. Burton *v.* Norwich, 34 Vt. 345.

28. Bridgman *v.* Grafton, 51 Vt. 478; Brackett *v.* State, 2 Tyler (Vt.) 152.

29. **Liability as to administration of finances** see *infra*, V, B.

Personal liability of officers for injuries from defects or obstructions in highways see Streets and Highways, 37 Cyc. 302.

30. Holly *v.* Lockwood, 1 Conn. 180; Campbell *v.* Pence, 118 Ind. 313, 20 N. E. 840; Maxwell *v.* Pike, 2 Me. 8.

31. Welles *v.* Hutchinson, 2 Root (Conn.) 85.

32. Pike *v.* Jenkins, 12 N. H. 255.

33. *Connecticut.*— Whitlock *v.* West, 26 Conn. 406.

ciously,[34] corruptly or wantonly,[35] or without authority.[36] Town officers will not be liable for the wrongful conduct of other officers appointed by them, but not subject to their control or accountable to them;[37] nor will officers be liable in their official capacity for errors of judgment[38] or nonfeasance[39] in matters not pertaining to the discharge of their official duties.

14. Accounting — a. In General. It is the duty of all fiscal officers of a town to keep strict account of all public funds coming to their hands,[40] to make regular settlements with the proper officers,[41] and to account for such balances as may be found due;[42] and they will be liable in an action of conversion for all funds wrongfully received or retained by them,[43] or paid out without authority.[44] A settlement by a town officer with the auditing officials is final and conclusive as against the officer,[45] unless appealed from,[46] and even on appeal will not be modified except on the ground of fraud or mistake;[47] but such a settlement will not preclude the town from recovering funds remaining in the hands of the officer and not accounted for in the settlement.[48]

Iowa.— Theulen *v.* Viola Tp., 139 Iowa 61, 117 N. W. 26.

Maine.— Harlow *v.* Young, 37 Me. 88.

Pennsylvania.— Yealy *v.* Fink, 43 Pa. St. 212, 82 Am. Dec. 556.

Wisconsin.— Smith *v.* Gould, 61 Wis. 31, 20 N. W. 369.

See 45 Cent. Dig. tit. "Towns," § 55.

34. Yealy *v.* Fink, 43 Pa. St. 212, 82 Am. Dec. 556.

35. Waters *v.* Waterman, 2 Root (Conn.) 214; Revere Water Co. *v.* Winthrop, 192 Mass. 455, 78 N. E. 497; Troy *v.* Aiken, 46 Vt. 55.

36. Revolving Scraper Co. *v.* Tuttle, 61 Iowa 423, 16 N. W. 353, 47 Am. Rep. 816; Baker *v.* Thayer, 3 Metc. (Mass.) 312.

37. Township *v.* Blackwell, 4 Lanc. L. Rev. (Pa.) 330.

38. Nickerson *v.* Dyer, 105 Mass. 320.

39. Hatch *v.* Attleborough, 97 Mass. 533; Langdon *v.* Chartiers Tp., 131 Pa. St. 77, 18 Atl. 930.

40. Butt *v.* Jennings School Tp., 81 Ind. 69, holding that where a township trustee failed to receive credit for a sum paid out by him because his accounts were not properly kept he could not afterward maintain suit for the amount.

Method of keeping accounts need not conform to custom, nor demands of clerk, if reasonable in itself. Stoddard *v.* Giasson, 120 Mich. 91, 78 N. W. 1016.

41. People *v.* Welbrook, 27 Hun (N. Y.) 598; *In re* Plains Tp., 15 Pa. Co. Ct. 408; State *v.* Brattleboro, 68 Vt. 520, 35 Atl. 472.

A dispute as to the settlement may be adjusted at a town meeting. Springer *v.* Logan Tp., 58 N. J. L. 588, 33 Atl. 952.

In Pennsylvania auditors may settle the unsettled accounts of a collector for any previous year. Bomboy's Appeal, 9 Kulp 373.

42. **This includes** loans paid into the treasury (Todd *v.* Patterson, 55 Pa. St. 496), an appropriation by the county paid to him without warrant of law (Remington *v.* Ward, 78 Wis. 539, 47 N. W. 659), and moneys collected without statutory warrant (Cairns *v.* O'Bleness, 40 Wis. 469).

Money received in different capacity.— The town treasurer and his sureties are not liable as such to the town for money received by the treasurer in a different capacity. Hatch *v.* Attloborough, 97 Mass. 533.

Trustees and treasurers are insurers of funds, being not mere bailees, but debtors to the town for the amounts received. Thompson *v.* Township 16 North, 30 Ill. 99; Rowley *v.* Fair, 104 Ind. 189, 3 N. E. 860.

43. Revere Water Co. *v.* Winthrop, 192 Mass. 455, 78 N. E. 497; Monroe Tp. *v.* Whipple, 56 Mich. 516, 23 N. W. 202; Pelham *v.* Shinn, 129 N. Y. App. Div. 20, 113 N. Y. Suppl. 98 [*affirmed* in 194 N. Y. 548, 87 N. E. 1123]; Rolling *v.* Wunderlich, 138 Wis. 667, 120 N. W. 515.

44. Hatch *v.* Attleborough, 97 Mass. 533; Buyck *v.* Buyck, (Minn. 1910) 127 N. W. 452; Annis *v.* McNulty, 51 Misc. (N. Y.) 121, 100 N. Y. Suppl. 951 [*affirmed* in 116 N. Y. App. Div. 909, 101 N. Y. Suppl. 1111]; Todd *v.* Patterson, 55 Pa. St. 496; Harrison Tp.'s Appeal, 20 Pa. Co. Ct. 54.

Where town officers illegally expended money in constructing a public road where no highway existed, so that the town had no title to the road, the town received no benefit from the expenditures, and was not estopped from demanding a return of the money from the town treasurer, who, with knowledge of the facts, and actively participating in the unlawful transaction, paid the money out upon unauthorized town orders. Buyck *v.* Buyck, (Minn. 1910) 127 N. W. 452.

45. Hamburg Borough *v.* Doering, 8 Pa. Dist. 131; Wissler *v.* East Hempfield Tp., 1 Lanc. Bar (Pa.) Nov. 27, 1869.

Account stated.—A general account of the selectmen, including receipts and disbursements in a special matter, but not in detail, which is presented to a town meeting, but withdrawn and not placed on file, cannot be considered an account stated. Chatham *v.* Niles, 36 Conn. 403.

A conditional settlement may be corrected before filing (Com. *v.* Allis, 19 Pa. Super. Ct. 130), and also a settlement made "subject to revision" (Middletown Tp. *v.* Miles, 61 Pa. St. 290).

46. See *infra*, III, D, 14, b.

47. State *v.* Mock, 21 Ind. App. 629, 52 N. E. 998.

48. Adams *v.* Farnsworth, 15 Gray (Mass.)

b. Appeal From Settlement With Auditors. The settlement with township auditors required by the Pennsylvania statute of all township fiscal officers may be appealed from within thirty days [49] by either the officer or a taxpayer to the court of common pleas,[50] but not to the supreme court.[51]

c. Settlement With Successor. The funds received by a town fiscal officer are held by him in a fiduciary capacity,[52] and should be kept separate and distinct, and as such turned over by him or his personal representative to his successor.[53] The retiring officer is not absolved from liability to the town by his successor's falsely charging himself with funds not paid over,[54] nor by his successor's acceptance of his note in lieu of cash,[55] unless such settlement is authorized or ratified by the town.[56] The incoming treasurer has authority to maintain an action against his predecessor for town funds,[57] and is himself chargeable with all moneys for which he has given a receipt,[58] but not for money charged to him without his knowledge in a settlement made by his deputy where such money has never been paid over by his successor.[59]

d. Actions For Official Default or Delinquency. Unless otherwise directed by statute,[60] actions to recover public moneys or property must be brought in the name of the corporation,[61] and it has been held that such actions may be in debt,[62] or in assumpsit for money had and received,[63] and that they are governed by the usual rules of pleading,[64] and subject to the usual defenses.[65] Mandamus is the proper proceeding to compel official accounting; [66] and a petition for removal of an officer for official delinquency is not barred by previous dismissal of similar application.[67] The treasurer's books and accounts are admissible in evidence,[68] and also the oral testimony of the outgoing and incoming treasurers,[69] and of other officials who examine the accounts or participate in the settlement; [70] and it has been held that such a suit against the officer opens up the entire account and permits him to introduce evidence of other errors to balance those claimed by the town.[71]

423 (holding, however, that in an action brought by a town against its treasurer to recover sums not included in his account, he may show other errors in the account tending to balance the omission, without pleading them in his answer or in set-off); Boardman Tp. *v.* Flagg, 70 Mich. 372, 38 N. W. 284.

49. The thirty days are computed by excluding the day of settlement, and if the last day falls on Sunday, the next day will be in time. McCready *v.* McGovern, 1 Kulp (Pa.) 474. And see Shippen Tp. *v.* Burlingame, 7 Pa. Cas. 258, 11 Atl. 547.

50. Lower Merion Tp. *v.* Cline, 211 Pa. St. 559, 61 Atl. 77; *In re* Plains Tp. Audit, 15 Pa. Co. Ct. 408, 7 Kulp 406.

From auditor's report on a school-district treasurer's account, no appeal lies to the court of common pleas. Mohney *v.* Red Bank Tp. School-Dist., (Pa. 1888) 15 Atl. 891.

51. Thomas *v.* Upper Merion Tp., 148 Pa. St. 116, 23 Atl. 986.

52. Wendell *v.* Pierce, 13 N. H. 502.

53. Rowley *v.* Fair, 104 Ind. 189, 3 N. E. 860.

54. State *v.* Haynes, 79 Ind. 294.

55. Madison Tp. *v.* Dunkle, 114 Ind. 262, 16 N. E. 593.

56. Murphy *v.* Oren, 121 Ind. 59, 22 N. E. 739.

57. Victory *v.* Blood, 25 Hun (N. Y.) 515.

58. Rice *v.* Sidney Tp., 44 Mich. 37, 5 N. W. 1070, 38 Am. Rep. 227.

59. Rice *v.* Sidney Tp., 44 Mich. 37, 5 N. W. 1070, 38 Am. Rep. 227.

60. Taylor *v.* Gurnee, 26 Hun (N. Y.) 624, in which action was directed by statute to be brought in the name of successor.

61. Hagadorn *v.* Raux, 72 N. Y. 583; Guilford *v.* Cooley, 58 N. Y. 116.

62. Sanford School Dist. No. 2 *v.* Tebbetts, 67 Me. 239.

63. Adams *v.* Farnsworth, 15 Gray (Mass.) 423.

64. McCrea *v.* Chahoon, 54 Hun (N. Y.) 577, 8 N. Y. Suppl. 88.

65. The consent of an officer to the issue of a warrant against him to collect moneys due does not estop him from showing that the warrant issued is illegal. Bringard *v.* Stellwagen, 41 Mich. 54, 1 N. W. 909.

Town is not estopped by settlement with board. Boardman Tp. *v.* Flagg, 70 Mich. 372, 38 N. W. 284. *Compare* Buyck *v.* Buyck, (Minn. 1910) 127 N. W. 452.

66. Guilford *v.* Cooley, 58 N. Y. 116.

67. People *v.* Eddy, 3 Lans. (N. Y.) 80.

68. Otsego Lake Tp. *v.* Kirsten, 72 Mich. 1, 40 N. W. 26, 16 Am. St. Rep. 524; Ontario *v.* Hill, 11 N. Y. Suppl. 641.

69. Ontario *v.* Hill, 11 N. Y. Suppl. 641.

70. Otsego Lake Tp. *v.* Kirsten, 72 Mich. 1, 40 N. W. 26, 16 Am. St. Rep. 524.

71. Adams *v.* Farnsworth, 15 Gray (Mass.) 423. But see Ross *v.* State, 131 Ind. 548, 30

15. Liabilities on Official Bonds — a. In General. Town and township officers are not mere bailees of public funds, but hold the legal title to such funds,[72] and, together with the sureties on their official bonds, are absolutely liable to account for all sums received by them in virtue of their office.[73] Sureties have accordingly been held liable for failure of the principal to account for all public moneys received by him during his term of office, even before the date of the bond;[74] for those received or disbursed after the expiration of his term, but before his successor was elected and qualified;[75] for those received during his previous term of office,[76] unless they were shown to have been converted by him during that term;[77] for taxes collected in excess of amount due;[78] for the amount of an official warrant drawn in his favor, although for more than was properly coming to the town under the law;[79] for a sum omitted by mistake from settlement;[80] for money borrowed by him for public use;[81] for moneys lost by theft,[82] bank insolvency,[83] or loans to individuals without authority,[84] or paid to the wrong officer,[85] or out of one fund on a claim against another fund,[86] and for shortage of his predecessor which he has not taken steps required of him by law to collect;[87] but his sureties are not liable for moneys not pertaining to the officer's office voluntarily received by him,[88] for moneys not belonging to his office but ordered by mistake to be paid to him,[89] for his failure to pay to his assignee his salary,[90] for moneys retained to reimburse himself for lawful advances,[91] for lawful credits omitted in settlement,[92] for township paper issued without consideration,[93] nor for breach of bond not required by law.[94] Formal approval of a bond is not essential to its validity;[95]

N. E. 702, holding the officer's oral testimony as to additional sums paid out not admissible unless preceded by exhibition of accounts and vouchers for such sums.

72. Inglis *v.* State, 61 Ind. 212; Rock *v.* Stinger, 36 Ind. 346; Morbeck *v.* State, 28 Ind. 86; Halbert *v.* State, 22 Ind. 125; Omro *v.* Kaime, 39 Wis. 468.

73. Purcell *v.* Bear Creek, 138 Ill. 524, 28 N. E. 1085; Swift *v.* School Trustees, 91 Ill. App. 221 [*affirmed* in 189 Ill. 584, 60 N. E. 44]; Sutherland *v.* Carr, 85 N. Y. 105; Cairns *v.* O'Bleness, 40 Wis. 469.

74. Hatch *v.* Attleborough, 97 Mass. 533.

75. Township No. 23 School Trustees *v.* Cowden, 240 Ill. 39, 88 N. E. 285 [*affirming* 143 Ill. App. 241]; State *v.* Berg, 50 Ind. 496. But see Norridgewock *v.* Hale, 80 Me. 362, 14 Atl. 943, holding sureties not liable for misappropriation of funds by officer after expiration of his term and before qualification of his successor, although the bond was conditioned for liability "until another is chosen and sworn in his stead," such stipulation not being authorized by statute.

76. Morley *v.* Metamora, 78 Ill. 394, 20 Am. Rep. 266; Kagay *v.* Township 8 School Trustees, 68 Ill. 75; Egremont *v.* Benjamin, 125 Mass. 15 (holding that credits for sums paid out by the officer during the term for which the bond is given will be applied as against a balance due him from a former term, although he has previously converted such balance to his own use); Wilson *v.* Elizabeth School Directors, 2 Am. L. Reg. N. S. (Ohio) 123; Com. *v.* Comer, 2 Leg. Rec. (Pa.) 334.

77. Kagay *v.* Township 8 School Trustees, 68 Ill. 75; Goodwine *v.* State, 81 Ind. 109 (holding that where a township trustee who was his own successor paid to himself as trustee the amount of a default which occurred during the first term, such payment discharged the sureties on his bond at the time of the default from liability therefor; and for a new default the sureties on his new bond were liable); Rochester *v.* Randall, 105 Mass. 295, 7 Am. Rep. 519; Paw Paw Tp. *v.* Eggleston, 25 Mich. 36.

78. Bullwinkel *v.* Guttenberg, 17 Wis. 583.

79. Stahl *v.* O'Malley, 39 Wis. 328.

80. Whitlow *v.* Township No. 11 School Trustees, 191 Ill. 457, 61 N. E. 386; Farmington *v.* Stanley, 60 Me. 472.

81. Killian *v.* State, 15 Ind. App. 261, 43 N. E. 955.

82. Morbeck *v.* State, 28 Ind. 86; Halbert *v.* State, 22 Ind. 125.

83. Swift *v.* School Trustees, 189 Ill. 584, 60 N. E. 44; Inglis *v.* State, 61 Ind. 212; Omro *v.* Kaime, 39 Wis. 468.

84. Rock *v.* Stinger, 36 Ind. 346.

85. Purcell *v.* Bear Creek, 138 Ill. 524, 28 N. E. 1085 [*affirming* 39 Ill. App. 499].

86. Robinson *v.* State, 60 Ind. 26; Wellington *v.* Lawrence, 73 Me. 125.

87. State *v.* Mock, 21 Ind. App. 629, 52 N. E. 998.

88. People *v.* Pennock, 60 N. Y. 421 [*reversing* 1 Thomps. & C. 209].

89. People *v.* Pennock, 60 N. Y. 421 [*reversing* 1 Thomps. & C. 209].

90. State *v.* Keifer, 120 Ind. 113, 22 N. E. 107.

91. State *v.* Parker, 33 Ind. 285.

92. School Trustees *v.* Peak, 43 Ill. App. 50.

93. Grimsley *v.* State, 116 Ind. 130, 17 N. E. 928; State *v.* Brown, 112 Ind. 600, 14 N. E. 487; State *v.* Hawes, 112 Ind. 323, 14 N. E. 87.

94. Stevens *v.* Hay, 6 Cush. (Mass.) 229.

95. Ashkum *v.* Lake, 12 Ill. App. 25; Omro *v.* Kaime, 39 Wis. 468.

nor does misrepresentation by the principal release the sureties;[96] nor can they unsettle his liquidated accounts except for fraud or mistake.[97] The sureties have been held liable on a bond given to an individual obligee, described as "town clerk," with penalty payable to "the said town clerk or his successor in office," [98] but not on a bond executed to the state instead of to the town.[99] Under Indiana statutes the courts have ruled that sureties are liable for conversion by the officer for public money loaned by him on a note payable to himself;[1] but not for money used by him in his own business,[2] unless he fails to account for it or pay it over at the end of his term.[3] For unlawful contracts made by the officer,[4] or his failure to make annual report [5] or other delinquency, the sureties are liable only for actual damages sustained by the town, unless an additional penalty is imposed by statute.[6]

b. Actions on Bonds — (I) *PARTIES.* As a general rule actions for breach of town official bonds must be brought in the name of the town;[7] but in some states they are brought in the name of the state upon the relation of the town,[8] and wherever the authority to sue is vested by statute in a particular officer the suit must be in his name,[9] or upon his relation.[10] In some cases it has been held that suit is properly brought in the name of the officer to whom the bond was executed, or in that of his successor,[11] or even in the name of the official custodian of the funds sued for.[12] Suit may be brought upon the relation of an officer in his joint capacity as trustee of a civil and of a school township for money belonging to one fund applied to the use of the other;[13] but in a suit brought by him in one capacity, he cannot recover funds belonging to him in the other.[14] A mere taxpayer occupying no official position is not competent to bring suit on an official bond.[15]

(II) *PLEADING.* Complaints have been held fatally defective for want of specific allegation of fact showing breach of bond,[16] and in actions for failure to pay over, for want of allegation of expiration of term and election of successor;[17] but a single count has been held sufficient to cover funds of civil and school townships, both of which were covered by a single bond,[18] and allegations in different paragraphs of the same complaint will be read together.[19] In reply to an answer claiming settlement with successor, fraud in such settlement is not sufficiently alleged in a statement that defendant did not in fact pay over the money to his successor, but fraudulently procured the latter to charge himself with it on promise of immediate reimbursement.[20]

(III) *DEFENSES.* Among the defenses that have been held insufficient to

96. Ladd *v.* Township No. 41, 80 Ill. 233.

97. Township No. 23 School Trustees *v.* Cowden, 240 Ill. 39, 88 N. E. 285 [*affirming* 143 Ill. App. 241]; Orneville *v.* Pearson, 61 Me. 552.

98. La Grange *v.* Chapman, 11 Mich. 499.

99. Sutherland *v.* Carr, 85 N. Y. 105.

1. Robbins *v.* Dishon, 19 Ind. 204.

2. Brown *v.* State, 78 Ind. 239.

3. Harvey *v.* State, 94 Ind. 159; Bocard *v.* State, 79 Ind. 270.

4. State *v.* Vogel, 117 Ind. 188, 19 N. E. 773; Stanton *v.* Shipley, 27 Fed. 498.

5. Bocard *v.* State, 79 Ind. 270.

6. Brown *v.* State, 78 Ind. 239.

7. Salem Tp. *v.* Cunningham, 45 Mo. App. 614.

Bond to supervisors and successors may be sued on in name of town. Platteville *v.* Hooper, 63 Wis. 385, 23 N. W. 583; Platteville *v.* Hooper, 63 Wis. 381, 23 N. W. 581.

A bond payable to the "people of the state" may not be sued on in the name of the town. La Grange *v.* Chapman, 11 Mich. 499.

8. State *v.* Wilson, 113 Ind. 501, 15 N. E. 596.

9. Palmer *v.* Roods, 116 N. Y. App. Div. 66, 101 N. Y. Suppl. 186.

Need not be officer to whom bond is given. — Sutherland *v.* Carr, 85 N. Y. 105.

10. Robinson *v.* State, 60 Ind. 26; Hawthorn *v.* State, 48 Ind. 464; Steinmetz *v.* State, 47 Ind. 465; Dishon *v.* State, 19 Ind. 255.

11. Berrien County Treasurer *v.* Bunbury, 45 Mich. 79, 7 N. W. 704.

12. Keller *v.* Bare, 62 Iowa 468, 17 N. W. 666.

13. Robinson *v.* State, 60 Ind. 26.

14. Steinmetz *v.* State, 47 Ind. 465.

15. Alvord *v.* Barrett, 16 Wis. 175.

16. Morback *v.* State, 34 Ind. 308; Wolff *v.* Stoddard, 25 Wis. 503; Franklin *v.* Kirby, 25 Wis. 498.

17. Hawthorn *v.* State, 48 Ind. 464.

18. Ross *v.* State, 131 Ind. 548, 30 N. E. 702.

19. La Pointe *v.* O'Malley, 46 Wis. 35, 50 N. W. 521.

20. State *v.* Prather, 44 Ind. 287.

actions on town bonds are: That the township had received a dividend on a claim filed by it in a proceeding to wind up the affairs of an insolvent bank, where its funds had been deposited;[21] that a predecessor from whom money should have been collected was insolvent where no allegation is made of insolvency of his bondsmen;[22] that a township board upon settlement had accepted notes payable at a future day;[23] and that the officer had disposed of the public money otherwise than authorized by law.[24]

(IV) *EVIDENCE.* Official books and vouchers of the officer are competent evidence both for and against his sureties.[25] So a report of an officer showing a shortage is *prima facie* evidence of such shortage in a suit against his sureties on his bond,[26] but it is not conclusive;[27] in the absence of a showing of fraud, however, the report of an officer charging himself with a balance as turned over to him by his predecessor is conclusive in favor of such predecessor and his sureties.[28] Where no claim is made on account of a particular fund, evidence of payments on account of such fund is not admissible;[29] but in an action for conversion of several funds, the amount of each fund actually received and expended is admissible under the general denial.[30] An allegation of the receipt of a sum of money is not sustained by evidence of the receipt of coupons from bonds.[31]

16. CRIMINAL RESPONSIBILITY. Criminal liability of town officers for official misconduct is wholly regulated by statute,[32] and statutes imposing penalties for failure to account for public funds,[33] and for other acts or negligence,[34] are construed strictly,[35] yet with a view to effectuating the intent of the legislature.[36] Indictments for such offenses must of course aver the particular acts which are alleged to constitute the offense;[37] and trials will be governed by the ordinary rules of evidence in criminal cases.[38]

IV. PROPERTY, CONTRACTS, AND LIABILITIES.[39]

A. Property — 1. ACQUISITION AND TITLE. A town may, in its corporate capacity, acquire title in fee to real property for public purposes,[40] such as

21. Rose *v.* Douglass Tp., 52 Kan. 451, 34 Pac. 1046, 39 Am. St. Rep. 354.

22. State *v.* Mock, 21 Ind. App. 629, 52 N. E. 998.

23. Otsego Lake Tp. *v.* Kirsten, 72 Mich. 1, 40 N. W. 26, 16 Am. St. Rep. 524.

24. Swift *v.* Sangamon County School Trustees, 189 Ill. 584, 60 N. E. 44, 91 Ill. App. 221.

25. School Trustees *v.* Peak, 43 Ill. App. 50; Union *v.* Bermes, 44 N. J. L. 269, 43 Am. Rep. 369.

26. Osborne *v.* State, 128 Ind. 129, 27 N. E. 345.

27. Nichols *v.* State, 65 Ind. 512. But see State *v.* Grammer, 29 Ind. 530, holding that a report made by an officer showing a certain amount on hand just before the bond in suit was given is conclusive as against his sureties.

28. State *v.* Prather, 44 Ind. 287.

29. Robinson *v.* State, 60 Ind. 26.

30. Searcy *v.* State, 93 Ind. 556.

31. Humiston *v.* School Trustees, 7 Ill. App. 122.

32. See *infra*, notes 33, 38.

33. Johnson *v.* People, 123 Ill. 624, 15 N. E. 37.

34. Baysinger *v.* People, 115 Ill. 419, 5 N. E. 375.

35. State *v.* York, 135 Iowa 529, 113 N. W. 324.

36. Johnson *v.* People, 123 Ill. 624, 15 N. E. 37 (holding that upon trial of officers for withholding public funds it is not necessary to prove that he had received the funds during his last term of office); Baysinger *v.* People, 115 Ill. 419, 5 N. E. 375.

Statute forbidding an officer to be a party to a contract with the town is violated by the officer's furnishing labor to the town from which a contract to pay may be implied. State *v.* York, 135 Iowa 529, 113 N. W. 324.

Refusal to appiont an agent is made out by proof that the rules governing agents appointed by the selectmen were wilfully made so stringent as to defeat the object of the law directing their appointment. Backman *v.* Charlestown, 42 N. H. 125.

37. People *v.* Castleton Town Auditors, 44 How. Pr. (N. Y.) 238.

38. Indictment for unlawfully creating a town debt need not state the consideration for the debt, and on the trial a certificate of indebtedness issued by defendant is admissible, and it need not be shown that the debt was valid. Duty *v.* State, 9 Ind. App. 595, 36 N. E. 655.

39. Authority of town officer: As to school property see SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 920 *et seq.* For duties, powers, and liabilities respecting bridges see BRIDGES, 5 Cyc. 1056. Respecting fisheries see FISH AND GAME, 19 Cyc. 1004. Respecting highways see STREETS AND HIGHWAYS, 37 Cyc. 1.

40. North Hempstead *v.* Hempstead, 2 Wend. (N. Y.) 109.

parks,[41] commons,[42] and sites for public buildings;[43] and it may also acquire title to coast lands and fishing rights;[44] but as a general rule it has only an easement, and not the fee, in land acquired for a public highway.[45] Title by prescription or adverse possession may be acquired by the town through acts or possession in its corporate capacity,[46] but it is not established by mere acts or possession of its officers and inhabitants, without corporate authority.[47] Within the scope of its corporate powers, a town may also acquire title to personal property.[48] So a town may in its corporate capacity hold property in trust, subject to the usual requirements as to certainty of the beneficiaries,[49] and of the objects for which it is to be used;[50] but it has been held that in the absence of statute a town clerk cannot *ex officio* hold property in trust.[51] Where the manner of acquiring property is prescribed by statute, substantial compliance with the terms of the act is necessary,[52] and sufficient[53] to the validity of title.

2. Leases. Power on behalf of the town to purchase land includes the power to lease.[54] Selectmen or other officials have no authority, by virtue of their office,[55] to execute leases, but may be given such authority by statute,[56] or by vote of the town;[57] and a vote of the town recorded by the clerk is a sufficient compliance with the statute of frauds.[58] A valid lease by one board binds its successors,[59] but an invalid lease is not ratified by electing the lessee to office.[60]

3. Regulation and Improvement. A town may, by vote duly taken at a town meeting, provide for the improvement and regulate the use of its property,[61] or delegate such power to its officers;[62] but it may not impose penalties for trespass beyond the authority granted by statute.[63]

4. Public Buildings. A town has authority, under its general powers, either

A town may hold property either in its corporate capacity as an ordinary proprietor, or solely for the public use. People *v.* Doxsee, 136 N. Y. App. Div. 400.

Whether it can devote to a private use any part of its property, even temporarily, depends entirely upon the capacity in which it holds title. People *v.* Doxsee, 136 N. Y. App. Div. 400.

41. **May own park in incorporated village** within the town. Atty.-Gen. *v.* Burrell, 31 Mich. 25.

42. Beach *v.* Haynes, 12 Vt. 15.

43. Bergen *v.* Gubna, 10 Hun (N. Y.) 11. See *infra*, IV, A, 4.

44. Rogers *v.* Jones, 1 Wend. (N. Y.) 237, 19 Am. Dec. 493.

Action of county board of supervisors in fixing boundary line does not affect title of town to land acquired by special grant. People *v.* Saxton, 15 N. Y. App. Div. 263, 44 N. Y. Suppl. 211 [*affirmed* in 154 N. Y. 748, 49 N. E. 1102].

45. Millbury *v.* Blackstone Canal Co., 8 Pick. (Mass.) 473.

46. Boothe *v.* Coventry, 4 Vt. 295.

47. Jeffries Neck Pasture *v.* Ipswich, 153 Mass. 42, 26 N. E. 239.

48. Washington *v.* Eames, 6 Allen (Mass.) 417; Lyndon *v.* Belden, 14 Vt. 423.

49. **Proviso in a conveyance to individuals** reserving certain rights to inhabitants of the town generally is void for uncertainty. Hornbeck *v.* Westbrook, 9 Johns. (N. Y.) 73.

50. **May take and administer funds for benefit of widows.**— Lovell *v.* Charlestown, 66 N. H. 584, 32 Atl. 160.

For support of religion.— Atty.-Gen. *v.* Dublin, 38 N. H. 459.

51. St. Albans Treasurer *v.* Gibbs, Brayt. (Vt.) 76.

52. Atty.-Gen. *v.* Burrell, 31 Mich. 25.

53. Lynch *v.* Forbes, 161 Mass. 302, 37 N. E. 437, 42 Am. St. Rep. 402; Rolling *v.* Wunderlich, 138 Wis. 667, 120 N. W. 515.

54. Beaver Dam *v.* Frings, 17 Wis. 398.

Trustees of a town holding title to docks and bulkheads purchased by the town under a statute which provides that they shall be held for the public use have no authority to lease a portion of the dock to a private corporation to be used for business purposes even though the remaining dock space be sufficient for the present needs of the public. People *v.* Doxsee, 136 N. Y. App. Div. 400, 120 N. Y. Suppl. 962 [*reversing* 121 N. Y. Suppl. 815].

55. Goff *v.* Rehoboth, 12 Metc. (Mass.) 26.

56. Beaver Dam *v.* Frings, 17 Wis. 398.

57. North Hempstead *v.* Gallagher, 21 Misc. (N. Y.) 508, 47 N. Y. Suppl. 225.

58. Marden *v.* Champlin, 17 R. I. 423, 22 Atl. 938.

59. Marden *v.* Champlin, 17 R. I. 423, 22 Atl. 938.

60. Wenk *v.* New York, 82 N. Y. App. Div. 584, 81 N. Y. Suppl. 583.

61. Contoocook Fire Precinct *v.* Hopkinton, 71 N. H. 574, 53 Atl. 797; People *v.* Works, 7 Wend. (N. Y.) 486; Rogers *v.* Jones, 1 Wend. (N. Y.) 237, 19 Am. Dec. 493.

62. Willard *v.* Newburyport, 12 Pick. (Mass.) 227.

63. Foster *v.* Rhoads, 19 Johns. (N. Y.) 191.

to erect a town hall,[64] or to lease quarters for use as such; [65] and it may exercise such power either through its governing board,[66] or through a special committee appointed for the purpose.[67] It may also have power to erect schoolhouses [68] and poorhouses,[69] and other needful public buildings; and the early New England towns frequently erected and owned houses of public worship.[70]

5. Disposition of Property. Within the limitations prescribed by statute,[71] a town may dispose of its property by grant, or may authorize sale and conveyance by the town board,[72] or by a special officer or committee appointed for the purpose.[73] A conveyance, to be valid, must be made in the manner prescribed by statute [74] or local ordinance, and by the proper officer or officers,[75] if acting in the proper capacity,[76] and within the time authorized.[77] A grant to a private person for a purpose of public conveyance will be construed liberally; [78] but title may be conveyed subject to restrictions,[79] and a grant of the rights and privileges of real estate on certain conditions has been construed not to convey the fee, but only a lease for an indeterminate period.[80] In case of a void contract of sale, a court of equity may grant suitable relief to both parties.[81]

6. Releases. A town, by vote of a majority of the electors, may release a doubtful claim,[82] or part of a debt by way of compromise,[83] but not an admitted debt by way of gratuity against the dissent of a minority.[84] The selectmen, or other officials constituting the governing board of a town or township,[85] have

64. White *v.* Stamford, 37 Conn. 578; Beaver Dam *v.* Frings, 17 Wis. 398.

65. New London Tp. *v.* Miner, 26 Ohio St. 452; Beaver Dam *v.* Frings, 17 Wis. 398.

66. State *v.* Haynes, 72 Mo. 377.

67. Drew *v.* West Orange Tp., 64 N. J. L. 481, 45 Atl. 787.

Committee may be increased after appointment. Damon *v.* Granby, 2 Pick. (Mass.) 345.

68. See Schools and School-Districts, 35 Cyc. 925 *et seq.*

69. See Paupers, 30 Cyc. 1075.

70. Fisher *v.* Glover, 4 N. H. 180.

71. Thomas *v.* Marshfield, 10 Pick. (Mass.) 364.

Glebe lands in Vermont are not subject to sale, but only to lease. Lampson *v.* New Haven, 2 Vt. 14; Bush *v.* Whitney, 1 D. Chipm. (Vt.) 369.

Law reports, statutes, and other public books and documents distributed by law to the several towns are held for public use and cannot be disposed of. Litchfield *v.* Parker, 64 N. H. 443, 14 Atl. 725.

72. **Town board has no authority** to sell or convey real estate of the town without special authority given by statute or town meeting. New York *v.* Brooklyn, etc., R. Co., 98 N. Y. App. Div. 201, 90 N. Y. Suppl. 695.

Power conferred upon selectmen may be limited to those then in office (Littlefield *v.* Boston, etc., R. Co., 146 Mass. 268, 15 N. E. 648), or may authorize action by their successors (Lumbard *v.* Trask, 9 Metc. (Mass.) 557).

Cash payment is not required by a general order of sale. Mt. Morris *v.* King, 8 N. Y. App. Div. 495, 40 N. Y. Suppl. 709 [*affirmed* in 158 N. Y. 450, 53 N. E. 214].

An ancient deed is sustained by slight record proof of authority. Hunt *v.* Johnson, 19 N. Y. 279.

73. See *infra*, notes 74, 81.

74. Argyle *v.* Dwinel, 29 Me. 29; Furey *v.* Gravesend, 38 Hun (N. Y.) 319.

Deed failing to recite statutory authority and consent of inhabitants of the town has been held invalid under New York statutes. Raquette Falls Land Co. *v.* Buyce, 108 N. Y. App. Div. 67, 95 N. Y. Suppl. 381.

Invalid grant may be confirmed by subsequent statute. Chatham *v.* Brainerd, 11 Conn. 60.

75. Monson *v.* Tripp, 81 Me. 24, 16 Atl. 327, 10 Am. St. Rep. 235 (holding that a town treasurer has no authority to convey real estate on behalf of the town unless expressly authorized by vote); Merrill *v.* Burbank, 23 Me. 538 (holding that if a levy be made by virtue of an execution in favor of "Hardy Merrill . . . treasurer of said town of Parsonsfield," his successor in the office of treasurer, without any special authority from H M or the town, cannot by his deed transfer title to the land levied on); Cofran *v.* Cockran, 5 N. H. 458.

Authority to sell implies authority to convey. Nobleboro *v.* Clark, 68 Me. 87, 28 Am. Rep. 22.

76. Warren *v.* Stetson, 30 Me. 231.

77. Tilyou *v.* Gravesend, 104 N. Y. 356, 669, 10 N. E. 542, 543.

78. Berry *v.* Raddin, 11 Allen (Mass.) 577.

79. Bushnel *v.* Whitlock, 77 Iowa 285, 42 N. W. 186.

80. Jackson *v.* Hughes, 1 Blackf. (Ind.) 421.

81. Lampson *v.* New Haven, 2 Vt. 14.

82. Ford *v.* Clough, 8 Me. 334, 23 Am. Dec. 513.

83. Wells *v.* Putnam, 169 Mass. 226, 47 N. E. 1005.

84. Washington Dist. Tp. *v.* Thomas, 59 Iowa 50, 12 N. W. 767; Wells *v.* Putnam, 169 Mass. 226, 47 N. E. 1005.

85. Taylor Dist. Tp. *v.* Morton, 37 Iowa 550.

no authority *ex officio* to release debts [86] or causes of action [87] in favor of the town or township.

B. Contracts — 1. Capacity to Contract in General. A town may enter into valid contracts within the scope of its general corporate functions,[88] or of special authority conferred by statute.[89] But towns will not be bound, even by express vote of the majority, to the performance of contracts not within the scope of the objects and purposes for which they are created,[90] nor authorized by special statute.[91] One, however, who has received benefits under a contract with the town cannot escape payment therefor under a plea that the contract was *ultra vires*.[92]

2. Power of Town Board or Officers to Contract — a. In General. Within the scope of the powers expressly conferred by statute [93] or by vote of the town,[94] and within the scope of such implied powers as may be reasonably necessary and proper for the discharge of functions committed to them,[95] town boards and other town officers may make contracts binding on the town. But they do not possess general authority *ex officio* to contract on behalf of the town,[96] and contracts made by officers beyond the scope of the authority thus defined are absolutely void.[97]

86. Middlebury *v.* Rood, 7 Vt. 125; Angel *v.* Pownal, 3 Vt. 461.

Authority to compromise in general see *infra*, VI, D.

87. Carlton *v.* Bath, 22 N. H. 559.

Authority to compromise suits see *infra*, VII, C.

88. Levis *v.* Black River Imp. Co., 105 Wis. 391, 81 N. W. 669.

It may borrow money. Lovejoy *v.* Foxcroft, 91 Me. 367, 40 Atl. 141.

It may sell surplus products from poor farm, but may not obligate itself by executory contract to furnish a certain quantity of produce, whether raised on the farm or not. Staples *v.* Walmsley, 27 R. I. 181, 61 Atl. 141.

It may subscribe to railroads. Petty *v.* Myers, 49 Ind. 1; Whitesides *v.* Neely, 30 S. C. 31, 8 S. E. 27; Floyd *v.* Perrin, 30 S. C. 1, 8 S. E. 14, 2 L. R. A. 242. And no other consideration than the public benefit is necessary. Paige *v.* Rochester, 137 Fed. 663.

89. Bronx Gas, etc., Co. *v.* New York, 17 Misc. (N. Y.) 433, 41 N. Y. Suppl. 358.

90. Concord *v.* Delaney, 56 Me. 201; Swift *v.* Falmouth, 167 Mass. 115, 45 N. E. 184; Parsons *v.* Goshen, 11 Pick. (Mass.) 396; Norton *v.* Mansfield, 16 Mass. 48; Stetson *v.* Kempton, 13 Mass. 272, 7 Am. Dec. 145; Wheeler *v.* Alton, 68 N. H. 477, 38 Atl. 208.

91. Fishkill *v.* Fishkill, etc., Plank Road Co., 22 Barb. (N. Y.) 634.

It cannot create new offices without authority. State *v.* Welbes, 129 Wis. 639, 109 N. W. 564.

92. Beloit *v.* Heineman, 128 Wis. 398, 107 N. W. 334.

93. *Maine.*— Kidder *v.* Knox, 48 Me. 551.

New Jersey.— Mason *v.* Cranbury Tp., 68 N. J. L. 149, 52 Atl. 568.

North Dakota.— Park River Bank *v.* Norton, 14 N. D. 143, 104 N. W. 525.

Pennsylvania.— Climax Road Mach. Co. *v.* Corydon Tp., 5 Pa. Dist. 436.

Wisconsin.— Siegel *v.* Liberty, 118 Wis. 599, 95 N. W. 402.

See 45 Cent. Dig. tit. "Towns," § 70.

94. Simonds *v.* Heard, 23 Pick. (Mass.) 120, 34 Am. Dec. 41.

95. *Connecticut.*— Rocky Hill *v.* Hollister, 59 Conn. 434, 22 Atl. 290; Burlington *v.* New Haven, etc., Co., 26 Conn. 51.

Indiana.— Pine Civil Tp. *v.* Huber Mfg. Co., 83 Ind. 121; Clark School Tp. *v.* Grossius, 20 Ind. App. 322, 50 N. E. 771.

Massachusetts.— Farr *v.* Ware, 173 Mass. 403, 53 N. E. 898.

Oklahoma.— Herring Lumber Co. *v.* Hazel Tp., 22 Okla. 102, 97 Pac. 612.

Vermont.— Battles *v.* Braintree, 14 Vt. 348.

See 45 Cent. Dig. tit. "Towns," § 70.

It may buy safe in which to keep the books, papers, etc., of the town. Barnum State Bank *v.* Goodland, 109 Minn. 28, 122 N. W. 468.

Bond taken by township trustee from contractor for fulfilment of contract and payment for materials used and labor employed is within the general scope of his authority. Williams *v.* Markland, 15 Ind. App. 669, 44 N. E. 562.

96. *Indiana.*— Clinton School Tp. *v.* Lebanon Nat. Bank, 18 Ind. App. 42, 47 N. E. 349.

Iowa.— Carpenter *v.* Union Dist. Tp., 58 Iowa 335, 12 N. W. 280.

Maine.— Lovejoy *v.* Foxcroft, 91 Me. 367, 40 Atl. 141.

Massachusetts.— Day *v.* Otis, 8 Allen 477; Haliburton *v.* Frankfort, 14 Mass. 214.

Michigan.— Jenney *v.* Mussey Tp., 121 Mich. 229, 80 N. W. 2.

See 45 Cent. Dig. tit. "Towns," § 70.

97. *Indiana.*— Jay County *v.* Pike Civil Tp., 168 Ind. 535, 81 N. E. 489; Posey Tp. *v.* Senour, 42 Ind. App. 580, 86 N. E. 440; Austin Mfg. Co. *v.* Smithfield Tp., 21 Ind. App. 609, 52 N. E. 1011.

Kansas.— Pleasant View Tp. *v.* Shawgo, 54 Kan. 742, 39 Pac. 704.

Maine.— Richmond *v.* Johnson, 53 Me. 437.

Massachusetts.— Murphy *v.* Clinton, 182 Mass. 198, 65 N. E. 34; Keyes *v.* Westford, 17 Pick. 273.

Authority to contract on behalf of the town,[98] especially in the case of individual[99] or special[1] officers, will be strictly construed; and all persons dealing with town officials are presumed to have notice of their limited authority.[2] Where a contract is authorized to be made by the town board, it is necessary to its validity that it be made at a meeting of the board regularly called, with opportunity for all members to be present.[3] A town is liable for money furnished upon an authorized loan, although it is embezzled by the officer to whom it is paid;[4] but the fact that money or supplies were applied to the use of the town will not validate an unauthorized contract or loan.[5]

b. Contracts by Part of Board. Where discretionary power to contract is conferred upon a town board, or is vested in a certain number of officials,[6] a contract made by an individual[7] or by a smaller number than that prescribed,[8] is invalid; but a majority of the board at a meeting duly called may act for the town in the making of contracts as in other matters,[9] and ministerial authority to direct work under a contract may be delegated to an individual.[10]

3. Making, Requisites, and Validity of Contracts. A town or township contract is complete and binding as soon as a valid proposition by one party is accepted by the other.[11] Compliance with requirements prescribed by statute[12] or local ordinance is essential to the validity of contracts; but in the absence of

New Hampshire.— Wheeler *v.* Alton, 68 N. H. 477, 38 Atl. 208.

New York.— Rockefeller *v.* Taylor, 69 N. Y. App. Div. 176, 74 N. Y. Suppl. 812; Suburban Electric Light Co. *v.* Hempstead, 38 N. Y. App. Div. 355, 56 N. Y. Suppl. 443.

North Carolina.— Paine *v.* Caldwell, 65 N. C. 488.

Pennsylvania.— Brobst *v.* Bright, 8 Watts 124.

Vermont.— Erwin *v.* Richmond, 42 Vt. 557.

See 45 Cent. Dig. tit. "Towns," § 70.

Contract made by officer after expiration of term is void. Everroad *v.* Flatrock Tp., 49 Ind. 451.

Acceptance of illegal order by treasurer is not binding on the term. Goodwin *v.* East Hartford, 70 Conn. 18, 38 Atl. 876.

98. Austin Mfg. Co. *v.* Twin Brooks Tp., 16 S. D. 126, 91 N. W. 470; Hubbard *v.* Williamstown, 66 Wis. 551, 29 N. W. 393.

Where contract is authorized only on petition signed by a certain number of names, the withdrawal of names leaving less than a statutory number at the time the contest is made renders it void. Suburban Electric Light Co. *v.* Hempstead, 38 N. Y. App. Div. 355, 56 N. Y. Suppl. 443.

99. Indiana Trust Co. *v.* Jefferson Tp., 37 Ind. App. 424, 77 N. E. 63.

1. Keyes *v.* Westford, 17 Pick. (Mass.) 273, holding that authority to make one contract does not imply authority to make a second contract for the completion of work unfinished under the first.

2. Indiana Trust Co. *v.* Jefferson Tp., 37 Ind. App. 424, 77 N. E. 63; Austin Mfg. Co. *v.* Smithfield Tp., 21 Ind. App. 609, 52 N. E. 1011; Clinton School Tp. *v.* Lebanon Nat. Bank, 18 Ind. App. 42, 47 N. E. 349; Rockefeller *v.* Taylor, 69 N. Y. App. Div. 176, 74 N. Y. Suppl. 812; Suburban Electric Light Co. *v.* Hempstead, 38 N. Y. App. Div. 355, 56 N. Y. Suppl. 443; McAleer *v.* Angell, 19 R. I. 688, 36 Atl. 588.

3. Lewis *v.* Eagle, 135 Wis. 141, 115 N. W. 361.

4. Lovejoy *v.* Foxcroft, 91 Me. 367, 40 Atl. 141.

5. Austin Mfg. Co. *v.* Smithfield Tp., 21 Ind. App. 609, 52 N. E. 1011; Pierce *v.* Greenfield, 96 Me. 350, 52 Atl. 765.

6. Assent of two supervisors is required in Pennsylvania. Eshleman *v.* Martic Tp., 152 Pa. St. 68, 25 Atl. 178; Union Tp. *v.* Gibboney, 94 Pa. St. 534; Cooper *v.* Lampeter Tp., 8 Watts (Pa.) 125; Brobst *v.* Bright, 8 Watts (Pa.) 124; North Manheim Tp. *v.* Reading, etc., R. Co., 10 Pa. Cas. 261, 14 Atl. 137.

7. Richmond *v.* Johnson, 53 Me. 437; Strafford *v.* Welch, 59 N. H. 46; Hunkins *v.* Johnson, 45 Vt. 131.

8. See *supra*, notes 6, 7.

One selectman is not authorized to sign another's name in his absence and without his express direction. Mason *v.* Bristol, 10 N. H. 36.

9. Beaver Dam *v.* Frings, 17 Wis. 398.

10. White *v.* Ellisburgh, 18 N. Y. App. Div. 514, 45 N. Y. Suppl. 1122.

11. Winterport Water Co. *v.* Winterport, 94 Me. 215, 47 Atl. 142, 1045; Hall *v.* Holden, 116 Mass. 172; Insley *v.* Shepard, 31 Fed. 869.

Vote of the town meeting may be sufficient to establish a contract, without further action by selectmen. Jackman *v.* New Haven, 42 Vt. 591.

No contract unless bid is clearly accepted. — Putnam Foundry, etc., Co. *v.* Barrington, 28 R. I. 422, 67 Atl. 733.

12. Western Wheeled Scraper Co. *v.* Butler Tp., 24 Pa. Super. Ct. 477; Pape *v.* Carlton, 130 Wis. 123, 109 N. W. 968.

Permissive statutory authority to contract by selectmen does not forbid contract through committee. Winterport Water Co. *v.* Winterport, 94 Me. 215, 47 Atl. 142, 1045.

Contract with one not lowest bidder is void. Oliver *v.* Gale, 182 Mass. 39, 64 N. E. 415.

express requirements, no particular method or form is necessary.[13] A valid contract once made may not be rescinded by the town;[14] nor will an improper expenditure of borrowed funds impair the validity of the loan.[15]

4. Unauthorized or Illegal Contracts — a. In General. Where a contract is void because *ultra vires*[16] or illegal,[17] no recovery can be had against the town for benefits received; but it has been held that a third party cannot plead *ultra vires* to action on a contract that has been executed on behalf of the town,[18] and also that the contracting party is entitled to the unexpended balance of a special fund raised and appropriated for the work done.[19] If the contract is void, not because *ultra vires*, but merely because executed by officers beyond the scope of their authority, it is held in some cases that the town is liable to the extent of benefits which the town has received thereunder;[20] but by the great weight of authority, in the absence of ratification by the town,[21] such liability is denied,[22]

13. Farr *v.* Ware, 173 Mass. 403, 53 N. E. 898; Mason *v.* Cranbury Tp., 68 N. J. L. 149, 52 Atl. 568; Putnam *v.* Rubicon, 32 Wis. 498.

Presumption is that officers contracted in the proper capacity (Jackson Tp. *v.* Home Ins. Co., 54 Ind. 184); and in the manner prescribed (Good Roads Mach. Co. *v.* Union Tp., 34 Pa. Super. Ct. 538).

Statutory validity of official action is tested as of the date of the act. Pape *v.* Carlton, 130 Wis. 123, 109 N. W. 968.

Omission of name of county in bond to township is not material. Middletown Tp. *v.* McCormick, 3 N. J. L. 500.

14. Hunneman *v.* Grafton, 10 Metc. (Mass.) 454. But see Thorp *v.* King, 42 Ill. App. 513, holding that the town may revoke authority of officers or agents before contract has been let.

15. Hohl *v.* Westford, 33 Wis. 323.

16. *Indiana.*— Harrison Tp. *v.* McGregor, 67 Ind. 380; Helms *v.* State, 19 Ind. App. 360, 48 N. E. 264.

Kansas.— Pleasant View Tp. *v.* Shawgo, 54 Kan. 742, 39 Pac. 704.

Maine.— Wolcott *v.* Strout, 19 Me. 132.

Massachusetts.— Haliburton *v.* Frankfort, 14 Mass. 214.

New York.— Holroyd *v.* Indian Lake, 85 N. Y. App. Div. 246, 83 N. Y. Suppl. 533 [*affirmed* in 180 N. Y. 318, 73 N. E. 36]; Suburban Electric Light Co. *v.* Hempstead, 38 N. Y. App. Div. 355, 56 N. Y. Suppl. 443.

Pennsylvania.— Pennsylvania Canal Co. *v.* Shirley, etc., Tps., 3 Pa. Cas. 341, 6 Atl. 221.

Wisconsin.— State *v.* Welbes, 129 Wis. 639, 109 N. W. 564.

See 45 Cent. Dig. tit. "Towns," § 73.

The township is not estopped from pleading such defense by having procured a judicial order for execution of contract. Pennsylvania Canal Co. *v.* Shirley, etc., Tps., 3 Pa. Cas. 341, 6 Atl. 221.

17. Boyd *v.* Mill Creek School Tp., 124 Ind. 193, 24 N. E. 661; State *v.* York, 131 Iowa 635, 109 N. W. 122; Beyer *v.* Crandon, 98 Wis. 306, 73 N. W. 771.

In Pennsylvania it has been held that a statute forbidding any officer or agent of a corporation to be interested in the sale or furnishing of any supplies or materials to the corporation he represents applies to township supervisors and forbids a recovery by them for the services of their own teams and also for the services of their minor sons. *In re* Hazle Tp., 6 Kulp 491; *In re* Coxe, 6 Kulp 379. In the later case it is denied that the statute applies to township supervisors, but recovery is denied on the ground of public policy, for the use of the supervisor's own teams, and also for the services of his minor sons unless it appears they received the compensation personally. Funk *v.* Washington Tp., 13 Pa. Co. Ct. 385. But see Anderson's Appeal, 9 Pa. Co. Ct. 567, allowing recovery by the supervisor for the use of his horse and wagon in the service of the township.

18. Electric Plaster Co. *v.* Blue Rapids City Tp., 77 Kan. 580, 96 Pac. 68.

19. French *v.* South Arm Tp., 122 Mich. 593, 81 N. W. 557.

20. Boyd *v.* Black School Tp., 123 Ind. 1, 23 N. E. 862; Helms *v.* State, 19 Ind. App. 360, 48 N. E. 264; Clinton School Tp. *v.* Lebanon Nat. Bank, 18 Ind. App. 42, 47 N. E. 349; Killian *v.* State, 15 Ind. App. 261, 43 N. E. 955; Wrought-Iron Bridge Co. *v.* Utica, 17 Fed. 316.

It may show that property bought without authority was worth less than contract price. Boyd *v.* Black School Tp., 123 Ind. 1, 23 N. E. 862.

21. See *infra*, IV, B, 4, b.

22. *Indiana.*— Moss *v.* Sugar Ridge Tp., 161 Ind. 417, 68 N. E. 896; State *v.* Fountain County, 147 Ind. 235, 46 N. E. 525; Shirts *v.* Noblesville Tp., 122 Ind. 580, 24 N. E. 169; Houston *v.* Clay County, 18 Ind. 396; Peck-Williamson Heating, etc., Co. *v.* Steen School Tp., 30 Ind. App. 637, 66 N. E. 909; Clark School Tp. *v.* Grossius, 20 Ind. App. 322, 50 N. E. 771.

Iowa.— Carpenter *v.* Union Dist. Tp., 58 Iowa 335, 12 N. W. 280.

Kansas.— Salt Creek Tp. *v.* King Iron Bridge, etc., Co., 51 Kan. 520, 33 Pac. 303.

Maine.— Pierce *v.* Greenfield, 96 Me. 350, 52 Atl. 765; Lovejoy *v.* Foxcroft, 91 Me. 367, 40 Atl. 141.

Massachusetts.— Keyes *v.* Westford, 17 Pick. 273.

New York.— People *v.* Ulster County, 93 N. Y. 397; People *v.* Vanderpoel, 35 N. Y. App. Div. 73, 54 N. Y. Suppl. 436; People *v.* Floyd Auditors, 26 N. Y. Suppl. 564.

See 45 Cent. Dig. tit. "Towns," § 73.

as all persons are presumed to have notice of the extent of the authority of public officers.[23]

b. Ratification. While a town cannot, by ratification, give validity to *ultra vires* contracts made by its officers,[24] it may ratify unauthorized contracts within the general scope of its corporate powers.[25] Ratification may be inferred from the acceptance by the town of a report of the unauthorized contract,[26] from the direction to bring suit for its enforcement,[27] and under some circumstances, from acquiescence and acceptance of benefits;[28] but as a general rule, mere acquiescence is insufficient,[29] nor will any action taken by the town without full knowledge of the contract constitute a ratification thereof,[30] nor can there be a ratification of a contract made by an officer not acting in his official capacity as the representative of the town.[31]

5. Implied Contracts. Contracts with a town may be implied upon familiar principles where services are rendered with the expectation of reward induced by actions on the part of the town or its officers.[32] But none will be implied from a mere notice that compensation is expected;[33] nor from receipt of benefits;[34] nor from the existence of a defectively executed express contract;[35] nor from the rendering of services in pursuance of other employment;[36] nor is the town under an implied obligation to refund fees illegally exacted by an officer, but not accounted for to the town.[37]

6. Construction and Operation. Where, from a consideration of both the signatures and the body of a contract executed by town officers, it appears to be made on behalf of the town, it will be construed to be the obligation of the town.[38] In accordance, however, with the general rule of law which distinguishes between the liability of a private agent and that of a public officer or agent,[39] an officer is not personally liable on a contract made by him in his own name on behalf of the town, whether authorized[40] or not,[41] unless the contract clearly indicates an intention to bind him,[42] or personal liability is imposed by statute.[43]

7. Performance, Rescission, or Discharge. Officers have power to waive

23. Pine Civil Tp. *v.* Huber Mfg. Co., 83 Ind. 121.

24. Pierce *v.* Greenfield, 96 Me. 350, 52 Atl. 765; Wolcott *v.* Strout, 19 Me. 132; Wheeler *v.* Alton, 68 N. H. 477, 38 Atl. 208; McAleer *v.* Angell, 19 R. I. 688, 36 Atl. 588.

25. Seward *v.* Revere Water Co., 201 Mass. 453, 87 N. E. 749; Arlington *v.* Cutter, 114 Mass. 344; Earle *v.* Wallingford, 44 Vt. 367.

Officer with authority may ratify act of officer without authority. Topsham *v.* Rogers, 42 Vt. 189.

26. Burlington *v.* New Haven, etc., Co., 26 Conn. 51; Arlington *v.* Peirce, 122 Mass. 270.

27. Rocky Hill *v.* Hollister, 59 Conn. 434, 22 Atl. 290; Melrose *v.* Hiland, 163 Mass. 303, 39 N. E. 1031; Contoocook Fire Precinct *v.* Hopkinton, 71 N. H. 574, 53 Atl. 797.

28. Bruce *v.* Dickey, 116 Ill. 527, 6 N. E. 435; Contoocook Fire Precinct *v.* Hopkinton, 71 N. H. 574, 53 Atl. 797; Mt. Holly *v.* Buswell, 45 Vt. 354.

29. Salt Creek Tp. *v.* King Iron Bridge, etc., Co., 51 Kan. 520, 33 Pac. 303.

Approval by the town of erection of a bridge on certain abutments does not constitute ratification of an unauthorized contract for purchase of the abutments. Hubbard *v.* Williamstown, 66 Wis. 551, 29 N. W. 393.

30. Brown *v.* Melrose, 155 Mass. 587, 30 N. E. 87; Dickinson *v.* Conway, 12 Allen (Mass.) 487.

31. Contoocook Fire Precinct *v.* Hopkinton, 71 N. H. 574, 53 Atl. 797.

32. Langdon *v.* Castleton, 30 Vt. 285.

33. Orcutt *v.* Roxbury, 17 Vt. 524.

34. Knowlton *v.* Plantation No. 4, 14 Me. 20.

35. Fullam *v.* West Brookfield, 9 Allen (Mass.) 1.

36. Clark *v.* West Bloomfield Tp., 154 Mich. 249, 117 N. W. 638.

37. Godkin *v.* Doyle Tp., 143 Mich. 236, 106 N. W. 882.

38. Cutler *v.* Ashland, 121 Mass. 588; St. Peter's Episcopal Church *v.* Varian, 28 Barb. (N. Y.) 644.

39. See Officers, 29 Cyc. 1446.

40. Cutler *v.* Ashland, 121 Mass. 588; Knight *v.* Clark, 48 N. J. L. 22, 2 Atl. 780, 57 Am. Rep. 534; Woodbridge Tp. *v.* Hall, 47 N. J. L. 388, 1 Atl. 492.

41. Houston *v.* Clay County, 18 Ind. 396; Spafford *v.* Norwich, 71 Vt. 78, 42 Atl. 970; Leet *v.* Shedd, 42 Vt. 277.

42. Revolving Scraper Co. *v.* Tuttle, 61 Iowa 423, 16 N. W. 353, 47 Am. Rep. 816 (holding that an order to ship "to us . . . nine . . . scrapers . . . for which the undersigned agree to pay you," signed by A, B, and C, as township trustees, binds them individually); Fullam *v.* West Brookfield, 9 Allen (Mass.) 1.

43. Declaration in action under statute must state facts sufficient to bring case

terms and specifications in contracts which they had original authority to make,[44] but not in other contracts.[45] The right to rescind a contract with the town can be exercised only by the town itself or authorized officials,[46] and not by mere citizens and taxpayers.[47] Contracts existing between towns for the maintenance of bridges over a river separating them are discharged by the division of the towns concerned.[48]

C. Liabilities — 1. Town Expenses and Charges and Liabilities in General. A town is liable for all expenses and charges imposed upon it by statute [49] or local ordinance,[50] or incurred by officials acting within the scope of their authority,[51] including costs and attorney's fees in suits by and against the town,[52] and money paid for use by one secondarily liable;[53] and a town or corporate board will be liable for the debts of its predecessor;[54] but a town is not liable for money paid out or services rendered in its behalf by mere volunteers,[55] even though requested by officials acting beyond their authority;[56] nor for services rendered under other employment;[57] nor for expenses of officials beyond their authority,[58] or not reasonably necessary for the discharge of their duties;[59] nor is a township liable in one capacity for expenses properly chargeable to it in another capacity.[60]

2. Torts — a. In General.[61] Towns and townships, being involuntarily quasi-municipal corporations, are not liable for injuries to private individuals

within the statute. Indiana *v.* Glover, 155 U. S. 513, 15 S. Ct. 186, 39 L. ed. 243.

44. Colby *v.* Franklin, 15 Wis. 311.

45. Good Roads Mach. Co. *v.* Union Tp., 34 Pa. Super. Ct. 538.

46. Seward *v.* Revere Water Co., 201 Mass. 453, 87 N. E. 749.

47. Seward *v.* Revere Water Co., 201 Mass. 453, 87 N. E. 749.

48. Pembroke *v.* Duxbury, 1 Pick. (Mass.) 199.

49. People *v.* Little Valley Bd. of Auditors, 75 N. Y. 316, holding, however, that a statute declaring that judgments "against town officers, in actions prosecuted by or against them in their name of office, shall be a town charge," includes only judgments against officers for actions within the scope of their authority.

Officers' fees.— People *v.* Clinton, 28 N. Y. App. Div. 478, 51 N. Y. Suppl. 115.

Election expenses.— Center Tp. *v.* Gilmore, 31 Kan. 675, 3 Pac. 291; North Towanda *v.* Bradford County, 2 Pa. Dist. 517.

Support of prisoners.— Norwich *v.* Hyde, 7 Conn. 529; Jay *v.* Gray, 57 Me. 345. See State *v.* Hollis, 59 N. H. 390. And see Prisons, 32 Cyc. 352 *et seq.*

Support of pauper.— Haddam *v.* East Lyme, 54 Conn. 34, 5 Atl. 368 (holding that the question as to which of three towns is liable for the support of a pauper cannot be submitted to arbitration by a selectman from each of the three towns); Lewiston *v.* Fairfield, 47 Me. 481 (holding that the town of legal residence is not liable for support of a boy committed to the reform school from another town under a void process). And see Paupers, 30 Cyc. 1128, 1149.

Liability for support of insane persons see Insane Persons, 22 Cyc. 1164 *et seq.*

Statute granting authority to assume certain liability does not impose such liability until assumed by the town. Langdon *v.* Chartiers Tp., 131 Pa. St. 77, 18 Atl. 930; Chartiers Tp. *v.* Langdon, 114 Pa. St. 541, 7 Atl. 84; *In re* Abolishing of School Dists., 27 R. I. 598, 65 Atl. 302.

50. Cochran *v.* Camden, 15 Mass. 296.

51. Nelson *v.* Milford, 7 Pick. (Mass.) 18; Wilkinson *v.* Albany, 28 N. H. 9.

52. Wells *v.* Whittaker, 4 Ill. App. 381; Bancroft *v.* Lynnfield, 18 Pick. (Mass.) 566, 29 Am. Dec. 623; Briggs *v.* Whipple, 6 Vt. 95.

Power of town to assume expenses of suit against officers see *infra*, V, A, 1.

53. People *v.* Porter, etc., Tps., 18 Mich. 101.

Only actual amount due may be recovered and not necessarily amount paid out. Wilton *v.* Weston, 48 Conn. 325.

54. Little *v.* Union Tp. Committee, 40 N. J. L. 397.

55. Estey *v.* Westminster, 97 Mass. 324; State *v.* Mt. Pleasant, 16 Wis. 613.

56. Haliburton *v.* Frankfort, 14 Mass. 214; Wilkinson *v.* Albany, 28 N. H. 9; Spafford *v.* Norwich, 71 Vt. 78, 42 Atl. 970.

Not liable for overdraft of officer in individual bank account, although funds are applied to township use. Steinback *v.* State, 38 Ind. 483.

57. Shirts *v.* Noblesville Tp., 122 Ind. 580, 24 N. E. 169; People *v.* Wood, 12 N. Y. Suppl. 436.

58. Rockefeller *v.* Taylor, 69 N. Y. App. Div. 176, 74 N. Y. Suppl. 812.

59. **Not liable for office rental** when officer is paid by the day and is not required to keep office open. State *v.* Mills, 142 Ind. 569, 41 N. E. 1026.

60. Kerlin *v.* Reynolds, 142 Ind. 460, 36 N. E. 693, 41 N. E. 827; Harrison Tp. *v.* McGregor, 67 Ind. 380; Utica Tp. *v.* Miller, 62 Ind. 230.

61. **Injuries from defects or obstructions on bridge** see Bridges, 5 Cyc. 1094.

Injuries from defects or obstructions in highway see Streets and Highways, 37 Cyc. 285.

through their failure to perform public or governmental functions; [62] nor are they liable for the default,[63] negligence,[64] or other torts [65] of their officers in the performance of governmental functions, nor for the torts of officers acting beyond the scope of their authority,[66] unless such liability is expressly imposed by statute; [67] but they are liable for torts in connection with the conduct of business or the ownership and management of property not essential to the performance of governmental functions,[68] and they are liable for damages through the creation or maintenance of nuisances on very much the same principles as individuals.[69]

b. Actions For Torts. In actions against towns for official neglect of the town clerk to keep proper records and indexes or disclose their contents, declarations have been held sufficient which set forth facts showing that the loss or injury was the direct and proximate result of such neglect,[70] without showing a specific request for information in regard to the particular document or encumbrance; [71] and in actions for official default of constables it has been ruled that proof of collection and conversion of money does not sustain an action for not levying, collecting, and returning a fieri facias; [72] nor does a return that one week previous

62. Larrabee *v.* Peabody, 128 Mass. 561; Eastman *v.* Meredith, 36 N. H. 284, 72 Am. Dec. 302, holding town not liable for injury to voter at town-meeting through defect in floor of town hall.

Trespassing animal on vacant lot.—Where the owner of a mule hired it, and it broke out of the inclosure and wandered on to a vacant lot and was injured, the town was not liable; the injury not happening on a highway. Garner *v.* East Point, 7 Ga. App. 630, 67 S. E. 847.

63. Hartwell *v.* New Milford, 50 Conn. 522; Hurlburt *v.* Marsh, 1 Root (Conn.) 520.

64. Brown *v.* Vinalhaven, 65 Me. 402, 20 Am. Rep. 709; Downes *v.* Hopkinton, 67 N. H. 456, 40 Atl. 433. And see Wells *v.* Chazy, 95 N. Y. App. Div. 618, 88 N. Y. Suppl. 54, holding evidence insufficient to raise the question of the town's liability.

65. Hoek *v.* Allendale Tp., 161 Mich. 571, 126 N. W. 987; Davis *v.* Kalamazoo Tp., 1 Mich. N. P. 16; Wheeler *v.* Gilsum, 73 N. H. 429, 62 Atl. 597, 3 L. R. A. N. S. 135; Shoe *v.* Nether Providence Tp., 3 Pa. Super. Ct. 137, 39 Wkly. Notes Cas. 437.

Injury to prisoner by being placed in unhealthy town lock-up. Mains *v.* Ft. Fairfield, 99 Me. 177, 59 Atl. 87; Doolittle *v.* Walpole, 67 N. H. 554, 38 Atl. 19.

Torts in collection of taxes.—Alger *v.* Easton, 119 Mass. 77; Perley *v.* Georgetown, 7 Gray (Mass.) 464; Taylor *v.* Avon Tp., 73 Mich. 604, 41 N. W. 703; Barker *v.* Vernon Tp., 63 Mich. 516, 30 N. W. 175; Lorillard *v.* Monroe, 11 N. Y. 392, 62 Am. Dec. 120 [*affirming* 12 Barb. 161]. But see Wolf *v.* Boettcher, 64 Ill. 316, holding a town liable, on the same principles as an individual plaintiff, for the levy upon and sale of goods of the wrong person under an execution.

66. Holly *v.* Lockwood, 1 Conn. 180; Chase *v.* Middleton, 123 Mich. 647, 82 N. W. 612; Langdon *v.* Chartiers Tp., 131 Pa. St. 77, 18 Atl. 930; Briggs *v.* Allen, 24 R. I. 80, 52 Atl. 679.

67. *Massachusetts.*— Canning *v.* Williamstown, 1 Cush. 451.

Michigan.— Smith *v.* Jones, 136 Mich. 532, 99 N. W. 742.

New York.— Shaw *v.* Potsdam, 11 N. Y. App. Div. 508, 42 N. Y. Suppl. 779.

Vermont.— Middlebury Bank *v.* Rutland, 33 Vt. 414.

Wisconsin.— McHugh *v.* Minocqua, 102 Wis. 291, 78 N. W. 478.

Under Vermont statute, making towns liable for default or neglect of officers, they have been held liable for negligence of clerk in failing to keep a proper index to records (Hunter *v.* Windsor, 24 Vt. 327), and for failure to disclose upon inquiry an encumbrance of record of which he had knowledge (Jarvis *v.* Barnard, 30 Vt. 492; Lyman *v.* Windsor, 24 Vt. 575); but they have been held not liable for failure of clerk to index a record, where plaintiff was not misled by such failure (Lyman *v.* Edgerton, 29 Vt. 305, 70 Am. Dec. 415), or for mere statements and representations of the clerk respecting the records (Lyman *v.* Edgerton, *supra*). It is not necessary to sue the officer first (McGregor *v.* Walden, 14 Vt. 450), but a defense available to the officer is also available to the town (Beech *v.* Canaan, 14 Vt. 485).

68. Moulton *v.* Scarborough, 71 Me. 267, 36 Am. Rep. 308.

Business partly governmental and partly commercial.—Where property is used or business is conducted by a town under the authority of law and principally for a public purpose, but incidentally and in part for profit, the town is liable for negligence in the management of it. Duggan *v.* Peabody, 187 Mass. 349, 73 N. E. 206; Collins *v.* Greenfield, 172 Mass. 78, 51 N. E. 454; Neff *v.* Wellesley, 148 Mass. 487, 20 N. E. 111, 2 L. R. A. 500.

69. Watson *v.* New Milford, 72 Conn. 561, 45 Atl. 167, 77 Am. St. Rep. 345; Bates *v.* Westborough, 151 Mass. 174, 35 N. E. 1070, 7 L. R. A. 156.

70. Lyman *v.* Windsor, 24 Vt. 575; Hunter *v.* Windsor, 24 Vt. 327.

71. Hunter *v.* Windsor, 24 Vt. 327.

72. Barber *v.* Benson, 9 Vt. 171.

defendant had no property and thereafter none could be found on diligent search warrant judgment for default;[73] nor is it competent to show in mitigation of damages that the creditor may yet, by new process on his judgment, get satisfaction out of defendant's property;[74] nor can the town reduce damages for the officer's default by the sum of his expenses incurred by him in prosecuting another officer for unlawfully taking property from him;[75] but evidence of plaintiff's lack of diligence in pursuing his remedy after the officer's default is admissible in mitigation of damages.[76] Actions against the town for trespass by officers require proof of authorization or ratification by the town;[77] and actions for negligence of officers demand the same *quantum* of proof as other cases of this class;[78] and when the facts leave the negligence in doubt, they should be submitted to a jury for verdict.[79] Such actions may be brought against the town after the officer's death,[80] and suit may be brought against the town and the officer jointly,[81] or against the town alone without first proceeding against the officer.[82]

V. Fiscal Management, Public Debt, Securities, and Taxation.

A. Indebtedness and Expenditures — 1. Power to Incur in General.[83] Towns have authority to raise money by taxation for such purposes as are specified by statute,[84] and for such other purposes as may be incident to the discharge of their corporate functions;[85] but all expenditures, resolutions authorizing expenditures,[86] and all debts incurred[87] for other purposes are *ultra vires* and void. Among other expenditures that have been held valid as within their corporate power are those for repair of meeting-house and services of sexton,[88] fire engine and water supply,[89] maintenance of a public clock,[90] and expenses of suits against officers;[91] while expenditures for bounties,[92] gifts,[93] care of private cemetery,[94] Fourth of July

73. Bramble *v.* Poultney, 12 Vt. 342.
74. Bowman *v.* Barnard, 24 Vt. 355.
75. Sawyer *v.* Middletown, 10 Vt. 237.
76. Blodgett *v.* Brattleboro, 30 Vt. 579.
77. Briggs *v.* Allen, 24 R. I. 80, 52 Atl. 679; Hunt *v.* Eden, 75 Vt. 119, 53 Atl. 774.
78. Wells *v.* Chazy, 95 N. Y. App. Div. 618, 88 N. Y. Suppl. 54.
79. McHugh *v.* Minocqua, 102 Wis. 291, 78 N. W. 478.
80. Martin *v.* Wells, 43 Vt. 428.
81. Lyman *v.* Windsor, 24 Vt. 575.
82. McGregor *v.* Walden, 14 Vt. 450.
83. **Expenses and liabilities** in general see *supra*, IV, C, 1.
84. Ford *v.* Washington Tp., 71 N. J. L. 49, 58 Atl. 79; *In re* Borup, 182 N. Y. 222, 74 N. E. 838, 108 Am. St. Rep. 796.
Power to raise money by tax or loan does not authorize use of both methods. Loomis *v.* Rogers Tp., 53 Mich. 135, 18 N. W. 596.
85. Livingston *v.* Pippin, 31 Ala. 542; Bussey *v.* Gilmore, 3 Me. 191; Mills *v.* Richland Tp., 72 Mich. 100, 40 N. W. 183; Wisner *v.* Davenport, 5 Mich. 501; Tweed *v.* Metcalf, 4 Mich. 579.
86. Mills *v.* Richland Tp., 72 Mich. 100, 40 N. W. 183.
87. Good Roads Mach. Co. *v.* Old Lycoming Tp., 25 Pa. Super. Ct. 156.
Statute prohibiting a county from incurring indebtedness does not apply to a township within the county. C. T. Herring Lumber Co. *v.* Hazel Tp., 22 Okla. 102, 97 Pac. 612.
88. Woodbury *v.* Hamilton, 6 Pick. (Mass.) 101.
89. Hardy *v.* Waltham, 3 Metc. (Mass.) 163.
90. Willard *v.* Newburyport, 12 Pick. (Mass.) 227.
91. Newton *v.* Hamden, 79 Conn. 237, 64 Atl. 229; Leonard *v.* Middleborough, 198 Mass. 221, 84 N. E. 323; Hixon *v.* Sharon, 190 Mass. 347, 76 N. E. 909; Hadsell *v.* Hancock, 3 Gray (Mass.) 526; Babbitt *v.* Savoy, 3 Cush. (Mass.) 530; Bancroft *v.* Lynnfield, 18 Pick. (Mass.) 566, 29 Am. Dec. 623; Jenney *v.* Mussey Tp., 121 Mich. 229, 80 N. W. 2 (holding that a township may defend and indemnify its officers in *bona fide* attempts to discharge their duty, when such duty is one imposed by law, and when the matter is one in which the township has an interest); Rulon *v.* Woolwich Tp., 55 N. J. L. 489, 27 Atl. 906; Atlantic City Water-works *v.* Smith, 47 N. J. L. 473, 1 Atl. 459. But not costs of criminal prosecution of officers. Gates *v.* Hancock, 45 N. H. 528; Merrill *v.* Plainfield, 45 N. H. 126. And see McCoy *v.* McClarty, 53 Misc. (N. Y.) 69, 104 N. Y. Suppl. 80, holding that a vote of a town to assume such expenses does not include expenses incurred upon appeal by the officers.
92. Cover *v.* Baytown, 12 Minn. 124; Wahlschlager *v.* Liberty, 23 Wis. 362.
Unless expressly authorized by statute. — Blodgett *v.* Holbrook, 39 Vt. 336.
93. Hooper *v.* Emery, 14 Me. 375; Allen *v.* Marion, 11 Allen (Mass.) 108.
Unless authorized by statute. — Davis *v.* Bath, 17 Me. 141; Fletcher *v.* Buckfield, 17 Me. 81.
94. Luques *v.* Dresden, 77 Me. 186.

celebration,[95] salary of circuit judge,[96] services before organization of town in procuring charter,[97] and sending committees [98] or lobbyists [99] to the legislature have been held void. Appropriations made without conformity to statutory requirements are void;[1] and valid indebtedness can be incurred only upon the conditions,[2] within the time and limit,[3] by the officers,[4] and in conformity to the procedure [5] prescribed by statute or local ordinance.[6]

2. Aid to Corporations. Towns do not possess inherent corporate power to appropriate funds or incur indebtedness for the purpose of aiding railroads or other corporations,[7] but such power may be conferred upon them by the legislature,[8] unless such legislative conferment of power forbidden by the state constitution.[9] Under constitutional provisions, such aid may be forbidden altogether,[10] or beyond a certain amount,[11] or without authorization by popular vote,[12]

95. Gerry *v.* Stoneham, 1 Allen (Mass.) 319.

96. Beauchamp *v.* Kankakee County, 45 Ill. 274.

97. Frost *v.* Belmont, 6 Allen (Mass.) 152.

98. Minot *v.* West Roxbury, 112 Mass. 1, 17 Am. Rep. 52.

Unless authorized by express statute.— Connolly *v.* Beverly, 151 Mass. 437, 24 N. E. 404.

99. Frankfort *v.* Winterport, 54 Me. 250.

1. State *v.* John, 170 Ind. 233, 83 N. E. 1; Coal Creek Tp. Advisory Bd. *v.* Levandowski, (Ind. App. 1908) 84 N. E. 346; Flood *v.* Leahy, 183 Mass. 232, 66 N. E. 787; Childs *v.* Hillsborough Electric Light, etc., Co., 70 N. H. 318, 47 Atl. 271.

2. Lovejoy *v.* Foxcroft, 91 Me. 367, 40 Atl. 141; French *v.* South Arm Tp., 122 Mich. 593, 81 N. W. 557; Webster *v.* White Plains, 93 N. Y. App. Div. 398, 87 N. Y. Suppl. 783; Barker *v.* Floyd, 61 N. Y. App. Div. 92, 69 N. Y. Suppl. 1109; Good Roads Mach. Co. *v.* Old Lycoming Tp., 25 Pa. Super. Ct. 156.

3. *Illinois.*— Kankakee *v.* McGrew, 178 Ill. 74, 52 N. E. 893.

Indiana.— State *v.* John, 170 Ind. 233, 84 N. E. 1; Austin Mfg. Co. *v.* Smithfield Tp., 21 Ind. App. 609, 52 N. E. 1011.

Massachusetts.— Brown *v.* Melrose, 155 Mass. 587, 30 N. E. 87.

Minnesota.— Evans *v.* Stanton, 23 Minn. 368.

Nebraska.— Union Pac. R. Co. *v.* Howard County, 66 Nebr. 663, 92 N. W. 579, 97 N. W. 280.

Rhode Island.— McAleer *v.* Angell, 19 R. I. 688, 36 Atl. 588.

South Dakota.— Dring *v.* St. Lawrence Tp., 23 S. D. 624, 122 N. W. 664.

See 45 Cent. Dig. tit. "Towns," § 81.

4. Coal Creek Tp. Advisory Bd. *v.* Levandowski, (Ind. App. 1908) 84 N. E. 346.

5. Coal Creek Tp. Advisory Bd. *v.* Levandowski, (Ind. App. 1908) 84 N. E. 346; Coombs *v.* Jefferson Tp., 31 Ind. App. 131, 67 N. E. 274; French *v.* South Arm Tp., 122 Mich. 593, 81 N. W. 557; Austin Mfg. Co. *v.* Twin Brooks Tp., 16 S. D. 126, 91 N. W. 470.

6. Brown *v.* Melrose, 155 Mass. 587, 30 N. E. 87.

7. Southington *v.* Southington Water Co., 80 Conn. 646, 69 Atl. 1023.

8. *Connecticut.*— Southington *v.* Southington Water Co., 80 Conn. 646, 69 Atl. 1023.

Illinois.— Marshall *v.* Silliman, 61 Ill. 218.

Ohio.— Loomis *v.* Lake, etc., Plank Road Co., 1 Ohio Dec. (Reprint) 312, 7 West. L. J. 218.

Pennsylvania.— Com. *v.* McWilliams, 11 Pa. St. 61.

United States.— Pine Grove Tp. *v.* Talcott, 19 Wall. 666, 22 L. ed. 227.

Provision permitting subscription to railroad "into, through, or near" the township includes a railroad the nearest point of which is seven miles from the township (Kirkbride *v.* Lafayette County, 108 U. S. 208, 2 S. Ct. 501, 27 L. ed. 705 [*reversing* 14 Fed. Cas. No. 7,840]); and that subscriptions of other towns will be invalid because not on the line of the railroad is not ground for injunction restraining subscriptions of town that is on the line (Phillips *v.* Albany, 28 Wis. 340).

Subscription of amount permitted under one statute does not prevent another subscription of amount allowed under subsequent statute. Scott *v.* Union County, 63 Iowa 583, 19 N. W. 667.

9. See *infra*, notes 10–16.

State authorizing aid to manufacturing plants is unconstitutional as authorizing public aid for private purposes. Central Branch Union Pac. R. Co. *v.* Smith, 23 Kan. 745.

10. Pleasant Tp. *v.* Ætna L. Ins. Co., 138 U. S. 67, 11 S. Ct. 215, 34 L. ed. 864; Ætna L. Ins. Co. *v.* Pleasant Tp., 62 Fed. 718, 10 C. C. A. 611 [*affirming* 53 Fed. 214].

Forbidding aid by "county, city, or town" includes townships. Harshman *v.* Bates County, 92 U. S. 569, 23 L. ed. 747 [*overruling* without mentioning Jordan *v.* Cass County, 13 Fed. Cas. No. 7,517, 3 Dill. 185].

Congressional townships included in provision forbidding aid by municipal corporations or political subdivisions. Weightman *v.* Clark, 103 U. S. 256, 26 L. ed. 392.

11. Vote authorizing bond issue beyond the debt limit is void only as to the excess. Turner *v.* Woodson County, 27 Kan. 314.

12. Barnes *v.* Lacon, 84 Ill. 461; Lynchburg, etc., R. Co. *v.* Person County, 109 N. C. 159, 13 S. E. 783; Loomis *v.* Lake, etc., Plank Road Co., 1 Ohio Dec. (Reprint) 312, 7 West. L. J. 218.

usually by a decided majority,[13] or it may be forbidden only to the extent of incurring indebtedness therefor,[14] or of imposing a tax beyond a certain rate.[15] And in granting such aid, it is competent for a township to prescribe reasonable conditions aside from those fixed by constitutions and statutes, compliance with which shall be a prerequisite to receipt of the aid.[16]

3. BORROWING MONEY. The town board, or other officers of a town, have no authority *ex officio* to borrow money on the credit of the town,[17] and loans contracted by them are void,[18] unless expressly authorized by statute,[19] or by vote of the town.[20] Where authority is derived from a statute, substantial compliance with the terms of the act is necessary,[21] and sufficient[22] to give validity to the loan. In some cases towns have been held liable for money borrowed by their officers without authority, upon proof that it was used for legitimate town purposes;[23] but by the weight of authority, such use alone is not sufficient without subsequent ratification by the town of the action of its officers in borrowing and applying the funds.[24]

Act authorizing vote "at an annual or special election" applies to a vote taken by ballot at a town meeting. Phillips *v.* Albany, 28 Wis. 340.

Act authorizing counties and townships to submit subscription to vote permits townships to do so, although the county has not (Shoemaker *v.* Goshen Tp., 14 Ohio St. 569); but does not authorize a subscription by a town after the county has subscribed (State *v.* Union Tp., 15 Ohio St. 437).

Election must be ordered by township trustees and not by city authorities where the township embraces territory outside the city limits. Young *v.* Webster City, etc., R. Co., 75 Iowa 140, 39 N. W. 234.

Election may be declared invalid by board of county commissioners authorized by vote to levy special tax. Duncan *v.* Cox, 41 Ind. App. 61, 81 N. E. 735, 82 N. E. 125.

Vote obtained by bribery in favor of subscription is void. Chicago, etc., R. Co. *v.* Shea, 67 Iowa 728, 25 N. W. 901.

Signatures may be made by proxy to petition required for election. Chicago, etc., Co. *v.* Coyer, 79 Ill. 373.

13. **A constitutional provision requiring assenting vote of two thirds** of all the qualified voters of the township renders void an act of the legislature permitting aid "whenever two-thirds of the qualified voters of such township voting at an election held for that purpose are in favor" of it. Ranney *v.* Bader, 67 Mo. 476; State *v.* Brassfield, 67 Mo. 331.

14. John *v.* Cincinnati, etc., R. Co., 35 Ind. 539; Petty *v.* Myers, 49 Ind. 1.

Act authorizing subscription to stock does not permit exchange of bonds for stock. State *v.* Brassfield, 67 Mo. 331.

15. Brocaw *v.* Gibson County, 73 Ind. 543.

16. Brocaw *v.* Gibson County, 73 Ind. 543; Atchison, etc., R. Co. *v.* Jefferson County, 21 Kan. 309.

But statutory authority to prescribe conditions does not require them. Goddard *v.* Stockman, 74 Ind. 400.

Certificate of compliance with conditions may be issued by trustees of original township, where the township has been divided since the vote. Sioux City, etc., R. Co. *v.* Herron, 46 Iowa 701; Meader *v.* Lowry, 45 Iowa 684.

17. East Hartford *v.* American Nat. Bank, 49 Conn. 539; Lincoln *v.* Stockton, 75 Me. 141.

Nor can they give renewal notes.—Abbott *v.* North Andover, 145 Mass. 484, 14 N. E. 754.

In extraordinary emergency, supervisors in Pennsylvania may borrow for repair of roads and bridges. Maneval *v.* Jackson Tp., 141 Pa. St. 426, 21 Atl. 672.

18. **Authority given by town to make one loan** does not make town liable for subsequent loan to same officer. Lowell Five Cents Sav. Bank *v.* Winchester, 8 Allen (Mass.) 109; Smith *v.* Epping, 69 N. H. 558, 45 Atl. 415.

Not validated by usage and ratification of previous loans. Benoit *v.* Conway, 10 Allen (Mass.) 528.

19. People *v.* Brinckerhoff, 7 Hun (N. Y.) 668 [*modified* on other grounds in 63 N. Y. 259].

Statute giving power to audit accounts and draw warrants on treasurer does not authorize officers to borrow money. Wells *v.* Whittaker, 4 Ill. App. 381.

Giving unauthorized obligation does not invalidate a debt in itself authorized. Ford *v.* Washington Tp., 71 N. J. L. 49, 58 Atl. 79.

20. **Town is not liable for a commission** to a broker for negotiating a loan by reason of a vote authorizing a loan to be made. Butterfield *v.* Melrose, 6 Allen (Mass.) 187.

Presumption is that a loan made by officers having authority to borrow for a certain purpose is for that purpose. Shackford *v.* Newington, 46 N. H. 415.

21. Birge *v.* Berlin Iron Bridge Co., 133 N. Y. 477, 31 N. E. 609.

22. People *v.* Tompkins, 64 N. Y. 53.

23. Killian *v.* State, 15 Ind. App. 261, 43 N. E. 955.

24. Brown *v.* Winterport, 79 Me. 305, 9 Atl. 844; Bessey *v.* Unity Plantation, 65 Me. 342; Agawam Nat. Bank *v.* South Hadley, 128 Mass. 503; Benoit *v.* Conway, 10 Allen (Mass.) 528; Musgrove *v.* Kennell, 23 N. J. Eq. 75.

4. Unauthorized Debts or Expenditures. As a general rule the legislature, within the limits of its power to authorize town debts and expenditures, may ratify those already contracted;[25] but it has been held that, where a vote of the people of the town is necessary to authorize a debt, the legislature cannot validate a debt contracted in reliance upon an invalid election, without a resubmission of the matter to the people.[26] Officers cannot be compelled to pay out money upon the strength of an illegal vote,[27] and expenditures made in obedience to such a vote may be recovered[28] unless duly ratified by subsequent action of the town.[29]

B. Administration of Finances — 1. In General. The officers entitled to the custody and control of town funds are designated by statute.[30] The proceeds of town bonds sold by an officer are the property of the town and not subject to be taken for the officer's individual debts;[31] money once paid into the town treasury is presumed, in contemplation of law, to remain therein until legally paid out;[32] and officers are responsible for money paid to an alleged town treasurer where no such office existed.[33] Town officers do not possess authority *ex officio* to loan town funds,[34] but may be given such authority by statute[35] or by vote of the town. An illegal loan made by its officers, however, does not prevent the recovery of the money by the town;[36] and a loan is to be distinguished from a mere deposit of funds at interest but without obligation to continue it for any specified time.[37] The general purposes for which town funds may be expended are also usually prescribed by statute;[38] but so long as the expenditures are within the general objects prescribed, the discretion of the town,[39] or of the officials,[40] cannot be controlled by the courts. Allowances in the nature of fees and commissions made to officers without warrant of law may be recovered by the town.[41] The publication of accounts of receipts and expenditures may be required by statute,[42] and a provision for publication in pamphlet form is not complied with by reading the account at a town meeting.[43]

2. Appropriations and Payment of Debts in General. It is necessary to the validity of all appropriations and payments of town moneys that they be made in the manner,[44] out of the funds,[45] and for the purposes authorized by law.[46]

Silence is not sufficient. Otis *v.* Stockton, 76 Me. 506.

25. Booth *v.* Woodbury, 32 Conn. 118; Jefferson School Tp. *v.* Litton, 116 Ind. 467, 19 N. E. 323.

26. Wiley *v.* Silliman, 62 Ill. 170; Marshall *v.* Silliman, 61 Ill. 218.

27. Hooper *v.* Emery, 14 Me. 375.

28. Frost *v.* Belmont, 6 Allen (Mass.) 152.

29. Greenland *v.* Weeks, 49 N. H. 472.

Usage cannot render valid an unlawful town expenditure, no matter how long continued. Hood *v.* Lynn, 1 Allen (Mass.) 103.

30. Florer *v.* State, 133 Ind. 453, 32 N. E. 829; Henderson *v.* Simpson, 45 Iowa 519.

County, as agent for township, may be vested with custody of funds. State *v.* Marion County Ct., 128 Mo. 427, 30 S. W. 103, 31 S. W. 23.

31. Bundy *v.* Monticello, 84 Ind. 119.

32. Hohl *v.* Westford, 33 Wis. 323.

33. Banks Tp. *v.* Frey, 10 Pa. Co. Ct. 580.

34. Holderness *v.* Baker, 44 N. H. 414.

35. **Mortgage security** may be taken as an incident to statutory authority to loan. State *v.* Rice, 65 Ala. 83.

36. Pleasant Valley Dist. Tp. *v.* Calvin, 59 Iowa 189, 13 N. W. 80; Pollock *v.* Hatch, 3 Ohio Dec. (Reprint) 304.

37. Pollock *v.* Hatch, 3 Ohio Dec. (Reprint) 304.

38. McConnell *v.* Allen, 120 N. Y. App. Div. 548, 105 N. Y. Suppl. 16 [*reversed* on other grounds in 193 N. Y. 318, 85 N. E. 1082].

39. Eddy *v.* Wilson, 43 Vt. 362.

40. McConnell *v.* Allen, 193 N. Y. 318, 85 N. E. 1082 [*reversing* 120 N. Y. App. Div. 548, 105 N. Y. Suppl. 16].

41. Demarest *v.* New Barbadoes Tp., 40 N. J. L. 604; Banks Tp. *v.* Frey, 10 Pa. Co. Ct. 580.

42. Dunster *v.* Randolph, 9 N. J. L. J. 178.

43. Dunster *v.* Randolph, 9 N. J. L. J. 178.

44. Atlantic City Water-works Co. *v.* Smith, 47 N. J. L. 473, 1 Atl. 459; *In re* Porter Tp. Road, 1 Walk. (Pa.) 10.

A vote to give an order on the treasurer is an appropriation. Baldwin *v.* North Branford, 32 Conn. 47.

45. Tippecanoe County *v.* Cox, 6 Ind. 403; Bradley *v.* Love, 76 Iowa 397, 41 N. W. 52; Park River Bank *v.* Norton, 14 N. D. 143, 104 N. W. 525; State *v.* Warren County, 2 Ohio 108.

46. Knowlton *v.* New Boston, 72 N. H. 590, 58 Atl. 509; Wendell *v.* Pierce, 13 N. H. 502; Mason *v.* Cranbury Tp., 68 N. J. L. 149, 52 Atl. 568; Boyce *v.* Russell, 2 Cow. (N. Y.)

It is also essential that the officers who make such appropriations or payments of town moneys shall be legally authorized to do so.[47]

3. Warrants, Orders, and Certificates of Indebtedness — a. In General. The method commonly provided for the disbursement of town funds is by warrants or orders drawn on the treasurer by the selectmen,[48] supervisors,[49] or other officers who may be authorized.[50] They may be made payable upon the completion of work or other contingency;[51] but are not binding on the town unless drawn by the proper officers,[52] within the scope of their authority,[53] for an authorized purpose,[54] and payable out of proper funds.[55] The payment of void orders or certificates of indebtedness cannot be enforced,[56] even though a tax has been collected for their payment.[57] Warrants constitute *prima facie* acknowledgments of town indebtedness,[58] but do not bear interest,[59] unless by special provision under statutory authority.[60] They may be negotiable in form;[61] but if illegally issued they cannot be enforced against the town even by a subsequent *bona fide* purchaser.[62] In some states the indorsee of a valid warrant may sue in his own name,[63] but in others suit may be brought only in the name of the original payee.[64]

444; Fletcher First Universalist Soc. *v.* Leach, 35 Vt. 108.

Authority of town to contract debt implies authority to make appropriation for its payment. Rose *v.* McKie, 145 Fed. 584, 76 C. C. A. 274.

47. **Selectmen** have general authority to pay existing town debts of ordinary character. Sanborn *v.* Deerfield, 2 N. H. 251.

Authority to pay does not confer authority to give a note for indebtedness. Ladd *v.* Franklin, 37 Conn. 53.

Statutory authority to officers to make appropriations does not deprive a town meeting of power to make additional appropriations. Benham *v.* Potter, 77 Conn. 186, 58 Atl. 735.

48. Willey *v.* Greenfield, 30 Me. 452.

49. Com. *v.* Upper Darby Auditors, 2 Pa. Dist. 89.

50. Snyder Tp. *v.* Bovaird, 122 Pa. St. 442, 15 Atl. 910, 9 Am. St. Rep. 118.

Overseer of the poor has power to issue orders for supplies to poor persons when no funds are available for their relief. Kankakee *v.* McGrew, 178 Ill. 74, 52 N. E. 893.

Approval of county commissioners required by statute in Indiana. Mitchelltree School Tp. *v.* Hall, 163 Ind. 667, 72 N. E. 641.

51. Elmendaro Tp. *v.* Kansas Bridge, etc., Co., 6 Kan. App. 640, 49 Pac. 784. But see Monroe *v.* Rowland Tp., 1 Mich. 318, holding that a written promise of officers to pay upon a contingency is not a warrant.

52. *In re* Porter Tp. Road, 1 Walk. (Pa.) 10; Com. *v.* Upper Darby Auditors, 2 Pa. Dist. 89.

Signatures by proxy may be ratified by officers signing in person on back. Just *v.* Wise Tp., 42 Mich. 573, 4 N. W. 298.

53. Davenport *v.* Johnson, 49 Vt. 403, holding that selectmen cannot bind the town by orders in favor of themselves.

Under authority to issue certificates of indebtedness to the amount of taxes then unpaid, the town is liable upon certificates issued in excess of that amount to a purchaser in good faith. Gifford *v.* White Plains, 25 Hun (N. Y.) 606.

Under statute prohibiting issue of orders in excess of funds provided, the mere fact that there are outstanding orders which there is no money to pay does not show that such orders are illegal, when it does not appear what moneys were raised for the years the orders were issued, or that the moneys so raised were not applied to some other purpose. Boyce *v.* Auditor-Gen., 90 Mich. 314, 51 N. W. 457.

54. Boyd *v.* Mill Creek School Tp., 124 Ind. 193, 24 N. E. 661; Salamanca Tp. *v.* Jasper County Bank, 22 Kan. 696; Mueller *v.* Cavour, 107 Wis. 599, 83 N. W. 944.

Compliance with statutory conditions precedent is necessary to validity. East Union Tp. *v.* Ryan, 86 Pa. St. 459.

55. Pease *v.* Cornish, 19 Me. 191, holding that the clause in a warrant, "it being for his proportionate part of the surplus revenue fund," designates the purpose for which the order was drawn and not the fund from which it was to be paid.

56. State *v.* Liberty Tp. Treasurer, 22 Ohio St. 144.

57. Cass County Bank *v.* Conrad, 81 Iowa 482, 46 N. W. 1055.

58. Walnut Tp. *v.* Jordan, 38 Kan. 562, 16 Pac. 812.

Irregularities of officer charged with collection of funds cannot impair rights of holder of warrant. Barnard *v.* Argyle, 20 Me. 296.

59. Snyder Tp. *v.* Bovaird, 122 Pa. St. 442, 15 Atl. 910, 9 Am. St. Rep. 118 (holding, however, that interest may be recovered in a suit on the original indebtedness under some circumstances, as where payment has been unreasonably delayed); Dyer *v.* Covington Tp., 19 Pa. St. 200.

60. Mueller *v.* Cavour, 107 Wis. 599, 83 N. W. 944.

61. Willey *v.* Greenfield, 30 Me. 452.

62. Boyd *v.* Mill Creek School Tp., 124 Ind. 193, 24 N. E. 661; Emery *v.* Mariaville, 56 Me. 315; Sturtevant *v.* Liberty, 46 Me. 457; Smith *v.* Cheshire, 13 Gray (Mass.) 318.

63. Davenport *v.* Johnson, 49 Vt. 403.

64. Smith *v.* Cheshire, 13 Gray (Mass.)

An indorser is liable, however, to his immediate indorsee, in an action for money had and received, to the extent of the consideration which passed between them.[65] Warrants are usually payable in money, but may be made receivable for taxes;[66] they can be discharged by payment only to the payee or to his order;[67] but when properly paid are *functus officio*, and cannot be again issued in payment of other debts of the town.[68] Demand is a necessary condition precedent to suit for the collection of a warrant;[69] but where payment is refused on other grounds, exhibition of the instrument is not requisite to a valid demand.[70] The enforcement of warrants may be barred by the statute of limitations,[71] or by laches;[72] but limitations will not begin to run until the right of enforcement accrues.[73]

b. Personal Liability of Officers. Officers are not personally liable upon orders or warrants issued by them on behalf of the town,[74] even where they have exceeded their authority.[75]

C. Notes and Bonds — 1. Bills and Notes. To the extent that towns have authority to borrow money they may issue notes as evidence of their indebtedness.[76] But officers have no authority *ex officio* to issue notes binding on the town,[77] or to execute renewals of those outstanding;[78] and notes issued by them without authority are not enforceable against the town, either in the hands of the original payee,[79] or of a *bona fide* indorsee for value,[80] unless the act of the officers in issuing them has been ratified by the town.[81]

2. Bonds and Other Securities — a. In General. As a general rule towns have no inherent authority to issue bonds,[82] and can derive such authority only from statutory enactments, either general[83] or special.[84] Bonds issued by them therefore are not valid, if there has been a failure to comply with any of the requirements of the statute as to the purposes for which they were issued,[85] the conditions

318; Snyder *v.* Bovaird, 122 Pa. St. 442, 15 Atl. 910, 9 Am. St. Rep. 118; East Union Tp. *v.* Ryan, 86 Pa. St. 459.

65. Furgerson *v.* Staples, 82 Me. 159, 19 Atl. 158, 17 Am. St. Rep. 470.

66. **Holder is not deprived of his right to demand money** by the act making a warrant receivable for taxes. Tobin *v.* Emmetsburg Tp., 52 Iowa 81, 2 N. W. 958.

67. Ullman *v.* Sandell, 158 Mich. 496, 122 N. W. 1076.

68. Mitchell *v.* Albion, 81 Me. 482, 17 Atl. 546. But see Willey *v.* Greenfield, 30 Me. 452, holding that the receiving of a town order by the collector in payment of taxes is not in itself a payment of the order.

69. Pease *v.* Cornish, 19 Me. 191; Varner *v.* Nobleborough, 2 Me. 121, 11 Am. Dec. 48.

70. Pease *v.* Cornish, 19 Me. 191.

71. Brannon *v.* White Lake Tp., 17 S. D. 83, 95 N. W. 284.

72. **After six years.**— People *v.* Lincoln Tp. Bd., 41 Mich. 415, 49 N. W. 925.

73. Brannon *v.* White Lake Tp., 17 S. D. 83, 95 N. W. 284.

74. Willett *v.* Young, 82 Iowa 292, 47 N. W. 990, 11 L. R. A. 115.

75. Willett *v.* Young, 82 Iowa 292, 47 N. W. 990, 11 L. R. A. 115.

76. Wallis *v.* Johnson School Tp., 75 Ind. 368, holding that a note "to be paid out of the township funds," and signed by A, "trustee of J. township," is the contract of the township and not the individual contract of A.

Power to borrow and power to secure the loan by notes are separate powers, and do not prevent the exercise of the power to borrow without giving notes. Ford *v.* Washington Tp., 71 N. J. L. 49, 58 Atl. 79.

77. Congressional Tp. No. 11 *v.* Weir, 9 Ind. 224; Rich *v.* Errol, 51 N. H. 350; Savage *v.* Rix, 9 N. H. 263.

78. Abbott *v.* North Andover, 145 Mass. 484, 14 N. E. 754; Good Roads Mach. Co. *v.* Old Lycoming Tp., 25 Pa. Super. Ct. 156.

79. Atkinson *v.* Minot, 75 Me. 189.

80. Rich *v.* Errol, 51 N. H. 350.

81. West *v.* Errol, 58 N. H. 233.

82. Cover *v.* Baytown, 12 Minn. 124; Schultze *v.* Manchester, 61 N. J. L. 513, 40 Atl. 589. But see Bennett *v.* Nebagamon, 122 Wis. 295, 99 N. W. 1039, holding that a town has implied power to issue bonds whenever reasonably necessary as an incident to the performance of municipal functions.

83. **Power to issue implies** power to pledge credit of the town for their payment. Grosse Pointe Tp. *v.* Finn, 134 Mich. 529, 96 N. W. 1078.

84. Valleytown Tp. *v.* Webb, 152 N. C. 710, 68 S. E. 211; Brattleboro Sav. Bank *v.* Hardy Tp., 98 Fed. 524.

Constitutional prohibition of passage of special act conferring corporate power does not render invalid an act authorizing a township to issue bonds, as a township is not a corporation. Brattleboro Sav. Bank *v.* Hardy Tp., 98 Fed. 524.

85. *Illinois.*— Stites *v.* Wiggins Ferry Co., 97 Ill. App. 157.

Kansas.—Faulkenstein Tp. *v.* Fitch, 2 Kan. App. 193, 43 Pac. 276.

Massachusetts.— Seward *v.* Revere Water Co., 201 Mass. 453, 87 N. E. 749.

Michigan.— Grosse Pointe Tp. *v.* Finn, 134 Mich. 529, 96 N. W. 1078.

upon which they were authorized,[86] the amount of the issue,[87] the procedure to be followed,[88] including the taking of a popular vote, where this is required,[89] the form of the bonds,[90] and the signatures of the proper officers; [91] nor are they valid in excess of the debt limit,[92] nor if sold at a lower price than the minimum prescribed.[93]

Minnesota.— Cover *v.* Baytown, 12 Minn. 124.

New York.— Jamaica Sav. Bank *v.* New York, 61 N. Y. App. Div. 464, 70 N. Y. Suppl. 967.

South Dakota.— Dring *v.* St. Lawrence Tp., 23 S. D. 624, 122 N. W. 664.

Wisconsin.— Bennett *v.* Nebagamon, 122 Wis. 295, 99 N. W. 1039.

United States.— Clagett *v.* Duluth Tp., 143 Fed. 824, 74 C. C. A. 620.

See 45 Cent. Dig. tit. "Towns," § 90.

Authority to issue bonds to pay outstanding orders does not validate all outstanding orders, but leaves their validity to be determined by the town board. Boyce *v.* Auditor-Gen., 90 Mich. 314, 51 N. W. 457.

86. Faulkenstein Tp. *v.* Fitch, 2 Kan. App. 193, 43 Pac. 276; Union Tp. Committee *v.* Rader, 45 N. J. L. 182.

Requirement of petition by taxpayers specifying the amount to be issued is not met by a petition requesting the issue of bonds not to exceed a certain amount. Schultze *v.* Manchester Tp., 61 N. J. L. 513, 40 Atl. 589.

87. Valleytown Tp. Highway Commission *v.* Webb, 152 N. C. 710, 68 S. E. 211.

Bonds may be issued for face value of amount authorized, although the proceeds of their sale may be more than the authorized indebtedness. Ghiglione *v.* Marsh, 23 N. Y. App. Div. 61, 48 N. Y. Suppl. 604.

88. Barker *v.* Oswegatchie, 10 N. Y. Suppl. 834; Meek *v.* Bayard, 53 Pa. St. 217.

Law in force at time of issue is that which governs procedure. Webster *v.* White Plains, 93 N. Y. App. Div. 398, 87 N. Y. Suppl. 783.

89. *Connecticut.*— Brooklyn Trust Co. *v.* Hebron, 51 Conn. 22.

Kansas.— Faulkenstein Tp. *v.* Fitch, 2 Kan. App. 193, 43 Pac. 276.

Massachusetts.— Seward *v.* Revere Water Co., 201 Mass. 453, 87 N. E. 749.

Michigan.— Bogart *v.* Lamotte Tp., 79 Mich. 294, 44 N. W. 612.

Minnesota.— Harrington *v.* Plainview, 27 Minn. 224, 6 N. W. 777.

New York.— Berlin Iron Bridge Co. *v.* Wagner, 57 Hun 346, 10 N. Y. Suppl. 840.

Wisconsin.— McVichie *v.* Knight, 82 Wis. 137, 51 N. W. 1094.

See 45 Cent. Dig. tit. "Towns," § 90.

Majority.—A provision authorizing issue only on the vote of a majority of the electors "voting at" any meeting requires a majority only of those voting on the bond proposition, and not of the entire vote cast at the meeting. May *v.* Bermel, 20 Misc. (N. Y.) 515, 45 N. Y. Suppl. 913 [*affirmed* in 20 N. Y. App. Div. 53, 46 N. Y. Suppl. 622].

Both bond issue and tax levy may be voted at the same meeting, if authorized. Rondot *v.* Rogers Tp., 99 Fed. 202, 39 C. C. A. 462.

Where a vote is not required by the constitution, the legislature may authorize a bond issue without submission to the people. Boyce *v.* Auditor-Gen., 90 Mich. 314, 51 N. W. 457.

Unauthorized vote of a town to issue bonds may be legalized by a subsequent legislative act. Marsh *v.* Little Valley, 1 Hun (N. Y.) 554, 4 Thomps. & C. 116 [*affirmed* in 64 N. Y. 112].

Written consent, signed by a majority of the taxpayers, who must also represent a majority of the bonded property, may be required by statute. Lane *v.* Schomp, 20 N. J. Eq. 82.

90. **Negotiable bonds** payable to bearer may be issued under general statutory authority. Rathbone *v.* Hopper, 57 Kan. 240, 45 Pac. 610, 34 L. R. A. 674; West Plains Tp. *v.* Sage, 69 Fed. 943, 16 C. C. A. 553.

Seal.— Provision that officers shall execute the bonds "under their hands and seals respectively" does not require them to be sealed with the corporate seal of the township. Smythe *v.* New Providence Tp., 158 Fed. 213.

Authority to issue bonds payable in twenty years from date is sufficiently complied with by the issue in March of bonds payable in twenty years from the first of January preceding. Kearny County *v.* Vandriss, 115 Fed. 866, 53 C. C. A. 192.

The town board may determine the form where this is not fixed by statute. People *v.* Tompkins, 64 N. Y. 53.

91. People *v.* Tompkins, 64 N. Y. 53; Middleton *v.* Mullica Tp., 112 U. S. 433, 5 S. Ct. 198, 28 L. ed. 785.

They may be signed by treasurer in office at their date instead of by one in office when sold. Stoughton *v.* Paul, 173 Mass. 148, 53 N. E. 272.

Signatures of a majority of the members of the town board are sufficient under an act authorizing issue by the board. Kearny County *v.* Vandriss, 115 Fed. 866, 53 C. C. A. 192.

92. Winamac *v.* Huddleston, 132 Ind. 217, 31 N. E. 561; Corbet *v.* Rocksbury, 94 Minn. 397, 103 N. W. 11; Alden *v.* Easton, 113 Fed. 60, 51 C. C. A. 47; Chilton *v.* Gratton, 82 Fed. 873.

Last valuation of property before issue controls as to amount permitted. Hurt *v.* Hamilton, 25 Kan. 76.

If the debt limit has been reached before the issue, the holder cannot recover any part of the indebtedness represented by the board; but if only part of the issue is in excess of the debt limit, the holder can recover for money had and received up to the limit. Dring *v.* St. Lawrence Tp., 23 S. D. 624, 122 N. W. 664.

93. **Under authority to sell at par,** a sale

b. Aid to Corporations. Constitutional provisions have been adopted in some states forbidding political subdivisions of the state, including towns and townships, to issue bonds in aid of railroads and other corporations.[94] Even in the absence of such provisions, towns do not possess the power to issue bonds for corporate aid,[95] unless such power has been clearly conferred by statute.[96] The granting of aid to private or quasi-public corporations, being beyond the ordinary functions for which townships are organized, the validity of bond issues for such purposes can be sustained only by at least substantial compliance with all the provisions of the statute authorizing the issue;[97] and the bonds will be void if the contingency upon which their issue was authorized has not happened,[98] or if the conditions precedent have not been complied with by the town and its officers, or by the corporations,[99] or if the consent of the voters has not been duly

at the face value, or on deferred payments without interest, of bonds which provide for payment of accrued interest, is void. Ft. Edward *v.* Fish, 156 N. Y. 363, 50 N. E. 973 [*affirming* 86 Hun 548, 33 N. Y. Suppl. 784]; Citizens Sav. Bank *v.* Greenburg, 31 Misc. (N. Y.) 428, 65 N. Y. Suppl. 554 [*affirmed* in 60 N. Y. App. Div. 225, 73 N. Y. Suppl. 68]. But this rule does not apply to bonds in the hands of innocent *bona fide* purchasers. Citizens Sav. Bank *v.* Greenburg, 173 N. Y. 215, 65 N. E. 978 [*reversing* 60 N. Y. App. Div. 225, 73 N. Y. Suppl. 68 (*affirming* 31 Misc. 428, 65 N. Y. Suppl. 554)].

94. **Effect of constitutional provision on issues already authorized.**— Under a petition by which a subscription to a railroad and the issues of bonds was authorized only upon the construction of the railroad through a certain village, a contract by the commissioners to deliver the bonds upon construction of the road and the execution and delivery of the bonds in escrow to be delivered to the corporation upon completion of the road, the contract and bonds were rendered void by the adoption of a constitutional provision forbidding corporate aid before the construction of the road as provided (Falconer *v.* Buffalo, etc., R. Co., 69 N. Y. 491 [*affirming* 7 Hun 499, and *affirmed* in 103 U. S. 821, 26 L. ed. 471]); but where the petition gives the commissioners power to fix the terms of subscription, and they subscribe to a certain amount of stock and issue bonds and deliver them in escrow to be delivered to the corporation upon the construction of the road, the rights of the corporation have so far vested that the contract is not affected by the adoption, before the construction of the road, of the constitutional provision forbidding corporate aid (Cherry Creek *v.* Becker, 123 N. Y. 161, 25 N. E. 369 [*affirming* 2 N. Y. Suppl. 514].

Existing statutes authorizing aid are not abrogated by the addition to the constitution of a section providing that the general assembly shall never authorize any county, town, or township by vote of its citizens to become a stock-holder in any corporation. State *v.* Union Tp., 8 Ohio St. 394.

Bonds issued under an unconstitutional statute are void. Graves *v.* Moore County, 135 N. C. 49, 47 S. E. 134; Congaree Constr. Co. *v.* Columbia Tp., 49 S. C. 535, 27 S. E. 570.

95. **An unorganized township** *a fortiori* has no power to issue bonds for corporate aid. People *v.* Dupuyt, 71 Ill. 651.

96. Wittkowsky *v.* Jackson County, 150 N. C. 90, 63 S. E. 275; Alden *v.* Easton, 113 Fed. 60, 51 C. C. A. 47.

The validity of a statute is not affected by its failure to prescribe details as to amount and method of issue. Niantic Sav. Bank *v.* Douglas, 5 Ill. App. 579.

Bonds issued for a steam grist-mill are not valid under a statute authorizing their issue for a "work of internal improvement." State *v.* Adams County, 15 Nebr. 568, 20 N. W. 96.

Authority given the legislature by a constitutional provision to "modify, change, or abrogate" sections of the constitution relating to corporate aid does not restrict it to a single act of modification. Brown *v.* Hertford County, 100 N. C. 92, 5 S. E. 178.

Authority to borrow money includes power to issue bonds. Shoemaker *v.* Goshen Tp., 14 Ohio St. 569.

Authority to issue bonds to aid in the completion of a railroad does not include power to issue bonds in aid of a road not yet begun. Graves *v.* Moore County, 135 N. C. 49, 47 S. E. 134.

Location of railroad.—An act authorizing any town "situate along the route" of a certain railroad to issue bonds in aid of the railroad includes towns along the proposed route before actual construction. Smith *v.* Yates, 22 Fed. Cas. No. 13,131, 15 Blatchf. 89. Legislative authority to subscribe to a railroad "into, through, or near" a township is sufficient to support an issue of bonds in aid of a railroad, the nearest point of which is nine miles from the township. Kirkbride *v.* Lafayette County, 108 U. S. 208, 2 S. Ct. 501, 27 L. ed. 705 [*reversing* 14 Fed. Cas. No. 7,840].

97. Springfield, etc., R. Co. *v.* Cold Spring Tp., 72 Ill. 603.

A vote to levy a tax by way of donation to a corporation does not authorize a bond issue. Schaeffer *v.* Bonham, 95 Ill. 368.

98. Hopple *v.* Brown Tp., 13 Ohio St. 311; Phillips *v.* Albany, 28 Wis. 340; Northern Nat. Bank *v.* Porter Tp., 110 U. S. 608, 4 S. Ct. 254, 28 L. ed. 258 [*affirming* 5 Fed. 568].

99. Falconer *v.* Buffalo, etc., Co., 69 N. Y. 491 [*affirming* 7 Hun 499, and *affirmed* in

obtained, where this is required,[1] or the bonds have not been issued by the proper officers,[2] or if the bonds have not been issued within the time prescribed by law.[3] A vote which authorizes a subscription to one railroad is not sufficient to give validity to a subscription in aid of another, even though the two roads have been consolidated between the taking of the vote and the subscription;[4] but where the subscription has been made before the consolidation, the subsequent issue of bonds to the consolidated corporation has been sustained;[5] and it is sufficient that the name of the company to which the subscription is made and the description of the route in the petition and other proceedings are substantially correct.[6] Under statutes authorizing the issue of bonds to pay for subscriptions to corporate stock, a sale of the bonds for cash is not required, and they may be delivered to the corporation at a valuation of not less than par in payment for the stock subscribed;[7] but where they are forbidden to be discounted or sold below par, the deduction of a commission from the par proceeds renders the sale void.[8] Where signatures to a petition or votes at an election have been secured in favor of a bond issue by false and fraudulent representations and assurances, the issue of the bonds will be enjoined at the suit of the taxpayers defrauded;[9] but a complaint of fraud in the election comes too late after the bonds have been issued, or liabilities have been incurred or other subscriptions made in reliance upon the vote.[10]

c. Ratification and Estoppel to Question Validity. Bonds invalid when issued for want of statutory authority may be legalized by subsequent legislative act;[11] but it has been held that the legislature is without power to validate bonds that are void for want of authorization at a legal election,[12] as it cannot create a debt against a town without its consent. The repeal of an act under which bonds

103 U. S. 821, 26 L. ed. 471]; Oswego County Sav. Bank *v.* Genoa, 66 N. Y. App. Div. 330, 72 N. Y. Suppl. 786 [*affirming* 28 Misc. 71, 59 N. Y. Suppl. 829, and *affirmed* in 172 N. Y. 635, 65 N. E. 1120]; Edwards *v.* Bates County, 117 Fed. 526.

Certificate of an officer of the completion of the road must be signed by him upon its completion or delivery of bonds will be ordered without it. Massachusetts, etc., Constr. Co. *v.* Cherokee, 42 Fed. 750.

1. Middleport *v.* Ætna L. Ins. Co., 82 Ill. 562; Springfield, etc., R. Co. *v.* Cold Spring Tp., 72 Ill. 603.

Vote may be taken at a town meeting under a statute authorizing a vote at "any annual election, or at any special election called for that purpose." Phillips *v.* N. Albany, 28 Wis. 340.

Proceedings must conform to the law in force at the time they are taken. Wiley *v.* Silliman, 62 Ill. 170.

Record and certificate by clerk of the legality of the vote does not estop the town from denying its legality. Brooklyn Trust Co. *v.* Hebron, 51 Conn. 22.

Where forgery of signatures to petition is alleged, the certificate of the county clerk to their genuineness is not conclusive, and the issue of bonds will be enjoined pending an investigation. Rochester *v.* Davis, 44 How. Pr. (N. Y.) 95.

An issue of bonds pending an appeal upon certiorari to test the sufficiency of the petition for issue is void. Stewart *v.* Lansing, 23 Fed. Cas. No. 13,432, 15 Blatchf. 281 [*affirmed* in 104 U. S. 505, 26 L. ed. 866].

Vote to issue an amount in excess of the debt limit is void as to the excess. Turner *v.* Woodson County, 27 Kan. 314.

2. Douglas *v.* Niantic Sav. Bank, 97 Ill. 228; Windsor *v.* Hallet, 97 Ill. 204; Prairie *v.* Lloyd, 97 Ill. 179; Schaeffer *v.* Bonham, 95 Ill. 368; Walnut *v.* Wade, 103 U. S. 683, 26 L. ed. 526.

Signature by town clerk of authorized bonds is a ministerial act and may be compelled by mandamus. Houston *v.* People, 55 Ill. 398.

3. People *v.* Granville, 104 Ill. 285.

4. Bates County *v.* Winter, 97 U. S. 83, 24 L. ed. 933.

Authority to subscribe to a railroad is revoked by its consolidation with another railroad before the subscription is made. Edwards *v.* Bates County, 117 Fed. 526.

5. Wilson *v.* Salamanca Tp., 99 U. S. 499, 25 L. ed. 330; Washburn *v.* Cass County, 29 Fed. Cas. No. 17,213, 3 Dill. 251.

6. Ranney *v.* Baeder, 50 Mo. 600.

7. Com. *v.* Williamstown, 156 Mass. 70, 30 N. E. 472; Shoemaker *v.* Goshen Tp., 14 Ohio St. 569.

8. Edwards *v.* Bates County, 117 Fed. 526.

9. Wullenwaber *v.* Dunigan, 30 Nebr. 477, 47 N. W. 420, 13 L. R. A. 811.

10. Butler *v.* Dunham, 27 Ill. 474.

11. Grannis *v.* Cherokee Tp., 47 Fed. 427; Massachusetts, etc., Constr. Co. *v.* Cherokee Tp., 42 Fed. 750.

Legalizing act may except those questioned by actions begun before its passage. Clagett *v.* Duluth Tp., 143 Fed. 824, 74 C. C. A. 620.

12. Wiley *v.* Silliman, 62 Ill. 170.

have been issued does not affect the validity of those issued before the repeal.[13] The payment of taxes to meet interest on the bonds, payment of interest, and acquiescence in the validity of the issue are sufficient to estop the town and the taxpayers from questioning the validity of the bonds on the ground of any irregularity in their issue,[14] especially if such acquiescence has been long continued [15] or the debt has been refunded by the issue of other bonds;[16] but none of these things will work an estoppel, even in favor of a *bona fide* purchaser, to deny the validity of bonds issued without lawful authority.[17] Notwithstanding any recitals in the bonds, they are void even in the hands of a *bona fide* purchaser where they have been issued without legislative authority,[18] or in pursuance of an illegal election;[19] but such recitals are conclusive upon the town as to any irregularities in the exercise of the power conferred [20] or as to the performance of any conditions the determination of the performance of which has been committed by statute to the officers making the recitals.[21] Nor will the issue of an amount in excess of that authorized by law constitute a defense against a *bona fide* purchaser.[22] The validity of a bond issue may not be questioned by the sureties of the issuing officers,[23] nor by an officer charged with mere ministerial duties;[24] nor may a town itself question the validity of bonds issued in its name but constituting charges only on certain property improved by means of the proceeds, and funds for the payment of which are collected by the town in the form of assessments on the property.[25] Upon the adjudication of the invalidity of proceedings in the

13. Marsh *v.* Little Valley, 1 Hun (N. Y.) 554, 4 Thomps. & C. 116 [*affirmed* in 64 N. Y. 112].

14. Schaeffer *v.* Bonham, 95 Ill. 368; Rice *v.* Shealey, 71 S. C. 161, 50 S. E. 868.

15. Morris County *v.* Hinchman, 31 Kan. 729, 3 Pac. 504.

16. Oswego Tp. *v.* Anderson, 44 Kan. 214, 24 Pac. 486.

17. Schaeffer *v.* Bonham, 95 Ill. 368.

18. Faulkenstein Tp. *v.* Fitch, 2 Kan. App. 193, 43 Pac. 276; Ft. Edward *v.* Fish, 156 N. Y. 363, 50 N. E. 973; Brownell *v.* Greenwich, 114 N. Y. 518, 22 N. E. 24, 4 L. R. A. 685 (holding, however, that under a statute providing that not more than ten per cent of the whole income shall become due in a single year, a purchaser in good faith is not bound to examine the whole issue to see that no more became due in a single year than the statute permits); Oswego County Sav. Bank *v.* Genoa, 66 N. Y. App. Div. 330, 72 N. Y. Suppl. 786 [*affirming* 28 Misc. 71, 59 N. Y. Suppl. 829, and *affirmed* in 172 N. Y. 635, 65 N. E. 1120]; Graves *v.* Moore County, 135 N. C. 49, 47 S. E. 134; Northern Nat. Bank *v.* Porter Tp., 110 U. S. 608, 4 S. Ct. 254, 28 L. ed. 258 [*affirming* 5 Fed. 568] (holding bonds void where subscription had been authorized by statute only on the failure of the county to vote in favor of a subscription, and the county had voted in favor of it); Northwestern Sav. Bank *v.* Centerville, 143 Fed. 81, 74 C. C. A. 274; Thomas *v.* Lansing, 14 Fed. 618, 21 Blatchf. 119.

Including amount fixed by valuation of property. Corbet *v.* Rocksbury, 94 Minn. 397, 103 N. W. 11.

19. Carpenter *v.* Lathrop, 51 Mo. 483.

20. Hutchinson, etc., R. Co. *v.* Kingman County, 48 Kan. 70, 28 Pac. 1078, 30 Am. St. Rep. 273, 15 L. R. A. 401.

21. Hutchinson, etc., R. Co. *v.* Kingman County, 48 Kan. 70, 28 Pac. 1078, 30 Am. St. Rep. 273, 15 L. R. A. 401; Faulkenstein Tp. *v.* Fitch, 2 Kan. App. 193, 43 Pac. 276; Lane *v.* Schomp, 20 N. J. Eq. 82; Northern Nat. Bank *v.* Porter Tp., 110 U. S. 608, 4 S. Ct. 254, 28 L. ed. 258 [*affirming* 5 Fed. 568]; Humboldt Tp. *v.* Long, 92 U. S. 642, 23 L. ed. 752; Marcy *v.* Oswego Tp., 92 U. S. 637, 23 L. ed. 748; Venice *v.* Murdock, 92 U. S. 494, 23 L. ed. 583 (holding recitals conclusive as to signatures of taxpayers to assent); Northwestern Sav. Bank *v.* Centerville, 143 Fed. 81, 74 C. C. A. 274; Greenburg *v.* International Trust Co., 94 Fed. 755, 36 C. C. A. 471; Brown *v.* Ingalls Tp., 86 Fed. 261, 30 C. C. A. 27; West Plains Tp. *v.* Sage, 69 Fed. 943, 16 C. C. A. 553; Smith *v.* Yates, 22 Fed. Cas. No. 13,131, 15 Blatchf. 89. *Contra*, Cagwin *v.* Hancock, 84 N. Y. 532; Citizens Sav. Bank *v.* Greenburg, 31 Misc. (N. Y.) 428, 65 N. Y. Suppl. 554 [*affirmed* in 60 N. Y. App. Div. 225, 73 N. Y. Suppl. 68 (*reversed* on other grounds in 173 N. Y. 215, 65 N. E. 978)].

A purchaser after maturity is not entitled to protection where it is shown that bonds were issued illegally or without consideration, unless he proves that he acquired title through a prior holder who took them before maturity for value and without notice of their invalidity. Edwards *v.* Bates County, 117 Fed. 526.

Recital of purpose not authorized shows invalidity of bond on its face. Clagett *v.* Duluth Tp., 143 Fed. 824, 74 C. C. A. 620.

22. Wilson *v.* Salamanca Tp., 99 U. S. 499, 25 L. ed. 330.

23. Wilson *v.* Monticello, 85 Ind. 10.

24. Biddlecom *v.* Newton, 13 Hun (N. Y.) 582; Ross *v.* Curtis, 30 Barb. (N. Y.) 238 [*affirmed* in 31 N. Y. 606].

25. People *v.* Millard, 133 N. Y. App. Div. 139, 117 N. Y. Suppl. 474.

the issue of bonds, all further authority of commissioners appointed to issue the bonds is at an end;[26] but agents appointed under a void statute to issue bonds are not personally liable for proceeds received by them and applied as directed by the statute.[27]

d. Payment and Compromise. Bonds are discharged by payment,[28] or by destruction with consent of the holder;[29] and, when once discharged, may not be reissued.[30] Where the proceeds of certain taxes have been set aside by statute as a sinking fund for the payment of the bonds, the town is entitled to have them so applied rather than resort to a sale of the stock of the railroad that it has received in exchange for the bonds in order to pay the bonds.[31] Bonds of doubtful validity may be made the subject of compromise when authorized by statute.[32]

e. Actions. In an action to enforce town bonds, the declaration must show compliance with the conditions and procedure necessary to their validity;[33] but the inclusion of matters constituting surplusage does not warrant a demurrer.[34] While all the proceedings of a town in the issuance of bonds are subject to scrutiny by the courts, yet, as a general rule, the determination of questions of fact by a popular vote will not be disturbed.[35]

D. Taxation and Other Revenue[36] **— 1. In General.** Subject to constitutional limitations,[37] the legislature, in the exercise of its plenary power over taxation, may delegate to towns and townships the authority to impose taxes within their respective limits,[38] and may prescribe the purposes for which such taxes may be levied,[39] the amount that may be raised or the limit of assessment,[40] the persons and property subject to assessment,[41] and the machinery of assessment and collection.[42] In some states the levy must be made in either the annual town

26. Biddlecom *v.* Newton, 13 Hun (N. Y.) 582.

27. Powell *v.* Heisler, 45 Minn. 549, 48 N. W. 411.

28. **For evidence sufficient to prove payment** see Collier *v.* St. Charles Tp. Bd., 147 Mich. 688, 111 N. W. 340.

In New York the county board may direct that the interest on the bonds may be paid from the proceeds thereof until the tax levied to pay such interest shall be collected, the money so used to be refunded from the receipts of the tax levy. Ghiglione *v.* Marsh, 23 N. Y. App. Div. 61, 48 N. Y. Suppl. 604.

29. Faulkenstein Tp. *v.* Fitch, 2 Kan. App. 193, 43 Pac. 276.

30. Faulkenstein Tp. *v.* Fitch, 2 Kan. App. 193, 43 Pac. 276.

31. Crowninshield *v.* Cayuga County, 124 N. Y. 583, 27 N. E. 242.

32. **Different opinions** by the supreme court of the state and that of the United States as to the validity of a statute render bonds issued in pursuance thereof proper subjects of compromise. State *v.* Hannibal, etc., R. Co., 101 Mo. 136, 13 S. W. 505, (Mo. 1889) 11 S. W. 746; State *v.* Holladay, 72 Mo. 499.

33. Cotton *v.* New Providence, 47 N. J. L. 401, 2 Atl. 253; Morrison *v.* Bernards Tp., 36 N. J. L. 219; Ft. Edward *v.* Fish, 156 N. Y. 363, 50 N. E. 973.

34. Pierce *v.* St. Anne, 30 Fed. 36.

35. Kirkbride *v.* Lafayette County, 108 U. S. 208, 2 S. Ct. 501, 27 L. ed. 705 [*reversing* 14 Fed. Cas. No. 7,840].

36. See Municipal Corporations, 28 Cyc. 1658.

License and taxation of liquor traffic see Intoxicating Liquors, 23 Cyc. 105.

37. **Uniform rule of apportionment** is necessary to validity of a tax imposed by the legislature on several townships. People *v.* State Treasurer, 23 Mich. 499.

Constitutional limitations upon taxation by county authorities do not apply to taxation by towns. Wabash, etc., R. Co. *v.* McCleave, 108 Ill. 368.

A penalty to the state incurred by a delinquent town in one year is not affected by payment for a previous year. State *v.* New London, 22 Conn. 163.

38. Wabash, etc., R. Co. *v.* McCleave, 108 Ill. 368.

A special act does not affect power already granted under general laws. Meyer *v.* Burritt, 60 Conn. 117, 22 Atl. 501.

Act relating to "towns" in a popular or local sense does not include townships. Banta *v.* Richards, 42 N. J. L. 497.

A supplementary act is inoperative so far as it relates to assessments made and completed and the duplicates for which have gone into the hands of the collector under the original act. Scudder *v.* Baker, 33 N. J. L. 424.

39. See *infra*, V, D, 3.

40. Ward *v.* Wheeling, etc., R. Co., 4 Ohio S. & C. Pl. Dec. 154, 3 Ohio N. P. 274.

Shrinkage in values does not warrant transgression of the limit. Miles *v.* Ray, 100 Ind. 166.

41. See *infra*, V, D, 2.

42. Chicago, etc., R. Co. *v.* People, 184 Ill. 240, 56 N. E. 367.

Irregularity in assessment proceedings may be cured by statute. Millikin *v.* Bloomington, 49 Ind. 62.

meeting [43] or in a special town meeting called for the purpose,[44] while in others the authority is vested by statute in the town board; [45] but in neither case may the power be delegated by the meeting or by the board to a committee or to other officers than those designated by statute.[46]

2. Persons and Property Liable. The persons [47] and property [48] subject to town taxation are in general prescribed by statute. All property within town or township limits is subject to assessment for common charges,[49] unless excepted by statute.[50] Where part of a township has been erected into an incorporated city the property within the city may,[51] or may not,[52] be subject to assessment for township purposes, the usual test being whether or not there is a common interest in the purpose for which the tax is levied.[53]

3. Purposes of Taxation. Within such limits as may be prescribed by the consitution and statutes,[54] towns and townships possess full power and discretion in the assessment and collection of taxes for general corporate purposes.[55] Authority to raise funds for "town purposes," "town expenses," or "town charges" applies to the ordinary expenses of the town government incident to the discharge of its distinctively corporate functions in a legitimate and appropriate manner,[56] and does not include many purposes for which it may be proper and even necessary for the township to raise funds.[57] Because of their subordinate and limited

43. Verhule *v.* Saalmann, 37 N. J. L. 156.

Unauthorized levy by officers in the previous year cannot be validated by a vote of town meeting. Banta *v.* Richards, 42 N. J. L. 497.

44. Freeland *v.* Hastings, 10 Allen (Mass.) 570.

A tax may be rescinded at a meeting duly called before any steps have been taken for its collection. Stoddard *v.* Gilman, 22 Vt. 568.

45. Millikin *v.* Bloomington, 49 Ind. 62.

Authority to audit accounts is quite distinct from, and does not include, the power to levy taxes. State *v.* Beloit, 21 Wis. 280, 91 Am. Dec. 474.

46. Chicago, etc., R. Co. *v.* People, 184 Ill. 240, 56 N. E. 367; Wharton *v.* Koster, 38 N. J. L. 308; Hance *v.* Sickles, 24 N. J. L. 125.

47. Sargent *v.* Milo, 90 Me. 374, 38 Atl. 341.

48. See *infra,* notes 49–53.

49. Tilford *v.* Douglass, 41 Ind. 580; Mowry *v.* Mowry, 20 R. I. 74, 37 Atl. 306.

Property of a railroad company is equally liable with other property in the township to a tax in aid of a competing railroad. Pittsburgh, etc., R. Co. *v.* Harden, 137 Ind. 486, 37 N. E. 324.

50. Capen *v.* Glover, 4 Mass. 305.

51. Scott *v.* Hansheer, 94 Ind. 1; Tilford *v.* Douglass, 41 Ind. 580; Jackson Tp. *v.* Wood, 55 Kan. 628, 40 Pac. 897.

52. Kerlin *v.* Reynolds, 142 Ind. 460, 36 N. E. 693, 41 N. E. 827; Hale *v.* Butler, 1 Lack. Leg. N. (Pa.) 5.

53. Kerlin *v.* Reynolds, 142 Ind. 460, 36 N. E. 693, 41 N. E. 827; Scott *v.* Hansheer, 94 Ind. 1.

54. Chicago, etc., R. Co. *v.* Klein, 52 Nebr. 258, 71 N. W. 1069.

55. Hixon *v.* Oneida County, 82 Wis. 515, 52 N. W. 445.

56. Opinion of the Justices, 52 Me. 595; Mills *v.* Richland Tp., 72 Mich. 100, 40 N. W. 183; Upton *v.* Kennedy, 36 Mich. 215.

57. **As for schools and roads.**— Upton *v.* Kennedy, 36 Mich. 215.

Special purposes for which a town may assess, levy, and collect taxes are often designated and provided for by statute, such as aiding the construction of railroads (Scott *v.* Hansheer, 94 Ind. 1; Goddard *v.* Stockman, 74 Ind. 400; Faris *v.* Reynolds, 70 Ind. 359; Davis *v.* Hert, (Ind. App. 1910) 90 N. E. 634; Duncan *v.* Cox, (Ind. App. 1907) 82 N. E. 125, 81 N. E. 735; De Maree *v.* Bridges, 30 Ind. App. 131, 65 N. E. 601; Chicago, etc., R. Co. *v.* Shea, 67 Iowa 728, 25 N. W. 901; State *v.* Mississippi Bridge Co., 134 Miss. 321, 35 S. W. 592); bridges (Auditor-Gen. *v.* McArthur, 87 Mich. 457, 49 N. W. 592); building town hall (Mills *v.* Richland Tp., 72 Mich. 100, 40 N. W. 183); funding township indebtedness (Purcell *v.* Bear Creek, 138 Ill. 524, 28 N. E. 1085 [*affirming* 39 Ill. App. 499]); highways (Griggs *v.* St. Croix County, 27 Fed. 333); military purposes (Warren R. Co. *v.* Person, 32 N. J. L. 566); payment of indebtedness to another town (Mills *v.* Richland Tp., 72 Mich. 100, 40 N. W. 183); payment of interest on town bonds (Woodlawn *v.* Cain, 135 Ala. 369, 33 So. 149; Atlantic City Water Works Co. *v.* Smith, 47 N. J. L. 473, 1 Atl. 459); purchase of fire apparatus (Torrey *v.* Milbury, 21 Pick. (Mass.) 64); school and school purposes (Atty.-Gen. *v.* Sparrow, 116 Mich. 574, 74 N. W. 881; Griggs *v.* St. Croix County, *supra*); support of minister (Lisbon *v.* Bath, 21 N. H. 319). See also Counties, 11 Cyc. 578 *et seq.*; Municipal Corporations, 28 Cyc. 1668 *et seq.* But the statutory provisions as to the manner and mode of assessment, levy, and collection must be complied with (Woodlawn *v.* Cain, *supra*; Auditor-Gen. *v.* MacArthur, *supra*; Mills *v.* Richland Tp., *supra*; Lisbon *v.* Bath, *supra*; Enyart *v.* Hanover Tp., 25 Ohio St. 618), although a substantial compliance has been held to be sufficient (Scott *v.* Hansheer, *supra*; Goddard *v.* Stockman, *supra*; Faris

powers,[58] and because the taxpayers are entitled to know whether the taxes levied are for a legal purpose,[59] the purposes for which they are levied must be stated with reasonable certainty, and must appear on the records of the town.[60] In New England [61] and in some other states [62] no more particular statement of the purposes of such taxes is necessary than that they are for town charges [63] or town expenses,[64] but in some states a more particular statement of purposes is essential to the validity of the tax.[65] In some states taxes may be assessed only by vote of the town,[66] and in others the authority to make the levy and assessment is vested in the town board,[67] or even in the county board; [68] while in at least one state the original power is vested in the town electors, with authority in the town board to act when the electors have failed to do so.[69] If the levy is made by the town board without authority,[70] or if the amount voted or levied is in excess of the legal limit,[71] the levy is void, and tax-sales and deeds based upon it are likewise void.[72] But the validity of an authorized levy for one year is not affected by a levy made at the same time for two additional years without authority.[73]

v. Reynolds, *supra*; Davis *v.* Hert, *supra*; Duncan *v.* Cox, *supra*; De Maree *v.* Bridges, *supra*; Chicago, etc., R. Co. *v.* Shea, *supra*; Torrey *v.* Milbury, *supra*; Taft *v.* Barrett, 58 N. H. 447; Mowry *v.* Mowry, 20 R. I. 74, 37 Atl. 306; Griggs *v.* St. Croix County, *supra*).

58. See *infra*, notes 60–82.

59. People *v.* Cleveland, etc., R. Co., 231 Ill. 209, 83 N. E. 111; Rexroth *v.* Ames, 55 N. J. L. 509, 26 Atl. 787. See *infra*, note 65.

60. See *infra*, notes 78–82.

61. Mowry *v.* Mowry, 20 R. I. 74, 37 Atl. 306.

62. Upton *v.* Kennedy, 36 Mich. 215.

63. Opinion of the Justices, 52 Me. 595.

64. Tucker *v.* Aiken, 7 N. H. 113; Warwick, etc., Water Co. *v.* Carr, 24 R. I. 226, 52 Atl. 1030.

65. **In Illinois** taxes for "town purposes" (St. Louis, etc., R. Co. *v.* People, 225 Ill. 428, 80 N. E. 303; People *v.* Chicago, etc., R. Co., 214 Ill. 190, 73 N. E. 315; People *v.* Chicago, etc., R. Co., 213 Ill. 225, 72 N. E. 778; Cincinnati, etc., R. Co. *v.* People, 213 Ill. 197, 72 N. E. 774; Illinois Cent. R. Co. *v.* People, 213 Ill. 174, 72 N. E. 1006; Cincinnati, etc., R. Co. *v.* People, 207 Ill. 566, 69 N. E. 938; People *v.* Indiana, etc., R. Co., 206 Ill. 612, 69 N. E. 575; Cincinnati, etc., R. Co. *v.* People, 206 Ill. 565, 69 N. E. 628; People *v.* Chicago, etc., R. Co., 194 Ill. 51, 61 N. E. 1064), "town expenses" (Cincinnati, etc., R. Co. *v.* People, 206 Ill. 565, 69 N. E. 628; Cleveland, etc., R. Co. *v.* People, 205 Ill. 582, 69 N. E. 89), "contingent expenses," "general expenses," and "contingent and general funds" (People *v.* Cleveland, etc., R. Co., 231 Ill. 209, 83 N. E. 111); have been held void because not sufficiently definite. But see People *v.* Cairo, etc., R. Co., 237 Ill. 312, 316, 86 N. E. 721, in which it is said: "We are not referred to any provision of the law which requires that the amounts of taxes raised for town purposes shall be stated separately. When contingent expenses necessarily incurred for the use and benefit of the town are deemed town charges, it is certainly not improper for the town meeting to levy a tax for incidentals."

In New Jersey "incidental expenses" and "incidental purposes" are not sufficient (Rexroth *v.* Ames, 55 N. J. L. 509, 26 Atl. 787; Verhule *v.* Saalmann, 37 N. J. L. 156); nor "ways and means" (Hance *v.* Sickles, 24 N. J. L. 125).

66. Hopkins *v.* People, 174 Ill. 416, 51 N. E. 757; Peoria, etc., R. Co. *v.* People, 141 Ill. 483, 31 N. E. 113.

Ordinary expenses anticipated may be provided for in advance by vote. Cincinnati, etc., R. Co. *v.* People, 213 Ill. 197, 72 N. E. 774.

67. Conwell *v.* O'Brien, 11 Ind. 419.

68. Bebb *v.* People, 172 Ill. 376, 50 N. E. 185; People *v.* Knopf, 171 Ill. 191, 49 N. E. 424; State *v.* Piper, 214 Mo. 439, 114 S. W. 1.

69. Williams *v.* Mears, 61 Mich. 86, 27 N. W. 863; Peninsula Iron, etc., Co. *v.* Crystal Falls Tp., 60 Mich. 510, 27 N. W. 666.

Power given the board to act if the town meeting shall "neglect or refuse" to do so requires a submission to the electors before the board may act, but power to act if the electors "do not determine" the tax does not require a previous submission to the electors as a prerequisite of the board's power to act. Auditor-Gen. *v.* Sparrow, 116 Mich. 574, 74 N. W. 881.

Township levy in excess of amount voted may be sustained on the presumption that the board increased the sum voted. Silsbee *v.* Stockle, 44 Mich. 561, 7 N. W. 160, 367.

70. Newaygo County Mfg. Co. *v.* Echtinaw, 81 Mich. 416, 45 N. W. 1010.

71. Hecock *v.* Van Dusen, 80 Mich. 359, 45 N. W. 343; Silsbee *v.* Stockle, 44 Mich. 561, 7 N. W. 160, 367.

Addition of excessive collection fees renders whole tax void. Bailey *v.* Haywood, 70 Mich. 188, 38 N. W. 209.

Where excess is easily separable, the tax is void only as to excess. Warwick, etc., Water Co. *v.* Carr, 24 R. I. 226, 52 Atl. 1030; Mowry *v.* Mowry, 20 R. I. 74, 37 Atl. 306.

72. Newaygo County Mfg. Co. *v.* Echtinaw, 81 Mich. 416, 45 N. W. 1010; Hecock *v.* Van Dusen, 80 Mich. 359, 45 N. W. 343; Silsbee *v.* Stockle, 44 Mich. 561, 7 N. W. 160, 367.

73. State *v.* Allen, 43 Ill. 456.

Where taxes have been properly voted at a town meeting, a failure of the town board to direct their levy will not invalidate the action of the assessor in spreading them upon his roll.[74] The levy should be made upon the basis of the latest assessment.[75] Where the method of assessment and levy is not prescribed by statute, the assessment for state and county purposes may be adopted as the basis of the levy,[76] and in some states this is required by statute.[77] It is necessary to the validity of a tax that the records of the town meeting [78] or board meeting [79] at which it was voted shall show affirmatively substantial compliance with all statutory requirements; [80] but defective records may be amended by the proper officer [81] or by order of court upon parol or other sufficient evidence.[82]

4. Assessment. Substantial compliance with the statutes is necessary [83] and sufficient [84] as to the persons and property assessed,[85] basis of valuation,[86] and form [87] to sustain assessments for town taxes. Where a tax has been voted to continue from year to year, assessment for it may be made annually without further vote,[88] and an assessment will be presumed to be valid until the contrary is shown; [89] but an officer is under no obligation to include an assessment for a tax not legally voted,[90] and even long continued usage will not invalidate an assessment list illegally made out.[91]

5. Collection — a. In General. A town or township may enforce collection of a valid tax in the statutory mode,[92] but only by the officer thereunto duly authorized.[93] In some states the collector of town taxes derives his authority directly from the statutes,[94] while in others he derives his authority from actions

74. Upton *v.* Kennedy, 36 Mich. 215.

75. Carrington *v.* Farmington, 21 Conn. 65.

Assessment list incomplete when tax voted may be perfected later. Montville *v.* Houghton, 7 Conn. 543.

76. Koontz *v.* Hancock, Burgess, etc., 64 Md. 134, 20 Atl. 1039.

77. Covington *v.* Rockingham, 93 N. C. 134.

78. Cincinnati, etc., R. Co. *v.* People, 213 Ill. 197, 72 N. E. 774; Cincinnati, etc., R. Co. *v.* People, 206 Ill. 565, 69 N. E. 628.

79. Must show a legal meeting.—Auditor-Gen *v.* McArthur, 87 Mich. 457, 49 N. W. 592; Harding *v.* Bader, 75 Mich. 316, 42 N. W. 942.

If board has power only where electors have failed, records of levy by the board must show failure of the electors. Auditor-Gen. *v.* McArthur, 87 Mich. 457, 49 N. W. 592; Newaygo County Mfg. Co. *v.* Echtinaw, 81 Mich. 416, 45 N. W. 1010; Gamble *v.* Stevens, 78 Mich. 302, 44 N. W. 329; Harding *v.* Bader, 75 Mich. 316, 42 N. W. 942.

Sufficient record may be made by a recital in the resolution of the board voting the taxes that the attention of the electors present at the annual meeting was called to the matter of voting upon such questions, and that they failed, neglected, and refused to vote such sums as were necessary. Weston Lumber Co. *v.* Munising Tp., 123 Mich. 138, 82 N. W. 267.

80. Indiana, etc., R. Co. *v.* People, 201 Ill. 351, 66 N. E. 293; Williams *v.* Mears, 61 Mich. 86, 27 N. W. 863.

An affirmative vote of a majority of the competent electors will be presumed, where the records show the adoption of a resolution. Lake Superior Ship Canal R., etc., Co. *v.* Thompson Tp., 56 Mich. 493, 23 N. W. 183.

81. Chicago, etc., R. Co. *v.* People, 184 Ill. 240, 56 N. E. 367.

82. Cincinnati, etc., R. Co. *v.* People, 206 Ill. 565, 69 N. E. 628; Chicago, etc., R. Co. *v.* People, 184 Ill. 240, 56 N. E. 367.

Year of levy may be supplied by parol evidence. Vail *v.* Bentley, 23 N. J. L. 532.

Evidence to justify amendment must be positive and conclusive. Illinois Cent. R. Co. *v.* People, 213 Ill. 174, 72 N. E. 1006.

Testimony of town clerk as to purpose of levy is inadmissible where such purpose was not stated at the meeting. Illinois Cent. R. Co. *v.* People, 213 Ill. 174, 72 N. E. 1006.

83. Franklin *v.* Warwick, etc., Water Co., 25 R. I. 384, 55 Atl. 934.

84. Gordon *v.* Norris, 29 N. H. 198; Scammon *v.* Scammon, 28 N. H. 419; Warwick, etc., Water Co. *v.* Carr, 24 R. I. 226, 52 Atl. 1030.

85. Sargent *v.* Milo, 90 Me. 374, 38 Atl. 341.

86. St. Louis, etc., R. Co. *v.* People, 225 Ill. 418, 80 N. E. 303; Deerfield Tp. *v.* Harper, 115 Mich. 678, 74 N. W. 207; Warne *v.* Johnson, 30 N. J. L. 452; Alger *v.* Curry, 38 Vt. 382.

87. Tillotson *v.* Webber, 96 Mich. 144, 55 N. W. 837.

88. People *v.* Illinois Cent. R. Co., 240 Ill. 426, 88 N. E. 985.

89. Gordon *v.* Norris, 29 N. H. 198.

90. Goodrich *v.* Compound School Dist. No. 5, 2 Wis. 102.

91. Middletown *v.* Berlin, 18 Conn. 189.

92. Bangor Tp. *v.* Smith Transp. Co., 112 Mich. 601, 71 N. W. 143.

93. Decatur Tp. *v.* Copley, 133 Mich. 546, 95 N. W. 545; Bangor Tp. *v.* Smith Transp. Co., 112 Mich. 601, 71 N. W. 143.

94. West Cain Tp. *v.* Gibbs, 4 Pa. Dist. 149.

of the town meeting and town board, and is subject to the general direction of the board.[95] Taxes are payable only in cash;[96] and if the collector surrenders the receipt in exchange for anything else, he becomes personally liable for the payment of the tax.[97] County commissioners have no inherent power to suspend the collection of a township tax duly levied and placed on the tax duplicate;[98] but under a statute giving the selectmen general supervision of the concerns of the town[99] they may not only suspend collection of an illegal tax, but may bind the town by a promise to repay.[1] An action cannot be brought to enforce a tax until all the steps required by statute have been taken;[2] but there is a general presumption in favor of the validity of a township tax,[3] and in a suit to collect taxes for the payment of bonds it will be presumed that the bonds are valid.[4] A declaration against a delinquent is sufficient which by fair and reasonable construction shows a substantial cause of action,[5] but not so as to one failing to aver a verified statement by the town treasurer.[6] A defective certificate may be amended on trial by the clerk so as to conform to the town record, if introduced in evidence,[7] but not otherwise.[8]

b. Wrongful Collection and Refunding. Taxes illegally assessed or collected on behalf of a town, the proceeds of which have been paid into the treasury,[9] may be recovered by the taxpayer[10] in an action in assumpsit against the town.[11] The selectmen[12] or other officers[13] making the assessment and collection are also liable for illegal acts done by them or under their authority, in an action in assump-

95. Miles *v.* Albany, 59 Vt. 79, 7 Atl. 601.

Collector cannot inquire into the precedent steps in levying the tax when he has a warrant from an authority having power to issue it. Cunningham *v.* Mitchell, 67 Pa. St. 78.

Payments by collector may also be under direction of the board. Lamb *v.* Anderson, 54 Iowa 190, 3 N. W. 416, 6 N. W. 268.

For publication of sales in newspaper without authority, the collector alone is liable. Millet *v.* Stoneham, 26 Me. 78.

96. Sawyer *v.* Springfield, 40 Vt. 305.

97. Sawyer *v.* Springfield, 40 Vt. 305, holding that where the collector surrenders the receipt in exchange for a town order, he assumes the tax and acquires title to the order and may transfer it.

98. State *v.* Laughlin, 101 Ind. 29.

99. Miles *v.* Albany, 59 Vt. 79, 7 Atl. 601.

1. Miles *v.* Albany, 59 Vt. 79, 7 Atl. 601.

2. Chicago, etc., R. Co. *v.* People, 190 Ill. 20, 60 N. E. 69; Peoria, etc., R. Co. *v.* People, 141 Ill. 483, 31 N. E. 113; Bangor Tp. *v.* Smith Transp. Co., 106 Mich. 223, 64 N. W. 28.

But statutes may provide that errors not affecting the substantial justice of the tax itself will not invalidate the tax. Chicago, etc., R. Co. *v.* People, 174 Ill. 80, 50 N. E. 1057.

3. Chicago, etc., R. Co. *v.* People, 174 Ill. 80, 50 N. E. 1057.

4. State *v.* Hannibal, etc., R. Co., 113 Mo. 297, 21 S. W. 14.

5. Kettelle *v.* Warwick, etc., Water Co., 24 R. I. 485, 53 Atl. 631.

6. Bangor Tp. *v.* Smith Transp. Co., 106 Mich. 223, 64 N. W. 28.

7. Cleveland, etc., R. Co. *v.* People, 205 Ill. 582, 69 N. E. 89.

8. Cleveland, etc., R. Co. *v.* People, 205 Ill. 582, 69 N. E. 89.

9. **But this does not apply** to state and county taxes (Anderson *v.* Hill, 54 Mich. 477, 20 N. W. 549; Slack *v.* Norwich, 32 Vt. 818; Vermont Cent. R. Co. *v.* Burlington, 28 Vt. 193; Spear *v.* Braintree, 24 Vt. 414), nor money received by officials beyond the scope of their jurisdiction (Rochester *v.* Rush, 80 N. Y. 302 [*reversing* 15 Hun 239]; People *v.* Chenango County, 11 N. Y. 563); and the town is not liable for arrest of taxpayers for tax already paid nor for tax paid collector a second time (Liberty *v.* Hurd, 74 Me. 101).

Taxes collected in one township cannot be applied by county authorities to refund taxes illegally collected in another. Des Moines, etc., R. Co. *v.* Lowry, 51 Iowa 486, 1 N. W. 782.

10. **But a township** cannot recover taxes on lands within its own boundaries which have not been assessed by it, but have been assessed and collected by another township. Shrewsbury Tp. *v.* Laporte Tp., 6 Pa. Dist. 457.

11. Phelps *v.* Thurston, 47 Conn. 477; Sargent *v.* Milo, 90 Me. 374, 38 Atl. 341. But see Noyes *v.* Haverhill, 11 Cush. (Mass.) 338, holding that where the sale of bank stocks for non-payment is void, the owner cannot sue the town in assumpsit to recover the proceeds of the sale which had been paid into the town treasury.

Action must be brought within time prescribed. Centre Tp. *v.* Marion County, 70 Ind. 562.

12. Chase *v.* Sparkhawk, 22 N. H. 134.

But they are not liable for mistakes of officers over whom they have no control, such as assessors (Phelps *v.* Thurston, 47 Conn. 477), and collectors of road taxes (Bishop *v.* Cone, 3 N. H. 513).

13. Bristol Mfg. Co. *v.* Gridley, 28 Conn. 201; People *v.* Chenango County, 11 N. Y. 563.

sit if the tax has been paid,[14] and in trespass if property has been levied on and sold for the tax;[15] nor is the town under any obligation to indemnify an officer for damages recovered from him by reason of a void assessment.[16]

6. Disposition of Taxes. Taxes belong to the town by which they are properly levied;[17] and, when collected, their custody is vested in the town treasurer[18] or other fiscal officer[19] who is responsible for their safe-keeping[20] and for their application to the purposes prescribed by statute[21] or local ordinance;[22] and funds which have been diverted to unauthorized purposes may be recovered in an action for the use of the town[23] brought within the period of the statute of limitations.[24]

7. Rights and Remedies of Taxpayers. In pursuance of statutory authority, action may be brought by a taxpayer to enjoin the making[25] or performance[26] of illegal contracts by town officers, to restrain illegal audit of claims and levy for their payment,[27] to enjoin illegal expenditures,[28] and also to recover for the benefit of the town funds illegally expended.[29] Certiorari also lies at the suit of a taxpayer to review illegal ordinances.[30] In some states the objections of a taxpayer to the levy and collection of a town tax can be urged only before the bodies authorized to impose the tax, and in courts of law;[31] but in others he may proceed in equity to enjoin the collection of a void tax.[32] Mere irregularities are nowhere

14. Liberty *v.* Hurd, 74 Me. 101.

15. Chase *v.* Sparhawk, 22 N. H. 134; People *v.* Chenango County, 11 N. Y. 563.

But they are not liable in trespass if tax is valid and the only error is not allowing a credit. Perley *v.* Parker, 20 N. H. 263.

Measure of damages is the full value of the property sold, without deduction for a portion of the tax that was legal. Drew *v.* Davis, 10 Vt. 506, 33 Am. Dec. 213.

Evidence may be introduced by the officer of all matters tending to show the legality of the tax. Micheltree *v.* Sweezy, 70 Pa. St. 278.

16. Wadsworth *v.* Henniker, 35 N. H. 189.

17. **A township created out of unauthorized territory** has no claim to taxes collected by the township to which it was formerly attached for expenditures in such territory. Midland Tp. *v.* Roscommon Tp., 39 Mich. 424.

A corporation has no interest in taxes levied for its aid until they are in the treasury. Duncan *v.* Cox, 41 Ind. App. 61, 81 N. E. 735, 82 N. E. 125.

18. Heckel *v.* Sandford, 40 N. J. L. 180.

A special tax ordered by the court to be levied to pay an indebtedness should be paid to the treasurer and not to a receiver appointed by the court. *In re* Foster Tp., 7 Kulp (Pa.) 21.

19. Purcell *v.* Bear Creek, 138 Ill. 524, 28 N. E. 1085 [*affirming* 39 Ill. App. 499].

20. Chicago Fifth Nat. Bank *v.* Hyde Park, 101 Ill. 595, 40 Am. Rep. 218.

21. State *v.* Marion County Ct., 128 Mo. 427, 30 S. W. 103, 31 S. W. 23.

Statute may direct taxes paid by a corporation to be applied to a sinking fund for the payment of bonds issued in aid of the corporation. Strough *v.* Jefferson County, 119 N. Y. 212, 23 N. E. 552; Clark *v.* Sheldon, 106 N. Y. 104, 12 N. E. 341; Jones *v.* Stokes County, 143 N. C. 59, 55 S. E. 427.

Mandamus will issue to compel application directed by statute. Jones *v.* Stokes County, 143 N. C. 59, 55 S. E. 427.

Permissive authority leaves discretion to officers. McConnell *v.* Allen, 193 N. Y. 318, 85 N. E. 1082 [*reversing* 120 N. Y. App. Div. 548, 105 N. Y. Suppl. 16].

22. **Under distribution ordered to resident taxpayers,** a resident in the town who is liable to taxation therein, but has never been taxed, is not entitled to share. Thompson *v.* Newtown, 21 N. H. 595.

Proceeds of taxes paid a bank in discharge of a loan to the treasurer which was used by him for town purposes are properly applied. Chicago Fifth Nat. Bank *v.* Hyde Park, 101 Ill. 595, 40 Am. Rep. 218.

23. Strough *v.* Jefferson County, 119 N. Y. 212, 23 N. E. 552; Clark *v.* Sheldon, 106 N. Y. 104, 12 N. E. 341.

24. Strough *v.* Jefferson County, 119 N. Y. 212, 23 N. E. 552.

25. Craft *v.* Lent, 53 Misc. (N. Y.) 481, 103 N. Y. Suppl. 366, holding, however, that action will not lie, in the absence of fraud, to restrain acts within the discretion of the officers.

26. Bartlett *v.* Austin, etc., Co., 147 Mich. 58, 110 N. W. 123.

27. Armstrong *v.* Fitch, 126 N. Y. App. Div. 527, 110 N. Y. Suppl. 736.

28. Rockefeller *v.* Taylor, 69 N. Y. App. Div. 176, 74 N. Y. Suppl. 812.

29. Annis *v.* McNulty, 51 Misc. (N. Y.) 121, 100 N. Y. Suppl. 951 [*affirmed* in 116 N. Y. App. Div. 909, 101 N. Y. Suppl. 1111].

30. Browning *v.* Pensauken Tp., 76 N. J. L. 110, 68 Atl. 1063, holding, however, that right to certiorari is subject to statutory restrictions.

31. Kilbourne *v.* St. John, 59 N. Y. 21, 17 Am. Rep. 291; Lewis *v.* Eagle, 135 Wis. 141, 115 N. W. 361; Judd *v.* Fox Lake, 28 Wis. 583.

32. *Indiana.*— McCleary *v.* Babcock, 169 Ind. 228, 82 N. E. 453; Williams *v.* Hall, 65 Ind. 129; Petty *v.* Myers, 49 Ind. 1.

Iowa.— Sinnett *v.* Moles, 38 Iowa 25.

Michigan.— Curtenius *v.* Hoyt, 37 Mich. 583.

ground for an injunction,[33] and injunctions have also been refused upon allegations that the railroad subsidized was not one legally eligible to subsidy,[34] that votes were obtained in favor of the subsidy by public notice of an illegal agreement with another company,[35] that the tax levied was slightly in excess of that voted,[36] that the claim to the tax had been assigned by the railroad,[37] that the railroad company has released from the payment of the tax those persons who had paid a subsidy that had been previously levied and declared void,[38] that the indebtedness for the payment of which the tax was levied was incurred through bad and reckless management of town affairs,[39] and that the road has not been constructed within the time limit;[40] nor will injunction lie to restrain what has already been done;[41] nor is it permissible in a petition for injunction to question the finding of the town board upon a question of fact necessary to give the board jurisdiction to order the election.[42] So acquiescence by a taxpayer for a considerable time, combined with large expenditures by the corporation in reliance upon a vote in its aid, will work an estoppel;[43] but not acquiescence in frauds of which the taxpayers were ignorant.[44] A corporation in whose aid a tax has been voted is a necessary party defendant to an action to enjoin the tax,[45] and where the town officers have refused to make or permit any defense, a taxpayer may be admitted as a party defendant.[46] A petition for an injunction to restrain the levy or collection of a tax,[47] or a complaint in a specific action to prevent misappropriation of town funds,[48] must state facts sufficient to show the illegality of the action sought to be enjoined; but harmless error in the admission of evidence is not ground for reversal.[49] Judgment in favor of the validity of a bond issue rendered in one suit brought by taxpayers to test its validity is conclusive upon all taxpayers who then reside or may thereafter reside in the town.[50] Interpleader is a remedy open to one whose identical property is rated in two towns at the same time;[51] but not to one whose property is taxable partly in one and partly in another town,[52] nor to a trustee merely to be informed in which one he is taxable.[53]

VI. CLAIMS AGAINST TOWNS.

A. Presentation and Allowance. Under statutes prescribing procedure for the auditing of claims against towns[54] claims are not enforceable unless they

Missouri.— Hays *v.* Dowis, 75 Mo. 250.

North Carolina.— Graves *v.* Moore County, 135 N. C. 49, 47 S. E. 134, holding that in an action to enjoin a township tax levied to pay interest on railroad bonds issued under a void statute, the burden is on defendants to show that the bonds are valid under some other statute.

United States.— Sully *v.* Drennan, 113 U. S. 287, 5 S. Ct. 453, 28 L. ed. 1007.

See 45 Cent. Dig. tit. "Towns," § 104.

33. Jones *v.* Cullen, 142 Ind. 335, 40 N. E. 124; Faris *v.* Reynolds, 70 Ind. 359; Warren *v.* Van Nostrand, 3 N. Y. Suppl. 151.

34. Pittsburgh, etc., R. Co. *v.* Harden, 137 Ind. 486, 37 N. E. 324.

35. Bish *v.* Stout, 77 Ind. 255.

36. Faris *v.* Reynolds, 70 Ind. 359.

37. Faris *v.* Reynolds, 70 Ind. 359.

38. Petty *v.* Myers, 49 Ind. 1.

39. Lemont *v.* Singer, etc., Stone Co., 98 Ill. 94.

40. Pittsburgh, etc., R. Co. *v.* Harden, 137 Ind. 486, 37 N. E. 324.

41. McCrea *v.* Chahoon, 54 Hun (N. Y.) 577, 8 N. Y. Suppl. 88.

42. Bell *v.* Maish, 137 Ind. 226, 36 N. E. 358, 1118.

43. Jones *v.* Cullen, 142 Ind. 335, 40 N. E. 124; Burlington, etc., R. Co. *v.* Stewart, 39 Iowa 267.

44. Sinnett *v.* Moles, 38 Iowa 25.

45. McCleary *v.* Babcock, 169 Ind. 228, 82 N. E. 453; Sully *v.* Drennan, 113 U. S. 287, 5 S. Ct. 453, 28 L. ed. 1007.

46. Norton *v.* Milner, 89 Ind. 197.

47. Hill *v.* Probst, 120 Ind. 528, 22 N. E. 664; Zorger *v.* Rapids Tp., 36 Iowa 175.

48. McCrea *v.* Chahoon, 54 Hun (N. Y.) 577, 8 N. Y. Suppl. 88.

49. Williams *v.* Hall, 65 Ind. 129.

50. Harmon *v.* Auditor of Public Accounts, 123 Ill. 122, 13 N. E. 161, 5 Am. St. Rep. 502 [*affirming* 22 Ill. App. 129].

51. Dorn *v.* Fox, 61 N. Y. 264 [*reversing* 6 Lans. 162]; Mohawk, etc., R. Co. *v.* Clute, 4 Paige (N. Y.) 384; Thomson *v.* Ebbets, Hopk. (N. Y.) 272; Redfield *v.* Genesee County, Clarke (N. Y.) 42.

52. Greene *v.* Mumford, 4 R. I. 313.

53. Macy *v.* Nantucket, 121 Mass. 351.

54. Salaries of officers are fixed by the town board, and the board of auditors has no jurisdiction as to their amount or allowance. People *v.* Sippell, 116 N. Y. App. Div. 753, 102 N. Y. Suppl. 69.

have been presented to,[55] and allowed by,[56] the proper officers,[57] assembled in a legal meeting [58] and acting substantially in the manner prescribed.[59] Under such statutes the action of the county board of supervisors,[60] or even of a town meeting,[61] in assuming to audit and allow a claim against the town, is void; and under a constitutional provision forbidding the legislature to audit and allow any private claim, the legislature is without power to pass upon the validity of claims against a town.[62] Personal appearance of claimants before the board is not necessary,[63] nor is it necessary that claims be supported by sworn evidence,[64] unless required by statute; [65] and the board may act upon its own knowledge of a claim.[66] A

Claim of officer for expenses incurred by him in prosecuting a suit on behalf of the town and for the judgment against him must be submitted to auditors. People *v.* Barnes, 114 N. Y. 317, 20 N. E. 609, 21 N. E. 739 [*affirming* 44 Hun 574].

Treasurer cannot pay to himself fees allowed by statute for striking off lands to a town, at a sale for taxes, without previous audit of his claim. Warrin *v.* Baldwin, 105 N. Y. 534, 12 N. E. 49 [*reversing* 35 Hun 334].

Judgments against officials acting within their authority must be submitted to audit. People *v.* Ulster County, 93 N. Y. 397.

Only township accounts of the preceding year are within the jurisdiction of township auditors in Pennsylvania. Leasure *v.* Mahoning Tp., 8 Watts (Pa.) 551.

Town ordinance may regulate auditing of claims in absence of statute. Foster *v.* Angell, 19 R. I. 285, 33 Atl. 406.

55. Peck *v.* Catskill, 119 N. Y. App. Div. 752, 104 N. Y. Suppl. 540; Foster *v.* Angell, 19 R. I. 285, 33 Atl. 406.

56. People *v.* Barnes, 114 N. Y. 317, 20 N. E. 609, 21 N. E. 739 [*affirming* 44 Hun 574].

57. **Supervisor is "the chief fiscal officer"** of a town having no treasurer. Stanton *v.* Taylor, 19 N. Y. Suppl. 43.

58. Jackson *v.* Collins, 16 N. Y. Suppl. 651.

59. Chicago, etc., R. Co. *v.* People, 190 Ill. 20, 60 N. E. 69; Webb *v.* Bell, 22 N. Y. App. Div. 314, 47 N. Y. Suppl. 989 [*affirmed* in 162 N. Y. 641, 57 N. E. 1128].

What proceedings sufficient.—Westchester Cent. Bank *v.* Shaw, 121 N. Y. App. Div. 415, 106 N. Y. Suppl. 94.

Each item must be audited separately (People *v.* Elmira Auditors, 20 Hun (N. Y.) 150 [*affirmed* in 82 N. Y. 80]); but where it appears that the claimant has acted fraudulently, the items may all be rejected, without attempting to sift the good from the bad (People *v.* Orleans County, 98 N. Y. App. Div. 390, 90 N. Y. Suppl. 318).

A claim for legal services in one suit and under one retainer is in fact but a single claim, and the board need not pass on each item separately. People *v.* Vanderpoel, 35 N. Y. App. Div. 73, 54 N. Y. Suppl. 436.

60. People *v.* Wright, 19 Mich. 351; Armstrong *v.* Fitch, 126 N. Y. App. Div. 527, 110 N. Y. Suppl. 736.

County board may be given limited authority by statute. McCrea *v.* Chahoon, 54 Hun (N. Y.) 577, 8 N. Y. Suppl. 88; Outagamie County *v.* Greenville, 77 Wis. 165, 45 N. W. 1090, holding that under statute conferring the authority to audit certain claims against towns upon the county board in which the town is represented by its supervisor, the allowance of a claim is conclusive against the town.

Effect of refusal to allow claim.—Ohio Rev. St. § 4715, provides that road superintendents may enter upon uncultivated or improved lands unencumbered by crops near public roads and carry away gravel necessary for the improvement or construction of such road, and that the owner shall be paid a reasonable compensation therefor, to be assessed by the township trustees. Held, that where gravel was taken from one's land under section 4715, and an amount allowed therefor by the township trustees was satisfactory to the landowner, and the claim was certified to the county commissioners because in excess of twenty-five dollars as expressly required by section 4745, who refused to allow it, the claim still remained a valid claim against the township, which could be enforced by civil action if the trustees declined to make a levy for its payment. Kendig *v.* Greene County, 82 Ohio St. 315, 92 N. E. 469.

61. Cottonwood *v.* People, 38 Ill. App. 239; People *v.* Onondaga Tp., 16 Mich. 254; Rockefeller *v.* Taylor, 69 N. Y. App. Div. 176, 74 N. Y. Suppl. 812 [*reversing* 28 Misc. 460, 59 N. Y. Suppl. 1038]. But see Wunderlich *v.* Kalkofen, 134 Wis. 74, 113 N. W. 1091, holding that where, after the disallowance of a claim by the auditors, it has been allowed by a town meeting and a tax voted and collected to pay it, mandamus will lie to compel the supervisors and clerk to issue a town warrant for its payment.

Acceptance of a committee's report on a claim presented is not an allowance of the claim. Bickford *v.* Hyde Park, 173 Mass. 536, 54 N. E. 250.

62. People *v.* Onondaga Tp., 16 Mich. 254.

63. Wall *v.* Trumbull, 16 Mich. 228.

64. Wall *v.* Trumbull, 16 Mich. 228.

65. People *v.* King, 116 N. Y. App. Div. 89, 101 N. Y. Suppl. 782.

66. Wall *v.* Trumbull, 16 Mich. 228; People *v.* Vanderpoel, 35 N. Y. App. Div. 73, 54 N. Y. Suppl. 436; People *v.* Pople, 81 Hun (N. Y.) 383, 30 N. Y. Suppl. 878; People *v.* Hannibal Auditors, 65 Hun (N. Y.) 414, 20 N. Y. Suppl. 165.

certificate as to the allowance [67] or rejection [68] of the claim should be issued by the board and filed with the town clerk.[69]

B. Interest. Claims against towns are governed as to the allowance of interest by the same general rules that prevail in the settlement of accounts between individuals.[70]

C. Conclusiveness of Audit and Review by Courts. The board acts in a semi-judicial capacity,[71] has a large measure of discretion in accepting or rejecting claims,[72] and its action is conclusive upon all parties [73] until reversed in a proper proceeding.[74] The board is without power to reconsider or amend its own action duly taken in allowing a claim;[75] but the same board, at a subsequent meeting, may reconsider its action in disallowing a claim.[76] Provision may be made by statute for a review of the action of the town board by the county board of supervisors,[77] and a proper and usual method is by certiorari; [78] but as the action of the board is of a judicial nature, mandamus will not lie.[79] In proceedings to set aside claims that have been allowed, the claimants are necessary parties,[80] and the provisions of the statute are controlling as to notice [81] and procedure.[82]

D. Settlement, Compromise, and Arbitration. In New England

67. Mandamus lies to compel issue. People *v.* Manning, 37 N. Y. App. Div. 141, 55 N. Y. Suppl. 781.

68. People *v.* Stillwater Auditors, 126 N. Y. App. Div. 487, 110 N. Y. Suppl. 745; People *v.* Horicon Auditors, 95 N. Y. App. Div. 620, 88 N. Y. Suppl. 1113 [*affirming* 42 Misc. 116, 85 N. Y. Suppl. 1093, and *affirmed* in 180 N. Y. 542, 73 N. E. 1130].

69. People *v.* Horicon Auditors, 95 N. Y. App. Div. 620, 88 N. Y. Suppl. 1113 [*affirming* 42 Misc. 116, 85 N. Y. Suppl. 1093, and *affirmed* in 180 N. Y. 542, 73 N. E. 1130].

70. Langdon *v.* Castleton, 30 Vt. 285, holding that interest on yearly balances was properly allowed on a claim known to the officers of the town.

71. See *infra*, notes 75, 76.

72. Wall *v.* Trumbull, 16 Mich. 228; People *v.* Orleans County, 98 N. Y. App. Div. 390, 90 N. Y. Suppl. 318; People *v.* Hannibal Auditors, 65 Hun (N. Y.) 414, 20 N. Y. Suppl. 165; Matter of Stokes, 33 Misc. (N. Y.) 448, 68 N. Y. Suppl. 439.

73. Barnard *v.* Argyle, 20 Me. 296; Armstrong *v.* Fitch, 126 N. Y. App. Div. 527, 110 N. Y. Suppl. 736; Matter of Mefford, 113 N. Y. App. Div. 529, 99 N. Y. Suppl. 400; People *v.* Ulster County, 32 Hun (N. Y.) 607; Elizabeth Tp. *v.* White, 48 Ohio St. 577, 29 N. E. 47. But see Wilkinson *v.* Long Rapids Tp., 74 Mich. 63, 68, 41 N. W. 861, in which it is said: "The decision of the township board, unlike that of the board of supervisors, is not final and conclusive upon the claimant or upon the courts."

Mandamus lies to enforce levy of a tax to pay claim properly allowed. Lattin *v.* Oyster Bay, 34 Misc. (N. Y.) 568, 70 N. Y. Suppl. 386.

74. See *infra*, notes 77–79.

75. Central Bank *v.* Shaw, 121 N. Y. App. Div. 415, 106 N. Y. Suppl. 94.

Disallowance of claim presented without authority does not bar subsequent presentation by the creditor. People *v.* King, 116 N. Y. App. Div. 89, 101 N. Y. Suppl. 782.

Rejection of claim of an attorney is not rejection of claim of officers for disbursements to the attorney. McCoy *v.* McClarty, 53 Misc. (N. Y.) 69, 104 N. Y. Suppl. 80.

76. Matter of Weeks, 97 N. Y. App. Div. 131, 89 N. Y. Suppl. 826.

If no adjudication on merits of claim rejected, it may be again presented. People *v.* Hempstead Town Auditors, 49 N. Y. App. Div. 4, 63 N. Y. Suppl. 114.

77. People *v.* Orleans County, 98 N. Y. App. Div. 390, 90 N. Y. Suppl. 318; McCrea *v.* Chahoon, 54 Hun (N. Y.) 577, 8 N. Y. Suppl. 88, holding that under the New York statute giving the board of town auditors and the board of supervisors concurrent jurisdiction in auditing claims against towns, the board of supervisors had authority to allow claims presented in proper form, which had been rejected by the auditors because "not itemized," but that they had no such authority as to claims rejected by the auditors on their merits.

78. People *v.* Barnes, 114 N. Y. 317, 20 N. E. 609, 21 N. E. 739; Matter of Weeks, 97 N. Y. App. Div. 131, 89 N. Y. Suppl. 826; People *v.* Vanderpoel, 35 N. Y. App. Div. 73, 54 N. Y. Suppl. 436; People *v.* Highland Town Auditors, 8 N. Y. St. 531.

New grounds for disallowance, not stated in the original certificate, cannot be relied on in certiorari proceedings to review. People *v.* Stillwater Auditors, 126 N. Y. App. Div. 487, 110 N. Y. Suppl. 745.

Writ must be obtained while board still retains jurisdiction of proceedings. People *v.* Hempstead Town Auditors, 49 N. Y. App. Div. 4, 63 N. Y. Suppl. 114; People *v.* Hannibal Auditors, 65 Hun (N. Y.) 414, 20 N. Y. Suppl. 165.

79. Cottonwood Auditors *v.* People, 38 Ill. App. 239; People *v.* Barnes, 114 N. Y. 317, 20 N. E. 609, 21 N. E. 739; People *v.* Highland Town Auditors, 8 N. Y. St. 531; Foster *v.* Angell, 19 R. I. 285, 33 Atl. 406.

80. Armstrong *v.* Fitch, 113 N. Y. App. Div. 317, 99 N. Y. Suppl. 471.

81. People *v.* Orleans County, 98 N. Y. App. Div. 390, 90 N. Y. Suppl. 318.

82. People *v.* Orleans County, 98 N. Y. App. Div. 390, 90 N. Y. Suppl. 318.

selectmen have authority, by virtue of their office, to settle claims against the town,[83] and, in their discretion, to submit them to arbitration.[84]

E. Payment. Town claims and orders are usually payable in money;[85] and, by agreement of the parties, may be made so payable, even though originally payable in merchandise or commodities.[86] The receiving of an order by the claimant, where not accepted in full payment,[87] does not preclude him from bringing suit for the balance alleged to be due.

VII. ACTIONS.

A. Capacity to Sue and Be Sued. Towns and townships, being merely quasi-corporations,[88] have no inherent capacity to sue and be sued;[89] but in such measure only as may be expressly conferred, which under some statutes is full,[90] and under others is limited and partial.[91] In some states towns are mere governmental agencies having no capacity of suit.[92]

B. Rights of Action. In those states in which towns have capacity to sue and be sued actions by them have been sustained in ejectment to recover possession of town lands,[93] in trespass *quare clausum fregit* for encroachments on land used for school purposes,[94] for use and occupation of land under a void lease by the town,[95] for breach of official duty by town officers,[96] for the enforcement of promissory notes received by them within the scope of their corporate powers,[97] and for numerous purposes within the general scope of their authority;[98] but it has been held that a town may not sue in ejectment to recover lands granted by an individual to a missionary society,[99] nor to enforce a bond exacted by the township committee acting under special authority conferred by the legislature;[1] nor, when not owning the fee in a highway, to set aside a contract relating to its control made between the highway officers and a private corporation;[2] nor, when

83. Sharon *v.* Salisbury, 29 Conn. 113 [*overruling* Leavenworth *v.* Kingsbury, 2 Day (Conn.) 323].

84. Hine *v.* Stephens, 33 Conn. 497, 89 Am. Dec. 217; Fogg *v.* Dummer, 58 N. H. 505; Hollister *v.* Pawlet, 43 Vt. 425; Dix *v.* Dummerston, 19 Vt. 262.

Town vote authorizing settlement at the discretion of the selectmen empowers them to submit the claim to arbitration. Campbell *v.* Upton, 113 Mass. 67.

85. Veazy *v.* Harmony, 7 Me. 91.

Mandamus may issue to compel payment by a town treasurer of claims against the town which have been properly audited and allowed, his duty to pay such claims being ministerial. H. P. Cornell Co. *v.* Barber, (R. I. 1910) 76 Atl. 801. See MANDAMUS, 26 Cyc. 158 *et seq.*, 317 *et seq.*

86. Veazy *v.* Harmony, 7 Me. 91, holding that the town treasurer had authority to agree to pay in money an order drawn on him payable in grain.

87. Wilkinson *v.* Long Rapids Tp., 74 Mich. 63, 41 N. W. 861.

88. Wallace *v.* Sharon Tp., 84 N. C. 164.

89. West Bend Tp. *v.* Munch, 52 Iowa 132, 2 N. W. 1047.

90. *Indiana.*— Sebrell *v.* Fall Creek Tp., 27 Ind. 86.

Maine.— Augusta *v.* Leadbetter, 16 Me. 45.

Nebraska.— Denver *v.* Myers, 63 Nebr. 107, 88 N. W. 191.

New York.— Hempstead *v.* Lawrence, 133 N. Y. App. Div. 473, 122 N. Y. Suppl. 1037; Horn *v.* New Lots, 83 N. Y. 100, 38 Am. Rep. 402.

Ohio.— Wilson *v.* Butler Tp. School Section 16, 8 Ohio 174.

See 45 Cent. Dig. tit. "Towns," § 111.

In New York under General Corporation Law (Laws (1890), c. 563), §§ 2, 3, Town Law (Laws (1890), c. 569), § 2, and General Municipal Law (Laws (1892), c. 685), § 1, a town under Const. art. 8, § 3, may sue in all courts in like cases as natural persons, and where there is an existing liability at law, or an existing right which it may enforce, the enforcement must be as in the case of a natural person. Hempstead *v.* Lawrence, 138 N. Y. App. Div. 473, 122 N. Y. Suppl. 1037.

91. Lorillard *v.* Monroe, 11 N. Y. 392, 62 Am. Dec. 120; Galen *v.* Clyde, etc., Plank Road Co., 27 Barb. (N. Y.) 543; Lattin *v.* Oyster Bay, 34 Misc. (N. Y.) 568, 70 N. Y. Suppl. 386.

92. Theulen *v.* Viola Tp., 139 Iowa 61, 117 N. W. 26; Austin Western Co. *v.* Weaver Tp., 136 Iowa 709, 114 N. W. 189.

93. Jamaica *v.* Hart, 52 Vt. 549.

94. Hempstead *v.* Lawrence, 138 N. Y. App. Div. 473, 122 N. Y. Suppl. 1037; Castleton *v.* Langdon, 19 Vt. 210.

95. Wilson *v.* Butler Tp. School Section 16, 8 Ohio 174.

96. Denver *v.* Myers, 63 Nebr. 107, 88 N. W. 191.

97. Augusta *v.* Leadbetter, 16 Me. 45.

98. See *supra*, notes 93–97.

99. Colchester *v.* Hill, Brayt. (Vt.) 65.

1. Woodbridge Tp. *v.* Hall, 47 N. J. L. 388, 1 Atl. 492.

2. Galen *v.* Clyde, etc., Plank Road Co., 27 Barb. (N. Y.) 543.

not charged with protection of the public health, to suppress a public nuisance constituting a menace to the health of its citizens;[3] nor, in general, to enforce duties owing, not to the town, but to the state or other subdivisions thereof.[4] Towns have been held liable in assumpsit for money paid to them by mistake,[5] for money collected under a void assessment,[6] and for the amount determined by settlement to be due an officer.[7] For the enforcement of an order on the town treasurer, mandamus, and not assumpsit,[8] is the proper remedy. In New York it has been held that the remedy against towns to enforce claims arising upon contract is by mandamus to the board of supervisors,[9] and not by action on the contract;[10] but that an action may be maintained upon a certificate of indebtedness made an absolute liability of the town without the necessity of submission to audit.[11] The right to enforce a liability or prosecute a claim against a town may be given by vote of the town,[12] but no action can be based upon such a vote unless strictly within the terms of the resolution adopted.[13]

C. Management and Compromise of Litigation. In New England, in the absence of regulation by statute or local ordinance, the power on behalf of the town to compromise suits by and against the town[14] is vested in the selectmen,[15] and not in the town agent;[16] but by vote in the town such authority may be conferred upon the agent,[17] and a compromise made by him in good faith in pursuance thereof is binding on the town.[18] An agent to prosecute and defend or an attorney appointed by him has general authority as to matters of procedure in the conduct of suits.[19] So it has been held in Indiana that a township trustee has authority to accept a note with sureties in discharge of a judgment,[20] and in New York that an officer sued for legal services rendered the town has authority to compromise the suit.[21]

D. Conditions Precedent — 1. In General. Under special statutes or town ordinances authorization by town meeting,[22] by a committee,[23] or by certain officers may be made a condition precedent to suit. In the absence of such provisions, however, no special authorization is necessary for the institution of suit by the proper officers on an official bond;[24] nor is a tender of stock received for

3. Belleville Tp. *v.* Orange, 70 N. J. Eq. 244, 62 Atl. 331.

4. See *supra*, notes 99, 1–3.

5. Center School Tp. *v.* State, 150 Ind. 168, 49 N. E. 961.

6. Horn *v.* New Lots, 83 N. Y. 100, 38 Am. Rep. 402.

7. Carney *v.* Wheatfield Tp., 4 Watts & S. (Pa.) 215.

8. Just *v.* Wise Tp., 42 Mich. 573, 4 N. W. 298.

9. Bell *v.* Esopus, 49 Barb. (N. Y.) 506.

10. Holroyd *v.* Indian Lake, 85 N. Y. App. Div. 246, 83 N. Y. Suppl. 533 [*affirmed* in 180 N. Y. 318, 73 N. E. 36]; Colby *v.* Day, 75 N. Y. App. Div. 211, 77 N. Y. Suppl. 1022 [*reversed* on other grounds in 177 N. Y. 548, 69 N. E. 367]; Bell *v.* Esopus, 49 Barb. (N. Y.) 506.

11. Brown *v.* Canton, 4 Lans. (N. Y.) 409 [*reversed* on other grounds in 49 N. Y. 662].

12. Hadsell *v.* Hancock, 3 Gray (Mass.) 526.

13. Warren *v.* Durham, 61 Me. 19; Lyons *v.* Cole, 3 Thomps. & C. (N. Y.) 431; Wahlschlager *v.* Liberty, 23 Wis. 362.

14. **What constitutes compromise.**—An attempt by part of the members of the board to allow a claim on condition that suits involving it shall be dismissed operates as an attempt at audit and not as a compromise. Webb *v.* Bell, 22 N. Y. App. Div. 314, 47 N. Y. Suppl. 989 [*affirmed* in 162 N. Y. 641, 57 N. E. 1128].

15. Cabot *v.* Britt, 36 Vt. 349, holding the authority of the selectmen not affected by the appointment by town meeting of an agent to prosecute and defend suits.

16. Clay *v.* Wright, 44 Vt. 538.

17. Kinsley *v.* Norris, 60 N. H. 131.

18. Kinsley *v.* Norris, 62 N. H. 652.

19. **He may agree to a reference.** Buckland *v.* Conway, 16 Mass. 396.

20. Philips *v.* East, 16 Ind. 254.

21. Hulburt *v.* Defendorf, 58 Hun (N. Y.) 585, 12 N. Y. Suppl. 673.

22. Cady *v.* Bailey, 95 Wis. 370, 70 N. W. 285.

Instruction to sue two persons authorizes an action against one or both of them. Rolling *v.* Wunderlich, 138 Wis. 667, 120 N. W. 515.

23. Briggs *v.* Murdock, 13 Pick. (Mass.) 305.

24. Blackstone *v.* Taft, 4 Gray (Mass.) 250; Cady *v.* Bailey, 95 Wis. 370, 70 N. W. 285.

New York Town Law (Laws (1890), c. 569), §§ 24, 25, authorizing the electors of each town at their biennial town meeting or at special town meetings to direct the prosecution or defense of all actions in which the town is interested, etc., give only a power of supervision to the town meeting over actions

bonds unlawfully issued essential to the commencement of a suit for cancellation of the bonds.[25]

2. Notice or Demand. Under special statutes [26] notice of an intention to bring suit against a town may be a prerequisite to the institution of such suit, but the terms of the statute will not be extended by construction to include classes of suits not specially mentioned.[27] Presentment to the proper fiscal officer [28] and demand of payment are conditions precedent to the maintenance of suit on a town warrant [29] or order.[30]

3. Presentment of Claim For Audit. In some states statutory provisions for audit are only permissive; [31] but in others, presentment of claims in due form for audit is a condition precedent to suit upon them.[32] Accounts should be itemized, verified, and formally presented; [33] but strict and formal presentation has been held unnecessary where the board has refused payment for other than technical reasons.[34] In a suit upon claims for unliquidated damages, the amount recoverable is limited to that stated in the claim filed,[35] but an additional allegation of negligence is permissible.[36] Mandamus lies to compel audit; [37] and failure to make due presentment is matter not in bar, but in abatement.[38]

E. Defenses. In an action by a town officer for the cancellation of town bonds it is a good defense that he was authorized only to sue for an injunction upon their issue until the rights of the town were protected; [39] but in an action by a township on notes by it, neither the lack of a record [40] nor of a vote [41] authorizing their purchase is a defense; nor may an officer sued for money converted plead that he had, without authority, expended it in necessary repairs of town roads or bridges; [42] nor is it a good defense to a taxpayer's action to set aside void

pending or thereafter to be brought, and the adoption of an affirmative resolution at a town meeting is not a condition precedent to the bringing thereof. Hempstead *v.* Lawrence, 138 N. Y. App. Div. 473, 122 N. Y. Suppl. 1037.

25. Springport *v.* Teutonia Sav. Bank, 84 N. Y. 403.

26. Stanyan *v.* Peterborough, 69 N. H. 372, 46 Atl. 191.

27. Hathaway *v.* Osborne, 25 R. I. 249, 55 Atl. 700, holding a statute relating to notice not applicable to action for trespass against the town.

28. Varner *v.* Nobleborough, 2 Me. 121, 11 Am. Dec. 48, holding, however, that notice to selectmen is not required of non-payment of town order by the treasurer.

29. East Union Tp. *v.* Ryan, 86 Pa. St. 459.

30. Dalrymple *v.* Whitingham, 26 Vt. 345; Packard *v.* Bovina, 24 Wis. 382.

If the order has been delivered and paid to the wrong person, a demand for it is not a condition precedent to suit on the claim when it has been presented and allowed. Stimpson *v.* Malden, 109 Mass. 313.

31. Ross *v.* Collins, 106 Ill. App. 396; Short *v.* Civil Tp., 8 S. D. 148, 65 N. W. 432.

In suit for services and expenditures as an officer of the township, proof was allowed of items not presented to the auditors. Judevine *v.* Hardwick, 49 Vt. 180.

32. People *v.* Plainfield Ave. Gravel-Road Co., 105 Mich. 9, 62 N. W. 998; Aurora Old Second Nat. Bank *v.* Middletown, 67 Minn. 1, 69 N. W. 471; Goodfriend *v.* Lyme, 90 N. Y. App. Div. 334, 86 N. Y. Suppl. 422; Bragg *v.* Victor, 84 N. Y. App. Div. 83, 82 N. Y. Suppl. 212; Wright *v.* Wilmurt, 44 Misc. (N. Y.) 456, 90 N. Y. Suppl. 90; Groundwater *v.* Washington, 92 Wis. 56, 65 N. W. 871; Schriber *v.* Richmond, 73 Wis. 5, 40 N. W. 644.

Cannot be waived.— Pitt County School Directors *v.* Greenville, 130 N. C. 87, 40 S. E. 847. But while a town officer could not sue the town on a claim for services without first submitting his claim to the town board for audit, where the town sues him on a demand as for salary wrongfully received, it thereby waives the statutory requirement as to audit, and subjects itself to the same rules as natural persons, so that the officer may counter-claim for his unaudited claim against the town. Bleecker *v.* Balje, 138 App. Div. 706, 123 N. Y. Suppl. 809.

33. Rock Creek Tp. *v.* Codding, 42 Kan. 649, 22 Pac. 741; Aurora Old Second Nat. Bank *v.* Middletown, 67 Minn. 1, 69 N. W. 471.

34. Rock Creek Tp. *v.* Codding, 42 Kan. 649, 22 Pac. 741.

35. Conrad *v.* Ellington, 104 Wis. 367, 80 N. W. 456.

36. Quinn *v.* Sempronius, 33 N. Y. App. Div. 70, 53 N. Y. Suppl. 325.

37. People *v.* Carrollton Auditors, 43 N. Y. App. Div. 22, 59 N. Y. Suppl. 615.

38. Schriber *v.* Richmond, 73 Wis. 5, 40 N. W. 644.

39. Lyons *v.* Cole, 3 Thomps. & C. (N. Y.) 431.

40. Scott *v.* Marion Tp., 39 Ohio St. 153.

41. Augusta *v.* Leadbetter, 16 Me. 45.

42. Remington *v.* Ward, 78 Wis. 539, 47 N. W. 659.

leases of town property that the lessee had expended a large sum upon the property or that plaintiff had made no objection to such expenditure.[43] It is a good defense to an action against a town that it is sued in the wrong capacity,[44] that the suit is not authorized by statute,[45] or that an action authorized by a vote is not strictly within its terms;[46] but in a suit against a town for money loaned it is no defense that the money was used to take up orders held by a town debtor;[47] nor, in an action against a town brought by selectmen on a vote to indemnify them for expenses of defending a suit, is want of notice of the suit any defense to the town;[48] nor, in an action by one town against another for supplies to a pauper inhabitant of the latter, may a like claim by defendant against plaintiff be pleaded in set-off.[49]

F. Jurisdiction and Venue. Jurisdiction and venue are matters of statutory regulation,[50] and a justice of the peace may have jurisdiction of suits by and against towns and townships;[51] and a suit for damages resulting from negligence of a town may be brought in another county.[52]

G. Time to Sue and Limitations. Towns and townships are subject to statutes of limitation,[53] and may avail themselves of the same.[54] Demand is necessary to start them running as in case of private persons,[55] and authorized partial payments keep a claim alive;[56] but compromise negotiations do not revive barred actions,[57] nor the mere adoption by town meeting of a report which states that an order is outstanding and unpaid;[58] and in some states at least the town board has no power to revive.[59]

H. Suits in Name of Town or Officers.[60] As a general rule actions involving corporate rights and liabilities should be in the name of the town;[61] and this

43. Wenk *v.* New York, 82 N. Y. App. Div. 584, 81 N. Y. Suppl. 583.

44. As civil, instead of school, townships. Utica Tp. *v.* Miller, 62 Ind. 230.

45. Doolittle *v.* Walpole, 67 N. H. 554, 38 Atl. 19.

46. Warren *v.* Durham, 61 Me. 19.

47. Brown *v.* Winterport, 79 Me. 305, 9 Atl. 844.

48. Hadsell *v.* Hancock, 3 Gray (Mass.) 526.

49. Augusta *v.* Chelsea, 47 Me. 367.

50. Spencer *v.* Cline, 28 Ind. 51.

51. Spencer *v.* Cline, 28 Ind. 51; Hart *v.* Port Huron, 46 Mich. 428, 9 N. W. 481; Lapham *v.* Rice, 55 N. Y. 472 [*reversing* 63 Barb. 485]; Harding *v.* New Haven Tp., 3 Ohio 227.

52. Lapham *v.* Rice, 55 N. Y. 472 [*reversing* 63 Barb. 485]; Hunt *v.* Pownal, 9 Vt. 411.

53. Mitchell *v.* Strough, 35 Hun (N. Y.) 83; Venice *v.* Breed, 65 Barb. (N. Y.) 597; Venice *v.* Breed, 1 Thomps. & C. (N. Y.) 131; Selpho *v.* Brooklyn, 9 N. Y. St. 700; Oxford Tp. *v.* Columbia, 38 Ohio St. 87.

54. Sturtevant *v.* Pembroke, 130 Mass. 373; Belchertown *v.* Bridgman, 118 Mass. 486; Cole *v.* Economy Tp., 13 Pa. Co. Ct. 549.

55. Smith *v.* Franklin, 61 Vt. 385, 17 Atl. 838.

56. Sargeant *v.* Sunderland, 21 Vt. 284.

57. Fiske *v.* Needham, 11 Mass. 452.

58. Prescott *v.* Vershire, 63 Vt. 517, 22 Atl. 655.

59. McGrory *v.* New York, 30 Misc. (N. Y.) 56, 61 N. Y. Suppl. 689.

60. Authority and powers of officers in prosecution and defense of actions see *supra*, III, D, 12, b.

61. *Illinois.*—Winne *v.* People, 177 Ill. 268, 52 N. E. 377.

Kansas.—Ralston *v.* Dodge City, etc., R. Co., 53 Kan. 337, 36 Pac. 712.

Massachusetts.—Weston *v.* Gibbs, 23 Pick. 205.

New Hampshire.—Sunapee *v.* Eastman, 32 N. H. 470, holding that an action for the recovery of a portion of a tract of land granted to certain individuals by a certain corporate name should be brought in such corporate name, notwithstanding subsequent changes in name and boundaries.

New York.—Cornell *v.* Guilford, 1 Den. 510, holding that under New York statutes a town meeting is without authority to direct action to be brought in the name of an officer.

Ohio.—Wilson *v.* Butler Tp. School Section 16, 8 Ohio 174; Green Tp. *v.* Robinson, 5 Ohio 186; Concord Tp. *v.* Miller, 5 Ohio 184; Harding *v.* New Haven Tp., 3 Ohio 227.

Vermont.—Jamaica *v.* Hart, 52 Vt. 549; Everts *v.* Allen, 1 D. Chipm. 116.

Wisconsin.—Pine Valley *v.* Unity, 40 Wis. 682.

See 45 Cent. Dig. tit. "Towns," § 119.

Authority to sue.—New York Town Law (Laws (1890), c. 569), § 180, providing that the cost, incurred by any town officer in prosecuting any action by the town, shall be a town charge, where the officer is instructed to prosecute the action by resolution adopted by the town board, impliedly authorizes the town board, made by General Municipal Laws (Laws (1892), c. 685), § 1, the governing board of the town, to direct the bringing of an action by the town, and such direction is sufficient, in the first instance, to authorize

rule has been applied to suits on notes [62] and bonds [63] made payable to officers, to officers "or their successors in office," [64] to an action in *indebitatus assumpsit* against a former officer for balance due upon an account stated,[65] and to a contract made with an agent for the benefit of the town; [66] but actions in the name of certain officers may be authorized by statute [67] or by vote of a town meeting,[68] and suits to restrain unlawful acts of officers should be brought against the officers themselves.[69]

I. Parties. The town itself, and not the officers, is the proper party to suits for damages resulting from acts of officers within the scope of their authority,[70] to suits for the collection of ordinary claims against the town,[71] and to suits by taxpayers to set aside contracts made by officers within their authority.[72] In a proceeding to enjoin illegal acts by an officer, not only the officer himself, but also the town board to whose direction he is subject,[73] is a proper party. Mere citizens or inhabitants of the town are without authority to engage the town in litigation at public expense,[74] but it has been held in New England that any inhabitant has the right to appear and defend a suit against the town.[75] Where a note given by two officers for a town debt has been paid by one of them, he may sue alone for indemnity; [76] and under a vote to indemnify several officers, action may be brought by a smaller number who have actually incurred the expenses.[77]

J. Process. Process for a town, to be valid, must issue and run in the corporate name [78] and be served upon the officer or officers prescribed by law,[79] and within the county of the town.[80] An affidavit made by an officer as the basis

the bringing of an action. Hempstead *v.* Lawrence, 138 N. Y. App. Div. 473, 122 N. Y. Suppl. 1037.

General authority of towns to sue is not taken away by statute authorizing officers to sue in certain cases. Newcastle *v.* Ballard, 3 Me. 369.

62. Middlebury *v.* Case, 6 Vt. 165.

63. Anderson *v.* Hamilton Tp., 25 Pa. St. 75; Middletown *v.* Newport Hospital, 16 R. I. 319, 15 Atl. 800, 1 L. R. A. 191.

64. Johnson *v.* Harris, 3 Blackf. (Ind.) 387, 26 Am. Dec. 424.

65. Sallee *v.* Fales, 67 Ill. 186.

66. Garland *v.* Reynolds, 20 Me. 45.

67. Robbins *v.* Dishon, 19 Ind. 204, holding that a note for town money loaned, but taken by a trustee payable to himself, is suable only in the name of the trustee. Woodbridge Tp. *v.* Hall, 47 N. J. L. 388, 1 Atl. 492; Mitchell *v.* Strough, 35 Hun (N. Y.) 83.

As against predecessor to recover balance due. Gleason *v.* Youmans, 9 Abb. N. Cas. (N. Y.) 107 [*affirmed* in 25 Hun 193].

A ward supervisor, where a ward is only a subdivision of a city, has no authority to sue under a statute authorizing suit by a township supervisor. Bixby *v.* Steketee, 44 Mich. 613, 7 N. W. 229.

In Indiana a trustee of a civil township is *ex officio* trustee of the school township, and may sue in one action to recover funds belonging to both. Manor *v.* State, 149 Ind. 310, 49 N. E. 160.

68. **Vote authorizing action in name of officer** does not justify action in name of the town. Lyons *v.* Cole, 3 Thomps. & C. (N. Y.) 431.

69. Riley *v.* Brodie, 22 Misc. (N. Y.) 374, 50 N. Y. Suppl. 347; Uren *v.* Walsh, 57 Wis. 98, 14 N. W. 902.

70. Koeper *v.* Louisville, 106 Minn. 269, 118 N. W. 1025.

71. Shea *v.* Plains Tp., 7 Kulp (Pa.) 554.

72. Siegel *v.* Liberty, 111 Wis. 470, 87 N. W. 487.

73. Rockefeller *v.* Taylor, 69 N. Y. App. Div. 176, 74 N. Y. Suppl. 812 [*reversing* 28 Misc. 460, 59 N. Y. Suppl. 1038].

74. Union *v.* Crawford, 19 Conn. 331.

75. State *v.* Arnold, 38 Ind. 41.

76. Sanborn *v.* Deerfield, 2 N. H. 251.

77. Hadsell *v.* Hancock, 3 Gray (Mass.) 526.

78. Lebanon *v.* Griffin, 45 N. H. 558, holding that a writ in favor of "the inhabitants of the town of Lebanon," instead of merely "the town of Lebanon," does not describe the corporation properly.

Summons against "Valentine Strange, trustee of Brown township" is not sufficient to charge the township. Vogel *v.* Brown Tp., 112 Ind. 299, 14 N. E. 77, 2 Am. St. Rep. 187, 112 Ind. 317, 14 N. E. 78. But against "trustee Cicero township," without naming him personally, is sufficient. Cicero School Tp. *v.* Chicago Nat. Bank, 127 Ind. 79, 26 N. E. 567.

79. **In Pennsylvania** service on one of the supervisors is sufficient. Shea *v.* Plains Tp., 7 Kulp 554.

In Vermont writ should be served on the town clerk; or in his absence, on a selectman. Charleston *v.* Lunenburgh, 21 Vt. 488. And service on the assistant town clerk is not sufficient. Fairfield *v.* King, 41 Vt. 611.

Where statute requires service upon two officers, service upon one only is inoperative. Mariner *v.* Waterloo, 75 Wis. 438, 44 N. W. 512; Young *v.* Dexter, 18 Fed. 201.

80. Pack *v.* Greenbush Tp., 62 Mich. 122, 23 N. W. 746.

for issue of process on behalf of the town should sufficiently show his official capacity,[81] and likewise the return of process served on an officer.[82]

K. Appearance by Attorney. Authority to bring and prosecute a suit on behalf of the town is proved by indorsement of names of the board on the writ and their presence at the trial.[83]

L. Pleading. A pleading is sufficient that by fair and reasonable construction [84] states a cause of action or defense; [85] and in an action by a town a complaint is not bad for failure to allege incorporation; [86] nor, in an action against the town on an order properly signed and regular on its face, for failure to aver audit; [87] nor, in an action for a statutory penalty because in the alternative, where the statute reads in the alternative; [88] nor does surplusage vitiate.[89] But a complaint against a township in one capacity is bad where it discloses a liability only in another capacity,[90] and a failure to allege conditions precedent to the validity of a claim,[91] or that injuries by officers were within the scope of their authority,[92] or that the contract sued on was authorized [93] is fatal. So facts relied on to create an estoppel must be specially pleaded.[94] Verification of pleading may be by any town officer knowing the facts,[95] and statutes excusing "municipal corporations" therefrom have been held to include townships.[96] Towns are subject to the general rules of pleading as to amendments,[97] and under a statute requiring the filing of a claim as a condition precedent to suit, the complaint may not be amended so as to call for a greater amount than that stated in the claim as filed.[98] An objection that an action in the name of the town is not authorized is properly made by motion to dismiss,[99] and not by motion to nonsuit.[1]

M. Evidence. The usual rules of evidence are applicable to suits by and against towns.[2] In an action on a certificate of indebtedness, evidence is admissible to show that it was forged or issued without authority.[3] In an action on a contract alleged to have been validated by statute, evidence is admissible of the proceedings of the officials on which the statute was based; [4] but declarations by individual voters at a town meeting that the vote under which the obligation in suit was issued was illegal [5] are not admissible; nor is evidence by an official as to

81. Fruitport Tp. *v.* Muskegon County Cir. Judge, 90 Mich. 20, 51 N. W. 109.

82. Shea *v.* Plains Tp., 7 Kulp (Pa.) 554; Mariner *v.* Waterloo, 75 Wis. 438, 44 N. W. 512.

83. New Gloucester *v.* Bridgman, 28 Me. 60.

84. *Indiana.*— Petersburg *v.* Petersburg Electric Light, etc., Co., 16 Ind. App. 151, 44 N. E. 814.

Maine.—Weymouth *v.* Gorham, 22 Me. 385.

Massachusetts.— Taunton *v.* Caswell, 4 Pick. 275.

Vermont.— Lyman *v.* Windsor, 24 Vt. 575.

Wisconsin.— Siegel *v.* Liberty, 111 Wis. 470, 87 N. W. 487.

See 45 Cent. Dig. tit. "Towns," § 123.

85. Robinson *v.* Jones, 71 Mo. 582; State *v.* Euclid Tp., 19 Ohio Cir. Ct. 742.

86. Morris *v.* Township 4 School Trustees, 15 Ill. 266.

87. Brown *v.* Jacobs, 77 Wis. 29, 45 N. W. 679.

88. Bronson *v.* Washington, 57 Conn. 346, 18 Atl. 264.

89. Siegel *v.* Liberty, 111 Wis. 470, 87 N. W. 487.

90. Utica Tp. *v.* Miller, 62 Ind. 230.

Allegation in a suit against a civil township that it is "a corporation for the purposes of common schools" does not render the action one against the school township. Jackson Tp. *v.* Barnes, 55 Ind. 136.

91. Mitchelltree School Tp. *v.* Hall, 163 Ind. 667, 72 N. E. 641.

92. Kreger *v.* Bismarck Tp., 59 Minn. 3, 60 N. W. 675.

93. Clinton School Tp. *v.* Lebanon Nat. Bank, 18 Ind. App. 42, 47 N. E. 349; Holroyd *v.* Indian Lake, 85 N. Y. App. Div. 246, 83 N. Y. Suppl. 533 [*affirmed* in 180 N. Y. 318, 73 N. E. 36].

94. Center School Tp. *v.* State, 150 Ind. 168, 49 N. E. 961.

95. Manor *v.* State, 149 Ind. 310, 49 N. E. 160; Ft. Covington *v.* U. S., etc., R. Co., 156 N. Y. 702, 51 N. E. 1094.

96. Barrett *v.* Plymouth Tp., 12 Montg. Co. Rep. (Pa.) 120.

97. Conrad *v.* Ellington, 104 Wis. 367, 80 N. W. 456.

98. Conrad *v.* Ellington, 104 Wis. 367, 80 N. W. 456.

99. Ft. Covington *v.* U. S., etc., R. Co., 156 N. Y. 702, 51 N. E. 1094.

1. Ft. Covington *v.* U. S., etc., R. Co., 156 N. Y. 702, 51 N. E. 1094.

2. Good Roads Mach. Co. *v.* Union Tp., 34 Pa. Super. Ct. 538.

3. Broadway Sav. Inst. *v.* Pelham, 83 Hun (N. Y.) 96, 31 N. Y. Suppl. 402.

4. Wrought-Iron Bridge Co. *v.* Attica, 49 Hun (N. Y.) 513, 2 N. Y. Suppl. 359 [*affirmed* in 119 N. Y. 204, 23 N. E. 542].

5. Brown *v.* Jacobs, 77 Wis. 29, 45 N. W. 679.

whether he would have made a contract if a certain representation had not been made to him;[6] nor, in a suit on an original indebtedness to his assignor is a certificate issued to the assignee without authority admissible.[7] A book in which the proceedings of the board of auditors are required to be kept is the best evidence of claims allowed by the board,[8] and may constitute *prima facie* evidence of an account stated.[9] In an action to enforce a contract against a town, the burden of proof is on plaintiff to show authority of the contracting officer to make the contract.[10]

N. Trial.[11] Questions as to whether a contract was made in the manner prescribed by law,[12] as to whether a town order issued without authority has been ratified,[13] and other questions of fact[14] are for the jury, under instructions from the court.[15]

O. Judgment.[16] In a proper case officers may confess judgment on behalf of the town,[17] and judgments against the members of a town board for acts within their authority are in effect judgments against the town;[18] but not judgments against officers for acts beyond their authority.[19] Judgments by[20] or against[21] a town may not be questioned for mere irregularities, in a collateral proceeding, nor even in a direct proceeding.[22] A judgment against a township that has been divided may be revived against each portion severally.[23] A town board has authority to discharge judgments in favor of the town only on payment of the full amount thereof in money or its equivalent.[24] Ordinarily it is the duty of the town board to designate the proper fund out of which a judgment against the town shall be satisfied and to direct the necessary orders to be drawn thereon,[25] but under a special statute it may be the duty of the treasurer to pay a judgment without an order.[26]

P. Execution and Enforcement of Judgment. In some states execution may be issued on judgments against a town,[27] but in others they may not.[28] So it has been held that statutory authority to enforce by fieri facias is not exclusive of enforcement by an action of debt for balance of judgment due;[29] and again that statutory provision of a special writ of execution is exclusive of fieri facias.[30] The statutory notice to the town supervisors entitling a judgment to a place in the tax roll must be in writing;[31] and a judgment creditor cannot require county supervisors to assess more than its *pro rata* share against any part of a divided

6. Good Roads Mach. Co. *v.* Union Tp., 34 Pa. Super. Ct. 538.
7. Snyder Tp. *v.* Bovaird, 122 Pa. St. 442, 15 Atl. 910, 9 Am. St. Rep. 118.
8. Kankakee *v.* McGrew, 178 Ill. 74, 52 N. E. 893.
9. Kankakee *v.* McGrew, 178 Ill. 74, 52 N. E. 893.
10. Mitchelltree School Tp. *v.* Hall, 163 Ind. 667, 72 N. E. 641.
11. **Competency of citizen or taxpayer as juror** in actions in which town is a party see JURIES, 24 Cyc. 271.
12. Austin Mfg. Co. *v.* Ayr Tp., 17 Pa. Super. Ct. 419.
13. Burnham *v.* Strafford, 53 Vt. 610.
14. See *supra*, notes 12, 13.
15. **Omission to instruct** the jury that a contract should have been made at a formal meeting of a committee is not a ground for a new trial where the evidence was that a majority of the committee met and, professing to act as a committee, entered into the contract. Phinney *v.* Mann, 1 R. I. 205.
16. **Judgments** generally see JUDGMENTS, 23 Cyc. 623.
17. Maneval *v.* Jackson Tp., 9 Pa. Co. Ct. 28.
18. Prichard *v.* Bixby, 71 Wis. 422, 37 N. W. 228.
19. People *v.* Ulster County, 93 N. Y. 397.
20. Hart *v.* Johnson, 6 Ohio 87.
21. Lyons *v.* Cooledge, 89 Ill. 529; Plains Tp.'s Appeal, 21 Pa. Super. Ct. 68 [*affirmed* in 206 Pa. St. 556, 56 Atl. 60].
22. Cicero Tp. *v.* Shirk, 122 Ind. 572, 24 N. E. 166; Cicero Tp. *v.* Picken, 122 Ind. 260, 23 N. E. 763.
23. Plunkett's Creek Tp. *v.* Crawford, 27 Pa. St. 107.
24. Butternut *v.* O'Malley, 50 Wis. 329, 7 N. W. 246.
25. Coon Dist. Tp. *v.* Providence Dist. Tp., 52 Iowa 287, 3 N. W. 109.
26. State *v.* Kispert, 21 Wis. 387.
27. Ware *v.* Pleasant Grove Tp., 9 Kan. App. 700, 59 Pac. 1089; Littlefield *v.* Greenfield, 69 Me. 86.
28. U. S. *v.* Ottawa Auditors, 28 Fed. 407.
29. Littlefield *v.* Greenfield, 69 Me. 86.
30. Hilbert *v.* North Codorus Tp., 14 York Leg. Rec. (Pa.) 21.
31. State *v.* Elba, 34 Wis. 169.

town.[32] In New England where execution against a town may be levied against the property of any inhabitant proprietor, one who has voluntarily paid his part of a fieri facias against the town is perpetually exempt from further liability;[33] and one whose land has been duly seized and sold under execution against the town may recover therefor in an action against the "inhabitants of the town,"[34] but not where the sale is void for defects in the proceedings.[35]

Q. Appeal and Error. Presumptions are in favor of the regularity and legality of records on appeal.[36] A township trustee signing an appeal-bond for the township is liable personally,[37] and a town meeting may direct dismissal of an appeal and payment of legal liability only.[38]

R. Costs.[39] An organized town or township[40] is liable for costs of legal proceedings on much the same principles as other parties,[41] and in appeals by the town from judgments in prosecutions under ordinances, the town is liable for costs, although a reversal is secured.[42] Costs awarded against officers suing in a representative capacity are properly charges against the town,[43] and not against the officers personally.[44]

TOWNSHIP. See TOWNS, *ante*, p. 599.

TOWNSHIP EXPENSES. The term usually applied to the ordinary expenses of township government.[1]

TOWN SITE. That portion of the public domain which is segregated from the great body of government land, by proper procedure and authority, as the site for a town.[2] (See PUBLIC LANDS, 32 Cyc. 838.)

TOWN'S POOR. In its natural sense and unexplained, poor whom the town is permanently bound to support.[3]

TOWN WAY. A term used in the statutes of some of the New England states signifying a highway laid out in proceedings in which a town or city has original jurisdiction;[4] and which is within the territorial limits of a particular town.[5]

TOXICOLOGY. The science of poisons.[6] (Toxicology: Liability For Injuries Resulting From Sale or Use of Poisons, see POISONS, 31 Cyc. 897. Offenses Relating to Poison, see POISONS, 31 Cyc. 898.)

TOY. A term which, in common speech, embraces only such things as are primarily intended for the entertainment and amusement of children.[7] (Toy:

32. People *v.* Ulster County, 94 N. Y. 263.
33. Spencer *v.* Brighton, 49 Me. 326.
34. Spencer *v.* Brighton, 49 Me. 326.
35. Crafts *v.* Elliotsville, 47 Me. 141.
36. Union *v.* Crawford, 19 Conn. 331; Marcy *v.* Springville Tp., 24 Pa. Super. Ct. 521; State *v.* Wertzel, 84 Wis. 344, 54 N. W. 579.
37. Hobbs *v.* Cowden, 20 Ind. 310, holding a trustee liable, although he appended to his signature the initials "T. C. T.," meaning "trustee of Columbus township."
38. State *v.* Decatur, 58 Wis. 291, 17 N. W. 20.
39. Costs generally see COSTS, 11 Cyc. 1.
40. Hobbs *v.* Cowden, 20 Ind. 310.
But not congressional townships.— Congressional Tp. No. 19 *v.* Clark, 1 Ind. 139, Smith 41.
41. Morrill Tp. *v.* Fletchall, 73 Kan. 787, 85 Pac. 753.
Stenographers' fees are not properly taxable in a proceeding to investigate the financial affairs of a town. Matter of Hempstead, 36 N. Y. App. Div. 321, 55 N. Y. Suppl. 345 [*affirmed* in 160 N. Y. 685, 55 N. E. 1101].
42. Columbus City *v.* Cutcomp, 61 Iowa 672, 17 N. W. 47.
43. Stockwell *v.* White Lake Tp. Bd., 22 Mich. 341.
44. Avery *v.* Slack, 19 Wend. (N. Y.) 50.
1. Upton *v.* Kennedy, 36 Mich. 215, 220.
2. Rice *v.* Colorado Smelting Co., 28 Colo. 519, 523, 66 Pac. 894, where such is said to be the meaning of the term in Colorado statutes and in the states and territories of the west generally.
3. West Bridgewater *v.* Wareham, 138 Mass. 305, 307, where it is said that the term does not include persons receiving temporary relief.
4. Boston, etc., R. Co. *v.* Boston, 140 Mass. 87, 88, 2 N. E. 943.
5. Waterford *v.* Oxford County Com'rs, 59 Me. 450, 452.
Distinguished from "highway" see Boston, etc., R. Co. *v.* Boston, 140 Mass. 87, 88, 2 N. E. 943; Butchers' Slaughtering, etc., Assoc. *v.* Boston, 139 Mass. 290, 291, 30 N. E. 94; Blackstone *v.* Worcester County, 108 Mass. 68.
6. Black L. Dict.
7. Zeh *v.* Cadwalader, 42 Fed. 525, 527.
"A 'toy' is a thing to amuse children, but it does not follow that everything which amuses them or which enters into a device

Duty on, see CUSTOMS DUTIES, 12 Cyc. 1127. Possession or Use of Toy Pistol, see WEAPONS.)

TP. A contraction for the word "township."[8]

TRACING. A mechanical copy or facsimile of an original, produced by following its lines, with a pen or pencil, through a transparent medium, called tracing paper.[9]

TRACK. As applied to a railroad, the two continuous lines of rails on which railway cars run;[10] the road, course, way.[11] (Track: Footprint — Compelling Accused to Make, see CRIMINAL LAW, 12 Cyc. 401; Evidence as to in Prosecution For Burglary, see BURGLARY, 6 Cyc. 232 note 70; Evidence as to in Prosecution For Larceny, see LARCENY, 25 Cyc. 131; Evidence as to to Prove Identity of Accused, see CRIMINAL LAW, 12 Cyc. 393. Of Railroad — Accidents to Trains From Defects in or Obstructions on, see RAILROADS, 22 Cyc. 740; Connection of With Private, see RAILROADS, 33 Cyc. 124; Frightening Animal at Crossing by Obstructions On or Near, see RAILROADS, 33 Cyc. 940; Injury to Animal On or Near, see RAILROADS, 33 Cyc. 1161; Injury to Passenger Through Defects in, see CARRIERS, 6 Cyc. 617; Injury to Person On or Near, see RAILROADS, 33 Cyc. 1145; Injury to Servant From Defects in, see MASTER AND SERVANT, 26 Cyc. 1125; Liability of Railroad Company Operating or Using Road of Others For Injuries From Defects in, see RAILROADS, 33 Cyc. 715; Liability to Assessment For Public Improvement, see MUNICIPAL CORPORATIONS, 28 Cyc. 1119; Mortgage of, see RAILROADS, 33 Cyc. 496; Nature and Extent of Right to Construct in Highway, see RAILROADS, 33 Cyc. 210; Plan and Mode of Construction of, see RAILROADS, 33 Cyc. 237; Regulation by City as to Laying in Street, see MUNICIPAL CORPORATIONS, 28 Cyc. 852; Removal of Trespasser From, see RAILROADS, 33 Cyc. 819; Statutory, Municipal, and Official Regulations as to Lighting of, see RAILROADS, 33 Cyc. 671; Stipulation For Joint Use by Other Railroad in Ordinance Granting Right to Use Street For, see MUNICIPAL CORPORATIONS, 28 Cyc. 876 note 6. Of Street Railroad — Crossing as Contributory Negligence, see STREET RAILROADS, 26 Cyc. 1533; Injury to Person On or Near, see STREET RAILROADS, 36 Cyc. 1513; Location of, see STREET RAILROADS, 36 Cyc. 1387; Regulations as to, see STREET RAILROADS, 36 Cyc. 1461; Right to Use of, Belonging to Other Railroad, see STREET RAILROADS, 36 Cyc. 1414; Use of by Other Company as Condition in Grant of Right to Lay in Street, see MUNICIPAL CORPORATIONS, 28 Cyc. 885; Walking on as Contributory Negligence, see STREET RAILROADS, 26 Cyc. 1530.)

TRACT. Something drawn out or extended; a region or quantity of land or water of indefinite extent;[12] a lot, piece, or parcel of land, of greater or less size, the term not importing, in itself, any precise dimension;[13] an area or a region

for their amusement is in itself a toy." Tuska *v.* U. S., 162 Fed. 814, 815; Thanhauser *v.* U. S., 159 Fed. 228, 230; Wanamaker *v.* Cooper, 69 Fed. 465, 466.

What is included by the term as used in customs act see CUSTOMS DUTIES, 12 Cyc. 1127 note 9.

"Any toy pistol, toy revolver, or toy firearm" see Taylor *v.* Seil, 120 Wis. 32, 35, 97 N. W. 498.

8. Ottumwa, etc., R. Co. *v.* McWilliams, 71 Iowa 164, 167, 32 N. W. 315, where it is said that such contraction is in almost universal use in describing lands and there is no uncertainty or indefiniteness in the term.

9. Chapman *v.* Ferry, 18 Fed. 539, 540, 9 Sawy. 395.

10. Century Dict. [*quoted* in Atchison, etc., R. Co. *v.* Kansas City, etc., R. Co., 67 Kan. 569, 574, 70 Pac. 939, 73 Pac. 899].

11. Webster Dict. [*quoted* in Gates *v.* Chicago, etc., R. Co., 82 Iowa 518, 527, 48 N. W. 1040, where it is said that the term includes all that enters into and composes the road, the course, and way].

"'Track' or 'course,'" as used with reference to horse racing, defined by statute see State *v.* Roby, 142 Ind. 168, 172, 41 N. E. 145, 51 Am. St. Rep. 174, 33 L. R. A. 213.

"Track bolting" see Lane *v.* Minnesota State Agricultural Soc., 62 Minn. 175, 182, 64 N. W. 382, 29 L. R. A. 708.

"Track tools" see Procter *v.* Spalding, 26 Fed. 610.

12. Rockwell *v.* Keefer, 39 Pa. Super. Ct. 468, 475, where it is said that there is no marked distinction between a tract of land and an estate in land.

13. Black L. Dict. [*quoted* in Fleming *v.* Charnock, 66 W. Va. 50, 52, 66 S. E. 8].

"In its common signification it does not imply anything as to the size of the parcel of land." Cade *v.* Larned, 99 Ga. 588, 589, 27 S. E. 166; *In re* Pine, etc., Tps., 32 Pa. Co. Ct. 152, 153; Fleming *v.* Charnock, 66 W. Va. 50, 52, 66 S. E. 8.

of land or water of indefinite extent.[14] (Tract: Allotment of Dower in Separate, see DOWER, 14 Cyc. 1002. Assessment For Public Improvement on Entire or Part, see MUNICIPAL CORPORATIONS, 28 Cyc. 1150. Compensation For Taking For Public Use — Where Entire Taken, see EMINENT DOMAIN, 15 Cyc. 685; Where Part Taken, see EMINENT DOMAIN, 15 Cyc. 687. Constructive Possession of Entire by Occupancy of Part, see ADVERSE POSSESSION, 1 Cyc. 1127. Part of Constituting Homestead, see HOMESTEADS, 21 Cyc. 495. Sale in Parcels or Separate — On Execution, see EXECUTIONS, 17 Cyc. 1249; On Judicial Sale, see JUDICIAL SALES, 24 Cyc. 24; On Mortgage Foreclosure, see MORTGAGES, 27 Cyc. 1696; On Tax-Sale, see TAXATION, 37 Cyc. 1344. Separate Constituting Homestead, see HOMESTEADS, 21 Cyc. 493.)

TRACTENT FABRILIA FABRI. A maxim meaning "Let smiths perform the work of smiths."[15]

TRACTION-ENGINE. A locomotive engine for drawing heavy loads upon common roads, or over arable land, as in agricultural operations;[16] a steam locomotive engine for dragging heavy loads on common roads.[17] (Traction Engine: Care in Use on Highway, see STREETS AND HIGHWAYS, 37 Cyc. 279. Exception of From Statute Relating to Motor Vehicle, see MOTOR VEHICLES, 28 Cyc. 24. Power of Municipality to Prohibit Running of on Street, see MUNICIPAL CORPORATIONS, 28 Cyc. 908 note 60. Use in Street as Public Nuisance, see MUNICIPAL CORPORATIONS, 28 Cyc. 895.)

TRADE. A. As a Noun — 1. IN GENERAL. In ordinary language, a word employed in three different senses: First, in that of the business of buying and selling; second, in that of an occupation generally; and third, in that of a mechanical employment, in contradistinction to agriculture and the liberal arts.[18]

2. REFERRING TO BUYING AND SELLING. Traffic in merchandise;[19] the business of exchanging commodities by buying and selling for money;[20] the exchange of commodities for other commodities or for money; the business of buying and

The word may embrace a district or large section of land subject to overflow from freshets, or which is usually in a low, marshy, boggy, or wet condition, and lying in a body. *In re* Lower Chatham, etc., Land Drainage, 35 N. J. L. 497, 508.

14. Webster Dict. [*quoted* in People *v.* Chase, 70 Ill. App. 42, 44].

Convertible with "plantation" see PLANTATION, 30 Cyc. 1638 note 80.

Statutory definition see Griffin *v.* Denison Land Co., (N. D. 1908) 119 N. W. 1041, 1042; State Finance Co. *v.* Bowdle, 16 N. D. 193, 197, 112 N. W. 76.

"Tract divided into lots" see Kendrick *v.* Latham, 25 Fla. 819, 836, 6 So. 871.

15. Black L. Dict. [*citing* 3 Coke Epist.].

16. Encyclopedic Dict. [*quoted* in Toedtemeier *v.* Clackamas County, 34 Oreg. 66, 70, 54 Pac. 954].

17. Imperial Dict. [*quoted* in Toronto Gravel Road, etc., Co. *v.* York County Corp., 12 Can. Sup. Ct. 517, 521, where such engine is distinguished from an engine used to draw railway carriages].

18. Queen Ins. Co. *v.* State, 86 Tex. 250, 263, 24 S. W. 397, 22 L. R. A. 483. See also Geise *v.* Pennsylvania F. Ins. Co., (Tex. Civ. App. 1908) 107 S. W. 555; Betz *v.* Maier, 12 Tex. Civ. App. 219, 220, 33 S. W. 710; The Nymph, 18 Fed. Cas. No. 10,388, 1 Sumn. 516; Anderson L. Dict. [*quoted* in *In re* Pinkney, 47 Kan. 89, 91, 27 Pac. 179]. See also *infra*, A, 2, 3.

Several meanings.— In a more restricted sense the term means either the particular occupation of a mechanic or a merchant, but in its broadest signification it is interpreted as comprehending not only all who are engaged in buying and selling merchandise but all whose occupation or business is to manufacture and sell the products of their plants. It includes in this sense any employment or business embarked in for gain or profit. State *v.* Worth, 116 N. C. 1007, 1010, 21 S. E. 204. Held to be used in the narrow sense, as meaning only buying and selling and not in the broader sense of any kind of business, in a lease containing a covenant not to use demised premises for the trades or business of butcher, baker, slaughterman, melter of tallow, tallow chandler, tobacco pipe maker, etc. Doe *v.* Bird, 2 A. & E. 161, 165, 4 L. J. K. B. 52, 4 N. & M. 285, 29 E. C. L. 92, 111 Eng. Reprint 63.

19. Barrett *v.* Barron, 13 N. H. 150, 161, where it was said that the use of the term as meaning "bargain" was a distortion from its proper meaning.

20. U. S. *v.* American Tobacco Co., 164 Fed. 700, 708.

"Deal" and "trade," in an act of congress incorporating the Bank of the United States, construed as used in the sense of buying and selling for gain and not as referring to ordinary banking operations. Fleckner *v.* U. S. Bank, 8 Wheat. (U. S.) 338, 351, 5 L. ed. 631. See also U. S. Bank *v.* Norton, 3 A. K. Marsh. (Ky.) 422, 425.

selling; dealing by way of sale or exchange;[21] any sort of dealings by way of sale or exchange; commerce; traffic;[22] any sort of dealing by way of sale or exchange;[23] any sort of dealings by way of sale or exchange; the dealings in a particular business; as, the Indian trade;[24] mutual traffic, buying, selling, or exchange of articles between members of the same community;[25] traffic; commerce; exchange of goods for other goods, or for money;[26] a purchase or sale, a bargain, specifically in United States politics, a deal; the exchange of commodities for other commodities or for money; the business of buying and selling; dealing by way of sale or exchange; commerce; traffic;[27] the act or business of exchanging commodities by barter, or by buying and selling for money; commerce; traffic; barter;[28] the act or business of exchanging commodities by barter; the business of buying and selling for money; commerce; traffic; barter.[29]

3. Referring to an Occupation or Employment — a. In General. A way of living;[30] an occupation, employment, or business carried on for gain or profit;[31] the craft or business which a person has learned and which he carries on as a means of livelihood;[32] the business a man has learned, by which he earns his livelihood.[33]

21. U. S. *v.* Coal Dealers' Assoc., 85 Fed. 252, 265; U. S. *v.* Cassidy, 67 Fed. 698, 705; *In re* Grand Jury, 62 Fed. 840, 841. See also People *v.* Klaw, 55 Misc. (N. Y.) 72, 88, 106 N. Y. Suppl. 341.

"Commerce" distinguished see Commerce, 7 Cyc. 412 note 2; Reg. *v.* Kings County Justices of the Peace, 11 Can. L. J. N. S. 249, 250.

22. Bouvier L. Dict. [*quoted* in Gower *v.* Jonesboro, 83 Me. 142, 145, 21 Atl. 846].

Trade, in its broadest signification, includes, not only the business of exchanging commodities by barter, but the business of buying and selling for money or commerce and traffic generally. Pocono Spring Water Ice Co. *v.* American Ice Co., 214 Pa. St. 640, 647, 64 Atl. 398; May *v.* Rice, 101 U. S. 231, 237, 25 L. ed. 797.

23. Bouvier L. Dict. [*quoted* in People *v.* Sheldon, 66 Hun (N. Y.) 590, 593, 21 N. Y. Suppl. 859].

24. Bouvier L. Dict. [*quoted* in People *v.* Klaw, 55 Misc. (N. Y.) 72, 88, 106 N. Y. Suppl. 341].

"Business" has a more extensive signification than "trade." Wheatley *v.* Smithers, [1906] 2 K. B. 321, 322, 75 L. J. K. B. 627, 95 L. T. Rep. N. S. 96, 22 T. L. R. 591, 54 Wkly. Rep. 537.

25. Jacob L. Dict. [*quoted* in People *v.* Sheldon, 66 Hun (N. Y.) 590, 593, 21 N. Y. Suppl. 859].

It indicates the giving of one article and the receiving of another, and the covenant in a chattel mortgage that the mortgagor would not "trade or exchange" any of the mortgaged property without the consent of the mortgagee, and that in case he did the property so obtained should be held and taken in place of that disposed of, does not require the substitution of animals which have died. Hulsizer *v.* Opdyke, (N. J. Ch. 1888) 13 Atl. 669.

26. Rapalje & L. L. Dict. [*quoted* in *In re* Pinkney, 47 Kan. 89, 92, 27 Pac. 179].

27. Century Dict. [*quoted* in *In re* Master Granite, etc., Assoc., 23 Pa. Co. Ct. 517, 520].

28. Webster Dict. [*quoted* in *In re* Pinkney, 47 Kan. 89, 92, 27 Pac. 179].

29. Citizens' Ins. Co. *v.* Parsons, 4 Can. Sup. Ct. 215, 287; Webster Dict. [*quoted* in People *v.* Klaw, 55 Misc. (N. Y.) 72, 87, 106 N. Y. Suppl. 341].

The term comprehends every species of exchange or dealing, either in the produce of land, in manufactures, in bills or in money; but it is chiefly used to denote the barter or purchase and sale of goods, wares, and merchandise either by wholesale or retail. State *v.* Hunt, 129 N. C. 686, 690, 40 S. E. 216, 85 Am. St. Rep. 758.

Includes: Furnishing a city with water by a corporation. People *v.* Blake, 19 Cal. 579, 594, statute providing for the formation of corporations for the purpose of engaging in any species of trade or commerce. The buying and selling of real estate. Finnegan *v.* Noerenberg, 52 Minn. 239, 245, 53 N. W. 1150, 38 Am. St. Rep. 552, 18 L. R. A. 778, statute authorizing formation of coöperative associations. Dealings in both imported and domestic commodities. State *v.* Schlitz Brewing Co., 104 Tenn. 715, 744, 59 S. W. 1033, 78 Am. St. Rep. 941.

May sometimes be allowed the meaning of voyage or destination of a ship, when the voyage or destination is named from the use or purpose to which it leads or is designed, although the obvious and most usual sense in which the word is employed is to express traffic, commerce, exchange dealing. Higginson *v.* Pomeroy, 11 Mass. 104, 112.

30. Beall *v.* Beck, 2 Fed. Cas. No. 1,161, 3 Cranch C. C. 666.

Construed in the broad sense of special occupation or profession rather than in the ordinary sense of mechanical employment. Colby *v.* Dean, 70 N. H. 591, 592, 49 Atl. 574, construction of will.

31. Abbott L. Dict. [*quoted* in *In re* Pinkney, 47 Kan. 89, 92, 27 Pac. 179].

As synonymous with "calling" or "occupation" see Topeka *v.* Jones, 74 Kan. 164, 166, 86 Pac. 162, 87 Pac. 1133.

32. Century Dict. [*quoted* in *In re* Master Granite, etc., Assoc., 23 Pa. Co. Ct. 517, 520].

33. Webster Dict. [*quoted* in Woodfield *v.* Colzey, 47 Ga. 121, 124].

b. Mechanical Employment. Any occupation, employment, or business carried on for profit, gain, or livelihood, not in the liberal arts or in the learned profession;[34] the business of a particular mechanic;[35] the business which a person has learned, and which he carries on for subsistence or profit; occupation; particularly employment, whether manual or mercantile, as distinguished from the liberal arts or the learned professions and agriculture.[36]

B. As a Verb. To engage in the purchase or sale of goods, wares, and merchandise;[37] to dispose of by bargain and sale; now, especially to barter; exchange;[38] to dispose of by bargain and sale; to engage in commerce or in business transactions of bargain and sale; barter; exchange; traffic.[39]

(Trade: Agreement For Violation of Statute Requiring License to Engage in, see CONTRACTS, 9 Cyc. 478. Board of, see EXCHANGES, 17 Cyc. 848. Capacity of Married Women to Carry on, see HUSBAND AND WIFE, 21 Cyc. 1333. Conspiracy to Injure, see CONSPIRACY, 8 Cyc. 634; MONOPOLIES, 27 Cyc. 891. Contract in Restraint of — In General, see CONTRACTS, 9 Cyc. 523; MONOPOLIES, 27 Cyc. 891; Assignability, see ASSIGNMENTS, 4 Cyc. 21 note 38. Custom of — In General, see CUSTOMS AND USAGES, 12 Cyc. 1033; Opinion Evidence as to, see EVIDENCE, 17 Cyc. 80. Directory as Subject of Copyright, see COPYRIGHT, 9 Cyc. 909 note 67. Exemption of — Stock in, see EXEMPTIONS, 18 Cyc. 1420; Tools and Implements of, see EXEMPTIONS, 18 Cyc. 1415. Fixtures — In General, see FIXTURES, 19 Cyc. 1065; Mechanic's Lien on, see MECHANICS' LIENS, 27 Cyc. 37. Good-Will, see GOOD-WILL, 20 Cyc. 1275. Hawker or Peddler, see HAWKERS AND PEDDLERS, 21 Cyc. 364. Injunction Against Injury to, see INJUNCTIONS, 22 Cyc. 842. Injury to — In General, see TORTS; As Element of Damage From Taking Property For Public Use, see EMINENT DOMAIN, 15 Cyc. 733. Libel or Slander by Imputation Affecting, see LIBEL AND SLANDER, 25 Cyc. 337. Loss From Illicit, as Excepted Risk in Marine Insurance Policy, see MARINE INSURANCE, 26 Cyc. 667. Mark or Name, see TRADE-MARKS AND TRADE-NAMES. Monopolies in Restraint of, see MONOPOLIES, 27 Cyc. 899. Municipal Regulation of, see MUNICIPAL CORPORATIONS, 28 Cyc. 720. Provision as to in Indenture of Apprenticeship, see APPRENTICES, 3 Cyc. 549. Regulation of — As Denial of Equal Protection of Laws, see CONSTITUTIONAL LAW, 8 Cyc. 1062; As Denial of Right to Acquire, Hold, and Dispose of Property, see CONSTITUTIONAL LAW,

"Trade" has a secondary sense by which almost any occupation is called a man's trade; as in the proverb "Two of a trade can never agree." *In re* Smith, 22 Fed. Cas. No. 12,981, 2 Lowell 69.

Includes: The working of a mine under a bare mining right. Smith *v.* Cooley, 65 Cal. 46, 48, 2 Pac. 880. Insurance business. *In re* Pinkney, 47 Kan. 89, 91, 27 Pac. 179, statute declaring unlawful, combinations in restraint of trade.

Does not include the making of a contract. Raines *v.* Watson, 2 W. Va. 371, 401.

34. Anderson L. Dict. [*quoted* in *In re* Pinkney, 47 Kan. 89, 91, 27 Pac. 179].

35. Bouvier L. Dict. [*quoted* in People *v.* Klaw, 55 Misc. (N. Y.) 72, 88, 106 N. Y. Suppl. 341], adding: "Hence boys are said to be put apprentices to learn a trade; as, the trade of a carpenter, shoemaker, and the like."

"Trade, business or calling" construed as synonymous terms having relation to mechanical employment, in statute requiring persons intending to conduct the trade, business, or calling of a plumber, etc., to submit to examination. People *v.* City Prison, 144 N. Y. 529, 538, 39 N. E. 686, 27 L. R. A. 718.

36. Encyclopedic Dict. [*quoted* in *In re* Pinkney, 47 Kan. 89, 92, 27 Pac. 179].

Other almost identical definitions see People *v.* Klaw, 55 Misc. (N. Y.) 72, 87, 106 N. Y. Suppl. 341; Webster Dict. [*quoted* in *In re* Pinkney, 47 Kan. 89, 92, 27 Pac. 179; Whitcomb *v.* Reid, 31 Miss. 567, 569, 66 Am. Dec. 579].

A statute authorizing the creation of a corporation for "the encouragement and protection of trade and commerce," includes the particular trades as well as trade in general, and therefore includes "roofing and sheet metal working." *In re* Roofing, etc., Contractors' Assoc., 200 Pa. St. 111, 113, 49 Atl. 894.

Construction of term in exemption statutes see EXEMPTIONS, 18 Cyc. 1415.

Does not include farming.— Leeds *v.* Freeport, 10 Me. 356, 359, statute relating to requirement of settlement by apprentices.

37. Jackson *v.* Union, 82 Conn. 266, 269, 73 Atl. 773 [*citing* Century Dict.; Webster Dict.].

38. Standard Dict. [*quoted* in People *v.* Klaw, 55 Misc. (N. Y.) 72, 87, 106 N. Y. Suppl. 341].

39. Standard Dict. [*quoted* in Pocono Spring Water Ice Co. *v.* American Ice Co., 214 Pa. St. 640, 647, 64 Atl. 398].

8 Cyc. 890; As Deprivation of Property Without Due Process of Law, see CONSTITUTIONAL LAW, 8 Cyc. 1110; Under Police Power, see CONSTITUTIONAL LAW, 8 Cyc. 872. Requisites of Usage, see CUSTOMS AND USAGES, 12 Cyc. 1034, 1044. Secret — Of Master, Disclosure by Servant as Justification For Discharge, see MASTER AND SERVANT, 26 Cyc. 898 note 35; Of Master, Duty of Servant, see MASTER AND SERVANT, 26 Cyc. 1021; Restraining Disclosure or Use, see INJUNCTIONS, 22 Cyc. 842. Slave Trade, see SLAVES, 36 Cyc. 467. Terms, Opinion Evidence as to, see EVIDENCE, 17 Cyc. 80. Union, see LABOR UNION, 24 Cyc. 816. Validity of Contract of Insurance on Cargo Transported in Violation of Trade Laws, see MARINE INSURANCE, 26 Cyc. 577. With Indians, see INDIANS, 22 Cyc. 140.)

TRADE FIXTURES. See FIXTURES, 19 Cyc. 1065.

TRADE LABEL. See TRADE-MARKS AND TRADE-NAMES.

TRADE LIBEL. See LIBEL AND SLANDER, 25 Cyc. 326.

TRADE-MARK MEDICINE. A medicine as to which a similar monopoly to that of patent and proprietary medicines has been secured by the use of a trade-mark or trade-name under which it is prepared and sold.[40]

"**Trading**" may have meanings which vary with its different applications. In laws concerning navigation, every vessel carrying a cargo or passengers may, in general, be considered as trading. U. S. *v.* The Canal Boat Ohio, 9 Phila. (Pa.) 448, 460.

"**Trading, dealing and trafficking**" in a statute relating to hawkers and peddlers see HAWKERS AND PEDDLERS, 21 Cyc. 369 note 27.

"**Trading voyage**" distinguished from "freighting . . . voyage" see Brown *v.* Jones, 4 Fed. Cas. No. 2,017, 2 Gall. 477.

"**Trading with an enemy**" see The Rapid, 8 Cranch (U. S.) 155, 163, 3 L. ed. 520.

40. Johnson *v.* Rutan, 122 Fed. 993, 998, where such construction was given to the term as used in the war revenue act of 1898.

TRADE-MARKS, TRADE-NAMES, AND UNFAIR COMPETITION

By William B. Hale
Of the New York Bar *

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For Matters Relating to — (*continued*)
Trade-Marks — (*continued*)
Property in as Subject to Attachment, see ATTACHMENT, 4 Cyc. 556 note 32.
Regulation of, as Regulation of Commerce, see COMMERCE, 7 Cyc. 470.
Restrictions on Sale of, Effect on Validity of Contract, see CONTRACTS, 9 Cyc. 538.
Rights on Sale of Good-Will of Business, see GOOD-WILL, 20 Cyc. 1278.
Unfair Use of Copyrighted Book, see COPYRIGHT, 9 Cyc. 939.

I. DEFINITION AND NATURE OF TRADE-MARK.

A. Definition. A trade-mark may be defined as a name, sign, symbol, or device which is attached to goods offered for sale in the market so as to distinguish them from similar goods, and to identify them with a particular trader, or with his successors, as owners of a particular business, as being made, worked upon, imported, selected, certified, or sold by him or them.[1] It has been aptly described

1. *California.*— Burke *v.* Cassin, 45 Cal. 467, 469, 478, 13 Am. Rep. 204.
Colorado.—Solis Cigar Co. *v.* Pozo, 16 Colo. 388, 392, 26 Pac. 556, 25 Am. St. Rep. 279.
Georgia.— Larrabee *v.* Lewis, 67 Ga. 561, 562, 44 Am. Rep. 735.
Illinois.— Hazelton Boiler Co. *v.* Hazelton Tripod Boiler Co., 137 Ill. 231, 232, 28 N. E. 248; Candee *v.* Deere, 54 Ill. 439, 456, 5 Am. Rep. 125.
Iowa.— Sartor *v.* Schaden, 125 Iowa 696, 700, 101 N. W. 511; Shaver *v.* Shaver, 54 Iowa 208, 210, 6 N. W. 188, 37 Am. Rep. 194.
Kentucky.— Com. *v.* Kentucky Distilleries, etc., Co., 132 Ky. 521, 527, 116 S. W. 766, 136 Am. St. Rep. 186, 21 L. R. A. N. S. 30; Parkland Hills Blue Lick Water Co. *v.* Hawkins, 95 Ky. 502, 504, 26 S. W. 389, 16 Ky. L. Rep. 210, 44 Am. St. Rep. 254; Avery *v.* Meikle, 81 Ky. 73, 84.
Louisiana.— Insurance Oil Tank Co. *v.* Scott, 33 La. Ann. 946, 952, 39 Am. Rep. 286.
Massachusetts.— Rogers *v.* Taintor, 97 Mass. 291, 297.
New Jersey.— Schneider *v.* Williams, 44 N. J. Eq. 391, 395, 14 Atl. 812.
New York.— People *v.* Krivitzky, 168 N. Y. 182, 185, 61 N. E. 175; Waterman *v.* Shipman, 130 N. Y. 301, 310, 29 N. E. 114; Dr. Jaeger's Sanitary Woolen System Co. *v.* Le Boutillier, 47 Hun 521, 523, 15 N. Y. St. 117; Potter *v.* McPherson, 21 Hun 559, 564; Glen, etc., Mfg. Co. *v.* Hall, 6 Lans. 158, 160 [*reversed* on other grounds in 61 N. Y. 226, 19 Am. Rep. 278]; Hegeman *v.* Hegeman, 8 Daly 1, 7; Munro *v.* Smith, 8 N. Y. Suppl. 671.
Ohio.— Reeder *v.* Brodt, 6 Ohio S. & C. Pl. Dec. 248, 252, 4 Ohio N. P. 265.
United States.— Elgin Nat. Watch Co. *v.* Illinois Watch Case Co., 179 U. S. 665, 673, 21 S. Ct. 270, 45 L. ed. 365; Columbia Mill Co. *v.* Alcorn, 150 U. S. 460, 463, 14 S. Ct. 151, 37 L. ed. 1144; Amoskeag Mfg. Co. *v.* Trainer, 101 U. S. 51, 53, 25 L. ed. 993; McLean *v.* Fleming, 96 U. S. 245, 248, 24 L. ed. 828; Delaware, etc., Canal Co. *v.* Clark, 13 Wall. 311, 322, 20 L. ed. 581; U. S. *v.* Borgfeldt, 123 Fed. 196, 197; Albany Perforated Wrapping-Paper Co. *v.* John Hoberg Co., 102 Fed. 157, 158 [*affirmed* in 109 Fed. 589, 48 C. C. A. 559]; Hostetter *v.* Fries, 17 Fed. 620, 622, 21 Blatchf. 339; Shaw Stocking Co. *v.* Mack, 12 Fed. 707, 710, 21 Blatchf. 1; Leidersdorf *v.* Flint, 15 Fed. Cas. No. 8,219, 8 Biss. 327, 18 Alb. L. J. 382, 429, 7 N. Y. Wkly. Dig. 360, 6 Reporter 739; Moorman *v.* Hoge, 17 Fed. Cas. No. 9,783, 2 Sawy. 78, 86; *Ex p.* Frieberg, 20 Pat. Off. Gaz. 1164.
England.— Leather Cloth Co. *v.* American Leather Cloth Co., 11 H. L. Cas. 523, 529, 11 Jur. N. S. 513, 35 L. J. Ch. 53, 12 L. T. Rep. N. S. 742, 6 New Rep. 209, 13 Wkly. Rep. 873, 11 Eng. Reprint 1435.
See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 1.
Other definitions are: "A distinctive name, word, mark, emblem, design, symbol, or device used in lawful commerce to indicate or authenticate the source, from which has come, or through which has passed, the chattel upon or to which it is affixed." Western Grocer Co. *v.* Caffarelli, (Tex. Civ. App. 1908) 108 S. W. 413, 414 [*reversed* on other grounds in 102 Tex. 104, 127 S. W. 1018].
"An arbitrary, distinctive name, symbol, or device, to indicate or authenticate the origin of the product to which it is attached." G. W. Cole Co. *v.* American Cement, etc., Co., 130 Fed. 703, 705, 65 C. C. A. 105.
"Anything that has become in time adopted as the *prima facie* means of detecting the goods, wares, or properties of certain proprietors." Washington Medalion Pen Co. *v.* Esterbrook, 29 Fed. Cas. No. 17,246*a*.
"A peculiar name or device, by which a person dealing in an article designates it as of a peculiar kind, character, or quality, or as manufactured by or for him, or dealt in by him, and of which he is entitled to the exclusive use." Weener *v.* Brayton, 152 Mass. 101, 102, 25 N. E. 46, 8 L. R. A. 640 [*citing* Rogers *v.* Taintor, 97 Mass. 291; Chadwick *v.* Covell, 151 Mass. 190, 23 N. E. 1068, 21 Am. St. Rep. 442, 6 L. R. A. 839].
"Something used upon vendible articles to designate them as the articles made or sold by A, and to distinguish them from similar articles made or sold by B." Hygeia Dis-

as the commercial substitute for one's own autographic signature, certifying to the genuineness of the goods to which it is affixed.[2]

B. Office or Function. The sole office or function of a trade-mark is to indicate the origin or ownership of the goods to which it is affixed,[3] and thus to

tilled Water Co. *v.* Hygeia Ice Co., 70 Conn. 516, 533, 40 Atl. 534.

"Symbols by which men engaged in trade and manufactures become known in the marts of commerce, by which their reputation and that of their goods are extended and published; . . . the means by which manufacturers and merchants identify their manufactures and merchandise." Trade-Mark Cases, 100 U. S. 82, 87, 25 L. ed. 550.

"**The definition of a trade-mark, given by Mr. Upton,** is as follows, to wit: 'A trade-mark is the name, symbol, figure, letter, form, or device, adopted and used by a manufacturer, or merchant, in order to designate the goods that he manufactures, or sells, and distinguish them from those manufactured or sold by another; to the end that they may be known in the market as his, and thus enable him to secure such profits as result from a reputation for superior skill, industry, or enterprise.' (Upton Trade-Marks, p. 9.) This is a good general definition, broad enough in its terms, probably, to cover every case to be found in the books, but it would not alone, perhaps, be sufficient as a test by which every individual claim of a device, as a proper trade-mark, can be tried and determined, without looking into the cases from which the definition is compiled, to see what names, symbols, figures, letters, forms, and devices have been recognized and protected as trade-marks." Moorman *v.* Hoge, 17 Fed. Cas. No. 9,783, 2 Sawy. 78, 86.

Statutory definitions, in most cases substantially declaratory of the common law, exist in many jurisdictions as part of the statutory regulation of trade-marks. See the codes and statutes of the several states.

2. Gowans *v.* Ahlborn, 4 Kulp (Pa.) 31, 34; Menendez *v.* Holt, 128 U. S. 514, 9 S. Ct. 143, 32 L. ed. 526; Leidersdorf *v.* Flint, 15 Fed. Cas. No. 8,219, 8 Biss. 327, 18 Alb. L. J. 382, 429, 7 N. Y. Wkly. Dig. 360, 6 Reporter 739; J. P. Bush Mfg. Co. *v.* Hanson, 2 Can. Exch. 557.

A trade-mark is one's commercial signature to his goods. Leidersdorf *v.* Flint, 15 Fed. Cas. No. 8,219, 8 Biss. 327, 18 Alb. L. J. 382, 429, 7 N. Y. Wkly. Dig. 360, 6 Reporter 739.

The trade-mark brands the goods as genuine, just as the signature to a letter stamps it as authentic. Kipling *v.* G. P. Putnam's Sons, 120 Fed. 631, 635, 57 C. C. A. 295, 65 L. R. A. 873.

3. *Connecticut.*— Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 70 Conn. 516, 40 Atl. 534.

District of Columbia.— *In re* American Circular Loom Co., 28 App. Cas. 446.

Louisiana.— Handy *v.* Commander, 49 La. Ann. 1119, 22 So. 230.

Massachusetts.— George G. Fox Co. *v.* Glynn, 191 Mass. 344, 78 N. E. 89, 114 Am. St. Rep. 619.

New Jersey.— Perlberg *v.* Smith, 70 N. J. Eq. 638, 62 Atl. 442.

New York.— Ball *v.* Broadway Bazaar, 194 N. Y. 429, 87 N. E. 674 [*reversing* 121 N. Y. App. Div. 546, 106 N. Y. Suppl. 249]; Barrett Chemical Co. *v.* Stern, 176 N. Y. 27, 68 N. E. 65, 13 N. Y. Annot. Cas. 430; Koehler *v.* Sanders, 122 N. Y. 65, 25 N. E. 235, 9 L. R. A. 576 [*affirming* 48 Hun 48]; Caswell *v.* Davis, 58 N. Y. 223, 17 Am. Rep. 233.

Texas.— Western Grocer Co. *v.* Caffarelli, (Civ. App. 1908) 108 S. W. 413 [*reversed* on other grounds in 102 Tex. 104, 127 S. W. 1018].

Wisconsin.— Gessler *v.* Grieb, 80 Wis. 21, 48 N. W. 1098, 27 Am. St. Rep. 20.

United States.— Newcomer *v.* Scriven Co., 168 Fed. 621, 94 C. C. A. 77; G. W. Cole Co. *v.* American Cement, etc., Co., 130 Fed. 703, 65 C. C. A. 105; Dennison Mfg. Co. *v.* Thomas Mfg. Co., 94 Fed. 651; Deering Harvester Co. *v.* Whitman, etc., Mfg. Co., 91 Fed. 376, 33 C. C. A. 558; Coffman *v.* Castner, 87 Fed. 457, 31 C. C. A. 55; Osgood *v.* Allen, 18 Fed. Cas. No. 10,603, Holmes 185.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 1.

"**It seems to be the office of a trade-mark** to point out the true source, origin or ownership of the goods to which the mark is applied, or to point out and designate a dealer's place of business, distinguishing it from the business locality of other dealers. Such is substantially the rule laid down by many authorities." Marshall *v.* Pinkham, 52 Wis. 572, 578, 9 N. W. 615, 38 Am. Rep. 756, per Cassoday, J. And see Boardman *v.* Meriden Britannia Co., 35 Conn. 402, 95 Am. Dec. 270; Handy *v.* Commander, 49 La. Ann. 1119, 22 So. 230; J. R. Watkins Medical Co. *v.* Sands, 83 Minn. 326, 86 N. W. 340; Oakes *v.* St. Louis Candy Co., 146 Mo. 391, 48 S. W. 467; Filley *v.* Fassett, 44 Mo. 168, 100 Am. Dec. 275; Reeder *v.* Brodt, 6 Ohio S. & C. Pl. Dec. 248, 4 Ohio N. P. 265; Putnam Nail Co. *v.* Dulaney, 140 Pa. St. 205, 21 Atl. 391, 23 Am. St. Rep. 228, 11 L. R. A. 524; Cady *v.* Schultz, 19 R. I. 193, 32 Atl. 915, 61 Am. St. Rep. 763, 29 L. R. A. 524; Barrows *v.* Knight, 6 R. I. 434, 78 Am. Dec. 452; Dunbar *v.* Glenn, 42 Wis. 118, 24 Am. Rep. 395; Elgin Nat. Watch Co. *v.* Illinois Watch Case Co., 179 U. S. 665, 21 S. Ct. 270, 45 L. ed. 365; Lawrence Mfg. Co. *v.* Tennessee Mfg. Co., 138 U. S. 537, 11 S. Ct. 396, 34 L. ed. 997; Amoskeag Mfg. Co. *v.* Trainer, 101 U. S. 51, 25 L. ed. 993; Delaware, etc., Canal Co. *v.* Clark, 13 Wall. (U. S.) 311, 20 L. ed. 581; Albany Perforated Wrapping-Paper Co. *v.* John Hoberg Co., 102 Fed. 157 [*affirmed* in 109 Fed. 589, 48 C. C. A. 559]; Deering Harvester Co. *v.* Whitman, etc., Mfg. Co., 91 Fed. 376, 33 C. C. A. 558; Tetlow *v.* Tappan,

distinguish the goods of one person from those of another.[4] More than one trade-mark may be acquired for the same goods.[5]

C. Grounds For Protection. The obvious purpose of distinguishing the goods of one person from those of another is to enable one to reap the benefit of the good-will and reputation which he has built up for his goods by means of his honesty, skill, and industry.[6] Good-will is property.[7] The unauthorized use or imitation of another's trade-mark being a means of appropriating the benefit of the latter's good-will, the real basis of the remedy for infringement is the protection of one's property rights in his business and good-will.[8] The relief afforded,

85 Fed. 774; Royal Baking Powder Co. *v.* Raymond, 70 Fed. 376. See Hoyt *v.* J. T. Lovett Co., 71 Fed. 173, 17 C. C. A. 652, 31 L. R. A. 44.

"Its purpose is to indicate the personal origin of the article to which it is applied, or the source from which it comes." Laughman's Appeal, 128 Pa. St. 1, 19, 18 Atl. 415, 5 L. R. A. 599.

4. *Connecticut.*— Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 70 Conn. 516, 40 Atl. 534.

Massachusetts.— Weener *v.* Brayton, 152 Mass. 101, 25 N. E. 46, 8 L. R. A. 640.

New York.— Gillott *v.* Esterbrook, 48 N. Y. 374, 8 Am. Rep. 553; Amoskeag Mfg. Co. *v.* Spear, 2 Sandf. 599; Fetridge *v.* Wells, 13 How. Pr. 385.

Pennsylvania.— Laughman's Appeal, 128 Pa. St. 1, 18 Atl. 415, 5 L. R. A. 599; Gowans *v.* Ahlborn, 4 Kulp 91.

Wisconsin.— Marshall *v.* Pinkham, 52 Wis. 572, 9 N. W. 615, 38 Am. Rep. 756.

United States.— Menendez *v.* Holt, 128 U. S. 514, 9 S. Ct. 143, 32 L. ed. 526; Thomas G. Carroll, etc., Co. *v.* McIlvaine, 171 Fed. 125 [*affirmed* in 183 Fed. 22, 105 C. C. A. 314]; Galena Signal Oil Co. *v.* Fuller, 142 Fed. 1002; Ohio Baking Co. *v.* National Biscuit Co., 127 Fed. 116, 62 C. C. A. 116.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 1.

"The function of a trade-mark is to point out the maker of the article to which it is attached. It individualizes the particular make of one who adopted the name for that purpose and with that effect." Waterman *v.* Shipman, 130 N. Y. 301, 311, 29 N. E. 111.

5. International Cheese Co. *v.* Phenix Cheese Co., 118 N. Y. App. Div. 499, 103 N. Y. Suppl. 362; Capewell Horse Nail Co. *v.* Mooney, 167 Fed. 575 [*affirmed* in 172 Fed. 826, 97 C. C. A. 248]; Enoch Morgan's Sons Co. *v.* Ward, 152 Fed. 690, 81 C. C. A. 616, 12 L. R. A. N. S. 729. But see Albany Perforated Wrapping-Paper Co. *v.* John Hoberg Co., 102 Fed. 157 [*affirmed* in 109 Fed. 589, 48 C. C. A. 559], holding that a manufacturer of a single article would not be protected in the exclusive use of a large number of different names which tend to produce confusion rather than certainty as to origin.

6. See cases cited *infra*, note 8.

7. See GOOD-WILL, 20 Cyc. 1275.

8. *Georgia.*—Larrabee *v.* Lewis, 67 Ga. 561, 44 Am. Rep. 735.

Louisiana.— Handy *v.* Commander, 49 La. Ann. 1119, 22 So. 230.

Massachusetts.— George G. Fox Co. *v.* Glynn, 191 Mass. 344, 78 N. E. 89, 114 Am. St. Rep. 619; Holbrook *v.* Nesbitt, 163 Mass. 120, 39 N. E. 794; Weener *v.* Brayton, 152 Mass. 101, 25 N. E. 46, 8 L. R. A. 640.

Missouri.— Gaines *v.* E. Whyte Grocery, etc., Co., 107 Mo. App. 507, 81 S. W. 648.

New Jersey.— Schneider *v.* Williams, 44 N. J. Eq. 391, 14 Atl. 812.

New York.— Prince Mfg. Co. *v.* Prince's Metallic Paint Co., 135 N. Y. 24, 31 N. E. 990, 17 L. R. A. 129; Munro *v.* Tousey, 129 N. Y. 38, 29 N. E. 9, 14 L. R. A. 245; Burnett *v.* Phalon, 1 Abb. Dec. 267, 3 Keyes 594, 3 Transcr. App. 167, 5 Abb. Pr. 212; Falk *v.* American West Indies Trading Co., 71 N. Y. App. Div. 320, 75 N. Y. Suppl. 964 [*affirming* 36 Misc. 376, 73 N. Y. Suppl. 547]; Godillot *v.* Hazard, 44 N. Y. Super. Ct. 427; Amoskeag Mfg. Co. *v.* Spear, 2 Sandf. 599; Partridge *v.* Menck, 2 Sandf. Ch. 622 [*affirmed* in 5 N. Y. Leg. Obs. 94, 2 Barb. Ch. 101, 47 Am. Dec. 281 (*affirmed* in How. App. Cas. 547, 3 Den. 610)]; Royal Baking Powder Co. *v.* Jenkins, Price & S. T. M. Cas. 309.

Pennsylvania.— Laughman's Appeal, 128 Pa. St. 1, 18 Atl. 415, 5 L. R. A. 599.

United States.— Amoskeag Mfg. Co. *v.* Trainer, 101 U. S. 51, 25 L. ed. 993; McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828; Moxie Nerve Food Co. *v.* Modox, 152 Fed. 493; Van Hoboken *v.* Mohns, 112 Fed. 528; Kann *v.* Diamond Steel Co., 89 Fed. 706, 32 C. C. A. 324; Royal Baking Powder Co. *v.* Raymond, 70 Fed. 376; Cleveland Stone Co. *v.* Wallace, 52 Fed. 431; Leidersdorf *v.* Flint, 15 Fed. Cas. No. 8,219, 8 Biss. 327, 18 Alb. L. J. 382, 429, 7 N. Y. Wkly. Dig. 360, 6 Reporter 739; Manhattan Medicine Co. *v.* Wood, 16 Fed. Cas. No. 9,026, 4 Cliff. 461 [*affirmed* in 108 U. S. 218, 2 S. Ct. 436, 27 L. ed. 706]; Walton *v.* Crowley, 29 Fed. Cas. No. 17,133, 3 Blatchf. 440; Washington Medalion Pen Co. *v.* Esterbrook, 29 Fed. Cas. No. 17,246*a*.

England.— Levy *v.* Walker, 10 Ch. D. 436, 48 L. J. Ch. 273, 39 L. T. Rep. N. S. 654, 27 Wkly. Rep. 370.

Thus one who has adopted a trade-mark to identify his product, and who has by his skill and labor created a valuable market therefor, and who has induced public confidence in the superior quality of his goods, is entitled, so long as he deals honestly with the public, to be protected against those who, without right, attempt to appropriate his trade-mark and apply it to other goods of the same class. Epperson *v.* Bluthenthal, 149 Ala. 125, 42 So. 863.

however, is often expressly placed upon the ground of an exclusive property right in the use of the trade-mark itself.[9] The public is also deemed entitled to protection against imposition by the unauthorized and improper use of trade-marks.[10] But this is hardly a sound reason for affording a private remedy.[11]

"**The court proceeds upon the ground,** that the complainant has a valuable interest in the good will of his trade or business, and that having appropriated to himself a particular label or sign or trade mark, indicating that the article is manufactured or sold by him or by his authority, or that he carries on his business at a particular place, he is entitled to protection against any other person who pirates upon the good will of his customers or of the patrons of his trade or business, by sailing under his flag without his authority or consent." Leidersdorf *v.* Flint, 15 Fed. Cas. No. 8,219, 8 Biss. 327, 331, 18 Alb. L. J. 382, 429, 7 N. Y. Wkly. Dig. 360, 6 Reporter 739.

9. *Alabama.*— Epperson *v.* Bluthenthal, 149 Ala. 125, 42 So. 863.

Iowa.— Sartor *v.* Schaden, 125 Iowa 696, 101 N. W. 511.

Kentucky.— Com. *v.* Kentucky Distilleries, etc., Co., 132 Ky. 521, 116 S. W. 766, 136 Am. St. Rep. 186, 21 L. R. A. N. S. 30.

Louisiana.— Handy *v.* Commander, 49 La. Ann. 1119, 22 So. 230.

Massachusetts.— Weener *v.* Brayton, 152 Mass. 101, 25 N. E. 46, 8 L. R. A. 640.

Minnesota.— Cigar Makers' Protective Union *v.* Conhaim, 40 Minn. 243, 41 N. W. 943, 12 Am. St. Rep. 726, 3 L. R. A. 125.

New York.— Volger *v.* Force, 63 N. Y. App. Div. 122, 124, 71 N. Y. Suppl. 209; Clark *v.* Clark, 25 Barb. 76; Corwin *v.* Daly, 7 Bosw. 222; Baldwin *v.* Von Micheroux, 5 Misc. 386, 25 N. Y. Suppl. 857 [*affirmed* in 83 Hun 43, 31 N. Y. Suppl. 696].

Ohio.— Reeder *v.* Brodt, 6 Ohio S. & C. Pl. Dec. 248, 4 Ohio N. P. 265.

Pennsylvania.—Joseph Dixon Crucible Co. *v.* Guggenheim, 2 Brewst. 321.

United States.— Elgin Nat. Watch Co. *v.* Illinois Watch Case Co., 179 U. S. 665, 676, 21 S. Ct. 270, 45 L. ed. 365; Lawson Mfg. Co. *v.* Tennessee Mfg. Co., 138 U. S. 557, 11 S. Ct. 396, 34 L. ed. 997; McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828; Burke *v.* Bishop, 175 Fed. 167; Enoch Morgan's Sons Co. *v.* Ward, 152 Fed. 690, 81 C. C. A. 616, 12 L. R. A. N. S. 729; Independent Baking Powder Co. *v.* Boorman, 130 Fed. 726; Bass *v.* Feigenspan, 96 Fed. 206; Dennison Mfg. Co. *v.* Thompson Mfg. Co., 94 Fed. 651; Vitascope Co. *v.* U. S. Phonograph Co., 83 Fed. 30; Royal Baking Powder Co. *v.* Raymond, 70 Fed. 376, 380; Blackwell *v.* Armistead, 3 Fed. Cas. No. 1,474, 3 Hughes 163. But see Kann *v.* Diamond Steel Co., 89 Fed. 706, 32 C. C. A. 324.

England.— Bradbury *v.* Dickens, 27 Beav. 53, 28 L. J. Ch. 667, 54 Eng. Reprint 21; Perry *v.* Truefitt, 6 Beav. 66, 49 Eng. Reprint 749; Hall *v.* Barrows, 4 De G. J. & S. 150, 10 Jur. N. S. 55, 33 L. J. Ch. 204, 9 L. T. Rep. N. S. 561, 3 New Rep. 259, 12 Wkly. Rep. 322, 69 Eng. Ch. 116, 46 Eng. Reprint 873 [*affirming* 9 Jur. N. S. 483, 32 L. J. Ch. 548, 8 L. T. Rep. N. S. 227, 1 New Rep. 543, 11 Wkly. Rep. 525]; Edelsten *v.* Edelsten, 1 De G. J. & S. 185, 9 Jur. N. S. 479, 7 L. T. Rep. N. S. 768, 11 Wkly. Rep. 328, 66 Eng. Ch. 142, 46 Eng. Reprint 72; Leather Cloth Co. *v.* American Leather Cloth Co., 1 Hem. & M. 271, 2 New Rep. 481, 11 Wkly. Rep. 931, 71 Eng. Reprint 118 [*reversed* on other grounds in 4 De G. J. & S. 137, 10 Jur. N. S. 81, 33 L. J. Ch. 199, 9 L. T. Rep. N. S. 558, 3 New Rep. 264, 12 Wkly. Rep. 289, 69 Eng. Ch. 106, 46 Eng. Reprint 868 (*affirmed* in 11 H. L. Cas. 523, 11 Jur. N. S. 513, 35 L. J. Ch. 53, 12 L. T. Rep. N. S. 742, 6 New Rep. 209, 13 Wkly. Rep. 873, 11 Eng. Reprint 1435)]; Millington *v.* Fox, 3 Myl. & C. 338, 14 Eng. Ch. 338, 40 Eng. Reprint 956. But see Singer Mfg. Co. *v.* Loog, 18 Ch. D. 412, 44 L. J. Ch. 481, 44 L. T. Rep. N. S. 888, 29 Wkly. Rep. 699 [*reversed* on other grounds in 8 App. Cas. 15, 52 L. J. Ch. 481, 48 L. T. Rep. N. S. 3, 31 Wkly. Rep. 325]; Collins Co. *v.* Brown, 3 Jur. N. S. 929, 3 Kay & J. 423, 5 Wkly. Rep. 676, 69 Eng. Reprint 1174.

Canada.— Reg. *v.* Van Dulken, 2 Can. Exch. 304.

Analogy to patent.— The property right in a trade-mark is of the same quality as a copyright or patent, and analogous remedies are accorded for its protection. Clark Thread Co. *v.* William Clark Co., 55 N. J. Eq. 658, 37 Atl. 599. But *compare* Delaware, etc., Canal Co. *v.* Clark, 13 Wall. (U. S.) 311, 20 L. ed. 581.

10. *Alabama.*— Epperson *v.* Bluthenthal, 149 Ala. 125, 42 So. 863.

District of Columbia.— Peter Schoenhofen Brewing Co. *v.* Maltine Co., 30 App. Cas. 340.

Illinois.— Hopkins Amusement Co. *v.* Frohman, 103 Ill. App. 613 [*affirmed* in 202 Ill. 541, 67 N. E. 391].

Maine.— W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 100 Me. 461, 62 Atl. 499, 4 L. R. A. N. S. 960.

Missouri.— Gaines *v.* E. Whyte Grocery, etc., Co., 107 Mo. App. 507, 81 S. W. 648.

New York.— Prince Mfg. Co. *v.* Prince's Metallic Paint Co., 135 N. Y. 24, 31 N. E. 990, 17 L. R. A. 129.

Protection of the public.— The enforcement of the doctrine that trade-marks shall not be simulated does not depend entirely on the alleged invasion of individual rights, but as well on the broad principle that the public are entitled to protection from the use of previously appropriated names or symbols in such a manner as may deceive them by inducing or leading to the purchase of one thing for another. Hopkins Amusement Co. *v.* Frohman, 103 Ill. App. 613 [*affirmed* in 202 Ill. 541, 67 N. E. 391].

11. Leather Cloth Co. *v.* American Leather

The right to a trade-mark exists at common law, and is protected even in the absence of statute,[12] although statutes exist in many jurisdictions providing for the registration and protection of trade-marks.[13]

D. Goods Subject to Trade-Mark. Strictly speaking, trade-marks are applicable only to articles of traffic, that is, such articles as are bought and sold in the market.[14] Sometimes the term is loosely applied to names and marks used in a business, but not in connection with articles of traffic.[15] This use of the term is inaccurate and probably means no more than that such names and marks will be protected under the doctrine of unfair competition.[16] A valid technical trade-mark may be acquired for use in connection with any lawful vendible commodity,[17] and it is immaterial whether such article be

Cloth Co., 4 De G. J. & S. 137, 141, 10 Jur. N. S. 81, 33 L. J. Ch. 199, 9 L. T. Rep. N. S. 588, 3 New Rep. 264, 12 Wkly. Rep. 289, 69 Eng. Ch. 106, 46 Eng. Reprint 868 [*affirmed* in 11 H. L. Cas. 523, 11 Jur. N. S. 513, 35 L. J. Ch. 53, 12 L. T. Rep. N. S. 742, 6 New Rep. 209, 13 Wkly. Rep. 873, 11 Eng. Reprint 1435] ("Imposition on the public, occasioned by one man selling his goods as the goods of another, cannot be the ground of private action or suit. . . . Imposition on the public, becomes the test of the property in the trade mark having been invaded and injured, and not the ground on which the Court rests its jurisdiction"); Webster *v.* Webster, 3 Swanst. 490 note, 19 Rev. Rep. 258, 36 Eng. Reprint 949 ("The fraud upon the public is no ground for the plaintiff's coming into this court"). See also Schneider *v.* Williams, 44 N. J. Eq. 391, 14 Atl. 812. See also *infra*, 761 note 64.

12. *Iowa.*— Shaver *v.* Shaver, 54 Iowa 208, 6 N. W. 188, 37 Am. Rep. 194.

Louisiana.— Handy *v.* Commander, 49 La. Ann. 1119, 22 So. 230.

Mississippi.— Coco-Cola *v.* Koca-Nola, 93 Miss. 306, 47 So. 379.

Ohio.— Reeder *v.* Brodt, 6 Ohio S. & C. Pl. Dec. 248, 4 Ohio N. P. 265.

Washington.— Woodcock *v.* Guy, 33 Wash. 234, 74 Pac. 358.

United States.— Baker *v.* Delapenha, 160 Fed. 746; L. H. Harris Drug Co. *v.* Stucky, 46 Fed. 624; La Croix *v.* May, 15 Fed. 236.

England.— Somerville *v.* Schembri, 12 App. Cas. 453, 56 L. J. P. C. 61, 56 L. T. Rep. N. S. 454.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 2.

13. See the codes and statutes of the several states. See also *infra*, VI.

14. Weener *v.* Brayton, 152 Mass. 101, 25 N. E. 46, 8 L. R. A. 640; Grocers Journal Co. *v.* Midland Pub. Co., 127 Mo. App. 356, 105 S. W. 310; Ball *v.* Broadway Bazaar, 194 N. Y. 429, 87 N. E. 674 [*reversing* 121 N. Y. App. Div. 546, 106 N. Y. Suppl. 249]; Koehler *v.* Sanders, 122 N. Y. 65, 25 N. E. 235, 9 L. R. A. 576 [*affirming* 48 Hun 48]; Leather Cloth Co. *v.* American Leather Cloth Co., 11 H. L. Cas. 523, 11 Jur. N. S. 513, 35 L. J. Ch. 53, 12 L. T. Rep. N. S. 742, 6 New Rep. 209, 13 Wkly. Rep. 873, 11 Eng. Reprint 1435; McAndrew *v.* Bassett, 4 De G. J. & S. 380, 10 Jur. N. S. 550, 33 L. J. Ch. 561, 10 L. T. Rep. N. S. 442, 4 New Rep. 123, 12 Wkly. Rep. 777, 69 Eng. Ch. 293, 46 Eng. Reprint 965.

15. Atlas Assur. Co. *v.* Atlas Ins. Co., 138 Iowa 228, 112 N. W. 232, 114 N. W. 609, 128 Am. St. Rep. 189, 15 L. R. A. N. S. 625.

Thus an insurance company, although not engaged in the manufacture of articles of commerce, is nevertheless entitled to protection in its use of a trade-mark. Atlas Assur. Co. *v.* Atlas Ins. Co., 138 Iowa 228, 112 N. W. 232, 114 N. W. 609, 128 Am. St. Rep. 189, 15 L. R. A. N. S. 625. But this ruling was unnecessary, as protection could have been, and was in part, granted upon ground of unfair competition.

16. See *infra*, V.

17. See cases cited *infra*, this note.

Bread.— George G. Fox Co. *v.* Glynn, 191 Mass. 344, 78 N. E. 89, 114 Am. St. Rep. 619.

Newspapers.— Grocers Journal Co. *v.* Midland Pub. Co., 127 Mo. App. 356, 105 S. W. 310; New York Herald Co. *v.* Star Co., 146 Fed. 1023, 76 C. C. A. 678 [*affirming* 146 Fed. 204], "Buster Brown," as the title of a newspaper comic supplement.

Patented articles.— Udell-Predock Mfg. Co. *v.* Udell Works, 32 App. Cas. (D. C.) 282; Waterman *v.* Shipman, 130 N. Y. 301, 29 N. E. 111 [*reversing* 8 N. Y. Suppl. 814]; Nathan Mfg. Co. *v.* Edna Smelting, etc., Co., 130 N. Y. App. Div. 512, 114 N. Y. Suppl. 1033; Avenarius *v.* Kornely, 139 Wis. 247, 121 N. W. 336. But the name of a patented article is not a valid trade-mark for such article. See *infra*, III, B, 19, b.

Patent medicines.— Spieker *v.* Lash, 102 Cal. 38, 36 Pac. 362; Schmidt *v.* Brieg, 100 Cal. 672, 35 Pac. 623, 22 L. R. A. 790; Foster *v.* Blood Balm Co., 77 Ga. 216, 3 S. E. 284; World's Dispensary Medical Assoc. *v.* Pierce, 138 N. Y. App. Div. 401, 122 N. Y. Suppl. 818; Gessler *v.* Grieb, 80 Wis. 21, 48 N. W. 1098, 27 Am. St. Rep. 20; Dr. Peter H. Fahrney, etc., Co. *v.* Ruminer, 153 Fed. 735, 82 C. C. A. 621; Filkins *v.* Blackman, 9 Fed. Cas. No. 4,786, 13 Blatchf. 440; Warner *v.* Roehr, 29 Fed. Cas. No. 17,189*a*; Theo. Noel Co. *v.* Vitæ Ore Co., 17 Manitoba 87; Davis *v.* Kennedy, 13 Grant Ch. (U. C.) 523. But see A. N. Chamberlain Medicine Co. *v.* H. A. Chamberlain Medicine Co., 43 Ind. App. 213, 86 N. E. 1025. See also *infra*, III, B, 19, f. In the absence of legislation, "courts cannot

natural or artificial,[18] so long as it is the subject of barter and sale in the market.

E. Extent of Right — 1. Exclusiveness. A trade-mark is in its very nature an exclusive right, for if several persons were entitled to use it it would not indicate the source of the goods to which it is attached.[19] A name or mark of such a nature

declare dealing in such preparations to be illegal, nor the articles themselves to be not entitled, as property, to the protection of the law." Worden *v.* California Fig Syrup Co., 187 U. S. 516, 527, 23 S. Ct. 161, 164, 47 L. ed. 282 [*distinguished* in New England Moxie Nerve Food Co. *v.* Modox, 152 Fed. 493]. Quack medicines have been denied protection in equity upon the ground that plaintiff did not come with clean hands. Houchens *v.* Houchens, 95 Md. 37, 51 Atl. 822; Fowle *v.* Spear, 9 Fed. Cas. No. 4,996; Heath *v.* Wright, 11 Fed. Cas. No. 6,310, 3 Wall. Jr. 141. See also New England Moxie Nerve Food Co. *v.* Modox, 152 Fed. 493, 496 [*citing* Missouri Drug Co. *v.* Wyman, 129 Fed. 623], where it was said that equity should not protect the business of selling medicine for serious diseases simply upon proof that the preparation is a harmless beverage with slight tonic properties.

Whisky.— People *v.* Luhrs, 195 N. Y. 377, 89 N. E. 171, 25 L. R. A. N. S. 473 [*affirming* 127 N. Y. App. Div. 634, 111 N. Y. Suppl. 749].

18. Parkland Hills Blue Lick Water Co. *v.* Hawkins, 95 Ky. 502, 26 S. W. 389, 16 Ky. L. Rep. 210, 44 Am. St. Rep. 254 (spring water); Congress, etc., Spring Co. *v.* High Rock Congress Spring Co., 45 N. Y. 291, 6 Am. Rep. 82 (spring water).

Protection of a trade-mark cannot be obtained for an organic article which by the law of its nature is reproductive and derives its chief value from its innate vital powers, independently of the care, management, or ingenuity of man. Hoyt *v.* J. T. Lovett Co., 71 Fed. 173, 178, 17 C. C. A. 652, 31 L. R. A. 44, wherein the court said that the question was novel and unprecedented. The decision here, however, amounts to no more than that the name of a variety of grapes cannot be exclusively appropriated as a trade-mark, which is in full accord with sound principle. See *infra*, III, B, 19.

19. *District of Columbia.*— U. S. *v.* Duell, 17 App. Cas. 471, 475.

Indiana.— State *v.* Hagen, 6 Ind. App. 167, 33 N. E. 223, holding that a "union label" is not a trade-mark.

Iowa.— Sarter *v.* Schaden, 125 Iowa 696, 101 N. W. 511.

Louisiana.— Handy *v.* Commander, 49 La. Ann. 1119, 22 So. 230; Insurance Oil Tank Co. *v.* Scott, 33 La. Ann. 946, 39 Am. Rep. 286.

Massachusetts.— George G. Fox Co. *v.* Glynn, 191 Mass. 344, 78 N. E. 89, 114 Am. St. Rep. 619.

Minnesota.— Cigar Makers' Protective Union *v.* Conhaim, 40 Minn. 243, 41 N. W. 943, 12 Am. St. Rep. 726, 3 L. R. A. 125.

New York.— Ball *v.* Broadway Bazaar, 194 N. Y. 429, 87 N. E. 674 [*reversing* 121 N. Y. App. Div. 546, 106 N. Y. Suppl. 249]; Barrett Chemical Co. *v.* Stern, 176 N. Y. 27, 68 N. E. 65, 13 N. Y. Annot. Cas. 430; Hier *v.* Abrahams, 82 N. Y. 519, 37 Am. Rep. 589; Burnett *v.* Phalon, 1 Abb. Dec. 267, 3 Keyes 594, 3 Transcr. App. 167, 5 Abb. Pr. N. S. 212; American Grocer Pub. Assoc. *v.* Grocer Pub. Co., 25 Hun 398; Amoskeag Mfg. Co. *v.* Spear, 2 Sandf. 599; Dr. Dadirrian, etc., Co. *v.* Hauenstein, 37 Misc. 23, 74 N. Y. Suppl. 709 [*affirmed* in 74 N. Y. App. Div. 630, 17 N. Y. Suppl. 1125 (*affirmed* in 175 N. Y. 522, 67 N. E. 1081)]. But see Clinton Metallic Paint Co. *v.* New York Metallic Paint Co., 23 Misc. 66, 50 N. Y. Suppl. 437 (where it is held that a trade-mark may, but need not, be wholly exclusive); Dr. Jaeger's Sanitary Woolen System Co. *v.* Le Boutillier, 5 Misc. 78, 24 N. Y. Suppl. 890.

Rhode Island.— Cady *v.* Schultz, 19 R. I. 193, 32 Atl. 915, 61 Am. St. Rep. 763, 29 L. R. A. 524.

United States.— Columbia Mill Co. *v.* Alcorn, 150 U. S. 460, 14 S. Ct. 151, 37 L. ed. 1144; Amoskeag Mfg. Co. *v.* Trainer, 101 U. S. 51, 25 L. ed. 993; McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828; Delaware, etc., Canal Co. *v.* Clark, 13 Wall. 311, 20 L. ed. 581; Enoch Morgan's Sons Co. *v.* Ward, 152 Fed. 690, 81 C. C. A. 616, 12 L. R. A. N. S. 729; Ohio Baking Co. *v.* National Biscuit Co., 127 Fed. 116, 62 C. C. A. 116 [*affirming* 127 Fed. 160]; Manhattan Medicine Co. *v.* Wood, 16 Fed. Cas. No. 9,026, 4 Cliff. 461, 14 Off. Gaz. 519 [*affirmed* in 108 U. S. 218, 2 S. Ct. 436, 27 L. ed. 706]; Osgood *v.* Allen, 18 Fed. Cas. No. 10,603, Holmes 185, 3 Off. Gaz. 124; Walton *v.* Crowley, 29 Fed. Cas. No. 17,133, 3 Blatchf. 440.

England.— Singer Mfg. Co. *v.* Wilson, 2 Ch. D. 434, 45 L. J. Ch. 490, 34 L. T. Rep. N. S. 858, 24 Wkly. Rep. 1023 [*reversed* on other grounds in 3 App. Cas. 376, 47 L. J. Ch. 481, 38 L. T. Rep. N. S. 303, 26 Wkly. Rep. 664]; Hirst *v.* Denham, L. R. 14 Eq. 542, 41 L. J. Ch. 752, 27 L. T. Rep. N. S. 56; Singer Mfg. Co. *v.* Kimball, 10 Sc. L. Rep. 173.

Canada.— J. P. Bush Mfg. Co. *v.* Hanson, 2 Can. Exch. 557.

But see Pratt's Appeal, 117 Pa. St. 401, 11 Atl. 878, 2 Am. St. Rep. 676.

Another statement of rule.— "One way of designating articles of manufacture as coming from a particular maker is by a trade-mark." This, to be an effectual protection to one who has adopted and used it, must be something to which the user may have an exclusive right. It therefore cannot be anything to the use of which, for a similar purpose, others may also have a right. The

that no one can acquire an exclusive right to its use cannot become a trade-mark,[20] although it may become a trade-name,[21] and the use of it to promote unfair competition may be prevented or redressed.[22] Being an exclusive right, a trade-mark may not be used by others either alone or in connection with other matter,[23] or in other forms,[24] or in other colors.[25] Unauthorized use or imitation constitutes an infringement of the owner's rights.[26]

2. No Rights in Gross. Since the sole function of a trade-mark is to indicate the origin or ownership of vendible commodities, trade-marks cannot exist separate and apart from a business to which they point and of which they are an incident.[27] There is no exclusive ownership of names, devices, or marks which constitute a trade-mark apart from the use or application of them. There is no such thing as an abstract right, or right in gross, to any particular name or mark.[28] The property right of the proprietor is in the peculiar and added function of the word

courts will not recognize trademarks which are not chosen in such a way as not to conflict with the rights of others to use common names and things, like the names of persons and places, and of colors and forms with which all are familiar." George G. Fox Co. *v.* Glynn, 191 Mass. 344, 349, 78 N. E. 89, 114 Am. St. Rep. 619.

20. See *infra*, III, A.

21. See *infra*, V, A, 4.

22. See *infra*, V.

23. Enoch Morgan's Sons Co. *v.* Ward, 152 Fed. 690, 81 C. C. A. 616, 12 L. R. A. N. S. 729.

24. Atlas Assur. Co. *v.* Atlas Ins. Co., 138 Iowa 228, 112 N. W. 232, 114 N. W. 609, 128 Am. St. Rep. 189, 15 L. R. A. N. S. 625.

25. *In re* La Société Anonyme des Verreries de L'Etoile, [1894] 2 Ch. 26, 63 L. J. Ch. 381, 70 L. T. Rep. N. S. 295, 7 Reports 183, 42 Wkly. Rep. 420; Smith *v.* Fair, 14 Ont. 729. See also *In re* Worthington, 14 Ch. D. 8, 49 L. J. Ch. 646, 42 L. T. Rep. N. S. 563, 28 Wkly. Rep. 747.

26. See *infra*, IV.

27. Com. *v.* Kentucky Distilleries, etc., Co., 132 Ky. 521, 116 S. W. 766, 136 Am. St. Rep. 186, 21 L. R. A. N. S. 30; Weener *v.* Brayton, 152 Mass. 101, 25 N. E. 46, 8 L. R. A. 640; Cigar Makers' Protective Union *v.* Conhaim, 40 Minn. 243, 41 N. W. 943, 12 Am. St. Rep. 726, 3 L. R. A. 125; Moxie Nerve Food Co. *v.* Modox, 152 Fed. 493.

"It is necessarily connected with some business." Johnson *v.* Schenck, 13 Fed. Cas. No. 7,412. "It is necessary for those who claim that their right of property in a trade-mark has been invaded to show that they are in some way, by themselves or with others, the owners thereof by reason of some business which they are transacting together and to which its use is incident, and that it is not merely a personal privilege, which they possess as members of a particular association of wide extent and embracing many persons of varied interest, to advertise, or have advertised by those by whom they are employed, the articles made by them as being made by members of such association." Weener *v.* Brayton, 152 Mass. 101, 105, 25 N. E. 46, 48, 8 L. R. A. 640.

28. *Kentucky.*— Avery *v.* Meikle, 81 Ky. 73, 4 Ky. L. Rep. 759, 764.

Maryland.— Seabrook *v.* Grimes, 107 Md. 410, 68 Atl. 883, 126 Am. St. Rep. 400, 16 L. R. A. N. S. 483.

Massachusetts.— Weener *v.* Brayton, 152 Mass. 101, 25 N. E. 46, 8 L. R. A. 640.

Minnesota.— Cigar Makers' Protective Union *v.* Conhaim, 40 Minn. 243, 41 N. W. 943, 12 Am. St. Rep. 726, 3 L. R. A. 125.

Missouri.— Grocers Journal Co. *v.* Midland Pub. Co., 127 Mo. App. 356, 105 S. W. 310.

New York.— Chas. S. Higgins Co. *v.* Higgins Soap Co., 144 N. Y. 462, 39 N. E. 490, 43 Am. St. Rep. 769, 27 L. R. A. 42.

Pennsylvania.— Joseph Dixon Crucible Co. *v.* Guggenheim, 2 Brewst. 321, 329 [*applied* in Seabrook *v.* Grimes, 107 Md. 410, 68 Atl. 883, 126 Am. St. Rep. 400, 16 L. R. A. N. S. 483].

United States.— Thomas G. Carroll, etc., Co. *v.* McIlvaine, 171 Fed. 125 [*affirmed* in 183 Fed. 22, 105 C. C. A. 314]; Coffeen *v.* Brunton, 5 Fed. Cas. No. 2,946, 4 McLean 516; Osgood *v.* Allen, 18 Fed. Cas. No. 10,603, Holmes 185, 3 Off. Gaz. 124; Walton *v.* Crowley, 29 Fed. Cas. No. 17,133, 3 Blatchf. 440.

England.— Lee *v.* Haley, L. R. 5 Ch. 155, 39 L. J. Ch. 284, 22 L. T. Rep. N. S. 251, 18 Wkly. Rep. 242; Gout *v.* Aleploglu, 6 Beav. 69 note, 49 Eng. Reprint 750; Collins Co. *v.* Brown, 3 Jur. N. S. 929, 3 Kay & J. 423, 428, 5 Wkly. Rep. 676, 69 Eng. Reprint 1174, 1177; Cotton *v.* Gillard, 44 L. J. Ch. 90; Crawshay *v.* Thompson, 11 L. J. C. P. 301, 4 M. & G. 357, 386, 5 Scott N. R. 562, 43 E. C. L. 189 [*quoted* with approval in Coffeen *v.* Brunton, 5 Fed. Cas. No. 2,946, 4 McLean 516].

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 26.

"A trade-mark only confers on the person whose mark it is a right to say, 'Do not imitate my mark in connection with goods like mine so that yours may be mistaken for mine.' There is no exclusive right to the mark except in connection with such goods and to prevent deception or mistake." Powell *v.* Birmingham Vinegar Brewery Co., [1896] 2 Ch. 54, 68, 65 L. J. Ch. 563, 74 L. T. Rep. N. S. 509, 44 Wkly. Rep. 688.

Assignments in gross are void. Good-will of the business must be included. See *infra*, VII, A, 2, b.

or mark as an identification of his goods, and in that alone.[29] Trade-marks confer no exclusive right to represent an idea.[30]

3 CLASS OF GOODS. The right to the exclusive use of a trade-mark is further limited to a use on the particular class of goods upon which it has been actually used, and other persons may use even the identical mark or name in connection with a different class of goods.[31] But the right extends to other goods of the same general class as that in which it has been applied. When one has acquired a

29. Royal Baking Powder Co. *v.* Raymond, 70 Fed. 376; Leather Cloth Co. *v.* American Leather Cloth Co., 11 H. L. Cas. 523, 11 Jur. N. S. 513, 35 L. J. Ch. 53, 12 L. T. Rep. N. S. 742, 6 New Rep. 209, 13 Wkly. Rep. 873, 11 Eng. Reprint 1435.

"Lord Langdale, Master of the Rolls, well expresses the whole law of trade-marks by names, in the case of Collins Co. *v.* Cowen, 3 Kay & J. 428, 5 Wkly. Rep. 676, 69 Eng. Reprint 1177. He says: 'There is no such thing as property in a trade-mark as an abstract name. It is the right which a person has to use a certain name for articles which he has manufactured, so that he may prevent another person from using it, because the mark or name denotes that articles so marked were manufactured by a certain person, and no one else can have the right to put the same name upon his goods, and then represent them to have been manufactured by the person whose mark it is.'" Osgood *v.* Allen, 18 Fed. Cas. No. 10,603, Holmes 185, 195, 3 Off. Gaz. 124.

"While property in these names, devices, etc., for all purposes, cannot exist, yet property as applied to particular, vendible articles may exist, when such articles have gone into the market identified by them, and have thus obtained reputation or currency by them, as indicating a special or superior manufacturer, or some other circumstance which commends them to the public." Weener *v.* Brayton, 152 Mass. 101, 25 N. E. 46, 8 L. R. A. 640.

30. Holeproof Hosiery Co. *v.* Wallach, 167 Fed. 373 [*affirmed* in 172 Fed. 859, 97 C. C. A. 263], where it is said that a trade-mark in "Holeproof" as applied to hosiery is not infringed by "Knotair," although both convey the same idea. See also Enoch Morgan's Sons Co. *v.* Troxell, 89 N. Y. 292, 42 Am. R. 294.

31. *California.*— Nolan Bros. Shoe Co. *v.* Nolan, 131 Cal. 271, 63 Pac. 480, 82 Am. St. Rep. 346, 53 L. R. A. 384.

District of Columbia.—Wayne County Preserving Co. *v.* Burt Olney Canning Co., 32 App. Cas. 279; E. McIlhenney *v.* New Iberia Extract of Tobasco Pepper Co., 30 App. Cas. 337.

New York.— Colman *v.* Crump, 70 N. Y. 573; Amoskeag Mfg. Co. *v.* Garner, 54 How. Pr. 297.

United States.— Amoskeag Mfg. Co. *v.* Trainer, 101 U. S. 51, 25 L. ed. 993; American Tobacco Co. *v.* Polacsek, 170 Fed. 117; Eiseman *v.* Schiffer, 157 Fed. 473; George *v.* Smith, 52 Fed. 830; Celluloid Mfg. Co. *v.* Read, 47 Fed. 712; Osgood *v.* Rockwood, 18 Fed. Cas. No. 10,605, 11 Blatchf. 310; Smith *v.* Reynolds, 22 Fed. Cas. No. 13,099, 13 Blatchf. 458.

England.— Somerville *v.* Schembri, 12 App. Cas. 453, 56 L. J. P. C. 61, 56 L. T. Rep. N. S. 454; Hart *v.* Colley, 44 Ch. D. 193, 59 L. J. Ch. 355, 62 L. T. Rep. N. S. 623, 38 Wkly. Rep. 440; *In re* Bach, 42 Ch. D. 661, 38 Wkly. Rep. 174; Jay *v.* Ladler, 40 Ch. D. 649, 60 L. T. Rep. N. S. 27, 37 Wkly. Rep. 505; Anglo-Swiss Condensed Milk Co. *v.* Metcalf, 31 Ch. D. 454, 55 L. J. Ch. 463, 34 Wkly. Rep. 345; Edwards *v.* Dennis, 30 Ch. D. 454, 55 L. J. Ch. 125, 54 L. T. Rep. N. S. 112; Singer Mfg. Co. *v.* Wilson, 2 Ch. D. 434, 45 L. J. Ch. 490, 34 L. T. Rep. N. S. 858, 24 Wkly. Rep. 1023 [*reversed* on other grounds in 3 App. Cas. 376, 47 L. J. Ch. 481, 38 L. T. Rep. N. S. 303, 26 Wkly. Rep. 664] (per Jessel, M. R.); Ainsworth *v.* Walmsley, L. R. 1 Eq. 518, 12 Jur. N. S. 205, 35 L. J. Ch. 352, 14 L. T. Rep. N. S. 220, 14 Wkly. Rep. 363; Leather Cloth Co. *v.* American Leather Cloth Co., 11 H. L. Cas. 523, 11 Jur. N. S. 513, 35 L. J. Ch. 53, 12 L. T. Rep. N. S. 742, 6 New Rep. 209, 13 Wkly. Rep. 873, 11 Eng. Reprint 1435; *In re* Jelley, 51 L. J. Ch. 639 note, 46 L. T. Rep. N. S. 381 note.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 76.

Reasons for rule.— There are two reasons for this rule. The first is that if a second trader were to adopt and use the mark of another within the same class of goods, he would thereby acquire exclusive rights to the mark as applied to his particular variety of goods, and if the first user of the mark should subsequently desire to add that particular variety of goods to his general line within the class, he would be unable to use his own trade-mark upon his own goods. Collins Co. *v.* Oliver Ames, etc., Corp., 18 Fed. 561, 20 Blatchf. 542. But see remarks of Cotton, L. J., in Edwards *v.* Dennis, 30 Ch. D. 454, 55 L. J. Ch. 125, 54 L. T. Rep. N. S. 112, and of Jessel, M. R., in *In re* Jelley, 51 L. J. Ch. 639 note, 46 L. T. Rep. N. S. 381 note. Another reason is that the public cannot know how many varieties of the same class of goods the owner of the mark makes and sells under the mark, and if they should see that mark upon other goods of the same class they would be deceived and the owner of the mark might be injured in his reputation because of the quality of goods over which he has no control. Amoskeag Mfg. Co. *v.* Garner, 54 How. Pr. (N. Y.) 297; Wamsutta Mills *v.* Allen, 12 Phila. (Pa.) 535. See Edwards *v.* Dennis, 30 Ch. D. 454, 55 L. J. Ch. 125, 54 L. T. Rep. N. S. 112 (per Cotton, L. J.); Delaware,

trade-mark in connection with particular goods, no one else will be permitted to use such trade-mark upon goods which, while different, belong to the same general class.[32] So where a trade-mark has been used on a particular species of goods, it cannot be thereafter appropriated by another as a trade-mark for a class of goods which includes such species.[33] Goods are in the same class when the general and essential characteristics of the goods are the same, so that the general public would be likely to be misled if the same mark were used.[34] The same trade-mark may be applied by the same person to many different classes of goods and is a valid trade-mark for each class.[35]

4. Monopoly of Goods Not Conferred. A trade-mark confers no exclusive

etc., Canal Co. *v.* Clark, 13 Wall. (U. S.) 311, 20 L. ed. 581.

32. Baker *v.* Harrison, 32 App. Cas. (D. C.) 272; American Stove Co. *v.* Detroit Stove Works, 31 App. Cas. (D. C.) 304 (holding that a trade-mark acquired for coal or wood stoves excludes subsequent use for gasoline stoves); Burt *v.* Tucker, 178 Mass. 493, 59 N. E. 1111, 86 Am. St. Rep. 499, 52 L. R. A. 112; Amoskeag Mfg. Co. *v.* Garner, 54 How. Pr. (N. Y.) 297; Wamsutta Mills *v.* Allen, 12 Phila. (Pa.) 535; Church, etc., Co. *v.* Russ, 99 Fed. 276; G. G. White Co. *v.* Miller, 50 Fed. 277; Collins Co. *v.* Oliver Ames, etc., Corp., 18 Fed. 561, 20 Blatchf. 542; Carroll *v.* Ertheiler, 1 Fed. 688; Anglo-Swiss Condensed Milk Co. *v.* Metcalf, 31 Ch. D. 454, 55 L. J. Ch. 463, 34 Wkly. Rep. 345. See George *v.* Smith, 52 Fed. 830. But see Hargreave *v.* Freeman, [1891] 3 Ch. 39, 61 L. J. Ch. 23, 65 L. T. Rep. N. S. 487; Medlar, etc., Shoe Co. *v.* Delsarte Mfg. Co., (N. J. Ch. 1900) 46 Atl. 1089 [*affirmed* in 68 N. J. Eq. 706, 61 Atl. 410].

In England a distinction is made between the same natural class, and the same statutory class. A trade-mark may be used and registered for particular goods in a statutory class, and others may use or register the same mark for other species of goods in the same statutory class. Hargreave *v.* Freeman, [1891] 3 Ch. 39, 61 L. J. Ch. 23, 65 L. T. Rep. N. S. 487 [*discussing* and *applying* Edwards *v.* Dennis, 30 Ch. D. 454, 55 L. J. Ch. 125, 54 L. T. Rep. N. S. 112]; Jay *v.* Ladler, 40 Ch. D. 649, 60 L. T. Rep. N. S. 27, 37 Wkly. Rep. 505; Edwards *v.* Dennis, 30 Ch. D. 454, 55 L. J. Ch. 125, 54 L. T. Rep. N. S. 112 [*reversing* Cab. & E. 428]; *In re* Braby, 21 Ch. D. 223, 51 L. J. Ch. 637, 46 L. T. Rep. N. S. 380, 30 Wkly. Rep. 675. In *In re* Hargreaves, 11 Ch. D. 669, 27 Wkly. Rep. 450, there being four trade-marks, each consisting of the device of an anchor, registered for different varieties of goods in the same general class, the court refused the application to register a fifth for still another kind of goods in the same general class.

33. American Tobacco Co. *v.* Polacsek, 170 Fed. 117; Smith *v.* Reynolds, 22 Fed. Cas. No. 13,098, 10 Blatchf. 100, 3 Off. Gaz. 213.

34. Phœnix Paint, etc., Co. *v.* Lewis, 32 App. Cas. (D. C.) 285.

Goods in same class.— *In re* Wright, 33 App. Cas. (D. C.) 510 (pure and blended whiskies); Phœnix Paint, etc., Co. *v.* Lewis, 32 App. Cas. (D. C.) 285 (ready mixed paints, stains, Japans, and varnishes in same class with paint colors and paste paints); Baker *v.* Harrison, 32 App. Cas. (D. C.) 272 (coffee and cocoa used as beverages); Wamsutta Mills *v.* Allen, 12 Phila. (Pa.) 535 (muslin and shirts made from muslin); American Tobacco Co. *v.* Polacsek, 170 Fed. 117 (smoking tobacco and cigarettes); Church, etc., Co. *v.* Russ, 99 Fed. 276 (baking powder and baking soda and saleratus); G. G. White Co. *v.* Miller, 50 Fed. 277 (straight and blended whisky); Collins Co. *v.* Oliver Ames, etc., Corp., 18 Fed. 561, 20 Blatchf. 542 (axes, hatchets, and digging tools, such as picks, hoes, and shovels); Carroll *v.* Ertheiler, 1 Fed. 688 (smoking tobacco and cigarettes).

Goods in different classes.— Virginia Baking Co. *v.* Southern Biscuit Works, (Va. 1910) 68 S. E. 261 (soda crackers and gingersnaps; "drops" and "jumbles"); George *v.* Smith, 52 Fed. 830 (canned fruits and canned salmon); Anglo-Swiss Condensed Milk Co. *v.* Metcalf, 31 Ch. D. 454, 55 L. J. Ch. 463, 34 Wkly. Rep. 345 (condensed milk and butterine and eggs).

Ingredients and manufactured article.— In La Société Anonyme, etc. *v.* Baxter, 14 Fed. Cas. No. 8,099, 14 Blatchf. 261, 14 Off. Gaz. 679, Blatchford, J., said: "The fact that the defendants sell a paint composed of a white oxide of zinc ground in oil, and represent it as containing white oxide of zinc made by the plaintiffs, when it does not contain white oxide of zinc made by the plaintiffs, is no violation of any trade-mark of the plaintiffs. . . . So, flour is intended to be made into bread. But, if a baker should falsely stamp his bread with the mark of a particular brand of flour, the maker of such brand, if having a trade-mark therefor, could not claim that the baker had violated his trade-mark. And so of any other raw material which enters as an ingredient into a compound or article of manufacture." But *compare* Schuster Co. *v.* Muller, 28 App. Cas. (D. C.) 409, where it was held that a mixture of ground roots and bark, where the wrapper of the package containing the mixture has on it directions how to make the bitters by steeping the contents in Holland gin, is to be considered goods of the same descriptive property as bitters made from such roots and bark, and bottled.

35. Edison *v.* Thomas A. Edison, Jr., Chemical Co., 128 Fed. 1013.

rights in the goods to which the mark has been applied. Such a right can be acquired only under the patent or copyright laws. Unless prevented by a copyright or patent, any one may make and sell goods, similar in all respects to the goods sold by another under a trade-mark.[36] Neither does a trade-mark confer a right to dictate the prices at which the trade-marked goods may be resold by a purchaser from the original owner.[37]

5. Time Limit. Common-law trade-marks do not expire by lapse of time. The right is limited only by the period of its use, and ceases only with its abandonment.[38]

6. Territorial Limits. Notwithstanding expressions to be found in some authorities to the effect that a trade-mark acknowledges no boundaries, and may be infringed anywhere,[39] trade-mark rights are confined to the limits of the country under whose laws they were acquired.[40] One person may own a particular trade-

36. *California.*— Spieker *v.* Lash, 102 Cal. 38, 36 Pac. 362.

Iowa.— Sartor *v.* Schaden, 125 Iowa 696, 101 N. W. 511, uncopyrighted labels sold indiscriminately.

Massachusetts.— Garst *v.* Hall, etc., Co., 179 Mass. 588, 61 N. E. 219, 55 L. R. A. 631; Flagg Mfg. Co. *v.* Holway, 178 Mass. 83, 59 N. E. 667; Dover Stamping Co. *v.* Fellows, 163 Mass. 191, 40 N. E. 105, 47 Am. St. Rep. 448, 28 L. R. A. 448.

Michigan.— Warren Bros. Co. *v.* Barber Asphalt Paving Co., 145 Mich. 79, 108 N. W. 652, 12 L. R. A. N. S. 339.

New York.— Cooke, etc., Co. *v.* Miller, 169 N. Y. 475, 62 N. E. 582; Westcott Chuck Co. *v.* Oneida Nat. Chuck Co., 122 N. Y. App. Div. 260, 106 N. Y. Suppl. 1016. See also Sweezy *v.* McBrair, 89 Hun 155, 35 N. Y. Suppl. 11. But see Dutton *v.* Cupples, 117 N. Y. App. Div. 172, 102 N. Y. Suppl. 309.

Ohio.— Brill *v.* Singer Mfg. Co., 41 Ohio St. 127, 52 Am. Rep. 74.

Pennsylvania.— Putnam Nail Co. *v.* Dulaney, 140 Pa. St. 205, 21 Atl. 391, 23 Am. St. Rep. 228, 11 L. R. A. 524 [*affirming* 8 Pa. Co. Ct. 595].

Wisconsin.— Gessler *v.* Grieb, 80 Wis. 21, 48 N. W. 1098, 27 Am. St. Rep. 20; Marshall *v.* Pinkham, 52 Wis. 572, 9 N. W. 615, 38 Am. Rep. 756.

United States.— Bamforth *v.* Douglass Post Card, etc., Co., 158 Fed. 355 (uncopyrighted post-cards); Globe-Wernicke Co. *v.* Fred Macey Co., 119 Fed. 696, 56 C. C. A. 304; Dennison Mfg. Co. *v.* Thomas Mfg. Co., 94 Fed. 651; Putnam Nail Co. *v.* Bennett, 43 Fed. 800; Coffeen *v.* Brunton, 5 Fed. Cas. No. 2,946, 4 McLean 516; Fairbanks *v.* Jacobus, 8 Fed. Cas. No. 4,608, 3 Ban. & A. 108, 14 Blatchf. 337; Singer Mfg. Co. *v.* Larsen, 22 Fed. Cas. No. 12,902, 3 Ban. & A. 246, 8 Biss. 151.

England.— Powell *v.* Birmingham Vinegar Brewery Co., [1896] 2 Ch. 54, 65 L. J. Ch. 563, 74 L. T. Rep. N. S. 509, 44 Wkly. Rep. 688 [*affirmed* in [1897] A. C. 710, 66 L. J. Ch. 763, 76 L. T. Rep. N. S. 792]. See also Hirst *v.* Denham, L. R. 14 Eq. 542, 41 L. J. Ch. 752, 27 L. T. Rep. N. S. 56.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 77.

"A man may make any article he pleases that is not protected by a patent. . . . He may imitate it so perfectly that the one may be mistaken for the other, but he may not sell his own article as and for that of another, by means of a trade-mark in imitation of the trade-mark of such other person." Putnam Nail Co. *v.* Dulaney, 140 Pa. St. 205, 213, 21 Atl. 391, 23 Am. St. Rep. 228, 11 L. R. A. 524, bronze horseshoe nail. But see *infra*, V, C, 14.

Little analogy to patent or copyright.— "Property in a trade-mark, or rather in the use of a trade-mark or name, has very little analogy to that which exists in copyrights, or in patents for inventions." Delaware, etc., Canal Co. *v.* Clark, 13 Wall. (U. S.) 311, 322, 20 L. ed. 581.

37. Garst *v.* Hall, etc., Co., 179 Mass. 588, 61 N. E. 219, 55 L. R. A. 631; Ajello *v.* Worsley, [1898] 1 Ch. 274, 67 L. J. Ch. 172, 77 L. T. Rep. N. S. 783, 46 Wkly. Rep. 245. See also Oliver Typewriter Co. *v.* American Writing Mach. Co., 156 Fed. 177.

As a general rule, any person may sell or offer for sale at any price whatsoever goods of which he is not the owner, but which he hopes or expects to acquire. Ajello *v.* Worsley, [1898] 1 Ch. 274, 67 L. J. Ch. 172, 77 L. T. Rep. N. S. 783, 46 Wkly. Rep. 245, per Sterling, J.

38. Leidersdorf *v.* Flint, 15 Fed. Cas. No. 8,219, 8 Biss. 327, 6 Reporter 739, 18 Alb. L. J. (N. Y.) 382, 429, 7 N. Y. Wkly. Dig. 360.

39. Derringer *v.* Plate, 29 Cal. 292, 87 Am. Dec. 170; Ball *v.* Broadway Bazaar, 121 N. Y. App. Div. 546, 106 N. Y. Suppl. 249 [*reversed* on the facts in 194 N. Y. 429, 87 N. E. 674] (distinguishing trade-marks and trade-names in this respect); Kidd *v.* Johnson, 100 U. S. 617, 25 L. ed. 769; Consolidated Ice Co. *v.* Hygeia Distilled Water Co., 151 Fed. 10, 80 C. C. A. 506 [*affirming* 144 Fed. 139]; Leidersdorf *v.* Flint, 15 Fed. Cas. No. 8,219, 8 Biss. 327, 18 Alb. L. J. 382, 429, 7 N. Y. Wkly. Dig. 360, 6 Reporter 739. See also Corbin *v.* Taussig, 132 Fed. 662.

40. Vacuum Oil Co. *v.* Eagle Oil Co., 122 Fed. 105. See Richter *v.* Reynolds, 59 Fed. 577, 8 C. C. A. 220.

Local law governs.—Whether one claiming a right to a trade-mark could register it in foreign countries under their laws is immaterial, but the question is whether his claim is in harmony with the local law and the court will not decide what trade-marks exist or do not exist in foreign countries.

mark in one country, and the same trade-mark may belong to another person in another country,[41] or the trade-mark may be valid in one country and invalid in another.[42] Trade-marks are, however, coextensive with the jurisdiction of the sovereignty granting the right,[43] and it is immaterial that the proprietor has not extended his business to a particular locality.[44] Treaties between various countries have to some extent made provision for the protection of the trade-mark rights of their respective citizens.[45]

II. ACQUISITION OF TRADE-MARKS.

A. Who May Acquire. Only those persons who have some connection or relation to the goods to which the mark is applied can obtain a trade-mark, because the sole function of a trade-mark is to indicate that relation,[46] and show origin or ownership of the goods. Any persons, including corporations,[47] and

Avenarius *v.* Kornely, 139 Wis. 247, 121 N. W. 336; *In re* Carter Medicine Co., [1892] 3 Ch. 472, 61 L. J. Ch. 716, 67 L. T. Rep. N. S. 747, 3 Reports 1, 41 Wkly. Rep. 13.

Infringement by acts in foreign country.—Neither common law nor registered trade-marks afford any protection against acts committed wholly in a foreign country. Vacuum Oil Co. *v.* Eagle Oil Co., 122 Fed. 105. An action will lie, however, where the right was acquired in this country, and the wrongful transactions emanated from here, although they were carried out in foreign countries. In such a suit the boundaries of the dealing and not of countries constitute the limits of investigation. Wyckoff *v.* Howe Scale Co. of 1886, 110 Fed. 520 [*reversed* on other grounds in 122 Fed. 348, 58 C. C. A. 510]. A trade-mark acquired in one state will support an action for an unauthorized use of such trade-mark in another state. Derringer *v.* Plate, 29 Cal. 292, 87 Am. Dec. 170.

41. Derringer *v.* Plate, 29 Cal. 292, 87 Am. Dec. 170; Sartor *v.* Schaden, 125 Iowa 696, 101 N. W. 511; Kathreiner's Malzkaffee Fabriken, etc. *v.* Pastor Kneipp Medicine Co., 82 Fed. 321, 27 C. C. A. 351; Carlsbad *v.* Kutnow, 71 Fed. 167, 18 C. C. A. 24; Richter *v.* Reynolds, 59 Fed. 577, 8 C. C. A. 220; Smith *v.* Fair, 14 Ont. 729. But see J. P. Bush Mfg. Co. *v.* Hanson, 2 Can. Exch. 557, holding that the right to use the mark "the world over" is an essential element of a legal trade-mark.

Priority between foreign and domestic user.—As between a foreigner who first used and registered a trade-mark in a foreign country, and a resident who first used the same mark in the United States, the resident has the paramount right to the trade-mark in the United States. Richter *v.* Anchor Remedy Co., 52 Fed. 455 [*affirmed* in 59 Fed. 577, 8 C. C. A. 220]. The owner of a valid, registered trade-mark in England may be an infringer by using such trade-mark in the United States, a resident having previously acquired a trade-mark in the United States in the same words. Carlsbad *v.* Kutnow, 68 Fed. 794 [*affirmed* in 71 Fed. 167, 18 C. C. A. 24].

42. Dr. Jaeger's Sanitary Woolen System Co. *v.* Le Boutillier, 5 Misc. (N. Y.) 78, 24 N. Y. Suppl. 890; Saxlehner *v.* Eisner, etc., Co., 179 U. S. 19, 21 S. Ct. 7, 45 L. ed. 60 [*reversing* 91 Fed. 536, 33 C. C. A. 291]; Kaiserbrauerei *v.* J. & P. Baltz Brewing Co., 71 Fed. 695. See National Starch Mfg. Co. *v.* Munn's Patent Maizena, etc., Co., [1894] A. C. 275, 63 L. J. P. C. 112, 6 Reports 462.

The action of a foreign government does not affect trade-mark rights acquired in this country. Baglin *v.* Cusenier Co., 156 Fed. 1015 [injunction *modified* in 141 Fed. 497, 72 C. C. A. 555]; s. c. on final hearing, 156 Fed. 1016 [*affirmed* in 164 Fed. 25, 90 C. C. A. 499].

43. Sartor *v.* Schaden, 125 Iowa 696, 101 N. W. 511; Morrison *v.* Case, 17 Fed. Cas. No. 9,845, 9 Blatchf. 548, 2 Off. Gaz. 544.

Trade-marks are an entirety, and are incapable of exclusive use at different places by more than one independent proprietor. Manhattan Medicine Co. *v.* Wood, 16 Fed. Cas. No. 9,026, 4 Cliff. 461, 14 Off. Gaz. 519 [*affirmed* in 108 U. S. 218, 2 S. Ct. 436, 27 L. ed. 706]. But see Griggs *v.* Erie Preserving Co., 131 Fed. 359.

44. Hygeia Distilled Water Co. *v.* Consolidated Ice Co., 144 Fed. 139 [*affirmed* in 151 Fed. 10]. But see Thomas G. Carroll, etc., Co. *v.* McIlvaine, 171 Fed. 125 [*affirmed* in 183 Fed. 22, 105 C. C. A. 314].

Trade-marks of a corporation are not limited to those states in which it has complied with the local laws authorizing it to do business therein as a foreign corporation. Motor Boat Pub. Co. *v.* Motor Boating Co., 57 Misc. (N. Y.) 108, 107 N. Y. Suppl. 468; Consolidated Ice Co. *v.* Hygeia Distilled Water Co., 151 Fed. 10, 80 C. C. A. 506 [*affirming* 144 Fed. 139]; Standard Sanitary Mfg. Co. *v.* Standard Ideal Co., 37 Quebec Super. Ct. 33 (holding that the statutory penalty for doing business without a license is the sole consequence).

45. See Hopkins Unfair Trade 374; Paul Trade-Marks 826.

46. See McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828; Hoyt *v.* J. T. Lovett Co., 71 Fed. 173, 17 C. C. A. 652, 31 L. R. A. 44; Hirsch *v.* Jonas, 3 Ch. D. 584, 45 L. J. Ch. 364, 35 L. T. Rep. N. S. 228.

47. Atlas Assur. Co. *v.* Atlas Ins. Co., 138 Iowa 228, 112 N. W. 232, 114 N. W. 609, 128 Am. St. Rep. 189, 15 L. R. A. N. S. 625

aliens,[48] who are connected with particular goods in any of the following capacities, may acquire a trade-mark to indicate that connection, and to secure to them the benefits of their good-will: viz., manufacturers,[49] workmen,[50] dealers, or jobbers who merely select or sell goods manufactured by others,[51]

(foreign corporation doing business in state by comity); Insurance Oil Tank Co. *v.* Scott, 33 La. Ann. 946, 39 Am. Rep. 286; New York Belting, etc., Co. *v.* Goodyear Rubber Hose, etc., Co., 7 Pa. Dist. 76, 20 Pa. Co. Ct. 493; Western Grocer Co. *v.* Caffarelli, (Tex. Civ. App. 1908) 108 S. W. 413.

48. Derringer *v.* Plate, 29 Cal. 292, 87 Am. Dec. 170; Atlas Assur. Co. *v.* Atlas Ins. Co., 138 Iowa 228, 112 N. W. 232, 114 N. W. 609, 128 Am. St. Rep. 189, 15 L. R. A. N. S. 625; Taylor *v.* Carpenter, 11 Paige (N. Y.) 292, 42 Am. Dec. 114 [*affirming* 2 Sandf. Ch. 603]; Baker *v.* Delapenha, 160 Fed. 746 (holding that mark must be used in this country); Coffeen *v.* Brunton, 5 Fed. Cas. No. 2,946, 4 McLean 516; Taylor *v.* Carpenter, 23 Fed. Cas. No. 13,784, 3 Story 458; Collins Co. *v.* Reeves, 4 Jur. N. S. 865, 28 L. J. Ch. 56, 6 Wkly. Rep. 717; Collins Co. *v.* Brown, 3 Jur. N. S. 929, 3 Kay & J. 423, 5 Wkly. Rep. 676, 69 Eng. Reprint 1174; Pabst Brewing Co. *v.* Ekers, 21 Quebec Super. Ct. 545; Davis *v.* Kennedy, 13 Grant Ch. (U. C.) 523. See also State *v.* Gibbs, 56 Mo. 133.

A foreign manufacturer has a remedy by suit in England for an injunction and account of profits, against a manufacturer there who has committed a fraud upon him by using his trade-mark for the purpose of inducing the public to believe that the goods so marked were manufactured by the foreigner. This relief is founded upon the personal injury caused to plaintiff by defendant's fraud, and exists, although plaintiff resides and carries on his business in another country, and has no establishment and does not even sell his goods in England. Collins Co. *v.* Brown, 3 Jur. N. S. 929, 3 Kay & J. 423, 5 Wkly. Rep. 676, 69 Eng. Reprint 1174.

49. William Rogers Mfg. Co. *v.* Simpson, 54 Conn. 527, 9 Atl. 395; Volger *v.* Force, 63 N. Y. App. Div. 122, 71 N. Y. Suppl. 209; Partridge *v.* Menck, 2 Barb. Ch. (N. Y.) 101, 47 Am. Dec. 281; McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828; Atlantic Milling Co. *v.* Robinson, 20 Fed. 217; Amoskeag Mfg. Co. *v.* Spear, 2 Sandf. (N. Y.) 599; Hirsh *v.* Jonas, 3 Ch. D. 584, 45 L. J. Ch. 364, 35 L. T. Rep. N. S. 228; Delondre *v.* Shaw, 2 Sim. 237, 2 Eng. Ch. 237, 57 Eng. Reprint 777.

Use of retailers' names and marks.—Where mnufacturers have established a trade and indicated their manufacture by a label, it is immaterial that they manufactured them for others, and printed the retailers' names on the labels. Volger *v.* Force, 63 N. Y. App. Div. 122, 71 N. Y. Suppl. 209. But where a manufacturer had no name for his product and did not advertise it as his make, but put it up under the trade-names and trade-marks of different customers in cartons upon which was printed a representation that the powder was manufactured exclusively by the customers, he could not enjoin the use of similar cartons by a rival manufacturer. Shelley *v.* Sperry, 121 Mo. App. 429, 99 S. W. 488.

50. Schmalz *v.* Wooley, 57 N. J. Eq. 303, 41 Atl. 939, 73 Am. St. Rep. 637, 43 L. R. A. 86 [*reversing* 56 N. J. Eq. 649, 39 Atl. 539]; Amoskeag Mfg. Co. *v.* Garner, 55 Barb. (N. Y.) 151, 6 Abb. Pr. N. S. 265; *Re* Sykes, 43 L. T. Rep. N. S. 626, 29 Wkly. Rep. 235.

51. *District of Columbia.*— Case *v.* Murphey, 31 App. Cas. 245.

Louisiana.— Insurance Oil Tank Co. *v.* Scott, 33 La. Ann. 946, 39 Am. Rep. 286.

Massachusetts.— Nelson *v.* Winchell, 203 Mass. 75, 89 N. E. 180, 23 L. R. A. N. S. 1150; Burt *v.* Tucker, 178 Mass. 493, 59 N. E. 1111, 86 Am. St. Rep. 499, 52 L. R. A. 112.

Missouri.— Conrad *v.* Joseph Uhrig Brewing Co., 8 Mo. App. 277.

New Jersey.— Perlberg *v.* Smith, 70 N. J. Eq. 638, 62 Atl. 442.

New York.—Amoskeag Mfg. Co. *v.* Spear, 2 Sandf. 599; Société des Huiles, etc. *v.* Rorke, 31 N. Y. Suppl. 51 [*affirmed* in 5 N. Y. App. Div. 175, 39 N. Y. Suppl. 28]; Godillot *v.* Hazard, 49 How. Pr. 5 [*affirmed* in 44 N. Y. Super. Ct. 427 (*affirmed* in 81 N. Y. 263)]; Partridge *v.* Menck, 2 Barb. Ch. 101, 47 Am. Dec. 281; Taylor *v.* Carpenter, 2 Sandf. Ch. 603, 614.

Pennsylvania.— Zeugschmidt *v.* Hantman, 28 Pittsb. Leg. J. N. S. 463.

Texas.—Western Grocer Co. *v.* Caffarelli, (Civ. App. 1908) 108 S. W. 413 [*reversed* on other grounds in 102 Tex. 104, 127 S. W. 1018].

United States.— Menendez *v.* Holt, 128 U. S. 514, 9 S. Ct. 143, 144, 32 L. ed. 526; McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828; Saxlehner *v.* Graef, 81 Fed. 704; Levy *v.* Waitt, 56 Fed. 1016 [*affirmed* in 61 Fed. 1008, 10 C. C. A. 227, 25 L. R. A. 190]; A. F. Pike Mfg. Co. *v.* Cleveland Stone Co., 35 Fed. 896; Holt *v.* Menendez, 23 Fed. 869 [*affirmed* in 128 U. S. 514, 9 S. Ct. 143, 32 L. ed. 526]; Walton *v.* Crowley, 29 Fed. Cas. No. 17,133, 3 Blatchf. 440.

England.— Ford *v.* Foster, L. R. 7 Ch. 611, 41 L. J. Ch. 682, 27 L. T. Rep. N. S. 219, 20 Wkly. Rep. 818.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 28.

Mere selection and approval.—A trade-mark may be acquired to indicate that the goods have been selected and approved by one who had a reputation for so doing. Hirsch *v.* Jonas, 3 Ch. D. 584, 45 L. J. Ch. 364, 35 L. T. Rep. N. S. 228. The use of a trade-mark does not necessarily import that the articles on which it is used are manufactured by the user; but it may be enough that they are manufactured for him, that

exporters,[52] importers,[53] commission merchants,[54] and other persons bearing a similar relation to the goods.[55]

B. Adoption and Use — 1. In General. A trade-mark is acquired by mere adoption and user as such,[56] subject to certain well-established rules as to what

he controls their production, or even that they pass through his hands in the course of trade, and that he gives to them the benefit of his reputation or name and business style. Nelson *v.* Winchell, 203 Mass. 75, 89 N. E. 180, 23 L. R. A. N. S. 1150. But where the owner of a shoe store marked all of the shoes he sold "Eagle Shoes," although they were procured from various sources, so that the name did not indicate any particular brand or make of shoes, he was held not entitled to protection in the use of the name. Perlberg *v.* Smith, 70 N. J. Eq. 638, 62 Atl. 442.

The manufacturer has no interest in trade-marks adopted and used by dealers. Michigan Condensed Milk Co. *v.* Kenneweg Co., 30 App. Cas. (D. C.) 491; Shelley *v.* Sperry, 121 Mo. App. 429, 99 S. W. 488; Société des Huiles, etc. *v.* Rorke, 31 N. Y. Suppl. 51 [*affirmed* in 5 N. Y. App. Div. 175, 39 N. Y. Suppl. 28 (*affirmed* in 158 N. Y. 677, 52 N. E. 1126)]; Zeugschmidt *v.* Hantman, 28 Pittsb. Leg. J. N. S. (Pa.) 463; Brower *v.* Boulton, 58 Fed. 888, 7 C. C. A. 567; Levy *v.* Waitt, 56 Fed. 1016 [*affirmed* in 61 Fed. 1008, 10 C. C. A. 227, 25 L. R. A. 190]. But see Hirsh *v.* Jonas, 3 Ch. D. 584, 45 L. J. Ch. 364, 35 L. T. Rep. N. S. 228. *Compare* Delondre *v.* Shaw, 2 Sim. 237, 2 Eng. Ch. 237, 57 Eng. Reprint 777.

Commercial mark distinguished.— The distinction between a "trade-mark" and a "commercial mark" in the civil law of France is pointed out by Pouillet, Marques de Fabrique, § 6, where he says: "A trade-mark is not a commercial mark. . . . The trade-mark is especially or peculiarly the mark of the manufacturer, of him who creates the product, who manufactures it. The commercial mark is that of the dealer, of him who, receiving the product of the manufacturer, sells it to the consumer." La Republique Francaise *v.* Schultz, 57 Fed. 37, 41. The common law makes no such distinction.

52. Brower *v.* Boulton, 58 Fed. 888, 7 C. C. A. 567; Robinson *v.* Finlay, 9 Ch. D. 487, 39 L. T. Rep. N. S. 398, 27 Wkly. Rep. 294.

53. Godillot *v.* Hazard, 44 N. Y. Super. Ct. 427; Saxlehner *v.* Graef, 81 Fed. 704; *In re* Australian Wine Importers, 41 Ch. D. 278.

The trade-mark of a foreign producer cannot be registered by an importer from that producer as his own, whether the importer has or has not an exclusive contract for this country, nor whether the producer does or does not consent to the registration. *In re* Apollinaris Co., [1891] 2 Ch. 186, 61 L. J. Ch. 625, 65 L. T. Rep. N. S. 6.

54. Brower *v.* Boulton, 58 Fed. 888, 7 C. C. A. 567.

55. See cases cited *infra*, this note.

Authors.— In Kipling *v.* Putnam, 120 Fed. 631, conceding that an author might acquire a trade-mark, it was held that the particular mark claimed had not been so used as to constitute a trade-mark within ordinary rules.

Different bottlers of the same goods may each acquire their own trade-marks. Burke *v.* Bishop, 175 Fed. 167.

Trade unions have been protected in the use of union labels designed to indicate that the goods were manufactured by members of the union, upon the ground that such labels constitute trade-marks. Hetterman *v.* Powers, 102 Ky. 133, 43 S. W. 180, 19 Ky. L. Rep. 1087, 80 Am. St. Rep. 348, 39 L. R. A. 211; Schmalz *v.* Wooley, 57 N. J. Eq. 303, 41 Atl. 939, 73 Am. St. Rep. 637, 43 L. R. A. 86 [*reversing* 56 N. J. Eq. 649, 39 Atl. 539]; People *v.* Fisher, 50 Hun (N. Y.) 552, 3 N. Y. Suppl. 786 [*following* Strasser *v.* Moonelis, 55 N. Y. Super. Ct. 197, 11 N. Y. St. 270]; Bloete *v.* Simon, 19 Abb. N. Cas. (N. Y.) 88. See Tracy *v.* Banker, 170 Mass. 266, 49 N. E. 308, 39 L. R. A. 508. But a contrary view has been taken in other cases upon the ground that the trade union as an association has no such relation to the goods worked upon by its members as may be indicated by a technical trade-mark. Lawlor *v.* Merritt, 78 Conn. 630, 63 Atl. 639; Weener *v.* Brayton, 152 Mass. 101, 25 N. E. 46, 8 L. R. A. 640; Cigar Makers' Protective Union *v.* Conhaim, 40 Minn. 243, 41 N. W. 943, 12 Am. St. Rep. 726, 3 L. R. A. 125; State *v.* Bishop, 128 Mo. 373, 31 S. W. 9, 49 Am. St. Rep. 569, 29 L. R. A. 200; Schmalz *v.* Wooley, 57 N. J. Eq. 303, 41 Atl. 939, 73 Am. St. Rep. 637, 43 L. R. A. 86 [*reversing* 56 N. J. Eq. 649, 39 Atl. 539]; Schneider *v.* Williams, 44 N. J. Eq. 391, 14 Atl. 812; McVey *v.* Brendel, 144 Pa. St. 235, 22 Atl. 912, 27 Am. St. Rep. 625, 13 L. R. A. 377; Carson *v.* Ury, 39 Fed. 777, 5 L. R. A. 614; *In re* Cigar Makers' Assoc., 16 Off. Gaz. 958. See also State *v.* Hagen, 6 Ind. App. 167, 33 N. E. 223; Martin Modern Law Labor Unions, § 356 *et seq.* In Allen *v.* McCarthy, 37 Minn. 349, 34 N. W. 416, the court was equally divided on the question. See also Bloete *v.* Simon, 19 Abb. N. Cas. (N. Y.) 88, and Carson *v.* Ury, 39 Fed. 777, 5 L. R. A. 614, where it was held that, although such a label is not a technical trade-mark, yet where special damage is shown and the imitation is fraudulent, equity will grant relief.

56. *California.*— Falkenburg *v.* Lucy, 35 Cal. 52, 95 Am. Dec. 76.

District of Columbia.— Bluthenthal *v.* Bigbie, 30 App. Cas. 118.

Iowa.— Shaver *v.* Shaver, 54 Iowa 208, 6 N. W. 188, 37 Am. Rep. 194.

Louisiana.— Handy *v.* Commander, 49 La. Ann. 1119, 22 So. 230.

Maryland.— Robertson *v.* Berry, 50 Md. 591, 33 Am. Rep. 328.

may be exclusively appropriated as a trade-mark,[57] and as to what manner of use will constitute the mark used a trade-mark.[58] The mark must be used in this country in order to acquire a trade-mark in this country.[59]

2. Actual Use Necessary. A trade-mark right can be acquired only by actual use of the word or mark in the manner that trade-marks must be used.[60] The goods with the mark must be placed upon the market.[61] Mere adoption with intent to use in the future will not create a trade-mark.[62]

Massachusetts.— Burt *v.* Tucker, 178 Mass. 493, 59 N. E. 1111, 86 Am. St. Rep. 499, 52 L. R. A. 112; Weener *v.* Brayton, 152 Mass. 101, 25 N. E. 46, 8 L. R. A. 640.

Minnesota.— Cigar Makers' Protective Union *v.* Conhaim, 40 Minn. 243, 41 N. W. 943, 12 Am. St. Rep. 726, 3 L. R. A. 125.

New York.— Caswell *v.* Hazard, 121 N. Y. 484, 24 N. E. 707, 18 Am. St. Rep. 833 [*affirming* 50 Hun 230, 2 N. Y. Suppl. 783]; Burnett *v.* Phalon, 1 Abb. Dec. 267, 3 Keyes 594, 3 Transcr. App. 167, 5 Abb. Pr. N. S. 212; Volger *v.* Force, 63 N. Y. App. Div. 122, 71 N. Y. Suppl. 209; Gaines *v.* Leslie, 25 Misc. 20, 54 N. Y. Suppl. 421.

Wisconsin.— Listman Mill Co. *v.* William Listman Milling Co., 88 Wis. 334, 60 N. W. 261, 43 Am. St. Rep. 907.

United States.— Amoskeag Mfg. Co. *v.* Trainer, 101 U. S. 51, 25 L. ed. 993 (per Clifford, J.); Baker *v.* Delapenha, 160 Fed. 746; Deitsch *v.* George R. Gibson Co., 155 Fed. 383; Enoch Morgan's Sons Co. *v.* Ward, 152 Fed. 690, 81 C. C. A. 616, 12 L. R. A. N. S. 729; Hygeia Distilled Water Co. *v.* Consolidated Ice Co., 144 Fed. 139; Royal Baking Powder Co. *v.* Raymond, 70 Fed. 376; Shaw Stocking Co. *v.* Mack, 12 Fed. 707, 21 Blatchf. 1; Wm. Rogers Mfg. Co. *v.* Rogers, etc., Mfg. Co., 11 Fed. 495; Alleghany Fertilizer Co. *v.* Woodside, 1 Fed. Cas. No. 206, 1 Hughes 115; Leidersdorf *v.* Flint, 15 Fed. Cas. No. 8,219, 8 Biss. 327, 18 Alb. L. J. 382, 429, 7 N. Y. Wkly. Dig. 360, 6 Reporter 739.

England.— Somerville *v.* Schembri, 12 App. Cas. 453, 56 L. J. P. C. 61, 56 L. T. Rep. N. S. 454; Hirst *v.* Denham, L. R. 14 Eq. 542, 41 L. J. Ch. 752, 27 L. T. Rep. N. S. 56.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 31.

57. See *infra*, III.

58. See *infra*, II, B, 2–5.

59. Baker *v.* Delapenha, 160 Fed. 746. See also *In re* Leonard, 26 Ch. D. 288, 53 L. J. Ch. 603, 51 L. T. Rep. N. S. 35; *In re* Riviere, 26 Ch. D. 48, 53 L. J. Ch. 578, 50 L. T. Rep. N. S. 763, 32 Wkly. Rep. 390. But see Collins Co. *v.* Reeves, 4 Jur. N. S. 865, 28 L. J. Ch. 56, 6 Wkly. Rep. 717.

60. *District of Columbia.*—Johnson *v.* Whelan, 33 App. Cas. 4; *In re* Spalding, 27 App. Cas. 314.

Iowa.— Shaver *v.* Shaver, 54 Iowa 208, 6 N. W. 188, 37 Am. Rep. 194.

Kentucky.— Avery *v.* Meikle, 81 Ky. 73, 4 Ky. L. Rep. 759.

New York.— People *v.* Fisher, 50 Hun 552, 3 N. Y. Suppl. 786.

United States.— Amoskeag Mfg. Co. *v.* Trainer, 101 U. S. 51, 25 L. ed. 993; U. S. *v.* Steffens, 100 U. S. 82, 25 L. ed. 550; Baker *v.* Delapenha, 160 Fed. 746; Macmahan Pharmacal Co. *v.* Denver Chemical Mfg. Co., 113 Fed. 468, 51 C. C. A. 302; Royal Baking Powder Co. *v.* Raymond, 70 Fed. 376; Shaw Stocking Co. *v.* Mack, 12 Fed. 707, 21 Blatchf. 1; Wm. Rogers Mfg. Co. *v.* Rogers, etc., Mfg. Co., 11 Fed. 495; Blackwell *v.* Armistead, 3 Fed. Cas. No. 1,474, 3 Hughes 163; Blackwell *v.* Dibrell, 3 Fed. Cas. No. 1,475, 3 Hughes 151; Filkins *v.* Blackman, 9 Fed. Cas. No. 4,786, 13 Blatchf. 440; Walton *v.* Crowley, 29 Fed. Cas. No. 17,133, 3 Blatchf. 440.

England.— Lawson *v.* London Bank, 18 C. B. 84, 2 Jur. N. S. 716, 25 L. J. C. P. 188, 4 Wkly. Rep. 481, 86 E. C. L. 84; *In re* Batt, [1898] 2 Ch. 432, 67 L. J. Ch. 576, 79 L. T. Rep. N. S. 206, 15 T. L. R. 538 [*affirmed* in [1899] A. C. 428, 68 L. J. Ch. 557, 81 L. T. Rep. N. S. 94, 15 T. L. R. 424].

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 31.

Registration under state statute followed by actual use creates a trade-mark. Regis *v.* Jaynes, 185 Mass. 458, 70 N. E. 480. See also *infra*, VI.

61. *Massachusetts.*— Weener *v.* Brayton, 152 Mass. 101, 25 N. E. 46, 8 L. R. A. 640.

Missouri.— Grocers Journal Co. *v.* Midland Pub. Co., 127 Mo. App. 356, 105 S. W. 310.

New Jersey.— Schneider *v.* Williams, 44 N. J. Eq. 391, 14 Atl. 812.

New York.— Ball *v.* Broadway Bazaar, 121 N. Y. App. Div. 546, 106 N. Y. Suppl. 249 [*reversed* on other grounds in 194 N. Y. 429, 87 N. E. 674].

United States.— Baker *v.* Delapenha, 160 Fed. 746.

England.— McAndrew *v.* Bassett, 4 De G. J. & S. 380, 10 Jur. N. S. 550, 33 L. J. Ch. 561, 10 L. T. Rep. N. S. 442, 4 New Rep. 123, 12 Wkly. Rep. 777, 69 Eng. Ch. 293, 46 Eng. Reprint 965.

62. Candee *v.* Deere, 54 Ill. 439, 5 Am. Rep. 125; Schneider *v.* Williams, 44 N. J. Eq. 391, 14 Atl. 812; American Washboard Co. *v.* Saginaw Mfg. Co., 103 Fed. 281, 43 C. C. A. 233, 50 L. R. A. 609; Royal Baking Powder Co. *v.* Raymond, 70 Fed. 376; George *v.* Smith, 52 Fed. 830; Maxwell *v.* Hogg, L. R. 2 Ch. 307, 36 L. J. Ch. 433, 16 L. T. Rep. N. S. 130, 15 Wkly. Rep. 467. *Compare* Civil Service Supply Assoc. *v.* Dean, 13 Ch. D. 512, a trade-name case involving sign on store.

Public declaration of intent.— The mere declaration of an intention, however public, to publish a magazine or any manufactured article, bearing a particular name or mark, notwithstanding such declaration is accompanied by expenditure in connection with the intended article, cannot create a right to

3. Length of Use. It is not necessary that the word or mark should have been used for any definite or considerable length of time. A single actual use with intent to continue such use *eo instanti* confers a right to such word or mark as a trade-mark.[63] It is sufficient if the article with the mark upon it has actually become a vendible article in the market, with intent upon the part of the proprietor to continue its production and sale.[64] It is not necessary that the goods should have acquired a reputation for quality under that mark,[65] although expressions may be found in some cases apparently so requiring.[66] The rule is stated in many cases that the use must have been general, continuous, and exclusive, and applied to goods and used in trade under such circumstances of publicity and length of use as to show an intention to adopt the mark as a trade-mark for specific goods, and to have become known as the distinguishing mark for such goods.[67] It is believed, however, that these cases really mean no more than that such use is necessary to maintain the right to a trade-mark, and to prevent others from acquiring rights therein upon the theory of abandonment by the first user.[68] Actual use under such circumstances as show an intention to adopt and use as a

the exclusive use of such name or mark as a trade-mark. Maxwell *v.* Hogg, L. R. 2 Ch. 307, 36 L. J. Ch. 433, 16 L. T. Rep. N. S. 130, 15 Wkly. Rep. 467.

63. Shaver *v.* Shaver, 54 Iowa 208, 6 N. W. 188, 37 Am. Rep. 194; Baker *v.* Delapenha, 160 Fed. 746; Kohler Mfg. Co. *v.* Beeshore, 59 Fed. 572, 8 C. C. A. 215 [*affirming* 53 Fed. 262]; Whitfield *v.* Loveless, 64 Pat. Off. Gaz. 442; Swift *v.* Peters, 11 Off. Gaz. 1110; Maxwell *v.* Hogg, L. R. 2 Ch. 307, 36 L. J. Ch. 433, 16 L. T. Rep. N. S. 130, 15 Wkly. Rep. 467; Cope *v.* Evans, L. R. 18 Eq. 138, 30 L. T. Rep. N. S. 292, 22 Wkly. Rep. 450; McAndrew *v.* Bassett, 4 De G. J. & S. 380, 10 Jur. N. S. 550, 33 L. J. Ch. 561, 10 L. T. Rep. N. S. 442, 4 New Rep. 123, 12 Wkly. Rep. 777, 69 Eng. Ch. 293, 46 Eng. Reprint 965; Hall *v.* Barrows, 4 De G. J. & S. 150, 10 Jur. N. S. 55, 33 L. J. Ch. 204, 9 L. T. Rep. N. S. 561, 3 New Rep. 259, 12 Wkly. Rep. 322, 69 Eng. Ch. 116, 46 Eng. Reprint 873 [*affirming* 9 Jur. N. S. 483, 32 L. J. Ch. 548, 8 L. T. Rep. N. S. 227, 1 New Rep. 543, 11 Wkly. Rep. 525]; Orr-Ewing *v.* Grant, 2 Hyde 185. See Kahn *v.* Gaines, 161 Fed. 495, 88 C. C. A. 437. But see Menendez *v.* Holt, 128 U. S. 514, 9 S. Ct. 143, 32 L. ed. 526; Wheeler *v.* Johnston, L. R. 3 Ir. 284.

64. Kathreiner's Malzkaffee Fabriken, etc. *v.* Pastor Kneipp Medicine Co., 82 Fed. 321, 27 C. C. A. 351; Swift *v.* Peters, 11 Off. Gaz. 1110. But see Brower *v.* Boulton, 58 Fed. 888, 7 C. C. A. 567.

65. Swift *v.* Peters, 11 Off. Gaz. 1110; Maxwell *v.* Hogg, L. R. 2 Ch. 307, 36 L. J. Ch. 433, 16 L. T. Rep. N. S. 130, 15 Wkly. Rep. 467; McAndrew *v.* Bassett, 4 De G. J. & S. 380, 10 Jur. N. S. 550, 33 L. J. Ch. 561, 10 L. T. Rep. N. S. 442, 4 New Rep. 123, 12 Wkly. Rep. 777, 69 Eng. Ch. 293, 46 Eng. Reprint 965; Hall *v.* Barrows, 4 De G. J. & S. 150, 10 Jur. N. S. 55, 33 L. J. Ch. 204, 9 L. T. Rep. N. S. 561, 3 New Rep. 259, 12 Wkly. Rep. 322, 69 Eng. Ch. 116, 46 Eng. Reprint 873 [*affirming* 9 Jur. N. S. 483, 32 L. J. Ch. 548, 8 L. T. Rep. N. S. 227, 1 New Rep. 543, 11 Wkly. Rep. 525]. But see Wheeler *v.* Johnston, L. R. 3 Ir. 284.

66. Robertson *v.* Berry, 50 Md. 591, 33 Am. Rep. 328; Grocers' Journal Co. *v.* Midland Pub. Co., 127 Mo. App. 356, 105 S. W. 310; Colgan *v.* Danheiser, 35 Fed. 150. See also Licensed Victuallers' Newspaper Co. *v.* Bingham, 38 Ch. D. 139, 58 L. J. Ch. 36, 59 L. T. Rep. N. S. 187, 36 Wkly. Rep. 433, name of newspaper.

67. Sheppard *v.* Stuart, 13 Phila. (Pa.) 117; Kipling *v.* Putnam, 120 Fed. 631, 57 C. C. A. 295, 65 L. R. A. 873; Macmahan Pharmacal Co. *v.* Denver Chemical Mfg. Co., 113 Fed. 468, 51 C. C. A. 302; Actiengesellschaft Vereinigte Ultramarine Fabriken, etc. *v.* Amberg, 102 Fed. 551; Atwater *v.* Castner, 88 Fed. 642, 32 C. C. A. 77; Levy *v.* Waitt, 61 Fed. 1008, 10 C. C. A. 227, 25 L. R. A. 190; Richter *v.* Reynolds, 59 Fed. 577, 8 C. C. A. 220; Brower *v.* Boulton, 53 Fed. 389 [*affirmed* in 58 Fed. 888, 7 C. C. A. 567]; Kohler Mfg. Co. *v.* Beeshore, 53 Fed. 262 [*affirmed* in 59 Fed. 572, 8 C. C. A. 215]; Colgan *v.* Danheiser, 35 Fed. 150; Alleghany Fertilizer Co. *v.* Woodside, 1 Fed. Cas. No. 206, 1 Hughes 115; Filkins *v.* Blackman, 25 Fed. Cas. No. 4,786, 13 Blatchf. 440; Somerville *v.* Schembri, 12 App. Cas. 453, 56 L. J. P. C. 61, 56 L. T. Rep. N. S. 454; Wheeler *v.* Johnston, L. R. 3 Ir. 284; Edelsten *v.* Vick, 11 Hare 78, 18 Jur. 7, 45 Eng. Ch. 78, 68 Eng. Reprint 1194; Purser *v.* Brain, 17 L. J. Ch. 141. In Trade-Mark Cases, 100 U. S. 82, 94, 25 L. ed. 550, Miller, J., said: "The trade-mark recognized by the common law is generally the growth of a considerable period of use, rather than a sudden invention. . . . It is often the result of accident rather than design. . . . The exclusive right to it grows out of its use, and not its mere adoption."

68. This distinction is very clearly stated by the Master of the Rolls, in Hall *v.* Barrows, 4 De G. J. & S. 150, 10 Jur. N. S. 55, 33 L. J. Ch. 204, 9 L. T. Rep. N. S. 561, 3 New Rep. 259, 12 Wkly. Rep. 322, 69 Eng. Ch. 116, 46 Eng. Reprint 873 [*affirming* 9 Jur. N. S. 483, 32 L. J. Ch. 548, 8 L. T. Rep. N. S. 227, 1 New Rep. 543, 11 Wkly. Rep. 525]. See also Seltzer *v.* Powell, 8 Phila. (Pa.) 296, per Paxson, J.

trade-mark is the test rather than the extent or duration of the use.[69] A mere casual, intermittent, or experimental use may be insufficient to show an intention to adopt the mark as a trade-mark for a specific article.[70]

4. Affixation to Goods. In order to become a valid trade-mark, the name or mark must be in some way physically attached to the goods, and go with them into the market.[71] Use only as a name or sign upon a place of business, or in advertisements, circulars, and other similar ways, without being actually affixed to the goods is insufficient to constitute the marks so used valid trade-marks.[72] It is sufficient, however, if the mark is affixed either upon the goods themselves, or upon the package or wrapper containing them, or in any other way physically attached to the goods.[73]

5. Purpose of Use. In order to become a trade-mark, the mark must be used as a trade-mark,[74] that is to say, it must be used as a distinguishing mark for the purpose of indicating the origin or ownership of the goods, and not merely their grade, class, or quality.[75] It is unnecessary, however, to give notice that a partic-

69. Medlar, etc., Shoe Co. *v.* Delsarte Mfg. Co., (N. J. Ch. 1900) 46 Atl. 1089 [*affirmed* in 68 N. J. Eq. 706, 61 Atl. 410]; Capewell Horse Nail Co. *v.* Putnam Nail Co., 140 Fed. 670.

70. Menendez *v.* Holt, 128 U. S. 514, 9 S. Ct. 143, 32 L. ed. 526; Kohler Mfg. Co. *v.* Beeshore, 59 Fed. 572, 8 C. C. A. 215 [*affirming* 53 Fed. 262]. See also Heublein *v.* Adams, 125 Fed. 782.

71. *District of Columbia.*— Johnson *v.* Whelan, 33 App. Cas. 4.

Illinois.— Hazelton Boiler Co. *v.* Hazelton Tripod Boiler Co., 142 Ill. 494, 30 N. E. 339 [*affirming* 40 Ill. App. 430]; William J. Moxley Co. *v.* Braun, etc., Co., 93 Ill. App. 183.

Massachusetts.— Weener *v.* Brayton, 152 Mass. 101, 25 N. E. 46, 8 L. R. A. 640.

Missouri.— Oakes *v.* St. Louis Candy Co., 146 Mo. 391, 48 S. W. 467; St. Louis Piano Mfg. Co. *v.* Merkel, 1 Mo. App. 305.

New Jersey.— Medlar, etc., Shoe Co. *v.* Delsarte Mfg. Co., 68 N. J. Eq. 706, 61 Atl. 410 [*affirming* (Ch. 1900) 46 Atl. 1089].

New York.— Koehler *v.* Sanders, 122 N. Y. 65, 25 N. E. 235, 9 L. R. A. 576 [*affirming* 48 Hun 48]; Ball *v.* Broadway Bazaar, 121 N. Y. App. Div. 546, 106 N. Y. Suppl. 249 [*reversed* on other grounds in 194 N. Y. 429, 87 N. E. 674].

United States.— Capewell Horse Nail Co. *v.* Mooney, 167 Fed. 575 [*affirmed* in 172 Fed. 826, 97 C. C. A. 248]; Adams *v.* Heisel, 31 Fed. 279; Lorillard *v.* Pride, 28 Fed. 434.

England.— Jay *v.* Ladler, 40 Ch. D. 649, 60 L. T. Rep. N. S. 27, 37 Wkly. Rep. 505; Singer Mfg. Co. *v.* Wilson, 2 Ch. D. 434, 45 L. J. Ch. 490, 34 L. T. Rep. N. S. 858, 24 Wkly. Rep. 1023 [*reversed* on other grounds in 3 App. Cas. 376, 47 L. J. Ch. 481, 38 L. T. Rep. N. S. 303, 26 Wkly. Rep. 664]; *Re* Chorlton, 53 L. T. Rep. N. S. 337, 34 Wkly. Rep. 60.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 30.

72. Hazelton Boiler Co. *v.* Hazelton Tripod Boiler Co., 142 Ill. 494, 30 N. E. 339 [*affirming* 40 Ill. App. 430]; Bolander *v.* Peterson, 136 Ill. 215, 26 N. E. 603, 11 L. R. A. 350 [*affirming* 35 Ill. App. 551]; Oakes *v.* St. Louis Candy Co., 146 Mo. 391, 48 S. W. 467; St. Louis Piano Mfg. Co. *v.* Merkel, 1 Mo. App. 305; Rowley *v.* Houghton, 2 Brewst. (Pa.) 303; Kerstein *v.* Cohen, 11 Ont. L. Rep. 450, 7 Ont. Wkly. Rep. 247. But see Wheeler *v.* Johnston, L. R. 3 Ir. 284.

73. Case *v.* Murphey, 31 App. Cas. (D. C.) 245 (use on sample cards held sufficient); Jay *v.* Ladler, 40 Ch. D. 649, 60 L. T. Rep. N. S. 27, 37 Wkly. Rep. 505; Singer Mfg. Co. *v.* Wilson, 2 Ch. D. 434, 45 L. J. Ch. 490, 34 L. T. Rep. N. S. 858, 24 Wkly. Rep. 1023 [*reversed* on other grounds in 3 App. Cas. 376, 47 L. J. Ch. 481, 38 L. T. Rep. N. S. 303, 26 Wkly. Rep. 664].

Stamping mark into substance of the article itself is sufficient and unobjectionable. Capewell Horse Nail Co. *v.* Mooney, 167 Fed. 575 [*affirmed* in 172 Fed. 826, 97 C. C. A. 248].

Branding the mark on a cork, although it cannot be seen until the cork is drawn, is a sufficient affixation. Moet *v.* Pickering, 6 Ch. D. 770.

74. Powell *v.* Birmingham Vinegar Brewery Co., [1894] A. C. 8, 58 J. P. 296, 63 L. J. Ch. 152, 70 L. T. Rep. N. S. 1, 6 Reports 52.

75. *California.*— Falkinburg *v.* Lucy, 35 Cal. 52, 95 Am. Dec. 76.

Connecticut.—Boardman *v.* Meriden Britannia Co., 35 Conn. 402, 95 Am. Dec. 270.

District of Columbia.— Case *v.* Murphey, 31 App. Cas. 245; *In re* American Circular Loom Co., 28 App. Cas. 450; *In re* American Circular Loom Co., 28 App. Cas. 446; U. S. *v.* Duell, 17 App. Cas. 575.

Massachusetts.— Reading Stove Works *v.* S. M. Howes Co., 201 Mass. 437, 87 N. E. 751; Burt *v.* Tucker, 178 Mass. 493, 59 N. E. 1111, 86 Am. St. Rep. 499, 52 L. R. A. 112; Lawrence Mfg. Co. *v.* Lowell Hosiery Mills, 129 Mass. 325, 37 Am. Rep. 362.

New Jersey.— Fay *v.* Fay, (Ch. 1886) 6 Atl. 12.

New York.— Barrett Chemical Co. *v.* Stern, 176 N. Y. 27, 68 N. E. 65; Amoskeag Mfg. Co. *v.* Spear, 2 Sandf. 599.

Pennsylvania.— Ferguson *v.* Davol Mills, 7 Phila. 253.

United States.— Columbia Mill Co. *v.* Alcorn, 150 U. S. 460, 14 S. Ct. 151, 37 L. ed.

ular mark is claimed as a trade-mark; use of it as such is sufficient.[76] A feature adopted merely for ornament is not a trade-mark;[77] but of course an ornamental feature may be adopted and used as a trade-mark.[78]

C. Priority of Right. The foundation of a trade-mark is priority of adoption and actual use in trade.[79] The one who first employs a trade-mark in connection with a particular class of goods acquires the prior and exclusive right to use it in connection with that class of goods.[80] It is immaterial that the subsequent user's

1144; Newcomer *v.* Scriven Co., 168 Fed. 621, 94 C. C. A. 77; Capewell Horse Nail Co. *v.* Mooney, 167 Fed. 575 [*affirmed* in 172 Fed. 826, 97 C. C. A. 248]; Smith *v.* Krause, 166 Fed. 1021, 91 C. C. A. 218; Wolf *v.* Hamilton-Brown Shoe Co., 165 Fed. 413, 91 C. C. A. 363; Dennison Mfg. Co. *v.* Scharf Tag, etc., Co., 135 Fed. 625, 68 C. C. A. 263; Stevens Linen Works *v.* Don, 127 Fed. 950, 62 C. C. A. 582 [*affirming* 121 Fed. 171]; Thomas G. Plant Co. *v.* May Co., 105 Fed. 375, 44 C. C. A. 534; Lamont *v.* Leedy, 88 Fed. 72; Deering Harvester Co. *v.* Whitman, etc., Mfg. Co., 86 Fed. 764, 91 Fed. 376, 33 C. C. A. 558; Beadleston *v.* Cooke Brewing Co., 74 Fed. 229, 20 C. C. A. 405; Burton *v.* Stratton, 12 Fed. 696.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 5.

Question for jury.—Adoption and use as a trade-mark is a question of fact for the jury. Caffarelli *v.* Western Grocer Co., 102 Tex. 104, 127 S. W. 1018 [*reversing* (Civ. App. 1908) 108 S. W. 413].

76. Capewell Horse Nail Co. *v.* Mooney, 167 Fed. 575 [*affirmed* in 172 Fed. 826, 97 C. C. A. 248].

77. Munro *v.* Smith, 55 Hun (N. Y.) 419, 8 N. Y. Suppl. 671 (illustration in book); Capewell Horse Nail Co. *v.* Putnam Nail Co., 140 Fed. 670.

78. Capewell Horse Nail Co. *v.* Mooney, 167 Fed. 575 [*affirmed* in 172 Fed. 826].

79. *District of Columbia.*— Somers *v.* Newman, 31 App. Cas. 193; Bluthenthal *v.* Bigbie, 30 App. Cas. 118.

Louisiana.— Handy *v.* Commander, 49 La. Ann. 1119, 22 So. 230.

Minnesota.— J. R. Watkins Medical Co. *v.* Sands, 83 Minn. 326, 86 N. W. 340.

Nebraska.— See Chadron Opera House Co. *v.* Loomer, 71 Nebr. 785, 99 N. W. 649.

United States.— Leidersdorf *v.* Flint, 15 Fed. Cas. No. 8,219, 8 Biss. 327, 18 Alb. L. J. 382, 429, 7 N. Y. Wkly. Dig. 360, 6 Reporter 739.

Canada.— Groff *v.* Snow Drift Baking Powder Co., 2 Can. Exch. 568.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 24.

80. *Colorado.*— Hyman *v.* Solis Cigar Co., 4 Colo. App. 475, 36 Pac. 444.

District of Columbia.— Johnson *v.* Whelan, 33 App. Cas. 4; Schuster Co. *v.* Muller, 28 App. Cas. 409; Giles Remedy Co. *v.* Giles, 26 App. Cas. 375; U. S. *v.* Duell, 17 App. Cas. 471.

Louisiana.— Handy *v.* Commander, 49 La. Ann. 1119, 22 So. 230.

Massachusetts.— Cohen *v.* Nagle, 190 Mass. 4, 76 N. E. 276, 2 L. R. A. N. S. 964; Weener *v.* Brayton, 152 Mass. 101, 25 N. E. 46, 8 L. R. A. 640.

Minnesota.— J. R. Watkins Medical Co. *v.* Sands, 83 Minn. 326, 86 N. W. 340.

Missouri.— St. Louis Carbonating, etc., Co. *v.* Eclipse Carbonating Co., 58 Mo. App. 411.

New Jersey.— Eureka Fire Hose Co. *v.* Eureka Rubber Mfg. Co., 71 N. J. Eq. 300, 71 Atl. 1134 [*affirming* 69 N. J. Eq. 159, 60 Atl. 561].

New York.— Caswell *v.* Hazard, 121 N. Y. 484, 24 N. E. 707, 18 Am. St. Rep. 833; Colman *v.* Crump, 70 N. Y. 573; Devlin *v.* Devlin, 69 N. Y. 212, 25 Am. Rep. 173; Wagner *v.* Daly, 67 Hun 477, 22 N. Y. Suppl. 493; Dr. Dadirrian, etc., Co. *v.* Hauenstein, 37 Misc. 23, 74 N. Y. Suppl. 709 [*affirmed* in 74 N. Y. App. Div. 630, 77 N. Y. Suppl. 1125 (*affirmed* in 175 N. Y. 522, 67 N. E. 1081)]; Rawlinson *v.* Brainard, etc., Co., 28 Misc. 287, 59 N. Y. Suppl. 880; Royal Baking Powder Co. *v.* Sherrill, 59 How. Pr. 17; Wolfe *v.* Goulard, 18 How. Pr. 64.

Pennsylvania.— Zeugschmidt *v.* Hantman, 28 Pittsb. Leg. J. N. S. 463.

United States.— Columbia Mill Co. *v.* Alcorn, 150 U. S. 460, 14 S. Ct. 151, 37 L. ed. 1144; Coats *v.* Merrick Thread Co., 149 U. S. 562, 13 S. Ct. 966, 37 L. ed. 847; Amoskeag Mfg. Co. *v.* Trainer, 101 U. S. 51, 25 L. ed. 993; McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828; Spiegel *v.* Zuckerman, 175 Fed. 978; Thomas G. Carroll, etc., Co. *v.* McIlvaine, 171 Fed. 125 [*affirmed* in 83 Fed. 22, 105 C. C. A. 314]; Kahn *v.* Gaines, 161 Fed. 495, 88 C. C. A. 437 [*reversing* 155 Fed. 639]; Revere Rubber Co. *v.* Consolidated Hoof Pad Co., 139 Fed. 151; H. B. Chaffee Mfg. Co. *v.* Selchow, 135 Fed. 1021, 68 C. C. A. 668; Heublein *v.* Adams, 125 Fed. 782; Actiengesellschaft Vereinigte Ultramarine Fabriken, etc. *v.* Amberg, 102 Fed. 551; Lamont *v.* Leedy, 88 Fed. 72; Tetlow *v.* Tappan, 85 Fed. 774; Kathreiner's Malzkaffee Fabriken, etc. *v.* Pastor Kneipp Medicine Co., 82 Fed. 321, 27 C. C. A. 351; Hoyt *v.* J. T. Lovett Co., 71 Fed. 173, 17 C. C. A. 652, 31 L. R. A. 44; Walton *v.* Crowley, 29 Fed. Cas. No. 17,133, 3 Blatchf. 440; Whitfield *v.* Loveless, 64 Off. Gaz. 442. But see Levy *v.* Waitt, 61 Fed. 1008, 10 C. C. A. 227, 25 L. R. A. 190 [*affirming* 56 Fed. 1016].

England.— Pinet *v.* Pinet, [1898] 1 Ch. 179, 67 L. J. Ch. 41, 77 L. T. Rep. N. S. 613, 14 T. L. R. 87, 46 Wkly. Rep. 506; Standish *v.* Whitwell, 14 Wkly. Rep. 512.

Canada.—Groff *v.* Snow Drift Baking Powder Co., 2 Can. Exch. 568; Pabst Brewing Co. *v.* Ekers, 21 Quebec Super. Ct. 545.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 24.

trade under the mark is the larger; greater sales do not confer a better right.[81] But such priority of right is limited, as elsewhere shown, to use upon that particular class.[82] Another person may subsequently apply the same mark to a different class of goods, and if he is the first to do so, he also acquires an exclusive right to the use of the mark in the connection used by him.[83] The right of one who first used a particular device as a trade-mark is superior to that of the one who first designed, invented, or suggested it,[84] but who did not use it as a trade-mark.[85] An unlawful or infringing use,[86] or use as a mere unmeaning incident in connection with other distinguishing features,[87] or a casual, intermittent, inconsiderable, and experimental use,[88] or a use wholly confined to a foreign country,[89] is insufficient to confer priority of right, although prior in point of time.

III. WHAT MAY BE A TRADE-MARK.

A. General Rules — 1. In General. Any word, mark, or device used for the primary purpose of identifying specific goods as being of a definite origin or ownership may constitute a valid trade-mark,[90] if adopted and used as

But see Old Times Distillery Co. *v.* Casey, 104 Ky. 616, 47 S. W. 610, 20 Ky. L. Rep. 994, 84 Am. St. Rep. 480, 42 L. R. A. 466.

Mere priority is sufficient title against an infringer, and it is not necessary to show a complete chain of title from the first user. E. H. Taylor, Jr., etc., Co. *v.* Taylor, 85 S. W. 1085, 27 Ky. L. Rep. 625; Gaines *v.* E. Whyte Grocery, etc., Co., 107 Mo. App. 507, 81 S. W. 648; R. J. Reynolds Tobacco Co. *v.* Allen Bros. Tobacco Co., 151 Fed. 819. See also Solis Cigar Co. *v.* Pozo, 16 Colo. 388, 26 Pac. 556, 25 Am. St. Rep. 279.

Abandoned trade-marks belong to the one who first reappropriates them. Church *v.* Kresner, 26 N. Y. App. Div. 349, 49 N. Y. Suppl. 742; Deitsch *v.* George R. Gibson Co., 155 Fed. 383. See also *infra*, III, A, 3.

Burden of proof of priority.—Where two or three makers are using the same word as a mark or brand on the same class of goods at the same time, and one asserts the right to it as a trade-mark, and seeks to enjoin the others from using it, he has the burden of proof to show that he was in fact the first to use it. Spiegel *v.* Zuckerman, 175 Fed. 978.

81. Kahn *v.* Gaines, 161 Fed. 495, 88 C. C. A. 437 [*reversing* 155 Fed. 639]. But see Thomas G. Carroll, etc., Co. *v.* McIlvaine, 171 Fed. 125.

82. See *supra*, I, E, 3.

83. Amoskeag Mfg. Co. *v.* Trainer, 101 U. S. 51, 25 L. ed. 993 (per Clifford, J.); Macmahan Pharmacal Co. *v.* Denver Chemical Mfg. Co., 113 Fed. 468, 51 C. C. A. 302; George *v.* Smith, 52 Fed. 830. See also *supra*, I, E, 3.

84. Welsbach Light Co. *v.* Adam, 107 Fed. 463; George *v.* Smith, 52 Fed. 830; Swift *v.* Peters, 11 Off. Gaz. 1110.

85. Cohen *v.* Nagle, 190 Mass. 4, 76 N. E. 276, 2 L. R. A. N. S. 964; Johnson *v.* Seabury, 69 N. J. Eq. 696, 61 Atl. 5; Medlar, etc., Shoe Co. *v.* Delsarte Mfg. Co., 68 N. J. Eq. 706, 61 Atl. 410 [*affirming* (Ch. 1900) 46 Atl. 1089]; Blackwell *v.* Armistead, 3 Fed. Cas. No. 1,474, 3 Hughes 163. But see Perlberg *v.* Rosenstone, (N. J. Ch. 1905) 62 Atl. 446, where it was held that an owner of a shoe store, using the name "Eagle Shoes" on all shoes sold by him, could acquire no right in the name which would entitle him to enjoin its use by another person in the same city, who before complainant began business in the city had conducted the "Eagle Shoe Store," and who afterward, by a statement on his sign and by his advertisements, published the fact that his store was not connected with any other.

86. Gaines *v.* Kahn, 155 Fed. 639 [*reversed* on other grounds in 161 Fed. 495, 88 C. C. A. 437]. But see Deitsch *v.* George R. Gibson Co., 155 Fed. 383.

87. Blackwell *v.* Armistead, 3 Fed. Cas. No. 1,474, 3 Hughes 163.

88. Heublein *v.* Adams, 125 Fed. 782. See also *supra*, II, B, 3.

89. Baker *v.* Delapenha, 160 Fed. 746.

90. *Iowa.*— Shaver *v.* Shaver, 54 Iowa 208, 6 N. W. 188, 37 Am. Rep. 194.

Louisiana.— Handy *v.* Commander, 49 La. Ann. 1119, 22 So. 230.

Maine.— W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 100 Me. 461, 62 Atl. 499, 4 L. R. A. N. S. 960.

Massachusetts.—Regis *v.* Jaynes, 185 Mass. 458, 70 N. E. 480.

Missouri.— Nicholson *v.* Wm. A. Stickney Cigar Co., 158 Mo. 158, 59 S. W. 121.

New York.— Hier *v.* Abrahams, 82 N. Y. 519, 37 Am. Rep. 589; Popham *v.* Cole, 66 N. Y. 69, 23 Am. Rep. 22; Potter *v.* McPherson, 21 Hun 559; Godillot *v.* Hazard, 44 N. Y. Super. Ct. 427 [*affirmed* in 81 N. Y. 263]; Hegeman *v.* Hegeman, 8 Daly 1.

Pennsylvania.— Laughman's Appeal, 128 Pa. St. 1, 18 Atl. 415, 417, 5 L. R. A. 599; McVey *v.* Brendel, 29 Wkly. Notes Cas. 1.

Rhode Island.— Barrows *v.* Knight, 6 R. I. 434, 78 Am. Dec. 452.

United States.— Lawrence Mfg. Co. *v.* Tennessee Mfg. Co., 138 U. S. 537, 11 S. Ct. 396, 34 L. ed. 997; Amoskeag Mfg. Co. *v.* Trainer, 101 U. S. 51, 25 L. ed. 993; Shaw Stocking Co. *v.* Mack, 12 Fed. 707, 21 Blatchf. 1; McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828; Coffman *v.* Castner, 87 Fed. 457, 31 C. C. A.

such,[91] provided they are such as may be exclusively appropriated without prejudice to the rights of others.[92] No sign, or mark, or form of words can be appropriated as an exclusive trade-mark which, from the fact conveyed by its primary meaning, others may employ with equal truth and equal right for the same purpose.[93] Moreover, a trade-mark must consist of some definite word, sign, or device.[94] A mere method of marking, as distinguished from the mark itself, is not a valid trade-mark.[95]

2. Distinctiveness. A valid trade-mark must either in itself or by association and use indicate a distinctive origin or ownership of the goods to which it is attached so as to serve its function in distinguishing such goods from similar goods of others.[96] It is not necessary that either the name or place of business of

55; Shaw Stocking Co. *v.* Mack, 12 Fed. 707, 21 Blatchf. 1; Leidersdorf *v.* Flint, 15 Fed. Cas. No. 8,219, 8 Biss. 327, 18 Alb. L. J. 382, 429, 7 N. Y. Wkly. Dig. 360, 6 Reporter 739; Morrison *v.* Case, 17 Fed. Cas. No. 9,845, 9 Blatchf. 548, 2 Off. Gaz. 544. See J. & P. Baltz Brewing Co. *v.* Kaiserbrauerei, 174 Fed. 222, 20 C. C. A. 402.

England.— *In re* James, 33 Ch. D. 392, 55 L. J Ch. 915, 55 L. T. Rep. N. S. 415, 35 Wkly. Rep. 67.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 5.

91. See *supra*, II, B.

92. Amoskeag Mfg. Co. *v.* Spear, 2 Sandf. (N. Y.) 599; New York, etc., Cement Co. *v.* Coplay Cement Co., 44 Fed. 277, 10 L. R. A. 833.

Exclusive appropriation.—As to exclusiveness of trade-mark rights see *supra*, I, E, 1. As to what may be exclusively appropriated see *infra*, III, B.

A name or mark which would practically confer a monopoly in dealing in a certain class of articles cannot be appropriated as a trade-mark. Dennison Mfg. Co. *v.* Thomas Mfg. Co., 94 Fed. 651.

93. *Georgia.*— Larrabee *v.* Lewis, 67 Ga. 561, 44 Am. Rep. 735.

Maine.— W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 100 Me. 461, 62 Atl. 499, 4 L. R. A. N. S. 960.

Michigan.— Smith *v.* Walker, 57 Mich. 456, 22 N. W. 267, 24 N. W. 830, 26 N. W. 783.

Minnesota.— J. R. Watkins Medical Co. *v.* Sands, 83 Minn. 326, 86 N. W. 340; Cigar Makers' Protective Union *v.* Conhaim, 40 Minn. 243, 41 N. W. 944, 12 Am. St. Rep. 726, 3 L. R. A. 125.

New York.— Barrett Chemical Co. *v.* Stern, 176 N. Y. 27, 68 N. E. 65, 13 N. Y. Annot. Cas. 430; Cooke, etc., Co. *v.* Miller, 169 N. Y. 475, 62 N. E. 582; Babbitt *v.* Brown, 68 Hun 515, 23 N. Y. Suppl. 25; Amoskeag Mfg. Co. *v.* Spear, 2 Sandf. 599; Rawlinson *v.* Brainard, etc., Co., 28 Misc. 287, 59 N. Y. Suppl. 880.

Pennsylvania.— Laughman's Appeal, 128 Pa. St. 1, 18 Atl. 415, 5 L. R. A. 599.

United States.— Elgin Nat. Watch Co. *v.* Illinois Watch Case Co., 179 U. S. 665, 21 S. Ct. 270, 45 L. ed. 365; Amoskeag Mfg. Co. *v.* Trainer, 101 U. S. 51, 25 L. ed. 993.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 4.

For this reason personal, geographical, and descriptive or generic names cannot be appropriated. See *infra*, III, B.

94. *In re* American Circular Loom Co., 28 App. Cas. (D. C.) 446; A. Leschen, etc., Rope Co. *v.* Broderick, etc., Rope Co., 201 U. S. 166, 26 S. Ct. 425, 50 L. ed. 710 [*affirming* 134 Fed. 571, 67 C. C. A. 418]; A. Leschen, etc., Rope Co. *v.* Macomber, etc., Rope Co., 142 Fed. 289; Regensburg *v.* Juan F. Portuondo Cigar Mfg. Co., 142 Fed. 160, 73 C. C. A. 378 [*affirming* 136 Fed. 866]; Continental Tobacco Co. *v.* Larus, etc., Co., 133 Fed. 727, 66 C. C. A. 557; *In re* Hanson, 37 Ch. D. 112, 57 L. J. Ch. 173, 57 L. T. Rep. N. S. 859, 36 Wkly. Rep. 134.

Illustrations of indefinite marks.—An alleged trade-mark, consisting simply of a colored strand in a wire rope, not restricted to any particular color, is invalid. A. Leschen, etc., Rope Co. *v.* Broderick, etc., Rope Co., 134 Fed. 571, 67 C. C. A. 418 [*affirmed* in 201 U. S. 166, 26 S. Ct. 425, 50 L. ed. 710]. A trade-mark of which the only distinction is color cannot be registered under the English statute. *In re* Hanson, 37 Ch. D. 112, 57 L. J. Ch. 173, 57 L. T. Rep. N. S. 859, 36 Wkly. Rep. 134, a red, white, and blue label without particular design.

95. Stirling Silk Mfg. Co. *v.* Sterling Silk Co., 59 N. J. Eq. 394, 46 Atl. 199; Fonotipia Limited *v.* Bradley, 171 Fed. 951; Dodge Mfg. Co. *v.* Sewall, etc., Cordage Co., 142 Fed. 288; A. Leschen, etc., Rope Co. *v.* Broderick, etc., Rope Co., 134 Fed. 571, 67 C. C. A. 418 [*affirmed* in 201 U. S. 166, 26 S. Ct. 425, 50 L. ed. 710].

Colored strand in rope.—Where a rope manufacturer adopted a blue thread twisted into one of the strands of its rope as a trade-mark, which was the only practicable way of marking rope, such manufacturer was not entitled to restrain another manufacturer from using a thread of a different color. Dodge Mfg. Co. *v.* Sewall, etc., Cordage Co., 142 Fed. 288. To the same effect see A. Leschen, etc., Rope Co. *v.* Macomber, etc., Rope Co., 142 Fed. 289.

96. *Connecticut.*— Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 70 Conn. 576, 40 Atl. 534.

District of Columbia.— U. S. *v.* Duell, 17 App. Cas. 471, 475.

Georgia.— Larrabee *v.* Lewis, 67 Ga. 561, 562, 44 Am. Rep. 735.

the proprietor should be used as part of the trade-mark; [97] nor is it necessary that any one should actually know to whom the mark refers or belongs. It is sufficient

Illinois.— Bolander *v.* Peterson, 136 Ill. 215, 26 N. E. 603, 11 L. R. A. 350 [*affirming* 35 Ill. App. 551].

Indiana.— State *v.* Hagen, 6 Ind. App. 167, 33 N. E. 223.

Louisiana.— Handy *v.* Commander, 49 La. Ann. 1119, 22 So. 230.

Massachusetts.—Weener *v.* Brayton, 152 Mass. 101, 25 N. E. 46, 8 L. R. A. 640.

Minnesota.— J. R. Watkins Medical Co. *v.* Sands, 83 Minn. 326, 86 N. W. 340.

Missouri.— Oakes *v.* St. Louis Candy Co., 146 Mo. 391, 48 S. W. 467.

New York.— Fischer *v.* Blank, 138 N. Y. 244, 33 N. E. 1040; Newman *v.* Alvord, 51 N. Y. 189, 10 Am. Rep. 588.

Wisconsin.— Listman Mill Co. *v.* William Listman Milling Co., 88 Wis. 334, 60 N. W. 261, 43 Am. St. Rep. 907.

United States.— Columbia Mill Co. *v.* Alcorn, 150 U. S. 460, 14 S. Ct. 151, 37 L. ed. 1144; Delaware, etc., Canal Co. *v.* Clark, 13 Wall. 311, 20 L. ed. 581; Galena-Signal Oil Co. *v.* Fuller, 142 Fed. 1002; Regensburg *v.* Juan F. Portuondo Cigar Mfg. Co., 136 Fed. 866; Macmahan Pharmacal Co. *v.* Denver Chemical Mfg. Co., 113 Fed. 468, 51 C. C. A. 302; Albany Perforated Wrapping Paper Co. *v.* John Hoberg Co., 102 Fed. 157 [*affirmed* in 109 Fed. 589, 48 C. C. A. 559]; New York Asbestos Mfg. Co. *v.* Ambler Asbestos Air-Cell Covering Co., 99 Fed. 85; Deering Harvester Co. *v.* Whitman, etc., Mfg. Co., 91 Fed. 376, 33 C. C. A. 558; Morrison *v.* Case, 17 Fed. Cas. No. 9,845, 9 Blatchf. 548, 2 Off. Gaz. 544. But see Clark Thread Co. *v.* Armitage, 67 Fed. 896.

England.— Davis *v.* Harbord, 15 App. Cas. 316, 60 L. J. Ch. 16, 63 L. T. Rep. N. S. 389; *In re* Faulder, [1902] 1 Ch. 125, 71 L. J. Ch. 124, 86 L. T. Rep. N. S. 66 [*approving* Burland *v.* Broxburn Oil Co., 42 Ch. D. 274, 58 L. J. Ch. 816, 61 L. T. Rep. N. S. 618, 38 Wkly. Rep. 89]; *In re* James, 33 Ch. D. 392, 55 L. J. Ch. 915, 55 L. T. Rep. N. S. 415, 35 Wkly. Rep. 67.

Canada.— Partlo *v.* Todd, 17 Can. Sup. Ct. 196.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 5.

Must distinguish article.— "A trade-mark must be such as will clearly identify the article to which it is affixed as that of the person adopting it, and distinguish it from that of all others. (Brown, Trade Marks, § 29.) It is true, it may consist of words, as well as of symbols, devices, emblems or marks. If it consists of words, only, they must be so clear and well defined as to give notice that the articles to which they are attached are from the factory or store or dealer who has adopted the same." Bolander *v.* Peterson, 136 Ill. 215, 218, 26 N. E. 603, 11 L. R. A. 350.

A large number of different names used on the same article, and tending to cause confusion rather than certainty as to origin, will not be protected as trade-marks for that article. Albany Perforated Wrapping-Paper Co. *v.* John Hoberg Co., 102 Fed. 157 [*affirmed* in 109 Fed. 589, 48 C. C. A. 559].

A representation of a star cannot by its own meaning indicate the origin or ownership of such an article as lubricating oil, nor in view of its general use as a symbol can it be appropriated as a trade-mark except in connection with other devices or words such as to render the whole characteristic. Galena-Signal Oil Co. *v.* Fuller, 142 Fed. 1002. But the fact that a star had been used in connection with other classes of goods would seem to be immaterial.

97. *Connecticut.*— Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 70 Conn. 576, 40 Atl. 534; Boardman *v.* Meriden Britannia Co., 35 Conn. 402, 95 Am. Dec. 270.

Louisiana.— Insurance Oil Tank Co. *v.* Scott, 33 La. Ann. 946, 39 Am. Rep. 286.

Missouri.— State *v.* Bishop, 128 Mo. 373, 31 S. W. 9, 49 Am. St. Rep. 569, 29 L. R. A. 200.

New York.— Godillot *v.* Harris, 81 N. Y. 263; Volger *v.* Force, 63 N. Y. App. Div. 122, 71 N. Y. Suppl. 209; People *v.* Fisher, 50 Hun 552, 3 N. Y. Suppl. 786.

Ohio.— Peurrung *v.* Compton, 6 Ohio Cir. Ct. 483, 3 Ohio Cir. Dec. 548.

Pennsylvania.— Sheppard *v.* Stuart, 13 Phila. 117. But see White *v.* Schlect, 14 Phila. 88; Ferguson *v.* Davol Mills, 7 Phila. 253.

Rhode Island.— American Solid Leather Button Co. *v.* Anthony, 15 R. I. 338, 5 Atl. 626, 2 Am. St. Rep. 898.

Wisconsin.— Avenarius *v.* Kornely, 139 Wis. 247, 121 N. W. 336; Listman Mill Co. *v.* William Listman Milling Co., 88 Wis. 334, 60 N. W. 261, 43 Am. St. Rep. 907; Fish Bros. Wagon Co. *v.* La Belle Wagon Works, 82 Wis. 546, 52 N. W. 595, 33 Am. St. Rep. 72, 16 L. R. A. 453; Gessler *v.* Grieb, 80 Wis. 21, 48 N. W. 1098, 27 Am. St. Rep. 20; Marshall *v.* Pinkham, 52 Wis. 572, 9 N. W. 615, 38 Am. Rep. 756; Dunbar *v.* Glenn, 42 Wis. 118, 24 Am. Rep. 395.

United States.—Amoskeag Mfg. Co. *v.* Trainer, 101 U. S. 51, 25 L. ed. 993; Hygeia Distilled Water Co. *v.* Consolidated Ice Co., 144 Fed. 139 [*affirmed* in 151 Fed. 10]; Dennison Mfg. Co. *v.* Thomas Mfg. Co., 94 Fed. 651; Alleghany Fertilizer Co. *v.* Woodside, 1 Fed. Cas. No. 206, 1 Hughes 115; Smith *v.* Reynolds, 22 Fed. Cas. No. 13,098, 10 Blatchf. 100, 3 Off. Gaz. 214.

Express indication of origin unnecessary.— A word may be a trade-mark, "although it cannot and does not of itself in any way indicate origin or ownership." Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 70 Conn. 516, 533, 40 Atl. 534. But see Virginia Baking Co. *v.* Southern Biscuit Works, (Va. 1910) 68 S. E. 261.

Reason for rule.— "The trade mark indicates the goods that are sold under it. They

if the mark points to some definite, although unknown, person.[98] A mark is none the less distinctive because the name of its proprietor is not generally known to the public.[99]

3. Novelty or Invention. The validity of a trade-mark does not depend upon either novelty, invention, or discovery, but is founded upon mere priority of appropriation and user as a trade-mark for a particular class of goods.[1] The only

become known to the public under the name that has been adopted to indicate this particular kind of goods manufactured by a particular firm. Whether this firm makes its name a part of the trade mark or not is immaterial. It is the name and device adopted to indicate the particular goods manufactured by the plaintiffs that is the trade mark; and if they are manufactured only by the person who has adopted the name and trade mark, they could be obtained only from him. The defendants seem to lay great stress upon the fact that there was no name upon this label, as though a person could not acquire a valid trade mark unless his name was a part of the trade mark. This is a novel proposition, is not, so far as I know, supported by any authority, and seems entirely opposed to the principle upon which a trade mark when adopted becomes property which a court of equity will protect." Volger *v.* Force, 63 N. Y. App. Div. 122, 124, 71 N. Y. Suppl. 209.

98. State *v.* Bishop, 128 Mo. 373, 31 S. W. 9, 49 Am. St. Rep. 569, 29 L. R. A. 200; Volger *v.* Force, 63 N. Y. App. Div. 122, 71 N. Y. Suppl. 209; People *v.* Fisher, 50 Hun (N. Y.) 552, 3 N. Y. Suppl. 786; Shaver *v.* Heller, etc., Co., 108 Fed. 821, 48 C. C. A. 48, 65 L. R. A. 878; Powell *v.* Birmingham Vinegar Brewery Co., [1896] 2 Ch. 54, 65 L. J. Ch. 563, 74 L. T. Rep. N. S. 509, 44 Wkly. Rep. 688 [*affirmed* in [1897] A. C. 710, 66 L. J. Ch. 763, 76 L. T. Rep. N. S. 792]; Cope *v.* Evans, L. R. 18 Eq. 138, 30 L. T. Rep. N. S. 292, 22 Wkly. Rep. 450; McAndrew *v.* Bassett, 4 De G. J. & S. 380, 10 Jur. N. S. 550, 33 L. J. Ch. 561, 10 L. T. Rep. N. S. 442, 4 New Rep. 123, 12 Wkly. Rep. 777, 69 Eng. Ch. 293, 46 Eng. Reprint 965; Hall *v.* Barrows, 4 De G. J. & S. 150, 10 Jur. N. S. 55, 35 L. J. Ch. 204, 9 L. T. Rep. N. S. 561, 3 New Rep. 259, 12 Wkly. Rep. 322, 69 Eng. Ch. 116, 46 Eng. Reprint 873 [*affirming* 9 Jur. N. S. 483, 32 L. J. Ch. 548, 8 L. T. Rep. N. S. 227, 1 New Rep. 543, 11 Wkly. Rep. 525].

The same principle applies to "secondary meaning" names, and other classes of unfair competition cases. See *infra*, V, B, 2.

99. Standard Sanitary Mfg. Co. *v.* Standard Ideal Co., 37 Quebec Super. Ct. 33.

Explanation of rule.— "Persons may be misled and may mistake one class of goods for another, although they do not know the names of the makers of either. A person whose name is not known but whose mark is imitated is just as much injured in his trade as if his name were known as well as his mark. His mark as used by him has given a reputation to his goods. His trade depends greatly on such reputation. His mark sells his goods. A rival who imitates his mark can hardly help deceiving buyers and injuring him; and for such injury, if proved, he can obtain redress. Siegert *v.* Findlater, (7 Ch. D. 801, 807) 47 L. J. Ch. 233, 38 L. T. Rep. N. S. 349, 26 Wkly. Rep. 459 (the 'Angostura Bitters' case) illustrates this. Siegert *v.* Findlater, 7 Ch. D. 807, 47 L. J. Ch. 233, 38 L. T. Rep. N. S. 349, 26 Wkly. Rep. 459." Powell *v.* Birmingham Vinegar Brewery Co., [1896] 2 Ch. 54, 68, 65 L. J. Ch. 563, 74 L. T. Rep. N. S. 509, 44 Wkly. Rep. 688 [*affirmed* in [1897] A. C. 710, 66 L. J. Ch. 763, 76 L. T. Rep. N. S. 792]. "One does not lose the good will of his trade in an article of his manufacture by placing upon it the names of his customers who are engaged in selling it, nor by the fact that the customers know only the name and excellence of the article, and neither know nor care who makes it." Shaver *v.* Heller, etc., Co., 108 Fed. 821, 824, 48 C. C. A. 48, 65 L. R. A. 878.

1. *Georgia.*— Foster *v.* Blood Balm Co., 77 Ga. 216, 3 S. E. 284.

Illinois.—William J. Moxley Co. *v.* Braun, etc., Co., 93 Ill. App. 183.

Louisiana.— Handy *v.* Commander, 49 La. Ann. 1119, 22 So. 230.

Massachusetts.— Burt *v.* Tucker, 178 Mass. 493, 59 N. E. 1111, 86 Am. St. Rep. 499, 52 L. R. A. 112.

New Jersey.— Schneider *v.* Williams, 44 N. J. Eq. 391, 14 Atl. 812.

New York.— Hegeman *v.* O'Byrne, 9 Daly 264; Dr. Dadirrian, etc., Co. *v.* Hauenstein, 37 Misc. 23, 74 N. Y. Suppl. 709 [*affirmed* in 74 N. Y. App. Div. 630, 77 N. Y. Suppl. 1125 (*affirmed* in 175 N. Y. 522, 67 N. E. 1081)]; Rawlinson *v.* Brainard, etc., Co., 28 Misc. 287, 59 N. Y. Suppl. 880; Dr. Jaeger's Sanitary Woolen System Co. *v.* George Le Boutillier, 15 N. Y. St. 117; Messerole *v.* Tynberg, 4 Abb. Pr. N. S. 410, 36 How. Pr. 14.

Pennsylvania.— Rowley *v.* Houghton, 7 Phila. 39.

United States.— Lawrence Mfg. Co. *v.* Tennessee Mfg. Co., 138 U. S. 537, 11 S. Ct. 396, 34 L. ed. 997; Trade Mark Cases, 100 U. S. 82, 25 L. ed. 550; McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828; Delaware, etc., Canal Co. *v.* Clark, 13 Wall. 311, 20 L. ed. 581; New York Herald Co. *v.* Star Co., 146 Fed. 1023, 76 C. C. A. 678 [*affirming* 146 Fed. 204]; Tetlow *v.* Tappan, 85 Fed. 774; Gray *v.* Taper-Sleeve Pulley Works, 16 Fed. 436; Leidersdorf *v.* Flint, 15 Fed. Cas. No. 8,219, 8 Biss. 327, 18 Alb. L. J. 382, 429, 7 N. Y. Wkly. Dig. 360, 6 Reporter 739; Osgood *v.* Allen, 18 Fed. Cas. No. 10,603, Holmes 185, 3 Off. Gaz. 124.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 23. See also *supra*, II, B.

novelty or originality required is first use in the particular connection.[2] A trade-mark may, but need not, consist of an invented word. Existing words applied in an arbitrary or fanciful way are valid trade-marks.[3] Abandoned trade-marks may be appropriated by others and become their exclusive property, even as against the original user.[4] Marks in prior use upon certain goods may be appropriated as trade-marks for a different class of goods.[5] But a mark or name so similar to an existing trade-mark of another as to create deception and confusion as to identity of goods cannot be subsequently adopted by another for the same class of goods.[6] Words, names, and marks already known and in general and common use in the trade cannot be subsequently appropriated by any one as an exclusive trade-mark.[7]

But see Lichtenstein *v.* Mellis, 8 Oreg. 464, 34 Am. Rep. 592.

2. New York Herald Co. *v.* Star Co., 146 Fed. 204 [*affirmed* in 146 Fed. 1023, 76 C. C. A. 678].

Common source.—The novelty and originality consist in the application to an article of manufacture of an idea, and are not destroyed by the design being taken from a source common to mankind. Saunders *v.* Wiel, [1893] 1 Q. B. 470, 62 L. J. Q. B. 341, 68 L. T. Rep. N. S. 183, 4 Reports 207, 41 Wkly. Rep. 356 [*questioning* Adams *v.* Clementson, 12 Ch. D. 714, 27 Wkly. Rep. 379].

3. Cohn *v.* Reynolds, 26 Misc. 473, 57 N. Y. Suppl. 469 [*affirmed* in 40 N. Y. App. Div. 619, 58 N. Y. Suppl. 1138]; Enoch Morgan's Sons Co. *v.* Ward, 152 Fed. 690, 81 C. C. A. 616, 12 L. R. A. N. S. 729. See also *infra*, III, B, 2.

4. *District of Columbia.*—*In re* Nash Hardware Co., 33 App. Cas. 221.

Indiana.— Julian *v.* Hoosier Drill Co., 78 Ind. 408.

Massachusetts.— Cohen *v.* Nagle, 190 Mass. 4, 76 N. E. 276, 2 L. R. A. N. S. 964; Burt *v.* Tucker, 178 Mass. 493, 59 N. E. 1111, 86 Am. St. Rep. 499, 52 L. R. A. 112.

Missouri.— Gaines *v.* E. Whyte Grocery, etc., Co., 107 Mo. App. 507, 81 S. W. 648.

New York.— Keasbey *v.* Brooklyn Chemical Works, 142 N. Y. 467, 37 N. E. 476, 40 Am. St. Rep. 623 [*reversing* 21 N. Y. Suppl. 696]; Church *v.* Kresner, 26 N. Y. App. Div. 349, 49 N. Y. Suppl. 742; Arnheim *v.* Arnheim, 28 Misc. 399, 59 N. Y. Suppl. 948.

United States.— Menendez *v.* Holt, 128 U. S. 514, 9 S. Ct. 143, 32 L. ed. 526; Deitsch *v.* George R. Gibson Co., 155 Fed. 383; Raymond *v.* Royal Baking-Powder Co., 85 Fed. 23, 29 C. C. A. 245 [*affirming* 70 Fed. 376]; Brower *v.* Boulton, 53 Fed. 389 [*affirmed* in 58 Fed. 888, 7 C. C. A. 567]; Symonds *v.* Greene, 28 Fed. 834; O'Rourke *v.* Central City Soap Co., 26 Fed. 576; Gray *v.* Taper-Sleeve Pulley Works, 16 Fed. 436; Blackwell *v.* Dibrell, 3 Fed. Cas. No. 1,475, 3 Hughes 151, 14 Off. Gaz. 633. See also Corbin *v.* Gould, 133 U. S. 308, 10 S. Ct. 312, 33 L. ed. 611.

England.— Daniel *v.* Whitehouse, [1898] 1 Ch. 685, 67 L. J. Ch. 262; Paine *v.* Daniells, etc., Breweries, [1893] 2 Ch. 567, 62 L. J. Ch. 732, 68 L. T. Rep. N. S. 801, 2 Reports 491, 42 Wkly. Rep. 40 [*distiguishing* Montgomery *v.* Thompson, [1891] A. C. 217, 55 J. P. 756, 60 L. J. Ch. 757, 64 L. T. Rep. N. S. 748].

Use on obsolete article.— The fact that a name has previously been applied to an article which had never gone into use and had long since become unknown is no objection to the validity of a trade-mark. Keasbey *v.* Brooklyn Chemical Works, 142 N. Y. 467, 37 N. E. 476, 40 Am. St. Rep. 623 [*reversing* 21 N. Y. Suppl. 696].

Infringing use.— A person may not appropriate a trade-mark belonging to another, without his consent, and subsequently acquire a good title thereto by the abandonment thereof by the first proprietor. Atlantic Milling Co. *v.* Robinson, 20 Fed. 217; Gray *v.* Taper-Sleeve Pulley Works, 16 Fed. 436; Mouson *v.* Boehm, 26 Ch. D. 398, 53 L. J. Ch. 932, 50 L. T. Rep. N. S. 784, 32 Wkly. Rep. 612.

5. *New Jersey.*— Johnson *v.* Seabury, 69 N. J. Eq. 696, 61 Atl. 5.

New York.— Dr. Jaeger's Sanitary Woolen System Co. *v.* Le Boutillier, 5 Misc. 78, 24 N. Y. Suppl. 890.

United States.— Delaware, etc., Canal Co. *v.* Clark, 13 Wall. 311, 20 L. ed. 581.

England.— Braham *v.* Bustard, 1 Hem. & M. 447, 9 L. T. Rep. N. S. 199, 11 Wkly. Rep. 1061, 71 Eng. Reprint 195.

Canada.—Watson *v.* Westlake, 12 Ont. 449 [*following* Partlo *v.* Todd, 12 Ont. 171].

See also *supra*, I, E, 3.

It is no infringement to use the same mark upon a different class of goods. See *infra*, IV, H.

6. Wayne County Preserving Co. *v.* Burt Olney Canning Co., 32 App. Cas. (D. C.) 279; Hall *v.* Ingram, 28 App. Cas. (D. C.) 454. See also *infra*, IV, H.

7. *California.*— Castle *v.* Siegfried, 103 Cal. 71, 37 Pac. 210.

District of Columbia.— U. S. *v.* Duell, 17 App. Cas. 471.

New Jersey.— Perlberg *v.* Smith, 70 N. J. Eq. 638, 62 Atl. 442.

New York.— Caswell *v.* Davis, 58 N. Y. 223, 17 Am. Rep. 233; Rawlinson *v.* Brainard, etc., Co., 28 Misc. 287, 59 N. Y. Suppl. 880; Wolfe *v.* Goulard, 18 How. Pr. 64. *Compare* Salvation Army *v.* American Salvation Army, 62 Misc. 360, 114 N. Y. Suppl. 1039 [*reversed* in 135 N. Y. App. Div. 268, 120 N. Y. Suppl.

4. Legality and Morality. Only words or marks used in a legitimate and lawful business may become valid trade-marks;[8] and the words, marks, or symbols adopted as a trade-mark must not be themselves illegal, immoral, or against public policy.[9]

5. Truth and Good Faith — a. In General. If an alleged trade-mark involves any material untruth, misrepresentation, or bad faith it will not be protected against infringement.[10] To have this effect, it is not necessary that the misrepresentation

471] ("War Cry" as name of religious paper).

Oregon.— Lichtenstein *v.* Mellis, 8 Oreg. 464, 34 Am. Rep. 592.

Rhode Island.—American Solid Leather Button Co. *v.* Anthony, 15 R. I. 338, 5 Atl. 626, 2 Am. St. Rep. 898.

United States.— Columbia Mill Co. *v.* Alcorn, 150 U. S. 460, 14 S. Ct. 151, 37 L. ed. 1144; Corbin *v.* Gould, 133 U. S. 308, 10 S. Ct. 312, 33 L. ed. 611; Stachelberg *v.* Ponce, 128 U. S. 686, 9 S. Ct. 900, 32 L. ed. 569; Liggett, etc., Tobacco Co. *v.* Finzer, 128 U. S. 182, 9 S. Ct. 60, 32 L. ed. 395; Amoskeag Mfg. Co. *v.* Trainer, 101 U. S. 51, 25 L. ed. 993; McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828; Delaware, etc., Canal Co. *v.* Clark, 13 Wall. 311, 20 L. ed. 581; Spiegel *v.* Zuckerman, 175 Fed. 978; Dietz *v.* Horton Mfg. Co., 170 Fed. 865, 96 C. C. A. 41; Moore *v.* Auwell, 158 Fed. 462; Galena-Signal Oil Co. *v.* Fuller, 142 Fed. 1002; Bulte *v.* Igleheart, 137 Fed. 492, 70 C. C. A. 76; Continental Tobacco Co. *v.* Larus, etc., Co., 133 Fed. 727, 66 C. C. A. 557; Liebig's Extract of Meat Co. *v.* Walker, 115 Fed. 822; Searle, etc., Co. *v.* Warner, 112 Fed. 674, 50 C. C. A. 321 [*affirmed* in 191 U. S. 195, 24 S. Ct. 79, 48 L. ed. 1115]; Liebig's Extract of Meat Co. *v.* Libby, 103 Fed. 87; Lamont *v.* Leedy, 88 Fed. 72; Shaw Stocking Co. *v.* Mack, 12 Fed. 707, 21 Blatchf. 1. *Compare* Siegert *v.* Gandolfi, 139 Fed. 917 [*reversed* on other grounds in 149 Fed. 100]. See also Moore *v.* Auwell, 172 Fed. 508 [*affirmed* in 178 Fed. 543, 102 C. C. A. 53].

England.— Pirie *v.* Goodall, [1892] 1 Ch. 35, 61 L. J. Ch. 79, 65 L. T. Rep. N. S. 640, 40 Wkly. Rep. 81; *In re* Hyde, 7 Ch. D. 724, 54 L. J. Ch. 395 note, 38 L. T. Rep. N. S. 777; Hirst *v.* Denham, L. R. 14 Eq. 542, 41 L. J. Ch. 752, 27 L. T. Rep. N. S. 56; Benbow *v.* Low, 44 L. T. Rep. N. S. 875, 29 Wkly. Rep. 837; Beard *v.* Turner, 13 L. T. Rep. N. S. 746.

Canada.— Partlo *v.* Todd, 17 Can. Sup. Ct. 196; Spilling *v.* O'Kelly, 8 Can. Exch. 426 [*explaining* Spilling *v.* Ryall, 8 Can. Exch. 195]; Partlo *v.* Todd, 12 Ont. 171 [*followed* in Watson *v.* Westlake, 12 Ont. 449].

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 24.

English three mark rule.— When a trade-mark has been used by more than three persons engaged in the same trade, it is common to the trade, and cannot be registered by any one. *In re* Wragg, 29 Ch. D. 551, 54 L. J. Ch. 391, 52 L. T. Rep. N. S. 467; *In re* Hyde, 7 Ch. D. 724, 54 L. J. Ch. 395 note, 38 L. T. Rep. N. S. 777; *In re* Jelley, 51 L. J. Ch. 639 note, 46 L. T. Rep. N. S. 381 note; Benbow *v.* Low, 44 L. T. Rep. N. S. 875, 29 Wkly. Rep. 837.

8. Hazelton Boiler Co. *v.* Hazelton Tripod Boiler Co., 142 Ill. 494, 30 N. E. 339 [*affirming* 40 Ill. App. 430] (unlawful assumption of corporate name); Portsmouth Brewing Co. *v.* Portsmouth Brewing, etc., Co., 67 N. H. 433, 30 Atl. 346. See also Hostetter Co. *v.* Martinoni, 110 Fed. 524.

9. Cohn *v.* People, 149 Ill. 486, 37 N. E. 60, 41 Am. St. Rep. 304, 23 L. R. A. 821; State *v.* Tetu, 98 Minn. 351, 107 N. W. 953, 108 N. W. 470 ("evaporated cream," where article is not up to statutory standard of cream); Cigar Makers' Protective Union No. 4 *v.* Lindner, 3 Ohio S. & C. Pl. Dec. 244, 2 Ohio N. P. 114; McVey *v.* Brendel, 144 Pa. St. 235, 22 Atl. 912, 27 Am. St. Rep. 625, 13 L. R. A. 377.

A union label which states that "the cigars contained in this box have been made by a first-class workman, a member of the Cigarmakers' International Union of America, an organization opposed to inferior, rat-shop, coolie, prison, or filthy tenement house workmanship," is not illegal, as being immoral, or against public policy. Cohn *v.* People, 149 Ill. 486, 37 N. E. 60, 41 Am. St. Rep. 304, 23 L. R. A. 821 [*disapproving* McVey *v.* Brendel, 144 Pa. St. 235, 22 Atl. 912, 27 Am. St. Rep. 625, 13 L. R. A. 377]; State *v.* Hagen, 6 Ind. App. 167, 33 N. E. 223 [*disapproving* McVey *v.* Brendel, 144 Pa. St. 235, 22 Atl. 912, 27 Am. St. Rep. 625, 13 L. R. A. 377]; Cigar Makers' Protective Union No. 4 *v.* Lindner, 3 Ohio S. & C. Pl. Dec. 244, 2 Ohio N. P. 114.

10. *Alabama.*— Epperson *v.* Bluthenthal, 149 Ala. 125, 42 So. 863, misrepresentation of quantity of whisky in bottle.

California.— Joseph *v.* Macowsky, 96 Cal. 518, 31 Pac. 914, 19 L. R. A. 53; Castroville Co-Operative Creamery Co. *v.* Col, 6 Cal. App. 533, 92 Pac. 648.

Colorado.— Solis Cigar Co. *v.* Pozo, 16 Colo. 388, 26 Pac. 556, 25 Am. St. Rep. 279; Schradsky *v.* Appel Clothing Co., 10 Colo. App. 195, 50 Pac. 528.

District of Columbia.— Levy *v.* Uri, 31 App. Cas. 441; Schuster Co. *v.* Muller, 28 App. Cas. 409.

Georgia.— Coleman, etc., Co. *v.* Dannenberg Co., 103 Ga. 784, 30 S. E. 639, 68 Am. St. Rep. 143, 41 L. R. A. 470.

Louisiana.— New Orleans Coffee Co. *v.* American Coffee Co., 124 La. 19, 49 So. 730.

Maryland.— Houchens *v.* Houchens, 95 Md. 37, 51 Atl. 822; Kenny *v.* Gillet, 70 Md. 574, 17 Atl. 499; Parlett *v.* Guggenheimer, 67 Md. 542, 10 Atl. 81, 1 Am. St. Rep. 416; Siegert *v.* Abbott, 61 Md. 276, 48 Am. Rep.

be part of the trade-mark itself, or that it appear upon the face of the label.[11] Misrepresentations in circulars and advertisements may be sufficient to bar relief,[12]

105; Robertson *v.* Berry, 50 Md. 591, 33 Am. Rep. 328.

Massachusetts.— Nelson *v.* Winchell, 203 Mass. 75, 89 N. E. 180, 23 L. R. A. N. S. 1150; Hoxie *v.* Chaney, 143 Mass. 592, 10 N. E. 713, 58 Am. Rep. 149; Connell *v.* Reed, 128 Mass. 477, 35 Am. Rep. 397.

Nebraska.— Regent Shoe Mfg. Co. *v.* Haaker, 75 Nebr. 426, 106 N. W. 595, 4 L. R. A. N. S. 447; Newbro *v.* Undeland, 69 Nebr. 821, 96 N. W. 635.

New Jersey.— Bear Lithia Springs Co. *v.* Great Bear Spring Co., 72 N. J. Eq. 871, 68 Atl. 86; Johnson *v.* Seabury, 71 N. J. Eq. 750, 67 Atl. 36, 124 Am. St. Rep. 1007, 12 L. R. A. N. S. 1201.

New York.— Prince Mfg. Co. *v.* Prince's Metallic Paint Co., 135 N. Y. 24, 31 N. E. 990, 17 L. R. A. 129; Fay *v.* Lambourne, 124 N. Y. App. Div. 245, 108 N. Y. Suppl. 874 [*affirmed* in 196 N. Y. 575, 90 N. E. 1158]; Falk *v.* American West Indies Trading Co., 71 N. Y. App. Div. 320, 75 N. Y. Suppl. 964; Fleischmann *v.* Fleischmann, 7 N. Y. App. Div. 280, 39 N. Y. Suppl. 1002; Koehler *v.* Sanders, 48 Hun 48 [*affirmed* in 122 N. Y. 65, 25 N. E. 235, 9 L. R. A. 576]; Smith *v.* Woodruff, 48 Barb. 438; Dale *v.* Smithson, 12 Abb. Pr. 237; Hobbs *v.* Francais, 19 How. Pr. 567; Fetridge *v.* Wells, 13 How. Pr. 385.

Ohio.— Brundred *v.* Rice, 49 Ohio St. 640, 32 N. E. 169, 34 Am. St. Rep. 589; Piso Co. *v.* Voight, 6 Ohio S. & C. Pl. Dec. 479, 4 Ohio N. P. 347.

Pennsylvania.— Palmer *v.* Harris, 60 Pa. St. 156, 100 Am. Dec. 557; McNair *v.* Cleave, 10 Phila. 155.

Tennessee.— C. F. Simmons Medicine Co. *v.* Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165.

Wisconsin.— Lemke *v.* Dietz, 121 Wis. 102, 98 N. W. 936.

United States.— Warden *v.* California Fig Syrup Co., 187 U. S. 516, 23 S. Ct. 161, 47 L. ed. 282; Holzapfel's Compositions Co. *v.* Rahtjen's American Composition Co., 183 U. S. 1, 22 S. Ct. 6, 46 L. ed. 49; Manhattan Medicine Co. *v.* Wood, 108 U. S. 218, 2 S. Ct. 436, 27 L. ed. 706; Beecham *v.* Jacobs, 159 Fed. 129, 86 C. C. A. 623; Uri *v.* Hirsch, 123 Fed. 568; Heller, etc., Co. *v.* Shaver, 102 Fed. 882; Alaska Packers' Assoc. *v.* Alaska Imp. Co., 60 Fed. 103; Chattanooga Medicine Co. *v.* Thedford, 58 Fed. 347; Blackwell *v.* Dibrell, 3 Fed. Cas. No. 1,475, 3 Hughes 151; Consolidated Fruit-Jar Co. *v.* Dorflinger, 6 Fed. Cas. No. 3,129, 1 N. Y. Wkly. Dig. 427, 2 Wkly. Notes Cas. (Pa.) 99; Schumacher *v.* Schwenke, 36 Off. Gaz. 457.

England.— Cochran *v.* Macnish, [1896] A. C. 225, 65 L. J. P. C. 20, 74 L. T. Rep. N. S. 109; *In re* Heaton, 27 Ch. D. 570, 53 L. J. Ch. 959, 51 L. T. Rep. N. S. 220, 32 Wkly. Rep. 951; Perry *v.* Truefitt, 6 Beav. 66, 49 Eng. Reprint 749; McAndrew *v.* Bassett, 4 De G. J. & S. 380, 10 Jur. N. S. 550, 33 L. J. Ch. 561, 10 L. T. Rep. N. S. 442, 4 New Rep. 123, 12 Wkly. Rep. 777, 69 Eng. Ch. 293, 46 Eng. Reprint 965; Leather Cloth Co. *v.* American Leather Cloth Co., 4 De G. J. & S. 137, 10 Jur. N. S. 81, 33 L. J. Ch. 199, 9 L. T. Rep. N. S. 558, 3 New Rep. 264, 12 Wkly. Rep. 289, 69 Eng. Ch. 106, 46 Eng. Reprint 868 [*affirmed* in 11 H. L. Cas. 523, 11 Jur. N. S. 513, 35 L. J. Ch. 53, 12 L. T. Rep. N. S. 742, 6 New Rep. 209, 13 Wkly. Rep. 873, 11 Eng. Reprint 1435]; Pidding *v.* How, 6 L. J. Ch. 345, 8 Sim. 477, 8 Eng. Ch. 477, 59 Eng. Reprint 190; Lewis *v.* Goodbody, 67 L. T. Rep. N. S. 194; Newman *v.* Pinto, 57 L. T. Rep. N. S. 31. But see Cochrane *v.* Macnish, [1896] A. C. 225, 65 L. J. P. C. 20, 74 L. T. Rep. N. S. 109; *In re* Dexter, [1893] 2 Ch. 262, 62 L. J. Ch. 545, 68 L. T. Rep. N. S. 793.

Canada.— Templeton *v.* Wallace, 4 Northwest. Terr. 340.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 25.

This same principle applies to unfair competition cases, as well as to technical trade-marks. See *infra*, V, B, 11.

Masonic symbols.—As to the validity of the freemasons' square and compasses as a trade-mark in the United States see *In re* Thomas, 14 Off. Gaz. 821; *In re* Tolle, 2 Off. Gaz. 415. In the former it was held that such a symbol had acquired a well-known special significance and its use would be deceptive. Thacher, Acting Com'r, said: "There can be no doubt that this device, so commonly worn and employed by Masons, has an established mystic significance, universally recognized as existing; whether comprehended by all or not is not material to this issue. . . . It will be universally understood, or misunderstood, as having a Masonic significance, and therefore as a trade-mark must constantly work deception." In the latter case this view is departed from, and it is held that the masons have no monopoly in their symbols.

11. In Canada it has been held that only such misrepresentations as are contained in the trade-mark itself will bar plaintiff's right to an injunction. Templeton *v.* Wallace, 4 Northwest. Terr. 340.

12. *Indiana.*—A. N. Chamberlain Medicine Co. *v.* H. A. Chamberlain Medicine Co., 43 Ind. App. 213, 86 N. E. 1025.

Massachusetts.— Nelson *v.* Winchell, 203 Mass. 75, 89 N. E. 180, 23 L. R. A. N. S. 1150.

Nebraska.— Regent Shoe Mfg. Co. *v.* Haaker, 75 Nebr. 426, 106 N. W. 595, 4 L. R. A. N. S. 447.

New Jersey.— Bear Lithia Springs Co. *v.* Great Bear Spring Co., 71 N. J. Eq. 595, 71 Atl. 383; Stirling Silk Mfg. Co. *v.* Sterling Silk Co., 59 N. J. Eq. 394, 46 Atl. 199.

New York.— Gluckman *v.* Strauch, 186 N. Y. 560, 79 N. E. 1106 [*affirming* 99 N. Y. App. Div. 361, 91 N. Y. Suppl. 223].

Tennessee.— C. F. Simmons Medicine Co.

although relief has sometimes been afforded, notwithstanding such misrepresentations, upon the ground that they are less serious than when constituting part of the mark itself.[13] The misrepresentation may consist in the use of the mark in an improper connection.[14] Misuse of a trade-mark is a bar to relief,[15] as where plaintiff himself uses it to deceive the public.[16] Not every misstatement will bar

v. Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165.

United States.— Preservaline Mfg. Co. *v.* Heller Chemical Co., 118 Fed. 103; Seabury *v.* Grosvenor, 21 Fed. Cas. No. 12,576, 14 Blatchf. 262, 14 Off. Gaz. 679, 53 How. Pr. 192.

England.— Leather Cloth Co. *v.* American Leather Cloth Co., 4 De G. J. & S. 137, 10 Jur. N. S. 81, 33 L. J. Ch. 199, 9 L. T. Rep. N. S. 558, 3 New Rep. 264, 12 Wkly. Rep. 289, 69 Eng. Ch. 106, 46 Eng. Reprint 868 [*affirmed* in 11 H. L. Cas. 523, 11 Jur. N. S. 513, 35 L. J. Ch. 53, 12 L. T. Rep. N. S. 742, 6 New Rep. 209, 13 Wkly. Rep. 873, 11 Eng. Reprint 1435]; Pidding *v.* How, 6 L. J. Ch. 345, 8 Sim. 477, 8 Eng. Ch. 477, 59 Eng. Reprint 190.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 25.

13. Curtis *v.* Bryan, 2 Daly (N. Y.) 312, 36 How. Pr. 33; Ford *v.* Foster, L. R. 7 Ch. 611, 41 L. J. Ch. 682, 27 L. T. Rep. N. S. 219, 20 Wkly. Rep. 818, false use of word "patented."

14. New Orleans Coffee Co. *v.* American Coffee Co., 124 La. 19, 49 So. 730; Prince Mfg. Co. *v.* Prince Metallic Paint Co., 135 N. Y. 24, 31 N. E. 990, 17 L. R. A. 129. *Contra,* Templeton *v.* Wallace, 4 Northwest. Terr. 340.

Application of the trade-mark to other goods than those to which it may be properly applied is such a misrepresentation as will defeat the right to an injunction. Prince Mfg. Co. *v.* Prince's Metallic Paint Co., 135 N. Y. 24, 31 N. E. 990, 17 L. R. A. 129. See also Krauss *v.* Jos. R. Peebles' Sons Co., 58 Fed. 585; Prince's Metallic Paint Co. *v.* Prince Mfg. Co., 57 Fed. 938, 6 C. C. A. 647. "The right to the use of a trade-mark cannot be so enjoyed by an assignee, that he shall have the right to affix the mark to goods differing in character or species from the article to which it was originally attached." Filkins *v.* Blackman, 9 Fed. Cas. No. 4,786, 13 Blatchf. 440, 444, holding that equity would not protect an assignee who applied the mark to a different article.

In Independent Baking Power Co. *v.* Boorman, 175 Fed. 448, 455, it was held that an assignee of a trade-mark which had been used to designate an alum baking powder had no right to transfer the name to a baking powder in which phosphate was substituted for alum, the court holding that it was immaterial whether a phosphate powder was better or worse than an alum powder, it being in fact a different powder. The court said: "A trade-mark established in connection with one article cannot be transferred at will to another."

Infringement by plaintiff bars relief.— Parlett *v.* Guggenheimer, 67 Md. 542, 9 Atl. 539, 1 Am. St. Rep. 416; Van Horn *v.* Coogan, 52 N. J. Eq. 380, 28 Atl. 788; Schumacher *v.* Schwenke, 36 Off. Gaz. 457. *Compare* Prince Mfg. Co. *v.* Prince's Metallic Paint Co., 135 N. Y. 24, 31 N. E. 990, 17 L. R. A. 129.

15. Castroville Co-Operative Creamery Co. *v.* Col, 6 Cal. App. 533, 92 Pac. 648 (allowing use on spurious article); Newbro *v.* Undeland, 69 Nebr. 821, 96 N. W. 635; Prince Mfg. Co. *v.* Prince's Metallic Paint Co., 135 N. Y. 24, 31 N. E. 990, 17 L. R. A. 129; Independent Baking Powder Co. *v.* Boorman, 175 Fed. 448 (use on goods sold at cut prices to meet competition); Lea *v.* New Home Sewing Mach. Co., 139 Fed. 732; Manhattan Medicine Co. *v.* Wood, 16 Fed. Cas. No. 9,026, 4 Cliff. 461, 14 Off. Gaz. 519 [*affirmed* in 108 U. S. 218, 2 S. Ct. 436, 27 L. ed. 706].

16. *Maryland.*— Houchens *v.* Houchens, 95 Md. 37, 51 Atl. 822; Kenny *v.* Gillet, 70 Md. 574, 17 Atl. 499.

New Jersey.— Perlberg *v.* Smith, 70 N. J. Eq. 638, 62 Atl. 442.

New York.— Prince Mfg. Co. *v.* Prince's Metallic Paint Co., 135 N. Y. 24, 31 N. E. 990, 17 L. R. A. 129; Koehler *v.* Sanders, 122 N. Y. 65, 25 N. E. 235, 9 L. R. A. 576 [*affirming* 48 Hun 481]; Fay *v.* Lambourne, 124 N. Y. App. Div. 245, 108 N. Y. Suppl. 874 [*affirmed* in 196 N. Y. 575, 90 N. E. 1158]; Falk *v.* American West Indies Trading Co., 71 N. Y. App. Div. 320, 75 N. Y. Suppl. 964; Fetridge *v.* Wells, 4 Abb. Pr. 144, 13 How. Pr. 385; Helmbold *v.* Helmbold Mfg. Co., 53 How. Pr. 453; Hobbs *v.* Francais, 19 How. Pr. 567. *Compare* Hennessy *v.* Wheeler, 51 How. Pr. 457, 69 N. Y. 271, 25 Am. Rep. 188 [*reversed* in 69 N. Y. 271, 25 Am. Rep. 188].

Ohio.— Wilson *v.* Neederman, 10 Ohio Dec. (Reprint) 226, 19 Cinc. L. Bul. 268.

United States.— Clotworthy *v.* Schepp, 42 Fed. 62; Ginter *v.* Kinney Tobacco Co., 12 Fed. 782; Fairbanks *v.* Jacobus, 8 Fed. Cas. No. 4,608, 3 Ban. & A. 108, 14 Blatchf. 337; Fowle *v.* Spear, 9 Fed. Cas. No. 4,996; Heath *v.* Wright, 11 Fed. Cas. No. 6,310, 3 Wall. Jr. 141; Manhattan Medicine Co. *v.* Wood, 16 Fed. Cas. No. 9,026, 4 Cliff. 461, 14 Off. Gaz. 519 [*affirmed* in 108 U. S. 218, 2 S. Ct. 436, 27 L. ed. 706]; Seabury *v.* Grosvenor, 21 Fed. Cas. No. 12,576, 14 Blatchf. 262, 14 Off. Gaz. 679, 53 How. Pr. 192.

England.— Lee *v.* Haley, L. R. 5 Ch. 155, 39 L. J. Ch. 284, 22 L. T. Rep. N. S. 251, 18 Wkly. Rep. 242; Leather Cloth Co. *v.* American Leather Cloth Co., 4 De G. J. & S. 137, 10 Jur. N. S. 81, 33 L. J. Ch. 199, 9 L. T. Rep. N. S. 558, 3 New Rep. 264, 12 Wkly. Rep. 289, 69 Eng. Ch. 106, 46 Eng. Reprint 868 [*affirmed* in 11 H. L. Cas. 523, 11 Jur. N. S. 513, 35 L. J. Ch. 53, 12 L. T. Rep. N. S. 742, 6 New Rep. 209, 13 Wkly.

relief. Allowance must be made for trifling inaccuracies, dealer's talk, puffing of goods, and the like.[17] Innocent inaccuracies caused by honest mistake,[18] especially where there is no real likelihood of any deception,[19] or mere collateral wrongdoing,[20] are not fatal to relief. But plaintiff must come into court with clean hands.[21] The true test is in ascertaining whether or not the name or mark owes

Rep. 873, 11 Eng. Reprint 1435]; Pidding *v.* How, 6 L. J. Ch. 345, 8 Sim. 477, 8 Eng. Ch. 477, 59 Eng. Reprint 190.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 25.

An exclusive right to deceive the public without interruption cannot be secured by means of a trade-mark. Bear Lithia Springs Co. *v.* Great Bear Spring Co., 71 N. J. Eq. 595, 71 Atl. 383; Hobbs *v.* Francais, 19 How. Pr. (N. Y.) 567.

17. *Illinois.*—William J. Moxley Co. *v.* Braun, etc., Co., 93 Ill. App. 183.

Maryland.— Gruber *v.* Almanack Co. *v.* Swingley, 103 Md. 362, 63 Atl. 684.

Massachusetts.— Nelson *v.* Winchell, 203 Mass. 75, 89 N. E. 180, 23 L. R. A. N. S. 1150.

Nebraska.— Regent Shoe Mfg. Co. *v.* Haaker, 75 Nebr. 426, 106 N. W. 595, 4 L. R. A. N. S. 447.

New York.— Gluckman *v.* Strauch, 186 N. Y. 560, 79 N. E. 1106 [*affirming* 99 N. Y. App. Div. 361, 91 N. Y. Suppl. 223], "sole manufacturer."

United States.— Holeproof Hosiery Co. *v.* Wallach, 172 Fed. 859, 97 C. C. A. 263 [*modifying* and *affirming* 167 Fed. 373] ("Holeproof" as applied to hosiery); Tarrant *v.* Hoff, 76 Fed. 959, 22 C. C. A. 644; Clark Thread Co. *v.* Armitage, 67 Fed. 896 [*affirmed* in 74 Fed. 936, 21 C. C. A. 178].

Canada.— Fafurd *v.* Ferland, 6 Quebec Pr. 119, false representations as to ownership of mark immaterial.

18. Gruber Almanack Co. *v.* Swingley, 103 Md. 362, 63 Atl. 684; C. F. Simmons Medicine Co. *v.* Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165; Capewell Horse Nail Co. *v.* Mooney, 167 Fed. 575 [*affirmed* in 172 Fed. 826, 97 C. C. A. 248]; Blackwell *v.* Armistead, 3 Fed. Cas. No. 1,474, 3 Hughes 163; Cochrane *v.* Macnish, [1896] A. C. 225, 65 L. J. P. C. 20, 74 L. T. Rep. N. S. 109.

Mistaken use of another's name.— The use to a limited extent of the name of a firm to which plaintiff believed itself to have succeeded will not bar relief. Clark Thread Co. *v.* Armitage, 67 Fed. 896 [*affirmed* in 74 Fed. 936, 21 C. C. A. 178].

Custom of trade.— False statements as to editions are insufficient to disentitle plaintiff to relief when they are justified by custom of trade. Metzler *v.* Wood, 8 Ch. D. 606, 47 L. J. Ch. 625, 38 L. T. Rep. N. S. 544, 26 Wkly. Rep. 577.

Fraudulent intent unnecessary.— Deceitful conduct, even without actual fraudulent intent, is a bar to relief. Prince Mfg. Co. *v.* Prince's Metallic Paint Co., 135 N. Y. 24, 31 N. E. 990, 17 L. R. A. 129. *Contra*, Cochrane *v.* Macnish, [1896] A. C. 225, 65 L. J. P. C. 20, 74 L. T. Rep. N. S. 109.

19. *Missouri.*— Conrad *v.* Joseph Uhrig Brewing Co., 8 Mo. App. 277.

New York.— Hennessy *v.* Wheeler, 69 N. Y. 271, 25 Am. Rep. 188; Ransom *v.* Ball, 4 Silv. Sup. 217, 7 N. Y. Suppl. 238.

Ohio.— Buckland *v.* Rice, 40 Ohio St. 526.

United States.— Société Anonyme, etc. *v.* Western Distilling Co., 43 Fed. 416.

England.— Read *v.* Richardson, 45 L. T. Rep. N. S. 54.

A falsehood too gross to be believed, and therefore not likely to deceive any one, is nevertheless a bar to relief in equity. Leather Cloth Co. *v.* American Leather Cloth Co., 4 De G. J. & S. 137, 10 Jur. N. S. 81, 33 L. J. Ch. 199, 9 L. T. Rep. N. S. 558, 3 New Rep. 264, 12 Wkly. Rep. 289, 69 Eng. Ch. 106, 46 Eng. Reprint 868 [*affirmed* in 11 H. L. Cas. 523, 11 Jur. N. S. 513, 35 L. J. Ch. 53, 12 L. T. Rep. N. S. 742, 6 New Rep. 209, 13 Wkly. Rep. 873, 11 Eng. Reprint 1435].

20. Nelson *v.* Winchell, 203 Mass. 75, 89 N. E. 180, 23 L. R. A. N. S. 1150; Independent Baking Powder Co. *v.* Boorman, 130 Fed. 726 (violation of anti-trust law); General Electric Co. *v.* Re-New Lamp Co., 128 Fed. 154; Heller, etc., Co. *v.* Shaver, 102 Fed. 882; Ford *v.* Foster, L. R. 7 Ch. 611. See Hennessy *v.* Wheeler, 69 N. Y. 271, 25 Am. Rep. 188; Baker *v.* Baker, 115 Fed. 297, 53 C. C. A. 157.

Doing business under fictitious names will not disentitle to relief except where a statute exists prohibiting it. Dale *v.* Smithson, 12 Abb. Pr. (N. Y.) 237.

21. *California.*— Castroville Co-Operative Creamery Co. *v.* Col, 6 Cal. App. 533, 92 Pac. 648.

Maryland.— Gruber Almanack Co. *v.* Swingley, 103 Md. 362, 63 Atl. 684; Parlett *v.* Guggenheimer, 67 Md. 542, 10 Atl. 81, 1 Am. St. Rep. 416; Robertson *v.* Berry, 50 Md. 591, 33 Am. Rep. 328.

Nebraska.— Newbro *v.* Undeland, 69 Nebr. 821, 96 N. W. 635.

United States.— Blackwell *v.* Armistead, 3 Fed. Cas. No. 1,474, 3 Hughes 163; Consolidated Fruit-Jar Co. *v.* Dorflinger, 6 Fed. Cas. No. 3,129, 1 N. Y. Wkly. Dig. 427, 2 Wkly. Notes Cas. (Pa.) 99.

England.— Leather Cloth Co. *v.* American Leather Cloth Co., 4 De G. J. & S. 137, 10 Jur. N. S. 81, 33 L. J. Ch. 199, 9 L. T. Rep. N. S. 558, 3 New Rep. 264, 12 Wkly. Rep. 289, 69 Eng. Ch. 106, 46 Eng. Reprint 868 [*affirmed* in 11 H. L. Cas. 523, 11 Jur. N. S. 513, 35 L. J. Ch. 53, 12 L. T. Rep. N. S. 742, 6 New Rep. 209, 13 Wkly. Rep. 873, 11 Eng. Reprint 1435].

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 25.

Use of confusing labels.—The use by plaintiff on two classes of goods of labels which might be mistaken for each other, but the statements on both of which were true, is no defense. Clark Thread Co. *v.* Armitage, 67

its value, in any material degree, to false representations. If it does it will not be protected in equity.[22] Words or names untrue in their primary sense may become conventionalized and come to indicate merely kind, grade, or quality. In such cases there is no misrepresentation, and protection may be afforded.[23] Whether or not there is a substantial misrepresentation is a question of fact in each case,[24] and must be established by proof.[25]

b. Particular Misrepresentations. Representations as to character, quality, purity. or ingredients of an article,[26] or as to the place where an article is manu-

Fed. 896 [*affirmed* in 74 Fed. 936, 21 C. C. A. 178].

False suggestion of authorship.— In Hogg *v.* Kirby, 8 Ves. Jr. 215, 226, 7 Rev. Rep. 30, 32 Eng. Reprint 336, in reference to "The Wonderful Magazine, by William Granger," a nominal author, the Lord Chancellor said: "I have considerable difficulty as to the false colours under which the original publication appears. Though this is very usual, I cannot represent it to my mind otherwise than as something excessively like a fraud on the public. But it will be better to leave that as an ingredient in the action for damages." An injunction was granted. In Chappell *v.* Sheard, 1 Jur. N. S. 996, 2 Kay & J. 117, 3 Wkly. Rep. 646, 69 Eng. Reprint 717, a false suggestion of authorship was held insufficient, although the words used were actually true. See also Chappell *v.* Davidson, 2 Kay & J. 123, 69 Eng. Reprint 719.

22. Johnson *v.* Seabury, 71 N. J. Eq. 750, 67 Atl. 36, 124 Am. St. Rep. 1007, 12 L. R. A. N. S. 1201; Seabury *v.* Grosvenor, 21 Fed. Cas. No. 12,576, 14 Blatchf. 262, 14 Off. Gaz. 679, 53 How. Pr. (N. Y.) 192.

A single misleading circular, issued long after the establishment of the business and eight years before bringing suit, is no defense to a suit for infringement. C. F. Simmons Medicine Co. *v.* Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165.

Misrepresentations after suit brought.— Misrepresentations by plaintiff, made after the institution of a suit, are collateral merely, and will not debar him from protection. Siegert *v.* Findlater, 7 Ch. D. 801, 47 L. J. Ch. 233, 38 L. T. Rep. N. S. 349, 26 Wkly. Rep. 459 [*citing* Ford *v.* Foster, L. R. 7 Ch. 611, 41 L. J. Ch. 682, 27 L. T. Rep. N. S. 219, 20 Wkly. Rep. 818, as decisive on the point].

23. Fischer *v.* Blank, 138 N. Y. 244, 33 N. E. 1040; Beecham *v.* Jacobs, 159 Fed. 129, 86 C. C. A. 623; Hall *v.* Barrows, 4 De G. J. & S. 150, 10 Jur. N. S. 55, 33 L. J. Ch. 204, 9 L. T. Rep. N. S. 561, 3 New Rep. 259, 12 Wkly. Rep. 322, 69 Eng. Ch. 116, 46 Eng. Reprint 873. *Compare* Dodge Stationery Co. *v.* Dodge, 145 Cal. 380, 78 Pac. 879.

Examples of this are "Russian Caravan Tea," and "English Breakfast Tea," applied to tea which is not Russian or English. Fischer *v.* Blank, 138 N. Y. 244, 33 N. E. 1040.

The word "patent," used in such phrases as "patent medicine," or "patent leather," or "patent thread," is a good illustration of a word acquiring a conventional meaning. See *infra*, III, A, 5, b.

24. Hilson Co. *v.* Foster, 80 Fed. 896; Carlsbad *v.* Kutnow, 71 Fed. 167, 18 C. C. A. 24; Cleveland Stone Co. *v.* Wallace, 52 Fed. 431.

25. **Mere argument and ridicule** are not sufficient to sustain charges of fraud and falsehood concerning the use of words and symbols claimed as a trade-mark. Blackwell *v.* Armistead, 3 Fed. Cas. No. 1,474, 3 Hughes 163.

26. *Alabama.*— Epperson *v.* Bluthenthal, 149 Ala. 125, 42 So. 863.

Colorado.—Solis Cigar Co. *v.* Pozo, 16 Colo. 388, 26 Pac. 556, 25 Am. St. Rep. 279.

Kentucky.— Laird *v.* Wilder, 9 Bush 131, 15 Am. Rep. 707.

New York.—Wolfe *v.* Burke, 56 N. Y. 115; Bloss *v.* Bloomer, 23 Barb. 604; Dale *v.* Smithson, 12 Abb. Pr. 237; Fetridge *v.* Wells, 4 Abb. Pr. 144.

Pennsylvania.— Phalon *v.* Wright, 5 Phila. 464.

Texas.—Western Grocer Co. *v.* Caffarelli, (Civ. App. 1908) 108 S. W. 413, "Genuine molasses."

United States.— Hilson Co. *v.* Foster, 80 Fed. 896; Krauss *v.* Jos. R. Peebles' Sons Co., 58 Fed. 585; Clotworthy *v.* Schepp, 42 Fed. 62; Ginter *v.* Kinney Tobacco Co., 12 Fed. 782; *In re* Dole, 12 Off. Gaz. 939; *Re* American Sardine Co., 3 Off. Gaz. 495. But see Centaur Co. *v.* Robinson, 91 Fed. 889.

England.— Estcourt *v.* Estcourt Hop Essence Co., L. R. 10 Ch. 276, 44 L. J. Ch. 223, 32 L. T. Rep. N. S. 80, 23 Wkly. Rep. 313; Perry *v.* Truefitt, 6 Beav. 66, 49 Eng. Reprint 749; Pidding *v.* How, 6 L. J. Ch. 345, 8 Sim. 477, 8 Eng. Ch. 477, 59 Eng. Reprint 190.

Canada.— Gillett *v.* Lumsden, 6 Ont. L. Rep. 66, 2 Ont. Wkly. Rep. 497.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 25.

Compare Feder *v.* Brundo, 8 Ohio S. & C. Pl. Dec. 179, 5 Ohio N. P. 275.

"Syrup of Figs" case.— Protection was refused to the name "Syrup of Figs" as applied to a laxative preparation, upon the ground of misrepresentation, fig juice being an unimportant element in the composition. Worden *v.* California Fig Syrup Co., 187 U. S. 516, 23 S. Ct. 161, 47 L. ed. 282 [*reversing* 102 Fed. 334, 42 C. C. A. 383, which *affirmed* 95 Fed. 132]; California Fig Syrup Co. *v.* Stearns, 73 Fed. 812, 20 C. C. A. 22, 33 L. R. A. 56 [*affirming* 67 Fed. 1008]; California Fig-Syrup Co. *v.* Putnam, 69 Fed. 740, 16 C. C. A. 376 [*affirming* 66 Fed. 750]. *Contra*, California Fig-Syrup Co. *v.* Worden,

factured or from which it or its ingredients are derived,[27] or as to the person by whom the goods are made or sold,[28] are material representations, and if false will constitute a bar to any relief. Assignees who continue the use of the old names and marks without the addition of anything to show that the business is no longer conducted by the original proprietors to whom the trade-mark originally pointed have been denied upon the ground that such use is necessarily a misrepresentation.[29] But the better view is that unless the trade-mark is purely personal,[30] in which

86 Fed. 212; California Fig-Syrup Co. *v.* Improved Fig-Syrup Co., 51 Fed. 296.

27. *California.*— Millbrae Co. *v.* Taylor, (1894) 37 Pac. 235; Joseph *v.* Macowsky, 96 Cal. 518, 31 Pac. 914, 19 L. R. A. 53.

Georgia.— Coleman, etc., Co. *v.* Dannenberg Co., 103 Ga. 784, 30 S. E. 639, 68 Am. St. Rep. 143, 41 L. R. A. 470.

Maryland.— Kenny *v.* Gillet, 70 Md. 574, 17 Atl. 499 (that tea was imported from China); Parlett *v.* Guggenheimer, 67 Md. 542, 10 Atl. 81, 1 Am. St. Rep. 416 (that cigars were made in Havana); Siegert *v.* Abbott, 61 Md. 276, 48 Am. Rep. 101.

Massachusetts.—Connell *v.* Reed, 128 Mass. 477, 35 Am. Rep. 397.

New Jersey.— Bear Lithia Springs Co. *v.* Great Bear Spring Co., 71 N. J. Eq. 595, 71 Atl. 383, "bottled at the springs."

New York.— Prince Mfg. Co. *v.* Prince's Metallic Paint Co., 135 N. Y. 24, 31 N. E. 990, 17 L. R. A. 129; Gluckman *v.* Strauch, 99 N. Y. App. Div. 361, 91 N. Y. Suppl. 223; Dale *v.* Smithson, 12 Abb. Pr. 237; Hobbs *v.* Francais, 19 How. Pr. 567.

Pennsylvania.— Palmer *v.* Harris, 60 Pa. St. 156, 100 Am. Dec. 557.

United States.— Manhattan Medicine Co. *v.* Wood, 108 U. S. 218, 2 S. Ct. 436, 27 L. ed. 706; Beecham *v.* Jacobs, 159 Fed. 129, 86 C. C. A. 623; Allan B. Wrisley Co. *v.* Iowa Soap Co., 104 Fed. 548; Raymond *v.* Royal Baking-Powder Co., 85 Fed. 231, 29 C. C. A. 245 [*affirming* 70 Fed. 376]; American Cereal Co. *v.* Eli Pettijohn Cereal Co., 72 Fed. 903; Prince's Metallic Paint Co. *v.* Prince Mfg. Co., 57 Fed. 938, 6 C. C. A. 647; *Ex p.* Farnum, 18 Off. Gaz. 412. But see Clark Thread Co. *v.* Armitage, 74 Fed. 936, 21 C. C. A. 178 [*affirming* 67 Fed. 896].

England.— Bischop *v.* Toler, 18 Cox C. C. 199, 59 J. P. 807, 65 L. J. M. C. 1, 73 L. T. Rep. N. S. 402, 15 Reports 607, 44 Wkly. Rep. 189.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 25.

English hallmarks.— A manufacturer of silverware is not debarred from establishing as its trade-mark in this country a combination of devices of an anchor, a lion, and the letter G, by the fact that each of these is a hallmark used on English silver, and that, used in combination, they would indicate to a buyer of English silver that the piece was sterling ware made in the city of Birmingham in 1831. Gorham Mfg. Co. *v.* Weintraub, 176 Fed. 927.

28. *Alabama.*— Epperson *v.* Bluthenthal, 149 Ala. 125, 42 So. 863.

California.— Joseph *v.* Macowsky, 96 Cal. 518, 31 Pac. 914, 19 L. R. A. 53.

Connecticut.— Meriden Britannia Co. *v.* Parker, 39 Conn. 450, 12 Am. Rep. 401.

New York.— Prince Mfg. Co. *v.* Prince's Metallic Paint Co., 135 N. Y. 24, 31 N. E. 990, 17 L. R. A. 129; Gluckman *v.* Strauch, 99 N. Y. App. Div. 361, 91 N. Y. Suppl. 223.

Wisconsin.— Lemke *v.* Dietz, 121 Wis. 102, 98 N. W. 936.

United States.— Manhattan Medicine Co. *v.* Wood, 108 U. S. 218, 2 S. Ct. 436, 27 L. ed. 706; Raymond *v.* Royal Baking-Powder Co., 85 Fed. 231, 29 C. C. A. 245 [*affirming* 70 Fed. 376]; Krauss *v.* Jos. R. Peebles' Sons Co., 58 Fed. 585; Chattanooga Medicine Co. *v.* Thedford, 58 Fed. 347; Société Anonyme, etc. *v.* Western Distilling Co., 43 Fed. 416.

England.— See Perry *v.* Truefitt, 6 Beav. 66.

Use of dealer's labels.— In Lichtenstein *v.* Goldsmith, 37 Fed. 359, Colt, J., said: "Again, it is said that the complainants deceive the public, in that they allow the boxes to be labeled with the names of dealers to whom the cigars are sold, or for whom they are made. But this is shown to be a custom in the cigar trade, and I do not think it results in any deception or false representation. All these cigars are in fact made at the Elk Factory, and they are so stamped, and when the public buy them, they are purchasing a genuine Elk cigar, made by these complainants; and I do not see that the additional label put on the box in accordance with a custom of the trade is in any just sense such a false representation as should invalidate the trade-mark." See also Samuel *v.* Berger, 4 Abb. Pr. (N. Y.) 88.

29. Hegeman *v.* Hegeman, 8 Daly (N. Y.) 1; Stachelberg *v.* Ponce, 23 Fed. 430 [*affirmed* in 128 U. S. 686, 9 S. Ct. 200, 32 L. ed. 569]; Sherwood *v.* Andrews, 5 Am. L. Reg. N. S. 588. See Symonds *v.* Jones, 82 Me. 302, 19 Atl. 820, 17 Am. St. Rep. 485, 8 L. R. A. 570; Manhattan Medicine Co. *v.* Wood, 108 U. S. 218, 2 S. Ct. 436, 27 L. ed. 706; Pillsbury *v.* Pillsbury-Washburn Flour-Mills Co., 64 Fed. 841, 12 C. C. A. 432.

30. Messer *v.* The Fadettes, 168 Mass. 140, 46 N. E. 407, 60 Am. St. Rep. 371, 37 L. R. A. 721; Hoxie *v.* Chaney, 143 Mass. 592, 10 N. E. 713, 58 Am. Rep. 149; Skinner *v.* Oakes, 10 Mo. App. 45; Hegeman *v.* Hegeman, 8 Daly (N. Y.) 1; Helmbold *v.* Henry T. Helmbold Mfg. Co., 53 How. Pr. (N. Y.) 453; Alaska Packers' Assoc. *v.* Alaska Imp. Co., 60 Fed. 103. See Filkins *v.* Blackman, 9 Fed. Cas. No. 4,786, 13 Blatchf. 440.

Even a personal name may lose its personal significance and cease to be a representation that the article is the manufacture of

case it is not assignable,[31] an assignee who is carrying on in lawful succession the same business in which the trade-mark was acquired by his predecessors will be protected even though he does not call attention to the fact that he is an assignee and not the original proprietor, provided no direct false statements are made.[32] Trade-marks for so-called patent medicines have been denied protection substantially upon the ground that the business is a fraudulent business not fit to be protected by a court of equity.[33] This rule is too strict, as some of such preparations may possess merit. Ordinarily such trade-marks will be protected unless accompanied by misrepresentations which cannot be justified as mere dealer's talk or customary puffing of goods.[34] The mere fact that the subject-matter is a proprietary medicine will not alone deprive the owner of the right to relief.[35] A false use of the word "patent" or "patented" in connection with an article covered by a trade-mark is sufficient to bar relief against infringement.[36] But the word

that particular person. In such cases a successor may properly use the name. Rogers *v.* Taintor, 97 Mass. 291; Bowman *v.* Floyd, 3 Allen (Mass.) 76, 80 Am. Dec. 55; Oakes *v.* Tousmierre, 49 Fed. 447, 4 Woods (U. S.) 547; Filkins *v.* Blackman, 9 Fed. Cas. No. 4,786, 13 Blatchf. 440; Hall *v.* Barrows, 4 De G. J. & S. 150, 10 Jur. N. S. 55, 33 L. J. Ch. 204, 9 L. T. Rep. N. S. 561, 3 New Rep. 259, 12 Wkly. Rep. 322, 69 Eng. Ch. 116, 46 Eng. Reprint 873; Leather Cloth Co. *v.* American Leather Cloth Co., 4 De G. J. & S. 137, 10 Jur. N. S. 81, 33 L. J. Ch. 199, 9 L. T. Rep. N. S. 558, 3 New Rep. 264, 12 Wkly. Rep. 289, 69 Eng. Ch. 106, 46 Eng. Reprint 868 [*affirmed* in 11 H. L. Cas. 523, 11 Jur. N. S. 513, 35 L. J. Ch. 53, 12 L. T. Rep. N. S. 742, 6 New Rep. 209, 13 Wkly. Rep. 873, 11 Eng. Reprint 1435]; Edlesten *v.* Vick, 1 Eq. Rep. 413, 11 Hare 78, 18 Jur. 7, 23 Eng. L. & Eq. 51, 45 Eng. Ch. 78, 68 Eng. Reprint 1194. See NAMES, 29 Cyc. 261; PARTNERSHIP, 30 Cyc. 419.

31. See *infra*, VII, A, 3.

32. *Massachusetts.*— Hoxie *v.* Chaney, 143 Mass. 592, 10 N. E. 713, 58 Am. Rep. 149.

Ohio.— Drake Medicine Co. *v.* Glessner, 68 Ohio St. 337, 67 N. E. 722.

Pennsylvania.— Fulton *v.* Sellers, 4 Brewst. 42; Joseph Dixon Crucible Co. *v.* Guggenheim, 2 Brewst. 321.

Rhode Island.— Carmichel *v.* Latimer, 11 R. I. 395, 23 Am. Rep. 481.

United States.— Kidd *v.* Johnson, 100 U. S. 617, 25 L. ed. 769; Bauer *v.* La Societe, etc., 120 Fed. 74, 56 C. C. A. 480; Clark Thread Co. *v.* Armitage, 74 Fed. 936, 21 C. C. A. 178 [*affirming* 67 Fed. 896]; Feder *v.* Benkert, 70 Fed. 613, 18 C. C. A. 549; Royal Baking Powder Co. *v.* Raymond, 70 Fed. 376; Société Anonyme, etc. *v.* Western Distilling Co., 43 Fed. 416; Jennings *v.* Johnson, 37 Fed. 364 [*distinguishing* Manhattan Medicine Co. *v.* Wood, 108 U. S. 218, 2 S. Ct. 436, 27 L. ed. 706]; Filkins *v.* Blackman, 9 Fed. Cas. No. 4,786, 13 Blatchf. 440.

England.— Leather Cloth Co. *v.* American Leather Cloth Co., 4 De G. J. & S. 137, 10 Jur. N. S. 81, 33 L. J. Ch. 199, 9 L. T. Rep. N. S. 558, 3 New Rep. 264, 12 Wkly. Rep. 289, 69 Eng. Ch. 106, 46 Eng. Reprint 868 [*affirmed* in 11 H. L. Cas. 523, 11 Jur. N. S. 513, 35 L. J. Ch. 53, 12 L. T. Rep. N. S. 742, 6 New Rep. 209, 13 Wkly. Rep. 873, 11 Eng. Reprint 1435]; Edelsten *v.* Vick, 1 Eq. Rep. 413, 11 Hare 78, 18 Jur. 7, 23 Eng. L. & Eq. 51, 45 Eng. Ch. 78, 68 Eng. Reprint 1194.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 25.

33. Kohler Mfg. Co. *v.* Beeshore, 59 Fed. 572, 8 C. C. A. 215; Heath *v.* Wright, 11 Fed. Cas. No. 6,310, 3 Wall. Jr. 141; Wolfe *v.* Burke, 56 N. Y. 115; Smith *v.* Woodruff, 48 Barb. (N. Y.) 438; Fetridge *v.* Wells, 13 How. Pr. (N. Y.) 385; Fowle *v.* Spear, 9 Fed. Cas. No. 4,996; C. F. Simmons Medicine Co. *v.* Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165; Cox Man. Trademark Cas. 90, 144, 133.

34. *District of Columbia.*— Schuster Co. *v.* Muller, 28 App. Cas. 409.

Maryland.— Houchens *v.* Houchens, 95 Md. 37, 51 Atl. 822.

New York.— Fetridge *v.* Merchant, 4 Abb. Pr. 156; Comstock *v.* White, 18 How. Pr. 421.

United States.— McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828; Samuel *v.* Hostetter Co., 118 Fed. 257; California Fig-Syrup Co. *v.* Worden, 95 Fed. 132; Filkins *v.* Blackman, 9 Fed. Cas. No. 4,786, 13 Blatchf. 440; Cox's Manual of Trademark Cases 180.

England.— Holloway *v.* Holloway, 13 Beav. 209.

Mere statements of opinion as to the curative properties of a compound, or as to the cause of a disease concerning which there is a conflict of opinion, are not false representations, within the meaning of the rule that one deceiving the public by false representations as to the nature of the compound sold cannot enforce his trade-mark therein. Newbro *v.* Undeland, 69 Nebr. 821, 96 N. W. 635.

False assumption of the title "Professor" and extravagant claims of cures were held insufficient to disentitle plaintiff to relief in Holloway *v.* Holloway, 13 Beav. 209, 51 Eng. Reprint 81.

35. Ellis *v.* Zeilin, 42 Ga. 91. See also *supra*, I, D.

36. *Connecticut.*— Chapman *v.* Shepard, 39 Conn. 413.

Iowa.— Sartor *v.* Schaden, 125 Iowa 696, 101 N. W. 511.

Louisiana.— Insurance Oil Tank Co. *v.* Scott, 33 La. Ann. 946, 39 Am. Rep. 286.

"patent" may, and in many cases does, become a general or special word of art, descriptive merely of kind or class. In such a case its use is not a false representation that the article is protected by a patent, and relief may be afforded.[37] A false statement that a label is copyrighted,[38] or registered as a trade-mark,[39] will bar relief.

New Jersey.— Stirling Silk Mfg. Co. *v.* Sterling Silk Co., 59 N. J. Eq. 394, 46 Atl. 199.

New York.— Fleischmann *v.* Fleischmann, 7 N. Y. App. Div. 280, 39 N. Y. Suppl. 1002; Cahn *v.* Gottschalk, 14 Daly 542, 2 N. Y. Suppl. 13; Lauferty *v.* Wheeler, 11 Abb. N. Cas. 220, 63 How. Pr. 488.

United States.— Holzapfel's Compositions Co. *v.* Rahtjen's American Composition Co., 183 U. S. 1, 22 S. Ct. 6, 46 L. ed. 49 [*reversing* 101 Fed. 257, 41 C. C. A. 329]; Preservaline Mfg. Co. *v.* Heller Chemical Co., 118 Fed. 103; De Long Hook, etc., Co. *v.* Francis Hook, etc., Co., 139 Fed. 146 [*modified* in 144 Fed. 682, 75 C. C. A. 484]; Anonymous, 1 Fed. Cas. No. 451; Consolidated Fruit-Jar Co. *v.* Dorflinger, 6 Fed. Cas. No. 3,129; Fairbanks *v.* Jacobus, 8 Fed. Cas. No. 4,608, 14 Blatchf. 337, 3 Ban. & A. 108. See *In re* Richardson, 3 Off. Gaz. 120.

England.— Ford *v.* Foster, L. R. 7 Ch. 611, 41 L. J. Ch. 682, 27 L. T. Rep. N. S. 219, 20 Wkly. Rep. 818.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 25.

The English courts have been less rigid on this subject than those of the United States, and in many cases the use of the word "patent" after the expiration of a patent on the product of the same manufacturer or factory, has been sustained by them. But a clear misrepresentation that the article is "patented" will bar relief. Cochrane *v.* Macnish, [1896] A. C. 225, 65 L. J. P. C. 20, 74 L. T. Rep. N. S. 109; Ford *v.* Foster, L. R. 7 Ch. 611, 41 L. J. Ch. 682, 27 L. T. Rep. N. S. 219, 20 Wkly. Rep. 818 (injunction granted, but account limited); Cheavin *v.* Walker, 5 Ch. D. 850, 46 L. J. Ch. 686, 37 L. T. Rep. N. S. 300; Marshall *v.* Ross, L. R. 8 Eq. 651, 39 L. J. Ch. 225, 21 L. T. Rep. N. S. 260, 17 Wkly. Rep. 1086; Sykes *v.* Sykes, 3 B. & C. 541, 5 D. & R. 292, 3 L. J. K. B. O. S. 46, 27 Rev. Rep. 420, 10 E. C. L. 248, 107 Eng. Reprint 834; Edelsten *v.* Vick, 1 Eq. Rep. 413, 11 Hare 78, 18 Jur. 7, 23 Eng. L. & Eq. 51, 45 Eng. Ch. 78, 68 Eng. Reprint 1194; Flavel *v.* Harrison, 10 Hare 467, 17 Jur. 368, 22 L. J. Ch. 866, 1 Wkly. Rep. 203, 19 Eng. L. & Eq. 15, 44 Eng. Ch. 452, 68 Eng. Reprint 1010; Leather Cloth Co. *v.* Hirschfield, 1 Hem. & M. 295, 1 New Rep. 551, 11 Wkly. Rep. 933, 71 Eng. Reprint 129; Leather Cloth Co. *v.* American Leather Cloth Co., 11 H. L. Cas. 523, 11 Jur. N. S. 513, 35 L. J. Ch. 53, 12 L. T. Rep. N. S. 742, 6 New Rep. 209, 13 Wkly. Rep. 873, 11 Eng. Reprint 1435; Gridley *v.* Swinborne, 52 J. P. 791; Ransome *v.* Graham, 51 L. J. Ch. 897, 47 L. T. Rep. N. S. 218; Morgan *v.* McAdam, 36 L. J. Ch. 228.

Collateral use of word "patented."—Where the deceptive word "patented" did not appear in the trade-mark itself, but only in collateral circulars and advertisements, relief was granted in one case (Ford *v.* Foster, L. R. 7 Ch. 611, 41 L. J. Ch. 682, 27 L. T. Rep. N. S. 219, 20 Wkly. Rep. 818), but denied in another (Preservaline Mfg. Co. *v.* Heller Chemical Co., 118 Fed. 103, upon the ground that it could not be determined to what extent the value of the business sought to be protected was due to the misrepresentation). *Compare* C. F. Simmons Medicine Co. *v.* Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165.

"Patented" instead of "registered."— The erroneous use of the word "patented" instead of "registered," applying to the trade-mark and not to the manufactured article, there being no fraudulent intention, will not bar relief. Insurance Oil Tank Co. *v.* Scott, 33 La. Ann. 946, 39 Am. Rep. 286; Cohn *v.* Gottschalk, 14 Daly (N. Y.) 542, 2 N. Y. Suppl. 13.

37. Solis Cigar Co. *v.* Pozo, 16 Colo. 388, 26 Pac. 556, 25 Am. St. Rep. 279; Beecham *v.* Jacobs, 159 Fed. 129, 86 C. C. A. 623; Consolidated Fruit-Jar Co. *v.* Dorflinger, 6 Fed. Cas. No. 3,129; Cheavin *v.* Walker, 5 Ch. D. 850, 46 L. J. Ch. 686, 37 L. T. Rep. N. S. 300; Marshall *v.* Ross, L. R. 8 Eq. 651, 39 L. J. Ch. 225, 21 L. T. Rep. N. S. 260, 17 Wkly. Rep. 1086; Hall *v.* Barrows, 4 De G. J. & S. 150, 10 Jur. N. S. 55, 33 L. J. Ch. 204, 9 L. T. Rep. N. S. 561, 3 New Rep. 259, 12 Wkly. Rep. 322, 69 Eng. Ch. 116, 46 Eng. Reprint 873; Ransome *v.* Graham, 51 L. J. Ch. 897, 47 L. T. Rep. N. S. 218.

Illustrations.— Patent leather and patent thread are illustrations of this mode of use. Consolidated Fruit-Jar Co. *v.* Dorflinger, 6 Fed. Cas. No. 3,129; Marshall *v.* Ross, L. R. 8 Eq. 651, 39 L. J. Ch. 225, 21 L. T. Rep. N. S. 260, 17 Wkly. Rep. 1086. "Patent medicines" is, perhaps, the most frequent illustration of this manner of use. See Beecham *v.* Jacobs, 159 Fed. 129, 86 C. C. A. 623, "Beecham's Patent Pills."

38. See Blackwell *v.* Armistead, 3 Fed. Cas. No. 1,474, 3 Hughes 163, where, however, the label had been actually entered for copyright, and the defense was overruled. *Contra*, Solis Cigar Co. *v.* Pozo, 16 Colo. 388, 26 Pac. 556, 25 Am. St. Rep. 279.

39. Brown *v.* Doscher, 20 N. Y. Suppl. 900.

"Registered trade-mark."— The use of the words "registered trade-mark" after application for registry, but before actual registry, is not fatal. Read *v.* Richardson, 45 L. T. Rep. N. S. 54. See also Sartor *v.* Schaden, 125 Iowa 696, 101 N. W. 511.

"Trade-mark."— The mere use of the word "trade-mark" does not imply that it is a registered trade-mark. Sen Sen Co. *v.* Britten, [1899] 1 Ch. 692, 68 L. J. Ch. 250, 80 L. T. Rep. N. S. 278, 15 T. L. R. 238, 47

c. Purging Falsehood. Where the value of the good-will represented by the trade-mark was built up by fraud and misrepresentation, mere discontinuance of such misrepresentations before suit brought will not entitle plaintiff to relief.[40] But where plaintiff is conducting an honest business, the mere fact that in times past he has been guilty of misrepresentations or fraud, which have been wholly discontinued before suit, is insufficient to deprive him of the right to protection against infringement.[41] A correction of the false statement not made until after the suit is brought will not help plaintiff.[42]

B. Particular Classes of Marks and Names — 1. Descriptive Terms and Marks — a. General Rules. It is a fundamental rule that terms merely descriptive of the goods or business to which they are applied cannot be exclusively appropriated as trade-marks or trade-names.[43] An exclusive trade-mark

Wkly. Rep. 358 [*distinguishing* Lewis *v.* Goodbody, 67 L. T. Rep. N. S. 194].

"Registered" instead of "copyrighted."— The erroneous use of the word "registered" in connection with a trade-mark, instead of the word "copyrighted," has been held not fatal where the public could not have been deceived. C. F. Simmons Medicine Co. *v.* Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165.

40. Johnson *v.* Seabury, 71 N. J. Eq. 750, 67 Atl. 36, 124 Am. St. Rep. 1007, 12 L. R. A. N. S. 1201; Seabury *v.* Grosvenor, 21 Fed. Cas. No. 12,576, 14 Blatchf. 262, 14 Off. Gaz. 679, 53 How. Pr. (N. Y.) 192; *In re* Fuente, [1891] 2 Ch. 166, 60 L. J. Ch. 308, 64 L. T. Rep. N. S. 196, 39 Wkly. Rep. 489, registration refused, because calculated to secure benefit of previous fraud.

41. Symonds *v.* Jones, 82 Me. 302, 316, 19 Atl. 820, 17 Am. St. Rep. 485, 8 L. R. A. 570 (where the court said: "Of course they cannot have any damages, or accounting for things done by the respondent while they were themselves offending, but if they are now themselves doing equity, they may ask the court to require the respondent to do equity also"); Johnson *v.* Seabury, 71 N. J. Eq. 750, 67 Atl. 36, 124 Am. St. Rep. 1007, 12 L. R. A. N. S. 1201; C. F. Simmons Medicine Co. *v.* Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165; Baker *v.* Baker, 115 Fed. 297, 53 C. C. A. 157 (an infringer who had been enjoined and compelled to change his labels held entitled to protection against a subsequent infringer upon his rights).

42. Alaska Packers' Assoc. *v.* Alaska Imp. Co., 60 Fed. 103.

43. *Alabama.*— Scott *v.* Standard Oil Co., 106 Ala. 475, 19 So. 71, 31 L. R. A. 374.

California.— Spieker *v.* Lash, 102 Cal. 38, 36 Pac. 362; Schmidt *v.* Brieg, 100 Cal. 672, 35 Pac. 623, 22 L. R. A. 790.

Connecticut.— Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 72 Conn. 646, 45 Atl. 957, 49 L. R. A. 147; Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 70 Conn. 516, 40 Atl. 534.

District of Columbia.— Planten *v.* Canton Pharmacy Co., 33 App. Cas. 268; *In re* New South Brewery, etc., Co., 32 App. Cas. 591; *In re* Central Consumers Co., 32 App. Cas. 523; Dennehy *v.* Robertson, 32 App. Cas. 355; Kentucky Distilleries, etc., Co. *v.* Old Lexington Club Distilling Co., 31 App. Cas. 223; Battle Creek Sanitarium Co. *v.* Fuller, 30 App. Cas. 411; U. S. Playing Card *v.* C. M. Clark Pub. Co., 30 App. Cas. 208; *In re* National Phonograph Co., 29 App. Cas. 142; *In re* Hopkins, 29 App. Cas. 118; *In re* American Circular Loom Co., 28 App. Cas. 450.

Georgia.— Larrabee *v.* Lewis, 67 Ga. 561, 44 Am. Rep. 735.

Illinois.— Bolander *v.* Peterson, 136 Ill. 215, 26 N. E. 603, 11 L. R. A. 350 [*affirming* 35 Ill. App. 551]; Ball *v.* Siegel, 116 Ill. 137, 4 N. E. 667, 56 Am. Rep. 766.

Indiana.— Computing Cheese Cutter Co. *v.* Dunn, (App. 1909) 88 N. E. 93.

Iowa.— Sartor *v.* Schaden, 125 Iowa 696, 101 N. W. 511.

Louisiana.— Insurance Oil Tank Co. *v.* Scott, 33 La. Ann. 946, 39 Am. Rep. 286.

Maine.— W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 100 Me. 461, 62 Atl. 499, 4 L. R. A. N. S. 960.

Massachusetts.— Thomson *v.* Winchester, 19 Pick. 214, 31 Am. Dec. 135.

Michigan.— Gray *v.* Koch, 2 Mich. N. P. 119.

Nebraska.— Regent Shoe Mfg. Co. *v.* Haaker, 75 Nebr. 426, 106 N. W. 595, 4 L. R. A. N. S. 447.

New Jersey.— Charles R. De Bevoise Co. *v.* H. & W. Co., 69 N. J. Eq. 114, 60 Atl. 407; Medlar, etc., Shoe Co. *v.* Delsarte Mfg. Co., (Ch. 1900) 46 Atl. 1089 [*affirmed* in 68 N. J. Eq. 706, 61 Atl. 401].

New York.— Barrett Chemical Co. *v.* Stern, 176 N. Y. 27, 68 N. E. 65, 13 N. Y. Annot. Cas. 430; Cooke, etc., Co. *v.* Miller, 169 N. Y. 475, 62 N. E. 582; Fischer *v.* Blank, 138 N. Y. 244, 33 N. E. 1040; Waterman *v.* Shipman, 130 N. Y. 301, 29 N. E. 111 [*reversing* 8 N. Y. Suppl. 814]; Koehler *v.* Sanders, 122 N. Y. 65, 25 N. E. 235, 9 L. R. A. 576 [*affirming* 48 Hun 48]; Merry *v.* Hoopes, 111 N. Y. 415, 18 N. E. 714; Enoch Morgan's Sons Co. *v.* Troxell, 89 N. Y. 292, 42 Am. Rep. 294; Caswell *v.* Davis, 58 N. Y. 223, 17 Am. Rep. 233; Roncoroni *v.* Gross, 92 N. Y. App. Div. 221, 86 N. Y. Suppl. 1112 [*citing* Caswell *v.* Davis, 58 N. Y. 223, 17 Am. Rep. 233; Barrett Chemical Co. *v.* Stern, 176 N. Y. 27, 68 N. E. 65, 13 N. Y. Annot. Cas. 430]; Amoskeag Mfg. Co. *v.* Spear, 2 Sandf. 599; Town *v.* Stetson, 3 Daly 53; Car

must consist of some arbitrary or fanciful term, figure, or device not descriptive of the article to which it is applied.[44] It must be used without any special meaning

Advertising Co. *v.* New York City Car Advertising Co., 57 Misc. 105, 107 N. Y. Suppl. 547 [*affirmed* in 123 N. Y. App. Div. 926, 108 N. Y. Suppl. 1126]; Rawlinson *v.* Brainard, etc., Co., 28 Misc. 287, 59 N. Y. Suppl. 880; Clinton Metalic Paint Co. *v.* New York Metalic Paint Co., 23 Misc. 66, 50 N. Y. Suppl. 437; New York Asbestos Mfg. Co. *v.* New York Fireproof Covering Co., 62 N. Y. Suppl. 339; Keasbey *v.* Brooklyn Chemical Works, 21 N. Y. Suppl. 696 [*reversed* on the facts in 142 N. Y. 467, 37 N. E. 476, 40 Am. St. Rep. 623]; Godillot *v.* Hazard, 49 How. Pr. 5 [*affirmed* in 44 N. Y. Super. Ct. 427 (*affirmed* in 81 N. Y. 263)]; Wolfe *v.* Goulard, 18 How. Pr. 64.

Pennsylvania.— Laughman's Appeal, 128 Pa. St. 1, 18 Atl. 415, 5 L. R. A. 599.

Rhode Island.— Cady *v.* Schultz, 19 R. I. 193, 32 Atl. 915, 61 Am. St. Rep. 763, 29 L. R. A. 524.

Tennessee.— C. F. Simmons Medicine Co. *v.* Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165.

Wisconsin.—Avenarius *v.* Kornely, 139 Wis. 247, 121 N. W. 336; Listman Mill Co. *v.* William Listman Milling Co., 88 Wis. 334, 60 N. W. 261, 43 Am. St. Rep. 907; Gessler *v.* Grieb, 80 Wis. 21, 48 N. W. 1098, 27 Am. St. Rep. 20.

United States.— Saxlehner *v.* Eisner, etc., Co., 179 U. S. 19, 21 S. Ct. 7, 45 L. ed. 60, 93 Off. Gaz. 940 [*reversing* 91 Fed. 536, 33 C. C. A. 291]; Columbia Mill Co. *v.* Alcorn, 150 U. S. 460, 14 S. Ct. 151, 37 L. ed. 1144; Brown Chemical Co. *v.* Meyer, 139 U. S. 540, 11 S. Ct. 625, 35 L. ed. 247; Corbin *v.* Gould, 133 U. S. 308, 10 S. Ct. 312, 33 L. ed. 611; Stachelberg *v.* Ponce, 128 U. S. 686, 9 S. Ct. 200, 32 L. ed. 569; Goodyear's India Rubber Glove Mfg. Co. *v.* Goodyear Rubber Co., 128 U. S. 598, 9 S. Ct. 166, 32 L. ed. 535; Amoskeag Mfg. Co. *v.* Trainer, 101 U. S. 51, 25 L. ed. 993; Delaware, etc., Canal Co. *v.* Clark, 13 Wall. 311, 20 L. ed. 581; Seeger Refrigerator Co. *v.* White Enamel Refrigerator Co., 178 Fed. 567; Florence Mfg. Co. *v.* Dowd, 178 Fed. 73, 101 C. C. A. 565 [*reversing* 171 Fed. 122]; American Tobacco Co. *v.* Polacsek, 170 Fed. 117; Holeproof Hosiery Co. *v.* Wallach, 167 Fed. 373 [*modified* and *affirmed* in 172 Fed. 859, 97 C. C. A. 263]; Rice-Stix Dry Goods Co. *v.* J. A. Scriven Co., 165 Fed. 639, 91 C. C. A. 475; Rushmore *v.* Manhattan Screw, etc., Works, 163 Fed. 939, 90 C. C. A. 299, 19 L. R. A. N. S. 269 [*affirmed* in 170 Fed. 1021, 95 C. C. A. 671]; William Wrigley, Jr., Co. *v.* Grove Co., 161 Fed. 885; Chalmers Knitting Co. *v.* Columbia Mesh Knitting Co., 160 Fed. 1013; Greene *v.* Manufacturers' Belt Hook Co., 158 Fed. 640; Worcester Brewing Corp. *v.* Rueter, 157 Fed. 217, 84 C. C. A. 665; American Brewing Co. *v.* Bienville Brewery, 153 Fed. 615; Consolidated Ice Co. *v.* Hygeia Distilled Water Co., 151 Fed. 10, 80 C. C. A. 506 [*affirming* 144 Fed. 139]; Germer Stove Co. *v.* Art Stove Co., 150 Fed. 141, 80 C. C. A. 9; Hygienic Fleeced Underwear Co. *v.* Way, 137 Fed. 592, 70 C. C. A. 553 [*reversing* 133 Fed. 245]; H. B. Chaffee Mfg. Co. *v.* Selchow, 135 Fed. 1021, 68 C. C. A. 668 [*affirming* 131 Fed. 543]; Bickmore Gall Cure Co. *v.* Karns, 134 Fed. 833, 67 C. C. A. 439 [*reversing* 126 Fed. 573]; Marvel Co. *v.* Pearl, 133 Fed. 160, 66 C. C. A. 226; M. J. Breitenbach Co. *v.* Spangenberg, 131 Fed. 160; Ludington Novelty Co. *v.* Leonard, 127 Fed. 155, 62 C. C. A. 269 [*affirming* 119 Fed. 937]; Heublein *v.* Adams, 125 Fed. 782; Scriven *v.* North, 124 Fed. 894 [*modified* in 134 Fed. 366, 67 C. C. A. 348]; Computing Scale Co. *v.* Standard Computing Scale Co., 118 Fed. 965, 55 C. C. A. 459; Searle, etc., Co. *v.* Warner, 112 Fed. 674, 50 C. C. A. 321; Fuller *v.* Huff, 99 Fed. 439; New York Asbestos Mfg. Co. *v.* Ambler Asbestos Air-Cell Covering Co., 99 Fed. 85; Continental Ins. Co. *v.* Continental Fire Assoc., 96 Fed. 846; Coffman *v.* Castner, 87 Fed. 457, 31 C. C. A. 55; Ginter *v.* Kinney Tobacco Co., 12 Fed. 782; Hartell *v.* Viney, 11 Fed. Cas. No. 6,158, 2 Wkly. Notes Cas. (Pa.) 602; Osgood *v.* Allen, 18 Fed. Cas. No. 10,603, Holmes 185, 3 Off. Gaz. 124.

England.—Cellular Clothing Co. *v.* Maxton, [1899] A. C. 326, 68 L. J. P. C. 72, 80 L. T. Rep. N. S. 809; Parsons *v.* Gillespie, [1898] A. C. 239, 67 L. J. P. C. 21, 14 T. L. R. 142; *In re* Trade Mark Bovril, [1896] 2 Ch. 600, 65 L. J. Ch. 715, 74 L. T. Rep. N. S. 805, 45 Wkly. Rep. 150; Raggett *v.* Findlater, L. R. 17 Eq. 29, 43 L. J. Ch. 64, 29 L. T. Rep. N. S. 448, 22 Wkly. Rep. 53; *In re* Meyerstein, 43 Ch. D. 604, 59 L. J. Ch. 401, 62 L. T. Rep. N. S. 526, 38 Wkly. Rep. 440; *In re* Hanson, 37 Ch. D. 112, 57 L. J. Ch. 173, 57 L. T. Rep. N. S. 859, 36 Wkly. Rep. 134; *In re* Price's Patent Candle Co., 27 Ch. D. 681, 54 L. J. Ch. 210, 51 L. T. Rep. N. S. 653; *In re* Palmer, 24 Ch. D. 504, 50 L. T. Rep. N. S. 30, 32 Wkly. Rep. 306; Cheavin *v.* Walker, 5 Ch. D. 850, 46 L. J. Ch. 265, 35 L. T. Rep. N. S. 757 [*reversed* on other grounds in 5 Ch. D. 862, 46 L. J. Ch. 686, 36 L. T. Rep. N. S. 938, 37 L. T. Rep. N. S. 300]; *In re* Talbot, 63 L. J. Ch. 264, 70 L. T. Rep. N. S. 119, 8 Reports 149, 42 Wkly. Rep. 501; *In re* Paine, 61 L. J. Ch. 365, 66 L. T. Rep. N. S. 642.

Canada.—Provident Chemical Works *v.* Canada Chemical Mfg. Co., 2 Ont. L. Rep. 182 [*applying* Reddaway *v.* Banham, [1896] A. C. 199, 65 L. J. Q. B. 381, 74 L. T. Rep. N. S. 289, 44 Wkly. Rep. 638]; Gillett *v.* Lumsden, 4 Ont. L. Rep. 300, 1 Ont. Wkly. Rep. 488; Partlo *v.* Todd, 14 Ont. App. 444; Asbestos, etc., Co. *v.* William Sclater Co., 18 Quebec Super. Ct. 324.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names, §§ 4–7.

44. Fischer *v.* Blank, 138 N. Y. 244, 33 N. E. 1040; Listman Mill Co. *v.* William Listman Milling Co., 88 Wis. 334, 60 N. W. 261, 43 Am. St. Rep. 907; Wolf *v.* Hamilton-Brown Shoe Co., 165 Fed. 413, 91 C. C. A.

of its own for the purpose of indicating origin or ownership by use and reputation.[45] The reason for this is that everyone must be allowed to truly describe his goods or business, and in order to do so, he must use the terms necessary or appropriate for that purpose. No one can secure a monopoly upon the adjectives of the

363; Trinidad Asphalt Mfg. Co. *v.* Standard Paint Co., 163 Fed. 977, 90 C. C. A. 195 [*affirmed* in 220 U. S. 446]; Burton *v.* Stratton, 12 Fed. 696; Blackwell *v.* Dibrell, 3 Fed. Cas. No. 1,475, 3 Hughes 151, 14 Off. Gaz. 633.

"Fancy word," as used in the English statute, means a word not in common use, and having, to ordinary English people, no specific meaning, or, if it has any meaning at all, one that is obviously meaningless when used as a trade-mark for the particular article to which it is applied. *In re* Trade Mark Bovril, [1896] 2 Ch. 600, 65 L. J. Ch. 715, 74 L. T. Rep. N. S. 805, 45 Wkly. Rep. 150; *In re* Van Duzer, 34 Ch. D. 623, 642, 644, 56 L. J. Ch. 370, 56 L. T. Rep. N. S. 286, 35 Wkly. Rep. 294, per Lindley, L. J., where it is said: "If it is not obviously meaningless, it appears to me it has not the characteristics of a fancy word. I do not mean to say that there are no English fancy words." Lopes, L. J., said: "I think a word to be a fancy word must be obviously meaningless as applied to the article in question. I think it must be a word fanciful in its application to the article to which it is applied in the sense of being so obviously and notoriously inappropriate as neither to be deceptive nor descriptive, nor calculated to suggest deception or description. Further than that, I think, that the word must have an innate and inherent character of fancifulness which must not depend on evidence, and cannot be supported by evidence to shew that in fact it is neither deceptive nor descriptive, or calculated to be deceptive or descriptive. What I mean is that a fancy word, in my opinion, must speak for itself; it must be a fancy word of its own inherent strength." See also Davis *v.* Stribolt, 59 L. T. Rep. N. S. 854, 855, where it is said: "A word which is not obviously an unmeaning word to an Englishman of ordinary intelligence is not a fancy word if that proposition is good. To say that every word is a fancy word because it is unknown to an average Englishman would be plainly to lay down a proposition which could not for a moment be maintained. There are many good English words descriptive of articles which are unknown to an average Englishman taking rather a high standard."

The term "fancy word" may embrace such words for instance as: "Bovril." *In re* Trade Mark Bovril, [1896] 2 Ch. 600, 606, 65 L. J. Ch. 715, 74 L. T. Rep. N. S. 805, 45 Wkly. Rep. 150. "Mazawattee." *In re* Densham, [1895] 2 Ch. 176, 183, 64 L. J. Ch. 634, 72 L. T. Rep. N. S. 614, 12 Reports 283, 43 Wkly. Rep. 515. "Oomoo." *Re* Burgoyne, 61 L. T. Rep. N. S. 39, 40.

The term will not embrace such words as: "Alpine." *In re* Van Duzer, 34 Ch. D. 623, 625, 56 L. J. Ch. 370, 56 L. T. Rep. N. S. 286, 35 Wkly. Rep. 294. But see *In re* Trade Mark Alpine, 29 Ch. D. 877, 54 L. J. Ch. 727, 53 L. T. Rep. N. S. 79, 33 Wkly. Rep. 725. "Apollinaris." *In re* Apollinaris Co., [1891] 2 Ch. 186, 200, 61 L. J. Ch. 625, 65 L. T. Rep. N. S. 6. "Bokol." Davis *v.* Stribolt, 59 L. T. Rep. N. S. 854, 855. "Electric." *In re* Van Duzer, 34 Ch. D. 623, 56 L. J. Ch. 370, 376, 56 L. T. Rep. N. S. 286, 35 Wkly. Rep. 294. "Emolio." *Re* Grossmith, 60 L. T. Rep. N. S. 612, 614. "Emolliolorum." *In re* Talbot, 63 L. J. Ch. 264, 70 L. T. Rep. 119, 122, 8 Reports 149, 42 Wkly. Rep. 501. "Friedrichshall." *In re* Apollinaris Co., [1891] 2 Ch. 186, 231, 61 L. J. Ch. 625, 65 L. T. Rep. N. S. 6. "Gem." *In re* Arbenz, 35 Ch. D. 248, 263, 56 L. J. Ch. 524, 56 L. T. Rep. N. S. 252, 35 Wkly. Rep. 527. "Hand Grenade Fire Extinguisher." *In re* Harden Star Hand Grenade Fire Extinguisher Co., 55 L. J. Ch. 596, 598, 54 L. T. Rep. N. S. 834. "Herbalin." Humphries *v.* Taylor Drug Co., 59 L. T. Rep. N. S. 820, 822. "Hunyadi Janos." *In re* Apollinaris Co., [1891] 2 Ch. 186, 223, 61 L. J. Ch. 625, 65 L. T. Rep. N. S. 6. "John Bull." *In re* Paine, 61 L. J. Ch. 365, 367, 66 L. T. Rep. N. S. 642. "Jubilee." Towgood *v.* Pirie, 56 L. T. Rep. N. S. 394, 395, 35 Wkly. Rep. 729. "Kokoko." *Re* Jackson Co., 60 L. T. Rep. N. S. 93, 95. "Melrose." *In re* Van Duzer, 34 Ch. D. 623, 626, 56 L. J. Ch. 370, 56 L. T. Rep. N. S. 286, 35 Wkly. Rep. 294. "Monobrut." *Re* Vignier, 61 L. T. Rep. N. S. 495, 497. "National Sperm." *In re* Price's Patent Candle Co., 27 Ch. D. 681, 683, 54 L. J. Ch. 210, 51 L. T. Rep. N. S. 653. "Red, White and Blue." *In re* Hanson, 37 Ch. D. 112, 57 L. J. Ch. 173, 57 L. T. Rep. N. S. 859, 36 Wkly. Rep. 134. "Reversi." Waterman *v.* Ayres, 39 Ch. D. 29, 30, 57 L. J. Ch. 893, 59 L. T. Rep. N. S. 17, 37 Wkly. Rep. 110. "Self-Washer." Lever *v.* Goodwin, 36 Ch. D. 1, 5, 57 L. T. Rep. N. S. 583, 36 Wkly. Rep. 177. "Shakspere." *In re* Banks, 11 T. L. R. 596, 44 Wkly. Rep. 32. "Strathmore." *In re* Van Duzer, 34 Ch. D. 623, 626, 56 L. J. Ch. 370, 56 L. T. Rep. N. S. 286, 35 Wkly. Rep. 294. "Washerine." Burland *v.* Broxburn Oil Co., 42 Ch. D. 274, 289, 58 L. J. Ch. 816, 61 L. T. Rep. N. S. 618, 38 Wkly. Rep. 89.

45. Avenarius *v.* Kornely, 139 Wis. 247, 121 N. W. 336; Listman Mill Co. *v.* William Listman Milling Co., 88 Wis. 334, 60 N. W. 261, 43 Am. St. Rep. 907; Chalmers Knitting Co. *v.* Columbia Mesh Knitting Co., 160 Fed. 1013; *In re* Trade Mark Bovril, [1896] 2 Ch. 600, 65 L. J. Ch. 715, 74 L. T. Rep. N. S. 805, 45 Wkly. Rep. 150. See also Creswill *v.* Grand Lodge K. P. of Georgia, 133 Ga. 837, 67 S. E. 188, 134 Am. St. Rep. 231.

language.[46] Nevertheless even descriptive terms may not be artfully used as a means of passing off the goods or business of one person for those of another.[47] In order to be descriptive, within the condemnation of the rule, it is sufficient if information is afforded as to the general nature or character of the article.[48] It is not necessary that the words or marks used shall comprise a clear, complete, and accurate description.[49] False description is not such an arbitrary use as will sustain a trade-mark.[50] A peculiar or distinctive style of printing,[51] or merely misspelling a common descriptive word will not sustain it as a trade-mark.[52] Words not originally or inherently descriptive may become descriptive through use and acceptation, in which case they are *publici juris* and not subject to appropriation as trade-marks.[53] It is a question of fact whether a name has acquired a generic meaning descriptive of a general kind, quality, or class of goods.[54]

b. Applications of Rules. It is a question arising in each case whether the words or marks, as used, are descriptive,[55] and hence not capable of exclusive

46. Cooke, etc., Co. *v.* Miller, 169 N. Y. 475, 62 N. E. 582; Clinton Metalic Paint Co. *v.* New York Metalic Paint Co., 23 Misc. (N. Y.) 66, 50 N. Y. Suppl. 437; Helmbold *v.* Henry T. Helmbold Mfg. Co., 53 How. Pr. (N. Y.) 453; Marshall *v.* Pinkham, 52 Wis. 572, 9 N. W. 615, 38 Am. Rep. 756; Amoskeag Mfg. Co. *v.* Trainer, 101 U. S. 51, 25 L. ed. 993; Celluloid Mfg. Co. *v.* Cellonite Mfg. Co., 32 Fed. 94.

Words belonging to the common stock of words may not be exclusively appropriated as trade-marks. Clinton Metalic Paint Co. *v.* New York Metalic Paint Co., 23 Misc. (N. Y.) 66, 50 N. Y. Suppl. 437; Germer Stove Co. *v.* Art Stove Co., 150 Fed. 141, 80 C. C. A. 9, "Twentieth century." The word "centennial" is general property, and cannot be used for a trade-mark. Hartell *v.* Viney, 11 Fed. Cas. No. 6,158, 2 Wkly. Notes Cas. (Pa.) 602. "The adjectives of the English language are the common property of all who speak and write it." Royal Baking Powder Co. *v.* Sherrell, 93 N. Y. 331, 45 Am. Rep. 229; Cook, etc., Co. *v.* Miller, 53 N. Y. App. Div. 120, 121, 65 N. Y. Suppl. 730 [*affirmed* in 169 N. Y. 475, 62 N. E. 582].

47. See *infra*, V, C, 1.

48. Stern *v.* Barrett Chemical Co., 29 Misc. (N. Y.) 609, 61 N. Y. Suppl. 221.

49. Lamont *v.* Leedy, 88 Fed. 72.

"The true test, it appears to me, must be not whether the words are exhaustively descriptive of the article designated, but whether in themselves, and as they are commonly used by those who understand their meaning, they are reasonably indicative and descriptive of the thing intended." Rumford Chemical Works *v.* Muth, 35 Fed. 524, 527, 1 L. R. A. 44.

50. Schmidt *v.* Brieg, 100 Cal. 672, 35 Pac. 623, 22 L. R. A. 790; *In re* National Phonograph Co., 29 App. Cas. (D. C.) 142, "standard" applied to an inferior article not in any sense standard.

51. H. W. Johns-Manville Co. *v.* American Steam Packing Co., 33 App. Cas. (D. C.) 224.

52. Barrett Chemical Co. *v.* Stern, 176 N. Y. 27, 68 N. E. 65, 13 N. Y. Annot. Cas. 430 ("Roachsault"); Trinidad Asphalt Mfg. Co. *v.* Standard Paint Co., 163 Fed. 977, 90 C. C. A. 195 [*affirmed* in 220 U. S. 446, 165 Off. Gaz. 971] ("Ruberoid" as applied to a flexible roofing material); *In re* Uneeda Trade-Mark, [1902] 1 Ch. 783, 71 L. J. Ch. 353, 86 L. T. Rep. N. S. 439, 18 T. L. R. 453, 50 Wkly. Rep. 467 [*affirming* [1901] 1 Ch. 550, 70 L. J. Ch. 318, 84 L. T. Rep. N. S. 259, 17 T. L. R. 241] ("Uneeda" as applied to biscuit); Girstein *v.* Cohen, 39 Can. Sup. Ct. 286 ("shur-on," and "sta-zon," as applied to eyeglasses).

53. Kentucky Distilleries, etc., Co. *v.* Old Lexington Club Distilling Co., 31 App. Cas. (D. C.) 223 ("Club" as applied to whisky); Albers Bros. Milling Co. *v.* Acme Mills Co., 171 Fed. 989 ("Cream" and "Extra-cream" as denoting first quality of rolled oats); National Starch Mfg. Co. *v.* Munn's Patent Maizena, etc., Co., [1894] A. C. 275, 63 L. J. P. C. 112, 6 Reports 462.

54. H. A. Williams Mfg. Co. *v.* Noera, 158 Mass. 110, 32 N. E. 1037; Lea *v.* Deakin, 14 Fed. Cas. No. 8,154, 11 Biss. 23, "Worcestershire Sauce."

Question for court.—The question whether the word "Hygeia" had come to have a meaning descriptive of character and quality, so that it could not be used as a trade-mark, is for the court to determine from its judicial knowledge, aided by reference to any appropriate authorities, or by evidence, or both. Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 70 Conn. 516, 40 Atl. 534.

55. See cases cited *infra*, this, and note 56.

Words and marks held to be descriptive and invalid as technical trade-marks. Kentucky Distilleries, etc., Co. *v.* Old Lexington Club Distilling Co., 31 App. Cas. (D. C.) 223 ("Club," as applied to whisky); Winchester Repeating Arms Co. *v.* Peters Cartridge Co., 30 App. Cas. (D. C.) 505 ("Self-loading," as applied to cartridges); *In re* Hopkins, 29 App. Cas. (D. C.) 118 ("Oriental Cream," as applied to a lotion); Larrabee *v.* Lewis, 67 Ga. 561, 44 Am. Rep. 735 ("Snow Flake," as applied to bread or crackers); Russia Cement Co. *v.* Le Page, 147 Mass. 206, 17 N. E. 304, 9 Am. St. Rep. 685 ("Liquid Glue"); Oakes *v.* St. Louis Candy Co., 146 Mo. 391, 48 S. W. 467 (the phrase "What is it?"); Trask Fish Co. *v.* Wooster, 28 Mo.

appropriation as technical trade-marks, or whether they are non-descriptive, arbitrary, or fanciful,[56] and therefore subject to appropriation as valid trade-

App. 408 ("Selected Shore Mackerel"); Barrett Chemical Co. *v.* Stern, 176 N. Y. 27, 68 N. E. 65, 13 N. Y. Annot. Cas. 430 [*reversing* 71 N. Y. App. Div. 616, 76 N. Y. Suppl. 1009 ("Roachsault," as applied to an insecticide); Prince Mfg. Co. *v.* Prince Metallic Paint Co., 135 N. Y. 24, 31 N. E. 990, 17 L. R. A. 129 ("Metallic Paint"); Cahn *v.* Hoffman House, 7 Misc. (N. Y.) 461, 28 N. Y. Suppl. 388 ("Club Whiskey"); Corwin *v.* Daly, 7 Bosw. (N. Y.) 222 ("Club House," as applied to gin); Town *v.* Stetson, 3 Daly (N. Y.) 53, 5 Abb. Pr. N. S. 218 ("Desiccated Codfish"); New York Asbestos Mfg. Co. *v.* New York Fireproof Covering Co., 62 N. Y. Suppl. 339 ("air-cell," as applied to a fireproof material); Florence Mfg. Co. *v.* Dowd, 178 Fed. 73, 101 C. C. A. 565 [*reversing* 171 Fed. 122] ("Keepclean," as applied to tooth brushes); Newcomer *v.* Scriven Co., 168 Fed. 621, 94 C. C. A. 77 ("Elastic Seam," used to denote men's drawers); Wolf *v.* Hamilton-Brown Shoe Co., 165 Fed. 413, 91 C. C. A. 363 ("The American Girl," used to designate women's shoes); Rice-Stix Dry Goods Co. *v.* J. A. Scriven Co., 165 Fed. 639, 91 C. C. A. 475 ("Elastic Seam," as applied to drawers); Trinidad Asphalt Mfg. Co. *v.* Standard Paint Co., 163 Fed. 977, 90 C. C. A. 195 [*affirmed* in 220 U. S. 446, 165 Off. Gaz. 971] ("Rubberoid" or "ruberroid," as applied to roofing material); Rushmore *v.* Manhattan Screw, etc., Works, 163 Fed. 939, 90 C. C. A. 299, 19 L. R. A. N. S. 269 [*affirmed* in 170 Fed. 1021, 95 C. C. A. 671] ("Flare Front," as applied to automobile lamps); Greene *v.* Manufacturers' Belt Hook Co., 158 Fed. 640 ("Stud," used to designate a belt fastener which is in fact a stud); Hygienic Fleeced Underwear Co. *v.* Way, 137 Fed. 592, 70 C. C. A. 553 [*reversing* 133 Fed. 245] ("Muffler" and "Mufflet," as applied to neck scarfs); Heide *v.* Wallace, 135 Fed. 346, 68 C. C. A. 16 ("Licorice Pastilles"); Devlin *v.* Peek, 135 Fed. 167 [*affirmed* in 144 Fed. 1021, 73 C. C. A. 619] ("Toothache Gum"); Marvel Co. *v.* Pearl, 133 Fed. 160, 66 C. C. A. 226 ("Whirling Spray," as the trade-name for a syringe); Heide *v.* Wallace, 129 Fed. 649 ("Liquorice Pastilles," as applied to a confection); Scriven *v.* North, 124 Fed. 894 [*modified* in 134 Fed. 366, 67 C. C. A. 348] ("Elastic Seam Drawer"); Kinney *v.* Allen, 14 Fed. Cas. No. 7,826, 1 Hughes 106 (holding that the symbol "½" on cigarettes is descriptive, indicating that two kinds of tobacco are used); Walker *v.* Reid, 29 Fed. Cas. No. 17,084 ("Stoga Kip," as applied to boots); *In re* Goodyear Rubber Co., 11 Off. Gaz. 1062 ("Crack Proof," as applied to rubber goods); Cellular Clothing Co. *v.* Maxton, [1899] A. C. 326, 68 L. J. P. C. 72, 80 L. T. Rep. N. S. 809 ("Cellular," as applied to cloth); *In re* Farbenfabriken, [1894] 1 Ch. 645, 63 L. J. Ch. 257, 70 L. T. Rep. N. S. 186, 7 Reports 439, 42 Wkly. Rep. 488 ("Somatose," as applied to a pharmaceutical product made from meat and designed for nourishment); *In re* Meyerstein, 43 Ch. D. 604, 59 L. J. Ch. 401, 62 L. T. Rep. N. S. 526, 38 Wkly. Rep. 440 ("Satinine," as applied to starch, etc.); Spottiswoode *v.* Clark, 10 Jur. 1043, 2 Phil. 154, 22 Eng. Ch. 154, 41 Eng. Reprint 900 ("Pictorial" or "Illustrated," as applied to a publication); Gillett *v.* Lumsden, 4 Ont. L. Rep. 300 ("Cream yeast"); Provident Chemical Works *v.* Canada Chemical Mfg. Co., 2 Ont. L. Rep. 182 ("Cream acid phosphates," and initials "C. A. P.," standing therefor); Asbestos, etc., Co. *v.* William Sclater Co., 10 Quebec Q. B. 165 ("asbestic," as applied to wall plaster).

56. See cases cited *infra*, this note.

Trade-marks held to be non-descriptive, arbitrary, or fanciful.— Kyle *v.* Perfection Mattress Co., 127 Ala. 39, 28 So. 545, 85 Am. St. Rep. 78, 50 L. R. A. 628 ("Perfection Mattress"); Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 72 Conn. 646, 45 Atl. 957, 49 L. R. A. 147 ("Hygeia," as applied to distilled water products); Reading Stove Works *v.* S. M. Howes Co., 201 Mass. 437, 87 N. E. 751, 21 L. R. A. N. S. 979 ("Sunshine," as applied to stoves); Filley *v.* Fassett, 44 Mo. 168, 100 Am. Dec. 275; Eureka Fire Hose Co. *v.* Eureka Rubber Mfg. Co., 71 N. J. Eq. 300, 71 Atl. 1134 [*affirming* 69 N. J. Eq. 159, 60 Atl. 561] ("Eureka," as applied to rubber goods); Koehler *v.* Sanders, 122 N. Y. 65, 25 N. E. 235, 9 L. R. A. 576; Congress, etc., Spring Co. *v.* High Rock Congress Spring Co., 45 N. Y. 291, 6 Am. Rep. 82; Barrett Chemical Co. *v.* Stern, 56 N. Y. App. Div. 143, 67 N. Y. Suppl. 595 ("Roachsault"); Stern *v.* Barrett Chemical Co., 29 Misc. (N. Y.) 609, 61 N. Y. Suppl. 221 [*reversing* 28 Misc. 429, 58 N. Y. Suppl. 1129] ("Roachsault") [but these last two cases have been overruled in Barrett Chemical Co. *v.* Stern, 176 N. Y. 27, 68 N. E. 65, 13 N. Y. Annot. Cas. 430]; Electro-Silicon Co. *v.* Hazard, 29 Hun (N. Y.) 369; Smith *v.* Sixbury, 25 Hun (N. Y.) 232 ("Magnetic Balm," as applied to a remedy); Rawlinson *v.* Brainard, etc., Co., 28 Misc. (N. Y.) 287, 59 N. Y. Suppl. 880 ("Filo-Floss," as applied to silk floss); Fetridge *v.* Merchant, 4 Abb. Pr. (N. Y.) 156; Fleischmann *v.* Schuckmann, 62 How. Pr. (N. Y.) 92; Williams *v.* Spence, 25 How. Pr. (N. Y.) 366; Duke *v.* Cleaver, 19 Tex. Civ. App. 218, 46 S. W. 1128; Listman Mill Co. *v.* William Listman Milling Co., 88 Wis. 334, 60 N. W. 261, 43 Am. St. Rep. 907 ("Marvel," as applied to flour); Saxlehner *v.* Eisner, etc., Co., 179 U. S. 19, 21 S. Ct. 7, 45 L. ed. 60 [*reversing* 91 Fed. 536, 33 C. C. A. 291]; Gorham Mfg. Co. *v.* Weintraub, 176 Fed. 927 (combination of English hallmarks used on silverware); Holeproof Hosiery Co. *v.* Wallach, 167 Fed. 373 [*modified* and *affirmed* in 172 Fed. 859, 97 C. C. A. 263] ("Holeproof," as applied to hosiery); Albers Bros. Milling Co. *v.* Acme

marks. Words, marks, or names which simply indicate quality, style, character, grade, or class of the goods to which they refer are not valid trade-marks.[57] So

Mills Co., 171 Fed. 989 ("Cream," as applied to rolled oats, unless it has acquired a descriptive meaning by manner of use); American Tobacco Co. *v.* Polacsek, 170 Fed. 117 ("Virgin Leaf," as applied to tobacco); Northwestern Consol. Milling Co. *v.* Mauser, 162 Fed. 1004 ("Ceresota," as applied to flour); Eiseman *v.* Schiffer, 157 Fed. 473 ("Radium," as applied to silk); Worcester Brewing Corp. *v.* Rueter, 157 Fed. 217, 84 C. C. A. 665 ("Sterling," as applied to ale); Dwinell-Wright Co. *v.* Co-operative Supply Co., 155 Fed. 909 ("White House," as applied to coffee); Hygeia Distilled Water Co. *v.* Consolidated Ice Co., 144 Fed. 139 [*affirmed* in 151 Fed. 10, 80 C. C. A. 506] ("Hygeia," as applied to distilled water); J. A. Scriven Co. *v.* Girard Co., 140 Fed. 794 [*modified* in 148 Fed. 1019, 79 C. C. A. 533] ("Elastic Seam" or "Stretchiseam"); Heublein *v.* Adams, 125 Fed. 782 ("Club," as applied to cocktails. But see *contra*, Kentucky Distilleries, etc., Co. *v.* Old Lexington Club Distilling Co., 31 App. Cas. (D. C.) 223); Ludington Novelty Co. *v.* Leonard, 119 Fed. 937 [*affirmed* in 127 Fed. 155, 62 C. C. A. 269]; Tetlow *v.* Tappan, 85 Fed. 774; J. & P. Baltz Brewing Co. *v.* Kaiserbrauerei, 74 Fed. 222, 20 C. C. A. 402; Royal Baking Powder Co. *v.* Raymond, 70 Fed. 376; N. K. Fairbank Co. *v.* Central Lard Co., 64 Fed. 133; Improved Fig Syrup Co. *v.* California Fig Syrup Co., 54 Fed. 175, 4 C. C. A. 264; Alleghany Fertilizer Co. *v.* Woodside, 1 Fed. Cas. No. 206, 1 Hughes 115 ("Eureka," as applied to fertilizers); Morrison *v.* Case, 17 Fed. Cas. No. 9,845, 9 Blatchf. 548, 2 Off. Gaz. 544 ("Star," as applied to shirts); Roberts *v.* Sheldon, 20 Fed. Cas. No. 11,916, 8 Biss. 398, 18 Off. Gaz. 1277 ("Parabola," used as the name of needles); Roberts *v.* Sheldon, *supra* ("Cream," as applied to baking powder); *In re* Glines, 8 Off. Gaz. 435; Wellcome *v.* Thompson, [1904] 1 Ch. 736, 73 L. J. Ch. 474, 91 L. T. Rep. N. S. 58, 20 T. L. R. 415, 52 Wkly. Rep. 581 ("Tabloid," as applied to medicines); *In re* Densham, [1895] 2 Ch. 176, 64 L. J. Ch. 634, 72 L. T. Rep. N. S. 614, 12 Reports 283, 43 Wkly. Rep. 515; *In re* Trade Mark Alpine, 29 Ch. D. 877, 54 L. J. Ch. 727, 53 L. T. Rep. N. S. 79, 33 Wkly. Rep. 725 ("Alpine," as applied to hats); Bodega Co. *v.* Owens, L. R. 23 Ir. 371 ("Bodega," as applied to wines and liquors); Braham *v.* Bustard, 1 Hem. & M. 447, 9 L. T. Rep. N. S. 199, 11 Wkly. Rep. 1061, 71 Eng. Reprint 195 ("Excelsior"); Partlo *v.* Todd, 17 Can. Sup. Ct. 196 [*affirming* 12 Ont. 171 (*affirming* 14 Ont. App. 444)] ("Gold Leaf," as applied to flour); Davis *v.* Kennedy, 13 Grant Ch. (U. C.) 523 ("Painkiller," as applied to a medicine); Standard Sanitary Mfg. Co. *v.* Standard Ideal Co., 37 Quebec Super. Ct. 33 ("Standard").

57. *Alabama.*— Scott *v.* Standard Oil Co., 106 Ala. 475, 19 So. 71, 31 L. R. A. 374, "Fireproof Oil."

California.— Burke *v.* Cassin, 45 Cal. 467, 13 Am. Rep. 204.

Connecticut.— Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 70 Conn. 516, 40 Atl. 534.

District of Columbia.— *In re* Central Consumers Co., 32 App. Cas. 523; U. S. Playing Card Co. *v.* C. M. Clark Pub. Co., 30 App. Cas. 208 ("Stage cards," as applied to playing cards, the face cards of which are pictures of actors and actresses); *In re* American Circular Loom Co., 28 App. Cas. 446; U. S. *v.* Duell, 17 App. Cas. 471.

Illinois.— Elgin Butter Co. *v.* Elgin Creamery Co., 155 Ill. 127, 40 N. E. 616 [*affirming* 51 Ill. App. 231]; Bolander *v.* Peterson, 136 Ill. 215, 26 N. E. 603, 11 L. R. A. 350 [*affirming* 35 Ill. App. 551]; Candee *v.* Deere, 54 Ill. 439, 5 Am. Rep. 125.

Kentucky.— Avery *v.* Meikle, 81 Ky. 73, 4 Ky. L. Rep. 759.

Maine.— W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 100 Me. 461, 62 Atl. 499, 4 L. R. A. N. S. 960.

Massachusetts.— Regis *v.* Jaynes, 185 Mass. 458, 70 N. E. 480; Burt *v.* Tucker, 178 Mass. 493, 59 N. E. 1111, 86 Am. St. Rep. 499, 52 L. R. A. 112; Frank *v.* Sleeper, 150 Mass. 583, 23 N. E. 213 [*distinguishing* Hoxie *v.* Chaney, 143 Mass. 592, 10 N. E. 713, 58 Am. Rep. 149]; Lawrence Mfg. Co. *v.* Lowell Hosiery Mills, 129 Mass. 325, 37 Am. Rep. 362.

Missouri.— Nicholson *v.* Wm. A. Stickney Cigar Co., 158 Mo. 158, 59 S. W. 121; Trask Fish Co. *v.* Wooster, 28 Mo. App. 408.

New Jersey.— Medlar, etc., Shoe Co. *v.* Delsarte Mfg. Co., (Ch. 1900) 46 Atl. 1089 [*affirmed* in 68 N. J. Eq. 706, 61 Atl. 410], "Delsarte," as applied to shoes.

New York.— Barrett Chemical Co. *v.* Stern, 176 N. Y. 27, 68 N. E. 65, 13 N. Y. Annot. Cas. 430; Cooke, etc., Co. *v.* Miller, 169 N. Y. 475, 62 N. E. 582 [*affirming* 53 N. Y. App. Div. 120, 65 N. Y. Suppl. 730]; Tischer *v.* Blank, 138 N. Y. 244, 33 N. E. 1040; Waterman *v.* Shipman, 130 N. Y. 301, 29 N. E. 111 [*reversing* 8 N. Y. Suppl. 814]; Merry *v.* Hoopes, 111 N. Y. 415, 18 N. E. 714; Selchow *v.* Baker, 93 N. Y. 59, 45 Am. Rep. 169; Caswell *v.* Davis, 58 N. Y. 223, 17 Am. Rep. 233; Smith *v.* Sixbury, 25 Hun 232; Gillott *v.* Esterbrook, 47 Barb. 455 [*affirmed* in 48 N. Y. 374, 8 Am. Rep. 553]; Stokes *v.* Landgraff, 17 Barb. 608; Godillot *v.* Hazard, 44 N. Y. Super. Ct. 427 [*affirmed* in 81 N. Y. 263]; Corwin *v.* Daly, 7 Bosw. 222; Amoskeag Mfg. Co. *v.* Spear, 2 Sandf. 599; Town *v.* Stetson, 3 Daly 53, 5 Abb. Pr. N. S. 218; Clinton Metalic Paint Co. *v.* New York Metalic Paint Co., 23 Misc. 66, 50 N. Y. Suppl. 437; Cahn *v.* Hoffman House, 7 Misc. 461, 28 N. Y. Suppl. 388; New York Asbestos Mfg. Co. *v.* New York Fireproof Covering Co., 62 N. Y. Suppl. 339; Keasbey *v.* Brooklyn Chemical Works, 21 N. Y. Suppl. 696 [*reversed* on other grounds in 142 N. Y. 467, 37 N. E. 476, 40 Am. St. Rep. 623]; Bininger *v.* Wattles, 28 How. Pr. 206.

words merely descriptive of the ingredients of which the article is composed, or of its mode of composition, do not constitute a valid trade-mark.[58] Words or

Ohio.— Feder *v.* Brundo, 8 Ohio S. & C. Pl. Dec. 179, 5 Ohio N. P. 275.

Pennsylvania.— Phalon *v.* Wright, 5 Phila. 464.

Wisconsin.— Avenarius *v.* Kornely, 139 Wis. 247, 121 N. W. 336; Oppermann *v.* Waterman, 94 Wis. 583, 69 N. W. 569; Listman Mill Co. *v.* William Listman Milling Co., 88 Wis. 334, 60 N. W. 261, 43 Am. St. Rep. 907.

United States.— Columbia Mill Co. *v.* Alcorn, 150 U. S. 460, 14 S. Ct. 151, 37 L. ed. 1144; Brown Chemical Co. *v.* Meyer, 139 U. S. 540, 11 S. Ct. 625, 35 L. ed. 247; Lawrence Mfg. Co. *v.* Tennessee Mfg. Co., 138 U. S. 537, 11 S. Ct. 396, 34 L. ed. 997; Corbin *v.* Gould, 133 U. S. 308, 10 S. Ct. 312, 33 L. ed. 611; Goodyear's India Rubber Glove Mfg. Co. *v.* Goodyear Rubber Co., 128 U. S. 598, 9 S. Ct. 166, 32 L. ed. 535; Amoskeag Mfg. Co. *v.* Trainer, 101 U. S. 51, 25 L. ed. 993; Delaware, etc., Canal Co. *v.* Clark, 13 Wall. 311, 20 L. ed. 581; Capewell Horse Nail Co. *v.* Mooney, 167 Fed. 575 [*affirmed* in 172 Fed. 826, 97 C. C. A. 248]; Devlin *v.* McLeod, 135 Fed. 164; Computing Scale Co. *v.* Standard Computing Scale Co., 118 Fed. 965, 55 C. C. A. 459; Draper *v.* Skerrett, 116 Fed. 206; Sterling Remedy Co. *v.* Spermine Medical Co., 112 Fed. 1000, 50 C. C. A. 657; Shaver *v.* Heller, etc., Co., 108 Fed. 821, 48 C. C. A. 48, 65 L. R. A. 878 [*affirming* 102 Fed. 882]; Brennan *v.* Emery-Bird-Thayer Dry Goods Co., 99 Fed. 971 [*affirming* 108 Fed. 624]; Dennison Mfg. Co. *v.* Thomas Mfg. Co., 94 Fed. 651; Lamont *v.* Leedy, 88 Fed. 72; Von Mumm *v.* Wittemann, 85 Fed. 966; Raymond *v.* Royal Baking-Powder Co., 85 Fed. 231, 29 C. C. A. 245; Beadleston *v.* Cooke Brewing Co., 74 Fed. 229, 20 C. C. A. 405; Bennett *v.* McKinley, 65 Fed. 505, 13 C. C. A. 25; Jaros Hygienic Underwear Co. *v.* Fleece Hygienic Underwear Co., 65 Fed. 424; N. K. Fairbank Co. *v.* Central Lard Co., 64 Fed. 133; Indurated Fibre Co. *v.* Amoskeag Indurated Fibre Ware Co., 37 Fed. 695; Rumford Chemical Works *v.* Muth, 35 Fed. 524, 1 L. R. A. 44; Colgan *v.* Danheiser, 35 Fed. 150; Humphreys' Specific Homeopathic Medicine Co. *v.* Wenz, 14 Fed. 250; Ginter *v.* Kinney Tobacco Co., 12 Fed. 782; Roberts *v.* Sheldon, 20 Fed. Cas. No. 11,916, 8 Biss. 398, 18 Off. Gaz. 1277 ("Best," "Extra," "Superfine"); *Ex p.* Kipling, 24 Off. Gaz. 899; *Ex p.* Strasburger, 20 Off. Gaz. 155; *In re* Eagle Pencil Co., 10 Off. Gaz. 981. See J. & P. Baltz Brewing Co. *v.* Kaiserbrauerei, 74 Fed. 222, 20 C. C. A. 402. See also Stachelberg *v.* Ponce, 128 U. S. 686, 9 S. Ct. 200, 32 L. ed. 569. But see Russia Cement Co. *v.* Katzenstein, 109 Fed. 314.

England.— *In re* Uneeda Trade-Mark, [1902] 1 Ch. 783, 71 L. J. Ch. 353, 86 L. T. Rep. N. S. 439, 18 T. L. R. 453, 50 Wkly. Rep. 467; *In re* Magnolia Metal Co., [1897] 2 Ch. 371, 66 L. J. Ch. 598, 76 L. T. Rep. N. S. 672; *In re* Farbenfabriken, [1894] 1 Ch. 645, 63 L. J. Ch. 257, 70 L. T. Rep. N. S. 186, 7 Reports 439, 42 Wkly. Rep. 488; *In re* Meyerstein, 43 Ch. D. 604, 59 L. J. Ch. 401, 62 L. T. Rep. N. S. 526, 38 Wkly. Rep. 440; *In re* Brandreth, 9 Ch. D. 618, 47 L. J. Ch. 816, 27 Wkly. Rep. 281; Raggett *v.* Findlater, L. R. 17 Eq. 29, 43 L. J. Ch. 64, 29 L. T. Rep. N. S. 448, 22 Wkly. Rep. 53; Perry *v.* Truefelt, 6 Beav. 66, 49 Eng. Reprint 749; Burgess *v.* Burgess, 3 De G. M. & G. 896, 17 Jur. 292, 22 L. J. Ch. 675, 52 Eng. Ch. 696, 43 Eng. Reprint 351. See *In re* Leonard, 26 Ch. D. 288, 53 L. J. Ch. 603, 51 L. T. Rep. N. S. 35. See also *In re* Horsburgh, 53 L. J. Ch. 237 note, 50 L. T. Rep. N. S. 23 note, 32 Wkly. Rep. 530 note.

Canada.— Partlo *v.* Todd, 17 Can. Sup. Ct. 196; Gorham Mfg. Co. *v.* Ellis, 8 Can. Exch. 401 (sterling silver "hall-mark" not a trade-mark); Gillett *v.* Lumsden, 4 Ont. L. Rep. 300; Provident Chemical Works *v.* Canada Chemical Mfg. Co., 2 Ont. L. Rep. 182.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," §§ 6, 7.

The word "Club," as applied to whisky, has been deemed descriptive of quality. Kentucky Distilleries, etc., Co. *v.* Old Lexington Club Distilling Co., 31 App. Cas. (D. C.) 223. But a contrary view has been also taken. Heublein *v.* Adams, 125 Fed. 782.

Use of different trade-marks for different grades does not make them invalid. Capewell Horse Nail Co. *v.* Mooney, 167 Fed. 575 [*affirmed* in 172 Fed. 826, 97 C. C. A. 248]. In Ransome *v.* Graham, 51 L. J. Ch. 897, 47 L. T. Rep. N. S. 218, it was held that where a manufacturer places on his goods a series of combinations of letters as trade-marks, each of which serves to indicate to purchasers, first, that the goods are manufactured by the person using the mark, and second, the quality of the goods as compared with the goods respectively bearing the other marks in the series, the marks, being exclusively used by the manufacturer, are valid trade-marks, notwithstanding they are indicative of the quality of the goods to which they are applied. It is proper to register a series of marks which differ from each other only by combining in different modes a mark common to them all and peculiar to the trader, with words merely indicative of the quality of the goods marked, or symbols common to the trade. *In re* Barrows, 5 Ch. D. 353, 46 L. J. Ch. 450, 36 L. T. Rep. N. S. 291, 25 Wkly. Rep. 407.

58. *California.*— Schmidt *v.* Brieg, 100 Cal. 672, 35 Pac. 623, 22 L. R. A. 790, "Sarsaparilla and Iron."

Connecticut.— Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 70 Conn. 516, 40 Atl. 534.

District of Columbia.— Johnson *v.* Brandau, 32 App. Cas. 348; *In re* American Circular Loom Co., 28 App. Cas. 450, "circular loom," as applied to goods made on a circular loom.

Illinois.— Bolander *v.* Peterson, 136 Ill. 215,

marks merely indicating superior excellence, popularity, or universality in use, such as "best," "standard," "favorite," etc., cannot be exclusively appropriated as a trade-mark.[59] Words describing the purpose or use to which the article is

26 N. E. 603, 11 L. R. A. 350 [*affirming* 35 Ill. App. 551].

Maine.— W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 100 Me. 461, 62 Atl. 499, 4 L. R. A. N. S. 960.

Minnesota.— J. R. Watkins Medical Co. *v.* Sands, 83 Minn. 326, 86 N. W. 340, "Vegetable Anodyne Liniment."

New York.— Koehler *v.* Sanders, 122 N. Y. 65, 25 N. E. 235, 9 L. R. A. 576 [*affirming* 48 Hun 48]; Van Beil *v.* Prescott, 82 N. Y. 630; Caswell *v.* Davis, 58 N. Y. 223, 17 Am. Rep. 233 ("Ferro-Phosphor-Elixir of Calisaya Bark"); Electro-Silicon Co. *v.* Hazard, 29 Hun 369; Clinton Metalic Paint Co. *v.* New York Metalic Paint Co., 23 Misc. 66, 50 N. Y. Suppl. 437 ("Clinton Hematic Red," and "Metalic Clinton Paint," as applied to paints). *Compare* Keasbey *v.* Brooklyn Chemical Works, 142 N. Y. 467, 37 N. E. 476, 40 Am. St. Rep. 623, wherein "Bromo-Caffeine" was sustained as non-descriptive, and Rawlinson *v.* Brainard, etc., Co., 28 Misc. 287, 59 N. Y. Suppl. 880, wherein "Filo-Floss" was sustained as applied to silk floss.

Ohio.— Feder *v.* Brundo, 8 Ohio S. & C. Pl. Dec. 179, 5 Ohio N. P. 275.

United States.— Brown Chemical Co. *v.* Meyer, 139 U. S. 540, 11 S. Ct. 625, 35 L. ed. 247; William Wrigley, Jr., Co. *v.* Grove Co., 161 Fed. 885 ("Spearmint," as applied to chewing gum); Standard Varnish Works *v.* Fisher, 153 Fed. 928 ("Turpentine Shellac"); American Brewing Co. *v.* Bienville Brewery, 153 Fed. 615 ("Bohemian," as applied to beer, indicating kind of hops used); M. J. Breitenbach Co. *v.* Spangenberg, 131 Fed. 160; Brennan *v.* Emery-Bird-Thayer Dry Goods Co., 108 Fed. 624, 47 C. C. A. 532; American Washboard Co. *v.* Saginaw Mfg. Co., 103 Fed. 281, 43 C. C. A. 233, 50 L. R. A. 609; Dennison Mfg. Co. *v.* Thomas Mfg. Co., 94 Fed. 651; California Fig Syrup Co. *v.* Stearns, 67 Fed. 1008; Indurated Fibre Co. *v.* Amoskeag Indurated Fibre Ware Co., 37 Fed. 695; Brown Chemical Co. *v.* Myer, 31 Fed. 453; Ginter *v.* Kinney Tobacco Co., 12 Fed. 782; Alleghany Fertilizer Co. *v.* Woodside, 1 Fed. Cas. No. 206, 1 Hughes 115. *Compare* Improved Fig Syrup Co. *v.* California Fig Syrup Co., 54 Fed. 175, 4 C. C. A. 264.

England.— *In re* Hudson, 32 Ch. D. 311, 55 L. J. Ch. 531, 55 L. T. Rep. N. S. 228, 34 Wkly. Rep. 616; Burgess *v.* Burgess, 3 De G. M. & G. 896, 17 Jur. 292, 22 L. J. Ch. 675, 52 Eng. Ch. 696, 43 Eng. Reprint 351 ("Essence of Anchovies," as applied to a fish sauce); Fels *v.* Hedley, 20 T. L. R. 69 ("Naphtha" soap).

Canada.— Provident Chemical Works *v.* Canada Chemical Mfg. Co., 2 Ont. L. Rep. 182; Asbestos, etc., Co. *v.* William Sclater Co., 10 Quebec Q. B. 165 [*affirming* 18 Quebec Super. Ct. 360] ("Asbestic wall paper").

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 6.

Names compounded from the names of ingredients are not valid trade-marks. Caswell *v.* Davis, 58 N. Y. 223, 17 Am. Rep. 233; Hegeman *v.* Hegeman, 8 Daly (N. Y.) 1; Ayer *v.* Rushton, 7 Daly (N. Y.) 9; Helmbold *v.* Henry T. Helmbold Mfg. Co., 53 How. Pr. (N. Y.) 453; Brown Chemical Co. *v.* Meyer, 139 U. S. 540, 11 S. Ct. 625, 35 L. ed. 247 [*affirming* 31 Fed. 453]; Searle, etc., Co. *v.* Warner, 112 Fed. 674, 50 C. C. A. 321 [*affirmed* in 191 U. S. 195, 24 S. Ct. 79, 48 L. ed. 145]; Sterling Remedy Co. *v.* Gorey, 110 Fed. 372; California Fig-Syrup Co. *v.* Stearns, 73 Fed. 812, 20 C. C. A. 22, 33 L. R. A. 56; Brown Chemical Co. *v.* Stearns, 37 Fed. 360; Rumford Chemical Works *v.* Muth, 35 Fed. 524, 1 L. R. A. 44; Carbolic Soap Co. *v.* Thompson, 25 Fed. 625. But see Keasbey *v.* Brooklyn Chemical Works, 142 N. Y. 467, 37 N. E. 476, 40 Am. St. Rep. 623 [*reversing* 21 N. Y. Suppl. 696], "Bromo-Caffeine."

Compound names merely suggestive of ingredients have been upheld as valid trade-marks. Keasbey *v.* Brooklyn Chemical Works, 142 N. Y. 467, 37 N. E. 476, 40 Am. St. Rep. 623 [*reversing* 21 N. Y. Suppl. 696] ("Bromo-Caffeine"); Burnett *v.* Phalon, 9 Bosw. (N. Y.) 193 [*affirmed* in 1 Abb. Dec. 267, 3 Keyes 594, 3 Transcr. App. 167, 5 Abb. Pr. N. S. 212]; M. J. Breitenbach Co. *v.* Spangenberg, 131 Fed. 160 ("Pepto-Mangan," as applied to a medicine); American Grocery Co. *v.* Sloan, 68 Fed. 539; Battle *v.* Finlay, 45 Fed. 796 ("Bromidia"). See Lockwood *v.* Bostwick, 2 Daly (N. Y.) 521.

"Electro-Silicon."— In Electro-Silicon Co. *v.* Levy, 59 How. Pr. (N. Y.) 469, the court said: "The plaintiff can have no exclusive right to the use of the word 'silicon,' which is one in common use, and is reasonably, in so far as the substance of this powder is concerned, descriptive." But the combination "Electro-Silicon" as applied to a polishing powder was held by the same court to be valid in Electro-Silicon Co. *v.* Trask, 59 How. Pr. (N. Y.) 189, and the subsequent case of Electro-Silicon Co. *v.* Hazard, 29 Hun (N. Y.) 369.

59. Worster Brewing Corp. *v.* Rueter, 30 App. Cas. (D. C.) 428 ("Sterling," as applied to any kind of goods); *In re* National Phonograph Co., 29 App. Cas. (D. C.) 142 ("standard," as applied to phonographs); Cooke, etc., Co. *v.* Miller, 169 N. Y. 475, 62 N. E. 582 [*affirming* 53 N. Y. App. Div. 120, 65 N. Y. Suppl. 730] ("The Improved, Best, Favorite Cheapest Letter and Invoice File"); Taylor *v.* Gillies, 59 N. Y. 331, 17 Am. Rep. 333 ("Gold Medal"); Gillott *v.* Esterbrook, 48 N. Y. 374, 8 Am. Rep. 553; Babbitt *v.* Brown, 68 Hun (N. Y.) 515, 23 N. Y. Suppl. 25; Amoskeag Mfg. Co. *v.* Spear, 2 Sandf. (N. Y.) 599; Lowe Bros. Co. *v.* Toledo Var-

to be put cannot be appropriated as a trade-mark.[60] The same rule applies to words descriptive of the effect produced by the use of the goods.[61] A picture

nish Co., 168 Fed. 627, 94 C. C. A. 83 ("High Standard"); Worcester Brewing Corp. *v.* Rueter, 157 Fed. 217, 84 C. C. A. 665 ("Sterling"); Proctor, etc., Co. *v.* Globe Refining Co., 92 Fed. 357, 34 C. C. A. 405; *In re* Van Duzer, 34 Ch. D. 623, 56 L. J. Ch. 370, 56 L. T. Rep. N. S. 286, 35 Wkly. Rep. 294. See also Lichtenstein *v.* Mellis, 8 Oreg. 464, 34 Am. Rep. 592; Beard *v.* Turner, 13 L. T. Rep. N. S. 746.

"First Quality," "Superfine."— In Amoskeag Mfg. Co. *v.* Spear, 2 Sandf. (N. Y.) 599, 616, Duer, J., said: "As the plaintiffs could not have acquired by their prior occupation, an exclusive right in the use of the words 'First Quality' or 'Superfine,' they cannot have acquired a right by similar means to an exclusive use of any letters, marks, or other signs, which are merely a substitute for the words, and intended to convey the same meaning." See *In re* Barrows, 5 Ch. D. 353, 46 L. J. Ch. 450, 36 L. T. Rep. N. S. 291, 25 Wkly. Rep. 407.

"Trademark Best Soap."— There can be no trade-mark in the words "Trademark Best Soap." Babbitt *v.* Brown, 68 Hun (N. Y.) 515, 23 N. Y. Suppl. 25. *Compare* Mrs. G. B. Miller & Co. Tobacco Manufactory *v.* Commerce, 45 N. J. L. 18, 46 Am. Rep. 750.

"La Favorita," as applied to flour, is a fancy name in a foreign language and is a valid trade-mark. Menendez *v.* Holt, 128 U. S. 514, 9 S. Ct. 143, 32 L. ed. 526.

"Ideal."— In Waterman *v.* Shipman, 130 N. Y. 301, 29 N. E. 111 [*reversing* 8 N. Y. Suppl. 814], the court held that the word "Ideal" as applied to fountain pens was not generic or descriptive of the article, its qualities, ingredients, grade, or characteristics, but was an arbitrary or fanciful name, and therefore a valid trade-mark. This case was *distinguished* in Cooke, etc., Co. *v.* Miller, 169 N. Y. 475, 62 N. E. 582, holding that the word "Favorite" is not a valid trade-mark.

The words "Imperial" and "Royal" may import quality and may be so used, but they do not necessarily do so, and if not so used they may constitute valid trade-marks. Raymond *v.* Royal Baking-Powder Co., 85 Fed. 231, 236, 29 C. C. A. 245, holding "Royal" non-descriptive as applied to baking powder. *Compare* Royal Baking Powder Co. *v.* Shirrell, 93 N. Y. 331, 45 Am. Rep. 229 [*reversing* 59 How. Pr. 17] (holding "Royal" descriptive of quality as applied to flavoring extracts); Beadleston *v.* Cooke Brewing Co., 74 Fed. 229, 20 C. C. A. 405 (holding "Imperial" to be descriptive as applied to beer).

Other like words have been held to be non-descriptive, and upheld as valid trade-marks. Kyle *v.* Perfection Mattress Co., 127 Ala. 39, 28 So. 545, 85 Am. St. Rep. 78, 50 L. R. A. 628 ("Perfection," as applied to mattresses); Hier *v.* Abrahams, 82 N. Y. 519, 37 Am. Rep. 589 ("Pride," as applied to cigars); Thomas G. Plant Co. *v.* May Co., 105 Fed. 375, 44 C. C. A. 534 ("Queen Quality," as applied to shoes); Sarrazin *v.* W. R. Irby Cigar, etc., Co., 93 Fed. 624, 35 C. C. A. 496, 46 L. R. A. 541 ("King Bee," as applied to smoking tobacco); J. & P. Blatz Brewing Co. *v.* Kaiserbrauerei, 74 Fed. 222, 20 C. C. A. 402 ("Kaiser," as applied to beer).

60. *California.*— Spieker *v.* Lash, 102 Cal. 38, 36 Pac. 362; Falkinburg *v.* Lucy, 35 Cal. 52, 95 Am. Dec. 76.

Indiana.— Computing Cheese Cutter Co. *v.* Dunn, (App. 1909) 88 N. E. 93, "Cheese cutter."

Massachusetts.— Gilman *v.* Hunnewell, 122 Mass. 139.

New York.— Barrett Chemical Co. *v.* Stern, 176 N. Y. 27, 68 N. E. 65, 13 N. Y. Annot Cas. 430 ("Roachsault," as applied to roach poison); Hegeman *v.* Hegeman, 8 Daly 1; Ayer *v.* Rushton, 7 Daly 9. *Compare* Barrett Chemical Co. *v.* Stern, 56 N. Y. App. Div. 143, 67 N. Y. Suppl. 595.

Tennessee.— C. F. Simmons Medicine Co. *v.* Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165.

Wisconsin.— Gessler *v.* Grieb, 80 Wis. 21, 48 N. W. 1098, 27 Am. St. Rep. 20.

United States.— Computing Scale Co. *v.* Standard Computing Scale Co., 118 Fed. 965, 55 C. C. A. 459; Air-Brush Mfg. Co. *v.* Thayer, 84 Fed. 640; L. H. Harris Drug Co. *v.* Stucky, 46 Fed. 624; Clotworthy *v.* Schepp, 42 Fed. 62 ("Puddine," "Rose," and "Vanilla," applied with reference to uncooked ingredients for pudding); Humphreys' Specific Homeopathic Medicine Co. *v.* Wenz, 14 Fed. 250; *In re* Roach, 10 Off. Gaz. 333; *In re* Lawrence, 10 Off. Gaz. 163. But see Stoughton *v.* Woodard, 39 Fed. 902.

England.— *In re* Van Duzer, 34 Ch. D. 623, 56 L. J. Ch. 370, 56 L. T. Rep. N. S. 286, 35 Wkly. Rep. 294.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," §§ 4–7.

61. *California.*— Spieker *v.* Lash, 102 Cal. 38, 36 Pac. 362, "Kidney and Liver Bitters."

Illinois.— Ball *v.* Siegel, 116 Ill. 137, 4 N. E. 667, 56 Am. Rep. 766, "Health Producing Corsets."

Louisiana.— Insurance Oil Tank Co. *v.* Scott, 33 La. Ann. 946, 951, 39 Am. Rep. 286, "Nourishing," as applied to a beverage.

Ohio.— Drake Medicine Co. *v.* Glessner, 68 Ohio St. 337, 67 N. E. 722, "Cramp Remedy."

Tennessee.— C. F. Simmons Medicine Co. *v.* Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165, "Liver Medicine."

Texas.— Alff *v.* Radam, 77 Tex. 530, 14 S. W. 164, 19 Am. St. Rep. 792, 9 L. R. A. 145, "Micobe Killer." See also Radam *v.* Capital Microbe Destroyer Co., 81 Tex. 122, 16 S. W. 990, 26 Am. St. Rep. 783, "Microbe Killer."

Wisconsin.— Gessler *v.* Grieb, 80 Wis. 21, 48 N. W. 1098, 27 Am. St. Rep. 20, "Headache Wafers."

or drawing of the article itself is descriptive of that article and therefore not a valid trade-mark, but a mere association of ideas suggested by the picture and the article would probably not be sufficient to invalidate the trade-mark.[62] A description of the package in which the goods are sold is not a valid trade-mark.[63] Names which merely to some extent suggest the character, quality, or ingredients of an article, or some supposed advantage to be derived from using it, or some effect to be produced by its use, or the locality of its origin, have been ordinarily upheld as valid trade-marks.[64]

United States.— Devlin *v.* McLeod, 135 Fed. 164 ("Toothache Gum"); Marvel Co. *v.* Pearl, 133 Fed. 160, 66 C. C. A. 226 ("Whirling Spray" held descriptive of mode of operation of a syringe); Bickmore Gall Cure Co. *v.* Karns Mfg. Co., 126 Fed. 573 [*reversed* on the facts in 134 Fed. 833, 67 C. C. A. 439] ("Gall Cure," as applied to a horse remedy); L. H. Harris Drug Co. *v.* Stucky, 46 Fed. 624 ("Cramp Cure"); *In re* Johnson, 2 Off. Gaz. 315 ("Parson's Purgative Pills, P. P. P.," and "Johnson's American Anodyne Liniment, Established A. D. 1810").

England.— Davis *v.* Harbord, 15 App. Cas. 316, 60 L. J. Ch. 16, 63 L. T. Rep. N. S. 389 ("Pain Killer," as applied to a medicine. But see *contra,* Davis *v.* Kendall, 2 R. I. 566; Davis *v.* Kennedy, 13 Grant Ch. (U. C.) 523); Raggett *v.* Findlater, L. R. 17 Eq. 29, 43 L. J. Ch. 64, 29 L. T. Rep. N. S. 448, 22 Wkly. Rep. 53 ("Nourishing Stout").

Comfort or advantage.—If a word or phrase suggests that the purchaser of goods will find them comforting or advantageous, it cannot be registered as "having no reference to the character or quality of the goods." *In re* Uneeda Trade-Mark, [1902] 1 Ch. 783, 71 L. J. Ch. 353, 86 L. T. Rep. N. S. 439, 18 T. L. R. 453, 50 Wkly. Rep. 467.

62. See cases cited *infra,* this note.

Picture or drawing of article to which applied.— In *In re* James, 33 Ch. D. 392, 396, 55 L. J. Ch. 915, 55 L. T. Rep. N. S. 415, 35 Wkly. Rep. 67 [*reversing* 31 Ch. D. 340, 55 L. J. Ch. 214, 54 L. T. Rep. N. S. 125, 34 Wkly. Rep. 347], a black dome as a trade-mark for black lead was sustained. (Note the distinction taken between the American and English cases.) Lindley, L. J., said: "As regards the American decisions, I quite concur in the observations made by Lord Justice Cotton. I cannot see why, according to English law, a fish should not be a distinctive mark of a fishing-line, though I can understand that a picture of a fish may not be a distinctive mark of that particular kind of fish. Why a pig should not be, according to English law, a distinctive mark for lard, or something made out of a pig, I do not know. Supposing you tanned pig-skin into leather, I do not know why a pig should not be a good trade-mark for tanned pig's hide." The court in this case overruled the decision below by Pearson, J., in which he said: "Curiously enough, though it has not arisen here, the question has been several times before the American Courts, whether a man can have as a trade-mark a drawing of the article sold, and they have decided that he cannot, because it is the common property of all the world." See *In re* James, 31 Ch. D. 340, 344. A fish is not a valid trade-mark for fishing-lines, because descriptive. Delaware, etc., Canal Co. *v.* Clark, 13 Wall. (U. S.) 311, 20 L. ed. 581 (is cited as conclusive); *In re* Pratt, 10 Off. Gaz. 866. A picture of a book is not a valid trade-mark for a publisher of books. Merriam *v.* Famous Shoe, etc., Co., 47 Fed. 411. A "representation of a barrel consisting of light and dark wood, the staves being alternately composed of each color," cannot be registered as a trade-mark for flour packed in barrels similar to that represented in the picture, because in each application it is descriptive, not, indeed, of the quality of the flour itself separated from its package, and, therefore, not in marketable form, but of the marketable commodity, the barrel of flour. But when applied to sacks of flour, or to barrels of flour having staves all of one color, it is an arbitrary symbol and is registrable as a trade-mark. *Ex p.* Halliday, 16 Off. Gaz. 500. In L. H. Harris Drug Co. *v.* Stucky, 46 Fed. 624, where there was a picture of a boy suffering from cramps, with words "Cramp Cure," it was held that the picture constituted a valid trade-mark, but the words were descriptive. In Topham *v.* Cole, 66 N. Y. 69, 23 Am. Rep. 22, it was questioned whether a picture of a pig could be a good trade-mark for lard, but it was held that, in any event, such trade-mark was not infringed by a different picture, although also of a pig.

63. Fischer *v.* Blank, 138 N. Y. 244, 33 N. E. 1040, "Black Package Tea."

64. *Connecticut.*— Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 70 Conn. 516, 40 Atl. 534, 72 Conn. 646, 45 Atl. 957, "Hygeia," as applied to water products.

Louisiana.— Funke *v.* Dreyfus, 34 La. Ann. 80, 44 Am. Rep. 413; Insurance Oil Tank Co. *v.* Scott, 33 La. Ann. 946, 951, 39 Am. Rep. 286, "Insurance," as applied to illuminating oil.

New York.— Silchow *v.* Baker, 93 N. Y. 59, 45 Am. Rep. 169; Cohn *v.* Reynolds, 40 N. Y. App. Div. 619, 58 N. Y. Suppl. 1138 [*affirming* 26 Misc. 473, 57 N. Y. Suppl. 469]; Electro-Silicon Co. *v.* Hazard, 29 Hun 369; Stern *v.* Barrett Chemical Co., 29 Misc. 609, 61 N. Y. Suppl. 221 [*reversing* 28 Misc. 429, 58 N. Y. Suppl. 1129]; Rawlinson *v.* Brainard, etc., Co., 28 Misc. 287, 59 N. Y. Suppl. 880; Caswell *v.* Davis, 4 Abb. Pr. N. S. 6, 35 How. Pr. 76 [*affirmed* in 58 N. Y. 223, 17 Am. Rep. 233].

2. Arbitrary or Fanciful Words. Words or phrases which are used in a purely arbitrary or fanciful way as applied to the goods in question may constitute a valid technical trade-mark.[65] Indeed, it is essential that they be so used, for if

Pennsylvania.—Fulton *v.* Sellers, 4 Brewst. 42.

Rhode Island.—Davis *v.* Kendall, 2 R. I. 566.

United States.—Menendez *v.* Holt, 128 U. S. 514, 9 S. Ct. 143, 32 L. ed. 526; Consolidated Ice Co. *v.* Hygeia Distilled Water Co., 151 Fed. 10, 80 C. C. A. 506 [*affirming* 144 Fed. 139] ("Hygeia," as applied to distilled water, distinguished from "hygienic"); Globe-Wernicke Co. *v.* Brown, 121 Fed. 185; Pennsylvania Salt Mfg. Co. *v.* Myers, 79 Fed. 87; Royal Baking Powder Co. *v.* Raymond, 70 Fed. 376; American Fibre Chamois Co. *v.* De Lee, 67 Fed. 329; Frost *v.* Rindskopf, 42 Fed. 408; Hiram Holt Co. *v.* Wadsworth, 41 Fed. 34; Stoughton *v.* Woodard, 39 Fed. 902; *Ex p.* Heyman, 18 Off. Gaz. 922.

England.—*In re* Trade Mark Bovril, [1896] 2 Ch. 600, 65 L. J. Ch. 715, 74 L. T. Rep. N. S. 805, 45 Wkly. Rep. 150 ("Bovril," as applied to meat extracts); *In re* Densham, [1895] 2 Ch. 176, 64 L. J. Ch. 634, 72 L. T. Rep. N. S. 614, 12 Reports 283, 43 Wkly. Rep. 515; O'Rourke *v.* Central City Soap Co., Price & S. T. M. Cas. 1043.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," §§ 6, 7.

Aptitude alone no objection.—It is not necessary to the validity of a trade-mark or trade-name that it shall be utterly devoid of aptitude, but it is enough that it leaves open to every one all words that are really descriptive of quality or character. Hygeia Distilled Water Co. *v.* Consolidated Ice Co., 144 Fed. 139 [*affirmed* in 151 Fed. 10, 80 C. C. A. 506].

Suggestive trade-marks illustrated.—"Among the words or terms which it has been held may be so used and protected are 'Crystal' castor oil, 'Damascus blade' scythes, 'Gaslight' illuminating oil, 'German' soap, 'Water White' petroleum, 'Tip Top' agricultural implements. Brown, Trade-Marks, p. 717, index. Doubtless, these words convey some suggestion of the quality of the articles to which they were applied, and for that reason they were selected and used. But that did not make them words of description. An ordinary scythe is hardly described as a 'Damascus' blade, and yet the use of those words as toward a scythe, while deceiving no one, would probably indicate that the scythe was of good steel and temper, was a good and serviceable scythe." Cohn *v.* Reynolds, 26 Misc. (N. Y.) 473, 475, 57 N. Y. Suppl. 469 [*affirmed* in 40 N. Y. App. Div. 619, 58 N. Y. Suppl. 1138].

65. Waterman *v.* Shipman, 130 N. Y. 301, 29 N. E. 111; Selchow *v.* Baker, 93 N. Y. 59, 45 Am. Rep. 169; Falk *v.* American West Indies Trading Co., 71 N. Y. App. Div. 320, 75 N. Y. Suppl. 964; Schendel *v.* Silver, 63 Hun (N. Y.) 330, 18 N. Y. Suppl. 1; Dr. Dadirrian, etc., Co. *v.* Hauenstein, 37 Misc. (N. Y.) 23, 74 N. Y. Suppl. 709 [*affirmed* in 74 N. Y. App. Div. 630, 77 N. Y. Suppl. 1125 (*affirmed* in 175 N. Y. 522, 67 N. E. 1081)]; Feder *v.* Brundo, 8 Ohio S. & C. Pl. Dec. 179, 5 Ohio N. P. 275; Listman Mill Co. *v.* William Listman Milling Co., 88 Wis. 334, 60 N. W. 261, 43 Am. St. Rep. 907; Lever Bros. Boston Works *v.* Smith, 112 Fed. 998; Noel *v.* Ellis, 89 Fed. 978; Hutchinson *v.* Blumberg, 51 Fed. 829; Frost *v.* Rindskopf, 42 Fed. 408; Adams *v.* Heisel, 31 Fed. 279. See Medlar, etc., Shoe Co. *v.* Delsarte Mfg. Co., (N. J. Ch. 1900) 46 Atl. 1089 [*affirmed* in 68 N. J. Eq. 706, 61 Atl. 410].

Illustrations of arbitrary or fanciful words or phrases sustained as trade-marks.—"Alderney," as applied to oleomargarine. Lauferty *v.* Wheeler, 11 Abb. N. Cas. (N. Y.) 220, 63 How. Pr. 488. "Anchor," as applied to wire. Edelston *v.* Edelston, 1 De G. J. & S. 185, 9 Jur. N. S. 479, 7 L. T. Rep. N. S. 768, 11 Wkly. Rep. 328, 66 Eng. Ch. 142, 46 Eng. Reprint 72. "Balm of Thousand Flowers." Fetridge *v.* Merchant, 4 Abb. Pr. (N. Y.) 156. But see Fetridge *v.* Wells, 4 Abb. Pr. (N. Y.) 144, 13 How. Pr. 385. "Cashmere Bouquet," as applied to soap. Colgate *v.* Adams, 88 Fed. 899. "Charter Oak," as applied to stoves. Filley *v.* Fassett, 44 Mo. 168, 100 Am. Dec. 275. "Cough Cherries," as applied to a confection. Stoughton *v.* Woodard, 39 Fed. 902. "Elk," as applied to cigars. Lichtenstein *v.* Goldsmith, 37 Fed. 359. "Epicure," as applied to packed salmon. George *v.* Smith, 52 Fed. 830. "Eureka," as applied to fertilizers. Alleghany Fertilizer Co. *v.* Woodside, 1 Fed. Cas. No. 206, 1 Hughes 115. "Eureka," as applied to shirts. Ford *v.* Foster, L. R. 7 Ch. 611, 41 L. J. Ch. 682, 27 L. T. Rep. N. S. 219, 20 Wkly. Rep. 818. "Excelsior," as applied to manufactured articles of various kinds. Volger *v.* Force, 63 N. Y. App. Div. 122, 71 N. Y. Suppl. 209; Sheppard *v.* Stuart, 13 Phila. (Pa.) 117; Braham *v.* Bustard, 1 Hem. & M. 447, 9 L. T. Rep. N. S. 199, 11 Wkly. Rep. 1061, 71 Eng. Reprint 195. "Home," as applied to sewing machines. New Home Sewing Mach. Co. *v.* Bloomingdale, 59 Fed. 284. "Hoosier," as applied to grain drills. Julian *v.* Hoosier Drill Co., 78 Ind. 408. "Hunyadi," as applied to medicinal waters. Saxlehner *v.* Eisner, etc., Co., 179 U. S. 19, 21 S. Ct. 7, 45 L. ed. 60 [*reversing* 91 Fed. 536, 33 C. C. A. 291]. "Kaiser," as applied to beer. J. & P. Baltz Brewing Co. *v.* Kaiserbrauerei, 74 Fed. 222, 20 C. C. A. 402. "Knickerbocker," as applied to shoes. Burt *v.* Tucker, 178 Mass. 493, 59 N. E. 111, 86 Am. St. Rep. 499, 52 L. R. A. 112. "La Favorita," as applied to flour. Menendez *v.* Holt, 128 U. S. 514, 9 S. Ct. 143, 32 L. ed. 526; Holt *v.* Menendez, 23 Fed. 869. "Magnetic Balm," as applied to medicine. Smith *v.* Sixbury, 25 Hun (N. Y.) 232. "Nickel," as applied

they are merely descriptive they cannot constitute a trade-mark, because descriptive words cannot be exclusively appropriated.[66]

3. Numerals. Mere numerals arbitrarily used to indicate origin or ownership,[67] especially when used in combination with letters or other devices, or when printed in a special or distinctive form or color,[68] constitute valid trade-marks, even though they have acquired a secondary meaning indicative of grade or quality.[69] But numbers used primarily to indicate grade, class, or quality are

to the goods of a general merchant which are not as a rule sold for a nickel. Duke *v.* Cleaver, 19 Tex. Civ. App. 218, 46 S. W. 1128. "Nickel In," as applied to cigars. Schendel *v.* Silver, 63 Hun (N. Y.) 330, 18 N. Y. Suppl. 1. "Omega," as applied to oil. Omega Oil Co. *v.* Weschler, 35 Misc. (N. Y.) 441, 71 N. Y. Suppl. 983 [*affirmed* in 68 N. Y. App. Div. 638, 74 N. Y. Suppl. 1140]. "Parabola," as applied to needles. Roberts *v.* Sheldon, 20 Fed. Cas. No. 11,916, 8 Biss. 308. "Pittsburg Leader," as applied to cigars. Zeugschmidt *v.* Hantman, 28 Pittsb. Leg. J. N. S. (Pa.) 463. "Sliced Animals" and "Sliced Birds," as applied to a manufactured product. Selchow *v.* Baker, 93 N. Y. 59, 45 Am. Rep. 169. "Star," as applied to shirts. Hutchinson *v.* Blumberg, 51 Fed. 829. "Sunlight," as applied to soap. Lever *v.* Pasfield, 88 Fed. 484. "Swan Down," as applied to complexion powder. Tetlow *v.* Tappan, 85 Fed. 774. "Syrup of Figs," as applied to a medicine. Improved Fig Syrup Co. *v.* California Fig Syrup Co., 54 Fed. 175, 4 C. C. A. 264. "Tin Tag" or "Wood Tag" may constitute a valid trade-mark. Lorillard *v.* Pride, 28 Fed. 434. "Turin," "Sefton," "Leopold," or "Liverpool," as applied to cloth. Hirst *v.* Denham, L. R. 14 Eq. 542, 41 L. J. Ch. 752, 27 L. T. Rep. N. S. 56. "Vienna," as applied to bread. Fleischmann *v.* Schuckmann, 62 How. Pr. (N. Y.) 92. "Yankee," as applied to shaving-soap. Williams *v.* Adams, 29 Fed. Cas. No. 17,711, 8 Biss. 452.

Other illustrations of arbitrary, fanciful, and descriptive words and phrases have been given elsewhere. See *supra*, III, B, 1.

66. See *supra*, III, B, 1.

67. *Connecticut.*— Boardman *v.* Meriden Britannia Co., 35 Conn. 402, 95 Am. Dec. 270.

Massachusetts.— Lawrence Mfg. Co. *v.* Lowell Hosiery Mills, 129 Mass. 325, 37 Am. Rep. 362.

New York.— Gillott *v.* Esterbrook, 48 N. Y. 374, 8 Am. Rep. 553; India Rubber Co. *v.* Rubber Comb, etc., Co., 45 N. Y. Super. Ct. 258; Collins *v.* Reynolds Card Mfg. Co., 7 Abb. N. Cas. 17.

Rhode Island.—American Solid Leather Button Co. *v.* Anthony, 15 R. I. 338, 5 Atl. 626, 2 Am. St. Rep. 898.

United States.— Dennison Mfg. Co. *v.* Scharf Tag, etc., Co., 135 Fed. 625, 68 C. C. A. 263; Shaw Stocking Co. *v.* Mack, 12 Fed. 707, 21 Blatchf. 1; Kinney *v.* Allen, 14 Fed. Cas. No. 7,826, 1 Hughes 106; *Ex p.* Dawes, 1 Off. Gaz. 27.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 9.

Numbers already known to the trade and in use by others cannot be so appropriated. American Solid Leather Button Co. *v.* Anthony, 15 R. I. 338, 5 Atl. 626, 2 Am. St. Rep. 898.

68. Lawrence Mfg. Co. *v.* Lowell Hosiery Mills, 129 Mass. 325, 37 Am. Rep. 362; Gillott *v.* Esterbrook, 47 Barb. (N. Y.) 455 [*affirmed* in 48 N. Y. 374, 8 Am. Rep. 553]; Kinney *v.* Allen, 14 Fed. Cas. No. 7,826, 1 Hughes 106; Ransome *v.* Bentall, 3 L. J. Ch. 161.

The distinction between the English and American cases concerning numerals as trade-marks is not very decided. On the whole, the English courts may be said to be more cautious in allowing their use than the American. No case appears to be reported in which they have admitted a numeral standing alone to be a technical trade-mark, although they have upheld their validity when used in connection with other devices, and have interfered to prevent infringement on the ground of unfair competition. Ransome *v.* Bentall, 3 L. J. Ch. 161. In Carver *v.* Bowker, British and Foreign Journal of Commerce and Trade Marks 252, Cox Man. Trade Mark Cas. 581, plaintiff, a shipper of cotton goods, stamped them, among other things, with the numbers "109," "406," "409," etc., respectively. It was held by Little, V. C., that the number "109" was in common use and descriptive of quality, and that the other numbers, although not in common use, could not be exclusively appropriated.

Distinctive printing of descriptive numeral. —A trade-mark in the symbol "½," as ordinarily printed, cannot be acquired for cigarettes made of two kinds of tobacco, half and half; but when printed in a special and unusual manner, it may be registered as a trade-mark, and be protected so far as to enjoin an imitator from using it printed in the like manner. Kinney *v.* Allen, 14 Fed. Cas. No. 7,826, 1 Hughes 106.

69. India Rubber Co. *v.* Rubber Comb, etc., Co., 45 N. Y. Super. Ct. 258; American Solid Leather Button Co. *v.* Anthony, 15 R. I. 338, 2 Am. St. Rep. 898; Lawrence Mfg. Co. *v.* Tennessee Mfg. Co., 138 U. S. 537, 11 S. Ct. 396, 34 L. ed. 997 [*affirming* 31 Fed. 776]; Burton *v.* Stratton, 12 Fed. 696; Ransome *v.* Graham, 51 L. J. Ch. 897, 47 L. T. Rep. N. S. 218. See Gillott *v.* Esterbrook, 47 Barb. (N. Y.) 455 [*affirmed* in 48 N. Y. 374, 8 Am. Rep. 553].

Arbitrary numbers applied to different styles.— In American Solid Leather Button Co. *v.* Anthony, 15 R. I. 338, 339, the complainant, a manufacturer of buttons and

descriptive and cannot be made the subject of a trade-mark.[70] It is an ordinary and legitimate use to indicate grade, class, or quality by numerals, and all the world may do so.[71] Of course even numerals may not be used as a means of promoting unfair competition.[72]

4. Letters and Initials. Letters are valid trade-marks where arbitrarily used to indicate origin or ownership, but not when used to indicate grade or quality,[73] as that is a common and legitimate use of letters open to everyone.[74] Initials of

nails, distinguished certain styles which he made by certain numerals arbitrarily chosen. These were held to be valid trade-marks. The court, by Stiness, J., said: "A person may have different symbols for different grades of goods, which in the same way, will indicate both quality and origin with respect to the goods so marked. A manufacturer may adopt such symbols, not simply to mark a style or quality, but his style and his quality as well. He is entitled to have his style and his quality protected from misrepresentation, and to have the benefit of any favorable reputation they may have gained." See also Ransome *v.* Graham, 51 L. J. Ch. 897, 47 L. T. Rep. N. S. 218, where a similar ruling was made as to others.

70. *Illinois.*— Candee *v.* Deere, 54 Ill. 439, 5 Am. Rep. 125.

Kentucky.— Avery *v.* Meikle, 81 Ky. 73, 4 Ky. L. Rep. 759.

New Jersey.— Corbett Bros. Co. *v.* Reinhardt-Meding Co., (Ch. 1910) 76 Atl. 243.

New York.—Amoskeag Mfg. Co. *v.* Spear, 2 Sandf. 599. See Gillott *v.* Kettle, 3 Duer 624.

United States.—Amoskeag Mfg. Co. *v.* Trainer, 101 U. S. 51, 25 L. ed. 993; Wolf *v.* Hamilton-Brown Shoe Co., 165 Fed. 413, 91 C. C. A. 363; Dennison Mfg. Co. *v.* Scharf Tag, etc., Co., 135 Fed. 625, 68 C. C. A. 263; Vacuum Oil Co. *v.* Climax Refining Co., 120 Fed. 254, 56 C. C. A. 90; Smith, etc., Mfg. Co. *v.* Smith, 89 Fed. 486; Deering Harvester Co. *v.* Whitman, etc., Mfg. Co., 86 Fed. 764 [*affirmed* in 91 Fed. 376, 33 C. C. A. 558]; Humphreys Homeopathic Medicine Co. *v.* Hilton, 60 Fed. 756; Shaw Stocking Co. *v.* Mack, 12 Fed. 707; Kinney *v.* Allen, 14 Fed. Cas. No. 7,826, 1 Hughes 106. See Lawrence Mfg. Co. *v.* Tennessee Mfg. Co., 138 U. S. 537, 11 S. Ct. 396, 34 L. ed. 997.

Canada.— See Partlo *v.* Todd, 17 Can. Sup. Ct. 196.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 9.

"Numerals," when used as a short method of identifying the several members of a class, and distinguishing one of them from another, are, in substance and effect, descriptive terms — the number conveys to the reader details which otherwise would have to be amplified in words — and their use will not be protected as a trade-mark. Humphreys' Homeopathic Medicine Co. *v.* Hilton, 60 Fed. 756, 758.

71. Candee *v.* Deere, 54 Ill. 439, 5 Am. Rep. 125 [*citing* Amoskeag Mfg. Co. *v.* Spear, 2 Sandf. (N. Y.) 599]; Shaw Stocking Co. *v.* Mack, 12 Fed. 707, 21 Blatchf. 1.

72. See *infra*, V, C, 13.

73. *Illinois.*— Candee *v.* Deere, 54 Ill. 439, 5 Am. Rep. 125.

Massachusetts.— Frank *v.* Sleeper, 150 Mass. 583, 23 N. E. 213.

New York.— Godillot *v.* Harris, 81 N. Y. 263; Amoskeag Mfg. Co. *v.* Spear, 2 Sandf. 599.

Pennsylvania.— Ferguson *v.* Davol Mills, 2 Brewst. 314.

United States.— Lawrence Mfg. Co. *v.* Tennessee Mfg. Co., 138 U. S. 537, 11 S. Ct. 396, 34 L. ed. 997 [*affirming* 31 Fed. 776]; Amoskeag Mfg. Co. *v.* Trainer, 101 U. S. 51, 25 L. ed. 993; Stevens Linen Works *v.* Don, 127 Fed. 950, 62 C. C. A. 582 [*affirming* 121 Fed. 171]; Vacuum Oil Co. *v.* Climax Refining Co., 120 Fed. 254, 56 C. C. A. 90; Noel *v.* Ellis, 89 Fed. 978; Deering Harvester Co. *v.* Whitman, etc., Mfg. Co., 86 Fed. 764 [*affirmed* in 91 Fed. 376, 33 C. C. A. 558]; Giron *v.* Gartner, 47 Fed. 467; Shaw Stocking Co. *v.* Mack, 12 Fed. 707, 21 Blatchf. 1; Smith *v.* Reynolds, 22 Fed. Cas. No. 13,098, 10 Blatchf. 100, 3 Off. Gaz. 214.

England.— Kinahan *v.* Bolton, 15 Ir. Ch. 75; Ramsome *v.* Graham, 51 L. J. Ch. 897, 47 L. T. Rep. N. S. 218; Mottley *v.* Downmann, 6 L. J. Ch. 308, 3 Myl. & C. 1, 14 Eng. Ch. 1, 40 Eng. Reprint 824; Millington *v.* Fox, 3 Myl. & C. 338, 14 Eng. Ch. 338, 40 Eng. Reprint 956.

Canada.— Provident Chemical Works *v.* Canada Chemical Mfg. Co., 4 Ont. L. Rep. 545 [*reversing* 2 Ont. L. Rep. 182]; Smith *v.* Fair, 14 Ont. 729.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 10.

The letters "I X L," as applied to a general merchandise auction store, do not constitute a valid trade-mark by themselves, having long been in prior use. Lichtenstein *v.* Mellis, 8 Oreg. 464, 34 Am. Rep. 592.

Arabic and Turkish letters may constitute valid trade-marks. *In re* Rotherham, 14 Ch. D. 585, 49 L. J. Ch. 511, 43 L. T. Rep. N. S. 1.

Different combinations of letters, for different styles or quality of the same proprietor's goods, are valid trade-marks, although they indicate quality as well as origin and ownership. Ransome *v.* Graham, 51 L. J. Ch. 897, 47 L. T. Rep. N. S. 218.

74. Amoskeag Mfg. Co. *v.* Trainer, 101 U. S. 51, 25 L. ed. 993; Vacuum Oil Co. *v.* Climax Refining Co., 120 Fed. 254, 56 C. C. A. 90; Shaw Stocking Co. *v.* Mack, 12 Fed. 707, 21 Blatchf. 1.

Like the adjectives of the language, letters and figures are open to any one to use for the purpose of indicating quality, class, or

a proper name,[75] and even of a descriptive name,[76] and monograms [77] have all been held to be valid trade-marks. Letters in combination with figures or other devices, or printed in a distinctive manner, are a common form of valid trade-mark.[78]

5. Fictitious, Mythological, or Noted Names. Names of characters in fiction,[79] or mythology,[80] or of celebrated imaginary or historical persons [81] or things,[82] constitute valid trade-marks, when used as such, because they are arbitrary or fanciful and non-descriptive,[83] unless, as may be the case, they have become generic and descriptive of quality, owing to the manner of use and the general understanding.[84]

6. Newly Coined or Invented Words. Newly coined or invented words or names are generally appropriate for use as trade-marks,[85] unless in fact descrip-

grade. Amoskeag Mfg. Co. *v.* Trainer, 101 U. S. 51, 25 L. ed. 993.

75. Frank *v.* Sleeper, 150 Mass. 583, 28 N. E. 213 [*distinguishing* Hoxie *v.* Chaney, 143 Mass. 592, 10 N. E. 713, 58 Am. Rep. 149].

76. Provident Chemical Works *v.* Canada Chemical Mfg. Co., 4 Ont. L. Rep. 545 [*reversing* 2 Ont. L. Rep. 182], "C. A. P." held a valid trade-mark for "cream acid phosphate."

77. Smith *v.* Fair, 14 Ont. 729. See also Godillot *v.* American Grocery Co., 71 Fed. 873.

78. Foster *v.* Blood Balm Co., 77 Ga. 216, 3 S. E. 284; Cook *v.* Starkweather, 13 Abb. Pr. N. S. (N. Y.) 392; Van Hoboken *v.* Mohns, 112 Fed. 528; Moet *v.* Pickering, 6 Ch. D. 770 [*reversed* on other grounds in 8 Ch. D. 372, 47 L. J. Ch. 527, 38 L. T. Rep. N. S. 799, 26 Wkly. Rep. 637]; Cartier *v.* Carlile, 31 Beav. 292, 8 Jur. N. S. 183, 54 Eng. Reprint 1151; Bury *v.* Bedford, 4 De G. J. & S. 352, 10 Jur. N. S. 503, 33 L. J. Ch. 465, 10 L. T. Rep. N. S. 470, 4 New Rep. 180, 12 Wkly. Rep. 727, 69 Eng. Ch. 272, 46 Eng. Reprint 954; Hall *v.* Barrows, 4 De G. J. & S. 150, 10 Jur. N. S. 55, 33 L. J. Ch. 204, 9 L. T. Rep. N. S. 561, 3 New Rep. 259, 12 Wkly. Rep. 322, 69 Eng. Ch. 116, 46 Eng. Reprint 873; *In re* Barrows, 5 Ch. D. 353, 46 L. J. Ch. 450, 36 L. T. Rep. N. S. 291, 25 Wkly. Rep. 407.

Letters combined with descriptive numeral. — In Ransome *v.* Bentall, 3 L. J. Ch. 161, the combination "H. H. 6," the numeral being used only to denote the size of plowshares, was held a valid trade-mark.

79. *In re* Holt, [1896] 1 Ch. 711, 65 L. J. Ch. 410, 74 L. T. Rep. N. S. 225, 44 Wkly. Rep. 360, "Trilby," as applied to ladies' gloves, etc.

80. Hainque *v.* Cyclops Irons Works, 136 Cal. 351, 68 Pac. 1014 ("Cyclops," as a trade-name for a machine works); Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 72 Conn. 646, 45 Atl. 957, 49 L. R. A. 147 ("Hygeia," as applied to distilled water, etc.); Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 70 Conn. 516, 40 Atl. 534 ("Hygeia"); Consolidated Ice Co. *v.* Hygeia Distilled Water Co., 151 Fed. 10, 80 C. C. A. 506 [*affirming* 144 Fed. 139] ("Hygeia").

81. Medlar, etc., Shoe Co. *v.* Delsarte Mfg. Co., (N. J. Ch. 1900) 46 Atl. 1089 [*affirmed* in 68 N. J. Eq. 706, 61 Atl. 410] ("Delsarte," as applied to shoes); Messerole *v.* Tynberg, 4 Abb. Pr. N. S. (N. Y.) 410, 36 How. Pr. 14 ("Bismarck," as applied to paper collars); Barrows *v.* Knight, 6 R. I. 434, 78 Am. Dec. 452 ("Roger Williams," as applied to cotton cloth); Saxlehner *v.* Eisner, etc., Co., 179 U. S. 19, 21 S. Ct. 7, 45 L. ed. 60, 93 Off. Gaz. 940 [*reversing* 91 Fed. 536, 33 C. C. A. 291] ("Hunyadi," as applied to mineral water); Petrolia Mfg. Co. *v.* Bell, etc., Soap Co., 97 Fed. 781 ("Coal Oil Johnny," as applied to soap); Carroll *v.* Ertheiler, 21 Alb. L. J. 503 ("Lone Jack," as applied to tobacco); *Ex p.* Pace, 15 Off. Gaz. 909 ("Bayard"); Kidd *v.* Mills, 5 Off. Gaz. 337 ("Dave Jones" and "Magnolia," as applied to whisky).

Names both historical and geographical. — Where, however, the name of a historical or celebrated person is also a geographical name, such name is not a good trade-mark. *Ex p.* Oliver, 18 Off. Gaz. 923, where "Raleigh," as applied to manufactured tobacco, was refused registration as a trade-mark. See, generally, *infra*, III, B, 7.

82. Filley *v.* Child, 9 Fed. Cas. No. 4,787, 4 Ban. & A. 353, 16 Blatchf. 376, 8 Reporter 230, 16 Off. Gaz. 261 ("Charter Oak," as applied to stoves); Barnett *v.* Leuchars, 13 L. T. Rep. N. S. 495, 14 Wkly. Rep. 166 ("Pharaoh's Serpents," as applied to fireworks).

83. Barrows *v.* Knight, 6 R. I. 434, 78 Am. Dec. 452.

84. Thomson *v.* Winchester, 19 Pick. (Mass.) 214, 31 Am. Dec. 135 ("Thomsonian Medicines"); Medlar, etc., Shoe Co. *v.* Delsarte Mfg. Co., (N. J. Ch. 1900) 46 Atl. 1089 [*affirmed* in 68 N. J. Eq. 706, 61 Atl. 410] ("Delsarte," as applied to shoes).

Names of patented articles and secret preparations are illustrations of names becoming generic. See *infra*, III, B, 19, b; III, B, 19, f.

85. Keasbey *v.* Brooklyn Chemical Works, 142 N. Y. 467, 37 N. E. 476, 40 Am. St. Rep. 623 ("Bromo-Caffein," as applied to a medicine); Selchow *v.* Baker, 93 N. Y. 59, 45 Am. Rep. 169; Burnett *v.* Phalon, 3 Keyes (N. Y.) 594 ("Cocoaine," as applied to hair oil); Electro-Silicon Co. *v.* Hazard, 29 Hun (N. Y.) 369; Caswell *v.* Davis, 4 Abb. Pr.

tive, or intended as such.[86] Mere compounds of existing descriptive words, or words formed by the mere addition of common adjectival prefixes or suffixes, are not invented words within the meaning of the rule.[87]

7. Geographical and Place Names. Geographical terms and words in common use to designate a locality, a country, or a section of a country cannot be monopolized as trade-marks.[88] In some cases geographical names have been protected

N. S. (N. Y.) 6, 35 How. Pr. 76 [*affirmed* in 58 N. Y. 223, 17 Am. Rep. 233] ("Ferro-Phosphorated," as applied to an elixir of Calisaya bark); Electro-Silicon Co. *v.* Levy, 59 How. Pr. (N. Y.) 469; Electro-Silicon Co. *v.* Trask, 59 How. Pr. (N. Y.) 189 ("Electro-Silicon"); Enoch Morgan's Sons' Co. *v.* Schwachhofer, 55 How. Pr. (N. Y.) 37 ("Sapolio," as applied to a scouring soap); Avenarius *v.* Kornely, 139 Wis. 247, 121 N. W. 336; Enoch Morgan's Sons' Co. *v.* Ward, 152 Fed. 690, 81 C. C. A. 616, 12 L. R. A. N. S. 729 ("Sapolio," as applied to scouring soap); Welsbach Light Co. *v.* Adam, 107 Fed. 463 ("Yusea," as applied to an incandescent gas mantel); Potter Drug, etc., Corp. *v.* Pasfield Soap Co., 106 Fed. 914, 46 C. C. A. 40 ("Cuticura," as applied to toilet soap); Sterling Remedy Co. *v.* Eureka Chemical, etc., Co., 80 Fed. 105, 25 C. C. A. 314 ("No-To-Bac," as applied to a medicine for the cure of the tobacco habit); American Grocery Co. *v.* Sloan, 68 Fed. 539 ("Momaja," as applied to a blend of coffees); Celluloid Mfg. Co. *v.* Read, 47 Fed. 712 ("Celluloid"); Leonard *v.* White's Golden Lubricator Co., 38 Fed. 922 ("Valvoline," as applied to lubricating oils); Celluloid Mfg. Co. *v.* Cellonite Mfg. Co., 32 Fed. 94 ("Celluloid"); *In re* Densham, [1895] 2 Ch. 176, 64 L. J. Ch. 634, 72 L. T. Rep. N. S. 614, 12 Reports 283, 43 Wkly. Rep. 515; *In re* Salt, [1894] 3 Ch. 166, 63 L. J. Ch. 756, 71 L. T. Rep. N. S. 386, 8 Reports 682, 42 Wkly. Rep. 666.

A word such as "Uneeda," which merely consists of a misspelling of three common words put into one, is not "an invented word." *In re* Uneeda Trade-Mark, [1901] 1 Ch. 550, 70 L. J. Ch. 318, 84 L. T. Rep. N. S. 259 [*affirmed* in [1902] 1 Ch. 783, 71 L. J. Ch. 353, 86 L. T. Rep. N. S. 439, 18 T. L. R. 453, 50 Wkly. Rep. 467]. *Contra*, National Biscuit Co. *v.* Baker, 95 Fed. 135.

86. *In re* Meyerstein, 43 Ch. D. 604, 59 L. J. Ch. 401, 62 L. T. Rep. N. S. 526, 38 Wkly. Rep. 440 ("Satinine," as applied to starch, etc.); *In re* Talbot, 63 L. J. Ch. 264, 70 L. T. Rep. N. S. 119, 8 Reports 149, 42 Wkly. Rep. 501 ("Satinine," as applied to starch, etc.).

87. Searle, etc., Co. *v.* Warner, 112 Fed. 674, 50 C. C. A. 321 ("Pancreopepsine," as applied to a medicine); *In re* Farbenfabriken, [1894] 1 Ch. 645, 63 L. J. Ch. 257, 70 L. T. Rep. N. S. 186, 7 Reports 439, 42 Wkly. Rep. 488 ("Somatose," as applied to a pharmaceutical product made from meats); *In re* Talbot, 63 L. J. Ch. 264, 70 L. T. Rep. N. S. 119, 8 Reports 149, 42 Wkly. Rep. 149 ("Emolliolorum," as applied to a preparation for softening leather and rendering it waterproof).

Compounds of names of ingredients are a common illustration of this. See *supra*, III, B, 1, b.

Suffix added to geographical name.—A word formed by adding a common adjectival suffix to the name of an existing place is not "an invented word," but is "a geographical name." *In re* Salt, [1894] 3 Ch. 166, 63 L. J. Ch. 756, 71 L. T. Rep. N. S. 386, 8 Reports 682, 42 Wkly. Rep. 666, "Eboline."

88. *California.*— Burke *v.* Cassin, 45 Cal. 467, 13 Am. Rep. 204.

District of Columbia.— Kentucky Distilleries, etc., Co. *v.* Old Lexington Club Distilling Co., 31 App. Cas. 223.

Illinois.— Elgin Butter Co. *v.* Elgin Creamery Co., 155 Ill. 127, 40 N. E. 616 [*affirming* 51 Ill. App. 231]; Bolander *v.* Peterson, 136 Ill. 215, 26 N. E. 603, 11 L. R. A. 350 [*affirming* 35 Ill. App. 551].

Maine.— W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 100 Me. 461, 62 Atl. 499, 4 L. R. A. N. S. 960.

Michigan.—Smith *v.* Walker, 57 Mich. 456, 22 N. W. 267, 24 N. W. 830, 26 N. W. 783.

Missouri.—American Brewing Co. *v.* St. Louis Brewing Co., 47 Mo. App. 14.

New York.— Gabriel *v.* Sicilian Asphalt Paving Co., 44 N. Y. App. Div. 633, 56 N. Y. Suppl. 30 [*affirming* 23 Misc. 534, 52 N. Y. Suppl. 722, and *affirmed* in 161 N. Y. 644, 57 N. E. 1110]; Siegert *v.* Abbott, 72 Hun 243, 25 N. Y. Suppl. 590; Clinton Metalic Paint Co. *v.* New York Metalic Paint Co., 23 Misc. 66, 50 N. Y. Suppl. 437; Lea *v.* Wolf, 15 Abb. Pr. N. S. 1; Wolfe *v.* Goulard, 18 How. Pr. 64.

Ohio.— Drake Medicine Co. *v.* Glessner, 68 Ohio St. 337, 67 N. E. 722.

Pennsylvania.— Laughman's Appeal, 128 Pa. St. 1, 18 Atl. 415, 5 L. R. A. 599; Glendon Iron Co. *v.* Uhler, 75 Pa. St. 467, 15 Am. Rep. 599.

Rhode Island.— Cady *v.* Schultz, 19 R. I. 193, 32 Atl. 915, 61 Am. St. Rep. 763, 29 L. R. A. 524.

South Carolina.— Telephone Mfg. Co. *v.* Sumter Telephone Mfg. Co., 63 S. C. 313, 41 S. E. 322.

Texas.—Western Grocer Co. *v.* Caffarelli, (Civ. App. 1908) 108 S. W. 413.

Wisconsin.—Avenarius *v.* Kornely, 139 Wis. 247, 121 N. W. 336.

United States.— Elgin Nat. Watch Co. *v.* Illinois Watch Case Co., 179 U. S. 665, 21 S. Ct. 270, 45 L. ed. 365; Saxlehner *v.* Eisner, etc., Co., 179 U. S. 19, 21 S. Ct. 7, 45 L. ed. 60, 93 Off. Gaz. 940 [*reversing* 91 Fed. 536, 33 C. C. A. 291]; Castner *v.* Coffman, 178 U. S. 168, 20 S. Ct. 842, 44 L. ed. 1021 [*affirming* 87 Fed. 457, 31 C. C. A. 55]; Columbia Mill Co. *v.* Alcorn, 150 U. S. 460, 14

nominally upon the ground of trade-mark, but these cases must be supported, if at all, upon the ground of unfair competition. Some of them were clearly not cases of technical trade-marks.[89] A combination of geographical or place names with other symbols or marks,[90] or a geographical name not used in a geographical sense to denote place of origin, but used in an arbitrary or fanciful way to indicate origin and ownership regardless of location,[91] may be sustained as valid

S. Ct. 151, 37 L. ed. 1144; Brown Chemical Co. *v.* Meyer, 139 U. S. 540, 11 S. Ct. 625, 35 L. ed. 247; Delaware, etc., Canal Co. *v.* Clark, 13 Wall. 311, 20 L. ed. 581; American Wine Co. *v.* Kohlman, 158 Fed. 830; Baglin *v.* Cusenier Co., 156 Fed. 1016 [*affirmed* in 164 Fed. 25, 90 C. C. A. 499]; Havana Commercial Co. *v.* Nichols, 155 Fed. 302; Buzby *v.* Davis, 150 Fed. 275, 80 C. C. A. 163; Siegert *v.* Gandolfi, 149 Fed. 100, 79 C. C. A. 142 [*reversing* 139 Fed. 917]; Allen B. Wrisley Co. *v.* Iowa Soap Co., 122 Fed. 796, 59 C. C. A. 54; Bauer *v.* La Société Anonyme, etc., 120 Fed. 74, 56 C. C. A. 480; Draper *v.* Skerrett, 116 Fed. 206; Sterling Remedy Co. *v.* Spermine Medical Co., 112 Fed. 1000, 1003, 50 C. C. A. 657; Shaver *v.* Heller, etc., Co., 108 Fed. 821, 48 C. C. A. 48, 65 L. R. A. 878 [*affirming* 102 Fed. 882]; Weyman *v.* Soderberg, 108 Fed. 63; Continental Ins. Co. *v.* Continental Fire Assoc., 96 Fed. 846; Illinois Watch-Case Co. *v.* Elgin Nat. Watch Co., 94 Fed. 667, 35 C. C. A. 237 [*reversing* 89 Fed. 487, and *affirmed* in 179 U. S. 665, 21 S. Ct. 270, 45 L. ed. 365]; Lamont *v.* Leedy, 88 Fed. 72; Coffman *v.* Castner, 87 Fed. 457, 31 C. C. A. 55; Pillsbury-Washburn Flour-Mills Co. *v.* Eagle, 86 Fed. 608, 30 C. C. A. 386, 41 L. R. A. 162; Hoyt *v.* J. T. Lovett Co., 71 Fed. 173, 17 C. C. A. 652, 31 L. R. A. 44; Genesee Salt Co. *v.* Burnap, 67 Fed. 534; New York, etc., Cement Co. *v.* Coplay Cement Co., 44 Fed. 227, 10 L. R. A. 833; Evans *v.* Von Laer, 32 Fed. 153; Anheuser-Busch Brewing Assoc. *v.* Piza, 24 Fed. 149, 23 Blatchf. 245; Burton *v.* Stratton, 12 Fed. 696; Pepper *v.* Labrot, 8 Fed. 29; Osgood *v.* Allen, 18 Fed. Cas. No. 10,603, Holmes 185, 3 Off. Gaz. 124; Williams *v.* Adams, 29 Fed. Cas. No. 17,711, 8 Biss. 452, 7 Reporter 613; *Ex p.* Oliver, 18 Off. Gaz. 923. But see Bauer *v.* Siegert, 120 Fed. 81, 56 C. C. A. 487; Atwater *v.* Castner, 88 Fed. 642, 32 C. C. A. 77.

England.— *In re* Salt, [1894] 3 Ch. 166, 63 L. J. Ch. 756, 71 L. T. Rep. N. S. 386, 8 Reports 682, 42 Wkly. Rep. 666; *In re* Apollinaris Co., [1891] 2 Ch. 186, 61 L. J. Ch. 625, 65 L. T. Rep. N. S. 6; McAndrew *v.* Bassett, 4 De G. J. & S. 380, 10 Jur. N. S. 550, 33 L. J. Ch. 561, 10 L. T. Rep. N. S. 442, 4 New Rep. 123, 12 Wkly. Rep. 777, 69 Eng. Ch. 293, 46 Eng. Reprint 965.

Canada.— Rose *v.* McLean Pub. Co., 27 Ont. 325.

Australia.— Wolfe *v.* Harrt, 4 Vict. L. Rep. 125.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 13.

89. Newman *v.* Alvord, 51 N. Y. 189, 10 Am. Rep. 588; Drake Medicine Co. *v.* Glessner, 68 Ohio St. 337, 67 N. E. 722; Elgin Nat. Watch Co. *v.* Illinois Watch-Case Co., 89 Fed. 487; Southern White Lead Co. *v.* Coit, 39 Fed. 492; Radde *v.* Norman, L. R. 14 Eq. 348, 41 L. J. Ch. 525, 26 L. T. Rep. N. S. 788, 20 Wkly. Rep. 766; McAndrew *v.* Bassett, 4 De G. J. & S. 380, 10 Jur. N. S. 550, 33 L. J. Ch. 561, 10 L. T. Rep. N. S. 442, 4 New Rep. 123, 12 Wkly. Rep. 777, 69 Eng. Ch. 293, 46 Eng. Reprint 965 ("Anatolia," applied to goods made from roots obtained from Anatolia, Spain).

90. El Modello Cigar Mfg. Co. *v.* Gato, 25 Fla. 886, 7 So. 23, 23 Am. St. Rep. 537, 6 L. R. A. 823; Blackwell *v.* Dibrell, 3 Fed. Cas. No. 1,475, 3 Hughes 151, 14 Off. Gaz. 633, the name "Durham" in combination with the picture of a bull is a valid trade-mark for tobacco. See also *infra*, III, B, 16.

91. *New York.*— Messerole *v.* Tynberg, 4 Abb. Pr. N. S. 410; Fleischmann *v.* Schuckmann, 62 How. Pr. 92 ("Vienna Bread"). But see Clinton Metalic Paint Co. *v.* New York Metalic Paint Co., 23 Misc. 66, 50 N. Y. Suppl. 437.

Ohio.— Drake Medicine Co. *v.* Glessner, 68 Ohio St. 337, 67 N. E. 722.

Pennsylvania.— Laughman's Appeal, 128 Pa. St. 1, 18 Atl. 415, 5 L. R. A. 599.

United States.— Dwinell-Wright Co. *v.* Co-operative Supply Co., 155 Fed. 909; Dwinell-Wright Co. *v.* Co-operative Supply Co., 148 Fed. 242 ("White House," as applied to coffee); Colgate *v.* Adams, 88 Fed. 899; Baker *v.* Baker, 77 Fed. 181; Whitfield *v.* Loveless, 64 Off. Gaz. 442.

England.— Wotherspoon *v.* Currie, L. R. 5 H. L. 508, 42 L. J. Ch. 130, 27 L. T. Rep. N. S. 393 [*distinguished* in Laughman's Appeal, 128 Pa. St. 1, 18 Atl. 415, 5 L. R. A. 599], "Glenfield Starch."

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 13.

Illustrations.— "There are strong reasons and high authority for the contention that a geographical name, when not used in a geographical sense, that is, when it does not denote the location of origin, but is used in a fictitious sense merely to indicate ownership and origin independent of location, may be a good trade-mark. For example, 'Liverpool' for cloth made at Hieddersfield, Hirst *v.* Denham, L. R. 14 Eq. Cas. 542, 41 L. J. Ch. 752, 27 L. T. Rep. N. S. 56; 'Dublin Soap' made in the United States, *In re* Cornwall, 12 Off. Gaz. 312; 'German Soap' made in the United States, *In re* Green, 8 Off. Gaz. 729; 'Vienna Bread' for bread made in New York, Fleischmann *v.* Schuckmann, 62 How. Pr. 92; 'Anatolia' stamped on liquorice, McAndrew *v.* Bassett, 10 Jur. N. S. 492, 550, per Westbury, L. C.; Browne on Trade-Marks, §§ 184–185. Upon this distinction it is diffi-

trade-marks. An unfair or fraudulent use of geographical names is a frequent instance of unfair competition for which a remedy is afforded irrespective of any technical trade-mark.[92]

8. Personal Names. It has frequently been said that the name of an individual may constitute a valid trade-mark.[93] But if such statements mean anything more

cult to understand why the word 'German' upon a package which expressly shows that it is made at 'Findlay, Ohio, U. S. A.,' may not be a valid trade-mark." Drake Medicine Co. *v.* Glessner, 68 Ohio St. 337, 355, 67 N. E. 722.

Words held geographical.— *In re* Crescent Typewriter Supply Co., 30 App. Cas. (D. C.) 324 ("Orient"); *In re* Hopkins, 29 App. Cas. (D. C.) 118 ("Oriental"); Columbia Mill Co. *v.* Alcorn, 150 U. S. 469, 14 S. Ct. 151, 37 L. ed. 1144 [*followed* in Morgan Envelope Co. *v.* Walton, 86 Fed. 605, 30 C. C. A. 383. *Contra*, Whitfield *v.* Loveless, 64 Off. Gaz. 442] ("Columbia"); Wolf *v.* Hamilton-Brown Shoe Co., 165 Fed. 413, 91 C. C. A. 363 ("American Girl," as applied to shoes); Coffman *v.* Castner, 87 Fed. 457, 31 C. C. A. 55 ("Pocahontas," as applied to coal from the Pocahontas coal field of Virginia).

Names held not geographical.— Baglin *v.* Cusenier Co., 156 Fed. 1016 [*affirmed* in 164 Fed. 25, 90 C. C. A. 499] ("Chartreuse" is not a place name, but a French term denoting a Carthusian monastery); Havana Commercial Co. *v.* Nichols, 155 Fed. 302 ("La Carolina," as applied to cigars); Jewish Colonization Assoc. *v.* Solomon, 154 Fed. 157 ("Rischon-le-Zion" and "Carmel," as applied to wines from Palestine); Buzby *v.* Davis, 150 Fed. 275, 80 C. C. A. 163 ("Keystone" is probably not a geographical name); A. F. Pike Mfg. Co. *v.* Cleveland Stone Co., 35 Fed. 896 ("Green Mountain," "Willoughby Lake," "Indian Pond," scythestones); Williams *v.* Adams, 29 Fed. Cas. No. 17,711, 8 Biss. 452, 7 Reporter 613 ("Yankee," as applied to soap); *In re* Cornwall, 12 Off. Gaz. 312 ("Dublin Soap" made in United States); *In re* Green, 8 Off. Gaz. 729 ("German Soap" made in United States). A word does not become a "geographical name" simply because some place on the earth has been called by it — its primary signification not being geographical, and it not being the name of the place where the article named after it is manufactured. *In re* Magnolia Metal Co., [1897] 2 Ch. 371, 66 L. J. Ch. 598, 76 L. T. Rep. N. S. 672; *In re* Densham, [1895] 2 Ch. 176, 64 L. J. Ch. 634, 72 L. T. Rep. N. S. 614, 12 Reports 283, 43 Wkly. Rep. 515 (words conveying merely a general idea of the East are not for that reason alone geographical words); Siegert *v.* Findlater, 7 Ch. D. 801, 47 L. J. Ch. 233, 38 L. T. Rep. N. S. 349, 26 Wkly. Rep. 459 ("Angostura Bitters"); Hirst *v.* Denham, L. R. 14 Eq. 542, 41 L. J. Ch. 752, 27 L. T. Rep. N. S. 56 ("Liverpool" for cloth made at Huddersfield, England); Bulloch *v.* Gray, 19 Journ. of Jurisp. 218 ("Loch Katrine Distillery").

Names of springs are not valid trade-marks. Virginia Hot Springs Co. *v.* Hegeman, 144 Fed. 1023, 73 C. C. A. 612 [*affirming* 138 Fed. 855; *In re* Apollinaris Co., [1891] 2 Ch. 186, 61 L. J. Ch. 625, 65 L. T. Rep. N. S. 6. *Contra*, Dunbar *v.* Glenn, 42 Wis. 118, 24 Am. Rep. 395. But protection will be afforded against unfair and fraudulent competition. See *infra*, V, C, 3. The words "Geyser Spring" were refused registration as a trade-mark for Saratoga mineral water, on the ground that "geyser" is a familiar geological term and has a meaning well known to the public, and is therefore generic and descriptive. *Ex p.* Batcheller, Browne Trade-Marks, § 276.

92. See *infra*, V, C, 2.

93. *California.*— Spieker *v.* Lash, 102 Cal. 38, 36 Pac. 362; Burke *v.* Cassin, 45 Cal. 467, 13 Am. Rep. 204.

Connecticut.— William Rogers Mfg. Co. *v.* Simpson, 54 Conn. 527, 9 Atl. 395.

Florida.— El Modello Cigar Mfg. Co. *v.* Gato, 25 Fla. 886, 7 So. 23, 23 Am. St. Rep. 537, 6 L. R. A. 823.

Illinois.— Candee *v.* Deere, 54 Ill. 439, 5 Am. Rep. 125; Imperial Mfg. Co. *v.* Schwartz, 105 Ill. App. 525.

Massachusetts.— H. A. Williams Mfg. Co. *v.* Noera, 158 Mass. 110, 32 N. E. 1037.

Missouri.— Skinner *v.* Oakes, 10 Mo. App. 45.

New Jersey.— Medlar, etc., Shoe Co. *v.* Delsarte Mfg. Co., (Ch. 1900) 46 Atl. 1089 [*affirmed* in 68 N. J. Eq. 706, 61 Atl. 410].

New York.— Cooke, etc., Co. *v.* Miller, 169 N. Y. 475, 62 N. E. 582; Koehler *v.* Sanders, 122 N. Y. 65, 25 N. E. 235, 9 L. R. A. 576 [*affirming* 48 Hun 48]; Howe *v.* Howe Mach. Co., 50 Barb. 236; Hegeman *v.* Hegeman, 8 Daly 1; Gaines *v.* Leslie, 25 Misc. 20, 54 N. Y. Suppl. 421; S. Howes Co. *v.* Howes Grain Cleaner Co., 24 Misc. 83, 52 N. Y. Suppl. 468. See Scheer *v.* American Ice Co., 32 Misc. 351, 66 N. Y. Suppl. 3.

Ohio.— Drake Medicine Co. *v.* Glessner, 68 Ohio St. 337, 67 N. E. 722.

Pennsylvania.— Shaw *v.* Pilling, 175 Pa. St. 78, 34 Atl. 446; Ayer *v.* Hall, 3 Brewst. 509; Ferguson *v.* Davol Mills, 2 Brewst. 314; Standinger *v.* Standinger, 19 Leg. Int. 85. See Fulton *v.* Sellers, 4 Brewst. 42.

Wisconsin.— Fish Bros. Wagon Co. *v.* La Belle Wagon Works, 82 Wis. 546, 52 N. W. 595, 33 Am. St. Rep. 72, 16 L. R. A. 453.

United States.— McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828; Baker *v.* Baker, 77 Fed. 181. See International Silver Co. *v.* Simeon L. & George H. Rogers Co., 110 Fed. 955.

England.— Ainsworth *v.* Walmsley, L. R. 1 Eq. 518, 12 Jur. N. S. 205, 35 L. J. Ch. 352, 14 L. T. Rep. N. S. 220, 14 Wkly. Rep. 363; Rodgers *v.* Norvill, 5 C. B. 109, 11 Jur. 1039,

than that personal names, even one's own, may not be used as a means of passing off one man's goods or business as that of another, which would be redressed as unfair competition,[94] they are inaccurate. The mere name of an individual cannot become a valid technical trade-mark,[95] because, as between persons of the same or similar names, each has an equal right to use his own name in his own business,[96] and trade-marks being property rights are necessarily exclusive.[97] A personal name in combination with other words or devices may, however, constitute a good trade-mark.[98] So celebrated names, arbitrarily used, may constitute valid trade-marks.[99]

9. CORPORATE NAMES. Courts have said that the name of a corporation is its valid trade-mark;[1] but this cannot be made to square with the accepted defini-

17 L. J. C. P. 52, 57 E. C. L. 109; Hall *v.* Barrows, 4 De G. J. & S. 150, 10 Jur. N. S. 55, 33 L. J. Ch. 204, 9 L. T. Rep. N. S. 561, 3 New Rep. 259, 12 Wkly. Rep. 322, 69 Eng. Ch. 116, 46 Eng. Reprint 873; Leather Cloth Co. *v.* American Leather Cloth Co., 4 De G. J. & S. 137, 10 Jur. N. S. 81, 33 L. J. Ch. 199, 9 L. T. Rep. N. S. 558, 3 New Rep. 264, 12 Wkly. Rep. 289, 69 Eng. Ch. 106, 46 Eng. Reprint 868 [*affirmed* in 11 H. L. Cas. 523, 11 Jur. N. S. 513, 35 L. J. Ch. 53, 12 L. T. Rep. N. S. 742, 6 New Rep. 209, 13 Wkly. Rep. 873, 11 Eng. Reprint 1435].

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 14.

"La Carolina," as applied to cigars, is not a personal name. Havana Commercial Co. *v.* Nichols, 155 Fed. 302.

94. See for example Imperial Mfg. Co. *v.* Schwartz, 105 Ill. App. 525.

As to unfair competition by means of personal names see *infra*, V, C, 4.

95. *Connecticut.*—William Rogers Mfg. Co. *v.* Simpson, 54 Conn. 527, 9 Atl. 395.

District of Columbia.— Rogers *v.* International Silver Co., 30 App. Cas. 97.

Maine.— W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 100 Me. 461, 62 Atl. 499, 4 L. R. A. N. S. 960.

Minnesota.— J. R. Watkins Medical Co. *v.* Sands, 83 Minn. 326, 86 N. W. 340.

New Jersey.— International Silver Co. *v.* Rogers, 72 N. J. Eq. 933, 67 Atl. 105, 129 Am. St. Rep. 722.

New York.— Meneely *v.* Meneely, 62 N. Y. 427, 20 Am. Rep. 489.

North Carolina.— Bingham School *v.* Gray, 122 N. C. 699, 30 S. E. 304, 41 L. R. A. 243.

Ohio.— Drake Medicine Co. *v.* Glessner, 68 Ohio St. 337, 67 N. E. 722.

Pennsylvania.— Pratt's Appeal, 117 Pa. St. 401, 11 Atl. 878, 2 Am. St. Rep. 676.

Tennessee.— C. F. Simmons Medicine Co. *v.* Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165.

United States.—Howe Scale Co. *v.* Wyckoff, 198 U. S. 118, 25 S. Ct. 609, 49 L. ed. 972; Brown Chemical Co. *v.* Meyer, 139 U. S. 540, 11 S. Ct. 625, 35 L. ed. 247; Havana Commercial Co. *v.* Nichols, 155 Fed. 302; Liebig's Extract of Meat Co. *v.* Walker, 115 Fed. 822; Sterling Remedy Co. *v.* Spermine Medical Co., 112 Fed. 1000, 50 C. C. A. 657; Smith *v.* Reynolds, 22 Fed. Cas. No. 13,098, 10 Blatchf. 100, 3 Off. Gaz. 214; Williams *v.* Adams, 29 Fed. Cas. No. 17,711, 8 Biss. 452. *Compare*, however, Thaddeus Davids Co. *v.* Davids, 178 Fed. 801, 102 C. C. A. 249 [*reversing* 165 Fed. 792].

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 14.

96. The extent and limit of this right is hereinafter discussed under the doctrine of unfair competition. See *infra*, V, C, 4.

97. See *supra*, I, E, 1.

98. *California.*— Spieker *v.* Lash, 102 Cal. 38, 36 Pac. 362.

Massachusetts.— Hoxie *v.* Chaney, 143 Mass. 592, 10 N. E. 713, 58 Am. Rep. 149.

New York.— Cooke *v.* Miller, 169 N. Y. 475, 62 N. E. 582.

Ohio.— Drake Medicine Co. *v.* Glessner, 68 Ohio St. 337, 67 N. E. 722.

Pennsylvania.— Fulton *v.* Sellers, 4 Brewst. 42.

United States.— Frese *v.* Bachof, 9 Fed. Cas. No. 5,109, 13 Blatchf. 234; Smith *v.* Reynolds, 22 Fed. Cas. No. 13,098, 10 Blatchf. 100, 3 Off. Gaz. 214.

England.— Gout *v.* Aleploglu, 6 Beav. 69 note, 49 Eng. Reprint 750.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 14.

But see Stirling Silk Mfg. Co. *v.* Sterling Silk Co., 59 N. J. Eq. 394, 46 Atl. 199.

A personal name, accompanied by a mark sufficient to distinguish it from the same name when used by others, may be a lawful trade-mark. Smith *v.* Reynolds, 22 Fed. Cas. No. 13,098, 10 Blatchf. 100, 3 Off. Gaz. 214.

Name not part of trade-mark.— A personal name used in connection with devices or symbols may be so used as not to constitute an essential part of the trade-mark, in which case the device alone would constitute the trade-mark. Dr. A. Reed Cushion Shoe Co. *v.* Frew, 162 Fed. 887, 89 C. C. A. 577 [*reversing* 158 Fed. 552].

99. See *supra*, III, B, 5.

1. *Illinois.*— Merchants' Detective Assoc. *v.* Detective Mercantile Agency, 25 Ill. App. 250.

New Jersey.— Medlar, etc., Shoe Co. *v.* Delsarte Mfg. Co., (Ch. 1900) 46 Atl. 1089.

New York.— Koehler *v.* Sanders, 122 N. Y. 65, 25 N. E. 235, 9 L. R. A. 576 [*affirming* 48 Hun 48]; India Rubber Co. *v.* Rubber Comb, etc., Co., 45 N. Y. Super. Ct. 258.

United States.— Investor Pub. Co. *v.* Dobinson, 72 Fed. 603 [but see Investor Pub. Co. *v.* Dobinson, 82 Fed. 56]; Newby *v.* Oregon

tions of a trade-mark,[2] and corporate names are not technical trade-marks.[3] It is more accurate to say that corporate names are trade-names [4] which will be protected against improper use or imitation under the doctrine of unfair competition.[5]

10. Color. Color alone cannot be made a valid trade-mark.[6] If a trade-mark is not used or imitated mere use of the color adopted by plaintiff cannot be enjoined.[7] No one can obtain a monopoly of a color in connection with a particular line of trade or class of goods.[8] But a color impressed in a particular design, such as a circle, square, triangle, cross, or star, or used in connection with other characters,[9] may be appropriated as a trade-mark. Of course color may be

Cent. R. Co., 18 Fed. Cas. No. 10,144, Deady 609, 616, where Deady, J., said: "The corporate name of a corporation is a trade-mark from the necessity of the thing, and upon every consideration of private justice and public policy, deserves the same consideration and protection from a Court of equity. Under the law, the corporate name is a necessary element of the corporation's existence. Without it, a corporation cannot exist."

England.— See London, etc., Law Assur. Soc. *v.* London, etc., Joint-Stock L. Ins. Co., 11 Jur. 938.

2. See *supra*, I, A.

3. Farmers' L. & T. Co. *v.* Farmers' L. & T. Co., 1 N. Y. Suppl. 44, 21 Abb. N. Cas. 104; Smith *v.* Reynolds, 22 Fed. Cas. No. 13,098, 10 Blatchf. 100, 3 Off. Gaz. 214; Lee *v.* Haley, L. R. 5 Ch. 155, 161, 39 L. J. Ch. 284, 22 L. T. Rep. N. S. 251, 18 Wkly. Rep. 242, where Gifford, L. J., said: "I quite agree that they [Guinea Coal Co.] have no property in the name."

4. See *infra*, V, A, 4.

5. See *infra*, V.

6. *District of Columbia.*— *In re* American Circular Loom Co., 28 App. Cas. 446.

Illinois.— Ball *v.* Siegel, 116 Ill. 137, 4 N. E. 667, 56 Am. Rep. 766.

Massachusetts.— New England Awl, etc., Co. *v.* Marlborough Awl, etc., Co., 168 Mass. 154, 46 N. E. 386, 60 Am. St. Rep. 377.

New York.— Fischer *v.* Blank, 138 N. Y. 244, 33 N. E. 1040; Babbitt *v.* Brown, 68 Hun 515, 23 N. Y. Suppl. 25; Faber *v.* Faber, 49 Barb. 357; Omega Oil Co. *v.* Weschler, 35 Misc. 441, 71 N. Y. Suppl. 983 [*affirmed* in 68 N. Y. App. Div. 638, 74 N. Y. Suppl. 1140]; Fleischmann *v.* Newman, 4 N. Y. Suppl. 642 [*affirmed* in 123 N. Y. 659, 25 N. E. 955].

Pennsylvania.— Putnam Nail Co. *v.* Dulaney, 140 Pa. St. 205, 21 Atl. 391, 23 Am. St. Rep. 228, 11 L. R. A. 524.

Rhode Island.— Cady *v.* Schultz, 19 R. I. 193, 32 Atl. 915, 61 Am. St. Rep. 763, 29 L. R. A. 524.

United States.— A. Leschen, etc., Rope Co. *v.* Broderick, etc., Rope Co., 201 U. S. 166, 26 S. Ct. 425, 50 L. ed. 710; Coats *v.* Merrick Thread Co., 149 U. S. 562, 13 S. Ct. 966, 37 L. ed. 847 [*affirming* 36 Fed. 324, 1 L. R. A. 616]; Newcomer *v.* Scriven Co., 168 Fed. 621, 94 C. C. A. 77; Diamond Match Co. *v.* Saginaw Match Co., 142 Fed. 727, 74 C. C. A. 59; A. Leschen, etc., Rope Co. *v.* Macomber, etc., Rope Co., 142 Fed. 289; Victor Talking Mach. Co. *v.* Armstrong, 132 Fed. 711; Lalance, etc., Mfg. Co. *v.* National Enameling, etc., Co., 109 Fed. 317; Von Mumm *v.* Wittemann, 91 Fed. 126, 33 C. C. A. 404 [*affirming* 85 Fed. 966]; N. K. Fairbank Co. *v.* R. W. Bell Mfg. Co., 71 Fed. 295; Putnam Nail Co. *v.* Bennett, 43 Fed. 800; Mumm *v.* Kirk, 40 Fed. 589; Fleischmann *v.* Starkey, 25 Fed. 127; Sawyer *v.* Horn, 1 Fed. 24, 4 Hughes 239; *Ex p.* Landreth, 31 Off. Gaz. 1441.

England.— *In re* Hanson, 37 Ch. D. 112, 57 L. J. Ch. 173, 57 L. T. Rep. N. S. 859, 36 Wkly. Rep. 134.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 20.

Trade-mark implies form, rather than color, and it consists of some peculiar name, symbol, figure, letter, or device whereby one manufacturer distinguishes his goods from like goods sold by other persons, and does not include color apart from a name or device. Fleischmann *v.* Starkey, 25 Fed. 127, 128.

The natural color of yarn, used in making an elastic seam, is not a trade-mark. Newcomer *v.* Scriven Co., 168 Fed. 621, 94 C. C. A. 77.

7. Fischer *v.* Blank, 138 N. Y. 244, 33 N. E. 1040; Omega Oil Co. *v.* Weschler, 35 Misc. (N. Y.) 411, 71 N. Y. Suppl. 983 [*affirmed* in 68 N. Y. App. Div. 638, 74 N. Y. Suppl. 1140].

8. New England Awl, etc., Co. *v.* Marlborough Awl, etc., Co., 168 Mass. 154, 46 N. E. 386, 60 Am. St. Rep. 377; Diamond Match Co. *v.* Saginaw Match Co., 142 Fed. 727, 74 C. C. A. 59; *In re* Hanson, 37 Ch. D. 112, 57 L. J. Ch. 173, 57 L. T. Rep. N. S. 859, 36 Wkly. Rep. 134.

Distinction dependent on color.— In *In re* Hanson, 37 Ch. D. 112, 116, 57 L. J. Ch. 173, 57 L. T. Rep. N. S. 859, 36 Wkly. Rep. 134, Kay, J., said: "It is the plain intention of the Act that, where the distinction of the mark depends upon colour, that will not do. You may register a mark, which is otherwise distinctive, in colour, and that gives you the right to use it in any colour you like, but you cannot register a mark of which the only distinction is the use of a colour, because practically, under the terms of the Act, that would give you a monopoly of all the colours of the rainbow."

9. *In re* American Circular Loom Co., 28 App. Cas. (D. C.) 446; A. Leschen, etc., Rope Co. *v.* Broderick, etc., Rope Co., 201 U. S. 166, 26 S. Ct. 425, 50 L. ed. 710; Newcomer *v.* Scriven Co., 168 Fed. 621, 94 C. C. A.

an element in the imitation of another's trade-mark or dress of goods, and in such case relief may be afforded.[10]

11. Size or Shape. The mere size or shape of the goods, packages, or labels cannot be exclusively appropriated as a trade-mark.[11] Unless protected by a valid patent,[12] any one may make, pack, and sell goods of like size and shape, in like kinds of packages,[13] subject to the rule that he must not imitate another's dress of goods so as to deceive the public as to identity and origin.[14]

77; Diamond Match Co. *v.* Saginaw Match Co., 142 Fed. 727, 74 C. C. A. 59.

10. See *infra*, IV, C; also *infra*, V, C, 12.

11. *Georgia.*— Ellis *v.* Zeilin, 42 Ga. 91.

Illinois.— Ball *v.* Siegel, 116 Ill. 137, 4 N. E. 667, 56 Am. Rep. 766; Candee *v.* Deere, 54 Ill. 439, 5 Am. Rep. 125.

New York.— Fischer *v.* Blank, 138 N. Y. 244, 33 N. E. 1040; Enoch Morgan's Sons Co. *v.* Troxell, 89 N. Y. 292, 42 Am. Rep. 294, 11 Abb. N. Cas. 86 [*reversing* 23 Hun 632, 57 How. Pr. 121]; Babbitt *v.* Brown, 68 Hun 515, 23 N. Y. Suppl. 25; Clinton Metalic Paint Co. *v.* New York Metalic Paint Co., 23 Misc. 66, 50 N. Y. Suppl. 437.

Pennsylvania.— Brown *v.* Seidel, 153 Pa. St. 60, 25 Atl. 1064; Hoyt *v.* Hoyt, 143 Pa. St. 623, 22 Atl. 755, 24 Am. St. Rep. 575, 13 L. R. A. 343.

Rhode Island.— Cady *v.* Schultz, 19 R. I. 193, 32 Atl. 915, 61 Am. St. Rep. 763, 29 L. R. A. 524.

United States.— Regensburg *v.* Juan F. Portuondo Cigar Mfg. Co., 142 Fed. 160, 73 C. C. A. 378 [*affirming* 136 Fed. 866]; Heide *v.* Wallace, 135 Fed. 346, 68 C. C. A. 16 [*affirming* 129 Fed. 649]; Marvel Co. *v.* Pearl, 133 Fed. 160, 66 C. C. A. 226; De Long Hook, etc., Co. *v.* Francis Hook, etc., Co., 118 Fed. 938; Keuffel, etc., Co. *v.* H. S. Crocker Co., 118 Fed. 187; Lalance, etc., Mfg. Co *v.* National Enameling Co., 109 Fed. 317; Pfeiffer *v.* Wilde, 102 Fed. 658; Von Mumm *v.* Witteman, 91 Fed. 126, 33 C. C. A. 404 [*affirming* 85 Fed. 966]; Sterling Remedy Co. *v.* Eureka Chemical, etc., Co., 80 Fed. 105, 25 C. C. A. 314; Merriam *v.* Texas Siftings Pub. Co., 49 Fed. 944; Coats *v.* Merrick Thread Co., 36 Fed. 324, 1 L. R. A. 616 [*affirmed* in 149 U. S. 562, 13 S. Ct. 966, 37 L. ed. 847]; Evans *v.* Von Laer, 32 Fed. 153; Adams *v.* Heisel, 31 Fed. 279; Davis *v.* Davis, 27 Fed. 490; Wilcox, etc., Sewing-Mach. Co. *v.* Gibbens Frame, 17 Fed. 623, 21 Blatchf. 431; Sawyer *v.* Horn, 1 Fed. 24, 4 Hughes 239; Fairbanks *v.* Jacobus, 8 Fed. Cas. No. 4,608, 3 Ban. & A. 108, 14 Blatchf. 337; Frese *v.* Bachof, 9 Fed. Cas. No. 5,109, 13 Blatchf. 234; Harrington *v.* Libby, 11 Fed. Cas. No. 6,107, 14 Blatchf. 128, 12 Off. Gaz. 188; Moorman *v.* Hoge, 17 Fed. Cas. No. 9,783, 2 Sawy. 78; *Ex p.* Landreth, 31 Off. Gaz. 1441; *In re* Gordon, 12 Off. Gaz. 517; *In re* Kane, 9 Off. Gaz. 105. See McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828; Morgan's Sons Co. *v.* Troxell, 89 N. Y. 292, 42 Am. Rep. 294.

England.— *In re* James, 33 Ch. D. 392, 55 L. J. Ch. 915, 55 L. T. Rep. N. S. 415, 35 Wkly. Rep. 67; Woollam *v.* Ratcliff, 1 Hem. & M. 259, 71 Eng. Reprint 113.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 19.

But see Spieker *v.* Lasch, 102 Cal. 38, 36 Pac. 362.

12. Hoyt *v.* Hoyt, 143 Pa. St. 623, 22 Atl. 755, 24 Am. St. Rep. 575, 13 L. R. A. 343. See Coats *v.* Merrick Thread Co., 36 Fed. 324, 1 L. R. A. 616 [*affirmed* in 149 U. S. 562, 13 S. Ct. 966, 37 L. ed. 847]. See also Patents, 30 Cyc. 803.

13. Cooke, etc., Co. *v.* Miller, 169 N. Y. 475, 62 N. E. 582; Sawyer *v.* Horn, 1 Fed. 24, 4 Hughes 239; Harrington *v.* Libby, 11 Fed. Cas. No. 6,107, 14 Blatchf. 128, 12 Off. Gaz. 188 [*citing* with approval Moorman *v.* Hoge, 17 Fed. Cas. No. 9,783, 2 Sawy. 78]; *In re* Gordon, 12 Pat. Off. Gaz. 517.

A barrel of peculiar form, dimensions, and capacity, irrespective of any marks or brands impressed upon or connected with it, cannot become a lawful trade-mark, or a substantive part of a lawful trade-mark. Moorman *v.* Hoge, 17 Fed. Cas. No. 9,783, 2 Sawy. 78.

Picture of package.— While barrels, boxes, etc., although of peculiar size or shape, do not constitute good trade-marks, a pictorial representation of them may constitute a good trade-mark. Clinton Metalic Paint Co. *v.* New York Metalic Paint Co., 23 Misc. (N. Y.) 66, 50 N. Y. Suppl. 437. But such pictures may be descriptive and hence not valid trade-marks. See *supra*, III, B, 1, b.

A cigar band, the only characteristics of which are that it is wider at one end than the other and that it is of a brown color with white lettering thereon, is not a valid trade-mark. Regensburg *v.* Juan F. Portuondo Cigar Mfg. Co., 142 Fed. 160, 73 C. C. A. 378 [*affirming* 136 Fed. 866].

The size, or shape, or mode of construction of a box, barrel, bottle, or package in which goods may be put is not a trade-mark; nor is the mechanical arrangement of bottles in boxes in which they are packed by the manufacturer capable of protection as such. Hoyt *v.* Hoyt, 143 Pa. St. 623, 638, 22 Atl. 755, 24 Am. St. Rep. 575, 13 L. R. A. 343, where it is said: "As a general proposition it may be said that one may imitate what is excellent in the processes and business methods of his neighbor as freely and as safely as he may imitate what is good in his moral character, as long as he infringes no right secured to him by statute, and does not fraudulently personate him or simulate his products."

Structural imitation or copying may or may not constitute unfair competitions according to circumstances. See *infra*, V, C, 14.

14. Imitation of dress of goods is a common form of unfair competition. See *infra*, V, C, 12.

12. Substance or Useful Part of Article or Package. The substance or any useful part or feature of the article itself, or of the package in which it is contained, cannot be appropriated as a trade-mark,[15] for otherwise all substances and methods useful in manufacturing and packing goods for the market would soon be monopolized without the formality of obtaining a patent even in cases where a patent could be obtained.[16] The product itself cannot be a trade-mark.[17] If the package is not patented, it is *publici juris*,[18] and no one can obtain an exclusive right to use it by a claimed appropriation of its form or materials as a trade-mark.[19] In

15. *District of Columbia.*— *In re* American Circular Loom Co., 28 App. Cas. 446.

Iowa.— Sartor *v.* Schaden, 125 Iowa 696, 101 N. W. 511.

New York.— Cooke, etc., Co. *v.* Miller, 169 N. Y. 475, 62 N. E. 582; Faber *v.* Faber, 49 Barb. 357.

Pennsylvania.— Putnam Nail Co. *v.* Dulaney, 140 Pa. St. 205, 21 Atl. 391, 23 Am. St. Rep. 228, 11 L. R. A. 524 [*affirming* 8 Pa. Co. Ct. 595].

United States.— Smith *v.* Krause, 166 Fed. 1021, 91 C. C. A. 218 [*affirming* 160 Fed. 270]; Bamforth *v.* Douglass Post Card, etc., Co., 158 Fed. 355; Diamond Match Co. *v.* Saginaw Match Co., 142 Fed. 727, 74 C. C. A. 59; Davis *v.* Davis, 27 Fed. 490; Lorillard *v.* Wight, 15 Fed. 383; Dausman, etc., Tobacco Co. *v.* Ruffner, 7 Fed. Cas. No. 3,585, 15 Off. Gaz. 559; Fairbanks *v.* Jacobus, 8 Fed. Cas. No. 4,608, 3 Ban. & A. 108, 14 Blatchf 337; Harrington *v.* Libby, 11 Fed. Cas. No. 6,107, 14 Blatchf. 128, 12 Off. Gaz. 188; *In re* Gordon, 12 Off. Gaz. 517; *In re* Kane, 9 Off. Gaz. 105.

Measuring marks.— In Dausman, etc., Tobacco Co. *v.* Ruffner, 7 Fed. Cas. No. 3,585, 15 Off. Gaz. 559, 560, Blodgett, J., said: "Any manufacturer of goods which are sold by the piece, such as cloths, for instance, must have the right by marks or lines to indicate where to cut, in order to remove each yard, or part of a yard, or other specific quantity. So, in regard to liquids put up, for instance, in glass bottles or similar packages, lines might be drawn, showing the half [etc.], and no manufacturer, by registering a trade-mark upon a package of that kind could prevent another manufacturer from thus showing how a measured portion of the contents of his package might be withdrawn."

There can be no trade-mark in a piece of tin, regardless of its color, shape, or inscriptions, used as a tag on tobacco, although by the use of such device said tobacco may have acquired a reputation in the market as "Tin Tag Tobacco." Lorillard *v.* Pride, 28 Fed. 434, 438, Blodgett, J., observing: "It seems to me it would be as reasonable to assume that the complainants could have adopted paper or wood, or a piece of cloth or leather, as a badge or *indicia* of their goods, as that they could have taken a piece of tin. . . . A person may appropriate any word, figure, or emblem as a trade-mark, but that does not give an exclusive right to the use of the well-known material substances upon which the word, figure, or emblem may be impressed or engraved."

An octagonal wooden stick upon which carpets were rolled so that the stick presented at its ends the appearance of two octagonal rings was upheld as a valid trade-mark for such carpets in Lowell Mfg. Co. *v.* Larned, 15 Fed. Cas. No. 8,570. At this day this case would probably be classed as one of unfair competition by dress of goods and not as a case of technical trade-mark. See *infra*, V, C, 12.

An ornamental mark is not, for that reason alone, invalid as a trade-mark. Capewell Horse Nail Co. *v.* Mooney, 167 Fed. 575 [*affirmed* in 172 Fed. 826, 97 C. C. A. 248].

A useful or integral part of the article may be so shaped as to present the trade-mark where the mark itself performs no useful function. Thus the iron framework of a machine may be cast in a form presenting a monogram. Hegeman *v.* Hegeman, 8 Daly (N. Y.) 1.

16. *In re* American Circular Loom Co., 28 App. Cas. (D. C.) 446; Enoch Morgan's Sons Co. *v.* Troxell, 89 N. Y. 292, 42 Am. Rep. 294, 11 Abb. N. Cas. 86 [*reversing* 23 Hun 632, 57 How. Pr. 121]; Diamond Match Co. *v.* Saginaw Match Co., 142 Fed. 727, 74 C. C. A. 59; Colgan *v.* Danheiser, 35 Fed. 150; Adams *v.* Heisel, 31 Fed. 279; Harrington *v.* Libby, 11 Fed. Cas. No. 6,107, 14 Blatchf. 128, 12 Off. Gaz. 188. See *supra*, I, E, 4.

17. Davis *v.* Davis, 27 Fed. 490.

Uncopyrighted post cards are not entitled to protection as trade-marks either singly or collectively, as they do not identify and distinguish the product of the manufacturer, but constitute the product itself. Bamforth *v.* Douglass Post Card, etc., Co., 158 Fed. 355.

A label as an article of commerce, and not attached to any goods, cannot be protected as a trade-mark. It must be protected, if at all, by a copyright or design patent. Schumacher *v.* Schwenke, 36 Off. Gaz. 457. See, generally, Copyright, 9 Cyc. 897 *et seq.*; Patents, 30 Cyc. 827.

The words "Merrie Christmas" printed on or woven in ribbons at intervals are not the subject of a trade-mark, the words being an integral part of the ribbon, which was evidently designed for use in tying Christmas packages, and not merely a mark to identify the manufacturer. Smith *v.* Krause, 160 Fed. 270 [*affirmed* in 166 Fed. 1021, 91 C. C. A. 218].

18. Hoyt *v.* Hoyt, 143 Pa. St. 623, 22 Atl. 755, 24 Am. St. Rep. 575, 13 L. R. A. 343, peculiar bottle sold to public generally.

19. Enoch Morgan's Sons' Co. *v.* Schwachofer, 5 Abb. N. Cas. (N. Y.) 265 (where

other words the package itself cannot be a trade-mark.[20] The mechanical arrangement of the goods in the package is not a trade-mark.[21]

13. Devices, Symbols, or Pictures. Devices or symbols are perhaps the most usual forms of trade-marks. Any device or symbol may be protected as a trade-mark which is arbitrary in its character and selection, and does not, by its inherent character, necessarily describe the goods upon which it is employed, or contain any misrepresentation of fact with reference to the goods, their origin, character, qualities, or contents. Trade-marks of this class usually consist of devices or symbols in combination with words or names.[22] National emblems, or coats of

the court says that "the plaintiffs cannot have an exclusive right to use tinfoil or ultramarine blue colored paper, in putting up their article, as such paper is much used for ordinary commercial purposes." This case was, however, decided against the defendants on the ground of unfair competition); C. F. Simmons Medicine Co. *v.* Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165; Harrington *v.* Libby, 11 Fed. Cas. No. 6,107, 14 Blatchf. 128, 12 Off. Gaz. 188. See also *supra*, III, B, 11.

Galvanized iron hoops, placed on a liquor barrel of dark color, were refused registration as a trade-mark, as not an original appropriation, and not sufficiently distinctive. *In re* Kane, 9 Off. Gaz. 105.

20. See cases cited *infra*, this note.

The device of a "drum" for holding collars, with nothing more to identify it, does not constitute a valid trade-mark. White *v.* Schlect, 14 Phila. (Pa.) 88.

Actual barrels, boxes, and the like may not be appropriated for trade-marks for their particular size, style, or shape; but this has reference only to the physical objects themselves, and not to pictures or devices of them for labels or brands. Clinton Metalic Paint Co. *v.* New York Metalic Paint Co., 23 Misc. (N. Y.) 66, 50 N. Y. Suppl. 437; Harrington *v.* Libby, 11 Fed. Cas. No. 6,107, 14 Blatchf. 128, 12 Off. Gaz. 188, tin pail sold with collars.

21. Hoyt *v.* Hoyt, 143 Pa. St. 623, 22 Atl. 755, 24 Am. St. Rep. 575, 13 L. R. A. 343; Davis *v.* Davis, 27 Fed. 490.

22. *Georgia.*— Foster *v.* Blood Balm Co., 77 Ga. 216, 3 S. E. 284.

Illinois.— See Ruhstrat *v.* People, 185 Ill. 133, 57 N. E. 41, 76 Am. St. Rep. 30, 49 L. R. A. 181.

New York.— Colman *v.* Crump, 70 N. Y. 573; Potter *v.* McPherson, 21 Hun 559; Hegeman *v.* O'Byrne, 9 Daly 264; Cook *v.* Starkweather, 13 Abb. Pr. N. S. 392. See Enoch Morgan's Sons Co. *v.* Troxell, 89 N. Y. 292, 42 Am. Rep. 294 [*reversing* 23 Hun 632, 57 How. Pr. 121]; Hier *v.* Abrahams, 82 N. Y. 519, 37 Am. Rep. 589.

Pennsylvania.— Morse *v.* Worrell, 10 Phila. 168.

United States.— Lawrence Mfg. Co. *v.* Tennessee Mfg. Co., 138 U. S. 537, 11 S. Ct. 396, 34 L. ed. 997; Amoskeag Mfg. Co. *v.* Trainer, 101 U. S. 51, 25 L. ed. 993; Delaware, etc., Canal Co. *v.* Clark, 13 Wall. 311, 20 L. ed. 581; Capewell Horse Nail Co. *v.* Mooney, 167 Fed. 575 [*affirmed* in 172 Fed. 826, 97 C. C. A. 248]; Buzby *v.* Davis, 150 Fed. 275, 80 C. C. A. 163; Merriam *v.* Famous Shoe, etc., Co., 47 Fed. 411; Lichtenstein *v.* Goldsmith, 37 Fed. 359; Adams *v.* Heisel, 31 Fed. 279; Anheuser-Busch Brewing Assoc. *v.* Clarke, 26 Fed. 410; Shaw Stocking Co. *v.* Mack, 12 Fed. 707, 21 Blatchf. 1; Morrison *v.* Case, 17 Fed. Cas. No. 9,845, 9 Blatchf. 548, 2 Off. Gaz. 544; Smith *v.* Reynolds, 22 Fed. Cas. No. 13,098, 10 Blatchf. 100, 3 Off. Gaz. 214; *In re* Pratt, 10 Off. Gaz. 866; *Ex p.* Straiton, 18 Off. Gaz. 923.

England.— Seixo *v.* Provezende, L. R. 1 Ch. 192, 12 Jur. N. S. 212, 14 L. T. Rep. N. S. 314, 14 Wkly. Rep. 357; *In re* Australian Wine Importers, 41 Ch. D. 278, 58 L. J. Ch. 380, 60 L. T. Rep. N. S. 436, 37 Wkly. Rep. 578; *In re* James, 33 Ch. D. 392, 55 L. J. Ch. 915, 55 L. T. Rep. N. S. 415, 35 Wkly. Rep. 67 [*reversing* 31 Ch. D. 340, 55 L. J. Ch. 214, 54 L. T. Rep. N. S. 125, 34 Wkly. Rep. 347]; *In re* Hudson, 32 Ch. D. 311, 55 L. J. Ch. 531, 55 L. T. Rep. N. S. 228, 34 Wkly. Rep. 616; *In re* Rotherham, 14 Ch. D. 585, 49 L. J. Ch. 511, 43 L. T. Rep. N. S. 1; *In re* Worthington, 14 Ch. D. 8, 49 L. J. Ch. 646, 42 L. T. Rep. N. S. 563, 28 Wkly. Rep. 747; Cartier *v.* Carlisle, 31 Beav. 292, 8 Jur. N. S. 183, 54 Eng. Reprint 1151; Edelsten *v.* Edelsten, 1 De G. J. & S. 185, 9 Jur. N. S. 479, 7 L. T. Rep. N. S. 768, 11 Wkly. Rep. 328, 66 Eng. Ch. 142, 46 Eng. Reprint 72; Harrison *v.* Taylor, 11 Jur. N. S. 408, 12 L. T. Rep. N. S. 339; Bass *v.* Dawber, 19 L. T. Rep. N. S. 626; Standish *v.* Whitwell, 14 Wkly. Rep. 512; *In re* Walkden Aerated Waters Co., Sebastian's Dig. 558; Steinthal *v.* Samson, Sebastian's Dig. 546; Allsopp *v.* Walker, Sebastian's Dig. 545; Bell *v.* Bell, Sebastian's Dig. 514; Cartier *v.* May, Sebastian's Dig. 200; Cartier *v.* Westhead, Sebastian's Dig. 199; Henderson *v.* Jorss, Sebastian's Dig. 198.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 8.

Illustrations.—A label containing a marine picture with a small six-pointed star and the words "Star of Hope," is a valid trade-mark for a brand of tobacco. *In re* Dexter, [1893] 2 Ch. 262, 62 L. J. Ch. 545, 68 L. T. Rep. N. S. 793. The device of a star in combination with the word "Star" is a good trade-mark as applied to underwear. Hutchinson *v.* Blumberg, 51 Fed. 829; Morrison *v.* Case, 17 Fed. Cas. No. 9,845, 9 Blatchf. 548, 2 Off. Gaz. 544. A picture of a boy suffering from cramps is a good trade-mark for a medicine designed to cure cramps. L. H. Harris Drug Co. *v.* Stucky, 46 Fed.

arms, in combination with other distinctive features, may be appropriated as a trade-mark.[23] Pictures either alone or in combination with names are ordinarily valid trade-marks.[24] The subject of a picture may be so related to the article in connection with which it is used as to be merely descriptive thereof, in which case it cannot be exclusively appropriated for that class of goods.[25] But a particular representation of such subject may be exclusively appropriated.[26] A portrait of the proprietor of the goods,[27] or of celebrities, either alone or in com-

624. The masonic symbol of a square and compass cannot be a good trade-mark, since it has acquired a special significance, and its use in any other sense would be deceptive. *In re* Thomas, 14 Off. Gaz. 821, holding that the masons have no monopoly in their symbols. A triangle, plain, inclosed by an oval with the words "Bass & Co.'s Pale Ale," forms a valid trade-mark. *In re* Worthington, 14 Ch. D. 8, 49 L. J. Ch. 646, 42 L. T. Rep. N. S. 563, 28 Wkly. Rep. 747. The coat of arms of the city of Paris, in combination with other marks, words, or devices, constitutes a good trade-mark. Godillot *v.* Hazard, 44 N. Y. Super. Ct. 427 [*affirmed* in 81 N. Y. 263]. An intermixture of colors in the selvage edge is a good trade-mark for worsted stuffs. Mitchell *v.* Henry, 15 Ch. D. 181, 43 L. T. Rep. N. S. 186. A red cross is a good trade-mark for absorbent cotton. Johnson *v.* Brunor, 107 Fed. 466. An illustration of a crown used by brand, stencil plate, etc., upon vessels and labels for paints, may be a lawful trade-mark. Smith *v.* Reynolds, 22 Fed. Cas. No. 13,098, 10 Blatchf. 100, 3 Off. Gaz. 214. The symbol of the keystone of an arch is susceptible of exclusive appropriation. Buzby *v.* Davis, 150 Fed. 275, 80 C. C. A. 163.

Distinction between words and marks.— There is great force in the following observation of Lindley, L. J., in Powell *v.* Birmingham Vinegar Brewery Co., [1896] 2 Ch. 54, 69, 65 L. J. Ch. 563, 74 L. T. Rep. N. S. 509, 44 Wkly. Rep. 688 [*affirmed* in [1897] A. C. 710, 66 L. J. Ch. 763, 76 L. T. Rep. N. S. 792]: "A person who designs or adopts a mark to denote his goods imposes no unreasonable burden on rivals in trade by forbidding them from using the same mark to denote similar goods if the public are thereby misled. But to monopolise the use of words imposes a much more serious burden. Consequently, limits have been put to the right to complain of the use of words which have not been put to the right to complain of the use of marks." Standard Table Oil Cloth Co. *v.* Trenton Oil Cloth, etc., Co., 71 N. J. Eq. 555, 63 Atl. 846.

23. U. S. *v.* Steffens, 27 Fed. Cas. No. 16,384. But see *In re* Cahn, 27 App. Cas. (D. C.) 173, holding that no person can acquire an exclusive right as against the state to the use of the state coat of arms as a trade-mark. Such marks are expressly excluded from registration under the federal statute. Act of Feb. 20, 1905, § 5.

American eagle.— The fact that the eagle is the national emblem of the United States does not prevent its appropriation by private parties for use as a trade-mark, especially when there is but slight resemblance in the figure of the eagle so used to that of the national emblem. U. S. *v.* Steffens, 27 Fed. Cas. No. 16,384.

Representations of the king and the royal arms constitute a valid trade-mark in Canada, as the English rule prohibiting the use of the royal arms, representations of the king, or of any member of the royal family, or of the royal crown, or of the national arms or flags of Great Britain, does not prevail in Canada. Spilling *v.* Ryall, 8 Can. Exch. 195. The royal crown, of which the instructions forbid the representation, is the circlet surmounted by two arches which appears on the royal arms. *In re* König, [1896] 2 Ch. 236, 65 L. J. Ch. 404, 45 Wkly. Rep. 230.

24. Atlas Assur. Co. *v.* Atlas Ins. Co., 138 Iowa 228, 112 N. W. 232, 114 N. W. 609, 128 Am. St. Rep. 189, 15 L. R. A. N. S. 625; Dwinell-Wright Co. *v.* Co-operative Supply Co., 155 Fed. 909 (the name "White House," and the picture of the White House at Washington); Paine *v.* Daniells, etc., Breweries, [1893] 2 Ch. 567, 62 L. J. Ch. 732, 68 L. T. Rep. N. S. 801, 2 Reports 491, 42 Wkly. Rep. 40 (name and picture of "John Bull"); Read *v.* Richardson, 45 L. T. Rep. N. S. 54 (picture of a bull-dog infringed by picture of a terrier, both applied to beer); Gillett *v.* Lumsden, 8 Ont. L. Rep. 168 [*affirming* 6 Ont. L. Rep. 66]. See also Baker *v.* Delapenha, 160 Fed. 746.

25. Bickmore Gall Cure Co. *v.* Karns Mfg. Co., 126 Fed. 573 [*reversed* on other grounds in 134 Fed. 883, 67 C. C. A. 439]. See also *supra*, III, B, 1, b.

A picture of a book, watch, or shoe has been held not a valid trade-mark for a bookseller, watchmaker, or shoemaker respectively, because not sufficiently arbitrary, but on the contrary clearly descriptive. Merriam *v.* Famous Shoe, etc., Co., 47 Fed. 411.

A picture of the goods contained in the package is not a valid trade-mark, and may be used by others dealing in the same goods. Marvel Co. *v.* Tullar Co., 125 Fed. 829.

A pictorial representation of a proper name, used as such, is not subject to exclusive appropriation as against one bearing that name. Fish Bros. Wagon Co. *v.* La Belle Wagon Works, 82 Wis. 546, 52 N. W. 595, 33 Am. St. Rep. 72, 16 L. R. A. 453.

26. Popham *v.* Cole, 66 N. Y. 69, 23 Am. Rep. 22; Bickmore Gall Cure Co. *v.* Karns Mfg. Co., 126 Fed. 573 [*reversed* on other grounds in 134 Fed. 833, 67 C. C. A. 439]. See also Dr. A. Reed Cushion Shoe Co. *v.* Frew, 162 Fed. 887, 89 C. C. A. 577.

27. Rowland *v.* Mitchell, [1897] 1 Ch. 71, 66 L. J. Ch. 110, 75 L. T. Rep. N. S. 498.

bination with names and other devices,[28] may constitute trade-marks. Illustrations in books or stories do not constitute trade-marks, and must be protected by copyright, if at all.[29]

14. Foreign Words or Letters. Foreign words, phrases, or letters may be a distinctive device and hence a valid trade-mark;[30] but a mere foreign form of the generic name of the article,[31] or a foreign descriptive word or phrase,[32] or a mere transliteration into English of a foreign generic word is not a good trade-mark.[33] An unmeaning compound of foreign words may, however, be appropriated as a trade-mark.[34]

15. Attached Articles. An article attached to a manufactured product may be a valid trade-mark, the same as any other sign or symbol, provided it complies with the definitions relative to those subjects.[35] All trade-marks must be attached, in some way, to the goods.[36]

16. Combinations. A combination of words, or of words and devices or symbols, is a very common form of valid trade-mark, and the combination may be sustained, although the elements taken separately are not capable of exclusive appropriation.[37] Upon the other hand, the appropriation of a word in one combination

28. *Ex p.* Pace, 15 Off. Gaz. 909.

29. Munro *v.* Smith, 55 Hun (N. Y.) 419, 8 N. Y. Suppl. 671.

30. Menendez *v.* Holt, 128 U. S. 514, 9 S. Ct. 143, 32 L. ed. 526; Holt *v.* Menendez, 23 Fed. 869; *In re* Rotherham, 14 Ch. D. 585, 49 L. J. Ch. 511, 43 L. T. Rep. N. S. 1.

31. De Bevoise Co. *v.* H. & W. Co., 69 N. J. Eq. 114, 60 Atl. 407, "Brassière," as applied to a corset cover and bust supporter.

The word "Matzoon," as applied to fermented milk, may be deemed a fanciful designation thereof, although an article of a similar nature, but different consistency, has been used in the extreme East under the Armenian name "Madzoon" or "Maadzoon." Dr. Dadirrian, etc., Co. *v.* Hauenstein, 37 Misc. (N. Y.) 23, 74 N. Y. Suppl. 709; Dadirrian *v.* Theodarian, 15 Misc. (N. Y.) 300, 37 N. Y. Suppl. 611. *Contra*, Dadirrian *v.* Gullian, 79 Fed. 784; Dadirrian *v.* Yacubian, 72 Fed. 1010, 90 Fed. 812, 98 Fed. 872, 39 C. C. A. 321.

32. Roncoroni *v.* Gross, 92 N. Y. App. Div. 221, 86 N. Y. Suppl. 1112. But see Gout *v.* Aleploglu, 6 Beav. 69 note, 49 Eng. Reprint 750 (where the plaintiff, long a manufacturer of watches for the Turkish and Levantine market, marked them with his name, a sprig, etc., and the Turkish word "*Pessendede*" (meaning "warranted"). This was held to be a valid trade-mark, and an injunction was granted restraining defendant from the use thereof); Partlo *v.* Todd, 17 Can. Sup. Ct. 196.

A word which is not itself descriptive will not be rendered such merely because descriptive words in foreign languages led to its invention and adoption. *In re* Densham, [1895] 2 Ch. 176, 64 L. J. Ch. 634, 72 L. T. Rep. N. S. 614, 12 Reports 283, 43 Wkly. Rep. 515.

33. Dadirrian *v.* Yacubian, 98 Fed. 872, 39 C. C. A. 321 [*affirming* 90 Fed. 812].

34. *In re* Densham, [1895] 2 Ch. 176, 64 L. J. Ch. 634, 72 L. T. Rep. N. S. 614, 12 Reports 283, 43 Wkly. Rep. 515, "Mayawattee," as applied to tea and coffee.

35. Articles attached to goods.— In *Ex p.* Straiton, 18 Off. Gaz. 923, Marble, Comr., said: "Applicants in this case seek to register as a trade-mark for cigars — 'A waved band or ribbon of rectilinear form longer than it is wide, which is fastened to the two ends of a cigar-box, and so placed with reference to the cigars within the box as to be below some of said cigars and above the remaining cigars.'" This was registered as a valid trade-mark. See also Lowell Mfg. Co. *v.* Larned, 15 Fed. Cas. No. 8,570.

36. See *supra*, II, B, 4.

37. *California.*— Spieker *v.* Lash, 102 Cal. 38, 36 Pac. 362.

Connecticut.— Meriden Britannia Co. *v.* Parker, 39 Conn. 450, 12 Am. Rep. 401.

Massachusetts.— New England Awl, etc., Co. *v.* Marlborough Awl, etc., Co., 168 Mass. 154, 46 N. E. 386, 60 Am. St. Rep. 377; Lawrence Mfg. Co. *v.* Lowell Hosiery Mills, 129 Mass. 325, 37 Am. Rep. 362.

New York.— Fischer *v.* Blank, 138 N. Y. 244, 33 N. E. 1040; Volger *v.* Force, 63 N. Y. App. Div. 122, 71 N. Y. Suppl. 209; T. B. Dunn Co. *v.* Trix Mfg. Co., 50 N. Y. App. Div. 75, 63 N. Y. Suppl. 333; Electro-Silicon Co. *v.* Hazard, 29 Hun 369; Godillot *v.* Hazard, 44 N. Y. Super. Ct. 427 [*affirmed* in 81 N. Y. 263]; Rawlinson *v.* Brainard, etc., Co., 28 Misc. 287, 59 N. Y. Suppl. 880; Clinton Metalic Paint Co. *v.* New York Metalic Paint Co., 23 Misc. 66, 50 N. Y. Suppl. 437; Cook *v.* Starkweather, 13 Abb. Pr. N. S. 392.

Virginia.— Virginia Baking Co. *v.* Southern Biscuit Works, (1910) 68 S. E. 261.

United States.— Burke *v.* Bishop, 175 Fed. 167; Holeproof Hosiery Co. *v.* Richmond Hosiery Mills, 167 Fed. 381; Social Register Assoc. *v.* Murphy, 128 Fed. 116 ("Social Register" sustained in association as a trade-mark, although neither word alone could be so appropriated); Lalance, etc., Mfg. Co. *v.* National Enameling, etc., Co., 109 Fed. 317; Kerry *v.* Toupin, 60 Fed. 272; Hutchinson *v.* Blumberg, 51 Fed. 829; Frost *v.* Rindskopf, 42 Fed. 408; Lichtenstein *v.* Goldsmith, 37 Fed. 359; Adams *v.* Heisel, 31 Fed. 279;

does not prevent its being used by others in other combinations not likely to deceive. In other words the combination is the thing protected.[38] A peculiar collocation of words which, although descriptive in their meaning, are arbitrary in their selection and arrangement, and are not the only words which could be employed to describe the article to which they are applied, may be protected as a trade-mark.[39] In many cases of this class it is difficult, if not impossible, to say whether relief is afforded upon the ground of technical trade-mark rights in the combination, or upon the ground of unfair competition. It is, perhaps, not very material, for the latter doctrine includes the former. At all events, a deceptive imitation of such combination will be enjoined.[40] Mere length in a collocation

Humphreys' Specific Homeopathic Medicine Co. *v.* Wenz, 14 Fed. 250; Filkins *v.* Blackman, 9 Fed. Cas. No. 4,786, 13 Blatchf. 440; Kinney *v.* Allen, 14 Fed. Cas. No. 7,826, 1 Hughes 106; Proctor *v.* McBride, 20 Fed. Cas. No. 11,441; Walker *v.* Reid, 29 Fed. Cas. No. 17,084.

England.— *In re* Hudson, 32 Ch. D. 311, 55 L. J. Ch. 531, 55 L. T. Rep. N. S. 228, 34 Wkly. Rep. 616; *In re* Barrows, 5 Ch. D. 353, 46 L. J. Ch. 450, 36 L. T. Rep. N. S. 291, 25 Wkly. Rep. 407; Gant *v.* Aleploglu, 6 Beav. 69 note, 49 Eng. Reprint 750; Spottiswoode *v.* Clark, 1 Coop. t. Cott. 254, 47 Eng. Reprint 844, 10 Jur. 1043, 2 Phil. 154, 22 Eng. Ch. 154, 41 Eng. Reprint 900; Bury *v.* Bedford, 4 De G. J. & S. 352, 10 Jur. N. S. 503, 33 L. J. Ch. 465, 10 L. T. Rep. N. S. 470, 4 New Rep. 180, 12 Wkly. Rep. 727, 69 Eng. Ch. 272, 46 Eng. Reprint 954; Ransome *v.* Bentall, 3 L. J. Ch. 161. See also Pirie *v.* Goodall, [1892] 1 Ch. 35, 61 L. J. Ch. 79, 65 L. T. Rep. N. S. 640, 40 Wkly. Rep. 81.

Canada.— Smith *v.* Fair, 14 Ont. 729.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 21.

Compare In re Meyer Bros. Coffee, etc., Co., 32 App. Cas. (D. C.) 277.

A geographical and personal name combined, such as "Auburn-Lynn," may be appropriated as a valid trade-mark. W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 100 Me. 461, 62 Atl. 499, 4 L. R. A. N. S. 960.

"The most universal element may be appropriated as the specific mark of a plaintiff's goods if it is used and claimed only in connection with a sufficiently complex combination of other things." New England Awl, etc., Co. *v.* Marlborough Awl, etc., Co., 168 Mass. 154, 156, 46 N. E. 386, 60 Am. St. Rep. 377 [*distinguishing* Enoch Morgan's Sons Co. *v.* Troxell, 89 N. Y. 292, 42 Am. Rep. 294].

38. Desmond's Appeal, 103 Pa. St. 126, 49 Am. Rep. 118; Pratt Mfg. Co. *v.* Astral Refining Co., 27 Fed. 492. See also *infra*, IV, M.

39. W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 100 Me. 461, 62 Atl. 499, 4 L. R. A. N. S. 960; Rawlinson *v.* Brainard, etc., Co., 28 Misc. (N. Y.) 287, 59 N. Y. Suppl. 880; Williams *v.* Spence, 25 How. Pr. (N. Y.) 366; Amoskeag Mfg. Co. *v.* Trainer, 101 U. S. 51, 25 L. ed. 993; McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828; Improved Fig Syrup Co. *v.* California Fig Syrup Co., 54 Fed. 175, 4 C. C. A. 264; Frost *v.* Rindskopf, 42 Fed. 408; Stoughton *v.* Woodard, 39 Fed. 902; *In re* Glines, 8 Off. Gaz. 435; Davis *v.* Kennedy, 13 Grant Ch. (U. C.) 523.

40. Tischer *v.* Blank, 138 N. Y. 244, 33 N. E. 1040 [*affirming* 19 N. Y. Suppl. 65]; Kassel *v.* Jeuda, 61 N. Y. App. Div. 613, 70 N. Y. Suppl. 480; Ransom *v.* Ball, 4 Silv. Sup. (N. Y.) 217, 7 N. Y. Suppl. 238; Williams *v.* Johnson, 2 Bosw. (N. Y.) 1; Davis *v.* Kendall, 2 R. I. 566; Lalance, etc., Mfg. Co. *v.* National Enameling, etc., Co., 109 Fed. 317; Davis *v.* Harbord, 15 App. Cas. 316, 60 L. J. Ch. 16, 63 L. T. Rep. N. S. 389. See also *infra*, V, C, 12.

The following combinations of words have been protected: "Akron Dental Rubber." Keller *v.* B. F. Goodrich Co., 117 Ind. 556, 19 N. E. 196, 10 Am. St. Rep. 88. "A. N. Hoxie's Mineral Soap," "A. N. Hoxie's Pumice Soap." Hoxie *v.* Chaney, 143 Mass. 592, 10 N. E. 713, 58 Am. Rep. 149. "Apollinaris Water." Apollinaris Co. *v.* Norrish, 33 L. T. Rep. N. S. 242. "Bell's Life in London and Sporting Chronicle," name of a paper. Clement *v.* Maddick, 1 Giffard 98, 5 Jur. N. S. 592, 33 L. T. Rep. N. S. 117, 65 Eng. Reprint 841. "Bethesda Mineral Water." Dunbar *v.* Glenn, 42 Wis. 118, 24 Am. Rep. 395. "Black Diamond," name of a scythestone. A. F. Pike Mfg. Co. *v.* Cleveland Stone Co., 35 Fed. 896. "Charter Oak," trade-mark for a stove. Filley *v.* Child, 9 Fed. Cas. No. 4,787, 4 Ban. & A. 353, 16 Blatchf. 376, 8 Reporter 230, 16 Off. Gaz. 261. "Cream Baking Powder." Price Baking-Powder Co. *v.* Fyfe, 45 Fed. 799. "Dr. C. McLane's Celebrated Liver Pills." McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828. "Dr. J. Blackman's Genuine Healing Balsam." Filkins *v.* Blackman, 9 Fed. Cas. No. 4,786, 13 Blatchf. 440. "Dunn's Fruit Salt Baking Powder" was held to be no infringement of "Eno's Fruit Salt," an effervescing drink; both were allowed registration. *In re* Dunn, 41 Ch. D. 439, 58 L. J. Ch. 604, 61 L. T. Rep. N. S. 98 [*affirmed* in 15 App. Cas. 252, 63 L. T. Rep. N. S. 6, 39 Wkly. Rep. 161]. "German Sweet Chocolate." See Pierce *v.* Guittard, 68 Cal. 68, 8 Pac. 645, 58 Am. Rep. 1. "Grenade Syrup," made from the juice of the pomegranate. Rillet *v.* Carlier, 61 Barb. (N. Y.) 435. "Hostetter's Celebrated Stomach Bitters." Myers *v.* Theller, 38 Fed. 607. "Johnson's Anodyne Liniment." Jennings *v.* Johnson, 37 Fed. 364. "Lactopeptine," a medicine infringed by "Lacto-pepsine." Carnrick *v.* Morson, L. J. Notes Cases [1877] 71. "La Favorita," a

of words not peculiarly arranged, and purely descriptive, does not make it a valid trade-mark.[41] But if any one or more of the words used be arbitrary, and distinctive, it will support the use of other words in combination with it which are either generic, personal, geographical, or descriptive, and the combination as a whole will constitute a valid trade-mark or trade-name.[42]

17. Labels. Mere labels used upon goods are not trade-marks,[43] although they will be protected against imitation upon the ground of unfair competition.[44] The authorities are divided as to whether or not so-called union labels constitute technical trade-marks, the weight of authority being in the negative.[45] By statute, however, union labels are protected in some states.[46]

18. Directions and Advertisements. Directions, advertisements, notices, and the like, although used in connection with the goods, form no part of a trade-mark.[47]

19. Generic Name of Article — a. In General. The generic name of an article is descriptive of such article, and therefore cannot be exclusively appropriated as a trade-mark.[48] Even words which were not originally or of their own

brand of flour. Menendez *v.* Holt, 128 U. S. 514, 9 S. Ct. 143, 32 L. ed. 526. "Licensed Victuallers' Relish," name of a sauce. Cotton *v.* Gillard, 44 L. J. Ch. 90. "Maryland Club Whisky." Cahn *v.* Gottschalk, 14 Daly (N. Y.) 542, 2 N. Y. Suppl. 13. "Moxie Nerve Food." Moxie Nerve Food Co. *v.* Beach, 33 Fed. 248. See Moxie Nerve Food Co. *v.* Baumbach, 32 Fed. 205. "Pharaoh's Serpents," name of fireworks. Barnett *v.* Leuchars, 13 L. T. Rep. N. S. 495, 14 Wkly. Rep. 166. "Pirie's Parchment Bank," a particular kind of paper. *In re* Goodall, 42 Ch. D. 566, 38 Wkly. Rep. 189. "Pond Lily Wash," name of a washing fluid. Wright *v.* Simpson, 15 Off. Gaz. 968. "Priestley's Silk Warp Henrietta." Priestley *v.* Adams, 59 Hun (N. Y.) 380, 13 N. Y. Suppl. 41. "Prince's Metallic Paint." Prince Mfg. Co. *v.* Prince Metallic Paint Co., 51 Hun (N. Y.) 443, 4 N. Y. Suppl. 348. "Roberts' Parabola Needles." Roberts *v.* Sheldon, 20 Fed. Cas. No. 11,916, 8 Biss. 398, 18 Off. Gaz. 1277. "Sliced Animals." Selchow *v.* Baker, 93 N. Y. 59, 45 Am. Rep. 169. "S. N. Pike's Magnolia Whisky, Cincinnati, Ohio." Kidd *v.* Johnson, 100 U. S. 617, 25 L. ed. 769. "Stephens' Blue Black Writing Fluid." Stephens *v.* Peel, 16 L. T. Rep. N. S. 145. "Sweet Opoponax of Mexico," name of a perfume. Smith *v.* Woodruff, 48 Barb. (N. Y.) 438. "Taylor's Persian Thread." Taylor *v.* Taylor, 2 Eq. Rep. 290, 23 L. J. Ch. 255. "The Baeder Flint Paper Company, New York." Baeder *v.* Baeder, 52 Hun (N. Y.) 170, 5 N. Y. Suppl. 123. "The Graduated, Grooveless, Drill-eyed, Ground-down," applied to a new style of needle. Shrimpton *v.* Laight, 18 Beav. 164, 52 Eng. Reprint 65. "The Rising Sun Stove Polish," not infringed by "The Rising Moon Stove Polish," both valid. Morse *v.* Worrell, 10 Phila. (Pa.) 168. "Union Made Cigars." Allen *v.* McCarthy, 37 Minn. 349, 34 N. W. 416. "Vanity Fair," for cigarettes. *In re* Kimball, 11 Off. Gaz. 1109.

41. Gilman *v.* Hunnewell, 122 Mass. 139.

42. Rawlinson *v.* Brainard, etc., Co., 28 Misc. (N. Y.) 287, 59 N. Y. Suppl. 880; Dreydoppel *v.* Young, 14 Phila. (Pa.) 226; Alleghany Fertilizer Co. *v.* Woodside, 1 Fed. Cas. No. 206, 1 Hughes 115; U. S. *v.* Steffens, 27 Fed. Cas. No. 16,384; Walker *v.* Reid, 29 Fed. Cas. No. 17,084; Braham *v.* Bustard, 1 Hem. & M. 447, 9 L. T. Rep. N. S. 199, 11 Wkly. Rep. 1061, 71 Eng. Reprint 195.

43. C. F. Simmons Medicine Co. *v.* Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165; Cheavin *v.* Walker, 5 Ch. D. 862, 46 L. J. Ch. 686, 37 L. T. Rep. N. S. 300, 36 L. T. Rep. N. S. 938. But see Wirtz *v.* Eagle Bottling Co., 50 N. J. Eq. 164, 24 Atl. 658.

Label distinguished.— A trade-mark may sometimes in form serve as a label, but it differs from a mere label in such cases, in that it is not confined to a designation of the article to which it is attached, but by words or design is a symbol or device which, affixed to a product of one's manufacture, distinguishes it from articles of the same general nature manufactured or sold by others, thus securing to the producer the benefits of any increased sale by reason of any peculiar excellence he may have given to it. Higgins *v.* Keuffel, 140 U. S. 428, 11 S. Ct. 731, 35 L. ed. 470.

Neither a letter nor a horseshoe, nor any such simple device, can be claimed as a label under the patent law, but may be a trade-mark. Lorillard *v.* Drummond Tobacco Co., 14 Fed. 111.

44. See *infra*, V, C, 12.

45. See cases collected *supra*, II, A, note 55. These cases have been stated and reviewed in Martin's Modern Law of Labor Unions.

46. See *infra*, VI, A.

47. Bolander *v.* Peterson, 136 Ill. 215, 26 N. E. 603, 11 L. R. A. 350 [*affirming* 35 Ill. App. 551]; Ball *v.* Siegel, 116 Ill. 137, 4 N. E. 667, 56 Am. Rep. 766; Candee *v.* Deere, 54 Ill. 439, 5 Am. Rep. 125; C. F. Simmons Medicine Co. *v.* Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165; Gessler *v.* Grieb, 80 Wis. 21, 48 N. W. 1098, 27 Am. St. Rep. 20; Bickmore Gall Cure Co. *v.* Karns Mfg. Co., 126 Fed. 573 [*reversed* on other grounds in 134 Fed. 833, 67 C. C. A. 439], "Be sure and work the horse," as applied to a gall cure.

48. *Connecticut.*— Hygeia Distilled Water

meaning descriptive terms, but which, by use, association, and acceptation, have come to be the generic name for a particular kind or class of goods, and indicate

Co. *v.* Hygeia Ice Co., 70 Conn. 516, 40 Atl. 534.

Illinois.— Bolander *v.* Peterson, 136 Ill. 215, 26 N. E. 603, 11 L. R. A. 350 [*affirming* 35 Ill. App. 551].

Massachusetts.— H. A. Williams Mfg. Co. *v.* Noera, 158 Mass. 110, 32 N. E. 1037; Thomson *v.* Winchester, 19 Pick. 214, 216, 31 Am. Dec. 135, "Thomsonian Medicines."

Michigan.— Lamb Knit-Goods Co. *v.* Lamb, Glove, etc., Co., 120 Mich. 159, 78 N. W. 1072, 44 L. R. A. 841.

Minnesota.— J. R. Watkins Medical Co. *v.* Sands, 83 Minn. 326, 86 N. W. 340; Watkins *v.* Landon, 52 Minn. 389, 54 N. W. 193, 38 Am. St. Rep. 560, 19 L. R. A. 236.

Missouri.— Oakes *v.* St. Louis Candy Co., 146 Mo. 391, 48 S. W. 467.

New Jersey.— Charles R. De Bevoise Co. *v.* H. & W. Co., 69 N. J. Eq. 114, 60 Atl. 407.

New York.— Prince Mfg. Co. *v.* Prince's Metallic Paint Co., 135 N. Y. 24, 31 N. E. 990, 17 L. R. A. 129; Gillott *v.* Esterbrook, 47 Barb. 455 [*affirmed* in 48 N. Y. 374, 8 Am. Rep. 553]; Thornton *v.* Crowley, 47 N. Y. Super. Ct. 527 [*affirmed* in 89 N. Y. 644]; Fetridge *v.* Wells, 4 Abb. Pr. 144, 13 How. Pr. 385; Godillot *v.* Hazard, 49 How. Pr. 5 [*affirmed* in 44 N. Y. Super. Ct. 427 (*affirmed* in 81 N. Y. 263)]. But see Dr. Dadirrian, etc., Co. *v.* Hauenstein, 37 Misc. 23, 74 N. Y. Suppl. 709 [*affirmed* in 74 N. Y. App. Div. 630, 77 N. Y. Suppl. 1125 (*affirmed* in 175 N. Y. 522, 67 N. E. 1081)]; Dadirrian *v.* Theodorian, 15 Misc. 300, 37 N. Y. Suppl. 611; Caswell *v.* Davis, 4 Abb. Pr. N. S. 6, 35 How. Pr. 76 [*affirmed* in 58 N. Y. 223]; Fetridge *v.* Merchant, 4 Abb. Pr. 156; Fetridge *v.* Wells, 4 Abb. Pr. 144, 13 How. Pr. 385; Fleischmann *v.* Schuckmann, 62 How. Pr. 92.

Pennsylvania.— Phalon *v.* Wright, 5 Phila. 464.

Tennessee.— C. F. Simmons Medicine Co. *v.* Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165.

Wisconsin.—Avenarius *v.* Kornely, 139 Wis. 247, 121 N. W. 336; Marshall *v.* Pinkham, 52 Wis. 572, 9 N. W. 615, 38 Am. Rep. 756.

United States.— Holzapfel's Compositions Co. *v.* Rahtjen's American Composition Co., 183 U. S. 1, 22 S. Ct. 6, 46 L. ed. 49 [*reversing* 101 Fed. 257, 41 C. C. A. 329 (*reversing* 97 Fed. 949)]; Delaware, etc., Canal Co. *v.* Clark, 13 Wall. 311, 20 L. ed. 581; Liebig's Extract of Meat Co. *v.* Liebig's Extract Co., 172 Fed. 158 [*reversed* on other grounds in 180 Fed. 688, 103 C. C. A. 654] ("Liebig's Extract"); H. B. Chaffee Mfg. Co. *v.* Selchow, 131 Fed. 543 [*affirmed* in 135 Fed. 1021, 68 C. C. A. 668]; Horlich's Food Co. *v.* Elgin Milkine Co., 120 Fed. 264, 56 C. C. A. 544; Liebig's Extract of Meat Co. *v.* Walker, 115 Fed. 822; Centaur Co. *v.* Marshall, 92 Fed. 605; Centaur Co. *v.* Robinson, 91 Fed. 889; Centaur Co. *v.* Heinsfurter, 84 Fed. 955, 28 C. C. A. 581; Air-Brush Mfg. Co. *v.* Thayer, 84 Fed. 640; Dadirrian *v.* Gullian, 79 Fed. 784; Dadirrian *v.* Yacubian, 72 Fed. 1010, 90 Fed. 812 [*affirmed* in 98 Fed. 872, 39 C. C. A. 321]; Leclancha Battery Co. *v.* Western Electric Co., 23 Fed. 276; Ginter *v.* Kinney Tobacco Co., 12 Fed. 782; Alleghany Fertilizer Co. *v.* Woodside, 1 Fed. Cas. No. 206, 1 Hughes 115; Frese *v.* Bachof, 9 Fed. Cas. No. 5,110, 14 Blatchf. 432, 13 Off. Gaz. 635; Lea *v.* Deakin, 15 Fed. Cas. No. 8,154, 11 Biss. 23, 7 Reporter 261; Osgood *v.* Allen, 18 Fed. Cas. No. 10,603, Holmes 185, 3 Off. Gaz. 124.

England.— Reddaway *v.* Banham, [1895] 1 Q. B. 286, 64 L. J. Q. B. 321, 72 L. T. Rep. N. S. 73, 43 Wkly. Rep. 294 [*reversed* on other grounds in [1896] A. C. 199, 65 L. J. Q. B. 381, 74 L. T. Rep. N. S. 289, 44 Wkly. Rep. 638]; *In re* Chesebrough, [1902] 2 Ch. 1, 71 L. J. Ch. 427, 86 L. T. Rep. N. S. 665, 18 T. L. R. 468; *In re* Magnolia Metal Co., [1897] 2 Ch. 371, 66 L. J. Ch. 598, 76 L. T. Rep. N. S. 672 [*distinguishing* Barlow *v.* Johnson, 7 Rep. Pat. Cas. 395]; Waterman *v.* Ayres, 39 Ch. D. 29, 57 L. J. Ch. 893, 59 L. T. Rep. N. S. 17, 37 Wkly. Rep. 110; *In re* Leonard, 26 Ch. D. 288, 53 L. J. Ch. 603, 51 L. T. Rep. N. S. 35; Linoleum Mfg. Co. *v.* Nairn, 7 Ch. D. 834, 47 L. J. Ch. 430, 38 L. T. Rep. N. S. 448, 26 Wkly. Rep. 463 [*distinguished* in *In re* Chesebrough, [1902] 2 Ch. 1, 71 L. J. Ch. 427, 86 L. T. Rep. N. S. 665, 18 T. L. R. 468] ("Linoleum"); Siegert *v.* Findlater, 7 Ch. D. 801, 47 L. J. Ch. 233, 38 L. T. Rep. N. S. 349, 26 Wkly. Rep. 459; Cocks *v.* Chandler, L. R. 11 Eq. 446, 40 L. J. Ch. 575, 24 L. T. Rep. N. S. 379, 19 Wkly. Rep. 593; Edelsten *v.* Vick, 1 Eq. Rep. 413, 11 Hare 78, 18 Jur. 7, 23 Eng. L. & Eq. 51, 45 Eng. Ch. 78, 68 Eng. Reprint 1194; Young *v.* Macrae, 9 Jur. N. S. 322; Liebig's Extract of Meat Co. *v.* Anderson, 55 L. T. Rep. N. S. 206 ("Liebig's Extract of Meat"); Liebig's Extract of Meat Co. *v.* Hanbury, 17 L. T. Rep. N. S. 298 ("Liebig's Extract of Meat"); *In re* Formalin Hygienic Co., 17 Rep. Pat. Cas. 486. *Compare* Ford *v.* Foster, L. R. 7 Ch. 611, 41 L. J. Ch. 682, 27 L. T. Rep. N. S. 219, 20 Wkly. Rep. 818.

Canada.— Watson *v.* Westlake, 12 Ont. 449 [*following* Partlo *v.* Todd, 12 Ont. 171].

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 11.

The name of a game is not a valid trademark for either the game itself, or the implements with which it is played. Selchow *v.* Chaffee, etc., Mfg. Co., 132 Fed. 996; Waterman *v.* Ayres, 39 Ch. D. 29, 57 L. J. Ch. 893, 59 L. T. Rep. N. S. 17, 37 Wkly. Rep. 110. But see Ludington Novelty Co. *v.* Leonard, 127 Fed. 155, 62 C. C. A. 269 [*affirming* 119 Fed. 937]. *Contra*, H. B. Chaffee Mfg. Co. *v.* Selchow, 131 Fed. 543 [*affirmed* in 135 Fed. 1021, 68 C. C. A. 668].

Name in combination with distinctive features.— Although there can be no exclusive

that only, and not origin or ownership, are not valid trade-marks.[49] It has been held that a word which at the time of its adoption was a valid trade-mark does not cease to be such and become generic merely because it has become so generally known that it has been adopted by the public as the ordinary appellation of the article.[50] Of course an arbitrary name applied by plaintiff to designate his manufacture of an article which has a generic name may be a valid trade-mark, no matter how widely known it may become under such arbitrary name.[51] But if a trade-mark has been permitted to lose its distinctiveness, and become merely

right in the commercial name of an article, as "Borax Soap," yet, when it is coupled with other distinctive features, the whole may be so appropriated. Dreydoppel *v.* Young, 14 Phila. (Pa.) 226. In Braham *v.* Bustard, 1 Hem. & M. 447, 9 L. T. Rep. N. S. 199, 11 Wkly. Rep. 1061, 1062, 71 Eng. Reprint 195, "The Excelsior White Soap" was protected as a valid trade-mark, Wood, V. C., saying: "If, in this case, the plaintiffs had sought protection for the name 'White Soft Soap' only, the same principle would have been applied (i. e., protection would have been refused). . . . But here the plaintiffs put the word 'Excelsior' before the 'White Soft Soap,' and it was not an unimportant circumstance that the plaintiffs did not simply call their article 'Excelsior White Soft Soap,' but 'The Excelsior White Soft Soap.'"

49. Watkins *v.* Landon, 52 Minn. 389, 54 N. W. 193, 38 Am. St. Rep. 560, 19 L. R. A. 236; Thornton *v.* Crowley, 47 N. Y. Super. Ct. 527 [*affirmed* in 89 N. Y. 644]; Liebig's Extract of Meat Co. *v.* Walker, 115 Fed. 822; Searle, etc., Co. *v.* Warner, 112 Fed. 674, 50 C. C. A. 321; National Starch Mfg. Co. *v.* Munn's Patent Maizena, etc., Co., [1894] A. C. 275, 63 L. J. P. C. 112, 6 Reports 462; *In re* Arbenz, 35 Ch. D. 248, 56 L. J. Ch. 524, 56 L. T. Rep. N. S. 252, 35 Wkly. Rep. 527. But see Celluloid Mfg. Co. *v.* Cellonite Mfg. Co., 32 Fed. 94.

Liebig's extract of meat.— In Liebig's Extract of Meat Co. *v.* Hanbury, 17 L. T. Rep. N. S. 298, the phrase "Liebig's Extract of Meat" was refused protection on the ground that for some time it had been commonly used as descriptive of an article made in a particular way. There was no patent, and the inventor did not seem to care to preserve the right of property in his name. See also *In re* Anderson, 26 Ch. D. 409, 53 L. J. Ch. 664, 32 L. T. Rep. N. S. 677.

The word "Julienne," a name applied to an article composed of vegetables for soup, is not subject to protection when used with reference to a specific kind of that article, it being merely descriptive. Godillot *v.* Hazard, 49 How. Pr. (N. Y.) 5 [*affirmed* in 44 N. Y. Super. Ct. 427 (*affirmed* in 81 N. Y. 263)].

50. Selchow *v.* Baker, 93 N. Y. 59, 45 Am. Rep. 169; Celluloid Mfg. Co. *v.* Read, 47 Fed. 712; Celluloid Mfg. Co. *v.* Cellonite Mfg. Co., 32 Fed. 94. See also Lawrence Mfg. Co. *v.* Tennessee Mfg. Co., 138 U. S. 537, 11 S. Ct. 396, 34 L. ed. 997; Burton *v.* Stratton, 12 Fed. 696. "Otherwise a trade-mark, as soon as it should become valuable enough to be generic, would expire." *Ex p.* Consolidated Fruit Jar Co., 16 Off. Gaz. 679, 680. A manufacturer who has produced an article of merchandise, e. g. a new pattern of cloth, and applied to it a particular fancy name, and sold it with a particular mark, under which name and mark it has obtained currency in the market, acquires an exclusive right to the use of such name and mark, and is entitled to restrain all other persons from using such name and mark to denote articles similar in kind and appearance, although he may have no exclusive right of manufacturing the article. Hirst *v.* Denham, L. R. 14 Eq. 542, 41 L. J. Ch. 752, 27 L. T. Rep. N. S. 56.

In the leading case of Selchow *v.* Baker, 93 N. Y. 59, 69, 45 Am. Rep. 169, Rapallo, J., after reviewing many cases on the subject, concludes as follows: "Our conclusion is, that where a manufacturer has invented a new name [as 'Sliced Animals,' 'Sliced Birds,' 'Sliced Objects'], consisting either of a new word, or a word or words in common use which he has applied for the first time to his own manufacture or to an article manufactured for him, to distinguish it from those manufactured and sold by others, and the name thus adopted is not generic or descriptive of the article, its qualities, ingredients or characteristics, but is arbitrary or fanciful and is not used merely to denote grade or quality, he is entitled to be protected in the use of that name, notwithstanding that it has become so generally known that it has been adopted by the public as the ordinary appellation of the article." This leading case has been approved in Celluloid Mfg. Co. *v.* Cellonite Mfg. Co., 32 Fed. 94, in the opinion by Mr. Justice Bradley, and also in Celluloid Mfg. Co. *v.* Read, 47 Fed. 712, in the opinion by Mr. Justice Shipman.

51. *Alabama.*— Kyle *v.* Perfection Mattress Co., 127 Ala. 39, 28 So. 545, 85 Am. St. Rep. 78, 50 L. R. A. 628.

New York.— Dr. Dadirrian, etc., Co. *v.* Hauenstein, 37 Misc. 23, 74 N. Y. Suppl. 709; Fleischmann *v.* Schuckmann, 62 How. Pr. 92.

United States.— American Fibre-Chamois Co. *v.* De Lee, 67 Fed. 329; Celluloid Mfg. Co. *v.* Read, 47 Fed. 712; Alleghany Fertilizer Co. *v.* Woodside, 1 Fed. Cas. No. 206, 1 Hughes 115.

England.— Hirst *v.* Denham, L. R. 14 Eq. 542, 41 L. J. Ch. 752, 27 L. T. Rep. N. S. 56; Barnett *v.* Leuchars, 13 L. T. Rep. N. S. 495, 14 Wkly. Rep. 166.

Canada.— Provident Chemical Works *v.* Canada Chemical Mfg. Co., 4 Ont. L. Rep. 545.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 11.

a generic name, all trade-mark rights therein are lost.[52] It seems that the question should be made to turn upon whether or not the trade-mark has been abandoned.[53] Distinctive names first applied to a new product have been often protected, and frequently declared to be valid trade-marks. But it is believed that these decisions must be supported, if at all, upon the principle of unfair competition in trade rather than upon the ground of technical trade-mark.[54] When any article or substance is first produced, it must necessarily be given a name by which it may be known, and this name, being the only appellation by which it can be distinguished, becomes *publici juris* whenever the article itself is *publici juris*. A person entitled to make and sell an article must necessarily be entitled to call it by the only name by which it is known.[55] A name which designates,

52. See *infra*, VIII, F.

53. See Powell *v.* Birmingham Vinegar Brewery Co., [1896] 2 Ch. 54, 65 L. J. Ch. 563, 74 L. T. Rep. N. S. 509, 44 Wkly. Rep. 688 [*affirmed* in [1897] A. C. 710, 66 L. J. Ch. 763, 76 L. T. Rep. N. S. 792].

54. *Massachusetts.*— Thomson *v.* Winchester, 19 Pick. 214, 31 Am. Dec. 135.

New York.— Keasbey *v.* Brooklyn Chemical Works, 142 N. Y. 467, 37 N. E. 476, 40 Am. St. Rep. 623 [*reversing* 21 N. Y. Suppl. 696]; Electro-Silicon Co. *v.* Hazard, 29 Hun 369; Caswell *v.* Davis, 4 Abb. Pr. N. S. 6, 35 How. Pr. 76 [*affirmed* in 58 N. Y. 223, 17 Am. Rep. 233]; Electro-Silicon Co. *v.* Levy, 59 How. Pr. 469; Electro-Silicon Co. *v.* Trask, 59 How. Pr. 189. See Gillott *v.* Esterbrook, 48 N. Y. 374, 8 Am. Rep. 553.

Ohio.— Lloyd *v.* Merrill Chemical Co., 11 Ohio Dec. (Reprint) 236, 25 Cinc. L. Bul. 319.

Pennsylvania.— Shaw *v.* Pilling, 175 Pa. St. 78, 34 Atl. 446.

Rhode Island.— Davis *v.* Kendall, 2 R. I. 566.

Wisconsin.—Avenarius *v.* Kornely, 139 Wis. 247, 121 N. W. 336.

United States.— Ludington Novelty Co. *v.* Leonard, 119 Fed. 937; Searle, etc., Co. *v.* Warner, 112 Fed. 674, 50 C. C. A. 321; Centaur Co. *v.* Robinson, 91 Fed. 889; N. K. Fairbank Co. *v.* Central Lard Co., 64 Fed. 133; Improved Fig Syrup Co. *v.* California Fig Syrup Co., 54 Fed. 175, 4 C. C. A. 264; Celluloid Mfg. Co. *v.* Cellonite Mfg. Co., 32 Fed. 94.

England.— Cochrane *v.* Macnish, [1896] A. C. 225, 65 L. J. P. C. 20, 74 L. T. Rep. N. S. 109; Singer Mfg. Co. *v.* Wilson, 3 App. Cas. 376, 47 L. J. Ch. 481, 38 L. T. Rep. N. S. 303, 26 Wkly. Rep. 664; Powell *v.* Birmingham Vinegar Brewery Co., [1896] 2 Ch. 54, 65 L. J. Ch. 563, 74 L. T. Rep. N. S. 509, 44 Wkly. Rep. 688 [*affirmed* in [1897] A. C. 710, 66 L. J. Ch. 763, 76 L. T. Rep. N. S. 792]; Braham *v.* Bustard, 1 Hem. & M. 447, 9 L. T. Rep. N. S. 199, 11 Wkly. Rep. 1061, 71 Eng. Reprint 195.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 11. See also *infra*, V, C, 1, 8, 9, 10.

"Chlorodyne."— In Browne *v.* Freeman, 4 New Rep. 476, 12 Wkly. Rep. 305, it was strongly intimated that the word "Chlorodyne," applied to a new medicine by its inventor, was capable of protection. See also Browne *v.* Freeman, [1873] W. N. 178, where it is said that "it had been settled that the word 'Chlorodyne' had become the name of an article, and might be used by any one."

"Syrup of Figs" has been sustained as a valid trade-mark upon the ground that it was formulated by the manufacturer from words of no prior association and applied to a new artificial product. Improved Fig Syrup Co. *v.* California Fig Syrup Co., 54 Fed. 175, 4 C. C. A. 264. *Contra*, California Fig. Syrup Co. *v.* Stearns, 67 Fed. 1008.

55. *Massachusetts.*— Dover Stamping Co. *v.* Fellows, 163 Mass. 191, 40 N. E. 105, 47 Am. St. Rep. 448, 28 L. R. A. 448.

Minnesota.— Watkins *v.* Landon, 52 Minn. 389, 54 N. W. 193, 38 Am. St. Rep. 560, 19 L. R. A. 236.

Missouri.— Oakes *v.* St. Louis Candy Co., 146 Mo. 391, 48 S. W. 467, "What is it?" used as the name of a candy.

New York.— Fetridge *v.* Wells, 4 Abb. Pr. 144, 13 How. Pr. 385.

Wisconsin.— Marshall *v.* Pinkham, 52 Wis. 572, 9 N. W. 615, 38 Am. Rep. 756.

United States.— Leclanche Battery Co. *v.* Western Electric Co., 23 Fed. 276; Leclancha Battery Co. *v.* Western Electric Co., 21 Fed. 538; Hostetter *v.* Fries, 17 Fed. 620, 21 Blatchf. 339. But see Celluloid Mfg. Co. *v.* Cellonite Mfg. Co., 32 Fed. 94, the authority of which was doubted in Hiram Holt Co. *v.* Wadsworth, 41 Fed. 34.

England.— Waterman *v.* Ayres, 39 Ch. D. 29, 57 L. J. Ch. 893, 59 L. T. Rep. N. S. 17, 37 Wkly. Rep. 110; *In re* Leonard, 26 Ch. D. 288, 53 L. J. Ch. 603, 51 L. T. Rep. N. S. 35; James *v.* James, L. R. 13 Eq. 421, 41 L. J. Ch. 353, 26 L. T. Rep. N. S. 568, 20 Wkly. Rep. 434; Singleton *v.* Bolton, 3 Dougl. 293, 26 E. C. L. 196, 99 Eng. Reprint 661; Young *v.* Macrae, 9 Jur. N. S. 322; Liebig's Extract of Meat Co. *v.* Hanbury, 17 L. T. Rep. N. S. 298; Canham *v.* Jones, 2 Ves. & B. 218, 13 Rev. Rep. 70, 35 Eng. Reprint 302.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 11.

The name "Magnolia," being applied to a certain metal, by whomever manufactured, cannot be registered as a trade-mark or as the essential part of one. *In re* Magnolia Metal Co., [1897] 2 Ch. 371, 66 L. J. Ch. 598, 76 L. T. Rep. N. S. 672 [*varying* 66 L. J. Ch. 312, 76 L. T. Rep. N. S. 190, 45 Wkly. Rep. 406 (*distinguishing* Barlow *v.* Johnson, 7 Rep. Pat. Cas. 395)].

not the article itself, but the article of a particular maker or seller is a proper trade-mark.[56]

b. Patented Articles. During the life of a patent, the name of the patented article is not a valid trade-mark for such article, because it is the generic designation or description of that article.[57] A contrary view, however, has been expressed,[58] although perhaps nothing more is meant than that the name of a patented article may not be used to pass off some other and different article, which would be unfair competition.[59] Upon expiration of the patent the name by which the patented article has become known, although an arbitrary one suitable for use as a trade-mark, or the name of the inventor, becomes *publici juris*, and any one who makes and sells an article made in conformity to the patent may call it by that name because such name is generic and descriptive.[60] Mere

56. Avenarius *v.* Kornely, 139 Wis. 247, 121 N. W. 336; Braham *v.* Bustard, 1 Hem. & M. 447, 9 L. T. Rep. 199, 11 Wkly. Rep. 1061, 71 Eng. Reprint 195; Young *v.* Macrae, 9 Jur. N. S. 322.

57. Rice-Stix Dry Goods Co. *v.* J. A. Scriven Co., 165 Fed. 639, 91 C. C. A. 475; Germer Stove Co. *v.* Art Stove Co., 150 Fed. 141, 80 C. C. A. 9; Hygienic Fleeced Underwear Co. *v.* Way, 137 Fed. 592, 70 C. C. A. 553 [*reversing* 133 Fed. 245].; Young *v.* Macrae, 9 Jur. N. S. 322. See Walker *v.* Reid, 29 Fed. Cas. No. 17,084.

Any one who deals in the patented article may use the name by which it is known, even though the patent has not expired. Johnson *v.* Seaman, 108 Fed. 951, 48 C. C. A. 158 [*reversing* 106 Fed. 915]; Vitascope Co. *v.* U. S. Phonograph Co., 83 Fed. 30.

58. Waterman *v.* Shipman, 130 N. Y. 301, 29 N. E. 111 [*reversing* 8 N. Y. Suppl. 814].

59. See *infra*, V, C, 8.

Judicial statement of distinction.— *In re* Palmer, 24 Ch. D. 504, 520, 50 L. T. Rep. N. S. 30, 32 Wkly. Rep. 306, Lord Justice Cotton said: "It is very true . . . that if any one during the existence of the patent had applied the name which the patentee had given to his article to an article not an infringement of the patent he would probably have been stopped by injunction, but only because, although it would not have been an infringement of the patent, it would have been a false representation that what he was selling was the patented article. In one sense, therefore, the name of the article might be called a trade-mark, but the user of it would not be a user of a trade-mark in the sense in which Messrs. Palmer & Son must establish a user for the purposes of this Act."

60. *District of Columbia.*— J. A. Scriven Co. *v.* Ferguson McKinney Dry Goods Co., 32 App. Cas. 323; J. A. Scriven Co. *v.* W. H. Towles Mfg. Co., 32 App. Cas. 321; Edna Smelting, etc., Co. *v.* Nathan Mfg. Co., 30 App. Cas. 487.

Louisiana.— Whann *v.* Whann, 116 La. 690, 41 So. 38.

Massachusetts.— Marshall Engine Co. *v.* New Marshall Engine Co., 203 Mass. 410, 89 N. E. 548; Dover Stamping Co. *v.* Fellows, 163 Mass. 191, 40 N. E. 105, 47 Am. St. Rep. 448, 28 L. R. A. 448, "Dover," as applied to an egg-beater.

New Jersey.— Edison *v.* Mills-Edisonia, 74 N. J. Eq. 52, 70 Atl. 191.

New York.— Wilcox, etc., Sewing-Mach. Co. *v.* Kruse-Murphy Mfg. Co., 118 N. Y. 677, 23 N. E. 1146 [*affirming* 14 Daly 116]; Selchow *v.* Baker, 93 N. Y. 59, 45 Am. Rep. 169; Jaffe *v.* Evans, 70 N. Y. App. Div. 186, 75 N. Y. Suppl. 257; St. Louis Stamping Co. *v.* Piper, 12 Misc. 270, 33 N. Y. Suppl. 443 [*affirmed* in 87 Hun 623, 34 N. Y. Suppl. 1147].

Ohio.— Brill *v.* Singer Mfg. Co., 41 Ohio St. 127, 52 Am. Rep. 74.

Rhode Island.— Armington *v.* Palmer, 21 R. I. 109, 42 Atl. 308, 79 Am. St. Rep. 786, 43 L. R. A. 95.

United States.— Elgin Nat. Watch Co. *v.* Illinois Watch Case Co., 179 U. S. 665, 21 S. Ct. 270, 45 L. ed. 365; Singer Mfg. Co. *v.* June Mfg. Co., 163 U. S. 169, 16 S. Ct. 1002, 41 L. ed. 118; Coats *v.* Merrick Thread Co., 149 U. S. 562, 13 S. Ct. 966, 37 L. ed. 847 [*affirming* 36 Fed. 324, 1 L. R. A. 616]; Goodyear's India Rubber Glove Mfg. Co. *v.* Goodyear Rubber Co., 128 U. S. 598, 9 S. Ct. 166, 32 L. ed. 535; Rice-Stix Dry Goods Co. *v.* J. A. Scriven Co., 165 Fed. 639, 91 C. C. A. 475 ("Elastic Seam," as applied to drawers); Sternberg Mfg. Co. *v.* Miller, etc., Mfg. Co., 161 Fed. 318, 88 C. C. A. 398; Warren Featherbone Co. *v.* American Featherbone Co., 141 Fed. 513, 72 C. C. A. 571 ("Featherbone"); Horlick's Food Co. *v.* Elgin Milkine Co., 120 Fed. 264, 56 C. C. A. 544; B. B. Hill Mfg. Co. *v.* Sawyer-Boss Mfg. Co., 118 Fed. 1014, 56 C. C. A. 596 [*affirming* 112 Fed. 144]; Singer Mfg. Co. *v.* Hipple, 109 Fed. 152; Rahtjen's American Composition Co. *v.* Holzapfel's Compositions Co., 97 Fed. 949 [*reversed* in 101 Fed. 257, 41 C. C. A. 329 (*reversed* in 183 U. S. 1, 22 S. Ct. 6, 46 L. ed. 49)]; Centaur Co. *v.* Marshall, 92 Fed. 605; Centaur Co. *v.* Neathery, 91 Fed. 891, 34 C. C. A. 118; Centaur Co. *v.* Killenberger, 87 Fed. 725; Centaur Co. *v.* Heinsfurter, 84 Fed. 955, 28 C. C. A. 581; Frost *v.* Rindskopf, 42 Fed. 408; Singer Mfg. Co. *v.* June Mfg. Co., 41 Fed. 208; Hiram Holt Co. *v.* Wadsworth, 41 Fed. 34; Gally *v.* Colt's Patent Fire-Arms Mfg. Co., 30 Fed. 118; Leclanche Battery Co. *v.* Western Electric Co., 23 Fed. 276; Wilcox, etc., Sewing-Mach. Co. *v.* Gibbens Frame, 17 Fed. 623, 21 Blatchf. 431; Gray *v.* Taper-Sleeve Pulley Works, 16 Fed. 436; Singer Mfg. Co. *v.* Riley, 11 Fed. 706; Singer Mfg.

continued use after expiration of the patent will not constitute the name a trade-mark.[61] Where the article is not in fact patented, as where the patent is invalid, the name is nevertheless *publici juris* and not a trade-mark.[62] It is always a question of fact arising upon the evidence in each case whether the name in question has come to be the name of the article, and not a mark or sign indicating the manufacturer. Unless the former is the case, the doctrine under discussion has no application.[63] A word which might become a valid trade-mark if applied to an unpatented article may not be so when applied to a patented article, because in the latter case it is more readily inferred that the word is used merely as a name to identify the article, and not as a trade-mark.[64] A name applied to many forms

Co. *v.* Stanage, 6 Fed. 279, 2 McCrary 512; Fairbanks *v.* Jacobus, 8 Fed. Cas. No. 4,608, 3 Ban. & A. 108, 14 Blatchf. 337; Filley *v.* Child, 9 Fed. Cas. No. 4,787, 4 Ban. & A. 353, 16 Blatchf. 376, 16 Off. Gaz. 261; Singer Mfg. Co. *v.* Larsen, 22 Fed. Cas. No. 12,902, 3 Ban. & A. 246, 8 Biss. 151; Tucker Mfg. Co. *v.* Boyington, 24 Fed. Cas. No. 14,229, 9 Off. Gaz. 455; *In re* Consolidated Fruit Jar Co., 14 Off. Gaz. 269. But see *Ex p.* Consolidated Fruit Jar Co., 16 Off. Gaz. 679. *Contra*, Celluloid Mfg. Co. *v.* Cellonite Mfg. Co., 32 Fed. 94.

England.— Singer Mfg. Co. *v.* Loog, 8 App. Cas. 15, 52 L. J. Ch. 481, 48 L. T. Rep. N. S. 3, 31 Wkly. Rep. 325; Powell *v.* Birmingham Vinegar Brewing Co., [1896] 2 Ch. 54, 65 L. J. Ch. 563, 74 L. T. Rep. N. S. 509, 44 Wkly. Rep. 688 [*affirmed* in [1897] A. C. 710, 66 L. J. Ch. 763, 76 L. T. Rep. N. S. 792]; *In re* Leonard, 26 Ch. D. 288, 53 L. J. Ch. 603, 51 L. T. Rep. N. S. 35 ("Valvoline"); *In re* Ralph, 25 Ch. D. 194, 48 J. P. 135, 53 L. J. Ch. 188, 49 L. T. Rep. N. S. 504, 32 Wkly. Rep. 168; *In re* Palmer, 24 Ch. D. 504, 50 L. T. Rep. N. S. 30, 32 Wkly. Rep. 306; Linoleum Mfg. Co. *v.* Nairn, 7 Ch. D. 834, 47 L. J. Ch. 430, 38 L. T. Rep. N. S. 448, 26 Wkly. Rep. 463 ("Linoleum"); Cheavin *v.* Walker, 5 Ch. D. 850, 46 L. J. Ch. 265, 35 L. T. Rep. N. S. 757 [*reversed* on other grounds in 5 Ch. D. 862, 46 L. J. Ch. 686, 36 L. T. Rep. N. S. 938, 37 L. T. Rep. N. S. 300]; Singer Mfg. Co. *v.* Wilson, 2 Ch. D. 434, 45 L. J. Ch. 490, 34 L. T. Rep. N. S. 858, 24 Wkly. Rep. 1023 [*reversed* on other grounds in 3 App. Cas. 376, 47 L. J. Ch. 481, 38 L. T. Rep. N. S. 303, 26 Wkly. Rep. 664]; Young *v.* Macrae, 9 Jur. N. S. 322; *In re* Horsburgh, 53 L. J. Ch. 237 note, 50 L. T. Rep. N. S. 23 note, 32 Wkly. Rep. 530 note; Wheeler, etc., Mfg. Co. *v.* Shakespear, 39 L. J. Ch. 36; Coudy *v.* Mitchell, 37 L. T. Rep. N. S. 766, 26 Wkly. Rep. 269.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 15.

"Goodyear Rubber."— In Goodyear's India Rubber Glove Mfg. Co. *v.* Goodyear Rubber Co., 128 U. S. 598, 604, 9 S. Ct. 166, 32 L. ed. 535, Field, J., said: "But the name of 'Goodyear Rubber Company' is not one capable of exclusive appropriation. 'Goodyear Rubber' are terms descriptive of well known classes of goods produced by the process known as Goodyear's invention. Names which are thus descriptive of a class of goods cannot be exclusively appropriated by anyone." See the earlier cases of Goodyear Rubber Co. *v.* Goodyear's Rubber Mfg. Co., 30 Off. Gaz. 97, and Goodyear Rubber Co. *v.* Day, 22 Fed. 44.

A design which has been protected by a design patent becomes *publici juris* after expiration of the patent. Coats *v.* Merrick Thread Co., 149 U. S. 562, 13 S. Ct. 966, 37 L. ed. 847.

61. Jaffe *v.* Evans, 70 N. Y. App. Div. 186, 75 N. Y. Suppl. 257; Singer Mfg. Co. *v.* June Mfg. Co., 163 U. S. 169, 16 S. Ct. 1002, 41 L. ed. 118; Centaur Co. *v.* Heinsfurter, 84 Fed. 955, 28 C. C. A. 581.

62. Selchow *v.* Baker, 93 N. Y. 59, 45 Am. Rep. 169; Horlicks Food Co. *v.* Elgin Milkine Co., 120 Fed. 264, 56 C. C. A. 544; Centaur Co. *v.* Marshall, 92 Fed. 605; Consolidated Fruit-Jar Co. *v.* Dorflinger, 6 Fed. Cas. No. 3,129; Lorillard *v.* Pride, 36 Off. Gaz. 1150. But see Sawyer *v.* Kellogg, 7 Fed. 720.

63. Martha Washington Creamery Buttered Flour Co. *v.* Martien, 37 Fed. 797, 44 Fed. 473; Singer Mach. Manufacturers *v.* Wilson, 3 App. Cas. 376, 47 L. J. Ch. 481, 38 L. T. Rep. N. S. 303, 26 Wkly. Rep. 664; Condy *v.* Mitchell, 37 L. T. Rep. N. S. 766, 26 Wkly. Rep. 269.

64. Dover Stamping Co. *v.* Fellows, 163 Mass. 191, 40 N. E. 105, 47 Am. St. Rep. 448, 28 L. R. A. 448; Young *v.* Macrae, 9 Jur. N. S. 322.

"A word which might become a valid trade-mark when applied to an unpatented article may not be so when applied to an article which has the protection of letters patent. In the latter case the letters patent indicate the ownership and origin of the article, and it is more readily to be inferred that the word is used as a name merely to identify the article. Usually the protection given by a patent is far greater, though of less duration in time, than that obtained by the use of a trademark; because if an article is patented nobody but the owner of the patent can without his consent make or sell anything embodying the same principles or elements, while a trademark only secures one in the use of the name or emblem adopted by him and applied to the article. Sebastian Trade-Marks 15. One may choose to rely on the name alone; and if so, he may establish or create a trademark which will be permanent. But if he seeks and obtains the protection afforded by a patent, he is bound to yield up his monopoly with all that belongs to it at the end of the term, and the right

of an article, to show ownership and origin, and not to any one particular form so as to become the generic name of a definite article is a valid trade-mark, and it is not dedicated to the public by expiration of a patent covering some or all of such articles; [65] and conversely, a name applied to only one form of a patented article is not presumably the generic name of the patented article.[66] A trade-mark in addition to, and different from, the name of the patented article itself may be acquired which will survive the expiration of the patent.[67] Trade-marks, the use of which antedated the patent, remain valid and exclusive notwithstanding the expiration of the patent.[68]

c. Books. The name or title of a book is the ordinary and usual designation and description of that particular book, given to it to be used for that purpose, and therefore it is not a valid technical trade-mark for such book.[69] Some contrary expressions may be found in the authorities; [70] but these are not well con-

to the exclusive use of the name given to his goods, which might otherwise have become a trademark, will ordinarily fall with the patent itself." Dover Stamping Co. *v.* Fellows, 163 Mass. 191, 194, 40 N. E. 105, 47 Am. St. Rep. 448, 28 L. R. A. 448.

65. Edna Smelting, etc., Co. *v.* Nathan Mfg. Co., 30 App. Cas. (D. C.) 487; Nathan Mfg. Co. *v.* Edna Smelting, etc., Co., 130 N. Y. App. Div. 512, 114 N. Y. Suppl. 1033.

66. Where, in a trade-mark case involving the registration of the word "Excelsior" as applied to stepladders, it appears that the applicant has for many years manufactured several styles of ladders embodying features of a patent, which styles it has sold under as many different trade-names, and that one style has been sold under the name of "Excelsior," it will not be presumed, at the instance of the opposer of the application, in the absence of substantive proof, that the word has become a generic designation of ladders manufactured by the applicant, instead of a name indicating a source or origin of manufacture, especially where it also appears that several other concerns have manufactured ladders embodying the same patent, and designated them under different trade-names. Udell-Predock Mfg. Co. *v.* Udell Works, 32 App. Cas. (D. C.) 282.

67. Dover Stamping Co. *v.* Fellows, 163 Mass. 191, 40 N. E. 105, 47 Am. St. Rep. 448, 28 L. R. A. 448; Nathan Mfg. Co. *v.* Edna Smelting, etc., Co., 130 N. Y. App. Div. 512, 114 N. Y. Suppl. 1033; Hegeman *v.* Hegeman, 8 Daly (N. Y.) 1; B. B. Hill Mfg. Co. *v.* Sawyer-Boss Mfg. Co., 118 Fed. 1014, 56 C. C. A. 596; Centaur Co. *v.* Killenberger, 87 Fed. 725; Osgood *v.* Rockwood, 18 Fed. Cas. No. 10,605, 11 Blatchf. 310; *Ex p.* Consolidated Fruit Jar Co., 16 Pat. Gaz. 679; *In re* Consolidated Fruit Jar Co., 14 Off. Gaz. 269; Singer Mach. Manufacturers *v.* Wilson, 3 App. Cas. 376, 47 L. J. Ch. 481, 38 L. T. Rep. N. S. 303, 26 Wkly. Rep. 664; *In re* Palmer, 24 Ch. D. 504, 50 L. T. Rep. N. S. 30, 32 Wkly. Rep. 306. See Linoleum Mfg. Co. *v.* Nairn, 7 Ch. D. 834, 47 L. J. Ch. 430, 38 L. T. Rep. N. S. 448, 26 Wkly. Rep. 463. But see Whann *v.* Whann, 116 La. 690, 41 So. 38; Coats *v.* Merrick Thread Co., 149 U. S. 562, 13 S. Ct. 966, 37 L. ed. 847 [*affirming* 36 Fed. 324, 1 L. R. A. 616]. *Contra*, Greene *v.* Manufacturers' Belt Hook Co., 158 Fed. 640.

Illustrations.— One Weymouth invented and took out a patent for a certain kind of hay knife. The patent was assigned to Holt, who, after some time, adopted the trade-mark "Lightning" for the knife. The knives became known to the trade as "Weymouth's Patent" and "Lightning" hay-knives. It was held that the word "Lightning" was a valid trade-mark during the life and after the expiration of the patent, but the words "Weymouth's Patent," after the expiration of the patent, could not be exclusively appropriated. Hiram Holt Co. *v.* Wadsworth, 41 Fed. 34.

Descriptive words are not valid trade-marks even for patented articles. Seeger Refrigerator Co. *v.* White Enamel Refrigerator Co., 178 Fed. 567.

A contrary view has been taken by some courts. Brill *v.* Singer Mfg. Co., 41 Ohio St. 127, 52 Am. Rep. 74; Wilcox, etc., Sewing-Mach. Co. *v.* Gibbens Frame, 17 Fed. 623, 21 Blatchf. 431; Singer Mfg. Co. *v.* Riley, 11 Fed. 706. And see Singer Mfg. Co. *v.* June Mfg. Co., 41 Fed. 208; Singer Mfg. Co. *v.* Stanage, 6 Fed. 279, 2 McCrary 512.

68. Avenarius *v.* Kornely, 139 Wis. 247, 121 N. W. 336; Batcheller *v.* Thomson, 93 Fed. 660, 35 C. C. A. 532 [*reversing* 86 Fed. 630].

69. G. & C. Merriam Co. *v.* Ogilvie, 149 Fed. 858 [*affirmed* in 159 Fed. 638], 170 Fed. 167, 95 C. C. A. 423; G. & C. Merriam Co. *v.* Straus, 136 Fed. 477; Merriam *v.* Texas Siftings Pub. Co., 49 Fed. 944; Merriam *v.* Famous Shoe, etc., Co., 47 Fed. 41; Black *v.* Ehrich, 44 Fed. 793; Merriam *v.* Holloway Pub. Co., 43 Fed. 450; Mark Twain Case, 14 Fed. 728, 11 Biss. 459. See Osgood *v.* Allen, 18 Fed. Cas. No. 10,603, Holmes 185, 3 Off. Gaz. 124.

70. Potter *v.* McPherson, 21 Hun (N. Y.) 559; Dayton *v.* Wilkes, 17 How. Pr. (N. Y.) 510; Social Register Assoc. *v.* Howard, 60 Fed. 270; Dicks *v.* Yates, 18 Ch. D. 76, 50 L. J. Ch. 809, 44 L. T. Rep. N. S. 660 (really a case of unfair competition); Browne Trade-marks, § 118. See Harper *v.* Holman, 84 Fed. 222; Mack *v.* Petter, L. R. 14 Eq. 431, 41 L. J. Ch. 781, 20 Wkly. Rep. 964.

Right analogous to trade-mark.— In Rob-

sidered, and if they mean more than that the name of a book may not be used or imitated to pass off one book as and for another, which would be a clear case of unfair competition,[71] they cannot be supported. A name applied to a series of books may, however, constitute a trade-mark.[72] The author's name, whether his real name or a *nom de plume*, does not constitute a trade-mark.[73]

d. Periodicals. The name of a periodical publication has often been said to constitute a valid technical trade-mark or to be in the nature of a trade-mark,[74] and titles of newspapers may be registered as trade-marks in the patent office.[75] Most frequently, however, the unlawful use or imitation of the title of a periodical is redressed upon the broader ground of unfair competition.[76]

e. Dramas. The name of a dramatic or other theatrical production is not a trade-mark,[77] but it may not be used so as to amount to unfair competition.[78]

f. Secret and Proprietary Preparations. The name of secret or proprietary preparations is descriptive thereof and hence is not a valid trade-mark. Any one who discovers the secret and makes the goods according to the formula may use the name to describe the goods.[79] A contrary view has been expressed, and such

ertson *v.* Berry, 50 Md. 591, 596, 33 Am. Rep. 328, Miller, J., said: "A publisher or author has either in the title of his work or in the application of his name to the work, or in the particular marks which designate it, a species of property similar to that which a trader has in his trade-mark, and may like a trader claim the protection of a Court of equity against such a use or imitation of the name, marks or designation, as is likely in the opinion of the Court to be a cause of damage to him in respect of that property."

71. See *infra*, V, C, 9.

72. Social Register Assoc. *v.* Murphy, 128 Fed. 116.

73. Mark Twain Case, 14 Fed. 728, 11 Biss. 459. See England *v.* New York Pub. Co., 8 Daly (N. Y.) 375.

74. *Maryland.*— Seabrook *v.* Grimes, 107 Md. 410, 68 Atl. 883, 126 Am. St. Rep. 400, 16 L. R. A. N. S. 483.

Missouri.— Grocers Journal Co. *v.* Midland Pub. Co., 127 Mo. App. 356, 105 S. W. 310.

New York.— See Stephens *v.* De Conto, 7 Rob. 343.

Pennsylvania.— Joseph Dixon Crucible Co. *v.* Guggenheim, 2 Brewst. 321.

United States.— New York Herald Co. *v.* Star Co., 146 Fed. 1023, 76 C. C. A. 678 [*affirming* 146 Fed. 204].

England.— Clement *v.* Maddock, 1 Giffard 98, 5 Jur. N. S. 592, 65 Eng. Reprint 841. *Compare* Borthwick *v.* Evening Post, 37 Ch. D. 449, 57 L. J. Ch. 406, 58 L. T. Rep. N. S. 252, 36 Wkly. Rep. 434. *Contra*, Walter *v.* Emmott, 54 L. J. Ch. 1059, 53 L. T. Rep. N. S. 437.

Canada.— Carey *v.* Goss, 11 Ont. 619.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 16; and Browne Trademarks, § 115; Hopkins Unfair Trade, § 56.

A property right in a name of a periodical undoubtedly exists, and no one has a right to use that name in connection with a similar publication. Gannett *v.* Ruppert, 119 Fed. 221.

The term "Buster Brown" or "Buster Brown and Tige" for use as the title of a comic section of a newspaper is not a trade-mark. New York Herald Co. *v.* Ottawa Citizen Co., 41 Can. Sup. Ct. 229. *Contra*, New York Herald Co. *v.* Star Co., 146 Fed. 204 [*affirmed* in 146 Fed. 1023, 76 C. C. A. 678].

75. See *infra*, V, B, 3.

76. See *infra*, V, C, 9.

77. Hopkins Amusement Co. *v.* Forhman, 103 Ill. App. 613 [*affirmed* in 202 Ill. 541, 67 N. E. 391].

78. See *infra*, V, C, 11.

79. J. R. Watkins Medical Co. *v.* Sands, 80 Minn. 89, 82 N. W. 1109; Watkins *v.* Landon, 52 Minn. 389, 54 N. W. 193, 38 Am. St. Rep. 560, 19 L. R. A. 236; C. F. Simmons Medicine Co. *v.* Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165 ("Simmons Liver Medicine"); Marshall *v.* Pinkham, 52 Wis. 572, 9 N. W. 615, 38 Am. Rep. 756 ("Old Dr. Marshall's Celebrated Liniment"); Siegert *v.* Findlater, 7 Ch. D. 801, 47 L. J. Ch. 233, 38 L. T. Rep. N. S. 349, 26 Wkly. Rep. 459; Singleton *v.* Bolton, 3 Dougl. 293, 26 E. C. L. 196, 99 Eng. Reprint 661; Hovenden *v.* Lloyd, 18 Wkly. Rep. 1132.

The words "Angostura Bitters" had become the term by which a certain medicinal preparation was generally known. It was held that they could not be exclusively appropriated, in case the secret of the manufacture of the article should become known, there being no patent right. Siegert *v.* Findlater, 7 Ch. D. 801, 47 L. J. Ch. 233, 38 L. T. Rep. N. S. 349, 26 Wkly. Rep. 459. The term "Angostura" is also geographical. See also Siegert *v.* Abbott, 61 Md. 276, 48 Am. Rep. 101.

"Thomsonian Medicines."— In Thomson *v.* Winchester, 19 Pick. (Mass.) 214, 31 Am. Dec. 135, plaintiff, an inventor of certain medicines, gave them the name of "Thomsonian Medicines," by which term alone they became generally known. The words having acquired a generic meaning, and the medicines not having been patented, it was held that the name could not be protected.

"Lieutenant James' Horse Blister" was the name given by the inventor to an unpat-

names declared to be valid trade-marks;[80] but such cases must be deemed instances of the broader doctrine of unfair competition. Of course the name may not be used so as to pass off spurious concoctions as and for the genuine preparation.[81]

IV. INFRINGEMENT OF TRADE-MARKS.

A. Definition and Nature of Infringement. Infringement of a trade-mark consists in the unauthorized use or colorable imitation of it upon substituted goods of the same class as those for which the mark has been appropriated.[82] Relief is afforded upon the ground that it is a fraud to use another's trade-mark and thus pass off different goods as and for the goods of the proprietor of the mark[83] rather than upon the ground of property in the mark itself.[84] The essence of the wrong consists in the sale of the goods of one manufacturer or dealer as and for those of another by means of such trade-mark.[85] It is only when this false

ented production. It was held that his assignees after his death had no right to its exclusive use. James *v.* James, L. R. 13 Eq. 421, 41 L. J. Ch. 353, 26 L. T. Rep. N. S. 568, 20 Wkly. Rep. 434. See the criticism of this case in Thorley's Cattle Food Co. *v.* Massam, 14 Ch. D. 763, 42 L. T. Rep. N. S. 851, 28 Wkly. Rep. 966.

80. Drake Medicine Co. *v.* Glessner, 68 Ohio St. 337, 67 N. E. 722 ("Dr. Drake's German Croup Remedy"); Avenarius *v.* Kornely, 139 Wis. 247, 121 N. W. 336; Filkins *v.* Blackman, 9 Fed. Cas. No. 4,786, 13 Blatchf. 440 ("Dr. J. Blackman's Genuine Healing Balsam"); Hostetter *v.* Vowinkle, 12 Fed. Cas. No. 6,714, 1 Dill. 329; Radam *v.* Shaw, 28 Ont. 612 [*following* Davis *v.* Kennedy, 13 Grant Ch. (U. C.) 523] ("Microbe Killer").

81. See *infra*, V, C, 10.

82. *Iowa.*— Sartor *v.* Schaden, 125 Iowa 696, 101 N. W. 511.

Kentucky.— George T. Stagg Co. *v.* Taylor, 95 Ky. 651, 27 S. W. 247, 16 Ky. L. Rep. 213.

New York.— Low *v.* Hart, 90 N. Y. 457; Gillott *v.* Esterbrook, 48 N. Y. 374, 8 Am. Rep. 553.

United States.— Amoskeag Mfg. Co. *v.* Trainer, 101 U. S. 51, 25 L. ed. 993; Delaware, etc., Canal Co. *v.* Clark, 13 Wall. 311, 20 L. ed. 581; Bass *v.* Feigenspan, 96 Fed. 206; Kinney *v.* Allen, 14 Fed. Cas. No. 7,826, 1 Hughes 106; Osgood *v.* Rockwood, 18 Fed. Cas. No. 10,605, 11 Blatchf. 310.

England.— Upmann *v.* Forester, 24 Ch. D. 231, 47 J. P. 807, 52 L. J. Ch. 946, 49 L. T. Rep. N. S. 122, 32 Wkly. Rep. 28; McAndrew *v.* Bassett, 4 De G. J. & S. 380, 10 Jur. N. S. 550, 33 L. J. Ch. 561, 10 L. T. Rep. N. S. 442, 4 New Rep. 123, 12 Wkly. Rep. 777, 69 Eng. Ch. 293, 46 Eng. Reprint 965; Bass *v.* Dawber, 19 L. T. Rep. N. S. 626; Singer Mfg. Co. *v.* Kimball, 10 Sc. L. Rep. 173.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," §§ 61–64.

83. *Florida.*— El Modello Cigar Mfg. Co. *v.* Gato, 25 Fla. 886, 7 So. 23, 23 Am. St. Rep. 537, 6 L. R. A. 823.

New Jersey.— Perlberg *v.* Smith, 70 N. J. Eq. 638, 62 Atl. 442.

New York.— Chas. S. Higgins Co. *v.* Higgins Soap Co., 144 N. Y. 462, 39 N. E. 490, 43 Am. St. Rep. 769, 27 L. R. A. 42.

United States.— A. Leschen, etc., Rope Co. *v.* Broderick, etc., Rope Co., 123 Fed. 149 [*affirmed* in 201 U. S. 166, 26 S. Ct. 425, 50 L. ed. 170]; Manhattan Medicine Co. *v.* Wood, 16 Fed. Cas. No. 9,026, 4 Cliff. 461, 14 Off. Gaz. 519 [*affirmed* in 108 U. S. 218, 2 S. Ct. 436, 27 L. ed. 706].

England.— Lee *v.* Haley, L. R. 5 Ch. 155, 39 L. J. Ch. 284, 22 L. T. Rep. N. S. 251, 18 Wkly. Rep. 242; Boulnois *v.* Peake, 13 Ch. D. 513 note; Perry *v.* Truefitt, 6 Beav. 66, 49 Eng. Reprint 749; McAndrew *v.* Bassett, 4 De G. J. & S. 380, 10 Jur. N. S. 550, 33 L. J. Ch. 561, 10 L. T. Rep. N. S. 442, 4 New Rep. 123, 12 Wkly. Rep. 777, 69 Eng. Ch. 293, 46 Eng. Reprint 965; Collins Co. *v.* Brown, 3 Jur. N. S. 929, 3 Kay & J. 423, 5 Wkly. Rep. 676, 69 Eng. Reprint 1174.

Canada.— McCall *v.* Theal, 28 Grant Ch. (U. C.) 48.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," §§ 61–64.

84. See *supra*, I.

"The principle upon which courts proceed in restraining the simulation of names in the nature of trade marks and have come to designate the business of a particular person or company, is stated in Lee *v.* Haley, L. R. 5 Ch. 155, 39 L. J. Ch. 284, 22 L. T. Rep. N. S. 251, 18 Wkly. Rep. 242, an action to restrain the use by the defendant of the name of The Guinea Coal Co., in his business. I quite agree (said Gifford, L. J.), that they (plaintiffs) have no property in the name (Guinea Coal Co.), but the principle upon which the cases on the subject proceed is, not that there is property in the word, but that it is a fraud on a person who has established a trade and carries it on under a given name, that some other person should assume the same name, or the same name with a slight alteration in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name." Chas. S. Higgins Co. *v.* Higgins Soap Co., 144 N. Y. 462, 469, 39 N. E. 490, 43 Am. St. Rep. 769, 27 L. R. A. 42.

85. *District of Columbia.*— Hall *v.* Ingram, 28 App. Cas. 454.

representation is directly or impliedly made that relief will be granted in equity.[86] Of course use or imitation of a trade-mark at the instance of its owner affords him no cause of action. The doctrine of *volenti non fit injuria* applies.[87]

B. Actual Copying or Use. When a trade-mark is actually copied and used upon other goods of the same class, there is of course an infringement,[88] and this is true even though other words or accessories are used in connection with it, because, being exclusive, it must not be used at all.[89] But the words of a trade-mark may be lawfully used by another, if used, not as a trade-mark for rival goods, but honestly, in good faith, without any deceptive artifice, as part of a truthful descriptive statement applied to the goods.[90] Unless color is made an essential element of the trade-mark, it may be infringed by using it in the same

Illinois.— William J. Moxley Co. *v.* Braun, etc., Co., 93 Ill. App. 183.

Iowa.— Sartor *v.* Schaden, 125 Iowa 696, 101 N. W. 511.

Michigan.— Warren Bros. Co. *v.* Barber Asphalt Paving Co., 145 Mich. 79, 108 N. W. 652, 12 L. R. A. N. S. 339.

Minnesota.— Cigar Makers' Protective Union *v.* Conhaim, 40 Minn. 243, 41 N. W. 943, 12 Am. St. Rep. 726, 3 L. R. A. 125.

Missouri.— Gaines *v.* E. Whyte Grocery, etc., Co., 107 Mo. App. 507, 81 S. W. 648.

New York.— Ball *v.* Broadway Bazaar, 194 N. Y. 429, 87 N. E. 674 [*reversing* 121 N. Y. App. Div. 546, 106 N. Y. Suppl. 249].

United States.— Delaware, etc., Canal Co. *v.* Clark, 13 Wall. 311, 20 L. ed. 581.

England.— Perry *v.* Truefitt, 6 Beav. 66, 49 Eng. Reprint 749; Farina *v.* Silverlock, 6 De G. M. & G. 214, 2 Jur. N. S. 1008, 26 L. J. Ch. 11, 55 Eng. Ch. 213, 43 Eng. Reprint 1214.

Canada.— Boston Rubber Shoe Co. *v.* Montreal Boston Rubber Shoe Co., 32 Can. Sup. Ct. 315; Fafard *v.* Ferland, 6 Quebec Pr. 119.

The doctrine of unfair competition is founded entirely upon this same principle, which is extended to cover cases of words, names, and marks not subject to exclusive appropriation as technical trade-marks. See *infra*, V, A.

86. *Illinois.*— Candee *v.* Deere, 54 Ill. 439, 5 Am. Rep. 125.

New York.— Hier *v.* Abrahams, 82 N. Y. 519, 37 Am. Rep. 589; Popham *v.* Cole, 66 N. Y. 69, 23 Am. Rep. 22; Amoskeag Mfg. Co. *v.* Spear, 2 Sandf. 599.

Pennsylvania.— Heinz *v.* Lutz, 146 Pa. St. 592, 23 Atl. 314; Jos. Dixon Crucible Co. *v.* Guggenheim, 7 Phila. 408.

United States.— Coats *v.* Merrick Thread Co., 149 U. S. 562, 13 S. Ct. 966, 37 L. ed. 847; Delaware, etc., Canal Co. *v.* Clark, 13 Wall. 311, 20 L. ed. 581; Osgood *v.* Allen, 18 Fed. Cas. No. 10,603, Holmes 185, 3 Off. Gaz. 124. See Frese *v.* Bachof, 9 Fed. Cas. No. 5,110, 14 Blatchf. 432, 13 Off. Gaz. 635.

England.— See Read *v.* Richardson, 45 L. T. Rep. N. S. 54 (per Jessel, M. R.); Hogg *v.* Kirby, 8 Ves. Jr. 215, 7 Rev. Rep. 30, 32 Eng. Reprint 336.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," §§ 61–77.

There is not ground for an injunction to protect a trade-mark or label, where the ordinary purchaser is not deceived into buying defendant's goods when it is intended to buy plaintiff's. New Orleans Coffee Co. *v.* American Coffee Co., 124 La. 19, 49 So. 730. See also *infra*, IV, C, 2.

87. Stetson *v.* Brennen, 21 N. Y. App. Div. 552, 48 N. Y. Suppl. 601, express order given for purpose of creating a cause of action.

Sale to detectives.— Where it was shown that defendant had in his possession a supply of labels carrying complainant's trade-mark, which might be easily affixed to spurious goods, the fact that a sale to detectives was by complainant's solicitation did not preclude complainant from an injunction, under the rule that a plaintiff cannot recover damages for an act done by defendant at plaintiff's solicitation. Kessler *v.* Klein, 177 Fed. 394, 101 C. C. A. 478; Kessler *v.* Goldstrom, 177 Fed. 392, 101 C. C. A. 476. But where defendant merely executed a special order given by detectives acting for plaintiff, he is not guilty of infringement. Liebig's Extract of Meat Co. *v.* Libby, 103 Fed. 87.

88. *Iowa.*— Sartor *v.* Schaden, 125 Iowa 696, 101 N. W. 511.

Louisiana.— Lacroix *v.* Nodal, 41 La. Ann. 1018, 6 So. 795.

Missouri.— Gaines *v.* E. Whyte Grocery, etc., Co., 107 Mo. App. 507, 81 S. W. 648.

United States.— Thackeray *v.* Saxlehner, 125 Fed. 911, 60 C. C. A. 562; Consolidated Fruit-Jar Co. *v.* Thomas, 6 Fed. Cas. No. 3,131, 2 N. J. L. J. 338.

England.— Braham *v.* Bustard, 1 Hem. & M. 447, 9 L. T. Rep. N. S. 199, 11 Wkly. Rep. 1061, 71 Eng. Reprint 195.

89. *New Jersey.*— Eureka Fire Hose Co. *v.* Eureka Rubber Mfg. Co., 69 N. J. Eq. 159, 60 Atl. 561.

New York.— Hier *v.* Abrahams, 82 N. Y. 519, 37 Am. Rep. 589.

United States.— Hutchinson *v.* Loewy, 163 Fed. 42, 90 C. C. A. 1; American Tin Plate Co. *v.* Licking Roller Mill Co., 158 Fed. 690; Enoch Morgan's Sons Co. *v.* Ward, 152 Fed. 690, 81 C. C. A. 616, 12 L. R. A. N. S. 729.

England.— Edelston *v.* Edelston, 1 De G. J. & S. 185, 9 Jur. N. S. 479, 7 L. T. Rep. N. S. 768, 11 Wkly. Rep. 328, 66 Eng. Ch. 142, 46 Eng. Reprint 72; Sanitas Co. *v.* Condy, 56 L. T. Rep. N. S. 621.

Canada.— Crawford *v.* Shuttock, 13 Grant Ch. (U. C.) 149.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," §§ 61–64.

90. Keller *v.* B. F. Goodrich Co., 117 Ind.

or any other color.[91] A trade-mark consisting of a name or word is infringed by use in any form or style of print, either with or without additions.[92]

C. Imitation and Partial Use — 1. In General. In order to constitute an infringement, it is not necessary that the trade-mark be exactly or literally copied. Similarity, not identity, is the test of infringement of a trade-mark.[93] It is not

556, 19 N. E. 196, 10 Am. St. Rep. 88; Saxlehner *v.* Wagner, 157 Fed. 745, 85 C. C. A. 321 ("Carbonated Artificial Hunyadi, Conforming to Fresenius' Analysis of the Hunyadi Janos Springs"); Wagner Typewriter Co. *v.* F. S. Webster Co., 144 Fed. 405 ("Underwood," used to indicate that typewriter ribbons were for use on an "Underwood" typewriter). See J. R. Watkins Medical Co. *v.* Sands, 83 Minn. 326, 86 N. W. 340. *Compare* Warren Bros. Co. *v.* Barber Asphalt Paving Co., 145 Mich. 79, 108 N. W. 652, 12 L. R. A. N. S. 339.

Deceptive artifice.—A manufacturer of an article of dentistry printed on the boxes containing it the words "Non-Secret Dental Vulcanite, made according to our analysis of the Akron Dental Rubber"; the words "Akron Dental Rubber" being the trade-mark of a competitor, and being printed in red ink and large type. The preceding words were printed in large black type, and the formula for the preparation of the article followed in red ink in very small type. It was held that the label was likely to mislead, and was an infringement, and that its use should be enjoined. Keller *v.* B. F. Goodrich Co., 117 Ind. 556, 19 N. E. 196, 10 Am. St. Rep. 88.

91. Smith *v.* Fair, 14 Ont. 729.

Color cannot be considered. In deciding the question of piracy of a trade-mark, the color of the marks cannot be taken into account, and the only test is a comparison of the uncolored diagrams. Nuthall *v.* Vining, 28 Wkly. Rep. 330.

92. Eureka Fire Hose Co. *v.* Eureka Rubber Mfg. Co., 69 N. J. Eq. 159, 60 Atl. 561; Hier *v.* Abrahams, 82 N. Y. 519, 37 Am. Rep. 589; Gaines *v.* Leslie, 25 Misc. (N. Y.) 20, 54 N. Y. Suppl. 421; Lauferty *v.* Wheeler, 11 Abb. N. Cas. (N. Y.) 220, 63 How. Pr. 488. But see Taylor *v.* Taylor, 124 Ky. 173, 85 S. W. 1085, 27 Ky. L. Rep. 625.

93. *Colorado.*— Solis Cigar Co. *v.* Pozo, 16 Colo. 388, 26 Pac. 556, 25 Am. St. Rep. 279.

Connecticut.— Bradley *v.* Norton, 33 Conn. 157, 87 Am. Dec. 200.

Georgia.—Whitley Grocery Co. *v.* McCaw Mfg. Co., 105 Ga. 839, 32 S. E. 113.

Illinois.— Frazer *v.* Frazer Lubricator Co., 121 Ill. 147, 13 N. E. 639, 2 Am. St. Rep. 73 [*affirming* 18 Ill. App. 450]; Ball *v.* Siegel, 116 Ill. 137, 4 N. E. 667, 56 Am. Rep. 766.

Indiana.— Keller *v.* B. F. Goodrich Co., 117 Ind. 556, 19 N. E. 196, 10 Am. St. Rep. 88.

Iowa.— Sartor *v.* Schaden, 125 Iowa 696, 101 N. W. 511; Shaver *v.* Shaver, 54 Iowa 208, 6 N. W. 188, 37 Am. Rep. 194.

Kentucky.— Rains *v.* White, 107 Ky. 114, 52 S. W. 970, 21 Ky. L. Rep. 742.

Massachusetts.— George G. Fox Co. *v.* Glynn, 191 Mass. 344, 78 N. E. 89, 114 Am. St. Rep. 619; Regis *v.* Jaynes, 185 Mass. 458, 70 N. E. 480.

Missouri.— Liggett, etc., Tobacco Co. *v.* Sam Reid Tobacco Co., 104 Mo. 53, 15 S. W. 843, 24 Am. St. Rep. 313; Filley *v.* Fassett, 44 Mo. 168, 100 Am. Dec. 275; McCann *v.* Anthony, 21 Mo. App. 83.

New Jersey.— Standard Table Oil Cloth Co. *v.* Trenton Oil Cloth, etc., Co., 71 N. J. Eq. 555, 63 Atl. 846.

New York.— Vulcan *v.* Myers, 139 N. Y. 364, 34 N. E. 904; Vulcan *v.* Myers, 58 Hun 161, 11 N. Y. Suppl. 663; Falk *v.* American West Indies Trading Co., 36 Misc. 376, 73 N. Y. Suppl. 547 [*affirmed* in 71 N. Y. App. Div. 320, 75 N. Y. Suppl. 964]; Monopol Tobacco Works *v.* Gensior, 32 Misc. 87, 66 N. Y. Suppl. 155.

Pennsylvania.— Juan F. Portuondo Cigar Mfg. Co. *v.* Vicente Portuondo Cigar Mfg. Co., 222 Pa. St. 116, 70 Atl. 968.

United States.— Saxlehner *v.* Eisner, etc., Co., 179 U. S. 19, 21 S. Ct. 7, 45 L. ed. 60 [*reversing* 91 Fed. 536, 33 C. C. A. 291]; Amoskeag Mfg. Co. *v.* Trainer, 101 U. S. 51, 25 L. ed. 993; McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828; Gulden *v.* Chance, 163 Fed. 447; Enoch Morgan's Sons Co. *v.* Ward, 152 Fed. 690, 81 C. C. A. 616, 12 L. R. A. N. S. 729; Ohio Baking Co. *v.* National Biscuit Co., 127 Fed. 116, 62 C. C. A. 116; National Biscuit Co. *v.* Swick, 121 Fed. 1007; Thomas G. Plant Co. *v.* May Co., 105 Fed. 375, 44 C. C. A. 534; N. K. Fairbank Co. *v.* Luckel, etc., Soap Co., 102 Fed. 327, 42 C. C. A. 376; Centaur Co. *v.* Killenberger, 87 Fed. 725; Tetlow *v.* Tappan, 85 Fed. 774; Hilson Co. *v.* Foster, 80 Fed. 896; Celluloid Mfg. Co. *v.* Cellonite Mfg. Co., 32 Fed. 94; Liggett, etc., Tobacco Co. *v.* Hynes, 20 Fed. 883 [*affirmed* in 128 U. S. 182, 9 S. Ct. 60, 32 L. ed. 395]; Walton *v.* Crowley, 29 Fed. Cas. No. 17,133, 3 Blatchf. 440; Rodgers *v.* Philp, 1 Off. Gaz. 29.

England.— Braham *v.* Bustard, 1 Hem. & M. 447, 9 L. T. Rep. N. S. 199, 11 Wkly. Rep. 1061, 71 Eng. Reprint 195.

Canada.— Barsalou *v.* Darling, 9 Can. Sup. Ct. 677; Carey *v.* Goss, 11 Ont. 619; Lefebvre *v.* Landry, 5 Quebec Pr. 341.

"**Similarity, not identity,** is the usual recourse when one party seeks to benefit himself by the good name of another." Per Bradley, J., in Celluloid Co. *v.* Cellonite Co., 32 Fed. 94, 97. "The cases in which the infringement is an exact copy are rare, if not entirely unknown." Monopol Tobacco Works *v.* Gensior, 32 Misc. (N. Y.) 87, 89, 66 N. Y. Suppl. 155.

Symbols and names distinguished.— "In the case of a symbol, merely, an imitation, to amount to an infringement, must be fairly exact, but in the case of a distinctive word, the use of the word itself, in any form, by

necessary that every word should be appropriated.[94] The imitation need not amount to a forgery or an entire counterfeit.[95] There is an infringement where the substantial and distinctive part of the trade-mark is copied or imitated, notwithstanding evasive attempts to hide the fact of imitation, or the addition of colorable explanations, or the omission of non-essential parts.[96] But the essential feature at least must be copied or imitated.[97] If the words or marks look or sound alike there is an infringement.[98]

a competitor, is a violation of the right of the trade-mark. Hier *v.* Abrahams, 82 N. Y. 519, 37 Am. Rep. 589. As was said by Rapallo, J., in the case cited: 'Where the trade-mark consists of a word, it may be used by the manufacturer who has appropriated it, in any style of print, or on any form of label, and its use by another in any form is unlawful. . . . The goods become known by the name or word by which they have been designated.'" This rule applies whether the distinctive word is used alone or together with another. Gaines *v.* Leslie, 25 Misc. (N. Y.) 20, 23, 54 N. Y. Suppl. 421; Lauferty *v.* Wheeler, 11 Abb. N. Cas. (N. Y.) 220, 63 How. Pr. 488. See also Beard *v.* Turner, 13 L. T. Rep. N. S. 746.

94. Eureka Fire Hose Co. *v.* Eureka Rubber Mfg. Co., 71 N. J. Eq. 300, 71 Atl. 1134 [*affirming* 69 N. J. Eq. 159, 60 Atl. 561]; Avenarius *v.* Kornely, 139 Wis. 247, 121 N. W. 336; Saxlehner *v.* Eisner, etc., Co., 179 U. S. 19, 21 S. Ct. 7, 45 L. ed. 60 [*reversing* 91 Fed. 536, 33 C. C. A. 291]; Ford *v.* Foster, L. R. 7 Ch. 611, 41 L. J. Ch. 682, 27 L. T. Rep. N. S. 219, 20 Wkly. Rep. 818; Braham *v.* Bustard, 1 Hem. & M. 447, 9 L. T. Rep. N. S. 199, 71 Eng. Reprint 195; Guinness *v.* Ulmer, 10 Law Times 127.

95. Peter Schoenhofer Brewing Co. *v.* Maltine Co., 30 App. Cas. (D. C.) 346; Peter Schoenhofen Brewing Co. *v.* Maltine Co., 30 App. Cas. (D. C.) 340; Blackwell *v.* Armistead, 3 Fed. Cas. No. 1,474, 3 Hughes 163.

96. *Indiana.*— Keller *v.* B. F. Goodrich Co., 117 Ind. 556, 19 N. E. 196, 10 Am. St. Rep. 88.

Iowa.—Atlas Assur. Co. *v.* Atlas Ins. Co., 138 Iowa 228, 112 N. W. 232, 114 N. W. 609, 128 Am. St. Rep. 189, 15 L. R. A. N. S. 625.

New Jersey.— Standard Table Oil Cloth Co. *v.* Trenton Oil Cloth, etc., Co., 71 N. J. Eq. 555, 63 Atl. 846; Eureka Fire Hose Co. *v.* Eureka Rubber Mfg. Co., 69 N. J. Eq. 159, 60 Atl. 561 [*affirmed* in 71 N. J. Eq. 300, 71 Atl. 1134].

Texas.—Western Grocer Co. *v.* Caffarelli, (Civ. App. 1908) 108 S. W. 413 [*reversed* on other grounds in 102 Tex. 104, 127 S. W. 1018].

Wisconsin.— Listman Mill Co. *v.* William Listman Milling Co., 88 Wis. 334, 60 N. W. 261, 43 Am. St. Rep. 907.

United States.— Saxlehner *v.* Eisner, etc., Co., 179 U. S. 19, 21 S. Ct. 7, 45 L. ed. 60; Baker *v.* Delapenha, 160 Fed. 746; American Tin Plate Co. *v.* Licking Roller Mill Co., 158 Fed. 690; Enoch Morgan's Sons Co. *v.* Ward, 152 Fed. 690, 81 C. C. A. 616, 12 L. R. A. N. S. 729 (holding that "Sopono" infringes "Sapolio," in connection with other imitation features); Baker *v.* Puritan Pure Food Co., 139 Fed. 680; Lanahan *v.* Kissel, 135 Fed. 899; Alleghany Fertilizer Co. *v.* Woodside, 1 Fed. Cas. No. 206, 1 Hughes 115; U. S. *v.* Roche, 27 Fed. Cas. No. 16,180, 1 McCrary 385.

England.— Ford *v.* Foster, L. R. 7 Ch. 611, 41 L. J. Ch. 682, 27 L. T. Rep. N. S. 219, 20 Wkly. Rep. 818. See *In re* Worthington, 14 Ch. D. 8, 49 L. J. Ch. 646, 42 L. T. Rep. N. S. 563, 28 Wkly. Rep. 747.

Canada.— Boston Rubber Shoe Co. *v.* Montreal Boston Rubber Co., 7 Can. Exch. 9; Davis *v.* Reid, 17 Grant Ch. (U. C.) 69.

Compare In re S. C. Herbst Importing Co., 30 App. Cas. (D. C.) 297.

Any use of the key or catchword in a trademark in a way calculated to deceive is an infringement. Western Grocer Co. *v.* Caffarelli, (Tex. Civ. App. 1908) 108 S. W. 413 [*reversed* on the facts in 102 Tex. 104, 127 S. W. 1018].

97. E. H. Taylor, Jr., etc., Co. *v.* Taylor, 124 Ky. 173, 85 S. W. 1085, 27 Ky. L. Rep. 625; Blackwell *v.* Crabb, 36 L. J. Ch. 504.

General resemblance is insufficient if the mark is different in the points at which a customer would naturally look in order to ascertain whose goods he was buying. Blackwell *v.* Crabb, 36 L. J. Ch. 504.

98. Stirling Silk Mfg. Co. *v.* Sterling Silk Co., 59 N. J. Eq. 394, 46 Atl. 109 ("Stirling" and "Sterling"); Volger *v.* Force, 63 N. Y. App. Div. 122, 71 N. Y. Suppl. 209 ("Excelsior" infringed by "Excellent"); Barrett Chemical Co. *v.* Stern, 56 N. Y. App. Div. 143, 67 N. Y. Suppl. 595 [*overruled* on validity of trade-mark in Barrett Chemical Co. *v.* Stern, 176 N. Y. 27, 68 N. E. 65, 13 N. Y. Annot. Cas. 430 (*reversing* 76 N. Y. Suppl. 1009)] ("Roachsault" and "Roach Salt"); Chance *v.* Gulden, 165 Fed. 624, 92 C. C. A. 58 [*reversing* 163 Fed. 447] ("Don Ceasar" infringes "Don Carlos"); Northwestern Consol. Milling Co. *v.* Mauser, 162 Fed. 1004 ("Ceresota" infringed by "Cressota" as applied to flour); Stephens *v.* Peel, 16 L. T. Rep. N. S. 145 ("Stephen's Blue Black" infringed by "Steelpens Blue Black" as applied to ink); Doran *v.* Hogadore, 11 Ont. L. Rep. 321, 7 Ont. Wkly. Rep. 349 (letter B held to infringe letter D). *Compare* Kirstein *v.* Cohen, 39 Can. Sup. Ct. 286, wherein "Staz-on" was held not to infringe "Shur-on," as applied to eyeglasses, being neither phonetically nor visually alike. But *compare* Allen B. Wrisley Co. *v.* Iowa Soap Co., 122 Fed. 796, 59 C. C. A. 54, "Old Country" soap, not infringed by "Our Country" soap.

2. Deceptive Tendency the Test. Whether or not an imitation which is not an exact copy constitutes an infringement depends upon whether the resemblance is sufficiently close to deceive purchasers and so pass off the goods of one man as being those of another.[99] Where one mark could not reasonably be mistaken for

"All that is necessary to sustain an injunction is that the imitation should be the same to the eye, or should sound the same to the ear, as the genuine trade-mark." Falk *v.* American West Indies Trading Co., 36 Misc. (N. Y.) 376, 377, 73 N. Y. Suppl. 547 [*affirmed* in 71 N. Y. App. Div. 320, 75 N. Y. Suppl. 964].

99. *Connecticut.*— Bradley *v.* Norton, 33 Conn. 157, 87 Am. Dec. 200.

Illinois.— Hopkins Amusement Co. *v.* Frohman, 103 Ill. App. 613 [*affirmed* in 202 Ill. 541, 67 N. E. 391]; Frazer *v.* Frazer Lubricator Co., 18 Ill. App. 450 [*affirmed* in 121 Ill. 147, 13 N. E. 639, 2 Am. St. Rep. 73].

Iowa.— Sartor *v.* Schaden, 125 Iowa 696, 101 N. W. 511.

Louisiana.— Cusimano *v.* Olive Oil Importing Co., 114 La. 312, 38 So. 200; Lacroix *v.* Nodal, 41 La. Ann. 1018, 6 So. 795.

Maine.—W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 100 Me. 461, 62 Atl. 499, 4 L. R. A. N. S. 960.

Maryland.— Parlett *v.* Guggenheimer, 67 Md. 542, 10 Atl. 81, 1 Am. St. Rep. 416.

Missouri.— Nicholson *v.* Wm. A. Stickney Cigar Co., 158 Mo. 158, 59 S. W. 121; Drummond Tobacco Co. *v.* Addison Tinsley Tobacco Co., 52 Mo. App. 10.

New Jersey.— Corbett Bros. Co. *v.* Reinhardt-Meding Co., (Ch. 1910) 76 Atl. 243; Standard Table Oil Cloth Co. *v.* Trenton Oil Cloth, etc., Co., 71 N. J. Eq. 555, 63 Atl. 846; Stirling Silk Mfg. Co. *v.* Sterling Silk Co., 59 N. J. Eq. 394, 46 Atl. 199.

New York.— Brown *v.* Doscher, 147 N. Y. 647, 42 N. E. 268 [*affirming* 73 Hun 107, 26 N. Y. Suppl. 951]; Colman *v.* Crump, 70 N. Y. 573; Falk *v.* American West Indies Trading Co., 71 N. Y. App. Div. 320, 75 N. Y. Suppl. 964; Dunlap *v.* Young, 68 N. Y. App. Div. 137, 74 N. Y. Suppl. 184 [*reversed* on other grounds in 174 N. Y. 327, 66 N. E. 964]; Ft. Stanwix Canning Co. *v.* William McKinley Canning Co., 49 N. Y. App. Div. 566, 63 N. Y. Suppl. 704; Thornton *v.* Crowley, 47 N. Y. Super. Ct. 527 [*affirmed* in 89 N. Y. 644]; Amoskeag Mfg. Co. *v.* Spear, 2 Sandf. 599; Cahn *v.* Gottschalk, 14 Daly 542, 2 N. Y. Suppl. 13; Merrimack Mfg. Co. *v.* Garner, 4 E. D. Smith 387; Bolen, etc., Mfg. Co. *v.* Jonasch, 29 Misc. 99, 60 N. Y. Suppl. 555; Jerome *v.* Johnson, 59 N. Y. Suppl. 859; Williams *v.* Spence, 25 How. Pr. 366.

North Carolina.— Blackwell *v.* Wright, 73 N. C. 310.

Pennsylvania.— Shaw *v.* Pilling, 175 Pa. St. 78, 34 Atl. 446.

Texas.— Caffarelli *v.* Western Grocer Co., 102 Tex. 104, 127 S. W. 1018 [*reversing* (Civ. App. 1908) 108 S. W. 413].

Wisconsin.—Avenarius *v.* Kornely, 139 Wis. 247, 121 N. W. 336; Listman Mill Co. *v.* William Listman Milling Co., 88 Wis. 334, 60 N. W. 261, 43 Am. St. Rep. 907; Leidersdorf *v.* Flint, 50 Wis. 400, 7 N. W. 252.

United States.— McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828; Hutchinson *v.* Loewy, 163 Fed. 42, 90 C. C. A. 1; Northwestern Consol. Milling Co. *v.* Mauser, 162 Fed. 1004; Consolidated Ice Co. *v.* Hygeia Distilled Water Co., 151 Fed. 10, 80 C. C. A. 506 [*affirming* 144 Fed. 139]; Baker *v.* Puritan Pure Food Co., 139 Fed. 680; Lanahan *v.* Kissel, 135 Fed. 899; Liggett, etc., Tobacco Co. *v.* Hynes, 20 Fed. 883; Apollinaris Brunnen *v.* Somborn, 1 Fed. Cas. No. 496, 14 Blatchf. 380; Blackwell *v.* Armistead, 3 Fed. Cas. No. 1,474, 3 Hughes 163; Hostetter *v.* Vowinkle, 12 Fed. Cas. No. 6,714, 1 Dill. 329; Manhattan Medicine Co. *v.* Wood, 16 Fed. Cas. No. 9,026, 4 Cliff. 461, 14 Off. Gaz. 519 [*affirmed* in 108 U. S. 218, 2 S. Ct. 436, 27 L. ed. 706]; Taylor *v.* Carpenter, 23 Fed. Cas. No. 13,784, 3 Story 458; U. S. *v.* Roche, 27 Fed. Cas. No. 16,180, 1 McCrary 385; Walton *v.* Crowley, 29 Fed. Cas. No. 17,133, 3 Blatchf. 440.

England.— Rodgers *v.* Nowill, 5 C. B. 109, 11 Jur. 1039, 17 L. J. C. P. 52, 57 E. C. L. 109; McAndrew *v.* Bassett, 4 De G. J. & S. 380, 10 Jur. N. S. 550, 33 L. J. Ch. 561, 10 L. T. Rep. N. S. 442, 4 New Rep. 123, 12 Wkly. Rep. 777, 69 Eng. Ch. 293, 46 Eng. Reprint 965; Leather Cloth Co. *v.* American Leather Cloth Co., 1 Hem. & M. 271, 2 New Rep. 481, 11 Wkly. Rep. 931, 71 Eng. Reprint 118 [*reversed* on other grounds in 4 De G. J. & S. 137, 10 Jur. N. S. 81, 33 L. J. Ch. 199, 9 L. T. Rep. N. S. 558, 3 New Rep. 264, 12 Wkly. Rep. 289, 69 Eng. Ch. 106, 46 Eng. Reprint 868 (*affirmed* in 11 H. L. Cas. 523, 11 Jur. N. S. 513, 35 L. J. Ch. 53, 12 L. T. Rep. N. S. 742, 6 New Rep. 209, 13 Wkly. Rep. 873, 11 Eng. Reprint 1435)]; Sanitas Co. *v.* Condy, 56 L. T. Rep. N. S. 621; Stephens *v.* Peel, 16 L. T. Rep. N. S. 145; Beard *v.* Turner, 13 L. T. Rep. N. S. 746.

Canada.— Davis *v.* Reid, 17 Grant Ch. (U. C.) 69.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," §§ 65–74.

Exact similitude.— "It is true that in cases of this kind, as a general rule, exact similitude is not required to constitute an infringement, or to entitle the complaining party to protection; but if the form, marks, contents, words, or other special arrangement or general appearance of the words of the alleged infringer's device, are such as would be likely to mislead persons in the ordinary course of purchasing the goods, and induce them to suppose that they were purchasing the genuine article, then the similitude is such as entitles the injured party to equitable protection, if he takes seasonable measures to assert his rights and prevent their continued invasion." Ball *v.* Siegel, 116 Ill. 137, 146, 4 N. E. 667, 56 Am. Rep. 766.

the other, and deception is improbable or impossible, there is no infringement.[1] In applying this test it has been said that all doubts ought to be resolved in favor of the prior trader and against the imitator.[2] Proof of actual deception of purchasers is not necessary to obtain relief. It is the probability of deception which calls for a remedy.[3] Of course actual instances of deception constitute the strongest

Picture merely of same generic character.— Equity will afford relief against the infringement of a trade-mark consisting in part of a picture or figure, although the alleged infringing picture is not a close imitation, but is merely of the same generic character, where the resemblance is such as is calculated to mislead ordinary purchasers into buying the product of defendant for that of complainant. Baker *v.* Puritan Pure Food Co., 139 Fed. 680.

1. *Illinois.*— Ball *v.* Siegel, 116 Ill. 137, 4 N. E. 667, 56 Am. Rep. 766.

Louisiana.— New Orleans Coffee Co. *v.* American Coffee Co., 124 La. 19, 49 So. 730.

Missouri.— Nicholson *v.* Wm. A. Stickney Cigar Co., 158 Mo. 158, 59 S. W. 121; Drummond Tobacco Co. *v.* Addison Tinsley Tobacco Co., 52 Mo. App. 10.

New York.— Boessneck *v.* Iselin, 83 N. Y. App. Div. 290, 82 N. Y. Suppl. 164; Commercial Advertiser Assoc. *v.* Haynes, 26 N. Y. App. Div. 279, 49 N. Y. Suppl. 938; Potter *v.* McPherson, 21 Hun 559; Tallcot *v.* Moore, 6 Hun 106; Stephens *v.* De Couto, 7 Rob. 343, 4 Abb. Pr. N. S. 47; Foster *v.* Webster Piano Co., 13 N. Y. Suppl. 338; Hurricane Patent Lantern Co. *v.* Miller, 56 How. Pr. 234; Bell *v.* Locke, 8 Paige 75, 34 Am. Dec. 371.

North Carolina.— Blackwell *v.* Wright, 73 N. C. 310.

Texas.— Alff *v.* Radam, 77 Tex. 530, 14 S. W. 164, 19 Am. St. Rep. 792, 9 L. R. A. 145.

United States.— Holzapfel's Compositions Co. *v.* Rahtjen's American Composition Co., 183 U. S. 1, 22 S. Ct. 6, 46 L. ed. 49; Liggett, etc., Tobacco Co. *v.* Finzer, 128 U. S. 182, 9 S. Ct. 60, 32 L. ed. 395; Fonotipa *v.* Bradley, 171 Fed. 951; Hutchinson *v.* Loewy, 163 Fed. 42, 90 C. C. A. 1; Galena Signal Oil Co. *v.* Fuller, 142 Fed. 1002; Allen B. Wrisley Co. *v.* Iowa Soap Co., 122 Fed. 796, 59 C. C. A. 54; B. B. Hill Mfg. Co. *v.* Sawyer-Boss Mfg. Co., 118 Fed. 1014, 56 C. C. A. 596 [*affirming* 112 Fed. 144]; Wells *v.* Ceylon Perfume Co., 105 Fed. 621; Harper *v.* Lare, 103 Fed. 203, 43 C. C. A. 182; Potter Drug, etc., Corp. *v.* Pasfield Soap Co., 102 Fed. 490; La Republique Francaise *v.* Saratoga Vichy Spring Co., 99 Fed. 733; Centaur Co. *v.* Marshall, 97 Fed. 785, 38 C. C. A. 413; Kroppf *v.* Furst, 94 Fed. 150; Centaur Co. *v.* Marshall, 92 Fed. 605; Kann *v.* Diamond Steel Co., 89 Fed. 706, 32 C. C. A. 324; N. K. Fairbank Co. *v.* Luckel, etc., Soap Co., 88 Fed. 694 [*affirmed* in 116 Fed. 332, 54 C. C. A. 204]; Bass *v.* Henry Zeltner Brewing Co., 87 Fed. 468 [*affirmed* in 95 Fed. 1006, 37 C. C. A. 355]; Lare *v.* Harper, 86 Fed. 481, 30 C. C. A. 373; Massachusetts Invester Pub. Co. *v.* Dobinson, 82 Fed. 56; Sterling Remedy Co. *v.* Eureka Chemical, etc., Co., 80 Fed. 105, 25 C. C. A. 314; Dadirrian *v.* Yacubian, 72 Fed. 1010; Mumm *v.* Kirk, 40 Fed. 589; Philadelphia Novelty Mfg. Co. *v.* Blakesley Novelty Co., 40 Fed. 588; Dawes *v.* Davies, Codd Dig. 260. But see Bass *v.* Feigenspan, 96 Fed. 206.

England.— Borthwick *v.* Evening Post, 37 Ch. D. 449, 57 L. J. Ch. 406, 58 L. T. Rep. N. S. 252, 36 Wkly. Rep. 434; Leather Cloth Co. *v.* American Leather Cloth Co., 11 H. L. Cas. 523, 11 Jur. N. S. 513, 35 L. J. Ch. 53, 12 L. T. Rep. N. S. 742, 16 New Rep. 209, 13 Wkly. Rep. 873, 11 Eng. Reprint 1435 [*affirming* 4 De G. J. & S. 137, 10 Jur. N. S. 81, 33 L. J. Ch. 199, 9 L. T. Rep. N. S. 558, 3 New Rep. 264, 12 Wkly. Rep. 289, 69 Eng. Ch. 106, 46 Eng. Reprint 868]; London, etc., Law Assur. Soc. *v.* London, etc., Joint-Stock L. Ins. Co., 11 Jur. 938; Lever *v.* Bedingfield, 80 L. T. Rep. N. S. 100; Bradbury *v.* Beeton, 21 L. T. Rep. N. S. 323.

Canada.— Kerstein *v.* Cohen, 11 Ont. L. Rep. 450, 7 Ont. Wkly. Rep. 247; Gillett *v.* Lumsden, 6 Ont. L. Rep. 66, 2 Ont. Wkly. Rep. 497; Wilson *v.* Lyman, 25 Ont. App. 303.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," §§ 65–74.

2. Hopkins Amusement Co. *v.* Frohman, 103 Ill. App. 613 [*affirmed* in 202 Ill. 541, 67 N. E. 391]. See also Leidersdorf *v.* Flint, 50 Wis. 400, 7 N. W. 252; Bass *v.* Feigenspan, 96 Fed. 206.

3. *Massachusetts.*— Reading Stove Works *v.* S. M. Howes Co., 201 Mass. 437, 87 N. E. 751, 21 L. R. A. N. S. 979.

Missouri.— Filley *v.* Fassett, 44 Mo. 168, 100 Am. Dec. 275.

New York.— Barrett Chemical Co. *v.* Stern, 56 N. Y. App. Div. 143, 67 N. Y. Suppl. 595.

Wisconsin.— Listman Mill Co. *v.* William Listman Milling Co., 88 Wis. 334, 60 N. W. 261, 43 Am. St. Rep. 907.

United States.— Baker *v.* Delapenha, 160 Fed. 746; American Tin Plate Co. *v.* Licking Roller Mill Co., 158 Fed. 690; Havana Commercial Co. *v.* Nichols, 155 Fed. 302; Hygeia Distilled Water Co. *v.* Consolidated Ice Co., 144 Fed. 139 [*affirmed* in 151 Fed. 10, 80 C. C. A. 506]; Lanahan *v.* Kissel, 135 Fed. 899; General Electric Co. *v.* Re-New Lamp Co., 128 Fed. 154.

England.— Johnston *v.* Orr-Ewing, 7 App. Cas. 219, 51 L. J. Ch. 797, 46 L. T. Rep. N. S. 216, 30 Wkly. Rep. 417; Lee *v.* Haley, L. R. 5 Ch. 155, 39 L. J. Ch. 284, 22 L. T. Rep. N. S. 251, 18 Wkly. Rep. 242; Cope *v.* Evans, L. R. 18 Eq. 138, 30 L. T. Rep. N. S. 292, 22 Wkly. Rep. 450; Edelsten *v.* Edelsten, 1 De G. J. & S. 185, 9 Jur. N. S. 479, 7 L. T. Rep. N. S. 768, 11 Wkly. Rep. 328, 66 Eng. Ch. 142, 46 Eng. Reprint 72; Hookham *v.* Pottage, 26 L. T. Rep. N. S. 755, 20 Wkly.

possible proof of the deceptive character of the imitation.[4] The doctrine of infringement of trade-marks by deceptive imitation is nothing more than an application of the broader doctrine of unfair competition.[5]

3. Standard For Determining Infringing Similarity. In determining whether an alleged infringing trade-mark is sufficiently similar to be deceptive, and therefore an infringement, ordinary purchasers, buying under the usual conditions prevailing in the trade, and giving such attention as such purchasers usually give in buying that class of goods, are the standard. If such a purchaser would probably be deceived into purchasing one article thinking it was the other, there is an infringement, otherwise not.[6] Some cases hold the similarity to be an infringe-

Rep. 720 [*affirmed* in L. R. 8 Ch. 91, 27 L. T. Rep. N. S. 595, 21 Wkly. Rep. 47]. But see N. K. Fairbank Co. *v.* Cocos Butter Mfg. Co., 20 T. L. R. 53.

In unfair competition cases the same rule applies. See *infra*, V, B, 4.

Where no actual deception is shown, infringement may be determined by the court from a comparison of the respective marks. Kerstein *v.* Cohen, 11 Ont. L. Rep. 450, 7 Ont. Wkly. Rep. 247.

It is not material that dealers or customers are indifferent whether the goods are made by the owner of the trade-mark or by the infringer, as it is the attempt to dispose of goods by misrepresentation that constitutes the wrong. Reading Stove Works *v.* S. M. Howes Co., 201 Mass. 437, 87 N. E. 751, 21 L. R. A. N. S. 979.

4. American Tin Plate Co. *v.* Licking Roller Mill Co., 158 Fed. 690. See also *infra*, V, B, 4.

5. See *infra*, V, A, 2.

6. *California.*— Sperry *v.* Percival Milling Co., 81 Cal. 252, 22 Pac. 651.

Colorado.— Solis Cigar Co. *v.* Pozo, 16 Colo. 388, 26 Pac. 556, 25 Am. St. Rep. 279.

District of Columbia.—Wayne County Preserving Co. *v.* Burt Olney Canning Co., 32 App. Cas. 279; Hall *v.* Ingram, 28 App. Cas. 454.

Illinois.— Frazer *v.* Frazer Lubricator Co., 18 Ill. App. 450.

Iowa.—Atlas Assur. Co. *v.* Atlas Ins. Co., 138 Iowa 228, 112 N. W. 232, 114 N. W. 609, 128 Am. St. Rep. 189, 15 L. R. A. N. S. 625.

Louisiana.— New Orleans Coffee Co. *v.* American Coffee Co., 124 La. 19, 49 So. 730; Cusimano *v.* Olive Oil Importing Co., 114 La. 312, 38 So. 200.

Maine.— W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 100 Me. 461, 62 Atl. 499, 4 L. R. A. N. S. 960, "ordinarily careful person."

Maryland.—Robertson *v.* Berry, 50 Md. 591, 33 Am. Rep. 328.

Massachusetts.— Regis *v.* Jaynes, 185 Mass. 458, 70 N. E. 480.

Missouri.— Liggett, etc., Tobacco Co. *v.* Sam Reid Tobacco Co., 104 Mo. 53, 15 S. W. 843, 24 Am. St. Rep. 313; Drummond Tobacco Co. *v.* Addison Tinsley Tobacco Co., 52 Mo. App. 10.

Nebraska.— Miskell *v.* Prokop, 58 Nebr. 628, 79 N. W. 552.

New York.— Fischer *v.* Blank, 138 N. Y. 244, 33 N. E. 1040 [*applied* in Monopol Tobacco Works *v.* Gensior, 32 Misc. 87, 66 N. Y. Suppl. 155]; Dunlap *v.* Young, 68 N. Y. App. Div. 137, 74 N. Y. Suppl. 184 [*reversed* on other grounds in 174 N. Y. 327, 66 N. E. 964]; Anargyros *v.* Egyptian Amasis Cigarette Co., 54 N. Y. App. Div. 345, 66 N. Y. Suppl. 626; Ft. Stanwix Canning Co. *v.* William McKinley Canning Co., 49 N. Y. App. Div. 566, 63 N. Y. Suppl. 704; Day *v.* Webster, 23 N. Y. App. Div. 601, 49 N. Y. Suppl. 314; Tuerk Hydraulic Power Co. *v.* Tuerk, 92 Hun 65, 36 N. Y. Suppl. 384; Tallcot *v.* Moore, 6 Hun 106; Williams *v.* Johnson, 2 Bosw. 1; Jerome *v.* Johnson, 59 N. Y. Suppl. 859; W. J. Johnston Co. *v.* Electric Age Pub. Co., 14 N. Y. Suppl. 803; Munro *v.* Smith, 13 N. Y. Suppl. 708; Foster *v.* Webster Piano Co., 13 N. Y. Suppl. 338; Peterson *v.* Humphrey, 4 Abb. Pr. 394; Fleischmann *v.* Shuckmann, 62 How. Pr. 92.

Ohio.— Cigar Maker's International Union *v.* Burkhardt, 9 Ohio S. & C. Pl. Dec. 459, 6 Ohio N. P. 342; Brown Brothers Co. *v.* Bucher, etc., Co., 9 Ohio S. & C. Pl. Dec. 362, 6 Ohio N. P. 379; Reeder *v.* Brodt, 6 Ohio S. & C. Pl. Dec. 248, 4 Ohio N. P. 265.

Pennsylvania.—Wiest Co. *v.* Weeks Co., 7 Kulp 505; Clark, etc., Co. *v.* Scott, 4 Lack. Leg. N. 159.

Tennessee.— Robinson *v.* Storm, 103 Tenn. 40, 52 S. W. 880.

Texas.— Caffarelli *v.* Western Grocer Co., 102 Tex. 104, 127 S. W. 1018 [*reversing* (Civ. App. 1908) 108 S. W. 413]; Goodman *v.* Bohls, 3 Tex. Civ. App. 183, 22 S. W. 11.

United States.—Amoskeag Mfg. Co. *v.* Trainer, 101 U. S. 51, 25 L. ed. 993; McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828; H. Mueller Mfg. Co. *v.* A. Y. McDonaly, etc., Mfg. Co., 164 Fed. 1001; Baker *v.* Puritan Pure Food Co., 139 Fed. 680; Regensburg *v.* Juan F. Portuondo Cigar Mfg. Co., 136 Fed. 866; Ohio Baking Co. *v.* National Biscuit Co., 127 Fed. 116, 62 C. C. A. 116; Allen B. Wrisley Co. *v.* Iowa Soap Co., 122 Fed. 796, 59 C. C. A. 54; Postum Cereal Co. *v.* American Health Food Co., 119 Fed. 848, 56 C. C. A. 360 [*affirming* 109 Fed. 898]; Gannett *v.* Ruppert, 119 Fed. 221 [*reversed* on the facts in 127 Fed. 962, 62 C. C. A. 594]; De Long Hook, etc., Co. *v.* Francis Hook, etc., Co., 118 Fed. 938; Keuffel, etc., Co. *v.* H. S. Crocker Co., 118 Fed. 187; Van Hoboken *v.* Mohns, 112 Fed. 528; Allan B. Wrisley Co. *v.* Iowa Soap Co., 104 Fed. 548; Pfeiffer *v.* Wilde, 102 Fed. 658; N. K. Fairbank Co. *v.* Luckel, etc.,

ment if sufficient to deceive an "incautious" or "unwary," "unobservant" or "unsuspecting" purchaser,[7] while a few cases refer to deception of a cautious

Soap Co., 102 Fed. 327, 42 C. C. A. 376; Paris Medicine Co. *v.* W. H. Hill Co., 102 Fed. 148, 42 C. C. A. 227; Centaur Co. *v.* Hughes Bros. Mfg. Co., 91 Fed. 901, 34 C. C. A. 127; Centaur Co. *v.* Neathery, 91 Fed. 891, 34 C. C. A. 118; Van Camp Packing Co. *v.* Cruikshanks Bros. Co., 90 Fed. 814, 33 C. C. A. 280; Kann *v.* Diamond Steel Co., 89 Fed. 706, 32 C. C. A. 324; Bass *v.* Henry Zeltner Brewing Co., 87 Fed. 468; Lare *v.* Harper, 86 Fed. 481, 30 C. C. A. 373; Von Mumm *v.* Wittemann, 85 Fed. 966; Sterling Remedy Co. *v.* Eureka Chemical, etc., Co., 80 Fed. 105, 25 C. C. A. 314; N. K. Fairbank Co. *v.* R. W. Bell Mfg. Co., 77 Fed. 869, 23 C. C. A. 554; Improved Fig Syrup Co. *v.* California Fig Syrup Co., 54 Fed. 175, 4 C. C. A. 264; Myers *v.* Theller, 38 Fed. 607; Glen Cove Mfg. Co. *v.* Ludeling, 22 Fed. 823, 23 Blatchf. 46; Liggett, etc., Tobacco Co. *v.* Hynes, 20 Fed. 883; Hostetter *v.* Adams, 10 Fed. 838, 20 Blatchf. 326; Coffeen *v.* Brunton, 5 Fed. Cas. No. 2,946, 4 McLean 516, 5 Fed. Cas. No. 2,947, 5 McLean 256; Consolidated Fruit-Jar Co. *v.* Thomas, 6 Fed. Cas. No. 3,131, 2 N. J. L. J. 272; Manhattan Medicine Co. *v.* Wood, 16 Fed. Cas. No. 9,026, 4 Cliff. 461, 14 Off. Gaz. 519 [*affirmed* in 108 U. S. 218, 2 S. Ct. 436, 27 L. ed. 706]; U. S. *v.* Roche, 27 Fed. Cas. No. 16,180, 1 McCrary 385; Walton *v.* Crowley, 29 Fed. Cas. No. 17,133, 3 Blatchf. 440.

England.— Seixo *v.* Provezende, L. R. 1 Ch. 192, 12 Jur. N. S. 215, 14 L. T. Rep. N. S. 314, 14 Wkly. Rep. 357; Wotherspoon *v.* Currie, L. R. 5 H. L. 508, 42 L. J. Ch. 130, 27 L. T. Rep. N. S. 393; Borthwick *v.* Evening Post, 37 Ch. D. 449, 57 L. J. Ch. 406, 58 L. T. Rep. N. S. 252, 36 Wkly. Rep. 434; Cope *v.* Evans, L. R. 18 Eq. 138, 30 L. T. Rep. N. S. 292, 22 Wkly. Rep. 450; Shrimpton *v.* Laight, 18 Beav. 164, 52 Eng. Reprint 65; Leather Cloth Co. *v.* American Leather Co., 1 Hem. & M. 271, 2 New Rep. 481, 11 Wkly. Rep. 931, 71 Eng. Reprint 118 [*reversed* in 4 De G. J. & S. 137, 10 Jur. N. S. 81, 33 L. J. Ch. 199, 9 L. T. Rep. N. S. 558, 3 New Rep. 264, 12 Wkly. Rep. 289, 69 Eng. Ch. 106, 46 Eng. Reprint 868 (*affirmed* in 11 H. L. Cas. 523, 11 Jur. N. S. 513, 35 L. J. Ch. 53, 12 L. T. Rep. N. S. 742, 6 New Rep. 209, 13 Wkly. Rep. 873, 11 Eng. Reprint 1435)]; Bradbury *v.* Beeton, 39 L. J. Ch. 57, 21 L. T. Rep. N. S. 323, 18 Wkly. Rep. 33; Anglo-Swiss Condensed Milk Co. *v.* Swiss Condensed Milk Co., [1871] W. N. 163, 5 L. J. Notes Cas. 154.

Canada.— Johnson *v.* Parr, Russ. Eq. Cas. (Nova Scotia) 98; Kerstein *v.* Cohen, 11 Ont. L. Rep. 450, 7 Ont. Wkly. Rep. 247.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 64. See also *infra*, V, B, 4.

Regard must be had to the class of persons who purchase the particular article for consumption, and to the circumstances ordinarily attending its purchase. N. K. Fairbank Co. *v.* R. W. Bell Mfg. Co., 77 Fed. 869, 23 C. C. A. 554. The fact that the goods are of a class purchased by persons who are easily deceived is a circumstance to be considered. Reckitt *v.* Kellogg, 28 N. Y. App. Div. 111, 50 N. Y. Suppl. 888; Clark Thread Co. *v.* Armitage, 67 Fed. 896. The intelligence or want of intelligence of the purchaser cannot be considered. Wolfe *v.* Hart, 4 Vict. L. Rep. 125.

Character and price of article must be considered. See Morse *v.* Worrell, 10 Phila. (Pa.) 168. Purchasers of small, cheap, and common articles are not expected to be critically observant. Fleischmann *v.* Schuckmann, 62 How. Pr. (N. Y.) 92.

7. *Illinois.*— Mossler *v.* Jacobs, 66 Ill. App. 571.

Missouri.— Drummond Tobacco Co. *v.* Addison Tinsley Tobacco Co., 52 Mo. App. 10; McCann *v.* Anthony, 21 Mo. App. 83.

New York.— Colman *v.* Crump, 70 N. Y. 573; Reckitt *v.* Kellogg, 28 N. Y. App. Div. 111, 50 N. Y. Suppl. 888; Kinney Tobacco Co. *v.* Maller, 53 Hun 340, 6 N. Y. Suppl. 389; Brooklyn White Lead Co. *v.* Masury, 25 Barb. 416; Brown *v.* Mercer, 37 N. Y. Super. Ct. 265; Monopol Tobacco Works *v.* Gensior, 32 Misc. 87, 66 N. Y. Suppl. 155. See Thornton *v.* Crowley, 47 N. Y. Super. Ct. 527 [*affirmed* in 89 N. Y. 644].

Pennsylvania.— Juan F. Portuondo Cigar Mfg. Co. *v.* Vicente Portuondo Cigar Mfg. Co., 222 Pa. St. 116, 70 Atl. 968 ("unobservant"); Colton *v.* Thomas, 7 Phila. 257 [*criticizing* Partridge *v.* Menck, 2 Sandf. Ch. (N. Y.) 622 (*affirmed* in 2 Barb. Ch. 101, 47 Am. Dec. 281)]. But see Brown *v.* Seidel, 153 Pa. St. 60, 25 Atl. 1064.

United States.— Chance *v.* Gulden, 165 Fed. 624, 92 C. C. A. 58 ("unwary"); Centaur Co. *v.* Robinson, 91 Fed. 889; Celluloid Mfg. Co. *v.* Cellonite Mfg. Co., 32 Fed. 94 (ordinary unsuspecting customer); Blackwell *v.* Armistead, 3 Fed. Cas. No. 1,474, 3 Hughes 163. See Amoskeag Mfg. Co. *v.* Trainer, 101 U. S. 51, 25 L. ed. 993 [*citing* Wotherspoon *v.* Currie, L. R. 5 H. L. 508, 42 L. J. Ch. 130, 27 L. T. Rep. N. S. 393] (per Clifford, J.). But see Coats *v.* Merrick Thread Co., 149 U. S. 562, 13 S. Ct. 966, 37 L. ed. 847; Allen B. Wrisley Co. *v.* Iowa Soap Co., 122 Fed. 796, 59 C. C. A. 54; Centaur Co. *v.* Marshall, 97 Fed. 785, 38 C. C. A. 413; Mumm *v.* Kirk, 40 Fed. 589.

England.— Johnston *v.* Orr-Ewing, 7 App. Cas. 219, 51 L. J. Ch. 797, 46 L. T. Rep. N. S. 216, 30 Wkly. Rep. 417 ("incautious"); Sen Sen Co. *v.* Britten, [1899] 1 Ch. 692, 68 L. J. Ch. 250, 80 L. T. Rep. N. S. 278, 15 T. L. R. 238, 47 Wkly. Rep. 358; Singer Mfg. Co. *v.* Wilson, 2 Ch. D. 434, 45 L. J. Ch. 490, 34 L. T. Rep. N. S. 858, 24 Wkly. Rep. 1023 [*reversed* on other grounds in 3 App. Cas. 376, 47 L. J. Ch. 481, 38 L. T. Rep. N. S. 303, 26 Wkly. Rep. 664]; Glenny *v.* Smith, 2 Dr. & Sm. 476, 11 Jur. N. S. 964, 13 L. T. Rep. N. S. 11, 6 New Rep. 363, 13 Wkly. Rep. 1032, 62 Eng. Reprint 701; Leather Cloth Co. *v.*

or careful purchaser,[8] or otherwise apparently require a somewhat greater degree of similarity.[9] It has been said that it must appear that the ordinary mass of purchasers, paying that attention which such persons usually do, would probably be deceived.[10] The resemblance need not be sufficient to deceive experts or persons specially familiar with the trade-mark or goods involved.[11] It is immaterial that the wholesale or retail dealer, familiar with the goods, is neither actually deceived nor liable to be deceived.[12] The ultimate consumer who makes the market, not the immediate purchaser, is the one whose deception is the vital fact.[13] If upon the whole there is a deceptive similarity between the marks, it is immaterial that a critical inspection and comparison discloses differences,[14] or

American Leather Cloth Co., 11 H. L. Cas. 523, 11 Jur. N. S. 513, 35 L. J. Ch. 53, 12 L. T. Rep. N. S. 742, 6 New Rep. 209, 13 Wkly. Rep. 873, 11 Eng. Reprint 1435. But see Bradbury *v.* Beeton, 39 L. J. Ch. 57, 21 L. T. Rep. N. S. 323, 18 Wkly. Rep. 33.

Canada.— Davis *v.* Reid, 17 Grant Ch. (U. C.) 69; Reg. *v.* Authier, 6 Quebec Q. B. 146.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 64.

"The fact that careful buyers who scrutinize closely are not deceived only shows that the injury is less in degree, not that there is no injury." Frazer *v.* Frazer Lubricator Co., 18 Ill. App. 450, 462.

8. U. S. *v.* Roche, 27 Fed. Cas. No. 16,180, 1 McCrary 385.

Deception despite ordinary care.— In Solis Cigar Co. *v.* Pozo, 16 Colo. 388, 393, 26 Pac. 556, 25 Am. St. Rep. 279, Bissell, C., said: "It is always essential to show that the imitation is of a character to escape the ordinary care and caution used in the purchase of the articles protected."

Deception on close inspection required.— Infringement of a trade-mark consisting of a monogram of three letters, the form of which was necessarily liable to a certain degree of limitation in general effect, if the general form or idea of the monograms was adopted, must, to some extent, depend on the liability of a purchaser to be deceived on close inspection. Corbett Bros. Co. *v.* Reinhardt-Meding Co., (N. J. Ch. 1910) 76 Atl. 243.

9. Ball *v.* Siegel, 116 Ill. 137, 4 N. E. 667, 56 Am. Rep. 766; Hier *v.* Abrahams, 82 N. Y. 519, 37 Am. Rep. 589; Popham *v.* Cole, 66 N. Y. 69, 23 Am. Rep. 22; Stokes *v.* Allen, 56 Hun (N. Y.) 526, 9 N. Y. Suppl. 846; Thornton *v.* Crowley, 47 N. Y. Super. Ct. 527 [*affirmed* in 89 N. Y. 644]; Heinz *v.* Lutz, 146 Pa. St. 592, 23 Atl. 314; Allen B. Wrisley Co. *v.* Iowa Soap Co., 122 Fed. 796, 59 C. C. A. 54. And see Civil Service Supply Assoc. *v.* Dean, 13 Ch. D. 512.

"The court will hold any imitation actionable which requires a careful inspection to distinguish its marks and appearances from those of the manufactures imitated. It is certainly not bound to interfere where ordinary attention will enable a purchaser to discriminate." Merrimack Mfg. Co. *v.* Garner, 4 E. D. Smith (N. Y.) 387, 391, 2 Abb. Pr. 318 [*quoting* Partridge *v.* Menck, 2 Sandf. Ch. (N. Y.) 622 (*affirmed* in 2 Barb. Ch. 101, 47 Am. Dec. 281)].

10. Tallcot *v.* Moore, 6 Hun (N. Y.) 106; Partridge *v.* Menck, 2 Sandf. Ch. (N. Y.) 622 [*affirmed* in 2 Barb. Ch. 101, 47 Am. Dec. 281]; Rowley *v.* Houghton, 2 Brewst. (Pa.) 303, 7 Phila. 39. But *compare* Colton *v.* Thomas, 2 Brewst. (Pa.) 308. In Gilman *v.* Hunnewell, 122 Mass. 139, 148, Gray, C. J., said: "All the authorities agree that the court will not restrain a defendant from the use of a label, on the ground that it infringes the plaintiff's trade-mark, unless the form of the printed words, the words themselves, and the figures, lines and devices, are so similar that any person, with such reasonable care and observation as the public generally are capable of using and may be expected to exercise, would mistake the one for the other."

11. Amoskeag Mfg. Co. *v.* Trainer, 101 U. S. 51, 25 L. ed. 993; R. Heinsch's Sons Co. *v.* Boker, 86 Fed. 765; Clark Thread Co. *v.* Armitage, 67 Fed. 896; Powell *v.* Birmingham Vinegar Brewery Co., [1896] 2 Ch. 54, 65 L. J. Ch. 563, 74 L. T. Rep. N. S. 509, 44 Wkly. Rep. 688 [*affirmed* in [1897] A. C. 710, 66 L. J. Ch. 763, 76 L. T. Rep. N. S. 792]; Sykes *v.* Sykes, 3 B. & C. 541, 5 D. & R. 292, 3 L. J. K. B. O. S. 46, 27 Rev. Rep. 420, 10 E. C. L. 248, 107 Eng. Reprint 834; Shrimpton *v.* Laight, 18 Beav. 164, 52 Eng. Reprint 65.

12. Stirling Silk Mfg. Co. *v.* Sterling Silk Co., 59 N. J. Eq. 394, 46 Atl. 199; Blackwell *v.* Armistead, 3 Fed. Cas. No. 1,474, 3 Hughes 163; Davis *v.* Kennedy, 13 Grant Ch. (U. C.) 523. *Contra*, Russia Cement Co. *v.* Frauenhar, 126 Fed. 228 [*affirmed* in 133 Fed. 518, 66 C. C. A. 500].

13. Johnston *v.* Orr-Ewing, 7 App. Cas. 219, 51 L. J. Ch. 797, 46 L. T. Rep. N. S. 216, 30 Wkly. Rep. 417, exportation of goods with deceptive mark enjoined. See also *infra*, V, B, 4.

14. *Maine.*— W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 100 Me. 461, 62 Atl. 499, 4 L. R. A. N. S. 960.

Massachusetts.— Lawrence Mfg. Co. *v.* Lowell Hosiery Mills, 129 Mass. 325, 37 Am. Rep. 362.

New Jersey.— Standard Table Oil Cloth Co. *v.* Trenton Oil Cloth, etc., Co., 71 N. J. Eq. 555, 63 Atl. 846.

New York.— Barrett Chemical Co. *v.* Stern, 56 N. Y. App. Div. 143, 67 N. Y. Suppl. 595; Jerome *v.* Johnson, 59 N. Y. Suppl. 859.

United States.— Liggett, etc., Tobacco Co. *v.* Hynes, 20 Fed. 883 [*affirmed* in 128 U. S.

that persons seeing the two trade-marks side by side would not be deceived.[15] Ocular comparison of the *tout ensemble* is the best means of determining the fact of deceptive and infringing imitation.[16]

4. Question of Fact. What similarity between two marks is sufficient to deceive, and hence to constitute an infringement, is a question of fact to be determined in each case by its own circumstances.[17] As there is no distinction in this respect between cases of infringement of technical trade-marks and unfair competition, the cases are for convenience grouped under the latter head.[18]

D. Intent and Motive. Guilty knowledge or fraudulent intent is not an essential element of infringement of a technical trade-mark. It is well settled that an infringement will be restrained irrespective of the question of intention on the part of defendant.[19] This is sometimes placed upon the ground that plain-

182, 9 S. Ct. 60, 32 L. ed. 395]; Blackwell *v.* Armistead, 3 Fed. Cas. No. 1,474, 3 Hughes 163.

England.— Day *v.* Binning, Coop. Pr. Cas. 489, 47 Eng. Reprint 611.

Canada.— Reg. *v.* Authier, 6 Quebec Q. B. 146.

15. *Indiana.*— Sohl *v.* Geisendorf, Wils. 60.

New York.— Potter *v.* McPherson, 21 Hun 559; Lockwood *v.* Bostwick, 2 Daly 521; Monopol Tobacco Works *v.* Gensior, 32 Misc. 87, 66 N. Y. Suppl. 155; Cook *v.* Starkweather, 13 Abb. Pr. N. S. 392.

Pennsylvania.— Pratt's Appeal, 117 Pa. St. 401, 11 Atl. 878, 2 Am. St. Rep. 676.

United States.— Sterling Remedy Co. *v.* Gorey, 110 Fed. 372; Paris Medicine Co. *v.* W. H. Hill Co., 102 Fed. 148, 42 C. C. A. 227; Stuart *v.* F. G. Steuart Co., 91 Fed. 243, 33 C. C. A. 480 [*reversing* 85 Fed. 778]; Centaur Co. *v.* Killenberger, 87 Fed. 725; Glen Cove Mfg. Co. *v.* Ludeling, 22 Fed. 823, 23 Blatchf. 46; Liggett, etc., Tobacco Co. *v.* Hynes, 20 Fed. 883.

England.— Seixo *v.* Provezende, L. R. 1 Ch. 192, 12 Jur. N. S. 215, 14 L. T. Rep. N. S. 314, 14 Wkly. Rep. 357.

Canada.—Whitney *v.* Hickling, 5 Grant Ch. (U. C.) 605.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," §§ 65–74.

16. Parlett *v.* Guggenheimer, 67 Md. 542, 10 Atl. 81, 1 Am. St. Rep. 416; Wirtz *v.* Eagle Bottling Co., 50 N. J. Eq. 164, 24 Atl. 658; G. W. Cole Co. *v.* American Cement, etc., Co., 130 Fed. 703, 65 C. C. A. 105; Blackwell *v.* Armistead, 3 Fed. Cas. No. 1,474, 3 Hughes 163; Consolidated Fruit-Jar Co. *v.* Thomas, 6 Fed. Cas. No. 3,131, 2 N. J. L. J. 272; Harper *v.* Wright, etc., Lamp Mfg. Co., [1896] 1 Ch. 142, 65 L. J. Ch. 161, 44 Wkly. Rep. 274; *In re* Jelley, 51 L. J. Ch. 639 note, 46 L. T. Rep. N. S. 381 note.

No amount of expert evidence, calling attention to differences, will justify a court in denying an injunction, where its own inspection and comparison shows that the two things are near enough alike to deceive purchasers. Consolidated Fruit-Jar Co. *v.* Thomas, 6 Fed. Cas. No. 3,131, 2 N. J. L. J. 272.

The standard of comparison should be the trade-mark registered and in use when the suit was filed, and not a somewhat similar trade-mark used by plaintiff theretofore. Caffarelli *v.* Western Grocer Co., 102 Tex. 104, 127 S. W. 1018 [*reversing* (Civ. App. 1908) 108 S. W. 413].

17. *Indiana.*— Keller *v.* B. F. Goodrich Co., 117 Ind. 556, 19 N. E. 196, 10 Am. St. Rep. 88.

Iowa.— Atlas Assur. Co. *v.* Atlas Ins. Co., 138 Iowa 228, 112 N. W. 232, 114 N. W. 609, 128 Am. St. Rep. 189, 15 L. R. A. N. S. 625.

Massachusetts.—Regis *v.* Jaynes, 185 Mass. 458, 70 N. E. 480.

New York.— Fischer *v.* Blank, 138 N. Y. 244, 33 N. E. 1040.

Texas.— Caffarelli *v.* Western Grocer Co., 102 Tex. 104, 127 S. W. 1018 [*reversing* (Civ. App. 1908) 108 S. W. 413].

United States.— Kentucky Distilleries, etc., Co. *v.* Wathen, 110 Fed. 641; Kroppf *v.* Furst, 94 Fed. 150; P. Lorillard Co. *v.* Peper, 86 Fed. 956, 30 C. C. A. 496; Coats *v.* Merrick Thread Co., 36 Fed. 324, 1 L. R. A. 616 [*affirmed* in 149 U. S. 562, 13 S. Ct. 966, 37 L. ed. 847]; Celluloid Mfg. Co. *v.* Cellonite Mfg. Co., 32 Fed. 94.

England.— Payton *v.* Snelling, [1901] A. C. 308, 70 L. J. Ch. 644, 85 L. T. Rep. N. S. 287; Crawshay *v.* Thompson, 11 L. J. C. P. 301, 4 M. & G. 357, 5 Scott N. R. 562, 43 E. C. L. 189.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," §§ 65–74.

18. See *infra*, V, B, 5.

19. *Florida.*— El Modello Cigar Mfg. Co. *v.* Gato, 25 Fla. 886, 7 So. 23, 23 Am. St. Rep. 537, 6 L. R. A. 823.

Illinois.— Eckhart *v.* Consolidated Milling Co., 72 Ill. App. 70.

Iowa.— Atlas Assur. Co. *v.* Atlas Ins. Co., 138 Iowa 228, 112 N. W. 232, 114 N. W. 609, 128 Am. St. Rep. 189, 15 L. R. A. N. S. 625.

Maine.— W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 100 Me. 461, 62 Atl. 499, 4 L. R. A. N. S. 960.

Maryland.— Stonebraker *v.* Stonebraker, 33 Md. 252.

Massachusetts.—Reading Stove Works, etc., Co. *v.* S. M. Howes Co., 201 Mass. 437, 87 N. E. 751, 21 L. R. A. N. S. 979; Regis *v.* Jaynes, 185 Mass. 458, 70 N. E. 480; Viano *v.* Baccigalupo, 183 Mass. 160, 67 N. E. 641.

Missouri.—Liggett, etc., Tobacco Co. *v.* Sam

tiff has a property right in the trade-mark.[20] But this is inaccurate because there

Reid Tobacco Co., 104 Mo. 53, 15 S. W. 843, 24 Am. St. Rep. 313; Filley *v.* Fassett, 44 Mo. 168, 100 Am. Dec. 275; McCann *v.* Anthony, 21 Mo. App. 83.

New Jersey.— Mrs. G. B. Miller, etc., Tobacco Manufactory *v.* Commerce, 45 N. J. L. 18, 46 Am. Rep. 750; Eureka Fire Hose Co. *v.* Eureka Rubber Mfg. Co., 71 N. J. Eq. 300, 71 Atl. 1134 [*affirming* 69 N. J. Eq. 159, 60 Atl. 561]; Wirtz *v.* Eagle Bottling Co., 50 N. J. Eq. 164, 24 Atl. 658.

New York.— Vulcan *v.* Myers, 139 N. Y. 364, 34 N. E. 904; Colman *v.* Crump, 70 N. Y. 573; Falk *v.* American West Indies Trading Co., 71 N. Y. App. Div. 320, 75 N. Y. Suppl. 964; Barrett Chemical Co. *v.* Stern, 56 N. Y. App. Div. 143, 67 N. Y. Suppl. 595; Day *v.* Webster, 23 N. Y. App. Div. 601, 49 N. Y. Suppl. 314; Electro-Silicon Co. *v.* Hazard, 29 Hun 369; American Grocer Pub. Assoc. *v.* Grocer Pub. Co., 25 Hun 398; Gaines *v.* Leslie, 25 Misc. 20, 54 N. Y. Suppl. 421; Clinton Metalic Paint Co. *v.* New York Metalic Paint Co., 23 Misc. 66, 50 N. Y. Suppl. 437.

North Carolina.— Blackwell *v.* Wright, 73 N. C. 310.

Pennsylvania.— Shaw *v.* Pilling, 175 Pa. St. 78, 34 Atl. 446; Brown *v.* Seidel, 153 Pa. St. 60, 25 Atl. 1064; Pratt's Appeal, 117 Pa. St. 401, 11 Atl. 878, 2 Am. St. Rep. 676; Clark, etc., Co. *v.* Scott, 4 Lack. Leg. N. 159.

Rhode Island.— Cady *v.* Schultz, 19 R. I. 193, 32 Atl. 915, 61 Am. St. Rep. 763, 29 L. R. A. 524.

Texas.— Western Grocer Co. *v.* Caffarelli, (Civ. App. 1908) 108 S. W. 413 [*reversed* on other grounds in 102 Tex. 104, 127 S. W. 1018].

Wisconsin.— Listman Mill Co. *v.* William Listman Milling Co., 88 Wis. 334, 60 N. W. 261, 43 Am. St. Rep. 907.

United States.— Saxlehner *v.* Siegel-Cooper Co., 179 U. S. 42, 21 S. Ct. 16, 45 L. ed. 77; Amoskeag Mfg. Co. *v.* Trainer, 101 U. S. 51, 25 L. ed. 993 (per Clifford, J.); McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828; Hutchinson *v.* Loewy, 163 Fed. 42, 90 C. C. A. 1; Consolidated Ice Co. *v.* Hygeia Distilled Water Co., 151 Fed. 10, 80 C. C. A. 506 [*affirming* 144 Fed. 139]; General Electric Co. *v.* Re-New Lamp Co., 128 Fed. 154; Welsbach Light Co. *v.* Adam, 107 Fed. 463; Manitowoc Pea-Packing Co. *v.* Numsen, 93 Fed. 196, 35 C. C. A. 267; Cuervo *v.* Landauer, 63 Fed. 1003; Liggett, etc., Tobacco Co. *v.* Hynes, 20 Fed. 883; Alleghany Fertilizer Co. *v.* Woodside, 1 Fed. Cas. No. 206, 1 Hughes 115; Blackwell *v.* Armistead, 3 Fed. Cas. No. 1,474, 3 Hughes 163; Coffeen *v.* Brunton, 5 Fed. Cas. No. 2,946, 4 McLean 516.

England.— Singer Mfg. Co. *v.* Wilson, 3 App. Cas. 376, 47 L. J. Ch. 481, 38 L. T. Rep. N. S. 303, 26 Wkly. Rep. 664; Wotherspoon *v.* Currie, L. R. 5 H. L. 508, 42 L. J. Ch. 130, 27 L. T. Rep. N. S. 393; Singer Mfg. Co. *v.* Loog, 18 Ch. D. 395, 44 L. T. Rep. N. S. 888, 29 Wkly. Rep. 699 [*reversed* on other grounds in 8 App. Cas. 15, 52 L. J. Ch. 481, 48 L. T. Rep. N. S. 3, 31 Wkly. Rep. 325]; Ewing *v.* Johnston, 13 Ch. D. 434 [*affirmed* in 7 App. Cas. 219, 51 L. J. Ch. 797, 46 L. T. Rep. N. S. 216, 30 Wkly. Rep. 417]; Singer Mfg. Co. *v.* Wilson, 2 Ch. D. 434, 45 L. J. Ch. 490, 34 L. T. Rep. N. S. 858, 24 Wkly. Rep. 1023 [*reversed* on other grounds in 3 App. Cas. 376, 47 L. J. Ch. 481, 38 L. T. Rep. N. S. 303, 26 Wkly. Rep. 664]; Cope *v.* Evans, L. R. 18 Eq. 138, 30 L. T. Rep. N. S. 292, 22 Wkly. Rep. 450; Moet *v.* Couston, 33 Beav. 578, 10 Jur. N. S. 1012, 10 L. T. Rep. N. S. 395, 4 New Rep. 86, 55 Eng. Reprint 493; Hall *v.* Barrows, 4 De G. J. & S. 150, 10 Jur. N. S. 55, 33 L. J. Ch. 204, 9 L. T. Rep. N. S. 561, 3 New Rep. 259, 12 Wkly. Rep. 322, 69 Eng. Ch. 116, 46 Eng. Reprint 873; Edelsten *v.* Edelsten, 1 De G. J. & S. 185, 9 Jur. N. S. 479, 7 L. T. Rep. N. S. 768, 11 Wkly. Rep. 328, 66 Eng. Ch. 142, 46 Eng. Reprint 72; Dixon *v.* Fawcus, 3 E. & E. 537, 7 Jur. N. S. 895, 30 L. J. Q. B. 137, 3 L. T. Rep. N. S. 693, 9 Wkly. Rep. 414, 107 E. C. L. 537; Clement *v.* Maddick, 1 Giffard 98, 5 Jur. N. S. 592, 65 Eng. Reprint 841; Woollam *v.* Ratcliff, 1 Hem. & M. 259, 71 Eng. Reprint 113; Harrison *v.* Taylor, 11 Jur. N. S. 408, 12 L. T. Rep. N. S. 339; Welch *v.* Knott, 4 Jur. N. S. 330, 4 Kay & J. 747, 70 Eng. Reprint 310; Knott *v.* Morgan, 2 Keen 213, 15 Eng. Ch. 213, 48 Eng. Reprint 610; Millington *v.* Fox, 3 Myl. & C. 338, 14 Eng. Ch. 338, 40 Eng. Reprint 956. But see Baker *v.* Rawson, 45 Ch. D. 519, 60 L. J. Ch. 49, 63 L. T. Rep. N. S. 306; N. K. Fairbank Co. *v.* Cocos Butter Mfg. Co., 20 T. L. R. 53. *Contra*, Blanchard *v.* Hill, 2 Atk. 484, 26 Eng. Reprint 692, overruled by later cases.

Canada.— Boston Rubber Shoe Co. *v.* Boston Rubber Co. of Montreal, 7 Can. Exch. 9. But see Pabst Brewing Co. *v.* Ekers, 21 Quebec Super. Ct. 545.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 63.

Opportunity for deception sufficient.— "So far as the right exists to enjoin the infringement of a trade mark it is not made to depend upon the fact that deception was either intended or practiced. If the opportunity is furnished where deception may be practiced, a basis exists to grant relief." Barrett Chemical Co. *v.* Stern, 56 N. Y. App. Div. 143, 147, 67 N. Y. Suppl. 595.

Mere possession of goods with infringing mark.— Relief will be granted even against a person who merely has in his possession a quantity of goods bearing a spurious trade-mark, and intends not to part with them, but use them for his own consumption. Upmann *v.* Forester, 24 Ch. D. 231, 47 J. P. 807, 52 L. J. Ch. 946, 49 L. T. Rep. N. S. 122, 32 Wkly. Rep. 28.

20. Colman *v.* Crump, 70 N. Y. 573; De Youngs *v.* Jung, 7 Misc. (N. Y.) 56, 25 N. Y. Suppl. 370; Cady *v.* Schultz, 19 R. I. 193, 32 Atl. 915, 61 Am. St. Rep. 763, 29 L. R. A. 524; C. F. Simmons Medicine Co. *v.* Mansfield Drug Co., 93 Tenn. 84, 23 S. W.

is no property right in any word or mark as such,[21] and the remedy is really based upon the sale of one man's goods as being those of another, thereby appropriating the latter's good-will.[22] The wrong and damage to plaintiff is the same whether or not it was intended by defendant. It is the invasion of plaintiff's property right in his good-will that supports the remedy.[23] Fraudulent intent may be material, however, where an accounting of damages and profits is sought in addition to injunctive relief.[24] And it has also been held that where a fraudulent intent is either admitted or proved, the imitation or copying need not be so close in order to sustain the action.[25] Persistence in the use of an infringing mark after notice constitutes intentional infringement,[26] and is strong evidence of fraud.[27] Fraudulent intent may be inferred from imitation.[28] Similar questions arise in unfair competition cases which should be consulted in this connection.[29]

E. Use on Genuine Goods. Use of another's trade-mark upon the genuine goods is not an infringement. Any one who deals in another's goods may use or sell them with the latter's trade-mark upon them, for in such case there is no deception. The mark truthfully indicates origin or ownership.[30] But the mere fact that genuine goods are used as an ingredient in a different preparation confers

165; Hall *v.* Barrows, 4 De G. J. & S. 150, 10 Jur. N. S. 55, 33 L. J. Ch. 204, 9 L. T. Rep. N. S. 561, 3 New Rep. 259, 12 Wkly. Rep. 322, 69 Eng. Ch. 116, 46 Eng. Reprint 873; Clement *v.* Maddick, 1 Giffard 98, 5 Jur. N. S. 592, 65 Eng. Reprint 841. In Lawrence Mfg. Co. *v.* Tennessee Mfg. Co., 138 U. S. 537, 548, 11 S. Ct. 396, 34 L. ed. 997, the court said: "The jurisdiction to restrain the use of a trademark rests upon the ground of the plaintiff's property in it, and of the defendants' unlawful use thereof. Boston Diatite Co. *v.* Florence Mfg. Co., 114 Mass. 69, 19 Am. Rep. 310. If the absolute right belonged to plaintiff, then if an infringement were clearly shown, the fraudulent intent would be inferred, and . . . the further violation of the right of property would nevertheless be restrained. Menendez *v.* Holt, 128 U. S. 514, 9 S. Ct. 143, 32 L. ed. 526; McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828."

21. See *supra*, I, E, 2.

22. See *supra*, I, C.

23. See *supra*, I, C.

24. See *infra*, IX, E, 12.

25. Ellis *v.* Zeilin, 42 Ga. 91; Barrows *v.* Knight, 6 R. I. 434, 78 Am. Dec. 452; Enoch Morgan's Sons Co. *v.* Hunkele, 8 Fed. Cas. No. 4,493, 10 Off. Gaz. 1092. See Whitley Grocery Co. *v.* McCaw Mfg. Co., 105 Ga. 839, 32 S. E. 113. See also Cope *v.* Evans, L. R. 18 Eq. 138, 30 L. T. Rep. N. S. 292, 22 Wkly. Rep. 450. The rule in unfair competition cases is held to be the same. See *infra*, V, B, 6.

26. *Iowa.*— Beebe *v.* Tolerton, etc., Co., 117 Iowa 593, 91 N. W. 905, decided under Code, § 5050.

Massachusetts.— Nelson *v.* Winchell, 203 Mass. 75, 89 N. E. 180, 23 L. R. A. N. S. 1150.

New Jersey.— Eureka Fire Hose Co. *v.* Eureka Rubber Mfg. Co., 69 N. J. Eq. 159, 60 Atl. 561 [*affirmed* in 71 N. J. Eq. 300, 71 Atl. 1134].

United States.—Hygeia Distilled Water Co. *v.* Consolidated Ice Co., 144 Fed. 139 [*affirmed* in 151 Fed. 10, 80 C. C. A. 506].

England.— Edelsten *v.* Edelsten, 1 De G. J. & S. 185, 9 Jur. N. S. 479, 7 L. T. Rep. N. S. 768, 11 Wkly. Rep. 328, 66 Eng. Ch. 142, 46 Eng. Reprint 72.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 63.

27. Johnston *v.* Orr-Ewing, 7 App. Cas. 219, 51 L. J. Ch. 797, 46 L. T. Rep. N. S. 216, 30 Wkly. Rep. 417.

28. Brown *v.* Seidel, 153 Pa. St. 60, 25 Atl. 1064 (holding that a cumulation of resemblances is evidence of fraudulent intent); Moorman *v.* Hoge, 17 Fed. Cas. No. 9,783, 2 Sawy. 78 (holding that the use of a peculiar, although unpatented, package, box, or barrel, if used in connection with the imitation of a trade-mark, has a tendency to show a fraudulent intention).

29. See *infra*, V, B, 6.

30. Edison *v.* Mills-Edisonia, 74 N. J. Eq. 521, 70 Atl. 191; Sweezy *v.* McBrair, 157 N. Y. 710, 53 N. E. 1132 [*affirming* 89 Hun 155, 35 N. Y. Suppl. 11]; Cutter *v.* Gudebrod Brothers Co., 44 N. Y. App. Div. 605, 61 N. Y. Suppl. 225 [*affirmed* in 168 N. Y. 572, 61 N. E. 887]; Samuel *v.* Berger, 24 Barb. (N. Y.) 163; Kipling *v.* Putnam, 120 Fed. 631; Gorham Mfg. Co. *v.* Emery-Bird-Thayer Dry-Goods Co., 92 Fed. 774; Vitascope Co. *v.* U. S. Phonograph Co., 83 Fed. 30; Hoyt *v.* J. T. Lovett Co., 71 Fed. 173, 17 C. C. A. 652, 31 L. R. A. 44; Apollinaris Co. *v.* Scherer, 27 Fed. 18, 23 Blatchf. 459; Walker *v.* Reid, 29 Fed. Cas. No. 17,084. See also Tucker Mfg. Co. *v.* Boyington, 24 Fed. Cas. No. 14,229, 9 Off. Gaz. 455, wherein the same goods were manufactured in accordance with a patent, after the expiration of the patent. Farina *v.* Silverlock, 1 Kay & J. 509, 24 L. J. Ch. 632, 3 Wkly. Rep. 532, 69 Eng. Reprint 560, 6 De G. M. & G. 214, 2 Jur. N. S. 1008, 26 L. J. Ch. 11, 55 Eng. Ch. 214, 43 Eng. Reprint 1214; Condy *v.* Taylor, 56 L. T. Rep. N. S. 891, per Kekewich, J. *Compare* Butler *v.* State, 127 Ga. 700, 56 S. E. 1000, where, under a state statute, use of a counterfeit label on genuine goods was held to be an offense.

no right to use the trade-mark thereon,[31] and a use of the trade-mark upon repaired or rebuilt goods,[32] or upon a different grade of goods than that upon which the proprietor uses the mark, especially if inferior, and even though obtained from the same proprietor,[33] constitutes an infringement.

F. Removal and Substitution of Trade-Marks. A dealer may legally remove the trade-marks from articles made by another and purchased by himself, and resell them with his own trade-marks placed thereon.[34]

G. Refilling Marked Bottles or Packages. It is a plain infringement to take another's bottles or packages marked with his trade-mark, and refill them with spurious goods, and then sell them in the market.[35]

H. Use on Different Class of Goods. The right to the exclusive use of a trade-mark is limited to a use of it upon some particular class of goods.[36] Accordingly it is not an infringement for another person to use even the same identical

But see *supra*, III, B, 19, b; and *infra*, V, C, 8.

The refilling of original or of trade-marked packages even if refilled with genuine goods is sometimes prohibited by statute. See *infra*, VI, A.

31. Omega Oil Co. *v.* Weschler, 35 Misc. (N. Y.) 441, 71 N. Y. Suppl. 983 [*affirmed* in 68 N. Y. App. Div. 638, 74 N. Y. Suppl. 1140].

32. General Electric Co. *v.* Re-New Lamp Co., 128 Fed. 154; Richards *v.* Williamson, 30 L. T. Rep. N. S. 746, 22 Wkly. Rep. 765. *Compare* Chapleau *v.* Laporte, 18 Quebec Super. Ct. 14 [*affirming* 16 Quebec Super. Ct. 189]. But see Singer Mfg. Co. *v.* Bent, 41 Fed. 214.

33. Gillott *v.* Kettle, 3 Duer (N. Y.) 624; Wilcox's Appeal, 9 Pa. Cas. 409, 12 Atl. 578; Thomas G. Plant Co. *v.* Hamburger, 153 Fed. 232; Thomas G. Plant Co. *v.* May Mercantile Co., 153 Fed. 229. See also *infra*, V, C, 17.

Bulk and bottled goods.— Where a distiller has different marks or labels for his bulk goods and bottled goods, a purchaser of bulk whisky may not bottle it himself, and place thereon the marks or labels used by the distiller for his bottled goods. Krauss *v.* Jos. R. Peebles' Sons Co., 58 Fed. 585; Hennessy *v.* Hogan, 6 W. W. & A'Beck. (Vict.) 225; Hennessy *v.* White, 6 W. W. & A'Beck. (Vict.) 216. But a manufacturer who sells to a dealer, in bulk, an article usually sold and used in small quantities, without any restriction as to its disposal, must be taken to authorize the dealer to sell it as being his vendor's manufacture. The dealer may therefore call the article by the name registered by the manufacturer as his trade-mark. Condy *v.* Taylor, 56 L. T. Rep. N. S. 891. The distinction between this case and the one last above cited is that there were not separate trade-marks for bulk and other goods. A purchaser of bulk goods has the right to divide it into small packages, and sell the same as originating with his vendor, according to the fact. Russia Cement Co. *v.* Frauenhar, 126 Fed. 228 [*affirmed* in 133 Fed. 518, 66 C. C. A. 500].

34. Johnson *v.* Raylton, 7 Q. B. D. 438, 50 L. J. Q. B. 753, 45 L. T. Rep. N. S. 374. *Compare* Chapleau *v.* Laporte, 16 Quebec Super. Ct. 189, 18 Quebec Super. Ct. 14, wherein it was held that no damages can be recovered from a stove manufacturer who, after repairing and refitting a second-hand stove of another manufacturer, puts his own name plate thereon, where there was no intention to deceive, the plate was removed as soon as complaint was made, and the stove returned by the purchaser and another taken in its place.

Reason for rule.— Sebastian says in this connection: "The maker's mark has already performed its function when the goods are sold, and when it is removed from the goods the maker ceases to be responsible for the guaranty implied by its presence on them. The purchaser, by substituting his own mark, undertakes the responsibility for the quality of the goods, which are in effect selected and guaranteed by him." Sebastian Trade-Marks 130 [*citing* Hirsch *v.* Jonas, 3 Ch. D. 584, 45 L. J. Ch. 364, 35 L. T. Rep. N. S. 228].

35. *Indiana.*— State *v.* Wright, 159 Ind. 422, 65 N. E. 289.

Mississippi.— Correro *v.* Wright, (1908) 47 So. 379.

Missouri.— Lampert *v.* Judge, etc., Drug Co., 119 Mo. App. 693, 100 S. W. 659.

New York.— Ricker *v.* Leigh, 74 N. Y. App. Div. 138, 77 N. Y. Suppl. 540.

United States.— Prest-O-Lite Co. *v.* Post, etc., Co., 163 Fed. 63; Prest-O-Lite Co. *v.* Avery Lighting Co., 161 Fed. 648; Bauer *v.* Siegert, 120 Fed. 81, 56 C. C. A. 487; Samuel *v.* Hostetter Co., 118 Fed. 257, 55 C. C. A. 111; Van Hoboken *v.* Mohns, 112 Fed. 528; Hostetter Co. *v.* Conron, 111 Fed. 737; Hostetter Co. *v.* Martinoni, 110 Fed. 524; Hostetter Co. *v.* William Schneider Wholesale Wine, etc., Co., 107 Fed. 705; Pontefact *v.* Isenberger, 106 Fed. 499; Hostetter Co. *v.* Comerford, 97 Fed. 585; Warner *v.* Roehr, 29 Fed. Cas. No. 17,189*a*. But see Hostetter Co. *v.* Brunn, 107 Fed. 707.

England.— Thwaites *v.* M'Evilly, [1904] 1 Ir. 310; Rose *v.* Loftus, 47 L. J. Ch. 576, 38 L. T. Rep. N. S. 409; Richards *v.* Williamson, 30 L. T. Rep. N. S. 746, 22 Wkly. Rep. 765; Barnett *v.* Leuchars, 13 L. T. Rep. N. S. 495, 14 Wkly. Rep. 166; Rose *v.* Henley, Sebastian's Gid. 551; Allen *v.* Richards, 26 Sol. J. 658. But see Welch *v.* Knott, 4 Jur. N. S. 330, 4 Kay & J. 747, 70 Eng. Reprint 310.

Australia.— Hostetter *v.* Anderson, 1 W. W. & A'Beck. (Vict.) 7, 1 Austr. Jur. 4.

36. See *supra*, I, E, 3.

trade-mark upon a different class of goods from that to which the prior user applied it.[37] Goods are in the same class, within this rule, whenever the use of a given trade-mark, name, or symbol would enable an unscrupulous dealer to palm off on unsuspecting customers spurious goods as being the genuine goods of the proprietor of the trade-mark.[38] A trade-mark for a broad class is infringed by its use on a particular species of goods belonging to such class.[39] Use even on non-competitive goods may be enjoined so long as defendant deals also in competitive goods.[40]

I. Relative Merits of Goods Immaterial. Upon the question of infringement, it is immaterial whether defendant's goods are of inferior or superior quality to that of plaintiff's. In either case he has no right to sell them under plaintiff's mark, and thereby avail himself of the benefit of the good-will and reputation of plaintiff's goods.[41]

J. Marks Conferring Same Market Name to Goods. Actual physical resemblance is not the sole test of infringement. A word may be infringed by a pictorial symbol or representation of the object denoted by such word, and *vice versa*. If the goods of a trader have become known in the market by a particular name by reason of the trade-mark used thereon, the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market is as much an infringement as an actual copy of the trade-mark.[42] But a device

37. *Alabama.*— Epperson *v.* Bluthenthal, 149 Ala. 125, 42 So. 863.

Maine.— Ricker *v.* Portland, etc., R. Co., 90 Me. 395, 38 Atl. 338.

New York.— Omega Oil Co. *v.* Weschler, 35 Misc. 441, 71 N. Y. Suppl. 983 [*affirmed* in 68 N. Y. App. Div. 638, 74 N. Y. Suppl. 1140].

Virginia.— Virginia Baking Co. *v.* Southern Biscuit Works, (1910) 68 S. E. 261.

United States.— Wells *v.* Ceylon Perfume Co., 105 Fed. 621; Bass *v.* Feigenspan, 96 Fed. 206; Kinney *v.* Allen, 14 Fed. Cas. No. 7,826, 1 Hughes 106; La Societe Anonyme Des Mines *v.* Baxter, 14 Fed. Cas. No. 8,099, 14 Blatchf. 261, 14 Off. Gaz. 679; Osgood *v.* Rockwood, 18 Fed. Cas. No. 10,605, 11 Blatchf. 310. But *compare* Elgin Nat. Watch Co. *v.* Illinois Watch-Case Co., 89 Fed. 487.

England.— Singer Mfg. Co. *v.* Wilson, 2 Ch. D. 434, 45 L. J. Ch. 490, 34 L. T. Rep. N. S. 858, 24 Wkly. Rep. 1023 [*reversed* on other grounds in 3 App. Cas. 376, 47 L. J. Ch. 481, 38 L. T. Rep. N. S. 303, 26 Wkly. Rep. 664].

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 76.

Any reasonable doubt should be resolved against defendant. Bass *v.* Feigenspan, 96 Fed. 206.

38. Omega Oil Co. *v.* Weschler, 35 Misc. (N. Y.) 441, 71 N. Y. Suppl. 983 [*affirmed* in 68 N. Y. App. Div. 638, 74 N. Y. Suppl. 1140]; Church, etc., Co. *v.* Russ, 99 Fed. 276.

Illustrations.—Any raw material and a compound or manufactured product made therefrom, such as flour and bread, or paint and dry oxide of zinc, are in different classes. La Societe Anonyme Des Mines *v.* Baxter, 14 Fed. Cas. No. 8,099, 14 Blatchf. 261, 14 Off. Gaz. 679. Liniment and medicated soap (Omega Oil Co. *v.* Weschler, 35 Misc. (N. Y.) 441, 71 N. Y. Suppl. 983 [*affirmed* in 68 N. Y. App. Div. 638, 74 N. Y. Suppl. 1140]) and smoking tobacco and cigarettes (Carroll *v.* Ertheiler, 1 Fed. 688) are in the same class. For other illustrations of goods in the same and different classes see *supra*, I, E, 3.

39. Omega Oil Co. *v.* Weschler, 35 Misc. (N. Y.) 441, 71 N. Y. Suppl. 983 [*affirmed* in 68 N. Y. App. Div. 638, 74 N. Y. Suppl. 1140], "Omega Oil" applied to a liniment and to a medicated soap.

40. Eureka Fire Hose Co. *v.* Eureka Rubber Mfg. Co., 72 N. J. Eq. 555, 65 Atl. 870.

41. *Iowa.*— Shaver *v.* Shaver, 54 Iowa 208, 6 N. W. 188, 37 Am. Rep. 194.

New York.— Prince Mfg. Co. *v.* Prince's Metallic Paint Co., 135 N. Y. 24, 31 N. E. 990, 17 L. R. A. 129; Rawlinson *v.* Brainard, etc., Co., 28 Misc. 287, 59 N. Y. Suppl. 880; Taylor *v.* Carpenter, 11 Paige 292, 42 Am. Dec. 114 [*affirmed* in 2 Sandf. Ch. 603]; Partridge *v.* Menck, 2 Sandf. Ch. 622 [*affirmed* in 2 Barb. Ch. 101, 47 Am. Dec. 281 (*affirmed* in How. App. Cas. 547, 3 Den. 610)]; Coats *v.* Holbrook, 2 Sandf. Ch. 586.

United States.— Cleveland Stone Co. *v.* Wallace, 52 Fed. 431; Leidersdorf *v.* Flint, 15 Fed. Cas. No. 8,219, 8 Biss. 327, 6 Reporter 739, 18 Alb. L. J. 382, 429, 7 N. Y. Wkly. Dig. 360. But see Kahn *v.* Caines, 161 Fed. 495, 88 C. C. A. 437.

England.— Blofeld *v.* Payne, 4 B. & Ad. 410, 2 L. J. K. B. 68, 1 N. & M. 353, 24 E. C. L. 183; Edelsten *v.* Edelsten, 1 De G. J. & S. 185, 9 Jur. N. S. 479, 7 L. T. Rep. N. S. 768, 11 Wkly. Rep. 328, 66 Eng. Ch. 142, 46 Eng. Reprint 72.

Canada.— Rex *v.* Lyons, 16 Can. Cr. Cas. 152.

The same rule applies to unfair competition cases. See *infra*, V, B, 10.

42. *New Jersey.*— Bear Lithia Springs Co. *v.* Great Bear Spring Co., (1907) 68 Atl. 86.

Texas.— Western Grocer Co. *v.* Caffarelli, (Civ. App. 1908) 108 S. W. 413 [*reversed* on other grounds in 102 Tex. 104, 127 S. W. 1018], "Coon" molasses.

or symbol is not infringed by a name unless the goods have been sold or become known under that name.[43]

K. Affixation of Infringing Mark to Goods. It has been held that a strict technical trade-mark in a name is not infringed by merely calling a similar article by that name, without affixing it to such article.[44] An injunction against infringement may extend, however, to advertisements announcing the infringing goods,[45] and a use of a trade-mark in advertisements and other announcements of rival goods may be restrained.[46]

L. Use of Infringer's Own Name. The mere fact that an infringer uses his own name in connection with the mark is not sufficient to rebut deception and prevent his use or imitation of the mark from being an infringement.[47]

M. Combination Trade-Marks. A trade-mark consisting of a combination of common elements is not infringed unless the combination is used.[48] Where only the common and non-exclusive feature is used there is no infringement.[49]

United States.— American Tin Plate Co. *v.* Licking Roller Mill Co., 158 Fed. 690; Bissell Chilled Plow Works *v.* T. M. Bissell Plow Co., 121 Fed. 357; Johnson *v.* Brunor, 107 Fed. 466; Johnson *v.* Bauer, 82 Fed. 662, 27 C. C. A. 374 [*reversing* 79 Fed. 954] ("Red Cross Plasters"); Hutchinson *v.* Covert, 51 Fed. 832 ("Star" goods); Blackwell *v.* Dibrell, 3 Fed. Cas. No. 1,475, 3 Hughes 151, 14 Off. Gaz. 633 ("Durham" infringed by picture of a Durham bull, as applied to tobacco); Taylor *v.* Carpenter, 23 Fed. Cas. No. 13,785, 2 Woodb. & M. 1.

England.— Johnston *v.* Orr Ewing, 7 App. Cas. 219, 51 L. J. Ch. 797, 46 L. T. Rep. N. S. 216, 30 Wkly. Rep. 417; Seixo *v.* Provezende, L. R. 1 Ch. 192, 12 Jur. N. S. 215, 14 L. T. Rep. N. S. 314, 14 Wkly. Rep. 357; *In re* La Societe Anonyme des Verreries de d'Etoile, [1894] 2 Ch. 26, 63 L. J. Ch. 381, 70 L. T. Rep. N. S. 295, 7 Reports 183, 42 Wkly. Rep. 420 (registered device of a star infringed by words "Red Star Brand"); *In re* Worthington, 14 Ch. D. 8, 49 L. J. Ch. 646, 42 L. T. Rep. N. S. 563, 28 Wkly. Rep. 747; Cartier *v.* Carlile, 31 Beav. 292, 8 Jur. N. S. 183, 54 Eng. Reprint 1151; Edelsten *v.* Edelsten, 1 De G. J. & S. 185, 9 Jur. N. S. 479, 7 L. T. Rep. N. S. 768, 11 Wkly. Rep. 328, 66 Eng. Ch. 142, 46 Eng. Reprint 72; Boord *v.* Huddart, 89 L. T. Rep. N. S. 718, 20 T. L. R. 142; *Re* Barker, 53 L. T. Rep. N. S. 23; Read *v.* Richardson, 45 L. T. Rep. N. S. 54 ("Dogshead" beer); Wilkinson *v.* Griffith, 8 Rep. Pat. Cas. 370; Anglo-Swiss Condensed Milk Co. *v.* Metcalf, 3 Rep. Pat. Cas. 28.

Canada.— Carey *v.* Goss, 11 Ont. 619; Davis *v.* Kennedy, 13 Grant Ch. (U. C.) 523. See Walker *v.* Alley, 13 Grant Ch. (U. C.) 366.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," §§ 61–74.

Mere initials of trade-mark words do not infringe the trade-mark in the absence of other imitation features. Lavanburg *v.* Pfeiffer, 31 Misc. (N. Y.) 690, 66 N. Y. Suppl. 39.

43. Pittsburgh Crushed-Steel Co. *v.* Diamond Steel Co., 85 Fed. 637; Morgan Envelope Co. *v.* Walton, 82 Fed. 469.

44. Air-Brush Mfg. Co. *v.* Thayer, 84 Fed. 640. See also Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 70 Conn. 516, 40 Atl. 534. But see Reading Stove Works *v.* S. M. Howes Co., 201 Mass. 437, 87 N. E. 751, 21 L. R. A. N. S. 979. Such conduct would, however, constitute unfair competition see *infra*, V, A.

45. New York Herald Co. *v.* Star Co., 146 Fed. 1023, 76 C. C. A. 678 [*affirming* 146 Fed. 204].

46. Manitowoc Malting Co. *v.* Milwaukee Malting Co., 119 Wis. 543, 97 N. W. 389. See also Eureka Fire Hose Co. *v.* Eureka Rubber Mfg. Co., 71 N. J. Eq. 300, 71 Atl. 1134 [*affirming* 69 N. J. Eq. 159, 60 Atl. 561].

47. *Missouri.*— Gaines *v.* Whyte Grocery, etc., Co., 107 Mo. App. 507, 81 S. W. 648.

New Jersey.— Eureka Fire Hose Co. *v.* Eureka Rubber Mfg. Co., 69 N. J. Eq. 159, 60 Atl. 561 [*affirmed* in 71 N. J. Eq. 300, 71 Atl. 1134].

New York.— Dunlap *v.* Young, 68 N. Y. App. Div. 137, 74 N. Y. Suppl. 184 [*reversed* on other grounds in 174 N. Y. 327, 66 N. E. 964].

Pennsylvania.— Pratt's Appeal, 117 Pa. St. 401, 11 Atl. 878, 2 Am. St. Rep. 676.

United States.— Roberts *v.* Sheldon, 20 Fed. Cas. No. 11,916, 8 Biss. 398, 18 Off. Gaz. 1277.

England.— Thwaites *v.* M'Evilly, [1904] 1 Ir. 310.

Canada.— Davis *v.* Kennedy, 13 Grant Ch. (U. C.) 523.

48. Social Register Assoc. *v.* Murphy, 128 Fed. 116; Tucker Mfg. Co. *v.* Boyington, 24 Fed. Cas. No. 14,229, 9 Off. Gaz. 455.

A trade-mark in which words are combined with a picture is not infringed by the use of such words by another unless in connection with a similar picture. Bickmore Gall Cure Co. *v.* Karns Mfg. Co., 126 Fed. 573 [*reversed* on the facts in 134 Fed. 833, 67 C. C. A. 439].

Use of one only of two trade-marks used in conjunction by the proprietor is an infringement which may be enjoined. Enoch Morgan's Sons Co. *v.* Ward, 152 Fed. 690, 81 C. C. A. 616; Crawford *v.* Shuttock, 13 Grant Ch. (U. C.) 149.

49. Gessler *v.* Grieb, 80 Wis. 21, 48 N. W. 1098, 27 Am. St. Rep. 20; Bickmore Gall Cure Co. *v.* Karns Mfg. Co., 126 Fed. 573 [*reversed* on the facts in 134 Fed. 833, 67 C. C. A. 439]; Walker *v.* Reid, 29 Fed. Cas. No. 17,084; Wilson *v.* Lyman, 25 Ont. App. 303;

N. Contributory Infringement. One who furnishes another with the means of infringement is liable as a contributory infringer.[50]

V. UNFAIR COMPETITION.

A. Definition and Nature — 1. IN GENERAL. Unfair competition consists in passing off or attempting to pass off, upon the public, the goods or business of one person as and for the goods or business of another.[51] It consists essentially in the conduct of a trade or business in such a manner that there is either an express or implied representation to that effect.[52] And it may be stated broadly that any conduct, the natural and probable tendency and effect of which is to deceive the public so as to pass off the goods or business of one person as and for that of another, constitutes actionable unfair competition.[53] The definition is comprehensive enough

Asbestos, etc., Co. *v.* William Sclater Co., 10 Quebec 165.

50. Hillside Chemical Co. *v.* Munson, 146 Fed. 198 (furnisher of cartons bearing infringing mark); Upmann *v.* Elkan, L. R. 7 Ch. 130, 41 L. J. Ch. 246, 25 L. T. Rep. N. S. 813, 20 Wkly. Rep. 131 (forwarding agents and carriers).

Manufacturers and jobbers may be held liable for frauds of retailers upon this principle. Royal Baking Powder Co. *v.* Royal, 122 Fed. 337, 345, 58 C. C. A. 499. This situation often arises in unfair competition cases. See *infra*, V, B, 4.

Selling labels similar to plaintiff's to be used by the purchaser upon goods to palm them off as plaintiff's constitutes contributory infringement. Hennessy *v.* Herrmann, 89 Fed. 669.

51. C. F. Simmons Medicine Co. *v.* Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165.

52. *New York.*— Day *v.* Webster, 23 N. Y. App. Div. 601, 49 N. Y. Suppl. 314; Royal Baking Powder Co. *v.* Jenkins, Price & S. T. M. Cas. 309.

Ohio.— Lippman *v.* Martin, 8 Ohio S. & C. Pl. Dec. 485, 5 Ohio N. P. 120.

United States.— Globe-Wernicke Co. *v.* Brown, 121 Fed. 90, 57 C. C. A. 344; Thomas G. Plant Co. *v.* May Co., 100 Fed. 72; Centaur Co. *v.* Marshall, 97 Fed. 785, 38 C. C. A. 413; Dennison Mfg. Co. *v.* Thomas Mfg. Co., 94 Fed. 651; Centaur Co. *v.* Neathery, 91 Fed. 891, 34 C. C. A. 118; Vitascope Co. *v.* U. S. Phonograph Co., 83 Fed. 30; Pennsylvania Salt Mfg. Co. *v.* Myers, 79 Fed. 87.

England.— Reddaway *v.* Banham, [1896] A. C. 199, 65 L. J. Q. B. 381, 74 L. T. Rep. N. S. 289, 44 Wkly. Rep. 638; Saxlehner *v.* Apollinaris Co., [1897] 1 Ch. 893, 66 L. J. Ch. 533, 76 L. T. Rep. N. S. 617; Powell *v.* Birmingham Vinegar Brewery Co., [1896] 2 Ch. 54, 65 L. J. Ch. 563, 74 L. T. Rep. N. S. 509, 44 Wkly. Rep. 688 [*affirmed* in [1897] A. C. 710, 66 L. J. Ch. 763, 76 L. T. Rep. N. S. 792]; Singer Mfg. Co. *v.* Loog, 18 Ch. D. 395, 44 L. T. Rep. N. S. 888, 29 Wkly. Rep. 699 [*reversed* on other grounds in 8 App. Cas. 15, 52 L. J. Ch. 481, 48 L. T. Rep. N. S. 3, 31 Wkly. Rep. 325].

Canada.— Provident Chemical Works *v.* Canada Chemical Mfg. Co., 2 Ont. L. Rep. 182.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," §§ 78–88.

53. *California.*— Morton *v.* Morton, 148 Cal. 142, 82 Pac. 664, 1 L. R. A. N. S. 660; Dodge Stationery Co. *v.* Dodge, 145 Cal. 380, 78 Pac. 879; Hainque *v.* Cyclops Iron Works, 136 Cal. 351, 68 Pac. 1014; Schmidt *v.* Brieg, 100 Cal. 672, 35 Pac. 623, 22 L. R. A. 790.

Connecticut.— Williams *v.* Brooks, 50 Conn. 278, 47 Am. Rep. 642; Meriden Britannia Co. *v.* Parker, 39 Conn. 450, 12 Am. Rep. 401.

Georgia.— Foster *v.* Blood Balm Co., 77 Ga. 216, 3 S. E. 284.

Illinois.— Imperial Mfg. Co. *v.* Schwartz, 105 Ill. App. 525.

Iowa.— Atlas Assur. Co. *v.* Atlas Ins. Co., 138 Iowa 228, 112 N. W. 232, 114 N. W. 609, 128 Am. St. Rep. 189, 15 L. R. A. 625.

Kentucky.— Rains *v.* White, 107 Ky. 114, 52 S. W. 970, 21 Ky. L. Rep. 742.

Maine.— W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 100 Me. 461, 62 Atl. 499, 4 L. R. A. N. S. 960.

Maryland.— Bagby, etc., Co. *v.* Rivers, 87 Md. 400, 40 Atl. 171, 67 Am. St. Rep. 357, 40 L. R. A. 632.

Massachusetts.— George G. Fox Co. *v.* Hathaway, 199 Mass. 99, 85 N. E. 417, 24 L. R. A. N. S. 900; Viano *v.* Baccigalupo, 183 Mass. 160, 67 N. E. 641; Marsh *v.* Billings, 7 Cush. 322, 54 Am. Dec. 723.

Missouri.— McCann *v.* Anthony, 21 Mo. App. 83; Skinner *v.* Oakes, 10 Mo. App. 45.

New Jersey.— International Silver Co. *v.* William H. Rogers Corp., 67 N. J. Eq. 646, 60 Atl. 187, 110 Am. St. Rep. 506 [*reversing* 66 N. J. Eq. 140, 57 Atl. 725].

New York.— Ball *v.* Broadway Bazaar, 194 N. Y. 429, 87 N. E. 674 [*reversing* 121 N. Y. App. Div. 546, 106 N. Y. Suppl. 249]; Fischer *v.* Blank, 138 N. Y. 244, 33 N. E. 1040 [*modifying* 19 N. Y. Suppl. 65]; Seeman *v.* Zechnowitz, 136 N. Y. App. Div. 937, 121 N. Y. Suppl. 125; Roncoroni *v.* Gross, 92 N. Y. App. Div. 221, 86 N. Y. Suppl. 1112; Church *v.* Kresner, 26 N. Y. App. Div. 349, 49 N. Y. Suppl. 742; Day *v.* Webster, 23 N. Y. App. Div. 601, 49 N. Y. Suppl. 314; India Rubber Co. *v.* Rubber Comb, etc., Co., 45 N. Y. Super. Ct. 258; Andrew Jurgens Co. *v.* Woodbury, 56 Misc. 404, 106 N. Y. Suppl. 571; Monopol Tobacco Works *v.* Gensior, 32 Misc. 87, 66 N. Y. Suppl. 155; Dr. Jaeger's Sanitary Woolen System Co. *v.* Le Boutillier, 5 Misc. 78, 24 N. Y. Suppl. 890; Brown *v.* Braunstein, 83 N. Y. Suppl. 1096; Johnson *v.* Hitch-

to reach every possible means of effecting the result. Unfair competition as thus

cock, 3 N. Y. Suppl. 680; Enoch Morgan's Sons Co. *v.* Schwachofer, 5 Abb. N. Cas. 265; Electro-Silicon Co. *v.* Levy, 59 How. Pr. 469; Coats *v.* Holbrook, 3 N. Y. Leg. Obs. 404, 2 Sandf. Ch. 586.

Pennsylvania.— Hoyt *v.* Hoyt, 143 Pa. St. 623, 22 Atl. 755, 24 Am. St. Rep. 575, 13 L. R. A. 343; Hohenstein *v.* Perelstine, 37 Pa. Super. Ct. 540; Hires *v.* Hires, 6 Pa. Dist. 285.

Texas.— Scanlan *v.* Williams, (Civ. App. 1908) 114 S. W. 862.

Washington.— Eastern Outfitting Co. *v.* Manheim, 59 Wash. 428, 110 Pac. 23.

Wisconsin.— Fish Bros. Wagon Co. *v.* La Belle Wagon Works, 82 Wis. 546, 52 N. W. 595, 33 Am. St. Rep. 72, 16 L. R. A. 453.

United States.— Saxlehner *v.* Eisner, etc., Co., 179 U. S. 19, 21 S. Ct. 7, 45 L. ed. 60; Lawrence Mfg. Co. *v.* Tennessee Mfg. Co., 138 U. S. 537, 11 S. Ct. 396, 34 L. ed. 997; Goodyear's India Rubber Glove Mfg. Co. *v.* Goodyear Rubber Co., 128 U. S. 598, 9 S. Ct. 166, 32 L. ed. 535; Amoskeag Mfg. Co. *v.* Trainer, 101 U. S. 51, 25 L. ed. 993; McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828; Allen *v.* Walton Wood, etc., Co., 178 Fed. 287; Northwestern Consol. Milling Co. *v.* Callam, 177 Fed. 786; Burke *v.* Bishop, 175 Fed. 167; Bates Mfg. Co. *v.* Bates Numbering Mach. Co., 172 Fed. 892 [*affirmed* in 178 Fed. 681, 102 C. C. A. 181]; Rushmore *v.* Saxon, 170 Fed. 1021, 95 C. C. A. 671 [*affirming* 158 Fed. 499]; American Tobacco Co. *v.* Polacsek, 170 Fed. 117; H. Mueller Mfg. Co. *v.* A. Y. McDonaly, etc., Mfg. Co., 164 Fed. 1001; Gaines *v.* Kahn, 155 Fed. 639 [*reversed* on the facts in 161 Fed. 495]; Yale, etc., Mfg. Co. *v.* Alder, 154 Fed. 37, 83 C. C. A. 149; Buzby *v.* Davis, 150 Fed. 275, 80 C. C. A. 163; Hostetter Co. *v.* Gallagher Stores, 142 Fed. 208; Revere Rubber Co. *v.* Consolidated Hoof Pad Co., 139 Fed. 151; Scriven *v.* North, 134 Fed. 366, 67 C. C. A. 348 [*modifying* 124 Fed. 894]; M. J. Breitenbach Co. *v.* Spangenberg, 131 Fed. 160; N. K. Fairbanks Co. *v.* Dunn, 126 Fed. 227; Swift *v.* Brenner, 125 Fed. 826; Globe-Wernicke Co. *v.* Brown, 121 Fed. 90, 57 C. C. A. 344; Samuel *v.* Hostetter Co., 118 Fed. 257, 55 C. C. A. 111; Sterling Remedy Co. *v.* Spermine Medical Co., 112 Fed. 1000, 50 C. C. A. 657; Lever Bros. Boston Works *v.* Smith, 112 Fed. 998; Hostetter Co. *v.* Martinoni, 110 Fed. 524; Hostetter Co. *v.* William Schneider Wholesale Wine, etc., Co., 107 Fed. 705; Weber Medical Tea Co. *v.* Kirschstein, 101 Fed. 580; Charles E. Hires Co. *v.* Consumers' Co., 100 Fed. 809, 41 C. C. A. 71; Centaur Co. *v.* Marshall, 97 Fed. 785, 38 C. C. A. 413; Proctor, etc., Co. *v.* Globe Refining Co., 92 Fed. 357, 34 C. C. A. 405; Elgin Nat. Watch Co. *v.* Illinois Watch-Case Co., 89 Fed. 487; Saxlehner *v.* Eisner, etc., Co., 88 Fed. 61; Hostetter Co. *v.* Sommers, 84 Fed. 333; Hilson Co. *v.* Foster, 80 Fed. 896; Putnam Nail Co. *v.* Bennett, 43 Fed. 800; Wilcox, etc., Sewing-Mach. Co. *v.* Gibbens Frame, 17 Fed. 623, 21 Blatchf. 431; Sawyer *v.* Horn, 1 Fed. 24, 4 Hughes 239; Frese *v.* Bachof, 13 Off. Gaz. 635.

England.— Reddaway *v.* Banham, [1896] A. C. 199, 65 L. J. Q. B. 381, 74 L. T. Rep. N. S. 289, 44 Wkly. Rep. 638; Singer Mfg. Co. *v.* Loog, 8 App. Cas. 15, 52 L. J. Ch. 481, 48 L. T. Rep. N. S. 3, 31 Wkly. Rep. 325; Lee *v.* Haley, L. R. 5 Ch. 155, 39 L. J. Ch. 284, 22 L. T. Rep. N. S. 251, 18 Wkly. Rep. 242; Seixo *v.* Provezende, L. R. 1 Ch. 192, 12 Jur. N. S. 215, 14 L. T. Rep. N. S. 314, 14 Wkly. Rep. 357; Aerators *v.* Tollitt, [1902] 2 Ch. 319, 71 L. J. Ch. 727, 86 L. T. Rep. N. S. 651, 10 Manson 95, 18 T. L. R. 637, 50 Wkly. Rep. 584; Turton *v.* Turton, 42 Ch. D. 128, 58 L. J. Ch. 677, 61 L. T. Rep. N. S. 571, 38 Wkly. Rep. 22; Mitchell *v.* Henry, 15 Ch. D. 181, 43 L. T. Rep. N. S. 186; Boulnois *v.* Peake, 13 Ch. D. 513 note; Levy *v.* Walker, 10 Ch. D. 436, 48 L. J. Ch. 273, 39 L. T. Rep. N. S. 654, 27 Wkly. Rep. 370; Metzler *v.* Wood, 8 Ch. D. 606, 47 L. J. Ch. 625, 38 L. T. Rep. N. S. 544, 26 Wkly. Rep. 577; Singer Mfg. Co. *v.* Wilson, 2 Ch. D. 434, 45 L. J. Ch. 490, 34 L. T. Rep. N. S. 858, 24 Wkly. Rep. 1023 [*reversed* on other grounds in 3 App. Cas. 376, 47 L. J. Ch. 481, 38 L. T. Rep. N. S. 303, 26 Wkly. Rep. 664]; Hirst *v.* Denham, L. R. 14 Eq. 542, 41 L. J. Ch. 752, 27 L. T. Rep. N. S. 56; Mack *v.* Petter, L. R. 14 Eq. 431, 41 L. J. Ch. 781, 20 Wkly. Rep. 964; Franks *v.* Weaver, 10 Beav. 297, 50 Eng. Reprint 596; Perry *v.* Truefitt, 6 Beav. 66, 49 Eng. Reprint 749; Woollam *v.* Ratcliff, 1 Hem. & M. 259, 71 Eng. Reprint 113; Boord *v.* Huddart, 89 L. T. Rep. N. S. 718, 20 T. L. R. 142; Barnett *v.* Leuchars, 13 L. T. Rep. N. S. 495, 14 Wkly. Rep. 166.

Canada.— Canada Pub. Co. *v.* Gage, 11 Can. Sup. Ct. 306; Grand Hotel Co. *v.* Wilson, 2 Ont. L. Rep. 323 [*affirmed* in 5 Ont. L. Rep. 141].

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," §§ 78–88. See, generally, cases cited *infra* in succeeding subsections of this article, all of which support the text. For particular classes of unfair competition cases see *infra*, V, C.

The general rule is that anything done by a rival in the same business, by imitation or otherwise, designed or calculated to mislead the public in the belief that, in buying the product offered by him for sale, they were buying the product of another's manufacture, would be in fraud of that other's rights, and would afford just grounds for equitable interference. Juan F. Portuondo Cigar Mfg. Co. *v.* Vincente Portuando Cigar Mfg. Co., 222 Pa. St. 116, 70 Atl. 968; Hohenstein *v.* Perelstine, 37 Pa. Super. Ct. 540.

Oral use of another's names or brands may constitute unfair competition. Lavanburg *v.* Pfeiffer, 23 Misc. (N. Y.) 577, 52 N. Y. Suppl. 801.

Oral representations made by a dealer tending to pass off one man's goods for those of another may be enjoined. Weber Medical Tea Co. *v.* Kirschstein, 101 Fed. 580.

defined is a legal wrong for which the courts afford a remedy.[54] It is a tort [55] and a fraud.[56] The basic principle is that no one has a right to dress up his goods or otherwise represent them in such a manner as to deceive an intending purchaser and induce him to believe he is buying the goods of another.[57] No monopoly is created or

54. *California.*— Schmidt *v.* Brieg, 100 Cal. 672, 35 Pac. 623, 22 L. R. A. 790.

Illinois.— The Fair *v.* Morales, 82 Ill. App. 499.

Massachusetts.— Flagg Mfg. Co. *v.* Holway, 178 Mass. 83, 59 N. E. 667.

Ohio.— Drake Medicine Co. *v.* Glessner, 68 Ohio St. 337, 67 N. E. 722; Lippman *v.* Martin, 8 Ohio S. & C. Pl. Dec. 485, 5 Ohio N. P. 120.

United States.— Elgin Nat. Watch Co. *v.* Illinois Watch-Case Co., 179 U. S. 665, 21 S. Ct. 270, 45 L. ed. 365; Keuffel, etc., Co. *v.* H. S. Crocker Co., 118 Fed. 187; Baker *v.* Baker, 115 Fed. 297, 53 C. C. A. 157; Shaver *v.* Heller, etc., Co., 108 Fed. 821, 48 C. C. A. 48, 65 L. R. A. 878 [*affirming* 102 Fed. 882]; Saxlehner *v.* Neilsen, 91 Fed. 1004, 34 C. C. A. 690 [*reversing* 88 Fed. 71, and *reversed* on other grounds in 179 U. S. 43, 21 S. Ct. 16, 45 L. ed. 77]; Pillsbury-Washburn Flour-Mills Co. *v.* Eagle, 86 Fed. 608, 30 C. C. A. 386, 41 L. R. A. 162; Clark Thread Co. *v.* Armitage, 67 Fed. 896.

England.— Reddaway *v.* Banham, [1896] A. C. 199, 65 L. J. Q. B. 381, 74 L. T. Rep. N. S. 289, 44 Wkly. Rep. 638; Seixo *v.* Provezende, L. R. 1 Ch. 192, 12 Jur. N. S. 215, 14 L. T. Rep. N. S. 314, 14 Wkly. Rep. 357; Reddaway *v.* Bentham Hemp-Spinning Co., [1892] 2 Q. B. 639, 67 L. T. Rep. N. S. 301; Sykes *v.* Sykes, 3 B. & C. 541, 5 D. & R. 292, 3 L. J. K. B. O. S. 46, 27 Rev. Rep. 420, 10 E. C. L. 248, 107 Eng. Reprint 834; Edelsten *v.* Edelsten, 1 De G. J. & S. 185, 9 Jur. N. S. 479, 7 L. T. Rep. N. S. 768, 11 Wkly. Rep. 328, 66 Eng. Ch. 142, 46 Eng. Reprint 72.

Canada.— Pabst Brewing Co. *v.* Ekers, 21 Quebec Super. Ct. 545 [*reversing* 20 Quebec Super. Ct. 20].

55. Vacuum Oil Co. *v.* Eagle Oil Co., 122 Fed. 105; Chubb *v.* Griffiths, 35 Beav. 127, 55 Eng. Reprint 843 (infant held liable); Morison *v.* Salmon, 10 L. J. C. P. 91, 2 M. & G. 385, 2 Scott N. R. 449, 40 E. C. L. 654; Vive Camera Co. *v.* Hogg, 18 Quebec Super. Ct. 1.

An action at law for damages lies for unfair competition. See *infra*, IX, D.

56. Banzhaf *v.* Chase, 150 Cal. 180, 88 Pac. 704; Cohen *v.* Nagle, 190 Mass. 4, 76 N. E. 276, 2 L. R. A. N. S. 964; Finney's Orchestra *v.* Finney's Famous Orchestra, 161 Mich. 289, 126 N. W. 198, 28 L. R. A. N. S. 458; Avenarius *v.* Kornely, 139 Wis. 247, 121 N. W. 336; Opperman *v.* Waterman, 94 Wis. 583, 69 N. W. 569.

57. *Florida.*— El Modello Cigar Mfg. Co. *v.* Gato, 25 Fla. 886, 7 So. 23, 23 Am. St. Rep. 537, 6 L. R. A. 823.

Illinois.— International Committee Y. W. C. A. *v.* Chicago Y. W. C. A., 194 Ill. 194, 62 N. E. 551, 56 L. R. A. 888.

Iowa.— Shaver *v.* Shaver, 54 Iowa 208, 6 N. W. 188, 37 Am. Rep. 194.

Maine.— W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 100 Me. 461, 62 Atl. 499, 4 L. R. A. N. S. 960.

Massachusetts.— Hildreth *v.* D. S. McDonald Co., 164 Mass. 16, 41 N. E. 56, 49 Am. St. Rep. 440.

Missouri.— Grocers' Journal Co. *v.* Midland Pub. Co., 127 Mo. App. 356, 105 S. W. 310.

New Jersey.— International Silver Co. *v.* Rogers, 72 N. J. Eq. 933, 67 Atl. 105, 129 Am. St. Rep. 722 [*reversing* 71 N. J. Eq. 560, 63 Atl. 977]; Standard Table Oil Cloth Co. *v.* Trenton Oil Cloth, etc., Co., 71 N. J. Eq. 555, 63 Atl. 846; Johnson *v.* Seabury, 69 N. J. Eq. 696, 61 Atl. 5; International Silver Co. *v.* William H. Rogers Corp., 67 N. J. Eq. 646, 60 Atl. 187, 110 Am. St. Rep. 506 [*reversing* 66 N. J. Eq. 140, 57 Atl. 725]; Smith *v.* Brand, 67 N. J. Eq. 529, 58 Atl. 1029; Van Horn *v.* Coogan, 52 N. J. Eq. 380, 28 Atl. 788; Wirtz *v.* Eagle Bottling Co., 50 N. J. Eq. 164, 24 Atl. 658.

New York.— Boker *v.* Korkemas, 122 N. Y. App. Div. 36, 106 N. Y. Suppl. 904; Lavanburg *v.* Pfeiffer, 23 Misc. 577, 52 N. Y. Suppl. 801.

Ohio.— Drake Medicine Co. *v.* Glessner, 68 Ohio St. 337, 67 N. E. 722.

Pennsylvania.— White *v.* Trowbridge, 216 Pa. St. 11, 64 Atl. 862; Hohenstein *v.* Perelstine, 37 Pa. Super. Ct. 540.

Rhode Island.— Armington *v.* Palmer, 21 R. I. 109, 42 Atl. 308, 79 Am. St. Rep. 786, 43 L. R. A. 95.

Wisconsin.— Avenarius *v.* Kornely, 139 Wis. 247, 121 N. W. 336.

United States.— Elgin Nat. Watch Co. *v.* Illinois Watch Case Co., 179 U. S. 665, 21 S. Ct. 270, 45 L. ed. 365; Lawrence Mfg. Co. *v.* Tennessee Mfg. Co., 138 U. S. 537, 11 S. Ct. 396, 34 L. ed. 997; McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828; Bates *v.* Bates Numbering Mach. Co., 172 Fed. 892 [*affirmed* in 178 Fed. 681, 102 C. C. A. 181]; American Tobacco Co. *v.* Polacsek, 170 Fed. 117; Worcester Brewing Corp. *v.* Rueter, 157 Fed. 217, 84 C. C. A. 665; Standard Varnish Works *v.* Fisher, 153 Fed. 928; International Silver Co. *v.* Rodgers Bros. Cutlery Co., 136 Fed. 1019; Bickmore Gall Cure Co. *v.* Karns, 134 Fed. 833, 67 C. C. A. 439 [*reversing* 126 Fed. 573]; Ohio Baking Co. *v.* National Biscuit Co., 127 Fed. 116, 62 C. C. A. 116; Van Hoboken *v.* Mohns, 112 Fed. 528; Shaver *v.* Heller, etc., Co., 108 Fed. 821, 48 C. C. A. 48; Hires Co. *v.* Consumers' Co., 100 Fed. 809, 41 C. C. A. 71; Dennison Mfg. Co. *v.* Thomas Mfg. Co., 94 Fed. 651; Coffeen *v.* Brunton, 5 Fed. Cas. No. 2,947, 5 McLean 256; Fairbanks *v.* Jacobus, 8 Fed. Cas. No. 4,608, 3 Ban. & A. 108, 14 Blatchf. 337; Frese *v.*

fostered by protection against unfair competition,[58] but the court should be careful not to interfere with free and fair competition, and should confine itself to preventing fraud and imposition from some real resemblance in name or dress of goods.[59] Nothing less than conduct tending to pass off one man's goods or business as that of another will constitute unfair competition.[60] Actual or probable decep-

Bachof, 9 Fed. Cas. No. 5,110, 14 Blatchf. 432, 13 Off. Gaz. 635; Osgood *v.* Allen, 18 Fed. Cas. No. 10,603, Holmes 185, 3 Off. Gaz. 124.

England.— Reddaway *v.* Banham, [1896] A. C. 199, 65 L. J. Q. B. 381, 74 L. T. Rep. N. S. 289, 44 Wkly. Rep. 638; Saxlehner *v.* Apollinaris Co., [1897] 1 Ch. 893, 66 L. J. Ch. 533, 76 L. T. Rep. N. S. 617; Jay *v.* Ladler, 40 Ch. D. 649, 60 L. T. Rep. N. S. 27, 37 Wkly. Rep. 505; Metzler *v.* Wood, 8 Ch. D. 606, 47 L. J. Ch. 625, 38 L. T. Rep. N. S. 544, 26 Wkly. Rep. 577; Ainsworth *v.* Walmsley, L. R. 1 Eq. 518, 12 Jur. N. S. 205, 35 L. J. Ch. 352, 14 L. T. Rep. N. S. 220, 14 Wkly. Rep. 363; Blanchard *v.* Hill, 2 Atk. 484, 26 Eng. Reprint 692; Sykes *v.* Sykes, 3 B. & C. 541, 5 D. & R. 292, 3 L. J. K. B. O. S. 46, 27 Rev. Rep. 420, 10 E. C. L. 248, 107 Eng. Reprint 834; Croft *v.* Day, 7 Beav. 84, 29 Eng. Ch. 84, 49 Eng. Reprint 994; Perry *v.* Truefitt, 6 Beav. 66, 49 Eng. Reprint 749; Burgess *v.* Burgess, 3 De G. M. & G. 896, 17 Jur. 292, 22 L. J. Ch. 675, 52 Eng. Ch. 696, 43 Eng. Reprint 351; Singleton *v.* Bolton, 3 Dougl. 293, 26 E. C. L. 196, 99 Eng. Reprint 661; Leather Cloth Co. *v.* American Leather Cloth Co., 11 H. L. Cas. 523, 11 Jur. N. S. 513, 35 L. J. Ch. 53, 12 L. T. Rep. N. S. 742, 6 New Rep. 209, 13 Wkly. Rep. 873, 11 Eng. Reprint 1435; Knott *v.* Morgan, 2 Keen 213, 15 Eng. Ch. 213, 48 Eng. Reprint 610; Valentine Meat Juice Co. *v.* Valentine Extract Co., 83 L. T. Rep. N. S. 259, 16 T. L. R. 522; Cash *v.* Cash, 82 L. T. Rep. N. S. 655, 84 L. T. Rep. N. S. 349.

Canada.— McCall *v.* Theal, 28 Grant Ch. (U. C.) 48; Vive Camera Co. *v.* Hogg, 18 Quebec Super. Ct. 1.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names, § 79.

58. Independent Baking Powder Co. *v.* Boorman, 130 Fed. 726; Frese *v.* Bachof, 9 Fed. Cas. No. 5,110, 14 Blatchf. 432, 13 Off. Gaz. 635.

59. Munro *v.* Tousey, 129 N. Y. 38, 29 N. E. 9, 14 L. R. A. 245; Eastern Outfitting Co. *v.* Manheim, 59 Wash. 428, 110 Pac. 23; G. W. Cole Co. *v.* American Cement, etc., Co., 130 Fed. 703, 65 C. C. A. 105.

"Care must be taken in these cases not to extend the meaning of the word 'unfair' to cover that which may be unethical but is not illegal. It may be unethical for one trader to take advantage of the advertising of his neighbor, but his so doing would in many instances be entirely legal. If one dealer advertises extensively and at great expense the sale of a staple article, or of any article which he has not the exclusive right to vend, his neighbor may undoubtedly endeavor to cause the customers attracted to the neighborhood by the advertising to purchase the same or a similar article at his store instead of at the store of the advertiser. What conduct on the part of a defendant will be held to constitute unfair competition is the subject-matter of discussion in cases too numerous for useful citation, but the principle applied in each case is extremely simple. As Lord Chancellor Halsbury said in the House of Lords, in the case of Reddaway *v.* Banham, [1896] A. C. 199, 204, 65 L. J. Q. B. 381, 74 L. T. Rep. N. S. 289, 44 Wkly. Rep. 638; 25 Eng. Rul. Cas. 197: 'For myself I believe the principle of law may be very plainly stated, and that is that nobody has any right to represent his goods as the goods of somebody else.'" Perlberg *v.* Smith, 70 N. J. Eq. 638, 642, 62 Atl. 442,

60. Ricker *v.* Portland, etc., R. Co., 90 Me. 395, 38 Atl. 338; Perlberg *v.* Smith, 70 N. J. Eq. 638, 62 Atl. 442; Fite *v.* Dorman, (Tenn. 1900) 57 S. W. 129; American Washboard Co. *v.* Saginaw Mfg. Co., 103 Fed. 281, 43 C. C. A. 233, 50 L. R. A. 609; Vitascope Co. *v.* U. S. Phonograph Co., 83 Fed. 30.

"The essence of the wrong consists in the sale of the goods of one manufacturer or vendor for those of another." Elgin Nat. Watch Co. *v.* Illinois Watch Case Co., 179 U. S. 665, 674, 21 S. Ct. 270, 45 L. ed. 365.

Rule of competition.— In Coats *v.* Merrick Thread Co., 149 U. S. 562, 13 S. Ct. 966, 37 L. ed. 847 [*followed* in Centaur Co. *v.* Neathery, 91 Fed. 891, 34 C. C. A. 118], Mr. Justice Brown, announcing this doctrine, says: "Rival manufacturers may lawfully compete for the patronage of the public in the quality and price of their goods, in the beauty and tastefulness of their inclosing packages, in the extent of their advertising, and in the employment of agents, but they have no right, by imitative devices, to beguile the public into buying their wares under the impression they are buying those of their rivals."

The law of unfair competition seeks only to restrain fraudulent practices inducing confusion of goods and deception of the public, and it cannot be used to prevent a defendant from adopting a trade-mark or label intended to attract attention and popularize its product, although it results, and is intended to result, in better enabling it to compete with complainant, where no deception or confusion of goods is caused or intended thereby. G. W. Cole Co. *v.* American Cement, etc., Co., 130 Fed. 703, 65 C. C. A. 105. The doctrine of unfair competition is based on the principle of common business integrity, and equity only affords relief when this principle has been violated, and the mischief which equity will guard against is a confusion in trade-names, or in the identity of parties, or in the goods sold, so as to de-

tion and confusion on the part of customers by reason of defendant's practices must appear.[61] Of course there must be actual competition before there can be any unfair competition.[62]

2. Basis For Remedy. Relief against unfair competition is properly afforded upon the ground that one who has built up a good-will and reputation for his goods or business is entitled to all the benefits therefrom. Such good-will is property, and like other property is protected against invasion.[63] The deception of the public

ceive the public and work a fraud on the party having a right to a trade-name. Eastern Outfitting Co. *v.* Manheim, 59 Wash. 428, 110 Pac. 23.

The adoption by a telephone company of the same number as a call for its Trouble Department as that used by a rival company previously established for its Trouble Department, enabling the newer company to learn through mistakes of subscribers of the older company of cases of trouble in the use of its telephones, was not unfair competition against which an injunction would issue. Rocky Mountain Bell Tel. Co. *v.* Utah Independent Tel. Co., 31 Utah 377, 88 Pac. 26, 8 L. R. A. N. S. 1153.

Competition by employee.—An employee engaged in the manufacture and sale of a patented article may take out a patent for a similar article and sell it in competition with the old article without being chargeable with unfair competition. American Coat Pad Co. *v.* Phœnix Pad Co., 113 Fed. 629, 51 C. C. A. 339.

Competition by customer.— The fact that a defendant has been, and still is, a large purchaser of an article made by complainant as a jobber does not create any trust relation between them which precludes it from placing on the market a competing article of its own manufacture. G. W. Cole Co. *v.* American Cement, etc., Co., 130 Fed. 703, 65 C. C. A. 105.

61. See *infra*, V, B, 4.

62. Sartor *v.* Schaden, 125 Iowa 696, 101 N. W. 511; Regent Shoe Mfg. Co. *v.* Haaker, 75 Nebr. 426, 106 N. W. 595, 4 L. R. A. N. S. 447; Eastern Outfitting Co. *v.* Manheim, 59 Wash. 428, 110 Pac. 23; Key West Cigar Manufacturers' Assoc. *v.* Rosenbloom, 171 Fed. 296, holding that an association of cigar manufacturers not in business as an association could not sue to restrain alleged unfair competition by a false use of "Key West" in connection with cigars. See also Pinet *v.* Maison Louis Pinet, [1898] 1 Ch. 179, 67 L. J. Ch. 41, 77 L. T. Rep. N. S. 613, 14 T. L. R. 87, 46 Wkly. Rep. 506. But see Eno *v.* Dunn, 15 App. Cas. 252, 63 L. T. Rep. N. S. 6, 39 Wkly. Rep. 161 [*affirming* 41 Ch. D. 439, 58 L. J. Ch. 604, 61 L. T. Rep. N. S. 98]; Walter *v.* Ashton, [1902] 2 Ch. 282, 71 L. J. Ch. 839, 87 L. T. Rep. N. S. 196, 18 T. L. R. 445, 51 Wkly. Rep. 131.

Morning and evening newspapers.— Upon the ground that there was no competition between morning and evening newspapers, and therefore no actual injury, the proprietor of a paper called the "Morning Post" was denied an injunction against the title "Evening Post," in Borthwick *v.* Evening Post, 37 Ch. D. 449, 57 L. J. Ch. 406, 58 L. T. Rep. N. S. 252, 36 Wkly. Rep. 434.

Wholesale and retail businesses are not competitive. Regent Shoe Mfg. Co. *v.* Haaker, 75 Nebr. 426, 106 N. W. 595, 4 L. R. A. N. S. 447.

Chemist and physician.— Injunction to prevent a chemist from selling a quack medicine, under a false and colorable representation that it was a medicine of plaintiff, an eminent physician, was refused in Clark *v.* Freeman, 11 Beav. 112, 12 Jur. 119, 17 L. J. Ch. 142, 50 Eng. Reprint 759.

63. *Alabama.*— Kyle *v.* Perfection Mattress Co., 127 Ala. 39, 28 So. 545, 85 Am. St. Rep. 78, 50 L. R. A. 628.

California.— Hainque *v.* Cyclops Iron Works, 136 Cal. 351, 68 Pac. 1014; Weinstock *v.* Marks, 109 Cal. 529, 42 Pac. 142, 50 Am. St. Rep. 57, 30 L. R. A. 182.

Georgia.— Larrabee *v.* Lewis, 67 Ga. 561, 44 Am. Rep. 735.

Iowa.— Sartor *v.* Schaden, 125 Iowa 696, 101 N. W. 511.

Massachusetts.— George G. Fox Co. *v.* Hathaway, 199 Mass. 99, 85 N. E. 417, 24 L. R. A. N. S. 900; George G. Fox Co. *v.* Glynn, 191 Mass. 344, 78 N. E. 89, 114 Am. St. Rep. 619; Cohen *v.* Nagle, 190 Mass. 4, 76 N. E. 276; Regis *v.* Jaynes, 185 Mass. 458, 70 N. E. 480; Holbrook *v.* Nesbitt, 163 Mass. 120, 39 N. E. 794.

Michigan.— Penberthy Injector Co. *v.* Lee, 120 Mich. 174, 78 N. W. 1074.

Missouri.— Grocers Journal Co. *v.* Midland Pub. Co., 127 Mo. App. 356, 105 S. W. 310; Shelley *v.* Sperry, 121 Mo. App. 429, 99 S. W. 488; Skinner *v.* Oakes, 10 Mo. App. 45.

Nebraska.— Regent Shoe Mfg. Co. *v.* Haaker, 75 Nebr. 426, 106 N. W. 595, 4 L. R. A. N. S. 447.

New York.— Cutter *v.* Gudebrod Bros. Co., 36 N. Y. App. Div. 362, 55 N. Y. Suppl. 298; Thornton *v.* Crowley, 47 N. Y. Super. Ct. 527 [*affirmed* in 89 N. Y. 644]; Godillot *v.* Hazard, 44 N. Y. Super. Ct. 427 [*affirmed* in 81 N. Y. 263]; Frohman *v.* Payton, 34 Misc. 275, 68 N. Y. Suppl. 849; Royal Baking Powder Co. *v.* Jenkins, Price & S. T. M. Cas. 309.

Ohio.— Lippman *v.* Martin, 8 Ohio S. & C. Pl. Dec. 485, 5 Ohio N. P. 120.

Rhode Island.—American Solid Leather Button Co. *v.* Anthony, 15 R. I. 338, 5 Atl. 626, 2 Am. St. Rep. 898.

United States.— Elgin Nat. Watch Co. *v.* Illinois Watch Case Co., 179 U. S. 665, 21 S. Ct. 270, 45 L. ed. 365; McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828; G. W. Cole Co. *v.* American Cement, etc., Co., 130 Fed. 703, 65 C. C. A. 105; Kenffel, etc., Co. *v.* H. S.

injures the proprietor of the business by diverting his customers and depriving him of sales which he otherwise would have made.[64] This, rather than protection of the public against imposition, is the true and sound basis for the private remedy, although it is often said that the remedy proceeds in part upon the theory of protection to the public against fraud.[65] No one has a right to avail himself of

Crocker Co., 118 Fed. 187; Peck *v.* Peck Bros. Co., 113 Fed. 291, 51 C. C. A. 251, 62 L. R. A. 81; Van Hoboken *v.* Mohns, 112 Fed. 528; Kentucky Distilleries, etc., Co. *v.* Wathen, 110 Fed. 641; Hostetter Co. *v.* Martinoni, 110 Fed. 524; Shaver *v.* Heller, etc., Co., 108 Fed. 821, 48 C. C. A. 48, 65 L. R. A. 878 [*affirming* 102 Fed. 882]; Hostetter Co. *v.* William Schneider Wholesale Wine, etc., Co., 107 Fed. 705; Thomas G. Plant Co. *v.* May Co., 105 Fed. 375, 44 C. C. A. 534; American Washboard Co. *v.* Saginaw Mfg. Co., 103 Fed. 281, 43 C. C. A. 233, 50 L. R. A. 609; Proctor, etc., Co. *v.* Globe Refining Co., 92 Fed. 357, 34 C. C. A. 405; Stuart *v.* F. G. Stewart Co., 91 Fed. 243, 33 C. C. A. 480; Anheuser-Busch Brewing Assoc. *v.* Fred Miller Brewing Co., 87 Fed. 864; Pillsbury-Washburn Flour Mills Co. *v.* Eagle, 86 Fed. 608, 30 C. C. A. 386, 41 L. R. A. 162; Hostetter Co. *v.* Sommers, 84 Fed. 333; Gage-Downs Co. *v.* Featherbone Corset Co., 83 Fed. 213; Hilson Co. *v.* Foster, 80 Fed. 896; Garrett *v.* Garrett, 78 Fed. 472, 24 C. C. A. 173; Estes *v.* Leslie, 27 Fed. 22, 23 Blatchf. 476; Shaw Stocking Co. *v.* Mack, 12 Fed. 707, 21 Blatchf. 1; Leidersdorf *v.* Flint, 15 Fed. Cas. No. 8,219, 8 Biss. 327.

England.— Pinet *v.* Maison Louis Pinet, [1898] 1 Ch. 179, 67 L. J. Ch. 41, 77 L. T. Rep. N. S. 613, 14 T. L. R. 87, 46 Wkly. Rep. 506; Powell *v.* Birmingham Vinegar Brewery Co., [1896] 2 Ch. 54, 65 L. J. Ch. 563, 74 L. T. Rep. N. S. 509, 44 Wkly. Rep. 688 [*affirmed* in [1897] A. C. 710, 66 L. J. Ch. 763, 76 L. T. Rep. N. S. 792]; Levy *v.* Walker, 10 Ch. D. 436, 48 L. J. Ch. 273, 39 L. T. Rep. N. S. 654, 27 Wkly. Rep. 370; Bradbury *v.* Dickens, 27 Beav. 53, 28 L. J. Ch. 667, 54 Eng. Reprint 21; Cash *v.* Cash, 84 L. T. Rep. N. S. 349; Valentine Meat Juice Co. *v.* Valentine Extract Co., 83 L. T. Rep. N. S. 259, 16 T. L. R. 522.

Canada.— Gillett *v.* Lumsden, 4 Ont. L. Rep. 300, 1 Ont. Wkly. Rep. 488; Grand Hotel Co. *v.* Wilson, 2 Ont. L. Rep. 322; Provident Chemical Works *v.* Canada Chemical Mfg. Co., 2 Ont. L. Rep. 182.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 78.

Good-will and reputation are as much a part of a man's assets as his mill or his counting-house. Clark Thread Co. *v.* Armitage, 67 Fed. 896.

64. Cohen *v.* Nagle, 190 Mass. 4, 76 N. E. 276, 2 L. R. A. N. S. 964; American Tobacco Co. *v.* Polacsek, 170 Fed. 117.

Diversion of trade.— "If what is done tends to mislead the public, it naturally diverts customers from the shop of the person entitled to use the firm name, and so injures his business." Holbrook *v.* Nesbitt, 163 Mass. 120, 125, 39 N. E. 794. "One person has no right, by simulating the trade devices of another, to take away his customers, or undermine his business. While the law justifies and encourages manly competition, it will not tolerate, but on the other hand will restrain and prevent, the use of artifices by which dealers may be deprived of well-earned advantages lawfully secured by fair dealing an honest trading." Per Daniels, J., in Royal Baking Powder Co. *v.* Jenkins, Price & S. T. M. Cas. 309.

The gist of an action to enjoin one from using a trade-name is, not an impairment of complainant's profits by defendant's competition, but the fraudulent representation that defendant's goods are complainant's; and the fact that a complainant is or may be injured by the use of the name is not material. International Silver Co. *v.* Rogers, 71 N. J. Eq. 560, 63 Atl. 977 [*reversed* on other grounds in 72 N. J. Eq. 933, 67 Atl. 105, 129 Am. St. Rep. 722]. But this is apparently unsound. Injury to plaintiff is the very basis of the private remedy. See Borthwick *v.* Evening Post, 37 Ch. D. 449, 57 L. J. Ch. 406, 58 L. T. Rep. N. S. 252, 36 Wkly. Rep. 434. And see American Washboard Co. *v.* Saginaw Mfg. Co., 103 Fed. 281, 43 C. C. A. 233, 50 L. R. A. 609, holding that deception of the public by defendant would not support a private suit unless it resulted in a sale of defendant's goods as those of the complainant. "It is not so much that the public may be deceived, *per se*, as that the complainant may be injured." Kentucky Distilleries, etc., Co. *v.* Wathen, 110 Fed. 641, 645.

65. *Alabama.*— Kyle *v.* Perfection Mattress Co., 127 Ala. 39, 28 So. 545, 85 Am. St. Rep. 78, 50 L. R. A. 628.

District of Columbia.— Peter Schoenhofen Brewing Co. *v.* Maltine Co., 30 App. Cas. 340.

Illinois.— Hopkins Amusement Co. *v.* Frohman, 202 Ill. 541, 67 N. E. 391 [*affirming* 103 Ill. App. 613]; Imperial Mfg. Co. *v.* Schwartz, 105 Ill. App. 525.

Iowa.— Sartor *v.* Schaden, 125 Iowa 696, 101 N. W. 511.

Michigan.— Finney's Orchestra *v.* Finney's Famous Orchestra, 161 Mich. 289, 126 N. W. 198, 128 L. R. A. N. S. 458.

Missouri.— Grocers Journal Co. *v.* Midland Pub. Co., 127 Mo. App. 356, 105 S. W. 310; Skinner *v.* Oakes, 10 Mo. App. 45.

New York.— Munro *v.* Tousey, 129 N. Y. 38, 29 N. E. 9, 14 L. R. A. 245; Amoskeag Mfg. Co. *v.* Spear, 2 Sandf. 599.

Ohio.— See Reeder *v.* Brodt, 6 Ohio S. & C. Pl. Dec. 248, 4 Ohio N. P. 265.

Wisconsin.— Avenarius *v.* Kornely, 139 Wis. 247, 121 N. W. 336.

United States.— Elgin Nat. Watch Co. *v.* Illinois Watch Case Co., 179 U. S. 665, 21 S. Ct. 270, 45 L. ed. 365; Yale, etc., Mfg. Co. *v.* Alder, 154 Fed. 37, 83 C. C. A. 149; R. J.

another's favorable reputation in order to sell his own goods.[66] A demand for goods created by advertising belongs to the advertiser, and he will be protected therein against unfair competition by another who seeks in any way to take advantage of such advertisement to sell his own goods.[67]

3. Trade-Mark Cases Distinguished. The infringement of a trade-mark is one means of passing off the goods of one person as and for the goods of another, and, indeed, the remedy for infringement is based upon this principle.[68] Accordingly the law of trade-marks is merely a specialized branch of the broader doctrine of unfair competition.[69] The doctrine of unfair competition, although not under that name, was recognized at an early day.[70] For a long time, however, the courts apparently did not see how they could afford relief against the use of particular

Reynolds Tobacco Co. *v.* Allen Bros. Tobacco Co., 151 Fed. 819; G. W. Cole Co. *v.* American Cement, etc., Co., 130 Fed. 703, 65 C. C. A. 105; American Washboard Co. *v.* Saginaw Mfg. Co., 103 Fed. 281, 43 C. C. A. 233, 50 L. R. A. 609; Heller, etc., Co. *v.* Shaver, 102 Fed. 882 [*affirmed* in 108 Fed. 821, 48 C. C. A. 48, 65 L. R. A. 878]; Stuart *v.* F. G. Stewart Co., 91 Fed. 243, 33 C. C. A. 480; Vitascope Co. *v.* U. S. Phonograph Co., 83 Fed. 30; Shaw Stocking Co. *v.* Mack, 12 Fed. 707, 21 Blatchf. 1.

England.— Oldham *v.* James, 14 Ir. Ch. 81.

66. Eureka Fire Hose Co. *v.* Eureka Rubber Mfg. Co., 72 N. J. Eq. 555, 65 Atl. 870; Eureka Fire Hose Co. *v.* Eureka Rubber Mfg. Co., 71 N. J. Eq. 300, 71 Atl. 1134 [*affirming* 69 N. J. Eq. 159, 60 Atl. 561]; Wirtz *v.* Eagle Bottling Co., 50 N. J. Eq. 164, 24 Atl. 658; S. Howes Co. *v.* Howes Grain-Cleaner Co., 24 Misc. (N. Y.) 83, 52 N. Y. Suppl. 468; Ball *v.* Best, 135 Fed. 434; Elgin Nat. Watch Co. *v.* Loveland, 132 Fed. 41; Coffeen *v.* Brunton, 5 Fed. Cas. No. 2,946, 4 McLean 516. But see Pinet *v.* Maison Louis Pinet, [1898] 1 Ch. 179, 67 L. J. Ch. 41, 77 L. T. Rep. N. S. 613, 14 T. L. R. 87, 46 Wkly. Rep. 506; *In re* Dunn, 41 Ch. D. 439, 58 L. J. Ch. 604, 61 L. T. Rep. N. S. 98 [*affirmed* in 15 App. Cas. 252, 63 L. T. Rep. N. S. 6, 39 Wkly. Rep. 161], popular name "Fruit Salt" adopted for non-competing article. *Compare* Kerstein *v.* Cohen, 11 Ont. L. Rep. 450, 7 Ont. Wkly. Rep. 247.

67. *Massachusetts.*— George G. Fox Co. *v.* Hathaway, 199 Mass. 99, 85 N. E. 417, 24 L. R. A. N. S. 900; Samuels *v.* Spitzer, 177 Mass. 226, 58 N. E. 693.

New Jersey.— Centaur Co. *v.* Link, 62 N. J. Eq. 147, 49 Atl. 828.

New York.— Cooke, etc., Co. *v.* Miller, 169 N. Y. 475, 62 N. E. 582 [*affirming* 53 N. Y. App. Div. 120, 65 N. Y. Suppl. 730]; Frohman *v.* Payton, 34 Misc. 275, 68 N. Y. Suppl. 849.

United States.— Northwestern Consol. Milling Co. *v.* Callam, 177 Fed. 786; Lever Bros. Boston Works *v.* Smith, 112 Fed. 998; Searle, etc., Co. *v.* Warner, 112 Fed. 674, 50 C. C. A. 321; N. K. Fairbank Co. *v.* Luckel, etc., Soap Co., 102 Fed. 327, 42 C. C. A. 376; Thomas G. Plant Co. *v.* May Co., 100 Fed. 72; Stuart *v.* F. G. Stewart Co., 91 Fed. 243, 33 C. C. A. 480; Hilson Co. *v.* Foster, 80 Fed. 896; Pennsylvania Salt Mfg. Co. *v.* Myers, 79 Fed. 87.

Canada.— Grand Hotel Co. *v.* Wilson, 2 Ont. L. Rep. 322; Pabst Brewing Co. *v.* Ekers, 20 Quebec Super. Ct. 20.

Money invested in advertising is as much a part of a business as if invested in buildings or machinery, and when the goods of a manufacturer have become popular not only because of their intrinsic worth, but also by reason of the ingenious, attractive, and persistent manner in which they have been advertised, the good-will thus created is entitled to protection against unfair competition. Hilson Co. *v.* Foster, 80 Fed. 896. See also Hostetter Co. *v.* Martinoni, 110 Fed. 524.

The broad principle underlying all these cases "is that property shall be protected from unlawful assaults; that where a party has for long years advertised his goods by a certain name, so that they are distinguished in the market by that name, the court will not permit a newcomer, by assuming that name, to destroy or impair an established business." Clark Thread Co. *v.* Armitage, 67 Fed. 896.

68. See *supra*, I, C. See also *supra*, IV, C, 2.

69. W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 100 Me. 461, 62 Atl. 499, 4 L. R. A. N. S. 960; Gordon Hollow Blast Grate Co. *v.* Gordon, 142 Mich. 488, 105 N. W. 1118; Dennison Mfg. Co. *v.* Thomas Mfg. Co., 94 Fed. 651.

Infringement of a trade-mark is one form of unfair competition. C. F. Simmons Medicine Co. *v.* Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165; Capewell Horse Nail Co. *v.* Mooney, 172 Fed. 826, 97 C. C. A. 248. The same acts may constitute both infringement of trade-mark and unfair competition. Prest-O-Lite Co. *v.* Avery Lighting Co., 161 Fed. 648.

70. Thomson *v.* Winchester, 19 Pick. (Mass.) 214, 31 Am. Dec. 135; Taylor *v.* Carpenter, 23 Fed. Cas. No. 13,784, 3 Story 458. See Sykes *v.* Sykes, 3 B. & C. 541, 5 D. & R. 292, 3 L. J. K. B. O. S. 46, 27 Rev. Rep. 420, 10 E. C. L. 248, 107 Eng. Reprint 834; Canham *v.* Jones, 2 Ves. & B. 218, 13 Rev. Rep. 70, 35 Eng. Reprint 302; Cruttwell *v.* Lye, 17 Ves. Jr. 335, 11 Rev. Rep. 98, 34 Eng. Reprint 129; Longman *v.* Winchester, 16 Ves. Jr. 269, 33 Eng. Reprint 987; Hogg *v.* Kirby, 8 Ves. Jr. 215, 7 Rev. Rep. 30, 32 Eng. Reprint 336.

names, signs, or symbols unless plaintiff could assert an exclusive right thereto. Accordingly, the earlier cases were decided upon the ground of trade-mark, and the principal inquiry was confined to the determination of what might be monopolized as a trade-mark.[71] Much difficulty was caused by straining the doctrines of trade-marks to cover cases which would now be readily recognized and redressed as unfair competition.[72] The present tendency is to decide every case upon the ground of unfair competition, by making the decision turn upon whether or not the effect of what was done is to pass off the goods or business of one man as those of another regardless of the existence of any technical trade-mark.[73] The law of trade-marks, however, has been too thoroughly specialized and crystallized by statute and decision to become wholly merged in the law of unfair competition. It therefore remains as a distinct subject, and furnishes the rule of decision in all cases to which it is applicable.[74] Protection against unfair competition is afforded upon the same general principles upon which technical trade-marks are protected.[75] The principal distinction between infringement of trade-mark and unfair competition is that in the latter class of cases no exclusive proprietary interest in the names or marks used to deceive is necessary to relief, while in trade-mark cases an exclusive right is necessary.[76] Another distinction frequently drawn by the cases is that fraudulent intent need not be proved in trade-mark cases, but must be shown in unfair competition cases,[77] but this is, perhaps,

71. See Blanchard *v.* Hill, 2 Atk. 484, 26 Eng. Reprint 692; Canham *v.* Jones, 2 Ves. & B. 218, 13 Rev. Rep. 70, 35 Eng. Reprint 302, and early cases cited *passim*.

72. See cases cited *infra*, this note.

Cases of unfair competition decided upon ground of trade-marks see for examples Clark *v.* Clark, 25 Barb. (N. Y.) 76; Thornton *v.* Crowley, 47 N. Y. Super. Ct. 527 [*affirmed* in 89 N. Y. 644]; Christy *v.* Murphy, 12 How. Pr. (N. Y.) 77; Ayer *v.* Hall, 3 Brewst. (Pa.) 509; C. F. Simmons Medicine Co. *v.* Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165; Taylor *v.* Carpenter, 23 Fed. Cas. No. 13,784, 3 Story 458; Hogg *v.* Kirby, 8 Ves. Jr. 215, 7 Rev. Rep. 30, 32 Eng. Reprint 336.

"**The advantage of not misusing the word 'property,'** in connection with the right of the user of a trade mark or trade name, is that the proper conception of the basis of the right, administered in favor of the complainant, reconciles the decisions respecting the subject-matter. The principle is universal in these cases that one may not palm off his goods as the goods of another, and this irrespective of whether that other has a technical trade mark, is using his own name, or is using words to which he has no exclusive right whatever, providing he is using the name or mark to denote the origin or ownership of the named or marked goods." Perlberg *v.* Smith, 70 N. J. Eq. 638, 644, 62 Atl. 442.

73. See *supra*, V, A, 1.

74. See C. F. Simmons Medicine Co. *v.* Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165 (wherein infringement and unfair competition are carefully contrasted); Searle, etc., Co. *v.* Warner, 112 Fed. 674, 50 C. C. A. 321 [*affirmed* in 191 U. S. 195, 24 S. Ct. 79, 48 L. ed. 145].

75. *Massachusetts.*— Cohen *v.* Nagle, 190 Mass. 4, 76 N. E. 276, 2 L. R. A. N. S. 964; New England Awl, etc., Co. *v.* Marlborough Awl, etc., Co., 168 Mass. 154, 46 N. E. 386, 60 Am. St. Rep. 377.

Missouri.— Shelley *v.* Sperry, 121 Mo. App. 429, 99 S. W. 488.

New York.— Chas. S. Higgins Co. *v.* Higgins Soap Co., 144 N. Y. 462, 39 N. E. 490, 43 Am. St. Rep. 769, 27 L. R. A. 42 [*reversing* 71 Hun 101, 24 N. Y. Suppl. 801]; Munro *v.* Tousey, 129 N. Y. 38, 29 N. E. 9, 14 L. R. A. 245.

United States.— Capewell Horse Nail Co. *v.* Mooney, 172 Fed. 826, 97 C. C. A. 248; Walton *v.* Crowley, 29 Fed. Cas. No. 17,133, 3 Blatchf. 440.

England.— Glenny *v.* Smith, 2 Dr. & Sm. 476, 11 Jur. N. S. 964, 13 L. T. Rep. N. S. 11, 6 New Rep. 363, 13 Wkly. Rep. 1032, 62 Eng. Reprint 701.

Canada.— McCall *v.* Theal, 28 Grant Ch. (U. C.) 48.

But see Atlas Assur Co. *v.* Atlas Ins. Co., 138 Iowa 228, 112 N. W. 232, 114 N. W. 609, 128 Am. St. Rep. 189, 15 L. R. A. N. S. 625.

"**Equity gives relief** for the infringement of a trade-mark upon the ground that one man is not allowed to offer his goods for sale, representing the goods to be the manufacture of another in the same commodity." Manhattan Medicine Co. *v.* Ward, 16 Fed. Cas. No. 9,026, 4 Cliff. 461, 478, 14 Off. Gaz. 519 [*citing* Seixo *v.* Provezende, L. R. 1 Ch. 192, 12 Jur. N. S. 215, 14 L. T. Rep. N. S. 314, 14 Wkly. Rep. 357].

76. **As to trade-marks** see *supra*, I, E, 1. **As to unfair competition** see *infra*, V, B, 1.

77. *Iowa.*— Sartor *v.* Schaden, 125 Iowa 696, 101 S. W. 511.

Maine.— W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 100 Me. 461, 62 Atl. 499, 4 L. R. A. N. S. 960.

New York.— Day *v.* Webster, 23 N. Y. App. Div. 601, 49 N. Y. Suppl. 314; Gaines *v.* Leslie, 25 Misc. 20, 54 N. Y. Suppl. 421.

open to doubt.[78] In trade-mark cases it is not necessary to prove that the mark or name has acquired a secondary meaning, and come to indicate plaintiff's goods.[79] In unfair competition cases this is necessary, and, in fact, is the very basis of relief.[80]

4. Trade-Names. Trade-names have been frequently confused with trade-marks, and, broadly considered, they do include names which may constitute technical trade-marks.[81] More accurately, however, trade-names are names which are used in trade to designate a particular business of certain individuals considered somewhat as an entity, or the place at which a business is located, or of a class of goods, but which are not technical trade-marks either because not applied or affixed to goods sent into the market, or because not capable of exclusive appropriation by any one as trade-marks.[82] Such trade-names may, or may not, be exclusive.[83] Exclusive trade-names are protected very much upon the same principles as trade-marks,[84] and the same rules that govern trade-marks are applied

Ohio.— Drake Medicine Co. *v.* Glessner, 68 Ohio St. 337, 67 N. E. 722.

United States.— Florence Mfg. Co. *v.* Dowd, 171 Fed. 122 [*reversed* on other grounds in 178 Fed. 73, 101 C. C. A. 565]; Scriven *v.* North, 134 Fed. 366, 67 C. C. A. 248 [*modifying* 124 Fed. 894].

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 80.

Question of fraud is more important in unfair competition cases, but may be inferred from imitation alone. Atlas Assur. Co. *v.* Atlas Ins. Co., 138 Iowa 228, 112 N. W. 232, 114 N. W. 609, 128 Am. St. Rep. 189, 15 L. R. A. N. S. 625.

78. See *infra*, V, B, 6.

79. See *supra*, II, B, 3.

80. See *infra*, V, B, 2.

81. Candee *v.* Deere, 54 Ill. 439, 5 Am. Rep. 125; Samuels *v.* Spitzer, 177 Mass. 226, 58 N. E. 693; Ayer *v.* Hall, 3 Brewst. (Pa.) 509.

82. *California.*— Hainque *v.* Cyclops Iron Works, 136 Cal. 351, 68 Pac. 1014.

Iowa.— Millspaugh Laundry *v.* Sioux City First Nat. Bank, 120 Iowa 1, 94 N. W. 262, holding that a trade-name is not in the nature of a trade-mark.

Massachusetts.— Cohen *v.* Nagle, 190 Mass. 4, 76 N. E. 276, 2 L. R. A. N. S. 964.

New York.— Koehler *v.* Sanders, 122 N. Y. 65, 25 N. E. 235, 9 L. R. A. 576; Church *v.* Kresner, 26 N. Y. App. Div. 349, 49 N. Y. Suppl. 742.

Pennsylvania.— Laughman's Appeal, 128 Pa. St. 1, 18 Atl. 415, 5 L. R. A. 599.

Rhode Island.— Armington *v.* Palmer, 21 R. I. 109, 42 Atl. 308, 311, 79 Am. St. Rep. 786, 43 L. R. A. 95.

Washington.— Eastern Outfitting Co. *v.* Manheim, 59 Wash. 428, 110 Pac. 23.

United States.— Draper *v.* Skerrett, 116 Fed. 206.

A trade-name is of a different character from a trade-mark.— It is descriptive of the manufacturer or dealer himself as much as his own name is, and frequently, like the names of business corporations, includes the name of the place where the business is located. If attached to goods, it is designed to say plainly what a trade-mark only indicates by association and use. Trade-marks, properly so called, may be violated by accident or ignorance. The law protects them, nevertheless, as property. Names which are not trade-marks, strictly speaking, may be protected likewise, if they are taken with fraudulent intention, and if they are so used as to be likely to affect such intention. Cady *v.* Schultz, 19 R. I. 193, 32 Atl. 915, 61 Am. St. Rep. 763, 29 L. R. A. 524. "The use of a trade name is in some respects different from that of a trade mark. The latter usually relates chiefly to the thing sold; while, in addition to this, the former involves the source from which it comes, the individuality of the maker, both for protection in trade and for avoiding confusion in business affairs, as well as for securing to him the advantage of any good reputation which he may have gained. The law of trade mark is designed chiefly for the protection of the public from imposition, that of trade name for the protection of the party entitled to it. A case, therefore, in regard to trade name is of somewhat broader scope than one relating to a trade mark." Armington *v.* Palmer, 21 R. I. 109, 115, 42 Atl. 308, 79 Am. St. Rep. 786, 43 L. R. A. 95. To same effect is Eastern Outfitting Co. *v.* Manheim, 59 Wash. 428, 110 Pac. 23.

A trade-name differs from a trade-mark in the fact that the former appeals more to the ear than to the eye, while in the case of trade-marks the reverse is the case. N. K. Fairbank Co. *v.* Luckel, 102 Fed. 327, 42 C. C. A. 376.

83. Amoskeag Mfg. Co. *v.* Garner, 54 How. Pr. (N. Y.) 297; Clark Thread Co. *v.* Armitage, 67 Fed. 896. See also *infra*, V, C, 6.

84. *Illinois.*— Bolander *v.* Peterson, 136 Ill. 215, 26 N. E. 603, 11 L. R. A. 350 [*affirmed* in 35 Ill. App. 551].

Louisiana.— Vonderbank *v.* Schmidt, 44 La. Ann. 264, 10 So. 616, 32 Am. St. Rep. 336, 15 L. R. A. 462.

New Jersey.— O'Grady *v.* McDonald, 72 N. J. Eq. 805, 66 Atl. 175.

New York.— Ball *v.* Broadway Bazaar, 194 N. Y. 429, 87 N. E. 674; Koehler *v.* Sanders, 122 N. Y. 65, 72, 25 N. E. 235, 9 L. R. A. 576 [*citing* Howard *v.* Henriques, 3 Sandf. 725]; Fay *v.* Lambourne, 124 N. Y. App. Div. 245, 108 N. Y. Suppl. 874 [*affirmed* in 196 N. E. 575, 90 N. E. 1158].

in determining what may be an exclusive trade-name.[85] Non-exclusive trade-names are names that are *publici juris* in their primary sense, but which in a secondary sense have come to be understood as indicating the goods or business of a particular trader.[86] Trade-names are acquired by adoption and user, and belong to the one who first used them and gave them a value.[87] Abandonment of trade-names is governed by the same rules as apply to technical trade-marks.[88] Trade-names are protected against use or imitation, upon the ground of unfair competition.[89]

England.— Singer Mfg. Co. *v.* Loog, 8 App. Cas. 15, 52 L. J. Ch. 481, 48 L. T. Rep. N. S. 3, 31 Wkly. Rep. 325.

85. *California.*— Hainque *v.* Cyclops Iron Works, 136 Cal. 351, 68 Pac. 1014 ("Cyclops" as applied to iron works); Weinstock *v.* Marks, 109 Cal. 529, 42 Pac. 142, 50 Am. St. Rep. 57, 30 L. R. A. 182.

Georgia.— Creswill *v.* Grand Lodge K. P., 133 Ga. 837, 67 S. E. 188, 134 Am. St. Rep. 231.

Illinois.—Bolander *v.* Peterson, 136 Ill. 215, 26 N. E. 603, 11 L. R. A. 350 [*affirming* 35 Ill. App. 551].

Massachusetts.— Burt *v.* Tucker, 178 Mass. 493, 59 N. E. 1111, 86 Am. St. Rep. 499, 52 L. R. A. 112, trade-mark "Knickerbocker" employed in trade-name of company making goods.

Michigan.— Michigan Sav. Bank *v.* Dime Sav. Bank, 162 Mich. 297, 127 N. W. 364, geographical name.

Nebraska.— Chadron Opera House Co. *v.* Loomer, 71 Nebr. 785, 99 N. W. 649, names in common use.

New York.— Frohman *v.* Morris, 68 Misc. 461, 123 N. Y. Suppl. 1090; Car Advertising Co. *v.* New York City Car Advertising Co., 57 Misc. 105, 107 N. Y. Suppl. 547 [*affirmed* in 123 N. Y. App. Div. 926, 108 N. Y. Suppl. 1126]; Cohn *v.* Reynolds, 26 Misc. 473, 57 N. Y. Suppl. 469 [*affirmed* in 40 N. Y. App. Div. 619, 58 N. Y. Suppl. 1138].

United States.— American Wine Co. *v.* Kohlman, 158 Fed. 830 ("American Wine Co."); Germer Stove Co. *v.* Art Stove Co., 150 Fed. 141, 80 C. C. A. 9.

England.— Saunders *v.* Sun L. Assur. Co., [1894] 1 Ch. 537, 63 L. J. Ch. 247, 69 L. T. Rep. N. S. 755, 8 Reports 125, 42 Wkly. Rep. 315.

Canada.— Robinson *v.* Bogle, 18 Ont. 387.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 84.

For specific illustrations see *infra*, V, C.

What names may be appropriated as trade-marks see *supra*, III.

86. See *infra*, V, B, 2.

87. *Massachusetts.*— Viano *v.* Baccigalupo, 183 Mass. 160, 67 N. E. 641.

Minnesota.—Nesne *v.* Sundet, 93 Minn. 299, 101 N. W. 490, 106 Am. St. Rep. 439.

Nebraska.— Chadron Opera House Co. *v.* Loomer, 71 Nebr. 785, 99 N. W. 649.

New York.— International Cheese Co. *v.* Phenix Cheese Co., 118 N. Y. App. Div. 499, 103 N. Y. Suppl. 362.

United States.— Liebig's Extract of Meat Co. *v.* Liebig Extract Co., 172 Fed. 158 [*reversed* on the facts in 180 Fed. 688, 103 C. C. A. 654].

Canada.— Robinson *v.* Bogle, 18 Ont. 387.

For analogous trade-mark cases see *supra*, II, B.

88. Nolan Bros. Shoe Co. *v.* Nolan, 131 Cal. 271, 63 Pac. 480, 82 Am. St. Rep. 346, 53 L. R. A. 384; Church *v.* Kresner, 26 N. Y. App. Div. 349, 49 N. Y. Suppl. 742.

89. *California.*— Hainque *v.* Cyclops Iron Works, 136 Cal. 351, 68 Pac. 1014; Nolan Bros. Shoe Co. *v.* Nolan, 131 Cal. 271, 63 Pac. 480, 82 Am. St. Rep. 346, 53 L. R. A. 384; Weinstock *v.* Marks, 109 Cal. 529, 42 Pac. 142, 50 Am. St. Rep. 57, 30 L. R. A. 182.

Illinois.— Hopkins Amusement Co. *v.* Frohman, 202 Ill. 541, 67 N. E. 391.

Massachusetts.— Viano *v.* Baccigalupo, 183 Mass. 160, 67 N. E. 641; Samuels *v.* Spitzer, 177 Mass. 226, 58 N. E. 693.

Michigan.— Finney's Orchestra *v.* Finney's Famous Orchestra, 161 Mich. 289, 126 N. W. 198, 28 L. R. A. N. S. 458; Penberthy Injector Co. *v.* Lee, 120 Mich. 174, 78 N. W. 1074.

Missouri.— St. Louis Carbonating, etc., Co. *v.* Eclipse Carbonating Co., 58 Mo. App. 411.

New York.— Slater *v.* Slater, 78 N. Y. App. Div. 449, 80 N. Y. Suppl. 363; Cutter *v.* Gudebrod Bros. Co., 36 N. Y. App. Div. 362, 55 N. Y. Suppl. 298; Frohman *v.* Payton, 34 Misc. 275, 68 N. Y. Suppl. 849.

Ohio.— Cincinnati Vici Shoe Co. *v.* Cincinnati Shoe Co., 9 Ohio S. & C. Pl. Dec. 579, 7 Ohio N. P. 135.

United States.— Draper *v.* Skerrett, 116 Fed. 206; Baker *v.* Baker, 115 Fed. 297, 53 C. C. A. 157; Edison *v.* Hawthorne, 108 Fed. 839, 48 C. C. A. 67; Shaver *v.* Heller, etc., Co., 108 Fed. 821, 48 C. C. A. 48, 65 L. R. A. 878 [*affirming* 102 Fed. 882]; Hansen *v.* Siegel-Cooper Co., 106 Fed. 691; Williams *v.* Mitchell, 106 Fed. 168, 45 C. C. A. 265; Continental Ins. Co. *v.* Continental Fire Assoc., 96 Fed. 846; Block *v.* Standard Distilling, etc., Co., 95 Fed. 978; Gage-Downs Co. *v.* Featherbone Corset Co., 83 Fed. 213; Garrett *v.* Garrett, 78 Fed. 472, 24 C. C. A. 173; Clark Thread Co. *v.* Armitage, 67 Fed. 896. See Carlsbad *v.* Tibbetts, 51 Fed. 852.

England.— North Cheshire, etc., Brewery Co. *v.* Manchester Brewery Co., [1899] A. C. 83, 68 L. J. Ch. 74, 79 L. T. Rep. N. S. 645, 15 T. L. R. 110 [*affirming* [1898] 1 Ch. 539, 67 L. J. Ch. 351, 78 L. T. Rep. N. S. 537, 14 T. L. R. 350, 46 Wkly. Rep. 515]; Daniel *v.* Whitehouse, [1898] 1 Ch. 685, 67 L. J. Ch. 262; Pinet *v.* Maison Louis Pinet, [1898] 1 Ch. 179, 67 L. J. Ch. 41, 77 L. T. Rep. N. S.

B. General Rules — 1. Exclusive Right to Name or Mark Unnecessary. An exclusive proprietary interest such as a trade-mark or copyright, in the terms or symbols used to palm off the goods of one manufacturer or vendor as those of another, is not essential to the maintenance of a suit to enjoin or redress the perpetration of the wrong, but an interest in the good-will of the business is sufficient, because it is the property in the good-will which is protected in all cases of unfair competition.[90] It is only necessary to show actual or probable confusion of goods as a result of defendant's use of particular terms or symbols;

613, 14 T. L. R. 87, 46 Wkly. Rep. 506; Boulnois *v.* Peake, 13 Ch. D. 513 note; Cash *v.* Cash, 84 L. T. Rep. N. S. 349; Valentine Meat Juice Co. *v.* Valentine Extract Co., 83 L. T. Rep. N. S. 259, 16 T. L. R. 522.

Canada.— Grand Hotel Co. *v.* Wilson, 2 Ont. L. Rep. 322; Provident Chemical Works *v.* Canada Chemical Mfg. Co., 2 Ont. L. Rep. 182.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 78.

For specific illustrations see *infra*, V, C.

90. *California.*— Dodge Stationery Co. *v.* Dodge, 145 Cal. 380, 78 Pac. 879; Schmidt *v.* Brieg, 100 Cal. 672, 35 Pac. 623, 22 L. R. A. 790.

Illinois.— International Committee Y. W. C. A. *v.* Chicago Y. W. C. A., 194 Ill. 194, 62 N. E. 551, 56 L. R. A. 888; The Fair *v.* Morales, 82 Ill. App. 499.

Indiana.— Computing Cheese Cutter Co. *v.* Dunn, (App. 1909) 88 N. E. 93; State *v.* Hagen, 6 Ind. App. 167, 33 N. E. 223.

Iowa.— Dyment *v.* Lewis, 144 Iowa 509, 123 N. W. 244, 26 L. R. A. N. S. 73; Sartor *v.* Schaden, 125 Iowa 696, 101 N. W. 511.

Kentucky.— Avery *v.* Meikle, 81 Ky. 73, 4 Ky. L. Rep. 759.

Maine.— W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 100 Me. 461, 62 Atl. 499, 4 L. R. A. N. S. 960.

Massachusetts.—American Waltham Watch Co. *v.* U. S. Watch Co., 173 Mass. 85, 53 N. E. 141, 73 Am. St. Rep. 263, 43 L. R. A. 826.

Minnesota— Rickard *v.* Caton College Co., 88 Minn. 242, 92 N. W. 958.

Missouri.— Grocers Journal Co. *v.* Midland Pub. Co., 127 Mo. App. 356, 105 S. W. 310; St. Louis Carbonating, etc., Co. *v.* Eclipse Carbonating Co., 58 Mo. App. 411; American Brewing Co. *v.* St. Louis Brewing Co., 47 Mo. App. 14; Trask Fish Co. *v.* Wooster, 28 Mo. App. 408; Conrad *v.* Joseph Uhrig Brewing Co., 8 Mo. App. 277.

New Jersey.— Perlberg *v.* Smith, 78 N. J. Eq. 638, 62 Atl. 442; International Silver Co. *v.* William H. Rogers Corp., 67 N. J. Eq. 646, 60 Atl. 187, 110 Am. St. Rep. 506 [*reversing* 66 N. J. Eq. 140, 57 Atl. 725]; Van Horn *v.* Coogan, 52 N. J. Eq. 380, 28 Atl. 788.

New York.— Koehler *v.* Sanders, 122 N. Y. 65, 25 N. E. 235, 9 L. R. A. 576 [*affirming* 48 Hun 48]; Westcott Chuck Co. *v.* Oneida Nat. Chuck Co., 122 N. Y. App. Div. 260, 106 N. Y. Suppl. 1016; Pettes *v.* American Watchman's Clock Co., 89 N. Y. App. Div. 345, 85 N. Y. Suppl. 900; Volger *v.* Force, 63 N. Y. App. Div. 122, 71 N. Y. Suppl. 209; Reckitt *v.* Kellogg, 28 N. Y. App. Div. 111, 50 N. Y. Suppl. 888; Kinney Tobacco Co. *v.* Maller, 53 Hun 340, 6 N. Y. Suppl. 389; Gaines *v.* Leslie, 25 Misc. 20, 54 N. Y. Suppl. 421; Johnson *v.* Hitchcock, 3 N. Y. Suppl. 680. See Thornton *v.* Crowley, 47 N. Y. Super. Ct. 527 [*affirmed* in 89 N. Y. 644].

Ohio.— Drake Medicine Co. *v.* Glessner, 68 Ohio St. 337, 67 N. E. 722.

Pennsylvania.— Lafean *v.* Weeks, 177 Pa. St. 412, 35 Atl. 693, 34 L. R. A. 172.

Texas.— Alff *v.* Radam, 77 Tex. 530, 14 S. W. 164, 19 Am. St. Rep. 792, 9 L. R. A. 145; Goodman *v.* Bohls, 3 Tex. Civ. App. 183, 22 S. W. 11.

United States.— Elgin Nat. Watch Co. *v.* Illinois Watch Case Co., 179 U. S. 665, 21 S. Ct. 270, 45 L. ed. 365; Singer Mfg. Co. *v.* June Mfg. Co., 163 U. S. 169, 16 S. Ct. 1002, 41 L. ed. 118; McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828; Delaware, etc., Canal Co. *v.* Clark, 13 Wall. 311, 20 L. ed. 581; Worcester Brewing Corp. *v.* Rueter, 157 Fed. 217, 84 C. C. A. 665; Standard Varnish Works *v.* Fisher, 153 Fed. 928; Enoch Morgan's Sons Co. *v.* Ward, 152 Fed. 690, 81 C. C. A. 616, 12 L. R. A. N. S. 729; Buzby *v.* Davis, 150 Fed. 275, 80 C. C. A. 163; Germer Stove Co. *v.* Art Stove Co., 150 Fed. 141, 80 C. C. A. 9; Bulte *v.* Igleheart, 137 Fed. 492, 70 C. C. A. 76; G. & C. Merriam Co. *v.* Straus, 136 Fed. 477; Bickmore Gall Cure Co. *v.* Karns, 134 Fed. 833, 67 C. C. A. 439 [*reversing* 126 Fed. 573]; Elgin Nat. Watch Co. *v.* Loveland, 132 Fed. 41; G. W. Cole Co. *v.* American Cement, etc., Co., 130 Fed. 703, 65 C. C. A. 105; Bauer *v.* La Societe Anonyme, etc., 120 Fed. 74, 56 C. C. A. 480; Draper *v.* Skerrett, 116 Fed. 206; Sterling Remedy Co. *v.* Spermine Medical Co., 112 Fed. 1000, 50 C. C. A. 657; Searle, etc., Co. *v.* Warner, 112 Fed. 674, 50 C. C. A. 321; Singer Mfg. Co. *v.* Hipple, 109 Fed. 152; Shaver *v.* Heller, etc., Co., 108 Fed. 821, 48 C. C. A. 48, 65 L. R. A. 878 [*affirming* 102 Fed. 882]; Williams *v.* Mitchell, 106 Fed. 168, 45 C. C. A. 265; Thomas G. Plant Co. *v.* May Co., 105 Fed. 375, 44 C. C. A. 534; Hires Co. *v.* Consumers' Co., 100 Fed. 809, 41 C. C. A. 71; Illinois Watch-Case Co. *v.* Elgin Nat. Watch Co., 94 Fed. 667, 35 C. C. A. 237; Dennison Mfg. Co. *v.* Thomas Mfg. Co., 94 Fed. 651; La Republique Francaise *v.* Schultz, 94 Fed. 500; Centaur Co. *v.* Robinson, 91 Fed. 889; Anheuser-Busch Brewing Assoc. *v.* Fred Miller Brewing Co., 87 Fed. 864; Pillsbury-Washburn Flour-Mills Co. *v.* Eagle, 86 Fed. 608, 30 C. C. A. 386, 41 L. R. A. 162; Morgan Envelope Co. *v.* Walton, 82 Fed. 469; Buck's Stove, etc., Co. *v.* Kiechle, 76 Fed. 758; Cleveland Stone Co. *v.* Wallace, 52 Fed. 431; Coffeen *v.* Brunton, 5 Fed. Cas. No. 2,946, 4 McLean 516; Kinney *v.* Basch, 16

the nature of the words or symbols causing this result are immaterial. It is unlawful to produce the result by any means.[91] It is not property in the word that is protected, but fraud that is prevented.[92] A competitor may not use a

Am. L. Reg. N. S. 596. But see New York, etc., Cement Co. *v.* Coplay Cement Co., 44 Fed. 277, 10 L. R. A. 833.

England.— Lee *v.* Haley, L. R. 5 Ch. 155, 39 L. J. Ch. 284, 22 L. T. Rep. N. S. 251, 18 Wkly. Rep. 242; Wotherspoon *v.* Currie, L. R. 5 H. L. 508, 42 L. J. Ch. 130, 27 L. T. Rep. N. S. 393; Jay *v.* Ladler, 40 Ch. D. 649, 60 L. T. Rep. N. S. 27, 37 Wkly. Rep. 505; Boulnois *v.* Peake, 13 Ch. D. 513 note; Singer Mfg. Co. *v.* Wilson, 2 Ch. D. 434, 45 L. J. Ch. 490, 34 L. T. Rep. N. S. 858, 24 Wkly. Rep. 1023 [*reversed* on other grounds in 3 App. Cas. 376, 47 L. J. Ch. 481, 38 L. T. Rep. N. S. 303, 26 Wkly. Rep. 664]; Croft *v.* Day, 7 Beav. 84, 29 Eng. Ch. 84, 49 Eng. Reprint 994; Gout *v.* Aleploglu, 6 Beav. 69 note, 49 Eng. Reprint 750; Perry *v.* Truefitt, 6 Beav. 66, 49 Eng. Reprint 749; Farina *v.* Silverlock, 6 De G. M. & G. 214, 2 Jur. N. S. 1008, 26 L. J. Ch. 11, 4 Wkly. Rep. 731, 55 Eng. Ch. 214, 43 Eng. Reprint 1214; McAndrew *v.* Bassett, 10 Jur. N. S. 492, 10 L. T. Rep. N. S. 65 [*affirmed* in 4 De G. J. & S. 380, 10 Jur. N. S. 550, 33 L. J. Ch. 561, 10 L. T. Rep. N. S. 442, 4 New Rep. 123, 12 Wkly. Rep. 777, 69 Eng. Ch. 293, 46 Eng. Reprint 965]; Knott *v.* Morgan, 2 Keen 213, 15 Eng. Ch. 213, 48 Eng. Reprint 610; Cash *v.* Cash, 84 L. T. Rep. N. S. 349.

Canada.— Pabst Brewing Co. *v.* Ekers, 20 Quebec Super. Ct. 20; Vive Camera Co. *v.* Hogg, 18 Quebec Super. Ct. 1.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," §§ 78, 79.

Aside from the law of trade-marks, courts will protect trade-names or reputations on the broad ground of enforcing justice, and protecting one in the fruits of his toil. Sartor *v.* Schaden, 125 Iowa 696, 101 N. W. 511.

Judicial summary of rule.— "It is true that a man cannot appropriate a geographical name, but neither can he a color, or any part of the English language, or even a proper name to the exclusion of others whose names are like his. Yet a color in connection with a sufficiently complex combination of other things may be recognized as saying so circumstantially that the defendant's goods are the plaintiff's as to pass the injunction line. New England Awl, etc., Co. *v.* Marlborough Awl, etc., Co., 168 Mass. 154, 156, 46 N. E. 386, 60 Am. St. Rep. 377. So, although the plaintiff has no copyright on the dictionary or any part of it, he can exclude a defendant from a part of the free field of the English language, even from the mere use of generic words unqualified and unexplained, when they would mislead the plaintiff's customers to another shop. Reddaway *v.* Banham, [1896] A. C. 199, 65 L. J. Q. B. 381, 74 L. T. Rep. N. S. 289, 44 Wkly. Rep. 638. So the name of a person may become so associated with his goods that one of the same name coming into the business later will not be allowed to use even his own name without distinguishing his wares. Reddaway *v.* Banham, *supra*; Brinsmead *v.* Brinsmead, 13 T. L. R. 3. See Singer Mfg. Co. *v.* June Mfg. Co., 163 U. S. 169, 204, 16 S. Ct. 1002, 41 L. ed. 169; Allegretti Chocolate Cream Co. *v.* Keller, 85 Fed. 643. And so, we doubt not, may a geographical name acquire a similar association with a similar effect. Montgomery *v.* Thompson, [1891] A. C. 217, 55 J. P. 756, 60 L. J. Ch. 757, 64 L. T. Rep. N. S. 748. Whatever might have been the doubts some years ago, we think that now it is pretty well settled that the plaintiff merely on the strength of having been first in the field may put later comers to the trouble of taking such reasonable precautions as are commercially practicable to prevent their lawful names and advertisements from deceitfully diverting the plaintiff's custom." American Waltham Watch Co. *v.* U. S. Watch Co., 173 Mass. 85, 87, 53 N. E. 141, 73 Am. St. Rep. 263, 43 L. R. A. 826.

91. *California.*— Weinstock *v.* Marks, 109 Cal. 529, 42 Pac. 142, 50 Am. St. Rep. 57, 30 L. R. A. 182.

Missouri.— St. Louis Carbonating, etc., Co. *v.* Eclipse Carbonating Co., 58 Mo. App. 411.

Texas.— Goodman *v.* Bohls, 3 Tex. Civ. App. 183, 22 S. W. 11.

United States.— Elgin Nat. Watch. Co. *v.* Illinois Watch Case Co., 179 U. S. 665, 21 S. Ct. 270, 45 L. ed. 365; Bates Mfg. Co. *v.* Bates Numbering Mach. Co., 172 Fed. 892 [*affirmed* in 178 Fed. 681, 102 C. C. A. 181]; American Tobacco Co. *v.* Polacsek, 170 Fed. 117; Shaver *v.* Heller, etc., Co., 108 Fed. 821, 48 C. C. A. 48, 65 L. R. A. 878; La Republique Francaise *v.* Saratoga Vichy Spring Co., 99 Fed. 733; La Republique Francaise *v.* Schultz, 94 Fed. 500; Anheuser-Busch Brewing Assoc. *v.* Fred Miller Brewing Co., 87 Fed. 864. In Bates Mfg. Co. *v.* Bates Numbering Mach. Co., 172 Fed. 892, 895 [*affirmed* in 178 Fed. 681, 102 C. C. A. 181], Judge Rellstab said: "Equity does not concern itself as to what the means, how, or with what intent they are used, if the result is fraud, and, if the public are induced thereby to purchase the goods of one under the belief that they are those of another, such means will be enjoined."

England.— Reddaway *v.* Banham, [1896] A. C. 199, 65 L. J. Q. B. 381, 74 L. T. Rep. N. S. 289, 44 Wkly. Rep. 638.

92. Dodge Stationery Co. *v.* Dodge, 145 Cal. 380, 78 Pac. 879; International Committee Y. W. C. A. *v.* Chicago Y. W. C. A., 194 Ill. 194, 62 N. E. 551, 56 L. R. A. 888.

Even technical trade-marks are protected upon the same principle. See *supra*, I, C; also I, E, 2.

"Ownership of the means by which a fraud is to be committed is not essential to entitle one to enjoin its perpetration; it is sufficient

name, whether fictitious or real, a description, whether true or not, which is intended or calculated to represent to the world that his business is that of another, and by such fraudulent misstatements deprive the latter of business which would otherwise come to him.[93] Relief will be afforded regardless of whether or not the deceptive words or marks are valid technical trade-marks.[94] The cases are

if the complainant be entitled to the custom and the good will of a business likely to be injured by the palming off of another's goods as his." Johnson *v.* Seabury, 69 N. J. Eq. 696, 703, 61 Atl. 5 [*citing* Shaver *v.* Heller, etc., Co., 108 Fed. 821, 48 C. C. A. 48, 65 L. R. A. 878].

93. American Tobacco Co. *v.* Polacsek, 170 Fed. 117; Levy *v.* Walker, 10 Ch. D. 436, 48 L. J. Ch. 273, 39 L. T. Rep. N. S. 654, 27 Wkly. Rep. 370.

Although defendant may have some title to the use of a name or mark, he will not be justified in adopting it, if the probable effect of his so doing is to lead the public to suppose, that in purchasing his goods they are purchasing those of plaintiff. Seixo *v.* Provezende, L. R. 1 Ch. 192, 12 Jur. N. S. 215, 14 L. T. Rep. N. S. 314, 14 Wkly. Rep. 357. See also Mitchell *v.* Henry, 15 Ch. D. 181, 43 L. T. Rep. N. S. 186.

94. *California.*—Banzhaf *v.* Chase, 150 Cal. 180, 88 Pac. 704; Hainque *v.* Cyclops Iron Works, 136 Cal. 351, 68 Pac. 1014; Schmidt *v.* Brieg, 100 Cal. 672, 35 Pac. 623, 22 L. R. A. 790; Pierce *v.* Guittard, 68 Cal. 68, 8 Pac. 645, 58 Am. Rep. 1.

Illinois.— People *v.* Rose, 219 Ill. 46, 76 N. E. 42; Hopkins Amusement Co. *v.* Frohman, 202 Ill. 541, 67 N. E. 391; Frazer *v.* Frazer Lubricator Co., 121 Ill. 147, 13 N. E. 639, 2 Am. St. Rep. 73; The Fair *v.* Morales, 82 Ill. App. 499.

Indiana.— Smail *v.* Sanders, 118 Ind. 105, 20 N. E. 296; State *v.* Hagen, 6 Ind. App. 167, 33 N. E. 223.

Iowa.— Dyment *v.* Lewis, 144 Iowa 509, 123 N. W. 244; Sartor *v.* Schaden, 125 Iowa 696, 101 N. W. 511.

Kentucky.— Rains *v.* White, 107 Ky. 114, 52 S. W. 970, 21 Ky. L. Rep. 742.

Maine.— W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 100 Me. 461, 62 Atl. 499, 4 L. R. A. N. S. 960.

Massachusetts.— New England Awl, etc., Co. *v.* Marlborough Awl, etc., Co., 168 Mass. 154, 46 N. E. 386, 60 Am. St. Rep. 377.

Minnesota.— Rickard *v.* Caton College Co., 88 Minn. 242, 92 N. W. 958.

Missouri.— Grocers Journal Co. *v.* Midland Pub. Co., 127 Mo. App. 356, 105 S. W. 310; Conrad *v.* Joseph Uhrig Brewing Co., 8 Mo. App. 277.

New Jersey.— Johnson *v.* Seabury, 69 N. J. Eq. 696, 61 Atl. 5.

New York.— Volger *v.* Force, 63 N. Y. App. Div. 122, 71 N. Y. Suppl. 209; Reckitt *v.* Kellogg, 28 N. Y. App. Div. 111, 50 N. Y. Suppl. 888; Fetridge *v.* Merchant, 4 Abb. Pr. 156.

Ohio.— Drake Medicine Co. *v.* Glessner, 68 Ohio St. 337, 67 N. E. 722.

Pennsylvania.— American Clay Mfg. Co. *v.* American Clay Mfg. Co., 198 Pa. St. 189, 47 Atl. 936; Lafean *v.* Weeks, 177 Pa. St. 412, 25 Atl. 693, 34 L. R. A. 172; Shepp *v.* Jones, 3 Pa. Dist. 539.

Texas.—Goodman *v.* Bohls, 3 Tex. Civ. App. 183, 22 S. W. 11.

Wisconsin.— Oppermann *v.* Waterman, 94 Wis. 583, 69 N. W. 569.

United States.— Elgin Nat. Watch Co. *v.* Illinois Watch Case Co., 179 U. S. 665, 21 S. Ct. 270, 45 L. ed. 365; Goodyear's India Rubber Glove Mfg. Co. *v.* Goodyear Rubber Co., 128 U. S. 598, 9 S. Ct. 166, 32 L. ed. 535; McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828; Lowe Bros. Co. *v.* Toledo Varnish Co., 168 Fed. 627, 94 C. C. A. 83; Wolf *v.* Hamilton-Brown Shoe Co., 165 Fed. 413, 91 C. C. A. 363; Rushmore *v.* Saxon, 158 Fed. 499; Worcester Brewing Corp. *v.* Ructer, 157 Fed. 217, 84 C. C. A. 665; R. J. Reynolds Tobacco Co. *v.* Allen Bros. Tobacco Co., 151 Fed. 819; Buzby *v.* Davis, 150 Fed. 275, 80 C. C. A. 163; Siegert *v.* Gandolfi, 149 Fed. 100, 79 C. C. A. 142 [*reversing* 139 Fed. 917]; Scriven *v.* North, 134 Fed. 366, 67 C. C. A. 348 [*modifying* 124 Fed. 894]; G. W. Cole Co. *v.* American Cement, etc., Co., 130 Fed. 703, 65 C. C. A. 105; Globe-Wernicke Co. *v.* Brown, 121 Fed. 90, 57 C. C. A. 344; Draper *v.* Skerrett, 116 Fed. 206; Searle, etc., Co. *v.* Warner, 112 Fed. 674, 50 C. C. A. 321; Van Hoboken *v.* Mohns, 112 Fed. 528; Shaver *v.* Heller, etc., Co., 108 Fed. 821, 48 C. C. A. 48, 65 L. R. A. 878 [*affirming* 102 Fed. 882]; Williams *v.* Mitchell, 106 Fed. 168, 45 C. C. A. 265; Oxford University *v.* Wilmore-Andrews Pub. Co., 101 Fed. 443; Thomas G. Plant Co. *v.* May Co., 100 Fed. 72; La Republique Francaise *v.* Saratoga Vichy Spring Co., 99 Fed. 733; Block *v.* Standard Distilling, etc., Co., 95 Fed. 978; California Fig-Syrup Co. *v.* Worden, 95 Fed. 132; Illinois Watch-Case Co. *v.* Elgin Nat. Watch Co., 94 Fed. 667, 35 C. C. A. 237; Dennison Mfg. Co. *v.* Thomas Mfg. Co., 94 Fed. 651; La Republique Francaise *v.* Schultz, 94 Fed. 500; Centaur Co. *v.* Neathery, 91 Fed. 891, 34 C. C. A. 118; Anheuser-Busch Brewing Assoc. *v.* Fred Miller Brewing Co., 87 Fed. 864; Pillsbury-Washburn Flour-Mills Co. *v.* Eagle, 86 Fed. 608, 30 C. C. A. 386, 41 L. R. A. 162; Vitascope Co. *v.* U. S. Phonograph Co., 83 Fed. 30; Morgan Envelope Co. *v.* Walton, 82 Fed. 469; Garrett *v.* Garrett, 78 Fed. 472, 24 C. C. A. 173; Buck's Stove, etc., Co. *v.* Kiechle, 76 Fed. 758; Goldstein *v.* Whelan, 62 Fed. 124; Cleveland Stone Co. *v.* Wallace, 52 Fed. 431; Kenney *v.* Basch, 16 Am. L. Reg. N. S. 596. In Lorillard *v.* Wight, 15 Fed. 383, it was held that plaintiff had no exclusive right to use tin tags upon tobacco, but defendant was enjoined from using tags of similar color and size upon tobacco sold by him, upon the ground of unfair competition.

England.— Reddaway *v.* Banham, [1896]

very numerous where relief has been afforded upon the ground of unfair competition against a deceptive use of generic or descriptive names and marks, personal, geographical, corporate, and other names, none of which are capable of exclusive appropriation as technical trade-marks.[95]

2. Doctrine of Secondary Meaning. Words or names which have a primary meaning of their own, such as words descriptive of the goods, or the place where they are made, or the name of the maker, and which are not capable of exclusive appropriation as a trade-mark, may nevertheless by long use in connection with the goods or business of a particular trader come to be understood by the public as designating the goods or business of that particular trader. Such words have both a primary and secondary meaning. In their primary descriptive sense, they are *publici juris*, and all the world may use them, but they must be used in such a way as not to falsely convey the secondary meaning, for this would constitute unfair competition as tending directly to pass off the goods or business of one man as and for that of another. This is what is known as the doctrine of secondary meaning. Its perception by the courts was the genesis of the law of unfair competition as distinguished from technical trade-marks.[96] In all this

A. C. 199, 65 L. J. Q. B. 381, 74 L. T. Rep. N. S. 289, 44 Wkly. Rep. 638; Wotherspoon *v.* Currie, L. R. 5 H. L. 508, 42 L. J. Ch. 130, 27 L. T. Rep. N. S. 393; Reddaway *v.* Bentham Hemp-Spinning Co., [1892] 2 Q. B. 639, 67 L. T. Rep. N. S. 301; Powell *v.* Birmingham Vinegar Brewery Co., [1896] 2 Ch. 54, 65 L. J. Ch. 563, 74 L. T. Rep. N. S. 509, 44 Wkly. Rep. 688 [*affirmed* in [1897] A. C. 710, 66 L. J. Ch. 763, 76 L. T. Rep. N. S. 792]; Ainsworth *v.* Walmsley, L. R. 1 Eq. 518, 12 Jur. N. S. 205, 35 L. J. Ch. 352, 14 L. T. Rep. N. S. 220, 14 Wkly. Rep. 363; Woollam *v.* Ratcliff, 1 Hem. & M. 259, 71 Eng. Reprint 113; Knott *v.* Morgan, 2 Keen 213, 15 Eng. Ch. 213, 48 Eng. Reprint 610; Cash *v.* Cash, 84 L. T. Rep. N. S. 349.

Canada.— Gillett *v.* Lumsden, 4 Ont. L. Rep. 300, 1 Ont. Wkly. Rep. 488; Pabst Brewing Co. *v.* Ekers, 20 Quebec Super. Ct. 20 [*reversed* in 21 Quebec Super. Ct. 545]; Vive Camera Co. *v.* Hogg, 18 Quebec Super. Ct. 1; Singer Mfg. Co. *v.* Charlebois, 16 Quebec Super. Ct. 167.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," §§ 78, 79.

95. See *infra*, V, C.

96. See cases cited *infra*, this note.

Judicial statements of doctrine of secondary meaning.— "Words or symbols naturally descriptive of the product, while not adapted for exclusive use as a trade-mark, may yet acquire, by long and general usage in connection with the preparation and by association with the name of the manufacturer, a secondary meaning or signification, such as will express or betoken the goods of that manufacturer only, and in this sense he will be entitled to protection from an unfair use of the designation or trade-name by others that may result in his injury and in fraud of the public." Standard Varnish Works *v.* Fisher, 153 Fed. 928, 930. In Reddaway *v.* Banham, [1896] A. C. 199, 65 L. J. Q. B. 381, 74 L. T. Rep. N. S. 289, 44 Wkly. Rep. 638, Lord Herschell said: "The name of a person, or words forming part of the common stock of language, may become so far associated with the goods of a particular maker that it is capable of proof that the use of them by themselves without explanation or qualification by another manufacturer would deceive a purchaser into the belief that he was getting the goods of A. when he was really getting the goods of B. In a case of this description the mere proof by the plaintiff that the defendant was using a name, word or device which he had adopted to distinguish his goods would not entitle him to any relief. He could only obtain it by proving further that the defendant was using it under such circumstances or in such manner as to put off his goods as the goods of the plaintiff. If he could succeed in proving this, I think he would, on well-established principles, be entitled to an injunction. This, I think, is a very accurate expression of the law as it is laid down in the most recent and the most authoritative decisions in this country." International Silver Co. *v.* Wm. H. Rogers Corp., 66 N. J. Eq. 119, 125, 57 Atl. 1037. "In Wotherspoon *v.* Currie, L. R. 5 H. L. 508, 42 L. J. Ch. 130, 27 L. T. Rep. N. S. 393, Currie was enjoined from using the geographical name of 'Glenfield' in connection with the starch manufactured by him in that village. It was contended that the defendant, in describing it as made there, only told the simple truth, but the house of lords said that the mere fact that he was really carrying on his manufacture at Glenfield, and that he was, therefore, in a misleading sense, stating what was so, did not relieve him from the charge that his proceedings were intended to produce, and calculated to produce in the mind of purchasers, the belief that his article was the article of the plaintiff. The fallacy, as was said in a subsequent case, lay in overlooking the fact that a word may acquire in a trade a secondary significance, differing from its primary one, and that if it is used to persons in the trade who will understand it and be known as intended to understand it in its secondary sense, it will be none the less a falsehood that in its primary sense it may be true." International Silver Co. *v.* Wm. H.

class of cases where the word, name, or other mark or device is primarily *publici juris* the right to relief depends upon the proof. If plaintiff proves that the name or word has been so exclusively identified with his goods or business as to have acquired a secondary meaning, so as to indicate his goods or business and his alone, he is entitled to relief against another's deceptive use of such terms. If he fails in such proof, he is not entitled to relief.[97] There is an exclusive right to the secondary meaning of a name, which has been deemed a property right,[98] in the

Rogers Corp., 66 N. J. Eq. 119, 127, 57 Atl. 1037. While the common use of a word or phrase may not be exclusively appropriated as a trade-mark, there may be a secondary meaning or construction, which, although it, too, may not be registered or selected as a trade-mark, may be appropriated by the person who has developed it, and the use of which will be protected against unfair competition. Sartor *v.* Schaden, 125 Iowa 696, 101 N. W. 511.

97. *Iowa.*— Dyment *v.* Lewis, 144 Iowa 509, 123 N. W. 244, 26 L. R. A. N. S. 73.

Massachusetts.— Giragosian *v.* Chutjian, 194 Mass. 504, 80 N. E. 647; Viano *v.* Baccigalupo, 183 Mass. 160, 67 N. E. 641.

Nebraska.— Chadron Opera House Co. *v.* Loomer, 71 Nebr. 785, 99 N. W. 649.

United States.— Seeger Refrigerator Co. *v.* White Enamel Refrigerator Co., 178 Fed. 567; Seeger Refrigerator Co. *v.* Parks, 178 Fed. 283; Bates Mfg. Co. *v.* Bates Numbering Mach. Co., 172 Fed. 892 [*affirmed* in 178 Fed. 681, 102 C. C. A. 181]; Rushmore *v.* Saxon, 170 Fed. 1021, 95 C. C. A. 671 [*affirming* 158 Fed. 499]; Lowe Bros. Co. *v.* Toledo Varnish Co., 168 Fed. 627, 94 C. C. A. 83; American Wine Co. *v.* Kohlman, 158 Fed. 830; Capewell Horse Nail Co. *v.* Putnam Nail Co., 140 Fed. 670; G. & C. Merriam Co. *v.* Straus, 136 Fed. 477; Elgin Nat. Watch Co. *v.* Loveland, 132 Fed. 41; Draper *v.* Skerrett, 116 Fed. 206; Hansen *v.* Siegel-Cooper Co., 106 Fed. 691.

England.— Parsons *v.* Gillespie, [1898] A. C. 239, 67 L. J. P. C. 21, 14 T. L. R. 142; Reddaway *v.* Banham, [1896] A. C. 199, 65 L. J. Q. B. 381, 74 L. T. Rep. N. S. 289, 44 Wkly. Rep. 638 [*distinguished* in Cellular Clothing Co. *v.* Maxton, [1899] A. C. 326, 68 L. J. P. C. 72, 80 L. T. Rep. N. S. 809]; Montgomery *v.* Thompson, [1891] A. C. 217, 55 J. P. 756, 60 L. J. Ch. 757, 64 L. T. Rep. N. S. 748; Singer Mfg. Co. *v.* Loog, 8 App. Cas. 15, 52 L. J. Ch. 481, 48 L. T. Rep. N. S. 3, 31 Wkly. Rep. 325; Wotherspoon *v.* Currie, L. R. 5 H. L. 508, 42 L. J. Ch. 130, 27 L. T. Rep. N. S. 393 [*reversing* 18 Wkly. Rep. 942]; Schove *v.* Schmincke, 33 Ch. D. 546, 55 L. J. Ch. 892, 55 L. T. Rep. N. S. 212, 34 Wkly. Rep. 700; Kelly *v.* Byles, 13 Ch. D. 682, 49 L. J. Ch. 181, 42 L. T. Rep. N. S. 338, 28 Wkly. Rep. 485; Radde *v.* Norman, L. R. 14 Eq. 348, 41 L. J. Ch. 525, 26 L. T. Rep. N. S. 788, 20 Wkly. Rep. 766; Valentine Meat Juice Co. *v.* Valentine Extract Co., 83 L. T. Rep. N. S. 259, 16 T. L. R. 522; Symington *v.* Footman, 56 L. T. Rep. N. S. 696 ("Guaranteed Corset"); Fels *v.* Hedley, 20 T. L. R. 69.

Canada.—*Re* Wedgwood, 12 Can. Exch. 417; Russia Cement Co. *v.* Le Page Liquid Glue, etc., Co., 14 Brit. Col. 317; Provident Chemical Works *v.* Canada Chemical Mfg. Co., 2 Ont. L. Rep. 182; Wilson *v.* Lyman, 25 Ont. App. 303; Robinson *v.* Bogle, 18 Ont. 387.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," §§ 78–88.

Limited to particular locality.— A secondary meaning may be acquired which is limited to a particular locality, and in such cases it will be protected in that locality. Sartor *v.* Schaden, 125 Iowa 696, 101 N. W. 511; Cohen *v.* Nagle, 190 Mass. 4, 76 N. E. 276, 2 L. R. A. N. S. 964; Regis *v.* Jaynes, 185 Mass. 458, 70 N. E. 480. It is immaterial that defendant's preparation is more widely known and popular than plaintiff's, as this bears merely on the extent of relief. A person is entitled to protection in building up his business. Regis *v.* Jaynes, 185 Mass. 458, 70 N. E. 480 [*citing* Shaver *v.* Shaver, 54 Iowa 208, 6 N. W. 188, 37 Am. Rep. 194]. *Compare* Kahn *v.* Gaines, 161 Fed. 495, 88 C. C. A. 437.

Limited to particular trade.— When a name denotes a special article to persons in a particular trade, but is used vaguely by persons not in the trade, it is not a misdescription to sell by that name, to persons not in their trade, articles popularly included under the name, but not strictly within the meaning of the word as used in the trade. Lee *v.* Haley, L. R. 5 Ch. 155, 39 L. J. Ch. 284, 22 L. T. Rep. N. S. 251, 18 Wkly. Rep. 242.

Prior use by third persons does not necessarily prevent a word from acquiring a secondary meaning which will support an injunction. Cohen *v.* Nagle, 190 Mass. 4, 76 N. E. 276, 2 L. R. A. N. S. 964.

Name of different obsolete article.—A name may acquire a secondary meaning and be protected, although it had previously been used in connection with a different article which, however, has become obsolete and unknown in the market. In such a case the name cannot be revived and applied to a new article in competition with the one indicated by the secondary meaning of the name. Keasbey *v.* Brooklyn Chemical Works, 142 N. Y. 467, 37 N. E. 476, 40 Am. St. Rep. 623 [*reversing* 21 N. Y. Suppl. 696]; Blackwell *v.* Dibrell, 3 Fed. Cas. No. 1,475, 3 Hughes 151, 14 Off. Gaz. 633. *Compare* G. & C. Merriam Co. *v.* Ogilvie, 159 Fed. 638, 88 C. C. A. 596, 16 L. R. A. N. S. 549. An abandoned trade-mark cannot be revived by the original user or his successors, after it has been appropriated by others, and acquired a different commercial meaning as indicating the latter's goods. Blackwell *v.* Dibrell, 3 Fed. Cas. No. 1,475, 3 Hughes, 151, 14 Off. Gaz. 633. See also *infra*, VIII, F, note 58.

98. Wotherspoon *v.* Currie, L. R. 5 H. L. 508, 42 L. J. Ch. 130, 27 L. T. Rep. N. S. 393; McAndrew *v.* Bassett, 4 De G. J. & S.

same sense that technical trade-marks are property.[99] This exclusive right is strictly limited to the secondary meaning of the word. Use by others may not be absolutely prevented. Merely the misleading manner of using it will be enjoined, leaving defendant at liberty to use it in all honest ways not deceptive.[1] It is the duty of the court to regulate the use which may be made of this class of names so as to preserve the rights of both parties with as little injury to either as is possible.[2] Practically the whole law of unfair competition is an application of these principles. Unfair competition by means of generic, descriptive, personal, and geographical names are common instances.[3]

3. Permissible Use of Secondary Meaning Names. The generic name of an article is *publici juris*, and all may use it as the name of that article,[4] although if it has acquired a secondary meaning, the subsequent trader may be required to accompany his use of the name with sufficient affirmative precautions to prevent deception of purchasers.[5] With this single exception, the rule is that a subsequent trader may not use even common terms or symbols, his own name, or a geographical or descriptive word, in such a manner as to cause his goods to be known in the market by the same name as that by which a prior trader's similar goods are already known and called for by the purchasing public. The trade-name for the goods of a particular trader may not be used by another as the trade-name for his similar rival goods.[6] The subsequent trader, however, may use such terms

380, 10 Jur. N. S. 550, 33 L. J. Ch. 561, 10 L. T. Rep. N. S. 442, 4 New Rep. 123, 12 Wkly. Rep. 777, 69 Eng. Ch. 293, 46 Eng. Reprint 965. *Compare* Boulnois *v.* Peake, 13 Ch. D. 513 note; Gillett *v.* Lumsden, 4 Ont. L. Rep. 300, 1 Ont. Wkly. Rep. 488.

99. See *supra*, I, C; also I, E, 2.

1. G. & C. Merriam Co. *v.* Ogilvie, 159 Fed. 638, 88 C. C. A. 596, 16 L. R. A. N. S. 549; Worcester Brewing Corp. *v.* Rueter, 157 Fed. 217, 84 C. C. A. 665; G. & C. Merriam Co. *v.* Straus, 136 Fed. 477; Singer Mfg. Co. *v.* Charlebois, 16 Quebec Super. Ct. 167.

Affirmative precautions against deception may be required. See *infra*, V, B, 7.

As to form of injunction in secondary meaning cases see *infra*, IX, E, 11, b, (II). See also V, B, 3.

2. Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 72 Conn. 646, 45 Atl. 957, 49 L. R. A. 147; Cohen *v.* Nagle, 190 Mass. 4, 76 N. E. 276, 2 L. R. A. N. S. 964.

3. See *infra*, V, C.

4. See *supra*, III, B, 19.

For specific instances see *infra*, **V, C.**

5. See *infra*, V, B, 7.

6. *Connecticut.*— Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 72 Conn. 646, 45 Atl. 957, 49 L. R. A. 147.

Massachusetts.— Cohen *v.* Nagle, 190 Mass. 4, 76 N. E. 276, 2 L. R. A. N. S. 964 ("Keystone" as applied to cigars); Russia Cement Co. *v.* Le Page, 147 Mass. 206, 17 N. E. 304, 9 Am. St. Rep. 685 ("Le Page's Glue").

New Jersey.— Johnson *v.* Seabury, 69 N. J. Eq. 696, 61 Atl. 5, "Red Cross Cotton."

New York.— Chas. S. Higgins Co. *v.* Higgins Soap Co., 144 N. Y. 462, 39 N. E. 490, 43 Am. St. Rep. 769, 27 L. R. A. 42.

Texas.— Western Grocer Co. *v.* Caffarelli, (Civ. App. 1908) 108 S. W. 413 [*reversed* on the facts in 102 Tex. 104, 127 S. W. 1018].

United States.— McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828 ("McLean's Liver Pills"); Bates Numbering Mach. Co. *v.* Bates Mfg. Co., 178 Fed. 681, 102 C. C. A. 181 [*affirming* 172 Fed. 892] ("Bates Numbering Machine"); Rushmore *v.* Saxon, 158 Fed. 499 [*modified* in 170 Fed. 1021, 95 C. C. A. 671]; George Frost Co. *v.* Estes, 156 Fed. 677; Selchow *v.* Chaffee, etc., Mfg. Co., 132 Fed. 996 ("Parcheesi"); Van Houten *v.* Hooton Cocoa, etc., Co., 130 Fed. 600 ("Van Houten's Cocoa"); Baker *v.* Slack, 130 Fed. 514, 65 C. C. A. 138 [*approved* in Herring-Hall-Marvin Safe Co. *v.* Hall's Safe Co., 208 U. S. 554, 559, 28 S. Ct. 350, 52 L. ed. 616] ("Baker's Chocolate"); Heublein *v.* Adams, 125 Fed. 782 ("Club Cocktails" infringed by "Boston Club Cocktails"); Royal Baking Powder Co. *v.* Royal, 122 Fed. 337, 58 C. C. A. 499 ("Royal Baking Powder"); Bissell Chilled Plow Works *v.* T. M. Bissell Plow Co., 121 Fed. 357 ("Bissell Plow"); Lever Bros. Boston Works *v.* Smith, 112 Fed. 998 ("Welcome Soap"); International Silver Co. *v.* Simeon L. & George H. Rogers, 110 Fed. 955 ("Rogers Silverware"); Shaver *v.* Heller, etc., Co., 108 Fed. 821, 48 C. C. A. 48, 65 L. R. A. 878 ("American Ball Blue" and "American Wash Blue"); Hansen *v.* Siegel-Cooper Co., 106 Fed. 691 ("Junket Tablets"); Stuart *v.* F. G. Stewart Co., 91 Fed. 243, 33 C. C. A. 480 [*reversing* 85 Fed. 778] ("Stewart's Dyspepsia Tablets"); Baker *v.* Baker, 87 Fed. 209; Johnson *v.* Bauer, 82 Fed. 662, 27 C. C. A. 374 [*reversing* 79 Fed. 954] ("Red Cross Plasters"); Morgan Envelope Co. *v.* Walton, 82 Fed. 469 ("Columbia Paper"); Baker *v.* Sanders, 80 Fed. 889, 26 C. C. A. 220 ("Baker's Chocolate" and "Baker's Cocoa"); Clark Thread Co. *v.* Armitage, 74 Fed. 936, 21 C. C. A. 178 [*affirming* 67 Fed. 896] ("Clark's Thread"); Meyer *v.* Dr. B. L. Bull Vegetable Medicine Co., 58 Fed. 884, 7 C. C. A. 558 ("Bull's Cough Syrup"); Hutchinson *v.* Covert, 51 Fed. 832 ("Star Goods"); Hutchinson *v.* Blumberg, 51 Fed. 829 ("Star

descriptively to tell the truth about his goods, describing them, stating where and by whom they were manufactured, and other like matters, because such terms

Goods"); Carroll *v.* Ertheiler, 1 Fed. 688 ("Lone Jack").

England.—Montgomery *v.* Thompson, [1891] A. C. 217, 55 J. P. 756, 60 L. J. Ch. 757, 64 L. T. Rep. N. S. 748 ("Stone Ale"); Johnston *v.* Orr Ewing, 7 App. Cas. 219, 51 L. J. Ch. 797, 46 L. T. Rep. N. S. 216, 30 Wkly. Rep. 417; Singer Mach. Manufacturers *v.* Wilson, 3 App. Cas. 376, 47 L. J. Ch. 481, 38 L. T. Rep. N. S. 303, 26 Wkly. Rep. 664 ("Singer Sewing Machine"); Seixo *v.* Provezende, L. R. 1 Ch. 192, 12 Jur. N. S. 215, 14 L. T. Rep. N. S. 314, 14 Wkly. Rep. 357; Thompson *v.* Montgomery, 41 Ch. D. 35, 58 L. J. Ch. 374, 60 L. T. Rep. N. S. 766, 37 Wkly. Rep. 637 ("Stone Ale"); Massam *v.* Thorley's Cattle Food Co., 14 Ch. D. 748, 42 L. T. Rep. N. S. 851, 28 Wkly. Rep. 966 [*reversing* 6 Ch. D. 574, 46 L. J. Ch. 707, 36 L. T. Rep. N. S. 848]; Mack *v.* Petter, L. R. 14 Eq. 431, 41 L. J. Ch. 781, 20 Wkly. Rep. 964 ("Birthday Text Book"); Shrimpton *v.* Laight, 18 Beav. 164, 52 Eng. Reprint 65 ("Glenfield Starch"); Braham *v.* Bustard, 1 Hem. & M. 447, 9 L. T. Rep. N. S. 199, 2 New Rep. 572, 11 Wkly. Rep. 1061, 71 Eng. Reprint 195; Ingram *v.* Stiff, 5 Jur. N. S. 947 ("London Journal"); Schweitzer *v.* Atkins, 37 L. J. Ch. 847, 19 L. T. Rep. N. S. 6, 16 Wkly. Rep. 1080; Boord *v.* Huddart, 89 L. T. Rep. N. S. 718, 20 T. L. R. 142; Valentine Meat Juice Co. *v.* Valentine Extract Co., 83 L. T. Rep. N. S. 259, 16 T. L. R. 522 ("Valentine Meat Extract"); Apollinaris Co. *v.* Norrish, 33 L. T. Rep. N. S. 242 ("Apollinaris Water").

Canada.— Barsalou *v.* Darling, 9 Can. Sup. Ct. 677 (horse's head and unicorn head, "Horse's Head Soap"); Gillett *v.* Lumsden, 4 Ont. L. Rep. 300, 1 Ont. Wkly. Rep. 488 ("Cream Yeast"); Carey *v.* Goss, 11 Ont. 619.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 82.

This rule has been most clearly stated in Bissell Chilled Plow Works *v.* T. M. Bissell Plow Co., 121 Fed. 357, 366, per Cochran, J., as follows: "In determining whether what he is doing or has done in either of these ways amounts to such a representation, and therefore constitutes unfair competition, the test is whether it is calculated to deceive intending purchasers of such goods — that they are the goods of the first comer. It is not necessary that it should be calculated to so deceive first or intelligent purchasers. It is sufficient that it is calculated to deceive ultimate or ordinary purchasers. And ordinary purchasers include incautious, unwary, and ignorant purchasers. The law has gone further than this, and prescribed a rule by which it can be determined whether what is done by the rival trader is calculated so to deceive such purchasers. That rule is that, if what is done by such trader causes his goods to be known in the trade by the same name by which such other goods are already known therein, it is calculated to deceive such purchasers." In Baker *v.* Baker, 87 Fed. 209, 210, the court said: "The well-known short name by which the public styles the article of the complainant is 'Baker's Chocolate,' and thus the public regards what is presented under that name as the complainant's article, and associates the name with a particular factory of long existence and permanence. The defendant has a right to manufacture chocolate, and to acquire his own reputation under his own name, but not to use the name so as to deceive the purchaser. When he presents his article as W. P. Baker's Chocolate, he not only improperly works mischief to the pre-existing manufacturer, but he wrongs the public. . . . So long as the title contains the words which in trade and among consumers have come to be the every-day designation of complainant's goods, the chocolate so labeled will naturally be assumed to be complainant's, unless special care be taken to indicate that it is not." Baker *v.* Sanders, 80 Fed. 889, 26 C. C. A. 220. A man is not entitled to call his goods by a name which is an accurate and true description of such goods, when the name is one by which the goods of another manufacturer have already been described and are known to the trade, and the effect of his doing so will be to mislead purchasers into the belief that they are buying the goods of that other. American Tobacco Co. *v.* Polacsek, 170 Fed. 117; Reddaway *v.* Banham, [1896] A. C. 199, 65 L. J. Q. B. 381, 74 L. T. Rep. N. S. 289, 44 Wkly. Rep. 638 [*reversing* [1895] 1 Q. B. 286, 64 L. J. Q. B. 321, 72 L. T. Rep. N. S. 73, 43 Wkly. Rep. 294 ("Camel's Hair Belting"); Levy *v.* Walker, 10 Ch. D. 436, 48 L. J. Ch. 273, 39 L. T. Rep. N. S. 654, 27 Wkly. Rep. 370.

Name conferred by public.— The name which, by the act of the public, has become the designation of a trader's goods, and by which they are called for in the market, will be protected. Johnson *v.* Seabury, 69 N. J. Eq. 696, 61 Atl. 5 [*citing* Levy *v.* Waitt, 61 Fed. 1008, 10 C. C. A. 227, 25 L. R. A. 190; Siegert *v.* Findlater, 7 Ch. D. 801, 47 L. J. Ch. 233, 38 L. T. Rep. N. S. 349, 26 Wkly. Rep. 459].

Marks conferring same name.—Where goods of a trader have acquired a specific name from the appearance of a trade-mark, no other trader will be allowed to use a mark which, although different, would cause his goods to be known by the same name. American Tin Plate Co. *v.* Licking Roller Mill Co., 158 Fed. 690; Johnson *v.* Bauer, 82 Fed. 662, 27 C. C. A. 374; Seixo *v.* Provezende, L. R. 1 Ch. 192, 12 Jur. N. S. 215, 14 L. T. Rep. N. S. 314, 14 Wkly. Rep. 357; Edelsten *v.* Edelsten, 1 De G. J. & S. 185, 9 Jur. N. S. 479, 7 L. T. Rep. N. S. 768, 11 Wkly. Rep. 328, 66 Eng. Ch. 142, 46 Eng. Reprint 72; Read *v.* Richard-

are *publici juris* in their primary sense, and cannot be exclusively appropriated by any one.[7] But use as a name or title is not a permissible use, because, by reason of the acquired secondary meaning, such a use carries with it a false representation that the goods of that name are those of the prior trader.[8] This rule is, perhaps, not yet fully recognized by all the courts but it is a reasonable and just rule and in accord with the principle that any unnecessary or untruthful use of words or symbols causing confusion of goods will be restrained as unfair competition.[9] The range of available names is so large that there is no need of any one giving his goods the same name as that of rival goods, and the right to use all words or names in an honestly descriptive manner preserves the rights of all parties. There is an absurdity involved in permitting one to unnecessarily use deceptive features and then requiring him to neutralize them by other cautionary features which may or may not be effective. The only real precaution is the omission of the unnecessary and deceptive name.[10] The use of a name which has already become identified with rival goods is necessarily deceptive.[11]

4. Actual or Probable Deception of Customers. In order to make out a case of unfair competition, it is not necessary to show that any person has been actually deceived by defendant's conduct and led to purchase his goods in the belief that they are the goods of plaintiff or to deal with defendant thinking he was dealing with plaintiff. It is sufficient to show that such deception will be the natural and probable result of defendant's acts.[12] But either actual or probable deception

son, 45 L. T. Rep. N. S. 54. See also *supra*, IV, J.

For further illustrations of the application of this rule see *infra*, V, C.

7. Shaver *v.* Heller, etc., Co., 108 Fed. 821, 48 C. C. A. 48, 65 L. R. A. 878; Hansen *v.* Siegel-Cooper Co., 106 Fed. 691; Williams *v.* Mitchell, 106 Fed. 168, 45 C. C. A. 265; Baker *v.* Baker, 87 Fed. 209; Baker *v.* Sanders, 80 Fed. 889, 26 C. C. A. 220; Meyer *v.* Dr. B. L. Bull Vegetable Medicine Co., 58 Fed. 884, 7 C. C. A. 558; Montgomery *v.* Thompson, [1891] A. C. 217, 55 J. P. 756, 60 L. J. Ch. 757, 64 L. T. Rep. N. S. 748.

8. Shaver *v.* Heller, etc., Co., 108 Fed. 821, 48 C. C. A. 48, 65 L. R. A. 878; Williams *v.* Mitchell, 106 Fed. 168, 45 C. C. A. 265; Meyer *v.* Dr. B. L. Bull Vegetable Medicine Co., 58 Fed. 884, 7 C. C. A. 558; Montgomery *v.* Thompson, [1891] A. C. 217, 55 J. P. 756, 60 L. J. Ch. 757, 64 L. T. Rep. N. S. 748. In Williams *v.* Mitchell, 106 Fed. 168, 171, 45 C. C. A. 265, complainant's game-board became known by the designation "Carrom Board." The circuit court of appeals said: "The defendants may not rightfully apply that name to their game as a designation or name of the game, although they have a right, as the court below decreed, to use the word in descriptive portions of advertisements so long as they use them in a purely and properly descriptive sense."

9. See *infra*, V, B, 8.

10. See *infra*, V, B, 7.

New name for new business.— "In establishing a new business the defendant had no occasion to adopt a name which would be likely to mislead the public and induce them to believe that the business which he was establishing was conducted by the plaintiffs. It was easy to choose a satisfactory name unlike the plaintiffs', and to conduct the business in such a way as to leave the plaintiffs the whole benefit of such reputation as they had gained in the community." Samuels *v.* Spitzer, 177 Mass. 226, 227, 58 N. E. 693.

11. *California.*— Pierce *v.* Guittard, 68 Cal. 68, 8 Pac. 645, 58 Am. Rep. 1.

Iowa.— Dyment *v.* Lewis, 144 Iowa 509, 123 N. W. 244, 26 L. R. A. N. S. 73.

New York.— Waterman *v.* Shipman, 130 N. Y. 301, 29 N. E. 111 [*reversing* 8 N. Y. Suppl. 814].

Washington.— Martell *v.* St. Francis Hotel Co., 51 Wash. 375, 98 Pac. 1116.

Wisconsin.— Avenarius *v.* Kornely, 139 Wis. 247, 121 N. W. 336.

United States.— Jewish Colonization Assoc. *v.* Solomon, 154 Fed. 157.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 84.

12. *Connecticut.*— Bradley *v.* Norton, 33 Conn. 157, 87 Am. Dec. 200.

Georgia.— Foster *v.* Blood Balm Co., 77 Ga. 216, 3 S. E. 284.

Illinois.— Eckhart *v.* Consolidated Milling Co., 72 Ill. App. 70.

Iowa.— Shaver *v.* Shaver, 54 Iowa 208, 6 N. W. 188, 37 Am. Rep. 194. "The wrongful use of a trade-name or device may be enjoined, without proof that any one has been actually deceived." Dyment *v.* Lewis, 144 Iowa 509, 123 N. W. 244, 26 L. R. A. N. S. 73; Atlas Assur. Co. *v.* Atlas Ins. Co., 138 Iowa 228, 233, 112 N. W. 232, 114 N. W. 609, 128 Am. St. Rep. 189, 15 L. R. A. N. S. 625.

Kentucky.— Rains *v.* White, 107 Ky. 114, 52 S. W. 970, 21 Ky. L. Rep. 742.

Maine.— W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 100 Me. 461, 62 Atl. 499, 4 L. R. A. N. S. 960.

Massachusetts.— Samuels *v.* Spitzer, 177 Mass. 226, 58 N. E. 693.

Michigan.— Penberthy Injector Co. *v.* Lee, 120 Mich. 174, 78 N. W. 1074.

and confusion must be shown, for if there is no probability of deception, there is

Missouri.— Liggett, etc., Tobacco Co. *v.* Sam Reid Tobacco Co., 104 Mo. 53, 15 S. W. 843, 24 Am. St. Rep. 313; Filley *v.* Fassett, 44 Mo. 168, 100 Am. Dec. 275; Williamson Corset, etc., Co. *v.* Western Corset Co., 70 Mo. App. 424; Drummond Tobacco Co. *v.* Addison Tinsley Tobacco Co., 52 Mo. App. 10; Sanders *v.* Jacob, 20 Mo. App. 96.

New Jersey.— Stirling Silk Mfg. Co. *v.* Sterling Silk Co., 59 N. J. Eq. 394, 46 Atl. 199; Wirtz *v.* Eagle Bottling Co., 50 N. J. Eq. 164, 24 Atl. 658.

New York.— Vulcan *v.* Myers, 139 N. Y. 364, 34 N. E. 904; Westcott Chuck Co. *v.* Oneida Nat. Chuck Co., 122 N. Y. App. Div. 260, 106 N. Y. Suppl. 1016; Dutton *v.* Cupples, 117 N. Y. App. Div. 172, 102 N. Y. Suppl. 309; Falk *v.* American West Indies Trading Co., 71 N. Y. App. Div. 320, 75 N. Y. Suppl. 964; Barrett Chemical Co. *v.* Stern, 56 N. Y. App. Div. 143, 67 N. Y. Suppl. 595; McLoughlin *v.* Singer, 33 N. Y. App. Div. 185, 53 N. Y. Suppl. 342; Commercial Advertiser Assoc. *v.* Haynes, 26 N. Y. App. Div. 279, 49 N. Y. Suppl. 938; Tuerk Hydraulic Power Co. *v.* Tuerk, 92 Hun 65, 36 N. Y. Suppl. 384; Vulcan *v.* Myers, 58 Hun 161, 11 N. Y. Suppl. 663; Potter *v.* McPherson, 21 Hun 559; Brooklyn White Lead Co. *v.* Masury, 25 Barb. 416; Thornton *v.* Crowley, 47 N. Y. Super. Ct. 527 [*affirmed* in 89 N. Y. 644]; Amoskeag Mfg. Co. *v.* Spear, 2 Sandf. 599; Bolen, etc., Mfg. Co. *v.* Jonasch, 29 Misc. 99, 60 N. Y. Suppl. 555; Roy Watch-Case Co. *v.* Camm-Roy Watch-Case Co., 28 Misc. 45, 58 N. Y. Suppl. 979; Cohn *v.* Reynolds, 26 Misc. 473, 57 N. Y. Suppl. 469 [*affirmed* in 40 N. Y. App. Div. 619, 58 N. Y. Suppl. 1138]; Godillot *v.* Hazard, 49 How. Pr. 5 [*affirmed* in 81 N. Y. 263].

Pennsylvania.— Shaw *v.* Pilling, 175 Pa. St. 78, 34 Atl. 446; Hires *v.* Hires, 6 Pa. Dist. 285; Shepp *v.* Jones, 3 Pa. Dist. 539; Colton *v.* Thomas, 2 Brewst. 308, 7 Phila. 257; Clark, etc., Co. *v.* Scott, 4 Lack. Leg. N. 159; Dreydoppel *v.* Young, 14 Phila. 226; Day *v.* Walls, 12 Phila. 274.

Rhode Island.— Armington *v.* Palmer, 21 R. I. 109, 42 Atl. 308, 79 Am. St. Rep. 786, 43 L. R. A. 95.

Wisconsin.— Manitowoc Malting Co. *v.* Milwaukee Malting Co., 119 Wis. 543, 97 N. W. 389; Tomah Bank *v.* Warren, 94 Wis. 151, 68 N. W. 549; Listman Mill Co. *v.* William Listman Milling Co., 88 Wis. 334, 60 N. W. 261, 43 Am. St. Rep. 907.

United States.— Amoskeag Mfg. Co. *v.* Trainer, 101 U. S. 51, 63, 25 L. ed. 993 (per Clifford, J.); McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828; Florence Mfg. Co. *v.* Dowd, 178 Fed. 73, 101 C. C. A. 565 [*reversing* 171 Fed. 122]; National Water Co. *v.* O'Connell, 159 Fed. 1001 [*affirming* 161 Fed. 545, 88 C. C. A. 487]; Bickmore Gall Cure Co. *v.* Karns, 134 Fed. 833, 67 C. C. A. 439 [*reversing* 126 Fed. 573]; Enterprise Mfg. Co. *v.* Landers, 131 Fed. 240, 65 C. C. A. 587 [*affirming* 124 Fed. 923]; Gannett *v.* Ruppert, 127 Fed. 962, 62 C. C. A. 594 [*reversing* 119 Fed. 221]; Allen B. Wrisley Co. *v.* Iowa Soap Co., 122 Fed. 796, 59 C. C. A. 54; Bauer *v.* La Société, etc., 120 Fed. 74, 56 C. C. A. 480; Samuel *v.* Hostetter Co., 118 Fed. 257, 55 C. C. A. 111; Van Hoboken *v.* Mohns, 112 Fed. 528; Kentucky Distilleries, etc., Co. *v.* Wathen, 110 Fed. 641; Lalance, etc., Mfg. Co. *v.* National Enameling, etc., Co., 109 Fed. 317; Hansen *v.* Siegel-Cooper Co., 106 Fed. 690; Fuller *v.* Huff, 104 Fed. 141, 43 C. C. A. 453, 51 L. R. A. 332; Little *v.* Kellam, 100 Fed. 353; Thomas G. Plant Co. *v.* May Co., 100 Fed. 72; Collinsplatt *v.* Finlayson, 88 Fed. 693; Centaur Co. *v.* Killenberger, 87 Fed. 725; N. K. Fairbank Co. *v.* R. W. Bell Mfg. Co., 77 Fed. 869, 23 C. C. A. 554; Cuervo *v.* Owl Cigar Co., 68 Fed. 541; Cuervo *v.* Landauer, 63 Fed. 1003; Von Mumm *v.* Frast, 56 Fed. 830; Jennings *v.* Johnson, 37 Fed. 364; Celluloid Mfg. Co. *v.* Cellonite Mfg. Co., 32 Fed. 94; Royal Baking Powder Co. *v.* Davis, 26 Fed. 293; Southern White Lead Co. *v.* Cary, 25 Fed. 125; Humphrey's Specific Homeopathic Medicine Co. *v.* Wenz, 14 Fed. 250; Walton *v.* Crowley, 29 Fed. Cas. No. 17,133, 3 Blatchf. 440; Rodgers *v.* Philp, 1 Off. Gaz. 29.

England.— Payton *v.* Snelling, [1901] A. C. 308, 70 L. J. Ch. 644, 85 L. T. Rep. N. S. 287; Johnston *v.* Orr Ewing, 7 App. Cas. 219, 51 L. J. Ch. 797, 46 L. T. Rep. N. S. 216, 30 Wkly. Rep. 417; Wotherspoon *v.* Currie, L. R. 5 H. L. 508, 42 L. J. Ch. 130, 27 L. T. Rep. N. S. 393 [*reversing* 23 L. T. Rep. N. S. 443, 18 Wkly. Rep. 942, 22 L. T. Rep. N. S. 260, 18 Wkly. Rep. 562]; Reddaway *v.* Bentham Hemp-Spinning Co., [1892] 2 Q. B. 639, 67 L. T. Rep. N. S. 301; Manchester Brewery Co. *v.* North Cheshire, etc., Brewery Co., [1898] 1 Ch. 539, 67 L. J. Ch. 351, 78 L. T. Rep. N. S. 537, 14 T. L. R. 350, 46 Wkly. Rep. 515; Jay *v.* Ladler, 40 Ch. D. 649, 60 L. T. Rep. N. S. 27, 37 Wkly. Rep. 505; Lever *v.* Goodwin, 36 Ch. D. 1, 57 L. T. Rep. N. S. 583, 36 Wkly. Rep. 177; Hendriks *v.* Montagu, 17 Ch. D. 638, 50 L. J. Ch. 456, 44 L. T. Rep. N. S. 879, 30 Wkly. Rep. 168; Cope *v.* Evans, L. R. 18 Eq. 138, 30 L. T. Rep. N. S. 292, 22 Wkly. Rep. 450; Cocks *v.* Chandler, L. R. 11 Eq. 446, 40 L. J. Ch. 575, 24 L. T. Rep. N. S. 379, 19 Wkly. Rep. 593; Blofeld *v.* Payne, 4 B. & Ad. 410, 2 L. J. K. B. 68, 1 N. & M. 353, 24 E. C. L. 183, 110 Eng. Reprint 509; Rodgers *v.* Nowill, 5 C. B. 109, 57 E. C. L. 109, 6 Hare 325, 11 Jur. 1039, 17 L. J. C. P. 52, 31 Eng. Ch. 325, 67 Eng. Reprint 1191; Braham *v.* Bustard, 1 Hem. & M. 447, 9 L. T. Rep. N. S. 199, 2 New Rep. 572, 11 Wkly. Rep. 1061, 71 Eng. Reprint 195; Welch *v.* Knott, 4 Jur. N. S. 330, 70 Eng. Reprint 310, 4 Kay & J. 747; Walter *v.* Emmott, 54 L. J. Ch. 1059, 53 L. T. Rep. N. S. 437; Accident Ins. Co. *v.* Accident, etc., Ins. Corp., 54 L. J. Ch. 104, 51 L. T. Rep. N. S. 597; Hookham *v.* Pottage, 26 L. T. Rep. N. S. 755, 20 Wkly. Rep. 720 [*affirmed* in L. R. 8 Ch. 91, 27 L. T. Rep. N. S. 595, 21 Wkly. Rep. 47].

no unfair competition.[13] In close cases, where the deceptive tendency is not clear, equity will withhold its hand until actual deception has resulted.[14] Mere possibility of deception is not enough.[15] Actual instances of deception, however, afford the strongest possible proof of the deceptive tendency of defendant's acts, and the presence or absence of such proof is often referred to as a reason for granting or withholding relief.[16] As in the case of infringement by imitation of another's

Canada.— Whitney *v.* Hickling, 5 Grant Ch. (U. C.) 605.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 86.

"It is the liability to deception which the remedy may be invoked to prevent. It is sufficient if injury to the plaintiff's business is threatened or imminent to authorize the court to intervene to prevent its occurrence." Vulcan *v.* Myers, 139 N. Y. 364, 367, 34 N. E. 904.

13. *California.*— Castle *v.* Siegfried, 103 Cal. 71, 37 Pac. 210.

Georgia.— Foster *v.* Blood Balm Co., 77 Ga. 216, 3 S. E. 284.

Illinois.— Hazelton Boiler Co. *v.* Hazelton Tripod Boiler Co., 142 Ill. 494, 30 N. E. 339 [*affirming* 40 Ill. App. 430].

Iowa.— Sartor *v.* Schaden, 125 Iowa 696, 101 N. W. 511.

Michigan.— Warren Bros. Co. *v.* Barber Asphalt Paving Co., 145 Mich. 79, 108 N. W. 652, 12 L. R. A. N. S. 339.

New Jersey.— Smith *v.* Brand, 67 N. J. Eq. 529, 58 Atl. 1029.

New York.— Hygeia Water Ice Co. *v.* New York Hygeia Ice Co., 140 N. Y. 94, 35 N. E. 417; Westcott Chuck Co. *v.* Oneida Nat. Chuck Co., 122 N. Y. App. Div. 260, 106 N. Y. Suppl. 1016; Cooke, etc., Co. *v.* Miller, 53 N. Y. App. Div. 120, 65 N. Y. Suppl. 730, 8 N. Y. Annot. Cas. 58 [*affirmed* in 169 N. Y. 475, 62 N. E. 582]; T. B. Dunn Co. *v.* Trix Mfg. Co., 50 N. Y. App. Div. 75, 63 N. Y. Suppl. 333; Commercial Advertiser Assoc. *v.* Haynes, 26 N. Y. App. Div. 279, 49 N. Y. Suppl. 938; Day *v.* Webster, 23 N. Y. App. Div. 601, 49 N. Y. Suppl. 314; Motor Boat Pub. Co. *v.* Motor Boating Co., 57 Misc. 108, 107 N. Y. Suppl. 468; U. S. Frame, etc., Co. *v.* Horowitz, 51 Misc. 101, 100 N. Y. Suppl. 705.

Pennsylvania.— White *v.* Trowbridge, 216 Pa. St. 11, 64 Atl. 862.

Tennessee.— Fite *v.* Dorman, (1900) 57 S. W. 129.

Utah.— Rocky Mountain Bell Tel. Co. *v.* Utah Independent Tel. Co., 31 Utah 377, 88 Pac. 26, 8 L. R. A. N. S. 1153.

Wisconsin.— Fish Bros. Wagon Co. *v.* La Belle Wagon Works, 82 Wis. 546, 52 N. W. 595, 33 Am. St. Rep. 72, 16 L. R. A. 453; Gessler *v.* Grieb, 80 Wis. 21, 48 N. W. 1098, 27 Am. St. Rep. 20. But see Manitowoc Malting Co. *v.* Milwaukee Malting Co., 119 Wis. 543, 97 N. W. 389.

United States.— Moore *v.* Auwell, 178 Fed. 543, 102 C. C. A. 53 [*affirming* 172 Fed. 508]; Newcomer *v.* Scriven Co., 168 Fed. 621, 94 C. C. A. 77; American Wine Co. *v.* Kohlman, 158 Fed. 830; American Brewing Co. *v.* Bienville Brewery, 153 Fed. 615; Germer Stove Co. *v.* Art Stove Co., 150 Fed. 141, 80 C. C. A. 9; Virginia Hot Springs Co. *v.* Hegeman, 144 Fed. 1023, 73 C. C. A. 612 [*affirming* 138 Fed. 855]; Lamont *v.* Hershey, 140 Fed. 763; Capewell Horse Nail Co. *v.* Putnam Nail Co., 140 Fed. 670; Siegert *v.* Gandolfi, 139 Fed. 917 [*reversed* on other grounds in 149 Fed. 100, 79 C. C. A. 142]; Bulte *v.* Igleheart, 137 Fed. 492, 70 C. C. A. 76; Rehbein *v.* Weaver, 133 Fed. 607; G. W. Cole Co. *v.* American Cement, etc., Co., 130 Fed. 703, 65 C. C. A. 105; Allen B. Wrisley Co. *v.* Iowa Soap Co., 122 Fed. 796, 59 C. C. A. 54; Sterling Remedy Co. *v.* Eureka Chemical, etc., Co., 80 Fed. 105, 25 C. C. A. 314.

England.— Turton *v.* Turton, 42 Ch. D. 128, 58 L. J. Ch. 677, 61 L. T. Rep. N. S. 571, 38 Wkly. Rep. 22; Civil Service Supply Assoc. *v.* Dean, 13 Ch. D. 512; Woollam *v.* Ratcliff, 1 Hem. & M. 259, 71 Eng. Reprint 113; London, etc., Law Assur. Soc. *v.* London, etc., Joint-Stock L. Ins. Co., 11 Jur. 938; Lever *v.* Bedingfield, 80 L. T. Rep. N. S. 100 [*distinguishing* Reddaway *v.* Banham, [1896] A. C. 199, 65 L. J. Q. B. 381, 74 L. T. Rep. N. S. 289, 44 Wkly. Rep. 638]; Cowen *v.* Hulton, 46 L. T. Rep. N. S. 897; Williams *v.* Osborne, 13 L. T. Rep. N. S. 498; General Reversionary Inv. Co. *v.* General Reversionary Co., 1 Meg. 65; Browne *v.* Freeman, 4 New Rep. 476, 12 Wkly. Rep. 305.

Canada.— Provident Chemical Works *v.* Canada Chemical Mfg. Co., 2 Ont. L. Rep. 182. See Gillett *v.* Lumsden, 6 Ont. L. Rep. 66 [*affirmed* in 8 Ont. L. Rep. 168]; Laing Packing, etc., Co. *v.* Laing, 25 Quebec Super. Ct. 344; Babst Brewing Co. *v.* Ekers, 21 Quebec Super. Ct. 545.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 86.

14. American Brewing Co. *v.* Bienville Brewery, 153 Fed. 615; Knickerbocker Chocolate Co. *v.* Griffing, 144 Fed. 316.

15. Brown *v.* Seidel, 153 Pa. St. 60, 25 Atl. 1064; Heinz *v.* Lutz, 146 Pa. St. 592, 23 Atl. 314; Regensburg *v.* Juan F. Portuondo Cigar Mfg. Co., 136 Fed. 866.

16. *Massachusetts.*— Viano *v.* Baccigalupo, 183 Mass. 160, 67 N. E. 641.

Missouri.— Drummond Tobacco Co. *v.* Addison Tinsley Tobacco Co., 52 Mo. App. 10; Sanders *v.* Jacob, 20 Mo. App. 96.

New York.— Hildreth *v.* McCaul, 70 N. Y. App. Div. 162, 74 N. Y. Suppl. 1072; Commercial Advertiser Assoc. *v.* Haynes, 26 N. Y. App. Div. 279, 49 N. Y. Suppl. 938; De Long *v.* De Long Hook, etc., Co., 89 Hun 399, 35 N. Y. Suppl. 509; Babbitt *v.* Brown, 68 Hun 515, 23 N. Y. Suppl. 25; Brown *v.* Mercer, 37 N. Y. Super. Ct. 265; American Novelty, etc.,

trade-mark, the true test of unfair competition is whether the acts of defendant are such as are calculated to deceive the ordinary buyer making his purchases under the ordinary conditions which prevail in the particular trade to which the controversy relates.[17] This has been said to include the incautious, unwary, or

Co. *v.* Manufacturing Electrical Novelty Co., 36 Misc. 450, 73 N. Y. Suppl. 755.

Pennsylvania.— Arthur *v.* Howard, 19 Pa. Co. Ct. 81.

Wisconsin.— Oppermann *v.* Waterman, 94 Wis. 583, 69 N. W. 569.

United States.— Holeproof Hosiery Co. *v.* Fitts, 167 Fed. 378; Holeproof Hosiery Co. *v.* Wallach, 167 Fed. 373 [*affirmed* in 172 Fed. 859, 97 C. C. A. 263]; Bulte *v.* Igleheart, 137 Fed. 492, 70 C. C. A. 76; National Biscuit Co. *v.* Swick, 121 Fed. 1007; Bissell Chilled Plow Works *v.* T. M. Bissell Plow Co., 121 Fed. 357; Stevens Linen Works *v.* Don, 121 Fed. 171 [*affirmed* in 127 Fed. 950, 62 C. C. A. 582]; Kipling *v.* Putnam, 120 Fed. 631, 57 C. C. A. 295, 65 L. R. A. 873; Postum Cereal Co. *v.* American Health Food Co., 119 Fed. 848, 56 C. C. A. 360 [*affirming* 109 Fed. 898]; Gannett *v.* Ruppert, 119 Fed. 221 [*reversed* on other grounds in 127 Fed. 902, 62 C. C. A. 594]; Daviess County Distilling Co. *v.* Martinoni, 117 Fed. 186; Peck *v.* Peck Bros. Co., 113 Fed. 291, 51 C. C. A. 251, 62 L. R. A. 81; Halstead *v.* Houston, 111 Fed. 376; Pfeiffer *v.* Wilde, 107 Fed. 456, 46 C. C. A. 415; N. K. Fairbank Co. *v.* Luckel, etc., Soap Co., 102 Fed. 327, 42 C. C. A. 376; Continental Ins. Co. *v.* Continental Fire Assoc., 96 Fed. 846; Kroppf *v.* Furst, 94 Fed. 150; Centaur Co. *v.* Marshall, 92 Fed. 605; Van Camp Packing Co. *v.* Cruikshanks Bros. Co., 90 Fed. 814, 33 C. C. A. 280; Kann *v.* Diamond Steel Co., 89 Fed. 706, 32 C. C. A. 324; Investor Pub. Co. *v.* Dobinson, 82 Fed. 56; Putnam Nail Co. *v.* Ausable Horsenail Co., 53 Fed. 390; Cleveland Stone Co. *v.* Wallace, 52 Fed. 431; Jennings *v.* Johnson, 37 Fed. 364. See Osgood *v.* Allen, 18 Fed. Cas. No. 10,603, Holmes 185, 3 Off. Gaz. 124. But see P. Lorillard Co. *v.* Peper, 86 Fed. 956, 30 C. C. A. 496.

England.— Lee *v.* Haley, L. R. 5 Ch. 155, 39 L. J. Ch. 284, 22 L. T. Rep. N. S. 251, 18 Wkly. Rep. 242; Borthwick *v.* Evening Post, 37 Ch. D. 449, 57 L. J. Ch. 406, 58 L. T. Rep. N. S. 252, 36 Wkly. Rep. 434; Boulnois *v.* Peake, 13 Ch. D. 513 note; Lever *v.* Bedingfield, 80 L. T. Rep. N. S. 100; Cowen *v.* Hulton, 46 L. T. Rep. N. S. 897; Stevens *v.* Paine, 18 L. T. Rep. N. S. 600.

Canada.— Pabst Brewing Co. *v.* Ekers, 21 Quebec Super. Ct. 545.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 86.

"If one case of actual deception is proved, there is no more to be said on either side. The case is at an end. Argument really only takes place where there is no proved case of actual deception." Liebig Extract of Meat Co. *v.* Chemists Co-operative Soc., 13 Rep. Pat. Cas. 635 [*affirmed* in 13 Rep Pat. Cas. 736]. See also Enterprise Mfg. Co. *v.* Landers, 124 Fed. 923, 927 [*affirmed* in 131 Fed. 240], wherein a customer had sent defendant's article to plaintiff for repair, and Judge Platt said: "Such a demonstration of fact is worth any amount of hypothesis." The fact that one person has been deceived is not conclusive as to the deceptive tendency. Civil Service Supply Assoc. *v.* Dean, 13 Ch. D. 512.

17. *California.*— Schmidt *v.* Brieg, 100 Cal. 672, 35 Pac. 623, 22 L. R. A. 790; Pierce *v.* Guittard, 68 Cal. 68, 8 Pac. 645, 58 Am. Rep. 1.

Iowa.— Sartor *v.* Schaden, 125 Iowa 696, 101 N. W. 511.

Massachusetts.— Regis *v.* Jaynes, 185 Mass. 458, 70 N. E. 480; Dover Stamping Co. *v.* Fellows, 163 Mass. 191, 40 N. E. 105, 47 Am. St. Rep. 448, 28 L. R. A. 448.

Nebraska.—Regent Shoe Mfg. Co. *v.* Haaker, 75 Nebr. 426, 106 N. W. 595, 4 L. R. A. N. S. 447; Miskell *v.* Prokop, 58 Nebr. 628, 79 N. W. 552.

New Jersey.— Centaur Co. *v.* Link, 62 N. J. Eq. 147, 49 Atl. 828.

New York.— Fischer *v.* Blank, 138 N. Y. 244, 33 N. E. 1040; Colman *v.* Crump, 70 N. Y. 573; Westcott Chuck Co. *v.* Oneida Nat. Chuck Co., 122 N. Y. App. Div. 260, 106 N. Y. Suppl. 1016; Anargyros *v.* Egyptian Amasis Cigarette Co., 54 N. Y. App. Div. 345, 66 N. Y. Suppl. 626; T. B. Dunn Co. *v.* Trix Mfg. Co., 50 N. Y. App. Div. 75, 63 N. Y. Suppl. 333; Reckitt *v.* Kellogg, 28 N. Y. App. Div. 111, 50 N. Y. Suppl. 888; Commercial Advertiser Assoc. *v.* Haynes, 26 N. Y. App. Div. 279, 49 N. Y. Suppl. 938; Day *v.* Webster, 23 N. Y. App. Div. 601, 49 N. Y. Suppl. 314; Amoskeag Mfg. Co. *v.* Spear, 2 Sandf. 599; Andrew Jurgens Co. *v.* Woodbury, 56 Misc. 404, 106 N. Y. Suppl. 571; Monopol Tobacco Works *v.* Gensior, 32 Misc. 87, 66 N. Y. Suppl. 155; Bolen, etc., Mfg. Co. *v.* Jonasch, 29 Misc. 99, 60 N. Y. Suppl. 555; Roy Watch-Case Co. *v.* Camm-Roy Watch-Case Co., 28 Misc. 45, 58 N. Y. Suppl. 979.

Ohio.— Drake Medicine Co. *v.* Glessner, 68 Ohio St. 337, 67 N. E. 722.

Pennsylvania.— White *v.* Trowbridge, 216 Pa. St. 11, 64 Atl. 862; Van Stan's Stratena Co. *v.* Van Stan, 209 Pa. St. 564, 58 Atl. 1064, 103 Am. St. Rep. 1018.

Tennessee.— Robinson *v.* Storm, 103 Tenn. 40, 52 S. W. 880.

Wisconsin.— Oppermann *v.* Waterman, 94 Wis. 583, 69 N. W. 569.

United States.— Lawrence Mfg. Co. *v.* Tennessee Mfg. Co., 138 U. S. 537, 11 S. Ct. 396, 34 L. ed. 997; McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828; Rice-Stix Dry Goods Co. *v.* J. A. Scriven Co., 165 Fed. 639, 91 C. C. A. 475; O'Connell *v.* National Water Co., 161 Fed. 545, 88 C. C. A. 487; Yale, etc., Mfg. Co. *v.* Alder, 154 Fed. 37, 83 C. C. A. 149; R. J. Reynolds Tobacco Co. *v.* Allen Bros. Tobacco Co., 151 Fed. 819; Capewell Horse Nail Co.

ignorant purchaser,[18] but not careless purchasers who make no examination.[19] The fact that careful buyers who scrutinize closely are not deceived merely shows that the injury is less in degree. It does not show that there is no injury.[20] The fact that careless purchasers are deceived merely by the use of ordinary and common form of putting up goods does not show unfair competition.[21] The class of purchasers who buy the particular kind of article manufactured, such as servants or children, upon the one hand, or persons skilled in the particular trade upon the other, must be considered in determining the question of probable deception.[22] Purchasers may be deceived and misled into purchasing the goods of one person under the belief that they are buying the goods of another person, whose goods they intended to buy, although they do not know who is the actual proprietor of the genuine goods. They are so deceived when they have in mind to purchase goods coming from a definite although unknown source, with which goods they are acquainted, although they neither know nor care who is the actual proprietor of such goods.[23] It is immaterial that the wholesale or retail dealer is not deceived

v. Putnam Nail Co., 140 Fed. 670; Regensburg *v.* Juan F. Portuondo Cigar Mfg. Co., 136 Fed. 866; Devlin *v.* McLeod, 135 Fed. 164; Van Houten *v.* Hooton Cocoa, etc., Co., 130 Fed. 600; Cantrell *v.* Butler, 124 Fed. 290; Allen B. Wrisley Co. *v.* Iowa Soap Co., 122 Fed. 796, 59 C. C. A. 54.

England.— Payton *v.* Snelling, [1901] A. C. 308, 70 L. J. Ch. 644, 85 L. T. Rep. N. S. 287; Manchester Brewery Co. *v.* North Cheshire, etc., Brewery Co., [1898] 1 Ch. 539, 67 L. J. Ch. 351, 78 L. T. Rep. N. S. 537, 14 T. L. R. 350, 46 Wkly. Rep. 515; Mitchell *v.* Henry, 15 Ch. D. 181, 43 L. T. Rep. N. S. 186; Franks *v.* Weaver, 10 Beav. 297, 50 Eng. Reprint 596.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 81.

For similar trade-mark cases which are equally applicable here see *supra*, IV, C, 3. A trade-mark serves a two-fold purpose to protect the owner from unfair competition, and the public from being deceived; and it is the design appearing upon the goods, and not the specifications filed in the patent office on which the trade-mark was registered, or is sought to be registered, that affects the public mind and protects the trade of the owner. Peter Schoenhofen Brewing Co. *v.* Maltine Co., 30 App. Cas. (D. C.) 340, 346.

Not a question for witness.— Whether a customer would be likely to be deceived is not a proper question to put to a witness, for it is for the court (and not for the witness) to decide, after inspection of the exhibits and paying regard to the evidence, whether a customer would be likely to be deceived by the make-up of goods. Payton *v.* Snelling, [1901] A. C. 308, 70 L. J. Ch. 644, 85 L. T. Rep. N. S. 287.

18. *New York.*— Dutton *v.* Cupples, 117 N. Y. App. Div. 172, 102 N. Y. Suppl. 309; Reckitt *v.* Kellogg, 28 N. Y. App. Div. 111, 50 N. Y. Suppl. 888.

Pennsylvania.— Juan F. Portuondo Cigar Mfg. Co. *v.* Vicente Portuondo Cigar Mfg. Co., 222 Pa. St. 116, 70 Atl. 968, "unobservant purchaser."

Wisconsin.— Gessler *v.* Grieb, 80 Wis. 21, 48 N. W. 1098, 27 Am. St. Rep. 20.

United States.— Cauffman *v.* Schuler, 123 Fed. 205; Blackwell *v.* Armistead, 3 Fed. Cas. No. 1,474, 3 Hughes 163.

England.— Wotherspoon *v.* Currie, L. R. 5 H. L. 508, 42 L. J. Ch. 130, 27 L. T. Rep. N. S. 393; Sen Sen Co. *v.* Britten, [1899] 1 Ch. 692, 68 L. J. Ch. 250, 80 L. T. Rep. N. S. 278, 15 T. L. R. 238, 47 Wkly. Rep. 358; Bodega Co. *v.* Owens, L. R. 23 Ir. 371, "Bodega" as applied to a public-house.

19. Brown *v.* Seidel, 153 Pa. St. 60, 25 Atl. 1064; Allen B. Wrisley Co. *v.* Iowa Soap Co., 122 Fed. 796, 59 C. C. A. 54 (holding that one is not required to so distinguish his articles that careless buyers will know by whom they are made and sold); Johnson *v.* Parr, Russ. Eq. Cas. (Nova Scotia) 98 (holding that the court will not interfere where ordinary attention would enable a purchaser to discriminate, and that it is not enough that a careless, inattentive, or illiterate purchaser might be deceived by reason of the similarity or resemblance).

20. Meriden Britannia Co. *v.* Parker, 39 Conn. 450, 12 Am. Rep. 401; Frazer *v.* Frazer Lubricator Co., 121 Ill. 147, 13 N. E. 639, 2 Am. St. Rep. 73; Blackwell *v.* Armistead, 3 Fed. Cas. No. 1,474, 3 Hughes 163.

21. Coats *v.* Merric Thread Co., 149 U. S. 562, 13 S. Ct. 966, 970, 37 L. ed. 847; U. S. Tobacco Co. *v.* McGreenery, 144 Fed. 1022, 74 C. C. A. 682 [*affirming* 144 Fed. 531, 532], "The complainant must show deception arising from some feature of its own, not common to the public."

22. Standard Table Oil Cloth Co. *v.* Trenton Oil Cloth, etc., Co., 71 N. J. Eq. 555, 63 Atl. 846; Westcott Chuck Co. *v.* Oneida Nat. Chuck Co., 122 N. Y. App. Div. 260, 106 N. Y. Suppl. 1016; Reckitt *v.* Kellogg, 28 N. Y. App. Div. 111, 50 N. Y. Suppl. 888; Legal Aid Soc. *v.* Co-operative Legal Aid Soc., 41 Misc. (N. Y.) 127, 83 N. Y. Suppl. 926.

23. Centaur Co. *v.* Link, 62 N. J. Eq. 147, 49 Atl. 828; Volger *v.* Force, 63 N. Y. App. Div. 122, 71 N. Y. Suppl. 209; People *v.* Fisher, 50 Hun (N. Y.) 552, 3 N. Y. Suppl. 786; Shaver *v.* Heller, etc., Co., 108 Fed. 821, 48 C. C. A. 48, 65 L. R. A. 878.

in procuring his stock of goods. The ultimate purchaser is the one in view, and it is sufficient if he is likely to be deceived.[24] The manufacturer or wholesaler is liable for deception practised by a retailer to which he has contributed by affording the means and opportunity for the deception of purchasers, although the retailer himself was not deceived.[25]

Deception without knowledge of real proprietor.— "Persons may be misled and may mistake one class of goods for another, although they do not know the names of the makers of either. A person whose name is not known but whose mark is imitated is just as much injured in his trade as if his name were known as well as his mark. His mark as used by him has given a reputation to his goods. His trade depends greatly on such reputation. His mark sells his goods. A rival who imitates his mark can hardly help deceiving buyers and injuring him; and for such injury, if proved, he can obtain redress. Siegert *v.* Findlater, 7 Ch. D. 801, 47 L. J. Ch. 233, 38 L. T. Rep. N. S. 349, 26 Wkly. Rep. 459 (the 'Angostura Bitters' case) illustrates this. (7 Ch. D. 807)." Powell *v.* Birmingham Vinegar Brewery Co., [1896] 2 Ch. 54, 68, 65 L. J. Ch. 563, 74 L. T. Rep. N. S. 509, 44 Wkly. Rep. 688 [*affirmed* in [1897] A. C. 710, 716, 66 L. J. Ch. 763, 76 L. T. Rep. N. S. 792]. "One does not lose the good will of his trade in an article of his manufacture by placing upon it the names of his customers who are engaged in selling it, nor by the fact that the consumers know only the name and excellence of the article, and neither know nor care who makes it." Shaver *v.* Heller, etc., Co., 108 Fed. 821, 824, 48 C. C. A. 48, 65 L. R. A. 878. Persons who know who is the proprietor of the genuine goods would expect to get his wares, and those who do not know the proprietor's name would expect to get goods from the same source as goods they previously had. In either case there would be deception. Standard Sanitary Mfg. Co. *v.* Standard Ideal Co., 37 Quebec Super. Ct. 33.

24. *Massachusetts.*— New England Awl, etc., Co. *v.* Marlborough Awl, etc., Co., 168 Mass. 154, 46 N. E. 386, 60 Am. St. Rep. 377.

Missouri.—Williamson Corset, etc., Co. *v.* Western Corset Co., 70 Mo. App. 424.

New Jersey.— Stirling Silk Mfg. Co. *v.* Sterling Silk Co., 59 N. J. Eq. 394, 46 Atl. 199.

New York.— Anargyros *v.* Egyptian Amasis Cigarette Co., 54 N. Y. App. Div. 345, 66 N. Y. Suppl. 626; Clark *v.* Clark, 25 Barb. 76. See Brown *v.* Mercer, 37 N. Y. Super. Ct. 265.

United States.—Amoskeag Mfg. Co. *v.* Trainer, 101 U. S. 51, 25 L. ed. 993 (per Clifford, J.); Royal Baking Powder Co. *v.* Royal, 122 Fed. 337, 58 C. C. A. 499; Enoch Morgan's Sons Co. *v.* Whittier-Coburn Co., 118 Fed. 657; Hostetter Co. *v.* Conron, 111 Fed. 737; Hansen *v.* Siegel-Cooper Co., 106 Fed. 690; N. K. Fairbank Co. *v.* Luckel, etc., Soap Co., 102 Fed. 327, 42 C. C. A. 376; Little *v.* Kellam, 100 Fed. 353; Von Mumm *v.* Wittemann, 85 Fed. 966; Hostetter Co. *v.* Sommers, 84 Fed. 333; Pennsylvania Salt Mfg. Co. *v.* Myers, 79 Fed. 87; Garrett *v.* Garrett, 78 Fed. 472, 24 C. C. A. 173; N. K. Fairbank Co. *v.* R. W. Bell Mfg. Co., 77 Fed. 869, 23 C. C. A. 554; Hostetter Co. *v.* Becker, 73 Fed. 297; Clark Thread Co. *v.* Armitage, 67 Fed. 896; Von Mumm *v.* Frash, 56 Fed. 830; Improved Fig Syrup Co. *v.* California Fig Syrup Co., 54 Fed. 175, 4 C. C. A. 264; Southern White Lead Co. *v.* Cary, 25 Fed. 125. But see Wm. Rogers Mfg. Co. *v.* Rogers, 84 Fed. 639; Rogers *v.* Wm. Rogers Mfg. Co., 70 Fed. 1019, 17 C. C. A. 575; Hostetter Co. *v.* Van Vorst, 62 Fed. 600.

England.— Powell *v.* Birmingham Vinegar Brewery Co., [1896] 2 Ch. 54, 65 L. J. Ch. 563, 74 L. T. Rep. N. S. 509, 44 Wkly. Rep. 688 [*affirmed* in [1899] A. C. 710, 66 L. J. Ch. 763, 76 L. T. Rep. N. S. 792]; Lever *v.* Goodwin, 36 Ch. D. 1, 57 L. T. Rep. N. S. 583, 36 Wkly. Rep. 177; Orr Ewing *v.* Johnston, 13 Ch. D. 434, 42 L. T. Rep. N. S. 67, 28 Wkly. Rep. 330 [*affirmed* in 7 App. Cas. 219, 51 L. J. Ch. 797, 46 L. T. Rep. N. S. 216, 30 Wkly. Rep. 417]; Sykes *v.* Sykes, 3 B. & C. 541, 5 D. & R. 292, 3 L. J. K. B. O. S. 46, 27 Rev. Rep. 420, 10 E. C. L. 248, 107 Eng. Reprint 834; Rose *v.* Loftus, 47 L. J. Ch. 576, 38 L. T. Rep. N. S. 409. See Ford *v.* Foster, L. R. 7 Ch. 611, 41 L. J. Ch. 682, 27 L. T. Rep. N. S. 219, 20 Wkly. Rep. 818. But see Payton *v.* Snelling, [1901] A. C. 308, 70 L. J. Ch. 644, 85 L. T. Rep. N. S. 287.

Australia.— Hennessy *v.* White, 6 W. W. & A'Beck. (Vict.) 216.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 86.

The open sale of an imitation article as such does not constitute unfair competition. Bolen, etc., Mfg. Co. *v.* Jonasch, 29 Misc. (N. Y.) 99, 60 N. Y. Suppl. 555; Yale, etc., Mfg. Co. *v.* Alder, 154 Fed. 37, 83 C. C. A. 149; Blackwell *v.* Armistead, 3 Fed. Cas. No. 1,474, 3 Hughes 163; Wotherspoon *v.* Currie, L. R. 5 H. L. 508, 42 L. J. Ch. 130, 27 L. T. Rep. N. S. 393; Shrimpton *v.* Laight, 18 Beav. 164, 52 Eng. Reprint 65; Hostetter Co. *v.* Van Vorst, 62 Fed. 600.

25. *California.*— Sperry *v.* Percival Milling Co., 81 Cal. 252, 22 Pac. 651.

Massachusetts.— George G. Fox Co. *v.* Glynn, 191 Mass. 344, 78 N. E. 89, 114 Am. St. Rep. 619; New England Awl, etc., Co. *v.* Marlborough Awl, etc., Co., 168 Mass. 154, 46 N. E. 386, 60 Am. St. Rep. 377.

New York.—Westcott Chuck Co. *v.* Oneida Nat. Chuck Co., 122 N. Y. App. Div. 260, 106 N. Y. Suppl. 1016; Anargyros *v.* Egyptian Amasis Cigarette Co., 54 N. Y. App. Div. 345, 66 N. Y. Suppl. 626.

United States.— Estes *v.* George Frost Co.,

5. Question of Fact Rather Than of Law. No inflexible rule can be laid down as to what conduct will constitute unfair competition.[26] Each case is, in a measure, a law unto itself. Unfair competition is always a question of fact.[27] The question to be determined in every case is whether or not, as a matter of fact, the name or mark used by defendant has previously come to indicate and designate plaintiff's

176 Fed. 338, 100 C. C. A. 258; George Frost Co. *v.* Estes, 156 Fed. 677; Yale, etc., Mfg. Co. *v.* Alder, 154 Fed. 37, 83 C. C. A. 149; R. J. Reynolds Tobacco Co. *v.* Allen Bros. Tobacco Co., 151 Fed. 819; Hillside Chemical Co. *v.* Munson, 146 Fed. 198; Von Mumm *v.* Steinmetz, 137 Fed. 158; Coats *v.* John Coates Thread Co., 135 Fed. 177; Scriven *v.* North, 134 Fed. 366, 67 C. C. A. 348 [*modifying* 124 Fed. 894]; Enterprise Mfg. Co. *v.* Landers, 124 Fed. 923 [*affirmed* in 131 Fed. 240, 65 C. C. A. 587]; Taylor *v.* Carpenter, 23 Fed. Cas. No. 13,785, 2 Woodb. & M. 1.

England.—Wotherspoon *v.* Currie, L. R. 5 H. L. 508, 42 L. J. Ch. 130, 27 L. T. Rep. N. S. 393; Lever *v.* Goodwin, 36 Ch. D. 1, 57 L. T. Rep. N. S. 583, 36 Wkly. Rep. 177, holding that injunction lies to prevent putting instruments of fraud into hands of retail dealers.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 86.

But see Regent Shoe Mfg. Co. *v.* Haaker, 75 Nebr. 426, 106 N. W. 595, 4 L. R. A. N. S. 447.

"If the opportunity is furnished where deception may be practical, a basis exists to grant relief." Barrett Chemical Co. *v.* Stern, 56 N. Y. App. Div. 143, 147, 67 N. Y. Suppl. 595. As was said in Jos. Dixon Crucible Co. *v.* Guggenheim, 7 Phila. (Pa.) 408, 410 [*cited* in Van Stan's Stratena Co. *v.* Van Stan, 209 Pa. St. 564, 58 Atl. 1064], where the subject of litigation was small packages of stove polish: "It is true, the wholesale dealers may generally understand the difference between the two articles, and may not sell the J. C. Dixon for the Joseph Dixon, but the small retail dealers, scattered over the world, do not so understand this distinction, and if they did, might not regard it. Much less would their customers."

It is not sufficient to show that by trick or device a retail dealer might be able to pass off the goods of one for those of another. Payton *v.* Snelling, [1901] A. C. 308, 70 L. J. Ch. 644, 85 L. T. Rep. N. S. 287. The question is not what a dishonest retailer might accomplish by a trick. Capewell Horse Nail Co. *v.* Putnam Nail Co., 140 Fed. 670. "That tricky retailers represent the defendant's article as the goods of the complainant, knowing better, is probably not a matter for which defendant is responsible, if he has done his full duty in distinguishing his own from that of the complainant. But, 'if he has intentionally put up his goods in a form or color or package or under a name which lends itself readily to deception,' it is not clear that defendant is not responsible for the frauds accomplished by the retailer, 'who only avails himself of the means of fraud furnished by the defendant.' New England Awl, etc., Co. *v.* Marlborough Awl, etc., Co., 168 Mass. 154, 46 N. E. 386, 60 Am. St. Rep. 377; Hostetter Co. *v.* Sommers, 84 Fed. 333; N. K. Fairbanks Co. *v.* R. W. Bell Mfg. Co., 77 Fed. 869, 23 C. C. A. 554." Royal Baking Powder Co. *v.* Royal, 122 Fed. 337, 345, 58 C. C. A. 499.

26. In Ludlow Valve Mfg. Co. *v.* Pittsburgh Mfg. Co., 166 Fed. 26, 29, 92 C. C. A. 60, it was said: "No arbitrary rules have ever been, nor ever can be, laid down by which courts of equity will furnish this protection. To establish such rules, would, like definitions in the law, furnish the means by which fraud could successfully accomplish its ends."

27. *Georgia.*— Creswill *v.* Grand Lodge K. P., 133 Ga. 837, 67 S. E. 188, 134 Am. St. Rep. 231.

Iowa.— Atlas Assur. Co. *v.* Atlas Ins. Co., 138 Iowa 228, 112 N. W. 232, 114 N. W. 609, 128 Am. St. Rep. 189, 15 L. R. A. N. S. 625.

Massachusetts.— Regis *v.* Jaynes, 185 Mass. 458, 70 N. E. 480.

New Jersey.— O'Grady *v.* McDonald, 72 N. J. Eq. 805, 66 Atl. 175; Eureka Fire Hose Co. *v.* Eureka Rubber Mfg. Co., 69 N. J. Eq. 159, 60 Atl. 561.

New York.— Chas. S. Higgins Co. *v.* Higgins Soap Co., 144 N. Y. 462, 39 N. E. 490, 43 Am. St. Rep. 769, 27 L. R. A. 42; Fischer *v.* Blank, 138 N. Y. 244, 33 N. E. 1040; Burrow *v.* Marceau, 124 N. Y. App. Div. 665, 109 N. Y. Suppl. 105; T. B. Dunn Co. *v.* Trix Mfg. Co., 50 N. Y. App. Div. 75, 63 N. Y. Suppl. 333.

United States.—Howe Scale Co. *v.* Wyckoff, 198 U. S. 118, 25 S. Ct. 609, 49 L. ed. 972; Wagner Typewriter Co. *v.* F. S. Webster Co., 144 Fed. 405; G. W. Cole Co. *v.* American Cement, etc., Co., 130 Fed. 703, 65 C. C. A. 105.

England.— Payton *v.* Snelling, [1901] A. C. 308, 70 L. J. Ch. 644, 85 L. T. Rep. N. S. 287; Burgess *v.* Burgess, 3 De G. M. & G. 896, 17 Jur. 292, 22 L. J. Ch. 675, 52 Eng. Ch. 696, 43 Eng. Reprint 351.

"It is a question of evidence in each case whether there is false representation or not." Burgess *v.* Burgess, 3 De G. M. & G. 896, 905, 17 Jur. 292, 22 L. J. Ch. 675, 52 Eng. Ch. 696, 43 Eng. Reprint 351 [*quoted* with approval in Howe Scale Co. *v.* Wyckoff, 198 U. S. 118, 25 S. Ct. 609, 49 L. ed. 972]. "Whether the court will interfere in a particular case must depend upon circumstances; the identity or similarity of the names; the identity of the business of the respective corporations; how far the name is a true description of the kind and quality of the articles manufactured or the business carried on; the extent of the confusion which may be created or apprehended, and other circumstance which might justly influence the judgment of the judge in granting or withholding the remedy."

goods,[28] or, to state it another way, whether defendant, as a matter of fact, is by his conduct passing off his goods as plaintiff's goods, or his business as plaintiff's business.[29] The universal test question is whether the public is likely to be deceived.[30] Various cases and illustrations wherein the similarity between particular names, marks, or dress of goods was held sufficient,[31] to be deceptive, and

Chas. S. Higgins Co. *v.* Higgins Soap Co., 144 N. Y. 462, 469, 39 N. E. 490, 43 Am. St. Rep. 769, 27 L. R. A. 42.

28. *Illinois.*—Allegretti *v.* Allegretti Chocolate Cream Co., 177 Ill. 129, 52 N. E. 487.

Massachusetts.— Cohen *v.* Nagle, 190 Mass. 4, 76 N. E. 276, 2 L. R. A. N. S. 964; Viano *v.* Baccigalupo, 183 Mass. 160, 67 N. E. 641.

New Jersey.— Eureka Fire Hose Co. *v.* Eureka Rubber Mfg. Co., 69 N. J. Eq. 159, 60 Atl. 561.

United States.— Stevens Linen Works *v.* Don, 127 Fed. 950, 62 C. C. A. 582 [*affirming* 121 Fed. 171]; Heublein *v.* Adams, 125 Fed. 782.

England.— Cellular Clothing Co. *v.* Maxton, [1899] A. C. 326, 68 L. J. P. C. 72, 80 L. T. Rep. N. S. 809 [*distinguishing* Reddaway *v.* Banham, [1896] A. C. 199, 65 L. J. Q. B. 381, 74 L. T. Rep. N. S. 289, 44 Wkly. Rep. 638]; Singer Mfg. Co. *v.* Loog, 8 App. Cas. 15, 52 L. J. Ch. 481, 48 L. T. Rep. N. S. 3, 31 Wkly. Rep. 325; Singer Mach. Manufacturers *v.* Wilson, 3 App. Cas. 376, 47 L. J. Ch. 481, 38 L. T. Rep. N. S. 303, 26 Wkly. Rep. 664; *In re* Chesebrough, [1902] 2 Ch. 1, 71 L. J. Ch. 427, 86 L. T. Rep. N. S. 665, 18 T. L. R. 468; Kelly *v.* Byles, 13 Ch. D. 682, 49 L. J. Ch. 181, 42 L. T. Rep. N. S. 338, 28 Wkly. Rep. 485; Cash *v.* Cash, 84 L. T. Rep. N. S. 349; Valentine Meat Juice Co. *v.* Valentine Extract Co., 83 L. T. Rep. N. S. 259, 16 T. L. R. 522.

See also cases cited *supra*, V, B, 2.

Mere priority in the use of trade-names or marks will not support an injunction, where the name or mark has not become identified with plaintiff's goods or business. Giragosian *v.* Chutjian, 194 Mass. 504, 80 N. E. 647; Stevens Linen Works *v.* Don, 127 Fed. 950, 62 C. C. A. 582 [*affirming* 121 Fed. 171].

"Any prior use, to be of value, must be such as to denote the origin of the product as to which it is claimed to be a trade-mark." Johnson *v.* Seabury, 69 N. J. Eq. 696, 701, 61 Atl. 5.

29. *Iowa.*— Sartor *v.* Schaden, 125 Iowa 696, 101 N. W. 511.

Massachusetts.—Viano *v.* Baccigalupo, 183 Mass. 160, 67 N. E. 641.

New Jersey.— International Silver Co. *v.* Wm. H. Rogers Corp., 66 N. J. Eq. 119, 57 Atl. 1037.

New York.— Commercial Advertiser Assoc. *v.* Haynes, 26 N. Y. App. Div. 279, 49 N. Y. Suppl. 938.

United States.—Howe Scale Co. *v.* Wyckoff, 198 U. S. 118, 25 S. Ct. 609, 49 L. ed. 972; Bates Mfg. Co. *v.* Bates Numbering Mach. Co., 172 Fed. 892 [*affirmed* in 178 Fed. 681, 102 C. C. A. 181]; Capewell Horse Nail Co. *v.* Putnam Nail Co., 140 Fed. 670; Siegert *v.* Gandolfi, 139 Fed. 917 [*reversed* on the facts in 149 Fed. 100, 79 C. C. A. 142]; Osgood *v.* Allen, 18 Fed. Cas. No. 10,603, 1 Holmes 185, 3 Off. Gaz. 124.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 86. See also cases cited *supra*, V, A, 1.

30. *Iowa.*— Sartor *v.* Schaden, 125 Iowa 696, 101 N. W. 511.

Massachusetts.— Samuels *v.* Spitzer, 177 Mass. 226, 58 N. E. 693.

New Jersey.— Johnson *v.* Seabury, 69 N. J. L. 696, 61 Atl. 5.

New York.— Munro *v.* Tousey, 129 N. Y. 38, 29 N. E. 9, 14 L. R. A. 245.

United States.— Knickerbocker Chocolate Co. *v.* Griffing, 144 Fed. 316; Hygeia Distilled Water Co. *v.* Consolidated Ice Co., 144 Fed. 139 [*affirmed* in 151 Fed. 10, 80 C. C. A. 506].

England.— Lee *v.* Haley, L. R. 5 Ch. 155, 39 L. J. Ch. 284, 22 L. T. Rep. N. S. 251, 18 Wkly. Rep. 242.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 86. See also cases cited *supra*, V, A, 1; V, B, 4.

31. Similarity held sufficient to constitute infringement or unfair competition.— *California.*— Weinstock *v.* Marks, 109 Cal. 529, 42 Pac. 142, 50 Am. St. Rep. 57, 30 L. R. A. 182 ("Mechanic's Store" is infringed by "Mechanical Store"); Pierce *v.* Guittard, 68 Cal. 68, 8 Pac. 645, 58 Am. Rep. 1.

Florida.— El Modello Cigar Mfg. Co. *v.* Gato, 25 Fla. 886, 7 So. 23, 6 L. R. A. 823, 23 Am. St. Rep. 537.

Illinois.— Hopkins Amusement Co. *v.* Frohman, 103 Ill. App. 613 [*affirmed* in 202 Ill. 541, 67 N. E. 391] ("Sherlock Holmes, Detective," infringes "Sherlock Holmes"); Rubel *v.* Allegretti Chocolate Cream Co., 76 Ill. App. 581; Mossler *v.* Jacobs, 66 Ill. App. 571.

Maryland.— Parlett *v.* Guggenheimer, 67 Md. 542, 10 Atl. 81, 1 Am. St. Rep. 416.

Massachusetts.— George G. Fox Co. *v.* Glynn, 191 Mass. 344, 78 N. E. 89, 114 Am. St. Rep. 619 ("Crown Malt" infringes "Creamalt," as applied to bread); Regis *v.* Jaynes, 185 Mass. 458, 70 N. E. 480 ("Rexall" infringes "Rex," as applied to medicines); Viano *v.* Baccigalupo, 183 Mass. 160, 67 N. E. 641; Samuels *v.* Spitzer, 177 Mass. 226, 58 N. E. 693.

Missouri.— McCartney *v.* Garnhart, 45 Mo. 593, 100 Am. Dec. 397; Sanders *v.* Jacob, 20 Mo. App. 96; Gamble *v.* Stephenson, 10 Mo. App. 581, "What Cheer Restaurant" is infringed by "New and Original What Cheer Restaurant."

New Jersey.— O'Grady *v.* McDonald, 72 N. J. Eq. 805, 66 Atl. 175 ("The Hotel Dominion" is infringed by "The New Do-

hence to constitute infringement of trade-mark, or unfair competition, and also

minion"); Standard Table Oil Cloth Co. *v.* Trenton Oil Cloth, etc., Co., 71 N. J. Eq. 555, 63 Atl. 846; Stirling Silk Mfg. Co. *v.* Sterling Silk Co., 59 N. J. Eq. 394, 46 Atl. 199 ("Sterling" infringes "Stirling"); Van Horn *v.* Coogan, 52 N. J. Eq. 380, 28 Atl. 788.

New York.—Vulcan *v.* Myers, 139 N. Y. 364, 34 N. E. 904 ("The Vulcan" infringed by "The Vulture" in connection with other similarities as applied to matches); Dunlap *v.* Young, 68 N. Y. App. Div. 137, 74 N. Y. Suppl. 184 [*reversed* on other grounds in 174 N. Y. 327, 66 N. E. 964]; Volger *v.* Force, 63 N. Y. App. Div. 122, 71 N. Y. Suppl. 209 ("Excellent" infringes "Excelsior"); Barrett Chemical Co. *v.* Stern, 56 N. Y. App. Div. 143, 67 N. Y. Suppl. 595; Ft. Stanwix Canning Co. *v.* William McKinley Canning Co., 49 N. Y. App. Div. 566, 63 N. Y. Suppl. 704; Tuerk Hydraulic Power Co. *v.* Tuerk, 92 Hun 65, 36 N. Y. Suppl. 384; Siegert *v.* Abbott, 72 Hun 243, 25 N. Y. Suppl. 590; American Grocer Pub. Assoc. *v.* Grocer Pub. Co., 25 Hun 398 ("The Grocer" infringes "The American Grocer," as applied to a periodical); Potter *v.* McPherson, 21 Hun 559; India Rubber Co. *v.* Rubber Comb, etc., Co., 45 N. Y. Super. Ct. 258; Burnett *v.* Phalon, 9 Bosw. 193 [*affirmed* in 1 Abb. Dec. 267, 3 Keyes 594, 3 Transcr. App. 167, 5 Abb. Pr. N. S. 212]; Howard *v.* Henriques, 3 Sandf. 725; American Novelty, etc., Co. *v.* Manufacturing Electrical Novelty Co., 36 Misc. 450, 73 N. Y. Suppl. 755; Crawford *v.* Laus, 29 Misc. 248, 60 N. Y. Suppl. 387; Gaines *v.* Leslie, 25 Misc. 20, 54 N. Y. Suppl. 421 ("Old Crow" infringed by "White Crow," as applied to whisky); De Youngs *v.* Jung, 7 Misc. 56, 27 N. Y. Suppl. 370 [*affirming* 25 N. Y. Suppl. 479]; Cook *v.* Starkweather, 13 Abb. Pr. N. S. 392; Matsell *v.* Flanagan, 2 Abb. Pr. N. S. 459; Electro-Silicon Co. *v.* Trask, 59 How. Pr. 189. See also Stone *v.* Carlin, 13 Month. L. Rep. 360.

Ohio.— Drake Medicine Co. *v.* Glessner, 68 Ohio St. 337, 67 N. E. 722.

Pennsylvania.—Arthur *v.* Howard, 19 Pa. Co. Ct. 81; Colton *v.* Thomas, 2 Brewst. 308, 7 Phila. 257 ("Colton Dental Association" is infringed by "Colton Dental Rooms"); Rowley *v.* Houghton, 2 Brewst. 303, 7 Phila. 39 ("The Heroine" infringes "The Hero" similarly used).

Rhode Island.— Cady *v.* Schultz, 19 R. I. 193, 32 Atl. 915, 61 Am. St. Rep. 763, 29 L. R. A. 524, "United States Dental Association" is infringed by "U. S. Dental Association."

Texas.—Western Grocer Co. *v.* Caffarelli, (Civ. App. 1908) 108 S. W. 413 [*reversed* on other grounds in 102 Tex. 104, 127 S. W. 1018], "Georgia Coon" infringed by "New Coon," as applied to molasses.

Wisconsin.— Oppermann *v.* Waterman, 94 Wis. 583, 69 N. W. 569.

United States.— McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828; Northwestern Consol. Milling Co. *v.* Callam, 177 Fed. 786 ("Ceresota" infringed by "Certosa," as applied to flour); Mellwood Distilling Co. *v.* Harper, 167 Fed. 389 ("Mellwood" infringed by "Mill Wood," as applied to whisky); American Tin Plate Co. *v.* Licking Roller Mill Co., 158 Fed. 690; Havana Commercial Co. *v.* Nichols, 155 Fed. 302 ("La Carolina" infringed by "La Corolina," as applied to cigars); Enoch Morgan's Sons Co. *v.* Ward, 152 Fed. 690, 81 C. C. A. 616, 12 L. R. A. N. S. 729 ("Sapolio" infringed by "Sopono" with other imitative features); Lanahan *v.* Kissel, 135 Fed. 899; Griggs *v.* Erie Preserving Co., 131 Fed. 359 ("Home Brand" is infringed by "Home Comfort," as applied to canned goods); Ohio Baking Co. *v.* National Biscuit Co., 127 Fed. 116, 62 C. C. A. 116; Enoch Morgan's Sons Co. *v.* Whittier-Coburn Co., 118 Fed. 657; Sterling Remedy Co. *v.* Spermine Medical Co., 112 Fed. 1000, 50 C. C. A. 657; Welsbach Light Co. *v.* Adam, 107 Fed. 463; Hansen *v.* Siegel-Cooper Co., 106 Fed. 691 ("Junket Capsules" infringes "Junket Tablets"); Little *v.* Kellam, 100 Fed. 353; Bass *v.* Feigenspan, 96 Fed. 206; National Biscuit Co. *v.* Baker, 95 Fed. 135 ("Iwanta" infringes "Uneeda," as applied to biscuit); Noel *v.* Ellis, 89 Fed. 978; Lever *v.* Pasfield, 88 Fed. 484; Baker *v.* Baker, 77 Fed. 181; Potter Drug, etc., Corp. *v.* Miller, 75 Fed. 656; Clark Thread Co. *v.* Armitage, 74 Fed. 936, 21 C. C. A. 178 ("Clark's N-E-W" infringes "Clark's O. N. T.," as applied to bread); American Grocery Co. *v.* Sloan, 68 Fed. 539; Pillsbury *v.* Pillsbury-Washburn Flour-Mills Co., 64 Fed. 841, 12 C. C. A. 432; N. K. Fairbank Co. *v.* Central Lard Co., 64 Fed. 133; New Home Sewing Mach. Co. *v.* Bloomingdale, 59 Fed. 284; Meyer *v.* Dr. B. L. Bull Vegetable Medicine Co., 58 Fed. 884, 7 C. C. A. 558; Carlsbad *v.* Thackeray, 57 Fed. 18; Improved Fig Syrup Co. *v.* California Fig. Syrup Co., 54 Fed. 175, 4 C. C. A. 264 ("Improved Fig Syrup" infringes "Syrup of Figs"); Hohner *v.* Gratz, 52 Fed. 871; Hutchinson *v.* Covert, 51 Fed. 832; Hutchinson *v.* Blumberg, 51 Fed. 829; California Fig-Syrup Co. *v.* Improved Fig-Syrup Co., 51 Fed. 296; Giron *v.* Gartner, 47 Fed. 467; Moxie Nerve Food Co. *v.* Beach, 33 Fed. 248 ("Noxie" infringes "Moxie"); Celluloid Mfg. Co. *v.* Cellonite Mfg. Co., 32 Fed. 94 ("Cellonite" infringes "Celluloid"); Estes *v.* Worthington, 31 Fed. 154, 24 Blatchf. 371; Estes *v.* Leslie, 27 Fed. 22, 23 Blatchf. 476, 29 Fed. 91; Estes *v.* Williams, 21 Fed. 189; Sawyer *v.* Kellogg, 7 Fed. 720; Apollinaris Brunnen *v.* Somborn, 1 Fed. Cas. No. 496, 14 Blatchf. 380; Blackwell *v.* Armistead, 3 Fed. Cas. No. 1,474, 3 Hughes 163 ("Durham Smoking Tobacco" in connection with the head of a bull infringes "Genuine Durham Smoking Tobacco" used in connection with the side figure of a bull); Consolidated Fruit-Jar Co. *v.* Thomas, 6 Fed. Cas. No. 3,131, 2 N. J. L. J. 272; Gardner *v.* Bailey, 9 Fed. Cas. No. 5,221; Hostetter *v.* Vowinkle, 12 Fed. Cas. No. 6,714, 1 Dill. 329 ("Hostetter & Smith" infringed by "Holstetter &

cases wherein the similarity was held insufficient,[32] to deceive the public and constitute infringement or unfair competition are collected below.

Smyte"); Procter *v.* McBride, 20 Fed. Cas. No. 11,441.

England.— North Cheshire, etc., Brewery Co. *v.* Manchester Brewery Co., [1899] A. C. 83, 68 L. J. Ch. 74, 79 L. T. Rep. N. S. 645, 15 T. L. R. 110; Ford *v.* Foster, L. R. 7 Ch. 611, 41 L. J. Ch. 682, 27 L. T. Rep. N. S. 219, 20 Wkly. Rep. 818; Lee *v.* Haley, L. R. 5 Ch. 155, 39 L. J. Ch. 284, 22 L. T. Rep. N. S. 251, 18 Wkly. Rep. 242; Metzler *v.* Wood, 8 Ch. D. 606, 47 L. J. Ch. 625, 38 L. T. Rep. N. S. 544, 26 Wkly. Rep. 577; Mack *v.* Petter, L. R. 14 Eq. 431, 41 L. J. Ch. 781, 20 Wkly. Rep. 964; Radde *v.* Norman, L. R. 14 Eq. 348, 41 L. J. Ch. 525, 26 L. T. Rep. N. S. 788, 20 Wkly. Rep. 766; Reed *v.* O'Meara, L. R. 21 Ir. 216; Clement *v.* Maddick, 1 Giffard 98, 5 Jur. N. S. 592, 65 Eng. Reprint 841; Ingram *v.* Stiff, 5 Jur. N. S. 947; Chappell *v.* Sheard, 1 Jur. N. S. 996, 2 Kay & J. 117, 3 Wkly. Rep. 646, 69 Eng. Reprint 717; Chappell *v.* Davidson, 2 Kay & J. 123, 69 Eng. Reprint 719; Accident Ins. Co. *v.* Accident, etc., Ins. Corp., 54 L. J. Ch. 104, 51 L. T. Rep. N. S. 597; Guardian F., etc., Assur. Co. *v.* Guardian, etc., Ins. Co., 50 L. J. Ch. 253, 43 L. T. Rep. N. S. 791; Sanitas Co. *v.* Condy, 56 L. T. Rep. N. S. 621; Stephens *v.* Peel, 16 L. T. Rep. N. S. 145; Corns *v.* Griffiths, [1873] W. N. 93; Clowes *v.* Hogg, [1870] W. N. 268, L. J. Notes Cas. 267 [*affirmed* in [1871] W. N. 40]; Edmonds *v.* Benbow, Seton (3d ed.) 905, (4th ed.) 238.

Canada.— Davis *v.* Reid, 17 Grant Ch. (U. C.) 69.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," §§ 78–88.

32. Similarity held insufficient to constitute infringement or unfair competition.— *California.*— Castle *v.* Siegfried, 103 Cal. 71, 37 Pac. 210; Schmidt *v.* Welch, (1893) 35 Pac. 626; Falkinburg *v.* Lucy, 35 Cal. 52, 95 Am. Dec. 76.

Colorado.—Solis Cigar Co. *v.* Pozo, 16 Colo. 388, 26 Pac. 556, 25 Am. St. Rep. 279.

Illinois.— N. K. Fairbank Co. *v.* Swift, 64 Ill. App. 477.

Missouri.— Nicholson *v.* Wm. A. Stickney Cigar Co., 158 Mo. 158, 59 S. W. 121; Oakes *v.* St. Louis Candy Co., 146 Mo. 391, 48 S. W. 467.

New Jersey.— Bear Lithia Springs Co. *v.* Great Bear Spring Co., 71 N. J. Eq. 595, 71 Atl. 383 [*affirmed* in 72 N. J. Eq. 871, 68 Atl. 86] (pictures of black bear and polar bear); Eureka Fire Hose Co. *v.* Eureka Rubber Mfg. Co., 71 N. J. Eq. 300, 71 Atl. 1134 [*affirming* 69 N. J. Eq. 159, 60 Atl. 561].

New York.— Brown *v.* Doscher, 147 N. Y. 647, 42 N. E. 268 [*affirming* 73 Hun 107, 26 N. Y. Suppl. 951]; Enoch Morgan's Sons Co. *v.* Troxell, 89 N. Y. 292, 42 Am. Rep. 294; Boessneck *v.* Iselin, 83 N. Y. App. Div. 290, 82 N. Y. Suppl. 164; T. B. Dunn Co. *v.* Trix Mfg. Co., 50 N. Y. App. Div. 75, 63 N. Y. Suppl. 333; Commercial Advertiser Assoc. *v.* Haynes, 26 N. Y. App. Div. 279, 49 N. Y. Suppl. 938; Babbitt *v.* Brown, 68 Hun 515, 23 N. Y. Suppl. 25 ("P. T. Butler's Trade-Mark Best Soap" does not infringe "B. T. Babbitt's Trade-Mark Best Soap"); Stokes *v.* Allen, 56 Hun 526, 9 N. Y. Suppl. 846; Stephens *v.* De Couto, 7 Rob. 343, 4 Abb. Pr. N. S. 47; Stern *v.* Barrett Chemical Co., 28 Misc. 429, 58 N. Y. Suppl. 1129 [*reversed* on other grounds in 29 Misc. 609, 61 N. Y. Suppl. 221]; Lavanburg *v.* Pfeiffer, 23 Misc. 577, 52 N. Y. Suppl. 801 (initials merely do not infringe a name); Frohman *v.* Miller, 8 Misc. 379, 29 N. Y. Suppl. 1109; Cahn *v.* Hoffman House, 7 Misc. 461, 28 N. Y. Suppl. 388; W. J. Johnston Co. *v.* Electric Age Pub. Co., 14 N. Y. Suppl. 803 ("The Electrical Age" does not infringe "The Electrical World," used as the titles for periodicals); Foster *v.* Webster Piano Co., 13 N. Y. Suppl. 338 ("Webster" does not infringe "Weber," as applied to pianos); Forney *v.* Engineering News Pub. Co., 10 N. Y. Suppl. 814; Hurricane Patent Lantern Co. *v.* Miller, 56 How. Pr. 234 ("Tempest" does not infringe "Hurricane," as applied to lamps); Bell *v.* Locke, 8 Paige 75, 34 Am. Dec. 371; Snowden *v.* Noah, Hopk. 347, 14 Am. Dec. 547.

Ohio.— Cincinnati Vici Shoe Co. *v.* Cincinnati Shoe Co., 9 Ohio S. & C. Pl. Dec. 579, 7 Ohio N. P. 135.

Oregon.— Duniway Pub. Co. *v.* Northwest Printing, etc., Co., 11 Oreg. 322, 8 Pac. 283; Lichtenstein *v.* Mellis, 8 Oreg. 464, 34 Am. Rep. 592.

Pennsylvania.— Lafean *v.* Weeks, 177 Pa. St. 412, 35 Atl. 693, 34 L. R. A. 172, holding "P. C. W." not infringed by "W. H. W.," each being the initials of the respective traders.

United States.— Liggett, etc., Tobacco Co. *v.* Finzer, 128 U. S. 182, 9 S. Ct. 60, 32 L. ed. 395; Moore *v.* Auwell, 172 Fed. 508 [*affirmed* in 178 Fed. 543, 102 C. C. A. 53] ("Muresco" is not infringed by "Murafresco," as applied to a wall finish); Holeproof Hosiery Co. *v.* Wallach, 167 Fed. 373 [*affirmed* in 172 Fed. 859, 97 C. C. A. 263] ("Knotair" does not infringe "Hole-Proof"); Chance *v.* Gulden, 165 Fed. 624, 92 C. C. A. 58 [*reversing* 163 Fed. 447] ("Don Carlos" is not infringed by "Don Ceasar," as applied to imported olives); H. Mueller Mfg. Co. *v.* A. Y. McDonaly, etc., Mfg. Co. 164 Fed. 1001 [*modified* in 183 Fed. 972]; Chalmers Knitting Co. *v.* Columbia Mesh Knitting Co., 160 Fed. 1013 ("Porosknit" is not infringed by "Porous Underwear"); J. A. Scriven Co. *v.* Morris, 154 Fed. 914 [*affirmed* in 158 Fed. 1020, 85 C. C. A. 571] ("Morris Web Seam Drawer" does not infringe "Elastic Seam Drawer"); De Long Hook, etc., Co. *v.* Francis Hook, etc., Fastener Co., 144 Fed. 682, 75 C. C. A. 484; Galena-Signal Oil Co. *v.* Fuller, 142 Fed. 1002; Regensburg *v.* Juan

6. Fraudulent Intent. It is often said that a fraudulent intent on the part of defendant to pass off his goods or business as and for that of plaintiff is necessary to constitute unfair competition,[33] and infringement of trade-marks has been dis-

F. Portuondo Cigar Mfg. Co., 136 Fed. 866; G. W. Cole Co. *v.* American Cement, etc., Co., 130 Fed. 703, 65 C. C. A. 105 ("Big Four" does not infringe "Three-in-One" in connection with other special features); Bickmore Gall Cure Co. *v.* Karns Mfg. Co., 126 Fed. 573 [*reversed* on other features in 134 Fed. 833, 67 C. C. A. 439] (a picture of a horse is not infringed by a picture of four horses); Wyckoff *v.* Howe Scale Co., 122 Fed. 348, 58 C. C. A. 510 [*reversing* 110 Fed. 520]; Vacuum Oil Co. *v.* Climax Refining Co., 120 Fed. 254, 56 C. C. A. 90; Postum Cereal Co. *v.* American Health Food Co., 119 Fed. 848, 56 C. C. A. 360 [*affirming* 109 Fed. 898]; Gannett *v.* Ruppert, 119 Fed. 221 [*reversed* on other grounds in 127 Fed. 962, 62 C. C. A. 594]; La Republique Francaise *v.* Schultz, 115 Fed. 196; Kentucky Distilleries, etc., Co. *v.* Wathen, 110 Fed. 641; Potter Drug, etc., Corp. *v.* Pasfield Soap Co., 106 Fed. 914, 46 C. C. A. 40, 102 Fed. 490; La Republique Francaise *v.* Saratoga Vichy Spring Co., 99 Fed. 733; Fuller *v.* Huff, 99 Fed. 439; La Republique Francaise *v.* Schultz, 94 Fed. 500; Allen B. Wrisley Co. *v.* Geo. E. Rouse Soap Co., 87 Fed. 589; P. Lorillard Co. *v.* Peper, 86 Fed. 956, 30 C. C. A. 496; Stuart *v.* F. G. Stewart Co., 85 Fed. 778; Pittsburgh Crushed-Steel Co. *v.* Diamond Steel Co., 85 Fed. 637; Sterling Remedy Co. *v.* Eureka Chemical, etc., Co., 80 Fed. 105, 25 C. C. A. 314; Johnson *v.* Bauer, 79 Fed. 954; J. C. Hubinger Bros. Co. *v.* Eddy, 74 Fed. 551; Burt *v.* Smith, 71 Fed. 161, 17 C. C. A. 573; Kohler Mfg. Co. *v.* Beeshore, 53 Fed. 262 [*affirmed* in 59 Fed. 572, 8 C. C. A. 215]; Evans *v.* Von Laer, 32 Fed. 153; Osgood *v.* Allen, 18 Fed. Cas. No. 10,603, Holmes 185, 3 Off. Gaz. 124.

England.— Borthwick *v.* Evening Post, 37 Ch. D. 449, 57 L. J. Ch. 406, 58 L. T. Rep. N. S. 252, 36 Wkly. Rep. 434 ("Evening Post" does not infringe "Morning Post," as applied to newspapers); Merchant Banking Co. *v.* Merchants' Joint Stock Bank, 9 Ch. D. 560, 47 L. J. Ch. 828, 26 Wkly. Rep. 847; Spottiswoode *v.* Clark, 1 Coop. t. Cott. 254, 47 Eng. Reprint 844, 10 Jur. 1043, 2 Phil. 154, 22 Eng. Ch. 154, 41 Eng. Reprint 900; Woollam *v.* Ratcliff, 1 Hem. & M. 259, 71 Eng. Reprint 113; Bradbury *v.* Beeton, 39 L. J. Ch. 57, 21 L. T. Rep. N. S. 323, 18 Wkly. Rep. 33; Farina *v.* Cathery, 2 L. J. Notes Cas. 134; Cowen *v.* Hulton, 46 L. T. Rep. N. S. 897; Bass *v.* Dawber, 19 L. T. Rep. N. S. 626; Charleston *v.* Campbell, 14 Sc. L. Rep. 104.

Canada.— Barsalou *v.* Darling, 9 Can. Sup. Ct. 677 ("Horse's Head" and "Unicorn's Head"); Kerstein *v.* Cohen, 11 Ont. L. Rep. 450, 7 Ont. Wkly. Rep. 247 ("Shur-On" not infringed by "Sta-Zon," as applied to eyeglasses); Gillett *v.* Lumsden, 6 Ont. L. Rep. 66.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," §§ 78–88.

33. *Connecticut.*—William Rogers Mfg. Co. *v.* Simpson, 54 Conn. 527, 9 Atl. 395; Rogers *v.* Rogers, 53 Conn. 121, 1 Atl. 807, 5 Atl. 675, 55 Am. Rep. 78.

Maine.—W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 100 Me. 461, 62 Atl. 499, 4 L. R. A. N. S. 960. See Ricker *v.* Portland, etc., R. Co., 90 Me. 395, 38 Atl. 338.

Massachusetts.— Gilman *v.* Hunnewell, 122 Mass. 139; Hallett *v.* Cumston, 110 Mass. 29.

New Jersey.— Eureka Fire Hose Co. *v.* Eureka Rubber Mfg. Co., 69 N. J. Eq. 159, 60 Atl. 561.

New York.— T. B. Dunn Co. *v.* Trix Mfg. Co., 50 N. Y. App. Div. 75, 63 N. Y. Suppl. 333; Day *v.* Webster, 23 N. Y. App. Div. 601, 49 N. Y. Suppl. 314; Gaines *v.* Leslie, 25 Misc. 20, 54 N. Y. Suppl. 421; Decker *v.* Decker, 52 How. Pr. 218.

North Carolina.— Bingham School *v.* Gray, 122 N. C. 699, 30 S. E. 304, 41 L. R. A. 243.

Ohio.— Drake Medicine Co. *v.* Glessner, 68 Ohio St. 337, 67 N. E. 722.

Pennsylvania.— Brown *v.* Seidel, 153 Pa. St. 60, 25 Atl. 1064.

Rhode Island.— Carmichel *v.* Latimer, 11 R. I. 395, 23 Am. Rep. 481.

Tennessee.— C. F. Simmons Medicine Co. *v.* Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165.

United States.— McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828; Industrial Press *v.* W. R. C. Smith Pub. Co., 164 Fed. 842, 90 C. C. A. 604; American Wine Co. *v.* Kohlman, 158 Fed. 830; Lamont *v.* Hershey, 140 Fed. 763; Heide *v.* Wallace, 129 Fed. 649 [*affirmed* in 135 Fed. 346, 68 C. C. A. 16]; Baker *v.* Baker, 115 Fed. 297, 53 C. C. A. 157; Hostetter Co. *v.* Conron, 111 Fed. 737; Gorham Mfg. Co. *v.* Emery-Bird-Thayer Dry-Goods Co., 104 Fed. 243, 43 C. C. A. 511 [*affirming* 92 Fed. 774]; Brennan *v.* Emery-Bird-Thayer Dry-Goods Co., 99 Fed. 971; Illinois Watch-Case Co. *v.* Elgin Nat. Watch Co., 94 Fed. 667, 35 C. C. A. 237; Stuart *v.* F. G. Stewart Co., 91 Fed. 243, 33 C. C. A. 480 [*reversing* 85 Fed. 778]; Lamont *v.* Leedy, 88 Fed. 72; Cleveland Stone Co. *v.* Wallace, 52 Fed. 431; *Ex p.* Farnum, 18 Off. Gaz. 412. See Florence Mfg. Co. *v.* Dowd, 171 Fed. 122 [*reversed* in 178 Fed. 73, 101 C. C. A. 565]; Regensburg *v.* Juan F. Portuondo Cigar Mfg. Co., 142 Fed. 160, 73 C. C. A. 378 [*affirming* 136 Fed. 866].

England.—Wotherspoon *v.* Currie, L. R. 5 H. L. 508, 519, 42 L. J. Ch. 130, 27 L. T. Rep. N. S. 393 [*reversing* 23 L. T. Rep. N. S. 443, 18 Wkly. Rep. 942 (*reversing* 22 L. T. Rep. N. S. 260, 18 Wkly. Rep. 562)] (per Chelmsford, L. J.); Turton *v.* Turton, 42 Ch. D. 128, 58 L. J. Ch. 677, 61 L. T. Rep. N. S. 571, 38 Wkly. Rep. 22; Cheavin *v.* Walker, 5 Ch. D. 850, 46 L. J. Ch. 265, 35 L. T. Rep. N. S. 757

tinguished upon this ground.[34] But the reasons for not requiring proof of a fraudulent intent in cases of infringement of trade-marks apply equally well to unfair competition cases,[35] for the basis of the remedy is substantially the same in both cases.[36] Unfair competition involves trading upon another's reputation and good-will, and the injury is the same regardless of the intent with which it is done. Accordingly the better view is that an actual fraudulent intent need not be shown where the necessary and probable tendency of defendant's conduct is to deceive the public, and pass off his goods or business as and for that of plaintiff,[37] especially

[*reversed* on other grounds in 5 Ch. D. 862, 46 L. J. Ch. 686, 36 L. T. Rep. N. S. 938, 37 L. T. Rep. N. S. 300]; Blanchard *v.* Hill, 2 Atk. 484, 26 Eng. Reprint 692; Valentine Meat Juice Co. *v.* Valentine Extract Co., 16 T. L. R. 33, 48 Wkly. Rep. 127.

Canada.— Boston Rubber Shoe Co. *v.* Boston Rubber Co., 7 Can. Exch. 187.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 80.

34. See *supra*, V, A, 3.

35. See W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 100 Me. 461, 62 Atl. 499, 4 L. R. A. N. S. 960; Singer Mach. Manufacturers *v.* Wilson, 3 App. Cas. 376, 47 L. J. Ch. 481, 38 L. T. Rep. N. S. 303, 26 Wkly. Rep. 664. See, generally, the trade-mark cases cited *supra*, IV, D.

36. See *supra*, I, C; also *supra*, V, A, 2.

37. *California.*— Dodge Stationery Co. *v.* Dodge, 145 Cal. 380, 78 Pac. 879.

Illinois.—Koebel *v.* Chicago Landlords' Protective Bureau, 210 Ill. 176, 71 N. E. 362, 102 Am. St. Rep. 154 [*affirming* 112 Ill. App. 21].

Iowa.— Atlas Assur. Co. *v.* Atlas Ins. Co., 138 Iowa 228, 112 N. W. 232, 114 N. W. 609, 128 Am. St. Rep. 189, 15 L. R. A. N. S. 625.

Massachusetts.— George G. Fox Co. *v.* Glynn, 191 Mass. 344, 78 N. E. 89, 114 Am. St. Rep. 619; Viano *v.* Baccigalupo, 183 Mass. 160, 67 N. E. 641. See also New England Awl, etc., Co. *v.* Marlborough Awl, etc., Co., 168 Mass. 154, 46 N. E. 386, 60 Am. St. Rep. 377.

Minnesota.—Nesne *v.* Sundet, 93 Minn. 299, 101 N. W. 490, 106 Am. St. Rep. 439.

Missouri.— McCann *v.* Anthony, 21 Mo. App. 83; Sanders *v.* Jacob, 20 Mo. App. 96.

New Jersey.— International Silver Co. *v.* Wm. H. Rogers Corp., 66 N. J. Eq. 140, 57 Atl. 725; Wirtz *v.* Eagle Bottling Co., 50 N. J. Eq. 164, 24 Atl. 658.

New York.— Chas. S. Higgins Co. *v.* Higgins Soap Co., 144 N. Y. 462, 39 N. E. 490, 43 Am. St. Rep. 769, 27 L. R. A. 42 [*reversing* 71 Hun 101, 24 N. Y. Suppl. 801]; Vulcan *v.* Myers, 139 N. Y. 364, 34 N. E. 904; Waterman *v.* Shipman, 130 N. Y. 301, 29 N. E. 111 [*reversing* 8 N. Y. Suppl. 814]; Dutton *v.* Cupples, 117 N. Y. App. Div. 172, 102 N. Y. Suppl. 309; Roy Watch-Case Co. *v.* Camm-Roy Watch-Case Co., 28 Misc. 45, 58 N. Y. Suppl. 979; Clinton Metalic Paint Co. *v.* New York Metalic Paint Co., 23 Misc. 66, 50 N. Y. Suppl. 437; Amoskeag Mfg. Co. *v.* Garner, 54 How. Pr. 297.

Pennsylvania.—Suburban Press *v.* Philadelphia Suburban Pub. Co., 227 Pa. St. 148, 75 Atl. 1037; American Clay Mfg. Co. *v.* New Jersey American Clay Mfg. Co., 198 Pa. St. 189, 47 Atl. 936; Colton *v.* Thomas, 2 Brewst. 308, 7 Phila. 257; Clark, etc., Co. *v.* Scott, 4 Lack. Leg. N. 159.

Rhode Island.— Armington *v.* Palmer, 21 R. I. 109, 42 Atl. 308, 79 Am. St. Rep. 786, 43 L. R. A. 95.

Texas.—Western Grocer Co. *v.* Caffarelli, (Civ. App. 1908) 108 S. W. 413 [*reversed* on other grounds in 102 Tex. 104, 127 S. W. 1018].

Washington.— Martell *v.* St. Francis Hotel Co., 51 Wash. 375, 98 Pac. 1116.

United States.— Hygeia Distilled Water Co. *v.* Consolidated Ice Co., 144 Fed. 139 [*affirmed* in 151 Fed. 10, 80 C. C. A. 506]; Bissell Chilled Plow Works *v.* T. M. Bissell Plow Co., 121 Fed. 357; Enoch Morgan's Sons Co. *v.* Whittier-Coburn Co., 118 Fed. 657; Sterling Remedy Co. *v.* Spermine Medical Co., 112 Fed. 1000, 50 C. C. A. 657; Halstead *v.* Houston, 111 Fed. 376; N. K. Fairbank Co. *v.* Luckel, etc., Soap Co., 102 Fed. 327, 42 C. C. A. 376; Le Page Co. *v.* Russia Cement Co., 51 Fed. 941, 2 C. C. A. 555, 17 L. R. A. 354; Coffeen *v.* Brunton, 5 Fed. Cas. No. 2,946, 4 McLean 516, 519 (wherein Mr. Justice McLean said: "This is a correct view of the principle; for the injury will be neither greater nor less by the knowledge of the party"); Newby *v.* Oregon Cent. R. Co., 18 Fed. Cas. No. 10,144, Deady 609. See Gannett *v.* Ruppert, 119 Fed. 221 [*reversed* in 127 Fed. 962, 62 C. C. A. 594].

England.— North Cheshire, etc., Brewery Co. *v.* Manchester Brewery Co., [1899] A. C. 83, 68 L. J. Ch. 74, 79 L. T. Rep. N. S. 645, 15 T. L. R. 110; Single Mfg. Co. *v.* Loog, 8 App. Cas. 15, 52 L. J. Ch. 481, 48 L. T. Rep. N. S. 3, 31 Wkly. Rep. 325; Singer Mach. Manufacturers *v.* Wilson, 3 App. Cas. 376, 47 L. J. Ch. 481, 38 L. T. Rep. N. S. 303, 26 Wkly. Rep. 664; Wotherspoon *v.* Currie, L. R. 5 H. L. 508, 42 L. J. Ch. 130, 27 L. T. Rep. N. S. 393 [*reversing* 23 L. T. Rep. N. S. 443, 18 Wkly. Rep. 942 (*reversing* 22 L. T. Rep. N. S. 260, 18 Wkly. Rep. 562)]; Reddaway *v.* Bentham Hemp-Spinning Co., [1892] 2 Q. B. 639, 67 L. T. Rep. N. S. 301; Saxlehner *v.* Apollinaris Co., [1897] 1 Ch. 893, 66 L. J. Ch. 533, 76 L. T. Rep. N. S. 617; Powell *v.* Birmingham Vinegar Brewery Co., [1896] 2 Ch. 54, 65 L. J. Ch. 563, 74 L. T. Rep. N. S. 509, 44 Wkly. Rep. 688 [*affirmed* in [1899] A. C. 710, 66 L. J. Ch. 763, 76 L. T. Rep. N. S. 792]; Hendriks *v.* Montagu, 17 Ch. D. 638, 50 L. J. Ch. 456, 44 L. T. Rep. N. S. 879, 30 Wkly. Rep. 168; Walsh *v.* Knott, 4 Jur. N. S.

where only preventive relief against continuance of the wrong is sought or granted.[38] Even if the resemblance is accidental and not intentional, plaintiff is entitled to protection against its injurious results to his trade.[39] Fraudulent intent is important, however, and in close cases may be decisive.[40] It may even deprive one of the right to use words or marks primarily *publici juris*.[41] The absence of any evidence of an intention to deceive is often alluded to in denying an injunction where the similarity complained of is not clearly sufficient to cause confusion or deception.[42] Where defendant actually intended to deceive, and adopted means to that end, an injunction will usually be granted.[43] But means must be adopted

330, 4 Kay & J. 747, 70 Eng. Reprint 310; Guardian F., etc., Assur. Co. *v.* Guardian, etc., Ins. Co., 50 L. J. Ch. 253, 43 L. T. Rep. N. S. 791; Millington *v.* Fox, 3 Myl. & C. 338, 14 Eng. Ch. 338, 40 Eng. Reprint 956.

Canada.— Slater *v.* Ryan, 17 Manitoba 89.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 80.

"The vital question . . . is not what did the defendant mean, but what has he done?" Wirtz *v.* Eagle Bottling Co., 50 N. J. Eq. 164, 167, 24 Atl. 658. The action of the court depends upon the injury to plaintiff, not upon the motive of defendant. International Silver Co. *v.* Wm. H. Rogers Corp., 66 N. J. Eq. 119, 57 Atl. 1037. The probable and ordinary consequences of the act, as distinguished from the intent and motive of the parties, must constitute the test. Nesne *v.* Sundet, 93 Minn. 299, 101 N. W. 490, 106 Am. St. Rep. 439.

38. International Silver Co. *v.* Wm. H. Rogers Corp., 66 N. J. Eq. 119, 57 Atl. 1037; Vulcan *v.* Myers, 139 N. Y. 364, 34 N. E. 904; Clinton Metalic Paint Co. *v.* New York Metalic Paint Co., 23 Misc. (N. Y.) 66, 50 N. Y. Suppl. 437; Van Houten *v.* Hooton Cocoa, etc., Co., 130 Fed. 600; Moet *v.* Couston, 33 Beav. 578, 10 Jur. N. S. 1012, 10 L. T. Rep. N. S. 395, 4 New Rep. 86, 55 Eng. Reprint 493. But see Ainsworth *v.* Walmsley, L. R. 1 Eq. 518, 12 Jur. N. S. 205, 35 L. J. Ch. 352, 14 L. T. Rep. N. S. 220, 14 Wkly. Rep. 363.

In an action at law, fraud is of the essence of the injury and must be proved. Crawshay *v.* Thompson, 11 L. J. C. P. 301, 4 M. & G. 357, 5 Scott N. R. 562, 43 E. C. L. 189.

Accounting for damages and profits may be denied where there was no fraudulent intent see *infra*, IX, E, 12.

39. Amoskeag Mfg. Co. *v.* Spear, 2 Sandf. (N. Y.) 599; Dreydoppel *v.* Young, 14 Phila. (Pa.) 226. See Johnston *v.* Orr Ewing, 7 App. Cas. 219, 51 L. J. Ch. 797, 46 L. T. Rep. N. S. 216, 30 Wkly. Rep. 417.

40. See cases cited *infra*, this note.

The presence of an inequitable purpose is an element of great weight in determining a question of fairness in trade. Ogilvie *v.* G. & C. Merriam Co., 149 Fed. 858 [*affirmed* in 159 Fed. 638]. See also Duniway Pub. Co. *v.* Northwest Printing, etc., Co., 11 Oreg. 322, 8 Pac. 283, holding a closer simulation necessary in absence of fraud. If defendants' goods on the face of them, and having regard to surrounding circumstances, are calculated to deceive, evidence to prove the intent to deceive is unnecessary, since a man must be taken to have intended the reasonable and natural consequences of his own acts. If, on the other hand, a mere comparison of the goods, having regard to the surrounding circumstances, is not sufficient, then it is allowable to prove from other sources that what is or may be apparent innocence was really intended to deceive. Saxlehner *v.* Apollinaris Co., [1897] 1 Ch. 893, 66 L. J. Ch. 533, 76 L. T. Rep. N. S. 617.

41. Elgin Butter Co. *v.* Elgin Creamery Co., 155 Ill. 127, 40 N. E. 616. But see Ball *v.* Broadway Bazaar, 121 N. Y. App. Div. 546, 549, 106 N. Y. Suppl. 249, wherein Gaynor, J., said: "The motive with which one does that which he has the right to do is of no consequence."

42. *New Jersey.*— Bear Lithia Springs Co. *v.* Great Bear Spring Co., 72 N. J. Eq. 871, 68 Atl. 86.

New York.— Boessneck *v.* Iselin, 83 N. Y. App. Div. 290, 82 N. Y. Suppl. 164; T. B. Dunn Co. *v.* Trix Mfg. Co., 50 N. Y. App. Div. 75, 63 N. Y. Suppl. 333; Lavanburg *v.* Pfeiffer, 31 Misc. 690, 66 N. Y. Suppl. 39; Snowden *v.* Noah, Hopk. 347, 14 Am. Dec. 547.

Oregon.— Duniway Pub. Co. *v.* Northwest Printing, etc., Co., 11 Oreg. 322, 8 Pac. 283.

United States.— Moore *v.* Auwell, 172 Fed. 508 [*affirmed* in 178 Fed. 543, 102 C. C. A. 53]; Capewell Horse Nail Co. *v.* Putnam Nail Co., 140 Fed. 670; Regensburg *v.* Juan F. Portuondo Cigar Mfg. Co., 136 Fed. 866; Stevens Linen Works *v.* Don, 121 Fed. 171 [*affirmed* in 127 Fed. 950, 62 C. C. A. 582]; Kipling *v.* Putnam, 120 Fed. 631, 57 C. C. A. 295, 65 L. R. A. 873; Gannett *v.* Ruppert, 119 Fed. 221 [*reversed* in 127 Fed. 962, 62 C. C. A. 594]; Daviess County Distilling Co. *v.* Martinoni, 117 Fed. 186; Harper *v.* Lare, 103 Fed. 203, 43 C. C. A. 182; La Republique Francaise *v.* Schultz, 94 Fed. 500; N. K. Fairbank Co. *v.* R. W. Bell Mfg. Co., 71 Fed. 295; Putnam Nail Co. *v.* Ausable Horsenail Co., 53 Fed. 390.

England.— Civil Service Supply Assoc. *v.* Dean, 13 Ch. D. 512; Merchant Banking Co. *v.* Merchants' Joint Stock Bank, 9 Ch. D. 560, 47 L. J. Ch. 828, 26 Wkly. Rep. 847; Cowen *v.* Hulton, 46 L. T. Rep. N. S. 897.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 80.

43. *California.*— Schmidt *v.* Brieg, 100 Cal. 672, 35 Pac. 623, 22 L. R. A. 790.

such as to make deception and injury reasonably probable. A mere fraudulent

Florida.— El Modello Cigar Mfg. Co. *v.* Gato, 25 Fla. 886, 7 So. 23, 23 Am. St. Rep. 537, 6 L. R. A. 823.

Georgia.— Whitley Grocery Co. *v.* McCaw Mfg. Co., 105 Ga. 839, 32 S. E. 113.

Illinois.— Koebel *v.* Chicago Landlords' Protective Bureau, 210 Ill. 176, 71 N. E. 362, 102 Am. St. Rep. 154 [*affirming* 112 Ill. App. 21]; Allegretti *v.* Allegretti Chocolate Cream Co., 177 Ill. 129, 52 N. E. 487 [*affirming* 76 Ill. App. 581]; Hopkins Amusement Co. *v.* Frohman, 103 Ill. App. 613 [*affirmed* in 202 Ill. 541, 67 N. E. 391]; O'Kane *v.* West End Dry Goods Store, 72 Ill. App. 297.

Indiana.— Smail *v.* Sanders, 118 Ind. 105, 20 N. E. 296; Keller *v.* B. F. Goodrich Co., 117 Ind. 556, 19 N. E. 196, 10 Am. St. Rep. 88; Computing Cheese Cutter Co. *v.* Dunn, (App. 1909) 88 N. E. 93, use of similar name with intent to deceive public.

Massachusetts.— Samuels *v.* Spitzer, 177 Mass. 226, 58 N. E. 693.

Missouri.— Drummond Tobacco Co. *v.* Addison Tinsley Tobacco Co., 52 Mo. App. 10; Sanders *v.* Jacob, 20 Mo. App. 96.

New Jersey.— Perlberg *v.* Smith, 70 N. J. Eq. 638, 62 Atl. 442; Johnson *v.* Seabury, 69 N. J. Eq. 696, 61 Atl. 5; Eureka Fire Hose Co. *v.* Rubber Mfg. Co., 69 N. J. Eq. 159, 60 Atl. 561; International Silver Co. *v.* William H. Rogers Corp., 67 N. J. Eq. 646, 60 Atl. 187, 110 Am. St. Rep. 506.

New York.— Burrow *v.* Marceau, 124 N. Y. App. Div. 665, 109 N. Y. Suppl. 105; Dunlap *v.* Young, 68 N. Y. App. Div. 137, 74 N. Y. Suppl. 184; Anargyros *v.* Egyptian Amasis Cigarette Co., 54 N. Y. App. Div. 345, 66 N. Y. Suppl. 626; Reckitt *v.* Kellogg, 28 N. Y. App. Div. 111, 50 N. Y. Suppl. 888; Tuerk Hydraulic Power Co. *v.* Tuerk, 92 Hun 65, 36 N. Y. Suppl. 384; Gebbie *v.* Stitt, 82 Hun 93, 31 N. Y. Suppl. 102; Amoskeag Mfg. Co. *v.* Spear, 2 Sandf. 599; Falk *v.* American West Indies Trading Co., 36 Misc. 376, 73 N. Y. Suppl. 547 [*affirmed* in 71 N. Y. App. Div. 320, 75 N. Y. Suppl. 964]; Gaines *v.* Leslie, 25 Misc. 20, 54 N. Y. Suppl. 421; Charles S. Higgins Co. *v.* Amalga Soap Co., 10 Misc. 268, 30 N. Y. Suppl. 1074; Brown *v.* Braunstein, 83 N. Y. Suppl. 1096; Kassel *v.* Jeuda, 70 N. Y. Suppl. 480; International Soc. *v.* International Soc., 59 N. Y. Suppl. 785; Cook *v.* Starkweather, 13 Abb. Pr. N. S. 392; Fetridge *v.* Merchant, 4 Abb. Pr. 156. See also Taylor *v.* Carpenter, 2 Sandf. Ch. 603 [*affirmed* in 11 Paige 292, 42 Am. Dec. 114]. But see Tallcot *v.* Moore, 6 Hun 106; Cox's Manual of Trade-mark Cases 478.

Pennsylvania.— Suburban Press *v.* Philadelphia Suburban Pub. Co., 227 Pa. St. 148, 75 Atl. 1037; Hires *v.* Hires, 6 Pa. Dist. 285; Shepp *v.* Jones, 3 Pa. Dist. 539.

Tennessee.— C. F. Simmons Medicine Co. *v.* Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165.

Texas.— Alff *v.* Radam, 77 Tex. 530, 14 S. W. 164, 19 Am. St. Rep. 792, 9 L. R. A. 145; Scanlan *v.* Williams, (Civ. App. 1908) 114 S. W. 862.

Wisconsin.— Avenarius *v.* Kornely, 139 Wis. 247, 121 N. W. 336.

United States.— McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828; Allen *v.* Walton Wood, etc., Co., 178 Fed. 287; Billiken Co. *v.* Baker, etc., Co., 174 Fed. 829; Rushmore *v.* Saxon, 170 Fed. 1021, 95 C. C. A. 671 [*modified* in 158 Fed. 499]; Holeproof Hosiery Co. *v.* Fitts, 167 Fed. 378; National Water Co. *v.* O'Connell, 159 Fed. 1001 [*affirmed* in 161 Fed. 545]; Rushmore *v.* Saxon, 158 Fed. 499 [*modified* in 170 Fed. 1021, 95 C. C. A. 671]; R. J. Reynolds Tobacco Co. *v.* Allen Bros. Tobacco Co., 151 Fed. 819; Coats *v.* John Coates Thread Co., 135 Fed. 177; Scriven *v.* North, 134 Fed. 366, 67 C. C. A. 348 [*modifying* 124 Fed. 894]; Royal Baking Powder Co. *v.* Royal, 122 Fed. 337, 58 C. C. A. 499; Bauer *v.* La Société, etc., 120 Fed. 74, 56 C. C. A. 480; Gannett *v.* Ruppert, 119 Fed. 221 [*reversed* in 127 Fed. 962, 62 C. C. A. 594]; Computing Scale Co. *v.* Standard Computing Scale Co., 118 Fed. 965, 55 C. C. A. 459; Enoch Morgan's Sons Co. *v.* Whittier-Coburn Co., 118 Fed. 657; Swift *v.* Groff, 114 Fed. 605; International Silver Co. *v.* Wm. G. Rogers Co., 113 Fed. 526; Peck *v.* Peck Bros. Co., 113 Fed. 291, 51 C. C. A. 251, 62 L. R. A. 81; Sterling Remedy Co. *v.* Spermine Medical Co., 112 Fed. 1000, 50 C. C. A. 657; Lalance, etc., Mfg. Co. *v.* National Enameling, etc., Co., 109 Fed. 317; Charles E. Hires Co. *v.* Consumers' Co., 100 Fed. 809, 41 C. C. A. 71; Thomas G. Plant Co. *v.* May Co., 100 Fed. 72, 105 Fed. 375, 44 C. C. A. 534; Continental Ins. Co. *v.* Continental Fire Assoc., 96 Fed. 846; Draper *v.* Skerrett, 94 Fed. 912; Saxlehner *v.* Neilsen, 91 Fed. 1004, 34 C. C. A. 690 [*modifying* 88 Fed. 71, and *reversed* in 179 U. S. 43, 21 S. Ct. 16, 45 L. ed. 77]; Centaur Co. *v.* Robinson, 91 Fed. 889; Burnett *v.* Hahn, 88 Fed. 694; Collingsplatt *v.* Finlayson, 88 Fed. 693; Centaur Co. *v.* Killenberger, 87 Fed. 725; R. Heinisch's Sons Co. *v.* Boker, 86 Fed. 765; Von Mumm *v.* Wittemann, 85 Fed. 966; Hostetter Co. *v.* Sommers, 84 Fed. 333; Pennsylvania Salt Mfg. Co. *v.* Myers, 79 Fed. 87; N. K. Fairbank Co. *v.* R. W. Bell Mfg. Co., 77 Fed. 869, 23 C. C. A. 554 [*reversing* 71 Fed. 295]; Buck's Stove, etc., Co. *v.* Kiechle, 76 Fed. 758; Clark Thread Co. *v.* Armitage, 74 Fed. 936, 21 C. C. A. 178; Meyer *v.* Dr. B. L. Bull Vegetable Medicine Co., 58 Fed. 884, 7 C. C. A. 558; Von Mumm *v.* Frash, 56 Fed. 830; Putnam Nail Co. *v.* Bennett, 43 Fed. 800; Brown Chemical Co. *v.* Stearns, 37 Fed. 360; Southern White Lead Co. *v.* Cary, 25 Fed. 125; Landreth *v.* Landreth, 22 Fed. 41; Sawyer *v.* Horn, 1 Fed. 24, 4 Hughes 239; Enoch Morgan's Sons Co. *v.* Hunkele, 8 Fed. Cas. No. 4,493, 10 Reporter 577, 16 Off. Gaz. 1092; Taylor *v.* Carpenter, 23 Fed. Cas. No. 13,784, 3 Story 458; Kinney *v.* Basch, 16 Am. L. Reg. N. S. 596. See also Taylor *v.* Carpenter, 23 Fed. Cas. No. 13,785, 2 Woodb. & M. 1. But

intent to deceive is insufficient.[44] A wrongful imitation for a fraudulent purpose will be enjoined.[45] A fraudulent intent may be presumed from a similarity close enough to cause actual or probable deception or damage, upon the principle that persons are held to have intended the natural and probable consequences of their acts.[46] Mere similarity is not, as a matter of law, conclusive evidence of an intention

see Von Mumm *v.* Wittemann, 85 Fed. 966. *Contra*, U. S. Tobacco Co. *v.* McGreenery, 144 Fed. 1022, 74 C. C. A. 682 [*affirming* 144 Fed. 531].

England.— Reddaway *v.* Banham, [1896] A. C. 199, 65 L. J. Q. B. 381, 74 L. T. Rep. N. S. 289, 44 Wkly. Rep. 638 [*reversing* [1895] 1 Q. B. 286, 64 L. J. Q. B. 321, 72 L. T. Rep. N. S. 73, 43 Wkly. Rep. 294]; Lee *v.* Haley, L. R. 5 Ch. 155, 39 L. J. Ch. 284, 22 L. T. Rep. N. S. 251, 18 Wkly. Rep. 242; Massam *v.* Thornley's Cattle Food Co., 14 Ch. D. 748, 42 L. T. Rep. N. S. 851, 28 Wkly. Rep. 966. But see Taylor *v.* Taylor, 2 Eq. Rep. 290, 23 L. J. Ch. 255, 23 Eng. L. & Eq. 281; Hine *v.* Lart, 10 Jur. 106; Lever *v.* Bedingfield, 80 L. T. Rep. N. S. 100.

Canada.— Templeton *v.* Wallace, 4 Northwest. Terr. 340; Vive Camera Co. *v.* Hogg, 18 Quebec Super. Ct. 1.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 80.

Compare New Orleans Coffee Co. *v.* American Coffee Co., 124 La. 19, 49 So. 730.

44. Tallcot *v.* Moore, 6 Hun (N. Y.) 106; U. S. Tobacco Co. *v.* McGreenery, 144 Fed. 531 [*affirmed* in 144 Fed. 1022, 74 C. C. A. 682]; G. W. Cole Co. *v.* American Cement, etc., Co., 130 Fed. 703, 65 C. C. A. 105; Centaur Co. *v.* Marshall, 97 Fed. 785, 38 C. C. A. 413; Kann *v.* Diamond Steel Co., 89 Fed. 706, 32 C. C. A. 324; N. K. Fairbank Co. *v.* R. W. Bell Mfg. Co., 77 Fed. 869, 23 C. C. A. 554.

45. *California.*— Banzhaf *v.* Chase, 150 Cal. 180, 88 Pac. 704; Schmidt *v.* Brieg, 100 Cal. 672, 35 Pac. 623, 22 L. R. A. 790.

Indiana.— Smail *v.* Sanders, 118 Ind. 105, 20 N. E. 296.

New Jersey.— O'Grady *v.* McDonald, 72 N. J. Eq. 805, 66 Atl. 175.

New York.— Keasbey *v.* Brooklyn Chemical Works, 142 N. Y. 467, 37 N. E. 476, 40 Am. St. Rep. 623 [*reversing* 21 N. Y. Suppl. 696].

Pennsylvania.— Van Stan's Stratena Co. *v.* Van Stan, 209 Pa. St. 564, 58 Atl. 1064, 103 Am. St. Rep. 1018.

Tennessee.— C. F. Simmons Medicine Co. *v.* Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165.

United States.— International Silver Co. *v.* Rodgers Bros. Cutlery Co., 136 Fed. 1019; Enoch Morgan's Sons Co. *v.* Hunkele, 8 Fed. Cas. No. 4,493, 10 Reporter 577, 16 Off. Gaz. 1092; Frese *v.* Bachof, 9 Fed. Cas. No. 5,110, 14 Blatchf. 432, 13 Off. Gaz. 635.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 80.

Compare Reddaway *v.* Bentham Hemp Spinning Co., [1892] 2 Q. B. 639, 67 L. T. Rep. N. S. 301.

Ground for injunction.—"It is enjoined, not as a deception of the public, likely to be successful, but as an attempt to defraud the plaintiff." Brown *v.* Seidel, 153 Pa. St. 60, 74, 25 Atl. 1064, per Mitchell, J.

46. *Iowa.*— Atlas Assur. Co. *v.* Atlas Ins. Co., 138 Iowa 228, 112 N. W. 232, 114 N. W. 609, 128 Am. St. Rep. 189, 15 L. R. A. N. S. 625.

New Jersey.— Eureka Fire Hose Co. *v.* Eureka Rubber Mfg. Co., 69 N. J. Eq. 159, 60 Atl. 561.

New York.— Vulcan *v.* Myers, 139 N. Y. 364, 34 N. E. 904; Volger *v.* Force, 63 N. Y. App. Div. 122, 71 N. Y. Suppl. 209; McLoughlin *v.* Singer, 33 N. Y. App. Div. 185, 53 N. Y. Suppl. 342; Day *v.* Webster, 23 N. Y. App. Div. 601, 49 N. Y. Suppl. 314; Curtis *v.* Bryan, 2 Daly 312; Bolen, etc., Mfg. Co. *v.* Jonasch, 29 Misc. 99, 60 N. Y. Suppl. 555.

Ohio.— Drake Medicine Co. *v.* Glessner, 68 Ohio St. 337, 67 N. E. 722.

Pennsylvania.— Juan F. Portuondo Cigar Mfg. Co. *v.* Vicente Portuondo Cigar Mfg. Co., 222 Pa. St. 116, 70 Atl. 968; Brown *v.* Seidel, 153 Pa. St. 60, 25 Atl. 1064.

United States.— Lawrence Mfg. Co. *v.* Tennessee Mfg. Co., 138 U. S. 537, 11 S. Ct. 396, 34 L. ed. 997; Billiken Co. *v.* Baker, etc., Co., 174 Fed. 829; Wolf *v.* Hamilton-Brown Shoe Co., 165 Fed. 413, 91 C. C. A. 363; Baker *v.* Puritan Pure Food Co., 139 Fed. 680; International Silver Co. *v.* Rodgers Bros. Cutlery Co., 136 Fed. 1019; Devlin *v.* McLeod, 135 Fed. 164; Bickmore Gall Cure Co. *v.* Karns, 134 Fed. 833, 67 C. C. A. 439 [*reversing* 126 Fed. 573]; Drewry *v.* Wood, 127 Fed. 887; Enterprise Mfg. Co. *v.* Landers, 124 Fed. 923 [*affirmed* in 131 Fed. 240, 65 C. C. A. 587]; Scriven *v.* North, 124 Fed. 894 [*modified* in 134 Fed. 366, 67 C. C. A. 348]; Cantrell *v.* Butler, 124 Fed. 290; Lalance, etc., Mfg. Co. *v.* National Enameling, etc., Co., 109 Fed. 317; R. Heinisch's Sons Co. *v.* Boker, 86 Fed. 765; Cleveland Stone Co. *v.* Wallace, 52 Fed. 431; Liggett, etc., Tobacco Co. *v.* Hynes, 20 Fed. 883. See Draper *v.* Skerrett, 116 Fed. 206.

England.— Saxlehner *v.* Apollinaris Co., [1897] 1 Ch. 893, 66 L. J. Ch. 533, 76 L. T. Rep. N. S. 617; Taylor *v.* Taylor, 2 Eq. Rep. 290, 23 L. J. Ch. 255, 23 Eng. L. & Eq. 281; Edelston *v.* Vick, 1 Eq. Rep. 413, 11 Hare 78, 18 Jur. 7, 23 Eng. L. & Eq. 51, 45 Eng. Ch. 78, 68 Eng. Reprint 1194; Hine *v.* Lart, 10 Jur. 106.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 80.

Judicial statement of rule.—"If a plaintiff has the absolute right to the use of a particular word or words as a trade-mark, then if an infringement is shown, the wrongful or fraudulent intent is presumed, and although allowed to be rebutted in exemption of damages, the further violation of the right of property will nevertheless be restrained. But

tion to deceive.[47] But such intent may be inferred, as a matter of fact, from similarity. Form, color, and general appearance may be considered. The greater the number of points of similarity, the stronger is the inference of an intentional imitation with intent to deceive.[48] Conspicuous and unnecessary use or display

where an alleged trade-mark is not in itself a good trade-mark, yet the use of the word has come to denote the particular manufacturer or vendor, relief against unfair competition or perfidious dealing will be awarded by requiring the use of the word by another to be confined to its primary sense by such limitations as will prevent misapprehension on the question of origin. In the latter class of cases such circumstances must be made out as will show wrongful intent in fact, or justify that inference from the inevitable consequences of the act complained of." Elgin Nat. Watch Co. *v.* Illinois Watch Case Co., 179 U. S. 665, 674, 21 S. Ct. 270, 45 L. ed. 365 [*citing* Singer Mfg. Co. *v.* June Mfg. Co., 163 U. S. 169, 16 S. Ct. 1003, 41 L. ed. 118; Coates *v.* Merrick Thread Co., 149 U. S. 562, 13 S. Ct. 966, 37 L. ed. 847; Lawrence Mfg. Co. *v.* Tennessee Mfg. Co., 138 U. S. 537, 11 S. Ct. 396, 34 L. ed. 997].

47. Ball *v.* Siegel, 116 Ill. 137, 4 N. E. 667, 56 Am. Rep. 766 (fact that dress of goods is the ordinary and usual one, or required by the circumstances, should be considered on question of intent); New Orleans Coffee Co. *v.* American Coffee Co., 124 La. 19, 49 So. 730 (similarity in the shape of the can in which coffee is sold to the can of a competitor, and that the same color is adopted, does not sustain the conclusion that a trade-mark or label was selected to accomplish a fraudulent purpose); P. Lorillard Co. *v.* Peper, 86 Fed. 956, 30 C. C. A. 496; Orr Ewing *v.* Johnston, 13 Ch. D. 434, 42 L. T. Rep. N. S. 67, 28 Wkly. Rep. 330 [*affirmed* in 7 App. Cas. 219, 51 L. J. Ch. 797, 46 L. T. Rep. N. S. 216, 30 Wkly. Rep. 417]; Walter *v.* Emmott, 54 L. J. Ch. 1059, 53 L. T. Rep. N. S. 437.

Directions to imitate.— In Woollam *v.* Ratcliff, 1 Hem. & M. 259, 261, 71 Eng. Reprint 113, Wood, V. C., said: "In this case the Plaintiff has a peculiar mode of making up his goods. This is not precisely a trade-mark." Later he said: "There is the express direction to the defendant to imitate the plaintiff's bundle. This is of course always an element of suspicion; but I cannot treat it as conclusive."

"The simulation might be so great as that fraud would be implied, otherwise it had to be proved by evidence *aliunde*." T. B. Dunn Co. *v.* Trix Mfg. Co., 50 N. Y. App. Div. 75, 63 N. Y. Suppl. 333 [*citing* Day *v.* Webster, 23 N. Y. App. Div. 602, 49 N. Y. Suppl. 314]. Proof of the fraudulent nature of defendant's acts must be furnished, except where the similarity of the labels is so striking as to raise a presumption of fraudulent intent without more. Gaines *v.* Leslie, 25 Misc. (N. Y.) 20, 54 N. Y. Suppl. 421.

Chance explanation incredible.— "Assuming that there is such a thing as chance, it is seldom found as an element in the adoption of a trade-mark, especially one which another person has found useful in his business." Bolen, etc., Mfg. Co. *v.* Jonasch, 29 Misc. (N. Y.) 99, 102, 60 N. Y. Suppl. 555.

48. *Connecticut.*— Boardman *v.* Meriden Britannia Co., 35 Conn. 402, 95 Am. Dec. 270.

New Jersey.— Centaur Co. *v.* Link, 62 N. J. Eq. 147, 49 Atl. 828.

New York.— Enoch Morgan's Sons Co. *v.* Troxell, 89 N. Y. 292, 42 Am. Rep. 294, 11 Abb. N. Cas. 86; McLoughlin *v.* Singer, 33 N. Y. App. Div. 185, 53 N. Y. Suppl. 342; Day *v.* Webster, 23 N. Y. App. Div. 601, 49 N. Y. Suppl. 314; De Long *v.* De Long Hook, etc., Co., 89 Hun 399, 35 N. Y. Suppl. 509; Babbitt *v.* Brown, 68 Hun 515, 23 N. Y. Suppl. 25; Lockwood *v.* Bostwick, 2 Daly 521; American Novelty, etc., Co. *v.* Manufacturing Electrical Novelty Co., 36 Misc. 450, 73 N. Y. Suppl. 755; Fischer *v.* Blank, 19 N. Y. Suppl. 65; Lea *v.* Wolf, 13 Abb. Pr. N. S. 389 [*modified* in 15 Abb. Pr. N. S. 1, 46 How. Pr. 157]; Fetridge *v.* Wells, 4 Abb. Pr. 144, 13 How. Pr. 385; Fleischmann *v.* Schuckmann, 62 How. Pr. 92; Electro-Silicon Co. *v.* Trask, 59 How. Pr. 189.

Pennsylvania.— Shaw *v.* Pilling, 175 Pa. St. 78, 34 Atl. 446; Brown *v.* Seidel, 153 Pa. St. 60, 25 Atl. 1064.

United States.— Bauer *v.* Siegert, 120 Fed. 81, 56 C. C. A. 487; Keuffel, etc., Co. *v.* H. S. Crocker Co., 118 Fed. 187; Liebig's Extract of Meat Co. *v.* Walker, 115 Fed. 822; Peck *v.* Peck Bros. Co., 113 Fed. 291, 51 C. C. A. 251, 62 L. R. A. 81; Kentucky Distilleries, etc., Co. *v.* Wathen, 110 Fed. 641; Sterling Remedy Co. *v.* Gorey, 110 Fed. 372; Liebig's Extract of Meat Co. *v.* Libby, 103 Fed. 87; Paris Medicine Co. *v.* W. H. Hill Co., 102 Fed. 148, 42 C. C. A. 227; Thomas G. Plant Co. *v.* May Co., 100 Fed. 72; Centaur Co. *v.* Hughes Bros. Mfg. Co., 91 Fed. 901, 34 C. C. A. 127; Centaur Co. *v.* Neathery, 91 Fed. 891, 34 C. C. A. 118; Centaur Co. *v.* Robinson, 91 Fed. 889; Stuart *v.* F. G. Stewart Co., 91 Fed. 243, 33 C. C. A. 480; R. Heinisch's Sons Co. *v.* Boker, 86 Fed. 765; Hilson Co. *v.* Foster, 80 Fed. 896; Walker *v.* Mikolas, 79 Fed. 955; Burt *v.* Smith, 71 Fed. 161, 17 C. C. A. 573; Pillsbury *v.* Pillsbury-Washburn Flour Mills Co., 64 Fed. 841, 12 C. C. A. 432; Humphrey's Specific Homeopathic Medicine Co. *v.* Wenz, 14 Fed. 250; Moorman *v.* Hoge, 17 Fed. Cas. No. 9,783, 2 Sawy. 78. See Kinney *v.* Basch, 16 Am. L. Reg. N. S. 596.

England.— Lever *v.* Goodwin, 36 Ch. D. 1, 57 L. T. Rep. N. S. 583, 36 Wkly. Rep. 177; Taylor *v.* Taylor, 2 Eq. Rep. 290, 23 L. J. Ch. 255, 23 Eng. L. & Eq. 281; Edelston *v.* Vick, 1 Eq. Rep. 413, 11 Hare 78, 18 Jur. 7, 23 Eng. L. & Eq. 51, 45 Eng. Ch. 78, 68 Eng. Reprint 1194.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 80.

of another's characteristic words or marks,[49] an untruthful use of a name previously identified with plaintiff's goods,[50] or continuance of use in the same form after notice of the facts,[51] or a change from a different mark or label to one more closely resembling that of plaintiff,[52] is strong evidence of actual fraudulent intent. The existence of a fraudulent intent is a question of fact for the jury.[53]

7. Affirmative Duty to Distinguish — a. Statement of Rule. It is the duty of a subsequent trader coming into an established trade not to dress up his goods or market them in such a way as to cause confusion between his goods or business and that of a prior trader. Even conceding that the later trader has an equal abstract right to use particular words, names, or marks, yet if his unexplained use of them will cause confusion and deception, he must accompany such use with affirmative distinguishing features sufficient to render deception improbable. This rule applies to all classes of names, including descriptive, generic, personal, and geographical names, which, although primarily *publici juris*, have acquired a secondary meaning.[54] Where a name has acquired a secondary meaning, and

49. Keller *v.* B. F. Goodrich Co., 117 Ind. 556, 19 N. E. 196, 10 Am. St. Rep. 88; Eureka Fire Hose Co. *v.* Eureka Rubber Mfg. Co., 69 N. J. Eq. 159, 60 Atl. 561 [*affirmed* in 71 N. J. Eq. 300, 71 Atl. 1134]; Apollinaris Brunnen *v.* Somborn, 1 Fed. Cas. No. 496, 14 Blatchf. 380; Cellular Clothing Co. *v.* Morton, [1899] A. C. 326, 68 L. J. P. C. 72, 80 L. T. Rep. N. S. 809.

50. Keller *v.* B. F. Goodrich Co., 117 Ind. 556, 19 N. E. 196, 10 Am. St. Rep. 88; Elgin Nat. Watch Co. *v.* Loveland, 132 Fed. 41; Burgess *v.* Burgess, 3 De G. M. & G. 896, 17 Jur. 292, 22 L. J. Ch. 675, 52 Eng. Ch. 696, 43 Eng. Reprint 351. See also *infra*, V, B, 8.

51. Regis *v.* Jaynes, 185 Mass. 458, 70 N. E. 480; Amoskeag Mfg. Co. *v.* Spear, 2 Sandf. (N. Y.) 599; Lamont *v.* Hershey, 140 Fed. 763.

52. Frazier *v.* Dowling, 39 S. W. 45, 18 Ky. L. Rep. 1109; Johnson *v.* Seabury, 71 N. J. Eq. 750, 67 Atl. 36, 124 Am. St. Rep. 1007, 12 L. R. A. N. S. 1201 [*reversing* 69 N. J. Eq. 696, 61 Atl. 5]; Van Horn *v.* Coogan, 52 N. J. Eq. 380, 28 Atl. 788; Heublein *v.* Adams, 125 Fed. 782; P. Lorillard Co. *v.* Peper, 86 Fed. 956, 30 C. C. A. 496; Scheuer *v.* Muller, 74 Fed. 225, 20 C. C. A. 161; Blackwell *v.* Armistead, 3 Fed. Cas. No. 1,474, 3 Hughes 163.

53. Shaw *v.* Pilling, 175 Pa. St. 78, 34 Atl. 446.

54. *California.*— Weinstock *v.* Marks, 109 Cal. 529, 42 Pac. 142, 50 Am. St. Rep. 57, 30 L. R. A. 182.

Maine.— W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 100 Me. 461, 62 Atl. 499, 4 L. R. A. N. S. 960.

Massachusetts.—Giragosian *v.* Chutjian, 194 Mass. 504, 80 N. E. 647; George G. Fox Co. *v.* Glynn, 191 Mass. 344, 78 N. E. 89, 114 Am. St. Rep. 619; Vinao *v.* Baccigalupo, 183 Mass. 160, 67 N. E. 641; Flagg Mfg. Co. *v.* Holway, 178 Mass. 83, 59 N. E. 667.

Michigan.— Gordon Hollow Blast Grate Co. *v.* Gordon, 142 Mich. 488, 105 N. W. 1118.

Minnesota.— Watkins *v.* Landon, 52 Minn. 389, 54 N. W. 193, 38 Am. St. Rep. 560, 19 L. R. A. 236.

New Jersey.— International Silver Co. *v.* Rogers, 72 N. J. Eq. 933, 67 Atl. 105, 129 Am. St. Rep. 722; Edison Mfg. Co. *v.* Gladstone, (Ch. 1903) 58 Atl. 391; Centaur Co. *v.* Link, 62 N. J. Eq. 147, 49 Atl. 828.

New York.— Gillott *v.* Esterbrook, 47 Barb. 455 [*affirmed* in 48 N. Y. 374, 8 Am. Rep. 553].

Tennessee.— Fite *v.* Dorman, (1900) 57 S. W. 129.

United States.— Herring-Hall-Marvin Safe Co. *v.* Hall's Safe Co., 208 U. S. 554, 28 S. Ct. 350, 52 L. ed. 616; Elgin Nat. Watch Co. *v.* Illinois Watch Case Co., 179 U. S. 665, 21 S. Ct. 270, 45 L. ed. 365; Coats *v.* Merrick Thread Co., 149 U. S. 562, 13 S. Ct. 966, 37 L. ed. 847; Dietz *v.* Horton Mfg. Co., 170 Fed. 865, 96 C. C. A. 41; Dr. A. Reed Cushion Shoe Co. *v.* Frew, 162 Fed. 887, 89 C. C. A. 577; Sternberg Mfg. Co. *v.* Miller, etc., Mfg. Co., 161 Fed. 318, 88 C. C. A. 398; Enterprise Mfg. Co. *v.* Bender, 148 Fed. 313 [*reversed* on other grounds in 156 Fed. 641, 17 L. R. A. N. S. 448]; National Starch Co. *v.* Koster, 146 Fed. 259; Virginia Hot Springs Co. *v.* Hegeman, 144 Fed. 1023, 73 C. C. A. 612 [*affirming* 138 Fed. 855]; Hygienic Fleeced Underwear Co. *v.* Way, 137 Fed. 592, 70 C. C. A. 553 [*reversing* 133 Fed. 245]; G. & C. Merriam Co. *v.* Straus, 136 Fed. 477; Baker *v.* Slack, 130 Fed. 514, 65 C. C. A. 138; Von Faber *v.* Faber, 124 Fed. 603 [*reversed* on other grounds in 139 Fed. 257, 71 C. C. A. 383]; Royal Baking Powder Co. *v.* Royal, 122 Fed. 337, 58 C. C. A. 499; Keuffel, etc., Co. *v.* H. S. Crocker Co., 118 Fed. 187; Sterling Remedy Co. *v.* Spermine Medical Co., 112 Fed. 1000, 50 C. C. A. 657; Wyckoff *v.* Howe Scale Co., 110 Fed. 520 [*reversed* in 122 Fed. 348, 58 C. C. A. 510 (*reversed* in 198 U. S. 118, 25 S. Ct. 609, 47 L. ed. 972)]; Dadirrian *v.* Yacubian, 98 Fed. 872, 39 C. C. A. 321 [*affirming* 90 Fed. 812]; Centaur Co. *v.* Marshall, 97 Fed. 785, 38 C. C. A. 413; Dennison Mfg. Co. *v.* Thomas Mfg. Co., 94 Fed. 651; Centaur Co. *v.* Neathery, 91 Fed. 891, 34 C. C. A. 118; Dadirrian *v.* Yacubian, 72 Fed. 1010; Hoff *v.*

come to indicate the source of particular articles, the mere use of such a name by another, unaccompanied by adequate distinguishing statements, in itself amounts to an artifice calculated and intended to deceive, and constitutes unfair competition.[55]

b. Sufficiency of Differentiation. It is a question of fact in each case whether or not the goods or business of the subsequent trader have been so distinguished as to prevent any actual or probable confusion and deception. All the circumstances of the particular case must be considered.[56] It is presumed that the public uses its senses and takes note of differences which are thus disclosed.[57] But on the other hand, it must be remembered that similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another, so that the mere existence of differences does not necessarily show honest and sufficient differentiation.[58] A nice discrimination is not to be expected from the ordinary purchaser.[59] Although differences between the respective labels and packages exist, and are readily apparent upon comparison, yet if the ordinary purchaser is liable to be deceived by the similarities which also exist, an injunction will be granted.[60] Where the distinctive part of a name or mark is taken, minor

Tarrant, 71 Fed. 163. See Baker *v.* Baker, 115 Fed. 297, 53 C. C. A. 157. But see Halstead *v.* John C. Winston Co., 111 Fed. 35.

England.— Reddaway *v.* Banham, [1896] A. C. 199, 65 L. J. Q. B. 381, 74 L. T. Rep. N. S. 289, 44 Wkly. Rep. 638 [*reversing* [1895] 1 Q. B. 286, 64 L. J. Ch. 321, 72 L. T. Rep. N. S. 73, 43 Wkly. Rep. 294]; Powell *v.* Birmingham Vinegar Brewery Co., [1894] 3 Ch. 449, 71 L. T. Rep. N. S. 393 [*affirmed* in [1896] 2 Ch. 54, 65 L. J. Ch. 563, 74 L. T. Rep. N. S. 509, 44 Wkly. Rep. 688 (*affirmed* in [1897] A. C. 710, 66 L. J. Ch. 763, 76 L. T. Rep. N. S. 792)]; Orr Ewing *v.* Johnston, 13 Ch. D. 434, 42 L. T. Rep. N. S. 67, 28 Wkly. Rep. 330 [*affirmed* in 7 App. Cas. 219, 51 L. J. Ch. 797, 46 L. T. Rep. N. S. 216, 30 Wkly. Rep. 417]; Singer Mfg. Co. *v.* Wilson, 2 Ch. D. 434, 45 L. J. Ch. 490, 34 L. T. Rep. N. S. 858, 24 Wkly. Rep. 1023 [*reversed* on other grounds in 3 App. Cas. 376, 47 L. J. Ch. 481, 38 L. T. Rep. N. S. 303, 26 Wkly. Rep. 664].

Canada.— Provident Chemical Works *v.* Canada Chemical Mfg. Co., 2 Ont. L. Rep. 188.

See also *infra*, V, C.

55. International Silver Co. *v.* Rogers, 72 N. J. Eq. 933, 67 Atl. 105, 129 Am. St. Rep. 722; International Silver Co. *v.* Wm. H. Rogers Corp., 66 N. J. Eq. 119, 57 Atl. 1037; Centaur Co. *v.* Link, 62 N. J. Eq. 147, 49 Atl. 828; Herring-Hall-Marvin Safe Co. *v.* Hall's Safe Co., 208 U. S. 554, 28 S. Ct. 350, 52 L. ed. 616; Howe Scale Co. *v.* Wyckoff, 198 U. S. 118, 25 S. Ct. 609, 49 L. ed. 972; French Republic *v.* Saratoga Vichy Co., 191 U. S. 427, 24 S. Ct. 145, 48 L. ed. 247; Singer Mfg. Co. *v.* June Mfg. Co., 163 U. S. 169, 16 S. Ct. 1002, 41 L. ed. 118; Ludlow Valve Mfg. Co. *v.* Pittsburgh Mfg. Co., 166 Fed. 26, 92 C. C. A. 60; David E. Foutz Co. *v.* S. A. Foutz Stock Food Co., 163 Fed. 408; Dr. A. Reed Cushion Shoe Co. *v.* Frew, 162 Fed. 887, 89 C. C. A. 577; Sternberg Mfg. Co. *v.* Miller, etc., Mfg. Co., 161 Fed. 318, 88 C. C. A. 398; Rowley *v.* J. F. Rowley Co., 161 Fed. 94, 89 C. C. A. 258; Ogilvie *v.* G. & C. Merriam Co., 149 Fed. 858 [*affirmed* in 159 Fed. 638]; International Silver Co. *v.* Rodgers Bros. Cutlery Co., 136 Fed. 1019; Van Houten *v.* Hooton Cocoa, etc., Co., 130 Fed. 600; Baker *v.* Slack, 130 Fed. 514, 65 C. C. A. 138; Chickering *v.* Chickering, 120 Fed. 69, 56 C. C. A. 475; B. B. Hill Mfg. Co. *v.* Sawyer-Boss Mfg. Co., 112 Fed. 144 [*affirmed* in 118 Fed. 1014, 56 C. C. A. 596]; Centaur Co. *v.* Marshall, 92 Fed. 605 [*affirmed* in 97 Fed. 785, 38 C. C. A. 413]; Centaur Co. *v.* Robinson, 91 Fed. 889; Baker *v.* Baker, 87 Fed. 209; Allegretti Chocolate Cream Co. *v.* Keller, 85 Fed. 643; Baker *v.* Sanders, 80 Fed. 889, 26 C. C. A. 220; Dadirrian *v.* Yacubian, 72 Fed. 1010; Birmingham Vinegar Brewery Co. *v.* Powell, [1897] A. C. 710, 66 L. J. Ch. 763, 76 L. T. Rep. N. S. 792 [*affirming* [1896] 2 Ch. 54, 65 L. J. Ch. 563, 74 L. T. Rep. N. S. 509, 44 Wkly. Rep. 188]; Massam *v.* Thorley's Cattle Food Co., 14 Ch. D. 748, 42 L. T. Rep. N. S. 851, 28 Wkly. Rep. 966; Brinsmead *v.* Brinsmead, 13 T. L. R. 3.

56. See *supra*, V, B, 5.

57. Munro *v.* Tousey, 129 N. Y. 38, 29 N. E. 9, 14 L. R. A. 245.

58. International Silver Co. *v.* William H. Rogers Corp., 67 N. J. Eq. 646, 60 Atl. 187, 110 Am. St. Rep. 506; Chas. E. Higgins Co. *v.* Higgins Soap Co., 144 N. Y. 462, 39 N. E. 490, 43 Am. St. Rep. 769, 27 L. R. A. 42 [*reversing* 71 Hun 101, 24 N. Y. Suppl. 801]; Celluloid Mfg. Co. *v.* Cellonite Mfg. Co., 32 Fed. 94. See *supra*, V, B, 4.

A similar principle is applied in trade-mark cases. See *supra*, IV, C.

59. International Silver Co. *v.* William H. Rogers Co., 67 N. J. Eq. 646, 60 Atl. 187, 110 Am. St. Rep. 506.

60. Centaur Co. *v.* Link, 62 N. J. Eq. 147, 49 Atl. 828; Boker *v.* Korkemas, 122 N. Y. App. Div. 36, 106 N. Y. Suppl. 904; Dutton *v.* Cupples, 117 N. Y. App. Div. 172, 102 N. Y. Suppl. 309; Drake Medicine Co. *v.* Glessner, 68 Ohio St. 337, 67 N. E. 722; Hygienic Fleeced Underwear Co. *v.* Way, 137 Fed. 592, 70 C. C. A. 553 [*reversing* 133 Fed. 245].

Imitation of dress of goods as constituting unfair competition see *infra*, V, C, 12.

differences afford no defense.[61] Similarity in the main distinguishing features will usually be sufficient to constitute infringement or unfair competition.[62] Alleged distinguishing features which are not so placed or used as to be sufficiently prominent to prevent deception, or which are not likely to attract attention comparably with the deceptive features, are insufficient.[63] Any artifice, such as the use of small type, to make inconspicuous the alleged distinguishing features shows unfair competition.[64] Where the trade-name is in itself deceptive, injunction lies, although there are differences in the dress of the goods, since purchasers may not be familiar with the exact appearance of the goods.[65] The mere addition

61. Samuels *v.* Spitzer, 177 Mass. 226, 58 N. E. 693; Stirling Silk Mfg. Co. *v.* Sterling Silk Co., 59 N. J. Eq. 394, 46 Atl. 199.

Use of the only injurious word.— "Whatever words or descriptions he used on his labels, he should not have used the one word the use of which would prove injurious to the plaintiffs." Per Malins, V. C., in Wotherspoon *v.* Currie, 22 L. T. Rep. N. S. 260, 261, 18 Wkly. Rep. 562 [*reversed* on other grounds in 23 L. T. Rep. N. S. 443, 18 Wkly. Rep. 942 (*reversed* on other grounds in L. R. 5 H. L. 508, 42 L. J. Ch. 130, 27 L. T. Rep. N. S. 393)].

62. *Connecticut.*— Boardman *v.* Meriden Britannia Co., 35 Conn. 402, 95 Am. Dec. 270.

Indiana.— Keller *v.* B. F. Goodrich Co., 117 Ind. 556, 19 N. E. 196, 10 Am. St. Rep. 88.

Missouri.— Filley *v.* Fassett, 44 Mo. 168, 100 Am. Dec. 275; American Brewing Co. *v.* St. Louis Brewing Co., 47 Mo. App. 14.

New York.— Dunlap *v.* Young, 68 N. Y. App. Div. 137, 74 N. Y. Suppl. 184 [*reversed* on the facts in 174 N. Y. 327, 66 N. E. 964]; Kassel *v.* Jeuda, 61 N. Y. App. Div. 613, 70 N. Y. Suppl. 480; Barrett Chemical Co. *v.* Stern, 56 N. Y. App. Div. 143, 67 N. Y. Suppl. 595; Hegeman *v.* O'Byrne, 9 Daly 264; Williams *v.* Spence, 25 How. Pr. 366.

Pennsylvania.— Pratt's Appeal, 117 Pa. St. 401, 11 Atl. 878, 2 Am. St. Rep. 676.

United States.— Saxlehner *v.* Eisner, etc., Co., 179 U. S. 19, 21 S. Ct. 7, 45 L. ed. 60 [*reversing* 91 Fed. 536, 33 C. C. A. 291]; Amoskeag Mfg. Co. *v.* Trainer, 101 U. S. 51, 25 L. ed. 993; International Silver Co. *v.* Simeon L. & George H. Rogers Co., 110 Fed. 955; Kentucky Distilleries, etc., Co. *v.* Wathen, 110 Fed. 641; N. K. Fairbank Co. *v.* Luckel, etc., Sons Co., 102 Fed. 327, 42 C. C. A. 376; Johnson *v.* Bauer, 82 Fed. 662, 27 C. C. A. 374 [*reversing* 79 Fed. 954]; Cook, etc., Co. *v.* Ross, 73 Fed. 203; Hutchinson *v.* Blumberg, 51 Fed. 829; G. G. White Co. *v.* Miller, 50 Fed. 277; Sawyer Crystal Blue Co. *v.* Hubbard, 32 Fed. 388; Celluloid Mfg. Co. *v.* Cellonite Mfg. Co., 32 Fed. 94. *Compare* De Long Hook, etc., Co. *v.* Francis Hook, etc., Co., 118 Fed. 938.

England.— Wotherspoon *v.* Currie, L. R. 5 H. L. 508, 42 L. J. Ch. 130, 27 L. T. Rep. N. S. 393 [*reversing* 23 L. T. Rep. N. S. 443, 18 Wkly. Rep. 942 (*reversing* 22 L. T. Rep. N. S. 260, 18 Wkly. Rep. 562)]; Orr Ewing *v.* Johnston, 13 Ch. D. 434, 42 L. T. Rep. N. S. 67, 28 Wkly. Rep. 330 [*affirmed* in 7 App. Cas. 219, 51 L. J. Ch. 797, 46 L. T. Rep. N. S. 216, 30 Wkly. Rep. 417]; Singer Mfg. Co. *v.* Wilson, 2 Ch. D. 434, 45 L. J. Ch. 490, 34 L. T. Rep. N. S. 858, 24 Wkly. Rep. 1023 [*reversed* on other grounds in 3 App. Cas. 376, 47 L. J. Ch. 481, 38 L. T. Rep. N. S. 303, 26 Wkly. Rep. 664]; Edelsten *v.* Edelsten, 1 De G. J. & S. 185, 9 Jur. N. S. 479, 7 L. T. Rep. N. S. 768, 11 Wkly. Rep. 328, 66 Eng. Ch. 142, 46 Eng. Reprint 372; Blackwell *v.* Crabb, 36 L. J. Ch. 504; Read *v.* Richardson, 45 L. T. Rep. N. S. 54; Apollinaris Co. *v.* Norrish, 33 L. T. Rep. N. S. 242.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 81.

63. Vulcan *v.* Myers, 139 N. Y. 364, 34 N. E. 904; Monopol Tobacco Works *v.* Gensior, 32 Misc. (N. Y.) 87, 66 N. Y. Suppl. 155; Kronthal Waters *v.* Becker, 137 Fed. 649; International Silver Co. *v.* Rodgers Bros. Cutlery Co., 136 Fed. 1019.

"It is the top which is usually exposed to the eye of the buyer, and from which the impression would be produced as to the brand of the article offered for sale." Vulcan *v.* Myers, 139 N. Y. 364, 367, 34 N. E. 904 [*quoted* and *applied* in Monopol Tobacco Works *v.* Gensior, 32 Misc. (N. Y.) 87, 66 N. Y. Suppl. 155].

64. See cases cited *infra*, this note.

Artifice to prevent observation of distinguishing name.— Fetridge *v.* Wells, 4 Abb. Pr. (N. Y.) 144, 13 How. Pr. 385; Clark, etc., Co. *v.* Scott, 4 Lack. Leg. N. (Pa.) 159; Centaur Co. *v.* Neathery, 91 Fed. 891, 34 C. C. A. 118.

Artifice causes unnecessary confusion, and thus violates another principle applicable to this class of cases. See *infra*, V, B, 8. Injunction was granted where plaintiffs described their goods as "manufactured" by D & M, and defendant described his like goods as "equal to" D & M's, printing the words "equal to" in very small type. Bell *v.* Locke, 8 Paige (N. Y.) 75, 34 Am. Dec. 371.

65. Regis *v.* Jaynes, 185 Mass. 458, 70 N. E. 480; Powell *v.* Birmingham Vinegar Brewery Co., [1894] 3 Ch. 449, 71 L. T. Rep. N. S. 393 [*affirmed* in [1896] 2 Ch. 54, 65 L. J. Ch. 563, 74 L. T. Rep. N. S. 509, 44 Wkly. Rep. 688 (*affirmed* in [1897] A. C. 710, 66 L. J. Ch. 763, 76 L. T. Rep. N. S. 792)]. But see Warren Featherbone Co. *v.* American Featherbone Co., 141 Fed. 513, 72 C. C. A. 571.

Advertisements showing that defendant did

of an adjective to a deceptive trade-name has no corrective effect.[66] The addition of prefixes or suffixes to a deceptive word is not a sufficient affirmative distinction.[67] Where a fraudulent intent to deceive is shown, the addition of explanatory phrases is not sufficient to prevent an injunction.[68] When a deceptive name is used unnecessarily, and *a fortiori* when it is used falsely, nothing except the omission of the name itself is a sufficient distinction.[69] Mere use of one's own name is not alone a sufficient affirmative distinction, where there is otherwise sufficient similarity to constitute unfair competition.[70] But where the respective names of the

not profess to sell his goods as and for the goods of the complainant are immaterial, where the trade-name of the goods is infringing and deceptive. Alleghany Fertilizer Co. *v.* Woodside, 1 Fed. Cas. No. 206, 1 Hughes 115.

66. *Alabama.*— Kyle *v.* Perfection Mattress Co., 127 Ala. 39, 28 So. 545, 85 Am. St. Rep. 78, 50 L. R. A. 628.

Illinois.— Frazer *v.* Frazer Lubricator Co., 121 Ill. 147, 13 N. E. 639, 2 Am. St. Rep. 73 [*affirming* 18 Ill. App. 450] ("Superior" added to "Frazer's Axle Grease").

Massachusetts.— Russia Cement Co. *v.* Le Page, 147 Mass. 206, 17 N. E. 304, 9 Am. St. Rep. 685, "Improved" added to "Le Page's Liquid Glue."

New York.— Crawford *v.* Laus, 29 Misc. 248, 60 N. Y. Suppl. 387, "The Little Antique Shop" infringes "The Little Shop."

England.—Apollinaris Co. *v.* Norrish, 33 L. T. Rep. N. S. 242, "Apollinaris Water" infringed by "London Apollinaris Water."

67. Kyle *v.* Perfection Mattress Co., 127 Ala. 39, 28 So. 545, 85 Am. St. Rep. 78, 50 L. R. A. 628; Eureka Fire Hose Co. *v.* Eureka Rubber Mfg. Co., 69 N. J. Eq. 159, 60 Atl. 561 [*affirmed* in 71 N. J. Eq. 300, 71 Atl. 1134]; Stirling Silk Mfg. Co. *v.* Sterling Silk Co., 59 N. J. Eq. 394, 46 Atl. 199; Roy Watch-Case Co. *v.* Camm-Roy Watch-Case Co., 28 Misc. (N. Y.) 45, 58 N. Y. Suppl. 979; G. & C. Merriam Co. *v.* Ogilvie, 159 Fed. 638, 88 C. C. A. 596, 16 L. R. A. N. S. 549; Dr. Peter H. Fahrney, etc., Co. *v.* Ruminer, 153 Fed. 735, 82 C. C. A. 621; Virginia Hot Springs Co. *v.* Hegeman, 144 Fed. 1023, 73 C. C. A. 612 [*affirming* 138 Fed. 855]; Ball *v.* Best, 135 Fed. 434; Roberts *v.* Sheldon, 20 Fed. Cas. No. 11,916, 8 Biss. 398, 18 Off. Gaz. 1277; U. S. *v.* Roche, 27 Fed. Cas. No. 16,180, 1 McCrary 385.

68. Keller *v.* B. F. Goodrich Co., 117 Ind. 556, 19 N. E. 196, 10 Am. St. Rep. 88; Lamont *v.* Hershey, 140 Fed. 763.

69. Singer Mfg. Co. *v.* Wilson, 3 App. Cas. 376, 47 L. J. Ch. 481, 38 L. T. Rep. N. S. 303, 26 Wkly. Rep. 664 (holding that use of defendant's own trade-mark upon the goods, together with labels stating that they were manufactured by him, and like statements in advertisements are insufficient); Taylor *v.* Taylor, 2 Eq. Rep. 290, 23 L. J. Ch. 255, 23 Eng. L. & Eq. 281 (holding that the court must ascertain whether the resemblances and the differences are such as naturally arise from the necessity of the case, or whether the differences are simply colorable, and the resemblances such as are obviously intended to deceive the purchaser). See also *infra*, V, B, 8.

70. *Connecticut.*— Boardman *v.* Meriden Britannia Co., 35 Conn. 402, 95 Am. Dec. 270.

Massachusetts.— New England Awl, etc., Co. *v.* Marlborough Awl, etc., Co., 168 Mass. 154, 46 N. E. 386, 60 Am. St. Rep. 377.

New Jersey.— Centaur Co. *v.* Link, 62 N. J. Eq. 147, 49 Atl. 828.

New York.— Dunlap *v.* Young, 68 N. Y. App. Div. 137, 74 N. Y. Suppl. 184 [*reversed* on other grounds in 174 N. Y. 327, 66 N. E. 964]; Gillott *v.* Esterbrook, 47 Barb. 455 [*affirmed* in 48 N. Y. 374]; Lea *v.* Wolf, 13 Abb. Pr. N. S. 389 [*modified* in 1 Thomps. & C. 626, 15 Abb. Pr. N. S. 1, 46 How. Pr. 157]. See Westcott Chuck Co. *v.* Oneida Nat. Chuck Co., 122 N. Y. App. Div. 260, 106 N. Y. Suppl. 1016.

Pennsylvania.— Pratt's Appeal, 117 Pa. St. 401, 11 Atl. 878, 2 Am. St. Rep. 676.

United States.— Singer Mfg. Co. *v.* Bent, 163 U. S. 205, 16 S. Ct. 1016, 41 L. ed. 131; Menendez *v.* Holt, 128 U. S. 514, 9 S. Ct. 143, 32 L. ed. 526; G. & C. Merriam Co. *v.* Ogilvie, 159 Fed. 638, 88 C. C. A. 596, 16 L. R. A. N. S. 549; Baker *v.* Puritan Pure Food Co., 139 Fed. 680; Enterprise Mfg. Co. *v.* Landers, 124 Fed. 923 [*affirmed* in 131 Fed. 240, 65 C. C. A. 587]; Shaver *v.* Heller, etc., Co., 108 Fed. 821, 48 C. C. A. 48, 67 L. R. A. 787 [*affirming* 102 Fed. 882]; Pennsylvania Salt Mfg. Co. *v.* Myers, 79 Fed. 87; N. K. Fairbank Co. *v.* R. W. Bell Mfg. Co., 77 Fed. 869, 23 C. C. A. 554 [*reversing* 71 Fed. 295]; Tarrant *v.* Hoff, 76 Fed. 959, 22 C. C. A. 644 [*affirming* 71 Fed. 163]; N. K. Fairbank Co. *v.* Central Lard Co., 64 Fed. 133; Hahner *v.* Gratz, 52 Fed. 871; Lorillard *v.* Wight, 15 Fed. 383; Alleghany Fertilizer Co. *v.* Woodside, 1 Fed. Cas. No. 206, 1 Hughes 115; Frese *v.* Bachof, 9 Fed. Cas. No. 5,110, 14 Blatchf. 432, 13 Off. Gaz. 635; Proctor *v.* McBride, 20 Fed. Cas. No. 11,441; Roberts *v.* Sheldon, 20 Fed. Cas. No. 11,916, 8 Biss. 398, 18 Off. Gaz. 1277. See also Saxlehner *v.* Eisner, etc., Co., 179 U. S. 19, 21 S. Ct. 7, 45 L. ed. 60 [*reversing* 91 Fed. 536, 33 C. C. A. 291].

England.— Singer Mfg. Co. *v.* Wilson, 3 App. Cas. 376, 47 L. J. Ch. 481, 38 L. T. Rep. N. S. 303, 26 Wkly. Rep. 664; Powell *v.* Birmingham Vinegar Brewery Co., [1894] 3 Ch. 449, 71 L. T. Rep. N. S. 393 [*affirmed* in [1896] 2 Ch. 54, 65 L. J. Ch. 563, 74 L. T. Rep. N. S. 509, 44 Wkly. Rep. 688 (*affirmed* in [1897] A. C. 710, 66 L. J. Ch. 763, 76 L. T. Rep. N. S. 792)]; Gout *v.* Aleploglu, 6 Beav.

parties are different, use of one's own name is a circumstance to be considered and will be given greater or less effect according to all the circumstances.[71] Use of the name of the manufacturer or of the place of manufacture does not tend to distinguish the goods where the trade-name of the goods is different from either.[72] The place of actual manufacture is usually unknown to the ordinary mass of purchasers, and hence a designation of the place of manufacture in connection with otherwise infringing goods has little or no tendency to distinguish between them and rival goods.[73] The same thing is true as to the name of the maker or proprietor of the goods.[74] Use of defendant's own name in connection with an infringing trade-name aggravates the wrong, because its effect is to give defendant the benefit of the established reputation of the goods, and thus increase the benefit derived by him from his fraud.[75] A mere additional label is not a sufficient affirmative distinction,[76] especially one readily removable by dealers, or in handling of the goods.[77] The form of explanatory statements which must accompany the use of names, primarily *publici juris*, but which have acquired a secondary meaning,[78] depends upon and varies with the facts of each particular case. It must be framed with a view to the exact nature of the inquiry, and the causes that mislead the public.[79] The designation must be efficient and ample under the circumstances of a given situation[80] and such as will unmistakably lead the ordinary purchaser to a correct conclusion as to the identity and source of the article to which the ambiguous name is applied.[81]

69 note, 49 Eng. Reprint 750; Harrison *v.* Taylor, 11 Jur. N. S. 408, 12 L. T. Rep. N. S. 339; Rose *v.* Loftus, 47 L. J. Ch. 576, 38 L. T. Rep. N. S. 409; Weingarten *v.* Bayer, 92 L. T. Rep. N. S. 511, 21 T. L. R. 418 (use of defendant's initials); Henderson *v.* Jorss, Seton (4th ed.) 236.

Canada.— Barsalou *v.* Darling, 9 Can. Sup. Ct. 677; McCall *v.* Theal, 28 Grant Ch. (U. C.) 48.

But *compare* Davis *v.* Kendall, 2 R. I. 566.

71. Ball *v.* Siegel, 116 Ill. 137, 4 N. E. 667, 56 Am. Rep. 766; Oakes *v.* St. Louis Candy Co., 146 Mo. 391, 48 S. W. 467; Koehler *v.* Sanders, 122 N. Y. 65, 25 N. E. 235, 9 L. R. A. 576 [*affirming* 48 Hun 48]; Coats *v.* Merrick Thread Co., 149 U. S. 562, 13 S. Ct. 966, 37 L. ed. 847; Trinidad Asphalt Mfg. Co. *v.* Standard Paint Co., 163 Fed. 977, 90 C. C. A. 195 [*affirmed* in 220 U. S. 446]; Germer Stove Co. *v.* Art Stove Co., 150 Fed. 141, 80 C. C. A. 9; Warren Featherbone Co. *v.* American Featherbone Co., 141 Fed. 513, 72 C. C. A. 571; Allen B. Wrisley Co. *v.* Iowa Soap Co., 122 Fed. 796, 59 C. C. A. 54; Daviess County Distilling Co. *v.* Martinoni, 117 Fed. 186; B. B. Hill Mfg. Co. *v.* Sawyer-Boss Mfg. Co., 112 Fed. 144 [*affirmed* in 118 Fed. 1014, 56 C. C. A. 596]; Allan B. Wrisley Co. *v.* Iowa Soap Co., 104 Fed. 548; Proctor, etc., Co. *v.* Globe Refining Co., 92 Fed. 357, 34 C. C. A. 405; Sterling Remedy Co. *v.* Eureka Chemical, etc., Co., 70 Fed. 704.

72. International Silver Co. *v.* Rogers, 72 N. J. Eq. 933, 67 Atl. 105, 129 Am. St. Rep. 722; Centaur Co. *v.* Link, 62 N. J. Eq. 147, 49 Atl. 828. See G. & C. Merriam Co. *v.* Ogilvie, 159 Fed. 638, 88 C. C. A. 596, 16 L. R. A. N. S. 549 [*modifying* 149 Fed. 858].

73. Eureka Fire Hose Co. *v.* Eureka Rubber Mfg. Co., 69 N. J. Eq. 159, 60 Atl. 561 [*affirmed* in 71 N. J. Eq. 300, 71 Atl. 1134]; Siegert *v.* Gandolfi, 149 Fed. 100, 79 C. C. A. 142 [*reversing* 139 Fed. 917].

74. See *supra*, V, B, 4.

75. Eureka Fire Hose Co. *v.* Eureka Rubber Mfg. Co., 69 N. J. Eq. 159, 60 Atl. 561 [*affirmed* in 71 N. J. Eq. 300, 71 Atl. 1134]; Menendez *v.* Holt, 128 U. S. 514, 9 S. Ct. 143, 32 L. ed. 526; Lanahan *v.* Kissel, 135 Fed. 899; Shaver *v.* Heller, etc., Co., 108 Fed. 821, 48 C. C. A. 48, 65 L. R. A. 878.

Two things are required for the accomplishment of a fraud: First, there must be such a general resemblance of the forms, words, symbols, and accompaniments as to mislead the public; second, sufficient distinctive individuality must be preserved, so as to procure for the person himself the benefit of that deception which the general resemblance is calculated to produce. Croft *v.* Day, 7 Beav. 84, 29 Eng. Ch. 84, 49 Eng. Reprint 994.

76. Saxlehner *v.* Eisner, etc., Co., 179 U. S. 19, 21 S. Ct. 7, 45 L. ed. 60, 93 Off. Gaz. 940 [*reversing* 91 Fed. 536, 33 C. C. A. 291]; Rose *v.* Loftus, 47 L. J. Ch. 576, 38 L. T. Rep. N. S. 409.

77. George G. Fox Co. *v.* Hathaway, 199 Mass. 99, 85 N. E. 417, 24 L. R. A. N. S. 900; Edison Mfg. Co. *v.* Gladstone, (N. J. Ch. 1903) 58 Atl. 391; Prest-O-Lite Co. *v.* Post, etc., Co., 163 Fed. 63; Prest-O-Lite Co. *v.* Avery Lighting Co., 161 Fed. 648. See also Thwaites *v.* McEvilly, [1904] 1 Ir. 310, label pasted on plaintiff's bottle.

78. See *supra*, V, B, 2.

79. Merriam *v.* Famous Shoe, etc., Co., 47 Fed. 411.

80. G. & C. Merriam Co. *v.* Ogilvie, 159 Fed. 638, 88 C. C. A. 596, 16 L. R. A. N. S. 549.

81. American Waltham Watch Co. *v.* U. S.

8. Unnecessary or Untruthful Use or Imitation. A dealer coming into a field already occupied by a rival of established reputation must do nothing which will unnecessarily create or increase confusion between his goods or business and the goods or business of his rival. Owing to the nature of the goods dealt in, or the common use of terms which are *publici juris*, some confusion may be inevitable. But anything done which unnecessarily increases this confusion and damage to the established trader constitutes unfair competition.[82] The unnecessary imitation or adoption of a confusing name, label, or dress of goods constitutes unfair competition.[83] Where there is no reason for using a particular name other

Watch Co., 173 Mass. 85, 53 N. E. 141, 73 Am. St. Rep. 263, 43 L. R. A. 826; International Silver Co. *v.* Rogers, 72 N. J. Eq. 933, 67 Atl. 105, 129 Am. St. Rep. 722; Herring-Hall-Marvin Safe Co. *v.* Hall's Safe Co., 208 U. S. 554, 28 S. Ct. 350, 52 L. ed. 616; French Republic *v.* Saratoga Vichy Spring Co., 191 U. S. 427, 24 S. Ct. 145, 48 L. ed. 247 [*affirming* 107 Fed. 459, 46 C. C. A. 418, 65 L. R. A. 830 (*reversing* 99 Fed. 733)]; Singer Mfg. Co. *v.* June Mfg. Co., 163 U. S. 169, 16 S. Ct. 1002, 41 L. ed. 118; Ludlow Valve Mfg. Co. *v.* Pittsburgh Mfg. Co., 166 Fed. 26, 92 C. C. A. 60; David E. Foutz Co. *v.* S. A. Foutz Stock Food Co., 163 Fed. 408; Dr. A. Reed Cushion Shoe Co. *v.* Frew, 162 Fed. 887, 89 C. C. A. 577; Rowley *v.* J. F. Rowley Co., 161 Fed. 94, 88 C. C. A. 258 [*reversing* 154 Fed. 744, which had absolutely enjoined the use of defendant's own name]; G. & C. Merriam Co. *v.* Ogilvie, 159 Fed. 638, 88 C. C. A. 596, 16 L. R. A. N. S. 549; Van Houten *v.* Hooton Cocoa, etc., Co., 130 Fed. 600; Baker *v.* Slack, 130 Fed. 514, 65 C. C. A. 138; Allegretti Chocolate Cream Co. *v.* Keller, 85 Fed. 643; Baker *v.* Sanders, 80 Fed. 889, 26 C. C. A. 220; Merriam *v.* Texas Siftings Pub. Co., 49 Fed. 944; Reddaway *v.* Banhan, [1896] A. C. 199, 65 L. J. Q. B. 381, 74 L. T. Rep. N. S. 289, 44 Wkly. Rep. 638; Brinsmead *v.* Brinsmead, 13 T. L. R. 3.

The explanation should "preclude a possibility of mistake," and it is the duty of the court to require such explanation as will "guard against any possibility of deceiving the public as to the source of manufacture." Ludlow Valve Mfg. Co. *v.* Pittsburgh Mfg. Co., 166 Fed. 26, 29, 92 C. C. A. 60, where the court also said: "Courts of equity may require such form of words to be used in connection with the appropriate name as will completely protect the rightful owner of that name from injury and the public from imposition, and a defendant so using the name has no just right to complain of any form of words in connection with the name, the only purpose and effect of which is to prevent appropriation by him of the fruits of another's business enterprise and skill."

"The explanation must accompany the use, so as to give the antidote with the bane." Herring-Hall-Marvin Safe Co. *v.* Hall's Safe Co., 208 U. S. 554, 559, 28 S. Ct. 350, 52 L. ed. 616 [*quoted* and *applied* in Ludlow Valve Mfg. Co. *v.* Pittsburgh Mfg. Co., 166 Fed. 26, 92 C. C. A. 60; Rowley *v.* J. F. Rowley Co., 161 Fed. 94, 88 C. C. A. 258].

"Where another avails himself of the principle of public dedication, he must in good faith fully identify his production and clearly disassociate his work from the work of one who has given significance to the name and sufficiently direct the mind of the trading public to the fact that, though the thing is of the same name, it is something produced and put upon the market by himself." G. & C. Merriam Co. *v.* Ogilvie, 159 Fed. 638, 642, 88 C. C. A. 596, 16 L. R. A. N. S. 549.

82. Hildreth *v.* McCaul, 70 N. Y. App. Div. 162, 74 N. Y. Suppl. 1072; Royal Baking Powder Co. *v.* Royal, 122 Fed. 337, 58 C. C. A. 499; Sterling Remedy Co. *v.* Spermine Medical Co., 112 Fed. 1000, 50 C. C. A. 657; Sterling Remedy Co. *v.* Gorey, 110 Fed. 372; Paris Medicine Co. *v.* W. H. Hill Co., 102 Fed. 148, 42 C. C. A. 227; Wm. Rogers Mfg. Co. *v.* Rogers, 84 Fed. 639; Hoff *v.* Tarrant, 71 Fed. 163; Wotherspoon *v.* Currie, L. R. 5 H. L. 508, 42 L. J. Ch. 130, 27 L. T. Rep. N. S. 393.

83. *California.*— Hainque *v.* Cyclops Iron Works, 136 Cal. 351, 68 Pac. 1014.

Indiana.— Smail *v.* Sanders, 118 Ind. 105, 20 N. E. 296.

Massachusetts.— George G. Fox Co. *v.* Hathaway, 199 Mass. 99, 85 N. E. 417, 24 L. R. A. N. S. 900; George G. Fox Co. *v.* Glynn, 191 Mass. 344, 78 N. E. 89, 114 Am. St. Rep. 619; Cohen *v.* Nagle, 190 Mass. 4, 76 N. E. 276, 2 L. R. A. N. S. 964.

New Jersey.— Standard Table Oil Cloth Co. *v.* Trenton Oil Cloth, etc., Co., 71 N. J. Eq. 555, 63 Atl. 846; International Silver Co. *v.* William H. Rogers Corp., 67 N. J. Eq. 646, 60 Atl. 187, 110 Am. St. Rep. 506.

New York.— Keasbey *v.* Brooklyn Chemical Works, 142 N. Y. 467, 37 N. E. 476, 40 Am. St. Rep. 623 [*reversing* 21 N. Y. Suppl. 696]; Charles S. Higgins Co. *v.* Amalga Soap Co., 10 Misc. 268, 30 N. Y. Suppl. 1074.

Rhode Island.— Armington *v.* Palmer, 21 R. I. 109, 42 Atl. 308, 79 Am. St. Rep. 786, 43 L. R. A. 95.

United States.— Rushmore *v.* Saxon, 170 Fed. 1021, 95 C. C. A. 671; American Tobacco Co. *v.* Polacsek, 170 Fed. 117; Rushmore *v.* Saxon, 158 Fed. 499 [*modified* in 170 Fed. 1021, 95 C. C. A. 671]; National Starch Co. *v.* Koster, 146 Fed. 259; Scriven *v.* North, 134 Fed. 366, 67 C. C. A. 348 [*modifying* 124 Fed. 894]; Selchow *v.* Chaffee, etc., Mfg. Co., 132 Fed. 996; Bissell Chilled Plow Works *v.* T. M. Bissell Plow Co., 121 Fed. 357; Swift *v.* Groff, 114 Fed. 605; International Silver

than to trade upon another's good-will, such use of the name constitutes unfair competition and will be enjoined.[84] Change of a name, label, or dress of goods from an existing innocent form to a closer approximation to plaintiff's goods, and a more damaging form, will be enjoined.[85] Any artifice, device, or peculiarity of arrangement adopted by defendant which tends to increase the probability of deception, and which is not necessary for any useful or proper purpose, will be enjoined.[86] An absolutely false use of words or names cannot be necessary

Co. *v.* Wm. G. Rogers Co., 113 Fed. 526; Peck *v.* Peck Bros. Co., 113 Fed. 291, 51 C. C. A. 251, 62 L. R. A. 81; Lever Bros. Boston Works *v.* Smith, 112 Fed. 998; International Silver Co. *v.* Simeon L. & George H. Rogers Co., 110 Fed. 955; Wyckoff *v.* Howe Scale Co., 110 Fed. 520; Lalance, etc., Mfg. Co. *v.* National Enameling, etc., Co., 109 Fed. 317; Thomas G. Plant Co. *v.* May Co., 105 Fed. 375, 44 C. C. A. 534; Fuller *v.* Huff, 104 Fed. 141, 43 C. C. A. 453, 51 L. R. A. 332; Liebig's Extract of Meat Co. *v.* Libby, 103 Fed. 87; Centaur Co. *v.* Neathery, 91 Fed. 891, 34 C. C. A. 118; R. Heinisch's Sons Co. *v.* Boker, 86 Fed. 765; N. K. Fairbank Co. *v.* R. W. Bell Mfg. Co., 77 Fed. 869, 23 C. C. A. 554; Hohner *v.* Gratz, 52 Fed. 871; Sawyer *v.* Kellogg, 7 Fed. 720. See Baker *v.* Baker, 115 Fed. 297, 53 C. C. A. 157.

England.— Seixo *v.* Provezende, L. R. 1 Ch. 192, 12 Jur. N. S. 215, 14 L. T. Rep. N. S. 314, 14 Wkly. Rep. 357; Tussaud *v.* Tussaud, 44 Ch. D. 678, 59 L. J. Ch. 631, 62 L. T. Rep. N. S. 633, 2 Meg. 120, 38 Wkly. Rep. 503; Turton *v.* Turton, 42 Ch. D. 128, 58 L. J. Ch. 677, 61 L. T. Rep. N. S. 571, 38 Wkly. Rep. 22; Edelsten *v.* Edelsten, 1 De G. J. & S. 185, 9 Jur. N. S. 479, 7 L. T. Rep. N. S. 768, 11 Wkly. Rep. 328, 66 Eng. Ch. 142, 46 Eng. Reprint 72.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 83.

"In this class of cases involving the purely voluntary selection of name, the selection of an arbitrary name, to which another has given a trade reputation or value, in connection with the very class of goods defendant intends to put on the market, under a name containing the arbitrary or trade-name, would seem to be ordinarily, of itself, sufficient proof of unfair competition, without further proof of fraudulent intent." Eureka Fire Hose Co. *v.* Eureka Rubber Mfg. Co., 69 N. J. Eq. 159, 169, 60 Atl. 561 [*affirmed* in 71 N. J. Eq. 300, 71 Atl. 1134]. A corporation named "Glucose Sugar Refining Co." is entitled to injunction against use by another corporation of the name "American Glucose Sugar Refining Co.," in view of the fact that the words "glucose sugar" do not describe any article of commerce, differing in this respect from such common words as "pig iron" or "wrought iron." Glucose Sugar Refining Co. *v.* American Glucose Sugar Refining Co., (N. J. Ch. 1899) 56 Atl. 861.

That resemblances in packages are unnecessary may be shown by comparison with the packages used by others in the trade which exhibit no resemblances. National Starch Co. *v.* Koster, 146 Fed. 259.

84. O'Grady *v.* McDonald, 72 N. J. Eq. 805, 66 Atl. 175; Keasbey *v.* Brooklyn Chemical Works, 142 N. Y. 467, 37 N. E. 476, 40 Am. St. Rep. 623 [*reversing* 21 N. Y. Suppl. 696]; Selchow *v.* Chaffee, etc., Mfg. Co., 132 Fed. 996; Croft *v.* Day, 7 Beav. 84, 29 Eng. Ch. 84, 49 Eng. Reprint 994, name borrowed for purpose of imitation.

85. Giragosian *v.* Chutjian, 194 Mass. 504, 80 N. E. 647. But see G. W. Cole Co. *v.* American Cement, etc., Co., 130 Fed. 703, 65 C. C. A. 105, holding that adoption of a new label for a new product of an old trader is no evidence of fraud. See also *supra*, V, B, 6.

86. *Illinois.*— Ball *v.* Siegel, 116 Ill. 137, 4 N. E. 667, 56 Am. Rep. 766, holding, on the facts, that charge was not maintained, the words being "Health-Preserving Corset."

Indiana.— Keller *v.* B. F. Goodrich Co., 117 Ind. 556, 19 N. E. 196, 10 Am. St. Rep. 88.

Massachusetts.— Russia Cement Co. *v.* Le Page, 147 Mass. 206, 17 N. E. 304, 9 Am. St. Rep. 685.

New York.— Hildreth *v.* McCaul, 70 N. Y. App. Div. 162, 74 N. Y. Suppl. 1072; De Youngs *v.* Jung, 7 Misc. 56, 27 N. Y. Suppl. 370; Bell *v.* Locke, 8 Paige 75, 34 Am. Dec. 371.

Pennsylvania.—Colton *v.* Thomas, 2 Brewst. 308, 7 Phila. 257; Clark, etc., Co. *v.* Scott, 4 Lack. Leg. N. 159.

United States.— Brown Chemical Co. *v.* Meyer, 139 U. S. 540, 11 S. Ct. 625, 35 L. ed. 247; G. & C. Merriam Co. *v.* Ogilvie, 159 Fed. 638, 88 C. C. A. 596, 16 L. R. A. N. S. 549; Peck *v.* Peck Bros. Co., 113 Fed. 291, 51 C. C. A. 251, 62 L. R. A. 81; Lever Bros. Boston Works *v.* Smith, 112 Fed. 998; Postum Cereal Co. *v.* American Health Food Co., 109 Fed. 898 [*affirmed* in 119 Fed. 848, 56 C. C. A. 360]; Potter Drug, etc., Corp. *v.* Miller, 75 Fed. 656; Klotz *v.* Hecht, 73 Fed. 822; Giron *v.* Gartner, 47 Fed. 467; Glen Cove Mfg. Co. *v.* Ludeling, 22 Fed. 823, 23 Blatchf. 46. But see Waukesha Hygeia Mineral Springs Co. *v.* Hygeia Sparkling Distilled Water Co., 63 Fed. 443, 11 C. C. A. 282.

England.— Metzler *v.* Wood, 8 Ch. D. 608, 47 L. J. Ch. 625, 38 L. T. Rep. N. S. 544, 26 Wkly. Rep. 577; Day *v.* Binning, Coop. Pr. Cas. 489, 47 Eng. Reprint 611.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 81.

"The misspelling of the word is, to say the least, as suspicious a circumstance as can be conceived." Radde *v.* Norman, L. R. 14 Eq. 348, 41 L. J. Ch. 525, 26 L. T. Rep. N. S. 788, 20 Wkly. Rep. 766.

for any honest purpose. Such false use is a deceptive artifice. Accordingly where the similarity and resulting confusion are caused by any false statement or suggestion made by defendant in connection with his goods or business, a clear case for injunction is presented. No falsity will be permitted.[86a] Although plaintiff has no exclusive right in the goods themselves, such as a patent or a copyright, he may nevertheless enjoin defendant from representing either expressly or by deceptive artifice that his different article is the same as plaintiff's article.[87] Injunction lies to prevent a false and injurious use of words or names which are primarily *publici juris*, but which have acquired a secondary meaning. Frequent instances of this are found in respect to the use of generic and descriptive names,[88] geographic and place names,[89] names of springs,[89a] personal names,[90] names of patented articles,[91] of periodicals and books,[92] or of secret and proprietary preparations.[93] Artificial products, plainly described as such, may to that extent use the name of the genuine product.[94] The use of a trade-name upon the genuine goods in connection with which it was acquired is not unfair competition, because that is a truthful and necessary use.[95] But the use of the trade-name of goods of a particular grade as the name of goods of an inferior grade, although coming from the same source, will be enjoined.[96]

9. Damnum Absque Injuria. Where a subsequent trader has acted honestly,[97] and has sufficiently discharged the duty resting upon him to affirmatively distinguish his goods or business,[98] and has made no unnecessary or untruthful use of names or marks previously identified with a rival trader,[99] any loss or damage caused by the mere use of words or marks which are *publici juris* in their primary sense is *damnum absque injuria* for which no action lies.[1] Some cases, more

86a. Sperry *v.* Percival Milling Co., 81 Cal. 252, 22 Pac. 651; World's Dispensary Medical Assoc. *v.* Pierce, 138 N. Y. App. Div. 401, 122 N. Y. Suppl. 818; F. S. Stanwix Canning Co. *v.* William McKinley Canning Co., 49 N. Y. App. Div. 566, 63 N. Y. Suppl. 704; Glen, etc., Mfg. Co. *v.* Hall, 6 Lans. (N. Y.) 158 [*reversed* in 61 N. Y. 226, 19 Am. Rep. 278]; Brooklyn White Lead Co. *v.* Masury, 25 Barb. (N. Y.) 416; American Novelty, etc., Co. *v.* Manfuacturing Electrical Novelty Co., 36 Misc. (N. Y.) 450, 73 N. Y. Suppl. 755; Société des Huiles, etc. *v.* Rorke, 31 N. Y. Suppl. 51; Mellwood Distilling Co. *v.* Harper, 167 Fed. 389; George Frost Co. *v.* Estes, 156 Fed. 677 (wooden button colored to imitate patented rubber button); Bauer *v.* Siegert, 120 Fed. 81, 56 C. C. A. 487; Bauer *v.* Order of Carthusian Monks, 120 Fed. 78, 56 C. C. A. 484; Liebig's Extract of Meat Co. *v.* Walker, 115 Fed. 822; Peck *v.* Peck Bros. Co., 113 Fed. 291, 51 C. C. A. 251, 62 L. R. A. 81; Liebig's Extract of Meat Co. *v.* Libby, 103 Fed. 87; La Republique Francaise *v.* Schultz, 102 Fed. 153, 42 C. C. A. 233; Scheuer *v.* Muller, 74 Fed. 225, 20 C. C. A. 161; Klotz *v.* Hecht, 73 Fed. 822; Von Mumm *v.* Frash, 56 Fed. 830. See also National Water Co. *v.* Hertz, 177 Fed. 607.

87. Coffeen *v.* Brunton, 5 Fed. Cas. No. 2,946, 4 MeLean 516, wherein an injunction was granted, although plaintiff's article was called "Chinese Liniment" while defendant's article was called "Ohio Liniment."

As to patented articles see *infra*, V, C, 8.

88. See *infra*, V, C, 1.

89. See *infra*, V, C, 2.

89a. See *infra*, V, C, 3.

90. See *infra*, V, C, 4.

91. See *infra*, V, C, 8.

92. See *infra*, V, C, 9.

93. See *infra*, V, C, 10.

94. Saxlehner *v.* Wagner, 157 Fed. 745, 85 C. C. A. 321 [*affirmed* in 216 U. S. 375, 30 S. Ct. 298], "Carbonated Artificial Hunyadi." *Compare* Thackeray *v.* Saxlehner, 125 Fed. 911, 60 C. C. A. 562; Carlsbad *v.* Thackeray, 57 Fed. 18; Apollinaris Co. *v.* Norrish, 33 L. T. Rep. N. S. 242.

95. Russia Cement Co. *v.* Frauenhar, 133 Fed. 518, 66 C. C. A. 500.

For trade-mark cases applying the same principle see *supra*, IV, E.

So long as complainant's goods are on the market, anyone has a right to sell or advertise that he will sell such goods by their name. Winchester Repeating Arms Co. *v.* Butler, 128 Fed. 976.

The sale of second-hand goods, not in any way represented to be new goods, is not unfair competition. Oliver Typewriter Co. *v.* American Writing Mach. Co., 156 Fed. 177. *Compare* Singer Mfg. Co. *v.* Bent, 41 Fed. 214.

A resale of genuine goods at cut prices is not unfair competition. Oliver Typewriter Co. *v.* American Writing Mach. Co., 156 Fed. 177.

96. Gillott *v.* Kettle, 3 Duer (N. Y.) 624; Russia Cement Co. *v.* Frauenhar, 133 Fed. 518, 66 C. C. A. 500 [*affirming* 126 Fed. 228]; Russia Cement Co. *v.* Katzenstein, 109 Fed. 314; Hennessy *v.* White, 6 W. W. & A'Beck. (Vict.) 216. See also Krauss *v.* Jos. R. Peebles' Sons Co., 58 Fed. 585.

97. See *supra*, V, B, 6.

98. See *supra*, V, B, 7.

99. See *supra*, V, B, 8.

1. *Connecticut.*— Hygeia Distilled Water

especially the earlier ones, state the rule without all the qualifications here stated,[2] but in the light of the modern development of the doctrines of unfair competition, it is only such damage as cannot be avoided by reasonable limitations upon defendant's exercise of common rights that is deemed *damnum absque injuria*.

10. Relative Merits of Goods. It is immaterial, so far as plaintiff's right to relief is concerned, that defendant's goods are of equal or superior intrinsic merit. Defendant has no right to make use of plaintiff's good-will and reputation, or of plaintiff's advertising, to sell even a superior article. Such conduct injures plaintiff by depriving him of sales which he otherwise would have made.[3] But the injury to plaintiff and his need for relief is greater if defendant's goods are in fact inferior, for that hurts the reputation of the genuine goods for which the other goods are mistaken, in addition to depriving plaintiff of sales.[4] The rule here is the same as in the case of technical trade-marks.[5]

11. Illegality or Fraud a Bar to Relief. If a trade or calling, as carried on, is illegal, deceptive, or fraudulent, names, marks, or devices used therein will not be protected upon the ground of unfair competition, no matter how plain defendant's fraud may be, and although a proper case for relief is made out in all other respects.[6]

Co. *v.* Hygeia Ice Co., 72 Conn. 646, 45 Atl. 957, 49 L. R. A. 147; William Rogers' Mfg. Co. *v.* Simpson, 54 Conn. 527, 9 Atl. 395.

Illinois.— Hazelton Boiler Co. *v.* Hazelton Tripod Boiler Co., 142 Ill. 494, 30 N. E. 339 [*affirming* 40 Ill. App. 430]; Bolander *v.* Peterson, 136 Ill. 215, 26 N. E. 603, 11 L. R. A. 350 [*affirming* 35 Ill. App. 551].

Kentucky.—Avery *v.* Meikle, 81 Ky. 73, 4 Ky. L. Rep. 759.

Massachusetts.— Cohen *v.* Nagle, 190 Mass. 4, 76 N. E. 276, 2 L. R. A. N. S. 964; American Waltham Watch Co. *v.* U. S. Watch Co., 173 Mass. 85, 53 N. E. 141, 73 Am. St. Rep. 263, 43 L. R. A. 826.

New York.—Chas. S. Higgins Co. *v.* Higgins Soap Co., 144 N. Y. 462, 39 N. E. 490, 43 Am. St. Rep. 769, 27 L. R. A. 42; Enoch Morgan's Sons Co. *v.* Troxell, 89 N. Y. 292, 42 Am. Rep. 294, 11 Abb. N. Cas. 86 [*reversing* 23 Hun 632]; Meneely *v.* Meneely, 62 N. Y. 427, 20 Am. Rep. 489; Amoskeag Mfg. Co. *v.* Spear, 2 Sandf. 599.

United States.— Singer Mfg. Co. *v.* June Mfg. Co., 163 U. S. 169, 16 S. Ct. 1002, 41 L. ed. 118; Brown Chemical Co. *v.* Meyer, 139 U. S. 540, 11 S. Ct. 625, 35 L. ed. 247 [*affirming* 31 Fed. 453]; Delaware, etc., Canal Co. *v.* Clark, 13 Wall. 311, 20 L. ed. 581; New York, etc., Cement Co. *v.* Coplay Cement Co., 44 Fed. 277, 10 L. R. A. 833 [*affirmed* in 45 Fed. 212].

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 84.

2. See cases cited *supra*, note 1.

3. Shaver *v.* Shaver, 54 Iowa 208, 6 N. W. 188, 37 Am. Rep. 194; Prince Mfg. Co. *v.* Prince's Metallic Paint Co., 135 N. Y. 24, 31 N. E. 990, 17 L. R. A. 129; Cutter *v.* Gudebrod Bros. Co., 36 N. Y. App. Div. 362, 55 N. Y. Suppl. 298; Partridge *v.* Menck, 2 Barb. Ch. (N. Y.) 101, 47 Am. Dec. 281 [*affirming* 2 Sandf. Ch. 622]; Taylor *v.* Carpenter, 11 Paige (N. Y.) 292, 42 Am. Dec. 114; Coats *v.* Holbrook, 2 Sandf. Ch. (N. Y.) 586, 3 N. Y. Leg. Obs. 404; McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828; Hostetter Co. *v.* Martinoni, 110 Fed. 524; Carlsbad *v.* Thackeray, 57 Fed. 18; Cleveland Stone Co. *v.* Wallace, 52 Fed. 431; Coleman *v.* Flavel, 40 Fed. 854, 12 Sawy. 220; Coffeen *v.* Brunton, 5 Fed. Cas. No. 2,947, 5 McLean 256; Taylor *v.* Carpenter, 23 Fed. Cas. No. 13,785, 2 Woodb. & M. 1; Edelsten *v.* Edelsten, 1 De G. J. & S. 185, 9 Jur. N. S. 479, 7 L. T. Rep. N. S. 768, 11 Wkly. Rep. 328, 66 Eng. Ch. 142, 46 Eng. Reprint 72. See also Prince Mfg. Co. *v.* Prince Metallic Paint Co., 135 N. Y. 24, 31 N. E. 990, 17 L. R. A. 129. But see Castle *v.* Siegfried, 103 Cal. 71, 37 Pac. 210.

4. Johnson *v.* Seabury, 71 N. J. Eq. 750, 67 Atl. 36, 124 Am. St. Rep. 1007, 12 L. R. A. N. S. 1201; Dutton *v.* Cupples, 117 N. Y. App. Div. 172, 102 N. Y. Suppl. 309; Dr. Jaeger's Sanitary Woolen System Co. *v.* Le Boutillier, 5 Misc. (N. Y.) 78, 24 N. Y. Suppl. 890; Wamsutta Mills *v.* Allen, 12 Phila. (Pa.) 535; Van Hoboken *v.* Mohns, 112 Fed. 528; Burnett *v.* Hahn, 88 Fed. 694; Carlsbad *v.* Tibbetts, 51 Fed. 852; Vive Camera Co. *v.* Hogg, 18 Quebec Super. Ct. 1.

5. See *supra*, IV, I.

6. *California.*— Dodge Stationery Co. *v.* Dodge, 145 Cal. 380, 78 Pac. 879; Millbrae Co. *v.* Taylor, (1894) 37 Pac. 235, 25 L. R. A. 193.

Iowa.— Sartor *v.* Schaden, 125 Iowa 696, 101 N. W. 511.

Missouri.— Grocers Journal Co. *v.* Midland Pub. Co., 127 Mo. App. 356, 105 S. W. 310; Shelley *v.* Sperry, 121 Mo. App. 429, 99 S. W. 488.

New Hampshire.— Portsmouth Brewing Co. *v.* Portsmouth Brewing, etc., Co., 67 N. H. 433, 30 Atl. 346.

New York.— Fay *v.* Lambourne, 124 N. Y. App. Div. 245, 108 N. Y. Suppl. 874 [*affirmed* in 196 N. Y. 575, 90 N. E. 1158].

United States.— Uri *v.* Hirsch, 123 Fed. 568.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 94.

Violation of liquor laws.—A corporation engaged in the liquor trade contrary to law cannot sue to enjoin another corporation from

The rule here is the same as in the case of technical trade-marks.[7] Plaintiff must come into court with clean hands.[8] Names and marks which are themselves a misrepresentation, or which are wrongfully used by plaintiff, and operate to deceive the public, will not be protected.[9] The illegal use of a name

using a name similar to its own. Portsmouth Brewing Co. *v.* Portsmouth Brewing, etc., Co., 67 N. H. 433, 30 Atl. 346.

Patent medicines.— In the absence of legislation, "courts cannot declare dealing in such preparations to be illegal, nor the articles themselves to be not entitled, as property, to the protection of the law." Worden *v.* California Fig Syrup Co., 187 U. S. 516, 527, 23 S. Ct. 161, 47 L. ed. 282 [*reversing* 102 Fed. 334, 42 C. C. A. 383]. See also *supra*, I, D.

7. See *supra*, III, A, 5.

8 *Iowa.*— Sartor *v.* Schaden, 125 Iowa 696, 101 N. W. 511.

Maryland.— Houchens *v.* Houchens, 95 Md. 37, 51 Atl. 822.

Nebraska.— Regent Shoe Mfg. Co. *v.* Haaker, 75 Nebr. 426, 106 N. W. 595, 4 L. R. A. N. S. 447.

New Hampshire.— Portsmouth Brewing Co. *v.* Portsmouth Brewing, etc., Co., 67 N. H. 433, 30 Atl. 346.

New Jersey.— Johnson *v.* Seabury, 69 N. J. Eq. 696, 61 Atl. 5; Stirling Silk Mfg. Co. *v.* Sterling Silk Co., 59 N. J. Eq. 394, 46 Atl. 199; Van Horn *v.* Coogan, 52 N. J. Eq. 380, 28 Atl. 788.

New York.— Prince Mfg. Co. *v.* Prince's Metallic Paint Co., 135 N. Y. 24, 31 N. E. 990, 17 L. R. A. 129; Koehler *v.* Sanders, 122 N. Y. 65, 25 N. E. 235, 9 L. R. A. 576 [*affirming* 48 Hun 48]; Fay *v.* Lambourne, 124 N. Y. App. Div. 245, 108 N. Y. Suppl. 874 [*affirmed* in 196 N. Y. 575, 90 N. E. 1158]; Lepow *v.* Kottler, 115 N. Y. App. Div. 231, 100 N. Y. Suppl. 779; Fetridge *v.* Wells, 4 Abb. Pr. 144, 13 How. Pr. 385.

United States.— Memphis Keeley Inst. *v.* Leslie E. Keeley Co., 155 Fed. 964, 84 C. C. A. 112, 16 L. R. A. N. S. 921; Dr. Peter H. Fahrney, etc., Co. *v.* Ruminer, 153 Fed. 735, 82 C. C. A. 621; Moxie Nerve Food Co. *v.* Modox Co., 153 Fed. 487; Moxie Nerve Food Co. *v.* Modox, 152 Fed. 493; National Starch Co. *v.* Koster, 146 Fed. 259; Siegert *v.* Gandolfi, 139 Fed. 917 [*reversed* in 149 Fed. 100, 79 C. C. A. 142]; De Long Hook, etc., Co. *v.* Francis Hook, etc., Co., 139 Fed. 146 [*modified* in 144 Fed. 682, 75 C. C. A. 484].

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 94.

The defense of unclean hands comes with ill grace from a rival manufacturer who is a fraudulent imitator whose hands are equally unclean. Moxie Nerve Food Co. *v.* Modox, 152 Fed. 493 [*citing* Siegert *v.* Gandolfi, 149 Fed. 100, 79 C. C. A. 142].

One who has wrongfully appropriated the business of a licensee under a patent, and prevented him from selling the patented article, may nevertheless complain of unfair competition because of his sale of a similar but different article under a like name. Taussig *v.* Corbin, 142 Fed. 660 [*reversing* 132 Fed. 662].

9. *California.*— Millbrae Co. *v.* Taylor, (1894) 37 Pac. 235, 25 L. R. A. 193; Castroville Co-Operative Creamery Co. *v.* Col, 6 Cal. App. 533, 92 Pac. 648, allowing use of wrapper on different goods.

Illinois.— Leslie E. Keeley Co. *v.* Hargreaves, 236 Ill. 316, 86 N. E. 132; Bolander *v.* Peterson, 136 Ill. 215, 28 N. E. 603, 11 L. R. A. 350 [*affirming* 35 Ill. App. 551].

Maryland.— Siegert *v.* Abbott, 61 Md. 276, 48 Am. Rep. 101.

Massachusetts.— George G. Fox Co. *v.* Glynn, 191 Mass. 344, 78 N. E. 89, 114 Am. St. Rep. 619; Messer *v.* The Fadettes, 168 Mass. 140, 46 N. E. 407, 60 Am. St. Rep. 371, 37 L. R. A. 721; Connell *v.* Reed, 128 Mass. 477, 35 Am. Rep. 397.

Missouri.— Grocers Journal Co. *v.* Midland Pub. Co., 127 Mo. App. 356, 105 S. W. 310.

New Jersey.—Amos H. Van Horn *v.* Coogan, 52 N. J. Eq. 380, 28 Atl. 788.

New York.— Koehler *v.* Sanders, 122 N. Y. 65, 25 N. E. 235, 9 L. R. A. 576 [*affirming* 48 Hun 48]; Wolfe *v.* Burke, 56 N. Y. 115; Fay *v.* Lambourne, 124 N. Y. App. Div. 245, 108 N. Y. Suppl. 874 [*affirmed* in 196 N. Y. 575, 90 N. E. 1158], name of fortune-tellers.

Pennsylvania.— Palmer *v.* Harris, 60 Pa. St. 156, 100 Am. Dec. 557.

United States.— Manhattan Medicine Co. *v.* Wood, 108 U. S. 218, 2 S. Ct. 436, 27 L. ed. 706; Moxie Nerve Food Co. *v.* Modox Co., 155 Fed. 304; National Starch Co. *v.* Koster, 146 Fed. 259 (use of package for different and inferior goods not made where stated); Krauss *v.* Jos. P. Peeble's Sons Co., 58 Fed. 585.

England.— Leather Cloth Co. *v.* American Leather Cloth Co., 4 De G. J. & S. 137, 10 Jur. 81, 33 L. J. Ch. 199, 9 L. T. Rep. N. S. 558, 3 New Rep. 264, 22 Wkly. Rep. 289, 69 Eng. Ch. 106, 46 Eng. Reprint 868 [*affirmed* in 11 H. L. Cas. 523, 11 Jur. N. S. 513, 35 L. J. Ch. 53, 12 L. T. Rep. N. S. 742, 6 New Rep. 209, 13 Wkly. Rep. 873, 11 Eng. Reprint 1435].

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 94.

Wrongful assumption of corporate name may be sufficient to bar relief. Koehler *v.* Sanders, 48 Hun (N. Y.) 48 [*affirmed* in 122 N. Y. 65, 25 N. E. 235, 9 L. R. A. 576]; McNair *v.* Cleave, 10 Phila. (Pa.) 155; Block *v.* Standard Distilling, etc., Co., 95 Fed. 978. See Colman, etc., Co. *v.* Dannenberg Co., 103 Ga. 784, 30 S. E. 639, 68 Am. St. Rep. 143, 41 L. R. A. 470. A partnership can have no property in a trade-name which imports that it is a corporation. Clark *v.* Ætna Iron Works, 44 Ill. App. 510.

Name of defunct newspaper.— One is not entitled to injunctive relief from unfair competition, where he seeks the relief to enable

in violation of law will not constitute it a trade-mark entitled to protection as such.[10] False statements in advertisements or labels as to material matters, such as the ingredients of medicines or beverages, will bar relief.[11] But where such advertisements have been discontinued prior to commencement of suit, their former publication is not necessarily a defense.[12] Immaterial or slight inaccuracies,[13] not substantially deceptive when fairly considered,[14] or innocent misrepresentations made without any intent to mislead,[15] are not a bar to relief. Mere trade puffing, or boastful or extravagant statements, are insufficient to support the defense of unclean hands.[16]

him to continue to deceive the public by listing the name of a defunct newspaper, and soliciting patronage for it as a going paper. Grocers Journal Co. *v.* Midland Pub. Co., 127 Mo. App. 356, 105 S. W. 310.

10. Hazelton Boiler Co. *v.* Hazelton Tripod Boiler Co., 142 Ill. 494, 30 N. E. 339, 344 [*affirming* 40 Ill. App. 430], wherein the court said: "A name which cannot be used except in violation of law cannot be so used as to become a trade-mark or trade-name."

11. *Colorado.*— Schradsky *v.* Appel Clothing Co., 10 Colo. App. 195, 50 Pac. 528.

Illinois.— Leslie E. Keeley Co. *v.* Hargreaves, 236 Ill. 316, 86 N. E. 132.

Indiana.— A. N. Chamberlain Medicine Co. *v.* H. A. Chamberlain Medicine Co., 43 Ind. App. 213, 86 N. E. 1025.

Iowa.— Sartor *v.* Schaden, 125 Iowa 696, 101 N. W. 511.

New Jersey.— Bear Lithia Springs Co. *v.* Great Bear Spring Co., 71 N. J. Eq. 595, 71 Atl. 383 [*affirmed* in 72 N. J. Eq. 871, 68 Atl. 86].

United States.— Worden *v.* California Fig Syrup Co., 187 U. S. 516, 23 S. Ct. 161, 47 L. ed. 282; Memphis Keeley Inst. *v.* Leslie E. Keeley Co., 155 Fed. 964, 84 C. C. A. 112, 16 L. R. A. N. S. 921; Moxie Nerve Food Co. *v.* Modox Co., 155 Fed. 304, 152 Fed. 493; Moxie Nerve Food Co. *v.* Modox Co., 153 Fed. 487; Siegert *v.* Gandolfi, 149 Fed. 100, 79 C. C. A. 142 [*reversing* 139 Fed. 917]; Moxie Nerve Food Co. *v.* Holland, 141 Fed. 202; De Long Hook, etc., Co. *v.* Francis Hook, etc., Co., 139 Fed. 146 [*modified* in 144 Fed. 682, 75 C. C. A. 484].

England.— Siegert *v.* Findlater, 7 Ch. D. 801, 47 L. J. Ch. 233, 38 L. T. Rep. N. S. 349, 26 Wkly. Rep. 459.

Canada.— Noel Co. *v.* Vitæ Ore Co., 17 Manitoba 87.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 94.

12. Johnson *v.* Seabury, 71 N. J. Eq. 750, 67 Atl. 36, 124 Am. St. Rep. 1007, 12 L. R. A. N. S. 1201 [*reversing* 69 N. J. Eq. 696, 61 Atl. 5] (false claim of exclusive right to use device); U. S. Frame, etc., Co. *v.* Horowitz, 51 Misc. (N. Y.) 101, 100 N. Y. Suppl. 705; C. F. Simmons Medicine Co. *v.* Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165; Moxie Nerve Food Co. *v.* Modox Co., 153 Fed. 487.

Situation at time of suit.— "The refusal to hear a party who comes into court with unclean hands is based upon the conditions existing when the party applies for aid." Johnson *v.* Seabury, 69 N. J. Eq. 696, 706, 61 Atl. 5 [*affirmed* on this point in 71 N. J. Eq. 750, 67 Atl. 36, 124 Am. St. Rep. 1007, 12 L. R. A. N. S. 1201, which, however, modified the decree, and *citing* Worden *v.* California Fig Syrup Co., 102 Fed. 334, 42 C. C. A. 383 (*reversed* on other grounds in 187 U. S. 516, 23 S. Ct. 161, 41 L. ed. 282)].

A misrepresentation not made till after the commencement of the action will not affect plaintiff's title to relief. Siegert *v.* Findlater, 7 Ch. D. 801, 47 L. J. Ch. 233, 38 L. T. Rep. N. S. 349, 26 Wkly. Rep. 459.

13. Regent Shoe Mfg. Co. *v.* Haaker, 75 Nebr. 426, 106 N. W. 595, 4 L. R. A. N. S. 447 (representations that goods were "made by us," held immaterial, although false); Edleston *v.* Vick, 1 Eq. Rep. 413, 11 Hare 78, 18 Jur. 7, 23 Eng. L. & Eq. 51, 45 Eng. Ch. 78, 68 Eng. Reprint 1194; Liebig's Extract of Meat Co. *v.* Anderson, 55 L. T. Rep. N. S. 206.

14. Gruber Almanack Co. *v.* Swingley, 103 Md. 362, 63 Atl. 684; Siegert *v.* Gandolfi, 149 Fed. 100, 79 C. C. A. 142 [*reversing* 139 Fed. 917].

Erroneous statements which are immediately corrected by correct statements in the same connection will not bar relief against unfair competition. Conrad *v.* Joseph Uhrig Brewing Co., 8 Mo. App. 277; Ransom *v.* Ball, 4 Silv. Sup. (N. Y.) 217, 7 N. Y. Suppl. 238; Centaur Co. *v.* Robinson, 91 Fed. 889.

A continued use of the facsimile of the autograph of the discoverer of a cure for drunkenness, on bottles containing the remedy, after his death is not such a fraud upon the public as to preclude equitable relief against unfair competition, as it cannot be regarded as a representation of any fact, in connection with the contents of the bottles, further than it was a genuine product. Leslie E. Keeley Co. *v.* Hargreaves, 236 Ill. 316, 86 N. E. 132.

Continued use of personal name.— The use by a corporation of the name of an individual, who at one time had been its president, as its corporate name, and his surname, used possessively, under which it had built up its reputation, as its popular name, does not import a declaration that a person of the name used is now connected with it, so as to render such use fraudulent. Dodge Stationery Co. *v.* Dodge, 145 Cal. 380, 78 Pac. 879.

15. Sartor *v.* Schaden, 125 Iowa 696, 101 N. W. 511.

16. Regent Shoe Mfg. Co. *v.* Haaker, 75 Nebr. 426, 106 N. W. 595, 4 L. R. A. N. S. 447; Burke *v.* Bishop, 175 Fed. 167; Hole-

C. Particular Classes of Unfair Competition — 1. Descriptive and Generic Terms. Descriptive terms and generic names are *publici juris* and not capable of exclusive appropriation by any one, but may be used by all the world in an honestly descriptive and non-deceptive manner.[17] Any injury necessarily caused thereby to a prior trader who has previously used such terms or names is *damnum absque injuria.*[18] Nevertheless, even descriptive and generic names may not be used in such a manner as to pass off the goods or business of one man as and for that of another. Where such words or names, by long use, have become identified in the minds of the public with the goods or business of a particular trader, it is unfair competition for a subsequent trader to use them in connection with similar goods or business in such a manner as to deceive the public and pass off his goods or business for that of his rival.[19] Accordingly the right to use

proof Hosiery Co. *v.* Wallach, 172 Fed. 859, 97 C. C. A. 263 [*modifying* and *affirming* 167 Fed. 373]; Moxie Nerve Food Co. *v.* Holland, 141 Fed. 202.

Claims as to cures.— Statements made on the labels and wrappers of a preparation as to its medical value and the cures it has effected are so largely of matters of opinion rather than statements of fact that, although apparently extravagant, they will not justify a court of equity in refusing a preliminary injunction against an imitator, who is clearly infringing the proprietary rights of the maker. Moxie Nerve Food Co. *v.* Holland, 141 Fed. 202. See also Dr. Peter H. Fahrney, etc., Co. *v.* Ruminer, 153 Fed. 735, 82 C. C. A. 621. But *compare* A. N. Chamberlain Medicine Co. *v.* H. A. Chamberlain Medicine Co., 43 Ind. App. 213, 86 N. E. 1025.

17. See *supra*, III, B, 1.

18. See *supra*, V, B, 9.

19. *Connecticut.*— Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 72 Conn. 646, 45 Atl. 957, 49 L. R. A. 147.

Illinois.— People *v.* Rose, 219 Ill. 46, 76 N. E. 42; International Committee Y. W. C. A. *v.* Chicago Y. W. C. A., 194 Ill. 194, 62 N. E. 551, 56 L. R. A. 888.

Indiana.— Keller *v.* B. F. Goodrich Co., 117 Ind. 556, 19 N. E. 196, 10 Am. St. Rep. 88.

Iowa.— Dyment *v.* Lewis, 144 Iowa 509, 123 N. W. 244, 26 L. R. A. N. S. 73.

Kentucky.— Avery *v.* Meikle, 81 Ky. 73, 4 Ky. L. Rep. 759.

Massachusetts.— Viano *v.* Baccigalupo, 183 Mass. 160, 67 N. E. 641. But see Dover Stamping Co. *v.* Fellows, 163 Mass. 191, 40 N. E. 105, 47 Am. St. Rep. 448, 28 L. R. A. 448.

New York.— Stokes *v.* Allen, 56 Hun 526, 9 N. Y. Suppl. 846; Kinney Tobacco Co. *v.* Maller, 53 Hun 340, 6 N. Y. Suppl. 389; Williams *v.* Johnson, 2 Bosw. 1; Dr. Jaeger's Sanitary Woolen System Co. *v.* Le Boutillier, 5 Misc. 78, 24 N. Y. Suppl. 890; New York Cab Co. *v.* Mooney, 15 Abb. N. Cas. 152. See Fetridge *v.* Merchant, 4 Abb. Pr. 156.

United States.— Florence Mfg. Co. *v.* Dowd, 171 Fed. 122; Lowe Bros. Co. *v.* Toledo Varnish Co., 168 Fed. 627, 94 C. C. A. 83 ("High Standard" varnishes); Rushmore *v.* Saxon, 158 Fed. 499 [*modified* in 170 Fed. 1021, 95 C. C. A. 671] ("Flare Front," as applied to lamps); Rushmore *v.* Saxon, 154 Fed. 213; Standard Varnish Works *v.* Fisher, 153 Fed. 928 ("Turpentine Shellac"); G. W. Cole Co. *v.* American Cement, etc., Co., 130 Fed. 703, 65 C. C. A. 105; Globe-Wernicke Co. *v.* Brown, 121 Fed. 185; Computing Scale Co. *v.* Standard Computing Scale Co., 118 Fed. 965, 55 C. C. A. 459; Draper *v.* Skerrett, 116 Fed. 206; Sterling Remedy Co. *v.* Spermine Medical Co., 112 Fed. 1000, 50 C. C. A. 657; Searle, etc., Co. *v.* Warner, 112 Fed. 674, 50 C. C. A. 321 [*affirmed* in 191 U. S. 195, 24 S. Ct. 79, 48 L. ed. 145]; Hostetter Co. *v.* Martinoni, 110 Fed. 524; Sterling Remedy Co. *v.* Gorey, 110 Fed. 372; Singer Mfg. Co. *v.* Hipple, 109 Fed. 152; Shaver *v.* Heller, etc., Co., 108 Fed. 821, 48 C. C. A. 48, 65 L. R. A. 878 [*affirming* 102 Fed. 882]; Hansen *v.* Siegel-Cooper Co., 106 Fed. 691; Williams *v.* Mitchell, 106 Fed. 168, 45 C. C. A. 265; Wells, etc., Co. *v.* Siegel, 106 Fed. 77; Fuller *v.* Huff, 104 Fed. 141, 43 C. C. A. 453, 51 L. R. A. 332 [*reversing* 99 Fed. 439]; Heller, etc., Co. *v.* Shaver, 102 Fed. 882; Dadirrian *v.* Yacubian, 98 Fed. 872, 39 C. C. A. 321 [*affirming* 90 Fed. 812]; Dennison Mfg. Co. *v.* Thomas Mfg. Co., 94 Fed. 651; Centaur Co. *v.* Robinson, 91 Fed. 889; Noel *v.* Ellis, 89 Fed. 978; Dadirrian *v.* Yacubian, 72 Fed. 1010; Von Mumm *v.* Frash, 56 Fed. 830; Landreth *v.* Landreth, 22 Fed. 41; Kinney *v.* Allen, 14 Fed. Cas. No. 7,826, 1 Hughes 106; U. S. *v.* Roche, 27 Fed. Cas. No. 16,180, 1 McCrary 385. But see Potter Drug, etc., Corp. *v.* Pasfield Soap Co., 102 Fed. 490.

England.— Cellular Clothing Co. *v.* Maxton, [1899] A. C. 326, 68 L. J. P. C. 72, 80 L. T. Rep. N. S. 809 [*distinguishing* Reddaway *v.* Banham, [1896] A. C. 199, 65 L. J. Q. B. 381, 74 L. T. Rep. N. S. 289, 44 Wkly. Rep. 633 (*reversing* [1895] 1 Q. B. 286, 64 L. J. Q. B. 321, 72 L. T. Rep. N. S. 73, 43 Wkly. Rep. 294), "Camel's Hair Belting"] (Cellular Cloth); Parsons *v.* Gillespie, [1898] A. C. 239, 67 L. J. P. C. 21, 14 T. L. R. 142; Davis *v.* Harbord, 15 A. C. 316, 60 L. J. Ch. 16, 63 L. T. Rep. N. S. 389; Lee *v.* Haley, L. R. 5 Ch. 161, 39 L. J. Ch. 284, 22 L. T. Rep. N. S. 251, 18 Wkly. Rep. 242; Leather Cloth Co. *v.* American Leather Cloth Co., 11 H. L. Cas. 523, 11 Jur. N. S. 513, 35 L. J. Ch. 53, 12 L. T. Rep. N. S. 742, 6 New Rep. 209, 13 Wkly. Rep. 873, 11 Eng. Reprint 1435; Powell *v.* Birmingham Vinegar Brewery Co., [1894] 3 Ch. 449, 71 L. T. Rep. N. S. 393 [*affirmed* in [1896] 2 Ch. 54, 65 L. J. Ch. 563, 74 L. T. Rep. N. S. 509, 44 Wkly. Rep. 688 (*affirmed*

generic names and descriptive terms is regulated by the courts in accordance with certain general rules already stated.[20] Thus, such terms may not be used in such a manner as to cause unnecessary deception of the public and damage to the complainant.[21] It is unnecessary for the subsequent trader to use such terms in such a manner as to give his goods the same short-name, or trade-name, in the market as that of the prior trader's goods, for it is easy to use such terms in some other honestly descriptive way without injury to any right of either party. Accordingly such a use of descriptive terms is unfair and will be enjoined.[22] Use of descriptive terms in connection with other imitative features may be enjoined.[23] If descriptive terms are not deceptively used or imitated there is no cause of action.[24] In justifying and upholding the right of all persons to use descriptive or generic names, the courts invariably place the justification upon the ground that defendant is using such names truthfully.[25] Use of truthfully descriptive words or names may not be absolutely enjoined.[26] The true name and description of goods may

in [1897] A. C. 710, 66 L. J. Ch. 763, 76 L. T. Rep. N. S. 792)]; Wassam *v.* Thorley's Cattle Food Co., 14 Ch. D. 748, 42 L. T. Rep. N. S. 851, 28 Wkly. Rep. 966; Croft *v.* Day, 7 Beav. 84, 29 Eng. Ch. 84, 49 Eng. Reprint 994; Knott *v.* Morgan, 2 Keen 213, 15 Eng. Ch. 213, 48 Eng. Reprint 610. See also Eno *v.* Dunn, 15 App. Cas. 252, 63 L. T. Rep. N. S. 6, 39 Wkly. Rep. 161 [*affirming* 41 Ch. D. 439, 58 L. J. Ch. 604, 61 L. T. Rep. N. S. 98].

Canada.— Gillett *v.* Lumsden, 4 Ont. L. Rep. 300; Provident Chemical Works *v.* Canada Chemical Mfg. Co., 2 Ont. L. Rep. 182.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," §§ 78, 79.

Geographical and personal names are governed by the same rule. See *infra*, V, C, 2, 4.

Words descriptive of ingredients, but which have acquired a secondary meaning indicating a particular origin or ownership, may not be used in such a manner as to cause unnecessary confusion and deception. Sterling Remedy Co. *v.* Gorey, 110 Fed. 372. See Burnett *v.* Phalon, 9 Bosw. (N. Y.) 192 [*affirmed* in 1 Abb. Dec. 267, 3 Keyes 594, 3 Transcr. App. 167, 5 Abb. Pr. N. S. 212], which was decided upon the ground of trade-mark, although it seems to be a clear case of unfair competition. See also *supra*, III, B, 1, b.

"New Label."— Where defendant uses the generic name of an article previously known as plaintiff's, but with a label substantially different, he will be enjoined from using thereon the words "New Label," as this might mislead old customers of plaintiff. Centaur Co. *v.* Marshall, 92 Fed. 605 [*affirmed* in 97 Fed. 785, 38 C. C. A. 413].

20. See *supra*, V, B.

21. See *supra*, V, B, 8.

22. Bates Mfg. Co. *v.* Bates Numbering Mach. Co., 172 Fed. 892 [*affirmed* in 178 Fed. 681, 102 C. C. A. 181]; Hirst *v.* Denham, L. R. 14 Eq. 542, 41 L. J. Ch. 752, 27 L. T. Rep. N. S. 56; Gillett *v.* Lumsden, 4 Ont. L. Rep. 300, "Cream Yeast." See also *supra*, V, B, 3.

The same rule applies to the use of geographical names. See *infra*, V, C, 2. Also to personal names see *infra*, V, C, 4.

The strongest judicial statement of the rule is the following: A man is not entitled to call his goods by a name which is an accurate and true description of such goods, when the name is one by which the goods of another manufacturer have already been described and are known to the trade, and the effect of his doing so will be to mislead purchasers into the belief that they are buying the goods of that other. American Tobacco Co. *v.* Polacsek, 170 Fed. 117; Reddaway *v.* Banham, [1896] A. C. 199, 65 L. J. Q. B. 381, 74 L. T. Rep. N. S. 289, 44 Wkly. Rep. 638; Levy *v.* Walker, 10 Ch. D. 436, 48 L. J. Ch. 273, 39 L. T. Rep. N. S. 654, 27 Wkly. Rep. 370.

23. Rushmore *v.* Saxon, 170 Fed. 1021, 95 C. C. A. 671 [*affirming* 158 Fed. 499]; Devlin *v.* Peek, 135 Fed. 167 [*affirmed* in 144 Fed. 1021, 73 C. C. A. 619] ("Toothache Gum"); Heide *v.* Wallace, 129 Fed. 649 [*affirmed* in 135 Fed. 346, 68 C. C. A. 16].

Deceptive dress of goods see *infra*, V, C, 12.

24. J. A. Scriven Co. *v.* Morris, 158 Fed. 1020, 85 C. C. A. 571 [*affirming* 154 Fed. 914]; Kirstein *v.* Cohen, 39 Can. Sup. Ct. 286, "Staz-on" not imitative of "Shur-on" as applied to eye-glasses.

25. Bolander *v.* Peterson, 136 Ill. 215, 26 N. E. 603, 11 L. R. A. 350 [*affirming* 35 Ill. App. 551]; Gordon Hollow Blast Grate Co. *v.* Gordon, 142 Mich. 488, 105 N. W. 1118; Lamb Knit-Goods Co. *v.* Lamb Glove, etc., Co., 120 Mich. 159, 78 N. W. 1072, 44 L. R. A. 841; Gabriel *v.* Sicilian Asphalt Paving Co., 44 N. Y. App. Div. 633, 56 N. Y. Suppl. 30 [*affirming* 23 Misc. 534, 52 N. Y. Suppl. 722]; Russia Cement Co. *v.* Frauenhar, 133 Fed. 518, 66 C. C. A. 500 [*affirming* 126 Fed. 228].

26. Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 72 Conn. 646, 45 Atl. 957, 49 L. R. A. 147; Car Advertising Co. *v.* New York City Car Advertising Co., 57 Misc. (N. Y.) 105, 107 N. Y. Suppl. 547 ("Car Advertising Company"); Cellular Clothing Co. *v.* Maxton, [1899] A. C. 326, 68 L. J. P. C. 72, 80 L. T. Rep. N. S. 809 ("Cellular" cloth); Waterman *v.* Ayres, 39 Ch. D. 29, 57 L. J. Ch. 893, 59 L. T. Rep. N. S. 17, 37 Wkly. Rep. 110.

Even another's trade-name may be used for an honestly descriptive purpose. Wagner

be used.[27] But a false use of descriptive terms, if tending to produce confusion and deception, will be enjoined as unfair.[28] The generic name of an article may not be used as the name of a different competing article if it misleads the public as to the identity of the article purchased,[29] and this is true even apart from any imitation of labels, marks, or dress of goods.[30] Where descriptive terms or generic names have acquired a secondary meaning,[31] they may be used by subsequent traders only when accompanied by sufficiently definite explanatory statements as to unmistakably prevent deception,[32] and unless they are the generic name of the article itself, they may be used only descriptively to tell the truth about the goods, and not as the trade-name of such goods.[33]

2. Geographical and Place Names. The general rule is that the name of a place cannot be exclusively appropriated by any person for trade purposes.[34] Geographical terms may be used by all persons for the purpose of truthfully stating the origin of materials used, or the location of a business,[35] subject, however,

Typewriter Co. *v.* F. S. Webster Co., 144 Fed. 405.

27. Singer Mfg. Co. *v.* June Mfg. Co., 163 U. S. 169, 16 S. Ct. 1002, 41 L. ed. 118 ("Singer Sewing Machine"); Russia Cement Co. *v.* Frauenhar, 133 Fed. 518, 66 C. C. A. 500 [*affirming* 126 Fed. 228]; Linoleum Mfg. Co. *v.* Nairn, 7 Ch. D. 834, 47 L. J. Ch. 430, 38 L. T. Rep. N. S. 448, 26 Wkly. Rep. 463 [*distinguished* in *In re* Chesebrough, [1902] 2 Ch. 1, 71 L. J. Ch. 427, 86 L. T. Rep. N. S. 665, 18 T. L. R. 468] ("Linoleum"); Liebig's Extract of Meat Co. *v.* Hanbury, 17 L. T. Rep. N. S. 298 ("Liebig's Extract of Meat").

For other cases and illustrations see *infra*, V, C, 3, 4, 8, 9,10.

28. This rule is of general application. See *supra*, V, B, 8. As to geographical names see *infra*, V, C, 2. As to personal names see *infra*, V, C, 4. As to names of patented articles see *infra*, V, C, 8. As to names of books see *infra*, V, C, 9. As to names of secret preparations see *infra*, V, C, 10.

29. *Kentucky.*— Taylor *v.* Taylor, 85 S. W. 1085, 27 Ky. L. Rep. 625.

New Jersey.— Smith *v.* Brand, 67 N. J. Eq. 529, 58 Atl. 1029 [*approving* and *distinguishing* Van Horn *v.* Coogan, 52 N. J. Eq. 380, 28 Atl. 788].

New York.— Jaffe *v.* Evans, 70 N. Y. App. Div. 186, 75 N. Y. Suppl. 257; Jaeger's Sanitary Woolen System Co. *v.* Le Boutillier, 5 Misc. 78, 24 N. Y. Suppl. 890.

United States.— M. J. Breitenbach Co. *v.* Spangenberg, 131 Fed. 160; Singer Mfg. Co. *v.* Hipple, 109 Fed. 152.

England.— Hirst *v.* Denham, L. R. 14 Eq. 542, 41 L. J. Ch. 752, 27 L. T. Rep. N. S. 56.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 76.

30. Hostetter Co. *v.* Gallagher Stores, 142 Fed. 208; Heublein *v.* Adams, 125 Fed. 782.

The mere use of a descriptive or generic name, apart from a fraudulent imitation of dress of goods, has been held insufficient to support an injunction. Schmidt *v.* Welch, (Cal. 1893) 35 Pac. 626; Schmidt *v.* Brieg, 100 Cal. 672, 35 Pac. 623, 22 L. R. A. 790; La Republique Francaise *v.* Saratoga Vichy Spring Co., 191 U. S. 427, 24 S. Ct. 145, 48 L. ed. 247; Moore *v.* Auwell, 172 Fed. 508 [*affirmed* in 178 Fed. 543, 102 C. C. A. 53]; Trinidad Asphalt Mfg. Co. *v.* Standard Paint Co., 163 Fed. 977, 90 C. C. A. 195 [*affirmed* in 220 U. S. 446]; J. A. Scriven Co. *v.* Morris, 158 Fed. 1020, 85 C. C. A. 571; Heide *v.* Wallace, 129 Fed. 649 [*affirmed* in 135 Fed. 346]. See also McCall *v.* Theal, 28 Grant Ch. (U. C.) 48.

31. See *supra*, V, B, 2.

32. See *supra*, V, B, 7.

33. See *supra*, V, B, 3.

34. Busch *v.* Gross, 71 N. J. Eq. 508, 64 Atl. 754; Siegert *v.* Gandolfi, 149 Fed. 100, 79 C. C. A. 142 [*reversing* 139 Fed. 917]; Grand Hotel Co. *v.* Wilson, 5 Ont. L. Rep. 141. See *supra*, III, B, 7.

35. *Illinois.*— Elgin Butter Co. *v.* Elgin Creamery Co., 155 Ill. 127, 40 N. E. 616 [*affirming* 51 Ill. App. 231], "Elgin Butter."

Maine.— Ricker *v.* Portland, etc., R. Co., 90 Me. 395, 38 Atl. 338.

Michigan.— Michigan Sav. Bank *v.* Dime Sav. Bank, 162 Mich. 297, 127 N. W. 364.

New York.— Gabriel *v.* Sicilian Asphalt Paving Co., 44 N. Y. App. Div. 633, 56 N. Y. Suppl. 30 [*affirming* 23 Misc. 534, 52 N. Y. Suppl. 722]; Clinton Metalic Paint Co. *v.* New York Metalic Paint Co., 23 Misc. 66, 50 N. Y. Suppl. 437.

Pennsylvania.— Laughman's Appeal, 128 Pa. St. 1, 18 Atl. 415, 5 L. R. A. 599, "Sonman Coal."

South Carolina.— Sumter Tel. Mfg. Co. *v.* Sumter Tel. Mfg. Co., 63 S. C. 313, 41 S. E. 322.

United States.— Virginia Hot Springs Co. *v.* Hegeman, 144 Fed. 1023, 73 C. C. A. 612 [*affirming* 138 Fed. 855].

England.— Grand Hotel Co. *v.* Wilson, [1904] A. C. 103, 3 Com. L. Rep. 434, 73 L. J. P. C. 1, 89 L. T. Rep. N. S. 456, 20 T. L. R. 19, 52 Wkly. Rep. 286 [*distinguishing* Montgomery *v.* Thompson, [1891] A. C. 217, 55 J. P. 756, 60 L. J. Ch. 757, 64 L. T. Rep. N. E. 748], "Caledonia Water."

Canada.— Caledonia Grand Hotel Co. *v.* Wilson, 5 Ont. L. Rep. 141, 1 Ont. Wkly. Rep. 785 [*affirming* 2 Ont. L. R. 322] ("Caledonia Water" not infringed by "Water From the New Springs at Caledonia");

to the general rules governing unfair competition.[36] If the term is used in such a manner that no actual or probable confusion or deception results, no one can complain.[37] But use in such a manner as to cause unnecessary confusion constitutes unfair competition and will be enjoined.[38] No device or artifice calculated to increase or insure deception and confusion from the use of the name will be permitted.[39] Where geographical names have acquired a secondary meaning, a deceptive use of such names by others in connection with similar goods or business constitutes unfair competition, and will be enjoined.[40] If a geographical term

Rose *v.* McLean Pub. Co., 24 Ont. App. 240 [*reversing* 27 Ont. 325].

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 13.

"As was said by the Supreme Court of the United States in Delaware, etc., Canal Co. *v.* Clark, 13 Wall. 311, 20 L. ed. 581: 'It must, then, be considered as sound doctrine that no one can apply a name of a district or country to a well-known article of commerce, and obtain thereby such an exclusive right to the application as to prevent others inhabiting the district, or dealing in similar articles coming from the district, from using the same designation.'" Elgin Butter Co. *v.* Elgin Creamery Co., 155 Ill. 127, 136, 40 N. E. 616 [*affirming* 51 Ill. App. 231]. In McAndrew *v.* Bassett, 10 Jur. N. S. 492, 10 L. T. Rep. N. S. 65 [*affirmed* in 4 De G. J. & S. 380, 10 Jur. N. S. 550, 33 L. J. Ch. 561, 10 L. T. Rep. N. S. 442, 4 New Rep. 123, 12 Wkly. Rep. 777, 69 Eng. Ch. 293, 46 Eng. Reprint 965], plaintiffs, manufacturers of licorice, stamped it with the word "Anatolia." It was held a valid trade-mark, because, by use and association, the word had come to indicate ownership and origin of the manufactured goods in complainant, in addition to the geographical location of the place where the licorice was grown. See the comments on this case in the opinion of Strong, J., in Delaware, etc., Canal Co. *v.* Clark, 13 Wall. (U. S.) 326, 20 L. ed. 581.

36. See *supra*, V, B.

37. Weyman *v.* Soderberg, 108 Fed. 63; Continental Ins. Co. *v.* Continental Fire Assoc., 101 Fed. 255, 41 C. C. A. 326 [*affirming* 96 Fed. 846]; Pabst Brewing Co. *v.* Ekers, 21 Quebec Super. Ct. 545.

38. American Brewing Co. *v.* St. Louis Brewing Co., 47 Mo. App. 14; Genesee Salt Co. *v.* Burnap, 73 Fed. 818, 20 C. C. A. 27 [*affirming* 67 Fed. 534].

39. American Brewing Co. *v.* St. Louis Brewing Co., 47 Mo. App. 14; Clinton Metalic Paint Co. *v.* New York Metalic Paint Co., 23 Misc. (N. Y.) 66, 50 N. Y. Suppl. 437; Collinsplatt *v.* Finlayson, 88 Fed. 693; Southern White Lead Co. *v.* Cary, 25 Fed. 125.

40. *Illinois.*— Elgin Butter Co. *v.* Elgin Creamery Co., 155 Ill. 127, 40 N. E. 616 [*affirming* 51 Ill. App. 231]; Candee *v.* Deere, 54 Ill. 456, 5 Am. Rep. 125, 10 Am. L. Reg. N. S. 694.

Iowa.— Dyment *v.* Lewis, 144 Iowa 509, 123 N. W. 244, 26 L. R. A. N. S. 73.

Maine.— W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 100 Me. 461, 52 Atl. 499, 4 L. R. A. N. S. 960.

Massachusetts.— Viano *v.* Baccigalupo, 183 Mass. 160, 67 N. E. 641; American Waltham Watch Co. *v.* U. S. Watch Co., 173 Mass. 85, 53 N. E. 141, 73 Am. St. Rep. 263, 43 L. R. A. 826.

Missouri.— American Brewing Co. *v.* St. Louis Brewing Co., 47 Mo. App. 14.

New Jersey.— Bush *v.* Gross, 71 N. J. Eq. 508, 64 Atl. 754 ("Metuchen Inn"); International Silver Co. *v.* Wm. H. Rogers Corp., 66 N. J. Eq. 119, 57 Atl. 1037; Van Horn *v.* Coogan, 52 N. J. Eq. 380, 28 Atl. 788.

New York.— Koehler *v.* Sanders, 122 N. Y. 65, 25 N. E. 235, 9 L. R. A. 576; Newman *v.* Alvord, 51 N. Y. 189, 10 Am. Rep. 588; Gebbie *v.* Stitt, 82 Hun 93, 31 N. Y. Suppl. 102; Brooklyn White Lead Co. *v.* Masury, 25 Barb. 416; Lea *v.* Wolf, 1 Thomps. & C. 626, 15 Abb. Pr. N. S. 5, 46 How. Pr. 157; Wolfe *v.* Goulard, 18 How. Pr. 64.

Pennsylvania.— Loughman's Appeal, 128 Pa. St. 1, 18 Atl. 415, 5 L. R. A. 599; Glendon Iron Co. *v.* Uhler, 75 Pa. St. 467, 15 Am. Rep. 599.

United States.— Elgin Nat. Watch Co. *v.* Illinois Watch Case Co., 179 U. S. 665, 21 S. Ct. 270, 45 L. ed. 365 [*affirming* 94 Fed. 667, 35 C. C. A. 237 (*reversing* 89 Fed. 487)]; Delaware, etc., Canal Co. *v.* Clark, 13 Wall. 311, 20 L. ed. 581; Jewish Colonization Assoc. *v.* Solomon, 154 Fed. 157; Buzby *v.* Davis, 150 Fed. 275, 80 C. C. A. 163; Siegert *v.* Gandolfi, 149 Fed. 100, 79 C. C. A. 142 [*reversing* 139 Fed. 917]; G. W. Cole Co. *v.* American Cement, etc., Co., 130 Fed. 703, 65 C. C. A. 105; Bauer *v.* La Société, etc., 120 Fed. 74, 56 C. C. A. 480; Shaver *v.* Heller, etc., Co., 108 Fed. 821, 48 C. C. A. 48, 65 L. R. A. 878; Heller, etc., Co. *v.* Shaver, 102 Fed. 882; American Waltham Watch Co. *v.* Sandman, 96 Fed. 330; Pillsbury-Washburn Flour-Mills Co. *v.* Eagle, 86 Fed. 608, 30 C. C. A. 386, 41 L. R. A. 162; A. F. Pike Mfg. Co. *v.* Cleveland Stone Co., 35 Fed. 896; Evans *v.* Von Laer, 32 Fed. 153; Southern White Lead Co. *v.* Cary, 25 Fed. 125; Anheuser-Busch Brewing Assoc. *v.* Piza, 24 Fed. 149, 23 Blatchf. 245; Blackwell *v.* Dibrell, 3 Fed. Cas. No. 1,475, 3 Hughes 151, 14 Off. Gaz. 633; Whitfield *v.* Loveless, 64 Off. Gaz. 442. *Compare* New York, etc., Cement Co. *v.* Coplay Cement Co., 44 Fed. 277, 10 L. R. A. 833; Evans *v.* Von Laer, 32 Fed. 153.

England.— Lee *v.* Haley, L. R. 5 Ch. 155, 39 L. J. Ch. 284, 22 L. T. Rep. N. S. 251, 18 Wkly. Rep. 242; Seixo *v.* Provezende, L. R. 1 Ch. 192, 12 Jur. N. S. 215, 14 L. T. Rep. N. S. 314, 14 Wkly. Rep. 357; Wotherspoon *v.* Cur-

has become the "short name" by which the public generally call for a particular trader's goods, a rival trader engaging in the same line of business may not use such term in such a way that the "short name" of his goods will be the same as that of his rival's goods.[41] This rule is in complete harmony with all the general principles governing this subject.[42] Use of the market name of the goods is wholly unnecessary, and is inevitably deceptive. Defendant enjoys his full right, if permitted to use the name descriptively, to indicate the locality of origin of his goods. So used no affirmative precautions are necessary, and no deception possible. But use as the market name of the goods requires explanation, which can never completely and certainly protect both the public and plaintiff. An absurdity is involved in permitting one first unnecessarily to create deception, and then requiring him to counteract it.[43] Frequently, however, subsequent users have been merely enjoined from using the name unless accompanied by a statement sufficient to clearly distinguish their goods from the prior user.[44] Decisions

rie, L. R. 5 H. L. 508, 42 L. J. Ch. 130, 27 L. T. Rep. N. S. 393 ("Glenfield Starch"); Thompson *v.* Montgomery, 41 Ch. D. 35, 58 L. J. Ch. 374, 60 L. T. Rep. N. S. 766, 37 Wkly. Rep. 637 [*affirmed* in [1891] A. C. 217, 55 J. P. 756, 60 L. J. Ch. 757, 64 L. T. Rep. N. S. 748] ("Stone Ale"); Siegert *v.* Findlater, 7 Ch. D. 801, 47 L. J. Ch. 233, 38 L. T. Rep. N. S. 349, 26 Wkly. Rep. 459; Hirst *v.* Denham, L. R. 14 Eq. 542, 41 L. J. Ch. 752, 27 L. T. Rep. N. S. 56; Radde *v.* Norman, L. R. 14 Eq. 348, 41 L. J. Ch. 525, 26 L. T. Rep. N. S. 788, 20 Wkly. Rep. 766; Cocks *v.* Chandler, L. R. 11 Eq. 446, 40 L. J. Ch. 575, 24 L. T. Rep. N. S. 379, 19 Wkly. Rep. 593; McAndrew *v.* Bassett, 4 De G. J. & S. 380, 10 Jur. N. S. 550, 33 L. J. Ch. 561, 10 L. T. Rep. N. S. 442, 4 New Rep. 123, 12 Wkly. Rep. 777, 69 Eng. Ch. 777, 46 Eng. Reprint 965; Taylor *v.* Taylor, 2 Eq. Rep. 290, 23 L. J. Ch. 255, 23 Eng. L. & Eq. 281; Bulloch *v.* Gray, 19 Journ. of Jurisp. 218; Hine *v.* Hart, 10 Jur. 106; Apollinaris Co. *v.* Norrish, 33 L. T. Rep. N. S. 242; Southon *v.* Reynolds, 12 L. T. Rep. N. S. 75; Davis *v.* Tylos, M. R. April 24, 1879; Powell *v.* McNulty, Sebastian's Dig. 526; Apollinaris Co. *v.* Edwards, Seton (4th ed.) 237.

Canada.— See Boston Rubber Shoe Co. *v.* Montreal Boston Rubber Shoe Co., 32 Can. Sup. Ct. 315; Rose *v.* McLean Pub. Co., 24 Ont. App. 240 [*reversing* 27 Ont. 325].

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," §§ 13.

A manufacturer locating with a view to obtaining the advantage of the name of the place, to the detriment of a former user of that name, is guilty of unfair competition and will be enjoined. Dyment *v.* Lewis, 144 Iowa 509, 123 N. W. 244, 26 L. R. A. N. S. 73.

41. *Massachusetts.*— American Waltham Watch Co. *v.* U. S. Watch Co., 173 Mass. 85, 53 N. E. 141, 73 Am. St. Rep. 263, 43 L. R. A. 826, "Waltham Watch."

New Jersey.— Van Horn *v.* Coogan, 52 N. J. Eq. 380, 28 Atl. 788, "Portland" stoves, infringed by "The Famous Portland."

New York.— Newman *v.* Alvord, 49 Barb. 588 [*affirmed* in 51 N. Y. 189, 10 Am. Rep. 588], "Akron Cement."

United States.— Siegert *v.* Gandolfi, 149 Fed. 100, 79 C. C. A. 142 [*reversing* 139 Fed. 917] ("Angostura Bitters"); Elgin Nat. Watch Co. *v.* Loveland, 132 Fed. 41 ("Elgin Watches"); Shaver *v.* Heller, etc., Co., 108 Fed. 821, 48 C. C. A. 48, 65 L. R. A. 878 [*affirming* 102 Fed. 882] ("American Ball Blue"); Oxford University *v.* Wilmore-Andrews Pub. Co., 101 Fed. 443 ("Oxford Bibles").

England.—Montgomery *v.* Thompson, [1891] A. C. 217, 55 J. P. 756, 60 L. J. Ch. 757, 64 L. T. Rep. N. S. 748 ("Stone Ale"); Wotherspoon *v.* Currie, L. R. 5 H. L. 508, 42 L. J. Ch. 130, 27 L. T. Rep. N. S. 393 [*reversing* 23 L. T. Rep. N. S. 443, 18 Wkly. Rep. 942] ("Glenfield Starch"); Powell *v.* Birmingham Vinegar Brewery Co., [1894] 3 Ch. 449, 71 L. T. Rep. N. S. 393 [*affirmed* in [1896] 2 Ch. 54, 65 L. J. Ch. 563, 74 L. T. Rep. N. S. 509, 44 Wkly. Rep. 688 (*affirmed* in [1897] A. C. 710, 66 L. J. Ch. 763, 76 L. T. Rep. N. S. 792)] ("Yorkshire Relish"); Shrimpton *v.* Laight, 18 Beav. 164, 52 Eng. Reprint 65 ("Glenfield Starch").

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 13.

42. See *supra*, V, B. See also the application of the same principle to personal names *infra*, V, C, 4.

43. A convincing exposition of this doctrine is found in Shaver *v.* Heller, etc., Co., 108 Fed. 821, 822, 48 C. C. A. 48, 65 L. R. A. 878. See also Bissell Chilled Plow Works *v.* T. M. Bissell Plow Co., 121 Fed. 357, 366, where the same doctrine is applied to personal names. See also *supra*, V, B, 3. In the "Stone Ale" case (Montgomery *v.* Thompson, [1891] A. C. 217, 227, 55 J. P. 756, 60 L. J. Ch. 757, 64 L. T. Rep. N. S. 748), complainant's ale, brewed at the village of Stone, had become known as "Stone Ale." The court said, per Lord Hannen: "The appellant is, undoubtedly, entitled to brew ale at Stone, and to indicate that it was manufactured there, but there are various means of stating that fact without using the name which has now become the designation of the respondents' ale."

44. American Waltham Watch Co. *v.* U. S. Watch Co., 173 Mass. 85, 53 N. E. 141, 73 Am. St. Rep. 263, 43 L. R. A. 826; National

declaring the right of all persons to use geographical names, in their statement of the right, invariably limit it to a truthful use in connection with goods actually produced in the designated geographical district.[45] A false use of geographical or place names by persons not doing business at the place indicated, or in connection with goods not coming from such place, for the purpose, or with the effect of deception, may be enjoined.[46] Residents of a place who are using the name of such place in their business may enjoin non-residents from using such name where such use is calculated to deceive the public and injure plaintiff.[47] A geographical name may become the generic designation of a class or species of goods, in which event even residents of the place indicated cannot restrain its use by others in connection with that class or species of goods, for in such connection it is an honestly descriptive use.[48]

3. Names of Springs and Mines. Names of springs, or mineral waters, or salts

Starch Co. *v.* Koster, 146 Fed. 259; American Waltham Watch Co. *v.* Sandman, 96 Fed. 330; Anheuser-Busch Brewing Assoc. *v.* Fred. Miller Brewing Co., 87 Fed. 864; Powell *v.* Birmingham Vinegar Brewery Co., [1894] 3 Ch. 449, 71 L. T. Rep. N. S. 393 [*affirmed* in [1896] 2 Ch. 54, 65 L. J. Ch. 563, 74 L. T. Rep. N. S. 509, 44 Wkly. Rep. 688 (*affirmed* in [1897] A. C. 710, 66 L. J. Ch. 763, 76 L. T. Rep. N. S. 792)].

45. Newman *v.* Alvord, 51 N. Y. 189, 10 Am. Rep. 588; Ft. Stanwix Canning Co. *v.* William McKinley Canning Co., 49 N. Y. App. Div. 566, 63 N. Y. Suppl. 704; Gabriel *v.* Sicilian Asphalt Paving Co., 44 N. Y. App. Div. 633, 56 N. Y. Suppl. 30 [*affirming* 23 Misc. 534, 52 N. Y. Suppl. 722]; Clifton Metalic Paint Co. *v.* New York Metalic Paint Co., 23 Misc. (N. Y.) 66, 50 N. Y. Suppl. 437; Portuondo Cigar Mfg. Co. *v.* Neiman, 19 York Leg. Rec. (Pa.) 201; Delaware, etc., Canal Co. *v.* Clark, 13 Wall. (U. S.) 311, 20 L. ed. 581; Elgin Nat. Watch Co. *v.* Loveland, 132 Fed. 41.

46. *Florida.*— El Modello Cigar Mfg. Co. *v.* Gato, 25 Fla. 886, 7 So. 23, 23 Am. St. Rep. 537, 6 L. R. A. 823.

Indiana.— Keller *v.* B. F. Goodrich Co., 117 Ind. 556, 19 N. E. 196, 10 Am. St. Rep. 88.

New York.— Koehler *v.* Sanders, 122 N. Y. 65, 25 N. E. 235, 9 L. R. A. 576 [*affirming* 48 Hun 48]; International Cheese Co. *v.* Phenix Cheese Co., 118 N. Y. App. Div. 499, 103 N. Y. Suppl. 362 ("Philadelphia Cream Cheese"); Gabriel *v.* Sicilian Asphalt Paving Co., 23 Misc. 534, 52 N. Y. Suppl. 722 [*affirmed* in 44 N. Y. App. Div. 633, 56 N. Y. Suppl. 30]; Clinton Metalic Paint Co. *v.* New York Metalic Paint Co., 23 Misc. 66, 50 N. Y. Suppl. 437.

Pennsylvania.— Portuondo Cigar Mfg. Co. *v.* Neiman, 19 York Leg. Rec. 201.

United States.— Elgin Nat. Watch Co. *v.* Loveland, 132 Fed. 41; Blackwell *v.* Dibrell, 3 Fed. Cas. No. 1,475, 3 Hughes 151, 14 Off. Gaz. 633.

England.— Braham *v.* Beachim, 7 Ch. D. 848, 47 L. J. Ch. 348, 38 L. T. Rep. N. S. 640, 26 Wkly. Rep. 654.

Canada.— Pabst Brewing Co. *v.* Ekers, 20 Quebec Super. Ct. 20 [*reversed* on questions of fact in 21 Quebec Super. Ct. 545].

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 13.

Where the value of the article consists in the locality from which is derived the principal material of which the article is composed, the geographical name may be used, although the article is made elsewhere. Gabriel *v.* Sicilian Asphalt Paving Co., 23 Misc. (N. Y.) 534, 52 N. Y. Suppl. 722 [*affirmed* in 44 N. Y. App. Div. 633, 56 N. Y. Suppl. 30].

47. *Illinois.*— Elgin Butter Co. *v.* Elgin Creamery Co., 155 Ill. 127, 40 N. E. 616.

Massachusetts.— Viano *v.* Baccigalupo, 183 Mass. 160, 67 N. E. 641.

Ohio.— Harvey *v.* Lamoureaux, 7 Ohio S. & C. Pl. Dec. 455, 5 Ohio N. P. 473.

United States.— Elgin Nat. Watch Co. *v.* Loveland, 132 Fed. 41; California Fruit Canners' Assoc. *v.* Myer, 104 Fed. 82; Oxford University *v.* Wilmore-Andrews Pub. Co., 101 Fed. 443; Pillsbury-Washburn Flour-Mills Co. *v.* Eagle, 86 Fed. 608, 30 C. C. A. 386, 41 L. R. A. 162; Gage-Downs Co. *v.* Featherbone Corset Co., 83 Fed. 213. But see New York, etc., Cement Co. *v.* Coplay Cement Co., 44 Fed. 277, 10 L. R. A. 833, 45 Fed. 212. But *compare* Key West Cigar Manufacturers' Assoc. *v.* Rosenbloom, 171 Fed. 296, holding that an association not itself engaged in business could not maintain the bill.

England.— Braham *v.* Beachim, 7 Ch. D. 848, 47 L. J. Ch. 348, 38 L. T. Rep. N. S. 640, 26 Wkly. Rep. 654; Southorn *v.* Reynolds, 12 L. T. Rep. N. S. 75.

Canada.— Pabst Brewing Co. *v.* Ekers, 20 Quebec Super. Ct. 20. But see Pabst Brewing Co. *v.* Ekers, 21 Quebec Super. Ct. 545.

The use by a Canadian brewing company of the word "Milwaukee" to describe its lager beer will not be enjoined, on the ground of unfair competition, in the absence of proof of deception or damage, at the suit of a company manufacturing beer in the city of Milwaukee, where such word was used by defendant for ten years prior to the introduction of plaintiff's product in the Canadian market. Pabst Brewing Co. *v.* Ekers, 21 Quebec Super. Ct. 545.

48. Lea *v.* Deakin, 15 Fed. Cas. No. 8,154, 11 Biss. 23, holding that "Worcestershire Sauce" has become a generic term.

derived therefrom will be protected against use or imitation in connection with spurious waters or salts.[49] But the name of springs cannot be exclusively appropriated as against those who use it with equal truth, and therefore other persons may use the name in connection with waters coming from the spring or district indicated by the name.[50] The same principles apply to the names of mines and minerals.[51] Artificial mineral waters or salts may be called by the name of the spring whose waters or salts are imitated, but only upon condition that the facts are plainly stated and that there are no circumstances calculated to deceive buyers into thinking that the artificial product is the genuine natural product. Any deception or misrepresentation, express or implied, constitutes unfair competition.[52]

49. *Kentucky.*— Northcutt *v.* Turney, 101 Ky. 314, 41 S. W. 21, 19 Ky. L. Rep. 483; Parkland Hills Blue Lick Water Co. *v.* Hawkins, 95 Ky. 502, 26 S. W. 389, 16 Ky. L. Rep. 210, 44 Am. St. Rep. 254.

Maine.— See Ricker *v.* Portland, etc., R. Co., 90 Me. 395, 38 Atl. 338, holding that the name of a spring, "Poland Springs," was not infringed by adoption as the name of a railroad station.

New York.— Congress, etc., Spring Co. *v.* High Rock Congress Spring Co., 45 N. Y. 291, 6 Am. Rep. 82 [*reversing* 57 Barb. 526]; Ricker *v.* Leigh, 74 N. Y. App. Div. 138, 77 N. Y. Suppl. 540.

United States.— La Republique Francaise *v.* Saratoga Vichy Spring Co., 191 U. S. 427, 24 S. Ct. 145, 48 L. ed. 247; Thackeray *v.* Saxlehner, 125 Fed. 911, 60 C. C. A. 562; La Republique Francaise *v.* Saratoga Vichy Spring Co., 99 Fed. 733; Carlsbad *v.* Kutnow, 71 Fed. 167, 18 C. C. A. 24 [*affirming* 68 Fed. 794]; La Republique Francaise *v.* Schultz, 57 Fed. 37, 94 Fed. 500 [*affirmed* in 102 Fed. 153, 42 C. C. A. 233]; Hill *v.* Lockwood, 32 Fed. 389; Luyties *v.* Hollendeer, 30 Fed. 632; Apollinaris Co. *v.* Scherer, 27 Fed. 18, 23 Blatchf. 459; Apollinaris Brunnen *v.* Somborn, 1 Fed. Cas. No. 496, 14 Blatchf. 380. See National Water Co. *v.* O'Connell, 159 Fed. 1001 [*affirmed* in 161 Fed. 545].

England.— *In re* Apollinaris Co., [1891] 2 Ch. 186, 61 L. J. Ch. 625, 65 L. T. Rep. N. S. 6; Wheeler *v.* Johnston, L. R. 3 Ir. 284; Apollinaris Co. *v.* Norrish, 33 L. T. Rep. N. S. 242; Apollinaris Co. *v.* Edwards, Seton (4th ed.) 237.

Canada.— Caledonia Grand Hotel Co. *v.* Wilson, 5 Ont. L. Rep. 141.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 13.

But see Bear Lithia Springs Co. *v.* Great Bear Spring Co., 72 N. J. Eq. 871, 68 Atl. 86.

50. La Republique Francaise *v.* Saratoga Vichy Spring Co., 191 U. S. 427, 24 S. Ct. 145, 48 L. ed. 247; Virginia Hot Springs Co. *v.* Hegeman, 138 Fed. 855 [*affirmed* in 144 Fed. 1023, 73 C. C. A. 612]; Grand Hotel Co. *v.* Wilson, [1904] A. C. 103, 3 Com. L. Rep. 434, 73 L. J. P. C. 1, 89 L. T. Rep. N. S. 456, 20 T. L. R. 19, 52 Wkly. Rep. 286 [*affirming* 5 Ont. L. Rep. 141, 1 Ont. Wkly. Rep. 785, 1 Com. L. Rep. 434, and *distinguishing* Montgomery *v.* Thompson, [1891] A. C. 217, 55 J. P. 756, 60 L. J. Ch. 757, 64 L. T. Rep. N. S. 748].

The name "Bethesda," applied to a mineral spring and the waters thereof, is a proper trade-mark and capable of protection against one who owns another spring within twelve hundred feet of that of plaintiff, although the water has the same constituents and properties, the name "Bethesda" not being a geographical designation of any district within or near which either of said springs is located. Dunbar *v.* Glenn, 42 Wis. 118, 24 Am. Rep. 395.

51. Braham *v.* Beachim, 7 Ch. D. 848, 47 L. J. Ch. 348, 38 L. T. Rep. N. S. 640, 26 Wkly. Rep. 654; Radde *v.* Norman, L. R. 14 Eq. 348, 41 L. J. Ch. 525, 26 L. T. Rep. N. S. 788, 20 Wkly. Rep. 766.

52. La Republique Francaise *v.* Saratoga Vichy Springs Co., 107 Fed. 459, 46 C. C. A. 418, 65 L. R. A. 830 [*affirmed* in 191 U. S. 427, 24 S. Ct. 145, 48 L. ed. 247]; La Republique Francaise *v.* Schultz, 94 Fed. 500 [*affirmed* in 102 Fed. 153, 42 C. C. A. 233]; Carlsbad *v.* Schultz, 78 Fed. 469.

"Carlsbad Salts."— Where the city of Carlsbad, Bohemia, sole owner of the mineral springs there, for fifty years has sold the salts therefrom as "Carlsbad Salts," etc., other parties will be restrained from using these words for similar artificial production, even with the word "Artificial" prefixed. Carlsbad *v.* Thackeray, 57 Fed. 18. *Compare* Carlsbad *v.* Schultz, 78 Fed. 469. In Carlsbad *v.* Kutnow, 68 Fed. 794, the use of the word "Carlsbad" was restrained at the suit of plaintiff, the German city, which had for years evaporated the salts of Carlsbad Springs and sold them under the name of "Carlsbad Sprudel Salts." Defendant, a firm of New York druggists, put up similar salts and called them "Improved Effervescent Carlsbad Powder." Although the genuine Carlsbad salts are not effervescent, and the word "Improved" was relied upon as implying that the salts were different from those sold under the name of "Carlsbad" alone, defendants were enjoined from using the word "Carlsbad" in any form. This decision was affirmed by the circuit court of appeals. Carlsbad *v.* Kutnow, 71 Fed. 167, 18 C. C. A. 24.

"Artificial Hunyadi."— The owner of a trade-mark or trade-name in the words "Hunyadi Janos," for a natural bitter water, is not entitled, in the absence of fraud or unfair competition, to enjoin a manufacturer of an artificial bitter water from advertising and labeling the product, "Artificial Hun-

4. Personal Names. A personal name is not the subject of exclusive appropriation as a trade-mark.[53] One cannot by using his own name as a trade-mark or trade-name deprive another person of the same or similar name from using his own name in connection with his goods or business.[54] Everyone has a right to use his own name in his own business, either alone or in connection with others, as in a partnership or a corporation.[55] The necessary and incidental inconven-

yadi"— especially since the word "Hunyadi" has become a generic name for mineral waters of a certain type, coming from a more or less extensive district, if not from anywhere in Hungary. Saxlehner *v.* Wagner, 216 U. S. 375, 30 S. Ct. 298 [*affirming* 157 Fed. 745, 85 C. C. A. 321]. *Compare* Thackerey *v.* Saxlehner, 125 Fed. 911, 60 C. C. A. 562.

"Apollinaris Water."— Plaintiffs having the exclusive right of selling "Apollinaris Water" in Great Britain, defendants made and sold an artificial mineral water under the name and description of "London Apollinaris Water, possessing all the properties of the natural water." An injunction was granted to restrain defendants' use of the words "London Apollinaris Water," or any other name of which the word "Apollinaris" so forms a part as to be calculated to mislead the public into purchasing the artificial for the real water of that name. Apollinaris Co. *v.* Norrish, 33 L. T. Rep. N. S. 242.

53. See *supra*, III, B, 8.

54. *Connecticut.*— Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 72 Conn. 646, 45 Atl. 957, 49 L. R. A. 147; William Rogers Mfg. Co. *v.* Simpson, 54 Conn. 527, 9 Atl. 395.

District of Columbia.—Wm. A. Rogers *v.* International Silver Co., 30 App. Cas. 97.

Florida.— El Modello Cigar Mfg. Co. *v.* Gato, 25 Fla. 886, 7 So. 23, 23 Am. St. Rep. 537, 6 L. R. A. 823.

Illinois.— Frazer *v.* Frazer Lubricator Co., 121 Ill. 147, 13 N. E. 639, 2 Am. St. Rep. 73 [*affirming* 18 Ill. App. 450].

Kansas.— Ætna Mill, etc., Co. *v.* Kramer Milling Co., 82 Kan. 679, 109 Pac. 692, 28 L. R. A. N. S. 934.

Massachusetts.— Russia Cement Co. *v.* Le Page, 147 Mass. 206, 17 N. E. 304, 9 Am. St. Rep. 685.

New York.— Koehler *v.* Sanders, 122 N. Y. 65, 25 N. E. 235, 9 L. R. A. 576 [*affirming* 48 Hun 48].

Pennsylvania.— White *v.* Trowbridge, 216 Pa. St. 11, 64 Atl. 862; Lafean *v.* Weeks, 177 Pa. St. 412, 35 Atl. 693, 34 L. R. A. 172; Hoyt *v.* Hoyt, 143 Pa. St. 623, 22 Atl. 755, 24 Am. St. Rep. 575, 13 L. R. A. 343.

Rhode Island.— Harson *v.* Halkyard, 22 R. I. 102, 46 Atl. 271.

Wisconsin.— Fish Bros. Wagon Co. *v.* La Belle Wagon Works, 82 Wis. 546, 52 N. W. 595, 33 Am. St. Rep. 72, 16 L. R. A. 453; Marshall *v.* Pinkham, 52 Wis. 572, 9 N. W. 615, 38 Am. Rep. 756.

United States.— Donnell *v.* Herring-Hall-Marvin Safe Co., 208 U. S. 267, 28 S. Ct. 288, 52 L. ed. 481; Brown Chemical Co. *v.* Meyer, 139 U. S. 540, 11 S. Ct. 625, 35 L. ed. 247; Von Faber-Castell *v.* Faber, 139 Fed. 257, 71 C. C. A. 383 [*reversing* 124 Fed. 603].

England.— Turton *v.* Turton, 42 Ch. D. 128, 58 L. J. Ch. 677, 61 L. T. Rep. N. S. 571, 38 Wkly. Rep. 22; Burgess *v.* Burgess, 3 De G. M. & G. 896, 17 Jur. 292, 22 L. J. Ch. 675, 52 Eng. Ch. 696, 43 Eng. Reprint 351; Cash *v.* Cash, 86 L. T. Rep. N. S. 211, 18 T. L. R. 299, 50 Wkly. Rep. 289; Valentine Meat Juice Co. *v.* Valentine Extract Co., 16 T. L. R. 33, 48 Wkly. Rep. 127.

Canada.—Aikins *v.* Piper, 15 Grant Ch. (U. C.) 581.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 14.

Doctrines of unfair competition not trade-marks apply.—As an ordinary surname cannot be appropriated as a trade-mark to the exclusion of others of the same name, it follows that the rules of law relating to the similarity of technical trade-marks cannot be applied to the use of such surname as a mark, notwithstanding the confusion that may result from its legitimate use by such others. The law relating to unfair competition may apply under certain conditions, but not that of infringement. Wm. A. Rogers *v.* International Silver Co., 30 App. Cas. (D. C.) 97.

55. *Connecticut.*—William Rogers' Mfg. Co. *v.* Simpson, 54 Conn. 527, 9 Atl. 395; Rogers *v.* Rogers, 53 Conn. 121, 1 Atl. 807, 5 Atl. 675, 55 Am. Rep. 78.

Illinois.—Allegretti *v.* Allegretti Chocolate Cream Co., 177 Ill. 129, 52 N. E. 487; Elgin Butter Co. *v.* Elgin Creamery Co., 155 Ill. 127, 40 N. E. 616; Frazer *v.* Frazer Lubricator Co., 121 Ill. 147, 13 N. E. 639, 2 Am. St. Rep. 73 [*affirming* 18 Ill. App. 450].

Maine.—W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 100 Me. 461, 62 Atl. 499, 4 L. R. A. N. S. 960.

Massachusetts.— Russia Cement Co. *v.* Le Page, 147 Mass. 206, 17 N. E. 304, 9 Am. St. Rep. 685; Gilman *v.* Hunnewell, 122 Mass. 139.

Michigan.— Penberthy Injector Co. *v.* Lee, 120 Mich. 174, 78 N. W. 1074.

Minnesota.— Sheffield-King Milling Co. *v.* Sheffield Mill, etc., Co., 105 Minn. 315, 117 N. W. 447, 127 Am. St. Rep. 574.

New Jersey.— International Silver Co. *v.* Rogers, 72 N. J. Eq. 933, 67 Atl. 105, 129 Am. St. Rep. 722; Medlar, etc., Shoe Co. *v.* Delsarte Mfg. Co., (Ch. 1900) 46 Atl. 1089.

New York.— Chas. S. Higgins Co. *v.* Higgins Soap Co., 144 N. Y. 462, 39 N. E. 490, 43 Am. St. Rep. 769, 27 L. R. A. 42 [*reversing* 71 Hun 101, 24 N. Y. Suppl. 801]; Caswell *v.* Hazard, 121 N. Y. 484, 24 N. E. 707, 18 Am. St. Rep. 833 [*affirming* 50 Hun 230, 2 N. Y. Suppl. 783]; Devlin *v.* Devlin, 69 N. Y. 212,

ience or loss thereby occasioned to others is *damnum absque injuria.*[56] Family relationship to the original user of a personal name which has a meaning and a value in the market confers no special rights in such name different from or greater

25 Am. Rep. 173; Meneely *v.* Meneely, 62 N. Y. 427, 20 Am. Rep. 489; Falk *v.* American West Indies Trading Co., 71 N. Y. App. Div. 320, 75 N. Y. Suppl. 964; Hildreth *v.* McCaul, 70 N. Y. App. Div. 162, 74 N. Y. Suppl. 1072; De Long *v.* De Long Hook, etc., Co., 7 N. Y. App. Div. 33, 39 N. Y. Suppl. 903; Charles S. Higgins Co. *v.* Higgins Soap Co., 71 Hun 101, 24 N. Y. Suppl. 801 [*reversed* on other grounds in 144 N. Y. 462, 39 N. E. 490, 43 Am. St. Rep. 769, 27 L. R. A. 42]; Faber *v.* Faber, 49 Barb. 357; Clark *v.* Clark, 25 Barb. 76; England *v.* New York Pub. Co., 8 Daly 375; Arnheim *v.* Arnheim, 28 Misc. 399, 59 N. Y. Suppl. 948; De Long *v.* De Long Hook, etc., Co., 10 Misc. 577, 32 N. Y. Suppl. 203 [*modified* in 89 Hun 399, 35 N. Y. Suppl. 509]; Ward *v.* Ward, 15 N. Y. Suppl. 913; Decker *v.* Decker, 52 How. Pr. 218.

Ohio.— Drake Medicine Co. *v.* Glessner, 68 Ohio St. 337, 67 N. E. 722.

Pennsylvania.— Tygert-Allen Fertilizer Co. *v.* J. E. Tygert Co., 7 Pa. Dist. 430; Clark, etc., Co. *v.* Scott, 4 Lack. Leg. N. 159.

Rhode Island.— Harson *v.* Halkyard, 22 R. I. 102, 46 Atl. 271; Carmichel *v.* Latimer, 11 R. I. 395, 23 Am. Rep. 481.

Tennessee.— Robinson *v.* Storm, 103 Tenn. 40, 52 S. W. 880.

Virginia.— F. T. Blanchard Co. *v.* Simon, 104 Va. 209, 51 S. E. 222.

United States.— Donnell *v.* Herring-Hall-Marvin Safe Co., 208 U. S. 267, 28 S. Ct. 288, 52 L. ed. 481 [*reversing* 143 Fed. 231, 74 C. C. A. 361]; Singer Mfg. Co. *v.* June Mfg. Co., 163 U. S. 169, 16 S. Ct. 1002, 41 L. ed. 118; Thaddeus Davids Co. *v.* Davids, 165 Fed. 792 [*reversed* on other grounds in 178 Fed. 801, 102 C. C. A. 249]; Dr. A. Reed Cushion Shoe Co. *v.* Frew, 162 Fed. 887, 89 C. C. A. 577; Rowley *v.* J. F. Rowley Co., 161 Fed. 94; Hall's Safe Co. *v.* Herring-Hall-Marvin Safe Co., 146 Fed. 37, 76 C. C. A. 495, 14 L. R. A. N. S. 1182 [*modified* in 208 U. S. 554, 28 S. Ct. 350, 52 L. ed. 616]; Bates Mfg. Co. *v.* Bates Mach. Co., 141 Fed. 213; Von Faber-Castell *v.* Faber, 139 Fed. 257, 71 C. C. A. 383 [*reversing* 124 Fed. 603]; Coats *v.* John Coates Thread Co., 135 Fed. 177; Hygienic Fleeced Underwear Co. *v.* Way, 133 Fed. 245 [*reversed* on other grounds in 137 Fed. 592, 70 C. C. A. 553]; Royal Baking Powder Co. *v.* Royal, 122 Fed. 337, 58 C. C. A. 499; Chickering *v.* Chickering, 120 Fed. 69, 56 C. C. A. 475; Wyckoff *v.* Howe Scale Co., 110 Fed. 520 [*reversed* on other grounds in 122 Fed. 348, 58 C. C. A. 510 (*reversed* on other grounds in 198 U. S. 118, 25 S. Ct. 609, 49 L. ed. 972)]; Stuart *v.* F. G. Stewart Co., 85 Fed. 778; Allegretti Chocolate Cream Co. *v.* Keller, 85 Fed. 643; Wm. Rogers Mfg. Co. *v.* Rogers, 84 Fed. 639; Duryea *v.* National Starch-Mfg. Co., 79 Fed. 651, 25 C. C. A. 139; American Cereal Co. *v.* Eli Pettijohn Cereal Co., 72 Fed. 903; Rogers *v.* Wm. Rogers Mfg. Co., 70 Fed. 1019, 17 C. C. A. 575; Clark Thread Co. *v.* Armitage, 67 Fed. 896; Wm. Rogers Mfg. Co. *v.* R. W. Rogers Co., 66 Fed. 56; Brown Chemical Co. *v.* Myer, 31 Fed. 453 [*affirmed* in 139 U. S. 540, 11 S. Ct. 625, 35 L. ed. 247].

England.— Powell *v.* Birmingham Vinegar Brewery Co., [1896] 2 Ch. 54, 65 L. J. Ch. 563, 74 L. T. Rep. N. S. 509, 44 Wkly. Rep. 688 [*affirmed* in [1897] A. C. 710, 66 L. J. Ch. 763, 76 L. T. Rep. N. S. 792]; Saunders *v.* Sun L. Assur. Co., [1894] 1 Ch. 537, 63 L. J. Ch. 247, 69 L. T. Rep. N. S. 755, 8 Reports 125, 42 Wkly. Rep. 315; Turton *v.* Turton, 42 Ch. D. 128, 58 L. J. Ch. 677, 61 L. T. Rep. N. S. 571, 38 Wkly. Rep. 22; James *v.* James, L. R. 13 Eq. 421, 41 L. J. Ch. 353, 26 L. T. Rep. N. S. 568, 20 Wkly. Rep. 434; Croft *v.* Day, 7 Beav. 84, 29 Eng. Ch. 84, 49 Eng. Reprint 944; Burgess *v.* Burgess, 3 De G. M. & G. 896, 17 Jur. 292, 22 L. J. Ch. 675, 52 Eng. Ch. 696, 43 Eng. Reprint 351; Franke *v.* Chappell, 57 L. T. Rep. N. S. 141 ("Richter Concerts," the name "Richter" being the name of the conductor formerly employed by plaintiffs); Valentine Meat Juice Co. *v.* Valentine Extract Co., 16 T. L. R. 33, 48 Wkly. Rep. 127.

Canada.— Aikins *v.* Piper, 15 Grant Ch. (U. C.) 581.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 14.

56. *Connecticut.*—William Rogers Mfg. Co. *v.* Simpson, 54 Conn. 527, 9 Atl. 395; Rogers *v.* Rogers, 53 Conn. 121, 1 Atl. 807, 5 Atl. 675, 55 Am. Rep. 78.

District of Columbia.—Wm. A. Rogers *v.* International Silver Co., 30 App. Cas. 97.

Massachusetts.—American Waltham Watch Co. *v.* U. S. Watch Co., 173 Mass. 85, 53 N. E. 141, 73 Am. St. Rep. 263, 43 L. R. A. 826; Russia Cement Co. *v.* Le Page, 147 Mass. 206, 17 N. E. 304, 9 Am. St. Rep. 685.

New Jersey.— International Silver Co. *v.* Rogers, 72 N. J. Eq. 933, 67 Atl. 105, 129 Am. St. Rep. 722; International Silver Co. *v.* Rogers, 71 N. J. Eq. 560, 63 Atl. 977.

New York.— Chas. S. Higgins Co. *v.* Higgins Soap Co., 144 N. Y. 462, 39 N. E. 490, 43 Am. St. Rep. 769, 27 L. R. A. 42 [*reversing* 71 Hun 101, 24 N. Y. Suppl. 801]; Meneely *v.* Meneely, 62 N. Y. 427, 20 Am. Rep. 489; World's Dispensary Medical Assoc. *v.* Pierce, 138 N. Y. App. Div. 401, 122 N. Y. Suppl. 818.

Rhode Island.— Harson *v.* Halkyard, 22 R. I. 102, 46 Atl. 271.

Tennessee.— Robinson *v.* Storm, 103 Tenn. 40, 52 S. W. 880.

United States.— Howe Scale Co. *v.* Wyckoff, 198 U. S. 118, 25 S. Ct. 609, 49 L. ed. 972 [*reversing* 122 Fed. 348, 58 C. C. A. 510 (*reversing* 110 Fed. 520)]; Singer Mfg. Co. *v.* June Mfg. Co., 163 U. S. 169, 16 S. Ct. 1002, 41 L. ed. 118; Brown Chemical Co. *v.* Meyer,

than the rights of total strangers bearing the same name.[57] The right to use a personal name in business, even one's own, is subject to the general rules in regard to unfair competition.[58] A man must use his own name honestly and not as a means of pirating upon the good-will and reputation of a rival by passing off his goods or business as the goods or business of his rival who gave the name its reputation and value.[59] No one will be permitted to use even his own name with the fraudulent

139 U. S. 540, 11 S. Ct. 625, 35 L. ed. 247; Royal Baking Powder Co. *v.* Royal, 122 Fed. 337, 58 C. C. A. 499.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," §§ 14, 84. See also *supra*, V, B, 9.

Judicial statement of rule.—"The case of Meneely *v.* Meneely, 62 N. Y. 427, 20 Am. Rep. 489, following other cases, is an authority upon the proposition that any person may use in his business his family name, provided he uses it honestly and without artifice and deception, although the business he carries on is the same as the business of another person of the same name previously established, which has become known under that name to the public, and although it may appear that the repetition of that name in connection with the new business of the same kind, may produce confusion and subject the other party to pecuniary injury. The right of a person to use his family name in his business is regarded as a natural right of which he cannot be deprived, by reason simply of priority of use by another of the same name." Higgins Co. *v.* Higgins Soap Co., 144 N. Y. 462, 467, 39 N. E. 490, 43 Am. St. Rep. 769, 27 L. R. A. 42. "When the second bearer of a name uses it with due distinguishing precautions and without actual fraudulent intent or representations that his wares are those of the first, he is not responsible for such confusion as results solely from the fact of similarity." William Rogers Mfg. Co. *v.* Simpson, 54 Conn. 527, 565, 9 Atl. 395.

57. Von Faber *v.* Faber, 124 Fed. 603 [*reversed* on other grounds in 139 Fed. 257, 71 C. C. A. 383]; Wyckoff *v.* Howe Scale Co., 110 Fed. 520 [*reversed* on other grounds in 122 Fed. 348, 58 C. C. A. 510]. But see Bingham School *v.* Gray, 122 N. C. 699, 30 S. E. 304, 41 L. R. A. 243.

58. See *supra*, V, B.

The manifest tendency of the decisions at the present time is to greatly extend the limitations upon the right to use one's own name in business. The difficulties raised in some of the earlier cases have been brushed aside, and it is believed that some of such decisions could not now be supported upon the same facts.

Fraud must be shown. Where a person is selling an article in his own name, fraud must be shown to constitute a case for restraining him from so doing, on the ground that the name is one on which another has long been selling a similar article. Burgess *v.* Burgess, 3 De G. M. & G. 896, 17 Jur. 292, 22 L. J. Ch. 675, 52 Eng. Ch. 696, 43 Eng. Reprint 351. The fair and honest use of a name cannot be enjoined when it is used in the ordinary course of business in the way and manner in which other manufacturers of similar goods are accustomed to use their own name in the preparation for sale or sale of goods. Rogers *v.* Rogers, 53 Conn. 121, 1 Atl. 807, 5 Atl. 675, 55 Am. Rep. 78. See also William Rogers Mfg. Co. *v.* Simpson, 54 Conn. 527, 9 Atl. 395.

59. *California.*— Dodge Stationery Co. *v.* Dodge, 145 Cal. 380, 78 Pac. 879; Spieker *v.* Lash, 102 Cal. 38, 36 Pac. 362.

Florida.— El Modello Cigar Mfg. Co. *v.* Gato, 25 Fla. 886, 7 So. 23, 23 Am. St. Rep. 537, 6 L. R. A. 823.

Illinois.— Fraser *v.* Frazer Lubricator Co., 121 Ill. 141, 13 N. E. 639, 2 Am. St. Rep. 73; Imperial Mfg. Co. *v.* Schwartz, 105 Ill. App. 525; Allegretti Chocolate Cream Co. *v.* Rubel, 86 Ill. App. 600 [*affirmed* in 177 Ill. 129, 52 N. E. 48].

Iowa.— Shaver *v.* Shaver, 54 Iowa 208, 6 N. W. 188, 37 Am. Rep. 194.

Kentucky.— Frazier *v.* Dowling, 39 S. W. 45, 18 Ky. L. Rep. 1109; Rock Springs Distillery Co. *v.* Monarch, 22 S. W. 1028, 15 Ky. L. Rep. 866.

Maine.— W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 100 Me. 461, 62 Atl. 499, 4 L. R. A. N. S. 960; Symonds *v.* Jones, 82 Me. 302, 19 Atl. 820, 17 Am. St. Rep. 485, 8 L. R. A. 570.

Maryland.— Stonebraker *v.* Stonebraker, 33 Md. 252.

Massachusetts.— Russia Cement Co. *v.* Le Page, 147 Mass. 206, 17 N. E. 304, 9 Am. St. Rep. 685; Hoxie *v.* Chaney, 143 Mass. 592, 10 N. E. 713, 58 Am. Rep. 149; Bassett *v.* Percival, 5 Allen 345.

Michigan.— Penberthy Injector Co. *v.* Lee, 120 Mich. 174, 78 N. W. 1074.

New Jersey.— International Silver Co. *v.* Rogers, 72 N. J. Eq. 933, 67 Atl. 105, 129 Am. St. Rep. 722; International Silver Co. *v.* Wm. H. Rogers Corp., 66 N. J. Eq. 119, 57 Atl. 1037.

New York.— Caswell *v.* Hazard, 121 N. Y. 484, 24 N. E. 707, 18 Am. St. Rep. 833 [*affirming* 50 Hun 230, 2 N. Y. Suppl. 783]; Rutherford *v.* Schattman, 119 N. Y. 604, 23 N. E. 440; Devlin *v.* Devlin, 69 N. Y. 212, 25 Am. Rep. 173; Meneely *v.* Meneely, 62 N. Y. 427, 20 Am. Rep. 489; Falk *v.* American West Indies Trading Co., 71 N. Y. App. Div. 320, 75 N. Y. Suppl. 964; Hildreth *v.* McCaul, 70 N. Y. App. Div. 162, 74 N. Y. Suppl. 1072; Cutter *v.* Gudebrod Bros. Co., 36 N. Y. App. Div. 362, 55 N. Y. Suppl. 298; Tuerk Hydraulic Power Co. *v.* Tuerk, 92 Hun 65, 36 N. Y. Suppl. 384; De Long *v.* De Long Hook, etc., Co., 89 Hun 399, 35 N. Y. Suppl. 509 [*affirming* 10 Misc. 577, 32 N. Y. Suppl. 203 (*reversed* on other grounds in 144 N. Y. 462, 39

intention of appropriating the good-will of a business established and built up by another person of the same name.[60] While the use of one's own name cannot be absolutely enjoined, nevertheless the manner of using it may be regulated by injunction.[61] No person will be allowed to use even his own name in such a manner

N. E. 490, 43 Am. St. Rep. 769, 27 L. R. A. 42)]; Charles S. Higgins Co. *v.* Higgins Soap Co., 71 Hun 101, 24 N. Y. Suppl. 801; Howe *v.* Howe Mach. Co., 50 Barb. 236; Arnheim *v.* Arnheim, 28 Misc. 399, 59 N. Y. Suppl. 948; Charles S. Higgins Co. *v.* Amalga Soap Co., 10 Misc. 268, 30 N. Y. Suppl. 1074.

Ohio.— Drake Medicine Co. *v.* Glessner, 68 Ohio St. 337, 67 N. E. 722.

Tennessee.— Robinson *v.* Storm, 103 Tenn. 40, 52 S. W. 880.

United States.— Singer Mfg. Co. *v.* June Mfg. Co., 163 U. S. 169, 16 S. Ct. 1002, 41 L. ed. 118; Brown Chemical Co. *v.* Meyer, 139 U. S. 540, 11 S. Ct. 625, 35 L. ed. 247; McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828; Dr. A. Reed Cushion Shoe Co. *v.* Frew, 158 Fed. 552 [*reversed* on other grounds in 162 Fed. 887, 89 C. C. A. 577]; J. F. Rowley Co. *v.* Rowley, 154 Fed. 744 [*reversed* on other grounds in 161 Fed. 94]; Hall's Safe Co. *v.* Herring-Hall-Marvin Safe Co., 146 Fed. 37, 76 C. C. A. 495, 114 L. R. A. N. S. 1182 [*affirmed* in 208 U. S. 554, 28 S. Ct. 350, 52 L. ed. 616]; Hall Safe, etc., Co. *v.* Herring-Hall-Marvin Safe Co., 143 Fed. 231, 74 C. C. A. 361 [*reversed* on other grounds in 208 U. S. 267, 28 S. Ct. 288, 52 L. ed. 481]; International Silver Co. *v.* Rodgers Bros. Cutlery Co., 136 Fed. 1019; Ball *v.* Best, 135 Fed. 434; Coats *v.* John Coates Thread Co., 135 Fed. 177; Wm. G. Rogers Co. *v.* International Silver Co., 118 Fed. 133, 55 C. C. A. 83; International Silver Co. *v.* Wm. G. Rogers Co., 113 Fed. 526; Peck *v.* Peck Bros. Co., 113 Fed. 291, 51 C. C. A. 251, 62 L. R. A. 81; Lever Bros. Boston Works *v.* Smith, 112 Fed. 998; Wyckoff *v.* Howe Scale Co., 110 Fed. 520 [*reversed* on other grounds in 122 Fed. 348, 58 C. C. A. 510]; Centaur *v.* Robinson, 91 Fed. 889; Stuart *v.* F. G. Stewart Co., 91 Fed. 243, 33 C. C. A. 480 [*reversing* 85 Fed. 778]; Baker *v.* Sanders, 80 Fed. 889, 26 C. C. A. 220; Duryea *v.* National Starch-Mfg. Co., 79 Fed. 651, 25 C. C. A. 139; Baker *v.* Baker, 77 Fed. 181, 87 Fed. 209; Clark Thread Co. *v.* Armitage, 74 Fed. 936, 21 C. C. A. 178 [*affirming* 67 Fed. 896]; Godillot *v.* American Grocery Co., 71 Fed. 873; Meyer *v.* Dr. B. L. Bull Vegetable Medicine Co., 58 Fed. 884, 7 C. C. A. 558; Jennings *v.* Johnson, 37 Fed. 364; Landreth *v.* Landreth, 22 Fed. 41.

England.— Panhard et Levassor *v.* Panhard Levassor Motor Co., [1901] 2 Ch. 513, 70 L. J. Ch. 738, 85 L. T. Rep. N. S. 20, 17 T. L. R. 680, 50 Wkly. Rep. 74; Powell *v.* Birmingham Vinegar Brewery Co., [1896] 2 Ch. 54, 65 L. J. Ch. 563, 74 L. T. Rep. N. S. 509, 44 Wkly. Rep. 688 [*affirmed* in [1897] A. C. 710, 66 L. J. Ch. 763, 76 L. T. Rep. N. S. 792]; Massam *v.* Thorley's Cattle Food Co., 14 Ch. D. 748, 42 L. T. Rep. N. S. 851, 28 Wkly. Rep. 966; Levy *v.* Walker, 10 Ch. D. 436, 48 L. J. Ch. 273, 39 L. T. Rep. N. S. 654, 27 Wkly. Rep. 370; Sykes *v.* Sykes, 3 B. & C. 541, 5 D. & R. 292, 3 L. J. K. B. O. S. 46, 27 Rev. Rep. 420, 10 E. C. L. 248, 107 Eng. Reprint 834; Holloway *v.* Holloway, 13 Beav. 209, 51 Eng. Reprint 81; Croft *v.* Day, 7 Beav. 84, 29 Eng. Ch. 84, 49 Eng. Reprint 994; Schweitzer *v.* Atkins, 37 L. J. Ch. 847, 19 L. T. Rep. N. S. 6, 16 Wkly. Rep. 1080; Valentine Meat Juice Co. *v.* Valentine Extract Co., 83 L. T. Rep. N. S. 259, 16 T. L. R. 522; Cash *v.* Cash, 82 L. T. Rep. N. S. 655; Millington *v.* Fox, 3 Myl. & C. 338, 14 Eng. Ch. 338, 40 Eng. Reprint 956. But see Burgess *v.* Burgess, 3 De G. M. & G. 896, 17 Jur. 292, 22 L. J. Ch. 675, 52 Eng. Ch. 696, 43 Eng. Reprint 351.

Canada.— Canada Pub. Co. *v.* Gage, 11 Can. Sup. Ct. 306.

Extensive advertising by the second comer into the market will not confer a right to enjoin a prior user of the same name from selling similar goods under that name. American Cereal Co. *v.* Eli Pettijohn Cereal Co., 72 Fed. 903; Cash *v.* Cash, 84 L. T. Rep. N. S. 349 [*reversed* on other grounds in 86 L. T. Rep. N. S. 211, 18 T. L. R. 299, 50 Wkly. Rep. 289].

60. *Illinois.*— Rubel *v.* Allegretti Chocolate Cream Co., 76 Ill. App. 581 [*affirmed* in 177 Ill. 129, 52 N. E. 487].

Massachusetts.— Russia Cement Co. *v.* Le Page, 147 Mass. 206, 17 N. E. 304, 9 Am. St. Rep. 685.

New Jersey.— International Silver Co. *v.* Rogers, 71 N. J. Eq. 560, 63 Atl. 977.

New York.— Burrow *v.* Marceau, 124 N. Y. App. Div. 665, 109 N. Y. Suppl. 105; Arnheim *v.* Arnheim, 28 Misc. 399, 59 N. Y. Suppl. 948; S. Howes Co. *v.* Howes Grain Cleaner Co., 24 Misc. 83, 52 N. Y. Suppl. 468; Kaufman *v.* Kaufman, 123 N. Y. Suppl. 699.

Pennsylvania.—White *v.* Trowbridge, 216 Pa. St. 11, 64 Atl. 862; Van Stan's Stratena Co. *v.* Van Stan, 209 Pa. St. 564, 58 Atl. 1064, 103 Am. St. Rep. 1018.

Texas.— Scanlan *v.* Williams, (Civ. App. 1908) 114 S. W. 862.

United States.— Ball *v.* Best, 135 Fed. 434; Coats *v.* John Coates Thread Co., 135 Fed. 177; G. W. Cole Co. *v.* American Cement, etc., Co., 130 Fed. 703, 65 C. C. A. 105; Royal Baking Powder Co. *v.* Royal, 122 Fed. 337, 58 C. C. A. 499.

England.— Valentine *v.* Valentine, L. R. 31 Ir. 488; Croft *v.* Day, 7 Beav. 84, 29 Eng. Ch. 84, 49 Eng. Reprint 994. See Valentine Meat Juice Co. *v.* Valentine Extract Co., 16 T. L. R. 33, 48 Wkly. Rep. 127.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," §§ 14, 84.

61. *New Jersey.*— International Silver Co. *v.* Wm. H. Rogers Corp., 66 N. J. Eq. 119, 139, 57 Atl. 1037, "the court, in this class of cases, interferes only to the extent of pre-

as to inflict an unnecessary injury upon another, and such as would not naturally result from the mere identity or similarity of names.[62] No device or artifice, such as an imitative dress of goods, or an inconspicuous size of type, misleading advertisements, etc., will be permitted which will facilitate or increase the deception caused by the similarity of names.[63] Where a personal name has become

venting the defendant company from passing off its goods as complainant's goods."

New York.— World's Dispensary Medical Assoc. *v.* Pierce, 138 App. Div. 401, 122 N. Y. Suppl. 818; Hildreth *v.* McCaul, 70 N. Y. App. Div. 162, 74 N. Y. Suppl. 1072.

Tennessee.— Robinson *v.* Storm, 103 Tenn. 40, 52 S. W. 880.

Wisconsin.— Fish Bros. Wagon Co. *v.* La Belle Wagon Works, 82 Wis. 546, 52 N. W. 595, 33 Am. St. Rep. 72, 16 L. R. A. 453.

United States.— Herring-Hall-Marvin Safe Co. *v.* Hall's Safe Co., 208 U. S. 554, 28 S. Ct. 350, 52 L. ed. 616 [*modifying* 146 Fed. 37, 76 C. C. A. 495, 14 L. R. A. N. S. 1182]; Donnell *v.* Herring-Hall-Marvin Safe Co., 208 U. S. 267, 28 S. Ct. 288, 52 L. ed. 481 [*reversing* 143 Fed. 231, 74 C. C. A. 361]; Howe Scale Co. *v.* Wyckoff, 198 U. S. 118, 25 S. Ct. 609, 49 L. ed. 972, 116 Off. Gaz. 299 [*reversing* 122 Fed. 348, 58 C. C. A. 510 (*reversing* 110 Fed. 520)]; J. F. Rowley Co. *v.* Rowley, 161 Fed. 94 [*reversing* 154 Fed. 744]; Von Faber-Castell *v.* Faber, 145 Fed. 626, 76 C. C. A. 538; Royal Baking Powder Co. *v.* Royal, 122 Fed. 337, 58 C. C. A. 499, wherein defendant was enjoined from displaying his name on the front label of his cans.

England.— Croft *v.* Day, 7 Beav. 84, 29 Eng. Ch. 84, 49 Eng. Reprint 994; Cash *v.* Cash, 86 L. T. Rep. N. S. 211, 18 T. L. R. 299, 50 Wkly. Rep. 289 [*reversing* 84 L. T. Rep. N. S. 349].

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," §§ 14, 84.

But see Van Stan's Stratena Co. *v.* Van Stan, 209 Pa. St. 564, 58 Atl. 1064, 103 Am. St. Rep. 1018.

Reasonable restrictions.—"A person is not obliged to abandon the use of his name or to unreasonably restrict it. The question is whether his use is reasonable and honest, or is calculated to deceive." Howe Scale Co. *v.* Wyckoff, 198 U. S. 118, 137, 25 S. Ct. 609, 49 L. ed. 972.

Even in the absence of imitation of dress of goods the use of a personal name may be enjoined or regulated. Van Houten *v.* Hooten Cocoa, etc., Co., 130 Fed. 600. *Contra,* Heide *v.* Wallace, 129 Fed. 649 [*affirmed* in 135 Fed. 346, 68 C. C. A. 16].

Absolute injunction.— In Kaufman *v.* Kaufman, 123 N. Y. Suppl. 699, it was said that if one "cannot use his own name without inevitably representing his goods as those of another, then he cannot use his own name at all," but the injunction granted did not go to that extent. The injunction merely enjoined defendant from using the name "Kaufman" in connection with certain figures, previously used by plaintiff, and "unless in connection with it he uses his first name on a line with it and in letters of equal size." In Cash *v.* Cash, 84 L. T. Rep. N. S. 349, defendant was enjoined from selling frillings under the name of "Cash" upon the ground that it was impossible for him to do so without his frillings becoming known as "Cash's Frillings," a name previously identified with plaintiff's goods. This decision was, however, reversed on appeal in 86 L. T. Rep. N. S. 211, 18 T. L. R. 299, 50 Wkly. Rep. 289, which reversal is cited with approval in International Silver Co. *v.* Rogers, 71 N. J. Eq. 560, 63 Atl. 977, 981. This last decision was itself reversed in 72 N. J. Eq. 933, 67 Atl. 105, 129 Am. St. Rep. 722, but without disturbing this principle.

62. International Silver Co. *v.* William H. Rogers Corp., 67 N. J. Eq. 646, 60 Atl. 187, 110 Am. St. Rep. 506; Cady *v.* Schultz, 19 R. I. 193, 32 Atl. 915, 61 Am. St. Rep. 763, 29 L. R. A. 524; Chickering *v.* Chickering, 120 Fed. 69, 56 C. C. A. 475; Godillot *v.* American Grocery Co., 71 Fed. 873; R. W. Rogers Co. *v.* Wm. Rogers Mfg. Co., 70 Fed. 1017, 17 C. C. A. 576; Saunders *v.* Sun L. Assur. Co., [1894] 1 Ch. 537, 63 L. J. Ch. 247, 69 L. T. Rep. N. S. 755, 8 Reports 125, 42 Wkly. Rep. 315. See also Wm. Rogers Mfg. Co. *v.* Rogers, 84 Fed. 639.

Initials of a name may not be used in such a manner as to cause deception and unfair competition. Avery *v.* Meikle, 81 Ky. 73, 4 Ky. L. Rep. 759; Stevens Linen Works *v.* Don, 121 Fed. 171 [*affirmed* in 127 Fed. 950, 62 C. C. A. 582]; Provident Chemical Works *v.* Canada Chemical Mfg. Co., 2 Ont. L. Rep. 182. Where plaintiff used his name by means of a monogram composed of his initials, a rival trader of different name but the same initials cannot use his initials in a similar monogram. Godillot *v.* American Grocery Co., 71 Fed. 873.

63. *California.*— Morton *v.* Morton, 148 Cal. 142, 82 Pac. 664, 1 L. R. A. N. S. 660; Dodge Stationery Co. *v.* Dodge, 145 Cal. 380, 78 Pac. 879; Nolan Bros. Shoe Co. *v.* Nolan, 131 Cal. 271, 63 Pac. 480, 82 Am. St. Rep. 346, 53 L. R. A. 384.

Connecticut.—William Rogers Mfg. Co. *v.* Simpson, 54 Conn. 527, 9 Atl. 395.

Illinois.— Frazer *v.* Frazer Lubricator Co., 121 Ill. 147, 13 N. E. 639, 2 Am. St. Rep. 73 [*affirming* 18 Ill. App. 450].

Iowa.— Shaver *v.* Shaver, 54 Iowa 208, 6 N. W. 188, 37 Am. Rep. 194.

Kansas.—Ætna Mill, etc., Co. *v.* Kramer Milling Co., 82 Kan. 679, 109 Pac. 692, 28 L. R. A. N. S. 934.

Massachusetts.— Russia Cement Co. *v.* Le Page, 147 Mass. 206, 17 N. E. 304, 9 Am. St. Rep. 685.

the trade-name for particular goods, another person of the same or a similar name may not use such name as the trade-name for similar goods, or in such a way as to cause his goods to be known and called for in the market by the same name as his rival's goods are already known to, and called for by, the purchasing public.[64] But everyone may use either his own or another's name descriptively

Missouri.—Williamson Corset, etc., Co. *v.* Western Corset Co., 70 Mo. App. 424.

New Jersey.— International Silver Co. *v.* Rogers, 72 N. J. Eq. 933, 67 Atl. 105, 129 Am. St. Rep. 722 [*reversing* 71 N. J. Eq. 560, 63 Atl. 977].

New York.— Chas. S. Higgins Co. *v.* Higgins Soap Co., 144 N. Y. 462, 39 N. E. 490, 43 Am. St. Rep. 769, 27 L. R. A. 42 [*reversing* 71 Hun 101, 24 N. Y. Suppl. 801]; Meneely *v.* Meneely, 62 N. Y. 427, 20 Am. Rep. 489; World's Dispensary Medical Assoc. *v.* Pierce, 138 N. Y. App. Div. 401, 122 N. Y. Suppl. 818; Falk *v.* American West Indies Trading Co., 71 N. Y. App. Div. 320, 75 N. Y. Suppl. 964; Hildreth *v.* McCaul, 70 N. Y. App. Div. 162, 74 N. Y. Suppl. 1072; Tuerk Hydraulic Power Co. *v.* Tuerk, 92 Hun 65, 36 N. Y. Suppl. 384; De Long *v.* De Long Hook, etc., Co., 89 Hun 399, 35 N. Y. Suppl. 509; Arnheim *v.* Arnheim, 28 Misc. 399, 59 N. Y. Suppl. 948; Bininger *v.* Wattles, 28 How. Pr. 206.

Ohio.— Drake Medicine Co. *v.* Glessner, 68 Ohio St. 337, 67 N. E. 722.

Pennsylvania.— Lafean *v.* Weeks, 177 Pa. St. 412, 35 Atl. 693, 34 L. R. A. 172; Clark, etc., Co. *v.* Scott, 4 Lack. Leg. N. 159.

Rhode Island.— Harson *v.* Halkyard, 22 R. I. 102, 46 Atl. 271.

Wisconsin.— Fish Bros. Wagon Co. *v.* La Belle Wagon Works, 82 Wis. 546, 52 N. W. 595, 33 Am. St. Rep. 72, 16 L. R. A. 453; Marshall *v.* Pinkham, 52 Wis. 572, 9 N. W. 615, 38 Am. Rep. 756.

United States.— Brown Chemical Co. *v.* Meyer, 139 U. S. 540, 11 S. Ct. 625, 35 L. ed. 247; Royal Baking Powder Co. *v.* Royal, 122 Fed. 337, 58 C. C. A. 499; Bissell Chilled Plow Works *v.* T. M. Bissell Plow Co., 121 Fed. 357; Chickering *v.* Chickering, 120 Fed. 69, 56 C. C. A. 475; Peck *v.* Peck Bros. Co., 113 Fed. 291, 51 C. C. A. 251, 62 L. R. A. 81; Lever Bros. Boston Works *v.* Smith, 112 Fed. 998; International Silver Co. *v.* Simeon L. & George H. Rogers Co., 110 Fed. 955; Baker *v.* Baker, 87 Fed. 209; R. Heinisch's Sons Co. *v.* Boker, 86 Fed. 765; Stuart *v.* F. G. Stewart Co., 85 Fed. 778; Allegretti Chocolate Cream Co. *v.* Keller, 85 Fed. 643; Baker *v.* Baker, 77 Fed. 181; Clark Thread Co. *v.* Armitage, 67 Fed. 896; Hohner *v.* Gratz, 52 Fed. 871; Jennings *v.* Johnson, 37 Fed. 364; Landreth *v.* Landreth, 22 Fed. 41.

England.— Turton *v.* Turton, 42 Ch. D. 128, 58 L. J. Ch. 677, 61 L. T. Rep. N. S. 571, 38 Wkly. Rep. 22; Metzler *v.* Wood, 8 Ch. D. 606, 47 L. J. Ch. 625, 38 L. T. Rep. N. S. 544, 26 Wkly. Rep. 577; James *v.* James, L. R. 13 Eq. 421, 41 L. J. Ch. 353, 26 L. T. Rep. N. S. 568, 20 Wkly. Rep. 434 (omission of part of own name so as to make respective name identical); Holloway *v.* Holloway, 13 Beav. 209, 51 Eng. Reprint 81; Croft *v.* Day, 7 Beav. 84, 29 Eng. Ch. 84, 49 Eng. Reprint 994; Taylor *v.* Taylor, 2 Eq. Rep. 290, 23 L. J. Ch. 255, 23 Eng. L. & Eq. 281; Jamieson *v.* Jamieson, 14 T. L. R. 160.

Canada.— Canada Pub. Co. *v.* Gage, 11 Can. Sup. Ct. 306; Slater *v.* Ryan, 17 Manitoba 89.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," §§ 14, 84.

64. *California.*— Dodge Stationery Co. *v.* Dodge, 145 Cal. 380, 78 Pac. 879, "Dodge's" as the name of a store.

Illinois.— Frazer *v.* Frazer Lubricator Co., 121 Ill. 147, 13 N. E. 639; 2 Am. St. Rep. 73; Allegretti Chocolate Cream Co. *v.* Rubel, 86 Ill. App. 600.

Iowa.— Shaver *v.* Shaver, 54 Iowa 208, 6 N. W. 188, 37 Am. Rep. 194, "Shaver Wagons."

Kentucky.— E. H. Taylor, Jr., etc., Co. *v.* Taylor, 85 S. W. 1085, 27 Ky. L. Rep. 625.

Massachusetts.— Russia Cement Co. *v.* Le Page, 147 Mass. 206, 17 N. E. 304, 9 Am. St. Rep. 685.

Michigan.— Penberthy Injector Co. *v.* Lee, 120 Mich. 174, 78 N. W. 1074.

New Jersey.— International Silver Co. *v.* Rogers, 72 N. J. Eq. 933, 67 Atl. 105, 129 Am. St. Rep. 722 [*reversing* 71 N. J. Eq. 560, 63 Atl. 977].

New York.— Chas. S. Higgins Co. *v.* Higgins Soap Co., 144 N. Y. 462, 39 N. E. 490, 43 Am. St. Rep. 769, 27 L. R. A. 42 [*reversing* 71 Hun 101, 24 N. Y. Suppl. 801]; World's Dispensary Medical Assoc. *v.* Pierce, 138 N. Y. App. Div. 401, 122 N. Y. Suppl. 818; Andrew Jurgens Co. *v.* Woodbury, 56 Misc. 404, 106 N. Y. Suppl. 571, holding that "Woodbury's Facial Soap" was infringed by "Woodbury's New Skin Soap."

Ohio.— Drake Medicine Co. *v.* Glessner, 68 Ohio St. 337, 67 N. E. 722, the name "Dr. Drake's German Croup Remedy" is infringed by "Dr. Drake's Famous Croup Remedy," and will be enjoined, although defendant is a doctor and is named Drake.

Pennsylvania.— Van Stan's Stratena Co. *v.* Van Stan, 209 Pa. St. 564, 58 Atl. 1064, 103 Am. St. Rep. 1018.

United States.—McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828; Bates Mfg. Co. *v.* Bates Numbering Mach. Co., 172 Fed. 892 [*affirmed* in 178 Fed. 681, 102 C. C. A. 181]; Dr. A. Reed Cushion Shoe Co. *v.* Frew, 158 Fed. 552 [*reversed* on other grounds in 162 Fed. 887]; Coats *v.* John Coates Thread Co., 135 Fed. 177; Lever Bros. Boston Works *v.* Smith, 122 Fed. 998; Stuart *v.* F. G. Stewart Co., 91 Fed. 243, 33 C. C. A. 480 [*reversing* 85 Fed. 778];

to show that the person named is the maker or proprietor of the goods or business.[65] The name of a person may acquire a secondary meaning and become so associated with his goods or business that another person of the same or a similar name subsequently engaging in the same business will not be allowed to use even his own

Baker *v.* Baker, 87 Fed. 209; Baker *v.* Sanders, 80 Fed. 889, 26 C. C. A. 220; Clark Thread Co. *v.* Armitage, 74 Fed. 936, 21 C. C. A. 178 [*affirming* 67 Fed. 896]. See Rushmore *v.* Saxon, 158 Fed. 499. See also Bissell Chilled Plow Works *v.* T. M. Bissell Plow Co., 121 Fed. 357. But see Brown Chemical Co. *v.* Meyer, 139 U. S. 540, 11 S. Ct. 625, 35 L. ed. 247.

England.—Ainsworth *v.* Walmsley, L. R. 1 Eq. 518, 12 Jur. N. S. 205, 35 L. J. Ch. 352, 14 L. T. Rep. N. S. 220, 14 Wkly. Rep. 363; Jameson *v.* Dublin Distillers' Co., [1900] 1 Ir. 43 ("Jameson Whisky"); Holloway *v.* Holloway, 13 Beav. 209, 51 Eng. Reprint 81 ("Holloway's Pills"); Schweitzer *v.* Atkins, 37 L. J. Ch. 847, 19 L. T. Rep. N. S. 6, 16 Wkly. Rep. 1080 ("Schweitzer's Cocoatina"); Cash *v.* Cash, 84 L. T. Rep. N. S. 349 ("Cash's Frillings"); Valentine Meat Juice Co. *v.* Valentine Extract Co., 83 L. T. Rep. N. S. 259, 16 T. L. R. 522 ("Valentine's Valtine Meat Globules," or "Valtine Meat Globules"). But see Burgess *v.* Burgess, 3 De G. M. & G. 896, 17 Jur. 292, 22 L. J. Ch. 675, 52 Eng. Ch. 696, 43 Eng. Reprint 351 ("Burgess's Sauce).

Canada.— Canada Pub. Co. *v.* Gage, 11 Can. Sup. Ct. 306; Russia Cement Co. *v.* Le Page Liquid Glue, etc., Co., 14 Brit. Col. 317 ("Le Page's Glue"); Slater *v.* Ryan, 17 Manitoba 89 ("The Slater Shoe").

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 84.

65. Russia Cement Co. *v.* Le Page, 147 Mass. 206, 17 N. E. 304, 9 Am. St. Rep. 685; Edison *v.* Mills-Edisonia, 74 N. J. Eq. 521, 70 Atl. 191; International Silver Co. *v.* Rogers, 71 N. J. Eq. 560, 63 Atl. 977 [*reversed* on the facts in 72 N. J. Eq. 933, 67 Atl. 105, 129 Am. St. Rep. 722]; Dr. A. Reed Cushion Shoe Co. *v.* Frew, 162 Fed. 887, 89 C. C. A. 577 [*reversing* 158 Fed. 552].

Judicial review of leading cases.—"Complainant's final contention is that the term 'Rogers goods' has acquired a secondary meaning; that it means complainant's goods. Conceding, for the sake of the argument, that it has that meaning, complainant's case fails, for there is no proof that defendant calls his goods 'Rogers goods.' What he does announce is that his ware is made by W. H. Rogers, of Plainfield, N. J. In every authoritative case upon the subject this distinction is vital. Thus, in Montgomery *v.* Thompson, [1891] A. C. 217, 55 J. P. 756, 60 L. J. Ch. 757, 64 L. T. Rep. N. S. 748, the defendant was enjoined from calling his ale 'Stone Ale,' but it was conceded that he might state that it was made at the town of Stone. In Reddaway *v.* Banham, [1896] A. C. 199, 65 L. J. Q. B. 381, 74 L. T. Rep. N. S. 289, 44 Wkly. Rep. 638, while the defendant was prohibited from calling his belting 'Camel Hair Belting,' that phrase having, at least as against defendant, come to mean in the trade the plaintiff's belting, and nothing else, it was conceded that any manufacturer might inform the public that his belting was made of camel's hair, if such were the fact. In the still later case of Cellular Clothing Co. *v.* Maxton, [1899] A. C. 326, 68 L. J. P. C. 72, 80 L. T. Rep. N. S. 809, in which Reddaway *v.* Banham is explained, one of the lords says that he thought that it should be made impossible for any one to obtain the exclusive right to the use of a word or term which is in ordinary use in our language, and which is descriptive only (and proper names are always put in the same category), and goes on to say that were it not for Reddaway *v.* Banham he should have said that this should be made altogether impossible. The American cases are to the same effect. In Baker *v.* Sanders, 80 Fed. 889, 26 C. C. A. 220, already cited, while W. H. Baker was prohibited from calling his manufacture 'Baker's Chocolate,' he was allowed to say that his preparation was made by W. H. Baker. In Duryea *v.* National Starch Mfg. Co., 79 Fed. 651, 25 C. C. A. 139, the court refused, on the application of a plaintiff, who called his starch 'Duryea's Starch,' to enjoin the use by defendant of the words 'Laundry Starch, prepared by Duryea & Co.' Indeed I have not found any decision in which the right of a person to announce to the public that he was the maker of the goods was denied on the ground that his proper name had theretofore acquired a secondary meaning as applied to goods of that kind, and that therefore he could not use it in connection with his manufacture, except the decision of Kekewich, J., in Cash *v.* Cash, 84 L. T. Rep. N. S. 349. There it was held that inasmuch as the plaintiffs had established a reputation for making Cash's frillings, and inasmuch as the defendant, Joseph Cash, had also commenced to make and sell frillings, and there was a likelihood that the public might in time come to denominate his (Joseph's) frillings as 'Cash's Frillings,' to the injury of plaintiffs, Joseph Cash should be enjoined from selling any frillings at all. This rather astonishing decision, which, so far as my examination has gone, stands alone, was corrected by the appellate court and the decree made to conform to the established rule. Cash *v.* Cash, 86 L. T. Rep. N. S. 211, 18 T. L. R. 299, 50 Wkly. Rep. 289. Under these and other decisions that might be cited, it is plain that defendant could not be enjoined from stating that the goods were made by him merely because 'Rogers goods' had come to mean goods made exclusively by complainants." International Silver Co. *v.* Rogers, 71 N. J. Eq. 560, 571, 63 Atl. 977 [*reversed* in 72 N. J. Eq. 933, 67 Atl. 105, 129 Am. St. Rep. 722, but the principles

name without affirmatively distinguishing his goods or business.[66] In such cases the mere use of defendant's name unaccompanied with sufficient affirmative distinguishing statements is equivalent to an artifice calculated to deceive, and is ground for an injunction.[67] Upon correct principle, where a personal name has acquired a secondary meaning, another person of the same name should not be permitted to use his name as the short title or trade-name of his goods, but should be limited to a descriptive use of it to show that he is the proprietor of the goods or business in question,[68] except only in such cases where a personal name has lost its personal significance and become the generic designation or description of the goods themselves.[69] The courts have not always observed this principle, however, and have usually permitted the name to be used, if accompanied by an adequate

above stated were fully recognized. The reversal was on the facts, and a better distinguishing statement was required].

66. *Connecticut.*—William Rogers Mfg. Co. *v.* Simpson, 54 Conn. 527, 9 Atl. 395.

Illinois.—Allegretti *v.* Allegretti Chocolate Cream Co., 177 Ill. 129, 133, 52 N. E. 487 [*affirming* 76 Ill. App. 581].

Massachusetts.—Viano *v.* Baccigalupo, 183 Mass. 160, 67 N. E. 641.

Michigan.— Gordon Hollow Blast Grate Co. *v.* Gordon, 142 Mich. 488, 105 N. W. 1118; Penberthy Injector Co. *v.* Lee, 120 Mich. 174, 78 N. W. 1074.

Minnesota.— Sheffield-King Milling Co. *v.* Sheffield Mill, etc., Co., 105 Minn. 315, 117 N. W. 447, 127 Am. St. Rep. 574.

New Jersey.— International Silver Co. *v.* Rogers, 72 N. J. Eq. 933, 67 Atl. 105, 129 Am. St. Rep. 722 [*reversing* 71 N. J. Eq. 560, 63 Atl. 977]; International Silver Co. *v.* Wm. H. Rogers Corp., 66 N. J. Eq. 119, 57 Atl. 1037 [*reversed* on other grounds in 67 N. J. Eq. 646, 60 Atl. 187, 110 Am. St. Rep. 506].

New York.—Arnheim *v.* Arnheim, 28 Misc. 399, 59 N. Y. Suppl. 948; Kaufman *v.* Kaufman, 123 N. Y. Suppl. 699.

Tennessee.— Fite *v.* Dorman, (1900) 57 S. W. 129.

United States.— Herring-Hall-Marvin Safe Co. *v.* Hall's Safe Co., 208 U. S. 554, 28 S. Ct. 350, 52 L. ed. 616 [*modifying* 146 Fed. 37, 76 C. C. A. 495]; Donnell *v.* Herring-Hall-Marvin Safe Co., 208 U. S. 267, 28 S. Ct. 288, 52 L. ed. 481; Singer Mfg. Co. *v.* June Mfg. Co., 163 U. S. 169, 16 S. Ct. 1002, 41 L. ed. 118; Ludlow Valve Mfg. Co. *v.* Pittsburgh Mfg. Co., 166 Fed. 26, 92 C. C. A. 60; David E. Foutz Co. *v.* S. A. Foutz Stock Food Co., 163 Fed. 408; Dr. A. Reed Cushion Shoe Co. *v.* Frew, 162 Fed. 887, 89 C. C. A. 577 [*reversing* 158 Fed. 552]; Rowley *v.* J. F. Rowley Co., 161 Fed. 94, 88 C. C. A. 258 [*reversing* 154 Fed. 744]; Von Faber-Castell *v.* Faber, 145 Fed. 626, 76 C. C. A. 538; Van Houten *v.* Hooton Cocoa, etc., Co., 130 Fed. 600; Baker *v.* Slack, 130 Fed. 514, 65 C. C. A. 138; Von Faber *v.* Faber, 124 Fed. 603 [*reversed* on other grounds in 139 Fed. 257, 71 C. C. A. 383]; Royal Baking Powder Co. *v.* Royal, 122 Fed. 337, 58 C. C. A. 499 ("every means reasonably possible" must be used to distinguish); Baker *v.* Baker, 87 Fed. 209; Allegretti Chocolate Cream Co. *v.* Keller, 85 Fed. 643; Baker *v.* Sanders, 80 Fed. 889, 26 C. C. A. 220; Merriam *v.* Texas Siftings Pub. Co., 49 Fed. 944.

England.—Wotherspoon *v.* Currie, L. R. 5 H. L. 508, 42 L. J. Ch. 130, 27 L. T. Rep. N. S. 393; Jameson *v.* Dublin Distillers' Co., [1900] 1 Ir. 43; Valentine Meat Juice Co. *v.* Valentine Extract Co., 83 L. T. Rep. N. S. 259, 16 T. L. R. 522; Brinsmead *v.* Brinsmead, 13 T. L. R. 3.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 84.

Required forms of distinguishing statements, varying with the facts of the particular cases, will be found in the cases cited in the above list. See also, generally, *supra*, V, B, 7, b.

67. International Silver Co. *v.* Rogers, 72 N. J. Eq. 933, 67 Atl. 105, 129 Am. St. Rep. 722 [*reversing* 71 N. J. Eq. 560, 63 Atl. 977]; International Silver Co. *v.* Wm. H. Rogers Corp., 66 N. J. Eq. 119, 57 Atl. 1037 [*reversed* on other grounds in 67 N. J. Eq. 646, 60 Atl. 187, 110 Am. St. Rep. 506]; Singer Mfg. Co. *v.* June Mfg. Co., 163 U. S. 169, 16 S. Ct. 1002, 41 L. ed. 118; Ludlow Valve Mfg. Co. *v.* Pittsburgh Mfg. Co., 166 Fed. 26, 92 C. C. A. 60; Hall's Safe Co. *v.* Herring-Hall-Marvin Safe Co., 146 Fed. 37, 76 C. C. A. 495, 14 L. R. A. N. S. 1182 [*modified* in 208 U. S. 554, 28 S. Ct. 350, 52 L. ed. 616]; International Silver Co. *v.* Rodgers Bros. Cutlery Co., 136 Fed. 1019; Stuart *v.* F. G. Stewart Co., 91 Fed. 243, 33 C. C. A. 480 [*reversing* 85 Fed. 778]; Tarrant *v.* Hoff, 76 Fed. 959, 22 C. C. A. 644; Sykes *v.* Sykes, 3 B. & C. 541, 5 D. & R. 292, 3 L. J. K. B. O. S. 46, 27 Rev. Rep. 420, 10 E. C. L. 248, 107 Eng. Reprint 834; Valentine Meat Juice Co. *v.* Valentine Extract Co., 83 L. T. Rep. N. S. 259, 16 T. L. R. 522.

68. See cases cited *supra*, note 64.

An illustration of a proper use of one's own name in such a case is found in Duryea *v.* National Starch Mfg. Co., 79 Fed. 651, 25 C. C. A. 139. In this case goods had become known as "Duryea's starch." Subsequently, men named Duryea put starch upon the market and sold it as "starch prepared by Duryea & Co." This was held to be a proper use by them of their own name. To the same effect see National Starch Mfg. Co. *v.* Duryea, 101 Fed. 117.

69. See *supra*, V, B, 3. See also *infra*, V, C, 8.

distinguishing explanation,[70] or sometimes even without explanation, if there are no affirmative fraudulent representations or deceptive devices.[71] Personal names may by use become generically descriptive of a kind or class of goods, in which event they are *publici juris*, and all may use them in their descriptive sense.[72] Personal names must be used truthfully and in good faith, or their use will be enjoined.[73] Where defendant seizes upon and uses a name which is neither his own, nor that of a *bona fide* associate, but which is the distinctive name of a

70. International Silver Co. *v.* Rogers, 72 N. J. Eq. 933, 67 Atl. 105, 129 Am. St. Rep. 722 [*reversing* 71 N. J. Eq. 560, 63 Atl. 977]; G. & C. Merriam Co. *v.* Ogilvie, 159 Fed. 638, 88 C. C. A. 596, 16 L. R. A. N. S. 549; J. F. Rowley Co. *v.* Rowley, 161 Fed. 94 [*reversing* 154 Fed. 744]. See also cases cited *supra*, note 67.

71. William Rogers Mfg. Co. *v.* Simpson, 54 Conn. 527, 9 Atl. 395; Burgess *v.* Burgess, 3 De G. M. & G. 896, 17 Jur. 292, 22 L. J. Ch. 675, 52 Eng. Ch. 696, 43 Eng. Reprint 351. *Compare* Dodge Stationery Co. *v.* Dodge, 145 Cal. 380, 78 Pac. 879.

Leading case explained.— In Burgess *v.* Burgess, 3 De G. M. & G. 896, 904, 17 Jur. 292, 22 L. J. Ch. 675, 52 Eng. Ch. 696, 43 Eng. Reprint 351, Turner, L. J., said: "No man can have any right to represent his goods as the goods of another person, but in applications of this kind it must be made out that the Defendant is selling his own goods as the goods of another. Where a person is selling goods under a particular name, and another person, not having that name, is using it, it may be presumed that he so uses it to represent the goods sold by himself as the goods of the person whose name he uses; but where the Defendant sells goods under his own name, and it happens that the Plaintiff has the same name, it does not follow that the Defendant is selling his goods as the goods of the Plaintiff. It is a question of evidence in each case whether there is false representation or not." He thought that under the evidence there was then no such representation. The report shows that plaintiff was making "Burgess' Essence of Anchovies" under the firm name of John Burgess & Son, while defendant was making a similar essence under the name of W. J. Burgess. Of this judgment, James, L. J., in the subsequent case of Massam *v.* Thorley's Cattle Food Co., 14 Ch. D. 748–753, 42 L. T. Rep. N. S. 851, 28 Wkly. Rep. 966, said: "That I take to be an accurate statement of the law, and to have been adopted by the House of Lords in Wotherspoon *v.* Currie." He said further: "Now Burgess *v.* Burgess has been very much misunderstood if it has been understood to decide that anybody can always use his own name as a description of an article whatever may be the consequence of it, or whatever may be the motive for doing it, or whatever may be the result of it."

72. Edison *v.* Mills-Edisonia, 74 N. J. Eq. 521, 70 Atl. 191; C. F. Simmons Medicine Co. *v.* Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165; Singer Mfg. Co. *v.* June Mfg. Co., 163 U. S. 169, 16 S. Ct. 1002, 41 L. ed. 118 ("Singer" Sewing Machines); Liebig's Extract of Meat Co. *v.* Liebig Extract Co., 172 Fed. 158 [*reversed* on other grounds in 180 Fed. 688, 103 C. C. A. 654]; Ludlow Valve Mfg. Co. *v.* Pittsburgh Mfg. Co., 166 Fed. 26, 92 C. C. A. 60; Singer Mach. Manufacturers *v.* Wilson, 3 App. Cas. 376, 47 L. J. Ch. 481, 38 L. T. Rep. N. S. 303, 26 Wkly. Rep. 664. See also Hall *v.* Barrows, 4 De G. J. & S. 150, 10 Jur. N. S. 55, 33 L. J. Ch. 204, 9 L. T. Rep. N. S. 651, 3 New Rep. 259, 12 Wkly. Rep. 322, 69 Eng. Ch. 116, 46 Eng. Reprint 873 [*affirming* 9 Jur. N. S. 483, 32 L. J. Ch. 548, 8 L. T. Rep. N. S. 227, 1 New Rep. 543, 11 Wkly. Rep. 525].

The name of a patentee frequently becomes the generic designation of the patented article, and in such case may be used truthfully by others. See *infra*, V, C, 8. The same is true of so-called patent medicines. See *infra*, V, C, 10.

73. *Connecticut.*—William Rogers Mfg. Co. *v.* Simpson, 54 Conn. 527, 9 Atl. 395.

New Jersey.— Edison *v.* Mills-Edisonia, 74 N. J. Eq. 521, 70 Atl. 191; International Silver Co. *v.* Rogers, 71 N. J. Eq. 560, 63 Atl. 977; International Silver Co. *v.* Wm. H. Rogers Corp., 66 N. J. Eq. 119, 57 Atl. 1037.

New York.— Koehler *v.* Sanders, 122 N. Y. 65, 25 N. E. 235, 9 L. R. A. 576 [*affirming* 48 Hun 48]; Falk *v.* American West Indies Trading Co., 71 N. Y. App. Div. 320, 75 N. Y. Suppl. 964; Falk *v.* American West Indies Trading Co., 36 Misc. 376, 73 N. Y. Suppl. 547 [*affirmed* in 71 N. Y. App. Div. 320, 75 N. Y. Suppl. 964].

Texas.— Scanlan *v.* Williams, (Civ. App. 1908) 114 S. W. 862.

United States.— Selchow *v.* Chaffee, etc., Mfg. Co., 132 Fed. 996.

England.— Burgess *v.* Burgess, 3 De G. M. & G. 896, 17 Jur. 292, 22 L. J. Ch. 675, 52 Eng. Ch. 696, 43 Eng. Reprint 351; Valentine Meat Juice Co. *v.* Valentine Extract Co., 16 T. L. R. 33, 48 Wkly. Rep. 127. See Valentine Meat Juice Co. *v.* Valentine Extract Co., 83 L. T. Rep. N. S. 259, 16 T. L. R. 522.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 84.

Presumption of fraud.— "Where a person is selling goods under a particular name, and another person, not having that name, is using it, it may be presumed that he so uses it to represent the goods sold by himself as the goods of the person whose name he uses." Burgess *v.* Burgess, 3 De G. M. & G. 896, 905, 17 Jur. 292, 22 L. J. Ch. 675, 52 Eng. Ch. 696, 43 Eng. Reprint 351 [*quoted* in Eureka Fire Hose Co. *v.* Eureka Rubber Mfg. Co., 69 N. J. Eq. 159, 170, 60 Atl. 561].

prior trader's goods or business, he will be promptly and absolutely enjoined from using such name.[74] An attempt to purchase, or otherwise acquire, the right to use a personal or family name, apart from a purchase of the business, and its good-will, in which the name has become valuable, is almost conclusive evidence of fraud and unfair competition.[75] The normal presumption is that the use of one's own name is an honest use, but this presumption may be rebutted by showing a prior fraudulent use of it in connection with the matter in issue, and the burden is then upon defendant to show that his use of the name is not practically a continuation of his prior fraud.[76] Where it appears that one is taken into a business

74. *Indiana.*— Smail *v.* Sanders, 118 Ind. 105, 20 N. E. 296, "Dr. Bass's Vegetable Liver Pills."

Maryland.— Bagby, etc., Co. *v.* Rivers, 87 Md. 400, 40 Atl. 171, 67 Am. St. Rep. 357, 40 L. R. A. 632.

Massachusetts.— Marshall Engine Co. *v.* New Marshall Engine Co., 203 Mass. 410, 89 N. E. 548; H. A. Williams Mfg. Co. *v.* Noera, 158 Mass. 110, 32 N. E. 1037.

New Jersey.— Edison *v.* Mills-Edisonia, 74 N. J. Eq. 521, 70 Atl. 191; International Silver Co. *v.* Wm. H. Rogers Corp., 66 N. J. Eq. 119, 57 Atl. 1037.

New York.— Prince Mfg. Co. *v.* Prince's Metallic Paint Co., 135 N. Y. 24, 31 N. E. 990, 17 L. R. A. 129; Falk *v.* American West Indies Trading Co., 71 N. Y. App. Div. 320, 75 N. Y. Suppl. 964 [*affirming* 36 Misc. 376, 73 N. Y. Suppl. 547]; Brooklyn White Lead Co. *v.* Masury, 25 Barb. 416. See S. Howes Co. *v.* Howes Grain-Cleaner Co., 19 N. Y. App. Div. 625, 46 N. Y. Suppl. 165.

Pennsylvania.— Juan F. Portuondo Cigar Mfg. Co. *v.* Vicente Portuondo Cigar Mfg. Co., 222 Pa. St. 116, 70 Atl. 968; Portuondo Cigar Mfg. Co. *v.* Neiman, 19 York Leg. Rec. 201.

Texas.— Scanlan *v.* Williams, (Civ. App. 1908) 114 S. W. 862.

United States.— National Distilling Co. *v.* Century Liquor, etc., Co., 183 Fed. 206, 105 C. C. A. 638; Rushmore *v.* Saxon, 170 Fed. 1021, 95 C. C. A. 671 [*affirming* 158 Fed. 499]; Hall Safe, etc., Co. *v.* Herring-Hall-Marvin Safe Co., 143 Fed. 231, 74 C. C. A. 361 [*reversed* on other grounds in 208 U. S. 267, 28 S. Ct. 288, 52 L. ed. 481]; International Silver Co. *v.* Rodgers Bros. Cutlery Co., 136 Fed. 1019; Selchow *v.* Chaffee, etc., Mfg. Co., 132 Fed. 996; Royal Baking Powder Co. *v.* Royal, 122 Fed. 337, 58 C. C. A. 499; Liebig's Extract of Meat Co. *v.* Libby, 103 Fed. 87; Hohner *v.* Gratz, 52 Fed. 871; Osgood *v.* Allen, 18 Fed. Cas. No. 10,603, Holmes 185, 3 Off. Gaz. 124. See Gaines *v.* Kahn, 155 Fed. 639 [*reversed* in 161 Fed. 495].

England.— Singer Mach. Manufacturers *v.* Wilson, 3 App. Cas. 376, 47 L. J. Ch. 481, 38 L. T. Rep. N. S. 303, 26 Wkly. Rep. 644 (one must justify the use of a name not his own); Pinet *v* Maison Louis Pinet, [1898] 1 Ch. 179, 67 L. J. Ch. 41, 77 L. T. Rep. N. S. 613, 14 T. L. R. 87, 46 Wkly. Rep. 506; Du Boulay *v.* Du Boulay, L. R. 2 P. C. 430, 38 L. J. P. C. 35, 6 Moore P. C. N. S. 31, 17 Wkly. Rep. 594, 16 Eng. Reprint 638; Franks *v.* Weaver, 10 Beav. 297, 50 Eng. Reprint 596; Gout *v.* Aleploglu, 6 Beav. 69 note, 49 Eng. Reprint 750; Burgess *v.* Burgess, 3 De G. M. & G. 896, 17 Jur. 292, 22 L. J. Ch. 675, 52 Eng. Ch. 696, 43 Eng. Reprint 351; Southorn *v.* Reynolds, 12 L. T. Rep. N. S. 575 (name of employee used); Barber *v.* Manico, 10 Rep. Pat. Cas. 93.

Canada.— Templeton *v.* Wallace, 4 Northwest. Terr. 340.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 84.

75. *Connecticut.*— Meriden Britannia Co. *v.* Parker, 39 Conn. 450, 12 Am. Rep. 401.

Florida.— El Modello Cigar Mfg. Co. *v.* Gato, 25 Fla. 886, 7 So. 23, 23 Am. St. Rep. 537, 6 L. R. A. 823.

Maryland.— Stonebraker *v.* Stonebraker, 33 Md. 252.

New York.— Falk *v.* American West Indies Trading Co., 71 N. Y. App. Div. 320, 75 N. Y. Suppl. 964; S. Howes Co. *v.* Howes Grain-Cleaner Co., 24 Misc. 83, 52 N. Y. Suppl. 468; Charles S. Higgins Co. *v.* Amalga Soap Co., 10 Misc. 268, 30 N. Y. Suppl. 1074.

Pennsylvania.— Juan F. Portuondo Cigar Co. *v.* Vicente Portuondo Cigar Mfg. Co., 222 Pa. St. 116, 70 Atl. 968, holding further that such fraud deprived the assignee of the benefit of the doctrine of laches and estoppel.

United States.— International Silver Co. *v.* Simeon L. & George H. Rogers Co., 110 Fed. 955; R. Heinisch's Sons Co. *v.* Boker, 86 Fed. 765; Garrett *v.* Garrett, 78 Fed. 472, 24 C. C. A. 173; R. W. Rogers Co. *v.* Wm. Rogers Mfg. Co., 70 Fed. 1017, 17 C. C. A. 576; Sawyer *v.* Kellogg, 7 Fed. 720.

England.— Massam *v.* Thorley's Cattle Food Co., 14 Ch. D. 748, 42 L. T. Rep. N. S. 851, 28 Wkly. Rep. 966 [*reversing* 6 Ch. D. 574, 46 L. J. Ch. 707, 36 L. T. Rep. N. S. 848]; Shrimpton *v.* Laight, 18 Beav. 164, 52 Eng. Reprint 65; Croft *v.* Day, 7 Beav. 84, 29 Eng. Ch. 84, 49 Eng. Reprint 994; Melachrino *v.* Melachrino Egyptian Cigarette Co., 4 Rep. Pat. Cas. 215. See Tussaud *v.* Tussaud, 44 Ch. D. 678, 59 L. J. Ch. 631, 62 L. T. Rep. N. S. 633, 2 Meg. 120, 38 Wkly. Rep. 503. See also Southorn *v.* Reynolds, 12 L. T. Rep. N. S. 75. *Compare* Valentine Meat Juice Co. *v.* Valentine Extract Co., 16 T. L. R. 33, 48 Wkly. Rep. 127, wherein the sale was in connection with the good-will of the business "being created."

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 84.

But see Hallett *v.* Cumston, 110 Mass. 29.

76. International Silver Co. *v.* Rogers, 72 N. J. Eq. 933, 67 Atl. 105, 129 Am. St. Rep.

merely to afford an excuse for using his name in the corporate or firm title and thus to promote unfair competition with another of the same name, such corporate or firm-name will be enjoined.[77] A corporate name made up from the family name of the organizers of the corporation may be enjoined if it results in passing off the corporation's goods or business as those of a prior trader already known by that name, especially where it appears that such corporate name was adopted with that intention.[78] The use of personal names as part of a corporate name has been often enjoined upon the ground that, as corporate names are self-chosen, there was no necessity for selecting a confusing or deceptive name, and a distinction has been drawn between such cases and the case of an individual trading in his own name, which he must necessarily use.[79] But this doctrine has been latterly exploded, and it is now recognized that a person has an equal right to use his own name in connection with either an incorporated business or in an unincorporated business. The use is as reasonable and necessary in one case as in the other.[80] Names which are *idem sonans* fall within the rules applicable to

722 [*reversing* 71 N. J. Eq. 560, 63 Atl. 977]; Royal Baking Powder Co. *v.* Royal, 122 Fed. 337, 58 C. C. A. 499.

77. *Connecticut.*— Rogers *v.* Rogers, 53 Conn. 121, 1 Atl. 807, 5 Atl. 675, 55 Am. Rep. 78.

New York.— Burrow *v.* Marceau, 124 N. Y. App. Div. 665, 109 N. Y. Suppl. 105; S. Howes Co. *v.* Howes Grain-Cleaner Co., 19 N. Y. App. Div. 625, 46 N. Y. Suppl. 165; Falk *v.* American West Indies Trading Co., 36 Misc. 376, 76 N. Y. Suppl. 547 [*affirmed* in 71 N. Y. App. Div. 320, 75 N. Y. Suppl. 964]; Schmid *v.* De Grauw, 27 Misc. 693, 59 N. Y. Suppl. 569; S. Howes Co. *v.* Howes Grain-Cleaner Co., 24 Misc. 83, 52 N. Y. Suppl. 468.

Pennsylvania.— See Juan F. Portuondo Cigar Mfg. Co. *v.* Vicente Portuondo Cigar Mfg. Co., 222 Pa. St. 116, 70 Atl. 968.

United States.— Coats *v.* John Coates Thread Co., 135 Fed. 177.

England.— Massam *v.* Thorley's Cattle Food Co., 14 Ch. D. 748, 42 L. T. Rep. N. S. 851, 28 Wkly. Rep. 966; Croft *v.* Day, 7 Beav. 84, 29 Eng. Ch. 84, 49 Eng. Reprint 994; Schweitzer *v.* Atkins, 37 L. J. Ch. 847, 19 L. T. Rep. N. S. 6, 16 Wkly. Rep. 1080.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 84.

78. *Connecticut.*— Holmes *v.* Holmes, etc., Mfg. Co., 37 Conn. 278, 9 Am. Rep. 324.

New Jersey.— International Silver Co. *v.* William H. Rogers Corp., 67 N. J. Eq. 646, 60 Atl. 187, 110 Am. St. Rep. 506.

New York.— Chas. S. Higgins Co. *v.* Higgins Soap Co., 144 N. Y. 462, 39 N. E. 490, 43 Am. St. Rep. 769, 27 L. R. A. 42 [*reversing* 71 Hun 101, 24 N. Y. Suppl. 801]; Burrow *v.* Marceau, 124 N. Y. App. Div. 665, 109 N. Y. Suppl. 105; De Long *v.* De Long Hook, etc., Co., 89 Hun 399, 35 N. Y. Suppl. 509; Schmid *v.* De Grauw, 27 Misc. 693, 59 N. Y. Suppl. 569.

United States.— Coats *v.* John Coates Thread Co., 135 Fed. 177; Garrett *v.* Garrett, 78 Fed. 472, 24 C. C. A. 173; Bissell Chilled Plow Works *v.* T. M. Bissell Plow Co., 121 Fed. 357.

England.— Panhard et Levassor *v.* Panhard Levassor Motor Co., [1901] 2 Ch. 513, 70 L. J. Ch. 738, 85 L. T. Rep. N. S. 20, 17 T. L. R. 680, 50 Wkly. Rep. 74; Tussaud *v.* Tussaud, 44 Ch. D. 678, 59 L. J. Ch. 631, 62 L. T. Rep. N. S. 633, 2 Meg. 120, 38 Wkly. Rep. 503.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 84.

79. W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 100 Me. 461, 62 Atl. 499, 4 L. R. A. N. S. 960; International Silver Co. *v.* Wm. H. Rogers Corp., 67 N. J. Eq. 646, 60 Atl. 187, 110 Am. St. Rep. 506 [*reversing* 66 N. J. Eq. 140, 57 Atl. 725]; Schmid *v.* De Grauw, 27 Misc. (N. Y.) 693, 59 N. Y. Suppl. 569; International Silver Co. *v.* Rodgers Bros. Cutlery Co., 136 Fed. 1019; Coats *v.* John Coates Thread Co., 135 Fed. 177; Wyckoff *v.* Howe Scale Co., 122 Fed. 348, 58 C. C. A. 510 [*reversing* 110 Fed. 520]; Wm. Rogers Mfg. Co. *v.* R. W. Rogers Co., 66 Fed. 56. See International Silver Co. *v.* Rogers, 71 N. J. Eq. 560, 63 Atl. 977.

"Corporations in the exercise of discretionary powers conferred by the statute, must so exercise them as not to infringe upon the established legal rights of others." Holmes *v.* Holmes, etc., Mfg. Co., 37 Conn. 278, 293, 9 Am. Rep. 324 [*quoted* with approval in American Clay Mfg. Co. *v.* American Clay Mfg. Co., 198 Pa. St. 189, 195, 47 Atl. 936].

80. *Kentucky.*—George T. Stagg Co. *v.* Taylor, 95 Ky. 651, 27 S. W. 247, 16 Ky. L. Rep. 213; Monarch *v.* Rosenfeld, 39 S. W. 236, 19 Ky. L. Rep. 14.

Maryland.—See Stonebraker *v.* Stonebraker, 33 Md. 252.

New Jersey.— International Silver Co. *v.* Wm. H. Rogers Corp., 66 N. J. Eq. 119, 57 Atl. 1037.

New York.— Hildreth *v.* McCaul, 70 N. Y. App. Div. 162, 74 N. Y. Suppl. 1072.

Tennessee.— Fite *v.* Dorman, (1900) 57 S. W. 129.

United States.— Donnell *v.* Herring-Hall-Marvin Safe Co., 208 U. S. 267, 28 S. Ct. 288, 52 L. ed. 481 [*reversing* 143 Fed. 231, 74 C. C. A. 361]; Howe Scale Co. *v.* Wyckoff, 198 U. S. 118, 25 S. Ct. 609, 49 L. ed. 972 [*reversing* 122 Fed. 348, 58 C. C. A. 510];

names which are identical.[81] A person may enjoin the unauthorized use of his name in the business of another.[82] The right to use a personal name may be lost, or conveyed, or regulated by contract.[83] But a contract depriving one of the right

Hall's Safe Co. *v.* Herring-Hall-Marvin Safe Co., 146 Fed. 37, 76 C. C. A. 495, 14 L. R. A. N. S. 1182 [*modified* in 208 U. S. 554, 28 S. Ct. 350, 52 L. ed. 616]; Bates Mfg. Co. *v.* Bates Mach. Co., 141 Fed. 213; Baker *v.* Baker, 115 Fed. 297, 53 C. C. A. 157.

England.—Dence *v.* Mason, [1877] W. N. 23.

Question one of evidence.—"It was argued on behalf of complainant, that while a man might use his own name in any business, if he used it fairly, he could not give it to a corporation, if it was also the name of a rival trader, and had acquired a peculiar significance in connection with that trader's business. No such rule is fairly deducible from the cases. The question being whether there was a false representation, it might, in many cases, be easier to infer such representation — as a matter of evidence — as a fact, where a corporation had, without propriety, assumed the name of a rival, than it would be to infer it where an individual of the same name came into competition with him; because, as has often been said, the whole vocabulary of names is open to those who organize a new company, while the individual is not responsible for his name, and ought, ordinarily, in common honesty, to use it and do business under it. Still the matter would be one of evidence, and not of law. This distinction is illustrated by the two cases of the International Silver Co. *v.* Simeon L. & George H. Rogers Co., 110 Fed. 955, and Baker *v.* Baker, 115 Fed. 297, 53 C. C. A. 157." International Silver Co. *v.* Wm. H. Rogers Corp., 66 N. J. Eq. 119, 57 Atl. 1037, 1040.

81. Van Houten *v.* Hooton Cocoa, etc., Co., 130 Fed. 600.

82. *Maryland.*— Bagby, etc., Co. *v.* Rivers, 87 Md. 400, 40 Atl. 171, 67 Am. St. Rep. 357, 40 L. R. A. 632.

Massachusetts.— See Hallett *v.* Cumston, 110 Mass. 29.

New York.— Scheer *v.* American Ice Co., 32 Misc. 351, 66 N. Y. Suppl. 3; Mackenzie *v.* Soden Mineral Springs Co., 18 N. Y. Suppl. 240, 27 Abb. N. C. 402.

Rhode Island.— Armington *v.* Palmer, 21 R. I. 109, 42 Atl. 308, 79 Am. St. Rep. 786, 43 L. R. A. 95.

United States.— See Kathreiner's Malzkaffee Fabricken, etc. *v.* Pastor Kneipp Medicine Co., 82 Fed. 321, 27 C. C. A. 351. *Compare* Edison *v.* Hawthorne, 108 Fed. 839, 48 C. C. A. 67 [*affirming* 106 Fed. 172].

England.— See Scott *v.* Scott, 16 L. T. Rep. N. S. 143. But see Du Boulay *v.* Du Boulay, L. R. 2 P. C. 430, 38 L. J. P. C. 35, 6 Moore P. C. N. S. 31, 17 Wkly. Rep. 594, 16 Eng. Reprint 638.

Canada.— Love *v.* Latimer, 32 Ont. 231.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 84.

But see Olin *v.* Bate, 98 Ill. 53, 38 Am. Rep. 78.

Contra.—In Clark *v.* Freeman, 11 Beav. 112, 12 Jur. 119, 17 L. J. Ch. 142, 50 Eng. Reprint 759, plaintiff, Sir James Clark, was a very eminent physician, practising in London, and physician in ordinary to her majesty. He had devoted especial attention to the treatment of consumptive diseases. Defendant, Freeman, a chemist and druggist in the neighborhood of London, offered for sale and extensively advertised certain pills, which he called "Sir J. Clarke's Consumption Pills." An injunction was refused by the master of the rolls, Lord Langdale. But see Mackenzie *v.* Soden Mineral Spring Co., 18 N. Y. Suppl. 240, 27 Abb. N. C. 402.

The use of the name and likeness of a deceased person upon a label will not be enjoined, provided such use does not constitute a libel and no question of unfair competition is involved. Atkinson *v.* Doherty, 121 Mich. 372, 80 N. W. 285, 80 Am. St. Rep. 507, 46 L. R. A. 219 [*citing* Chapman *v.* Western Union Tel. Co., 88 Ga. 763, 15 S. E. 901, 30 Am. St. Rep. 183, 17 L. R. A. 430; Murray *v.* Gast Lithographic, etc., Co., 8 Misc. (N. Y.) 36, 28 N. Y. Suppl. 271, 31 Abb. N. Cas. 266; Corliss *v.* E. W. Walker Co., 57 Fed. 434, 64 Fed. 280, 31 L. R. A. 283, and *distinguishing* Tuck *v.* Priester, 19 Q. B. D. 629, 52 J. P. 213, 56 L. J. Q. B. 553, 36 Wkly. Rep. 93; Pollard *v.* Photographic Co., 40 Ch. D. 345, 58 L. J. Ch. 251, 60 L. T. Rep. N. S. 418, 37 Wkly. Rep. 266; Prince Albert *v.* Strange, 1 Hall & T. 1, 47 Eng. Reprint 1302, 13 Jur. 109, 18 L. J. Ch. 120, 1 Macn. & G. 25, 47 Eng. Ch. 19, 41 Eng. Reprint 1170].

83. *California.*— Spieker *v.* Lash, 102 Cal. 38, 36 Pac. 362.

Connecticut.— Holmes *v.* Holmes, etc., Mfg. Co., 37 Conn. 278, 9 Am. Rep. 324.

Illinois.— Ranft *v.* Reimers, 200 Ill. 386, 65 N. E. 720, 60 L. R. A. 291; Hazelton Boiler Co. *v.* Hazelton Tripod Boiler Co., 142 Ill. 494, 30 N. E. 339 [*affirming* 40 Ill. App. 430]; Frazer *v.* Frazer Lubricator Co., 121 Ill. 147, 13 N. E. 639, 2 Am. St. Rep. 73.

Maine.— Symonds *v.* Jones, 82 Me. 302, 19 Atl. 820, 17 Am. St. Rep. 485, 8 L. R. A. 570.

Maryland.— Stonebraker *v.* Stonebraker, 33 Md. 252.

Massachusetts.— Russia Cement Co. *v.* Le Page, 147 Mass. 206, 17 N. E. 304, 9 Am. St. Rep. 685.

Michigan.— Myers *v.* Kalamazoo Buggy Co., 54 Mich. 215, 19 N. W. 961, 20 N. W. 545, 52 Am. Rep. 811.

New York.— Dr. David Kennedy Corp. *v.* Kennedy, 36 N. Y. App. Div. 599, 55 N. Y. Suppl. 917 [*modified* in 165 N. Y. 353, 59 N. E. 133] (wherein defendant was enjoined from receiving mail addressed to him in his own name); Andrew Jurgens Co. *v.* Woodbury, 56 Misc. 404, 106 N. Y. Suppl. 571.

to use his own name must be clear and unequivocal in order to be given that effect.[84]

5. Corporate Names. Corporate names have frequently been enjoined upon the general principles of trade-marks and unfair competition, where they were sufficiently similar to the names in use by prior traders to produce confusion and injury.[85] A corporate charter grants no immunity in the use of a deceptive

Ohio.— Brass, etc., Works Co. *v.* Payne, 50 Ohio St. 115, 33 N. E. 88, 19 L. R. A. 82.

Pennsylvania.— Van Stan's Stratena Co. *v.* Van Stan, 209 Pa. St. 564, 58 Atl. 1064, 103 Am. St. Rep. 1018; Gillis *v.* Hall, 2 Brewst. 342, 1 Phila. 422.

Virginia.— F. T. Blanchard Co. *v.* Simon, 104 Va. 209, 51 S. E. 222.

Wisconsin.— Fish Bros. Wagon Co. *v.* La Belle Wagon Works, 82 Wis. 546, 52 N. W. 595, 33 Am. St. Rep. 72, 16 L. R. A. 453.

United States.— Herring-Hall-Marvin Safe Co. *v.* Hall's Safe Co., 208 U. S. 554, 28 S. Ct. 350, 52 L. ed. 616; Donnell *v.* Herring-Hall-Marvin Safe Co., 208 U. S. 267, 28 S. Ct. 288, 52 L. ed. 481; Kidd *v.* Johnson, 100 U. S. 619, 25 L. ed. 769. See Hall Safe, etc., Co. *v.* Herring-Hall-Marvin Safe Co., 143 Fed. 231, 74 C. C. A. 363 [*reversed* in 208 U. S. 267, 28 S. Ct. 288, 52 L. ed. 481]; Von Faber-Castell *v.* Faber, 139 Fed. 257, 71 C. C. A. 383 [*reversing* 124 Fed. 603].

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," §§ 26–45.

"The principle seems to be well settled, that where a party sells out an established business, and with it his own name, to be used in connection with such business, he can not afterwards resume it in carrying on the same business. Probasco *v.* Bouyon, 1 Mo. App. 241; Ayer *v.* Hall, 3 Brewst. (Pa.) 509; Filkins *v.* Blackman, 9 Fed. Cas. No. 4,786, 13 Blatchf. 440; Witt *v.* Corcoran, Cox Trade-Mark Cas. 423; Gillis *v.* Hall, Cox Trade-Mark Cas. 353; Churton *v.* Douglas, Cox Trade-Mark Cas. 172. The case in hand falls directly within the doctrine of the cases cited. There is nothing, however, new in this doctrine. It is the old principle, that a title based on a sale for a valuable and adequate consideration, fairly entered into between parties *sui juris*, will be upheld, and enforced in equity as well as at law." Frazer *v.* Frazer Lubricator Co., 121 Ill. 147, 157, 13 N. E. 639, 2 Am. St. Rep. 73.

84. Ranft *v.* Reimers, 200 Ill. 386, 65 N. E. 720, 60 L. R. A. 291; Bellows *v.* Bellows, 24 Misc. (N. Y.) 482, 53 N. Y. Suppl. 853; F. T. Blanchard Co. *v.* Simon, 104 Va. 209, 51 S. E. 222; Franke *v.* Chappell, 57 L. T. Rep. N. S. 141.

Doubtful or uncertain proof insufficient.— "The right of a man to use his own name in connection with his own business is so fundamental that an intention to entirely divest himself of such right and transfer it to another will not readily be presumed but must be clearly shown. Where it is so shown the transaction will be upheld. But it will not be sustained upon doubtful or uncertain proof." Hazelton Boiler Co. *v.* Hazelton Tripod Boiler Co., 142 Ill. 494, 507, 30 N. E. 339 [*quoted* with approval in Ranft *v.* Reimers, 200 Ill. 386, 391, 65 N. E. 720, 60 L. R. A. 291].

85. *California.*— Hainque *v.* Cyclops Iron Works, 136 Cal. 351, 68 Pac. 1014.

Connecticut.— Holmes *v.* Holmes, etc., Mfg. Co., 37 Conn. 278, 9 Am. Rep. 324.

Illinois.— Van Auken Co. *v.* Van Auken Steam Specialty Co., 57 Ill. App. 240. But see Hazelton Boiler Co. *v.* Hazelton Tripod Boiler Co., 142 Ill. 494, 30 N. E. 339; German Hanoverian, etc., Coach Horse Assoc. *v.* Oldenberg Coach Horse Assoc., 46 Ill. App. 281.

Kentucky.— Frazier *v.* Dowling, 39 S. W. 45, 18 Ky. L. Rep. 1109.

Maine.— W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 100 Me. 461, 62 Atl. 499, 4 L. R. A. N. S. 960.

Michigan.— Penberthy Injector Co. *v.* Lee, 120 Mich. 174, 78 N. W. 1074.

Minnesota.— Sheffield-King Milling Co. *v.* Sheffield Mill, etc., Co., 105 Minn. 315, 117 N. W. 447, 127 Am. St. Rep. 574; Nesne *v.* Sundet, 93 Minn. 299, 101 N. W. 490, 106 Am. St. Rep. 439.

Missouri.— Williamson Corset, etc., Co. *v.* Western Corset Co., 70 Mo. App. 424; Plant Seed Co. *v.* Michel Plant, etc., Co., 23 Mo. App. 579.

New Jersey.— Eureka Fire Hose Co. *v.* Eureka Rubber Mfg. Co., 72 N. J. Eq. 555, 65 Atl. 870; Eureka Fire Hose Co. *v.* Eureka Rubber Mfg. Co., 69 N. J. Eq. 159, 60 Atl. 561; St. Patrick's Alliance *v.* Byrne, 59 N. J. Eq. 26, 44 Atl. 716.

New York.— Chas. S. Higgins Co. *v.* Higgins Soap Co., 144 N. Y. 462, 39 N. E. 490, 43 Am. St. Rep. 769, 27 L. R. A. 42 [*reversing* 71 Hun 101, 24 N. Y. Suppl. 801]; Pettes *v.* American Watchman's Clock Co., 89 N. Y. App. Div. 345, 85 N. Y. Suppl. 900; S. Howes Co. *v.* Howes Grain-Cleaner Co., 19 N. Y. App. Div. 625, 46 N. Y. Suppl. 165; Tuerk Hydraulic Power Co. *v.* Tuerk, 92 Hun 65, 36 N. Y. Suppl. 384; India Rubber Co. *v.* Rubber Comb, etc., Co., 45 N. Y. Super. Ct. 258; American Novelty, etc., Co. *v.* Manufacturing Electrical Novelty Co., 36 Misc. 450, 73 N. Y. Suppl. 755; Schmid *v.* De Grauw, 27 Misc. 693, 59 N. Y. Suppl. 569; S. Howes Co. *v.* Howes Grain Cleaner Co., 24 Misc. 83, 52 N. Y. Suppl. 468; De Long *v.* De Long Hook, etc., Co., 10 Misc. 577, 32 N. Y. Suppl. 203 [*modified* in 89 Hun 399, 35 N. Y. Suppl. 509]; Farmers' L. & T. Co. *v.* Kansas Farmers' L. & T. Co., 1 N. Y. Suppl. 44, 21 Abb. N. Cas. 104.

Ohio.— Thayer Carpet Cleaning, etc., Co. *v.* George A. Thayer Co., 9 Ohio S. & C. Pl. Dec. 288, 6 Ohio N. P. 300.

name.[86] The same rule applies to corporate names as applies to the names of natural persons. The name may be used, but only if used honestly.[87] A name selected and adopted for the purpose of deception and calculated to produce it will be enjoined.[88] Corporate names will be protected from imitation constitut-

Pennsylvania.— See New York Belting, etc., Co. *v.* Goodyear Rubber Hose, etc., Co., 7 Pa. Dist. 76, 20 Pa. Co. Ct. 493.

Rhode Island.— Aiello *v.* Montecalfo, 21 R. I. 496, 44 Atl. 931; Armington *v.* Palmer, 21 R. I. 109, 42 Atl. 308, 79 Am. St. Rep. 786, 43 L. R. A. 95.

United States.—Bates Numbering Mach. Co. *v.* Bates Mfg. Co., 178 Fed. 681, 102 C. C. A. 181 [*modifying* 172 Fed. 892]; David E. Foutz Co. *v.* S. A. Foutz Stock Food Co., 163 Fed. 408; Buzby *v.* Davis, 150 Fed. 275, 80 C. C. A. 163; Philadelphia Trust, etc., Co. *v.* Philadelphia Trust Co., 123 Fed. 534; Wyckoff *v.* Howe Scale Co., 122 Fed. 348, 58 C. C. A. 510 [*reversing* 110 Fed. 520, and *reversed* in 198 U. S. 118, 25 S. Ct. 609, 49 L. ed. 972]; Bissell Chilled Plow Works *v.* T. M. Bissell Plow Co., 121 Fed. 357; Chickering *v.* Chickering, 120 Fed. 69, 56 C. C. A. 475; Wm. G. Rogers Co. *v.* International Silver Co., 118 Fed. 133, 55 C. C. A. 83; International Silver Co. *v.* Wm. G. Rogers Co., 113 Fed. 526; Peck *v.* Peck Bros. Co., 113 Fed. 291, 51 C. C. A. 251, 62 L. R. A. 81; International Silver Co. *v.* Simeon L. & George H. Rogers Co., 118 Fed. 955; Garrett *v.* Garrett, 78 Fed. 472, 24 C. C. A. 173; R. W. Rogers Co. *v.* Wm. Rogers Mfg. Co., 70 Fed. 1017, 17 C. C. A. 576; Clark Thread Co. *v.* Armitage, 67 Fed. 896, 74 Fed. 936, 21 C. C. A. 178; Rogers Mfg. Co. *v.* R. W. Rogers Co., 66 Fed. 56; Le Page Co. *v.* Russia Cement Co., 51 Fed. 941, 2 C. C. A. 555, 17 L. R. A. 354; Celluloid Mfg. Co. *v.* Read, 47 Fed. 712; Celluloid Mfg. Co. *v.* Cellonite Mfg. Co., 32 Fed. 94; Wm. Rogers Mfg. Co. *v.* Rogers, etc., Mfg. Co., 11 Fed. 495; Newby *v.* Oregon Cent. R. Co., 18 Fed. Cas. No. 10,144, Deady 609; U. S. *v.* Roche, 27 Fed. Cas. No. 16,180, 1 McCrary 385. But see Continental Ins. Co. *v.* Continental Fire Assoc., 101 Fed. 255, 41 C. C. A. 326; Investor Pub. Co. *v.* Dobinson, 82 Fed. 56, 72 Fed. 603.

England.— North Cheshire, etc., Brewery Co. *v.* Manchester Brewery Co., [1899] A. C. 83, 68 L. J. Ch. 74, 79 L. T. Rep. N. S. 645, 15 T. L. R. 110; Panhard et Levassor *v.* Panhard Levassor Motor Co., [1901] 2 Ch. 513, 70 L. J. Ch. 738, 85 L. T. Rep. N. S. 20, 17 T. L. R. 680, 50 Wkly. Rep. 74; Manchester Brewery Co. *v.* North Cheshire, etc., Brewery Co., [1898] 1 Ch. 539, 67 L. J. Ch. 351, 78 L. T. Rep. N. S. 537, 14 T. L. R. 350, 46 Wkly. Rep. 515; Tussaud *v.* Tussaud, 44 Ch. D. 678, 59 L. J. Ch. 631, 62 L. T. Rep. N. S. 633, 2 Meg. 120, 38 Wkly. Rep. 503; Massam *v.* Thorley's Cattle Food Co., 14 Ch. D. 748, 42 L. T. Rep. N. S. 851, 28 Wkly. Rep. 966 [*reversing* 6 Ch. D. 574, 46 L. J. Ch. 707, 36 L. T. Rep. N. S. 848]; London Merchant Banking Co. *v.* Merchant's Joint Stock Bank, 9 Ch. D. 560, 47 L. J. Ch. 828, 26 Wkly. Rep. 847; National Folding Box, etc., Co. *v.* National Folding Box Co., 13 Reports 60, 43 Wkly. Rep. 156. But see Saunders *v.* Sun L. Assur. Co., [1894] 1 Ch. 537, 63 L. J. Ch. 247, 69 L. T. Rep. N. S. 755, 8 Reports 125, 42 Wkly. Rep. 315.

Canada.— Boston Rubber Shoe Co. *v.* Boston Rubber Co., 32 Can. Sup. Ct. 315. But see Boston Rubber Shoe Co. *v.* Boston Rubber Co., 7 Can. Exch. 187.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 70.

A corporation may acquire a right to the exclusive use of a name other than its corporate name as a trade-name, but not as a corporate name. Boston Rubber Shoe Co. *v.* Boston Rubber Co., 149 Mass. 436, 21 N. E. 875.

86. *California.*— Hainque *v.* Cyclops Iron Works, 136 Cal. 351, 68 Pac. 1014.

New York.— Chas. S. Higgins Co. *v.* Higgins Soap Co., 144 N. Y. 462, 39 N. E. 490, 43 Am. St. Rep. 769, 27 L. R. A. 42 [*reversing* 71 Hun 101, 24 N. Y. Suppl. 801].

Washington.— Eastern Outfitting Co. *v.* Manheim, 59 Wash. 428, 110 Pac. 23.

United States.— Elgin Nat. Watch Co. *v.* Loveland, 132 Fed. 41.

England.— Hendriks *v.* Montague, 17 Ch. D. 638, 50 L. J. Ch. 456, 44 L. T. Rep. N. S. 879, 30 Wkly. Rep. 168.

87. *California.*— Hainque *v.* Cyclops Iron Works, 136 Cal. 351, 68 Pac. 1014.

Illinois.— Elgin Butter Co. *v.* Elgin Creamery Co., 155 Ill. 127, 40 N. E. 616 [*affirming* 51 Ill. App. 231]; Imperial Mfg. Co. *v.* Schwartz, 105 Ill. App. 525.

Minnesota.— Sheffield-King Milling Co. *v.* Sheffield Mill, etc., Co., 105 Minn. 315, 117 N. W. 447, 127 Am. St. Rep. 574; Nesne *v.* Sundet, 93 Minn. 299, 101 N. W. 490, 106 Am. St. Rep. 439.

New Jersey.— Standard Table Oil Cloth Co. *v.* Trenton Oil Cloth, etc., Co., 71 N. J. Eq. 555, 63 Atl. 846 (holding that a corporation may stamp its initials upon its goods, although same initials were part of another's trade-mark); International Silver Co. *v.* Wm. H. Rogers Corp., 66 N. J. Eq. 119, 57 Atl. 1037; Medlar, etc., Shoe Co. *v.* Delsarte Mfg. Co., (Ch. 1900) 46 Atl. 1089 [*affirmed* in 68 N. J. Eq. 706, 61 Atl. 410].

New York.— Roy Watch-Case Co. *v.* Camm-Roy Watch Case Co., 28 Misc. 45, 58 N. Y. Suppl. 979.

Rhode Island.— Armington *v.* Palmer, 21 R. I. 109, 42 Atl. 308, 79 Am. St. Rep. 786, 43 L. R. A. 95.

Washington.—Eastern Outfitting Co. *v.* Manheim, 59 Wash. 428, 110 Pac. 23.

United States.— Celluloid Mfg. Co. *v.* Cellonite Mfg. Co., 32 Fed. 94.

England.— Merchant Banking Co. *v.* Merchant's Joint Stock Bank, 9 Ch. D. 560, 47 L. J. Ch. 828, 26 Wkly. Rep. 847.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 70.

88. Sheffield-King Milling Co. *v.* Sheffield

ing unfair competition.[89] Injunction will be refused where no likelihood of deception by reason of the name is shown.[90] Priority in adoption and user confers the superior right.[91] A deceptive corporate name should be enjoined only for so long as the corporation deals in competitive goods.[92] Injunction may be granted at the suit of a domestic corporation to restrain the use of a similar corporate name by another domestic corporation,[93] or the use of a similar name within the state by a foreign corporation, although the latter has been licensed

Mill, etc., Co., 105 Minn. 315, 117 N. W. 447, 127 Am. St. Rep. 574; Eureka Fire Hose Co. *v.* Eureka Rubber Mfg. Co., 71 N. J. Eq. 300, 71 Atl. 1134 [*affirming* 69 N. J. Eq. 159, 60 Atl. 561]; International Silver Co. *v.* William H. Rogers Corp., 67 N. J. Eq. 646, 60 Atl. 187, 110 Am. St. Rep. 506 [*reversing* 66 N. J. Eq. 140, 57 Atl. 725].

89. *Connecticut.*— Holmes *v.* Holmes, etc., Co., 37 Conn. 278, 9 Am. Rep. 324.

Illinois.—Koebel *v.* Chicago Landlords' Protective Bureau, 210 Ill. 176, 71 N. E. 362, 102 Am. St. Rep. 154 [*affirming* 112 Ill. App. 21].

Michigan.— Gordon Hollow Blast Grate Co. *v.* Gordon, 142 Mich. 488, 105 N. W. 1118.

New Jersey.— Glucose Sugar Refining Co. *v.* American Glucose Sugar Refining Co., (Ch. 1899) 56 Atl. 861.

New York.— International Soc. *v.* International Soc., 59 N. Y. Suppl. 785; Farmers' L. & T. Co. *v.* Farmers' L. & T. Co., 1 N. Y. Suppl. 44, 21 Abb. N. Cas. 104.

Wisconsin.— High Ct. of Wisconsin I. O. F. *v.* State Ins. Com'r, 98 Wis. 94, 73 N. W. 326.

United States.— Buzby *v.* Davis, 150 Fed. 275, 80 C. C. A. 163; Corbin *v.* Taussig, 132 Fed. 662 [*reversed* on other grounds in 142 Fed. 660, 73 C. C. A. 656]; Newby *v.* Oregon Cent. R. Co., 18 Fed. Cas. No. 10,144, Deady 609. *Compare* Liebig's Extract of Meat Co. *v.* Liebig Extract Co., 172 Fed. 158 [*reversed* on other grounds in 180 Fed. 688, 103 C. C. A. 654].

England.— North Cheshire, etc., Brewery Co. *v.* Manchester Brewery Co., [1899] A. C. 83, 68 L. J. Ch. 74, 79 L. T. Rep. N. S. 645, 15 T. L. R. 110; Tussaud *v.* Tussaud, 44 Ch. D. 678, 59 L. J. Ch. 631, 62 L. T. Rep. N. S. 633, 2 Meg. 120, 38 Wkly. Rep. 503; Hendricks *v.* Montagu, 17 Ch. D. 638, 50 L. J. Ch. 456, 44 L. T. Rep. N. S. 879, 30 Wkly. Rep. 168; London, etc., Law Assur. Soc. *v.* London, etc., Joint-Stock Ins. Co., 11 Jur. 938; Accident Ins. Co. *v.* Accident, etc., Ins. Corp., 54 L. J. Ch. 104, 51 L. T. Rep. N. S. 597; Guardian F., etc., Assur. Co. *v.* Guardian, etc., Ins. Co., 50 L. J. Ch. 253, 43 L. T. Rep. N. S. 791; General Reversionary Inv. Co. *v.* General Reversionary Co., 1 Meg. 65; National Folding Box, etc., Co. *v.* National Folding Box Co., 13 Reports 60, 43 Wkly. Rep. 156.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 70.

Patriotic societies.— "The rules governing the right to trade-marks and trade-names should not be applied with strictness to actions for infringement upon the right to an exclusive name between societies formed for patriotic and unselfish ends." Colonial Dames of America *v.* Colonial Dames of New York, 29 Misc. (N. Y.) 10, 60 N. Y. Suppl. 302 [*affirmed* in 63 N. Y. App. Div. 615, 71 N. Y. Suppl. 1134 (*affirmed* in 173 N. Y. 586, 65 N. E. 1115)]. See also Society of War of 1812 *v.* Society of War of 1812, 46 N. Y. App. Div. 568, 62 N. Y. Suppl. 355.

90. Hygeia Water Ice Co. *v.* New York Hygeia Ice Co., 140 N. Y. 94, 35 N. E. 417; General Reversionary Inv. Co. *v.* General Reversionary Co., 1 Meg. 65. See also *supra*, V, B, 4.

91. S. Howes Co. *v.* Howes Grain-Cleaner Co., 46 N. Y. Suppl. 165; High Ct. of Wisconsin I. O. F. *v.* State Ins. Com'r, 98 Wis. 94, 73 N. W. 326.

92. Eureka Fire Hose Co. *v.* Eureka Rubber Mfg. Co., 69 N. J. Eq. 159, 60 Atl. 561. See also Elgin Nat. Watch Co. *v.* Loveland, 132 Fed. 41.

93. International Committee Y. W. C. A. *v.* Chicago Y. W. C. A., 194 Ill. 194, 62 N. E. 551, 56 L. R. A. 888; Hygeia Water Ice Co. *v.* New York Hygeia Ice Co., 140 N. Y. 94, 35 N. E. 417; Society of War of 1812 *v.* Society of War of 1812, 46 N. Y. App. Div. 568, 62 N. Y. Suppl. 355; Legal Aid Soc. *v.* Co-operative Legal Aid Soc., 41 Misc. (N. Y.) 127, 83 N. Y. Suppl. 926; Roy Watch-Case Co. *v.* Camm-Roy Watch-Case Co., 28 Misc. (N. Y.) 45, 58 N. Y. Suppl. 979; People *v.* O'Brien, 91 N. Y. Suppl. 649 (holding that certiorari would not lie to review the action of the secretary of state, because there was a remedy in equity by injunction); International Soc. *v.* International Soc., 59 N. Y. Suppl. 785; Ft. Pitt Bldg., etc., Assoc. *v.* Model Plan Bldg., etc., Assoc., 159 Pa. St. 308, 28 Atl. 215; Armington *v.* Palmer, 21 R. I. 109, 42 Atl. 308, 79 Am. St. Rep. 786, 43 L. R. A. 95. But see Eastern Outfitting Co. *v.* Manheim, 59 Wash. 428, 110 Pac. 23.

A private suit, and not a quo warranto proceeding, is the proper remedy for unfair competition, by means of confusing corporate names. Boston Rubber Shoe Co. *v.* Boston Rubber Co., 149 Mass. 436, 21 N. E. 875.

Injunction will not lie to restrain the incorporation of a company under a name similar to that of the complainant, as under the state statutes the name to be permitted is discretionary with the proper state officers. American O. S. C. *v.* Merrill, 151 Mass. 558, 24 N. E. 918, 8 L. R. A. 320; Elgin Nat. Watch Co. *v.* Loveland, 132 Fed. 41. *Contra*, Hendriks *v.* Montagu, 17 Ch. D. 638, 50 L. J. Ch. 456, 44 L. T. Rep. N. S. 879, 30 Wkly. Rep. 168. See, generally CORPORATIONS, 10

to do business within the state.[94] A foreign corporation cannot restrain a domestic corporation from using a corporate name similar to its own, unless that name has become a trade-mark or a trade-name.[95] This is particularly true where the domestic corporation was first formed.[96] A corporation may be enjoined from using the name of an unincorporated society or association.[97] Corporate names made up solely of generic and descriptive terms cannot be exclusively appropriated.[98] Corporation statutes usually prohibit the assumption of a name likely to be confused with the name of an existing corporation.[99]

6. Name in Which Business Is Conducted. The name in which a business is conducted will be protected against use or imitation by another to the damage of the first user.[1] Conducting business under confusing and deceptive names constitutes

Cyc. 153, for circumstances under which injunctive relief will not be granted.

94. American Clay Mfg. Co. *v.* American Clay Mfg. Co., 198 Pa. St. 189, 47 Atl. 936.

95. Hazelton Boiler Co. *v.* Hazelton Tripod Boiler Co., 142 Ill. 494, 30 N. E. 339 [*affirming* 40 Ill. App. 430]; Boston Rubber Shoe Co. *v.* Montreal Boston Rubber Shoe Co., 32 Can. Sup. Ct. 315. See also People *v.* Home L. Assur. Co., 111 Mich. 405, 69 N. W. 653. *Contra,* Atlas Assur. Co. *v.* Atlas Ins. Co., 138 Iowa 228, 112 N. W. 232, 114 N. W. 609, 128 Am. St. Rep. 189, 15 L. R. A. N. S. 625; National Folding Box, etc., Co. *v.* National Folding Box Co., 13 Reports 60, 43 Wkly. Rep. 156.

Principle discussed.— "The complainant is in the attitude of a foreign corporation coming into this state, and seeking to contest the right to the use of a corporate name which this state, in furtherance of its own public policy and in the exercise of its own sovereignty, has seen fit to bestow upon one of its own corporations. For such a purpose a foreign corporation, ordinarily, at least, can have no standing in our courts. Such corporations do not come into this state as a matter of legal right, but only by comity, and they can not be permitted to come for the purpose of asserting rights in contravention of our laws or public policy. It is competent for this state, whenever it sees fit to do so, to debar any or all foreign corporations from doing business here; and whatever it may do by way of chartering corporations of its own can not be called in question by corporations which are here only by a species of legal sufferance. We would not be understood, however, as holding that cases may not arise where the name of a foreign corporation has so far become its trade-mark or trade-name as to entitle it to protection in our courts against infringement caused by the chartering of a domestic corporation by the same name. We only wish to hold that the present case is not of that character." Hazelton Boiler Co. *v.* Hazelton Tripod Boiler Co., 140 Ill. 494, 30 N. E. 339, 343.

96. Hazelton Boiler Co. *v.* Hazelton Tripod Boiler Co., 142 Ill. 494, 30 N. E. 339 [*affirming* 40 Ill. App. 430]; Lawrence *v.* Times Pub. Co., 90 Fed. 24.

97. Aiello *v.* Montecalfo, 21 R. I. 496, 44 Atl. 931.

98. Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 72 Conn. 646, 45 Atl. 957, 49 L. R. A. 147; Howe Scale Co. *v.* Wyckoff, 198 U. S. 118, 25 S. Ct. 609, 49 L. ed. 972; American Wine Co. *v.* Kohlman, 158 Fed. 830, geographical name. See also *supra,* V, A, 4.

99. Glucose Sugar Refining Co. *v.* American Sugar Refining Co., (N. J. Ch. 1899) 56 Atl. 861; Society of War of 1812 *v.* Society of War of 1812, 46 N. Y. App. Div. 569, 62 N. Y. Suppl. 355; Aiello *v.* Montecalfo, 21 R. I. 496, 44 Atl. 931; Armington *v.* Palmer, 21 R. I. 109, 42 Atl. 308, 79 Am. St. Rep. 786, 43 L. R. A. 95. See Corporations, 10 Cyc. 150.

In refusing leave to change a corporate name, under statutes providing for such changes, the danger of the new name causing confusion or deception may be considered as affecting the discretion of the state officers. Chas. S. Higgins Co. *v.* Higgins Soap Co., 144 N. Y. 462, 39 N. E. 490, 43 Am. St. Rep. 769, 27 L. R. A. 42 [*reversing* 71 Hun 101, 24 N. Y. Suppl. 801]; *In re* U. S. Mercantile Reporting, etc., Agency, 115 N. Y. 176, 21 N. E. 1034 [*affirming* 4 N. Y. Suppl. 916].

1. *California.*— Hainque *v.* Cyclops Iron Works, 136 Cal. 351, 68 Pac. 1014; Nolan Bros. Shoe Co. *v.* Nolan, 131 Cal. 271, 63 Pac. 480, 82 Am. St. Rep. 346, 53 L. R. A. 384; Weinstock *v.* Marks, 109 Cal. 529, 42 Pac. 142, 50 Am. St. Rep. 57, 30 L. R. A. 182; Woodward *v.* Lazar, 21 Cal. 448, 82 Am. Dec. 751.

Georgia.— See Southern Medical College *v.* Thompson, 92 Ga. 564, 18 S. E. 430.

Illinois.— People *v.* Rosè, 219 Ill. 46, 76 N. E. 42; International Committee Y. W. C. A. *v.* Chicago Y. W. C. A., 194 Ill. 194, 62 N. E. 551, 56 L. R. A. 888; Nokes *v.* Mueller, 72 Ill. App. 431; Mossler *v.* Jacobs, 66 Ill. App. 571.

Indiana.— Computing Cheese Cutter Co. *v.* Dunn, (App. 1909) 88 N. E. 93.

Iowa.— Dyment *v.* Lewis, 144 Iowa 509, 123 N. W. 244, 26 L. R. A. N. S. 73; Atlas Assur. Co. *v.* Atlas Ins. Co., 138 Iowa 228, 112 N. W. 232, 114 N. W. 609, 128 Am. St. Rep. 189, 15 L. R. A. N. S. 625.

Kentucky.— Dewitt *v.* Mathey, 35 S. W. 1113, 18 Ky. L. Rep. 257. *Compare* Armstrong *v.* Kleinhans, 82 Ky. 303, 56 Am. Rep. 894.

Maryland.— Bagby, etc., Co. *v.* Rivers, 87 Md. 400, 40 Atl. 171, 67 Am. St. Rep. 357, 40 L. R. A. 632.

Massachusetts.— Viano *v.* Baccigalupo, 183

unfair competition. This rule has been applied to the protection of the name of an

Mass. 160, 67 N. E. 641; Samuels *v.* Spitzer, 177 Mass. 226, 58 N. E. 693, "Manufacturer's Outlet Co." infringed by "Taunton Outlet Co." *Compare* Giragosian *v.* Chutjian, 194 Mass. 504, 80 N. E. 647.

Michigan.— Finney's Orchestra *v.* Finney's Famous Orchestra, 161 Mich. 289, 126 N. W. 198, 28 L. R. A. N. S. 458, "Finney's Famous Orchestra."

Minnesota.— Nesne *v.* Sundet, 93 Minn. 299, 101 N. W. 490, 106 Am. St. Rep. 439; Rickard *v.* Caton College Co., 88 Minn. 242, 92 N. W. 958.

Missouri.— Sanders *v.* Jacob, 20 Mo. App. 96.

Nebraska.— Regent Shoe Mfg. Co. *v.* Haaker, 75 Nebr. 426, 106 N. W. 595, 4 L. R. A. N. S. 447; Miskell *v.* Prokop, 58 Nebr. 628, 79 N. W. 552.

New York.— Ball *v.* Broadway Bazaar, 194 N. Y. 429, 87 N. E. 674 [*reversing* 121 N. Y. App. Div. 546, 106 N. Y. Suppl. 249]; Chas. S. Higgins Co. *v.* Higgins Soap Co., 144 N. Y. 462, 39 N. E. 490, 43 Am. St. Rep. 769, 27 L. R. A. 42 [*reversing* 71 Hun 101, 24 N. Y. Suppl. 801]; Glen, etc., Mfg. Co. *v.* Hall, 61 N. Y. 226, 19 Am. Rep. 278; Burrow *v.* Marceau, 124 N. Y. App. Div. 665, 109 N. Y. Suppl. 105; Fay *v.* Lambourne, 124 N. Y. App. Div. 245, 108 N. Y. Suppl. 874 [*affirmed* in 196 N. Y. 575, 90 N. E. 1158]; Pettes *v.* American Watchman's Clock Co., 89 N. Y. App. Div. 345, 85 N. Y. Suppl. 900; Cohn *v.* Reynolds, 40 N. Y. App. Div. 619, 58 N. Y. Suppl. 1138 [*affirming* 26 Misc. 473, 57 N. Y. Suppl. 469]; Church *v.* Kresner, 26 N. Y. App. Div. 349, 49 N. Y. Suppl. 742; Howard *v.* Henriques, 3 Sandf. 725; American Novelty, etc., Co. *v.* Manufacturing Electrical Novelty Co., 36 Misc. 450, 73 N. Y. Suppl. 755; Arnheim *v.* Arnheim, 28 Misc. 399, 59 N. Y. Suppl. 948; Schmid *v.* De Grauw, 27 Misc. 693, 59 N. Y. Suppl. 569; Brown *v.* Braunstein, 83 N. Y. Suppl. 1096; International Soc. *v.* International Soc., 59 N. Y. Suppl. 785; De Youngs *v.* Jung, 25 N. Y. Suppl. 479 [*affirmed* in 7 Misc. 56, 27 N. Y. Suppl. 370]; Kingsley *v.* Jacoby, 20 N. Y. Suppl. 46, 28 Abb. N. Cas. 451; New York Cab Co. *v.* Mooney, 15 Abb. N. Cas. 152; Peterson *v.* Humphrey, 4 Abb. Pr. 394; Hazard *v.* Caswell, 57 How. Pr. 1; McCardel *v.* Peck, 28 How. Pr. 120; Christy *v.* Murphy, 12 How. Pr. 77, "Christy's Minstrels."

Ohio.— Brass, etc., Works Co. *v.* Payne, 50 Ohio St. 115, 33 N. E. 88, 19 L. R. A. 82; Lippman *v.* Martin, 8 Ohio S. & C. Pl. Dec. 485, 5 Ohio N. P. 120; Christy *v.* Groves, 2 Ohio S. & C. Pl. Dec. 384, 3 Ohio N. P. 293.

Pennsylvania.— Shoemaker *v.* Ulmer, 15 Pa. Dist. 159; Goodwin *v.* Hamilton, 6 Pa. Dist. 705, 19 Pa. Co. Ct. 652; Colton *v.* Thomas, 2 Brewst. 308, 7 Phila. 257; Sapp *v.* New York Dental Parlors, 4 Lack. Leg. N. 114; Winsor *v.* Clyde, 9 Phila. 513. But see New York Belting, etc., Co. *v.* Goodyear Rubber Hose, etc., Co., 7 Pa. Dist. 76, 20 Pa. Co. Ct. 493.

Rhode Island.— Cady *v.* Schultz, 19 R. I. 193, 32 Atl. 915, 61 Am. St. Rep. 763, 29 L. R. A. 524.

Texas.— Scanlan *v.* Williams, (Civ. App. 1908) 114 S. W. 862.

Washington.— Eastern Outfitting Co. *v.* Manheim, 59 Wash. 428, 110 Pac. 23.

United States.— Ball *v.* Best, 135 Fed. 434; Block *v.* Standard Distilling, etc., Co., 95 Fed. 978.

England.— Montreal Lith. Co. *v.* Sabiston, [1899] A. C. 610, 68 L. J. P. C. 121, 81 L. T. Rep. N. S. 135; North Cheshire, etc., Brewery Co. *v.* Manchester Brewery Co., [1899] A. C. 83, 68 L. J. Ch. 74, 79 L. T. Rep. N. S. 645, 15 T. L. R. 110; Hookham *v.* Portage, L. R. 8 Ch. 91, 27 L. T. Rep. N. S. 595, 21 Wkly. Rep. 47; Lee *v.* Haley, L. R. 5 Ch. 155, 39 L. J. Ch. 284, 22 L. T. Rep. N. S. 258, 18 Wkly. Rep. 242 ("The Guinea Coal Company" infringed by "The Pall Mall Guinea Coal Company"); Aerators *v.* Tollitt, [1902] 2 Ch. 319, 71 L. J. Ch. 727, 86 L. T. Rep. N. S. 651, 18 T. L. R. 637, 10 Manson 95, 50 Wkly. Rep. 584; Manchester Brewery Co. *v.* North Cheshire, etc., Brewery Co., [1898] 1 Ch. 539, 67 L. J. Ch. 351, 78 L. T. Rep. N. S. 537, 14 T. L. R. 350, 46 Wkly. Rep. 515; Saunders *v.* Sun L. Assur. Co. of Canada, [1894] 1 Ch. 537, 63 L. J. Ch. 247, 69 L. T. Rep. N. S. 755, 8 Reports 125, 42 Wkly. Rep. 315; Tussaud *v.* Tussaud, 44 Ch. D. 678, 59 L. J. Ch. 631, 62 L. T. Rep. N. S. 633, 2 Meg. 120, 38 Wkly. Rep. 503; Boulnois *v.* Peake, 13 Ch. D. 513 note; Croft *v.* Day, 7 Beav. 84, 29 Eng. Ch. 84, 49 Eng. Reprint 994; Burgess *v.* Burgess, 3 De G. M. & G. 896, 17 Jur. 292, 22 L. J. Ch. 675, 52 Eng. Ch. 696, 43 Eng. Reprint 351; Glenny *v.* Smith, 2 Dr. & Sm. 476, 11 Jur. N. S. 964, 13 L. T. Rep. N. S. 11, 6 New Rep. 363, 13 Wkly. Rep. 1032, 62 Eng. Reprint 701; Churton *v.* Douglas, Johns. 174, 28 L. J. Ch. 841, 7 Wkly. Rep. 365, 70 Eng. Reprint 385; Knott *v.* Morgan, 2 Keen 213, 15 Eng. Ch. 213, 48 Eng. Reprint 610; Guardian F., etc., Assur. Co. *v.* Guardian, etc., Ins. Co., 50 L. J. Ch. 253, 43 L. T. Rep. N. S. 791; Hudson *v.* Osborne, 39 L. J. Ch. 79, 21 L. T. Rep. N. S. 386; Dence *v.* Mason, [1877] W. N. 23; Hoby *v.* Grosvenor Library Co., 28 Wkly. Rep. 386. See Williams *v.* Osborne, 13 L. T. Rep. N. S. 498.

Canada.— Montreal Lith. Co. *v.* Sabiston, 3 Rev. de Jur. 403; Robinson *v.* Bogle, 18 Ont. 387; Walker *v.* Alley, 13 Grant Ch. (U. C.) 366; Laing Packing, etc., Co. *v.* Laing, 25 Quebec Super. Ct. 344.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 68.

But see Fite *v.* Dorman, (Tenn. 1900) 57 S. W. 129.

The protection of personal and corporate names affords additional illustrations of this rule. See *supra*, V, C, 4, 5.

Ground for relief.— Plaintiff in cases relating to trade-names has not any property in the particular title, but he has a right to prevent others from personating his business by using such a description as would lead cus-

established hotel or boarding-house,[2] theater or opera house,[3] a school,[4] a bank,[5] a lodge,[6] religious organizations,[7] and a library.[8] An exclusive right may be acquired in the name in which a business is conducted which will be protected by injunction against infringement.[9] But this is of course subject to the ordinary

tomers to suppose they were trading with plaintiff. Lee *v.* Haley, L. R. 5 Ch. 155, 39 L. J. Ch. 284, 22 L. T. Rep. N. S. 251, 18 Wkly. Rep. 242; Boulnois *v.* Peake, 13 Ch. D. 513 note. The trade-name of an established enterprise is regarded as of importance, and the right to its exclusive use generally recognized. It is not in the nature of a trade-mark, and of necessity is closely connected with the good-will. It is the designation by which the company is known and addressed by its patrons. Millspaugh Laundry *v.* Sioux City First Nat. Bank, 120 Iowa 1, 94 N. W. 262, 263.

The doctrine de minimis non curat lex does not apply in cases of infringements on trade-names. Shoemaker *v.* Ulmer, 15 Pa. Dist. 159.

Use of a confusing name in the telephone directory so as to divert business is unfair competition, and may be enjoined. Scanlan *v.* Williams, (Tex. Civ. App. 1908) 114 S. W. 862.

User with knowledge that another intends to use the name, but in advance of actual user, may not be enjoined. Civil Service Supply Assoc. *v.* Dean, 13 Ch. D. 512.

2. O'Grady *v.* McDonald, 72 N. J. Eq. 805, 66 Atl. 175; Wilcoxen *v.* McCray, 38 N. J. Eq. 466; Howard *v.* Henriques, 3 Sandf. (N. Y.) 725; Martell *v.* St. Francis Hotel Co., 51 Wash. 375, 98 Pac. 1116, right limited to locality.

That defendant's hotel is larger and more expensive, and caters more to transient trade, while that of plaintiffs, although taking transients, is more of a family hotel, is no defense. Martell *v.* St. Francis Hotel Co., 51 Wash. 375, 98 Pac. 1116.

Combination of "Inn" with place name.— A hotel proprietor may acquire a right to the exclusive use of the name of a place in conjunction with the word "Inn" for the name of his hotel. Busch *v.* Gross, 71 N. J. Eq. 508, 64 Atl. 754.

The name of a hotel is not necessarily connected with the particular premises where it is first established and conducted, but the owner may remove his hotel business and apply the old name to the new buildings in the same locality, even as against subsequent tenants of the original premises. Woodward *v.* Lazar, 21 Cal. 448, 82 Am. Dec. 751 [*distinguished* in Armstrong *v.* Kleinhaus, 82 Ky. 303, 56 Am. Rep. 894]; Busch *v.* Gross, 71 N. J. Eq. 508, 64 Atl. 754, "Metuchen Inn." In Hudson *v.* Osborne, 39 L. J. Ch. 79, 21 L. T. Rep. N. S. 386, defendant, proprietor of the "Osborne House" in Ludgate Hill, London, became insolvent and his business was sold to plaintiff. Defendant subsequently opened a new place but a few doors distant from his former one, calling it "Osborne House." An injunction was granted. Generally as to local names see *infra,* VII, A, 4.

Right of lessee.—"Defendant leased the hotel for one year furnished and ready for occupancy. Her lease described the property as 'The Hotel Dominion.' If during the year of her tenancy the reputation of the hotel was improved by reason of her labors, that fact cannot properly be held to entitle her to the use of the name for an opposition hotel at the end of her term. Had the name been one of her own adoption, as in Wilcoxen *v.* McCray, 38 N. J. Eq. 466, and not one which she only became entitled to use because she was a tenant of the property of complainant, an altogether different condition might exist." O'Grady *v.* McDonald, 72 N. J. Eq. 805, 806, 66 Atl. 175.

3. Chadron Opera House Co. *v.* Loomer, 71 Nebr. 785, 99 N. W. 649.

4. Rickard *v.* Caton College Co., 88 Minn. 242, 92 N. W. 958. See also Bingham School *v.* Gray, 122 N. C. 699, 30 S. E. 304, 41 L. R. A. 243. But see Robinson *v.* Bogle, 18 Ont. 387, wherein "Belleville Business College" was refused protection on various grounds.

5. Tomah Bank *v.* Warren, 94 Wis. 151, 68 N. W. 549.

6. Creswill *v.* Grand Lodge K. P. of Georgia, 133 Ga. 837, 67 S. E. 188, 134 Am. St. Rep. 231. But see Freundschaft Lodge, No. 72 D. O. H. *v.* Achlenburger, 235 Ill. 438, 85 N. E. 653 [*affirming* 138 Ill. App. 204].

7. Salvation Army in United States *v.* American Salvation Army, 62 Misc. (N. Y.) 360, 114 N. Y. Suppl. 1039 [*reversed* in 135 N. Y. App. Div. 268, 120 N. Y. Suppl. 471] wherein it was said that equity will be reluctant, except in a clear case, to restrain a religious organization, although its name and methods bear some slight resemblance to another religious body.

8. Hoby *v.* Grosvenor Library Co., 23 Wkly. Rep. 386.

9. *California.*— Hainque *v.* Cyclops Iron Works, 136 Cal. 351, 68 Pac. 1014; Weinstock *v.* Marks, 109 Cal. 529, 42 Pac. 142, 50 Am. St. Rep. 57, 30 L. R. A. 182, "Mechanic's Store."

Nebraska.— Miskell *v.* Prokop, 58 Nebr. 628, 79 N. W. 552.

New Jersey.— Busch *v.* Gross, 71 N. J. Eq. 508, 64 Atl. 754.

New York.— Chas. S. Higgins *v.* Higgins Soap Co., 144 N. Y. 462, 39 N. E. 490, 43 Am. St. Rep. 769, 27 L. R. A. 42; Church *v.* Kresner, 26 N. Y. App. Div. 349, 49 N. Y. Suppl. 742; Andrew Jurgens Co. *v.* Woodbury, 56 Misc. 404, 106 N. Y. Suppl. 571; Cohn *v.* Reynolds, 26 Misc. 473, 57 N. Y. Suppl. 469 [*affirmed* in 40 N. Y. App. Div. 619, 58 N. Y. Suppl. 1138], "The Brooklyn Valet."

rules as to what may be exclusively appropriated for trade purposes.[10] A geographical name,[11] or a name merely descriptive of the business carried on,[12] cannot be exclusively appropriated as against others who can and do use the name with equal truth. The right to a trade-name in which a business is conducted is usually of only local extent, and the name will be protected against use by others only in the locality where the business is conducted and the name is known.[13] The right is coextensive with, and limited to, plaintiff's market.[14] The use of the same

Texas.— Duke *v.* Cleaver, 19 Tex. Civ. App. 218, 46 S. W. 1128, 1130, "Nickle Store."

United States.—Corbin *v.* Taussig, 132 Fed. 662 [*reversed* on other grounds in 142 Fed. 660].

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," §§ 17, 68.

10. See *supra*, III; V, A, 4.

11. Nebraska L. & T. Co. *v.* Nine, 27 Nebr. 507, 43 N. W. 348, 20 Am. St. Rep. 686 ("Nebraska" used in name of trust company); Robinson *v.* Bogle, 18 Ont. 387 ("Belleville Business College" refused protection, and held not to have acquired a secondary meaning, distinguishing upon this ground Thompson *v.* Montgomery, 41 Ch. D. 35, 58 L. J. Ch. 374, 60 L. T. Rep. N. S. 766, 37 Wkly. Rep. 637, "Stone Ale").

12. *California.*— Eggers *v.* Hink, 63 Cal. 445, 49 Am. Rep. 96; Choynski *v.* Cohen, 39 Cal. 501, 2 Am. Rep. 476, "The Antiquarian Book Store."

Illinois.—Bolander *v.* Peterson, 136 Ill. 215, 26 N. E. 603, 11 L. R. A. 350 [*affirming* 35 Ill. App. 551], "Svenska Snusmagasinet," meaning "Swedish snuff store."

Kentucky.—Armstrong *v.* Kleinhans, 82 Ky. 303, 56 Am. Rep. 894.

Maine.— Ricker *v.* Portland, etc., R. Co., 90 Me. 395, 38 Atl. 338.

Michigan.— Gray *v.* Koch, 2 Mich. N. P. 119.

New Jersey.— Fay *v.* Fay, (Ch. 1886) 6 Atl. 12.

New York.— Ball *v.* Broadway Bazaar, 194 N. Y. 429, 87 N. E. 674 [*reversing* 121 N. Y. App. Div. 546, 106 N. Y. Suppl. 249] ("Lilliputian" is a descriptive word); Koehler *v.* Sanders, 122 N. Y. 65, 25 N. E. 235, 9 L. R. A. 576 ("International," as applied to a banking business); Car Advertising Co. *v.* New York City Car Advertising Co., 57 Misc. 105, 107 N. Y. Suppl. 547 [*affirmed* in 123 N. Y. App. Div. 926, 108 N. Y. Suppl. 1126]; ("Car Advertising Co.," as applied to an advertising business); U. S. Frame, etc., Co. *v.* Horowitz, 51 Misc. 101, 100 N. Y. Suppl. 705.

Rhode Island.— Cady *v.* Schultz, 19 R. I. 193, 32 Atl. 915, 61 Am. St. Rep. 763, 29 L. R. A. 524.

Texas.— Duke *v.* Cleaver, 19 Tex. Civ. App. 218, 46 S. W. 1128.

United States.— Goodyear's India Rubber Glove Mfg. Co. *v.* Goodyear Rubber Co., 128 U. S. 598, 9 S. Ct. 166, 32 L. ed. 535.

England.—Aerators *v.* Tollitt, [1902] 2 Ch. 319, 71 L. J. Ch. 727, 86 L. T. Rep. N. S. 651, 10 Manson 95, 18 T. L. R. 637, 50 Wkly. Rep. 584 [*distinguishing* North Cheshire, etc., Brewery Co. *v.* Manchester Brewery Co., [1899] A. C. 83, 68 L. J. Ch. 74, 79 L. T. Rep. N. S. 645, 15 T. L. R. 110]; Civil Service Supply Assoc. *v.* Dean, 13 Ch. D. 512; Colonial L. Ins. Co. *v.* Home, etc., Ins. Co., 33 Beav. 548, 10 Jur. N. S. 967, 33 L. J. Ch. 741, 10 L. T. Rep. N. S. 448, 4 New Rep. 129, 12 Wkly. Rep. 783, 55 Eng. Reprint 482 (the word "colonial" was refused protection as part of a trade-name, it being merely descriptive of the kind of business carried on); Charleston *v.* Campbell, 14 Sc. L. Rep. 104 (there is no exclusive right in the term "station" as part of a hotel name, it being a mere descriptive title).

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," §§ 4–7.

13. *Iowa.*— Sartor *v.* Schaden, 125 Iowa 696, 101 N. W. 511.

Massachusetts.— Viano *v.* Baccigalupo, 183 Mass. 160, 67 N. E. 641.

Nebraska.— Regent Shoe Mfg. Co. *v.* Haaker, 75 Nebr. 426, 106 N. W. 595, 4 L. R. A. N. S. 447; Miskell *v.* Prokop, 58 Nebr. 628, 79 N. W. 552.

New York.— Ball *v.* Broadway Bazaar, 121 N. Y. App. Div. 546, 106 N. Y. Suppl. 249 [*reversed* on the facts in 194 N. Y. 429, 87 N. E. 674]; Church *v.* Kresner, 26 N. Y. App. Div. 349, 49 N. Y. Suppl. 742; International Soc. *v.* International Soc., 59 N. Y. Suppl. 785; De Youngs *v.* Jung, 25 N. Y. Suppl. 479 [*affirmed* in 7 Misc. 56, 27 N. Y. Suppl. 370]; Farmers' L. & T. Co. *v.* Kansas Farmers' L. & T. Co., 1 N. Y. Suppl. 47.

North Carolina.— Bingham School *v.* Gray, 122 N. C. 699, 30 S. E. 304, 41 L. R. A. 243.

Ohio.— Lippman *v.* Martin, 8 Ohio S. & C. Pl. Dec. 485, 5 Ohio N. P. 120.

Washington.— Eastern Outfitting Co. *v.* Manheim, 59 Wash. 428, 110 Pac. 23; Martell *v.* St. Francis Hotel Co., 51 Wash. 375, 98 Pac. 1116.

England.— Lee *v.* Haley, L. R. 5 Ch. 155, 39 L. J. Ch. 284, 22 L. T. Rep. N. S. 251, 18 Wkly. Rep. 242; Hoby *v.* Grosvenor Library Co., 28 Wkly. Rep. 386, in or near the same city.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," §§ 17, 68.

Compare Ball *v.* Best, 135 Fed. 434.

A particular city cannot be cut off from the rest of the business world, and a trade-name built up confined to that particular city. Corbin *v.* Taussig, 132 Fed. 662 [*reversed* on other grounds in 142 Fed. 660, 73 C. C. A. 656].

14. Eastern Outfitting Co. *v.* Manheim, 59 Wash. 428, 110 Pac. 23.

or similar trade-name or business name in a different non-competitive class of business does not constitute unfair competition and will not be enjoined.[15] Priority in adoption and user of the name of a store or business confers a superior right to the name in the particular locality.[16]

7. Signs and Dress of Store. A distinctive name of a place of business will be protected as a trade-name against use or imitation by others.[17] Deceptive signs and names upon a place of business or a deceptive dress of a store will be enjoined.[18] The right to the exclusive use of a distinctive name or sign in a particular locality may be acquired.[19] But the use of signs of the ordinary and common size, shape, and color, such as are customarily used by tradesmen, cannot be enjoined, although used by a competitor.[20] Misleading names upon coaches,

New York and Chicago.— "There could be no confusion of identity between two tailoring establishments located in the cities of New York and Chicago." Arnheim *v.* Arnheim, 28 Misc. (N. Y.) 399, 400, 59 N. Y. Suppl. 948. But in Ball *v.* Best, 135 Fed. 434, a business name established in New York was held infringed by use in Chicago, reference being made to the fact that defendant also conducted a mail order business.

15. Nolan Bros. Shoe Co. *v.* Nolan, 131 Cal. 271, 63 Pac. 480, 82 Am. St. Rep. 346, 53 L. R. A. 384 (holding that wholesale and retail businesses are different and non-competitive within this rule); Ricker *v.* Portland, etc., R. Co., 90 Me. 395, 38 Atl. 338 (holding that the proprietor of the "Poland Springs" and of a hotel of the same name cannot enjoin a railway company from naming its station at that point "Poland Springs"). See also Eastern Outfitting Co. *v.* Manheim, 59 Wash. 428, 110 Pac. 23, holding that competition must exist before there can be any unfair competition. And see Eureka Fire Hose Co. *v.* Eureka Rubber Mfg. Co., 72 N. J. Eq. 555, 65 Atl. 870, holding that a use in connection with non-competitive goods may be enjoined as long as the concern continues to manufacture any competitive goods. But see Kinsley *v.* Jacoby, 20 N. Y. Suppl. 46, 28 Abb. N. Cas. 451, holding that the use of the name of plaintiff's hotel as a trade-mark for defendant's cigars may be enjoined.

16. Weinstock *v.* Marks, 109 Cal. 529, 42 Pac. 142, 50 Am. St. Rep. 57, 30 L. R. A. 182; Perlberg *v.* Rosenstone, (N. J. Ch. 1905) 62 Atl. 446; Eastern Outfitting Co. *v.* Manheim, 59 Wash. 428, 110 Pac. 23; Liebig's Extract of Meat Co. *v.* Liebig's Extract Co., 172 Fed. 158 [*reversed* on other grounds in 180 Fed. 688, 103 C. C. A. 654]; Corbin *v.* Taussig, 132 Fed. 662 [*reversed* on other grounds in 142 Fed. 660, 73 C. C. A. 656].

17. Weinstock *v.* Marks, 109 Cal. 529, 42 Pac. 142, 50 Am. St. Rep. 57, 30 L. R. A. 182 ("Mechanic's Store" infringed by "Mechanical Store"); Bolander *v.* Peterson, 136 Ill. 215, 26 N. E. 603, 11 L. R. A. 350 [*affirming* 35 Ill. App. 551]; Crawford *v.* Laus, 29 Misc. (N. Y.) 248, 60 N. Y. Suppl. 387 ("The Little Antique Shop" is an infringement of the name "The Little Shop," when applied to a similar business in the same locality); International Soc. *v.* International Soc., 59 N. Y. Suppl. 785; Cady *v.* Schultz, 19 R. I. 193, 32 Atl. 915, 61 Am. St. Rep. 763, 29 L. R. A. 524.

18. *California.*— Dodge Stationery Co. *v.* Dodge, 145 Cal. 380, 78 Pac. 879; Weinstock *v.* Marks, 109 Cal. 529, 42 Pac. 142, 50 Am. St. Rep. 57, 30 L. R. A. 182, "Mechanic's Store" is infringed by "Mechanical Store."

Massachusetts.— Holbrook *v.* Nesbitt, 163 Mass. 120, 39 N. E. 794.

Nebraska.—Miskell *v.* Prokop, 58 Nebr. 628, 79 N. W. 552.

New Jersey.— Busch *v.* Gross, 71 N. J. Eq. 508, 64 Atl. 754; Perlberg *v.* Smith, 70 N. J. Eq. 638, 62 Atl. 442.

New York.— Church *v.* Kresner, 26 N. Y. App. Div. 349, 49 N. Y. Suppl. 742; Crawford *v.* Laus, 29 Misc. 248, 60 N. Y. Suppl. 387; Arnheim *v.* Arnheim, 28 Misc. 399, 59 N. Y. Suppl. 948. See Ball *v.* Broadway Bazaar, 121 N. Y. App. Div. 546, 106 N. Y. Suppl. 249 [*reversed* on other grounds in 194 N. Y. 429, 87 N. E. 674].

Oregon.— In Lichtenstein *v.* Mellis, 8 Oreg. 464, 34 Am. Rep. 592, plaintiff, who had designated his place of business as "IXL General Merchandise Auction Store," sued to restrain defendant from using on his sign "Great IXL Auction Co." An injunction was denied.

Rhode Island.— Cady *v.* Schultz, 19 R. I. 193, 32 Atl. 915, 61 Am. St. Rep. 763, 29 L. R. A. 524.

England.— Hookham *v.* Pottage, L. R. 8 Ch. 91, 27 L. T. Rep. N. S. 595, 21 Wkly. Rep. 47; Hart *v.* Colley, 44 Ch. D. 193, 59 L. J. Ch. 355, 62 L. T. Rep. N. S. 623, 38 Wkly. Rep. 440; Glenny *v.* Smith, 2 Dr. & Sm. 476, 11 Jur. N. S. 964, 13 L. T. Rep. N. S. 11, 6 New Rep. 363, 13 Wkly. Rep. 1032. But see Civil Service Supply Assoc. *v.* Dean, 13 Ch. D. 512.

Canada.— Walker *v.* Alley, 13 Grant Ch. (U. C.) 366, figure of a "Golden Lion."

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," §§ 18, 68.

Placing a false street number upon a store, which was the number of a rival store, may be enjoined as unfair competition. Van Horn *v.* Coogan, 52 N. J. Eq. 380, 28 Atl. 788 [*affirmed* in 52 N. J. Eq. 588, 33 Atl. 50].

19. Miskell *v.* Prokop, 58 Nebr. 628, 79 N. W. 552.

20. Cady *v.* Schultz, 19 R. I. 193, 32 Atl. 915, 61 Am. St. Rep. 763, 29 L. R. A. 524.

omnibuses, employees' caps, etc., tending to deceive customers, as to the proprietorship of the business, constitute unfair competition, and will be enjoined.[21]

8. Patented Articles. The name of a patented article by which it has become known to the trade, whether derived from the personal name of the inventor, or whether purely arbitrary, is the generic designation and description of that article, and is not the subject of exclusive appropriation as a trade-mark or trade-name.[22] Even during the existence and life of the patent, if the same thing can be and is made in a manner not involving an infringement of the patent, the name of the patented article may be used as the name thereof,[23] although it has been held that an infringer has no right to use such name.[24] And of course any one may use the name as the name of the genuine article manufactured under and in accordance with the patent, because it is the truthful and generic description of that article.[25] But during the life of the patent, a deceptive use of the name of the patented article in connection with a generically different article, constitutes unfair competition and will be enjoined. The name may be used only in connection with articles manufactured in conformity with the patent.[26] The expiration of a patent

21. *Maine.*— Ricker *v.* Portland, etc., R. Co., 90 Me. 395, 38 Atl. 338.

Massachusetts.— March *v.* Billings, 7 Cush. 322, 54 Am. Dec. 723.

New York.—An agreement by the proprietor of a hotel to permit another to place the name of the hotel upon his coaches is a valid contract; and both proprietor and his licensee may claim the protection of the court for any violation of his individual rights by a third person. Deiz *v.* Lamb, 6 Rob. 537; Stone *v.* Carlan, 13 Month. L. Bul. 360.

Pennsylvania.— Goodwin *v.* Hamilton, 6 Pa. Dist. 705, 19 Pa. Co. Ct. 652.

England.— Knott *v.* Morgan, 2 Keen 213, 15 Eng. Ch. 213, 48 Eng. Reprint 610.

22. See *supra*, III, B, 19, b. See also *supra*, V, A, 4.

23. Lamb Knit-Goods Co. *v.* Lamb Glove, etc., Co., 120 Mich. 159, 78 N. W. 1072, 44 L. R. A. 841; Young *v.* Macrae, 9 Jur. N. S. 322. *Compare* Kyle *v.* Perfection Mattress Co., 127 Ala. 39, 28 So. 545, 85 Am. St. Rep. 78, 50 L. R. A. 628.

Descriptive name.—A patentee cannot by applying to his device a word which is descriptive only acquire the exclusive right to use such word as against another maker of a device which does not infringe his patent, of which the word is equally descriptive. Seeger Refrigerator Co. *v.* White Enamel Refrigerator Co., 178 Fed. 567.

24. Waterman *v.* Shipman, 130 N. Y. 301, 29 N. E. 111 [*reversing* 8 N. Y. Suppl. 814]; Fonotipia Limited *v.* Bradley, 171 Fed. 951; Revere Rubber Co. *v.* Consolidated Hoof Pad Co., 139 Fed. 151.

The fact that an article is made under a patent, and that the manufacturer might have a remedy against another manufacturer for infringement of such patent, does not preclude him from maintaining a suit against such manufacturer for unfair competition. Fonotipia Limited *v.* Bradley, 171 Fed. 951.

25. Marshall Engine Co. *v.* New Marshall Engine Co., 203 Mass. 410, 89 N. E. 548; Lamb Knit-Goods Co. *v.* Lamb Glove, etc., Co., 120 Mich. 159, 78 N. W. 1072, 44 L. R. A. 841; Edison *v.* Mills-Edisonia, 74 N. J. Eq. 521, 70 Atl. 191; Hygienic Fleeced Underwear Co. *v.* Way, 137 Fed. 592, 70 C. C. A. 553 [*reversing* 133 Fed. 245]; Johnson *v.* Seaman, 108 Fed. 951, 48 C. C. A. 158 [*reversing* 106 Fed. 915]; Vitascope Co. *v.* U. S. Phonograph Co., 83 Fed. 30; Walker *v.* Reid, 29 Fed. Cas. No. 17,084. See Janney *v.* Pan-Coast Ventilator, etc., Co., 128 Fed. 121.

A patent confers no right to any particular name but only the exclusive right to make and sell the article to which that name is applied. Centaur *v.* Heinsfurter, 84 Fed. 955, 28 C. C. A. 581, per Brewer, J.

26. Gordon Hollow Blast Grate Co. *v.* Gordon, 142 Mich. 488, 105 N. W. 1118; Penberthy Injector Co. *v.* Lee, 120 Mich. 174, 78 N. W. 1074; Lamb Knit-Goods Co. *v.* Lamb Glove, etc., Co., 120 Mich. 159, 78 N. W. 1072, 44 L. R. A. 841; Jaffe *v.* Evans, 70 N. Y. App. Div. 189, 75 N. Y. Suppl. 257; Seeger Refrigerator Co. *v.* White Enamel Refrigerator Co., 178 Fed. 567; Dr. A. Reed Cushion Shoe Co. *v.* Frew, 162 Fed. 887, 89 C. C. A. 577 [*reversing* 158 Fed. 552]; Greene *v.* Manufacturers' Belt Hook Co., 158 Fed. 640; Warren Featherbone Co. *v.* American Featherbone Co., 141 Fed. 513, 72 C. C. A. 571; Hygienic Fleeced Underwear Co. *v.* Way, 133 Fed. 245 [*reversed* on other grounds in 137 Fed. 592, 70 C. C. A. 553]; Janney *v.* Pan-Coast Ventilator, etc., Co., 128 Fed. 121 ("Improved Pancoast" or "New Pancoast" infringes "Pan-Coast," as applied to patented ventilators); Johnson *v.* Seaman, 108 Fed. 951, 48 C. C. A. 158 [*reversing* 106 Fed. 915]; Leclancha Battery Co. *v.* Western Electric Co., 21 Fed. 538; Osgood *v.* Rockwood, 18 Fed. Cas. No. 10,605, 11 Blatchf. 310; Singer Mfg. Co. *v.* Larsen, 22 Fed. Cas. No. 12,902, 3 Ban. & A. 246, 8 Biss. 151; Tucker Mfg. Co. *v.* Boyington, 24 Fed. Cas. No. 14,229, 9 Off. Gaz. 455; Washburn, etc., Mfg. Co. *v.* Haish, 29 Fed. Cas. No. 17,217, 4 Ban. & A. 571, 9 Biss. 141, 18 Off. Gaz. 465; Powell *v.* Birmingham Vinegar Brewery Co., [1894] 3 Ch. 449, 71 L. T. Rep. N. S. 393, 13 Reports 153 [*affirmed* in [1896] 2 Ch. 54, 65 L. J. Ch. 563, 74 L. T. Rep. N. S. 509, 44 Wkly. Rep. 688 (*affirmed* in [1897] A. C. 710, 66

has been held to dedicate the name of the patented article to the public along with the article itself.[27] Any one may thereafter use the name in connection with, and as the name of, his own make of the article known by that name and previously manufactured under the patent.[28] This rule is but an application of

L. J. Ch. 763, 76 L. T. Rep. N. S. 792)]; *In re* Leonard, 26 Ch. D. 288, 53 L. J. Ch. 603, 51 L. T. Rep. N. S. 35 [*affirming* 32 Wkly. Rep. 530]; *In re* Palmer, 24 Ch. D. 504, 50 L. T. Rep. N. S. 30, 32 Wkly. Rep. 306; Wheeler, etc., Mfg. Co. *v.* Shakespear, 39 L. J. Ch. 36. *Compare* Seeger Refrigerator Co. *v.* Parks, 178 Fed. 283.

Goods made under different patents.—A defendant manufacturing under his own patent will be enjoined from in any way marking his goods so as to represent that they are manufactured under plaintiff's patent. Penberthy Injector Co. *v.* Lee, 120 Mich. 174, 78 N. W. 1074; Dr. A. Reed Cushion Shoe Co. *v.* Frew, 162 Fed. 887, 89 C. C. A. 577 [*reversing* 158 Fed. 552]; Washburn, etc., Mfg. Co. *v.* Haish, 29 Fed. Cas. No. 17,217, 4 Ban. & A. 571, 9 Biss. 141, 18 Off. Gaz. 465.

27. See cases cited *infra*, note 28.

The principle of dedication by expiration of the patent seems to be an erroneous one. The name is dedicated, if at all, when it is first allowed to become the generic name of the article itself. The name is just as much generic and descriptive, and therefore *publici juris*, during the life of the patent as it is afterward. The only difference caused by the expiration of the patent is that it enables all the world to use the name truthfully if they so desire, whereas, during the life of the patent, the name may be used truthfully only by the proprietor of the patent or his licensees. Even expiration of the patent does not, or at least should not, dedicate the name in such a sense as to authorize an untruthful and misleading use of it in connnection with a different article. See *infra*, note 29.

28. *Massachusetts.*— Marshall Engine Co. *v.* New Marshall Engine Co., 203 Mass. 410, 89 N. E. 548; Dover Stamping Co. *v.* Fellows, 163 Mass. 191, 40 N. E. 105, 47 Am. St. Rep. 448, 28 L. R. A. 448.

New Jersey.— Centaur Co. *v.* Link, 62 N. J. Eq. 147, 49 Atl. 828.

New York.—Waterman *v.* Shipman, 130 N. Y. 301, 29 N. E. 111 [*reversing* 8 N. Y. Suppl. 814]; Westcott Chuck Co. *v.* Oneida Nat. Chuck Co., 122 N. Y. App. Div. 260, 106 N. Y. Suppl. 1016; Jaffe *v.* Evans, 70 N. Y. App. Div. 186, 75 N. Y. Suppl. 257.

Rhode Island.— Armington *v.* Palmer, 21 R. I. 109, 42 Atl. 308, 79 Am. St. Rep. 786, 43 L. R. A. 95.

United States.— Holzapfel's Compositions Co. *v.* Rathjen's American-Composition Co., 183 U. S. 1, 22 S. Ct. 6, 46 L. ed. 49; Singer Mfg. Co. *v.* June Mfg. Co., 163 U. S. 169, 16 S. Ct. 1002, 41 L. ed. 118; Ludlow Valve Mfg. Co. *v.* Pittsburgh Mfg. Co., 166 Fed. 26, 92 C. C. A. 60; Rice-Stix Dry Goods Co. *v.* J. A. Scriven Co., 165 Fed. 639, 91 C. C. A. 475; Sternberg Mfg. Co. *v.* Miller, etc., Mfg. Co., 161 Fed. 318, 88 C. C. A. 398; Greene *v.* Manufacturers' Belt Hook Co., 158 Fed. 640; Warren Featherbone Co. *v.* American Featherbone Co., 141 Fed. 513, 72 C. C. A. 571; Centaur Co. *v.* Neathery, 91 Fed. 891, 34 C. C. A. 118; Centaur Co. *v.* Killenberger, 87 Fed. 725; Centaur Co. *v.* Heinsfurter, 84 Fed. 955, 28 C. C. A. 581; Consolidated Fruit-Jar Co. *v.* Dorflinger, 6 Fed. Cas. No. 3,129; Filley *v.* Child, 9 Fed. Cas. No. 4,787, 4 Ban. & A. 353, 16 Blatchf. 376, 16 Off. Gaz. 261; Singer Mfg. Co. *v.* Larsen, 22 Fed. Cas. No. 12,902, 3 Ban. & A. 246, 8 Biss. 151; Tucker Mfg. Co. *v.* Boyington, 24 Fed. Cas. No. 14,229, 9 Off. Gaz. 455. But see Bates Mfg. Co. *v.* Bates Numbering Mach. Co., 172 Fed. 892 [*affirmed* in 178 Fed. 681, 102 C. C. A. 181].

England.— Singer Mfg. Co. *v.* Loog, 8 App. Cas. 15, 52 L. J. Ch. 481, 48 L. T. Rep. N. S. 3, 31 Wkly. Rep. 325; *In re* Leonard, 26 Ch. D. 288, 53 L. J. Ch. 603, 51 L. T. Rep. N. S. 35 [*affirming* 32 Wkly. Rep. 530] ("Valvoline"); *In re* Ralph, 25 Ch. D. 194, 48 J. P. 135, 53 L. J. Ch. 188, 49 L. T. Rep. N. S. 504, 32 Wkly. Rep. 168; *In re* Palmer, 24 Ch. D. 504, 50 L. T. Rep. N. S. 30, 32 Wkly. Rep. 306; Linoleum Mfg. Co. *v.* Nairn, 7 Ch. D. 834, 47 L. J. Ch. 430, 38 L. T. Rep. N. S. 448, 26 Wkly. Rep. 463 ("Linoleum"); Cheavin *v.* Walker, 5 Ch. D. 850, 46 L. J. Ch. 265, 35 L. T. Rep. N. S. 757 [*reversed* on other grounds in 5 Ch. D. 862, 46 L. J. Ch. 686, 36 L. T. Rep. N. S. 938, 37 L. T. Rep. N. S. 300]; Wheeler, etc., Mfg. Co. *v.* Shakespear, 39 L. J. Ch. 36. And see Singer Mfg. Co. *v.* Wilson, 3 App. Cas. 376, 47 L. J. Ch. 481, 38 L. T. Rep. N. S. 303, 26 Wkly. Rep. 664.

Canada.— Singer Mfg. Co. *v.* Charlebois, 16 Quebec Super. Ct. 167.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 15.

"In the leading case of Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 16 S. Ct. 1002, 41 L. ed. 118, it is said: 'The result, then, of the American, the English and the French doctrine universally upheld is this, that where, during the life of a monopoly created by a patent, a name, whether it be arbitrary or be that of the inventor, has become, by his consent, either express or tacit, the identifying and generic name of the thing patented, this name passes to the public with the cessation of the monopoly which the patent created.' That case is also authority for the further statement that one who avails himself of this public dedication may use the generic designation in all forms with the fullest liberty, by affixing such name to the machine or product and by referring to it in advertisements, subject, however, to the condition that the name must be so used as not to deprive others of their rights or to deceive

the general principle that the generic name of an article cannot be exclusively appropriated as a trade-mark, because such name is essentially descriptive, and a person entitled to make and sell an article must necessarily be entitled to call it by the only name by which it is known. Otherwise, an expired patent might be indefinitely extended, for all practical purposes, under the doctrine of a trade-mark in the name, which, of course, cannot be permitted. But the name of the article upon which the patent has expired may be used as the name of that article only because it is truthfully descriptive of that article. It is generic, and *publici juris*, only as applied to that particular article. It is not dedicated in gross. It is not truthfully descriptive of any other or different article than that upon which the patent has expired. Accordingly where the name of a patented article has acquired a secondary meaning, and come to indicate in the minds of the public an article of a particular type coming from a particular source, even expiration of the patent will not authorize another person to use and apply the name to a different article of the same class sold in competition with the rival goods of that name. Such use of the name is a false use which will be enjoined.[29] Even when the name is truthfully used as the name of an article of the kind formerly protected by the patent, the subsequent user must accompany his use of the name with an adequate explanatory statement affirmatively distinguishing his product from that of the

the public and that the name must be accompanied with such indications as will show by whom it is made so that the public may be informed of that fact." Jaffe *v.* Evans, 70 N. Y. App. Div. 186, 189, 75 N. Y. Suppl. 257.

29. Jaffe *v.* Evans, 70 N. Y. App. Div. 186, 75 N. Y. Suppl. 257; Singer Mfg. Co. *v.* Hipple, 109 Fed. 152; Powell *v.* Birmingham Vinegar Brewery Co., [1894] 3 Ch. 449, 71 L. T. Rep. N. S. 393, 13 Reports 153 [*affirmed* in [1896] 2 Ch. 54, 65 L. J. Ch. 563, 74 L. T. Rep. N. S. 509, 44 Wkly. Rep. 688 (*affirmed* in [1897] A. C. 710, 66 L. J. Ch. 763, 76 L. T. Rep. N. S. 792)]. The same principle applies to copyrighted books. See *infra*, V, C, 9. For the general principle see *supra*, V, B, 8.

Applications of doctrine.— In Singer Mfg. Co. *v.* Hipple, 109 Fed. 152, 153, it was directly held that the original users of the word "Singer" as applied to sewing machines were not precluded by the expiration of their patent from enjoining its use upon machines which were not of the kind with which the name had become associated by the public. The court held that the only purpose and effect of such use was to mislead and deceive the public. Defendant relied upon Singer Mfg. Co. *v.* June Mfg. Co., 163 U. S. 169, 16 S. Ct. 1002, 41 L. ed. 118, but the court said that case sanctioned no such use, but in fact was an authority against it. The court further said: "In short, the principle of that decision is, not that the first user of a mark indicative of origin forfeits his exclusive right thereto for that purpose by allowing it to be applied for the additional purpose of designing the thing itself, but that his monopoly of it for the one purpose cannot be so enforced as to nullify the general right to apply it for the other. If, therefore, the defendant's article were in fact a 'Singer' machine, she would be at liberty to so designate it, provided she also clearly and unmistakably specified that it was not the product of the Singer Company; but the evidence, as I view it, is against her upon the main point, and therefore her manner of marking need not be considered. The machine which she puts upon the market is not a 'Singer.' That word is not, as a name for it, either necessary or appropriate. Nor can I accede to the contention that her machine is a developed or improved 'Singer'; for the proof is that it is of a distinct type which is and long has been known as the 'Domestic.' Consequently the defendant's employment of the word 'Singer' can have but one result, and that is, not to correctly identify the thing itself, but to mislead the public as to its source of origin; and, this being so, the decision in Singer Mfg. Co. *v.* June Mfg. Co. does not support, but subverts, her present position." In Jaffe *v.* Evans, 70 N. Y. App. Div. 186, 189, 75 N. Y. Suppl. 257, the court said: "In the present case, if the word 'Lanoline' or 'Lanolin' is generic or descriptive of the article, which we think upon the evidence adduced it is, it follows that the defendant may use the word provided its preparation is substantially the same product as plaintiffs' and the word is accompanied with *indicia* which show clearly that the defendant is the manufacturer. This necessarily includes the other proposition that the defendant has no right to manufacture something entirely different and call it 'Lanolin,' nor would it have the right to use that name in advertisements or labels in such a way as to deceive the public into thinking its product was the one manufactured by the plaintiffs." In Janney *v.* Pan-Coast Ventilator, etc., Co., 128 Fed. 121, the goods manufactured under plaintiff's unexpired patent had become known as "Pancoast Ventilators." Defendant had previously been enjoined from infringing this patent, and thereupon substituted a different kind of ventilator, which he called by the same name. This was enjoined as unfair competition.

original trader,[30] and he must not commit any affirmative act or use any artifice or device tending to increase the deception and confusion necessarily caused by the use of the ambiguous name.[31] Although the name of the patented article may be used, an injunction will be granted against a misleading manner of using it.[32] The right to use the name depends upon a showing that the name is understood by the public to denote a patented or other article of a particular type, structure, or arrangement of parts.[33] After expiration of the patent the article may be exactly duplicated, even to the extent of using the original article as a mold or model.[34] But distinctive marks and labels long used on patented articles are not dedicated to the public by the expiration of the patent and the use of such marks and labels by another may be enjoined.[35] One who has an invalid or expired patent may still lawfully use its subject-matter, and like all other traders is entitled to protection against unfair competition.[36]

30. *New Jersey.*— Centaur Co. *v.* Link, 62 N. J. Eq. 147, 49 Atl. 828.

New York.— Jaffe *v.* Evans, 70 N. Y. App. Div. 186, 75 N. Y. Suppl. 257.

Rhode Island.—Armington *v.* Palmer, 21 R. I. 109, 42 Atl. 308, 79 Am. St. Rep. 786, 43 L. R. A. 95.

United States.— Holzapfel's Compositions Co. *v.* Rahtjen's American-Composition Co., 183 U. S. 1, 22 S. Ct. 6, 46 L. ed. 49; Elgin Nat. Watch Co. *v.* Illinois Watch Case Co., 179 U. S. 665, 21 S. Ct. 270, 45 L. ed. 365; Singer Mfg. Co. *v.* June Mfg. Co., 163 U. S. 169, 16 S. Ct. 1002, 41 L. ed. 118; Ludlow Valve Mfg. Co. *v.* Pittsburgh Mfg. Co., 166 Fed. 26, 92 C. C. A. 60; J. A. Scriven Co. *v.* Morris, 154 Fed. 914 [*affirmed* in 158 Fed. 1020, 85 C. C. A. 571]; B. B. Hill Mfg. Co. *v.* Sawyer-Boss Mfg. Co., 118 Fed. 1014, 56 C. C. A. 596 [*affirming* 112 Fed. 144]; Singer Mfg. Co. *v.* Hipple, 109 Fed. 152; Centaur Co. *v.* Neathery, 91 Fed. 891, 34 C. C. A. 118; Centaur Co. *v.* Robinson, 91 Fed. 889; Filley *v.* Child, 9 Fed. Cas. No. 4,787, 4 Ban. & A. 353, 16 Blatchf. 376, 16 Off. Gaz. 261; Singer Mfg. Co. *v.* Larsen, 22 Fed. Cas. No. 12,902, 3 Ban. & A. 246, 8 Biss. 151.

England.— Powell *v.* Birmingham Vinegar Brewery Co., [1896] 2 Ch. 54, 65 L. J. Ch. 563, 74 L. T. Rep. N. S. 509, 44 Wkly. Rep. 688 [*affirmed* in [1897] A. C. 710, 66 L. J. Ch. 763, 76 L. T. Rep. N. S. 792]; Linoleum Mfg. Co. *v.* Nairn, 7 Ch. D. 834, 47 L. J. Ch. 430, 38 L. T. Rep. N. S. 448, 26 Wkly. Rep. 463; Cheavin *v.* Walker, 5 Ch. D. 862, 46 L. J. Ch. 686, 36 L. T. Rep. N. S. 938, 37 L. T. Rep. N. S. 300.

Canada.— Singer Mfg. Co. *v.* Charlebois, 16 Quebec Super. Ct. 167.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 15.

31. Waterman *v.* Shipman, 130 N. Y. 301, 29 N. E. 111 [*reversing* 8 N. Y. Suppl. 814]; Armington *v.* Palmer, 21 R. I. 109, 42 Atl. 308, 79 Am. St. Rep. 786, 43 L. R. A. 95; Ludlow Valve Mfg. Co. *v.* Pittsburgh Mfg. Co., 166 Fed. 26, 92 C. C. A. 60; Fairbanks *v.* Jacobus, 8 Fed. Cas. No. 4,608, 3 Ban. & A. 108, 14 Blatchf. 337; Filley *v.* Child, 9 Fed. Cas. No. 4,787, 4 Ban. & A. 353, 16 Blatchf. 376, 16 Off. Gaz. 261; Singer Mfg. Co. *v.* Larsen, 22 Fed. Cas. No. 12,902, 3 Ban. & A. 246, 8 Biss. 151; Wheeler, etc., Mfg. Co. *v.* Shakespear, 39 L. J. Ch. 36.

32. Singer Mfg. Co. *v.* Charlebois, 16 Quebec Super. Ct. 167. "The right to use the name goes with the right to manufacture, but this applies only to the use of the name in connection with the article." Armington *v.* Palmer, 21 R. I. 109, 117, 42 Atl. 308, 79 Am. St. Rep. 786, 43 L. R. A. 95, holding that expiration of a patent did not authorize a corporation to use the corporate name of the prior maker of such article. See also Wheeler, etc., Mfg. Co. *v.* Shakespear, 39 L. J. Ch. 36, holding that name may not be used on shop front as a proper name. One may truthfully represent that his article is made according to an expired patent, but must not do so in a manner liable to cause deception. Edleston *v.* Vick, 1 Eq. Rep. 413, 11 Hare 78, 18 Jur. 7, 23 Eng. L. & Eq. 51, 45 Eng. Ch. 78, 68 Eng. Reprint 1194.

33. Singer Mfg. Co. *v.* Wilson, 3 App. Cas. 376, 47 L. J. Ch. 481, 38 L. T. Rep. N. S. 303, 26 Wkly. Rep. 664.

34. Westcott Chuck Co. *v.* Oneida Nat. Chuck Co., 122 N. Y. App. Div. 260, 106 N. Y. Suppl. 1016; Rice-Stix Dry Goods Co. *v.* J. A. Scriven Co., 165 Fed. 639, 91 C. C. A. 475; J. A. Scriven Co. *v.* Morris, 158 Fed. 1020, 85 C. C. A. 571; Warren Featherbone Co. *v.* American Featherbone Co., 141 Fed. 513, 72 C. C. A. 571. But see Fonotipia *v.* Bradley, 171 Fed. 951. See also *infra*, V, C, 14.

35. Centaur Co. *v.* Link, 62 N. J. Eq. 147, 49 Atl. 828; Westcott Chuck Co. *v.* Oneida Nat. Chuck Co., 122 N. Y. App. Div. 260, 106 N. Y. Suppl. 1016; Avenarius *v.* Kornely, 139 Wis. 247, 121 N. W. 336; Centaur Co. *v.* Neathery, 91 Fed. 891, 34 C. C. A. 118; Centaur Co. *v.* Killenberger, 87 Fed. 725. See Sawyer *v.* Kellogg, 7 Fed. 720; *Ex p.* Consolidated Fruit Jar Co., 16 Off. Gaz. 679. See also Warren Featherbone Co. *v.* American Featherbone Co., 141 Fed. 513, 72 C. C. A. 571. *Compare* Wilcox, etc., Sewing-Mach. Co. *v.* Gibbens Frame, 17 Fed. 623, 21 Blatchf. 431. *Contra*, Greene *v.* Manufacturers' Belt Hook Co., 158 Fed. 640.

36. Consolidated Fruit-Jar Co. *v.* Dorflinger, 6 Fed. Cas. No. 3,129, 1 N. Y. Wkly. Dig. 427, 2 Wkly. Notes Cas. (Pa.) 99;

9. Books and Periodicals. Publications are property and entitled to protection against unfair competition like any other property.[37] The cases are quite numerous wherein the title or name of a book, periodical, or other literary production has been protected by injunction against deceptive use or imitation in connection with some different publication which defendant was lawfully entitled to publish and sell in competition with complainant's work, and in which no question of infringement of copyright or protection of literary property was involved.[38]

Tucker Mfg. Co. *v.* Boyington, 24 Fed. Cas. No. 14,229, 9 Off. Gaz. 455.

37. Munro *v.* Tousey, 129 N. Y. 38, 29 N. E. 9, 14 L. R. A. 245; G. & C. Merriam Co. *v.* Straus, 136 Fed. 477.

"There may be a commercial property in books as well as a literary property, and when a publisher has imparted to his books peculiar characteristics which enable the public to distinguish them from other books embodying the same literary property, and to recognize them as his particular product, there is no reason why the principles which interdict unfair competition in trade should not afford him protection against the copying of the characteristics by rivals." G. & C. Merriam Co. *v.* Straus, 136 Fed. 477, 479.

38. *Maryland.*— Gruber Almanack Co. *v.* Swingley, 103 Md. 362, 63 Atl. 684; Robertson *v.* Berry, 50 Md. 591, 33 Am. Rep. 328.

Missouri.— Grocers' Journal Co. *v.* Midland Pub. Co., 127 Mo. App. 356, 105 S. W. 310.

New York.— Munro *v.* Tousey, 129 N. Y. 38, 29 N. E. 9, 14 L. R. A. 245; Commercial Advertiser Assoc. *v.* Haynes, 26 N. Y. App. Div. 279, 49 N. Y. Suppl. 938; American Grocer Pub. Assoc. *v.* Grocer Pub. Co., 25 Hun 398; Potter *v.* McPherson, 21 Hun 559; Tallcot *v.* Moore, 6 Hun 106; Stephens *v.* De Couto, 7 Rob. 343, 4 Abb. Pr. N. S. 47; England *v.* New York Pub. Co., 8 Daly 375; New York Polyclinic Medical School, etc. *v.* King, 27 Misc. 250, 57 N. Y. Suppl. 796; W. J. Johnston Co. *v.* Electric Age Pub. Co., 14 N. Y. Suppl. 803; Forney *v.* Engineering News Pub. Co., 10 N. Y. Suppl. 814; Matsell *v.* Flanagan, 2 Abb. Pr. N. S. 459; American Grocer Pub. Assoc. *v.* Grocer Pub. Co., 51 How. Pr. 402; Bell *v.* Locke, 8 Paige 75, 34 Am. Dec. 371; Snowden *v.* Noah, Hopk. 347, 14 Am. Dec. 547.

Oregon.— Duniway Pub. Co. *v.* Northwest Printing, etc., Co., 11 Oreg. 322, 8 Pac. 283.

Pennsylvania.— Shook *v.* Wood, 10 Phila. 373.

United States.— Industrial Press *v.* W. R. C. Smith Pub. Co., 164 Fed. 842, 90 C. C. A. 604; Ogilvie *v.* G. & C. Merriam Co., 149 Fed. 858 [*affirmed* in 159 Fed. 638]; G. & C. Merriam Co. *v.* Straus, 136 Fed. 477; Gannert *v.* Rupert, 127 Fed. 962, 62 C. C. A. 594 [*reversing* 119 Fed. 221]; Harper *v.* Lare, 103 Fed. 203, 43 C. C. A. 182; Oxford University *v.* Wilmore-Andrews Pub. Co., 101 Fed. 443; Lare *v.* Harper, 86 Fed. 481, 30 C. C. A. 373; Harper *v.* Holman, 84 Fed. 224; Investor Pub. Co. *v.* Dobinson, 72 Fed. 603; Social Register Assoc. *v.* Howard, 60 Fed. 270; Merriam *v.* Texas Siftings Pub. Co., 49 Fed. 944; Black *v.* Ehrich, 44 Fed. 793; Estes *v.* Worthington, 31 Fed. 154, 24 Blatchf. 371; Aronson *v.* Fleckenstein, 28 Fed. 75, 51 L. R. A. 378; Estes *v.* Leslie, 27 Fed. 22, 23 Blatchf. 476, 29 Fed. 91; Estes *v.* Williams, 21 Fed. 189; Iolanthe Case, 15 Fed. 439; Thomas *v.* Lennon, 14 Fed. 849; Osgood *v.* Allen, 18 Fed. Cas. No. 10,603, Holmes 185, 3 Off. Gaz. 124.

England.— Kelly *v.* Hutton, L. R. 3 Ch. 703, 37 L. J. Ch. 917, 19 L. T. Rep. N. S. 228, 16 Wkly. Rep. 1182; Borthwick *v.* Evening Post, 37 Ch. D. 449, 57 L. J. Ch. 406, 58 L. T. Rep. N. S. 252, 36 Wkly. Rep. 434; Dicks *v.* Yates, 18 Ch. D. 76, 50 L. J. Ch. 809, 44 L. T. Rep. N. S. 660; Weldon *v.* Dicks, 10 Ch. D. 247, 48 L. J. Ch. 201, 39 L. T. Rep. N. S. 467, 27 Wkly. Rep. 639; Metzler *v.* Wood, 8 Ch. D. 608, 47 L. J. Ch. 625, 38 L. T. Rep. N. S. 544, 26 Wkly. Rep. 577; Mack *v.* Petter, L. R. 14 Eq. 431, 41 L. J. Ch. 781, 20 Wkly. Rep. 964; Reed *v.* O'Meara, L. R. 21 Ir. 216; Bradbury *v.* Dickens, 27 Beav. 53, 28 L. J. Ch. 667, 54 Eng. Reprint 21; Spottiswoode *v.* Clark, 1 Coop. t. Cott. 254, 47 Eng. Reprint 844, 10 Jur. 1043, 2 Phil. 154, 22 Eng. Ch. 154, 41 Eng. Reprint 900; Clement *v.* Maddick, 1 Giffard 98, 5 Jur. N. S. 592, 65 Eng. Reprint 841; Ingram *v.* Stiff, 5 Jur. N. S. 947; Prowett *v.* Mortimer, 2 Jur. N. S. 414, 4 Wkly. Rep. 519; Chappell *v.* Sheard, 1 Jur. N. S. 996, 2 Kay & J. 117, 3 Wkly. Rep. 646, 69 Eng. Reprint 717; Chappel *v.* Davidson, 2 Kay & J. 123, 69 Eng. Reprint 719; Bradbury *v.* Beeton, 39 L. J. Ch. 57, 21 L. T. Rep. N. S. 323, 18 Wkly. Rep. 33; Clowes *v.* Hogg, 5 L. J. Notes Cas. 267, [1870] W. N. 268 [*affirmed* in [1871] W. N. 40]; Cowen *v.* Hulton, 46 L. T. Rep. N. S. 897; Edmonds *v.* Benbow, Sebastian Dig. 33; *In re* Edinburgh Correspondent Newspaper, 1 Shaw 407; Walter *v.* Head, 25 Sol. J. 742; Hogg *v.* Kirby, 8 Ves. Jr. 215, 7 Rev. Rep. 30, 32 Eng. Reprint 336; Corns *v.* Griffiths, [1873] W. N. 93. *Compare* Schove *v.* Schmincke, 33 Ch. D. 546, 55 L. J. Ch. 892, 55 L. T. Rep. N. S. 212, 34 Wkly. Rep. 700.

Canada.— Canada Pub. Co. *v.* Gage, 11 Can. Sup. Ct. 306.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," §§ 16, 69.

Titles held to infringe.— "Home Comfort" infringes "Comfort." Gannert *v.* Rupert, 127 Fed. 962, 62 C. C. A. 594 [*reversing* 119 Fed. 221]. "Howard's Social Register" infringes "Social Register." Social Register Assoc. *v.* Howard, 60 Fed. 270, wherein a preliminary injunction was granted. "The Grocer" infringes "The American Grocer." American Grocer Pub. Assoc. *v.* Grocer Pub. Co., 25 Hun (N. Y.) 398. "Frank Leslie's Chatterbox" infringes "Chatterbox." Estes *v.* Les-

In a number of other cases the same principle was recognized, but injunction was refused because, as a matter of fact, the titles of the two works were not deemed sufficiently similar to deceive ordinary buyers.[39] The protection in this class of cases is afforded solely upon the principles of unfair competition.[40] Titles of

lie, 27 Fed. 22, 23 Blatchf. 476; Estes *v.* Williams, 21 Fed. 189. "Chatterbox" infringed by "Chatterbook." Estes *v.* Worthington, 31 Fed. 154, 24 Blatchf. 371. "Independent National System of Penmanship" infringes "Payson, Dunton, and Scribner's National System of Penmanship." Potter *v.* McPherson, 21 Hun (N. Y.) 559. "The Heroine" infringes on "The Hero." Rowley *v.* Houghton, 2 Brewst. (Pa.) 303, 7 Phila. 39. "The Penny Bell's Life and Sporting News" or any paper containing the words "Bell's Life" (in the title) infringes "Bell's Life in London." Clement *v.* Maddick, 1 Giffard 98, 5 Jur. N. S. 592, 65 Eng. Reprint 841. "The Daily London Journal" infringes "The London Journal." Ingram *v.* Stiff, 5 Jur. N. S. 947, wherein the court suggested that defendant drop the word "London" and call his paper simply "The Daily Journal." "The Children's Birthday Text Book" infringes "The Birthday Scripture Text-Book." Mack *v.* Potter, L. R. 14 Eq. 431, 41 L. J. Ch. 781, 20 Wkly. Rep. 964. "Hemy's New and Revised Edition of Jousse's Royal Standard Pianoforte Tutor" infringes "Hemy's Modern Tutor for the Pianoforte." Metzler *v.* Wood, 8 Ch. D. 608, 47 L. J. Ch. 625, 38 L. T. Rep. N. S. 544, 26 Wkly. Rep. 577. "United States Police Gazette" infringes "The National Police Gazette." Matsell *v.* Flanagan, 2 Abb. Pr. N. S. (N. Y.) 459. "Sherlock Holmes, Detective," infringes "Sherlock Holmes." Hopkins Amusement Co. *v.* Frohman, 202 Ill. 541, 67 N. E. 391. "Traveller" infringes "Commercial Traveller." Carey *v.* Goss, 11 Ont. 619. "Wonderful Magazine, New Series Improved," infringes "Wonderful Magazine." Hogg *v.* Kirby, 8 Ves. Jr. 215, 7 Rev. Rep. 30, 32 Eng. Reprint 336. "Beatty's New and Improved Headline Copybooks" infringes "Beatty's Headline Copybooks," although the same man, Beatty, prepared both. Canada Pub. Co. *v.* Gage, 11 Can. Sup. Ct. 306. "The Spice of Life" infringes "The Good Things of Life." Stokes *v.* Allen, 2 N. Y. Suppl. 643. "The Canada Bookseller and Stationer" infringes "The Canadian Bookseller and Library Journal." Rose *v.* McLean Pub. Co., 24 Ont. App. 240 [*reversing* 27 Ont. 325]. "Philadelphia Suburban Life" infringes "Suburban Life" used as the titles of magazines, in connection with other resemblances. Suburban Press *v.* Philadelphia Suburban Pub. Co., 227 Pa. St. 148, 75 Atl. 1037.

"Dr. Eliot's Five-Foot Shelf of Books."— Where plaintiffs had printed and published and advertised very extensively a set of books selected by Dr. Eliot, former president of Harvard University, under the title of "The Harvard Classics," and designated in advertisements and in labels on the books as "Dr. Eliot's Five-Foot Shelf of Books," and had sold many thousand volumes, they were entitled to a temporary injunction restraining defendants from advertising and selling a different set of books under the titles of "Dr. Eliot's Five-Foot Shelf of the World's Best Books" and "Dr. Eliot's Five-Foot Shelf of the World's Greatest Books." Collier *v.* Jones, 66 Misc. (N. Y.) 97, 120 N. Y. Suppl. 991 [*modified* in 140 N. Y. App. Div. 911, 125 N. Y. Suppl. 1116].

39. Commercial Advertiser Assoc. *v.* Haynes, 26 N. Y. App. Div. 279, 49 N. Y. Suppl. 938 (injunction refused to protect "The Commercial Advertiser" against the name "New York Commercial," there being conspicuous differences in type, arrangement, etc., and one being a morning and the other an evening paper catering to a different class of trade); Dayton *v.* Wilkes, 17 How. Pr. (N. Y.) 510; Snowden *v.* Noah, Hopk. (N. Y.) 347, 14 Am. Dec. 547; Duniway Pub. Co. *v.* Northwest Printing, etc., Co., 11 Oreg. 322, 8 Pac. 283 ("The New Northwest News" does not infringe "The New Northwest" in the absence of intentional deception); Harper *v.* Lare, 103 Fed. 203, 43 C. C. A. 182; Lare *v.* Harper, 86 Fed. 481, 30 C. C. A. 373; Borthwick *v.* Evening Post, 37 Ch. D. 449, 57 L. J. Ch. 406, 58 L. T. Rep. N. S. 252, 36 Wkly. Rep. 434 ("Morning Post" not infringed by "Evening Post," applied respectively to morning and evening newspapers); Kelly *v.* Byles, 13 Ch. D. 682, 49 L. J. Ch. 181, 42 L. T. Rep. N. S. 338, 28 Wkly. Rep. 485; Spottiswoode *v.* Clarke, 1 Coop. t. Cott. 254, 47 Eng. Reprint 844, 10 Jur. 1043, 2 Phil. 154, 22 Eng. Ch. 154, 41 Eng. Reprint 900; Jarrold *v.* Houlston, 3 Jur. N. S. 1051, 3 Kay & J. 708, 69 Eng. Reprint 1294; Walter *v.* Emmett, 54 L. J. Ch. 1059, 53 L. T. Rep. N. S. 437 (interlocutory injunction refused to protect "The Mail" against the "Morning Mail"); Cowen *v.* Hulton, 46 L. T. Rep. N. S. 897 ("Newcastle Chronicle" as the name of a newspaper not infringed by "Sporting Chronicle," the papers being dissimilar).

"Old Sleuth" is not infringed by "Young Sleuth," where there is no other similarity, and there are many obvious and striking points of distinction, so no one can be reasonably misled. Munro *v.* Tousey, 129 N. Y. 38, 29 N. E. 9, 14 L. R. A. 245.

40. In Dicks *v.* Yates, 18 Ch. D. 76, 90, 50 L. J. Ch. N. S. 809, 44 L. T. Rep. N. S. 660, Lord Justice James, distinguishing unfair competition in books from infringement of copyright, said: "There is another mode which to my mind is wholly irrespective of any copyright legislation, and that is where a man sells a work under the name or title of another man or another man's work, that is not an invasion of copyright, it is Common Law fraud, and can be redressed by ordinary Common Law remedies, wholly irrespective of

books are not covered by the copyright, and the mere use or imitation of the title of a book is not an infringement of the copyright upon such book.[41] Neither is the title of a book a valid technical trade-mark.[42] On the contrary, the title of a book is the generic name and description of that book, and therefore any one who is entitled to publish such book, either because the copyright thereon has expired, or because it has never been copyrighted, and who actually does publish such book, may call it by its proper name by which alone it is known.[43] But the mere fact that a book together with its name is in the public domain, by reason of expiration of copyright, or failure to secure copyright, does not authorize any person to use such name or title in connection with another and a different book in such a manner as to pass off the latter book as and for the former, or some other book known by that name. To do so constitutes unfair competition which will be enjoined.[44] These rules are but an application of the familiar principles of

any of the conditions or restrictions imposed by the Copyright Acts. Supposing a man were to publish a book calling it 'Soyer's Cookery Book,' which it is not; or 'Colenso's Arithmetic,' which it is not; or . . . 'Hemy's Modern Tutor for the Pianoforte' [as in the case of Metzler *v.* Wood, before the Court of Appeal], which it is not, that is a Common Law fraud."

41. Corbett *v.* Purdy, 80 Fed. 901; Harper *v.* Ranous, 67 Fed. 904; Benn *v.* Leclercq, 3 Fed. Cas. No. 1,308; Jollie *v.* Jaques, 13 Fed. Cas. No. 7,437, 1 Blatchf. 618, 9 N. Y. Leg. Obs. 11; Osgood *v.* Allen, 18 Fed. Cas. No. 10,603, Holmes 185, 3 Off. Gaz. 124; Licensed Victuallers' Newspaper Co. *v.* Bingham, 38 Ch. D. 139, 58 L. J. Ch. 36, 59 L. T. Rep. N. S. 187, 36 Wkly. Rep. 433; Schove *v.* Schminske, 33 Ch. D. 546, 55 L. J. Ch. 892, 55 L. T. Rep. N. S. 212, 34 Wkly. Rep. 700; Dicks *v.* Yates, 18 Ch. D. 76, 50 L. J. Ch. 809, 44 L. T. Rep. N. S. 660. See also COPYRIGHT, 9 Cyc. 889.

42. See *supra*, III, B, 19, c.

43. G. & C. Merriam Co. *v.* Ogilvie, 159 Fed. 638, 88 C. C. A. 596, 16 L. R. A. N. S. 549 [*modifying* 149 Fed. 858]; G. & C. Merriam Co. *v.* Straus, 136 Fed. 477; Merriam *v.* Texas Siftings Pub. Co., 49 Fed. 944; Merriam *v.* Famous Shoe, etc., Co., 47 Fed. 411; Black *v.* Ehrich, 44 Fed. 793; Merriam *v.* Holloway Pub. Co., 43 Fed. 450; "Mark Twain" Case, 14 Fed. 728, 11 Biss. 459; Jollie *v.* Jaques, 13 Fed. Cas. No. 7,437, 1 Blatchf. 618, 627, 9 N. Y. Leg. Obs. 11 (where Nelson, J., said: "The title or name is an appendage to the book or piece of music for which the copyright is taken out, and if the latter fails to be protected, the title goes with it, as certainly as the principal carries with it the incident"); Osgood *v.* Allen, 18 Fed. Cas. No. 10,603, Holmes 185, 3 Off. Gaz. 124.

44. Aronson *v.* Fleckenstein, 28 Fed. 75, 51 L. R. A. 378; Thomas *v.* Lennon, 14 Fed. 849; Weldon *v.* Dicks, 10 Ch. D. 247, 48 L. J. Ch. 201, 39 L. T. Rep. N. S. 467, 27 Wkly. Rep. 639; Metzler *v.* Wood, 8 Ch. D. 608, 47 L. J. Ch. 625, 38 L. T. Rep. N. S. 544, 26 Wkly. Rep. 577; Chappell *v.* Sheard, 1 Jur. N. S. 996, 2 Kay & J. 117, 3 Wkly. Rep. 646, 69 Eng. Reprint 717; Chappell *v.* Davidson, 2 Kay & J. 123, 69 Eng. Reprint 719; Cotton *v.* Gillard, 44 L. J. Ch. 90. See also cases cited *supra*, note 38. In Thomas *v.* Lennon, 14 Fed. 849, a performance of an oratorio advertised as "Gounod's Redemption" was enjoined, the score orchestration being different from the original and made by other persons from a piano score which had become public property, and which fact was also advertised. Injunction was mainly on the ground that it tended to deceive the public and infringed plaintiff's common-law rights.

The patent cases support this principle. See *supra*, V, C, 8.

"Chatter-box" cases.— In Estes *v.* Williams, 21 Fed. 189, 190, the complainant's book was entitled "Chatter-box." It was published without being copyrighted, and therefore became *publici juris* to the same extent that every book does upon the expiration of its copyright. Defendant published a book of different literary contents, and entitled it "Chatter-box." His use of that name was enjoined upon the ground of unfair competition. The point here under consideration was thus disposed of by Judge Wheeler: "Johnston had the exclusive right to put his own work, as his own, upon the markets of the world. No one else had the right to represent that other work was his. Not the right to prevent the copying of his, and putting the work upon the markets, but the right to be free from untrue representations that this other work was his when put upon the markets. This gives him nothing but the fair enjoyment of the just reputation of his own work, which fully belongs to him. It deprives others of nothing that belongs to them." This decision was followed in the later "Chatterbox" cases. Estes *v.* Worthington, 31 Fed. 154, 24 Blatchf. 371; Estes *v.* Worthington, 30 Fed. 465; Estes *v.* Leslie, 27 Fed. 22, 23 Blatchf. 476; Estes *v.* Worthington, 22 Fed. 822, 23 Blatchf. 65; Estes *v.* Belford, 30 Off. Gaz. 99.

"Webster's Dictionary" cases.— In Ogilvie *v.* G. & C. Merriam Co., 149 Fed. 858 [*modified* in 159 Fed. 638, 88 C. C. A. 596, 16 L. R. A. N. S. 549], it was held that the expiration of copyright upon an early edition of Webster's dictionary authorized any one to entitle a new edition thereof "Webster's Dictionary," notwithstanding the fact that such name had acquired a secondary meaning, and

unfair competition, which have already been stated.[45] An imitation of a publication by which the public may be misled into supposing that it is the literary composition which they had in mind to purchase is an act of deception which injures the publisher and entitles him to relief.[46] Genuine copies of a book, although independently bound, may be sold under the name and title of the book and its author.[47] But repaired or second-hand books must not be sold as and for new books of the complete production of the original publisher, and, if necessary, an affirmative statement sufficient to prevent deception may be required.[48] It is unfair competition to pass off an early edition of a work, upon which the copyright has expired, or a new and independent revision thereof, as and for subsequent editions published by the original publishers, or their successors which are already known in the market.[49] Where the title of a book has acquired a secondary meaning, so as to denote a particular production coming from a particular source, any one who avails himself of the expiration of copyright in order to reproduce such book must accompany his use of the name with sufficient affirmative precautions to prevent deception and confusion.[50] And he must refrain from the use of any affirmatively deceptive artifice or device in or upon the book or in advertisements.[51] Generic and descriptive words cannot be exclusively appropriated as the title of a publication.[52] But even generic or descriptive words used as a title will be

come to indicate a later copyrighted edition published by the successors of the original publishers of Webster's dictionary. This decision seems inconsistent with established principles, because the name was not truthfully used upon a copy of the expired book. It was unnecessarily used as the title or short name of a new and different book, which could easily have been given a distinctive name, thus avoiding all confusion and deception. Of course, any one would have the right to use the words "Webster's Dictionary," descriptively to indicate the relation of his new book to the old book of that name. See *supra*, V, B, 3. The earlier Webster dictionary cases all merely held that such name may be used as the title of an exact photographic reprint of the expired book. Merriam *v.* Texas Siftings Pub. Co., 49 Fed. 944; Merriam *v.* Famous Shoe, etc., Co., 47 Fed. 411; Merriam *v.* Holloway Pub. Co., 43 Fed. 450. These decisions were correct, because such use of the title was a truthfully descriptive use of the generic name of the book published, which may always be used if accompanied with a sufficient distinguishing statement to prevent deception. See *supra*, V, B, 3.

45. See *supra*, V, B, 3, 8.

46. Munro *v.* Tousey, 129 N. Y. 38, 29 N. E. 9, 14 L. R. A. 245; G. & C. Merriam Co. *v.* Ogilvie, 159 Fed. 638, 88 C. C. A. 596, 16 L. R. A. N. S. 549 [*modifying* 149 Fed. 858]; G. & C. Merriam Co. *v.* Straus, 136 Fed. 477.

47. Dodd *v.* Smith, 144 Pa. St. 340, 22 Atl. 710.

48. Doan *v.* American Book Co., 105 Fed. 772, 777, 45 C. C. A. 42, where defendant was required to stamp upon the cover a notice sufficient to prevent any deception. This was placed upon the ground that "the American Book Company has attained to a high reputation with respect to its school books. That reputation goes not only to the text of the book, but to the quality of the book itself, the character of the print, the quality of the paper, the binding, and the cover."

49. G. & C. Merriam Co. *v.* Ogilvie, 159 Fed. 638, 88 C. C. A. 596, 16 L. R. A. N. S. 549 [*modifying* 149 Fed. 858]; Merriam *v.* Texas Siftings Pub. Co., 49 Fed. 944; Merriam *v.* Famous Shoe, etc., Co., 47 Fed. 411; Merriam *v.* Holloway Pub. Co., 43 Fed. 450.

50. G. & C. Merriam Co. *v.* Ogilvie, 159 Fed. 638, 88 C. C. A. 596, 16 L. R. A. N. S. 549 [*modifying* 149 Fed. 858]; G. & C. Merriam Co. *v.* Straus, 136 Fed. 477. See also Glaser *v.* St. Elmo Co., 175 Fed. 276.

Uncopyrighted book of a distinctive form.— Where an uncopyrighted book was published in a distinctive and artistic form, an exact reproduction by photographic process was enjoined at the instance of the original publishers, in a case where plaintiff did not show that any person had been actually deceived, or, otherwise than by the books themselves, that defendant was guilty of a fraudulent intent. Dutton *v.* Cupplos, 117 N. Y. App. Div. 172, 102 N. Y. Suppl. 309.

51. Ogilvie *v.* G. & C. Merriam Co., 149 Fed. 858 [*affirmed* as to this point in 159 Fed. 638, 88 C. C. A. 596, 16 L. R. A. N. S. 549]; Metzler *v.* Woods, 8 Ch. D. 608, 47 L. J. Ch. 625, 38 L. T. Rep. N. S. 544, 26 Wkly. Rep. 577.

52. Munro *v.* Tousey, 129 N. Y. 38, 29 N. E. 9, 14 L. R. A. 245, "Sleuth" in title of detective stories. *Contra*, see Munro *v.* Beadle, 55 Hun (N. Y.) 312, 8 N. Y. Suppl. 414 [*reversing* 2 N. Y. Suppl. 314]; Munro *v.* Smith, 55 Hun (N. Y.) 419, 8 N. Y. Suppl. 671; Motor Boat Pub. Co. *v.* Motor Boating Co., 57 Misc. (N. Y.) 108, 107 N. Y. Suppl. 468 ("Motor Boat" and "Motor Boating Magazine"); Schove *v.* Schmincké, 33 Ch. D. 546, 55 L. J. Ch. 892, 55 L. T. Rep. N. S. 212, 34 Wkly. Rep. 700 (holding the title "Castle Album" descriptive as applied to an album containing pictures of castles, and *distinguishing* Wotherspoon *v.* Currie, L. R. 5 H. L.

protected if they have acquired a secondary meaning.[53] The true name or *nom de plume* of the actual author may be used in connection with a publication of his writings,[54] but not in such a manner as to cause deception and confusion resulting in unfair competition.[55]

10. Secret and Proprietary Preparations. The names of secret and proprietary preparations will be protected against unauthorized use or imitation as the name of some other different preparation of like kind sold in competition, but not made in accordance with the formula of the original and genuine article,[56]

508, 42 L. J. Ch. 130, 27 L. T. Rep. N. S. 393, upon the ground that, on the evidence, the title had not acquired a secondary meaning as designating plaintiff's album exclusively); Kelly *v.* Byles, 13 Ch. D. 682, 49 L. J. Ch. 181, 42 L. T. Rep. N. S. 338, 28 Wkly. Rep. 485 ("Post Office Directory"); Spottiswoode *v.* Clark, 1 Coop. t. Cott. 254, 47 Eng. Reprint 844, 10 Jur. 1043, 2 Phil. 154, 22 Eng. Ch. 154, 41 Eng. Reprint 900. See Rose *v.* McLean Pub. Co., 27 Ont. 325 [*reversed* on other grounds in 24 Ont. App. 240].

53. See *supra*, V, C, 1.

54. **Ascription of authorship.**— It is settled law that where one has a right to publish literary matter, he may truthfully use the name of the author in connection with that matter. But that an action will lie for falsely representing one to be the author of that of which he is not the author, and hence if the matter is edited, added to, or changed, the facts must be plainly stated so as to avoid any misrepresentation. Jones *v.* American Law Book Co., 125 N. Y. App. Div. 519, 522, 109 N. Y. Suppl. 706; Harte *v.* De Witt, 1 Cent. L. J. (N. Y.) 360; Kipling *v.* Putnam, 120 Fed. 631; Kipling *v.* Fenno, 106 Fed. 692; Drummond *v.* Altemus, 60 Fed. 338; Merriam *v.* Holloway Pub. Co., 43 Fed. 450; Clemens *v.* Clark, 14 Fed. 728, 11 Biss. 459; Archbold *v.* Sweet, 5 C. & P. 219, 1 M. & Rob. 62, 24 E. C. L. 535; Cox *v.* Cox, 1 Eq. Rep. 94, 11 Hare 118, 1 Wkly. Rep. 345, 45 Eng. Ch. 118, 68 Eng. Reprint 1211; Lee *v.* Gibbings, 47 L. T. Rep. N. S. 263; Byron *v.* Johnston, 2 Meriv. 29, 16 Rev. Rep. 135, 35 Eng. Reprint 851. The author of a law book sold the copyright thereof to his publisher, and edited a second edition, but refused to edit a third; whereupon the publisher put out a third edition bearing the name of the author as if he had edited it; this edition contained errors which were prejudicial to the author. An injunction was granted to restrain the publisher from issuing the third edition with any statement which would lead the public to suppose that it was edited by the author. Archbold *v.* Sweet, 5 C. & P. 219, 1 M. & Rob. 62, 24 E. C. L. 535, per Tenterden, C. J. A publisher advertised for sale certain poems, which were represented to be by Lord Byron. An application for injunction was made by friends of Lord Byron, who was abroad. It was granted because the publisher would not swear that the poems were by Lord Byron. Byron *v.* Johnston, 2 Meriv. 29, 16 Rev. Rep. 135, 35 Eng. Reprint 851. In Lee *v.* Gibbings, 47 L. T. Rep. N. S. 263, it was held that an author's remedy for injury to his reputation by the publication of an altered or mutilated manuscript was "libel or nothing." This was approved in Donaldson *v.* Wright, 7 App. Cas. (D. C.) 45. See also Martin *v.* Wright, 6 Sim. 297, 9 Eng. Ch. 297, 58 Eng. Reprint 605.

"Mark Twain" agreed with a publisher to allow him to publish one of his essays in a book of selections, and sent him a number from which to select, which had been published but not copyrighted. The publisher brought out all of the essays, and also another, alleging in the advertisement and title page that all were by "Mark Twain," which was the *nom de plume* of plaintiff. An injunction was granted restraining defendant from using the name "Mark Twain" in any manner other than as provided by the agreement between the publisher and the author. Clemens *v.* Such, Codd. Dig. 312.

55. See *supra*, V, C, 4. And see Canada Pub. Co. *v.* Gage, 11 Can. Sup. Ct. 306. In an English case, the author of complainant's uncopyrighted book was enjoined from placing his own name in the title of a rival book upon the same subject which he had in fact edited. Metzler *v.* Wood, 8 Ch. D. 606, 47 L. J. Ch. 625, 33 L. T. Rep. N. S. 544, 26 Wkly. Rep. 577, wherein plaintiffs were proprietors of "Hemy's Royal Modern Tutor for the Pianoforte." Defendant employed Hemy to bring out a new edition of an obsolete work entitled "Jousse's Royal Standard Pianoforte Tutor," and published it as "Hemy's New and Revised Edition of Jousse's Royal Standard Pianoforte Tutor," the word "Hemy's" being in large and conspicuous letters. An injunction was granted on the ground that "no man has a right to sell his own goods as the goods of another."

56. *Georgia.*— Thedford Medicine Co. *v.* Curry, 96 Ga. 89, 22 S. E. 661.

Minnesota.— J. R. Watkins Medical Co. *v.* Sands, 83 Minn. 326, 86 N. W. 340; Watkins *v.* Landon, 52 Minn. 389, 54 N. W. 193, 38 Am. St. Rep. 560, 19 L. R. A. 236.

New York.— Keasbey *v.* Brooklyn Chemical Works, 142 N. Y. 467, 37 N. E. 476, 40 Am. St. Rep. 623 [*reversing* 21 N. Y. Suppl. 696]; Andrew Jurgens Co. *v.* Woodbury, 56 Misc. 404, 106 N. Y. Suppl. 571.

Tennessee.— C. F. Simmons Medicine Co. *v.* Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165.

Wisconsin.—Avenarius *v.* Kornely, 139 Wis. 247, 121 N. W. 336; Marshall *v.* Pinkham, 52 Wis. 572, 9 N. W. 615, 38 Am. Rep. 756.

United States.— Liebig's Extract of Meat Co. *v.* Liebig Extract Co., 172 Fed. 158 [*reversed* on other grounds in 180 Fed. 688, 103 C. C. A. 654]; Barnes *v.* Pierce 164

even though the labels and wrappers are entirely different,[57] because such a use of the name is necessarily false and deceptive.[58] But such names are generically descriptive and therefore may be used by any one who discovers and knows the secret of the composition of the article, and makes his own article in accordance with the original formula,[59] and such person may advertise that his preparation is made according to the original formula, if such is the truth.[60] A subsequent user of the name, however, must add some distinguishing statement showing that the article is his own production of the article known by that name,[61] and he must not imitate the dress or make-up of the goods, in addition to using the name, or do any affirmative act calculated to deceive the public and pass off his goods as

Fed. 213; Baglin *v.* Cusenier Co., 156 Fed. 1016 [*affirmed* in 164 Fed. 25, 90 C. C. A. 499] ("Chartreuse"); Memphis Keeley Inst. *v.* Leslie E. Keeley Co., 155 Fed. 964, 84 C. C. A. 112, 16 L. R. A. N. S. 921 (relief denied because of false representations by complainant); Dr. Peter H. Fahrney, etc., Co. *v.* Ruminer, 153 Fed. 735, 82 C. C. A. 621; Hostetter Co. *v.* Gallagher Stores, 142 Fed. 208; Hostetter *v.* Fries, 17 Fed. 620, 21 Blatchf. 339; Hostetter *v.* Vowinkle, 12 Fed. Cas. No. 6,714, 1 Dill. 329. See also "Castoria" cases *supra*, p. 828 note 28.

England.— Birmingham Vinegar Brewery Co. *v.* Powell, [1897] A. C. 710, 66 L. J. Ch. 763, 76 L. T. Rep. N. S. 792 [*affirming* [1896] 2 Ch. 54, 65 L. J. Ch. 563, 74 L. T. Rep. N. S. 509, 44 Wkly. Rep. 688 (*affirming* [1894] 3 Ch. 449, 71 L. T. Rep. N. S. 393, 13 Reports 153)] ("Yorkshire Relish"); Massam *v.* Thorley's Cattle Food Co., 14 Ch. D. 748, 42 L. T. Rep. N. S. 851, 28 Wkly. Rep. 966; Siegert *v.* Findlater, 7 Ch. D. 801, 47 L. J. Ch. 233, 38 L. T. Rep. N. S. 349, 26 Wkly. Rep. 459; Holloway *v.* Holloway, 13 Beav. 209, 51 Eng. Reprint 81; Franks *v.* Weaver, 10 Beav. 297, 50 Eng. Reprint 596; Morison *v.* Moat, 9 Hare 241, 15 Jur. 787, 20 L. J. Ch. 513, 41 Eng. Ch. 241, 68 Eng. Reprint 492 [*affirmed* in 16 Jur. 321, 21 L. J. Ch. 248]; Oldham *v.* James, 14 Ir. Ch. 81; Cotton *v.* Gillard, 44 L. J. Ch. 90; Morison *v.* Salmon, 10 L. J. C. P. 91, 2 M. & G. 385, 2 Scott N. R. 449, 40 E. C. L. 654; Liebig's Extract of Meat Co. *v.* Hanbury, 17 L. T. Rep. N. S. 298. *Compare* Singleton *v.* Bolton, 3 Dougl. 293, 26 E. C. L. 196, 99 Eng. Reprint 661; Morgan *v.* McAdam, 36 L. J. Ch. 228. *Contra*, Browne *v.* Freeman, 4 New Rep. 476, 12 Wkly. Rep. 305.

Canada.— Noel Co. *v.* Vitæ Ore Co., 17 Manitoba 87; Davis *v.* Kennedy, 13 Grant Ch. (U. C.) 523 [*followed* in Radam *v.* Shaw, 28 Ont. 612]; Whitney *v.* Hickling, 5 Grant Ch. (U. C.) 605.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," §§ 11, 14, 71.

57. Powell *v.* Birmingham Vinegar Co., [1894] 3 Ch. 449, 71 L. T. Rep. N. S. 393, 13 Reports 153 [*affirmed* in [1896] 2 Ch. 54, 65 L. J. Ch. 563, 74 L. T. Rep. N. S. 509, 44 Wkly. Rep. 688 (*affirmed* in [1897] A. C. 710, 66 L. J. Ch. 763, 76 L. T. Rep. N. S. 792)].

58. See *supra*, V, B, 8.

59. *Massachusetts.*— Covell *v.* Chadwick, 153 Mass. 263, 26 N. E. 856, 25 Am. St. Rep. 625; Chadwick *v.* Covell, 151 Mass. 190, 23 N. E. 1068, 21 Am. St. Rep. 442, 6 L. R. A. 839.

Minnesota.— J. R. Watkins Medical Co. *v.* Sands, 83 Minn. 326, 86 N. W. 340; Watkins *v.* Landon, 52 Minn. 389, 54 N. W. 193, 38 Am. St. Rep. 560, 19 L. R. A. 236, "Ward's Liniment."

Tennessee.— C. F. Simmons Medicine Co. *v.* Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165.

Wisconsin.— Marshall *v.* Pinkham, 52 Wis. 572, 9 N. W. 615, 38 Am. Rep. 756. *Compare* Avenarius *v.* Kornely, 129 Wis. 247, 121 N. W. 336.

England.— Massam *v.* Thorley's Cattle Food Co., 14 Ch. D. 748, 42 L. T. Rep. N. S. 851, 28 Wkly. Rep. 966 [*reversing* 14 Ch. D. 763, 41 L. T. Rep. N. S. 543, 28 Wkly. Rep. 295 (*reversing* 6 Ch. D. 574, 46 L. J. Ch. 707, 36 L. T. Rep. N. S. 848)]; ("Thorley's Food for Cattle"); Siegert *v.* Findlater, 7 Ch. D. 801, 47 L. J. Ch. 233, 38 L. T. Rep. N. S. 349, 26 Wkly. Rep. 459; James *v.* James, L. R. 13 Eq. 421, 41 L. J. Ch. 353, 26 L. T. Rep. N. S. 568, 20 Wkly. Rep. 434; Benbow *v.* Low, 44 L. T. Rep. N. S. 875, 29 Wkly. Rep. 837; Condy *v.* Mitchell, 37 L. T. Rep. N. S. 766, 26 Wkly. Rep. 269; Hovenden *v.* Lloyd, 18 Wkly. Rep. 1132. See also Estcourt *v.* Estcourt Hop Essence Co., L. R. 10 Ch. 276, 44 L. J. Ch. 223, 32 L. T. Rep. N. S. 80, 23 Wkly. Rep. 313. *Contra*, where knowledge of the secret was acquired by breach of trust. Morison *v.* Moat, 9 Hare 241, 15 Jur. 787, 20 L. J. Ch. 513, 41 Eng. Ch. 241, 68 Eng. Reprint 248 [*affirmed* in 16 Jur. 321, 21 L. J. Ch. 248]; Yovatt *v.* Winyard, 1 Jac. & W. 394, 21 Rev. Rep. 194, 37 Eng. Reprint 425.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," §§ 11, 14, 71.

60. Watkins *v.* Landon, 52 Minn. 389, 54 N. W. 193, 38 Am. St. Rep. 560, 19 L. R. A. 236.

61. Watkins *v.* Landon, 52 Minn. 389, 54 N. W. 193, 38 Am. St. Rep. 560, 19 L. R. A. 236; Birmingham Vinegar Brewery Co. *v.* Powell, [1897] A. C. 710, 66 L. J. Ch. 763, 76 L. T. Rep. N. S. 792 [*affirming* [1896] 2 Ch. 54, 65 L. J. Ch. 563, 74 L. T. Rep. N. S. 509, 44 Wkly. Rep. 688]; Massam *v.* Thorley's Cattle Food Co., 14 Ch. D. 763, 42 L. T. Rep. N. S. 851, 28 Wkly. Rep. 966 [*reversing* 6 Ch. D. 574, 46 L. J. Ch. 707, 36 L. T. Rep. N. S. 848]. And see general rule *supra*, V, B, 7.

and for the previously known goods.[62] Where plaintiff himself does not know the formula of the original article whose name he has applied to an imitation of it, he is not entitled to restrain others from using the name on their imitations.[63] Of course, if the name has not acquired a secondary meaning as indicating a particular production of such article the name may be used by any one without more, for in such case it is not deceptive.[64]

11. Dramatic Productions. The name or title of a play or other dramatic production, although not a trade-mark, will be protected against unauthorized use or imitation in connection with a different production.[65] If such name is non-descriptive and arbitrary, an exclusive right may be acquired therein as a trade-name.[66] Two plays, each founded on the same novel, may each use the name of such novel, but the second user of the name must distinguish his play from the prior play.[67] The name under which dramatic performers give their performance will be protected against use or imitation by others giving similar performances,[68] provided of course the nature of the performance is unobjectionable and fit to be protected.[69]

12. Dress of Goods. Irrespective of any question of technical trade-mark, or the existence of any exclusive proprietary interest in the labels, marks, form of packages, and general dress or make-up of the goods, as they go into the market, a rival trader has no right to use or imitate such labels, marks, form of package, or dress of goods, so as to deceive purchasers and pass off his goods as those of his rival. To do so constitutes unfair competition against which an injunction will be granted.[70] This class of cases is in fact one of the commonest forms of

62. C. F. Simmons Medicine Co. *v.* Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165; James *v.* James, L. R. 13 Eq. 421, 41 L. J. Ch. 353, 26 L. T. Rep. N. S. 568, 20 Wkly. Rep. 434 (holding that the subsequent user must do nothing calculated to lead the public to believe that he is the successor of the original inventor, and that he must not assert that his article is the only genuine article and must not even suggest that the article manufactured by the successors of the original maker is a spurious article); Condy *v.* Mitchell, 37 L. T. Rep. N. S. 766, 26 Wkly. Rep. 269.

63. Cotton *v.* Gillard, 44 L. J. Ch. 90.

For the general principle see *supra*, V, B, 11.

64. See *supra*, V, B, 5.

65. *Illinois.*— Hopkins Amusement Co. *v.* Grohman, 103 Ill. App. 613 [*affirmed* in 202 Ill. 541, 67 N. E. 391].

New York.— Hier *v.* Abrahams, 82 N. Y. 519, 37 Am. Rep. 589; Frohman *v.* Morris, 68 Misc. 461, 123 N. Y. Suppl. 1090; Frohman *v.* Payton, 34 Misc. 275, 68 N. Y. Suppl. 849. *Compare* Frohman *v.* Miller, 8 Misc. 379, 29 N. Y. Suppl. 1109.

Pennsylvania.— Shook *v.* Wood, 10 Phila. 373.

United States.— Glaser *v.* St. Elmo Co., 175 Fed. 276; Investor Pub. Co. *v.* Dobinson, 82 Fed. 56; Thomas *v.* Lennon, 14 Fed. 849.

England.— Tussaud *v.* Tussaud, 44 Ch. D. 678, wax-works exhibition.

The presentation of a burlesque under the name of "Chanticlair" may be enjoined by the owner of the play "Chantecler," on the ground that the presentation of the burlesque under such name tends to deceive the public. Frohman *v.* Morris, 68 Misc. (N. Y.) 461, 123 N. Y. Suppl. 1090.

66. See *supra*, V, A, 4.

"Chantecler," as the name of a play in which a barnyard fowl is represented by each part, is not of such a descriptive character as to preclude its exclusive appropriation. Frohman *v.* Morris, 68 Misc. (N. Y.) 461, 123 N. Y. Suppl. 1090.

67. Glaser *v.* St. Elmo Co., 175 Fed. 276.

68. Finney's Orchestra *v.* Finney's Famous Orchestra, 161 Mich. 289, 126 N. W. 198, 28 L. R. A. N. S. 458 (name of orchestra); Fay *v.* Lambourne, 124 N. Y. App. Div. 245, 108 N. Y. Suppl. 874 [*affirmed* in 196 N. Y. 575, 90 N. E. 1158].

69. See *supra*, V, B, 11.

70. *Alabama.*— Kyle *v.* Perfection Mattress Co., 127 Ala. 39, 28 So. 545, 85 Am. St. Rep. 78, 50 L. R. A. 628.

California.— Banzhaf *v.* Chase, 150 Cal. 180, 88 Pac. 704; Spieker *v.* Lash, 102 Cal. 38, 36 Pac. 362; Schmidt *v.* Brieg, 100 Cal. 672, 35 Pac. 623, 22 L. R. A. 790; Sperry *v.* Percival Milling Co., 81 Cal. 252, 22 Pac. 651; Pierce *v.* Guittard, 68 Cal. 68, 8 Pac. 645, 58 Am. Rep. 1; Burke *v.* Cassin, 45 Cal. 467, 13 Am. Rep. 204; Castroville Co-Operative Creamery Co. *v.* Col, 6 Cal. App. 533, 92 Pac. 648.

Colorado.— See Solis Cigar Co. *v.* Pozo, 16 Colo. 388, 26 Pac. 556, 25 Am. St. Rep. 279.

Florida.— Bluthenthal *v.* Mohlmann, 49 Fla. 275, 38 So. 709; El Modello Cigar Mfg. Co. *v.* Gato, 25 Fla. 886, 7 So. 23, 23 Am. St. Rep. 537, 6 L. R. A. 823.

Georgia.— M. A. Thedford Medicine Co. *v.* Curry, 96 Ga. 89, 22 S. E. 661; Foster *v.* Blood Balm Co., 77 Ga. 216, 3 S. E. 284. See Ellis *v.* Zeilin, 42 Ga. 91.

Illinois.— Ball *v.* Siegel, 116 Ill. 137, 4 N. E. 667, 56 Am. Rep. 766; Frazer *v.* Frazer Lubricator Co., 18 Ill. App. 450.

unfair competition. Long, extensive, and exclusive use of a distinctive package,

Iowa.— Sartor *v.* Schaden, 125 Iowa 696, 101 N. W. 511.

Kentucky.—Avery *v.* Meikle, 81 Ky. 73.

Maryland.— Parlett *v.* Guggenheimer, 67 Md. 542, 10 Atl. 81, 1 Am. St. Rep. 416.

Massachusetts.— New England Awl, etc., Co. *v.* Marlborough Awl, etc., Co., 168 Mass. 154, 46 N. E. 386, 60 Am. St. Rep. 377; Hildreth *v.* D. S. McDonald Co., 164 Mass. 16, 41 N. E. 56, 49 Am. St. Rep. 440.

Missouri.— McCartney *v.* Garnhart, 45 Mo. 593, 100 Am. Dec. 397; Shelley *v.* Sperry, 121 Mo. App. 429, 99 S. W. 488; Gaines *v.* E. Whyte Grocery, etc., Co., 107 Mo. App. 507, 81 S. W. 648; Conrad *v.* Joseph Uhrig Brewing Co., 8 Mo. App. 277.

New Jersey.— Johnson *v.* Seabury, 71 N. J. Eq. 750, 67 Atl. 36, 124 Am. St. Rep. 1007, 12 L. R. A. N. S. 1201 [*reversing* 69 N. J. Eq. 696, 61 Atl. 5]; Centaur Co. *v.* Link, 62 N. J. Eq. 147, 49 Atl. 828; Stirling Silk Mfg. Co. *v.* Sterling Silk Co., 59 N. J. Eq. 394, 46 Atl. 199; Wirtz *v.* Eagle Bottling Co., 50 N. J. Eq. 164, 24 Atl. 658.

New York.— Brown *v.* Doscher, 147 N. Y. 647, 42 N. E. 268 [*affirming* 73 Hun 107, 26 N. Y. Suppl. 951]; Fischer *v.* Blank, 138 N. Y. 244, 33 N. E. 1040 [*affirming* 19 N. Y. Suppl. 65]; Seeman *v.* Zechnowitz, 136 N. Y. App. Div. 937, 121 N. Y. Suppl. 125; Westcott Chuck Co. *v.* Oneida Nat. Chuck Co., 122 N. Y. App. Div. 260, 106 N. Y. Suppl. 1016; Boker *v.* Korkemas, 122 N. Y. App. Div. 36, 106 N. Y. Suppl. 904; Dutton *v.* Cupples, 117 N. Y. App. Div. 172, 102 N. Y. Suppl. 309; Roncoroni *v.* Gross, 92 N. Y. App. Div. 221, 86 N. Y. Suppl. 1112; Volger *v.* Force, 63 N. Y. App. Div. 122, 71 N. Y. Suppl. 209; Kassel *v.* Jeuda, 61 N. Y. App. Div. 613, 70 N. Y. Suppl. 480; Anargyros *v.* Egyptian Amasis Cigarette Co., 54 N. Y. App. Div. 345, 66 N. Y. Suppl. 626; T. B. Dunn Co. *v.* Trix Mfg. Co., 50 N. Y. App. Div. 75, 63 N. Y. Suppl. 333; Ft. Stanwix Canning Co. *v.* William McKinley Canning Co., 49 N. Y. App. Div. 566, 63 N. Y. Suppl. 704; McLoughlin *v.* Singer, 33 N. Y. App. Div. 185, 53 N. Y. Suppl. 342; Reckitt *v.* Kellogg, 28 N. Y. App. Div. 111, 50 N. Y. Suppl. 888; Day *v.* Webster, 23 N. Y. App. Div. 601, 49 N. Y. Suppl. 314; Potter *v.* McPherson, 21 Hun 559; Ransom *v.* Ball, 4 Silv. Sup. 217, 7 N. Y. Suppl. 238; Brown *v.* Mercer, 37 N. Y. Super. Ct. 265; Williams *v.* Johnson, 2 Bosw. 1; Lockwood *v.* Bostwick, 2 Daly 521; Monopol Tobacco Works *v.* Gensior, 32 Misc. 87, 66 N. Y. Suppl. 155; Bolen, etc., Mfg. Co. *v.* Jonasch, 29 Misc. 99, 60 N. Y. Suppl. 555; Fischer *v.* Blank, 19 N. Y. Suppl. 65; Johnson *v.* Hitchcock, 3 N. Y. Suppl. 680; Enoch Morgan's Sons Co. *v.* Schwachofer, 5 Abb. N. Cas. 265, 55 How. Pr. 37; Lea *v.* Wolff, 13 Abb. Pr. N. S. 389 [*modified* in 1 Thomps. & C. 626, 15 Abb. Pr. N. S. 1, 46 How. Pr. 157]; Fetridge *v.* Wells, 4 Abb. Pr. 144, 13 How. Pr. 385; Fleischmann *v.* Schuckmann, 62 How. Pr. 92; Electro-Selicon Co. *v.* Trask, 59 How. Pr. 189; Bininger *v.* Wattles, 28 How. Pr. 206; Williams *v.* Spence, 25 How. Pr. 366. But see Enoch Morgan's Sons Co. *v.* Troxell, 89 N. Y. 292, 42 Am. Rep. 294.

Pennsylvania.— Juan F. Portuonodo Cigar Mfg. Co. *v.* Vicente Portuondo Mfg. Co., 222 Pa. St. 116, 70 Atl. 968; Arthur *v.* Howard, 19 Pa. Co. Ct. 81; Clark, etc., Co. *v.* Scott, 4 Lack. Leg. N. 159; Dreydoppel *v.* Young, 14 Phila. 226. But see Brown *v.* Seidel, 153 Pa. St. 60, 25 Atl. 1064.

Rhode Island.—Alexander *v.* Morse, 14 R. I. 153, 51 Am. Rep. 369; Davis *v.* Kendall, 2 R. I. 566.

Tennessee.— Robinson *v.* Storm, 103 Tenn. 40, 52 S. W. 880; C. F. Simmons Medicine Co. *v.* Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165.

Texas.— Goodman *v.* Bohls, 3 Tex. Civ. App. 183, 22 S. W. 11.

Wisconsin.— Manitowoc Malting Co. *v.* Milwaukee Malting Co., 119 Wis. 543, 97 N. W. 389; Oppermann *v.* Waterman, 94 Wis. 583, 69 N. W. 569; Gessler *v.* Grieb, 80 Wis. 21, 48 N. W. 1098, 27 Am. St. Rep. 20.

United States.— Saxlehner *v.* Neilsen, 179 U. S. 43, 21 S. Ct. 16, 45 L. ed. 77, 93 Off. Gaz. 948 [*reversing* 91 Fed. 1004, 34 C. C. A. 690]; Saxlehner *v.* Eisner, etc., Co., 179 U. S. 19, 21 S. Ct. 7, 45 L. ed. 60, 93 Off. Gaz. 940 [*reversing* 91 Fed. 536, 33 C. C. A. 291]; Coats *v.* Merrick Thread Co., 149 U. S. 562, 13 S. Ct. 966, 37 L. ed. 847 [*affirming* 36 Fed. 324, 1 L. R. A. 616]; McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828; Florence Mfg. Co. *v.* Dowd, 178 Fed. 73, 101 C. C. A. 565 [*reversing* 171 Fed. 122]; National Water Co. *v.* Hertz, 177 Fed. 607; Burke *v.* Bishop, 175 Fed. 167; Billiken Co. *v.* Baker, etc., Co., 174 Fed. 829; Mellwood Distilling Co. *v.* Harper, 167 Fed. 389; Holeproof Hosiery Co. *v.* Fitts, 167 Fed. 378; Rice-Stix Dry Goods Co. *v.* J. A. Scriven Co., 165 Fed. 639, 91 C. C. A. 475; Wolf *v.* Hamilton-Brown Shoe Co., 165 Fed. 413, 91 C. C. A. 363; Baglin *v.* Cusenier Co., 164 Fed. 25, 90 C. C. A. 499 [*affirming* 156 Fed. 1016]; William Wrigley, Jr., Co. *v.* Grove Co., 161 Fed. 885; National Water Co. *v.* O'Connell, 159 Fed. 1001 [*affirmed* in 161 Fed. 545, 88 C. C. A. 487]; G. & C. Merriam Co. *v.* Ogilvie, 159 Fed. 638, 88 C. C. A. 596, 16 L. R. A. N. S. 549; De Long Hook, etc., Co. *v.* Francis Hook, etc., Co., 159 Fed. 292 [*affirmed* in 168 Fed. 898, 94 C. C. A. 310]; Baglin *v.* Cusenier, 156 Fed. 1016 [*affirmed* in 164 Fed. 25, 90 C. C. A. 499]; Enoch Morgan's Sons Co. *v.* Ward, 152 Fed. 690, 81 C. C. A. 616, 12 L. R. A. N. S. 729; R. J. Reynolds Tobacco Co. *v.* Allen Bros. Tobacco Co., 151 Fed. 819; Clay *v.* Kline, 149 Fed. 912; Siegert *v.* Gandolfi, 149 Fed. 100, 79 C. C. A. 142 [*reversing* 139 Fed. 917]; National Starch Co. *v.* Koster, 146 Fed. 259; De Long Hook, etc., Co. *v.* Francis Hook, etc., Fastener Co., 144 Fed. 682, 75 C. C. A. 484 [*modifying* 139 Fed. 146]; Knickerbocker Chocolate Co. *v.* Griffing, 144 Fed. 316; Bates Mfg. Co. *v.* Bates Mach. Co., 141 Fed. 213; Lamont *v.* Hershey, 140 Fed.

label, or dress of goods raises a presumption that the public recognize the goods

763; Revere Rubber Co. *v.* Consolidated Hoof Pad Co., 139 Fed. 151; Kronthal Waters *v.* Becker, 137 Fed. 649; Von Mumm *v.* Steinmetz, 137 Fed. 158; Dennison Mfg. Co. *v.* Scharf Tag, etc., Co., 135 Fed. 625, 68 C. C. A. 263; Devlin *v.* Peek, 135 Fed. 167 [*affirmed* in 144 Fed. 1021]; Devlin *v.* McLeod, 135 Fed. 164; Bickmore Gall Cure Co. *v.* Karns, 134 Fed. 833, 67 C. C. A. 459 [*reversing* 126 Fed. 573]; Scriven *v.* North, 134 Fed. 366, 67 C. C. A. 348 [*modifying* 124 Fed. 894]; Continental Tobacco Co. *v.* Larus, etc., Co., 133 Fed. 727, 66 C. C. A. 557; Hygienic Fleeced Underwear Co. *v.* Way, 133 Fed. 245 [*reversed* on other grounds in 137 Fed. 592, 70 C. C. A. 553]; Victor Talking Mach. Co. *v.* Armstrong, 132 Fed. 711; Heide *v.* Wallace, 129 Fed. 649 [*affirmed* in 135 Fed. 346, 68 C. C. A. 16]; Drewry *v.* Wood, 127 Fed. 887; Swift *v.* Brenner, 125 Fed. 826; Enterprise Mfg. Co. *v.* Landers, 124 Fed. 923 [*affirmed* in 131 Fed. 240, 65 C. C. A. 587]; Cauffman *v.* Schuler, 123 Fed. 205; Royal Baking Powder Co. *v.* Royal, 122 Fed. 337, 58 C. C. A. 499; Globe-Wernicke Co. *v.* Brown, 121 Fed. 90, 57 C. C. A. 344; Bauer *v.* Siegert, 120 Fed. 81, 56 C. C. A. 487; Bauer *v.* Order of Carthusian Monks, 120 Fed. 78, 56 C. C. A. 484; Bauer *v.* La Société, etc., 120 Fed. 74, 56 C. C. A. 480; Enoch Morgan's Sons Co. *v.* Whittier-Coburn Co., 118 Fed. 657; Keuffel, etc., Co. *v.* H. S. Crocker Co., 118 Fed. 187; Kostering *v.* Seattle Brewing, etc., Co., 116 Fed. 620, 54 C. C. A. 76; Draper *v.* Skerrett, 116 Fed. 206, 94 Fed. 912; Liebig's Extract of Meat Co. *v.* Walker, 115 Fed. 822, 103 Fed. 87; Sterling Remedy Co. *v.* Spermine Medical Co., 112 Fed. 1000, 50 C. C. A. 657; Kentucky Distilleries, etc., Co. *v.* Wathen, 110 Fed. 641; Sterling Remedy Co. *v.* Gorey, 110 Fed. 372; Postum Cereal Co. *v.* American Health Food Co., 109 Fed. 898 [*affirmed* in 119 Fed. 848, 56 C. C. A. 360]; Lalance, etc., Mfg. Co. *v.* National Enameling, etc., Co., 109 Fed. 317; Johnson *v.* Brunor, 107 Fed. 466; Pheiffer *v.* Wilde, 107 Fed. 456, 46 C. C. A. 415; Potter Drug, etc., Corp. *v.* Pasfield Soap Co., 106 Fed. 914, 46 C. C. A. 40; Hansen *v.* Siegel-Cooper Co., 106 Fed. 690; Charles E. Hires Co. *v.* Consumers' Co., 100 Fed. 809, 41 C. C. A. 71; Centaur Co. *v.* Marshall, 97 Fed. 785, 38 C. C. A. 413; Franck *v.* Frank Chicory Co., 95 Fed. 818; National Biscuit Co. *v.* Baker, 95 Fed. 135; California Fig-Syrup Co. *v.* Worden, 95 Fed. 132; Centaur Co. *v.* Marshall, 92 Fed. 605 [*affirmed* in 97 Fed. 785, 38 C. C. A. 413]; Proctor, etc., Co. *v.* Globe Refining Co., 92 Fed. 357, 34 C. C. A. 405; Centaur Co. *v.* Neathery, 91 Fed. 891, 34 C. C. A. 118; Centaur Co. *v.* Robinson, 91 Fed. 889; Von Mumm *v.* Witteman, 91 Fed. 126, 33 C. C. A. 404 [*affirming* 85 Fed. 966]; Noel *v.* Ellis, 89 Fed. 978; Centaur Co. *v.* Killenberger, 87 Fed. 725; Pillsbury-Washburn Flour-Mills Co. *v.* Eagle, 86 Fed. 608, 30 C. C. A. 386, 41 L. R. A. 162; Walker *v.* Hockstaeder, 85 Fed. 776; Johnson *v.* Bauer, 82 Fed. 662, 27 C. C. A. 374 [*reversing* 79 Fed. 954]; Saxlehner *v.* Graef, 81 Fed. 704; C. F. Simmons Medicine Co. *v.* Simmons, 81 Fed. 163; Walker *v.* Mikolas, 79 Fed. 955; Pennsylvania Salt Mfg. Co. *v.* Myers, 79 Fed. 87; N. K. Fairbank Co. *v.* R. W. Bell Mfg. Co., 77 Fed. 869, 23 C. C. A. 554 [*reversing* 71 Fed. 295]; Buck's Stove, etc., Co. *v.* Kiechle, 76 Fed. 758; Klotz *v.* Hecht, 73 Fed. 822; Cook, etc., Co. *v.* Ross, 73 Fed. 203; Sterling Remedy Co. *v.* Eureka Chemical, etc., Co., 70 Fed. 704; Chattanooga Medicine Co. *v.* Thedford, 66 Fed. 544, 14 C. C. A. 101 [*reversing* 58 Fed. 347]; Meyer *v.* Dr. B. L. Bull Vegetable Medicine Co., 58 Fed. 884, 7 C. C. A. 558; Von Mumm *v.* Frash, 56 Fed. 830; Improved Fig Syrup Co. *v.* California Fig Syrup Co., 54 Fed. 175, 4 C. C. A. 264; Hutchinson *v.* Blumberg, 51 Fed. 829; California Fig-Syrup Co. *v.* Improved Fig-Syrup Co., 51 Fed. 296; Wellman, etc., Tobacco Co. *v.* Ware Tobacco-Works, 46 Fed. 289; Putnam Nail Co. *v.* Bennett, 43 Fed. 800; Myers *v.* Theller, 38 Fed. 607; Jennings *v.* Johnson, 37 Fed. 364; Brown Chemical Co. *v.* Stearns, 37 Fed. 360; Sawyer Crystal Blue Co. *v.* Hubbard, 32 Fed. 388; Moxie Nerve Food Co. *v.* Baumbach, 32 Fed. 205; Royal Baking Powder Co. *v.* Davis, 26 Fed. 293; Carbolic Soap Co. *v.* Thompson, 25 Fed. 625; Burton *v.* Stratton, 12 Fed. 696; Hostetter *v.* Adams, 10 Fed. 838, 20 Blatchf. 326; Sawyer *v.* Kellogg, 7 Fed. 720; Joseph Dixon Crucible Co. *v.* Benham, 4 Fed. 527; Sawyer *v.* Horn, 1 Fed. 24, 4 Hughes 239; Coffeen *v.* Brunton, 5 Fed. Cas. No. 2,946, 4 McLean 516; Frese *v.* Bachof, 9 Fed. Cas. No. 5,110, 14 Blatchf. 432, 13 Off. Gaz. 635; Hostetter *v.* Vowinkle, 12 Fed. Cas. No. 6,714, 1 Dill. 329; Lowell Mfg. Co. *v.* Larned, 15 Fed. Cas. No. 8,570; Moorman *v.* Hoge, 17 Fed. Cas. No. 9,783, 2 Sawy. 78; Walton *v.* Crowley, 29 Fed. Cas. No. 17,133, 3 Blatchf. 440; Washington Medalion Pen Co. *v.* Esterbrook, 29 Fed. Cas. No. 17,246*a*. But see Frese *v.* Bachof, 9 Fed. Cas. No. 5,109, 13 Blatchf. 234.

England.— Payton *v.* Snelling, [1901] A. C. 308, 70 L. J. Ch. 644, 85 L. T. Rep. N. S. 287; Singer Mfg. Co. *v.* Loog, 8 App. Cas. 15, 52 L. J. Ch. 481, 48 L. T. Rep. N. S. 3, 31 Wkly. Rep. 325 [*reversing* 18 Ch. D. 395, 44 L. T. Rep. N. S. 888, 29 Wkly. Rep. 699]; Seixo *v.* Provezende, L. R. 1 Ch. 192, 12 Jur. N. S. 215, 14 L. T. Rep. N. S. 314, 14 Wkly. Rep. 357; Sen Sen Co. *v.* Britten, [1899] 1 Ch. 692, 68 L. J. Ch. 250, 80 L. T. Rep. N. S. 278, 15 T. L. R. 238, 47 Wkly. Rep. 358; Lever *v.* Goodwin, 36 Ch. D. 1, 57 L. T. Rep. N. S. 583, 36 Wkly. Rep. 177; Massam *v.* Thorley's Cattle Food Co., 14 Ch. D. 748, 42 L. T. Rep. N. S. 851, 28 Wkly. Rep. 966; Siegert *v.* Findlater, 7 Ch. D. 801, 47 L. J. Ch. 233, 38 L. T. Rep. N. S. 349, 26 Wkly. Rep. 459; Hirst *v.* Denham, L. R. 14 Eq. 542, 41 L. J. Ch. 752, 27 L. T. Rep. N. S. 56; Blofeld *v.* Payne, 4 B. & Ad. 410, 2 L. J. K. B. 68, 1 N. & M. 353, 24 E. C. L. 183, 110 Eng. Reprint 509; Shrimpton *v.* Laight, 18 Beav. 164, 52 Eng. Reprint 65; Holloway *v.* Holloway, 13 Beav. 209, 51 Eng. Reprint 81;

by reason of the appearance of such package or label.[71] Where plaintiff's use of the particular dress of goods has not been exclusive so that it has come to indicate his goods as distinguished from all others, he is not entitled to an injunction.[72] Substantially the dress of goods must have acquired a secondary meaning and come to indicate plaintiff's goods.[73] Use of the common, usual, or necessary method of putting up or marking the particular class of goods involved does not alone constitute unfair competition.[74] Use of features common to the trade or required by the nature of the article cannot be enjoined as unfair.[75] Mere use of the same color, apart from any other imitative feature, will not be enjoined.[76] But color is one of the most marked *indicia* of a package, label, or dress of an article, and is an important element in determining whether the combination of features making up the dress of the goods is a fraudulent and deceptive one.[77]

Franks *v.* Weaver, 10 Beav. 297, 50 Eng. Reprint 596; Croft *v.* Day, 7 Beav. 84, 29 Eng. Ch. 84, 49 Eng. Reprint 994; Gout *v.* Aleploglu, 6 Beav. 69 note, 49 Eng. Reprint 750; Day *v.* Binning, Coop. Pr. Cas. 489, 47 Eng. Reprint 611; Edelsten *v.* Vick, 1 Eq. Rep. 413, 11 Hare 78, 18 Jur. 7, 23 Eng. L. & Eq. 51, 45 Eng. Ch. 78, 68 Eng. Reprint 1194; Knott *v.* Morgan, 2 Keen 213, 15 Eng. Ch. 213, 48 Eng. Reprint 610; Schweitzer *v.* Atkins, 37 L. J. Ch. 847, 19 L. T. Rep. N. S. 6, 16 Wkly. Rep. 1080; Weingarten *v.* Bayer, 92 L. T. Rep. N. S. 511, 21 T. L. R. 418; Bass *v.* Dawber, 19 L. T. Rep. N. S. 626; Barnett *v.* Leuchars, 13 L. T. Rep. N. S. 495, 14 Wkly. Rep. 166; Southorn *v.* Reynolds, 12 L. T. Rep. N. S. 575.

Canada.— Johnson *v.* Parr, Russ. Eq. Dec. (Nova Scotia) 98; Gillett *v.* Lumsden, 8 Ont. L. Rep. 168, 3 Ont. Wkly. Rep. 851 [*affirming* 6 Ont. L. Rep. 66, 2 Ont. Wkly. Rep. 497]; McCall *v.* Theal, 28 Grant Ch. (U. C.) 48; Whitney *v.* Hickling, 5 Grant Ch. (U. C.) 605.

Australia.—Wolfe *v.* Hart, 4 Vict. L. Rep. 125, 134.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," §§ 73, 74.

71. New England Awl, etc., Co. *v.* Marlboro Awl, etc., Co., 168 Mass. 154, 46 N. E. 386, 60 Am. St. Rep. 377; R. J. Reynolds Tobacco Co. *v.* Allen Bros. Tobacco Co., 151 Fed. 819.

72. Piaget *v.* Headley, 33 Misc. (N. Y.) 204, 68 N. Y. Suppl. 351.

73. In Colgan *v.* Danheiser, 35 Fed. 150, where the complainant put up and labeled his chewing gum in a particular way, he was held not entitled to an injunction to restrain defendant from doing likewise, in the absence of clear proof that he had first established a reputation for his goods by this means, and that defendant had attempted to supplant him in the market by the unlawful use of such device. See also Lowell Mfg. Co. *v.* Larned, 15 Fed. Cas. No. 8,570, Codd. Dig. 341.

Modification of the dress by which goods had become known to the public does not justify a rival manufacturer in adopting or simulating the earlier dress, or relieve it from liability for unfair competition where it has done so. De Long Hook, etc., Co. *v.* Francis Hook, etc., Co., 159 Fed. 292 [*affirmed* in 168 Fed. 898, 94 C. C. A. 310].

74. *California.*— Castle *v.* Siegfried, 103 Cal. 71, 37 Pac. 210.

Louisiana.— New Orleans Coffee Co. *v.* American Coffee Co., 124 La. 19, 49 So. 730.

Pennsylvania.— Heinz *v.* Lutz, 146 Pa. St. 592, 23 Atl. 314.

Wisconsin.— Gessler *v.* Grieb, 80 Wis. 21, 48 N. W. 1098, 27 Am. St. Rep. 20.

United States.— Coats *v.* Merric Thread Co., 149 U. S. 562, 13 S. Ct. 966, 970, 37 L. ed. 847; U. S. Tobacco Co. *v.* McGreenery, 144 Fed. 1022, 74 C. C. A. 682 [*affirming* 144 Fed. 531]; Regensburg *v.* Juan F. Portuondo Cigar Mfg. Co., 142 Fed. 160, 73 C. C. A. 378 [*affirming* 136 Fed. 866]; Dennison Mfg. Co. *v.* Scharf Tag, etc., Co., 135 Fed. 625, 68 C. C. A. 263; Continental Tobacco Co. *v.* Larus, etc., Co., 133 Fed. 727, 66 C. C. A. 557; Heide *v.* Wallace, 129 Fed. 649 [*affirmed* in 135 Fed. 346, 68 C. C. A. 16]; Bickmore Gall Cure Co. *v.* Karns Mfg. Co., 126 Fed. 573 [*reversed* on other grounds in 134 Fed. 833, 67 C. C. A. 439]; Marvel Co. *v.* Tullar Co., 125 Fed. 829; Frese *v.* Bachof, 9 Fed. Cas. No. 5,109, 13 Blatchf. 234.

England.— Payton *v.* Ward, 17 Rep. Pat. Cas. 58; Payton *v.* Snelling, 17 Rep. Pat. Cas. 48 [*affirmed* in [1901] A. C. 308, 70 L. J. Ch. 644, 85 L. T. Rep. N. S. 287].

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," §§ 73, 74.

75. Castle *v.* Siegfried, 103 Cal. 71, 37 Pac. 210; Schenker *v.* Awerbach, 89 N. Y. App. Div. 612, 85 N. Y. Suppl. 129; J. A. Scriven Co. *v.* Morris, 154 Fed. 914 [*affirmed* in 158 Fed. 1020, 85 C. C. A. 571]; U. S. Tobacco Co. *v.* McGreenery, 144 Fed. 1022, 74 C. C. A. 682 [*affirming* 144 Fed. 531]; Heide *v.* Wallace, 135 Fed. 346, 68 C. C. A. 16; Marvel & Co. *v.* Pearl, 133 Fed. 160, 66 C. C. A. 226; Bickmore Gall Cure Co. *v.* Karns Mfg. Co., 126 Fed. 573 [*reversed* on other grounds in 134 Fed. 833, 67 C. C. A. 439].

76. Fisher *v.* Blank, 138 N. Y. 244, 33 N. E. 1040; Omega Oil Co. *v.* Weschler, 35 Misc. (N. Y.) 441, 71 N. Y. Suppl. 983 [*affirmed* in 68 N. Y. App. Div. 638, 74 N. Y. Suppl. 1140]; Heinz *v.* Lutz, 146 Pa. St. 592, 23 Atl. 314.

Color as a trade-mark see *supra*, III, B, 10.

77. *Illinois.*— Nokes *v.* Mueller, 72 Ill. App. 431.

Massachusetts.— New England Awl, etc.,

Similarly, the form of an article or package, like the color and other *indicia*, is to some extent arbitrary, because the vendor might have adopted almost any form for the packing of his goods, and having adopted and adhered to one particular form until it has become well-known to the public, he will be protected in it as far as the court can go without creating unlawful monopolies or appropriating public property to private use without legal grant. Such form cannot be used by another for the purpose of carrying on unfair competition.[78] But mere form of package standing alone could hardly ever constitute unfair competition.[79]

Co. *v.* Marlborough Awl, etc., Co., 168 Mass. 154, 46 N. E. 386, 60 Am. St. Rep. 377; Hildreth *v.* D. S. McDonald Co., 164 Mass. 16, 41 N. E. 56, 49 Am. St. Rep. 440.

New York.— Reckitt *v.* Kellogg, 28 N. Y. App. Div. 111, 50 N. Y. Suppl. 888; Babbitt *v.* Brown, 68 Hun 515, 23 N. Y. Suppl. 25; Williams *v.* Johnson, 2 Bosw. 1; Lockwood *v.* Bostwick, 2 Daly 521; Fischer *v.* Blank, 19 N. Y. Suppl. 65; New York Cab Co. *v.* Mooney, 15 Abb. N. Cas. 152; Lea *v.* Wolf, 13 Abb. Pr. N. S. 389 [*modified* in 1 Thomps. & C. 626, 15 Abb. Pr. N. S. 1, 46 How. Pr. 157]; Enoch Morgan's Co. *v.* Schwachhofer, 5 Abb. N. Cas. 265, 55 How. Pr. 37; Williams *v.* Spence, 25 How. Pr. 366.

United States.— McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828; Drewery *v.* Wood, 127 Fed. 887; Bauer *v.* La Société, etc., 120 Fed. 74, 56 C. C. A. 480; Enoch Morgan's Sons Co. *v.* Whittier-Coburn Co., 118 Fed. 657; Keuffel, etc., Co. *v.* H. S. Crocker Co., 118 Fed. 187; Sterling Remedy Co. *v.* Spermine Medical Co., 112 Fed. 1000, 50 C. C. A. 657; Lalance, etc., Mfg. Co. *v.* National Enameling, etc., Co., 109 Fed. 317; Actiengesellschaft, etc. *v.* Amberg, 102 Fed. 551; Franck *v.* Frank Chicory Co., 95 Fed. 818; Von Mumm *v.* Witteman, 91 Fed. 126, 33 C. C. A. 404; N. K. Fairbank Co. *v.* R. W. Bell Mfg. Co., 71 Fed. 295; Genesee Salt Co. *v.* Burnap, 67 Fed. 534 [*affirmed* in 73 Fed. 818]; Von Mumm *v.* Frash, 56 Fed. 830; Putnam Nail Co. *v.* Bennett, 43 Fed. 800; Carbolic Soap Co. *v.* Thompson, 25 Fed. 625; Lorillard *v.* Wight, 15 Fed. 383; Sawyer *v.* Horn, 1 Fed. 24, 4 Hughes 239; Frese *v.* Bachof, 13 Off. Gaz. 635. See Mumm *v.* Kirk, 40 Fed. 589.

England.— Croft *v.* Day, 7 Beav. 84, 27 Eng. Ch. 84, 49 Eng. Reprint 994.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 20.

78. *Massachusetts.*— New England Awl, etc., Co. *v.* Marlborough Awl, etc., Co., 168 Mass. 154, 46 N. E. 386, 60 Am. St. Rep. 377.

New York.— Fischer *v.* Blank, 138 N. Y. 244, 33 N. E. 1040; Reckitt *v.* Kellogg, 28 N. Y. App. Div. 111, 50 N. Y. Suppl. 888; Babbitt *v.* Brown, 68 Hun 515, 23 N. Y. Suppl. 25; Williams *v.* Johnson, 2 Bosw. 1; Lockwood *v.* Bostwick, 2 Daly 521; Fischer *v.* Blank, 19 N. Y. Suppl. 65; Williams *v.* Spence, 25 How. Pr. 366. In Cook *v.* Starkweather, 13 Abb. Pr. N. S. 392, 393, Monell, J., said: "The package, case, or vessel in which the commodity is put, if prepared in a peculiar or novel manner, although in itself perhaps not a trade-mark, may very properly be a very important part of it; and where a peculiar device is applied to a box or barrel which has been especially prepared to receive and give prominence to the design, such specially prepared box or barrel constitutes a part of the trade-mark, and may participate in the protection which will be given to the trade-mark itself."

Pennsylvania.— Clark, etc., Co. *v.* Scott, 4 Lack. Leg. N. 159.

Rhode Island.— Alexander *v.* Morse, 14 R. I. 153, 51 Am. Rep. 369.

Tennessee.— C. F. Simmons Medicine Co. *v.* Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165.

United States.— McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828; Bauer *v.* La Société, etc., 120 Fed. 74, 56 C. C. A. 480; Enoch Morgan's Sons Co. *v.* Whittier-Coburn Co., 118 Fed. 657; Keuffel, etc., Co. *v.* H. S. Crocker Co., 118 Fed. 187; Sterling Remedy Co. *v.* Spermine Medical Co., 112 Fed. 1000, 50 C. C. A. 657; Pfeiffer *v.* Wilde, 102 Fed. 658; Franck *v.* Frank Chicory Co., 95 Fed. 818; Genesee Salt Co. *v.* Burnap, 67 Fed. 534 [*affirmed* in 73 Fed. 818]; Moxie Nerve Food Co. *v.* Beach, 33 Fed. 248; Moxie Nerve Food Co. *v.* Baumbach, 32 Fed. 205; Carbolic Soap *v.* Thompson, 25 Fed. 625; Lorillard *v.* Wight, 15 Fed. 383; Sawyer *v.* Horn, 1 Fed. 24, 4 Hughes 239; Frese *v.* Bachof, 9 Fed. Cas. No. 5,110, 14 Blatchf. 432, 13 Off. Gaz. 635.

England.— Woollam *v.* Ratcliff, 1 Hem. & M. 259, 71 Eng. Reprint 113.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," §§ 19, 73.

The adoption of another's peculiar method of packing goods or preparing them for the market is evidence of unfair competition as tending to show an intent that the goods so packed shall be mistaken for those of the former trader. Moorman *v.* Hoge, 17 Fed. Cas. No. 9,783, 2 Sawy. 78. See also Colgan *v.* Danheiser, 35 Fed. 150; Lowell Mfg. Co. *v.* Larned, 15 Fed. Cas. No. 8,570.

79. See Piaget *v.* Headley, 33 Misc. (N. Y.) 204, 68 N. Y. Suppl. 351. But see Lowell Mfg. Co. *v.* Larned, 15 Fed. Cas. No. 8,570, where injunction was granted.

"Probably, no mere form of a package would ever alone amount to a representation, capable of deceiving, that the wares contained in it were those of any particular make. But, when the form of these packages, the color of the wrappers and papers done up with them, and the form and color of the labels, are considered all together, it is quite apparent, that, when they had been so long used by the ora-

Form, size, color, and any other circumstance of similarity or dissimilarity should be considered in determining whether there is such similarity as constitutes infringement or unfair competition.[80] The abstract right to use any color, size, or shape does not authorize the use of a combination of them which will deceive purchasers.[81] A cumulation of resemblances so that, taking the goods or packages as a whole, buyers are likely to be deceived is unfair and will be enjoined, although there may be no single point of resemblance affording adequate ground for equitable relief.[82]

tor's firm for holding this particular compound when offered for sale, the mere appearance of the packages would amount to a representation, that they contained that article, of that manufacture." Frese *v.* Bachof, 9 Fed. Cas. No. 5,110, 14 Blatchf. 432, 435, 13 Off. Gaz. 635.

80. *Illinois.*— Frazer *v.* Frazer Lubricator Co., 18 Ill. App. 450.

Kentucky.— Rains *v.* White, 107 Ky. 114, 21 Ky. L. Rep. 742, 52 S. W. 970.

Missouri.— Conrad *v.* Joseph Uhrig Brewing Co., 8 Mo. App. 277.

New Jersey.— Wirtz *v.* Eagle Bottling Co., 50 N. J. Eq. 164, 24 Atl. 658.

New York.— Potter *v.* McPherson, 21 Hun 559; Brown *v.* Mercer, 37 N. Y. Super. Ct. 265; Williams *v.* Johnson, 2 Bosw. 1; Lockwood *v.* Bostwick, 2 Daly 521; Jerome *v.* Johnson, 59 N. Y. Suppl. 859; Lea *v.* Wolf, 13 Abb. Pr. N. S. 389 [*modified* in 1 Thomps. & C. 626, 15 Abb. Pr. N. S. 1, 46 How. Pr. 157]; Electro-Silicon Co. *v.* Trask, 59 How. Pr. 189; Bininger *v.* Wattles, 28 How. Pr. 206.

Ohio.— Brown Brothers Co. *v.* Bucher, etc., Co., 9 Ohio S. & C. Pl. Dec. 362, 6 Ohio N. P. 379.

Pennsylvania.— Heinz *v.* Lutz, 146 Pa. St. 592, 23 Atl. 314.

Texas.— Western Grocer Co. *v.* Caffarelli, (Civ. App. 1908) 108 S. W. 413 [*reversed* on other grounds in 102 Tex. 104, 127 S. W. 1018].

Wisconsin.— Opperman *v.* Waterman, 94 Wis. 583, 69 N. W. 569.

United States.— Holeproof Hosiery Co. *v.* Wallach, 167 Fed. 373 [*affirmed* in 172 Fed. 859, 97 C. C. A. 263]; O'Connell *v.* National Water Co., 161 Fed. 545, 88 C. C. A. 487 [*affirming* 159 Fed. 1001]; Clay *v.* Kline, 149 Fed. 912; De Long Hook, etc., Co. *v.* Francis Hook, etc., Co., 139 Fed. 146 [*modified* in 144 Fed. 682, 75 C. C. A. 484]; Allen B. Wrisley Co. *v.* Iowa Soap Co., 122 Fed. 796, 59 C. C. A. 54; Enoch Morgan's Sons Co. *v.* Whittier-Coburn Co., 118 Fed. 657; Daviess County Distilling Co. *v.* Martinoni, 117 Fed. 186; Kostering *v.* Seattle Brewing, etc., Co., 116 Fed. 620, 54 C. C. A. 76; Wellman, etc., Tobacco Co. *v.* Ware Tobacco-Works, 46 Fed. 289; Myers *v.* Theller, 38 Fed. 607; Carbolic Soap *v.* Thompson, 25 Fed. 625; Hostetter *v.* Vowinkle, 12 Fed. Cas. No. 6,714, 1 Dill. 329. But see N. K. Fairbank Co. *v.* Luckel, 102 Fed. 327, 42 C. C. A. 376.

England.— Massam *v.* Thorley's Cattle Food Co., 14 Ch. D. 748, 42 L. T. Rep. N. S. 85, 28 Wkly. Rep. 966; Croft *v.* Day, 7 Beav. 84, 29 Eng. Ch. 84, 49 Eng. Reprint 994; Edelsten *v.* Vick, 1 Eq. Rep. 413, 11 Hare 78, 18 Jur. 7, 23 Eng. L. & Eq. 51, 45 Eng. Ch. 78, 68 Eng. Reprint 1194; Walter *v.* Emmott, 54 L. J. Ch. 1059, 53 L. T. Rep. N. S. 437.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," §§ 73, 74.

81. George G. Fox Co. *v.* Glynn, 191 Mass. 344, 78 N. E. 89, 114 Am. St. Rep. 619; Viano *v.* Baccigalupo, 183 Mass. 160, 67 N. E. 641; New England Awl, etc., Co. *v.* Marlborough Awl, etc., Co., 168 Mass. 154, 46 N. E. 386, 60 Am. St. Rep. 377; National Biscuit Co. *v.* Ohio Baking Co., 127 Fed. 160 [*affirming* 127 Fed. 116, 62 C. C. A. 116].

While it is true in the abstract that every one has a right to use white paper, yet no one has a right to use it in such a way as to imitate another's labels, and thereby appropriate the good-will of his business. Garrett *v.* Garrett, 78 Fed. 472, 24 C. C. A. 173.

82. *California.*— Pierce *v.* Guittard, 68 Cal. 68, 8 Pac. 645, 58 Am. Rep. 1.

New Jersey.— Wirtz *v.* Eagle Bottling Co., 50 N. J. Eq. 164, 24 Atl. 658.

New York.— Vulcan *v.* Myers, 139 N. Y. 364, 34 N. E. 904; Fischer *v.* Blank, 138 N. Y. 244, 33 N. E. 1040 [*affirming* 19 N. Y. Suppl. 65]; Ft. Stanwix Canning Co. *v.* William McKinley Canning Co., 49 N. Y. App. Div. 566, 63 N. Y. Suppl. 704; Reckitt *v.* Kellogg, 28 N. Y. App. Div. 111, 50 N. Y. Suppl. 888; Monopol Tobacco Works *v.* Gensior, 32 Misc. 87, 66 N. Y. Suppl. 155; Jerome *v.* Johnson, 59 N. Y. Suppl. 859; Williams *v.* Spence, 25 How. Pr. 366. See Ball *v.* Broadway Bazaar, 194 N. Y. 429, 87 N. E. 674 [*reversing* 121 N. Y. App. Div. 546, 106 N. Y. Suppl. 249].

Ohio.— Cigar Makers' International Union *v.* Burkhardt, 9 Ohio S. & C. Pl. Dec. 459, 6 Ohio N. P. 342.

United States.— Enterprise Mfg. Co. *v.* Landers, 131 Fed. 240, 65 C. C. A. 587 [*affirming* 124 Fed. 923]; National Biscuit Co. *v.* Ohio Baking Co., 127 Fed. 160 [*affirmed* in 127 Fed. 116, 62 C. C. A. 116]; Enterprise Mfg. Co. *v.* Landers, 124 Fed. 923 [*affirmed* in 131 Fed. 240, 65 C. C. A. 587]; Sterling Remedy Co. *v.* Spermine Medical Co., 112 Fed. 1000, 50 C. C. A. 657; Lalance, etc., Mfg. Co. *v.* National Enameling, etc., Co., 109 Fed. 317; Centaur Co. *v.* Neathery, 91 Fed. 891, 34 C. C. A. 118; Celluloid Mfg. Co. *v.* Cellonite Mfg. Co., 32 Fed. 94; Glen Cove Mfg. Co. *v.* Ludeling, 22 Fed. 823, 23 Blatchf. 46; Frese *v.* Bachof, 9 Fed. Cas. No. 5,110, 14 Blatchf. 432, 13 Off. Gaz. 635; Moorman *v.* Hoge, 17 Fed. Cas. No. 9,783, 2 Sawy. 78. See Holeproof Hosiery Co. *v.* Richmond Hosiery Mills, 167 Fed. 381.

England.— Lever *v.* Goodwin, 36 Ch. D. 1, 57 L. T. Rep. N. S. 583, 36 Wkly. Rep. 177;

Minor differences are immaterial, if the whole is deceptively similar.[83] The general effect upon the eye is often given controlling effect.[84] The packages and labels must be considered as a whole.[85] The *tout ensemble* must not be copied.[86] New and distinctive features must not be copied or imitated.[87] Resemblance between the respective articles must be made to appear.[88] A comparison of the labels and goods themselves is generally the best evidence of fraudulent imitation.[89] Actual or probable deception must be shown.[90] Mere possibility of mistake is not sufficient to support an injunction.[91] Beyond the statement that it must clearly appear that defendant's goods are so gotten up as to be calculated to deceive,[92] no general rule can be laid down, and each case of this class must be determined by its own circumstances, and as a question of fact.[93] Refilling bottles or packages bearing another's marks, labels, or names is of course unfair competition.[94]

13. Numerals. Although in a particular case numerals used may not con-

Schweitzer *v.* Atkins, 37 L. J. Ch. 847, 19 L. T. Rep. N. S. 6, 16 Wkly. Rep. 1080. In Rodgers *v.* Nowill, 5 C. B. 109, 57 E. C. L. 109, 6 Hare 325, 31 Eng. Ch. 325, 67 Eng. Reprint 1191, 11 Jur. 1039, 17 L. J. C. P. 52, an action was directed to be brought, the court saying: "The court will consider, whether, taking all the names together, it is or not apparent that there is such a deceptive quality as is likely to produce the injury complained of."

Australia.— Wolfe *v.* Hart, 4 Vict. L. Rep. 125.

83. *Illinois.*— Frazer *v.* Frazer Lubricator Co., 18 Ill. App. 450.

New York.— Godillot *v.* Harris, 81 N. Y. 263 [*affirming* 44 N. Y. Super. Ct. 427 (*affirming* 49 How. Pr. 5); Brown *v.* Mercer, 37 N. Y. Super. Ct. 265; Jerome *v.* Johnson, 59 N. Y. Suppl. 859.

Ohio.— Feder *v.* Brundo, 8 Ohio S. & C. Pl. Dec. 179, 5 Ohio N. P. 275.

Pennsylvania.— Juan F. Portuondo Cigar Mfg. Co. *v.* Vicente Portuondo Cigar Mfg. Co., 222 Pa. St. 116, 70 Atl. 968.

Rhode Island.— Davis *v.* Kendall, 2 R. I. 566.

United States.—Kronthal Waters *v.* Becker, 137 Fed. 649; Cantrell *v.* Butler, 124 Fed. 290; Cauffman *v.* Schuler, 123 Fed. 205; Wellman, etc., Tobacco Co. *v.* Ware Tobacco-Works, 46 Fed. 289; Sawyer Crystal Blue Co. *v.* Hubbard, 32 Fed. 388; Hostetter *v.* Adams, 10 Fed. 838, 20 Blatchf. 326.

"A variation must be regarded as immaterial which it requires a close inspection to detect." Fetridge *v.* Wells, 4 Abb. Pr. (N. Y.) 144, 13 How. Pr. 385. See also Merrimack Mfg. Co. *v.* Garner, 4 E. D. Smith (N. Y.) 387, 2 Abb. Pr. 318.

84. Fischer *v.* Blank, 19 N. Y. Suppl. 65 [*modified* in 138 N. Y. 244, 33 N. E. 1040]; National Biscuit Co. *v.* Swick, 121 Fed. 1007; Royal Baking Powder Co. *v.* Davis, 26 Fed. 293; Hostetter *v.* Adams, 10 Fed. 838, 20 Blatchf. 326; Harper *v.* Wright, etc., Lamp Mfg. Co., [1896] 1 Ch. 142, 65 L. J. Ch. 161, 44 Wkly. Rep. 274; Edlesten *v.* Vick, 1 Eq. Rep. 413, 11 Hare 78, 18 Jur. 7, 23 Eng. L. & Eq. 51, 45 Eng. Ch. 78, 68 Eng. Reprint 1194.

85. P. Lorillard Co. *v.* Peper, 86 Fed. 956, 30 C. C. A. 496.

86. Enoch Morgan's Sons Co. *v.* Ward, 152 Fed. 690, 81 C. C. A. 616, 12 L. R. A. N. S. 729; Kronthal Waters *v.* Becker, 137 Fed. 649; G. W. Cole Co. *v.* American Cement, etc., Co., 130 Fed. 703, 65 C. C. A. 105; Cantrell *v.* Butler, 124 Fed. 290.

"The real question is as to the similitude of the ensemble." Knickerbocker Chocolate Co. *v.* Griffing, 144 Fed. 316, 318.

87. U. S. Tobacco Co. *v.* McGreenery, 144 Fed. 1022, 74 C. C. A. 682 [*affirming* 144 Fed. 531].

88. Mahler *v.* Sanche, 223 Ill. 136, 79 N. E. 9.

89. Wirtz *v.* Eagle Bottling Co., 50 N. J. Eq. 164, 24 Atl. 658; Yale, etc., Mfg. Co. *v.* Alder, 154 Fed. 37, 83 C. C. A. 149; American Brewing Co. *v.* Bienville Brewery, 153 Fed. 615; G. W. Cole Co. *v.* American Cement, etc., Co., 130 Fed. 703, 65 C. C. A. 105; Bickmore Gall Cure Co. *v.* Karns Mfg. Co., 126 Fed. 573 [*reversed* on other grounds in 134 Fed. 833, 67 C. C. A. 439].

90. Virginia Hot Springs Co. *v.* Hegeman, 144 Fed. 1023, 73 C. C. A. 612 [*affirming* 138 Fed. 855]. See also *supra*, V, B, 4.

Testimony of a dealer that he kept the packages side by side, and when asked for plaintiff's article he had sold that of defendant, was held sufficient, in connection with the similarity of name and dress of goods, to show a case of unfair competition for which relief might be granted. Sperry *v.* Percival Milling Co., 81 Cal. 252, 22 Pac. 651.

91. Brown *v.* Seidel, 153 Pa. St. 60, 25 Atl. 1064; Allen B. Wrisley Co. *v.* Iowa Soap Co., 122 Fed. 796, 59 C. C. A. 54.

92. Payton *v.* Snelling, [1901] A. C. 308, 70 L. J. Ch. 644, 85 L. T. Rep. N. S. 287, holding that the proof must be "beyond question."

93. Payton *v.* Snelling, [1891] A. C. 308, 70 L. J. Ch. 644, 85 L. T. Rep. N. S. 287. See also *supra*, V, B, 5.

94. Rose *v.* Loftus, 47 L. J. Ch. 576, 38 L. T. Rep. N. S. 409. See Correro *v.* Wright, (Miss. 1908) 47 So. 379.

Infringement of trade-mark is also thereby committed. See *supra*, IV, G.

stitute a valid trade-mark, because used to indicate grade or quality, or for some other reason, yet where such numerals by use have come to indicate to the trade origin and ownership, a rival trader will not be permitted so to use them as to pass off his goods as those of his rival.[95]

14. Structural Imitation or Copying. As a general proposition, an unpatented article or uncopyrighted book may be reproduced by any one in the precise original form and shape, and this alone will not constitute unfair competition.[96] But

95. Avery *v.* Meikle, 81 Ky. 73; Glen, etc., Mfg. Co. *v.* Hall, 61 N. Y. 226, 19 Am. Rep. 278 [*reversing* 6 Lans. 158]; Kinney *v.* Basch, 16 Am. L. Reg. N. S. (N. Y.) 596; Dawes *v.* Davies, Codd. Dig. (N. Y.) 260; Ransome *v.* Bentall, 3 L. J. Ch. 161. See Gillott *v.* Kettle, 3 Duer (N. Y.) 624; Wolf *v.* Hamilton-Brown Shoe Co., 165 Fed. 413, 91 C. C. A. 363.

Illustrations.— In Humphreys' Specific Homeopathic Medicine Co. *v.* Wenz, 14 Fed. 250, plaintiff had for a long period manufactured and sold a series of homeopathic specific medicines, labeled with a series of numbers running from "1" to "35," each number being applied to a medicine for a particular disease or class of diseases. It appeared that the remedies were frequently purchased by the public by the numbers alone. It was held that plaintiff could be protected in the use of the serial numbers as applied to "Homeopathic Specifics," and a preliminary injunction was granted. In Kinney *v.* Allen, 14 Fed. Cas. No. 7,826, 1 Hughes 106, plaintiff, a manufacturer of cigarettes, placed upon boxes, etc., containing them, the symbol "½," printed in large red characters. Defendant sold other cigarettes with a similarly printed "½" as a trade-mark. A limited injunction was granted to restrain defendant from using the symbol in that form, but not the symbol itself, on the ground that the symbol was not absolutely arbitrary, it being originally used to indicate that cigarettes stamped with it were composed of two kinds of tobacco in equal proportions. See also to same effect as to the same mark Kinney *v.* Basch, 16 Am. L. Reg. N. S. (N. Y.) 596. Numbers used by manufacturers of ribbon to designate the width of the ribbon were the common property of the trade and not the subject of a trade-mark, but a series of arbitrary numbers used to indicate the precise color or shade of the ribbons was a proper subject of protection against unlawful competition. Corbett Bros. Co. *v.* Reinhardt-Meding Co., 77 N. J. Eq. 7, 76 Atl. 243. Series of numbers used by a manufacturer of labels in its catalogues and in connection with its corporate name on the boxes containing its labels, not primarily to indicate origin, but to designate the color, shape, and size of the label, each kind being given a different number, do not in themselves constitute good trade-marks, and such manufacturer is not entitled to an injunction to restrain the use of the same numbers in the same way and for a similar purpose by another in connection with its own name, either on the ground of infringement of trade-mark or of unfair competition, there being no attempt to deceive in dress or style of package, and the labels themselves being such as it is open to any one to make. Dennison Mfg. Co. *v.* Scharf Tag, etc., Co., 135 Fed. 625, 68 C. C. A. 263.

96. *Illinois.*— Mahler *v.* Sanche, 223 Ill. 136, 79 N. E. 9 [*citing* Candee *v.* Deere, 54 Ill. 439, 5 Am. Rep. 125].

Iowa.— Sartor *v.* Schaden, 125 Iowa 696, 101 N. W. 511, stock labels bearing word "She."

Massachusetts.— Flagg Mfg. Co. *v.* Holway, 178 Mass. 83, 59 N. E. 667.

Minnesota.—Watkins *v.* Landon, 52 Minn. 389, 54 N. W. 193, 38 Am. St. Rep. 560, 19 L. R. A. 236.

Pennsylvania.— Putnam Nail Co. *v.* Dulaney, 140 Pa. St. 205, 21 Atl. 391, 23 Am. St. Rep. 228, 11 L. R. A. 524 [*affirming* 8 Pa. Co. Ct. 595], "Bronz Nail."

United States.—Allen *v.* Walton Wood, etc., Co., 178 Fed. 287; Bamforth *v.* Douglass Post Card, etc., Co., 158 Fed. 355 (uncopyrighted post-cards); Yale, etc., Mfg. Co. *v.* Alder, 149 Fed. 783 [*reversed* on the facts in 154 Fed. 37, 83 C. C. A. 149]; Marvel Co. *v.* Pearl, 133 Fed. 160, 66 C. C. A. 226; Enterprise Mfg. Co. *v.* Landers, 124 Fed. 923 [*affirmed* in 131 Fed. 240, 65 C. C. A. 587]; Scriven *v.* North, 124 Fed. 894 [*modified* in 134 Fed. 366, 67 C. C. A. 348]; Fairbanks *v.* Jacobus, 8 Fed. Cas. No. 4,608, 3 Ban. & A. 108, 14 Blatchf. 337. See Heide *v.* Wallace, 129 Fed. 649 [*affirmed* in 135 Fed. 346, 68 C. C. A. 16]. No publisher has an exclusive right to the form and size into which a book may be cast. Merriam *v.* Famous Shoe, etc., Co., 47 Fed. 411.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 19.

Even a trade-mark confers no monoply to make and sell the goods to which it is applied. See *supra*, I, E, 4.

Imitation of a patented article is unfair. Allen *v.* Walton Wood, etc., Co., 178 Fed. 287; George Frost Co. *v.* Estes, 156 Fed. 677.

Duplication of gramophone records.— In Victor Talking Mach. Co. *v.* Armstrong, 132 Fed. 711, it was contended that defendant had no right to take plaintiff's disks which it produced as records of a piece of music specially executed, and reproduce from them duplicates thereof. Judge Lacombe pronounced the question novel and interesting, but refrained from deciding it, basing the injunction which he granted upon the ground of unfair competition by dress of goods, plaintiff's labels and marks having been imitated. In the subsequent case of Fonotipa *v.* Bradley, 171 Fed. 951, Judge Chatfield held that aside from any question of infringement of trade-mark or imitation of label or deception

where goods are cast into a distinctive form, unnecessary and deceptive imitation of the size, shape, and structure of the article itself will be enjoined as unfair competition.[97] The subsequent trader may be required to clearly distinguish his goods so that they will not be mistaken for the goods of the prior trader.[98] After expiration of a patent, all persons may make the article in the precise form in which it was made while protected by the patent,[99] especially where the subsequent maker adds distinguishing features to his goods and there are no *indicia* of an intent to deceive purchasers.[1] Functional features may be used and copied in the absence of any other features calculated to deceive.[2] The copying or imitation of non-functional features may be evidence of fraudulent intent constituting unfair competition.[3] Copying or imitation of the distinctive marks, ornamentation, lettering, etc., making up the dress of goods of another is unfair competition, although the article itself may be copied.[4] Making and selling repair parts for use in another's device is not unfair competition, provided they are

of the public, plaintiff was entitled to an injunction enjoining such duplication of its records placing his decision upon the ground that plaintiff's property had been wrongfully appropriated. It is doubtful if this decision can be supported upon the ground upon which it was rested, because there was at that time no copyright in such records, and such records did not themselves infringe any copyright in the music reproduced. White-Smith Music Co. *v.* Apollo Co., 209 U. S. 1, 28 S. Ct. 319, 52 L. ed. 655 [*affirming* 147 Fed. 226, 77 C. C. A. 368].

97. *Alabama.*— Kyle *v.* Perfection Mattress Co., 127 Ala. 39, 28 So. 545, 85 Am. St. Rep. 78, 50 L. R. A. 628.

Massachusetts.—George G. Fox Co. *v.* Hathaway, 199 Mass. 99, 85 N. E. 417, 24 L. R. A. N. S. 900; George G. Fox Co. *v.* Glynn, 191 Mass. 344, 78 N. E. 89, 114 Am. St. Rep. 619.

New Jersey.— Edison Mfg. Co. *v.* Gladstone, (Ch. 1903) 58 Atl. 391.

New York.— Dutton *v.* Cupples, 117 N. Y. App. Div. 172, 102 N. Y. Suppl. 309, a photographic reproduction of an artistic but uncopyrighted book.

United States.— Capewell Horse Nail Co. *v.* Mooney, 172 Fed. 826, 97 C. C. A. 248 [*affirming* 167 Fed. 575]; Rushmore *v.* Saxon, 170 Fed. 1021, 95 C. C. A. 671 [*affirming* 158 Fed. 499]; H. Mueller Mfg. Co. *v.* A. Y. McDonaly, etc., Mfg. Co., 164 Fed. 1001 [*modified* in 183 Fed. 972]; Rushmore *v.* Manhattan Screw, etc., Works, 163 Fed. 939, 90 C. C. A. 299, 19 L. R. A. N. S. 269 [*modified* in 170 Fed. 1021]; George Frost Co. *v.* Estes, 156 Fed. 677; Yale, etc., Mfg. Co. *v.* Alder, 154 Fed. 37, 83 C. C. A. 149; Scriven *v.* North, 134 Fed. 366, 67 C. C. A. 348 [*modifying* 124 Fed. 894]; Enterprise Mfg. Co. *v.* Landers, 131 Fed. 240, 65 C. C. A. 587 [*affirming* 124 Fed. 923]; Enterprise Mfg. Co. *v.* Landers, 124 Fed. 923 [*affirmed* in 131 Fed. 240, 65 C. C. A. 587]. But see Rice-Stix Dry Goods Co. *v.* J. A. Scriven Co., 165 Fed. 639, 91 C. C. A. 475.

98. Flagg Mfg. Co. *v.* Holway, 78 Mass. 83, 59 N. E. 667; Edison Mfg. Co. *v.* Gladstone, (N. J. Ch. 1903) 58 Atl. 391; Rushmore *v.* Saxon, 154 Fed. 213; Yale, etc., Mfg. Co. *v.* Alder, 149 Fed. 783 [*reversed* on the facts in 154 Fed. 37, 83 C. C. A. 149].

For the general principle see *supra*, V, B, 7.

99. Dover Stamping Co. *v.* Fellows, 163 Mass. 191, 40 N. E. 105, 47 Am. St. Rep. 448, 28 L. R. A. 448; Westcott Chuck Co. *v.* Oneida Nat. Chuck Co., 122 N. Y. App. Div. 260, 106 N. Y. Suppl. 1016; Brill *v.* Singer Mfg. Co., 41 Ohio St. 127, 52 Am. Rep. 74; Singer Mfg. Co. *v.* June Mfg. Co., 163 U. S. 169, 16 S. Ct. 1002, 1008, 41 L. ed. 118; Allen *v.* Walton Wood, etc., Co., 178 Fed. 287; J. A. Scriven Co. *v.* Morris, 158 Fed. 1020, 85 C. C. A. 571; Bender *v.* Enterprise Mfg. Co., 156 Fed. 641, 84 C. C. A. 353, 17 L. R. A. N. S. 448 [*reversing* 148 Fed. 313]; J. A. Scriven Co. *v.* Morris, 154 Fed. 914 [*affirmed* in 158 Fed. 1020, 85 C. C. A. 571]; Singer Mfg. Co. *v.* Larsen, 22 Fed. Cas. No. 12,902, 3 Ban. & A. 246, 8 Biss. 151. See also *supra*, V, C, 8.

1. J. A. Scriven Co. *v.* Morris, 154 Fed. 914 [*affirmed* in 158 Fed. 1020, 85 C. C. A. 571]; Dunlap *v.* Willbrandt Surgical Mfg. Co., 151 Fed. 223, 80 C. C. A. 575.

2. Diamond Match Co. *v.* Saginaw Match Co., 142 Fed. 727, 74 C. C. A. 59; Marvel Co. *v.* Pearl, 133 Fed. 160, 66 C. C. A. 226; Marvel Co. *v.* Tullar Co., 125 Fed. 829.

3. Singer Mfg. Co. *v.* June Mfg. Co., 163 U. S. 169, 16 S. Ct. 1002, 41 L. ed. 118 (use of a "dummy" screw); Allen *v.* Walton Wood, etc., Co., 178 Fed. 287 (copying ornamentation); Estes *v.* George Frost Co., 176 Fed. 338, 100 C. C. A. 258; Rushmore *v.* Saxon, 170 Fed. 1021, 95 C. C. A. 671 [*affirming* 158 Fed. 499] (copying defects and injurious features); G. & C. Merriam Co. *v.* Ogilvie, 159 Fed. 638, 88 C. C. A. 596, 16 L. R. A. N. S. 549 (false use of editor's name); Rushmore *v.* Saxon, 154 Fed. 213; Scriven *v.* North, 134 Fed. 366, 67 C. C. A. 348 [*modifying* 124 Fed. 894]; Enterprise Mfg. Co. *v.* Landers, 131 Fed. 240, 65 C. C. A. 587 [*affirming* 124 Fed. 923].

4. George G. Fox Co. *v.* Glynn, 191 Mass. 344, 78 N. E. 89, 114 Am. St. Rep. 619; Capewell Horse Nail Co. *v.* Mooney, 172 Fed. 826, 97 C. C. A. 248 [*affirming* 167 Fed. 575]; Yale, etc., Mfg. Co. *v.* Alder, 154 Fed. 37, 83 C. C. A. 149 [*reversing* 149 Fed. 783]; Scriven *v.* North, 134 Fed. 366, 67 C. C. A. 348 [*modifying* 124 Fed. 894]; Victor Talking Mach. Co. *v.* Armstrong, 132 Fed. 711; Enterprise Mfg.

not so marked as to pass them off for repair parts made by the proprietor for his own machines.[5]

15. Advertisements and Circulars. Circulars, advertisements, or other announcements calculated to deceive the public and pass off defendant's goods or business as the goods or business of plaintiff constitute unfair competition and will be enjoined.[6] The imitation or copying of the complainant's circulars and advertisements is strong evidence of fraud and unfair competition and is ground for an injunction.[7] The use of another's trade symbols in advertising matter on

Co. *v.* Landers, 124 Fed. 923 [*affirmed* in 131 Fed. 240, 65 C. C. A. 587].

Dedication by expiration of patent.—Where an article made under a patent was made in a certain form and color and with certain ornamentation to distinguish it as the patented article, the exclusive right to such form, color, and ornamentation ceased with the expiration of the patent, and the right to use them passed to the public. Allen *v.* Walton Wood, etc., Co., 178 Fed. 287.

5. Bender *v.* Enterprise Mfg. Co., 156 Fed. 641, 84 C. C. A. 353, 17 L. R. A. N. S. 448 [*reversing* 148 Fed. 313]. See also Reading Stove Works *v.* S. M. Howes Co., 201 Mass. 437, 87 N. E. 751, 21 L. R. A. N. S. 979; Wagner Typewriter Co. *v.* F. S. Webster Co., 144 Fed. 405.

6. *Iowa.*— Atlas Assur. Co. *v.* Atlas Ins. Co., 138 Iowa 228, 112 N. W. 232, 114 N. W. 609, 128 Am. St. Rep. 189, 15 L. R. A. N. S. 625.

Maine.— W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 100 Me. 461, 62 Atl. 499, 4 L. R. A. N. S. 960.

Massachusetts.— Samuels *v.* Spitzer, 177 Mass. 226, 58 N. E. 693.

New Jersey.— Van Horn *v.* Coogan, 52 N. J. Eq. 380, 28 Atl. 788.

New York.— Tuerk Hydraulic Power Co. *v.* Tuerk, 92 Hun 65, 36 N. Y. Suppl. 384; Collier *v.* Jones, 66 Misc. 97, 120 N. Y. Suppl. 991; U. S. Frame, etc., Co. *v.* Horowitz, 51 Misc. 101, 100 N. Y. Suppl. 705 (removal notices); American Novelty, etc., Co. *v.* Manufacturing Electrical Novelty Co., 36 Misc. 450, 73 N. Y. Suppl. 755; Arnheim *v.* Arnheim, 28 Misc. 399, 59 N. Y. Suppl. 948; Dr. Jaeger's Sanitary Woolen System Co. *v.* Le Boutillier, 5 Misc. 78, 24 N. Y. Suppl. 890; Brown *v.* Braunstein, 83 N. Y. Suppl. 1096; Johnson *v.* Hitchcock, 3 N. Y. Suppl. 680; Williams *v.* Spence, 25 How. Pr. 366. See Frohman *v.* Miller, 8 Misc. 379, 29 N. Y. Suppl. 1109.

Pennsylvania.— Juan F. Portuondo Cigar Mfg. Co. *v.* Vicente Portuondo Cigar Mfg. Co., 222 Pa. St. 116, 70 Atl. 968.

United States.— Bates Mfg. Co. *v.* Bates Numbering Mach. Co., 172 Fed. 892 [*affirmed* in 178 Fed. 681, 102 C. C. A. 181]; Sternberg Mfg. Co. *v.* Miller, etc., Mfg. Co., 161 Fed. 318, 88 C. C. A. 398; G. & C. Merriam Co. *v.* Ogilvie, 159 Fed. 638, 88 C. C. A. 596, 16 L. R. A. N. S. 549 [*affirming* 149 Fed. 858]; Baker *v.* Baker, 115 Fed. 297, 53 C. C. A. 157; Halstead *v.* Houston, 111 Fed. 376; International Silver Co. *v.* Simeon L. & George H. Rogers Co., 110 Fed. 955; Merriam *v.* Texas Siftings Pub. Co., 49 Fed. 944; Merriam *v.* Holloway Pub. Co., 43 Fed. 450. But see Halstead *v.* John C. Winston Co., 111 Fed. 35.

England.— Jay *v.* Ladler, 40 Ch. D. 649, 60 L. T. Rep. N. S. 27, 37 Wkly. Rep. 505; Stevens *v.* Paine, 18 L. T. Rep. N. S. 600; Hoby *v.* Grosvenor Library Co., 28 Wkly. Rep. 386. In Singer Mfg. Co. *v.* Loog, 8 App. Cas. 15, 52 L. J. Ch. 481, 48 L. T. Rep. N. S. 3, 31 Wkly. Rep. 325, defendant declared in his invoices, price lists, etc., that his machines were made on the "Singer System"; he also put on some machines a label with the words "Singer Machines." An injunction was granted as to the label, but refused as to the invoices, price lists, etc., on the ground that they were not calculated to deceive by representing defendant's machine to have been manufactured by plaintiffs.

Canada.— Slater *v.* Ryan, 17 Manitoba 89. But see Schradsky *v.* Appel Clothing Co., 10 Colo. App. 195, 50 Pac. 528.

The issuance of a circular calculated to produce confusion in the identity of two works upon the same subject will be enjoined, and it is immaterial whether any fraud was intended or not. Halstead *v.* Houston, 111 Fed. 376 [*citing* Singer Mfg. Co. *v.* June Mfg. Co., 163 U. S. 169, 16 S. Ct. 1002, 41 L. ed. 118]; Merriam *v.* Texas Siftings Pub. Co., 49 Fed. 944; Merriam *v.* Holloway Pub. Co., 43 Fed. 450.

7. India Rubber Co. *v.* Rubber Comb, etc., Co., 45 N. Y. Super. Ct. 258; De Youngs *v.* Jung, 25 N. Y. Suppl. 479 [*affirmed* in 7 Misc. 56, 27 N. Y. Suppl. 370]; Jordan *v.* O'Connor, 17 N. Y. Suppl. 462; Ogilvie *v.* G. & C. Merriam Co., 149 Fed. 858 [*affirmed* in 159 Fed. 638, 88 C. C. A. 596, 16 L. R. A. N. S. 549]; Baker *v.* Slack, 130 Fed. 514, 65 C. C. A. 138; Halstead *v.* Houston, 111 Fed. 376; Noel *v.* Ellis, 89 Fed. 978; Hilson *v.* Foster, 80 Fed. 896; Merriam *v.* Holloway Pub. Co., 43 Fed. 450; Consolidated Fruit-Jar Co. *v.* Thomas, 6 Fed. Cas. No. 3,131, 2 N. J. L. J. 272; Singer Mfg. Co. *v.* Wilson, 3 App. Cas. 376, 47 L. J. Ch. 481, 38 L. T. Rep. N. S. 303, 26 Wkly. Rep. 664; Jay *v.* Ladler, 40 Ch. D. 649, 60 L. T. Rep. N. S. 27, 37 Wkly. Rep. 505; Francks *v.* Weaver, 8 L. T. Rep. N. S. 510; Singer Mfg. Co. *v.* British Empire Mfg. Co., 20 Rep. Pat. Cas. 313; Singer Mfg. Co. *v.* Spence, 10 Rep. Pat. Cas. 297. See also Ludlow Valve Mfg. Co. *v.* Pittsburgh Mfg. Co., 166 Fed. 26, 92 C. C. A. 60.

The use of the complainant's circulars by a competitor will be enjoined. Noel *v.* Ellis, 89 Fed. 978.

Notwithstanding the copying in some respects of plaintiff's wrapper, he was held not entitled to an injunction where defendant's

bill-heads, stationery, etc., may be enjoined.[8] Circulars falsely claiming ownership of particular trade-marks and threatening dealers with suits for infringement may be enjoined,[9] but this hardly seems to constitute unfair competition in any technical sense. It is more nearly akin to slander or libel of property, and upon the authority of the patent cases, injunction will not lie in the absence of both falsity and malice, and in advance of an actual decision upon the question of infringement.[10]

16. "Successor," "Original," "Only Genuine," "Sole Proprietor," Etc. A false representation, actual or implied, that defendant is the successor to the good-will and business of an established concern constitutes unfair competition, and is ground for injunction at the suit of the original owner or lawful successor of such business.[11] A periodical or magazine may not be represented as a continuation

wrapper was not calculated to deceive. Lever *v.* Bedingfield, 80 L. T. Rep. N. S. 100 [*distinguishing* Reddaway *v.* Banham, [1896] A. C. 199, 65 L. J. Q. B. 381, 74 L. T. Rep. N. S. 289, 44 Wkly. Rep. 638].

Circulars not sent to customers.— That defendant issued a circular advertising an article of its manufacture to some extent similar to one issued by complainant, and inclosed in the cartons containing its goods, does not constitute unfair competition, where defendant's circulars are not so inclosed, and are sent only to jobbers, and do not come into the hands of retail purchasers. G. W. Cole Co. *v.* American Cement, etc., Co., 130 Fed. 703, 65 C. C. A. 105.

8. Manitowoc Malting Co. *v.* Milwaukee Malting Co., 119 Wis. 543, 97 N. W. 389; Singer Mfg. Co. *v.* Wilson, 3 App. Cas. 376, 47 L. J. Ch. 481, 38 L. T. Rep. N. S. 303, 26 Wkly. Rep. 664.

9. Hoxie *v.* Chaney, 143 Mass. 592, 10 N. E. 713, 58 Am. Rep. 149; Racine Paper Goods Co. *v.* Dittgen, 171 Fed. 631, 96 C. C. A. 433 [*affirming* 164 Fed. 85]; Ogilvie *v.* G. & C. Merriam Co., 149 Fed. 858 [*affirmed* in 159 Fed. 638, 88 C. C. A. 596, 16 L. R. A. 549]; George Frost Co. *v.* Kora Co., 140 Fed. 987, 71 C. C. A. 19 [*affirming* 136 Fed. 487]; Thorley's Cattle Food Co. *v.* Massam, 14 Ch. D. 763, 41 L. T. Rep. N. S. 543, 28 Wkly. Rep. 295 [*reversed* on other grounds in 14 Ch. D. 748, 42 L. T. Rep. N. S. 851, 28 Wkly. Rep. 966]; Anderson *v.* Liebig's Extract of Meat Co., 45 L. T. Rep. N. S. 757. *Contra,* Wolfe *v.* Burke, 56 N. Y. 115.

The writing of a single letter by one manufacturer to a customer of another manufacturer, stating that the latter manufacturer is infringing a patent, and that any one purchasing from him would be held as an infringer, is not sufficient proof of unfair competition to warrant a preliminary injunction. George Frost Co. *v.* Kora Co., 136 Fed. 487 [*affirmed* in 140 Fed. 987, 71 C. C. A. 19].

10. Birdsell *v.* Shaliol, 112 U. S. 485, 5 S. Ct. 244, 28 L. ed. 768; Eldred *v.* Breitwieser, 132 Fed. 251; Adriance *v.* National Harrow Co., 121 Fed. 827, 58 C. C. A. 163; Computing Scale Co. *v.* National Computing Scale Co., 79 Fed. 962; New York Filter Co. *v.* Schwarzwalder, 58 Fed. 577; Kelley *v.* Ypsilanti Dress-Stay Co., 44 Fed. 19. Other like cases might be cited, but they are beyond the scope of this article. See Libel and Slander, 25 Cyc. 558; Patents, 30 Cyc. 1005 *et seq.*

11. *Maine.*— W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 100 Me. 461, 62 Atl. 499, 4 L. R. A. N. S. 960.

Massachusetts.— Holbrook *v.* Nesbitt, 163 Mass. 120, 39 N. E. 794; Hoxie *v.* Chaney, 143 Mass. 592, 10 N. E. 713, 58 Am. Rep. 149.

New York.— Hildreth *v.* McCaul, 70 N. Y. App. Div. 162, 74 N. Y. Suppl. 1072; Hegeman *v.* Hegeman, 8 Daly 1; American Novelty, etc., Co. *v.* Manufacturing Electrical Novelty Co., 36 Misc. 450, 73 N. Y. Suppl. 755; Hazard *v.* Caswell, 57 How. Pr. 1 [*reversed* in 93 N. Y. 259, 45 Am. Rep. 198].

Ohio.— Brass, etc., Works Co. *v.* Payne, 50 Ohio St. 115, 33 N. E. 88, 19 L. R. A. 82.

Pennsylvania.— Chesterman *v.* Seeley, 5 Pa. Dist. 757, 18 Pa. Co. Ct. 631.

Rhode Island.— Armington *v.* Palmer, 21 R. I. 109, 42 Atl. 308, 79 Am. St. Rep. 786, 43 L. R. A. 95.

Tennessee.— Fite *v.* Dorman, (1900) 57 S. W. 129.

United States.— Donnell *v.* Herring-Hall-Marvin Safe Co., 208 U. S. 267, 28 S. Ct. 288, 52 L. ed. 481; Ogilvie *v.* G. & C. Merriam Co., 149 Fed. 858 [*affirmed* in 159 Fed. 638]; International Silver Co. *v.* Simeon L. & George H. Rogers Co., 110 Fed. 955.

England.— Montreal Lith. Co. *v.* Sabiston, [1899] A. C. 610, 68 L. J. P. C. 121, 81 L. T. Rep. N. S. 135 [*affirming* 6 Quebec Q. B. 510]; Hookham *v.* Pottage, L. R. 8 Ch. 91, 27 L. T. Rep. N. S. 595, 21 Wkly. Rep. 47; Manchester Brewery Co. *v.* North Cheshire, etc., Brewery Co., [1898] 1 Ch. 539, 67 L. J. Ch. 351, 78 L. T. Rep. N. S. 537, 14 T. L. R. 350, 46 Wkly. Rep. 515; Fullwood *v.* Fullwood, 9 Ch. D. 176, 47 L. J. Ch. 459, 38 L. T. Rep. N. S. 380, 26 Wkly. Rep. 435; James *v.* James, L. R. 13 Eq. 421, 41 L. J. Ch. 353, 26 L. T. Rep. N. S. 568, 20 Wkly. Rep. 434; Churton *v.* Douglas, Johns. 174, 28 L. J. Ch. 841, 7 Wkly. Rep. 365, 70 Eng. Reprint 385; Prowett *v.* Mortimer, 2 Jur. N. S. 414, 4 Wkly. Rep. 519; Scott *v.* Scott, 16 L. T. Rep. N. S. 143; Harper *v.* Pearson, 3 L. T. Rep. N. S. 547; Hogg *v.* Kirby, 8 Ves. Jr. 215, 7 Rev. Rep. 30, 32 Eng. Reprint 336.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 85.

of a previous existing magazine or periodical.[12] One who has sold his business and its good-will may not thereafter hold himself out as continuing the business which he has sold.[13] One who has gone out of business, the business being discontinued, cannot enjoin any one from representing himself as his successor, since he cannot be injured thereby.[14] One may truthfully represent himself as the successor to a certain business.[15] One may truthfully represent himself as being late or formerly of or with a named concern, provided there is no artifice or device connected with the announcement so as to cause deception.[16] Announcements of this character must be wholly free from any artifice or device, such as the use of different sizes of type, arrangement and display of names, etc., calculated to deceive the public and pass off the new goods or business as those of the original trader. One may tell the truth, but must tell it in a wholly truthful way.[17] The subsequent trader's use of the word "genuine," and *a fortiori* the words "the genuine," in connection with the trade-name of the goods, tends strongly to show unfair competition and infringement.[18] False representations that one's goods or business are the original or only goods of a particular brand is unfair competition and will be enjoined.[19] So no one will be permitted to advertise that his goods

A purchase of the tangible property of a corporation does not authorize the purchaser to use as his name the name of the corporation and to describe himself as its successor. Armington *v.* Palmer, 21 R. I. 109, 42 Atl. 308, 79 Am. St. Rep. 786, 43 L. R. A. 95.

A lessee of the same premises formerly occupied by a rival is not entitled to claim successorship, and announcements calculated to mislead the public in that respect may be enjoined, although the words used may be literally true. Harper *v.* Pearson, 3 L. T. Rep. N. S. 547.

A corporate name plainly suggesting consolidation of two existing companies will be enjoined when false. Manchester Brewery Co. *v.* North Cheshire, etc., Brewery Co., [1898] 1 Ch. 539, 67 L. J. Ch. 351, 78 L. T. Rep. N. S. 537, 14 T. L. R. 350, 46 Wkly. Rep. 515.

12. In Hogg *v.* Kirby, 8 Ves. Jr. 215, 7 Rev. Rep. 30, 32 Eng. Reprint 336, plaintiff was the proprietor of "The Wonderful Magazine." Defendant brought out a publication, very similar in appearance, under the same name, with the addition of the words "New Series Improved." An injunction was granted.

13. Ranft *v.* Reimers, 200 Ill. 386, 65 N. E. 720, 60 L. R. A. 291; Fite *v.* Dorman, (Tenn. 1900) 57 S. W. 129; Fish Bros. Wagon Co. *v.* La Belle Wagon Works, 82 Wis. 546, 52 N. W. 595, 33 Am. St. Rep. 72, 16 L. R. A. 453.

14. Shonk Tin Printing Co. *v.* Shonk, 138 Ill. 34, 27 N. E. 529. But see Armington *v.* Palmer, 21 R. I. 109, 42 Atl. 308, 79 Am. St. Rep. 786, 43 L. R. A. 95.

15. Martin *v.* Bowker, 163 Mass. 461, 40 N. E. 766; Smith *v.* Brand, 67 N. J. Eq. 529, 58 Atl. 1029. See Lepow *v.* Kottler, 115 N. Y. App. Div. 231, 100 N. Y. Suppl. 779.

16. *Massachusetts.*— Holbrook *v.* Nesbitt, 163 Mass. 120, 39 N. E. 794.

Missouri.— Sanders *v.* Bond, 47 Mo. App. 363.

New Jersey.— Newark Coal Co. *v.* Spangler, 54 N. J. Eq. 354, 34 Atl. 932.

New York.— Sultzbach Clothing Co. *v.* Balsam, 56 Misc. 324, 107 N. Y. Suppl. 622; Ward *v.* Ward, 15 N. Y. Suppl. 913; Peterson *v.* Humphrey, 4 Abb. Pr. 394.

Wisconsin.— Fish Bros. Wagon Co. *v.* La Belle Wagon Works, 82 Wis. 546, 52 N. W. 595, 33 Am. St. Rep. 72, 16 L. R. A. 453.

England.— Hookham *v.* Pottage, L. R. 8 Ch. 91, 27 L. T. Rep. N. S. 595, 21 Wkly. Rep. 47; Foot *v.* Lea, 13 Ir. Eq. 484; Williams *v.* Osborne, 13 L. T. Rep. N. S. 498.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 85.

17. *California.*— Nolan Bros. Shoe Co. *v.* Nolan, 131 Cal. 271, 63 Pac. 480, 82 Am. St. Rep. 346, 53 L. R. A. 384; Woodward *v.* Lazar, 21 Cal. 448, 82 Am. Dec. 751.

Massachusetts.— Holbrook *v.* Nesbitt, 163 Mass. 120, 39 N. E. 794.

New York.— Hildreth *v.* McCaul, 70 N. Y. App. Div. 162, 74 N. Y. Suppl. 1072; Sultzbach Clothing Co. *v.* Balsam, 56 Misc. 324, 107 N. Y. Suppl. 622.

Pennsylvania.— Colton *v.* Thomas, 2 Brewst. 308, 7 Phila. 257.

United States.— Klotz *v.* Hecht, 73 Fed. 822.

England.— Hookham *v.* Pottage, L. R. 8 Ch. 91, 27 L. T. Rep. N. S. 595, 21 Wkly. Rep. 47; Hart *v.* Colley, 44 Ch. D. 193, 59 L. J. Ch. 355, 62 L. T. Rep. N. S. 623, 38 Wkly. Rep. 440; Glenny *v.* Smith, 2 Dr. & Sm. 476, 11 Jur. N. S. 964, 13 L. T. Rep. N. S. 11, 6 New Rep. 363, 13 Wkly. Rep. 1032, 62 Eng. Reprint 701. See also Dence *v.* Mason, [1877] W. N. 23.

18. Baglin *v.* Cusenier Co., 156 Fed. 1016 [*affirmed* in 164 Fed. 25]; Blackwell *v.* Armistead, 3 Fed. Cas. No. 1,474, 3 Hughes 163.

19. Juan F. Portuondo Cigar Mfg. Co. *v.* Vicente Portuondo Cigar Mfg. Co., 222 Pa. St. 116, 70 Atl. 968; Cocks *v.* Chandler, L. R. 11 Eq. 446, 40 L. J. Ch. 575, 24 L. T. Rep. N. S. 379, 19 Wkly. Rep. 593, "The Original Reading Sauce." See also Hayward *v.* Hayward, 34 Ch. D. 198, 56 L. J. Ch. 287, 55 L. T. Rep. N. S. 729, 35 Wkly. Rep. 392. But see Browne *v.* Freeman, 4 New Rep. 476, 12 Wkly. Rep. 305.

are the "only genuine" goods of a particular name, where others are equally entitled to deal in those goods and use that name.[20] Where two persons have equal rights to sell a proprietary article, either may enjoin the other from representing himself as the "sole proprietor," [21] or "sole agent." [22] Representations either express or implied that the original article is a spurious article will be enjoined as unfair competition.[23]

17. Miscellaneous Cases. False representations either oral or written that defendant is connected with or represents the complainant in his business constitute unfair competition.[24] Supplying customers calling for genuine goods with similar but spurious goods is unfair and enjoinable.[25] But merely persuading customers who call for particular goods that other goods are just as good or better does not constitute unfair competition.[26] Representations that defendant's article is substantially identical with plaintiff's article, although the names are different, will be enjoined.[27] Depicting characters in books or pictures in new scenes and connections, apart from any infringement of copyright, does not constitute unfair competition and will not be enjoined.[28] But pictures, symbols,

Representation as "original."—The original inventor of a new manufacture, and persons claiming under him, are alone entitled to designate such manufacture as "the original"; and if he or they have been in the habit of so doing, an injunction will be granted to restrain another manufacturer from applying the designation to his goods. Cocks *v.* Chandler, L. R. 11 Eq. 446, 40 L. J. Ch. 575, 24 L. T. Rep. N. S. 379, 19 Wkly. Rep. 593. In Lazenby *v.* White, Sebastian's Dig. 344, plaintiffs were successors in business of the inventor of "Harvey's Sauce" (that name having become generic), and defendant began to sell a sauce under the name of "The Original Lazenby's Harvey Sauce." An injunction was granted. See also Lazenby *v.* White, L. R. 6 Ch. 89, 19 Wkly. Rep. 291.

20. Fish Bros. Wagon Co. *v.* Fish Bros. Mfg. Co., 87 Fed. 203; James *v.* James, L. R. 13 Eq. 421, 41 L. J. Ch. 353, 26 L. T. Rep. N. S. 568, 20 Wkly. Rep. 434; Liebig's Extract of Meat Co. *v.* Anderson, 55 L. T. Rep. N. S. 206.

21. McAllister *v.* Stumpp, etc., Co., 25 Misc. (N. Y.) 438, 55 N. Y. Suppl. 693; Hygienic Fleeced Underwear Co. *v.* Way, 137 Fed. 592, 70 C. C. A. 553 [*reversing* 133 Fed. 245] ("manufactured and owned by," etc.); International Silver Co. *v.* Simeon L. & George H. Rogers Co., 110 Fed. 955.

22. Coleman *v.* Flavel, 40 Fed. 854, 12 Sawy. 220.

23. James *v.* James, L. R. 13 Eq. 421, 41 L. J. Ch. 353, 26 L. T. Rep. N. S. 568, 20 Wkly. Rep. 434.

24. Morton *v.* Morton, 148 Cal. 142, 82 Pac. 664, 1 L. R. A. N. S. 660; National Water Co. *v.* Hertz, 177 Fed. 607 ("Sole agent"); Elgin Nat. Watch Co. *v.* Loveland, 132 Fed. 41; Hookham *v.* Pottage, L. R. 8 Ch. 91, 27 L. T. Rep. N. S. 595, 21 Wkly. Rep. 47. See also Walter *v.* Ashton, [1902] 2 Ch. 282, 71 L. J. Ch. 839, 87 L. T. Rep. N. S. 196, 18 T. L. R. 445, 51 Wkly. Rep. 131. But *compare* Clark *v.* Freeman, 11 Beav. 112, 12 Jur. 119, 17 L. J. Ch. 142, 50 Eng. Reprint 759.

Oral statements.—The court has jurisdiction to restrain by injunction a person from making oral statements as well as written statements calculated to injure another person in his business; but with regard to oral statements such jurisdiction will be exercised with great caution. Hermann Loog *v.* Bean, 26 Ch. D. 306, 53 L. J. Ch. 1128, 51 L. T. Rep. N. S. 442, 32 Wkly. Rep. 994.

25. Sperry *v.* Percival Milling Co., 81 Cal. 252, 22 Pac. 651; Barnes *v.* Pierce, 164 Fed. 213; M. J. Breitenbach Co. *v.* Spangenberg, 131 Fed. 160; Heublein *v.* Adams, 125 Fed. 782.

This is the essence of unfair competition, and is the basis for relief in all the cases.

A merchant filling orders for an advertised article, well-known by its trade-name, with a different article coming from another source is guilty of unfair competition, and will be enjoined. Barnes *v.* Pierce, 164 Fed. 213 ("Argyrol"); Baker *v.* Slack, 130 Fed. 514, 65 C. C. A. 138 ("Baker's Cocoa," "Baker's Chocolate." In this last case the dealer told customers that there were two Bakers, and when the customers could not distinguish, and asked for the best, he gave them the subsequent trader's goods); N. K. Fairbanks Co. *v.* Dunn, 126 Fed. 227 ("Gold Dust"); Rex *v.* Lyons, 16 Can. Cr. Cas. 152 (holding that such dealer may be convicted of an attempt to obtain money by false pretenses, although the customer in the particular case was not actually deceived, and further holding that it is immaterial whether the commodity so passed off is inferior in quality or different in ingredients).

26. Winchester Repeating Arms Co. *v.* Butler, 128 Fed. 976. See also Rocky Mountain Bell Tel. Co. *v.* Utah Independent Tel. Co., 31 Utah 377, 88 Pac. 26, 8 L. R. A. N. S. 1153.

27. Coffeen *v.* Brunton, 5 Fed. Cas. No. 2,946, 4 McLean 516. See Whitney *v.* Hickling, 5 Grant Ch. (U. C.) 605.

28. New York Herald Co. *v.* Star Co., 146 Fed. 1023, 76 C. C. A. 678 [*affirming* 146 Fed. 204]; Outcalt *v.* New York Herald, 146 Fed. 205.

An artist has no such common-law right in pictures drawn by him and sold to another,

devices, etc., used in trade otherwise than as technical trade-marks will be protected against deceptive imitation.[29] Selling or representing second-hand repaired or rebuilt goods as genuine, new goods is unfair competition.[30] Union labels, although not technical trade-marks, have been protected in equity against improper use substantially upon the ground of unfair competition.[31] Other cases are stated below.[32]

VI. STATUTORY REGULATION, REGISTRATION, AND OFFENSES.

A. State Statutes — 1. In General. Statutes regulating trade-marks, names, and labels, and providing civil, criminal, or penal remedies for violation thereof, exist in many of the states.[33] Union labels are protected by statute in

who published and copyrighted the same, as to render it unfair competition in trade for the latter to afterward publish other pictures depicting different scenes merely because they contain characters in imitation of those in the earlier ones. Outcalt *v.* New York Herald, 146 Fed. 205.

29. Manitowoc Malting Co. *v.* Milwaukee Malting Co., 119 Wis. 543, 97 N. W. 389.

30. Oliver Typewriter Co. *v.* American Writing Mach. Co., 156 Fed. 177, preliminary injunction denied upon the facts. See also *supra*, IV, E; and *supra*, V, B, 8. But see Singer Mfg. Co. *v.* Bent, 41 Fed. 214.

31. State *v.* Hagen, 6 Ind. App. 167, 33 N. E. 223; Hetterman *v.* Powers, 102 Ky. 133, 43 S. W. 180, 19 Ky. L. Rep. 1087, 80 Am. St. Rep. 348, 39 L. R. A. 211; United Garment Workers of America *v.* Davis, (N. J. Ch. 1909) 74 Atl. 306; Strasser *v.* Moonelis, 55 N. Y. Super. Ct. 197, 11 N. Y. St. 270. See also Martin Law Labor Unions, § 357 *et seq.* But see Weener *v.* Brayton, 152 Mass. 101, 25 N. E. 46, 8 L. R. A. 640.

32. False claim of "prize medal."— One to whom a prize medal has been awarded at an exposition is not entitled to an injunction to restrain one who had not obtained such a medal from falsely asserting that he had. This was placed upon the ground that the court will not grant an injunction to restrain false representations when such falsehood is not an infringement of any right vested in plaintiff. Batty *v.* Hill, 1 Hem. & M. 264, 8 L. T. Rep. N. S. 791, 2 N. R. 265, 11 Wkly. Rep. 745, 71 Eng. Reprint 115. A false use of words "Gold Medal" by the plaintiff will not be protected. Taylor *v.* Gillies, 5 Daly (N. Y.) 285.

Appropriation of testimonials given to rival.— In Franks *v.* Weaver, 10 Beav. 297, 50 Eng. Reprint 596, plaintiff and defendant were rival dealers in a similar medicine. Defendant's labels contained plaintiff's name and testimonials given to plaintiff in an ingenious manner so as to appropriate and apply them to defendant's medicine. An injunction was granted. But this case was distinguished in Tallerman *v.* Dowsing Radiant Heat Co., [1900] 1 Ch. 1, 68 L. J. Ch. 618, 48 Wkly. Rep. 146, where it was held that the appropriation and alteration of testimonials given to a rival so as to make them apparently applicable to defendant's goods would not be enjoined, damage not being shown and not necessarily flowing from the act.

Use of a short arbitrary telegraphic address will not be enjoined, although plaintiff had previously used same for many years. Street *v.* Union Bank, 30 Ch. D. 156, 55 L. J. Ch. 31, 53 L. T. Rep. N. S. 262, 33 Wkly. Rep. 901.

Unjust and malicious criticisms of a manufactured article published in a magazine are not actionable at law, unless special damage be alleged and proved, and the mere fact that in a particular case plaintiff has no remedy at law because of his inability to prove such damage does not confer equitable jurisdiction to enjoin future publication of such criticisms. Marlin Firearms Co. *v.* Shields, 171 N. Y. 384, 64 N. E. 163 [*reversing* 68 N. Y. App. Div. 88, 74 N. Y. Suppl. 84].

Obstructing the view of a place of business will not be enjoined as unfair competition. Butt *v.* Imperial Gas Co., L. R. 2 Ch. 158, 16 L. T. Rep. N. S. 820, 15 Wkly. Rep. 92.

33. Cases under state statutes.— *California.*— Hainque *v.* Cyclops Iron Works, 136 Cal. 351, 68 Pac. 1014; Schmidt *v.* McEwen, (1893) 35 Pac. 854; Schmidt *v.* Brieg, 100 Cal. 672, 35 Pac. 623, 22 L. R. A. 790; Whittier *v.* Dietz, 66 Cal. 78, 4 Pac. 986.

Georgia.— Butler *v.* State, 127 Ga. 700, 56 S. E. 1000; Comer *v.* State, 103 Ga. 69, 29 S. E. 501, holding Pen. Code, §§ 252–254, limited to union labels.

Indiana.— State *v.* Wright, 159 Ind. 394, 65 N. E. 289; State *v.* Hagen, 6 Ind. App. 167, 33 N. E. 223.

Iowa.— Beebe *v.* Tolerton, etc., Co., 117 Iowa 593, 91 N. W. 905.

Kentucky.— Geo. T. Stagg Co. *v.* Taylor, 95 Ky. 651, 27 S. W. 247, 16 Ky. L. Rep. 213.

Maryland.— Smith-Dixon Co. *v.* Stevens, 100 Md. 110, 59 Atl. 401.

Massachusetts.— Com. *v.* Rozen, 176 Mass. 129, 57 N. E. 223; Tracy *v.* Banker, 170 Mass. 266, 49 N. E. 308, 39 L. R. A. 508; Dover Stamping Co. *v.* Fellows, 163 Mass. 191, 40 N. E. 105, 47 Am. St. Rep. 448, 28 L. R. A. 448, statute not applicable to generic name of patented article.

Missouri.— Oakes *v.* St. Louis Candy Co., 146 Mo. 391, 48 S. W. 467; State *v.* Bishop, 128 Mo. 373, 31 S. W. 9, 49 Am. St. Rep. 569, 29 L. R. A. 200; State *v.* Niesman, 101 Mo. App. 507, 74 S. W. 638.

New Jersey.— Cigar Makers' International Union *v.* Goldberg, 70 N. J. L. 488, 57 Atl. 141; Gottlob *v.* Schmidt, 66 N. J. L. 180, 48

various states, either *eo nomine*, or by trade-mark acts broad enough to include such labels.[34] Where the right to relief depends upon a statute, the case must be brought within the terms of the statute.[35] Usually some form of registration is provided as a part of the scheme for regulation and protection either of trade-marks generally, or of some class of trade-marks, names, or labels.[36] But under other statutes no registration anywhere is required,[37] or at least not as a condition precedent to relief against infringement of a common-law trade-mark.[38] Statutory provision for the registration of trade-marks as a general rule apply only to words, marks, or symbols which have already become trade-marks by adoption and user. The purpose of registry is merely to facilitate the remedy. Registration in such cases confers no new rights.[39] Some statutes provide for the registration and protection of labels or marks which are not technical trade-marks, as for example union labels. In such cases a new right is created.[40] Rights under state registration are not infringed by acts wholly done without the state.[41]

2. CONSTITUTIONALITY AND CONSTRUCTION. The states have general constitutional

Atl. 588; Schmalz *v.* Wooley, 56 N. J. Eq. 649, 39 Atl. 539.

New York.— People *v.* Krivitzky, 168 N. Y. 182, 61 N. E. 175 [*affirming* 60 N. Y. App. Div. 307]; People *v.* Cannow, 139 N. Y. 32, 34 N. E. 759, 36 Am. St. Rep. 668; People *v.* Hilfman, 61 N. Y. App. Div. 541, 70 N. Y. Suppl. 621; Higgins *v.* Dakin, 86 Hun 461, 33 N. Y. Suppl. 890; People *v.* Elfenbein, 65 Hun 434, 20 N. Y. Suppl. 364; Bulena *v.* Newman, 10 Misc. 460, 31 N. Y. Suppl. 449; Pound *v.* Molyneaux, 24 N. Y. Suppl. 592; People *v.* Bartholf, 20 N. Y. Suppl. 782 [*reversed* in 139 N. Y. 32, 34 N. E. 759, 36 Am. St. Rep. 668, 10 N. Y. Cr. 497].

Ohio.— Cigar Makers' Protective Union *v.* Lindner, 3 Ohio S. & C. Pl. Dec. 244, 2 Ohio N. P. 114.

Pennsylvania.— Com. *v.* Norton, 16 Pa. Super. Ct. 423.

Texas.— Caffarelli *v.* Western Grocer Co., 102 Tex. 104, 127 S. W. 1018 [*reversing* (Civ. App. 1908) 108 S. W. 413].

Washington.—Woodcock *v.* Guy, 33 Wash. 234, 74 Pac. 358.

Wisconsin.—Avenarius *v.* Kornely, 139 Wis. 247, 121 N. W. 336; Gassler *v.* Grieb, 80 Wis. 21, 48 N. W. 1098, 27 Am. St. Rep. 20.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," §§ 46–60. See codes and statutes of the various states.

State corporation statutes prohibiting the use of the name of an existing corporation are intended to prevent identity of corporate names, and have no reference to the fraudulent use of trade-names. Boston Rubber Shoe Co. *v.* Boston Rubber Co., 149 Mass. 436, 21 N. E. 875.

34. *Connecticut.*— Lawlor *v.* Merritt, 79 Conn. 399, 65 Atl. 295; Lawlor *v.* Merritt, 78 Conn. 630, 63 Atl. 639.

Georgia.— Butler *v.* State, 127 Ga. 700, 56 S. E. 1000; Comer *v.* State, 103 Ga. 69, 29 S. E. 501.

Massachusetts.— Tracy *v.* Banker, 170 Mass. 266, 49 N. E. 308, 39 L. R. A. 508.

Missouri.— State *v.* Bishop, 128 Mo. 373, 31 S. W. 9, 49 Am. St. Rep. 569, 29 L. R. A. 200; State *v.* St. Clair, (App. 1909) 117 S. W. 648; State *v.* Niesmann, 101 Mo. App. 507, 74 S. W. 638.

New Jersey.— Cigar Makers' International Union *v.* Goldberg, 70 N. J. L. 488, 57 Atl. 141; Schmalz *v.* Wooley, 57 N. J. Eq. 303, 41 Atl. 939, 73 Am. St. Rep. 637, 43 L. R. A. 86 [*reversing* 56 N. J. Eq. 649, 39 Atl. 539].

New York.— Lynch *v.* John Single Paper Co., 115 N. Y. App. Div. 911, 101 N. Y. Suppl. 824; Myrup *v.* Friedman, 58 Misc. 323, 110 N. Y. Suppl. 1106 [*affirmed* in 128 N. Y. App. Div. 888, 112 N. Y. Suppl. 1138].

Washington.— State *v.* Montgomery, 56 Wash. 443, 105 Pac. 1035, 134 Am. St. Rep. 1119.

35. Lawlor *v.* Merritt, 79 Conn. 399, 65 Atl. 295.

36. Whittier *v.* Dietz, 66 Cal. 78, 4 Pac. 986; State *v.* Barnett, 159 Ind. 432, 65 N. E. 515; State *v.* Wright, 159 Ind. 422, 65 N. E. 289; Smith-Dixon Co. *v.* Stevens, 100 Md. 110, 59 Atl. 401; Partridge *v.* Doty, 121 N. Y. Suppl. 586 [*affirmed* in 140 N. Y. App. Div. 916, 124 N. Y. Suppl. 1124].

37. Butler *v.* State, 127 Ga. 700, 56 S. E. 1000.

38. Lawlor *v.* Merritt, 79 Conn. 399, 65 Atl. 295; Woodcock *v.* Guy, 33 Wash. 234, 74 Pac. 358.

39. State *v.* Hagen, 6 Ind. App. 167, 33 N. E. 223 (union label not entitled to registration because right to use it not exclusive); Oakes *v.* St. Louis Candy Co., 146 Mo. 391, 48 S. W. 467. Registration is sufficient *prima facie* proof that all acts necessary to entitle the mark to registration were duly performed. State *v.* Montgomery, 56 Wash. 443, 105 Pac. 1035, 134 Am. St. Rep. 1119.

This is the rule under the federal statute. See *infra*, VI, B.

40. Lawlor *v.* Merritt, 78 Conn. 630, 63 Atl. 639; Tracy *v.* Banker, 170 Mass. 266, 49 N. E. 308, 39 L. R. A. 508; Oakes *v.* St. Louis Candy Co., 146 Mo. 391, 48 S. W. 467.

41. Rehbein *v.* Weaver, 133 Fed. 607.

A suit cannot be maintained in a federal court to enforce rights under a state statute relating to trade-marks, and providing for their registration, where the transactions complained of occurred outside of such state, notwithstanding there is the requisite diverse citizenship to give the court general jurisdiction. Rehbein *v.* Weaver, 133 Fed. 607.

power to enact statutes regulating trade-marks and labels, although particular statutes have been sometimes held unconstitutional for various reasons.[42] Such statutes are a constitutional exercise of the police power of the state, as tending to prevent fraud,[43] although of course particular provisions may exceed the police power as having no real relation to the mischief to be prevented.[44] State statutes prohibiting the unauthorized use of bottles or other receptacles bearing registered names or marks are constitutional and within the police power of the state.[45] Statutes making it a misdemeanor to sell or offer for sale goods as the goods of another unless contained in the original package or under the original marks affixed by the owner are constitutional and do not deprive any one of his property without due process of law.[46] The purpose of this class of statutes is to protect the public against fraud and deception, as well as the proprietor of the goods.[47] Penal statutes passed under the police power for the protection of trade-marks will be strictly construed.[48]

3. Counterfeiting or Imitating Mark or Label. The infringement, imitation, or counterfeiting of registered trade-marks or labels or the sale of goods under such marks or labels is made a criminal offense in many states.[49] Knowledge that the

42. *Illinois.*— Horwich *v.* Walker-Gordon Laboratory Co., 205 Ill. 497, 68 N. E. 938, 98 Am. St. Rep. 254; Ruhstrat *v.* People, 185 Ill. 133, 57 N. E. 41, 76 Am. St. Rep. 30, 49 L. R. A. 181; Cohn *v.* People, 149 Ill. 486, 37 N. E. 60, 41 Am. St. Rep. 304, 23 L. R. A. 821; White *v.* Wagar, 83 Ill. App. 592; Vogt *v.* People, 59 Ill. App. 684.

Missouri.— Oakes *v.* St. Louis Candy Co., 146 Mo. 391, 48 S. W. 467; State *v.* Bishop, 128 Mo. 373, 31 S. W. 9 (union label); State *v.* Berlinsheimer, 62 Mo. App. 168.

New Jersey.— Cigar Makers' International Union of America *v.* Goldberg, 70 N. J. L. 488, 57 Atl. 141 (union label); Schmalz *v.* Wooley, 57 N. J. Eq. 303, 41 Atl. 939, 73 Am. St. Rep. 637, 43 L. R. A. 86; Schmalz *v.* Wooley, 56 N. J. Eq. 649, 39 Atl. 539.

Ohio.— Cigar Makers' Protective Union *v.* Lindner, 3 Ohio S. & C. Pl. Dec. 244, 2 Ohio N. P. 114.

Pennsylvania.— Com. *v.* Norton, 9 Pa. Dist. 132; Com. *v.* Morton, 23 Pa. Co. Ct. 386.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 47.

43. People *v.* Luhrs, 195 N. Y. 377, 89 N. E. 171, 25 L. R. A. N. S. 473 [*affirming* 127 N. Y. App. Div. 634, 111 N. Y. Suppl. 749].

44. See, generally, Constitutional Law, 8 Cyc. 863.

Statutes prohibiting traffic in or use of bottles or other receptacles bearing registered trade-marks without the consent of the owner of the mark have been held unconstitutional as not within the police power and as special and class legislation, as the consent of the owner to the sale has no relation to preventing fraud upon the public. Horwich *v.* Walker-Gordon Laboratory Co., 205 Ill. 497, 68 N. E. 938, 98 Am. St. Rep. 254, holding further that the Illinois statute of May 11, 1901, was intended only for the protection of the owners of such marked receptacles and to facilitate the recovery of such property and that the statute was not intended for the protection of the public and manufacturers of food products from fraud.

45. Com. *v.* Anselvich, 186 Mass. 376, 71 N. E. 790, 104 Am. St. Rep. 590; People *v.* Luhrs, 127 N. Y. App. Div. 634, 111 N. Y. Suppl. 749 [*affirmed* in 195 N. Y. 377, 89 N. E. 171, 25 L. R. A. N. S. 473].

46. People *v.* Luhrs, 127 N. Y. App. Div. 634, 111 N. Y. Suppl. 749 [*affirmed* in 195 N. Y. 377, 89 N. E. 171, 25 L. R. A. N. S. 473], holding that refilling bottles even with genuine goods is an offense under the statute.

47. People *v.* Luhrs, 127 N. Y. App. Div. 634, 111 N. Y. Suppl. 749 [*affirmed* in 195 N. Y. 377, 89 N. E. 171, 25 L. R. A. N. S. 473]; People *v.* Hoffheimer, 110 N. Y. App. Div. 423, 97 N. Y. Suppl. 84; People *v.* Hilfman, 61 N. Y. App. Div. 541, 70 N. Y. Suppl. 621, 15 N. Y. Cr. 456.

48. People *v.* Sommer, 55 Misc. (N. Y.) 55, 106 N. Y. Suppl. 190.

Such statutes are not penal, so far as the right to relief is concerned, and should be fairly and liberally construed. Lynch *v.* John Single Paper Co., 115 N. Y. App. Div. 911, 101 N. Y. Suppl. 824, union labels.

49. *Georgia.*— Butler *v.* State, 127 Ga. 700, 56 S. E. 1000.

Illinois.— Vincendeau *v.* People, 219 Ill. 474, 76 N. E. 675 [*reversing* 119 Ill. App. 603].

Indiana.— State *v.* Hagen, 6 Ind. App. 167, 33 N. E. 223, union label.

Louisiana.— Cusimano *v.* Olive Oil Importing Co., 114 La. 312, 38 So. 200.

Massachusetts.— Com. *v.* Rozen, 176 Mass. 129, 57 N. E. 223.

Missouri.— State *v.* Thierauf, 167 Mo. 429, 67 S. W. 292; State *v.* St. Clair, 137 Mo. App. 188, 117 S. W. 648 [union label]; State *v.* Gibbs, 56 Mo. 133; State *v.* Berlinsheimer, 62 Mo. App. 168.

New Jersey.— Cigar Makers' International Union of America *v.* Goldberg, 70 N. J. L. 488, 57 Atl. 141.

New York.— People *v.* Krivitsky, 168 N. Y. 182, 61 N. E. 175, 10 N. Y. Annot. Cas. 245 [*affirming* 60 N. Y. App. Div. 307, 70 N. Y. Suppl. 173, 15 N. Y. Cr. 441]; People *v.* Hilfman, 61 N. Y. App. Div. 541, 70 N. Y. Suppl.

goods sold are not the goods indicated by the trade-mark thereon, or that the label is counterfeit, is essential to a conviction.[50] A fraudulent intent is necessary to constitute the offense and to support the recovery of a penalty.[51] The intentional sale of counterfeit labels, knowing them to be such, is sufficient to show a fraudulent intent.[52] A statute against counterfeiting labels is violated by using genuine labels in a fraudulent manner.[53] A use of a counterfeit label even on genuine goods violates the statute.[54] A statute prohibiting the sale of goods as being the goods of another's production or manufacture, unless contained in the original packages and under the marks and labels affixed by the manufacturer, is not violated by a mere representation that an article is made from certain goods manufactured by another.[55] An indictment will not lie unless the mark or label was validly registered in accordance with the statute, where the statute requires registration.[56]

4. Marked or Labeled Bottles or Packages. In many states statutes exist authorizing the registration of stamped or labeled bottles or other receptacles

621, 15 N. Y. Cr. 456; Brown *v.* Mercer, 37 N. Y. Super. Ct. 265; People *v.* Fisher, 50 Hun 552, 3 N. Y. Suppl. 786.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 56.

To constitute the offense of using a counterfeit trade-mark the alleged trade-mark must be capable of appropriation as such and must be the exclusive property of the owner and not abandoned by him; the use must be with intent to defraud; and to establish this intent it must appear that the accused knew of the owner's rights. People *v.* Molins, 7 N. Y. Cr. 51. A label proved to have been in long and continuous use by manufacturers to indicate to the public the origin of their product is a trade-mark within the definition of N. Y. Pen. Code, § 366, and the printing thereof for a person designing, or apparently designing, to fraudulently use the same is an offense under § 364 of that code. People *v.* Krivitsky, 168 N. Y. 182, 61 N. E. 175, 10 N. Y. Annot. Cas. 245.

Deception of purchaser unnecessary.— It is immaterial that the prosecutor knew that he was purchasing counterfeit goods, and purchased them for resale to the public. People *v.* Hilfman, 61 N. Y. App. Div. 541, 70 N. Y. Suppl. 621, 15 N. Y. Cr. 456.

Counterfeiting label for agent of owner.— In a prosecution for counterfeiting a trade-mark it is no defense that the labels were procured by an agent of the owner for the purpose of procuring evidence that defendant was in the business of counterfeiting the label; it is enough that defendant printed the labels, not for the owner, but for one apparently designing to use them fraudulently. People *v.* Krivitsky, 168 N. Y. 182, 61 N. E. 175, 10 N. Y. Annot. Cas. 245 [*affirming* 60 N. Y. App. Div. 307, 70 N. Y. Suppl. 173, 15 N. Y. Cr. 441]. In the last case cited it was held no defense that the labels were printed from a plate furnished by an agent of the owner, there being no evidence that the agent had authority to have the labels printed, since without such authority one who printed them falsely made or counterfeited them.

Fraudulent use antedating statute.— In a suit to prevent defendant from fraudulently using a trade union's labels, it is no defense that he commenced using them before the statute authorizing an action to enjoin such use was passed. Tracy *v.* Banker, 170 Mass. 266, 49 N. E. 308, 39 L. R. A. 508.

50. State *v.* Bishop, 128 Mo. 373, 31 S. W. 9 (union label); People *v.* Hoffheimer, 110 N. Y. App. Div. 423, 97 N. Y. Suppl. 84.

51. Watkins *v.* Landon, 52 Minn. 389, 54 N. W. 193, 38 Am. St. Rep. 560, 19 L. R. A. 236; People *v.* Molins, 7 N. Y. Cr. 51. *Contra,* Cigar Makers' International Union of America *v.* Goldberg, 70 N. J. L. 488, 57 Atl. 141.

Under the Georgia statute of Dec. 20, 1898, under the first, third, and fourth sections, it is unlawful for any person to counterfeit or imitate another's trade-mark "with intent to deceive the public." This intent is necessary to constitute an offense under the sections named. The words quoted do not appear in the second section of the act, and accordingly the use of any counterfeit or imitation label, trade-mark, etc., is unlawful and an offense where the one using it knows that it is a counterfeit or imitation. But it is not necessary to show an intent to deceive the public. Butler *v.* State, 127 Ga. 700, 56 S. E. 1000.

52. U. S. *v.* Steffens, 27 Fed. Cas. No. 16,384.

Evidence of criminal intent.— The jury may consider, as bearing on the question of criminal intent, that the trade-mark used was printed by defendant and falsely represented on its face to be printed by the printer of the genuine trade-mark. People *v.* Molins, 7 N. Y. Cr. 51.

53. Tracy *v.* Banker, 170 Mass. 266, 49 N. E. 308, 39 L. R. A. 508.

54. Butler *v.* State, 127 Ga. 700, 56 S. E. 1000.

55. People *v.* Hoffheimer, 110 N. Y. App. Div. 423, 97 N. Y. Suppl. 84, sale of couch under representations that it was covered with "pantasote."

56. Vincendeau *v.* People, 219 Ill. 474, 76 N. E. 675 [*reversing* 119 Ill. App. 603]; State *v.* Barnett, 159 Ind. 432, 65 N. E. 515; State *v.* Hagen, 6 Ind. App. 167, 33 N. E. 223.

and making unauthorized use or traffic therein a criminal offense.[57] Refilling of such bottles is also sometimes prohibited and made an offense.[58] Mere possession of registered bottles by certain classes of agents or dealers has been made *prima facie* evidence of unlawful use or traffic in violation of the statute.[59] So use has been made presumptive evidence of unlawful use.[60] Mere possession is not use. Use involves an act of some kind.[61]

B. Federal Statutes — 1. Constitutionality. The earlier acts of congress in regard to trade-marks have been declared unconstitutional because not based upon the commerce clause of the constitution, which is the only clause which seems broad enough to confer the power upon congress to legislate upon the subject of trade-marks,[62] unless it be the treaty-making power, which might support limited legislation confined to commerce with foreign nations and Indian tribes.[63] The power to legislate in favor of authors and inventors, under which the patent and copyright laws are enacted, does not include power to legislate upon the subject of trade-marks.[64] The act of March 3, 1881, was drawn under the commerce clause of the constitution and has been generally considered as constitutional,[65] although grave doubts have been expressed,[66] and the power of congress to legislate upon the subject of trade-marks, either under the commerce clause, or any other clause of the constitution has not yet been authoritatively determined by

57. *Indiana.*— State *v.* Barnett, 159 Ind. 432, 65 N. E. 515.

Massachusetts.— Com. *v.* Anselvich, 186 Mass. 376, 71 N. E. 790, 104 Am. St. Rep. 590.

New Jersey.—Brant *v.* Froehlich, 49 N. J. L. 336, 8 Atl. 283; Bowden *v.* Randolph Tp., 41 N. J. L. 462.

New York.— People *v.* Cannon, 139 N. Y. 32, 34 N. E. 759, 36 Am. St. Rep. 668, 10 N. Y. Cr. 497 [*affirming* 63 Hun 306, 18 N. Y. Suppl. 25, and *reversing* 20 N. Y. Suppl. 782]; Bell *v.* Gibson, 71 N. Y. App. Div. 472, 75 N. Y. Suppl. 753; People's Milk Co. *v.* Doty, 64 Misc. 595, 118 N. Y. Suppl. 966; People *v.* Sommer, 55 Misc. 55, 106 N. Y. Suppl. 190; Partridge *v.* Doty, 121 N. Y. Suppl. 586 [*affirmed* in 140 N. Y. App. Div. 916, 124 N. Y. Suppl. 1124; People *v.* Elfenbein, 65 Hun 434, 20 N. Y. Suppl. 364.

Wisconsin.— Oppermann *v.* Waterman, 94 Wis. 583, 69 N. W. 569.

The statute is not violated by a sale of the goods in the original bottles, as they come from the manufacturer. It is merely the dealing in empty bottles after the original contents have been removed that is prohibited. People *v.* Cannon, 139 N. Y. 32, 34 N. E. 759, 36 Am. St. Rep. 668, 10 N. Y. Cr. 497 [*affirming* 63 Hun 306, 18 N. Y. Suppl. 25, and *reversing* 20 N. Y. Suppl. 782].

58. State *v.* Wright, 159 Ind. 394, 65 N. E. 190; People *v.* Sommer, 55 Misc. (N. Y.) 55, 106 N. Y. Suppl. 190.

Refilling with genuine goods.— Refilling stamped or labeled bottles, even with genuine goods, is made a misdemeanor by N. Y. Pen. Code, § 364, subd. 6. People *v.* Luhrs, 127 N. Y. App. Div. 634, 111 N. Y. Suppl. 749 [*affirmed* in 195 N. Y. 377, 89 N. E. 171, 25 L. R. A. N. S. 473].

59. Com. *v.* Anselvich, 186 Mass. 376, 71 N. E. 790, 104 Am. St. Rep. 590 (holding Mass. Rev. Laws, c. 72, § 17, constitutional, as reasonable, and not class legislation); Bell *v.* Gibson, 71 N. Y. App. Div. 472, 75 N. Y. Suppl. 753; People *v.* Sommer, 55 Misc. (N. Y.) 55, 106 N. Y. Suppl. 190.

60. People *v.* Sommer, 55 Misc. (N. Y.) 55, 106 N. Y. Suppl. 190.

61. People *v.* Sommer, 55 Misc. (N. Y.) 55, 106 N. Y. Suppl. 190.

62. **Constitutional power of congress.**— Smail *v.* Sanders, 118 Ind. 105, 20 N. E. 296; U. S. *v.* Steffens, 100 U. S. 82, 25 L. ed. 550; U. S. *v.* Koch, 40 Fed. 250, 5 L. R. A. 130; Day *v.* Walls, 7 Fed. Cas. No. 3,692; Leidersdorf *v.* Flint, 15 Fed. Cas. No. 8,219, 8 Biss. 327, 6 Reporter 739, 18 Alb. L. J. 382, 429, 7 N. Y. Wkly. Dig. 360.

63. See 10 Cong. Rec. pt. 2, p. 1574.

64. Smail *v.* Sanders, 118 Ind. 105, 20 N. E. 296; U. S. *v.* Steffens, 100 U. S. 82, 25 L. ed. 550; Leidersdorf *v.* Flint, 15 Fed. Cas. No. 8,219, 8 Biss. 327, 6 Reporter 739, 18 Alb. L. J. 382, 429, 7 N. Y. Wkly. Dig. 360. The maker of a trade-mark is neither an "author" nor "inventor," and a trade-mark is neither a "writing" nor a "discovery" within the meaning of U. S. Const. art. 1, § 8, cl. 8. Leidersdorf *v.* Flint, 15 Fed. Cas. No. 8,219, 8 Biss. 327, 6 Reporter 739, 18 Alb. L. J. 382, 429, 7 N. Y. Wkly. Dig. 360. *Contra,* Duwell *v.* Bohmer, 8 Fed. Cas. No. 4,213, 2 Flipp. 168, 6 Reporter 262, 14 Off. Gaz. 270, holding that trade-mark statutes are substantially copyright statutes.

65. **Act of March 3, 1881.**— See U. S. *v.* Seymour, 153 U. S. 353, 14 S. Ct. 871, 38 L. ed. 742; Hennessy *v.* Braunschweiger, 89 Fed. 664; L. H. Harris Drug Co. *v.* Stucky, 46 Fed. 624.

66. In Illinois Watch-Case Co. *v.* Elgin Nat. Watch Co., 94 Fed. 667, 35 C. C. A. 237 [*reversing* 89 Fed. 487], it was held that the constitutionality of this act was so doubtful that the court would not exercise jurisdiction between citizens of the same state. Upon appeal, the supreme court refused to consider this question because not necessary to a de-

the supreme court, although it has been denied by a circuit court case.[67] Whatever power congress may have in respect to trade-marks, it is only such as is incidental to other subjects over which it has jurisdiction, because it is not anywhere expressly conferred.[68] The federal power does not extend to trade-marks used in commerce wholly within a single state.[69]

2. General Provisions. The act of congress of February 20, 1905, as amended, superseded all prior federal legislation upon this subject, and is the present law. In many respects the provisions of the act of 1881 were preserved and carried forward in this new act.[70] Upon compliance with the act, and subject to its conditions, the owner of a trade-mark used in commerce with foreign nations, or among the several states,[71] or with Indian tribes, may register such trade-mark in the patent office.[72] Certificates of registration are issued which remain in force twenty years,[73] and may be renewed from time to time for additional like periods upon compliance with the statute.[74] Remedies at law and in equity are provided for infringement, and jurisdiction is conferred upon the proper federal courts for that purpose.[75] Injunctions granted in one district may be served and enforced anywhere throughout the United States, and the infringing labels, wrappers, packages, etc., may be destroyed.[76] The act is permissive only, and does not affect the rights of owners of unregistered common-law trade-marks.[77] It is expressly provided that all existing remedies at law or in equity shall remain unaffected.[78] No criminal remedy is provided.[79] Importation of articles bearing infringing trade-marks is prohibited and provision is made to exclude such goods from entry.[80]

3. What May Be Registered. To be entitled to registration, the mark or name must have been used in commerce with foreign nations, or among the states, or with Indian tribes,[81] and it must be a valid, existing, technical, common-law trade-mark,[82] except that any mark which was in actual and exclusive use as a

termination of the case. See Elgin Nat. Watch Co. *v.* Illinois Watch Case Co., 179 U. S. 665, 21 S. Ct. 270, 45 L. ed. 365.

67. Leidersdorf *v.* Flint, 15 Fed. Cas. No. 8,219, 8 Biss. 327, 6 Reporter 739, 18 Alb. L. J. 382, 429, 7 N. Y. Wkly. Dig. 360, in which Circuit Justice Harlan concurred with District Judge Dyer.

68. Traiser *v.* J. W. Doty Cigar Co., 198 Mass. 327, 84 N. E. 462.

Congress has no power to declare what are lawful trade-marks, and what are not, or to say that any alleged marks can be appropriated without a prior use. *In re* Spalding, 27 App. Cas. (D. C.) 314.

69. Perlberg *v.* Smith, 70 N. J. Eq. 638, 62 Atl. 442; A. Leschen, etc., Rope Co. *v.* Broderick, etc., Rope Co., 201 U. S. 166, 26 S. Ct. 425, 50 L. ed. 710; U. S. *v.* Steffens, 100 U. S. 82, 25 L. ed. 550.

70. **Except where a change in the law requires it,** cases under similar provisions in former statutes are cited herein without indicating whether they were determined under the present or earlier statutes.

71. The act of 1881 did not extend to interstate commerce, but was strictly limited to commerce with foreign nations and Indian tribes. Warner *v.* Searle, etc., Co., 191 U. S. 195, 24 S. Ct. 79, 48 L. ed. 145.

72. Act, Feb. 20, 1905, § 1.

Cases under act of 1881.— U. S. *v.* Duell, 17 App. Cas. (D. C.) 471; Sorg *v.* Welsh, 16 Off. Gaz. 910, Price & S. T. M. Cas. 220; *In re* Bush, 10 Off. Gaz. 164; *In re* Boehm, 8 Off. Gaz. 319.

73. Act, Feb. 20, 1905, §§ 11, 12.

74. Act, Feb. 20, 1905, § 12.

75. Act, Feb. 20, 1905, §§ 16–23. See also *infra*, IX.

76. Act, Feb. 20, 1905, § 20.

77. Traiser *v.* J. W. Doty Cigar Co., 198 Mass. 327, 84 N. E. 462; Ohio Baking Co. *v.* National Biscuit Co., 127 Fed. 116, 62 C. C. A. 116.

78. Act, Feb. 20, 1905, § 23.

79. **Criminal remedies** are very common in state legislation. See *supra*, VI, A.

80. Act, Feb. 20, 1905, § 27.

81. Act, Feb. 20, 1905, § 1.

The state of South Carolina was denied registration of a trade-mark for liquors sold in Canada by a state commissioner, such sales not being authorized by the Dispensary Act. Seymour *v.* U. S., 2 App. Cas. (D. C.) 240.

82. Kentucky Distilleries, etc., Co. *v.* Old Lexington Club Distilling Co., 31 App. Cas. (D. C.) 223; Winchester Repeating Arms Co. *v.* Peters Cartridge Co., 30 App. Cas. (D. C.) 505; Worster Brewing Corp. *v.* Reuter, 30 App. Cas. (D. C.) 428; *In re* National Phonograph Co., 29 App. Cas. (D. C.) 142; *In re* American Circular Loom Co., 28 App. Cas. (D. C.) 446; *In re* Standard Underground Cable Co., 27 App. Cas. (D. C.) 320; *In re* Spalding, 27 App. Cas. (D. C.) 314; U. S. *v.* Duell, 17 App. Cas. (D. C.) 471; Seymour *v.* South Carolina, 2 App. Cas. (D. C.) 240; Chase *v.* Mayo, 121 Mass. 343; A. Leschen, etc., Rope Co. *v.* Broderick, etc., Rope Co., 201 U. S. 166, 26 S. Ct. 425, 50 L. ed. 710 [*affirming* 134 Fed. 571, 67 C. C. A. 418]; Ludington Novelty Co. *v.* Leonard, 119 Fed. 937 [*affirmed* in 127 Fed. 155, 62 C. C. A. 269]; Brower *v.*

trade-mark of the applicant or his predecessor for ten years next preceding the passage of the act is entitled to registration, even though not a technical trade-mark.[83] With this exception mere secondary meaning names, although entitled to protection under the doctrine of unfair competition,[84] are not entitled to registra-

Boulton, 53 Fed. 389; Smith *v.* Reynolds, 22 Fed. Cas. No. 13,098, 10 Blatchf. 100, 3 Off. Gaz. 214 [*affirmed* in 22 Fed. Cas. No. 13,099, 13 Blatchf. 458]; *Ex p.* Frieberg, 20 Off. Gaz. 1164; *Ex p.* Farnum, 18 Off. Gaz. 412; *Ex p.* Pace, 15 Off. Gaz. 909; *In re* Richardson, 3 Off. Gaz. 120; *Ex p.* Dawes, 1 Off. Gaz. 27. See Einstein *v.* Sawhill, 2 App. Cas. (D. C.) 10.

The patent office should not recognize a property right in a mark, and grant it registration as a trade-mark, when the courts, upon the same facts, would decline to protect the mark if registered. Levy *v.* Uri, 31 App. Cas. (D. C.) 441.

Marks serving useful purpose.— By the trade-mark act it is intended to limit the selection of marks for registration to mere arbitrary words or designs, the value of which will consist alone in their becoming fixed in the public mind through continued use on the goods of the owner, and not to permit marks to be registered which are such as will in themselves enhance the sale or value of the article to which they are applied. *In re* Central Consumers Co., 32 App. Cas. (D. C.) 523. For the principle see *supra*, III, B, 12.

Actual use as a trade-mark is essential to registration. Planten *v.* Canton Pharmacy Co., 33 App. Cas. (D. C.) 268; Johnson *v.* Whelan, 33 App. Cas. (D. C.) 4.

Abandoned trade-marks may not be registered. Hannis Distilling Co. *v.* George W. Torrey Co., 32 App. Cas. (D. C.) 530. See also *infra*, VIII, C.

False and misleading statements in connection with the mark or label, or a misuse of it, constitute a bar to registration. *In re* Wright, 33 App. Cas. (D. C.) 510; Levy *v.* Uri, 31 App. Cas. (D. C.) 441; Schoenhofen Brewing Co. *v.* Maltine Co., 30 App. Cas. (D. C.) 346; Schoenhofen Brewing Co. *v.* Maltine Co., 30 App. Cas. (D. C.) 340; Schuster Co. *v.* Muller, 28 App. Cas. (D. C.) 409. For the same principle applied to trade-marks generally see *supra*, III, A, 5.

83. Act, Feb. 20, 1905, § 5; *In re* Hoff, 33 App. Cas. (D. C.) 233; H. W. Johns-Manville Co. *v.* American Steam Packing Co., 33 App. Cas. (D. C.) 224; Dennehy *v.* Robertson, 32 App. Cas. (D. C.) 355 (use not exclusive); Kentucky Distilleries, etc., Co. *v.* Old Lexington Club Distilling Co., 31 App. Cas. (D. C.) 223 (use not exclusive); Brown-Forman Co. *v.* Beech Hill Distilling Co., 30 App. Cas. (D. C.) 485 (use held not exclusive); Worster Brewing Corp. *v.* Rueter, 30 App. Cas. (D. C.) 428 (registration refused because use not exclusive); Natural Food Co. *v.* Williams, 30 App. Cas. (D. C.) 348 ("Shredded Wheat" refused registration); Wm. A. Rogers *v.* International Silver Co., 30 App. Cas. (D. C.) 97 (personal name); *In re* Spalding, 27 App. Cas. (D. C.) 314; Thaddeus Davids Co. *v.* Davids, 178 Fed. 801, 102 C. C. A. 249 [*reversing* 165 Fed. 792].

Construction of proviso.— The purpose of the proviso was to permit the registration of marks not amounting to technical trade-marks where they had been exclusively used as such for more than ten years, and in which the user had thereby acquired property rights, even though within the prohibited classes, unless contrary to public policy, as containing immoral or scandalous matter. Thaddeus Davids Co. *v.* Davids, 178 Fed. 801, 102 C. C. A. 249 [*reversing* 165 Fed. 792]. The proviso applies only to marks which are not technical trade-marks, and the registration of which are not prohibited elsewhere in the section. *In re* Cahn, 27 App. Cas. (D. C.) 173, holding that a mark simulating the arms or seal of a state is not entitled to registration. This proviso was not intended to provide for the registration of technical trade-marks, but permitted the registration of marks not in either of the classes prohibited by the section, if in actual and exclusive use for the required ten years. Rogers *v.* International Silver Co., 30 App. Cas. (D. C.) 97.

The phrase "actual use" should be strictly construed. *In re* Spaulding, 27 App. Cas. (D. C.) 314. Ten years' use of a combination of words does not authorize separate registration of only the descriptive part of such combination. Planten *v.* Canton Pharmacy Co., 33 App. Cas. (D. C.) 268.

Exclusive use of a descriptive term, although used in a distinctive form of type, is not shown where others had used the word in an ordinarily descriptive manner. H. W. Johns-Manville Co. *v.* American Steam Packing Co., 33 App. Cas. (D. C.) 224. The burden of proof is on the applicant to show exclusive use by clear and convincing evidence. *In re* Hoff, 33 App. Cas. (D. C.) 233. Pure whisky and blended whisky are in the same general class, so that the deceptive use of a mark upon a blended whisky, represented to be pure whisky, by one person is sufficient to prevent the truthful use of the same mark by another person in connection with pure whisky from being exclusive, and therefore entitled to registration under this clause of the statute. *In re* Wright, 33 App. Cas. (D. C.) 510.

Personal names may be registered under this proviso. Thaddeus Davids Co. *v.* Davids, 178 Fed. 801, 102 C. C. A. 249 [*reversing* 165 Fed. 792]. See also Rogers *v.* International Silver Co., 30 App. Cas. (D. C.) 97.

Descriptive words may be registered under this proviso. Worster Brewing Co. *v.* Rueter, 30 App. Cas. (D. C.) 428 ("Sterling" as applied to ale); Battle Creek Sanitarium Co. *v.* Fuller, 30 App. Cas. (D. C.) 411.

The English statute see *infra*, VI, C.

84. See *supra*, V.

tion as trade-marks.[85] What constitutes a technical trade-mark has been elsewhere considered.[86] The statute expressly excludes from registration [87] immoral and scandalous matter,[88] representations of the flag or coat of arms or other insignia of the United States, or of any state, municipality, or foreign nation, or of the emblem of any fraternal society,[89] marks consisting merely in the name of an individual, firm, corporation, or association, not written, printed, impressed, or woven in some particular or distinctive manner, or in association with a portrait of the individual,[90] words or devices which are descriptive of the goods with which they are used,[91] geographical names or terms,[92] and the portrait of a living person without his written consent, subject to the exception as to marks in exclusive use for ten years prior to the enactment of the statute.[93] The several features of a trade-mark may not be segregated and separately registered.[94] A combination

85. A. Leschen, etc., Rope Co. *v.* Broderick, etc., Rope Co., 201 U. S. 166, 26 S. Ct. 425, 50 L. ed. 710; Smith *v.* Reynolds, 22 Fed. Cas. No. 13,098, 10 Blatchf. 100, 3 Off. Gaz. 214.

86. See *supra*, III.

87. Act, Feb. 20, 1905, § 5.

88. For the principle involved see *supra*, III, A, 4.

89. *In re* American Glue Co., 27 App. Cas. (D. C.) 391; *In re* William Connors Paint Mfg. Co., 27 App. Cas. (D. C.) 389 (imitation of seal of the department of justice and the great seal of the United States); *In re* Cahn, 27 App. Cas. (D. C.) 173 (notwithstanding additions).

90. Kentucky Distilleries, etc., Co. *v.* Old Lexington Club Distilling Co., 31 App. Cas. (D. C.) 223 (holding that the registration of the words "Old Lexington Club," as a trade-mark for whisky, upon the application of a corporation the name of which is "Old Lexington Club Distilling Company," will not be allowed, especially where the testimony shows that the corporate name of the applicant was derived from the mark sought to be registered); Brown-Forman Co. *v.* Beech Hill Distilling Co., 30 App. Cas. (D. C.) 485; *In re* Spalding, 27 App. Cas. (D. C.) 314 Thaddeus Davids Co. *v.* Davids, 178 Fed. 801, 102 C. C. A. 249 [*reversing* 165 Fed. 792].

Such names are not trade-marks. See *supra*, III, B.

91. Planten *v.* Canton Pharmacy Co., 33 App. Cas. (D. C.) 268 ("Black Capsules"); H. W. Johns-Manville Co. *v.* American Steam Packing Co., 33 App. Cas. (D. C.) 224; *In re* New South Brewery, etc., Co., 32 App. Cas. (D. C.) 591 ("Crystal" as applied to beer); *In re* Central Consumers' Co., 32 App. Cas. (D. C.) 523 ("Nextobeer" as a trade-mark for a malt beverage); Dennehy *v.* Robertson, 32 App. Cas. (D. C.) 355 ("Mountain Dew," when applied to whisky); Johnson *v.* Brandau, 32 App. Cas. (D. C.) 348 ("Asbestos," as applied to shoes made of leather and asbestos); Udell-Predock Mfg. Co. *v.* Udell Works, 32 App. Cas. (D. C.) 282 (name of patented article); Edna Smelting, etc., Co. *v.* Nathan Mfg. Co., 30 App. Cas. (D. C.) 487; Worster Brewing Corp. *v.* Rueter, 30 App. Cas. (D. C.) 428; Battle Creek Sanitarium Co. *v.* Fuller, 30 App. Cas. (D. C.) 411; Natural Food Co. *v.* Williams, 30 App. Cas. (D. C.) 348; U. S. Playing Card Co. *v.* C. M. Clark Pub. Co., 30 App. Cas. (D. C.) 208 ("Stage" is descriptive of playing cards, the face cards of which are pictures of stage celebrities); *In re* National Phonograph Co., 29 App. Cas. (D. C.) 142 ("Standard" as applied to phonographs); *In re* Hopkins, 29 App. Cas. (D. C.) 118 ("Oriental Cream" as applied to a lotion); *In re* American Circular Loom Co., 28 App. Cas. (D. C.) 450 ("Circular Loom" as applied to goods made on a circular loom).

Declaratory statute.— In prohibiting the registration of marks consisting of words and devices descriptive of the goods with which they are used, or of the character of such goods, the statute is declaratory of existing law. *In re* National Phonograph Co., 29 App. Cas. (D. C.) 142. See, generally, *supra*, III, B, 1.

The name of an expired patented article will be refused registration. J. A. Scriven Co. *v.* Ferguson McKinney Dry Goods Co., 32 App. Cas. (D. C.) 323; J. A. Scriven Co. *v.* W. H. Towles Mfg. Co., 32 App. Cas. (D. C.) 321. For the principle involved see *supra*, III, B, 19, b; V, C, 8.

Peculiarities in printing cannot make a word registerable as a technical trade-mark that would be otherwise unregisterable because descriptive of the goods to which it is applied. H. W. Johns-Manville Co. *v.* American Steam Packing Co., 33 App. Cas. (D. C.) 224.

92. Kentucky Distilleries, etc., Co. *v.* Old Lexington Club Distilling Co., 31 App. Cas. (D. C.) 223; *In re* Crescent Typewriter Supply Co., 30 App. Cas. (D. C.) 324 ("Orient"); *In re* Hopkins, 29 App. Cas. (D. C.) 118 ("Oriental Cream" refused registration). Not only is a name indicating a particular place prohibited, such as the name of a city or country, or subdivision of a country, but also a name applying to a particular section of the globe, as for instance to a section composed of a number of countries. The word "Orient" is a geographical name, and as such cannot properly be registered as a trade-mark. *In re* Crescent Typewriter Supply Co., *supra*.

Geographical names not trade-marks see *supra*, III, B, 7.

93. See *supra*, this section, note 83.

94. Planten *v.* Canton Pharmacy Co., 33 App. Cas. (D. C.) 268.

of non-registerable words is not entitled to registration.[95] False statements in the application for registration are sufficient to deprive one of the right to registration.[96]

4. Proceedings For Registration. An application for the registration of a trade-mark must be made to the commissioner of patents.[97] A complete application comprises: (1) A petition requesting registration signed by the applicant;[98] (2) a statement specifying the name, domicile, location, and citizenship of the party applying, and, if the applicant be a corporation or association, the state or nation under the laws of which it is organized, the class of merchandise, according to the official classification, and the particular description of goods comprised in such class upon which the trade-mark has actually been used, a statement of the mode in which the same is applied or affixed to the goods, and the length of time during which the trade-mark has been used upon the goods specified; and a description of the trade-mark itself must be included, if desired by the applicant or required by the commissioner, provided such description is of such a character as to meet the approval of the commissioner;[99] (3) a declaration properly verified, containing a statement of the matters enumerated by the statute;[1] (4) a drawing of the trade-mark signed by the applicant, or his attorney, which must be a facsimile of the trade-mark as actually used upon the goods;[2] (5) five specimens, or facsimiles, when from the mode of applying or affixing the trade-mark to the goods specimens cannot be furnished, of the trade-mark as actually used upon the goods;[3] and (6) a fee of ten dollars.[4] The petition, the statement, and the declaration must be in the English language and written on one side of the paper only.[5] The statute expressly

A party may not segregate his trade-mark, and, by registering each of its features separately, thereby prevent the registration by another party of any particular part of the mark as actually used, notwithstanding that such registration and use by another party would cause no confusion to the trade and no prejudice to the first registrant. Planten *v.* Canton Pharmacy Co., 33 App. Cas. (D. C.) 268.

95. *In re* Meyer Brothers Coffee, etc., Co., 32 App. Cas. (D. C.) 277, holding that a mark registerable as a trade-mark cannot be made by combining two non-registerable words, such as "America" and "Strength."

96. A statement made in an application for registration of a trade-mark that the applicant's use of such mark has been exclusive is not false, so as to deprive him of the right of registration or estop him from maintaining an action to protect his right because it may appear that someone else had previously used such mark in violation of his exclusive right. Capewell Horse Nail Co. *v.* Mooney, 167 Fed. 575 [*affirmed* in 172 Fed. 826, 97 C. C. A. 248].

97. Section 1. The commissioner is not subject to control by mandamus. Seymour *v.* U. S., 2 App. Cas. (D. C.) 240. See also U. S. *v.* Marble, 3 Mackey (D. C.) 32; U. S. *v.* Marble, 1 Mackey (D. C.) 284.

98. Section 1; Patent Office Rule No. 22.

99. Section 1; Patent Office Rule No. 22.

In the case of firm trade-marks a statement of the name and residence and place of business of the firm is sufficient, and it is not necessary that the name and residence of each individual partner be given. Smith *v.* Reynolds, 22 Fed. Cas. No. 13,098, 10 Blatchf. 100, 3 Off. Gaz. 214, decided under the act of 1870.

In specifying class, it is sufficient to specify paints generally without specifying any particular description of paints. Smith *v.* Reynolds, 22 Fed. Cas. No. 13,098, 10 Blatchf. 100, 3 Off. Gaz. 214, decided under the act of 1870. In an application to register a personal name under the ten-year clause, a statement of the class of merchandise as "athletic supplies" and the particular description of goods comprised in such class as "implements, apparatus, and goods used in athletic games and sports" is insufficient, and the application is properly refused, because it is impossible for the applicant to have actually used the name as a trade-mark for ten years prior to the passage of the act in connection with such newly invented games and sports as are being constantly invented. *In re* Spalding, 27 App. Cas. (D. C.) 314.

In an application for registration under the ten-year clause, it should clearly appear in the application that every condition precedent has been fully complied with. *In re* Spalding, 27 App. Cas. (D. C.) 314.

1. Section 2; Patent Office Rule No. 22.

2. Patent Office Rule No. 22.

The commissioner of patents has power to determine merely whether the trade-mark sought to be registered is subject to appropriation and has actually been used in interstate or foreign commerce. He cannot require the applicant to add to his drawing matter appearing in the specimens filed but not contained in the drawing. *In re* Standard Underground Cable Co., 27 App. Cas. (D. C.) 320.

3. Patent Office Rule No. 22.

4. Section 1; Patent Office Rule No. 22.

5. Patent Office Rule No. 23.

requires compliance not only with its own requirements, but also with such regulations as may be prescribed by the commissioner of patents.[6] The application may be amended to correct informalities, or to avoid objections raised by the patent office, or for other reasons arising in the course of examination.[7] Applications for registration pending at the time of the passage of the act of 1905 may be amended so as to bring them, and the certificates thereunder, under the provisions of said act, and the prosecution of such applications may be proceeded with in accordance with such act.[8] If, on examination, it appears that the applicant is entitled to have his trade-mark registered, the mark must be published at least once in the official gazette of the patent office, and if no notice of opposition is filed within thirty days, the application will be allowed, and a certificate of registration will be issued.[9]

5. INTERFERENCE, OPPOSITION, AND CANCELLATION. Whenever application is made for the registration of a trade-mark which is substantially identical with a trade-mark appropriated to goods of the same descriptive properties for which a certificate of registration has been previously issued to another, or for registration of which another had previously made application, or which so nearly resembles such trade-mark, or a known trade-mark owned and used by another, as, in the opinion of the commissioner, to be likely to be mistaken therefor by the public, an interference will be declared, for the purpose of determining priority of rights.[10]

6. Section 1.

A complete set of rules, with forms, has been promulgated by and may be obtained from the patent office. The rule of the patent office requiring the question of whether there is an interference in fact to be raised within a stated time before the examiner of interferences was within the authority of the commissioner of patents to promulgate and must be complied with. Somers *v.* Newman, 31 App. Cas. (D. C.) 193.

7. Patent Office Rules Nos. 41–45.

8. Sections 14, 24; Giles Remedy Co. *v.* Giles, 26 App. Cas. (D. C.) 375; *In re* Mark Cross Co., 26 App. Cas. (D. C.) 101.

An application for registration which stood rejected by the commissioner on an appeal duly taken to him, such decision having been made more than two years before the act of 1905 went into effect, is not a "pending application" within the meaning of the statute. *In re* Mark Cross Co., 26 App. Cas. (D. C.) 101.

9. Section 6; Patent Office Rule No. 40.

Affidavit in support of application.—Affidavits in support of an application for registration of the word "standard" as applied to phonographs, stating that the word does not indicate to affiants' minds, or to the minds of other persons in the phonograph trade, a phonograph of any particular type, quality, or character, are not convincing, if, indeed, relevant, as the affiants can only state what impression the word makes on their minds. *In re* National Phonograph Co., 29 App. Cas. (D. C.) 142.

10. Section 7; Patent Office Rule No. 46; Johnson *v.* Whelan, 33 App. Cas. (D. C.) 4; Case *v.* Murphy, 31 App. Cas. (D. C.) 245; Somers *v.* Newman, 31 App. Cas. (D. C.) 193 (holding that an interference must be raised within the time limited by the patent office rules); Rose Shoe Mfg. Co. *v.* Rosenbush, 28 App. Cas. (D. C.) 465; Hanford *v.* Westcott, 11 Fed. Cas. No. 6,022, 16 Off. Gaz. 1181; Hoosier Drill Co. *v.* Ingels, 14 Off. Gaz. 785; Decision of Secretary of Interior, 13 Off. Gaz. 963.

Issues on interference.— The issue which the commissioner of patents is called upon to determine is not merely one of priority, as in a patent interference proceeding, but involves any question that might arise in an *ex parte* case. *In re* Herbst, 32 App. Cas. (D. C.) 565; Schuster Co. *v.* Muller, 28 App. Cas. (D. C.) 409, misrepresentation by one party. The only question involved is whether the right of registration will be accorded either or both of the parties. Whether either of the parties has been guilty of laches will not be considered. Phœnix Paint, etc., Co. *v.* Lewis, 32 App. Cas. (D. C.) 285.

The title to a certificate of registration of a trade-mark, if claimed under some act or set of acts done or performed after its issue, cannot as a rule be determined in an interference proceeding. Such question is to be tried in a proceeding brought to compel the assignment of the issued certificate, or by some analogous proceeding. If a later applicant seeks to re-register the mark for any lawful reason, and it appears that his title is based on the same adoption and use as claimed by the prior registrant, he has no standing in interference, unless at least he shows that the entire right, title, and interest in the trade-mark have become vested in him. Giles Remedy Co. *v.* Giles, 26 App. Cas. (D. C.) 375.

The decision upon an interference is conclusive upon the parties, unless appealed from, and cannot be questioned collaterally. It is *res judicata*. Bluthenthal *v.* Bigbie, 33 App. Cas. (D. C.) 209; *In re* Herbst, 32 App. Cas. (D. C.) 269; Hanford *v.* Westcott, 11 Fed. Cas. No. 6,022, 16 Off. Gaz. 1181. The decision of the patent office that a given word is valid as a trade-mark must be accepted as

The practice in trade-mark interferences follows as nearly as practicable the practice in interferences between applications for patents.[11] Any person who believes he would be damaged by the registration of a trade-mark may oppose the same by filing a written and verified notice of opposition, stating the grounds therefor, within thirty days after the publication of the mark sought to be registered.[12] Any person deeming himself to be injured by the registration of a trade-mark in the patent office may at any time make application to the commissioner to cancel the registration thereof. Such application must be filed in duplicate, and must state the grounds for cancellation and must be verified by the person filing the same.[13] If it shall appear after the hearing before the examiner of interferences

conclusive in an interference proceeding between rival applicants for registration of the word as a trade-mark. U. S. Playing Card Co. *v.* C. M. Clark Pub. Co., 30 App. Cas. (D. C.) 208.

The burden of proof, in a case of interference with a prior registration, is upon the applicant to show either that he was the first to adopt and use the mark, or that its use had been abandoned by the party who had registered it. *In re* Nash Hardware Co., 33 App. Cas. (D. C.) 221. The party last to make application has the burden of showing prior adoption and use of the trade-mark. Bluthenthal *v.* Bigbie, 30 App. Cas. (D. C.) 118.

The statement by a witness in an interference proceeding that a certain word was adopted and used by his company as a trade-mark is a mere conclusion, when based upon trade lists in evidence, and testimony of former witnesses. U. S. Playing Card Co. *v.* C. M. Clark Pub. Co., 30 App. Cas. (D. C.) 208.

Reopening case.—It is discretionary with the commissioner whether or not to reopen a case for newly discovered evidence. American Stove Co. *v.* Detroit Stove Works, 31 App. Cas. (D. C.) 304, holding in the particular case that there had been no abuse of discretion in refusing to reopen.

Avoiding decision on interference.—An applicant put in interference may withdraw his application and seek protection for his mark in the courts, thereby avoiding a decision in the interference proceeding by the patent office. Hanford *v.* Westcott, 11 Fed. Cas. No. 6,022, 16 Off. Gaz. 1181.

11. Patent Office Rule No. 46. See PATENTS, 30 Cyc. 892.

12. Section 6; Patent Office Rule No. 51; Hannis Distilling Co. *v.* George W. Torrey Co., 32 App. Cas. (D. C.) 530 (holding that leave to amend a notice of opposition after expiration of the thirty days allowed by statute, so as to carry back the date of the alleged opposer's alleged use of the mark to a period prior to that stated in the notice of opposition, was properly refused); Johnson *v.* Brandau, 32 App. Cas. (D. C.) 348 (holding that it was error for the commissioner to sustain a demurrer upon the ground that a descriptive word is not an essential feature of the applicant's mark and that under the circumstances the registration should be denied with leave to the applicant to amend by disclaiming and omitting the word objected to by the opposer; also holding that one who has used a trade-name with a secondary meaning, although not a trade-mark, may oppose a registration); Andrew McLean Co. *v.* Adams Mfg. Co., 31 App. Cas. (D. C.) 509 (holding that the burden of proof is on the opposer to show probable deception, where the marks are not conflicting upon their face); Hall's Safe Co. *v.* Herring-Hall-Marvin Safe Co., 31 App. Cas. (D. C.) 498 (questioning whether one who has failed to properly verify his opposition within the thirty days allowed him may be given leave by the commissioner after the expiration of that time to make a proper verification); Michigan Condensed Milk Co. *v.* Kenneweg Co., 30 App. Cas. (D. C.) 491 (holding that mere delay of the owner to assert his trade-mark rights is not ground for opposition by an infringer); Battle Creek Sanitarium Co. *v.* Fuller, 30 App. Cas. (D. C.) 411 (holding that leave to amend an opposition should be asked, if at all, when the examiner of interferences sustains a demurrer, and that after an appeal to the commissioner, leave to amend is discretionary with the commissioner, and in the absence of an abuse of discretion an appeal from a refusal of leave to amend will not lie; also questioning whether an amendment setting up new grounds of opposition is equivalent to a new opposition and not permissible if the time limit has expired); Rogers *v.* International Silver Co., 30 App. Cas. (D. C.) 97 (holding that a demurrer to an opposition admits all allegations of fact, and cannot be supported by affidavit; holding further that an allegation that the mark of the applicant so closely resembles the marks of the opposer as to be calculated to confuse and deceive purchasers is a conclusion of law which is not admitted by a demurrer); Hall *v.* Ingram, 28 App. Cas. (D. C.) 454 (holding that similarity between marks may be determined on demurrer to an opposition); Buchanan-Anderson-Nelson Co. *v.* Breen, 27 App. Cas. (D. C.) 573 (same holding); Gaines *v.* Carlton Importation Co., 27 App. Cas. (D. C.) 571 (same holding); Gaines *v.* Knecht, 27 App. Cas. (D. C.) 530 (holding that a party opposing another's application for registration cannot question the constitutionality of the statute); Martin *v.* Martin, etc., Co., 27 App. Cas. (D. C.) 59 (holding that a notice of opposition verified by attorney was insufficient even where the party was out of the country).

13. Section 13; Patent Office Rule No. 52; McIlheney *v.* New Iberia Extract of To-

that the registrant was not entitled to the use of the mark at the date of his application for registration thereof, or that the mark is not used by the registrant, or has been abandoned, and the examiner shall so decide, the commissioner must cancel the registration of the mark, unless appeal be taken within the time limited.[14] In cases of opposition, and of applications for cancellation, the examiner in charge of interferences must give notice thereof to the applicant or registrant, who must make answer at such time, not less than thirty days from the date of the notice, as shall be fixed by such examiner.[15] The proceedings on oppositions and on applications for cancellation must follow as nearly as practicable the practice in interferences between applications for patents.[16] The commissioner may refuse to register a mark against the registration of which objection is filed, or he may refuse to register both of two interfering marks, or he may register the mark as a trade-mark for the person first to adopt and use the mark, if otherwise entitled to register the same, unless an appeal is taken from his decision by a party interested in the proceeding in accordance with the statute and within such time not less than twenty days as the commissioner may prescribe.[17]

6. APPEALS. From an adverse decision of the examiner in charge of trade-marks upon an applicant's right to register a trade-mark, or to renew the registration of a trade-mark, or from a decision of the examiner in charge of interferences, an appeal may be taken to the commissioner in person upon payment of the fee

basco Pepper Co., 30 App. Cas. (D. C.) 337 (holding that interest of petitioner is jurisdictional, and must affirmatively appear, and that facts showing injury must be alleged); Martin *v.* Martin, etc., Co., 27 App. Cas. (D. C.) 59.

14. Section 13; Patent Office Rule No. 53.

15. Patent Office Rule No. 54.

16. Patent Office Rule No. 55. See PATENTS, 30 Cyc. 892 *et seq.*

17. Section 7.

Refusal of registration on ground of similarity to existing marks.— Lang *v.* Green River Distilling Co., 33 App. Cas. (D. C.) 506; *In re* Hoff, 33 App. Cas. (D. C.) 233; *In re* Nash Hardware Co., 33 App. Cas. (D. C.) 221; Johnson *v.* Brandau, 32 App. Cas. (D. C.) 348; Phœnix Paint, etc., Co. *v.* Lewis, 32 App. Cas. (D. C.) 285; Wayne County Preserving Co. *v.* Burt Olney Canning Co., 32 App. Cas. (D. C.) 279; Baker *v.* Harrison, 32 App. Cas. (D. C.) 272; Andrew McLean Co. *v.* Adams Mfg. Co., 31 App. Cas. (D. C.) 509; Ehret *v.* Star Brewery Co., 31 App. Cas. (D. C.) 507; American Stove Co. *v.* Detroit Stove Works, 31 App. Cas. (D. C.) 304; Kentucky Distilleries, etc., Co. *v.* Old Lexington Club Distilling Co., 31 App. Cas. (D. C.) 223; Michigan Condensed Milk Co. *v.* Kenneweg Co., 30 App. Cas. (D. C.) 491; *In re* Indian Portland Cement Co., 30 App. Cas. (D. C.) 463; Peter Schoenhofen Brewing Co. *v.* Maltine Co., 30 App. Cas. (D. C.) 346; Peter Schoenhofen Brewing Co. *v.* Maltine Co., 30 App. Cas. (D. C.) 340; *In re* S. C. Herbst Importing Co., 30 App. Cas. (D. C.) 297; Rogers *v.* International Silver Co., 30 App. Cas. (D. C.) 97; Hall *v.* Ingram, 28 App. Cas. (D. C.) 454; Buchanan-Anderson-Nelson Co. *v.* Breen, 27 App. Cas. (D. C.) 573; Gaines *v.* Carlton Importation Co., 27 App. Cas. (D. C.) 571; Gaines *v.* Knecht, 27 App. Cas. (D. C.) 530. But see Rogers *v.* International Silver Co., 30 App. Cas. (D. C.) 97, involving registration of personal names under the ten-year clause. Generally as to the rule in respect to deceptive similarity as constituting infringement or unfair competition see *supra*, IV, C; V, B, 4, 5. Whether a mark is or is not registerable as a trade-mark, because of alleged similarity to another, depends upon the special facts and circumstances of the case. Lang *v.* Green River Distilling Co., 33 App. Cas. (D. C.) 506. Where a doubt exists as to whether a mark which it is sought to have registered as a trade-mark is so similar to a mark already registered as to be likely to cause confusion, the doubt will be resolved in favor of the prior registrant or user in good faith. Wayne County Preserving Co. *v.* Burt Olney Canning Co., 32 App. Cas. (D. C.) 279. See also Phœnix Paint, etc., Co. *v.* Lewis, 32 App. Cas. (D. C.) 285.

The prior user is entitled to registration notwithstanding prior registration by another. Case *v.* Murphey, 31 App. Cas. (D. C.) 245; Somers *v.* Newman, 31 App. Cas. (D. C.) 193; Rose Shoe Mfg. Co. *v.* Rosenbush, 28 App. Cas. (D. C.) 465; Schuster Co. *v.* Muller, 28 App. Cas. (D. C.) 409; Giles Remedy Co. *v.* Giles, 26 App. Cas. (D. C.) 375; Smith *v.* Reynolds, 22 Fed. Cas. No. 13,099, 13 Blatchf. 458.

Registration for one class of goods is no bar to registration of the same name or mark as the trade-mark on a different class of goods. McIlhenny *v.* New Iberia Extract of Tobasco Pepper Co., 30 App. Cas. (D. C.) 337. Goods are in the same class within the meaning of the statute when the general and essential characteristics are the same. Phœnix Paint, etc., Co. *v.* Lewis, 32 App. Cas. (D. C.) 285. See, generally, as to class of goods *supra*, I, E, 3; IV, H.

Both of two interfering marks may be refused registration. Planten *v.* Canton Pharmacy Co., 33 App. Cas. (D. C.) 268.

required by law.[18] From an adverse decision of the commissioner of patents upon the right of an applicant to register a trade-mark, or to renew the registration of a trade-mark, or from the decision of the commissioner in cases of interference, opposition, or cancellation, an appeal may be taken to the court of appeals of the District of Columbia in the manner prescribed by the rules of that court, and upon compliance with the conditions required in case of like appeals in patent cases so far as the same may be applicable.[19]

7. Effect of Registration. Registration under the statute confers no new rights to the mark claimed or any greater rights than already exist at common law without registration.[20] It does, however, facilitate the remedy, which may be obtained in the federal courts and enforced throughout the entire United States, and it establishes a record of facts affecting the right to the mark.[21] Registration may also be important under treaty stipulations where international protection is sought for the trade-mark.[22] Registration of matters or features which are *publici juris* confers no exclusive right therein. Registration does not itself create a trade-mark.[23] The trade-mark exists independently of the registration which merely affords further protection under the statute.[24] Common-law rights

18. Sections 8, 13; Patent Office Rule No. 56.

19. Section 9; Patent Office Rule No. 57. See Patents, 30 Cyc. 896. *In re* Mark Cross Co., 26 App. Cas. (D. C.) 101, holding that a decision of the commissioner dismissing an appeal from the examiner of trade-marks upon the ground that relief should be sought by petition and not by appeal, but where he nevertheless took jurisdiction of the proceedings, and held that the application was not a pending application within the meaning of the act of 1905, was equivalent to a refusal of registration and was therefore an appealable adverse decision of the commissioner.

Review on appeal.— On appeal from the commissioner in an opposition case, the sole question before the court is the deceptive resemblance between the two marks, and the court will not determine whether either of the marks is otherwise entitled to registration. Hannis Distilling Co. *v.* George W. Torrey Co., 32 App. Cas. (D. C.) 530; Case *v.* Murphey, 31 App. Cas. (D. C.) 245; Buchanan-Anderson-Nelson Co. *v.* Breen, 27 App. Cas. (D. C.) 573. Since the court of appeals has no power to make a system of classification, it cannot determine whether an applicant has stated the class of merchandise and the particular description of goods comprised in the class to which he seeks to appropriate his trade-mark, except as each case comes before it. *In re* Spaulding, 27 App. Cas. (D. C.) 314.

Appeal in interference pending at passage of act.—A trade-mark interference declared under the act of March 3, 1881, but not decided until after the passage of the act of Feb. 20, 1905, is appealable under the act of Feb. 20, 1905, where the application involved has been amended to bring it under the provisions of that act. Giles Remedy Co. *v.* Giles, 26 App. Cas. (D. C.) 375.

20. Oakes *v.* St. Louis Candy Co., 146 Mo. 391, 48 S. W. 467; Sarrazin *v.* W. R. Irby Cigar, etc., Co., 93 Fed. 624, 35 C. C. A. 496, 46 L. R. A. 541; Hennessy *v.* Braunschweiger, 89 Fed. 664; Brower *v.* Boulton, 58 Fed. 888, 7 C. C. A. 567; Brower *v.* Boulton, 53 Fed. 389; Kohler Mfg. Co. *v.* Beshore, 53 Fed. 262; U. S. *v.* Braun, 39 Fed. 775; Smith *v.* Reynolds, 22 Fed. Cas. No. 13,099, 13 Blatchf. 458. See also Gaines *v.* Leslie, 25 Misc. (N. Y.) 20, 54 N. Y. Suppl. 421.

21. Hennessy *v.* Braunschweiger, 89 Fed. 664; Glen Cove Mfg. Co. *v.* Ludeling, 22 Fed. 823, 23 Blatchf. 46. But see Illinois Watch-Case Co. *v.* Elgin Nat. Watch Co., 94 Fed. 667, 35 C. C. A. 237 [*affirmed* in 179 U. S. 665, 21 S. Ct. 270, 45 L. ed. 365].

22. U. S. *v.* Duell, 17 App. Cas. (D. C.) 479 [*citing* Elgin Nat. Watch Co. *v.* Illinois Watch Case Co., 179 U. S. 665, 21 S. Ct. 270, 45 L. ed. 365].

23. *In re* Standard Underground Cable Co., 27 App. Cas. (D. C.) 320; *In re* Spalding, 27 App. Cas. (D. C.) 314; Howe Scale Co. of 1886 *v.* Wyckoff, 198 U. S. 118, 25 S. Ct. 609, 49 L. ed. 972; Thomas G. Carroll, etc., Co. *v.* McIlvaine, 171 Fed. 125 [*affirmed* in 183 Fed. 22, 105 C. C. A. 314]; Deitsch *v.* George R. Gibson Co., 155 Fed. 383; Dodge Mfg. Co. *v.* Sewall, etc., Cordage Co., 142 Fed. 288; Siegert *v.* Gandolfi, 139 Fed. 917 [*reversed* on other grounds in 149 Fed. 100, 79 C. C. A. 142]; Revere Rubber Co. *v.* Consolidated Hoof Pad Co., 139 Fed. 151; A. Leschen, etc., Rope Co. *v.* Broderick, etc., Rope Co., 134 Fed. 571, 67 C. C. A. 418 [*affirmed* in 201 U. S. 166, 26 S. Ct. 425, 50 L. ed. 710]; Edison *v.* Thomas A. Edison, Jr., Chemical Co., 128 Fed. 1013; Dausman, etc., Tobacco Co. *v.* Ruffner, 7 Fed. Cas. No. 3,585, 15 Off. Gaz. 559.

24. *In re* Standard Underground Cable Co., 27 App. Cas. (D. C.) 320; Traiser *v.* J. W. Doty Cigar Co., 198 Mass. 327, 84 N. E. 462; Capewell Horse Nail Co. *v.* Mooney, 172 Fed. 826, 97 C. C. A. 248 [*affirming* 167 Fed. 575]; Ohio Baking Co. *v.* National Biscuit Co., 127 Fed. 116, 62 C. C. A. 116; Moorman *v.* Hoge, 17 Fed. Cas. No. 9,783, 2 Sawy. 78; U. S. *v.* Roche, 27 Fed. Cas. No. 16,180, 1 McCrary 385.

are left wholly unaffected.[25] Priority in adoption and use as a common-law trade-mark is superior to priority in registration.[26] Registration cuts off no rights of the true owner.[27] The commissioner of patents is not authorized to issue a grant of a trade-mark, there being a difference in this respect between patents and trade-marks.[28] Registration is *prima facie* but not conclusive evidence of ownership.[29] A certificate reciting that the statute has been complied with and that the trade-mark has been duly registered is no evidence of that fact.[30] Registration is evidence that the name is not descriptive.[31] A certificate from the patent office is evidence that what is shown to have been filed was filed at the time stated.[32] The applicant is concluded as to date of adoption and user by his sworn statement made part of his application.[33] Registered trade-marks are limited by the claim.[34] The exclusive right to use the mark is limited to use upon the class of goods for which it was registered as set forth in the statement filed in the patent office.[35] A registration must stand or fall as a whole for that which is claimed in the statement filed. If it is not valid for the entire class claimed, the registration is wholly void.[36] One cannot by registration extend the class of goods to which his mark

25. Edison *v.* Thomas A. Edison, Jr., Chemical Co., 128 Fed. 1013 (if the registration is irregular and void, the preëxisting common-law trade-mark remains unaffected); Hennessy *v.* Braunschweiger, 89 Fed. 664. See also Gaines *v.* Leslie, 25 Misc. (N. Y.) 20, 54 N. Y. Suppl. 421. Registration under the acts of congress neither creates nor destroys rights in trade-marks. Avenarius *v.* Kornely, 139 Wis. 247, 121 N. W. 336.

26. Thomas G. Carroll, etc., Co. *v.* McIlvaine, 171 Fed. 125 [*affirmed* in 183 Fed. 22, 105 C. C. A. 314]; Deitsch *v.* George R. Gibson Co., 155 Fed. 383; Revere Rubber Co. *v.* Consolidated Hoof Pad Co., 139 Fed. 151.

27. Martin *v.* Martin, etc., Co., 27 App. Cas. (D. C.) 59; Thomas G. Carroll, etc., Co. *v.* McIlvaine, 171 Fed. 125 [*affirmed* in 183 Fed. 22, 105 C. C. A. 314].

Remedies of true owner of mark.—Although the owner of a trade-mark has lost his right to oppose registration thereof by another, by failure to comply with the statute, he may still protect his right of property by the usual remedies at law and in equity, and he may possibly obtain a remedy through a declaration of interference under section 7, or by a proceeding for cancellation under section 13. Martin *v.* Martin, etc., Co., 27 App. Cas. (D. C.) 59.

28. Smith *v.* Reynolds, 22 Fed. Cas. No. 13,097, 10 Blatchf. 85, 3 Off. Gaz. 213.

29. Section 16; U. S. *v.* Duell, 17 App. Cas. (D. C.) 471; Elgin Nat. Watch Co. *v.* Illinois Watch Case Co., 179 U. S. 665, 21 S. Ct. 270, 45 L. ed. 365; Deitsch *v.* George R. Gibson Co., 155 Fed. 383; A. Leschen, etc., Rope Co. *v.* Broderick, etc., Rope Co., 123 Fed. 149 [*affirmed* in 134 Fed. 571, 67 C. C. A. 418 (*affirmed* in 201 U. S. 166, 26 S. Ct. 425, 50 L. ed. 710)] (holding that registration is not sufficient to support a preliminary injunction against infringement); Welsbach Light Co. *v.* Adam, 107 Fed. 463; Hennessy *v.* Braunschweiger, 89 Fed. 664; Brower *v.* Boulton, 58 Fed. 888, 7 C. C. A. 567; Glen Cove Mfg. Co. *v.* Ludeling, 22 Fed. 823, 23 Blatchf. 46; Moorman *v.* Hoge, 17 Fed. Cas. No. 9,783, 2 Sawy. 78. Mere registration upon an *ex parte* showing does not conclusively determine the right, and it may be questioned collaterally. State *v.* Hagen, 6 Ind. App. 167, 33 N. E. 223 [*citing* U. S. *v.* Braun, 39 Fed. 775]; Moorman *v.* Hoge, 17 Fed. Cas. No. 9,783, 2 Sawy. 78; Smith *v.* Reynolds, 22 Fed. Cas. No. 13,097, 10 Blatchf. 85, 3 Off. Gaz. 213.

30. Smith *v.* Reynolds, 22 Fed. Cas. No. 13,097, 10 Blatchf. 85, 3 Off. Gaz. 213.

31. Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 70 Conn. 516, 40 Atl. 534.

32. U. S. *v.* Steffens, 27 Fed. Cas. No. 16,384; Walker *v.* Reid, 29 Fed. Cas. No. 17,084. The certificate of the commissioner is evidence of all facts recited, but not of conclusions of law. U. S. *v.* Steffens, *supra*. Even in a suit for infringement of a common-law trade-mark used only in domestic commerce, registration is evidence of what was really claimed. Richter *v.* Reynolds, 59 Fed. 577, 8 C. C. A. 220 [*following* Kohler Mfg. Co. *v.* Beshore, 53 Fed. 262].

Proof of registration.—When the facts certified by the commissioner show a full compliance with all the requirements of the statute the certificate must be considered *prima facie* evidence of proper registration of the trade-mark. U. S. *v.* Steffens, 27 Fed. Cas. No. 16,384.

33. Hyman *v.* Solis Cigar Co., 4 Colo. App. 475, 36 Pac. 444.

34. **Registration as evidence of abandonment.**—A registration with a claim more limited than the established common-law right may operate as an abandonment of the matters not claimed. Richter *v.* Reynolds, 59 Fed. 577, 8 C. C. A. 220; Richter *v.* Anchor Remedy Co., 52 Fed. 455. See also George T. Stagg Co. *v.* Taylor, 95 Ky. 651, 27 S. W. 247, 16 Ky. L. Rep. 213; Pittsburgh Crushed-Steel Co. *v.* Diamond Steel Co., 85 Fed. 637; Kohler Mfg. Co. *v.* Beeshore, 59 Fed. 572, 8 C. C. A. 215.

35. Eiseman *v.* Schiffer, 157 Fed. 473; Osgood *v.* Rockwood, 18 Fed. Cas. No. 10,605, 11 Blatchf. 310.

36. A. Leschen, etc., Rope Co. *v.* Broderick,

has been applied as against prior users of the mark upon a class of goods to which the registered owner of the mark had not appropriated it.[37] Federal registration confers no rights against one doing business in the same state with the registered owner.[38]

C. English and Canadian Statutes. In England the whole subject of trade-marks is regulated by elaborate statutory provisions.[39] Registration is made a condition precedent to the maintenance of a suit for infringement.[40] But unregistered trade-marks receive a large measure of protection under the doctrine of unfair competition which is unaffected by the statutes.[41] In Canada also the subject is regulated by statutory provisions largely derived from English legislation.[42] Registration is required for trade-marks,[43] but a remedy may be had for

etc., Rope Co., 201 U. S. 166, 26 S. Ct. 425, 50 L. ed. 710; Smith *v.* Reynolds, 22 Fed. Cas. No. 13,099, 13 Blatchf. 458.

37. Smith *v.* Reynolds, 22 Fed. Cas. No. 13,099, 13 Blatchf. 458.

38. Perlberg *v.* Smith, 70 N. J. Eq. 638, 62 Atl. 442.

Registration as notice.— Persons not engaged in commerce with foreign nations or Indian tribes are not charged with notice of a trade-mark by registration. Brennan *v.* Emery-Bird-Thayer Dry-Goods Co., 99 Fed. 971, under act of 1881.

39. **Cases under English statutes.**— Batt *v.* Dunnett, [1899] A. C. 428, 68 L. J. Ch. 557, 81 L. T. Rep. N. S. 94, 15 T. L. R. 424 [*affirming* [1898] 2 Ch. 432, 67 L. J. Ch. 576, 79 L. T. Rep. N. S. 206, 15 T. L. R. 538]; Eastman Photographic Materials Co. *v.* Comptroller-Gen. of Patents, etc., [1898] A. C. 571, 67 L. J. Ch. 628, 79 L. T. Rep. N. S. 195, 47 Wkly. Rep. 152 [*overruling In re* Farbenfabriken, [1894] 1 Ch. 645, 63 L. J. Ch. 257, 70 L. T. Rep. N. S. 186, 7 Reports 439, 42 Wkly. Rep. 488]; Eno *v.* Dunn, 15 App. Cas. 252, 63 L. T. Rep. N. S. 6, 39 Wkly. Rep. 161; *In re* Uneeda Trade-Mark, [1901] 1 Ch. 550, 70 L. J. Ch. 318, 84 L. T. Rep. N. S. 259, 17 T. L. R. 241 [*affirmed* in [1902] 1 Ch. 783, 71 L. J. Ch. 353, 86 L. T. Rep. N. S. 439, 18 T. L. R. 453, 50 Wkly. Rep. 467]; *In re* Salt, [1894] 3 Ch. 166, 63 L. J. Ch. 756, 71 L. T. Rep. N. S. 386, 8 Reports 682, 42 Wkly. Rep. 666; *In re* Colman, [1894] 2 Ch. 115, 63 L. J. Ch. 403, 70 L. T. Rep. N. S. 398, 8 Reports 208, 42 Wkly. Rep. 555; *In re* La Société Anonyme des Verreries de l'Etoile, [1894] 2 Ch. 26, 63 L. J. Ch. 381, 70 L. T. Rep. N. S. 295, 7 Reports 183, 42 Wkly. Rep. 420; *In re* Loftus, [1894] 1 Ch. 193, 63 L. J. Ch. 52, 69 L. T. Rep. N. S. 690, 8 Reports 87, 42 Wkly. Rep. 251; *In re* Hopkinson, [1892] 2 Ch. 116, 61 L. J. Ch. 387, 66 L. T. Rep. N. S. 487; Baker *v.* Rawson, 45 Ch. D. 519, 60 L. J. Ch. 49, 63 L. T. Rep. N. S. 306; *In re* Bach, 42 Ch. D. 661, 38 Wkly. Rep. 174; *In re* Goodall, 42 Ch. D. 566, 38 Wkly. Rep. 189; Jay *v.* Ladler, 40 Ch. D. 649, 60 L. T. Rep. N. S. 27, 37 Wkly. Rep. 505; Edwards *v.* Dennis, 30 Ch. D. 454, 55 L. J. Ch. 125, 54 L. T. Rep. N. S. 112 [*reversing* Cab. & E. 428]; *In re* Price's Patent Candle Co., 27 Ch. D. 681, 54 L. J. Ch. 210, 51 L. T. Rep. N. S. 653; *In re* Heaton, 27 Ch. D. 570, 53 L. J. Ch. 959, 51 L. T. Rep. N. S. 220, 32 Wkly. Rep. 951; *In re* Worthington, 14 Ch. D. 8, 49 L. J. Ch. 646, 42 L. T. Rep. N. S. 563, 28 Wkly. Rep. 747; *In re* Talbot, 63 L. J. Ch. 264, 70 L. T. Rep. N. S. 119, 8 Reports 149, 42 Wkly. Rep. 501; *In re* Hayward, 54 L. J. Ch. 1003, 53 L. T. Rep. N. S. 487 ("Sole Maker"); *Re* Faulder, 83 L. T. Rep. N. S. 726; *Re* Ripley, 78 L. T. Rep. N. S. 367, 14 T. L. R. 299; De Kuyper *v.* Van Dulken, 24 Can. Sup. Ct. 114. See Patents, Designs, and Trademarks Act of 1883, as amended by the act of 1888; Merchandise Marks Act of Aug. 23, 1887, 50 & 51 Vict. c. 28; Merchandise Marks Act of May 11, 1891, 54 Vict. c. 15. For a full collection of English statutes, rules, forms, and precedents see Kerly Trade-Marks.

40. Kerly Trade-Marks 8, 9.

41. Thompson *v.* Montgomery, 41 Ch. D. 35, 58 L. J. Ch. 374, 60 L. T. Rep. N. S. 766, 37 Wkly. Rep. 637 [*affirmed* in [1891] A. C. 217, 55 J. P. 756, 60 L. J. Ch. 757, 64 L. T. Rep. N. S. 748]; Kerly Trade-Marks 12. See, generally, *supra*, V.

42. Templeton *v.* Wallace, 4 Terr. L. Rep. 340 (medicines for different complaints are in different classes); De Kuyper *v.* Van Dulken, 24 Can. Sup. Ct. 114 [*affirming* 4 Can. Exch. 71]; Partlo *v.* Todd, 17 Can. Sup. Ct. 196; Spilling *v.* O'Kelly, 8 Can. Exch. 426 (holding that defendant may attack the right of plaintiff to exclusive use of a registered trade-mark); Gorham Mfg. Co. *v.* Ellis, 8 Can. Exch. 401; Meagher *v.* Hamilton Distillery Co., 8 Can. Exch. 311; Spilling *v.* Ryall, 8 Can. Exch. 195 (holding that declaration may be signed by attorney or agent); Melchers *v.* De Kuyper, 6 Can. Exch. 82; Gröff *v.* Snow Drift Baking Powder Co., 2 Can. Exch. 568; Partlo *v.* Todd, 12 Ont. 171 [*affirmed* in 14 Ont. App. 444 (*affirmed* in 17 Can. Sup. Ct. 196)]; Fafard *v.* Ferland, 6 Quebec Pr. 119.

In construing Canadian statute respecting trade-mark reference for interpretation should be had to English decisions, since the Canada law was derived from English legislation, and a Quebec court should not follow French decisions which differ from English decisions on the same matter. Reg. *v.* Authier, 6 Quebec L. Rep. 146.

43. Smith *v.* Fair, 14 Ont. 729; Carey *v.* Goss, 11 Ont. 619; Pabst Brewing Co. *v.* Ekers, 21 Quebec Super. Ct. 545, holding that an unregistered trade-mark will be protected only against unfair or fraudulent competition resulting in damage.

fraudulent competition irrespective of any trade-mark registration.[44] The Canadian statute defines trade-marks more comprehensively than the American and English statutes or the common law, and includes some names and marks as trade-marks which otherwise would not be deemed such.[45] Thus personal and firm-names may be registered.[46] Use prior to registration is not essential under either the English or Canadian statutes, but registration must be followed by user if the trade-mark is to be retained.[47] Marks improperly upon the registry may be canceled and expunged upon the application of any person aggrieved,[48] and the courts may refuse to enforce improperly registered trade-marks, allowing invalidity to be set up in defense.[49]

D. Treaties With Foreign Nations. The United States has entered into many treaties and conventions with foreign nations for the reciprocal registration and protection of trade-marks.[50]

VII. ASSIGNMENTS, TRANSFERS, LICENSES, AND CONTRACTS.

A. Assignability — 1. IN GENERAL. Trade-marks and trade-names must always tell the truth and always tell the same truth, and from this it follows that they cannot be assigned except for use in the same sense as originally conveyed by the use of the name or mark. Unless use by the assignee will truthfully indicate the same origin or ownership of the same goods or business, the name or mark is not assignable.[51]

44. Smith *v.* Fair, 14 Ont. 729. See, generally, *supra*, V.

45. Smith *v.* Fair, 14 Ont. 729; Davis *v.* Kennedy, 13 Grant Ch. (U. C.) 523 [*followed* in Radam *v.* Shaw, 28 Ont. 612].

46. Matter of Wedgwood, 12 Can. Exch. 417 (personal name with acquired secondary meaning); Matter of Elkington, 11 Can. Exch. 293.

47. *In re* Batt, [1898] 2 Ch. 432, 67 L. J. Ch. 576, 79 L. T. Rep. N. S. 206, 15 T. L. R. 538 [*affirming* with variation 78 L. T. Rep. N. S. 552, 46 Wkly. Rep. 459]; *In re* Apollinaris Co., [1891] 2 Ch. 186, 61 L. J. Ch. 625, 65 L. T. Rep. N. S. 6; Spilling *v.* Ryall, 8 Can. Exch. 195; Smith *v.* Fair, 14 Ont. 729.

48. Powell *v.* Birmingham Vinegar Brewery Co., [1894] A. C. 8, 58 J. P. 296, 63 L. J. Ch. 152, 70 L. T. Rep. N. S. 1, 6 Reports 52; *In re* Cheesebrough, [1902] 2 Ch. 1, 71 L. J. Ch. 427, 86 L. T. Rep. N. S. 665, 18 T. L. R. 468; *In re* Crompton, [1902] 1 Ch. 758, 71 L. J. Ch. 497, 86 L. T. Rep. N. S. 657, 18 T. L. R. 398, 50 Wkly. Rep. 426; Edwards *v.* Dennis, 30 Ch. D. 454, 55 L. J. Ch. 125, 54 L. T. Rep. N. S. 112 [*reversing* Cab. & E. 428]; *In re* Wraggs, 29 Ch. D. 551, 54 L. J. Ch. 391, 52 L. T. Rep. N. S. 467; *In re* Leonard, 26 Ch. D. 288, 53 L. J. Ch. 603, 51 L. T. Rep. N. S. 35; De Kuyper *v.* Van Dulken, 24 Can. Sup. Ct. 114; Spilling *v.* O'Kelly, 8 Can. Exch. 426; Meagher *v.* Hamilton Distillery Co., 8 Can. Exch. 311; Wright *v.* Royal Baking Powder Co., 6 Can. Exch. 143; De Kuyper *v.* Van Dulken, 3 Can. Exch. 88; Groff *v.* Snow Drift Baking Powder Co., 2 Can. Exch. 568; Bush Mfg. Co. *v.* Hanson, 2 Can. Exch. 557; Reg. *v.* Van Dulken, 2 Can. Exch. 304; Laing Packing, etc., Co. *v.* Laing, 25 Quebec Super. Ct. 344.

A prior interfering registration may be obviated by purchase and cancellation. Meagher *v.* Hamilton Distillery Co., 8 Can. Exch. 311.

49. Partlo *v.* Todd, 17 Can. Sup. Ct. 196 [*affirming* 14 Ont. App. 444 (*affirming* 12 Ont. 171)]; McCall *v.* Theal, 28 Grant Ch. (U. C.) 48; Bush Mfg. Co. *v.* Hanson, 2 Can. Exch. 557; Provident Chemical Works *v.* Canada Chemical Mfg. Co., 4 Ont. L. Rep. 545, 1 Ont. Wkly. Rep. 618; Asbestos, etc., Co. *v.* William Sclater Co., 18 Quebec Super. Ct. 324; Fafard *v.* Ferland, 6 Quebec Pr. 119, per Doherty, J. But see Standard Sanitary Manufacturing Co. *v.* Standard Ideal Co., 37 Quebec Super. Ct. 33.

50. J. & P. Baltz Brewing Co. *v.* Kaiserbrauerei, 74 Fed. 222, 20 C. C. A. 402; Kerry *v.* Toupin, 60 Fed. 272; Richter *v.* Reynolds, 59 Fed. 577, 8 C. C. A. 220; La Republique Francaise *v.* Schultz, 57 Fed. 37.

The full text of the treaties and conventions has been published in the Patent Office Gazette, as follows: Austria-Hungary, vol. 2, p. 418; Belgium, vol. 2, p. 417, vol. 29, p. 452; Denmark, vol. 61, p. 571; France, vol. 2, p. 416; Germany, vol. 2, p. 418; Great Britain, vol. 14, p. 233; Italy, vol. 27, p. 304; Japan, vol. 78, p. 1744, vol. 136, p. 1068; Roumania, vol. 123, p. 1288; Russia, vol. 2, p. 416; Servia, vol. 28, p. 1191; Spain, vol. 25, p. 98.

51. Macmahan Pharmacal Co. *v.* Denver Chemical Mfg. Co., 113 Fed. 468, 51 C. C. A. 302. The assignment of a trade-mark to confer right on the assignee must be accompanied by a use of the trade-mark in the manner and for the purposes used by the assignor. Western Grocer Co. *v.* Caffarelli, (Tex. Civ. App. 1908) 108 S. W. 413 [*reversed* in 102 Tex. 104, 127 S. W. 1018]. Where a trade-mark contains statements which, although true as regards the original adopter of the trade-mark, are calculated to deceive the public when used by his assignee, the assignee is not entitled to protection in the use of such trade-mark. Leather Cloth Co. *v.*

2. Impersonal Marks and Names — a. In General. If the trade-mark is of a general nature and means that the goods are of the same character and quality as have been heretofore produced by a particular person, firm, or corporation, where the element of personal skill does not enter, but only that of honesty and fair dealing, the mark may be assigned together with the business and the right to make the article or articles to which the mark has been applied, for in such cases use by the assignee involves no misrepresentation.[52] Trade-names may be assigned equally with trade-marks, provided they are not personal.[53] Abandoned

American Leather Cloth Co., 11 H. L. Cas. 523, 11 Jur. N. S. 513, 35 L. J. Ch. 53, 12 L. T. Rep. N. S. 742, 6 New Rep. 209, 13 Wkly. Rep. 873, 11 Eng. Reprint 1435 [*affirming* 4 De G. J. & S. 137, 10 Jur. N. S. 81, 33 L. J. Ch. 199, 9 L. T. Rep. N. S. 558, 3 New Rep. 264, 12 Wkly. Rep. 289, 69 Eng. Ch. 106, 46 Eng. Reprint 868 (*reversing* 1 Hem. & M. 271, 2 New Rep. 481, 11 Wkly. Rep. 931, 71 Eng. Reprint 118)].

52. *Indiana.*— Julian *v.* Hoosier Drill Co., 78 Ind. 408; Sohl *v.* Geisendorf, Wils. 60.

Maine.— W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 100 Me. 461, 62 Atl. 499, 4 L. R. A. N. S. 960; Symonds *v.* Jones, 82 Me. 302, 19 Atl. 820, 17 Am. St. Rep. 485, 8 L. R. A. 570.

Maryland.—Witthaus *v.* Braun, 44 Md. 303, 22 Am. Rep. 44.

Massachusetts.—Warren *v.* Warren Thread Co., 134 Mass. 247; Gilman *v.* Hunnewell, 122 Mass. 139; Sohier *v.* Johnson, 111 Mass. 238; Emerson *v.* Badger, 101 Mass. 82; Marsh *v.* Billings, 7 Cush. 322, 54 Am. Dec. 723.

Missouri.— Skinner *v.* Oakes, 10 Mo. App. 45.

New York.— Caswell *v.* Hazard, 121 N. Y. 484, 24 N. E. 707, 18 Am. St. Rep. 833 [*affirming* 50 Hun 230, 2 N. Y. Suppl. 783]; Huwer *v.* Dannenhoffer, 82 N. Y. 499; Glen, etc., Mfg. Co. *v.* Hall, 61 N. Y. 226, 19 Am. Rep. 278; Congress, etc., Spring Co. *v.* High Rock Congress Spring Co., 45 N. Y. 291, 6 Am. Rep. 82 [*reversing* 57 Barb. 526]; Burrow *v.* Marceau, 124 N. Y. App. Div. 665, 109 N. Y. Suppl. 105; Hegeman *v.* Hegeman, 8 Daly 1; Baldwin *v.* Von Micheroux, 5 Misc. 386, 25 N. Y. Suppl. 857; Matter of Swezey, 62 How. Pr. 215.

Ohio.— Drake Medicine Co. *v.* Glessner, 68 Ohio St. 337, 67 N. E. 722; Christy *v.* Groves, 2 Ohio S. & C. Pl. Dec. 384, 3 Ohio N. P. 293.

Pennsylvania.— Fulton *v.* Sellers, 4 Brewst. 42; Joseph Dixon Crucible Co. *v.* Guggenheim, 2 Brewst. 321; Rowley *v.* Houghton, 2 Brewst. 303, 7 Phila. 39.

Rhode Island.— Carmichel *v.* Latimer, 11 R. I. 395, 23 Am. Rep. 481.

Virginia.— Tennant *v.* Dunlop, 97 Va. 234, 33 S. E. 620.

Wisconsin.— Tomah Bank *v.* Warren, 94 Wis. 151, 68 N. W. 549.

United States.— Kidd *v.* Johnson, 100 U. S. 617, 25 L. ed. 769; Eiseman *v.* Schiffer, 157 Fed. 473; Bulte *v.* Igleheart, 137 Fed. 492, 70 C. C. A. 76; Griggs *v.* Erie Preserving Co., 131 Fed. 359; Petrolia Mfg. Co. *v.* Bell, etc., Soap Co., 97 Fed. 781; Batcheller *v.* Thomson, 93 Fed. 660, 35 C. C. A. 532 [*reversing* 86 Fed. 630]; Sarrazin *v.* W. R. Irby Cigar, etc., Co., 93 Fed. 624, 35 C. C. A. 496, 46 L. R. A. 541; Fish Bros. Wagon Co. *v.* Fish Bros. Mfg. Co., 87 Fed. 203; P. Lorillard Co. *v.* Peper, 65 Fed. 597; Le Page *v.* Russia Cement Co., 51 Fed. 941, 2 C. C. A. 555, 17 L. R. A. 354; Oakes *v.* Tousmierre, 49 Fed. 447, 4 Woods 547; Jennings *v.* Johnson, 37 Fed. 364; Atlantic Milling Co. *v.* Robinson, 20 Fed. 217; Filkins *v.* Blackham, 9 Fed. Cas. No. 4,786, 13 Blatchf. 440; Walton *v.* Crowley, 29 Fed. Cas. No. 17,133, 3 Blatchf. 440; Morgan *v.* Rogers, 26 Off. Gaz. 1113.

England.—Ainsworth *v.* Walmsley, L. R. 1 Eq. 518, 12 Jur. N. S. 205, 35 L. J. Ch. 352, 14 L. T. Rep. N. S. 220, 14 Wkly. Rep. 363; Croft *v.* Day, 7 Beav. 84, 29 Eng. Ch. 84, 49 Eng. Reprint 994; Longman *v.* Tripp, 2 B. & P. N. R. 67; *Ex p.* Foss, 2 De G. & J. 230, 4 Jur. N. S. 522, 27 L. J. Bankr. 17, 6 Wkly. Rep. 417, 59 Eng. Ch. 184, 44 Eng. Reprint 977; Bury *v.* Bedford, 4 De G. J. & S. 352, 10 Jur. N. S. 503, 33 L. J. Ch. 465, 10 L. T. Rep. N. S. 470, 4 New Rep. 180, 12 Wkly. Rep. 727, 69 Eng. Ch. 272, 46 Eng. Reprint 954; Hall *v.* Barrows, 4 De G. J. & S. 150, 10 Jur. N. S. 55, 33 L. J. Ch. 204, 9 L. T. Rep. N. S. 561, 3 New Rep. 259, 12 Wkly. Rep. 322, 69 Eng. Ch. 116, 46 Eng. Reprint 873; Edlesten *v.* Vick, 1 Eq. Rep. 413, 11 Hare 78, 18 Jur. 7, 23 Eng. L. & Eq. 51, 45 Eng. Ch. 78, 68 Eng. Reprint 1194; Leather Cloth Co. *v.* American Leather Cloth Co., 11 H. L. Cas. 523, 11 Jur. N. S. 513, 35 L. J. Ch. 53, 12 L. T. Rep. N. S. 742, 6 New Rep. 209, 13 Wkly. Rep. 873, 11 Eng. Reprint 1435; Cox Manual of Trademark Cases 292.

Canada.— Groff *v.* Snow Drift Baking Powder Co., 2 Can. Exch. 568; Gegg *v.* Bassett, 3 Ont. L. Rep. 263.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 37.

Union labels, under the New York statute, are not assignable, but the right of use may be conferred upon the members of a subordinate branch. Lynch *v.* John Single Paper Co., 115 N. Y. App. Div. 911, 101 N. Y. Suppl. 824. See Martin Labor Unions, § 372.

53. *Illinois.*— Rauft *v.* Reimers, 200 Ill. 386, 65 N. E. 720, 60 L. R. A. 291.

Louisiana.— Vonderbank *v.* Schmidt, 44 La. Ann. 264, 10 So. 616, 32 Am. St. Rep. 336, 15 L. R. A. 462.

Massachusetts.— Moore *v.* Rawson, 185 Mass. 264, 70 N. E. 64; Russia Cement Co. *v.* Le Page, 147 Mass. 206, 17 N. E. 304, 9 Am. St. Rep. 685.

New York.— Chas. S. Higgins Co. *v.* Higgins Soap Co., 144 N. Y. 462, 39 N. E. 490, 43

trade-marks or trade-names cannot be assigned because there is nothing to assign.[54]

b. Good-Will and Business Must Be Included. A trade-mark or name cannot be assigned except in connection with an assignment of the particular business in which it has been used, with its good-will, and for continued use upon the same article or class of articles which it was first applied to, and used upon, by its original adopter, as otherwise the use by the assignee would be false and deceptive.[55] There is no such thing as a right in gross to any particular name or mark. The sole right which may exist, and which may be assigned, is a right to use such name or mark in a particular connection to signify a particular fact.[56] Trade-marks

Am. St. Rep. 769, 27 L. R. A. 42 [*reversing* 71 Hun 101, 24 N. Y. Suppl. 801]; Burrow *v.* Marceau, 124 N. Y. App. Div. 665, 109 N. Y. Suppl. 105; Read *v.* Mackay, 47 Misc. 435, 95 N. Y. Suppl. 935. But see Bellows *v.* Bellows, 24 Misc. 482, 53 N. Y. Suppl. 853.

Pennsylvania.— Laughman's Appeal, 128 Pa. St. 1, 18 Atl. 415, 5 L. R. A. 599.

Wisconsin.— Tomah Bank *v.* Warren, 94 Wis. 151, 68 N. W. 549.

United States.—Kronthal Waters *v.* Becker, 137 Fed. 649.

England.— Levy *v.* Walker, 10 Ch. D. 436, 48 L. J. Ch. 273, 39 L. T. Rep. N. S. 654, 27 Wkly. Rep. 370; Hudson *v.* Osborne, 39 L. J. Ch. 79, 21 L. T. Rep. N. S. 386.

Canada.— Love *v.* Latimer, 32 Ont. 231.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 37.

The right to use a firm-name may be sold in connection with the business and good-will of the firm. Levy *v.* Walker, 10 Ch. D. 436, 48 L. J. Ch. 273, 39 L. T. Rep. N. S. 654, 27 Wkly. Rep. 370; Melrose-Drover *v.* Heddle, 4 F. (Ct. Sess.) 1120; Love *v.* Latimer, 32 Ont. 231. The good-will does not include the use of the firm-name in cases where the business depends upon the personal qualities of the partners, such as is the case in professional and banking partnerships. Morgan *v.* Schuyler, 79 N. Y. 490, 35 Am. Rep. 543.

54. Bellows *v.* Bellows, 24 Misc. (N. Y.) 482, 53 N. Y. Suppl. 853, holding that where one had abandoned the use of his name as a trade-name for twenty-five years, and then made a general assignment, equity will not enforce the right to such trade-name of one who purchased the same from the assignees twenty years after the assignment.

55. *Indiana.*— Julian *v.* Hoosier Drill Co., 78 Ind. 408.

Maryland.—Witthaus *v.* Braun, 44 Md. 303, 22 Am. Rep. 44.

Massachusetts.— Viano *v.* Baccigalupo, 183 Mass. 160, 67 N. E. 641 [*distinguishing* Webster *v.* Webster, 180 Mass. 310, 62 N. E. 383]; Covell *v.* Chadwick, 153 Mass. 263, 26 N. E. 856, 25 Am. St. Rep. 625 [*following* Chadwick *v.* Covell, 151 Mass. 190, 23 N. E. 1068, 21 Am. St. Rep. 438, 6 L. R. A. 839]; Hoxie *v.* Chaney, 143 Mass. 592, 10 N. E. 713, 58 Am. Rep. 149; Warren *v.* Warren Thread Co., 134 Mass. 247; Sohier *v.* Johnson, 111 Mass. 238; Marsh *v.* Billings, 7 Cush. 322, 54 Am. Dec. 723.

Minnesota.— Cigar Makers' Protective Union *v.* Conhaim, 40 Minn. 243, 41 N. W. 943, 12 Am. St. Rep. 726, 3 L. R. A. 125.

New York.— Falk *v.* American West Indies Trad. Co., 180 N. Y. 445, 73 N. E. 239, 105 Am. St. Rep. 778, 1 L. R. A. N. S. 704 [*reversing* 90 N. Y. App. Div. 606, 85 N. Y. Suppl. 1130]; Congress, etc., Spring Co. *v.* High Rock Congress Spring Co., 45 N. Y. 291, 6 Am. Rep. 82; Baldwin *v.* Von Micheroux, 5 Misc. 386, 25 N. Y. Suppl. 857 [*affirmed* in 83 Hun 43, 31 N. Y. Suppl. 696]; Howe *v.* Searing, 10 Abb. Pr. 264, 19 How. Pr. 14; Samuel *v.* Berger, 4 Abb. Pr. 88; Weston *v.* Ketcham, 51 How. Pr. 455; Partridge *v.* Merick, 2 Barb. Ch. 101, 47 Am. Dec. 281 [*affirmed* in How. App. Cas. 547].

Pennsylvania.— Joseph Dixon Crucible Co. *v.* Guggenheim, 2 Brewst. 321; Rowley *v.* Houghton, 2 Brewst. 303, 7 Phila. 39.

Texas.—Western Grocer Co. *v.* Caffarelli, (Civ. App. 1908) 108 S. W. 413 [*reversed* on other grounds in 102 Tex. 104, 127 S. W. 1018].

Virginia.— Tennant *v.* Dunlop, 97 Vt. 234, 33 S. E. 620.

United States.— Brown Chemical Co. *v.* Meyer, 139 U. S. 540, 11 S. Ct. 625, 35 L. ed. 247; Kidd *v.* Johnson, 100 U. S. 617, 25 L. ed. 769; Spiegel *v.* Zuckerman, 175 Fed. 978; Independent Baking Powder Co. *v.* Boorman, 175 Fed. 448; Dietz *v.* Horton Mfg. Co., 170 Fed. 865, 96 C. C. A. 41; Eiseman *v.* Schiffer, 157 Fed. 473; Bulte *v.* Igleheart, 137 Fed. 492, 70 C. C. A. 76; Griggs *v.* Erie Preserving Co., 131 Fed. 359; Macmahan Pharmacal Co. *v.* Denver Chemical Co., 113 Fed. 468, 51 C. C. A. 302; Batcheller *v.* Thomson, 93 Fed. 660, 35 C. C. A. 532; Jennings *v.* Johnson, 37 Fed. 364; Atlantic Milling Co. *v.* Robinson, 20 Fed. 217; McVeagh *v.* Valencia Cigar Factory, 32 Off. Gaz. 1124.

England.— Singer Mfg. Co. *v.* Loog, 8 App. Cas. 17, 52 L. J. Ch. 481, 48 L. T. Rep. N. S. 3, 31 Wkly. Rep. 325; *In re* Magnolia Metal Co., [1897] 2 Ch. 371, 66 L. J. Ch. 598, 76 L. T. Rep. N. S. 672; Robertson *v.* Quiddington, 28 Beav. 529, 54 Eng. Reprint 469; Croft *v.* Day, 7 Beav. 84, 29 Eng. Ch. 84, 49 Eng. Reprint 994; Edelsten *v.* Vick, 1 Eq. Rep. 413, 11 Hare 78, 18 Jur. 7, 23 Eng. L. & Eq. 51, 45 Eng. Ch. 78, 68 Eng. Reprint 1194; Cotton *v.* Gillard, 44 L. J. Ch. 90.

Canada.— Gegg *v.* Bassett, 3 Ont. L. Rep. 263. *Contra*, Smith *v.* Fair, 14 Ont. 729, by statute.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 37.

56. See *supra*, I, E, 2.

cannot be assigned in gross.[57] An attempted assignment of a naked trade-mark disconnected from any business or good-will is void.[58] The assignor must discontinue the sale of the article, as otherwise the good-will does not pass.[59] The right to use a trade-mark cannot be so enjoyed by the assignee or transferee that he shall have the right to use it on goods differing in character or species from the article to which it was originally attached, and the reason is that such a use would be an untruthful use and would deceive the public.[60] The tangible assets, book-accounts, etc., of a concern need not be included in an assignment of its trade-marks, as they are not a necessary part of its good-will.[61]

3. Personal Names and Marks. If a trade-mark or name means to the public that the personal care and skill of a particular individual were exercised in the manufacture, selection, or production of the goods upon which it is used, or in the conduct of the business, it cannot be assigned, because it can never be truthfully used by another.[62] But the mere use of a personal name as part of a trade-mark

57. *Illinois.*— The Fair *v.* Morales, 82 Ill. App. 499.

Massachusetts.— Crossman *v.* Griggs, 186 Mass. 275, 71 N. E. 560; Chadwick *v.* Covell, 151 Mass. 190, 23 N. E. 1068, 21 Am. St. Rep. 442, 6 L. R. A. 839.

New York.—Weston *v.* Ketcham, 51 How. Pr. 455.

Pennsylvania.— Rowley *v.* Houghton, 2 Brewst. 303, 7 Phila. 39; Colladay *v.* Baird, 4 Phila. 139.

United States.—McVeagh *v.* Valencia Cigar Factory, 32 Off. Gaz. 1124; Morgan *v.* Rogers, 26 Off. Gaz. 1113.

England.— Thorneloe *v.* Hill, [1894] 1 Ch. 569, 63 L. J. Ch. 331, 70 L. T. Rep. N. S. 124, 8 Reports 718, 42 Wkly. Rep. 397; Cotton *v.* Gillard, 44 L. J. Ch. 90.

"**As a mere abstract right,** having no reference to any particular person or property, it is conceded that it cannot exist, and so cannot pass by an assignment, or descend to a man's legal representatives." Joseph Dixon Crucible Co. *v.* Guggenheim, 2 Brewst. (Pa.) 321, 339.

58. Crossman *v.* Griggs, 186 Mass. 275, 71 N. E. 560; Falk *v.* American West Indies Trading Co., 180 N. Y. 445, 73 N. E. 239, 105 Am. St. Rep. 778, 1 L. R. A. N. S. 704 [*reversing* 90 N. Y. App. Div. 606, 85 N. Y. Suppl. 1130]; Lea *v.* New Home Sewing Mach. Co., 139 Fed. 732; Bulte *v.* Igleheart, 137 Fed. 492, 70 C. C. A. 76; Thorneloe *v.* Hill, [1894] 1 Ch. 569, 63 L. J. Ch. 331, 70 L. T. Rep. N. S. 124, 8 Reports 718, 42 Wkly. Rep. 397.

Registered trade-marks, under the federal statute, are expressly made assignable only "in connection with the good-will of the business in which the mark is used." Act Feb. 20, 1905, § 10. Eiseman *v.* Schiffer, 157 Fed. 473.

59. Independent Baking Powder Co. *v.* Boorman, 175 Fed. 448 (sale continued under different name); Eiseman *v.* Schiffer, 157 Fed. 473 (sale of same article continued under different name).

60. Baglin *v.* Cusenier Co., 156 Fed. 1016 [*affirmed* in 164 Fed. 25, 90 C. C. A. 499]; Lea *v.* New Home Sewing Mach. Co., 139 Fed. 732; Macmahan Pharmacal Co. *v.* Denver Chemical Mfg. Co., 113 Fed. 468, 51 C. C. A. 302. In Filkins *v.* Blackman, 9 Fed. Cas. No. 4,786, 13 Blatchf. 440, 444, Judge Shipman said: "The name, as a whole, was his trade-mark, which he had the exclusive right to use, and the exclusive use of which would pass, by assignment, to any one who had lawfully obtained from the inventor the exclusive right, also, to manufacture and sell, and who did sell, that particular article compounded according to the original formula. The property or right to a trade-mark may pass, by an assignment, or by operation of law, to any one who takes, at the same time, the right to manufacture or sell the particular merchandise to which said trade-mark has been attached. As a mere abstract right, having no reference to any particular person or property, it is conceded that it cannot exist, and, so, cannot pass by an assignment, or descend to a man's legal representatives. (Dixon Crucible Co. *v.* Guggenheim, Am. Trade-Mark Cases, 559.) If the assignee should make a different article, he would not derive, by purchase from Jonas Blackman, a right which a Court of equity would enforce, to use the name which the inventor had given to his own article, because such a use of the name would deceive the public. The right to the use of a trade-mark cannot be so enjoyed by an assignee, that he shall have the right to affix the mark to goods differing in character or species from the article to which it was originally attached." In Independent Baking Powder Co. *v.* Boorman, 175 Fed. 448, it was held that an assignee of a trade-mark which had been used to designate an alum baking powder had no right to transfer the name to a baking powder in which phosphate was substituted for alum, and that it was immaterial whether a phosphate powder was better or worse than an alum powder. "It resulted in the production of a different powder made under a materially different formula. . . . A trade-mark established in connection with one article cannot be transferred at will to another."

61. Tennant *v.* Dunlop, 97 Va. 234, 33 S. E. 620.

62. *Kentucky.*— Mattingly *v.* Stone, 12 S. W. 467, 12 Ky. L. Rep. 72.

Massachusetts.— Messer *v.* The Fadettes, 168 Mass. 140, 46 N. E. 407, 60 Am. St. Rep. 371, 37 L. R. A. 721; Frank *v.* Sleeper, 150 Mass. 583, 23 N. E. 213; Hoxie *v.* Chaney,

does not necessarily make it a personal trade-mark, and as such non-assignable.[63] It depends upon the meaning which the name has, as a matter of fact, in the minds of the public.[64] Where a trade-mark or a trade-name, originally personal, has

143 Mass. 592, 10 N. E. 713, 58 Am. Rep. 149; Warren *v.* Warren Thread Co., 134 Mass. 247.

Missouri.— Skinner *v.* Oakes, 10 Mo. App. 45.

New York.— Prince Mfg. Co. *v.* Prince's Metallic Paint Co., 135 N. Y. 24, 31 N. E. 990, 17 L. R. A. 129; Merry *v.* Hoopes, 111 N. Y. 415, 18 N. E. 714; Cutter *v.* Gudebrod Bros. Co., 44 N. Y. App. Div. 605, 61 N. Y. Suppl. 225 [*affirmed* in 168 N. Y. 512, 61 N. E. 887]; Kinney Tobacco Co. *v.* Maller, 53 Hun 340, 6 N. Y. Suppl. 389; Hegeman *v.* Hegeman, 8 Daly 1; Read *v.* Mackay, 47 Misc. 435, 95 N. Y. Suppl. 935; Samuel *v.* Berger, 4 Abb. Pr. 88; Matter of Swezey, 62 How. Pr. 215. See Kennedy *v.* Dr. David Kennedy Corp., 32 Misc. 480, 66 N. Y. Suppl. 225.

Tennessee.— Slack *v.* Suddoth, 102 Tenn. 375, 52 S. W. 180, 73 Am. St. Rep. 881, 45 L. R. A. 589.

Texas.— Mayer *v.* Flanagan, 12 Tex. Civ. App. 405, 34 S. W. 785.

Wisconsin.— Fish Bros. Wagon Co. *v.* La Belle Wagon Works, 82 Wis. 546, 52 N. W. 595, 33 Am. St. Rep. 72, 16 L. R. A. 453.

United States.—Alaska Packers' Assoc. *v.* Alaska Imp. Co., 60 Fed. 103; Hill *v.* Lockwood, 32 Fed. 389.

England.— Leather Cloth Co. *v.* American Leather Cloth Co., 4 De G. J. & S. 137, 10 Jur. N. S. 81, 33 L. J. Ch. 199, 9 L. T. Rep. N. S. 558, 3 New Rep. 264, 12 Wkly. Rep. 289, 69 Eng. Ch. 106, 46 Eng. Reprint 868 [*affirmed* in 11 H. L. Cas. 523, 11 Jur. N. S. 513, 35 L. J. Ch. 53, 12 L. T. Rep. N. S. 742, 6 New Rep. 209, 13 Wkly. Rep. 873, 11 Eng. Reprint 1435] (per Lord Kingsdown); Hall *v.* Barrows, 4 De G. J. & S. 150, 10 Jur. N. S. 55, 33 L. J. Ch. 204, 9 L. T. Rep. N. S. 561, 3 New Rep. 259, 12 Wkly. Rep. 322, 69 Eng. Ch. 116, 46 Eng. Reprint 873.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 37.

The trade-mark is inseparable from the particular thing which gives it its value. Matter of Swezey, 62 How. Pr. (N. Y.) 215.

A trade-name given to an orchestra by its founder is not assignable, since it is personal to him, and rests on reputation as a musician; and its use by an assignee to designate a body of musicians different from those who earned a reputation thereunder would be a fraud on the public. Messer *v.* The Fadettes, 168 Mass. 140, 46 N. E. 407, 60 Am. St. Rep. 371, 37 L. R. A. 721.

The firm-name of a banking partnership is personal, and not assignable. It cannot be sold as an asset, or part of the good-will of the business. Read *v.* Mackay, 47 Misc. (N. Y.) 435, 95 N. Y. Suppl. 935.

63. *Illinois.*— Frazer *v.* Frazer Lubricator Co., 121 Ill. 147, 13 N. E. 639, 2 Am. St. Rep. 73 [*affirming* 18 Ill. App. 450].

Iowa.— Shaver *v.* Shaver, 54 Iowa 208, 6 N. W. 188, 37 Am. Rep. 194.

Maine.— Symonds *v.* Jones, 82 Me. 302, 19 Atl. 820, 17 Am. St. Rep. 485, 8 L. R. A. 570.

Massachusetts.— Nelson *v.* Winchell, 203 Mass. 75, 89 N. E. 180, 23 L. R. A. N. S. 1150; Noera *v.* H. A. Williams Mfg. Co., 158 Mass. 110, 32 N. E. 1037; Frank *v.* Sleeper, 150 Mass. 583, 23 N. E. 213 [*distinguishing* Hoxie *v.* Chaney, 143 Mass. 592, 10 N. E. 713, 58 Am. Rep. 149]; Russia Cement Co. *v.* Le Page, 147 Mass. 206, 17 N. E. 304, 9 Am. St. Rep. 685.

Missouri.— Probasco *v.* Bouyon, 1 Mo. App. 241.

New Jersey.— Smith *v.* Brand, 67 N. J. Eq. 529, 58 Atl. 1029, firm-name.

Pennsylvania.— Joseph Dixon Crucible Co. *v.* Guggenheim, 2 Brewst. 321.

United States.— Dr. S. A. Richmond Nervine Co. *v.* Richmond, 159 U. S. 293, 16 S. Ct. 30, 40 L. ed. 155; Kidd *v.* Johnson, 100 U. S. 617, 25 L. ed. 769; McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828; Oakes *v.* Tonsmierre, 49 Fed. 447, 4 Woods 547; Celluloid Mfg. Co. *v.* Cellonite Mfg. Co., 32 Fed. 94; Horton Mfg. Co. *v.* Horton Mfg. Co., 18 Fed. 816; Filkins *v.* Blackman, 9 Fed. Cas. No. 4,786, 13 Blatchf. 440; Johnson *v.* Schenck, 13 Fed. Cas. No. 7,412.

England.— Ainsworth *v.* Walmsley, L. R. 1 Eq. 518, 12 Jur. N. S. 205, 35 L. J. Ch. 352, 14 L. T. Rep. N. S. 220, 14 Wkly. Rep. 363.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 37.

64. See cases cited *infra*, this note.

Question of fact as to meaning of name.— In Skinner *v.* Oakes, 10 Mo. App. 45, 56, Thompson, J., said: "But where the trade-mark consists of a name, how far it is capable of assignment is a more difficult question. We think that the answer to this question depends upon the effect which the use of the name in each particular instance is shown to have upon the minds of the public. If it leads the public to believe that the particular goods are, in fact, made by the person whose name is thus stamped upon them, or in whose name they are advertised, whereas they are, in fact, made by another person, then such a use of the name will not be protected by the courts; for to do so would be to protect the perpetration of a fraud upon the public." "There may no doubt be cases where the personal skill of an artist or artisan may so far enter into the value of a product that a trade-mark bearing his name would, or at least might, imply that his personal work or supervision was employed in the manufacture; and, in such cases, it would be a fraud upon the public if the trade-mark should be used by other persons, and for this reason such a trade-mark would be held to be unassignable. It is in any case a question whether the use of the trade-mark would give

by the manner of its use come to indicate merely that the article or business is the same one to which it was originally affixed or in which it was originally used, it is assignable, for it has then lost its personal significance.[65] Corporate names, although made up in part of the name of an individual, are not personal.[66] The assignee of a personal trade-mark must modify it, by the addition of explanatory statements or otherwise, so that his use of it will be a truthful use, and indicate that the assignee and not the assignor is now carrying on the business.[67] A mere license to use another's name is not assignable.[68]

to the public or to purchasers a false idea as to who made the article; and a court of equity would not lend any active aid to sustain a claim to a trade-mark which should contain a misrepresentation to the public. Connell *v.* Reed, 128 Mass. 477, 35 Am. Rep. 397; Manhattan Medicine Co. *v.* Wood, 108 U. S. 218, 2 S. Ct. 436, 27 L. ed. 706. But, on the other hand, the usages of trade may be such that no such inference would naturally be drawn from the use of a trade-mark which contains a person's name, and that all that purchasers would reasonably understand is that goods bearing the trade-mark are of a certain standard kind or quality, or are made in a certain manner, or after a certain formula, by persons who are carrying on the same business that formerly was carried on by the person whose name is in the trade-mark." Hoxie *v.* Chaney, 143 Mass. 592, 593, 10 N. E. 713, 58 Am. Rep. 140. "A name used as an adjective of description is not necessarily understood by the public as any assertion that the person whose name is used is the maker of the article." Russia Cement Co. *v.* Le Page, 147 Mass. 206, 209, 17 N. E. 304, 9 Am. St. Rep. 685.

65. *Illinois.*— Frazer *v.* Frazer Lubricator Co., 121 Ill. 147, 13 N. E. 639, 2 Am. St. Rep. 73.

Kentucky.— Dant *v.* Head, 90 Ky. 255, 13 S. W. 1073, 12 Ky. L. Rep. 153, 29 Am. St. Rep. 369.

Louisiana.— Vonderbank *v.* Schmidt, 44 La. Ann. 264, 10 So. 616, 32 Am. St. Rep. 336, 15 L. R. A. 462.

Massachusetts.— Noera *v.* H. A. Williams Mfg. Co., 158 Mass. 110, 32 N. E. 1037; Russia Cement Co. *v.* Le Page, 147 Mass. 206, 17 N. E. 304, 9 Am. St. Rep. 685; Hoxie *v.* Chaney, 143 Mass. 592, 10 N. E. 713, 58 Am. Rep. 149. See also Warren *v.* Warren Thread Co., 134 Mass. 247; Sohier *v.* Johnson, 111 Mass. 238.

Missouri.— Skinner *v.* Oakes, 10 Mo. App. 45; Probasco *v.* Bouyon, 1 Mo. App. 241.

New York.— Slater *v.* Slater, 175 N. Y. 143, 67 N. E. 224, 96 Am. St. Rep. 605, 61 L. R. A. 796; Cutter *v.* Gudebrod Bros. Co., 44 N. Y. App. Div. 605, 61 N. Y. Suppl. 225 [*affirmed* in 168 N. Y. 512, 61 N. E. 887]; Hegeman *v.* Hegeman, 8 Daly 1; Read *v.* Mackay, 47 Misc. 435, 95 N. Y. Suppl. 935; Kennedy *v.* Dr. David Kennedy Corp., 32 Misc. 480, 66 N. Y. Suppl. 225.

Ohio.— Drake Medicine Co. *v.* Glessner, 68 Ohio St. 337, 67 N. E. 722.

Rhode Island.— Carmichel *v.* Latimer, 11 R. I. 395, 23 Am. Rep. 481.

Wisconsin.— Fish Bros. Wagon Co. *v.* La Belle Wagon Works, 82 Wis. 546, 52 N. W. 595, 33 Am. St. Rep. 72, 16 L. R. A. 453.

United States.— Herring-Hall-Marvin Safe Co. *v.* Hall's Safe Co., 208 U. S. 554, 28 S. Ct. 350, 52 L. ed. 616; Dr. S. A. Richmond Nervine Co. *v.* Richmond, 159 U. S. 293, 16 S. Ct. 30, 40 L. ed. 155; Brown Chemical Co. *v.* Meyer, 139 U. S. 540, 11 S. Ct. 625, 35 L. ed. 247; Kidd *v.* Johnson, 100 U. S. 617, 25 L. ed. 769; Oakes *v.* Tonsmierre, 49 Fed. 447, 4 Woods 547; Jennings *v.* Johnson, 37 Fed. 364 [*distinguishing* Manhattan Medicine Co. *v.* Wood, 108 U. S. 218, 2 S. Ct. 436, 27 L. ed. 706; Burton *v.* Stratton, 12 Fed. 696]; Filkins *v.* Blackman, 9 Fed. Cas. No. 4,786, 13 Blatchf. 440.

England.— Bury *v.* Bedford, 4 De G. J. & S. 352, 10 Jur. N. S. 503, 33 L. J. Ch. 465, 10 L. T. Rep. N. S. 470, 4 New Rep. 180, 12 Wkly. Rep. 727, 69 Eng. Ch. 272, 46 Eng. Reprint 954; Hall *v.* Barrows, 4 De G. J. & S. 150, 33 L. J. Ch. 204, 10 Jur. N. S. 55, 9 L. T. 561, 3 New Rep. 259, 12 Wkly. Rep. 322; Edelsten *v.* Vick, 1 Eq. Rep. 413, 11 Hare 78, 18 Jur. 7, 23 Eng. L. & Eq. 51, 45 Eng. Ch. 78, 68 Eng. Reprint 1194; Leather Cloth Co. *v.* American Leather Cloth Co., 11 H. L. Cas. 523, 11 Jur. N. S. 513, 35 L. J. Ch. 53, 12 L. T. Rep. N. S. 742, 6 New Rep. 209, 13 Wkly. Rep. 873, 11 Eng. Reprint 1435 [*affirming* 4 De G. J. & S. 137, 10 Jur. N. S. 81, 33 L. J. Ch. 199, 9 L. T. Rep. N. S. 558, 3 New Rep. 264, 12 Wkly. Rep. 289, 69 Eng. Ch. 106, 46 Eng. Reprint 868].

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 37.

Compare Dodge Stationery Co. *v.* Dodge, 145 Cal. 380, 78 Pac. 879.

66. Cutter *v.* Gudebrod Bros. Co., 44 N. Y. App. Div. 605, 61 N. Y. Suppl. 225 [*affirmed* in 168 N. Y. 512, 61 N. E. 887].

67. Symonds *v.* Jones, 82 Me. 302, 19 Atl. 820, 17 Am. St. Rep. 485, 8 L. R. A. 570.

68. Bagby, etc., Co. *v.* Rivers, 87 Md. 400, 422, 40 Atl. 171, 67 Am. St. Rep. 357, 40 L. R. A. 632, where the court said: "Where the contract is for the sale of or the right to use a fictitious name, or a trade-name or a trade-mark, or a corporate name, though composed of individual names, or where the goodwill of a business includes the right to use names of that character, then such right is assignable by the purchaser and follows the business. But where the contract merely gives to one person the right to use the name of another, as in this case, such right is personal, and in the absence of an express

4. Local Names and Marks. If the name or mark means that the goods are the product of a particular establishment or spring, into which the location enters as an essential element, then the name or mark can be assigned only together with the particular establishment, spring, or other local business.[69] It becomes an inseparable part of the building or premises, and will pass with a sale or lease of it, and cannot be severed therefrom even by its first adopter and user.[70] But if not local, the trade-mark or name may be assigned to be used in a different locality by the assignee, or be transferred by the proprietor from one locality to another, and a sale of the premises will not affect the ownership of the trade-marks or names.[71]

stipulation, cannot be assigned or transferred by the purchaser to a third party."

69. Dant *v.* Head, 90 Ky. 255, 13 S. W. 1073, 12 Ky. L. Rep. 153, 29 Am. St. Rep. 369; Warren *v.* Warren Thread Co., 134 Mass. 247; Congress, etc., Spring Co. *v.* High Rock Congress Spring Co., 45 N. Y. 291, 6 Am. Rep. 82; Kinney Tobacco Co. *v.* Maller, 53 Hun (N. Y.) 340, 6 N. Y. Suppl. 389; Kidd *v.* Johnson, 100 U. S. 617, 25 L. ed. 769; Pepper *v.* Labrot, 8 Fed. 29; Ainsworth *v.* Walmsley, L. R. 1 Eq. 518, 12 Jur. N. S. 205, 35 L. J. Ch. 352, 14 L. T. Rep. N. S. 220, 14 Wkly. Rep. 363. See also Dietz *v.* Horton Mfg. Co., 170 Fed. 865, 96 C. C. A. 41. *Compare* Glen, etc., Mfg. Co. *v.* Hall, 61 N. Y. 226, 19 Am. Rep. 278.

70. *Indiana.*— Julian *v.* Hoosier Drill Co., 78 Ind. 408.

Kansas.— Redlon *v.* Barker, 4 Kan. 445, 96 Am. Dec. 180.

Massachusetts.— Marsh *v.* Billings, 7 Cush. 322, 54 Am. Dec. 723.

New York.— Glen, etc., Mfg. Co. *v.* Hall, 61 N. Y. 226, 19 Am. Rep. 278; Congress, etc., Spring Co. *v.* High Rock Congress Spring Co., 45 N. Y. 291, 6 Am. Rep. 82; Hegeman *v.* Hegeman, 8 Daly 1; Howe *v.* Searing, 10 Abb. Pr. 264, 19 How. Pr. 14; Matter of Swezey, 62 How. Pr. 215; Booth *v.* Jarrett, 52 How. Pr. 169.

Pennsylvania.— Joseph Dixon Crucible Co. *v.* Guggenheim, 2 Brewst. 321; Musselman's Appeal, 62 Pa. St. 81, 1 Am. Rep. 382. See also Elliot's Appeal, 60 Pa. St. 161.

Rhode Island.— Carmichel *v.* Latimer, 11 R. I. 395, 23 Am. Rep. 481.

United States.— Kidd *v.* Johnson, 100 U. S. 617, 25 L. ed. 769; Prince's Metallic Paint Co. *v.* Prince Mfg. Co., 57 Fed. 938, 6 C. C. A. 647; Hill *v.* Lockwood, 32 Fed. 389; Atlantic Milling Co. *v.* Robinson, 20 Fed. 217; Pepper *v.* Labrot, 8 Fed. 29.

England.— Fullwood *v.* Fullwood, 9 Ch. D. 176, 47 L. J. Ch. 459, 38 L. T. Rep. N. S. 380, 26 Wkly. Rep. 435; Llewellyn *v.* Rutherford, L. R. 10 C. P. 456, 44 L. J. C. P. 281, 32 L. T. Rep. N. S. 610; Croft *v.* Day, 7 Beav. 84, 29 Eng. Ch. 84, 49 Eng. Reprint 994; Hall *v.* Barrows, 4 De G. J. & S. 150, 10 Jur. N. S. 55, 33 L. J. Ch. 204, 9 L. T. Rep. N. S. 561, 3 New Rep. 259, 12 Wkly. Rep. 322, 69 Eng. Ch. 116, 46 Eng. Reprint 873; Edelsten *v.* Vick, 1 Eq. Rep. 413, 11 Hare 78, 18 Jur. 7, 23 Eng. L. & Eq. 51, 45 Eng. Ch. 78, 68 Eng. Reprint 1194; Hudson *v.* Osborne, 39 L. J. Ch. 79, 21 L. T. Rep. N. S. 386; Motley *v.* Downmann, 6 L. J. Ch. 308, 3 Myl. & C. 1, 14 Eng. Ch. 1, 40 Eng. Reprint 824; Chissum *v.* Dewes, 5 Russ. 29, 29 Rev. Rep. 10, 5 Eng. Ch. 29, 38 Eng. Reprint 938; Crawshay *v.* Collins, 15 Ves. Jr. 224, 10 Rev. Rep. 61, 33 Eng. Reprint 736; King *v.* Midland R. Co., 17 Wkly. Rep. 113.

Canada.— Mossop *v.* Mason, 18 Grant Ch. (U. C.) 453.

In Armstrong *v.* Kleinhans, 82 Ky. 303, 313, 56 Am. Rep. 894, plaintiff leased a building with a tower, and used it as a clothing store, designating it, with the consent of the landlord, who paid half the expense of the sign, "Tower Palace." Plaintiff subsequently removed his business to another store, transferring the sign, without consent of the landlord, to the new house. The landlord continued the use of the name, and leased to defendant, who used the store under the name of "Tower Palace" as a clothing establishment. An injunction was refused. In distinguishing this case from Woodward *v.* Lazar, 21 Cal. 448, 82 Am. Dec. 751, Lewis, J., said: "But conceding the correctness of the conclusion of the court in that case, it does not sustain the claim of appellant. There the name of the hotel was not applicable to or descriptive of a particular building, but was arbitrary, and applied to the business carried on first in the building upon the leased premises and afterwards in both of the buildings. Here the name 'Tower Palace' was intended to describe and designate the place, and not the particular business, nor the person carrying it on. It never was used as a trade-mark by appellant, but simply to indicate the particular place on Market street where he did business, and consequently he never acquired the exclusive right to use the name, except as applicable to and while he occupied that building."

71. *California.*— Woodward *v.* Lazar, 21 Cal. 448, 82 Am. Dec. 751.

Kentucky.— Dewitt *v.* Mathey, 35 S. W. 1113, 18 Ky. L. Rep. 257.

Massachusetts.— Sohier *v.* Johnson, 111 Mass. 238.

New York.— Huwer *v.* Dannenhoffer, 82 N. Y. 499 [*distinguishing* Congress, etc., Spring Co. *v.* High Rock Congress Spring Co., 45 N. Y. 291, 6 Am. Rep. 82]; Glen, etc., Mfg. Co. *v.* Hall, 61 N. Y. 226, 19 Am. Rep. 278; Prince Mfg. Co. *v.* Prince's Metallic Paint Co., 20 N. Y. Suppl. 462.

Rhode Island.— Armington *v.* Palmer, 21 R. I. 109, 42 Atl. 308, 79 Am. St. Rep. 786,

B. Requisites and Sufficiency. No particular formalities are required to transfer the right to a trade-mark. Any writing or act of the parties from which the intention to assign an assignable trade-mark can be gathered will suffice to pass title.[72] Trade-marks pass with the transfer of a business and its good-will, although they are not expressly mentioned in the instrument of transfer.[73] Even

43 L. R. A. 95; Cady *v.* Schultz, 19 R. I. 193, 32 Atl. 915, 61 Am. St. Rep. 763, 29 L. R. A. 524.

Virginia.— See also Tennant *v.* Dunlop, 97 Va. 234, 33 S. E. 620.

United States.— Baglin *v.* Cusenier, 156 Fed. 1016 [*affirmed* in 164 Fed. 25, 90 C. C. A. 499 ("Chartreuse" not local); Gaines *v.* Kahn, 155 Fed. 639 [*reversed* on question of priority of use in 161 Fed. 495]; Fish Bros. Wagon Co. *v.* Fish Bros. Mfg. Co., 95 Fed. 457, 37 C. C. A. 146.

Canada.— Mossop *v.* Mason, 18 Grant Ch. (U. C.) 453.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 37.

72. Allegretti *v.* Allegretti Chocolate Cream Co., 177 Ill. 129, 52 N. E. 487 [*affirming* 76 Ill. App. 581]; Lippincott *v.* Hubbard, 28 Pittsb. Leg. J. N. S. (Pa.) 303; Dr. S. A. Richmond Nervine Co. *v.* Richmond, 159 U. S. 293, 16 S. Ct. 30, 40 L. ed. 155.

Under the federal statute assignments of registered trade-marks must be by an instrument in writing duly acknowledged, and such assignments are void against subsequent purchasers for value, and without notice, unless recorded in the patent office within three months from the date thereof. Act Feb. 20, 1905, § 10. See also Patent Office Rules 63–65. Registered trade-marks may be transferred without the formalities required by the patent laws. Sarrazin *v.* W. R. Irby Cigar, etc., Co., 93 Fed. 624, 35 C. C. A. 496, 46 L. R. A. 541. A contract between persons using similar trade-marks providing for the form which each shall use is not entitled to record in the patent office as a transfer of the right to use a trade-mark. Waukesha Hygeia Mineral Springs Co. *v.* Hygeia Sparkling Distilled Water Co., 63 Fed. 438, 11 C. C. A. 277.

73. *Colorado.*— Solis Cigar Co. *v.* Pozo, 16 Colo. 388, 26 Pac. 556, 25 Am. St. Rep. 279.

District of Columbia.— Bluthenthal *v.* Bigbie, 30 App. Cas. 118.

Illinois.—Allegretti *v.* Allegretti Chocolate Cream Co., 177 Ill. 129, 52 N. E. 487; Hazelton Boiler Co. *v.* Hazelton Tripod Boiler Co., 40 Ill. App. 430.

Maryland.— Seabrook *v.* Grimes, 107 Md. 410, 68 Atl. 883, 126 Am. St. Rep. 400, 16 L. R. A. N. S. 483; Witthaus *v.* Braun, 44 Md. 303, 22 Am. Rep. 44.

Massachusetts.— Nelson *v.* Winchell, 203 Mass. 75, 89 N. E. 180, 23 L. R. A. N. S. 1150; Moore *v.* Rawson, 185 Mass. 264, 70 N. E. 64; Covell *v.* Chadwick, 153 Mass. 263, 26 N. E. 856, 25 Am. St. Rep. 625; Russia Cement Co. *v.* Le Page, 147 Mass. 206, 17 N. E. 304, 9 Am. St. Rep. 685; Hoxie *v.* Chaney, 143 Mass. 592, 10 N. E. 713, 58 Am. Rep. 149; Warren *v.* Warren Thread Co., 134 Mass. 247; Gilman *v.* Hunnewell, 122 Mass. 139; Sohier *v.* Johnson, 111 Mass. 238; Emerson *v.* Badger, 101 Mass. 82.

Michigan.— Myers *v.* Kalamazoo Buggy Co., 54 Mich. 215, 19 N. W. 961, 20 N. W. 545, 52 Am. Rep. 811.

Missouri.— Grocers Journal Co. *v.* Midland Pub. Co., 127 Mo. App. 356, 105 S. W. 310.

New Jersey.— Corbett Bros. Co. *v.* Reinhardt-Meding Co., 77 N. J. Eq. 7, 76 Atl. 243; Smith *v.* Brand, 67 N. J. Eq. 529, 58 Atl. 1029.

New York.— Merry *v.* Hoopes, 111 N. Y. 415, 18 N. E. 714; Glen, etc., Mfg. Co. *v.* Hall, 61 N. Y. 226, 19 Am. Rep. 278; Congress, etc., Spring Co. *v.* High Rock Congress Spring Co., 45 N. Y. 291, 6 Am. Rep. 82; Milliken *v.* Dart, 26 Hun 24; Hegeman *v.* Hegeman, 8 Daly 1; Prince Mfg. Co. *v.* Prince's Metallic Paint Co., 15 N. Y. Suppl. 249; Hazard *v.* Caswell, 57 How. Pr. 1; Booth *v.* Jarrett, 52 How. Pr. 169.

Pennsylvania.—Fulton *v.* Sellers, 4 Brewst. 42; Joseph Dixon Crucible Co. *v.* Guggenheim, 2 Brewst. 321.

Tennessee.— Robinson *v.* Storm, 103 Tenn. 40, 52 S. W. 880.

Texas.— Caffarelli *v.* Western Grocer Co., 102 Tex. 104, 127 S. W. 1018 [*reversing* (Civ. App. 1908) 108 S. W. 413].

Wisconsin.— Tomah Bank *v.* Warren, 94 Wis. 151, 68 N. W. 549; Listman Mill Co. *v.* William Listman Milling Co., 88 Wis. 334, 60 N. W. 261, 43 Am. St. Rep. 907.

United States.— Kidd *v.* Johnson, 100 U. S. 617, 25 L. ed. 769; Sarrazin *v.* W. R. Irby Cigar, etc., Co., 93 Fed. 624, 35 C. C. A. 496, 46 L. R. A. 541; Royal Baking Powder Co. *v.* Raymond, 70 Fed. 376; Atlantic Milling Co. *v.* Robinson, 20 Fed. 217; Morgan *v.* Rogers, 19 Fed. 596; Pepper *v.* Labrot, 8 Fed. 29; Blackwell *v.* Dibrell, 3 Fed. Cas. No. 1,475, 3 Hughes 151, 14 Off. Gaz. 633; Filkins *v.* Blackman, 9 Fed. Cas. No. 4,786, 13 Blatchf. 440.

England.— Thynne *v.* Shove, 45 Ch. D. 577, 59 L. J. Ch. 509, 62 L. T. Rep. N. S. 803, 38 Wkly. Rep. 667; Banks *v.* Gibson, 34 Beav. 566, 34 L. J. Ch. 591, 13 Wkly. Rep. 1012, 55 Eng. Reprint 753; Bury *v.* Bedford, 4 De G. J. & S. 352, 10 Jur. N. S. 503, 33 L. J. Ch. 465, 10 L. T. Rep. N. S. 470, 4 New Rep. 180, 12 Wkly. Rep. 209, 13 Wkly. Rep. 873, 11 Eng. Reprint 954; Hall *v.* Barrows, 4 De G. J. & S. 150, 10 Jur. N. S. 55, 33 L. J. Ch. 204, 9 L. T. Rep. N. S. 561, 3 New Rep. 259, 12 Wkly. Rep. 322, 69 Eng. Ch. 116, 46 Eng. Reprint 873; Leather Cloth Co. *v.* American Leather Cloth Co., 11 H. L. Cas. 523, 11 Jur. N. S. 513, 35 L. J. Ch. 53, 12 L. T. Rep. N. S. 742, 6 New Rep. 209, 13 Wkly. Rep. 873, 11 Eng. Reprint 1435; Churton *v.* Douglas, Johns. 174, 5 Jur. N. S. 887, 28 L. J. Ch. 814, 7 Wkly. Rep.

where neither good-will nor trade-marks are expressly mentioned, if upon the construction of the whole transaction the good-will was intended to pass with the business, trade-marks used therein also pass.[74] Of course a trade-mark may pass under any general terms of description sufficiently broad to include it.[75] Trade-marks pass to the successors of a business, although no formal transfer is shown.[76] The right to the use of a trade-mark will pass to any one who takes at the same time the right to make or sell the particular articles to which the trade-mark has been attached.[77] A sale of a stock of goods, the good-will of the business not being included, does not operate to transfer a right to use the trade-name and marks of the seller.[78]

365, 70 Eng. Reprint 385; Shipwright *v.* Clements, 19 Wkly. Rep. 599.

Canada.— Robin *v.* Hart, 23 Nova Scotia 316; Mossop *v.* Mason, 18 Grant Ch. (U. C.) 453.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 38.

The title of a newspaper as a trade-mark passes on a sale and delivery of the newspaper, the name and good-will thereof, the plant, and all things appertaining thereto. Grocers Journal Co. *v.* Midland Pub. Co., 127 Mo. App. 356, 105 S. W. 310.

74. *Illinois.*—Allegretti *v.* Allegretti Chocolate Cream Co., 177 Ill. 129, 132, 52 N. E. 487, where it is said: "The transfer of the property and effects of a business carries with it the exclusive right to use such trade-marks or trade-names as have been used in such business." See also Hazelton Boiler Co. *v.* Hazelton Tripod Boiler Co., 142 Ill. 494, 30 N. E. 339.

Massachusetts.— Lothrop Pub. Co. *v.* Lothrop, etc., Co., 191 Mass. 353, 77 N. E. 841, 5 L. R. A. N. S. 1077.

New York.— Merry *v.* Hoopes, 111 N. Y. 415, 18 N. E. 714.

United States.— R. J. Reynolds Tobacco Co. *v.* Allen Bros. Tobacco Co., 151 Fed. 819; Kronthal Waters *v.* Becker, 137 Fed. 649.

England.— Shipwright *v.* Clements, 19 Wkly. Rep. 599.

75. Corbett Bros. Co. *v.* Reinhardt-Meding Co., 77 N. J. Eq. 7, 76 Atl. 243; Robin *v.* Hart, 23 Nova Scotia 316; Piper *v.* Laughman, 6 Pa. Co. Ct. 232, holding that firm trade-marks pass under an assignment of "all the personal property of the firm." See Peck *v.* Peck Bros. Co., 113 Fed. 291, 51 C. C. A. 251, 62 L. R. A. 81.

Included under "Assets and Effects."— In Morgan *v.* Rogers, 26 Off. Gaz. 1113, Price & S. T. M. Cas. 878, Colt, J., said: "If a trade-mark is an asset, as it is, there is no reason why it should not pass under the term 'assets' in an instrument which conveys the entire partnership property. To hold that the trade-mark is not included in this mortgage is to say that the most valuable part of the partnership property is not covered by the words 'assets and effects of every kind and nature.'" But *compare* Hazelton Boiler Co. *v.* Hazelton Tripod Boiler Co., 142 Ill. 494, 30 N. E. 339.

76. Allegretti *v.* Allegretti Chocolate Cream Co., 177 Ill. 129, 52 N. E. 487 [*affirming* 76 Ill. App. 581]; Listman Mill Co. *v.* William Listman Milling Co., 88 Wis. 334, 60 N. W. 261, 43 Am. St. Rep. 907; Fish Bros. Wagon Co. *v.* La Belle Wagon Works, 82 Wis. 546, 52 N. W. 595, 33 Am. St. Rep. 72, 16 L. R. A. 453; Frese *v.* Bachof, 9 Fed. Cas. No. 5,110, 14 Blatchf. 432, 13 Off. Gaz. 635. But see Deitsch *v.* George R. Gibson Co., 155 Fed. 383, holding that plaintiff was not the successor.

If a partner acquires an interest in a trade-mark through its use during his membership in the firm, it ceases upon his withdrawal, in the absence of an agreement to the contrary, and remains with the partner who continues to conduct the business. Bluthenthal *v.* Bigbie, 30 App. Cas. (D. C.) 118.

77. Filkins *v.* Blackman, 9 Fed. Cas. No. 4,786, 13 Blatchf. 440; Johnson *v.* Schenck, 13 Fed. Cas. No. 7,412; Leather Cloth Co. *v.* American Leather Cloth Co., 11 H. L. Cas. 523, 11 Jur. N. S. 513, 35 L. J. Ch. 53, 12 L. T. Rep. N. S. 742, 6 New Rep. 209, 13 Wkly. Rep. 873, 11 Eng. Reprint 1435. In Joseph Dixon Crucible Co. *v.* Guggenheim, 2 Brewst. (Pa.) 321, 339, Paxton, J., said: "The true rule to be deduced from these cases would appear to be this: That the property or right to a trade-mark may pass by an assignment or by operation of law, to any one who takes at the same time, the right to manufacture or sell the particular merchandise to which said trade-mark has been attached. As a mere abstract right, having no reference to any particular person or property, it is conceded that it cannot exist, and so cannot pass by an assignment, or descend to a man's legal representatives." See March *v.* Billings, 7 Cush. (Mass.) 322, 54 Am. Dec. 723; Samuel *v.* Berger, 24 Barb. (N. Y.) 163, 4 Abb. Pr. 88; Howe *v.* Searing, 6 Bosw. (N. Y.) 354, 10 Abb. Pr. 264, 19 How. Pr. 14; Partridge *v.* Menck, 2 Barb. Ch. (N. Y.) 101, 47 Am. Dec. 281 [*affirmed* in How. App. Cas. 547]; Cooper *v.* Hood, 26 Beav. 293, 4 Jur. N. S. 1266, 28 L. J. Ch. 212, 7 Wkly. Rep. 81, 53 Eng. Reprint 911; Bury *v.* Bedford, 4 De G. J. & S. 352, 10 Jur. N. S. 503, 33 L. J. Ch. 465, 10 L. T. Rep. N. S. 470, 4 New Rep. 180, 12 Wkly. Rep. 727, 69 Eng. Ch. 272, 46 Eng. Reprint 954; Edelsten *v.* Vick, 1 Eq. Rep. 413, 11 Hare 78, 18 Jur. 7, 23 Eng. L. & Eq. 51, 45 Eng. Ch. 78, 68 Eng. Reprint 1194.

78. Reeves *v.* Denicke, 12 Abb. Pr. N. S. (N. Y.) 92 [*disapproving* Peterson *v.* Humphrey, 4 Abb. Pr. (N. Y.) 394, and *following* Howe *v.* Searing, 6 Bosw. (N. Y.) 354];

C. Construction, Operation, and Effect. The ordinary rules of construction apply to assignments and contracts affecting trade-mark rights.[79] An intention to part with the right to use one's own name and to transfer the exclusive right to use it to another must be made clearly to appear. It will not readily be presumed.[80] The mere transfer of a business coupled with a covenant by the vendor not to engage in the same business does not authorize the vendee to conduct the business in the vendor's name.[81] An agreement for a future assignment of trade-mark is not a present assignment of the trade-mark or good-will.[82] Successors or assignees are entitled to the same rights as the original proprietor.[83] The assignor of an assignable trade-mark will not be permitted to use it thereafter in competition with his assignee or the latter's successors,[84] for this would be an

Christy *v.* Groves, 2 Ohio S. & C. Pl. Dec. 384, 3 Ohio N. P. 293. If certain words were adopted by a grocery company as a trade-mark for syrup sold by them, the sale of the stock of groceries carried with it the right to the trade-mark. Caffarelli Bros. *v.* Western Grocer Co., 102 Tex. 104, 127 S. W. 1018 [*reversing* (Civ. App. 1908) 108 S. W. 413].

79. See Miller *v.* Billington, 6 Pa. Dist. 335; Batcheller *v.* Thomson, 93 Fed. 660, 35 C. C. A. 532 [*reversing* 86 Fed. 630]; Filkins *v.* Blackman, 9 Fed. Cas. No. 4,786, 13 Blatchf. 440; Johnson *v.* Schenck, 13 Fed. Cas. No. 7,412. See also CONTRACTS, 9 Cyc. 577.

80. *Illinois.*— Ranft *v.* Reimers, 200 Ill. 386, 65 N. E. 720, 60 L. R. A. 291; Hazelton Boiler Co. *v.* Hazelton Tripod Boiler Co., 142 Ill. 494, 30 N. E. 339.

Kentucky.— Mattingly *v.* Stone, 12 S. W. 467, 12 Ky. L. Rep. 72.

New York.— Cutter *v.* Gudebrod Bros. Co., 44 N. Y. App. Div. 605, 61 N. Y. Suppl. 225 [*affirming* 36 N. Y. App. Div. 362, 55 N. Y. Suppl. 298, and *affirmed* in 168 N. Y. 512, 61 N. E. 887]; Howe *v.* Searing, 6 Bosw. 354, 10 Abb. Pr. 264, 19 How. Pr. 14; Scheer *v.* American Ice Co., 32 Misc. 351, 66 N. Y. Suppl. 3; Bellows *v.* Bellows, 24 Misc. 482, 53 N. Y. Suppl. 853; Prince Mfg. Co. *v.* Prince's Metallic Paint Co., 20 N. Y. Suppl. 462; Helmbold *v.* H. T. Helmbold Mfg. Co., 17 Am. L. Reg. N. S. 169.

United States.— Young *v.* Jones, 30 Fed. Cas. No. 18,159, 3 Hughes 274.

England.— Levy *v.* Walker, 10 Ch. D. 436, 48 L. J. Ch. 273, 39 L. T. Rep. N. S. 654, 27 Wkly. Rep. 370; Scott *v.* Rowland, 26 L. T. Rep. N. S. 391, 20 Wkly. Rep. 508. But see Thynne *v.* Shove, 45 Ch. D. 577, 59 L. J. Ch. 509, 62 L. T. Rep. N. S. 803, 38 Wkly. Rep. 667; Hudson *v.* Osborne, 39 L. J. Ch. 79, 21 L. T. Rep. N. S. 386.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," §§ 39, 45. See also, generally, *supra*, V, C, 4.

But see Burkhardt *v.* A. E. Burkhardt Fur, etc., Co., 9 Ohio S. & C. Pl. Dec. 84, 4 Ohio N. P. 358. In Frazer *v.* Frazer Lubricator Co., 121 Ill. 147, 157, 13 N. E. 639, 2 Am. St. Rep. 73, Mulkey, J., said: "The principle seems to be well settled, that where a party sells out an established business, and with it his own name, to be used in connection with such business, he cannot afterwards resume it in carrying on the same business."

Probasco *v.* Bouyon, 1 Mo. App. 241; Ayer *v.* Hall, 3 Brewst. (Pa.) 509; Filkins *v.* Blackman, 9 Fed. Cas. No. 4,786, 13 Blatchf. 440; Witt *v.* Corcoran, 2 Ch. D. 69, 45 L. J. Ch. 603, 34 L. T. Rep. N. S. 550, 24 Wkly. Rep. 501; Churton *v.* Douglas, Johns. 174, 5 Jur. N. S. 887, 28 L. J. Ch. 841, 7 Wkly. Rep. 365, 70 Eng. Reprint 385.

A contract restricting one's right to use his own name will not be extended by construction beyond its clear import. Chattanooga Medicine Co. *v.* Thedford, 58 Fed. 347. See also Tygert-Allen Fertilizer Co. *v.* J. E. Tygert Co., 7 Pa. Dist. 430.

An assignment of good-will authorizes the use of the assignor's name so as to show that the business was the one formerly carried on by him, but it may not be used in such a way as to expose him to liability or hold him out as the proprietor of such business. Thynne *v.* Shove, 45 Ch. D. 577, 55 L. J. Ch. 509, 62 L. T. Rep. N. S. 803, 38 Wkly. Rep. 667.

The purchaser of the property and good-will of a firm acquires the right to describe himself as the successor of such firm, even though the firm-name contains the individual name of one of the partners. Chesterman *v.* Seeley, 5 Pa. Dist. 757, 18 Pa. Co. Ct. 631. See also, generally, *supra*, V, C, 16.

81. Scheer *v.* American Ice Co., 32 Misc. (N. Y.) 351, 66 N. Y. Suppl. 3 [*citing* Morgan *v.* Schuyler, 79 N. Y. 490, 35 Am. Rep. 543; Howe *v.* Searing, 6 Bosw. (N. Y.) 354, 10 Abb. Pr. 264, 19 How. Pr. 14; Reeves *v.* Denicke, 12 Abb. Pr. N. S. (N. Y.) 92].

82. Crossman *v.* Griggs, 186 Mass. 275, 71 N. E. 560.

83. Merry *v.* Hoopes, 111 N. Y. 415, 18 N. E. 714; Cutter *v.* Gudebrod Bros. Co., 44 N. Y. App. Div. 605, 61 N. Y. Suppl. 225 [*affirmed* in 168 N. Y. 512, 61 N. E. 887]; Kinney Tobacco Co. *v.* Maller, 53 Hun (N. Y.) 340, 6 N. Y. Suppl. 389; Walton *v.* Crowley, 29 Fed. Cas. No. 17,133, 3 Blatchf. 440; Peck *v.* Peck Bros. Co., 113 Fed. 291, 51 C. C. A. 251; Kentucky Distilleries, etc., Co. *v.* Wathen, 110 Fed. 641; International Silver Co. *v.* Simeon L. & George H. Rogers Co., 110 Fed. 955; Cuervo *v.* Landauer, 63 Fed. 1003.

A purchaser of the right to use a firm-name has no right to use it in such a way as to subject a person whose name is part of the firm-name to a partnership liability. Chesterman *v.* Seeley, 5 Pa. Dist. 757, 18 Pa. Co. Ct. 631.

84. *Alabama.*— Kyle *v.* Perfection Mattress

appropriation of the good-will which he has sold.[85] A contract between claimants of conflicting trade-marks, or between assignor and assignee, as to the use each shall make of particular marks or names, even their own personal names, is valid and binding upon such parties and their assignees and successors.[86] A defendant may be estopped by contract from claiming that plaintiff's devices are not subject to appropriation as valid trade-marks.[87]

D. Insolvency and Bankruptcy. Trade-marks and trade-names, other than personal ones, are property and pass to an assignee for the benefit of creditors, and may be sold in bankruptcy, in connection with the business and good-will.[88]

Co., 127 Ala. 39, 28 So. 545, 85 Am. St. Rep. 78, 50 L. R. A. 628.

California.— Spieker *v.* Lash, 102 Cal. 38, 36 Pac. 362.

Illinois.— Frazer *v.* Frazer Lubricator Co., 121 Ill. 147, 13 N. E. 639, 2 Am. St. Rep. 73.

Maine.— Symonds *v.* Jones, 82 Me. 302, 19 Atl. 820, 17 Am. St. Rep. 485, 8 L. R. A. 570.

Massachusetts.— Russia Cement Co. *v.* Le Page, 147 Mass. 206, 17 N. E. 304, 9 Am. St. Rep. 685.

Wisconsin.— Listman Mill Co. *v.* William Listman Milling Co., 88 Wis. 334, 60 N. W. 261, 43 Am. St. Rep. 907; Fish Bros. Wagon Co. *v.* La Belle Wagon Works, 82 Wis. 546, 52 N. W. 595, 33 Am. St. Rep. 72, 16 L. R. A. 453.

United States.— Peck *v.* Peck Bros. Co. 113 Fed. 291, 51 C. C. A. 251; Chattanooga Medicine Co. *v.* Thedford, 66 Fed. 544, 14 C. C. A. 101 [*reversing* 58 Fed. 347]; Le Page Co. *v.* Russia Cement Co., 51 Fed. 941, 2 C. C. A. 555, 17 L. R. A. 354; Oakes *v.* Tonsmierre, 49 Fed. 447, 4 Woods 547.

Canada.— See Love *v.* Latimer, 32 Ont. 231.

The assignor may subsequently acquire a new trade-mark in which the assignee will have no interest, notwithstanding the assignor engaged in the same business in violation of his contract. Burch *v.* Toledo Plow Co., 15 Ohio Cir. Ct. 482, 8 Ohio Cir. Dec. 201.

85. See GOOD-WILL, 20 Cyc. 1275.

86. *California.*— Spieker *v.* Lash, 102 Cal. 38, 36 Pac. 362.

Massachusetts.— Russia Cement Co. *v.* Le Page, 147 Mass. 206, 17 N. E. 304, 9 Am. St. Rep. 685. See Noera *v.* H. A. Williams Mfg. Co., 158 Mass. 110, 32 N. E. 1037.

Missouri.— Probasco *v.* Bouyon, 1 Mo. App. 241.

New York.— New York Polyclinic Medical School, etc. *v.* King, 27 Misc. 250, 57 N. Y. Suppl. 796. See Hornbostel *v.* Kinney, 110 N. Y. 94, 17 N. E. 666 [*affirming* 52 N. Y. Super. Ct. 41].

United States.— Waukesha Hygeia Mineral Springs Co. *v.* Hygeia Sparkling Distilled Water Co., 63 Fed. 438, 11 C. C. A. 277; Chattanooga Medicine Co. *v.* Thedford, 58 Fed. 347. See also Le Page Co. *v.* Russia Cement Co., 51 Fed. 941, 2 C. C. A. 555, 17 L. R. A. 354.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 45. See also *supra*, V, C, 4.

87. Ft. Stanwix Canning Co. *v.* William McKinley Canning Co., 49 N. Y. App. Div. 566, 63 N. Y. Suppl. 704.

88. *Iowa.*— Iowa Seed Co. *v.* Dorr, 70 Iowa 481, 30 N. W. 866, 59 Am. Rep. 446.

Kentucky.— Taylor, Jr., etc., Co. *v.* Taylor, 85 S. W. 1085, 27 Ky. L. Rep. 625.

Maryland.— Witthaus *v.* Braun, 44 Md. 303, 22 Am. Rep. 44.

Massachusetts.—Hoxie *v.* Chaney, 143 Mass. 592, 10 N. E. 713, 58 Am. Rep. 149; Warren *v.* Warren Thread Co., 134 Mass. 247.

New York.— Matter of Swezey, 62 How. Pr. 215 [*affirmed* in 64 How. Pr. 353]. But see Cutter *v.* Gudebrod Bros. Co., 36 N. Y. App. Div. 362, 55 N. Y. Suppl. 298 [*affirmed* in 44 N. Y. App. Div. 605, 61 N. Y. Suppl. 225 (*affirmed* in 168 N. Y. 512, 61 N. E. 887)].

Ohio.— Burkhardt *v.* A. E. Burkhardt Fur, etc., Co., 9 Ohio S. & C. Pl. Dec. 84, 4 Ohio N. P. 358.

Wisconsin.— Tomah Bank *v.* Warren, 94 Wis. 151, 68 N. W. 549; Fish Bros. Wagon Co. *v.* La Belle Wagon Works, 82 Wis. 546, 52 N. W. 595, 33 Am. St. Rep. 72, 16 L. R. A. 453.

United States.— Dr. S. A. Richmond Nervine Co. *v.* Richmond, 159 U. S. 293, 16 S. Ct. 30, 40 L. ed. 155; Menendez *v.* Holt, 128 U. S. 514, 9 S. Ct. 143, 32 L. ed. 526; Kidd *v.* Johnson, 100 U. S. 617, 25 L. ed. 769; Sarrazin *v.* W. R. Irby Cigar, etc., Co., 93 Fed. 624, 35 C. C. A. 496, 46 L. R. A. 541; Morgan *v.* Rogers, 19 Fed. 596; Pepper *v.* Labrot, 8 Fed. 29.

England.— *In re* Wellcome, 32 Ch. D. 213, 55 L. J. Ch. 542, 54 L. T. Rep. N. S. 493, 34 Wkly. Rep. 453; Longman *v.* Tripp, 2 B. & P. N. R. 67; Bury *v.* Bedford, 4 De G. J. & S. 352, 10 Jur. N. S. 503, 33 L. J. Ch. 465, 10 L. T. Rep. N. S. 470, 4 New Rep. 180, 12 Wkly. Rep. 727, 69 Eng. Ch. 272, 46 Eng. Reprint 954; Hall *v.* Barrows, 4 De G. J. & S. 157, 10 Jur. N. S. 55, 33 L. J. Ch. 204, 9 L. T. Rep. N. S. 561, 3 New Rep. 259, 12 Wkly. Rep. 322, 69 Eng. Ch. 116, 46 Eng. Reprint 873; Edelsten *v.* Vick, 1 Eq. Rep. 413, 11 Hare 78, 18 Jur. 7, 23 Eng. L. & Eq. 51, 45 Eng. Ch. 78, 68 Eng. Reprint 1194; Hudson *v.* Osborne, 39 L. J. Ch. 79, 21 L. T. Rep. N. S. 386; Mottley *v.* Downmann, 6 L. J. Ch. 308, 3 Myl. & C. 1, 14 Eng. Ch. 1, 40 Eng. Reprint 824.

Canada.— Robin *v.* Hart, 23 Nova Scotia 316.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 42.

They cannot of course be sold in gross.[89] Bankruptcy, or a general assignment for creditors, will not operate to deprive the bankrupt or assignor of the right to use his own name in his own business, although it is the same business.[90] The assignee for the benefit of creditors of a corporation does not take the right to use the name of a stock-holder as a trade-mark or a trade-name, where the corporation had a mere revocable license.[91]

E. Attachment and Execution. A trade-mark cannot be seized and sold upon execution or attachment, apart from the business in which it has been used.[92]

F. Inheritance and Succession. Trade-marks do not descend to a man's legal representatives in gross, but only in connection with the business and its good-will.[93] They do descend, however, in connection with the descent and transfer of the business.[94]

G. Licenses. A naked license to use a trade-mark is of no more validity than a naked assignment thereof; both are void.[95] A license to use the trade-

The right to vend property assigned for the benefit of creditors passed to the assignee, although a trade-name thereon, which his assignor, a corporation, was entitled to use exclusively, did not, but the right is limited to the property in existence. Cutter *v.* Gudebrod Bros. Co., 44 N. Y. App. Div. 605, 61 N. Y. Suppl. 225 [*affirmed* in 168 N. Y. 512, 61 N. E. 887].

89. See *supra*, VII, A, 2, b.

90. Iowa Seed Co. *v.* Dorr, 70 Iowa 481, 30 N. W. 866, 59 Am. Rep. 446; Cutter *v.* Gudebrod Bros. Co., 44 N. Y. App. Div. 605, 61 N. Y. Suppl. 225 [*affirmed* in 168 N. Y. 512, 61 N. E. 887]; Bellows *v.* Bellows, 24 Misc. (N. Y.) 482, 53 N. Y. Suppl. 853; Helmbold *v.* Henry T. Helmbold Mfg. Co., 53 How. Pr. (N. Y.) 453; Cruttwell *v.* Lye, 17 Ves. Jr. 335, 11 Rev. Rep. 98, 34 Eng. Reprint 129.

91. Cutter *v.* Gudebrod Bros. Co., 44 N. Y. App. Div. 605, 61 N. Y. Suppl. 225 [*affirmed* in 168 N. Y. 512, 61 N. E. 887]; Cutter *v.* Gudebrod Bros. Co., 36 N. Y. App. Div. 362, 55 N. Y. Suppl. 298.

92. Milliken *v.* Dart, 26 Hun (N. Y.) 24; Prince Mfg. Co. *v.* Prince's Metallic Paint Co., 20 N. Y. Suppl. 462; Gegg *v.* Bassett, 3 Ont. L. Rep. 263. See Hegeman *v.* Hegeman, 8 Daly 1. In Taylor *v.* Bemis, 23 Fed. Cas. No. 13,779, 4 Biss. 406, the sale by execution creditors of a partner's interest in a firm-name or trade-mark was refused, on the ground that such interest was merely a right to a part of it, and that the right was too shadowy and intangible to be of any value apart from the partnership business. See also for the general rule *supra*, VII, A, 2, b.

93. Pratt's Appeal, 117 Pa. St. 401, 11 Atl. 878, 2 Am. St. Rep. 676; Filkins *v.* Blackman, 9 Fed. Cas. No. 4,786, 13 Blatchf. 440.

Will passing name of newspaper.— The name of a newspaper is in the nature of a trade-mark, and passes by assignment with the business in which it is used, but, apart from the business, it confers no right of ownership; and so, in a controversy to determine the owners of a newspaper plant according to the provisions of a will, plaintiffs can have no right in the name of the paper as an element of value, unless the material property itself is held to pass to them under the will. Seabrook *v.* Grimes, 107 Md. 410, 68 Atl. 883, 126 Am. St. Rep. 400, 16 L. R. A. N. S. 483.

Kin or descendants have no special rights in personal names which have acquired a trade reputation. See *supra*, V, C, 4. In Skinner *v.* Oakes, 10 Mo. App. 45, 53, Thompson, J., said: "A point is made in behalf of the defendant Annie Oakes, that before the plaintiffs acquired the alleged right to use the name of Oakes in the manufacture of candies, she, by marrying with Oakes, had acquired a right to use his name in the same connection, of which the plaintiffs cannot lawfully deprive her. There is nothing in this point except novelty. Peter Oakes could not confer upon Annie McLaughlin, by marrying her, any higher rights in the use of his own name than he himself had. A son cannot acquire from his father the right to use his father's name as a trade-mark, if the father had parted with the right by contract (Filkins *v.* Blackman, 9 Fed. Cas. No. 4,786, 13 Blatchf. 440), and we do not see how a wife could stand in a better position as to the name of her husband."

94. Hegeman *v.* Hegeman, 8 Daly (N. Y.) 1; Bingham School *v.* Gray, 122 N. C. 699, 30 S. E. 304, 41 L. R. A. 243. See Seabrook *v.* Grimes, 107 Md. 410, 68 Atl. 883, 126 Am. St. Rep. 400, 16 L. R. A. N. S. 483. In Huwer *v.* Dannenhoffer, 82 N. Y. 499, 502, Earl, J., said: "A trademark is a species of property which may be sold or transmitted by death with the business in which it has been used." Glen, etc., Mfg. Co. *v.* Hall, 61 N. Y. 226, 19 Am. Rep. 278; Leather Cloth Co. *v.* American Leather Cloth Co., 4 De G. J. & S. 137, 10 Jur. N. S. 81, 33 L. J. Ch. 199, 9 L. T. Rep. N. S. 558, 3 New Rep. 264, 12 Wkly. Rep. 289, 69 Eng. Ch. 106, 46 Eng. Reprint 523 [*affirmed* in 11 H. L. Cas. 523, 11 Jur. N. S. 513, 35 L. J. Ch. 53, 12 L. T. Rep. N. S. 742, 6 New Rep. 209, 13 Wkly. Rep. 873, 11 Eng. Reprint 1435].

95. Lea *v.* New Home Sewing Mach. Co., 139 Fed. 732. See *supra*, VII, A, 2, b. See, generally, Batcheller *v.* Thomson, 93 Fed. 660, 35 C. C. A. 532 [*reversing* 86 Fed. 630].

mark on different goods from those in connection with which it was acquired and used is void.[96] The sale of goods with trade-marks impressed thereon carries with it the right to use such trade-marks upon the particular goods sold,[97] but not on other goods, although made in part from the genuine goods.[98] A retailer who deals in genuine goods supplied by the manufacturer has merely a license to use the trade-mark or name during the continuance of such dealing.[99] A license to use a firm-name given to a purchaser of its property who has built up the business and created his own good-will under that name is irrevocable.[1]

H. Partnership Contracts. Trade-marks and names of an individual who enters a firm formed to carry on the business in which the names and marks are used become firm assets,[2] unless the contract or circumstances show that such partner intended to contribute merely a license to use them during his continuance in the firm.[3] The question depends upon the construction of the contract, and the principles of partnership in regard to individual and firm property.[4] Trade-marks used by a firm are *prima facie* firm assets.[5] An assignment to a copartner of all one partner's interest in the firm passes firm trade-marks, unless expressly reserved.[6] Where one partner retires from the firm, he abandons or transfers to the remaining partners his interest in firm trade-marks and names, subject to his right to use his own name in his own business.[7] Upon dissolution, and in the

96. Lea *v.* New Home Sewing Mach. Co., 139 Fed. 732.

Assignees are subject to the same rule. See *supra*, VII, A, 2, b.

97. Caswell *v.* Hazard, 121 N. Y. 484, 24 N. E. 707, 18 Am. St. Rep. 833 [*affirming* 50 Hun 230, 2 N. Y. Suppl. 783]. See also *supra*, IV, E.

A dealer in sewing machines, who has purchased old machines bearing the trade-mark of the manufacturer, will not be restrained from selling them with the same mark. Singer Mfg. Co. *v.* Bent, 41 Fed. 214. See Singer Mfg. Co. *v.* June Mfg. Co., 41 Fed. 208.

98. Charles E. Hires Co. *v.* Xepapas, 180 Fed. 952.

99. Joseph Laurer Brewing Co. *v.* Ehresman, 127 N. Y. App. Div. 486, 111 N. Y. Suppl. 266.

Where a license for the use of patents, coupled with a trade-mark, includes a keeping of accurate accounts and the rendering of statements at specified periods, the fulfilment of these terms becomes a condition precedent to the existence of the license, and on breach the license is terminable. Martha Washington Creamery Buttered Flour Co. *v.* Martien, 44 Fed. 473.

1. Harris *v.* Brown, 202 Pa. St. 16, 51 Atl. 586, 90 Am. St. Rep. 610.

Where a distiller sells his business and agrees that his name may be employed in connection therewith for a short period, the purchaser may, during such period, employ the name of the founder, but the license is terminable at the will of the founder. Mattingly *v.* Stone, (Ky. 1890) 14 S. W. 47.

2. Caswell *v.* Hazard, 121 N. Y. 484, 24 N. E. 707, 18 Am. St. Rep. 833 [*affirming* 50 Hun 230, 2 N. Y. Suppl. 783]; Filkins *v.* Blackman, 9 Fed. Cas. No. 4,786, 13 Blatchf. 440. In Bury *v.* Bedford, 4 De G. J. & S. 352, 374, 10 Jur. N. S. 503, 33 L. J. Ch. 465, 10 L. T. Rep. N. S. 470, 4 New Rep. 180, 12 Wkly. Rep. 727, 69 Eng. Ch. 272, 46 Eng. Reprint 954, Turner, L. J., said: "This part of the case . . . rests, as it seems to me, upon the simple question whether upon the formation of a partnership with a person entitled to the benefit of a trade-mark, the trade-mark does not, in the absence of express provision in relation to it, become an asset of the partnership; and in my judgment it does; for the whole trade is carried into the partnership, and the trade-mark is but an element of the trade." This case is followed on this point in Sohier *v.* Johnson, 111 Mass. 238.

3. Giles Remedy Co. *v.* Giles, 26 App. Cas. (D. C.) 375; Kidd *v.* Johnson, 100 U. S. 617, 25 L. ed. 769; Greacen *v.* Bell, 115 Fed. 553; Batcheller *v.* Thomson, 93 Fed. 660, 35 C. C. A. 532 [*reversing* 86 Fed. 630].

4. See PARTNERSHIP, 30 Cyc. 334.

5. Smith *v.* Walker, 57 Mich. 456, 22 N. W. 267, 24 N. W. 830, 26 N. W. 783; Caswell *v.* Hazard, 121 N. Y. 484, 24 N. E. 707, 18 Am. St. Rep. 833 [*affirming* 50 Hun 230, 2 N. Y. Suppl. 783]; Merry *v.* Hoopes, 111 N. Y. 415, 18 N. E. 714; Filkins *v.* Blackman, 9 Fed. Cas. No. 4,786, 13 Blatchf. 440; Taylor *v.* Bothin, 23 Fed. Cas. No. 13,780, 5 Sawy. 584, 8 Reporter 516.

6. Morgan *v.* Rogers, 19 Fed. 596; Blackwell *v.* Dibrell, 3 Fed. Cas. No. 1,475, 3 Hughes 151, 14 Off. Gaz. 633.

7. Iowa Seed Co. *v.* Dorr, 70 Iowa 481, 30 N. W. 866, 59 Am. Rep. 446; Ward *v.* Ward, 15 N. Y. Suppl. 913; Hazard *v.* Caswell, 57 How. Pr. (N. Y.) 1; Comstock *v.* White, 18 How. Pr. (N. Y.) 421; Gray *v.* Smith, 43 Ch. D. 208, 59 L. J. Ch. 145, 62 L. T. Rep. N. S. 335, 38 Wkly. Rep. 310 [*distinguishing* Levy *v.* Walker, 10 Ch. D. 436, 48 L. J. Ch. 273, 39 L. T. Rep. N. S. 654, 27 Wkly. Rep. 370]. But see Giles Remedy Co. *v.* Giles, 26 App. Cas. (D. C.) 375. See, generally, *supra*, V, C, 4; VII, C.

A junior partner retiring from a firm re-

absence of special contract, each partner has an equal right to use the firm-name and trade-marks, unless they are sold with the business; but if the firm-name embraces the individual name of a partner, it must be used, if at all, with suitable precautions against unfair competition.[8] Upon the death of a partner, firm trade-marks and names, like other assets, pass to the surviving partners for administration and winding up.[9] The purchaser of the business and good-will

tains no interest in a trade-mark used by the firm, and originated by its senior member, particularly when the weight of evidence indicates that he released all rights to the brand. Menendez *v.* Holt, 128 U. S. 514, 9 S. Ct. 143, 32 L. ed. 526 [*affirming* 23 Fed. 869].

A retiring partner has no right to the exclusive use of his own name, where that name has been used as part of the firm-name, and been made a valuable asset by the efforts and expenditures of the firm. Caswell *v.* Hazard, 121 N. Y. 484, 24 N. E. 707, 18 Am. St. Rep. 833.

The remaining partner is not entitled, upon dissolution, and under a contract which permits him to take over the shares of the retiring partners at a valuation, to use the names of the retiring partners. Dickson *v.* McMaster, 18 Ir. Jur. 202.

8. *Connecticut.*— Holmes *v.* Holmes, etc., Mfg. Co., 37 Conn. 278, 9 Am. Rep. 324.

District of Columbia.— Giles Remedy Co. *v.* Giles, 26 App. Cas. 375. But see Bluthenthal *v.* Bigbie, 30 App. Cas. 118.

Massachusetts.— See Viano *v.* Baccigalupo, 183 Mass. 160, 67 N. E. 641.

Michigan.— Smith *v.* Walker, 57 Mich. 456, 22 N. W. 267, 24 N. W. 830, 26 N. W. 783.

New York.— Chas. S. Higgins Co. *v.* Higgins Soap Co., 144 N. Y. 462, 39 N. E. 490, 43 Am. St. Rep. 769, 27 L. R. A. 42; Caswell *v.* Hazard, 121 N. Y. 484, 24 N. E. 707, 18 Am. St. Rep. 833 [*affirming* 50 Hun 230, 2 N. Y. Suppl. 783]; Merry *v.* Hoopes, 111 N. Y. 415, 18 N. E. 714; Hazard *v.* Caswell, 93 N. Y. 259, 45 Am. Rep. 198; Huwer *v.* Dannenhoffer, 82 N. Y. 499; Lepow *v.* Kottler, 115 N. Y. App. Div. 231, 100 N. Y. Suppl. 779; Slater *v.* Slater, 78 N. Y. App. Div. 449, 80 N. Y. Suppl. 363; Weston *v.* Ketcham, 39 N. Y. Super. Ct. 54. But see Baldwin *v.* Von Micheroux, 83 Hun 43, 31 N. Y. Suppl. 696 [*affirming* 5 Misc. 386, 25 N. Y. Suppl. 857].

Pennsylvania.— White *v.* Trowbridge, 216 Pa. St. 11, 64 Atl. 862.

United States.— Horton Mfg. Co. *v.* Horton Mfg. Co., 18 Fed. 816; Taylor *v.* Bothin, 23 Fed. Cas. No. 13,780, 5 Sawy. 584, 8 Reporter 516; Young *v.* Jones, 30 Fed. Cas. No. 18,159, 3 Hughes 274; Wright *v.* Simpson, 15 Off. Gaz. 968 [*reversing* 15 Off. Gaz. 248].

England.— Robinson *v.* Finlay, 9 Ch. D. 487, 39 L. T. Rep. N. S. 398, 27 Wkly. Rep. 294; Banks *v.* Gibson, 34 Beav. 566, 11 Jur. N. S. 680, 34 L. J. Ch. 591, 6 New Rep. 373, 13 Wkly. Rep. 1012, 55 Eng. Reprint 753; Condy *v.* Mitchell, 37 L. T. Rep. N. S. 766, 26 Wkly. Rep. 269; Scott *v.* Rowland, 26 L. T. Rep. N. S. 391, 29 Wkly. Rep. 508; Hoffman *v.* Duncan, Seton (4th ed.) 256. See Benbow *v.* Low, 44 L. T. Rep. N. S. 875, 29 Wkly. Rep. 837.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 41.

Upon the dissolution of a partnership, the trade-mark vests in both partners, and a party claiming under a grant from one only has not an exclusive right to such mark, and therefore, under the statute, cannot register it. Armistead *v.* Blackwell, 1 Off. Gaz. 603.

An injunction will lie at the suit of one partner against his former copartner, restraining the continuance of the use of the signs containing the old firm-name, without sufficient alterations or additions to give distinct notice of a change in the firm. Peterson *v.* Humphrey, 4 Abb. Pr. (N. Y.) 394.

9. Phelan *v.* Collender, 6 Hun (N. Y.) 244; Howe *v.* Searing, 6 Bosw. (N. Y.) 354, 10 Abb. Pr. 264, 19 How. Pr. 14; Dougherty *v.* Van Nostrand, Hoffm. (N. Y.) 68 [*disapproving* Hammond *v.* Douglas, 5 Ves. Jr. 539, 31 Eng. Reprint 726]; Young *v.* Jones, 30 Fed. Cas. No. 18,159, 3 Hughes 274; Wedderburn *v.* Wedderburn, 22 Beav. 84, 2 Jur. N. S. 674, 25 L. J. Ch. 710, 52 Eng. Reprint 1039; Macdonald *v.* Richardson, 1 Giffard 81, 5 Jur. N. S. 9, 65 Eng. Reprint 833; Hall *v.* Barrows, 9 Jur. N. S. 483, 32 L. J. Ch. 548, 8 L. T. Rep. N. S. 227, 1 New Rep. 543, 11 Wkly. Rep. 525 [*affirmed* in 4 De G. J. & S. 150, 10 Jur. N. S. 55, 33 L. J. Ch. 204, 9 L. T. Rep. N. S. 561, 3 New Rep. 259, 12 Wkly. Rep. 322, 69 Eng. Ch. 116, 46 Eng. Reprint 873]; Webster *v.* Webster, 3 Swanst. 490 note, 19 Rev. Rep. 258, 36 Eng. Reprint 949. See also Rogers *v.* Taintor, 97 Mass. 291; Bowman *v.* Floyd, 3 Allen (Mass.) 76, 80 Am. Dec. 55. Although the personal representatives of a deceased partner may have a right jointly with the survivor to the use of a trade-mark of the firm ("a trade-mark being in the nature of a personal chattel"), still the surviving partner alone has sufficient interest to entitle him to file a bill for injunction against an infringer. Hine *v.* Lart, 10 Jur. 106. In Robertson *v.* Quiddington, 28 Beav. 529, 54 Eng. Reprint 469, the court said: "The case of Lewis *v.* Langdon, 7 Sim. 421, 40 Rev. Rep. 166, 8 Eng. Ch. 421, 58 Eng. Reprint 899, also appears to me to establish very clearly that the firm's name (whatever its value may be) survives to the surviving partner." And in Lewis *v.* Langdon, 7 Sim. 421, 40 Rev. Rep. 166, 8 Eng. Ch. 421, 58 Eng. Reprint 899, Vice-Chancellor Shadwell said: "I cannot but think, when two partners carry on a business in partnership together under a given name, that, during the partnership, it is the joint right of them both to carry on the business under

of a firm acquires the exclusive right to continue the use of the firm-name and trade-marks as against former partners, but not unless the good-will is included.[10]

VIII. LOSS OR TERMINATION OF RIGHT.

A. In General. Unless affirmatively terminated in some manner, the right to protection in the use of a common-law trade-mark may continue indefinitely.[11] A certificate of registration, under the statute, continues in force for twenty years and then expires, unless renewed. But it may be renewed from time to time for like periods.[12] A custom to disregard trade-marks generally cannot be shown to destroy a valid trade-mark.[13]

B. Unclean Hands. Plaintiff's own fraud or wrong-doing may deprive him of the right to a remedy for infringement of his trade-mark,[14] or for any other form of unfair competition in business.[15]

C. Abandonment and Non-User. The title to a trade-mark or trade-name acquired by adoption and user may be lost by an abandonment of such use.[16] Abandonment is a question of fact, depending upon intent.[17] It may be

that name, and that, upon the death of one of them, the right which they before had jointly, becomes the separate right of the survivor."

10. *Michigan.*— Myers *v.* Kalamazoo Buggy Co., 54 Mich. 215, 19 N. W. 961, 20 N. W. 545, 52 Am. Rep. 811.

New Jersey.— Smith *v.* Brand, 67 N. J. Eq 529, 58 Atl. 1029.

Ohio.— Snyder Mfg. Co. *v.* Snyder, 54 Ohio St. 80, 43 N. E. 325, 31 L. R. A. 657; Brass, etc., Works Co. *v.* Payne, 50 Ohio St. 115, 33 N. E. 88, 19 L. R. A. 82. See McGowan Brothers Pump, etc., Co. *v.* McGowan, 2 Cinc. Super. Ct. 313.

United States.— Batcheller *v.* Thomson, 86 Fed. 630 [*reversed* on other grounds in 93 Fed. 660, 35 C. C. A. 532]; Morgan *v.* Rogers, 19 Fed. 596; Blackwell *v.* Dibrell, 3 Fed. Cas. No. 1,475, 3 Hughes 151, 14 Off. Gaz. 633. In Jennings *v.* Johnson, 37 Fed. 364, it was held that plaintiff, who had been a member of the firm which had prepared the article, and who had purchased the business, had a right to state on his labels that the article was prepared by the old firm.

England.— Levy *v.* Walker, 10 Ch. D. 436, 48 L. J. Ch. 273, 39 L. T. Rep. N. S. 654, 27 Wkly. Rep. 370; Witt *v.* Corcoran, 2 Ch. D. 69, 45 L. J. Ch. 603, 34 L. T. Rep. N. S. 550, 24 Wkly. Rep. 501; Churton *v.* Douglas, Johns. 174, 5 Jur. N. S. 887, 28 L. J. Ch. 841, 7 Wkly. Rep. 365, 70 Eng. Reprint 385; Scott *v.* Rowland, 26 L. T. Rep. N. S. 391, 20 Wkly. Rep. 508; Bond *v.* Milbourn, 20 Wkly. Rep. 197. See also Gray *v.* Smith, 43 Ch. D. 208, 59 L. J. Ch. 145, 62 L. T. Rep. N. S. 335, 38 Wkly. Rep. 310.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 41.

11. See *supra*, I, E, 5.

12. Act of Feb. 20, 1905, § 12.

"**In the case of trade-marks previously registered in a foreign country** such certificates shall cease to be in force on the day on which the trade-mark ceases to be protected in such foreign country, and shall in no case remain in force more than twenty years, unless renewed." Act of Feb. 20, 1905, § 12.

13. American Tobacco Co. *v.* Polacsek, 170 Fed. 117.

14. See *supra*, III, A, 5.

An assignee forfeits his right to protection by transferring the assigned mark to, and using it upon, a different article of the same species. Independent Baking Powder Co. *v.* Boorman, 175 Fed. 448; Filkins *v.* Blackman, 9 Fed. Cas. No. 4,786, 13 Blatchf. 440.

Disregard of territorial limits and misuse of the trade-mark by a licensee work a forfeiture of his rights. Manhattan Medicine Co. *v.* Wood, 16 Fed. Cas. No. 9,026, 4 Cliff. 461, 14 Off. Gaz. 519 [*affirmed* in 108 U. S. 218, 2 S. Ct. 436, 27 L. ed. 706].

15. See *supra*, V, B, 11.

16. Caswell *v.* Davis, 58 N. Y. 223, 17 Am. Rep. 233; Perkins *v.* Heert, 5 N. Y. App. Div. 335, 39 N. Y. Suppl. 223 [*affirmed* in 158 N. Y. 306, 53 N. E. 18, 70 Am. St. Rep. 483, 43 L. R. A. 858]; Hegeman *v.* Hegeman, 8 Daly (N. Y.) 1; Menendez *v.* Holt, 128 U. S. 514, 9 S. Ct. 143, 32 L. ed. 526; Brower *v.* Boulton, 53 Fed. 389; Symonds *v.* Greene, 28 Fed. 834; O'Rourke *v.* Central City Soap Co., 26 Fed. 576; Atlantic Milling Co. *v.* Robinson, 20 Fed. 217; Blackwell *v.* Dibrell, 3 Fed. Cas. No. 1,475, 3 Hughes 151, 14 Off. Gaz. 633.

17. *California.*— Nolan Bros. Shoe Co. *v.* Nolan, 131 Cal. 271, 63 Pac. 480, 82 Am. St. Rep. 346, 53 L. R. A. 384; Judson *v.* Malloy, 40 Cal. 299.

Connecticut.— Moore *v.* Stevenson, 27 Conn. 14.

Indiana.— Julian *v.* Hoosier Drill Co., 78 Ind. 408.

Maine.— Livermore *v.* White, 74 Me. 452, 43 Am. Rep. 600.

Massachusetts.— Burt *v.* Tucker, 178 Mass. 493, 59 N. E. 1111, 86 Am. St. Rep. 499, 52 L. R. A. 112.

Missouri.— Hickman *v.* Link, 116 Mo. 123, 22 S. W. 472.

New York.— Hegeman *v.* Hegeman, 8 Daly 1; Dr. Dadirrian, etc., Co. *v.* Hauenstein, 37 Misc. 23, 74 N. Y. Suppl. 709 [*affirmed* in 74 N. Y. App. Div. 630, 77 N. Y. Suppl. 1125

inferred from circumstances necessarily pointing to an intent to abandon.[18] An actual intention to permanently give up the use of a trade-mark is necessary to constitute abandonment of it. Mere disuse, although for a considerable period, is not necessarily an abandonment.[19] But a long-continued disuse may be sufficient to show an abandonment.[20] Discontinuance of use, coupled with circumstances showing an intent to give it up permanently, constitute abandonment.[21] In the absence of intentional abandonment, mere disuse will not destroy trade-mark rights, unless the mark has ceased to be distinctive, and the good-will associated with it has passed away,[22] or the mark has become identified with other goods.[23] Abandonment may be inferred by the trier of the fact from a long-continued acquiescence in infringement.[24] But abandonment is not shown, even

(*affirmed* in 175 N. Y. 522, 67 N. E. 1081)]. See Colman *v.* Crump, 70 N. Y. 573.

Pennsylvania.— See Pratt's Appeal, 117 Pa. St. 401, 11 Atl. 878, 2 Am. St. Rep. 676; Sheppard *v.* Stuart, 13 Phila. 117.

Texas.— Caffarelli *v.* Western Grocer Co., 102 Tex. 104, 127 S. W. 1018 [*reversing* (Civ. App. 1908) 108 S. W. 413].

United States.— Saxlehner *v.* Eisner, etc., Co., 179 U. S. 19, 21 S. Ct. 7, 45 L. ed. 60, 93 Off. Gaz. 940 [*reversing* 91 Fed. 536, 33 C. C. A. 291]; Singer Mfg. Co. *v.* June Mfg. Co., 163 U. S. 169, 16 S. Ct. 1002, 41 L. ed. 118; Actiengesellschaft, etc. *v.* Amberg, 109 Fed. 151, 48 C. C. A. 264; Blackwell *v.* Dibrell, 3 Fed. Cas. No. 1,475, 3 Hughes 151, 14 Off. Gaz. 633; Williams *v.* Adams, 29 Fed. Cas. No. 17,711, 8 Biss. 452, 7 Reporter 613. See Brower *v.* Boulton, 53 Fed. 389; Collins Co. *v.* Oliver Ames, etc., Corp., 18 Fed. 561, 20 Blatchf. 542; Burton *v.* Stratton, 12 Fed. 696; Taylor *v.* Carpenter, 23 Fed. Cas. No. 13,784, 3 Story 458.

England.— Mouson *v.* Boehm, 26 Ch. D. 398, 53 L. J. Ch. 932, 50 L. T. Rep. N. S. 784, 32 Wkly. Rep. 612.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 36.

18. Burke *v.* Bishop, 175 Fed. 167.

Registration of a trade-mark is an abandonment of the features not included in the registry. Pittsburgh Crushed-Steel Co. *v.* Diamond Steel Co., 85 Fed. 637.

Dismissal of prior suit.—In Browne *v.* Freeman, 4 New Rep. 476, 12 Wkly. Rep. 305, plaintiff, who was the inventor of a medicine which he called "chlorodyne," moved for an injunction to prevent defendant from using the same word on a preparation of his own make; plaintiff having previously dismissed a bill, with costs, which he had filed against defendant for the same purpose. The court said that such dismissal of the previous bill was an abandonment of the exclusive right to the trade-mark.

19. *District of Columbia.*— *In re* Nash Hardware Co., 33 App. Cas. 221; Hannis Distilling Co. *v.* George W. Torrey Co., 32 App. Cas. 530.

Indiana.— Julian *v.* Hoosier Drill Co., 78 Ind. 408.

Massachusetts.— Burt *v.* Tucker, 178 Mass. 493, 59 N. E. 1111, 86 Am. St. Rep. 499, 52 L. R. A. 112, disuse for four years.

New York.— Lemoine *v.* Gauton, 2 E. D. Smith 343, non-user for three years.

Wisconsin.— Tomah Bank *v.* Warren, 94 Wis. 151, 68 N. W. 549, eight months while in hands of assignee.

United States.— Saxlehner *v.* Eisner, etc., Co., 179 U. S. 19, 21 S. Ct. 7, 45 L. ed. 60, 93 Off. Gaz. 940 [*reversing* 91 Fed. 536, 33 C. C. A. 291]; Burke *v.* Bishop, 175 Fed. 167.

England.— Mouson *v.* Boehm, 26 Ch. D. 398, 53 L. J. Ch. 932, 50 L. T. Rep. N. S. 784, 32 Wkly. Rep. 612.

Canada.— Gillett *v.* Lumsden, 4 Ont. L. Rep. 300, 1 Ont. Wkly. Rep. 488.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 36.

"**To establish the defence of abandonment** it is necessary to show not only acts indicating a practical abandonment, but an actual intent to abandon. Acts which unexplained would be sufficient to establish an abandonment may be answered by showing that there never was an intention to give up and relinquish the right claimed. Judson *v.* Malloy, 40 Cal. 299; Moore *v.* Stevenson, 27 Conn. 14; Livermore *v.* White, 74 Me. 452, 43 Am. Rep. 600; Hickman *v.* Link, 116 Mo. 123, 22 S. W. 472; Singer Mfg. Co. *v.* June Mfg. Co., 163 U. S. 169, 16 S. Ct. 1002, 41 L. ed. 118. And in a recent English case this doctrine has been applied to a case of trade-marks. Mouson *v.* Boehm, 26 Ch. D. 398, 53 L. J. Ch. 932, 50 L. T. Rep. N. S. 784, 32 Wkly. Rep. 612." Saxlehner *v.* Eisner, etc., Co., 179 U. S. 19, 31, 21 S. Ct. 7, 45 L. ed. 60, 93 Off. Gaz. 940.

20. Royal Baking Powder Co. *v.* Raymond, 70 Fed. 376; Blackwell *v.* Dibrell, 3 Fed. Cas. No. 1,475, 3 Hughes 151, 14 Off. Gaz. 633.

21. Eiseman *v.* Schiffer, 157 Fed. 473.

Thus where the proprietor of a registered trade-mark made an assignment of the same, which was invalid to convey any rights to the assignee, but itself discontinued the use of such mark, such discontinuance operated as an abandonment, and neither assignor nor assignee can maintain a suit for infringement because of the use of the trade-mark by another after such abandonment. Eiseman *v.* Schiffer, 157 Fed. 473.

22. Burt *v.* Tucker, 178 Mass. 493, 59 N. E. 1111, 86 Am. St. Rep. 499, 52 L. R. A. 112.

23. Tygert-Allen Fertilizer Co. *v.* J. E. Tygert Co., 191 Pa. St. 336, 43 Atl. 224; Blackwell *v.* Dibrell, 3 Fed. Cas. No. 1,475, 3 Hughes 151, 14 Off. Gaz. 633.

24. Taylor *v.* Carpenter, 23 Fed. Cas. No. 13,785, 2 Woodb. & M. 1.

by numerous infringements, in the absence of the owner's acquiescence.[25] Permitting a limited use by others is not an abandonment.[26] Use by licensees works no abandonment.[27] Adoption of a new mark may amount to an abandonment of the old one, but not necessarily.[28] Adoption of a new distinguishing word or mark, and the subsequent use of it in connection with the old word or mark, does not show abandonment of the latter.[29] The abandonment and discontinuance of a business and the dissipation of its good-will operates as an abandonment of the trade-marks used therein.[30] The burden of proving abandonment is upon the party alleging it. It is not favored, and must be strictly proved.[31]

D. Laches, Acquiescence, and Delay. In suits for unfair competition or infringement it is well settled that mere laches in the sense of delay to bring suit does not constitute a defense. Such laches may, under some circumstances, bar an accounting for past profits, but under no circumstances will it bar an injunction against a further continuance of the wrong.[32] Laches or delay must be accom-

25. International Cheese Co. *v.* Phenix Cheese Co., 118 N. Y. App. Div. 499, 103 N. Y. Suppl. 362; Burke *v.* Bishop, 175 Fed. 167; Williams *v.* Adams, 29 Fed. Cas. No. 17,711, 8 Biss. 452, 7 Reporter 613.

26. Atlas Assur. Co. *v.* Atlas Ins. Co., 138 Iowa 228, 112 N. W. 232, 114 N. W. 609, 128 Am. St. Rep. 189, 15 L. R. A. N. S. 625.

27. Nelson *v.* Winchell, 203 Mass. 75, 89 N. E. 180, 23 L. R. A. N. S. 1150 (temporary disuse by owner during period of license); Sheppard *v.* Stuart, 13 Phila. (Pa.) 117 (holding that a license to another to use a trade-mark is not an abandonment and not even evidence of abandonment); New York Herald Co. *v.* Star Co., 146 Fed. 1023, 76 C. C. A. 678 [*affirming* 146 Fed. 204].

28. See Dr. Dadirrian, etc., Co. *v.* Hauenstein, 37 Misc. (N. Y.) 23, 74 N. Y. Suppl. 709 [*affirmed* in 74 N. Y. App. Div. 630, 77 N. Y. Suppl. 1125 (*affirmed* in 175 N. Y. 522, 67 N. E. 1081)]; Saxlehner *v.* Eisner, etc., Co., 88 Fed. 61; Montreal Lith. Co. *v.* Sabiston, [1899] A. C. 610, 68 L. J. P. C. 121, 81 L. T. Rep. N. S. 135; Lea *v.* Millar, Seton (4th ed.) 242. See also Nolan Bros. Shoe Co. *v.* Nolan, 131 Cal. 271, 63 Pac. 480, 82 Am. St. Rep. 346, 53 L. R. A. 384.

The adoption of a new label only slightly different from the former one will be regarded as an amendment rather than an abandonment of the old label. Perkins *v.* Heert, 5 N. Y. App. Div. 335, 39 N. Y. Suppl. 223 [*affirmed* in 158 N. Y. 306, 53 N. E. 18, 70 Am. St. Rep. 483, 43 L. R. A. 858].

The voluntary relinquishment of an old mark for a new device is an abandonment of the right to the old mark. Manhattan Medicine Co. *v.* Wood, 16 Fed. Cas. No. 9,026, 4 Cliff. 461, 14 Off. Gaz. 519 [*affirmed* in 108 U. S. 218, 2 S. Ct. 436, 27 L. ed. 706].

29. Dr. Dadirrian, etc., Co. *v.* Hauenstein, 37 Misc. (N. Y.) 23, 74 N. Y. Suppl. 709; Avenarius *v.* Kornely, 139 Wis. 247, 121 N. W. 336.

30. Deitsch *v.* George R. Gibson Co., 155 Fed. 383; Royal Baking Powder Co. *v.* Raymond, 70 Fed. 376; Atlantic Milling Co. *v.* Robinson, 20 Fed. 217.

31. Julian *v.* Hoosier Drill Co., 78 Ind. 408, holding abandonment to be in the nature of a forfeiture.

32. *California.*— Nolan Bros. Shoe Co. *v.* Nolan, 131 Cal. 271, 63 Pac. 480, 82 Am. St. Rep. 346, 53 L. R. A. 384.

Florida.— El Modello Cigar Mfg. Co. *v.* Gato, 25 Fla. 886, 7 So. 23, 23 Am. St. Rep. 537, 6 L. R. A. 823.

Indiana.— Julian *v.* Hoosier Drill Co., 78 Ind. 408.

Kentucky.— Northcutt *v.* Turney, 101 Ky. 314, 41 S. W. 21, 19 Ky. L. Rep. 483. But see Old Times Distillery Co. *v.* Casey, 104 Ky. 616, 47 S. W. 610, 20 Ky. L. Rep. 994, 84 Am. St. Rep. 480, 42 L. R. A. 466.

Louisiana.— Wolfe *v.* Barnett, 24 La. Ann. 97, 13 Am. Rep. 111.

Massachusetts.— Tracy *v.* Banker, 170 Mass. 266, 49 N. E. 308, 39 L. R. A. 508.

Minnesota.— Sheffield-King Milling Co. *v.* Sheffield Mill, etc., Co., 105 Minn. 315, 117 N. W. 447, 127 Am. St. Rep. 574.

Missouri.— Gaines *v.* E. Whyte Grocery, etc., Co., 107 Mo. App. 507, 81 S. W. 648; Sanders *v.* Jacob, 20 Mo. App. 96.

New Jersey.— International Silver Co. *v.* Wm. H. Rogers Corp., 66 N. J. Eq. 140, 57 Atl. 725.

New York.— Stetson *v.* Brennan, 21 N. Y. App. Div. 552, 48 N. Y. Suppl. 601; Gillott *v.* Esterbrook, 47 Barb. 455 [*affirmed* in 48 N. Y. 374, 8 Am. Rep. 553]; Amoskeag Mfg. Co. *v.* Spear, 2 Sandf. 599; Cahn *v.* Gottschalk, 14 Daly 542, 2 N. Y. Suppl. 13; Munro *v.* Tousey, 13 N. Y. Suppl. 79; Amoskeag Mfg. Co. *v.* Garner, 54 How. Pr. 297 [*reversed* on other grounds in 55 Barb. 151, 6 Abb. Pr. N. S. 265]; McCardel *v.* Peck, 28 How. Pr. 120.

North Carolina.— Blackwell's Durham Tobacco Co. *v.* McElwee, 100 N. C. 150, 5 S. E. 907.

Pennsylvania.— Sheppard *v.* Stuart, 13 Phila. 117. But see Tygert-Allen Fertilizer Co. *v.* J. E. Tygert Co., 191 Pa. St. 336, 43 Atl. 224.

United States.— La Republique Francaise *v.* Saratoga Vichy Spring Co., 191 U. S. 427, 24 S. Ct. 145, 48 L. ed. 247; Saxlehner *v.* Nielsen, 179 U. S. 43, 21 S. Ct. 16, 45 L. ed. 77, 93 Off. Gaz. 948 [*reversing* 91 Fed. 1004, 34 C. C. A. 690]; Saxlehner *v.* Eisner, etc., Co., 179 U. S. 19, 21 S. Ct. 7, 45 L. ed. 60, 93 Off. Gaz. 940 [*reversing* 91 Fed. 536, 33

panied by circumstances amounting to an abandonment or an estoppel before it constitutes any defense.[33] Mere delay and silence, although with knowledge of

C. C. A. 291]; McIntire *v.* Pryor, 173 U. S. 38, 19 S. Ct. 352, 43 L. ed. 606; Menendez *v.* Holt, 128 U. S. 514, 9 S. Ct. 143, 32 L. ed. 526; McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828; Prevost *v.* Gratz, 6 Wheat. 481, 5 L. ed. 311; Burke *v.* Bishop, 175 Fed. 167; Worcester Brewing Corp. *v.* Rueter, 157 Fed. 217, 84 C. C. A. 665; Havana Commercial Co. *v.* Nichols, 155 Fed. 302; Dr. Peter H. Fahrney, etc., Co. *v.* Ruminer, 153 Fed. 735, 82 C. C. A. 621 ("inexcusable laches" no defense); Bissell Chilled Plow Works *v.* T. M. Bissell Plow Co., 121 Fed. 357; Rahtjen's American Composition Co. *v.* Holzappel's Composition Co., 101 Fed. 257, 41 C. C. A. 329 [*reversed* on other grounds in 183 U. S. 1, 22 S. Ct. 6, 46 L. ed. 49]; Low *v.* Fels, 35 Fed. 361; Consolidated Fruit-Jar Co. *v.* Thomas, 6 Fed. Cas. No. 3,131, 2 N. J. L. J. 272; Taylor *v.* Carpenter, 23 Fed. Cas. No. 13,785, 2 Woodb. & M. 1, 23 Fed. Cas. No. 13,784, 3 Story 458; Williams *v.* Adams, 29 Fed. Cas. No. 17,711, 8 Biss. 452, 7 Reporter 613. See La Republique Francaise *v.* Schultz, 102 Fed. 153, 42 C. C. A. 233; Rodgers *v.* Philp, 1 Off. Gaz. 29. But see Prince's Metallic Paint Co. *v.* Prince Mfg. Co., 57 Fed. 938, 6 C. C. A. 647.

England.— Fullwood *v.* Fullwood, 9 Ch. D. 176, 47 L. J. Ch. 459, 38 L. T. Rep. N. S. 380, 26 Wkly. Rep. 435; Rodgers *v.* Rodgers, 31 L. T. Rep. N. S. 285, 22 Wkly. Rep. 887, holding that clearer proof may be required after long delay.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 95.

Rule established by supreme court.— In Menendez *v.* Holt, 128 U. S. 514, 523, 9 S. Ct. 143, 32 L. ed. 526, an injunction was granted, although defendant had infringed for thirteen years without objection by the complainant. The court said: "The intentional use of another's trade-mark is a fraud; and when the excuse is that the owner permitted such use, that excuse is disposed of by affirmative action to put a stop to it. . . . The wrong is a continuing one, demanding restraint. . . . Mere delay or acquiescence cannot defeat the remedy by injunction in support of the legal right, unless it has been continued so long and under such circumstances as to defeat the right itself. . . . Acquiescence to avail must be such as to create a new right in the defendant. Rodgers *v.* Nowill, 3 De G. M. & G. 614, 17 Jur. 171, 22 L. J. Ch. 404, 1 Wkly. Rep. 205, 216, 52 Eng. Ch. 478, 43 Eng. Reprint 241. Where consent by the owner to the use of his trademark by another is to be inferred from his knowledge and silence merely, 'it lasts no longer than the silence from which it springs; it is, in reality, no more than a revocable license.' Per Duer, J., in Amoskeag Mfg. Co. *v.* Spear, 2 Sandf. (N. Y.) 599; Julian *v.* Hoosier Drill Co., 78 Ind. 408; Taylor *v.* Carpenter, 23 Fed. Cas. Nos. 13,784, 13,785, 3 Story 458, 2 Woodb. & M. 1. So far as the act complained of is completed, acquiescence may defeat the remedy on the principle applicable when action is taken on the strength of encouragement to do it, but so far as the act is in progress and lies in the future, the right to the intervention of equity is not generally lost by previous delay, in respect to which the elements of an estoppel could rarely arise. At the same time, as it is in the exercise of discretionary jurisdiction that the doctrine of reasonable diligence is applied, and those who seek equity must do it, a court might hesitate as to the measure of relief, where the use, by others, for a long period, under assumed permission of the owner, had largely enhanced the reputation of a particular brand." In McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828, which was a suit to enjoin infringement of a trade-mark it appeared that defendant had used the infringing labels for over twenty years, during which period the complainant and his predecessors knew of such use and made no objection. It was nevertheless held that this was no ground for denying an injunction against future infringement.

"In cases of actual fraud, as we have repeatedly held . . . the principle of laches has but an imperfect application, and delay even greater than that permitted by the statute of limitations is not fatal to plaintiff's claim." Saxlehner *v.* Eisner, etc., Co., 179 U. S. 19, 39, 21 S. Ct. 7, 45 L. ed. 60, applying the rule to a case of unfair competition. See also Gaines *v.* E. Whyte Grocery, etc., Co., 107 Mo. App. 507, 526, 81 S. W. 648 ("where actual fraud is shown the court will look with much indulgence upon the circumstances tending to excuse the plaintiff from a prompt assertion of his rights"); Sanders *v.* Jacob, 20 Mo. App. 96; La Republique Francaise *v.* Schultz, 94 Fed. 500 [*affirmed* in 102 Fed. 153, 42 C. C. A. 233]; Rodgers *v.* Rodgers, 31 L. T. Rep. N. S. 285, 22 Wkly. Rep. 887.

33. Michigan Condensed Milk Co. *v.* Kenneweg Co., 30 App. Cas. (D. C.) 491; Saxlehner, *v.* Eisner, etc., Co., 179 U. S. 19, 21 S. Ct. 7, 45 L. ed. 60; Actiengesellschaft, etc. *v.* Amberg, 109 Fed. 151, 48 C. C. A. 264; Rahtjen's American Composition Co. *v.* Holzappel's Composition Co., 101 Fed. 257, 41 C. C. A. 329 [*reversed* on other grounds in 183 U. S. 1, 22 S. Ct. 6, 46 L. ed. 49].

"There must be such neglect on the part of the complainant as shows an intention to abandon his trade-mark before he can be estopped to have injunctive process." Gaines *v.* E. Whyte Grocery, etc., Co., 107 Mo. App. 507, 527, 81 S. W. 648 [*citing* Williams *v.* Adams, 29 Fed. Cas. No. 17,711, 8 Biss. 452, 7 Reporter 613; Prince Metallic Paint Co. *v.* Prince Mfg. Co., 57 Fed. 938, 6 C. C. A. 647; G. G. White Co. *v.* Miller, 50 Fed. 277, and *quoting* with approval Menendez *v.* Holt, 128 U. S. 514, 9 S. Ct. 143, 32 L. ed. 526, as "the best expression of the rule"]. The use of

infringement, does not amount to consent and is no bar to relief against a continuance of the infringement.[34] Delay is no bar to even a preliminary injunction where the legal right is clear,[35] although ordinarily mere laches or delay is sufficient to justify a denial of a preliminary injunction.[36] Laches, acquiescence, or delay, under circumstances showing an abandonment,[37] or otherwise rendering it inequitable to grant an injunction or other relief,[38] constitutes a valid defense. This rule seems to be applied with somewhat greater strictness in England than in this country.[39] The true rule to be deduced from all the decisions is that laches,

one's trade-mark by another is a continuing wrong, and the right to prevent its continuance can rarely be lost by mere delay of assertion. There must be some element of estoppel. Michigan Condensed Milk Co. *v.* Kenneweg Co., 30 App. Cas. (D. C.) 491.

34. Michigan Condensed Milk Co. *v.* Kenneweg Co., 30 App. Cas. (D. C.) 491.

35. Consolidated Fruit-Jar Co. *v.* Thomas, 6 Fed. Cas. No. 3,131, 2 N. J. L. J. 272, although sufficient to preclude accounting for profits.

36. Stirling Silk Mfg. Co. *v.* Sterling Silk Co., 59 N. J. Eq. 394, 398, 46 Atl. 199 ("in view of its interference with trade the rule against delays is specially strict"); John H. Woodbury Dermatological Inst. *v.* Woodbury, 120 N. Y. Suppl. 638; Havana Commercial Co. *v.* Nichols, 155 Fed. 302; Burke *v.* Bishop, 144 Fed. 838, 75 C. C. A. 666; Von Mumm *v.* Steinmetz, 137 Fed. 158; H. Mueller Mfg. Co. *v.* A. Y. McDonaly, etc., Mfg. Co., 132 Fed. 585; Estes *v.* Worthington, 22 Fed. 822, 23 Blatchf. 65; Isaacson *v.* Thompson, 41 L. J. Ch. 101, 20 Wkly. Rep. 196. See Bovill *v.* Crate, L. R. 1 Eq. 388.

37. See *supra*, VIII, C.

38. *Louisiana.*— New Orleans Coffee Co. *v.* American Coffee Co., 124 La. 19, 49 So. 730.

New York.— Stetson *v.* Brennan, 21 N. Y. App. Div. 552, 48 N. Y. Suppl. 601; Salvation Army in United States *v.* American Salvation Army, 62 Misc. 360, 114 N. Y. Suppl. 1039 [*reversed* on the facts in 135 N. Y. App. Div. 268, 120 N. Y. Suppl. 471]; Colonial Dames of America *v.* Colonial Dames of State of New York, 29 Misc. 10, 60 N. Y. Suppl. 302 [*affirmed* in 63 N. Y. App. Div. 615, 71 N. Y. Suppl. 1145 (*affirmed* in 173 N. Y. 586, 65 N. E. 1115)].

North Carolina.— Blackwell's Durham Tobacco Co. *v.* McElwee, 100 N. C. 150, 5 S. E. 907.

Pennsylvania.— Tygert-Allen Fertilizer Co. *v.* J. F. Tygert Co., 191 Pa. St. 336, 43 Atl. 224.

United States.— La Republique Francaise *v.* Saratoga Vichy Spring Co., 191 U. S. 427, 24 S. Ct. 145, 48 L. ed. 247; Saxlehner *v.* Nielsen, 179 U. S. 43, 21 S. Ct. 16, 45 L. ed. 77, 93 Off. Gaz. 948 [*reversing* 91 Fed. 1004, 34 C. C. A. 690]; Saxlehner *v.* Eisner, etc., Co., 179 U. S. 19, 21 S. Ct. 7, 45 L. ed. 60, 93 Off. Gaz. 940 [*reversing* 91 Fed. 536, 33 C. C. A. 291]; Burke *v.* Bishop, 175 Fed. 167; Saxlehner *v.* Wagner, 157 Fed. 745, 85 C. C. A. 321 [*affirmed* in 216 U. S. 375, 30 S. Ct. 298]; Virginia Hot Springs Co. *v.* Hegeman, 144 Fed. 1023, 73 C. C. A. 612 [*affirming* 138 Fed. 855]; Anonymous, 1 Fed. Cas. No. 451; Delaware, etc., Canal Co. *v.* Clark, 7 Fed. Cas. No. 3,764, 7 Blatchf. 112 [*affirmed* in 13 Wall. 311, 20 L. ed. 581].

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," §§ 95, 96.

But see Giles Remedy Co. *v.* Giles, 26 App. Cas. (D. C.) 375.

The court may retain the bill for a time to permit of a suit at law. Anonymous, 1 Fed. Cas. No. 451.

Plaintiff may be estopped by his own conduct from asking relief, where to grant it would be inequitable. Northcutt *v.* Turney, 101 Ky. 314, 41 S. W. 21, 19 Ky. L. Rep. 483; Schrier *v.* Friedberg, 9 Pa. Dist. 435; Clark Thread Co. *v.* Armitage, 74 Fed. 936, 21 C. C. A. 178 [*affirming* 67 Fed. 896]; Prince's Metallic Paint Co. *v.* Prince Mfg. Co., 57 Fed. 938, 6 C. C. A. 647; Le Page Co. *v.* Russia Cement Co., 51 Fed. 941, 2 C. C. A. 555, 17 L. R. A. 354. See Sheppard *v.* Stuart, 13 Phila. (Pa.) 117.

39. Estcourt *v.* Estcourt Hop Essence Co., L. R. 10 Ch. 276, 44 L. J. Ch. 223, 32 L. T. Rep. N. S. 80, 23 Wkly. Rep. 313; Lee *v.* Haley, L. R. 5 Ch. 155, 39 L. J. Ch. 284, 22 L. T. Rep. N. S. 251, 18 Wkly. Rep. 242 (holding that reasonable delay to secure proof of injury is not laches); Powell *v.* Birmingham Vinegar Brewery Co., [1896] 2 Ch. 54, 65 L. J. Ch. 563, 74 L. T. Rep. N. S. 509, 44 Wkly. Rep. 688 [*affirmed* in [1897] A. C. 710, 66 L. J. Ch. 763, 76 L. T. Rep. N. S. 792]; Chappell *v.* Sheard, 1 Jur. N. S. 996, 2 Kay & J. 117, 3 Wkly. Rep. 646, 69 Eng. Reprint 717; Lazenby *v.* White, 41 L. J. Ch. 354 note; Rodgers *v.* Rodgers, 31 L. T. Rep. N. S. 285, 22 Wkly. Rep. 887; Beard *v.* Turner, 13 L. T. Rep. N. S. 746 (two years' delay). See also Flavel *v.* Harrison, 10 Hare 467, 17 Jur. 368, 22 L. J. Ch. 866, 1 Wkly. Rep. 213, 19 Eng. L. & Eq. 15, 44 Eng. Ch. 452, 68 Eng. Reprint 1010; Farina *v.* Gebhardt, Sebastian's Dig. 118. But see Ford *v.* Foster, L. R. 7 Ch. 611, 41 L. J. Ch. 682, 27 L. T. Rep. N. S. 219, 20 Wkly. Rep. 818; Fullwood *v.* Fullwood, 9 Ch. D. 176, 47 L. J. Ch. 459, 38 L. T. Rep. N. S. 380, 26 Wkly. Rep. 435; Harrison *v.* Taylor, 11 Jur. N. S. 408, 12 L. T. Rep. N. S. 339, holding that mere delay would not bar relief. In *In re* Heaton, 27 Ch. D. 570, 576, 53 L. J. Ch. 959, 51 L. T. Rep. N. S. 220, 32 Wkly. Rep. 951, Kay, J., said: "Where persons come and object, in whatever form, to the use of a trade-mark which has been used for a great number of years, it does not follow, as a

acquiescence, or delay is no defense to an injunction in this class of cases, unless it has been so long continued, and is accompanied with such circumstances as to result in either: (1) An estoppel as to the particular defendant; (2) an abandonment of the trade-mark or trade-name; or (3) a loss of distinctiveness. There may be discordant expressions in some cases, but it will usually be found that circumstances existed in each case making it inequitable to grant the desired relief against defendant.[40] Laches or delay is a bar to an accounting for profits and a recovery of damages for past infringement, even though not sufficient to bar an injunction against a further continuance of the wrong.[41] Knowledge of infringement must be shown in order to establish laches or acquiescence. Even long

matter of course that the use for a great number of years is an absolute bar to obtaining an injunction; but, most certainly, it throws on those who object to the use the onus of proving that it was originally a fraudulent use, and that it is calculated to deceive; and very much stronger evidence is required in such a case where there has been a long user than would be required in another case."

A moderate delay on the part of plaintiff in prosecuting an infringement of his trade-mark or trade-name, or such a delay as will enable him to obtain evidence, is no bar to his success. Lee *v.* Haley, L. R. 5 Ch. 155, 39 L. J. Ch. 284, 22 L. T. Rep. N. S. 251, 18 Wkly. Rep. 242; Cave *v.* Myers, Seton (4th ed.) 238.

English and American rules contrasted.— In Sawyer *v.* Kellogg, 9 Fed. 601, 602, Nixon, D. J., said: "In England the rule is stringent in trade-mark cases, that lack of diligence in suing deprives the complainant in equity of the right either to an injunction or an account. Our courts are more liberal in this respect. A long lapse of time will not deprive the owner of a trade-mark of an injunction against an infringer, but a reasonable diligence is required of a complainant in asserting his rights, if he would hold a wrong-doer to an account for profits and damages. This rule, however, applies only to those cases where there has been an acquiescence after a knowledge of the infringement is brought home to the complainant." See White *v.* Schlect, 14 Phila. (Pa.) 88; Filley *v.* Child, 9 Fed. Cas. No. 4,787, 4 Ban. & A. 353, 16 Blatchf. 376, 8 Reporter 230, 16 Off. Gaz. 261.

40. See cases cited *supra*, note 38. What constitutes laches see EQUITY, 16 Cyc. 150.

41. *California.*— Schmidt *v.* Welch, (1893) 35 Pac. 626; Schmidt *v.* Brieg, 100 Cal. 672, 35 Pac. 623, 22 L. R. A. 790.

Massachusetts.— Nelson *v.* Winchell, 203 Mass. 75, 89 N. E. 180 (two years' delay explained); Regis *v.* Jaynes, 191 Mass. 245, 77 N. E. 774.

Minnesota.— Sheffield-King Milling Co. *v.* Sheffield Mill, etc., Co., 105 Minn. 315, 117 N. W. 447, 127 Am. St. Rep. 574.

Missouri.— Drummond Tobacco Co. *v.* Addison Tinsley Tobacco Co., 52 Mo. App. 10, where a decree for an accounting of profits was denied, but without prejudice to the right to sue at law for damages.

New Jersey.— International Silver Co. *v.* Wm. H. Rogers Corp., 66 N. J. Eq. 140, 57 Atl. 725 [*affirmed* in 67 N. J. Eq. 646, 60 Atl. 187, 110 Am. St. Rep. 506].

New York.— Cohn *v.* Gottschalk, 14 Daly 542, 2 N. Y. Suppl. 13; S. Howes Co. *v.* Howes Grain Cleaner Co., 24 Misc. 83, 52 N. Y. Suppl. 468; Weed *v.* Peterson, 12 Abb. Pr. N. S. 178; Amoskeag Mfg. Co. *v.* Garner, 54 How. Pr. 297 [*reversing* 55 Barb. 151, 6 Abb. Pr. N. S. 265].

North Carolina.— Blackwell's Durham Tobacco Co. *v.* McElwee, 100 N. C. 150, 5 S. E. 907.

Ohio.— Lloyd *v.* Merrill Chemical Co., 11 Ohio Dec. (Reprint) 236, 25 Cinc. L. Bul. 319.

Tennessee.— C. F. Simmons Medicine Co. *v.* Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165, one year's delay no bar.

United States.— Menendez *v.* Holt, 128 U. S. 514, 9 S. Ct. 143, 32 L. ed. 526; McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828; Burke *v.* Bishop, 175 Fed. 167; Worcester Brewing Corp. *v.* Rueter, 157 Fed. 217, 84 C. C. A. 665; Bissel Chilled Plow Works *v.* T. M. Bissel Plow Co., 121 Fed. 357; N. K. Fairbank Co. *v.* Luckel, etc., Soap Co., 116 Fed. 332, 54 C. C. A. 204; N. K. Fairbank Co. *v.* Luckel, etc., Soap Co., 106 Fed. 498; La Republique Francaise *v.* Schultz, 102 Fed. 153; Low *v.* Fels, 35 Fed. 361; Holt *v.* Menendez, 23 Fed. 869, 32 Off. Gaz. 136; Sawyer *v.* Kellogg, 9 Fed. 601; Consolidated Fruit-Jar Co. *v.* Thomas, 6 Fed. Cas. No. 3,131; Manhattan Medicine Co. *v.* Wood, 16 Fed. Cas. No. 9,026, 4 Cliff. 461, 14 Off. Gaz. 519 [*affirmed* in 108 U. S. 218, 2 S. Ct. 436, 27 L. ed. 706]. See also Le Page Co. *v.* Russia Cement Co., 51 Fed. 941, 2 C. C. A. 555, 17 L. R. A. 354.

England.— Ford *v.* Foster, L. R. 7 Ch. 611, 41 L. J. Ch. 682, 27 L. T. Rep. N. S. 219, 20 Wkly. Rep. 818; Harrison *v.* Taylor, 11 Jur. N. S. 408, 12 L. T. Rep. N. S. 339; Beard *v.* Turner, 13 L. T. Rep. N. S. 746.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 95.

A delay of one year will not deprive plaintiff of his right to an accounting of profits. C. F. Simmons Medicine Co. *v.* Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165.

Two years' delay will not deprive plaintiff of the right to recover damages, where he had prosecuted other infringers, and defendant had in consequence thereof changed his labels. Schmidt *v.* Brieg, 100 Cal. 672, 35 Pac. 623, 22 L. R. A. 790.

infringement, if unknown to plaintiff, is no defense to an injunction, or a recovery of damages and profits.[42] Mere infringements by other persons beside the particular defendant constitute no defense,[43] unless such infringements have been so numerous and long continued that the mark has lost its distinctiveness.[44] Laches in prosecuting third persons for infringement, even amounting to an estoppel in favor of such third persons, will not avail a defendant as to whom there has been no delay or laches.[45] Prosecution of suits against other infringers may be shown to rebut the defense of acquiescence and laches.[46] Acquiescence in a non-competitive use in connection with a different class of goods or business is no bar to relief when the use is subsequently extended to competing goods or business.[47] The burden of proving laches and acquiescence is upon defendant.[48] Long delay is evidence of acquiescence, but it has been held not a defense, unless extending to the period of the statute of limitations.[49] Since infringement and unfair competition are continuing wrongs, and the injunctive remedy looks to the future, it is difficult to see how a statute of limitations can have any application.[50]

42. Sartor *v.* Schaden, 125 Iowa 696, 101 N. W. 511; Gaines *v.* E. Whyte Grocery Fruit, etc., Co., 107 Mo. App. 507, 81 S. W. 648; Hygeia Distilled Water Co. *v.* Consolidated Ice Co., 144 Fed. 139 [*affirmed* in 151 Fed. 10, 80 C. C. A. 506]; Devlin *v.* McLeod, 135 Fed. 164; Sawyer *v.* Kellogg, 9 Fed. 601; Kinahan *v.* Bolton, 15 Ir. Ch. 75.

Circumstances attending use.— In a suit to restrain the infringement of a trade-name used in the sale of tobacco, the introduction of two packages of tobacco having the same name and apparently manufactured by different individuals is irrelevant when unaccompanied by proof of the circumstances surrounding the origin and use of the packages. American Tobacco Co. *v.* Polacsek, 170 Fed. 117.

43. Funke *v.* Dreyfus, 34 La. Ann. 80, 44 Am. Rep. 413 (holding that infringement by third persons does not justify defendant's infringement, but on the contrary aggravates it); Taylor *v.* Carpenter, 23 Fed. Cas. No. 13,784, 3 Story 458 (holding that "this rather aggravates than excuses the misconduct, unless done with the consent, or acquiescence of the plaintiffs"); Williams *v.* Adams, 29 Fed. Cas. No. 17,711, 8 Biss. 452 (holding that there is no fixed time in which suit must be brought in order to save the owner's rights). See also Filley *v.* Fassett, 44 Mo. 168, 100 Am. Dec. 275; Gillott *v.* Esterbrook, 47 Barb. (N. Y.) 455 [*affirmed* in 48 N. Y. 374, 8 Am. Rep. 553].

Piracy by one person does not authorize piracy by another. Cocks *v.* Chandler, L. R. 11 Eq. 446, 40 L. J. Ch. 575, 24 L. T. Rep. N. S. 379, 19 Wkly. Rep. 593. That plaintiff had been guilty of laches in allowing his brother to infringe his trade-mark and trade-name did not authorize an assignee of his brother so to do. Juan F. Portuondo Cigar Mfg. Co. *v.* Vicente Portuondo Cigar Mfg. Co., 222 Pa. St. 116, 70 Atl. 968.

"A trespasser cannot justify upon the ground that others have committed like trespasses." Actiengesellschaft, etc. *v.* Amberg, 109 Fed. 151, 48 C. C. A. 264.

44. Saxlehner *v.* Eisner, etc., Co., 179 U. S. 19, 21 S. Ct. 7, 45 L. ed. 60 [*reversing* 91 Fed. 536, 33 C. C. A. 291]. See *infra*, VIII, E.

45. Thackeray *v.* Saxlehner, 125 Fed. 911, 60 C. C. A. 562. See also Tetlow *v.* Tappan, 85 Fed. 774; Scheuer *v.* Muller, 74 Fed. 225, 20 C. C. A. 161; Clark Thread Co. *v.* Armitage, 67 Fed. 896.

46. Schmidt *v.* Brieg, 100 Cal. 672, 35 Pac. 623, 22 L. R. A. 790; Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 70 Conn. 516, 40 Atl. 534; Burke *v.* Bishop, 175 Fed. 167.

Illustrations.—A right of action for fraudulent use of labels in this country is not defeated on the ground of laches by failure for many years to assert it, when, during that time, the owner was making repeated, persistent, and, for a long time, unsuccessful, efforts in his own country to establish his rights. Saxlehner *v.* Nielsen, 179 U. S. 43, 21 S. Ct. 16, 45 L. ed. 77, 93 Off. Gaz. 948 [*reversing* 91 Fed. 1004, 34 C. C. A. 690]; Saxlehner *v.* Eisner, etc., Co., 179 U. S. 19, 21 S. Ct. 7, 45 L. ed. 60, 93 Off. Gaz. 940 [*reversing* 91 Fed. 536, 33 C. C. A. 291]. Where one claiming the right to a trade-name was always diligent in his endeavor to protect the same, and applied for the registration of the name in the United States at a time the name had not been used by any other person for any purpose, and was wholly unknown, he was not guilty of laches. Avenarius *v.* Kornely, 139 Wis. 247, 121 N. W. 336.

47. Nolan Bros. Shoe Co. *v.* Nolan, 131 Cal. 271, 63 Pac. 480, 82 Am. St. Rep. 346, 53 L. R. A. 384, holding that acquiescence in the use of the name in one business does not authorize defendant to use it in another business.

48. Chappell *v.* Sheard, 1 Jur. N. S. 996, 2 Kay & J. 117, 3 Wkly. Rep. 646, 69 Eng. Reprint 717.

49. Taylor *v.* Carpenter, 23 Fed. Cas. No. 13,785, 2 Woodb. & M. 1.

Acquiescence in the infringement of a trade-mark is not established by proof of the publication, during a period of ten years, of advertisements which, although they sometimes infringed, yet did not do so uniformly or continuously. Kinahan *v.* Bolton, 15 Ir. Ch. 75.

50. Gaines *v.* E. Whyte Grocery, etc., Co., 107 Mo. App. 507, 81 S. W. 648 [*citing* Wolfe

E. Loss of Distinctiveness. The exclusive right to an originally valid trade-mark is lost if such mark for any reason loses its distinctiveness and no longer indicates a particular origin or ownership. It has then ceased to be a trade-mark.[51] Indiscriminate use by a number of different persons, if continued long enough, will result in a loss of distinctiveness and destroy a trade-mark.[52] Extensive piracy by a single individual will not have this effect,[53] nor will a few scattering infringements by several persons even though not prosecuted.[54] Permitting a limited use by another is not sufficient to defeat the owner's right to prevent others from using his trade-mark.[55]

F. Generic Meaning Acquired Through Use. Where a word or name, although originally a valid trade-mark or an exclusive trade-name, has by use acquired a generic meaning, and become merely a generic name descriptive of a general kind, quality, or class of goods, it is *publici juris* for that purpose, and in that sense, and is no longer an exclusive trade-mark.[56] Whether such generic meaning has been acquired in any particular case is a question of fact.[57] The

v. Barnett, 24 La. Ann. 97, 13 Am. Rep. 111; Sanders *v.* Jacob, 20 Mo. App. 96], holding the statute inapplicable; also holding that "as the underlying principles in cases involving trade-marks and unfair competition are the same, no reason is seen why the statute is not as inapplicable to" the one as well as the other.

51. Hegeman *v.* Hegeman, 8 Daly (N. Y.) 1; Pratt's Appeal, 117 Pa. St. 401, 11 Atl. 878, 2 Am. St. Rep. 676; National Starch Mfg. Co. *v.* Munn's Patent Maizena, etc., Co., [1894] A. C. 275, 63 L. J. P. C. 112, 6 Reports 462; Ford *v.* Foster, L. R. 7 Ch. 611, 41 L. J. Ch. 682, 27 L. T. Rep. N. S. 219, 20 Wkly. Rep. 818; Powell *v.* Birmingham Vinegar Brewery Co., [1896] 2 Ch. 54, 65 L. J. Ch. 563, 74 L. T. Rep. N. S. 509, 44 Wkly. Rep. 688 [*affirmed* in [1897] A. C. 710, 66 L. J. Ch. 763, 76 L. T. Rep. N. S. 792]; Lazenby *v.* White, 41 L. J. Ch. 354 note. But see Volger *v.* Force, 63 N. Y. App. Div. 122, 71 N. Y. Suppl. 209.

The test whether or not the mark has become *publici juris* is whether the use of it by other persons is still calculated to deceive the public. Ford *v.* Foster, L. R. 7 Ch. 611, 41 L. J. Ch. 682, 27 L. T. Rep. N. S. 219, 20 Wkly. Rep. 818.

Names acquiring a generic meaning are an illustration of loss of distinctiveness. See *infra*, VIII, F.

52. Sherwood *v.* Andrews, 5 Am. L. Reg. N. S. 588; Saxlehner *v.* Eisner, etc., Co., 179 U. S. 19, 21 S. Ct. 7, 45 L. ed. 60, 93 Off. Gaz. 940 [*reversing* 91 Fed. 536, 33 C. C. A. 291]; Dietz *v.* Horton Mfg. Co., 170 Fed. 865, 96 C. C. A. 41; Manhattan Medicine Co. *v.* Wood, 16 Fed. Cas. No. 9,026, 4 Cliff. 461, 14 Off. Gaz. 519 [*affirmed* in 108 U. S. 218, 2 S. Ct. 436, 27 L. ed. 706]; *In re* Hall, 13 Off. Gaz. 229; National Starch Mfg. Co. *v.* Munn's Patent Maizena, etc., Co., [1894] A. C. 275, 63 L. J. P. C. 112, 6 Reports 462; Ripley *v.* Bandey, 14 Rep. Pat. Cas. 591. But see Cleveland Stone Co. *v.* Wallace, 52 Fed. 431.

53. Ford *v.* Foster, L. R. 7 Ch. 611, 41 L. J. Ch. 682, 27 L. T. Rep. N. S. 219, 20 Wkly. Rep. 818.

54. Kinahan *v.* Bolton, 15 Ir. Ch. 75; Rowland *v.* Michell, 13 Rep. Pat. Cas. 457, 14 Rep. Pat. Cas. 37.

55. Noera *v.* H. A. Williams Mfg. Co., 158 Mass. 110, 32 N. E. 1037; Pratt's Appeal, 117 Pa. St. 401, 11 Atl. 878, 2 Am. St. Rep. 676 (use by several members of a family); Tetlow *v.* Tappan, 85 Fed. 774; Scheuer *v.* Muller, 74 Fed. 225, 20 C. C. A. 161; Clark Thread Co. *v.* Armitage, 67 Fed. 896 [*affirmed* in 74 Fed. 936, 21 C. C. A. 178].

Where a son is the first to adopt and use a trade-mark, and has not parted with his interest in it, and has continued its use, he does not, by acquiescing in its use by his father jointly with him, forfeit his right to claim the trade-mark as his own property. Giles Remedy Co. *v.* Giles, 26 App. Cas. (D. C.) 375.

56. *Illinois.*— Sherwood *v.* Andrews, 5 Am. L. Reg. N. S. 588.

Massachusetts.— Noera *v.* H. A. Williams Mfg. Co., 158 Mass. 110, 32 N. E. 1037; Thomson *v.* Winchester, 19 Pick. 214, 31 Am. Dec. 135, "Thompsonian Medicines."

Tennessee.— C. F. Simmons Medicine Co. *v.* Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165.

Wisconsin.— Marshall *v.* Pinkham, 52 Wis. 572, 9 N. W. 615, 38 Am. Rep. 756.

United States.— La Republique Francaise *v.* Saratoga Vichy Spring Co., 191 U. S. 427, 24 S. Ct. 145, 48 L. ed. 247; Saxlehner *v.* Nielsen, 179 U. S. 43, 21 S. Ct. 16, 45 L. ed. 77, 93 Off. Gaz. 948 [*reversing* 91 Fed. 1004, 34 C. C. A. 690]; Saxlehner *v.* Eisner, etc., Co., 179 U. S. 19, 21 S. Ct. 7, 45 L. ed. 60, 93 Off. Gaz. 940 [*reversing* 91 Fed. 536, 33 C. C. A. 291]; Liebig's Extract of Meat Co. *v.* Walker, 115 Fed. 822.

England.— Singleton *v.* Bolton, 3 Dougl. 293, 26 E. C. L. 196, 99 Eng. Reprint 661; Canham *v.* Jones, 2 Ves. & B. 218, 35 Eng. Reprint 302. See also Ford *v.* Foster, L. R. 7 Ch. 611, 41 L. J. Ch. 682, 27 L. T. Rep. N. S. 219, 20 Wkly. Rep. 818.

But see Fleischmann *v.* Schuckmann, 62 How. Pr. (N. Y.) 92.

Illustrations of this principle are found in the names of patented articles see *supra*, V, C, 8. Personal names may acquire a generic meaning see *supra*, V, C, 4.

57. Hygeia Distilled Water Co. *v.* Hygeia

right once lost is gone forever.[58] It is only where the name has become generic with the owner's consent or acquiescence that his rights therein are lost.[59] A name originally a valid trade-mark does not become common property merely because the public has come to ascribe a descriptive meaning to it, due to plaintiff's use thereof.[60]

IX. REMEDIES AND PROCEDURE.

A. In General. The remedies available to redress or prevent infringement of trade-marks or unfair competition are common-law rather than statutory,[61]

Ice Co., 70 Conn. 516, 40 Atl. 534; Noera *v.* H. A. Williams Mfg. Co., 158 Mass. 110, 32 N. E. 1037. See Coats *v.* Merrick Thread Co., 36 Fed. 324, 1 L. R. A. 616 [*affirming* 149 U. S. 562, 13 S. Ct. 966, 37 L. ed. 847].

The question is for the court to determine from its judicial knowledge aided by reference to any appropriate authorities, or by evidence, or both. Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 70 Conn. 516, 40 Atl. 534.

The test whether a fancy name adopted by a manufacturer as a trade-mark for certain goods has become *publici juris* is the question whether the use of it by other persons in connection with the same goods is calculated to deceive the public, so as to induce them to believe that in purchasing the goods so named they are purchasing goods of the original manufacturer. Consequently, a trade-mark may have become *publici juris* among a certain class, as between the wholesale and retail dealers who will not be deceived by it, and yet may not have become *publici juris* as between the retail dealers and their ordinary customers. Ford *v.* Foster, L. R. 7 Ch. 611, 41 L. J. Ch. 682, 27 L. T. Rep. N. S. 219, 20 Wkly. Rep. 818.

58. Saxlehner *v.* Eisner, etc., Co., 179 U. S. 19, 21 S. Ct. 7, 45 L. ed. 60, 93 Off. Gaz. 940 [*reversing* 91 Fed. 536, 33 C. C. A. 291]. See also Ogilvie *v.* G. & C. Merriam Co., 149 Fed. 858, 863 [*modified* in 159 Fed. 638], where the circuit court said: "When the word 'Webster' as applied to dictionaries, has once become dedicated to the public, it is not again subject to exclusive appropriation as a trade-mark or trade-name, nor can the public be deprived of its use on the ground of unfair competition." But the necessary qualification of this is found in Estes *v.* Williams, 21 Fed. 189, the first "Chatterbox" case, where the court said: "This would be true, doubtless, as to all such publications as those to which the name was applied, but not as to those essentially different." It is, of course, true that no new exclusive rights can be acquired in the title of a book, or the name of a patented article, by merely continuing to publish that same book under that same title after the copyright has expired, or by continuing to manufacture and sell an article under its generic name after the patent thereon has expired. But it is not true that no new rights can be acquired in words which are, or have become, *publici juris*. The whole doctrine of secondary meaning is inconsistent with such a proposition. See *supra*, V, B, 2. So also abandoned trade-marks may be reclaimed or reappropriated. See *supra*, II, C; III, A, 3. A name which has become *publici juris* in a particular connection may acquire a secondary meaning by use in a different connection which will be protected. Boake *v.* Wayland, 26 Rep. Pat. Cas. 257; Daimler Motor Co. *v.* London Daimler Co., 24 Rep. Pat. Cas. 329.

59. Saxlehner *v.* Eisner, etc., Co., 179 U. S. 19, 21 S. Ct. 7, 45 L. ed. 60, 93 Off. Gaz. 940 [*reversing* 91 Fed. 536, 33 C. C. A. 291].

60. Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 70 Conn. 516, 40 Atl. 534; *In re* American Circular Loom Co., 28 App. Cas. (D. C.) 450; Capewell Horse Nail Co. *v.* Mooney, 167 Fed. 575 [*affirmed* in 172 Fed. 826, 97 C. C. A. 248].

"The mere fact that the word, by association of ideas, would suggest to some persons the idea of purity or healthfulness, would not prevent its being available as a trade-mark word . . . and the fact that such association grew out of its use by the plaintiff and its predecessors would not make it common property." Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 70 Conn. 516, 534, 40 Atl. 534 [*citing* Burton *v.* Stratton, 12 Fed. 696; N. K. Fairbank Co. *v.* Central Lard Co., 64 Fed. 133, 136 (*citing* Selchow *v.* Baker, 93 N. Y. 59, 45 Am. Rep. 169; Celluloid Mfg. Co. *v.* Read, 47 Fed. 712; Ausable Horse-Nail Co. *v.* Essex Horse-Nail Co., 32 Fed. 94), in which the court said: "It is well settled that the inventor of an arbitrary or fanciful name may apply it to an article manufactured by him to distinguish his manufacture from that of others, and that the subsequent use of such word by the public to denote the article does not deprive the originator of such word of his exclusive right to its use"].

61. Shaver *v.* Shaver, 54 Iowa 208, 6 N. W. 188, 37 Am. Rep. 194; Smith *v.* Walker, 57 Mich. 456, 22 N. W. 267, 24 N. W. 830, 26 N. W. 783; U. S. *v.* Steffens, 100 U. S. 82, 25 L. ed. 550.

Restraining suit.—A person charged with an infringement of a trade-mark and against whom an action is threatened and about to be commenced cannot maintain an action to restrain the commencement of such threatened action, and the fact that an injunction against him would be a serious injury to his business furnishes no justification therefor. Wolfe *v.* Burke, 56 N. Y. 115. See also Hunt *v.* Maniere, 34 Beav. 157, 11 Jur. N. S. 28, 34 L. J. Ch. 142, 11 L. T. Rep. N. S. 469, 13 Wkly. Rep. 212, 55 Eng. Reprint 594 [*affirmed* in 11 Jur. N. S. 73, 34 L. J. Ch. 142,

and depend upon state rather than national laws.[62] They are the ordinary and usual legal [63] and equitable remedies,[64] and are not taken away by statutes providing additional or cumulative statutory remedies, such as criminal prosecutions or penal actions.[65]

B. Jurisdiction — 1. Of Federal Courts. Federal circuit courts have jurisdiction of suits for infringement of trade-marks registered under the federal statute without regard to diversity of citizenship of the parties.[66] But the federal courts have no jurisdiction of suits for the infringement of unregistered common-law trade-marks, or of suits for unfair competition, unless the requisite diverse citizenship exists, in which case they have jurisdiction.[67] Since the jurisdiction of the federal courts depends upon the amount in controversy it must be made to appear that the amount or value of the matter in controversy exceeds the sum of two thousand dollars exclusive of interest and costs,[68] except in the case of registered trade-marks, as to which the statute expressly confers jurisdiction without regard to the amount in controversy.[69] Federal district courts have no jurisdiction of suits for infringement of trade-marks.[70]

11 L. T. Rep. N. S. 723, 5 New Rep. 181, 13 Wkly. Rep. 363].

62. Schumacher *v.* Schwencke, 26 Fed. 818; Luyties *v.* Hollender, 21 Fed. 281.

63. See *infra*, IX, D.

64. See *infra*, IX, E.

65. Derringer *v.* Plate, 29 Cal. 292, 87 Am. Dec. 170. See *supra*, VI. See also *infra*, IX, F.

66. Act Cong. Feb. 20, 1905; 21 U. S. St. at L. 502, c. 138; U. S. *v.* Duell, 17 App. Cas. (D. C.) 471; *In re* Keasbey, etc., Co., 160 U. S. 221, 16 S. Ct. 273, 40 L. ed. 402; Ryder *v.* Holt, 128 U. S. 525, 9 S. Ct. 145, 32 L. ed. 529; A. Leschen, etc., Rope Co. *v.* Broderick, etc., Rope Co., 134 Fed. 571, 67 C. C. A. 418 [*affirmed* in 201 U. S. 166, 26 S. Ct. 425, 50 L. ed. 710]; Allen B. Wrisley Co. *v.* George E. Rouse Soap Co., 90 Fed. 5, 32 C. C. A. 496 [*affirming* 87 Fed. 589]; Hennessy *v.* Braunschweiger, 89 Fed. 664; Prince's Metallic Paint Co. *v.* Prince Mfg. Co., 53 Fed. 493; Graveley *v.* Graveley, 42 Fed. 265; Schumacher *v.* Schwencke, 26 Fed. 818; Glen Cove Mfg. Co. *v.* Ludeling, 22 Fed. 823, 23 Blatchf. 46; Luyties *v.* Hollender, 21 Fed. 281; Duwell *v.* Bohmer, 8 Fed. Cas. No. 4,213, 2 Flipp. 168, 14 Off. Gaz. 270.

67. U. S. *v.* Steffens, 100 U. S. 82, 25 L. ed. 550; A. Leschen, etc., Rope Co. *v.* Broderick, etc., Rope Co., 134 Fed. 571, 67 C. C. A. 418 [*affirmed* in 201 U. S. 166, 26 S. Ct. 425, 50 L. ed. 710]; Allen B. Wrisley Co. *v.* George E. Rouse Soap Co., 90 Fed. 5, 32 C. C. A. 496; Hennessy *v.* Herrmann, 89 Fed. 669; Hennessy *v.* Braunschweiger, 89 Fed. 664; Battle *v.* Finlay, 50 Fed. 106; De Kuyper *v.* Witteman, 23 Fed. 871; La Croix *v.* May, 15 Fed. 236; Leidersdorf *v.* Flint, 15 Fed. Cas. No. 8,219, 8 Biss. 327, 6 Reporter 739, 18 Alb. L. J. (N. Y.) 382, 429, 7 N. Y. Wkly. Dig. 360; Scoville *v.* Toland, 21 Fed. Cas. No. 12,553; U. S. *v.* Roche, 27 Fed. Cas. No. 16,180, 1 McCrary 385.

Allegations of diverse citizenship are essential when jurisdiction is invoked independently of the registration act. Allen B. Wrisley Co. *v.* George E. Rouse Soap Co., 90 Fed. 5, 32 C. C. A. 496 [*affirming* 87 Fed. 589]; La Croix *v.* May, 15 Fed. 236.

Foreign infringement.—The federal courts have no jurisdiction of unfair competition or infringement of trade-marks wholly committed in a foreign country. Vacuum Oil Co. *v.* Eagle Oil Co., 122 Fed. 105.

68. Winchester Repeating Arms Co. *v.* Butler, 128 Fed. 976 (holding the averments of the bill insufficient to show jurisdictional amount, and that the value of the trade-name is not the amount in controversy, when there is no danger of destroying such trade-name); Merriam *v.* Texas Siftings Pub. Co., 49 Fed. 944, 947 (where the trade-name "Webster's Dictionary" was involved, and the court said: "No direct evidence was given of the amount of the matter in dispute, but it is easy to see from the testimony that the amount is such as to give this court jurisdiction"). But see Griggs *v.* Erie Preserving Co., 131 Fed. 359. "It is not necessary that the amount of actual damages sustained be proved for this court to retain jurisdiction and decide the question of infringement. It is enough that the parties are citizens of different states, and that irreparable damage may be sustained by a continuance of the alleged wrongful acts of the defendant. The value of the object to be gained by a bill in equity is the test of jurisdiction. The injury from which relief is sought is the wrongful appropriation and infringement by defendant of complainant's arbitrarily selected word 'Home' as a trademark. The remedy invokes the restraining power of the court. To restrain and enjoin future trespasses upon property rights in a proper case is one of the privileges conferred upon a court of equity, and the value derived from the exercise of such power is often difficult of ascertainment. Gannert *v.* Rupert, 127 Fed. 962, 62 C. C. A. 594; American Fisheries Co. *v.* Lennen, 118 Fed. 869; Johnston *v.* Pittsburg, 106 Fed. 753; Symonds *v.* Greene, 28 Fed. 834. The objection that the court is without jurisdiction is therefore overruled." Griggs *v.* Erie Preserving Co., 131 Fed. 359, 360.

69. Act Feb. 20, 1905, § 17.

70. Days *v.* Walls, 7 Fed. Cas. No. 3,692.

2. Of State Courts. The appropriate state courts have jurisdiction of actions or suits for infringement of trade-marks or unfair competition,[71] even in the case of a trade-mark registered under the federal statute.[72]

C. Parties — 1. In General. The ordinary rules as to parties in actions at law and suits in equity are fully applicable to similar actions and suits involving trade-marks or unfair competition.[73]

2. Plaintiffs. An action or suit for infringement or unfair competition should be brought by and in the name of the owner of the trade-mark, business, and good-will for which protection is sought.[74] A person without any right, title, or interest in the name, mark, or business affected has no standing to maintain

But the new judiciary act has transferred the jurisdiction of the circuit courts to the district courts. Act March 3, 1911, in effect Jan. 1, 1912.

71. Smail *v.* Sanders, 118 Ind. 105, 20 N. E. 296; Traiser *v.* J. W. Doty Cigar Co., 198 Mass. 327, 84 N. E. 462; Reeder *v.* Brodt, 6 Ohio S. & C. Pl. Dec. 248, 4 Ohio N. P. 265; U. S. *v.* Steffens, 100 U. S. 82, 25 L. ed. 550.

In an action for a penalty, under a state statute imposing a penalty of not less than two hundred dollars, and not more than five hundred dollars, plaintiff may limit his demand to a sum within the jurisdictional limit of an inferior court, so as to confer jurisdiction upon that court. Gottlob *v.* Schmidt, 66 N. J. L. 180, 48 Atl. 588.

72. Smail *v.* Sanders, 118 Ind. 105, 20 N. E. 296; Traiser *v.* J. W. Doty Cigar Co., 198 Mass. 327, 84 N. E. 462; Reeder *v.* Brodt, 6 Ohio S. & C. Pl. Dec. 248, 4 Ohio N. P. 265; *In re* Keasbey, etc., Co., 160 U. S. 221, 16 S. Ct. 273, 40 L. ed. 402.

Bill for infringement of patent.— State courts have no jurisdiction of a bill brought to restrain the violation of a trade-mark, when the real purpose or effect is to prevent the infringement of a patent. Wilcox, etc., Sewing Mach. Co. *v.* Kruse, etc., Mfg. Co., 14 Daly (N. Y.) 116, 3 N. Y. St. 590 [*affirmed* in 118 N. Y. 677, 23 N. E. 1146]. See, generally, Patents, 30 Cyc. 971. Even where the mark is applied to a patented article, and the defense is a license under the patent, the state court has jurisdiction. Waterman *v.* Shipman, 130 N. Y. 301, 29 N. E. 111 [*reversing* 8 N. Y. Suppl. 814].

73. See Parties, 30 Cyc. 1, and Cross-References There Given. See also Equity, 16 Cyc. 181; Good-Will, 20 Cyc. 1275; Injunctions, 22 Cyc. 910.

74. Bradley *v.* Norton, 33 Conn. 157, 87 Am. Dec. 200; Huwer *v.* Dannenhoffer, 82 N. Y. 499 (after dissolution of firm, one partner must have exclusive title to maintain suit against former partners); Godillot *v.* Harris, 81 N. Y. 263 (holding that person for whom goods are manufactured has a sufficient interest to maintain a suit); Prince Mfg. Co. *v.* Prince's Metallic Paint Co., 15 N. Y. Suppl. 249 [*reversed* on other grounds in 135 N. Y. 24, 31 N. E. 990, 17 L. R. A. 129]; Hill *v.* Lockwood, 62 Wis. 507, 22 N. W. 581; Billiken Co. *v.* Baker, etc., Co., 174 Fed. 829 (holding that one for whom goods are made under contract, and not the actual maker, is the owner of the business, and the proper plaintiff); Cuervo *v.* Landauer, 63 Fed. 1003; Jennings *v.* Johnson, 37 Fed. 364; Moxie Nerve Food Co. *v.* Baumbach, 32 Fed. 205 (holding that owner may sue, although he has a licensee whose rights are also infringed); Filkins *v.* Blackman, 9 Fed. Cas. No. 4,786, 13 Blatchf. 440 (firm succeeding to trade-mark of individual partner); Walton *v.* Crowley, 29 Fed. Cas. No. 17,133, 3 Blatchf. 440 (one whose interests are directly affected may sue).

Union labels.— Under Mass. St. (1895) c. 462, § 3, allowing "any person, association, or union" to sue for the counterfeiting of labels and stamps, an unincorporated voluntary trade union which has with legal authority adopted a label may maintain a suit to prevent its infringement. Tracy *v.* Banker, 170 Mass. 266, 49 N. E. 308, 39 L. R. A. 508. In Bloete *v.* Simon, 19 Abb. N. Cas. (N. Y.) 88, it was held that the provision of N. Y. Code Civ. Proc. § 488, allowing suit by one or more persons for the benefit of all who are united in interest where the parties are so numerous that it is impracticable to bring them all before the court, applies to individual members of an unincorporated association suing on behalf of themselves and other members for the protection of their union label, although section 1919 of the code provides for suit by the president and treasurer of the association. See also People *v.* Fisher, 50 Hun (N. Y.) 552, 3 N. Y. Suppl. 786; Strasser *v.* Moonelis, 55 N. Y. Super. Ct. 197, 11 N. Y. St. 270. A union and a subordinate council may properly unite in an action for a wrongful use of the union label. Lynch *v.* John Single Paper Co., 115 N. Y. App. Div. 911, 101 N. Y. Suppl. 824. The subordinate lodges of a trades union association which has a common label for the use of all of its members cannot maintain a bill to restrain the unauthorized use of such label. The right of action, if any, is in the parent association. McVey *v.* Brendel, 144 Pa. St. 235, 22 Atl. 912, 13 L. R. A. 377, 27 Am. St. Rep. 625.

The executors or administrators of a deceased partner are the proper parties to resort to and enforce the remedy given by the Massachusetts statute to restrain by injunction the unlawful use of the decedent's name by the surviving partners, where such use is without the written consent of the legal representatives of the decedent. Bowman *v.* Floyd, 3 Allen (Mass.) 76, 80 Am. Dec. 55.

a suit in respect thereto.[75] An assignee may maintain a bill in his own name.[76] Alien friends may sue at law, or maintain a bill in equity for an injunction and accounting.[77] All persons having a common interest are properly joined as plaintiffs.[78] All partners must join as complainants in a bill for infringement of firm trade-marks or unfair competition in respect to the business of the firm.[79] Both the owner and an exclusive licensee of a product and its name must be joined in a suit for injunction.[80] Persons whose interests are separately affected may sue separately.[81]

3. Defendants. The proper party defendant is of course the person committing the infringement or engaging in the unfair competition.[82] As infringe-

75. *Louisiana.*— Lacroix *v.* Nodal, 41 La. Ann. 1018, 6 So. 795.

Maryland.— Parlett *v.* Guggenheimer, 67 Md. 542, 10 Atl. 81, 1 Am. St. Rep. 416.

Massachusetts.—Warren *v.* Warren Thread Co., 134 Mass. 247; Hallett *v.* Cumston, 110 Mass. 29.

New York.— Société des Huiles, etc. *v.* Rorke, 5 N. Y. App. Div. 175, 39 N. Y. Suppl. 28 [*affirmed* in 158 N. Y. 677, 52 N. E. 1126]; Thornton *v.* Crowley, 47 N. Y. Super. Ct. 527 [*affirmed* in 89 N. Y. 644].

United States.— Key West Cigar Manufacturers' Assoc. *v.* Rosenbloom, 171 Fed. 296 (holding that an association of merchants, not itself engaged in trade, cannot maintain a suit for unfair competition); Krauss *v.* Jos. R. Peebles' Sons Co., 58 Fed. 585 (holding that a mere vendee of a trade-marked article is not entitled to sue a third person for infringement of his vendor's trade-mark).

England.— Beazley *v.* Soares, 22 Ch. D. 660, 52 L. J. Ch. 201, 31 Wkly. Rep. 887 (mortgagee); Richards *v.* Butcher, 62 L. T. Rep. N. S. 867 [*affirmed* in [1891] 2 Ch. 522, 60 L. J. Ch. 530] (holding that exclusive agents could not sue, and granting leave to amend by making owners plaintiffs); Delondre *v.* Shaw, 2 Sim. 237, 2 Eng. Ch. 237, 57 Eng. Reprint 777.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," §§ 98, 101.

76. *California.*— Spieker *v.* Lash, 102 Cal. 38, 36 Pac. 362, mark registered under a state statute.

Colorado.— Solis Cigar Co. *v.* Pozo, 16 Colo. 388, 26 Pac. 556, 25 Am. St. Rep. 279.

Massachusetts.— Hoxie *v.* Chaney, 143 Mass. 592, 10 N. E. 713, 58 Am. Rep. 149.

New York.— Congress, etc., Spring Co. *v.* High Rock Congress Spring Co., 45 N. Y. 291, 6 Am. Rep. 82, 10 Abb. Pr. N. S. 348 [*reversing* 57 Barb. 526].

United States.— Estes *v.* Williams, 21 Fed. 189; Walton *v.* Crowley, 29 Fed. Cas. No. 17,133, 3 Blatchf. 440.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 98. Generally as to assignments and transfers of trade-mark rights see *supra*, VII.

Substitution of assignee pendente lite.— When, pending a suit for the infringement of a trade-mark in which an injunction and accounting have been ordered, plaintiff assigns his claim for damages, the assignee, although he could not originally have maintained a naked suit for damages and profits, may be substituted as plaintiff in the existing suit and have the benefit of the prior litigation by filing an original bill in the nature of a supplemental bill. Baker *v.* Baker, 89 Fed. 673.

77. Taylor *v.* Carpenter, 11 Paige (N. Y.) 292, 42 Am. Dec. 114 [*affirmed* in 2 Sandf. Ch. 611]; Coffeen *v.* Brunton, 5 Fed. Cas. No. 2,946, 4 McLean 516; Taylor *v.* Carpenter, 23 Fed. Cas. No. 13,784, 3 Story 458; Taylor *v* Carpenter, 23 Fed. Cas. No. 13,785, 2 Woodb. & M. 1; Collins Co. *v.* Reeves, 4 Jur. N. S. 865, 28 L. J. Ch. 56, 6 Wkly. Rep. 717.

78. Northcutt *v.* Turney, 101 Ky. 314, 41 S. W. 21, 19 Ky. L. Rep. 483; Morse *v.* Hall, 109 Mass. 409 (holding that administrator might join with purchaser of decedent's name); Key West Cigar Manufacturers' Assoc. *v.* Rosenbloom, 171 Fed. 296 (holding that merchants in same locality and trade may join in suit to restrain false and deceptive use of geographical name by non-residents); Jewish Colonization Assoc. *v.* Solomon, 125 Fed. 994; Pillsbury-Washburn Flour-Mills Co. *v.* Eagle, 86 Fed. 608, 30 C. C. A. 386, 41 L. R. A. 162.

79. Frese *v.* Bachof, 9 Fed. Cas. No. 5,110, 14 Blatchf. 432, 13 Off. Gaz. 635. But see Bradley *v.* Norton, 33 Conn. 157, 87 Am. Dec. 200, holding that a silent partner whose existence is unknown to the public need not be joined. See, generally, Partnership, 30 Cyc. 561. Where the case is meritorious, the bill will be retained, after final hearing, to afford complainant an opportunity to bring in his copartner. Frese *v.* Bachof, 9 Fed. Cas. No. 5,110, 14 Blatchf. 432, 13 Off. Gaz. 635.

80. Wallach *v.* Wigmore, 87 Fed. 469 (holding further that a licensee under a license less than exclusive should not be joined); Krauss *v.* Jos. R. Peebles' Sons Co., 58 Fed. 585 (holding that grantor is a necessary party to a bill by exclusive licensee, but defect is amendable).

81. Dent *v.* Turpin, 2 Johns. & H. 139, 7 Jur. N. S. 673, 30 L. J. Ch. 495, 4 L. T. Rep. N. S. 637, 9 Wkly. Rep. 548, 70 Eng. Reprint 1003; Southern *v.* Reynolds, 12 L. T. Rep. N. S. 575.

82. See, generally, cases cited throughout this article. See also Injunctions, 22 Cyc. 912; Parties, 30 Cyc. 98; Torts, *ante*, p. 408.

Parties for purpose of discovery.— Shipowners who have shipped goods bearing counterfeits of plaintiff's trade-marks are

ment or unfair competition is a tort and a fraud,[83] where two or more persons participate in committing the wrong, they are jointly and severally liable.[84] Thus the executive officers and agents of a corporation who had charge of its affairs and controlled its action may be joined as defendants, and personally charged with infringement or unfair competition.[85] But mere stock-holders are not liable or subject to injunction because of unfair competition practised by the corporation.[86]

D. Actions at Law — 1. In General. An action at law lies for infringement of a trade-mark,[87] or for unfair competition in business.[88] An innocent infringer has a remedy over against one who caused him to infringe.[89]

2. Pleading and Proof. In accordance with the ordinary rules of pleading,[90] the declaration or complaint must allege facts showing plaintiff's title or interest, and defendant's wrongful violation thereof,[91] with resulting damage to plain-

proper parties defendant in an action for the purpose of discovering the name of the consignor from whom the goods were received. Orr *v.* Diaper, 4 Ch. D. 92, 46 L. J. Ch. 41, 35 L. T. Rep. N. S. 468, 25 Wkly. Rep. 23.

83. See *supra*, IV, A; V, A, 1.

84. Bradley *v.* Norton, 33 Conn. 157, 87 Am. Dec. 200 (holding that real principal need not be joined as defendant in suit against agent who acted as ostensible proprietor); Gaines *v.* Leslie, 25 Misc. (N. Y.) 20, 54 N. Y. Suppl. 421 (a retired partner, who retired prior to the infringement, is not liable); Matsell *v.* Flanagan, 2 Abb. Pr. N. S. (N. Y.) 459 (dealers may be joined as defendants with the proprietor or maker of the infringing goods); Estes *v.* Worthington, 30 Fed. 465 (holding that principal, agents, and servants may be sued jointly).

85. Burrow *v.* Marceau, 124 N. Y. App. Div. 665, 109 N. Y. Suppl. 105; Saxlehner *v.* Eisner, 147 Fed. 189, 77 C. C. A. 417 [*affirming* 140 Fed. 938]; Elgin Nat. Watch Co. *v.* Loveland, 132 Fed. 41 (holding that the corporation is not an indispensable party); California Fig-Syrup Co. *v.* Improved Fig-Syrup Co., 51 Fed. 296. See also, generally, Corporations, 10 Cyc. 903 *et seq.*

86. Hall's Safe Co. *v.* Herring-Hall-Marvin Safe Co., 146 Fed. 37, 76 C. C. A. 495, 14 L. R. A. N. S. 1182 [*modified* in 208 U. S. 554, 28 S. Ct. 350, 52 L. ed. 616]. But see Burrow *v.* Marceau, 124 N. Y. App. Div. 665, 109 N. Y. Suppl. 105.

87. *District of Columbia.*— U. S. *v.* Duell, 17 App. Cas. 471, action on the case under federal statute.

Georgia.—Hagan, etc., Co. *v.* Rigbers, 1 Ga. App. 100, 57 S. E. 970.

Indiana.— Julian *v.* Hoosier Drill Co., 78 Ind. 408, claim for damages assignable.

Louisiana.— Handy *v.* Commander, 49 La. Ann. 1119, 22 So. 230.

Missouri.— Lampert *v.* Judge, etc., Drug Co., 119 Mo. App. 693, 100 S. W. 659.

United States.— Gardner *v.* Bailey, 9 Fed. Cas. No. 5,221; Taylor *v.* Carpenter, 23 Fed. Cas. No. 13,785, 2 Woodb. & M. 1 (action on the case for fraud and deceit); Warner *v.* Roehr, 29 Fed. Cas. No. 17,189*a*.

England.— Blofeld *v.* Payne, 4 B. & Ad. 410, 2 L. J. K. B. 68, 1 N. & M. 353, 24 E. C. L. 183, 110 Eng. Reprint 509 (although defendant's article is not inferior, and no actual damage is shown); Cartier *v.* Carlile, 31 Beav. 292, 8 Jur. N. S. 183, 54 Eng. Reprint 1151; Rodgers *v.* Nowill, 5 C. B. 109, 11 Jur. 1039, 17 L. J. C. P. 52, 57 E. C. L. 109; Southern *v.* How, Cro. Jac. 468, 79 Eng. Reprint 400, Poph. 143, 79 Eng. Reprint 1243; Edelston *v.* Edelston, 1 De G. J. & S. 185, 9 Jur. N. S. 479, 7 L. T. Rep. N. S. 768, 11 Wkly. Rep. 328, 66 Eng. Ch. 142, 46 Eng. Reprint 72 (action for deceit); Singleton *v.* Bolton, 3 Dougl. 293, 26 E. C. L. 196, 99 Eng. Reprint 661; Foot *v.* Lea, 13 Ir. Eq. 484.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 89.

88. *Georgia.*— M. A. Thedford Medicine Co. *v.* Curry, 96 Ga. 89, 22 S. E. 661.

Missouri.— Conrad *v.* Joseph Uhrig Brewing Co., 8 Mo. App. 277, action in nature of deceit lies, although label imitated not a trade-mark.

United States.— Frese *v.* Bachof, 9 Fed. Cas. No. 5,110, 14 Blatchf. 432, 13 Off. Gaz. 635.

England.— Sykes *v.* Sykes, 3 B. & C. 541, 5 D. & R. 292, 3 L. J. K. B. O. S. 46, 27 Rev. Rep. 420, 10 E. C. L. 248, 107 Eng. Reprint 834; Crawshay *v.* Thompson, 11 L. J. C. P. 301, 4 M. & G. 357, 5 Scott N. R. 562, 43 E. C. L. 189; Morison *v.* Sullivan, 10 L. J. C. P. 91, 2 Scott N. R. 449, 2 M. & G. 385, 40 E. C. L. 654.

Canada.—Vive Camera Co. *v.* Hogg, 18 Quebec Super. Ct. 1, although plaintiff has not registered any trade-mark.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 89.

89. Dixon *v.* Fawcus, 3 E. & E. 537, 7 Jur. N. S. 895, 30 L. J. Q. B. 137, 3 L. T. Rep. N. S. 693, 9 Wkly. Rep. 414, 107 E. C. L. 537.

90. See Pleading, 31 Cyc. 92 *et seq.*

91. Edelston *v.* Edelston, 1 De G. J. & S. 185, 9 Jur. N. S. 479, 7 L. T. Rep. N. S. 768, 11 Wkly. Rep. 328, 66 Eng. Ch. 142, 46 Eng. Reprint 72, fraud must be alleged at law, but not in equity.

Declarations held sufficient.— A declaration alleging in substance that plaintiffs were profitably engaged in the manufacture and sale of certain valuable medicine, and that

tiff.[92] Special damage need not be alleged or proved.[93] The question of fraudulent imitation will not ordinarily be determined on demurrer, but will be left to the jury.[94]

3. Damages. Ordinarily the measure of damages for infringement of a trademark is the loss of plaintiff's profits caused by such infringement.[95] Defendant's profits are not the measure of plaintiff's damages.[96] It will be presumed that plaintiff lost sales to the extent of the sales made by defendant under the infringing mark and was damaged by loss of the usual profits on that number of sales.[97] But where the goods are not marked with the infringing mark, it cannot be assumed, in the absence of evidence, that plaintiff lost a sale for every sale made by defendant.[98] The burden of proof is on plaintiff to show damage from particular sales.[99] No damages can be recovered for unfair competition in the absence of proof that actual deception has resulted.[1] It is for the jury to say whether a

defendant fraudulently, deceitfully, and with intent to injure plaintiff's business, did manufacture in a similar name a spurious and inferior medicine in imitation of that made by plaintiffs, and by simulating the wrappers used by plaintiffs for putting up their medicine did deceive the public and thus sell large quantities of the spurious medicine, all of which was to plaintiff's injury and damage, sets forth sufficiently a cause of action for the recovery of damages. M. A. Thedford Medicine Co. *v.* Curry, 96 Ga. 89, 22 S. E. 661; Dixon *v.* Fawcus, 3 E. & E. 537, 7 Jur. N. S. 895, 30 L. J. Q. B. 137, 3 L. T. Rep. N. S. 693, 9 Wkly. Rep. 414, 107 E. C. L. 537, where a declaration in an action over by an innocent infringer was sustained. See also Morison *v.* Salmon, 10 L. J. C. P. 91, 2 M. & G. 385, 2 Scott N. R. 449, 40 E. C. L. 654.

Evidence under allegations of sales by defendant.— Evidence may be offered of any number of sales, under a count for selling on a particular day and divers other days between that and the date of the writ. Taylor *v.* Carpenter, 23 Fed. Cas. No. 13,785, 2 Woodb. & M. 1. But a declaration averring that defendant, "since the 1st day of November, 1888, knowingly, willfully, and fraudulently offered for sale, and is now selling," etc., without any *continuando* with reference to the matter of selling, will allow plaintiff to prove only one actual sale as an independent basis of damages. Le Page Co. *v.* Russia Cement Co., 51 Fed. 941, 2 C. C. A. 555, 17 L. R. A. 354, holding further that the Massachusetts statutes relating to pleading have not changed this rule.

92. Rodgers *v.* Nowill, 5 C. B. 109, 11 Jur. 1039, 17 L. J. C. P. 52, 57 E. C. L. 109, holding that a general allegation that by the means alleged plaintiff was deprived of the sale of divers large quantities of goods, and lost the profits that would otherwise have accrued to him therefrom is sufficient, at least, after verdict.

93. Rodgers *v.* Nowill, 5 C. B. 109, 11 Jur. 1039, 17 L. J. C. P. 52, 57 E. C. L. 109. See for the general rule as to allegation of special damage Damages, 13 Cyc. 176; Pleading, 31 Cyc. 109; Torts, *ante*, p. 408.

94. M. C. Thedford Medicine Co. *v.* Curry, 96 Ga. 89, 22 S. E. 661; Crawshay *v.* Thompson, 11 L. J. P. C. 301, 4 M. & G. 357, 5 Scott N. R. 562, 43 E. C. L. 189. As to rule in equity see *infra*, IX, E, 5.

95. Conrad *v.* Joseph Uhrig Brewing Co., 8 Mo. App. 277; Hostetter *v.* Vowinkle, 12 Fed. Cas. No. 6,714, 1 Dill. 329. Loss of profits is a proper element of damage to be considered. Hostetter *v.* Vowinkle, *supra*. An agreed license-fee is some evidence of damage. Nelson *v.* Winchell, 203 Mass. 75, 89 N. E. 180, 23 L. R. A. N. S. 1150.

96. Davidson *v.* Munsey, 29 Utah 181, 80 Pac. 743; Leather Cloth Co. *v.* Hirschfield, L. R. 1 Eq. 299, 13 L. T. Rep. N. S. 427, 14 Wkly. Rep. 78.

97. Hostetter *v.* Vowinkle, 12 Fed. Cas. No. 6,714, 1 Dill. 329 (in connection with proof that plaintiff's sales fell off to that extent); Taylor *v.* Carpenter, 23 Fed. Cas. No. 13,785, 2 Woodb. & M. 1.

98. W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 103 Me. 334, 69 Atl. 569.

English rule.— The burden of proof is upon plaintiff to show by distinct evidence the actual damage which he has suffered. The courts will not presume that plaintiff would have made all the sales made by defendant, but if plaintiff's sales have fallen off approximately to the same extent as defendant's have increased in the same region, this will be sufficient to entitle plaintiff to recover this loss. Leather Cloth Co. *v.* Hirschfield, L. R. 1 Eq. 299, 13 L. T. Rep. N. S. 427, 14 Wkly. Rep. 78; Tonge *v.* Ward, 21 L. T. Rep. N. S. 480. See also Blofield *v.* Payne, 4 B. & Ad. 410, 2 L. J. K. B. 68, 1 N. & M. 353, 24 E. C. L. 183, 110 Eng. Reprint 509; Rodgers *v.* Nowill, 5 C. B. 109, 57 E. C. L. 109, 6 Hare 325, 31 Eng. Ch. 325, 67 Eng. Reprint 1191, 11 Jur. 1039, 17 L. J. C. P. 52. This rule was applied in Hostetter *v.* Vowinkle, 12 Fed. Cas. No. 6,714, 1 Dill. 329.

99. W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 103 Me. 334, 69 Atl. 569; New Orleans Coffee Co. *v.* American Coffee Co. of New Orleans, 124 La. 19, 49 So. 730.

1. New Orleans Coffee Co. *v.* American Coffee Co., 124 La. 19, 49 So. 730; Westcott Chuck Co. *v.* Oneida Nat. Chuck Co., 122 N. Y. App. Div. 260, 106 N. Y. Suppl. 1016, proof of underselling not sufficient.

falling off in plaintiff's custom was due to defendant's infringement.[2] Damages need not be proved with precision and definiteness, but it is sufficient if the evidence affords a basis for a reasonably probable estimate.[3] General damages can be awarded:[4] Nominal damages may be recovered for infringement where no actual damages are proved.[5] Exemplary damages, beyond full indemnity, should not ordinarily be given.[6] But exemplary damages for infringement may be allowed where an intention to defraud is shown.[7]

E. Suits in Equity — 1. In General. Equity jurisdiction in this class of cases rests upon the ground of preventing a multiplicity of suits, irreparable injury to plaintiff, and inadequacy of the remedy at law.[8] The legal remedy is

2. Shaw *v.* Pilling, 175 Pa. St. 78, 34 Atl. 446.

3. W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 103 Me. 334, 69 Atl. 569. "It is not necessary, however, for the plaintiff in such case to prove the resulting damages in separation from other damages with mathematical certainty or anything like it. He is not to be held to precision, to the exact pound, neither more nor less, nor even to show a distinct separation in time and circumstance. It is enough if he furnishes evidnece upon which the tribunal can make a reasonably probable estimate through the exercise of intelligent judgment. Mere difficulty in making such an estimate does not authorize the tribunal to turn the plaintiff away without any damages. Of course in a given case the estimate may be too large or too small, as it may be and undoubtedly often is in that large class of cases in which damages cannot be calculated but necessarily have to be estimated. Certainly, precision is undoubtedly very desirable in the assessment of damages in such cases, but it is practically unattainable, and there is less danger of injustice in awarding judgment upon reasonably intelligent estimates than in refusing it wholly. See Allison *v.* Chandler, 11 Mich. 542." W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 103 Me. 334, 341, 69 Atl. 569, holding, however, that defendant is not chargeable with the whole loss suffered by plaintiff merely because it is impossible to determine how much of such loss was due to his wrongful acts.

4. Conrad *v.* Joseph Uhrig Brewing Co., 8 Mo. App. 277. See also Graham *v.* Plate, 40 Cal. 593, 6 Am. Rep. 639.

5. *Florida.*— El Modello Cigar Mfg. Co. *v.* Gato, 25 Fla. 886, 7 So. 23, 23 Am. St. Rep. 537; 6 L. R. A. 823.

Massachusetts.— Thomson *v.* Winchester, 19 Pick. 214, 31 Am. Dec. 135.

Missouri.— Lampert *v.* Judge, etc., Drug Co., 119 Mo. App. 693, 100 S. W. 659.

United States.— Baker *v.* Baker, 115 Fed. 297, 53 C. C. A. 157; Coffeen *v.* Brunton, 5 Fed. Cas. No. 2,946, 4 McLean 516.

England.— Blofeld *v.* Payne, 4 B. & Ad. 410, 2 L. J. K. B. 68, 1 N. & M. 353, 24 E. C. L. 183, 110 Eng. Reprint 509.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 112.

6. Lampert *v.* Judge, etc., Drug Co., 119 Mo. App. 693, 100 S. W. 659; Taylor *v.* Carpenter, 11 Paige (N. Y.) 292, 42 Am. Dec. 114 [*affirmed* in 2 Sandf. Ch. 603]; Taylor *v.* Carpenter, 23 Fed. Cas. No. 13,785, 2 Woodb. & M. 1. Certainly not in equity. Hennessy *v.* Wilmerding-Loewe Co., 103 Fed. 90.

7. Warner *v.* Roehr, 29 Fed. Cas. No. 17,189*a*. *Contra,* Lampert *v.* Judge, etc., Drug Co., 119 Mo. App. 693, 100 S. W. 659; Addington *v.* Cullinane, 28 Mo. App. 238.

Under a statute making it a misdemeanor to counterfeit or imitate a trade-mark, and authorizing the imposition of such damages as the court may deem just and reasonable, in addition to the payment of all profits derived by defendant from the manufacture or sale of the article, the court may award damages beyond the actual pecuniary loss shown by the evidence. Cusimano *v.* Olive Oil Importing Co., 114 La. 312, 38 So. 200.

A penalty provided by a state statute cannot ordinarily be recovered as a part of the damages. Watkins *v.* Landon, 52 Minn. 389, 54 N. E. 193, 38 Am. St. Rep. 560, 19 L. R. A. 236.

8. Whitley Grocery Co. *v.* McCaw Mfg. Co., 105 Ga. 839, 32 S. E. 113; Hagan, etc., Co. *v.* Rigbers, 1 Ga. App. 100, 57 S. E. 970 (holding that plaintiff has an election of remedies, either to sue at law for damages or in equity for injunction and an accounting); Munro *v.* Tousey, 129 N. Y. 38, 29 N. E. 9, 14 L. R. A. 245; Frese *v.* Bachof, 9 Fed. Cas. No. 5,110, 14 Blatchf. 432, 13 Off. Gaz. 635; Leather Cloth Co. *v.* American Leather Cloth Co., 4 De G. J. & S. 137, 10 Jur. N. S. 81, 33 L. J. Ch. 199, 9 L. T. Rep. N. S. 558, 3 New Rep. 264, 12 Wkly. Rep. 289, 69 Eng. Ch. 106, 46 Eng. Reprint 868 [*reversing* 1 Hem. & M. 271, 2 New Rep. 481, 11 Wkly. Rep. 931, 71 Eng. Reprint 118, and *affirmed* in 11 H. L. Cas. 523, 11 Jur. N. S. 513, 35 L. J. Ch. 53, 12 L. T. Rep. N. S. 742, 6 New Rep. 209, 13 Wkly. Rep. 873, 11 Eng. Reprint 1435], per Westbury, C. But see Foot *v.* Lea, 13 Ir. Eq. 484.

"The theory upon which a court of equity has long acted is that a resemblance in, or an imitation of the names, signs, or marks, under which another conducts a business, is a deception practiced upon the public, and an injury to the proprietor, in the loss of custom and patronage; to redress which an action at law for damages is not a sufficiently satisfactory remedy. That is the principle we may extract from the often cited opinions of Lord Eldon in Hogg *v.* Kirby, 8 Ves. 215, 7 Rev. Rep. 30, 32 Eng. Reprint 336; of Lord Langdale in Knott *v.*

inadequate regardless of the question of defendant's solvency.[9] Formerly, if plaintiff's right or title to relief was at all doubtful, equity would refuse to entertain jurisdiction until the right and its violation had been established at law.[10] This rule has been substantially, if not entirely, abrogated,[11] and at the present day suits for infringement or unfair competition are almost invariably brought upon the equity side of the court in the first instance. The relief sought is an injunction against a continuance of the wrong,[12] and an accounting and recovery of damages and profits by reason of the past infringement.[13]

2. Bill of Complaint. The bill, petition, or complaint must state, in accordance with the usual rules of equity pleading,[14] or code pleading,[15] according to the system prevailing in the jurisdiction where the suit is brought, facts entitling plaintiff to equitable relief. This is done where facts are alleged showing an infringement of plaintiff's trade-mark,[16] or unfair competition,[17] within the principles already stated. The bill should contain averments of facts, not conclusions, showing that defendant's use of the mark or name complained of is wrongful.[18] In suits for infringement of a technical trade-mark, the existence of such trade-mark, its description, and its ownership and use by plaintiff in connection with a particular class of goods must be alleged.[19] Actual or threatened use or imita-

Morgan, 2 Keen 213, 15 Eng. Ch. 213, 48 Eng. Reprint 610, and of our own chancellors, in the early cases of Snowden *v.* Noah, Hopk. (N. Y.) 347, 14 Am. Dec. 547, and of Bell *v.* Locke, 8 Paige (N. Y.) 75, 34 Am. Dec. 371." Morton *v.* Morton, 148 Cal. 142, 82 Pac. 664, 1 L. R. A. N. S. 660; Munro *v.* Tousey, 129 N. Y. 38, 41, 29 N. E. 9.

9. Coffeen *v.* Brunton, 5 Fed. Cas. No. 2,947, 5 McLean 256.

10. Witthaus *v.* Braun, 44 Md. 303, 22 Am. Rep. 44; Samuel *v.* Berger, 24 Barb. (N. Y.) 163; Amoskeag Mfg. Co. *v.* Spear, 2 Sandf. (N. Y.) 599; Merrimack Mfg. Co. *v.* Garner, 4 E. D. Smith (N. Y.) 387, 2 Abb. Pr. 318; Wolfe *v.* Goulard, 18 How. Pr. (N. Y.) 64; Partridge *v.* Menck, 2 Sandf. Ch. (N. Y.) 622 [*affirmed* in 2 Barb. Ch. 101, 47 Am. Dec. 281 (*affirmed* in How. App. Cas. 547)]; Coffeen *v.* Brunton, 5 Fed. Cas. No. 2,947, 5 McLean 256; Perry *v.* Truefitt, 6 Beav. 66, 49 Eng. Reprint 749; Spottiswoode *v.* Clark, 1 Coop. t. Cott. 254, 47 Eng. Reprint 844, 10 Jur. 1043, 2 Phil. 154, 22 Eng. Ch. 154, 41 Eng. Reprint 900; Foot *v.* Lea, 13 Ir. Eq. 484; London, etc., Law Assur. Soc. *v.* London, etc., Joint-Stock L. Ins. Co., 11 Jur. 938; Pidding *v.* How, 6 L. J. Ch. 345, 8 Sim. 477, 8 Eng. Ch. 477, 59 Eng. Reprint 190; Mottley *v.* Downman, 6 L. J. Ch. 308, 3 Myl. & C. 1, 14 Eng. Ch. 1, 40 Eng. Reprint 824.

11. Hier *v.* Abrahams, 82 N. Y. 519, 37 Am. Rep. 589; Amoskeag Mfg. Co. *v.* Spear, 2 Sandf. (N. Y.) 599. See Equity, 16 Cyc. 30; Injunctions, 22 Cyc. 906.

12. See *infra*, IX, E, 11.

13. See *infra*, IX, E, 12.

14. See Equity, 16 Cyc. 216.

15. See Pleading, 31 Cyc. 92.

16. See *supra*, IV.

17. See *supra*, V.

18. Lothrop Pub. Co. *v.* Lothrop, etc., Co., 191 Mass. 353, 77 N. E. 841, 5 L. R. A. N. S. 1077.

19. Pennell *v.* Lothrop, 191 Mass. 357, 77 N. E. 842 (holding a bill insufficient in the absence of an allegation as to whom the trade-mark belongs); Frank *v.* Sleeper, 150 Mass. 583, 23 N. E. 213; J. R. Watkins Medical Co. *v.* Sands, 80 Minn. 89, 82 N. W. 1109 (specific allegation that plaintiff's predecessor was the first to adopt the device held unnecessary, long use being alleged); Prince Mfg. Co. *v.* Prince's Metallic Paint Co., 15 N. Y. Suppl. 249 [*reversed* on other grounds in 135 N. Y. 24, 31 N. E. 990, 17 L. R. A. 129] (holding averment of title by purchase sufficient to admit proof of sale on execution and mesne conveyances to plaintiff).

Profert of the instruments of title by which plaintiff acquired the property with which the trade-mark or trade-name is connected is not necessary. Such title is not in issue, and is not the foundation or gist of the action. La Republique Française *v.* Schultz, 57 Fed. 37. As against a wrongdoer, plaintiff need not show a formal assignment from his predecessors where he has used the mark for many years. Hostetter *v.* Vowinkle, 12 Fed. Cas. No. 6,714, 1 Dill. 329. See Bulte *v.* Igleheart, 137 Fed. 492, 70 C. C. A. 76, where an amendment was held inconsistent with the original bill in respect to origin and ownership of the mark, and equivalent to an admission that plaintiff pirated it.

Alleging express assignment of trade-mark on sale of business.— A sale of a mineral spring carries to the purchaser the right to use the trade-mark or name by which the water is known; and in an action by the purchaser to enjoin third persons from infringing, the complaint need not allege any express assignment of the trade-mark. Congress, etc., Spring Co. *v.* High Rock Congress Spring Co., 10 Abb. Pr. N. S. (N. Y.) 348 [*reversing* 57 Barb. 526]. For the principle involved see *supra*, VII, A, 4.

Averring registration according to treaty. — In Lacroix *v.* Escobal, 37 La. Ann. 533, a petition of a French citizen for an injunction against the infringement of his trade-mark and for damages and an account of

tion of such trade-mark by defendant under circumstances constituting an infringement[20] must be alleged.[21] It is usual to charge that such infringement was committed fraudulently and intentionally, and such charge is perhaps essential where a recovery of damages and profits is sought.[22] But a charge of fraud is unnecessary to support a bill for an injunction only, because fraud is not necessary to constitute an infringement.[23] An averment of special damage is unnecessary in a bill for an injunction.[24] A bill for unfair competition need not show an exclusive proprietary right in plaintiff to the names, marks, or devices used by defendant to pass off his goods or business as and for the goods or business of plaintiff;[25] but it is sufficient to allege their prior use by plaintiff or his predecessors, and their acquired secondary meaning as indicative of his goods or business.[26] Of course if plaintiff is entitled to an exclusive trade-name[27] he should allege his exclusive title.[28] A fraudulent intent upon the part of defendant should be charged, as according to many cases fraud is the very essence of unfair competition, and in any event it greatly strengthens plaintiff's right to relief.[29] Actual or probable confusion and deception of the public by reason of

profits was held to be fatally defective where it failed to allege that plaintiff had deposited a copy of his trade-mark in the patent office at Washington as required by the convention or treaty of April 16, 1869, between the United States and France.

Plaintiff's failure to prove the registration of his trade-mark, as alleged in the complaint, is not fatal to his recovery, where the allegations of the complaint are broad enough to admit of proof of a common-law trade-mark, and defendants do not assail the method of proof adopted, by motion for dismissal for variance or otherwise, and where, assuming the variance, defendants fail to offer any proof to controvert the existence of the trade-mark, as a matter of fact. Gaines *v.* Leslie, 25 Misc. (N. Y.) 20, 54 N. Y. Suppl. 421.

Under an averment of ownership, plaintiff may show that he acquired title by adoption and user subsequent to the origination and abandonment of such mark by another, without alleging such details. Gaines *v.* E. Whyte Grocery, etc., Co., 107 Mo. App. 507, 81 S. W. 648.

Variance between device alleged and proven. —Where the petition for an injunction sets out as an exhibit, with full description, the trade-marks and device used by both plaintiff and defendant, and makes such exhibits a part of the petition by appropriate averments, an objection to the introduction of plaintiff's trade-mark and device on the ground of variance between the device declared upon and that proven cannot be maintained. Particularly is such an objection not well taken when it is raised for the first time by a request for the charge to the jury to declare as a matter of law the existence of such fatal variance. Goodman *v.* Bohls, 3 Tex. Civ. App. 183, 22 S. W. 11.

20. See *supra*, IV.

21. Ricker *v.* Portland, etc., R. Co., 90 Me. 395, 38 Atl. 338; Smith-Dixon Co. *v.* Stevens, 100 Md. 110, 59 Atl. 401 (holding that the bill did not show such use as to authorize a preliminary injunction); Bloete *v.* Simon, 19 Abb. N. Cas. (N. Y.) 88 (sustaining a complaint for infringement of a union label); Boston Rubber Shoe Co. *v.* Boston Rubber Co., 7 Can. Exch. 9 (holding that it is sufficient to allege that the registered trade-mark of plaintiff and the mark used by defendant are in their essential features the same).

Infringement in all respects not alleged.— A bill for injunction alleging that defendant has fraudulently simulated the manufacture of the complainant and that he has successfully deceived the public by inducing it to purchase the simulated for the genuine article is sufficient on demurrer. The question is not whether defendant has in all respects imitated the trade-marks of the complainant, but whether he has so imitated them that the purchaser has been imposed on. Enoch Morgan's Sons' Co. *v.* Hunkele, 8 Fed. Cas. No. 4,493, 10 Reporter 577, 16 Off. Gaz. 1092.

22. See *infra*, IX, E, 12.

23. See *supra*, IV, D; Boston Rubber Shoe Co. *v.* Boston Rubber Co., 7 Can. Exch. 9.

Alleging fraud under Massachusetts statute.— To enable a party to maintain a bill in equity under Mass. St. (1852) c. 197 (Pub. St. c. 76, § 7) granting authority to restrain the unlawful infringement of a trade-mark, the bill must allege a fraudulent use for the purpose of falsely representing an article to have been manufactured by a person or a firm that did not in fact make it. Ames *v.* King, 2 Gray (Mass.) 379.

24. Dent *v.* Turpin, 2 Johns. & H. 139, 7 Jur. N. S. 673, 30 L. J. Ch. 495, 4 L. T. Rep. N. S. 637, 9 Wkly. Rep. 548, 70 Eng. Reprint 1003.

25. See *supra*, V, B, 1.

26. See *supra*, V, B, 2; McCardel *v.* Peck, 28 How. Pr. (N. Y.) 120 (holding averment of successorship in right to name of an inn sufficient); Investor Pub. Co. *v.* Dobinson, 72 Fed. 603 (bill for infringement of name of periodical held sufficient).

27. See *supra*, V, A, 4.

28. Hill *v.* Lockwood, 62 Wis. 507, 22 N. W. 581, complaint held to show exclusive right to trade-name for spring water.

29. See *supra*, V, B, 6; Pierce *v.* Guittard, 68 Cal. 68, 8 Pac. 645, 58 Am. Rep. 1; O'Kane *v.* West End Dry Goods Store, 72 Ill. App.

defendant's acts must be alleged.[30] Unfair competition and infringement of trade-marks by the same acts may be both embraced in one bill.[31] But a bill for relief against unlawful competition in the sale of an article before a patent was granted therefor, and also for infringement of the patent subsequently granted, is multifarious.[32] A bill seeking to restrain the publication and sale of a book because in its text it infringes plaintiff's copyright and in its title infringes the title of plaintiff's book, which is a trade-name, is not multifarious.[33]

3. Cross Bill and Counter-Claim. In a suit to enjoin circulars and advertisements claiming an exclusive right to a trade-name, and threatening plaintiff's customers with suits for infringement, a cross bill to establish such exclusive right and praying an injunction against infringement and unfair competition is germane to the subject of the original suit.[34] So in an action under the code to enjoin infringement of a name or mark, defendant may by counter-claim assert ownership of such name or mark, and pray for an injunction and damages against plaintiff, as this is a cause of action connected with the subject of the main action.[35] But a cross bill for unfair competition is not germane to a bill for infringement of a patent.[36]

4. Plea. A plea must advance some single fact which displaces the equity of the bill.[37] A plea to a bill for unfair competition which amounts substantially to a denial of infringement with an allegation of evidential facts to disprove the charges of the bill is improper, an answer being sufficient.[38]

5. Demurrer. Demurrers in this class of cases are governed by the ordinary rules.[39] If the averments of the bill are sufficient to entitle plaintiff to any relief, a demurrer going to the whole bill is too broad and will be overruled.[40] Where

297; Merchants' Detective Assoc. *v.* Detective Mercantile Agency, 25 Ill. App. 250; Hallett *v.* Cumston, 110 Mass. 29; Plant Seed Co. *v.* Michel Plant, etc., Co., 23 Mo. App. 579; Woodcock *v.* Guy, 33 Wash. 234, 74 Pac. 358 (bill failing to allege either fraud or deceptive simulation held insufficient); Industrial Press *v.* W. R. C. Smith Pub. Co., 164 Fed. 842, 90 C. C. A. 604 (holding that a bill for infringement of the name of a periodical must allege that the imitative name was used with intent to deceive, and that an allegation that it was "calculated to deceive" is not sufficient); Carson *v.* Ury, 39 Fed. 777, 5 L. R. A. 614. See also Goldstein *v.* Whelan, 62 Fed. 124. A bill which cannot be sustained on the ground that a lawful trade-mark has been infringed cannot stand for relief on the ground that defendants have injured or intend to injure the complainant by deceitfully representing and marketing their product as the product made by the complainant, where it is not alleged that defendants have attempted to practise or intend to practise such deceit. Lamont *v.* Leedy, 88 Fed. 72.

30. See *supra*, V, B, 4; Plant Seed Co. *v.* Michel Plant, etc., Co., 23 Mo. App. 579; Investor Pub. Co. *v.* Dobinson, 72 Fed. 603, holding averments sufficient. But see Bagby, etc., Co. *v.* Rivers, 87 Md. 400, 40 Atl. 171, 67 Am. St. Rep. 357, 40 L. R. A. 632, holding that damage from an unauthorized use of plaintiff's name in defendant's business need not be alleged.

31. Jewish Colonization Assoc. *v.* Solomon, 125 Fed. 994.

32. Ball, etc., Fastener Co. *v.* Cohn, 90 Fed. 664.

33. Harper *v.* Holman, 84 Fed. 222.

34. Ogilvie *v.* G. & C. Merriam Co., 149 Fed. 858 [*affirmed* in 159 Fed. 638].

35. Glen, etc., Mfg. Co. *v.* Hall, 61 N. Y. 226, 19 Am. Rep. 278 [*reversing* 6 Lans. 158].

36. George Frost Co. *v.* Kora Co., 136 Fed. 487 [*affirmed* in 140 Fed. 987, 71 C. C. A. 19].

37. See Equity, 16 Cyc. 286. A plea that certain defendants acted only as agents or servants of the principal defendant is bad as stating no defense. Estes *v.* Worthington, 30 Fed. 465. See also *supra*, IX, C, 3.

38. G. & C. Merriam Co. *v.* Straus, 136 Fed. 477, plea overruled.

39. See Equity, 16 Cyc. 261; Pleading, 31 Cyc. 269.

40. Investor Pub. Co. *v.* Dobinson, 72 Fed. 603; California Fig-Syrup Co. *v.* Improved Fig-Syrup Co., 51 Fed. 296; Putnam Nail Co. *v.* Bennett, 43 Fed. 800; Merriam *v.* Holloway Pub. Co., 43 Fed. 450; La Croix *v.* May, 15 Fed. 236. Where a bill states a cause of action which entitles the complainant to relief against the use by defendant of certain trade-marks and names in combination, it will not be held demurrable because he may not be entitled to enjoin their use separately, or to relief to the full extent prayed for. Holeproof Hosiery Co. *v.* Richmond Hosiery Mills, 167 Fed. 381.

Validity of geographical trade-mark.— In a suit for infringement of trade-marks and labels and for unlawful competition, an objection that the trade-marks are invalid because consisting of geographical names, etc., cannot be considered on demurrer, but is matter of defense to be raised by answer. Jewish Colonization Assoc. *v.* Solomon, 125 Fed. 994.

fraudulent intent and deception of purchasers is charged in the bill, it is admitted by a demurrer, and ordinarily plaintiff will be entitled to a preliminary injunction.[41] The respective names or marks may be compared and considered on demurrer, if made a part of the bill, or filed as exhibits,[42] and if it clearly appears from such comparison that there is no infringement, the demurrer will be sustained;[43] but to justify such action, the dissimilarity should be so marked as to leave no doubt in the mind of the court.[44]

6. Answer. The answer, in accordance with familiar rules,[45] must be responsive to the bill,[46] and not frivolous.[47] If an answer under oath is not waived, a verified answer responsive to the bill is evidence for defendant, and can be overcome only by the testimony of two witnesses, or of one witness and efficient corroborating circumstances.[48]

7. Unclean Hands. It has been held that the defense of unclean hands, fraud, and misrepresentation upon the part of plaintiff is an affirmative defense which must be pleaded in order to be available.[49] But by the weight of authority, unclean hands is not strictly a defense, and need not be pleaded. Upon the fact appearing, equity will withhold its hand, upon its own motion, and in the interest of the public deny its assistance to plaintiff.[50]

8. Evidence. The evidence for final hearing or on the trial is taken in the usual manner, and subject to the usual rules.[51] The matters necessary to be

41. Bluthenthal *v.* Mohlmann, 49 Fla. 275, 38 So. 709 (holding that unless a bare inspection of the respective marks filed as exhibits necessarily overcomes such admissions, it is error to dismiss the bill); Ellis *v.* Zeilin, 42 Ga. 91; Plant Seed Co. *v.* Michel Plant, etc., Co., 23 Mo. App. 579; Enoch Morgan's Sons Co. *v.* Hunkele, 8 Fed. Cas. No. 4,493, 10 Reporter 577, 16 Off. Gaz. 1092. See also Mrs. G. B. Miller, etc., Tobacco Manufactory *v.* Commerce, 45 N. J. L. 18, 46 Am. Rep. 750; Barrows *v.* Knight, 6 R. I. 434, 78 Am. Dec. 452.

42. Bluthenthal *v.* Mohlmann, 49 Fla. 275, 38 So. 709.

43. Desmond's Appeal, 103 Pa. St. 126, 49 Am. Rep. 118; Collins Chemical, etc., Co. *v.* Capitol City Mfg. Co., 42 Fed. 64. That ocular comparison is the best means of determining infringing and deceptive similarity see *supra*, IV, C, 3; V, C, 12.

44. Leidersdorf *v.* Flint, 50 Wis. 400, 7 N. W. 252. See also Barrows *v.* Knight, 6 R. I. 434, 78 Am. Dec. 452.

45. See Equity, 16 Cyc. 297; Pleading, 31 Cyc. 126 *et seq.*

46. McVey *v.* Brendal, 7 Lanc. L. Rev. (Pa.) 399, 5 Lanc. L. Rev. 350 (answer that defendant is a member of the union and entitled to use the union label is responsive to a bill to restrain use of a counterfeit label); Uri *v.* Hirsch, 123 Fed. 568 (holding an answer alleging prior use by defendant was directly responsive to a bill for infringement).

47. Silver *v.* Waterman, 122 N. Y. App. Div. 373, 106 N. Y. Suppl. 899 (holding that an answer is not frivolous merely because it may not constitute a complete defense, if it may justify some of the acts complained of); Guilhon *v.* Lindo, 9 Bosw. (N. Y.) 605 (holding that an answer denying fraudulent intent, and alleging only small sales, and those to plaintiff's agent, is material upon the question of damages and costs, and is not frivolous). To the same effect see Faber *v.* D'Utassey, 11 Abb. Pr. N. S. (N. Y.) 399.

48. Uri *v.* Hirsch, 123 Fed. 568. See Equity, 16 Cyc. 392.

49. Falk *v.* American West Indies Trading Co., 71 N. Y. App. Div. 320, 75 N. Y. Suppl. 964 [*affirming* 36 Misc. 376, 73 N. Y. Suppl. 547]; Fleischmann *v.* Fleischmann, 7 N. Y. App. Div. 280, 39 N. Y. Suppl. 1002. Generally as to this defense in trade-mark cases see *supra*, III, A, 5; in unfair competition cases see *supra*, V, B, 11.

50. Fetridge *v.* Wells, 4 Abb. Pr. (N. Y.) 144, 13 How. Pr. 385; C. F. Simmons Medicine Co. *v.* Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165; Memphis Keeley Inst. *v.* Leslie E. Keeley Co., 155 Fed. 964, 84 C. C. A. 112, 16 L. R. A. N. S. 921; Moxie Nerve Food Co. *v.* Modox, 152 Fed. 493; Uri *v.* Hirsch, 123 Fed. 568. It is competent for defendant to show by cross-examination or otherwise, without pleading the same, that plaintiff's goods are not as represented by his trade-mark or advertising, and that his business has been built up on false representations which deprive him of the right to relief in equity. Uri *v.* Hirsch, *supra*. A complainant, seeking the aid of a court of equity in protection of his rights in a proprietary medicine, should be required as a part of his affirmative case to allege and prove that his preparation is what it purports to be, and is represented to the public to be, there being no presumption that such representations are true upon which a court can act. Moxie Nerve Food Co. *v.* Modox, 152 Fed. 493. But it would seem that there should be no presumption of fraud.

The objection ought to be raised by the court. The suggestion comes with a poor grace from one who has, by imitation of plaintiff's marks, been guilty of the same fraud or imposition upon the public, if such it happen to be. Smith *v.* Woodruff, 48 Barb. (N. Y.) 438.

51. See, generally, Depositions, 13 Cyc. 822; Equity, 16 Cyc. 382; Evidence, 16 Cyc. 821; Trial, *post*, p. 1326; Witnesses.

shown, and the facts relevant to the various issues that arise in this class of cases, have been stated in preceding sections of this article in connection with the specific topics. Some additional rulings and cases are appended below.[52]

52. Deception and secondary meaning.— Mistakes in delivery of mail, letters, and orders intended for one party but addressed to or received by the other, etc., are admissible to show confusion and deception as to identity of goods or business. W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 100 Me. 461, 62 Atl. 499, 4 L. R. A. N. S. 960; Viano *v.* Baccigalupo, 183 Mass. 160, 67 N. E. 641; Chas. S. Higgins Co. *v.* Higgins Soap Co., 144 N. Y. 462, 39 N. E. 490, 43 Am. St. Rep. 769, 27 L. R. A. 42 [*reversing* 71 Hun 101, 24 N. Y. Suppl. 801]; American Clay Mfg. Co. *v.* American Clay Mfg. Co., 198 Pa. St. 189, 47 Atl. 936; Lee *v.* Haley, L. R. 5 Ch. 155, 39 L. J. Ch. 284, 22 L. T. Rep. N. S. 251, 18 Wkly. Rep. 242, testimony of customers that orders given defendant were intended for plaintiff. Actual deception of purchasers is almost conclusive evidence of infringement and unfair competition. Alleghany Fertilizer Co. *v.* Woodside, 1 Fed. Cas. No. 206, 1 Hughes 115. Duly qualified witnesses may testify as to the meaning in the trade of the names and marks applied to plaintiff's products. Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 70 Conn. 516, 40 Atl. 534. Witnesses may not testify that purchasers are likely to be deceived, as that is the issue to be determined upon all the evidence. Payton *v.* Snelling, [1901] A. C. 308, 70 L. J. Ch. 644, 85 L. T. Rep. N. S. 287. But see Cope *v.* Evans, L. R. 18 Eq. 138, 30 L. T. Rep. N. S. 292, 22 Wkly. Rep. 450, holding that opinion evidence of skilled witnesses that the public is likely to be deceived by the similarity is not of itself sufficient evidence of infringement. Testimony of experts and dealers is of little weight on the question of similarity and probability of deception, where the court can personally inspect and compare the goods and packages. Yale, etc., Mfg. Co. *v.* Alder, 154 Fed. 37, 83 C. C. A. 149. The court may act upon a mere comparison of the respective devices, and without the testimony of any witnesses. Coats *v.* Merrick Thread Co., 149 U. S. 562, 13 S. Ct. 966, 37 L. ed. 847; Von Mumm *v.* Frash, 56 Fed. 830. Although the main test of the alleged resemblance between plaintiff's and defendant's trade-marks, devices, etc., is an inspection by the court, yet the court cannot usually determine upon a bare inspection whether an ordinary customer having neither the opportunity for comparison nor time for examination would probably be deceived by the similarity of the marks. On that question the opinion of witnesses familiar with the trade and habits of the customer is of weight, and, when aided by evidence of instances of actual deception, should be controlling unless the dissimilarity between the two marks is such as to exclude any probability of deception. Drummond Tobacco Co. *v.* Addison Tinsley Tobacco Co., 52 Mo. App. 10. The court must be governed by its own judgment as to the similarity of the packages and labels, and is not controlled by the contrary opinion of others or by the fact that a few people have been deceived by defendant's conduct. P. Lorillard Co. *v.* Peper, 86 Fed. 956, 30 C. C. A. 496. Advertisements showing that defendant marketed the goods in his own name do not rebut infringement where the name itself is infringing and deceptive. Alleghany Fertilizer Co. *v.* Woodside, 1 Fed. Cas. No. 206, 1 Hughes 115.

The record and evidence in a prior case brought by complainant for infringement of its trade-mark, to which defendant was not a party, while inadmissible as proof of the issues on trial, was competent for the information of the chancellor as to the scope of the decision in the prior case as a precedent. Gaines *v.* Kahn, 155 Fed. 639 [*affirmed* as to this point in 161 Fed. 495].

Exhibits attached to affidavits for preliminary injunction.— Statements made in the patent office on application for registration of a trade-mark, although not set up in the bill for injunction, may come into the case as an exhibit attached to the complainant's affidavits used on the motion for a preliminary injunction and may properly be used at the final hearing. Kohler Mfg. Co. *v.* Beeshore, 59 Fed. 572, 8 C. C. A. 215.

A certified copy of an application for registration is admissible against defendant's objection that the law authorizing the registration of trade-marks is unconstitutional, as a statement of defendant for the purpose of contradicting his testimony. Blackwell's Durham Tobacco Co. *v.* McElwee, 100 N. C. 150, 5 S. E. 907.

Books of registrar.— The books of the registrar of trade-marks which show marks, the registration of which has been refused, are not evidence that these marks are *publici juris*. Orr-Ewing *v.* Johnston, 13 Ch. D. 434, 42 L. T. Rep. N. S. 67, 28 Wkly. Rep. 330 [*affirmed* in 7 App. Cas. 219, 51 L. J. Ch. 797, 46 L. T. Rep. N. S. 216, 30 Wkly. Rep. 417].

Evidence of ownership.— The uncontradicted testimony of a stock-holder that the company now owns the trade-mark is sufficient to enable the jury to pass upon the question of ownership. Blackwell's Durham Tobacco Co. *v.* McElwee, 100 N. C. 150, 5 S. E. 907.

Immaterial evidence.— The fact that the products of both parties to an action for infringement of a trade-mark are on sale at the same or different places in the same city is immaterial, but the objection cannot be raised for the first time on appeal. Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 70 Conn. 516, 40 Atl. 534.

Evidence of identity of articles.— Where the only issue is as to the similarity of the trade-marks, labels, and packages, evidence of the identity of the articles themselves is not admissible, being without the issue. Radam

9. Hearing and Determination. The final hearing or trial is had upon the pleadings and proofs as in other cases in equity,[53] or equitable actions under code procedure.[54] The whole case may be referred to a master to take the testimony and report with his opinion.[55]

10. Final and Interlocutory Decrees. The relief awarded in this class of cases consists of an injunction,[56] and where the facts warrant it a recovery of damages and profits.[57] Where damages and profits are awarded, an interlocutory decree is entered awarding an injunction, and directing a reference to a master to ascertain the damages and profits.[58] This is followed by a final decree for the recovery of the damages and profits found. The infringing mark may be ordered removed from the goods,[59] by or under the direction of a master or referee, and at the cost of defendant.[60]

11. Injunctions — a. Preliminary Injunctions. Preliminary injunctions upon motion, based upon *ex parte* affidavits, and in advance of a hearing upon full proofs, are granted much more cautiously than in the case of permanent injunctions upon final hearing.[61] Accordingly all the limitations and qualifications upon the granting of permanent injunctions apply with added force to preliminary injunctions.[62] In trade-mark cases it is not a matter of course to grant preliminary injunctions even where plaintiff's case seems to be made out. The usual considerations affecting the just discretion of the court in granting preliminary injunctions are fully applicable.[63] The absence of fraudulent intent, the financial

v. Capital Microbe Destroyer Co., 81 Tex. 122, 16 S. W. 990, 26 Am. St. Rep. 783.

53. See Equity, 16 Cyc. 407 *et seq.*

54. See Trial, *post*, p. 1238.

Construction of finding.— A finding in effect that the manner in which defendant has used a certain word either alone or "in combinations" is a violation of plaintiff's trade-mark or name is not a finding either expressly or by clear implication that the mere ordinary use by defendant of its legitimate corporate name constitutes such an infringement. Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 70 Conn. 516, 40 Atl. 534.

55. Osgood *v.* Allen, 18 Fed. Cas. No. 10,603, Holmes 185, 3 Off. Gaz. 124.

56. See *infra*, IX, E, 11.

57. See *infra*, IX, E, 12.

58. See *infra*, IX, E, 12. As to final and interlocutory decrees generally see Appeal and Error, 2 Cyc. 586; Equity, 16 Cyc. 471.

59. Upmann *v.* Elkan, L. R. 12 Eq. 140, 40 L. J. Ch. 475, 24 L. T. Rep. N. S. 896, 19 Wkly. Rep. 867; Dent *v.* Turpin, 2 Johns. & H. 139, 7 Jur. N. S. 673, 30 L. J. Ch. 495, 4 L. T. Rep. N. S. 637, 9 Wkly. Rep. 548, 70 Eng. Reprint 1003.

60. Jurgensen *v.* Alexander, 24 How. Pr. (N. Y.) 269.

61. See Injunctions, 22 Cyc. 906.

"Injunctions in restraint of trade should be sparingly granted before final decree." Lies *v.* Daniel, 82 Ga. 272, 8 S. E. 432. "Preliminary injunctions, which, in effect, determine the litigation, and give the same relief which it is expected to obtain by the judgment, should be granted with great caution, and only when necessity requires." Whiting Mfg. Co. *v.* Joseph H. Bauland Co., 56 N. Y. Suppl. 114, 28 N. Y. Civ. Proc. 230 [*citing* Grill *v.* Wiswall, 82 Hun (N. Y.) 281, 31 N. Y. Suppl. 470; Bronk *v.* Riley, 50 Hun (N. Y.) 489, 492, 3 N. Y. Suppl. 446].

62. Permanent injunctions see *infra*, IX, E, 11, b.

Inequitable conduct of plaintiff.— Where the complainants refused to recognize the rights of a foreigner, the original proprietor of a trade-mark, until they thought it would be more profitable to purchase his rights in the United States and obtain a monopoly, it was held that a preliminary injunction would not be granted, but the complainants would be left to their rights at final hearing. Estes *v.* Worthington, 22 Fed. 822, 23 Blatchf. 65. Where defendant had abandoned a device alleged to infringe plaintiff's trade-mark before the motion for a preliminary injunction was heard, and alleged in his affidavits that plaintiffs themselves were guilty of attempting to mislead the public by a statement shown to have been false, it was held that a preliminary injunction should not be granted. Brown *v.* Doscher, 20 N. Y. Suppl. 900.

If a remedy at law would be adequate the party will be left to it. Coffeen *v.* Brunton, 5 Fed. Cas. No. 2,947, 5 McLean 256.

63. Fairbanks *v.* Jacobus, 8 Fed. Cas. No. 4,608, 3 Ban. & A. 108, 14 Blatchf. 337. See also Injunctions, 22 Cyc. 746.

Preliminary injunctions granted in miscellaneous cases.— Boker *v.* Korkemas, 122 N. Y. App. Div. 36, 106 N. Y. Suppl. 904; Anargyros *v.* Egyptian Amasis Cigarette Co., 54 N. Y. App. Div. 345, 66 N. Y. Suppl. 626; Collier *v.* Jones, 66 Misc. (N. Y.) 97, 120 N. Y. Suppl. 991; Bolen, etc., Mfg. Co. *v.* Jonasch, 29 Misc. (N. Y.) 99, 60 N. Y. Suppl. 555; Jerome *v.* Johnson, 59 N. Y. Suppl. 859; Bates Numbering Mach. Co. *v.* Bates Mfg. Co., 178 Fed. 681, 102 C. C. A. 181 [*modifying* 172 Fed. 892]; Holeproof Hosiery Co. *v.* Wallach, 172 Fed. 859, 97 C. C. A. 263 [*modifying* and *affirming* 167 Fed. 373]; American Tobacco Co. *v.* Polacsek, 170 Fed. 117; Holeproof Hosiery Co. *v.* Fitts, 167 Fed.

responsibility of defendant, and other like considerations may be taken into account in granting or denying the injunction.[64] Preliminary injunctions rest in the sound discretion of the trial court.[65] The case must be reasonably strong and free from doubt to justify a preliminary injunction.[66] But where plaintiff's right and defendant's infringement are clearly shown, a preliminary injunction should be granted.[67] Thus where plaintiff's title to a trade-mark is *res judicata*,

378; Moxie Nerve Food Co. *v.* Madox Co., 153 Fed. 487 [*affirmed* in 162 Fed. 649, 89 C. C. A. 441]; Dwinell-Wright Co. *v.* Co-Operative Supply Co., 148 Fed. 242; Frese *v.* Bachof, 9 Fed. Cas. No. 5,109, 13 Blatchf. 234; Hanford *v.* Westcott, 11 Fed. Cas. No. 6,022, 16 Off. Gaz. 1181; Read *v.* Richardson, 45 L. T. Rep. N. S. 54; Lefebvre *v.* Landry, 5 Quebec Pr. 341.

Preliminary injunctions denied in miscellaneous cases.— Lies *v.* Daniel, 82 Ga. 272, 8 S. E. 432; Whiting Mfg. Co. *v.* Joseph H. Bauland Co., 56 N. Y. Suppl. 114, 28 N. Y. Civ. Proc. 230; Billiken Co. *v.* Baker, etc., Co., 174 Fed. 829 (sale stopped upon commencement of suit); Société Anonyme, etc., Benedictine *v.* Hygrade Wine Co., 173 Fed. 796 (where the article sold by defendant bore a label which conformed to an order of court made in a suit by complainant against the manufacturer); William Wrigley, Jr., Co. *v.* Grove Co., 161 Fed. 885; Oliver Typewriter Co. *v.* American Writing Mach. Co., 156 Fed. 177; American Brewing Co. *v.* Bienville Brewery, 153 Fed. 615; Lamont & Co. *v.* Hershey, 140 Fed. 763.

Laches is sufficient ground for denial of a preliminary injunction. See *supra*, VIII, D.

64. Lies *v.* Daniel, 82 Ga. 272, 8 S. E. 432; Foster *v.* Blood Balm Co., 77 Ga. 216, 3 S. E. 284; H. Mueller Mfg. Co. *v.* A. Y. McDonaly, etc., Mfg. Co., 132 Fed. 585.

65. Schenker *v.* Awerbach, 89 N. Y. App. Div. 612, 85 N. Y. Suppl. 129; McVey *v.* Brendal, 5 Lanc. L. Rev. (Pa.) 350; Tucker Mfg. Co. *v.* Boyington, 24 Fed. Cas. No. 14,229, 9 Off. Gaz. 455.

66. *Georgia.*— Foster *v.* Blood Balm Co., 77 Ga. 216, 3 S. E. 284; Ellis *v.* Zeilin, 42 Ga. 91.

Maryland.— Smith-Dixon Co. *v.* Stevens, 100 Md. 110, 59 Atl. 401.

New York.— Selchow *v.* Baker, 93 N. Y. 59, 45 Am. Rep. 169; Commercial Advertiser Assoc. *v.* Haynes, 26 N. Y. App. Div. 279, 49 N. Y. Suppl. 938; Samuel *v.* Berger, 24 Barb. 163; Amoskeag Mfg. Co. *v.* Spear, 2 Sandf. 599; Merrimack Mfg. Co. *v.* Garner, 4 E. D. Smith 387, 2 Abb. Pr. 318; Motor Boat Pub. Co. *v.* Motor Boating Co., 57 Misc. (N. Y.) 108, 107 N. Y. Suppl. 468; Lavanburg *v.* Pfeiffer, 23 Misc. 577, 52 N. Y. Suppl. 801; Whiting Mfg. Co. *v.* Joseph H. Bauland Co., 56 N. Y. Suppl. 114, 28 N. Y. Civ. Proc. 230; Société des Huiles, etc. *v.* Rorke, 31 N. Y. Suppl. 51; Keasbey *v.* Brooklyn Chemical Works, 16 N. Y. Suppl. 318 [*reversed* in 21 N. Y. Suppl. 696]; Foster *v.* Webster Piano Co., 13 N. Y. Suppl. 338; Fetridge *v.* Merchant, 4 Abb. Pr. 156; Wolfe *v.* Goulard, 18 How. Pr. 64; Partridge *v.* Menck, 2 Sandf. Ch. 622 [*affirmed* in 2 Barb. Ch. 101 (*affirmed* in How. App. Cas. 547)].

Pennsylvania.— Platt *v.* Stackhouse, 2 Pa. Dist. 601.

Wisconsin.— Marshall *v.* Pinkham, 52 Wis. 572, 9 N. W. 615, 38 Am. Rep. 756.

United States.— Anargyros *v.* Anargyros, 167 Fed. 753, 93 C. C. A. 241; Moore *v.* Auwell, 158 Fed. 462 (must be a clear case); Oliver Typewriter Co. *v.* American Writing Mach. Co., 156 Fed. 177; Lamont *v.* Hershey, 140 Fed. 763; H. Mueller Mfg. Co. *v.* A. Y. McDonaly, etc., Mfg. Co., 132 Fed. 585; Van Camp Packing Co. *v.* Cruikshanks Bros. Co., 90 Fed. 814, 33 C. C. A. 280; Morgan Envelope Co. *v.* Walton, 86 Fed. 605, 30 C. C. A. 383; American Cereal Co. *v.* Eli Pettijohn Cereal Co., 76 Fed. 372, 22 C. C. A. 236 [*affirming* 72 Fed. 903]; French *v.* Alter, etc., Co., 74 Fed. 788; Goldstein *v.* Whelan, 62 Fed. 124; Portuondo *v.* Monne, 28 Fed. 16; Leclancha Battery Co. *v.* Western Electric Co., 21 Fed. 538; Coffeen *v.* Brunton, 5 Fed. Cas. No. 2,947, 5 McLean 256; Fairbanks *v.* Jacobus, 8 Fed. Cas. No. 4,608, 3 Ban. & A. 108, 14 Blatchf. 337; Frese *v.* Bachof, 9 Fed. Cas. No. 5,109, 13 Blatchf. 234; Walker *v.* Reid, 29 Fed. Cas. No. 17,084.

England.— Mitchell *v.* Henry, 15 Ch. D. 181, 43 L. T. Rep. N. S. 186; Bovill *v.* Crate, L. R. 1 Eq. 388; Perry *v.* Truefitt, 6 Beav. 66, 49 Eng. Reprint 749; Spottiswoode *v.* Clarke, 1 Coop. t. Cott. 254, 47 Eng. Reprint 844, 10 Jur. 1043, 2 Phil. 154, 22 Eng. Ch. 154, 41 Eng. Reprint 900; London, etc., Law Assur. Soc. *v.* London, etc., Joint-Stock L. Ins. Co., 11 Jur. 938; Isaacson *v.* Thompson, 41 L. J. Ch. 101, 20 W. R. 196; Purser *v.* Brain, 17 L. J. Ch. 141; Pidding *v.* How, 6 L. J. Ch. 345, 8 Sim. 477, 8 Eng. Ch. 477, 59 Eng. Reprint 190; Mottley *v.* Downmann, 6 L. J. Ch. 308, 3 Myl. & C. 1, 14 Eng. Ch. 1, 40 Eng. Reprint 824; Green *v.* Rooke, 7 L. J. Notes Cas. 54.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 108.

67. *Maryland.*— Robertson *v.* Berry, 50 Md. 591, 33 Am. Rep. 328.

New York.— Seeman *v.* Zechnowitz, 136 N. Y. App. Div. 937, 121 N. Y. Suppl. 125; Kasel *v.* Jeuda, 61 N. Y. App. Div. 613, 70 N. Y. Suppl. 480 (copy dictated from plaintiff's label); Rorke *v.* Société des Huiles, etc., 14 N. Y. App. Div. 173, 43 N. Y. Suppl. 548; Baeder *v.* Baeder, 52 Hun 170, 5 N. Y. Suppl. 123; Frohman *v.* Payton, 34 Misc. 275, 68 N. Y. Suppl. 849; Partridge *v.* Menck, 2 Sandf. Ch. 622 [*affirmed* in 2 Barb. Ch. 101 (*affirmed* in How. App. Cas. 547)].

Pennsylvania.— Arthur *v.* Howard, 19 Pa. Co. Ct. 81.

Wisconsin.— Hill *v.* Lockwood, 62 Wis. 507, 22 N. W. 581.

United States.— Dwinell-Wright Co. *v.* Co-

or at least established by a prior adjudication, and infringement is admitted or clearly shown, a preliminary injunction should be granted.[68] If the affidavits are conflicting upon a material matter of fact, a preliminary injunction may be denied and the question reserved for the final hearing.[69] A preliminary injunction may also be granted with full reservation of all questions for final hearing.[70] Upon the motion it is improper to pass upon the merits of an affirmative defense.[71] The balance of convenience rule is especially applicable upon motions for injunctions in trade-mark and unfair competition cases.[72] Terms may be imposed. Thus, it is not unusual to require defendant to keep an account, or to give a bond, as a condition of denying a motion for a preliminary injunction,[73] and a complainant may be required to give a bond as a condition of granting a preliminary injunction.[74] The parties may be required to put in their proof within a limited time fixed by the court as a condition of the granting or refusal of a preliminary injunction.[75] Preliminary injunctions should be no broader than the necessities

Operative Supply Co., 148 Fed. 242; California Fig-Syrup Co. *v.* Worden, 86 Fed. 212; Scheuer *v.* Muller, 74 Fed. 225, 20 C. C. A. 161; American Grocery Co. *v.* Sloan, 68 Fed. 539; G. G. White Co. *v.* Miller, 50 Fed. 277; Price Baking-Powder Co. *v.* Fyfe, 45 Fed. 799; Battle *v.* Finlay, 45 Fed. 796; Moxie Nerve Food Co. *v.* Beach, 33 Fed. 248; Moxie Nerve Food Co. *v.* Baumbach, 32 Fed. 205; Estes *v.* Leslie, 29 Fed. 91; Symonds *v.* Greene, 28 Fed. 834; Carroll *v.* Ertheiler, 1 Fed. 688; Apollinaris Brunnen *v.* Somborn, 1 Fed. Cas. No. 496, 14 Blatchf. 380; Filkins *v.* Blackman, 9 Fed. Cas. No. 4,786, 13 Blatchf. 440; Frese *v.* Bachof, 9 Fed. Cas. No. 5,109, 13 Blatchf. 234; Hostetter *v.* Vowinkle, 12 Fed. Cas. No. 6,714, 1 Dill. 329; Walton *v.* Crowley, 29 Fed. Cas. No. 17,133, 3 Blatchf. 440.

England.— Croft *v.* Day, 7 Beav. 84, 29 Eng. Ch. 84, 49 Eng. Reprint 994; Radde *v.* Norman, L. R. 14 Eq. 348, 41 L. J. Ch. 525, 26 L. T. Rep. N. S. 788, 20 Wkly. Rep. 766; Read *v.* Richardson, 45 L. T. Rep. N. S. 54.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 108.

68. Ricker *v.* Leigh, 74 N. Y. App. Div. 138, 77 N. Y. Suppl. 540 (plea of guilty in prior criminal prosecutions); Rorke *v.* Société des Huiles, etc., 14 N. Y. App. Div. 173, 43 N. Y. Suppl. 548; Atwater *v.* Castner, 88 Fed. 642, 32 C. C. A. 77, 90 Fed. 828, 32 C. C. A. 602; Symonds *v.* Greene, 28 Fed. 834; Hanford *v.* Westcott, 11 Fed. Cas. No. 6,022, 16 Off. Gaz. 1181 (decision in interference proceeding in patent office on application for registration). See also Carmel Wine Co. *v.* Palestine Hebrew Wine Co., 161 Fed. 654, prior adjudication of other trade-marks similarly used. A court should not grant a preliminary injunction against the infringement of a trade-mark until the complainant's right thereto has been judicially determined, and the decision of the commissioner of patents in favor of such right in an interference declared between him and another applicant for registration, under the limited authority given therefor by section 3 of the act of March 3, 1881, 21 U. S. St. at L. 503 [U. S. Comp. St. (1901) p. 3402], is not such a judicial determination. A. Leschen, etc., Rope Co. *v.* Broderick, etc., Rope Co., 123 Fed. 149 [*affirmed* in 201 U. S. 166, 26 S. Ct. 425, 50 L. ed. 710]. But see *supra*, IX, E, 1.

69. Lavanburg *v.* Pfeiffer, 23 Misc. (N. Y.) 577, 52 N. Y. Suppl. 801; National Starch Co. *v.* Koster, 146 Fed. 259.

Indefinite affidavit.— An affidavit merely stating that plaintiff had used the name or mark "for a long time" is too indefinite for judicial action. Charles R. De Bevoise Co. *v.* H. & W. Co., 69 N. J. Eq. 114, 60 Atl. 407.

70. Moxie Nerve Food Co. *v.* Modox Co., 153 Fed. 487 [*affirmed* in 162 Fed. 649, 89 C. C. A. 441], applying Wm. G. Rogers Co. *v.* International Silver Co., 118 Fed. 133, 55 C. C. A. 83.

71. Blackwell *v.* Armistead, 3 Fed. Cas. No. 1,474, 3 Hughes 163.

72. Stirling Silk Mfg. Co. *v.* Sterling Silk Co., 59 N. J. Eq. 394, 46 Atl. 199.

Delay of plaintiff and injury to defendant. — When delay of the owner of a trade-mark to prosecute infringers has tended to mislead the public, or has lulled defendant against whom injunction is sought into a false security, and a sudden injunction would result injuriously, it ought not to be granted summarily, but the complainant should be left to his relief at final hearing. Estes *v.* Worthington, 22 Fed. 822, 23 Blatchf. 65.

73. Stirling Silk Mfg. Co. *v.* Sterling Silk Co., 59 N. J. Eq. 394, 46 Atl. 199; Romanoff Cigarette Co. *v.* Vuccino, 118 N. Y. Suppl. 535; Mitchell *v.* Henry, 15 Ch. D. 181, 43 L. T. Rep. N. S. 186.

74. Apollinaris Brunnen *v.* Somborn, 1 Fed. Cas. No. 496, 14 Blatchf. 380; Roberts *v.* Sheldon, 20 Fed. Cas. No. 11,916, 8 Biss. 398, 18 Off. Gaz. 1277; Lefebvre *v.* Landry, 5 Quebec Pr. 341.

Increasing security.— In Lord *v.* Lord, 25 Wkly. Notes Cas. (Pa.) 436, the court, on deciding that a preliminary injunction restraining the lawful use by defendant of plaintiff's trade-mark could be published in the newspapers as an advertisement, increased the security on the injunction bond.

75. Rushmore *v.* Saxon, 154 Fed. 213; J. A. Scriven Co. *v.* Girard Co., 140 Fed. 794 [*modified* in 148 Fed. 1019, 79 C. C. A. 533];

of the case require.[76] Preliminary injunctions will usually be dissolved upon the coming in of an answer denying the fact and equity of the bill.[77] But mere affidavits denying the equity of the bill, without an answer, are not necessarily sufficient to defeat a motion for injunction.[78] A mandatory injunction will not be granted in advance of the trial or final hearing.[79]

b. Final Injunctions— (1) *RIGHT TO INJUNCTION.* A permanent injunction at final hearing is a matter of course and of right where plaintiff's title to the mark and defendant's infringement of it are clearly shown, and there are no countervailing equities.[80] Actual or threatened infringement or violation of plaintiff's rights must be shown.[81] Cessation of infringement, *pendente lite*, is no reason for refusing an injunction,[82] and even discontinuance of infringement before commencement of the suit is not necessarily a bar, especially where that fact was unknown to plaintiff and defendant contests the suit, as there may be danger that he will resume the infringement.[83] But an injunction may be denied

Roberts *v.* Sheldon, 20 Fed. Cas. No. 11,916, 8 Biss. 398, 18 Off. Gaz. 1277.

76. Rushmore *v.* Saxon, 154 Fed. 213; Baglin *v.* Cusenier Co., 141 Fed. 497, 72 C. C. A. 555 [*modifying* 156 Fed. 1015]. A preliminary injunction against one who has purchased a hotel properly bearing the name of another person, prohibiting the use of such name, will not be extended to forbid a retention of such name marked upon minor articles the use of which with the name would be no serious injury to plaintiff and which would be valueless if their use were forbidden. McCardel *v.* Peck, 28 How. Pr. (N. Y.) 120.

A sale by defendant of stock in trade pending an action to enjoin the infringement of a trade-name will not impair the effect of a judgment in plaintiff's favor; and hence he is not entitled to a preliminary injunction against the sale, under Code Civ. Proc. § 604, subd. 1, providing for a preliminary injunction where defendant is about to do an act tending to render the judgment ineffectual. Whiting Mfg. Co. *v.* Joseph H. Bauland Co., 56 N. Y. Suppl. 114, 28 N. Y. Civ. Proc. 230.

77. McVey *v.* Brendal, 5 Lanc. L. Rev. (Pa.) 350; Tucker Mfg. Co. *v.* Boyington, 24 Fed. Cas. No. 14,229, 9 Off. Gaz. 455.

78. Walton *v.* Crowley, 29 Fed. Cas. No. 17,133, 3 Blatchf. 440, bill corroborated by affidavit not denied.

79. Morton *v.* Morton, 148 Cal. 142, 82 Pac. 664, 1 L. R. A. N. S. 660, holding that the particular injunction was prohibitory only, and not mandatory. Generally as to mandatory injunctions see INJUNCTIONS, 22 Cyc. 959.

80. Morton *v.* Morton, 148 Cal. 142, 82 Pac. 664, 1 L. R. A. N. S. 660; Weinstock *v.* Marks, 109 Cal. 529, 42 Pac. 142, 50 Am. St. Rep. 57, 30 L. R. A. 182; Schmidt *v.* Welch, (Cal. 1893) 35 Pac. 626; Handy *v.* Commander, 49 La. Ann. 1119, 22 So. 230; Correro *v.* Wright, (Miss. 1908) 47 So. 379; McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828; Jennings *v.* Johnson, 37 Fed. 364; Collins Co. *v.* Oliver Ames, etc., Corp., 18 Fed. 561, 20 Blatchf. 542; Hostetter *v.* Vowinkle, 12 Fed. Cas. No. 6,714, 1 Dill. 329. In a suit to enjoin the use of a trade-name and from conspiring to deprive plaintiff of its use, if the right to and ownership of the name is in defendants, or one of them, plaintiff would not be entitled to the relief demanded. Solar Baking Powder Co. *v.* Royal Baking Powder Co., 128 N. Y. App. Div. 550, 112 N. Y. Suppl. 1013.

81. Stetson *v.* Brennan, 21 N. Y. App. Div. 552, 48 N. Y. Suppl. 601 (mere possession of die for printing counterfeits held insufficient); Wilcox *v.* Cutter, 9 Pa. Cas. 409, 12 Atl. 578 (unintentional infringement held insufficient, where sale rescinded on discovery of facts by defendant); Kessler *v.* Klein, 177 Fed. 394, 101 C. C. A. 478; Kessler *v.* Goldstrom, 177 Fed. 392, 101 C. C. A. 476 (actual sales and possession of supply of infringing labels sufficient); Van Raalt *v.* Schneck, 170 Fed. 1021, 95 C. C. A. 672 [*affirming* 159 Fed. 248]; Saxlehner *v.* Eisner, 147 Fed. 189, 77 C. C. A. 417 [*affirming* 140 Fed. 937] (averments of answer); Enterprise Mfg. Co. *v.* Landers, 131 Fed. 240, 65 C. C. A. 587 [*affirming* 124 Fed. 923] (on averments and admissions of answer).

82. Clark Thread Co. *v.* William Clark Co., 55 N. J. Eq. 658, 37 Atl. 599, notwithstanding a promise of perpetual cessation.

83. *New Jersey.*— Clark Thread Co. *v.* William Clark Co., 55 N. J. Eq. 658, 37 Atl. 599.

New York.— Ricker *v.* Leigh, 74 N. Y. App. Div. 138, 77 N. Y. Suppl. 540; Schmid *v.* Maeurer, 9 N. Y. St. 843. "It may be that the defendant will voluntarily desist from infringing the rights of the plaintiff hereafter, but that possibility or even probability furnishes no ground for denying the plaintiff the protection of an injunction. The plaintiff is not compelled to rely upon the defendant's present virtuous intentions. What the defendant did was a wanton invasion of the plaintiff's right as well as a deception practiced upon the public, and a repetition of such acts should be prevented effectually by the restraining order of a court of equity." Ricker *v.* Leigh, 74 N. Y. App. Div. 138, 140, 77 N. Y. Suppl. 540; U. S. Frame, etc., Co. *v.* Horowitz, 51 Misc. 101, 100 N. Y. Suppl. 705.

United States.— Thomas G. Plant Co. *v.* Hamburger, 153 Fed. 232; Thomas G. Plant

where the infringement was discontinued in good faith, and there is no reason to believe it will be resumed.[84] An injunction will be granted against threatened infringement, even in advance of any actual loss.[85] Actual deception and damage need not be shown in order to support an injunction against infringement or unfair competition.[86] An injunction may be granted, although the use shown is too slight to warrant an accounting.[87] An injunction may be refused within the sound discretion of the court.[88] Plaintiff's right or title to the mark or name should be clear, or established at law, before injunction should be granted.[89] Where there is a real controversy between the parties as to whether both were not concerned in the establishment of the business in connection with which the name or mark is used, it is not a case for injunction until the right has been determined at law or otherwise.[90]

(II) *FORM OF INJUNCTION.* The injunction must conform to the usual requirements; [91] and it is framed with a view to the exact nature of the injury,

Co. *v.* May Mercantile Co., 153 Fed. 229; Dwinell-Wright Co. *v.* Co-Operative Supply Co., 148 Fed. 242 (modification of package); Saxlehner *v.* Eisner, 140 Fed. 938 [*affirmed* in 147 Fed. 189, 77 C. C. A. 417]; Saxlehner *v.* Eisner, etc., Co., 88 Fed. 61 (use discontinued but right still claimed); Hutchinson *v.* Blumberg, 51 Fed. 829; Frese *v.* Bachof, 9 Fed. Cas. No. 5,109, 13 Blatchf. 234.

England.— Millington *v.* Fox, 3 Myl. & C. 338, 14 Eng. Ch. 338, 40 Eng. Reprint 956.

Canada.— Radway *v.* Coleman, 15 Grant Ch. (U. C.) 50.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 110.

84. Van Raalt *v.* Schneck, 170 Fed. 1021, 95 C. C. A. 672 [*affirming* 159 Fed. 248]; Dodge Mfg. Co. *v.* Sewall, etc., Cordage Co., 142 Fed. 288 (where defendant acted in good faith, and promptly discontinued the objectionable form upon notice, and before suit, an injunction will be denied and the bill dismissed); Slater *v.* Ryan, 17 Manitoba 89 (infringement discontinued voluntarily before objection or suit); Fafard *v.* Ferland, 6 Quebec Pr. 119. Where defendant more than two years before suit on notice from complainant of its claim ceased the acts complained of, and thereafter committed no act of unfair competition, complainant is not entitled to either an injunction or an accounting. Ferguson-McKinney Dry Goods Co. *v.* J. A. Scriven Co., 165 Fed. 655, 91 C. C. A. 491. Cessation of the alleged infringement may be considered on application for preliminary injunction. Lamont *v.* Hershey, 140 Fed. 763. But a modification of defendant's mark on package so as to remove the more objectionable features will not prevent the issuance of even a preliminary injunction. Dwinell-Wright Co. *v.* Co-Operative Supply Co., 148 Fed. 242.

85. Atlas Assur. Co. *v.* Atlas Ins. Co., 138 Iowa 228, 112 N. W. 232, 114 N. W. 609, 128 Am. St. Rep. 189, 15 L. R. A. N. S. 625; Vulcan *v.* Myers, 139 N. Y. 364, 34 N. E. 904; Cuervo *v.* Landauer, 63 Fed. 1003. See also *supra*, V, B, 4.

86. Bagby, etc., Co. *v.* Rivers, 87 Md. 400, 40 Atl. 171, 67 Am. St. Rep. 357, 40 L. R. A. 632; Regis *v.* Jaynes, 185 Mass. 458, 70 N. E. 480; Dunlap *v.* Young, 68 N. Y. App. Div. 137, 74 N. Y. Suppl. 184 [*reversed* on other grounds in 174 N. Y. 327, 66 N. E. 964]; Brown *v.* Braunstein, 83 N. Y. Suppl. 1096; Gannert *v.* Rupert, 127 Fed. 962, 62 C. C. A. 594 [*reversing* 119 Fed. 221]. See also, generally, *supra*, V, B, 4.

87. Devlin *v.* McLeod, 135 Fed. 164.

Where infringement shown by single sale.— Although the proof does not establish an infringement by defendant to any great extent, yet if it is shown that a dealer had an imitated article in his store and offered it for sale as genuine, proof of a single sale is sufficient to sustain a permanent injunction against the continuance of the wrong, and an action for such infringement will not be defeated solely on the ground that on the day it is brought the dealer happens not to have any of the articles on hand. Low *v.* Hart, 90 N. Y. 457.

88. Hygeia Water Ice Co. *v.* New York Hygeia Ice Co., 140 N. Y. 94, 35 N. E. 417; Calhoun *v.* Millard, 121 N. Y. 69, 24 N. E. 27, 8 L. R. A. 248; Singer Mfg. Co. *v.* Larsen, 22 Fed. Cas. No. 12,902, 3 Ban. & A. 246, 8 Biss. 151; Tucker Mfg. Co. *v.* Boyington, 24 Fed. Cas. No. 14,229, 9 Off. Gaz. 455; London, etc., Law Assur. Soc. *v.* London, etc., Joint-Stock L. Ins. Co., 11 Jur. 938, plaintiff remitted to remedy at law as injury improbable. But see Slater *v.* Ryan, 17 Manitoba 89.

89. Witthaus *v.* Braun, 44 Md. 303, 22 Am. Rep. 44; Blackwell *v.* Wright, 73 N. C. 310; Coffeen *v.* Brunton, 5 Fed. Cas. No. 2,947, 5 McLean 256; Hartell *v.* Viney, 11 Fed. Cas. No. 6,158, 2 Wkly. Notes Cas. (Pa.) 602; Walker *v.* Reid, 29 Fed. Cas. No. 17,084; Farina *v.* Silverlock, 6 De G. M. & G. 214, 2 Jur. N. S. 1008, 26 L. J. Ch. 11, 4 Wkly. Rep. 731, 55 Eng. Ch. 214, 43 Eng. Reprint 1214; Purser *v.* Brain, 17 L. J. Ch. 141; Pidding *v.* How, 6 L. J. Ch. 345, 8 Sim. 477, 8 Eng. Ch. 477, 59 Eng. Reprint 190; Mottley *v.* Downmann, 6 L. J. Ch. 308, 3 Myl. & C. 1, 14 Eng. Ch. 1, 40 Eng. Reprint 824; Lewis *v.* Langdon, 4 L. J. Ch. 258, 7 Sim. 421, 40 Rev. Rep. 166, 8 Eng. Ch. 421, 58 Eng. Reprint 899. See also Collins Co. *v.* Reeves, 4 Jur. N. S. 865, 28 L. J. Ch. 56, 6 Wkly. Rep. 717; and *supra*, IX, E, 1.

90. Coffeen *v.* Brunton, 5 Fed. Cas. No. 2,947, 5 McLean 256.

91. See INJUNCTIONS, 22 Cyc. 755.

and the causes that mislead the public, in the particular case.[92] The object of the court in these cases is to see how effectually unfair trade can be put a stop to, not to be astute to see how little the fraudulent business of defendant can be interfered with.[93] The degree of restraint in any particular case is always commensurate with the necessities of the situation.[94] The injunction should be no broader than necessary to prevent deception and protect complainant's rights.[95] An injunction against unfair competition by dress of goods should not enjoin any single feature, since each feature may be properly used in different forms and combinations which do not resemble plaintiff's dress of goods. It is the deceptive combination of features which should be enjoined.[96] The use of a descriptive name or mark, or other feature which is *publici juris*, in connection with a particular dress of goods, may be properly enjoined, although its use alone may not be enjoined.[97] Where both parties have rights in a particular mark or name, the injunction should be framed so as to preserve the rights of each as far as possible.[98] But if defendant has no special right, the injunction may be absolute in its terms, even though plaintiff has not an exclusive trade-mark right, but rests entirely upon the doctrine of secondary meaning.[99] A false or unnecessary use of a deceptive geographical,[1] or personal name,[2] the name of a book,[3] proprietary article,[4] or of a patented article, either before or after expiration of the patent,[5] or of generic and descriptive words,[6] may and should be absolutely enjoined. Where the words or symbols are primarily *publici juris*, and defendant uses them truthfully in their primary sense, the injunction cannot absolutely prohibit their use, but should merely prohibit their use in a deceptive manner.[7]

92. Merriam *v.* Famous Shoe, etc., Co., 47 Fed. 411.

93. See the forcible language of Lord Justice Rigby in Valentine *v.* Valentine, 17 Rep. Pat. Cas. 686.

94. Cohen *v.* Nagle, 190 Mass. 4, 76 N. E. 276, 2 L. R. A. N. S. 964; Sheffield-King Milling Co. *v.* Sheffield Mill, etc., Co., 105 Minn. 315, 117 N. W. 447, 127 Am. St. Rep. 574; Portuondo Cigar Mfg. Co. *v.* Vicente Portuondo Co., 222 Pa. St. 116, 70 Atl. 968; Van Stan's Stratena Co. *v.* Van Stan, 209 Pa. St. 564, 58 Atl. 1064, 54 Am. St. Rep. 1018.

95. Spieker *v.* Lash, 102 Cal. 38, 36 Pac. 362 (should not prohibit sale of unpatented goods); Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 70 Conn. 516, 40 Atl. 534; Meriden Britannia Co. *v.* Parker, 39 Conn. 450, 12 Am. Rep. 401 (absolute prohibition of sale of goods already manufactured and marked not granted); Reading Stove Works, etc., Co. *v.* S. M. Howes Co., 201 Mass. 437, 87 N. E. 751, 21 L. R. A. N. S. 979 (should not enjoin sale of the goods with the infringing or deceptive features omitted); Andrew Jergens Co. *v.* Woodbury, 128 N. Y. App. Div. 924, 112 N. Y. Suppl. 1121 [*modified* and *affirmed* in 197 N. Y. 66, 90 N. E. 344], 197 N. Y. 581, 91 N. E. 1109.

Territorial limit unnecessary.— An injunction against the use of plaintiff's trade-mark by defendant may be general, although plaintiff had never used his trade-mark except in a particular market. Johnston *v.* Orr-Ewing, 7 App. Cas. 219, 51 L. J. Ch. 797, 46 L. T. Rep. N. S. 216, 30 Wkly. Rep. 417.

96. Fischer *v.* Blank, 138 N. Y. 244, 33 N. E. 1040, holding that an injunction against using an oblong form of package for packing tea was too broad.

97. Fischer *v.* Blank, 138 N. Y. 244, 33 N. E. 1040; Devlin *v.* Peek, 135 Fed. 167 [*affirmed* in 144 Fed. 1021, 73 C. C. A. 619]; Devlin *v.* McLeod, 135 Fed. 164.

98. Meriden Britannia Co. *v.* Parker, 39 Conn. 450, 12 Am. Rep. 401; Cohen *v.* Nagle, 190 Mass. 4, 76 N. E. 276, 2 L. R. A. N. S. 964. See also *supra*, V, B, 3.

99. Cohen *v.* Nagle, 190 Mass. 4, 76 N. E. 276, 2 L. R. A. N. S. 964. Where defendant insurance company improperly used the word "Atlas" and the figure of Atlas supporting the world, as a trade-mark and symbol, in unlawful competition with plaintiff, plaintiff was entitled to a decree restraining such use without limitation, instead of a decree merely restraining defendant's use of the word "in its present form." Atlas Assur. Co. *v.* Atlas Ins. Co., 138 Iowa 228, 112 N. W. 232, 114 N. W. 609, 128 Am. St. Rep. 189, 15 L. R. A. N. S. 625.

1. See *supra*, V, C, 2; Collinsplatt *v.* Finlayson, 88 Fed. 693, where Judge Lacombe enjoined the use of the word "Plymouth" upon gin not made in Plymouth, saying: "It is abundantly settled by authority in the federal courts that they will not tolerate a false use of a geographical name, when it is so used to promote unfair competition."

2. See *supra*, V, C, 4; Royal Baking Powder Co. *v.* Royal, 122 Fed. 337, 343, 58 C. C. A. 499, where Lurton, J., said: "If the defendant did not bear the family name of 'Royal,' there would not be the slightest doubt but that his use of the word 'Royal,' . . . would be absolutely prohibited."

3. See *supra*, V, C, 9.

4. See *supra*, V, C, 10.

5. See *supra*, V, C, 8.

6. See *supra*, V, C, 1.

7. See *supra*, V, B, 2, 3.

In secondary meaning cases, the approved form of injunction is one restraining the use of the common name by defendant, unless accompanied by a clear statement sufficient to unmistakably distinguish defendant's goods or business from that of plaintiff.[8] Quite frequently a precise form of words is required to be used in connection with the ambiguous name.[9] The injunction should be definite, precise, and particular, so that all who see it may know with certainty what is and what is not permitted.[10] A decree in such general terms as to amount to a sweeping injunction to obey the law is objectionable upon the ground of indefiniteness, and should not be granted.[11] It should enjoin specifically the use of the marks, words, or devices adjudged misleading, or an infringement, and to this specific injunction should be added a general clause to prevent merely colorable evasion. This form of decree will definitely determine that defendant may not continue the particular form of infringement or unfair competition which has been litigated and adjudicated, and it will leave him at liberty to determine for himself what other forms of inscriptions or devices he may safely and properly use.[12] It is not a proper function of a court of equity, after finding infringement, to indulge in label making, and to give its approval in advance to a changed form proposed to be adopted by defendant to avoid future liability.[13] A contrary

8. Allegretti *v.* Allegretti Chocolate Cream Co., 177 Ill. 129, 52 N. E. 487 [*affirming* 76 Ill. App. 581]; Singer Mfg. Co. *v.* June Mfg. Co., 163 U. S. 169, 16 S. Ct. 1002, 41 L. ed. 118; Ludlow Valve Mfg. Co. *v.* Pittsburgh Mfg. Co., 166 Fed. 26, 92 C. C. A. 60; Dr. A. Reed Cushion Shoe Co. *v.* Frew, 162 Fed. 887, 89 C. C. A. 577 [*reversing* 158 Fed. 552]; Rowley *v.* J. F. Rowley Co., 161 Fed. 94, 88 C. C. A. 258; Massam *v.* Thorley's Cattle Food Co., 6 Ch. D. 574, 46 L. J. Ch. 707, 36 L. T. Rep. N. S. 848 [*reversed* on other grounds in 14 Ch. D. 748, 42 L. T. Rep. N. S. 851, 28 Wkly. Rep. 966]. See also *supra*, V, B, 3.

9. Allegretti *v.* Allegretti Chocolate Cream Co., 177 Ill. 129, 133, 52 N. E. 487; Holeproof Hosiery Co. *v.* Wallach, 172 Fed. 859, 97 C. C. A. 263 [*affirmed* in 167 Fed. 373]; G. & C. Merriam Co. *v.* Ogilvie, 170 Fed. 167, 95 C. C. A. 423; Ludlow Valve Mfg. Co. *v.* Pittsburgh Mfg. Co., 166 Fed. 26, 92 C. C. A. 60. See Dyment *v.* Lewis, 144 Iowa 509, 123 N. W. 244, 26 L. R. A. N. S. 73, holding that the court is not required to suggest a method of discrimination. See also *supra*, V, B, 3, 7.

10. See, generally, INJUNCTIONS, 22 Cyc. 957. See also Whipple *v.* Hutchinson, 29 Fed. Cas. No. 17,517, 4 Blatchf. 190, and St. Louis, Min., etc., Co. *v.* Montana Min. Co., 58 Fed. 129, neither of which, however, is a trade-mark case.

Decree free from uncertainty.— A decree restraining the respondents from selling specified articles in packages having thereon certain specified labels in imitation of the labels of plaintiffs or with labels and numbers thereon so nearly like those used by plaintiffs as to be calculated to induce the purchasers to believe they are the genuine manufacture of plaintiffs is sufficiently free from uncertainty, and defendants could have no difficulty in understanding what labels they are prohibited from using where the petition, which is made a part of the decree, describes fully and particularly the labels used by plaintiff. Boardman *v.* Meriden Britannia Co., 36 Conn. 207, holding that remedy for uncertain decree is application to correct it.

General prayer refused for uncertainty.— A general prayer that the respondent be enjoined from selling goods stamped with a stamp so nearly resembling the petitioner's stamp that it is difficult to decide, etc., is too vague and uncertain to be of any practical benefit if granted, and will therefore be refused. Meriden Britannia Co. *v.* Parker, 39 Conn. 450, 12 Am. Rep. 401.

11. Swift *v.* U. S., 196 U. S. 375, 25 S. Ct. 276, 49 L. ed. 518, not a trade-mark case, but decided under the Anti-Trust Act.

12. Charles E. Hires Co. *v.* Consumers' Co., 100 Fed. 809, 813, 41 C. C. A. 71, where the court said: "When an infringement has been found, it should be restrained. . . . The court ought not to say how near the infringer may lawfully approximate the label of the complainant, but should cast the burden upon the guilty party of deciding for himself how near he may with safety drive to the edge of the precipice, and whether it be not better for him to keep as far from it as possible."

13. Charles E. Hires Co. *v.* Consumers' Co., 100 Fed. 809, 813, 41 C. C. A. 71 [*followed* in Sterling Remedy Co. *v.* Spermine Medical Co., 112 Fed. 1000, 50 C. C. A. 657], where Jenkins, J., said: "A court of equity does not sit as an arbiter to determine in advance upon other and changed labels which the infringer may adopt to avoid the condemnation of the court. Whether such changed forms do in fact infringe is matter of fact to be determined by the court in its usual course of procedure upon complaint lodged by the party damnified. The duty of the court below was to determine whether the labels complained of in the bill infringed the complainant's right. That duty was fully performed when the court had so determined. It is not called upon to decide whether a new label proposed for adoption would infringe. This is especially so here, where the infringement was deliberate and designed."

practice is fraught with danger of injustice to the complainant. It cannot be determined *a priori* what effect any particular device will have in the trade, and upon the mind of the public. The new device when put in use may injure the complainant in unforeseen and unanticipated ways, and complainant should have his day in court for the determination of such question upon the evidence, and without having it in any way prejudged.[14] Upon this principle the court should not construe its injunction in advance, and say what will, and what will not, constitute a violation of it,[15] although sometimes an explanatory or interpretation clause is inserted to make clear what is prohibited.[16]

c. Violation and Contempt. Violation of an injunction may be punished as a contempt of court.[17] The president of a corporation is guilty of contempt for violation of an injunction running against the corporation.[18] An injunction restraining the use of certain marks, words, or names is violated by use thereof, although in connection with other added matter.[19]

A label was designed in Carlsbad *v.* Schultz, 78 Fed. 469, 472, where Judge Coxe said: "In order that there may be no misunderstanding upon the settlement of the decree the court has applied a copy of a label which, it is thought, the defendant may use with impunity as truthfully representing the water sold by him."

14. "It will be time enough for the court to determine the question when presented upon issues properly framed and the evidence taken thereunder." Williams *v.* Mitchell, 106 Fed. 168, 172, 45 C. C. A. 265. See also Sterling Remedy Co. *v.* Spermine Medical Co., 112 Fed. 1000, 50 C. C. A. 657.

15. Eureka Fire Hose Co. *v.* Eureka Rubber Mfg. Co., 72 N. J. Eq. 555, 65 Atl. 870. See also Dyment *v.* Lewis, 144 Iowa 509, 123 N. W. 244, 26 L. R. A. N. S. 73.

16. Interpretation clause.—In a case of unfair competition, where a manufacturer put up his goods in packages similar to those of plaintiff in many ways besides those of size, color, and form, it was held proper to grant an injunction against putting up and selling or offering for sale the particular form of package referred to in the bill "or any other form of package which shall, by reason of the collocation of size, shape, colors, lettering, spacing, and ornamentation, present a general appearance as closely resembling the 'Complainant's Package,' referred to in the bill and marked in evidence, as does the said 'Defendant's Second Package.' . . . But, since so much has been said about the impossibility of framing any decree which would prevent the sale of the package complained of, and yet not give complainant the monopoly of yellow paper for its wrappers, the following clause may be added: 'This injunction shall not be construed as restraining defendant from selling packages of the size, weight, and shape of complainant's package, nor from using the designation 'Buffalo Soap Powder,' nor from making a powder having the appearance of complainant's 'Gold Dust,' nor from using paper of a yellow color as wrappers for its packages, provided such packages are so differentiated in general appearance from said 'Complainant's Package' that they are not calculated to deceive the ordinary purchaser.'" N. K. Fairbank Co. *v.* R. W. Bell Mfg. Co., 77 Fed. 869, 878, 23 C. C. A. 554.

17. See, generally, CONTEMPT, 9 Cyc. 8; INJUNCTIONS, 22 Cyc. 1009.

To sustain a motion for contempt for violation, by means of an altered trade-mark, of a preliminary injunction against the use of a trade-mark, it must appear clearly that the ordinary mass of customers, paying that attention which persons usually pay in buying the article in question, would be easily deceived. If this state of facts be not shown to the court the motion will be denied. Swift *v.* Dey, 4 Rob. (N. Y.) 611. In Cartier *v.* May, Sebastian's Dig. 200, a motion to commit for breach of injunction was refused on the ground of plaintiff's delay for fifteen months; but the injunction was enlarged to cover new fraud, and costs were given.

Acquiescence in violation of injunction.—In Rodgers *v.* Nowill, 3 De G. M. & G. 614, 619, 17 Jur. 109, 1 Wkly. Rep. 122, 52 Eng. Ch. 478, 43 Eng. Reprint. 241, an injunction having been granted, restraining defendant from the use of a trade-mark containing the words "J. Rogers & Sons," he formed, in 1848, a partnership with his father (who was named John Rogers), and brother, and used the same firm-name. In 1853 plaintiff moved for committal for breach of injunction. Stuart, V. C., refused the motion, but without costs, on the ground (among others) of acquiescence by plaintiffs for five years. This holding was reversed on appeal. Turner, L. J., said: "On the question of acquiescence, I think that in a case of this description, where there has been an injunction granted by this court, there must, in order to deprive the party who has obtained the injunction of the right to move for committal upon the breach of it, be a case made out almost amounting to such a license to the party enjoined to do the act enjoined against as would entitle him to maintain a bill against others for doing that act. The party enjoined must, I think, show such acquiescence as would be sufficient to create new right in him." See also Taylor *v.* Carpenter, 23 Fed. Cas. No. 13,784, 3 Story 458.

18. Janney *v.* Pan-Coast Ventilator, etc., Co., 131 Fed. 143.

19. U. S. *v.* Roche, 27 Fed. Cas. No. 16,180,

d. Successive Injunctions and Res Judicata. The ordinary rules in respect to the doctrine of *res judicata*,[20] and the granting of successive injunctions,[21] have full application in this class of cases. But as infringement or unfair competition is a tort, and a continuing wrong, each deceptive "passing off" giving rise to a new and separate cause of action, a prior decree is not an absolute bar to the maintenance of a subsequent suit for a continuance of the infringement or unfair competition, especially where the subsequent acts of defendant are not identically the same as those previously adjudicated.[22] Even if a second injunction is unnecessary, because defendant is violating an injunction already granted by which he is bound, a new suit may be maintained upon the new cause of action;[23] and *a fortiori* this rule applies where the new acts of infringement are committed in a different district or jurisdiction, where defendant cannot be reached by contempt proceedings, or where they were committed by one not a party to the prior bill, and who cannot be punished as for a contempt, even if he could be reached.[24] Where defendant has changed his form of infringement since the prior decree, and there is any substantial question whether the new form is an infringement, that question will not be adjudicated in contempt proceedings brought to punish for violation of the prior injunction, but the complainant will be remitted to his remedy by a new bill.[25] A prior decree, although *res judicata* between the parties, does not preclude plaintiff in a subsequent suit from showing that acts not disclosed or contemplated in the original suit are a violation of his right as there defined.[26] To the extent that the issues are the same, a final decree in a prior suit is conclusive evidence for or against parties or privies in a second suit.[27]

1 McCrary 385. See also Hildreth *v.* McCaul, 70 N. Y. App. Div. 615, 74 N. Y. Suppl. 1075, holding that injunction had been violated.

20. See JUDGMENTS, 22 Cyc. 1215.

Effect of prior decree without accounting.— In a suit against a corporation to enjoin its use of the trade-marks of the complainant, and to obtain an accounting of profits, the fact that a previous suit had been brought by the same complainant against the selling agent of defendant for the same purpose, and that there had been a decree for an injunction, but no decree for an accounting, in that suit, does not estop the complainant from obtaining an accounting in the second suit; it appearing that the selling agent had been employed upon a salary, and received no profits, and that for this reason no decree for an accounting was made against him. Clark Thread Co. *v.* William Clark Co., 55 N. J. Eq. 658, 37 Atl. 599 [*reversed* on other grounds in 56 N. J. Eq. 789, 40 Atl. 686].

21. See INJUNCTIONS, 22 Cyc. 724. See also PATENTS, 30 Cyc. 1010.

22. Dr. A. Reed Cushion Shoe Co. *v.* Frew, 158 Fed. 552 [*modified* in 162 Fed. 887, 89 C. C. A. 577] (refusing to be bound by prior decree that cautionary labels were sufficient to prevent unfair competition); Dennison Mfg. Co. *v.* Scharf Tag, etc., Co., 121 Fed. 313, 57 C. C. A. 9 (where the prior decree had dismissed a bill for infringement and unfair competition). See also Hohner *v.* Gratz, 50 Fed. 369.

23. Horton *v.* New York Cent., etc., R. Co., 63 Fed. 897 (where a new bill for infringement of a patent was filed by the same plaintiff against the same defendant in the same court for infringement committed since the prior decree, and an injunction was granted, although one was already in force); Higby *v.* Columbia Rubber Co., 18 Fed. 601 (holding, in a patent case, that a new bill was necessary to full relief for the new infringement).

24. Wheeler *v.* McCormick, 29 Fed. Cas. No. 17,498, 8 Blatchf. 267, 4 Fish. Pat. Cas. 433 [*approved* and *explained* in Gold, etc., Tel. Co. *v.* Pearce, 19 Fed. 419], a patent case.

25. Goss Printing Press Co. *v.* Scott, 134 Fed. 880; U. S. Playing-Card Co. *v.* Spalding, 93 Fed. 822; Bonsack Mach. Co. *v.* National Cigarette Co., 64 Fed. 858; Higby *v.* Columbia Rubber Co., 18 Fed. 601; Allis *v.* Stowell, 15 Fed. 242; Putnam *v.* Hollender, 11 Fed. 75. The above cases involved infringement of patents.

Second preliminary injunction for subsequent infringement.—Where a preliminary injunction has been granted against the infringement of the complainant's label, and defendants have resorted to another label so similar to the complainant's as to deceive consumers, a second preliminary injunction will be granted. Cuervo *v.* Owl Cigar Co., 68 Fed. 541, granting leave to file supplemental bill.

26. Clark Thread Co. *v.* William Clark Co., 56 N. J. Eq. 789, 40 Atl. 686.

27. Schmid *v.* De Grauw, 27 Misc. (N. Y.) 693, 59 N. Y. Suppl. 569, judgment that defendant was entitled to use a trade-name. See Dr. Dadirrian, etc., Co. *v.* Hauenstein, 37 Misc. (N. Y.) 23, 74 N. Y. Suppl. 709 [*affirmed* in 74 N. Y. App. Div. 630, 77 N. Y. Suppl. 1125 (*affirmed* in 175 N. Y. 522, 67 N. E. 1081)], where it was urged that the decision in Dadirrian *v.* Gullian, 79 Fed. 784, was conclusive, but the court ruled otherwise on the facts, in a trade-name case.

Summary statement of rule.— The second cause of action is not merged in the prior judgment. It is not extinguished. But what-

Although complainant has obtained an injunction against a principal, he is entitled to maintain a subsequent suit so as to have an independent injunction against an agent, and to recover the agent's profits.[28] A prior decree for an injunction against an agent is no bar to a subsequent recovery of profits against the principal.[29] A decree enjoining a corporation, its officers and agents and employees, in the usual form is no bar to a subsequent suit against the officers and agents in their individual capacity. On the contrary, it is conclusive against them where they controlled the defense in the prior suit.[30] A former decree for an injunction in another jurisdiction by which both parties are bound, and on which both rely in a subsequent suit should be followed in terms as nearly as may be in framing the decree, in a subsequent suit.[31] A prior interlocutory decree is not conclusive upon the parties in a subsequent suit.[32]

12. Accounting For Damages and Profits. Jurisdiction to decree an accounting of profits and damages is incident to, and dependent upon, jurisdiction to grant an injunction. Where an injunction is denied, equity will not retain jurisdiction for a naked accounting of damages and profits.[33] But the jurisdiction to decree an accounting does not depend upon the right to, and the granting of, an injunction at the time of the final hearing. It is sufficient if such right existed at the time when the bill was filed.[34] The general rule is that upon obtaining an injunction for infringement of a trade-mark, plaintiff is entitled to recover defendant's profits on the goods sold under that mark, and to a reference to ascertain them.[35]

ever was actually decided in the first suit must be taken as conclusively established for the purposes of the second suit. Either party may rely upon what has been adjudged. The doctrine of *res judicata* is a sword as well as a shield. If the prior decree was in favor of complainant in the second suit, his second suit is established to the extent that the issues determined are the same. If the prior decree was adverse to the complainant, his second suit must fail, upon the facts, so far as it depends upon the issues adversely determined. These principles have been most fully developed in the patent cases, which are of course equally applicable to trade-marks, and unfair competition. David Bradley Mfg. Co. *v.* Eagle Mfg. Co., 57 Fed. 980, 6 C. C. A. 661 [*affirming* 50 Fed. 193]; Bredin *v.* National Metal Weatherstrip Co., 147 Fed. 741 [*affirmed* in 157 Fed. 1003]; Empire State Nail Co. *v.* American Solid Leather Button Co., 74 Fed. 864, 21 C. C. A. 152 (where a dismissal of the bill was reversed and an injunction and accounting was ordered); Mack *v.* Levy, 60 Fed. 751, 59 Fed. 468; Accumulator Co. *v.* Consolidated Electric Storage Co., 53 Fed. 793 [*affirmed* in 55 Fed. 485, 5 C. C. A. 202]; Underwood Typewriter Co. *v.* Fox Typewriter Co., 181 Fed. 541.

28. Steiger *v.* Heidelberger, 4 Fed. 455, 18 Blatchf. 426, a patent case. In Baker *v.* Sanders, 80 Fed. 889, 890, 26 C. C. A. 220, an injunction had been granted against defendant's principal in Virginia against unfair competition. The circuit court of appeals for the second circuit held that a more specific injunction might be granted against the agent selling goods with the infringing name in the southern district of New York. The court said: "Nor is the circumstance that Sanders is selling the alleged infringing packages as agent for a non-resident any ground for refusing injunction. He may not be liable for profits which his principal takes, but injunction operates upon the individual, and in a proper case the individual will be restrained from manufacture, preparation, and sale which infringe upon another's rights, whether he be principal or merely employé."

29. Clark Thread Co. *v.* William Clark Co., 55 N. J. Eq. 658, 37 Atl. 599 [*reversed* on other grounds in 56 N. J. Eq. 789, 40 Atl. 686].

30. Saxlehner *v.* Eisner, 147 Fed. 189, 77 C. C. A. 417 [*affirming* 140 Fed. 938].

31. Clark Thread Co. *v.* William Clark Co., 56 N. J. Eq. 789, 40 Atl. 686.

32. Baker *v.* Sanders, 80 Fed. 889, 26 C. C. A. 220, principal and agent in unfair competition.

33. Frazer *v.* Frazer Lubricator Co., 121 Ill. 147, 13 N. E. 639, 2 Am. St. Rep. 73 [*affirming* 18 Ill. App. 450]; L. Martin Co. *v.* L. Martin, etc., Co., 75 N. J. Eq. 39, 71 Atl. 409 [*reversed* in 75 N. J. Eq. 257, 72 Atl. 294, 21 L. R. A. N. S. 526]; Clark Thread Co. *v.* William Clark Co., 55 N. J. Eq. 658, 37 Atl. 599 [*reversed* on other grounds in 56 N. J. Eq. 789, 40 Atl. 686]; Van Raalt *v.* Schneck, 170 Fed. 1021, 95 C. C. A. 672 [*affirming* 159 Fed. 248]; Ferguson-McKinney Dry Goods Co. *v.* J. A. Scriven Co., 165 Fed. 655, 91 C. C. A. 491.

Ruling on damages where no infringement found.—A ruling of the court upon the question of damages in a suit for an injunction to restrain the infringement of a trade-mark is immaterial where the court had decided that there had been no infringement upon which damages could be predicated. Radam *v.* Capital Microbe Destroyer Co., 81 Tex. 122, 16 S. W. 990, 26 Am. St. Rep. 783.

34. Clark Thread Co. *v.* William Clark Co., 55 N. J. Eq. 658, 37 Atl. 599 [*reversed* on other grounds in 56 N. J. Eq. 789, 40 Atl. 686].

35. *Florida.*— El Modello Cigar Mfg. Co. *v.*

The same rule applies to cases of unfair competition merely as in technical trade-marks.[36] In such cases equity holds the infringer or unfair trader liable as a trustee for the rightful owner to the extent of the profits realized upon the infringing goods or from the unlawful or wrongful business.[37] The accounting is taken upon equitable principles, and any facts rendering the general rule inequitable will bar its application.[38] Thus laches, acquiescence, and delay is a bar to

Gato, 25 Fla. 886, 7 So. 23, 23 Am. St. Rep. 537, 6 L. R. A. 823.

Georgia.— Hagan, etc., Co. *v.* Rigbers, 1 Ga. App. 100, 57 S. E. 970.

Kentucky.— Avery *v.* Meikle, 85 Ky. 435, 3 S. W. 609, 9 Ky. L. Rep. 69, 7 Am. St. Rep. 604.

Maryland.— Stonebraker *v.* Stonebraker, 33 Md. 252.

Massachusetts.— Nelson *v.* Winchell, 203 Mass. 75, 89 N. E. 180, 23 L. R. A. N. S. 1150 (profits recoverable under Massachusetts statute, although no evidence of damages); Regis *v.* Jaynes, 191 Mass. 245, 77 N. E. 774.

New Jersey.— Clark Thread Co. *v.* William Clark Co., 56 N. J. Eq. 789, 40 Atl. 686 [*reversing* 55 N. J. Eq. 658, 37 Atl. 599].

Rhode Island.— Buchanan *v.* Carpenter, 19 R. I. 337, 36 Atl. 90.

Tennessee.— C. F. Simmons Medicine Co. *v.* Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165.

Wisconsin.— Leidersdorf *v.* Flint, 50 Wis. 400, 7 N. W. 252.

United States.— Saxlehner *v.* Eisner, etc., Co., 138 Fed. 22, 70 C. C. A. 452 [*affirming* 127 Fed. 1023]; Société Anonyme *v.* Western Distilling Co., 46 Fed. 921; Benkert *v.* Feder, 34 Fed. 534, 13 Sawy. 229; Atlantic Milling Co. *v.* Rowland, 27 Fed. 24; Collins Co. *v.* Oliver Ames, etc., Corp., 18 Fed. 561, 20 Blatchf. 542; Sawyer *v.* Kellogg, 9 Fed. 601; Blackwell *v.* Armistead, 3 Fed. Cas. No. 1,474, 3 Hughes 163; Blackwell *v.* Dibrell, 3 Fed. Cas. No. 1,475, 3 Hughes 151, 14 Off. Gaz. 633; Hostetter *v.* Vowinkle, 12 Fed. Cas. No. 6,714, 1 Dill. 329.

England.— Ford *v.* Foster, L. R. 7 Ch. 611, 41 L. J. Ch. 682, 27 L. T. Rep. N. S. 219, 20 Wkly. Rep. 818; Carter *v.* Carlile, 31 Beav. 292, 8 Jur. N. S. 183, 54 Eng. Reprint 1151 (holding that "the liability to account for the profits is incident to the injunction"); Tonge *v.* Ward, 21 L. T. Rep. N. S. 480; Leather Cloth Co. *v.* Hirshfield, 13 L. T. Rep. N. S. 427, 14 Wkly. Rep. 78; Edelsten *v.* Edelsten, 10 L. T. Rep. N. S. 780, 12 Wkly. Rep. 1026.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 112.

In Avery *v.* Meikle, 85 Ky. 435, 450, 3 S. W. 609, 9 Ky. L. Rep. 69, 7 Am. St. Rep. 604, the court said: "We have found no case, and been cited to no authority, where there has been a violation of the trade-mark, and an injunction granted, where the party wronged has been refused an account of profits, unless he had first elected to claim the actual damages he had sustained, or delayed the assertion of his claim."

Unfair competition by advertisements.—In Williams *v.* Mitchell, 106 Fed. 168, 172, 45 C. C. A. 265, the unfair competition consisted solely of misleading advertisements. These were enjoined, but the circuit court refused to decree an accounting. This was held to be error. The circuit court of appeals said: "The complainants also assert error in that the decree denied them compensation for past unfair competition. In this respect, also, we think the court was in error. The decree declares that the defendants, by their imitation of the complainants' advertisements, had been guilty of deceiving purchasers and the public into believing that the game boards of their make were the game boards made by the complainants. It declares an invasion of the complainants' rights, and the complainants are entitled, upon proper proof, to compensation to the extent of the invasion."

36. *Maine.*— W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 103 Me. 334, 69 Atl. 569.

Massachusetts.—Regis *v.* Jaynes, 191 Mass. 245, 77 N. E. 774.

New Jersey.— L. Martin Co. *v.* L. Martin, etc., Co., 75 N. J. Eq. 257, 72 Atl. 294, 21 L. R. A. N. S. 526 [*reversing* 75 N. J. Eq. 39, 71 Atl. 409].

Pennsylvania.— Van Stan's Stratena Co. *v.* Van Stan, 209 Pa. St. 564, 58 Atl. 1064, 103 Am. St. Rep. 1018.

United States.— Worcester Brewing Corp. *v.* Rueter, 157 Fed. 217, 84 C. C. A. 665 (where Putnam, J., said that the decision of the supreme court in Singer Mfg. Co. *v.* June Mfg. Co., 163 U. S. 169, 16 S. Ct. 1002, 41 L. ed. 118, which involved only the question of unfair trade, settled the rule that there may be an accounting in cases of mere unfair competition); Saxlehner *v.* Eisner, etc., Co., 138 Fed. 22, 70 C. C. A. 452 [*affirming* 127 Fed. 1023]; Baker *v.* Slack, 130 Fed. 514, 65 C. C. A. 138; N. K. Fairbank Co. *v.* Windsor, 118 Fed. 96 [*overruled* as to other points in 124 Fed. 200, 61 C. C. A. 233, and *followed* in Regis *v.* Jaynes, 191 Mass. 245, 77 N. E. 774]; Williams *v.* Mitchell, 106 Fed. 168, 45 C. C. A. 265.

England.— Lever *v.* Goodwin, 36 Ch. D. 1, 57 L. T. Rep. N. S. 583, 36 Wkly. Rep. 177 [*followed* in Saxlehner *v.* Apollinaris Co., [1897] 1 Ch. 893, 66 L. J. Ch. 533, 76 L. T. Rep. N. S. 617]; Weingarten *v.* Bayer, 92 L. T. Rep. N. S. 511, 21 T. L. R. 418.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 112.

37. Avery *v.* Meikle, 85 Ky. 435, 3 S. W. 609, 9 Ky. L. Rep. 69, 7 Am. St. Rep. 604; Regis *v.* Jaynes, 191 Mass. 245, 77 N. E. 774 [*citing* Tilghman *v.* Proctor, 125 U. S. 136, 8 S. Ct. 894, 31 L. ed. 664; Root *v.* Lake Shore, etc., R. Co., 105 U. S. 189, 26 L. ed. 975]; Sawyer *v.* Kellogg, 9 Fed. 601.

38. Regis *v.* Jaynes, 191 Mass. 245, 77 N. E. 774.

an accounting for profits and a recovery of damages.[39] Where the amount of damages suffered, or of profits realized, is seen to be very small, or the infringing use has been very slight, equity will limit its relief to an injunction and deny an accounting.[40] An accounting will not be directed where the evidence shows that there is no rational rule by which to estimate the profits recoverable.[41] An accounting has been denied where both parties were found at fault.[42] An accounting of profits or damages will not be ordered where the infringing use of the trade-mark or trade-name was merely accidental or without actual fraudulent intent.[43]

Accounting difficult from changes made in device.— Where for many years defendant had used plaintiff's trade-mark in various shapes and forms, and for part of the time without any active objection from plaintiff, and different changes had been introduced in its shape and general appearance in the various attempts to settle the matter amicably, it was held that propositions were raised which would make it difficult to render a proper account, and that an accounting was properly denied, without prejudice to plaintiff's right to proceed at law for damages. Drummond Tobacco Co. *v.* Addison Tinsley Tobacco Co., 52 Mo. App. 10.

39. *New York.*— Cahn *v.* Gottschalk, 14 Daly 542; S. Howes Co. *v.* Howes Grain Cleaner Co., 24 Misc. 83, 52 N. Y. Suppl. 468.

Ohio.— Lloyd *v.* Merrill Chemical Co., 11 Ohio Dec. (Reprint) 236, 25 Cinc. L. Bul. 319.

Tennessee.— C. F. Simmons Medicine Co. *v.* Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165.

United States.— Menendez *v.* Holt, 128 U. S. 514, 9 S. Ct. 143, 32 L. ed. 526 [*affirming* 23 Fed. 869]; McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828; Low *v.* Fels, 35 Fed. 361; Sawyer *v.* Kellogg, 9 Fed. 601; Consolidated Fruit-Jar Co. *v.* Thomas, 6 Fed. Cas. No. 3,131, 2 N. J. L. J. 272; Manhattan Medicine Co. *v.* Wood, 16 Fed. Cas. No. 9,026, 4 Cliff. 461, 14 Off. Gaz. 519. See also Gilka *v.* Mihalovitch, 50 Fed. 427.

England.— Fullwood *v.* Fullwood, 9 Ch. D. 176, 47 L. J. Ch. 459, 38 L. T. Rep. N. S. 380, 26 Wkly. Rep. 435; Harrison *v.* Taylor, 11 Jur. N. S. 408, 12 L. T. Rep. N. S. 339.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 95; and *supra*, VIII, D.

Compare Schmidt *v.* Brieg, 100 Cal. 672, 35 Pac. 623, 22 L. R. A. 790.

40. *Massachusetts.*— Giragosian *v.* Chutjian, 194 Mass. 504, 80 N. E. 647; Regis *v.* Jaynes, 191 Mass. 245, 77 N. E. 774.

New Jersey.— Clark Thread Co. *v.* William Clark Co., 55 N. J. Eq. 658, 37 Atl. 599, apparent that defendant received no profits.

New York.— S. Howes Co. *v.* Howes Grain-Cleaner Co., 24 Misc. 83, 52 N. Y. Suppl. 465.

United States.— Kessler *v.* Klein, 177 Fed. 394, 101 C. C. A. 478; Kessler *v.* Goldstrom, 177 Fed. 392, 101 C. C. A. 476; Dr. A. Reed Cushion Shoe Co. *v.* Frew, 158 Fed. 552 [*reversed* on other grounds in 162 Fed. 887, 89 C. C. A. 577]; Devlin *v.* McLeod, 135 Fed. 164; Liebig's Extract of Beef Co. *v.* Walker, 115 Fed. 822; Little *v.* Kellam, 100 Fed. 353.

England.— Sanitas Co. *v.* Condy, 14 Rep. Pat. Cas. 530. "And this is specially true in cases in which a defendant is doing only what he has the general right to do, but equity requires that his right should be restricted so as not to interfere with some right which the plaintiff has acquired." Regis *v.* Jaynes, 191 Mass. 245, 247, 77 N. E. 774 [*citing* Ludington Novelty Co. *v.* Leonard, 127 Fed. 155, 62 C. C. A. 269; Baker *v.* Baker, 115 Fed. 297, 53 C. C. A. 157].

41. Ludington Novelty Co. *v.* Leonard, 127 Fed. 155, 62 C. C. A. 269 [*affirming* 119 Fed. 937]. In a suit for unfair competition, if it appears to the court that an inquiry as to damages or profits would rest on no basis except conjecture or speculation, or would yield no profits or damages proportionate to the cost of the investigation, an accounting may not be ordered. G. & C. Merriam Co. *v.* Ogilvie, 170 Fed. 167, 95 C. C. A. 423.

42. G. & C. Merriam Co. *v.* Ogilvie, 170 Fed. 167, 95 C. C. A. 423.

43. *Iowa.*— Beebe *v.* Tolerton, etc., Co., 117 Iowa 593, 91 N. W. 905, bad faith necessary under Code, § 5050.

Massachusetts.— Nelson *v.* Winchell, 203 Mass. 75, 89 N. E. 180, 23 L. R. A. N. S. 1150; Regis *v.* Jaynes, 191 Mass. 245, 77 N. E. 774.

New Jersey.— Eureka Fire Hose Co. *v.* Eureka Rubber Mfg. Co., 69 N. J. Eq. 159, 60 Atl. 561 [*affirmed* in 71 N. J. Eq. 300, 71 Atl. 1134].

New York.— Taendsticksfabriks Aktiebolagat Vulcan *v.* Myers, 139 N. Y. 364, 34 N. E. 904; Clinton Metalic Paint Co. *v.* New York Metalic Paint Co., 23 Misc. 66, 50 N. Y. Suppl. 437, fraud is only material on the question of damages.

United States.— Saxlehner *v.* Siegel-Cooper Co., 179 U. S. 42, 21 S. Ct. 16, 45 L. ed. 77, 93 Off. Gaz. 947; Billiken Co. *v.* Baker, etc., Co., 174 Fed. 829; Dr. A. Reed Cushion Shoe Co. *v.* Frew, 158 Fed. 552 [*reversed* on other grounds in 162 Fed. 887, 89 C. C. A. 577]; Consolidated Ice Co. *v.* Hygeia Distilled Water Co., 151 Fed. 10, 80 C. C. A. 506 [*affirming* 144 Fed. 139]; N. K. Fairbank Co. *v.* Windsor, 124 Fed. 200, 61 C. C. A. 233.

England.— Moet *v.* Couston, 33 Beav. 578, 10 Jur. N. S. 1012, 10 L. T. Rep. N. S. 395, 4 New Rep. 86, 55 Eng. Reprint 493; Cartier *v.* Carlile, 31 Beav. 292, 8 Jur. N. S. 183, 54 Eng. Reprint 1151; McAndrew *v.* Bassett, 4 De G. J. & S. 380, 10 Jur. N. S. 550, 33 L. J. Ch. 561, 10 L. T. Rep. N. S. 442, 4 New Rep. 123, 12 Wkly. Rep. 777, 69 Eng.

The profits obtained by defendant after the filing of the bill are not the result of innocent infringement and may be recovered.[44] Where the infringement or unfair competition is wilful and intentional, that is to say, fraudulent, the complainant is entitled to an accounting of damages and profits as a matter of course and of right in the absence of a valid equitable defense.[45] After entry of an interlocutory decree for an accounting, the sole question before the master is the amount of damages and profits. Defendant's infringement and plaintiff's right to relief are not open questions.[46] Findings of fact made by the master upon a reference have the weight of a verdict by a jury and will not be set aside unless the evidence is reported and shows the findings to be clearly wrong.[47] Defendant must account for all profits made on all goods sold under the infringing mark or name, and not merely for those shown to be due to the infringement.[48] Where

Ch. 293, 46 Eng. Reprint 965; Edelsten *v.* Edelsten, 1 De G. J. & S. 185, 9 Jur. N. S. 479, 7 L. T. Rep. N. S. 768, 11 Wkly. Rep. 328, 66 Eng. Ch. 142, 46 Eng. Reprint 72. See Rodgers *v.* Nowill, 5 C. B. 109, 11 Jur. 1039, 17 L. J. C. P. 52, 57 E. C. L. 109. See also Harrison *v.* Taylor, 11 Jur. N. S. 408, 12 L. T. Rep. N. S. 339, *Contra*, Cartier *v.* Carlile, 31 Beav. 292, 8 Jur. N. S. 183, 54 Eng. Reprint 1151, holding that a defendant is liable, in equity, to account for the profits made by the user of a plaintiff's trade-mark, although, at the time of the user, he may have been ignorant of the rights and of the existence of plaintiff, and notwithstanding that, to entitle him to recover damages at law, it may be necessary to prove a *scienter*.

Canada.— Smith *v.* Fair, 14 Ont. 729, account not limited to period after registration where infringement not innocent.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 112.

"There is some conflict in the decisions; but we think that the weight of modern authority is in favor of the rule that an account of profits will not be taken where the wrongful use of a trademark or a trade-name has been merely accidental or without any actual wrongful intent to defraud a plaintiff, or to deceive the public." Regis *v.* Jaynes, 191 Mass. 245, 248, 77 N. E. 774 [*citing* Beebe *v.* Tolerton, etc., Co., 117 Iowa 593, 91 N. W. 905; George T. Stagg Co. *v.* Taylor, 95 Ky. 651, 27 S. W. 247, 16 Ky. L. Rep. 213; Elgin Nat. Watch Co. *v.* Illinois Watch Case Co., 179 U. S. 665, 21 S. Ct. 270, 45 L. ed. 365; Saxlehner *v.* Siegel-Cooper Co., 179 U. S. 42, 21 S. Ct. 16, 45 L. ed. 77, 93 Off. Gaz. 947; N. K. Fairbank Co. *v.* Windsor, 124 Fed. 200, 61 C. C. A. 233; North Cheshire, etc., Brewery Co. *v.* Manchester Brewery Co., [1899] A. C. 83, 68 L. J. Ch. 74, 79 L. T. Rep. N. S. 645, 15 T. L. R. 110; Moet *v.* Couston, 33 Beav. 578, 10 Jur. N. S. 1012, 10 L. T. Rep. N. S. 395, 4 New Rep. 86, 55 Eng. Reprint 493; Hodgson *v.* Kynoch Limited, 15 Rep. Pat. Cas. 465].

The presumption of fraudulent intent in cases of infringement of technical trade-marks may be rebutted upon the question of liability for profits and damages. W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 100 Me. 461, 62 Atl. 499, 4 L. R. A. N. S. 960 [*citing* Elgin Nat. Watch Co. *v.* Illinois Watch Case Co., 179 U. S. 665, 21 S. Ct. 270, 45 L. ed. 365].

44. In a suit to restrain the infringement of a trade-mark, defendants, who persisted in the infringement during the litigation, could not invoke the rule that an account of profits will not be taken where the wrongful use is accidental or without wrongful intent. Regis *v.* Jaynes, 191 Mass. 245, 77 N. E. 774. See also Baker *v.* Slack, 130 Fed. 514, 65 C. C. A. 138, holding that accounting runs from commencement of infringement where same was deliberate.

45. El Model & Co. *v.* Gato, 25 Fla. 886, 7 So. 23, 23 Am. St. Rep. 537, 6 L. R. A. 823; Regis *v.* Jaynes, 191 Mass. 245, 77 N. E. 774; Stevens *v.* Gladding, 17 How. (U. S.) 447, 15 L. ed. 155; Baker *v.* Slack, 130 Fed. 514, 65 C. C. A. 138; Mitchell *v.* Williams, 106 Fed. 168, 45 C. C. A. 265; Hennessy *v.* Wilmerding-Loewe Co., 103 Fed. 90; Atlantic Milling Co. *v.* Rowland, 27 Fed. 24; Collins Co. *v.* Oliver Ames, etc., Corp., 18 Fed. 561, 20 Blatchf. 542; Sawyer *v.* Kellogg, 9 Fed. 601; Moet *v.* Couston, 33 Beav. 578, 10 Jur. N. S. 1012, 10 L. T. Rep. N. S. 395, 4 New Rep. 86, 55 Eng. Reprint 493; Edelsten *v.* Edelsten, 1 De G. J. & S. 185, 9 Jur. N. S. 479, 7 L. T. Rep. N. S. 768, 11 Wkly. Rep. 328, 66 Eng. Ch. 142, 46 Eng. Reprint 72; Weingarten *v.* Bayer, 92 L. T. Rep. N. S. 511, 21 T. L. R. 418.

Advice of counsel.— Where one receiving a temporary license to use the trade-mark of another used it after the expiration of the license, and after notice from the owner not to do so, and warning that he would be held responsible for further use, he was guilty of wrongfully using the trade-mark, and liable for the profits realized thereby, although he acted on advice of counsel not informed of the temporary license. Nelson *v.* Winchell, 203 Mass. 75, 89 N. E. 180, 23 L. R. A. N. S. 1150.

46. Nelson *v.* Winchell, 203 Mass. 75, 89 N. E. 180, 23 L. R. A. N. S. 1150; De Long Hook, etc., Co. *v.* Francis Hook, etc., Co., 168 Fed. 898, 94 C. C. A. 310 [*affirming* 159 Fed. 292].

47. W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 103 Me. 334, 69 Atl. 569.

48. *California.*— Graham *v.* Plate, 40 Cal. 593, 6 Am. Rep. 639.

the goods themselves are not impressed with the deceptive mark, defendant is not chargeable with sales of such goods to persons who are not deceived.[49] If the right to use a trade-mark is common to two or more persons, neither will be allowed to recover full profits against an infringer, but each will be permitted to recover only according to his own interest.[50] In ascertaining profits, where defendant does not deal exclusively in the infringing goods, he should be credited with a proportion of the general expenses of the business;[51] but not where such general expense is not shown to have been increased by handling the unlawfully marked goods.[52] The cost of manufacture[53] and defendant's selling

Florida.— El Modello Cigar Mfg. Co. *v.* Gato, 25 Fla. 886, 7 So. 23, 23 Am. St. Rep. 537, 6 L. R. A. 823.

Maine.— W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 100 Me. 461, 62 Atl. 499, 4 L. R. A. N. S. 960.

Maryland.— Stonebraker *v.* Stonebraker, 33 Md. 252.

Massachusetts.— Reading Stove Works *v.* S. M. Howes Co., 201 Mass. 437, 87 N. E. 751, 21 L. R. A. N. S. 979 (actual fraud); Regis *v.* Jaynes, 191 Mass. 245, 77 N. E. 774 (liable irrespective of actual deception of public).

New Jersey.— International Silver Co. *v.* Wm. H. Rogers Corp., 66 N. J. Eq. 140, 57 Atl. 725; Clark Thread Co. *v.* William Clark Co., 55 N. J. Eq. 658, 37 Atl. 599 [*reversed* in 56 N. J. Eq. 789, 40 Atl. 686].

Wisconsin.— Leidersdorf *v.* Flint, 50 Wis. 400, 7 N. W. 252.

United States.— Saxlehner *v.* Eisner, etc., Co., 138 Fed. 22, 70 C. C. A. 452 [*affirming* 127 Fed. 1023]; N. K. Fairbank Co. *v.* Windsor, 118 Fed. 96 [*reversed* on other grounds in 124 Fed. 200, 61 C. C. A. 233]; Scoiété Anonyme *v.* Western Distilling Co., 46 Fed. 921; Benkert *v.* Feder, 34 Fed. 534, 13 Sawy. 229; Atlantic Milling Co. *v.* Rowland, 27 Fed. 24; Sawyer *v.* Kellogg, 9 Fed. 601.

England.— Lever *v.* Goodwin, 36 Ch. D. 1, 57 L. T. Rep. N. S. 583, 36 Wkly. Rep. 177; Edelsten *v.* Edelsten, 1 De G. J. & S. 185, 9 Jur. N. S. 479, 7 L. T. Rep. N. S. 768, 11 Wkly. Rep. 328, 66 Eng. Ch. 142, 46 Eng. Reprint 72.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 112.

Compare Peltz *v.* Eichele, 62 Mo. 171; Enoch Morgan's Sons' Co. *v.* Troxell, 57 How. Pr. (N. Y.) 121 [*affirmed* in 23 Hun 632 (*reversed* in 89 N. Y. 292, 42 Am. Rep. 294)]. But see Beebe *v.* Tolerton, etc., Co., 117 Iowa 593, 91 N. W. 905.

The rule in patent cases (Garretson *v.* Clark, 111 U. S. 120, 4 S. Ct. 291, 28 L. ed. 371) does not apply to trade-mark cases. Regis *v.* Jaynes, 191 Mass. 245, 77 N. E. 774. Plaintiff is not bound, on an accounting of profits, to show what part of defendant's goods it could have sold had it used honest marks and labels, and what part of defendant's profits were due to the infringement. Saxlehner *v.* Eisner, etc., Co., 138 Fed. 22, 70 C. C. A. 452 [*affirming* 127 Fed. 1023]. "It is equally well settled that the profits recoverable in equity for unfair competition are governed by the same rule as in cases of infringement of trade-marks, and are not limited to such as accrue from sales in which it is shown that the customer is actually deceived, but include all made on the goods sold in the simulated dress or package, and in violation of the rights of the original proprietor. Graham *v.* Plate, 40 Cal. 593, 6 Am. Rep. 639; Avery *v.* Meikle, 85 Ky. 435, 3 S. W. 609, 9 Ky. L. Rep. 69, 7 Am. St. Rep. 604; Saxlehner *v.* Eisner, etc., Co., 179 U. S. 19, 21 S. Ct. 7, 45 L. ed. 60, 93 Off. Gaz. 940; Singer Mfg. Co. *v.* June Mfg. Co., 163 U. S. 169, 16 S. Ct. 1002, 41 L. ed. 118; McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828; N. K. Fairbank Co. *v.* Windsor, 118 Fed. 96; Williams *v.* Mitchell, 106 Fed. 168, 45 C. C. A. 265; Benkert *v.* Feder, 34 Fed. 534, 13 Sawy. 229; Sawyer *v.* Kellogg, 9 Fed. 601." W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 100 Me. 461, 479, 62 Atl. 499, 4 L. R. A. N. S. 960.

Manufacturing profits.— Where plaintiff adopted a trade-mark on shoes manufactured for him according to his directions by defendant, who infringed the trade-mark, defendant was not liable for the total profits on the shoes sold by him, but was liable for the amount of the trade-mark profits, and could retain for himself the manufacturing profits. Nelson *v.* Winchell, 203 Mass. 75, 89 N. E. 180, 23 L. R. A. N. S. 1150.

49. W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 103 Me. 334, 69 Atl. 569. "Granting the general fraudulent character, as to the plaintiff, of the defendant's business conduct, we should not assume that none of its business transactions were free from that fraud." W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 103 Me. 334, 338, 69 Atl. 569, holding that defendant should not be charged with goods sold to persons who knew he was the manufacturer, nor with goods sold to persons who had no knowledge of plaintiff's existence.

50. Regis *v.* Jaynes, 191 Mass. 245, 77 N. E. 774; Clark Thread Co. *v.* William Clark Co., 56 N. J. Eq. 789, 40 Atl. 686 [*reversing* 55 N. J. Eq. 658, 37 Atl. 599]. See also Dent *v.* Turpin, 2 Johns. & H. 139, 7 Jur. N. S. 673, 30 L. J. Ch. 495, 4 L. T. Rep. N. S. 637, 9 Wkly. Rep. 548, 70 Eng. Reprint 1003.

51. Saxlehner *v.* Eisner, etc., Co., 138 Fed. 22, 70 C. C. A. 452 [*affirming* 127 Fed. 1023].

52. Nelson *v.* Winchell, 203 Mass. 75, 89 N. E. 180, 23 L. R. A. N. S. 1150; Regis *v.* Jaynes, 191 Mass. 245, 77 N. E. 774.

53. Nelson *v.* Winchell, 203 Mass. 75, 89 N. E. 180, 23 L. R. A. N. S. 1150, holding

expenses [54] should be deducted in ascertaining profits. Salaries paid to managing officers should ordinarily be allowed as a credit in ascertaining the cost of manufacture and sale; [55] but not where such officers are practically the corporation and are the persons individually guilty of the unfair competition or infringement.[56] No allowance can be made for defendant's services in wronging plaintiff by his unfair competition.[57] Interest on profits may be awarded from the time of commencement of the action.[58] Damages may be recovered in equity where an injunction is granted.[59] The English rule puts plaintiff to his election. He may have either profits or damages, but cannot have both.[60] In this country both the damages suffered by plaintiff and the profits realized by defendant may be recovered.[61] The burden of proof is upon plaintiff to show damages and profits if a recovery thereof is sought.[62] The cost of warning notices issued after the granting of a

that in determining the profits realized through the wrongful use of a trade-mark on shoes, it is proper to treat as evidence of the cost of the shoes of the infringers a cost sheet prepared by one of them, and adopted and acted on by the infringers in the conduct of the business, in the absence of explicit evidence to the contrary.

54. Nelson *v.* Winchell, 203 Mass. 75, 89 N. E. 180, 23 L. R. A. N. S. 1150 (holding that in determining the profits realized through the wrongful use of a trade-mark on shoes, it is proper, in considering losses from bad debts, to treat such sales of shoes as if they had not been made); Cutter *v.* Gudebrod Bros. Co., 190 N. Y. 252, 83 N. E. 16; Saxlehner *v.* Eisner, etc., Co., 138 Fed. 22, 70 C. C. A. 452 [*affirming* 127 Fed. 1023] (proportion of salaries and expenses of salesmen).

55. W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 103 Me. 334, 69 Atl. 569; Providence Rubber Co. *v.* Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566.

56. W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 103 Me. 334, 69 Atl. 569.

57. W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 103 Me. 334, 69 Atl. 569. See Callaghan *v.* Myers, 128 U. S. 617, 9 S. Ct. 177, 32 L. ed. 547, where the same rule was applied in a copyright case.

58. Cutter *v.* Gudebrod Bros. Co., 190 N. Y. 252, 83 N. E. 16.

59. Hostetter *v.* Vowinkle, 12 Fed. Cas. No. 6,714, 1 Dill. 329; Leather Cloth Co. *v.* Hirschfield, L. R. 1 Eq. 299, 13 L. T. Rep. N. S. 427, 14 Wkly. Rep. 78; Barsalou *v.* Darling, 9 Can. Sup. Ct. 677. But not exemplary damages. Hennessy *v.* Wilmerding-Loewe Co., 103 Fed. 90.

Profits are the true criterion of damages in a suit in equity to restrain infringement of a trade-mark when no other special injury is alleged or claimed. Avery *v.* Meikle, 85 Ky. 435, 3 S. W. 609, 9 Ky. L. Rep. 69, 7 Am. St. Rep. 604.

Assessment of damages by jury.—The judgment cannot properly direct that the damages be assessed by a jury. The proofs must be taken by the court, or a reference must be ordered. Guilhon *v.* Lindo, 9 Bosw. (N. Y.) 605. But as to the power to direct an issue out of chancery for an advisory verdict see EQUITY, 16 Cyc. 413.

For the rule as to damages see *supra*, IX, D, 3.

60. Lever *v.* Goodwin, 36 Ch. D. 1, 57 L. T. Rep. N. S. 583, 36 Wkly. Rep. 177; Leather Cloth Co. *v.* Hirschfield, L. R. 1 Eq. 299, 13 L. T. Rep. N. S. 427, 14 Wkly. Rep. 78. See De Vitre *v.* Betts, L. R. 6 H. L. 319, 42 L. J. Ch. 841, 21 Wkly. Rep. 705; Neilson *v.* Betts, L. R. 5 H. L. 1, 40 L. J. Ch. 317, 19 Wkly. Rep. 1121.

61. *California.*—Graham *v.* Plate, 40 Cal. 593, 6 Am. Rep. 639.

Florida.—El Modello Cigar Mfg. Co. *v.* Gato, 25 Fla. 886, 7 So. 23, 23 Am. St. Rep. 537, 6 L. R. A. 823.

Indiana.—Julian *v.* Hoosier Drill Co., 78 Ind. 408.

Iowa.—Beebe *v.* Tolerton, etc., Co., 117 Iowa 593, 91 N. W. 905.

Maine.—W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 103 Me. 334, 69 Atl. 569.

Massachusetts.—Marsh *v.* Billings, 7 Cush. 322, 54 Am. Dec. 723.

Missouri.—Addington *v.* Cullinane, 28 Mo. App. 238; Conrad *v.* Joseph Uhrig Brewing Co., 8 Mo. App. 277. See also Peltz *v.* Eichele, 62 Mo. 171.

Pennsylvania.—Shaw *v.* Pilling, 175 Pa. St. 78, 34 Atl. 446.

Rhode Island.—Buchanan *v.* Carpenter, 19 R. I. 337, 36 Atl. 90.

Wisconsin.—Leidersdorf *v.* Flint, 50 Wis. 400, 7 N. W. 252, holding no misjoinder in combining prayer for injunction, damages, and profits.

United States.—Williams *v.* Mitchell, 106 Fed. 168, 45 C. C. A. 265; Hennessy *v.* Wilmerding-Loewe Co., 103 Fed. 90; Benkert *v.* Feder, 34 Fed. 534, 13 Sawy. 229; Atlantic Milling Co. *v.* Rowland, 27 Fed. 24; Atlantic Milling Co. *v.* Robinson, 20 Fed. 217; Sawyer *v.* Kellogg, 9 Fed. 601; Hostetter *v.* Vowinkle, 12 Fed. Cas. No. 6,714, 1 Dill. 329.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 112.

Contra.—L. Martin Co. *v.* L. Martin, etc., Co., 75 N. J. Eq. 257, 72 Atl. 294, 21 L. R. A. N. S. 526.

62. Beebe *v.* Tolerton, etc., Co., 117 Iowa 593, 91 N. W. 905 (under Code, § 5050); Watkins *v.* Landon, 52 Minn. 389, 54 N. W. 193, 38 Am. St. Rep. 560, 19 L. R. A. 236.

Evidence of profits.—The actual profits made by one wrongfully using the trade-mark

preliminary injunction are not recoverable as damages. It may be otherwise as to notices prior to an injunction.[33]

13. Discovery. Plaintiff is entitled to the usual discovery from defendant in aid of his bill,[64] and upon the accounting.[65]

14. Costs. Costs are governed by the usual rules,[66] and as in other cases in equity are largely discretionary, being granted or withheld as the equities of the particular case require.[67] Costs will usually be awarded to a successful complainant upon the granting of an injunction,[68] but may be denied where the infringement was inadvertent, and not persisted in,[69] where both parties have been found at fault,[70] or where costs may be divided.[71] Costs subsequent to a preliminary injunction entered on defendant's consent may be imposed on complainant where he fails to secure any broader decree.[72] In England the court exercises its discretion as to costs with great freedom.[73]

of another after his right under a license so to do had expired cannot be decisively measured by the amount of the agreed license-fee. In determining the profits realized through the wrongful use of a trade-mark on shoes, the failure of the infringers, after they had received notice of the claim of the owner of the trade-mark, to keep accounts which would show accurately the amount of their expenses, and of their profits on the shoes, may be considered as a circumstance bearing against them. Nelson *v.* Winchell, 203 Mass. 75, 89 N. E. 180, 23 L. R. A. N. S. 1150.

63. Buchanan *v.* Carpenter, 19 R. I. 337, 36 Atl. 90.

64. See Discovery, 14 Cyc. 306; Equity, 16 Cyc. 223.

An action will lie against ship-owners who have shipped goods bearing counterfeits of plaintiff's trade-marks for discovery of the names of the consignor from whom the goods were received. Orr *v.* Diaper, 4 Ch. D. 92, 46 L. J. Ch. 41, 35 L. T. Rep. N. S. 468, 25 Wkly. Rep. 23.

65. After decree for an accounting, defendant may be compelled to disclose the names of all persons to whom he has sold any such goods; and if he be unable to give such information precisely, he may then (but not otherwise) be required to disclose the names of all persons to whom he has sold any goods which he will not swear positively were unstamped. Leather Cloth Co. *v.* Hirschfeld, 1 Hem. & M. 295, 1 New Rep. 551, 11 Wkly. Rep. 933, 71 Eng. Reprint 129. See also Carver *v.* Pinto Leite, L. R. 7 Ch. 90, 41 L. J. Ch. 92, 25 L. T. Rep. N. S. 722, 20 Wkly. Rep. 134, as to the extent of the discovery.

66. See Costs, 11 Cyc. 1.

An extra allowance of costs cannot be awarded where only an injunction is granted and no damages are recovered. Volger *v.* Force, 63 N. Y. App. Div. 122, 71 N. Y. Suppl. 209.

67. Low *v.* Hart, 90 N. Y. 457.

68. Low *v.* Hart, 90 N. Y. 457; Weed *v.* Peterson, 12 Abb. Pr. N. S. (N. Y.) 178; Coats *v.* Holbrook, 3 N. Y. Leg. Obs. 404, 2 Sandf. Ch. 586; Collins Co. *v.* Oliver Ames, etc., Corp., 18 Fed. 561, 20 Blatchf. 542; Sawyer *v.* Kellogg, 9 Fed. 601.

69. United Garment Workers of America *v.* Davis, (N. J. Ch. 1909) 74 Atl. 306; Bass *v.* Guggenheimer, 69 Fed. 271; American Tobacco Co. *v.* Guest, [1892] 1 Ch. 630, 61 L. J. Ch. 242, 66 L. T. Rep. N. S. 257, 40 Wkly. Rep. 364; Moet *v.* Couston, 33 Beav. 578, 10 Jur. N. S. 1012, 10 L. T. Rep. N. S. 395, 4 New Rep. 86, 55 Eng. Reprint 493; Wharton *v.* Thurber, Cox Man. Trade Mark Cas. 663. But see Burgess *v.* Hately, 26 Beav. 249, 53 Eng. Reprint 894; Burgess *v.* Hill, 26 Beav. 244, 5 Jur. N. S. 233, 28 L. J. Ch. 356, 7 Wkly. Rep. 158, 53 Eng. Reprint 891.

70. Moxie Nerve Food Co. *v.* Modox Co., 155 Fed. 304; Ogilvie *v.* G. & C. Merriam Co., 149 Fed. 858 [*affirmed* in 159 Fed. 638, 88 C. C. A. 596, 16 L. R. A. N. S. 549], 170 Fed. 167, 95 C. C. A. 423; Estcourt *v.* Estcourt Hop Essence Co., L. R. 10 Ch. 276, 44 L. J. Ch. 223, 32 L. T. Rep. N. S. 80, 23 Wkly. Rep. 313.

71. Fetridge *v.* Wells, 4 Abb. Pr. (N. Y.) 144, 13 How. Pr. 385; Amoskeag Mfg. Co. *v.* Garner, 54 How. Pr. (N. Y.) 297; McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828.

72. Cole *v.* Cole's Many-Use Oil Co., 147 Fed. 930.

73. **Costs in English trade-mark cases.**— Estcourt *v.* Estcourt Hop Essence Co., L. R. 10 Ch. 276, 44 L. J. Ch. 223, 32 L. T. Rep. N. S. 80, 23 Wkly. Rep. 313; American Tobacco Co. *v.* Guest, [1892] 1 Ch. 630, 61 L. J. Ch. 242, 66 L. T. Rep. N. S. 257, 40 Wkly. Rep. 364; Upmann *v.* Forester, 24 Ch. D. 231, 47 J. P. 807, 52 L. J. Ch. 946, 49 L. T. Rep. N. S. 122, 32 Wkly. Rep. 28; Metzler *v.* Wood, 8 Ch. D. 606, 47 L. J. Ch. 625, 38 L. T. Rep. N. S. 544, 26 Wkly. Rep. 577; Moet *v.* Pickering, 8 Ch. D. 372, 47 L. J. Ch. 527, 38 L. T. Rep. N. S. 799, 26 Wkly. Rep. 637; Upmann *v.* Elkan, L. R. 12 Eq. 140, 40 L. J. Ch. 475, 24 L. T. Rep. N. S. 896, 19 Wkly. Rep. 867 [*affirmed* in L. R. 7 Ch. 130, 41 L. J. Ch. 246, 25 L. T. Rep. N. S. 813, 20 Wkly. Rep. 131]; Leather Cloth Co. *v.* Lorsont, L. R. 9 Eq. 345, 39 L. J. Ch. 86, 21 L. T. Rep. N. S. 661, 18 Wkly. Rep. 572; Ainsworth *v.* Walmsley, L. R. 1 Eq. 518, 12 Jur. N. S. 205, 35 L. J. Ch. 352, 14 L. T. Rep. N. S. 220, 14 Wkly. Rep. 363; Wheeler *v.* Johnston, L. R. 3 Ir. 284; Chubb *v.* Griffiths, 35 Beav. 127, 55 Eng. Reprint 843; Ponsardin *v.* Peto, 33 Beav. 642, 10 Jur. N. S. 66, 33 L. J. Ch. 371, 9 L. T. Rep. N. S. 567, 3 New Rep. 237, 12 Wkly. Rep. 198, 55 Eng. Reprint 518; Moet *v.* Couston, 33 Beav. 578,

F. Criminal Prosecutions and Penal Actions. Violations of trade-marks have to some extent been made criminal or penal offenses.[74] An indictment, information, or complaint for a trade-mark offense must conform to the usual rules,[75] and state facts showing every element of an offense under the statute.[76] There must be no fatal variance between the facts charged and the facts

10 Jur. N. S. 1012, 10 L. T. Rep. N. S. 395, 4 New Rep. 86, 55 Eng. Reprint 493; Burgess *v.* Hately, 26 Beav. 249, 53 Eng. Reprint 894; Burgess *v.* Hills, 26 Beav. 244, 5 Jur. N. S. 233, 28 L. J. Ch. 356, 7 Wkly. Rep. 158, 53 Eng. Reprint 891; Rodgers *v.* Nowill, 5 C. B. 109, 57 E. C. L. 109, 6 Hare 325, 31 Eng. Ch. 325, 67 Eng. Reprint 1191, 11 Jur. 1039, 17 L. J. C. P. 52; Cartier *v.* May, Cox Man. Trade Mark Cas. 200; McAndrew *v.* Bassett, 4 De G. J. & S. 380, 10 Jur. N. S. 550, 33 L. J. Ch. 561, 10 L. T. Rep. N. S. 442, 4 New Rep. 123, 12 Wkly. Rep. 777, 69 Eng. Ch. 293, 46 Eng. Reprint 965 [*affirming* 10 Jur. N. S. 492, 10 L. T. Rep. N. S. 65]; Edelsten *v.* Edelsten, 1 De G. J. & S. 185, 9 Jur. N. S. 479, 7 L. T. Rep. N. S. 768, 11 Wkly. Rep. 328, 66 Eng. Ch. 142, 46 Eng. Reprint 72; Geary *v.* Norton, 1 De G. & Sm. 9, 63 Eng. Reprint 949; Wallis *v.* Wallis, 4 Drew. 458, 62 Eng. Reprint 177; Colburn *v.* Simms, 2 Hare 543, 7 Jur. 1140, 12 L. J. Ch. 388, 24 Eng. Ch. 543, 67 Eng. Reprint 224; Woollam *v.* Ratcliff, 1 Hem. & M. 259, 71 Eng. Reprint 113; Hudson *v.* Bennett, 12 Jur. N. S. 519, 14 L. T. Rep. N. S. 698, 14 Wkly. Rep. 911; Farina *v.* Silverlock, 4 Kay & J. 650, 70 Eng. Reprint 270, 1 Kay & J. 509, 24 L. J. Ch. 632, 3 Wkly. Rep. 532, 69 Eng. Reprint 560; Chappell *v.* Davidson, 2 Kay & J. 123, 69 Eng. Reprint 719; Rose *v.* Loftus, 47 L. J. Ch. 576, 38 L. T. Rep. N. S. 409; Wheeler, etc., Mfg. Co. *v.* Shakespear, 39 L. J. Ch. 36; Pierce *v.* Franks, 15 L. J. Ch. 122; Robineau *v.* Charbonnel, L. J. Notes Cas. 104; Fennessy *v.* Day, 55 L. T. Rep. N. S. 161; Hudson *v.* Asgerby, 50 L. T. Rep. N. S. 323, 32 Wkly. Rep. 566; Tonge *v.* Ward, 21 L. T. Rep. N. S. 480; Bass *v.* Dawber, 19 L. T. Rep. N. S. 626; Beard *v.* Turner, 13 L. T. Rep. N. S. 746; Williams *v.* Osborne, 13 L. T. Rep. N. S. 498; Brook *v.* Evans, 2 L. T. Rep. N. S. 740; Millington *v.* Fox, 3 Myl. & C. 338, 14 Eng. Ch. 338, 40 Eng. Reprint 956; Browne *v.* Freeman, 4 New Rep. 476, 12 Wkly. Rep. 305; Monson *v.* Boehm, 28 Sol. J. 361; Carunoho *v.* Highmoor, 27 Sol. J. 199; Twentsche Stoom Bleekery Goor *v.* Ellinger, 26 Wkly. Rep. 70; Standish *v.* Whitwell, 14 Wkly. Rep. 512; Collins Co. *v.* Walker, 7 Wkly. Rep. 222; Wylam *v.* Clarke, [1876] D. N. 68; Cox Man. Trade-Mark Cas. 488.

74. See *supra*, VI.

Procedure relating to search warrants.— The act of 1876 provided that application for a search warrant might be made to any United States circuit court or district judge or United States commissioner, who might "within their respective jurisdiction, proceed under the law relating to search warrants." In *In re* O'Donnell, 18 Fed. Cas. No. 10,434, 14 Off. Gaz. 379, it was held that since there was no general United States statute on the subject of search warrants, the law referred to must have been the common law, and the application would therefore be denied unless the known requirements in the application or affidavit with respect to definiteness and particularity had been observed.

Commitment for trial.— In order for a magistrate to commit the accused for trial, it is required only that the evidence be sufficient to establish probable cause that defendant had committed the offense charged. U. S. *v.* Steffens, 27 Fed. Cas. No. 16,384.

Jurisdiction of non-registered foreign trade-mark.— The act of congress of 1881 relating to trade-marks used in commerce with foreign nations and providing for an action on the case for damages for the wrongful use of such a trade-mark does not oust a state court in New York of jurisdiction of a prosecution under section 364 of the penal code for counterfeiting a foreign trade-mark which is not registered under the act of congress. People *v.* Molins, 10 N. Y. Suppl. 130, 7 N. Y. Cr. 51.

Remedy for non-residents or foreigners.— The Missouri act of 1870 (now Mo. Rev. St. §§ 10366–10368) providing a criminal proceeding against the counterfeiting of trade-marks may be invoked by citizens of other states and countries. State *v.* Gibbs, 56 Mo. 133.

75. See CRIMINAL LAW, 12 Cyc. 290; INDICTMENTS AND INFORMATIONS, 22 Cyc. 157.

76. *Illinois.*— Vincendeau *v.* People, 219 Ill. 474, 76 N. E. 675 [*reversing* 119 Ill. App. 603], averment that label was "duly filed for record as by law provided" sufficient.

Indiana.— State *v.* Barnett, 159 Ind. 432, 65 N. E. 515 (must show compliance with statute); State *v.* Wright, 159 Ind. 422, 65 N. E. 289 (holding that an indictment for refilling beer bottles was defective where it failed to allege that the act was with intent to defraud the owner of the bottles); State *v.* Wright, 159 Ind. 394, 65 N. E. 190; State *v.* Hagen, 6 Ind. App. 167, 33 N. E. 223 (holding that indictment must show that mark was entitled to registration).

Missouri.— State *v.* Thierauf, 167 Mo. 429, 67 S. W. 292; State *v.* Bishop, 128 Mo. 373, 31 S. W. 9.

New Jersey.— Brant *v.* Froehlich, 49 N. J. L. 336, 8 Atl. 283, holding that the complaint is defective if it charges in the alternative the commission of one or another of several offenses specified in that act.

New York.— People *v.* Krivitzky, 60 N. Y. App. Div. 307, 70 N. Y. Suppl. 173, 15 N. Y. Cr. 441 [*affirmed* in 168 N. Y. 182, 61 N. E. 175, 10 N. Y. Annot. Cas. 245], holding complaint sufficient under Pen. Code, § 364. See also People *v.* Fisher, 50 Hun 552, 3 N. Y. Suppl. 786, under the New York statute.

Washington.— State *v.* Montgomery, 56 Wash. 443, 105 Pac. 1035, 134 Am. St. Rep. 1119, 57 Wash. 192, 106 Pac. 771, complaint

proved.[77] Questions of fact are for the jury,[78] under proper instructions from the court.[79]

TRADE-NAME. See TRADE-MARKS AND TRADE-NAMES, *ante*, p. 674.

TRADER. A dealer in buying and selling or barter;[1] one engaged in trade or commerce; one who makes a business of buying and selling or of barter; a merchant;[2] one engaged in trade or in the business of buying and selling;[3] a person engaged in merchandise, or one who gets his living by buying and selling again for profit;[4] one who makes it his business to buy and sell merchandise or other things ordinarily the subject of traffic and commerce;[5] one who makes it his business to buy merchandise or goods and chattels, and to sell the same for the purpose of making a profit;[6] one who sells goods substantially in the form in which they are bought;[7] one who sells to gain his living by such buying and selling, not to gain a profit on one isolated transaction;[8] one whose business is to buy and sell merchandise or any class of goods deriving a profit from his dealings.[9] (Trader: Accounts — In General, see ACCOUNTS AND ACCOUNTING, 1 Cyc.

for counterfeiting union label held sufficient.

United States.— U. S. *v.* Braun, 39 Fed. 775, must show existence of trade-mark.

See 46 Cent. Dig. tit. "Trade-Marks and Trade-Names," § 59.

In a prosecution under St. (1895) c. 462, for using a counterfeit trade-mark, where defendants were shown to have their place of business within the state, it was not necessary to show that the trade used the trade-mark within the state, to make out a *prima facie* case. Com. *v.* Rozen, 176 Mass. 129, 57 N. E. 223. Massachusetts statutes construed see Com. *v.* Anselvich, 186 Mass. 376, 71 N. E. 790.

In an action to recover a penalty under N. Y. Laws (1893), c. 219, for the counterfeiting of a label adopted by a labor union, allegations in the complaint of knowledge of the counterfeit and intent to injure are mere surplusage, these not being ingredients of the offense. Bulena *v.* Newman, 10 Misc. (N. Y.) 460, 31 N. Y. Suppl. 449.

77. Vincendeau *v.* People, 219 Ill. 474, 76 N. E. 675 [*reversing* 119 Ill. App. 603] (holding no variance as to person to whom goods were sold); State *v.* Niesman, 101 Mo. App. 507, 74 S. W. 638 (held no variance between label alleged and label registered and proved).

78. People's Milk Co. *v.* Doty, 64 Misc. (N. Y.) 595, 118 N. Y. Suppl. 966 [*affirmed* in 140 N. Y. App. Div. 883, 124 N. Y. Suppl. 1126]. Evidence by the expressman who hauled the goods from defendant's place of business to that of the prosecuting witness that he had previously hauled the same goods from the warehouse of an alleged pledgor to defendant's place of business was admissible upon fact of guilty knowledge. Vincendeau *v.* People, 219 Ill. 474, 76 N. E. 675 [*reversing* 119 Ill. App. 603].

79. Vincendeau *v.* People, 219 Ill. 474, 76 N. E. 675 [*reversing* 119 Ill. App. 603], holding an instruction erroneous upon the subject of *idem sonans*.

1. Webster Dict. [*quoted* in Brown Mfg. Co. *v.* Deering, 35 W. Va. 255, 258, 13 S. E. 383].

2. Webster Dict. [*quoted* in Morris *v.* Clifton Forge Grocery Co., 46 W. Va. 197, 200, 32 S. E. 997].

3. State *v.* Barnes, 126 N. C. 1063, 1064, 35 S. E. 605; State *v.* Chadbourn, 80 N. C. 479, 481, 30 Am. Rep. 94.

Occasionally buying and selling will not necessarily make one a trader under bankrupt and insolvency laws. To make one such he must buy and sell as a business. Groves *v.* Kilgore, 72 Me. 489, 491.

Construed as synonymous with "dealer" see State *v.* Barnes, 126 N. C. 1063, 1064, 35 S. E. 605.

4. McDowall *v.* Wood, 2 Nott & M. (S. C.) 242, 244.

5. Love *v.* Love, 15 Fed. Cas. No. 8,549. See also *In re* Cowles, 6 Fed. Cas. No. 3,297, 1 Nat. Bankr. Reg. 280.

6. Bouvier L. Dict. [*quoted* in State *v.* Rosenbaum, 80 Conn. 327, 329, 68 Atl. 250, 125 Am. St. Rep. 121, 15 L. R. A. N. S. 288; *Ex p.* Conant, 77 Me. 275, 277, 52 Am. Rep. 759; Brown Mfg. Co. *v.* Deering, 35 W. Va. 255, 258, 13 S. E. 383; Toxaway Hotel Co. *v.* Smathers, 216 U. S. 439, 447, 30 S. Ct. 263, 54 L. ed. ——; *In re* Kingston Realty Co., 160 Fed. 445, 447, 87 C. C. A. 406; *In re* U. S. Hotel Co., 134 Fed. 225, 226, 67 C. C. A. 153, 68 L. R. A. 588; *In re* Pacific Coast Warehouse Co., 123 Fed. 749, 750; *In re* Surety Guarantee, etc., Co., 121 Fed. 73, 74, 56 C. C. A. 654; *In re* New York, etc., Water Co., 98 Fed. 711, 713, 3 Am. Bankr. Rep. 508; *In re* San Gabriel Sanatorium Co., 95 Fed. 271, 273; *In re* Smith, 22 Fed. Cas. No. 12,981, 2 Lowell 69]. See also *In re* Minnesota, etc., Constr. Co., 7 Ariz. 137, 146, 60 Pac. 881, where such is said to be the usual meaning of the term.

7. Sylvester *v.* Edgecomb, 76 Me. 499, 500. **It originally meant a shopkeeper,** that is, a tradesman; but it now in an unrestricted sense means merely a business man. Peabody *v.* Citizens' State Bank, 98 Minn. 302, 310, 108 N. W. 272.

8. Reg. *v.* Pearson, 1 Can. Cr. Cas. 337, 338.

9. Black L. Dict. [*quoted* in *In re* Kingston Realty Co., 160 Fed. 445, 447, 87 C. C. A. 406; *In re* U. S. Hotel Co., 134 Fed. 225, 226, 67 C. C. A. 153, 68 L. R. A. 588; *In re* Pacific Coast Warehouse Co., 123 Fed. 749, 750; *In re* New York, etc., Water Co., 98 Fed. 711, 713, 3 Am. Bankr. Rep. 508].

351; Books of Account as Evidence, see EVIDENCE, 17 Cyc. 369; Limitation of Actions, see LIMITATIONS OF ACTIONS, 25 Cyc. 1044, 1118. Bankruptcy, see BANKRUPTCY, 5 Cyc. 284. Capacity of Married Woman to Become, see HUSBAND AND WIFE, 21 Cyc. 1333. Customs of, see CUSTOMS AND USAGES, 12 Cyc. 1034, 1044. Hawker or Peddler, see HAWKERS AND PEDDLERS, 21 Cyc. 364. Infant as, see INFANTS, 22 Cyc. 584. Insolvency of, see INSOLVENCY, 21 Cyc. 1272. Libel or Slander, see LIBEL AND SLANDER, 25 Cyc. 337. License and Taxation of —

Questions as to who is a trader most frequently arise under the bankrupt laws, and the most difficult among them are those cases where the party follows a business which is not that of buying and selling principally, but in which he is occasionally engaged in purchases and sales. Bouvier L. Dict. [*quoted* in Brown Mfg. Co. *v.* Deering, 35 W. Va. 255, 258, 13 S. E. 383].

For persons held to be traders under bankruptcy laws see BANKRUPTCY, 5 Cyc. 284 note 80.

"The proper description of the business of a trader includes both buying and selling either goods or merchandise, or other goods ordinarily the subject of traffic." *In re* Pacific Coast Warehouse Co., 123 Fed. 749, 750; *In re* Surety Guarantee, etc., Co., 121 Fed. 73, 75, 56 C. C. A. 654; *In re* Tontine Surety Co., 116 Fed. 401, 402; *In re* New York, etc., Water Co., 98 Fed. 711, 713, 3 Am. Bankr. Rep. 508; *In re* Chandler, 5 Fed. Cas. No. 2,591, 1 Lowell 478, 4 Nat. Bankr. Reg. 213; *In re* Smith, 22 Fed. Cas. No. 12,981, 2 Lowell 69; Wakeman *v.* Hoyt, 28 Fed. Cas. No. 17,051, 1 N. Y. Leg. Obs. 132; Sutton *v.* Weeley, 7 East 442, 448, 3 Smith K. B. 445, 103 Eng. Reprint 171.

Has been held to include: A farmer who buys horses or other stock, or products of a farm to sell again as a part of his business. *In re* Kenyon, 1 Utah 47, 49. A general merchant. Morris *v.* Clifton Forge Grocery Co., 46 W. Va. 197, 199, 32 S. E. 997, statute requiring a person transacting business as a trader with the addition of the words "factor, agent, and company," to disclose the name of his principal or partner. A licensed auctioneer conveying goods by public stage wagon from place to place and selling them on commission. Rex *v.* Turner, 4 B. & Ald. 510, 515, 6 E. C. L. 581, 106 Eng. Reprint 1024, statute requiring license. A livery-stable keeper. Groves *v.* Kilgore, 72 Me. 489, 490, insolvency laws. One who bought and sold lumber, and bought clay and made and sold bricks. Huston *v.* Goudy, 90 Me. 128, 130, 37 Atl. 881, insolvency statute. One who for several years prior to his petition in insolvency was engaged in purchasing small parcels of timber lands and timber growth, cutting and removing timber therefrom, manufacturing the same at his mill, into staves and heading, constructing the manufactured materials into casks and barrels at his shop, and transporting these products with his team to market for sale. *In re* Merryfield, 80 Me. 233, 234, 13 Atl. 891, insolvency law. One who in the course of a few months is engaged with another in purchasing one hundred cattle and sells them to a proprietor of an establishment for canning beef. Sylvester *v.* Edgecomb, 76 Me. 499, 500, insolvency laws. Operating a flour mill, buying wheat, grinding it into flour and selling it for a profit. Daniels *v.* Palmer, 35 Minn. 347, 350, 29 N. W. 162, insolvency law. A person who keeps a lodging-house and supplies the lodgers with food and wine. King *v.* Simmonds, 1 H. L. Cas. 754, 773, 12 Jur. 903, 9 Eng. Reprint 959. A retail dealer in liquors. *In re* Ryan, 21 Fed. Cas. No. 12,183, 2 Sawy. 411. A smuggler. Cobb *v.* Symonds, 5 B. & Ald. 516, 1 D. & R. 111, 7 E. C. L. 283, 106 Eng. Reprint 1279.

Held not to include: A baker. Robinson *v.* Graham, 16 Manitoba 69, 71. A farmer. Wells *v.* Parker, 1 T. R. 34, 38, 99 Eng. Reprint 957. A keeper of a restaurant. *In re* Excelsior Café Co., 175 Fed. 294, 296; *In re* Wentworth Lunch Co., 159 Fed. 413, 415, 86 C. C. A. 393, 20 Am. Bankr. Rep. 29. Livery-stable keepers. Durham *v.* Slidell Co., 94 Miss. 140, 144, 49 So. 739 (statute providing that if a person shall transact business as a trader or otherwise as agent of another and fail to disclose his principal by a business sign all his property shall be liable); Hall *v.* Cooley, 11 Fed. Cas. No. 5,928, 3 N. Y. Leg. Obs. 282. One engaged in buying and selling stocks, bonds, and other securities. *In re* Surety Guarantee, etc., Co., 121 Fed. 73, 75, 56 C. C. A. 654. On transacting business solely as an insurance agent. Lyons *v.* Steele, 86 Miss. 261, 262, 38 So. 371. One who from time to time bought and sold mining stocks, outside of his established business and independent of it. *Ex p.* Conant, 77 Me. 275, 277, 52 Am. Rep. 759, insolvency law. An owner of oil land who divides it into leaseholds and receives the rent in oil. *In re* Woods, 30 Fed. Cas. No. 17,990, 7 Nat. Bankr. Reg. 126. A person to whom a stock of goods was set apart as an exemption and who continued to trade therewith without an order of court. Powers *v.* Rosenblatt, 113 Ga. 559, 560, 38 S. E. 969, statute relating to insolvent traders. A railroad company running a car over its track supplied with provisions and clothing suitable to the wants of its employees, and delivering such supplies to its laborers in payment of the wages due them, selling to no other persons, and not to laborers except in payment of wages. Vicksburg, etc., R. Co. *v.* State, 62 Miss. 105, 107. A saloon-keeper. *In re* Chesapeake Oyster, etc., Co., 112 Fed. 960, 961. A theatrical company. *In re* Oriental Soc., 104 Fed. 975, 5 Am. Bankr. Rep. 219. A theatrical manager. *In re* Duff, 4 Fed. 519, 521. A water company buying and selling water as a part of its regular business. *In re* New York, etc., Water Co., 98 Fed. 711, 713, 3 Am. Bankr. Rep. 508.

Distinguished from "manufacturer" see State *v.* Chadbourn, 80 N. C. 479, 481, 30 Am. Rep. 94.

In General, see LICENSES, 25 Cyc. 614; Federal Taxation, see INTERNAL REVENUE, 22 Cyc. 1627. Taxation by Statute as Constituting an Interference With Commerce, see COMMERCE, 7 Cyc. 483.)

TRADESMAN. A person carrying on a trade — buying and selling;[10] a shop keeper;[11] one who trades; a shop keeper; any mechanic or artificer whose livelihood depends upon the labor of his hands; a handicraftsman in a borough.[12]

TRADE UNION. See LABOR UNIONS, 24 Cyc. 815.

TRADING CORPORATION. A commercial corporation.[13]

TRADING PARTNERSHIP. A partnership which buys and sells;[14] a partnership requiring capital and credit.[15] (See, generally, PARTNERSHIP, 30 Cyc. 334.)

10. Palmer *v.* Snow, [1900] 1 Q. B. 725, 727, 64 J. P. 342, 69 L. J. Q. B. 356, 82 L. T. Rep. N. S. 199, 16 T. L. R. 168, 48 Wkly. Rep. 351; Rex *v.* Anderson, 10 Can. Cr. Cas. 144, 146, both cases giving such meaning to the term as used in Sunday laws.

11. Wharton L. Lex. [*quoted* in *In re* Ragsdale, 20 Fed. Cas. No. 11,530, 7 Biss. 154 (where the term is held to have a different meaning from trader); *In re* Rugsdale, 20 Fed. Cas. No. 12,123, 16 Nat. Bankr. Reg. 215; *In re* Cote, 6 Fed. Cas. No. 3,267, 2 Lowell 374, 14 Nat. Bankr. Reg. 503].

Referring to a smaller class of merchants see *In re* Stickney, 23 Fed. Cas. No. 13,439, 5 Dill. 91, 5 Reporter 586, 17 Nat. Bankr. Reg. 305.

12. Webster Dict. [*quoted* in *In re* Cote, 6 Fed. Cas. No. 3,267, 2 Lowell 374, 14 Nat. Bankr. Reg. 503].

"In England, according to their lexicographers, the word . . . would seem to be principally used as expressive of a person engaged in traffic, as a small shopkeeper; but in this country, in its ordinary acceptation, it embraces a much larger class. With us, it is scarcely ever applied to persons engaged in the business of buying and selling. . . . In its most extended American signification, it may embrace all who are engaged in mechanical pursuits and employments; every one who exercises an art in making and constructing for the use of others the almost innumerable articles that civilization and refinement have made necessary or convenient to the habits and business of men as social beings, whether the individual labour himself, or only oversee and direct the labours of others." Richie *v.* McCauley, 4 Pa. St. 471, 472. See also *In re* Cote, 6 Fed. Cas. No. 3,267, 2 Lowell 374, 14 Nat. Bankr. Reg. 503.

In a statute relating to preferences for services the term was held to mean persons who work at a trade, and probably intends to include in a general phrase all the various kinds of skilled labor which are not specifically named in the earlier part of the act. Steininger *v.* Butler, 17 Pa. Co. Ct. 97, 99.

A traveling salesman is not included. Witmer *v.* Miller, 12 Pa. Co. Ct. 363, 364.

Held to include physicians, in an act providing that the accounts of merchants, tradesmen, and mechanics, which by custom become due at the end of the year, bear interest, etc., although the word does not, perhaps, ordinarily, cover physicians. Woodfield *v.* Colzey, 47 Ga. 121, 124.

13. Adams *v.* Boston, etc., R. Co., 1 Fed. Cas. No. 47, Holmes 30, 31, 4 Nat. Bankr. Reg. 314.

An educational corporation, although authorized to hold and convey property, is not a "trading corporation." McLeod *v.* Lincoln Medical College, 69 Nebr. 550, 554, 96 N. W. 265, 98 N. W. 672.

What corporations are included by the term as used in the Federal Bankruptcy Act of 1898 see BANKRUPTCY, 5 Cyc. 284, 285; *In re* Pacific Coast Warehouse Co., 123 Fed. 749; *In re* White Star Laundry Co., 117 Fed. 570, 571, 9 Am. Bankr. Rep. 30; *In re* Chesapeake Oyster, etc., Co., 112 Fed. 960, 961.

14. Marsh *v.* Wheeler, 77 Conn. 449, 453, 59 Atl. 410, 107 Am. St. Rep. 40, where it is said: "But buying and selling need not be its sole purpose, nor even its most characteristic feature."

15. Hatchett *v.* Sunset Brick, etc., Co., (Tex. Civ. App. 1907) 99 S. W. 174, 175.

"Wherever the business, according to the usual mode of conducting it, imports, in its nature, the necessity of buying and selling, the firm is then properly regarded as a trading partnership." Marsh *v.* Wheeler, 77 Conn. 449, 453, 59 Atl. 410, 107 Am. St. Rep. 40; Schellenbeck *v.* Studebaker, 13 Ind. App. 437, 41 N. E. 845, 847, 55 Am. St. Rep. 240; Randall *v.* Merideth, 76 Tex. 669, 683, 13 S. W. 576; Masterson *v.* Mansfield, 25 Tex. Civ. App. 262, 265, 61 S. W. 505; Huey *v.* Fish, 15 Tex. Civ. App. 455, 462, 40 S. W. 29; Dowling *v.* Boston Nat. Exch. Bank, 145 U. S. 512, 516, 12 S. Ct. 928, 36 L. ed. 795; Kimbro *v.* Bullitt, 22 How. (U. S.) 256, 268, 16 L. ed. 313.

"If the partnership contemplates the periodical or continuous or frequent purchasing, not as incidental to an occupation, but for the purpose of selling again the thing purchased, either in its original or manufactured shape, it is a trading or commercial partnership." Bates Partn. [*quoted* in Marsh *v.* Wheeler, 77 Conn. 449, 453, 59 Atl. 410, 107 Am. St. Rep. 40; Randall *v.* Merideth, 76 Tex. 669, 683, 13 S. W. 576; Masterson *v.* Mansfield, 25 Tex. Civ. App. 262, 265, 61 S. W. 505; Huey *v.* Fish, 15 Tex. Civ. App. 455, 462, 40 S. W. 29; Phillips *v.* Stanzell (Tex. Civ. App. 1895) 28 S. W. 900].

Partners whose business is to buy and sell cotton seed constitute a trading partnership. Cotton Plant Oil Mill Co. *v.* Buckeye Cotton Oil Co., 92 Ark. 271, 275, 122 S. W. 658.

"Mining partnership" distinguished see Bentley *v.* Brossard, 33 Utah 396, 413, 94 Pac. 736.

TRADING STAMPS

By Edwin DuBose Smith *

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I. Definition.

A trading stamp is a printed stamp, with a certain value, given as a premium by a dealer to a customer, and usable instead of money in procuring articles from the issuers of the stamps.[1] A trading stamp is not ordinary property; it is *sui generis*;[2] it is an artificial creation.[3]

II. Nature of Scheme.[4]

While the several trading stamp schemes now in vogue are somewhat different

1. Webster New Int. Dict. See also cases cited *infra*, note 6.

It is "a draft upon another merchant, payable in goods." Com. *v.* Sisson, 178 Mass. 578, 581, 60 N. E. 385.

Nature of trading stamp scheme see *infra*, II.

"Trading stamp company" as defined by statute, is a company that gives premiums or valuable personal property in exchange for stamps or checks furnished to purchasers of merchandise. Com. *v.* Gibson Co., 125 Ky. 440, 441, 101 S. W. 385, 31 Ky. L. Rep. 51, citing St. (1903) § 4224.

2. Sperry, etc., Co. *v.* Mechanics' Clothing Co., 135 Fed. 833, 834.

It is not, in the full sense, property. Sperry, etc., Co. *v.* Weber, 161 Fed. 219, 221.

Considered as chose in action.— The stamps issued by a trading stamp company and sold to merchants who furnish them to their customers with cash purchases as premiums to promote their business, and which, under the contract between the trading stamp company and merchants purchasing them, are made redeemable, when collected or issued in the regular way, in merchandise kept in the stores of the trading stamp company, without limitation except that they must be presented in lots of a minimum quantity of nine hundred and ninety stamps, are choses in action. Sperry, etc., Co. *v.* Hertzberg, 69 N. J. Eq. 264, 60 Atl. 368.

3. Sperry, etc., Co. *v.* Mechanics' Clothing Co., 135 Fed. 833, 835.

The trading stamp, when issued, represents a closed transaction between the merchant and the company, as well as an outstanding obligation to redeem the stamp. As a token or voucher of the sale and use of so much advertising, the trading stamp is necessarily a consumable article — an article designed for a single use in an advertising scheme. Sperry, etc., Co. *v.* Mechanics' Clothing Co., 135 Fed. 833, 834.

When functus officio see Sperry, etc., Co. *v.* Mechanics' Clothing Co., 135 Fed. 833; and *infra*, text and note 52.

4. **Contract between company and subscriber** see *infra*, IV.

* Author of "Plate-Glass Insurance," 30 Cyc. 1641.

in form in their various details,[5] their general character is a matter of common knowledge.[6] When used by merchants as an advertisement, in the strict com-

5. *Ex p.* Drexel, 147 Cal. 763, 767, 82 Pac. 429, 2 L. R. A. N. S. 588 [*followed* in *Ex p.* West, 147 Cal. 774, 82 Pac. 434]; *Ex p.* Holland, 147 Cal. 763, 82 Pac. 429, 2 L. R. A. N. S. 588.

6. *Ex p.* Drexel, 147 Cal. 763, 82 Pac. 429, 431, 2 L. R. A. N. S. 588 [*followed* in *Ex p.* West, 147 Cal. 774, 82 Pac. 434]; *Ex p.* Holland, 147 Cal. 763, 82 Pac. 429, 2 L. R. A. N. S. 588.

Descriptions of methods of conducting scheme.— "It concerns the three parties interested in it, viz., the stamp company, the merchant, and the customer who buys goods from the merchant. The stamp company prints stamps of some selected color containing a design and inscription indicating what they are and the words and figures '10 cents purchased.' Any other sum may be settled upon, but 10 cents is usual, and it will be simpler to assume it is always selected. These it sells to the merchant in convenient packages or pads for an agreed price. The merchant, when requested by a customer who has made a purchase, gives him one of these stamps for each 10 cents represented by the retail price of goods purchased for which cash is paid, and agrees that he will not dispose of such stamps otherwise than to such customer upon such terms. The customer keeps the stamps he gets, pasting them in blank spaces in a small book furnished by the stamp company. The book contains 10 stamps furnished free by the stamp company, and, when the customer has pasted 990 more stamps in it, the book is filled, and upon its presentation at one of certain designated places, called 'premium parlors,' the stamp company will give in exchange for it some valuable premium in the shape of an article of merchandise. If the customer prefers, he may exchange his book for a voucher good for further purchases of merchandise at any one of certain designated stores, to wit, stores which themselves are issuing trading stamps of the same type. It is understood that the customer in filling his book is not confined to stamps issued in any one store. He may use stamps of the designated color and type received for purchases of goods, wherever those purchases were made. This circumstance makes the stamps more desirable for the customer. The stamp company by advertising, by promises to the public, by the exhibition of goods, by the circulation of books creates a demand for the trading stamps, customers ask for them, and, in order to hold or secure their trade, the merchant finds it desirable to buy them. The merchant also advertises the type of stamps he issues, and tries to commend it to the customer. Of course, he must arrange the selling price of his merchandise so as to meet the additional cost to which he is put in advertising in giving away these stamps for which he has paid and in assisting in their redemption. In like manner the stamp company must so regulate the cost of the 'valuable premiums' it gives to customers in exchange for stamps that the money it receives from the merchants will pay all expenses, provide the premiums, and leave a profit. . . . The price [customers] pay when they purchase from the merchant must be large enough to pay all expenses and give a profit both to the stamp company and to the merchant. . . . Having settled upon its type of stamp, the company secures as many merchants as it can (or thinks it wise to secure) to distribute that particular type, but in so doing it naturally seeks to avoid supplying the same type to two merchants who are competitors in the same line of business, since the value of this stamp distribution to the merchant consists mainly in the circumstance that it is himself, and not his rival across the street, who can give away this particular type of stamp." Sperry, etc., Co. *v.* O'Neill-Adams Co., 185 Fed. 231, 233, per Lacombe, J. *Compare* People *v.* Gillson, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465. "Each time a customer purchases goods from a merchant and pays for them in cash, the merchant gives him a memorandum in writing — called a stamp or coupon — which expresses in money value a small percentage of the price of the goods bought and paid for, and entitles him, after he has accumulated a certain number of such coupons, to use them, to the extent of their face value, in payment for any other goods of the merchant which he may afterward desire — or goods of some other person or trading company who has undertaken to redeem the coupons. There is generally issued with the stamp or coupon a catalogue of articles from which the holder of the coupon may afterward select." Per McFarland, J., in *Ex p.* Drexel, 147 Cal. 763, 767, 82 Pac. 429, 2 L. R. A. N. S. 588. Detailed description may also be found in Com. *v.* Gibson Co., 125 Ky. 440, 444, 101 S. W. 385, 31 Ky. L. Rep. 51; People *v.* Dycker, 72 N. Y. App. Div. 308, 310, 76 N. Y. Suppl. 111; State *v.* Dodge, 76 Vt. 197, 203, 56 Atl. 983; Humes *v.* Little Rock, 138 Fed. 929, 930; Sperry, etc., Co. *v.* Temple, 137 Fed. 992; Sperry, etc., Co. *v.* Mechanics' Clothing Co., 135 Fed. 833, 835; Sperry, etc., Co. *v.* Mechanics' Clothing Co., 128 Fed. 800, 801.

In the trading stamp scheme or plan, as explained in the books, there are designed to be three parties — the customer, the merchant, and the trading stamp company. The customer is to acquire, as his benefit, a redeemable stamp; the merchant is to acquire, as his benefit, a trade advantage resulting from issuing the stamps at his shop; the trading stamp company's benefit is the money paid to it by merchants for the privilege of issuing the stamps. Sperry, etc., Co. *v.* Mechanics' Clothing Co., 135 Fed. 833, 835.

mercial sense of the term "business," it is not a business at all,[7] but simply a mode or a manner of business,[8] an instrumentality or incident of a business.[9] It has been referred to as a mode or method of advertising,[10] a unique and attractive form of advertising resorted to for the purpose of increasing trade,[11] a device to attract customers or to induce those who have bought once to buy again,[12] merely one way of discounting bills in consideration for immediate payment in cash,[13] which is a common practice of merchants, and is doubtless a popular method, and advantageous to all concerned, and it is not obnoxious to public policy.[14]

III. STATUTES AND ORDINANCES.

A. Prohibiting Gifts Through Medium of Stamps — 1. INVASION OF CONSTITUTIONAL RIGHTS. Statutes and ordinances designed to prohibit the giving away trading stamps by a merchant with the purchase of goods, as part of the sale transaction, have been repeatedly held to be unconstitutional,[15] as being in

7. Hewin *v.* Atlanta, 121 Ga. 723, 49 S. E. 765, 67 L. R. A. 795; *Ex p.* Hutchinson, 137 Fed. 950. See also State *v.* Dodge, 76 Vt. 197, 56 Atl. 983.

These acts do not constitute a "business," in the proper use of that word. They are a mere means of advertising — an incident of a business —"a medium," as stated in the petition, "of co-operation and exchange for value." *Ex p.* Hutchinson, 137 Fed. 950, 951. "The furnishing of the trading stamps by a merchant to his customers did not constitute a business separate and distinct from that of selling merchandise, but was merely an instrumentality in or an incident to that business, being in its nature incapable of such separate existence as to constitute of itself a business in either a commercial or a legal sense." Hewin *v.* Atlanta, 121 Ga. 723, 49 S. E. 765, 67 L. R. A. 795.

8. *Ex p.* Hutchinson, 137 Fed. 950.

9. Hewin *v.* Atlanta, 121 Ga. 723, 49 S. E. 765, 67 L. R. A. 795; *Ex p.* Hutchinson, 137 Fed. 950.

It is a "means used to effect the giving away or delivery" of merchandise. People *v.* Gillson, 109 N. Y. 389, 402, 17 N. E. 343, 4 Am. St. Rep. 465.

10. State *v.* Shugart, 138 Ala. 86, 35 So. 28, 100 Am. St. Rep. 17 [*quoted* in Winston *v.* Beeson, 135 N. C. 271, 284, 47 S. E. 457, 65 L. R. A. 167]; State *v.* Dodge, 76 Vt. 197, 56 Atl. 983.

11. *Ex p.* Hutchinson, 137 Fed. 950, 951.

12. *Ex p.* McKenna, 126 Cal. 429, 58 Pac. 916 [*quoted* in Winston *v.* Beeson, 135 N. C. 271, 284, 47 S. E. 457, 65 L. R. A. 167]; Young *v.* Com., 101 Va. 853, 45 S. E. 327 [*quoted* in Winston *v.* Beeson, 135 N. C. 271, 284, 47 S. E. 457, 65 L. R. A. 167].

"In its ultimate analysis, the use of trading stamps by a merchant is simply a unique and attractive form of advertising, resorted to for the purpose of increasing trade. In the strict commercial sense of the term 'business,' it is not a business at all. It is simply a mode or manner of business — an instrumentality or incident of a business. When resorted to for the purpose of increasing the business to which it is annexed, it occupies the same relation to that business as newspaper advertising, circulars, dodgers, and the like; and, if the city of Atlanta can classify as a business advertising through the medium of the trading stamp, it can also classify as a business advertising through the journals of the city, or through the medium of a person employed to walk the streets with the sandwich upon which the goods, wares, and merchandise of a merchant are advertised, or the employment of a dwarf who carries upon his shoulder a barrel upon which the wares of a merchant are advertised, and who stops at every street corner and seats himself upon it." Hewin *v.* Atlanta, 121 Ga. 723, 735, 49 S. E. 765, 67 L. R. A. 795 [*quoted* in *Ex p.* Hutchinson, 137 Fed. 950, 951].

13. Sperry, etc., Co. *v.* Temple, 137 Fed. 992; *Ex p.* Hutchinson, 137 Fed. 949. See also dissenting opinion of Van Orsdel, J., in District of Columbia *v.* Kraft, 35 App. Cas. (D. C.) 253, 270, 30 L. R. A. N. S. 957.

It is "a mere form of allowing discounts on cash payments." *Ex p.* Drexel, 147 Cal. 763, 773, 82 Pac. 429, 2 L. R. A. N. S. 588.

14. Sperry, etc., Co. *v.* Temple, 137 Fed. 992; *Ex p.* Hutchinson, 137 Fed. 949.

15. *Alabama.*— State *v.* Shugart, 138 Ala. 86, 35 So. 28, 100 Am. St. Rep. 17. See also Yellow-Stone Kit *v.* State, 88 Ala. 196, 7 So. 338, 16 Am. St. Rep. 38, 7 L. R. A. 599.

California.— *Ex p.* Drexel, 147 Cal. 763, 82 Pac. 429, 2 L. R. A. N. S. 588 [*followed* in *Ex p.* West, 147 Cal. 774, 82 Pac. 434]; *Ex p.* Holland, 147 Cal. 763, 82 Pac. 429, 2 L. R. A. N. S. 588.

Colorado.— Denver *v.* Frueauff, 39 Colo. 20, 88 Pac. 389, 7 L. R. A. N. S. 1131; People *v.* Beer, (County Ct. of Teller County May 1905 [*cited* in *Ex p.* Drexel, 147 Cal. 763, 770, 82 Pac. 429, 2 L. R. A. N. S. 588]).

Georgia.— Hewin *v.* Atlanta, 121 Ga. 723, 49 S. E. 765, 67 L. R. A. 795.

Hawaii.— Territory *v.* Gunst, 18 Hawaii 196.

Illinois.— Wells *v.* Brons, (Circ. Ct. of —— County Jan. 1905).

Iowa.— State *v.* Friedman, (Distr. Ct. of Wapello County Oct. 1910).

Louisiana.— State *v.* Walker, 105 La. 492, 29 So. 973.

Maryland.— See Long *v.* State, 74 Md. 565, 22 Atl. 4, 28 Am. St. Rep. 268, 12 L. R. A. 425; State *v.* Frankel, (Baltimore Cr. Ct.

violation of the provisions of the federal [16] and state [17] constitutions securing to

Sept. 1902 [*cited* in *Ex p.* Drexel, 147 Cal. 763, 773, 82 Pac. 429, 2 L. R. A. 588]); State *v.* Black, (Circ. Ct. of Baltimore County —— 1902).

Massachusetts.— *In re* Opinion of Justices, (1911) 94 N. E. 848; Com. *v.* Sisson, 178 Mass. 578, 60 N. E. 385; Com. *v.* Emerson, 165 Mass. 146, 42 N. E. 559.

Michigan.— People *v.* Michigan Stamp Co., (Recorder's Ct. of City of Detroit Dec. 1904).

New Hampshire.— State *v.* Ramseyer, 73 N. H. 31, 58 Atl. 958.

New York.— People *v.* Zimmerman, 102 N. Y. App. Div. 103, 92 N. Y. Suppl. 497; People *v.* Dycker, 72 N. Y. App. Div. 308, 76 N. Y. Suppl. 111. See also People *v.* Gillson, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465.

North Carolina.—Winston *v.* Beeson, 135 N. C. 271, 47 S. E. 457, 65 L. R. A. 167 [*followed* in Winston *v.* Hudson, 135 N. C. 286, 47 S. E. 1023].

Rhode Island.— State *v.* Dalton, 22 R. I. 77, 46 Atl. 234, 84 Am. St. Rep. 818, 48 L. R. A. 775.

Vermont.— State *v.* Dodge, 76 Vt. 197, 56 Atl. 983.

Virginia.— Young *v.* Com., 101 Va. 853, 45 S. E. 327.

Washington.— Leonard *v.* Bassindale, 46 Wash. 301, 89 Pac. 879.

United States.— Sperry, etc., Co. *v.* Temple, 137 Fed. 992. *Compare* Matter of Gregory, 219 U. S. 210, 31 S. Ct. 143, where the court expressly declined to pass upon the legality or illegality of the trading stamp business or scheme.

Contra.— Lansburgh *v.* District of Columbia, 11 App. Cas. (D. C.) 512, 56 Alb. L. J. 488 [*followed* in District of Columbia *v.* Gregory, 35 App. Cas. (D. C.) 271; District of Columbia *v.* Kraft, 35 App. Cas. (D. C.) 253, 30 L. R. A. N. S. 957]; Humes *v.* Ft. Smith, 93 Fed. 857; Wilder *v.* Quebec, 25 Quebec Super. Ct. 128.

"The only [American] cases upholding the law are Humes *v.* Ft. Smith, 93 Fed. 857, and Lansburgh *v.* District of Columbia, 11 App. Cas. (D. C.) 512, 56 Alb. L. J. 488. These cases, it may be remarked, are among the earlier ones to reach the courts where the question was presented; but neither the reasoning on which they were based nor the unquestioned ability of the courts pronouncing the decisions seem to have been able to withstand the overwhelming trend of opinion to the opposite view. While we might, were the question one of first impression in the courts, entertain a different opinion, we have felt impelled to follow the great weight of authority and hold the statute unconstitutional, especially in view of the fact that the federal courts have shown an inclination to hold the statute in contravention of the constitution of the United States." Per Fullerton, J., in Leonard *v.* Bassindale, 46 Wash. 301, 302, 303. In Lansburgh *v.* District of Columbia, *supra*, "the decision seems to be based upon facts, tending to show a lottery in the manner the stamp business was there conducted, which do not exist in this case, and cannot be judicially found to exist as a matter of speculation or inference. The case of Humes *v.* Ft. Smith, 93 Fed. 857, which adopts the reasoning in Lansburgh *v.* District of Columbia, relates to a regulation, not the prohibition, of the stamp business." Per Walker, J., in State *v.* Ramseyer, 73 N. H. 31, 39, 58 Atl. 958. The Lansburgh and Humes cases have been frequently criticized, disapproved, or distinguished in later cases. Winston *v.* Beeson, 135 N. C. 271, 285, 47 S. E. 457, 65 L. R. A. 167; and cases cited *supra*, this note.

"The recent decision in Matter of Gregory, 219 U. S. 210, 31 S. Ct. 143, has no bearing upon the question before us as the judge who wrote the opinion was careful to put the decision upon grounds that have no relation to the validity of such provisions as those of this bill." *In re* Opinion of Justices, (Mass. 1911) 94 N. E. 848, 849.

16. *Colorado.*—Denver *v.* Frueauff, 39 Colo. 20, 88 Pac. 389, 7 L. R. A. N. S. 1131; People *v.* Beer, (County Ct. of Teller County May 1905 [*cited* in *Ex p.* Drexel, 147 Cal. 763, 770, 82 Pac. 429, 2 L. R. A. N. S. 588]).

Iowa.— State *v.* Friedman, (Distr. Ct. of Wapello County Iowa Oct. 1910).

Louisiana.— See State *v.* Walker, 105 La. 492, 29 So. 973.

Massachusetts.— *In re* Opinion of Justices, (1911) 94 N. E. 848.

New York.— People *v.* Zimmerman, 102 N. Y. App. Div. 103, 92 N. Y. Suppl. 497. See also People *v.* Gillson, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465.

Rhode Island.— State *v.* Dalton, 22 R. I. 77, 46 Atl. 234, 84 Am. St. Rep. 818, 48 L. R. A. 775.

South Carolina.— Columbia *v.* Lusk, (Ct. Com. Pleas of Richland County Sept. 1909).

Vermont.— State *v.* Dodge, 76 Vt. 197, 56 Atl. 983.

Washington.— Leonard *v.* Bassindale, 46 Wash. 301, 89 Pac. 879.

United States.— Sperry, etc., Co. *v.* Temple, 137 Fed. 992; *Ex p.* Hutchinson, 137 Fed. 950. *Compare* Matter of Gregory, 219 U. S. 210, 31 S. Ct. 143.

Contra.— District of Columbia *v.* Gregory, 35 App. Cas. (D. C.) 271 [*following* District of Columbia *v.* Kraft, 35 App. Cas. (D. C.) 253, 30 L. R. A. N. S. 957; Lansburgh *v.* District of Columbia, 11 App. Cas. (D. C.) 512].

Defendant in offering and giving a prize as a gratuity to induce the purchase of tobacco was engaging in a lawful business, and any act which hampered or interfered with this transaction was repugnant to the clauses of the constitution of the United States and of our own state, which guaranteed him liberty of person and property in carrying on a lawful vocation. People *v.* Zimmerman, 102 N. Y. App. Div. 103, 108, 92 N. Y. Suppl. 497.

17. *California.*— *Ex p.* Drexel, 147 Cal. 763 [*followed* in *Ex p.* West, 147 Cal. 774, 82

every person liberty and property, unless he is deprived thereof by due process of law; and one convicted thereunder will be discharged on *habeas corpus*.[18] It is immaterial whether the stamps are redeemable by the merchant or by a third person.[19] A statute of this character, which required that the trading stamp

Pac. 434]; *Ex p.* Holland, 147 Cal. 763, 82 Pac. 429, 2 L. R. A. N. S. 588; People *v.* Sweet, (Police Ct. of San Francisco [*affirmed* in Super. Ct. March 1898]).

Colorado.— Denver *v.* Frueauff, 39 Colo. 20, 88 Pac. 389, 7 L. R. A. N. S. 1131.

Iowa.— State *v.* Friedman, (Distr. Ct. of Wapello County Iowa Oct. 1910).

Louisiana.— See State *v.* Walker, 105 La. 492, 29 So. 973.

Massachusetts.— *In re* Opinion of Justices, (1911) 94 N. E. 848.

New Hampshire.— State *v.* Ramseyer, 73 N. H. 31, 58 Atl. 958.

New York.— People *v.* Zimmerman, 102 N. Y. App. Div. 103, 92 N. Y. Suppl. 497.

Rhode Island.— State *v.* Dalton, 22 R. I. 77, 46 Atl. 234, 84 Am. St. Rep. 818, 48 L. R. A. 775.

South Carolina.— Columbia *v.* Lusk, (Ct. Com. Pleas of Richland County Sept. 1909).

Washington.— Leonard *v.* Bassindale, 46 Wash. 301, 89 Pac. 879.

Interference with lawful business.—A statute forbidding any person to sell, give away, or distribute any stamp, coupon, or other device which will enable a purchaser of property to demand or receive from another person any article of merchandise other than that actually sold to such purchaser, and further prohibiting any person other than a vendor from delivering to any person any article of merchandise other than that actually sold upon the presentation of any such stamp, coupon, or other device, violates the fourteenth amendment to the constitution of the United States and also R. I. Const. § 10, art. 1, declaring that in all criminal prosecutions the accused shall not be deprived of life, liberty, or property unless by the law of the land. State *v.* Dalton, 22 R. I. 77, 46 Atl. 234, 84 Am. St. Rep. 818, 48 L. R. A. 775. A statute, prohibiting gift enterprises and thereby forbidding transactions not different in principle from contracts of sale, within the constitutional rights of persons to possess and acquire property, to transact legitimate business, and to buy and sell and get gain, is violative of Declaration of Rights, art. 1, and the fourteenth amendment to the federal constitution. *In re* Opinion of Justices, (Mass. 1911) 94 N. E. 848. So long as his manner of conducting his business does not offend public morals and work an injury to the public, it is his constitutional right to pursue, on terms equal to that allowed to others in like business, even though his methods may have a tendency to draw trade to him, to the detriment of competitors. Montgomery *v.* Kelly, 142 Ala. 552, 38 So. 67, 110 Am. St. Rep. 43, 70 L. R. A. 209; *Ex p.* Holland, 147 Cal. 763, 82 Pac. 429, 2 L. R. A. N. S. 588; Denver *v.* Frueauff, 39 Colo. 20, 88 Pac. 389, 7 L. R. A. N. S. 1131; Winston *v.* Beeson, 135 N. C. 271, 284, 47 S. E. 457, 65 L. R. A. 167 [*followed* in Winston *v.* Hudson, 135 N. C. 286, 47 S. E. 1023]; State *v.* Dalton, 22 R. I. 77, 46 Atl. 234, 84 Am. St. Rep. 818, 48 L. R. A. 775; Young *v.* Com., 101 Va. 853, 45 S. E. 327. The scheme of giving trading stamps with sales of goods is not unlawful, as demoralizing to legitimate business. State *v.* Dodge, 76 Vt. 197, 56 Atl. 983. It may be that the trading stamp business tends to demoralize trade. It may be that people in moderate or straitened circumstances are prone to purchase beyond their means by the incitement of a gift after a stated amount has been expended. The farmer who attends an auction sale is often disposed to buy what he does not need, led along by the competition in the bidding or by the fact that time is allowed on the purchase. If a grocer of the city of Rochester should reduce the price of flour or coffee below cost it might tend to the demoralization of the grocery trade in that city and would certainly be exasperating to his competitors. These slight derelictions may be imprudent, but they are not the subject of legislative control. It is fundamental that the widest scope is accorded to the individual in the prosecution of his business, if only that business be lawful and be conducted in a lawful manner. People *v.* Zimmerman, 102 N. Y. App. Div. 103, 92 N. Y. Suppl. 497. See also *infra*, III, A, 2.

18. *Ex p.* Drexel, 147 Cal. 763, 82 Pac. 429, 2 L. R. A. N. S. 588 [*followed* in *Ex p.* West, 147 Cal. 774, 82 Pac. 434]; *Ex p.* Holland, 147 Cal. 763, 82 Pac. 429, 2 L. R. A. N. S. 588; People *v.* Beer, (County Ct. of Teller County Colo. May 1902) [*cited* in *Ex p.* Drexel, *supra*]). *Contra*, Matter of Gregory, 219 U. S. 210, 31 S. Ct. 143, where it is said: "The business of issuing and redeeming trading stamps is not so manifestly outside the range of judicial consideration, under D. C. Rev. St. § 1177, making it a crime to engage in any manner in any gift enterprise business in the District, as to justify relief by habeas corpus to a person convicted of that offense, on the theory that the trial court was without jurisdiction."

19. *Maryland.*— State *v.* Caspare, 115 Md. ——, 80 Atl. ——; State *v.* Hawkins, 95 Md. 133, 51 Atl. 850, 93 Am. St. Rep. 328.

Minnesota.— State *v.* Sperry, etc., Co., 110 Minn. 378, 126 N. W. 120, 30 L. R. A. N. S. 966.

New Hampshire.— State *v.* Ramseyer, 73 N. H. 31, 58 Atl. 958.

New York.— People *v.* Dycker, 72 N. Y. App. Div. 308, 76 N. Y. Suppl. 111.

Rhode Island.— State *v.* Dalton, 22 R. I. 77, 46 Atl. 234, 84 Am. St. Rep. 818, 48 L. R. A. 775.

Vermont.— State *v.* Dodge, 76 Vt. 197, 56 Atl. 983.

should be redeemable in money or goods at the purchaser's own option, was declared to be unconstitutional for the further reason that it created a preferential class.[20]

2. Not a Valid Exercise of Police Power — a. In General. Furthermore statutes and ordinances of this kind have been declared to be invalid as not being a proper exercise of the police power.[21] Such legislation does not look to, or in any manner concern, the public health;[22] nor does it look to, or tend to promote, the public safety;[23] nor does it in any manner relate to, or tend to promote, public morals;[24] nor can such legislation, it seems, be upheld as a valid exercise of the legislative power to enact what shall amount to a crime.[25]

b. Absence or Presence of Element of Chance. While of course contracts containing lotteries, advantages dependent upon chance, or any kind of gambling scheme may be regulated or suppressed,[26] it has been uniformly decided

Virginia.— Young *v.* Com., 101 Va. 853, 45 S. E. 327.

Compare Wilder *v.* Quebec, 25 Quebec Super. Ct. 128, where the court upholding the statute also held that the fact that the statute permitted the merchant himself to redeem, and prohibited redemption by any one else, did not invalidate it.

The third person in such a case acts as the agent of the merchant. People *v.* Dycker, 72 N. Y. App. Div. 308, 76 N. Y. Suppl. 111.

20. People *v.* Zimmerman, 102 N. Y. App. Div. 103, 92 N. Y. Suppl. 497.

N. Y. Pen. Code, § 384q, added by chapter 657 of the Laws of 1904, which prohibits persons, among other things, from issuing trading stamps or coupon tickets unless they "shall have legibly printed or written upon the face thereof" in money, and which requires that such stamps, upon presentation, shall be redeemed in goods or money at the option of the holder when presented in number or quantity aggregating in money value not less than five cents in each lot, making a violation of its provisions a misdemeanor, and which excludes from the provisions of the section trading stamps issued by him, is in violation of the constitutional provision preventing the interference with "life, liberty or property without due process of law." People *v.* Zimmerman, 102 N. Y. App. Div. 103, 92 N. Y. Suppl. 497.

21. *California.*— *Ex p.* Drexel, 147 Cal. 763, 82 Pac. 429, 2 L. R. A. N. S. 588 [*followed* in *Ex p.* West, 147 Cal. 774, 82 Pac. 434]; *Ex p.* Holland, 147 Cal. 763, 82 Pac. 429, 2 L. R. A. N. S. 588.

Colorado.— Denver *v.* Frueauff, 39 Colo. 20, 88 Pac. 389, 7 L. R. A. N. S. 1131.

Maryland.— State *v.* Caspare, 115 Md. ——, 80 Atl. ——; State *v.* Hawkins, 95 Md. 133, 51 Atl. 850, 93 Am. St. Rep. 328.

Minnesota.— State *v.* Sperry, etc., Co., 110 Minn. 378, 126 N. W. 120, 30 L. R. A. N. S. 966.

New Hampshire.— State *v.* Ramseyer, 73 N. H. 31, 58 Atl. 958.

New York.— People *v.* Dycker, 72 N. Y. App. Div. 308, 76 N. Y. Suppl. 111. See also People *v.* Gillson, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465.

Rhode Island.— State *v.* Dalton, 22 R. I. 77, 46 Atl. 234, 48 L. R. A. 775, 84 Am. St. Rep. 818.

South Carolina.— Columbia *v.* Lusk, (Ct. Com. Pleas of Richland County Sept. 1909).

Vermont.— State *v.* Dodge, 76 Vt. 197, 56 Atl. 983.

Virginia.— Young *v.* Com., 101 Va. 853, 45 S. E. 327.

Contra.— District of Columbia *v.* Gregory, 35 App. Cas. (D. C.) 271 [*following* District of Columbia *v.* Kraft, 35 App. Cas. (D. C.) 253, 30 L. R. A. N. S. 957; Lansburgh *v.* District of Columbia, 11 App. Cas. (D. C.) 512]; Wilder *v.* Quebec, 25 Quebec Super. Ct. 128.

22. State *v.* Dalton, 22 R. I. 77, 46 Atl. 234, 84 Am. St. Rep. 818, 48 L. R. A. 775; 57 Cent. L. J. 421. See also Long *v.* State, 74 Md. 565, 22 Atl. 4, 28 Am. St. Rep. 268, 12 L. R. A. 425; People *v.* Gillson, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465; and cases cited *supra*, note 21.

23. State *v.* Dalton, 22 R. I. 77, 46 Atl. 234, 84 Am. St. Rep. 818, 48 L. R. A. 775; 57 Cent. L. J. 421. See also Long *v.* State, 74 Md. 565, 22 Atl. 4, 28 Am. St. Rep. 268, 12 L. R. A. 425; and cases cited *supra*, note 21.

Protection from fraud.— Such statutes cannot be sustained on the ground that they are proper as protecting the holders of trading stamps from the fraud of those who issued them. *Ex p.* Drexel, 147 Cal. 763, 82 Pac. 429, 2 L. R. A. N. S. 588 [*followed* in *Ex p.* West, 147 Cal. 774, 82 Pac. 434]; *Ex p.* Holland, 147 Cal. 763, 82 Pac. 429, 2 L. R. A. N. S. 588.

24. State *v.* Dalton, 22 R. I. 77, 46 Atl. 234, 84 Am. St. Rep. 818, 48 L. R. A. 775. See also cases cited *supra*, note 21.

25. See People *v.* Gillson, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465. But *compare* State *v.* Dalton, 22 R. I. 77, 46 Atl. 234, 84 Am. St. Rep. 818, 48 L. R. A. 775, where the court expressly limits its decision to the case of the merchant giving premiums and declines to say that the legislature may not prohibit the business of trading stamp companies. *Contra*, District of Columbia *v.* Gregory, 35 App. Cas. (D. C.) 271 [*following* District of Columbia *v.* Kraft, 35 App. Cas. (D. C.) 253, 30 L. R. A. N. S. 957; Lansburgh *v.* District of Columbia, 11 App. Cas. (D. C.) 512].

26. *California.*—*Ex p.* Drexel, 147 Cal. 763, 82 Pac. 429, 431, 2 L. R. A. N. S. 588 [*fol-*

that trading stamp schemes and devices as they are usually operated do not involve any element of chance,[27] are not lotteries or "gift enter-

lowed in *Ex p.* West, 147 Cal. 774, 82 Pac. 434]; *Ex p.* Holland, 147 Cal. 763, 82 Pac. 429, 2 L. R. A. N. S. 588.

District of Columbia.— District of Columbia *v.* Gregory, 35 App. Cas. 271 [*following* District of Columbia *v.* Kraft, 35 App. Cas. 253, 30 L. R. A. N. S. 957; Lansburgh *v.* District of Columbia, 11 App. Cas. 512].

Maryland.— State *v.* Caspare, 115 Md. ——, 80 Atl. ——; State *v.* Hawkins, 95 Md. 133, 51 Atl. 850, 93 Am. St. Rep. 328; State *v.* Frankel, (Baltimore Cr. Ct. Sept. 1902 [*cited* in *Ex p.* Drexel, 147 Cal. 763, 773, 82 Pac. 429, 2 L. R. A. 588]).

Massachusetts.— O'Keeffe *v.* Somerville, 190 Mass. 110, 114, 76 N. E. 457, 458, 112 Am. St. Rep. 316, where it is said: "If these stamps were used in such a way as to constitute a lottery or game of chance, the use would be punishable." *Compare* Com. *v.* Sisson, 178 Mass. 578, 60 N. E. 385.

Minnesota.— State *v.* Sperry, etc., Co., 110 Minn. 378, 126 N. W. 120, 30 L. R. A. N. S. 966.

See also LOTTERIES, 25 Cyc. 1631.

When a scheme in its nature amounts to a gift enterprise or a lottery within the meaning of those terms, it may be prohibited within the police power. District of Columbia *v.* Kraft, 35 App. Cas. (D. C.) 253, 30 L. R. A. N. S. 957.

Liberty and property are not taken without due process of law, contrary to U. S. Const. Amendm. 5, by the provisions of D. C. Rev. St. § 1177, making it a crime to engage in any manner in any gift enterprise business in the district. Matter of Gregory, 219 U. S. 210, 31 S. Ct. 143. Freedom of contract is not unconstitutionally interfered with by the prohibition of the use of trading stamps. District of Columbia *v.* Kraft, 35 App. Cas. (D. C.) 253, 30 L. R. A. N. S. 957. But see *supra*, text and notes 15–17.

Uncertain or unknown article or thing procurable.— "If the act had prohibited the giving away of any stamp or device in connection with the sale of an article, which would entitle the holder to receive, either directly from the vendor, or indirectly through another person, some indefinite and undescribed article, the nature and value of which were unknown to the purchaser, there would then be introduced into the prohibited transaction enough of the element of uncertainty and chance to condemn it as being in the nature of a lottery." State *v.* Hawkins, 95 Md. 133, 145, 51 Atl. 850, 93 Am. St. Rep. 328 [*explained* in State *v.* Frankel, (Baltimore Cr. Ct. Sept. 1902, which is *cited* in *Ex p.* Drexel, 147 Cal. 763, 82 Pac. 429, 2 L. R. A. N. S. 588)]. See also Com. *v.* Sisson, 178 Mass. 578, 60 N. E. 385; State *v.* Sperry, etc., Co., 110 Minn. 378, 126 N. W. 120; State *v.* Dalton, 22 R. I. 77, 46 Atl. 234, 84 Am. St. Rep. 818, 48 L. R. A. 775. The anti-trade stamp or coupon act (Cal. St. (1905) p. 67), prohibiting the issuance of trading stamps by a merchant to a customer buying goods, is not valid, because it prohibits the giving of a trading stamp "for anything unidentified or unselected by the purchaser at or before the time of the sale," and which at the time of sale shall not be "completely identified beyond the necessity of any further or other selection," there being no element of chance in the transaction, whether the purchaser is allowed to make his selection when ready to do so, or whether he be compelled at the time of the purchase to limit his choice. *Ex p.* Drexel, 147 Cal. 763, 82 Pac. 429, 2 L. R. A. N. S. 588 [*disapproving* State *v.* Hawkins, *supra*, except as construed in State *v.* Frankel, *supra*]; People *v.* Beer, (County Ct. of Teller County Colo. May 1905 [*cited* in *Ex p.* Drexel, *supra*]); Territory *v.* Gunst, 18 Hawaii 196.

27. *Alabama.*— State *v.* Shugart, 138 Ala. 86, 35 So. 28, 100 Am. St. Rep. 17.

California.— *Ex p.* Drexel, 147 Cal. 763, 82 Pac. 429, 2 L. R. A. N. S. 588 [*followed* in *Ex p.* West, 147 Cal. 774, 82 Pac. 434]; *Ex p.* Holland, 147 Cal. 763, 82 Pac. 429, 2 L. R. A. N. S. 588; *Ex p.* McKenna, 126 Cal. 429, 58 Pac. 916; People *v.* Sweet, (Police Ct. of San Francisco [*affirmed* in Super. Ct. March 1898]); People *v.* Ross, (Super. Ct. of Sacramento County Nov. 1902).

Colorado.— Denver *v.* Frueauff, 39 Colo. 20, 88 Pac. 389, 7 L. R. A. N. S. 1131; People *v.* Beer, (County Ct. of Teller County Colo. May 1905 [*cited* in *Ex p.* Drexel, 147 Cal. 763, 770, 82 Pac. 429, 2 L. R. A. N. S. 588]).

Maryland.— State *v.* Caspare, 115 Md. ——, 80 Atl. ——. See State *v.* Hawkins, 95 Md. 133, 51 Atl. 850, 93 Am. St. Rep. 328 (holding that in so far as the statute prohibits the giving of a stamp to be redeemed at a place other than that at which the sale is made it is invalid provided no element of chance is involved); Long *v.* State, 74 Md. 565, 22 Atl. 4, 28 Am. St. Rep. 268, 12 L. R. A. 425; State *v.* Frankel, (Baltimore Cr. Ct. Sept. 1902 [*cited* in *Ex p.* Drexel, 147 Cal. 763, 773, 82 Pac. 429, 2 L. R. A. N. S. 588]); State *v.* Black, (Cir. Ct. of Baltimore County Sept. 1902).

Massachusetts.— *In re* Opinion of Justices, (1911) 94 N. E. 848; Com. *v.* Sisson, 178 Mass. 578, 60 N. E. 385.

Minnesota.— State *v.* Sperry, etc., Co., 110 Minn. 378, 126 N. W. 120.

New York.— Madden *v.* Dycker, 72 N. Y. App. Div. 308, 76 N. Y. Suppl. 111. See also People *v.* Gillson, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465.

North Carolina.— Winston *v.* Beeson, 135 N. C. 271, 47 S. E. 457, 65 L. R. A. 167 [*followed* in Winston *v.* Hudson, 135 N. C. 286, 47 S. E. 1023].

Pennsylvania.— See Com. *v.* Moorhead, 7 Pa. Co. Ct. 513, 519, where it is said: "To give to a purchaser, without additional price,

prises," [28] and cannot be forbidden by statute or ordinance under a proper exercise of the police power.[29]

B. Licensing and Taxing — 1. Trading Stamp Companies. While the state [30] or to sell to him, a ticket, etc., entitling him to a certain sum of money, or to goods of a certain value, is not, in the absence of any element of chance or hazard, an evasion of the laws against gambling and lotteries, any more than the sale of six tickets by a street-car company for the price in cash of five single fares."

Vermont.— State *v.* Dodge, 76 Vt. 197, 56 Atl. 983.

Virginia.— Young *v.* Com., 101 Va. 853, 45 S. E. 327.

Known and certain articles procurable.— Where the articles procurable through the medium of the stamps are known and certain, there can be no element of chance. People *v.* Dycker, 72 N. Y. App. Div. 308, 76 N. Y. Suppl. 111. See also Com. *v.* Emerson, 165 Mass. 146, 42 N. E. 559; and cases cited *supra*, this note.

Failure to present for redemption.— The fact that one who sells trading stamps to be given to merchants and redeemed by him may profit by the failure to present some stamps for redemption does not introduce such an element of chance into the transaction as to make it a lottery or gift enterprise. Winston *v.* Beeson, 135 N. C. 271, 47 S. E. 457, 65 L. R. A. 167 [*followed* in Winston *v.* Hudson, 135 N. C. 286, 47 S. E. 1023].

28. Winston *v.* Beeson, 135 N. C. 271, 47 S. E. 457, 65 L. R. A. 167 [*followed* in Winston *v.* Hudson, 135 N. C. 286, 47 S. E. 1023, and *cited* in Matter of Gregory, 219 U. S. 210, 31 S. Ct. 143]. See also Lotteries, 25 Cyc. 1640.

Not a lottery.— A method of doing business by which the vendor of articles gives the purchaser a stamp or other device which entitles him to obtain from some other person some article of merchandise in addition to that actually sold is not a lottery, and therefore cannot be forbidden by statute. State *v.* Dalton, 22 R. I. 77, 46 Atl. 234, 84 Am. St. Rep. 818, 48 L. R. A. 775.

Defining a gift enterprise to include the giving of trading stamps by merchants does not make it so in fact. Denver *v.* Frueauff, 39 Colo. 20, 88 Pac. 389, 7 L. R. A. N. S. 1131.

29. *Alabama.*— State *v.* Shugart, 138 Ala. 86, 35 So. 28, 100 Am. St. Rep. 17.

California.— *Ex p.* Drexel, 147 Cal. 763, 82 Pac. 429, 2 L. R. A. N. S. 588 [*followed* in *Ex p.* West, 147 Cal. 774, 82 Pac. 434]; *Ex p.* Holland, 147 Cal. 763, 82 Pac. 429, 2 L. R. A. N. S. 588; People *v.* Ross, (Super. Ct. of Sacramento County Nov. 1902).

Colorado.— Denver *v.* Frueauff, 39 Colo. 20, 88 Pac. 389, 7 L. R. A. N. S. 1131; People *v.* Beer, (County Ct. of Teller County May 1905 [*cited* in *Ex p.* Drexel, 147 Cal. 763, 770, 82 Pac. 429, 2 L. R. A. N. S. 588]).

Hawaii.— Territory *v.* Gunst, 18 Hawaii 196.

Illinois.— Wells *v.* Brons, (Circ. Ct. of Peoria County Jan. 1905).

Iowa.— State *v.* Friedman, (Distr. Ct. Wapello County Dec. 1910).

Maryland.— Long *v.* State, 74 Md. 565, 22 Atl. 4, 28 Am. St. Rep. 268, 12 L. R. A. 425; State *v.* Frankel, (Baltimore Cr. Ct. Sept. 1902 [*cited* in *Ex p.* Drexel, 147 Cal. 763, 82 Pac. 429, 2 L. R. A. N. S. 588]); State *v.* Black, (Circ. Ct. of Baltimore County —— 1902).

Massachusetts.— *In re* Opinion of Justices, (1911) 94 N. E. 848; Com. *v.* Sisson, 178 Mass. 578, 60 N. E. 385.

Michigan.— People *v.* Michigan Stamp Co., (Recorder's Ct. of City of Detroit Dec. 1904).

New York.— People *v.* Dycker, 72 N. Y. App. Div. 308, 76 N. Y. Suppl. 111.

North Carolina.— See Winston *v.* Beeson, 135 N. C. 271, 47 S. E. 457, 65 L. R. A. 167 [*followed* in Winston *v.* Hudson, 135 N. C. 286, 47 S. E. 1023].

Rhode Island.— State *v.* Dalton, 22 R. I. 77, 46 Atl. 234, 84 Am. St. Rep. 818, 48 L. R. A. 775.

Virginia.— Young *v.* Com., 101 Va. 853, 45 S. E. 327.

Washington.—Leonard *v.* Bassindale, (1907) 89 Pac. 879.

United States.— Humes *v.* Little Rock, 138 Fed. 929; Sperry, etc., Co. *v.* Fisher, (U. S. Circ. Ct. Distr. of Md. Oct. 1905).

Contra.— District of Columbia *v.* Gregory, 35 App. Cas. (D. C.) 271 [*following* District of Columbia *v.* Kraft, 35 App. Cas. (D. C.) 253, 30 L. R. A. N. S. 957; Lansburgh *v.* District of Columbia, 11 App. Cas. (D. C.) 512]. The business of a trading stamp company is not a provision of advertising the merchants with whom contracts are made, which will take it out of the operation of the police power. District of Columbia *v.* Kraft, 35 App. Cas. (D. C.) 253, 30 L. R. A. N. S. 957.

The police power of congress in the District of Columbia is substantially the same under the fifth amendment of the constitution as that which may be exercised by the states under the limitations of the fourteenth amendment. District of Columbia *v.* Kraft, 35 App. Cas. (D. C.) 253, 30 L. R. A. N. S. 957.

30. See State *v.* Merchants' Trading Co., 114 La. 529, 38 So. 443. See also Licenses, 25 Cyc. 599, 601.

Graduation of taxes.— The general assembly, by Act No. 47 of 1904, divided trading stamp companies and dealers issuing stamps to merchants or dealers into three classes. By that act, where the gross annual receipts are more than two hundred thousand dollars, the license is fixed at ten thousand dollars; where the gross annual receipts are one hundred and fifty thousand dollars or more, and less than two hundred thousand dollars, the license is fixed at seven thousand five hundred

or a municipality under delegated authority[31] may, with the object of raising revenue or of regulation, or both, grant licenses to trading stamp companies for the carrying on of their business by selling stamps to merchants, the license-fee must be reasonable, and not excessive or oppressive,[32] must not be really intended to prohibit the business,[33] and must not infringe the constitutional rights and privileges of the company taxed or licensed.[34]

2. MERCHANTS USING TRADING STAMPS. The power to impose a license fee or tax upon merchants who give trading stamps in connection with their business has been generally denied,[35] but in a few cases recognized.[36] Ordinances imposing license fees or taxes upon such merchants have been declared invalid as abridging constitutional rights and privileges,[37] as constituting double taxation,[38] as taxing

dollars; where the gross annual receipts are one hundred thousand dollars or less, the license is fixed at five thousand dollars. It cannot be said therefore that there was no graduation of the licenses for corporations or parties engaged in that business. State *v.* Merchants' Trading Co., 114 La. 529, 38 So. 443. The defense made by defendant (a trading stamp company) to the payment of a license-tax upon its business, that the statute imposing the license was unconstitutional because licenses upon that business were not graduated as required by article 229 of the constitution of 1898, is not well grounded. They were in fact graduated. State *v.* Merchants' Trading Co., *supra*.

31 Gamble *v.* Montgomery, 147 Ala. 682, 685, 39 So. 353 (where it is said: "These views are not in conflict with the case of Shugart *v.* State, 138 Ala. 86, which simply decided that 'issuing trading stamps' was not violative of the statute against lotteries and gift enterprises"); *Ex p.* Hutchinson, 137 Fed. 950; *Ex p.* Hutchinson, 137 Fed. 949. See LICENSES, 25 Cyc. 600; MUNICIPAL CORPORATIONS, 28 Cyc. 745.

Power not delegated to enact such ordinances see Trading Stamp Co. *v.* Memphis, 101 Tenn. 181, 47 S. W. 136, where the ordinance was declared to be illegal and *ultra vires*. Dealers in trading stamps do not come within the provision of an ordinance taxing "gift enterprises." Winston *v.* Beeson, 135 N. C. 271, 47 S. E. 457, 65 L. R. A. 167 [*followed* in Winston *v.* Hudson, 135 N. C. 286, 47 S. E. 1023]; Humes *v.* Little Rock, 138 Fed. 929.

Uniformity of taxation.— A city ordinance, imposing upon persons engaged in the business of furnishing trading stamps to merchants to be distributed among their customers for use in the purchase of other merchandise, a larger tax than that imposed upon merchants carrying on an ordinary mercantile business, is not violative of the constitutional provision requiring uniformity of taxation. Gamble *v.* Montgomery, 147 Ala. 682, 39 So. 353.

A company conducting a general mercantile business, that gave to the purchaser of its goods who paid cash a check representing four per cent of his purchase, which could be exchanged for articles in the store or for cash, was held not to be a trading stamp company. Com. *v.* Gibson Co., 125 Ky. 440, 101 S. W. 385, 31 Ky. L. Rep. 51, construing St. (1903) § 4224, providing for a license-tax on such companies.

32. Gamble *v.* Montgomery, 147 Ala. 682, 39 So. 353; Humes *v.* Little Rock, 138 Fed. 929. See LICENSES, 25 Cyc. 611.

33. *Ex p.* Hutchinson, 137 Fed. 949. See LICENSES, 25 Cyc. 603 note 42, 611 note 91. *Contra*, Humes *v.* Ft. Smith, 93 Fed. 857.

34. Humes *v.* Little Rock, 138 Fed. 929; *Ex p.* Hutchinson, 137 Fed. 950; *Ex p.* Hutchinson, 137 Fed. 949. And see Columbia *v.* Lusk, (Ct. Com. Pleas of Richland County S. C. Sept. 1909); Sperry, etc., Co. *v.* Danville, (Corp. Ct. of Danville Va. Oct. 1910).

35. *Alabama.*— Montgomery *v.* Kelly, 142 Ala. 552, 38 So. 67, 100 Am. St. Rep. 43, 70 L. R. A. 209.

California.— *Ex p.* McKenna, 126 Cal. 429, 58 Pac. 916.

Georgia.— Hewin *v.* Atlanta, 121 Ga. 723, 49 S. E. 765, 67 L. R. A. 795.

Kentucky.— Com. *v.* Gibson Co., 125 Ky. 440, 101 S. W. 385, 31 Ky. L. Rep. 51.

Massachusetts.— O'Keeffe *v.* Somerville, 190 Mass. 110, 76 N. E. 457, 112 Am. St. Rep. 316.

South Carolina.— Columbia *v.* Lusk, (Ct. Com. Pleas of Richland County Sept. 1909).

Tennessee.— Trading Stamp Co. *v.* Memphis, 101 Tenn. 181, 47 S. W. 136.

United States.— Humes *v.* Little Rock, 138 Fed. 929; *Ex p.* Hutchinson, 137 Fed. 950; *Ex p.* Hutchinson, 137 Fed. 949.

36. Humes *v.* Ft. Smith, 93 Fed. 857. *Compare* Oilure Mfg. Co. *v.* Pidduck-Ross Co., 38 Wash. 137, 80 Pac. 276; Fleetwood *v.* Read, 21 Wash. 547, 58 Pac. 665, 47 L. R. A. 205.

No interference with interstate commerce.— A city ordinance making it unlawful for any person to sell goods and merchandise by selling trading stamps to merchants, without first procuring a license and paying six hundred dollars, and requiring the merchant using trading stamps to procure a license and pay one hundred dollars, was not void as an interference with interstate commerce, as applied to a non-resident corporation soliciting by an agent business for a business man, a resident of the state. Oilure Mfg. Co. *v.* Pidduck-Ross Co., 38 Wash. 137, 80 Pac. 276.

37. Hewin *v.* Atlanta, 121 Ga. 723, 49 S. E. 765, 67 L. R. A. 795; *Ex p.* Hutchinson, 137 Fed. 950; *Ex p.* Hutchinson, 137 Fed. 949. *Contra*, Humes *v.* Ft. Smith, 93 Fed. 857.

38. Montgomery *v.* Kelly, 142 Ala. 552, 38

something which is not a taxable business [39] or commodity,[40] and as being wholly *ultra vires* and enacted under no authority delegated to the municipality from the state.[41] However, in all cases where the fees, taxes, or restrictions imposed were discriminatory, excessive, oppressive, prohibitory, or unreasonable, the statutes and ordinances have been held to be unconstitutional and void.[42]

IV. CONTRACT BETWEEN COMPANY AND SUBSCRIBER.[43]

A. In General. From the inevitable and necessary course of business there must be certain restrictions on dealings in the stamps.[44] The trading stamp company usually enters into a special contract with the subscribers as to the title [45] and use of the trading stamps furnished to them.[46] Contracts restricting the use, disposal, and transfer of trading stamps,[47] making them good only for

So. 67, 110 Am. St. Rep. 43, 70 L. R. A. 209; Hewin *v.* Atlanta, 121 Ga. 723, 49 S. E. 765, 67 L. R. A. 795.

39. Hewin *v.* Atlanta, 121 Ga. 723, 49 S. E. 765, 67 L. R. A. 795.

The word "business" in a commercial or legal sense means something done or carried on for a livelihood, profit, or the like. Hewin *v.* Atlanta, 121 Ga. 723, 49 S. E. 765, 67 L. R. A. 795.

40. O'Keeffe *v.* Somerville, 190 Mass. 110, 76 N. E. 457, 112 Am. St. Rep. 316.

Mass. St. (1904) p. 476, c. 403, § 1, provides that every person, etc., selling, giving, or delivering trading stamps, in connection with a sale of articles, entitling the holders to receive articles other than those so sold, shall pay an excise tax for carrying on such business. It was held that the right to conduct the business in the manner described in section 1 is not a commodity within the meaning of the constitution. O'Keeffe *v.* Somerville, 190 Mass. 110, 76 N. E. 457, 112 Am. St. Rep. 316.

41. Hewin *v.* Atlanta, 121 Ga. 723, 49 S. E. 765, 67 L. R. A. 795; Trading Stamp Co. *v.* Memphis, 101 Tenn. 181, 47 S. W. 136; Humes *v.* Little Rock, 138 Fed. 929. And see People *v.* Ross, (Super. Ct. of Sacramento County Nov. 1902).

In Sandels & H. Dig. Ark. § 5132, authorizing cities to tax, license, and suppress certain occupations named, among them "gift enterprises," such terms mean schemes for the distribution of property into which some element of chance enters, and the statute does not confer power on a city to impose a license-tax upon the occupation of selling trading stamps to merchants, which are given by them to cash customers as a premium, and redeemed by the seller in merchandise at their face value in whatever sums presented by such customers. Humes *v.* Little Rock, 138 Fed. 929. See *supra*, note 27.

42. *Alabama.*— Montgomery *v.* Kelly, 142 Ala. 552, 38 So. 67, 110 Am. St. Rep. 43, 70 L. R. A. 209.

California.— *Ex p.* McKenna, 126 Cal. 429, 58 Pac. 916; People *v.* Ross, (Super. Ct. of Sacramento County Nov. 1902).

Massachusetts.— O'Keeffe *v.* Somerville, 190 Mass. 110, 76 N. E. 457, 112 Am. St. Rep. 316.

South Carolina.— Columbia *v.* Lusk, (Ct. Com. Pleas of Richland County Sept. 1909).

Washington.— Fleetwood *v.* Read, 21 Wash. 547, 58 Pac. 665, 47 L. R. A. 205.

United States.— Humes *v.* Little Rock, 138 Fed. 929.

43. **Nature of scheme** see *supra*, II.

44. Sperry, etc., Co. *v.* Temple, 137 Fed. 992.

It is the essence of the company's business that its subscribers shall get the full benefit of its methods of advertising and assistance. Sperry, etc., Co. *v.* Weber, 161 Fed. 219.

The nature of the business requires that there should be a certain monopoly. If the stamps were on the market generally, thus opening the business extensively, no merchant would have any inducement to deal with the complainant. Sperry, etc., Co. *v.* Temple, 137 Fed. 992.

45. Sperry, etc., Co. *v.* Mechanics' Clothing Co., 128 Fed. 800. See also *infra*, text and note 51.

46. Sperry, etc., Co. *v.* Mechanics' Clothing Co., 128 Fed. 800.

Forms of agreement to furnish stamps and stamp books to merchants see Denver *v.* Frueauff, 39 Colo. 20, 24, 88 Pac. 389, 7 L. R. A. N. S. 1131; People *v.* Dycker, 72 N. Y. App. Div. 308, 310, 76 N. Y. Suppl. 111; Sperry, etc., Co. *v.* Weber, 161 Fed. 219.

"In nearly all, if not all, of these contracts made by the trading stamp companies with their subscribers, the right to use them as an advertising medium is restricted to the subscriber." Sperry, etc., Co. *v.* O'Neill-Adams Co., 185 Fed. 231, 234.

47. Sperry, etc., Co. *v.* Mechanics' Clothing Co., 135 Fed. 833; Sperry, etc., Co. *v.* Mechanics' Clothing Co., 128 Fed. 800.

The company may dispose of it on such terms as it sees fit. It may in the first instance restrict the right to issue it for advertising purposes to such persons as it may select, and to such persons as are willing to pay for it. The public is entitled to receive it upon the terms offered, namely, that it is exchangeable for goods. Sperry, etc., Co. *v.* Mechanics' Clothing Co., 135 Fed. 833.

When they are issued without limitation on the power of the holders, who have acquired them as premiums from merchants with cash purchases, to transfer them, the company issuing them has no power, by a subsequent change of its plans and contracts with its customers, to limit the transferable quality of those previously issued, which have

redemption purposes,[48] or making them non-transferable on their face,[49] are valid and lawful contracts, and not contrary to public policy.[50] Under the usual contract, title to the stamp does not vest in the subscribing merchant who issues it, but remains in the trading stamp company until it has been issued in regular course of business;[51] the stamp, once issued, represents so much advertising furnished and paid for; it then is *functus officio* as a token of the sale and use of so much advertising.[52]

B. Breach of Contract.[53] The right of action for damages resulting from breaches of contracts between the trading stamp companies and their subscribers,[54]

passed to dealers and traders in the regular way. Sperry, etc., Co. *v.* Hertzberg, 69 N. J. Eq. 264, 60 Atl. 368.

48. Sperry, etc., Co. *v.* Temple, 137 Fed. 992.

The customer of the merchant is expressly offered only the right to redeem the stamp, and impliedly the right to transfer it for redemption. Sperry, etc., Co. *v.* Mechanics' Clothing Co., 135 Fed. 833.

Injunction against reissue of trading stamps which are *functi officio*, see *infra*, V. See also Sperry, etc., Co. *v.* Temple, 137 Fed. 992.

49. Sperry, etc., Co. *v.* Weber, 161 Fed. 219.

Their non-transferability is an essential element of their value, both to complainant and its subscribers. Sperry, etc., Co. *v.* Weber, 161 Fed. 219. While a transfer of ordinary property by the owner upon any terms usually deprives other persons of no rights, this is not always the case with the trading stamps. While it may be transferred in any way which confines its use within the purpose for which it was issued, it may not be transferred in such a way as to destroy its value as an instrument of special trade advantage or advertising, or as to deprive the company which created the value of the stamp, and which has assumed the obligation to redeem it, of its right to compensation for expenditures and for redeeming the stamps. Sperry, etc., Co. *v.* Mechanics' Clothing Co., 135 Fed. 833.

By the very nature of the business, the stamps are not intended to be dealt with by the public generally, and are not transferable in the general and ordinary sense of the word. Sperry, etc., Co. *v.* Temple, 137 Fed. 992. It represents a somewhat complicated transaction, and, from its nature, I think there are necessary limitations upon the modes in which it may be transferred. Sperry, etc., Co. *v.* Mechanics' Clothing Co., 135 Fed. 833.

Effect of no such limitation see Sperry, etc., Co. *v.* Hertzberg, 69 N. J. Eq. 264, 60 Atl. 368. And see *supra*, note 47.

50. Sperry, etc., Co. *v.* Weber, 161 Fed. 219; Sperry, etc., Co. *v.* Temple, 137 Fed. 992. See also Montgomery *v.* Kelly, 142 Ala. 552, 38 So. 67, 110 Am. St. Rep. 43, 70 L. R. A. 209; Denver *v.* Frueauff, 39 Colo. 20, 32, 88 Pac. 389, 7 L. R. A. N. S. 1131; People *v.* Zimmerman, 102 N. Y. App. Div. 103, 92 N. Y. Suppl. 497; Winston *v.* Beeson, 135 N. C. 271, 47 S. E. 457, 65 L. R. A. 167 [*followed* in Winston *v.* Hudson, 135 N. C. 286, 47 S. E. 1023]; State *v.* Dalton, 22 R. I. 77, 46 Atl. 234, 84 Am. St. Rep. 818, 48 L. R. A. 775; State *v.* Dodge, 76 Vt. 197, 56 Atl. 983; Young *v.* Com., 101 Va. 853, 45 S. E. 327.

When honestly conducted, the business of issuing trading stamps to merchants to be given to purchasers of small bills for cash, redeemable in articles of merchandise, etc., is not contrary to public policy. Sperry, etc., Co. *v.* Temple, 137 Fed. 992.

51. Sperry, etc., Co. *v.* Mechanics' Clothing Co., 135 Fed. 833.

Ownership of stamps.— By extensive advertising, by promises to the public, by the exhibition of goods, by the circulating of books, like exhibit C, giving a general description of the business, the Sperry & Hutchinson Company creates a demand for the trading stamp. By contract between the complainant and the merchant, the title to the stamp does not vest in the merchant who issues it, but remains in the company until it has been issued in regular course to a customer of the merchant. Sperry, etc., Co. *v.* Mechanics' Clothing Co., 135 Fed. 833.

52. Sperry, etc., Co. *v.* Mechanics' Clothing Co., 135 Fed. 833.

53. **Injunction for breach of contract** see *infra*, V.

54. Sperry, etc., Co. *v.* O'Neill-Adams Co., 185 Fed. 231.

Waiver of breach.— Where, by reason of a temporary injunction, defendant was prevented from carrying out a part of a trading stamp contract with plaintiff, the fact that plaintiff after the issuance of the injunction continued to buy stamps from defendant under the contract prior to the injunction being made permanent did not waive defendant's breach, which was continued on each succeeding day after the injunction was made permanent. Sperry, etc., Co. *v.* O'Neill-Adams Co., 185 Fed. 231.

Defenses.— Where a contract to furnish plaintiff with trading stamps to advertise its business provided that plaintiff should have the right to add at its own expense such advertising as it might desire in any stamp books or directories of the stamp company which were distributed from plaintiff's store, "such advertising not to be detrimental to the interests of the stamp company," plaintiff was not precluded from suing defendant for breach of its contract arising out of its inability to carry out the same owing to a contract previously made with the S company,

as well as the waiver of the right to sue,[55] damages recoverable,[56] evidence admissible in such actions,[57] and the trial of such actions[58] are governed by the rules applicable to other civil actions for damages for breaches of contracts.

V. INJUNCTIONS.[59]

A. In Favor of Trading Stamp Companies. In the exercise of their jurisdiction with regard to unfair trade and fraudulent business methods,[60] courts of equity will, on a proper showing made by a trading stamp company, grant an

because certain advertisements put out by plaintiff after the making of the contract with defendant indicated the nature of its contract, from which the S company derived knowledge of a violation of its rights in the making of the contract between plaintiff and defendant, resulting in injunction proceedings. Sperry, etc., Co. *v.* O'Neill-Adams Co., 185 Fed. 231.

55 Sperry, etc., Co. *v.* O'Neill-Adams Co., 185 Fed. 231.

Withholding payment due.— Where a trading stamp contract bound plaintiff to pay for stamps purchased during one month on or before the 15th of the succeeding month, and on Jan. 15, 1909, it was manifest that defendant had broken the contract and intended to continue doing so, plaintiff lost none of its rights to sue defendant for such breach by withholding the instalment due on January 15th for stamps purchased as security for damages it might expect to recover in such action. Sperry, etc., Co. *v.* O'Neill-Adams Co., 185 Fed. 231.

56. Gagnon *v.* Sperry, etc., Co., 206 Mass. 547, 92 N. E. 761; Sperry, etc., Co. *v.* O'Neill-Adams Co., 185 Fed. 231. See DAMAGES, 13 Cyc. 1.

Measure of damages.— Where, in an action for breach of a trading stamp contract, there was no proof from which an intelligent estimate of possible profits could be made, but it appeared that plaintiff had expended over twenty thousand dollars in providing machinery, space, etc., for carrying on the work, the court properly limited plaintiff to a recovery of such expenses, and directed a verdict for that amount. Sperry, etc., Co. *v.* O'Neill-Adams Co., 185 Fed. 231.

Loss of profits.— Where the business of a grocer, prior to his use of trading stamps, was small and largely on credit, while after he began to use the stamps his trade greatly increased, with a greater proportion of cash sales, and the amount and nature of the business continued as long as he distributed stamps, and when he discontinued the distribution thereof his sales rapidly changed in amount and kind to the condition in which they were before the contract for stamps, and the consideration held out by the stamp company to induce the grocer to contract for the stamps was that by distribution thereof his business would be more profitable, the jury could find, in the absence of other satisfactory cause, that the increase in the sales was due to the distribution of stamps, and that the sudden fall was the natural and probable consequence of the breach of the contract, so that loss of profits could be recovered so far as the evidence showed loss of profits. Gagnon *v.* Sperry, etc., Co., 206 Mass. 547, 92 N. E. 761.

57. Gagnon *v.* Sperry, etc., Co., 206 Mass. 547, 92 N. E. 761. See EVIDENCE, 16 Cyc. 821, 17 Cyc. 1.

Evidence as to profits.— In an action for breach of contract to furnish trading stamps to a grocer, evidence of what percentage of the receipts in the business was profit was admissible, as estimating the profits of the business. Gagnon *v.* Sperry, etc., Co., 206 Mass. 547, 92 N. E. 761.

Opinion evidence.—A statement of a witness, in response to the question as to the effect of the distribution of trading stamps on the trade in a store, that the business increased and that the number of recognized customers increased from sixty-five to one hundred and fifteen, and a statement, in response to the question as to the result observed in lessening or increasing the number of customers after the stamps were exhausted, that the customers ceased on the ground that they did not care to trade at the store, and a greater part of the customers traded elsewhere, were admissible as statements of facts, and not as mere opinions of the witnesses. Gagnon *v.* Sperry, etc., Co., 206 Mass. 547, 92 N. E. 761.

58. Gagnon *v.* Sperry, etc., Co., 206 Mass. 547, 92 N. E. 761. See TRIAL, *post*.

Matters included in charge already given.—Where, in an action for breach of contract to furnish trading stamps to a merchant, there was evidence that a writing was signed by the parties, and that subsequently an agent of defendant took it away that he might print on the back a statement that plaintiff was to have exclusive right on a street, and the court submitted the issue whether it was understood that the contract assigned should become operative from the time of signing, irrespective of the time of the printing of the indorsement, under an instruction permitting the jury to find for plaintiff only if it was found that it was so understood, and the jury found for plaintiff, the refusal to charge that there was no evidence on which a jury could find that an exclusive contract in writing was made, or evidence on which the jury could find that a written contract was executed and delivered, etc., was proper. Gagnon *v.* Sperry, etc., Co., 206 Mass. 547, 92 N. E. 761.

59. Injunctions generally see INJUNCTIONS, 22 Cyc. 716.

60. See INJUNCTIONS, 22 Cyc. 842.

injunction to restrain the improper use of the company's stamps by third persons,[61] or to restrain a third person from fraudulent interference with the trading stamp company's business,[62] such as interfering with complainant's contracts with subscribing merchants,[63] by inducing the latter to sell stamps in violation of their contracts with the trading stamp company.[64] An injunction will also be granted in a proper case to restrain a merchant, who is not a subscriber, from using the company's trading stamps in connection with his business without the company's permission,[65] including the reissuing of such stamps after they have become *functi officio*;[66] to restrain a third person from advertising that he will purchase the

61. Sperry, etc., Co. *v.* Asch, 145 Fed. 659; Crown Stamp Co. *v.* Beal, 145 Fed. 659; Sperry, etc., Co. *v.* Temple, 137 Fed. 992; Sperry, etc., Co. *v.* Brady, 134 Fed. 691. See also cases cited *infra*, notes 62–71.

62. Sperry, etc., Co. *v.* Weber, 161 Fed. 219; Sperry, etc., Co. *v.* Mechanics' Clothing Co., 135 Fed. 833.

Fraudulent interference with business.— Defendants, having obtained quantities of such stamps, in part by purchase from merchants, and in part from customers of such merchants to whom they had been regularly issued, gave them out to their own customers in such quantities as they chose. They also advertised that they had special arrangements with complainant by which they were authorized to give double the usual number of stamps with purchases from their store, and offered to redeem any of complainant's stamps either in goods or in cash, whereas in fact they had no contract with complainant. It was held that such manner of advertising was a fraud upon complainant, and entitled it to an injunction restraining the same, as well as the use of the stamps by defendants, in so far as they were acquired by purchase from merchants in violation of their contracts; and that as there was no way of distinguishing between the stamps so acquired, and those obtained from customers of merchants having contracts with complainant who issued them in accordance with the contract, the injunction would be extended to all. Sperry, etc., Co. *v.* Mechanics' Clothing Co., 128 Fed. 800.

63. Sperry, etc., Co. *v.* Mechanics' Clothing Co., 128 Fed. 800. See also Sperry, etc., Co. *v.* Retail Grocers Assoc., (Distr. Ct. of Ramsey County Minn. March 1905); Sperry, etc., Co. *v.* McKelvey-Hughes Co., (Ct. Com. Pleas of Alleghany County Pa. —— 1908); Sperry, etc., Co. *v.* Weber, 161 Fed. 219.

64. Sperry, etc., Co. *v.* Weber, 161 Fed. 219; Sperry, etc., Co. *v.* Mechanics' Clothing Co., 128 Fed. 800.

Interference with contract.— Complainant company issued trading stamps, which it sold to merchants under a contract that they should be given out to customers as a special discount for cash, one stamp for each ten cents worth of goods purchased. The contract provided that the stamps when so issued would be redeemed by complainant in goods when presented in books containing nine hundred and ninety stamps each, that they should only be given out in the manner prescribed, and that the property in and title to the stamps should remain in complainant. It also issued advertising books to the public, which did not give the terms of the contracts with merchants, or state the requirement that the stamps must be presented in books, but represented that each stamp was redeemable, nor did the stamps show such condition on their face. It was held that the title to the stamps while they remained in the hands of the merchant was a limited one, and he acquired no right to dispose of them otherwise than according to the contract, and that complainant was entitled to an injunction to restrain a defendant from unlawfully interfering with its contracts by inducing merchants to sell the stamps in violation thereof, and by selling the stamps so purchased to other merchants having no contracts with complainant, defendant having full knowledge of the terms of such contracts. Sperry, etc., Co. *v.* Mechanics' Clothing Co., 128 Fed. 800. *Compare* Sperry, etc., Co. *v.* Weber, 161 Fed. 219.

65. Sperry, etc., Co. *v.* Asch, 145 Fed. 659; Crown Stamp Co. *v.* Beal, 145 Fed. 659; Sperry, etc., Co. *v.* Mechanics' Clothing Co., 135 Fed. 833; Sperry, etc., Co. *v.* Brady, 134 Fed. 691; Sperry, etc., Co. *v.* Mechanics' Clothing Co., 128 Fed. 1015; Sperry, etc., Co. *v.* Mechanics' Clothing Co., 128 Fed. 800.

Fraudulent advertising see Sperry, etc., Co. *v.* Mechanics' Clothing Co., 128 Fed. 800. Where allegations of a bill to enjoin defendants from using complainants' trading stamps that defendants were engaged in using such stamps in advertising their business without complainants' permission were not denied by any of the answers filed, complainants were entitled to a preliminary injunction. Sperry, etc., Co. *v.* Brady, 134 Fed. 691.

A preliminary injunction restraining defendants from using trading stamps issued by complainant, based on a finding that a portion of the stamps in defendant's possession were obtained in fraud of complainant's rights, will not be modified on application of defendants to permit them to use stamps acquired by them after its issuance in a different and lawful manner, where the question of their right to use stamps, even when so obtained, is in issue, and was expressly reserved for determination on final hearing. Sperry, etc., Co. *v.* Mechanics' Clothing Co., 128 Fed. 1015.

66. Sperry, etc., Co. *v.* Mechanics' Clothing Co., 135 Fed. 833.

trading stamp company's issued stamps, and from selling stamps so purchased by him as articles of merchandise; [67] to restrain a third person from purchasing [68] or selling,[69] or from purchasing and selling issued stamps of the trading stamp company to merchants who are not subscribers of the trading stamp company; [70] or to restrain a rival trading stamp company from purchasing partly filled books containing complainant's trading stamps.[71] Upon a proper showing on the part of a trading stamp company,[72] or on the part of a merchant who is

Stamp when functus officio see *supra*, text and note 52.

Reissuing trading stamps.—Trading stamps sold to a merchant under a contract that they are to be issued to the merchant's customers for cash purchases, and to be then redeemable at the stamp company's store, are, upon such issue, good only for redemption purposes; hence a person collecting them from such customers with the intent to reissue them, and without having contracted with the stamp company allowing this to be done, may be restrained by injunction. Sperry, etc., Co. *v.* Mechanics' Clothing Co., 135 Fed. 833; Sperry, etc., Co. *v.* Mechanics' Clothing Co., 128 Fed. 800. See also Sperry, etc., Co. *v.* Temple, 137 Fed. 992. But see Sperry, etc., Co. *v.* Hertzberg, 69 N. J. Eq. 264, 60 Atl. 368.

67. Sperry, etc., Co. *v.* Temple, 137 Fed. 992.

For example, where defendant purchased complainant's trading stamps, among others, for resale, and such purchases seriously interfered with complainant's business in issuing such stamps for redemption in articles of merchandise, etc., complainant was entitled to an injunction prohibiting defendant from advertising that he would purchase complainant's stamps, and from selling stamps so purchased as articles of merchandise. Sperry, etc., Co. *v.* Temple, 137 Fed. 992.

"**This court has no power to restrain him** from purchasing all the stamps he sees fit to purchase. It has no power to prevent him from selling stamps to persons who desire to make collections as mere matters of curiosity. It has no power to restrain him from selling them as waste paper, provided they are so canceled or in any way broken up or disfigured that they can be used only as such." Sperry, etc., Co. *v.* Temple, 137 Fed. 992, 994.

The court "has power to restrain him from selling them as articles of merchandise, and from advertising generally that he will purchase specifically them, or stamps which would include them, as articles of merchandise. It should go to that extent, and protect the complainant's business so far as an injunction of that character would protect it." Sperry, etc., Co. *v.* Temple, 137 Fed. 992, 994.

68. Sperry, etc., Co. *v.* Temple, 137 Fed. 992; Sperry, etc., Co. *v.* McKelvey-Hughes Co., (Ct. Com. Pleas of Alleghany County Pa. —— 1908).

Innocent purchaser without notice.—Where defendant had been in complainant's employment long enough to know that the necessities of complainant's business in selling and redeeming trading stamps required that such stamps should not be dealt in by the public generally, he was not an innocent purchaser without notice in purchasing issued stamps for resale. Sperry, etc., Co. *v.* Temple, 137 Fed. 992.

69. Sperry, etc., Co. *v.* Temple, 137 Fed. 992.

70. Sperry, etc., Co. *v.* Temple, 137 Fed. 992. *Compare* Sperry, etc., Co. *v.* Mechanics' Clothing Co., 128 Fed. 800.

71. Sperry, etc., Co. *v.* Weber, 161 Fed. 219.

Complainant was entitled to protection by injunction against a rival in the business, which sent out agents to purchase or exchange its own stamps for partly filled books containing complainant's stamps, some of which were again resold at a low price, materially interfering with complainant's business. Sperry, etc., Co. *v.* Weber, 161 Fed. 219.

"**To create an unfair market** for partly filled and non-transferable stamp books would have a tendency to keep purchasers from trading with subscribers until they were filled." Sperry, etc., Co. *v.* Weber, 161 Fed. 219, 221, where it was said: "This has been held in a number of cases instituted by complainant to protect its business. Among these are the cases of Sperry, etc., Co. *v.* Beal, 145 Fed. 659; Sperry, etc., Co. *v.* Asch, 145 Fed. 659; Sperry, etc., Co. *v.* Temple, 137 Fed. 922; Sperry, etc., Co. *v.* Mechanics' Clothing Co., 135 Fed. 833; Sperry, etc., Co. *v.* Brady, 134 Fed. 691; Sperry, etc., Co. *v.* Mechanics' Clothing Co., 128 Fed. 1015; Sperry, etc., Co. *v.* Mechanics' Clothing Co., 128 Fed. 800. In addition there are unpublished opinions and decisions to the same effect by Judge Morris of Baltimore, Judge McPherson, Eastern district of Pennsylvania, Judge Thomas, Eastern district of New York, and Judge Lacombe, Southern district of New York." Presumably the unpublished decisions referred to are Sperry, etc., Co. *v.* Driesbach, (U. S. Cir. Ct. East. Distr. of Pa. April 1904); Sperry, etc., Co. *v.* Benjamin, (U. S. Cir. Ct. East. Distr. of N. Y. March 1905); Sperry, etc., Co. *v.* Alexander, (U. S. Cir. Ct. South. Distr. of N. Y. June 1905); Sperry, etc., Co. *v.* Belkin, (Cir. Ct. South. Distr. of N. Y. Aug. 1905); Sperry, etc., Co. *v.* Andrew, (U. S. Cir. Ct. East. Distr. of Pa. Nov. 1905); Sperry, etc., Co. *v.* Kenyon, (U. S. Cir. Ct. Distr. of Md. June 1907).

72. Hewin *v.* Atlanta, 121 Ga. 723, 49 S. E.

a subscriber of the trading stamp company,[73] an injunction may issue to enjoin the collection of a tax imposed under an invalid ordinance,[74] or to prevent the passage of an *ultra vires* ordinance taxing merchants who use trading stamps in connection with their business.[75] However, in one case it has been held that where the obligation represented by a trading stamp is, by the contract between the trading stamp company as the maker and the merchants who buy them from the maker, made assignable without limitation except as to the minimum quantity presented at one time after having been regularly issued by the merchants to their customers, the trading stamp company could not, in the absence of special legislation in behalf of such business,[76] prevent the use by a merchant not a customer of the company of such stamps as may have been given by the customers of the stamp company to dealers and traders with them in pursuance of the contract of the company with its customers, although such use by the merchant be injurious to the business of the trading stamp company.[77]

B. Against Trading Stamp Companies. An *ex parte* restraining order may be granted upon a proper showing in favor of the subscriber against the trading stamp company for a violation of its contract granting exclusive privileges to the subscriber with respect to the purchaser's use and redemption of trading stamps.[78]

765, 67 L. R. A. 795; Trading Stamp Co. *v.* Memphis, 101 Tenn. 181, 47 S. W. 136.

73. Hewin *v.* Atlanta, 121 Ga. 723, 49 S. E. 765, 67 L. R. A. 795; Trading Stamp Co. *v.* Memphis, 101 Tenn. 181, 47 S. W. 136.

An application for an injunction, filed jointly by the trading stamp company and one or more merchants who are its customers, seeking to enjoin the collection of a tax imposed under an ordinance of the character above referred to, is not bad for misjoinder of parties. Hewin *v.* Atlanta, 121 Ga. 723, 49 S. E. 765, 67 L. R. A. 795.

74. Hewin *v.* Atlanta, 121 Ga. 723, 49 S. E. 765, 67 L. R. A. 795. See also Fleming *v.* Augusta, (Richmond Super. Ct. Ga. Apr. 1901).

75. Trading Stamp Co. *v.* Memphis, 101 Tenn. 181, 47 S. W. 136.

76. **Courts will not create novel rules of** law for the protection of novel schemes of transacting business. Men must make their novel business schemes fit existing laws. It is for the legislature, and not the courts, to create new laws to protect new schemes of business. Sperry, etc., Co. *v.* Hertzberg, 69 N. J. Eq. 264, 60 Atl. 368.

77. Sperry, etc., Co. *v.* Hertzberg, 69 N. J. Eq. 264, 265, 60 Atl. 368, where complainant sought to restrain defendant from using in his business "or giving to persons who may trade or deal with him, any of the complainant's trading stamps . . . except such trading stamps as said defendant may lawfully obtain from the complainant, or use in his business with its consent, and except such trading stamps as may have been given by the customers of the complainant to dealers and traders with them in pursuance of the contract of complainant with such customers."

The court of chancery has no jurisdiction to issue a preliminary injunction where complainant rests his case on a rule of law, as distinguished from a principle of equity, that is unsettled and doubtful; and hence, assuming it to be a doubtful legal proposition whether a trading stamp company is entitled to control the right of transfer attaching to stamps issued by it after they have passed to customers of merchants who have purchased them, in the absence of limitation on the transferable character of the stamps, still a preliminary injunction cannot be issued to prevent a merchant from using such stamps as may have been given by the customers of a trading stamp company to dealers and traders with them in pursuance of the contract of the trading stamp company with its customers, especially in the absence of allegation that the defendant is not responsible for any amount of damages which the complainant could recover against him in an action at law. Sperry, etc., Co. *v.* Hertzberg, 69 N. J. Eq. 264, 60 Atl. 368.

There is no presumption that any particular scheme or plan of business, although lawful, is necessary, or even specifically advantageous, to the growth of commerce and the advance of civilization, and hence the trading stamp business is not *per se* one which the courts must protect. Sperry, etc., Co. *v.* Hertzberg, 69 N. J. Eq. 264, 60 Atl. 368.

Title retained by company.— Where the title to the paper on which the evidence of a transferable chose in action is imprinted by the owner of the paper and the maker of the instrument is retained by the maker as in the case of trading stamps, such retention of title to the paper does not interfere with the use of the paper as the token or evidence of the chose in action, and cannot, in a court of equity, be asserted adversely to the interests of the holder of the chose. Sperry, etc., Co. *v.* Hertzberg, 69 N. J. Eq. 264, 60 Atl. 368.

78. Siegel-Cooper Co. *v.* Sperry, etc., Co., Dec. 18, 1908 [*cited* and *referred* to in Sperry etc., Co. *v.* O'Neill-Adams Co., 185 Fed. 231, 236].

TRADITIO LOQUI FACIT CHARTAM. A maxim meaning "Delivery makes the deed speak." [17]

TRADITION.[18] That which is derived from the declarations of those who lived or were living at a time, if not ancient, at least comparatively remote;[19] knowledge, belief, or practices, transmitted orally from father to son, or from ancestors to posterity.[20] (Tradition: As Evidence on Questions of — Boundary, see BOUNDARIES, 5 Cyc. 957; Pedigree, see EVIDENCE, 16 Cyc. 1233.)

TRADITIONIBUS ET USUCAPIONIBUS, NON NUDIS PACTIS, TRANSFERUNTUR RERUM DOMINIA. A maxim meaning "Rights of property are transferred by delivery, and by prescription founded on lengthened possession, not by a mere agreement." [21]

TRADITIONIBUS NON NUDIS TRANSFERUNTUR RERUM DOMINA, SED PER LONGAM CONTINUAM ET PACIFICAM POSSESSIONEM. A maxim meaning "The rights of superiority are not transferred by bare deliveries, but by long-continued and peaceful possession." [22]

TRADITIO NIHIL AMPLIUS TRANSFERRE DEBET VEL POTEST, AD EUM QUI ACCIPIT, QUAM EST APUD EUM QUI TRADIT. A maxim meaning "Delivery ought to, and can, transfer nothing more to him who receives than is with him who delivers." [23]

TRAFFIC. As a noun, trade, commerce, exchange or sale of commodities;[24] the passing of goods or commodities from one person to another for an equivalent in goods or money;[25] the buying of something from another or the selling of something to another;[26] the business or employment of buying and selling;[27] commerce; trade; sale or exchange of merchandise, bills, money and the like;[28] commerce either by barter or by buying and selling; trade.[29] As a verb, to trade; to buy and sell; to exchange in traffic;[30] to trade either by barter or by buying and selling; to trade;[31] to pass goods and commodities from one person to another for an equivalent in goods or money;[32] to sell; to buy; to trade; to pass goods and commodities from one person to another for an equivalent in

17. Peloubet Leg. Max. [*citing* Clayton's Case, 5 Coke 1*a*, 77 Eng. Reprint 48].

18. "Tradition or delivery is the transferring of the thing sold into the power and possession of the buyer." Mazone *v.* Caze, 18 La. Ann. 31, 34 [*quoting* La. Civ. Code, art. 2452]. See SALES, 35 Cyc. 164.

19. Westfelt *v.* Adams, 131 N. C. 379, 384, 42 S. E. 823, where "general reputation" is used as a synonymous term.

20. *In re* Hurlburt, 68 Vt. 366, 377, 35 Atl. 77, 35 L. R. A. 794, where it is said that "repute, reputation and tradition" are spoken of by some of the authorities as convertible terms when applied to cases of pedigree.

21. Morgan Leg. Max. [*citing* Trayner Leg. Max.].

22. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].

23. Burrill L. Dict. [*citing* Dig. 41. 1. 20, pr.].

24. Skelton *v.* State, 173 Ind. 462, 89 N. E. 860, 90 N. E. 897.

"This word, like 'trade,' comprehends every species of dealing in the exchange or passing of goods or merchandise from hand to hand for an equivalent, unless the business of retailing may be excepted." Curtin *v.* Atkinson, 36 Nebr. 110, 115, 54 N. W. 131; State *v.* Small, 82 S. C. 93, 97, 63 S. E. 4.

25. Senior *v.* Ratterman, 44 Ohio St. 661, 673, 11 N. E. 321; Anderson L. Dict. [*quoted* in Williams *v.* Fears, 110 Ga. 584, 590, 35 S. E. 699, 50 L. R. A. 685].

May be dealing in a commodity at wholesale or retail see Senior *v.* Ratterman, 44 Ohio St. 661, 673, 11 N. E. 321.

The business of procuring labor contracts to be performed in another state cannot be properly denominated traffic. Williams *v.* Fears, 110 Ga. 584, 590, 35 S. E. 699, 50 L. R. A. 685.

26. *In re* Cameron Town Mut. F., etc., Ins. Co., 96 Fed. 756, 757, 2 Am. Bankr. Rep. 372.

27. *Ex p.* Fitzpatrick, 5 Can. Cr. Cas. 191, 196.

State and interstate traffic distinguished see Ft. Worth, etc., R. Co. *v.* Whitehead, 6 Tex. Civ. App. 595, 598, 26 S. W. 172.

28. Bouvier L. Dict. [*quoted* in Williams *v.* Fears, 110 Ga. 584, 590, 35 S. E. 699, 50 L. R. A. 685; Curtin *v.* Atkinson, 36 Nebr. 110, 115, 54 N. W. 131].

29. Webster Dict. [*quoted* in Curtin *v.* Atkinson, 36 Nebr. 110, 115, 54 N. W. 131].

30. *Ex p.* Fitzpatrick, 5 Can. Cr. Cas. 191, 196.

31. Webster Dict. [*quoted* in People *v.* Collins, 3 Mich. 343, 385, where "manufacture" is distinguished].

32. Webster Dict. [*quoted* in Kansas City *v.* Vindquest, 36 Mo. App. 584, 588]; Webster Dict. [*quoted* in People *v.* Collins, 3 Mich. 343, 385, where "Manufacture" is distinguished].

goods or money.[33] (Traffic: In General, see COMMERCE, 7 Cyc. 407. Charges by Carrier in General, see CARRIERS, 6 Cyc. 491; SHIPPING, 36 Cyc. 298. Contract Between Carriers — In General, see CARRIERS, 6 Cyc. 478; As in Restraint of Trade, see MONOPOLIES, 27 Cyc. 902. Contract Between Railroad Companies — In General, see RAILROADS, 33 Cyc. 410; Rights and Liabilities of Purchaser at Sale Under Foreclosure of Mortgage of Lien on Railroad, see RAILROADS, 33 Cyc. 592. Contract Between Street Railroads, see STREET RAILROADS, 36 Cyc. 1435: Contract Between Telegraph and Telephone Companies, see TELEGRAPH AND TELEPHONE COMPANIES, 37 Cyc. 1620. Contract, Effect on Relation of Employees as Fellow Servants, see MASTER AND SERVANT, 26 Cyc. 1286. In Intoxicating Liquors — Penalties For Illegal, see INTOXICATING LIQUORS, 23 Cyc. 86; Power to Control, see INTOXICATING LIQUORS, 23 Cyc. 64; Regulation of, see INTOXICATING LIQUORS, 23 Cyc. 161; Taxation of, see INTOXICATING LIQUORS, 23 Cyc. 84. On Sunday, see SUNDAY, 37 Cyc. 547. Roads, Liability to Assessment For Public Improvement, see MUNICIPAL CORPORATIONS, 28 Cyc. 1119. See also TRADE, *ante*, p. 670.)

TRAFFICKER. One who traffics; a trader; a merchant.[34]

TRAGEDY. A dramatic representation.[35]

TRAHI NON DEBENT IN ARGUMENTUM QUÆ PROPTER NECESSITATEM RECEPTA SUNT. A maxim meaning "Things which are tolerated on account of necessity ought not to be drawn into precedents."[36]

TRAIL. A word sometimes used to mean a way, road, or path, suitable for the purpose of driving cattle over or along on their way to a market.[37]

TRAILER. The name applied to a passenger coach connected with a grip car,[38] or to a car without a motor attached to a motor car.[39]

TRAIN.[40] A continuous or connected line of cars or carriages on a railroad;[41] that which is drawn along.[42] (Train: Check, Assignability of, see CARRIERS,

33. Webster Dict. [*quoted* in Levine *v.* State, 35 Tex. Cr. 647, 649, 34 S. W. 969].

"Traffic in" synonymous with "deal" see Clifford *v.* State, 29 Wis. 327, 329.

"Trafficking in liquors" defined by statute see People *v.* Hamilton, 17 Misc. (N. Y.) 11, 18, 39 N. Y. Suppl. 531; Jung Brewing Co. *v.* Talbot, 59 Ohio St. 511, 513, 53 N. W. 51; Leonard *v.* Bowland, 17 Ohio S. & C. Pl. Dec. 558, 561.

34. Senior *v.* Ratterman, 44 Ohio St. 661, 673, 11 N. E. 321.

35. Com. *v.* Fox, 10 Phila. (Pa.) 204.

36. Morgan Leg. Max. [*citing* Dig. 50, 17, 162].

37. U. S. *v.* Andrews, 179 U. S. 96, 99, 21 S. Ct. 46, 45 L. ed. 105.

"An established trail" see U. S. *v.* Andrews, 179 U. S. 96, 99, 21 S. Ct. 46, 45 L. ed. 105.

38. Steeg *v.* St. Paul City R. Co., 50 Minn. 149, 150, 52 N. W. 393, 16 L. R. A. 379.

39. Von Diest *v.* San Antonio Traction Co., 33 Tex. Civ. App. 577, 77 S. W. 632.

"Trailing cars" are excluded from an act requiring street railway companies to provide each car with an inclosure to protect certain employees from the inclemency of the weather. State *v.* Smith, 58 Minn. 35, 36, 59 N. W. 545, 25 L. R. A. 759.

40. Derived from traho, to draw see Hollinger *v.* Canadian Pac. R. Co., 21 Ont. 705, 713.

41. Detroit City R. Co. *v.* Mills, 85 Mich. 634, 647, 48 N. W. 1007, where such was said to be the meaning of the term as used in an act entitled "An act to provide for the construction of train railways."

In reference to railroad traffic the term means all kinds of trains, freight trains, passenger trains, mail train, construction train, and the character of the train is designated by a word. State *v.* Missouri Pac. R. Co., 219 Mo. 156, 166, 17 S. W. 1173.

It is composed of one or more engines, with one or more cars attached for the purpose of being moved to another place. A single engine is not a train. Larson *v.* Illinois Cent. R. Co., 91 Iowa 81, 85, 58 N. W. 1076. See also Harris *v.* Rex, 9 Can. Exch. 206, 211.

A locomotive and one or more cars connected together and run upon a railroad constitute a train within the meaning of that word as used in a statute giving a right of action for personal injury caused by the negligence of any person in the service of the employer who has the charge or control of any locomotive engine or train upon a railroad. Decey *v.* Old Colony R. Co., 153 Mass. 112, 115, 26 N. E. 437. See also Southern R. Co. *v.* Cullen, 122 Ill. App. 293, 297; Shea *v.* New York, etc., R. Co., 173 Mass. 177, 178, 53 N. E. 396; Caron *v.* Boston, etc., R. Co., 164 Mass. 523, 527, 42 N. E. 112.

One motor car and a trailer do not constitute a "train" within the meaning of a statute requiring railroad companies to keep drinking water on all trains. Dean *v.* State, 149 Ala. 34, 35, 43 So. 24.

42. Hollinger *v.* Canadian Pac. R. Co., 21 Ont. 705, 713.

6 Cyc. 573 note 18. Constitutionality of Act Requiring Stopping at Station, see CONSTITUTIONAL LAW, 8 Cyc. 831 note 90. Contributory Negligence of Passenger in Getting On or Off, see CARRIERS, 6 Cyc. 643. Crews as Fellow Servants of Other Employees of Railroad, see MASTER AND SERVANT, 26 Cyc. 1350. Equipment of, Statutory, Municipal, and Official Regulations, see RAILROADS, 33 Cyc. 660. Expulsion From Moving, as Negligence, see CARRIERS, 6 Cyc. 562. Injury to Person on Highway or Private Premises by Derailment of, see RAILROADS, 33 Cyc. 1147. Liability of Railroad Company For — Injuries From Collision or Accident to, see RAILROADS, 33 Cyc. 734; Negligence of Person Operating, Under Employers' Liability Acts, see MASTER AND SERVANT, 26 Cyc. 1374. Movement of, Statutory, Municipal, and Official Regulations, see RAILROADS, 33 Cyc. 664. Person Pursuing Special Callings on as Passenger, see CARRIERS, 6 Cyc. 542. Provision For Safety and Comfort of Passenger on, see CARRIERS, 6 Cyc. 622. Right to Transportation on Particular, see CARRIERS, 6 Cyc. 581. Service — Duty of Railroad as to, see RAILROADS, 33 Cyc. 639; Statutory, Official, and Municipal Regulations, see RAILROADS, 33 Cyc. 657. Taking Wrong, Effect on Liability of Carrier For Expelling Passenger, see CARRIERS, 6 Cyc. 556. Transfer to Different, see CARRIERS, 6 Cyc. 584. Transportation of Passenger on Freight, see CARRIERS, 6 Cyc. 552. Wrecking or Obstructing Passage of as Criminal Offense, see RAILROADS, 33 Cyc. 689, 693.)

TRAINER. See ANIMALS, 2 Cyc. 316.

TRAITOR. See TREASON, *post.*

TRAMP. A wandering, homeless vagabond;[43] a foot traveler; a tramper; often used in a bad sense for vagrant, or wandering vagabond;[44] an idle wanderer; itinerant beggar; vagrant; vagabond.[45] (See, generally, DISORDERLY CONDUCT, 14 Cyc. 466; VAGRANCY.)

TRAMP CORPORATION. See FOREIGN CORPORATIONS, 19 Cyc. 1232.

TRAMWAY.[46] A railroad or railway over which cars are operated;[47] a line

Meaning "railroad train" see Waters *v.* Greenleaf-Johnson Lumber Co., 115 N. C. 648, 653, 20 S. E. 718.

"Train of cars" is not merely the engine and tender. Harris *v.* Rex, 9 Can. Exch. 206, 211.

43. Miller *v.* State, 73 Ind. 88, 92.

44. Webster Dict. [*quoted* in Savannah, etc., R. Co. *v.* Boyle, 115 Ga. 836, 840, 42 S. E. 242, 59 L. R. A. 104].

45. Standard Dict. [*quoted* in Savannah, etc., R. Co. *v.* Boyle, 115 Ga. 836, 840, 42 S. E. 242, 59 L. R. A. 104].

"The genus tramp, in this country, is a public enemy. He is numerous and he is dangerous. He is a nomad, a wanderer on the face of the earth, with his hand against every honest man, woman and child in so far as they do not, promptly and fully, supply his demands. He is a thief, a robber, often a murderer, and always a nuisance. He does not belong to the working classes, but is an idler; he does not work because he despises work. It is a fixed principle with him that, come what may, he will not work. He is so low in the scale of humanity that he is without that not uncommon virtue among the low of honor among thieves. He will steal from a fellow tramp, if in need of what that fellow has, and will resort to violence when that is necessary." State *v.* Hogan, 63 Ohio St. 202, 215, 58 N. E. 572, 81 Am. St. Rep. 626, 52 L. R. A. 863.

"Because a man is a tramp he is not necessarily dangerous. The idea conveyed to the mind by the word is that simply of an idle, worthless fellow who wanders about the country seeking to secure a living without toil." Savannah, etc., R. Co. *v.* Boyle, 115 Ga. 836, 840, 42 S. E. 242, 59 L. R. A. 104, where it was held that there was no presumption that tramps caught stealing a ride and brought into a train under arrest were characters so dangerous as to make it altogether unsafe for any person to be lodged in the same car with them, where it was said that stealing a ride although a crime was only a misdemeanor.

Distinguished from vagrant.—Under statutory definitions of the term it seems that while all tramps are vagrants all vagrants are not tramps. Des Moines *v.* Polk County, 107 Iowa 525, 532, 78 N. W. 249; Johnson *v.* Waukesha County, 64 Wis. 281, 286, 25 N. W. 7. See also People *v.* Deacons, 109 N. Y. 374, 380.

46. For a discussion of the origin of the term "tram" see Blackpool, etc., Tramroad Co. *v.* Thornton Urban Dist. Council, [1907] 1 K. B. 568, 576, 71 J. P. 177, 76 L. J. K. B. 492, 96 L. T. Rep. N. S. 209, 5 Loc. Gov. 422, 23 T. L. R. 267.

47. Gough *v.* Jewett, 32 N. Y. App. Div. 79, 81, 52 N. Y. Suppl. 707, where it is said that such is the ordinary use of the word, and that in the absence of evidence that defendant knew of the custom of calling platforms used to carry away lumber from a sawmill by such name, the jury had no right to assume that the term was used in any other than its customary sense.

of railway laid down upon the surface of a street or common road with a rail adapted for use by ordinary vehicles.[48] (See, generally, STREET RAILROADS, 36 Cyc. 1338.)

TRANQUILLITY. Calmness; composure.[49]

TRANSACT BUSINESS. A phrase said to mean, in common parlance, the same thing as "to carry on business."[50] (See DOING BUSINESS, 14 Cyc. 825; FOREIGN CORPORATIONS, 19 Cyc. 1195, 1206, 1212; INSURANCE, 22 Cyc. 1380, 1386; PROCESS, 32 Cyc. 560 *et seq.*)

TRANSACTION. Something which has taken place whereby a cause of action has arisen;[51] whatever may be done by one person which affects another's rights, and out of which a cause of action may arise;[52] the doing or performing any business; the management of an affair;[53] the doing or performing of any business;

48. Toronto R. Co. *v.* Reg., 25 Can. Sup. Ct. 24, 29, where "street railway" is distinguished.

It is but an improved road or passway. Duncan *v.* American Standard Asphalt Co., 97 S. W. 392, 393, 30 Ky. L. Rep. 84.

"In England, the word . . . includes and is generally used to denote a street railway. It is of course a larger term. There are tramways which are not street railways, but all street railways are tramways within the meaning of that term as commonly used in that country. The word has also found its way into the French language, with . . . substantially the same meaning. In Canada the word is sometimes, though not generally, used to designate a street railway." Toronto R. Co. *v.* Reg., 4 Can. Exch. 262, 269.

49. Webster New Int. Dict.

"Public and domestic tranquillity" mean nothing more than public peace. *In re* Powers, 25 Vt. 261, 268.

50. Territory *v.* Harris, 8 Mont. 140, 144, 19 Pac. 286.

Construed as equivalent to "to do business," as used in a constitutional provision that "no corporation organized outside the limits of this state shall be allowed to transact business within this state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state" see Free Baptists' Gen. Conference *v.* Berkey, 156 Cal. 466, 468, 469, 105 Pac. 411.

The following acts have been held not to be "transacting business" within the meaning of the phrase as used in statutes requiring foreign corporations or insurance companies to do certain things before transacting business within the state: Adjusting a loss by the agent of a foreign insurance company. People *v.* Gilbert, 44 Hun (N. Y.) 522, 524. Bringing an action. American Button-Hole, etc., Co. *v.* Moore, 2 Dak. 280, 8 N. W. 131, 134; Orange Nat. Bank *v.* Traver, 7 Fed. 146, 148, 7 Sawy. 210. Entering into a contract with a city for street lighting by a foreign corporation. Hogan *v.* St. Louis, 176 Mo. 149, 156, 75 S. W. 604. Filling of an order for goods by a foreign corporation. Black-Clawson Co. *v.* Carlyle Paper Co., 133 Ill. App. 61, 67; Zuberbier Co. *v.* Harris, (Tex. Civ. App. 1896) 35 S. W. 403, 404; Reed *v.* Walker, 2 Tex. Civ. App. 92, 95, 21 S. W. 687. Making a contract of insurance with a foreign insurance company without the state, on property within the state. Clay F. & M. Ins. Co. *v.* Huron Salt, etc., Mfg. Co., 31 Mich. 346, 354. Taking a warehouse receipt by a foreign corporation as security for indebtedness. State *v.* Robb-Lawrence Co., 17 N. D. 257, 261, 115 N. W. 846, 16 L. R. A. N. S. 227.

Executing a lease is not transacting business within the meaning of a statute forbidding the transaction of business in the name of a partner not interested in the firm. Sparrow *v.* Kohn, 109 Pa. St. 359, 362, 58 Am. Rep. 726.

"Transacting business" by a foreign bank see Vancouver Commercial Bank *v.* Sherman, 28 Oreg. 573, 576, 43 Pac. 658, 52 Am. St. Rep. 811.

"Transaction of business" by a court see U. S. *v.* Fennell, 185 U. S. 236, 242, 22 S. Ct. 633, 46 L. ed. 890.

51. Craft Refrigerating Mach. Co. *v.* Quinnipiac Brewing Co., 63 Conn. 551, 560, 29 Atl. 76, 25 L. R. A. 856, where such is said to be the meaning of the term as employed in American codes of pleading.

"This notion of completed action strongly characterizes the word in the Latin language, from which through the Normans we have derived it, although we gain little assistance otherwise from these sources in determining its meaning, since both the Romans and the French have used it mainly as a juridical term to signify an agreement of parties in settlement of differences." Craft Refrigerating Mach. Co. *v.* Quinnipiac Brewing Co., 63 Conn. 551, 560, 29 Atl. 76, 25 L. R. A. 856.

52. Scarborough *v.* Smith, 18 Kan. 399, 406; Anderson L. Dict. [*quoted* in Duggar *v.* Pitts, 145 Ala. 358, 361, 39 So. 905; Garwood *v.* Schlichenmaier, 25 Tex. Civ. App. 176, 177, 60 S. W. 573]; Jones Ev. [*quoted* in Cunningham *v.* Speagle, 106 Ky. 278, 285, 50 S. W. 244, 20 Ky. L. Rep. 1833].

53. Holliday *v.* McKinnie, 22 Fla. 153, 161; Cunningham *v.* Speagle, 106 Ky. 278, 286, 50 S. W. 244, 20 Ky. L. Rep. 1833; Webster Dict. [*quoted* in Montague *v.* Thomason, 91 Tenn. 168, 173, 18 S. W. 264].

Employed in Bankrupt Law Consolidation Act of 1849 (12 & 13 Vict. c. 106, § 125) see Brewin *v.* Short, 5 E. & B. 227, 235, 1 Jur. N. S. 798, 24 L. J. Q. B. 297, 3 Wkly. Rep. 514, 85 E. C. L. 226.

management of any affair; performance; that which is done; an affair;[54] doing or performing; business; that which is done; an affair;[55] the doing or performing of any business or affair.[56] (Transaction: Between Husband and Wife, Testimony in Respect to, see WITNESSES. Causes of Action Arising From Same — As Counter-Claim, see RECOUPMENT, SET-OFF, AND COUNTER-CLAIM, 34 Cyc. 682; Joinder of, see JOINDER, ETC., OF ACTIONS, 23 Cyc. 411. With Decedent, Testimony in Respect to, see WITNESSES.)

TRANSACTOR. One who transacts or conducts any business or affairs.[57]

TRANSCRIBE. To write across or over.[58]

TRANSCRIPT. As a noun, a copy of the original record; an official copy;[59] substantially a copy;[60] a copy of an original record;[61] a copy of an original writing or deed;[62] a copy; particularly of a record;[63] a copy; a writing made from and according to an original; a writing or composition consisting of the same words with the original; a copy of any kind;[64] that which has been transcribed; a writing or composition consisting of the same words as the original; a written copy;[65] a writing made from or after an original; a copy.[66] As a verb, to copy or to copy

It may not be confined to what is done on one day, or at one place. Immediateness is tested, not by closeness of time, but by logical relation. Paducah First Nat. Bank *v.* Wisdom, 111 Ky. 135, 147, 63 S. W. 461, 23 Ky. L. Rep. 530. "A 'transaction' may, and not infrequently does, include a series of occurrences extending over a great length of time." Fraley *v.* Fraley, 150 N. C. 501, 506, 64 S. E. 381.

54. Webster Dict. [*quoted* in Duggar *v.* Pitts, 145 Ala. 358, 361, 39 So. 905; Garwood *v.* Schlichenmaier, 25 Tex. Civ. App. 176, 177, 60 S. W. 573].

55. Webster Dict. [*quoted* in Krehl *v.* Great Cent. Gas Consumers' Co., L. R. 5 Exch. 289, 291, 39 L. J. Exch. 197, 23 L. T. Rep. N. S. 72, 18 Wkly. Rep. 1035].

56. Kroh *v.* Heins, 48 Nebr. 691, 700, 67 N. W. 771.

A broader term than contract, for while every contract is a transaction, every transaction is not a contract. Roberts *v.* Donovan, 70 Cal. 108, 113, 9 Pac. 180, 11 Pac. 599; King *v.* Coe Commission Co., 93 Minn. 52, 54, 100 N. W. 667; Xenia Branch Bank *v.* Lee, 2 Bosw. (N. Y.) 694, 7 Abb. Pr. 372, 389; Jones Ev. [*quoted* in Cunningham *v.* Speagle, 106 Ky. 278, 289, 50 S. W. 244, 20 Ky. L. Rep. 1833].

"Transaction of business" in statutes relating to foreign corporations see Slaughter *v.* Canadian Pac. R. Co., 106 Minn. 263, 269, 119 N. W. 398; People *v.* Montreal, etc., Copper Co., 40 Misc. (N. Y.) 282, 285, 81 N. Y. Suppl. 974; Suydam *v.* Morris Canal, etc., Co., 6 Hill (N. Y.) 217; Vancouver Commercial Bank *v.* Sherman, 28 Oreg. 573, 576, 43 Pac. 658, 52 Am. St. Rep. 811. See also TRANSACT BUSINESS, *ante*, and Cross-References thereunder.

For other definitions of the term see JOINDER AND SPLITTING OF ACTIONS, 23 Cyc. 412; RECOUPMENT, SET-OFF, AND COUNTER-CLAIM, 34 Cyc. 686.

57. Holcomb *v.* Holcomb, 20 Hun (N. Y.) 156, 159.

58. Wilmoth *v.* Wheaton, 81 Kan. 29, 32, 105 Pac. 39, where it is said that as generally used the term means to reduce to writing.

59. State *v.* Carey, 44 Ind. App. 659, 84 N. E. 761, 762, 87 N. E. 670 [*citing* Anderson L. Dict.; Webster Dict.].

60. U. S. *v.* Gaussen, 19 Wall. (U. S.) 198, 212, 22 L. ed. 41.

Distinguished from "abstract" see Dearborn *v.* Patton, 4 Oreg. 58, 61; Harrison *v.* Southern Porcelain Mfg. Co., 10 S. C. 278, 283.

61. Dearborn *v.* Patton, 4 Oreg. 58, 61 [*citing* Burrill Dict.]; Anderson L. Dict. [*quoted* in Waitman *v.* Bowles, 3 Indian Terr. 294, 306, 58 S. W. 686].

"A transcript of a judgment is a copy of a judgment." Hastings School-Dist. *v.* Caldwell, 16 Nebr. 68, 72, 19 N. W. 634.

62. Bouvier L. Dict. [*quoted* in Waitman *v.* Bowles, 3 Indian Terr. 294, 306, 58 S. W. 686; State *v.* Washoe County Bd. of Equalization, 7 Nev. 83, 95].

63. Burrill L. Dict. [*quoted* in State *v.* Washoe County Bd. of Equalization, 7 Nev. 83, 95].

64. Webster Dict. [*quoted* in Waitman *v.* Bowles, 3 Indian Terr. 294, 306, 58 S. W. 686].

65. Webster Dict. [*quoted* in *In re* Dance, 2 N. D. 184, 189, 49 N. W. 733, 33 Am. St. Rep. 768].

Whether all the testimony is ordered transcribed or only a portion thereof, alike it is denominated a "transcript," under a statute specifying certain cases wherein the court may order a transcript of the shorthand notes. Kaeppler *v.* Pollock, 8 N. D. 59, 61, 76 N. W. 987.

66. Worcester Dict. [*quoted* in State *v.* Washoe County Bd. of Equalization, 7 Nev. 83, 95].

Synonymous with "copy." — Escavaille *v.* Stephens, 102 Tex. 514, 516, 119 S. W. 842.

"The word, not only in its popular but legal sense, means a copy of something already reduced to writing." State *v.* Washoe County Bd. of Equalization, 7 Nev. 83, 95. See also Moline, etc., Co. *v.* Curtis, 38 Nebr. 520, 527, 57 N. W. 161.

Statutory meaning of term in relation to appeals see Backhaus *v.* Buells, 43 Oreg. 558, 562, 72 Pac. 976, 73 Pac. 342; Tatum *v.* Massie, 29 Oreg. 140, 144, 44 Pac. 494.

officially; whence transcripted.[67] (Transcript: As Evidence — In General, see EVIDENCE, 17 Cyc. 323; In Trial De Novo, see JUSTICES OF THE PEACE, 24 Cyc. 741. Judgment Entered on — Amendment and Correction of, see JUDGMENTS, 23 Cyc. 864; Opening or Vacating, see JUDGMENTS, 23 Cyc. 893; Scire Facias to Enforce, see JUDGMENTS, 23 Cyc. 1435. Of Judgment — Execution on, see EXECUTIONS, 17 Cyc. 931; Filing in Other Court in General, see JUDGMENTS, 23 Cyc. 856; Garnishment on, see GARNISHMENT, 20 Cyc. 981; Necessity and Sufficiency to Create Lien, see JUDGMENTS, 23 Cyc. 1354; Necessity of Filing on Pleadings as an Estoppel, see JUDGMENTS, 23 Cyc. 1526; Of Court of Sister State, see JUDGMENTS, 23 Cyc. 1568; Revival on, see JUDGMENTS, 23 Cyc. 1437; Setting Forth or Annexing to Pleading in Action on, see JUDGMENTS, 23 Cyc. 1516. Of Justice's Judgment — Filing in Another County, see JUSTICES OF THE PEACE, 24 Cyc. 604; Filing in Court of Record, see JUDGMENTS, 23 Cyc. 857. Of Proceedings in State Court, Filing on Removal to Federal Court, see REMOVAL OF CAUSES, 34 Cyc. 1303. Of Record For Review — In Actions in Justice's Court, see JUSTICES OF THE PEACE, 24 Cyc. 698; In Civil Case in General, see APPEAL AND ERROR, 3 Cyc. 92; In Criminal Case, see CRIMINAL LAW, 12 Cyc. 857; In Probate Proceedings, see WILLS; In Proceedings to Forfeit Bail-Bond, see BAIL, 5 Cyc. 155; Presumption as to, see APPEAL AND ERROR, 3 Cyc. 274. Of Record on Appeal From County Board, see COUNTIES, 11 Cyc. 601. Of Record, Transmission on Change of Venue, see CRIMINAL LAW, 12 Cyc. 251. Payment of Fees of Clerk For Making as Requisite to Perfection of Appeal, see APPEAL AND ERROR, 2 Cyc. 817.)

TRANSFER. A. As a Noun. The act by which the owner of a thing delivers it to another person with the intent of passing the rights he had in it to the latter;[68] any act by which the owner of anything delivers or conveys it to another with the intent to pass his rights therein;[69] the bearing over of a right or title or property in a thing, from one to another;[70] the handing over or parting with property with intent to pass it or certain rights in it to another who becomes

In statute in reference to the trial of habeas corpus proceedings by a judge in vacation, providing that the transcript on appeal may be prepared by any person under the direction of the judge, and certified to by such judge, the term embraces proceedings which have been reduced to writing and properly authenticated. *Ex p.* Malone, 35 Tex. Cr. 297, 299, 31 S. W. 665, 33 S. W. 360.

67. Anderson L. Dict. [*quoted* in Waitman *v.* Bowles, 3 Indian Terr. 294, 306, 58 S. W. 686].

68. E. L. Cleveland Co. *v.* Chittenden, 81 Conn. 667, 668, 71 Atl. 935; Bouvier L. Dict. [*quoted* in Robertson *v.* Wilcox, 36 Conn. 426, 429; *Ex p.* Thomason, 16 Nebr. 238, 240, 20 N. W. 312]. See also *In re* Gould, 156 N. Y. 423, 428, 51 N. E. 287.

"In ordinary language it has a very general meaning, applying either to the removal of a thing or rights from one place or person to another, the changing of the control or possession of things, or to the conveyance of title." *In re* Peabody, 154 Cal. 173, 177, 97 Pac. 184.

More comprehensive than "sale" see Western Massachusetts Ins. Co. *v.* Riker, 10 Mich. 279, 281.

It means in legal proceedings, if not otherwise restricted, a transfer by writing. Andrews *v.* Carr, 26 Miss. 577, 578.

69. Hendrick *v.* Daniel, 119 Ga. 358, 361, 46 S. E. 438, where the term is said to be broader than "assignment."

Applied to negotiable paper it is a general word showing that the beneficial interest in the paper has passed to another but not indicating in what manner. Montague *v.* King, 37 Miss. 441, 443.

In reference to fraudulent conveyances, the term refers to change of ownership and excludes the idea of removing property from one place to another. *Ex p.* Thomason, 16 Nebr. 238, 240, 20 N. W. 312.

Foreclosure of mortgage constitutes a transfer. Waterbury Sav. Bank *v.* Lawler, 46 Conn. 243, 244.

70. Sands *v.* Hill, 55 N. Y. 18, 22 (where it is said that there is no meaning of the term which carries the idea of an act of extinction, hence it does not apply to the satisfaction of a chose in action); Lane *v.* Albertson, 78 N. Y. App. Div. 607, 618, 79 N. Y. Suppl. 947 (where the term is so construed as used in the articles of a joint stock association providing that the transfer of stock shall work a dissolution).

In its ordinary sense as applicable to real property, the term is either synonymous with "sale," or it imports something more than or subsequent to sale; selling being but one mode of transferring property. Ober *v.* Schenck, 23 Utah 614, 620, 65 Pac. 1073.

It does not describe a conveyance with covenants of title, but is usually, if not always, when applied technically, used in reference to an estate for years, or an equitable interest, or a chattel. Franklin *v.* Kelley, 2 Nebr. 79, 88.

the transferee;[71] an act or transaction by which the property of one person is by him vested in another.[72] In reference to street railroads, a check received by passengers upon their cars who have paid the usual fare, entitling them to leave the car at a certain designated point, and there within a limited time and without a further payment of fare, but upon presentation and delivery of the transfer check pursue their travels upon the connecting line.[73]

B. As a Verb. To convey or pass over the right of one person to another;[74] to carry across; to bear over from one place to another;[75] to convey from one person to another; to pass or hand over.[76]

71. *In re* Plum, 37 Misc. (N. Y.) 466, 469, 75 N. Y. Suppl. 940.

Statute of frauds.— Partition which merely severs the relation existing between tenants in common in the undivided whole and vests title to a correspondent part in severalty, is not such a sale or transfer of title as will be affected by the statute of frauds. McKnight *v.* Bell, 135 Pa. St. 358, 372, 19 Atl. 1036; Mellon *v.* Reed, 114 Pa. St. 647, 653, 8 Atl. 227.

72. Pearre *v.* Hawkins, 62 Tex. 434, 437.

Statutory definition.— In California civil code see Enscoe *v.* Fletcher, 1 Cal. App. 659, 664, 82 Pac. 1075. In New York Inheritance Tax Law see *In re* Hoffman, 143 N. Y. 327, 331, 38 N. E. 311; Matter of Wolfe, 89 N. Y. App. Div. 349, 350, 85 N. Y. Suppl. 949; Matter of Hall, 88 Hun (N. Y.) 68, 70, 34 N. Y. Suppl. 616; *In re* Plum, 37 Misc. (N. Y.) 466, 469, 75 N. Y. Suppl. 940. In Federal Bankruptcy Act of 1898 see BANKRUPTCY, 5 Cyc. 238 note 8 (25); Andrews *v.* Kellogg, 41 Colo. 35, 40, 92 Pac. 222; Sherman *v.* Luckhardt, 96 Mo. App. 320, 324, 70 S. W. 388; Marden *v.* Sugden, 71 N. H. 274, 276, 52 Atl. 74; West *v.* Lahoma Bank, 16 Okla. 328, 331, 85 Pac. 469; Pirie *v.* Chicago Title, etc., Co., 182 U. S. 438, 443, 21 S. Ct. 906, 45 L. ed. 1171; Walter A. Wood Mowing, etc., Mach. Co. *v.* Vanstory, 171 Fed. 375, 382, 96 C. C. A. 331; *In re* Tupper, 163 Fed. 766, 768; *In re* Riggs Restaurant Co., 130 Fed. 691, 693, 66 C. C. A. 48; *In re* Doscher, 120 Fed. 408, 413; *In re* Baker-Ricketson Co., 97 Fed. 489, 491; *In re* Rome Planing-Mill, 96 Fed. 812, 814.

What constitutes a transfer under attachment statutes see ATTACHMENT, 4 Cyc. 417; Hopkins *v.* Nichols, 22 Tex. 206, 210.

An ascertained transferee has been held not necessary to constitute a transfer under the New York inheritance tax law. *In re* Brez, 172 N. Y. 609, 610, 64 N. E. 958; *In re* Vanderbilt, 172 N. Y. 69, 72, 64 N. E. 782 [*modifying* 68 N. Y. App. Div. 27, 74 N. Y. Suppl. 450]; Matter of Le Brun, 39 Misc. (N. Y.) 516, 518, 80 N. Y. Suppl. 486.

"Transfer of freight, passengers or express matter" see Council Bluffs *v.* Kansas City, etc., R. Co., 45 Iowa 338, 346, 24 Am. Rep. 773.

"Transfer or renewal to a third person of a policy" distinguished from "assignment of the interest of the insured in a policy" see New York Mut. L. Ins. Co. *v.* Allen, 138 Mass. 24, 28, 52 Am. Rep. 245.

"'Transfer' or 'switching' service," used in reference to railroads, distinguished from "'transportation' service" see Dixon *v.* Georgia Cent. R. Co., 110 Ga. 173, 179, 35 S. E. 369.

"Transfer in trust" see Brown *v.* Bryan, 6 Ida. 1, 13, 51 Pac. 995.

73. *Ex p.* Lorenzen, 128 Cal. 431, 435, 61 Pac. 68, 79 Am. St. Rep. 47, 50 L. R. A. 55.

It means transportation for the same given fare. Gaedeke *v.* Staten Island Midland R. Co., 43 N. Y. App. Div. 514, 526, 60 N. Y. Suppl. 598.

"The ticket is a mere token, to be used for the convenience of the road. It is not the contract between the road and the passenger. It is a statement by the initial conductor to the subsequent conductor what the contract is, and what the passenger is entitled to, and, if it is not correct, the fault is that of the road." Memphis St. R. Co. *v.* Graves, 110 Tenn. 232, 237, 75 S. W. 729, 100 Am. St. Rep. 803.

74. Innerarity *v.* Mims, 1 Ala. 660, 669 (where such is said to be the general meaning); *Ex p.* Thomason, 16 Nebr. 238, 240, 20 N. W. 312.

"Transfer agent" see McClure *v.* Central Trust Co., 28 N. Y. App. Div. 433, 438, 53 N. Y. Suppl. 188 [*reversed* in 165 N. Y. 108, 119, 58 N. E. 777, 53 L. R. A. 153].

75. Hanna *v.* South St. Joseph Land Co., 126 Mo. 1, 13, 28 S. W. 652, where it is said that while these meanings are, no doubt, often intended by the use of the term, it has many broader meanings both in the language from which we derive it and in our own.

76. Century Dict. [*quoted* in Matter of Hitchins, 43 Misc. (N. Y.) 485, 492, 89 N. Y. Suppl. 472].

Used in wills in addition to such words as "pay over," "deliver over" and "devise," the term has been construed as showing that the testator did not intend a conversion of his real estate into personalty. Matter of Coolidge, 85 N. Y. App. Div. 295, 305, 83 N. Y. Suppl. 299; *In re* Thompson, 1 N. Y. Suppl. 213, 215.

"Transfer or assign" is applicable to choses in action, rights, and privileges, rather than tangible property, and are almost if not quite identical in meaning. Germer *v.* Triple-State Natural Gas, etc., Co., 60 W. Va. 143, 168, 54 S. E. 509, dissenting opinion.

"Agree to transfer" see Godwin *v.* Murchison Nat. Bank, 145 N. C. 320, 327, 59 S. E. 154, 17 L. R. A. N. S. 935.

"Mortgage, assign over, and transfer" see Gambril *v.* Doe, 8 Blackf. (Ind.) 140, 141, 44 Am. Dec. 760.

"Use and transfer" see Ogden *v.* Lathrop, 1 Sweeny (N. Y.) 643, 651.

(Transfer: In General, see ASSIGNMENTS, 4 Cyc. 1; DEEDS, 13 Cyc. 505; SALES, 35 Cyc. 1; VENDOR AND PURCHASER. As Act of — Bankruptcy, see BANKRUPTCY, 5 Cyc. 288; Insolvency, see INSOLVENCY, 22 Cyc. 1271. As Affected by — Insolvency of Corporation, see CORPORATIONS, 10 Cyc. 1236; Insolvency of Debtor in General, see BANKRUPTCY, 5 Cyc. 363; FRAUDULENT CONVEYANCES, 20 Cyc. 455; INSOLVENCY, 22 Cyc. 1285; Statute of Frauds, see FRAUDS, STATUTE OF, 20 Cyc. 218. As Affecting — Insurance, see FIRE INSURANCE, 19 Cyc. 742; MARINE INSURANCE, 20 Cyc. 611; Tax Lien, see TAXATION, 37 Cyc. 1145. As Consideration For Indorsement, see COMMERCIAL PAPER, 7 Cyc. 729 note 23. As Constituting Violation of Injunction, see INJUNCTIONS, 22 Cyc. 1018. As Essential of Advancement, see DESCENT AND DISTRIBUTION, 14 Cyc. 163. As Preference to Creditor, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 163; BANKRUPTCY, 5 Cyc. 369; FRAUDULENT CONVEYANCES, 20 Cyc. 572; INSOLVENCY, 22 Cyc. 1285. Between Husband and Wife — In General, see HUSBAND AND WIFE, 21 Cyc. 1271, 1664; Validity as to Creditors, see FRAUDULENT CONVEYANCES, 20 Cyc. 603. Between Parent and Child — In General, see PARENT AND CHILD, 29 Cyc. 1657; Validity as to Creditors, see FRAUDULENT CONVEYANCES, 20 Cyc. 607. By Bankrupt to Trustee Under Order of Court, see BANKRUPTCY, 5 Cyc. 345. By Husband in — Fraud of Wife, see HUSBAND AND WIFE, 21 Cyc. 1155, 1156; Fraud of Wife's Right to Alimony, see DIVORCE, 14 Cyc. 798. By Insolvent, Assignee, or Trustee, see INSOLVENCY, 22 Cyc. 1280. In Fraud of Creditors, see FRAUDULENT CONVEYANCES, 20 Cyc. 323. Injunction to Restrain, see INJUNCTIONS, 22 Cyc. 840. Marriage Settlement, see HUSBAND AND WIFE, 21 Cyc. 1241. Maturity For Purposes of, of — Certificate of Deposit, see COMMERCIAL PAPER, 7 Cyc. 854; Check, see COMMERCIAL PAPER, 7 Cyc. 852; Negotiable Instrument Payable on Demand, see COMMERCIAL PAPER, 7 Cyc. 849. Of Appropriations of Municipality, see MUNICIPAL CORPORATIONS, 28 Cyc. 1566. Of Bankruptcy Proceedings in Different Courts, see BANKRUPTCY, 5 Cyc. 308. Of Bill of Lading, see CARRIERS, 6 Cyc. 424; SHIPPING, 36 Cyc. 218. Of Bond, see BONDS, 5 Cyc. 782. Of Canadian Government Mining Lease or License, see MINES AND MINERALS, 27 Cyc. 628. Of Canal, see CANALS, 6 Cyc. 279. Of Causes — After Levy of Attachment Affecting Jurisdiction of Court, see ATTACHMENT, 4 Cyc. 458; Constitutionality of Laws Relating to, see CONSTITUTIONAL LAW, 8 Cyc. 824; From Federal Court to Other Federal Court or Division Thereof, see COURTS, 11 Cyc. 917, 948, 952; From Law to Equity and From Equity to Law, see TRIAL; From Lower Court to Appellate Court, see APPEAL AND ERROR, 2 Cyc. 789; From One Docket to Another, see TRIAL; From Provisional Court, see COURTS, 11 Cyc. 957, 959; From State Court to Court of Same State, see COURTS, 11 Cyc. 992; From State Court to Federal Court, see REMOVAL OF CAUSES, 34 Cyc. 1211; In Justice's Court, see JUSTICES OF THE PEACE, 24 Cyc. 510; Mandamus to Compel, see MANDAMUS, 26 Cyc. 204; On Abolition of Court or Creation of New Court, see COURTS, 11 Cyc. 714; On Disqualification of Judge, see JUDGES, 23 Cyc. 595; Review of Orders, see APPEAL AND ERROR, 2 Cyc. 592. Of City Warrant, see MUNICIPAL CORPORATIONS, 28 Cyc. 1570. Of Claim — Against City, see MUNICIPAL CORPORATIONS, 28 Cyc. 1753; For Purpose of Litigation, see CHAMPERTY AND MAINTENANCE, 7 Cyc. 855. Of Common Lands, see COMMON LANDS, 8 Cyc. 354. Of Community or Separate Property, see HUSBAND AND WIFE, 21 Cyc. 1666. Of Copyright, see COPYRIGHT, 9 Cyc. 931. Of Corporate Assets on Reorganization of Corporation, see CORPORATIONS, 10 Cyc. 286. Of County Warrant, see COUNTIES, 11 Cyc. 537. Of Criminal Cause, see CRIMINAL LAW, 12 Cyc. 222. Of Deposit in — Bank in General, see BANKS AND BANKING, 5 Cyc. 518; Savings Bank, see BANKS AND BANKING, 5 Cyc. 609. Of Easement, see EASEMENTS, 14 Cyc. 1184. Of Estate or Interest of Cestui Que Trust, see TRUSTS. Of Exempt Property, see EXEMPTIONS, 18 Cyc. 1446. Of Franchise

Sufficiency to convey title.— The following phrases held sufficient to convey title: "Transfer and assign." Sanders *v.* Ransom, 37 Fla. 457, 461, 20 So. 530. "Transfer, sell, release." Whalon *v.* North Platte Canal, etc., Co., 11 Wyo. 313, 347, 71 Pac. 995.

of — Corporation, see CORPORATIONS, 10 Cyc. 1090; Ferry Owner, see FERRIES, 19 Cyc. 504. Of Ground-Rents, see GROUND-RENTS, 20 Cyc. 1375. Of Guaranty, see GUARANTY, 20 Cyc. 1431. Of Guardianship to Another State, see GUARDIAN AND WARD, 21 Cyc. 61. Of Homestead — In General, see HOMESTEADS, 21 Cyc. 527; Of Survivor, see HOMESTEADS, 21 Cyc. 593. Of Insurance — Business, see INSURANCE, 22 Cyc. 1403, 1419; Policies and Certificates, see FIRE INSURANCE, 19 Cyc. 631; LIFE INSURANCE, 25 Cyc. 764; LIVE-STOCK INSURANCE, 25 Cyc. 1518; MARINE INSURANCE, 26 Cyc. 611; MUTUAL BENEFIT INSURANCE, 29 Cyc. 93. Of Interest as Ground For Abatement of — Action, see ABATEMENT AND REVIVAL, 1 Cyc. 116; Appeal, see APPEAL AND ERROR, 2 Cyc. 781. Of Judgment, see JUDGMENTS, 23 Cyc. 1413. Of Land — Granted to State in Aid of Internal Improvements, see PUBLIC LANDS, 32 Cyc. 935; Held Adversely, see CHAMPERTY AND MAINTENANCE, 6 Cyc. 867; Under Water, see NAVIGABLE WATERS, 29 Cyc. 371. Of Legal Title as Creating Trust, see TRUSTS. Of License — In General, see LICENSES, 25 Cyc. 625; Granted under Police Power, see MUNICIPAL CORPORATIONS, 28 Cyc. 748; To Sell Intoxicating Liquor, see INTOXICATING LIQUORS, 23 Cyc. 154. Of Literary Property, see LITERARY PROPERTY, 25 Cyc. 1498. Of Married Woman's Separate Property, see HUSBAND AND WIFE, 21 Cyc. 1496. Of Mining Lease, see MINES AND MINERALS, 27 Cyc. 701. Of Mortgaged Chattel by Mortgagor, see CHATTEL MORTGAGES, 7 Cyc. 37. Of Mortgaged Property or Equity of Redemption, see MORTGAGES, 27 Cyc. 1333. Of Mortgage or Debt Secured Thereby, see MORTGAGES, 27 Cyc. 1278. Of Municipal Securities, see MUNICIPAL CORPORATIONS, 28 Cyc. 1610. Of Municipal Warrant or Certificate of Indebtedness, see MUNICIPAL CORPORATIONS, 28 Cyc. 1570. Of Negotiable Instrument — In General, see COMMERCIAL PAPER, 7 Cyc. 783; Allegation as to in Action on, see COMMERCIAL PAPER, 8 Cyc. 112; Payment to Original Holder After, see COMMERCIAL PAPER, 7 Cyc. 1036. Of Partnership Property or Assets, see PARTNERSHIP, 30 Cyc. 493. Of Partner's Interest in Firm, see PARTNERSHIP, 30 Cyc. 458. Of Passenger to Other Train or Connecting Line, see CARRIERS, 6 Cyc. 584. Of Patent, see PATENTS, 30 Cyc. 943. Of Pew, see RELIGIOUS SOCIETIES, 34 Cyc. 1179. Of Pledge or Debt, see PLEDGES, 31 Cyc. 848. Of Policeman, see MUNICIPAL CORPORATIONS, 28 Cyc. 524. Of Prisoner From Place of Confinement, see PRISONS, 32 Cyc. 330. Of Property — Corporate Powers Relating to, see CORPORATIONS, 10 Cyc. 1122; In Payment of Debt, see PAYMENT, 30 Cyc. 1188; Of Partnership by Partner, see PARTNERSHIP, 30 Cyc. 493; Of Partnership to Pay or Secure Individual Debts, see PARTNERSHIP, 30 Cyc. 550; Subject to Execution, see EXECUTIONS, 17 Cyc. 1068; Subject to Judgment Lien, see JUDGMENTS, 23 Cyc. 1391; Subject to Landlord's Lien, see LANDLORD AND TENANT, 24 Cyc. 1264; Subject to Lien in General, see LIENS, 25 Cyc. 680. Of Pupil From One School-District to Another For Educational Purposes, see SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 1115. Of Railroad and Railroad Property, see RAILROADS, 33 Cyc. 78, 381, 700. Of Receiver's Certificate, see RECEIVERS, 34 Cyc. 302. Of Remainder, see ESTATES, 16 Cyc. 652. Of Reversion — In General, see ESTATES, 16 Cyc. 662; By Lessor, see LANDLORD AND TENANT, 24 Cyc. 925. Of Rights — Acquired Under Power of Eminent Domain, see EMINENT DOMAIN, 15 Cyc. 1025; In Public Lands, see PUBLIC LANDS, 32 Cyc. 1066. Of Riparian — Land, see NAVIGABLE WATERS, 29 Cyc. 366; WATERS; Rights, see NAVIGABLE WATERS, 29 Cyc. 371; WATERS. Of School — Bonds, see SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 996; District Warrants, see SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 985; Lands, see PUBLIC LANDS, 32 Cyc. 876. Of Seat in Stock Exchange, see EXCHANGES, 17 Cyc. 864. Of Ship, see SHIPPING, 36 Cyc. 40. Of Standing Timber, see LOGGING, 25 Cyc. 1549. Of State Warrant, see STATES, 36 Cyc. 896. Of Stock of — Bank, see BANKS AND BANKING, 5 Cyc. 437; Bank as Affecting Stock-Holder's Liability For Debts of Bank, see BANKS AND BANKING, 5 Cyc. 444; Building and Loan Society, see BUILDING AND LOAN SOCIETIES, 6 Cyc. 128; Corporation, see CORPORATIONS, 10 Cyc. 577; Corporation as Affected by Lien of Corporation, see CORPORATIONS, 10 Cyc. 580; Corporation as Affecting Right

to Dividend, see CORPORATIONS, 10 Cyc. 556; Corporation as Affecting Stock-Holder's Liability For Debts of Corporation, see CORPORATIONS, 10 Cyc. 700; Corporation on Books of Corporation, see CORPORATIONS, 10 Cyc. 593; Joint Stock, see JOINT STOCK COMPANIES, 23 Cyc. 473. Of Street Railroad Franchise or Property, see STREET RAILROADS, 36 Cyc. 1431. Of Swamp Lands, see PUBLIC LANDS, 32 Cyc. 912. Of Tax Exemption or of Property Exempt From Taxation, see TAXATION, 37 Cyc. 897. Of Telegraph or Telephone Franchise, see TELEGRAPHS AND TELEPHONES, 37 Cyc. 1616. Of Theater Ticket, see THEATERS AND SHOWS, *ante*, p. 264. Of Ticket by a Passenger, see CARRIERS, 6 Cyc. 572. Of Timber Lands, see LOGGING, 25 Cyc. 1547. Of Turnpike or Toll Road, see TOLL ROADS, *ante*, p. 384. Of Water Rights — In General, see WATERS; In Public Lands, see WATERS. Of Wharf, see WHARVES. Pending — Action or Suit in General, see LIS PENDENS, 25 Cyc. 1447; Action or Suit as Ground For Abatement, see ABATEMENT AND REVIVAL, 1 Cyc. 116; Garnishment, see GARNISHMENT, 20 Cyc. 1064. Subject and Title of Act Relating to, see STATUTES, 36 Cyc. 1046. Tax on — In General, see TAXATION, 37 Cyc. 1559, 1587; As Abridging Privileges and Immunities of Citizens, see CONSTITUTIONAL LAW, 8 Cyc. 1047; Federal Tax, see INTERNAL REVENUE, 22 Cyc. 1616. Ticket — Between Connecting Street Railroads, see STREET RAILROADS, 36 Cyc. 1453; Mandamus to Compel Issue, see MANDAMUS, 26 Cyc. 375; Municipal Regulations as to, see MUNICIPAL CORPORATIONS, 28 Cyc. 730. To Effect or Prevent Purpose of Removal of Cause to Federal Court, see REMOVAL OF CAUSES, 34 Cyc. 1263. To Evade — Assessment For Public Improvement, see MUNICIPAL CORPORATIONS, 28 Cyc. 1133; Taxation, see TAXATION, 37 Cyc. 770. To Give Jurisdiction to Federal Court, see COURTS, 11 Cyc. 872.)

TRANSFERABLE. A term said to include every means by which property may be passed from one person to another.[77]

TRANSFER COMPANY. See CARRIERS, 6 Cyc. 369.

TRANSFER TAX. See TAXATION, 37 Cyc. 1587.

TRANSFERUNTUR DOMINIA SINE TITULO ET TRADITIONE, PER USUCAPTIONEM, SCIL, PER LONGAM CONTINUAM ET PACIFICAM POSSESSIONEM. A maxim meaning "Rights of dominion are transferred without title or delivery, by usucaption, to-wit, long and quiet possession." [78]

TRANSFORMER. In connection with an electric light system, a coil of copper wire contained in a sheet-iron box, and usually placed on a pole outside of the building.[79]

TRANSGRESSIO EST CUM MODUS NON SERVATUR NEC MENSURA, DEBIT ENIM QUILIBET IN SUO FACTO MODUM HABERE ET MENSURAM. A maxim meaning "Transgression is when neither mode nor measure is preserved, for every one in his act ought to have a mode and measure." [80]

TRANSGRESSIONE MULTIPLICATA, CRESCAT PŒNÆ INFLICTIO. A maxim meaning "When transgression is multiplied, let the infliction of punishment be increased." [81]

TRANSGRESSIVE TRUST. In equity, the substantial equivalent of what in law is called a perpetuity.[82]

TRANSHIPMENT. See MARINE INSURANCE, 26 Cyc. 591 text and notes 82, 83, 628 text and note 95; SHIPPING, 36 Cyc. 219.

TRANSIENT.[83] As an adjective, passing across, as from one thing or person

77. Gathercole *v.* Smith, 17 Ch. D. 1, 9, 50 L. J. Ch. 671, 44 L. T. Rep. N. S. 439, 29 Wkly. Rep. 434.

"Transferable at the bank" see Williams *v.* Mechanics' Bank, 29 Fed. Cas. No. 17,727, 5 Blatchf. 59, 62.

"Transferable by delivery" see American Trust, etc., Bank *v.* Gueder, etc., Mfg. Co., 150 Ill. 336, 342, 37 N. E. 227.

78. Black L. Dict. [*citing* Coke Litt. 113].

79. Snell *v.* Clinton Electric Light, etc., Co., 196 Ill. 626, 630, 63 N. E. 1082, 89 Am. St. Rep. 341, 58 L. R. A. 284, where it is said: "Its office is to reduce the current from the main line, or, rather, to induce a lesser current in the wire leading to the house for house use."

80. Black L. Dict. [*citing* Coke Litt. 37].

81. Bouvier L. Dict. [*citing* 2 Coke Inst. 479].

82. Pulitzer *v.* Livingston, 89 Me. 359, 364, 36 Atl. 635.

83. Derived from the Latin, *trans*, over; *ire*, go. Century Dict. [*quoted* in Com. *v.* Town-

to another; passing with time; of short duration; not permanent; not lasting; temporary; [84] to pass away; not stationary or lasting; [85] not lasting; not permanent; of short duration.[86] As a noun, one who, or that which is temporary, passing, or not permanent.[87] (Transient: Pauper — In General, see PAUPERS, 30 Cyc. 1066; Furnishing Aid and Support to, see PAUPERS, 30 Cyc. 1142; Removal of, see PAUPERS, 30 Cyc. 1112. Residence, see DOMICILE, 14 Cyc. 841.)

TRANSIT. As used in reference to the seller's right of stoppage *in transitu*, a term which, it is said, is not confined in its meaning to the passage of the goods through the country, but includes their situations in every stage, from the time of passing out of the control or possession of the vendor into that of the vendee.[88] (See IN TRANSITU, 23 Cyc. 345.)

TRANSIT CAR. A term which has a well defined and uniform meaning in a contract for the sale and delivery of merchandise.[89]

TRANSIT IN REM JUDICATAM. A maxim meaning "It passes into a matter adjudged." [90]

ley, 7 Pa. Dist. 413, 416]. "The word '*transeo*,' from which transient is derived, means literally to go over — the participle of the verb, *transiens* (going over) — not stationary: but by no means implying, by strict inference, that there are any *termini* in the *transitio*. *Transeo* but seems to be the opposite of *resideo*, which is to remain, to dwell, to continue." Middlebury *v.* Waltham, 6 Vt. 200, 203.

84. Century Dict. [*quoted* in Com. *v.* Townley, 7 Pa. Dist. 413, 416].

85. Webster Dict. [*quoted* in Twining *v.* Elgin, 38 Ill. App. 356, 360].

86. Webster Dict. [*quoted* in Com. *v.* Townley, 7 Pa. Dist. 413, 416].

It is "a relative term, which, in the absence of an inflexible statutory or legislative definition, may be the source of much vexation and uncertainty." Waukon *v.* Fisk, 124 Iowa 464, 468, 100 N. W. 475.

"Transient foreigner" in Spanish law is one who visits the country without the intention of remaining. Yates *v.* Iams, 10 Tex. 168, 170.

"Transient merchant" is a transitory or temporary trader who has no intention of locating permanently (State *v.* Parr, 109 Minn. 147, 150, 123 N. W. 408, 134 Am. St. Rep. 759, where "permanent merchant" is distinguished); one who goes from place to place, taking with him the chattels which he offers for sale or in which he deals or trades, a person who conducts his business substantially the same as a peddler (Wausau *v.* Heideman, 119 Wis. 244, 247, 96 N. W. 549, where transient merchant, trader, or dealer is so defined, and where it is held that a person who as agent merely solicits orders for goods for his principal, whether by sample or otherwise, is not included by the terms). "The occupation of the itinerant or transient merchant, the mode of conducting it, closely resemble the business of hawkers and peddlers, and the methods generally practiced by them in disposing of their goods and wares. The transient merchant has no fixed place of business, but migrates from town to town, remaining only long enough to dispose of his stock of goods. He is usually a stranger in the community where he offers his goods and makes his sales, and is often wholly irresponsible. Tempting advertisements and extravagant representations in regard to the character of his stock and the prices at which it will be sold are calculated to create excitement and to deceive the unwary, who are generally without redress for the impositions practiced upon them." Levy *v.* State, 161 Ind. 251, 259, 68 N. E. 172. The term relates to the character of the business carried on and does not have reference to the residence of the individual. Ottumwa *v.* Zekind, 95 Iowa 622, 624, 64 N. W. 646, 58 Am. St. Rep. 447, 29 L. R. A. 734, construing ordinance requiring a license from all transient merchants. See also State *v.* Nelson, 128 Iowa 740, 742, 105 N. W. 327. Statutory definition see Clay *v.* Wrought Iron Range Co., 42 Ind. App. 145, 85 N. E. 119, 120; Simoyan *v.* Rohan, 36 Ind. App. 495, 76 N. E. 176, 178. See, generally, HAWKERS AND PEDDLERS, 21 Cyc. 364.

"Transient vender of merchandise," as used in municipal ordinance relating to licenses see Waterloo *v.* Heely, 81 Ill. App. 310, 315; Twining *v.* Elgin, 38 Ill. App. 356, 361.

Transient dealer or trader.— The ordinary meaning of the term is one who goes from place to place carrying goods for the purpose of selling, trading, or dealing in the same, as distinct from one who does the same kind of business without traveling about. Wausau *v.* Heideman, 119 Wis. 244, 247, 96 N. W. 549.

"Transient person" see PAUPERS, 30 Cyc. 1112 note 62.

"Transient trader" defined see HAWKERS AND PEDDLERS, 21 Cyc. 370 note 37.

87. Century Dict. [*quoted* in Com. *v.* Townley, 7 Pa. Dist. 413, 416].

Distinguished from "resident" see New Haven *v.* Middlebury, 63 Vt. 399, 404, 21 Atl. 608.

88. Sutro *v.* Hoile, 2 Nebr. 186, 195.

Construed in statute relating to inspection of grain as referring to an intrastate and not an interstate transit see Great Northern R. Co. *v.* Walsh, 47 Fed. 406, 408.

89. Stock *v.* Towle, 97 Me. 408, 412, 54 Atl. 918, where it was said to mean a car already loaded with flour and on its way from the mill to the vendee.

90. Peloubet Leg. Max.

Applied in: Blythe *v.* Cordingly, 20 Colo.

TRANSITIVE COVENANTS. Those personal covenants the duty of performing which passes over to the representatives of the covenantor.[91]

TRANSITORY ACTIONS. Those personal actions which might have arisen in any county, actions in assumpsit or of contract, actions which seek nothing more than the recovery of money, or personal chattels, whether they sound in contract or tort;[92] such personal actions as seek only the recovery of money or personal chattels, whether they sound in tort or contract;[93] personal actions brought for the recovery of money or personal chattels, whether they sound in tort or contract.[94] (Transitory Actions: Bastardy Proceedings, see BASTARDS, 5 Cyc. 652. Jurisdiction of — Courts in General, see COURTS, 11 Cyc. 663; Federal Courts, see COURTS, 11 Cyc. 850. Venue of, see VENUE.)

TRANSIT TERRA CUM ONERE. A maxim meaning "Land passes subject to any burden affecting it."[95]

TRANSLATE. To give the sense or equivalent of, as a word, an expression, or an entire work in another language or dialect; to explain by clearer terms, or to express in a different form or style of language.[96]

TRANSLATION. The act of turning into another language; interpretation; something made by translation; version.[97] (Translation: Interpreter — Appointment and Services in General, see COURTS, 11 Cyc. 720; CRIMINAL LAW, 12 Cyc. 520; Examination of Witnesses, see WITNESSES; In Taking Deposition, see DEPOSITIONS, 13 Cyc. 933; Reception of Evidence Through, see CRIMINAL LAW, 12 Cyc. 545. Of Foreign Language — In Action For Libel or Slander, see LIBEL AND SLANDER, 25 Cyc. 448; In Extradition Proceedings, see EXTRADITION (INTERNATIONAL) 19 Cyc. 64; In Indictment For Forgery, see FORGERY, 19 Cyc. 1399; Of Document in Evidence, see EVIDENCE, 17 Cyc. 363 note 55. Of Statute — In General, see STATUTES, 36 Cyc. 1116; Foreign Law, Evidence of Skilled Witness as to, see EVIDENCE, 17 Cyc. 70 note 50.)

App. 508, 80 Pac. 494, 497; Fairchild *v.* Holly, 10 Conn. 474, 479; Morgan *v.* Chester, 4 Conn. 387, 389; Steers *v.* Shaw, 53 N. J. L. 358, 359, 21 Atl. 940; Fox *v.* Prickett, 34 N. J. L. 13, 16; Robertson *v.* Smith, 18 Johns. (N. Y.) 459, 480, 9 Am. Dec. 227; Bunker *v.* Bunker, 140 N. C. 18, 22, 52 S. E. 237; Rudolph *v.* Sturgis, 17 Montg. Co. Rep. (Pa.) 13, 14; Moore *v.* Tate, 22 Gratt. (Va.) 351, 357; Kendall *v.* Hamilton, 4 App. Cas. 504, 526, 48 L. J. C. P. 705, 41 L. T. Rep. N. S. 418, 28 Wkly. Rep. 95; Victoria Mut. F. Ins. Co. *v.* Bethune, 1 Ont. App. 398, 407; Abell *v.* Church, 26 U. C. C. P. 338, 351; Edinburgh L. Assur. Co. *v.* Clark, 10 U. C. C. P. 351, 357.

91. Cyclopedic L. Dict.

92. Educational Soc., etc. *v.* Varney, 54 N. H. 376, 378.

93. Ackerson *v.* Erie R. Co., 31 N. J. L. 309, 312, where it is said: "They are universally founded on the supposed violation of rights, which, in contemplation of law, have no locality."

94. McLeod *v.* Connecticut, etc., R. Co., 58 Vt. 727, 736, 6 Atl. 648 [*citing* 1 Chitty Pl. 273]. See also Lister *v.* Wright, 2 Hill (N. Y.) 320, 321.

Personal actions are actions of a transitory character. They follow the party wherever he is found. McIntire *v.* McIntire, 5 Mackey (D. C.) 344, 350.

Distinguished from "local actions" see McGonigle *v.* Atchison, 33 Kan. 726, 735, 7 Pac. 550; Mason *v.* Warner, 31 Mo. 508, 510; Condon *v.* Leipsiger, 17 Utah 498, 501, 55 Pac. 82; Hill *v.* Pride, 4 Call (Va.) 107, 108; Livingston *v.* Jefferson, 15 Fed. Cas. No. 8,411, 1 Brock. 203, 210; Brereton *v.* Canadian Pac. R. Co., 29 Ont. 57, 60.

Examples of transitory actions: Action against railroad company for personal injury. South Florida R. Co. *v.* Weese, 32 Fla. 212, 223, 13 So. 436. Action for a foreign injury. Smith *v.* Bull, 17 Wend. (N. Y.) 323, 326. Action for libel or slander. Herhold *v.* White, 114 Ill. App. 186, 188. Action for negligence. Barney *v.* Burnstenbinder, 64 Barb. (N. Y.) 212, 214. Action of covenant founded on contract between the parties and their executors or administrators. Lienow *v.* Ellis, 6 Mass. 331, 332. Action of debt for escape. Jones *v.* Pemberton, 7 N. J. L. 350, 351. Action on the case against a railroad company for killing stock on its tracks by reason of the company's failure to keep the adjoining fence in repair. Illinois Cent. R. Co. *v.* Swearingen, 33 Ill. 289, 295.

95. Black L. Dict. [*citing* Coke Litt. 231*a*; Broom Leg. Max. 495, 706].

Applied in: Mygatt *v.* Coe, 124 N. Y. 212, 222, 26 N. E. 611, 11 L. R. A. 646; Taylor *v.* Dodd, 2 Thomps. & C. (N. Y.) 88, 94 [*affirmed* in 58 N. Y. 335].

96. Rasmussen *v.* Baker, 7 Wyo. 117, 140, 50 Pac. 819, 38 L. R. A. 773.

97. Johnson Dict. [*quoted* in Wood *v.* Chart, L. R. 10 Eq. 193, 202, 39 L. J. Ch. 641, 22 L. T. Rep. N. S. 432, 18 Wkly. Rep. 822, argument of counsel].

"Generally speaking, a translation need not consist of transferring from one language into

TRANSMISSION. The act of transmitting, or the state of being transmitted; transmittal; transference.[98] Applied to a telegraph message, a term which includes delivery.[99] In the civil law, the right which heirs or legatees may have of passing to their successors the inheritance or legacy to which they were entitled, if they happen to die without exercising their rights.[1] (Transmission: Of Deposition, see DEPOSITIONS, 13 Cyc. 961. Of Record on Appeal or Other Proceedings For Review, see APPEAL AND ERROR, 3 Cyc. 114; CRIMINAL LAW, 12 Cyc. 859. Of Record on Change of Venue, see CRIMINAL LAW, 12 Cyc. 252. Of Telegraph or Telephone Message, see TELEGRAPHS AND TELEPHONES, 37 Cyc. 1665.)

TRANSMIT. A word which is sometimes used in two senses.[2] First, to send from one person to another; to communicate;[3] to send from one person or place to another;[4] to convey, to transfer, to impart.[5] Second, to suffer to pass through.[6] (Transmit: Capacity of Bastards to, see BASTARDS, 5 Cyc. 642. See also TRANSMISSION.)

TRANSMITTER. Applied to a telephone, the mouth piece, into which words are spoken, with the diaphragm, etc., immediately connected with it.[7]

TRANSMUTATION. The change of one species into another; the change from one nature, form or substance into another.[8]

TRANSPORT.[9] To remove;[10] to carry or convey from one place to another;[11] to carry, bear or convey from one place or country to another;[12] to carry; to

another; it may apply to the expression of the same thoughts in other words of the same language." Rasmussen *v.* Baker, 7 Wyo. 117, 141, 50 Pac. 819, 38 L. R. A. 773.

98. Century Dict.

"Transmission company" defined by statute see Hine *v.* Wadlington, 26 Okla. 389, 390, 109 Pac. 301.

99. Western Union Tel. Co. *v.* Braxton, 165 Ind. 165, 171, 74 N. E. 985.

1. Black L. Dict. [*citing* Domat, liv. 3, t. 1, s. 10; Toullier No. 186; Dig. 50, 17, 54; Code 6, 51].

2. Garland *v.* Harrison, 8 Leigh (Va.) 368, 394.

In connection with inheritance, it is a word of two significations implying the transmission of an estate by descent, either from a person or through him. Nothing is more familiar than to speak of a person transmitting from himself. Garland *v.* Harrison, 8 Leigh (Va.) 368, 394.

3. Parker *v.* Western Union Tel. Co., 87 Mo. App. 553, 559 [*citing* Century Dict.; Webster Dict.; Worcester Dict.]; Dudley *v.* Western Union Tel. Co., 54 Mo. App. 391, 398 [*citing* Webster Dict.].

It means the same as "send" or "remit" and does not mean "lodge," as used in a statute imposing a penalty upon members of house of commons for failure to transmit a return of their election expenses to the returning officer. Mackinnon *v.* Clark, [1898] 2 Q. B. 251, 255, 67 L. J. Q. B. 763, 79 L. T. Rep. N. S. 83, 14 T. L. R. 485, 47 Wkly. Rep. 19.

4. Johnson Dict.; Webster Dict. [both *quoted* in Garland *v.* Harrison, 8 Leigh (Va.) 368, 382, where it is said that this appears to be the principal meaning].

A letter deposited in a post-office is in every reasonable sense "transmitted" whether the person addressed resides in the same place or at a different one. Stanton *v.* Kline, 11 N. Y. 196, 199.

5. Garland *v.* Harrison, 8 Leigh (Va.) 368, 394, where the term is so used in reference to the inheritance of an estate.

6. Webster Dict. [*quoted* in Garland *v.* Harrison, 8 Leigh (Va.) 368, 382].

Construction in will, giving land to decedent's brother, and other land to his niece, providing that they should hold their respective shares "he independently of his wife, and she of her future husband, when she shall marry, and transmit that share, respectively, to their children, if they shall have such, free from all incumbrances and debts." Shannon *v.* Bonham, 27 Ind. App. 369, 60 N. E. 951, 953.

"Transmitting estates," as used in a statute providing that bastards shall be capable of inheriting from and through their mother and of transmitting estates, is construed so as to exclude the father and pass the entire estate to the mother, since brothers and sisters could only inherit through the father. Ford *v.* Boone, 32 Tex. Civ. App. 550, 552, 75 S. W. 353.

7. State *v.* Halliday, 61 Ohio St. 352, 376, 56 N. E. 118, 49 L. R. A. 427.

8. State *v.* Smith, 51 Kan. 120, 123, 32 Pac. 927, where it is said that while the term is sometimes so defined, in an instruction by the court "that a sale in law is the transmutation of personal property from one person to another for a price," it meant "change" or "exchange" and was not misleading to the jury.

9. **Derived from the Latin word** *transportare,* compounded from the word *trans,* meaning over or beyond, and *portare,* to carry. Walker *v.* Southern R. Co., 137 N. C. 163, 169, 49 S. E. 84.

10. Walker *v.* Southern R. Co., 137 N. C. 163, 165, 49 S. E. 84, where such is said to be one of its primary significations.

11. Walker *v.* Southern R. Co., 137 N. C. 163, 165, 49 S. E. 84; State *v.* Pope, 79 S. C. 87, 90, 60 S. E. 234.

12. State *v.* Pickett, 47 S. C. 101, 103, 25 S. E. 46, where "handling" is distinguished,

convey;[13] to carry or convey from one place to another; to move from one place to another.[14]

TRANSPORTATION. Carriage from one place to another.[15] In criminal law, a species of punishment consisting in removing the criminal from his own country to another (usually a penal colony), there to remain in exile for a prescribed period.[16] (Transportation: As Constituting Commerce, see COMMERCE, 7 Cyc. 417. As Subject of Municipal Regulation, see MUNICIPAL CORPORATIONS, 28 Cyc. 731. Authority of Municipality as to, see MUNICIPAL CORPORATIONS, 28 Cyc. 923. By Carrier of Goods — In General, see SHIPPING, 36 Cyc. 219; Charges For, see CARRIERS, 6 Cyc. 491; Custody of Goods Before and After, see CARRIERS, 6 Cyc. 453; Duty as to, see CARRIERS, 6 Cyc. 436; Special Contract For, see CARRIERS, 6 Cyc. 427. By Carrier of Passengers — In Palace or Sleeping Cars, see CARRIERS, 6 Cyc. 656; Performance of Contract or Duty as to, see CARRIERS, 6 Cyc. 581. Combinations to Control, see MONOPOLIES, 27 Cyc. 902. Company as Common Carrier, see CARRIERS, 6 Cyc. 369. Cost of as Affecting Valuation of Imports at Custom-House, see CUSTOMS DUTIES, 12 Cyc. 1143. Evidence of Skilled Witness as to, see EVIDENCE, 17 Cyc. 209. License and Regulation of Means of, see LICENSES, 25 Cyc. 616. Lines, Power of Corporation to Establish, see CORPORATIONS, 10 Cyc. 1144. Of Baggage of Passenger, see CARRIERS, 6 Cyc. 661. Of Cattle, Regulation of Commerce, see COMMERCE, 7 Cyc. 432. Of Destitute Seamen, Powers and Duties of Consul as to, see AMBASSADORS AND CONSULS, 2 Cyc. 273. Of Diseased Animals, see ANIMALS, 2 Cyc. 333. Of Explosives, Liability For Illegal or Negligent, see EXPLOSIVES, 19 Cyc. 5. Of Goods Sold, see SALES, 35 Cyc. 35, 101, 196, 493. Of Intoxicating Liquors as Criminal Offense, see INTOXICATING LIQUORS, 23 Cyc. 174. Of Mail, see POST-OFFICE, 31 Cyc. 987. Of Materials For Construction of Building, Mechanic's Lien For, see MECHANICS' LIENS, 27 Cyc. 44. Of Prisoner, Fees of Sheriffs, see SHERIFFS AND CONSTABLES, 35 Cyc. 1593. Of Property of United States as Condition of Grant of Lands, in Aid of Railroad, see PUBLIC LANDS, 32 Cyc. 966. Of Pupil, see SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 970.)

13. U. S. *v.* Sheldon, 2 Wheat. (U. S.) 119, 120, 4 L. ed. 199.

14. Webster Dict. [*quoted* in Columbia Conduit Co. *v.* Com., 90 Pa. St. 307, 309, where it is said: "Throughout all of the derivations from the word transport we find the same part of the definition 'to remove'"].

"Transported" as used in a way-bill construed as equivalent of "carried" and quite distinct from the idea of "forwarding" see Ogdensburg, etc., R. Co. *v.* Pratt, 22 Wall. (U. S.) 123, 133, 22 L. ed. 827.

"Transport of passion" in charge to jury on crime of manslaughter see Waters *v.* State, 54 Tex. Cr. 322, 331, 114 S. W. 628; Clark *v.* State, 51 Tex. Cr. 519, 522, 102 S. W. 1136.

15. U. S. *v.* Hamburg American Line, 159 Fed. 104, 105, 86 C. C. A. 294.

It was held to mean asportation, a taking out of the possession of the owner, without his privity and consent, without the *animus revertendi,* as used in an act entitled "An Act to prevent the transportation of people of color upon railroads or in steam-boats." Wilson *v.* State, 21 Md. 1, 7, 9.

Used in the Interstate Commerce Act the term includes all instrumentalities of shipment or carriage. Adair *v.* U. S., 208 U. S. 161, 167, 28 S. Ct. 277, 52 L. ed. 436; Interstate Commerce Commission *v.* Brimson, 154 U. S. 447, 457, 14 S. Ct. 1125, 38 L. ed. 1047; U. S. *v.* Baltimore, etc., R. Co., 165 Fed. 113, 121, 91 C. C. A. 147; Davis *v.* Cleveland, etc., R. Co., 146 Fed. 403, 410.

It implies the taking up of persons or property at some point and putting them down at another. A tax, therefore, upon receiving and landing passengers and freight by a ferry plying between two states is a tax upon their transportation and therefore an interference with interstate commerce. Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 203, 5 S. Ct. 826, 29 L. ed. 158.

Transportation goods defined by statute see Moran *v.* Ross, 79 Cal. 159, 163, 21 Pac. 547.

"'Transportation' service" and "'transfer' or 'switching' service" distinguished see Dixon *v.* Georgia Cent. R. Co., 110 Ga. 173, 179, 35 S. E. 369.

Transportation company.— The use of the term in the name of a company does not imply authority to operate trains on its road. Black *v.* Delaware, etc., Canal Co., 22 N. J. Eq. 130, 411.

An express company declared by statute to be a transportation company see Southern Express Co. *v.* Keeler, 109 Va. 459, 468, 64 S. E. 38.

16. Black L. Dict.

Distinguished from "extradition" and "deportation."— Fong Yue Ting *v.* U. S., 149 U. S. 698, 709, 13 S. Ct. 1016, 37 L. ed. 905.

TRAP. A term said to include any very dangerous construction or condition designedly arranged to do injury.[17] (Trap: Liability For Injury From, see NEGLIGENCE, 29 Cyc. 470. Prohibition of Taking Fish by, see FISH AND GAME, 19 Cyc. 1012.)

TRAPPING. In the operation of mines, the name given to the occupation of a person engaged in opening and closing doors, and giving signals to approaching trains or coal cars by waving his lamp.[18]

TRAUMA. Having to do with a wound or injury.[19]

TRAUMATIC NEURASTHENIA. A term signifying that the nervous system, as the result of a wound or injury, has become weakened, and that there is a lack of power in the nerve centers to perform their functions properly.[20]

TRAUMATIC PNEUMONIA. Pneumonia resulting from a violent injury.[21]

TRAVAIL. The act of child-bearing.[22] (Travail: Accusation in Time of as Condition Precedent to Right to Institute Bastardy Proceedings, see BASTARDS, 5 Cyc. 651. Admissibility of Declarations by Prosecutrix in Bastardy Proceedings, see BASTARDS, 5 Cyc. 660.)

TRAVEL. To pass from place to place whether for pleasure, instruction, business or health;[23] to go from one place to another at a distance; to journey.[24] (Travel: Condition as to in Policy, see LIFE INSURANCE, 25 Cyc. 822. Insurance Against Risks of, see ACCIDENT INSURANCE, 1 Cyc. 255. Judicial Notice of Facts of, see EVIDENCE, 16 Cyc. 873.)

TRAVELER. A person who travels;[25] one who travels in any way;[26] one who makes a journey, or who goes from place to place.[27] (Traveler:

17. Moffatt *v.* Kenny, 174 Mass. 311, 315, 316, 54 N. E. 850, where such is said to be the meaning of the term in the rule that a landowner is liable for a "trap" upon his land.

"Trap net" as used in Canadian fisheries act see Rex *v.* Chandler, 6 Can. Cr. Cas. 308, 309.

18. Ewing *v.* Lanark Fuel Co., 65 W. Va. 726, 738, 65 S. E. 200.

19. Fisher *v.* St. Louis Transit Co., 198 Mo. 562, 576, 95 S. W. 917.

20. Colorado Springs, etc., R. Co. *v.* Nichols, 41 Colo. 272, 280, 92 Pac. 691, 20 L. R. A. N. S. 215.

21. Johnson *v.* Continental Casualty Co., 122 Mo. App. 369, 371, 99 S. W. 473.

22. Black L. Dict.

"Accusation in time of travail" see Scott *v.* Donovan, 153 Mass. 378, 379, 26 N. E. 871. See also Bacon *v.* Harrington, 5 Pick. (Mass.) 63. See also Dennett *v.* Kneeland, 6 Me. 460; Drowne *v.* Stimpson, 2 Mass. 441.

23. Lockett *v.* State, 47 Ala. 42, 45; Price Company *v.* Atlanta, 105 Ga. 358, 366, 31 S. E. 619 (where such is said to be its primary and general import); Burst *v.* State, 89 Ind. 133, 135.

Having no precise or technical meaning when used without limitation see Lockett *v.* State, 47 Ala. 42, 45; Price Co. *v.* Atlanta, 105 Ga. 358, 366, 31 S. E. 619; Burst *v.* State, 89 Ind. 133, 135; Hourigan *v.* Bakersfield, 79 Vt. 249, 255, 64 N. E. 1130.

24. Black L. Dict. [*quoted* in Price Co. *v.* Atlanta, 105 Ga. 358, 366, 31 S. E. 619].

"Travel to serve" see Northern Trust Co. *v.* Snyder, 113 Wis. 516, 544, 89 N. W. 460, 70 Am. St. Rep. 867.

"Traveled part" in reference to highways, is that part of the road which is usually wrought for traveling. Clark *v.* Com., 4 Pick. (Mass.) 125, 126; Daniels *v.* Clegg, 28 Mich. 32, 42; Winter *v.* Harris, 23 R. I. 47, 51, 49 Atl. 398, 54 L. R. A. 643, in which cases the term is so construed in statutes regulating the passing of vehicles meeting on highways. But it has been held that where the ground was covered with snow, and the wrought path was obscured from the eye, the term referred to the path then beaten and traveled by those passing and repassing on the way. Jaquith *v.* Richardson, 8 Metc. (Mass.) 213, 215.

"Traveled place" as used in statutes requiring railroads to give signals and maintain sign-boards see RAILROADS, 33 Cyc. 665 note 68, 942 note 56, 963 note 70. See also Whittaker *v.* Boston, etc., R. Co., 7 Gray (Mass.) 98; Barber *v.* Richmond, etc., R. Co., 34 S. C. 444, 450, 13 S. E. 630.

"Traveled public road or street" under statute requiring railroads to give signals or maintain lookouts at such places see RAILROADS, 33 Cyc. 962 note 70.

The "traveled way" which it is the duty of borough authorities to keep in a reasonable condition is the part of the road that the borough has laid out and provided for public travel. Mudd *v.* Lansdowne, 190 Pa. St. 89, 42 Atl. 474.

25. *Ex p.* Archy, 9 Cal. 147, 164.

26. State *v.* Smith, 157 Ind. 241, 242, 61 N. E. 566, 87 Am. St. Rep. 205; Webster Dict. [*quoted* in Walling *v.* Potter, 35 Conn. 183, 185; Price Co. *v.* Atlanta, 105 Ga. 358, 366, 31 S. E. 619; Pullman Palace Car Co. *v.* Lowe, 28 Nebr. 239, 246, 44 N. W. 226, 26 Am. St. Rep. 325, 6 L. R. A. 809; Williams *v.* State, 44 Tex. Cr. 494, 495, 72 S. W. 380; Bain *v.* State, 38 Tex. Cr. 635, 636, 44 S. W. 518].

27. Williams *v.* State, 44 Tex. Cr. 494, 495, 72 S. W. 380; Bain *v.* State, 38 Tex. Cr. 635,

Accommodation and Entertainment at Inn, see INNKEEPERS, 22 Cyc. 1068. Conveyance by Carrier, see CARRIERS, 6 Cyc. 533; SHIPPING, 36 Cyc. 320. Injury to Where Relation of Carrier and Passenger Exists, see CARRIERS, 6 Cyc. 590. On Bridge, Injury From Defective Bridge, see BRIDGES, 5 Cyc. 1094. On Highway — In General, see STREETS AND HIGHWAYS, 37 Cyc. 266; Injury at Railroad Crossing, see RAILROADS, 33 Cyc. 920; Injury From Defect or Obstruction, see STREETS AND HIGHWAYS, 37 Cyc. 294. On Street — In General, see MUNICIPAL CORPORATIONS, 28 Cyc. 907; Injury From Defect or Obstruction, see MUNICIPAL CORPORATIONS, 28 Cyc. 1414. Right to Carry Weapons, see WEAPONS. Violation of Sunday Laws, see SUNDAY, 37 Cyc. 555.)

TRAVELING. A passing from place to place; the act of performing a journey;[28] a going from one place to another;[29] the going to or from one fixed place to another.[30] (Traveling: Expenses — As Item of Cost, see COSTS, 11 Cyc. 129; As Necessaries For Which Husband Is Liable, see HUSBAND AND WIFE, 21 Cyc. 222 note 39; Evidence to Show Meaning of, see EVIDENCE, 17 Cyc. 686; Of Guardian, see GUARDIAN AND WARD, 21 Cyc. 69 note 54; Of Members of County Board, see COUNTIES, 11 Cyc. 388 note 39.)

636, 44 S. W. 518 [*citing* Century Dict.; Webster Dict.].

"One who is merely on the move for a day is not necessarily a traveler." Davis *v.* State, 45 Ark. 359, 361.

Distance is not material. Walling *v.* Potter, 35 Conn. 183, 185; Price Co. *v.* Atlanta, 105 Ga. 358, 366, 31 S. E. 619; State *v.* Smith, 157 Ind. 241, 242, 61 N. E. 566, 87 Am. St. Rep. 205; Pullman Palace Car Co. *v.* Lowe, 28 Nebr. 239, 246, 44 N. W. 226, 26 Am. St. Rep. 325, 6 L. R. A. 809.

Persons belonging to the army and navy who have no permanent residence they can call home are regarded as "travelers or wayfarers," when stopping at public inns or hotels; and to make them chargeable as mere boarders it must be shown satisfactorily that an explicit contract has been made which deprived them of the privileges and rights which their vocation confers upon them as passengers or travelers. Hancock *v.* Rand, 94 N. Y. 1, 6, 46 Am. Rep. 112.

Does not include a person "who goes to a place at a short distance from his home merely for the purpose of taking refreshment," within the meaning of a statute forbidding the sale of fermented liquors between certain hours on Sunday, to persons other than travelers, but one who "goes to an inn for refreshment in the course of a journey, whether of business or pleasure," is a traveler within the meaning of the statute. Taylor *v.* Humphreys, 10 C. B. N. S. 429, 435, 30 L. J. M. C. 242, 4 L. T. Rep. N. S. 514, 9 Wkly. Rep. 705, 100 E. C. L. 429; Atkinson *v.* Sellers, 5 C. B. N. S. 442, 448, 5 Jur. N. S. 21, 28 L. J. M. C. 12, 94 E. C. L. 442.

Traveler entitled to recover for injuries on streets or highways see MUNICIPAL CORPORATIONS, 28 Cyc. 1415, 1416; STREETS AND HIGHWAYS, 37 Cyc. 294.

Traveler in determining the liability of innkeepers see INNKEEPERS, 22 Cyc. 1076.

Traveler within statutes allowing such persons to carry weapons see WEAPONS.

28. *Ex p.* Archy, 9 Cal. 147, 164.

29. White *v.* Beazley, 1 B. & Ald. 166, 171, 106 Eng. Reprint 62.

30. Ramsden *v.* Gibbs, 1 B. & C. 319, 326, 8 E. C. L. 137, 107 Eng. Reprint 119, where it was held that within the meaning of the statute making horses let to hire for travel, subject to post duty, the term applies to a horse hired in London to go to Richmond and back the same day, a distance of twenty miles, but not to a horse hired to go ten or twelve miles into the country and return in the evening.

In its ordinary sense, the term does not have reference to moving about from street to street, or house to house, in a city or its suburbs. Kochmann *v.* Baumeister, 49 N. Y. App. Div. 369, 371, 63 N. Y. Suppl. 503.

Walking half a mile is not "travelling" within the meaning of the statute making it an offense punishable by a fine to travel on the Lord's day. O'Connell *v.* Lewiston, 65 Me. 34, 37, 20 Am. Rep. 673; Barker *v.* Worcester, 139 Mass. 74, 75, 29 N. E. 474.

"Traveling by a public or private conveyance" in accident insurance policy see Northrup *v.* Railway Pass. Assur. Co., 43 N. Y. 516, 519, 3 Am. Rep. 724.

"Traveling from place to place" as used in a statute imposing an occupation tax upon a physician, specialist, etc., "traveling from place to place in the practice of his profession," refers to an itinerant practitioner but not to a physician having two places of business and dividing his time between the two. Hairston *v.* State, 36 Tex. Cr. 470, 471, 37 S. W. 858.

"Travelling upon a highway" see Varney *v.* Manchester, 58 N. H. 430, 431, 40 Am. Rep. 592; Hardy *v.* Keene, 52 N. H. 370, 377. See also Hendry *v.* North Hampton, 72 N. H. 351, 355, 56 Atl. 922, 101 Am. St. Rep. 681, 64 L. R. A. 70.

"Traveling merchant" held to be synonymous with "hawker" or "peddler." Com. *v.* Edson, 2 Pa. Co. Ct. 377, 380.

"Travelling peddler" as used in a town ordinance was construed to apply to all who travelled from house to house in the town for the purpose of vending merchandise, without regard to their place of residence. Martin *v.* Rosedale, 130 Ind. 109, 111, 29 N. E. 410.

TRAVELING SALESMAN. A man who travels about the country soliciting orders for goods, which orders are sent to his employer for approval;[31] one who exhibits samples of and takes orders from purchasers for his employer's goods.[32] (Traveling Salesman: In General, see HAWKERS AND PEDDLERS, 21 Cyc. 364, 370. Catalogue or Price Books Carried by as Baggage, see CARRIERS, 6 Cyc. 667. Goods or Samples Carried For Sale or For Purpose of Making Sales as Baggage, see CARRIERS, 6 Cyc. 668. Liability of Shareholders of Corporation For Salary of, see CORPORATIONS, 10 Cyc. 690. Priority of Claim For Services Against — Bankrupt, see BANKRUPTCY, 5 Cyc. 386 note 33; Insolvent, see INSOLVENCY, 22 Cyc. 1320 note 28. Sale of Goods by as Act of Interstate Commerce, see COMMERCE, 7 Cyc. 441. Service of Process Against Foreign Corporation on, see PROCESS, 32 Cyc. 565. Venue of Criminal Prosecution For Sale of Adulterated Food by, see CRIMINAL LAW, 12 Cyc. 237. See also COMMERCIAL TRAVELER, 8 Cyc. 334; DRUMMER, 14 Cyc. 1087.)

TRAVELING VENDOR. One who carries about with him the articles of merchandise which he sells.[33] (See, generally, HAWKERS AND PEDDLERS, 21 Cyc. 364.)

TRAVERSE. As a noun, a denial, by a party, of facts alleged in an adverse pleading, if they be presumptively within his knowledge; or a denial of them, or a denial that he has sufficient knowledge or information to form a belief concerning them, if they be not presumptively within his knowledge.[34] As a verb, to lay in a cross direction, to cross.[35] (Traverse: Of Allegations in Pleading — In General, see PLEADING, 31 Cyc. 188; In Criminal Prosecution, see CRIMINAL LAW, 12 Cyc. 348. Of Answer of Garnishee, see GARNISHMENT, 20 Cyc. 1093. Of Attachment by Claimant of Attached Property, see ATTACHMENT, 4 Cyc. 743. Of Challenge to Juror or Jury Panel, see JURIES, 24 Cyc. 337. Of Grounds of Attachment, see ATTACHMENT, 4 Cyc. 788. Of Inquisition — In Forcible Entry and Detainer, see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1189; Of Lunacy, see INSANE PERSONS, 22 Cyc. 1131. Of Return to Writ of — Certiorari, see CERTIORARI, 6 Cyc. 810 note 33; Habeas Corpus, see HABEAS CORPUS, 21 Cyc. 321; Mandamus, see MANDAMUS, 21 Cyc. 452. Of Truth of Affidavit In Forma Pauperis, see APPEAL AND ERROR, 2 Cyc. 826.)

31. *In re* Dexter, 158 Fed. 788, 790, 89 C. C. A. 285.

32. Hamberger *v.* Marcus, 157 Pa. St. 133, 139, 27 Atl. 681, 37 Am. St. Rep. 719, where it is said that such person is not, in a technical and popular sense, a broker or factor, although he may be compensated for his services by commissions on the sales so effected by him.

It includes only that class of persons engaged in selling goods either by sample or otherwise, who travel on this business from city to city and from town to town, and whose business relations are connected with those who in such cities or towns are likewise engaged in business which contemplates a resale of the goods sold, or consumption in large quantities. Price Co. *v.* Atlanta, 105 Ga. 358, 367, 31 S. E. 619. It includes one who sells goods for wholesale dealers in dry goods, paying his own expenses and receiving house and road commissions, his compensation being entirely by commissions on approved sales. Mulholland *v.* Wood, 166 Pa. St. 486, 489, 31 Atl. 248.

33. Pegues *v.* Ray, 50 La. Ann. 574, 576, 23 So. 904, where the term is said to be a synonym of "peddler."

34. Johnson *v.* Asher, 105 S. W. 943, 944, 32 Ky. L. Rep. 317; Dickinson *v.* Gray, 8 S. W. 876, 9 S. W. 281, 10 Ky. L. Rep. 292 [both *citing* Civ. Code, § 113].

35. National Candy Co. *v.* Miller, 160 Fed. 51, 56, 87 C. C. A. 207, where it is said: "The participle 'traversing' implies 'adjustable laterally, having a lateral motion, or swinging motion,'" construing Mo. Rev. St. (1899) § 6434 [Annot. St. (1906) p. 3217].

TREASON

By Stanley A. Hackett*

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Bill of Attainder Punishing Treason, see Constitutional Law, 8 Cyc. 1036 note 60; War.

Conspiracy, see Conspiracy, 8 Cyc. 615.

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Disloyalty as Affecting Qualification of Juror, see Juries, 24 Cyc. 199.

Insurrection, see Insurrection, 22 Cyc. 1451.

Loyalty or Disloyalty as Affecting Limitations, see Limitations of Actions, 25 Cyc. 1285.

War, see War.

I. Definition and Nature.

A. In General. Treason is a breach of allegiance,[1] and, on account of self-preservation being the first duty of government, is regarded as the highest crime known to the law.[2]

1. U. S. *v.* Wiltberger, 5 Wheat. (U. S.) 76, 97, 5 L. ed. 37 [*quoted* in Young *v.* U. S., 97 U. S. 39, 62, 24 L. ed. 992].

Construction of expression "treason, felony, or other crime" as used in the constitutional provision relating to extradition see Extradition (Interstate), 19 Cyc. 86.

2. *Ex p.* Quarrier, 2 W. Va. 569, 571; Hanauer *v.* Doane, 12 Wall. (U. S.) 342, 347, 20 L. ed. 439; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,263, 1 Sprague 593; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,269, 2 Curt. 630, 633; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,273, 1 Sprague 602; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,274, 2 Sprague 292, 303; Brandreth's Trial, 32 How. St. Tr. 755, 865; Watson's Trial, 32 How. St. Tr. 1, 26.

Its gravity is shown by the fact that it is the only crime defined in the constitution of the United States. U. S. *v.* Greathouse, 26 Fed. Cas. No. 15,254, 2 Abb. 364, 4 Sawy.

* Author of "Time," *ante*, p. 302; "Toll Roads," *ante*, p. 357. Joint author of "Religious Societies," 34 Cyc. 1112; "Street Railroads," 37 Cyc. 1338.

B. Specific Acts Enumerated in Constitutional and Statutory Provisions. While various and numerous acts against the sovereign and the government are classed as treason under the statutes of England [3] and Canada,[4] the constitution of the United States itself defines and limits the crime by declaring that "treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort," [5] thus not only abolishing and refusing to recognize petit [6] and what is commonly known as

457, 465; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,269, 2 Curt. 630, 633.

Treason as one of the three classes of crime see CRIMINAL LAW, 12 Cyc. 131.

3. **English statutes.**—Omitting certain provisions which have been repealed by 9 Geo. IV, c. 31; 24 & 25 Vict. c. 100, § 8; and other statutes, the principal English statute (25 Edw. III, c. 2) declares that treason consists (1) in compassing or imagining the death of the king or queen, or their eldest son and heir; (2) in violating the king's companion, or the king's eldest daughter unmarried, or the wife of the king's eldest son and heir; (3) in levying war against the king in his realm; (4) in adhering to the king's enemies in his realm, giving to them aid and comfort in the realm or elsewhere; and (5) slaying the chancellor, treasurer, or the king's justices of the one bench or the other, justices in eyre, or justices of assize, and all other justices assigned to hear and determine, being in their places doing their offices. Ludlam's Trial, 32 How. St. Tr. 1135. The crime has been further extended in England by later statutes (see Maclane's Trial, 26 How. St. Tr. 721), particularly by 11 Vict. c. 12, § 1, which in effect declares it to be treason for any person or persons, within the realm or without, to compass, imagine, invent, devise, or intend death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint, of the person of the king, or his heirs or successors, and such compassings, imaginings, inventions, devices or intentions, or any of them, to express, utter, or declare, by publishing any printing or writing, or by any overt act or deed.

4. **The Canadian** statutes define treason to be (a) the act of killing his majesty, or doing him any bodily harm tending to death or destruction, maim or wounding, and the act of imprisoning or restraining him, or (b) the forming and manifesting by any overt act an intention to do so; or (c) the act of killing the eldest son and heir apparent of his majesty, or the queen consort of any king of the United Kingdom of Great Britain and Ireland, or (d) the forming and manifesting, by an overt act, an intention to do so; or (e) conspiring with any person to kill his majesty, or to do him any bodily harm tending to death or destruction, maim or wounding, or conspiring with any person to imprison or restrain him; or (f) levying war against his majesty either with intent to depose him from the style, honour, and royal name of the Imperial Crown of the United Kingdom of Great Britain and Ireland or of any other of his majesty's dominions or countries, or in order, by force or constraint, to compel his majesty to change his measures or counsels, or in order to intimidate or overawe both houses or either house of parliament of the United Kingdom of Great Britain or of Canada; or (g) conspiring to levy war against his majesty with any such intent or for any such purpose as aforesaid; or (h) instigating any foreigner with force to invade the said United Kingdom or Canada or any other of the dominions of his majesty; or (i) assisting any public enemy at war with his majesty in such war by any means whatsoever; or (j) violating, whether with her consent or not, a queen consort, or the wife of the eldest son and heir apparent, for the time being, of the king or queen regnant. Can. Rev. St. (1906) p. 2438; 55 & 56 Vict. c. 29, § 65; 57 & 58 Vict. c. 57, § 1.

5. U. S. Const. art. 3, § 3. And see U. S. *v.* Burr, 25 Fed. Cas. No. 14,692*a*, 4 Cranch (appendix) 469, 2 L. ed. 684; U. S. *v.* Hanway, 26 Fed. Cas. No. 15,299, 2 Wall. Jr. 139; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,269, 2 Curt. 630; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,274, 2 Sprague 292; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,276, 2 Wall. Jr. 134.

This provision was borrowed from portions of the statute of 25 Edw. III. U. S. *v.* Greathouse, 26 Fed. Cas. No. 15,254, 2 Abb. 364, 4 Sawy. 457. See also *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,269, 2 Curt. 630; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,271, 5 Blatchf. 549; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,276, 2 Wall. Jr. 134.

Some state statutes employ the same or similar terms in defining treason against the state. See the statutes of the several states. And see People *v.* Lynch, 11 Johns. (N. Y.) 549; Respublica *v.* Carlisle, 1 Dall. (Pa.) 35, 1 L. ed. 26.

6. State *v.* Bilansky, 3 Minn. 246, holding that, although the statute of 1851 (Rev. St. 523, § 14) in express terms abolished the distinction between murder and petit treason, there was nothing for the statute to operate upon.

In England the crime of petit treason at common law was involved in some uncertainty and comprehended numerous cases, but by 25 Edw. III, c. 2, they were reduced to three heads: (1) Where a servant killed his master; (2) where a wife killed her husband; (3) where an ecclesiastic killed his superior. See State *v.* Bilansky, 3 Minn. 246; CRIMINAL LAW, 12 Cyc. 131. However, that portion of the statute relating to petit treason was repealed by 9 Geo. IV, c. 31; 24 & 25 Vict. c. 100, § 8, in which offenses

constructive treason,[7] but leaving congress without power to enlarge or restrict the offense.[8]

II. WHO MAY COMMIT.

Treason being a breach of allegiance,[9] it can be committed against a government only by one who owes allegiance, either perpetual or temporary, thereto.[10] Within the meaning of this rule, a citizen owes allegiance to his government so long as its courts of justice remain open to maintain peace and protect him.[11] Treason, however, differs from other crimes and offenses,[12] in that there are no accessaries, all persons being regarded as principals whose acts would, in the case of a felony, make them accessaries, such as persons who are present and are aiding, abetting, counseling, or countenancing the act,[13] or who are absent from the scene of action, but take some part in the conspiracy, no matter how small.[14]

III. AGAINST WHAT SOVEREIGNTY IT MAY BE COMMITTED.

To constitute treason against a particular government, the treasonable act must be aimed at that government. Thus, a treasonable act directed exclusively against the sovereignty of a particular state is not treason against the United States,[15]

formerly constituting petit treason are declared to be murder only. See HOMICIDE, 21 Cyc. 661 text and note 15.

7. Shortridge *v.* Macon, 22 Fed. Cas. No. 12,812, 1 Abb. 58, Chase 136; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,271, 5 Blatchf. 549.

8. Fries' Case, 9 Fed. Cas. No. 5,126, 3 Dall. 515, 1 L. ed. 701 (holding, therefore, that the fact that congress, in the sedition act (1 U. S. St. at L. 596), and in the act relating to rescue and obstruction of process (1 U. S. St. at L. 117, § 23), has created misdemeanors which may include acts amounting to treason, cannot be considered a legislative definition of "treason," whereby those acts cease to be punishable as such); U. S. *v.* Greathouse, 26 Fed. Cas. No. 15,254, 2 Abb. 364, 3 Sawy. 457; U. S. *v.* Hanway, 26 Fed. Cas. No. 15,299, 2 Wall. Jr. 139; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,271, 5 Blatchf. 549.

9. See *supra*, I, A.

10. *Ex p.* Quarrier, 2 W. Va. 569 (holding that, as none but the citizens of a state owe her allegiance, treason against a state can only be committed by a citizen thereof); U. S. *v.* Wiltberger, 5 Wheat. (U. S.) 76, 5 L. ed. 37; U. S. *v.* Greiner, 26 Fed. Cas. No. 15,262, 4 Phila. (Pa.) 396; U. S. *v.* Villato, 28 Fed. Cas. No. 16,622, 2 Dall. 370, 1 L. ed. 419. And see Young *v.* U. S., 97 U. S. 39, 24 L. ed. 992.

Treason may be committed by aliens domiciled in this country, as they owe a temporary allegiance to this government during their sojourn here. See ALIENS, 2 Cyc. 106.

Where all the laws of a state are suspended for a short interval, as they were in Pennsylvania from May 14, 1776, to Feb. 11, 1777, there is no state government during that time to which an inhabitant can owe allegiance, and hence he is incapable of committing treason. Respublica *v.* Chapman, 1 Dall. (Pa.) 53, 1 L. ed. 33.

11. U. S. *v.* Greiner, 26 Fed. Cas. No. 15,262, 4 Phila. (Pa.) 396.

Allegiance defined see ALLEGIANCE, 2 Cyc. 132.

The attempted secession of part of the states did not absolve the citizens of any of the states from their obligation of loyalty and fidelity to the United States government, so as to render them incapable of committing treason. U. S. *v.* Cathcart, 25 Fed. Cas. No. 14,756, 1 Bond 556; *In re* Charge to Grand Jury, 30 Fed. Cas No. 18,270, 4 Blatchf. 518. And see Latham *v.* Clark, 25 Ark. 574; Hammond *v.* State, 3 Coldw. (Tenn.) 129. However, one who took part in the Civil war on the confederate side could not be guilty of treason against the state of West Virginia, on account of the act of Feb. 3, 1863, which declares that any citizen of the state who shall levy war against the United States shall no longer be deemed a citizen of the state. *Ex p.* Quarrier, 2 W. Va. 569.

12. See CRIMINAL LAW, 12 Cyc. 183.

13. Fries' Case, 9 Fed. Cas. No. 5,127; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,276, 2 Wall. Jr. 134.

14. *Ex p.* Bollman, 4 Cranch (U. S.) 75, 2 L. ed. 554; U. S. *v.* Burr, 25 Fed. Cas. No. 14,693; U. S. *v.* Greathouse, 26 Fed. Cas. No. 15,254, 2 Abb. 364, 4 Sawy. 457; U. S. *v.* Hanway, 26 Fed. Cas. No. 15,299, 2 Wall. Jr. 139; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,269, 2 Curt. 630; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,274, 2 Sprague 292; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,276, 2 Wall. Jr. 134; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,277, 2 Sprague 285.

15. *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,275, 1 Story 614, where the court further charged the jury that treason begun against a state may become mixed up with or merged with treason against the United States and gave an illustration that, if the treasonable purpose be to overthrow the government of a state and forcibly to withdraw it from the Union, thereby preventing the exercise of national sovereignty within the limits of the state, there would be trea-

nor is a treasonable act against the United States treason against one of the states.[16]

IV. ELEMENTS OF OFFENSE.[17]

A. In General — 1. INTENT. As it is essential to the crime of treason that there be not only an intention to overthrow the government or defeat the execution of its laws, but that the intention be of a general, public, and universal, instead of a local, private, or transitory nature,[18] the intent of the parties doing alleged treasonable acts is highly important in determining whether such acts are treason, felony, or no crime at all.[19]

2. OVERT ACT.[20] The crime of treason is not complete until there is an overt act, it being not sufficient that there exist a mere conspiracy to overthrow the government,[21] or an intention to commit treason,[22] or treasonable words, whether oral, written or printed.[23]

B. Levying War — 1. IN GENERAL. Our constitutional definition of treason being borrowed from the ancient English statute,[24] the expression "levying war" contained therein must be interpreted and applied in the same sense which it bore in that law.[25] So interpreted, it means that a mere conspiracy to overthrow the government by force is not sufficient to constitute the crime of treason by levying war, but that there must be an overt act of actual levying of war.[26] More

son against the United States, as there would also be if United States troops, called out to aid a state in suppressing domestic violence, were resisted. And see U. S. *v.* Bollman, 24 Fed. Cas. No. 14,622, 1 Cranch C. C. 373; U. S. *v.* Hanway, 26 Fed. Cas. No. 15,299, 2 Wall. Jr. 139.

16. People *v.* Lynch, 11 Johns. (N. Y.) 549; *Ex p.* Quarrier, 2 W. Va. 569.

17. **Elements of particular phases of the crime** see *infra*, IV, B; IV, C.

18. Fries' Case, 9 Fed. Cas. No. 5,126, 3 Dall. (Pa.) 515, 1 L. ed. 701; Fries' Case, 9 Fed. Cas. No. 5,127; U. S. *v.* Hanway, 26 Fed. Cas. No. 15,299, 2 Wall. Jr. 139; U. S. *v.* Hoxie, 26 Fed. Cas. No. 15,407, 1 Paine 265.

Intent or purpose to forcibly prevent execution of public law see *infra*, IV, B, 2.

19. Fries' Case, 9 Fed. Cas. No. 5,127; U. S. *v.* Bollman, 24 Fed. Cas. No. 14,622, 1 Cranch C. C. 373; U. S. *v.* Hanway, 26 Fed. Cas. No. 15,299, 2 Wall. Jr. 139; U. S. *v.* Hoxie, 26 Fed. Cas. No. 15,407, 1 Paine 265.

20. **Necessity of overt act in levying war** see *infra*, IV, B, 1.

Requisite proof of overt act see *infra*, V, C.

21. U. S. *v.* Burr, 25 Fed. Cas. No. 14,692*a*, 4 Cranch appendix 469, 2 L. ed. 684; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,270, 4 Blatchf. 518; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,271, 5 Blatchf. 549; Rex *v.* Meany, 10 Cox C. C. 506, Ir. R. 1 C. L. 500, 15 Wkly. Rep. 1082. And see Culliton *v.* U. S., 5 Ct. Cl. 627, holding that if a person faithfully adhered to the government after the beginning of the rebellion, by the bombardment of Fort Sumter, his previous doubts and errors should not be deemed to attach to him the infamy of treason.

22. U. S. *v.* Pryor, 27 Fed. Cas. No. 16,096, 3 Wash. 234.

Mistake in carrying out intention.—A person does not commit treason when, intending to join British troops, he, by mistake, joins and adheres to American troops. Respublica *v.* Malin, 1 Dall. (Pa.) 33, 1 L. ed. 25.

Necessity of treasonable intent see *supra*, IV, A, 1.

23. *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,271, 5 Blatchf. 549.

Mere expressions of opinion indicative of sympathy with the public enemy, although sufficient to justify a strong feeling of indignation against the individual and the suspicion that he is at heart a traitor, are not sufficient, under the constitution and laws of the United States, to warrant a conviction of treason. *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,272, 1 Bond 609.

24. See *supra*, I, B.

25. Druecker *v.* Salomon, 21 Wis. 621, 94 Am. Dec. 571; U. S. *v.* Burr, 25 Fed. Cas. No. 14,693; U. S. *v.* Greiner, 26 Fed. Cas. No. 15,262, 4 Phila. (Pa.) 396; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,276, 2 Wall. Jr. 134.

Levy, as applied to war, defined see LEVY, 25 Cyc. 207 text and note 53 *et seq.*

War defined see WAR.

26. *Ex p.* Bollman, 4 Cranch (U. S.) 75, 2 L. ed. 554; U. S. *v.* Burr, 25 Fed. Cas. No. 14,692*a*, 4 Cranch appendix 469, 2 L. ed. 684; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,263, 1 Sprague 593; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,270, 4 Blatchf. 518; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,275, 1 Story 614; Watts' Trial, 23 How. St. Tr. 1167.

The success of the conspiracy does not, it seems, render the acts done any less treasonable. Keppel *v.* Petersburg R. Co., 14 Fed. Cas. No. 7,722, Chase 167. Thus, the combination of a body of men, with the design of seizing, and the actual seizing of forts and other public property of the United States, is a levying of war against the

specifically, there must be an actual assemblage of men for the purpose of executing a treasonable design by force.[27] While it is not essential that any blow be struck, provided the assemblage is in condition to use force, either by virtue of its being armed with military weapons or by being so strong in numbers as to do away with the necessity of weapons, and is actuated with an intention to use force,[28] it is essential that such body of men have an intent to carry out their purpose by violence.[29]

2. Forcible Opposition to Public Law. The expression "levying war," in the sense in which it is used in the constitutional provision defining treason, includes not only formal or declared war, but also any forcible opposition, as the result of a combination, to the execution of any public law of the United States.[30] To constitute the crime of treason, under this interpretation of the phase "levying war," there must be a combination of the following elements: (1) A combination, or conspiracy, by which different individuals are united in one common purpose;[31] (2) a common purpose to prevent the execution of some public law of the United

United States, and is treason. *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,270, 4 Blatchf. 518. And see U. S. *v.* Mitchell, 26 Fed. Cas. No. 15,788, 2 Dall. 348, 1 L. ed. 410.

27. U. S. *v.* Burr, 25 Fed Cas. No. 14,692*a*, 4 Cranch appendix 469, 2 L. ed. 684, 25 Fed. Cas. No. 14,693 (holding that mere enlistment of men is not sufficient, but that there must be an embodying of troops and assembling of men); *Ex p.* Bollman, 4 Cranch (U. S.) 75, 2 L. ed. 554 (holding that the traveling of individuals to the place of rendezvous would not be sufficient; but that the meeting of particular bodies of men, and their marching from places of partial to places of general rendezvous would be such an assemblage); U. S. *v.* Greathouse, 26 Fed. Cas. No. 15,254, 2 Abb. 364, 4 Sawy. 457.

Being in attendance armed in a military manner would itself amount to treason, if the design was treasonable (U. S. *v.* Mitchell, 26 Fed. Cas. No. 15,788, 2 Dall. 348, 1 L. ed. 410), as the constitutional definition of treason is broad enough to include all those who enlist in or join a hostile army or assemblage after war has begun (*In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,272, 1 Bond 609. And see Respublica *v.* McCarty, 2 Dall. (Pa.) 86, 1 L. ed. 300).

The number of men assembled is immaterial, provided the means adopted, such as explosive materials, are sufficient to effect their treasonable purpose. Rex *v.* Gallagher, 15 Cox C. C. 291.

28. U. S. *v.* Burr, 25 Fed. Cas. No. 14,692*a*, 4 Cranch appendix 469, 2 L. ed. 684, 25 Fed. Cas. No. 14,693; U. S. *v.* Greiner, 26 Fed. Cas. No. 15,262, 4 Phila. (Pa.) 396 (holding that the marching of an armed body, mustered in military array, with a treasonable purpose, in the direction in which such a blow might be struck, is levying war); *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,273, 1 Sprague 602; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,275, 1 Story 614 (holding that the marching in military form of armed men, for the express purpose of overawing and intimidating the public, and thus attempting to carry into effect the treasonable design, will of itself amount to a levy of war, although no actual blow be struck). *Compare* Reg. *v.* Frost, 9 C. & P. 129, 38 E. C. L. 87, holding that there must not only be an insurrection but force accompanying it.

The mere cruising of an armed vessel with a hostile purpose is levying maritime war, although the cruiser may not encounter a single vessel. U. S. *v.* Greiner, 26 Fed. Cas. No. 15,262, 4 Phila. (Pa.) 396. To like effect see Vaughan's Case, 2 Salk. 634, 91 Eng. Reprint 535.

29. U. S. *v.* Burr, 25 Fed. Cas. No. 14,694*a* (holding that a treasonable intent on the part of the leader or person who convened the assemblage, uncommunicated to the assemblage, is not sufficient); *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,275, 1 Story 614.

30. Druecker *v.* Salomon, 21 Wis. 621, 94 Am. Dec. 571; Fries' Case, 9 Fed. Cas. No. 5,126, 3 Dall. 515, 1 L. ed. 701; Fries' Case, 9 Fed. Cas. No. 5,127; U. S. *v.* Mitchell, 26 Fed. Cas. No. 15,788, 2 Dall. (U. S.) 348, 1 L. ed. 410; U. S. *v.* Vigol, 28 Fed. Cas. No. 16,621, 2 Dall. (U. S.) 346, 1 L. ed. 409; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,263, 1 Sprague 593; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,269, 2 Curt. 630; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,273, 1 Sprague 602; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,275, 1 Story 614; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,276, 2 Wall. Jr. 134.

The consummation of a purpose to prevent the execution of a state statute, or by force and violence to coerce its repeal, or to deprive any class of the community of the protection afforded by it, is treason against the state. *In re* Charge to Grand Jury, 4 Pa. L. J. 29.

In England an attempt, by violence and intimidation, to force the repeal of a law is a levying of war against the king and high treason. Rex *v.* Gordon, Dougl. (3d ed.) 590, 99 Eng. Reprint 372.

31. *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,269, 2 Curt. 630; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,276, 2 Wall. Jr. 134.

States;[32] (3) the actual use of force, by such combination, to prevent the execution of that law.[33]

C. Adhering to Enemies, Giving Them Aid and Comfort. The courts have experienced some difficulty in specifying the precise acts which constitute treason against the United States by "adhering to their enemies, giving them aid and comfort," but have construed the expression to clearly include such acts as furnishing the enemy with arms, troops, supplies, information, or means of transportation,[34] and to include in a general way any act indicating disloyalty and sympathy with the enemy, and which is directly in furtherance of their hostile designs, regardless of whether the motive prompting the act is merely sympathy or pecuniary gain.[35] It seems that it is not essential, however, that the effort to aid be successful, provided overt acts are done which, if successful, would advance the interests of the enemy.[36]

32. *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,269, 2 Curt. 630.

Purpose must be to defeat law generally. The assembling of men, in order, by force, to defeat the execution of a law in a particular instance, and then to disperse, and without any intention to continue together or to reassemble for the purpose of defeating the law generally and in all cases, is not levying war. *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,263, 1 Sprague 593.

33. Fries' Case, 9 Fed. Cas. No. 5,126, 3 Dall. 515, 1 L. ed. 701, 9 Fed. Cas. No. 5,127; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,269, 2 Curt. 630 (holding, however, that what amounts to the use of force depends much upon the nature of the enterprise and the circumstances of the case, and that it is not necessary that there be any military array or weapons); *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,276, 2 Wall. Jr. 134.

34. Hanauer *v.* Doane, 12 Wall. (U. S.) 342, 20 L. ed. 439; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,270, 4 Blatchf. 518; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,272, 1 Bond 609. And see U. S. *v.* Greathouse, 26 Fed. Cas. No. 15,254, 2 Abb. 364, 4 Sawy. 457, holding that the purchase of a vessel, guns, and ammunition, the preparing her for sea, and making her ready for service in aid of the rebellion of citizens of the United States against the government thereof, with the purpose of attacking and destroying American vessels, constitute a levying of war against the United States and would, if the war were between the United States and a foreign public enemy, constitute an adherence to the enemy.

Sale of saltpeter to be manufactured into gunpowder.— It was giving aid and comfort for persons to manufacture and sell saltpeter to the confederate states, knowing that it would be used by them in the manufacture of gunpowder for the prosecution of the war against the United States. Carlisle *v.* U. S., 16 Wall. (U. S.) 147, 21 L. ed. 426.

Letter writing.— It is an offense punishable by fine and imprisonment, under the act of congress of Jan. 30, 1799 (1 U. S. St. at L. 613), for a citizen of the United States, at a time when a part of the inhabitants of the United States are in rebellion against the government, to write letters to a member of the British parliament, urging that body to acknowledge the independence of the insurgents. *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,277, 2 Sprague 285. However, the mere writing of a letter by an alien resident within the confederate lines, addressed to the president of the confederate government, but not sent or uttered, offering the services of the writer, did not amount to giving aid and comfort to the rebellion. Medway *v.* U. S., 6 Ct. Cl. 421. In England, letters of advice and intelligence to the enemy to enable them to annoy English subjects or defend themselves, written and sent in order to be delivered to the enemy, are, although intercepted, deemed to be overt acts of treason by adhering to the king's enemies. Rex *v.* Hensey, 1 Burr. 642, 97 Eng. Reprint 489; Rex *v.* Stone, 6 T. R. 527, 101 Eng. Reprint 684; De la Motte's Trial, 21 How. St. Tr. 687.

Trade with loyal people living in an insurrectionary district, when carried on in good faith and without collusion with the enemy, is lawful, unless interdicted by the government. *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,271, 5 Blatchf. 549.

35. *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,272, 1 Bond 609. And see *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,277, 2 Sprague 285.

Delivering up prisoners and deserters to an enemy is treason. U. S. *v.* Hodges, 26 Fed. Cas. No. 15,374, Brunn. Col. Cas. 465, 2 Wheel. Cr. (N. Y.) 477.

Who embraced within term "enemies."— Although the distinction is not recognized in other cases, except to a limited extent in one which holds that, in case of rebellion, citizens or subjects residing within the insurrectionary district who are not implicated in the rebellion are not enemies (*In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,271, 5 Blatchf. 549), it has been held that the word "enemies," as used in our constitutional definition of treason, applies only to the subjects of a foreign power in a state of open hostility to the United States, and that it does not embrace rebels in insurrection against their own government (U. S. *v.* Greathouse, 26 Fed. Cas. No. 15,254, 2 Abb. 364, 4 Sawy. 457). For a general definition of enemy see 15 Cyc. 1046.

36. U. S. *v.* Greathouse, 26 Fed. Cas. No.

V. DEFENSES.

Treason being such a heinous crime, the courts have been loath to recognize defenses thereto, it being held that the only defense allowable is duress or compulsion, and that only when the fear produced is one of immediate death.[37] Naturalization in the country of an enemy during time of war is no defense,[38] nor is infancy, provided the person has arrived at years of discretion,[39] nor a letter of marque which has not been recognized,[40] nor a military parole, after the war has ended.[41]

VI. PROSECUTION AND PUNISHMENT.

A. Jurisdiction and Preliminary Proceedings.[42] While the jurisdiction of state courts over cases of treason against the state depends entirely upon the statutes of the state,[43] cases of treason against the United States are not cognizable in the state courts,[44] but are triable only by the United States courts located in the state and district wherein the alleged crime was committed.[45] To warrant the arrest and commitment for trial of a person, for treason, there must be a charge or affidavit alleging all the elements of the offense,[46] supported by proof showing probable cause that the crime has been committed.[47] Under both the

15,254, 2 Abb. 364, 4 Sawy. 457. But see U. S. *v.* Pryor, 27 Fed. Cas. No. 16,096, 3 Wash. 234, holding that treason is not committed by a prisoner of war who goes from the enemy's squadron to the shore for the purpose of peaceably procuring provisions for the enemy and with the intention of securing his ransom or escaping, but who fails to either procure or carry any provisions toward the enemy with the intent of supplying them.

Persuading another to enlist, however, is not a crime, unless followed by actual enlistment of the person persuaded, under a state statute providing that it shall be high treason to aid or assist any enemies at open war with the state by persuading others to enlist for that purpose. Respublica *v.* Roberts, 1 Dall. (Pa.) 39, 1 L. ed. 27.

37. Respublica *v.* McCarty, 2 Dall. (Pa.) 86, 1 L. ed. 300. And see U. S. *v.* Hodges, 26 Fed. Cas. No. 15,374, Brunn. Col. Cas. 465, 2 Wheel. Cr. (N. Y.) 477.

Duress or compulsion as excuse for crime generally see CRIMINAL LAW, 12 Cyc. 161.

Specific applications of rule.—The rule stated in the text has been held to apply even where the compulsion was exercised by a superior military official (U. S. *v.* Greiner, 26 Fed. Cas. No. 15,262, 4 Phila. (Pa.) 396), or by a husband or wife (see CRIMINAL LAW, 12 Cyc. 161; HUSBAND AND WIFE, 21 Cyc. 1355).

38. Rex *v.* Lynch, [1903] 1 K. B. 444, 20 Cox C. C. 468, 67 J. P. 41, 72 L. J. K. B. 167, 88 L. T. Rep. N. S. 26, 19 T. L. R. 163, 51 Wkly. Rep. 619.

39. Denn *v.* Banta, 1 N. J. L. 266.

40. U. S. *v.* Greathouse, 26 Fed. Cas. No. 15,254, 2 Abb. 364, 4 Sawy. 457, holding also that belligerent rights conceded to the confederate states could not be invoked for the protection of persons entering within the limits of a loyal state, and secretly getting up hostile expeditions against the government.

41. U. S. *v.* Rucker, 27 Fed. Cas. No. 16,203, holding that the agreement of surrender between Sherman and Johnston was a military parole, intended to terminate with the war.

42. **Right of one charged with treason to release on bail** see BAIL, 5 Cyc. 63, 68 note 16.

43. Kemp *v.* Kennedy, 14 Fed. Cas. No. 7,686, Pet. C. C. 30 [*affirmed* in 5 Cranch 173, 3 L. ed. 70], construing the New Jersey statutes and holding that, although the action of a court in erroneously deciding a certain act to be treason is reversible error, it does not constitute a usurpation of jurisdiction.

44. People *v.* Lynch, 11 Johns. (N. Y.) 549.

45. *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,277, 2 Sprague 285.

Transfer from one federal court to another.—After a person has been acquitted on a charge of treason, but is still in the custody of the marshal and bound to answer an indictment for a misdemeanor, the court has no authority to send him to another district to stand trial on another indictment for treason. U. S. *v.* Burr, 25 Fed. Cas. No. 14,694. Where a person is arrested in a district other than the one in which the alleged treason was committed, and the courts of the latter district are not open so as to insure a speedy trial, the court will neither detain the prisoner nor order his removal to the district where the offense was committed, but will only require security to keep the peace. U. S. *v.* Greiner, 26 Fed. Cas. No. 15,262, 4 Phila. (Pa.) 396.

46. U. S. *v.* Burr, 25 Fed. Cas. No. 14,692, 4 Cranch appendix 469, 2 L. ed. 684, holding that a person will not be held to trial for levying war against the United States on an affidavit that he is engaging or enlisting men for such purpose, without proof of the actual embodying of men.

47. U. S. *v.* Bollman, 24 Fed. Cas. No. 14,622, 1 Cranch C. C. 373; U. S. *v.* Greiner, 26 Fed. Cas. No. 15,262, 4 Phila. (Pa.) 396.

Same proof as on trial not required.—The constitutional requirement that there be two witnesses to the overt act is not applicable

English and United States statutes, a person accused of treason is entitled to a copy of the jury panel and the indictment.[48]

B. Indictment.[49] Although an indictment is sufficient if it follows the language of the statute under which it is drawn, without employing the phrase "levying war,"[50] an overt act must be charged with some particularity as to place and circumstances, a general charge of levying war not being sufficient.[51] It must also be alleged that accused owed allegiance,[52] but the day alleged in the indictment is not material,[53] nor is it objectionable that different overt acts are charged in one count.[54]

C. Evidence.[55] After the constitutional requirement that there be testimony of two witnesses to the same overt act[56] has been satisfied by the introduction of the testimony of two witnesses to the overt act charged in the indictment, and only then,[57] it is proper to admit evidence of a collateral or corroborative nature, such as the confession of accused to the same or another species of treason,[58]

to preliminary proceedings before a magistrate or grand jury. U. S. *v.* Greiner, 26 Fed. Cas. No. 15,262, 4 Phila. (Pa.) 396; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,276, 2 Wall. Jr. 134. The rule is otherwise under the English statutes which provide that no person shall be indicted for high treason but upon the testimony of two lawful witnesses to the same overt act, or the testimony of one witness to the overt act and the testimony of another witness to another overt act of the same treason. Watson's Trial, 32 How. St. Tr. 1; Maclane's Trial, 26 How. St. Tr. 721.

48. U. S. Rev. St. (1878) § 1033 [U. S. Comp. St. (1901) p. 722]; 7 Anne, c. 21, § 11; 1 Geo. IV, c. 4, § 8. And see Respublica *v.* Molder, 1 Dall. (Pa.) 33, 1 L. ed. 25; U. S. *v.* Wood, 28 Fed. Cas. No. 16,756, 3 Wash. C. C. 440; CRIMINAL LAW, 12 Cyc. 511 notes 92 and 99, 518 text and note 59.

A copy of the caption of the indictment as well as of the indictment itself must be delivered to a prisoner charged with high treason. U. S. *v.* Pennsylvania Insurgents, 26 Fed. Cas. No. 15,443, 2 Dall. 335, 1 L. ed. 404.

49. **Indictments and informations** generally see INDICTMENTS AND INFORMATIONS, 22 Cyc. 157.

Motion to quash see INDICTMENTS AND INFORMATIONS, 22 Cyc. 412.

For forms of indictments in cases of treason see People *v.* Lynch, 11 Johns. (N. Y.) 549; Respublica *v.* Carlisle, 1 Dall. (Pa.) 35, 1 L. ed. 26; Fries' Case, 9 Fed. Cas. No. 5,127; U. S. *v.* Hanway, 26 Fed. Cas. No. 15,299, 2 Wall. Jr. 139; Reg. *v.* Gallagher, 15 Cox C. C. 291; Reg. *v.* Mitchel, 3 Cox C. C. 1; Brandreth's Trial, 32 How. St. Tr. 755; Maclane's Trial, 26 How. St. Tr. 721.

50. U. S. *v.* Greathouse, 26 Fed. Cas. No. 15,254, 2 Abb. 364, 4 Sawy. 457.

51. Respublica *v.* Carlisle, 1 Dall. (Pa.) 35, 1 L. ed. 26 (holding it sufficient, however, to allege in the indictment that accused sent intelligence to the enemy, without setting forth the particular letter or its contents); U. S. *v.* Burr, 25 Fed. Cas. No. 14,693; Vaughan's Case, 2 Salk. 634, 91 Eng. Reprint 535. And see Watts' Trial, 23 How. St. Tr. 1167.

52. Maclane's Trial, 26 How. St. Tr. 721, holding, however, that where allegiance is duly averred, together with a breach of it, it is not necessary that accused be charged as a subject.

53. Denn *v.* Banta, 1 N. J. L. 266 [*citing* Kel. C. C. 16, 84 Eng. Reprint 1061, where it was held that the day in the indictment is not material, and that treason may be laid "on a certain day, and divers days and times before and after," and the jury may find defendant guilty on a day long before].

54. Mulcahy *v.* Reg., L. R. 3 H. L. 306.

55. **Order of reception of evidence** see *infra*, VI, D.

56. U. S. Const. art. 3, § 3.

The plain meaning of the words "overt act," as used in the constitution, is an act of a character susceptible of clear proof, and not resting in mere inference or conjecture. *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,272, 1 Bond 609.

Under the English statutes, it is not necessary that two witnesses testify to the same overt act, but it is sufficient if one witness swear to one overt act and another to another overt act of the same treason. Reg. *v.* McCafferty, 10 Cox C. C. 603, Ir. R. 1 C. L. 363, 15 Wkly. Rep. 1022; Watts' Trial, 23 How. St. Tr. 1167.

57. U. S. *v.* Burr, 26 Fed. Cas. No. 14,693; U. S. *v.* Mitchell, 26 Fed. Cas. No. 15,788, 2 Dall. 348, 1 L. ed. 410.

Proof of overt act of co-conspirator.— If persons collect together to act for one and the same common end, any act done by any one of them, with intent to effectuate such common end, is a fact that may be given in evidence against all of them (Fries' Case, 9 Fed. Cas. No. 5,127); and, although one overt act in the county, or other venue where the offense is laid, must be proved, it is sufficient to prove an overt act of one of defendant's co-conspirators in such county (Reg. *v.* Meany, 10 Cox C. C. 506, Ir. R. 1 C. L. 500, 15 Wkly. Rep. 1082).

Proof of one of several overt acts alleged in the indictment is sufficient, where all the acts alleged are treasonable. Fries' Case, 9 Fed. Cas. No. 5,127.

Sufficiency of evidence of holding commission under enemy see Respublica *v.* Carlisle, 1 Dall. (Pa.) 35, 1 L. ed. 26.

58. Respublica *v.* McCarty, 2 Dall. (Pa.) 86, 1 L. ed. 300; Respublica *v.* Roberts, 1

or evidence of other overt acts, although done at another time or place,[59] especially when such evidence tends to show or explain defendant's intent or purpose, as any evidence on that point is admissible [60] at any time during the trial,[61] on account of direct proof of intent being unnecessary and often impossible to obtain.[62]

D. Trial and Punishment. Although a person cannot be convicted of treason in advising and procuring a warlike assemblage until after the conviction of one of those charged with the overt act,[63] and although proof of intention, being properly part of the evidence in chief, cannot be given in rebuttal,[64] such proof may be given in evidence before proof of the overt act.[65] It is the function of the jury to consider, under instructions from the court, the disputed questions of fact and determine whether the crime of treason has been committed.[66] The statutory punishment for treason in the United States is death or, at the discretion of the court, imprisonment at hard labor for not less than five years, together with a minimum fine of ten thousand dollars, and incapacity to hold any office under the United States.[67]

VII. MISPRISION OF TREASON.

Under an express provision of the United States statutes,[68] persons who have knowledge of the commission of acts of treason and do not disclose their knowledge to the proper officials at the earliest opportunity are guilty of misprison of treason and subject to fine and imprisonment.[69]

TREASURER. One who holds or keeps the treasury;[1] the style or title of an officer to whom funds are committed to be kept or disbursed;[2] one having charge

Dall. (Pa.) 39, 1 L. ed. 27; Fries' Case, 9 Fed. Cas. No. 5,126, 3 Dall. 515, 1 L. ed. 701. And see U. S. *v.* Lee, 26 Fed. Cas. No. 15,584, 2 Cranch C. C. 104.

59. Respublica *v.* Malin, 1 Dall. (Pa.) 33, 1 L. ed. 25; Fries' Case, 9 Fed. Cas. No. 5,126, 3 Dall. 515, 1 L. ed. 701.

60. Respublica *v.* Roberts, 1 Dall. (Pa.) 39, 1 L. ed. 27; Fries' Case, 9 Fed. Cas. No. 5,126, 3 Dall. 515, 1 L. ed. 701; U. S. *v.* Hanway, 26 Fed. Cas. No. 15,299, 2 Wall. Jr. 139; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,276, 2 Wall. Jr. 134; Reg. *v.* Deasy, 15 Cox C. C. 334.

The declarations of accused may be given in evidence for the purpose of showing his intent. Respublica *v.* Malin, 1 Dall. (Pa.) 33, 1 L. ed. 25; U. S. *v.* Lee, 26 Fed. Cas. No. 15,584, 2 Cranch C. C. 104.

Accused is not bound to show the object and meaning of the acts done, as it is incumbent on the prosecution to make out a case against him. Reg. *v.* Frost, 9 C. & P. 129, 38 E. C. L. 87.

61. See *infra*, VI, D.

62. U. S. *v.* Hanway, 26 Fed. Cas. No. 15,299, 2 Wall. Jr. 139; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,276, 2 Wall. Jr. 134.

63. U. S. *v.* Burr, 25 Fed. Cas. No. 14,693.

64. U. S. *v.* Hanway, 26 Fed. Cas. No. 15,299, 2 Wall, Jr. 139.

65. U. S. *v.* Burr, 25 Fed. Cas. No. 14,692*h*; U. S. *v.* Burr, 25 Fed. Cas. No. 14,693; U. S. *v.* Lee, 26 Fed. Cas. No. 15,584, 2 Cranch C. C. 104.

66. U. S. *v.* Hanway, 26 Fed. Cas. No. 15,299, 2 Wall. Jr. 139; Brandreth's Trial, 32 How. St. Tr. 755; Reg. *v.* Davitt, 11 Cox C. C. 676, holding that it is for the jury to determine whether there existed a treasonable purpose.

67. U. S. Rev. St. (1878) § 5332 [U. S. Comp. St. (1901) p. 3623].

Past and present statutes construed.— The act of April 30, 1790 (1 U. S. Ct. at L. 112), declared that the punishment for treason should be death (*In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,272, 1 Bond 609), and it has been held that, by the act of 1862, congress intended to preserve the act of 1790 in force for the prosecution and punishment of offenses committed previous to July 17, 1862, unless the parties accused were convicted, under the act of the latter date, for subsequent offenses; and to punish treason thereafter committed with either death or fine and imprisonment, in the discretion of the court, unless the treason consist in engaging in or assisting a rebellion or insurrection, in which event the death penalty was to be abandoned, and a less penalty is to be inflicted (U. S. *v.* Greathouse, 26 Fed. Cas. No. 15,254, 2 Abb. 364, 4 Sawy. 457).

68. U. S. Rev. St. (1878) § 5333 [U. S. Comp. St. (1901) p. 3623].

69. *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,270, 4 Blatchf. 518; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,274, 2 Sprague 292. And see Carlisle *v.* U. S., 16 Wall. (U. S.) 147, 21 L. ed. 426; Hanauer *v.* Doane, 12 Wall. (U. S.) 342, 20 L. ed. 439.

Misprision defined see MISPRISION, 27 Cyc. 806.

1. Millward-Cliff Cracker Co.'s Estate, 161 Pa. St. 157, 164, 28 Atl. 1072.

2. Abbott L. Dict. [*quoted* in State *v.* Eames, 39 La. Ann. 986, 989, 3 So. 93], adding: "The function is much the same in all cases,— to take charge of the funds or

of the money, funds or revenues of a society, corporation, state or nation.[3] (Treasurer: Of City — In General, see MUNICIPAL CORPORATIONS, 28 Cyc. 1028; Accounting For Funds or Property by, see MUNICIPAL CORPORATIONS, 28 Cyc. 471; Action on Bond of, see MUNICIPAL CORPORATIONS, 28 Cyc. 476; Action to Recover Unpaid Taxes by, see MUNICIPAL CORPORATIONS, 28 Cyc. 1715 note 95; Authority to Issue City Warrant, see MUNICIPAL CORPORATIONS, 28 Cyc. 648, 1569 note 73; Eligibility For Office, see MUNICIPAL CORPORATIONS, 28 Cyc. 417; Power to Appoint, see MUNICIPAL CORPORATIONS, 28 Cyc. 589 note 39. Of Corporation — Negotiable Paper Payable to, see CORPORATIONS, 10 Cyc. 1028; Service of Process on, see PROCESS, 32 Cyc. 550. Of County — As Custodian of Funds, see COUNTIES, 11 Cyc. 513; Compensation of, see COUNTIES, 11 Cyc. 432; Duty as to Payment of Warrants, see COUNTIES, 11 Cyc. 540; Powers and Duties, see COUNTIES, 11 Cyc. 437. Of Insurance Company, Validity of Premium Note Payable to, see FIRE INSURANCE, 19 Cyc. 612. Of State, see STATES, 36 Cyc. 856. Of Township, see TOWNS, *ante*, p. 618.)

TREASURE TROVE. See FINDING LOST GOODS, 19 Cyc. 539.

TREASURY. A department of government which has control over the collection, management, and expenditure of the public revenue.[4]

TREASURY NOTE. A bill circulating as money by authority of the general government.[5] (Treasury Note: As Medium of Payment, see PAYMENT, 30 Cyc. 1212. Of Confederacy, Amount Recoverable on Note Payable in, see COMMERCIAL PAPER, 8 Cyc. 329. Payment of Taxes With, see TAXATION, 37 Cyc. 1164.)

TREASURY STOCK. In reference to mining stock, such stock as is set aside for the actual development of the property.[6] (See CORPORATIONS, 10 Cyc. 364.)

TREAT. To manage in the application of remedies;[7] to negotiate, to settle, to come to terms of accommodation.[8]

revenue as they come in, to keep them safely, and make payments from them, as required from time to time."

3. Worcester Dict. [*quoted* in State *v.* Eames, 39 La. Ann. 986, 989, 3 So. 93].

It is the word by which the custodian of public money is usually designated. Yarnell *v.* Los Angeles, 87 Cal. 603, 608, 25 Pac. 767.

A public treasurer is one who receives public moneys, keeps them in his charge, and disburses them upon proper orders. New York Mut. L. Ins. Co. *v.* Martien, 27 Mont. 437, 440, 71 Pac. 470.

Where a few people assemble and form a voluntary society to raise money to be appropriated to some specific object, and choose one of their members to be their treasurer, the meaning of the word would imply that he holds their funds for their use, to be appropriated according to their order. He would be a trustee for them and accountable to them. Weld *v.* May, 9 Cush. (Mass.) 181, 189.

Distinguished from "tax collector" see Hubbell *v.* Bernalillo County, 13 N. M. 546, 549, 86 Pac. 430.

4. *In re* Township Fines, 35 Pa. Co. Ct. 655, 656.

In the Arkansas constitution the term means the state treasury and not a county treasury. Straub *v.* Gordon, 27 Ark. 625, 628.

Construction of term in statute relating to punishment for embezzlement see EMBEZZLEMENT, 15 Cyc. 505 note 50.

"Treasury certificates" may be employed to mean "funds." Ramsey *v.* Cox, 28 Ark. 366, 368.

5. Brown *v.* State, 120 Ala. 342, 349, 25 So. 182, where such construction was given to the term as used in an indictment charging that defendant "feloniously took, one two dollar United States Treasury note."

6. State *v.* Manhattan Verde Co., (Nev. 1910) 109 Pac. 442, 443.

The term has been applied to the regular ordinary stock of a corporation, upon which certificates in regular form were duly issued and sold, in contradistinction to "Pool Stock" upon which no certificates of stock in regular form should be issued for a fixed period. Williams *v.* Ashurst Oil, etc., Co., 144 Cal. 619, 622, 78 Pac. 28.

7. Century Dict. [*quoted* in U. S. *v.* Somers, 164 Fed. 259, 262].

Giving victuals and drink "by way of treat," referred to in a statute providing that if a party obtaining a verdict in his favor, during the term of court at which such verdict is obtained shall so give to a juror knowing him to be such, the verdict shall be set aside, is something distinct from the ordinary exercise of friendly hospitality, and the statute was not intended to forbid such acts of hospitality in the intercourse of friends as would be usual and ordinary, but was designed to apply to something of a different character, to an entertainment or treat which suggests the idea of convivial enjoyments and fellowship, rather than the customary hospitalities of daily life. Carlisle *v.* Sheldon, 38 Vt. 440, 445.

8. Webster Dict. [*quoted* in Godwin *v.* Brind, L. R. 5 C. P. 299 note, 39 L. J. C. P. 122 note, 17 Wkly. Rep. 29].

Applications "to treat and view" see Godwin *v.* Brind, L. R. 5 C. P. 299 note, 39 L. J. C. P. 122 note, 17 Wkly. Rep. 29.

TREATIES

By William R. Day
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I. HISTORY AND DEFINITION.

From time immemorial treaties, leagues, and compacts have been made between states, tribes, and rulers.[1] There are recorded instances of treaty-making during the entire known history of the world, from the time that Joshua made the treaty with the Gibeonites until the present time.[2] A treaty is primarily a compact between independent nations,[3] and has been briefly defined as a contract between nations;[4] also, as an agreement or contract between two or more

1. Butler, Treaty-Making Power, § 110; 1 Walker Hist. L. Nat. pp. 34, 47, 61, 78.

2. Joshua, c. 9, v. 3–27; Woolsey Int. L. (N. Y. ed.) §§ 101, 102.

3. Edye *v.* Robertson, 112 U. S. 580, 5 S. Ct. 247, 28 L. ed. 798 [*quoted* in United Shoe Mach. Co. *v.* Duplessis Shoe Mach. Co., 148 Fed. 31, 36 (*affirmed* in 155 Fed. 842, 84 C. C. A. 76); La Ninfa, 75 Fed. 513, 518, 21 C. C. A. 434].

A similar definition is "primarily a contract between two or more independent nations." Whitney *v.* Robertson, 124 U. S. 190, 194, 8 S. Ct. 456, 31 L. ed. 386.

Compacts which have temporary matters for their object are called agreements, conventions, and pactions. Vattel L. Nat. bk. 2, c. 12, § 153 [*quoted* in Holmes *v.* Jennison, 14 Pet. (U. S.) 540, 572, 614, 10 L. ed. 618].

4. Adriance *v.* Lagrave, 59 N. Y. 110, 115, 17 Am. Rep. 317; Hauensteins *v.* Lynham, 28 Gratt. (Va.) 62, 75 [*reversed* on other grounds in 100 U. S. 483, 25 L. ed. 628]; Fourteen Diamond Rings, 183 U. S. 176, 182, 22 S. Ct. 59, 46 L. ed. 138; Kinkead *v.* U. S., 150 U. S. 483, 511, 14 S. Ct. 172, 37 L. ed. 1152; U. S. *v.* Rauscher, 119 U. S. 407, 418, 7 S. Ct. 234, 30 L. ed. 425; Chew Heong *v.* U. S., 112 U. S. 536, 565, 5 S. Ct. 255, 28 L. ed. 770; Worcester *v.* Georgia, 6 Pet. (U. S.) 515, 581, 8 L. ed. 483; Foster *v.* Neilson, 2 Pet. (U. S.) 253, 314, 7 L. ed. 415; Goetze *v.* U. S., 103 Fed. 72, 79; Moore *v.* U. S., 32 Ct. Cl. 593, 597; Hall Int. L. (6th ed.) pp. 321 *et seq.*; Wharton Int. L. Dig. §§ 130, 131; Wheaton Int. L. (8th ed.) pp. 328 *et seq.*; Woolsey Int. L. (6th ed.) § 130. See also Glenn Int. L. §§ 100–103.

Similar definitions are: "[A compact] between states or organized communities or their representatives." U. S. *v.* Hunter, 21 Fed. 615, 616.

"A compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." Edye *v.* Robertson, 112 U. S. 580, 598, 5 S. Ct. 247, 28 L. ed. 798.

"A compact formed between two nations or communities, having the right of self-government." Worcester *v.* Georgia, 6 Pet. (U. S.) 515, 581, 8 L. ed. 483.

"A written contract between sovereigns." *Ex p.* Ortiz, 100 Fed. 955, 962.

"In its nature a contract between two nations, not a legislative act." U. S. *v.* Rauscher, 119 U. S. 407, 418, 7 S. Ct. 234, 30 L. ed. 425; Foster *v.* Neilson, 2 Pet. (U. S.) 253, 314, 7 L. ed. 415; *In re* Ah Lung, 18

nations or sovereigns, entered into by agents appointed for that purpose, and duly sanctioned by the supreme power of the respective parties.[5] Contractual relations between different governments find expression not only in those written instruments which are called treaties, but also in what are termed conventions,[6] declarations of accession,[7] *modi vivendi*,[8] protocols,[9] sponsions,[10] agreements,[11]

Fed. 28, 29, 9 Sawy. 306; U. S. *v.* Watts, 14 Fed. 130, 131, 8 Sawy. 370. See also Com. *v.* Hawes, 13 Bush (Ky.) 697, 702, 26 Am. Rep. 242.

In its legal effect an executory agreement see Welch *v.* Trotter, 53 N. C. 197, 203.

A treaty is not a legislative act, but is in its nature a contract between two nations. Foster *v.* Neilson, 2 Pet. (U. S.) 253, 314, 7 L. ed. 415.

The preamble of a treaty does not form a part of the contract itself. Little *v.* Watson, 32 Me. 214, 222.

"Treaty," "compact," and "agreement" compared and defined see Holmes *v.* Jennison, 14 Pet. (U. S.) 540, 572, 614, 10 L. ed. 579, 618.

5. Cherokee Nation *v.* Georgia, 5 Pet. (U. S.) 1, 60, 8 L. ed. 25; Foster *v.* Neilson, 2 Pet. (U. S.) 253, 314, 7 L. ed. 415.

6. Holmes *v.* Jennison, 14 Pet. (U. S.) 540, 572, 614, 10 L. ed. 579, 618; U. S. *v.* Hunter, 21 Fed. 615; Butler Treaty-Making Power, note to § 463.

7. Butler Treaty-Making Power, note to § 463; U. S. Tr. & Conv. (1889) p. 1150; U. S. Treaties in Force (1899), p. 665.

Thus where a treaty has already been made between two or more powers, and another power desires to enter into similar treaty stipulations, it can, if the original treaty so provides, accede to the existing treaty. It happens most frequently where there is a general convention to which it is desired that all the nations shall be parties, and in which provision is generally made for accession of non-signatory powers. See the case of the Geneva Convention (Red Cross) of 1864, to which the United States acceded by a declaration, March 1, 1882. U. S. Tr. & Conv. (1889) p. 1150; U. S. Treaties in Force (1899), p. 665. There have been other accessions to treaties between the United States and one other nation, such as when Württemberg acceded in 1853 by a declaration to the treaty of 1852 between the United States and Prussia. Butler Treaty-Making Power, note to § 463. For other instances see U. S. Tr. & Conv. (1889) p. 1146; 9 U. S. St. at L. p. 66.

8. Butler Treaty-Making Power, note to § 463; Devlin Treaty Power, § 70; U. S. For. Rel. (1899) pp. 328–330; U. S. For. Rel. (1885) pp. 460 *et seq.*; Senate Ex. Doc. 113, pp. 125–141.

A modus vivendi is an agreement between two or more nations as to their conduct in regard to matters in dispute pending the adjustment thereof. That is to say, it is a temporary treaty or convention limited to a period which as a general rule is very brief. Butler Treaty-Making Power, note to § 463.

Under a modus vivendi and "temporary diplomatic agreement" between the United States and Great Britain the Alaska boundary fishing privileges were fixed and extended. U. S. For. Rel. (1885) p. 460. See also Devlin Treaty Power, § 70.

With San Domingo, February, 1905, see U. S. For. Rel. (1905) pp. 342, 378.

With Spain, January, 1895, and September, 1898, see U. S. For. Rel. (1898) p. 828; U. S. For. Rel. (1895) p. 1186.

9. Butler Treaty-Making Power, note to § 463; Devlin Treaty Power, § 71; U. S. For. Rel. (1871) pp. 495 *et seq.* See also, as to use of protocol to determine the meaning of a treaty, U. S. Tr. & Conv. (1889) p. 50.

Protocol has been defined as: "A document serving as the preliminary to, or opening of, any diplomatic transaction." Black L. Dict.

"A diplomatic expression which signifies the register on which the deliberations of a conference, etc., are inscribed, whence the word comes to signify the deliberations themselves." Bouvier L. Dict.

"It is used to indicate a preliminary treaty, as the instrument of Aug. 12, 1898, entered into between the United States and Spain." Bouvier L. Dict.

Informal diplomatic arrangements generally have been described as protocols and sometimes the word might include those of a more formal nature on which action is taken, such as the reference of claims to arbitration, and the agreement as to the basis of future negotiations. Horse Shoe Reef in Lake Erie was transferred to this government by protocol, and no formal agreement ever made, but the United States has continued to maintain a light-house in accordance with the agreement ever since. U. S. Tr. & Conv. (1889) p. 444.

Protocols of agreement as to the basis of future negotiations are clearly within the executive authority. Devlin Treaty Power, § 71.

Agreements as to when treaties shall be exchanged, and extending the time of treaties, have been regarded as protocols, but a protocol to determine the meaning of a clause in a treaty made after it is ratified, or as to the method of enforcement of the treaty, cannot be regarded as a part of the treaty unless ratified by the senate. Senate Ex. Doc. 194 (47th Cong. 1st Sess.), pp. 82–87.

10. Vattel L. Nat. bk. 2, c. 14, § 209; Wheaton Int. L. pt. 3, c. 2, § 3.

Sponsions have been defined as "agreements or engagements made by certain public officers (as generals or admirals in time of war) in behalf of their governments, either without authority or in excess of the authority under which they purport to be made, and which therefore require an express or tacit ratification." Black L. Dict.

11. Holmes *v.* Jennison, 14 Pet. (U. S.)

compacts,[12] and cartels.[13] Sometimes such relations are established by reciprocal legislation,[14] or by exchange of diplomatic notes.[15]

II. NATURE AND GROUNDS OF OBLIGATION.

A treaty is in its nature primarily a contract between different nations,[16] and not a legislative act.[17] In the United States, however, it is more than a contract between nations,[18] being, as declared by the constitution,[19] the supreme law of the land,[20] and binding upon all the courts both state and federal,[21] and therefore obligatory upon all the people of the nation so that every citizen is under a duty to observe and respect the law of the treaty.[22] A treaty, therefore, in the United States, provided it is self-executing,[23] and its terms do not import a contract to be performed,[24] but prescribe a rule by which private rights may be determined,[25] is in the nature of a legislative act,[26] and is placed by the constitution upon the same footing as an act of congress,[27] and superior to any state constitution or law.[28] A treaty is consequently as much a part of the law of any state as its own

540, 572, 614, 10 L. ed. 579, 618; Vattel L. Nat. bk. 2, c. 12, § 153.

There is a distinction between a treaty and a compact or agreement. Holmes *v.* Jennison, 14 Pet. (U. S.) 540, 571, 614, 10 L. ed. 579, 618.

12. Vattel L. Nat. bk. 2, c. 12, §§ 152, 153; bk. 2, c. 14, § 206. See also Virginia *v.* Tennessee, 148 U. S. 503, 13 S. Ct. 728, 37 L. ed. 537.

Compact defined see 8 Cyc. 398.

13. See Black L. Dict.; Bouvier L. Dict.

Cartel defined see 6 Cyc. 679.

14. Butler Treaty-Making Power, note to § 463.

15. Butler Treaty-Making Power, note to § 463; Devlin Treaty Power, § 71. See also 4 Am. St. Papers, pp. 203–207.

16. Com. *v.* Hawes, 13 Bush (Ky.) 697, 26 Am. Rep. 242; Whitney *v.* Robertson, 124 U. S. 190, 8 S. Ct. 456, 31 L. ed. 386; Edye *v.* Robertson, 112 U. S. 580, 5 S. Ct. 247, 28 L. ed. 798; Foster *v.* Neilson, 2 Pet. (U. S.) 253, 7 L. ed. 415. See also *supra*, I.

17. Com. *v.* Hawes, 13 Bush (Ky.) 697, 26 Am. Rep. 242; Foster *v.* Neilson, 2 Pet. (U. S.) 253, 314, 7 L. ed. 415; *In re* Ah Lung, 18 Fed. 28, 9 Sawy. 306.

18. Com. *v.* Hawes, 13 Bush (Ky.) 697, 26 Am. Rep. 242; Little *v.* Watson, 32 Me. 214; Minnesota Canal, etc., Co. *v.* Pratt, 101 Minn. 197, 112 N. W. 395; Foster *v.* Neilson, 2 Pet. (U. S.) 253, 7 L. ed. 415.

19. U. S. Const. art. 6. See also cases cited *infra*, notes 20, 21.

20. *Iowa.*— Opel *v.* Shoup, 100 Iowa 407, 69 N. W. 560, 37 L. R. A. 583.

Kentucky.— Com. *v.* Hawes, 13 Bush 697, 26 Am. Rep. 242.

Massachusetts.— *In re* Wyman, 191 Mass. 276, 77 N. E. 379, 114 Am. St. Rep. 601.

Michigan.— Maiden *v.* Ingersoll, 6 Mich. 373.

Minnesota.— Minnesota Canal, etc., Co. *v.* Pratt, 101 Minn. 197, 112 N. W. 395.

Tennessee.— Ehrlich *v.* Weber, 114 Tenn. 711, 88 S. W. 188.

Texas.— Blandford *v.* State, 10 Tex. App. 627.

United States.— U. S. *v.* Rauscher, 119 U. S. 407, 7 S. Ct. 234, 30 L. ed. 425; Foster *v.* Neilson, 2 Pet. 253, 314, 7 L. ed. 415; Ware *v.* Hylton, 3 Dall. 199, 1 L. ed. 568.

Conflicts between treaties and constitutions or statutes see *infra*, XI.

A treaty is as much a part of the law of the land as the common law or statutes. Jost *v.* Jost, 1 Mackey (D. C.) 487.

21. Com. *v.* Hawes, 13 Bush (Ky.) 697, 26 Am. Rep. 242; Minnesota Canal, etc., Co. *v.* Pratt, 101 Minn. 197, 112 N. W. 395.

22. Minnesota Canal, etc., Co. *v.* Pratt, 101 Minn. 197, 112 N. W. 395.

The citizens of the contracting governments are bound by all the terms and conditions of the treaty. Poole *v.* Fleeger, 11 Pet. (U. S.) 185, 9 L. ed. 680, 955 [*affirming* 9 Fed. Cas. No. 4,860, 1 McLean 185].

23. Com. *v.* Hawes, 13 Bush (Ky.) 697, 26 Am. Rep. 242; Little *v.* Watson, 32 Me. 214; Foster *v.* Neilson, 2 Pet. (U. S.) 253, 314, 7 L. ed. 415.

Self-executing provisions see *infra*, IX.

If the treaty is not self-executing but requires the concurrence of congress to give it effect, it is not the supreme law of the land, for until this power is executed, as where the appropriation of money is required, the treaty is not perfect and is not operative in the sense of the constitution. Turner *v.* American Baptist Missionary Union, 24 Fed. Cas. No. 14,251, 5 McLean 344.

24. Foster *v.* Neilson, 2 Pet. (U. S.) 253, 314, 7 L. ed. 415.

25. Edye *v.* Robertson, 112 U. S. 580, 5 S. Ct. 247, 28 L. ed. 798; *Ex p.* McCabe, 46 Fed. 363, 12 L. R. A. 589.

26. Com. *v.* Hawes, 13 Bush (Ky.) 697, 26 Am. Rep. 242; Little *v.* Watson, 32 Me. 214; Edye *v.* Robertson, 112 U. S. 580, 5 S. Ct. 247, 28 L. ed. 798; Foster *v.* Neilson, 2 Pet. (U. S.) 253, 314, 7 L. ed. 415; *Ex p.* McCabe, 46 Fed. 363, 12 L. R. A. 589; *In re* Ah Lung, 18 Fed. 28, 9 Sawy. 306; *In re* Metzger, 17 Fed. Cas. No. 9,511, 5 N. Y. Leg. Obs. 83.

27. Chae Chan Ping *v.* U. S., 130 U. S. 581, 9 S. Ct. 623, 32 L. ed. 1068; Whitney *v.* Robertson, 124 U. S. 190, 8 S. Ct. 456, 31 L. ed. 386; *In re* Ah Lung, 18 Fed. 28, 9 Sawy. 306. See also *infra*, XI, A.

28. Ware *v.* Hylton, 3 Dall. (U. S.) 199,

local laws and constitution.[29] As a contract between nations, the treaty depends for its observance and performance upon the honor and integrity of the nations which are parties to it,[30] and for its enforcement in case of infraction upon diplomatic negotiations, international arbitration, or war.[31] But the treaty may give rise to private rights which as between individuals may be enforced by the courts,[32] and in such cases the courts resort to the treaty for a rule of decision as they would to a statute.[33] A nation in making a treaty does not act as the agent or representative of any individuals who may be benefited by it,[34] nor are its citizens or subjects parties to the agreement;[35] and the courts can give no redress to a party who is injured by a failure of a government to observe the terms of a treaty. A party so injured must look to his government for relief.[36]

III. POWER TO MAKE.

A. In General. While the treaty-making power of each state or nation must be determined by its own constitution and fundamental law,[37] the right of making treaties has from the beginning been very generally regarded as an attribute of sovereignty,[38] vested in and exercisable only by the sovereign or highest governmental power;[39] and therefore in nearly all federations the power is vested in the central government to the exclusion of the constituent states.[40] In the United States, the treaty-making power is vested by the constitution,[41] in the president, by and with the advice and consent of the senate;[42] and by other provisions of the constitution,[43] the states are expressly prohibited from entering into any treaty, alliance, or confederation,[44] or, without the consent of congress, from entering into any agreement or compact with another state or foreign power.[45]

1 L. ed. 568; *In re* Parrott, 1 Fed. 481, 6 Sawy. 349. See also *infra*, XI, A.

29. Hauenstein *v.* Lynham, 100 U. S. 483, 25 L. ed. 628.

30. Edye *v.* Robertson, 112 U. S. 580, 5 S. Ct. 247, 28 L. ed. 798. See also *infra*, XII.

31. Edye *v.* Robertson, 112 U. S. 580, 5 S. Ct. 247, 28 L ed. 798. See also Whitney *v* Robertson, 124 U. S. 190, 8 S. Ct. 456, 31 L. ed. 386. And see *infra*, XII.

32. U. S. *v.* Rauscher, 119 U. S. 407, 7 S. Ct. 234, 30 L. ed. 425; Edye *v.* Robertson, 112 U. S. 580, 5 S. Ct. 247, 28 L. ed. 798.

33. Maiorano *v.* Baltimore, etc., R. Co., 216 Pa. St. 402, 65 Atl. 1077, 116 Am. St. Rep. 778, 21 L. R. A. N. S. 271; U. S. *v.* Rauscher, 119 U. S. 407, 7 S. Ct. 234, 30 L. ed. 425; Edye *v.* Robertson, 112 U. S. 580, 5 S. Ct. 247, 28 L. ed. 798.

34. Great Western Ins. Co. *v.* U. S., 19 Ct. Cl. 206 [*affirmed* in 112 U. S. 193, 5 S. Ct. 99, 28 L. ed. 687].

35. Frelinghuysen *v.* U. S., 110 U. S. 63, 3 S. Ct. 462, 28 L. ed. 71.

36. Minnesota Canal, etc., Co. *v.* Pratt, 101 Minn. 197, 112 N. W. 395.

37. Butler Treaty-Making Power, § 117; Vattel L. Nat. bk. 2, c. 12, § 154.

38. Butler Treaty-Making Power, § 111.

39 Holmes *v.* Jennison, 14 Pet. (U. S.) 540, 10 L ed. 579, 618; Butler Treaty-Making Power, § 111; Vattel L. Nat. bk. 2, c. 12, § 154.

In England the treaty-making power is vested in the crown. Butler Treaty-Making Power, § 120. And none of the colonies, including the Dominion of Canada, possess any treaty-making power. Butler Treaty-Making Power, §§ 121, 122. As a general rule, however, the governing bodies of the colonies are consulted before treaties are made, and action by colonial legislation taken before they become effective.

Treaty-making power of different nations see Butler Treaty-Making Power, § 130.

40. Butler Treaty-Making Power, §§ 114, 128, 129.

41. U. S. Const. art. 2, § 2.

42. Holmes *v.* Jennison, 14 Pet. (U. S.) 540, 614, 10 L. ed. 579, 618; *In re* Parrott, 1 Fed. 481, 6 Sawy. 349.

43. U. S. Const. art. 1, § 10.

44. People *v.* Curtis, 50 N. Y. 321, 10 Am. Rep. 483; Holmes *v.* Jennison, 14 Pet. (U. S.) 540, 614, 10 L. ed. 579, 618; *In re* Parrott, 1 Fed. 481, 6 Sawy. 349.

45. Wharton *v.* Wise, 153 U. S. 155, 14 S. Ct. 783, 38 L. ed. 669; Virginia *v.* Tennessee, 148 U. S. 503, 13 S. Ct. 728, 37 L. ed. 537; Holmes *v.* Jennison, 14 Pet. (U. S.) 540, 614, 10 L. ed. 579, 618.

The intention of the prohibition was not to prevent every form of agreement between the different states, but only those tending to an increase of political power in the states which might encroach upon or interfere with the supremacy of the United States or the management of particular subjects placed under their entire control. Wharton *v.* Wise, 153 U. S. 155, 14 S. Ct. 783, 38 L. ed. 669; Virginia *v.* Tennessee, 148 U. S. 503, 13 S. Ct. 728, 37 L. ed. 537.

Compacts and agreements made prior to the constitution are not affected by the prohibition except in so far as their stipulations

The courts have no treaty-making power whatever,[46] and while in their application to private rights, the courts may construe treaties,[47] they cannot in any way alter, amend, add to, or dispense with any of their stipulations or requirements.[48]

B. Subjects of Treaties. Generally speaking the treaty-making power extends to all proper subjects of negotiation between the governments of different nations.[49] As expressed in the constitution of the United States the treaty-making power is in terms unlimited,[50] and subject only to those restraints which are found in that instrument against the action of the government or its departments and those arising from the nature of the government itself and of that of the states.[51] To what extent it is thus limited has been considerably discussed without being definitely defined,[52] no treaty having ever been declared by the courts to be void.[53] It would seem clear, however, that the treaty power does not extend so far as to authorize what the constitution forbids,[54] or a change in the character of the government or in that of one of the states,[55] and it has also been stated that it would not authorize a cession of any portion of the territory of a state without the consent of that state;[56] but subject to the limitations mentioned it may be said generally to extend to all matters which are proper subjects of negotiation between our government and the governments of other nations,[57] such as matters relating to extradition,[58] property rights and disabilities of aliens,[59] rights, powers, and duties of ambassadors and consuls,[60] and the jurisdiction of consular courts,[61] regulation

may be in conflict with the provisions of the constitution or affect subjects placed under the control of congress. Wharton *v.* Wise, 153 U. S. 155, 14 S. Ct. 783, 38 L. ed. 669. See also *Ex p.* Marsh, 57 Fed. 719.

With the consent of congress two or more states may enter into an agreement or compact with each other which will be binding not only upon the contracting states but equally so upon the citizens of each. Poole *v.* Fleeger, 11 Pet. (U. S.) 185, 9 L. ed. 680, 955 [*affirming* 9 Fed. Cas. No. 4,860, 1 McLean 185].

46. The Amiable Isabella, 6 Wheat. (U. S.) 1, 5 L. ed. 191.

47. See *infra*, VI.

48. The Amiable Isabella, 6 Wheat. (U. S.) 1, 5 L. ed. 191. See also *infra*, VI.

49. People *v.* Gerke, 5 Cal. 381; De Geofroy *v.* Riggs, 133 U. S. 258, 10 S. Ct. 295, 33 L. ed. 642.

50. People *v.* Gerke, 5 Cal. 381; De Geofroy *v.* Riggs, 133 U. S. 258, 10 S. Ct. 295, 33 L. ed. 642.

51. De Geofroy *v.* Riggs, 133 U. S. 258, 10 S. Ct. 295, 33 L. ed. 642.

52. See Siemssen *v.* Bofer, 6 Cal. 250; People *v.* Gerke, 5 Cal. 381; People *v.* Naglee, 1 Cal. 232, 52 Am. Dec. 312; De Geofroy *v.* Riggs, 133 U. S. 258, 10 S. Ct. 295, 33 L. ed. 642; Thurlow *v.* Massachusetts, 5 How. (U. S.) 504, 613, 12 L. ed. 256; Hamilton *v.* Eaton, 11 Fed. Cas. No. 5,980, 1 Hughes 249; Butler Treaty-Making Power, § 455 *et seq.*

53. Butler Treaty-Making Power, § 454. See also Ware *v.* Hylton, 3 Dall. (U. S.) 199, 237, 1 L. ed. 568, where the court said: "If the court possess a power to declare treaties void, I shall never exercise it, but in a very clear case indeed."

54. People *v.* Gerke, 5 Cal. 381; De Geofroy *v.* Riggs, 133 U. S. 258, 10 S. Ct. 295, 33 L. ed. 642; Boudinot *v.* U. S., 11 Wall. (U. S.) 616, 20 L. ed. 227.

55. People *v.* Gerke, 5 Cal. 381; De Geofroy *v.* Riggs, 133 U. S. 258, 10 S. Ct. 295, 33 L. ed. 642.

56. De Geofroy *v.* Riggs, 133 U. S. 258, 10 S. Ct. 295, 33 L. ed. 642.

But there is some conflict of opinon as to the right to cede by treaty territory of a state without its consent. See Butler Treaty-Making Power, §§ 426, 474, 475.

57. People *v.* Gerke, 5 Cal. 381; *In re* Stixrud, 58 Wash. 339, 109 Pac. 343; De Geofroy *v.* Riggs, 133 U. S. 258, 10 S. Ct. 295, 33 L. ed. 642; United Shoe Mach. Co. *v.* Duplessis Shoe Mach. Co., 148 Fed. 31 [*affirmed* in 155 Fed. 842, 84 C. C. A. 76].

The only questions to be considered with regard to the subject-matter of the treaty are: (1) Whether it is a proper subject of treaty according to international law or the usage and practice of civilized nations; and (2) whether it is prohibited by any of the limitations contained in the constitution. People *v.* Gerke, 5 Cal. 381.

58. Butler Treaty-Making Power, § 432. See also, generally, EXTRADITION (INTERNATIONAL), 19 Cyc. 54.

59. Blythe *v.* Hinckley, 127 Cal. 431, 59 Pac. 787 [*affirmed* in 180 U. S. 333, 21 S. Ct. 390, 45 L. ed. 557]; People *v.* Gerke, 5 Cal. 381; Opel *v.* Shoup, 100 Iowa 407, 69 N. W. 560, 37 L. R. A. 583; *In re* Stixrud, 58 Wash. 339, 109 Pac. 343; De Geofroy *v.* Riggs, 133 U. S. 258, 10 S. Ct. 295, 33 L. ed. 642; Hauenstein *v.* Lynham, 100 U. S. 483, 25 L. ed. 628; Bahuaud *v.* Bize, 105 Fed. 485. See also, generally, ALIENS, 2 Cyc. 97.

60. *In re* Wyman, 191 Mass. 276, 77 N. E. 379, 114 Am. St. Rep. 601, provision as to appointment of consuls and vice-consuls as administrators. See also, generally, AMBASSADORS AND CONSULS, 2 Cyc. 259.

61. Butler Treaty-Making Power, §§ 448–450. See also AMBASSADORS AND CONSULS, 2 Cyc. 274.

of commercial relations with foreign countries,[62] regulation and protection of trade-marks,[63] submission to arbitration of controversies with other governments in which public interests are concerned,[64] and the acquisition of territory.[65] The treaty-making power in the Unites States has been exercised with regard to a large variety of subjects,[66] and at different times pursuant to resolutions of the senate compilations have been made of all the treaties between the United States and other powers.[67]

IV. NEGOTIATION AND RATIFICATION.

The terms of a treaty are ordinarily agreed upon and it is signed by plenipotentiaries or commissioners who are the authorized agents of the contracting powers.[68] After such agreement and signature it must be ratified by the respective governments,[69] which in the United States is done by first referring it to the president who determines whether or not he will submit it to the senate for ratification,[70] and if it is submitted by him it must be approved by a two-thirds vote of the senate.[71] After ratification by each of the contracting powers there must be an exchange of these ratifications,[72] which constitutes the delivery and conclusion of the treaty,[73] and up to this time the treaty is inchoate and may never take effect.[74] In negotiating a treaty the United States does so as a sovereign and not as the agent of any individual or individuals who may be benefited by the result thereof;[75] and the courts have no power to interfere with the negotiation and modification of treaties, this being the prerogative of the executive.[76]

62. Butler Treaty-Making Power, § 430. See also Taylor *v.* Morton, 23 Fed. Cas. No. 13,799, 2 Curt. 454.

63. Butler Treaty-Making Power, § 447. See also TRADE-MARKS AND TRADE-NAMES, *ante*.

64. The Brig Armstrong *v.* U. S., Dev. Ct. Cl. (U. S.) § 20. See also Comegys *v.* Vasse, 1 Pet. (U. S.) 193, 7 L. ed. 108.

65. Wilson *v.* Shaw, 204 U. S. 24, 27 S. Ct. 233, 51 L. ed. 351; American Ins. Co. *v.* 356 Bales of Cotton, 1 Pet. (U. S.) 511, 7 L. ed. 242. See also TERRITORIES, *ante*, p. 191 *et seq.*

But the treaty of 1795 with Spain was not a cession of territory by Spain to the United States, but the recognition of a boundary line, and an admission that all the territory on the American side of the line was originally within the United States. Pollard *v.* Hagan, 3 How. (U. S.) 212, 11 L. ed. 565.

66. Butler Treaty-Making Power, § 428. See also cases cited *supra*, notes 57–65; and the cross-references given at the head of this article.

67. Devlin Treaty Power, appendix II, p. 609; Compilation of Treaties in Force (1904); Treaties, Conventions, etc., Between the United States and Other Powers 1776–1909.

For treaties since the compilation of 1909 see 36 U. S. St. at L. pp. 45–312; 36 U. S. St. at L. pp. 320–351.

68. *Ex p.* Ortiz, 100 Fed. 955.

The terms are "agreed upon" when the ministers have come to an understanding as to the terms of the treaty and have reduced them to writing. Hylton *v.* Brown, 12 Fed. Cas. No. 6,982, 1 Wash. 343.

69. *Ex p.* Ortiz, 100 Fed. 955. See also Jecker *v.* Magee, 9 Wall. (U. S.) 32, 19 L. ed. 571; Hall Int. L. (5th ed.) 331.

70. Butler Treaty-Making Power, § 463.

71. Butler Treaty-Making Power, § 465; U. S. Const. art. 2, § 2, par. 2. See also The Diamond Rings *v.* U. S., 183 U. S. 176, 22 S. Ct. 59, 46 L. ed. 138; Jecker *v.* Magee, 9 Wall. (U. S.) 32, 19 L. ed. 571.

Proceedings in senate.— If the treaty is satisfactory to the president and transmitted by him to the senate it is first submitted to the committee on foreign relations. If reported favorably by the committee it is still necessary for it to be approved by a two-thirds majority of the senate and all questions relating to it are fully open for discussion. Butler Treaty-Making Power, § 465.

The power of the senate is limited to a ratification of such terms as have already been agreed upon between the president acting for the United States and the commissioners of the other contracting power. The senate, while it might refuse its ratification or make such ratification conditional upon the adoption of amendments to a treaty, has no right to ratify the treaty and introduce new terms into it which shall be obligatory upon the other power. Fourteen Diamond Rings *v.* U. S., 183 U. S. 176, 22 S. Ct. 59, 46 L. ed. 138, opinion of Brown, J.

72. Butler Treaty-Making Power, § 465.

73. Armstrong *v.* Bidwell, 124 Fed. 690; *Ex p.* Ortiz, 100 Fed. 955.

74. Armstrong *v.* Bidwell, 124 Fed. 690; *Ex p.* Ortiz, 100 Fed. 955.

75. Great Western Ins. Co. *v.* U. S., 19 Ct. Cl. 206 [*affirmed* in 112 U. S. 193, 5 S. Ct. 99, 28 L. ed. 687]. See also Frelinghuysen *v.* U. S., 110 U. S. 63, 3 S. Ct. 462, 28 L. ed. 71.

76. Devlin Treaty Power, § 60. See also Frelinghuysen *v.* U. S., 110 U. S. 63, 3 S. Ct. 462, 28 L. ed. 71.

V. REQUISITES AND VALIDITY.

When we speak of "a treaty," we mean an instrument written and executed with the formalities customary among nations,[77] but usage has not prescribed any particular form as being necessary for such an agreement.[78] Letters and replies thereto have been ratified as such;[79] and a written declaration annexed to a treaty before ratification explaining ambiguous language or adding new stipulations is after ratification and exchange of ratifications as binding as if inserted in the body of the instrument.[80] All that is essential is that there shall be a sufficient power in the contracting parties and their mutual consent sufficiently declared;[81] and it is not necessary that each of the contracting parties should possess the same attributes of sovereignty, it being sufficient if each possess the right of self-government and the power to perform the stipulations of the treaty.[82] A treaty to be valid must not of course be in violation of the federal constitution,[83] but when a treaty has been duly executed, ratified, and exchanged, it becomes effective and binding upon the contracting powers and the courts, not only as a contract,[84] but also upon all the states of the Union, and becomes a part of the supreme law of the land,[85] and the courts have no right to annul or disregard any of its provisions unless they violate the constitution of the United States.[86] Where the power to make a treaty exists, the courts cannot inquire whether a treaty has been properly executed,[87] or whether it has been procured by undue influence.[88] The power given to the judiciary to determine the validity of treaties is restricted to questions of form, execution, constitutionality, and effect on individuals within the jurisdiction of the court, and not to questions of a public nature.[89] In other words the court is restricted to what has been termed the "necessary" as distinguished from the "voluntary" validity of the treaty;[90] and the courts have also held that it

77. Holmes *v.* Jennison, 14 Pet. (U. S.) 540, 614, 10 L. ed. 579, 618.

78. Hall Int. L. (5th ed.) 329.

79. 4 Am. St. Papers, pp. 202, 207; Treaty Book. (1904), pp. 305–311; Treaty Book (1817), pp. 312–327.

80. Clark *v.* Braden, 16 How. (U. S.) 635, 14 L. ed. 1090.

But in construing a treaty supplemental articles not appended to a treaty until several months after it is signed cannot be referred to to explain the preceding articles. The Ship Tom, 29 Ct. Cl. 68, 39 Ct. Cl. 290.

Matters appearing in a preamble to a treaty, while not forming a part of the contract, yet, being authenticated by the signatures of the contracting parties, are to be regarded as admitted truths. Little *v.* Watson, 32 Me. 214.

81. Vattel L. Nat. bk. 2, c. 12, § 157.

Where territory is acquired by the treaty it is not necessary that the treaty should contain the technical terms used in ordinary conveyances of real estate or that it should define the exact boundaries, provided the description is sufficient for purposes of identification. Wilson *v.* Shaw, 204 U. S. 24, 27 S. Ct. 233, 51 L. ed. 351.

82. Worcester *v.* Georgia, 6 Pet. (U. S.) 515, 581, 8 L. ed. 483.

83. See Boudinot *v.* U. S., 11 Wall. (U. S.) 616, 20 L. ed. 227; The Neck, 138 Fed. 144.

84. Pollard *v.* Kibbe, 14 Pet. (U. S.) 353, 10 L. ed. 490.

The compacts and agreements of allied nations with the common enemy bind each other when they tend to the accomplishment of the object of the allies. Miller *v.* The Resolution, 2 Dall. (U. S.) 1, 1 L. ed. 263.

85. *In re* Cooper, 143 U. S. 472, 12 S. Ct. 453, 36 L. ed. 232; Hauenstein *v.* Lynham, 100 U. S. 483, 25 L. ed. 628; Boudinot *v.* U. S., 11 Wall. (U. S.) 616, 20 L. ed. 227; Fellow *v.* Blacksmith, 19 How. (U. S.) 366, 15 L. ed. 684; Strother *v.* Lucas, 12 Pet. (U. S.) 410, 9 L. ed. 1137; U. S. *v.* The Peggy, 1 Cranch (U. S.) 103, 2 L. ed. 49; U. S. *v.* Berry, 4 Fed. 779, 2 McCrary 58; *In re* Parrott, 1 Fed. 481, 6 Sawy. 349.

86. Clark *v.* Braden, 16 How. (U. S.) 635, 14 L. ed. 1090.

87. Clark *v.* Braden, 16 How. (U. S.) 635, 14 L. ed. 1090; Leighton *v.* U. S., etc., Band, 29 Ct. Cl. 288 [*affirmed* in 161 U. S. 291, 16 S. Ct. 495, 40 L. ed. 703].

Indian treaties.— The courts cannot go behind a treaty, when ratified, to inquire whether or not the tribe was properly represented by its head men. Fellow *v.* Blacksmith, 19 How. (U. S.) 366, 15 L. ed. 684.

88. Leighton *v.* U. S., etc., Band, 29 Ct. Cl. 288–322 [*affirmed* in 161 U. S. 291, 16 S. Ct. 495, 40 L. ed. 703].

89. U. S. *v.* Choctaw Nation, 179 U. S. 494, 21 S. Ct. 149, 45 L. ed. 291; The Amiable Isabella, 6 Wheat. (U. S.) 1, 5 L. ed. 191; *Ex p.* McCabe, 46 Fed. 363, 12 L. R. A. 589; Jones *v.* Walker, 13 Fed. Cas. No. 7,507, 2 Paine 688.

90. Jones *v.* Walker, 13 Fed. Cas. No. 7,507, 2 Paine 688.

The term "validity," applied to treaties,

is for the political department to determine whether a treaty is in existence.[91] So also it is incumbent upon the president and senate to first satisfy themselves as to the authority of representatives of other nations to act for such nations in the capacity of plenipotentiaries, and behind such determinations the courts cannot go.[92]

VI. CONSTRUCTION AND OPERATION.[93]

The construction and operation of treaties viewed as contracts between independent nations are questions for the political departments of the contracting powers and not for the courts; [94] but as treaties in their effect upon private rights are in the nature of legislative acts and binding upon the courts,[95] it is often necessary where such rights are involved for the courts to construe treaties,[96] and they have authority to do so.[97] But the courts can only construe the treaty and cannot in any way alter, add to, or amend it,[98] or annul or disregard any of its provisions unless they violate the constitution,[99] nor can they dispense with any of its conditions or requirements upon any notion of equity, general convenience, or substantial justice.[1] If the terms of the treaty are clear and unambiguous the courts must recognize and enforce it as written,[2] notwithstanding the language of the treaty is inconsistent with the correspondence which preceded it;[3] but if the treaty is open to construction they should endeavor to ascertain and give effect to the inten-

admits of two descriptions, necessary and voluntary. By the necessary validity is meant that which results from the treaty having been made by persons authorized by, and for purposes consistent with, the constitution. By voluntary validity is meant that validity which a treaty, become voidable by reason of violation, afterward continues to retain by the silent volition and acquiescence of the nation. It is called voluntary because it entirely depends on the will of the nation, either to let it continue to operate, or to annul and extinguish it. Jones *v.* Walker, 13 Fed. Cas. No. 7,507, 2 Paine 688.

91. Terlinden *v.* Ames, 184 U. S. 270, 22 S. Ct. 484, 46 L. ed. 534, holding that whether a treaty made by the United States with Prussia is still in force notwithstanding the absorption of that country by the German Empire is a political and not a judicial question.

92. Fellow *v.* Blacksmith, 19 How. (U. S.) 366, 15 L. ed. 684; Clark *v.* Braden, 16 How. (U. S.) 635, 14 L. ed. 1090; U. S. *v.* Arredondo, 6 Pet. (U. S.) 691, 8 L. ed. 547; U. S. *v.* The Peggy, 1 Cranch 103, 2 L. ed. 49; Leighton *v.* U. S., etc., Band, 29 Ct. Cl. 288 [*affirmed* in 161 U. S. 291, 16 S. Ct. 495, 40 L. ed. 703].

93. **Construction to avoid conflict** with acts of congress or state laws see *infra*, XI, C, D.

94. Whitney *v.* Robertson, 124 U. S. 190, 8 S. Ct. 456, 31 L. ed. 386; Foster *v.* Neilson, 2 Pet. (U. S.) 253, 7 L. ed. 415; Taylor *v.* Morton, 23 Fed. Cas. No. 13,799, 2 Curt. 454 [*affirmed* in 2 Black 481, 17 L. ed. 277].

95. See *supra*, II.

96. Adams *v.* Akerlund, 168 Ill. 632, 48 N. E. 454; Maiorano *v.* Baltimore, etc., R. Co., 216 Pa. St. 402, 65 Atl. 1077, 116 Am. St. Rep. 778, 21 L. R. A. N. S. 271; *Ex p.* McCabe, 46 Fed. 363, 12 L. R. A. 589.

97. Scharpf *v.* Schmidt, 172 Ill. 255, 50 N. E. 182; Jones *v.* Meehan, 175 U. S. 1, 20 S. Ct. 1, 44 L. ed. 49; U. S. *v.* Arredondo, 6 Pet. (U. S.) 691, 8 L. ed. 547.

As in the case of any other law the construction of a treaty and its application to particular cases are questions for the courts. Scharpf *v.* Schmidt, 172 Ill. 255, 50 N. E. 182.

The circuit court of appeals has no jurisdiction of cases involving the construction of a treaty, and in such cases an appeal or writ of error lies directly to the supreme court. U. S. *v.* Lee Yen Tai, 113 Fed. 465, 51 C. C. A. 299.

98. U. S. *v.* Choctaw Nation, 179 U. S. 494, 21 S. Ct. 149, 45 L. ed. 291; The Amiable Isabella, 6 Wheat. (U. S.) 1, 5 L. ed. 191.

The duty of the court is to find out the intention of the parties by just rules of interpretation applied to the subject-matter, and having found out such intention to follow it as far as it goes and stop where it stops, whatever may be the imperfections or difficulties which it leaves behind. The Amiable Isabella, 6 Wheat. (U. S.) 1, 5 L. ed. 191.

99. Doe *v.* Braden, 16 How. (U. S.) 635, 14 L. ed. 1090.

1. U. S. *v.* Choctaw Nation, 179 U. S. 494, 21 S. Ct. 149, 45 L. ed. 291; The Amiable Isabella, 6 Wheat. (U. S.) 1, 5 L. ed. 191.

2. Little *v.* Watson, 32 Me. 214; Maiorano *v.* Baltimore, etc., R. Co., 216 Pa. St. 402, 65 Atl. 1077, 116 Am. St. Rep. 778, 21 L. R. A. N. S. 271; The Amiable Isabella, 6 Wheat. (U. S.) 1, 5 L. ed. 191; Ware *v.* Hylton, 3 Dall. (U. S.) 199, 1 L. ed. 568.

Although the preamble of a treaty does not form a part of the contract, yet being duly authenticated by the signatures of the contracting parties, its averments are to be regarded as truths admitted. Little *v.* Watson, 32 Me. 214.

3. Little *v.* Watson, 32 Me. 214.

tion of the parties,[4] and in so doing will adopt the same general rules which are applicable in the construction of statutes, contracts, and written instruments generally,[5] and particularly those applicable in the construction of contracts between individuals.[6] Various rules have, however, been laid down expressly with reference to the construction of treaties.[7] A treaty should be construed as a whole,[8] and in the light of the circumstances and conditions existing at the time it was entered into,[9] the objects that the parties were desirous of effecting,[10] and their legislation upon the subject;[11] and if practicable it should be construed so as to give a reasonable and sensible meaning to all of its provisions,[12] and so that it may have its effect and not prove vain or nugatory.[13] The treaty should also be given such a construction as will avoid unjust or unreasonable conclusions,[14] and exclude fraud,[15] and such a construction as tends to the common advantage of the contracting parties and tends to place them upon an equality,[16] but not so as to put aliens on a more favorable footing than our own citizens.[17] Treaties should ordinarily be construed liberally,[18] and so where the treaty admits of two constructions, one restrictive as to the rights that may be claimed under it and the

4. Matter of Lobrasciano, 38 Misc. (N. Y.) 415, 77 N. Y. Suppl. 1040; Maiorano *v.* Baltimore, etc., R. Co., 216 Pa. St. 402, 65 Atl. 1077, 116 Am. St. Rep. 778, 21 L. R. A. N. S. 271; U. S. *v.* Texas, 162 U. S. 1, 16 S. Ct. 725, 40 L. ed. 867; De Geofroy *v.* Riggs, 133 U. S. 258, 10 S. Ct. 295, 33 L. ed. 642; The Amiable Isabella, 6 Wheat. (U. S.) 1, 5 L. ed. 191; Ware *v.* Hylton, 3 Dall. (U. S.) 199, 1 L. ed. 568; *Ex p.* McCabe, 46 Fed. 363, 12 L. R. A. 589.

5. Adams *v.* Akerlund, 168 Ill. 632, 48 N. E. 454; Matter of Lobrasciano, 38 Misc. (N. Y.) 415, 77 N. Y. Suppl. 1040.

There is this difference, however, that the language of treaties in most instances, as it comes for interpretation and construction, is but a translation from a foreign tongue, and there would be great danger of violating the spirit of such an instrument were the courts to bear too heavily upon the local technical definition and use of a word. Matter of Lobrasciano, 38 Misc. (N. Y.) 415, 77 N. Y. Suppl. 1040.

6. Com. *v.* Hawes, 13 Bush (Ky.) 697, 26 Am. Rep. 242; Anderson *v.* Lewis, Freem. (Miss.) 178; Adriance *v.* Lagrave, 59 N. Y. 110, 17 Am. Rep. 317; *In re* Tirnan, 5 B. & S. 645, 117 E. C. L. 645.

7. Devlin Treaty Power, §§ 115–132; Vattel L. Nat. bk. 2, c. 17, §§ 262–322. See also De Geofroy *v.* Riggs, 133 U. S. 258, 10 S. Ct. 295, 33 L. ed. 642.

8. U. S. *v.* Texas, 162 U. S. 1, 16 S. Ct. 725, 40 L. ed. 867; Doe *v.* Braden, 16 How. (U. S.) 635, 14 L. ed. 1090; Ware *v.* Hylton, 3 Dall. (U. S.) 199, 1 L. ed. 568; *Ex p.* McCabe, 46 Fed. 363, 12 L. R. A. 589.

A map to which the contracting parties referred in the treaty must, in construing the treaty, be given the same effect as if it had been expressly made a part of the treaty. U. S. *v.* Texas, 162 U. S. 1, 16 S. Ct. 725, 40 L. ed. 867.

9. Ross *v.* McIntyre, 140 U. S. 453, 11 S. Ct. 897, 35 L. ed. 581; Strother *v.* Lucas, 12 Pet. (U. S.) 410, 9 L. ed. 1137; U. S. *v.* Payne, 8 Fed. 883, 2 McCrary 289.

10. Matter of Lobrasciano, 38 Misc. (N. Y.) 415, 77 N. Y. Suppl. 1040; U. S. *v.* Texas, 162 U. S. 1, 16 S. Ct. 725, 40 L. ed. 867; Ross *v.* McIntyre, 140 U. S. 453, 11 S. Ct. 897, 35 L. ed. 581; Ware *v.* Hylton, 3 Dall. (U. S.) 199, 1 L. ed. 568; U. S. *v.* Payne, 8 Fed. 883, 2 McCrary 289; Jackson *v.* Porter, 13 Fed. Cas. No. 7,143, 1 Paine 457.

11. Matter of Lobrasciano, 38 Misc. (N. Y.) 415, 77 N. Y. Suppl. 1040.

12. Collins *v.* O'Neil, 214 U. S. 113, 29 S. Ct. 573, 53 L. ed. 933; De Geofroy *v.* Riggs, 133 U. S. 258, 10 S. Ct. 295, 33 L. ed. 642.

13. Vattel L. Nat. bk. 2, c. 17, § 283 [*quoted* in De Geofroy *v.* Riggs, 133 U. S. 258, 270, 10 S. Ct. 295, 33 L. ed. 642]. See also U. S. *v.* The Peggy, 1 Cranch (U. S.) 103, 2 L. ed. 49; Jones *v.* Walker, 13 Fed. Cas. No. 7,507, 2 Paine 688.

14. Strother *v.* Lucas, 12 Pet. (U. S.) 410, 9 L. ed. 1137. See also the cases cited *infra*, notes 15–17.

15. U. S. *v.* The Amistad, 15 Pet. (U. S.) 518, 10 L. ed. 826.

16. Jones *v.* Walker, 13 Fed. Cas. No. 7,507, 2 Paine 688.

17. La Republique Francaise *v.* Saratoga Vichy Spring Co., 191 U. S. 427, 24 S. Ct. 145, 48 L. ed. 247.

18. *In re* Wyman, 191 Mass. 276, 77 N. E. 379, 114 Am. St. Rep. 601; *In re* Stixrud, 58 Wash. 339, 109 Pac. 343; Disconto Gesellschaft *v.* Umbreit, 208 U. S. 570, 28 S. Ct. 337, 52 L. ed. 625; De Geofroy *v.* Riggs, 133 U. S. 258, 10 S. Ct. 295, 33 L. ed. 642; Pino *v.* U. S., 38 Ct. Cl. 64. But see The Neck, 138 Fed. 144, 147, where the court said: "International treaties are usually, if not invariably, prepared with great care by men of learning and experience, accustomed to select words apt to express precisely and fully the intention of the contracting parties. Therefore a reasonable, rather than a liberal, construction must be given to agreements solemnly entered into by nations; and there is no authority for reading into an international treaty, under the guise of construction, extraordinary provisions not necessary to give full effect to the intention expressed."

other liberal, the latter is to be preferred.[19] The construction which has been placed upon the treaty by the parties themselves is also an important consideration,[20] and the courts will ordinarily follow the construction which has been placed upon a treaty by the political department of the government.[21] The words of the treaty are to be taken in their ordinary meaning as understood in the public law of nations,[22] and as applied to the subject-matter in connection with which they are used in the treaty.[23] Where treaties are executed in two languages both are originals and must be construed together.[24] It would be impracticable to attempt to set out the application and construction of the different treaties and treaty provisions which have been before the courts, most of which have been treated elsewhere in this work.[25]

VII. TIME OF TAKING EFFECT.

As between the contracting parties a treaty takes effect, in the absence of any provision to the contrary, from the time it is signed,[26] and its subsequent ratification relates back to that date,[27] so as to render its provisions applicable to acts done by the contracting parties between the dates of signing and ratification.[28] This rule is of course subject to the possibility of non-ratification,[29] and also to any stipulations in the treaty itself as to the time when it shall go into effect,[30] or in regard to the manner in which it shall be ratified [31] or the performance of any conditions precedent,[32] as well as to any amendments made at the time the treaty is submitted for ratification in regard to when it shall become effective.[33] So

19. Scharpf *v.* Schmidt, 172 Ill. 255, 50 N. E. 182; Adams *v.* Akerlund, 168 Ill. 632, 48 N. E. 454; Matter of Lobrasciano, 38 Misc. (N. Y.) 415, 77 N. Y. Suppl. 1040; De Geofroy *v.* Riggs, 133 U. S. 258, 10 S. Ct. 295, 33 L. ed. 642; Hauenstein *v.* Lynham, 100 U. S. 483, 25 L. ed. 628.

20. U. S. *v.* Payne, 8 Fed. 883, 2 McCrary 289. See also Oldfield *v.* Marriott, 10 How. (U. S.) 146, 13 L. ed. 364; Lattimer *v.* Poteet, 14 Pet. (U. S.) 4, 10 L. ed. 328.

21. Matter of Lobrasciano, 38 Misc. (N. Y.) 415, 77 N. Y. Suppl. 1040; Castro *v.* De Uriarte, 16 Fed. 93, 98, where the court said: "While the construction which may be placed by the executive department upon laws or treaties is not necessarily binding upon the judiciary, yet where its construction is not repugnant either to their letter or obvious intent, and, as in this case, is sustained by such manifest considerations of convenience and expediency, it should be adopted without hesitation."

22. De Geofroy *v.* Riggs, 133 U. S. 258, 10 S. Ct. 295, 33 L. ed. 642.

23. *In re* Ghio, 157 Cal. 552, 108 Pac. 516.

24. U. S. *v.* Percheman, 7 Pet. (U. S.) 51, 8 L. ed. 604. See also *In re* Metzger, 1 Barb. (N. Y.) 248.

25. See the cases cited *infra*, this note; and the cross-references given at the head of this article.

Construction of the "most favored nation" clause in treaties see *In re* Ghio, 157 Cal. 552, 108 Pac. 516; Matter of Lobrasciano, 38 Misc. (N. Y.) 415, 77 N. Y. Suppl. 1040; Matter of Fattosini, 33 Misc. (N. Y.) 18, 67 N. Y. Suppl. 1119; Whitney *v.* Robertson, 124 U. S. 190, 8 S. Ct. 456, 31 L. ed. 386; Bartram *v.* Robertson, 122 U. S. 116, 7 S. Ct. 1115, 30 L. ed. 1118; The Ship James & William, 37 Ct. Cl. 303.

Construction of treaties with Indians see INDIANS, 22 Cyc. 122.

Private rights during American occupation of Cuba under treaty with Spain see O'Reilly de Camara *v.* Brooke, 135 Fed. 384.

26. Montault *v.* U. S., 12 How. (U. S.) 47, 13 L. ed. 887; Jecker *v.* Magee, 9 Wall. (U. S.) 32, 19 L. ed. 571; U. S. *v.* D'Auterive, 10 How. (U. S.) 609, 13 L. ed. 560; Davis *v.* Concordia Parish Police Jury, 9 How. (U. S.) 280, 13 L. ed. 138; U. S. *v.* Reynes, 9 How. (U. S.) 127, 13 L. ed. 74; Hylton *v.* Brown, 12 Fed. Cas. No. 6,982, 1 Wash. 343; *In re* Metzger, 17 Fed. Cas. No. 9,511, 5 N. Y. Leg. Obs. 83; Bush *v.* U. S., 29 Ct. Cl. 144.

27. Jacker *v.* Magee, 9 Wall. (U. S.) 32, 19 L. ed. 571; U. S. *v.* D'Auterive, 10 How. (U. S.) 609, 13 L. ed. 560; Davis *v.* Concordia Parish Police Jury, 9 How. (U. S.) 280, 13 L. ed. 138; U. S. *v.* Reynes, 9 How. (U. S.) 127, 13 L. ed. 74; Bush *v.* U. S., 29 Ct. Cl. 144.

28. U. S. *v.* D'Auterive, 10 How. (U. S.) 609, 13 L. ed. 560.

29. Butler Treaty-Making Power, § 383.

30. Shepard *v.* Northwestern L. Ins. Co., 40 Fed. 341; Bush *v.* U. S., 29 Ct. Cl. 144.

Provision for ratification.— If the treaty expressly provides that it shall be obligatory on the contracting parties as soon as ratified, it is not binding until ratified, and the ratification does not relate back to the date of signing. Bush *v.* U. S., 29 Ct. Cl. 144.

31. Shepard *v.* Northwestern L. Ins. Co., 40 Fed. 341.

32. Kenton *v.* Pontalba, 1 Rob. (La.) 343.

33. U. S. *v.* American Sugar Refining Co., 202 U. S. 563, 26 S. Ct. 717, 50 L. ed. 1149 [*reversing* 136 Fed. 508].

The treaty with Cuba by its original terms was to go into effect ten days after the exchange of ratifications, but by virtue

also the rule that the treaty takes effect from the time it is signed applies only to the contracting parties and its effect upon national rights.[34] With regard to individual rights a different rule prevails and the treaty is considered as taking effect only from the exchange of ratifications,[35] and does not relate back so as to affect private rights which have vested prior to that date;[36] for although a treaty is the supreme law of the land it does not become such until duly ratified as required by the constitution,[37] and it would be manifestly unjust to hold individuals chargeable with notice of or bound by its provisions until it has been finally concluded and proclaimed.[38]

VIII. RETROACTIVE OPERATION.

Under the general rule as to when a treaty takes effect with regard to private rights,[39] it is held that where rights of succession to realty are given by a treaty it is not retroactive so as to affect the succession of a person dying before the treaty was concluded;[40] but treaties of extradition may and unless otherwise provided do operate retroactively so as to apply to crimes previously committed.[41]

IX. SELF-EXECUTING PROVISIONS.

When a treaty does not require subsequent legislation to render it effective, after ratification it is the law of the land and will be enforced by the courts the same as a federal legislative act;[42] but where a treaty is incomplete within itself and requires subsequent legislation to render it effective, manifestly it cannot be enforced by the courts until such necessary legislation is had;[43] such as, for instance, where an appropriation of money is necessary to carry the treaty into effect, and until congress makes such an appropriation the treaty is incomplete,

of the senate amendment providing for its approval by congress, which approval was not given until after the exchange of ratifications, it did not go into effect until Dec. 27, 1903, the date proclaimed by the president of the United States and the president of Cuba for the commencement of its operation. Franklin Sugar Refining Co. *v.* U. S., 202 U. S. 580, 26 S. Ct. 720, 50 L. ed. 1153; U. S. *v.* American Sugar Refining Co., 202 U. S. 563, 26 S. Ct. 717, 50 L. ed. 1149 [*reversing* 136 Fed. 508]; U. S. *v.* M. J. Dalton Co., 151 Fed. 144; M. J. Dalton Co. *v.* U. S., 151 Fed. 143.

34. Jecker *v.* Magee, 9 Wall. (U. S.) 32, 19 L. ed. 571; U. S. *v.* Arredondo, 6 Pet. (U. S.) 691, 8 L. ed. 547; U. S. *v.* Grand Rapids, etc., R. Co., 165 Fed. 297, 91 C. C. A. 265; Bush *v.* U. S., 29 Ct. Cl. 144.

35. Jecker *v.* Magee, 9 Wall. (U. S.) 32, 19 L. ed. 571 [*affirming* 4 Metc. (Ky.) 33, 81 Am. Dec. 530]; U. S. *v.* Grand Rapids, etc., R. Co., 165 Fed. 297, 91 C. C. A. 265; Armstrong *v.* Bidwell, 124 Fed. 690; *Ex p.* Ortiz, 100 Fed. 955; Beam *v.* U. S., 43 Ct. Cl. 61.

For the purpose of tariff laws a treaty does not become effective until the exchange of ratifications. Armstrong *v.* Bidwell, 124 Fed. 690.

36. Jecker *v.* Magee, 9 Wall. (U. S.) 32, 19 L. ed. 571; Prevost *v.* Greneaux, 19 How. (U. S.) 1, 15 L. ed. 572.

The date of the treaty is the time of its ratification as regards individual rights. U. S. *v.* Sibbald, 10 Pet. (U. S.) 313, 9 L. ed. 437; U. S. *v.* Arredondo, 6 Pet. (U. S.) 691, 8 L. ed. 547.

37. Jecker *v.* Magee, 9 Wall. (U. S.) 32, 19 L. ed. 571; U. S. *v.* Grand Rapids, etc., R. Co., 165 Fed. 297, 91 C. C. A. 265.

38. Jecker *v.* Magee, 9 Wall. (U. S.) 32, 19 L. ed. 571.

39. See *supra*, VII.

40. Prevost *v.* Greneaux, 19 How. (U. S.) 1, 15 L. ed. 572; Jecker *v.* Magee, 9 Wall. (U. S.) 32, 19 L. ed. 571 [*affirming* 4 Metc. (Ky.) 33, 81 Am. Dec. 530].

41. See EXTRADITION (INTERNATIONAL), 19 Cyc. 54.

42. Little *v.* Watson, 32 Me. 214; Puget Sound Agricultural Co. *v.* Pierce County, 1 Wash. Terr. 159; U. S. *v.* Lariviere, 93 U. S. 188, 23 L. ed. 846; Foster *v.* Neilson, 2 Pet. (U. S.) 253, 7 L. ed. 415; *In re* Metzger, 17 Fed. Cas. No. 9,511, 5 N. Y. Leg. Obs. 83; *In re* Sheazle, 21 Fed. Cas. No. 12,734, 1 Woodb. & M. 66. See also U. S. *v.* Percheman, 7 Pet. (U. S.) 51, 8 L. ed. 604.

A treaty that operates of itself without the aid of legislation is equivalent to an act of congress, and while in force constitutes a part of the supreme law of the land. Chew Heong *v.* U. S., 112 U. S. 536, 5 S. Ct. 255, 28 L. ed. 770; Foster *v.* Nielson, 2 Pet. (U. S.) 253, 7 L. ed. 415.

43. *In re* Metzger, 1 Barb. (N. Y.) 248; Whitney *v.* Robertson, 124 U. S. 190, 8 S. Ct. 456, 31 L. ed. 386; Foster *v.* Neilson, 2 Pet. (U. S.) 253, 7 L. ed. 415; United Shoe Mach. Co. *v.* Duplessis Shoe Mach. Co., 148 Fed. 31 [*affirmed* in 155 Fed. 842, 84 C. C. A. 76]; Turner *v.* American Baptist Missionary Union, 24 Fed. Cas. No. 14,251, 5 McLean 344. See also Fellow *v.* Blacksmith, 19 How. (U. S.) 366, 15 L. ed. 684.

for under the constitution money cannot be appropriated by the treaty-making power.[44] A treaty is to be regarded in courts of justice as equivalent to an act of congress whenever it operates of itself without the aid of any legislative provision;[45] but when the terms of the stipulation import a contract, or when either of the parties engages to perform a particular act, the treaty addresses itself to the political and not the judicial department of the government.[46]

X. DURATION, ABROGATION, AND TERMINATION.

A. In General. Treaties may be terminated in various ways.[47] Thus if a treaty is entered into for a particular period it may be terminated by the expiration of the time limited,[48] or it may be modified or terminated by agreement between the contracting parties,[49] or it may be impliedly repealed or superseded by a later treaty covering the same subject-matter.[50] Provision is also sometimes made in the treaty for its termination by one party on notice to the other;[51] but even where there is no such provision it is legally possible, although it may constitute a breach of the treaty, for one of the parties to abrogate it without the consent or concurrence of the other.[52] A treaty may also be terminated by the absorption of one of the contracting powers into another nationality and the loss of separate existence;[53] but where sovereignty in that respect is not extinguished and the power to execute remains unimpaired, outstanding treaties cannot be regarded as avoided on the ground of impossibility of performance.[54] Treaties may be of such a nature as to their object and import that war will put an end to them,[55] and war of course supersedes treaties of peace and friendship,[56] but war does not always or necessarily dissolve or terminate treaties between the contending powers,[57] and in some cases they are merely suspended,[58] and unless waived or new and repugnant stipulations made will revive upon the cessation of hostilities.[59]

B. Right to Abrogate. Since a treaty is a contract its provisions should be faithfully observed by each of the contracting parties,[60] and not disregarded or

44. Turner *v.* American Baptist Missionary Union, 24 Fed. Cas. No. 14,251, 5 McLean 344; 13 Op. Atty.-Gen. 354.

45. Whitney *v.* Robertson, 124 U. S. 190, 8 S. Ct. 456, 31 L. ed. 386; Chew Heong *v.* U. S., 112 U. S. 536, 5 S. Ct. 255, 28 L. ed. 770; U. S. *v.* Lariviere, 93 U. S. 188, 23 L. ed. 846; Foster *v.* Neilson, 2 Pet. (U. S.) 253, 7 L. ed. 415.

46. *In re* Metzger, 1 Barb. (N. Y.) 248; Foster *v.* Neilson, 2 Pet. (U. S.) 253, 7 L. ed. 415; Humphrey *v.* U. S., Dev. Ct. Cl. §§ 141, 704.

47. Terlinden *v.* Ames, 184 U. S. 270, 22 S. Ct. 484, 46 L. ed. 534.

48. Butler Treaty-Making Power, § 384; Vattel L. Nat. bk. 2, c. 13, § 198.

49. Devlin Treaty-Making Power, § 95; Vattel L. Nat. bk. 2, c. 13, § 205.

50. La Republique Francaise *v.* Schultz, 57 Fed. 37, holding that the treaty of April 16, 1869, between the United States and France was impliedly repealed by the industrial property treaty of 1883, which covered the whole subject-matter of the former treaty.

But a prior treaty will remain in force as to matters not incorporated into or provided for by the later treaty. Ross *v.* McIntyre, 140 U. S. 453, 11 S. Ct. 897, 35 L. ed. 581 [*affirming* 44 Fed. 185].

51. Ropes *v.* Clinch, 20 Fed. Cas. No. 12,041, 8 Blatchf. 304; Devlin Treaty-Making Power, § 98.

52. Ropes *v.* Clinch, 20 Fed. Cas. No. 12,041, 8 Blatchf. 304; Taylor *v.* Morton, 23 Fed. Cas. No. 13,799, 2 Curt. 454; The Ship James and William, 37 Ct. Cl. 303.

53. Terlinden *v.* Ames, 184 U. S. 270, 22 S. Ct. 484, 46 L. ed. 534.

54. Terlinden *v.* Ames, 184 U. S. 270, 22 S. Ct. 484, 46 L. ed. 534.

55. Society for Propagation of Gospel *v.* New Haven, 8 Wheat. (U. S.) 464, 5 L. ed. 662. See also Hutchinson *v.* Brock, 11 Mass. 119.

56. Valk *v.* U. S., 29 Ct. Cl. 62 [*affirmed* in 168 U. S. 703, 18 S. Ct. 949, 42 L. ed. 1211].

57. Fox *v.* Southack, 12 Mass. 143; Society for Propagation of Gospel *v.* New Haven, 8 Wheat. (U. S.) 464, 5 L. ed. 662.

58. McNair *v.* Ragland, 16 N. C. 516; Society for Propagation of Gospel *v.* New Haven, 8 Wheat. (U. S.) 464, 5 L. ed. 662.

Treaties stipulating for permanent rights and general arrangements and professing to aim at perpetuity and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are at most merely suspended while it lasts. Society for Propagation of Gospel *v.* New Haven, 8 Wheat. (U. S.) 464, 5 L. ed. 662.

59. Society for Propagation of Gospel *v.* New Haven, 8 Wheat. (U. S.) 464, 5 L. ed. 662.

60. Minnesota Canal, etc., Co. *v.* Pratt, 101 Minn. 197, 112 N. W. 395; Heong *v.* U. S., 112 U. S. 536, 5 S. Ct. 255, 28 L. ed. 770; Taylor

abrogated except for good and sufficient reasons;[61] but although the treaty is on its face of indefinite duration, circumstances and conditions may arise which will justify one of the parties in disregarding or abrogating it,[62] as where there has been a failure of consideration,[63] where the state of things which was the basis of the treaty and one of its tacit conditions no longer exists,[64] or where there has been such a change of circumstances as to make its performance impossible or impracticable.[65] So also where one of the parties violates or neglects or refuses to perform the conditions of the treaty, the other may treat the obligation as terminated,[66] but a violation by one party does not of itself terminate or render void the treaty, but merely makes it voidable at the option of the other party.[67]

C. How and By Whom Abrogated. Treaties can be modified, annulled, or abrogated only by those in whom such authority is vested,[68] and not by the courts.[69] In the United States, although the treaty-making power is vested in the president with the consent and approval of the senate,[70] yet as an act of congress is equally the law of the land, and, in case of conflict, will control a prior treaty,[71] it is possible for congress to directly abrogate or indirectly render ineffective the provisions of any treaty.[72] This it may do by a formal act or resolution directly abrogating the treaty,[73] or, indirectly, by the enactment of legislation which is in conflict with the provisions of the treaty,[74] or, where the treaty is not self-executing, by failure to enact legislation necessary to carry it into effect,[75] or by a declaration of war.[76]

D. Powers of Courts. If the political departments of the government see fit to abrogate a treaty, although such action may constitute a breach of moral obligations, the courts have no power to prevent it,[77] or to declare an act of congress unconstitutional or void merely because it violates the obligations of a prior treaty.[78] It is for the executive and legislative departments and not for the judiciary to determine whether a government was justified in disregarding or abrogating the provisions of a treaty,[79] or whether there has been a violation of

v. Morton, 23 Fed. Cas. No. 13,799, 2 Curt. 454.

61. Ropes *v.* Clinch, 20 Fed. Cas. No. 12,041, 8 Blatchf. 304.

62. Chae Chan Ping *v.* U. S., 130 U. S. 581, 9 S. Ct. 623, 32 L. ed. 1068; Hooper *v.* U. S., 22 Ct. Cl. 408; Devlin Treaty Power, § 95.

63. Hooper *v.* U. S., 22 Ct. Cl. 408.

64. Hooper *v.* U. S., 22 Ct. Cl. 408; Devlin Treaty Power, § 95. See also New Orleans *v.* De Armas, 9 Pet. (U. S.) 224, 9 L. ed. 109.

65. Hooper *v.* U. S., 22 Ct. Cl. 408; Devlin Treaty Power, § 95.

66. Chae Chan Ping *v.* U. S., 130 U. S. 581, 9 S. Ct. 623, 32 L. ed. 1068; Hooper *v.* U. S., 22 Ct. Cl. 408; Vattel L. Nat. bk. 2, c. 13, § 200; Devlin Treaty Power, § 97.

67. Ware *v.* Hylton, 3 Dall. (U. S.) 199, 1 L. ed. 568; *In re* Thomas, 23 Fed. Cas. No. 13,887, 12 Blatchf. 370.

68. Jones *v.* Walker, 13 Fed. Cas. No. 7,507, 2 Paine 688.

69. Jones *v.* Walker, 13 Fed. Cas. No. 7,507, 2 Paine 688.

70. See *supra*, III, A.

71. See *infra*, XI, C, 1.

72. Boudinot *v.* U. S., 11 Wall. (U. S.) 616, 20 L. ed. 227 [*affirming* 28 Fed. Cas. No. 16,528, 1 Dill. 264]; Ropes *v.* Clinch, 20 Fed. Cas. No. 12,041, 8 Blatchf. 304; Taylor *v.* Morton, 23 Fed. Cas. No. 13,799, 2 Curt. 454; Butler Treaty-Making Power, § 384.

It will not be presumed, in the absence of clear language to that purport, that congress intended to disregard the requirements of a treaty with a foreign government, or to abrogate any of its clauses. *In re* Ah Lung, 18 Fed. 28, 9 Sawy. 306.

73. Ropes *v.* Clinch, 20 Fed. Cas. No. 12,041, 8 Blatchf. 304; Butler Treaty-Making Power, §§ 384, 385.

The treaty of 1778 with France was abrogated *in toto* by the United States by the act of July 7, 1798. The Schooner Endeavor, 44 Ct. Cl. 242.

74. Boudinot *v.* U. S., 11 Wall. (U. S.) 616, 20 L. ed. 227 [*affirming* 28 Fed. Cas. No. 16,528, 1 Dill. 264]; Ropes *v.* Clinch, 20 Fed. Cas. No. 12,041, 8 Blatchf. 304; Butler Treaty-Making Power, §§ 384, 386.

75. Butler Treaty-Making Power, § 311. See also *supra*, IX.

76. Butler Treaty-Making Power, § 384. See also Taylor *v.* Morton, 23 Fed. Cas. No. 13,799, 2 Curt. 454.

77. U. S. *v.* Tobacco Factory, 28 Fed. Cas. No. 16,528, 1 Dill. 264 [*affirmed* in 11 Wall. 616].

78. U. S. *v.* Tobacco Factory, 28 Fed. Cas. No. 16,528, 1 Dill. 264 [*affirmed* in 11 Wall. 616].

Conflict between treaty and acts of congress see *infra*, XI, C.

79. Chae Chan Ping *v.* U. S., 130 U. S. 581, 9 S. Ct. 623, 32 L. ed. 1068; Ware *v.* Hylton, 3 Dall. (U. S.) 199, 1 L. ed. 568; Taylor *v.* Morton, 23 Fed. Cas. No. 13,799, 2 Curt. 454; Butler Treaty-Making Power, § 388.

any of the provisions of the treaty,[80] or whether it has ever been terminated or is still in force.[81]

E. Effect of Abrogation or Termination. The abrogation or termination of a treaty operates like the repeal of a law only upon the future, and does not affect whatever of a permanent character has been executed or vested under it.[82]

XI. CONFLICT BETWEEN TREATIES, CONSTITUTIONS, AND STATUTES.

A. In General. The federal constitution provides that that instrument and the laws and treaties of the United States shall be the supreme law of the land, and binding upon the judges in every state, anything in the constitution or laws of any state to the contrary notwithstanding.[83] By this provision treaties are expressly made superior to both the constitutions and laws of the several states,[84] and while there is no express provision in the constitution as to the effect of conflicts between treaties and acts of congress,[85] they are placed by that instrument upon the same footing, each being declared to be the supreme law of the land,[86] so that neither having any inherent superiority over the other, either may supersede the other, and in case of conflict the one which is later in date will control.[87]

B. Between Different Treaties. A treaty between two nations will supersede or impliedly repeal a former treaty where it covers the whole subject-matter of the former treaty;[88] but the prior treaty will continue in force as to provisions not incorporated in the later treaty, in the absence of express words to the contrary.[89]

C. Between Treaty and Act of Congress — 1. TREATY AND SUBSEQUENT ACT. Under the constitution declaring both treaties and laws of the United States to be the supreme law of the land,[90] treaties and acts of congress are placed upon the same footing,[91] and an act of congress cannot be declared unconstitutional or void merely because it is in conflict with the provisions of a prior treaty.[92] On

80. Ware *v.* Hylton, 3 Dall. (U. S.) 199, 1 L. ed. 568; *In re* Ah Lung, 18 Fed. 28, 9 Sawy. 306; Taylor *v.* Morton, 23 Fed. Cas. No. 13,799, 2 Curt. 454.

81. Terlinden *v.* Ames, 184 U. S. 270, 22 S. Ct. 484, 46 L. ed. 534.

82. Chae Chan Ping *v.* U. S., 130 U. S. 581, 9 S. Ct. 623, 32 L. ed. 1068. See also Carneal *v.* Banks, 10 Wheat. (U. S.) 181, 6 L. ed. 297.

The termination of a treaty by war does not divest rights of property already vested under it. Society for Propagation of Gospel *v.* New Haven, 8 Wheat. (U. S.) 464, 5 L. ed. 662.

83. Opel *v.* Shoup, 100 Iowa 407, 69 N. W. 560, 37 L. R. A. 583; *In re* Wyman, 191 Mass. 276, 77 N. E. 379, 114 Am. St. Rep. 601; Ehrlich *v.* Weber, 114 Tenn. 711, 88 S. W. 188; Ware *v.* Hylton, 3 Dall. (U. S.) 199, 1 L. ed. 568; *In re* Parrott, 1 Fed. 481, 6 Sawy. 349.

84. *In re* Wyman, 191 Mass. 276, 77 N. E. 379, 114 Am. St. Rep. 601; Blandford *v.* State, 10 Tex. App. 627; Ware *v.* Hylton, 3 Dall. (U. S.) 199, 1 L. ed. 568; *In re* Parrott, 1 Fed. 481, 6 Sawy. 349.

The common law as well as the statutes of a state in so far as it is in conflict with the provisions of a treaty is suspended during the continuance of the treaty. De Geofroy *v.* Riggs, 133 U. S. 258, 10 S. Ct. 295, 33 L. ed. 642.

Conflict between treaty and state constitution or law see *infra*, XI, D.

85. See Boudinot *v.* U. S., 11 Wall. (U. S.) 616, 20 L. ed. 227; Taylor *v.* Morton, 23 Fed. Cas. No. 13,799, 2 Curt. 454.

86. Chae Chan Ping *v.* U. S., 130 U. S. 581, 9 S. Ct. 623, 32 L. ed. 1068; Whitney *v.* Robertson, 124 U. S. 190, 8 S. Ct. 456, 31 L. ed. 386; *In re* Ah Lung, 18 Fed. 28, 9 Sawy. 306; Bartram *v.* Robertson, 15 Fed. 212, 21 Blatchf. 211.

87. Ribas *v.* U. S., 194 U. S. 315, 24 S. Ct. 727, 48 L. ed. 994; Chae Chan Ping *v.* U. S., 130 U. S. 581, 9 S. Ct. 623, 32 L. ed. 1068; Whitney *v.* Robertson, 124 U. S. 190, 8 S. Ct. 456, 31 L. ed. 386; Boudinot *v.* U. S., 11 Wall. (U. S.) 616, 20 L. ed. 227; Bartram *v.* Robertson, 15 Fed. 212, 21 Blatchf. 211.

Conflict between treaty and act of congress see *infra*, XI, C.

88. La Republique Francaise *v.* Schultz, 57 Fed. 37.

89. Ross *v.* McIntyre, 140 U. S. 453, 11 S. Ct. 897, 35 L. ed. 581 [*affirming* 44 Fed. 185].

90. U. S. Const. art. 6. See also the cases cited *supra*, note 83.

91. Chae Chan Ping *v.* U. S., 130 U. S. 581, 9 S. Ct. 623, 32 L. ed. 1068; Whitney *v.* Robertson, 124 U. S. 190, 8 S. Ct. 456, 31 L. ed. 386; United Shoe Mach. Co. *v.* Duplessis Shoe Mach. Co., 155 Fed. 842, 84 C. C. A. 76 [*affirming* 148 Fed. 31]; *In re* Ah Lung, 18 Fed. 28, 9 Sawy. 306.

92. Horner *v.* U. S., 143 U. S. 570, 12 S. Ct. 522, 36 L. ed. 266; Whitney *v.* Robertson, 124 U. S. 190, 8 S. Ct. 456, 31 L. ed. 386.

the contrary, it is always possible for congress by statute to repeal, supersede, or render ineffectual the provisions of a prior treaty,[93] and in all cases of conflict between a treaty and a subsequent act of congress the latter will control,[94] provided the statute is otherwise constitutional.[95] It will not be presumed, however, that congress intended to violate the provisions of a treaty,[96] and the general rule applies that repeals by implication are not favored.[97] The statute and the treaty should therefore, if possible, be so construed that both may stand together and each be given effect,[98] but at the same time the statute must be construed according to its manifest intent,[99] and if the conflict is clear and the statute is the later in date it will control and must be recognized by the courts regardless of political consequences.[1]

2. Treaty and Prior Act. Since a treaty and an act of congress are of equal dignity,[2] it follows that an act of congress may be repealed or superseded by a later treaty,[3] and so where the provision of an act of congress and a subsequent treaty are conflicting, the latter will control,[4] provided the treaty is self-executing;[5] but as in other cases, repeals by implication are not favored,[6] and the statute and

93. Tuttle *v.* Moore, 3 Indian Terr. 712, 64 S. W. 585; Thomas *v.* Gay, 169 U. S. 264, 18 S. Ct. 340, 42 L. ed. 740; Ward *v.* Race Horse, 163 U. S. 504, 16 S. Ct. 1076, 41 L. ed. 244; Chae Chan Ping *v.* U. S., 130 U. S. 581, 9 S. Ct. 623, 32 S. E. 1068; Whitney *v.* Robertson, 124 U. S. 190, 8 S. Ct. 456, 31 L. ed. 386; Edye *v.* Robertson, 112 U. S. 580, 5 S. Ct. 247, 28 L. ed. 798; *In re* Ah Lung, 18 Fed. 28, 9 Sawy. 306; Ropes *v.* Clinch, 20 Fed. Cas. No. 12,041, 8 Blatchf. 304; Taylor *v.* Morton, 23 Fed. Cas. No. 13,799, 2 Curt. 454. See also *supra*, X, C.

94. Dukes *v.* McKenna, 4 Indian Terr. 156, 69 S. W. 832; Minnesota Canal, etc., Co. *v.* Pratt, 101 Minn. 197, 112 N. W. 395; Sanchez *v.* U. S., 216 U. S. 167, 30 S. Ct. 361, 54 L. ed. [*affirming* 42 Ct. Cl. 458]; Ward *v.* Race Horse, 163 U. S. 504, 16 S. Ct. 1076, 41 L. ed. 244; Lem Moon Sing *v.* U. S., 158 U. S. 538, 15 S. Ct. 967, 39 L. ed. 1082; Fong Yue Ting *v.* U. S., 149 U. S. 698, 13 S. Ct. 1016, 37 L. ed. 905; Horner *v.* U. S., 143 U. S. 570, 12 S. Ct. 522, 36 L. ed. 266; Chae Chan Ping *v.* U. S., 130 U. S. 581, 9 S. Ct. 623, 32 L. ed. 1068; Botiller *v.* Dominguez, 130 U. S. 238, 9 S. Ct. 525, 32 L. ed. 926; Whitney *v.* Robertson, 124 U. S. 190, 8 S. Ct. 456, 31 L. ed. 386; Edye *v.* Robertson, 112 U. S. 580, 5 S. Ct. 247, 28 L. ed. 798; Boudinot *v.* U. S., 11 Wall. (U. S.) 616, 20 L. ed. 227; Wadsworth *v.* Boysen, 148 Fed. 771, 78 C. C. A. 437; North German Lloyd Steamship Co. *v.* Hedden, 43 Fed. 17; Bartram *v.* Robertson, 15 Fed. 212, 21 Blatchf. 211 [*affirmed* in 122 U. S. 116, 7 S. Ct. 1115, 30 L. ed. 1118]; Thingvalla Line *v.* U. S., 24 Ct. Cl. 255, 5 L. R. A. 135.

95. Ropes *v.* Clinch, 20 Fed. Cas. No. 12,041, 8 Blatchf. 304.

96. U. S. *v.* Gue Lim, 176 U. S. 459, 20 S. Ct. 415, 44 L. ed. 544; Chew Heong *v.* U. S., 112 U. S. 536, 5 S. Ct. 255, 28 L. ed. 770; *In re* Chin A On, 18 Fed. 506, 9 Sawy. 343.

Before the courts will impute to congress an intention to violate an important article of a treaty with a foreign power, that intention must be clearly and unequivocally manifested and the language of the statute must admit of no other reasonable construction. *In re* Chin A On, 18 Fed. 506, 9 Sawy. 343.

97. Chew Heong *v.* U. S., 112 U. S. 536, 5 S. Ct. 255, 28 L. ed. 770; Hennebique Constr. Co. *v.* Myers, 172 Fed. 869, 97 C. C. A. 289.

98. Ainsworth *v.* Munoskung Hunting, etc., Club, 159 Mich. 61, 123 N. W. 802; U. S. *v.* Gue Lim, 176 U. S. 459, 20 S. Ct. 415, 44 L. ed. 544; Chew Heong *v.* U. S., 112 U. S. 536, 5 S. Ct. 255, 28 L. ed. 770; Powers *v.* Comly, 101 U. S. 789, 25 L. ed. 805; Wadsworth *v.* Boysen, 148 Fed. 771, 78 C. C. A. 437; *In re* Chin A On, 18 Fed. 506, 9 Sawy. 343.

99. *In re* Ah Lung, 18 Fed. 28, 9 Sawy. 306.

1. Fong Yue Ting *v.* U. S., 149 U. S. 698, 13 S. Ct. 1016, 37 L. ed. 905; Botiller *v.* Dominguez, 130 U. S. 238, 9 S. Ct. 525, 32 L. ed. 926; Whitney *v.* Robertson, 124 U. S. 190, 8 S. Ct. 456, 21 L. ed. 386; Ropes *v.* Clinch, 1 Fed. Cas. No. 12,041, 8 Blatchf. 304; *In re* Ah Lung, 18 Fed. 28, 9 Sawy. 300. See also Barker *v.* Harvey, 181 U. S. 481, 21 S. Ct. 690, 45 L. ed. 963.

2. Ribas *v.* U. S., 194 U. S. 315, 24 S. Ct. 727, 48 L. ed. 994; Whitney *v.* Robertson, 124 U. S. 190, 8 S. Ct. 456, 31 L. ed. 386. See also *supra*, XI, A.

3. Dukes *v.* McKenna, 4 Indian Terr. 156, 69 S. W. 832; U. S. *v.* Lee Yen Tai, 185 U. S. 213, 22 S. Ct. 629, 46 L. ed. 878; The Cherokee Tobacco, 11 Wall. (U. S.) 616, 20 L. ed. 227; Bartram *v.* Robertson, 15 Fed. 212, 21 Blatchf. 211.

A convention may also supersede prior legislation. Watts *v.* U. S., 1 Wash. Terr. 288.

4. Ribas *v.* U. S., 196 U. S. 315, 24 S. Ct. 727, 48 L. ed. 994. See also cases cited *supra*, note 3.

5. See Whitney *v.* Robertson, 124 U. S. 190, 8 S. Ct. 456, 31 L. ed. 386.

6. Johnson *v.* Browne, 205 U. S. 309, 27 S. Ct. 539, 51 L. ed. 816; U. S. *v.* Lee Yen Tai, 185 U. S. 213, 22 S. Ct. 629, 46 L. ed. 878.

treaty should if possible be so construed that both may stand together and each be given effect.[7]

D. Between Treaty and State Constitution or Law — 1. Treaty and State Constitution. By express provision of the federal constitution,[8] a treaty is superior to a state constitution,[9] and in so far as the provisions of a state constitution and a treaty are conflicting the latter will control.[10]

2. Treaty and State Statute. By express provision of the federal constitution,[11] a treaty is superior to a state law,[12] and when the provisions of a state statute and a treaty conflict the latter will control,[13] and the application of the statute as to the subject-matter covered by the treaty will be held in abeyance during the existence of the treaty.[14] The rule has been frequently applied in the case of conflicts between treaty and statutory provisions relating to the property rights and disabilities of aliens.[15] A state law is, however, suspended or invali-

7. Johnson *v.* Browne, 205 U. S. 309, 27 S. Ct. 539, 51 L. ed. 816 (holding that the statute should not be held to be repealed unless there is such incompatibility that it cannot be enforced without antagonizing the treaty); U. S. *v.* Lee Yen Tai, 185 U. S. 213, 22 S. Ct. 629, 46 L. ed. 878.

8. U. S. Const. art. 6. See also Blandford *v.* State, 10 Tex. App. 627.

9. Blandford *v.* State, 10 Tex. App. 627; Ware *v.* Hylton, 3 Dall. (U. S.) 199, 236, 1 L. ed. 568; *In re* Parrott, 1 Fed. 481, 6 Sawy. 349; Gordon *v.* Kerr, 10 Fed. Cas. No. 5,611, 1 Wash. 322. See also *Ex p.* Coy, 32 Fed. 911.

10. *In re* Parrott, 1 Fed. 481, 6 Sawy. 349; Gordon *v.* Kerr, 10 Fed. Cas. No. 5,611, 1 Wash. 322. See also the cases cited *supra*, note 9.

11. U. S. Const. art. 6. See also *supra*, XI, A.

12. *In re* Wyman, 191 Mass. 276, 77 N. E. 379, 114 Am. St. Rep. 601; Ehrlich *v.* Weber, 114 Tenn. 711, 88 S. W. 188; *In re* Stixrud, 58 Wash. 339, 109 Pac. 343; Ware *v.* Hylton, 3 Dall. (U. S.) 199, 236, 1 L. ed. 568; Bahuaud *v.* Bize, 105 Fed. 485; *In re* Parrott, 1 Fed. 481, 6 Sawy. 349; Hamilton *v.* Eaton, 11 Fed. Cas. No. 5,980, 1 Hughes 249, 3 N. C. 83.

A state has no power in any way to interfere with or limit the operation of a treaty of the United States. Baker *v.* Portland, 2 Fed. Cas. No. 777, 5 Sawy. 566, 20 Alb. L. J. (N. Y.) 206.

13. *California.*— Blythe *v.* Hinckley, 127 Cal. 431, 59 Pac. 787 [*affirmed* in 180 U. S. 333, 21 S. Ct. 941, 46 L. ed. 557]; People *v.* Gerke, 5 Cal. 381. *Compare* People *v.* Naglee, 1 Cal. 232, 52 Am. Dec. 312.

Delaware.— Doe *v.* Roe, 4 Pennew. 398, 55 Atl. 341.

Illinois.— Scharpf *v.* Schmidt, 172 Ill. 255, 50 N. E. 182; Adams *v.* Akerlund, 168 Ill. 632, 48 N. E. 454; Schultze *v.* Schultze, 144 Ill. 290, 33 N. E. 201, 36 Am. St. Rep. 432, 19 L. R. A. 90; Wunderle *v.* Wunderle, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84.

Indiana.— Lehman *v.* State, (App. 1909) 88 N. E. 365.

Iowa.— Doehrel *v.* Hillmer, 102 Iowa 169, 71 N. W. 204; Opel *v.* Shoup, 100 Iowa 407, 69 N. W. 560, 37 L. R. A. 583.

Kentucky.— Yeaker *v.* Yeaker, 4 Metc. 33, 81 Am. Dec. 530.

Louisiana.— Rixner's Succession, 48 La. Ann. 552, 19 So. 597, 32 L. R. A. 177; Rabasse's Succession, 47 La. Ann. 1452, 17 So. 867, 49 Am. St. Rep. 433.

Massachusetts.— *In re* Wyman, 191 Mass. 276, 77 N. E. 379, 114 Am. St. Rep. 601.

New York.— Kull *v.* Kull, 37 Hun 476; Watson *v.* Donnelly, 28 Barb. 653; Matter of Fattosini, 33 Misc. 18, 67 N. Y. Suppl. 1119; People *v.* Warren, 13 Misc. 615, 34 N. Y. Suppl. 615; Jackson *v.* Wright, 4 Johns. 75.

Tennessee.— Ehrlich *v.* Weber, 114 Tenn. 711, 88 S. W. 188. See also Cornet *v.* Winton, 2 Yerg. 143.

Washington.— *In re* Stixrud, 58 Wash. 339, 109 Pac. 343.

United States.— De Geofroy *v.* Riggs, 133 U. S. 258, 10 S. Ct. 295, 33 L. ed. 642; Worcester *v.* Georgia, 6 Pet. 515, 8 L. ed. 483; Carver *v.* Jackson, 4 Pet. 1, 7 L. ed. 761; Chirac *v.* Chirac, 2 Wheat. 259, 4 L. ed. 234; Higginson *v.* Mein, 4 Cranch 415, 2 L. ed. 664; Ware *v.* Hylton, 3 Dall. 199, 236, 1 L. ed. 568; Bahuaud *v.* Bize, 105 Fed. 485; Love *v.* Pamplin, 21 Fed. 755; *In re* Quong Woo, 13 Fed. 229, 7 Sawy. 526; *In re* Ah Chong, 2 Fed. 733, 6 Sawy. 451; *In re* Parrott, 1 Fed. 481, 6 Sawy. 349; *In re* Ah Fong, 1 Fed. Cas. No. 102, 3 Sawy. 144; Baker *v.* Portland, 2 Fed. Cas. No. 777, 5 Sawy. 566, 20 Alb. L. J. (N. Y.) 206; Fisher *v.* Harnden, 9 Fed. Cas. No. 4,819, 1 Paine 55 [*reversed* on other grounds in 1 Wheat. 300, 4 L. ed. 96]; Hamilton *v.* Eaton, 11 Fed. Cas. No. 5,980, 1 Hughes 249, 3 N. C. 83.

See 46 Cent. Dig. tit. "Treaties," § 11.

A treaty by virtue of the constitution of the United States is the supreme law of the land and supersedes all local statutes that contravene its provisions. Kull *v.* Kull, 37 Hun (N. Y.) 476.

14. *In re* Stixrud, 58 Wash. 339, 109 Pac. 343.

15. *California.*— Blythe *v.* Hinckly, 127 Cal. 431, 59 Pac. 787 [*affirmed* in 180 U. S. 333, 21 S. Ct. 390, 45 L. ed. 557].

Delaware.— Doe *v.* Roe, 4 Pennew. 398, 55 Atl. 341.

Illinois.— Schultze *v.* Schultze, 144 Ill. 290, 33 N. E. 201, 36 Am. St. Rep. 432, 19 L. R. A. 90.

dated only in so far as it contravenes the provisions of the treaty,[16] and if under a proper construction of the treaty and the statute, the latter can be given effect without violating the provisions of the treaty, this should be done,[17] particularly in the case of statutes enacted in the proper exercise of the police power,[18] as for the protection and preservation of the public health,[19] and such statutes, if proper police regulations and applicable without discrimination to citizens and to all aliens, will not ordinarily be held invalid as impairing treaty rights,[20] notwithstanding they may happen to affect the citizens or subjects of one nation more than others.[21]

E. Between Treaty and Municipal Ordinance. In so far as any municipal ordinance conflicts with the provisions of a treaty it is invalid and the treaty will control.[22]

XII. PERFORMANCE AND ENFORCEMENT.

A treaty is primarily a compact between independent nations,[23] and depends for the performance and enforcement of its provisions upon the interest and honor of the governments which are parties to it.[24] If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured

Iowa.—Wilcke *v.* Wilcke, 102 Iowa 173, 71 N. W. 201; Doehrel *v.* Hillmer, 102 Iowa 169, 71 N. W. 204; Opel *v.* Shoup, 100 Iowa 407, 69 N. W. 560, 37 L. R. A. 583.

Kentucky.— Yeaker *v.* Yeaker, 4 Metc. 33, 81 Am. Dec. 530.

New York.— Kull *v.* Kull, 37 Hun 476; Watson *v.* Donnelly, 28 Barb. 653.

Tennessee.— Ehrlich *v.* Weber, 114 Tenn. 711, 88 S. W. 188.

Washington. — *In re* Stixrud, 58 Wash. 339, 109 Pac. 343.

United States.— De Geofroy *v.* Riggs, 133 U. S. 258, 10 S. Ct. 295, 33 L. ed. 642; Bahuaud *v.* Bize, 105 Fed. 485.

But the treaty which will suspend or override the statute of a state must be a treaty between the United States and the government of the particular country of which the alien claiming to be relieved of the disability imposed by the state law is a citizen or subject. Wunderle *v.* Wunderle, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84.

16. Yeaker *v.* Yeaker, 4 Metc. (Ky.) 33, 81 Am. Dec. 530.

17. Lehman *v.* State, (Ind. App. 1909) 88 N. E. 365; Sala's Succession, 50 La. Ann. 1009, 24 So. 674; Maiorano *v.* Baltimore, etc., R. Co., 213 U. S. 268, 29 S. Ct. 424, 53 L. ed. 792; Frederickson *v.* Louisiana, 23 How. (U. S.) 445, 16 L. ed. 577.

Statutes construed as not in conflict with treaty provisions see Blythe *v.* Hinckly, 127 Cal. 431, 59 Pac. 787 [*affirmed* in 180 U. S. 333, 21 S. Ct. 390, 45 L. ed. 557] (California Code, section 671, removing disabilities of aliens not in conflict with treaty with Great Britain); People *v.* Naglee, 1 Cal. 233, 52 Am. Dec. 312 (statute requiring foreigners to pay license-fee for privilege of working gold mines); Baldwin *v.* Goldfrank, 88 Tex. 249, 31 S. W. 1064 (Texas statute of 1850 in regard to the investigation of land titles not in conflict with the Mexican treaty of Guadalupe Hidalgo); Olsen *v.* Smith, 195 U. S. 332, 25 S. Ct. 52, 49 L. ed. 224 (Texas statute regulating pilotage not in conflict with treaty with Great Britain); Frederickson *v.* Louisiana, 23 How. (U. S.) 445, 16 L. ed. 577 (statute imposing succession tax not in conflict with treaty provision removing disabilities of aliens); Cantini *v.* Tillman, 54 Fed. 969 (South Carolina dispensary act prohibiting the sale of intoxicating liquors not in conflict with treaty with Italy).

The federal courts in determining the proper construction and application of a state statute will ordinarily adopt and follow the construction placed upon it by the state courts, but whether the statute as so construed is in conflict with the provisions of the treaty is a question for the determination of the federal courts. Maiorano *v.* Baltimore, etc., R. Co., 213 U. S. 268, 29 S. Ct. 424, 53 L. ed. 792.

18. Compagnie Francaise, etc., *v.* State Bd. of Health, 51 La. Ann. 645, 25 So. 591, 72 Am. St. Rep. 458, 56 L. R. A. 795 [*affirmed* in 186 U. S. 380, 22 S. Ct. 811, 46 L. ed. 1209]; *In re* Wong Yung Quy, 2 Fed. 624, 6 Sawy. 442.

19. Compagnie Francaise, etc., *v.* State Bd. of Health, 51 La. Ann. 645, 25 So. 591, 72 Am. St. Rep. 458, 56 L. R. A. 795 [*affirmed* in 186 U. S. 380, 22 S. Ct. 811, 46 L. ed. 1209]; Minneapolis, etc., R. Co. *v.* Milner, 57 Fed. 276.

20. Compagnie Francaise, etc., *v.* State Bd. of Health, 51 La. Ann. 645, 25 So. 591, 72 Am. St. Rep. 458, 56 L. R. A. 795 [*affirmed* in 186 U. S. 380, 22 S. Ct. 811, 46 L. ed. 1209]; *In re* Wong Yung Quy, 2 Fed. 624, 6 Sawy. 442.

21. *In re* Wong Yung Quy, 2 Fed. 624, 6 Sawy. 442.

22. *In re* Lee Sing, 43 Fed. 359; *In re* Quong Woo, 13 Fed. 229, 7 Sawy. 526.

23. Edye *v.* Robertson, 112 U. S. 580, 5 S. Ct. 247, 28 L. ed. 798. See also *supra*, II.

24. Edye *v.* Robertson, 112 U. S. 580, 5 S. Ct. 247, 28 L. ed. 798; La Ninfa, 75 Fed. 513, 21 C. C. A. 434.

party chooses to seek redress,[25] which may in the end be enforced by actual war.[26] With all of this it is obvious that the judicial courts have nothing to do and can give no redress;[27] but a treaty may also contain provisions which confer rights upon the citizens or subjects of the contracting powers which are of a nature to be enforced for the benefit of private parties in the courts,[28] and such provisions being the supreme law of the land, will be recognized and enforced by the courts in the same manner as an act of congress,[29] subject, however, to such acts as congress may subsequently pass in regard to their enforcement, modification, or repeal.[30] Provisions which are not self-executing depend for their enforcement upon the enactment of such legislation as is necessary to carry them into effect.[31]

XIII. VIOLATION.

Treaties are solemn international obligations and should be faithfully observed,[32] but as an individual may break a contract so a nation may violate the provisions of a treaty;[33] but while a breach by one party is a violation of a perfect right of the other party,[34] this is a matter which the courts cannot prevent or redress,[35] or even determine whether as a matter of fact the treaty has been violated,[36] whether the complaining nation has any just ground of complaint,[37] or whether in case

25. Edye *v.* Robertson, 112 U. S. 580, 5 S. Ct. 247, 28 L. ed. 798. See also Botiller *v.* Dominguez, 130 U. S. 238, 9 S. Ct. 525, 32 L. ed. 926; Whitney *v.* Robertson, 124 U. S. 190, 8 S. Ct. 456, 31 L. ed. 386.

26. Edye *v.* Robertson, 112 U. S. 580, 5 S. Ct. 247, 28 L. ed. 798.

27. Edye *v.* Robertson, 112 U. S. 580, 5 S. Ct. 247, 28 L. ed. 798. See also Botiller *v.* Dominguez, 130 U. S. 238, 9 S. Ct. 525, 32 L. ed. 926; *In re* Ah Lung, 18 Fed. 28, 9 Sawy. 306.

28. Edye *v.* Robertson, 112 U. S. 580, 5 S. Ct. 247, 28 L. ed. 798. See also United Shoe Mach. Co. *v.* Duplessis Shoe Mach. Co., 148 Fed. 31 [*affirmed* in 155 Fed. 842, 84 C. C. A. 76].

29. Edye *v.* Robertson, 112 U. S. 580, 5 S. Ct. 247, 28 L. ed. 798; La Ninfa, 75 Fed. 513, 21 C. C. A. 434; *Ex p.* McCabe, 46 Fed. 363, 12 L. R. A. 589.

30. Whitney *v.* Robertson, 124 U. S. 190, 8 S. Ct. 456, 31 L. ed. 386; Edye *v.* Robertson, 112 U. S. 580, 5 S. Ct. 247, 28 L. ed. 798.

Conflict between treaties and subsequent acts of congress see *supra*, XI, C.

The government may adopt whatever mode it may deem expedient in the execution of its treaty obligations with respect to property claimed under Mexican laws. It may act by legislation directly upon the claims preferred, or it may provide a special board for their determination, or it may require their submission to the ordinary tribunals. Grisar *v.* McDowell, 6 Wall. (U. S.) 363, 18 L. ed. 863.

31. Whitney *v.* Robertson, 124 U. S. 190, 8 S. Ct. 456, 31 L. ed. 386; Foster *v.* Neilson, 2 Pet. (U. S.) 253, 7 L. ed. 415.

Self-executing provisions see *supra*, IX.

32. Vattel L. Nat. bk. 2, c. 12, § 163; bk. 2, c. 15, §§ 218–221. See also Taylor *v.* Morton, 22 Fed. Cas. No. 13,799, 2 Curt. 454.

33. Minnesota Canal, etc., Co. *v.* Pratt, 101 Minn. 197, 112 N. W. 395; Taylor *v.* Morton, 22 Fed. Cas. No. 13,799, 2 Curt. 454.

An expulsion without trial of an American citizen from Mexico is a violation of a treaty provision between these countries granting their special protection to the persons and property of the citizens of each other. Atocha *v.* U. S., 8 Ct. Cl. 427.

34. Vattel L. Nat. bk. 2, c. 12, § 164.

Nature and grounds of obligation see *supra*, II.

35. Chae Chan Ping *v.* U. S., 130 U. S. 581, 9 S. Ct. 623, 32 L. ed. 1068; Botiller *v.* Dominguez, 130 U. S. 238, 9 S. Ct. 525, 32 L. ed. 926; Whitney *v.* Robertson, 124 U. S. 190, 8 S. Ct. 456, 31 L. ed. 386; Edye *v.* Robertson, 112 U. S. 580, 5 S. Ct. 247, 28 L. ed. 798.

The court has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the government of the United States as a sovereign power chooses to disregard. Botiller *v.* Dominguez, 130 U. S. 238, 9 S. Ct. 525, 32 L. ed. 926.

For the breach of a treaty a nation is responsible only to the other contracting power, its own sense of right and justice, and the public opinion of the world. Its treaty obligations are not cognizable ordinarily in any court of justice deriving its authority from municipal law. Minnesota Canal, etc., Co. *v.* Pratt, 101 Minn. 197, 112 N. W. 395.

If the country with which the treaty is made is dissatisfied with the action of the legislative department of the government, it may present its complaint to the executive head of the government and take such other measures as it may deem essential for the protection of its interests, but the courts can afford no redress. Whitney *v.* Robertson, 124 U. S. 190, 8 S. Ct. 456, 31 L. ed. 386.

36. *In re* Ah Lung, 18 Fed. 28, 9 Sawy. 306; Taylor *v.* Morton, 23 Fed. Cas. No. 13,799, 2 Curt. 454.

37. Whitney *v.* Robertson, 124 U. S. 190, 8 S. Ct. 456, 31 L. ed. 386.

of violation there was any justification therefor.[38] Such matters are within the exclusive province of the political department of the government and not of the courts.[39] In the United States a treaty may be violated by a subsequent act of congress,[40] and the courts cannot on this ground declare the act to be unconstitutional or void,[41] but they may and frequently have declared state laws to be void on the ground that they were in violation of treaty provisions,[42] and as the courts themselves may violate treaty provisions by a failure to recognize private rights secured thereby,[43] they may and should refuse to sanction or lend their process in aid of any individual enterprise or proceeding which would result in the violation of treaty rights,[44] except pursuant to congressional legislation superseding such treaty provisions.[45] The violation of a treaty by one party does not of itself terminate or render void the treaty but makes it voidable at the option of the other party,[46] who may waive or remit the infraction or demand satisfaction therefor.[47] The breach becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war.[48] In the case of a federation such as the United States, the extent of the responsibility of the general government for acts committed by the different states in violation of treaty stipulations, and the power of the general government to enforce compliance with such stipulations, are at present academic questions, neither having been authoritatively passed upon and definitely determined by the supreme court.[49] The question has been raised on several occasions but a definite determination of the point has generally been avoided by diplomatic settlements,[50] and payments of indemnity when made by

38. Chae Chan Ping *v.* U. S., 130 U. S. 581, 9 S. Ct. 623, 32 L. ed. 1068; Whitney *v.* Robertson, 124 U. S. 190, 8 S. Ct. 456, 31 L. ed. 386; Taylor *v.* Morton, 23 Fed. Cas. No. 13,799, 2 Curt. 454.

39. Chae Chan Ping *v.* U. S., 130 U. S. 581, 9 S. Ct. 623, 32 L. ed. 1068; Whitney *v.* Robertson, 124 U. S. 190, 8 S. Ct. 456, 31 L. ed. 386.

40. Chae Chan Ping *v.* U. S., 130 U. S. 581, 9 S. Ct. 623, 32 L. ed. 1068.

Conflict between treaties and acts of congress see *supra*, XI, C.

41. Fong Yue Ting *v.* U. S., 149 U. S. 698, 13 S. Ct. 1016, 37 L. ed. 905; Horner *v.* U. S., 143 U. S. 570, 12 S. Ct. 522, 36 L. ed. 266; Botiller *v.* Dominguez, 130 U. S. 238, 9 S. Ct. 525, 32 L. ed. 926; Whitney *v.* Robertson, 124 U. S. 190, 8 S. Ct. 456, 31 L. ed. 386; U. S. *v.* Tobacco Factory, 28 Fed. Cas. No. 16,528, 1 Dill. 264 [*affirmed* in 11 Wall. 616, 20 L. ed. 227]. See also *supra*, XI, C, 1.

If the treaty is violated by an act of congress it is a matter of international concern which the contracting parties may settle by such means as enables one state to enforce upon another the obligations of a treaty. The courts cannot enforce them. Botiller *v.* Dominguez, 130 U. S. 238, 9 S. Ct. 525, 32 L. ed. 926.

42. See *supra*, XI, D, 2.

43. See *In re* Dillon, 7 Fed. Cas. No. 3,914, 7 Sawy. 561, consul's exemption by treaty from compulsory process.

Raising question on appeal.—An objection that the trial court denied certain rights guaranteed by treaty cannot be raised for the first time on appeal. *Ex p.* Spies, 123 U. S. 131, 8 S. Ct. 21, 31 L. ed. 80.

44. Minnesota Canal, etc., Co. *v.* Pratt, 101 Minn. 197, 112 N. W. 395; *In re* Dillon, 7 Fed. Cas. No. 3,914, 7 Sawy. 561, holding that where by treaty consular officers are exempt from appearing as witnesses, and papers in consular offices are exempt from seizure or examination, the court may and should refuse to issue and enforce compulsory process requiring a consul to appear as a witness and produce documents in his possession.

A covenant in a deed not to convey or lease land to a Chinaman is in contravention of the treaty of 1880 with China and will not be enforced by a court of equity. Gandolfo *v.* Hartman, 49 Fed. 181, 16 L. R. A. 277.

Provisions not violated.—A treaty provision allowing citizens of the other contracting power to attend to their affairs in the United States and for that purpose to enjoy the same security and protection as citizens is not violated by the refusal of a state court to permit local property to be taken out of the jurisdiction and administration in favor of foreign creditors to the prejudice of its own citizens. De Disconto Gesellschaft *v.* Umbreit, 208 U. S. 570, 28 S. Ct. 337, 52 L. ed. 625 [*affirming* 127 Wis. 651, 106 N. W. 821, 115 Am. St. Rep. 1063].

45. Minnesota Canal, etc., Co. *v.* Pratt, 101 Minn. 197, 112 N. W. 395.

46. See *supra*, X, B.

47. Terlinden *v.* Ames, 184 U. S. 270, 22 S. Ct. 484, 46 L. ed. 534; *In re* Thomas, 23 Fed. Cas. No. 13,887, 12 Blatchf. 370.

48. U. S. *v.* Rauscher, 119 U. S. 407, 7 S. Ct. 234, 30 L. ed. 425; Edye *v.* Robertson, 112 U. S. 580, 5 S. Ct. 247, 28 L. ed. 798.

49. Butler Treaty-Making Power, § 79.

50. Butler Treaty-Making Power, § 81.

the United States have been coupled with a disclaimer of any liability on the part of the general government,[51] although the state department of the United States has prosecuted on behalf of American citizens claims against another federation for acts by one of its constituent states in violation of a treaty and obtained by arbitration a decision in favor of such claimants.[52]

XIV. CLAIMS AGAINST FOREIGN GOVERNMENTS.

Claims of citizens of the United States against foreign governments are not determined by municipal but by international law,[53] and generally speaking neither the state nor federal courts have any jurisdiction in regard to such claims,[54] except as to the adjustment of conflicting rights of different claimants after the amount and validity of the claim has been established by some other tribunal.[55] There are instances in which the courts of this country have been clothed with jurisdiction to determine the merits of claims against a foreign government,[56] but their jurisdiction does not exist unless conferred by congress,[57] and as a rule the cases in which it has been conferred are where the United States for political purposes has assumed to pay such claims.[58] Claims against foreign governments have frequently been the subject of treaty provisions,[59] and have ordinarily been submitted to commissioners or some tribunal of arbitration to determine their validity and amount.[60] While the United States has the power to make such disposition of claims of its citizens against other governments as may be necessary for the peace and welfare of the country, and may, as between its citizens and the other government, entirely extinguish them,[61] yet such claims are property rights of the citizens,[62] and under the constitution cannot be taken or destroyed by the government without compensation.[63] So also while it seems that the United

51. Butler Treaty-Making Power, §§ 90, 95.

52. Butler Treaty-Making Power, §§ 96–100.

53. Butler Treaty-Making Power, § 444. See also Cushing *v.* U. S., 22 Ct. Cl. 1; Hubbell *v.* U. S., 15 Ct. Cl. 546.

54. Butler Treaty-Making Power, § 444.

Jurisdiction of court of claims see COURTS, 11 Cyc. 971.

55. Comegys *v.* Vasse, 1 Pet. (U. S.) 193, 7 L. ed. 108; Dutilh *v.* Coursault, 8 Fed. Cas. No. 4,206, 5 Cranch C. C. 349; Butler Treaty-Making Power, § 444.

56. Butler Treaty-Making Power, § 444. See also *Ex p.* U. S., 17 Wall. (U. S.) 439, 21 L. ed. 696; Hubbell *v.* U. S., 15 Ct. Cl. 546.

Where a special act authorizes the court of claims to examine into a particular claim, and if found to be just to fix and determine its amount, and provides that the amount so determined shall be paid by the United States out of the fund in its hands, the decision of the court of appeals is final and conclusive and no appeal therefrom will lie. *Ex p.* U. S., 17 Wall. (U. S.) 439, 21 L. ed. 696.

57. Butler Treaty-Making Power, § 444.

58. Butler Treaty-Making Power, § 444.

Claims against United States see UNITED STATES.

59. Lee *v.* Thorndike, 2 Metc. (Mass.) 313 (treaty of 1831 with France); Radcliff *v.* Coster, Hoffm. (N. Y.) 99 (treaty of 1831 with France); Lestapies *v.* Ingraham, 5 Pa. St. 71 (treaty of 1831 with France); Yard *v.* Cramond, 5 Rawle (Pa.) 18 (treaty of 1819 with Spain); Williams *v.* Heard, 140 U. S. 529, 11 S. Ct. 885, 35 L. ed. 550 (treaty of 1871 with Great Britain — Alabama claims); Comegys *v.* Vasse, 1 Pet. (U. S.) 193, 7 L. ed. 108 (treaty of 1819 with Spain); Stewart *v.* Callaghan, 23 Fed. Cas. No. 13,423, 4 Cranch C. C. 594 (treaty of indemnity with the king of the two Sicilies); Hubbell *v.* U. S., 15 Ct. Cl. 546 (convention of 1858 with China).

It has been the province of the senate committee on foreign relations to consider such claims of our citizens as have reached a condition requiring the negotiation of treaties for their settlement or adjudication. Butler Treaty-Making Power, § 444.

60. Lee *v.* Thorndike, 2 Metc. (Mass.) 313; Yard *v.* Cramond, 5 Rawle (Pa.) 18; Williams *v.* Heard, 140 U. S. 529, 11 S. Ct. 885, 35 L. ed. 550; Comegys *v.* Vasse, 1 Pet. (U. S.) 193, 7 L. ed. 108.

61. Meade *v.* U. S., 2 Ct. Cl. 224 [*affirmed* in 9 Wall. 691, 19 L. ed. 687]; Butler Treaty-Making Power, §§ 442, 443. See also EMINENT DOMAIN, 15 Cyc. 603.

62. Meade *v.* U. S., 2 Ct. Cl. 224 [*affirmed* in 9 Wall. 691, 19 L. ed. 687]. See also Bachman *v.* Lawson, 109 U. S. 659, 3 S. Ct. 479, 27 L. ed. 1067; Comegys *v.* Vasse, 1 Pet. (U. S.) 193, 7 L. ed. 108.

63. Meade *v.* U. S., 2 Ct. Cl. 224 [*affirmed* in 9 Wall. 691, 19 L. ed. 687]; Butler Treaty-Making Power, §§ 442, 443.

Remedy of claimant.—Where by treaty the United States extinguishes a claim of a citizen against another government, and a special mode for obtaining compensation therefor is provided by statute or by the treaty, this

States has power to submit to arbitration the claim of one of its own citizens against a foreign government,[64] it must be done with due regard to the rights of the citizen,[65] and ample provision made for him to be heard and to present the evidence on which he relies.[66] The decision of commissioners appointed pursuant to treaty to determine the amount and validity of claims is final and conclusive upon all matters within their jurisdiction and authority,[67] whether of law or fact;[68] but ordinarily their authority is restricted to determining the amount and validity of claims as against the other government,[69] and their decision is not conclusive as to the rights of different claimants among themselves.[70] After the amount and validity of the claim has been established by the commissioners, the rights of different claimants to the whole or any part of the amount thereof may be settled by the ordinary judicial tribunals,[71] and the secretary of state may properly refuse to pay over to claimants money received on an award made by commissioners while litigation over conflicting claims is pending.[72] The United States may, although the commissioners have rendered their decision, treat with the other nation for a retrial of the case, as where it is alleged that some of the claims presented were fraudulent, and may, pending such negotiations, withhold from claimants the amounts already received by the United States for distribution;[73] or it may authorize the bringing of a suit in the name of the United States to try the question of fraud, and if the claims are shown to be fraudulent may authorize the return of any moneys paid to and remaining in the custody of the United States.[74] The United States is not, in the absence of statute, liable for interest for the detention of money received by it to be distributed to claimants.[75]

TREATING. As commonly understood, the giving of food, drinks, or cigars, as a compliment or mark of good fellowship, and in company at the table, bar or cigar counter.[1] (Treating: Affecting Verdict of Jury, see TRIAL, *post*. As Exposing

remedy supersedes the ordinary means and is exclusive. Meade *v.* U. S., 2 Ct. Cl. 224 [*affirmed* in 9 Wall. 691, 19 L. ed. 687].

64. The Armstrong *v.* U. S., Dev. Ct. Cl. §§ 20, 21.

65. The Armstrong *v.* U. S., Dev. Ct. Cl. §§ 23, 24.

66. The Armstrong *v.* U. S., Dev. Ct. Cl. §§ 16–18.

67. Yard *v.* Cramond, 5 Rawle (Pa.) 18; Butler *v.* Goreley, 146 U. S. 303, 13 S. Ct. 84, 36 L. ed. 981 [*affirming* 147 Mass. 8, 16 N. E. 734]; Comegys *v.* Vasse, 1 Pet. (U. S.) 193, 7 L. ed. 108; Roberts *v.* U. S., Dev. Ct. Cl. 702.

A rejected claim cannot again be brought under review in a judicial tribunal (Comegys *v.* Vasse, 1 Pet. (U. S.) 193, 7 L. ed. 108), except pursuant to legislative authority (Hubbell *v.* U. S., 15 Ct. Cl. 546).

68. Yard *v.* Cramond, 5 Rawle (Pa.) 18.

69. Delafield *v.* Colden, 1 Paige (N. Y.) 139; Comegys *v.* Vasse, 1 Pet. (U. S.) 193, 7 L. ed. 108; Dutilh *v.* Coursault, 8 Fed. Cas. No. 4,206, 5 Cranch C. C. 349; Ridgway *v.* Hays, 20 Fed. Cas. No. 11,817, 5 Cranch C. C. 23.

70. Lee *v.* Thorndike, 2 Metc. (Mass.) 313; New York Ins. Co. *v.* Roulet, 24 Wend. (N. Y.) 505 [*affirming* 7 Paige 560]; Radcliff *v.* Coster, Hoffm. (N. Y.) 98; Delafield *v.* Colden, 1 Paige (N. Y.) 139; Butler *v.* Goreley, 146 U. S. 303, 13 S. Ct. 84, 36 L. ed. 981 [*affirming* 147 Mass. 8, 16 N. E. 734]; Williams *v.* Heard, 140 U. S. 529, 11 S. Ct. 885, 35 L. ed. 550; Frevall *v.* Bache, 14 Pet. (U. S.) 95, 10 L. ed. 369; Comegys *v.* Vasse, 1 Pet. (U. S.) 193, 7 L. ed. 108; Dutilh *v.* Coursault, 8 Fed. Cas. No. 4,206, 5 Cranch C. C. 349; Ridgway *v.* Hays, 20 Fed. Cas. No. 11,817, 5 Cranch C. C. 23.

An award of the entire amount of a claim to one claimant will not prevent another person having an interest in the claim from recovering his proportionate share of the amount awarded. Johnson *v.* Thorndike, 2 Metc. (Mass.) 313; Dutilh *v.* Coursault, 8 Fed. Cas. No. 4,206, 5 Cranch C. C. 349.

Where an award is made nominally to one person and the beneficial interest is in another, the latter may recover the money in an action for money had and received. Heard *v.* Bradford, 4 Mass. 326.

71. Lee *v.* Thorndike, 2 Metc. (Mass.) 313; Comegys *v.* Vasse, 1 Pet. (U. S.) 193, 7 L. ed. 108; Dutilh *v.* Coursault, 8 Fed. Cas. No. 4,206, 5 Cranch C. C. 349; Ridgway *v.* Hays, 20 Fed. Cas. No. 11,817, 5 Cranch C. C. 23.

72. Bayard *v.* U. S., 127 U. S. 246, 8 S. Ct. 1223, 32 L. ed. 116, holding that such payment will not be compelled by mandamus.

73. Frelinghuysen *v.* U. S., 110 U. S. 63, 3 S. Ct. 462, 28 L. ed. 71.

74. La Abra Silver Min. Co. *v.* U. S., 175 U. S. 423, 20 S. Ct. 168, 44 L. ed. 223 [*affirming* 29 Ct. Cl. 432].

75. U. S. *v.* Bayard, 127 U. S. 251, 8 S. Ct. 1156, 32 L. ed. 159 [*affirming* 4 Mackey (D. C.) 310].

1. *Re* Price's Expense Account, 33 Pa. Co. Ct. 244, 247, where it is said: "It has

to Liability Under Civil Damage Law, see INTOXICATING LIQUORS, 23 Cyc. 319 note 30. As Offense Against Liquor Law, see INTOXICATING LIQUORS, 23 Cyc. 182 note 34. By Third Person as Violation of Law Prohibiting Sale of Liquor to Intoxicated Person, see INTOXICATING LIQUORS, 23 Cyc. 198 note 51.)

TREATMENT. Any behavior of one party which affects the other physically or mentally;[2] the act or the manner of treating in any sense.[3] (Treatment: Cruel — As Ground For Divorce, see DIVORCE, 14 Cyc. 598; Of Animal, see ANIMALS, 2 Cyc. 341; Of Child, see INFANTS, 22 Cyc. 526; PARENT AND CHILD, 29 Cyc. 1585; Of Convict, see CONVICTS, 9 Cyc. 877; Of Seaman, see SEAMEN, 35 Cyc. 1251. Medical — In General, see PHYSICIANS AND SURGEONS, 30 Cyc. 1539; As County Expense, see COUNTIES, 11 Cyc. 494; Authority to Contract For, see CORPORATIONS, 10 Cyc. 926; HEALTH, 21 Cyc. 389; PRINCIPAL AND AGENT, 31 Cyc. 1399; Death by Negligence in as Manslaughter, see HOMICIDE, 21 Cyc. 769; For Apprentice, see APPRENTICES, 3 Cyc. 552; For Seaman, see SEAMEN, 35 Cyc. 1200; For Servant, see MASTER AND SERVANT, 26 Cyc. 1049; Liability of Husband For, see HUSBAND AND WIFE, 21 Cyc. 1220; Of Passenger, Liability of Carrier For Negligence in, see SHIPPING, 36 Cyc. 338.)

TREBLE COSTS. See COSTS, 11 Cyc. 146.

TREBLE DAMAGES. In practice, damages given by statute in certain cases, consisting of the single damages found by the jury actually tripled in amount.[4] (Treble Damages: In General, see DAMAGES, 13 Cyc. 253. For Cutting and Removal of Timber, see TRESPASS, *post*. For Forcible Entry and Detainer, see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1169 note 14. For Infringement of Patent, see PATENTS, 30 Cyc. 1023. For Trespass, see TRESPASS, *post*. For Waste, see WASTE.)

TREBUCKET. A stool that falleth down into a pit of water for the punishment of the party in it.[5] (See CUCKING-STOOL, 12 Cyc. 986 note 53.)

TRECENTISSIMO SEXAGESIMO-QUINTO DIE DECITA PLANE NON EXACTO DIE; ANNICULUS QUI ANNUM CIVILITER NON AD MOMENTA TEMPORUM, SED AD DIES NUMERAMUM. A maxim meaning "We call a child a year old on the three hundred and sixty-fifth day, when the day is fairly begun, but not ended; because we calculate the civil year by moments, and not by days."[6]

TREE. A woody plant whose branches spring from and are supported upon a trunk or body.[7] (Tree: In General, see LOGGING, 25 Cyc. 1541; WOODS AND FORESTS. As Fixture, see FIXTURES, 19 Cyc. 1061. As Included in Mortgage, see MORTGAGES, 27 Cyc. 1144. As Obstruction of Street, see MUNICIPAL CORPORATIONS, 28 Cyc. 894. As Subject to Replevin, see REPLEVIN, 34 Cyc. 1366. Bounty For Planting, see BOUNTIES, 5 Cyc. 993. Change of Form as Affecting Title, see ACCESSION, 1 Cyc. 224 note 8. Compensation For on Land Taken For Public Use, see EMINENT DOMAIN, 15 Cyc. 758. Conversion of, Damages For, see TROVER

grown to such an extent in the United States as to make of it an abuse and an evil. It may very properly be called an American custom."

A generic word which may properly embrace all kinds of entertainment from the most harmless to the most baneful. Rhoder *v.* McKenzie, 1 Ont. El. Cas. 250, 256.

2. Ring *v.* Ring, 118 Ga. 183, 193, 44 S. E. 861, 62 L. R. A. 878; Robinson *v.* Robinson, 66 N. H. 600, 610, 23 Atl. 362, 49 Am. St. Rep. 632, 15 L. R. A. 121, where such is said to be the meaning of the term in a statute granting divorce when either party has so treated the other as seriously to injure health or endanger reason.

3. Century Dict. [*quoted* in U. S. *v.* Somers, 164 Fed. 259, 262].

4. Black L. Dict.

5. Coke Inst. [*quoted* in U. S. *v.* Royall, 27 Fed. Cas. No. 16,202, 3 Cranch C. C. 620].

Derived from the Celtic tre, that is *ville*, and our own bucket, and signifies a town bucket. James *v.* Com., 12 Serg. & R. (Pa.) 220, 227.

6. Morgan Leg. Max. [*citing* Dig. 50, 16, 134].

7. Clay *v.* Postal Tel.-Cable Co., 70 Miss. 406, 411, 11 So. 658.

Generally speaking, it means wood applicable to buildings and does not include orchard trees. Bullen *v.* Denning, 5 B. & C. 842, 851, 8 D. & R. 657, 4 L. J. K. B. O. S. 314, 29 Rev. Rep. 431, 11 E. C. L. 705, 108 Eng. Reprint 313. See also Wyndham *v.* Way, 4 Taunt. 316, 318, 13 Rev. Rep. 607.

"Timber" distinguished see U. S. *v.* Schuler, 27 Fed. Cas. No. 16,234, 6 McLean 28, 37.

AND CONVERSION, *post*. Cutting—As Showing Adverse Possession, see ADVERSE POSSESSION, 1 Cyc. 990; As Waste, see WASTE; Contracts For, see LOGGING, 25 Cyc. 1554; Damages, see TRESPASS, *post*; In Construction, Improvement, and Repair of Highway, see STREETS AND HIGHWAYS, 37 Cyc. 223; Injunction Against, see INJUNCTIONS, 22 Cyc. 832; On Indian Land, see INDIANS, 22 Cyc. 126; On Public Land, see PUBLIC LANDS, 32 Cyc. 778; Penalty For, see TRESPASS, *post*; Damages For Destruction of in Making Public Improvement, see MUNICIPAL CORPORATIONS, 28 Cyc. 1077. Easement For Removal, see EASEMENTS, 14 Cyc. 1176. Entries, Sales, and Possessory Rights as to — Timber Culture Lands, see PUBLIC LANDS, 32 Cyc. 835; Timber Lands, see PUBLIC LANDS, 32 Cyc. 836. Estate in Created by Deed, see DEEDS, 13 Cyc. 651. Evidence as to Damages, see DAMAGES, 13 Cyc. 209. Grant to Railroad of Right to Take, see PUBLIC LANDS, 32 Cyc. 998. In Highway or Street, see MUNICIPAL CORPORATIONS, 28 Cyc. 848, 851; STREETS AND HIGHWAYS, 37 Cyc. 203. Injury to From Construction or Maintenance of Telegraph or Telephone Line, see TELEGRAPHS AND TELEPHONES, 37 Cyc. 1642. Liability of City For Injury Caused by Falling of, see MUNICIPAL CORPORATIONS, 28 Cyc. 1378. Notice to Landowner to Remove, Necessity For Before Removal by City, see MUNICIPAL CORPORATIONS, 28 Cyc. 772 note 84. On Boundary Between Adjoining Landowners, see ADJOINING LANDOWNERS, 1 Cyc. 792. On Land of One Adjoining Landowner, see ADJOINING LANDOWNERS, 1 Cyc. 790. Prohibition of Mutilation of Under Police Power, see MUNICIPAL CORPORATIONS, 28 Cyc. 707 note 74. Reservation of on Conveyance of Land, see DEEDS, 13 Cyc. 679. Rights and Liabilities of — Cotenant as to, see TENANCY IN COMMON, *ante*, p. 17; Life-Tenant as to, see ESTATES, 16 Cyc. 627; Parties to Mortgage as to, see MORTGAGES, 27 Cyc. 1246; Purchaser at Tax-Sale as to, see TAXATION, 37 Cyc. 1470; Tenant Under Farm Lease as to, see LANDLORD AND TENANT, 24 Cyc. 1066; Vendor and Purchaser as to, see VENDOR AND PURCHASER. Sale of — In General, see LOGGING, 25 Cyc. 1549; Application of Statute of Frauds, see FRAUDS, STATUTE OF, 20 Cyc. 212. Severance of as Affecting Character of Property as Real or Personal, see PROPERTY, 32 Cyc. 672. Taxation, see TAXATION, 37 Cyc. 780.)

TRES FACIUNT COLLEGIUM. A maxim meaning "Three form a corporation." [8]

When spoken of without any explanation it implies, *ex vi termini*, a standing tree, and a charge that plaintiff stole "my bee tree" does not constitute actionable slander since a tree cannot be the subject of larceny. Idol *v.* Jones, 13 N. C. 162, 164.

8. Bouvier L. Dict. [*citing* Dig. 50. 16. 85; 1 Blackstone Comm. 469].

TRESPASS

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For Matters Relating to:
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Compensation For Taking or Injuring Land, see EMINENT DOMAIN, 15 Cyc. 993.
Criminal Conversation, see HUSBAND AND WIFE, 21 Cyc. 1629.
Damage to Mining Property, see MINES AND MINERALS, 27 Cyc. 631.
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Arrest of Execution Defendant, see EXECUTIONS, 17 Cyc. 1571.
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By Electric Companies, see ELECTRICITY, 15 Cyc. 475.
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By Animals, see ANIMALS, 2 Cyc. 375.
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Indian Lands, see INDIANS, 22 Cyc. 129.
Mining Property by Lessee, see MINES AND MINERALS, 27 Cyc. 696.
Mortgaged Property, see MORTGAGES, 27 Cyc. 1272.
Private Lands and Fisheries, see FISH AND GAME, 19 Cyc. 1016.
Public Lands, see PUBLIC LANDS, 32 Cyc. 778.
School Buildings, see SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 945.
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Water Rights, see WATERS.
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In General, see WASTE.
By Person in Rightful Possession, see WASTE.

I. CIVIL TRESPASS.

A. Civil Trespass Generally — 1. DEFINITION AND SCOPE OF TERM. The term "trespass" in its broadest sense means any misfeasance, transgression, or offense which damages another's person, health, reputation, or property,[1] and as used in some statutes is equivalent to "tort."[2] In this article, the term is used in a more limited sense and is to be understood as designating an injury to the person, property, or rights of another, which is the immediate result of some wrongful act committed with force, either actual or implied.

2. ELEMENTS — a. The Act — (I) *TRESPASS TO REALTY* — (A) *In General.* Direct injury to realty of another is a trespass,[3] as is any wrongful interference

1. Cox *v.* Strickland, 120 Ga. 104, 106, 47 S. E. 912.

Other definitions are: "Any transgression or offence against the laws of nature or society whether it relates to person or property." 3 Blackstone Comm. 208 [*quoted* in Grunson *v.* State, 89 Ind. 533, 536, 46 Am. Rep. 178].

"Any unauthorized entry upon the realty of another to the damage thereof." Bouvier L. Dict.

"Any unlawful act, committed with violence, actual or implied, to the person, property, or rights of another." Bouvier L. Dict. [*quoted* in Louisville, etc., R. Co. *v.* McCombs, 55 S. W. 921, 922, 21 Ky. L. Rep. 1358].

"Any misfeasance or act of one man whereby another is injuriously treated or damnified." 3 Blackstone Comm. 208 [*quoted* in Louisville, etc., R. Co. *v.* McCombs, 55 S. W. 921, 922, 21 Ky. L. Rep. 1358].

2. Thus under a statute concerning venue in "trespass," libel is a trespass (Cox *v.* Strickland, 120 Ga. 104, 106, 47 S. E. 912), and trespass on the case is a trespass (Hill *v.* Kimball, 76 Tex. 210, 217, 13 S. W. 59, 7 L. R. A. 618; Munal *v.* Brown, 70 Fed. 967, 968); and under statutes relating to survival of actions, actions for deceit are "trespasses" (Tichenor *v.* Hayes, 41 N. J. L. 193, 198, 32 Am. Rep. 186; Noice *v.* Brown, 39 N. J. L. 569; Ten Eyck *v.* Runk, 31 N. J. L. 428, 430). But a breach of contract is not a trespass; and therefore an action against sureties on a sheriff's bond for injury resulting from his misfeasance is not within the statute relating to venue, in "trespass." Lasater *v.* Waits, 95 Tex. 553, 555, 68 S. W. 500.

3. Bentley *v.* Fischer Lumber, etc., Co., 51 La. Ann. 451, 25 So. 262; Peach *v.* Mills, 14 Vt. 371; Sayles *v.* Bemis, 57 Wis. 315, 15 N. W. 432.

Instances.— Building a levee on another's

with possession.[4] And the condition of the land is not material.[5] But a mere lease of lands in plaintiff's rightful possession is not a trespass,[6] nor remaining in possession by a tenant at will after a conveyance, no demand for possession or for rent having been made,[7] nor putting cattle on one's own land,[8] nor injury to land from driving logs in a navigable stream,[9] nor inclosing one's own land.[10] Mere words do not constitute a trespass,[11] nor a mere breach of an agreement by one in possession of land.[12] Where defendant has a right to enter on plaintiff's premises and do certain acts, they are not rendered trespasses because the entry was made wrongfully.[13]

(B) *Entry on Realty* — (1) ENTRY IN PERSON. Every unauthorized entry on land of another is a trespass,[14] even if no damage is done,[15] or the injury is

land is a trespass (Bentley *v.* Fischer Lumber, etc., Co., 51 La. Ann. 451, 25 So. 262), and if cutting ice on a navigable stream running on plaintiff's land is an injury to the realty it is a trespass, but not otherwise (Van Rensselaer *v.* Mould, 48 Hun (N. Y.) 396, 1 N. Y. Suppl. 28). So carrying off the materials of a building, severed by a trespasser (Woodruff *v.* Halsey, 8 Pick. (Mass.) 333, 19 Am. Dec. 329), the cutting trees by one having neither title nor possession (King *v.* Baker, 25 Pa. St. 186), or the taking of water from a spring by a corporation without compensation (Lord *v.* Meadville Water Co., 135 Pa. St. 122, 19 Atl. 1007, 20 Am. St. Rep. 864, 8 L. R. A. 202) is a trespass.

4. Bass *v.* West, 110 Ga. 698, 36 S. E. 244, of tenant.

5. Norton *v.* Young, 6 Colo. App. 187, 40 Pac. 156 (fence injured or not lawful fence); Schwartz *v.* McQuaid, 214 Ill. 357, 73 N. E. 582, 105 Am. St. Rep. 112 (building in dilapidated condition); Jenks *v.* Lansing Lumber Co., 97 Iowa 342, 66 N. W. 231 (unfenced land). See also *infra*, I, A, 2, d.

6. Swygert *v.* Wingard, 48 S. C. 321, 26 S. E. 653.

7. Ingram *v.* Thomas, 24 Ind. App. 570, 57 N. E. 263.

8. Haskins *v.* Andrews, 12 Wyo. 458, 76 Pac. 588, although inclosed with plaintiff's by fences of adjoining landowner and the cattle overstock the joint pasture.

9. Field *v.* Apple River Log Driving Co., 67 Wis. 569, 31 N. W. 17.

10. Abbey *v.* Shiner, 5 Tex. Civ. App. 287, 24 S. W. 91, although it also incloses plaintiff's, unless there is user of plaintiff's.

11. Wheeler *v.* Moore, Wright (Ohio) 408.

12. Kretzer *v.* Wysong, 5 Gratt. Va.) 9, breach of promise by tenant, after attornment to plaintiff, to pay rent to him.

13. Percival *v.* Stamp, 2 C. L. R. 282, 9 Exch. 167.

14. **Entry on land** generally see the following cases:

Delaware.— Tubbs *v.* Lynch, 4 Harr. 521.

Illinois.— Pfeiffer *v.* Grossman, 15 Ill. 53.

Maine.— Hatch *v.* Donnell, 74 Me. 163.

New Hampshire.— Brown *v.* Manter, 22 N. H. 468.

North Carolina.— Barneycastle *v.* Walker, 92 N. C. 198 (wrongful entry by a landlord); Dougherty *v.* Stepp, 18 N. C. 371.

Tennessee.— Norvell *v.* Gray, 1 Swan 96.

Texas.— Ripy *v.* Less, (Civ. App. 1909) 118 S. W. 1084.

See 46 Cent. Dig. tit. "Trespass," § 10.

Entry into a dwelling-house without a license. Markham *v.* Brown, 37 Ga. 277, 92 Am. Dec. 73; Brown *v.* Perkins, 1 Allen (Mass.) 89; Haight *v.* Badgeley, 15 Barb. (N. Y.) 499 (entry into plaintiff's kitchen and enticing away his servant); Adams *v.* Freeman, 12 Johns. (N. Y.) 408, 7 Am. Dec. 327.

Extent of rule.— It is immaterial that the entry was made in the course of defendant's operations on adjoining land (Ritter *v.* Sieger, 105 Pa. St. 400); although to prevent an injury to plaintiff's house (Cozzens *v.* Higgins, 1 Abb. Dec. (N. Y.) 451, 3 Keyes 206, 33 How. Pr. 436; Ketcham *v.* Cohn, 2 Misc. (N. Y.) 427, 22 N. Y. Suppl. 181); or under *bona fide* claim of right (Cushman *v.* Blanchard, 2 Me. 266, 11 Am. Dec. 76).

15. *Alabama.*— Western Union Tel. Co. *v.* Dickens, 148 Ala. 480, 41 So. 469; Eagle, etc., Mfg. Co. *v.* Gibson, 62 Ala. 369.

California.— Sefton *v.* Prentice, 103 Cal. 670, 37 Pac. 641.

Connecticut.— Puorto *v.* Chieppa, 78 Conn. 401, 62 Atl. 664.

Delaware.— Quillen *v.* Betts, 1 Pennew. 53, 39 Atl. 595; Smethurst *v.* Journey, 1 Houst. 196.

Illinois.— Merrill *v.* Dibble, 12 Ill. App. 85.

Maine.— Chase *v.* Cochran, 102 Me. 431, 67 Atl. 320.

Maryland.— Gusdorff *v.* Duncan, 94 Md. 160, 50 Atl. 574.

Massachusetts.— Brown *v.* Perkins, 1 Allen 89.

Mississippi.—Agnew *v.* Jones, 74 Miss. 347, 23 So. 25, it is immaterial that the land is uninclosed.

Nevada.— Patchen *v.* Keeley, 19 Nev. 404, 14 Pac. 347.

New Jersey.— U. S. Pipe Line Co. *v.* Delaware, etc., R. Co., 62 N. J. L. 254, 41 Atl. 759, 42 L. R. A. 572.

New York.— Wood *v.* Snider, 187 N. Y. 28, 79 N. E. 858, 12 L. R. A. N. S. 912; Pierce *v.* Hosmer, 66 Barb. 345.

North Carolina.— Dale *v.* Southern R. Co., 132 N. C. 705, 44 S. E. 399.

South Carolina.— Few *v.* Keller, 63 S. C. 154, 41 S. E. 85.

Texas.— Carter *v.* Wallace, 2 Tex. 206; McCarthy *v.* Miller, (Civ. App. 1900) 57

slight.[16] It will be presumed that injury resulted even if it was no more than the trampling of the herbage.[17] An entry and taking possession of land of another,[18] forcibly excluding the owner,[19] or injuring the property[20] is a trespass. An entry is a trespass if obtained by a wrongful act,[21] under color of a defective grant,[22] under a tax deed void on its face,[23] or if made for an illegal purpose.[24] So, an entry by a police officer without justification,[25] or by one having a legal right but in an unlawful manner,[26] is a trespass. However, a person is not a trespasser who uses as a public way an apparently public alley, kept so by defendant, simply because he steps over the technical legal boundary.[27]

(2) ENTRY BY THING CONTROLLED BY DEFENDANT. The entry need not be in person but may be by casting something on the land controlled by the trespasser;[28]

S. W. 973; Nafe *v.* Hudson, 19 Tex. Civ. App. 381, 47 S. W. 675; Vincent *v.* Mayblum, 1 Tex. App. Civ. Cas. § 763.

Vermont.— Bragg *v.* Laraway, 65 Vt. 673, 27 Atl. 492; Cole *v.* Drew, 44 Vt. 49, 8 Am. Rep. 363 (*de minimis non curat lex* does not apply); Fullam *v.* Stearns, 30 Vt. 443.

16. *California.*— Empire Gold Min. Co. *v.* Bonanza Gold Min. Co., 67 Cal. 406, 7 Pac. 810, holding that where the expense of extracting ore illegally mined is greater than its value, the landowner is entitled to at least nominal damage.

Georgia.— Postal Tel.-Cable Co. *v.* Kuhnen, 127 Ga. 20, 55 S. E. 967, holding that digging holes and setting telegraph posts on plaintiff's land entitled him to nominal damages if there is no special damage.

Illinois.— Pfeiffer *v.* Grossman, 15 Ill. 53.

Iowa.— Wing *v.* Seske, (1906) 109 N. W. 717, holding that including a small portion of plaintiff's land within defendant's fence entitled plaintiff to at least nominal damages. *Contra*, Hull *v.* Harker, 130 Iowa 190, 106 N. W. 629.

Mississippi.— Keirn *v.* Warfield, 60 Miss. 799.

Ohio.— Besuden *v.* Hamilton County, 7 Ohio Cir. Ct. 237, 4 Ohio Cir. Dec. 575, holding that appropriating a small strip of plaintiff's land to support a turnpike fill entitles plaintiff to at least nominal damages.

Rhode Island.— McCusker *v.* Mitchell, 20 R. I. 13, 36 Atl. 1123, holding that lifting a fence rail or removing anything erected to inclose the land is a breaking and entering.

Contra.— Mahle *v.* Grierson, 2 Tex. App. Civ. Cas. § 764.

17. Welch *v.* Seattle, etc., R. Co., 56 Wash. 97, 105 Pac. 166, 26 L. R. A. N. S. 1047.

18. *Alabama.*— McCall *v.* Capehart, 20 Ala. 521.

Illinois.— Moll *v.* Chicago Sanitary Dist., 228 Ill. 633, 81 N. E. 1147.

Kansas.— Simmonds *v.* Richards, 74 Kan. 311, 86 Pac. 452.

Missouri.— Mylar *v.* Hughes, 60 Mo. 105.

New York.— Wood *v.* New York Cent., etc., R. Co., 184 N. Y. 290, 77 N. E. 27, encroaching on adjoining land by a railroad, although done by its employees by mistake.

Pennsylvania.— Allwein *v.* Brown, 29 Pa. Super. Ct. 331, by statute.

See 46 Cent. Dig. tit. "Trespass," § 10.

19. Charron *v.* Thivierge, (R. I. 1906) 67 Atl. 585.

20. Badu *v.* Satterwhite, (Tex. Civ. App. 1910) 125 S. W. 929; Wetzel *v.* Satterwhite, (Tex. Civ. App. 1910) 125 S. W. 93 (entry of unoccupied house and building fire therein resulting in destruction of house); Steger *v.* Barrett, (Tex. Civ. App. 1910) 124 S. W. 174 (stationing engine on land of another which sets fire to and destroys property).

21. Kimball *v.* Custer, 73 Ill. 389 (entry by one wishing to remove his piano from plaintiff's house, by pretense of examining flues); Chandler *v.* Egan, 28 How. Pr. (N. Y.) 98 (entry by member of a crowd, knowing that admission was obtained by an act of violence).

22. Anderson *v.* Critcher, 11 Gill & J. (Md.) 450, 37 Am. Dec. 72.

23. Whitehead *v.* Callahan, 44 Colo. 396, 99 Pac. 57.

24. Gilmore *v.* Wale, Anth. N. P. (N. Y.) 87 (in order to wrongfully and unlawfully take a receipt); New York, etc., R. Co. *v.* Wenger, 9 Ohio Dec. (Reprint) 815, 17 Cinc. L. Bul. 306 (to induce employees to strike).

25. Bailey *v.* Ragatz, 50 Wis. 554, 7 N. W. 564, 36 Am. Rep. 862, holding that entry by a police officer at night after plaintiff's family had retired, effected by threat of bursting in the door if not opened, is unlawful when made without warrant or intent to make an arrest but merely to see and "give a talking to" a woman of bad character supposed by him to be there but not there in fact.

26. Cate *v.* Schaum, 51 Md. 299, by force.

27. Everett *v.* Foley, 132 Ill. App. 438, 441, in which it was said that "to impose upon a person lawfully using public alleys the duty of ascertaining at his peril the technical division lines, before venturing to use the alley, would be an appropriation of public property in behalf of abutting property owners."

28. *Alabama.*— Louisville, etc., R. Co. *v.* Higginbotham, 153 Ala. 334, 44 So. 872.

Illinois.— Tobin *v.* French, 93 Ill. App. 18, holding that it is a trespass for a landlord to render the leased premises untenantable by dirt, etc., thrown in them in adding another story thereto.

Iowa.— Hendershott *v.* Ottumwa, 46 Iowa 658, 26 Am. Rep. 182, dumping earth on one's own land so that it rolls on plaintiff's.

Kentucky.— Prewitt *v.* Clayton, 5 T. B. Mon. 4, in course of operations on adjoining land.

by projecting anything into, over, or upon the land;[29] by attaching anything to the side of another's house;[30] or by driving animals thereon.[31] Maintaining an

Michigan.— Hooper *v.* Herald, 154 Mich. 529, 118 N. W. 3 (erecting fence); Clark *v.* Wiles, 54 Mich. 323, 20 N. W. 63 (in digging a drain through another's land throwing earth beyond limits of land appropriated).

Minnesota.—Whittaker *v.* Stanzvick, 100 Minn. 386, 111 N. W. 295, 117 Am. St. Rep. 703, 10 L. R. A. N. S. 921, shooting on one's own land so that the shot drops on plaintiff's.

New York.— McCahill *v.* John H. Parker Co., 49 Misc. 258, 97 N. Y. Suppl. 398, carting building material on adjoining land in course of erecting a house.

North Carolina.— McGehee *v.* Norfolk, etc., R. Co., 147 N. C 142, 60 S. E. 912, 24 L. R. A. N. S. 119 (shooting from public highway into house of plaintiff and causing explosion of dynamite); Newsom *v.* Anderson, 24 N. C. 42, 37 Am. Dec. 406 (felling a tree so that it falls on plaintiff's land).

Pennsylvania.— McKnight *v.* Denny, 198 Pa. St. 323, 47 Atl. 970.

England.— Pickering *v.* Rudd, 4 Campb. 219, 1 Stark. 56, 16 Rev. Rep. 777, 2 E. C. L. 32.

See 46 Cent. Dig. tit. "Trespass," § 8.

Compare Murphy *v.* Lowell, 128 Mass. 396, 35 Am. Rep. 381, holding that a city is liable for stones thrown on adjacent land in course of construction of a sewer only in the absence of due care, as it had a right to construct the sewer.

Water.—An action lies for backing water on another's land by means of a dam (Montgomery *v.* Locke, 72 Cal. 75, 13 Pac. 401; Carleton *v.* Redington, 21 N. H. 291; Russell *v.* Scott, 9 Cow. (N. Y.) 279), which causes ice jams which back up the water (Cowles *v.* Kidder, 24 N. H. 364, 57 Am. Dec. 287); by a log boom which causes logs to pile up and back up the water (Hueston *v.* Mississippi, etc., Boom Co., 76 Minn. 251, 79 N. W. 92); for damming water and then wilfully discharging it so that it floods another's land below (McKee *v.* Delaware, etc., Canal Co., 125 N. Y. 353, 26 N. E. 305, 21 Am. St. Rep. 740), or sweeps away his dam (Kelly *v.* Lett, 35 N. C. 50); for deflecting the water of a stream against another's land (Gulf R. *v.* Clark, 2 Indian Terr. 319, 51 S. W. 962), or for casting surface water on it either by a ditch (Sanderlin *v.* Shaw, 51 N. C. 225), or by the grade of a city street made by the city (Bloomington *v.* Burke, 12 Ill. App. 314); by failure to remove obstructions in the gutters (Clay *v.* St. Albans, 43 W. Va. 539, 27 S. E. 368, 64 Am. St. Rep. 883); by causing surface water to percolate against another's house by elevating the surface of adjoining land (Hurdman *v.* North Eastern R. Co., 3 C. P. D. 168, 47 L. J. C. P. 368, 38 L. T. Rep. N. S. 339, 26 Wkly. Rep. 489); for flowing another's land with water from an overflow of a cesspool (Weed *v.* Brush, 89 Hun (N. Y.) 62, 34 N. Y. Suppl. 1025), or flooding his premises on floor below by leakage of water used to scrub floors (Patton *v.* McCants, 29 S. C. 597, 6 S. E. 848); or for constructing a tunnel under plaintiff's land and continuously forcing water through it (Chicago *v.* Troy Laundry Mach. Co., 162 Ind. 678, 89 C. C. A. 470). And one who in digging a subway under a street breaks a pipe so water escapes on plaintiff's land is liable in trespass regardless of negligence. Wheeler *v.* Norton, 92 N. Y. App. Div. 368, 86 N. Y. Suppl. 1095 [*affirming* 84 N. Y. Suppl. 524]; Lersner *v.* McDonald, 38 Misc. (N. Y.) 734, 78 N. Y. Suppl. 1125.

By blasting.— Casting earth or stones on adjoining land by blasting is a trespass (Birmingham Ore, etc., Co. *v.* Grover, 159 Ala. 276, 48 So. 682; Bessemer Coal, etc., Co. *v.* Doak, 151 Ala. 670, 44 So. 631; Scott *v.* Bay, 3 Md. 431; Berlin *v.* Thompson, 61 Mo. App. 234; Gourdier *v.* Cormack, 2 E. D. Smith (N. Y.) 202; Herron *v.* Jones, etc., Co., 23 Pa. Super. Ct. 226), as where it is done by a contractor constructing a subway under a street (Turner *v.* Degnon-McLean Contracting Co., 184 N. Y. 525, 76 N. E. 1111 [*affirming* 99 N. Y. App. Div. 135, 90 N. Y. Suppl. 948], or a canal (St. Peter *v.* Denison, 58 N. Y. 416, 17 Am. Rep. 258); and it is immaterial whether the blasting was done negligently or carefully (Colton *v.* Onderdonk, 69 Cal. 155, 10 Pac. 395, 58 Am. Rep. 556; Blackford *v.* Heman Constr. Co., 132 Mo. App. 157, 112 S. W. 287; Thurmond *v.* Ash Grove White Line Assoc., 125 Mo. App. 73, 102 S. W. 617; Schaub *v.* Perkinton Bros. Constr. Co., 108 Mo. App. 122, 82 S. W. 1094; St. Peter *v.* Denison, 58 N. Y. 416, 17 Am. Rep. 258; Trewain *v.* Cohoes Co., 2 N. Y. 163, 51 Am. Dec. 284; Hay *v.* Cohoes Co., 2 N. Y. 159, 51 Am. Dec. 279; Kratzer *v.* Saratoga Springs, 8 N. Y. App. Div. 613, 40 N. Y. Suppl. 474 [*affirmed* in 158 N. Y. 736, 53 N. E. 1127]; Tiffin *v.* McCormack, 34 Ohio St. 638, 32 Am. Rep. 408); and a railroad with authority to construct is liable for carting rocks on adjoining land in blasting its right of way (G. B. & L. R. Co. *v.* Doyle, 9 Colo. 549, 13 Pac. 699; G. B. & L. R. Co. *v.* Eagles, 9 Colo. 544, 13 Pac. 696). Distinct acts of blasting are not a continuing trespass. Jackson *v.* Emmons, 25 App. Cas. (D. C.) 146 [*affirmed* in 203 U. S. 578, 27 S. Ct. 778, 51 L. ed. 325].

29. Puorto *v.* Chieppa, 78 Conn. 401, 62 Atl. 664 (extending a flat board one inch over the line); Hannabalson *v.* Sessions, 116 Iowa 457, 90 N. W. 93, 93 Am. St. Rep. 250 (projecting an arm over a boundary fence); Esty *v.* Baker, 48 Me. 495 (placing a shaft from one building to another across a passageway owned by another).

30. Hennessy *v.* Anstock, 19 Pa. Super. Ct. 644, holding that it is immaterial that it is not vertically over plaintiff's land.

31. Erbes *v.* Wehmeyer, 69 Iowa 85, 28 N. W. 447; Cosgriff *v.* Miller, 10 Wyo. 190, 68 Pac. 206.

erection on another's land is a continuing trespass.[32] But mere ownership of the personalty cast on another's land does not render the owner liable.[33]

(c) *Wrongful Act After Rightful Entry.* Trespass to realty according to many decisions may be committed after a rightful entry;[34] but where the law is strictly followed, the courts, adhering to the requirement of a breach of the peace, hold that case and not trespass is the proper remedy when the entry on the land was rightful.[35]

(II) *TRESPASS TO PERSONALTY.* An act of trespass to personal property must be an interference with plaintiff's possession of the property.[36] A taking

32. Rahn *v.* Milwaukee Electric R., etc., Co., 103 Wis. 467, 79 N. W. 747, foundation wall.

A purchaser of the land on which is such a wall can sue as for a fresh trespass. Ross *v.* Hunter, 7 Can. Sup. Ct. 289.

33. Forster *v.* Juniata Bridge Co., 16 Pa. St. 393, 55 Am. Dec. 506, holding that property which breaks adrift without negligence and strands on plaintiff's land does not make the owner a trespasser and he may abandon it, although notified to remove it.

34. *Alabama.*— Snedecor *v.* Pope, 143 Ala. 275, 39 So. 318, acts outside scope of a license.

Georgia.— Mackenzie *v.* Minis, 132 Ga. 323, 63 S. E. 900, holding that where a servant whose occupation of a house on the master's premises is in connection with his service, and for the necessary or better performance thereof he is discharged, he is a trespasser if he retains possession, entering on the land and continuing to treat it as if there had been no discharge, although he contends that under the contract he cannot be discharged for three years.

Iowa.— Concanan *v.* Boynton, 76 Iowa 543, 41 N. W. 213, taking by mortgagee of chattels on plaintiff's land in his possession after denial of his right by plaintiff.

Minnesota.— Mitchell *v.* Mitchell, 54 Minn. 301, 55 N. W. 1134, holding that where administrators entered deceased's house by leave of his widow to demand his chattels and, after her refusal to deliver, remained against her protest from six thirty-six to twelve they were trespassers.

New York.— Capel *v.* Lyons, 3 Misc. 73, 22 N. Y. Suppl. 378, holding that, where a license to insert shoring timbers to a limited extent to protect plaintiff's building from an excavation on adjoining land was exceeded, trespass lies.

North Carolina.— Gardner *v.* Rowland, 24 N. C. 247, letting down plaintiff's fence to drive defendant's hogs out, instead of opening the gate.

Pennsylvania.— Shiffer *v.* Broadhead, 126 Pa. St. 260, 17 Atl. 592, cutting trees of a size larger than authorized by a license.

South Carolina.— Burnett *v.* Postal Tel., etc., Cable Co., 79 S. C. 462, 60 S. E. 1116, holding that if a company which is given permission to enter on land and construct a line of telegraph wires thereon constructs it in a different place than that designated by the owner, it is guilty of a trespass, and the owner in suing for damages is not confined to a remedy under the condemnation statutes which apply when the entry is by permission and the acts done on the land are incident to the exercise of the right granted by the owner.

Vermont.— Warner *v.* Hoisington, 42 Vt. 94, holding that a license to enter one part of a field is no defense to entry on another part.

United States.— Lindquest *v.* Union Pac. R. Co., 33 Fed. 372.

35. Beers *v.* McGinnis, 191 Mass. 279, 77 N. E. 768; Richmond *v.* Fisk, 160 Mass. 34, 35 N. E. 103 (holding that entering a sleeping room against express command after entering the house by license is not a trespass); Hill *v.* Bartholomew, 71 Hun (N. Y.) 453, 24 N. Y. Suppl. 944 (holding that failure to close a gate over defendant's right of way does not render him a trespasser); Hall *v.* Louis Weber Bldg. Co., 36 Misc. (N. Y.) 551, 73 N. Y. Suppl. 997 (holding that a license to enter and protect plaintiff's building is a defense to an action of trespass, although conditional, but an action lies for damages for breach of the condition); Boults *v.* Mitchell, 15 Pa. St. 371 (holding that cutting trees outside scope of a right is not a trespass as there was no tortious breach of the close).

36. O'Conner *v.* Corbitt, 3 Cal. 370; Bever *v.* Swecker, 138 Iowa 721, 116 N. W. 704; Swank *v.* Elwest, (Oreg. 1910) 105 Pac. 901. And see cases cited *infra*, this note.

Applications of rule.— Taking up an animal as an estray does not interfere with a possessory right of another (Pope *v.* Cordell, 47 Mo. 251); nor a purchase of goods at a wrongful sale without taking possession (Talmadge *v.* Scudder, 38 Pa. St. 517); and if possession is taken of part there is no trespass as to the part not taken (Leisherness *v.* Berry, 38 Me. 80); nor does failure to comply with directions in performing work on plaintiff's chattels interfere with any possessory right of plaintiff (Hood *v.* Cronkite, 29 U. C. Q. B. 98); nor acts done after taking possession (Nashville, etc., R. Co. *v.* Walley, (Ala. 1906) 41 So. 134); nor converting goods already in possession (Henderson *v.* Marx, 57 Ala. 169; Davis *v.* Young, 20 Ala. 151; Bradley *v.* Davis 14 Me. 44, 30 Am. Dec. 729; Weitzel *v.* Marr, 46 Pa. St. 463); nor receiving goods by delivery from one who obtained them by a trespass (Archibeque *v.* Miera, 1 N. M. 419); and demand and refusal alone will not support trespass *de bonis* (Imlay *v.* Sage, 5 Conn. 489).

of chattels from another's possession is a trespass,[37] whether the goods so taken are converted [38] or not.[39] A mere asportation of property in plaintiff's possession,[40] or enticing away his slave,[41] or without right giving the slave orders which result in injury to him [42] is a trespass. When there is no unlawful intent and no disturbance of a right and no actual damage trespass to personalty will not lie.[43]

(III) *TRESPASS TO THE PERSON.*[44] An unlawful act, committed with violence upon the person of another, constitutes a trespass,[45] and where the effect of such an act is to make plaintiff nervous and unable to carry on his business, damages may be recovered, not for mental anguish, but for injury to health and business.[46] On the other hand, trespass is an appropriate remedy for injury to the person only when such injury is the direct and primary result of the act complained of,[47] and it does not lie for an act lawfully done by one in the enforcement of his rights.[48] So it has been held that mere words, although they are abusive

37. Ely *v.* Ehle, 3 N. Y. 506. And see cases cited *infra*, in this and the following notes.

Exercise of dominion over another's property without manual interference is a sufficient taking, and mere words are enough if the goods are in the speaker's power (Connah *v.* Hale, 23 Wend. (N. Y.) 462); and a levy, inventory, and requiring a receiptor has been held sufficient (Fonda *v.* Van Horne, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77; Wintringham *v.* Lafoy, 7 Cow. (N. Y.) 735); or levy and receiptor (Phillips *v.* Hall, 8 Wend. (N. Y.) 610, 24 Am. Dec. 108); or levy and sale (Neff *v.* Thompson, 8 Barb. (N. Y.) 213); or locking the room where goods are (Jones *v.* Lewis, 7 C. & P. 343, 32 E. C. L. 647); or unlawful interference by a purchaser of realty, with the personal property of another, stored in a building on the premises either under a verbal or written contract with the vendor (Temple *v.* Duran, (Tex. Civ. App. 1908) 121 S. W. 253); but an inventory and forbidding of removal by one without legal process has been held insufficient (Hervey *v.* Alexander, (Hil. T. 2 Vict.) 3 Ont. Case Law Dig. 6905); Cameron *v.* Lount, 4 U. C. Q. B. 275). So a mere levy without taking possession is not an act of trespass (Keyes *v.* Howe, 18 Vt. 411); nor is a mere declaration of distress on things not distrainable, as fixtures (Beck *v.* Denbigh, 6 Jur. N. S. 998, 29 L. J. C. P. 273, 2 L. T. Rep. N. S. 154, 8 Wkly. Rep. 392); and merely expelling plaintiffs from defendant's land is not a taking of plaintiff's chattels thereon (White *v.* Bayley, 2 F. & F. 385, 10 C. B. N. S. 227, 7 Jur. N. S. 948, 30 L. J. C. P. 253, 100 E. C. L. 227). But see *contra*, Hance *v.* Burke, 73 Tex. 62, 11 S. W. 135.

38. Outcalt *v.* Darling, 25 N. J. L. 443 (taking and sale of the whole of an animal in plaintiff's possession on which he has a lien); Ely *v.* Ehle, 3 N. Y. 506; Peeples *v.* Brown, 42 S. C. 81, 20 S. E. 24.

39. Price *v.* Helyar, 4 Bing. 597, 6 L. J. C. P. O. S. 132, 1 M. & P. 541, 13 E. C. L. 652, momentary taking without conversion a trespass.

40. Bruch *v.* Carter, 32 N. J. L. 554, untying one's horse and tying him to another post.

41. Tyson *v.* Ewing, 3 J. J. Marsh. (Ky.) 185.

42. Greer *v.* Emerson, 1 Overt. (Tenn.) 13.

43. Graves *v.* Severens, 40 Vt. 636; Paul *v.* Slason, 22 Vt. 231, 54 Am. Dec. 75.

44. **Civil liability for assault and battery** see ASSAULT AND BATTERY, 3 Cyc. 1066.

Form of action for false imprisonment see FALSE IMPRISONMENT, 19 Cyc. 357.

Wrongful expulsion of passenger from railroad train see CARRIERS, 6 Cyc. 561.

45. Kirton *v.* North Chicago St. R. Co., 91 Ill. App. 554; Sadler *v.* South Staffordshire, etc., Dist. Steam Tramways Co., 23 Q. B. D. 17, 53 J. P. 694, 58 L. J. Q. B. 421, 37 Wkly. Rep. 582 (holding that a tramway company, maintaining its tramway upon a highway in a defective condition not authorized by the statute allowing such maintenance, is liable for the consequence of an accident immediately resulting from its unlawful act, such as an injury to a person on the highway caused by a tramcar going off the track); Scott *v.* Shepherd, W. Bl. 892, 96 Eng. Reprint 525, 3 Wils. C. P. 403, 95 Eng. Reprint 1124.

Unnecessary and disturbing noises.—An action may be sustained for a wilful and malicious trespass consisting of annoying, worrying, and disturbing plaintiff by screaming, and beating on tin pans, fences, and iron. Shellabarger *v.* Morris, 115 Mo. App. 566, 91 S. W. 1005.

46. Shellabarger *v.* Morris, 115 Mo. App. 566, 91 S. W. 1005.

47. Bay Shore R. Co. *v.* Harris, 67 Ala. 6. **In the celebrated "Squib case,"** defendant threw a lighted squib, composed of gunpowder and other combustible materials, which was almost immediately thereafter thrown away from them, by other persons near whom it landed, in order to protect themselves, and finally struck plaintiff, injuring his eye, and a recovery in trespass was allowed on the ground that the subsequent throwing of the squib was but a continuation of the act of defendant, so that plaintiff's injury was a direct result of that act. Scott *v.* Shepherd, W. Bl. 892, 96 Eng. Reprint 525, 3 Wils. C. P. 403, 95 Eng. Reprint 1124.

48. Morgan *v.* Owen, 193 Mo. 587, 91 S. W.

and threatening in character, are not actionable in trespass to the person, however morally wrong they may be.[49]

(IV) *TRESPASS AB INITIO.* The general rule is laid down that where an entry is made or possession of property taken by authority of law, which would be a trespass but for such authority, a subsequent abuse of the authority renders the doer a trespasser *ab initio*,[50] and is applied to a mere failure to fulfil the conditions attached to the exercise of the right.[51] Nevertheless, the original act

1055, holding that officials are not liable in trespass for using such force as is necessary to obtain the possession of records, to which they are entitled, from a person who attempts to retain possession without lawful authority.

Injury received from a spring-gun.—While the question of the liability of one setting spring-guns, or other man-traps, on his own premises for death or injury to another person, caused by such devices, generally arises in criminal prosecutions (see HOMICIDE, 21 Cyc. 787, 831); and in civil actions other than trespass, the question of liability in trespass has arisen and resulted in conflicting decisions, no recovery may be had in trespass where the party injured had knowledge that spring-guns had been placed on the premises (Ilott *v.* Wilkes, 3 B. & Ald. 304, 22 Rev. Rep. 400, 5 E. C. L. 181, 106 Eng. Reprint 674); and recovery has also been denied where plaintiff, at the time of receiving the injury, was attempting to burglarize the premises (Scheuermann *v.* Scharfenberg, 163 Ala. 337, 50 So. 335, 24 L. R. A. N. S. 369). On the other hand, recovery has been allowed where the person injured was a mere trespasser and was committing no crime (Grant *v.* Hass, 31 Tex. Civ. App. 688, 75 S. W. 342), or was committing only a mere misdemeanor, the decision in this case being placed on the ground that a person has no right to prevent or resist a trespass by using means dangerous to life or inflicting great bodily injury (Hooker *v.* Miller, 37 Iowa 613, 18 Am. Rep. 18).

49. Rankin *v.* Sievern, etc., R. Co., 58 S. C. 532, 36 S. E. 997.

50. Malcom *v.* Spoor, 12 Metc. (Mass.) 279, 46 Am. Dec. 675; Sterling *v.* Warden, 52 N. H. 197; Markham *v.* Brown, 8 N. H. 523, 31 Am. Dec. 209; Van Brunt *v.* Schenck, Anth. N. P. (N. Y.) 217, 11 Johns. 377; Lamb *v.* Day, 8 Vt. 407, 30 Am. Dec. 479. And see cases cited *infra*, this note.

Rule applied in case of entry on realty.—A street commissioner is a trespasser *ab initio* if, after rightful removal of plaintiff's shop, he sells it (Mussey *v.* Cahoon, 34 Me. 74). So is an officer who puts an intoxicated person in as keeper after lawful attachment (Malcom *v.* Spoor, 12 Metc. (Mass.) 279, 46 Am. Dec. 675); or one who, cutting grass in a highway lawfully, thereafter feeds it to his horse (Cole *v.* Drew, 44 Vt. 49, 8 Am. Rep. 363). Assault and battery after lawful entry on plaintiff's dwelling to remove government property may make one a trespasser *ab initio* (Sterling *v.* Warden, 52 N. H. 197); and assault on the innkeeper after lawful entry (Markham *v.* Brown, 8 N. H. 523, 31 Am. Dec. 209); or remaining on premises to keep possession of goods after distress has ceased to be lawful (Ladd *v.* Thomas, 12 A. & E. 117, 9 L. J. Q. B. 345, 4 P. & D. 9, 40 E. C. L. 67, 113 Eng. Reprint 755); or taking possession of a lunch room under writ of attachment excluding customers, etc. (Walsh *v.* Brown, 194 Mass. 317, 80 N. E. 465); or entry under search warrant by an officer to obtain evidence, not to search for the goods (Lawton *v.* Cardell, 22 Vt. 524); or by using unlawful force by breaking a door in entering to remove one's gas meter (Reed *v.* New York, etc., Gas Co., 93 N. Y. App. Div. 453, 87 N. Y. Suppl. 810), or other personalty (Daniels *v.* Brown, 34 N. H. 454, 69 Am. Dec. 505); or conversion of mill dam materials after its lawful destruction (Little *v.* Ince, 3 U. C. C. P. 528) renders one a trespasser *ab initio*. On the other hand injury by a third person to property seized under lawful authority does not make the officer guilty of trespass *ab initio* (Ferrin *v.* Symonds, 11 N. H. 363); and setting aside of the judgment under which proceedings have been taken does not render persons who took part in the proceedings trespassers *ab initio* (Missouri Bank *v.* Franciscus, 15 Mo. 303).

Rule applied to personalty.—An officer who perverts process to other uses is a trespasser *ab initio* (Lawton *v.* Cardell, 22 Vt. 524); so working an animal seized under attachment renders both creditor who does it and the constable trespassers *ab initio* (Lamb *v.* Day, 8 Vt. 407, 30 Am. Dec. 479); or working an animal taken up as an estray (Oxley *v.* Watts, 1 T. R. 12, 1 Rev. Rep. 133, 99 Eng. Reprint 944); or attachment at night in bad weather so that the goods are damaged renders the officer a trespasser *ab initio* (Barrett *v.* White, 3 N. H. 210, 14 Am. Dec. 352); but an excessive levy does not make the officer a trespasser *ab initio*, a levy being proper (Jarratt *v.* Gwathmay, 5 Blackf. (Ind.) 237).

51. Sherman *v.* Braman, 13 Metc. (Mass.) 407; Gilson *v.* Fisk, 8 N. H. 404; Crawford *v.* Maxwell, 3 Humphr. (Tenn.) 476. And see cases cited *infra*, this note.

Realty.—Failure to put up bars by one having a right to construct a turnpike road on plaintiff's land (Crawford *v.* Maxwell, 3 Humphr. (Tenn.) 476), or abandonment of eminent domain proceedings after entry thereunder, and withdrawal of the condemnation money (Enid, etc., R. Co. *v.* Wiley, 14 Okla. 310, 78 Pac. 96) constitutes a trespass.

Personalty.—After lawfully taking up an estray failure to comply with the statute renders one a trespasser *ab initio* (Burton *v.*

must have been a trespass but for the legal justification,[52] and the abuse of process must be for the benefit of a person other than plaintiff.[53] Defendant must have been implicated in the original act of entry or taking possession.[54] And those who assisted in the original act do not become trespassers *ab initio* by subsequent abuse not participated in by them.[55] The general rule is sometimes qualified by requiring that the subsequent act be an act of trespass, not a mere nonfeasance,[56] or even by requiring further that the act of misfeasance be such as to warrant a conclusion that the legal authority was used as a mere cloak from the beginning,[57] and the entire doctrine of trespass *ab initio* has been repudiated in some cases.[58] Where the authority was from plaintiff an abuse of it does not make one a trespasser *ab initio*.[59] Where there is an authority in fact, and a party exceeds that

Calaway, 20 Ind. 469); or after lawfully impounding cattle failure to feed and water them (Adams *v.* Adams, 13 Pick. (Mass.) 384); or failing to follow the statutory requirement by giving the pound keeper the written memorandum of charges as required by statute (Sherman *v.* Braman, 13 Metc. (Mass.) 407), or the owner notice of the impounding (Coffin *v.* Field, 7 Cush. (Mass.) 355); or otherwise failing to comply with essential features of the statute (Coffin *v.* Field, 7 Cush. (Mass.) 355); or after lawfully driving stray cattle off one's land to drive them a long way off (Gilson *v.* Fisk, 8 N. H. 404); or after lawful distress, irregularity in following the statutory proceedings (Kerr *v.* Sharp, 14 Serg. & R. (Pa.) 399), as failing to give notice of sale (Cornelius *v.* Burton, 3 Nova Scotia Dec. 337), or failing to appraise (Wyke *v.* Wilson, 173 Pa. St. 12, 33 Atl. 701, a third person whose goods were distrained could take advantage of the failure; Christman *v.* Geise, 1 Chest. Co. Rep. (Pa.) 342); or appraisal prior to the statutory time (Brisben *v.* Wilson, 60 Pa. St. 452); or after lawful seizure by an officer of a seine for illegal fishing a failure to obtain judgment of forfeiture (Russell *v.* Hanscomb, 15 Gray (Mass.) 166); or conversion of an animal after seizure damage feasant (Dye *v.* Leatherdale, 3 Wils. C. P. 20, 95 Eng. Reprint 910); or of goods received under wrongful attachment (Barfield *v.* Coker, 73 S. C. 181, 53 S. E. 170). So a purchaser at judicial sale of goods in a vessel who moves the vessel to a more convenient place for their removal is a trespasser *ab initio*. Bear *v.* Harris, 118 N. C. 476, 24 S. E. 364.

52. Johnson *v.* Hannihan, 1 Strobh. (S. C.) 313, holding that an assault after entry on defendant's own land in wrongful possession of plaintiff does not render defendant a trespasser *ab initio*.

53. Paul *v.* Slason, 22 Vt. 231, 54 Am. Dec. 75, use of a horse and wagon, part of the goods attached, to remove them does not make the officer a trespasser *ab initio*.

54. Van Brunt *v.* Schenck, Anth. N. P. (N. Y.) 217, 11 Johns. 377.

55. Mussey *v.* Cahoon, 34 Me. 74.

56. Adams *v.* Rivers, 11 Barb. (N. Y.) 390; Fullam *v.* Stearns, 30 Vt. 443; Stone *v.* Knapp, 29 Vt. 501; Stoughton *v.* Mott, 25 Vt. 668; Shortland *v.* Govett, 5 B. & C. 485, 8 D. & R. 257, 4 L. J. K. B. O. S. 212, 29 Rev. Rep. 294, 11 E. C. L. 551, 108 Eng. Reprint 181.

Applications of rule.— Retaining goods distrained, even though amounting to a conversion, is a mere nonfeasance (West *v.* Nibbs, 4 C. B. 172, 17 L. J. C. P. 150, 56 E. C. L. 172); or mere words; and so abuse of adjoining owners while passing along the road does not make one a trespasser *ab initio*, not being a trespass; although stopping does as there is no right to stop (Adams *v.* Rivers, 11 Barb. (N. Y.) 390); or mere detaining of goods by customs officers (Jacobson *v.* Blake, 8 Jur. 272, 13 L. J. C. P. 89, 6 M. & G. 919, 7 Scott N. R. 772, 46 E. C. L. 919); but a wrongful sale after rightful seizure is enough (Califf *v.* Wilson, 2 N. Brunsw. 145).

57. Page *v.* De Puy, 40 Ill. 506; Taylor *v.* Jones, 42 N. H. 25; Stone *v.* Knapp, 29 Vt. 501; Eaton *v.* Cooper, 29 Vt. 444.

58. Van Brunt *v.* Schenck, 13 Johns. (N. Y.) 414, to personalty.

59. Gusdorff *v.* Duncan, 94 Md. 160, 50 Atl. 574; Esty *v.* Wilmot, 15 Gray (Mass.) 168; Heath *v.* West, 28 N. H. 101; Whitfield *v.* Bodenhammer, 61 N. C. 362. And see cases cited *infra*, this note.

Rule applied in case of realty — *In general.* — Ballard *v.* Noaks, 2 Ark. 45; Spades *v.* Murray, 2 Ind. App. 401, 28 N. E. 709; Wendell *v.* Johnson, 8 N. H. 220, 29 Am. Dec. 648; Narehood *v.* Wilhelm, 69 Pa. St. 64.

Exceeding a license.— Bennett *v.* McIntire, 121 Ind. 201, 23 N. E. 78, 6 L. R. A. 736 (although license obtained by fraud); Spades *v.* Murray, 2 Ind. App. 401, 28 N. E. 709; Perry *v.* Bailey, 94 Me. 50, 46 Atl. 789 (piling more stone on a wharf than permitted by the license); Dingley *v.* Buffum, 57 Me. 379; Cushing *v.* Adams, 18 Pick. (Mass.) 110; Jewell *v.* Mahood, 44 N. H. 474, 84 Am. Dec. 90; Wendell *v.* Johnson, 8 N. H. 220, 29 Am. Dec. 648; Dumont *v.* Smith, 4 Den. (N. Y.) 319; Allen *v.* Crofoot, 5 Wend. (N. Y.) 506; Edelman *v.* Yeakel, 27 Pa. St. 26; Willoughby *v.* Northeastern R. Co., 32 S. C. 410, 11 S. E. 339; Stone *v.* Knapp, 29 Vt. 501.

Failing to perform an act incident to a license.— Stone *v.* Knapp, 29 Vt. 501.

Acts of wrong outside an agreement.— Ballard *v.* Noaks, 2 Ark. 45; Page *v.* De Puy, 40 Ill. 506 (holding that trespass *quare clausum* will not lie for using excessive force in expelling plaintiff from defendant's land, where plaintiff authorized an expulsion, using

authority, he is only liable for acts which he has committed in the excess of such authority.[60]

(v) *Trespass by Relation.* An act, lawful when committed, cannot subsequently, by a legal fiction, be converted into a trespass,[61] and an act done subsequent to the beginning of the action does not relate back so as to constitute a cause of action,[62] nor does fraud in exercising a license make one a trespasser by relation.[63] Where the act was a trespass, but not against a right, then existing in any person, plaintiff's right, inchoate, at the time but perfected before the beginning of the action, is sufficient;[64] but if the trespass was against a right then existent in a person, plaintiff's subsequently acquired right is not enough,[65] although entitled at the time to a conveyance which was made before the beginning of the action.[66]

b. The Intent. The intent or motive with which an act of trespass is done is immaterial as regards the doer's liability therefor,[67] except in so far as it may

necessary force, by a covenant in her lease; the entry being justified by the license); Pike *v.* Heinmann, 89 Ill. App. 642; Spades *v.* Murray, 2 Ind. App. 401, 28 N. E. 709; Walsh *v.* Taylor, 39 Md. 592; Beers *v.* McGinnis, 191 Mass. 279, 77 N. E. 768; Hubbard *v.* Kansas City, etc., R. Co., 63 Mo. 68 (holding that failure to build a depot as agreed does not make the railroad's entry a trespass *ab initio*); Whitfield *v.* Bodenhammer, 61 N. C. 362; Narehood *v.* Wilhelm, 69 Pa. St. 64. But it is often held in realty cases that remaining on land after the license is revoked or expires makes the occupant a trespasser *ab initio* (Markham *v.* Brown, 37 Ga. 277, 92 Am. Dec. 73; Adams *v.* Freeman, 12 Johns. (N. Y.) 408, 7 Am. Dec. 327); or forcibly entering other parts of the house (Gusdorff *v.* Duncan, 94 Md. 160, 50 Atl. 574); or cutting trees not authorized by a contract (Lyford *v.* Putnam, 35 N. H. 563).

Rule applied in case of personalty — *In general.*— Injury to personalty after taking possession under a mortgage does not render one a trespasser *ab initio*. Heath *v.* West, 28 N. H. 101.

To the person.— Excessive force in ejecting a well operative does not render the owner a trespasser *ab initio*. Esty *v.* Wilmot, 15 Gray (Mass.) 168.

60. Bennett *v.* McIntire, 121 Ind. 231, 23 N. E. 78, 6 L. R. A. 736; Spades *v.* Murray, 2 Ind. App. 401, 28 N. E. 709; Dingley *v.* Buffum, 57 Me. 379; Jewell *v.* Mahood, 44 N. H. 474, 84 Am. Dec. 90; Allen *v.* Crofoot, 5 Wend. (N. Y.) 506.

61. Pratt *v.* Potter, 21 Barb. (N. Y.) 589; Tharpe *v.* Stallwood, 1 D. & L. 24, 7 Jur. 492, 12 L. J. C. P. 241, 5 M. & G. 760, 6 Scott N. R. 715, 44 E. C. L. 397; Smith *v.* Milles, 1 T. R. 475, 99 Eng. Reprint 1205; Abrams *v.* Moon, 1 U. C. Q. B. 552.

62. Dunlap *v.* Steele, 80 Ala. 424, wrongful sale after action brought under rightful levy made before.

63. Allen *v.* Crofoot, 5 Wend. (N. Y.) 506.

64. Covington *v.* Simpson, 3 Pennew. (Del.) 269, 52 Atl. 349. And see cases cited *infra*, this note.

Applications of rule.— An administrator can recover for goods taken after his intestate's death and before his appointment (Covington *v.* Simpson, 3 Pennew. (Del.) 269, 52 Atl. 349; Tharpe *v.* Stallwood, 1 D. & L. 24, 7 Jur. 492, 12 L. J. C. P. 241, 5 M. & G. 760, 6 Scott N. R. 715, 44 E. C. L. 397); or an heir after entry for trespass committed after his ancestor's death and before such entry (Barnett *v.* Guildford, 11 Exch. 19, 1 Jur. N. S. 1142, 24 L. J. Exch. 281, 3 Wkly. Rep. 406); or a trustee appointed after the trespass (Allison *v.* Little, 85 Ala. 512, 5 So. 221).

65. Lane *v.* Thompson, 43 N. H. 326, holding that an administrator cannot sue for acts after decedent's death but before the decree that the estate be administered by him as insolvent. *Contra*, Gilbert *v.* McDonald, 94 Minn. 289, 102 N. W. 712, 110 Am. St. Rep. 368, holding that an assignee of a mere application for government land can sue for a trespass committed after application but before issue of patent.

66. Pierce *v.* Hall, 41 Barb. (N. Y.) 142. And see cases cited *infra*, this note.

Applications of rule.— A grant made to correct a previous grant which erroneously described the land does not relate back to the date of the defective deed (Missouri Lumber, etc., Co. *v.* Zeitinger, 45 Mo. App. 114); nor does a tax deed made several years after the purchaser was entitled to it (Pierce *v.* Hall, 41 Barb. (N. Y.) 142), or made a year after the sale as the law provided (Paul *v.* Linscott, 56 N. H. 347).

67. *Alabama.*— Pruitt *v.* Ellington, 59 Ala. 454.

Connecticut.— Gates *v.* Miles, 3 Conn. 64.

Illinois.— Goffman *v.* Burkhalter, 98 Ill. App. 304.

Indiana.— Moyer *v.* Gordon, 113 Ind. 282, 14 N. E. 476.

Massachusetts.— Cole *v.* Fisher, 11 Mass. 137.

Missouri.— Pearson *v.* Inlow, 20 Mo. 322, 64 Am. Dec. 189; Dyer *v.* Tyrrell, 142 Mo. App. 467, 127 S. W. 114; Betz *v.* Kansas City Home Tel. Co., 121 Mo. App. 473, 97 S. W. 207.

New Jersey.— Bruch *v.* Carter, 32 N. J. L. 554; Waldron *v.* Hopper, 1 N. J. L. 339.

New York.— Mairs *v.* Manhattan Real Estate Assoc., 89 N. Y. 498; Ketcham *v.* Newman, 14 Daly 57, 3 N. Y. St. 566 [*reversed*

affect the measure of damages.[68] Therefore an unlawful intent is not necessary,[69] and defendant is liable, although the trespass was committed by mistake of fact,[70] or mistake of law,[71] or in ignorance of plaintiff's right.[72] It further results from this that *bona fide* claim of right is not a defense to a trespass,[73] although the belief was

on others grounds in 116 N. Y. 422, 22 N. E. 1052]; Percival *v.* Hickey, 18 Johns. 257, 9 Am. Dec. 210.

North Carolina.— Loubz *v.* Hafner, 12 N. C. 185.

Tennessee.— Luttrell *v.* Hazen, 3 Sneed 20.

United States.— Guttner *v.* Pacific Steam Whaling Co., 96 Fed. 617, holding that goods were taken to save the taker's life does not excuse the trespass.

England.— Kirk *v.* Gregory, 1 Ex. D. 55, 45 L. J. Exch. 186, 34 L. T. Rep. N. S. 488, 24 Wkly. Rep. 614 (putting away decedent's jewelry to protect it, by a stranger to the succession); Underwood *v.* Hewson, Str. 596, 93 Eng. Reprint 722.

Canada.— Latourelle *v.* Darby, 14 Quebec K. B. 553.

See 46 Cent. Dig. tit. "Trespass," § 3.

"Malice" in a trespass need not be ill-will or hatred; it being sufficient that the trespass be intentional and in known violation of the owner's rights. Southern R. Co. *v.* McEntire, (Ala. 1910) 53 So. 158.

68. Milltown Lumber Co. *v.* Carter, 5 Ga. App. 344, 63 S. E. 270 (holding that in trespass to realty, the fact that the trespass was wilful is material only for the purpose of obtaining punitive damages, and the burden of proving wilfulness is on plaintiff); Moyer *v.* Gordon, 113 Ind. 282, 14 N. E. 476; Cubit *v.* O'Dett, 51 Mich. 347, 16 N. W. 679. And see DAMAGES, 13 Cyc. 105 *et seq.*

69. Maye *v.* Yappen, 23 Cal. 306 (to realty); Schuer *v.* Veeder, 7 Blackf. (Ind.) 342 (to personalty); Hodges *v.* Weltberger, 6 T. B. Mon. (Ky.) 337 (to the person); Cate *v.* Cate, 44 N. H. 211 (holding that where defendant caused plaintiff's cattle to be impounded he is liable for their subsequent wrongful sale by the pound-keeper).

70. Hobart *v.* Hagget, 12 Me. 67, 28 Am. Dec. 159. And see cases cited *infra*, this note.

Rule applied in respect of realty — *Mistake generally.*— Mishler Lumber Co. *v.* Craig, 112 Mo. App. 454, 87 S. W. 41.

Mistake as to the land.— Quillen *v.* Betts, 1 Pennew. (Del.) 53, 39 Atl. 595; Cahill *v.* Harris, 6 D. C. 214.

As to boundaries.—Gosdin *v.* Williams, 151 Ala. 592, 44 So. 611; Jeffries *v.* Hargis, 50 Ark. 65, 6 S. W. 328; Atlantic, etc., Consol. Coal Co. *v.* Maryland Coal Co., 62 Md. 135; Blaen Avon Coal Co. *v.* McCulloh, 59 Md. 403, 43 Am. Rep. 560; Chase *v.* Clearfield Lumber Co., 209 Pa. St. 422, 58 Atl. 813. *Contra*, by statute see Blackburn *v.* Bowman, 46 N. C. 441.

As to land being a parcel owned by defendant.— Sunnyside Coal, etc., Co. *v.* Reitz, 14 Ind. App. 478, 39 N. E. 541, 43 N. E. 46; Perry *v.* Jefferies, 61 S. C. 292, 39 S. E. 515.

Rule applied in respect of personalty.— Mistake as to identity of thing taken. Hobart *v.* Hagget, 12 Me. 67, 28 Am. Dec. 159.

71. Blaen Avon Coal Co. *v.* McCulloh, 59 Md. 403, 43 Am. Rep. 560 (mistake as to title); Franz *v.* Hilterbrand, 45 Mo. 121 (entry on plaintiff's land and killing his diseased horses under belief in a right to do so to prevent the spread of the disease); Wadleigh *v.* Marathon County Bank, 58 Wis. 546, 17 N. W. 314 (tax title regular on its face but invalid); Edwick *v.* Hawkes, 18 Ch. D. 199, 50 L. J. Ch. 577, 45 L. T. Rep. N. S. 168, 29 Wkly. Rep. 913 (forcibly ejecting a tenant under a mistaken belief that his term had expired, and although he had given a license under the same belief).

72. Wood *v.* New York Cent., etc., R. Co., 184 N. Y. 290, 77 N. E. 27 [*reversing* 100 N. Y. App. Div. 511, 91 N. Y. Suppl. 1119], encroachment on plaintiff's land by servants of railroad, they being in ignorance of plaintiff's right.

73. Cases relating to realty.— *Alabama.*— Shipman *v.* Baxter, 21 Ala. 456, claim of title.

Kentucky.— Johnson *v.* Park, 17 S. W. 273, 13 Ky. L. Rep. 437, lease from person without authority.

Maine.— Norton *v.* Craig, 68 Me. 275, entry and removal of manure made while defendant was lawfully in possession of the land.

Maryland.— Medairy *v.* McAllister, 97 Md. 488, 55 Atl. 461, advice of counsel.

Massachusetts.— Fitzgerald *v.* Lewis, 164 Mass. 495, 41 N. E. 687 (belief that land was defendant's); Higginson *v.* York, 5 Mass. 341 (removal, by direction of a purchaser, of wood cut by a trespasser).

Michigan.— Fisher *v.* Naysmith, 106 Mich. 71, 64 N. W. 19 (cutting trees in a highway under a void proceeding); Cubit *v.* O'Dett, 51 Mich. 347, 16 N. W. 679 (digging ditch under direction of overseer of highways).

Minnesota.— Sanborn *v.* Sturtevant, 17 Minn. 200 (color of title, as a void tax deed); Lynd *v.* Picket, 7 Minn. 184, 82 Am. Dec. 79 (attaching exempt property, although fact giving exemption was not known).

New York.— Scribner *v.* Young, 111 N. Y. App. Div. 814, 97 N. Y. Suppl. 866 (cutting trees on lunatic's land under belief that authority from her husband, son, and committee was sufficient); O'Horo *v.* Kelsey, 60 N. Y. App. Div. 604, 70 N. Y. Suppl. 14 (attempt to remove furniture without legal process).

Wisconsin.— Scheer *v.* Kriesel, 109 Wis. 125, 85 N. W. 138, tearing down a fence under belief that it was on his land. *Contra*, Hazelton *v.* Week, 49 Wis. 661, 6 N. W. 309, 35 Am. Rep. 796, removal of logs by a purchaser from the trespasser who cut them.

See 46 Cent. Dig. tit. "Trespass," § 49.

Cases relating to personalty.— Removal of

unintentionally induced by plaintiff.[74] But the act must be consciously done.[75] Upon this principle physical duress has been held a defense.[76] Mere wrongful intent may under some circumstances render conduct not actionable in itself an actionable trespass, by depriving defendant of a justification which he would have had if he had acted *bona fide*.[77] But bad intent will not of course render actionable as trespass an act which is not in itself an act of trespass.[78] A trespass after being forbidden is wilful and malicious.[79] And an entry pending a decision of the court to try the right is not in good faith.[80]

c. The Force. Actual force is not necessary.[81] The force implied by law will be sufficient,[82] and the law always implies force where the injury is immediate to the person and property of another.[83]

d. The Right Invaded — (I) *Realty Generally* — (A) *Rights Essential — Possession, Actual or Constructive* — (1) In General. The action of trespass is given for an injury to the property itself, rather than for an injury to some person's right therein. It follows that the person to maintain the action is the person who had possession of the property at the time of the injury. By bearing this in mind and bearing in mind further the old rule of the common law that the owner of property adversely held by another had only an action for its recovery, so that he could not convey his property right in it, etc., the rules of law as to the right of a plaintiff to support an action of trespass will be greatly illumined. The fundamental doctrines of the law of trespass, that possession is the gist of the action, that plaintiff must have actual or constructive possession, that possession alone is sufficient to maintain the action, that title is not sufficient where the property is adversely held by another, and finally, that to maintain the action no right not a right *in rem* to the property rather than merely a right *in personam* against another to get the property will support the action, as set forth below, all rest on this basic idea. And similarly, no defense *in personam* was good unless it was against the person in possession. A chose in action against the true owner, as a contract for purchase of land in possession of another, would not be a defense

personalty by a servant of a person receiving it from the receiptor of the sheriff renders the servant liable, although ignorant of the sheriff's right. Sinclair *v.* Tarbox, 2 N. H. 135.

74. Wallard *v.* Worthman, 84 Ill. 446 (by bill of sale of chattels, absolute on its face but in fact a mere security); Pearson *v.* Inlow, 20 Mo. 322, 64 Am. Dec. 189 (by mistake in leading defendant to believe timber cut was on defendant's own land).

75. Young *v.* Vaughan, 1 Houst. (Del.) 331 (holding that driving off in defendant's drove of plaintiff's cattle running at large is a trespass if he knew they were not his or having his attention called to them did not exercise due diligence to ascertain); Brownell *v.* Flagler, 5 Hill (N. Y.) 282; Brooks *v.* Olmstead, 17 Pa. St. 24.

Accident if entirely unavoidable and without the doer's fault is an excuse. Jennings *v.* Fundeburg, 4 McCord (S. C.) 161.

76. Cunningham *v.* Pitzer, 2 W. Va. 264, 94 Am. Dec. 526.

77. Rogers *v.* Brown, 20 N. J. L. 119 (holding that whether seizure of goods exposed for sale contrary to a statute is a trespass depends on the intent); Gorman *v.* Marsteller, 10 Fed. Cas. No. 5,629, 2 Cranch C. C. 311 (holding that entry on land with intent to injure part of it lying in another jurisdiction is a trespass, although lawful without such intent).

78. Estey *v.* Smith, 45 Mich. 402, 8 N. W. 83.

79. McMillan *v.* Fairly, 12 N. Brunsw. 500.

80. Richwine *v.* Noblesville Presbyterian Church, 135 Ind. 80, 34 N. E. 737.

81. Febes *v.* Tiernan, 1 Mont. 179; Jordan *v.* Wyatt, 4 Gratt. (Va.) 151, 47 Am. Dec. 720.

Thus any unlawful exercise of authority over another's property is a trespass (Hardy *v.* Clendening, 25 Ark. 436; Chicago Title, etc., Co. *v.* Core, 223 Ill. 58, 79 N. E. 108 [*affirming* 126 Ill. App. 272]; Reynolds *v.* Shuler, 5 Cow. (N. Y.) 323), as attaching goods, although not removed (Miller *v.* Baker, 1 Metc. (Mass.) 27); or selling timber and forbidding interference (Gibbs *v.* Chase, 10 Mass. 125); or selling timber and appropriating the proceeds (Lyford *v.* Putnam, 35 N. H. 563); or driving off sheep which became mixed with defendant's drove (Dexter *v.* Cole, 6 Wis. 319, 70 Am. Dec. 465).

Degree of force used is immaterial if dominion is exercised over the property, against the will of the owner or person rightfully in possession. Guttner *v.* Pacific Steam Whaling Co., 96 Fed. 617.

82. Febes *v.* Tiernan, 1 Mont. 179; Jordon *v.* Wyatt, 4 Gratt. (Va.) 151, 47 Am. Dec. 720.

83. Jordan *v.* Wyatt, 4 Gratt. (Va.) 151, 47 Am. Dec. 720.

to an action by the possessor against the vendee, although if the right had ripened into title it would be a good defense. Title in plaintiff is not necessary [84] unless the land is unoccupied,[85] or neither plaintiff nor any one else has actual possession.[86] The gist of trespass is the injury to possession,[87] and in England the rule has always been that actual possession was necessary,[88] and the doctrine has been followed to some extent in this country.[89] But the general rule in America is that either actual or constructive possession is sufficient to maintain trespass,[90] although

In every trespass quare clausum fregit force is implied. Febes *v.* Tiernan, 1 Mont. 179.

84. Oglesby *v.* Stodghill, 23 Ga. 590.

Occupation by a railroad.—Rule that plaintiff must either have possession at the time complained of or title was held to require title in this case. Hanlon *v.* Union Pac. R. Co., 40 Nebr. 52, 58 N. W. 590.

85. Wild lands.— Shipman *v.* Baxter, 21 Ala. 456; Wadleigh *v.* Marathon County Bank, 58 Wis. 546, 17 N. W. 314.

86. Moore *v.* Vickers, 126 Ga. 42, 54 S. E. 814; Whiddon *v.* Williams Lumber Co., 98 Ga. 700, 25 S. E. 770; Gray *v.* Peay, 82 S. W. 1006, 26 Ky. L. Rep. 989; Drake *v.* Howell, 135 N. C. 162, 45 S. E. 539.

87. *Alabama.*— Louisville, etc., R. Co. *v.* Higginbotham, 153 Ala. 334, 44 So. 872.

Arkansas.— McKinney *v.* Demby, 44 Ark. 74.

Colorado.— Sullivan *v.* Clements, 1 Colo. 261.

Illinois.—Western Book, etc., Co. *v.* Jevne, 78 Ill. App. 668.

Louisiana.— Daigre *v.* Levin, 48 La. Ann. 414, 19 So. 336; Le Blanc *v.* Nolan, 2 La. Ann. 223.

Maine.— Munsey *v.* Hanly, 102 Me. 423, 67 Atl. 217, 13 L. R. A. N. S. 209.

Massachusetts.— Kellenberger *v.* Sturtevant, 7 Cush. 465.

Missouri.— Cox *v.* Barker, 81 Mo. App. 181; Masterson *v.* West-End Narrow-Gauge R. Co., 5 Mo. App. 575.

New Hampshire.— Chandler *v.* Walker, 21 N. H. 282, 53 Am. Dec. 202.

88. Bristow *v.* Cormican, 3 App. Cas. 641; 9 Bacon Abr. tit. "Trespass," 458. Hence, a lessee cannot maintain the action before entry. Harrison *v.* Blackburn, 17 C. B. N. S. 678, 10 Jur. N. S. 1131, 34 L. J. C. P. 109, 11 L. T. Rep. N. S. 454, 13 Wkly. Rep. 135, 112 E. C. L. 678; Turner *v.* Cameron's Coalbrook Steam Coal Co., 5 Exch. 932, 20 L. J. Exch. 71.

89. Quillen *v.* Betts, 1 Pennew. (Del.) 53, 39 Atl. 595; McClain *v.* Todd, 5 J. J. Marsh. (Ky.) 335, 22 Am. Dec. 37; Daniel *v.* Holland, 4 J. J. Marsh. (Ky.) 18; Walton *v.* Clarke, 4 Bibb (Ky.) 218 (that the rule has been changed by statute see Kentucky cases cited in the following note); Dugan *v.* Ferguson, 1 S. W. 539, 8 Ky. L. Rep. 342; Hillman *v.* Hurley, 6 Ky. L. Rep. 682; Truss *v.* Old, 6 Rand. (Va.) 556, 18 Am. Dec. 748; Holmead *v.* Corcoran, 12 Fed. Cas. No. 6,627, 2 Cranch C. C. 119.

90. *Alabama.*— Buford *v.* Christian, 149 Ala. 343, 42 So. 997; Louisville, etc., R. Co. *v.* Hall, 131 Ala. 161, 32 So. 603; Ledbetter *v.* Blassingame, 31 Ala. 495.

Arkansas.— Ledbetter *v.* Fitzgerald, 1 Ark. 448.

Connecticut.—Waterbury Clock Co. *v.* Irion, 71 Conn. 254, 41 Atl. 827; Bulkley *v.* Dolbeare, 7 Conn. 232; Williams *v.* Lewis, 3 Day 498.

Georgia.— Under statutory provisions. Moore *v.* Vickers, 126 Ga. 42, 54 S. E. 814.

Kentucky.— Under statutory provisions. Scroggins *v.* Nave, 133 Ky. 793, 119 S. W. 158; McCloskey *v.* Doherty, 97 Ky. 300, 30 S. W. 649, 17 Ky. L. Rep. 178; Meehan *v.* Edwards, 92 Ky. 574, 18 S. W. 519, 13 Ky. L. Rep. 803; Goff *v.* Lowe, 80 S. W. 219, 25 Ky. L. Rep. 2176; Coppage *v.* Griffith, 40 S. W. 908, 19 Ky. L. Rep. 459.

Maine.— Howe *v.* Farrar, 44 Me. 233.

Maryland.— Zimmerman *v.* Shreeve, 59 Md. 357.

Massachusetts.— Hersey *v.* Chapin, 162 Mass. 176, 38 N. E. 442; Emerson *v.* Thompson, 2 Pick. 473.

Michigan.— Newcomb *v.* Love, 112 Mich. 115, 70 N. W. 443.

Minnesota.— Moon *v.* Avery, 42 Minn. 405, 44 N. W. 257; Williams *v.* McGrade, 18 Minn. 82.

Missouri.— Brown *v.* Hartzell, 87 Mo. 564.

New Hampshire.— Richardson *v.* Palmer, 38 N. H. 212.

New York.— Van Brunt *v.* Schenck, 11 Johns. 377.

North Carolina.— Drake *v.* Howell, 133 N. C. 162, 45 S. E. 539; State *v.* Reynolds, 95 N. C. 616; McLean *v.* Murchison, 53 N. C. 38; Patterson *v.* Bodenhammer, 33 N. C. 4; Cohoon *v.* Simmons, 29 N. C. 189; Kennedy *v.* Wheatley, 3 N. C. 402.

Ohio.— Van Buskirk *v.* Dunlap, 2 Ohio Dec. (Reprint) 233, 2 West. L. Month. 125.

Pennsylvania.— Tustin *v.* Sammons, 23 Pa. Super. Ct. 175, title to unimproved land gives possession presumptively, but not if it is improved.

South Carolina.— Gilmore *v.* Roberts, 18 S. C. 551; Davis *v.* Clancy, 3 McCord 422; Skinner *v.* McDowell, 2 Nott & M. 68; Grimke *v.* Brandon, 1 Nott & M. 382; McColman *v.* Wilkes, 3 Strobh. 465, 51 Am. Dec. 637.

West Virginia.— High *v.* Pancake, 42 W. Va. 602, 26 S. E. 536; Wilson *v.* Phœnix Powder Mfg. Co., 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. Rep. 890.

Canada.—Barnhill *v.* Peffard, 3 Nova Scotia Dec. 491; Greaves *v.* Hilliard, 15 U. C. C. P. 326.

See 46 Cent. Dig. tit. "Trespass," § 32.

[I, A, 2, d, (I), (A), (1)]

one of these two kinds of possession is of course necessary [91] at the time of the trespass,[92] although not at the time of the commencement of suit.[93] One having neither title nor possession,[94] or having neither possession nor right of possession,[95]

91. *Alabama.*— Buck *v.* Louisville, etc., R. Co., 159 Ala. 305, 48 So. 699; Powers *v.* Hatter, 152 Ala. 636, 44 So. 859; Blackburn *v.* Baker, 7 Port. 284.

Arkansas.— Newman *v.* Mountain Park Land Co., 85 Ark. 208, 107 S. W. 391, 122 Am. St. Rep. 27; Price *v.* Greer, 76 Ark. 426, 88 S. W. 985; Taylor *v.* State, 65 Ark. 595, 47 S. W. 1055; McKinney *v.* Demby, 44 Ark. 74; Merrick *v.* Britton, 26 Ark. 496.

Colorado.—Patrick *v.* Brown, 36 Colo. 298, 85 Pac. 325; Sullivan *v.* Clements, 1 Colo. 261.

Connecticut.— Church *v.* Meeker, 34 Conn. 421; Chatham *v.* Brainerd, 11 Conn. 60.

Florida.— Yellow River R. Co. *v.* Harris, 35 Fla. 385, 17 So. 568; Jenkins *v.* Lykes, 19 Fla. 148, 45 Am. Rep. 19.

Georgia.— Clower *v.* Maynard, 112 Ga. 340, 37 S. E. 370; Whiddon *v.* Williams Lumber Co., 98 Ga. 700, 25 S. E. 770; Phillips *v.* Babcock Bros. Lumber Co., 5 Ga. App. 634, 63 S. E. 808.

Idaho.— Steltz *v.* Morgan, 16 Ida. 368, 101 Pac. 1057, 28 L. R. A. N. S. 398.

Illinois.— Winkler *v.* Meister, 40 Ill. 349; Williams *v.* Shade, 13 Ill. App. 337.

Iowa.— Heinrichs *v.* Terrell, 65 Iowa 25, 21 N. W. 171.

Louisiana.— Ramos Lumber, etc., Co. *v.* Labarre, 116 La. 559, 40 So. 898; Louisiana Land, etc., Co. *v.* Gasquet, 45 La. Ann. 759, 13 So. 171; Patin *v.* Blaize, 19 La. 396; Hornsby *v.* McDermott, 19 La. 304, by grant from the United States.

Maine.— Vassal Borough *v.* Somerset, etc., R. Co., 43 Me. 337.

Maryland.— Ridgely *v.* Bond, 17 Md. 14; Norwood *v.* Shipley, 1 Harr. & J. 295.

Minnesota.— Olson *v.* Minnesota, etc., R. Co., 89 Minn. 280, 94 N. W. 871.

Mississippi.— Gathings *v.* Miller, 76 Miss. 651, 24 So. 964 (must have either record or paper title or possession under claim of ownership); Dejarnett *v.* Haynes, 23 Miss. 600.

Nebraska.— Dold *v.* Knudsen, 70 Nebr. 373, 97 N. W. 482; Nelson *v.* Jenkins, 42 Nebr. 133, 60 N. W. 311; Hanlon *v.* Union Pac. R. Co., 40 Nebr. 52, 58 N. W. 590; Chicago, etc., R. Co. *v.* Shepherd, 39 Nebr. 523, 58 N. W. 189.

New Jersey.— Rollins *v.* Atlantic City R. Co., 70 N. J. L. 664, 58 Atl. 344.

New York.— Price *v.* Brown, 101 N. Y. 669, 5 N. E. 434; Edwards *v.* Noyes, 65 N. Y. 125; Alt *v.* Gray, 55 N. Y. App. Div. 563, 67 N. Y. Suppl. 411.

North Carolina.— Gordner *v.* Blades Lumber Co., 144 N. C. 110, 56 S. E. 695.

Pennsylvania.— McGrew *v.* Foster, 113 Pa. St. 642, 6 Atl. 346; Payne *v.* Ulmer, 1 Walk. 516.

South Carolina.— McColman *v.* Wilkes, 3 Strobh. 465, 51 Am. Dec. 637; Rhodes *v.* Bunch, 3 McCord 66; Skinner *v.* McDowell, 2 Nott & M. 68.

Vermont.— Paine *v.* Hutchins, 49 Vt. 314; Oatman *v.* Fowler, 43 Vt. 462; Bakersfield Religious Cong. Soc. *v.* Baker, 15 Vt. 119, 40 Am. Dec. 668.

West Virginia.— Buck *v.* Newberry, 55 W. Va. 681, 47 S. E. 889.

United States.— Fraser *v.* Hunter, 9 Fed. Cas. No. 5,063, 5 Cranch C. C. 470.

Canada.— Mott *v.* Feenor, 10 Nova Scotia 387; Cameron *v.* McDonald, 3 Nova Scotia 240; Shey *v.* McHeffey, 1 Nova Scotia Dec. 350.

See 46 Cent. Dig. tit. "Trespass," § 32.

Actual possession or right to immediate possession is necessary. Houghtaling *v.* Houghtaling, 56 Barb. (N. Y.) 194; McGrew *v.* Foster, 113 Pa. St. 642, 6 Atl. 346; Lewis *v.* Carsam, 15 Pa. St. 31; Blair Iron, etc., Co. *v.* Lloyd, 1 Walk. (Pa.) 158.

92. *Alabama.*— Buck *v.* Louisville, etc., R. Co., 159 Ala. 305, 48 So. 699.

Connecticut.—Sutton *v.* Lockwood, 40 Conn. 318.

Kentucky.— Wilson *v.* Bibb, 1 Dana 7, 25 Am. Dec. 118.

North Carolina.— McMillan *v.* Hafley, 4 N. C. 186.

Pennsylvania.— Ward *v.* Taylor, 1 Pa. St. 238.

93. Buck *v.* Louisville, etc., R. Co., 159 Ala. 305, 48 So. 699.

94. *Georgia.*— Whiddon *v.* Williams Lumber Co., 98 Ga. 700, 25 S. E. 770.

Illinois.— Harms *v.* Solem, 79 Ill. 460 (in which the court held that one joint tenant cannot recover damages for injury to the separate estate of another joint tenant); Rockwell *v.* Jones, 21 Ill. 279; Ebersol *v.* Trainor, 81 Ill. App. 645 (plaintiff cannot show that the act wronged the person in possession).

Kentucky.— Jones *v.* Patterson, 66 S. W. 377, 23 Ky. L. Rep. 1838 (holding that plaintiff cannot show an outstanding title); Ohio, etc., R. Co. *v.* Wooten, 46 S. W. 681, 20 Ky. L. Rep. 383; Santford *v.* Dobyns, 30 S. W. 996, 17 Ky. L. Rep. 283.

Louisiana.— Ramos Lumber, etc., Co. *v.* Labarre, 116 La. 559, 40 So. 898.

Maryland.— Parker *v.* Wallis, 60 Md. 15, 45 Am. Rep. 703.

Massachusetts.— Conklin *v.* Old Colony R. Co., 154 Mass. 155, 28 N. E. 143.

New Hampshire.— Richardson *v.* Palmer, 38 N. H. 212.

Pennsylvania.— Allegheny *v.* Ohio, etc., R. Co., 26 Pa. St. 355.

South Carolina.—Turner *v.* Poston, 63 S. C. 244, 41 S. E. 296.

Texas.— Texas, etc., R. Co. *v.* Torrey, (App. 1891) 16 S. W. 547.

Vermont.— Bakersfield Religious Cong. Soc. *v.* Baker, 15 Vt. 119, 40 Am. Dec. 668.

95. Latham *v.* Roanoke R., etc., Co., 139 N. C. 9, 51 S. E. 780, 111 Am. St. Rep. 764; Gates *v.* Davidson, 17 Nova Scotia 431.

cannot maintain trespass. Where plaintiff relies solely on possession it must be actual.[96]

(2) LEGAL TITLE TO LAND IN ACTUAL OCCUPATION OF ANOTHER — (a) OCCUPATION UNDER AND NOT ADVERSELY TO THE OWNER. Mere occupation by other persons but under and not adversely to the owner does not oust his possession or prevent his maintaining trespass.[97]

(b) OCCUPATION OF LESSEE — aa. *Before Reentry by the Owner.* The rule is well settled that the lessor has no such possession of the demanded premises before reëntry thereon as will entitle him to maintain an action of trespass,[98]

96. Webb *v.* Sturtevant, 2 Ill. 181.

97. *Alabama.*— Garrett *v.* Sewell, 108 Ala. 521, 18 So. 737.

Connecticut.— Curtiss *v.* Hoyt, 19 Conn. 154, 48 Am. Dec. 149.

Kentucky.— McClain *v.* Todd, 5 J. J. Marsh. 335, 22 Am. Dec. 37.

Massachusetts.— Shaw *v.* Commiskey, 7 Pick. 76.

Ohio.— Wilson *v.* Crosby, Wright 288.

Principles applied as against third persons. — Occupation by *a cestui que trust* does not prevent an action by the trustee (Rogers *v.* White, 1 Sneed (Tenn.) 68); nor does occupation of a store by relatives without a lease prevent recovery by the owner for trespass (Kelly *v.* Davidson, 7 N. Y. St. 481); so the owner's right to maintain trespass is not affected by occupation of individual rooms by tenants at will (Curtiss *v.* Hoyt, 19 Conn. 154, 48 Am. Dec. 149); nor by occupation of land by persons employed to hold possession (McColman *v.* Wilkes, 3 Strobh. (S. C.) 465, 51 Am. Dec. 637); nor by mere temporary residence on the land by a former tenant (Garrett *v.* Sewell, 108 Ala. 521, 18 So. 737); nor by the making of bricks by a mere licensee (Shaw *v.* Cummiskey, 7 Pick. (Mass.) 76); nor by the working of a farm by his children (Russell *v.* Scott, 9 Cow. (N. Y.) 279); nor by the raising of a single crop by one having a contractual right, not a lease (Warner *v.* Hoisington, 42 Vt. 94); nor by the mere remaining on land by a grantor by sufferance of the grantee (Chesley *v.* Brockway, 34 Vt. 550); nor by carrying on a farm "on halves," if the injury is to the inheritance (Cutting *v.* Cox, 19 Vt. 517); nor by occupation of another by a bare license (Percival *v.* Chase, 182 Mass. 371, 65 N. E. 800); nor by occupation by mortgagor after default which entitled the mortgagee to possession (Mann *v.* English, 38 U. C. Q. B. 240); nor even before default, in states where the mortgagee is legal owner with immediate right of possession (Smith *v.* Goodwin, 2 Me. 173). So it has been held that occupation of land under a bond for title is under, not adverse, to the owner and will not prevent a recovery by the owner for injury to the freehold (Southern R. Co. *v.* Ethridge, 108 Ga. 121, 33 S. E. 850); and possession under contract for purchase before deed has been given does not prevent a recovery by the vendor for trespass (Adams *v.* Farr, 2 Hun (N. Y.) 473, 5 Thomps. & C. 59), even though the full purchase-price had been paid (Jones *v.* Taylor, 12 N. C. 434).

Principles applied as against the occupant. —Where the grantor remains in possession of a house and cuts trees, he is liable, being either tenant at will or at sufferance or else a mere occupant (Spencer *v.* Weatherly, 46 N. C. 327); and a person employed to hold possession for the owner is liable for resisting the owner's entry (Looram *v.* Burlingame, 16 La. Ann. 199); and one occupying by license, after revocation of the license by conveyance to plaintiff, is liable for remaining in possession (Hicks *v.* Swift Creek Mill Co., 133 Ala. 411, 31 So. 947, 91 Am. St. Rep. 38, 57 L. R. A. 720).

98. *Alabama.*— Garrett *v.* Sewell, 108 Ala. 521, 18 So. 737.

California.— Uttendorffer *v.* Saegers, 50 Cal. 496.

Delaware.— Tilghman *v.* Cruson, 4 Harr. 341.

Illinois.— Halligan *v.* Chicago, etc., R. Co., 15 Ill. 558; Gould *v.* Sternberg, 4 Ill. App. 439.

Kentucky.— Walden *v.* Conn, 84 Ky. 312, 1 S. W. 537, 4 Am. St. Rep. 204; Britton *v.* Moody, 5 J. J. Marsh. 399.

Maine.— Lyford *v.* Toothaker, 39 Me. 28.

Massachusetts.— Bascom *v.* Dempsey, 143 Mass. 409, 9 N. E. 744; French *v.* Fuller, 23 Pick. 104; Rising *v.* Stannard, 17 Mass. 282.

Michigan.— Bigelow *v.* Reynolds, 68 Mich. 344, 36 N. W. 95.

Missouri.— Lindenbower *v.* Bentley, 86 Mo. 515; Roussin *v.* Benton, 6 Mo. 592; Thurmond *v.* Ash Grove White Lime Assoc., 125 Mo. App. 73, 102 S. W. 617.

New Hampshire.— Wentworth *v.* Portsmouth, etc., R. Co., 55 N. H. 540; Jewett *v.* Berry, 20 N. H. 36; Robertson *v.* George, 7 N. H. 306; Anderson *v.* Nesmith, 7 N. H. 167.

New Jersey.— New Jersey Midland R. Co. *v.* Van Syckle, 37 N. J. L. 496.

New York.— Miller *v.* Decker, 40 Barb. 228; Holmes *v.* Seely, 19 Wend. 507; Tobey *v.* Webster, 3 Johns. 468; Campbell *v.* Arnold, 1 Johns. 511.

Pennsylvania.— Clark *v.* Smith, 25 Pa. St. 137; Greber *v.* Kleckner, 2 Pa. St. 289; Torrence *v.* Irwin, 2 Yeates 210, 1 Am. Dec. 340; Stoner *v.* Hunsicker, 4 Lanc. Bar, Dec. 14, 1872; Williams *v.* Dougherty, 6 Phila. 156.

South Carolina.— Davis *v.* Clancy, 3 McCord 422.

Texas.— Reynolds *v.* Williams, 1 Tex. 311.

Vermont.— Hurd *v.* Darling, 16 Vt. 377.

Virginia.— Kretzer *v.* Wysong, 5 Gratt. 9.

whether against the tenant [99] or third persons,[1] at least where the injury is to possession only, not to the freehold,[2] except when authorized by statute;[3] and the rule is not changed by statutory abolition of forms of action.[4] Where, however, the injury is to the reversion, an action in some form lies, usually an action on the case,[5] and mere possession by his tenant is sufficient for a lessor to maintain an action for injury to the reversion without establishing any other right.[6]

Wisconsin.— Stoltz *v.* Kretschmar, 24 Wis. 283.

See 46 Cent. Dig. tit. "Trespass," § 36.

Indefinite term.— The fact that the lease is for an indefinite term will not alter the case. Perry *v.* Bailey, 94 Me. 50, 46 Atl. 789 (holding that the lessor cannot sue in trespass when the tenancy is merely at will, if the tenancy did in fact exist at the time of the act); Hersey *v.* Chapin, 162 Mass. 176, 38 N. E. 442; Woodman *v.* Francis, 14 Allen (Mass.) 198; French *v.* Fuller, 23 Pick. (Mass.) 104; Rising *v.* Stannard, 17 Mass. 282; Taylor *v.* Townsend, 8 Mass. 411, 5 Am. Dec. 107; Robertson *v.* George, 7 N. H. 306; Miller *v.* Fulton, 4 Ohio 433 (action against third persons); Clark *v.* Smith, 25 Pa. St. 137; Gunsolus *v.* Lormer, 54 Wis. 630, 12 N. W. 62. But see Kellenberger *v.* Sturtevant, 7 Cush. (Mass.) 465; Hingham *v.* Sprague, 15 Pick. (Mass.) 102.

Rule applied in case of tenancy for years see Halligan *v.* Chicago, etc., R. Co., 15 Ill. 558; Hingham *v.* Sprague, 15 Pick. (Mass.) 102; Hayward *v.* Hope Tp. School Dist. No. 9, 139 Mich. 539, 102 N. W. 999; Bigelow *v.* Reynolds, 68 Mich. 344, 36 N. W. 95; Cramer *v.* Groseclose, 53 Mo. App. 648; Wickham *v.* Freeman, 12 Johns. (N. Y.) 183; Catlin *v.* Hayden, 1 Vt. 375.

Where crops were by the terms of the lease to remain his property the lessor may maintain trespass for them. Gray *v.* Stevens, 28 Vt. 1, 65 Am. Dec. 216.

99. Rogers *v.* Brooks, 99 Ala. 31, 11 So. 753; Britton *v.* Moody, 5 J. J. Marsh. (Ky.) 399; Tobey *v.* Webster, 3 Johns. (N. Y.) 468; Greber *v.* Kleckner, 2 Pa. St. 289.

The rule is not affected by the fact that he lives on the land with the tenant (Kimball *v.* McIntosh, 134 Mass. 362); and even though since the trespass the lessor has obtained possession (Pilgrim *v.* Southampton, etc., R. Co., 8 C. B. 25, 18 L. J. C. P. 330, 65 E. C. L. 25; Boulton *v.* Jarvis, (Hil. T. 6 Vict.) 3 Ont. Case Law Dig. 6932). Otherwise, however, if the lessor was personally present at the act and it does not appear that the lease by its terms excluded him from possession. O'Brien *v.* Cavanaugh, 61 Mich. 368, 28 N. W. 127.

1. *Arkansas.*— Gibbons *v.* Dillingham, 10 Ark. 9, 50 Am. Dec. 233.

California.— Uttendorffer *v.* Saegers, 50 Cal. 496.

Iowa.— Drake *v.* Chicago, etc., R. Co., 70 Iowa 59, 29 N. W. 804.

Missouri.— Lindenbower *v.* Bentley, 86 Mo. 515; Fitch *v.* Gosser, 54 Mo. 267.

New York.— Miller *v.* Decker, 40 Barb. 228; Holmes *v.* Seely, 19 Wend. 507.

England.— Cooper *v.* Crabtree, 20 Ch. D. 589, 51 L. J. Ch. 544, 46 L. T. Rep. N. S. 573, 30 Wkly. Rep. 579.

See 46 Cent. Dig. tit. "Trespass," § 36.

2. *Illinois.*— Gould *v.* Sternburg, 4 Ill. App. 439.

Kentucky.— Walden *v.* Conn, 84 Ky. 312, 1 S. W. 537, 4 Am. St. Rep. 204.

Maine.— Perry *v.* Bailey, 94 Me. 50, 46 Atl. 789; Bartlett *v.* Perkins, 13 Me. 87.

Massachusetts.— Dearborn *v.* Wellman, 130 Mass. 238.

New York.— Tobias *v.* Cohn, 36 N. Y. 363; Wood *v.* Williamsburgh, 46 Barb. 601.

Wisconsin.— Lyon *v.* Green Bay, etc., R. Co., 42 Wis. 548.

Injury in fact to possession only by third person see Lyford *v.* Toothaker, 39 Me. 28; Little *v.* Palister, 3 Me. 6; Smith *v.* Slocomb, 11 Gray (Mass.) 280; French *v.* Fuller, 23 Pick. (Mass.) 104; Shenk *v.* Mundorf, 2 Browne (Pa.) 106; Nafe *v.* Hudson, 19 Tex. Civ. App. 381, 47 S. W. 675.

3. McCloskey *v.* Doherty, 97 Ky. 300, 30 S. W. 649, 17 Ky. L. Rep. 178; Holderman *v.* Middleton, 6 Bush (Ky.) 44.

4. Lawry *v.* Lawry, 88 Me. 482, 34 Atl. 273.

5. As against a stranger.— *Iowa.*— Brown *v.* Bridges, 31 Iowa 138.

Kentucky.— Walden *v.* Conn, 84 Ky. 312, 1 S. W. 537, 4 Am. St. Rep. 204.

Louisiana.— Bright *v.* Bell, 113 La. 1078, 37 So. 976.

Massachusetts.— Hersey *v.* Chapin, 162 Mass. 176, 38 N. E. 442; Anthony *v.* New York, etc., R. Co., 162 Mass. 60, 37 N. E. 780; Putney *v.* Lapham, 10 Cush. 232.

Missouri.— Fitch *v.* Gosser, 54 Mo. 267.

New York.— Smith *v.* Felt, 50 Barb. 612; Wood *v.* Williamsburgh, 46 Barb. 601.

North Carolina.— Cherry *v.* Lake Drummond Canal, etc., Co., 140 N. C. 422, 53 S. E. 138, 111 Am. St. Rep. 850; Aycock *v.* Raleigh, etc., Air Line R. Co., 89 N. C. 321.

North Dakota.— Russell *v.* Meyer, 7 N. D. 335, 75 N. W. 262, 47 L. R. A. 637.

Pennsylvania.— Bailey *v.* Mill Creek Coal Co., 20 Pa. Super. Ct. 186.

Texas.— Gulf, etc., R. Co. *v.* Cusenberry, 86 Tex. 525, 26 S. W. 43 (holding that the landlord may recover in an action on the case for a mere temporary injury where it was agreed in the lease that he should have the right to recover); Gulf, etc., R. Co. *v.* Harmonson, (Civ. App. 1893) 22 S. W. 764.

Canada.— Creamer *v.* Hogan, 3 Nova Scotia 237.

As against the tenant see Russell *v.* Fabyan, 34 N. H. 218.

6. Wilson *v.* Hinsley, 13 Md. 64; Thoreau *v.* Pallies, 1 Allen (Mass.) 425 (by means of tenant for eleven years will support action

Even for an injury to the reversion, the prevailing doctrine is that the lessor cannot maintain an action of trespass [7] except in cases where the tenancy is merely one at will. When this is so the prevailing doctrine is that trespass will lie.[8]

bb. *After Reëntry by the Owner and Regaining Possession.* After reëntry and taking possession on termination of the lease, the lessor can maintain trespass for acts subsequent to the reëntry.[9] A mere formal entry is sufficient [10] or abandonment of possession by the tenant; [11] and where the tenancy is at will or on sufferance it is commonly held that an act of waste by the tenant terminates the tenancy so that trespass will lie against him by the owner without entry.[12]

(c) Occupation Adverse to the Owner — aa. *In General.* Where land is adversely held in possession of one person no other person can maintain trespass, and therefore the owner cannot maintain trespass where another is in possession holding adversely,[13] either against the person in possession [14] or against

for injury to reversionary interest); Fitch *v.* Gosser, 54 Mo. 267.

7. *Massachusetts.*— Lienow *v.* Ritchie, 8 Pick. 235; Taylor *v.* Townsend, 8 Mass. 411, 5 Am. Dec. 107.

New Hampshire.— Wentworth *v.* Portsmouth, etc., R. Co., 55 N. H. 540; Lane *v.* Thompson, 43 N. H. 320; Anderson *v.* Nesmith, 7 N. H. 167.

New York.— Campbell *v.* Arnold, 1 Johns. 511.

Pennsylvania.— Greber *v.* Kleckner, 2 Pa. St. 289; Shenk *v.* Mundorf, 2 Browne 106, cutting trees, deed being defective in erroneously stating township number.

South Carolina.— Cannon *v.* Hatcher, 1 Hill 260, 26 Am. Dec. 177.

Vermont.— Catlin *v.* Hayden, 1 Vt. 375.

Canada.— Roys *v.* Cramer, 12 U. C. Q. B. 165.

See 46 Cent. Dig. tit. "Trespass," §§ 36, 37. And see Case, 6 Cyc. 692.

In Missouri the weight of authority is against the rule stated in the text (Parker *v.* Shackelford, 61 Mo. 68; Thurmond *v.* Ash Grove White Lime Assoc., 125 Mo. App. 73, 102 S. W. 617; Ridge *v.* Railroad Transfer Co., 56 Mo. App. 133; Bailey *v.* A. Siegel Gas Fixture Co., 54 Mo. App. 50; Cramer *v.* Groseclose, 53 Mo. App. 648), although an earlier decision sustains it (Roussin *v.* Benton, 6 Mo. 592).

8. Davis *v.* Nash, 32 Me. 411; Hingham *v.* Sprague, 15 Pick. (Mass.) 102; Starr *v.* Jackson, 11 Mass. 519; Comyns Dig. "Trespass," n. 2; Rolle Abr. "Trespass," n. 3, 4; 1 Saunders 322, a, n. 5; Viner Abr. "Trespass," n. 3. And see *dicta* in Jewett *v.* Whitney, 43 Me. 242; Greber *v.* Kleckner, 2 Pa. St. 289; Cannon *v.* Hatcher, 1 Hill (S. C.) 260, 26 Am. Dec. 177. *Contra*, Campbell *v.* Arnold, 1 Johns. (N. Y.) 511.

9. Dorrell *v.* Johnson, 17 Pick. (Mass.) 263 (holding that reëntry and taking possession are sufficient to maintain trespass against the tenant at sufferance); Todd *v.* Jackson, 26 N. J. L. 525; Wood *v.* Hyatt, 4 Johns. (N. Y.) 313.

10. Hey *v.* Moorhouse, 6 Bing. N. Cas. 52, 9 L. J. C. P. 113, 8 Scott 156, 37 E. C. L. 503, holding that it gives possession sufficient to maintain trespass against third persons for acts thereafter.

Against tenant.— Sufficient possession is gained to give a right of action against the tenant himself. Dorrell *v.* Johnson, 17 Pick. (Mass.) 263; Hey *v.* Moorhouse, 6 Bing. N. Cas. 52, 9 L. J. C. P. 113, 8 Scott 156, 37 E. C. L. 503.

Formal declaration of possession.— A formal declaration that possession is taken is not necessary where the acts show intent to take possession. Dorrell *v.* Johnson, 17 Pick. (Mass.) 263; Butcher *v.* Butcher, 7 B. & C. 399, 6 L. J. K. B. O. S. 51, 1 M. & R. 220, 31 Rev. Rep. 237, 14 E. C. L. 182, 108 Eng. Reprint 772.

11. Hatch *v.* Hart, 40 N. H. 93.

12. Daniels *v.* Pond, 21 Pick. (Mass.) 367, 32 Am. Dec. 269; Catlin *v.* Hayden, 1 Vt. 375. But see Russell *v.* Fabyan, 34 N. H. 218.

Cutting trees see Treat *v.* Peck, 5 Conn. 280; Phillips *v.* Covert, 7 Johns. (N. Y.) 1; Shenk *v.* Mundorf, 2 Browne (Pa.) 106.

Injury to the freehold see Ripley *v.* Yale, 16 Vt. 257.

Authorizing use of a house as a smallpox hospital see Hersey *v.* Chapin, 162 Mass. 176, 38 N. E. 442.

13. Daisey *v.* Hudson, 5 Harr. (Del.) 320; McMenamy *v.* Cohick, 1 Mo. App. 529; Carter *v.* Pitcher, 87 Hun (N. Y.) 580, 34 N. Y. Suppl. 549.

14. *Alabama.*— Powers *v.* Hatter, 152 Ala. 636, 44 So. 859.

Connecticut.— Payne *v.* Clark, 20 Conn. 30; Wheeler *v.* Hotchkiss, 10 Conn. 225.

Delaware.— Clark *v.* Hill, 1 Harr. 335.

Illinois.— Cook *v.* Foster, 7 Ill. 652.

Kentucky.— Wilson *v.* Bibb, 1 Dana 7, 25 Am. Dec. 118; Norton *v.* Norton, 25 S. W. 750, 27 S. W. 85, 15 Ky. L. Rep. 872.

Louisiana.— South Louisiana Land Co. *v.* Norgress, 120 La. 168, 45 So. 49, purchaser at tax-sale must bring action to recover possession if former owner holds over.

Maine.— Butler *v.* Taylor, 86 Me. 17, 29 Atl. 923.

Maryland.— Parker *v.* Wallis, 60 Md. 15, 45 Am. Rep. 703, remedy in ejectment.

Massachusetts.— Taylor *v.* Townsend, 8 Mass. 411, 5 Am. Dec. 107, tearing down a house built by possessor occupying under defeasible title, after judgment of defeasance but before entry or issuance of writ of possession.

third persons.[15] The statutes abolishing forms of actions does not change the rule.[16]

Michigan.— Vetterly *v.* McNeal, 129 Mich. 507, 89 N. W. 441; Newcomb *v.* Love, 112 Mich. 115, 70 N. W. 443 (possession under agreed boundary line); Scarwell *v.* Grand Rapids, etc., R. Co., 103 Mich. 373, 61 N. W. 534, 28 L. R. A. 519 (holding that trespass is not the remedy for occupation by spur track of a railroad under parol agreement with plaintiff's grantor, although demand has been made for removal, as possession was lawfully taken); Kinney *v.* Ferguson, 101 Mich. 178, 59 N. W. 401; Carpenter *v.* Smith, 40 Mich. 639 (holding that the owner of land cannot maintain trespass for removal of building by parties in possession); Ruggles *v.* Sands, 40 Mich. 559.

Minnesota.— Moon *v.* Avery, 42 Minn. 405, 44 N. W. 257.

Missouri.— Brown *v.* Hartzell, 87 Mo. 564 (possession under contract for purchase from former owner); Cobb *v.* Griffith, etc., Sand, etc., Co., 87 Mo. 90; More *v.* Perry, 61 Mo. 174; Brown *v.* Carter, 52 Mo. 46; Cochran *v.* Whitesides, 34 Mo. 417; Harris *v.* Sconce, 66 Mo. App. 345; Hampton *v.* Massey, 53 Mo. App. 501 (ejectment is the remedy); McMenamy *v.* Cohick, 1 Mo. App. 529 (defendant in possession by plaintiff's husband, although she had not departed from the land).

Nebraska.— Yorgenson *v.* Yorgenson, 6 Nebr. 383.

New Hampshire.— Drown *v.* Foss, 39 N. H. 525 (holding that an execution creditor in possession under a levy is not liable in trespass for cutting hay or remaining in possession after recovery of his interest); Jewett *v.* Berry, 20 N. H. 36.

New Jersey.— Beattie *v.* Connolly, 39 N. J. L. 159 (taking clay from clay pits by one in possession under parol agreement for purchase not performed); Todd *v.* Jackson, 26 N. J. L. 525 (infants whose guardian has parted with possession by deed void as to their interests).

New York.— Wood *v.* Lafayette, 68 N. Y. 181; Dagrauw *v.* Warner, 89 Hun 9, 35 N. Y. Suppl. 59 (possession by grantee under defective deed); Zorn *v.* Haake, 75 Hun 235, 27 N. Y. Suppl. 38 (possession inside of line fence put on plaintiff's land by mutual mistake as to boundary); Welch *v.* Winterburn, 25 Hun 437 (possession under negotiations for lease, although not perfected and demand of possession is made); Cowenhoven *v.* Brooklyn, 38 Barb. 9; Frost *v.* Duncan, 19 Barb. 560 (cutting trees); Orser *v.* Storms, 9 Cow. 687, 18 Am. Dec. 543 (distraining cattle); Stuyvesant *v.* Tompkins, 9 Johns. 61 [*affirmed* in 11 Johns. 569]. *Contra*, Adams *v.* Farr, 2 Hun 473, 5 Thomps. & C. 59, occupation by defendant as vendee under contract for purchase, but title not to pass till price paid.

North Carolina.— State *v.* Reynolds, 95 N. C. 616; Brooks *v.* Stinson, 44 N. C. 72; Smith *v.* Ingram, 29 N. C. 175; Tredwell *v.* Reddick, 23 N. C. 56 (must first regain possession); Ring *v.* King, 20 N. C. 301 (although plaintiff has possession of part of the tract).

Pennsylvania.— Wilkinson *v.* Connell, 158 Pa. St. 126, 27 Atl. 870 (holding that where the grantor of a strip of land surveyed it off and built up to the line the grantee has never had actual or constructive possession and cannot maintain trespass against the grantor, the survey being incorrect); Collins *v.* Beatty, 148 Pa. St. 65, 23 Atl. 982; Berkey *v.* Auman, 91 Pa. St. 481 (possession under agreement to support owner, not performed entirely); Greber *v.* Kleckner, 2 Pa. St. 289; Mather *v.* Trinity Church, 3 Serg. & R. 509, 8 Am. Dec. 663; Carroll *v.* Carroll, 2 Chest. Co. Rep. 119.

South Carolina.— Vance *v.* Beatty, 4 Rich. 104; McColman *v.* Wilkes, 3 Strobh. 465, 51 Am. Dec. 637 (although plaintiff has possession of another part); Wilson *v.* Douglas, 2 Strobh. 97; Amick *v.* Frazier, Dudley 340; Pearson *v.* Dansby, 2 Hill 466.

Tennessee.—Polk *v.* Henderson, 9 Yerg. 310.

Utah.— Burnham *v.* Call, 2 Utah 433.

Vermont.— Howard *v.* Black, 42 Vt. 258; Ripley *v.* Yale, 16 Vt. 257, possession by defendant under contract for purchase and deed to plaintiff while defendant held possession.

Virginia.— Blackford *v.* Rogers, (1896) 23 S. E. 896, disputed boundary.

United States.— Johnson *v.* C. & N. W. Sand, etc., Co., 86 Fed. 269, 30 C. C. A. 35 (ejectment the remedy); Tayloe *v.* Varden, 23 Fed. Cas. No. 13,771, 2 Cranch C. C. 37 (defendant in possession at time of grant to plaintiff and ever since).

Canada.— Dunham *v.* King, (Trin. T. 1831) Stevens N. Brunsw. Dig. 744; Hart *v.* Scott, 23 Nova Scotia 369; Mooney *v.* McIntosh, 19 Nova Scotia 419, 7 Can. L. T. Occ. Notes 436 [*affirmed* in 14 Can. Sup. Ct. 740, 7 Can. L. T. Occ. Notes 390] (plaintiff never had had actual or constructive possession); Langille *v.* Langille, 1 Nova Scotia 159 (grantors remaining in possession).

In Iowa trespass for waste may be maintained by one claiming under a deed to own an interest in land against one holding by reason of and claiming title adverse to her, although plaintiff is not in the actual possession of the land at the time the action is instituted. Dodge *v.* Davis, 85 Iowa 77, 52 N. W. 2.

15. *Delaware.*— Chorman *v.* Queen Anne's R. Co., 3 Pennew. 417, 53 Atl. 438.

Indiana.— Broker *v.* Scobey, 56 Ind. 588, third person holding under contract for purchase.

Missouri.— Hawkins *v.* Roby, 77 Mo. 140, acts done by permission of person in possession.

Virginia.— Latham *v.* Latham, 3 Call 181, heir cannot maintain trespass on quarantine lands of widow.

Canada.— Campbell *v.* Cushman, 4 U. C. Q. B. 9, land purchased for benefit of another who was put in possession but title taken in plaintiff.

16. Blew *v.* Ritz, 82 Minn. 530, 85 N. W.

bb. *Disseizin.* Where defendant enters on land and ousts plaintiff from the possession, plaintiff cannot recover in trespass for acts done by the disseizor on the land after the disseizin and before reëntry of disseizor,[17] nor for acts of a person committed on the land by authority of the disseizor,[18] although he may, of course, recover in this form of action for the original wrongful entry without himself reëntering.[19] But to prevent action by the owner the wrongful possession must exclude that of the owner,[20] for otherwise his possession is not adverse

548; Frost *v.* Duncan, 19 Barb. (N. Y.) 560; Busch *v.* Calhoun, 14 Pa. Super. Ct. 578.

17. *Delaware.*— Stean *v.* Anderson, 4 Harr. 209.

Illinois.— Illinois, etc., R., etc., Co. *v.* Cobb, 82 Ill. 183; Smith *v.* Wunderlich, 70 Ill. 426; Greenlee *v.* Goldstein, 43 Ill. App. 639; Chicago, etc., R. Co. *v.* Slee, 33 Ill. App. 420.

Kentucky.— Wilson *v.* Bibb, 1 Dana 7, 25 Am. Dec. 118.

Maryland.— Gent *v.* Lynch, 23 Md. 58, 87 Am. Dec. 558.

Massachusetts.— Bigelow *v.* Jones, 10 Pick. 161; Emerson *v.* Thompson, 2 Pick. 473; Allen *v.* Thayer, 17 Mass. 299; Proprietors Kennebeck Purchase *v.* Call, 1 Mass. 483.

Michigan.— Wood *v.* Michigan Air Line R. Co., 90 Mich. 212, 51 N. W. 265.

Mississippi.— Miller *v.* Wesson, 58 Miss. 831.

New Hampshire.— Carter *v.* Beals, 44 N. H. 408; Wendell *v.* Blanchard, 2 N. H. 456.

New York.— Wood *v.* Lafayette, 68 N. Y. 181; Wohler *v.* Buffalo R. Co., 46 N. Y. 686; Holmes *v.* Seely, 19 Wend. 507; Case *v.* Shepherd, 2 Johns. Cas. 27.

North Carolina.— Fore *v.* Western North Carolina R. Co., 101 N. C. 526, 8 S. E. 335; Hays *v.* Askew, 52 N. C. 272; Gilchrist *v.* McLaughlin, 29 N. C. 310; Graham *v.* Houston, 15 N. C. 232.

Ohio.— Rowland *v.* Rowland, 8 Ohio 40.

Pennsylvania.— Irwin *v.* Nolde, 176 Pa. St. 594, 35 Atl. 217, 35 L. R. A. 415; King *v.* Baker, 25 Pa. St. 186; Baker *v.* Howell, 6 Serg. & R. 476; Mather *v.* Trinity Church, 3 Serg. & R. 509, 8 Am. Dec. 663; Smucker *v.* Pennsylvania R. Co., 6 Pa. Super. Ct. 521 [*reversed* on other grounds in 188 Pa. St. 40, 41 Atl. 45].

Tennessee.— West *v.* Lanier, 9 Humphr. 762.

Vermont.— Stevens *v.* Hollister, 18 Vt. 294, 46 Am. Dec. 154; Bowne *v.* Graham, 2 Tyler 411.

Virginia.— Bailey *v.* Butcher, 6 Gratt. 144; Cooke *v.* Thornton, 6 Rand. 8.

United States.— O'Neale *v.* Brown, 18 Fed. Cas. No. 10,514, 1 Cranch C. C. 79.

See 46 Cent. Dig. tit. "Trespass," § 42.

The fact that plaintiff by reason of having conveyed the land can never reënter and so is deprived of all remedy does not affect the operation of the rule. Johnson *v.* C. & N. W. Sand, etc., Co., 86 Fed. 269, 30 C. C. A. 35.

Ouster of the lessee of the owner is equally effective to prevent suit by the owner before actual reëntry as ouster of the owner himself. Sprague Nat. Bank *v.* Erie R. Co., 22 N. Y. App. Div. 526, 48 N. Y. Suppl. 65.

18. *Louisiana.*—Banks *v.* Doughty, 11 Rob. 483.

Missouri.—Fuhrer *v.* Langford, 11 Mo. App. 286.

New Jersey.— Bacon *v.* Sheppard, 11 N. J. L. 197, 20 Am. Dec. 583.

North Carolina.— McMillan *v.* Turner, 52 N. C. 435.

South Carolina.— McColman *v.* Wilkes, 3 Strobh. 465, 51 Am. Dec. 637.

Tennessee.—Waller *v.* Condray, 2 Yerg. 171.

Canada.— Street *v.* Crooks, 6 U. C. C. P. 124.

See 46 Cent. Dig. tit. "Trespass," § 42.

19. *Kentucky.*—Johns *v.* Cumberland Tel., etc., Co., 80 S. W. 165, 25 Ky. L. Rep. 2074.

North Carolina.— Gilchrist *v.* McLaughlin, 29 N. C. 310.

South Carolina.— McColman *v.* Wilkes, 3 Strobh. 465, 51 Am. Dec. 637.

Tennessee.— Bailey *v.* Massey, 2 Swan 167.

Vermont.— Cutting *v.* Cox, 19 Vt. 517.

Canada.—Appleby *v.* Devine, 23 N. Brunsw. 198.

But see *dicta* to the opposite effect in Blood *v.* Wood, 1 Metc. (Mass.) 528.

Limitations of rule.— In a few states, plaintiff in trespass for the original ouster may recover as consequential damages, compensation for the continued possession. Tracy *v.* Butters, 40 Mich. 406; Blew *v.* Ritz, 82 Minn. 530, 85 N. W. 548; Oklahoma City *v.* Hill, 6 Okla. 114, 50 Pac. 242.

20. Kennebeck Purchase *v.* Call, 1 Mass. 483; Wendell *v.* Blanchard, 2 N. H. 456.

What amounts to disseizin.— For the purpose of this rule entry under claim of title and removing ore is a disseizin (West *v.* Lanier, 9 Humphr. (Tenn.) 762); so is clearing and actually occupying land (Stevens *v.* Hollister, 18 Vt. 294, 46 Am. Dec. 154); cutting trees and building a house (Bailey *v.* Massey, 2 Swan (Tenn.) 167; Wadleigh *v.* Marathon County Bank, 58 Wis. 546, 17 N. W. 314); entering and leasing a house (Patterson *v.* Bodenhammer, 33 N. C. 4); entering land and tearing down wall (Percival *v.* Chase, 182 Mass. 371, 65 N. E. 800); levy of execution against the owner, although the levy is invalid (Jewett *v.* Whitney, 43 Me. 242; Allen *v.* Thayer, 17 Mass. 299); and a levy against a tenant at will has been held to disseize the landlord (Bartlett *v.* Perkins, 13 Me. 87), but not levy of execution against a third party (Shepard *v.* Pratt, 15 Pick. (Mass.) 32; Gore *v.* Brazier, 3 Mass. 523, 3 Am. Dec. 182); nor execution of writ of possession in an action against a third person (Warren *v.* Cochran, 30 N. H. 379);

to plaintiff.[21] An entry on part of a tract under a deed claiming title does not give possession of part of the tract actually occupied by plaintiff,[22] and the entry must be sufficient to put the statute of limitation in motion.[23]

cc. *After Reëntry by the Owner and Retaking Possession From the Disseizor.* After reëntry and retaking possession the owner can recover compensation, called mesne profits, for the use of the land and also for injury done to it during the disseizin by the disseizor.[24] He is regarded as having been continuously invested with the freehold and possession, which before reëntry was in the disseizor.[25] This rule applies whether the possession was regained by legal proceedings[26] or the disseizee reënters personally on the land, without legal proceedings,[27] provided such entry is obtained in a legal manner,[28] or the disseizor abandons his possession and leaves the land vacant for the true owner.[29] A mere formal

digging sand from a sand-lot does not constitute a disseizin (Parker *v.* Wallis, 60 Md. 15, 45 Am. Rep. 703); nor building and operating a railroad (Baltimore, etc., R. Co. *v.* Boyd, 63 Md. 325; Blesch *v.* Chicago, etc., R. Co., 43 Wis. 183). So an attornment to defendant by plaintiff's tenant is not a disseizin (Buford *v.* Christian, 149 Ala. 343, 42 So. 997); nor does a series of trespasses constitute a disseizin (Thornton *v.* St. Louis Refrigerator, etc., Co., 69 Ark. 424, 65 S. W. 113; Welch *v.* Louis, 31 Ill. 446); Parker *v.* Wallis, 60 Md. 15, 45 Am. Rep. 703, digging sand from time to time and selling it; Gent *v.* Lynch, 23 Md. 58, 87 Am. Dec. 558; Roe *v.* Wilbur, 57 Pa. St. 406; Hughes *v.* Stevens, 36 Pa. St. 320; Heck *v.* Knapp, 20 U. C. Q. B. 360, cutting timber and building a shanty claiming title).

21. Rothrock *v.* Cordzz-Fisher Lumber Co., 80 Mo. App. 510.

22. Langdon *v.* Templeton, 66 Vt. 173, 28 Atl. 866.

23. Thornton *v.* St. Louis Refrigerator, etc., Co., 69 Ark. 424, 65 S. W. 113. *Contra,* Miller *v.* Wolfe, 30 Nova Scotia 277.

24. *Delaware.*— Stean *v.* Anderson, 4 Harr. 209.

Illinois.— Smith *v.* Wunderlich, 70 Ill. 426.

Kentucky.— Shields *v.* Henderson, 1 Litt. 239.

Maine.— Brown *v.* Ware, 25 Me. 411.

Massachusetts.— Emerson *v.* Thompson, 2 Pick. 473.

Mississippi.— Emrich *v.* Ireland, 55 Miss. 390.

Missouri.— Fuhrer *v.* Langford, 11 Mo. App. 286.

New York.—Alt *v.* Gray, 55 N. Y. App. Div. 563, 67 N. Y. Suppl. 411; Welch *v.* Winterburn, 25 Hun 437; Haley *v.* Wheeler, 8 Hun 569.

North Carolina.— London *v.* Bear, 84 N. C. 266; White *v.* Cooper, 53 N. C. 48; Smith *v.* Ingram, 29 N. C. 175.

Oregon.— Pacific Live Stock Co. *v.* Isaacs, 52 Oreg. 54, 96 Pac. 460.

Pennsylvania.— King *v.* Baker, 25 Pa. St. 186.

South Carolina.— Perry *v.* Jefferies, 61 S. C. 292, 39 S. E. 515.

Tennessee.— Bailey *v.* Massey, 2 Swan 167.

Texas.— Beauchamp *v.* Williams, (Civ. App. 1908) 115 S. W. 120.

Vermont.— Cutting *v.* Cox, 19 Vt. 517.

See 46 Cent. Dig. tit. "Trespass," § 35.

Effect of special statutory provisions.—A statute substituting assumpsit as the form of action after recovery of possession by ejectment does not apply to an action by one not a party to the ejectment proceedings. Snow *v.* McCormick, 43 Ill. App. 537.

25. Pacific Live Stock Co. *v.* Isaacs, 52 Oreg. 54, 96 Pac. 460.

26. Bacon *v.* Sheppard, 11 N. J. L. 197, 20 Am. Dec. 583; King *v.* Baker, 29 Pa. St. 200. In such a case it is not necessary to show a technical execution of the writ of possession (Jackson *v.* Combs, 7 Cow. (N. Y.) 36 [*affirmed* in 2 Wend. 153, 19 Am. Dec. 568]); but it must be shown that possession was actually regained (Caldwell *v.* Walters, 22 Pa. St. 378).

In Alabama if he brings legal proceedings for recovery of the land he must recover mesne profits in that action, and cannot subsequently sue for them in trespass. Segar *v.* Kirkley, 23 Ala. 680; Fry *v.* Mobile Branch Bank, 16 Ala. 282.

27. *Alabama.*— Fry *v.* Mobile Branch Bank, 16 Ala. 282.

Connecticut.— Trubee *v.* Miller, 48 Conn. 347, 40 Am. Rep. 177.

Maine.— Abbott *v.* Abbott, 51 Me. 575.

Massachusetts.— Tyler *v.* Smith, 8 Metc. 599; Putney *v.* Dresser, 2 Metc. 583.

Vermont.— Mussey *v.* Scott, 32 Vt. 82; Beecher *v.* Parmele, 9 Vt. 352, 31 Am. Dec. 633.

Canada.— Smith *v.* Smith, 37 N. Brunsw. 7; McDonald *v.* Sutherland, 2 Nova Scotia 363.

See 46 Cent. Dig. tit. "Trespass," § 35.

28. Zell *v.* Ream, 31 Pa. St. 304.

29. *Illinois.*— Western Book, etc., Co. *v.* Jevne, 179 Ill. 71, 53 N. E. 565; McWilliams *v.* Morgan, 75 Ill. 473.

Iowa.— Clark *v.* Wabash R. Co., 132 Iowa 11, 109 N. W. 309.

Minnesota.— Blew *v.* Ritz, 82 Minn. 530, 85 N. W. 548.

North Carolina.— Graham *v.* Houston, 15 N. C. 232.

Pennsylvania.— Enterprise Transit Co. *v.* Hazelwood Oil Co., 20 Pa. Super. Ct. 127.

South Carolina.— Cleveland *v.* Jones, 3 Strobh. 479.

See 46 Cent. Dig. tit. "Trespass," § 35.

reëntry is not enough, but actual possession must be regained.[30] But an actual entry for the purpose of asserting title and securing possession is sufficient.[31] After reëntry and taking possession the owner can maintain trespass against a third person for acts done under the disseizor's authority, as well as against the disseizor himself.[32] A subsequent second ouster does not defeat the action.[33] Recovery for mesne profits may be defeated, if the trespasser has held possession for the period which by statute gives him certain rights in the land.[34]

(B) *Rights Sufficient — Possession, Actual or Constructive* — (1) POSSESSION WITH FULL LEGAL TITLE. Possession with full legal title is sufficient to maintain trespass.[35] Entry and acts of dominion are sufficient possession.[36] If both parties are in some sense in possession, such mixed possession inures to the benefit of him who has the legal title.[37] The owner's possession of part of a tract of land not otherwise actually occupied extends to the whole,[38] and any possession by a

30. *Connecticut.*— Payne *v.* Clark, 20 Conn. 30.

Delaware.— Clark *v.* Hill, 1 Harr. 335.

Maine.— Chadbourne *v.* Straw, 22 Me. 450.

Nebraska.— Gaster *v.* Welna, 23 Nebr. 564, 37 N. W. 456.

New York.— Dunham *v.* Stuyvesant, 11 Johns. 569; Stuyvesant *v.* Tompkins, 9 Johns. 61; Douglas *v.* Valentine, 7 Johns. 273, delivery of the house key to plaintiff by defendant's tenant.

Pennsylvania.— Tustin *v.* Sammons, 23 Pa. Super. Ct. 175.

South Carolina.— McColman *v.* Wilkes, 3 Strobh. 465, 51 Am. Dec. 637.

An attempt to take possession repulsed by the disseizor does not reinstate the disseizee in possession. Sigerson *v.* Hornsby, 14 Mo. 71.

31. *Illinois.*— Illinois, etc., R., etc., Co. *v.* Cobb, 94 Ill. 55.

Massachusetts.— Percival *v.* Chase, 182 Mass. 371, 65 N. E. 800.

New Hampshire.— Dexter *v.* Sullivan, 34 N. H. 478.

North Carolina.—White *v.* Cooper, 53 N. C. 48; Bynum *v.* Carter, 26 N. C. 310.

Vermont.— Cutting *v.* Cox, 19 Vt. 517.

32. *Connecticut.*— Trubee *v.* Miller, 48 Conn. 347, 40 Am. Rep. 177.

Illinois.— Marshall *v.* Eggleston, 82 Ill. App. 52.

Maine.— Stowell *v.* Pike, 2 Me. 387.

Massachusetts.— Emerson *v.* Thompson, 2 Pick. 473.

North Carolina.— London *v.* Bear, 84 N. C. 266.

South Carolina.— Cleveland *v.* Jones, 3 Strobh. 479 note.

33. Illinois, etc., R., etc., Co. *v.* Cobb, 82 Ill. 183.

34. Hood *v.* Stewart, 2 La. Ann. 219 (for a year by which the owner is prevented from bringing possessory action); Bourguignon *v.* Destrehan, 5 La. 115; Cressey *v.* Bradford, 45 Me. 16 (for six years, which entitles possessor to remuneration for betterments); Paine *v.* Marr, 35 Me. 181; Brown *v.* Ware, 25 Me. 411.

35. *Georgia.*— Martin *v.* Pattillo, 126 Ga. 436, 55 S. E. 240, holding that after a boundary is established by judgment of the court, an invasion across it by the adjoining owner is a trespass.

New York.— Van Nostrand *v.* Hubbard, 35 N. Y. App. Div. 201, 54 N. Y. Suppl. 739; Farmers' Turnpike Road *v.* Coventry, 10 Johns. 389, income of turnpike road, not road itself, mortgaged.

Tennessee.— Crawford *v.* Maxwell, 3 Humphr. 476.

West Virginia.— McDodrill *v.* Pardee, etc., Lumber Co., 40 W. Va. 564, 21 S. E. 878.

Canada.— Therian *v.* Belliveau, 3 Nova Scotia Dec. 450 (holding that where, on ascertaining that a fence was not on the line, the owner took possession of the strip of his land on the other side against protest, and planted and cultivated a crop, he had possession to maintain trespass against the adjoining owner for taking it); Gallagher *v.* Brown, 3 U. C. Q. B. 350.

That prescriptive title is sufficient see Pennington *v.* Lewis, 4 Pennew. (Del.) 447, 56 Atl. 378; Farmer *v.* Lyons, 87 Ky. 421, 9 S. W. 248, 10 Ky. L. Rep. 375; Wells *v.* Rubenacker, 15 S. W. 1063, 12 Ky. L. Rep. 936 (forty years' possession to a boundary under survey made to establish the line); Nicol *v.* Illinois Cent. R. Co., 44 La. Ann. 816, 11 So. 34 (against former owner); Hart *v.* Doyle, 128 Mich. 257, 87 N. W. 219 (against adverse claimant); International, etc., R. Co. *v.* Timmermann, 61 Tex. 660 (plaintiff widow of prescriptive owner and entitled to homestead for life in his lands by statute); Bowen *v.* Shears, 2 Nova Scotia Dec. 507.

36. Bedden *v.* Clark, 76 Ill. 338 (land need not be inclosed); Norton *v.* Craig, 68 Me. 275 (holding that entry by purchaser is sufficient against husband of grantor who had had joint possession but removed all his property after the sale); Boos *v.* Gomber, 23 Wis. 284 (married woman, although her husband resides on the land with her and aids cultivation); Church *v.* Foulds, 9 U. C. Q. B. 393 (entry by purchaser and informing a mere permissive occupant of his purchase).

37. Markham *v.* Brown, 37 Ga. 277, 92 Am. Dec. 73; Abbott *v.* Abbott, 51 Me. 575; Leach *v.* Woods, 14 Pick. (Mass.) 461; Brimmer *v.* Proprietors Long Wharf, 5 Pick. (Mass.) 131.

38. *Illinois.*— Wahl *v.* Laubersheimer, 174 Ill. 338, 51 N. E. 860 (the land need not be inclosed); Welch *v.* Louis, 31 Ill. 446; Moore *v.* Vanormer, 60 Ill. App. 25 (holding that in

trespasser, although under color of title, ousts the owner only to the extent of the trespasser's actual possession;[39] but possession of one tract of land does not give actual possession of an adjoining tract held by a different title.[40]

(2) Possession Under Voidable Legal Title. Possession with legal title is sufficient to maintain trespass, although the title is voidable by a third person[41] or by defendant in another proceeding.[42]

(3) Possession Coupled With Some Interest in the Land. Possession of land is sufficient to maintain trespass when coupled with some interest in the land.[43] Where possession has once become actual it continues without further

a dispute over boundaries the owner need not have a fence to recover).

Maryland.— Parker *v.* Wallis, 60 Md. 15, 45 Am. Rep. 703.

Massachusetts.— Proprietors Monumoi Great Beach *v.* Rogers, 1 Mass. 159, holding that possession by one of the proprietors of common lands will avail the corporation without proof of his authority to act for them.

North Carolina.— Lamb *v.* Swain, 48 N. C. 370 (may be by a servant for the master); Graham *v.* Houston, 15 N. C. 232 (unless another is in actual occupation).

Ohio.— Johnson *v.* Meyer, 4 Ohio Dec. (Reprint) 383, 2 Clev. L. Rep. 81, possession of guardian is possession of ward to enable latter to sue by next friend.

Pennsylvania.— Penn *v.* Preston, 2 Rawle 14; Smucker *v.* Pennsylvania R. Co., 6 Pa. Super. Ct. 521 [*reversed* on other grounds in 188 Pa. St. 40, 41 Atl. 457].

Tennessee.— Rogers *v.* White, 1 Sneed 68.

Vermont.— Hunt *v.* Taylor, 22 Vt. 556.

Wisconsin.— Gerhardt *v.* Swaty, 57 Wis. 24, 14 N. W. 851.

See 46 Cent. Dig. tit. "Trespass," § 40.

39. Wilmoth *v.* Canfield, 76 Pa. St. 150, void tax deed.

40. Morris *v.* Hayes, 47 N. C. 93.

41. Bigelow *v.* Hillman, 37 Me. 52 (title defeasible on a contingency as to a highway which was discontinued by vote, subject to reconsideration); Greber *v.* Kleckner, 2 Pa. St. 289; Packer *v.* Johnson, 1 Nott & M. (S. C.) 1 (sale in fraud of creditors).

Government land.— Nelson *v.* Mather, 5 Kan. 151 (under United States patent to incompetent Indian and deed from Indian to plaintiff not approved by secretary of interior); Gulf, etc., R. Co. *v.* Johnson, 54 Fed. 474, 4 C. C. A. 447 (under eight years' contract with Chickasaw Indian where law forbids longer than for one year).

42. Toothaker *v.* Greer, 92 Me. 546, 43 Atl. 498, judgment under which plaintiff holds possession cannot be collaterally attached.

43. *Alabama.*— Benjamin *v.* Slaughter, 151 Ala. 445, 44 So. 468, under a right good except perhaps against mortgagees.

Georgia.— Stevens *v.* Stevens, 96 Ga. 374, 23 S. E. 312, widow before assignment of dower having right of possession by statute.

Maine.— Freeman *v.* Underwood, 66 Me. 229 (holding that instrument granting timber, grass, and berries, and possession for control of same gives right sufficient to sue for their taking); Blaisdell *v.* Roberts, 37 Me. 239 (under a levy).

Massachusetts.— Anthony *v.* New York, etc., R. Co., 162 Mass. 60, 37 N. E. 780 (life-tenant); Martin *v.* Tobin, 123 Mass. 85 (mortgagor before taking possession by mortgagee, although after formal entry to foreclose).

Nevada.— Courchaine *v.* Bullion Min. Co., 4 Nev. 369, after filing declaration of intent to preëmpt.

New Hampshire.— Rollins *v.* Varney, 22 N. H. 99.

New York.— People *v.* Horr, 7 Barb. 9, undivided interest.

Pennsylvania.— Shoemaker *v.* Rockel, 1 Lehigh Val. L. Rep. 412, life-tenant in possession.

South Carolina.— Perry *v.* Jefferies, 61 S. C. 292, 39 S. E. 515, life-tenant or under conditional fee.

Tennessee.— Luttrell *v.* Hazen, 3 Sneed 20, dower title.

Canada.— Ferguson *v.* Savoy, 9 N. Brunsw. 263, agreement to have the land on condition that he support the owner.

Under contract for purchase from owner.— Peterson *v.* Orr, 12 Ga. 464, 58 Am. Dec. 484 (obligee of bond for title who has paid purchase-money); Smith *v.* Price, 42 Ill. 399; Carney *v.* Reed, 11 Ind. 417 (under verbal contract deed executed after the trespass); Witheral *v.* Muskegon Booming Co., 68 Mich. 48, 35 N. W. 758, 13 Am. St. Rep. 325 (entitled to deed under contract of sale giving vendor half crops until land paid for); Hueston *v.* Mississippi, etc., Boom Co., 76 Minn. 251, 79 N. W. 92; Gartner *v.* Chicago, etc., R. Co., 71 Nebr. 444, 98 N. W. 1052; Inderlied *v.* Whaley, 65 Hun (N. Y.) 407, 20 N. Y. Suppl. 183 (for removal after time limited in reservation thereof, of timber cut before); Rood *v.* New York, etc., R. Co., 18 Barb. (N. Y.) 80; Gotshall *v.* Langdon, 16 Pa. Super. Ct. 158 (all purchase-price paid before and deed received after trespass); Hunt *v.* Taylor, 22 Vt. 556 (for cutting trees, although vendee had agreed not to cut trees till he had paid for land and received deed, and had done neither); Johnston *v.* Christie, 31 U. C. C. P. 358. *Compare* Jones *v.* Taylor, 12 N. C. 434, holding that one entering under control for purchase and paying or securing to be paid the price gets no possession before the deed.

Under lease from the owner.— Kellogg *v.* King, 114 Cal. 378, 46 Pac. 166, 55 Am. St. Rep. 74; Halligan *v.* Chicago, etc., R. Co., 15 Ill. 558; Foster *v.* Elliott, 33 Iowa 216; Hayward *v.* Sedgley, 14 Me. 439, 31 Am. Dec. 64;

actual possession or acts of possession,[44] except where the right has determined.[45] A levy of execution against the judgment debtor in possession gives possession sufficient to maintain trespass against him;[46] but if a third person is in actual possession such levy does not give possession to maintain trespass against him.[47] Possession of part of a tract of land not otherwise actually occupied, coupled with an interest in the whole, gives possession sufficient to maintain trespass.[48]

(4) POSSESSION UNDER COLOR OF TITLE OR CLAIM OF RIGHT. Possession under color of title or claim of right is sufficient right,[49] although the possession is tor-

Bartlett *v.* Perkins, 13 Me. 87; Tyson *v.* Shueey, 5 Md. 540; Darling *v.* Kelly, 113 Mass. 29 (lease of farm on shares); Hardrop *v.* Gallagher, 2 E. D. Smith (N. Y.) 523; Gourdier *v.* Cormack, 2 E. D. Smith (N. Y.) 200; Hillhouse *v.* Jennings, 60 S. C. 392, 38 S. E. 596 (parol lease giving right to one year's possession by statute); Davis *v.* Clancy, 3 McCord (S. C.) 422; Leader *v.* Moody, L. R. 20 Eq. 145, 44 L. J. Ch. 711, 32 L. T. Rep. N. S. 422, 23 Wkly. Rep. 606 (alterations contrary to lease); Le Blanc *v.* Cutter, 2 Nova Scotia Dec. 552.

Under equitable title.— Colton *v.* Onderdonk, 69 Cal. 155, 10 Pac. 395, 58 Am. Rep. 556 (as sole devisee pending settlement of the estate); Walton *v.* Clarke, 4 Bibb (Ky.) 218; Cox *v.* Walker, 26 Me. 504 (*cestui que trust* in possession); Kempton *v.* Cook, 4 Pick. (Mass.) 305 (purchaser of equity of redemption); Brown *v.* Hartzell, 87 Mo. 564; Gartner *v.* Chicago, etc., R. Co., 71 Nebr. 444, 98 N. W. 1052; Safford *v.* Hynds, 39 Barb. (N. Y.) 625 (possession by authority of one for whom and with whose money land was purchased by agent who took title in himself); Salisbury *v.* Western North Carolina R. Co., 98 N. C. 465, 4 S. E. 465 (*cestui que trust* in possession); Clay *v.* St. Albans, 43 W. Va. 539, 27 S. E. 368, 64 Am. St. Rep. 883 (wife, title to whose lands are in trustee with right in her to have possession); Schweitzer *v.* Connor, 57 Wis. 177, 14 N. W. 922; Campbell *v.* Cushman, 4 U. C. Q. B. 9 (conveyance taken in name of another).

Government land.— Gulf, etc., R. Co. *v.* Clark, 2 Indian Terr. 319, 51 S. W. 962 (entry under homestead laws and receipt from receiver of land-office); Mott *v.* Hopper, 116 La. 629, 40 So. 921 (under approved application for a homestead); Matthews *v.* O'Brien, 84 Minn. 505, 88 N. W. 12 (under certificate of land-office); McCurdy *v.* Potts, 2 Dall. (Pa.) 98, 1 L. ed. 305 (location for definite tract and building house and improving land); Wendel *v.* Spokane County, 27 Wash. 121, 67 Pac. 576 (entry under homestead laws but before final proof); Gulf, etc., R. Co. *v.* Clark, 101 Fed. 678, 41 C. C. A. 597 (possession under receiver's receipt and claim of homestead).

Possession of a tenant pending an appeal from a judgment against him in an action of forcible detainer is lawful, and sufficient to enable him to maintain an action of trespass for disturbing him in the peaceable enjoyment of the demised premises. Tobin *v.* French, 93 Ill. App. 18.

44. Schwartz *v.* McQuaid, 214 Ill. 357, 73 N. E. 582, 105 Am. St. Rep. 112 (holding that a lessee has possession of locked building with his personalty in it, although in prison and no one in charge); Van Rensselaer *v.* Van Rensselaer, 9 Johns. (N. Y.) 377 (possession of mill sites reserved from a deed, although not occupied for some time).

Government land.— Watterston *v.* Jetche, 7 Rob. (La.) 20, holding that the vendee of a settler's claim can maintain an action, although not in actual possession at the time.

Personalty.— Possession of a store by the assignee of goods is not lost by temporary absence of his clerk. Cook *v.* Thornton, 109 Ala. 523, 20 So. 14.

45. Brown *v.* Notley, 3 Exch. 219, 18 L. J. Exch. 39, death of life-tenant before expiration of his lease for years to plaintiff.

46. Gore *v.* Brazier, 3 Mass. 523, 3 Am. Dec. 182; Langdon *v.* Potter, 3 Mass. 215 (judgment debtor a lessee); Cressy *v.* Sawyer, 18 N. H. 95.

47. Bowne *v.* Graham, 2 Tyler (Vt.) 411.

48. Carey *v.* Buntain, 4 Bibb (Ky.) 217 (holding that the possession of a widow before assignment of dower extends only to the house and grounds, not the whole tract of land); Munsey *v.* Hanly, 102 Me. 423, 67 Atl. 217, 13 L. R. A. N. S. 209. *Compare* Faith *v.* Yocum, 51 Ill. App. 620, holding that where plaintiff's right is equitable merely his possession is confined to his *pedis possessio*.

Government land.— Mott *v.* Hopper, 116 La. 629, 40 So. 921, approved application for homestead.

49. *Georgia.*— Tolbert *v.* Rome, 134 Ga. 136, 67 S. E. 540; Gillis *v.* Hilton, etc., Lumber Co., 113 Ga. 622, 38 S. E. 940, grant from one who held possession seven years.

Illinois.— Shoup *v.* Shields, 116 Ill. 488, 6 N. E. 502, holding that possession is coextensive with deed and title and need not be deduced from the government.

Kentucky.— Hall *v.* Deaton, 68 S. W. 672, 24 Ky. L. Rep. 314, forcible entry and cutting of trees.

Louisiana.— Hébert *v.* Légé, 29 La. Ann. 511; Bonis *v.* James, 7 Rob. 149; Patin *v.* Blaize, 19 La. 396.

Massachusetts.— Bowley *v.* Walker, 8 Allen 21, of land discontinued as a highway.

Michigan.— Patterson *v.* Patterson, 49 Mich. 176, 13 N. W. 504, widow claiming homestead.

New Hampshire.— Maxfield *v.* White River Lumber Co., 74 N. H. 158, 65 Atl. 832 (defective tax deed); Poor *v.* Gibson, 32 N. H. 415 (mistaken belief of plaintiff that his deed covered the land).

New Jersey.— Todd *v.* Jackson, 26 N. J. L.

tious,[50] and although title is in another.[51] Fencing land under color and claim of title gives sufficient possession to maintain trespass,[52] but is not essential,[53] nor is residence on the tract or one adjoining it.[54] Acts of possession by one person for another gives the latter possession sufficient to maintain trespass.[55] Possession under color and claim of right, to be sufficient must be actual,[56] but where possession is once actual it continues without further actual occupation or acts of possession[57] unless abandoned.[58] In the absence of actual occupancy by another, possession of part of a tract of land under color and claim of title to the whole is possession of the whole and is sufficient to maintain trespass as to any part,[59]

525, under void deed from guardian of infants.

New York.— Walker *v.* Wilson, 8 Bosw. 586.

North Carolina.— Lamb *v.* Swain, 48 N. C. 370, by servant.

Utah.— Kunkel *v.* Utah Lumber Co., 29 Utah 13, 81 Pac. 897.

Vermont.— Capen *v.* Sheldon, 78 Vt. 39, 61 Atl. 864; Doolittle *v.* Linsley, 2 Aik. 155.

Canada.— Young *v.* Milne, 28 N. Brunsw. 186; Nugent *v.* Parks, 11 N. Brunsw. 391; Wilson *v.* Sinclair, 8 N. Brunsw. 343; Payzant *v.* Hawbold, 29 Nova Scotia 66; Fullerton *v.* Brundige, 20 Nova Scotia 182, 8 Can. L. T. Occ. Notes 378, original grant with a plan covered the land but plaintiff's grant did not refer to the plan.

Claim under defective instrument executed by the owner.— McDonald *v.* Bear River, etc., Water, etc., Co., 13 Cal. 220 (deed not sealed, made under power of attorney); Curtiss *v.* Hoyt, 19 Conn. 154, 48 Am. Dec. 149; Stephenson *v.* Goff, 10 Rob. (La.) 99, 43 Am. Dec. 171; Fanchonette *v.* Grangé, 5 Rob. (La.) 510; Kernion *v.* Guenon, 7 Mart. N. S. (La.) 171; Anthony *v.* New York, etc., R. Co., 162 Mass. 60, 37 N. E. 780 (under unrecorded lease required by law to be recorded); Low Moor Co. *v.* Stanley Coal Co., 34 L. T. Rep. N. S. 186 (indenture not enrolled and no livery of seizin made).

Government land.— Forst *v.* Rothe, (Tex. Civ. App. 1902) 66 S. W. 575 (defective grant of school lands); Colwell *v.* Smith, 1 Wash. Terr. 92 (claim under preëmption laws).

50. Hoyt *v.* Van Alstyne, 15 Barb. (N. Y.) 568; Littleton *v.* McNamara, Ir. R. 9 C. L. 417, possession by sublessee where lease forbids subletting.

51. Briggs *v.* McBride, 19 N. Brunsw. 202; Morrison *v.* McAlpin, 3 N. Brunsw. 650, mistaken belief of plaintiff that his grant covered the land.

52. McLean *v.* Jacobs, 1 Nova Scotia 9, holding that fencing to the waters of a harbor gives possession of part of the tract under the water.

53. Gleason *v.* Edmonds, 3 Ill. 448, under the act to define the extent of possession in cases of settlement on government lands.

54. Gleason *v.* Edmunds, 3 Ill. 448, under the act of 1837 to define extent of possession in cases of settlement on government land.

55. Capen *v.* Sheldon, 78 Vt. 39, 61 Atl. 864 (acts by grantor); Hadden *v.* White, 4 N. Brunsw. 634 (acts by relative of children of deceased claimant).

56. Ohio, etc., R. Co. *v.* Wooten, 46 S. W. 681, 20 Ky. L. Rep. 383 (holding that mere claim of ownership and repeated acts of trespass are not sufficient, as repeated cutting of timber); Gordner *v.* Blades Lumber Co., 144 N. C. 110, 56 S. E. 695.

Applications of rule.— Former possession by plaintiff as tenant after taking possession by a subsequent tenant is not sufficient (Donaldson *v.* Crane, 120 Mich. 369, 79 N. W. 569); nor is mere entry under color and claim of title (Williston *v.* Morse, 10 Metc. (Mass.) 17); nor entry on adjoining land and building a fence, where the adjoining owner at once removes it (Ebersol *v.* Trainor, 81 Ill. App. 645).

57. Holman *v.* Herscher, (Tex. 1891) 16 S. W. 984 (holding that where a house is locked and in charge of an agent to rent it, it is immaterial that it is at the moment unoccupied); Kolb *v.* Bankhead, 18 Tex. 228.

58. United Copper Min., etc., Co. *v.* Franks, 85 Me. 321, 27 Atl. 185.

59. *Illinois.*— Welch *v.* Louis, 31 Ill. 446.

Kentucky.— Crate *v.* Strong, 69 S. W. 957, 24 Ky. L. Rep. 710, deed excepting "all the old patented land" where plaintiff claims all within the bounds, believing all old patents have been located.

Maryland.— Parker *v.* Wallis, 60 Md. 15, 45 Am. Rep. 703.

North Carolina.— Mitchell *v.* Bridgers, 113 N. C. 63, 18 S. E. 91; Osborne *v.* Ballew, 34 N. C. 373. *Contra*, Smith *v.* Wilson, 18 N. C. 40.

Pennsylvania.— Stambaugh *v.* Hollabaugh, 10 Serg. & R. 357.

Vermont.— Davenport *v.* Newton, 71 Vt. 11, 42 Atl. 1087; Fullam *v.* Foster, 68 Vt. 590, 35 Atl. 484; Hunt *v.* Taylor, 22 Vt. 556 (written contract for purchase, although unrecorded and from one without title); Beach *v.* Sutton, 5 Vt. 209.

See 46 Cent. Dig. tit. "Trespass," § 40.

Possession by tenant is sufficient. Zundel *v.* Baldwin, 114 Ala. 328, 21 So. 420 (unless another is in adverse possession of other parts of the tract); American Tel., etc., Co. *v.* Jones, 78 Ill. App. 372; Lamb *v.* Swain, 48 N. C. 370 (good against all but one having better title).

That the land must be within the boundaries of plaintiff's deed see Lindsay *v.* Latham, 107 S. W. 267, 32 Ky. L. Rep. 867; Edwards *v.* Noyes, 65 N. Y. 125; Rice *v.* Chase, 74 Vt. 362, 52 Atl. 967; Fullam *v.* Foster, 68 Vt. 590, 35 Atl. 484.

If the claim of title is to less than the deed covers plaintiff has possession only to

even though part of the tract is covered by an elder title, if plaintiff has actual possession of some part of the lappage and there is no actual occupancy by other persons of any part of the tract covered by the elder title.[60] But not if plaintiff has no possession of any part of the lappage.[61] Where, however, there is some actual possession by other persons under color and claim of title to the whole, if neither party has title and right of possession the first occupant has possession of the whole, except such part as in actual possession of the other;[62] and his possession of the part actually occupied by the other reverts without further actual entry on abandonment of possession by the other;[63] but if one party is the true owner then his possession extends to all not occupied by the other.[64] The general doctrine of possession of all from possession of a part does not apply where the tract is a very large one.[65]

(5) ADVERSE POSSESSION FOR TIME SUFFICIENT TO ACQUIRE TITLE. Adverse possession for a period long enough to acquire title by adverse possession gives the right to maintain trespass.[66]

(6) MERE POSSESSION[67]— (a) SUFFICIENCY OF THE RIGHT. It is a general rule which is supported by decisions from nearly every jurisdiction that, as against a mere tort-feasor, mere actual possession of land is alone sufficient to maintain trespass.[68]

the extent of his actual claim. Hosford *v.* Whitcomb, 56 Vt. 651.

The doctrine applies where the nature of claim and color of title is apparent. Penn *v.* Preston, 2 Rawle (Pa.) 14 (uninclosed woodland if clearly a part of inclosed land); Carpenter *v.* Logee, 24 R. I. 383, 53 Atl. 288 (if not in actual possession of another); Gambling *v.* Prince, 2 Nott & M. (S. C.) 138 (extent of possession may be shown by parol); Grimke *v.* Brandon, 1 Nott & M. (S. C.) 356 (although part is across a navigable stream where plaintiff has never been). But not where there are no definitely apparent boundaries to the claim. Langdon *v.* Templeton, 66 Vt. 173, 28 Atl. 866, land uninclosed and without definite boundaries.

60. Greer *v.* Bowling, 55 S. W. 1081, 21 Ky. L. Rep. 1648; Williams *v.* Buchanan, 23 N. C. 535, 35 Am. Dec. 760; McColman *v.* Wilkes, 3 Strobh. (S. C.) 465, 51 Am. Dec. 637, holding that, although defendant had acquired a subsequent adverse possession of three years, plaintiff's possession is "actual possession" of the land outside his *pedis possessio*. See also Burt, etc., Lumber Co. *v.* Hurst, 110 S. W. 242, 33 Ky. L. Rep. 270. *Compare* Ault *v.* Meager, 112 Ga. 148, 37 S. E. 185, holding that prescriptive title for period of statute of limitations is necessary.

61. McLean *v.* Murchison, 53 N. C. 38 (holding that plaintiff's possession is then bounded by the lines of the elder title, and so a mere trespasser can raise the point as it shows plaintiff has neither actual nor constructive possession); Williams *v.* Buchanan, 23 N. C. 535, 35 Am. Dec. 760.

62. Ralph *v.* Bayley, 11 Vt. 521 (holding that such occupant can maintain trespass against that other); Weld *v.* Scott, 12 U. C. Q. B. 537. *Contra*, Baldwin *v.* Braydon, 5 N. Brunsw. 169.

63. McColman *v.* Wilkes, 3 Strobh. (S. C.) 465, 51 Am. Dec. 637.

64. Kentucky Land, etc., Co. *v.* Crabtree, 113 Ky. 922, 70 S. W. 31, 24 Ky. L. Rep. 743; Millar *v.* Humphries, 2 A. K. Marsh. (Ky.) 446; Roberts *v.* Preston, 106 N. C. 411, 10 S. E. 983.

65. Paine *v.* Hutchins, 49 Vt. 314; Chandler *v.* Spear, 22 Vt. 388, a whole township of twenty thousand acres.

66. Johnson *v.* Stinger, 39 Ill. App. 180 (fifty years); Martin *v.* Burgess, 63 S. C. 423, 41 S. E. 450 (ten years).

67. **For measure of damages** see *infra*, I, A, 7, i, (VII).

68. *Alabama.*— Louisville, etc., R. Co. *v.* Higginbotham, 153 Ala. 334, 44 So. 872; Eagle, etc., Mfg. Co. *v.* Gibson, 62 Ala. 369; Lankford *v.* Green, 62 Ala. 314; Duncan *v.* Potts, 5 Stew. & P. 82, 24 Am. Dec. 766, prior actual possession.

Colorado.— Omaha, etc., Smelting, etc., Co. *v.* Tabor, 13 Colo. 41, 21 Pac. 925, 16 Am. St. Rep. 185, 5 L. R. A. 236, taking ore.

Connecticut.— Mallett *v.* White, 52 Conn. 50 (possession, however recent, of a *de facto* trustee); Sutton *v.* Lockwood, 40 Conn. 318.

Georgia.— Bass *v.* West, 110 Ga. 698, 36 S. E. 244; McDonough *v.* Carter, 98 Ga. 703, 25 S. E. 938; Whiddon *v.* Williams Lumber Co., 98 Ga. 700, 25 S. E. 770; Markham *v.* Brown, 37 Ga. 277, 92 Am. Dec. 73.

Illinois.— Galt *v.* Chicago, etc., R. Co., 157 Ill. 125, 41 N. E. 643 (sufficient against one without right of possession or authority from true owner); Morse *v.* Iman, 42 Ill. 150, 89 Am. Dec. 417; Snow *v.* McCormick, 43 Ill. App. 537 (sufficient against one not showing a better title).

Iowa.— Blunck *v.* Chicago, etc., R. Co., (1908) 115 N. W. 1013.

Kansas.— Hefley *v.* Baker, 19 Kan. 9; Nelson *v.* Mather, 5 Kan. 151.

Kentucky.— Wilson *v.* Bibb, 1 Dana 7, 25 Am. Dec. 118 (sufficient against all the world except rightful owner); North *v.* Cates, 2 Bibb 591; Crate *v.* Strong, 69 S. W. 957, 24 Ky. L. Rep. 710, 71 S. W. 1, 24 Ky. L. Rep. 1221; Hackney *v.* Louisville, etc., R. Co., 1 Ky. L. Rep. 357 (holding that weakness of plaintiff's title is no defense to laying tracks without condemnation or compensation).

This general rule has been held to apply, although such possession is altogether unsup-

Louisiana.— Frederick *v.* Goodbee, 120 La. 783, 45 So. 606.

Maine.— Davis *v.* Alexander, 99 Me. 40, 58 Atl. 55 (rightful as to defendant); Black *v.* Grant, 50 Me. 364; Hunt *v.* Rich, 38 Me. 195; Heath *v.* Williams, 25 Me. 209, 43 Am. Dec. 265; Moore *v.* Moore, 21 Me. 350 (sufficient against one not showing better title).

Massachusetts.— Nickerson *v.* Thacher, 146 Mass. 609, 16 N. E. 581 (sufficient against all but owner or person having right of possession); Manners *v.* Haverhill, 135 Mass. 165 (although the land is not included in plaintiff's deed); Sweetland *v.* Stetson, 115 Mass. 49; Kilborn *v.* Rewee, 8 Gray 415; Porter *v.* Sullivan, 7 Gray 441 (removal of mud and mussels from plats in plaintiff's exclusive possession).

Michigan.— Bird *v.* Stark, 66 Mich. 654, 33 N. W. 754.

Minnesota.— Witt *v.* St. Paul, etc., R. Co., 38 Minn. 122, 35 N. W. 862, holding that possessor can recover for building railroad tracks without showing better title.

Missouri.— Watts *v.* Loomis, 81 Mo. 236.

Nebraska.— Chicago R., etc., Co. *v.* Shepherd, 39 Nebr. 523, 58 N. W. 189.

Nevada.— Rogers *v.* Cooney, 7 Nev. 213; Courchaine *v.* Bullion Min. Co., 4 Nev. 369, good except against owner, need only be rightful against defendant.

New Hampshire.— Jenkins *v.* Palmer, 72 N. H. 592, 58 Atl. 42 (good unless defendant has better right of possession); Colbath *v.* Anderson, 63 N. H. 617; Berry *v.* Garland, 26 N. H. 473; Hobson *v.* Roles, 20 N. H. 41; Moore *v.* Hodgdon, 18 N. H. 144; Wendell *v.* Blanchard, 2 N. H. 456.

New York.— Farnsworth *v.* Western Union Tel. Co., 3 Silv. Sup. 30, 6 N. Y. Suppl. 735; Hardrop *v.* Gallagher, 2 E. D. Smith 523; Powers *v.* Conroy, 47 How. Pr. 84; Kellogg *v.* Vollentine, 21 How. Pr. 226 (sufficient *prima facie*); Shipman *v.* Clark, 4 Den. 446, 47 Am. Dec. 264; Willard *v.* Warren, 17 Wend. 257; Green *v.* Cady, 9 Wend. 414 (*de facto* trustee); Byrne *v.* Van Hoesen, 5 Johns. 66 (widow in possession of lands in possession of deceased at his death).

North Carolina.— Frisbee *v.* Marshall, 122 N. C. 760, 30 S. E. 21; Salisbury *v.* Western North Carolina R. Co., 91 N. C. 490; Cohoon *v.* Simmons, 29 N. C. 189 (sufficient against one without title or authority from true owner); Horton *v.* Hensley, 23 N. C. 163; Myrick *v.* Bishop, 8 N. C. 485.

Pennsylvania.— Fisher *v.* Morris, 5 Whart. 358 (sufficient *prima facie*); Townsend *v.* Kerns, 2 Watts 180; Omensetter *v.* Kemper, 6 Pa. Super. Ct. 309, 41 Wkly. Notes Cas. 501.

Rhode Island.— Lavin *v.* Dodge, 30 R. I. 8, 73 Atl. 376; Carpenter *v.* Logee, 24 R. I. 383, 53 Atl. 288, must be overcome by a better title.

South Carolina.— Beaufort Land, etc., Co. *v.* New River Lumber Co., 86 S. C. 358, 68 S. E. 637; Hillhouse *v.* Jennings, 60 S. C. 392, 38 S. E. 596 (holding that defendant must show a better title in himself); Johnson *v.* McIlwaine, Rice 368 (entry by defendant under writ of possession against a third person); Gambling *v.* Prince, 2 Nott & M. 138 (title is not necessarily in question).

South Dakota.— Scott *v.* Trebilcock, 21 S. D. 333, 112 N. W. 847, sufficient to recover damages for injury to the land.

Tennessee.— Dederick *v.* State, 122 Tenn. 222, 132 S. W. 975; Allen *v.* McCorkle, 3 Head 181; Lorge *v.* Dennis, 5 Sneed 595; Bailey *v.* Massey, 2 Swan 167.

Texas.— Wilson *v.* Palmer, 18 Tex. 592 (prior occupancy); Paraffine Oil Co. *v.* Berry, (Civ. App. 1906) 93 S. W. 1089; Beaumont Lumber Co. *v.* Ballard, (Civ. App. 1893) 23 S. W. 920 (for cutting trees); Collins *v.* Turner, 1 Tex. App. Civ. Cas. § 517 (wrongdoer has no right to put possessor to proof of title).

Utah.— Marks *v.* Sullivan, 8 Utah 406, 32 Pac. 668, 20 L. R. A. 590, forcible entry by one not the owner.

Vermont.— McGrady *v.* Mitler, 14 Vt. 128 (prior possession); Sawyer *v.* Newland, 9 Vt. 383 (however recent, except against one having a better title); Doolittle *v.* Linsey, 2 Aik. 155 (mere prior occupancy).

West Virginia.— Clay *v.* St. Albans, 43 W. Va. 539, 27 S. E. 368, 64 Am. St. Rep. 883; Wilson *v.* Phœnix Co., 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. Rep. 890.

Wisconsin.— Gilman *v.* Brown, 115 Wis. 1, 91 N. W. 227 (sufficient against all but owner or one authorized by him); Field *v.* Apple River Log Driving Co., 67 Wis. 569, 31 N. W. 17 (washing away land); Newton *v.* Marshall, 62 Wis. 8, 21 N. W. 803 (sufficient against one who cannot show better title in himself).

England.— Lewis *v.* Ponsford, 8 C. & P. 687, 34 E. C. L. 963 (of a house); Catteris *v.* Cowper, 4 Taunt. 547, 13 Rev. Rep. 682 (mere occupancy gives title against all the world except one with a better title).

Canada.— Clarke *v.* Harding, 17 N. Brunsw. 495; Humphrey *v.* Helmes, 10 N. Brunsw. 59 (to land outside plaintiff's deed, although within the limits of the adjoining lot claimed by defendant under color of title to the whole and actual possession of another part); Gaudin *v.* McKilligan, 7 N. Brunsw. 392 (against adjoining owner on a question of boundary); Hodgson *v.* Carr, 5 N. Brunsw. 499; Des Barres *v.* Bell, 20 Nova Scotia 482; Le Blanc *v.* Cutter, 2 Nova Scotia Dec. 552; Kellington *v.* Herring, 17 U. C. C. P. 639 (sufficient against one not authorized by owner); Boulton *v.* Shand, 10 U. C. Q. B. 351 (sufficient if defendant shows no better right in himself or one under whose authority he acted).

See 46 Cent. Dig. tit. "Trespass," § 38.

Possession is prima facie evidence of title and he who invades it must establish his title. If this were not so, a holder of land could be put to proof of title against the world by any one who might choose to trespass or squat upon his lands. Beaufort Land, etc., Co. *v.* New River Lumber Co., 86 S. C. 358, 68 S. E. 637.

ported by evidence of title.[69] So the doctrine has been held applicable although it affirmatively appears that plaintiff is without title,[70] and that title is in a third person,[71]

Extent and limits of rule.— The forcible entry statute does not alter the common-law remedy. Marks *v.* Sullivan, 8 Utah 406, 32 Pac. 668, 20 L. R. A. 590. And the rule applies, although defendant obtained possession by his trespass. Zundel *v.* Baldwin, 114 Ala. 328, 21 So. 420. Where both parties have been in actual possession, the one who first had actual and exclusive possession prevails. Coffin *v.* Lawson, 7 Houst. (Del.) 327, 32 Atl. 79; Kellogg *v.* Vollentine, 21 How. Pr. (N. Y.) 226. And after peaceably regaining possession plaintiff may maintain trespass for a subsequent trespass. Illinois, etc., R., etc., Co. *v.* Cobb, 94 Ill. 55; Illinois R., etc., Co. *v.* Cobb, 82 Ill. 183. Sometimes the rule is qualified by a requirement that the possession be legal and peaceable (Mott *v.* Hopper, 116 La. 629, 40 So. 921; Litchworth *v.* Bartells, 4 Mart. N. S. (La.) 136), or rightful (Louisville, etc., R. Co. *v.* Smith, 141 Ala. 335, 37 So. 490); Ehle *v.* Quackenboss, 6 Hill (N. Y.) 537.

69. *Alabama.*— Morris *v.* Robinson, 80 Ala. 291; Lankford *v.* Green, 62 Ala. 314.

California.— Golden Gate Mill, etc., Co. *v.* Joshua Hendy Mach. Wks., 82 Cal. 184, 23 Pac. 45; McCarron *v.* O'Connell, 7 Cal. 152.

Delaware.— Inskeep *v.* Shields, 4 Harr. 345.

District of Columbia.— Edmondson *v.* Lovell, 8 Fed. Cas. No. 4,286, 1 Cranch C. C. 103.

Florida.— Crawford *v.* Waterson, 5 Fla. 472.

Georgia.— Cartersville *v.* Lyon, 69 Ga. 577.

Illinois.— Illinois, etc., R., etc., Co. *v.* Cobb, 94 Ill. 55; Chicago *v.* McGraw, 75 Ill. 566; Illinois, etc., R., etc., Co. *v.* Cobb, 68 Ill. 53; Webb *v.* Sturtevant, 2 Ill. 181.

Indiana.— Catterlin *v.* Douglass, 17 Ind. 213.

Kansas.— Duncan *v.* Yordy, 27 Kan. 348; Hefley *v.* Baker, 19 Kan. 9.

Maryland.— Tyson *v.* Shueey, 5 Md. 540.

Massachusetts.— Nickerson *v.* Thacher, 146 Mass. 609, 16 N. E. 581; Litchfield *v.* Ferguson, 141 Mass. 97, 6 N. E. 721; Sweetland *v.* Stetson, 115 Mass. 49; Allen *v.* Taft, 6 Gray 552; Barnstable *v.* Thacher, 3 Metc. 239.

Minnesota.— Witt *v.* St. Paul, etc., R. Co., 38 Minn. 122, 35 N. W. 862.

Missouri.— Richardson *v.* Murrill, 7 Mo. 333; Russell *v.* Thorn, 1 Mo. 390.

New Hampshire.— Beach *v.* Morgan, 67 N. H. 529, 41 Atl. 349, 68 Am. St. Rep. 692 (entry to fish; that plaintiff cannot show his lease is immaterial); Colbath *v.* Anderson, 63 N. H. 617; Barstow *v.* Sprague, 40 N. H. 27; Albin *v.* Lord, 39 N. H. 196; Moor *v.* Campbell, 15 N. H. 208.

New Jersey.— Todd *v.* Jackson, 26 N. J. L. 525; Phillips *v.* Kent, 23 N. J. L. 155.

New Mexico.— Probst *v.* Presbyterian Church Gen. Assembly Domestic Missions, 3 N. M. 237, 5 Pac. 702 [*reversed* on other grounds in 129 U. S. 182, 9 S. Ct. 263, 32 L. ed. 642].

New York.— Ehle *v.* Quackenboss, 6 Hill 537.

North Carolina.— Horton *v.* Hensley, 23 N. C. 163; Myrick *v.* Bishop, 8 N. C. 485.

Pennsylvania.— Cheney *v.* Dallett, 1 Del. Co. 225.

Rhode Island.— Hodges *v.* Goodspeed, 20 R. I. 537, 40 Atl. 373.

South Carolina.— Johnson *v.* McIlwain, Rice 368; Grimke *v.* Brandon, 1 Nott & M. 356.

Texas.— Linard *v.* Crossland, 10 Tex. 462, 60 Am. Dec. 213; Galveston, etc., R. Co. *v.* Rheiner, (Civ. App. 1894) 25 S. W. 971.

Vermont.— Rice *v.* Chase, 74 Vt. 362, 52 Atl. 967; Stratton *v.* Lyons, 53 Vt. 641.

West Virginia.— Wilson *v.* Phœnix Powder Mfg. Co., 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. Rep. 890.

Wisconsin.— Reilly *v.* Howe, 101 Wis. 108, 76 N. W. 1114; Stahl *v.* Grover, 80 Wis. 650, 50 N. W. 589; Newton *v.* Marshall, 62 Wis. 8, 21 N. W. 803; McNarra *v.* Chicago, etc., R. Co., 41 Wis. 69, injury to grass and timber.

Canada.— Boulton *v.* Shand, 10 U. C. Q. B. 351, although paper title at first relied on proved defective.

See 46 Cent. Dig. tit. "Trespass," § 38.

70. *Alabama.*— Louisville, etc., R. Co. *v.* Hall, 131 Ala. 161, 32 So. 603; Tarry *v.* Brown, 34 Ala. 159.

California.— Cardoza *v.* Calkins, 117 Cal. 106, 48 Pac. 1010 (possession of waters of a stream by flowing them in a ditch); Kellogg *v.* King, 114 Cal. 378, 46 Pac. 166, 55 Am. St. Rep. 74; McCarron *v.* O'Connell, 7 Cal. 152.

Connecticut.— Merwin *v.* Backer, 80 Conn. 338, 68 Atl. 373.

Illinois.— Morse *v.* Iman, 42 Ill. 150, 89 Am. Dec. 417, of land under joint fence but assigned and occupied by plaintiff under parol division without partition fence.

Maine.— Savage *v.* Holyoke, 59 Me. 345.

Maryland.— New Windsor *v.* Stocksdale, 95 Md. 196, 52 Atl. 596.

Massachusetts.— Percival *v.* Chase, 182 Mass. 371, 65 N. E. 800.

Nevada.— Patchen *v.* Keeley, 19 Nev. 404, 14 Pac. 347.

Pennsylvania.— Stambaugh *v.* Hollabaugh, 10 Serg. & R. 357; Cheney *v.* Dallett, 1 Del. Co. 225.

England.— Every *v.* Smith, 26 L. J. Exch. 344, *locus* a street.

Canada.— Foley *v.* Foley, 30 N. Brunsw. 68.

71. Rule applied in case of land generally see the following cases:

Alabama.— Finch *v.* Alston, 2 Stew. & P. 83, 23 Am. Dec. 299.

New Hampshire.— Fowler *v.* Owen, 68 N. H. 270, 39 Atl. 329, 73 Am. St. Rep. 588.

New York.— Stevens *v.* Adams, 1 Thomps. & C. 587, injury to crops.

North Carolina.— Frisbee *v.* Marshall, 122

or that another has an interest in common.[72] The general rule is sometimes limited to injury to possession,[73] and mere possession held insufficient where the injury is to the freehold.[74]

N. C. 760, 30 S. E. 21, widow in possession of her husband's lands.

Vermont.— Hughes *v.* Graves, 39 Vt. 359, 94 Am. Dec. 331.

Canada.— White *v.* Smith, 9 N. Brunsw. 335.

Contra.— Gulf, etc., R. Co. *v.* Cusenberry, 86 Tex. 525, 26 S. W. 43.

That the rule applies to government land see Duncan *v.* Potts, 5 Stew. & P. (Ala.) 82, 24 Am. Dec. 766; Grover *v.* Hawley, 5 Cal. 485; Patchen *v.* Keeley, 19 Nev. 404, 14 Pac. 347 (possession of mining claim not in accordance with the mining rules); Palmer *v.* Aldridge, 16 Barb. (N. Y.) 131; McDougall *v.* McNeil, 24 Nova Scotia 322. *Compare* Tubbs *v.* Lynch, 4 Harr. (Del.) 521, holding that occupation of state lands gives no possession against the state so the occupant cannot maintain trespass against others.

Rule applied in case of possession under the owner, but voidable by him — *In general.* — Shrewsbury First Parish *v.* Smith, 14 Pick. (Mass.) 297 (land about a church); Glass *v.* Dobson, 14 U. C. Q. B. 419 (remaining in possession after sale to a third person).

Government land.— Keith *v.* Tilford, 12 Nebr. 271, 11 N. W. 315, title revested in United States by expiration of preëmption filing.

Rule applied in case of possession by permission of the owner — *Land generally.*— Engle *v.* Simmons, 148 Ala. 92, 41 So. 1023, 121 Am. St. Rep. 59, 7 L. R. A. N. S. 96 (holding that a wife may recover for nervous injury from shock of unlawful entry of home occupied by her and her husband as husband and wife, although title is in him); McCarty *v.* Gray, 95 Ill. App. 559 (husband in possession of his wife's lands); Illinois, etc., R., etc., Co. *v.* Caldwell, 17 Ill. App. 409 (contractor in possession to erect a building); Watson *v.* Dilts, 116 Iowa 249, 89 N. W. 1068, 93 Am. St. Rep. 239, 57 L. R. A. 559 (recovery by wife for illness and mental anguish resulting from unlawful entry on her husband's house, occupied by them as husband and wife); Bullis *v.* Chicago, etc., R. Co., 76 Iowa 680, 39 N. W. 245; Welch *v.* Jenks, 58 Iowa 694, 12 N. W. 727; Brown *v.* Benjamin, 8 Allen (Mass.) 197 (husband in possession of his wife's lands); Lesch *v.* Great Northern R. Co., 97 Minn. 503, 106 N. W. 955, 7 L. R. A. N. S. 93 (recovery of wife for injury from fright caused by entry on her husband's house occupied by them as husband and wife); Sell *v.* Graves, 16 Mont. 342, 40 Pac. 788 (holding that remaining in possession after sale by vendee's permission is sufficient to maintain trespass for cutting grass); Albin *v.* Lord, 39 N. H. 196 (husband in possession of wife's lands); Delamater *v.* Folz, 50 Hun (N. Y.) 528, 3 N. Y. Suppl. 711 (qualified possession of a contractor while constructing a sewer); Collins *v.* Turner, 1 Tex. App. Civ. Cas. § 517 (husband in possession of his wife's lands); Newell *v.* Whitcher, 53 Vt. 589, 38 Am. Rep. 703 (entry by defendant into parlor of his house assigned to plaintiff, a guest in the house, as bedroom, without justifiable excuse after she had gone to bed); Ford *v.* Schliessman, 107 Wis. 479, 83 N. W. 761 (a recovery by a wife for unlawful entry on home in husband's absence); Lewis *v.* Ponsford, 8 C. & P. 687, 34 E. C. L. 963 (possession of her bedroom by daughter or servant of occupant).

Government land.— Fitzgerald *v.* Urton, 5 Cal. 308 (holding that entry to a mine is not justified by a statute allowing such entry where the land is held for grazing or agricultural purposes, where plaintiff holds for a hotel and yard); Harper *v.* Charlesworth, 4 B. & C. 574, 6 D. & R. 572, 4 L. J. K. B. O. S. 22, 28 Rev. Rep. 405, 10 E. C. L. 708, 107 Eng. Reprint 1174; Juson *v.* Reynolds, 34 U. C. Q. B. 174.

Rule applied in case of wrongful possession adverse to the owner — *Land generally.*— Louisville, etc., R. Co. *v.* Higginbotham, 153 Ala. 334, 44 So. 872 (although tortious); McLean *v.* Farden, 61 Ill. 106; Beebe *v.* Stutsman, 5 Iowa 271 (injury to bridge erected on another's land without compensation as required by law); Rollins *v.* Clay, 33 Me. 132 (reversioner who has wrongfully regained possession of leased land); Booth *v.* Sherwood, 12 Minn. 426; Evertson *v.* Sutton, 5 Wend. (N. Y.) 281, 21 Am. Dec. 217 (holding that the illegal possessor can maintain trespass against all the world but the true owner, as where he obtained possession by a trespass); Linard *v.* Crossland, 10 Tex. 462, 60 Am. Dec. 213; Kunkel *v.* Utah Lumber Co., 29 Utah 13, 81 Pac. 897; Baker *v.* Mills, 11 Ont. 253.

Government land. — Cutts *v.* Spring, 15 Mass. 135 (possession taken under a grant from the commonwealth of more land than the grant calls for); Oklahoma City *v.* Hill, 6 Okla. 114, 50 Pac. 242 (possession of public lands acquired in violation of statute forbidding entry thereon before opened for entry); Skinner *v.* McDowell, 2 Nott & M. (S. C.) 68 (illegal possession). *Contra*, Bruyea *v.* Rose, 19 Ont. 433, intruder where squatting is forbidden.

72. Preston *v.* Robinson, 24 Vt. 583; Garrioch *v.* McKay, 13 Manitoba 404.

73. Clinton *v.* Franklin, 83 S. W. 142, 26 Ky. L. Rep. 1053 (holding that a tenant by the curtesy can recover if the injury merely affects the present enjoyment); Alford *v.* Stanford, 13 Ky. L. Rep. 876; International, etc., R. Co. *v.* Ragsdale, 67 Tex. 24, 2 S. W. 515; Boyington *v.* Squires, 71 Wis. 276, 37 N. W. 227.

74. Anderson *v.* Thunder Bay River Boom Co., 57 Mich. 216, 23 N. W. 776; Ridge *v.* Railroad Transfer Co., 56 Mo. App. 133; Albin *v.* Lord, 39 N. H. 196; Reed *v.* Chicago,

(b) Sufficiency of the Possession. All forms of occupation are insufficient to maintain trespass which are less than possession in the legal sense.[75] Possession must be at the time of the trespass [76] and must be exclusive of defendant.[77] For instance, where both parties have equal claim to possession, plaintiff cannot maintain his action.[78] Such possession, however, need not necessarily be exclusive of persons other than defendant.[79] Possession by an agent or servant is sufficient possession in the principal.[80] And it is held that a wife who, by virtue of the husband's absence, is exclusively in possession of land has such possession as will authorize an action by her for a wrongful entry on the land.[81] Fencing land ordinarily gives possession sufficient to maintain trespass,[82] but it is not essential [83] A mere entry without title does not give possession,[84] but where possession has been taken it continues without further acts of possession [85]

etc., R. Co., 71 Wis. 399, 37 N. W. 225; Wadleigh *v.* Marathon County Bank, 58 Wis. 546, 17 N. W. 314; Winchester *v.* Stevens Point, 58 Wis. 350, 17 N. W. 3, 547.

75. Spencer *v.* Weatherly, 46 N. C. 327.

Applications of rule.— Occupation is not sufficient to maintain trespass where it is under a right to cut a limited number of trees only (Monahan *v.* Foley, 4 U. C. Q. B. 129); to gather seaweed on a beach (Tappan *v.* Burnham, 8 Allen (Mass.) 65; Parsons *v.* Smith, 5 Allen (Mass.) 578); the right as agent to keep trespassers away from land (Chenault *v.* Quisenberry, 81 S. W. 690, 26 Ky. L. Rep. 462); under a grant of an easement only (Wilson *v.* Sinclair, 8 N. Brunsw. 343); by a servant of a house occupied in connection with his employment (Heffelfinger *v.* Fulton, 25 Ind. App. 33, 56 N. E. 688; Mulberry *v.* Carrier, 18 Pa. Super. Ct. 51; Ft. Worth, etc., R. Co. *v.* Smith, (Tex. Civ. App. 1894) 25 S. W. 1032; Hunt *v.* Colson, 3 Moore & S. 790, 30 E. C. L. 527; Williams *v.* Herrick, 5 U. C. Q. B. 613); of a school by the schoolmaster (Monaghan *v.* Ferguson, 3 U. C. Q. B. 484); by a mere cropper of land, not occupying it (McKeeby *v.* Webster, 170 Pa. St. 624, 32 Atl. 1096, holding that the tenant, not his cropper, should bring the action; Greber *v.* Kleckner, 2 Pa. St. 289; Carter *v.* Pinchbeck, 7 Rich. (S. C.) 356); or by the possessor of the key of a house given to enable him to take possession of personalty therein (Davis *v.* Wood, 7 Mo. 162).

76. Knight *v.* Empire Land Co., 55 Fla. 301, 45 So. 1025; Yellow River R. Co. *v.* Harris, 35 Fla. 385, 17 So. 568; Jones *v.* Patterson, 66 S. W. 377, 23 Ky. L. Rep. 1838 (holding that there can be no recovery for acts done before); Chicago, etc., R. Co. *v.* Shepherd, 39 Nebr. 523, 58 N. W. 189; Blair Iron, etc., Co. *v.* Lloyd, 1 Walk. (Pa.) 158.

77. Morgan *v.* Boyes, 65 Me. 124 (holding that a right of way does not give exclusive possession); Smith *v.* Slocomb, 11 Gray (Mass.) 280 (holding that use of land between the traveled part of a highway and the adjoining land by the owner of the adjoining land who does not own in the highway gives no exclusive possession but is a mere easement); Allen *v.* Suseng, 1 Coldw. (Tenn.) 204.

Where the trespass is to something attached to the realty by plaintiff the rule does not apply. Coffin *v.* Lawson, 7 Houst. (Del.) 327, 32 Atl. 79, removing a fence.

78. Bartholomew *v.* Edwards, 1 Houst. (Del.) 17; Shields *v.* Heard, 53 S. W. 820, 21 Ky. L. Rep. 992 (acts of same general character by both parties); Ramos Lumber, etc., Co. *v.* Labarre, 116 La. 559, 40 So. 898; Litchfield *v.* Ferguson, 141 Mass. 97, 6 N. E. 721; Barnstable *v.* Thacher, 3 Metc. (Mass.) 239; Bailey *v.* McNeily, 20 U. C. Q. B. 451 (holding that building a fence which is immediately torn down by the other person gives no exclusive possession).

79. Holly *v.* Brown, 14 Conn. 255 (joint possession sufficient); McCormick *v.* Huse, 66 Ill. 315.

Dedicated land.— It is possible to obtain possession although the land has been dedicated as a park. Louisville, etc., R. Co. *v.* Higginbotham, 153 Ala. 334, 44 So. 872.

Possession such as to disseize the true owner is unnecessary. Currier *v.* Gale, 9 Allen (Mass.) 522; Langdon *v.* Templeton, 66 Vt. 173, 28 Atl. 866.

80. Field *v.* Lang, 89 Me. 454, 36 Atl. 984 (agent); Russell *v.* Thorn, 1 Mo. 390 (by agent or keeper); Davis *v.* Clancy, 3 McCord (S. C.) 422 (agent).

81. Bien *v.* Fonger, 139 Wis. 150, 120 N. W. 862; Ford *v.* Schliessman, 107 Wis. 479, 83 N. W. 761.

82. Lake *v.* Briley, 5 U. C. Q. B. 136, against mere occupant of another part of the land.

83. Eureka Min., etc., Co. *v.* Way, 11 Nev. 171, where boundaries are clearly marked.

84. Savage *v.* Holyoke, 59 Me. 345 (entry twenty years before to foreclose a mortgage, with no dominion exercised); Merritt *v.* Quinton, 2 N. Brunsw. 209 (holding that entry on land in another's occupation and building a fence does not give possession to maintain trespass against a third person who tears it down). And see Hooper *v.* Herald, 154 Mich. 529, 118 N. W. 3, holding that where plaintiff did not have title to land on which he erected a fence, and was never in possession or occupancy until he entered to erect the fence, which was thereafter removed by defendant, who continued to occupy the land, plaintiff may not maintain trespass.

85. Myers *v.* Myers, 1 Bailey (S. C.) 306

unless abandoned.[86] Mere actual occupancy without color of title is not sufficient to maintain trespass except to land *in pedis possessio*.[87]

(7) CONSTRUCTIVE POSSESSION. Constructive as well as actual possession may be sufficient to maintain trespass.[88]

(8) TITLE TO LAND NOT OCCUPIED BY ANOTHER — (a) FULL LEGAL TITLE. In the absence of actual possession in any one, complete and unrestricted title to land gives the owner constructive possession sufficient to maintain trespass[89]

(holding that entry by defendant and taking a crop planted by him while in possession is not a trespass against plaintiff who entered after the planting, while defendant was out of actual possession); Langdon *v.* Templeton, 66 Vt. 173, 28 Atl. 866 (holding that after taking possession of unoccupied timber, the fact that no further act was done for thirteen years does not, as matter of law, show abandonment of possession); Patchin *v.* Stroud, 28 Vt. 394 (holding that an interval of fifteen years, the period of the statute of limitations, since the last possessory act does not as matter of law show loss of possession); Hibbard *v.* Foster, 24 Vt. 542 (holding that acts of possession need not be renewed from year to year; that continual claim is enough).

86. Macauley *v.* Kamp, 60 Ill. App. 31, holding that removal of fences shows abandonment.

Mere neglect to work a place is not abandonment of possession. Kinney *v.* Ferguson, 101 Mich. 178, 59 N. W. 401.

Where a tenant abandons possession, the lessor cannot sue for acts of another thereafter and before reëntry. Wickham *v.* Freeman, 12 Johns. (N. Y.) 183.

87. *Alabama.*— Blackburn *v.* Baker, 7 Port. 284, holding that possession of one tract does not give possession of adjoining tract.

Illinois.— Webb *v.* Sturtevant, 2 Ill. 181.

Kentucky.— Fish *v.* Branamon, 2 B. Mon. 379 (ousts owner only to extent of *pedis possessio*); McClain *v.* Todd, 5 J. J. Marsh. 335, 22 Am. Dec. 37; Phillips *v.* Beattyville Mineral, etc., Co., 88 S. W. 1058, 28 Ky. L. Rep. 12 (holding that where defendant was in possession at the time of plaintiff's entry, plaintiff's possession is confined to his *pedis possessio*).

New Hampshire.— Moor *v.* Campbell, 15 N. H. 208.

New York.— Buck *v.* Aikin, 1 Wend. 466, 19 Am. Dec. 535, actual possession of only one end of a lot.

Texas.— Beaumont Lumber Co. *v.* Ballard, (Civ. App. 1893) 23 S. W. 920.

West Virginia.— High *v.* Pancake, 42 W. Va. 602, 26 S. E. 536, possession must be by paper title to extend beyond land actually occupied.

Canada.— Hovey *v.* Long, 33 N. Brunsw. 462; Creamer *v.* Whipple, 8 N. Brunsw. 273; Gaudin *v.* M'Killigan, 7 N. Brunsw. 392; Falmouth Churchwardens *v.* Vaughan, 11 Nova Scotia 438. But see Parker and Street, JJ., in Gaudin *v.* M'Killigan, 7 N. Brunsw. 392.

See 46 Cent. Dig. tit. "Trespass," § 40.

Survey and claim will not extend the claim beyond actual possession. Rannels *v.* Rannels, 52 Mo. 108. And see Danihee *v.* Hyatt, 12 N. Y. Suppl. 465.

Possession without color but with mere claim of title extends only to the land actually occupied. Riley *v.* Jameson, 3 N. H. 23, 14 Am. Dec. 325.

88. *Arkansas.*— McKinney *v.* Demby, 44 Ark. 74.

Kentucky.— Taylor *v.* Burt, etc., Lumber Co., 109 S. W. 348, 33 Ky. L. Rep. 191.

Maine.— Woodward *v.* Robinson, 67 Me. 565; Maxwell *v.* Mitchell, 61 Me. 106.

Minnesota.— Woll *v.* Voigt, 105 Minn. 371, 117 N. W. 608, 23 L. R. A. N. S. 270.

Missouri.— Hobart-Lee Tie Co. *v.* Stone, 135 Mo. App. 438, 117 S. W. 604.

North Carolina.— Gwaltney *v.* Scottish Carolina Timber, etc., Co., 115 N. C. 579, 20 S. E. 465, injury to dam and fish-traps in a stream.

South Carolina.— Peareson *v.* Dansby, 2 Hill 466; Davis *v.* Clancy, 3 McCord 422.

Texas.— Wetzel *v.* Satterwhite, (Civ. App. 1910) 125 S. W. 93.

West Virginia.— Wilson *v.* Phœnix Powder Mfg. Co., 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. Rep. 890.

And see *infra*, the following sections.

89. *Alabama.*— Buford *v.* Christian, 149 Ala. 343, 42 So. 997; Louisville, etc., R. Co. *v.* Hall, 131 Ala. 161, 32 So. 603; Shipman *v.* Baxter, 21 Ala. 456; Gillespie *v.* Dew, 1 Stew. 229, 18 Am. Dec. 42.

Arkansas.— Newman *v.* Mountain Park Land Co., 85 Ark. 208, 107 S. W. 391, 122 Am. St. Rep. 27; Smith *v.* Yell, 8 Ark. 470; Wilson *v.* Bushnell, 1 Ark. 465; Ledbetter *v.* Fitzgerald, 1 Ark. 448.

California.— Halleck *v.* Mixer, 16 Cal. 574.

Colorado.— McFeters *v.* Pierson, 15 Colo. 201, 24 Pac. 1076, 22 Am. St. Rep. 388.

Connecticut.— Merwin *v.* Morris, 71 Conn. 555, 42 Atl. 855; Church *v.* Meeker, 34 Conn. 421.

Georgia.— Under the code. Burns *v.* Horkan, 126 Ga. 161, 54 S. E. 946; Moore *v.* Vickers, 126 Ga. 42, 54 S. E. 814; Ault *v.* Meager, 112 Ga. 148, 37 S. E. 185; Whiddon *v.* Williams Lumber Co., 98 Ga. 700, 25 S. E. 770; Parker *v.* Waycross, etc., R. Co., 81 Ga. 387, 8 S. E. 871; Atlantic, etc., R. Co. *v.* Fuller, 48 Ga. 423; Yahoola River, etc., Min. Co. *v.* Irby, 40 Ga. 479; Markham *v.* Brown, 37 Ga. 277, 92 Am. Dec. 73; Gaskins *v.* Gray Lumber Co., 6 Ga. App. 167, 64 S. E. 714.

Illinois.—Smith *v.* Wunderlich, 70 Ill. 426; Barber *v.* School Trustees, 51 Ill. 396 (holding that school trustees holding legal title in their corporate capacity can sue in such

without ever having had actual possession,[90] and may be title as tenant in com-

capacity); American Tel., etc., Co. *v.* Jones, 78 Ill. App. 372.

Indiana.— Broker *v.* Scobey, 56 Ind. 588; Wood *v.* Mansell, 3 Blackf. 125; Carter *v.* Augusta Gravel Road Co., Wils. 14.

Indian Territory.— Gulf, etc., R. Co. *v.* Clark, 2 Indian Terr. 319, 51 S. W. 962.

Iowa.— Printz *v.* Cheeney, 11 Iowa 469; Terpenning *v.* Gallup, 8 Iowa 74; Mason *v.* Lewis, 1 Greene 494.

Kansas.— Fitzpatrick *v.* Gebhart, 7 Kan. 35, under code.

Kentucky.— Scroggins *v.* Nave, 133 Ky. 793, 119 S. W. 158; Bebee *v.* Hutchison, 17 B. Mon. 496 (by statute); Taylor *v.* Burt, etc., Lumber Co., 109 S. W. 348, 33 Ky. L. Rep. 191; Alford *v.* Stanford, 13 Ky. L. Rep. 876 (trustee).

Louisiana.— Coucy *v.* Cummings, 12 La. Ann. 748, holding that plaintiff's deed need not be recorded.

Maine.— Toothaker *v.* Pennell, (1909) 76 Atl. 488; Wentworth *v.* Blanchard, 37 Me. 14.

Maryland.— Miller *v.* Miller, 41 Md. 623; Gent *v.* Lynch, 23 Md. 58, 87 Am. Dec. 558.

Michigan.— Tolles *v.* Duncombe, 34 Mich. 101 (holding, however, that a tax title in third persons is sufficient *prima facie* to defeat plaintiff's title); Safford *v.* Basto, 4 Mich. 406.

Minnesota.— Booth *v.* Sherwood, 12 Minn. 426.

Missouri.— Brown *v.* Hartzell, 87 Mo. 564; More *v.* Perry, 61 Mo. 174; Renshaw *v.* Lloyd, 50 Mo. 368; Dreyer *v.* Ming, 23 Mo. 434 (patentee of land); Hurt *v.* Adams, 86 Mo. App. 73; Bell *v.* Clark, 30 Mo. App. 224.

Nebraska.—Dold *v.* Knudsen, 70 Nebr. 373, 97 N. W. 482.

New Hampshire.— Paul *v.* Linscott, 56 N. H. 347, holding that if plaintiff relies on a tax deed he must show that the tax was legally assessed.

New Jersey.— U. S. Pipe Line Co. *v.* Delaware, etc., R. Co., 62 N. J. L. 254, 41 Atl. 759, 42 L. R. A. 572, railroad owning fee of right of way, not a mere easement.

New York.— Randall *v.* Sanders, 87 N. Y. 578 [*affirming* 23 Hun 611]; Clark *v.* Holdridge, 12 N. Y. App. Div. 613, 43 N. Y. Suppl. 115 (holding that tax title in defendant not purporting to convey *locus* does not affect plaintiff's right where plaintiff has a valid title); Van Rensselaer *v.* Radcliff, 10 Wend. 639, 25 Am. Dec. 582. But see Frost *v.* Duncan, 19 Barb. 560.

North Carolina.— Saunders *v.* Lee, 101 N. C. 3, 7 S. E. 590 (grantee in fraud of creditor against trespassers who attorn to purchaser at judicial sale for debt of grantor); McCormick *v.* Monroe, 46 N. C. 13; Smith *v.* Ingram, 29 N. C. 175; Walker *v.* Fawcett, 29 N. C. 44 (holding that the grantee as trustee for a church, although not appointed as required by statute, may maintain action as legal title passes); Dobbs *v.* Gullidge, 20 N. C. 197.

North Dakota.— Russell *v.* Meyer, 7 N. D. 335, 75 N. W. 262, 47 L. R. A. 637.

Ohio.— Van Buskirk *v.* Dunlap, 2 Ohio Dec. (Reprint) 233, 2 West. L. Month. 125.

Pennsylvania.— Irwin *v.* Patchen, 164 Pa. St. 51, 30 Atl. 436; Huling *v.* Henderson, 161 Pa. St. 553, 29 Atl. 276; Wilkinson *v.* Connell, 158 Pa. St. 126, 27 Atl. 870; Miller *v.* Zufall, 113 Pa. St. 317, 6 Atl. 350; Roe *v.* Wilbur, 57 Pa. St. 406; Hess *v.* Sutton, 33 Pa. Super. Ct. 530; Trexler *v.* Africa, 33 Pa. Super. Ct. 395, unseated land.

South Carolina.— Thompson *v.* Brannon, 14 S. C. 542; McColman *v.* Wilkes, 3 Strobh. 465, 51 Am. Dec. 637; Peareson *v.* Dansby, 2 Hill 466.

Tennessee.— Bailey *v.* Massey, 2 Swan 167; West *v.* Lanier, 9 Humphr. 762; Polk *v.* Henderson, 9 Yerg. 310; Padgett *v.* Baker, 1 Tenn. Ch. 222.

Texas.— Texas, etc., R. Co. *v.* Torrey, (App. 1891) 16 S. W. 547.

Vermont.— Capen *v.* Sheldon, 78 Vt. 39, 61 Atl. 864 (holding that a mere dispute as to boundary does not affect plaintiff's constructive possession); Rice *v.* Chase, 74 Vt. 362, 52 Atl. 967; Chesley *v.* Brockway, 34 Vt. 550; Bakersfield Religious Cong. Soc. *v.* Baker, 15 Vt. 119, 40 Am. Dec. 668.

West Virginia.—Snider *v.* Myers, 3 W. Va. 195.

Wisconsin.—Dayton *v.* Walsh, 47 Wis. 113, 2 N. W. 65, 32 Am. Rep. 757 (holding that a married woman is owner of land purchased by her on credit, although she has no separate estate, pays nothing down, and her husband manages the land for her, she being able by statute to hold property in her own right); Lyon *v.* Green Bay, etc., R. Co., 42 Wis. 548 (married woman owner where land is her separate estate).

Canada.— Humphreys *v.* Helmes, 10 N. Brunsw. 59; Merithew *v.* Sisson, 5 N. Brunsw. 373 (holding further that plaintiff must show that *locus* is within his title); Gallagher *v.* Brown, 3 U. C. Q. B. 350.

See 46 Cent. Dig. tit. "Trespass," § 34.

Rule applied in case of wild lands see Meehan *v.* Edwards, 92 Ky. 574, 18 S. W. 519, 19 S. W. 179, 13 Ky. L. Rep. 803; Gent *v.* Lynch, 23 Md. 58, 87 Am. Dec. 558; Caldwell *v.* Walters, 22 Pa. St. 378; Guion *v.* Anderson, 8 Humphr. (Tenn.) 298.

Legal title is sufficient, although equitable title is in a third person. Alford *v.* Stanford, 13 Ky. L. Rep. 876, trustee.

90. *Alabama.*— Gillespie *v.* Dew, 1 Stew. 229, 18 Am. Dec. 42.

Arkansas.— Smith *v.* Yell, 8 Ark. 470.

Indiana.— Raub *v.* Heath, 8 Blackf. 575.

Kentucky.— McClain *v.* Todd, 5 J. J. Marsh. 335, 22 Am. Dec. 37, against mere occupant.

New Hampshire.— Warren *v.* Cochran, 30 N. H. 379.

Pennsylvania.— Smucker *v.* Pennsylvania R. Co., 6 Pa. Super. Ct. 521 [*reversed* on other grounds in 188 Pa. St. 40, 41 Atl. 457].

mon.[91] Plaintiff must have had title at the time of the trespass and so in general he cannot maintain trespass for acts committed before he acquired title;[92] and parting with his estate in the land does not take away his right of action for such acts[93] nor convey it to the grantee of the land.[94] But the grantee of land can recover for a trespass continuing after the time of the grant.[95]

South Carolina.— McGraw *v.* Bookman, 3 Hill 265.

Vermont.— Hosford *v.* Whitcomb, 56 Vt. 651.

United States.— Johnson *v.* C. & N. W. Sand, etc., Co., 86 Fed. 269, 30 C. C. A. 35, unfenced and never in actual occupancy of plaintiff or his ancestors.

Canada.— Heck *v.* Knapp, 20 U. C. Q. B. 360, plaintiff's tax title sufficient.

Rule applied in case of heir or devisee see Dexter *v.* Sullivan, 34 N. H. 478.

Rule applied in case of grantee see Proprietors Concord *v.* McIntire, 6 N. H. 527; Gauthier *v.* Masson, 27 Can. Sup. Ct. 575.

91. Jewett *v.* Whitney, 43 Me. 242 (cotenants in active management of the property); Martin *v.* Campbell, 23 Quebec Super. Ct. 522.

92. *Colorado.*— Colorado Consol. Land, etc., Co. *v.* Morris, 1 Colo. App. 401, 29 Pac. 302.

Connecticut.— Foot *v.* New Haven, etc., Co., 23 Conn. 214.

Florida.— Knight *v.* Empire Land Co., 55 Fla. 301, 45 So. 1025; Yellow River R. Co. *v.* Harris, 35 Fla. 385, 17 So. 568.

Georgia.— Alaculsy Lumber Co. *v.* Gudger, 134 Ga. 603, 68 S. E. 427; Allen *v.* Macon, etc., R. Co., 107 Ga. 838, 33 S. E. 696; Burkhalter *v.* Oliver, 88 Ga. 473, 14 S. E. 704.

Illinois.— Galt *v.* Chicago, etc., R. Co., 157 Ill. 125, 41 N. E. 643.

Maine.— Maxwell *v.* Mitchell, 61 Me. 106.

New York.— Kenyon *v.* New York Cent., etc., R. Co., 29 N. Y. App. Div. 80, 51 N. Y. Suppl. 386.

Texas.— May *v.* Slade, 24 Tex. 205.

West Virginia.— Newlon *v.* Reitz, 31 W. Va. 483, 7 S. E. 411.

Canada.— Nicholson *v.* Page, 27 U. C. Q. B. 318, right under patent presumed, in absence of evidence, to have begun only at date thereof.

Subsequent cure of defective title.—As a plaintiff in trespass *quare clausum fregit* must recover on proof of his title or possession at the time of the alleged trespass, his defective title at that time will not be aided by defendant's subsequent purchase of the land from one who may be estopped from denying plaintiff's title, although defendant may have notice of facts constituting estoppel at the time of his purchase; estoppels *in pais* operating only upon existing rights. Alaculsy Lumber Co. *v.* Gudger, 134 Ga. 603, 68 S. E. 427.

Under special statutory provisions a patentee is sometimes entitled to action for injury to land done before the issue of the patent. Brock *v.* Smith, 14 Ark. 431; Smith *v.* Morgan, 68 Wis. 358, 32 N. W. 135; Conklin *v.* Hawthorn, 29 Wis. 476.

Relation back of conveyances.— A grant made to correct a previous grant which erroneously described the land does not relate back to the date of the prior deed (Missouri Lumber, etc., Co. *v.* Zeitinger, 45 Mo. App. 114); nor does a tax deed made several years after the purchaser was entitled to it (Pierce *v.* Hall, 41 Barb. (N. Y.) 142), or made a year after the sale as the law provided (Paul *v.* Linscott, 56 N. H. 347).

Unexecuted contract of sale.— Where a complaint alleged that a trespass was committed about December 1, and a contract for the sale of the land was executed December 12, and both vendor and vendee were plaintiffs, the damage to the lots was suffered by the vendor before the contract of sale was executed, and he could have recovered had he alone brought the action. Young *v.* Vincent, (Ark. 1910) 125 S. W. 658.

93. *Alabama.*— Louisville, etc., R. Co. *v.* Hill, 115 Ala. 334, 22 So. 163.

Iowa.— Clark *v.* Wabash R. Co., 132 Iowa 11, 109 N. W. 309.

Kentucky.— Shaw *v.* Robinson, 111 Ky. 715, 64 S. W. 620, 23 Ky. L. Rep. 998.

Maine.— Cargill *v.* Sewall, 19 Me. 288, holding that ceasing to be a minister pending the suit does not abate plaintiff's action although he held the land as such.

Missouri.— Dreyer *v.* Ming, 23 Mo. 434.

South Carolina.— McGraw *v.* Bookman, 3 Hill 265.

Wisconsin.— Carl *v.* Sheboygan, etc., R. Co., 46 Wis. 625, 1 N. W. 295.

Canada.— Brookfield *v.* Brown, 22 Can. Sup. Ct. 398.

94. *Illinois.*— Faith *v.* Yocum, 51 Ill. App. 620, although plaintiff was owner of the equity at the time of the trespass.

Iowa.— Clark *v.* Wabash R. Co., 132 Iowa 11, 109 N. W. 309, holding that the grantee cannot recover for the injuries sustained by his grantor from an entry by a railroad.

Kentucky.— Floyd *v.* Louisville, etc., R. Co., 80 S. W. 204, 25 Ky. L. Rep. 2147, barred by statute of limitations.

North Carolina.— Gordner *v.* Blades Lumber Co., 144 N. C. 110, 56 S. E. 695 (state grantor); Drake *v.* Howell, 133 N. C. 162, 45 S. E. 539.

Pennsylvania.— Schuylkill, etc., Nav. Co. *v.* Decker, 2 Watts 343.

Texas.— Galveston, etc., R. Co. *v.* Pfeuffer, 56 Tex. 66.

95. Union Springs *v.* Jones, 58 Ala. 654 (holding that the grantee's measure of damages for flowage from a sewer is the injury to the land since the grant to plaintiff); Donald *v.* St. Louis, etc., R. Co., 52 Iowa 411, 3 N. W. 462; Galveston, etc., R. Co. *v.* Pfeuffer, 56 Tex. 66; Corbitt *v.* Wilson, 24 Nova Scotia 25 (holding that where a tank

(b) IMPERFECT LEGAL TITLE. Legal title is sufficient, although restricted to some extent,[96] or defeasible by third persons,[97] or subject to certain servitudes in favor of third persons,[98] or although title is defective, if the defect is not such as to wholly invalidate the title,[99] for plaintiff may sue on establishing a *prima facie* title.[1] But mere color of title without any actual interest is not sufficient to maintain trespass.[2] There is no such thing as constructive possession based on color of title.[3]

(9) RIGHTS LESS THAN LEGAL TITLE IN LAND NOT ACTUALLY OCCUPIED BY ANOTHER — (a) IN REM. A right less than full legal title is sufficient to maintain trespass if it is a right *in rem* in the land, giving right of possession.[4]

larger than permitted by an easement was erected a subsequent grantee of the land can recover for its continuance).

96. Hancock *v.* McAvoy, 151 Pa. St. 439, 25 Atl. 48, title to burial lots "for the uses and purposes of sepulture only."

97. Raub *v.* Heath, 8 Blackf. (Ind.) 575 (land redeemable by former owner within one year from sheriff's sale); Williams *v.* Sheldon, 10 Wend. (N. Y.) 654 (holding that only the state can complain of plaintiff's failure to comply with the condition of a patent); Balliot *v.* Bauman, 5 Watts & S. (Pa.) 150

98. Graham *v.* Houston, 15 N. C. 232 (lease of turpentine boxes, lessee giving a certain part of turpentine for rent); State *v.* Pacific Guano Co., 22 S. C. 50 (an exclusive license to dig guano does not prevent the landowner from recovering against a third person for digging guano).

99. Baillio *v.* Burney, 3 Rob. (La.) 317; Longfellow *v.* Quimby, 29 Me. 196, 48 Am. Dec. 525; Cushing *v.* Longfellow, 26 Me. 306; Dexter *v.* Billings, 110 Pa. St. 135, 1 Atl. 180, deed of partition of wife's separate land, made to husband and wife instead of wife only.

Where there is a mere technical defect in plaintiff's conveyance only the grantor can object. Arden *v.* Kermit, Anth. N. P. (N. Y.) 112 (title under quit rent and rent paid); Sawyer *v.* Newland, 9 Vt. 383 (imperfect division of land held in common). The state only can object to a technical defect in a patent. Zumwalt *v.* Dickey, 92 Cal. 156, 28 Pac. 212; Williams *v.* Sheldon, 10 Wend. (N. Y.) 654, failure to seal.

1. Wentworth *v.* Blanchard, 37 Me. 14; Dolloff *v.* Hardy, 26 Me. 545; Lawrence *v.* Russell, 17 Pick. (Mass.) 388 (plaintiff holding under a partition to a tenant in common of land previously assigned to another proprietor, or the grantor having previously received his full share); Hull *v.* Campbell, 56 Pa. St. 154.

2. Price *v.* Greer, 76 Ark. 426, 88 S. W. 985; Chenault *v.* Quisenberry, 81 S. W. 690, 26 Ky. L. Rep. 462; Jones *v.* Patterson, 66 S. W. 377, 23 Ky. L. Rep. 1838 (grant to plaintiff of land not owned by grantor by deed which transferred land he did own); Blake *v.* Grondin, 141 Mich. 104, 104 N. W. 423 (title lost by tax-sale); Kraus *v.* Congdon, 161 Fed. 18, 88 C. C. A. 182.

An invalid tax title does not give constructive possession. Longfellow *v.* Quimby, 29 Me. 196, 48 Am. Dec. 525; Cushing *v.* Longfellow, 26 Me. 306; Wadleigh *v.* Marathon County Bank, 58 Wis. 546, 17 N. W. 314; Kraus *v.* Congdon, 161 Fed. 18, 88 C. C. A. 182.

A title invalid by reason of previous grant does not give constructive possession. Greer *v.* Bowling, 55 S. W. 1081, 21 Ky. L. Rep. 1648; Racquette Falls Land Co. *v.* Buyce, 43 Misc. (N. Y.) 402, 89 N. Y. Suppl. 359; Rowe *v.* Cape Fear Lumber Co., 129 N. C. 97, 39 S. E. 748.

3. Kraus *v.* Congdon, 161 Fed. 18, 88 C. C. A. 182.

4. Georgia R., etc., Co. *v.* Knight, 122 Ga. 290, 50 S. E. 124 (interest in property necessary); State *v.* Newton, 5 Blackf. (Ind.) 455 (interest giving right of possession sufficient); Richardson *v.* Milburn, 11 Md. 340 (holding that a possessory right, at least, is necessary); Dorsey *v.* Eagle, 7 Gill & J. (Md.) 321 (interest, although temporary, sufficient if exclusive); Stevens *v.* Adams, 1 Thomps. & C. (N. Y.) 587.

Application and limits of rule. — A tenant by curtesy can maintain trespass (Clark *v.* Welton, 1 Root (Conn.) 299), or a minister settled for a term for years or for life (Cargill *v.* Sewall, 19 Me. 288), or a grantee of a right springing from mere possession (Capen *v.* Sheldon, 78 Vt. 39, 61 Atl. 864), or a grantee of equity of redemption at sheriff's sale, as the mortgagor before entry by mortgagee has a right of possession (Fernald *v.* Linscott, 6 Me. 234); so entry, survey, or patent of government land is sufficient by statute (Terry *v.* Johnson, 96 Ky. 95, 27 S. W. 984, 16 Ky. L. Rep. 307), a lease of a pond with exclusive right to take ice is a sufficient right to sustain action in some form of an encroachment (Richards *v.* Gauffret, 145 Mass. 486, 14 N. E. 535), or assignment of land from one having only a right by application filed in the land-office, patent geing issued after the trespass but before the bringing of the action (Gilbert *v.* McDonald, 94 Minn. 289, 102 N. W. 712, 110 Am. St. Rep. 368), or a warrant for unimproved land (Baker *v.* King, 18 Pa. St. 138), or administrator's right to possession of land (Carter *v.* Jackson, 56 N. H. 364), but right of trustees of a town in its streets is not sufficient being a mere supervisory right (St. Louis, etc., R. Co. *v.* Summit, 3 Ill. App. 155; Connor *v.* New Albany, 1 Blackf. (Ind.) 88, 12 Am. Dec. 207); nor a crown grant of a privilege of building mills in a stream, as it conveys

(b) In Personam. A mere executory right *in personam* will not sustain an action of trespass for injury to the land,[5] although it may give some form of action for injury to the right;[6] but an equitable title with right of possession has been held sufficient to maintain trespass.[7]

(10) Estoppel. It is well settled that defendant may be estopped to deny plaintiff's title and consequent right to maintain trespass;[8] and on the other

no right in the soil (Frink *v.* Hill, (East. T. 1831) Stevens N. Brunsw. Dig. 744); nor a parol sale of an interest in lands, being insufficient by reason of the statute of frauds to convey an interest, as growing trees (Deland *v.* Vanstone, 26 Mo. App. 297; Drake *v.* Howell, 133 N. C. 162, 45 S. E. 539), or grass (Powers *v.* Clarkson, 17 Kan. 218); nor a mere right to use the sand on a railroad right of way (Vermilya *v.* Chicago, etc., R. Co., 66 Iowa 606, 24 N. W. 234, 55 Am. Rep. 279), nor mere right to use the land (Lomax *v.* Phillips, 113 La. 850, 37 So. 777, 68 L. R. A. 661); nor right to receive a patent to government land, there being no actual possession (Shoenberger *v.* Baker, 22 Pa. St. 396, pending proceedings as to who is entitled to the patent); nor the grant of a right to take something from the land (Duffield *v.* Rosenzweig, 150 Pa. St. 543, 24 Atl. 705 [*affirming* 144 Pa. St. 520, 23 Atl. 4], oil; Breckenridge *v.* Woolner, 8 N. Brunsw. 303, trees); but in some cases a parol grant invalid under the statute of frauds has been held sufficient (Ganter *v.* Atkinson, 35 Wis. 48, grantee of exclusive right to mine ore; Glenwood Lumber Co. *v.* Phillips, [1904] A. C. 405, 73 L. J. P. C. 62, 90 L. T. Rep. N. S. 741, 20 T. L. R. 531, license from governor to cut timber, giving an exclusive right to occupation).

5. Herman *v.* Mountain Park Land Co., 85 Ark. 208, 107 S. W. 391, 122 Am. St. Rep. 27; Sabine, etc., R. Co. *v.* Johnson, 65 Tex. 389.

Applications of rule.— Accordingly it has been held that a mere license to do something on the land will not suffice (Powers *v.* Clarkson, 17 Kan. 218; Balcom *v.* McQuesten, 65 N. H. 81, 17 Atl. 638, to cut ice; Sabine, etc., R. Co. *v.* Johnson, 65 Tex. 389, to graze cattle; Hull *v.* Sanctuary, 68 Vt. 57, 33 Atl. 899, to a flow of water to supply a mill); nor a contract for purchase (Newman *v.* Mountain Park Land Co., 85 Ark. 208, 107 S. W. 391, 122 Am. St. Rep. 27; Greve *v.* Wood-Harmon Co., 173 Mass. 45, 52 N. E. 1070; Gates *v.* Comstock, 107 Mich. 546, 65 N. W. 544; Des Jardins *v.* Thunder Bay River Boom Co., 95 Mich. 140, 54 N. W. 718, contract giving no right to possession before payment; Olson *v.* Minnesota, etc., R. Co., 89 Minn. 280, 94 N. W. 871; Tabor *v.* Robinson, 36 Barb. (N. Y.) 483, contract giving future right to possession; Robb *v.* Mann, 11 Pa. St. 300, 51 Am. Dec. 551; McNaught *v.* Swing, 1 Chest. Co. Rep. (Pa.) 467, contract giving future right to possession); or bond for purchase (Dean *v.* Comstock, 32 Ill. 173); or equitable right to conveyance (Steen *v.* Mark, 32 S. C. 286, 11 S. E. 93); or a lien on crops not in use at the time of the grant, it being a mere executory agreement (Brainard *v.* Burton, 5 Vt. 97); or a mere right of entry (Polk *v.* Henderson, 9 Yerg. (Tenn.) 310); or a right to enter for breach of condition (Carter *v.* Branson, 79 Ind. 14, condition subsequent in a deed; Ellsworth *v.* McDowell, 44 Nebr. 707, 62 N. W. 1082, right to reënter for breach of contract of purchase; Jewett *v.* Berry, 20 N. H. 36, condition subsequent); or right to annul a conveyance for fraud (Halsey *v.* Huse, 46 Conn. 389); or regain land from plaintiff's wife granted after decree setting aside a deed to her (O'Hagan *v.* Clinesmith, 24 Iowa 249); or a purchase of land adversely held, such purchase not conveying any title (Bynum *v.* Carter, 26 N. C. 310; Ripley *v.* Yale, 16 Vt. 257; Mooney *v.* McIntosh, 19 Nova Scotia 419 [*affirmed* in 14 Can. Sup. Ct. 740, 7 Can. L. T. Occ. Notes 390]. But see Cook *v.* Foster, 7 Ill. 652; Sanders *v.* Ditch, 110 La. 884, 34 So. 860); or purchase of part of a tract, "to be surveyed off" (Glen Mfg. Co. *v.* Weston Lumber Co., 80 Fed. 242); or purchase of and part payment for government land (Henderson *v.* McLean, 8 U. C. C. P. 42); or right to raise a crop on shares (Decker *v.* Decker, 17 Hun (N. Y.) 13; Bradish *v.* Schenck, 8 Johns. (N. Y.) 151); or lease of a stall in a city market (Strickland *v.* Pennsylvania R. Co., 154 Pa. St. 348, 26 Atl. 431, 21 L. R. A. 224); nor a mere right to enter and cut trees (Perry *v.* Buck, 12 U. C. Q. B. 451).

6. Gillerson *v.* Mansur, 45 Me. 25 (holding that one having a written permit to cut timber can recover in an action on the case against a third person who cuts the timber); Morgan *v.* Waters, 122 N. Y. App. Div. 340, 106 N. Y. Suppl. 882 (holding that a mortgagee can recover the amount of a deficiency in a mortgage caused by injury to the land done by one knowing of the mortgage); Robb *v.* Mann, 11 Pa. St. 300, 51 Am. Dec. 551 (holding that a purchaser of land after part payment can maintain an action on the case for removal of a stone distillery therefrom).

7. Sunnyside Coal, etc., Co. *v.* Reitz, 14 Ind. App. 478, 39 N. E. 541, 43 N. E. 46; Russell *v.* Meyer, 7 N. D. 335, 75 N. W. 262, 47 L. R. A. 637; Arnold *v.* Pfoutz, 117 Pa. St. 103, 11 Atl. 871; Miller *v.* Zufall, 113 Pa. St. 317, 6 Atl. 350. *Contra*, Van Buskirk *v.* Dunlap, 2 Ohio Dec. (Reprint) 233, 2 West. L. Month. 125.

A lease, even before entry, gives such an interest in the term that the lessee may sue. Burt *v.* Warne, 31 Mo. 296.

8. See cases cited *infra*, this note.

Title by estoppel gives constructive possession sufficient to maintain trespass. Drake *v.* Howell, 133 N. C. 162, 45 S. E. 539; Phelps *v.* Blount, 13 N. C. 177.

hand it is held that plaintiff may be estopped to assert his right [9] or to recover in the action.[10]

(II) *REALTY OF A PARTICULAR NATURE* — (A) *Things on the Boundary Line.* Destruction by the owner of land of objects on the boundary line is a trespass against the adjacent owner, as they are tenants in common of them;[11] and so is an interference with the user by the adjoining owner of his half of the party-wall.[12] Taking and converting an object hanging over one's land from the adjacent land is a trespass, as it belongs to the adjacent owner,[13] but not the mere removal of overhanging branches, without converting them [14] unless removed

What does not constitute estoppel.— A right of way from defendant to plaintiff does not estop him from denying title to other parts of the land (Bishop *v.* Blair, 36 Ala. 80); nor that the *locus* is part of a lot the balance of which defendant purchased from plaintiff (Kissam *v.* Gaylord, 46 N. C. 294).

9. See cases cited *infra*, this note.

Acts creating estoppel see Clinton *v.* Franklin, 83 S. W. 142, 26 Ky. L. Rep. 1053 (holding that where plaintiff sued a city for damages because of its construction of a sidewalk on a portion of a lot belonging to him, and plaintiff's son testified in his father's behalf, and made no claim to any part of the lot, or to the damages sought to be recovered, his failure to do so estopped him to make any claim against the city for damages, irrespective of his interest in the land); Immaculate Conception Church *v.* Sheffer, 88 Hun (N. Y.) 335, 34 N. Y. Suppl. 724 [*affirmed* in 156 N. Y. 670, 50 N. E. 1118]; Davis *v.* Morris, 132 N. C. 435, 43 S. E. 950 (holding that laying of land out as a street and recognizing it as such in grants of land on each side and permitting grantees to use it as such estops grantor from maintaining trespass against a grantee for putting a woodpile there); Joyce *v.* Conlin, 72 Wis. 607, 40 N. W. 212.

Acts not creating estoppel.— Porter *v.* Midland R. Co., 125 Ind. 476, 25 N. E. 556; Bravard *v.* Cincinnati, etc., R. Co., 115 Ind. 1, 17 N. E. 183 (both holding that estoppel by acquiescence to enjoin a railroad from use of a street for its railroad does not create an estoppel to sue for the trespass); Moore *v.* Pear, 129 Mich. 513, 89 N. W. 347 (holding that assessing land to plaintiff does not estop a village from asserting its actual possession); De Camp *v.* Wallace, 45 Misc. (N. Y.) 436, 92 N. Y. Suppl. 746 (holding that license to cross land with trees cut under contract with a third person, under which contract defendant claimed a right to cut plaintiff's trees, does not estop plaintiff to assert his title where he never saw the contract or knew defendant made such a claim); Cheeney *v.* Nebraska, etc., Stone Co., 41 Fed. 740 (holding that a landowner who in good faith points out to the owner of adjoining land an incorrect division line, both parties being ignorant of the true line, is not estopped from denying that such line is the true boundary); Craft *v.* Yeaney, 66 Pa. St. 210; Heck *v.* Knapp, 20 U. C. Q. B. 360 (both holding that the bringing of ejectment by plaintiff against defendant does not operate as an estoppel as being an admission of defendant's possession).

10. Wrightsville, etc., R. Co. *v.* Holmes, 85 Ga. 668, 11 S. E. 658, a railroad director participating in locating the road and afterward buying the land is estopped to recover damages for the location.

11. Quillen *v.* Betts, 1 Pennew. (Del.) 53, 39 Atl. 595; Marion *v.* Johnson, 23 La. Ann. 597; Ft. Worth, etc., R. Co. *v.* Smith, (Tex. Civ. App. 1894) 25 S. W. 1032.

Instances.— Removal of a partition fence, although defendant stood on his own land (Garrett *v.* Sewell, 108 Ala. 521, 18 So. 737); and although each adjoining owner built half and defendant only removed the half he built (Smith *v.* Johnson, 76 Pa. St. 191; Stoner *v.* Hunsicker, 47 Pa. St. 514); destruction of a line fence (Quillen *v.* Betts, 1 Pennew. (Del.) 53, 39 Atl. 595) regardless of which one owns the fence (Sayles *v.* Bemis, 57 Wis. 315, 15 N. W. 432); destruction of trees growing on the line (Quillen *v.* Betts, 1 Pennew. (Del.) 53, 39 Atl. 595; Relyea *v.* Beaver, 34 Barb. (N. Y.) 547 [*affirmed* in 25 N. Y. 123, 82 Am. Dec. 326]; Miller *v.* Mutzabaugh, 3 Pa. Dist. 449; Miller *v.* Holland, 13 Pa. Co. Ct. 622), or a party-wall (Schile *v.* Brokhahus, 80 N. Y. 614); cutting into a party-wall without first making compensation (Ritter *v.* Sieger, 105 Pa. St. 400); forcibly ejecting plaintiff from a house standing partly on defendant's right of way, although plaintiff had no interest in the house (Ft. Worth, etc., R. Co. *v.* Smith, (Tex. Civ. App. 1894) 25 S. W. 1032), constitute trespasses.

12. Marion *v.* Johnson, 23 La. Ann. 597 (by extending the iron front of defendant's building over plaintiff's side, although defendant owns the land under plaintiff's half); Shiverick *v.* R. J. Gunning Co., 58 Nebr. 29, 78 N. W. 460 (erasing plaintiff's advertising sign painted on plaintiff's half of the wall).

13. Lyman *v.* Hale, 11 Conn. 177, 27 Am. Dec. 728 (gathering fruit from a tree whose entire trunk is on adjoining land but some of whose branches and roots extend over into defendant's); Skinner *v.* Wilder, 38 Vt. 115, 88 Am. Dec. 645.

14. Bright *v.* New Orleans R. Co., 114 La. 679, 38 So. 494 (holding that either lessee or lessor of the land can remove them); Hickey *v.* Michigan Cent. R. Co., 96 Mich. 498, 55 N. W. 989, 35 Am. St. Rep. 621, 21 L. R. A. 729 (holding that after plaintiff's refusal railroad may remove overhanging

beyond the point of overhang.[15] Digging holes and setting posts of a line fence partly on adjacent owner's land is a trespass.[16] But hanging property on a division fence is not a trespass.[17]

(B) *Land Covered With Water.* Trespass *quare clausum* lies for an entry on land covered with water,[18] or taking oysters planted by plaintiff in the common waters of the state,[19] or for entry and use of land between high and low water mark.[20] But it is not a trespass to enter on uninclosed land between high and low water mark to fish or to take oysters if there is (as in some states) a public right to do so.[21]

(C) *Above and Below the Surface.* The landowner owns above and below the surface and for acts done above or below it he can maintain an action.[22]

(D) *Highways.* The owner of the fee in a street [23] or highway [24] can maintain an action of trespass for acts on his land therein not justified by the right of way. This principle has been applied in various instances such as cutting trees,[25] or

branches which strike the engineer as he leans from his cab); Lemmon *v.* Webb, [1895] A. C. 1, 59 J. P. 564, 64 L. J. Ch. 205, 71 L. T. Rep. N. S. 647, 11 Reports 116.

15. Newberry *v.* Bunda, 137 Mich. 69, 100 N. W. 277.

16. Hunter *v.* Ronne, 2 Nova Scotia Dec. 113.

17. Hannabalson *v.* Sessions, 116 Iowa 457, 90 N. W. 93, 93 Am. St. Rep. 250.

18. Paul *v.* Hazelton, 37 N. J. L. 106 (planting and later removing oysters within a staked inclosure of plaintiff's in a navigable stream, authorized by statute); Mitchell *v.* Bridgers, 113 N. C. 63, 18 S. E. 91; Smith *v.* Ingram, 29 N. C. 175 (if subject to grant).

19. Bendich *v.* Scobel, 107 La. 242, 31 So. 703; Post *v.* Kreischer, 103 N. Y. 110, 8 N. E. 365.

20. Wall *v.* Pittsburgh Harbor Co., 152 Pa. St. 427, 25 Atl. 647, 34 Am. St. Rep. 667, keeping barges thereon.

21. Peck *v.* Lockwood, 5 Day (Conn.) 22; Packard *v.* Ryder, 144 Mass. 440, 11 N. E. 578, 59 Am. Rep. 101. Otherwise where there is no such right. McKenzie *v.* Hulet, 4 N. C. 613.

22. Markham *v.* Brown, 37 Ga. 277, 92 Am. Dec. 73.

The remedy for nailing a board so as to overhang plaintiff's land, or firing a shot across it which does not strike the land, is not trespass but case lies if there is damage. Pickering *v.* Rudd, 4 Campb. 219, 1 Stark. 56, 16 Rev. Rep. 777, 2 E. C. L. 32.

Where a room projects over land a grantee of the land under the room has a right to the space above it, and not the owner of the room; and the owner of the room cannot enjoin building above it by the grantee as a trespass. Corbett *v.* Hill, L. R. 9 Eq. 671, 39 L. J. Ch. 547, 22 L. T. Rep. N. S. 263.

23. Sunnyside Coal, etc., Co. *v.* Reitz, 14 Ind. App. 478, 39 N. E. 541, 43 N. E. 46 (mining); Karst *v.* St. Paul, etc., R. Co., 22 Minn. 118, 23 Minn. 401 (making excavations); Restetsky *v.* Delmar Ave., etc., R. Co., 106 Mo. App. 382, 85 S. W. 665.

24 Kincaid *v.* Indianapolis Natural Gas Co., 124 Ind. 577, 24 N. E. 1066, 19 Am. St. Rep. 113, 8 L. R. A. 602; Cortelyou *v.* Van Brundt, 2 Johns. (N. Y.) 357, 3 Am. Dec. 439.

Applications of rule.— Plowing up the highway (Robbins *v.* Borman, 1 Pick. (Mass.) 122; Cole *v.* Maxwell, 8 N. Brunsw. 183) or laying pipe therein (Kincaid *v.* Indianapolis Natural Gas. Co., 124 Ind. 577, 24 N. E. 1066, 19 Am. St. Rep. 113, 8 L. R. A. 602), although with permission of local officers (Kincaid *v.* Indianapolis Natural Gas Co., *supra*; McCruden *v.* Rochester R. Co., 5 Misc. (N. Y.) 59, 25 N. Y. Suppl. 114 [*affirmed* in 151 N. Y. 623, 45 N. E. 1133]); or appropriating the soil (Cortelyou *v.* Van Brundt, 2 Johns. (N. Y.) 357, 3 Am. Dec. 439), or removing the soil for a purpose other than its use on the highway (Aurora *v.* Fox, 78 Ind. 1; Delphi *v.* Evans, 36 Ind. 90, 10 Am. Rep. 12), or interfering with the owner's use of adjacent land (Harrison *v.* Rutland, [1893] 1 Q. B. 142, 57 J. P. 278, 62 L. J. Q. B. 117, 68 L. T. Rep. N. S. 35, 4 Reports 155, 41 Wkly. Rep. 322), or stopping in the highway and abusing him (Adams *v.* Rivers, 11 Barb. (N. Y.) 390), or injuring plaintiff's right in the soil (Cole *v.* Drew, 44 Vt. 49, 8 Am. Rep. 363) is a trespass. But see Fitch *v.* New York, etc., R. Co., 59 Conn. 414, 20 Atl. 345, 10 L. R. A. 188, holding that plaintiff's possession of the *locus* must be exclusive and here being a highway, it is not.

25. *Indiana.*— Western Union Tel. Co. *v.* Krueger, 30 Ind. App. 28, 64 N. E. 635.

Missouri.— Betz *v.* Kansas City Home Tel. Co., 121 Mo. App. 473, 97 S. W. 207.

New York.— Kellar *v.* Central Tel., etc., Co., 53 Misc. 523, 105 N. Y. Suppl. 63.

Pennsylvania.— Huling *v.* Henderson, 161 Pa. St. 553, 29 Atl. 276.

Wisconsin.— Andrews *v.* Youmans, 78 Wis. 56, 47 N. W. 304.

Canada.— O'Connor *v.* Nova Scotia Tel. Co., 22 Can. Sup. Ct. 276 [*reversing* 23 Nova Scotia 509]; Bannatyne *v.* Suburban Rapid Transit Co., 15 Manitoba 7, railroad without first making compensation.

Applications of rule.— The rule applies to a highway commissioner removing the trees from a highway as an obstruction if he does not first give the owner notice (Clark *v.* Dasso, 34 Mich. 86; Douglas *v.* Fox, 31 U. C.

building a railroad thereon,[26] or erecting telegraph lines thereon without the consent of the owner.[27]

(E) *Things Affixed to Another's Realty.* The owner of land cannot recover for an injury to anything affixed to it or part of it that is owned by another.[28] On the other hand, one who owns a certain specific thing which is a part of another's realty can maintain trespass *quare clausum* for an injury to it as trees growing on another's land,[29] growing crops,[30] the subsoil,[31] a building,[32] or a dam.[33] The action lies by such owner, although the thing injured was attached to the land by the plaintiff under a mere license or a contract, so that no interest in the land was acquired.[34] And an action lies even against the owner of the land for an inter-

C. P. 140); or who sells the trees after removal (Clark *v.* Dasso, 34 Mich. 86).

Ownership of fee.— Plaintiff must own the fee of the highway to entitle him to maintain trespass (Western Union Tel. Co. *v.* Krueger, 30 Ind. App. 28, 64 N. E. 635), except where otherwise provided by statute (Edsall *v.* Howell, 86 Hun (N. Y.) 424, 33 N. Y. Suppl. 892; Douglas *v.* Fox, 31 U. C. C. P. 140), or where he planted and maintained the trees with the sanction of the municipal authorities (Lane *v.* Lamke, 53 N. Y. App. Div. 395, 65 N. Y. Suppl. 1090).

26. Rule applied in case of streets.— Galt *v.* Chicago, etc., R. Co., 157 Ill. 125, 41 N. E. 643; Porter *v.* Midland R. Co., 125 Ind. 476, 25 N. E. 556; Hartz *v.* St. Paul, etc., R. Co., 21 Minn. 358; Wohler *v.* Buffalo, etc., R. Co., 46 N. Y. 686; McCruden *v.* Rochester R. Co., 5 Misc. (N. Y.) 59, 25 N. Y. Suppl. 114 [*affirmed* in 77 Hun 609, 28 N. Y. Suppl. 1135 (*affirmed* in 151 N. Y. 623, 45 N. E. 1133)]; Carl *v.* Sheboygan, etc., R. Co., 46 Wis. 625, 1 N. W. 295; Ford *v.* Chicago, etc., R. Co., 14 Wis. 609, 80 Am. Dec. 791.

27. Board of Trade Tel. Co. *v.* Barnett, 107 Ill. 507, 47 Am. Rep. 453 (highway); American Tel., etc., Co. *v.* Jones, 78 Ill. App. 372; Maryland Tel., etc., Co. *v.* Ruth, 106 Md. 644, 68 Atl. 358, 124 Am. St. Rep. 506, 14 L. R. A. N. S. 427 (private alley).

28. Cohen *v.* Bryant, 65 S. W. 347, 23 Ky. L. Rep. 1448 (trees severed by the grantor); Dyer *v.* Hartshorn, 73 N. H. 509, 63 Atl. 231; Stratton *v.* Lyons, 53 Vt. 641 (clay pits granted to another). But where a mill site is reserved, the reservation is inoperative till the mill is built; so the landowner can maintain an action against third persons for trespass thereon, or against the grantor for entry for another purpose. Dygert *v.* Matthews, 11 Wend. (N. Y.) 35.

29. Gronour *v.* Daniels, 7 Blackf. (Ind.) 108 (holding, however, that under a declaration for injury to trees with no averment that the land was plaintiff's, plaintiff cannot recover for injury to the land); Narehood *v.* Wilhelm, 69 Pa. St. 64 (holding that the action lies even against the landowner); Haskin *v.* Record, 32 Vt. 575; Goodrich *v.* Hathaway, 1 Vt. 485, 18 Am. Dec. 701 (holding that entry by purchaser of growing trees gives him possession to maintain the action against a stranger); Burleigh Tp., etc., Corp. *v.* Hales, 27 U. C. Q. B. 72 (holding that a qualified property in a town arising from power to pass by-laws to preserve or sell the trees is a sufficient interest). But see Whitehouse Cannel Coal Co. *v.* Wells, 74 S. W. 736, 25 Ky. L. Rep. 60.

Source of title.— The title may arise from a reservation in a grant (Goodwin *v.* Hubbard, 47 Me. 595; Phillips *v.* De Groat, 2 Lans. (N. Y.) 192; Schermerhorn *v.* Buell, 4 Den. (N. Y.) 422; Robinson *v.* Gee, 26 N. C. 186; Irwin *v.* Patchen, 164 Pa. St. 51, 30 Atl. 436; Greber *v.* Kleckner, 2 Pa. St. 289) or from a direct grant (Clap *v.* Draper, 4 Mass. 266, 3 Am. Dec. 215); but a mere right to enter and cut is not a sufficient right (Fletcher *v.* Livingston, 153 Mass. 388, 26 N. E. 1001, agreement for sale with a year in which to remove gives only a license to enter; Gates *v.* Comstock, 107 Mich. 546, 65 N. W. 544); or a mere stipulation by lessor that they shall not be cut (Schermerhorn *v.* Buell, 4 Den. (N. Y.) 422).

30. *New Hampshire.*— Dolloff *v.* Danforth, 43 N. H. 219, purchaser of growing grass.

New York.— Austin *v.* Sawyer, 9 Cow. 39 (growing wheat); Carter *v.* Jarvis, 9 Johns. 143.

North Carolina.— Brittain *v.* McKay, 23 N. C. 265, 35 Am. Dec. 738.

Pennsylvania.— Stultz *v.* Dickey, 5 Binn. 285, 6 Am. Dec. 411.

Canada.— Haydon *v.* Crawford, 3 U. C. Q. B. O. S. 583.

Contra.— Foster *v.* Fletcher, 7 T. B. Mon. (Ky.) 534, 18 Am. Dec. 208.

31. Cox *v.* Glue, 5 C. B. 533, 12 Jur. 185, 17 L. J. C. P. 162, 57 E. C. L. 533.

32. Jordan *v.* Staples, 57 Me. 352; Kelley *v.* Seward, 51 Vt. 436.

33. Conwell *v.* Brookhart, 4 B. Mon. (Ky.) 580, 41 Am. Dec. 244.

34. *California.*— Rubio Canyon Land, etc., Assoc. *v.* Pasadena, etc., R. Co., 3 Cal. App. 226, 84 Pac. 846, pipe line.

District of Columbia.— Jackson *v.* Emmons, 19 App. Cas. 250, building.

Maine.— Salley *v.* Robinson, 96 Me. 474, 52 Atl. 930, 90 Am. St. Rep. 410; Ricker *v.* Kelly, 1 Me. 117, 10 Am. Dec. 38, bridge.

New Jersey.— Miller *v.* Greenwich Tp., 62 N. J. L. 771, 42 Atl. 735, sewer.

North Carolina.—.Hogwood *v.* Edwards, 61 N. C. 350, log and rails in a boundary ditch.

Wisconsin.— Roche *v.* Milwaukee Gaslight Co., 5 Wis. 55, lamp posts in a city street.

England.— Spooner *v.* Brewster, 3 Bing. 136, 3 L. J. C. P. O. S. 203, 10 Moore C. P.

ference therewith unless after revocation of the license and reasonable notice to remove the thing is suffered to remain.[35]

(F) *Trespass De Bonis For Thing Part Of, Attached To, or Severed From Realty, in Which Plaintiff Has an Interest.* Mere possession of land is sufficient right to maintain trespass *de bonis* for things severed therefrom during such possession.[36] Severing a part of the realty, under agreement with the owner that it should belong upon severance to the person severing, gives a right sufficient to maintain trespass *de bonis* for the thing severed,[37] but not if some further act is necessary [38] unless the severance was under circumstances which gave the person severing a lien.[39] Where a trespasser severed property from realty before plaintiff's right in the land accrued, but removed it thereafter, such right, whether actual or constructive possession of the land, gives plaintiff possession of the thing severed; and defendant cannot set up a *jus tertii* of the former owner of the land, to defeat the action of trespass *de bonis*;[40] but if the right is a mere temporary possession it will not sustain such action,[41] nor if the severance was by the owner so that the thing severed became his chattel before the grant of the land.[42] Where the lands are in possession of a tenant, the severance puts an end to his interest so that the owner can at once without entry maintain the action against third persons who sever and remove during the tenancy,[43] or against the tenant himself for taking after severing,[44] at least, if the taking is after and at another time from the severance.[45] While land remains in the adverse possession of another, the owner cannot maintain trespass *de bonis* against such holder [46] for taking things severed by him from the realty during such holding,[47] nor against a third person who takes

494, 28 Rev. Rep. 613, 11 E. C. L. 75 (tombstones); Dyson *v.* Collick, 5 B. & Ald. 600, 1 D. & R. 225, 7 E. C. L. 328, 106 Eng. Reprint 1310 (temporary dam).

Contra, in Massachusetts, where there must be some interest in the land itself (Clapp *v.* Boston, 133 Mass. 367), as by grant or prescriptive right (Cook *v.* Stearns, 11 Mass. 533).

35. Salley *v.* Robinson, 96 Me. 474, 52 Atl. 930, 90 Am. St. Rep. 410; Wilson *v.* Chalfant, 15 Ohio 248, 45 Am. Dec. 574; Empire Steel, etc., Co. *v.* Lawrence, 27 Pa. Super. Ct. 620.

36. Moran *v.* Laird, 5 N. Brunsw. 403.

37. Fiske *v.* Small, 25 Me. 453 (trees cut by A under permit and assigned to plaintiff who never had possession, taken by sheriff under attachment against A); Hamilton *v.* McDonell, 5 U. C. Q. B. O. S. 720 (holding that trees removed under agreement with the landowner that they shall belong to the person removing as compensation for their removal gives him a right to maintain trespass *de bonis* against such owner for taking them after they are cut down.

38. Creps *v.* Dunham, 69 Pa. St. 456, holding that an assignee of one who made staves on a third person's land under agreement that they were not to be removed till paid for cannot maintain trespass *de bonis.*

39. Haverly *v.* State Line, etc., R. Co., 125 Pa. St. 116, 17 Atl. 224, holding that one erecting a sawmill and cutting and sawing logs and piling timber under agreement that he should have certain proportions after piling, but the logs remain the property of the landowner till division, has possession and a lien.

40. Glenwood Lumber Co. *v.* Phillips, [1904] A. C. 405, 73 L. J. P. C. 62, 90 L. T. Rep. N. S. 741, 20 T. L. R. 531, trees cut on government land before but removed after a lease to plaintiff.

41. Davis *v.* Danks, 3 Exch. 435, 18 L. J. Exch. 213, holding that temporary possession of a house by an auctioneer for purpose of selling fixtures will not sustain trespass *de bonis* for their taking.

42. Brock *v.* Smith, 14 Ark. 431, trees cut and made into cordwood.

43. Daniels *v.* Pond, 21 Pick. (Mass.) 367, 32 Am. Dec. 269 (holding that sale of manure by tenant at will divests his right and lessor can sue purchaser for a removal); Lane *v.* Thompson, 43 N. H. 320 (taking trees, tenancy for life); Alexander *v.* Hartt, 12 N. Brunsw. 161.

44. Chesnut *v.* Day, 6 U. C. Q. B. O. S. 637.

45. Bulkley *v.* Dolbeare, 7 Conn. 232 (trees); Schermerhorn *v.* Buell, 4 Den. (N. Y.) 422 (by letting them lie property in them as chattels vests in the owner).

46. See *supra*, I, A, 2, d, (I), (A), (2).

47. Halleck *v.* Mixer, 16 Cal. 574; Deland *v.* Vanstone, 26 Mo. App. 297; Desbrisay *v.* McPhelim, 10 N. Brunsw. 327; Jarvis *v.* Edgett, 6 N. Brunsw. 66, action by purchaser under foreclosure against one who cut and carried away trees by authority of mortgagor in possession. But in some states while he must sue in case for the severance, he may sue in trespass for carrying away the thing severed. McClain *v.* Todd, 5 J. J. Marsh. (Ky.) 335, 22 Am. Dec. 37 (case not trespass lies also for the severance of the trees); Alliance Trust Co. *v.* Nettleton Hardwood Co., 74 Miss. 584, 21 So. 396, 60 Am. St. Rep. 531, 36 L. R. A. 155.

after severing during such holding; but after reëntry the action lies for such taking against either the disseizor or his grantee.[48]

(G) *Burying Grounds.* Action lies by one who buries his dead in a public cemetery for disturbance of the body.[49]

(H) *Incorporeal Hereditaments.* Trespass will not lie for the disturbance of an incorporeal hereditament,[50] such as a right of way,[51] or a mere water privilege,[52] or the right to use a church pew,[53] although such disturbance is an actionable wrong, but trespass on the case will lie.[54]

(III) *PERSONALTY* — (A) *Rights Essential — Possession, Actual or Constructive.* The gist of trespass to personalty is the injury to possession,[55] and title is not necessary to maintain trespass except where the owner has not the actual possession of the property.[56] Actual or constructive possession is necessary to maintain an action for a trespass to personalty.[57] The strict requirements of the common law are, however, often relaxed, and one having general or special property and a right to immediate possession is allowed to maintain the action.[58] The owner cannot maintain the action where possession of property is held by another

48. Alliance Trust Co. *v.* Nettleton Hardwood Co., 74 Miss. 584, 21 So. 396, 60 Am. St. Rep. 531, 36 L. R. A. 155.

49. Bessemer Land, etc., Co. *v.* Jenkins, 111 Ala. 135, 18 So. 565, 56 Am. St. Rep. 26.

50. Baer *v.* Martin, 8 Blackf. (Ind.) 317. And see cases cited in subsequent notes in this section.

51. Baer *v.* Martin, 8 Blackf. (Ind.) 317; Dorsey *v.* Eagle, 7 Gill & J. (Md.) 321 (given tenant to enter and take crop, against succeeding tenant with right to enter and seed field); Dietrich *v.* Berk, 24 Pa. St. 470; Lloyd *v.* Wunderlich, 2 Del. Co. (Pa.) 377.

52. Wilson *v.* Sinclair, 8 N. Brunsw. 343.

53. White *v.* Marshall, Harp. (S. C.) 122.

54. Union Petroleum Co. *v.* Bliven Petroleum Co., 72 Pa. St. 173 (taking possession of oil wells dug by plaintiff under right to take oil); Trauger *v.* Sassaman, 14 Pa. St. 514 (disturbing easement); Erie, etc., Turnpike *v.* Cochran, 2 Am. L. J. (Pa.) 88 (obstructing turnpike); Sporting Club *v.* Vosburg, Wilcox (Pa.) 285 (fishing in a reservoir which plaintiff had a right to stock with fish and take fish therefrom).

55. Terry *v.* Williams, 148 Ala. 468, 41 So. 804.

56. Roberts *v.* Wentworth, 5 Cush. (Mass.) 192; Hurd *v.* Fleming, 34 Vt. 169.

The reason for the rule which permits one lawfully in possession, although not the owner, of personal property to recover its value of a stranger who unlawfully deprives him of such possession is his obligation to restore the property to the general owner, or stand responsible to him for its value. Temple *v.* Duran, (Tex. Civ. App. 1908) 121 S. W. 253.

57. *Alabama.*— Burns *v.* Campbell, 71 Ala. 271; Boswell *v.* Carlisle, 70 Ala. 244; Segar *v.* Kirkley, 23 Ala. 680.

Arkansas.— Merrick *v.* Britton, 26 Ark. 496; Gracie *v.* Morris, 22 Ark. 415.

Colorado.— Nachtrieb *v.* Stoner, 1 Colo. 423.

New Hampshire.— Heath *v.* West, 28 N. H. 101; Clark *v.* Carlton, 1 N. H. 110.

United States.— Wilson *v.* Haley Live-Stock Co., 153 U. S. 39, 14 S. Ct. 768, 36 L. ed. 627.

England.— Smith *v.* Milles, 1 T. R. 475, 99 Eng. Reprint 1205.

See 46 Cent. Dig. tit. "Trespass," § 44.

Applications of rule.— A husband cannot maintain trespass for a taking of his wife's goods (Burns *v.* Campbell, 71 Ala. 271); nor can a consignor of goods where title has passed to the consignee by delivering to the railroad company (Wetzel *v.* Power, 5 Mont. 214, 2 Pac. 338); nor school trustees for the taking of school registers, they having mere custody and possession being in the town (Perkins *v.* Weston, 3 Cush. (Mass.) 539).

Actual possession, or right to immediate possession (Holman *v.* Ketchum, 153 Ala. 360, 45 So. 206; Vines *v.* Vines, 145 Ala. 679, 40 So. 84; Cook *v.* Thornton, 109 Ala. 523, 20 So. 14; Dunlap *v.* Steele, 80 Ala. 424; Davis *v.* Young, 20 Ala. 151) arising from title (Ginsberg *v.* Pohl, 35 Md. 505; Weitzel *v.* Marr, 46 Pa. St. 463), or arising from a general or special property in the chattel (Dunning *v.* Fitch, 66 Ill. 51), is necessary.

General or constructive property in the chattels is sometimes required in addition. Swift *v.* Moseley, 10 Vt. 208, 33 Am. Dec. 197. Without actual possession a lien for rent due or a levy of a distress warrant without sale will not support trespass. Brainard *v.* Burton, 5 Vt. 97; Corfield *v.* Coryell, 6 Fed. Cas. No. 3,230, 4 Wash. 371.

58. *Illinois.*— Cannon *v.* Kinney, 4 Ill. 9.

Indiana.— Hume *v.* Tufts, 6 Blackf. 136.

Maine.— Freeman *v.* Rankins, 21 Me. 446; Lunt *v.* Brown, 13 Me. 236.

Mississippi.— McFarland *v.* Smith, Walk. 172.

New Hampshire.— Barron *v.* Cobleigh, 11 N. H. 557, 35 Am. Dec. 505.

New York.— Hanmer *v.* Wilsey, 17 Wend. 91; Putnam *v.* Wyley, 8 Johns. 432, 5 Am. Dec. 346.

South Carolina.— Bell *v.* Monahan, Dudley 38, 31 Am. Dec. 548.

See 46 Cent. Dig. tit. "Trespass," § 45.

person who has a special property therein,[59] unless his special property has been forfeited; [60] where the personalty is in the custody of the law [61] nor, where it is in possession of one holding wholly adversely, for acts done during such holding.[62] One having a special interest in the chattels cannot maintain trespass where they are adversely held by another.[63]

(B) *Rights Sufficient — Possession, Actual or Constructive* — (1) ACTUAL OR CONSTRUCTIVE POSSESSION. Actual or constructive possession is sufficient to maintain trespass to personalty,[64] provided it is at the time of the trespass.[65]

(2) POSSESSION COUPLED WITH LEGAL TITLE. Actual possession coupled with

Bailor must show immediate right of possession to recover against one who takes from the bailee. Dick *v.* Cooper, 24 Pa. St. 217, 64 Am. Dec. 652.

59. Boswell *v.* Carlisle, 70 Ala. 244; Borne *v.* Merritt, 22 Vt. 429. To the same effect see cases cited *infra*, this note. But see Luse *v.* Jones, 39 N. J. L. 707; Neff *v.* Thompson, 8 Barb. (N. Y.) 213 (lien for agistment of sheep); Strong *v.* Adams, 30 Vt. 221, 73 Am. Dec. 305 (in all of which cases this principle appears to have been overlooked, and the owner was allowed to sue, although the chattels were in the possession of another who had a special property in them); Coe *v.* English, 6 Houst. (Del.) 456 (holding that where the distinction between actions of trespass and case has been abolished by statute the action may be brought by the owner out of possession).

Under right of possession for a definite time under a contract see Davis *v.* Young, 20 Ala. 151; Lunt *v.* Brown, 13 Me. 236; Corfield *v.* Coryell, 6 Fed. Cas. No. 3,230, 4 Wash. 371.

Under pledge as security for a debt see Gay *v.* Smith, 38 N. H. 171.

Under parol charter of a vessel see Muggridge *v.* Eveleth, 9 Metc. (Mass.) 233.

Under a lease see Lunt *v.* Brown, 13 Me. 236; McFarland *v.* Smith, Walk. (Miss.) 172; Clark *v.* Carlton, 1 N. H. 110 (horse for nine days); Putnam *v.* Wyley, 8 Johns. (N. Y.) 432, 5 Am. Dec. 346 (cows and sheep for a year); Fitler *v.* Shotwell, 7 Watts & S. (Pa.) 14; Bell *v.* Monahan, Dudley (S. C.) 38, 31 Am. Dec. 548 (horse let to "make a crop"); Saenz *v.* Mumme, (Tex. Civ. App. 1905) 85 S. W. 59 (farm animals on a farm rented to another); Keyes *v.* Home, 18 Vt. 411 (cow); Ward *v.* Macauley, 4 T. R. 489, 100 Eng. Reprint 1135; Henderson *v.* Moodie, 3 U. C. Q. B. 348 (at least where there is no injury to the reversion, and a seizure under execution against tenant, but without removal and even sale, does not injure the reversion).

Under conditional sale agreement see Hurd *v.* Fleming, 34 Vt. 169.

Under distress damage feasant, so long as the distress is detained. Boden *v.* Roscoe, [1894] 1 Q. B. 608, 58 J. P. 368, 63 L. J. Q. B. 767, 70 L. T. Rep. N. S. 450, 10 Reports 173, 42 Wkly. Rep. 445.

Under mortgage whether expressly giving mortgagor right of possession (Hall *v.* Snowhill, 14 N. J. L. 8); or only giving the mortgagee right to take possession which he has not taken (Skiff *v.* Solace, 23 Vt. 279). *Contra*, Dunlap *v.* Steele, 80 Ala. 424, where the distinction between a right to take possession and a right of possession without any act to perfect it is not observed.

60. Jordan *v.* Wells, 104 Ala. 383, 16 So. 23 (by failure to make payments due under conditional sale agreement); Fields *v.* Williams, 91 Ala. 502, 8 So. 808; Briggs *v.* Bennett, 26 Vt. 146 (by use of property held under contract, different from that authorized); Swift *v.* Moseley, 10 Vt. 208, 33 Am. Dec. 197 (by use of bailment different from that authorized, not a mere abuse of the authority); Swift *v.* Moseley, *supra* (by destruction of the bailment).

61. Joseph *v.* Henderson, 95 Ala. 213, 10 So. 843; Gloss *v.* Black, 91 Pa. St. 418.

Rule applied in case of goods attached, although wrongfully and in custody of the officers see Joseph *v.* Henderson, 95 Ala. 213, 10 So. 843; Ginsberg *v.* Pohl, 35 Md. 505; Hunt *v.* Pratt, 7 R. I. 283.

Purchaser from sheriff.— An action does not lie against the purchaser from the sheriff, either if the sheriff delivers them (Gloss *v.* Black, 91 Pa. St. 418; Ward *v.* Taylor, 1 Pa. St. 238); or does not deliver them (Hammon *v.* Fisher, 2 Grant (Pa.) 330).

62. McCarty *v.* Vickery, 12 Johns. (N. Y.) 348 (holding that after sale and delivery of wood, the former owner cannot maintain trespass against one who removes it for the vendee, although the sale was fraudulently obtained and plaintiff forbid the removal); Weitzel *v.* Marr, 46 Pa. St. 463 (holding that possession of land gives possession of chattels on it so that trespass cannot be maintained for their conversion); Hunt *v.* Pratt, 7 R. I. 283 (taking goods from one who obtained them from the owner by trespass).

63. Lewis *v.* Carsaw, 15 Pa. St. 31, holding that a sheriff after delivery to another of goods levied on, to be redelivered at future time, cannot maintain trespass.

64. Moores *v.* Winter, 67 Ark. 189, 53 S. W. 1057; Covington *v.* Simpson, 3 Pennew. (Del.) 269, 52 Atl. 349 (actual possession, or general or special property with immediate right of possession); Edwards *v.* Edwards, 11 Vt. 587, 34 Am. Dec. 711; Ker *v.* Bryan, 163 Fed. 233, 90 C. C. A. 179.

Although others may have imperfect equities on personalty the holder of the legal title may sue for its destruction. Atlanta, etc., R. Co. *v.* Minchew, 7 Ga. App. 566, 67 S. E. 678.

65. Williams *v.* McGrade, 18 Minn. 82.

unrestricted legal title,[66] or with legal title obtained by fraud,[67] or obtained contrary to a statute[68] or restricted to some extent,[69] is sufficient to maintain an action for a trespass to personalty.

(3) POSSESSION COUPLED WITH RIGHTS LESS THAN LEGAL TITLE. And actual possession coupled with an equitable title is sufficient,[70] or possession coupled with some other interest,[71] or possession under legal process.[72]

(4) POSSESSION NOT COUPLED WITH AN INTEREST. Possession under color and claim of title has been held to be sufficient to maintain an action for a trespass to personalty,[73] and mere actual possession of chattels is sufficient to maintain an action for a trespass to them by a mere wrong-doer,[74] without other proof of

66. Kelley *v.* Seward, 51 Vt. 436; Cummings *v.* Friedman, 65 Wis. 183, 26 N. W. 575, 56 Am. Rep. 628; Bowman *v.* Yielding, (Mich. T. 3 Viet.) 3 Ont. Case Law Dig. 6904, momentary possession in owner after recaption by purchaser from a thief, purchaser at once retaking.

67. Harrison *v.* Davis, 2 Stew. (Ala.) 350.

68. Sterrett *v.* Kaster, 37 Ala. 366 (action by master for injury to property sold to his slave in violation of a statute making a sale of goods to a slave without the master's consent a penal offense); Bliss *v.* Winslow, 80 Me. 274, 13 Atl. 899, 6 Am. St. Rep. 195 (inspector of customs purchasing and taking possession of a vessel contrary to statute forbidding it); Hallett *v.* Novion, 14 Johns. (N. Y.) 273 (foreign shipmaster receiving commission in United States waters contrary to statute).

69. Frankenthal *v.* Camp, 55 Ill. 169 (contract of sale by owner and receipt of part of purchase-price); Browning *v.* Skillman, 24 N. J. L. 351 (property levied on by sheriff but left in owner's possession); McMartin *v.* Hurlburt, 2 Ont. App. 146.

70. Miller *v.* Kirby, 74 Ill. 242 (possession of a store and goods by the former owner with right to make sales, receive proceeds, and manage the store, although a deed of trust to secure payment has been given by him); Cummings *v.* Friedman, 65 Wis. 183, 26 N. W. 575, 56 Am. Rep. 628.

71. Warner *v.* Capps, 37 Ark. 32; Houston *v.* Howard, 39 Vt. 54.

Rule applied as against the general owner. — Lunsford *v.* Dietrich, 86 Ala. 250, 5 So. 461, 1 Am. St. Rep. 37 (interest as house builder having right to possession of plans during building operation against architect owning them); Cowing *v.* Snow, 11 Mass. 415 (lien-holder against general owner).

Rule applied as against persons other than the general owner — *In general.* — Warner *v.* Capps, 37 Ark. 32; Boyd *v.* McArthur, 120 Ga. 974, 48 S. E. 358.

Interest as attaching creditor. — Houston *v.* Howard, 39 Vt. 54, although defendant had before attached the goods and been summoned by plaintiff under trustee process.

Foreign administrator. — McGrew *v.* Browder, 2 Mart. N. S. (La.) 17.

Holder of lien for agistment. — Neff *v.* Thompson, 8 Barb. (N. Y.) 213.

Obligee of respondentia bond with assignment of bill of lading. — Pacific Ins. Co. *v.* Conard, 18 Fed. Cas. No. 10,647, Baldw. 138 [*affirmed* in 6 Pet. (U. S.) 262, 8 L. ed. 392].

72. Gibbs *v.* Chase, 10 Mass. 125 (by deputy sheriff in possession under an execution); Brown *v.* Thomas, 26 Miss. 335 (by officer in possession under levy); Houston *v.* Howard, 39 Vt. 54 (by an officer in possession under attachment); Simpson *v.* Great Western R. Co., 17 U. C. Q. B. 57 (by constable in possession under distress warrant).

That the sheriff was not indemnified till after delivery to plaintiff does not aid defendant. Russell *v.* Gray, 11 Barb. (N. Y.) 541.

73. Barker *v.* Chase, 24 Me. 230 (assignee under assignment void under provisions of a statute); Emerson *v.* Thompson, 59 Wis. 619, 18 N. W. 503 (grantee of void tax title).

74. *Alabama.* — Carter *v.* Fulgham, 134 Ala. 238, 32 So. 684; Alabama Great Southern R. Co. *v.* Jones, 71 Ala. 487; Tarry *v.* Brown, 34 Ala. 159.

Arkansas. — Warner *v.* Capps, 37 Ark. 32.

Connecticut. — Limbert *v.* Fenn, 32 Conn. 158, allegation that plaintiff is a trustee is surplusage.

Delaware. — Covington *v.* Simpson, 3 Pennew. 269, 52 Atl. 349.

Illinois. — Searles *v.* Crombie, 28 Ill. 396 (unless defendant shows right to immediate possession); Gilson *v.* Wood, 20 Ill. 37.

Louisiana. — Gardiner *v.* Thibodeau, 14 La. Ann. 732.

Maine. — Craig *v.* Gilbreth, 47 Me. 416; Brown *v.* Ware, 25 Me. 411, unless defendant shows superior title in himself.

New Jersey. — Outcalt *v.* Durling, 25 N. J. L. 443.

New York. — Wheeler *v.* Lawson, 103 N. Y. 40, 8 N. E. 360; Kissam *v.* Roberts, 6 Bosw. 154; Sickles *v.* Gould, 51 How. Pr. 22; Butts *v.* Collins, 13 Wend. 139; Cook *v.* Howard, 13 Johns. 276 (sufficient against all but true owner); Hoyt *v.* Gelston, 13 Johns. 141 [*affirmed* in 13 Johns. 561 (*affirmed* in 3 Wheat. (U. S.) 246, 4 L. ed. 381)].

Pennsylvania. — Cunningham *v.* Ritter, 4 Kulp 381.

Tennessee. — Carson *v.* Prater, 6 Coldw. 565; Criner *v.* Pike, 2 Head 398.

Texas. — Willis *v.* Hudson, 63 Tex. 678.

Vermont. — Wooley *v.* Edson, 35 Vt. 214; Potter *v.* Washburn, 13 Vt. 558, 37 Am. Dec. 615 (possession, being title against all the world but the owner); Fisher *v.* Cobb, 6 Vt. 622.

title,[75] although another person has title,[76] and although the possession is wrongful against persons other than defendant.[77]

(5) Legal Title and Rights Less Than Legal Title With no Actual Possession in Any One. Unrestricted title to personalty is sufficient to maintain trespass where there is no one in actual possession,[78] but not title acquired subsequent to the trespass.[79]

(6) Legal Title and Rights Less Than Legal Title to Personalty Held by Another, But Not Adversely. Legal title to personalty which is in the possession of another is considered sufficient where the holding is under the owner and he has right to immediate possession,[80] or a right less than the legal

West Virginia.— Wustland *v.* Potterfield, 9 W. Va. 438.

Wisconsin.— Emerson *v.* Thompson, 59 Wis. 619, 18 N. W. 503; Kemp *v.* Seely, 47 Wis. 687, 3 N. W. 830 (*prima facie* evidence of title); Rogan *v.* Perry, 6 Wis. 194.

England.— Haggan *v.* Pasley, L. R. 2 Ir. 573.

See 46 Cent. Dig. tit. "Trespass," § 46.

Necessity for completing possession.— Where possession alone is relied on the taking of possession must have been completed and momentary possession in course of a struggle to take possession between two servants is not enough (Peachey *v.* Wing, 5 L. J. K. B. O. S. 55), nor pursuit of a wild fox with hounds (Pierson *v.* Post, 3 Cai. (N. Y.) 175, 2 Am. Dec. 264), nor partial surrounding of a shoal of mackerel with a seine (Young *v.* Hichens, 6 Q. B. 606, D. & M. 592, 51 E. C. L. 606).

Loss of possession.— Where a horse taken up as an estray strays again completely out of possession, the possession is lost (Bayless *v.* Lefaivre, 37 Mo. 119); but a horse is not lost to possession merely from being at large on the range (Boston *v.* Neat, 12 Mo. 125), or straying into a neighbor's field (Criner *v.* Pike, 2 Head (Tenn.) 398).

75. Hurd *v.* West, 7 Cow. (N. Y.) 752 (plaintiff purchaser from one without title); Cummings *v.* Friedman, 65 Wis. 183, 26 N. W. 575, 56 Am. Rep. 628.

Rule applied in case of mere bailee.— Thompson *v.* Spinks, 12 Ala. 155; Bradley *v.* Davis, 14 Me. 44, 30 Am. Dec. 729; Laing *v.* Nelson, 41 Minn. 521, 43 N. W. 476; Strong *v.* Adams, 30 Vt. 221, 73 Am. Dec. 305.

76. *Alabama.*— Terry *v.* Williams, 148 Ala. 468, 41 So. 804; W. K. Syson Timber Co. *v.* Dickens, 146 Ala. 471, 40 So. 753, possession must be rightful.

Massachusetts.— Cowing *v.* Snow, 11 Mass. 415, bailee holding for a lien-holder; action for a taking by the owner.

New York.— Bass *v.* Pierce, 16 Barb. 595 (plaintiff hired by owner of cow to keep her in his pasture in the daytime and defendant taking her therefrom); Matthews *v.* Smith's Express Co., 1 Misc. 238, 23 N. Y. Suppl. 132 (plaintiff expressman in possession to move goods for owners); Paddock *v.* Wing, 16 How. Pr. 547 (holding that plaintiff in possession is the "real party in interest" under the statutes requiring that suit be brought by such).

Vermont.— Taylor *v.* Hayes, 63 Vt. 475, 21 Atl. 610, plaintiff a husband in actual possession of his wife's cow.

United States.— Cuttner *v.* Pacific Steam Whaling Co., 96 Fed. 617, plaintiff's seamen remaining on a vessel abandoned by the captain and the rest of the crew.

England.— Moore *v.* Robinson, 2 B. & Ad. 817, 1 L. J. K. B. 4, 22 E. C. L. 344, 109 Eng. Reprint 1346 (plaintiff master of a canal-boat); Colwill *v.* Reeves, 2 Campb. 575 (plaintiff ship-keeper in possession for sale or return).

77. Barron *v.* Cobleigh, 11 N. H. 557, 35 Am. Dec. 505 (possession wrongful against the true owner); Criner *v.* Pike, 2 Head (Tenn.) 398.

Possession of a horse taken up as an estray is sufficient, although the statute was not complied with. Boston *v.* Neat, 12 Mo. 125. But see Bayless *v.* Lefaivre, 37 Mo. 119.

78. *Alabama.*— Boswell *v.* Carlisle, 70 Ala. 244, no intervening adverse right of enjoyment.

Georgia.— Crenshaw *v.* Moore, 10 Ga. 384.

Kentucky.— Walton *v.* Clarke, 4 Bibb. 218.

New York.— Goff *v.* Kilts, 15 Wend. 550, title to bees which have swarmed and entered a tree on another's land, the owner following and marking it.

Vermont.— Bailey *v.* Quint, 22 Vt. 474, title after lien of a sawyer of logs is waived by loss of possession.

See 46 Cent. Dig. tit. "Trespass," § 47.

79. Imlay *v.* Sage, 5 Conn. 489; Wilson *v.* Haley Live-Stock Co., 153 U. S. 39, 14 S. Ct. 768, 38 L. ed. 627, plaintiff a corporation not organized till after the trespass.

80. *Alabama.*— Cook *v.* Thornton, 109 Ala. 523, 20 So. 14.

Delaware.— Covington *v.* Simpson, 3 Pennew. 269, 52 Atl. 349.

Florida.— McRaeny *v.* Johnson, 2 Fla. 520.

Kentucky.— Daniel *v.* Holland, 4 J. J. Marsh. 18.

Maryland.— Young *v.* Mertens, 27 Md. 114, property held by common carrier; action by vendor of goods consigned to another but refused by the consignee.

New Hampshire.— Morse *v.* Pike, 15 N. H. 529.

North Carolina.— Carson *v.* Noblet, 4 N. C. 136, 6 Am. Dec. 554.

Pennsylvania.— Talmadge *v.* Scudder, 38 Pa. St. 517; Dallam *v.* Fitler, 6 Watts & S.

title.[81] Rights less than legal title which do not give right of possession are not sufficient to maintain trespass, as a mere right *in personam* against the owner or person in possession;[82] but a right *in rem* to possession is sufficient.[83]

(c) *Estoppel.* Defendant may be estopped to deny plaintiff's title.[84] But denial of possession in ejectment does not conclude defendant in an action of trespass.[85]

3. Rights Acquired by a Trespasser.[86] A mere trespasser on land acquires no

323 (assignees for benefit of creditors); Hower *v.* Geesaman, 17 Serg. & R. 251.

South Carolina.— Poole *v.* Mitchell, 1 Hill 404.

Vermont.— Hayward Rubber Co. *v.* Dunklee, 30 Vt. 29; Shloss *v.* Cooper, 27 Vt. 623 (in hands of dealer to "sell or return on demand"); Chaffee *v.* Sherman, 26 Vt. 237 (in hands of peddler, owner having right to immediate possession); Swift *v.* Moseley, 10 Vt. 208, 33 Am. Dec. 197.

England.— White *v.* Morris, 11 C. B. 1015, 16 Jur. 500, 21 L. J. C. P. 185, 73 E. C. L. 1015, assignment to plaintiff in trust to allow assignor to hold till default and then trustee to sell.

Canada.— Harvey *v.* Cotter, 3 Nova Scotia Dec. 161, possession by insolvent by permission of the assignee.

The rule has been applied where the property was held by the agent (Thomas *v.* Snyder, 23 Pa. St. 515; Thomas *v.* Philips, 7 C. & P. 573, 32 E. C. L. 765, cow purchased by one commissioned by plaintiff to buy a cow for her, although plaintiff had not assented to the purchase or ever received the cow); or servants of the owner (Willis *v.* Hudson, 63 Tex. 678); or by a bailee where the owner had the immediate right to possession (Davis *v.* Young, 20 Ala. 151; Overby *v.* McGee, 15 Ark. 459, 63 Am. Dec. 49; Atlantic, etc., R. Co. *v.* Fuller, 48 Ga. 423; Long *v.* Bledsoe, 3 J. J. Marsh. (Ky.) 307; Staples *v.* Smith, 48 Me. 470; Bradley *v.* Davis, 14 Me. 44, 30 Am. Dec. 729; Stanley *v.* Gaylord, 1 Cush. (Mass.) 536, 48 Am. Dec. 643; Root *v.* Chandler, 10 Wend. (N. Y.) 110, 25 Am. Dec. 546; Orser *v.* Storms, 9 Cow. (N. Y.) 687, 18 Am. Dec. 543; White *v.* Griffin, 49 N. C. 139; White *v.* Morris, 8 N. C. 301; Strong *v.* Adams, 30 Vt. 221, 73 Am. Dec. 305; Potter *v.* Washburn, 13 Vt. 558, 37 Am. Dec. 615; Lotan *v.* Cross, 2 Campb. 464, holding that the action lies even against the bailee); but not if the bailment is for a term which has not expired (Lunt *v.* Brown, 13 Me. 236; McFarland *v.* Smith, Walk. (Miss.) 172).

The mortgagee may maintain an action for trespass, although the property was held by a mortgagor, where the mortgage does not expressly or impliedly give the mortgagor the right to possession. Dunlap *v.* Steele, 80 Ala. 424; Boswell *v.* Carlisle, 70 Ala. 244; Codman *v.* Freeman, 3 Cush. (Mass.) 306. And see Porter *v.* Flintoff, 6 U. C. C. P. 335.

The vendee may maintain trespass, although delivery has not been made (Parsons *v.* Dickinson, 11 Pick. (Mass.) 352; Beals *v.* Guernsey, 8 Johns. (N. Y.) 446, 5 Am. Dec. 348; Poole *v.* Mitchell, 1 Hill (S. C.) 404; Forman *v.* Dawes, C. & M. 127, 41 E. C. L. 75); even against the vendor (Smith *v.* Sherwood, 2 Tex. 460, although thing given to vendor in exchange was destroyed before delivered; Edwards *v.* Edwards, 11 Vt. 587, 34 Am. Dec. 711).

81. Boynton *v.* Turner, 13 Mass. 391, holding that hiring a chaise by an infant gives his father who ratifies the act and, being entitled to his wages, directs him to pay the hire, a right to maintain an action against one who injures it.

82. Thornton *v.* Dwight Mfg. Co., 137 Ala. 211, 34 So. 187 (statutory vendor's lien on timber, after delivery to the purchaser); Ledbeter *v.* Blassingame, 31 Ala. 495 (right of vendee of wagon made to order, before delivery); Thompson *v.* Spinks, 12 Ala. 155 (statutory right of landlord to attach a crop grown on the leased land to secure his rent); Wilson *v.* Wilson, 37 Md. 1, 11 Am. Rep. 518 (right by verbal agreement purporting to convey after-acquired property, to property acquired thereafter); Merrill *v.* Hunnewell, 13 Pick. (Mass.) 213 (right to a definite number of brick, part of a mass and not separated or designated specially); Waldron *v.* Haupt, 52 Pa. St. 408 (right as vendor of property sold and delivered but not paid for); Payne *v.* Ulmer, 1 Walk. (Pa.) 516 (mere right to take ice from a canal).

83. Woodruff *v.* Halsey, 8 Pick. (Mass.) 333, 19 Am. Dec. 329 (mortgage even before condition broken); Buck *v.* Aikin, 1 Wend. (N. Y.) 466, 19 Am. Dec. 535; Roberts *v.* Messinger, 134 Pa. St. 298, 19 Atl. 625 (statutory right of widow and children to retain property of a certain value free from claims of creditors, although there has been no administration).

84. Russell *v.* Gray, 11 Barb. (N. Y.) 541 (holding that defendant in replevin who recovers judgment for the value of the property and collects it cannot deny title of plaintiffs therein in an action by such plaintiff for a subsequent taking by such defendant); Darby *v.* Anderson, 1 Nott & M. (S. C.) 369 (holding that where defendant claims under a lease from plaintiffs' guardian which he had no right to make, defendant cannot dispute their right); Houston *v.* Howard, 39 Vt. 54 (holding that if property is returned to the owner's custody after attachment, the attaching creditor is estopped against a subsequent attachment to deny that it is the creditor's).

85. Crockett *v.* Lashbrook, 5 T. B. Mon. (Ky.) 530, 17 Am. Dec. 98.

86. **Title acquired by owner by change of form of personalty** see Accession, 1 Cyc. 222 *et seq.*

rights in the property trespassed upon, against the owner of the land,[87] nor right against the owner to compensation for benefit rendered by the trespass,[88] the owner being entitled to the fruits of the trespass.[89] And recovery of damages for the breaking and entering only does not vest in defendant title to part of the realty severed by him.[90] Nor does the severance from the realty give title to the thing severed, even against a stranger, and the trespasser can therefore bring no action if to maintain it he must establish the ownership.[91] In general a trespasser who takes and holds possession of land for a period short of an adverse holding for the period of the statute of limitations acquires no rights against the owner to improvements therein,[92] but by statute in some states possession for a shorter time gives a right to the value of improvement made by the trespasser.[93] Defendant in trespass *de bonis* does not acquire title to the goods before the judgment is satisfied,[94] but satisfaction of the judgment vests the title in him,[95] which relates back to the time of taking.[96] A trespasser, however, who has obtained possession of the property, whether it be real or personal, may maintain any action which can be supported by merely establishing possession,[97] and may be described as owner in an indictment for larceny;[98] and an owner who is out of possession cannot transfer his title, unless he is aided by statute.[99]

4. Persons Entitled to Sue. Generally speaking any person may maintain trespass to realty who has sufficient possession of the land [1] as a trustee,[2] although only trustee *de facto*.[3] Any one in actual possession, although the title is in another,

87. *Alabama.*— Stewart *v.* Tucker, 106 Ala. 319, 17 So. 385, holding that preparing land for a crop does not divest the true owner's possession or right to plant a crop, nor give the trespasser a right against the landowner for taking the crop planted by the trespasser.

Illinois.— Cook *v.* Foster, 7 Ill. 652, holding that intrusion on public domain does not dispossess the sovereign, and so the purchaser of the land gets title and can sue for a removal thereafter by the trespasser of a house built by him thereon.

Kansas.— Kansas Pac. R. Co. *v.* Mihlman, 17 Kan. 224, holding that one who enters and trespasses on land by digging a ditch does not acquire any right to restore it to its former condition.

Kentucky.— Burris *v.* Johnson, 1 J. J. Marsh. 196, holding that it is not a trespass for a landowner to take the frame of a boat made from timber cut on his land.

Wisconsin.— Warner *v.* Fountain, 28 Wis. 405, holding that trespass will not lie against a landowner who obtains possession of and removes a house built by mistake on his land.

See 46 Cent. Dig. tit. "Trespass," 2.

88. Busch *v.* Fisher, 89 Mich. 192, 50 N. W. 788.

89. Stewart *v.* Tucker, 106 Ala. 319, 17 So. 385.

90. Thus title to trees cut does not pass (Loomis *v.* Green, 7 Me. 386), although made into charcoal (Curtis *v.* Groat, 6 Johns. (N. Y.) 168, 5 Am. Dec. 204); it was so held in case of compromise of an action, although the amount paid was equal to the value of the trees severed (Betts *v.* Lee, 5 Johns. (N. Y.) 348, 4 Am. Dec. 368).

91. Brock *v.* Smith, 14 Ark. 431; Tubbs *v.* Lynch, 4 Harr. (Del.) 521 (holding that occupants of state lands are trespassers and so cannot maintain an action against each other); Murphy *v.* Sioux City, etc., R. Co., 55 Iowa 473, 8 N. W. 320, 39 Am. Rep. 175 (holding that entry on land and cutting and stacking hay thereon gives no right of action for its destruction by a person not the landowner).

92. Houston, etc., R. Co. *v.* Adams, 63 Tex. 200.

93. Brown *v.* Ware, 25 Me. 411, in which it was held that where in an action of entry by the owner the intruder is paid for betterments, he is not then entitled to timber cut by a third person during his possession, as that does not enter into the estimated value of the betterments, but he is entitled to trees cut by himself, as the value of such trees has been considered in the estimate of betterments.

94. Goldsmith *v.* Stetson, 39 Ala. 183; Jones *v.* McNeil, 2 Bailey (S. C.) 466.

95. Schindel *v.* Schindel, 12 Md. 108; Thurst *v.* West, 31 N. Y. 210.

96. Smith *v.* Smith, 51 N. H. 571, holding that on satisfaction of a judgment in trespass for conversion of chattels trespass lies for a recaption by the owner after judgment but before satisfaction.

97. See *infra*, I, A, 2, d, (III), (B), (4).

98. See Larceny, 25 Cyc. 89.

99. See Deeds, 13 Cyc. 528.

1. See *supra*, I, A, 2, d, (I), (A).

2. Kellogg *v.* King, 114 Cal. 378, 46 Pac. 166, 55 Am. St. Rep. 74 (trustee holding as lessee; he need not join the *cestuis*); Barber *v.* District No. 4 School Trustees, 51 Ill. 396 (holding that school trustees holding legal title in their corporate capacity can sue in their corporate capacity); Alford *v.* Stanford, 13 Ky. L. Rep. 876 (trustee with legal title); Rogers *v.* White, 1 Sneed (Tenn.) 68 (holding that the trustee may maintain the action as the party seized, although the *cestui* is in actual occupation of the land).

3. Mallett *v.* White, 52 Conn. 50 (a person

may maintain the action. Thus a wife in possession may sue, although the title is in her husband;[4] a widow in possession, although the title is in the heirs of her deceased husband;[5] a husband in actual possession of his wife's land, and he need not join his wife;[6] a mother in actual possession of her child's land as next friend or natural guardian;[7] a guardian in possession of the land of his ward;[8] a minister in possession of land occupied by him as a parsonage;[9] an assignee of equity of redemption in possession;[10] a tenant by the curtesy;[11] or an administrator in actual possession of chattels.[12] So a corporation in possession of land may maintain an action of trespass.[13] Personal representatives of a deceased owner cannot sue for acts of trespass done before his death, since the action does not survive;[14] but if the action survives by statute the personal representative may sue;[15] but

in actual possession as trustee of a society not legally formed may sue); Green *v.* Cady, 9 Wend. (N. Y.) 414; Walker *v.* Fawcett, 29 N. C. 44 (holding that a trustee not legally appointed but having actual title and possession may sue).

4. Lesch *v.* Great Northern R. Co., 97 Minn. 503, 106 N. W. 955, 7 L. R. A. N. S. 93; Ford *v.* Schliessman, 107 Wis. 479, 83 N. W. 761. And see cases cited *infra*, this note.

Applications of rule.— She may maintain trespass as for entry on the house during the temporary absence of her husband (Ford *v.* Schliessman, 107 Wis. 479, 83 N. W. 761); or even for entry on the house occupied by herself and husband as husband and wife, resulting in injury to her from nervous excitement (Engle *v.* Simmons, 148 Ala. 92, 41 So. 1023, 121 Am. St. Rep. 59, 7 L. R. A. N. S. 96); or in fright and mental anguish and illness (Watson *v.* Dilts, 116 Iowa 249, 89 N. W. 1068, 93 Am. St. Rep. 239, 57 L. R. A. 559; Lesch *v.* Great Northern R. Co., 97 Minn. 503, 106 N. W. 955, 7 L. R. A. N. S. 93).

Entry on wife's land.—*A fortiori* the wife may sue for entry on her own land, she being *sui juris* (Hickey *v.* Welch, 91 Mo. App. 4; Lyon *v.* Green Bay, etc., R. Co., 42 Wis. 548; Boos *v.* Gomber, 23 Wis. 284, holding that there is no presumption from her husband's residence on the land with her and aid to her in cultivation of the land that he is in possession); or for levy of execution against her husband on the grain on her land, although on purchase of the land on credit she pays nothing down, and she has no separate estate and her husband manages the land for her (Dayton *v.* Walsh, 47 Wis. 113, 2 N. W. 65, 32 Am. Rep. 757); or for taking personalty in her actual possession given her by her husband (Cummings *v.* Friedman, 65 Wis. 183, 26 N. W. 575, 56 Am. Rep. 628).

5. Byrne *v.* Van Hoesen, 5 Johns. (N. Y.) 66 [*affirmed* in 2 Wend. 157]; Frisbee *v.* Marshall, 122 N. C. 760, 30 S. E. 21; International, etc., R. Co. *v.* Timmermann, 61 Tex. 660, so clearly if she is entitled by statute to homestead in the land.

Possession of chattels.— So she may maintain an action for trespass to his chattels where she was in actual possession of his chattels, worth less than three hundred dollars, without administration. Cunningham *v.* Ritter, 4 Kulp (Pa.) 381.

6. McCarty *v.* Gray, 95 Ill. App. 559; Brown *v.* Benjamin, 8 Allen (Mass.) 197; Albin *v.* Lord, 39 N. H. 196; Collins *v.* Turner, 1 Tex. App. Civ. Cas. § 517.

Injury to personalty.— The husband may maintain trespass for injury to the wife's personalty in his possession. Taylor *v.* Hayes, 63 Vt. 475, 21 Atl. 610.

7. Johnson *v.* McGillis, 7 U. C. Q. B. 309.

8. Parks *v.* Dial, 56 Tex. 261.

9. Cargill *v.* Sewall, 19 Me. 288. But not without such possession. Cox *v.* Walker, 26 Me. 504.

10. Fernald *v.* Linscott, 6 Me. 234.

11. Clark *v.* Welton, 1 Root (Conn.) 299.

12. Covington *v.* Simpson, 3 Pennew. (Del.) 269, 52 Atl. 349.

13. Greenville, etc., R. Co. *v.* Partlow, 14 Rich. (S. C.) 237.

A municipal corporation having jurisdiction over highways may maintain trespass for injury to a bridge. Wellington County Corp. *v.* Wilson, 16 U. C. C. P. 124. Such an action will lie in favor of the corporation against its own members who have injured the property by an *ultra vires* act of trespass. South Dist. School Section No. 16 *v.* Cameron, 2 Can. Sup. Ct. 690 (unlawfully moving a schoolhouse); St. George's Church *v.* Cougle, 12 N. Brunsw. 609 (unlawfully dismantling church; but in New Brunswick the corporation is in possession of the real estate only if there is a vacancy; if there is a rector he is in possession and must sue); St. Stephen's Church *v.* Tortelot, 3 N. Brunsw. 537.

If the corporation is de facto in possession of land claiming title, the mere trespasser cannot dispute its existence or its right to hold the land. Golden Gate Mill, etc., Co. *v.* Joshua Hendy Mach. Works, 82 Cal. 184, 23 Pac. 45.

14. Marcy *v.* Howard, 91 Ala. 133, 8 So. 566; O'Conner *v.* Corbitt, 3 Cal. 370; Spruill *v.* Branning Mfg. Co., 130 N. C. 42, 40 S. E. 824; Dobbs *v.* Cullidge, 20 N. C. 197. So at common law the heir could not sue for a trespass committed during the lifetime of his ancestor. McClain *v.* Todd, 5 J. J. Marsh. (Ky.) 335, 22 Am. Dec. 37.

15. Pittsburgh, etc., R. Co. *v.* Swinney, 97 Ind. 586; Bell *v.* Clark, 30 Mo. App. 224; Hone *v.* Hamilton, Ir. R. 9 C. L. 15; Grant *v.* Wolfe, 32 Nova Scotia 444. But not the heir. Dobbs *v.* Gullidge, 20 N. C. 197.

a joint tenant gets no new title on the death of the other tenant and so can maintain trespass for such acts.[16] An action of trespass not being assignable, an assignee of the action cannot sue,[17] except where authorized by statute.[18] In an action for personal injury to a wife the husband must be a party.[19]

5. Persons Liable[20]— a. Property-Owners. The owner of land is not liable for acts done thereon by others in which he takes no part,[21] and the mortgagee of personalty who has not taken possession is not liable for allowing it to remain on plaintiff's realty.[22] But the owner of a house is liable for its encroachment on plaintiff's land.[23]

b. The Person Actually Doing or Aiding in the Doing of the Act. The person who actually does the act is liable, although he was acting for another person,[24] and, in general, any one who aids or coöperates with another in the commission of a trespass is liable for it.[25]

c. Persons Taking no Part in the Actual Doing of the Act — (I) *In General.* In general where the act of trespass is done by one person other independent persons are not liable for the act.[26] When, however, the act is done by one under

16. Spruill *v.* Branning Mfg. Co., 130 N. C. 42, 40 S. E. 824.

17. Galt *v.* Chicago, etc., R. Co., 157 Ill. 125, 41 N. E. 643.

18. Grant *v.* Smith, 26 Mich. 201; Chouteau *v.* Boughton, 100 Mo. 406, 13 S. W. 877.

The assignment must be before the beginning of the action to authorize its maintenance. Dean *v.* Metropolitan El. R. Co., 119 N. Y. 540, 23 N. E. 1054.

19. Lamb *v.* Harbaugh, 105 Cal. 680, 39 Pac. 56.

20. **Corporations** see Corporations, 10 Cyc. 1212 *et seq.*

Counties see Counties, 11 Cyc. 498 *et seq.*

Customs officers for detention of goods see Customs Duties, 12 Cyc. 1136, 1137.

Infants see Infants, 22 Cyc. 620.

Municipal corporations see Municipal Corporations, 28 Cyc. 1295.

21. McDonald *v.* Lester, 30 N. Brunsw. 137, holding that a wife owning a house is not liable for trespasses resulting from her husband's management of it.

22. Campbell *v.* Reid, 14 U. C. Q. B. 305.

23. Hofferberth *v.* Myers, 42 N. Y. App. Div. 183, 59 N. Y. Suppl. 88, and tenant is not liable.

24. Davison *v.* Shanahan, 93 Mich. 486, 53 N. W. 624; Lightner *v.* Brooks, 15 Fed. Cas. No. 8,344, 2 Cliff. 287.

Extent and limits of rule.— An independent contractor building a house for the owner of the land is liable for trespasses on adjoining land committed in the course of the work (Kinser *v.* Dewitt, 7 Ind. App. 597, 34 N. E. 1014; Davison *v.* Shanahan, 93 Mich. 486, 53 N. W. 624; Ritter *v.* Sieger, 105 Pa. St. 400; Wallace *v.* New Castle, etc., R. Co., 11 Pa. Co. Ct. 347. So a servant is liable equally with his master, although acting solely for his master (Lightner *v.* Brooks, 15 Fed. Cas. No. 8,344, 2 Cliff. 287), or agent with his principal (Baker *v.* Davis, 127 Ga. 649, 57 S. E. 62; Burns *v.* Horkan, 126 Ga. 161, 53 S. E. 946; Diamond *v.* Smith, 27 Tex. Civ. App. 558, 66 S. W. 141); and a person acting by direction of another is liable equally with the person directing (Meloon *v.* Read, 75 N. H. 153, 59 Atl. 946). But an agent is not liable for the wrongful continuance of an erection made by him on another's land for his principal, whether the erection was originally lawful but thereafter became a trespass, or the wrongful erection was a trespass. Lyman *v.* Dorr, 1 Aik. (Vt.) 217.

25. *Alabama.*— Carter *v.* Fulgham, 134 Ala. 238, 32 So. 684.

Arkansas.— Clark *v.* Bales, 15 Ark. 452.

Delaware.— Quillen *v.* Betts, 1 Pennew. 53, 39 Atl. 595.

Georgia.— Markham *v.* Brown, 37 Ga. 277, 92 Am. Dec. 73; Brooks *v.* Ashburn, 9 Ga. 297.

Kentucky.— Prince *v.* Flynn, 2 Litt. 240.

Maine.— Muzzey *v.* Davis, 54 Me. 361.

Missouri.— Allred *v.* Bray, 41 Mo. 484, 97 Am. Dec. 283.

New York.— Smith *v.* Felt, 50 Barb. 612.

Virginia.— Peshine *v.* Shepperson, 17 Gratt. 472, 94 Am. Dec. 468.

West Virginia.— Shepherd *v.* McQuilkin, 2 W. Va. 90.

Wisconsin.— Gerhardt *v.* Swaty, 57 Wis. 24, 14 N. W. 851.

See 46 Cent. Dig. tit. "Trespass," §§ 69, 70.

26. *Louisiana.*— Bright *v.* Bell, 113 La. 1078, 37 So. 976, members of a municipal board not liable for acts of fellow members in which they take no part.

New Jersey.— McCauley *v.* Wood, 2 N. J. L. 86, father not liable for acts of his son.

Pennsylvania.—Whitney *v.* Backus, 149 Pa. St. 29, 24 Atl. 51 (stock-holder not liable for acts of the corporation); Strohl *v.* Levan, 39 Pa. St. 177 (father not liable for act of son).

Vermont.— Davenport *v.* Newton, 71 Vt. 11, 42 Atl. 1087 (director taking no part in act of corporation not liable for such act); Langdon *v.* Bruce, 27 Vt. 657 (tenant not liable for act of cotenant).

England.— Peacock *v.* Young, 21 L. T. Rep. N. S. 527, 18 Wkly. Rep. 134, candidate not liable for act of election mob.

Canada.— Dever *v.* South Bay Boom Co., 14 N. Brunsw. 109 (holding that a boom

the control and direction of defendant, the latter is liable for the trespass.[27] So, where the act is done by an independent contractor, the other party is not liable for it when it was not authorized in any way by the contract.[28] When an officer of the law, acting in excess of authority, commits a trespass, those who have authorized him to act are not generally responsible for his trespass.[29] If, however, the officer is expressly authorized to do the act which is a trespass, the person giving the authority may be held liable for the trespass.[30] The judgment creditor

company in whose boom are logs under immediate charge of their owners is not liable for damage done by the logs); Kingston *v.* Wallace, 25 N. Brunsw. 573 (holding that laying an information does not render one liable for unauthorized acts of the court or its officers done in the course of the prosecution); Smith *v.* Evans, 13 U. C. C. P. 60.

See 46 Cent. Dig. tit. "Trespass," § 69.

A person present at a trespass but taking no part in it is not liable for it. Strohl *v.* Levan, 39 Pa. St. 177; Roche *v.* Milwaukee Gaslight Co., 5 Wis. 55; Berry *v.* Fletcher, 3 Fed. Cas. No. 1,357, 1 Dill. 67.

One having mere knowledge of a contemplated trespass and allowing the use of his personalty for the doing it is not liable for the trespass. Heitzman *v.* Divil, 11 Pa. St. 264; Holder *v.* McGarrigle, 15 N. Brunsw. 62.

Liability for damage by a hunt.—One member of a hunt is not generally liable for acts of another (Paget *v.* Birkbeck, 3 F. & F. 683); but he is if he purposely leads the others on plaintiff's land (Hill *v.* Walker, 2 Peake N. P. 234), or invites them to go out with his hounds (Baker *v.* Berkeley, 3 C. & P. 32, 14 E. C. L. 436).

27. West Chicago St. R. Co. *v.* Morrison, etc., Co., 160 Ill. 288, 43 N. E. 393 (corporation liable for acts of dummy corporation owned and controlled by it); Bloomfield R. Co. *v.* Van Slike, 107 Ind. 480, 8 N. E. 269 (corporation liable for acts done by a receiver during the receivership).

28. *Georgia.*— Parker *v.* Waycross, etc., R. Co., 81 Ga. 387, 8 S. E. 871.

Indiana.— Kinser *v.* Dewitt, 7 Ind. App. 597, 34 N. E. 1014.

Michigan.— Davison *v.* Shanahan, 93 Mich. 486, 53 N. W. 624.

New Jersey.— Slingerland *v.* East Jersey Water Co., 58 N. J. L. 411, 33 Atl. 843.

Pennsylvania.— Wallace *v.* New Castle, etc., R. Co., 11 Pa. Co. Ct. 347.

Vermont.— Benton *v.* Beattie, 63 Vt. 186, 22 Atl. 422.

Canada.— Payne *v.* Fredericton R. Co., 13 N. Brunsw. 497.

Under what circumstances liability of acts of independent contractor attaches.— If the party authorized the specific act, he is liable, although it was committed by an independent contractor (Tyler *v.* Tehama County, 109 Cal. 618, 42 Pac. 240; Crisler *v.* Ott, 72 Miss. 166, 16 So. 416; Walters *v.* Hamilton, 75 Mo. App. 237); so, also, if he keeps control of the work (Dale *v.* Southern R. Co., 132 N. C. 705, 44 S. E. 399; Reynolds *v.* Braithwaite, 131 Pa. St. 416, 18 Atl. 1110); or if the contract could not be performed unless the act of trespass was committed (Ketchum *v.* Cohn, 2 Misc. (N. Y.) 427, 22 N. Y. Suppl. 181); but in that case it must appear clearly that the contract could not be performed without the trespass (Murdfeldt *v.* New York, etc., R. Co., 102 N. Y. 703, 7 N. E. 404); or was a necessary consequence of it (Northern Trust Co. *v.* Palmer, 70 Ill. App. 93 [*affirmed* in 171 Ill. 383, 49 N. E. 553]).

29. Collins *v.* Ferris, 14 Johns. (N. Y.) 246; Hammon *v.* Fisher, 2 Grant (Pa.) 330. And see cases cited *infra*, this note.

Applications of rule.— An attorney in an action is not liable in general for acts done by an officer outside the authority of a writ issued therein (Ford *v.* Williams, 13 N. Y. 577, 67 Am. Dec. 83; Hammon *v.* Fisher, 2 Grant (Pa.) 330; Marks *v.* Culmer, 6 Utah 419, 24 Pac. 528; Sowell *v.* Champion, 6 A. & E. 407, 7 L. J. Q. B. 197, 2 N. & P. 627, W. W. & D. 667, 33 E. C. L. 226, 112 Eng. Reprint 156); nor is the justice suing the writ liable for such acts of such officer (Collins *v.* Ferris, 14 Johns. (N. Y.) 246); nor is the judgment plaintiff liable for such acts of such officer (Sutherland *v.* Ingalls, 63 Mich. 620, 30 N. W. 342, 6 Am. St. Rep. 332; Adams *v.* Freeman, 9 Johns. (N. Y.) 117; Marks *v.* Culmer, 6 Utah 419, 24 Pac. 528); and so a landlord is not liable for a seizure of the wrong person's goods by a bailiff (Becker *v.* Dupree, 75 Ill. 167).

30. Inos *v.* Winspear, 18 Cal. 397; Hay *v.* Collins, 118 Ga. 243, 44 S. E. 1002; Cunningham *v.* Coyle, 2 Tex. App. Civ. Cas. § 422.

Liability of attorney.— If the attorney directed the doing of the specific act by the officer, he is liable in trespass. Ford *v.* Williams, 24 N. Y. 359; Cunningham *v.* Coyle, 2 Tex. App. Civ. Cas. § 422; Marks *v.* Culmer, 6 Utah 419, 24 Pac. 528; Power *v.* Fleming, Ir. R. 4 C. L. 404; McClevertie *v.* Massie, 21 U. C. C. P. 516; Benson *v.* Connor, 6 U. C. C. P. 356; Phillips *v.* Findlay, 27 U. C. Q. B. 32; Radenhurst *v.* McLean, 4 U. C. Q. B. O. S. 281.

Liability of justice.— The justice of a court of limited jurisdiction issuing a void writ is liable for acts done within its command. Inos *v.* Winspear, 18 Cal. 397; Perry *v.* Mitchell, 5 Den. (N. Y.) 537; Vosburgh *v.* Welch, 11 Johns. (N. Y.) 175; Case *v.* Shepherd, 2 Johns. Cas. (N. Y.) 27; McVea *v.* Walker, 11 Tex. Civ. App. 46, 31 S. W. 839.

Liability of party.— A party who directed the specific act of trespass by the officer is liable in trespass. Inos *v.* Winspear, 18 Cal. 397; Hay *v.* Collins, 118 Ga. 243, 44 S. E. 1002; Olsen *v.* Upsahl, 69 Ill. 273; McNeeley *v.* Hunton, 30 Mo. 332; Marks *v.* Culmer, 6

is in general liable for a seizure of goods authorized by his attorney,[31] general authority to collect the claim given to the attorney being enough to make the client responsible.[32] The state cannot be sued in trespass, but a plea that defendant was acting for the state does not make the action one against the state.[33]

(II) *Persons For Whom the Act Is Done by Another Person.*[34] A person is liable for trespasses of his agents or servants done with his knowledge,[35] or by his consent, given either before or after the act,[36] or by his direction,[37] or instigation,[38] or acting within the scope of their authority conferred by him.[39] So a master is liable if a trespass is the natural and probable result of orders given by him to his servant,[40] or if he ratifies a trespass committed by his servant or agent.[41] There can be no ratification unless the act was done for defend-

Utah 419, 24 Pac. 528; McClevertie *v.* Massie, 21 U. C. C. P. 516; Phillips *v.* Findlay, 27 U. C. Q. B. 32; Cameron *v.* Lount, 4 U. C. Q. B. 275. Where defendant directed the sheriff to attach certain property in plaintiff's possession, but not to take possession of it, he is liable in trespass; the question being what the process authorized him to do, not what he privately instructed the officer to do. Corner *v.* Mackintosh, 48 Md. 374.

31. Gillingham *v.* Clark, 1 Phila. (Pa.) 51; Morris *v.* Salberg, 22 Q. B. D. 614, 53 J. P. 772, 58 L. J. Q. B. 275, 61 L. T. Rep. N. S. 283, 37 Wkly. Rep. 469; Jarmain *v.* Hooper, 1 D. & L. 769, 8 Jur. 127, 13 L. J. C. P. 63, 6 M. & G. 827, 46 E. C. L. 827. But see Smith *v.* Keal, 9 Q. B. D. 349, 47 L T. Rep. N. S. 142, 31 Wkly. Rep. 79 [*affirming* 9 Q. B. D. 340, 47 J. P. 615, 51 L. J. Q. B. 487, 31 Wkly. Rep. 76].

32. Wilkinson *v.* Harvey, 15 Ont. 346; Slaght *v.* West, 25 U. C. Q. B. 391. On this general principle it has been held that a person causing goods to be impounded is liable for their wrongful sale by an officer. Cate *v.* Cate, 44 N. H. 211.

33. Elmore *v.* Fields, 153 Ala. 345, 45 So. 66, 127 Am. St. Rep. 31.

34. And see, generally, Master and Servant, 26 Cyc. 1518 *et seq.*; Principal and Agent, 31 Cyc. 1583 *et seq.*

35. Exum *v.* Brister, 35 Miss. 391.

36. Carle *v.* White Haven Ice Co., 4 Pa. Dist. 289, 15 Pa. Co. Ct. 546, 7 Kulp 429.

37. *Alabama.*— Gilliland *v.* Martin, (1906) 42 So. 7; Fulgham *v.* Carter, 142 Ala. 227, 37 So. 932.

Connecticut.— Thames Steamboat Co. *v.* Housatonic R. Co., 24 Conn. 40, 63 Am. Dec. 154.

New Hampshire.— Searle *v.* Parke, 68 N. H. 311, 34 Atl. 744.

New York.— Blake *v.* Jerome, 14 Johns. 406; Heermance *v.* Vernoy, 6 Johns. 5.

Oregon.— Swackhamer *v.* Johnson, 39 Oreg. 383, 65 Pac. 91, 54 L. R. A. 625.

Vermont.— Andrus *v.* Howard, 36 Vt. 248, 84 Am. Dec. 680.

United States.— Lightner *v.* Brooks, 15 Fed. Cas. No. 8,344, 2 Cliff. 287.

See 34 Cent. Dig. tit. "Master and Servant," § 1229.

38. Bell *v.* Troy, 35 Ala. 184; Wilkins *v.* Gilmore, 2 Humphr. (Tenn.) 140.

39. *Alabama.*— Alabama State Land Co. *v.* Slaton, 120 Ala. 259, 24 So. 720.

California.— Roberts *v.* Hall, 147 Cal. 434, 82 Pac. 66.

Georgia.— Crockett *v.* Sibley, 3 Ga. App. 554, 60 S. E. 326.

Massachusetts.— Barnes *v.* Hurd, 11 Mass. 57.

Missouri.— Mishler Lumber Co. *v.* Craig, 112 Mo. App. 454, 87 S. W. 41.

New York.— Reed *v.* New York, etc., Gas Co., 93 N. Y. App. Div. 453, 87 N. Y. Suppl. 810.

Pennsylvania.— Gerwig *v.* W. J. Johnston Co., 207 Pa. St. 585, 57 Atl. 42; McKnight *v.* Ratcliff, 44 Pa. St. 156.

Tennessee.— Luttrell *v.* Hazen, 3 Sneed 20.

Texas.— Jesse French Piano, etc., Co. *v.* Phelps, 47 Tex. Civ. App. 385, 105 S. W. 225; Ft. Worth, etc., R. Co. *v.* Smith, (Civ. App. 1894) 25 S. W. 1032.

Vermont.— Small *v.* Ball, 47 Vt. 486; Andrus *v.* Howard, 36 Vt. 248, 84 Am. Dec. 680; Hill *v.* Morey, 26 Vt. 178; May *v.* Bliss, 22 Vt. 477.

Wisconsin.— Ehrmantrout *v.* McMahon, 78 Wis. 138, 47 N. W. 305.

United States.— Guttner *v.* Pacific Steam Whaling Co., 96 Fed. 617.

Canada.—McKay *v.* Botsford, 10 N. Brunsw. 550; Ferguson *v.* Roblin, 17 Ont. 167.

See 34 Cent. Dig. tit. "Master and Servant," § 1229.

In England trespass lies only where the act is specifically ordered by the master; otherwise the remedy is by an action on the case. Gauntlett *v.* King, 3 C. B. N. S. 59, 91 E. C. L. 59; Sharrod *v.* London, etc., R. Co., 7 D. & L. 213, 4 Exch. 580, 11 Jur. 23, 6 R. & Can. Cas. 239.

In Ohio, it was held that where defendant directed his workmen to erect a fence on his land adjoining that of plaintiff, and by mistake they erected the fence on plaintiff's land, defendant was not guilty of a trespass, having neither done the act himself nor ordere that it be done. Keller *v.* Mosser, Tapp. 43.

40. Carle *v.* White Haven Ice Co., 4 Pa. Dist. 289, 15 Pa. Co. Ct. 546, 7 Kulp 429; Andrus *v.* Howard, 36 Vt. 248, 84 Am. Dec. 680. And see Thames Steamboat Co. *v.* Housatonic R. Co., 24 Conn. 40, 63 Am. Dec. 154.

41. Exum *v.* Brister, 35 Miss. 391; Mishler Lumber Co. *v.* Craig, 112 Mo. App. 454, 87 S. W. 41; Whitney *v.* Backus, 149 Pa. St. 29, 24 Atl. 51; Carle *v.* White Haven Ice Co., 4 Pa. Dist. 289, 15 Pa. Co. Ct. 546, 7 Kulp

ant,[42] or at least purported to be done for him.[43] But a principal is not liable for acts of a servant or agent done outside the scope of his authority,[44] or while acting under orders of a third person.[45]

(III) *Persons at Whose Orders, or by Whose Authorization, Encouragement, Direction, or the Like, the Act Is Done by Another Person.* The person authorizing the doing of an act of trespass by another is liable, whether the authorization is express,[46] or implied.[47] And one

429; Holder *v.* McGarrigle, 15 N. Brunsw. 62.

Requisites of ratification.— The ratification must be with full knowledge of the tortious character of the act (Burns *v.* Campbell, 71 Ala. 271, mere appropriation of proceeds not enough; Freeman *v.* Rosher, 13 Q. B. 780, 18 L. J. Q. B. 340, 66 E. C. L. 780); and before action brought (Burns *v.* Campbell, 71 Ala. 271; Heller *v.* North, etc., R. Co., 148 Pa. St. 563, 24 Atl. 114).

Particular acts held sufficient to ratify.— Failure to dissent within reasonable time. Kent County Agricultural Soc. *v.* Ide, 128 Mich. 423, 87 N. W. 369. Acceptance of the proceeds of the trespass with knowledge of the trespass. Ferriman *v.* Fields, 3 Ill. App. 252; Hower *v.* Ulrich, 156 Pa. St. 410, 27 Atl. 37; Voss *v.* Baker, 28 Fed. Cas. No. 17,012, 1 Cranch C. C. 104; McKay *v.* Botsford, 10 N. Brunsw. 550. On this ground it has been held that on seizure of goods by the sheriff, interpleading by judgment creditor on claim of goods by a third person ratifies the sheriff's trespass. May *v.* Howland, 19 U. C. Q. B. 66. See also Cotton *v.* Stokes, 10 U. C. Q. B. 262. But see *contra*, Phillips *v.* Findlay, 27 U. C. Q. B. 32. So it has been held a ratification of the sheriff's act that the principal went on his indemnity bond, told him to sell, and attended and bid at the sale (Gray *v.* Fortune, 18 U. C. Q. B. 253. But see *contra*, McLeod *v.* Fortune, 19 U. C. Q. B. 98); and directing the sheriff to retain an unauthorized wrongful levy is a ratification (Root *v.* Chandler, 10 Wend. (N. Y.) 110, 25 Am. Dec. 546).

Whether doctrine of ratification applies to personal tort has been doubted. Adams *v.* Freeman, 9 Johns. (N. Y.) 117.

42. Lewis *v.* Johns, 34 Cal. 629; Crockett *v.* Sibley, 3 Ga. App. 554, 60 S. E. 326; Olsen *v.* Upsahl, 69 Ill. 273; Smith *v.* Lozo, 42 Mich. 6, 3 N. W. 227.

Payment for benefit as affecting rule.— This general rule is not altered by the fact that defendant, after knowledge of an act which, although not in fact done for his benefit, or purporting to be done for him, does in fact benefit him, pays for the benefit. Reed *v.* Rich, 49 Ill. App. 262; Brown *v.* Peaslee, 69 N. H. 458, 43 Atl. 591.

43. Grund *v.* Van Vleck, 69 Ill. 478; Justice *v.* Mendell, 14 B. Mon. (Ky.) 12; Fox *v.* Jackson, 8 Barb. (N. Y.) 355; Wilson *v.* Tummon, 1 D. & L. 513, 12 L. J. C. P. 306, 6 M. & G. 236, 6 Scott N. R. 894, 46 E. C. L. 236.

Application of rule.— On this ground it has been held that ratification by judgment plaintiff of a seizure by a sheriff cannot be ratified if plaintiff has not directed it, since the sheriff acts for the court, not for the litigant. Wilson *v.* Tummon, 1 D. & L. 513, 12 L. J. C. P. 306, 6 M. & G. 236, 6 Scott N. R. 894, 46 E. C. L. 236; Tilt *v.* Jarvis, 7 U. C. C. P. 145.

44. Hower *v.* Ulrich, 156 Pa. St. 410, 27 Atl. 37; McKnight *v.* Ratcliff, 44 Pa. St. 156. Agent to manage a farm has no authority to cut away adjoining land to widen and straighten a stream. Bolingbroke *v.* Swindon New Town Local Bd., L. R. 9 C. P. 575, 43 L. J. C. P. 287, 30 L. T. Rep. N. S. 723, 23 Wkly. Rep. 47.

45. Swackhamer *v.* Johnson, 39 Oreg. 383, 65 Pac. 91, 54 L. R. A. 625.

46. Donovan *v.* St. Louis Consol. Coal Co., 88 Ill. App. 589 [*affirmed* in 187 Ill. 28, 58 N. E. 290, 79 Am. St. Rep. 206] (granting a right to take coal); Couch *v.* Texas, etc., R. Co., 99 Tex. 464, 90 S. W. 860 (giving permission to take water from plaintiff's spring).

Licensing persons to cut trees on plaintiff's land renders the licensor liable (Cook *v.* American Exch. Bank, 129 N. C. 149, 39 S. E. 746; Chandler *v.* Spear, 22 Vt. 388), although acting under supposed authority as public agents (State *v.* Smith, 78 Me. 260, 4 Atl. 412, 57 Am. Rep. 802).

47. Marshall *v.* Eggleston, 82 Ill. App. 52; Sanborn *v.* Sturtevant, 17 Minn. 200.

Implied authority is given by pointing out plaintiff's steer to a third person as one sold by defendant to him, to the third person to kill him (Hamilton *v.* Hunt, 14 Ill. 472); by stopping of trains by a railroad on a common, for passengers and shippers to use common to get the train (Allegheny *v.* Ohio, etc., R. Co., 26 Pa. St. 355); by claim of plaintiff's land by a father, for his son to enter and occupy under the claim, where the father knows and does not object (Binda *v.* Benbow, 11 Rich. (S. C.) 24); or by a lease of plaintiff's land to lessee to enter and exercise rights of lessee (Marshall *v.* Eggleston, 82 Ill. App. 52; Snow *v.* McCormick, 43 Ill. App. 537; Russell *v.* Fabyan, 34 N. H. 218; London *v.* Bear, 84 N. C. 266). So a sale of part of plaintiff's realty is an implied authorization to enter and take it (Oswalt *v.* Smith, 97 Ala. 627, 12 So. 604; Meehan *v.* Edwards, 19 S. W. 179, 13 Ky. L. Rep. 803, 92 Ky. 574, 18 S. W. 519, 13 Ky. L. Rep. 803; Sanborn *v.* Sturtevant, 17 Minn. 200; Dreyer *v.* Ming, 23 Mo. 434; Wall *v.* Osborn, 12 Wend. (N. Y.) 39; Kolb *v.* Bankhead, 18 Tex. 228); but no such implied authority is given, by a conveyance of the land itself, as to make the grantor liable in trespass for the entry of the grantee (Sullivan *v.* Davis, 29 Kan. 28; Bourguignon *v.* Destre-

who orders the doing of a trespass,[48] advises it,[49] encourages, procures, or incites it,[50] or conspires with the actual doer for the doing of it [51] is liable, but mere leave and license will not render one liable.[52] Defendant need not be personally present to be liable under the foregoing rules,[53] and it is immaterial that the person directing the act was not benefited by it.[54] And therefore a person who as agent of another person directs the doing of the act is liable for it, although he is not personally interested in the act and does not benefit from it.[55]

(IV) *REPRESENTATIVES OF DECEASED TRESPASSERS.*[56] At common law trespass to realty does not survive against the trespasser's representatives, but by statute in some states the executor or administrator is liable for actual damages.[57]

6. DEFENSES — a. Justification. Where defendant had a right to do the act his motive is generally immaterial;[58] but the act must have been done in the intentional exercise of the right.[59] The fact that a third person also trespassed on the land,[60] or that his wrongful act contributed to the damage,[61] is no defense; and trespass to plaintiff's personalty may not be justified by proceedings in executing the judgment obtained by defendant against a third party.[62] A right to build a house on another's land cannot be acquired by prescription and so is no defense.[63]

han, 5 La. 115; Caughie *v.* Brown, 88 Minn. 469, 93 N. W. 656; McClanahan *v.* Stephens, 67 Tex. 354, 3 S. W. 312; Pattison *v.* Tingley, 10 N. Brunsw. 553).

48. *Delaware.*— Quillen *v.* Betts, 1 Pennew. 53, 39 Atl. 595.

Illinois.— Northern Trust Co. *v.* Palmer, 171 Ill. 383, 49 N. E. 553; Olsen *v.* Upsahl, 69 Ill. 273.

Missouri.— Holliday *v.* Jackson, 30 Mo. App. 263.

New Hampshire.— Meloon *v.* Read, 72 N. H. 153, 59 Atl. 946.

Pennsylvania.— Reed *v.* Vastine, 1 Northumb. Co. Leg. N. 115.

Wisconsin.— Schrubbe *v.* Connell, 69 Wis. 476, 34 N. W. 503.

United States.— Berry *v.* Fletcher, 3 Fed. Cas. No. 1,357, 1 Dill. 67.

Canada.— Holder *v.* McGarrigle, 15 N. Brunsw. 62.

49. Quillen *v.* Betts, 1 Pennew. (Del.) 53, 39 Atl. 595.

50. *Delaware.*— Quillen *v.* Betts, 1 Pennew. 53, 39 Atl. 595.

Georgia.— Burns *v.* Horkan, 126 Ga. 161, 54 S. E. 946.

Kansas.— Sharpe *v.* Williams, 41 Kan. 56, 20 Pac. 497.

Maryland.— Medairy *v.* McAllister, 97 Md. 488, 55 Atl. 461.

Missouri.— McMannus *v.* Lee, 43 Mo. 206, 97 Am. Dec. 386.

Pennsylvania.— McGill *v.* Ash, 7 Pa. St. 397.

Tennessee.— Cox *v.* Crumley, 5 Lea 529; Luttrell *v.* Hazen, 3 Sneed 20.

West Virginia.— Shaver *v.* Edgell, 48 W. Va. 502, 37 S. E. 664.

See 46 Cent. Dig. tit. "Trespass," § 69.

51. Burns *v.* Horkan, 126 Ga. 161, 54 S. E. 946.

52. Robinson *v.* Vaughton, 8 C. & P. 252, 34 E. C. L. 718.

53. Ferguson *v.* Terry, 1 B. Mon. (Ky.) 96; Cox *v.* Crumley, 5 Lea (Tenn.) 529.

54. Woodbridge *v.* Conner, 49 Me. 353, 77 Am. Dec. 263; Sanborn *v.* Sturtevant, 17 Minn. 200; Coats *v.* Darby, 2 N. Y. 517; Hardrop *v.* Gallagher, 2 E. D. Smith (N. Y.) 523; Blake *v.* Jerome, 14 Johns. (N. Y.) 406; Reed *v.* Vastine, 1 Northumb. Co. Leg. N. (Pa.) 115.

55. Morgan *v.* Langford, 126 Ga. 58, 54 S. E. 818; Chase *v.* Cochran, 102 Me. 431, 67 Atl. 320 (selectmen of a town acting for the town without right); Blaen Avon Coal Co. *v.* McCulloh, 59 Md. 403, 43 Am. Rep. 560; Hardrop *v.* Gallagher, 2 E. D. Smith 523.

56. See, generally, ABATEMENT, 1 Cyc. 10.

57. Cotter *v.* Plumer, 72 Wis. 476, 40 N. W. 379.

58. Stearns *v.* Sampson, 59 Me. 568, 8 Am. Rep. 442 (holding that intent of a landlord in reëntering after expiration of tenancy is immaterial; as that he concealed his intent to remove the tenant till after the entry was effected); Harvard College *v.* Stearns, 14 Gray (Mass.) 1 (holding that defendant, having a right to tear down a fence across his right of way to a navigable stream, did so in order to fill up the creek and thus commit a nuisance is immaterial); Slingerland *v.* Gillespie, 70 N. J. L. 720, 59 Atl. 162 (holding that the fact that defendant resisted the moving of pipe across land in her charge to hinder plaintiff in the use of his right of way for the laying of the pipe is immaterial); Oakes *v.* Wood, 6 L. J. Exch. 200, M. & H. 237, 2 M. & W. 791 (holding that the motive of a keeper of a public house for expelling a person creating a disturbance is immaterial).

59. Davis *v.* Lennon, 8 U. C. Q. B. 599, holding that the owner of premises is liable for an assault not committed for the purpose of expelling the intruder.

60. Wetzel *v.* Satterwhite, (Tex. Civ. App. 1910) 125 S. W. 93.

61. Wheeler *v.* Norton, 84 N. Y. Suppl. 524 [*affirmed* in 92 N. Y. App. Div. 368, 86 N. Y. Suppl. 1095].

62. Totten *v.* Dreier, (N. J. Sup. 1910) 75 Atl. 778.

63. Cortelyou *v.* Van Brundt, 2 Johns. (N. Y.) 357, 3 Am. Dec. 439.

b. Waiver. An action for the value of the thing severed from realty waives the trespass,[64] but giving a bond to dissolve an attachment writ does not waive a trespass committed in levying the attachment.[65]

c. Custom. Custom is not a good defense to an unlawful act.[66]

d. Injunction. An injunction against plaintiff forbidding him to assert any rights in land is a good defense in trespass, although an appeal is pending;[67] but an injunction in plaintiff's favor against further trespass by defendant will not prevent recovery for trespasses whether done prior to or during the period covered by it,[68] nor the pendency of another action in the United States courts involving title to property in plaintiff's possession but to which defendant is not a party.[69]

e. Benefit to Property. A trespasser on real estate may not, when compensation is demanded for his trespass, urge in defense that he has benefited plaintiff by his wrongful acts.[70]

f. Acts Subsequent to the Trespass. An accord and satisfaction is a good defense,[71] but acts subsequent to the trespass not in satisfaction or release of the right of action are not a defense;[72] and a return of goods wrongfully taken by defendant will not bar an action for the taking;[73] nor will acceptance of a tender of damages under the statute,[74] a retaking of them by plaintiff,[75] obtaining possession by purchase under protest at their sale by defendant,[76] nor paying pound fees to obtain them.[77] Where an act is a public as well as a private wrong a pardon will not relieve from civil liability.[78]

g. Wrongful Acts of Plaintiff — (i) *In General.* Where property was transferred by the owner in fraud of creditors, a taking by a creditor without legal process is a trespass as he cannot avoid the sale except by legal process;[79] but a taking under a levy against the former owner is not.[80] Fraudulent confusion by plaintiff of his goods with those defendant had a right to take is not a defense to a taking of plaintiff's goods if they could be distinguished.[81] Plaintiff's failure to pay for goods sold and delivered is no defense in trespass for taking them.[82] A trespass is justified when committed from necessity arising without defendant's fault and from plaintiff's wrong,[83] or from accident caused by plaintiff or one with

64. Cobb *v.* Griffith, etc., Sand, etc., Co., 87 Mo. 90.

65. Walsh *v.* Brown, 194 Mass. 317, 80 N. E. 465.

66. Evans *v.* Hesler, 1 Bibb (Ky.) 561 (custom to set dogs on trespassing animals); Nudd *v.* Hobbs, 17 N. H. 524 (inhabitants of town entering and taking seaweed).

67. Day *v.* Holland, 15 Oreg. 464, 15 Pac. 855.

68. Miller *v.* Rambo, 73 N. J. L. 726, 64 Atl. 1053.

69. Farnsworth *v.* Western Union Tel. Co., 3 Silv. Sup. (N. Y.) 30, 6 N. Y. Suppl. 735.

70. Pinney *v.* Winchester, (Conn. 1910) 76 Atl. 994.

71. Heirn *v.* Carron, 11 Sm. & M. (Miss.) 361, 49 Am. Dec. 65, tender of damages and agreement by plaintiff to accept them in satisfaction. And see ACCORD AND SATISFACTION, 1 Cyc. 310.

72. Henson *v.* Taylor, 108 Ga. 567, 33 S. E. 911 (holding that an offer by plaintiff to return defective goods, not accepted by defendant, does not bar an action for a subsequent taking by defendant against plaintiff's protest); Feuerstein *v.* Jackson, 8 Ohio Cir. Ct. 396, 4 Ohio Cir. Dec. 516 (holding that where defendant unlawfully changed the grade of the street in front of plaintiff's lot, a subsequent resolution of the city altering the grade still more is no defense); Brooks *v.* Olmstead, 17 Pa. St. 24 (holding that purchase of an animal wrongfully taken by defendant does not bar the action for the taking where the question of damages for that was reserved).

73. Warner *v.* Capps, 37 Ark. 32; Walker *v.* Fuller, 29 Ark. 448 (considered in mitigation of damages); Hanmer *v.* Wilsey, 17 Wend. (N. Y.) 91; Knott *v.* Barker, Anstr. 896.

74. Brown *v.* Mead, 68 Vt. 215, 34 Atl. 950, only payment *pro tanto*.

75. Champion *v.* Vincent, 20 Tex. 811.

76. Ford *v.* Williams, 24 N. Y. 359.

77. Coffin *v.* Field, 7 Cush. (Mass.) 355.

78. Hedges *v.* Price, 2 W. Va. 192, 94 Am. Dec. 507.

79. McGee *v.* Campbell, 7 Watts (Pa.) 545, 32 Am. Dec. 783.

80. Billings *v.* Thomas, 114 Mass. 570; Milburn *v.* Beach, 14 Mo. 104, 55 Am. Dec. 91; Jones *v.* Lake, 2 Wis. 210; Ashby *v.* Minnitt, 8 A. & E. 121, 7 L. J. Q. B. 133, 3 N. & P. 231, 1 W. W. & H. 155, 35 E. C. L. 511, 112 Eng. Reprint 782.

81. Colwill *v.* Reeves, 2 Campb. 575.

82. Ives *v.* Humphreys, 1 E. D. Smith (N. Y.) 196.

83. Haley *v.* Colcord, 59 N. H. 7, 47 Am.

whom he is in privity.[84] In trespass to realty it is not a defense that plaintiff's act enhanced the injury.[85] Plaintiff's wrongful act does not justify an act not necessary to prevent it,[86] nor an act of aggression rather than of mere defense.[87] Entry on plaintiff's land to prevent his committing murder is justifiable,[88] but not to prevent a breach of the peace.[89]

(II) *ILLEGAL USE OF REALTY.* It is no excuse for trespass on plaintiff's property that he is making an illegal use of it,[90] or intends to put it to an illegal use if it is not actually so used already,[91] or an immoral use.[92]

(III) *ESTOPPEL BY CONDUCT.* Failure of plaintiff to oppose or object to a trespass is not a defense,[93] at least, if plaintiff does not know of the trespass.[94] Failure to notify defendant that he is trespassing does not operate as an estoppel;[95] but acceptance of compensation for the *locus* as a highway will estop plaintiff from denying that it is such.[96] Defendant may be estopped to set up a defense otherwise good.[97]

Rep. 176 (holding that obstruction of a private way over plaintiff's land justifies passing over another part of the land); Gulf, etc., R. Co. *v.* Insurance Co. of North America, (Tex. Civ. App. 1894) 28 S. W. 237 (injury by common carrier to goods presented for shipment but refused as badly packed, done in separating them from other freight with which they had been improperly mixed).

84. Roche *v.* Milwaukee Gaslight Co., 5 Wis. 55, injury to plaintiff's lamp post erected in a city street by its permission, caused by bad condition of the street.

85. Henley *v.* Wilson, 81 N. C. 405, holding, however, that it might mitigate damages.

86. Ball *v.* Axten, 4 F. & F. 1019, holding that a landowner has no right to seize a trespasser who is departing from the land and detain him to compel him to give his name and address.

87. Simpson *v.* Morris, 4 Taunt. 821, holding that it is no defense to throwing water over plaintiff that it was done to prevent her obstructing an ancient window in defendant's house.

88. Handcock *v.* Baker, 2 B. & P. 260, 5 Rev. Rep. 587.

89. Rockwell *v.* Murray, 6 U. C. Q. B. 412.

90. Schwartz *v.* McQuaid, 214 Ill. 357, 73 N. E. 582, 105 Am. St. Rep. 112 (holding that the use of leased premises for sale of liquor without a license does not *ipso facto* and without judicial proceeding annul the lease); Earp *v.* Lee, 71 Ill. 193 (holding that the fact that plaintiff is engaged in the unlawful sale of liquor and keeps a disorderly house is no defense to an entry and tearing down the house and breaking personalty); Wilson *v.* Sullivan, 77 S. W. 193, 25 Ky. L. Rep. 1110 (holding that the fact that a ferry company is engaged in a pool or combination prohibited by statute is no excuse for a trespass by defendant on its lands).

91. Gulf, etc., R. Co. *v.* Johnson, 71 Tex. 619, 9 S. W. 602, 1 L. R. A. 730 (injury to gambling implements); Fowler *v.* Harrison, 39 Wash. 617, 81 Pac. 1055 (destruction of fish traps which somewhat obstructed the channel of a navigable stream and the law to maintain which had not been fully complied with).

92. Love *v.* Moynehan, 16 Ill. 277, 63 Am. Dec. 306, keeping a bawdy-house.

93. *Indiana.*— Strickler *v.* Midland R. Co., 125 Ind. 412, 25 N. E. 455, holding that although failure to oppose entry and building of a railroad prevents an action of ejectment or for injunction, trespass lies.

Minnesota.— Woll *v.* Voigt, 105 Minn. 371, 117 N. W. 608, 23 L. R. A. N. S. 270 (holding that a trespasser on land cannot claim, by reason of his unlawful occupation thereof for less than the limitation period, that the real owner, although with knowledge of the same, is estopped to sue for wrongful acts committed); Leber *v.* Minneapolis, etc., R. Co., 29 Minn. 256, 13 N. W. 31 (immaterial that plaintiff saw the trespasser).

Mississippi.— Currie *v.* Natchez, etc., R. Co., 61 Miss. 725, mere acquiescence by plaintiff after forbidding an entry on his land.

Vermont.— Wooley *v.* Edson, 35 Vt. 214, failure to oppose taking of oxen from plaintiff's possession under attachment against another.

Wisconsin.— Blesch *v.* Chicago, etc., R. Co., 43 Wis. 183, failure to seek injunction against building a railroad on a street in front of plaintiff's lot.

But see Rankin *v.* Sievern, etc., R. Co., 58 S. C. 532, 36 S. E. 997.

94. Enterprise Transit Co. *v.* Hazelwood Oil Co., 20 Pa. Super. Ct. 127, digging a well on plaintiff's land neither party knowing the location of the boundary.

95. Marshall *v.* Eggleston, 82 Ill. App. 52.

96. Karber *v.* Nellis, 22 Wis. 215.

97. Dunlap *v.* Steele, 80 Ala. 424 (holding that after levy and sale of goods as property of the mortgagor, the mortgagee cannot assert title in himself in them); Goodwin *v.* Fall, 102 Me. 353, 66 Atl. 727 (holding that the grantee of a right to cut trees may be estopped to assert his right by his representations by reason of which the limits of the right were described); Darlington *v.* Pritchard, 2 Dowl. P. C. N. S. 664, 7 Jur. 677, 12 L. J. C. P. 34, 4 M. & G. 783, 5 Scott N. R. 610, 43 E. C. L. 404 (holding that a lease and notice to quit from defendant estop him to assert title in another);

h. Rights In Rem of Defendant to Realty in the Possession of Another — (I) *Title* — (A) *In General.* Subject to the limitation which prevails in some jurisdictions that the entry must be peaceable,[98] it is very generally held that title with right of possession is in general a good defense for an entry by the owner on realty in possession of another,[99] or for an entry by one in privity with the

Caverhill *v.* Robillard, 2 Can. Sup. Ct. 575 (holding that acquiescence for sixteen years by defendant in the maintenance of a wharf by plaintiff on public property where known to defendant estops him to assert a right to remove it).

One doing acts by authority of vendee of land in possession is not estopped to deny vendor's title. Smith *v.* Babcock, 36 N. Y. 167, 93 Am. Dec. 498.

98. See *infra*, I, A, 6, h, (I), (D).

99. *California.*— Henderson *v.* Grewell, 8 Cal. 581.

Illinois.— Ryan *v.* Sun Sing Chow Poy, 164 Ill. 259, 45 N. E. 497; Lee *v.* Mound Station, 118 Ill. 304, 8 N. E. 759; Ft. Dearborn Lodge No. 214 I. O. O. F. *v.* Klein, 115 Ill. 177, 3 N. E. 272, 56 Am. Rep. 133; Illinois, etc., R., etc., Co. *v.* Cobb, 94 Ill. 55; Dean *v.* Comstock, 32 Ill. 173; White *v.* Naerup, 57 Ill. App. 114; Bloomington *v.* Brophy, 32 Ill. App. 400; Brooke *v.* O'Boyle, 27 Ill. App. 384.

Indiana.— Culver *v.* Smart, 1 Ind. 65, Smith 50.

Kentucky.— Yeates *v.* Allin, 2 Dana 134; Crockett *v.* Lashbrook, 5 T. B. Mon. 530, 17 Am. Dec. 98.

Maine.— Stearns *v.* Sampson, 59 Me. 568, 8 Am. Rep. 442.

Maryland.—Manning *v.* Brown, 47 Md. 506.

Minnesota.—Sharon *v.* Wooldrick, 18 Minn. 354.

Missouri.— Cox *v.* Barker, 81 Mo. App. 181; Barbarick *v.* Anderson, 45 Mo. App. 270, wild land of which the owner has never had possession.

New Hampshire.— Brown *v.* Peaslee, 69 N. H. 436, 45 Atl. 234.

New Jersey.— Mayhew *v.* Ford, 61 N. J. L. 532, 39 Atl. 914.

New York.—McDougall *v.* Sticher, 1 Johns. 42, title as purchaser at sheriff's sale.

North Carolina.—Walton *v.* File, 18 N. C. 567.

Pennsylvania.— Leidy *v.* Proctor, 97 Pa. St. 486; Barnes *v.* Dean, 5 Watts 543, 30 Am. Dec. 346.

Wisconsin.— Lyon *v.* Fairbank, 79 Wis. 455, 48 N. W. 492, 24 Am. St. Rep. 732 (force); Toomey *v.* Kay, 62 Wis. 104, 22 N. W. 286.

England.— Taylor *v.* Cole, 124 Bl. 555, 3 T. R. 292, 1 Rev. Rep. 706, 100 Eng. Reprint 582.

Canada.— Doyle *v.* Walker, 26 U. C. Q. B. 502.

See 46 Cent. Dig. tit. "Trespass," § 59.

Landlord and tenant — *Peaceable entry.*— The landlord when entitled to possession is not liable in trespass for peaceable entry on the premises to a lessee holding over (Snedecor *v.* Pope, 143 Ala. 275, 39 So. 318; White *v.* Naerup, 57 Ill. App. 114; Jones *v.* Foley, [1891] 1 Q. B. 730, 55 J. P. 521, 60 L. J. Q. B. 464, 64 L. T. Rep. N. S. 538, 39 Wkly. Rep. 510); and one who is entitled to the possession of premises can remove the property left there by a previous tenant, if he exercises care in doing so as the nature of the property demands; and if he leaves it in such a condition that the owner, by reasonable diligence, can take it uninjured, he is not bound to house it or otherwise protect it until the owner sees fit to take possession (U. S. Manufacturing Co. *v.* Stevens, 52 Mich. 330, 17 N. W. 934); after a peaceable reëntry the landlord may remain and remove doors and windows and the tenant's furniture (Stearns *v.* Sampson, 59 Me. 568, 8 Am. Rep. 442).

Forcible entry.— In some jurisdictions a forcible entry by a landlord entitled to possession does not entitle the tenant to maintain an action of trespass (Hyatt *v.* Wood, 4 Johns. (N. Y.) 150, 4 Am. Dec. 258; Wilde *v.* Cantillon, 1 Johns. Cas. (N. Y.) 123; Overdeer *v.* Lewis, 1 Watts & S. (Pa.) 90, 37 Am. Dec. 440), unless he uses unnecessary violence (Overdeer *v.* Lewis, 1 Watts & S. (Pa.) 90, 37 Am. Dec. 440).

License.— After revoking a license to occupy a house on the land, a licensee is not liable in trespass for entry and injury to it, although the house was built and occupied by the occupant by license of the landowner. Harris *v.* Gillingham, 6 N. H. 9, 23 Am. Dec. 701. And see Dolittle *v.* Eddy, 7 Barb. (N. Y.) 74.

Trespasser.— As against a mere intruder, who has not acquired a lawful possession, entry by the owner gives no right of action for trespass. Hoots *v.* Graham, 23 Ill. 81; Browne *v.* Dawson, 12 A. & E. 624, 10 L. J. Q. B. 7, 4 P. & D. 355, 40 E. C. L. 312, 113 Eng. Reprint 950.

Sufficiency of title.— Title as mortgagee is sufficient (Blaney *v.* Bearce, 2 Me. 132; Chellis *v.* Stearns, 22 N. H. 312; Gibbs *v.* Cruikshank, L. R. 8 C. P. 454, 42 L. J. C. P. 273, 28 L. T. Rep. N. S. 735, 21 Wkly. Rep. 734); and so is a title voidable by a third person (Brown *v.* Pinkham, 18 Pick. (Mass.) 172); or, as against a mere licensee, a title as to which the evidence of the grantor's power to convey was slight (Blaisdell *v.* Morse, 75 Me. 542); but not an after-acquired title (Moore *v.* Crose, 43 Ind. 30; Kilborn *v.* Rewee, 8 Gray (Mass.) 415; Higgins *v.* Reynolds, 31 N. Y. 151; Buck *v.* Aikin, 1 Wend. (N. Y.) 466, 19 Am. Dec. 535; Davis *v.* Elmore, 40 S. C. 533, 19 S. E. 204); nor a deed from a corporation not shown to have power to receive and convey title (Kimball *v.* Shoemaker, 82 Iowa 459, 48 N. W. 925); or a void tax title (Trexler *v.* Africa, 33 Pa. Super. Ct.

owner,[1] or an obstruction by the owner of access to the land,[2] or an entry and removal of a part of the realty by the owner,[3] although attached to the realty by the person in possession.[4] The weight of authority seems to be that such title is a good defense, although the person in possession has equitable right to the land.[5] But where the person in possession has right of possession against the owner, title is not a defense to an entry by the owner;[6] to one acting by his orders;[7] for a severance of things part of the realty by the owner of the land;[8]

395); or an unregistered deed of release and quitclaim (Pattison *v.* Tingley, 10 N. Brunsw. 553); nor a title lost by the statute of limitations, either against the holder of the title (Argotsinger *v.* Vines, 82 N. Y. 308; Crowell *v.* Bebee, 10 Vt. 33, 33 Am. Dec. 172); or even a mere possessor (Percival *v.* Chase, 182 Mass. 371, 65 N. E. 800).

1. Clark *v.* Beach, 6 Conn. 142 (licensee); Jones *v.* Columbus Water Lot Co., 18 Ga. 539; Danforth *v.* Briggs, 89 Me. 316, 36 Atl. 452; Howe *v.* Lewis, 14 Pick. (Mass.) 329 (lessee).

2. Doty *v.* Chicago, etc., R. Co., 137 Iowa 689, 114 N. W. 522.

3. Ford *v.* Rountree, 3 Ga. App. 80, 59 S. E. 325 (cutting trees); Glynn *v.* George, 20 N. H. 114 (removing a barn after expiration of a license to occupy).

4. Floyd *v.* Ricks, 14 Ark. 285, 58 Am. Dec. 374 (holding that a subsequent purchaser of United States land may take crops planted by an intruder); Rasor *v.* Qualls, 4 Blackf. (Ind.) 286, 30 Am. Dec. 658 (holding that such purchaser may take crops planted by one whose preëmption right has expired since the planting); Fagan *v.* Scott, 14 Hun (N. Y.) 162 (removal by vendor of land after failure of vendee to make second payment and after notice to remove).

5. Dean *v.* Comstock, 32 Ill. 173; Hunter *v.* Hatton, 4 Gill (Md.) 115, 45 Am. Dec. 117; Bick *v.* Hill, 27 Mo. App. 554; Darby *v.* Anderson, 1 Nott & M. (S. C.) 369. And see cases cited *infra*, this note. *Contra*, Skinner *v.* Terry, 134 N. C. 305, 46 S. E. 517.

Applications of rule — *Equitable right to a conveyance.*— Hunter *v.* Hatton, 4 Gill (Md.) 115, 45 Am. Dec. 117 (purchase under judicial sale before deed); Henley *v.* Wilson, 77 N. C. 216 (holding that possession under a deed conveying only a life-estate instead of a fee as intended gives an equitable right to a conveyance, not an equitable estate, and is not sufficient against a subsequent grantee of the vendee).

Contract for purchase.— Possession under bond for a conveyance is not sufficient against a subsequent grantee of the obligor of the bond (Dean *v.* Comstock, 32 Ill. 173); although he took with notice (Gatewood *v.* Head, 2 Litt. (Ky.) 60); nor against the obligor himself (Walton *v.* File, 18 N. C. 567. *Contra*, Smith *v.* Price, 42 Ill. 399).

6. *Kentucky.*— Hope *v.* Cason, 3 B. Mon. 544.

Nebraska.— Ellsworth *v.* McDowell, 44 Nebr. 707, 62 N. W. 1082.

New Jersey.— Phillips *v.* Kent, 23 N. J. L. 155.

New York.— O'Horo *v.* Kelsey, 60 N. Y. App. Div. 604, 70 N. Y. Suppl. 14.

England.— Ryan *v.* Clarke, 7 D. & L. 8, 13 Jur. 1000, 18 L. J. Q. B. 267.

Possession under valid lease.— A valid lease gives the occupant a good right to possession against his lessor (West Chicago St. R. Co. *v.* Morrison, etc., Co., 160 Ill. 288, 43 N. E. 393; Lowrey *v.* Reef, 1 Ind. App. 244, 27 N. E. 626; Blake *v.* Coats, 3 Greene (Iowa) 548; Warner *v.* Abbey, 112 Mass. 355, lease on shares; Dickinson *v.* Goodspeed, 8 Cush. (Mass.) 119, tenant at will whose estate has not been legally terminated; Eten *v.* Luyster, 60 N. Y. 252; Morgan *v.* Powers, 83 Hun (N. Y.) 298, 31 N. Y. Suppl. 954, entry by landlord before expiration of notice to quit; Barneycastle *v.* Walker, 92 N. C. 198, forcible entry during the term; Wilber *v.* Paine, 1 Ohio 251, parol lease; Kretzer *v.* Wysong, 5 Gratt. (Va.) 9; Jolly *v.* Single, 16 Wis. 280, forfeiture waived; McNeil *v.* Train, 5 U. C. Q. B. 91, tenant at will); or one in privity with him (Lathrop *v.* Rogers, 1 Ind. 554, holding that the right to fixed rent or half the crop does not justify grantee of reversion in turning in hogs without notice of election; Salimonie Min., etc., Co. *v.* Wagner, 2 Ind. App. 81, 28 N. E. 158, grantee of reversion; Fischer-Leaf Co. *v.* Caldwell, 15 Ky. L. Rep. 542, holding that, although lessee was in arrears and liable to ejectment on notice she can recover for tearing down of a wall under agreement with the lessor); even where made for the purpose of repairing the premises (Great Falls Co. *v.* Worster, 15 N. H. 412; Stocker *v.* Planet Bldg. Soc., 27 Wkly. Rep. 877).

Right of mortgagee to enter on default of payment on demand does not justify entry after demand by an agent but not known to be such to the mortgagor. Moore *v.* Shelley, 8 App. Cas. 285, 52 L. J. P. C. 35, 48 L. T. Rep. N. S. 918.

Land held adversely.— Where statutes put the owner of land, after adverse possession for a certain time, to an action to try title it has sometimes been held that he cannot enter (Hood *v.* Stewart, 2 La. Ann. 219; D'Orgenoy *v.* Droz, 13 La. 389; Yarborough *v.* Palmer, 7 La. 153); or where adverse possession for a certain time gives a right by statute to the value of improvements (Bollinger *v.* McMinn, 47 Tex. Civ. App. 89, 104 S. W. 1079. But see Tribble *v.* Frame, 5 Litt. (Ky.) 187).

7. Welsh *v.* Stewart, 31 Mo. App. 376.

8. Hall *v.* Brewster, 2 N. J. L. J. 84 (tenant in possession and entitled to notice to quit); Eardley *v.* Granville, 3 Ch. D. 826, 45 L. J. Ch. 669, 34 L. T. Rep. N. S. 609, 24

or for the expulsion of the occupant by the owner or persons acting for him.[9]

(B) *Title as Cotenant.* Cotenancy or joint possession is a good defense to an action of trespass by the cotenant[10] or one authorized by him.[11] It is not a defense where there has been an ouster[12] or destruction of the property,[13] except to the extent of defendant's interest,[14] or to an action for mesne profits,[15] or in case plaintiff is in exclusive possession with defendant's consent.[16] Title as tenant in common is also a good defense in an action by a stranger to the cotenancy.[17]

(C) *Agreed Boundary.* Where adjoining landowners agree on a boundary they are bound by it as to subsequent acts on the land,[18] and likewise their successors,[19] and it has been held to be conclusive as to prior acts;[20] but a mere executory agreement for a survey which has not been completed is no defense for an entry,[21] nor is a completed survey not agreed upon as a boundary.[22]

(D) *Force in Asserting Title.* Where the owner of land with right to immediate possession uses force in the exercise of his right to enter or retake possession, the question of his liability has been variously determined. The better opinion seems to be that title and right of possession is a good defense to a forcible entry by the owner of land on one holding possession;[23] and forcible expulsion of such

Wkly. Rep. 528 (removal by the lord, of trees or minerals from a copyhold estate).

9. Kellington *v.* Herring, 17 U. C. C. P. 639, possession under a deed giving right of possession to the occupant but certain rights to the owner.

10. Decker *v.* Decker, 17 Hun (N. Y.) 13; Wood *v.* Phillips, 43 N. Y. 152 (holding that one tenant in common has the right to take possession of premises owned in common, and although such possession is acquired by stealth, yet if without tumult or breach of the peace, it will not be illegal); Harman *v.* Gartman, Harp. (S. C.) 430, 18 Am. Dec. 659; Wiggins *v.* White, 2 N. Brunsw. 97; Zwicker *v.* Morash, 34 Nova Scotia 555; Woods *v.* Gammon, 22 Nova Scotia 362; Wemp *v.* Mormon, 2 U. C. Q. B. 146.

Lease by some of the cotenants does not abridge the rights of others or affect the operation of the rule stated in the text. Cox *v.* Walker, 26 Me. 504; Harman *v.* Gartman, Harp. (S. C.) 430, 18 Am. Dec. 659.

11. Beaver *v.* Filson, 8 Pa. St. 327.

12. *Iowa.*— Dodge *v.* Davis, 85 Iowa 77, 52 N. W. 2.

New York.— Erwin *v.* Olmsted, 7 Cow. 229.

Pennsylvania.— Trauger *v.* Sassaman, 14 Pa. St. 514; McGill *v.* Ash, 7 Pa. St. 397.

South Carolina.— Jefcoat *v.* Knotts, 13 Rich. 50.

England.— Jacobs *v.* Seward, L. R. 5 H. L. 464, 41 L. J. C. P. 221, 27 L. T. Rep. N. S. 185 [*affirming* 22 L. T. Rep. N. S. 690, 18 Wkly. Rep. 953]; Murray *v.* Hall, 7 C. B. 441, 13 Jur. 262, 18 L. J. C. P. 161, 62 E. C. L. 441.

What constitutes an ouster.— Increasing the height of a wall and using it as the back of a building (Stedman *v.* Smith, 8 E. & B. 1, 3 Jur. N. S. 1248, 26 L. J. Q. B. 314, 92 E. C. L. 1), carrying away part of the soil (Wilkinson *v.* Haygarth, 12 Q. B. 837, 11 Jur. 104, 16 L. J. Q. B. 103, 64 E. C. L. 837), or growing crops (Tignor *v.* Toney, 13 Tex. Civ. App. 518, 25 S. W. 881), erecting a wharf (Zwicker *v.* Morash, 34 Nova Scotia 555), or taking off doors and breaking down partitions (Moore *v.* Moore, 3 Nova Scotia Dec. 436) constitute an ouster.

13. Longfellow *v.* Quimby, 33 Me. 457; Bennet *v.* Bullock, 35 Pa. St. 364.

14. Cresswell *v.* Hedges, 1 H. & C. 421, 8 Jur. N. S. 767, 31 L. J. Exch. 497, 7 L. T. Rep. N. S. 70, 10 Wkly. Rep. 777.

15. Bennet *v.* Bullock, 35 Pa. St. 364.

16. Grimes *v.* Butts, 65 Ill. 347; Wausau Boom Co. *v.* Plumer, 49 Wis. 112, 4 N. W. 1072.

17. Sullings *v.* Carter, 105 Mich. 392, 63 N. W. 411.

18. Inch *v.* Flewelling, 30 N. Brunsw. 19 (after erecting fences on it and occupying accordingly); Lawrence *v.* McDowall, 2 N. Brunsw. 283 (parol agreement on a line as a division line). *Contra,* Mooney *v.* McIntosh, 7 Can. L. T. Occ. Notes 436, 19 Nova Scotia 419 [*affirmed* in 14 Can. Sup. Ct. 740, 7 Can. L. T. Occ. Notes 390].

19. Jones *v.* Morgan, 22 N. Brunsw. 338, actual occupation had under the agreement.

20. Perry *v.* Jeffries, 61 S. C. 292, 39 S. E. 515. *Contra,* Stockton *v.* Garfrias, 12 Cal. 315.

21. Crosswaite *v.* Gage, 32 U. C. Q. B. 196.

22. Cole *v.* Brunt, 35 U. C. Q. B. 103.

23. *California.*— Canavan *v.* Gray, 64 Cal. 5, 27 Pac. 788.

Illinois.— Ostatag *v.* Taylor, 44 Ill. App. 469.

Massachusetts.— Sampson *v.* Henry, 13 Pick. 36.

New York.— Willard *v.* Warren, 17 Wend. 257; Evertson *v.* Sutton, 5 Wend. 281, 21 Am. Dec. 217 (dispossession, by mortgagee entitled by agreement to possession, of mortgagor by void proceedings before a justice); Ives *v.* Ives, 13 Johns. 235; Hyatt *v.* Wood, 4 Johns. 150, 4 Am. Dec. 258.

South Carolina.— Johnson *v.* Hannahan, 1 Strobh. 313.

See 46 Cent. Dig. tit. "Trespass," § 59 *et seq.*

occupant [24] or forcible removal of part of the realty.[25] At any rate the weight of authority is strongly against ever allowing an action of trespass to land against the owner of realty with immediate right to possession,[26] and the rule has not been changed by statutes making forcible entry a crime [27] on ground for civil

That the entry renders the owner liable to indictment does not render him liable in trespass. Floyd *v.* Ricks, 14 Ark. 286, 58 Am. Dec. 374; Ives *v.* Ives, 13 Johns. (N. Y.) 235; McDougall *v.* Sitcher, 1 Johns. (N. Y.) 42 (breach of the peace); Wilde *v.* Cantillon, 1 Johns. Cas. (N. Y.) 123; Barnes *v.* Dean, 5 Watts (Pa.) 543, 30 Am. Dec. 346 (holding that no amount of force to the land would render him liable to indictment or action, but excessive force to the person renders him liable in trespass to the person).

In Illinois it has been frequently laid down that the entry must have caused a breach of the peace to render the owner liable. Lee *v.* Mound Station, 118 Ill. 304, 8 N. E. 759; Ft. Dearborn Lodge No. 214 I. O. O. F. *v.* Klein, 115 Ill. 177, 3 N. E. 272, 56 Am. Rep. 133; Hoots *v.* Graham, 23 Ill. 81; Harding *v.* Sandy, 43 Ill. App. 442; Brooke *v.* O'Boyle, 27 Ill. App. 384.

24. Scott *v.* Brown, 51 L. T. Rep. N. S. 746, holding that the owner is entitled to use force if he does no personal injury.

25. Lyon *v.* Fairbank, 79 Wis. 455, 48 N. W. 492, 24 Am. St. Rep. 732 (buildings); Burling *v.* Read, 11 Q. B. 904, 14 Jur. 395, 19 L. J. Q. B. 291, 63 E. C. L. 904 (building actually occupied by an intruder); Davison *v.* Wilson, 11 Q. B. 890, 12 Jur. 647, 17 L. J. Q. B. 196, 63 E. C. L. 890 (breaking open doors and windows of a building actually occupied).

26. **Expulsion of wrongful occupant in general.**— Comstock *v.* Brosseau, 65 Ill. 39; Wright *v.* Chandler, 4 Bibb 422 (tenant in common); Fuhr *v.* Dean, 26 Mo. 116, 69 Am. Dec. 484; Krevet *v.* Meyer, 24 Mo. 107; Thiel *v.* Bulls' Ferry Land Co., 58 N. J. L. 212, 33 Atl. 281; Fagan *v.* Scott, 14 Hun (N. Y.) 162; Roberts *v.* Tarver, 1 Lea (Tenn.) 441; Beecher *v.* Parmele, 9 Vt. 352, 31 Am. Dec. 633; Burling *v.* Read, 11 Q. B. 904, 14 Jur. 395, 19 L. J. Q. B. 291, 63 E. C. L. 904 (pulling down a house to eject an intruder, although he is in it); Davison *v.* Wilson, 11 Q. B. 890, 12 Jur. 647, 17 L. J. Q. B. 196, 63 E. C. L. 890; Beddall *v.* Maitland, 17 Ch. D. 174, 50 L. J. Ch. 401, 44 L. T. Rep. N. S. 248, 29 Wkly. Rep. 484; Butcher *v.* Butcher, 7 B. & C. 399, 6 L. J. K. B. O. S. 51, 1 M. & R. 220, 31 Rev. Rep. 237, 14 E. C. L. 182, 108 Eng. Reprint 772; Taunton *v.* Costar, 7 T. R. 431, 4 Rev. Rep. 481, 101 Eng. Reprint 1060; Stroud *v.* Kane, 13 U. C. Q. B. 459.

Tenant at will.— A tenant at will may be forcibly expelled after his tenancy has terminated (Pollen *v.* Brewer, 7 C. B. N. S. 371, 6 Jur. N. S. 509, 1 L. T. Rep. N. S. 9, 97 E. C. L. 371), but not before (Marden *v.* Jordan, 65 Me. 9; Cunningham *v.* Horton, 57 Me. 420).

Rule applied in case of tenant at sufferance.— Manning *v.* Brown, 47 Md. 506, even though the entry renders him liable criminally. *Contra,* Marquart *v.* La Farge, 5 Duer (N. Y.) 559.

Rule applied in case of tenant for a term wrongfully holding over (Snedecor *v.* Pope, 143 Ala. 275, 39 So. 318; Schaefer *v.* Silverstein, 46 Ill. App. 608; Mueller *v.* Kuhn, 46 Ill. App. 496; Wilde *v.* Cantillon, 1 Johns. Cas. (N. Y.) 123; Overdeer *v.* Lewis, 1 Watts & S. (Pa.) 90, 37 Am. Dec. 440; Willoughby *v.* Northeastern R. Co., 32 S. C. 410, 11 S. E. 339; Johnson *v.* Hannahan, 1 Strobh. (S. C.) 313; Jones *v.* Foley, [1891] 1 Q. B. 730, 55 J. P. 521, 60 L. J. Q. B. 464, 64 L. T. Rep. N. S. 538, 39 Wkly. Rep. 510; Turner *v.* Meymott, 1 Bing. 156, 1 L. J. C. P. O. S. 13, 7 Moore C. P. 574, 25 Rev. Rep. 612, 8 E. C. L. 450, in absence of tenant; Harvey *v.* Bridges, 3 D. & L. 55, 9 Jur. 759, 14 L. J. Exch. 272, 14 M. & W. 442; Gray *v.* Harding, 21 U. C. Q. B. 241, in tenant's absence, putting out his furniture and insisting on his children going out, near night, in cold weather. *Contra,* Carpenter *v.* Barber, 44 Vt. 441; Edwick *v.* Hawkes, 18 Ch. D. 199, 50 L. J. Ch. 577, 45 L. T. Rep. N. S. 168, 29 Wkly. Rep. 913); especially is the rule operative where the lease expressly authorizes it (Fabri *v.* Bryan, 80 Ill. 182; Page *v.* De Puy, 40 Ill. 506; Frazier *v.* Caruthers, 44 Ill. App. 61; Moyer *v.* Gordon, 113 Ind. 282, 14 N. E. 476).

Rule applied in case of expulsion of mortgagor in possession after foreclosure.— Gault *v.* Jenkins, 12 Wend. (N. Y.) 488, expulsion by purchaser at foreclosure sale.

Rule applied in case of servant.— It is well settled that title is a good defense for the use of actual force necessary to eject an employee holding possession merely in connection with his employment. His possession is that of the master. Millikin *v.* Trover, 42 Ill. App. 592 (property belonging to a county); Heffelfinger *v.* Fulton, 25 Ind. App. 33, 56 N. E. 688 (servant residing in a house in connection with his employment, as a farm hand); Kerrains *v.* People, 60 N. Y. 221, 19 Am. Rep. 158; Behm *v.* Damm, 91 N. Y. Suppl. 735 (janitress of a building); Haywood *v.* Miller, 3 Hill (N. Y.) 90; White *v.* Bayley, 2 F. & F. 385 [*affirmed* in 10 C. B. N. S. 227, 7 Jur. N. S. 948, 30 L. J. C. P. 253, 100 E. C. L. 227] (manager of a society occupying a house as such and carrying on there by permission his business as bookseller). And see MASTER AND SERVANT, 26 Cyc. 994.

27. Jackson *v.* Morse, 16 Johns. (N. Y.) 197, 8 Am. Dec. 306; Ives *v.* Ives, 13 Johns. (N. Y.) 235; Jones *v.* Muldrow, Rice (S. C.) 64; Marks *v.* Sullivan, 8 Utah 406, 32 Pac. 668, 20 L. R. A. 590; Lows *v.* Telford, 1 App. Cas. 414, 45 L. J. Exch. 613, 13 Cox C. C. 226, 35 L. T. Rep. N. S. 69 (assault); Beddall *v.* Maitland, 17 Ch. D. 174, 50 L. J.

action for restoration of possession;[28] and the better opinion seems to be that in the absence of statute no civil action for damages lies against him in any form if no more force was used than was necessary;[29] but that if the personalty or the person of the occupant is injured by excessive force[30] or by carelessness,[31] the owner of the land is liable therefor. There are, however, good authorities which limit the right to set up title as a justification to cases where the entry was peaceable,[32] and hold that the owner is liable in an action of trespass if the entry was accomplished by force,[33] at least, if he injures the personal property or the person

Ch. 401, 44 L. T. Rep. N. S. 248, 29 Wkly. Rep. 484; Harvey *v.* Bridges, 3 D. & L. 55, 9 Jur. 759, 14 L. J. Exch. 272, 14 M. & W. 437. *Contra*, Griffin *v.* Martel, 77 Vt. 19, 58 Atl. 788.

Rule applied in case of expulsion of tenant holding over see Low *v.* Elwell, 121 Mass. 309, 23 Am. Rep. 272.

28. *Arkansas.*— Vinson *v.* Flynn, 64 Ark. 453, 43 S. W. 146, 46 S. W. 186, 39 L. R. A. 415.

California.— Canavan *v.* Gray, 64 Cal. 5, 27 Pac. 788, unroofing a house and injuring furniture.

Illinois.— Ambrose *v.* Root, 11 Ill. 497, 52 Am. Dec. 456.

Indiana.— Moyer *v.* Gordon, 113 Ind. 282, 14 N. E. 476.

Kentucky.— Johnson *v.* Castleman, 2 Dana 377.

Missouri.— Fuhr *v.* Dean, 26 Mo. 116, 69 Am. Dec. 484.

29. Canavan *v.* Gray, 64 Cal. 5, 27 Pac. 788; Fuhr *v.* Dean, 26 Mo. 116, 69 Am. Dec. 484; Lows *v.* Telford, 1 App. Cas. 414, 13 Cox C. C. 226, 45 L. J. Exch. 613, 35 L. T. Rep. N. S. 69; Harvey *v.* Bridges, 3 D. & L. 55, 9 Jur. 759, 14 L. J. Exch. 272, 14 M. & W. 437 (per Parke, B.); Napier *v.* Ferguson, 18 N. Brunsw. 255; Smith *v.* Troop, 14 Nova Scotia 483; Stroud *v.* Kane, 13 U. C. Q. B. 459.

Expulsion of tenant holding over.— No action lies for an assault necessarily committed. Low *v.* Elwell, 121 Mass. 309, 23 Am. Rep. 272.

If entry was gained peaceably and the force used thereafter no action lies. Stearns *v.* Sampson, 59 Me. 568, 8 Am. Rep. 442.

30. *Alabama.*— Snedecor *v.* Pope, 143 Ala. 275, 39 So. 318.

Illinois.— Brooke *v.* O'Boyle, 27 Ill. App. 384.

New Mexico.— Denver, etc., R. Co. *v.* Harris, 3 N. M. 109, 2 Pac. 369.

New York.— Behm *v.* Damm, 91 N. Y. Suppl. 735.

Pennsylvania.—Overdeer *v.* Lewis, 1 Watts & S. 90, 37 Am. Dec. 440; Barnes *v.* Dean, 5 Watts 543, 30 Am. Dec. 346.

South Carolina.— Johnson *v.* Hannahan, 1 Strobh. 313; Caldwell *v.* Julian, 2 Mill 294.

Vermont.— Beecher *v.* Parmele, 9 Vt. 352, 31 Am. Dec. 633.

England.— Johnson *v.* Northwood, 1 Moore C. P. 420, 7 Taunt. 689, 2 E. C. L. 550; Gregory *v.* Hill, 8 T. R. 299, 101 Eng. Reprint 1400.

Canada.— Robichaud *v.* Genest, 16 Quebec Super. Ct. 337.

31. Owsley *v.* Fowler, 104 S. W. 762, 31 Ky. L. Rep. 1154, in executing a writ of possession.

32. *Colorado.*— Smith *v.* Schlink, 6 Colo. App. 228, 40 Pac. 478.

Georgia.— Clower *v.* Maynard, 112 Ga. 340, 37 S. E. 370.

Illinois.— Brush *v.* Blanchard, 19 Ill. 31 (trust property); Brooke *v.* O'Boyle, 27 Ill. App. 384.

Indiana.— Larue *v.* Russell, 26 Ind. 386.

Louisiana.— Mott *v.* Hopper, 116 La. 629, 40 So. 921; Nicol *v.* Illinois Cent. R. Co., 44 La. Ann. 816, 11 So. 34.

Michigan.— Burke *v.* Douglass, 115 Mich. 197, 73 N. W. 133; Newcombe *v.* Irwin, 55 Mich. 620, 22 N. W. 66.

New York.— Mills *v.* Munger, 21 N. Y. Suppl. 923.

South Carolina.— Wright *v.* Willoughby, 79 S. C. 971, 60 S. E. 971.

England.— Edwick *v.* Hawkes, 18 Ch. D. 199, 50 L. J. Ch. 577, 45 L. T. Rep. N. S. 168, 29 Wkly. Rep. 913.

See 46 Cent. Dig. tit. "Trespass," § 59 *et seq.*

Reasons assigned for rule.— There are several reasons why the law cannot suffer a forcible entry upon a peaceable possession, even though it be in the assertion of a valid title against a mere intruder: (1) Whoever assumes to make such an entry makes himself judge in his own cause, and enforces his own judgment; (2) he does this by the employment of force against a peaceable party; (3) as the other party must have an equal right to judge in his own cause, and to employ force in giving effect to his judgment, a breach of the public peace would be invited, and any wrong, if redressed at all, would be redressed at the cost of a public disturbance, and perhaps of serious bodily injury to the parties. Cooley Torts 380.

33. *Connecticut.*— McAllin *v.* McAllin, 77 Conn. 398, 59 Atl. 413 (holding that an injunction restraining a further remaining on the premises does not give the owner a right to use force); Bliss *v.* Bange, 6 Conn. 78.

Illinois.— Schwartz *v.* McQuaid, 214 Ill. 357, 73 N. E. 582, 105 Am. St. Rep. 112 (pushing off a board nailed over a window in an unoccupied building containing another's goods is such force as to enable the occupant to maintain the action); Wahl *v.* Laubersheimer, 174 Ill. 338, 51 N. E. 860 (holding that to render the entry wrongful it is not necessary that there be a breach of the peace); Dearlove *v.* Herrington, 70 Ill. 251; Chicago *v.* Wright, 69 Ill. 318; Illinois, etc., R., etc., Co. *v.* Cobb, 68 Ill. 53; Haskins

of the occupant the view being taken that he has his remedy by appropriate proceedings in the courts.[34]

(II) *Rights Other Than Title* — (A) *In General.* Right of entry on land is a good defense to a peaceable entry on the land;[35] but a mortgagee's right of entry does not justify injury to the land without entry.[36] A right *in rem* to the land is a sufficient justification for the exercise of the right thereon by the holder of the right[37] or one in privity with him;[38] but does not justify acts not author-

v. Haskins, 67 Ill. 446; Comstock *v.* Brosseau, 65 Ill. 39; Farwell *v.* Warren, 51 Ill. 467; Wilder *v.* House, 48 Ill. 279; Reeder *v.* Purdy, 48 Ill. 261; Reeder *v.* Purdy, 41 Ill. 279; Page *v.* De Puy, 40 Ill. 506; Briggs *v.* Roth, 28 Ill. App. 313; Marks *v.* Gartside, 16 Ill. App. 177; Westcott *v.* Arbuckle, 12 Ill. App. 577.

Iowa.— Kimball *v.* Shoemaker, 82 Iowa 459, 48 N. W. 925, removal of fences.

Louisiana.— Hebert *v.* Lege, 29 La. Ann. 511, pulling down houses.

Maine.— *In re* Harding, 1 Me. 22.

Michigan.— Newcombe *v.* Irwin, 55 Mich. 620, 22 N. W. 66.

Nebraska.— Dold *v.* Knudsen, 70 Nebr. 373, 97 N. W. 482.

New Jersey.— Sprague Nat. Bank *v.* Erie R. Co., 62 N. J. L. 474, 41 Atl. 681; Thiel *v.* Bull's Ferry Land Co., 58 N. J. L. 212, 33 Atl. 281.

New York.— Wood *v.* Phillips, 43 N. Y. 152, cotenants.

Pennsylvania.— Vanderslice *v.* Donner, 26 Pa. Super. Ct. 319, removal of a building.

South Carolina.— Caldwell *v.* Julian, 2 Mill 294.

Texas.— Sinclair *v.* Stanley, 69 Tex. 718, 7 S. W. 511.

Vermont.— Carpenter *v.* Barber, 44 Vt. 441; Whittaker *v.* Perry, 38 Vt. 107; Dustin *v.* Cowdry, 23 Vt. 631.

Virginia.— Young *v.* Gooch, 2 Leigh 596.

34. *Illinois.*—Comstock *v.* Brosseau, 65 Ill. 39.

Massachusetts.— Sampson *v.* Henry, 13 Pick. 36.

New York.— Mills *v.* Munger, 21 N. Y. Suppl. 923.

South Carolina.— Caldwell *v.* Julian, 2 Mill 294.

Texas.— Sinclair *v.* Stanley, 64 Tex. 67; McVea *v.* Walker, 11 Tex. Civ. App. 46, 31 S. W. 839.

Vermont.— Beecher *v.* Parmele, 9 Vt. 352, 31 Am. Dec. 633.

England.— Edwick *v.* Hawkes, 18 Ch. D. 199, 50 L. J. Ch. 577, 45 L. T. Rep. N. S. 168, 29 Wkly. Rep. 913.

35. Taylor *v.* Cole, 1 H. Bl. 555, 3 T. R. 292, 1 Rev. Rep. 706, 100 Eng. Reprint 582.

Mere prior possession gives right to reënter on one who takes possession without a better right (Vial *v.* Hofen, 106 Mich. 160, 64 N. W. 11; Wood *v.* Hyatt, 4 Johns. (N. Y.) 313; Hyatt *v.* Wood, 4 Johns. (N. Y.) 150, 4 Am. Dec. 258; Jones *v.* Muldrow, Rice (S. C.) 64; McGrady *v.* Miller, 14 Vt. 128; Hall *v.* Dewey, 10 Vt. 593; Killichan *v.* Robertson, 6 U. C. Q. B. O. S. 468. *Contra*, Ross *v.* Nesbit, 7 Ill. 252); unless it has been abandoned (Welch *v.* Louis, 31 Ill. 446. And see Huston *v.* Skaggs, 7 Ky. L. Rep. 592).

36. Great Falls Co. *v.* Worster, 15 N. H. 412, as flooding it.

37. **Crossing a railroad track** by a landowner at any point where it runs through his land is not a trespass (Louisville R. Co. *v.* McCombs, 55 S. W. 921, 21 Ky. L. Rep. 1358; Grand Junction R. Co. *v.* White, 10 L. J. Exch. 292, 8 M. & W. 214), unless compensation was received on the basis of a total separation of the land (Manning *v.* Eastern Counties R. Co., 13 L. J. Exch. 265, 12 M. & W. 237, 3 R. & Can. Cas. 637).

A grant of a right to build a railroad on one's land carries with it a right to do all things necessary, as digging ditches to drain water from the right of way where necessary, and is a defense to an action of trespass. Babcock *v.* Western R. Corp., 9 Metc. (Mass.) 553, 43 Am. Dec. 411.

A sale of standing timber gives a right to cut and remove it, against a subsequent purchaser of the land by warranty but with notice. Russell *v.* Myers, 32 Mich. 522.

A reservation of trees from a deed gives a kind of tenancy in common, preventing either party maintaining trespass against the other. Boults *v.* Mitchell, 15 Pa. St. 371.

Private right of way by grant from plaintiff's grantor (Walker *v.* Newhouse, 14 Mo. 373), or by prescription (Pennington *v.* Lewis, 4 Pennew. (Del.) 447, 56 Atl. 378) is a good defense.

Common of vicinage to excuse a trespass can only be between contiguous towns. Smith *v.* Floyd, 18 Barb. (N. Y.) 522.

Laying out a village is a good defense against the purchaser of the land (excepting certain lots) with knowledge, for an entry by a lot owner on an alley in rear of it. Sloan *v.* Ballentine, 138 Pa. St. 99, 20 Atl. 839.

Right to unload at a wharf justifies use of plaintiff's landing stage which is in the way, but only at a stage of the water when unloading could have been done without it if it had not been there. Eastern Counties R. Co. *v.* Dorling, 5 C. B. N. S. 821, 5 Jur. N. S. 869, 28 L. J. C. P. 202, 94 E. C. L. 821.

A lease, although voidable by the owner, is a good defense against other persons. Bright *v.* New Orleans R. Co., 114 La. 679, 38 So. 494.

Right of way for a railroad from the owner is a good defense against one in possession. Louisville, etc., R. Co. *v.* Day, 67 Miss. 227, 7 So. 349.

A several fishery is good against a lessee of the land from the state. Fitzgerald *v.* Faunce, 6 N. J. L. J. 176.

38. Robinson *v.* Crescent City Mill, etc.,

ized by it,[39] nor acts not done in exercise of it,[40] nor acts done after its expiration,[41] and is no defense if it has been acquired after the trespass,[42] or if it is invalid,[43] or merely equitable.[44] A right of user by the public is a justification for the exercise of it by a member of the public,[45] but it does not justify acts not authorized by

Co., 93 Cal. 316, 28 Pac. 950 (holding that a right of way for logging justifies hauling of logs for the holder of the easement, although a third person has an interest in them); Perry *v.* Bailey, 94 Me. 50, 46 Atl. 789 (holding that a lease and a license from the lessee is a good defense against the lessor for an entry); Heiser *v.* Gaul, 39 N. Y. App. Div. 162, 57 N. Y. Suppl. 198 (holding that the right to repair a ditch justifies one authorized by the holder of it); Sheets *v.* Allen, 89 Pa. St. 47 (holding that mining lease is a good defense against a purchaser of the land subject to it who had notice for continuing to remove ore under it).

39. French *v.* Marstin, 24 N. H. 440, 57 Am. Dec. 294; Silliman *v.* Whitmer, 11 Pa. Super. Ct. 243 [*affirmed* in 196 Pa. St. 363, 46 Atl. 489].

Applications of rule.—"School land certificates" which by statute give a right to take wood for certain purposes do not justify taking for other purposes. Smith *v.* Morgan, 68 Wis. 358, 32 N. W. 135. Right to take water from a spring does not justify taking from other springs and obstructing them. Louisville, etc., R. *v.* Higginbotham, 153 Ala. 334, 44 So. 872. Right of way for a railroad does not justify taking sand to build a round-house (Vermilya *v.* Chicago, etc., R. Co., 66 Iowa 606, 24 N. W. 234, 55 Am. Rep. 279), nor the building of a side-track and leaving cars standing on it (Frankle *v.* Jackson, 33 Fed. 371, 30 Fed. 398). Right to natural drainage does not justify enlarging the drainway. Sharpe *v.* Lavert, 51 La. Ann. 1249, 26 So. 100. Right to a wagon way does not justify laying a pipe line across the right of way of a railroad (U. S. Pipe Line Co. *v.* Delaware, etc., Co., 62 N. J. L. 254, 41 Atl. 759, 42 L. R. A. 572); nor does a way for a ditch justify wanton or unnecessary injury to fences across it (Dixon *v.* Clow, 24 Wend. (N. Y.) 188). A way of necessity does not justify a divergence from it, unless impassable (Holmes *v.* Seely, 19 Wend. (N. Y.) 507); nor other private way, although it is impassable (Holmes *v.* Seely, *supra*); and a way for passage does not justify discharging water and shoveling snow on the land when not done to improve or repair the way (O'Brien *v.* Murphy, 189 Mass. 353, 75 N. E. 700); nor making a permanent erection on it (Hays *v.* Askew, 52 N. C. 272; Taylor *v.* Coppock, 1 Del. Co. (Pa.) 190); nor the breaking down of a gate over it (Maxwell *v.* McAtee, 9 B. Mon. (Ky.) 20, 48 Am. Dec. 409; Wille *v.* Bartz, 88 Wis. 424, 60 N. W. 789); nor grading and leveling it so that it causes surface water to collect on adjoining land (The Redemptorists *v.* Wenig, 79 Md. 348, 29 Atl. 667). Right to build a dock does not justify depositing dredging material on plaintiff's oyster bed for another purpose. Post *v.* Kreischer, 103 N. Y. 110, 8 N. E. 365. Common of estovers is not apportionable and is extinguished by division of the land. Van Rensselaer *v.* Radcliff, 10 Wend. (N. Y.) 639, 25 Am. Dec. 582. Right to maintain a dam and flood land does not justify a dam higher than the grant allows. Fisher *v.* Paff, 11 Pa. Super. Ct. 401. Right to enter and repair an easement does not justify a general entry. Pico *v.* Colimas, 32 Cal. 578. Right to clean out a ditch to drain a meadow does not justify cleaning it out to carry water from a mill. Darlington *v.* Painter, 7 Pa. St. 473. Right to unload passengers at a wharf does not justify using plaintiff's landing stage at low water when he could not have landed without, but does at high water when he could have landed but the stage was in the way. Eastern Counties R. Co. *v.* Dorling, 5 C. B. N. S. 821, 5 Jur. N. S. 869, 28 L. J. C. P. 202, 94 E. C. L. 821. Right to take stone for use on certain land does not justify taking it for use on other land. Thomas *v.* Oakley, 18 Ves. Jur. 184, 11 Rev. Rep. 181, 34 Eng. Reprint 287. Right to collect water into a tank by drains on land does not justify destruction of drains made by the landowner which do not interfere with the right, nor the erection of a tank larger than the right allowed. Corbitt *v.* Wilson, 24 Nova Scotia 25.

40. Merithew *v.* Sisson, 5 N. Brunsw. 373, holding that where a boundary is in dispute right as mortgagee does not justify the acts done under claim of title to the adjoining land.

41. Todd *v.* Jackson, 26 N. J. L. 525.

Applications of rule.—Expired lease after possession has been given up does not justify a reëntry and taking fittings (Todd *v.* Jackson, 26 N. J. L. 525; Moxon *v.* Savage, 2 F. & F. 182. *Contra*, Daniels *v.* Brown, 34 N. H. 454, 69 Am. Dec. 505); and tenancy at will determined by a subsequent lease is no defense to an action of trespass *de bonis* for taking the grass (Kelly *v.* Waite, 12 Metc. (Mass.) 300).

42. Smith *v.* Guild, 34 Me. 443 (holding that possession delivered subsequent to the trespass under a writ is no defense); Sweeney *v.* Montana R. Co., 25 Mont. 543, 65 Pac. 912 (holding that a grant of a right of way for a stream which has already been diverted into said way is no defense to an action for the original diversion).

43. Cook *v.* Redman, 45 Mo. App. 397, lease void under the statute.

44. Darby *v.* Anderson, 1 Nott & M. (S. C.) 369.

45. Louisville, etc., R. Co. *v.* McCombs, 55 S. W. 921, 21 Ky. L. Rep. 1358; Louisville Land, etc., Co. *v.* Gasquet, 45 La. Ann. 759, 13 So. 171; Van O'Linda *v.* Lothrop, 21 Pick. (Mass.) 292, 32 Am. Dec. 261.

it.[46] It is only to the extent of the right that the acts of the owner thereof are

Highways.— More than a mere entry must be shown to prove a trespass on a highway. Munson *v.* Mallory, 36 Conn. 165, 4 Am. Rep. 52. A person crossing a railroad in the city limits at a point other than a public crossing is not a trespasser. Louisville, etc., R. Co. *v.* McCombs, 55 S. W. 921, 21 Ky. L. Rep. 1358. Where a highway is impassable it is justifiable to pass over adjoining land. Holmes *v.* Seely, 19 Wend. (N. Y.) 507.

Streets.— To erect gates so they swing open over a street, spread earth on it to improve it, or occasionally allow horses and carriages to stand on it is not a trespass against the owner of the fee in the street. Van O'Linda *v.* Lothrop, 21 Pick. (Mass.) 292, 32 Am. Dec. 261.

Public fishery.— One cannot obtain possession of a state oyster bed common to all citizens so as to make a taking of oysters by others a trespass. Louisville Land, etc., Co. *v.* Gasquet, 45 La. Ann. 759, 13 So. 171.

Great ponds of over ten acres are subject to public use in Massachusetts, and trespass will not lie by a town owning the fee for the taking of ice. West Roxbury *v.* Stoddard, 7 Allen (Mass.) 158.

Right of way for all inhabitants of a town to the seashore is a good defense. Nudd *v.* Hobbs, 17 N. H. 524.

Navigable waters.— One may tie his vessel or go temporarily on a private wharf projecting into a navigable stream. Degan *v.* Dunlap, 15 Phila. (Pa.) 69.

Public domain.—There is an implied license to graze cattle on the public domain so that one who has unlawfully inclosed it cannot complain of an entry on it by another to graze cattle. Martin *v.* Platte Valley Sheep Co., 12 Wyo. 432, 76 Pac. 571, 78 Pac. 1093.

Right to hunt on another's land.— There is in general no right to enter another's land to hunt (Kellogg *v.* King, 114 Cal. 378, 46 Pac. 166, 55 Am. St. Rep. 74; Glenn *v.* Kays, 1 Ill. App. 479, holding that actual pursuit of animals, although they are dangerous to man, is not justifiable; Diana Shooting Club *v.* Lamoreux, 114 Wis. 44, 89 N. W. 880, 91 Am. St. Rep. 898, holding that a state license to hunt gives no right to go on private lands; Paul *v.* Summerhayes, 4 Q. B. D. 9, 14 Cox C. C. 202, 48 L. J. M. C. 33, 39 L. T. Rep. N. S. 574, 27 Wkly. Rep. 215, holding that entry for fox hunting is a trespass, and discussing Gundry *v.* Feltham, 1 T. R. 334, 1 Rev. Rep. 215, 99 Eng. Reprint 1125, to the contrary; Blades *v.* Higgs, 20 C. B. N. S. 214, 11 H. L. Cas. 621, 11 Jur. N. S. 701, 34 L. J. C. P. 286, 12 L. T. Rep. N. S. 615, 13 Wkly. Rep. 927, 11 Eng. Reprint 1474, holding that the landowner may take from a poacher game that the poacher has killed on the land; Baker *v.* Berkeley, 3 C. & P. 32, 14 E. C. L. 436, holding that entry into a barn to take a stag which has taken refuge there from the hounds is a trespass); unless otherwise provided by statute or constitution (Fripp *v.* Hasell, 1 Strobh. (S. C.) 173, holding that by custom and inference from legislative enactment the owner cannot prevent entry on wild, uninclosed lands to hunt animals *feræ naturæ*, although he forbids it, but that a navigable stream is sufficient inclosure to make hunting unlawful; Broughton *v.* Singleton, 2 Nott & M. (S. C.) 338; McConico *v.* Singleton, 2 Mill (S. C.) 244; Payne *v.* Gould, 74 Vt. 208, 52 Atl. 421, holding that the constitution of Vermont gives a right to hunt and shoot wild game on uninclosed lands of another); nor is an entry to fish justifiable (Coolidge *v.* Williams, 4 Mass. 140, 144); although the value of the fish taken cannot be recovered by the landowner (Beach *v.* Morgan, 67 N. H. 529, 41 Atl. 349, 68 Am. St. Rep. 692).

Rights of common in England.— One having a right of common may pull down a house interfering with his right (Perry *v.* Fitzhowe, 8 Q. B. 757, 10 Jur. 799, 15 L. J. Q. B. 239, 55 E. C. L. 757); although it is a dwelling-house actually occupied (Davies *v.* Williams, 16 Q. B. 546, 15 Jur. 752, 20 L. J. Q. B. 330, 71 E. C. L. 546, holding, however, that he must not come suddenly and without notice or demand and must do no unnecessary damage); but not if there are persons in it at the time (Perry *v.* Fitzhowe, 8 Q. B. 757, 10 Jur. 799, 15 L. J. Q. B. 239, 55 E. C. L. 757. See also Jones *v.* Jones, 1 H. & C. 1, 31 L. J. Exch. 506).

46. Ashley *v.* Landers, 9 Allen (Mass.) 250; Winter *v.* Peterson, 24 N. J. L. 524, 61 Am. Dec. 678.

Highways.— The fact that land is a highway does not justify a taking by the state of gravel outside its limits, nor a taking within the limits for a purpose other than to improve the road (District of Columbia *v.* Robinson, 14 App. Cas. (D. C.) 512 [*affirmed* in 180 U. S. 92, 21 S. Ct. 283, 45 L. ed. 440]); nor does it justify a road overseer in removing trees (Winter *v.* Peterson, 24 N. J. L. 524, 61 Am. Dec. 678), nor acts by a private individual which the town had a right to do, as taking down fences and removing trees to open the road (Hunt *v.* Rich, 38 Me. 195), widening the road or placing rocks, etc., on untraveled parts of it (Ashley *v.* Landers, 9 Allen (Mass.) 250; Hollenbeck *v.* Rowley, 8 Allen (Mass.) 473); nor any acts of private persons, other than use of it as a way as going *extra viam* without need (Gosdin *v.* Williams, 151 Ala. 592, 44 So. 611, taking of the herbage by the servant of a turnpike company (Adams *v.* Emerson, 6 Pick. (Mass.) 57), the cutting of trees (Moore *v.* Cooley, 88 Hun (N. Y.) 66, 34 N. Y. Suppl. 624 [*affirmed* in 156 N. Y. 700, 51 N. E. 1092]); laying a pipe line (Hartman *v.* Tully Pipe Line Co., 71 Hun (N. Y.) 367, 25 N. Y. Suppl. 24), stopping in front of the house of the owner of the fee and refusing to leave (Com. *v.* Vondersmith, 1 Northumb. Co. Leg. N. (Pa.) 189), or

protected. Possession by defendant is a good defense against one not showing a better title,[47] and possession under "record title" is, in Kentucky, by statute a defense against the true owner.[48] Equitable title without possession is no defense to an action of trespass by the holder of the legal title in possession.[49]

(B) *Right to Cut Timber After the Expiration of the Time Limited in the Right.* One who reserves or is granted growing trees, with a limited time in which to remove them, is a trespasser if he enters and removes them thereafter,[50] although they were cut before the expiration of the time, and the removal within the period limited was prevented by plaintiff.[51] But some courts hold that he still has title so that no damages can be recovered for the value of the timber,[52] while others hold his right is gone *in toto* so that he has no rights in the land and full damages can be recovered.[53]

(C) *Force in Exercising Rights.* A right *in rem* to land is a good defense to the use of force in exercising it.[54]

i. Rights In Rem of Defendant to Realty Not in Possession of Another — (I) *In General.* An owner of land may justify the removal of chattels which are wrongfully on his land.[55] However, due care must be used in the removal,[56] and it should be effected with as little injury to the chattels removed as is possible,[57] and without the exercise of excessive force.[58] So the owner may forcibly take

abusing the owner (Adams *v.* Rivers, 11 Barb. (N. Y.) 390), or removing the stone and appropriating it (Root *v.* Prowattain, 13 Leg. Int. (Pa.) 20).

Statutory right to mine on any part of the public domain which is in possession of another for agricultural or grazing purposes does not justify mining on a part of it occupied for other purposes, as for a hotel and yard. Fitzgerald *v.* Urton, 5 Cal. 308.

47. Hecock *v.* Van Dusen, 80 Mich. 359, 45 N. W. 343.

48. Shaw *v.* Robinson, 111 Ky. 715, 64 S. W. 620, 23 Ky. L. Rep. 998, holding that title of record means by patent or grant from the state, not from an individual.

49. Baltimore Belt R. Co. *v.* Lee, 75 Md. 596, 23 Atl. 901; Ware *v.* Johnson, 55 Mo. 500; Watt *v.* Rogers, 2 Abb. Pr. (N. Y.) 261.

50. Howard *v.* Lincoln, 13 Me. 122; Pease *v.* Gibson, 6 Me. 81; Bunch *v.* Elizabeth City Lumber Co., 134 N. C. 116, 46 S. E. 24.

51. Inderlied *v.* Whaley, 65 Hun (N. Y.) 407, 20 N. Y. Suppl. 183.

52. C. W. Zimmerman Mfg. Co. *v.* Daffin, 149 Ala. 380, 42 So. 858, 123 Am. St. Rep. 58, 9 L. R. A. N. S. 663; Dyer *v.* Hartshorn, 73 N. H. 509, 63 Atl. 231; Hoit *v.* Stratton Mills, 54 N. H. 452; Hoit *v.* Stratton Mills, 54 N. H. 109, 20 Am. Rep. 119.

53. Morgan *v.* Perkins, 94 Ga. 353, 21 S. E. 574; Bunch *v.* Elizabeth City Lumber Co., 134 N. C. 116, 46 S. E. 24; Boults *v.* Mitchell, 15 Pa. St. 371.

54. Hall *v.* Davis, 2 C. & P. 33, 12 E. C. L. 434, holding that a license to one to enter and repair a house and entry under it gives him a right to use force necessary to expel his servant.

A right of way justifies tearing down a fence put across it (Harvard College *v.* Stearns, 15 Gray (Mass.) 1; Immaculate Conception Church *v.* Sheffer, 88 Hun (N. Y.) 335, 34 N. Y. Suppl. 724 [*affirmed* in 156 N. Y. 670, 50 N. E. 1118]) or using personal violence to effect an entry on the way, against one in charge of the rest of the land (Slingerland *v.* East Jersey Water Co., 58 N. J. L. 411, 33 Atl. 843).

Rightful possession justifies force necessary to expel an intruder (Thomas *v.* Marsh, 5 C. & P. 596, 24 E. C. L. 726) or an entry, although indictable force is used (Fisher *v.* Morris, 5 Whart. (Pa.) 358).

55. Mead *v.* Pollock, 99 Ill. App. 151; Berry *v.* Carle, 3 Me. 269; Peaslee *v.* Wadleigh, 5 N. H. 317; Crane *v.* Mason, Wright (Ohio) 333.

Applications of rule.— The owner may remove goods placed on his land without his consent (Grier *v.* Ward, 23 Ga. 145); or belonging to the housekeeper of an outgoing tenant, who remains after the departure of the tenant (Mead *v.* Pollock, 99 Ill. App. 151); or left by a servant in an outbuilding to which she retained the key (Looram *v.* Burlingame, 16 La. Ann. 199); or a horse hitched to his shade tree (Gilman *v.* Emery, 54 Me. 460); or property deposited on the land by water (Berry *v.* Carle, 3 Me. 269); or a seine reel (Almy *v.* Grinnell, 12 Metc. (Mass.) 53, 45 Am. Dec. 238, holding that after reasonable notice to remove cutting it down and pushing it into the river so that it floated off is justifiable); or muskrat traps (Crane *v.* Mason, Wright (Ohio) 333); or sawlogs deposited by plaintiff under agreement to remove by a certain time, not fulfilled (Knapp *v.* Hortung, 103 Pa. St. 400).

Notice.— It is sometimes held that notice must be given before removal. Burgess *v.* Graffman, 18 Fed. 251, personalty on land sold for debt.

56. Berry *v.* Carle, 3 Me. 269, holding that one owning a dam jointly with another is liable if he turns the other's logs which have lodged on the dam adrift over it.

57. Grier *v.* Ward, 23 Ga. 145; Berry *v.* Carle, 3 Me. 269.

58. Mead *v.* Pollock, 99 Ill. App. 151, holding that the landowner is liable for the use of excessive force.

game killed on his land from the trespasser,[59] or things severed from it by a trespasser,[60] and may justify interference with plaintiff's property from necessity for which defendant is not responsible.[61] The owner of land is justified in removing a structure erected wrongfully on his land,[62] or erected rightfully, after the right has terminated;[63] or in filling in excavations thereon wrongfully made by nother.[64] So the owner of a turnpike road is justified in removing obstructions thereon.[65] A trespass is not justified because done by defendant to prevent an injury to his property arising from natural condition or to obtain a benefit to himself;[66] but

59. Blades *v.* Higgs, 20 C. B. N. S. 214, 11 H. L. Cas. 621, 11 Jur. N. S. 701, 34 L. J. C. P. 286, 12 L. T. Rep. N. S. 615, 13 Wkly. Rep. 927, 11 Eng. Reprint 1474.

60. Wilson *v.* Clark, 4 N. J. L. 379 (trees cut on the land and still lying there); Baker *v.* Flint, 3 U. C. Q. B. O. S. 89 (stones cut and shaped into millstones are not so altered as not to be reclaimable).

61. Huning *v.* Chavez, 7 N. M. 128, 34 Pac. 44, driving plaintiff's sheep which had become intermingled with defendant's on the highway to a point where they could be separated.

62. Ryan *v.* State, 5 Ind. App. 396, 31 N. E. 1127; Dunham *v.* Stuyvesant, 11 Johns. (N. Y.) 569.

Fences.— The owner may remove a fence on his land. Dunham *v.* Stuyvesant, 11 Johns. (N. Y.) 569; Stuyvesant *v.* Tompkins, 9 Johns. (N. Y.) 61; Whalon *v.* Blackburn, 14 Wis. 432) or across his right of way (Ryan *v.* State, 5 Ind. App. 396, 31 N. E. 1127); as where the offending fence is extended up to his own fence, set inside his boundary line (Smith *v.* Johnson, 76 Pa. St. 191); even cutting off the fence posts is proper if necessary to prevent the resetting of them (Kendall *v.* Green, 67 N. H. 557, 42 Atl. 178).

Telephone poles.— The lessee may remove a telephone pole erected in a private alley on land leased by him, although plaintiff has a bill in equity for its removal pending. Maryland Tel., etc., Co. *v.* Ruth, 106 Md. 644, 68 Atl. 358, 124 Am. St. Rep. 506, 14 L. R. A. N. S. 427.

Dams.— An owner of land may remove the end of a dam on his own side of a boundary stream, built by the adjoining landowner across the stream; and a previous recovery in trespass is sufficient notice to remove. Marsh *v.* Brooks, 2 Hill (S. C.) 427.

Part of a house overhanging the land may be removed. Koester *v.* Cowan, 37 Ill. App. 252, holding, however, that it is not justifiable to enter on the adjoining land to effect the removal.

An encroaching foundation of a wall may be removed. Mayfair Property Co. *v.* Johnston, [1894] 1 Ch. 508, 63 L. J. Ch. 399, 70 L. T. Rep. N. S. 485, 8 Reports 781.

63. Prince *v.* Case, 10 Conn. 375, 27 Am. Dec. 675, a house erected by license which has expired by the death of the licensee and by a grant of the land to another who has taken possession.

Notice.—A lessee refusing to remove his buildings after notice as agreed and forcibly preventing the lessor is a wilful trespasser (Emry *v.* Roanoke Nav., etc., Co., 111 N. C. 94, 16 S. E. 18, 17 L. R. A. 699); and recovery of possession in ejectment is sufficient notice to remove (Prince *v.* Case, 10 Conn. 375, 27 Am. Dec. 675).

64. Dower *v.* Richards, 73 Cal. 477, 15 Pac. 105, holding that where a patent reserves to the United States title to gold mines, the lot owner may cave in a tunnel made by a third person searching for a gold mine.

65. Estes *v.* Kelsey, 8 Wend. (N. Y.) 555.

66. Bolling *v.* Whittle, 37 Ala. 35 (holding that entry to remove a house which is partly on the land entered is a trespass); Grant *v.* Allen, 41 Conn. 156 (holding that an entry to change the natural flow of surface water to prevent injury to defendant's house is a trespass); Toledo, etc., R. Co. *v.* Loop, 139 Ind. 542, 39 N. E. 306 (holding that entry and cutting trees to prevent their falling on defendant's adjacent railroad is a trespass); Dexter *v.* Alfred, 74 Hun (N. Y.) 259, 26 N. Y. Suppl. 592 (holding that entry to remove defendant's logs, cut by him on his own land and which he had no other means of getting out, is a trespass).

Excavations.— That defendant is engaged in excavating on his own land does not excuse his excavating under plaintiff's foundations adjoining (Bass *v.* West, 110 Ga. 698, 36 S. E. 244; Walters *v.* Hamilton, 75 Mo. App. 237); nor an entry thereafter and destruction of the building so undermined (Bass *v.* West, 110 Ga. 698, 36 S. E. 244); and digging a canal on defendant's own land does not justify his throwing the earth on plaintiff's adjoining land (Cherry *v.* Lake Drummond Canal, etc., Co., 140 N. C. 422, 53 S. E. 138, 11 Am. St. Rep. 850).

Flooding mines.— Permission to plaintiff by defendant to use a gangway in defendant's mine does not justify turning water into it and flooding plaintiff's mine. McKnight *v.* Ratcliffe, 44 Pa. St. 156.

Support of buildings.— Where no duty to support defendant's adjoining building is shown, plaintiff's failure to support it is no defense to its encroachment on plaintiff's land (Hutchison *v.* St. John Y. M. C. A., 19 N. Brunsw. 65); nor for an entry by defendant to support it, although the need of support arose from plaintiff's excavations on his own land (Hutchison *v.* St. John Y. M. C. A., *supra*).

Taking provisions from an ice-bound vessel abandoned by her captain and part of her crew is not justified because done to save the takers' lives. Guttner *v.* Pacific Steam Whaling Co., 96 Fed. 617.

entry on land to remove a dam thereon which diverted water on plaintiff's land is not a trespass where it was made by the landowner.[67]

(II) *Force in Exercising Rights.* The use of force is justifiable to defend a lawful possession of land,[68] or to eject one unlawfully trespassing on the possession of land,[69] provided unnecessary force is not employed;[70] but the trespasser must first be requested to leave if he entered quietly.[71] Of course the landowner is liable for an assault committed for a purpose other than to expel the trespasser.[72] An officer of parliament is justified in forcibly removing a member in accordance with orders from it.[73]

j. Rights In Rem to Things Affixed to Realty of Another. Title to things affixed by consent to another's realty is no defense to a taking if the landowner has a right of user.[74]

k. Rights In Rem to Personalty — (I) *In General.* Subject to limitations placed by some decisions on the right of entry on the premises of another,[75] title to chattels and immediate right to possession is a good defense to an action for

67. Great Falls *v.* Worster, 15 N. H. 412, defendant's interest in the land that of tenant in common.

68. *Michigan.*— Taylor *v.* Adams, 58 Mich. 187, 24 N. W. 864.

Missouri.— Morgan *v.* Durfee, 69 Mo. 469, 33 Am. Rep. 508, by all necessary means, even to the taking of life.

New Jersey.— Slingerland *v.* East Jersey Water Co., 58 N. J. L. 411, 33 Atl. 843.

New York.— Newkirk *v.* Sabler, 9 Barb. 652.

England.— Weaver *v.* Bush, 8 T. R. 78, 101 Eng. Reprint 1276.

Canada.— Reid *v.* Inglis, 12 U. C. C. P. 191, removal at request of proper authorities of a person making a disturbance in a church, justifiable.

Trespass on highway.— The owner of the fee in a highway is justified in forcibly holding one who is thereon not as a traveler but engaged in wilfully frightening the birds at which said owner was shooting on his adjoining land. Harrison *v.* Rutland, [1893] 1 Q. B. 142, 57 J. P. 278, 62 L. J. Q. B. 117, 68 L. T. Rep. N. S. 35, 4 Reports 155, 41 Wkly. Rep. 322.

Making arrest.—An officer entering land to serve a warrant of arrest cannot recover for an assault if he did not inform the landowner and the landowner did not know of the warrant. Bellows *v.* Shannon, 2 Hill (N. Y.) 86.

Requesting trespasser to desist.— It is held in England that where an attempt is made to forcibly enter on land, the owner in possession need not request the trespasser to desist before assaulting him in resisting the trespass, distinguishing the ejectment of one already on the land. Polkinhorn *v.* Wright, 8 Q. B. 197, 10 Jur. 11, 15 L. J. Q. B. 70, 55 E. C. L. 197; Tullay *v.* Reed, 1 C. & P. 6, 12 E. C. L. 16; Scott *v.* Brown, 51 L. T. Rep. N. S. 746. But in Ontario a request has been held necessary, although the nature of the assault, a shooting and wounding with a pistol, may have affected the decision. Spires *v.* Barrick, 14 U. C. Q. B. 420.

69. Hannabalson *v.* Sessions, 116 Iowa 457, 90 N. W. 93, 93 Am. St. Rep. 250 (holding that force reasonable and necessary to compel one who has thrust her arm across a division fence to remove it may be used); Tribble *v.* Frame, 5 Litt. (Ky.) 187; Shaw *v.* Chairitie, 3 C. & K. 21 (holding that the owner of a house may turn out a person disturbing the peace of the family or call a policeman to do so, although the disturber has not committed an assault).

Innkeeper.—An innkeeper is not liable for having a constable remove a person who is making a disturbance therein who has assaulted him (Webster *v.* Watts, 11 Q. B. 311, 12 Jur. 243, 17 L. J. Q. B. 73, 63 E. C. L. 311); and he may himself remove one making a disturbance regardless of the motive for the removal (Oakes *v.* Wood, 6 L. J. Exch. 200, M. & H. 237, 2 M. & W. 791).

Shopkeeper.—A shopkeeper is justified in expelling by force one who refuses to leave but not in arresting him for such mere refusal not accompanied by an assault. Reece *v.* Taylor, 1 Harr. & W. 15, 4 L. J. K. B. 74, 4 N. & M. 470.

Licensor.—A ticket entitling the holder to enter the grand stand at a race-course is a mere license conveying no interest in the lands, and the owner of the land is not liable in trespass for ejecting the holder. Wood *v.* Ledbitter, 14 L. J. Exch. 161, 13 M. & W. 838.

70. Green *v.* Buckingham, 122 Ill. App. 631, holding that use of unnecessary force renders the owner of land in possession liable for assault.

71. Emmons *v.* Quade, 176 Mo. 22, 75 S. W. 103 (holding that the owner of a car on which a boy is playing must first order him to leave); Tullay *v.* Reed, 1 C. & P. 6, 12 E. C. L. 16 (from a dwelling-house); Ballard *v.* Bond, 1 Jur. 7 (from a church); Scott *v.* Brown, 51 L. T. Rep. N. S. 746.

72. Davis *v.* Lennon, 8 U. C. Q. B. 599.

73. Bradlaugh *v.* Erskine, 47 L. T. Rep. N. S. 618, 31 Wkly. Rep. 365.

74. Rubio Canyon Land, etc., Assoc. *v.* Pasadena, etc., R. Co., 3 Cal. App. 226, 84 Pac. 846, pipe line laid under contract giving landowner right of user.

75. See *infra*, I, A, 6, k, (II).

a taking of them by the owner. The owner of goods with immediate right of possession may justify retaking them peaceably,[76] or one acting under him; [77] and for taking goods of another wrongfully and indistinguishably mixed with defendant's goods by plaintiff or his privies; [78] and one who is entitled to rescind a contract of sale for fraud is not liable for taking the goods.[79] But title to personalty in another's possession wrongfully is no defense to a taking by mistake of other property which really belongs to the wrong-doer.[80] And title is no defense where the person in possession has right of possession against the owner.[81] A prior lien is a good defense in trespass to personalty,[82] but not where defendant has contracted to postpone it,[83] or has lost it,[84] or it never was valid.[85] Title as mortgagee of chattels is a good defense for taking them,[86] at least after default,[87] although the debt was usurious; [88] but a discharged mortgage [89] or one obtained by fraud [90] is no defense. Title to some of the things taken is no defense for the taking of others.[91] A wife is not liable for using, during her husband's insanity, his personalty for support of the family.[92]

(II) *Right to Personalty on Land of Another.* According to many decisions, mere title to and right to possession of goods on land of another is not a defense for entering and taking them,[93] and this, it is held, is especially true if force is

76. *Alabama.*— Stowers Furniture Co. *v.* Brake, 158 Ala. 639, 48 So. 89; Terry *v.* Williams, 148 Ala. 468, 41 So. 804.

Illinois.— Burt *v.* Blake, 14 Ill. App. 324.

Louisiana.— Wells *v.* Wells, 8 Mart. N. S. 307.

New Hampshire.— Heath *v.* West, 28 N. H. 101, holding that on sale and mortgage back of a horse to a minor, the mortgagee is not liable for retaking on default in payment as he either has title as mortgagee, or if the minor repudiates, as general owner.

North Carolina.— Warbritton *v.* Savage, 49 N. C. 382, holding that the vendee after purchase of his coöwner's share may take such share, although forbidden.

Tennessee.— Collomb *v.* Taylor, 9 Humphr. 689.

Vermont.— Merritt *v.* Miller, 13 Vt. 416, although taken under a writ of attachment.

Title as cotenant is in general a good defense for a peaceable taking (Tallman *v.* Barnes, 54 Wis. 181, 11 N. W. 478); but not for a destruction of the chattel (Trout *v.* Kennedy, 47 Pa. St. 387).

77. Swigert *v.* Thomas, 7 Dana (Ky.) 220 (authority from mortgagee to take); Bogard *v.* Jones, 9 Humphr. (Tenn.) 739; Collomb *v.* Taylor, 9 Humphr. (Tenn.) 689 (peaceable taking).

78. Burns *v.* Campbell, 71 Ala. 271.

Logs cut by trespasser.—A landowner may seize the whole of a lot of logs, part of which were cut on his land by a trespasser, as he is a coöwner, although he may have to account for part to the owner of the land, where the other part of the logs was cut (Bryant *v.* Ware, 30 Me. 295; Hesseltine *v.* Stockwell, 30 Me. 237, 1 Am. Dec. 627); or may at least take his proportionate part (Lawrie *v.* Rathbun, 38 U. C. Q. B. 255).

79. Wheelden *v.* Lowell, 50 Me. 499.

80. Carter *v.* Fulgham, 134 Ala. 238, 32 So. 684, taking the wrong mule in reclaiming stolen United States mules.

81. Boyd *v.* McArthur, 120 Ga. 974, 48 S. E. 358 (holding that a vendor of a piano delivered pending negotiations as to purchase is liable in trespass for a taking without notice); Holmes *v.* Clarke, 2 N. Brunsw. 167 (holding that a lessor of a farm entitled to ride a horse let with it, when not in use, is liable for taking it while in actual use).

Title obtained by fraud is no defense to a taking by the holder of the title (Butler *v.* Collins, 12 Cal. 457); or one claiming under him (Walker *v.* Swasey, 2 Allen (Mass.) 312).

82. Dunlap *v.* Steele, 80 Ala. 424.

83. Hanchett *v.* Ives, 171 Ill. 122, 49 N. E. 206.

84. Hickok *v.* Coates, 2 Wend. (N. Y.) 419, 20 Am. Dec. 632, delay in proceeding after a levy.

85. Keyes *v.* Howe, 18 Vt. 411, holding that a levy on exempt property gives no lien, so a subsequent taking by the officer is a trespass.

86. Holman *v.* Ketchum, 153 Ala. 360, 45 So. 206.

87. Burns *v.* Campbell, 71 Ala. 271.

88. Burns *v.* Campbell, 71 Ala. 271.

89. Burns *v.* Campbell, 71 Ala. 271.

90. Holman *v.* Ketchum, 153 Ala. 360, 45 So. 206.

91. Holly *v.* Brown, 14 Conn. 255; Kuschell *v.* Campau, 49 Mich. 34, 12 N. W. 899.

92. Forbes *v.* Moore, 32 Tex. 195.

93. *Alabama.*— Brown *v.* Floyd, 163 Ala. 317, 50 So. 995; Milner *v.* Milner, 101 Ala. 599, 14 So. 373, holding that a stepmother residing with her husband in the house of the late wife left to her children is not entitled to enter the bedroom of one of the children against protest and take property belonging to said stepmother.

Michigan.— Waldo *v.* Waldo, 52 Mich. 91, 94, 17 N. W. 709, 710.

Mississippi.— Agnew *v.* Jones, 74 Miss. 347, 23 So. 25.

New Hampshire.— Dame *v.* Dame, 38 N. H. 429, 75 Am. Dec. 195.

used;[94] nor is title to goods placed on another's land with the consent of the owner of the goods[95] or by his wrongful act.[96] There are, however, cases which hold that the owner of chattels is justified in going on the land to retake his chattels where they were there without his fault,[97] as, for instance, where the chattels have come upon plaintiff's land by unavoidable accident.[98] So there are decisions in which it is held that where personalty has been wrongfully taken from the owner, he does not commit a trespass by entering upon the premises of the wrongdoer and retaking his property;[99] that the rightful owner may enter on the premises of one who wrongfully detains the property,[1] or fails to deliver it as

New York.— Goff *v.* Kilts, 15 Wend. 550; Blake *v.* Jerome, 14 Johns. 406; Heermance *v.* Vernoy, 6 Johns. 5.

Ohio.— Ballou *v.* Farnsworth, 4 Ohio Dec. (Reprint) 75, 1 Clev. L. Rep. 1.

Rhode Island.— Salisbury *v.* Green, 17 R. I. 758, 24 Atl. 787.

Tennessee.— Collomb *v.* Taylor, 9 Humphr. 689; Roach *v.* Damron, 2 Humphr. 425.

England.— Patrick *v.* Colerick, 7 L. J. Exch. 135, 3 M. & W. 483.

Canada.— Bransfield *v.* Bishop, 2 N. Brunsw. 171; Cameron *v.* Hunter, 34 U. C. Q. B. 121.

See 46 Cent. Dig. tit. "Trespass," § 63.

Applications of rule.—A mortgagee is not entitled to enter land of one not the mortgagor to take the mortgaged chattel (Kennedy *v.* Hoyt, 197 Mass. 361, 83 N. E. 862), nor the land of the mortgagor (McLeod *v.* Jones, 105 Mass. 403, 7 Am. Rep. 539). An administrator may not enter another's lands to take property of the estate. Waldo *v.* Waldo, 52 Mich. 91, 94, 17 N. W. 709, 710. Entry and assault to retake a strayed chicken is not justifiable. Shellabarger *v.* Morris, 115 Mo. App. 566, 91 S. W. 1005. After a license to remove one's house on another's land is revoked he is liable for an entry made after a reasonable time for removal has expired. Dame *v.* Dame, 38 N. H. 429, 75 Am. Dec. 195. The owner of bees cannot enter another's land to retake them. Goff *v.* Kilts, 15 Wend. (N. Y.) 550. Entry to take property sold under conditional sale agreement is a trespass, although not fully paid for. Ballou *v.* Farnsworth, 4 Ohio Dec. (Reprint) 75, 1 Clev. L. Rep. 1. Where a pipe for natural gas was laid under an agreement and later a part was removed, removal of the balance ten years later is a trespass. Halstead *v.* American Natural Gas Co., 17 Pa. Super. Ct. 605. A partner cannot enter his partner's lands to take a house built with partnership funds and intended for use in the partnership, although the house is merely set on blocks. McKenzie *v.* McKenzie, 1 Nova Scotia 198. That defendant put a house on another's land shows no right or title to it to justify its taking. Cameron *v.* Hunter, 34 U. C. Q. B. 121.

94. Herndon *v.* Bartlett, 4 Port. (Ala.) 481 (holding that a joint owner cannot break into his coöwner's premises to take the chattel); Shores *v.* Brooks, 81 Ga. 468, 8 S. E. 429, 12 Am. St. Rep. 332 (breaking into an outhouse); Daniels *v.* Brown, 34 N. H. 454, 69 Am. Dec. 505 (coöwners).

95. Crocker *v.* Carson, 33 Me. 436; Smith *v.* Pierce, 110 Mass. 35, holding that one who rents personalty to another is not justified in entering his lands to take it at the end of the term. *Contra,* Arrington *v.* Larrabee, 10 Cush. (Mass.) 512, building materials placed on the land under an agreement afterward mutually rescinded.

96. Newkirk *v.* Sabler, 9 Barb. (N. Y.) 652 (holding that where a servant of one forbidden to enter lands drove on them and the owner nailed up the bars, the owner is not liable for assault on the master to prevent his tearing down the bars and removing his team); Anthony *v.* Haneys, 8 Bing. 186, 1 L. J. C. P. 81, 1 Moore & S. 300, 21 E. C. L. 499.

97. *New Hampshire.*— Pierce *v.* Finerty, (1910) 76 Atl. 194 (but not otherwise); Carter *v.* Thurston, 58 N. H. 104, 42 Am. Rep. 584.

Pennsylvania.—Chambers *v.* Bedell, 2 Watts & S. 225, 37 Am. Dec. 508.

Vermont.— Richardson *v.* Anthony, 12 Vt. 273.

England.— Anthony *v.* Haneys, 8 Bing. 186, 1 L. J. C. P. 81, 1 Moore & S. 300, 21 E. C. L. 499.

Canada.—Hamilton *v.* Calder, 23 N. Brunsw. 373 (after permission to retake had been asked and refused); Read *v.* Smith, 2 N. Brunsw. 288.

98. Proctor *v.* Adams, 113 Mass. 376, 18 Am. Rep. 500 (boat cast ashore by a storm); Rightmire *v.* Shepard, 12 N. Y. Suppl. 800 (cattle escaping while driven along a highway and immediately pursued); Forster *v.* Juniata Bridge Co., 16 Pa. St. 393, 55 Am. Dec. 506 (property which has gone adrift and stranded); Webb *v.* Beavan, 6 M. & G. 1055, 7 Scott N. R. 936, 46 E. C. L. 1055 (property stolen from the owner).

99. Allen *v.* Feland, 10 B. Mon. (Ky.) 306; Madden *v.* Brown, 8 N. Y. App. Div. 454, 40 N. Y. Suppl. 714; Chambers *v.* Bedell, 2 Watts & S. (Pa.) 225, 37 Am. Dec. 508; Blades *v.* Higgs, 10 C. B. N. S. 713, 7 Jur. N. S. 1289, 30 L. J. C. P. 347, 4 L. T. Rep. N. S. 551, 100 E. C. L. 713; Patrick *v.* Colerick, 7 L. J. Exch. 135, 3 M. & W. 483; Hamilton *v.* Calder, 23 N. Brunsw. 373 (although defendant used personal violence for which he is responsible criminally in order to get them); Graham *v.* Green, 10 N. Brunsw. 330. *Contra,* Chess *v.* Kelly, 3 Blackf. (Ind.) 438; Bogard *v.* Jones, 9 Humphr. (Tenn.) 739; Collomb *v.* Taylor, 9 Humphr. (Tenn.) 689, property wrongfully distrained as the property of another.

1. Turner *v.* Smith, 29 N. Brunsw. 567.

agreed,[2] or that where property is wrongfully taken by a third person and placed on the land and the landowner refuses on request to allow the owner to take it, he may enter on the land to retake it.[3]

(III) *FORCE IN EXERCISING THE RIGHT.* Title with immedate right to possession thereof is a good defense to the use of actual force necessary to retake personalty from one withholding it.[4] The owner is not justified, however, in committing an assault or a breach of the peace.[5] The use of force is justifiable to defend a lawful possession of personalty.[6] But a mere contractual right to possession of personalty does not justify the use of force to take it, unless such right is clearly given by the contract.[7] A destruction of the property of plaintiff in defense of the person or property of defendant can certainly not be justified unless it is shown to be necessary.[8]

l. Property Rights In Rem of Persons Other Than Defendant. Title and right of possession in a third person to property in plaintiff's possession is not a good defense to a trespass thereon where defendant does not connect himself with it;[9] nor can defendant justify under other rights in a third person where he does not connect himself with them.[10] But title with right of possession in a

2. Huddlestone *v.* Pearson, 3 L. J. K. B. O. S. 43.

3. Hamilton *v.* Calder, 23 N. Brunsw. 373.

4. *Illinois.*— Mills *v.* Wooters, 59 Ill. 234, goods in possession of bailee of former owner who forbids the taking.

Michigan.— Smith *v.* Lozo, 42 Mich. 6, 3 N. W. 227.

New Hampshire.— Hopkins *v.* Dickson, 59 N. H. 235; Sterling *v.* Warden, 51 N. H. 217, 12 Am. Rep. 80.

South Carolina.— Skinner *v.* McDowell, 2 Nott & M. 68.

Virginia.— Hite *v.* Long, 6 Rand. 457, 18 Am. Dec. 719.

England.— Blades *v.* Higgs, 10 C. B. N. S. 713, 7 Jur. N. S. 1289, 30 L. J. C. P. 347, 4 L. T. Rep. N. S. 551, 100 E. C. L. 713.

Equitable title is sufficient. Pierce *v.* Hall, 41 Barb. (N. Y.) 142.

5. Mills *v.* Wooters, 59 Ill. 234; White Sewing Mach. Co. *v.* Conner, 111 Ky. 827, 64 S. W. 841, 23 Ky. L. Rep. 1125.

6. Alderson *v.* Waistell, 1 C. & K. 358, 47 E. C. L. 358.

7. Montgomery Water Power Co. *v.* Chapman, 126 Fed. 68, 61 C. C. A. 124.

8. Kirkwood *v.* Miller, 5 Sneed (Tenn.) 455, 73 Am. Dec. 134, holding that plaintiff's slave cannot be killed because of an expected insurrection of slaves in which plaintiff's slave is not implicated.

9. **Rule applied in case of realty.**— Finch *v.* Alston, 2 Stew. & P. (Ala.) 83, 23 Am. Dec. 299; Weimer *v.* Lowery, 11 Cal. 104; Omaha, etc., Smelting, etc., R. Co. *v.* Tabor, 13 Colo. 41, 21 Pac. 925, 16 Am. St. Rep. 185, 5 L. R. A. 236; Beach *v.* Livergood, 15 Ind. 496; Owings *v.* Gibson, 2 A. K. Marsh. (Ky.) 515; North *v.* Cates, 2 Bibb (Ky.) 591; Look *v.* Norton, 55 Me. 103; Clancey *v.* Houdlette, 39 Me. 451; Hammond *v.* Morrell, 33 Me. 300; Dunlap *v.* Glidden, 31 Me. 510; Merrill *v.* Burbank, 23 Me. 538; Moore *v.* Moore, 21 Me. 350; New Windsor *v.* Stocksdale, 95 Md. 196, 52 Atl. 596; Doane *v.* Willcutt, 16 Gray (Mass.) 368; Allen *v.* Taft, 6 Gray (Mass.) 552; Richardson *v.* Murrill, 7 Mo. 333; Fowler *v.* Owen, 68 N. H. 270, 39 Atl. 329, 73 Am. St. Rep. 588; Todd *v.* Jackson, 26 N. J. L. 525; Wheeler *v.* Lawson, 103 N. Y. 40, 8 N. E. 360; Stowell *v.* Otis, 71 N. Y. 36; Farnsworth *v.* Western Union Tel. Co., 3 Silv. Sup. (N. Y.) 30, 6 N. Y. Suppl. 735; Jackson *v.* Gunton, 26 Pa. Super. Ct. 203 [*affirmed* in 218 Pa. St. 275, 67 Atl. 467]; Love *v.* Turner, 71 S. C. 322, 51 S. E. 101; McColman *v.* Wilkes, 3 Strobh. (S. C.) 465, 51 Am. Dec. 637; Forst *v.* Rothe, (Tex. Civ. App. 1902) 66 S. W. 575; Beaumont Lumber Co. *v.* Ballard, (Tex. Civ. App. 1893) 23 S. W. 920; Stratton *v.* Lyons, 53 Vt. 641; Hughes *v.* Graves, 39 Vt. 359, 94 Am. Dec. 331; Chambers *v.* Donaldson, 11 East 65, 10 Rev. Rep. 435, 103 Eng. Reprint 929; Boulton *v.* Shand, 10 U. C. Q. B. 351.

Rule applied in case of personalty.— W. K. Syson Timber Co. *v.* Dickens, 146 Ala. 471, 40 So. 753; Equitable Trust Co. *v.* Burley, 110 Ill. App. 538; Beebe *v.* Stutsman, 5 Iowa 271; Fiske *v.* Small, 25 Me. 453; Agnew *v.* Jones, 74 Miss. 347, 23 So. 25; Cook *v.* Howard, 13 Johns. (N. Y.) 276 (although taking purported to be for the owner); Kissam *v.* Roberts, 6 Bosw. (N. Y.) 154; King *v.* Orser, 4 Duer (N. Y.) 431; Sickles *v.* Gould, 51 How. Pr. (N. Y.) 22; Paddock *v.* Wing, 16 How. Pr. (N. Y.) 547; Hanmer *v.* Wilsey, 17 Wend. (N. Y.) 91; Buck *v.* Aikin, 1 Wend. (N. Y.) 466, 19 Am. Dec. 535; Carson *v.* Prater, 6 Coldw. (Tenn.) 565; Wooley *v.* Edson, 35 Vt. 214; Fisher *v.* Cobb, 6 Vt. 622; Haggan *v.* Pasley, L. R. 2 Ir. 573; Nelson *v.* Cherrell, 7 Bing. 663, 9 L. J. C. P. O. S. 227, 1 Moore & S. 452, 20 E. C. L. 296; Carter *v.* Johnson, 2 M. & Rob. 263.

10. *California.*— Kellogg *v.* King, 114 Cal. 378, 46 Pac. 166, 55 Am. St. Rep. 74, holding that right to hunt reserved in a lease does not justify third persons in hunting.

Kentucky.— Winn *v.* Wilhite, 5 J. J. Marsh. 521, holding that prior possession is no defense to one not in privity.

Louisiana.— Bendich *v.* Scobel, 107 La. 242, 31 So. 703, holding that rights of the state against a squatter who beds oysters in a

third person is a good defense to an action for trespass if defendant was acting under his orders [11] or authority,[12] or under his right,[13] or the true owner intervenes in the action; [14] and the right of a third person other than title is a good defense where defendant *de facto* acted by command of the holder of the right, although it was contrary to a statute for him so to act.[15]

m. Rights In Personam — (I) *In General.* Rights which are purely *in personam* against the owner of property and which give no right *in rem* to the property itself do not justify interference with the property; [16] but a right *in rem*, although equitable, is a good defense.[17]

(II) *Consent or License.* A license from the owner of land is a good defense to an action of trespass for acts within the scope of the license,[18] although

stream do not justify others in diverting the stream.

Maryland.— New Windsor *v.* Stocksdale, 95 Md. 196, 52 Atl. 596, holding that inconvenience of third persons from closing an alley is no defense to defendant for removing obstructions.

Missouri.— Kennett *v.* Plummer, 28 Mo. 142.

Rhode Island.— Newport Hospital *v.* Carter, 15 R. I. 285, 3 Atl. 412, holding that the right to take sand reserved to the inhabitants of a town is no defense to one not an inhabitant at the time, although he became one later.

South Carolina.— Beaudrot *v.* Southern R. Co., 69 S. C. 160, 48 S. E. 106, holding that a right of way does not justify persons not connected with it.

Texas.— Diamond *v.* Smith, 27 Tex. Civ. App. 558, 66 S. W. 141, holding that the right of owner of a sewer to disconnect a sewer connected with it does not justify others in doing so.

Vermont.— Capen *v.* Sheldon, 78 Vt. 39, 61 Atl. 864

England.— Dobree *v.* Napier, 2 Bing. N. Cas. 781, 6 L. J. C. P. 273, 3 Scott 201, 29 E. C. L. 759, holding that right of the state to seize a vessel will not justify seizure by private person.

Canada.— Garrioch *v.* McKay, 13 Manitoba 404; Johnston *v.* Christie, 31 U. C. C. P. 358, holding that failure of plaintiff to complete his contract for purchase, under which he entered, can be set up only by the vendor.

11. Rule applied in case of realty.— Logan *v.* Vernon, etc., R. Co., 90 Ind. 552; Gault *v.* Jenkins, 12 Wend. (N. Y.) 488; Everett *v.* Smith, 44 N. C. 303; Benson *v.* Connor, 6 U. C. C. P. 356.

Rule applied in case of personalty.— See Starkweather *v.* Smith, 6 Mich. 377.

12. Esty *v.* Baker, 50 Me. 325, 79 Am. Dec. 616; Stambaugh *v.* Hollabaugh, 10 Serg. & R. (Pa.) 357; Parent *v.* Cornelison, 2 N. Brunsw. 373. But it is not enough that the owner merely allowed the act, neither commanding, authorizing, nor taking responsibility for it. Keen *v.* Seymour, 11 N. Brunsw. 44.

13. Rule applied in case of realty.— Jones *v.* Columbus Water Lot Co., 18 Ga. 539; Danforth *v.* Briggs, 89 Me. 316, 36 Atl. 452; Goetchius *v.* Sanborn, 46 Mich. 330, 9 N. W. 437.

Rule applied in case of personalty.— Tarry *v.* Brown, 34 Ala. 159; Costenbader *v.* Shuman, 3 Watts & S. (Pa.) 504; Hutchinson *v.* Lord, 1 Wis. 286, 60 Am. Dec. 381.

14. Le Moyne *v.* Anderson, 123 Ky. 584, 96 S. W. 843, 29 Ky. L. Rep. 1017, trespass for cutting trees.

15. Dobree *v.* Napier, 2 Bing. N. Cas. 781, 5 L. J. C. P. 273, 3 Scott 201, 29 E. C. L. 759, holding that seizure of a vessel by an Englishman in the service of a foreign sovereign and subsequent forfeiture by the prize court is a good defense, although his taking service was illegal under the foreign enlistment act.

16. Moss *v.* Meshew, 8 Bush (Ky.) 187 (holding that a contract for the sale of unspecified growing trees does not justify entry and taking particular trees); Bangor Sav. Bank *v.* Wallace, 87 Me. 28, 32 Atl. 716 (mortgagor of land liable for entry on the mortgagee's possession); Rawson *v.* Putnam, 128 Mass. 552 (holding that a grant of land in adverse possession conveys no title and is no defense for entering, although the occupant afterward abandons possession and the vendee perfects his title by entry); North Bridgewater Second Cong. Soc. *v.* Waring, 24 Pick. (Mass.) 304 (member of a religious corporation liable for interference with the corporate property).

17. Peterson *v.* Lauretzen, 68 Cal. 19, 8 Pac. 607, right to a way fraudulently omitted from deed of partition.

18. *District of Columbia.*— W. T. Walker Furniture Co. *v.* Dyson, 32 App. Cas. 90, 19 L. R. A. N. S. 606.

Illinois.— Blake *v.* Dow, 18 Ill. 261.

Indiana.— Bennett *v.* McIntire, 121 Ind. 231, 23 N. E. 78, 6 L. R. A. 736; Wheeler *v.* Me-shing-go-me-sia, 30 Ind. 402; Conklin *v.* White Water Valley Canal Co., 3 Ind. 506.

Iowa.— Beck *v.* Luers, (1910) 126 N. W. 811.

Maryland.— South Baltimore Co. *v.* Muhlbach, 69 Md. 395, 16 Atl. 117, 1 L. R. A. 507.

Michigan.— Bigelow *v.* Reynolds, 68 Mich. 344, 36 N. W. 95.

New York.— Walter *v.* Post, 6 Duer 363, 4 Abb. Pr. 382.

See 46 Cent. Dig. tit. "Trespass," § 54 *et seq.* And see Licenses, 25 Cyc. 643.

Applications of rule.— License to build a railroad is a justification to the person entering to build (Louisville, etc., Co. *v.* Thompson, 18 B. Mon. (Ky.) 735; Pomeroy

by parol [19] or given by mistake,[20] but not if void [21] or obtained by fraud.[22] The license may be implied.[23] A license to enter on land for a certain purpose is a

v. Milwaukee, etc., R. Co., 16 Wis. 640); license to sell a shop on one's land under execution is a defense to an entry to take, although the officer selling was not such *de jure* (Doty *v.* Gorham, 5 Pick. (Mass.) 487, 16 Am. Dec. 417); injury to the land from work carried on by license does not give a cause of action unless inflicted wilfully or negligently (Baldwin *v.* Postal Tel. Cable Co., 78 S. C. 419, 59 S. E. 67).

Forfeiture of the license does not give any right to damages for acts done in accordance therewith before forfeiture. Pratt *v.* Ogden, 34 N. Y. 20.

When demand necessary.— Where there is a license to enter and take chattels, demand or some intimation of the reason of the entrance must first be made. Aikins *v.* Brunton, 14 Wkly. Rep. 636; Read *v.* Smith, 2 N. Brunsw. 173.

19. *Connecticut.*— Collins Co. *v.* Marcy, 25 Conn. 239; Foot *v.* New Haven, etc., Co., 23 Conn. 214.

Indiana.— Schoonover *v.* Irwin, 58 Ind. 287; Owens *v.* Lewis, 46 Ind. 488, 15 Am. Rep. 295.

Massachusetts.— Hodgkins *v.* Farrington, 150 Mass. 19, 22 N. E. 73, 15 Am. St. Rep. 168, 5 L. R. A. 209; Clapp *v.* Boston, 133 Mass. 367; Giles *v.* Simonds, 15 Gray 441, 77 Am. Dec. 373; Stevens *v.* Stevens, 11 Metc. 251, 45 Am. Dec. 203.

Mississippi.— Hicks *v.* Mississippi Lumber Co., 95 Miss. 353, 48 So. 624; Currie *v.* Natchez, etc., R. Co., 61 Miss. 725; New Orleans, etc., R. Co. *v.* Moye, 39 Miss. 374.

New Hampshire.— Blaisdell *v.* Portsmouth, etc., R. Co., 51 N. H. 483; Marston *v.* Gale, 24 N. H. 176; Sampson *v.* Burnside, 13 N. H. 264.

New Jersey.— Freeman *v.* Headley, 32 N. J. L. 225; Den *v.* Baldwin, 21 N. J. L. 395.

New York.— Pratt *v.* Ogden, 34 N. Y. 20; Selden *v.* Delaware, etc., Canal Co., 29 N. Y. 634; Sherman Line Co. *v.* Glens Falls, 101 N. Y. App. Div. 269, 91 N. Y. Suppl. 994; Eggleston *v.* New York, etc., R. Co., 35 Barb. 162; Syron *v.* Blakeman, 22 Barb. 336; Woodruff *v.* Beekman, 43 N. Y. Super. Ct. 282; Walter *v.* Post, 6 Duer 363.

Pennsylvania.— Pursell *v.* Stover, 110 Pa. St. 43, 20 Atl. 403; Coxe *v.* England, 65 Pa. St. 212.

Vermont.— Barnes *v.* Barnes, 6 Vt. 388.

Wisconsin.— Lockhart *v.* Geir, 54 Wis. 133, 11 N. W. 245; French *v.* Owen, 2 Wis. 250.

See 46 Cent. Dig. tit. "Trespass," § 54 *et seq.*

20. Ashcraft *v.* Cox, 50 S. W. 986, 21 Ky. L. Rep. 131 (holding that consent to cut trees, given in ignorance of one's rights, is a defense to the trespass); Shaw *v.* Mussey, 48 Me. 247 (consent to entry under belief that premises were covered by a mortgage); Dewey *v.* Bordwell, 9 Wend. (N. Y.) 65 (holding that where a lessee ran a boundary and the adjoining landowner planted a crop and then the lessor ran the true line taking in the crop, the lessee cannot maintain an action against the adjoining owner for harvesting the crop).

21. Chandler *v.* Edson, 9 Johns. (N. Y.) 362.

A license by a tenant to his landlord to eject him without process of law is void. Edwick *v.* Hawkes, 18 Ch. D. 199, 50 L. J. Ch. 577, 45 L. T. Rep. N. S. 168, 29 Wkly. Rep. 913.

A sale or gift by an infant being voidable is if avoided no defense to an action for taking chattels. Fonda *v.* Van Horne, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77.

22. Ives *v.* Humphreys, 1 E. D. Smith (N. Y.) 196; Brown *v.* American Tel., etc., Co., 82 S. C. 173, 63 S. E. 744; Voyles *v.* Postal Tel. Cable Co., 78 S. C. 430, 59 S. E. 68; *In re* McLay, 24 U. C. Q. B. 54, obtaining registrar's books by falsely representing a paper to be a writ of mandamus requiring their delivery.

23. Rule applied in case of realty — *Where license is implied.*— Lehman *v.* Shackleford, 50 Ala. 437 (entry on leased land by obligee of a rent note to arrange for payment); Chicago City R. Co. *v.* Rosenberger, 110 Ill. App. 406 (entry into a railroad office to make complaint against an employee, although wrong office is entered by mistake); Ramey *v.* W. W. Kimball Co., 58 S. W. 471, 22 Ky. L. Rep. 597 (entry to take goods sold plaintiff's adult children living with him, under agreement giving right to resume possession on default of payment); Thurmond *v.* Ash Grove White Lime Assoc., 125 Mo. App. 73, 102 S. W. 617 (holding that a lease for quarry implies right to blast carefully); Adams *v.* Freeman, 12 Johns. 408, 7 Am. Dec. 327 (holding that familiar intimacy implies a license to enter another's house); Freck *v.* Locust Mountain Coal, etc., Co., 86 Pa. St. 318 (holding that a lease of coal mine with duty to fix a theoretical boundary gives right to lessee to do acts necessary to that end); Clark *v.* Vermont, etc., R. Co., 28 Vt. 103 (holding that a license to take stones implies license to draw them across the land if necessary); Reid *v.* Inglis, 12 U. C. C. P. 191 (holding that there is an implied license to enter a church to join in public worship); Peters *v.* Frecker, 3 Nova Scotia Dec. 67 (holding that a statement by the landowner to an adjoining owner that a wall was partly on his land but he did not object, but his grantee might, implies a license to build only).

License to make an erection on land gives a right to its removal thereafter by the licensee (Whittier *v.* Sanborn, 38 Me. 32), or his successor in title (Doty *v.* Gorham, 5 Pick. (Mass.) 487, 16 Am. Dec. 417); although forbidden (De Laine *v.* Alderman, 31 S. C. 267, 9 S. E. 950; Barnes *v.* Barnes, 6 Vt. 388).

good defense for the entry, although unauthorized acts are committed,[24] or the act is not done as agreed;[25] but it does not justify an entry for another purpose,[26] nor the doing of acts not authorized by the license;[27] and if conditional it is no

When one visits the place of another upon an errand connected with the joint business of the two, it cannot be said that he is a trespasser, or that he is there without invitation. Mackie *v.* Heywood, etc., Rattan Co., 88 Ill. App. 119; Gilbert *v.* Nagle, 118 Mass. 278; Indermaur *v.* Dames, L. R. 1 C. P. 274, 4 H. & C. 243, 12 Jur. 432, 35 L. J. C. P. 184, 14 L. T. Rep. N. S. 484, 14 Wkly. Rep. 586 [*affirmed* in L. R. 2 C. P. 311, 36 L. J. C. P. 181, 16 L. T. Rep. N. S. 293, 15 Wkly. Rep. 434].

When license is not implied.— Omaha, etc., Smelting, etc., Co. *v.* Tabor, 13 Colo. 41, 21 Pac. 925, 16 Am. St. Rep. 185, 5 L. R. A. 236 (holding that where ore is being taken from a mine by order of court, consent that another join in taking is no license to those already taking); Watson *v.* Dilts, 124 Iowa 344, 100 N. W. 50 (entry into plaintiff's house between nine and twelve P. M. to have sexual intercourse with a female boarder who admitted defendant); Musch *v.* Burkhart, 83 Iowa 301, 48 N. W. 1025, 32 Am. St. Rep. 305, 12 L. R. A. 484 (holding that cutting boundary trees does not imply a license to adjoining owner to cut others); Gusdorff *v.* Duncan, 94 Md. 160, 50 Atl. 574 (holding that the keeper of a lodging-house does not impliedly license an entry to seize property of a lodger under a writ); Graham *v.* Poor, 50 Mich. 153, 15 N. W. 61 (holding that a sale of lots according to a flat laying off streets does not imply a license to tear down fences and pass over the platted streets, where there is another means of access); Heermance *v.* Vernoy, 6 Johns. 5 (holding that where a bark mill is excepted from a deed of land, a purchaser of the mill is liable in trespass for entering and taking it); Sloane *v.* McConahy, 4 Ohio 157 (holding that a bond covenanting to lay down water pipes to a town and secure the use of the water to the inhabitants is not a grant of the use of the land and entry to repair the pipes is a trespass); Swackhamer *v.* Johnson, 39 Oreg. 383, 65 Pac. 91, 54 L. R. A. 625 (holding that an agreement to convey timbered land for a railroad terminal does not imply a license to remove the timber before delivery of the deed); Hobbs *v.* Geiss, 13 Serg. & R. 417 (holding that entry on property of a third person by landlord to search for his tenant's goods is a trespass if not found).

Rule applied in case of personalty.— Right under a contract "to take any measures he may think proper to complete the work within the specified time" gives no right to use the contractor's tools and materials. Montgomery Water Power Co. *v.* Chapman, 126 Fed. 68, 61 C. C. A. 124 [*affirmed* in 126 Fed. 372, 61 C. C. A. 347]. Where an ice-bound vessel is abandoned by the master and part of crew there is no implied license to another vessel to take its stores, although the crew left does not object. Guttner *v.* Pacific Steam Whaling Co., 96 Fed. 617.

24. Hall *v.* Louis Weber Bldg. Co., 36 Misc. (N. Y.) 551, 73 N. Y. Suppl. 997, holding that a license to enter and shore up a building justifies the entry but not injury to personalty.

25. Bloomington *v.* Burke, 12 Ill. App. 314.

26. Kent County Agricultural Soc. *v.* Ide, 128 Mich. 423, 87 N. W. 369, holding that a right of entry of a president of a society does not justify entry to tear down and tearing down a building.

27. *Alabama.*— Snedecor *v.* Pope, 143 Ala. 275, 39 So. 318 (holding that a license to enter does not justify tearing down part of a dwelling); Louisville, etc., R. Co. *v.* Smith, 141 Ala. 335, 37 So. 490 (holding that a license to build a railroad does not justify trespass on adjoining land, although within the legal limits which might have been taken).

Colorado.— Omaha, etc., Smelting, etc., Co. *v.* Tabor, 13 Colo. 41, 21 Pac. 925, 16 Am. St. Rep. 185, 5 L. R. A. 236, entry on another part of the land.

Maine.— Norton *v.* Craig, 68 Me. 275 (entry for a purpose or on a part not authorized); Abbott *v.* Wood, 13 Me. 115 (breaking down a door, ostensibly to get personalty, but really to let in an officer with an execution).

Maryland.— Moats *v.* Witmer, 3 Gill & J. 118, entry to take unthreshed grain where the right is merely to enter to thresh it and take grain leaving straw.

Massachusetts.— Gifford *v.* Brownell, 2 Allen 535 (holding that a license to take seaweed, depositing one load on licensee's land and then one on licensor's, alternately, does not justify taking a number of loads to licensee's land continuously); Davenport *v.* Lamson, 21 Pick. (Mass.) 72 (holding that a right of way appurtenant to a lot does not justify loading a wagon on an adjacent lot and hauling to it and then along the way).

New York.—Hall *v.* Louis Weber Bldg. Co., 36 Misc. 551, 73 N. Y. Suppl. 997 (holding that entry to shore up a building does not justify injury to personalty in it); Wheelock *v.* Noonan, 108 N. Y. 179, 15 N. E. 67, 2 Am. St. Rep. 405 (holding that a license to put a "few stones" on a lot does not justify piling stone fourteen to eighteen feet high over it and five other lots).

North Carolina.— Gardner *v.* Rowland, 24 N. C. 247, holding that the right to enter and take corn does not justify taking down a fence, instead of going to the gate.

Rhode Island.— McCusker *v.* Mitchell, 20 R. I. 13, 36 Atl. 1123, holding that going farther than the licensed distance is a trespass.

England.—Acaster *v.* Binney, 1 L. J. K. B. O. S. 168 (holding that license to enter a house with a key to show it to prospective lessees does not justify entry through a win-

defense unless the condition is performed;[28] and, where personal to the licensee, it does not justify the doing of the act by other persons.[29]

(III) *Revocation or Expiration of License.* A mere license is revocable, and where it has been revoked it is not a good defense for acts thereafter;[30]

dow, the key being lost); Ancaster *v.* Milling, 2 D. & R. 714, 16 E. C. L. 118.

See 46 Cent. Dig. tit. "Trespass," § 54 *et seq.*

Rebuilding in case of destruction.— A license to erect a structure on another's land does not authorize rebuilding it in case of its destruction. Wingard *v.* Tift, 24 Ga. 179 (bridge); Cowles *v.* Kidder, 24 N. H. 364, 57 Am. Dec. 287 (dam); Carleton *v.* Redington, 21 N. H. 291; Clark *v.* Glidden, 60 Vt. 702, 15 Atl. 358 (aqueduct).

28. Merriam *v.* Meriden, 43 Conn. 173; Harlan *v.* Logansport Natural Gas Co., 133 Ind. 323, 32 N. E. 930; Martin *v.* O'Brien, 34 Miss. 21; Freeman *v.* Headley, 33 N. J. L. 523.

29. Gronendyke *v.* Cramer, 2 Ind. 382 (license to a life-tenant to take fruit and firewood from adjoining premises for his own use); Wickham *v.* Hawker, 10 L. J. Exch. 153, 159, 7 M. & W. 63 [*citing* Norfolk *v.* Wiseman, Y. B. 12 Hen. VII, 25, 13 Hen. VII, 13, pl. 2] (per Parke, B.). But where one has a personal license to cut wood he may employ another to do the work for him (Smith *v.* Morse, 70 N. Y. App. Div. 318, 75 N. Y. Suppl. 126), and a license to a tenant to cross the landlord's land in going to the premises extends to his children where assisting him (Powers *v.* Harlow, 53 Mich. 507, 19 N. W. 257, 51 Am. Rep. 154).

30. *Alabama.*— Riddle *v.* Brown, 20 Ala. 412, 56 Am. Dec. 202.

Iowa.— Acrea *v.* Brayton, 75 Iowa 719, 38 N. W. 171.

Maryland.— Baltimore, etc., R. Co. *v.* Algire, 63 Md. 319.

Massachusetts.— Stevens *v.* Stevens, 11 Metc. 251, 45 Am. Dec. 203; Ruggles *v.* Lesure, 24 Pick. 187.

Michigan.— Druse *v.* Wheeler, 22 Mich. 439.

Missouri.— State *v.* Shawley, 42 Mo. App. 584.

New Hampshire.— Ockington *v.* Richey, 41 N. H. 275; Cowles *v.* Kidder, 24 N. H. 364, 57 Am. Dec. 287; Marston *v.* Gale, 24 N. H. 176; Glynn *v.* George, 20 N. H. 114.

New York.— Wheelock *v.* Noonan, 108 N. Y. 179, 15 N. E. 67, 2 Am. St. Rep. 405; Sherman Line Co. *v.* Glens Falls, 101 N. Y. App. Div. 269, 91 N. Y. Suppl. 994; Bogert *v.* Haight, 20 Barb. 251; Tillotson *v.* Preston, 7 Johns. 285.

England.— Adams *v.* Andrews, 15 Q. B. 291, 15 Jur. 149, 20 L. J. Q. B. 33, 69 E. C. L. 284; Wood *v.* Leadbitter, 14 L. J. Exch. 161, 13 M. & W. 838; Wallis *v.* Harrison, 4 M. & W. 538.

See 46 Cent. Dig. tit. "Trespass," § 57 *et seq.*

Licenses held revocable.—A license to maintain a structure on another's land to divert water is revocable (Foot *v.* New Haven, etc., Co., 23 Conn. 214), to cut and remove wood, even as to wood cut but not removed (Buker *v.* Bowden, 83 Me. 67, 21 Atl. 748), to pass over the land on condition (Marston *v.* Gale, 24 N. H. 176), to discharge sewerage on land (Sherman Line Co. *v.* Glens Falls, 101 N. Y. App. Div. 269, 91 N. Y. Suppl. 994), or parol license to run trains over the land (Hetfield *v.* Central R. Co., 29 N. J. L. 571), or to change the location of a fence, pending a sale of the land (Druse *v.* Wheeler, 22 Mich. 439).

What constitutes revocation.— A refusal to permit entry revokes the license (Siberman *v.* New Amsterdam Gas Co., 30 Misc. (N. Y.) 42, 61 N. Y. Suppl. 699), so also locking a gate across a way which it had been agreed should be used pending a dispute (Hyde *v.* Graham, 1 H. & C. 593, 8 Jur. N. S. 1229, 32 L. J. Exch. 27, 7 L. T. Rep. N. S. 563, 11 Wkly. Rep. 119); or the commencement of an action for damages by the licensor against the licensee (Lockhart *v.* Geir, 54 Wis. 133, 11 N. W. 245); a conveyance of land *ipso facto* revokes a license to do acts thereon, as a license to occupy (Hicks *v.* Swift Creek Mill Co., 133 Ala. 411, 31 So. 947, 91 Am. St. Rep. 38, 57 L. R. A. 720); or use a ditch and dam thereon (Hicks *v.* Swift Creek Mill Co., 133 Ala. 411, 31 So. 947, 91 Am. St. Rep. 720, 57 L. R. A. 720); or to mine on government land (Omaha, etc., Smelting, etc., Co. *v.* Tabor, 13 Colo. 41, 21 Pac. 925, 16 Am. St. Rep. 185, 5 L. R. A. 236); or to take timber (Putney *v.* Day, 6 N. H. 430, 25 Am. Dec. 470; Paine *v.* Northern Pac. R. Co., 14 Fed. 407, 4 McCrary 586 [*affirmed* in 119 U. S. 561, 7 S. Ct. 323, 30 L. ed. 513]; Jarvis *v.* Edgett, 6 N. Brunsw. 66, license from mortgagor in possession is no defense against purchaser under foreclosure sale); or to flood lands (Cowles *v.* Kidder, 24 N. H. 364, 57 Am. Dec. 287; Veghte *v.* Raritan Water Power Co., 19 N. J. Eq. 142); or to maintain telephone wires (Bunke *v.* New York Tel. Co., 188 N. Y. 600, 81 N. E. 1161 [*affirming* 110 N. Y. App. Div. 241, 97 N. Y. Suppl. 66]); or to go on lands (Dexter *v.* Alfred, 74 Hun (N. Y.) 259, 26 N. Y. Suppl. 592, after notice of grant by grantee); or lay water mains (Jayne *v.* Cortland Water Works Co., 42 Misc. (N. Y.) 263, 86 N. Y. Suppl. 571, holding that if the grantee is not a purchaser for value he can only recover nominal damages); or to maintain a drain ditch (Wilson *v.* Higgins, 4 Ohio Dec. (Reprint) 582, 2 Clev. L. Rep. 411); or erecting a wall upon another's wall (Ross *v.* Hunter, 7 Can. Sup. Ct. 289); but a license to discharge sewerage on land has been held not revoked by a conveyance (Union Springs *v.* Jones, 58 Ala. 654); and a conveyance does not *ipso facto* revoke a license to diverge from a highway where the grantor has fenced up the old way (Prouty *v.* Bell, 44 Vt. 72).

but a license coupled with an interest is irrevocable and a good defense to acts done under it within the scope of the license.[31] Where a license has expired it is no defense to acts thereafter.[32]

(iv) *Contracts Generally.* A contract is a good defense for acts done under it,[33] even though plaintiff misunderstood it, if it was not obtained by fraud, accident, or mistake.[34] It is not a defense for the commission of unauthorized acts.[35] A contract concerning land which is insufficient to pass an interest in it is revocable and no defense for acts done after the revocation.[36] A license to enter land arising from a contract to perform work therefor is revocable and no defense to a subsequent entry.[37] An agreement which gives a right to part of personalty is no defense for taking all of it.[38]

(v) *Agreement For Purchase or Lease.* An agreement for the sale of land does not imply a license to enter,[39] nor does an offer of sale made two years

So it has been held that where an employee, who rented a house on the land of his employer, acquired thereby the right to have persons visit the house on business or pleasure and go over the employer's land in so doing, no one as to whom the right had been acquired could be guilty of trespass in exercising the right; and, where the right was acquired by the contract of renting, it could not be taken away by a mere notice to such person, the contract remaining in force (Tutwiler Coal, etc., Co. *v.* Tuvin, 158 Ala. 657, 48 So. 79).

Acquiescence by grantee.— The grantee may acquiesce in the license. Selch *v.* Jones, 28 Ind. 255.

31. Smith *v.* Pierce, 110 Mass. 35; Veghte *v.* Raritan Water Power Co., 19 N. J. Eq. 142.

Applications of rule.—Where goods seized are left on the realty under license to enter and sell thereafter, it cannot be revoked (McGillis *v.* McMartin, 1 U. C. Q. B. 145); and license to do an act on one's own land, as build a dam which floods another's land (Veghte *v.* Raritan Water Power Co., 19 N. J. Eq. 142); or to enter another's land to remove one's personalty (Smith *v.* Pierce, 110 Mass. 35; Pursell *v.* Stover, 110 Pa. St. 43, 20 Atl. 403); or to shore up his building (Ketchum *v.* Newman, 116 N. Y. 422, 22 N. E. 1052 [*reversing* 14 Daly 57]); but the entry must be within a reasonable time after the revocation (Dame *v.* Dame, 38 N. H. 429, 75 Am. Dec. 195).

32. Louisville, etc., R. Co. *v.* Higginbotham, 153 Ala. 334, 44 So. 872, holding that license to use water from a spring pending repairs on another expires after a reasonable time to make the repairs.

33. *Idaho.*— Bowman *v.* Ayers, 2 Ida. (Hasb.) 465, 21 Pac. 405, holding that a contract with three of the four owners in common of a water ditch granting defendant a right to use water in return for enlarging it justifies his enlarging it and using water.

Indiana.—Alexandria Min., etc., Co. *v.* Painter, 1 Ind. App. 587, 28 N. E. 113, holding that use of gas in one's house while in arrears is not a trespass.

Kentucky.— C. F. Adams Co. *v.* Sanders, 66 S. W. 815, 23 Ky. L. Rep. 1978 (holding that a contract of sale of personalty authorizing retaking for non-payment is a good defense to a peaceable entry on the vendee's house and retaking); Ramey *v.* W. W. Kimball Co., 58 S. W. 471, 22 Ky. L. Rep. 597; Andrews *v.* Singer Mfg. Co., 48 S. W. 976, 20 Ky. L. Rep. 1089.

Maryland.— Gibson *v.* Kephart, 3 Harr. & J. 439, holding that a parol agreement accompanying a deed of land is a good defense to acts done under it, as taking fence rails by the grantor.

Michigan.— Finch *v.* Brian, 44 Mich. 517, 7 N. W. 81, holding that use of part of a piece of meat delivered to be paid for at the market price is not rendered a trespass by refusal to pay a sum demanded greater than such price.

Canada.— Walter *v.* Dexter, 34 U. C. Q. B. 426; McGinness *v.* Kennedy, 29 U. C. Q. B. 93.

34. Windle *v.* Crescent Pine Line Co., 186 Pa. St. 224, 40 Atl. 310.

35. Disbrow *v.* Westchester Hardwood Co., 17 N. Y. App. Div. 610, 45 N. Y. Suppl. 376 [*reversed* on other grounds in 164 N. Y. 415, 58 N. E. 579] (taking trees smaller than the specified size); Parks *v.* Dial, 56 Tex. 261 (holding that a right under a contract to take timber from a certain part of another's land does not justify taking from other parts).

36. Hitchens *v.* Shaller, 32 Mich. 496 (parol agreement to give a license to dig a ditch); Green *v.* Evans, 38 Mo. App. 517 (parol executory agreement for the sale of growing crops); Duryea *v.* Smith, 16 N. Y. Suppl. 688 (parol agreement to allow taking of gravel at an agreed price); Chesley *v.* Brockway, 34 Vt. 550 (holding that sale of manure does not justify its taking after a grant of the land).

37. Campbell *v.* Howland, 7 U. C. C. P. 358.

38. Trout *v.* Kennedy, 47 Pa. St. 387, holding that one agreeing to cut and saw another's trees and pile the boards for which he was to have half is liable if he takes all.

39. Fagan *v.* Scott, 14 Hun (N. Y.) 162; Erwin *v.* Olmsted, 7 Cow. (N. Y.) 229; Cooper *v.* Stower, 9 Johns. (N. Y.) 331. *Contra*, Mize *v.* Jackson, 32 S. W. 467, 17 Ky. L. Rep. 750.

before,[40] nor a parol agreement to convey;[41] and such parol agreement conveys no interest and so is revocable and no defense after revocation,[42] although the purchase price has been paid;[43] and a parol agreement for sale without actual possession under it is no defense against a subsequent vendee.[44] An express license to the holder of a contract for purchase to enter does not imply a license to cut and use trees, and is no defense to an action therefor;[45] and where entry is made under the agreement, or other acts are done under it, it is no defense for the commission of such acts if its terms are not carried out by the purchaser.[46] A certificate of purchase of public lands, afterward forfeited, is no defense to an action for cutting trees before its forfeiture.[47] Negotiations for a lease which fall through are no defense for occupation after demand for surrender;[48] but where a lease falls through after defendant's entry because plaintiff will not give a lease as agreed, defendant is not liable.[49] A sale of personalty and receipt of part payment, but without delivery, will not justify a levy on them as the goods of the vendee;[50] but where possession is delivered under a conditional sale agreement, it is held, in Pennsylvania, to be fraudulent against creditors of the vendee, and so the vendor cannot maintain trespass for a levy.[51]

(VI) *AUTHORITY FROM THIRD PERSONS.* Authority from a third person having no right to give it is no defense for the commission of acts which without proper authority would constitute a trespass on land,[52] and the fact that defendant

40. Nickerson *v.* Allen, 110 La. 194, 34 So. 410.

41. Suffern *v.* Townsend, 9 Johns. (N. Y.) 35. Parol agreement for sale of land by owner to one person does not justify entry against another in possession. Beaumont Lumber Co. *v.* Ballard, (Tex. Civ. App. 1893) 23 S. W. 920.

42. Owens *v.* Lewis, 46 Ind. 488, 15 Am. Rep. 295.

43. Giles *v.* Simonds, 15 Gray (Mass.) 441, 77 Am. Dec. 373.

44. Miller *v.* Zufall, 113 Pa. St. 317, 6 Atl. 350.

45. Lyford *v.* Putnam, 35 N. H. 563; Suffern *v.* Townsend, 9 Johns. (N. Y.) 35.

46. Wendell *v.* Johnson, 8 N. H. 220, 29 Am. Dec. 648 (entry); Clough *v.* Hosford, 6 N. H. 231 (cutting of timber); Freeman *v.* Headley, 33 N. J. L. 523 (tearing down of a building); Suffern *v.* Townsend, 9 Johns. (N. Y.) 35 (cutting of timber).

47. Conklin *v.* Hawthorn, 29 Wis. 476.

48. Welch *v.* Winterburn, 25 Hun (N. Y.) 437.

49. Sloper *v.* Saunders, 29 L. J. Exch. 275.

50. Welsh *v.* Bell, 32 Pa. St. 12.

51. Rose *v.* Story, 1 Pa. St. 190, 44 Am. Dec. 121; Martin *v.* Mathrot, 14 Serg. & R. (Pa.) 214, 16 Am. Dec. 491.

52. *Alabama.*—Western Union Tel. Co. *v.* Dickens, 148 Ala. 480, 41 So. 469 (holding that authority from a railroad company is no defense to building a telegraph line on adjacent land); Lowery *v.* Rowland, 104 Ala. 420, 16 So. 88 (holding that authority from a widow before assignment of dower cannot justify cutting trees).

Illinois.— Essington *v.* Neill, 21 Ill. 139, holding that a wife is not her husband's agent and cannot authorize a removal of property from his lands and the conversion thereof.

Indiana.— Ohio, etc., R. Co. *v.* Hemberger, 43 Ind. 462, holding that an adjoining landowner cannot authorize the interference with a drain, although partly on his land.

Louisiana.— Hood *v.* Stewart, 2 La. Ann. 219; Tourne *v.* Lee, 8 Mart. N. S. 548, 20 Am. Dec. 260.

Maine.— Smith *v.* Guild, 34 Me. 443, holding that an administrator of remainder-man cannot justify a trespass on possession of tenant by curtesy.

Maryland.— Maryland Tel., etc., Co. *v.* Ruth, 106 Md. 644, 68 Atl. 358, 124 Am. St. Rep. 506, 14 L. R. A. N. S. 427 (holding that permission of lessor does not justify erection of telephone pole in alley of leased premises); Baltimore, etc., R. Co. *v.* Thompson, 10 Md. 76 (holding that permission of lessor does not justify entry on lessee's possession to build a railroad).

Massachusetts.— Hersey *v.* Chapin, 162 Mass. 176, 38 N. E. 442 (holding that permission of tenant at will does not justify use of premises as smallpox hospital); Abbott *v.* Abbott, 97 Mass. 136 (holding that permission of guardian of minor child who has abandoned the homestead is no defense to use of homestead premises in widow's possession as a stable); North Bridgewater Second Cong. Soc. *v.* Waring, 24 Pick. (Mass.) 304 (holding that license of member of religious corporation is no defense against the corporation).

Michigan.—Kent County Agricultural Soc. *v.* Ide, 128 Mich. 423, 87 N. W. 369 (holding that permission of the president of a society is no defense to tearing down a barn if he had no authority to give it); Burns *v.* Kirkpatrick, 91 Mich. 364, 51 N. W. 893, 30 Am. St. Rep. 485 (holding that direction of a wife to remove her husband's household goods is no defense).

Missouri.— Jackson *v.* Pettigrew, 133 Mo. App. 508, 113 S. W. 672, holding that the cutting and hauling, from time to time, dur-

believed the person giving permission had authority is immaterial;[53] but a license by a cotenant is a good defense for entry on land,[54] although it justifies a taking of part of the realty only to the extent of the licensor's interest;[55] and a license from the manager of land justifies acts thereon[56] unless wholly unconnected with the management.[57] License by a mortgagee is a good defense to an action for trespass, the mortgage debt being overdue,[58] or by tenant in possession,[59] unless the injury is to the reversion;[60] or by other person lawfully on the land by license of the owner.[61] Authority from a third person having no right to give it does not justify acts which without authority would amount to a trespass to personalty;[62] but unauthorized consent by the person in possession of personalty is a defense to an action for a trespass on it;[63] and where goods are delivered by the

ing a course of years, of trees for fire wood, indicated only by the stumps left, is not such actual possession of the land by the person so doing that authority from her would be a defense, against the actual owner, to trespass by defendant.

New Hampshire.— Warner *v.* Badger, 65 N. H. 283, 20 Atl. 249, holding that a license from the grantee of a deed is no defense where there is no evidence of possession in him or his grantor.

New York.— Norton *v.* Snyder, 4 Thomps. & C. 330 (holding that a grant of a renewal of a right to quarry made in pursuance of a covenant, but after conveyance of the land, is no defense against the grantee of the land, although the deed reserved to the grantees of the quarry right the privileges they had); Lambert *v.* Huber, 22 Misc. 462, 50 N. Y. Suppl. 793 (holding that a deed from one having neither title nor possession as defendant knew is no defense to an entry on land).

Pennsylvania.— Pittock *v.* Central Dist., etc., Tel. Co., 31 Pa. Super. Ct. 589 (holding that where a railroad has only a right of way its permission to erect a telegraph line on the way is no defense against the owner of the fee); Dunbar Furnace Co. *v.* Fairchild, 128 Pa. St. 485, 18 Atl. 443, 444 (holding that a grant from a life-tenant greater than his estate permitted is no defense to an entry after his death).

Texas.— Tucson Land, etc., Co. *v.* Everett, 34 Tex. Civ. App. 340, 78 S. W. 535, holding that permission of a lessee whose lease has not gone into effect does not justify herding horses on land.

England.— Littleton *v.* McNamara, Ir. R. 9 C. L. 417, holding that authority of the administrator of a sublessor obtained after the trespass does not relate back.

Canada.— Turnbull *v.* McNaught, 14 U. C. C. P. 375, holding that a survey for a landowner does not justify entry on land adjoining.

See 46 Cent. Dig. tit. "Trespass," §§ 55, 56.

53. Allison *v.* Little, 85 Ala. 512, 5 So. 221; Remington *v.* State, 116 N. Y. App. Div. 522, 101 N. Y. Suppl. 952 (holding that permission to the state from one supposed to be owner does not justify entry and use); Huling *v.* Henderson, 161 Pa. St. 553, 29 Atl. 276; Duke *v.* Postal Tel. Cable Co., 71 S. C. 95, 50 S. E. 675.

54. Harris *v.* Ansonia, 73 Conn. 359, 47 Atl. 672; Granger *v.* Postal Tel. Co., 70 S. C. 528, 50 S. E. 193, 106 Am. St. Rep. 750.

55. Omaha, etc., Smelting, etc., Co. *v.* Tabor, 13 Colo. 41, 21 Pac. 925, 16 Am. St. Rep. 185, 5 L. R. A. 236.

56. Vernon Min. Co. *v.* Prescott, (East. T. 1871) Stevens N. Brunsw. Dig. 753, holding that where the agent pointed out the wrong boundary there is no liability in trespass for trees cut on the land by reason of the mistake.

57. Henderson *v.* Clanfield, 31 N. Brunsw. 568, holding that a manager of a farm cannot authorize digging a ditch thereon for the sole benefit of the diggers and not for the benefit of the land.

58. Carson *v.* Griffin, 11 N. Brunsw. 244, license to cut trees.

59. McNair *v.* Rochester, etc., R. Co., 14 N. Y. Suppl. 39 (life-tenant); Livingston *v.* Mott, 2 Wend. (N. Y.) 605 (license to build a railroad).

Visit to tenant on business or pleasure.— Where a tenant by renting a house acquires the right to have persons visit his house on business or pleasure and go over the owner's land in so doing, no one for whom such right has been thus acquired can be guilty of trespass in so doing. Tutwiler Coal, etc., Co. *v.* Tuvin, 158 Ala. 657, 48 So. 79.

60. Devlin *v.* Snellenburg, 132 Pa. St. 186, 18 Atl. 1119, holding that painting an advertisement on a building in possession of a tenant is an injury to the reversion.

61. Kelly *v.* Tilton, 2 Abb. Dec. (N. Y.) 495, 3 Keyes 263.

62. Reader *v.* Moody, 48 N. C. 372, holding that where one made a number of shingles on vacant land, and left them there, he is entitled to maintain trespass against a person who, privately and without his knowledge, carried them off; and this, although defendant proceeded under a license from one who obtained a grant for the land on which the shingles were made, subsequently to their being made, but before their removal. *Compare* Stafford *v.* Mercer, 42 Ga. 556, holding that sale of goods by a warehouse clerk by advice of the warehouse owner does not render him liable in an action of trespass *vi et armis*.

63. Dean *v.* Hogg, 10 Bing. 345, 25 E. C. L. 166, 6 C. & P. 54, 25 E. C. L. 318, 3 L. J. C. P. 113, 4 Moore & S. 188 (consent by the owner's captain of a vessel to an entry on a

person in possession trespass will not lie against the taker, although they will if he takes without delivery,[64] unless the taking is ratified.[65]

(VII) *FORCE IN EXERCISING RIGHTS.* In general, a right *in personam* is no justification to the use of force in exercising it;[66] but a license coupled with an interest and so irrevocable is a good defense to the use of force necessary to exercise it,[67] or the use of force in resisting expulsion from realty.[68]

n. Rights Given by Law — (I) *IN GENERAL.* Interference with plaintiff's property is justifiable in certain cases where necessary in the exercise of a public right,[69] or to prevent a great public disaster.[70] The prosecution of a public work does not excuse trespasses committed in course of it.[71] An illegal distress for rent is a trespass.[72] Right to enter and abate a nuisance is no defense to doing more than is necessary to accomplish the result.[73] One peaceably on land is not

steamboat hired by plaintiff for a private excursion); Mills *v.* Dawson, 2 Peake N. P. 54 (consent of agent of the owner to the taking of a ship); Bransfield *v.* Bishop, 2 N. Brunsw. 171 (killing of an ox).

64. Plott *v.* Robertson, (Ala. 1905) 39 So. 771; Ely *v.* Ehle, 3 N. Y. 506 (delivery by a common carrier); Barrett *v.* Warren, 3 Hill (N. Y.) 348 (delivery by one who got by a trespass); Nash *v.* Mosher, 19 Wend. (N. Y.) 431 (delivery by lien-holder); Marshall *v.* Davis, 1 Wend. (N. Y.) 109, 19 Am. Dec. 463 (delivery by bailee); Talmadge *v.* Scudder, 38 Pa. St. 517 (taking by purchaser at sheriff's sale of goods wrongfully levied on); Brooks *v.* Olmstead, 17 Pa. St. 24 (delivery by wrong-doer). *Contra,* Rich *v.* Johnson, 61 Ind. 246; Spotts *v.* Lange, 7 La. 182; North Bridgewater Second Cong. Soc. *v.* Howard, 16 Pick. (Mass.) 206; Garey *v.* Woodward, 127 Pa. St. 251, 18 Atl. 9.

65. Wellington *v.* Drew, 16 Me. 51.

66. Riddle *v.* Brown, 20 Ala. 412, 56 Am. Dec. 202; Ferguson *v.* Roblin, 17 Ont. 167; Cardinal *v.* Fiset, 29 Quebec Super. Ct. 424.

Applications of rule.—A verbal agreement "to dig and carry away ore" does not justify a forcible entry (Riddle *v.* Brown, 20 Ala. 412, 56 Am. Dec. 202); so one is not justified in resorting to force to compel another to keep an agreement allowing the use of a way over his land (Hyde *v.* Graham, 1 H. & C. 593, 8 Jur. N. S. 1229, 32 L. J. Exch. 27, 7 L. T. Rep. N. S. 563, 11 Wkly. Rep. 119); or to fix a boundary line (Wood *v.* Lafayette, 68 N. Y. 181); a contract authorizing an entry on realty to take personalty without process of law is void and no defense to a forcible entry (Loftus *v.* Maxey, 73 Tex. 242, 11 S. W. 272; Gillett *v.* Moody, (Tex. Civ. App. 1899) 54 S. W. 35).

67. Lambert *v.* Robinson, 162 Mass. 34, 37 N. E. 753, 44 Am. St. Rep. 326.

Applications of rule.—A license coupled with an interest is irrevocable, and so a necessary assault committed in course of an entry into the old post-office by a servant of a new postmaster to remove government property is justifiable (Sterling *v.* Warden, 51 N. H. 217, 12 Am. Rep. 80); or by a person to get his mail (Sterling *v.* Warden, *supra*); or forcible entry by one to remove rails laid by consent (Willoughby *v.* Northeastern R. Co., 32 S. C. 410, 11 S. E. 339; De Laine *v.* Alderman, 31 S. C. 267, 9 S. E. 950); or under license to obtain mortgaged personalty (Bacon *v.* Hooker, 177 Mass. 335, 53 N. E. 1078, 83 Am. St. Rep. 279); or forcible entry by lessor of land to remove personalty under a right reserved in the lease (Abbott *v.* Wood, 13 Me. 115); or by purchaser of personalty to obtain it (Long *v.* Buchanan, 27 Md. 502, 92 Am. Dec. 653; Nettleton *v.* Sikes, 8 Metc. (Mass.) 34, bark peeled from trees); or by vendee of property with a right to rescind in order to retake it (Smith *v.* Hale, 158 Mass. 178, 33 N. E. 493, 35 Am. St. Rep. 485).

68. Vaughan *v.* Hampson, 33 L. T. Rep. N. S. 15, holding that one present at a creditors' meeting can maintain trespass for assault in ejecting him.

69. Morey *v.* Fitzgerald, 56 Vt. 487, 48 Am. Rep. 811 (passing over land adjoining a highway during temporary impassability of the way); Thurlow Tp. *v.* Bogart, 15 U. C. C. P. 9, 601 (injury to a bridge obstructing a navigable stream, done in course of user of the stream, if due care is used); Little *v.* Ince, 3 U. C. C. P. 528 (injury to a mill dam to give passage to logs, where it has not the log slide required by statute).

Abuse of statutory power to enter land and take stone for a bridge is punishable in trespass. Myers *v.* Howard, 4 U. C. Q. B. O. S. 113.

70. Hale *v.* Lawrence, 23 N. J. L. 590, 57 Am. Dec. 420, in an action for blowing up a building and destroying plaintiff's goods therein to prevent the spread of a fire, the common-law plea of necessity is good, and defendant need not be resident in or owner of property in the city, nor need his own property have been in danger.

71. Lersner *v.* McDonald, 38 Misc. (N. Y.) 734, 78 N. Y. Suppl. 1125, breaking a water main and so flooding plaintiff's premises while digging a rapid transit subway.

72. Owens *v.* Shovlin, 116 Pa. St. 371, 9 Atl. 484 (distress of goods not on leased premises nor fraudulently removed therefrom); Rees *v.* Emerick, 6 Serg. & R. (Pa.) 286 (distress for greater sum than was due, the proper amount being tendered); Mitchell *v.* McDuffy, 31 U. C. C. P. 266, 649 (distress for an unliquidated sum); Hope *v.* White, 22 U. C. C. P. 5 (distress of sheep where sufficient other property was on the premises).

73. Day *v.* Woodworth, 13 How. (U. S.)

a trespasser if he forcibly breaks a gate to escape therefrom.[74] Entry on adjoining land to deposit goods wrongfully placed on one's land by the adjoining landowner is not a trespass.[75] In Michigan, an heir has only a right to partition and is liable for an entry on land in the widow's possession.[76] By statute in some jurisdictions reasonable and probable cause is a defense in an action of trespass against a justice for acts done in his official capacity;[77] but defendant must have been acting within his jurisdiction.[78] Where defendant relies on a statutory justification he must bring himself fully within its terms.[79] A statute passed subsequent to the acquiring by plaintiff of his rights in land is no defense to an action by him.[80] In general the creation of a new remedy does not affect the old.[81] That defendant is plaintiff's guardian is no defense to an injury to realty.[82]

(II) *Exercise of Duty as Public Servant.* Authority from the government to do an act is a justification for what would, in the absence thereof, constitute a trespass;[83] but it must appear that such authority in fact exists.[84]

363, 14 L. ed. 181, removing more of a dam than was necessary to prevent its flooding one's land.

74. Robson *v.* Jones, 2 Bailey (S. C.) 4.

In Indiana it has been held that breaking a toll-gate to pass off a toll road where the gateman refuses passage is not justifiable, although toll was properly paid on entering, and less so where defendant refused a ticket from the first gateman which would have enabled him to pass. Franklin *v.* State, 85 Ind. 99.

75. Rea *v.* Shuard, 6 L. J. Exch. 125, 2 M. & W. 424.

76. Patterson *v.* Patterson, 49 Mich. 176, 13 N. W. 504.

77. Stiles *v.* Brewster, 9 N. Brunsw. 414.

78. Crooks *v.* Williams, 39 U. C. Q. B. 530.

79. U. S. *v.* Gentry, 119 Fed. 70, 55 C. C. A. 658. Articles of food are not within the terms of a statute forbidding sale of "articles of traffic," spirituous liquors, and numerous other enumerated intoxicants within three miles of a place of worship. Fetter *v.* Wilt, 46 Pa. St. 457.

80. State *v.* Surles, 74 N. C. 330.

81. Tackett *v.* Huesman, 19 Mo. 525.

Illustrations.— Statute giving multiple damages does not take away remedy in trespass, as for illegal distress. Rees *v.* Emerick, 6 Serg. & R. (Pa.) 286. The statutory remedy for trespass on realty does not supersede the common-law remedy. Tackett *v.* Huesman, 19 Mo. 525; Montague *v.* Papin, 1 Mo. 757. A statute giving penalty for injury to a turnpike (Farmers' Turnpike Road *v.* Coventry, 10 Johns. (N. Y.) 389), a forcible entry statute (Marks *v.* Sullivan, 8 Utah 406, 32 Pac. 668, 20 L. R. A. 590), or a statute allowing replevin for unlawful distress (Coffin *v.* Field, 7 Cush. (Mass.) 355), does not exclude trespass. See JUDGMENTS, 23 Cyc. 1215 *et seq.*

82. Johnson *v.* Meyer, 4 Ohio Dec. (Reprint) 383, 2 Clev. L. Rep. 81.

83. *Maine.*— Plummer *v.* Jarvis, 23 Me. 297, holding that a statute requiring a state land agent to prevent persons found trespassing from committing trespasses justifies breaking up lumbering operations on private land as well as public lands.

Massachusetts.— Harriman *v.* Whitney, 196 Mass. 466, 82 N. E. 671 (repair of a street by the superintendent of streets); Winslow *v.* Gifford, 6 Cush. 327 (holding that authority to ascertain boundaries of public landing places by town commissioners justifies entry on private lands to do so, if reasonably necessary, not too long continued and not accompanied by unnecessary damage).

Missouri.— Morgan *v.* Owen, 193 Mo. 587, 91 S. W. 1055, ejectment by sheriff and judges of a wrongful claimant from a room containing judicial records.

New Jersey.— Hale *v.* Lawrence, 21 N. J. L. 714, 47 Am. Dec. 190; American Print Works *v.* Lawrence, 21 N. J. L. 248, holding that, to prevent spread of fire, pulling down buildings by an official whose duty it is by statute is not a trespass.

New York.— Edwards *v.* Law, 63 N. Y. App. Div. 451, 71 N. Y. Suppl. 1097 (entry to make a survey for a map of Greater New York, made under authority of the board of public works and the charter); Ruan *v.* Perry, 3 Cai. 120 (holding that stopping a neutral ship by authority of the secretary of the United States navy does not render the captain liable for its subsequent capture resulting from it).

England.— Dobree *v.* Napier, 2 Bing. N. Cas. 781, 5 L. J. C. P. 273, 3 Scott 201, 29 E. C. L. 759 (seizure of a vessel as lawful prize by an officer of a foreign country); De Gondouin *v.* Lewis, 10 A. & E. 117, 9 L. J. Q. B. 148, 2 P. & D. 283, 37 E. C. L. 84, 113 Eng. Reprint 45 (holding that for forcibly taking dutiable goods liable to forfeiture for failure to pay the duty, trespass *de bonis* will not lie, although assault for taking without notice may).

Canada.— Dame *v.* Carberry, 10 U. C. Q. B. 374, seizure of a vessel for breach of the revenue laws.

84. Linblom *v.* Ramsey, 75 Ill. 246 (holding that *prima facie* the act is a trespass); Plummer *v.* Jarvis, 23 Me. 297 (holding that *bona fide* intent to do an official act will not take the place of legal authority).

A railway commissioner has no arbitrary power to fix the height of trolley wires crossing a railroad and the railroad is liable for

So also it must appear that the authority is valid,[85] and that it justifies the method employed to carry out the authority[86] and the particular act done,[87] and the

cutting them, although placed lower than the height so fixed. Saginaw Union St. R. Co. *v.* Michigan Cent. R. Co., 91 Mich. 657, 52 N. W. 49.

Opening a road by ministerial officers of a township is a trespass in the absence of an express order from the township board. Navin *v.* Martin, (Mo. App. 1907) 102 S. W. 61; Mulligan *v.* Martin, 125 Mo. App. 630, 102 S. W. 59.

Entry by a policeman into a public house at one A. M. to investigate a noise is not a trespass, the door being open, although it would be otherwise in case of a private house. Rex *v.* Smith, 6 C. & P. 136, 25 E. C. L. 360.

85. Chase *v.* Cochran, 102 Me. 431, 67 Atl. 320; Whittier *v.* Sanborn, 38 Me. 32 (holding that legal authority from a school-district under which defendant justifies must be shown); Macey *v.* Carter, 76 Mo. App. 490 (holding that where township organization is void for want of proper petitions its officers are trespassers in opening roads).

A patrol whether legally such or not is liable for entry on dwelling of a freeman and taking his guns. Porteous *v.* Hazel, Harp. (S. C.) 332.

If a highway is not duly laid out acts by the proper official in opening it are a trespass. Stewart *v.* Wallis, 30 Barb. (N. Y.) 344 (order laying out a highway not in accordance with the statute); Austin *v.* Allen, 6 Wis. 134; Norton *v.* Peck, 3 Wis. 714 (failure to make compensation or take slips to ascertain the value of the land); Williams *v.* Holmes, 2 Wis. 129.

Void proceedings to establish a drain, the application for appointment of the commissioner being defective, are no defense to an entry on land. Walters *v.* Chamberlin, 65 Mich. 333, 32 N. W. 440.

86. Markham *v.* Brown, 37 Ga. 277, 92 Am. Dec. 73; Davison *v.* Burnham, Cassels Dig. (Can.) 846.

Where a statute requires consent of landowners to the building of a sewer, the commissioner is a trespasser if he does not get it. Davison *v.* Burnham, Cassels Dig. (Can.) 846.

Where sanction of commissioners to removal of a school-house by trustees is required by statute, their removal without it is a trespass for which their successors can sue them. Pictou County School Trustees *v.* Cameron, 2 Can. Sup. Ct. 690.

Impressing a private house for a smallpox hospital is not justified by statute authorizing justices of inferior courts to "provide" such a hospital (Markham *v.* Brown, 37 Ga. 277, 92 Am. Dec. 73); nor is a board of health justified in so taking if not done under the statutory warrant (Hersey *v.* Chapin, 162 Mass. 176, 38 N. E. 442).

Failure by a municipality to exactly follow the terms of a statute giving it power to grade streets will not render the grading a trespass, as failure to advertise for bids (Aurora *v.* Fox, 78 Ind. 1); but if there is no order for grading made, no advertisement for bids and no contract, the grading is a trespass by the city (Delphi *v.* Evans, 36 Ind. 90, 10 Am. Dec. 12).

87. Elmore *v.* Fields, 153 Ala. 345, 45 So. 66, 127 Am. St. Rep. 31; Bright *v.* Bell, 113 La. 1078, 37 So. 976, holding that the condition of realty, as whether a hedge is trimmed or untrimmed, ornamental or a "blot on the landscape" will not justify its removal by individuals or members of a street board.

Where the locus is not a street a resolution of a city council to open it as such is no defense to its members for opening it. Young *v.* Gormley, 119 Iowa 546, 93 N. W. 565.

Selling trees in a highway is not justified by the right of the commissioner to remove them. Clark *v.* Dasso, 34 Mich. 86.

Removal of trees in a highway but not obstructing it is a trespass. Clark *v.* Dasso, 34 Mich. 86 (in which it was said that the highway commissioner doing it must take his chance of the jury's agreeing with him that they were an obstruction); Winter *v.* Peterson, 24 N. J. L. 524, 61 Am. Dec. 678 (removal by road commissioner).

Removal of an encroachment from a street where the dedication was subject to it is a trespass. And where an encroaching porch had existed for sixty years in the absence of evidence the dedication of the street will be taken to have been subject to it. Hagarty *v.* Pryor, 2 Nova Scotia Dec. 532.

Seizure in civil war of property of a United States citizen by a confederate soldier for use of his army is not a trespass. Smith *v.* Brazelton, 1 Heisk. (Tenn.) 44, 2 Am. Rep. 678 [*overruling* Yost *v.* Stout, 4 Coldw. (Tenn.) 205, 94 Am. Dec. 194; Davidson *v.* Manlove, 2 Coldw. (Tenn.) 346]. *Contra*, Hedges *v.* Price, 2 W. Va. 192, 94 Am. Dec. 507, even though ordered to do so by a superior officer.

Unauthorized seizure by fisheries' officer (Venning *v.* Steadman, 9 Can. Sup. Ct. 206), or by an officer of freedman's bureau (Hunt *v.* Wing, 10 Heisk. (Tenn.) 139).

Unauthorized entry by a sewer commissioner is a trespass. Davison *v.* Burnham, Cassels Dig. (Can.) 846.

Laying out a highway less than the legal width is a trespass. Perley *v.* Dibblee, 3 N. Brunsw. 514.

Opening land as a street by a path-master is a trespass if it is not legally a street. Crooks *v.* Williams, 39 U. C. Q. B. 530.

Statutory right to arrest for criminal trespass does not justify an assault if it does not appear such trespass was committed. Madden *v.* Farley, 6 U. C. Q. B. 210.

Mistake as to authority.— Mistaken belief that authority of a highway commissioner justifies tearing down plaintiff's fence will

doing of it by defendant.[88] If any of these essentials be lacking, the attempted justification must fail.

(III) *LEGAL PROCESS.* Process regularly issued with full jurisdiction and valid on its face is ordinarily a good defense to acts done under its authority,[89] although there are cases to the contrary.[90] The acts done must be authorized by the process.[91] But such process is not a defense if thereafter aban-

not relieve from actual damages. Coffman *v.* Burkhalter, 98 Ill. App. 304.

Warrant to survey vacant land will not justify entry on occupied land. Harry *v.* Graham, 51 N. C. 460.

88. Schmidt *v.* Densmore, 42 Mo. 225 (holding that authority to a public official to do an act does not justify one contracting to perform the work in doing it, so authority to county commissioners to enter private land and take timber to build a bridge will not justify a contractor in so doing); St. Peter *v.* Denison, 58 N. Y. 416, 17 Am. Rep. 258 (holding that the right of canal commissioners to take land does not justify one digging the canal in casting earth on it); Welch *v.* Piercy, 29 N. C. 365 (holding that failure of a road jury to lay out the road does not justify the person appointed to open it in laying it out).

89. Sasnett *v.* Weathers, 21 Ala. 673; Chenault *v.* Quisenberry, 81 S. W. 690, 26 Ky. L. Rep. 462, holding that an order of court to cut timber and pay the proceeds into court justifies the cutting.

An execution is a good defense for the seizure of goods under it and one who without authority, having ceased to be attorney, for the judgment creditor, procures it to issue is not liable in trespass, but if at all for procuring it to issue. McQuade *v.* Lizars, 39 U. C. Q. B. 215.

A warrant of the superintendent of an insane asylum, properly issued under the statute, for the arrest of an escaped inmate, is a good defense in trespass against one who procured it to issue by falsely representing that the escaped inmate was still insane. An action on the case for malicious arrest is the remedy. Dobbyn *v.* Decow, 25 U. C. C. P. 18.

Writ of fieri facias issued on a void garnishee order is a good defense to a seizure under it, being at most irregular and liable to be set aside on motion. Karns *v.* Phelan, 19 U. C. C. P. 288.

Execution on foreclosure of a mortgage is a good defense in trespass, although the mortgage was fraudulently made by one not owner of the property under a scheme to fraudulently obtain possession, since the process was valid. Fulton Grocery Co. *v.* Maddox, 111 Ga. 260, 36 S. E. 647.

Malice or want of probable cause will not affect the validity of the process. Gray *v.* Joiner, 127 Ga. 544, 56 S. E. 752.

A writ of replevin is a justification for a taking under it, although plaintiff in that action fails to recover (Williams *v.* Scott, 30 Ala. 241), or gives insufficient sureties if satisfactory to the officer (Harriman *v.* Wilkins, 20 Me. 93).

Warrant for collection of taxes is a defense to the collector and he need not show that the tax was legally assessed. Wilcox *v.* Sherwin, 1 D. Chipm. (Vt.) 72.

Abatement on the plea of another action does not render proceedings under an attachment a trespass. Hayden *v.* Shed, 11 Mass. 500.

Libel against a vessel justifies the taking, although afterward dismissed. McIntyre *v.* Globe Iron Works, 9 Ohio Dec. (Reprint) 433, 13 Cinc. L. Bul. 438.

Declaration that the entry is made in another right is immaterial. Crowther *v.* Ramsbottom, 7 T. R. 654, 4 Rev. Rep. 540, 101 Eng. Reprint 1182, allegation of taking for debt, when taking was under process to compel an appearance.

90. Barfield *v.* Coker, 73 S. C. 181, 53 S. E. 170, holding that where the debt has been paid on which a warrant to seize crops issued and the creditor knew it, the warrant is not a defense to him.

Where dispossess proceedings before a justice are reversed, the warrant is no defense. Eten *v.* Luyster, 60 N. Y. 252.

Where defendant in replevin obtains a dismissal of the action and an order of restitution, and, after accepting from plaintiffs a deed of certain land in full satisfaction for the replevied chattel, procures a writ of restitution to be issued and executed, he is liable as a trespasser, the property in such chattel being transferred to plaintiffs by such acceptance of satisfaction. Archibeque *v.* Miera, 1 N. M. 419.

91. Holton *v.* Taylor, 80 Ga. 508, 6 S. E. 15; Hoyt *v.* Van Alstyne, 15 Barb. (N. Y.) 568; McMaster *v.* McPherson, 6 U. C. Q. B. O. S. 16.

Replevin.— Replevin by A against B is no defense for the taking of goods from the possession of C to plaintiff in replevin (Shipman *v.* Clark, 4 Den. (N. Y.) 446, 47 Am. Dec. 264); but may be to the sheriff (Shipman *v.* Clark, *supra*; Hallett *v.* Byrt, Carth. 449); except where it is otherwise provided by statute (King *v.* Orser, 4 Duer (N. Y.) 431); and a justification in trespass for taking goods under a writ of replevin is insufficient if it does not allege the property was not detained on mesne or final process (Moors *v.* Parker, 3 Mass. 310); or that a bond was given pursuant to statute (Moors *v.* Parker, *supra*).

Levy of execution not on property in the debtor's possession and not subject to levy (Holton *v.* Taylor, 80 Ga. 508, 6 S. E. 15; Hall *v.* Penney, 11 Wend. (N. Y.) 44, 25 Am. Dec. 601); or not belonging to the debtor or, if belonging, exempt (Hoyt *v.* Van Alstyne, 15 Barb. (N. Y.) 568), is a trespass.

doned,[92] nor is it a defense to persons not connected with the proceedings.[93] Process issued by a court without jurisdiction is no defense for acts done under it [94] nor if otherwise void.[95]

(IV) *Exercise of Right of Eminent Domain.*[96] A right to take land by virtue of an exercise of the power of eminent domain is a good defense to a taking in accordance with the right;[97] but it is no defense to an action of trespass for an entry made in exercise of such right but not in accordance with the requirements of the statute,[98] and not even then if the proceedings are dismissed by the holder of the right, after entry,[99] or if the statute under which the proceedings are taken is unconstitutional.[1] Nor is it a defense to an action of trespass for wrongful acts done in the course of a legitimate exercise of the right.[2]

Assisting an officer in executing a search warrant on his summons justifies an entry on realty (Payne *v.* Green, 10 Sm. & M. (Miss.) 507); but plaintiff in an action cannot justify a taking under a fieri facias as the sheriff's assistant, as he is not an assistant but a responsible principal (Park *v.* Taylor, 1 U. C. C. P. 414).

But distress of more goods than necessary is not a trespass. Hamilton *v.* Windolf, 36 Md. 301, 11 Am. Rep. 491 (holding, however, that if more than necessary are sold trespass lies); Crowther *v.* Ramsbottom, 7 T. R. 654, 4 Rev. Rep. 540, 101 Eng. Reprint 1182 (holding that case lies for an excessive distress).

92. Wooley *v.* Edson, 35 Vt. 214, attachment.

A rule to show cause is no defense to a taking if thereafter dismissed without taking action to adjudicate the right. Chicago Title, etc., Co. *v.* Core, 126 Ill. App. 272 [*affirmed* in 223 Ill. 58, 79 N. E. 108].

93. Reeves *v.* Myers, 1 U. C. Q. B. 462, holding that to justify under writ of possession, defendant must connect himself with the ejectment proceedings.

94. Bradford *v.* Boozer, 139 Ala. 502, 36 So. 716, holding that where a judgment is void for want of jurisdiction, a writ issued on it is no defense, although regular on its face.

Where jurisdictional facts are not alleged in the complaint as the statute required, dispossession proceedings are no defense to the landlord. Sperry *v.* Seidel, 218 Pa. St. 16, 66 Atl. 853.

Where the sum claimed is greater than the justice has jurisdiction of trespass *de bonis* lies against both the sheriff and plaintiff therein. White Water Valley Canal Co. *v.* Dow, Smith (Ind.) 62.

A United States district judge has jurisdiction under libel proceedings against a vessel to order its detention, although the proceedings are afterward dismissed for want of jurisdiction. Thompson *v.* Lyle, 3 Watts & S. (Pa.) 166.

95. Mecartney *v.* Smith, (Kan. App. 1900) 62 Pac. 540, proceedings before a justice which were void.

Ex parte order in condemnation proceedings made without notice, admitting a railroad to possession without payment or tender of compensation or payment into court, is void and no defense to the entry. Sweeney *v.* Montana Cent. R. Co., 25 Mont. 543, 65 Pac. 912.

96. See also Eminent Domain, 15 Cyc. 593.

97. Woods *v.* Nashua Mfg. Co., 4 N. H. 527, taking by building a dam.

98. Postal Tel.-Cable Co. *v.* Kuhney, 127 Ga. 20, 55 S. E. 967; Bridgers *v.* Dill, 97 N. C. 222, 1 S. E. 767 (holding that a railroad must show that it has obtained a right of way in accordance with the statute to justify tearing down fences and entering); Bideford Urban Dist. Council *v.* Bideford, etc., R. Co., 68 J. P. 123 (failing to obtain necessary consents before laying a tramway in a road); Kearney *v.* Oakes, 18 Can. Sup. Ct. 148 (failing to set out the lands by metes and bounds, and to file a plan by the government before taking it for a public use).

Exclusiveness of statutory remedies.— The landowner is not required to proceed under the eminent domain statutes where the statutory procedure under them has not been followed, but may resort to any and all the usual legal remedies (Pittsburgh, etc., R. Co. *v.* Swinney, 97 Ind. 586); and may sue in trespass instead of under such statute for compensation where a foreign telegraph corporation has not complied with the law requiring it to become a domestic corporation before exercising the right of eminent domain (Baldwin *v.* Postal Tel. Cable Co., 78 S. C. 419, 59 S. E. 67; Duke *v.* Postal Tel.-Cable Co., 71 S. C. 95, 50 S. E. 675); or where a railroad has built its tracks in a street of which plaintiff owns the fee (Loop *v.* Chamberlain, 17 Wis. 504; Pomeroy *v.* Milwaukee, etc., R. Co., 16 Wis. 640); and need not arbitrate under them where proceedings to expropriate water rights have not been properly taken (Saunby *v.* London Water Com'rs, [1906] A. C. 110, 75 L. J. P. C. 25, 93 L. T. Rep. N. S. 648, 22 T. L. R. 37 [*reversing* 34 Can. Sup. Ct. 650]).

99. Enid, etc., R. Co. *v.* Wiley, 14 Okla. 310, 78 Pac. 96.

1. Hursh *v.* First Div. St. Paul, etc., R. Co., 17 Minn. 439; Hale *v.* Lawrence, 21 N. J. L. 714, 47 Am. Dec. 190.

2. Bridgers *v.* Dill, 97 N. C. 222, 1 S. E. 767 (acts by a railroad outside its right of way); South Eastern R. Co. *v.* European, etc., Electric Printing Tel. Co., 2 C. L. R. 467, 9 Exch. 363, 23 L. J. Exch. 113 (holding that the right to carry telegraph lines "directly" across a railroad does not give

For obvious reasons, it is held that the statute under which the right is exercised has no application in such case.[3]

(v) *STATUTE OF LIMITATIONS AND LACHES.* Where the statutory period has run it is a bar to the action;[4] but where the statute of limitations has not run plaintiff will not be nonsuited on ground of "stale claim."[5]

o. Res Judicata and Estoppel by Judgment. *Res judicata* is not a good defense in trespass unless plaintiff was a party to the other action,[6] and a recovery of damages as for a trespass was within its scope;[7] but a judgment in an action

a right to carry under, although the *locus* is a highway crossing and there is a right to carry under highways).

3. Gilchrist *v.* Dominion Tel. Co., 19 N. Brunsw. 553 [*affirmed* in Cassels Dig. (Can.) 844], holding that unnecessary cutting of ornamental shade trees by a telegraph company is not within the clause requiring arbitration in case of disagreement over the amount of damages for necessary cutting, although defendant thought it necessary. It must appear that it was necessary.

4. Park *v.* Northport Smelting, etc., Co., 47 Wash. 597, 92 Pac. 442.

5. Loop *v.* Chamberlain, 17 Wis. 504.

6. Fowler *v.* Owen, 68 N. H. 270, 39 Atl. 329, 73 Am. St. Rep. 588 (holding that a judgment in trespass against defendant's tenant for building a house on plaintiff's land does not bar an action against defendant, although he defended the action, claiming title); Marks *v.* Sullivan, 8 Utah 406, 32 Pac. 668, 20 L. R. A. 590 (holding that judgment in an action where it appeared defendant therein was agent of another does not bar an action against that other); Goodrich *v.* Judevine, 40 Vt. 190 (holding that the fact that defendant appeared in court in an action of trespass *quare clausum* against his servant does not connect him with the action and is not a good plea to establish *res adjudicata*).

7. White *v.* Cooper, 53 N. C. 48; Providence *v.* Adams, 10 R. I. 184; Hite *v.* Long, 6 Rand. (Va.) 457, 18 Am. Dec. 719; Gibbs *v.* Cruikshank, L. R. 8 C. P. 454, 42 L. J. C. P. 273, 28 L. T. Rep. N. S. 735, 21 Wkly. Rep. 734.

Judgment in replevin for plaintiff therein bars an action of trespass for the same taking, but not an action for injury to realty committed at the same time. Gibbs *v.* Cruikshank, L. R. 8 C. P. 454, 42 L. J. C. P. 273, 28 L. T. Rep. N. S. 735, 21 Wkly. Rep. 734.

Judgment in trover for plaintiff therein bars an action of trespass where the taking and conversion were all one act. Hite *v.* Long, 6 Rand. (Va.) 457, 18 Am. Dec. 719.

Judgment on forcible entry for plaintiff therein does not bar an action of trespass where the justice has power to restore possession only. Boulton *v.* FitzGerald, 1 U. C. Q. B. 343.

Recovery of purchase-price.—Judgment for money had and received in favor of the vendee of chattels suing to recover the purchase-price after a forcible retaking by the vendor does not bar an action of trespass for the forcible taking. Henson *v.* Taylor, 108 Ga. 567, 33 S. E. 911.

Reëntry after eviction.—Where a defendant in an action of ejectment has been evicted under a judgment and writ of possession, he is not estopped, on making an actual entry on the premises, from maintaining an action of trespass *quare clausum fregit*, and on showing title he may recover for trespass committed after the termination of the former suit. White *v.* Cooper, 53 N. C. 48.

A recovery in ejectment of damages as for mesne profits does not bar an action for injury done to the freehold during the disseizin (Henry *v.* Davis, 149 Ala. 359, 43 So. 122; Walker *v.* Hitchcock, 19 Vt. 634; Foster *v.* Foster, 10 U. C. Q. B. 607. *Contra*, in Minnesota. Pierro *v.* St. Paul, etc., R. Co., 37 Minn. 314, 34 N. W. 38); nor for profits accruing after the judgment and before the writ of habere possessionem (Shumake *v.* Nelms, 25 Ala. 126); but it bars an action for mesne profits (Cummings *v.* McGehee, 9 Port. (Ala.) 349; Cobb *v.* Wrightsville, etc., R. Co., 129 Ga. 377, 58 S. E. 862; Doe *v.* Wright, 10 A. & E. 763, 2 P. & D. 672, 37 E. C. L. 401, 113 Eng. Reprint 289) from the date of the demise (Fairman *v.* Fairman, 1 U. C. C. P. 435).

Judgment in trespass to realty if for plaintiff therein bars a subsequent action for the same act upon other parts thereof, as the act is indivisible (Pierro *v.* St. Paul, etc., R. Co., 39 Minn. 314, 34 N. W. 38); and estops defendant to deny plaintiff's title in an action for another trespass at the same place, if title was in issue (Clinton *v.* Franklin, 83 S. W. 142, 26 Ky. L. Rep. 1053), but not if title to another part of the premises only was there in question (Providence *v.* Adams, 10 R. I. 184; Hunter *v.* Birney, 27 Grant Ch. (U. C.) 204).

Other applications of rule.—A judgment for an injury to personalty in favor of plaintiff in an action for trespass thereto does not bar an action for injury to the person from the same act (Brunsden *v.* Humphrey, 14 Q. B. D. 141, 49 J. P. 4, 53 L. J. Q. B. 476, 51 L. T. Rep. N. S. 529, 32 Wkly. Rep. 944); nor is an action of replevin for the taking of personalty a bar to an action for trespass to land committed at the same time (Gibbs *v.* Cruikshank, L. R. 8 C. P. 454, 42 L. J. C. P. 273, 28 L. T. Rep. N. S. 735, 21 Wkly. Rep. 734). Damages for a permanent injury to land must all be recovered in one action, as damages resulting from a permanent erection on defendant's land which cast water on plaintiff's (Gart-

by one in possession of property bars an action by the general owner.[8] The estoppel of a judgment is coextensive with the trespass.[9] A judgment for defendant under plea of *liberum tenementum* estops plaintiff from showing that the land at the place of trespass was not in dispute.[10] A judgment is no defense for acts done under it in breach of a contract not to enforce it.[11] An acquittal of the criminal charge is no bar to an action of trespass for the same act, brought by the injured party;[12] but under certain statutes criminal proceedings before the magistrate bar a civil action.[13]

7. The Action[14] — a. Forms of Action — (I) *In General.* Trespass *vi et armis* is the proper remedy for a direct injury committed with force,[15] and takes the form of trespass *quare clausum* for a forcible violation of the right of possession of realty.[16]

(II) *Trespass Quare Clausum.* The entry is the gist of the action of trespass *quare clausum* and acts thereafter are mere aggravation.[17] This action lies for a forcible violation of the right of possession of realty.[18] It lies for removal

ner *v.* Chicago, etc., R. Co., 71 Nebr. 444, 98 N. W. 1052); but recovery for making an erection on plaintiff's land does not bar a subsequent action for maintaining it there (Holmes *v.* Wilson, 10 A. & E. 503, 37 E. C. L. 273, 113 Eng. Reprint 190). So recovery by bailee of chattels bars an action by bailor for their taking (Jones *v.* McNeil, 2 Bailey (S. C.) 466); recovery by a mere possessor bars an action by the owner (Guttner *v.* Pacific Steam Whaling Co., 96 Fed. 617); recovery by a mortgagor in possession bars an action by the mortgagee, but the court will exert its equitable powers to control the disposition of the sum recovered (Elvins *v.* Delaware, etc., Tel., etc., Co., 63 N. J. L. 243, 43 Atl. 903, 76 Am. St. Rep. 217); recovery by a grantee of land in possession under void deed from guardian of infants bars action by any one else (Todd *v.* Jackson, 26 N. J. L. 525), and recovery by a vendee in possession of land for the cutting of trees thereon bars an action by the vendor, although he has not paid for it or received a deed (Hunt *v.* Taylor, 22 Vt. 556); but it has been held in Kentucky that an action by one who cut trees by a trespass against the vendee for the purchase-price does not bar an action by the owner, although notified to come in and defend, if brought in a foreign jurisdiction (Jones Lumber Co. *v.* Gatliff, 82 S. W. 295, 26 Ky. L. Rep. 616).

8. Wooley *v.* Edson, 35 Vt. 214; Hunt *v.* Taylor, 22 Vt. 556, holding that an action by vendee of land in possession under contract in which he agrees not to cut trees by a stranger bars an action by the vendor, although payment has not been made or a deed given.

Possession of land by life-tenant.— Judgment in action by him bars an action by the reversioner. Willey *v.* Laraway, 64 Vt. 559, 25 Atl. 436.

Possession of personalty.—Action by mortgagor in possession bars action by the mortgagee. Luse *v.* Jones, 39 N. J. L. 707.

Action either by lien-holder or owner bars action by the other. Neff *v.* Thompson, 8 Barb. (N. Y.) 213.

9. Schæffer *v.* Brown, 23 R. I. 364, 50 Atl. 640.

10. Whittaker *v.* Jackson, 2 H. & C. 926, 33 L. J. Exch. 181, 11 L. T. Rep. N. S. 155, in action for building a wall and cornice defendant therein recovered under *liberum tenementum*, and in a subsequent action by said defendant's grantees against plaintiff in said first action for tearing down the cornice, it was held that defendants were estopped to show the land under the cornice has not been in dispute.

11. Juchter *v.* Boehm, 67 Ga. 534.

12. Von Hoffman *v.* Kendall, 17 N. Y. Suppl. 713.

13. Game Act, § 46, 1 & 2 Wm. 4, c. 32; Robinson *v.* Vaughton, 8 C. & P. 252, 34 E. C. L. 718.

14. **Abolition of distinction between trespass and case** see Case, 6 Cyc. 683.

Action of trespass distinguished from other remedies: Case see Case, 6 Cyc. 684; Detinue see Detinue, 14 Cyc. 242; Replevin see Replevin, 34 Cyc. 1354; Trover see Trover and Conversion.

Election between trespass and other remedies see Election of Remedies, 15 Cyc. 254.

Waiver of tort and suing in assumpsit see Assumpsit, 4 Cyc. 331.

15. Crawford *v.* Waterson, 5 Fla. 472; Kelly *v.* Lett, 35 N. C. 50.

Beating plaintiff's slave.— This form of action is appropriate for injuries of this character. Carsten *v.* Murray, Harp. (S. C.) 113; Wilson *v.* Kedgeley, 30 Fed. Cas. No. 17,815, 1 Cranch C. C. 477.

16. See *infra*, I, A, 7, a, (II).

17. Prussner *v.* Brady, 136 Ill. App. 395; Cook *v.* Redman, 45 Mo. App. 397; Adams *v.* Blodgett, 47 N. H. 219, 90 Am. Dec. 569; Brown *v.* Manter, 22 N. H. 468.

Cutting trees see Owens *v.* Lewis, 46 Ind. 488, 15 Am. Rep. 295; Rucker *v.* McNeely, 4 Blackf. (Ind.) 179.

18. Uttendorffer *v.* Saegers, 50 Cal. 496; Jackson *v.* Rounsevilie, 5 Metc. (Mass.) 127 (church pews, being realty by statute); Gordner *v.* Blades Lumber Co., 144 N. C. 110, 56 S. E. 695; Pearson *v.* Smith, 1 N. C. 444.

For injury to plaintiff's mules done by defendant's bees it has been held that trespass *quare clausum* is not the proper remedy.

of part of the realty,[19] but not for an injury committed after an entry by permission, because as already stated the wrongful entry is the gist of the action.[20] It is the remedy against a sublessee where subletting is contrary to statute,[21] and lies by a life-tenant for a severance of part of the realty.[22] It cannot be maintained for breaking and entering property not real estate.[23]

(III) *TRESPASS DE BONIS.* Trespass *de bonis* lies by a lessee whose term is to begin *in futuro* for destruction by the lessor of a growing crop which the lessee has agreed to buy,[24] and for taking and carrying away fixtures or portions of realty temporarily severed.[25] It does not lie in favor of a life-tenant for the severing and taking of trees. This results from the nature of his interest in the premises.[26]

(IV) *TRESPASS FOR MESNE PROFITS.* Trespass for mesne profits is the remedy for keeping plaintiff out of possession, brought after regaining possession,[27] and lies after judgment in a writ of entry, without showing any actual entry.[28]

(V) *INJUNCTION.* Under some circumstances an injunction will lie to prevent the commission or continuance of a trespass. This subject has already been considered at length in another title of this work.[29]

(VI) *INTERVENING IN ACTIONS.* A party not liable in trespass cannot intervene as party defendant [30] unless authorized by statute.[31]

b. Jurisdiction. An action of trespass *quare clausum* cannot be brought in the courts of a state other than that where the land lies.[32] That damages are

Petey Mfg. Co. *v.* Dryden, 5 Pennew. (Del.) 166, 62 Atl. 1056.

19. Eldridge *v.* Gorman, 77 Conn. 699, 60 Atl. 643 (trees); Milltown Lumber Co. *v.* Carter, 5 Ga. App. 344, 63 S. E. 270; Kent County Agricultural Soc. *v.* Ide, 128 Mich. 423, 87 N. W. 369 (a barn); Perry *v.* Carr, 44 N. H. 118 (manure made on the premises).

Election of remedies.— A landowner whose standing timber has been cut and carried away by a trespasser has an election of remedies. He may treat the transaction as an injury to the realty and sue in trespass *quare clausum fregit*, or, since the timber as soon as severed becomes personalty, he may maintain trover or any other form of action appropriate to the recovery of personalty or for damages for injury to or conversion of the severed timber, or he may waive the tort, and sue in implied assumpsit for the value. Milltown Lumber Co. *v.* Carter, 5 Ga. App. 344, 63 S. E. 270.

20. Hunnewell *v.* Hobart, 42 Me. 565; Jewell *v.* Mahood, 44 N. H. 474, 84 Am. Dec. 90. *Compare* Dobson *v.* Postal Tel. Cable Co., 79 S. C. 429, 60 S. E. 948, where a telegraph company claiming a right under an agreement with an owner entered on the land and erected poles thereon and strung wires, the remedy of the owner, claiming that the agreement was fraudulently obtained, was by action for trespass, and not by condemnation proceedings under the statutes.

21. Brown *v.* Pope, 27 Tex. Civ. App. 225, 65 S. W. 42.

22. C. W. Zimmerman Mfg. Co. *v.* Daffin, 149 Ala. 380, 42 So. 858, 123 Am. St. Rep. 58, 9 L. R. A. N. S. 663.

23. Burleigh *v.* Ford, 59 N. H. 536, a wooden tent.

24. Meinke *v.* Nelson, 56 Ill. App. 269.

25. Taylor *v.* Burt, etc., Lumber Co., 109 S. W. 348, 33 Ky. L. Rep. 191; Dennis *v.* Strunk, 108 S. W. 957, 32 Ky. L. Rep. 1230; Wadleigh *v.* Janvrin, 41 N. H. 503, 77 Am. Dec. 780.

Trover, replevin, or trespass.— One whose timber has been wrongfully taken from his land by another may sue in trespass, or for the recovery of the specific property, or its value, if it cannot be obtained, as provided by Civ. Code Pr. §§ 180–193, inclusive; or he may treat the property as converted by defendant and sue in trover for its value. Dennis *v.* Strunk, 108 S. W. 957, 32 Ky. L. Rep. 1230.

Detinue of trespass.— Where plaintiff owned the land upon which the trees wrongfully cut by defendant were standing, plaintiff could maintain either detinue or trespass for the value thereof. Taylor *v.* Burt, etc., Lumber Co., 109 S. W. 348, 33 Ky. L. Rep. 191.

26. C. W. Zimmerman Mfg. Co. *v.* Daffin, 149 Ala. 380, 42 So. 858, 123 Am. St. Rep. 58, 9 L. R. A. N. S. 663.

27. Western Book, etc., Co. *v.* Jevne, 78 Ill. App. 668.

28. Winkley *v.* Hill, 6 N. H. 391.

29. See INJUNCTIONS, 22 Cyc. 825 *et seq.*

30. Bennett *v.* Pennsylvania R. Co., 17 Pa. Co. Ct. 189.

31. Le Moyne *v.* Anderson, 123 Ky. 584, 96 S. W. 843, 29 Ky. L. Rep. 1017, person claiming the land.

32. *Alabama.*— Howard *v.* Ingersoll, 23 Ala. 673.

Illinois.— Eachus *v.* Illinois, etc., Canal, 17 Ill. 534.

Indiana.— Du Breuil *v.* Pennsylvania Co., 130 Ind. 137, 29 N. E. 909.

Kansas.— Brown *v.* Irwin, 47 Kan. 50, 27 Pac. 184.

Massachusetts.—Allin *v.* Connecticut River Lumber Co., 150 Mass. 560, 23 N. E. 581, 6

sought for the tort only does not alter the rule;[33] and damages cannot be recovered in another action for the trespass to such realty,[34] although it has been held that in trespass to a tract of land lying in two states the injury to the part outside the state may be shown to enhance the damages.[35] In many states the jurisdiction of certain courts in trespass to realty is limited to cases where title is involved.[36] Common-law courts have jurisdiction of marine trespass, and this is not taken away by the establishment of the New York courts.[37]

c. Venue [38] — (i) *At Common Law.* Trespass to realty is a local action,[39] and cannot be brought outside the jurisdiction where the land lies,[40] and so cannot be brought outside the county where the land lies.[41] Where the *locus* has been annexed to another county, the action lies there.[42] Trespass to personalty is transitory and may be brought anywhere, regardless of the place of trespass.[43]

L. R. A. 416, holding that a statute providing that all personal actions, except certain named, may be commenced by trustee process, and requiring trustee writs to be returnable in the county where the trustee lives, do not give jurisdiction of an action for trespass to land committed in another state, although such action is personal, and may be begun by trustee process.

New York.— Sentenis *v.* Ladew, 140 N. Y. 463, 35 N. E. 650, 37 Am. St. Rep. 569; Dodge *v.* Colby, 108 N. Y. 445, 15 N. E. 703; Cragin *v.* Lovell, 88 N. Y. 258; American Union Tel. Co. *v.* Middleton, 80 N. Y. 408; Sprague Nat. Bank *v.* Erie R. Co., 40 N. Y. App. Div. 69, 57 N. Y. Suppl. 844.

Vermont.— Niles *v.* Howe, 57 Vt. 388.

Wisconsin.— Bettys *v.* Milwaukee, etc., R. Co., 37 Wis. 323.

United States.— Livingston *v.* Jefferson, 15 Fed. Cas. No. 8,411, 1 Brock. 203.

England.— British South Africa Co. *v.* Companhia de Mocambique, [1893] A. C. 602, 63 L. J. Q. B. 70, 69 L. T. Rep. N. S. 604, 6 Reports 1, holding that the rule is not affected by anything contained in the judicature act); Doulson *v.* Matthews, 4 T. R. 503, 2 Rev. Rep. 448, 100 Eng. Reprint 1143.

See 46 Cent. Dig. tit. "Trespass," § 71.

Contra.— Little *v.* Chicago, etc., R. Co., 65 Minn. 48, 67 N. W. 846, 60 Am. St. Rep. 421, 33 L. R. A. 423. And see *dictum* of Lord Mansfield in Mostyn *v.* Fabrigas, Cowp. 161, 98 Eng. Reprint 1021.

33. Hill *v.* Nelson, 70 N. J. L. 376, 57 Atl. 411, breaking and entering plaintiff's pool and fishery.

34. McKenna *v.* Fisk, 16 Fed. Cas. No. 8,852, 1 Hayw. & H. 179, in trespass to personalty committed on plaintiff's land in another state.

35. Gorman *v.* Marsteller, 10 Fed. Cas. No. 5,629, 2 Cranch C. C. 311.

36. McClelland *v.* Hurd, 21 Colo. 197, 40 Pac. 445 (holding that title is involved where defendant claims title); Long *v.* Ober, 51 Vt. 73; Reilly *v.* Howe, 101 Wis. 108, 76 N. W. 1114; Armstrong *v.* McGourty, 22 N. Brunsw. 29 (claim as lessee for years).

37. Hallett *v.* Novion, 14 Johns. (N. Y.) 273.

Jurisdiction of special courts.— District of Columbia courts have same jurisdiction in trespass to personalty that English and state courts have, and must apply same rules as to mode of bringing action, pleading, and proof. McKenna *v.* Fisk, 1 How. (U. S.) 241, 11 L. ed. 117. New York court of claims has jurisdiction to try claim for a trespass done by the state of New York. Remington *v.* State, 116 N. Y. App. Div. 522, 101 N. Y. Suppl. 952.

38. **Change of venue** see Venue.

39. Mather *v.* Trinity Church, 3 Serg. & R. (Pa.) 509, 8 Am. Dec. 663.

40. Gusdorff *v.* Duncan, 94 Md. 160, 50 Atl. 574; Dodge *v.* Colby, 108 N. Y. 445, 15 N. E. 703; Cragin *v.* Lovell, 88 N. Y. 258; American Union Tel. Co. *v.* Middletown, 80 N. Y. 408; Huenermund *v.* Erie R. Co., 48 How. Pr. (N. Y.) 55; McKenna *v.* Fisk, 1 How. (U. S.) 241, 11 L. ed. 117; Livingston *v.* Jefferson, 15 Fed. Cas. No. 8,411, 1 Brock. 203, 4 Hughes 606. *Contra,* Hannibal, etc., R. Co. *v.* Mahoney, 42 Mo. 467.

In New York.— A distinction has been taken between an action of trespass *quare clausum* and an action for damages for cutting and removing trees, holding the latter transitory. Shank *v.* Cross, 9 Wend. 160.

41. *Indiana.*— Prichard *v.* Campbell, 5 Ind. 494; Ham *v.* Rogers, 6 Blackf. 559.

Iowa.— Chapman *v.* Morgan, 2 Greene 374.

Kentucky.— Meehan *v.* Edwards, 92 Ky. 574, 18 S. W. 519, 13 Ky. L. Rep. 803, 19 S. W. 179, 13 Ky. L. Rep. 803.

New Jersey.— Jenkins *v.* Crevier, 50 N. J. L. 351, 13 Atl. 28; Champion *v.* Doughty, 18 N. J. L. 3, 35 Am. Dec. 523.

Tennessee.— Roach *v.* Damron, 2 Humphr. 425.

United States.— Livingston *v.* Jefferson, 15 Fed. Cas. No. 8,411, 1 Brock. 203, 4 Hughes 606; Gorman *v.* Marsteller, 10 Fed. Cas. No. 5,629, 2 Cranch C. C. 311.

See 46 Cent. Dig. tit. "Trespass," § 73.

Destruction of a growing crop is a trespass to realty not to personalty. Keaton *v.* Snider, 14 Ind. App. 66, 42 N. E. 372.

An injury to an exclusive right to quarry stone is not an injury to realty. O'Connor *v.* Shannon, (Tex. Civ. App. 1895) 30 S. W. 1096.

42. Champion *v.* Doughty, 18 N. J. L. 3, 35 Am. Dec. 523.

43. *Arkansas.*— Moores *v.* Winter, 67 Ark. 189, 53 S. W. 1057.

New Hampshire.— Ford *v.* Burleigh, 62 N. H. 388.

On the other hand, trespass for injuries to the person or for false imprisonment is a local action.[44]

(II) *IN COURTS OF LIMITED JURISDICTION.* By statute in some states courts of limited jurisdiction have no jurisdiction of trespass to realty,[45] in others it is limited in such case by the amount of damages demanded.[46] In other states their jurisdiction is ousted if title comes in issue,[47] and so title cannot be given in evidence in such cases for any purpose;[48] but they have jurisdiction to try the fact of possession.[49] A state court cannot decide a federal question.[50]

(III) *UNDER STATUTES.* The common-law rule that trespass to land is a local action is expressly continued by statute in some of the states,[51] and the statutes relating to venue have not in general been held to alter the rule,[52] although in some states the rule has been changed by statute or constitutional provision.[53]

New Jersey.— Hale *v.* Lawrence, 21 N. J. L. 714, 47 Am. Dec. 190.

New York.— Brice *v.* Vanderheyden, 9 Wend. 472.

Pennsylvania.— Guffey *v.* Gree, 19 Pa. St. 384.

United States.— McKenna *v.* Fisk, 1 How. 241, 11 L. ed. 117.

44. Chapman *v.* Wilbur, 6 Hill (N. Y.) 475; Perry *v.* Mitchell, 5 Den. (N. Y.) 537.

45. Elliott *v.* Hall, 8 Ala. 508 (county courts); Bartlett *v.* Baybutt, 91 Me. 140, 39 Atl. 474.

46. Pitts *v.* Looby, 142 Ill. 534, 32 N. E. 519 (justice's court, two hundred dollars); Montgomery *v.* Edwards, 45 Vt. 75 (justice's court, twenty dollars).

47. Ostrom *v.* Potter, 71 Mich. 44, 38 N. W. 670; Dold *v.* Knudsen, 70 Nebr. 373, 97 N. W. 482.

Title is in issue where plaintiff, in order to establish constructive possession, relies on title (Orris *v.* Kempton, 105 Mich. 229, 63 N. W. 68; Ostrom *v.* Potter, 71 Mich. 44, 38 N. W. 670; Dold *v.* Knudsen, 70 Nebr. 373, 97 N. W. 482); where right of possession is in issue (Ehle *v.* Quackenboss, 6 Hill (N. Y.) 537); or where defendant sets up a right of way, public or private (Randall *v.* Crandall, 6 Hill (N. Y.) 342; Whiting *v.* Dudley, 19 Wend. (N. Y.) 373; Saunders *v.* Wilson, 15 Wend. (N. Y.) 338; Radley *v.* Brice, 6 Wend. (N. Y.) 539; Striker *v.* Mott, 6 Wend. (N. Y.) 465); or where plaintiff's allegation of title is denied (Lipsky *v.* Borgmann, 52 Wis. 256, 9 N. W. 158, 38 Am. Rep. 735). But a plea of license does not put title in issue (Dolittle *v.* Eddy, 7 Barb. (N. Y.) 74, holding that plea that defendant contracted to sell with authority to reënter on default is a plea of license); nor the fact that the injury is to the freehold (Gregory *v.* Kanouse, 11 N. J. L. 62; Haley *v.* Wheeler, 8 Hun (N. Y.) 569); and the location of a boundary line on the land does not necessarily involve title (La Rue *v.* Smith, 153 N. Y. 428, 47 N. E. 796). So where one of two adjoining tenants, each, respectively, in possession of land and buildings thereon up to a dividing fence, removes the fence on to the land of the other, an action by the other for damages for the taking of the lands and buildings thereon is not an action in which title or boundaries of lands are in dispute, of which a justice could not have jurisdiction, there being no dispute as to where the fence was, and it makes no difference that plaintiff introduced evidence to show that the true line was where the fence had stood. Smith *v.* Schlink, 6 Colo. App. 228, 40 Pac. 478.

In Texas title is not in issue so as to oust the jurisdiction if only incidentally involved (Hatch *v.* Allen, 3 Tex. App. Civ. Cas. § 229); nor where the action is for damages and not to determine title (Victoria *v.* Schott, 9 Tex. Civ. App. 332, 29 S. W. 681; Brown *v.* Brown, 3 Tex. App. Civ. Cas. § 82; Gulf, etc., R. Co. *v.* Graves, 1 Tex. Civ. App. Cas. § 579).

48. Edgar *v.* Annes, 47 N. J. L. 465, 2 Atl. 246; Jeffrey *v.* Owen, 41 N. J. L. 260.

49. Campfield *v.* Johnson, 21 N. J. L. 83 (holding that a declaration alleging the breaking and entering plaintiff's close alleges possession, not title, and is therefore cognizable); Locklin *v.* Casler, 50 How. Pr. (N. Y.) 43; Ehle *v.* Quackenboss, 6 Hill (N. Y.) 537.

50. Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246, 4 L. ed. 381, as whether a vessel seized was forfeited under a United States statute.

51. Jacks *v.* Moore, 33 Ark. 31 (holding that the action cannot be brought outside the county in which the land lies); Jacobson *v.* Lynn, 54 Nebr. 794, 75 N. W. 243.

52. Gordon *v.* Merry, 65 Me. 168; Freeman *v.* Thompson, 50 Hun (N. Y.) 340, 3 N. Y. Suppl. 93, 16 N. Y. Civ. Proc. 186.

The action must be brought in the county where the land lies (Freeman *v.* Thompson, 50 Hun (N. Y.) 340, 3 N. Y. Suppl. 93, 16 N. Y. Civ. Proc. 186; Easton *v.* Booth, 19 N. Y. Wkly. Dig. 552. *Contra*, Polley *v.* Wilkisson, 5 N. Y. Civ. Proc. 135; Neely *v.* Gas Co., 37 Pittsb. Leg. J. N. S. (Pa.) 90), or at least may be, although all defendants reside in another county (Barnes *v.* Davis, 2 Iowa 160; Gordon *v.* Merry, 65 Me. 168; Henderson *v.* Bennett, 58 S. C. 30, 36 S. E. 2; Southern Cotton Press, etc., Co. *v.* Bradley, 52 Tex. 587); and may be brought in the town where the land lies if one of the parties to the writ resides there (Burke *v.* Grace, 53 Conn. 513, 4 Atl. 257; Curtiss *v.* Atwood, 51 Conn. 169).

53. Osmond *v.* Flournoy, 34 Ga. 509, holding that a constitutional provision that all civil cases shall be tried in the county where defendant resides includes trespass to realty.

The statutes in Texas give jurisdiction of trespasses to the courts in the jurisdiction where they are committed,[54] although this was formerly limited to cases where the trespass was a crime,[55] and Georgia has a somewhat similar statute.[56]

d. Conditions Precedent to Suit. Where the trespass was felony it has been held that there can be no recovery for the civil wrong till the offender has been prosecuted.[57] Statutes requiring that before action shall be brought against the government or the employees notice shall be given have been held to apply to trespasses,[58] but are strictly interpreted.[59] Where a taking of goods is not authorized by a writ the statute requiring that claim be made upon the sheriff before bringing suit does not apply.[60] Restoration of the consideration for a contract is not a prerequisite to an action for a trespass done in violation of it;[61] and a grantee of land need not return money paid his grantor by the trespasser for a void contract for timber.[62]

e. The Scope of the Action. Trespass is a personal action, and judgment in trespass can only be for damages.[63] A verdict for possession in addition to the damages is surplusage,[64] and the jury by a verdict in trespass cannot establish a disputed boundary,[65] although the true boundary may be a subject for consideration.[66] Title is not involved in the issue where possession merely is alleged.[67] But title may be put in issue and determined as a fact in trespass *quare clausum*.[68]

f. Process.[69] The writ in trespass need not be as full and specific as the

54. See cases cited *infra*, this note.

That all of defendants reside out of the county is immaterial. Campbell *v.* Trimble, 75 Tex. 270, 12 S. W. 863.

A corporation is included in the term "persons." Bartee *v.* Houston, etc., R. Co., 36 Tex. 648.

Fine distinctions between trespass and case at common law will not be made, and accordingly where plaintiff was run down by defendant's locomotive the statute applies. Bartee *v.* Houston, etc., R. Co., 36 Tex. 648.

Limitations of rule.— The statute extends only to an action against the trespasser individually, and does not authorize the bringing of an action against the sureties on a sheriff's bond for a trespass committed by a deputy sheriff in the county where the trespass occurred instead of the county in which the bondsmen are domiciled, at least where neither the sheriff nor deputy are joined. Lasater *v.* Waits, 95 Tex. 553, 68 S. W. 500 [*reversing* 67 S. W. 518].

55. Robertson *v.* Ephraim, 18 Tex. 118; Illies *v.* Knight, 3 Tex. 312.

56. Gillis *v.* Hilton, etc., Lumber Co., 113 Ga. 622, 38 S. E. 940, holding that a corporation may be sued where the cause of action originated.

57. Bell *v.* Troy, 35 Ala. 184.

58. Spry *v.* Mumby, 11 U. C. C. P. 285, trespass by a collector of school rates. But see Hathaway *v.* Osborne, 25 R. I. 249, 55 Atl. 700.

59. Kearney *v.* Oakes, 18 Can. Sup. Ct. 148, holding that a contractor building a railroad is not an employee of the department of railroads under section 109 of the government railway act.

60. King *v.* Orser, 4 Duer (N. Y.) 431, holding that a writ of replevin does not justify taking goods from one not a defendant in the action.

61. Bunch *v.* Elizabeth City Lumber Co., 134 N. C. 116, 46 S. E. 24.

62. Monds *v.* Elizabeth City Lumber Co., 131 N. C. 20, 42 S. E. 334.

63. Biggins *v.* Chandler, 84 Ill. App. 64; Adler *v.* Parr, 34 Misc. (N. Y.) 482, 70 N. Y. Suppl. 255.

Applying this principle plaintiff cannot recover in trespass as in an action for an accounting (Biggins *v.* Chandler, 84 Ill. App. 64); and plaintiff's right, as to the character of a division fence are not involved (Adler *v.* Parr, 34 Misc. (N. Y.) 482, 70 N. Y. Suppl. 255); so the court cannot declare that defendant's possession has ripened into title (Johnson *v.* C. & N. W. Sand, etc., Co., 86 Fed. 269, 30 C. C. A. 35); and cannot give possession of the land (Hagins *v.* Whitaker, 42 S. W. 751, 19 Ky. L. Rep. 1050; Grimke *v.* Brandon, 2 Nott & M. (S. C.) 382; Galveston, etc., R. Co. *v.* Pfeuffer, 56 Tex. 66). The court in actions of trespass will not grant a rule to stay waste. Leeds *v.* Doughty, 11 N. J. L. 193.

64. Love *v.* Turner, 71 S. C. 322, 51 S. E. 101.

65. Seale *v.* Shepherd, 29 S. W. 31, 16 Ky. L. Rep. 563.

66. Gilman *v.* Brown, 115 Wis. 1, 91 N. W. 227.

67. Peytavin *v.* Winter, 6 La. 553.

68. Weidner *v.* Lund, 105 Ill. App. 454; Booth *v.* Sherwood, 12 Minn. 426.

Under an issue as to title plaintiff must show title at the place of trespass (France *v.* Four-Mile Land, etc., Co., 32 S. W. 283, 17 Ky. L. Rep. 665), but not elsewhere, although it is alleged (Knowles *v.* Dow, 20 N. H. 135; J. L. Roper Lumber Co. *v.* Elizabeth City Lumber Co., 135 N. C. 742, 47 S. E. 757).

69. **Execution against the person in actions for injuries to personalty** see EXECUTIONS, 12 Cyc. 1496.

petition [70] but must state the gist of the action.[71] After pleading defendant cannot take advantage of a defect in the writ.[72] Process under special statutes must conform to the local practice.[73] In Pennsylvania where defendant is a non-resident, process in trespass to land may be served on him in an adjoining county.[74] Under statute in Wisconsin allowing arrest in trespass there is no distinction between voluntary and involuntary trespass and a warrant is proper in either case.[75]

g. Pleadings — (i) *General Requisites.* In general, the pleadings must contain allegations of the cause of action or defense relied on. Therefore there can be no recovery for trespass not declared on [76] or for acts not trespass.[77] And so no recovery can be had for a trespass when the action does not allege a trespass, but is brought for an injury of a different sort,[78] nor for damages not claimed by the complaint.[79] Conclusions of law should not be pleaded.[80] Evidential facts need not be alleged.[81] And an argumentative plea is bad on special demurrer.[82]

70. Des Moines Nav., etc., Co. *v.* Doran, 4 Iowa 553; Fogg *v.* Cushing, 40 Me. 315.

It is not ground for abatement that the writ omits to allege the date of the trespass (Des Moines Nav., etc., Co. *v.* Doran, 4 Iowa 553; Bishop *v.* Lyman, 6 N. H. 268); or that the act was committed with force and arms (Bishop *v.* Lyman, 6 N. H. 268); or notice required by a statute, the gist of the action being the breaking and entering (Fogg *v.* Cushing, 40 Me. 315); and in trespass *quare clausum*, the writ need not describe all the boundaries (Teed *v.* Beebe, 3 Nova Scotia 426).

71. Parris *v.* Brown, 5 Yerg. (Tenn.) 267, holding that the nature of the act and the property trespassed on must be stated.

72. McKenna *v.* Fisk, 1 How. (U. S.) 241, 11 L. ed. 117.

73. McKenna *v.* Fisk, 1 How. (U. S.) 241, 11 L. ed. 117, holding that a writ mentioning a trespass on a warehouse and seizure and destruction of goods covers a transitory as well as a local action.

74. Guffey *v.* Free, 19 Pa. St. 384; Neely *v.* Sas Co., 37 Pittsb. Leg. J. N. S. (Pa.) 90.

75. Harrison *v.* Brown, 5 Wis. 27.

76. *Iowa.*— Negley *v.* Cowell, 91 Iowa 256, 59 N. W. 48, 51 Am. St. Rep. 344, holding that where no claim for damage from pasturage is made in a substituted petition the fact that it was made in the original petition which was put in evidence will not supply the lack.

Kentucky.— Gillen *v.* Wilson, 2 T. B. Mon. 11, holding that no more trespasses can be recovered for than are declared on.

Mississippi.— Memphis, etc., R. Co. *v.* Chastine, 54 Miss. 503, act amounting to an independent trespass.

New York.— La Rue *v.* Smith, 153 N. Y. 428, 47 N. E. 796, act not stated as a cause of action, of a different nature from those so stated and occurring a year earlier.

Vermont.— Clark *v.* Boardman, 42 Vt. 667 (acts not committed on the premises described); Myrick *v.* Downer, 18 Vt. 360 (on declaration for a single trespass recovery confined to one act).

Canada.— Caniffe *v.* Caniffe, 1 U. C. Q. B. 551, holding that in trespass for destruction of a dam there can be no recovery for crossing land to get to it, where not declared on.

77. Willis *v.* Branch, 94 N. C. 142; Joseph Dessert Lumber Co. *v.* Wadleigh, 103 Wis. 318, 79 N. W. 237.

Illustrations.— Under a declaration in trespass to land, plaintiff cannot recover under an implied promise for use and occupation (Haskins *v.* Andrews, 12 Wyo. 458, 76 Pac. 588), for a conversion (Joseph Dessert Lumber Co. *v.* Wadleigh, 103 Wis. 318, 79 N. W. 237) against a purchaser from the trespasser (Joseph Dessert Lumber Co. *v.* Wadleigh, *supra*), for waste (Tracy *v.* Ames, 4 Lans. (N. Y.) 500), or for a breach of the terms of a lease (Willis *v.* Branch, 94 N. C. 142).

78. Potter *v.* New Haven, 35 Conn. 520, ejectment.

79. Taylor *v.* Keeler, 50 Conn. 346.

Illustrations.— Where damage to a well alone from flooding is claimed there can be no recovery for flooding the land (Taylor *v.* Keeler, 50 Conn. 346); and in an action for value of fruit trees destroyed their value attached to the soil cannot be recovered (Galveston, etc., R. Co. *v.* Warnecke, 43 Tex. Civ. App. 83, 95 S. W. 600).

80. Rankin *v.* Sievern, etc., R. Co., 58 S. C. 532, 36 S. E. 997, holding that an allegation that a trespass by a railroad was "without having acquired a right of way" is a conclusion of law.

81. Haggerty *v.* Potter, 111 Ill. App. 433.

Illustrations.— In trespass against a carrier for assault, it need not state that plaintiff was a passenger. Haggerty *v.* Potter, 111 Ill. App. 433. A statement in general terms as to a lot of chattels taken from a house is good without an enumeration and valuation of each separate article. Jesse French Piano, etc., Co. *v.* Phelps, 47 Tex. Civ. App. 385, 105 S. W. 225. In an action against a landowner for injury to improvements made by plaintiff in good faith all the grounds of his good faith need not be stated. Bollinger *v.* McMinn, 47 Tex. Civ. App. 89, 104 S. W. 1079. Plaintiff need not allege fraud in defendant in obtaining a license under which he justifies. Voyles *v.* Postal Tel. Cable Co., 78 S. C. 430, 59 S. E. 68.

82. Simpson *v.* Coe, 3 N. H. 12.

Surplusage, that is, unnecessary but not misleading allegations, does not vitiate the complaint.[83]

(II) *The Declaration, Petition, or Complaint* — (A) *In General.* The declaration must state the essential elements of the cause of action,[84] but no special form of words is necessary.[85] Defenses need not be negatived[86] except under special circumstances.[87] The substance of the complaint is looked to,[88] and if the cause of action stated in the declaration is a trespass it will be treated as such, although in form it is another action;[89] or if it contains the necessary allegations in trespass and lacks some of those necessary to the other cause of action;[90] or

83. *Florida.*— Jacksonville, etc., R. Co. *v.* Griffin, 33 Fla. 602, 15 So. 336; Stephens *v.* Bradley, 24 Fla. 201, 3 So. 415.

Iowa.— Young *v.* Gormley, 119 Iowa 546, 93 N. W. 565, holding that in a complaint for pulling down plaintiff's fence, allegations of conspiracy to injure his realty need not be proved.

Minnesota.— Clague *v.* Hodgson, 16 Minn. 329, allegations of conversion in an action for trespass.

South Carolina.— Beaufort Land, etc., Co. *v.* New River Lumber Co., 86 S. C. 358, 68 S. E. 637; Baldwin *v.* Postal Tel. Cable Co., 78 S. C. 419, 59 S. E. 67.

Virginia.— Chesapeake, etc., R. Co. *v.* Greaver, 110 Va. 350, 66 S. E. 59.

84. See Pleading, 31 Cyc. 100. And cases cited *infra*, this note.

Sufficiency of complaint considered in various actions.— For taking water from a spring and injuring it (Louisville, etc., R. Co. *v.* Higginbotham, 153 Ala. 334, 44 So. 872); removal of plaintiff's pipe laid in a highway (Roberts *v.* Hall, 147 Cal. 434, 82 Pac. 66); trespass *de bonis* (Covington *v.* Simpson, 3 Pennew. (Del.) 269, 52 Atl. 349); taking goods by illegal process (Gray *v.* Joiner, 127 Ga. 544, 56 S. E. 752); injury to a horse (Summers *v.* Tarney, 123 Ind. 560, 24 N. E. 678; Bruch *v.* Carter, 32 N. J. L. 554); injury to woman from trespass on her husband's house where they resided (Watson *v.* Dilts, 116 Iowa 249, 89 N. W. 1068, 93 Am. St. Rep. 239, 57 L. R. A. 559); forcible expulsion from realty and injury to goods (Mecartney *v.* Smith, (Kan. App. 1900, 62 Pac. 540); injury from deadening trees (Ramos Lumber, etc., Co. *v.* Labarre, 116 La. 559, 40 So. 898), or carrying them off, together with parts of a building (Johns *v.* Schmidt, 32 Kan. 383, 4 Pac. 872); assault (Reed *v.* Maley, 115 Ky. 816, 74 S. W. 1079, 25 Ky. L. Rep. 209); forcible taking of property held under lien (Cooper *v.* Cappel, 29 La. Ann. 213); entry by a railroad on a street the fee of which plaintiff owns (Morrell *v.* Chicago, etc., R. Co., 49 Minn. 526, 52 N. W. 140); unlawful ouster of a leaseholder (Robertson *v.* Cleveland, etc., Mineral Land Co., 70 Mo. App. 262; Creswell Ranch, etc., Co. *v.* Scoggins, 15 Tex. Civ. App. 373, 39 S. W. 612), or interference with his business (Gans *v.* Hughes, 16 N. Y. Suppl. 615); unlawful seizure of goods (Barfield *v.* Coker, 73 S. C. 181, 53 S. E. 170); destruction of a sewer (Diamond *v.* Smith, 27 Tex. Civ. App. 558, 66 S. W. 141); entry on realty and assaulting plaintiff's servants and removing his personalty (Tallman *v.* Barnes, 54 Wis. 181, 11 N. W. 478); or cutting down and destroying trees (Gilchrist *v.* Dominion Tel. Co., 19 N. Brunsw. 553 [*affirmed* in Cassels Dig. (Can.) 844]).

Where wilfulness or negligence is a necessary element in a trespass it must be alleged. Baldwin *v.* Postal Tel. Cable Co., 78 S. C. 419, 59 S. E. 67.

Forbidding trespass.— Plaintiff need not allege that he forbade the trespass (Loop *v.* Chamberlain, 17 Wis. 504), or prove it if alleged (Hooper *v.* Smith, (Tex. Civ. App. 1899, 53 S. W. 65).

85. McRae *v.* Blakeley, 3 Cal. App. 171, 84 Pac. 679, holding that the fact that the act was wrongful and unlawful need not be stated in those words.

Averment that an act was done by the corporation is a sufficient averment that the directors adopted it where such adoption was necessary. Arizona, etc., R. Co. *v.* Denver, etc., R. Co., 13 N. M. 345, 84 Pac. 1018.

86. Medairy *v.* McAllister, 97 Md. 488, 55 Atl. 461, holding that an allegation of possession need not negative facts making it unlawful if it could be lawful.

87. Rankin *v.* Sievern, etc., R. Co., 58 S. C. 532, 36 S. E. 997, holding that, when a railroad is authorized by its charter to enter lands to build a railroad, unless the entry is without consent, consent must be negatived); Creswell Ranch, etc., Co. *v.* Scoggins, 15 Tex. Civ. App. 373, 39 S. W. 612 (holding that where plaintiff in trespass *quare clausum* alleges that land of an unknown is inclosed with his he must negative defendant's right to it).

88. Russell *v.* Meyer, 7 N. D. 335, 75 N. W. 262, 47 L. R. A. 637, holding that a declaration for forcibly entering plaintiff's land and removing a barn is trespass to realty, not conversion of personalty.

89. Wood *v.* Michigan Air-Line R. Co., 81 Mich. 358, 45 N. W. 980.

90. Hewitt *v.* Harvey, 46 Mo. 368; De Laine *v.* Alderman, 31 S. C. 267, 9 S. E. 950; Hawley *v.* Clerk, 2 Tyler (Vt.) 20.

Illustrations.—A complaint in form of statutory action for treble damages for trespass to land it is good in trespass *quare clausum* (Hewitt *v.* Harvey, 46 Mo. 368; Mishler Lumber Co. *v.* Craig, 112 Mo. App. 454, 87 S. W. 41; Lundgren *v.* Crum, 47 Nebr. 242, 66 N. W. 284; Lewis *v.* Thompson, 3 N. Y. App. Div. 329, 38 N. Y. Suppl. 316; Montgomery *v.*

contains allegations of another cause of action badly pleaded,[91] or well pleaded, but the proof is insufficient to support it yet is sufficient for trespass.[92] The complaint is not bad because matters merely in aggravation are not well laid,[93] but a paper filed for another purpose cannot be recovered on as a declaration.[94] Under some codes the declaration may include a prayer for an injunction.[95]

(B) *Description of Property Involved.* The property involved must be described,[96] and a correct description of land is sufficient, although it applies also to land in defendant's possession.[97] The description need not be a particular description.[98] Description by metes and bounds is not necessary,[99] although not improper,[1] and it is held that any description which is sufficiently certain to identify the property is good[2] unless a special description is required by

Edwards, 45 Vt. 75), or containing allegations that the trespasses were negligently (Kratzer *v.* Saratoga Springs, 158 N. Y. 736, 53 N. E. 1127) or maliciously (Stilwell *v.* Zinser, 6 N. Y. St. 10. *Contra,* Miller *v.* Clark, 78 Mo. App. 447) done.

Where trespass to land and the person are joined in one count and the former is badly pleaded plaintiff can recover on the latter. Wright *v.* Chandler, 4 Bibb (Ky.) 422.

91. Papin *v.* Ruelle, 2 Mo. 28, holding that a declaration containing allegations proper to trespass for treble damages, but not in form of an action of debt, is good as a declaration in trespass for actual damages.

92. Kellar *v.* Central Tel., etc., Co., 53 Misc. (N. Y.) 523, 105 N. Y. Suppl. 63.

Illustrations.— Where the action is in form for treble damages for cutting trees, recovery may be in trespass *quare clausum* if plaintiff does not show title (Kellar *v.* Central Tel., etc., Co., 53 Misc. (N. Y.) 523, 105 N. Y. Suppl. 63); or if wilfulness or negligence is alleged but not proved (Baldwin *v.* Postal Tel. Cable Co., 78 S. C. 419, 59 S. E. 67).

93. Rucker *v.* McNeely, 4 Blackf. (Ind.) 179.

94. Griffith *v.* Warnock, 8 Pa. Co. Ct. 357, a paper filed as an affidavit.

95. Ware *v.* Johnson, 55 Mo. 500.

96. Randlette *v.* Judkins, 77 Me. 114, 52 Am. Rep. 747 (personalty); Mayfield *v.* White, 1 Browne (Pa.) 241 (personalty); McDodrill *v.* Pardee, etc., Lumber Co., 40 W. Va. 564, 21 S. E. 878 (realty).

97. Lempriere *v.* Humphrey, 3 A. & E. 181, 1 Harr. & W. 170, 4 N. & M. 638, 30 E. C. L. 101, 111 Eng. Reprint 381. And see Cocker *v.* Crompton, 1 B. & C. 489, 8 E. C. L. 207, 107 Eng. Reprint 181.

In New Brunswick, in trespass to realty, failure to specially describe the premises is not ground for demurrer. Defendant's remedy is by application to compel plaintiff to amend. Gilchrist *v.* Dominion Tel. Co., 19 N. Brunswick 553 [*affirmed* in Cassels Dig. (Can.) 844]; Paran *v.* Barrett, 19 N. Brunsw. 497.

98. Randall *v.* Sanders, 71 Ark. 609, 77 S. W. 56, realty.

99. *Alabama.*— Elmore *v.* Fields, 153 Ala. 345, 45 So. 66, 127 Am. St. Rep. 31.

Illinois.— Meixsell *v.* Feezor, 43 Ill. App. 180.

Indiana.—Shipler *v.* Isenhower, 27 Ind. 36.

New Hampshire.— Palmer *v.* Tuttle, 39 N. H. 486.

North Carolina.— Whitaker *v.* Forbes, 68 N. C. 228.

Vermont.— Swerdferger *v.* Hopkins, 67 Vt. 136, 31 Atl. 153; Rice *v.* Hathaway, Brayt. 231.

See 46 Cent. Dig. tit. "Trespass," § 82.

1. Locklin *v.* Casler, 50 How. Pr. (N. Y.) 43.

When the land is described by metes and bounds, plaintiff may prove a trespass within the boundaries, whether it was within the lot named or not. Poor *v.* Gibson, 32 N. H. 415.

2. **Realty** — *In general.*— Bessemer Land, etc., Co. *v.* Jenkins, 111 Ala. 135, 18 So. 565, 56 Am. St. Rep. 26; Gray *v.* Peay, 83 S. W. 1006, 26 Ky. L. Rep. 989; Glen Jean, etc., R. Co. *v.* Kanawha, etc., R. Co., 47 W. Va. 725, 35 S. E. 978; Holt *v.* Daw, 16 Q. B. 990, 20 L. J. Q. B. 365, 71 E. C. L. 990.

Description by name or abuttals is not necessary. Noyes *v.* Colby, 30 N. H. 143.

Descriptions held sufficient.—A description is sufficient where the *locus* is described as a creek, although it is a lake, if the lake is part of the creek (W. K. Syson Timber Co. *v.* Dickens, 146 Ala. 471, 40 So. 753); or as plaintiff's property, a description of which is annexed and marked "Exhibit A" (Western Union Tel. Co. *v.* Dickens, 148 Ala. 480, 41 So. 469); or as a certain close of plaintiff in a particular county (Prussner *v.* Brady, 136 Ill. App. 395); or by street number (Snedecor *v.* Pope, 143 Ala. 275, 39 So. 318); or by stating the number of acres, the survey and its general location, and the name by which the premises are generally known (Badu *v.* Satterwhite, (Tex. Civ. App. 1910) 125 S. W. 929); or as being in a certain county (Jean *v.* Sandiford, 39 Ala. 317); or as plaintiff's land in a certain county (Larkin *v.* Taylor, 5 Kan. 433); or town (Elliot *v.* Shepherd, 25 Me. 371); or by name acquired by reputation (Tyson *v.* Shueey, 5 Md. 540); or as in a certain part of a section of land north of a certain county drain, without giving the section number, if there is only one section north of the drain (Husted *v.* Willoughby, 117 Mich. 56, 75 N. W. 279); or as a mining claim of a stated size, without a reference to location certificate and patent for metes and bounds (Rico-Aspen Consol. Min. Co. *v.* Enterprise Min. Co., 56 Fed. 131); or by two abuttals (North *v.* Ingamells, 1

statute.[3] But a description is bad if uncertain,[4] erroneous,[5] or misleading.[6] Part of a house may be described as a messuage.[7] The description of property refers to the time of trespass not the time of filing of declaration.[8] In Maryland and the District of Columbia, where the land or the place of trespass is located on plats, that location is absolutely controlling,[9] but the plats need not be produced in evidence but may be proved by other evidence.[10]

(c) *Statement of Acts Constituting Trespass.* The allegation of the acts complained of in the declaration must be positive and direct,[11] certain,[12] and not mis-

Dowl. P. C. N. S. 151, 11 L. J. Exch. 15, 9 M. & W. 249); or by name of a close to which it was annexed a year before (Brownlow *v.* Tomlinson, 8 Dowl. P. C. 827, 1 M. & G. 484, 1 Scott N. R. 426, 39 E. C. L. 867); and where the town in which the trespass is alleged is afterward divided and the *locus* set off to another town the trespass may be alleged as done in the original town (Renaudet *v.* Crocken, 1 Cai. (N. Y.) 167).

The whole description need not be proved if enough is proved to identify the property. Goodwin *v.* Jack, 62 Me. 414.

Personalty.— In a suit for injury to personal property plaintiff must show what property was injured. McKenna *v.* Fisk, 16 Fed. Cas. No. 8,852, 1 Hayw. & H. 179. Personalty is sufficiently described as a "stock of merchandise formerly owned by [A.] consisting of," etc., and in a named town and building (Joseph *v.* Henderson, 95 Ala. 213, 10 So. 843); or as "four horses, the property of the plaintiff" (Beaumont *v.* Yantz, 1 Ill. 26); or that defendant "broke and entered the close of the plaintiff, situate . . . and took and carried away therefrom two hundred dozen sheaves of wheat, the personal property of the plaintiff" (Richardson *v.* Brewer, 81 Ind. 107).

3. See cases cited *infra*, this note.

Sufficient compliance with statute.— A statute requiring the name to be given is complied with by the averment "lands of the plaintiff covered with water, being the bed and channel of the river T., and under the same, in the several parishes of L. & L., in the county of G" (Beaufort *v.* Vivian, 7 Exch. 580, 21 L. J. Exch. 204); or requiring name or abuttals or other proper description by stating the lands or natural objects on the boundaries (Forbush *v.* Lombard, 13 Metc. (Mass.) 109); or the owner's name (Sawyer *v.* Ryan, 13 Metc. (Mass.) 144).

4. See cases cited *infra*, this note.

What descriptions are bad for uncertainty. — A declaration is bad which alleges the taking of documents and receipts to prove plaintiff's claim against the British government for one thousand two hundred dollars, sundry notes of hand and accounts in five books, and other papers of the plaintiff (Oystead *v.* Shed, 12 Mass. 506); or which alleges the taking of "chattels to the value of $1000," as the chattels must be specified (Mayfield *v.* White, 1 Browne (Pa.) 241); but where plaintiff is named as owner of certain lands, describing them, with a certain exception, a subsequent allegation of injury "to said premises" is not uncertain (Toner *v.* Eau Claire, 56 Wis. 173, 14 N. W. 55); and where defendant denies that he cut any trees he cannot claim he was misled as to which of the trees falling within the description were sued for (Plumb *v.* Griffin, 74 Conn. 132, 50 Atl. 1).

5. Martin *v.* State, 89 Miss. 633, 42 So. 601, holding that locating a house in block 8 instead of block 9 is fatal error.

Description erroneous but not misleading. — Where the close is misdescribed but defendant knows it by that description and so is not misled, it is sufficient. Hart *v.* Doyle, 128 Mich. 257, 87 N. W. 219; Burton *v.* Lazell, 16 Vt. 158.

6. See cases cited *infra*, this note.

Application of rule.— In trespass, for destruction of growing corn, if it is in a highway that fact should be stated (Wolf *v.* Holton, 61 Mich. 550, 28 N. W. 524); and where the *locus* is described as bounded on a public road, it will not be taken to include land to the center of the road (Pickering *v.* Shearer, 11 Gray (Mass.) 153; Simonds *v.* Chesley, 30 N. Brunsw. 303 [*affirmed* in 20 Can. Sup. Ct. 174); but in trespass to a "mill dam" destruction of a false dam used during repair of the regular dam can be shown (Durgin *v.* Leighton, 10 Mass. 56).

7. Fenn *v.* Grafton, 2 Bing. N. Cas. 617, 2 Hodges 58, 3 Scott 56, 29 E. C. L. 687; Monks *v.* Dyke, 1 H. & H. 418, 8 L. J. Exch. 73, 4 M. & W. 567.

8. Humfrey *v.* London, etc., R. Co., 7 Exch. 325, 22 L. J. Exch. 149.

9. Peters *v.* Tilghman, 111 Md. 227, 73 Atl. 726. And see cases cited *infra*, this note.

Applications of rule.—Plaintiff must locate the place of trespass on plats where the defense is on warrant of resurvey (Houck *v.* Loveall, 8 Md. 63), and cannot show possession not in accordance with the plats (Houck *v.* Loveall, *supra*; Carroll *v.* Smith, 4 Harr. & J. (Md.) 128; Chapman *v.* Brawner, 2 Harr. & J. (Md.) 366; Holmead *v.* Corcoran, 12 Fed. Cas. No. 6,627, 2 Cranch C. C. 119); nor give evidence of trespass or other things not located on the plats and referred to in the explanation thereof (Funk *v.* Hughes, 5 Gill (Md.) 315; Crawford *v.* Berry, 11 Gill & J. (Md.) 310; Mundell *v.* Perry, 2 Gill & J. (Md.) 193; Pottinger *v.* Hall, 4 Harr. & M. (Md.) 349).

10. Trammell *v.* Hook, 1 Harr. & M. (Md.) 259.

11. Sturdevant *v.* Gains, 5 Ala. 435.

12. McCalla *v.* Wood, 2 N. J. L. 81 (holding that a complaint for "a trespass" is bad); Strasbaugh *v.* Dessenberg, 18 York

leading,[13] nor by way of recital,[14] and it must be alleged that the act was wrongful.[15] No special form of words is necessary, however,[16] and the words will not be construed strictly.[17] A direct statement of facts is sufficient if the wrong can be inferred from them.[18] Where the act is done by defendant's direction for his benefit it may be declared on as done by him.[19] A complaint by a disseizee in trespass for the original entry may state the continuance of the disseizin to characterize the ouster, although the recovery is for the ouster only.[20] Where only one trespass is alleged plaintiff cannot prove several,[21] except when done the same day on the same close for one general purpose.[22]

(D) *Allegations of the Right Invaded.* Plaintiff's right must be directly stated [23] and possession cannot be inferred,[24] except from an allegation of title,[25] which is

Leg. Rec. (Pa.) 73; Wright *v.* Burroughes, 3 C. B. 685, 4 D. & L. 438, 16 L. J. C. P. 6, 54 E. C. L. 685; Harvey *v.* Bridges, 3 D. & L. 55, 9 Jur. 759, 14 L. J. Exch. 272, 14 M. & W. 437 (holding that *vi et armis* does not imply actual force).

Application of rule.— Workings on plaintiff's mining claim must be stated definitely as to the extent of the workings (Rico-Aspen Consol. Min. Co. *v.* Enterprise Min. Co., 56 Fed. 131); but the means are sufficiently alleged as "by means of certain drifts, levels, and other workings" (Rico-Aspen Consol. Min. Co. *v.* Enterprise Min. Co., *supra*).

Matters of aggravation.— The principal act of trespass should be set forth so that it is kept distinct from matters of aggravation. Clark *v.* Langworthy, 12 Wis. 441. Where in trespass *quare clausum* the allegation of taking of personalty specially designates the articles a substantive cause of action is alleged; but if they are described generally it is mere aggravation. Thayer *v.* Sherlock, 4 Mich. 173.

13. Martin *v.* Miller, 20 Mo. 391, holding that where the declaration was for wrongfully setting a fire on defendant's own land on a certain day, which extended to plaintiff's land, plaintiff cannot show at the trial that the act was wrongful because done on Sunday.

14. Sturdevant *v.* Gains, 5 Ala. 435; Houghton *v.* Davenport, 23 Pick. (Mass.) 235; Moore *v.* Dawney, 3 Hen. & M. (Va.) 127.

For allegation held sufficiently direct see Griffin *v.* Gilbert, 28 Conn. 493.

15. Glen Jean. etc., R. Co. *v.* Kanawha, etc., R. Co., 47 W. Va. 725, 35 S. E. 978.

16. See cases cited *infra*, this note.

Applications of rule.— "Broke and entered" need not be used in trespass for entry on land (Griffin *v.* Gilbert, 28 Conn. 493); nor *quare clausum fregit* (Prewitt *v.* Clayton, 5 T. B. Mon. (Ky.) 4); nor *vi et armis* (Little Rock, etc., R. Co. *v.* Dyer, 35 Ark. 360); but in Massachusetts it is held that "forcibly" must be used (Wilcox *v.* Conway, 115 Mass. 561).

17. Thurlow Tp. *v.* Bogart, 15 U. C. C. P. 9.

18. Weaver *v.* Mississippi, etc., Boom Co., 28 Minn. 542, 11 N. W. 113 (holding that an allegation of trespass on plaintiff's land is sufficient, although it does not state that plaintiff was damaged); Buck *v.* Colbath, 7 Minn. 310, 82 Am. Dec. 91 (holding that an allegation of facts showing a wrongful taking is sufficient without direct allegation to that effect).

19. Mecartney *v.* Smith, (Kan. App. 1900) 62 Pac. 540; Allen *v.* Archer, 49 Me. 346.

20. Bailey *v.* Butcher, 6 Gratt. (Va.) 144.

21. Ingraham *v.* Parks, 19 N. Brunsw. 101.

22. Gusdorff *v.* Duncan, 94 Md. 160, 50 Atl. 574; Harris *v.* Sneeden, 104 N. C. 369, 10 S. E. 477.

23. Warner *v.* Capps, 37 Ark. 32; Neale *v.* Clautice, 7 Harr. & J. (Md.) 372; Deland *v.* Vanstone, 26 Mo. App. 297; Hite *v.* Long, 6 Rand. (Va.) 457, 18 Am. Dec. 719.

Where plaintiff claims under a deed she must bring herself within its description. Cobb *v.* Wrightsville, etc., R. Co., 129 Ga. 377, 58 S. E. 862.

Where the declaration alleges twenty years' adverse possession it is a good declaration of ownership. Illinois Cent. R. Co. *v.* Hatter, 207 Ill. 88, 69 N. E. 751.

Allegation of title to land not inconsistent with a claim of adverse possession see Gilman *v.* Brown, 115 Wis. 1, 91 N. W. 227.

24. Crowder *v.* Fordyce Lumber Co., 93 Ark. 392, 125 S. W. 417; Wetmore *v.* Robinson, 2 Conn. 529 (holding that an allegation that a pond was nearer plaintiff's land than any one else's and the owners of his land had immemorially enjoyed the right to take water and manure therefrom is not sufficient to show possession); Dugan *v.* Ferguson, 1 S. W. 539, 8 Ky. L. Rep. 342 (holding that an allegation that defendant "entered the close of plaintiff — that is to say, a certain tract of land, and the lines and boundaries thereof"— without otherwise alleging possession is demurrable); Alt *v.* Gray, 55 N. Y. App. Div. 563, 67 N. Y. Suppl. 411 (holding that an allegation that plaintiff was a landlord or lessee of land states neither possession nor title).

25. *Alabama.*— O'Neal *v.* Simonton, 109 Ala. 167, 19 So. 412, holding, however, that if plaintiff does not rely on title but on possession merely, possession must be alleged.

Connecticut.— Parker *v.* Hotchkiss, 25 Conn. 321.

Minnesota.— Blew *v.* Ritz, 82 Minn. 530, 85 N. W. 548.

Missouri.— Renshaw *v.* Lloyd, 50 Mo. 368;

sufficient without a further allegation of possession because possession presumptively follows title.[26] If plaintiff's right is directly stated it is immaterial that facts are also stated from which a contrary inference might be drawn.[27] The declaration need not set out plaintiff's title in detail, a general averment of ownership being sufficient,[28] and the allegation of his right need not be formally made.[29] An allegation that the close was plaintiff's alleges possession only.[30] Where title or possession of a tract of land is alleged it is enough to show the right only at the place of the trespass.[31]

(E) *Allegations of Time.* The time of the trespass must be stated [32] definitely,[33] except where the rule is changed by the statute;[34] but the time alleged need not

Hammontree *v.* Huber, 39 Mo. App. 326; Bell *v.* Clark, 30 Mo. App. 224.

Virginia.— Donaghe *v.* Roudeboush, 4 Munf. 251, personalty.

Wisconsin.— Leihy *v.* Ashland Lumber Co., 49 Wis. 165, 5 N. W. 471.

See 46 Cent. Dig. tit. "Trespass," § 81.

Contra.— Casey *v.* Mason, 8 Okla. 665, 59 Pac. 252.

Allegations from which an adverse possession could be inferred should not be made. Jacksonville, etc., R. Co. *v.* Griffin, 33 Fla. 602, 15 So. 336; Holladay-Klotz Land, etc., Co. *v.* T. J. Moss Tie Co., 79 Mo. App. 543.

Allegation of ownership of a lot abutting on a street is a sufficient allegation of possession and ownership in the street. Spencer *v.* St. Paul, etc., R. Co., 21 Minn. 362; Betz *v.* Kansas City Home Tel. Co., 121 Mo. App. 473, 97 S. W. 207.

What proof sustains averment.—An allegation of property is sustained by proof of possession coupled with an interest, although absolute property is in a third person. Outcalt *v.* Durling, 25 N. J. L. 443. And see Rocker *v.* Perkins, 6 Mackey (D. C.) 379; Kissam *v.* Roberts, 6 Bosw. (N. Y.) 154.

26. Leihy *v.* Ashland Lumber Co., 49 Wis. 165, 5 N. W. 471.

27. Marcy *v.* Howard, 91 Ala. 133, 8 So. 566 (holding that a complaint in trespass *quare clausum fregit* in which plaintiffs describe themselves as heirs of a certain decedent, but allege that the trespass was committed on plaintiffs' land, is not demurrable on the ground that the right to sue for such damages passes to the personal representative of a decedent, and not to his heirs, as plaintiffs do not sue as heirs; but those words are merely descriptive); State *v.* Newton, 5 Blackf. (Ind.) 455 (where a state sues for a trespass on lands previously granted for school purposes); Hussner *v.* Brooklyn City R. Co., 96 N. Y. 18 [*affirming* 30 Hun 409] (where a description stated excludes the *locus in quo*).

28. *Arkansas.*— Price *v.* Greer, 76 Ark. 426, 88 S. W. 985.

Georgia.— James *v.* Saunders, 127 Ga. 336, 56 S. E. 491 (holding that an abstract of title need not be attached); Burns *v.* Horkan, 126 Ga. 161, 54 S. E. 946.

Iowa.— Dorcey *v.* Patterson, 7 Iowa 420.

Kentucky.—Asher *v.* Helton, 101 S. W. 350, 31 Ky. L. Rep. 9.

New Jersey.— Vanwinkle *v.* Curtis, 3 N. J. Eq. 422.

See 46 Cent. Dig. tit. "Trespass," § 81.

Under the Alabama statutes which prescribe the form of declaration (2 Code (1907), p. 1199, form 26) an allegation that the land belonged to plaintiff is sufficient. Southern R. Co. *v.* McEntire, (1910) 53 So. 158. And see Brinkmeyer *v.* Bethea, 139 Ala. 376, 35 So. 996.

Ownership of personalty.—A complaint alleging that defendant, by its agents, entered plaintiff's house and took from her possession her household furniture, etc., was not demurrable for not sufficiently alleging that plaintiff was rightfully possessed and was the owner of the goods, and had possession thereof as against defendant, or that plaintiff's possession was superior to the rights of defendant. Stowers Furniture Co. *v.* Brake, 158 Ala. 639, 48 So. 89.

29. Stanley *v.* Gaylord, 10 Metc. (Mass.) 82.

Applications of rule.— It is a sufficient allegation that "defendant broke and entered plaintiff's close" (Finch *v.* Alston, 2 Stew. & P. (Ala.) 83, 23 Am. Dec. 299); or, in an action by an administrator, that the taking was of certain chattels "of the plaintiff's intestate" (Stanley *v.* Gaylord, 10 Metc. (Mass.) 82); or that cattle were "his" cattle (Heath *v.* Conway, 1 Bibb (Ky.) 398); and ownership is sufficiently alleged by stating the acts were done "on the land of the plaintiffs" (Ehrmantrout *v.* McMahon, 78 Wis. 138, 47 N. W. 305).

30. Wolf *v.* Holton, 61 Mich. 550, 28 N. W. 524. *Contra*, Kinney *v.* Service, 91 Mich. 629, 52 N. W. 53.

31. Tyson *v.* Shueey, 5 Md. 540; Hall *v.* Mayo, 97 Mass. 416 (title alleged); Profile, etc., Hotels Co. *v.* Bickford, 72 N. H. 73, 54 Atl. 699 (title alleged); King *v.* Dunn, 21 Wend. (N. Y.) 253.

32. Snedecor *v.* Pope, 143 Ala. 275, 39 So. 318.

33. Andrews *v.* Thayer, 40 Conn. 156 ("heretofore" not sufficiently definite); Warren *v.* Powell, 122 Ga. 4, 49 S. E. 730.

In South Carolina it is held that the exact day need not be stated. Caldwell *v.* Julian, 2 Mill 294.

34. See cases cited *infra*, this note.

In Alabama where time is left blank the defect is cured by the statute of amendments. Estill *v.* Shelley, 2 Port. 185.

In Massachusetts, since St. (1852) c. 312,

be exactly proved.[35] Any trespass whether before or after the date laid may be proved [36] if within the period of the statute of limitations [37] and before the bringing of the action.[38] Where a single act of trespass is alleged as done at a certain time several trespasses committed at different times cannot be shown,[39] but plaintiff is confined to some single day.[40] This rule, however, has been changed in some places by statute,[41] and does not apply to a number of distinct acts done at the same place on the same day and in pursuance of the same general plan,[42] nor on a succession of days.[43] A trespass may be alleged with a *continuando*, that is, as committed on a certain day and continued for a certain period. When this is done only one distinct act of trespass can be shown.[44] Where the time of a trespass is alleged with a *continuando* no act can be shown prior to the first date named.[45] But not only may a single trespass be described as continuous; "divers trespasses" may be alleged to have been committed from day to day during a certain period,[46] and where the acts are several and distinct trespasses they cannot be declared on with a *continuando* but must be alleged as occurring at divers times.[47] In general where "divers trespasses" are alleged as occurring within a certain period any number within the period may be shown.[48] The case differs from the statement of time with a *continuando*. Plaintiff may show either a single act prior to the time first alleged or any number of trespasses within the period.[49] If a single prior act is proved it cannot be abandoned and acts subsequent shown,[50] and *vice versa*,[51] except where statutes have relaxed the rule.[52]

(F) *Allegations of Quantity and Value.* The allegation of value is formal only,[53] and a greater value than alleged may be proved.[54] No value need be stated to set forth a cause of action,[55] and a declaration is sufficient which omits the quantity or value of the several items of property injured,[56] except where otherwise provided by statute.[57]

§ 2, no averment of time is necessary. Knapp *v.* Slocomb, 9 Gray 73.

35. Moore *v.* Boyd, 24 Me. 242; Conlon *v.* McGraw, 66 Mich. 194, 33 N. W. 388; Burnham *v.* Call, 2 Utah 433; Molloy *v.* Stansfield, 2 U. C. Q. B. 390.

36. Cooper *v.* Taylor, 15 N. J. L. 455.

37. Allen *v.* Archer, 49 Me. 346.

38. Terpenning *v.* Gallup, 8 Iowa 74; Little *v.* Downing, 37 N. H. 355; Stout *v.* Rassel, 2 Yeates (Pa.) 334; Degraffinreid *v.* Mitchell, Harp. (S. C.) 437.

In New Brunswick it has even been said to be immaterial that the time laid is subsequent to the beginning of the action. Clarke *v.* Harding, 17 N. Brunsw. 495.

39. Sanders *v.* Palmer, 1 McCord (S. C.) 165.

40. Snedecor *v.* Pope, 143 Ala. 275, 39 So. 318.

41. Burnham *v.* Call, 2 Utah 433.

42. Cheswell *v.* Chapman, 42 N. H. 47.

43. Gilliland *v.* Martin, (Ala. 1906) 42 So. 7.

44. Kendall *v.* Bay State Brick Co., 125 Mass. 532. *Contra*, Joralimon *v.* Pierpont, Anth. N. P. (N. Y.) 59, the distinction between an allegation of a trespass with a *continuando* and allegation of several trespasses at divers times seems not to have been noted in this case.

45. Fairman *v.* Fairman, 1 U. C. C. P. 435.

46. Alabama Midland R. Co. *v.* Martin, 100 Ala. 511, 14 So. 401; Smith *v.* Bradley, 16 Leg. Int. (Pa.) 188.

47. Rucker *v.* McNeely, 4 Blackf. (Ind.) 179; Sanders *v.* Palmer, 1 McCord (S. C.) 165.

48. Cooper *v.* Maukin, 6 Mo. 624, 35 Am. Dec. 456; Smith *v.* Brazelton, 1 Heisk. (Tenn.) 44, 2 Am. Rep. 678; Myrick *v.* Downer, 18 Vt. 360.

49. McDiarmid *v.* Caruthers, 34 Mich. 49; Joralimon *v.* Pierpont, Anth. N. P. (N. Y.) 59; U. S. *v.* Kennedy, 26 Fed. Cas. No. 15,524, 3 McLean 175. *Contra*, Payne *v.* Green, 10 Sm. & M. (Miss.) 507, in which the distinction between alleging several trespasses as committed at divers times and the allegation of a trespass with a *continuando* seems not to have been noted.

50. Powell *v.* Bagg, 15 Gray (Mass.) 507; Gilbert *v.* Kennedy, 22 Mich. 5.

51. Pierce *v.* Pickens, 16 Mass. 470.

52. Dubois *v.* Beaver, 25 N. Y. 123, 82 Am. Dec. 326 [*affirming* 34 Barb. 547], in which it is held that the test is whether defendant was misled.

53. Hawkins *v.* Johnson, 3 Blackf. (Ind.) 46.

54. Plumb *v.* Griffin, 74 Conn. 132, 50 Atl. 1.

55. Carter *v.* Wallace, 2 Tex. 206.

56. Kolb *v.* Bankhead, 18 Tex. 228; Donaghe *v.* Roudeboush, 4 Munf. (Va.) 251; Newlon *v.* Reitz, 31 W. Va. 483, 7 S. E. 411. At least it is sufficient if stated under a *videlicet*. Louisville, etc., R. Co. *v.* Hill, 115 Ala. 334, 22 So. 163.

57. Mallory *v.* Thomas, 98 Cal. 644, 33 Pac. 757; Forbes *v.* Moore, 32 Tex. 195.

(G) *Allegations of Damages.* If permanent damages are claimed, enough must appear in the pleadings to warrant their allowance.[58] If the declaration is framed strictly on the theory of compensatory damages exemplary damages cannot be recovered;[59] but under a declaration for wilful trespass plaintiff can recover both actual and punitive damages.[60] If both actual and vindictive damages are alleged actual damages may be recovered, although there is no evidence of punitive damage.[61] The amount claimed as punitive damages need not be separately alleged as such.[62] Damages necessarily resulting from the trespass alleged need not be specially pleaded.[63] But special damages, although not pleaded, may be given in evidence under *alia enormia* solely to characterize the trespass,[64] at least if they do not themselves constitute a substantive cause of action.[65] But special damages not necessarily arising from the trespass must be pleaded or there can be no recovery for them.[66] If the consequential damages

58. Nichols *v.* Norfolk, etc., R. Co., 120 N. C. 495, 26 S. E. 643 (holding that allegation that the fertility of land was almost destroyed is notice that the action is for permanent damages); Casey *v.* Mason, 8 Okla. 665, 59 Pac. 252 (holding that allegation of plowing of land does not state an injury to the freehold but only to the possession).

59. McCormack *v.* Showalter, 11 Ind. App. 98, 38 N. E. 875; Welsh *v.* Stewart, 31 Mo. App. 376.

60. Baldwin *v.* Postal Tel. Cable Co., 78 S. C. 419, 59 S. E. 67; Duke *v.* Postal Tel. Cable Co., 71 S. C. 95, 50 S. E. 675; Beaudrot *v.* Southern R. Co., 69 S. C. 160, 48 S. E. 106.

61. Duke *v.* Postal Tel. Cable Co., 71 S. C. 95, 50 S. E. 675. And see Chesapeake, etc., R. Co. *v.* Greaver, 110 Va. 350, 66 S. E. 59.

62. Greeney *v.* Pennsylvania Water Co., 29 Pa. Super. Ct. 136.

63. Rife *v.* Middletown, 32 Pa. Super. Ct. 68.

Illustrations.— Injury to land may be recovered under allegation of entry and cutting and carrying away trees. Argotsinger *v.* Vines, 82 N. Y. 308; Davis *v.* Wall, 142 N. C. 450, 55 S. E. 350. In trespass for taking goods from a merchant's stock injury to his credit and business can be recovered, although not alleged. Peshine *v.* Shepperson, 17 Gratt. (Va.) 472, 94 Am. Dec. 468. In trespass for entering realty to search for stolen goods resulting injury to character may be considered, although not alleged. Faulkner *v.* Anderson, Gilm. (Va.) 221. In trespass for the value of two portable houses "in a knock-down condition," but alleged to be complete in all their parts, evidence may be given to show that parts of the houses were wanting in order to fix the damages. Ellis *v.* Bonner, 7 Tex. Civ. App. 539, 27 S. W. 687.

64. Snider *v.* Myers, 3 W. Va. 195.

Applications of rule.— Pulling down a house, not alleged, may be proved under *alia enormia* to show the character of the trespass to the realty (Snider *v.* Myers, 3 W. Va. 195); and in the same manner, in an action of trespass to land in the District of Columbia, injury to part of the tract lying in Virginia may be shown (Gorman *v.* Marsteller, 10 Fed. Cas. No. 5,629, 2 Cranch C. C. 311).

65. Peshine *v.* Shepperson, 17 Gratt. (Va.) 472, 94 Am. Dec. 468.

66. *Georgia.*— Malone, etc., Co. *v.* Hammond, 6 Ga. App. 114, 64 S. E. 666.

Illinois.— Kirby *v.* Douglas, 75 Ill. 443.

Michigan.— Ives *v.* Williams, 53 Mich. 636, 19 N. W. 562; Gilbert *v.* Kennedy, 22 Mich. 117.

North Carolina.— Baldridge *v.* Allen, 24 N. C. 206.

South Carolina.— Alston *v.* Huggins, 2 Treadw. 688.

Canada.— Benson *v.* Connor, 6 U. C. C. P. 356.

Applications of rule.— In trespass for entering a lot and removing a house, plaintiff cannot recover for injury to her possession of a part of the house which stood on an adjoining lot. Jones *v.* Kennedy, 138 Ala. 502, 35 So. 465. Loss of profits on a crop of vegetables, if recoverable at all, must be pleaded. Razzo *v.* Varni, (Cal. 1889) 21 Pac. 762. Damage for injury to land as building lots from cutting of shade-trees cannot be recovered under a mere allegation of entry and cutting trees, although an injunction is prayed to prevent the cutting of the remaining trees, alleging their value as shade-trees. Eldridge *v.* Gorman, 77 Conn. 699, 60 Atl. 643. A special allegation must be made of personal indignities and injury to personalty accompanying a trespass to realty (Freelove *v.* Gould, 3 Kan. App. 750, 45 Pac. 454; Gusdorff *v.* Duncan, 94 Md. 160, 50 Atl. 574); or of a battery to plaintiff (Burson *v.* Cox, 6 Baxt. (Tenn.) 360; Simpson *v.* Markwood, 6 Baxt. (Tenn.) 340). In trespass for an eviction damages resulting from exposure of goods and inconvenience in being compelled to live for a time in an unsuitable dwelling cannot be recovered if not alleged, but mental anguish, shame, and injury to the feelings can. Rauma *v.* Bailey, 80 Minn. 336, 83 N. W. 191. In trespass *de bonis* expenses incurred in recovering the property cannot be recovered without an allegation that they were incurred. Gray *v.* Bullard, 22 Minn. 278; Spencer *v.* St. Paul, etc., R. Co., 21 Minn. 362. In an action for tearing down a fence deprivation of the use of the land must be alleged. Macy *v.* Carter, 67

constitute a substantive cause of action they must be specially alleged.[67] It is not necessary to allege that the damage is due and unpaid.[68]

(H) *Effect of Special Statutes Relating to Declaration.* If a declaration is substantially in the form prescribed by statute it is good,[69] but a direct requirement of the statute must be followed.[70] The statute abolishing forms of action does not abolish the distinction in substance between trespass and case, and there can be no recovery for negligent acts under a declaration for a trespass.[71]

(III) *PLEA OR ANSWER* — (A) *In General.* The answer must traverse or confess and avoid,[72] and if the principal trespass is admitted, defendant must specially deny matters of aggravation if he wishes to controvert them.[73] Denial of an immaterial allegation is surplusage.[74] The plea must not be uncertain,[75] misleading,[76] or insufficient.[77] A plea in denial and one in justification may be

Mo. App. 323. Special consequential damages from running down a vessel must be alleged. Slack *v.* Brown, 13 Wend. (N. Y.) 390. Where entry and laying out a highway by town officers and tearing down a sea-wall caused submersion of the soil and influx of the sea, it is proper to allege it. Hathaway *v.* Osborne, 25 R. I. 249, 55 Atl. 700. In trespass for entering plaintiff's house and taking goods, their value cannot be recovered if they are not alleged to be plaintiff's. Pritchard *v.* Long, 1 Dowl. P. C. N. S. 883, 11 L. J. Exch. 306, 9 M. & W. 666.

67. Rehkopf *v.* Samuels, 60 Ill. App. 308; Sampson *v.* Coy, 15 Mass. 493.

Applications of rule.— In trespass *de bonis* damages for injury to the person cannot be recovered. Plumb *v.* Ives, 39 Conn. 120. In trespass for breaking and entering a building the loss of a sum of money cannot be shown under *alia enormia* (Rehkopf *v.* Samuels, 60 Ill. App. 308), nor can an assault (Sampson *v.* Coy, 15 Mass. 493). Under an allegation of cutting trees proof of their removal is inadmissible. Johnson *v.* Gorham, 38 Conn. 513. Injury to plaintiff's wife is inadmissible under an allegation of breaking and entering and taking grain. Fisher *v.* Conway, 21 Kan. 18, 30 Am. Rep. 419. In trespass for destroying a store occupied by plaintiff so that he was put out and deprived of its use, evidence of the value of repairs made previously is inadmissible, the fact that plaintiff was defendant's tenant not having been alleged, although it appeared in evidence. Chandler *v.* Allison, 10 Mich. 460. In trespass for extending a street embankment over part of plaintiff's lot, injury to the value of a building thereon not alleged cannot be proved. Nelson *v.* West Duluth, 55 Minn. 497, 57 N. W. 149. In an action for trespass upon a mine other damage than the conversion of ores is inadmissible if not pleaded. Patchen *v.* Keeley, 19 Nev. 404, 14 Pac. 347.

68. Atkinson *v.* Mott, 102 Ind. 431, 26 N. E. 217.

69. Gilliland *v.* Martin, (Ala. 1906) 42 So. 7; Pike *v.* Elliott, 36 Ala. 69.

By statute in Alabama it is not necessary to allege that the land trespassed on is in the county where the action is brought. Pike *v.* Elliott, 36 Ala. 69.

70. Barrett *v.* Mobile, 129 Ala. 179, 30 So. 36, 87 Am. St. Rep. 54, holding that where a statute requires that a statement of claim must be filed before bringing an action a complaint which fails to allege such filing is bad on demurrer.

71. Roach *v.* Trottie, 50 Ga. 251; Gordon *v.* Ellenville, etc., R. Co., 119 N. Y. App. Div. 797, 104 N. Y. Suppl. 702.

72. Latta *v.* Redden, 5 Ky. L. Rep. 426. In an action by a corporation it is a bad plea that defendants are the true officers thereof and that the election under which plaintiffs claim was void. Atlantic, etc., R. Co. *v.* Johnston, 70 N. C. 348.

73. Knapp *v.* Slocomb, 9 Gray (Mass.) 73.

74. Tuthill *v.* Clark, 11 Wend. (N. Y.) 642.

75. Snedecor *v.* Pope, 143 Ala. 275, 39 So. 318.

Plea held bad for uncertainty in the scope of a license pleaded (Snedecor *v.* Pope, 143 Ala. 275, 39 So. 318); as to which of two rights of way were intended to be put in issue (Robbins *v.* Wolcott, 19 Conn. 356); as to what part of the goods taken the plea of justification was intended to cover (Oystead *v.* Shed, 12 Mass. 506); as to the location of a boundary line (Orange *v.* Berry, 24 N. H. 105); as to whether the justification pleaded was intended as a public or a private way or a license (Boyce *v.* Brown, 7 Barb. (N. Y.) 80).

76. Monks *v.* Dyke, 1 H. & H. 418, 8 L. J. Exch. 73, 4 M. & W. 567, holding that a plea alleging possession of a dwelling-house is misleading where defendant merely had two rooms therein and plaintiff, the landlord, had the key to the outer door.

Constructive possession by title can be shown under a plea of possession. Great Falls Co. *v.* Worster, 15 N. H. 412.

77. Davidson *v.* Pickard, (Tex. Civ. App. 1896) 37 S. W. 374, holding that a special plea alleging that a boundary was fixed by agreement, but not showing where, is insufficient.

Pleas held sufficient.—An answer which justifies the same trespass alleged is not bad for lack of venue where the venue was laid in the complaint. Levelling *v.* Leavell, 2 Blackf. (Ind.) 163. An averment that certain persons were created and declared a corporation is a sufficient averment that defendant corporation was organized. Beekman *v.* Traver, 20 Wend. (N. Y.) 67. It is not necessary to state that a warrant of a

pleaded together.[78] Defendant need not plead his evidence but only the ultimate facts proved by it.[79] Defendant may be allowed to withdraw his demurrer and plead without notice to plaintiff.[80] There must be a separate plea to each count. An allegation that all the counts are for the same trespass and then justifying is bad on special demurrer.[81] Under some statutes inconsistent defenses may be pleaded.[82]

(B) *Answering Entire Charge.* The entire trespass as alleged in the complaint must be answered,[83] but not mere matters of aggravation,[84] for the trespass is the gist of the action, and it is enough to answer it completely; matters of aggravation need not be answered.[85] But they are admitted by admitting the principal

justice was under seal. Beekman *v.* Traver, *supra.*

78. See cases cited *infra*, this note.

Applications of rule.— *Liberum tenementum* may be pleaded with the general issue (Hext *v.* Jarrell, 2 Strobh. (S. C.) 172); or with a plea denying plaintiff's right (Slocombe *v.* Lyall, 6 Exch. 119, 20 L. J. Exch. 95, 2 L. M. & P. 33).

79. Snedecor *v.* Pope, 143 Ala. 275, 39 So. 318 (holding that a plea of a lease is sufficient, without setting it out); Latta *v.* Redden, 5 Ky. L. Rep. 426.

80. Paran *v.* Barnett, 19 N. Brunsw. 497.

81. Rubottom *v.* McClure, 4 Blackf. (Ind.) 505; Sterry *v.* Schuyler, 23 Wend. (N. Y.) 487; Nevins *v.* Keeler, 6 Johns. (N. Y.) 63. But see Beekman *v.* Traver, 20 Wend. (N. Y.) 67.

82. Johnson *v.* Eversole Lumber Co., 144 N. C. 717, 57 S. E. 518, 147 N. C. 249, 60 S. E. 1129, holding that under Revisal (1905), § 482, authorizing a defendant to set forth as many defenses as he may have, a defense, in an action for cutting timber, praying that plaintiff be decreed a trustee of the premises for the benefit of defendant, is not a waiver of the denial of plaintiff's title.

83. See cases cited *infra*, this note.

Applications of rule.— Justification of an entry only is bad where entry is not even an element of some of the counts. Snedecor *v.* Pope, 143 Ala. 275, 39 So. 318. A plea answering one count only without averring that all the counts are for the same cause of action is bad in substance. McGillicuddy *v.* Forsythe, 5 Blackf. (Ind.) 435; Rubottom *v.* McClure, 4 Blackf. (Ind.) 505. In trespass *de bonis* if defendant enumerates in his justification the articles taken he must enumerate all. Sterry *v.* Schuyler, 23 Wend. (N. Y.) 487; Hickok *v.* Coates, 2 Wend. (N. Y.) 419, 20 Am. Dec. 632. In trespass in two counts alleging trespass at different times a justification of "the trespass" is bad. Gleason *v.* Howard, Brayt. (Vt.) 190. Plea of title to part of goods alleged to have been taken is insufficient. Parker *v.* Lewis, 18 Fed. Cas. No. 10,741*a*, Hempst. 721. A plea of bankruptcy to a declaration, some of the causes of action in which would not pass to the assignee, is bad. Rogers *v.* Spence, 12 Cl. & F. 700, 8 Eng. Reprint 1586. In trespass for assaulting, beating, and wounding, a plea that defendant gently expelled plaintiff from his house does not answer the beating and wounding. Gregory *v.* Hill, 8 T. R. 299, 101 Eng. Reprint 1400. To a declaration for several trespasses, including placing rubbish on the soil and tearing up and subverting it, a plea of right of way is bad. Tobin *v.* O'Neil, 2 Nova Scotia 60. In trespass for breaking and entering and taking goods where defendant pleaded two pleas, first that goods were not plaintiff's, second that close was not plaintiff's, each was held bad on demurrer, as each was pleaded to the whole but only answered part. Lambe *v.* Teeter, 20 U. C. Q. B. 82. In trespass *quare clausum* for cutting grass and corn and taking away hay and corn *liberum tenementum* is bad as it does not appear that the grass and corn taken were the same that were cut. Wilcox *v.* Montgomery, 5 U. C. Q. B. O. S. 312. In an action for assaulting, beating, and falsely imprisoning plaintiff a plea not answering the allegation of false imprisonment is bad. Jones *v.* Ross, 3 U. C. Q. B. 328. But where to a declaration in two counts defendant pleaded to "the whole trespass and all the trespasses mentioned in the declaration" it was held to be an answer to the whole. Parker *v.* Parker, 17 Pick. (Mass.) 236.

84. Levelling *v.* Leavell, 2 Blackf. (Ind.) 163; Kingsbury *v.* Pond, 3 N. H. 511.

For instance an allegation of the conversion of goods taken is mere aggravation and need not be answered if the taking is justified. Burton *v.* Sweaney, 4 Mo. 1; Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246, 4 L. ed. 381; Pratt *v.* Pratt, 6 D. & L. 20, 2 Exch. 413, 17 L. J. Exch. 299; Dye *v.* Leatherdale, 3 Wils. C. P. 20, 95 Eng. Reprint 910.

85. Wallace *v.* Goodall, 18 N. H. 439; Houghtaling *v.* Houghtaling, 5 Barb. (N. Y.) 379; Perry *v.* Jefferies, 61 S. C. 292, 39 S. E. 515.

Rule applied in respect of particular allegations.— Tearing down a gate (Pico *v.* Colimas, 32 Cal. 578), tearing down a fence and consequential damage therefrom (Sayles *v.* Bemis, 57 Wis. 315, 15 N. W. 432), unlawful use of land after entry (Lindquest *v.* Union Pac. R. Co., 33 Fed. 372), excavating land and destroying and carrying away lumber (Green *v.* Boody, 21 Ind. 10), breaking and entering and ejecting and expelling plaintiff from his dwelling-house (Harvey *v.* Bridges, 3 D. & L. 55, 9 Jur. 759, 14 L. J. Exch. 272, 14 M. & W. 437 [*affirmed* in 1 Exch. 261]), taking personalty (Herndon *v.* Bartlett, 4 Port. (Ala.) 481; Carpenter *v.* Barber, 44 Vt. 441; U. S. *v.* Magoon, 24

trespass and pleading merely in justification,[86] and if defendant answers them as a substantive cause of action he cannot have judgment on justification of the trespass only.[87] A justification of the aggravation without justifying the trespass is bad.[88]

(c) *Pleas in Abatement.* The plea must clearly set forth the cause for abatement,[89] and any defect of form is fatal to the plea.[90] The remedy for non-joinder of parties plaintiff is by plea in abatement.[91]

(d) *Denials* — (1) On Information and Belief.[92] A denial on information and belief is bad,[93] except where otherwise provided by statute.[94]

(2) Denial of the Right Invaded. A denial of plaintiff's right is a good answer,[95] but there must be a denial of the right as alleged;[96] and whatever goes to show that plaintiff has not the right alleged can be shown under such denial.[97] A plea of land not plaintiff's puts his possession in issue.[98] Where title and possession are alleged, a plea of not possessed is good, as possession is the gist of the action.[99] Where by statute certain facts are made equivalent to possession and

Fed. Cas. No. 15,707, 3 McLean 171; Meriton *v.* Coombes, 9 C. B. 787, 19 L. J. C. P. 336, 1 L. M. & P. 510, 67 E. C. L. 787), destruction of house (Houghtaling *v.* Houghtaling, 5 Barb. (N. Y.) 379). The decisions are far from harmonious, however, and the contrary doctrine has been upheld where allegations were of breaking doors and locks (Curlewis *v.* Laurie, 12 Q. B. 640, 64 E. C. L. 640), tearing down part of house (Snedecor *v.* Pope, 143 Ala. 275, 39 So. 318), destroying a fence (Dutton *v.* Holden, 4 Wend (N. Y.) 643), assaulting (Roberts *v.* Tayler, 1 C. B. 117, 3 D. & L. 1, 9 Jur. 330, 14 L. J. C. P. 87, 50 E. C. L. 117); and forcibly expelling plaintiff (Sprague Nat. Bank *v.* Erie R. Co., 62 N. J. L. 474, 41 Atl. 681; Thiel *v.* Bull's Ferry Land Co., 58 N. J. L. 212, 33 Atl. 281), beating plaintiff's wife and son and expelling plaintiff and his family (Underwood *v.* Campbell, 13 Wend. (N. Y. 78), or beating plaintiff and his servants and horses (Tribble *v.* Frame, 3 T. B. Mon. (Ky.) 13).

86. Knapp *v.* Slocomb, 9 Gray (Mass.) 73, removing a fence.

87. Carpenter *v.* Barber, 44 Vt. 441, taking personalty.

88. *California.*— Pico *v.* Colimas, 32 Cal. 578.

Kentucky.— Terrill *v.* Thompson, 3 Bibb 272, taking personalty.

Mississippi.— Miles *v.* Myers, 1 Walk. 379, taking personalty.

New York.— Underwood *v.* Campbell, 13 Wend. 78, beating plaintiff's wife and son.

Vermont.— Goodrich *v.* Judevine, 40 Vt. 190.

89. Southard *v.* Hill, 44 Me. 92, 69 Am. Dec. 85 (holding that the rule that non-joinder of tenants in common as parties defendant is ground for abatement applies only to realty, so in an action for trespass to a dam the plea must aver that it was realty); East *v.* Cain, 49 Mich. 473, 13 N. W. 822 (holding that a plea that another was "before and at the time of the commencement of the suit" part-owner with plaintiff is bad in failing to allege an interest at the time of the trespass).

90. Townsend *v.* Jeffries, 24 Ala. 329, holding that a plea defending the "wrong and injury" instead of the "force and injury" is bad on demurrer.

91. See Pleading, 31 Cyc. 174.

92. And see, generally, Pleading, 31 Cyc. 189.

93. McCormick *v.* Bailey, 10 Cal. 230.

94. Knapp *v.* Slocomb, 9 Gray (Mass.) 73; Niles *v.* Lindsley, 1 Duer (N. Y.) 610, 8 How. Pr. 131; Gordner *v.* Blades Lumber Co., 144 N. C. 110, 56 S. E. 695; Maxim *v.* Wedge, 69 Wis. 547, 35 N. W. 11.

95. Foster *v.* Lane, 30 N. H. 305, plea that the close was not the soil and freehold of plaintiff.

96. Miller *v.* Miller, 41 Md. 623, holding that where title is alleged a denial of "possession" is bad on demurrer.

97. See cases cited *infra*, this note.

Under "not possessed" defendant can show a retaking of plaintiff's cow from plaintiff of which defendant had possession as security for a debt from plaintiff with a privilege in plaintiff of driving her home twice a day to milk, and a failure by plaintiff to return her, the agreement expressly giving a right to retake in such case. Richards *v.* Symons, 8 Q. B. 90, 10 Jur. 6, 15 L. J. Q. B. 35, 55 E. C. L. 90.

Under plea of land not plaintiff's defendant can show title in himself (Gray *v.* Harding, 21 U. C. Q. B. 241); or one under whom he claims (Kellington *v.* Herring, 17 U. C. C. P. 639; Gray *v.* Harding, 21 U. C. Q. B. 241); or that he is a grantee of the mortgagor and that prior to default the mortgagor gave him right of possession (Dundas *v.* Arthur, 14 U. C. Q. B. 521).

Tenancy in common of the parties is not admissible under a plea denying plaintiff's possession. Wilkinson *v.* Haygarth, 12 Q. B. 837, 11 Jur. 104, 16 L. J. Q. B. 103, 64 E. C. L. 837; Moore *v.* Moore, 3 Nova Scotia Dec. 436.

98. McNeil *v.* Train, 5 U. C. Q. B. 91. In Embree *v.* Noiles, 15 Nova Scotia 82, the court was evenly divided on this question.

99. Johnstone *v.* Odell, 1 U. C. C. P. 395.

they are declared on by plaintiff a denial that plaintiff is owner or in possession sufficiently puts them in issue.[1]

(3) General Issue or General Denial.[2] Any defense can be shown under the general issue that denies allegations which plaintiff must prove.[3] The general issue denies the act of trespass alleged,[4] and that it was on the land described in the declaration,[5] and under it defendant can show that the damages were less than as claimed,[6] or that they did not result from his act.[7] So also all the circumstances of the transaction can be shown.[8] A categorical denial in the answer of the statement of claim is considered equivalent to a plea of not guilty.[9] According to a number of decisions, some of which are based on statutes and rules of court, the general issue puts in issue only the wrongful act alleged, and therefore does not deny the right of plaintiff as alleged,[10] although according to the prevailing view it is held to put in issue also plaintiff's right as he has alleged it,[11]

1. Price *v.* Greer, 76 Ark. 426, 88 S. W. 985, holding that payment of taxes alleged is denied by such plea.

2. And see, generally, Pleading, 31 Cyc. 189 *et seq.*

3. Rawson *v.* Morse, 4 Pick. (Mass.) 127; Fuller *v.* Rounceville, 29 N. H. 554; New Jersey Cent. R. Co. *v.* Hetfield, 29 N. J. L. 206.

4. Munn *v.* Galbraith, 13 U. C. C. P. 75.

5. Ball *v.* Young, 8 U. C. C. P. 231.

6. Blair Iron, etc., Co. *v.* Lloyd, 1 Walk. (Pa.) 158, realty.

7. See cases cited *infra*, this note.

Thus it may be shown that the injury was due to another cause (Siegfried *v.* South Bethlehem Borough, 27 Pa. Super. Ct. 456); or to contributory negligence (Siegfried *v.* South Bethlehem Borough, *supra*). *Contra*, Macdonald *v.* Monk, 3 U. C. Q. B. O. S. 20).

8. Sutherland *v.* Ingalls, 63 Mich. 620, 30 N. W. 342, 6 Am. St. Rep. 332.

9. Siegfried *v.* South Bethlehem Borough, 27 Pa. Super. Ct. 456 (where by statute the defense of taking as a distress can be given under the general issue it is confined to a taking of goods on the premises); Oliver *v.* Phelps, 20 N. J. L. 180.

10. *Illinois.*— Harris *v.* Miner, 28 Ill. 135, holding that in trespass *de bonis* title is not put in issue.

Iowa.— Under the Iowa code if the defense is that the property belonged to defendant this fact must be specially pleaded. Dyson *v.* Ream, 9 Iowa 51.

Maryland.— Tomlinson *v.* Rizer, 2 Harr. & J. 444, trespass *quare clausum*.

Massachusetts.— Stone *v.* Hubbard, 17 Pick. 217, trespass *quare clausum*.

Michigan.— Under the Michigan statutes pleading the general issue does not operate as a denial of title. A special plea is essential for this purpose. Haney *v.* Munzar, 104 Mich. 119, 62 N. W. 71; Ostrom *v.* Potter, 104 Mich. 115, 62 N. W. 170; Keyser *v.* Sutherland, 59 Mich. 455, 26 N. W. 865; Walters *v.* Tefft, 57 Mich. 390, 24 N. W. 117; Druse *v.* Wheeler, 22 Mich. 439. *Contra*, Soloman *v.* Grosbeck, 65 Mich. 540, 36 N. W. 163; Estey *v.* Smith, 45 Mich. 402, 8 N. W. 83. It is held, however, that in trespass *quare clausum*, if the declaration does not assert title, and plaintiff relies on possession merely, defendant may disprove it under the general issue. Vandoozer *v.* Dayton, 45 Mich. 247, 7 N. W. 814.

South Carolina.— Hendrix *v.* Trapp, 2 Rich. 93, trespass for injuries to personalty.

Tennessee.— Carson *v.* Prater, 6 Coldw. 565, trespass *de bonis asportatis*.

Texas.— Under the statutes of Texas, it has been held that the general issue does not, either in an action of trespass *quare clausum* or an action of trespass *de bonis*, put in issue either plaintiff's right of property or right of possession. Carter *v.* Wallace, 2 Tex. 206; Paraffine Oil Co. *v.* Berry, (Civ. App. 1906) 93 S. W. 1089; Cummings *v.* Masterson, 42 Tex. Civ. App. 549, 93 S. W. 500; William J. Lemp Brewing Co. *v.* La Rose, 20 Tex. Civ. App. 575, 50 S. W. 460; Nafe *v.* Hudson, 19 Tex. Civ. App. 381, 47 S. W. 675.

England.— In England by virtue of the provisions of the Hilary Rules, in actions of trespass *quare clausum fregit*, the plea of not guilty operates as a denial that defendant committed the trespass alleged in the place mentioned, but not as a denial of plaintiff's possession or right of possession of that place, which, if intended to be denied, must be traversed specially (Reg. Gen. Hil. T. 4 Wm. IV, r. 5; 1 Chitty Pl. (16th Am. ed.) 538; Jones *v.* Chapman, 18 L. J. Exch. 456); and in trespass *de bonis asportatis*, the general issue does not put in issue plaintiff's property in the goods carried off. Martin Civ. Proc. § 264. Prior to the Hilary Rules the rule was as stated in the next paragraph of text (Argent *v.* Durrant, 8 T. R. 403, 101 Eng. Reprint 1457; Badkin *v.* Powell, Cowp. 478, 98 Eng. Reprint 1195; Dodd *v.* Kyffin, 7 T. R. 354, 101 Eng. Reprint 1016).

Canada.— Jowett *v.* Haacke, 14 U. C. C. P. 447, trespass *quare clausum*.

See 46 Cent. Dig. tit. "Trespass," § 104.

11. Alliance Trust Co. *v.* Nettleton Hardwood Co., 74 Miss. 584, 21 So. 396, 60 Am. St. Rep. 531, 36 L. R. A. 155 (holding that not guilty does not admit in trespass the possession, or in trespass *de bonis* the property in plaintiff); Dunckel *v.* Farley, 1 How. Pr. (N. Y.) 180 (trespass *quare clausum*); Van Buskirk *v.* Irving, 7 Cow. (N. Y.) 35 (trespass *quare clausum*); Child *v.* Allen, 33 Vt. 476; Brainard *v.* Burton, 5 Vt. 97 (trespass *de bonis asportatis*). And therefore if title is alleged it denies plaintiff's

especially where there is statutory authority therefor.[12] The weight of authority is that under the general issue plaintiff may show title in himself to the property on which the trespass was committed, whether it was land,[13] or personalty,[14] or title in those under whom he entered the land [15] or took the personalty.[16] So defendant may show possession in himself of the land,[17] or posses-

title to the land (Monumoi Great Beach *v.* Rogers, 1 Mass. 159; Solomon *v.* Grosbeck, 65 Mich. 540, 36 N. W. 163; Carmichael *v.* Township No. 1 School Land Trustees, 3 How. (Miss.) 84, holding that in trespass by trustees of school lands their character as such is put in issue by it; Lyman *v.* Brown, 73 N. H. 411, 62 Atl. 650; Pipe Line Co. *v.* Delaware, etc., R. Co., 62 N. J. L. 254, 41 Atl. 759; Todd *v.* Jackson, 26 N. J. L. 525; Wickham *v.* Seely, 18 Wend. (N. Y.) 649, uninclosed, uncultivated, unoccupied land covered with water; Taylor *v.* Lyon Lumber Co., 13 Pa. Co. Ct. 235, land of which there is no actual possession; Clark *v.* Dower, 67 W. Va. 298, 68 S. E. 369); or if possession is alleged it denies his possession of the land (Uttendorffer *v.* Saegers, 50 Cal. 496; Prussner *v.* Boody, 136 Ill. App. 395; Ebersol *v.* Trainor, 81 Ill. App. 645; Meeks *v.* Willard, 57 N. J. L. 22, 29 Atl. 318; Babcock *v.* Lamb, 1 Cow. (N. Y.) 238; Gilchrist *v.* McLaughlin, 29 N. C. 310; Stambaugh *v.* Hollabaugh, 10 Serg. & R. (Pa.) 357; Carpenter *v.* Logee, 24 R. I. 383, 53 Atl. 288; Sayles *v.* Mitchell, 22 R. I. 238, 47 Atl. 320; Clark *v.* Dower, 67 W. Va. 298, 68 S. E. 369; McDowell *v.* McCormick, 121 Fed. 61, 57 C. C. A. 401). So thus a lease of land to a third person and possession held by him under it may be shown (Miller *v.* Decker, 40 Barb. (N. Y.) 228); or title and possession of chattels in a third person (Brainard *v.* Burton, 5 Vt. 97).

12. Bennett *v.* Clemence, 6 Allen (Mass.) 10; Hess *v.* Sutton, 33 Pa. Super. Ct. 530; Fisher *v.* Paff, 11 Pa. Super. Ct. 401; Taylor *v.* Lyon Lumber Co., 13 Pa. Co. Ct. 235.

13. *Alabama.*— Louisville, etc., R. Co. *v.* Hall, 131 Ala. 161, 32 So. 603.

Arkansas.— Floyd *v.* Ricks, 14 Ark. 286, 58 Am. Dec. 374.

Delaware.— Quillen *v.* Betts, 1 Pennew. 53, 39 Atl. 595.

Maryland.—New Windsor *v.* Stocksdale, 95 Md. 196, 52 Atl. 596; Storr *v.* James, 84 Md. 282, 35 Atl. 965. *Compare* Manning *v.* Brown, 47 Md. 506, holding that, although in general *liberum tenementum* may be given in evidence under the general issue of not guilty, yet if the tenant in taking possession of the close has necessarily injured or destroyed or removed goods, the property of plaintiff, it is proper to plead *liberum tenementum,* justifying such acts as to the personalty, and the general issue is not sufficient.

Massachusetts.—Proprietors Monumoi Great Beach *v.* Rogers, 1 Mass. 159.

New Hampshire.— Hobson *v.* Roles, 20 N. H. 41; Murray *v.* Webster, 5 N. H. 391.

New Jersey.— U. S. Pipe Line Co. *v.* Delaware, etc., R. Co., 62 N. J. L. 254, 41 Atl. 759, 42 L. R. A. 572; Hetfield *v.* New Jersey Cent. R. Co., 29 N. J. L. 571.

New York.— Babcock *v.* Lamb, 1 Cow. 238.

North Carolina.— Walton *v.* File, 18 N. C. 567.

Pennsylvania.— Altemose *v.* Hufsmith, 45 Pa. St. 121; Fisher *v.* Morris, 5 Whart. 358; Edwards *v.* Woodruff, 25 Pa. Super. Ct. 575. *Contra,* Dohan *v.* Wilson, 2 Del. Co. 501.

South Carolina.— Turner *v.* Poston, 63 S. C. 244, 41 S. E. 296; Jones *v.* Muldrow, Rice 64.

Tennessee.— Duncan *v.* Blair, 2 Overt. 213.

West Virginia.— Dickinson *v.* Mankin, 61 W. Va. 429, 56 S. E. 824.

Wisconsin.— Williams *v.* Holmes, 2 Wis. 129.

United States.—Pancoast *v.* Barry, 18 Fed. Cas. No. 10,705, 1 Cranch C. C. 176.

Canada.— Gesner *v.* Cairns, 7 N. Brunsw. 595. *Contra,* Gray *v.* Harding, 21 U. C. Q. B. 241.

See 46 Cent. Dig. tit. "Trespass," § 104.

Contra.— Waterbury Clock Co. *v.* Irion, 71 Conn. 254, 41 Atl. 827; Fowler *v.* Fowler, 52 Conn. 254; Mallett *v.* White, 52 Conn. 50; Vandoozer *v.* Dayton, 45 Mich. 247, 7 N. W. 814 (*semble,* statutory); Schoeffer *v.* Brown, 23 R. I. 364, 50 Atl. 640; Carter *v.* Wallace, 2 Tex. 206.

14. Estey *v.* Smith, 45 Mich. 402, 8 N. W. 83; Fuller *v.* Rounceville, 29 N. H. 554; Altemose *v.* Hufsmith, 45 Pa. St. 121; Emerson *v.* Thompson, 59 Wis. 619, 18 N. W. 503 (trespass *de bonis*); Phœnix Mut. L. Ins. Co. *v.* Walrath, 53 Wis. 669, 10 N. W. 151. *Contra,* Fairbanks *v.* Stowe, 83 Vt. 155, 74 Atl. 1006.

Under the Iowa code the contrary doctrine prevails. Dyson *v.* Ream, 9 Iowa 51.

15. *Indiana.*— Boltz *v.* Smith, 3 Ind. App. 43, 29 N. E. 155.

Massachusetts.— Rawson *v.* Morse, 4 Pick. 127.

New Hampshire.— Murray *v.* Webster, 5 N. H. 391.

New Jersey.— New Jersey Cent. R. Co. *v.* Hetfield, 29 N. J. L. 206.

New York.— Babcock *v.* Lamb, 1 Cow. 238.

Vermont.— Child *v.* Allen, 33 Vt. 476.

United States.— Reynolds *v.* Baker, 20 Fed. Cas. No. 11,727, 4 Cranch C. C. 104.

See 46 Cent. Dig. tit. "Trespass," § 104.

Contra.— Stambaugh *v.* Hollabaugh, 10 Serg. & R. (Pa.) 357; Gray *v.* Harding, 21 U. C. Q. B. 241.

A license from plaintiff himself, however, must always be pleaded specially. See *infra,* I, A, 7, g, (III), (E), (1).

16. Fuller *v.* Rounceville, 29 N. H. 554; Emerson *v.* Thompson, 59 Wis. 619, 18 N. W. 503; Phœnix Mut. L. Ins. Co. *v.* Walrath, 53 Wis. 669, 10 N. W. 151.

17. Louisville, etc., R. Co. *v.* Hall, 131 Ala. 161, 32 So. 603; Vandoozer *v.* Dayton, 45 Mich. 247, 7 N. W. 814.

sion of land in a third person rightful against plaintiff,[18] or that defendant is a tenant in common with plaintiff of the land,[19] or entered by authority of defendant's tenant in common.[20] On the same principle defendant under the general issue may rely upon an agreed boundary line,[21] or other right to the land.[22] The general denial, which is a statutory form of plea, denies every allegation of the declaration, and therefore puts in issue plaintiff's right as alleged.[23]

(4) PLEAS AMOUNTING TO THE GENERAL ISSUE. A plea which is inconsistent with plaintiff's right as alleged in the declaration amounts to the general issue and is therefore bad on special demurrer;[24] and so also is a plea inconsistent with defendant's having done the act as alleged.[25] But a plea admitting and justifying a trespass does not amount to the general issue.[26]

(5) DENIAL OF DAMAGES. Under the general issue evidence of all circumstances attending the trespass are admissible for defendant on the question of damages.[27] Facts in mitigation cannot be pleaded but must be shown under the general issue,[28] unless otherwise provided by statute.[29] A denial of value must not be *modo et forma*.[30]

(E) *Justification* — (1) IN GENERAL. Except where otherwise provided by statute,[31] matters in justification[32] or matters in discharge, or defeasance of

18. Baker *v.* Pearce, 4 Harr. & M. (Md.) 502; Miller *v.* Decker, 40 Barb. (N. Y.) 228.

19. Hastings *v.* Hastings, 110 Mass. 280.

20. Rawson *v.* Morse, 4 Pick. (Mass.) 127.

21. Grogan *v.* Leike, 22 Pa. Super. Ct. 59.

22. Duncan *v.* Blair, 2 Overt. (Tenn.) 213, entry or location of the land. *Contra*, Ward *v.* Bartlett, 12 Allen (Mass.) 419.

23. Uttendorffer *v.* Saegers, 50 Cal. 496; Louisiana Land, etc., Co. *v.* Gasquet, 45 La. Ann. 759, 13 So. 171; Carter *v.* Pitcher, 87 Hun (N. Y.) 580, 34 N. Y. Suppl. 549; Willis *v.* Hudson, 63 Tex. 678. But see Texas cases cited *supra*, note 10, of this section.

24. See cases cited *infra*, this note.

As for instance an allegation of possession in defendant of land (Plant *v.* Wormager, 5 Blackf. (Ind.) 236); or a license to do the act given by one in possession (Alexander *v.* Eastland, 37 Miss. 554); even a license from one who is in possession of the land by license from plaintiff (Underwood *v.* Campbell, 13 Wend. (N. Y.) 78); or a lease from one seized in fee and entry under it (Collet *v.* Flinn, 5 Cow. (N. Y.) 466); or allegation of title and possession (Miller *v.* Miller, 41 Md. 623, holding that where the general issue is pleaded the plea of possession and title is properly stricken out); or allegation of right of possession of the land in defendant (Sage *v.* Keesecker, Morr. (Iowa) 338); or a denial of plaintiff's possession and title (Smith *v.* Edelstein, 92 Ill. App. 38); or title to chattels in a third person against whom he claims a right to take under a judgment (McBride *v.* Duncan, 1 Whart. (Pa.) 269).

25. Dorman *v.* Long, 2 Barb. (N. Y.) 214, plea that it was done on land other than that alleged.

26. Sturman *v.* Colon, 48 Ill. 463, holding that in an action for trespass by animals, a plea that they were free commoners on uninclosed land adjoining defendant's and entered by reason of the insufficiency of defendant's fence does not amount to the general issue.

27. Carter *v.* Bedortha, 124 Mich. 548, 83 N. W. 277.

Special damages alleged may be disproved, even though defendant fails to disprove the principal trespass. Ballard *v.* Leavell, 5 Call (Va.) 531.

28. Hopple *v.* Higbee, 23 N. J. L. 342. *Contra*, Gray *v.* Henry County, 42 S. W. 333, 19 Ky. L. Rep. 885.

29. Wehle *v.* Haviland, 42 How. Pr. (N. Y.) 399.

30. Lynd *v.* Picket, 7 Minn. 184, 82 Am. Dec. 79, holding that denial that the property is of the value alleged is bad; defendant must allege it to be of no value or must state the value he claims it to be.

31. Brooks *v.* Ashburn, 9 Ga. 297; Wheeler *v.* Rowell, 7 N. H. 515 (holding that in trespass *quare clausum* before a justice any special matter can be given in evidence under the general issue, as a license); Demick *v.* Chapman, 11 Johns. (N. Y.) 132; Reed *v.* Stoney, 2 Rich. (S. C.) 401 (holding that taking as a distress for rent can be shown).

32. *Delaware.*— Coe *v.* English, 6 Houst. 456.

Illinois.— Thomas *v.* Morgan, 96 Ill. App. 629.

Indiana.— Johnson *v.* Cuddington, 35 Ind. 43.

Kansas.—Mecartney *v.* Smith, (App. 1900) 62 Pac. 540.

Massachusetts.— Rawson *v.* Morse, 4 Pick. 127.

New Hampshire.— Fuller *v.* Rounceville, 29 N. H. 554.

New Jersey.— U. S. Pipe Line Co. *v.* Delaware, etc., R. Co., 62 N. J. L. 254, 41 Atl. 759, 42 L. R. A. 572.

New York.— Ely *v.* Ehle, 3 N. Y. 506; Coats *v.* Darby, 2 N. Y. 517; Drake *v.* Barrymore, 14 Johns. 166.

South Carolina.— Henderson *v.* Bennett, 58 S. C. 30, 36 S. E. 2.

plaintiff's right [33] must be specially pleaded. Thus defenses based on legal authority must be pleaded [34] and a license from plaintiff [35] and also a license from a third person who owns the property,[36] or an easement.[37] Matter constituting a justi-

Tennessee.— Plowman *v.* Foster, 6 Coldw. 52.

Texas.— Carter *v.* Wallace, 2 Tex. 206.

United States.— Montgomery Water Power Co. *v.* Chapman, 126 Fed. 68, 61 C. C. A. 124 [*affirmed* in 126 Fed. 372, 61 C. C. A. 347]; Goddard *v.* Davis, 10 Fed. Cas. No. 5,491, 1 Cranch C. C. 33.

See 46 Cent. Dig. tit. "Trespass," § 104.

Miscellaneous applications of rule.— That the killing of plaintiff's horse was in self-defense must be pleaded in justification. Stow *v.* Scribner, 6 N. H. 24. So in trespass *quare clausum*, it must be pleaded in justification that defendant went to plaintiff's house to demand a debt. Van Buskirk *v.* Irving, 7 Cow. (N. Y.) 35. So the fact that plaintiff's title was obtained by fraud (Huddleston *v.* Spear, 8 Ark. 406; Smith *v.* Edelstein, 92 Ill. App. 38), or a right of entry on realty (Razzo *v.* Varni, (Cal. 1889) 21 Pac. 762), or estoppel (Hilton *v.* Colvin, 78 S. W. 890, 25 Ky. L. Rep. 1808), or a prescriptive right to divert part of a stream (Whetstone *v.* Bowser, 29 Pa. St. 59), or orders from a military commander (Peck *v.* Goss, 6 Heisk. (Tenn.) 108; Merritt *v.* Nashville, 5 Coldw. (Tenn.) 95), or that property taken had been defendant's and the consideration for its sale to plaintiff had failed (Smith *v.* Sherwood, 2 Tex. 460), or that the property whose injury was complained of was on plaintiff's land without a license and the injury was done in removing it (Page *v.* Rattcliff, 1 L. J. C. P. 57), or that entry of cattle was by reason of defective fences (Griswold *v.* Hallet, (Mich. T. 1834) Stevens N. Brunsw. Dig. 752); or that defendant was tenant in common with plaintiff (Zwicker *v.* Morash, 34 Nova Scotia 555) must be pleaded.

Justification held sufficient.— It is a good justification to an action for trespass to a several fishery that the *locus* was an arm of the sea; it is not an argumentative traverse, as it admits the soil to be plaintiff's but not in such a way as to include a several fishery. Crichton *v.* Collery, 19 Wkly. Rep. 107.

33. Goetz *v.* Ambs, 27 Mo. 28 (assignment of plaintiff's cause of action); Riley *v.* Denny, 2 Rich. (S. C.) 539 (a settlement); Austin *v.* Norris, 11 Vt. 38 (release).

34. *Alabama.*— Barrett *v.* Mobile, 129 Ala. 179, 30 So. 36, 87 Am. St. Rep. 54.

Arkansas.— Huddleston *v.* Spear, 8 Ark. 406, taking under attachment.

Illinois.— Smith *v.* Edelstein, 92 Ill. App. 38, taking on execution.

Kansas.— Mecartney *v.* Smith, (App. 1900) 62 Pac. 540, expulsion under execution issued by a justice in action of forcible entry.

New Jersey.— Bruch *v.* Carter, 32 N. J. L. 554.

New York.—Drake *v.* Barrymore, 14 Johns. 166, under collector's warrant.

Vermont.— Giffin *v.* Martel, 77 Vt. 19, 58 Atl. 788, assisting in a writ of replevin.

United States.— Martin *v.* Clark, 1 Fed. Cas. No. 9,158*a*, Hempst. 259, under a warrant.

See 46 Cent. Dig. tit. "Trespass," § 104.

35. *Alabama.*— Finch *v.* Alston, 2 Stew. & P. 83, 23 Am. Dec. 299.

Delaware.— Quillen *v.* Betts, 1 Pennew. 53, 39 Atl. 595.

Illinois.— Chicago Title, etc., Co. *v.* Core, 126 Ill. App. 272 [*affirmed* in 223 Ill. 58, 79 N. E. 108].

Indiana.— Chase *v.* Long, 44 Ind. 427; Crabs *v.* Fetick, 7 Blackf. 373; Gronour *v.* Daniels, 7 Blackf. 108; Boltz *v.* Smith, 3 Ind. App. 43, 29 N. E. 155.

Massachusetts.— Hollenbeck *v.* Rowley, 8 Allen 473; Ruggles *v.* Lesure, 24 Pick. 187; Rawson *v.* Morse, 4 Pick. 127.

Michigan.— Senecal *v.* Labadie, 42 Mich. 126, 3 N. W. 296.

New Jersey.— Pipe Line Co. *v.* Delaware, etc., R. Co., 62 N. J. L. 254, 41 Atl. 759; Hetfield *v.* Central R. Co., 29 N. J. L. 571.

New York.— Haight *v.* Badgeley, 15 Barb. 499.

Rhode Island.— Collier *v.* Jenks, 19 R. I. 493, 34 Atl. 998.

South Carolina.— Gambling *v.* Prince, 2 Nott & M. 138.

Vermont.— Warner *v.* Hoisington, 42 Vt. 94; Child *v.* Allen, 33 Vt. 476; Hill *v.* Morey, 26 Vt. 178 (a defense that plaintiff misled defendant as to boundary line and so induced the cutting of trees amounts to a plea of license); Sawyer *v.* Newland, 9 Vt. 383.

Wisconsin.—Lockhart *v.* Geir, 54 Wis. 133, 11 N. W. 245.

England.— Bennett *v.* Allcott, 2 T. R. 166, 100 Eng. Reprint 90.

Canada.— Gesner *v.* Cairns, 7 N. Brunsw. 595; Langille *v.* Langille, 1 Nova Scotia 159; Bell *v.* Lott, 9 Ont. L. Rep. 114, 4 Ont. Wkly. Rep. 430.

See 46 Cent. Dig. tit. "Trespass," § 104.

Contra.— Wallace *v.* Robb, 37 Iowa 192; Cox *v.* Dove, 1 N. C. 72.

36. Rasor *v.* Qualls, 4 Blackf. (Ind.) 286, 30 Am. Dec. 658; Kissam *v.* Roberts, 6 Bosw. (N. Y.) 154; Keen *v.* Seymour, 11 N. Brunsw. 44. See also Covington *v.* Simpson, 3 Pennew. (Del.) 269, 52 Atl. 349. But see *supra*, I, A, 7, g, (III), (D), (3).

37. Carter *v.* Augusta Gravel Road Co., Wils. (Ind.) 14; Waters *v.* Lilley, 4 Pick. (Mass.) 145, 16 Am. Dec. 333; Strout *v.* Berry, 7 Mass. 385; Ferris *v.* Brown, 3 Barb. (N. Y.) 105; Saunders *v.* Wilson, 15 Wend. (N. Y.) 338; Aiken *v.* Stewart, 63 Pa. St. 30. *Contra*, Chestnut Hill, etc., Turnpike Co. *v.* Piper, 77 Pa. St. 432, easement to build a drain.

Applications of rule.— Thus it is necessary to plead that the *locus* was a public high-

fication is not admissible under the general issue,[38] even in mitigation of damages.[39] The justification must be sufficient in law,[40] and must set forth enough facts to show that it is sufficient,[41] and if it is conditional on certain facts these facts must

way (Wood *v.* Mansell, 3 Blackf. (Ind.) 125; Babcock *v.* Lamb, 1 Cow. (N. Y.) 238. *Contra*, Munson *v.* Mallory, 36 Conn. 165, 4 Am. Rep. 52); or a private way (Saunders *v.* Wilson, 15 Wend. (N. Y.) 338); or an easement to divert a stream (Wallace *v.* Milliken, (East. T. 1831) Stevens N. Brunsw. Dig. 750).

38. *Alabama.*— Thornton *v.* Dwight Mfg. Co., 120 Ala. 653, 25 So. 22.

Delaware.— Covington *v.* Simpson, 3 Pennew. 269, 52 Atl. 349.

Illinois.— Chicago Title, etc., Co. *v.* Core, 223 Ill. 58, 79 N. E. 108 [*affirming* 126 Ill. App. 272]; Thomas *v.* Riley, 114 Ill. App. 520; Chicago, etc., R. Co. *v.* Cassazza, 83 Ill. App. 421.

Kentucky.— Smith *v.* Hancock, 4 Bibb 222.

Michigan.— Waldo *v.* Waldo, 52 Mich. 91, 94, 17 N. W. 709, 710.

New York.— Wheeler *v.* Lawson, 103 N. Y. 40, 8 N. E. 360; Root *v.* Chandler, 10 Wend. 110, 25 Am. Dec. 546.

Compare Wilcox *v.* Sherwin, D. Chipm. (Vt.) 72, holding that defendant may show anything which proves he did not do a wrong, as a justification, but not a release or other matters subsequent to the trespass.

For instance.— Legal authority cannot be shown under the general issue (Barrett *v.* Mobile, 129 Ala. 179, 30 So. 36; Womack *v.* Bird, 51 Ala. 504; Montgomery Water Power Co. *v.* Chapman, 126 Fed. 68, 61 C. C. A. 124 [*affirmed* in 126 Fed. 372, 61 C. C. A. 347]; Tyson *v.* Little, 8 U. C. Q. B. 434, right to distrain. *Contra*, Smith *v.* Brazelton, 1 Heisk. (Tenn.) 44, 2 Am. Rep. 678); that the act was done in execution of legal process (Womack *v.* Bird, 63 Ala. 500, 51 Ala. 504; Goldstein *v.* Miller, 93 Ill. App. 103, distress warrant; Rosenbury *v.* Angell, 6 Mich. 508, attachment against a third person as owner; Carson *v.* Wilson, 11 N. J. L. 43, 19 Am. Dec. 368, taking on execution; Simpson *v.* Watrus, 3 Hill (N. Y.) 619, taking on execution; Butterworth *v.* Soper, 13 Johns. (N. Y.) 443, warrant issued by an officer of militia to collect a fine levied by a court-martial; Henderson *v.* Bennett, 58 S. C. 30, 36 S. E. 2, magistrate's warrant to eject; Newkirk *v.* Payme, 6 U. C. Q. B. O. S. 458, execution); nor, in an action for the taking of lumber after a right by contract had expired, can it be shown that plaintiff waived the tort by suing on the contract (Thornton *v.* Dwight Mfg. Co., 120 Ala. 653, 25 So. 22).

39. Womack *v.* Bird, 51 Ala. 504; Gambling *v.* Prince, 2 Nott & M. (S. C.) 138, license. And see as sustaining this doctrine Western Union Tel. Co. *v.* Dickens, 148 Ala. 480, 41 So. 469. *Contra*, Hamilton *v.* Windolf, 36 Md. 301, 11 Am. Rep. 491 (license); Hendrix *v.* Trapp, 2 Rich. (S. C.) 93 (license).

40. Amwell Baptist Soc. *v.* Fisher, 18 N. J. L. 240 (holding that justification of entering a house and breaking doors, etc., showing no necessity for the damage and alleging entry as members of a religious society but not stating they were such is bad); Ackerman *v.* Shelp, 8 N. J. L. 125 (holding that a plea of right of highway over adjoining lands should be stricken out); Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246, 4 L. ed. 381.

41. See cases cited *infra*, this note.

Applications of rule.— In justifying under a writ of a justice of the peace, it is not enough to plead it, but the judgment, the parties, the date, the justice, and the fact of his jurisdiction must be stated or else the judgment set out *in hæc verba*. Olmstead *v.* Thompson, 91 Ala. 130, 8 So. 755. Justification under the drainage law must show that plaintiff's land was legally taken and the drainage commissioner properly appointed. Pettingill *v.* Lawrence, 20 Ill. App. 552. A plea of a distraint for rent must show that it was made subsequent to the day the rent fell due and before the termination of the tenancy. Kizer *v.* Kennedy, 11 Ill. 572. A justification as town trustee in opening a road by order of the board of commissioners must state that the notice required by statute has been given. Suits *v.* Murdock, 63 Ind. 73; Ruston *v.* Grimwood, 30 Ind. 364. A justification for entering plaintiff's house and taking property which merely alleges that the property belonged to defendant and does not deny an assault charged in the complaint is insufficient. Stowers Furniture Co. *v.* Brake, 158 Ala. 639, 48 So. 89. Justification as tax assessors must show that defendants were legally elected as such. Allen *v.* Archer, 49 Me. 346. A plea of right of way must allege that it extends to servants or the justification will not extend to them. Bartlett *v.* Prescott, 41 N. H. 493. Justification under title in the "inhabitants" of the "Chichester, etc., School District," which is not a corporation known to the law, does not sufficiently describe them. Foster *v.* Lane, 30 N. H. 305. In justifying an entry to repair a wharf on failure of plaintiff to do so, the plea must state that repairs were necessary and that plaintiff was notified to repair and failed to do so. Lonsdale *v.* Nelson, 2 B. & C. 302, 3 D. & R. 556, 2 L. J. K. B. O. S. 28, 26 Rev. Rep. 363, 9 E. C. L. 138, 107 Eng. Reprint 396.

Identity of acts justified and acts complained of.— An express averment that the acts justified are the same as those complained of is not necessary, if it appears that they are (Carridge *v.* Lautour, 7 L. J. K. B. O. S. 33); but the plea is bad if the identity of the acts is neither averred nor appears (Wheeler *v.* Me-shing-go-me-sia, 30 Ind. 402). If, however, identity is specifically alleged it is sufficient, although the acts justified are to some extent inconsistent with those alleged. Peaslee *v.* Wadleigh, 5 N. H. 317, holding that where trespass *de bonis* is

be made to appear;[42] but evidential facts need not be set forth,[43] nor the provisions of a public statute;[44] and matter which should properly have been deferred until the replication need not be denied.[45] Under a general statement of a justification, any particular justification coming within its terms can be shown.[46] The general issue with notice that defendant will give evidence of a particular justification is equivalent to a plea of the justification.[47]

(2) LIBERUM TENEMENTUM. *Liberum tenementum* is a good plea in trespass *quare clausum*,[48] whether the premises are described generally in the complaint[49]

alleged as at a certain close and defendant justifies in a different place, but alleges the acts to be the same as those complained of, he need not traverse the *locus*, the place being immaterial.

42. Fulton *v.* Monahan, 4 Ohio 426 (holding that a justification under act of congress for taking stone to build a national road must set forth the facts showing the necessity for such taking); Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246, 4 L. ed. 381 (holding that a justification for seizing a ship under the act of congress of 1794, chapter 50, which omits to state that the ship was forfeited or that the government for which it was fitted out had been recognized as such by the United States government is bad in substance); Dayrell *v.* Hoare, 12 A. & E. 356, 9 L. J. Q. B. 299, 4 P. & D. 114, 40 E. C. L. 182, 113 Eng. Reprint 847 (holding that where a justification is of a lease by tenant for life it must aver that life-tenant is still living); Reid *v.* Inglis, 12 U. C. C. P. 191 (holding that a justification for assault under William & Mary, chapter 18, relating to disturbances in a church, must show that the act was within its term).

43. Dillon *v.* Brown, 11 Gray (Mass.) 179, 71 Am. Dec. 700 (holding that a lease need not be set forth in full); Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246, 4 L. ed. 381 (holding that a plea justifying a seizure of a vessel under the act of congress forbidding arming of vessels to cruise against subjects of a foreign state need not name the foreign state).

44. Edwards *v.* Law, 63 N. Y. App. Div. 451, 71 N. Y. Suppl. 1097.

45. Rubottom *v.* McClure, 4 Blackf. (Ind.) 505 (holding that a justification under a statute authorizing the taking of land for public use need not state that the proper steps to ascertain the damages have been taken); Bury *v.* Britton, 32 U. C. Q. B. 547 (holding that where a taking of land by the commissioner of public works under a statute is alleged, it will be taken to mean a lawful taking after compliance with the preliminaries).

46. Heyward *v.* Chisolm, 11 Rich. (S. C.) 253 (holding that under justification of a "public highway" any public way, however named, by land or sea, may be shown); Vogt *v.* Bexar County, 5 Tex. Civ. App. 272, 23 S. W. 1044 (holding that where a highway is alleged any lawful origin, by grant, prescription, etc., may be shown).

47. Mansfield *v.* Church, 21 Conn. 73 (notice of soil and freehold in defendant); Payne *v.* Green, 10 Sm. & M. (Miss.) 507.

48. *Illinois.*— Ft. Dearborn Lodge *v.* Klein, 115 Ill. 177, 3 N. E. 272, 56 Am. Rep. 133.

Kentucky.— Stillwell *v.* Duncan, 103 Ky. 59, 44 S. W. 357, 19 Ky. L. Rep. 1701, 39 L. R. A. 863; Crockett *v.* Lashbrook, 5 T. B. Mon. 530, 17 Am. Dec. 98.

Missouri.— Fuhr *v.* Dean, 26 Mo. 116, 69 Am. Dec. 484.

New Hampshire.—Simpson *v.* Coe, 3 N. H. 12.

New Jersey.— Mayhew *v.* Ford, 61 N. J. L. 532, 39 Atl. 914. *Contra*, Phillips *v.* Phillips, 21 N. J. L. 42, because it amounts to the general issue.

New Mexico.— Jemez Land Co. *v.* Garcia, (1910) 107 Pac. 683.

New York.— Shank *v.* Cross, 9 Wend. 160.

Rhode Island.— Carpenter *v.* Logee, 24 R. I. 383, 53 Atl. 288; Schaeffer *v.* Brown, 23 R. I. 364, 50 Atl. 640.

Tennessee.— Roberts *v.* Tarver, 1 Lea 441.

West Virginia.— Clark *v.* Dower, (1910) 68 S. E. 369.

England.— Turner *v.* Meymott, 1 Bing. 158, 1 L. J. C. P. O. S. 13, 7 Moore C. P. 574, 25 Rev. Rep. 612, 8 E. C. L. 450; Taunton *v.* Costav, 7 T. R. 431, 4 Rev. Rep. 481, 101 Eng. Reprint 1060.

See 46 Cent. Dig. tit. "Trespass," § 95.

Contra.— Durkee *v.* Varnum, 1 Root (Conn.) 410, because it does not deny plaintiff's right of possession.

In New York a distinction has been taken between an action of trespass *quare clausum* and an action for cutting and removing trees, holding the latter transitory and *liberum tenementum* a bad plea to it. Shank *v.* Cross, 9 Wend. 160.

It has been assigned as a reason why the plea is good, that it gives plaintiff implied color of title and is therefore not bad as amounting to the general issue (Hunter *v.* Hatton, 4 Gill (Md.) 115, 45 Am. Dec. 117; Millet *v.* Singleton, 1 Nott & M. (S. C.) 355); and that it admits possession sufficient against a wrong-doer but denies that it was rightful and asserts a right to possession in defendant (Ryan *v.* Clark, 14 Q. B. 65, 7 D. & L. 8, 13 Jur. 1000, 18 L. J. Q. B. 267, 68 E. C. L. 65; Doe *v.* Wright, 10 A. & E. 763, 2 P. & D. 672, 37 E. C. L. 401, 113 Eng. Reprint 289).

Liberum tenementum in a third person under whom defendant acted is also a good plea. Douling *v.* Hickman, 4 Hayw. (Tenn.) 170.

49. Palmer *v.* Tuttle, 39 N. H. 486. Where the premises are described generally defendant can show title to any lands in the jurisdiction. McFarlane *v.* Ray, 14 Mich. 465; Ellet *v.* Pullen, 12 N. J. L. 357; Austin *v.*

or a particular description is given;[50] and the right to justify under this plea is not changed by statutes regulating proceedings in forcible entry and detainer.[51] The plea admits such a possession in plaintiff as would enable him to maintain the action against a wrong-doer,[52] and asserts a right of freehold in defendant with right to immediate possession,[53] thereby putting in issue the question of whether the premises are defendant's freehold,[54] and, according to the usual doctrine, that alone is in issue.[55] The plea must be proved by deed or adverse possession for the period of the statute of limitations[56] or by estoppel.[57] A plea that the close was the close and soil of defendant is not a plea of *liberum tenementum*, but puts only plaintiff's possession in issue.[58]

(F) *Matters in Mitigation.* Unless otherwise provided by statute, facts which do not amount to a justification but are in mitigation of damages need not be specially pleaded, but may be shown under the general issue or general denial.[59] Facts which are in mitigation only, and which do not constitute a justification, should not be pleaded as a justification. They must be pleaded as mitigating circumstances and not as a full defense; or the pleading will be demurrable.[60]

(IV) *Replication and New Assignment* — (A) *Necessity and Propriety of.* At common law, plaintiff should reply to a justification as well as join issue

Morse, 8 Wend. (N. Y.) 476; Hawke *v.* Bacon, 2 Taunt. 156, 11 Rev. Rep. 545.

If there are two counts describing the land generally plaintiff must show two closes and a trespass on each if defendant shows title to land in the jurisdiction. Tribble *v.* Frame, 7 T. B. Mon. (Ky.) 529.

50. Fisher *v.* Morris, 5 Whart. (Pa.) 358; Harvey *v.* Bridges, 3 D. & L. 55, 9 Jur. 759, 14 L. J. Exch. 272, 14 M. & W. 437 [*affirmed* in 1 Exch. 261].

Defendant cannot show title in himself to some other close if the premises are particularly described. Hope *v.* Cason, 3 B. Mon. (Ky.) 544.

51. Roberts *v.* Tarver, 1 Lea (Tenn.) 441.

52. *Illinois.*— Ft. Dearborn Lodge *v.* Klein, 115 Ill. 177, 3 N. E. 272, 56 Am. Rep. 133.

Maryland.— Keener *v.* Kauffman, 16 Md. 296; Hunter *v.* Hutton, 4 Gill 125.

North Carolina.— Gilchrist *v.* McLaughlin, 29 N. C. 310.

Rhode Island.— Lavin *v.* Dodge, 30 R. I. 8, 73 Atl. 376; Carpenter *v.* Logee, 24 R. I. 383, 53 Atl. 288; Wilbur *v.* Peckham, 22 R. I. 284, 47 Atl. 597; Providence *v.* Adams, 10 R. I. 184.

South Carolina.— Millet *v.* Singleton, 1 Nott & M. 355.

Tennessee.— Roberts *v.* Tarver, 1 Lea 441.

England.— Ryan *v.* Clark, 14 Q. B. 65, 7 D. & L. 8, 13 Jur. 1000, 18 L. J. Q. B. 267, 68 E. C. L. 65; Doe *v.* Wright, 10 A. & E. 763, 2 P. & D. 672, 37 E. C. L. 401, 113 Eng. Reprint 289.

53. *Illinois.*— Ft. Dearborn Lodge *v.* Klein, 115 Ill. 177, 3 N. E. 272, 56 Am. Rep. 133.

Maryland.— Keener *v.* Kauffman, 16 Md. 296; Hunter *v.* Hatton, 4 Gill 125, 45 Am. Dec. 117.

Massachusetts.— Davis *v.* Mason, 4 Pick. 156.

Tennessee.— Roberts *v.* Tarver, 1 Lea 441.

England.— Ryan *v.* Clark, 14 Q. B. 65, 7 D. & L. 8, 13 Jur. 1000, 18 L. J. Q. B. 267, 68 E. C. L. 65; Doe *v.* Wright, 10 A. & E. 763, 2 P. & D. 672, 37 E. C. L. 401, 113 Eng. Reprint 289; Thompson *v.* Hardinge, 1 C. B. 940, 9 Jur. 927, 14 L. J. C. P. 268, 50 E. C. L. 940.

Evidence admissible to support plea.— Defendant can show that he is mortgagor, under a mortgage entitling him to possession (Dundas *v.* Arthur, 14 U. C. Q. B. 521); or that his licensor is a mortgagee in possession after a default (Clark *v.* Beach, 6 Conn. 142). It has been held that the fact that defendant was a tenant in common with plaintiff cannot be shown under the plea (Roberts *v.* Dame, 11 N. H. 226); but an estate in common in a third person under whom defendant acted has been admitted (Jewett *v.* Foster, 14 Gray (Mass.) 495; Hern *v.* Weston, 32 U. C. Q. B. 402).

Evidence of paramount title in either party is admissible on this issue. Wilson *v.* Bibb, 1 Dana (Ky.) 7, 25 Am. Dec. 118.

54. Schaeffer *v.* Brown, 23 R. I. 364, 50 Atl. 640; Roberts *v.* Tarver, 1 Lea (Tenn.) 441.

55. Keener *v.* Kauffman, 16 Md. 296; Hunter *v.* Hatton, 4 Gill (Md.) 115, 45 Am. Dec. 117; Gilchrist *v.* McLaughlin, 29 N. C. 310; Stambaugh *v.* Hollabaugh, 10 Serg. & R. (Pa.) 357. *Compare* Tabor *v.* Judd, 62 N. H. 288.

56. Grice *v.* Lever, 9 Dowl. P. C. 246, 10 L. J. Exch. 337, 7 M. & W. 593; Miller *v.* Wolfe, 30 Nova Scotia 277.

57. Feversham *v.* Emerson, 3 C. L. R. 1379, 11 Exch. 385, 24 L. J. Exch. 254.

58. Millison *v.* Holmes, 1 Ind. 45, Smith 55.

59. Western Union Tel. Co. *v.* Dickens, 148 Ala. 480, 41 So. 469; U. S. *v.* Homestake Min. Co., 117 Fed. 481, 54 C. C. A. 303 (that cutting of trees was in good faith); Henderson *v.* Bennett, 58 S. C. 30, 36 S. E. 2; Montgomery Water Power Co. *v.* William, 126 Fed. 68, 61 C. C. A. 124 [*affirmed* in 126 Fed. 372, 61 C. C. A. 347].

60. Jenks *v.* Lansing Lumber Co., 97 Iowa 342, 66 N. W. 231; Ronan *v.* Williams, 41 Iowa 680.

on not guilty,[61] unless the plea amounts merely to a denial of the trespass.[62] Where defendant pleads *liberum tenementum* in another, and that defendant did the acts complained of under his command, plaintiff cannot, under a replication traversing the command, show an unexpired lease to plaintiff, and that in consequence defendant had no authority to give the command. The lease must be specially pleaded;[63] and under a traverse of a plea of *liberum tenementum* in one under whom defendant acted, a recovery in ejectment by plaintiff against the third person cannot be shown.[64] That defendant exceeded the right pleaded in justification should be set up by a reply.[65] Fraud which makes the justification void, not merely voidable, need not be replied, but may be given in evidence under a traverse of the justification,[66] otherwise where, as is usually the case, the fraud renders the transaction voidable merely not void.[67] A denial of a justification *modo et forma* denies all its allegations.[68] There cannot be a new assignment unless there was a special plea;[69] but if the trespasses are justified plaintiff may then new assign other and different trespasses,[70] and if he does so, without a traverse, the action is then for them only, or trespasses not within the justification.[71] But to recover, plaintiff must show that they were different.[72] Where defendant's answer applies to a trespass other than that intended by the complaint, plaintiff should new assign.[73] The general issue continues to be an answer to the whole cause of action, notwithstanding a new assignment.[74] Where the pleas clearly put in issue the whole matter alleged there can be no further pleading except a traverse.[75] If the plea is true in part and is pleaded to the whole, plaintiff may

61. Mangum *v.* Flowers, 2 Munf. (Va.) 205. And see Lavin *v.* Dodge, 30 R. I. 8, 73 Atl. 376.

62. Cravens *v.* Despain, 79 S. W. 276, 25 Ky. L. Rep. 2018, 80 S. W. 456, 25 Ky. L. Rep. 2205 (denial of plaintiff's title accompanied by an averment of title in defendant); Scaggs *v.* Poteet, 58 S. W. 822, 22 Ky. L. Rep. 775 (plea of title to the land at the *locus*).

63. Ewer *v.* Jones, 9 Q. B. 623, 10 Jur. 965, 16 L. J. Q. B. 42, 58 E. C. L. 623.

64. McMillan *v.* McMillan, 12 U. C. C. P. 158.

65. *Illinois.*—Ambrose *v.* Root, 11 Ill. 497, 52 Am. Dec. 456, excessive force.

Indiana.— West *v.* Blake, 4 Blackf. 234; Spades *v.* Murray, 2 Ind. App. 401, 28 N. E. 709, exceeding a license.

New Hampshire.— Great Falls Co. *v.* Worster, 15 N. H. 412, exceeding license.

New York.— Collier *v.* Moulton, 7 Johns. 109.

England.— D'Ayrolles *v.* Howard, 3 Burr. 1385, 97 Eng. Reprint 887; Taylor *v.* Cole, 1 H. Bl. 555, 3 T. R. 292, 1 Rev. Rep. 706, 100 Eng. Reprint 582; Oakes *v.* Wood, 6 L. J. Exch. 200, 2 M. & W. 791, M. & H. 237 (excessive force); Moore *v.* Taylor, 5 Taunt. 67, 1 E. C. L. 47.

See 46 Cent. Dig. tit. "Trespass," § 98.

66. Anthony *v.* Wilson, 14 Pick. (Mass.) 303.

67. Slee *v.* Graham, 2 U. C. Q. B. 387.

68. Helliwell *v.* Eastwood, 5 U. C. Q. B. O. S. 104.

69. Smith *v.* Milles, 1 T. R. 475, 99 Eng. Reprint 1205.

70. See Cameron *v.* Lount, 3 U. C. Q. B. 453, holding that where all of a number of trespasses are justified, a new assignment of a different trespass from "that" justified is bad. It should be from "any." And see cases cited *infra*, this and subsequent notes in this section.

Time and place need not be stated in the new assignment. It is sufficient to allege that the trespasses complained of were committed at other and different times, and on other and different occasions. McGillis *v.* Martin, 6 U. C. Q. B. O. S. 495.

71. Robbins *v.* Wolcott, 19 Conn. 356; McNutt *v.* Arnott, 5 Blackf. (Ind.) 95; Davidson *v.* Schenck, 31 N. J. L. 174.

72. See cases cited *infra*, this note.

Thus if only one trespass is proved, plaintiff cannot recover (Smith *v.* Ingoldsby, 9 U. C. Q. B. 207; Reeves *v.* Myers, 1 U. C. Q. B. 462); as the jury, if the circumstances are alike, ought to consider it the same (Darby *v.* Smith, 2 M. & Rob. 184); and so plaintiff should be nonsuited (Henderson *v.* Beekman, 4 U. C. Q. B. 150).

73. Waddell *v.* Corbett, 25 U. C. Q. B. 234, holding that in trespass *quare clausum* where defendants pleaded that the sheriff under a writ of habere facias made a warrant to his bailiff who entered, etc., a reply that the sheriff himself entered is bad as it appears there were but two trespasses and the answer was to one not complained of.

74. Stewart *v.* Henry, 5 Blackf. (Ind.) 445.

75. See cases cited *infra*, this note.

Thus where only a single act of trespass is alleged there can be no new assignment (Taylor *v.* Smith, 7 Taunt. 156, 2 E. C. L. 304); nor can plaintiff both traverse the justification and new assign (Spencer *v.* Bemis, 46 Vt. 29); as where in trespass *quare clausum*, land is particularly described (Smith *v.* Powers, 13 N. H. 216; Spalding *v.* Rogers, 1 U. C. Q. B. 135, otherwise by statute in Connecticut; Lamb *v.*

reply, as where only part of the goods were wrongfully taken.[76] If the plea is true in part, plaintiff may new assign for the part not covered thereby.[77] By statute in many states the pleadings end with the answer, and in such states the common-law rules as to necessity or propriety of a reply or new assignment do not apply.[78] Some courts hold that the justification proved must be coextensive with the trespass alleged;[79] and if defendant fails in proof of his justification to any part of the trespasses, plaintiff is entitled to a verdict without new assigning the excess.[80]

(B) *Sufficiency of.* A replication in confession and avoidance is good if consistent with the plea,[81] but it is bad if it changes the form of the action[82] or if it is inconsistent with the plea,[83] but not if it merely qualifies it.[84] A replication *de injuria* to a plea of title is bad,[85] but not to a plea in excuse in which title to other lands is pleaded as inducement;[86] and a replication *de injuria* does not put in issue excess in the exercise of a right pleaded as a justification.[87] A traverse must deny the whole of the answer,[88] but the form of the traverse is not strictly

Beebe, 10 Conn. 322); but he can if several acts of trespass are alleged (Cheswell *v.* Chapman, 42 N. H. 47).

76. Emanuel *v.* Cocke, 6 Dana (Ky.) 212.

77. See cases cited *infra*, this note.

On a plea of liberum tenementum to a declaration describing the land generally plaintiff should new assign, describing it more particularly. Halsey *v.* Matthews, 3 Ind. 404; Hawke *v.* Bacon, 2 Taunt. 156, 11 Rev. Rep. 545.

Where the plea justifies the whole time averred plaintiff must new assign for an unreasonable continuance on his premises. Straight *v.* Hanchett, 23 Ill. App. 584.

Where authority to take goods is alleged plaintiff may new assign that the taking was outside the authority. Martin *v.* Prowattain, 3 Phila. (Pa.) 463.

That defendant exceeded his right to clean out a race on plaintiff's land may be new assigned under Md. Pub. Gen. Laws, art. 75, § 24, subs. 78. Haines *v.* Haines, 104 Md. 208, 64 Atl. 1044.

Where the entry is justified plaintiff may new assign matter alleged as aggravation (Grout *v.* Knapp, 40 Vt. 163); as the removal of personalty (Warner *v.* Hoisington, 42 Vt. 94); or an assault (Kavanagh *v.* Gudge, 1 D. & L. 928, 8 Jur. 362, 3 L. J. C. P. 99, 7 M. & C. 316, 7 Scott N. R. 1025, 49 E. C. L. 316).

78. See cases cited *infra*, this note.

Title to land pleaded by defendant is not a counter-claim so as to allow a reply under the New York code. Williams *v.* Upton, 8 How. Pr. (N. Y.) 205.

Defenses stated by way of notice.—No reply is necessary to a defense which is stated by way of notice under the general issue (Palmer *v.* Dougherty, 33 Me. 502, 54 Am. Dec. 636; Lawton *v.* Cardell, 22 Vt. 524); but all defenses are available as if it had been (Fullam *v.* Stearns, 30 Vt. 443; Keyes *v.* Howe, 18 Vt. 411; Williams *v.* Holmes, 2 Wis. 129).

In trespass quare clausum and debauching plaintiff's daughter plaintiff can rely on the last without new assigning it after plea of license. Hubbell *v.* Wheeler, 2 Aik. (Vt.) 359.

A new assignment is neither necessary nor proper to more particularly set forth the cause of action under the New York code. Stewart *v.* Wallis, 30 Barb. (N. Y.) 344.

79. Vreeland *v.* Berry, 21 N. J. L. 183. Where an easement of drainage is alleged, plaintiff may show under a traverse that defendant opened it larger than he had a right (Chestnut Hill, etc., Turnpike Co. *v.* Piper, 77 Pa. St. 432); or if leave and license is alleged, and some of the trespasses were committed after it was revoked that can be shown (Hayward *v.* Grant, 1 C. & P. 448, 12 E. C. L. 262); or if the license referred to part only (Thompson *v.* Van Buskirk, 14 U. C. Q. B. 388).

80. Vreeland *v.* Berry, 21 N. J. L. 183.

81. See cases cited *infra*, this note.

Adverse possession for the statutory period is a good reply to a plea of *liberum tenementum*. Crockett *v.* Lashbrook, 5 T. B. Mon. (Ky.) 530, 17 Am. Dec. 98.

Loss of an easement pleaded by non-user and plaintiff's adverse possession is a good reply. Wilmot *v.* Yazoo, etc., R. Co., 76 Miss. 374, 24 So. 701.

82. Hayden *v.* Shed, 11 Mass. 500.

83. Hyatt *v.* Wood, 4 Johns. (N. Y.) 150, 4 Am. Dec. 258.

Peaceable possession is not a good reply to a plea of title without showing how such possession was consistent with defendant's title. Rose *v.* Ruyle, 46 Ill. App. 17.

84. Spear *v.* Bicknell, 5 Mass. 125, holding that prescriptive right to maintain a gate is a good reply to a plea that the close was a highway and the gate encumbered it.

85. Great Falls Co. *v.* Worster, 15 N. H. 412; Hyatt *v.* Wood, 4 Johns. (N. Y.) 150, 4 Am. Dec. 258; Ross *v.* McConaghy, 13 U. C. Q. B. 444.

86. Great Falls Co. *v.* Worster, 15 N. H. 412.

87. Great Falls Co. *v.* Worster, 15 N. H. 412; Parish *v.* Rigdon, 12 Ohio 191. Failure to follow out the statute where sheep were taken damage feasant so that defendant became a trespasser *ab initio* cannot be shown under the replication *de injuria*. George *v.* West, 52 Vt. 645.

88. Hamilton *v.* Calder, 23 N. Brunsw. 373.

construed.[89] Where plaintiff replies to a plea of *liberum tenementum* by setting up title in himself, the reply not being the proper one, and possession being sufficient to maintain the action, which is admitted by the plea, the court will construe the reply as a denial only of defendant's plea of title, and treat the rest as surplusage.[90]

(v) *Rejoinder.* Where plaintiff traverses the justification, no rejoinder should be made.[91] It is not necessary to take issue on an immaterial traverse.[92] Where plaintiff new assigns trespasses *extra viam* defendant should deny them if he claims that all the acts were done on the way.[93]

(vi) *Departure in Pleadings.* A pleading which is inconsistent with a previous pleading of the same party is bad as being a departure.[94]

(vii) *Joinder of Causes of Action* [95] — (a) *Counts.* Counts for common-law trespass and for enhanced damages for trespass under a statute may be joined,[96] and ejectment may be joined with a statutory action for treble damages for forcible disseizin;[97] but an action to condemn land should not be consolidated with one for trespass.[98] Separate entries on land are properly united in one action of trespass,[99] and counts for distinct trespass on lands and personalty are

89. Spear *v.* Bicknell, 5 Mass. 125 (holding that where plaintiff alleges a right to maintain a gate on a highway where found necessary to protect the grass, an allegation that she found it necessary is good); Austin *v.* Waddell, 10 Mo. 705 (where to a statutory defense for the taking of timber by the overseer of woods, that it was on the "nearest unimproved lands," a reply *in hæc verba* denies both the location and condition of the land); Williams *v.* Price, 1 L. J. K. B. 258 (holding that to a statutory plea of tender of a certain sum, as damages, and allegation that it was sufficient, defendant's denial of the tender of "said sum" was held good).

90. Lavin *v.* Dodge, 30 R. I. 8, 73 Atl. 376.

91. Lewis *v.* Cooke, 1 Harr. & M. (Md.) 159 (holding that to a plea of entry under writ of habere facias, to which plaintiff replied *de injuria,* a rejoinder restating the writ and concluding to the country is bad on demurrer); Outcalt *v.* Durling, 25 N. J. L. 443 (holding that where plaintiff traverses a plea of title and avers title in himself the last may be rejected as surplusage).

92. Low *v.* Ross, 3 Me. 256, holding that to a plea of title where the close was not described particularly, plaintiff new assigned describing the close and also traversed and defendant pleaded not guilty, ignoring the traverse of his plea. It was held proper as it was an immaterial traverse.

93. Hodgkinson *v.* Donaldson, 2 U. C. Q. B. 539.

94. Brougham *v.* Balfour, 3 U. C. C. P. 114.

What amounts to a departure.— Trespass *quare clausum fregit*; plea, soil, and freehold; reply, a demise; rejoinder; license; plaintiff traversed this and new assigned other trespasses; plea to the new assignment of soil and freehold. Brougham *v.* Balfour, 3 U. C. C. P. 114.

What does not amount to a departure.— Complaint for wrongfully raising an embankment and flooding plaintiff's house; plea, an act of parliament, and reply, wrongful and negligent construction (Brine *v.* Great Western, etc., R. Co., 2 B. & S. 402, 8 Jur. N. S. 410, 31 L. J. Q. B. 101, 6 L. T. Rep. N. S. 50, 10 Wkly. Rep. 341, 110 E. C. L. 402); action for cutting trees, plea of a contractual right, reply denying the contract granted such right (Roots *v.* Boring Junction Lumber Co., 50 Oreg. 298, 92 Pac. 811, 94 Pac. 182); trespass *quare clausum fregit*; plea *liberum tenementum*; reply, lease; rejoinder; reservation of right of entry (Dutton *v.* Holden, 4 Wend. (N. Y.) 643).

95. **Joinder of trespass and assumpsit** see Joinder and Splitting Causes of Action, 23 Cyc. 393.

Joinder of trespass and case see Joinder and Splitting of Actions, 23 Cyc. 391, 394.

Joinder of trespass and debt see Joinder and Splitting Causes of Action, 23 Cyc. 393.

Joinder of trespass and false imprisonment see Joinder and Splitting of Actions, 23 Cyc. 398.

Joinder of trespass and libel or slander see Joinder and Splitting of Actions, 23 Cyc. 399.

Joinder of trespass and malicious abuse of process see Joinder and Splitting Causes of Action, 23 Cyc. 398.

Joinder of trespass and malicious prosecution see Joinder and Splitting of Actions, 23 Cyc. 399.

Joinder of trespass and pound breach see Joinder and Splitting of Actions, 23 Cyc. 398.

Joinder of trespass and trover see Joinder and Splitting Causes of Action, 23 Cyc. 391, 394, 395.

Joinder of trespass and use and occupation see Use and Occupation.

96. Withington *v.* Young, 4 Mo. 564; Jackson *v.* Gunton, 26 Pa. Super. Ct. 203 [*affirmed* in 218 Pa. St. 275, 67 Atl. 467]. *Contra,* Morrison *v.* Bedell, 22 N. H. 234.

97. Compton *v.* The Chelsea, 139 N. Y. 538, 34 N. E. 1090.

98. Georgia R., etc., Co. *v.* Gardner, 118 Ga. 723, 45 S. E. 600.

99. Whatling *v.* Nash, 41 Hun (N. Y.) 579; Gans *v.* Hughes, 16 N. Y. Suppl. 615.

properly joined, as trespass *quare clausum* and trespass *de bonis*.[1] A count alleging that defendant committed the act is properly joined with one alleging that his agent did it.[2] Successive trespasses of the same kind to personalty can be alleged in a single count with a *continuando*,[3] for where a number of separate acts of trespass in taking goods are parts of a whole transaction, the whole constitutes a single trespass,[4] and an entry on several closes at the same time is a single act of trespass for which recovery can be had in a single count.[5] A series of acts against plaintiff's possession under one plan can be united in a single cause of action.[6]

(B) *Aggravations Alleged in a Single Count.* In an action for trespass to realty plaintiff may in the same count with the allegation of the trespass allege damage to the realty as aggravation[7] and injury to the person, or to chattels, or the like; as for instance, conversion of chattels,[8] injury to business and taking of fixtures,[9] injury to personalty[10] or fixtures,[11] injury to the person,[12] assault and battery,[13] frightening plaintiff's wife,[14] which need not be alleged to give a cause of action[15] or proved to entitle plaintiff to recover;[16] nor will disproof of it defeat the action.[17] Proof of special damages alone will not entitle plaintiff to recover,[18] for there can be no recovery if the entry is not proved,[19] or if the entry

1. Wilson *v.* Johnson, 1 Greene (Iowa) 147; Guffey *v.* Free, 19 Pa. St. 384; Floyd *v.* Floyd, 4 Rich. (S. C.) 23.

2. Illinois Cent. R. Co. *v.* Latimer, 128 Ill. 163, 21 N. E. 7 [*affirming* 28 Ill. App. 552].

3. Folger *v.* Fields, 12 Cush. (Mass.) 93.

4. Harris *v.* Rosenberg, 43 Conn. 227 (removal of goods by one of defendants while the other selected more which they both took); Browning *v.* Skillman, 24 N. J. L. 351 (levy one day, removal the next, sale the next); Wilson *v.* Higgins, 4 Ohio Dec. (Reprint) 381, 2 Clev. L. Rep. 73 (holding that where the trespass sued for consists in digging a ditch and flooding the land, the mere fact that the trespass is laid as on different days between given dates gives no right to plaintiff to have the alleged trespasses separated and numbered, as there is in fact but one cause of action); Trout *v.* Kennedy, 47 Pa. St. 387 (hauling away lumber under claim of right, although part was hauled after action brought). But see Gunn *v.* Fellows, 41 Hun (N. Y.) 257, holding that under a section of the code requiring each cause of action to be separate and numbered, assault and battery must be separated from the trespass to property and numbered.

5. Halligan *v.* Chicago, etc., R. Co., 15 Ill. 558.

6. O'Horo *v.* Kelsey, 60 N. Y. App. Div. 604, 70 N. Y. Suppl. 14, such as forcible trespass, assault, false statements, and attempt to obtain process illegally with purpose of ousting plaintiff from realty.

7. Cook *v.* Redman, 45 Mo. App. 397.

8. *Alabama.*— Showers Furniture Co. *v.* Brake, 158 Ala. 639, 48 So. 89; Southern Suspender Co. *v.* Von Borries, 91 Ala. 507, 8 So. 367.

Maryland.— Medairy *v.* McAllister, 97 Md. 488, 55 Atl. 461; Barton Coal Co. *v.* Cox, 39 Md. 1, 17 Am. Rep. 525.

Michigan.— Waldo *v.* Waldo, 52 Mich. 91, 94, 17 N. W. 709, 710.

Texas.— Carter *v.* Wallace, 2 Tex. 206.

Wisconsin.— Merriman *v.* McCormick Harvesting Mach. Co., 86 Wis. 142, 56 N. W. 743.

9. Gans *v.* Hughes, 16 N. Y. Suppl. 615.

10. Van Leuven *v.* Lyke, 1 N. Y. 515, 49 Am. Dec. 346 (killing an animal); Whatling *v.* Nash, 41 Hun (N. Y.) 579; Dunckle *v.* Kocker, 11 Barb. (N. Y.) 387 (injuring a horse).

11. Gans *v.* Hughes, 16 N. Y. Suppl. 615.

12. Waldo *v.* Waldo, 52 Mich. 91, 94, 17 N. W. 709, 710.

13. Stowers Furniture Co. *v.* Brake, 158 Ala. 639, 48 So. 89 (where the alleged trespasses are parts of the same transaction); Gilbert *v.* Pritchard, 41 Hun (N. Y.) 46 (although barred as such by the statute of limitations); Burson *v.* Cox, 6 Baxt. (Tenn.) 360.

14. Razzo *v.* Varni, (Cal. 1889) 21 Pac. 762. *Contra,* Lawrence *v.* Phelps, 2 Root (Conn.) 334. *Compare* Lamb *v.* Harbaugh, 105 Cal. 680, 39 Pac. 56, holding in trespass to realty allegations of injury to plaintiff's character and health and putting her in fear are improper.

15. Donohue *v.* Dyer, 23 Ind. 521 (holding that lack of allegation of loss of service does not vitiate a declaration for breaking and entering, and ravishing plaintiff's daughter); Rankin *v.* Sievern, etc., R. Co., 58 S. C. 532, 36 S. E. 997 (cutting trees).

16. Halsey *v.* Matthews, 3 Ind. 404; Mundell *v.* Perry, 2 Gill & J. (Md.) 193 (cutting trees); Foote *v.* Merrill, 54 N. H. 490, 20 Am. Rep. 151 (cutting trees); Doss *v.* Doss, 14 L. T. Rep. N. S. 646, 14 Wkly. Rep. 590.

17. Pico *v.* Colimas, 32 Cal. 578 (tearing down a fence); Phelps *v.* Morse, 9 Gray (Mass.) 207 (taking posts).

18. Pike *v.* Heinmann, 89 Ill. App. 642 (injury to person or property after entry); Eames *v.* Prentice, 8 Cush. (Mass.) 337 (taking personalty); Joseph Dessert Lumber Co. *v.* Wadleigh, 103 Wis. 318, 79 N. W. 237 (conversion of timber).

19. *California.*— Pico *v.* Colimas, 32 Cal. 578, tearing down a gate.

is justified,[20] even where the distinction between trespass and case has been abolished by statute.[21]

(VIII) *AMENDMENTS.* Where the pleadings fail to set forth the real issue they may be amended,[22] even after the evidence is closed,[23] or even after verdict,[24] provided the complaint as amended would still be consistent with the original case and issue.[25] So plaintiff may amend the declaration by adding a count for a similar trespass, if he adheres to his original cause of action;[26] but a new cause of action cannot be added by amendment,[27] at least after the expiration of the period of the statute of limitations.[28] An amended pleading which is bad will be stricken out on motion without demurrer.[29] Where it appears that trespass is not the proper form of action, but some action may lie, plaintiff may on terms change the form of action by amendment,[30] and the scope of the action may be enlarged if the intent appears in the complaint.[31]

(IX) *ADMISSIONS IN PLEADINGS.* A failure to deny the allegations of the complaint or declaration admits them; and plaintiff need prove only the allegations denied.[32] So a plea of title to land in defendant *liberum tenementum* admits

Illinois.— Reed *v.* Peoria, etc., R. Co., 18 Ill. 403, personal injuries.

Massachusetts.— Beers *v.* McGinnis, 191 Mass. 279, 77 N. E. 768; Merriam *v.* Willis, 10 Allen 118. But see Sampson *v.* Henry, 13 Pick. 36, assault and battery.

Michigan.— U. S. Manufacturing Co. *v.* Stevens, 52 Mich. 330, 17 N. W. 934, treading down grass.

Missouri.— Davis *v.* Wood, 7 Mo. 162, taking personalty.

New York.— Frost *v.* Duncan, 19 Barb. 560 (cutting trees); Howe *v.* Willson, 1 Den. 181 (taking personalty).

Ohio.— Brown *v.* Lake, 29 Ohio St. 64, removing roof of house and consequential damages therefrom.

But see Haines *v.* Haines, 104 Md. 208, 64 Atl. 1044; Hubbell *v.* Wheeler, 2 Aik. (Vt.) 359 (debauching plaintiff's daughter); Lindquest *v.* Union Pac. R. Co., 33 Fed. 372 (building a railroad on another's land and unlawfully using it).

20. Taylor *v.* Cole, 1 H. Bl. 555, 3 T. R. 292, 1 Rev. Rep. 706, 100 Eng. Reprint 582, expelling plaintiff.

21. Sawyer *v.* Goodwin, 34 Me. 419, consequential damages.

22. Lynn *v.* Comer, 2 F. & F. 244.

23. Pollard *v.* Barrows, 77 Vt. 1, 58 Atl. 726, misdescription of land by omitting the *locus.*

24. Beers *v.* McGinnis, 191 Mass. 279, 77 N. E. 768.

25. Rhemke *v.* Clinton, 2 Utah 230.

Amendments held permissible.—A claim for treble damages may be amended to one for single damages. Rhemke *v.* Clinton, 2 Utah 230. A claim for use and occupation may be amended to one for trespass on the same facts, under a statute allowing amendment "if substantial justice will be promoted thereby." Bunke *v.* New York Tel. Co., 110 N. Y. App. Div. 241, 97 N. Y. Suppl. 66 [*affirming* 46 Misc. 97, 91 N. Y. Suppl. 390, 34 N. Y. Civ. Proc. 170, and *affirmed* in 188 N. Y. 600, 81 N. E. 1161].

26. Knapp *v.* Hartung, 73 Pa. St. 290, holding that in trespass *quare clausum* he may add a count for taking hickory timber to counts for taking oak, ash, etc.

27. Bartlett *v.* Perkins, 13 Me. 87, holding that a count for usurpation of the fee cannot be added to one for cutting grass.

To a count for trespass to realty a count for purely consequential damages cannot be added (Sawyer *v.* Goodwin, 34 Me. 419); nor one for treble damages under a statute (Fairchild *v.* Dunbar Furnace Co., 128 Pa. St. 485, 18 Atl. 443, 444).

28. Mahoney *v.* Park Steel Co., 34 Pittsb. Leg. J. N. S. (Pa.) 149.

29. Parker *v.* Lewis, 18 Fed. Cas. No. 10,741*a*, Hempst. 72.

30. Lloyd *v.* Wunderlich, 2 Del. Co. (Pa.) 377, as where plaintiff has a right of way instead of a title.

31. Fincannon *v.* Sudderth, 144 N. C. 587, 57 S. E. 337, holding that under the code trespass may be enlarged to include an action to settle a boundary.

32. Harris *v.* Sneeden, 104 N. C. 369, 10 S. E. 477, code, every material allegation not denied admitted.

For instance.— Title properly alleged is admitted by failure to deny it (Norton *v.* Young, 6 Colo. App. 187, 40 Pac. 156; Althause *v.* Rice, 4 E. D. Smith (N. Y.) 347); even though the land is wild and vacant (O'Reilly *v.* Davies, 4 Sandf. (N. Y.) 722); and so possession if not denied is admitted (Falmouth *v.* Vaughan, 11 Nova Scotia 438; Grotto *v.* Farish, 3 Nova Scotia 291). A plea of not guilty in trespass *quare clausum* admits plaintiff's title and right to possession, if they are well alleged (Nafe *v.* Hudson, 19 Tex. Civ. App. 381, 47 S. W. 675); and a plea of not guilty admits the correctness of the description of the land (Merritt *v.* Coxeter, 4 N. Brunsw. 385). Under the Utah practice act a failure to deny quantity and value admits them (Rhemke *v.* Clinton, 2 Utah 230); but by statute in Kentucky the amount of damages must be proved, although not denied (Mize *v.* Jackson, 32 S. W. 467, 17 Ky. L. Rep. 750).

In Georgia plaintiff had formerly to prove all the allegations of his complaint. Majette

possession in plaintiff;[33] and the doing of the act complained of,[34] and a plea of leave and license admits possession of plaintiff and entry by defendant.[35] A plea of justification, however, does not admit facts not alleged in the declaration.[36] But a plea in justification, when not accompanied by a denial of the acts alleged, admits the facts alleged in the complaint or declaration.[37] Where, however, a general denial is joined with the justification, plaintiff must prove all the allegations of his complaint or declaration, since nothing is admitted.[38] A replication confessing and avoiding admits the allegations of the plea.[39] And a new assignment is held to admit the plea.[40] So it has been held that a motion to dismiss based on a certain state of facts admits their existence.[41] Other admissions

v. Bewick Lumber Co., 104 Ga. 613, 30 S. E. 777.

33. *Florida.*— Tison *v.* Broward, 17 Fla. 465.

Illinois.— Ft. Dearborn Lodge *v.* Klein, 115 Ill. 177, 3 N. E. 272, 56 Am. Rep. 133.

Maryland.— Keener *v.* Kauffman, 16 Md. 296.

New Hampshire.— Profile, etc., Hotels Co. *v.* Bickford, 72 N. H. 73, 54 Atl. 699.

New Jersey.— Phillips *v.* Kent, 23 N. J. L. 155; Appleby *v.* Obert, 16 N. J. L. 336.

Rhode Island.— Lavin *v.* Dodge, 30 R. I. 8, 73 Atl. 376; Wilbur *v.* Peckham, 22 R. I. 284, 47 Atl. 597.

South Carolina.— Millet *v.* Singleton, 1 Nott & M. 355.

England.— Doe *v.* Wright, 10 A. & E. 763, 2 P. & D. 672, 37 E. C. L. 401, 113 Eng. Reprint 289.

Canada.— Grotto *v.* Farish, 3 Nova Scotia 291.

See 46 Cent. Dig. tit. "Trespass," § 96.

34. *Florida.*— Tison *v.* Broward, 17 Fla. 465.

New York.— Marsh *v.* Berry, 7 Cow. 344.

Pennsylvania.— Fisher *v.* Morris, 5 Whart. 358.

Rhode Island.— Lavin *v.* Doge, 30 R. I. 8, 73 Atl. 376; Carpenter *v.* Logee, 24 R. I. 383, 53 Atl. 288.

South Carolina.— Caruth *v.* Allen, 2 McCord 226; Hext *v.* Jarrell, 2 Strobh. 172.

England.— Grice *v.* Lever, 9 Dowl. P. C. 246, 10 L. J. Exch. 337, 7 M. & W. 593.

Canada.— Munn *v.* Galbraith, 13 U. C. C. P. 75.

See 46 Cent. Dig. tit. "Trespass," § 96.

Illustrations.— Thus a plea that the trespass to realty was under a conveyance admits the act (Asher *v.* Helton, 101 S. W. 350, 31 Ky. L. Rep. 9); and a plea of title to one half the land and a denial of plaintiff's title to the other half each admits trespass; and plaintiff can recover on proof of his title to the second half, although the jury found the only trespass was on the first half and that defendant owned it (Munn *v.* Galbraith, 14 U. C. C. P. 75).

35. Ragain *v.* Stout, 182 Ill. 645, 55 N. E. 529.

36. Law *v.* Hempstead, 10 Conn. 23, holding that a plea of right of way admits possession, but not title in plaintiff or in his grantors.

37. Burton *v.* Sweaney, 4 Mo. 1, in which it was said that at common law, before a denial could be pleaded with a plea in justification, a plea in justification would be invalid unless it confessed the declaration. For this purpose, however, it is sufficient to admit the taking of "the horses" in the declaration mentioned.

Admission of use of force.— Plea alleging that the taking possession of realty was "without unnecessary force" admits force. Tallman *v.* Barnes, 54 Wis. 181, 11 N. W. 478.

Admission of quantity.—A plea admitting the taking of the corn in the declaration mentioned admits the quantity. Wells *v.* Wilson, 3 Bibb (Ky.) 264.

38. *Alabama.*— Davis *v.* Young, 20 Ala. 151.

California.— Odd Fellows' Sav. Bank *v.* Turman, (1892) 30 Pac. 966, general denial and plea that the land was not fenced.

Indiana.—Anthony *v.* Gilbert, 4 Blackf. 348.

New York.— Walrath *v.* Barton, 11 Barb. 382.

Vermont.— Child *v.* Allen, 33 Vt. 476.

See 46 Cent. Dig. tit. "Trespass," § 96.

Not guilty and denial of title puts the burden on plaintiff to prove his whole case. West Chicago St. R. Co. *v.* Morrison, etc., Co., 160 Ill. 288, 43 N. E. 393; Jennings *v.* Maddox, 8 B. Mon. (Ky.) 430; Tuthill *v.* Clark, 11 Wend. (N. Y.) 642; Whitney *v.* Backus, 149 Pa. St. 29, 24 Atl. 51; Hext *v.* Jarrell, 2 Strobh. (S. C.) 172.

39. Keener *v.* Kauffman, 16 Md. 296, holding that a replication of a lease to a plea of *liberum tenementum* admits the freehold to be in defendant.

40. Dand *v.* Kingscote, 9 L. J. Exch. 279, 6 M. & W. 174, 2 R. & Can. Cas. 27.

41. Harrison *v.* Brooklyn, etc., R. Co., 100 N. Y. 621, 3 N. E. 187, holding that, although a complaint was so indefinite in form that it was more appropriate to an action of ejectment than trespass, yet where defendant at the outset of the trial moved to dismiss on the ground that it was in ejectment, and that the averments showed trespass only, and then moved that plaintiff elect between ejectment and trespass, and at the close again moved to dismiss on the ground that the only acts proven were trespass, all of which motions were denied, defendant cannot claim, on appeal from a verdict of trespass, that the complaint did not set up a cause of action in trespass; if the evidence proved a trespass, as, in making his first motion, he as-

may be made by the pleadings, as has already been shown in another treatise appearing in this work.[42]

(x) *VARIANCE.* As in other actions,[43] the proof must correspond with the pleadings. Plaintiff must prove the facts of his case substantially as he has set them out in his declaration or complaint. Title or right must be proved as alleged[44] and also the description of the property,[45] and the alleged acts of trespass,[46] except in unessential details.[47] A material variance between pleading and proof is fatal;[48]

sumed that the complaint charged trespass, and in his second that trespass had been proved.

42. McBurney *v.* Cutler, 18 Barb. (N. Y.) 203.

Instances.— Claim of title from the person through whom plaintiff claims admits his title (McBurney *v.* Cutler, 18 Barb. (N. Y.) 203); but an averment in a complaint of maintenance of a bridge by defendant does not admit title in him to the ground under it (Peoria, etc., R. Co. *v.* Attica, etc., R. Co., 154 Ind. 218, 56 N. E. 210); and allegation of numerous and continuous wrongful acts of trespass does not amount to an admission of possession in defendant (Arizona, etc., R. Co. *v.* Denver, etc., R. Co., 13 N. M. 345, 84 Pac. 1018).

43. See PLEADING, 31 Cyc. 700.

44. *Alabama.*— Snedecor *v.* Pope, 143 Ala. 275, 39 So. 318.

Colorado.— Mott *v.* Scott, 35 Colo. 68, 83 Pac. 779, holding that right as assignee of a cause of action cannot be shown where plaintiff claimed as owner of the land trespassed on.

Illinois.— Litchfield *v.* Keagy, 78 Ill. App. 398.

Indiana.— Broker *v.* Scobey, 56 Ind. 588.

Iowa.— Heinrichs *v.* Terrell, 65 Iowa 25, 21 N. W. 171.

Massachusetts.— Putnam *v.* Lewis, 133 Mass. 264, holding that allegation of interference with a right to cut timber is not sustained by proof of possession of the timber.

Michigan.— Taylor *v.* McConnell, 53 Mich. 587, 19 N. W. 196.

Nebraska.— Nelson *v.* Jenkins, 42 Nebr. 133, 60 N. W. 311.

See 46 Cent. Dig. tit. "Trespass," § 107 *et seq.*

The particular title alleged must be proved. Great Falls Co. *v.* Worster, 15 N. H. 412.

Where title is alleged to the whole of a tract of land it need only be proved as to the *locus.* Tyson *v.* Shueey, 5 Md. 540.

Allegation of title and proof of easement.— *Locus* described as belonging to plaintiff; proof cannot be admitted that it belongs to defendant, but plaintiff has an easement. Shafer *v.* Smith, 7 Harr. & J. (Md.) 67.

45. Graham *v.* Sellers, 70 Ga. 720 (holding that injury to trees used to make turpentine cannot be recovered in trespass to "mill timber"); Benton *v.* Beattie, 63 Vt. 186, 22 Atl. 422 (holding that in trespass for taking spruce trees on a certain lot there can be no recovery for spruce trees on a different lot).

Abuttals.— In trespass *quare clausum* it is necessary to prove the abuttals of the close (Tyson *v.* Shueey, 5 Md. 540; Wheeler *v.* Rowell, 7 N. H. 515; Hooker *v.* Hicock, 2 Aik. (Vt.) 172; Fraser *v.* Hunter, 9 Fed. Cas. No. 5,063, 5 Cranch C. C. 470); or other special description (Mattice *v.* Farr, Taylor (U. C.) 218); but abuttals will not be strictly construed (Holbrook *v.* McBride, 4 Gray (Mass.) 215, holding that a highway comes within the term "road"; Palmer *v.* Tuttle, 39 N. H. 486, holding that land need not be bounded by monuments but may be by abutting land generally; Rollins *v.* Varney, 22 N. H. 99, holding that points of the compass need not be exactly stated; Wheeler *v.* Rowell, 6 N. H. 215, 7 N. H. 515, holding that a statement that land abuts on another's on the south does not mean all along the line; Hooker *v.* Hicock, 2 Aik. (Vt.) 172; Fraser *v.* Hunter, 9 Fed. Cas. No. 5,063, 5 Cranch C. C. 470); and need not be proved exactly as alleged (Barden *v.* Smith, 7 Wis. 439; Harrison *v.* Brown, 5 Wis. 27, holding that where three abutters on the east are stated it is enough to prove two. And see Pitt *v.* Shew, 4 B. & Ald. 206, 6 E. C. L. 453, 106 Eng. Reprint 913).

An allegation of breaking plaintiff's close is proved by an entry on any part. Porter *v.* Sullivan, 7 Gray (Mass.) 441.

46. Ropps *v.* Barker, 4 Pick. (Mass.) 239 (as breaking and entering); Adler *v.* Parr, 34 Misc. (N. Y.) 482, 70 N. Y. Suppl. 255 (an erection was upon plaintiff's land). But acts coming within the description are sufficient however slight they are. Thus the projection of eaves on plaintiff's land is sufficient proof of the allegation of forcibly building a barn thereon (Smith *v.* Smith, 110 Mass. 302); and an allegation of the erection of an obstruction over plaintiff's land proved by showing a board nailed to defendant's house but standing out over plaintiff's land (Hennessy *v.* Anstock, 19 Pa. Super. Ct. 644). So expulsion from part of a close sustains a count for expulsion. Gesner *v.* Cairns, 7 N. Brunsw. 595.

47. Williams *v.* Meadville, etc., R. Co., 31 Pa. Super. Ct. 580.

48. See cases cited *infra,* this note.

The rule has been applied: Where possession in several is alleged and proof is of possession in one (Holmes *v.* Bagge, 1 E. & B. 782, 17 Jur. 1095, 22 L. J. Q. B. 301, 72 E. C. L. 782); where the plea is that an assault was made to prevent plaintiffs driving away defendant's gig and proof is that plaintiff seized the horse's head to obtain defendant's name and address (Gaylard *v.* Morris, 3 Exch. 695, 18 L. J. Exch. 297); where under an allegation of joint recovery in trespass for mesne profits, proof is made that the demise was by one alone (Ashton *v.* Keesar,

and the evidence must be confined to proof of the allegations of the pleadings.[49] Evidence of any facts within the scope of the allegations is, however, proper.[50]

(xi) *Waiver of Defects and Objections and Aider by Proceedings at the Trial or by Verdict or Judgment.* Defects of form are waived if objection is not taken specially,[51] and are cured by verdict.[52] But a

5 U. C. Q. B. O. S. 325); or where there is a material variance between the land as described in the petition and as proved (Shields *v.* Heard, 53 S. W. 820, 21 Ky. L. Rep. 992; Howie *v.* California Brewery Co., 35 Mont. 264, 88 Pac. 1007); or, in trespass for mesne profits, between the judgment in ejectment alleged and proved (Garrion *v.* Woodruff, 8 U. C. Q. B. 328).

49. See cases cited *infra*, this note.

Place described.—In trespass *quare clausum* evidence must be confined to the *locus* described. Sullivan *v.* Clements, 1 Colo. 261; Waltemeyer *v.* Wisconsin, etc., R. Co., 71 Iowa 626, 33 N. W. 140; Longfellow *v.* Quimby, 29 Me. 196, 48 Am. Dec. 525; White *v.* Moseley, 5 Pick. (Mass.) 230; Knowles *v.* Dow, 20 N. H. 135; Barnhart *v.* Ehrhart, 33 Oreg. 274, 54 Pac. 195; Jennings *v.* Meldrum, 15 Oreg. 629, 16 Pac. 646; Manning *v.* McDonnell, 3 Brev. (S. C.) 15.

Justification.—A justification not pleaded cannot be shown (Hudson *v.* Miller, 97 Ill. App. 74; Fidler *v.* Smith, 10 Iowa 587); nor can evidence of one justification be given in evidence under a plea of another. Thus under plea of accord and satisfaction, arbitration and award is not admissible (Hubbert *v.* Collier, 6 Ala. 269); and under a plea of an unqualified right to raise water by a dam, evidence of a qualified right is irrelevant (Corbin *v.* Brown, 14 Pick. (Mass.) 306). On plea of license title cannot be shown (Coan *v.* Osgood, 15 Barb. (N. Y.) 583); and evidence of a several freehold is not admissible under plea of a joint freehold (Williams *v.* Holmes, 2 Wis. 129). Defendant who pleads a justification must prove it as he alleges it. Thus a license alleged must be coextensive with the trespass. Thompson *v.* Van Buskirk, 14 U. C. Q. B. 388. If divers trespasses are alleged and the license was revoked before all were committed, plaintiff is entitled to judgment. Marrs *v.* Davidson, 26 U. C. Q. B. 641. In an action by several plaintiffs when a license is alleged in defense, it is not proved by showing a license from one plaintiff only. Murray *v.* Haverty, 70 Ill. 318. A license to erect and maintain a wall is not proved by a license to erect merely. Alexander *v.* Bonnin, Arn. 337, 4 Bing. N. Cas. 799, 8 L. J. C. P. 53, 6 Scott 611, 33 E. C. L. 983. Under the plea of license a lease of land cannot be shown (Cooper *v.* Adams, 6 Cush. (Mass.) 87; Johnson *v.* Carter, 16 Mass. 443); nor a right of entry by reason of purchase of trees (Howe *v.* Batchelder, 49 N. H. 204); or of purchase of a growing crop (Lunn *v.* Turner, 4 U. C. Q. B. 282); nor a license other than an express license (Moxon *v.* Savage, 2 F. & F. 182; Williams *v.* Morris, 11 L. J. Exch. 126, 8 M. & W. 488; Lunn *v.* Turner, 4 U. C. Q. B. 282). But a plea of license is sustained by evidence of a stipulation in a lease of land giving a right to take possession on default (Kavanagh *v.* Gudge, 1 D. & L. 928, 8 Jur. 362, 13 L. J. C. P. 99, 7 M. & C. 316, 7 Scott N. R. 1025, 49 E. C. L. 316); and a plea of *liberum tenementum* is proved by proof of title to the *locus* only, not the whole close (Profile, etc., Hotels Co. *v.* Bickford, 72 N. H. 73, 54 Atl. 699; Rich *v.* Rich, 16 Wend. (N. Y.) 663; Providence *v.* Adams, 10 R. I. 184; Smith *v.* Royston, 1 Dowl. P. C. N. S. 124, 10 L. J. Exch. 437, 8 M. & W. 381. *Contra*, Munn *v.* Galbraith, 13 U. C. C. P. 75); and defendant may show title to any part in the absence of proof of the exact place of trespass (Ware *v.* Johnson, 55 Mo. 500). A possessory right cannot be shown under plea of an easement (Darlington *v.* Painter, 7 Pa. St. 473); nor a particular easement under a plea of a general easement (Darlington *v.* Painter, *supra*); so under plea of a way, a way of necessity cannot be shown (Teed *v.* Beebe, 3 Nova Scotia 426); or a private way under a plea of a public way (Aiken *v.* Stewart, 63 Pa. St. 30); nor a license under a plea of contract (Carrington *v.* Roots, 6 L. J. Exch. 95, 2 M. & W. 248). And where a highway is alleged it is not proved by evidence of a usage, however long, of passing over a common. Emerson *v.* Wiley, 7 Pick. (Mass.) 68. A plea that defendant acted under "military orders" is not sustained by proof of verbal orders. Simpson *v.* Markwood, 6 Baxt. (Tenn.) 340. Where the allegation as to justification includes more than is necessary, the essential part only need be proved. Weld *v.* Brooks, 152 Mass. 297, 25 N. E. 719; Moriarty *v.* Brooks, 6 C. & P. 684, 25 E. C. L. 638. The rule as to proof of a justification is less rigid in case of notices given under the general issue by virtue of a statute than where the defense is pleaded. Manion *v.* Creigh, 37 Conn. 462.

50. Arrington *v.* Larrabee, 10 Cush. (Mass.) 512; Briggs *v.* Bowen, 60 N. Y. 454.

In trespass quare clausum plaintiff will not be restricted in proof to a less number of lots than is set forth in his complaint. Gardner *v.* Gooch, 48 Me. 487.

51. Stoneman-Zearing Lumber Co. *v.* McComb, 92 Ark. 297, 122 S. W. 648 (failure to give description and value of timber cut on each tract trespassed upon); Griffin *v.* Gilbert, 28 Conn. 493 (omission of allegation of force and arms); Foley *v.* McCarthy, 157 Mass. 474, 32 N. E. 669 (failure to describe the premises as prescribed by statute); Leatherbee *v.* Barrett, 152 Mass. 532, 25 N. E. 965; Bean *v.* Green, 4 Cush. (Mass.) 279 (failure to allege quantity and value); Van Dyk *v.* Dodd, 6 N. J. L. 129 (failure to allege quantity and value); Higgins *v.* Hayward, 5 Vt. 73 (omission of use of word "force").

52. Peoria, etc., R. Co. *v.* Attica, etc., R.

verdict will not of itself cure the omission of an essential fact,[53] although proof of it at the trial will do so,[54] if evidence introduced for that purpose is not objected to.[55] Matters not within the issue may sometimes become a part of it and matters within it may be eliminated from it by the course of the trial. Thus, when at the trial evidence is admitted as if the pleadings raised a certain issue the case will be treated as if they did;[56] and so if plaintiff admits at the trial a justification not pleaded,[57] or if counsel treat it as pleaded,[58] or make no objection to it,[59] the verdict will not be disturbed; and if the trial is on the theory that the issue includes only certain points it will be so confined;[60] but admission without objection of evidence in aggravation before the principal trespass is proved does not preclude defendant from thereafter objecting to it on failure of such proof.[61]

(XII) *BENEFIT OF PLAINTIFF'S EVIDENCE SHOWING A DEFENSE NOT PLEADED.* According to some decisions defendant can take advantage of a bar to the action which was not pleaded by him but appears from plaintiff's evidence.[62] But in such cases plaintiff's evidence may be considered in mitigation of damages.[63]

(XIII) *PLEADINGS ON REMOVAL FROM JUSTICE'S COURT.* The pleadings on removal from a justice's court on plea of title must be the same as in the justice's court. Where title is pleaded below, that and that only can be relied on in the upper court,[64] and where the general issue was pleaded defendant cannot show title.[65] So where title and the general issue were pleaded below only the

Co., 154 Ind. 218, 56 N. E. 210 (holding that an averment in trespass to land that plaintiff was "owner" is sufficient after judgment); Ballard *v.* Leavell, 5 Call (Va.) 531 (trespass laid by way of recital instead of directly averred); Smith *v.* Smith, 37 N. Brunsw. 7 (holding that a verdict for expulsion and exclusion from realty and for profits will not be disturbed because recovered on a complaint in form for mesne profits).

53. Carlisle *v.* Weston, 1 Metc. (Mass.) 26, possession or title in plaintiff.

54. Copley *v.* Rose, 2 N. Y. 115, failure to allege title.

55. Columbia, etc., R. Co. *v.* Histogenetic Medicine Co., 14 Wash. 475, 45 Pac. 29, failure to allege that withholding of possession was wrongful.

56. Brown *v.* Hendrickson, 69 Iowa 749, 27 N. W. 914 (holding that where the declaration is in trespass, but the evidence establishes, if anything, an action on the case, it is too late to take objection after verdict if the evidence was not objected to); Pollard *v.* Barrows, 77 Vt. 1, 58 Atl. 726 (land misdescribed but case tried as if rightly described); Zwicker *v.* Morash, 34 Nova Scotia 555 (tenancy in common not pleaded but put in issue raised in the trial); Teed *v.* Beebe, 3 Nova Scotia 426 (right of way pleaded and way of necessity shown without objection); Comeau *v.* Le Blanc, 2 Nova Scotia Dec. 13 (private way pleaded but highway shown without objection).

57. Jenne *v.* Piper, 69 Vt. 497, 38 Atl. 147, right of way.

58. U. S. Pipe Line Co. *v.* Delaware, etc., R. Co., 62 N. J. L. 254, 41 Atl. 759, 42 L. R. A. 572.

59. South Baltimore Co. *v.* Muhlbach, 69 Md. 395, 16 Atl. 117, 1 L. R. A. 507, holding that the court should charge as to a defense of license shown but not pleaded if plaintiff does not object.

60. Emmons *v.* Quade, 176 Mo. 22, 75 S. W. 103 (holding that where the trial is on theory of wilful trespass, the use of the word "negligently" in the complaint does not warrant an instruction as to it); Miller *v.* Rambo, 66 N. J. L. 191, 49 Atl. 453 (holding that where injury to a lot is tried on the theory that damages were limited to compensation for diminished convenience, evidence of the cost of replacing a sewer on property is improperly admitted); Butman *v.* Wright, 16 N. H. 219 (holding that where in trespass *de bonis*, evidence of the taking was put in and defendant justified under legal process, plaintiff could not thereafter show abuse of the process); Miller *v.* Decher, 40 Barb. (N. Y.) 228 (holding that where trespass *quare clausum* is tried on the assumption that plaintiff has title, defendant cannot show a lease to a third person and possession by him under it).

61. Joseph Dessert Lumber Co. *v.* Wadleigh, 103 Wis. 318, 79 N. W. 237.

62. Peck *v.* Goss, 6 Heisk. (Tenn.) 108; Tacoma Light, etc., Co. *v.* Huson, 13 Wash. 124, 42 Pac. 536. *Contra*, Walker *v.* Hitchcock, 19 Vt. 634.

Illustrations.— A constable called by plaintiff to prove that he took as defendant's agent can show he attached as property of another, although that was not pleaded. Southwick *v.* Berry, 1 Pinn. (Wis.) 559. Where plaintiff by his evidence locates the trespass in a highway, defendant can show that he acted as overseer of highway. Wolf *v.* Holton, 61 Mich. 550, 28 N. W. 524.

63. Williams *v.* Hathaway, 20 R. I. 534, 40 Atl. 418.

64. Campfield *v.* Johnson, 21 N. J. L. 83; Phillips *v.* Phillips, 21 N. J. L. 42; Dover School House *v.* McFarlan, 14 N. J. L. 471; Tuthill *v.* Clark, 11 Wend. (N. Y.) 642.

65. Dewey *v.* Bordwell, 9 Wend. (N. Y.) 65.

title can be relied on above.[66] If other pleas are made, the remedy is by motion to strike out.[67] The plea of title includes any right of possession.[68] Where the statutory procedure for removal on title coming in issue is not followed by defendant, it is proper not to discontinue but to reject evidence of title at the trial.[69]

h. Evidence — (i) *Presumptions and Burden of Proof.* In general, the burden of proving facts is on the person who relies on them; therefore plaintiff must prove the allegations of his complaint.[70] And the wrong must be proved as alleged by plaintiff;[71] and where defendant has set up a justification, plaintiff must establish facts admitting the justification but avoiding it.[72] The burden of proof is on defendant to establish a justification pleaded by him.[73] An improper

66. Marsh *v.* Berry, 7 Cow. (N. Y.) 344.

67. Brotherton *v.* Wright, 15 Wend. (N. Y.) 237; Tuthill *v.* Clark, 11 Wend. (N. Y.) 642.

68. Campfield *v.* Johnson, 21 N. J. L. 83.

69. Randall *v.* Crandall, 6 Hill (N. Y.) 342.

70. Stoneman-Zearing Lumber Co. *v.* McComb, 92 Ark. 297, 122 S. W. 648; Warden *v.* Addington, 131 Ky. 296, 115 S. W. 241; Charleroi Timber, etc., Co. *v.* Licking Coal, etc., Co., (Ky. 1909) 116 S. W. 682; Ripy *v.* Less, (Tex. Civ. App. 1909) 118 S. W. 1084.

Applications of rule.— Plaintiff's right must be proved as alleged, whether possession or title (Price *v.* Greer, 76 Ark. 426, 88 S. W. 985; Alaculsy Lumber Co. *v.* Gudger, 134 Ga. 603, 68 S. E. 427; Ripley *v.* Trask, (Me. 1910) 76 Atl. 951); as actual possession (Pennington *v.* Lewis, 4 Pennew. (Del.) 447, 56 Atl. 378; Hulse *v.* Brantley, 110 N. C. 134, 14 S. E. 510); title by adverse possession (Monk *v.* Wilmington, 137 N. C. 322, 49 S. E. 345), or good title if no possession is shown (Le Moyne *v.* Anderson, 123 Ky. 584, 96 S. W. 843, 29 Ky. L. Rep. 1017; Bullard *v.* Hollingsworth, 140 N. C. 634, 53 S. E. 441). Where a statute requires that surveys of land be recorded in order to be evidence of possession, plaintiff, relying on them, must show that they were recorded. Rivers *v.* Burbank, 13 Nev. 398. If, however, a *prima facie* title is proved by the production of a deed, the burden of bringing in evidence of invalidity of the deed is on defendant. Jackson *v.* Gunton, 26 Pa. Super. Ct. 203 [*affirmed* in 218 Pa. St. 275, 67 Atl. 467].

71. Mead *v.* Pollock, 99 Ill. App. 151; Gordner *v.* Blades Lumber Co., 144 N. C. 110, 56 S. E. 695.

The place of trespass must be proved as alleged, as, in trespass to land, that the act was on plaintiff's land. Thus, in trespass against a highway commissioner for removing a fence where plaintiff bounded the *locus* on a highway and defendant justified that the fence was in the highway, the burden of proof was on plaintiff to prove the place was in the highway. Holbrook *v.* McBride, 4 Gray (Mass.) 215. So plaintiff must show that a wharf whose removal was complained of was on his land and if defendant counterclaims for erecting a wharf on his land he must prove that it was on his land. Zwicker *v.* Morash, 34 Nova Scotia 555. But see Campbell *v.* King, 32 Mo. App. 38 (holding that if defendant admits the act it has been held that the burden is on him to show it was not done on plaintiff's property); McCormick *v.* Monroe, 46 N. C. 13 (holding that where plaintiff describes the land by metes and bounds "except two hundred and fifty acres previously granted" defendant must show the act was on the part previously granted).

72. Mason *v.* Postal Tel. Cable Co., 74 S. C. 557, 54 S. E. 763, holding that fraud in obtaining a license under which defendant justified must be shown by plaintiff.

Matter postponing the statute of limitations must be shown by plaintiff. Thus where the statute provided that limitation should run as to injuries to timber from the date of discovery by plaintiff it was held that the burden was on plaintiff to show the date. Citizens' Bank *v.* Jeansonne, 120 La. 393, 45 So. 367.

Where a justification under a distress is set up the burden of proof is on plaintiff to show that the goods taken were exempt under the statute. Van Sickler *v.* Jacobs, 14 Johns. (N. Y.) 434.

73. *Illinois.*—Hudson *v.* Miller, 97 Ill. App. 74.

Maryland.— New Windsor *v.* Stocksdale, 95 Md. 196, 52 Atl. 596.

Michigan.— Kent County Agricultural Soc. *v.* Ide, 128 Mich. 423, 87 N. W. 369.

New Jersey.— Heiser *v.* Martin, 9 N. J. L. J. 277.

Rhode Island.— Shibley *v.* Gendron, 25 R. I. 519, 57 Atl. 304.

England.— Hayling *v.* Okey, 8 Exch. 531, 17 Jur. 325, 22 L. J. Exch. 139, 1 Wkly. Rep. 182.

See 46 Cent. Dig. tit. "Trespass," § 113.

When defendant pleads liberum tenementum he must prove his title to the land as alleged (Rondell *v.* Fay, 32 Cal. 354, holding that, if the title alleged is good in part and bad in part, defendant must show the act was done within the efficient part; Caskey *v.* Lewis, 15 B. Mon. (Ky.) 27; Hope *v.* Cason, 3 B. Mon. (Ky.) 544; Lavin *v.* Dodge, 30 R. I. 8, 73 Atl. 376; Carpenter *v.* Logee, 24 R. I. 383, 53 Atl. 288; Wilbur *v.* Peckham, 22 R. I. 284, 47 Atl. 597; Providence *v.* Adams, 10 R. I. 184. *Contra*, Tabor *v.* Judd, 62 N. H. 288, holding that in New Hampshire, in trespass *quare clausum*, when issue is joined upon a traverse of the plea of soil and freehold, the burden of proof is on

anticipation in a pleading does not shift the burden of proof, but it remains as it would have been if the pleading had taken the proper course.[74] Where certain facts have been shown the person relying on other related facts is sometimes aided, in the absence of direct evidence either way, by a presumption of fact as to their existence.[75]

plaintiff); as title by adverse possession (Miller *v.* Wolfe, 30 Nova Scotia 277, holding that payment of rent must be negatived for twenty years prior to action brought, not to trial); or by condemnation proceedings (Bassett *v.* Pennsylvania R. Co., 201 Pa. St. 226, 50 Atl. 772, holding that defendant must show the *locus* was part of the land condemned); and upon that plea plaintiff is entitled to recover if defendant fails to show title according to his plea (Carpenter *v.* Logee, 24 R. I. 383, 53 Atl. 288).

A public right must be proved as alleged, as a highway at the *locus* (District of Columbia *v.* Robinson, 14 App. Cas. (D. C.) 512 [*affirmed* in 180 U. S. 92, 21 S. Ct. 283, 45 L. ed. 440]; Weed *v.* Sibley, 40 Me. 356; New Windsor *v.* Stocksdale, 95 Md. 196, 52 Atl. 596; Danielson *v.* Kyllonen, 111 Minn. 47, 126 N. W. 404; Peterson *v.* Hopewell, 55 Nebr. 670, 76 N. W. 451; Shaffer *v.* Stull, 32 Nebr. 94, 48 N. W. 882. And see Holbrook *v.* McBride, 4 Gray (Mass.) 215, holding that where plaintiff bounded his land on a highway he must prove that the *locus* was not in the highway, although defendant alleged in justification that the act was done in the highway); or a public common (Wilbur *v.* Peckham, 22 R. I. 284, 47 Atl. 597).

An easement must be proved as alleged, as a prescriptive right of way. Black *v.* O'Hara, 54 Conn. 17, 5 Atl. 598; Pennington *v.* Lewis, 4 Pennew. (Del.) 447, 56 Atl. 378.

Legal authority must be proved as alleged. Thus the sheriff must show that a sale of goods which he attached as the vendor's was bad as in fraud of creditors (Cook *v.* Thornton, 109 Ala. 523, 20 So. 14); and where goods are taken for non-payment of a tax, defendant must show a tax due and a right to take as collector (Woodbridge *v.* Conner, 49 Me. 353, 77 Am. Dec. 263).

Consent or license must be proved as alleged. Northern Trust Co. *v.* Palmer, 171 Ill. 383, 49 N. E. 553; Collier *v.* Jenks, 19 R. I. 493, 34 Atl. 998.

A right by contract must be proved as alleged. Columbia Land, etc., Co. *v.* Tinsley, 60 S. W. 10, 22 Ky. L. Rep. 1082; Williford *v.* Williams, 127 N. C. 60, 37 S. E. 74.

74. Snedecor *v.* Pope, 143 Ala. 275, 39 So. 318, holding that an allegation in the declaration that the trespass was against the will of plaintiff does not put upon him the burden of proving non-consent; defendant must plead and prove plaintiff's consent.

75. See cases cited *infra*, this note.

If an act of trespass is proved it is presumed to be wilful (Watkins *v.* Gale, 13 Ill. 152); so as to enable plaintiff to recover the value of logs at the time of their conversion rather than the value of the standing timber (Mississippi River Logging Co. *v.* Page, 68 Minn. 269, 71 N. W. 4); or the value of ore without deduction for cost of mining (St. Clair *v.* Cash Gold Min., etc., Co., 9 Colo. App. 235, 47 Pac. 466); and there is no presumption in defendant's favor that the act was justified (Bunke *v.* New York Tel. Co., 110 N. Y. App. Div. 241, 97 N. Y. Suppl. 66 [*affirmed* in 188 N. Y. 600, 81 N. E. 1161], holding that a telephone company must prove a license to enter and attach its wires to plaintiff's land); although it is a continuing trespass whose origin was prior to defendant's acquisition of title (Bunke *v.* New York Tel. Co., 110 N. Y. App. Div. 241, 97 N. Y. Suppl. 66 [*affirmed* in 188 N. Y. 600, 81 N. E. 1161]); but where a boundary is in dispute the presumption of wilfulness fails (Gunn *v.* Harris, 88 Ga. 439, 14 S. S. 593); and on proof that defendant took some of the trees from plaintiff's land for which he sues, plaintiff cannot show that defendant had no land in the vicinity and so must be trespassing on some one, to raise a presumption that the rest were taken from plaintiff's land (Sorrel *v.* Carlin, 23 La. Ann. 528).

Proof of title to land raises a presumption that the holder is in possession (Griffin *v.* Creppin, 60 Me. 270; Stone *v.* Perkins, 217 Mo. 586, 117 S. W. 717); although she is a married woman and she and her husband entered into possession (Van Nostrand *v.* Hubbard, 35 N. Y. App. Div. 201, 54 N. Y. Suppl. 739); and title and possession shown are presumed to continue till an ouster is shown (Brimmer *v.* Proprietors Long Wharf, 5 Pick. (Mass.) 131).

A notice that defendant is going to do an act justifies a presumption that the doing of it thereafter was by him. Gourdier *v.* Cormack, 2 E. D. Smith (N. Y.) 200, blasting on adjoining land.

A trespass by a servant in the course of his employment is presumed to be at his master's direction. Carter *v.* Pinchbeck, 7 Rich. (S. C.) 356.

One who buys and pays for property is presumed to be the owner. Kelly *v.* Davidson, 7 N. Y. St. 481.

Entry by a person having right of entry is presumed to be under the right. Benson *v.* Bolles, 8 Wend. (N. Y.) 175; McGrady *v.* Miller, 14 Vt. 128.

Where a trespass renders proof as to damage difficult the presumption is against the trespasser. Hence if defendant mingles ore taken from plaintiff's land with his own, plaintiff can recover the whole unless defendant proves how much is his (Little Pittsburg Consol. Min. Co. *v.* Little Chief Consol. Min. Co., 11 Colo. 223, 17 Pac. 760, 7 Am. St. Rep. 226; St. Clair *v.* Cash Gold Min., etc., Co., 9 Colo. App. 235, 47 Pac. 466); and the presumption as to number, quantity, and value of articles of personalty taken is against the trespasser (Harris *v.* Rosenberg, 43 Conn.

(II) *ADMISSIBILITY* — (A) *In General.* The evidence must be relevant to the fact to be proved,[76] but in general any relevant evidence is admissible,[77] except hearsay,[78] although not sufficient in itself without other evidence supplementary to it;[79] and it is admissible if offered in connection with an offer of proof of such

227); but proof of the taking of property raises no presumption that defendant took other property in the same place which was found to be missing, in the absence of proof of opportunity to take, as that it was there immediately before and missed immediately after (Harris *v.* Rosenberg, *supra*).

Alterations and interlineations in a document made by a public officer are presumed to have been made prior to execution, as an execution. Wilbur *v.* Wilbur, 13 Metc. (Mass.) 405.

Defendant's name on wagons raises a presumption that they were in use in his service (Leubuscher *v.* Bailey, 52 Misc. (N. Y.) 661, 102 N. Y. Suppl. 756); and his denial coupled with failure to call his foreman who was in court does not rebut it (Leubuscher *v.* Bailey, *supra*).

The rule of the criminal law that a man is presumed innocent till proved guilty does not apply to a civil trespass. Bonelli *v.* Bowen, 70 Miss. 142, 11 So. 791.

Direct proof of want of consent by plaintiff to cutting timber on his property does not prevent a recovery; the acts of plaintiff and other evidence before the jury could create an inference that plaintiff did not consent. Bufford *v.* Little, 159 Ala. 300, 48 So. 697.

76. *Connecticut.*— Merwin *v.* Backer, 80 Conn. 338, 68 Atl. 373.

Georgia.— Northeastern R. Co. *v.* Hawkins, 62 Ga. 164.

Iowa.— Brown *v.* Hendrickson, 69 Iowa 749, 27 N. W. 914.

Missouri.— Holladay-Klotz Land, etc., Co. *v.* T. J. Moss Tie Co., 79 Mo. App. 543.

Pennsylvania.— Kennedy *v.* Erdman, 150 Pa. St. 427, 24 Atl. 643.

Texas.— Fowler *v.* Stonum, 6 Tex. 60.

Evidence of expense entailed by defendant's trespass is not admissible where not offered for the purpose of claiming its amount. W. K. Syson Timber Co. *v.* Dickens, 146 Ala. 471, 40 So. 753.

Applications of rule.— General reputation of defendant cannot be shown for any purpose. Fahey *v.* Crotty, 63 Mich. 383, 29 N. W. 876, 6 Am. St. Rep. 305. Acts done by defendant on other land are not admissible, nor the amount paid his agents for the work there. Avery *v.* White, 79 Conn. 705, 66 Atl. 517. In trespass by a tenant against his landlord the duration of negotiations for the lease is immaterial, and also whether plaintiff complained to the police of the trespass. Snedecor *v.* Pope, 143 Ala. 275, 39 So. 318. Where possession only is in issue evidence is not admissible to show a right not possessory. Fisher *v.* Dowling, 66 Mich. 370, 33 N. W. 521. And where title is in issue, evidence of mere possession by consent of the owner is irrelevant. Hunter *v.* Hatton, 4 Gill (Md.) 115, 45 Am. Dec. 117. Evidence of a conviction for violating the oleomargarine law is not admissible in an action for a forcible seizure of other oleomargarine. Medairy *v.* McAllister, 97 Md. 488, 55 Atl. 461. In trespass for cutting trees where plaintiff testified that he was keeping them for lumber and he got several thousand feet of lumber some years before, evidence that said lumber is still in his mill and its condition is irrelevant. Hathaway *v.* Goslant, 77 Vt. 199, 59 Atl. 835. In an action for cutting timber on plaintiff's land, evidence as to the number of trees cut within six years on land lying some distance from that of plaintiff was irrelevant. Avery *v.* White, 83 Conn. 311, 76 Atl. 360. In trespass against a railroad for purchasing stolen ties evidence that afterward it required sellers to make affidavit that they were not stolen is presumptively prejudicial and irrelevant. Holladay-Klotz Land, etc., Co. *v.* T. J. Moss Tie Co., 79 Mo. App. 543. In trespass *quare clausum*, evidence as to defendant's reason for filing a prior bill of equity against plaintiff concerning the property, and as to the nature of negotiations for settlement of the differences, was immaterial. Co-operative Bldg. Bank *v.* Hawkins, 30 R. I. 171, 73 Atl. 617.

77. Burns *v.* Campbell, 71 Ala. 271.

Applications of rule.— Where ratification is in issue evidence of repudiation by a principal of his agent's act done outside the scope of his authority is admissible. Burns *v.* Campbell, 71 Ala. 271. Plaintiff may testify as to the trespass. Gray *v.* Joiner, 127 Ga. 544, 56 S. E. 752. As bearing on the weight and credibility of plaintiff's evidence that a tax payment was intended to pay taxes on two tracts the amount of the payment is admissible. Trexler *v.* Africa, 33 Pa. Super. Ct. 395. Inaccuracy does not render evidence inadmissible but goes only to its credibility. Bassett *v.* Pennsylvania R. Co., 201 Pa. St. 226, 50 Atl. 772. The identity of property taken by defendant with that held by plaintiff under writ of replevin may be shown by the officer who executed the writ. Woodward *v.* Garey, 2 Walk. (Pa.) 447. Where it appeared that plaintiff's property injured was being used illegally by him he can show that he had made an honest effort to comply with the law. Fowler *v.* Harrison, 39 Wash. 617, 81 Pac. 1055.

78. Catchot *v.* Ocean Springs, 78 Miss. 509, 29 So. 468; Carmichael *v.* Township No. 1 School Land Trustees, 3 How. (Miss.) 84.

Limitation of rule.— Hearsay is admissible to show how plaintiff obtained knowledge of the trespass, although not to prove the act. Gordon *v.* Cook, 47 Mich. 248, 10 N. W. 357.

79. Pike *v.* Elliott, 36 Ala. 69 (holding that evidence of a trespass by defendant on plaintiff's land is admissible without first identifying the land as the same as that de-

supplementary evidence,[80] or if followed by proof of it.[81] Relevant evidence is admissible, although it also tends to prove a trespass other than that complained of,[82] or tends to show a defense not set up if properly restricted.[83]

(B) *Title and Claim of Title.* Where plaintiff relies expressly on a title by grant or of record he must prove it, and evidence of a title otherwise derived is inadmissible,[84] and in proving documentary title all deeds in the chain of title are admissible.[85] In disproving title in general, anything is admissible which tends to invalidate it, as that plaintiff's title was invalid,[86] or that his right is a

scribed in the complaint, although this must be done at some time during the trial); Heinrichs *v.* Terrell, 65 Iowa 25, 21 N. W. 171 (holding that a deed in the chain of plaintiff's title is admissible, although defective, as other evidence may cure it); Perry *v.* Jefferies, 61 S. C. 292, 39 S. E. 515 (holding that evidence of the act is admissible, although the witness states the date as prior to that laid in the declaration as the date can be otherwise shown); Stratton *v.* Lyons, 53 Vt. 641 (holding that evidence of title is admissible, although insufficient in itself).

80. Keim *v.* Warfield, 60 Miss. 799, holding that in an action for cutting trees evidence of one person that he counted the stumps at the point where plaintiff claimed defendant had cut is admissible in connection with an offer to prove that another person saw defendant cut the trees there.

81. Wolf *v.* Wolf, 158 Pa. St. 621, 28 Atl. 164, holding that proof that persons were seen cutting trees at a certain place is admissible to show possession of plaintiff where it is followed by their testimony that they were cutting for plaintiff.

82. Lee *v.* Lord, 76 Wis. 582, 45 N. W. 601, holding that in an action for cutting and removing logs marked "A" evidence of the cutting of other logs is admissible if it tends to show how many of those so marked were taken and the recovery is limited to those so marked.

83. Heilbron *v.* Heinlen, 72 Cal. 371, 14 Pac. 22 (holding that under a denial of plaintiff's possession defendant may show fifteen years' possession in himself, although he did not plead the statute of limitations); Quillen *v.* Betts, 1 Pennew. (Del.) 53, 39 Atl. 595 (holding that evidence of location of a line fence is admissible, although it also tends to show a license not pleaded).

84. See cases cited *infra,* this note.

Thus plaintiff must prove a title to land by the document or record if he formally sets it out in the complaint (Mayo *v.* Spartanburg, etc., R. Co., 40 S. C. 517, 19 S. E. 73); or relies on title derived from the former owner (Twyman *v.* Knowles, 13 C. B. 222, 17 Jur. 238, 22 L. J. C. P. 143, 76 E. C. L. 222).

85. See cases cited *infra,* this note.

A deed of adjoining land, reserving the *locus,* is admissible as to the construction of the deed to the *locus.* Louk *v.* Woods, 15 Ill. 256.

An ancient deed reciting that the grantor was heir of the patentee of the land is admissible against a mere trespasser, plaintiff claiming title through it and it only. Jackson *v.* Gunton, 26 Pa. Super. Ct. 203 [*affirmed* in 218 Pa. St. 275, 67 Atl. 467].

Lost deeds.— If a deed is lost proof of its contents is not admissible except on proof of its formal execution and its substantial contents. Edwards *v.* Noyes, 65 N. Y. 125.

Misdescription.— An error in the name of the county does not render the deed inadmissible if the description was sufficient to warrant a finding that the land trespassed on was that conveyed. Silliman *v.* Whitmer, 11 Pa. Super. Ct. 243 [*affirmed* in 196 Pa. St. 363, 46 Atl. 489].

Execution.—Where both parties claim under the same instrument it is admissible without proof of its execution. Helton *v.* Belcher, 114 Ky. 172, 70 S. W. 295, 24 Ky. L. Rep. 927.

That the deed is of the land in question must appear. Clary *v.* Kimmell, 18 Md. 246.

Where defendant alleged ownership of the trees cut, the court erred in excluding a deed offered by defendant granting to it all the timber on the lands described in the complaint, among others. Wilmer Lumber Co. *v.* Eisely, 163 Ala. 290, 50 So. 225.

86. Lankford *v.* Green, 62 Ala. 314; Tolles *v.* Duncombe, 34 Mich. 101.

Illustrations.—A judgment against defendant's lessors in an action to determine adverse claims is admissible against him where he specifically claims the land under the lease. Blew *v.* Ritz, 82 Minn. 530, 85 N. W. 548. Title in a third person is admissible where plaintiff relies on title alone without possession. Tolles *v.* Duncombe, 34 Mich. 101. So defendant may show that plaintiff's deed, although recorded before the trespass, was not delivered till afterward (Maxwell *v.* Mitchell, 61 Me. 106), that title had passed from him by reason of bankruptcy (Lankford *v.* Green, 62 Ala. 314), that he never had it, as his grantor had previously conveyed it (Howe *v.* Farrar, 44 Me. 233, prior mortgage of personalty; Walker *v.* Swasey, 2 Allen (Mass.) 312), or that a sale of personalty was invalid from lack of authority in the agent who made it (Deitsch *v.* Wiggins, 15 Wall. (U. S.) 539, 21 L. ed. 228). Deeds not connected with the original source of title are not admissible to show title in defendant, where plaintiff shows a complete chain of title, as they do not invalidate it. Kentucky Land, etc., Co. *v.* Crabtree, 113 Ky. 922, 70 S. W. 31, 24 Ky. L. Rep. 743. In an action for damages to saloon fixtures removed from a leased building, evidence of the issuance of a liquor license to a third person, and of the failure of plaintiff to secure a

mere easement;[87] but parol evidence is not admissible to contradict a deed.[88] Where the title generally is alleged by either party to the action it may be proved by acts of ownership,[89] or by a contract or agreement between the parties in cases of trespass to personalty,[90] or even to realty, where equitable title is sufficient to maintain trespass,[91] or admissions of title,[92] or declarations by one in possession that he holds for the claimant,[93] although declarations by the claimant in possession or those under whom he claims are inadmissible,[94] except to characterize the possession where title by adverse possession is claimed.[95] Of course the general rule that *res inter alios acta* are not admissible applies to trespass.[96] Evidence of title is admissible, although the plea putting it in issue is bad in form for duplicity.[97] A mere claim to the land without possession is no evidence of title, and so is inadmissible to show title,[98] except where otherwise provided by statute;[99] but in some cases, while this rule is recognized, yet claim of title is admitted "for what it is worth," the reason of the rule not being clear.[1] Where plaintiff is in possession claim of title is admissible,[2] and wherever for any reason claim of title is admitted in evidence, evidence is admissible in rebuttal.[3]

(c) *Possession.* Possession of plaintiff may be shown by acts of possession,[4]

license, was inadmissible to show that the third person, and not plaintiff, was the owner of the fixtures. Temple *v.* Duran, (Tex. Civ. App. 1908) 121 S. W. 253.

87. Smith *v.* Slocomb, 11 Gray (Mass.) 280.

88. Lawrence *v.* Wilson, 160 Mass. 304, 35 N. E. 858 (holding that subsequent declarations by the maker of a deed are not admissible to invalidate it); Hancock *v.* McAvoy, 151 Pa. St. 439, 25 Atl. 48 (holding that where plaintiff puts in evidence a deed to a burial lot evidence by the secretary of the cemetery company as to plaintiff's right of burial is not admissible).

89. Kellogg *v.* King, 114 Cal. 378, 46 Pac. 166, 55 Am. St. Rep. 74 (holding that possession under color and claim of title is admissible); Quillen *v.* Betts, 1 Pennew. (Del.) 53, 39 Atl. 595 (holding that pointing out boundary lines is admissible as an act of ownership); Gordon *v.* Cook, 47 Mich. 248, 10 N. W. 357 (holding that a conversation as to splitting rails to fence the land is admissible as an act of ownership); McCusker *v.* Mitchell, 20 R. I. 13, 36 Atl. 1123 (location of division fence).

90. Henson *v.* Taylor, 108 Ga. 567, 33 S. E. 911.

91. Arnold *v.* Pfoutz, 117 Pa. St. 103, 11 Atl. 871, contract for sale to plaintiff.

92. Gilbert *v.* Felton, 5 Gray (Mass.) 406. *Contra*, Mason *v.* Park, 4 Ill. 532, holding that the title deeds are the best evidence. And see Gilchrist *v.* McLaughlin, 29 N. C. 310, holding that moving a fence to conform with the description of land recovered in ejectment is admissible against defendant to show an admission of boundary.

93. South Hampton *v.* Fowler, 54 N. H. 197.

94. South Hampton *v.* Fowler, 54 N. H. 197.

95. Morss *v.* Salisbury, 48 N. Y. 636.

96. Fahey *v.* Crotty, 63 Mich. 383, 29 N. W. 876, 6 Am. St. Rep. 305 (holding that a judgment to which plaintiff was not a party is not admissible against him); Connor *v.* Johnson, 59 S. C. 115, 37 S. E. 240 (holding that evidence of a boundary established by defendant and a third person under whom plaintiff does not claim is irrelevant); Davis *v.* Moyles, 76 Vt. 25, 56 Atl. 174 (holding that where plaintiff claimed through a grantee of land from the state who had petitioned the legislature to grant him the land, alleging its confiscation by the state from petitioner's father, the petition is no evidence of title nor of the petitioner's relationship to the original owner as against a third person).

97. Crockett *v.* Lashbrook, 5 T. B. Mon. (Ky.) 530, 17 Am. Dec. 98.

98. Gray Lumber Co. *v.* Harris, 127 Ga. 693, 56 S. E. 252; South Hampton *v.* Fowler, 52 N. H. 225.

Tax receipts and assessment books are not admissible. Irwin *v.* Patchen, 164 Pa. St. 51, 30 Atl. 436.

A certificate from the state commissioners of public lands certifying that a patent was issued to plaintiff's grantor is not admissible. Reed *v.* Chicago, etc., R. Co., 71 Wis. 399, 37 N. W. 225.

99. Yellow River R. Co. *v.* Harris, 35 Fla. 385, 17 So. 568, holding that in Florida receipts by receivers of a public land-office are *prima facie* evidence of title.

1. Irwin *v.* Patchen, 164 Pa. St. 51, 30 Atl. 436 (tax receipts and assessment books); Thompson *v.* Brannon, 14 S. C. 542 (plats made for plaintiff's grantor).

2. Wylie *v.* Railes, (Kan. App. 1898) 55 Pac. 523, by title papers of plaintiff's lessor.

A plat is admissible to identify the land and show extent of grantee's claim. Guentherodt *v.* Ross, 121 Mich. 47, 79 N. W. 920.

3. South Hampton *v.* Fowler, 54 N. H. 197 (records of plaintiff's grantor, a town showing non-claim); Beaver *v.* Filson, 8 Pa. St. 327 (repairs by others of property claimed by plaintiff without claim made by him).

4. See cases cited *infra*, this note.

Survey.— A survey being claim of title may characterize a subsequent act as possessory which would otherwise not be so regarded (Kidder *v.* Kennedy, 43 Vt. 717); but is not in itself an act of possession or title (Kidder *v.* Kennedy, *supra*).

or by admissions of defendant,[5] and may be shown by any person who knows the lines and corners or who can prove plaintiff's possession.[6] But acts which show rather a claim of right than actual possession are inadmissible to show possession.[7] And proof of plaintiff's possession may be rebutted by proof of possession in other persons,[8] or by explanation of acts which apparently show possession,[9] or by admission by plaintiff of possession in defendant,[10] but not by acts which do not oust plaintiff's possession.[11] Title is evidence of possession,[12] but not a void deed of the land.[13] However, it has been held that where possession is actually shown to be in defendant, the mere fact that title is shown to be in plaintiff is not evidence of possession in him.[14] Where possession of land is shown matters which characterize it and show its extent are admissible both as to possession by plaintiff[15]

Entry by plaintiff's agent claiming title for plaintiff and making a survey is evidence of plaintiff's possession. Little *v.* Downing, 37 N. H. 355.

Entry and staking out land.—Where it appeared that plaintiff entered and staked out vacant land and erected buildings thereon he may show to prove defendant's knowledge that this was the customary way of taking possession in that town. Cook *v.* Rider, 16 Pick. (Mass.) 186.

5. Craig *v.* Cook, 28 Minn. 232, 9 N. W. 712.

6. Ledbetter *v.* Fitzgerald, 1 Ark. 448.

7. Great Falls Co. *v.* Worster, 15 N. H. 412, holding that a survey by a mortgagee is not evidence of possession, unless an intent to take possession is shown, although it would be if the grant were of the fee.

Payment of taxes on land is not evidence of possession. Langdon *v.* Templeton, 66 Vt. 173, 28 Atl. 866; Tillotson *v.* Prichard, 60 Vt. 94, 14 Atl. 302, 6 Am. St. Rep. 95; Reed *v.* Field, 15 Vt. 672. *Contra*, Merwin *v.* Backer, 80 Conn. 338, 68 Atl. 373; Merwin *v.* Morris, 71 Conn. 555, 42 Atl. 855.

8. Heilbron *v.* Heinlen, 72 Cal. 371, 14 Pac. 22, holding that under a denial of plaintiff's possession defendant may show possession in himself for fifteen years, and it is immaterial that the statute of limitations was not pleaded.

9. Houghtaling *v.* Houghtaling, 56 Barb. (N. Y.) 194, holding that where plaintiff put up a fence every time defendant took it down to drive across the land, defendant may show that it was done at defendant's request.

10. Barton *v.* Cordy, 1 C. & P. 664, McClell. & Y. 278, 12 E. C. L. 376, holding that notice to defendant to quit possession as plaintiff's tenant is an admission of his possession.

Inquiry as to whether the reason defendant cut a tree was that he claimed adverse possession is not an admission of possession. Clark *v.* Boardman, 42 Vt. 667.

11. Niles *v.* Patch, 13 Gray (Mass.) 254 (holding that the secret intent with which acts of third persons is done is immaterial); Gordon *v.* Cook, 47 Mich. 248, 10 N. W. 357 (holding that possession of a third person subsequent to the trespass is immaterial to disprove plaintiff's possession shown at the time).

12. Van Buskirk *v.* Dunlap, 2 Ohio Dec. (Reprint) 233, 2 West. L. Month. 125, equitable title. Although it is of course controlled by proof of actual possession in another. Davis *v.* Alexander, 99 Me. 40, 58 Atl. 55.

13. Jackson *v.* Todd, 25 N. J. L. 121.

14. O'Neale *v.* Brown, 18 Fed. Cas. No. 10,514, 1 Cranch C. C. 79.

15. See cases cited *infra*, this note.

In aid of proof of peaceful possession title is admissible. Bossier *v.* Jackson, 114 La. 707, 38 So. 525; Nicol *v.* Illinois Cent. R. Co., 44 La. Ann. 816, 11 So. 34.

To define the limits of possession a deed is admissible (Wahlé *v.* Laubersheimer, 174 Ill. 338, 51 N. E. 860; Chenault *v.* Quisenberry, 43 S. W. 717, 19 Ky. L. Rep. 1632; New Windsor *v.* Stocksdale, 95 Md. 196, 52 Atl. 596; Winter *v.* Peterson, 24 N. J. L. 524, 61 Am. Dec. 678, deed of adjoining farm including *locus* which was a highway), although defective (McDonald *v.* Bear River, etc., Water, etc., Co., 13 Cal. 220, deed lacking seal; Dubuque *v.* Coman, 64 Conn. 475, 30 Atl. 777, deed improperly executed under a power in a will; Chicago *v.* McGraw, 75 Ill. 566; Kentucky Land, etc., Co. *v.* Crabtree, 113 Ky. 922, 70 S. W. 31, 24 Ky. L. Rep. 743, holding that if defendant shows perfect title the admission of plaintiff's deed must be restricted to this purpose; Robison *v.* Swett, 3 Me. 316; New Windsor *v.* Stocksdale, 95 Md. 196, 52 Atl. 596; Hadden *v.* White, 4 N. Brunsw. 634, unregistered deed without livery of seizin); or a private survey (Aughenbough *v.* Johnston, 4 Yeates (Pa.) 317, and defendant can show his possession of an adjoining lot to define the extent of plaintiff's possession of the *locus* (Dewey *v.* Bordwell, 9 Wend. (N. Y.) 65); but plaintiff's bankruptcy does not characterize or define possession subsequent to it (Lankford *v.* Green, 62 Ala. 314); nor does a former possession by persons other than plaintiff (Smith *v.* Bingham, 9 N. Y. Suppl. 97).

To show color of title a deed is admissible, although defective (Taylor *v.* Corley, 113 Ala. 580, 21 So. 404, tax deed; Southern R. Co. *v.* Ethridge, 108 Ga. 121, 33 S. E. 850, holding, however, that a bond for title is not admissible as color of title prior to payment of purchase-price); or a town charter (Town of Newcastle *v.* Haywood, 68 N. H. 179, 44 Atl. 132).

To characterize the holding defective partition proceedings are admissible (Grimes *v.* Butts, 65 Ill. 347); or defective dower proceedings (Nickerson *v.* Thacher, 146 Mass.

and by defendant.[16] As the question of possession of realty is one of fact, an answer to the question as to what person has been in possession of real estate since a specified date is admissible.[17]

(D) *Connection of Defendant With the Act.* Where an act of trespass is proved to show that it was done by defendant his admission that he did it is admissible.[18] So also is evidence that he threatened to do it,[19] or that he did similar acts in accordance with a preconceived plan,[20] or received compensation for the doing of the act,[21] or authorized it,[22] or ratified it,[23] or that it resulted from his act.[24] A mere accusation against defendant is not admissible to prove that he did the act,[25] nor is previous malicious conduct alone,[26] nor mere evidence that a third person did the act without showing that defendant was responsible for it.[27] Threats of a third person to do the act are admissible to show defendant did not do it,[28] but not the fact that plaintiff sued a third person some time before for a similar trespass.[29]

609, 16 N. E. 581); or a contract of purchase (Rose *v.* Ruyle, 46 Ill. App. 17, parol to show possession is rightful; Moore *v.* Moore, 21 Me. 350); or of settlement between defendant and the lessor of plaintiff (Wylie *v.* Railes, (Kan. App. 1898) 55 Pac. 523).

To show knowledge in defendant of the extent of plaintiff's claim allegations in writs in former actions by plaintiff against him are admissible. Robison *v.* Swett, 3 Me. 316.

16. Le Blanc *v.* Nolan, 2 La. Ann. 223, holding that title is admissible to show the beginning of adverse possession, although the action is limited strictly to questions of possession.

17. Diamond *v.* Lawyer, 117 N. Y. Suppl. 94.

18. Mecartney *v.* Smith, (Kan. App. 1900) 62 Pac. 540; McGill *v.* Ash, 7 Pa. St. 397.

Minutes of a town officers' meeting are admissible to show the town committed the trespass. New Windsor *v.* Stocksdale, 95 Md. 196, 52 Atl. 596.

19. Craig *v.* Cook, 28 Minn. 232, 9 N. W. 712 (threat to evict); Morrow *v.* Moses, 28 N. H. 95 (threat to burn house); Chapman *v.* Kincaid, 8 Humphr. (Tenn.) 150.

20. Cox *v.* Crumley, 5 Lea (Tenn.) 529, holding that in an action of trespass for entering upon plaintiff's land and beating him evidence that defendant on the same night similarly beat two other persons is admissible.

21. Carter *v.* Fulgham, 134 Ala. 238, 32 So. 684.

22. *Alabama.*— Fulgham *v.* Carter, 142 Ala. 227, 37 So. 932, holding that a statement of the trespasser at the time of the act, showing by what authority he professed to act, is admissible, although not conclusive, where there is other evidence of the agency.

Connecticut.— McAllin *v.* McAllin, 77 Conn. 398, 59 Atl. 413.

Massachusetts.— Bigelow *v.* Dawson, 6 Cush. (Mass.) 97, holding that a contract between a railroad and its contractor is admissible on the question of whether it authorized the act done by the contractor.

Minnesota.— Leber *v.* Minneapolis, etc., R. Co., 29 Minn. 256, 13 N. W. 31, holding that an answer stating that the acts were done by defendant's contractor and were necessary to the performance of the contract is an admission that they were done by defendant's direction.

Texas.— Jess French Piano, etc., Co. *v.* Phelps, 47 Tex. Civ. App. 385, 105 S. W. 225, holding that a notice from a general manager of defendant piano company to its local agent that a music dealer advised them to look after their piano is admissible to show that it authorized the taking.

Wisconsin.— Gerhardt *v.* Swaty, 57 Wis. 24, 14 N. W. 851, holding that where defendant's minor son hauled off logs cut on plaintiff's land, using his father's team, it will be presumed that he acted in his father's behalf under his directions.

23. Sinclair *v.* Stanley, 69 Tex. 718, 7 S. W. 511, holding that a power of attorney expressly ratifying a trespass in ejecting a tenant is sufficient.

24. Cooper *v.* Randall, 59 Ill. 317 (holding that to show that dust cast on plaintiff's land was cast by plaintiff's mill, evidence that it cast dust on land similarly situated is admissible as it showed it was capable of it); Jesse French Piano, etc., Co. *v.* Phelps, 47 Tex. Civ. App. 385, 105 S. W. 225 (holding that where defendant left plaintiff's house unfastened after an unlawful entry plaintiff may show the condition of the house on his return home some time after, and that various articles were missing).

25. Allison *v.* Little, 85 Ala. 512, 5 So. 221, holding that records of a church imputing the cutting of trees to defendant and appointing a committee to compromise are irrelevant.

In Michigan it was held that defendant could be asked whether plaintiff had not had him arrested for the trespass. Gordon *v.* Cook, 47 Mich. 248, 10 N. W. 357.

26. Harrison *v.* Jurgielewiez, 28 La. Ann. 238.

27. Wolf *v.* Wolf, 158 Pa. St. 621, 28 Atl. 164.

28. Susong *v.* Ellis, 11 Heisk. (Tenn.) 80.

29. Western Union Tel. Co. *v.* Ring, 102 Md. 677, 62 Atl. 801, holding that in trespass for cutting trees where plaintiff had sued a third person before for a similar injury the amount claimed in that suit is no evidence that the present injury was done by some one else.

(E) *Circumstances of the Act.* All the circumstances entering into the act can be shown. Thus all the facts surrounding the act are admissible as parts of the *res gestæ*,[30] and the circumstances under which the trespass was committed may be shown to characterize it.[31]

(F) *Intent and Motive.* Acts done long after the trespass are not admissible to prove malice,[32] nor does the act itself ordinarily show malice;[33] but acts of trespass other than the one sued for are admissible to show malice,[34] or acts accompanying the trespass;[35] and the relations of the parties may be shown,[36] and defendant's treatment of other persons similarly situated.[37] Prior threats of defendant are admissible for the same purpose.[38] To rebut an inference of malice defendant may show that the act was done under claim of title,[39] or he may show a decree in his favor upholding his title, although appealed from,[40] or the directions given by him to his servant who actually did the act,[41] but not declarations by defendant made after the fact.[42] To prove that the act was intentional, knowledge of plaintiff's claim may be shown.[43] Where defendant had a right to do the acts complained of it is not error to admit evidence of the motive which induced him to exercise his right.[44] Where declarations of intent and of the reasons therefor are admitted the other party may go fully into such reasons and evidence of facts throwing light on them is admissible.[45] To show a conspiracy to evict plaintiff the consideration in a grant of the premises by plaintiff's husband to defendant is admissible.[46]

(G) *Place of Trespass.* It is not necessary to prove location and boundary by any particular method.[47] Proof of place of trespass as on plaintiff's or defend-

30. Carter *v.* Fulgham, 134 Ala. 238, 32 So. 684 (statements made by defendant's agent at the time of taking chattels); Tomlinson *v.* Booth, 2 Root (Conn.) 32 (in an action for shooting plaintiff's horse evidence that plaintiff was disorderly and crowding defendant); Perry *v.* Jefferies, 61 S. C. 292, 39 S. E. 515 (evidence of what plaintiff said to defendant's agent at the time of their trespass); Golding *v.* Williams, Dudley (S. C.) 92 (insulting words used to plaintiff's wife at the time of a trespass to his land).

31. See cases cited *infra*, this note.

Application of rule.— To characterize the act notices forbidding trespass which defendant saw are admissible. Gosdin *v.* Williams, 151 Ala. 592, 44 So. 611. And plaintiff may show that an assault took place in the house occupied by him. Brown *v.* Wheeler, 18 Conn. 199. Evidence of facts showing good faith is proper, although not sufficient to amount to a justification. Columbia Land, etc., Co. *v.* Tinsley, 60 S. W. 10, 22 Ky. L. Rep. 1082. In an action for enlarging a millrace it is proper to show the uses to which defendant put the water and their manner of clearing it. Haines *v.* Haines, 104 Md. 208, 64 Atl. 1044.

32. Newton *v.* Holford, 1 C. & K. 537, 47 E. C. L. 537, nine months.

33. Miller *v.* Clark, 78 Mo. App. 447, mere taking of personalty.

34. Perry *v.* Jefferies, 61 S. C. 292, 39 S. E. 515.

35. Perkins *v.* Towle, 43 N. H. 220, 80 Am. Dec. 149.

36. Winter *v.* Peterson, 24 N. J. L. 524, 61 Am. Dec. 678, holding that the fact that the parties had quarreled is admissible, although not the history of the quarrel.

37. Winter *v.* Peterson, 24 N. J. L. 524, 61 Am. Dec. 678, holding that to show that cutting of trees by the road overseer in a road over plaintiff's land was malicious plaintiff can show that he did not cut trees of other persons which were an equal obstruction.

38. Chapman *v.* Kincaid, 8 Humphr. (Tenn.) 150.

39. Perry *v.* Jefferies, 61 S. C. 292, 39 S. E. 515.

40. Day *v.* Holland, 15 Oreg. 464, 15 Pac. 855.

41. Davenport *v.* Ledger, 80 Ill. 574.

42. Clark *v.* Boardman, 42 Vt. 667.

43. Gray Lumber Co. *v.* Harris, 127 Ga. 693, 56 S. E. 252, a statement by president of defendant corporation that he knew plaintiff claimed the timber and that they were going to get it.

44. Rhodes *v.* Bunch, 3 McCord. (S. C.) 66, holding that where plaintiff was evicted by the owner of land because he was a common vagabond and dealer in illicit trade with negroes his character may be shown.

45. Marcy *v.* Stone, 8 Cush. (Mass.) 4, 54 Am. Dec. 736.

46. McAllin *v.* McAllin, 77 Conn. 398, 59 Atl. 413.

47. See cases cited *infra*, this note.

Applications of rule.— It is not necessary to prove boundary by a certified copy of a county surveyor's survey (Jeffries *v.* Hargis, 50 Ark. 65, 6 S. W. 328); nor by deed of adjoining land where said land is a boundary (Tomlinson *v.* Rizer, 2 Harr. & J. (Md.) 444); but an ancient surveyor's bill is admissible (Moore *v.* Cooley, 88 Hun (N. Y.) 66, 34 N. Y. Suppl. 624); or evidence by a surveyor of a survey in defendant's presence, pending suit (Gunn *v.* Harris, 88 Ga. 439, 14 S. E. 593); or a map to show the location

ant's land is not objectionable as proving title by parol.[48] Evidence of the condition of the land at the time of the trespass must clearly relate to that time.[49] The original location of land can be shown by a person present at the locating.[50]

(H) *Justification in General.* Where a justification is in issue anything is, as a general rule, admissible which tends to prove it[51] or to invalidate it.[52]

(I) *License.* Acts from which a license or the reverse might be inferred are admissible;[53] and where the act in question was necessary to the exercise of an express license that may be proved.[54] A void agreement may be shown to prove a license,[55] and so may a void deed.[56] Subsequent declarations by plaintiff are admissible to show a license.[57]

(J) *Damages* — (1) IN GENERAL. Similar acts done since the trespass are not admissible.[58] Evidence as to the various items going to make up the measure

of a turnpike, although not filed as the statute requires (Estes *v.* Kelsey, 8 Wend. (N. Y.) 555). It may be shown that a surveyor made a map and survey for use at the trial. McCusker *v.* Mitchell, 20 R. I. 13, 36 Atl. 1123.

Where plaintiff bounds his close on a highway user is admissible to define its boundaries. Pickering *v.* Shearer, 11 Gray (Mass.) 153.

A plot is admissible to show the situation of the premises. Adams *v.* Lorraine Mfg. Co., 29 R. I. 333, 71 Atl. 180; Eastland *v.* Fogo, 66 Wis. 133, 27 N. W. 159, 28 N. W. 143.

The location of land by a private survey can be shown to be incorrect. Arnold *v.* Pfoutz, 117 Pa. St. 103, 11 Atl. 871.

48. Grevenberg *v.* Borel, 25 La. Ann. 530.

49. Florida Southern R. Co. *v.* Parsons, 33 Fla. 631, 15 So. 338, as a map, where the question at issue was whether the land had been cut into building lots.

50. Hogmire *v.* McCoy, 2 Harr. & J. (Md.) 351.

51. Ward *v.* Green, 11 Conn. 455 (holding that where defendant justifies an assault as in attempting to make an arrest he may show by the court records that the arrest was made two days later and plaintiff convicted and punished); Columbia Land, etc., Co. *v.* Tinsley, 60 S. W. 10, 22 Ky. L. Rep. 1082 (holding that where defendant claims to have paid plaintiff's agent for a trespass and that plaintiff got the money, the agent's bank account is admissible to show what became of the money); Hendrickson *v.* Dwyer, 70 N. J. L. 223, 57 Atl. 420 (holding that a receipt by plaintiff of rent paid by defendant to a third person is admissible against plaintiff to show either authority of the third person to lease or acquiescence in the lease).

An offer of judgment not accepted by statute in Massachusetts is not admissible. Greve *v.* Wood-Harmon Co., 173 Mass. 45, 52 N. E. 1070.

52. *Alabama.*— Terry *v.* Williams, 148 Ala. 468, 41 So. 804, holding that where defendant claimed title, under a conditional sale agreement, to goods taken, while plaintiff claims that the agreement was to receive a loan, plaintiff may show that defendant was a pawnbroker.

Connecticut.— Harris *v.* Ansonia, 73 Conn. 359, 47 Atl. 672, evidence of lack of means admissible to explain delay in bringing suit.

Georgia.— Henson *v.* Taylor, 108 Ga. 567, 33 S. E. 911, holding that where in an action for taking goods defendant relies on a tender of the goods to him by plaintiff before the seizure and negotiations leading to it, plaintiff may show the goods were bought of defendant and were defective.

New Jersey.— Oliver *v.* Phelps, 20 N. J. L. 180, holding that where distress is pleaded plaintiff can give in evidence anything which tends to show there was no right to distrain.

Pennsylvania.—Fisher *v.* Paff, 11 Pa. Super. Ct. 401, holding that where a right by deed to flood lands by means of a dam is claimed and the dam is destroyed, in the absence of direct evidence of its height plaintiff can show the present dam floods more land.

53. Daffin *v.* C. W. Zimmerman Mfg. Co., 158 Ala. 637, 48 So. 109 (holding that in trespass for damages to land by cutting timber, evidence was admissible that the logs were delivered to defendant, as tending to show that the trespass was committed by defendant, and with its knowledge and consent); Terry *v.* Williams, 148 Ala. 468, 41 So. 804 (holding that in trespass for taking personalty evidence that plaintiff was "sitting in a corner of the house crying" is admissible); Pennsylvania Co. *v.* Ellett, 35 Ill. App. 278 [*affirmed* in 132 Ill. 654, 24 N. E. 559] (holding that daily use of land is evidence that it was by agreement, not tortious); Halfpenny *v.* Pennock, 33 U. C. Q. B. 229 (holding that a wife's standing by and permitting the taking of her husband's goods, used by her during his prolonged absence, is some evidence of leave and license); Dawson *v.* Murray, 29 U. C. Q. B. 464 (holding that evidence of an entry under an award of fence viewers made with consent of defendant is evidence of leave and license).

54. Newberry *v.* Bunda, 137 Mich. 69, 100 N. W. 277, holding that under a license to build a fence defendant may ask witness whether the cutting out of branches of trees complained of was necessary.

55. Woods *v.* Toombs, 36 Tex. 85, void because consideration was confederate money.

56. Caldwell *v.* Morganton Mfg. Co., 121 N. C. 339, 28 S. E. 475, holding that a deed of an easement made after the trespass to correct a former defective deed is not admissible under plea of easement, although it would be under plea of license.

57. Keane *v.* Old Colony R. Co., 161 Mass. 203, 36 N. E. 788.

58. Cooper *v.* Randall, 59 Ill. 317, action

of damages may be shown,[59] but not evidence of damage as a whole where plaintiff is not entitled to recover for all the items.[60] Where direct evidence of injury has been given corroborative circumstances may be shown.[61] Where injury to property is shown defendant may show that it resulted from other causes.[62]

(2) Injury to Business. To show injury to an established business, the amount of the business before and after the trespass is admissible,[63] and its general condition before the injury.[64] Thus loss of profits of an established business may be shown,[65] and probable profits in the future, judged by the past profits.[66] To show the *quantum* of damage, a removal to an inferior store as a result of a trespass is admissible.[67]

(3) Injury to Land. The difference in market value of land before and after a trespass may be shown by evidence of the amount of permanent injury where it is not objected to.[68] On the question of damages to realty, the jury may take into consideration knowledge acquired by a view made under direction of the court.[69] To show that fear of injury from acts was reasonable, injury to other property similarly situated may be shown,[70] and evidence of the effect on the premises.[71] Evidence of value of property taken is admissible, although an action of replevin brought by plaintiff is pending.[72] To show how much of a lot of ore defendant mingled with his own came from plaintiff's land, defendant can show the work done and the amount taken from plaintiff's mine.[73] Where the damages are the cost of restoring premises, or the value before and after, whichever is least, evidence under both theories is admissible, that admitted under the theory not adopted to be disregarded.[74] An injunction obtained by plaintiff to restrain the continuance of the trespass is not admissible for defendant on the question of damages.[75] Where plaintiff does not give evidence of damage which he might under the pleadings, defendant cannot do so.[76] A witness may state facts on which damage is predicated, but cannot give his opinion as to the amount of the damage.[77]

(4) Evidence of Value. Value may be shown by evidence of agreement

for throwing dust on plaintiff's land by operation of a mill.

59. Hueston *v.* Mississippi, etc., Boom Co., 76 Minn. 251, 79 N. W. 92. As how the removal of a brick wall built to keep water from plaintiff's foundations injured them. New Windsor *v.* Stockdale, 95 Md. 196, 52 Atl. 596.

60. Slingerland *v.* International Contracting Co., 43 N. Y. App. Div. 215, 60 N. Y. Suppl. 12 [*affirmed* in 169 N. Y. 60, 61 N. E. 995, 56 L. R. A. 494].

61. Razzo *v.* Varni, 81 Cal. 289, 22 Pac. 848, holding that after evidence by plaintiff of sickness resulting from fright, she may show that she was then nursing a child six months old, to show that her condition was such that fright would so affect her.

62. Cooper *v.* Randall, 59 Ill. 317.

For instance, on claim that sickness resulted from fright caused by defendant's trespass to her realty, defendant may show that a discussion of the possible arrest of her son might have caused the fright. Lamb *v.* Harbaugh, 105 Cal. 680, 39 Pac. 56.

63. Hawthorne *v.* Siegel, 88 Cal. 159, 25 Pac. 1114, 22 Am. St. Rep. 291; Keables *v.* Christie, 47 Mich. 594, 11 N. W. 400.

64. Marquart *v.* La Farge, 5 Duer (N. Y.) 559.

65. Juchter *v.* Boehm, 67 Ga. 534.

66. Peshine *v.* Shepperson, 17 Gratt. (Va.) 472, 94 Am. Dec. 468, not as a measure of damages but as the best guide in the nature of the case.

67. Chandler *v.* Allison, 10 Mich. 460.

68. Harrison *v.* Adamson, 86 Iowa 693, 53 N. W. 334.

69. Chicago, etc., R. Co. *v.* Willits, 45 Kan. 110, 25 Pac. 576. And see, generally, Trial.

70. G., B. & L. R. Co. *v.* Doyle, 9 Colo. 549, 13 Pac. 699, action for loss of guests of an inn from fear of blasting.

To show extent of damage in trespass to realty evidence of damage to plaintiff's goods and return of them by customers is admissible. Ketcham *v.* Newman, 14 Daly (N. Y.) 57, 3 N. Y. St. 566 [*reversed* on other grounds in 116 N. Y. 422, 22 N. E. 1052].

71. Cozzens *v.* Higgins, 1 Abb. Dec. (N. Y.) 451, 3 Keyes 206, 33 How. Pr. 436, holding that a photograph of the premises at the time is admissible.

72. Krider *v.* Lafferty, 1 Whart. (Pa.) 303.

73. St. Clair *v.* Cash Gold Min., etc., Co., 9 Colo. App. 235, 47 Pac. 466.

74. Sweeney *v.* Montana Cent. R. Co., 25 Mont. 543, 65 Pac. 912.

75. Arel *v.* Centebar, 73 Vt. 238, 50 Atl. 1064.

76. Sunnyside Coal, etc., Co. *v.* Reitz, 14 Ind. App. 478, 39 N. E. 541, 43 N. E. 46.

77. Montgomery *v.* Somers, 50 Oreg. 259, 90 Pac. 674.

between the parties which fixed a value,[78] or by showing value in similar cases,[79] or by the cost of the property [80] and the amount of use it has been subjected to,[81] or by value at a period long prior if there is evidence that it is unchanged;[82] and the value to the owner may be given as one test where it has a special value to him,[83] and may be proved by the opinion of witnesses;[84] but the basis of the opinion may be brought out on cross-examination.[85] A refusal of a vendee to complete his purchase because of the trespass is not evidence of value.[86] Where evidence of value has been given, evidence to the contrary can be given in rebuttal.[87] To show injury to land, evidence of its value and its condition before and after is admissible,[88] and an estimate by persons familiar with the land of the amount of damage is not bad as opinion evidence.[89] Evidence of the value of land is admissible in order to restrict damages to an amount not in excess thereof.[90]

(5) Evidence in Mitigation or Aggravation. On the question of exemplary or punitive damages, accompanying circumstances giving character to the act may be shown by plaintiff,[91] and defendant is entitled to offer evidence in rebuttal thereof.[92] So also it is permissible for defendant to offer evidence of

78. Weaver *v.* Mississippi, etc., Boom Co., 28 Minn. 534, 11 N. W. 114, holding that to show the value of the use of land the amount defendant had agreed to pay is admissible as an admission, but defendant can show the circumstances under which the agreement was made to rebut the inference, as that it was made pending an injunction and defendant had to accept or suffer irretrievable loss. Weaver *v.* Mississippi, etc., Boom Co., 28 Minn. 542, 11 N. W. 113.

The purchase-price of land is admissible to show its value. Gates *v.* Comstock, 113 Mich. 127, 71 N. W. 515.

79. Sweeney *v.* Montana Cent. R. Co., 25 Mont. 543, 65 Pac. 912, holding that the value of land may be shown by showing the value of adjoining land and its relation to the land in suit by maps. But evidence of the amount paid for the attachment of telephone wires on another house with no evidence as to their location, character, etc., is no evidence of the value of such use of plaintiff's house. Bunke *v.* New York Tel. Co., 110 N. Y. App. Div. 241, 97 N. Y. Suppl. 66 [*affirmed* in 188 N. Y. 600, 81 N. E. 1161].

80. Behm *v.* Damm, 91 N. Y. Suppl. 735; Griffin *v.* Martel, 77 Vt. 19, 58 Atl. 788. *Compare* Gray *v.* Henry County, 42 S. W. 333, 19 Ky. L. Rep. 885, holding that the cost of erecting posts and chains could not be shown in an action for their taking.

81. Behm *v.* Damm, 91 N. Y. Suppl. 735.

82. Griffin *v.* Martel, 77 Vt. 19, 58 Atl. 788.

83. Hughes *v.* Stevens, 36 Pa. St. 320, timber cut on furnace lands.

84. Argotsinger *v.* Vines, 82 N. Y. 308 (the value of wood cut on plaintiff's land); Hughes *v.* Stevens, 36 Pa. St. 320.

85. Dunbar Furnace Co. *v.* Fairchild, 121 Pa. St. 563, 15 Atl. 656, holding that where an opinion has been given as to the value of timber to the owner of land for timbering his mine, witness may be asked as to the cost of cutting, hauling, and placing the timber.

86. Western Union Tel. Co. *v.* Ring, 102 Md. 677, 62 Atl. 801.

87. Martin *v.* Erwin, 74 N. J. L. 337, 65 Atl. 888, cutting of ornamental vines.

In an action for attaching telephone wires to plaintiff's house where defendant testifies, the privilege was of no value and was never paid for, plaintiff may show defendant had paid for it. Bunke *v.* New York Tel. Co., 110 N. Y. App. Div. 241, 97 N. Y. Suppl. 66.

88. Gosdin *v.* Williams, 151 Ala. 592, 44 So. 611.

89. Perry *v.* Jefferies, 61 S. C. 292, 39 S. E. 515.

90. Welliver *v.* Pennsylvania Canal Co., 23 Pa. Super. Ct. 79.

91. Zimmerman *v.* Helser, 32 Md. 274; Young *v.* Mertens, 27 Md. 114; Wyant *v.* Crouse, 127 Mich. 158, 86 N. W. 527, 53 L. R. A. 626; Romaine *v.* Norris, 8 N. J. L. 80; Ogden *v.* Gibbons, 5 N. J. L. 518; Cook *v.* Garza, 9 Tex. 358.

Language and conduct of defendants may be given in evidence as to wantonness, malignity, etc. Shaftall *v.* Zipperer, 133 Ga. 488, 66 S. E. 253, 27 L. R. A. N. S. 442; Johnson *v.* Hannahan, 1 Strobh. (S. C.) 313.

Misleading actions.—Misleading plaintiff into believing defendant owned an adjoining lot and consented to the erection of windows overlooking it is admissible in an action for nailing them up. Omensetter *v.* Kemper, 6 Pa. Super. Ct. 309, 41 Wkly. Notes Cas. 501.

Evidence of motive is admissible as bearing on the measure of damages where a wilful trespass is alleged. Sunnyside Coal, etc., Co. *v.* Reitz, 14 Ind. App. 478, 39 N. E. 541, 43 N. E. 46. And see Kentucky Stave Co. *v.* Page, (Ky. 1910) 125 S. W. 170.

92. Roth *v.* Smith, 41 Ill. 314.

Applications of rule.— That an entry was to make a survey may be shown to rebut malice (Machin *v.* Geortner, 14 Wend. (N. Y.) 239); or that it was to search for furniture (Bohun *v.* Taylor, 6 Cow. (N. Y.) 313). Good-will toward plaintiff is admissible to rebut malice. Cannon *v.* Overstreet, 2 Baxt. (Tenn.) 464. In an action for whipping plaintiff's slave it may be shown that plaintiff had authorized defendant to do so three

circumstances in extenuation of it.[93] Matter not admissible as a justification may be admissible in mitigation of damages.[94] Defendant may show in mitigation that he was acting in good faith,[95] as under advice of counsel,[96] under an invalid but apparently good title,[97] under legal process which appeared to be valid,[98] or other circumstances connected with the trespass which show a good motive.[99] Matter offered in mitigation, however, must not be too remote in time,[1] and must have some tendency to mitigate the damages.[2]

(K) *Pecuniary Condition of Defendant.* Where a right to punitive damages has been shown plaintiff may show the pecuniary ability of defendant.[3]

(III) *WEIGHT AND SUFFICIENCY* — (A) *In General.* Plaintiff must establish his case by a clear preponderance of evidence.[4] A preponderance of the evidence is sufficient proof of a justification,[5] although where the trespass is also a crime

years before and he had done so then. Boling *v.* Wright, 16 Ala. 664. In trespass to realty it may be shown that plaintiff had agreed to give up possession. Farwell *v.* Warren, 51 Ill. 467.

93. See cases cited *infra*, this note.

Applications of rule.—An apparently good paper title is admissible in explanation (Caston *v.* Perry, 2 Bailey (S. C.) 104); so it may be shown that tearing down of plaintiff's building was done peaceably to prevent violence by a mob (Reed *v.* Bias, 8 Watts & S. (Pa.) 189). Non-payment of rent, notice to quit, etc., may be shown in trespass for assault and battery, trespass to realty and injury to personalty. Allen *v.* Champion, Wright (Ohio) 672. Where force is shown defendant may show provocation by plaintiff. Huftalin *v.* Misner, 70 Ill. 55 (holding, however, that provocation must have been so recent as to create a presumption that the act was a result of it); Dempsey *v.* Dobson, 174 Pa. St. 122, 34 Atl. 459, 52 Am. St. Rep. 816, 32 L. R. A. 761.

94. McAllin *v.* McAllin, 77 Conn. 398, 59 Atl. 413 (holding that an injunction against plaintiff's remaining on the premises is admissible in an action for forcibly disseizing him in mitigation of damages, if at all); Turner *v.* Poston, 63 S. C. 244, 41 S. E. 296 (holding that an invalid deed to defendant is admissible in an action for entering and plowing the land); Cannon *v.* Overstreet, 2 Baxt. (Tenn.) 464.

95. Burns *v.* Campbell, 71 Ala. 271.

96. Abbott *v.* '76 Land, etc., Co., 103 Cal. 607, 37 Pac. 527; Shores *v.* Brooks, 81 Ga. 468, 8 S. E. 429, 12 Am. St. Rep. 332; Moyer *v.* Gordon, 113 Ind. 282, 14 N. E. 476; Reeves *v.* Penson, L. R. 26 Ir. 141. *Contra*, Jasper *v.* Purnell, 67 Ill. 358. But not where the circumstances negatived a belief by defendant in his right (Carpenter *v.* Barber, 44 Vt. 441); or the advice was not based on the facts in the case (Louisville, etc., R. Co. *v.* Smith, 141 Ala. 335, 37 So. 490).

97. Barrett *v.* Mobile, 129 Ala. 179, 30 So. 36, 87 Am. St. Rep. 54; Gray *v.* Waterman, 40 Ill. 522; Hillman *v.* Baumbach, 21 Tex. 203.

98. Stephenson *v.* Wright, 111 Ala. 579, 20 So. 622; Boggan *v.* Bennett, 102 Ala. 400, 14 So. 742; Selden *v.* Cashman, 20 Cal. 56, 81 Am. Dec. 93; Buntin *v.* Duchane, 1 Blackf. (Ind.) 56.

99. Lamb *v.* Harbaugh, 105 Cal. 680, 39 Pac. 56. And see Sutherland *v.* Ingalls, 63 Mich. 620, 30 N. W. 342, 6 Am. St. Rep. 332.

1. Perkins *v.* Towle, 43 N. H. 220, 80 Am. Dec. 149.

2. Carpenter *v.* Barber, 44 Vt. 441, holding that in trespass *quare clausum* a secret arrangement by the owners of land with plaintiff's hired woman to let him in in the family's absence is more in aggravation than in mitigation.

3. Cumberland Tel., etc., Co. *v.* Poston, 94 Tenn. 696, 30 S. W. 1040; Gilman *v.* Brown, 115 Wis. 1, 91 N. W. 227; Cosgriff *v.* Miller, 10 Wyo. 190, 68 Pac. 206, 98 Am. St. Rep. 977. *Contra*, Farnsworth *v.* Western Union Tel. Co., 3 Silv. Sup. (N. Y.) 30, 6 N. Y. Suppl. 735.

4. Moulton *v.* Powers, 32 Me. 375; Curtiss *v.* Townsend, 6 U. C. C. P. 253.

Weight of evidence considered as to whether it justified a verdict for plaintiff see Gray Lumber Co. *v.* Harris, 127 Ga. 693, 56 S. E. 252; Hay *v.* Collins, 118 Ga. 243, 44 S. E. 1002; Chesapeake Stone Co. *v.* Fossett, 100 S. W. 825, 30 Ky. L. Rep. 1175; Hilton *v.* Colvin, 78 S. W. 890, 25 Ky. L. Rep. 1808; Lesch *v.* Great Northern R. Co., 97 Minn. 503, 106 N. W. 955, 7 L. R. A. N. S. 93 (fright caused by trespasses); Gerwiz *v.* W. J. Johnston Co., 207 Pa. St. 585, 57 Atl. 42 (injury to goods from intentional overflow of water); Lavin *v.* Dodge, 30 R. I. 8, 73 Atl. 376.

Weight of evidence considered as to whether it justified a verdict for defendant see Owsley *v.* Fowler, 104 S. W. 762, 31 Ky. L. Rep. 1154; Bright *v.* New Orleans R. Co., 114 La. 679, 38 So. 494.

Whether evidence justified directing a verdict or granting a motion for nonsuit see Davis *v.* Poland, 99 Me. 345, 59 Atl. 520; Haines *v.* Haines, 104 Md. 208, 64 Atl. 1044; Dobson *v.* Postal Tel. Cable Co., 79 S. C. 429, 60 S. E. 948.

Title to personalty and a taking without consent make out a *prima facie* case against the holder. Nashville, etc., R. Co. *v.* Walley, (Ala. 1906) 41 So. 134.

5. French *v.* Day, 89 Me. 441, 36 Atl. 909, clear preponderance and convincing proof not necessary.

Proof of license.—A license is proved by an agreement to give possession of realty at a future date, and entry and taking possession on that date (Feltham *v.* Cartwright, 5 Bing. N. Cas. 569, 9 L. J. C. P. 67, 7 Scott

it is sometimes held that it must be proved beyond a reasonable doubt.[6] Where the evidence is conflicting, the verdict will not be set aside as against the weight of evidence,[7] nor will it be set aside if the evidence is slightly contradictory.[8] Want of good faith is not conclusively proved by evidence that a deed in plaintiff's chain of title was forged.[9] The act itself may because of its nature be *prima facie* evidence that it was wilful and malicious,[10] but may be rebutted by evidence of good faith.[11]

(B) *Plaintiff's Right Other Than Possession.* Proof of title against a mere trespasser need not be as complete as in an action to recover the land.[12] Possession is *prima facie* evidence of title to maintain trespass,[13] or possession under claim

695, 35 E. C. L. 306); or by evidence of an agreement for the operation of a tramway on land at a price to be agreed upon (Brommell *v.* Eastern Kentucky R. Co., 22 S. W. 646, 15 Ky. L. Rep. 218); or by evidence of plaintiff's own witness as to an agreement, not impeached (Meyers *v.* Savery, 19 Mont. 329, 48 Pac. 390).

Proof of a right to enter and repair a ditch need not show the quantity of water owned. Hart *v.* Hoyt, (Cal. 1902) 70 Pac. 19.

Agency whose terms are not shown and a crediting the owner with timber cut is not conclusive of a right to cut it. Bellows *v.* Butler, 127 Mich. 100, 86 N. W. 533.

Sufficiency of evidence considered in particular cases: As to whether a surrender of land was voluntary. Robertson *v.* Cleveland, etc., Mineral Land Co., 70 Mo. App. 262. Prescription or dedication of a way. Clark *v.* Hull, 184 Mass. 164, 68 N. E. 60; Jeppson *v.* Almquist, 94 Minn. 403, 103 N. W. 10. Necessity for force used to eject trespasser. Green *v.* Buckingham, 122 Ill. App. 631.

6. Williams *v.* Dickenson, 28 Fla. 90, 9 So. 847. *Contra*, Cox *v.* Crumley, 5 Lea (Tenn.) 529.

7. Fidler *v.* Rehmeyer, 20 York Leg. Rec. (Pa.) 21.

8. Gunn *v.* Harris, 88 Ga. 439, 14 S. E. 593; Bullis *v.* Chicago, etc., R. Co., 76 Iowa 680, 39 N. W. 245.

9. Ross *v.* Scott, 15 Lea (Tenn.) 479.

10. Tucker *v.* McClure, 17 Iowa 583, shooting and killing plaintiff's horse.

11. Newell *v.* Giggey, 13 Colo. 16, 21 Pac. 904 (holding that where the evidence showed that defendant tried to prevent plaintiff's bull from joining his herd but he persistently returned, it will not warrant a finding of wilfully driving him away); Young *v.* Gormley, 119 Iowa 546, 93 N. W. 565 (tearing down a fence in a street under advice of counsel, although third persons told defendant he had no right to); Baker *v.* Meisch, 29 Nebr. 227, 45 N. W. 685.

12. Thornton *v.* St. Louis Refrigerator, etc., Co., 69 Ark. 424, 65 S. W. 113 (tax deed is sufficient *prima facie* evidence); Cairo, etc., R. Co. *v.* Woosley, 85 Ill. 370; Clay *v.* Boyer, 10 Ill. 506 (parol evidence of title sufficient if not objected to); Gardere *v.* Blanton, 35 La. Ann. 811; Thompson *v.* Chase, 2 Grant (Pa.) 367.

Acknowledgment of title in former action. —Written acknowledgment of title in plaintiff in an action to recover the land is sufficient evidence of title in a subsequent action of trespass for a subsequent entry. Kallenberger *v.* Sturtevant, 7 Cush. (Mass.) 465.

Acquiescence in running of boundary. — Running a boundary in defendant's presence, he being adjoining landowner, and observance of the line by defendant for twenty years is sufficient evidence of title. Thomas *v.* Thomas, 2 Harr. & J. (Md.) 506.

Levy and sale of land without proof of the facts making it lawful is sufficient against a mere trespasser. Wellington *v.* Geary, 3 Allen (Mass.) 508. *Contra*, Ames *v.* Sturtevant, 2 Allen (Mass.) 583.

Quitclaim. — A quitclaim deed to a cranberry marsh and evidence of a contract made by plaintiff as owner with another to gather the berries, and receipt of his share of berries thereunder, is sufficient. Reed *v.* Chicago, etc., R. Co., 71 Wis. 399, 37 N. W. 225.

The sufficiency of evidence of plaintiff's title generally was considered in the following cases: Kimball *v.* McKee, 149 Cal. 435, 86 Pac. 1089; Scroggins *v.* Nave, 133 Ky. 793, 119 S. W. 158; Cheatham *v.* Hicks, 88 S. W. 1093, 28 Ky. L. Rep. 66; Ripley *v.* Trask, (Me. 1910) 76 Atl. 951; Country Club Land Assoc. *v.* Lohbauer, 187 N. Y. 106, 79 N. E. 844; Johnson *v.* Crosson, Cassels Dig. (Can.) 848; Gates *v.* Davidson, Cassels Dig. (Can.) 847; Creighton *v.* Kuhn, Cassels Dig. (Can.) 845; Campbell *v.* McKinnon, 3 Nova Scotia Dec. 322.

13. *Alabama.* — Louisville, etc., R. Co. *v.* Smith, 141 Ala. 335, 37 So. 490 (possession for years); Miller *v.* Clay, 57 Ala. 162; Finch *v.* Alston, 2 Stew. & P. 83, 23 Am. Dec. 299.

California. — Kellogg *v.* King, 114 Cal. 378, 46 Pac. 166, 55 Am. St. Rep. 74; Golden Gate Mill, etc., Co. *v.* Joshua Hendy Mach. Works, 82 Cal. 184, 23 Pac. 45.

Delaware. — Covington *v.* Simpson, 3 Pennew. 269, 52 Atl. 349.

Georgia. — Southern R. Co. *v.* Thompson, 129 Ga. 367, 58 S. E. 1044; Southern R. Co. *v.* Horine, 121 Ga. 386, 49 S. E. 285.

Illinois. — Ragain *v.* Stout, 182 Ill. 645, 55 N. E. 529; Chicago Sanitary Dist. *v.* Kompare, 135 Ill. App. 312 (especially where he testified without objection that he was the owner); Baltimore, etc., R. Co. *v.* Higgins, 69 Ill. App. 412 (possession twelve or fifteen years).

Kentucky. — Chesapeake, etc., R. Co. *v.* Hickey, 22 S. W. 441, 15 Ky. L. Rep. 112, possession for nearly a century.

of title;[14] and adverse possession for the statutory period is sufficient proof of title.[15] A deed from one in possession is sufficient evidence of title in the grantee or his grantees;[16] but a deed to plaintiff without proof of possession in plaintiff or his grantor, or that the title was derived from the original source of title, are not sufficient evidence of title to maintain trespass,[17] except where defendant claims a right under the same grantor[18] or where the rule has been changed by statute.[19] This rule applies to personalty.[20] The proof of title must show title to that part of the land on which the trespass took place.[21] Title to land is *prima*

Michigan.— Beeman *v.* Black, 49 Mich. 598, 14 N. W. 560, possession for several years.

Minnesota.— Clague *v.* Hodgson, 16 Minn. 329 (personalty); Rau *v.* Minnesota Valley R. Co., 13 Minn. 442.

Nebraska.— Burlington, etc., R. Co. *v.* Beebe, 14 Nebr. 463, 16 N. W. 747, injury to freehold.

New Jersey.— Bloom *v.* Stenner, 50 N. J. L. 59, 11 Atl. 131.

New York.— Hoyt *v.* Van Alstyne, 15 Barb. 568; People *v.* Horr, 7 Barb. 9; Gidney *v.* Earl, 12 Wend. 98, possession of land on either side of a road is possession of the road.

Texas.— Pacific Express Co. *v.* Dunn, 81 Tex. 85, 16 S. W. 792; Texas, etc., R. Co. *v.* Torrey, (Civ. App. 1891) 16 S. W. 547.

West Virginia.— Wilson *v.* Phœnix Powder Mfg Co., 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. Rep. 890.

Wisconsin.— Carl *v.* Sheboygan, etc., R. Co., 46 Wis. 625, 1 N. W. 295.

Canada.— Munn *v.* Galbraith, 13 U. C. C. P. 75.

See 46 Cent. Dig. tit. "Trespass," § 124.

Where it appears plaintiff has not legal title the rule does not apply. Gartner *v.* Chicago, etc., R. Co., 71 Nebr. 444, 98 N. W. 1052.

14. *Illinois.*— Mason *v.* Park, 4 Ill. 532.

Kansas.— Douglass *v.* Dickson, 31 Kan. 310, 1 Pac. 541.

Michigan.— McFarlane *v.* Ray, 14 Mich. 465.

New York.— Eno *v.* Christ, 25 Misc. 24, 54 N. Y. Suppl. 400.

Texas.— Gulf, etc., R. Co. *v.* Cusenberry, 86 Tex. 525, 26 S. W. 43.

Possession by a tenant under color of title is sufficient evidence of title in the lessor to maintain an action for injury to the realty (Schneider *v.* Brown, 85 Cal. 205, 24 Pac. 715; McDodrill *v.* Pardee, etc., Lumber Co., 40 W. Va. 564, 21 S. E. 878); although the tenant had moved off the land at the time of the trespass (Davis *v.* Clancy, 3 McCord (S. C.) 422).

15. Argotsinger *v.* Vines, 82 N. Y. 308.

Evidence held sufficient to show title by adverse possession see Shinnecock Hills, etc., Realty Co. *v.* Aldrich, 132 N. Y. App. Div. 118, 116 N. Y. Suppl. 532.

16. Curtis *v.* Campbell, 54 Mich. 340, 20 N. W. 69.

17. *California.*— Odd Fellows' Sav. Bank *v.* Turman, (1892) 30 Pac. 966.

Iowa.— McCormick *v.* Chicago, etc., R. Co., 47 Iowa 345.

Kentucky.—Phillips *v.* Beattyville Mineral, etc., Co., 88 S. W. 1058, 28 Ky. L. Rep. 12; Dugan *v.* Ferguson, 1 S. W. 539, 8 Ky. L. Rep. 342.

Maine.— Butler *v.* Taylor, 86 Me. 17, 29 Atl. 923 (quit-claim deed); Savage *v.* Holyoke, 59 Me. 345; Vassal Borough *v.* Somerset, etc., R. Co., 43 Me. 337; Marr *v.* Boothby, 19 Me. 150.

Massachusetts.— Estes *v.* Cook, 39 Mass. 295, unrecorded deed.

New Jersey.— Rollins *v.* Atlantic City R. Co., 70 N. J. L. 664, 58 Atl. 344.

North Carolina.— Gordner *v.* Blades Lumber Co., 144 N. C. 110, 56 S. E. 695.

Canada.— Sears *v.* Palmer, 8 N. Brunsw. 400.

See 46 Cent. Dig. tit. "Trespass," § 124.

But see Cleveland, etc., R. Co. *v.* Kepler, 31 Ind. App. 1, 66 N. E. 1030; Ft. Worth, etc., R. Co. *v.* Wallace, 74 Tex. 581, 12 S. W. 227.

Where title is carried back to the state the rule is the same unless it affirmatively appears that it had a right to convey. Grant *v.* Smith, 26 Mich. 201 (*semble*); Racquette Falls Land Co. *v.* Buyce, 43 Misc. (N. Y.) 402, 89 N. Y. Suppl. 359. But see Clark *v.* Holdridge, 12 N. Y. App. Div. 613, 43 N. Y. Suppl. 115; Bristow *v.* Cormican, 3 App. Cas. 641.

If title is not denied but merely the wrongful act, a deed from the last owner is sufficient evidence of title. Printz *v.* Cheeney, 11 Iowa 469.

18. Garbutt Lumber Co. *v.* Wall, 126 Ga. 172, 54 S. E. 944; Rogers *v.* Cuyler, 89 S. W. 2, 28 Ky. L. Rep. 129; Rollins *v.* Atlantic City R. Co., 70 N. J. L. 664, 58 Atl. 344; Wolf *v.* Wolf, 158 Pa. St. 621, 28 Atl. 164. And see Leverett *v.* Tift, 6 Ga. App. 90, 64 S. E. 317.

19. **In New York** a chain of title thirty years old is presumptive evidence of title (Ridgway *v.* Hawkins, 123 N. Y. App. Div. 15, 107 N. Y. Suppl. 416) which is not rebutted by occasional acts of trespass by defendant (Cravath *v.* Baylis, 113 N. Y. App. Div. 666, 99 N. Y. Suppl. 973).

20. Carter *v.* Simpson, 7 Johns. (N. Y.) 535; Kennedy *v.* Waller, 2 Hen. & M. (Va.) 415.

21. *Illinois.*— David *v.* Correll, 74 Ill. App. 47.

Kentucky.— Le Moyne *v.* Anderson, 123 Ky. 584, 96 S. W. 843, 29 Ky. L. Rep. 1017.

North Carolina.— Berry *v.* W. M. Ritter Lumber Co., 141 N. C. 386, 54 S. E. 278.

Pennsylvania.— Hess *v.* Sutton, 33 Pa. Super. Ct. 530.

facie evidence of title to things on it and appurtenant to it.[22] A recovery in ejectment is conclusive evidence of plaintiff's title against defendant in ejectment proceedings or one claiming under him.[23] A judgment for plaintiff in forcible entry is sufficient to enable him to recover in trespass for mesne profits.[24] A recital in an ancient deed is sufficient evidence of facts necessary to make it a valid grant.[25] Lineal descent alone does not show title to land of the ancestor.[26] A conveyance of land to defendant's grantor, reserving the timber as a result of a compromise of their conflicting claims to the land, is not sufficient evidence of title to the timber.[27]

(c) *Defendant's Right Other Than Possession.* Defendant must prove his title by a preponderance of the evidence.[28] Title deeds are not the sole means of proving title in defendant.[29] A record title in defendant together with possession of part of the premises is sufficient evidence of title,[30] but not if neither defendant nor his grantors is shown to have had possession.[31] Where plaintiff proves a patent and mesne conveyances to himself, a series of deeds to defendant, not running back to a valid title, will not warrant a verdict for him.[32] Against plaintiff in possession an *ex parte* survey is not evidence of title,[33] nor a written acknowledgment of surrender of the premises by the mortgagor to the mortgagee, with no entry by the latter;[34] and an assignment of a mortgage without assignment of the debt and without entry is no evidence of title in defendant.[35] A conveyance to defendant without proof of possession in the grantee or title, or possession in his grantor, is no evidence of title in him.[36] Possession in defendant's grantors without proof of a claim of title is not evidence of title by adverse possession.[37] A deed from a foreign corporation is no evidence of title without proof of the creation of the corporation.[38] Recitals in deeds in defendant's chain of title and possession long continued are sufficient evidence of a lost deed if consistent with no other theory.[39]

(d) *Possession in Plaintiff.* Plaintiff's possession of land is *prima facie* proved by title.[40] Where actual possession is relied on it is not shown by isolated acts of trespass, although under claim of title,[41] nor by a series of acts not done under

Texas.— Gulf, etc., R. Co. *v.* Cusenberry, 86 Tex. 525, 26 S. W. 43.

West Virginia.— Buck *v.* Newberry, 55 W. Va. 681, 47 S. E. 889.

22. Roberts *v.* Hall, 147 Cal. 434, 82 Pac. 66 (water pipe in a street of which plaintiff owns the fee running from the water main to plaintiff's house); Dorsey *v.* Patterson, 7 Iowa 420 (rails and logs).

23. Dewey *v.* Osborn, 4 Cow. (N. Y.) 329 (trespass committed after verdict but before judgment); Van Alen *v.* Rogers, 1 Johns. Cas. (N. Y.) 281, 1 Am. Dec. 113 (mesne profits from time of demise).

24. Western Book, etc., Co. *v.* Jevne, 78 Ill. App. 668.

25. Young *v.* Shulenberg, 165 N. Y. 385, 59 N. E. 135, 80 Am. St. Rep. 730, 31 N. Y. Civ. Proc. 368 [*affirming* 35 N. Y. App. Div. 79, 54 N. Y. Suppl. 419], recital in a deed eighty years old, made in a foreign country, that grantors were heirs of the record owner.

26. Rice *v.* Chase, 74 Vt. 362, 52 Atl. 967.

27. Moore *v.* Vickers, 126 Ga. 42, 54 S. E. 814.

28. **Weight of evidence considered in** Kentucky Land, etc., Co. *v.* Crabtree, 113 Ky. 922, 70 S. W. 31, 24 Ky. L. Rep. 743; Courtney *v.* Ashcraft, 105 S. W. 106, 31 Ky. L. Rep. 1324.

29. Blaisdell *v.* Morse, 75 Me. 542; McNeil *v.* Train, 5 U. C. Q. B. 91, holding that an entry on plaintiff's possession by defendant claiming title, and possession yielded by plaintiff is sufficient evidence of defendant's title.

30. Burk *v.* Spinning, 2 N. Y. St. 221, although plaintiff has possession of other parts.

31. Newcastle *v.* Haywood, 68 N. H. 179, 44 Atl. 132.

32. Sibley *v.* Haslam, 75 Ga. 490.

33. Beeman *v.* Black, 49 Mich. 598, 14 N. W. 560.

34. Hobson *v.* Roles, 20 N. H. 41.

35. Hobson *v.* Roles, 20 N. H. 41.

36. Wilkinson *v.* Searcy, 76 Ala. 176, personalty.

37. Clark *v.* Boardman, 42 Vt. 667.

38. Young *v.* Milne, 28 N. Brunsw. 186.

39. Quillen *v.* Betts, 1 Pennew. (Del.) 53, 39 Atl. 595.

40. Printz *v.* Cheeney, 11 Iowa 469; Marsteller *v.* Coryell, 4 Leigh (Va.) 325; Ball *v.* Young, 8 U. C. C. P. 231.

In Pennsylvania this doctrine is limited to cases where the land is unimproved, as if improved it shows someone has actual possession. Hess *v.* Sutton, 33 Pa. Super. Ct. 530; Tustin *v.* Sammons, 23 Pa. Super. Ct. 175.

41. Hovey *v.* Long, 33 N. Brunsw. 462.

claim of right;[42] and evidence showing possession subsequent or probably subsequent to the trespass is insufficient to show trespass at the time;[43] but possessory acts repeated during a considerable period of time under claim of right,[44] or an exclusive control,[45] are sufficient, and, in general, the acts need only be such as

As for instance a survey made to locate a lake, advertisement of the land for sale, and notification to a stockman to keep his stock off (Odd Fellows' Sav. Bank *v.* Turman, (Cal. 1892) 30 Pac. 966); cutting trees on wild land (Young *v.* Shulenberg, 165 N. Y. 385, 59 N. E. 135, 80 Am. St. Rep. 730, 31 N. Y. Civ. Proc. 368); making pole bridges over a roadside ditch to enable plaintiff's cattle to range in adjoining swamp land and occasionally cutting a tree (Morris *v.* Hayes, 47 N. C. 93); marking of trees around the land (Oatman *v.* Fowler, 43 Vt. 462); running a boundary (Cameron *v.* McDonald, 3 Nova Scotia 240); running a boundary and marking it (Rice *v.* Chase, 74 Vt. 362, 52 Atl. 967); making a survey (Oatman *v.* Fowler, *supra*; Greaves *v.* Hilliard, 15 U. C. C. P. 326).

42. Powers *v.* Hatter, 152 Ala. 636, 44 So. 859; Doolittle *v.* Linsley, 2 Aik. (Vt.) 155.

Applications of rule.— Payment of taxes and riding along the highway running over the land is not sufficient evidence of actual possession. Powers *v.* Hatter, 152 Ala. 636, 44 So. 859. One who contracts with the owner of timber to cut and deliver it to the owner's mill gets no possession in course of doing it. Fitzgerald *v.* Elliott, 162 Pa. St. 118, 29 Atl. 346, 42 Am. St. Rep. 812. Cutting trees on wild land for fifteen years gives no possession, although it would if the land were neglected and title claimed. Doolittle *v.* Linsley, 2 Aik. (Vt.) 155. Use of vacant land for pasture in common with others is no evidence of possession. Temiscouata R. Co. *v.* Clair, 38 Can. Super. Ct. 230. Casual acts of a transient or temporary nature, not showing apparent object of taking possession as owner, do not give possession. Gidney *v.* Bates, 10 N. Brunsw. 395. Occasional use by a mechanic of land near his shop to deposit wood on, etc., does not give possession. Moore *v.* Hodgdon, 18 N. H. 144. Possession of a pier in a navigable stream does not give possession of the bed of the stream. Dixson *v.* Snetsinger, 23 U. C. C. P. 235. And use of water in a mill pond is no evidence of title or possession of the land covered by it. Bartholomew *v.* Edwards, 1 Houst. (Del.) 17.

43. Henry *v.* Davis, 149 Ala. 359, 43 So. 122 (holding that judgment in ejectment relating only to possession at the time the action was brought is not sufficient evidence of possession prior thereto); Gordner *v.* Blades Lumber Co., 144 N. C. 110, 56 S. E. 695 (holding that proof of possession some time during the year the trespass was done is not sufficient evidence of possession at the time of the act done not later than March); Greaves *v.* Hilliard, 15 U. C. C. P. 326 (holding that entry claiming title after the act of trespass is no evidence to prove plaintiff's right).

44. Bileu *v.* Paisley, 18 Oreg. 47, 21 Pac. 934, 4 L. R. A. 840; Burnham *v.* Davison, 17 Nova Scotia 388.

Applications of rule.— As for instance, entry, partial fencing, slight cultivation, cutting timber, and continuous public acts of ownership (McLean *v.* Farden, 61 Ill. 106); use of mining ditches in course of mining operations for two seasons (Bileu *v.* Paisley, 18 Oreg. 47, 21 Pac. 934, 4 L. R. A. 840); raising corn two years on a small isolated tract on which no one resided (Douling *v.* Hickman, 4 Hayw. (Tenn.) 170); occasional trespass under continual claim of title (Hibbard *v.* Foster, 24 Vt. 542); entry and selling timber from time to time and exercising acts of ownership (Sawyer *v.* Newland, 9 Vt. 383); staking off marsh and cutting the grass each year, the land being incapable of other possession (Davison *v.* Burnham, Cassels Dig. (Can.) 846; Burnham *v.* Davison, 17 Nova Scotia 388); frequent cutting trees on woodland during a long period of years (Kilborn *v.* Rewee, 8 Gray (Mass.) 415; Fitch *v.* Gosser, 54 Mo. 267. *Contra*, Barnhill *v.* Peppard, 3 Nova Scotia Dec. 491); or on a woodlot (Chandler *v.* Walker, 21 N. H. 282, 53 Am. Dec. 202; Machin *v.* Geortner, 14 Wend. (N. Y.) 239); and such cutting for the statutory period gives title so that the action lies against the grantee of the record owner (Argotsinger *v.* Vines, 82 N. Y. 308). So working of a mine by plaintiff and an admission by defendant that the taking by him of ore was wrongful is evidence of possession in plaintiff. Wild *v.* Holt, 1 Dowl. P. C. N. S. 876, 11 L. J. Exch. 285, 9 M. & W. 672. Constructing a series of canals by which marsh lands were flooded twice a day and finally converted into firm soil gives possession. McCulley *v.* Blair, 15 Nova Scotia 435.

The acts may be done by a third person acting for plaintiff. Proprietors Monumoi Great Beach *v.* Rogers, 1 Mass. 159, possessory acts of a proprietor of common lands inure *per se* to the benefit of the corporation.

In New Brunswick it was held that fastening a net annually for twenty years to a tree on a small, uncultivated island, collecting driftwood on it, and once pasturing a calf there gave no possession. Gidney *v.* Bates, 10 N. Brunsw. 395.

45. Carrine *v.* Westerfield, 3 A. K. Marsh. (Ky.) 331.

Thus use of a church for worship and keeping it locked at other times gives possession. Carrine *v.* Westerfield, 3 A. K. Marsh. (Ky.) 331. Fencing or cultivating land by plaintiff's agent for him gives possession. Van Buskirk *v.* Dunlap, 2 Ohio Dec. (Reprint) 233, 2 West. L. Month. 125. It has been held, however, that where a fence had been completed on three sides only, plaintiff had not obtained exclusive possession (Allen *v.* Su-

are usual and customary in taking possession of land of the character of the land in question.[46] Actual residence is not an essential feature of possession,[47] nor actual inclosing of the land.[48] Where the law requires that the land be inclosed, inclosure by natural objects is sufficient.[49] Where plaintiff actually enters upon land and takes possession, it extends to boundaries clearly marked out by him,[50] even though plaintiff has no color of title.[51] Things appurtenant to the soil can be taken possession of by clear acts of appropriation, although not removed.[52] The evidence of retaking of possession by a disseizee must show actual possession.[53] Mere designation of property in another's possession as belonging to plaintiff does not give possession.[54] That defendant erected his fence inside his boundary line is no evidence of possession in plaintiff up to the fence.[55] Whether plaintiff has made out sufficient possession to go to the jury is a question for the judge.[56]

(E) *Possession in Defendant.* The evidence of possession need only be of acts such as are usual in taking possession of land of the character of that in dispute.[57] A single act of trespass does not give possession to defendant to defeat an action of trespass brought against him,[58] nor a number of separate acts of trespass,[59] nor remaining on the land for a time conducting operations there, where no intent to take possession is shown; [60] but entry and acts of dominion and control give

seng, 1 Coldw. (Tenn.) 204); nor where the land had been used as a common grazing ground and for eighty rods there was neither post hole, post, nor fence of any kind (Rivers *v.* Burbank, 13 Nev. 398). Where the jury were instructed that they must find plaintiff had exclusive possession, and it appeared plaintiff had moved his household goods in but did not take up his residence there for several months, the verdict for plaintiff was not disturbed. Lawton *v.* Cardell, 22 Vt. 524.

46. Cook *v.* Rider, 16 Pick. (Mass.) 186; Rogers *v.* Cooney, 7 Nev. 213 (setting up boundary posts on mineral land or land valuable solely for its minerals); Carpenter *v.* Logee, 24 R. I. 383, 53 Atl. 288 (several entry on unoccupied woodland, claiming title, surveying it, etc.); Doolittle *v.* Linsley, 2 Aik. (Vt.) 155.

47. Yorgenson *v.* Yorgenson, 6 Nebr. 383; Van Buskirk *v.* Dunlap, 2 Ohio Dec. (Reprint) 233, 2 West. L. Month. 125.

Special statutory provisions.— Under Colo. Gen. St. c. 90, declaring a settler upon public land, in actual occupancy with boundaries marked so as to be readily traced and having done one hundred dollars worth of improvements, can maintain trespass, he cannot if he has never actually resided on the land and has only surveyed the land and done less than one hundred dollars improvements to it. Martin *v.* Pittman, 3 Colo. App. 220, 32 Pac. 840.

48. Tyson *v.* Shueey, 5 Md. 540.

49. Fripp *v.* Hasell, 1 Strobh. (S. C.) 173, inclosure by navigable water.

50. Cook *v.* Rider, 16 Pick. (Mass.) 186; Woods *v.* Banks, 14 N. H. 101.

51. Gaudin *v.* McKilligan, 7 N. Brunsw. 392.

52. Hickey *v.* Hazard, 3 Mo. App. 480.

Illustrations.— Marking off ice on a navigable river and clearing it off, etc., gives possession (Hickey *v.* Hazard, 3 Mo. App. 480); or cutting a crop (Algood *v.* Hutchins, 7 N. C. 496), although not against one who cultivated it jointly with plaintiff (McGahey *v.* Moore, 25 N. C. 35); or cutting and cording wood (Rogan *v.* Perry, 6 Wis. 194).

53. Clark *v.* Hill, 1 Harr. (Del.) 335, holding that entry and cutting wood does not divert the disseizor's possession so that trespass lies against him. *Contra,* Payne *v.* Clark, 20 Conn. 30.

Entry by lessor's agent before expiration of term.— It has been held that where a tenant delivered possession to a third person, an entry by the lessor's agent before the expiration of the term of the tenancy gave the lessor possession to maintain trespass. Tasker *v.* Ridgely, 4 Harr. & M. (Md.) 497.

54. Merrick *v.* Britton, 26 Ark. 496.

55. Storr *v.* James, 84 Md. 282, 35 Atl. 965.

56. Merritt *v.* Quinton, 2 N. Brunsw. 209.

57. Williams *v.* Buchanan, 23 N. C. 535, 35 Am. Dec. 760 (holding that erection and maintenance of a fish trap in a nonnavigable stream gives defendant possession against the owner); Tredwell *v.* Reddick, 23 N. C. 56 (holding that entry into a swamp with workmen, putting up tents and remaining three years making shingles gives possession, that being the only use it could be put to); Haseltine *v.* Mosher, 51 Wis. 443, 8 N. W. 273 (holding that entry and cutting trees and building roads on timber land by the owner prevents a tax title being perfected under the statute by three years' possession, as it was the only use timber land could be put to).

58. Page *v.* Fowler, 37 Cal. 100 (cutting grass); Cleveland, etc., R. Co. *v.* Kepler, 31 Ind. App. 1, 66 N. E. 1030 (mowing weeds); Kinney *v.* Ferguson, 101 Mich. 178, 59 N. W. 401.

59. Caskey *v.* Lewis, 15 B. Mon. (Ky.) 27 (entering at intervals to cut wood and make sugar); Frederick *v.* Goodbee, 120 La. 783, 45 So. 606 (cutting timber on isolated forest land).

60. Safford *v.* Basto, 4 Mich. 406, holding that entry on land, building temporary shan-

possession.[61] Title is presumed to give defendant possession unless the contrary appears.[62] Defendant's possession must be a reasonable inference from the evidence.[63]

(F) *Acts Constituting Trespass.* The act constituting the trespass must be proved by a preponderance of the evidence,[64] and that defendant did it [65] or participated with others in its commission,[66] or that he authorized it,[67] or that he

ties, and cutting timber shows only an intent to cut the timber and then abandon the land.

61. Hampton *v.* Massey, 53 Mo. App. 501 (holding that entry claiming title, and surveying, and marking the boundaries, and exercising control gives possession); Bynum *v.* Carter, 26 N. C. 310 (holding that where for years defendant had for six months in each year been on the land making turpentine, it was held to give possession, as it required open and notorious dominion over the land).

62. Gardner *v.* Gooch, 48 Me. 487.

A lease of a house gives possession against the owner of the street adjoining. Alexander *v.* Bonnin, Arn. 337, 4 Bing. N. Cas. 799, 8 L. J. C. P. 53, 6 Scott 611, 33 E. C. L. 983

63. Jones *v.* Muldrow, Rice (S. C.) 64 (holding that defendant's naked assertion that he holds possession for a third person is not sufficient evidence of it); White *v.* Smith, 9 N. Brunsw. 335 (holding that oral permission given while off the land to erect a building on land is not evidence of possession or title in the one giving it); Dacksteder *v.* Baird, 5 U. C. Q. B. 591 (holding that working a farm on shares is not conclusive evidence of possession exclusive of the owner so that he cannot maintain trespass against a third person).

Erection of a building on premises under claim of right is sufficient evidence of possession by defendant. Waterbury Clock Co. *v.* Irion, 71 Conn. 254, 41 Atl. 827.

64. See cases cited *infra*, this note.

Sufficiency of evidence considered in particular cases.— Every arrest is *prima facie* a trespass. Clark *v.* Tilton, 74 N. H. 330, 68 Atl. 335. Turning one out of a house is sufficient proof of excess in exercise of a mere right to enter. Honsberger *v.* Honsberger, 5 U. C. Q. B. O. S. 479. A breaking and entering of plaintiff's furnished apartment in defendant's house is sufficiently proved by proof that he excluded plaintiff from the house. Lane *v.* Dixon, 3 C. B. 776, 11 Jur. 89, 16 L. J. C. P. 129, 54 E. C. L. 776. That defendant attached telegraph wires to plaintiff's house is sufficient evidence that on their remaining there he was maintaining them as a continuing trespass. Bunke *v.* New York Tel. Co., 188 N. Y. 600, 81 N. E. 1161 [*affirming* 110 N. Y. App. Div. 241, 97 N. Y. Suppl. 66]. Evidence showing only that an act may have been done within a certain time is insufficient. Price *v.* Greer, 76 Ark. 426, 88 S. W. 985. Ownership by one of defendants of a mill where timber taken was found is not alone sufficient evidence of its taking by him. Holliday *v.* Jackson, 30 Mo. App. 263. Refusal to permit a lodger to take his personalty from defendant's realty until rent is paid is not a taking of the personalty. Hartley *v.* Moxham, 3 Q. B. 701, 43 E. C. L. 933, 114 Eng. Reprint 675, C. & M. 504, 41 E. C. I. 276, 3 G. & D. 1, 6 Jur. 946, 12 L. J. Q. B. 41. For other cases in which the sufficiency of the evidence was considered see Therrell *v.* Ellis, 83 Miss. 494, 35 So. 826 (reckless cutting of trees); Pagan *v.* Drake Furniture Co., 73 S. C. 364, 33 S. E. 542 (frightening and subjecting plaintiff to nervous shock by violence); Auger *v.* Cook, 39 U. C. Q. B. 537 (breaking a boom wrongfully).

65. See cases cited *infra*, this note.

Sufficiency of evidence to connect defendant with act considered.—Authority to build a railroad and actual operation of it when built is *prima facie* evidence that defendant built it (Gilchrist *v.* Dominion Tel. Co., 20 N. Brunsw. 241); defendant's liability is proved *prima facie* by evidence that the act was done under the supervision of his agent (American Horse Exch. Co. *v.* Naughton Co., 97 N. Y. Suppl. 384); or by direction of his agent (Louisville, etc., R. Co. *v.* Hill, 115 Ala. 334, 22 So. 163); or by the agent acting within the scope of his authority (McKay *v.* Botsford, 10 N. Brunsw. 550, holding that where defendant's employee sold boards of a third person on defendant's premises and gave defendant the money and defendant said it was the best thing to do, the jury are justified in finding the act was within the scope of his employment); where gravel was taken by persons with wagons of the same color as defendant's it is not sufficient evidence that he took it (Greve *v.* Wood-Harmon Co., 173 Mass. 45, 52 N. E. 1070); and in an action for cutting and removing timber, proof that some of it was cut by defendant was insufficient to charge it with responsibility for all the timber missing from plaintiff's land during an indefinite period of two or three years. Stoneman-Zearing Lumber Co. *v.* McComb, 92 Ark. 297, 122 S. W. 648.

For sufficiency of evidence to show that a trespass was jointly committed by two corporate defendants see Heybrook *v.* Index Lumber Co., 49 Wash. 378, 95 Pac. 324.

Sufficiency of evidence that the wanton cutting of plaintiff's trees was done by defendant see Faris *v.* American Tel., etc., Co., 84 S. C. 102, 65 S. E. 1017.

66. Wetzel *v.* Satterwhite, (Tex. Civ. App. 1910) 125 S. W. 93, holding certain evidence insufficient for that purpose.

67. Finch *v.* Alston, 2 Stew. & P. (Ala.) 83, 23 Am. Dec. 299 (holding that possession by defendant of plaintiff's house is *prima facie* evidence that he took it); Barrett *v.* Warren, 3 Hill (N. Y.) 348.

ratified it;[68] and where the action is for consequential damages it must appear that the act causing the injury was wrongful.[69]

(G) *Damages.*[70] The evidence must not be too remote in time or place,[71] nor insufficient as a basis for an inference,[72] and must show that the damage resulted from the act;[73] but in general no particular form of evidence is requisite.[74] Extent of injury may be shown by a view merely,[75] or from photographs and testimony of what was done with no evidence measuring the damages in money.[76] Possession is *prima facie* evidence of a right to recover full damages.[77] It is not necessary to show the exact amount of damage done, but damages may be given for what the jury are reasonably satisfied was done.[78] The act may itself be sufficient evidence to justify exemplary damages.[79] The fact that it was done intentionally, in known violation of plaintiff's right, will justify exemplary damages;[80] but evidence of negligence alone is not enough,[81] nor evidence of acts prior to the act and not a part of it;[82] and if good faith is shown the damages for things severed from the realty will be confined to their value *in situ*.[83] If there is some evidence to support a verdict for compensatory damages to its full amount it will not be set aside as excessive,[84] although the evidence was conflicting.[85]

i. Damages — (I) *In General.* While the prevailing view is that case is

Weight of evidence considered: In an action for cutting timber see Whitney *v.* Backus, 149 Pa. St. 29, 24 Atl. 51; Smith *v.* Brazelton, 1 Heisk. (Tenn.) 44, 2 Am. Rep. 678. For seizing goods see Aldrich *v.* Ketcham, 3 E. D. Smith (N. Y.) 577; McClevertie *v.* Massie, 21 U. C. C. P. 516.

68. Burns *v.* Campbell, 71 Ala. 271, holding that a failure to repudiate an act done by defendant's agent and which was a benefit to defendants shows a ratification.

Substantial proof of the ratification of a trespass is necessary. Burns *v.* Campbell, 71 Ala. 271.

69. Richardson *v.* Milburn, 11 Md. 340, holding that removal of fence by defendant so that stock damaged plaintiff's crop is not enough without proof as to when, where, and by whom it was erected or whose the cattle were or any agreement regarding it.

70. **Sufficiency of evidence to sustain verdict for amount awarded** see Doniphan Lumber Co. *v.* Case, 87 Ark. 168, 110 S. W. 208; Saunders *v.* Collins, 56 Fla. 534, 47 So. 958; Brobst *v.* Evans, 35 Pa. Super. Ct. 610.

71. Jackson *v.* Gunton, 26 Pa. Super. Ct. 203 [*affirmed* in 218 Pa. St. 275, 67 Atl. 467], holding that condition of land many years after is not sufficient evidence of its condition at a given time.

Value near the locus is *prima facie* evidence of the extent of the damage. Keith *v.* Tilford, 12 Nebr. 271, 11 N. W. 315.

72. Thornton *v.* Dwight Mfg. Co., 120 Ala. 653, 25 So. 22, holding that a statement showing dates and figures only is not evidence of damage from cutting trees.

Mere market value of a crop without evidence of the cost of harvesting it is no criterion of the value of the unharvested crop (Van Rensselaer *v.* Mould, 48 Hun (N. Y.) 396, 1 N. Y. Suppl. 28); but is sufficient if the cost of harvesting is shown (Gulf, etc., R. Co. *v.* McMurrough, 41 Tex. Civ. App. 216, 91 S. W. 320).

73. Feuerstein *v.* Jackson, 8 Ohio Cir. Ct. 396, 4 Ohio Cir. Dec. 516, holding that where under authority to cut down the grade of a street two feet it was cut three to five feet and it did not appear how much of the damage to plaintiff's house resulted from the unauthorized cutting it did not justify a verdict for three hundred dollars.

74. Hueston *v.* Mississippi, etc., Boom Co., 76 Minn. 251, 79 N. W. 92.

75. Weed *v.* Brush, 89 Hun (N. Y.) 62, 34 N. Y. Suppl. 1025.

76. Harris *v.* Ansonia, 73 Conn. 359, 47 Atl. 672.

77. Reed *v.* Price, 30 Mo. 442; Bloom *v.* Stenner, 50 N. J. L. 59, 11 Atl. 131; Todd *v.* Jackson, 26 N. J. L. 525. And see Steenburgh *v.* McRorie, 60 Misc. (N. Y.) 510, 113 N. Y. Suppl. 1118.

78. Lowery *v.* Rowland, 104 Ala. 420, 16 So. 88.

79. Western Union Tel. Co. *v.* Dickens, 148 Ala. 480, 41 So. 469, destruction of plaintiff's fence unnecessarily in repairing defendant's telegraph line.

80. Louisville, etc., R. Co. *v.* Smith, 141 Ala. 335, 37 So. 490.

For evidence held sufficient to show that the act was not involuntary see Nethery *v.* Nelson, 51 Wash. 624, 99 Pac. 879.

81. Spencer *v.* San Francisco Brick Co., 5 Cal. App. 126, 89 Pac. 851.

82. Lawandoski *v.* Wilkes-Barre, etc., R. Co., 35 Pa. Super. Ct. 10, holding that evidence of an altercation over defendant's right to enter land which quickly passed was not sufficient to warrant exemplary damages when the actual entry was peaceable.

83. Pettit *v.* Frothingham, 48 Tex. Civ. App. 105, 106 S. W. 907, holding that sale of timber to defendant by an old settler of good repute is sufficient evidence of his good faith to reduce damages to compensation for thing severed from realty at time of severance.

84. Sunnyside Coal, etc., Co. *v.* Reitz, 14 Ind. App. 478, 39 N. E. 541, 43 N. E. 46.

85. Prescott *v.* Walton, 3 N. Brunsw. 230.

the appropriate remedy for injuries resulting from mere negligence or which are not the immediate consequence of the act complained of,[86] trespass lies for the recovery of damages which are the natural and necessary consequences of a tort committed with force.[87] And it is not necessary that the particular injury should have been contemplated if some injury was the unavoidable result.[88] It is a principle of universal application that every trespass gives a right to at least nominal damages,[89] even though the act was a benefit to plaintiff.[90] One whose property rights have been invaded by a tortious act can without proof of any amount of damage recover a nominal amount for the purpose of vindicating his right.[91] But plaintiff is confined to nominal damages where no actual injury

86. See CASE, 6 Cyc. 648.

87. *Alabama.*— Garrett *v.* Sewell, 108 Ala. 521, 18 So. 737, injury to growing crops resulting from removal of fence.

California.— Hawthorne *v.* Siegel, 88 Cal. 159, 25 Pac. 1114, 22 Am. St. Rep. 291.

Connecticut.— Eldridge *v.* Gorman, 77 Conn. 699, 60 Atl. 643, damages resulting from an entry and cutting trees.

Georgia.— Stevens *v.* Stevens, 96 Ga. 374, 23 S. E. 312.

Illinois.— Gray *v.* Waterman, 40 Ill. 522 (injury to growing crops from removal of fence); Buckmaster *v.* Coal, 12 Ill. 74.

Maryland.— Moore *v.* Schultz, 31 Md. 418; Baltimore, etc., R. Co. *v.* Thompson, 10 Md. 76, failure of cattle to thrive owing to the construction of a railroad through the pasture.

Michigan.—Gilbert *v.* Kennedy, 22 Mich. 117.

New York.— Wood *v.* New York Cent., etc., R. Co., 184 N. Y. 290, 77 N. E. 27, injury to the person.

North Carolina.— Bridgers *v.* Dill, 97 N. C. 222, 1 S. E. 767 (injury to growing crops from removal of fence); Hatchell *v.* Kimbrough, 49 N. C. 163 (loss of an eye in consequence of exposure from wrongful removal of the roof of plaintiff's house); Welch *v.* Piercy, 29 N. C. 365 (loss of animals from breaking of plaintiff's fence).

Rhode Island.— Hathaway *v.* Osborne, 25 R. I. 249, 55 Atl. 700, holding that damages from influx of the sea on plaintiff's land caused by defendant's trespass can be recovered in action for trespass to the land.

South Carolina.— Hardin *v.* Kennedy, 2 McCord 277.

Tennessee.— Damron *v.* Roach, 4 Humphr. 134 (loss of animals from breaking of plaintiff's fence); Johnson *v.* Perry, 2 Humphr. 569 (injuries to a slave caused by his efforts to escape from defendant's chastisement).

Texas.— Jesse French Piano, etc., Co. *v.* Phelps, 47 Tex. Civ. App. 385, 105 S. W. 225, goods taken from plaintiff's house which defendant wrongfully entered and left open, although it did not appear who took them.

Vermont.— Clark *v.* Boardman, 42 Vt. 667; Hutchinson *v.* Granger, 13 Vt. 386.

England.— Gilbertson *v.* Richardson, 5 C. B. 502, 12 Jur. 292, 17 L. J. C. P. 112, 57 E. C. L. 502; Bennett *v.* Allcott, 3 T. R. 166, 100 Eng. Reprint 90, loss of services of child.

Canada.—Auger *v.* Cook, 39 U. C. Q. B. 537, logs lost from the breaking of a boom.

See 46 Cent. Dig. tit. "Trespass," § 129.

Injuries by third persons brought on premises by defendant.— Recovery may be had in the action of trespass for damage done by third persons wrongfully brought by defendant upon the premises. Thus where defendant led a body of men upon plaintiff's sawmill premises to ascertain whether plaintiff's workmen were satisfied with their hours of labor he is liable for acts of violence done by them (Webber *v.* Barry, 66 Mich. 127, 33 N. W. 289, 11 Am. St. Rep. 466); and where defendant's balloon landed in plaintiff's garden and a crowd broke in to assist him he is liable, as he should have foreseen the result, and his vountarily placing himself in such a situation was equivalent to a request to the crowd to follow (Guille *v.* Swan, 19 Johns. (N. Y.) 381, 10 Am. Dec. 234).

88. Munger *v.* Baker, 65 Barb. (N. Y.) 539, 1 Thomps. & C. 122.

89. *Arkansas.*— Brock *v.* Smith, 14 Ark. 431.

California.— Empire Gold Min. Co. *v.* Bonanza Gold Min. Co., 67 Cal. 406, 7 Pac. 810.

Georgia.— Swift *v.* Broyles, 115 Ga. 885, 42 S. E. 277, 58 L. R. A. 390.

Massachusetts.— Brown *v.* Parkins, 1 Allen 89.

Mississippi.— Keirn *v.* Warfield, 60 Miss. 799.

Nevada.— Patchen *v.* Keeley, 19 Nev. 404, 14 Pac. 347.

New York.— Pierce *v.* Hosmer, 66 Barb. 345; Dixon *v.* Clow, 24 Wend. 188.

North Carolina.— Brame *v.* Clark, 148 N. C. 364, 62 S. E. 418, 19 L. R. A. N. S. 1033; White *v.* Griffin, 49 N. C. 139; Dougherty *v.* Stepp, 18 N. C. 371.

Ohio.— Besaden *v.* Hamilton County, 7 Ohio Cir. Ct. 237, 4 Ohio Cir. Dec. 575.

South Carolina.— Bradley *v.* Flewitt, 6 Rich. 69; Norvell *v.* Thompson, 2 Hill 470; Caruth *v.* Allen, 2 McCord 226.

Texas.— Champion *v.* Vincent, 20 Tex. 811.

Vermont.— Paul *v.* Slason, 22 Vt. 231, 54 Am. Dec. 75.

See 46 Cent. Dig. tit. "Trespass," § 141.

90. Haynes *v.* Thomas, 7 Ind. 38 (erecting valuable buildings); Sharpe *v.* Levert, 51 La. Ann. 1249, 26 So. 100; Johnson *v.* Conant, 64 N. H. 109, 7 Atl. 116; Huddleston *v.* Johnson, 71 Wis. 336, 37 N. W. 407 (cutting timber, the land being worth more cleared than with the timber on it); Murphy *v.* Fond du Lac, 23 Wis. 365, 99 Am. Dec. 181.

91. Swift *v.* Broyles, 115 Ga. 885, 42 S. E. 277, 58 L. R. A. 390.

is shown,[92] or where the injury is repaired by defendant.[93] If an injury is done by the trespass plaintiff is on general principles entitled to compensation for the amount of damage caused thereby,[94] which is not affected by defendant's use of the property thereafter.[95] But, in the absence of circumstances of aggravation, damages for a trespass are limited to compensation.[96] Damages cannot be recovered twice over under two different forms.[97]

(II) *Damages Accruing After the Bringing of the Action.*[98] All

92. *Connecticut.*— Eldridge *v.* Gorman, 77 Conn. 699, 60 Atl. 643.

Delaware.—Pennington *v.* Lewis, 4 Pennew. 447, 56 Atl. 378.

Georgia.— Batson *v.* Higginbothem, 7 Ga. App. 835, 68 S. E. 455.

Illinois.— Green *v.* Buckingham, 26 Ill. App. 240; Merrill *v.* Dibble, 12 Ill. App. 85.

Iowa.— Plummer *v.* Harbut, 5 Iowa 308.

Kansas.— Hefley *v.* Baker, 19 Kan. 9.

Mississippi.— Clark *v.* Hart, (1887) 3 So. 33, trees cut but used in fencing the land.

Missouri.— Ross *v.* New Home Sewing Mach. Co., 24 Mo. App. 353.

New York.— Fortescue *v.* Kings County Lighting Co., 128 N. Y. App. Div. 826, 112 N. Y. Suppl. 1010; Wood *v.* Williamsburgh, 46 Barb. 601 (unlawful grading of a public street of which plaintiff owns the fee); Rich *v.* Rich, 16 Wend. 663.

Texas.— Smith *v.* Huizar, 25 Tex. Suppl. 205.

Wisconsin.— Benson *v.* Waukesha, 74 Wis. 31, 41 N. W. 1017; Murphy *v.* Fond du Lac, 23 Wis. 365, 99 Am. Dec. 181, cost of removing earth cannot be recovered if it did no harm to the land.

Necessity for proof.— The damages must be proved (Ross *v.* New Home Sewing Mach. Co., 24 Mo. App. 353; Smith *v.* Huizar, 25 Tex. Suppl. 205 (failure to prove value of use and occupation); Murray *v.* Pannaci, 130 Fed. 529, 65 C. C. A. 153); although defendant's plea in justification fails (Rich *v.* Rich, 16 Wend. (N. Y.) 663; Caruth *v.* Allen, 2 McCord (S. C.) 226).

93. Jewett *v.* Whitney, 43 Me. 242 (tearing down an old well and erecting a better); Flynt *v.* Chicago, etc., R. Co., 38 Mo. App. 94 (earth removed by a railroad's servants inadvertently but replaced on complaint).

94. Moyer *v.* Gordon, 113 Ind. 282, 14 N. E. 476; Zimmerman *v.* Bonzar, (Pa. 1888) 16 Atl. 71; Krider *v.* Lafferty, 1 Whart. (Pa.) 303.

In trespass de bonis the jury must give at least the value of the goods taken. Wooley *v.* Carter, 7 N. J. L. 85, 11 Am. Dec. 520.

Where the property has no market value and could not be replaced the loss to the owner is the proper measure of damages. Sinclair *v.* Stanley, 64 Tex. 67.

95. Caverhill *v.* Robillard, 2 Can. Sup. Ct. 575, holding that abandonment of a wharf and bridge after its destruction by defendant do not affect plaintiff's right to substantial damages.

96. *Alabama.*— Warrior Coal, etc., Co. *v.* Mabel Min. Co., 112 Ala. 624, 20 So. 918.

Kentucky.— Lindsay *v.* Latham, 107 S. W. 267, 32 Ky. L. Rep. 867.

Maryland.— Strasburger *v.* Barber, 38 Md. 103, act done in excuse of a supposed legal right without violence.

Missouri.— Ross *v.* New Home Sewing Mach. Co., 24 Mo. App. 353, act done in exercise of a supposed legal right without violence.

Nebraska.— Murray *v.* Mace, 41 Nebr. 60, 59 N. W. 387, 43 Am. St. Rep. 664, injury done without malice in course of execution of a writ of restitution.

New Jersey.— Lord *v.* Carbon Iron Mfg. Co., 42 N. J. Eq. 157, 6 Atl. 812.

New York.— Ferguson *v.* Buckell, 101 N. Y. App. Div. 213, 91 N. Y. Suppl. 724; Ives *v.* Humphreys, 1 E. D. Smith 196.

Texas.— Smith *v.* Sherwood, 2 Tex. 460 (holding that where there are no circumstances of aggravation a verdict of twice the value of corn taken is improper); Ostrom *v.* San Antonio, 33 Tex. Civ. App. 683, 77 S. W. 829.

Virginia.—Peshine *v.* Shepperson, 17 Gratt. 472, 94 Am. Dec. 468, holding that the value of goods taken is the measure where taken under claim of right.

Wisconsin.— Scheer *v.* Kriesel, 109 Wis. 125, 85 N. W. 138, tearing down a fence under belief it was on defendant's own land.

United States.— Durant Min. Co. *v.* Percy Consol. Min. Co., 93 Fed. 166, 35 C. C. A. 252, holding that intent is immaterial where the complaint is purely for compensatory damages.

For effect of matter of aggravation see *infra*, I, A, 7, i, (XIX).

97. See cases cited *infra*, this note.

Applications of rule.— In trespass for pasturage of cattle plaintiff cannot recover for the use of the land and the injury to the land naturally incident to such use (Gilbert *v.* Kennedy, 22 Mich. 5); nor for the taking and converting of chattels and the value of their use up to the time of the trespass (Anthony *v.* Gilbert, 4 Blackf. (Ind.) 348); nor for the rental of buildings and their value upon their conversion (Oklahoma City *v.* Hill, 6 Okla. 114, 50 Pac. 242); nor the value of land appropriated and the value of its use while defendant kept plaintiff out; nor the whole depreciation of land and the depreciation during a period plaintiff was kept out by defendant (Cobb *v.* Wrightsville, etc., R. Co., 129 Ga. 377, 58 S. E. 862); nor for loss of services of a slave killed or permanently injured in addition to damages for the injury (Johnson *v.* Perry, 2 Humphr. (Tenn). 569).

98. See also *infra*, I, A, 7, i, (V).

damages growing out of the act as its direct and natural result can be recovered, although accruing after action brought.[99] But there can be no recovery for special damages accruing after the date of the writ,[1] or for damages which were not the necessary and natural result of the acts complained of.[2] And if the damages would furnish grounds for a distinct suit they cannot be recovered.[3]

(III) *TRESPASS TO PERSONALTY.* For a taking and converting of personalty its value is ordinarily the measure of damages,[4] which value is determined as of the time of the taking,[5] and is the market value, if the thing has a market value,[6] and not their special value to plaintiff.[7] The value must be allowed as damages when there is a complete taking,[8] and interest on the value from the time of taking should be given,[9] and damages for any injury done in the taking may be added.[10] Where the personalty is not converted or destroyed, the measure of damages is compensation for the injury.[11]

99. Williams *v.* Missouri Furnace Co., 13 Mo. App. 70; Frisbee *v.* Marshall, 122 N. C. 760, 30 S. E. 21.

Applications of rule.— In an action for injury to plaintiff's land from water which escaped from defendant's tank and froze on plaintiff's land injury from its melting can be recovered, although it accrued after the action was brought. Chicago, etc., R. Co. *v.* Hoag, 90 Ill. 339. The death of a slave resulting after the beginning of the action from a beating for which the action was brought or results from the beating more serious than at that time supposed. Johnson *v.* Perry, 2 Humphr. (Tenn.) 569. Where the taking of timber was a single act but part was hauled away after the beginning of the action it can all be recovered for. Wolf *v.* Wolf, 158 Pa. St. 621, 28 Atl. 164.

1. Johnson *v.* Perry, 2 Humphr. (Tenn.) 569, holding that a medical bill contracted and paid after the beginning of an action for beating plaintiff's slave cannot be recovered for, being a collateral result, but the slave's death could be, being an immediate result.

2. Patchen *v.* Keeley, 19 Nev. 404, 14 Pac. 347.

3. Corner *v.* Mackintosh, 48 Md. 374; Gulf, etc., R. Co. *v.* Hartley, 88 Miss. 674, 41 So. 382.

For instance where trees are cut before but not carried away until after the writ there can be no recovery for the carrying away. Archibald *v.* Davis, 49 N. C. 133.

4. Maye *v.* Yappen, 23 Cal. 306 (gold); Bevar *v.* Swecker, 137 Iowa 721, 116 N. W. 704; Brannin *v.* Johnson, 19 Me. 361.

5. *Connecticut.*— Oviatt *v.* Pond, 29 Conn. 479.

Illinois.— Gilson *v.* Wood, 20 Ill. 37.

Maryland.— Schindel *v.* Schindel, 12 Md. 108.

Mississippi.— Black *v.* Robinson, 61 Miss. 54.

Missouri.— Walker *v.* Borland, 21 Mo. 289.

New Hampshire.— Adams *v.* Blodgett, 47 N. H. 219, 90 Am. Dec. 569.

Vermont.— Gray *v.* Stevens, 28 Vt. 1, 65 Am. Dec. 216.

Wisconsin.— Ingram *v.* Rankin, 47 Wis. 406, 2 N. W. 755, 32 Am. Rep. 762, not highest market value while in taker's possession.

United States.— Conard *v.* Pacific Ins. Co., 6 Pet. 262, 8 L. ed. 392.

Canada.— Maxwell *v.* Crann, 13 U. C. Q. B. 253.

See 46 Cent. Dig. tit. "Trespass," § 133.

6. Gardner *v.* Field, 1 Gray (Mass.) 151; Coolidge *v.* Choate, 11 Metc. (Mass.) 79; Hopple *v.* Higbee, 23 N. J. L. 342; Campbell *v.* Woodworth, 26 Barb. (N. Y.) 648 [*reversed* on other grounds in 20 N. Y. 499]; King *v.* Orser, 4 Duer (N. Y.) 431.

Price obtained at a sale on execution is not conclusive as to the value but other evidence can be considered to ascertain the real value. McMartin *v.* Hurlburt, 2 Ont. App. 146.

7. Brown *v.* Allen, 35 Iowa 306, holding that their value by virtue of a contract plaintiff had made is not the measure of damages. But see Stanton *v.* Cox, 18 La. 508, holding that the price limited by a consignor of goods is a proper measure of damages for their taking.

8. Wooley *v.* Carter, 7 N. J. L. 85, 11 Am. Dec. 520, holding that damages cannot be confined to the injury from the taking on the ground that property did not pass.

Where there is a forcible taking the question of conversion is immaterial. Griffin *v.* Martel, 77 Vt. 19, 58 Atl. 788.

9. *Maryland.*— Moore *v.* Shultz, 31 Md. 418.

Mississippi.— Black *v.* Robinson, 61 Miss. 54.

Missouri.— Walker *v.* Borland, 21 Mo. 289.

South Carolina.—Jones *v.* McNeil, 2 Bailey 466, the value of its hire may be given in place of interest.

Wisconsin.— Ingram *v.* Rankin, 47 Wis. 406, 2 N. W. 755, 32 Am. Rep. 762.

Canada.— Maxwell *v.* Crann, 13 U. C. Q. B. 253.

See 46 Cent. Dig. tit. "Trespass," § 130.

10. Packer *v.* Johnson, 1 Nott & M. (S. C.) 1. But not speculative profits that might have been made on personalty taken (Butler *v.* Collins, 12 Cal. 457); or from its use (Stell *v.* Paschal, 41 Tex. 640).

11. See cases cited *infra*, this note.

For injury to chattels the diminished value is ordinarily the measure (Cookman *v.* Nill, 81 Mo. App. 297, mending articles injured and curing horses injured is part of this);

(IV) *ENTRY ON AND INJURY TO REALTY.* The difference in the value of land before and after the trespass is the general rule as to the measure of damages for an injury to the land itself,[12] and this means the difference in value of the entire tract, not merely the ground at the exact place of injury.[13] But where the

and the value should be proved to enable the jury to determine it (Snedecor *v.* Pope, 143 Ala. 275, 39 So. 318). Where, however, personal property in the actual use of the owner is injured by a trespasser so that the owner is deprived of the use of it, the special damage necessarily and proximately attendant on such privation may be proven to augment the damages beyond the diminution in value of the thing injured. Graves *v.* Baltimore, etc., R. Co., 76 N. J. L. 362, 69 Atl. 971.

When chattels are merely removed from realty no right is asserted in them so plaintiff cannot recover their value. Sinclair *v.* Tarbox, 2 N. H. 135; Hammond *v.* Sullivan, 112 N. Y. App. Div. 788, 99 N. Y. Suppl. 472.

Personalty on land from which plaintiff is evicted.— Where plaintiff is evicted from realty he cannot recover the value of his personalty thereon if defendant offers to give it to him, although not allowed to enter and get it. Freelove *v.* Gould, 3 Kan. App. 750, 45 Pac. 454.

Substantial damages may be given for deprivation of personalty by injury to it, although plaintiff incurred no out-of-pocket expense. The Mediana, [1900] A. C. 113, 9 Aspin. 41, 69 L. J. P. D. & Adm. 35, 82 L. T. Rep. N. S. 95, 16 T. L. R. 194, 48 Wkly. Rep. 398.

12. *Alabama.*— Buck *v.* Louisville, etc., R. Co., 159 Ala. 305, 48 So. 699; Atlanta, etc., R. Co. *v.* Brown, 158 Ala. 607, 48 So. 73; Gosdin *v.* Williams, 151 Ala. 592, 44 So. 611; Brinkmeyer *v.* Bethea, 139 Ala. 376, 35 So. 996.

Indiana.— Delaware County, etc., Tel. Co. *v.* Fiske, 40 Ind. App. 348, 81 N. E. 1100, injury to growing trees.

Kansas.— Chicago, etc., R. Co. *v.* Willits, 45 Kan. 110, 25 Pac. 576, difference in market value resulting from excavations made on land.

Kentucky.— Maysville *v.* Stanton, 16 S. W. 675, 12 Ky. L. Rep. 586.

Minnesota.— Ward *v.* Chicago Ry., 61 Minn. 449, 63 N. W. 1104 (destruction of a perennial crop); Nelson *v.* West Duluth, 55 Minn. 497, 57 N. W. 149 (holding that in an action for trespass in casting and imposing earth on plaintiff's lot, the measure of damages is, in general, the difference between the value of the lot in its former state and the value after the earth is so imposed upon it); Barnett *v.* St. Anthony Falls Water Power Co., 33 Minn. 265, 22 N. W. 535; Karst *v.* St. Paul, etc., R. Co., 22 Minn. 118, 23 Minn. 401 (holding that for unlawful excavation and removal of his soil, a party is entitled to recover, not the cost of refilling, but the amount of the diminution of the value of the property by the excavation and removal, that being the amount of the injury directly resulting from the acts complained of).

Missouri.— Legeler *v.* Kansas City, 95 Mo. App. 162, 68 S. W. 953; Williams *v.* Missouri Furnace Co., 13 Mo. App. 70.

New Jersey.— Manda *v.* Orange, 77 N. J. L. 285, 72 Atl. 42; Freeman *v.* Sayre, 48 N. J. L. 37, 2 Atl. 650; McGuire *v.* Grant, 25 N. J. L. 356, 67 Am. Dec. 49.

New York.— Disbrow *v.* Westchester Hardwood Co., 164 N. Y. 415, 58 N. E. 519; Mott *v.* Lewis, 52 N. Y. App. Div. 558, 65 N. Y. Suppl. 31.

Pennsylvania.—Duffield *v.* Rosenzwerg, 144 Pa. St. 520, 23 Atl. 4.

Texas.— Wetzel *v.* Satterwhite, (Civ. App. 1910) 125 S. W. 93, holding that in an action of trespass for burning an old house, the price of new lumber is not the test of the damages, the true measure of damages being the difference between the value of the premises just before and just after its destruction. But see Sabine, etc., T. R. Co. *v.* Johnson, 65 Tex. 389, holding that for flooding lands the measure of damages is the value of growing products of the soil and the injury to the land, not the difference in value before and after.

West Virginia.— Rowe *v.* Shenandoah Pulp Co., 42 W. Va. 551, 26 S. E. 320, 57 Am. St. Rep. 870.

See 46 Cent. Dig. tit. "Trespass," § 134.

In New Hampshire the rule is laid down that the cost of restoring, the value before and after, the use for which the land was adapted, and the extent to which plaintiff was deprived are all simply facts to be considered in determining the damages. Hutchinson *v.* Parker, 64 N. H. 89, 5 Atl. 659.

13. *Alabama.*— Gosdin *v.* Williams, 151 Ala. 592, 44 So. 611, holding that damages cannot be confined to the value of the land actually run over.

Kansas.— Chicago, etc., R. Co. *v.* Willits, 45 Kan. 110, 25 Pac. 576, excavations.

Minnesota.— Nelson *v.* West Duluth, 55 Minn. 497, 57 N. W. 149, extending a street embankment over part of plaintiff's lot.

New York.— Disbrow *v.* Westchester Hardware Co., 164 N. Y. 415, 58 N. E. 519; Hartshorn *v.* Chaddock, 135 N. Y. 116, 31 N. E. 997, 17 L. R. A. 426; Argotsinger *v.* Vines, 82 N. Y. 308 (holding that for cutting trees on plaintiff's wood lot which supplies his farm with fuel and fencing the value of the wood is not the measure); Morrison *v.* American Tel., etc., Co., 115 N. Y. App. Div. 744, 101 N. Y. Suppl. 140.

Wisconsin.— Carl *v.* Sheboygan, etc., R. Co., 46 Wis. 625, 1 N. W. 295, holding that for building a railroad in the street the value of the use of that part of the street is not the measure of damages.

United States.— Frankle *v.* Jackson, 30 Fed. 398, holding that for building a rail-

land can be restored to its former condition at a cost less than the diminution in value, if it is not restored, the cost of restoration,[14] plus compensation for loss of use,[15] is frequently laid down as the measure of damages. However, the application of this principle is confined to cases where the cost of restoration is less than the difference in the value of the land before and after the trespass,[16] and of course it is limited to cases where cost of restoring the specific land is less than the value of the land.[17] Evidence of cost of restoration is admissible only to reduce, not to increase, the damages above the diminution in value of the land resulting from the trespass.[18] It is of course improper to allow damages both for diminution in value and for restoration of the property to its former condition.[19]

(v) *Continuing Trespass to Realty.*[20] Damages for all the injury to the land which results from a single act of trespass to realty are recoverable in a single action;[21] but where the act is not a single act of trespass but a continuous

road in the street in front of a lot the measure of damages is the diminution in value of the lot.

See 46 Cent. Dig. tit. "Trespass," § 134.

14. *California.*— Colton *v.* Onderdonk, 69 Cal. 155, 10 Pac. 395, 58 Am. Rep. 556.

Iowa.— Graessle *v.* Carpenter, 70 Iowa 166, 30 N. W. 392 (for injury to fences, walks, trees, shrubberies, and house the difference in value before and after is not the measure of damages, it not being shown the injury could not be repaired); Vermilya *v.* Chicago, etc., R. Co., 66 Iowa 606, 24 N. W. 234, 55 Am. Rep. 279 (destruction of grass roots by fire).

Michigan.— Walters *v.* Chamberlin, 65 Mich. 333, 32 N. W. 440.

Minnesota.— Ziebarth *v.* Nye, 42 Minn. 541, 44 N. W. 1027; Barnett *v.* St. Anthony Falls Water Power Co., 33 Minn. 265, 22 N. W. 535, *dictum.*

Missouri.— Smith *v.* Kansas City, 128 Mo. 23, 30 S. W. 314; Tegeler *v.* Kansas City, 95 Mo. App. 162, 68 S. W. 933.

Montana.— Sweeney *v.* Montana Cent. R. Co., 25 Mont. 543, 65 Pac. 912, a dam built on land of a third person which diverts water on to plaintiff's land.

New York.— Hartshorn *v.* Chaddock, 135 N. Y. 116, 31 N. E. 997, 17 L. R. A. 426.

Pennsylvania.— Lentz *v.* Carnegie, 145 Pa. St. 612, 23 Atl. 219, 27 Am. St. Rep. 717; Seely *v.* Alden, 61 Pa. St. 302, 100 Am. Dec. 642.

And see Gulf, etc., R. Co. *v.* McMurrough, 41 Tex. Civ. App. 216, 91 S. W. 320; Hooper *v.* Smith, (Civ. App. 1899) 53 S. W. 65, in which case it was held broadly that cost of restoration was the measure of damages.

That the doctrine is sometimes limited to cases where plaintiff intends to restore the land see Burtraw *v.* Clark, 103 Mich. 383, 61 N. W. 552.

15. *Massachusetts.*— Cavanagh *v.* Durgin, 156 Mass. 466, 31 N. E. 643 (building a dam and digging a trench); Loker *v.* Damon, 17 Pick. 284.

Michigan.—Walters *v.* Chamberlin, 65 Mich. 333, 32 N. W. 440, making a drain.

Oklahoma.— Enid, etc., R. Co. *v.* Wiley, 14 Okla. 310, 78 Pac. 96.

Pennsylvania.— Hoffman *v.* Mill Creek Coal Co., 16 Pa. Super. Ct. 631.

Utah.— Marks *v.* Culmer, 6 Utah 419, 24 Pac. 528, destruction of a house.

16. *Minnesota.*— Nelson *v.* West Duluth, 55 Minn. 497, 57 N. W. 149, extending a street embankment over plaintiff's lot.

Missouri.— Smith *v.* Kansas City, 128 Mo. 23, 30 S. W. 314; Tegeler *v.* Kansas City, 95 Mo. App. 162, 68 S. W. 953, piling dirt on plaintiff's land and throwing down his fence in course of making a fill in the alley behind his lot.

Montana.— Sweeney *v.* Montana R. Co., 25 Mont. 543, 65 Pac. 912, digging new channel for a stream on plaintiff's lands.

New York.— Hartshorn *v.* Chaddock, 135 N. Y. 116, 31 N. E. 997, 17 L. R. A. 426.

Oklahoma.— Enid, etc., R. Co. *v.* Wiley, 14 Okla. 310, 78 Pac. 96.

Pennsylvania.— Lentz *v.* Carnegie, 145 Pa. St. 612, 23 Atl. 219, 27 Am. St. Rep. 717; Seely *v.* Alden, 61 Pa. St. 302, 100 Am. Dec. 642; Hoffman *v.* Mill Creek Coal Co., 16 Pa. Super. Ct. 631, coal deposited upon land.

England.— Jones *v.* Gooday, 1 Dowl. P. C. N. S. 50, 10 L. J. Exch. 275, 8 M. & W. 146, holding that for carrying off soil the measure of damages is the value to plaintiff of the soil removed.

Proof that cost of restoration would be less than diminution in value from trespass devolves on defendant. Ziebarth *v.* Nye, 42 Minn. 541, 44 N. W. 1027. And see Manda *v.* Orange, 77 N. J. L. 285, 72 Atl. 42; Hartshorn *v.* Chaddock, 135 N. Y. 116, 31 N. E. 997, 17 L. R. A. 426. But see Hoffman *v.* Mill Creek Coal Co., 16 Pa. Super. Ct. 631, coal deposited upon land.

17. Easterbrook *v.* Erie R. Co., 51 Barb. (N. Y.) 94; Herron *v.* Jones, etc., Co., 23 Pa. Super. Ct. 226; Welliver *v.* Pennsylvania Canal Co., 23 Pa. Super. Ct. 79. And see Burtran *v.* Clark, 103 Mich. 383, 61 N. W. 552.

18. Nelson *v.* West Duluth, 55 Minn. 497, 57 N. W. 149.

19. Maysville *v.* Stanton, 16 S. W. 675, 12 Ky. L. Rep. 586.

20. For a full discussion of recovery of mesne profits and damages see EJECTMENT, 15 Cyc. 213 *et seq.*

21. See cases cited *infra*, this note.

Applications of rule.— Permanent damages resulting from throwing dirt on plaintiff's land can be recovered. Such as throwing down

trespass or series of trespasses which amounts to an appropriation or an attempt to appropriate the land itself or its use to the use of the trespasser, the damages are to be assessed for the trespass only, and not as if for the permanent appropriation of the land,[22] although where defendant has the right to appropriate the land or an easement therein by eminent domain plaintiff is, according to some decisions, allowed a recovery in trespass of the entire loss as for a taking.[23] The

plaintiff's fence and piling earth on his land by a contractor in making a fill in an alley beyond plaintiff's lot (Tegeler *v.* Kansas City, 95 Mo. App. 162, 68 S. W. 953); or from casting sand and mud thereon (Cherry *v.* Lake Drummond Canal, etc., Co., 140 N. C. 422, 53 S. E. 138, 111 Am. St. Rep. 850); or from deposit of coal culm in a stream (Bailey *v.* Mill Creek Co., 20 Pa. Super. Ct. 186; Hoffman *v.* Mill Creek Coal Co., 16 Pa. Super. Ct. 631); or from cutting holes in plaintiff's wall and inserting girders to support defendant's building (Ritter *v.* Sieger, 105 Pa. St. 400); or from constructing a road on plaintiff's land (Ziebarth *v.* Nye, 42 Minn. 541, 44 N. W. 1027); or from burning a pile of driftwood on plaintiff's land which protected it from washing by a stream (Walker *v.* Davis, 83 Mo. App. 374).

The damages should be estimated up to the time of the trial and not merely to the commencement of the suit. Chicago, etc., R. Co. *v.* Robbins, 159 Ill. 598, 43 N. E. 332 [*affirming* 54 Ill. App. 611] (breaking down plaintiff's wall by raising defendant's lot, on which it operated a railroad, and causing gravel, water, etc., to fall on plaintiff's lot); Dale *v.* Southern R. Co., 132 N. C. 705, 44 S. E. 399 (under a statute); Pepoon *v.* Clarke, 1 Mill (S. C.) 137. And see Cooper *v.* Randall, 59 Ill. 317.

22. See cases cited *infra*, this note.

As for instance where defendant erects a wall on plaintiff's land (McGann *v.* Hamilton, 58 Conn. 69, 19 Atl. 376; Stowers *v.* Gilbert, 156 N. Y. 600, 51 N. E. 282, holding that it is defendant's duty to remove and it is not to be presumed he will seek to continue it); or builds a railroad on plaintiff's land (Hartz *v.* St. Paul, etc., R. Co., 21 Minn. 358; Carl *v.* Sheboygan, etc., R. Co., 46 Wis. 625, 1 N. W. 295; Blesch *v.* Chicago, etc., Co., 43 Wis. 183; Sherman *v.* Milwaukee, etc., R. Co., 40 Wis. 645); or a telephone line (Morison *v.* American Tel., etc., Co., 115 N. Y. App. Div. 744, 101 N. Y. Suppl. 140); or lays a pipe line thereon (Hartman *v.* Tully Pipe Line Co., 71 Hun (N. Y.) 367, 25 N. Y. Suppl. 24); otherwise, however, where permanent injury is done which a cessation of the flooding will not relieve (Cubit *v.* O'Dett, 51 Mich. 347, 16 N. W. 679); or floods plaintiff's lands (Jones *v.* Lavender, 55 Ga. 228; Winchester *v.* Stevens Point, 58 Wis. 350, 17 N. W. 3, 547); but the rule seems to have been overlooked where defendant's wharf encroached on plaintiff's water lot and the current value of the part in defendant's possession was given as damages (Arden *v.* Kermit, Anth. N. P. (N. Y.) 112).

Only damages sustained prior to the commencement of the action are recoverable for a continuing trespass, as a general rule. Ketron *v.* Sutton, 130 Ga. 539, 61 S. E. 113; Jones *v.* Lavender, 55 Ga. 228; Savannah, etc., Canal Co. *v.* Bourquin, 51 Ga. 378; Close *v.* Samm, 27 Iowa 503; Cumberland, etc., Canal Corp. *v.* Hitchings, 65 Me. 140; Kenyon *v.* New York Cent., etc., R. Co., 29 N. Y. App. Div. 80, 51 N. Y. Suppl. 386 (error to give them to the date of entry of judgment); Hartman *v.* Tully Pipe Line Co., 71 Hun (N. Y.) 367, 25 N. Y. Suppl. 24; Winchester *v.* Stevens Point, 58 Wis. 350, 17 N. W. 3, 547; Carl *v.* Sheboygan, etc., R. Co., 46 Wis. 625, 1 N. W. 295; Sherman *v.* Milwaukee, etc., R. Co., 40 Wis. 645 (construction of a railroad); Blesch *v.* Chicago, etc., R. Co., 43 Wis. 183. And see Thayer *v.* Brooks, 17 Ohio 489, 49 Am. Dec. 474; Battishill *v.* Reed, 18 C. B. 696, 25 L. J. C. P. 290, 4 Wkly. Rep. 603, 86 E. C. L. 696); but by statute in some jurisdictions damages for a continuing trespass can be recovered to the time of the trial (Pantall *v.* Rochester, etc., Coal, etc., Co., 204 Pa. St. 158, 53 Atl. 751; Tustin *v.* Sammons, 23 Pa. Super. Ct. 175, on filing notice, but this does not apply to a subsequent cause of action, although of the same character; Dale *v.* Southern R. Co., 132 N. C. 705, 44 S. E. 399; Grant *v.* Wolfe, 32 Nova Scotia 444).

Right to bring successive actions.— Continuance of the trespass after the bringing of suit is a new cause of action for which a new action will lie. Successive actions may be brought as long as the trespass is maintained. Louisville, etc., R. Co. *v.* Higginbotham, 153 Ala. 334, 44 So. 872 (as where water is repeatedly pumped from plaintiff's springs each new pumping being a new trespass); Savannah, etc., R. Co. *v.* Davis, 25 Fla. 917, 7 So. 29; Savannah, etc., Canal Co. *v.* Bourquin, 51 Ga. 378; Close *v.* Samm, 27 Iowa 503; Hartz *v.* St. Paul, etc., R. Co., 21 Minn. 358; Carl *v.* Sheboygan, etc., R. Co., 46 Wis. 625, 1 N. W. 295. And see Lindquest *v.* Union Pac. R. Co., 33 Fed. 372.

23. In some of the cases while it is apparent that defendant has the right to exercise eminent domain that is not adverted to in any way in the opinion, as where defendant is a railroad corporation (Jacksonville, etc., R. Co. *v.* Lockwood, 33 Fla. 573, 15 So. 327; Donald *v.* St. Louis, etc., R. Co., 52 Iowa 411, 3 N. W. 462, holding that value of land appropriated can be recovered; Weaver *v.* Mississippi, etc., Boom Co., 28 Minn. 534, 11 N. W. 114, plaintiff's land flooded by a dam maintained by defendant; Mueller *v.* St. Louis, etc., R. Co., 31 Mo. 262; New Jersey Cent. R. Co. *v.* Hetfield, 29 N. J. L. 206, holding that the whole damage is done at once and a subsequent owner of the land has no cause of action for the continuance of the

measure of damages for an appropriation of the use of the land by a continuing trespass is the worth of the use of the property,[24] except where the doctrine is held that the recovery is based on a permanent appropriation of the land by defendant.[25] If defendant takes possession of the land and ousts plaintiff in jurisdictions where trespass will lie at all in such a case without a reëntry,[26] the value of the land is not the measure of damages,[27] but only the value of its use;[28] and the value of the use is the measure of damages after reëntry[29] plus damages for any injury done to the premises,[30] and, according to some authorities, expenses incurred in regaining possession.[31]

(VI) *ENTRY AND TAKING AWAY PROPERTY* — (A) *In General.* For an entry on realty and severing and removing a part of it the measure of damages is in general the value of the thing taken as it was *in situ* before the taking,[32] although there are decisions holding that the value of the thing after severance is given is the measure of damages.[33] Where the value of the thing detached from

railroad; McFadden *v.* Schill, 84 Tex. 77, 19 S. W. 368; Davis *v.* La Crosse, etc., R. Co., 12 Wis. 16; Linquest *v.* Union Pac. R. Co., 33 Fed. 372); or a city, and the taking is for a street (Soulard *v.* St. Louis, 36 Mo. 546, value of the land, the measure of damages); in other cases it is hinted at, defendant being a railroad corporation (Cobb *v.* Wrightsville, etc., R. Co., 129 Ga. 377, 58 S. E. 862, the act a complete act and the loss is complete; Porter *v.* Midland R. Co., 125 Ind. 476, 25 N. E. 556, *locus* a highway, occupation permanent, for a permanent purpose; Pittsburgh, etc., R. Co. *v.* Noftsger, 26 Ind. App. 614, 60 N. E. 372, *locus* a highway; it is not left to plaintiff to say whether the obstruction shall be permanent).

24. Western Book, etc., Co. *v.* Jevne, 179 Ill. 71, 53 N. E. 565 [*affirming* 78 Ill. App. 668]; McWilliams *v.* Morgan, 75 Ill. 473; Eno *v.* Christ, 25 Misc. 24, 54 N. Y. Suppl. 400; Herron *v.* Jones, etc., Co., 23 Pa. Super. Ct. 226 (holding that the rent paid for property to which plaintiff was obliged to remove is not to be considered); Houston, etc., R. Co. *v.* Adams, 63 Tex. 200 (construction of a railroad).

The difference in the rental value with and without the encroachment is the usual measure of the worth of the use (Eno *v.* Christ, 25 Misc. (N. Y.) 24, 54 N. Y. Suppl. 400); and this applies in respect of the entire tract if the tract is affected (Kenyon *v.* New York Cent., etc., R. Co., 29 N. Y. App. Div. 80, 51 N. Y. Suppl. 386; Leigh *v.* Garysburg Mfg. Co., 132 N. C. 167, 43 S. E. 632, tramway; Houston, etc., R. Co. *v.* Adams, 63 Tex. 200; Carl *v.* Sheboygan, etc., R. Co., 46 Wis. 625, 1 N. W. 295, railroad).

The value of the use to defendant is to be considered where the act is not merely an injury to plaintiff but defendant has the use of plaintiff's property. Bunke *v.* New York Tel. Co., 110 N. Y. App. Div. 241, 97 N. Y. Suppl. 66 [*affirmed* in 188 N. Y. 600, 81 N. E. 1161] (attaching telephone wires to plaintiff's house, there being no other demand for such a use); Whitwham *v.* Westminster Brymbo Coal, etc., Co., [1896] 2 Ch. 538, 65 L. J. Ch. 741, 74 L. T. Rep. N. S. 804, 44 Wkly. Rep. 698 (use of land as a dumping place).

25. Carli *v.* Union Depot, etc., Co., 32 Minn. 101, 20 N. W. 89, holding that where no permanent injury to the land from the construction of a railroad is shown the difference in value with and without is the measure of damages.

26. In general possession of the land must first be recovered. See cases *supra*, I, A, 2, d, (I), (A), (2), (C).

27. Allen *v.* Macon, etc., R. Co., 107 Ga. 838, 33 S. E. 696 (holding that a trespasser cannot be compelled to become an involuntary purchaser at the election of the owner); Sprague Nat. Bank *v.* Erie R. Co., 22 N. Y. App. Div. 526, 48 N. Y. Suppl. 65 (holding that a lessee ousted by a mortgagee after foreclosure invalid against him cannot recover in trespass for the value of his unexpired term).

28. **Where land is occupied and used** the fair rental is the measure of damages (Jacob Tome Inst. *v.* Crothers, 87 Md. 569, 40 Atl. 261), allowed up to the date of the verdict by some courts (Oklahoma City *v.* Hill, 6 Okla. 114, 50 Pac. 242).

Against one who never had possession the rental value of the premises cannot be recovered. McClellan *v.* Hurd, 21 Colo. 197, 40 Pac. 445 (defendant a hired ticket seller of the disseizor); Mason *v.* Postal Tel. Cable Co., 74 S. C. 557, 54 S. E. 763.

29. Scheffel *v.* Weiler, 41 Ill. App. 85; Cincinnati *v.* Evans, 5 Ohio St. 594; Wall *v.* Pittsburgh Harbor Co., 152 Pa. St. 427, 25 Atl. 647, 34 Am. St. Rep. 667; Columbia, etc., R. Co. *v.* Histogenetic Medicine Co., 14 Wash. 475, 45 Pac. 29.

30. Columbia, etc., R. Co. *v.* Hostogenetic Medicine Co., 14 Wash. 475, 45 Pac. 29.

31. Fowler *v.* Owen, 68 N. H. 270, 39 Atl. 329, 73 Am. St. Rep. 588, holding that expenses in an action of trespass against defendant's tenant defended by defendant, and costs in the ejectment proceeding can be recovered.

32. Kentucky, etc., Cement Co. *v.* Morgan, 28 Ind. App. 89, 62 N. E. 68 (cement rock in a quarry); Kent County Agricultural Soc. *v.* Ide, 128 Mich. 423, 87 N. W. 369 (a barn). And see *infra*, the following sections.

33. Piper *v.* Connelly, 108 Ill. 646 (severing and taking ice); Washington Ice Co. *v.*

the soil would not adequately compensate the owner for the wrong done, a recovery is permitted embracing all the injury to the land,[34] or damages for injury to the land may be given in addition to the value of the thing taken.[35] For a mere entry and taking of property not belonging to plaintiff nominal damages only can be recovered.[36]

(B) *Cutting and Removal of Trees* — (1) TREES VALUABLE FOR TIMBER. For cutting and removing trees actual damages are recoverable, although the trespass was not wilful.[37] Although the decisions are not harmonious, it is generally held that in trespass for cutting and removing timber trees their value at the time and place of felling is the measure of the damages to be awarded,[38] where defendant did not act wilfully[39] and there was no damage to the land beyond the

Shortall, 101 Ill. 46, 40 Am. Rep. 196 (severing and taking ice); Acrea *v.* Brayton, 75 Iowa 719, 38 N. W. 171 (grass); Parker *v.* Wallis, 60 Md. 15, 45 Am. Rep. 703 (sand). And see *infra*, the following sections.

34. *Alabama.*— Brinkmeyer *v.* Bethea, 139 Ala. 376, 35 So. 996.

California.— Chipman *v.* Hibberd, 6 Cal. 162.

Maine.— Longfellow *v.* Quimby, 33 Me. 457.

New Hampshire.—Wallace *v.* Goodall, 18 N. H. 439.

New York.— Dwight *v.* Elmira, etc., R. Co., 132 N. Y. 199, 30 N. E. 398, 28 Am. St. Rep. 563, 15 L. R. A. 612; Nixon *v.* Stillwell, 52 Hun 353, 5 N. Y. Suppl. 248.

The difference in the value of the land before and after the trespass may be given where it more fully compensates plaintiff for the injury. Brinkmeyer *v.* Bethea, 139 Ala. 376, 35 So. 996.

35. Omaha, etc., Smelting, etc., Co. *v.* Tabor, 13 Colo. 41, 21 Pac. 925, 16 Am. St. Rep. 185, 5 L. R. A. 236; Krider *v.* Lafferty, 1 Whart. (Pa.) 303, taking of willows.

For entry, breaking the land, cultivating it, and taking the crop, plaintiff can recover the value of the crop and the difference in the value of the land before and after breaking but no damages with reference to plaintiff's intent to leave it untilled. Keirnan *v.* Heaton, 69 Iowa 136, 28 N. W. 478.

36. Brock *v.* Smith, 14 Ark. 431 (property severed from the realty before plaintiff acquired title); Whittier *v.* Sanborn, 38 Me. 32; Plumer *v.* Prescott, 43 N. H. 277; Dame *v.* Dame, 38 N. H. 429, 75 Am. Dec. 195.

37. Bolton *v.* Hendrix, 84 S. C. 35, 65 S. E. 947.

38. *Alabama.*— Ivey *v.* McQueen, 17 Ala. 408.

Georgia.— Smith *v.* Gonder, 22 Ga. 353. *Compare* Milltown Lumber Co. *v.* Carter, 5 Ga. App. 344, 63 S. E. 270, holding that the measure of damages for a wrongful cutting and carrying away of standing timber, where the owner sues upon the theory of a trespass to the realty, is the diminution in the market value of the realty, unless the value of the timber plus any incidental damage to the land itself exceeds the diminution in the market value of the realty, in which event the higher measure is allowable.

Iowa.— Koonz *v.* Hempy, 142 Iowa 337, 120 N. W. 976.

Kansas.—Arn *v.* Matthews, 39 Kan. 272, 18 Pac. 65.

Massachusetts.— Cutts *v.* Spring, 15 Mass. 135.

Michigan.—Michigan Land, etc., Co. *v.* Deer Lake Co., 60 Mich. 143, 27 N. W. 10, 1 Am. St. Rep. 491; Skeels *v.* Starrett, 57 Mich. 350, 24 N. W. 98.

Mississippi.— Bond *v.* Griffin, 74 Miss. 599, 22 So. 187.

New Hampshire.—Foote *v.* Merrill, 54 N. H. 490, 20 Am. Rep. 151, holding that plaintiff is not entitled to an allowance for labor expended by defendant in cutting and trimming.

New Jersey.— Dawson *v.* Amey, (Ch. 1888) 13 Atl. 667.

New York.— Ferguson *v.* Buckell, 101 N. Y. App. Div. 213, 91 N. Y. Suppl. 724 (holding that it is doubtful whether destruction of shade in a public road resulting from the cutting of forest trees can be shown); Clark *v.* Holdridge, 12 N. Y. App. Div. 613, 43 N. Y. Suppl. 115; Stanton *v.* Pritchard, 4 Hun 266.

Ohio.— Hulett *v.* Fairbanks, 1 Ohio Cir. Ct. 155, 1 Ohio Cir. Dec. 89.

South Carolina.— Lewis *v.* Virginia-Carolina Chemical Co., 69 S. C. 364, 48 S. E. 280, 104 Am. St. Rep. 806.

Tennessee.— Holt *v.* Hayes, 110 Tenn. 42, 73 S. W. 111; Dougherty *v.* Chestnutt, 86 Tenn. 1, 5 S. W. 444.

Washington.—Gustin *v.* Jose, 11 Wash. 348, 39 Pac. 687.

Wisconsin.— Tuttle *v.* Wilson, 52 Wis. 643, 9 N. W. 822; Wright *v.* E. E. Bolles Wooden Ware Co., 50 Wis. 167, 6 N. W. 508; Hungerford *v.* Redford, 29 Wis. 345; Single *v.* Schneider, 24 Wis. 299.

See 46 Cent. Dig. tit. "Trespass," § 137.

Where the value of the land is shown to be the value of the timber, the value of the timber is the measure of the damages. Gates *v.* Comstock, 113 Mich. 127, 71 N. W. 515.

If the timber was not removed, and was as valuable cut as uncut, plaintiff can recover nominal damages only. De Camp *v.* Wallace, 45 Misc. (N. Y.) 436, 92 N. Y. Suppl. 746.

Diminished value of the land is not a just criterion where the land is wild and more valuable for its timber than for its soil. Meehan *v.* Edwards, 92 Ky. 574, 18 S. W. 519, 13 Ky. L. Rep. 803, 19 S. W. 179, 13 Ky. L. Rep. 803.

39. Mississippi River Logging Co. *v.* Page, 68 Minn. 269, 71 N. W. 4; Dawson *v.* Amey,

cutting,[40] although some decisions give their value as of the time when they first become a chattel,[41] at least when the action is for their value rather than for the injury to the land.[42] The value at the place to which the severed logs have been removed cannot be recovered under either view.[43] Some decisions have stated as the measure of damages the difference in the value of the land before and after the cutting of the timber,[44] at least where the value of the timber alone would not be adequate compensation,[45] or have permitted plaintiff to recover the value of the timber or for the depreciation in the land, according as one or the other furnishes the larger measure of damages.[46] So some decisions allow the value of the trees and the diminution in the value of the land, if any, caused by their removal.[47] And it has been held that if the action is trespass *quare clausum*, and not trespass *de bonis*, the measure of damages is the difference between the value of the land before and after the trespass.[48]

(2) TREES NOT VALUABLE FOR TIMBER. It is very generally held that the measure of damages for trees which are not valuable for their timber is the injury to the land that is caused by destroying them, as it is obvious that an allowance of the value of the trees would not be an adequate compensation for the trespass. The rule has been applied in respect of timber trees not ready to cut,[49] fruit

(N. J. Ch. 1888) 13 Atl. 667; Pettit *v.* Frothingham, 48 Tex. Civ. App. 105, 106 S. W. 907; Tilden *v.* Johnson, 52 Vt. 628, 36 Am. Rep. 769.

40. Hitchcock *v.* Libby, 70 N. H. 399, 47 Atl. 269; Lewis *v.* Virginia-Carolina Chemical Co., 69 S. C. 364, 48 S. E. 280, 104 Am. St. Rep. 806; Holt *v.* Hayes, 110 Tenn. 42, 73 S. W. 111.

41. *Louisiana.*— J. F. Ball, etc., Lumber Co. *v.* Simms Lumber Co., 121 La. 627, 46 So. 674, 18 L. R. A. N. S. 244; St. Paul *v.* Louisiana Cypress Lumber Co., 116 La. 585, 40 So. 906; Guarantee Trust, etc., Co. *v.* E. C. Drew Inv. Co., 107 La. 251, 31 So. 736; Gardere *v.* Blanton, 35 La. Ann. 811; Schlater *v.* Gay, 28 La. Ann. 340; Yarborough *v.* Nettles, 7 La. Ann. 116; Shepherd *v.* Young, 2 La. Ann. 238; Watterston *v.* Jetche, 7 Rob. 20. The above cases presuppose that defendant acted in good faith. If defendant acted in bad faith, the measure of damages is the value of the timber after reaching market. Guarantee Trust, etc., Co. *v.* E. C. Drew Inv. Co., 107 La. 251, 31 So. 736.

Maine.— Cushing *v.* Longfellow, 26 Me. 306.

Maryland.— Peters *v.* Tilghman, 111 Md. 227, 73 Atl. 726.

Michigan.— Ayres *v.* Hubbard, 57 Mich. 322, 23 N. W. 829, 58 Am. Rep. 361.

North Carolina.— Gaskins *v.* Davis, 115 N. C. 85, 20 S. E. 188, 44 Am. St. Rep. 439, 25 L. R. A. 813; Bennett *v.* Thompson, 35 N. C. 146.

See 46 Cent. Dig. tit. "Trespass," § 137.

Another statement of this doctrine is that the measure of damages for cutting and carrying away timber is such sum as the timber was worth when first cut without deducting the expense of severing the same from the land. Peters *v.* Tilghman, 111 Md. 227, 73 Atl. 726.

42. Eldridge *v.* Gorman, 77 Conn. 699, 60 Atl. 643; Coody *v.* Gress Lumber Co., 82 Ga. 793, 10 S. E. 218; Galveston, etc., R. Co. *v.* Warnecke, 43 Tex. Civ. App. 83, 95 S. W. 600.

43. Cushing *v.* Longfellow, 26 Me. 306; Ayres *v.* Hubbard, 57 Mich. 322, 23 N. W. 829, 58 Am. Rep. 361; Gaskins *v.* Davis, 115 N. C. 85, 20 S. E. 188, 44 Am. St. Rep. 439, 25 L. R. A. 813; Coxe *v.* England, 65 Pa. St. 212.

44. Argotsinger *v.* Vines, 82 N. Y. 308; Van Deusen *v.* Young, 29 N. Y. 9; Morrison *v.* American Tel., etc., Co., 115 N. Y. App. Div. 744, 101 N. Y. Suppl. 140; McCruden *v.* Rochester R. Co., 5 Misc. (N. Y.) 59, 25 N. Y. Suppl. 114 [*affirmed* in 77 Hun 609, 28 N. Y. Suppl. 1135 (*affirmed* in 151 N. Y. 623, 45 N. E. 1133)]. And see Dwight *v.* Elmira, etc., R. Co., 132 N. Y. 199, 30 N. E. 398, 28 Am. St. Rep. 563, 15 L. R. A. 612.

Diminution in value of the whole tract must be considered. Morrison *v.* American Tel., etc., Co., 115 N. Y. App. Div. 744, 101 N. Y. Suppl. 140.

45. Kentucky Stave Co. *v.* Page, (Ky. 1910) 125 S. W. 170.

46. Knisely *v.* Hire, 2 Ind. App. 86, 28 N. E. 195; Park *v.* Northport Smelting, etc., Co., 47 Wash. 597, 92 Pac. 442, in which it was said "that valuation should be adopted which will prove most beneficial to the injured party as he is entitled to the benefit of his property intact."

47. Miller *v.* Wellman, 75 Mich. 353, 42 N. W. 843; Gaskins *v.* Davis, 115 N. C. 85, 20 S. E. 188, 44 Am. St. Rep. 439, 25 L. R. A. 813; Chase *v.* Clearfield Lumber Co., 209 Pa. St. 422, 58 Atl. 813; Ensley *v.* Nashville, 2 Baxt. (Tenn.) 144. And see Union Bank *v.* Rideau Lumber Co., 4 Ont. L. Rep. 721.

48. Davies *v.* Miller-Brent Lumber Co., 151 Ala. 580, 44 So. 639.

49. Chipman *v.* Hibberd, 6 Cal. 162; Wallace *v.* Goodall, 18 N. H. 439, 456 (in which it was said: "The value of young timber, like the value of a growing crop, may be but little when separated from the soil. The land stripped of its trees may be valueless. The trees considered as timber may, from their youth, be valueless, and so the injury done to the plaintiff by the trespass would

trees,[50] trees which were part of a sugar bush,[51] ornamental or shade trees,[52] or trees used for windbreak;[53] and it has been held that plaintiff may recover either the value of the trees or the injury to the land at his election.[54]

(3) Wisconsin Highest Market Value Doctrine. By statute in Wisconsin where defendant wrongfully cuts plaintiff's trees, plaintiff can recover their highest market value in whatever condition defendant has put them, between the cutting and the trial,[55] unless the cutting was within one of the express provisos of the statute, limiting the liability if the cutting was done by mistake and defendant files an affidavit to that effect,[56] or was done in good faith under claim of title.[57] The rule of the statute applies to a suit begun before its passage.[58] It applies to a cutting on the public domain,[59] and applies if the cutting is by an agent where defendant on discovery of the facts refuses to give up the logs.[60] So it applies where a person, having a contractual right to cut timber, cuts timber not within the purview of the contract.[61] An equitable action to set aside a deed

be but imperfectly compensated, unless he could receive a sum that would be equal to their value to him while standing upon the soil"); Gilman *v.* Brown, 115 Wis. 1, 91 N. W. 227.

50. *Alabama.*— Mitchell *v.* Billingsley, 17 Ala. 391.

California.— Montgomery *v.* Locke, 72 Cal. 75, 13 Pac. 401.

New Hampshire.— See Foote *v.* Merrill, 54 N. H. 490, 20 Am. Rep. 151.

New York.— Dwight *v.* Elmira, etc., R. Co., 132 N. Y. 199, 30 N. E. 398, 28 Am. St. Rep. 563, 15 L. R. A. 612; Carter *v.* Pitcher, 87 Hun 580, 34 N. Y. Suppl. 549.

Texas.— Galveston, etc., R. Co. *v.* Warnecke, 43 Tex. Civ. App. 83, 95 S. W. 600.

51. Humes *v.* Proctor, 73 Hun (N. Y.) 265, 26 N. Y. Suppl. 315 [*affirmed* in 151 N. Y. 520, 45 N. E. 948].

52. Eldridge *v.* Gorman, 77 Conn. 699, 60 Atl. 643; Hoyt *v.* Southern New England Tel. Co., 60 Conn. 385, 22 Atl. 957; Longfellow *v.* Quimby, 33 Me. 457; Edsall *v.* Howell, 86 Hun (N. Y.) 424, 33 N. Y. Suppl. 892; Nixon *v.* Stillwell, 52 Hun (N. Y.) 353, 5 N. Y. Suppl. 248; Bennett *v.* Thompson, 35 N. C. 146.

53. Nixon *v.* Stillwell, 52 Hun (N. Y.) 353, 5 N. Y. Suppl. 248.

54. Hooper *v.* Smith, (Tex. Civ. App. 1899) 53 S. W. 65.

55. Wis. St. (1898) § 4269; McNaughton *v.* Borth, 136 Wis. 543, 117 N. W. 1031; Smith *v.* Morgan, 73 Wis. 375, 41 N. W. 532; Schweitzer *v.* Connor, 57 Wis. 177, 14 N. W. 922 (holding that if the jury fail to give it and it is admitted, the court may give judgment for it); Tuttle *v.* Wilson, 52 Wis. 643, 9 N. W. 822; Haseltine *v.* Mosher, 51 Wis. 443, 8 N. W. 273 (holding that it is error to limit a recovery to the highest market value of the logs at the mill where defendant afterward made them into lumber).

56. Everett *v.* Gores, 89 Wis. 421, 62 N. W. 82; Smith *v.* Morgan, 68 Wis. 358, 32 N. W. 135; Webber *v.* Quaw, 46 Wis. 118, 49 N. W. 830.

Sufficiency of affidavit.— An affidavit by one of several joint defendants is sufficient if made in behalf of all. Brown *v.* Bosworth, 58 Wis. 379, 17 N. W. 241.

Where the act was done carelessly and negligently filing the affidavit is no excuse. Brown *v.* Bosworth, 58 Wis. 379, 17 N. W. 241.

A mistake of law is no excuse as a cutting under an oral reservation invalid because in contradiction of a deed. Schweitzer *v.* Connor, 57 Wis. 177, 14 N. W. 922.

Facts held to show that cutting was not by mistake see McNaughton *v.* Borth, 136 Wis. 543, 117 N. W. 1031.

57. See cases cited *infra*, this note.

A cutting is not in good faith where defendant knew all the facts but believed his title paramount (Warren *v.* Putnam, 68 Wis. 481, 32 N. W. 533); although he learned them after his purchase of the land (Warren *v.* Putnam, *supra*); or after the cutting but before the removal (Cook Land, etc., Co. *v.* Oconto Co., 134 Wis. 426, 114 N. W. 823); nor is the cutting in good faith if the authority under which the act was done does not give a right to cut (Smith *v.* Morgan, 68 Wis. 358, 32 N. W. 135, school lands' certificate). The owner whose title has been divested by a tax-sale is liable for cutting if he knows the fact (Fleming *v.* Sherry, 72 Wis. 503, 40 N. W. 375); and so is his grantee with knowledge (St. Croix Land, etc., Co. *v.* Ritchie, 78 Wis. 492, 47 N. W. 657), although if he did not it is an open question (Smith *v.* Sherry, 54 Wis. 114, 11 N. W. 465).

Good faith in fact is enough and defendant need not show that it was reasonable (Fleming *v.* Sherry, 72 Wis. 503, 40 N. W. 375); and where land has been conveyed by the United States to a state, one who receives a certificate of entry from the United States land-office in good faith is not liable (Befay *v.* Wheeler, 84 Wis. 135, 53 N. W. 1121); and mere notice of plaintiff's claim without knowledge of the facts on which it is based will not affect defendant's good faith (Fleming *v.* Sherry, *supra*; Warren *v.* Putnam, 68 Wis. 481, 32 N. W. 533).

58. Webster *v.* Moe, 35 Wis. 75.

59. Smith *v.* Morgan, 68 Wis. 358, 32 N. W. 135.

60. Lee *v.* Lord, 76 Wis. 582, 45 N. W. 601.

61. Everett *v.* Gores, 89 Wis. 421, 62 N. W. 82.

and recover damages for cutting trees is not within the statute.[62] Nor does it apply to an innocent purchaser of the timber or logs from the trespasser,[63] and in an action against a purchaser the burden of proof of notice is on plaintiff.[64] So the statute does not apply to actions against the personal representative of the wrong-doer or a purchaser from him.[65] The statute does not authorize interest on the value allowed.[66]

(c) *Mining and Removal of Minerals.* Although it is held in some jurisdictions that the measure of damages in trespass for severing and taking minerals is the value of the thing severed after it becomes a chattel,[67] the measure of damages in such action is generally held to be its value *in situ*;[68] and this is the rule in equity.[69] Of course, if injury is done to the land beyond the value of the mineral extracted, this also must be compensated.[70] The cost of running levels, drifts, etc., to find the ore cannot be deducted,[71] nor the use by defendant of workings in his own mine.[72] Where defendant mingles the ore taken with his own, plaintiff can recover the value of all unless defendant shows how much came from plaintiff's land.[73] The rate at which leases are made on mining lands is not a proper measure

62. Warren *v.* Putnam, 68 Wis. 481, 32 N. W. 533.

63. Tuttle *v.* Wilson, 52 Wis. 643, 9 N. W. 822; Wright *v.* E. E. Bolles Wooden Ware Co., 50 Wis. 167, 6 N. W. 508.

64. Tucker *v.* Cole, 54 Wis. 539, 11 N. W. 703 (holding, however, that notice to one partner is sufficient); Tuttle *v.* Wilson, 52 Wis. 643, 9 N. W. 822.

65. Cotter *v.* Plumer, 72 Wis. 476, 40 N. W. 379, holding that plaintiff can recover against the personal representative only the value of the stumpage.

66. Everett *v.* Gores, 92 Wis. 527, 66 N. W. 616; Smith *v.* Morgan, 73 Wis. 375, 41 N. W. 532.

67. Illinois, etc., R., etc., Co. *v.* Ogle, 92 Ill. 353; Illinois, etc., R., etc., Co. *v.* Ogle, 82 Ill. 627, 25 Am. Rep. 342; McLean County Coal Co. *v.* Long, 81 Ill. 359; Robertson *v.* Jones, 71 Ill. 405; Donovan *v.* Consolidated Coal Co., 88 Ill. App. 589; Sunnyside Coal, etc., Co. *v.* Reitz, 14 Ind. App. 478, 39 N. E. 541, 43 N. E. 46 (wilful mining of coal); Atlantic, etc., Consol. Coal Co. *v.* Maryland Coal Co., 62 Md. 135; Blaen Avon Coal Co. *v.* McCulloh, 59 Md. 403, 43 Am. Rep. 560; Franklin Coal Co. *v.* McMillan, 49 Md. 549, 33 Am. Rep. 280; Barton Coal Co. *v.* Cox, 39 Md. 1, 17 Am. Rep. 525.

68. *Alabama.*— Warrior Coal, etc., Co. *v.* Mabel Min. Co., 112 Ala. 624, 20 So. 918.

California.— Maye *v.* Yappen, 23 Cal. 306.

Colorado.— St. Clair *v.* Cash Gold Min., etc., Co., 9 Colo. App. 235, 47 Pac. 466.

Massachusetts.— Stockbridge Iron Co. *v.* Cone Iron Works, 102 Mass. 80.

Pennsylvania.— Blair Iron, etc., Co. *v.* Lloyd, 1 Walk. 158.

Wisconsin.— See Ganter *v.* Atkinson, 35 Wis. 48.

United States.— Colorado Cent. Consol. Min. Co. *v.* Turck, 70 Fed. 294, 17 C. C. A. 128.

England.— Livingstone *v.* Rawyards Coal Co., 5 App. Cas. 25, 44 J. P. 392, 41 L. T. Rep. N. S. 334, 28 Wkly. Rep. 357 (modifying the earlier cases); Morgan *v.* Powell, 3 Q. B. 278, 2 G. & D. 721, 6 Jur. 1109, 11 L. J. Q. B. 263, 43 E. C. L. 734, 114 Eng. Reprint 513; Wild *v.* Holt, 1 Dowl. P. C. N. S. 876, 11 L. J. Exch. 285, 9 M. & W. 672.

Canada.—Kirkpatrick *v.* McNamee, 36 Can. Sup. Ct. 152.

See 46 Cent. Dig. tit. "Trespass," § 139.

The rule applies to gravel (Illinois Cent. R. Co. *v.* Le Blanc, 74 Miss. 626, 21 So. 748), stone (Viliski *v.* Minneapolis, 40 Minn. 304, 41 N. W. 1050, 3 L. R. A. 831), coal (Austin *v.* Huntsville Coal, etc., Co., 72 Mo. 535, 37 Am. Rep. 446; Oak Ridge Coal Co. *v.* Rogers, 108 Pa. St. 147; Bolles Wooden-Ware Co. *v.* U. S., 106 U. S. 432, 1 S. Ct. 398, 27 L. ed. 230), oil (Dyke *v.* National Transit Co., 22 N. Y. App. Div. 360, 49 N. Y. Suppl. 180), or phosphate (State *v.* Pacific Guano Co., 22 S. C. 50, 24 S. C. 598).

The expense of a view with interest can be recovered. Stockbridge Iron Co. *v.* Cone Iron Works, 102 Mass. 80; Livingstone *v.* Rawyards Coal Co., 5 App. Cas. 25, 44 J. P. 392, 42 L. T. Rep. N. S. 334, 28 Wkly. Rep. 357.

Where the trespass is wilful it has been held that the trespasser is liable for the value of mineral after it has been severed. Patchen *v.* Keeley, 19 Nev. 404, 14 Pac. 347; Cheeney *v.* Nebraska, etc., Stone Co., 41 Fed. 740.

69. Ross *v.* Scott, 15 Lea (Tenn.) 479, coal.

70. Warrior Coal, etc., Co. *v.* Mabel Min. Co., 112 Ala. 624, 20 So. 918; Blaen Avon Coal Co. *v.* McCulloh, 59 Md. 403, 43 Am. Rep. 560; Stockbridge Iron Co. *v.* Cone Iron Works, 102 Mass. 80; 3 Sedgewick Dam. § 935.

71. St. Clair *v.* Cash Gold Min., etc., Co., 9 Colo. App. 235, 47 Pac. 466.

72. Blaen Avon Coal Co. *v.* McCulloh, 59 Md. 403, 43 Am. Rep. 560, even though plaintiff's tract was so small that the expense of opening the mine would be greater than the coal.

73. St. Clair *v.* Cash Gold Min., etc., Co., 9 Colo. App. 235, 47 Pac. 466.

of damages, for one taking ore as a trespasser is not to be put on the footing of a lessee.[74]

(VII) *MEASURE OF DAMAGES AS AFFECTED BY PLAINTIFF'S INTEREST.* Possession of land is sufficient right to recover for an injury to possession, although title is in a third person.[75] Where a trespass injures the property itself, not merely the possession of it, there are two doctrines as to the measures of damages. The first one, which best accords with reason and the nature of the action in the light of its history,[76] is that possession of property is sufficient right for the recovery of the whole of the damage against a mere trespasser, although title or other right to the property is in a third person, and the injury is not to possession merely but to property itself.[77] But plaintiff's possession must be real, not

74. U. S. *v.* Magoon, 26 Fed. Cas. No. 15,707, 3 McLean 171. *Contra,* Livingstone *v.* Rawyards Coal Co., 5 App. Cas. 25, 44 J. P. 392, 42 L. T. Rep. N. S. 334, 28 Wkly. Rep. 357.

75. Forst *v.* Rothe, (Tex. Civ. App. 1902) 66 S. W. 575. For a taking of annual crops the tenant, not the landlord, can bring the action. Chicago, etc., R. Co. *v.* Watkins, 43 Kan. 50, 22 Pac. 985.

76. See "Disseizin of Chattels," 3 Harvard L. Rev. by James Barr Ames. Trespass is not now and never was, as is clearly shown by the article above referred to, an action for injury to a right. It was its weakness in that regard that gave rise to the action on the case. Trespass is and always has been an action for injury to the thing, and whoever had the thing could recover for the whole injury, although he might be answerable over.

77. See cases cited *infra,* this note.

A tenant in possession can recover the whole of the damages against a mere trespasser for an injury to the freehold or to personalty, whether such tenant be a lifetenant of land (Fay *v.* Brewer, 3 Pick. (Mass.) 203, waste; Perry *v.* Jefferies, 61 S. C. 292, 39 S. E. 515, cutting of trees; Willey *v.* Laraway, 64 Vt. 559, 25 Atl. 436, holding that a tenant in dower is answerable to the reversioner for injuries to the inheritance and so can recover them against a trespasser); or a tenant for years of land (Cook *v.* Champlain Transp. Co., 1 Den. (N. Y.) 91, wrongful destruction of premises; Sturgis *v.* Warren, 11 Vt. 433, severing and carrying a part of the realty).

A coöwner in possession can recover the whole of the damage. Hasbrouck *v.* Winkler, 48 N. J. L. 431, 6 Atl. 22 (personalty); Hibbard *v.* Foster, 24 Vt. 542 (realty).

Possession under a special property is sufficient for recovery of the whole damage as possession as mortgagor of realty (Elvins *v.* Delaware, etc., Tel., etc., Co., 63 N. J. L. 243, 43 Atl. 903, 76 Am. St. Rep. 217; Kunkel *v.* Utah Lumber Co., 29 Utah 13, 81 Pac. 897; Attersoll *v.* Stevens, 1 Taunt. 183, 9 Rev. Rep. 731), or of personalty (Becker *v.* Bailies, 44 Conn. 167), or possession of personalty as lien-holder (Phillips *v.* Hall, 8 Wend. (N. Y.) 610, 24 Am. Dec. 108; Conard *v.* Pacific Ins. Co., 6 Pet. (U. S.) 262, 8 L. ed. 392 [*affirming* 18 Fed. Cas. No. 10,647, Baldw. 138]).

One in possession of land can recover the whole of the damages, for an injury to the freehold, although title is in a third person whether plaintiff has a bare possession merely (Illinois, etc., R., etc., Co. *v.* Cobb, 94 Ill. 55; Owings *v.* Gibson, 2 A. K. Marsh. (Ky.) 515; North *v.* Cates, 2 Bibb (Ky.) 591; Reed *v.* Price, 30 Mo. 442; Paraffine Oil Co. *v.* Berry, (Tex. Civ. App. 1906) 93 S. W. 1089; Baker *v.* Cornelius, 6 Tex. Civ. App. 27, 24 S. W. 949; Beaumont Lumber Co. *v.* Ballard, (Tex. Civ. App. 1893) 23 S. W. 920); long-continued possession (Woods *v.* Banks, 14 N. H. 101; Caverhill *v.* Robillard, 2 Can. Sup. Ct. 575, wharf and bridge in public waters); possession coupled with color or claim of title (Nelson *v.* Mather, 5 Kan. 151; Hall *v.* Deaton, 68 S. W. 672, 24 Ky. L. Rep. 314; Todd *v.* Jackson, 26 N. J. L. 525, holding that one in possession under a void deed from the guardian of infants can recover the whole damage and no one else can; Dewey *v.* Osborn, 4 Cow. (N. Y.) 329, possession after recovery in ejectment); although such possession was forbidden by statute (Oklahoma City *v.* Hill, 6 Okla. 114, 50 Pac. 242, holding that where plaintiff's possession was in violation of a statute forbidding occupancy of land before thrown open to entry, he can recover damages up to the time when the secretary of the interior renders his decision on defendant's application for the lots, giving them to him); possession under contract for purchase (Hueston *v.* Mississippi, etc., Boom Co., 76 Minn. 251, 79 N. W. 92, holding that plaintiff must show such a right that her recovery will bar that of the owner and that here he has equitable title so it would, but that a bare possession would not; Gartner *v.* Chicago, etc., R. Co., 71 Nebr. 444, 98 N. W. 1052, holding that full recovery may be had for trees cut by trespass, although plaintiff in his contract of purchase agrees not to cut trees till land has been paid for; Hunt *v.* Taylor, 22 Vt. 556; Johnston *v.* Christie, 31 U. C. C. P. 358); possession of public lands under an application for them (Mott *v.* Hopper, 116 La. 629, 40 So. 921); or under a land-office receipt (Gulf, etc., R. Co. *v.* Clark, 2 Indian Terr. 319, 51 S. W. 962).

The value of things severed from land before plaintiff got possession but removed after can be recovered by one in possession (Glenwood Lumber Co. *v.* Phillips, [1904] A. C. 405, 73 L. J. P. C. 62, 90 L. T. Rep. N. S. 741, 20 T. L. R. 531, holding that

merely colorable.[78] The second doctrine, which is supported by numerous cases, is that the recovery of damages by plaintiff in possession is limited by the extent of his right.[79] Where plaintiff has no possession his damages are of course

where plaintiff has a lease with a right to cut trees defendant cannot set up the title of the crown to trees severed before plaintiff took possession); but one who severs wood on government land and piles it thereon has possession, although he took as a trespasser, so he can maintain trespass against a bare trespasser who takes it or destroys it (Northern Pac. R. Co. *v.* Lewis, 51 Fed. 658, 2 C. C. A. 446).

Possession of personalty is sufficient right to recover for the whole of the damage to it, although title is in a third person, whether it be a bare possession (Gibbs *v.* Chase, 10 Mass. 125; King *v.* Orser, 4 Duer (N. Y.) 431, holding that a sheriff cannot show that the goods belonged to plaintiff in a replevin suit against a third person and that he took them under the writ, as under New York code the writ would justify a taking only from defendant in the replevin suit; Criner *v.* Pike, 2 Head (Tenn.) 398, since plaintiff is either owner or answerable over to him; Rhemke *v.* Clinton, 2 Utah 230, possession being title as to all the world but the owner; Fisher *v.* Cobb, 6 Vt. 622; Wustland *v.* Potterfield, 9 W. Va. 438; Pabst Brewing Co. *v.* Greenberg, 117 Fed. 135, 55 C. C. A. 151, holding that plaintiff can recover because liable over to the owner; Guttner *v.* Pacific Steam Whaling Co., 96 Fed. 617; Mason *v.* Morgan, 24 U. C. Q. B. 328, bailee; Irving *v.* Hagerman, 22 U. C. Q. B. 545, recovery by bailee, as master of a vessel for freight he is carrying); possession under assignment void by statute (Barker *v.* Chase, 24 Me. 230, full recovery, although debt for which assignment was made had been paid); possession under special property (Fisher *v.* Cobb, 6 Vt. 622); possession as vendee under a conditional sale agreement (Wooley *v.* Edson, 35 Vt. 214, the reason is that plaintiff is answerable over to the owner or his assent is assumed in the absence of his interference); possession as mortgagor with the mortgagee's consent (Luse *v.* Jones, 39 N. J. L. 707).

78. McDowell *v.* McCormick, 121 Fed. 61, 57 C. C. A. 401, holding that if plaintiff's possession is colorable merely, not *bona fide*, the rule does not apply to a taking by sheriff under a writ of replevin against third persons.

79. Gilbert *v.* Kennedy, 22 Mich. 5 (realty); Gwaltney *v.* Scottish Carolina Timber, etc., Co., 115 N. C. 579, 20 S. E. 465 (realty and personalty); Johnson *v.* Meyer, 4 Ohio Dec. (Reprint) 383, 2 Clev. L. Rep. 81 (realty).

A tenant of land in possession can recover only damages to his estate whether he be a life-tenant (Zimmerman *v.* Shreeve, 59 Md. 357; Rockwood *v.* Robinson, 159 Mass. 406, 34 N. E. 521, unless he has a power of disposition of the property), or tenant for years (Hawthorne *v.* Siegel, 88 Cal. 159, 25 Pac. 1114, 22 Am. St. Rep. 291; Uttendorffer *v.* Saegers, 50 Cal. 496; Nivin *v.* Stevens, 5 Harr. (Del.) 272; Eten *v.* Luyster, 60 N. Y. 252, holding that a lessee can recover for the destruction of a building which he had erected with privilege of removal, and also the value of his unexpired term; Gourdier *v.* Cormack, 2 E. D. Smith (N. Y.) 200; Fisher *v.* Grace, 27 U. C. Q. B. 158), except where he is required by the lease to repair all damages (Gourdier *v.* Cormack, *supra*).

A tenant in common can recover damages only to the extent of his interest as such tenant, whether the property is realty (Baltimore, etc., R. Co. *v.* Higgins, 69 Ill. App. 412; McGill *v.* Ash, 7 Pa. St. 397; Winters *v.* McGhee, 3 Sneed (Tenn.) 128; Rowland *v.* Murphy, 66 Tex. 534, 1 S. W. 658; Gulf, etc., R. Co. *v.* McMurrough, 41 Tex. Civ. App. 216, 91 S. W. 320); of which plaintiff has exclusive possession claiming exclusive title (Jackson *v.* Todd, 25 N. J. L. 121); or personalty (Daniels *v.* Brown, 34 N. H. 454, 69 Am. Dec. 505, holding that if half the joint property is taken plaintiff can recover half the value of that taken; Chandler *v.* Spear, 22 Vt. 388, holding that if the whole value is recovered new trial will not be granted but amount in excess will be deducted; Long *v.* Monck, 22 U. C. C. P. 387).

A tenant at sufferance can only recover nominal damages for destruction of grass. He cannot recover for injury to the turf. Texas, etc., R. Co. *v.* Torrey, (Tex. App. 1891) 16 S. W. 547.

A right to the use of land merely will not justify a recovery of an amount commensurate with the injury to it (Farnsworth *v.* Western Union Tel. Co., 3 Silv. Sup. (N. Y.) 30, 6 N. Y. Suppl. 735); but only the value of the use (Delamater *v.* Folz, 50 Hun (N. Y.) 528, 3 N. Y. Suppl. 711, holding that one having qualified possession under a contract for laying a sewer can recover the value of the injury to his use of the premises as necessary to fulfil his contract; Farnsworth *v.* Western Union Tel. Co., *supra*, cutting telegraph wires).

Possession of land with title in a third person does not authorize a recovery for injury to the freehold. Advance El., etc., Co. *v.* Eddy, 23 Ill. App. 352 (recovery limited to injury to possession); Waltemeyer *v.* Wisconsin, etc., R. Co., 71 Iowa 626, 33 N. W. 140; Hunter *v.* Hatton, 4 Gill (Md.) 115, 45 Am. Dec. 117 (holding that plaintiff may show title in order to entitle himself to greater damages than a mere possessor could recover); Rau *v.* Minnesota Valley R. Co., 13 Minn. 442; Poor *v.* Gibson, 32 N. H. 415; Woods *v.* Banks, 14 N. H. 101; Kelly *v.* New York, etc., R. Co., 81 N. Y. 233; Frisbee *v.* Marshall, 122 N. C. 760, 30 S. E. 21 (recovery limited to injury to possession); Russell *v.* Meyer, 7 N. D. 335, 75 N. W. 262, 47 L. R. A. 637 (holding that one in possession can re-

limited to the injury to the right for which the action is brought.[80] The recovery by an executor or administrator for a trespass on decedent's land during the lifetime of the decedent is for full damages, as the whole right of action goes to him, not excepting the injury by reason of the permanent nature of the damage.[81]

(VIII) *MEASURE OF DAMAGES AS AFFECTED BY DEFENDANT'S INTEREST.* Where defendant in trespass has a right in the property, plaintiff's damages cannot include the injury to such right,[82] nor can it include damages for an injury to the right of one under whom defendant acted.[83]

cover only nominal damages for removal of a barn); International, etc., R. Co. *v.* Ragsdale, 67 Tex. 24, 2 S. W. 515 (holding that one who sells his land but retains possession by verbal agreement can recover only nominal damages for destruction of timber, although he afterward buys back the title); Ford *v.* Schliessman, 107 Wis. 479, 83 N. W. 761; Wadleigh *v.* Marathon County Bank, 58 Wis. 546, 17 N. W. 314 (holding that a recovery by plaintiff for the full damages would not bar an action by the owner).

Title and possession does not warrant a recovery for property severed if it has been sold to a third person. Wallace *v.* Goodall, 18 N. H. 439.

Possession and equitable title in plaintiff do not authorize a recovery of the damage for an injury to the freehold. Salisbury *v.* Western North Carolina R. Co., 98 N. C. 465, 4 S. E. 465 (premises conveyed to trustees by mistake, which conveyance had been annulled before action brought); Van Buskirk *v.* Dunlap, 2 Ohio Dec. (Reprint) 233, 2 West. L. Month. 125.

Possession of land under a contract for purchase does not warrant a recovery of the damages for an injury to the freehold. Southern R. Co. *v.* Ethridge, 108 Ga. 121, 33 S. E. 850.

Possession of personalty with title in a third person does not warrant a recovery of its value when taken (Anthony *v.* Gilbert, 4 Blackf. (Ind.) 348); but only the value of its use to the party whose right of possession is invaded (Temple *v.* Duran, (Tex. Civ. App. 1908) 121 S. W. 253).

A mortgagee can recover the amount which will compensate him for the injury to his security. Elvins *v.* Delaware, etc., Tel., etc., Co., 63 N. J. L. 243, 43 Atl. 903, 76 Am. St. Rep. 217.

80. See cases cited *infra*, this note.

Applications of rule.—A coöwner cannot recover damages for his coöwners either to realty (Lowery *v.* Rowland, 104 Ala. 420, 16 So. 88; Gulf, etc., R. Co. *v.* Cusenberry, 86 Tex. 525, 26 S. W. 43; McDodrill *v.* Pardee, etc., Lumber Co., 40 W. Va. 564, 21 S. E. 878, license to defendant from other owner); or to personalty (Lefebre *v.* Utter, 22 Wis. 189); or a remainder-man or reversioner for injuries not to the inheritance (Indianapolis, etc., R. Co. *v.* McLaughlin, 77 Ill. 275; Cooper *v.* Randall, 59 Ill. 317; Van Deusen *v.* Young, 29 N. Y. 9). Where plaintiff has only a right to dig ore on the land, his damage is not the value of the ore but the injury to the right. O'Connor *v.* Shannon, (Tex. Civ. App. 1895) 30 S. W. 1096. *Contra*, Ganter *v.* Atkinson, 35 Wis. 48.

81. Barton Coal Co. *v.* Cox, 39 Md. 1, 17 Am. Rep. 525.

82. Snedecor *v.* Pope, 143 Ala. 275, 39 So. 318 (holding that against the lessor of land a tenant cannot recover for injuries to the freehold but only injuries to his leasehold); McDonald *v.* Lightfoot, Morr. (Iowa) 450.

Applications of rule.—A life-tenant of land cannot recover against the reversioner damages for injury to the reversion. Willey *v.* Laraway, 64 Vt. 559, 25 Atl. 436. Title in defendant will prevent a recovery of damages for an injury to the property (Baker *v.* Cornelius, 6 Tex. Civ. App. 27, 24 S. W. 949); or a recovery of the value of part of the realty severed and taken (Baker *v.* Cornelius, *supra*). A retaking of personalty by the owner by unlawful means does not render him liable for its value (Decker *v.* Decker, 17 Hun (N. Y.) 13, taking by force; Bogard *v.* Jones, 9 Humphr. (Tenn.) 739, recapture by breach of the peace or trespass on plaintiff's realty; Collomb *v.* Taylor, 9 Humphr. (Tenn.) 689; Pabst Brewing Co. *v.* Greenberg, 117 Fed. 135, 55 C. C. A. 151, retaking by trespass on plaintiff's realty); and defendant in replevin who retakes the property can show his ownership on the question of damages (Fowler *v.* Stonum, 6 Tex. 60). A tenant of land holding over can recover only nominal damages for the loss of the land by an entry of the landlord contrary to the statute of forcible entry. Reeder *v.* Purdy, 41 Ill. 279; Thiel *v.* Bull's Ferry Land Co., 58 N. J. L. 212, 33 Atl. 281.

83. See cases cited *infra*, this note.

Against one who attaches personalty as the property of the general owner a lienholder can recover only the value of his lien (Outcalt *v.* Durling, 25 N. J. L. 443); and if the attachment is for a claim against one having possession under an interest the general owner can only recover the value of the property less such interest (Chaffee *v.* Sherman, 26 Vt. 237).

Against a lessee of land, plaintiff, claiming under a prior agreement with the lessor and occupancy, can recover only nominal damages unless he shows the duration of his interest. Twyman *v.* Knowles, 13 C. B. 222, 17 Jur. 238, 22 L. J. C. P. 143, 76 E. C. L. 222.

Against a mortgagee the mortgagor can recover only the value of his equity. Street *v.* Sinclair, 71 Ala. 110 (taking of personalty); Swigert *v.* Thomas, 7 Dana (Ky.) 220.

(IX) *INJURY TO BUSINESS.* A recovery may be had in an action of trespass for an injury to business which is the immediate consequence of the trespass.[84]

(X) *NON-PECUNIARY INJURY.* Compensation may be recovered for resulting pain,[85] fright,[86] and mental suffering,[87] shame and humiliation,[88] inconvenience,[89] and invasion of privacy.[90]

(XI) *INTEREST.* Interest on the value of the property destroyed from the time of trespass has been held to be part of the measure of damages in an action of trespass,[91] or at least the jury may award it if they see fit to do so.[92]

84. *California.*— Hawthorne *v.* Siegel, 88 Cal. 159, 25 Pac. 1114, 22 Am. St. Rep. 291.

Colorado.— G., B. & L. R. Co. *v.* Doyle, 9 Colo. 549, 13 Pac. 699; G., B. & L. R. Co. *v.* Eagles, 9 Colo. 544, 13 Pac. 696, removal of tenants and inability to rent premises and loss of guests in a hotel.

Georgia.— Bass *v.* West, 110 Ga. 698, 36 S. E. 244.

Maryland.— Moore *v.* Schultz, 31 Md. 418.

Massachusetts.— White *v.* Moseley, 8 Pick. 356.

Michigan.—Allison *v.* Chandler, 11 Mich. 542; Chandler *v.* Allison, 10 Mich. 460.

Missouri.—Allred *v.* Bray, 41 Mo. 484, 97 Am. Dec. 283; Freidenheit *v.* Edmundson, 36 Mo. 226, 88 Am. Dec. 141.

New Jersey.— Luse *v.* Jones, 39 N. J. L. 707, taking of furniture of a boarding-housekeeper.

New York.— Schile *v.* Brokhahus, 80 N. Y. 614; O'Horo *v.* Kelsey, 60 N. Y. App. Div. 604, 70 N. Y. Suppl. 14; Capel *v.* Lyons, 3 Misc. 73, 22 N. Y. Suppl. 378 [*affirming* 20 N. Y. Suppl. 49].

85. Snedecor *v.* Pope, 143 Ala. 275, 39 So. 318; Moyer *v.* Gordon, 113 Ind. 282, 14 N. E. 476; Ives *v.* Humphreys, 1 E. D. Smith (N. Y.) 196.

86. *Alabama.*— Engle *v.* Simmons, 148 Ala. 92, 41 So. 1023, 121 Am. St. Rep. 59, 7 L. R. A. N. S. 96, where the trespass caused a miscarriage to the wife.

Iowa.— Watson *v.* Dilts, 116 Iowa 249, 89 N. W. 1068, 93 Am. St. Rep. 239, 57 L. R. A. 559, although plaintiff is a married woman and the premises were her husband's property.

Minnesota.— Lesch *v.* Great Northern R. Co., 97 Minn. 503, 106 N. W. 955, 7 L. R. A. N. S. 93.

Missouri.— Freidenheit *v.* Edmundson, 36 Mo. 226, 88 Am. Dec. 141; Hickey *v.* Welch, 91 Mo. App. 4, fright causing return of nervous disease.

Texas.— Hill *v.* Kimball, 76 Tex. 210, 13 S. W. 59, 7 L. R. A. 618.

Vermont.— Newell *v.* Whitcher, 53 Vt. 589, 38 Am. Rep. 703.

87. *Alabama.*— Mattingly *v.* Houston, (1909) 52 So. 78; Snedecor *v.* Pope, 143 Ala. 275, 39 So. 318.

Indiana.— Moyer *v.* Gordon, 113 Ind. 282, 14 N. E. 476.

Massachusetts.— Fillebrown *v.* Hoar, 124 Mass. 580, illegal eviction.

Mississippi.— Bonelli *v.* Bowen, 70 Miss. 142, 11 So. 791, entry into plaintiff's bedroom after she had disrobed for the night and taking her personalty.

Missouri.— Hickey *v.* Welch, 91 Mo. App. 4, forcibly entering and digging a ditch and assaulting plaintiff.

Texas.— Ft. Worth, etc., R. Co. *v.* Smith, (Civ. App. 1894) 25 S. W. 1032, mental suffering from insults and indignities. *Compare* Williams *v.* Yoe, 19 Tex. Civ. App. 281, 46 S. W. 659, holding that actual damages cannot be recovered for injury to one's feelings, in a suit for nothing more than wrongfully depriving plaintiff of the possession of property without violence to his person.

Contra.— Ford *v.* Schliessman, 107 Wis. 479, 83 N. W. 761. *Compare* Murray *v.* Mace, 41 Nebr. 60, 59 N. W. 387, 43 Am. St. Rep. 664, holding that compensation for mental suffering of the injured party is a legitimate element of damage, in actions for trespass to property, where the unlawful act is inspired by fraud, malice, or like motives. But in cases where the wrong consists in the taking or destruction of personal property without fraud, malice, or other aggravating circumstances, the measure of damage is compensation for plaintiff's loss, which is ordinarily the value of the property, with such incidental damage as may be shown to be the natural and proximate result of the act charged.

88. Moyer *v.* Gordon, 113 Ind. 282, 14 N. E. 476.

89. Snedecor *v.* Pope, 143 Ala. 275, 39 So. 318; Moyer *v.* Gordon, 113 Ind. 282, 14 N. E. 476; Ives *v.* Humphreys, 1 E. D. Smith (N. Y.) 196; Benson *v.* Connor, 6 U. C. C. P. 356.

90. Ives *v.* Humphreys, 1 E. D. Smith (N. Y.) 196.

91. Walker *v.* Borland, 21 Mo. 289; Ingram *v.* Rankin, 47 Wis. 406, 2 N. W. 755, 32 Am. Rep. 762.

Applications of rule.— The rule applies in an action for cutting trees (Lowery *v.* Rowland, 104 Ala. 420, 16 So. 88; Winchester *v.* Craig, 33 Mich. 205); taking goods (Fields *v.* Williams, 91 Ala. 502, 8 So. 808; Burns *v.* Campbell, 71 Ala. 271; Hamer *v.* Hathaway, 33 Cal. 117; Brannin *v.* Johnson, 19 Me. 361; Moore *v.* Schultz, 31 Md. 418; Black *v.* Robinson, 61 Miss. 54; Hopple *v.* Higbee, 23 N. J. L. 342; Campbell *v.* Woodworth, 26 Barb. (N. Y.) 648 [*reversed* on other grounds in 20 N. Y. 499]; Maxwell *v.* Crann, 13 U. C. Q. B. 253); taking gravel (Pittsburgh, etc., R. Co. *v.* Swinney, 97 Ind. 586); seizing and detaining a vessel (Woodham *v.* Gelston, 1 Johns. (N. Y.) 134); and destroying property (Rhemke *v.* Clinton, 2 Utah 230).

92. See cases cited *infra*, this note.

Applications of rule.— Rule applied in an action for taking slaves (Hair *v.* Little, 28

In some cases interest has been disallowed because of the form of the verdict rendered therein.[93]

(XII) *REMOTE OR SPECULATIVE DAMAGES.* No recovery can be had for merely remote [94] or speculative damages.[95] Damages are given as compensation, recompense, or satisfaction to plaintiff for the injury actually received by him from defendants, and they must be the natural and proximate consequence of the act complained of.[96]

(XIII) *HAZARDS FROM TRESPASS NOT RESULTING IN LOSS.* There cannot be any recovery for a mere hazard or danger arising from a trespass which never in fact led to any loss or detriment.[97]

(XIV) *DAMAGES PREVENTABLE BY CARE ON PLAINTIFF'S PART.* If part of the damages result from plaintiff's neglect to employ the ordinary and obvious means to prevent the injury there can be no recovery therefor.[98] Upon this principle, where the property can easily be replaced in the market, injury merely from lack of the thing taken or injured is not recoverable.[99] But where the nature of the property is such that it cannot readily be replaced in the market or not so promptly as to prevent injury special damage resulting to plaintiff merely from lack of it can be recovered.[1] But the rule excluding a recovery

Ala. 236); for taking personalty (Bradley *v.* Geiselman, 22 Ill. 494; Beals *v.* Guernsey, 8 Johns. (N. Y.) 446, 5 Am. Dec. 348; Shepherd *v.* McQuilkin, 2 W. Va. 90); cutting trees (Longfellow *v.* Quimby, 33 Me. 457), and trespass *quare clausum* (District of Columbia *v.* Robinson, 14 App. Cas. (D. C.) 512 [*affirmed* in 180 U. S. 92, 21 S. Ct. 283, 45 L ed. 440]; Gulf, etc., R. Co. *v.* Johnson, 54 Fed. 474, 4 C. C. A. 447).

Discretion of jury.— In some jurisdictions it is held that plaintiff is not entitled to interest as matter of right, but only in the jury's discretion. Wehle *v.* Haviland, 42 How. Pr. (N. Y.) 399.

In Maine it is not recognized as "the exact measure of damages." Longfellow *v.* Quimby, 29 Me. 196, 48 Am. Dec. 525.

In Louisiana it is allowed only from the date of judgment. Robertson *v.* Green, 18 La. Ann. 28.

93. Glidden *v.* Street, 68 Ala. 600; Connelly *v.* McNeil, 47 N. C. 51.

94. See cases cited *infra*, this note.

Illustrations.— Damages for trouble in looking after trespassers cannot be recovered. Longfellow *v.* Quimby, 29 Me. 196, 48 Am. Dec. 525. So no damages for loss of crop or other damages in the course of farming operations can be recovered in an action of trespass for carrying away stock used in farming. Nelms *v.* Hill, 85 Ala. 583, 5 So. 344; Street *v.* Sinclair, 71 Ala. 110; Sledge *v.* Reid, 73 N. C. 440.

95. McKnight *v.* Ratcliff, 44 Pa. St. 156.

96. Longfellow *v.* Quimby, 29 Me. 196, 48 Am. Dec. 525.

97. Fore *v.* Western North Carolina R. Co., 101 N. C. 526, 8 S. E. 335.

98. Loker *v.* Damon, 17 Pick. (Mass.) 284; Karst *v.* St. Paul, etc., R. Co., 22 Minn. 118; Lord *v.* Carbon Iron Mfg. Co., 42 N. J. Eq. 157, 6 Atl. 812; Williams *v.* Yoe, 19 Tex. Civ. App. 281, 46 S. W. 659.

Applications of rule.— Damages for injury done cattle resulting from destruction of a fence cannot be recovered for an indefinite period thereafter (Berry *v.* San Francisco, etc., R. Co., 50 Cal. 435); as after a reasonable time to rebuild has elapsed (Smith *v.* Johnson, 76 Pa. St. 191); and the cost of replacing a few rods of fence, not an injury arising to a subsequent year's crop, is the measure of damage for its removal (Loker *v.* Damon, 17 Pick. (Mass.) 284). Where plaintiff's cattle are wrongfully driven from a pasture and he had notice he cannot recover for their starving some time after. Story *v.* Robinson, 32 Cal. 205. Where plaintiff sued the city for damages for digging a ditch and making a dam on his land and they were held not liable he cannot recover against the party liable for loss of use during this period as it resulted from his own error, although he can recover for loss of use necessarily resulting. Cavanagh *v.* Durgin, 156 Mass. 466, 31 N. E. 643. So the danger of fire from brush cut by a trespasser and piled on defendant's lands is not an element of damage, being too remote and speculative and the obvious remedy being to remove it. Chase *v.* Clearfield Lumber Co., 209 Pa. St. 422, 58 Atl. 813.

99. Sims *v.* Glazener, 14 Ala. 695, 48 Am. Dec. 120.

Applications of rule.— Plaintiff cannot show that he was compelled to work as a day laborer to replace corn taken (Sims *v.* Glazener, 14 Ala. 695, 48 Am. Dec. 120); nor, in an action for taking clothes, can he show the condition of his family as to clothes unless it appears defendant knew their condition (Burns *v.* Campbell, 71 Ala. 271).

1. See cases cited *infra*, this note.

Applications of rule.— The rule has been applied in respect of a loss from being deprived of plaintiff's house and furniture (Moyer *v.* Gordon, 113 Ind. 282, 14 N. E. 476); damages from being deprived of use of a mill by taking materials of the sluiceway (Hammat *v.* Russ, 16 Me. 171); or a part of the machinery (Jolly *v.* Single, 16 Wis. 280); damages to crops from carrying off all plaintiff's slaves from his plantation (Johnson *v.*

in case the consequences were avoidable only requires that plaintiff should exercise good faith and fair dealing.[2]

(xv) *Expense Incurred in Avoiding Injurious Consequences of Trespass.* Expense incurred by plaintiff by reason of the trespass in the effort to avoid the injurious consequences of it can be recovered.[3]

(xvi) *Counsel Fees and Expenses of Litigation.* Counsel fees and other expenses of the litigation are not ordinarily recoverable as part of the damages.[4]

Courts, 3 Harr. & M. (Md.) 510; Fowler *v.* Stonum, 6 Tex. 60; McAfee *v.* Crofford, 13 How. (U. S.) 447, 14 L. ed. 217); inconvenience resulting from ouster from a shanty convenient to plaintiff's lumbering operations (Tracy *v.* Butters, 40 Mich. 406); peculiar value of a leasehold to plaintiff by reason of his business which he had established there (Allison *v.* Chandler, 11 Mich. 542); loss from being unable to run a hotel during the summer by reason of the taking of the furniture which could not be replaced in time (O'Horo *v.* Kelsey, 60 N. Y. App. Div. 604, 70 N. Y. Suppl. 14); loss of annual output of fish by destruction of a fish trap (Gwaltney *v.* Scottish Carolina Timber, etc., Co., 115 N. C. 579, 20 S. E. 465); cost of feeding plaintiff's stock by reason of destruction of his pasture (Cosgriff *v.* Miller, 10 Wyo. 190, 68 Pac. 206, 98 Am. St. Rep. 977); loss of profits on logs where plaintiff's boom was destroyed causing their loss, defendant not showing plaintiff could have procured others (Auger *v.* Cook, 39 U. C. Q. B. 537).

2. Gilbert *v.* Kennedy, 22 Mich. 117. And see cases cited *infra*, this note.

Applications of rule.— Plaintiff need not remove his own cattle from his pasture where defendant turns his cattle in and puts them back every time plaintiff removes them, but can recover for injury to them from overstocking. Gilbert *v.* Kennedy, 22 Mich. 117. Where plaintiff was ejected from her home and thereby compelled to remain in the street all night to the impairment of her health defendant was not entitled to an instruction that if it was dangerous to her health to remain out all night she could not recover if she failed to go in. Mecartney *v.* Smith, (Kan. App. 1900) 62 Pac. 540. Plaintiff need not gather up his chattels which defendant has taken from his possession and scattered about (Eten *v.* Luyster, 60 N. Y. 252); and his sickness excuses him from repairing a fence to prevent injury by stock (Gulf, etc., R. Co. *v.* McMurrough, 41 Tex. Civ. App. 216, 91 S. W. 320).

3. See cases cited *infra*, this note.

The rule has been applied in respect of expense in reducing the damages. W. K. Syson Timber Co. *v.* Dickens, 146 Ala. 471, 40 So. 753. The amount necessarily paid for treatment for an injury to an animal is recoverable (Summers *v.* Tarney, 123 Ind. 560, 24 N. E. 678); and cost of keeping it during the illness (Taylor *v.* Hayes, 63 Vt. 475, 21 Atl. 610). So a recovery may be had for prospective medical attentions made necessary in the future by reason of injury to plaintiff's person (Hickey *v.* Welch, 91 Mo. App. 4); and cost of removal on eviction (Hawthorne *v.* Siegel, 88 Cal. 159, 25 Pac. 1114, 22 Am. St. Rep. 291. *Contra*, Tobin *v.* French, 93 Ill. App. 18); also for repairs made in consequence of the trespass (Chandler *v.* Allison, 10 Mich. 460); cost of replacing the thing destroyed (Reynolds *v.* Braithwaite, 131 Pa. St. 416, 18 Atl. 1110, water pipe cut); cost of restoring the land (Bentley *v.* Fischer Lumber, etc., Co., 51 La. Ann. 451, 25 So. 262); expense and trouble of getting and putting back escaped cattle by defendant's removal of plaintiff's fence and cost of rebuilding the fence (Coffman *v.* Burkhalter, 98 Ill. App. 304); expense of recovering personalty taken by defendant (Dennison *v.* Hyde, 6 Conn. 508); as for instance the amount paid by the owner of a horse at a wrongful sale on execution after asserting the title and protesting against the sale (Ford *v.* Williams, 24 N. Y. 359); and where defendant wrongfully seized plaintiff's goods and a third person then took them from him against his will it was held that plaintiff could recover from defendant the amount he had to pay the third person in order to get them back (Keene *v.* Dilke, 4 Exch. 388, 18 L. J. Exch. 440). Such expenses have been allowed even in cases where incurred in course of another action, as of replevin (Bird *v.* Hempstead, 3 Day (Conn.) 272, 3 Am. Dec. 269; Haviland *v.* Parker, 11 Mich. 103); but not the costs of an action for setting aside a judgment under which they were taken (Holloway *v.* Turner, 6 Q. B. 928, 9 Jur. 160, 14 L. J. Q. B. 143, 51 E. C. L. 928; Loton *v.* Devereux, 3 B. & Ad. 343, 1 L. J. K. B. 103, 23 E. C. L. 155, 110 Eng. Reprint 129). So there are some decisions which hold that under a general allegation of loss of time, and expense in regaining property taken under execution against a third person, evidence of expenses in proving plaintiff's right before a sheriff's jury is not admissible (Wilson *v.* Eills, 2 N. Brunsw. 497); that expenses incurred in prosecuting criminal proceedings against the trespasser are not recoverable (Bendich *v.* Scobel, 107 La. 242, 31 So. 703); that expense of a chancery action, to determine ownership of land still pending, cannot be recovered in an action of trespass for injury to it (Murray *v.* Pannaci, 130 Fed. 529, 65 C. C. A. 153).

Preliminary proof.—Evidence of the amount paid as expenses is admissible without first showing that such amount was reasonable. After showing the amount paid, it could be shown by other testimony that the amount was reasonable. Williams *v.* Newberry, 32 Miss. 256.

4. *California.*— Falk *v.* Waterman, 49 Cal. 224.

(XVII) *MITIGATION OF DAMAGES.* In general compensatory damages cannot be mitigated.[5] But where property taken is returned that fact goes in mitigation of actual damages,[6] provided the return is accepted by plaintiff,[7] and provided

Connecticut.— Dibble *v.* Morris, 26 Conn. 416; St. Peter's Church *v.* Beach, 26 Conn. 355.

Georgia.— Georgia R., etc., Co. *v.* Gardner, 118 Ga. 723, 45 S. E. 600.

Indiana.— Young *v.* Tustin, 4 Blackf. 277.

Louisiana.— Bentley *v.* Fischer Lumber, etc., Co., 51 La. Ann. 451, 25 So. 262; Knott *v.* Gough, 10 La. Ann. 562. But see Cooper *v.* Cappel, 29 La. Ann. 213.

Maine.—Longfellow *v.* Quimby, 29 Me. 196, 48 Am. Dec. 525.

United States.— Day *v.* Woodworth, 13 How. 363, 14 L. ed. 181.

5. Mecartney *v.* Smith, (Kan. App. 1900) 62 Pac. 540 (holding that evidence that defendant acted under claim of right is not admissible in mitigation of compensatory damages); Bliss *v.* Ball, 99 Mass. 597 (holding that the fact that the property destroyed injured defendant's land cannot be shown in mitigation of actual damages); Bear *v.* Harris, 118 N. C. 476, 24 S. E. 364; Carter *v.* Streator, 49 N. C. 62 (holding that the fact that the property was lessened in value while in defendant's hands is not admissible in mitigation of actual damages).

Extenuating circumstances cannot be shown in mitigation of actual damages (Henderson *v.* Lyles, 2 Hill (S. C.) 504), as in trespass for forcibly taking possession of slaves that defendant acted on a well founded belief that plaintiff who had possession under a replevin bond was about to place them beyond the reach of legal process (Fowler *v.* Stonum, 6 Tex. 60); or advice of counsel in an action for forcibly ejecting plaintiff (Moyer *v.* Gordon, 113 Ind. 282, 14 N. E. 476).

Benefits resulting to plaintiff's land from the trespass cannot be shown to mitigate actual damages. Pinney *v.* Winchester, (Conn. 1910) 76 Atl. 994 (in which it was said: "He cannot thrust benefits upon the land-owner and then set up the benefits in reduction of the damage caused by these acts"); Turner *v.* Rising Sun, etc., Turnpike Co., 71 Ind. 547; Baillio *v.* Burney, 3 Rob. (La.) 317 (clearing of land); Loomis *v.* Green, 7 Me. 386 (improvement of an estate from the cutting of trees); Leigh *v.* Garysburg Mfg. Co., 132 N. C. 167, 43 S. E. 632 (benefit to plaintiff's tenants not admissible in mitigation of an injury to his freehold); Hurley *v.* Jones, 165 Pa. St. 34, 30 Atl. 499 (improvement of a lot from filling it in). *Contra*, Burtraw *v.* Clark, 103 Mich. 383, 61 N. W. 552, digging a drain.

Defendant's belief that he owned the land cannot be shown in mitigation of actual damages. Sutton *v.* Lockwood, 40 Conn. 318; Franklin Coal Co. *v.* McMillan, 49 Md. 549, 33 Am. Rep. 280; Hillman *v.* Baumbach, 21 Tex. 203; Hazelton *v.* Week, 49 Wis. 661, 6 N. W. 309, 35 Am. Rep. 796.

Acting under supposed authority or license. — That defendant acted under a supposed authority that was void (Reed *v.* Bias, 8 Watts & S. (Pa.) 189, authority of town commissioners to pull down a building as a nuisance to prevent violence by a mob, although the grand jury returned it as a nuisance); or under a supposed license (Huling *v.* Henderson, 161 Pa. St. 553, 29 Atl. 276), cannot be shown in mitigation of actual damages.

Damages — Removal of erection.— That an unlawful erection by defendant railroad on plaintiff's land was ordered removed by the president as soon as he heard of it cannot be considered in mitigation of damages. Kentucky Midland R. Co. *v.* Stump, 12 Ky. L. Rep. 316.

Payment for land is not admissible in an action by the holder of the legal title. Howe *v.* Batchelder, 49 N. H. 204.

Immoral use of realty by plaintiff is not admissible in mitigation of actual damages for injury to it. Johnson *v.* Farwell, 7 Me. 370, 22 Am. Dec. 203, house of ill fame.

6. *Alabama.*— Stephenson *v.* Wright, 111 Ala. 579, 20 So. 622; Grisham *v.* Bodman, 111 Ala. 194, 20 So. 514.

New Jersey.— Hopple *v.* Higbee, 23 N. J. L. 342.

New York.— Vosburgh *v.* Welch, 11 Johns. 175.

Oregon.— Lowenberg *v.* Rosenthal, 18 Oreg. 178, 22 Pac. 601.

Canada.— Loucks *v.* McSloy, 29 U. C. C. P. 54.

See 46 Cent. Dig. tit. "Trespass," § 143.

The measure of damages is the value of the use during the time of detention, together with any damages done them if they are returned (Fields *v.* Williams, 91 Ala. 502, 8 So. 808; Warfield *v.* Walter, 11 Gill & J. (Md.) 80; Hart *v.* Blake, 31 Mich. 278; Jones *v.* McNeil, 2 Bailey (S. C.) 466; Hance *v.* Burke, 73 Tex. 62, 11 S. W. 135), or put in another form the difference in their value at the time and place of taking and the time and place where returned (Clark *v.* Bates, 1 Dak. 42, 46 N. W. 510); but where part only is recovered which is greatly enhanced in value, the enhanced value cannot be set off against a recovery of the value of the balance (Caskins *v.* Davis, 115 N. C. 85, 20 S. E. 188, 44 Am. St. Rep. 439, 25 L. R. A. 813).

Return to a coöwner with plaintiff is sufficient. Nightingale *v.* Scannell, 18 Cal. 315.

Where the vendor under a conditional sale agreement sells his interest, the vendee's right to recover full damages for a taking by a third person is not affected by the vendor's obtaining possession from the trespasser. Wooley *v.* Edson, 35 Vt. 214.

7. Walker *v.* Fuller, 29 Ark. 448; Hanmer *v.* Wilsey, 17 Wend. (N. Y.) 91.

If plaintiff accepts the proceeds of a sale of the property taken that may be shown in mitigation. Ferguson *v.* Buckell, 101 N. Y. App. Div. 213, 91 N. Y. Suppl. 724; Van Brunt *v.* Schenck, 13 Johns. (N. Y.) 414.

also that the return is before the beginning of the action,[8] or if he otherwise assents to its disposition.[9] So if the property while in defendant's possession is taken under legal process against plaintiff in favor of a third person,[10] or even in favor of defendant himself,[11] this fact may be shown in mitigation of damages, and it may be shown in mitigation of damages that the goods did not belong to plaintiff and that they have gone to the use of the owner, although defendant in taking them acted without authority.[12] As against a special owner defendant may show a return of the goods to the general owner,[13] and in such case if the special owner is paid the amount of his lien he cannot recover the value of the goods.[14] However, defendant cannot himself apply the property taken to an obligation due from plaintiff.[15] Recovery by a mortgagee of land for injury to it is admissible in mitigation in an action by the mortgagor for the same injury.[16] Defendant may of course show that the damage was enhanced by plaintiff's acts,[17] and if evidence in mitigation is allowed plaintiff can give evidence in rebuttal.[18]

(XVIII) *DEDUCTIONS FOR LABOR EXPENDED IN COMMITTING TRESPASS.* Where a trespass is wilful the strict rule of compensation is not applied,[19] and no allowance will in general be made defendant for the value of his labor expended in committing it;[20] but damages will be given without deduction for labor

What is not an acceptance.— Mere opening of boxes by the owner to appraise them is not an acceptance (Connah *v.* Hale, 23 Wend. (N. Y.) 462); nor an actual return and leaving the property on plaintiff's premises, not assented to by him (Hanmer *v.* Wilsey, 17 Wend. (N. Y.) 91); and an offer to return cannot be shown if not accepted (Hanmer *v.* Wilsey, *supra*). But see Wooley *v.* Carter, 7 N. J. L. 85, 11 Am. Dec. 520.

Where defendant has injured the goods, defendant's motion for a return of goods in mitigation will be denied. Griffin *v.* Martel, 77 Vt. 19, 58 Atl. 788.

8. Hanmer *v.* Wilsey, 17 Wend. (N. Y.) 91.

9. Davenport *v.* Ledger, 80 Ill. 574 (holding that where a mortgagor procures a first mortgage to replevy from a second mortgagee who took the property, the mortgagor can recover in trespass for the taking only the difference between the value at the time of taking and retaking on replevy); Hendrickson *v.* Dwyer, 70 N. J. L. 223, 57 Atl. 420 (holding that sums paid by a trespasser to a third person as lessor and which the owner received go to reduce the damages against the trespasser).

10. Bates *v.* Courtwright, 36 Ill. 518 (holding that plaintiff's consent thereto will be implied); Kaley *v.* Shed, 10 Metc. (Mass.) 317 (in which it was said that under these circumstances they go to plaintiff's benefit as much as if they had been returned); Wehle *v.* Haviland, 42 How. Pr. (N. Y.) 399; Higgins *v.* Whitney, 24 Wend. (N. Y.) 379; Montgomery *v.* Wilson, 48 Vt. 616.

Although defendant by using property attached became a trespasser ab initio the rule applies. Lamb *v.* Day, 8 Vt. 407, 30 Am. Dec. 479.

The reason of the rule is that, the property having been rightfully appropriated in paying debts of the owner, he has received satisfaction for its value, and he ought not again to recover the same value. Bates *v.* Courtwright, 36 Ill. 518.

11. Bates *v.* Courtwright, 36 Ill. 518, 520 (in which it was said: "The owner receives the value of his property by virtue of legal process, the same in one case that he does in the other; and to that extent his claim for damages is mitigated"); Hopple *v.* Higbee, 23 N. J. L. 342. And see McAfee *v.* Crofford, 13 How. (U. S.) 447, 14 L. ed. 217. *Contra*, Hanmer *v.* Wilsey, 17 Wend. (N. Y.) 91.

12. Squire *v.* Hollenback, 9 Pick. (Mass.) 551, 20 Am. Dec. 506.

13. Huning *v.* Chavez, 7 N. M. 128, 34 Pac. 44. But see King *v.* Orser, 4 Duer (N. Y.) 431, holding that after taking by sheriff under a writ of replevin against a third person he cannot show that he gave them to the owner.

14. Bisson *v.* Joyce, 66 N. H. 478, 30 Atl. 112.

15. Bird *v.* Womack, 69 Ala. 390 (applied in satisfaction of a lien of a third person); Heartz *v.* Klinkhammer, 39 Minn. 488, 40 N. W. 826 (applied in payment of debt to a third person); Higgins *v.* Whitney, 24 Wend. (N. Y.) 379 (*semble*).

16. Elvins *v.* Delaware, etc., Tel., etc., Co., 63 N. J. L. 243, 43 Atl. 903, 76 Am. St. Rep. 217.

17. Hanley *v.* Wilson, 81 N. C. 405.

18. McAfee *v.* Crofford, 13 How. (U. S.) 447, 14 L. ed. 217.

19. Page *v.* Ratcliff, 1 L. J. C. P. 57 (holding that damages are in the jury's discretion); Phillips *v.* Redpath, Draper (U. C.) 68.

That damages may exceed the value of property taken see Flint *v.* Bird, 11 U. C. Q. B. 444; Church *v.* Foulds, 9 U. C. Q. B. 393.

20. Sunnyside Coal, etc., Co. *v.* Reitz, 14 Ind. App. 478, 39 N. E. 541, 43 N. E. 46; Oskaloosa College *v.* Western Union Fuel Co., 90 Iowa 380, 54 N. W. 152, 57 N. W. 903 (in which the rule was applied to mining of coal on land excepted from defendant's lease, although he claimed that it was not excepted); Patchen *v.* Keeley, 19 Nev. 404, 14 Pac. 347

expended,[21] and the same rule has been applied where the act was negligent,[22] but, in general, good faith is the test.[23]

(XIX) *EXEMPLARY DAMAGES.* Where a trespass is committed under circumstances of aggravation, exemplary or punitive damages, sometimes called "smart money," may be given by the jury,[24] not as compensation alone for the

(holding that no deduction for working expenses will be made in an action for wilfully taking ore); Durant Min. Co. *v.* Percy Consol. Min. Co., 93 Fed. 166, 35 C. C. A. 252; Bolles Wooden-Ware Co. *v.* U. S., 106 U. S. 432, 1 S. Ct. 398, 27 L. ed. 230.

Act of agent.— The rule applies where the wilful act was done by defendant's agent. Sunnyside Coal, etc., Co. *v.* Reitz, 14 Ind. App. 478, 39 N. E. 541, 43 N. E. 46.

Although committed under mistake of law a trespass is wilful within the rule. Sunnyside Coal, etc., Co. *v.* Reitz, 14 Ind. App. 478, 39 N. E. 541, 43 N. E. 46.

Taking timber from United States land is sufficient *prima facie* evidence that it was wilful. U. S. *v.* Homestake Min. Co., 117 Fed. 481, 54 C. C. A. 303.

21. *Colorado.*— United Coal Co. *v.* Canon City Coal Co., 24 Colo. 116, 48 Pac. 1045, holding that for wilful mining of coal the measure of damages is its value when severed, without deduction for severance.

Illinois.— Bull *v.* Griswold, 19 Ill. 631, holding that in trespass for wilful taking wheat the value of the harvested crop is the measure of damages, without deduction for harvesting.

Indiana.— Sunnyside Coal, etc., Co. *v.* Reitz, 14 Ind. App. 478, 39 N. E. 541, 43 N. E. 46 (holding that the value of coal after it is severed, without deduction for cost of severance, is the measure of damages where the act was wilful, and plaintiff can recover the highest market value between taking and conversion); Ellis *v.* Wire, 33 Ind. 127, 5 Am. Rep. 189 (holding that where wheat in a field is forcibly taken and sold plaintiff can recover the highest market value between taking and sale, without deduction for defendant's labor).

Iowa.— Negley *v.* Cowell, 91 Iowa 256, 59 N. W. 48, 51 Am. St. Rep. 344, holding that for a wilful trespass on land and occupation of it the damages are not limited to compensation for the use but plaintiff can recover the fair market value of the crops.

Kentucky.— Jones Lumber Co. *v.* Gatliff, 82 S. W. 295, 26 Ky. L. Rep. 616, holding that where logs are wantonly cut, plaintiff can recover their value at the place they were sold to defendant.

Minnesota.— Mississippi River Logging Co. *v.* Page, 68 Minn. 269, 71 N. W. 4, holding that for wilful severance of logs their value at the time and place of conversion is the measure of damages.

Texas.— Emporia Lumber Co. *v.* League, (Civ. App. 1907) 105 S. W. 1167, holding that the value of trees in the condition into which defendant manufactured it is the measure of damage for taking in wilful or grossly negligent disregard of plaintiff's boundary line.

Vermont.—Whiting *v.* Adams, 66 Vt. 679, 30 Atl. 32, 44 Am. St. Rep. 875, 25 L. R. A. 598.

United States.— U. S. *v.* Homestake Min. Co., 117 Fed. 481, 54 C. C. A. 303 (holding that the enhanced value of ore at the time it is converted to defendant's use is the measure of damages for a wilful taking); Cheeney *v.* Nebraska, etc., Stone Co., 41 Fed. 740 (holding that the value of stone after it is quarried is the measure of damages for a wilful taking).

Canada.— Union Bank *v.* Rideau Lumber Co., 3 Ont. L. Rep. 269.

22. Donovan *v.* Consolidated Coal Co., 88 Ill. App. 589 [*affirmed* in 187 Ill. 28, 58 N. E. 290, 79 Am. St. Rep. 206], holding that where defendant knew the coal was plaintiff's and had a map showing it but had forgotten it, his taking was negligent and he is liable for its value when first severed, not *in situ*.

23. U. S. *v.* Gentry, 119 Fed. 70, 55 C. C. A. 658; U. S. *v.* Homestake Min. Co., 117 Fed. 481, 54 C. C. A. 303.

Advice of counsel is in general sufficient evidence of good faith. U. S. *v.* Homestake Min. Co., 117 Fed. 481, 54 C. C. A. 303.

24. *Alabama.*— Snedecor *v.* Pope, 143 Ala. 275, 39 So. 318; Garrett *v.* Sewell, 108 Ala. 521, 18 So. 737; Burns *v.* Campbell, 71 Ala. 271; Mitchell *v.* Billingsley, 17 Ala. 391.

California.— Dorsey *v.* Manlove, 14 Cal. 553.

Connecticut.— Dennison *v.* Hyde, 6 Conn. 508 (holding that plaintiff can recover for force exercised in doing the act of trespass); Davenport *v.* Russell, 5 Day 145; Edwards *v.* Beach, 3 Day 447.

Georgia.— Stevens *v.* Stevens, 96 Ga. 374, 23 S. E. 312.

Illinois.— McCarty *v.* Gray, 95 Ill. App. 559.

Kansas.— Mecartney *v.* Smith, (App. 1900) 62 Pac. 540, injury to the person.

Maryland.— Moore *v.* Schultz, 31 Md. 418.

Massachusetts.— Sampson *v.* Henry, 13 Pick. 36.

Michigan.— Druse *v.* Wheeler, 22 Mich. 439, malice in trespass to land.

Minnesota.— Spencer *v.* St. Paul, etc., R. Co., 22 Minn. 29, other trespasses done after an entry on realty and their consequences.

Mississippi.—Avera *v.* Williams, 81 Miss. 714, 33 So. 501; Williams *v.* Newberry, 32 Miss. 256, malice in taking of slaves.

Missouri.— Engle *v.* Jones, 51 Mo. 316; Freidenheit *v.* Edmundson, 36 Mo. 226, 88 Am. Dec. 141 (threatening plaintiff's life); Prueitt *v.* Cheltenham Quarry Co., 33 Mo. App. 18.

New Hampshire.— Towle *v.* Blake, 48 N. H. 92. See, however, Fay *v.* Parker, 53 N. H. 342, 16 Am. Rep. 270.

New York.—Althause *v.* Rice, 4 E. D. Smith

injury received but as punishment to the party who committed the wrong.[25] Exemplary damages may be given when the act was wilful,[26] reckless,[27] wanton,[28]

347 (wilfulness in trespass to land); Gilmore *v.* Wale, Anth. N. P. 87.

North Carolina.— Sanderlin *v.* Shaw, 51 N. C. 225.

Pennsylvania.— Greeney *v.* Pennsylvania Water Co., 29 Pa. Super. Ct. 136; Mayfield *v.* White, 1 Browne 241, where vital principles of liberty are struck at, although the actual damage is slight.

Texas.— Sinclair *v.* Stanley, 64 Tex. 67.

Virginia.— Fishburne *v.* Engledove, 91 Va. 548, 22 S. E. 354; Peshine *v.* Shepperson, 17 Gratt. 472, 94 Am. Dec. 468.

United States.— Gorman *v.* Marsteller, 10 Fed. Cas. No. 5,629, 2 Cranch C. C. 311, trespasses to a part of the land lying out of the jurisdiction.

England.— Bracegirdle *v.* Orford, 2 M. & S. 77, 105 Eng. Reprint 311.

Canada.— Honsberger *v.* Honsberger, 5 U. C. Q. B. O. S. 479.

See 46 Cent. Dig. tit. "Trespass," § 144.

Motive and intent.— Therefore, as bearing on the allowance of exemplary damages, defendant's motive (Merrill *v.* Dibble, 12 Ill. App. 85; Zimmerman *v.* Helser, 32 Md. 274; Schindel *v.* Schindel, 12 Md. 108; Johnson *v.* Hannahan, 3 Strobh. (S. C.) 425) or intent (Scott *v.* Bay, 3 Md. 431) may be considered as that he acted in bad faith (Hereshoff *v.* Tripp, 15 R. I. 92, 23 Atl. 104), or was guilty of gross wrong-doing (Reynolds *v.* Braithwaite, 131 Pa. St. 416, 18 Atl. 1110).

25. Ously *v.* Hardin, 23 Ill. 403.

26. *Georgia.*— McConnell *v.* Slappey, 134 Ga. 95, 67 S. E. 440.

Illinois.—West Chicago St. R. Co. *v.* Morrison, etc., Co., 160 Ill. 288, 43 N. E. 393; Illinois, etc., R., etc., Co. *v.* Ogle, 92 Ill. 353 (knowingly and wilfully); Jones *v.* Jones, 71 Ill. 562; Illinois, etc., R., etc., Co. *v.* Cobb, 68 Ill. 53; Stillwell *v.* Barnett, 60 Ill. 210; Williams *v.* Reil, 20 Ill. 147; Bull *v.* Griswold, 19 Ill. 631.

Louisiana.— Nickerson *v.* Allen, 110 La. 194, 34 So. 410; Marion *v.* Johnson, 23 La. Ann. 597.

Maryland.—Atlantic, etc., Consol. Coal Co. *v.* Maryland Coal Co., 62 Md. 135; Barton Coal Co. *v.* Cox, 39 Md. 1, 17 Am. Rep. 525; Ridgely *v.* Bond, 17 Md. 14.

Michigan.— Briggs *v.* Milburn, 40 Mich. 512, wilful and with insult.

Minnesota.— Lynd *v.* Picket, 7 Minn. 184, 82 Am. Dec. 79.

Mississippi.— Cumberland Tel., etc., Co. *v.* Cassedy, 78 Miss. 666, 29 So. 762.

Missouri.— McKeon *v.* Citizens' R. Co., 42 Mo. 79 (intentional, wilful, and malicious); Goetz *v.* Ambs, 27 Mo. 28 (although not maliciously).

New Jersey.— Trainer *v.* Wolff, 58 N. J. L. 381, 33 Atl. 1051.

New York.— Ives *v.* Humphreys, 1 E. D. Smith 196; Tifft *v.* Culver, 3 Hill 180.

Pennsylvania.— Gerwig *v.* W. J. Johnston Co., 207 Pa. St. 585, 57 Atl. 42; Huling *v.* Henderson, 161 Pa. St. 553, 29 Atl. 276; Greeney *v.* Pennsylvania Water Co., 29 Pa. Super. Ct. 136; Reed *v.* Vastine, Northumb. Co. Leg. N. 115.

South Carolina.— Willoughby *v.* Northeastern R. Co., 32 S. C. 410, 11 S. E. 339.

Texas.— Champion *v.* Vincent, 20 Tex. 811 (wilful, deliberate, and lawless); Cook *v.* Garza, 9 Tex. 358; Tignor *v.* Toney, 13 Tex. Civ. App. 518, 35 S. W. 881; Vincent *v.* Mayblum, 1 Tex. App. Civ. Cas. § 763 (wilful, deliberate, and with circumstances of aggravation).

Vermont.—Whiting *v.* Adams, 66 Vt. 679, 30 Atl. 32, 44 Am. St. Rep. 875, 25 L. R. A. 598; Bragg *v.* Laraway, 65 Vt. 673, 27 Atl. 492 (knowingly, wilfully, and maliciously).

See 46 Cent. Dig. tit. "Trespass," § 144.

27. *Alabama.*— Terry *v.* Williams, 148 Ala. 468, 41 So. 804; Burns *v.* Campbell, 71 Ala. 271; Devaughn *v.* Heath, 37 Ala. 595.

Illinois.— Becker *v.* Dupree, 75 Ill. 167; Illinois, etc., R., etc., Co. *v.* Cobb, 68 Ill. 53.

Missouri.— Prueitt *v.* Cheltenham Quarry Co., 33 Mo. App. 18, wantonly reckless.

Pennsylvania.— Greeney *v.* Pennsylvania Water Co., 29 Pa. Super. Ct. 136, wantonly reckless.

Wyoming.— Cosgriff *v.* Miller, 10 Wyo. 190, 68 Pac. 206, 98 Am. St. Rep. 977.

United States.— Berry *v.* Fletcher, 3 Fed. Cas. No. 1,357, 1 Dill. 67, wantonly reckless.

See 46 Cent. Dig. tit. "Trespass," § 144.

In case of wilful or reckless disregard of rights exemplary damages may be recovered. Dorsey *v.* Manlove, 14 Cal. 553; Chicago Title, etc., Co. *v.* Core, 223 Ill. 58, 79 N. E. 108 [*affirming* 126 Ill. App. 272]; Becker *v.* Dupree, 75 Ill. 167; Gardner *v.* Minea, 47 Minn. 295, 50 N. W. 199; Ives *v.* Humphreys, 1 E. D. Smith (N. Y.) 196; Reynolds *v.* Braithwaite, 131 Pa. St. 416, 18 Atl. 1110.

In cases of gross negligence exemplary damages are recoverable. Burns *v.* Campbell, 71 Ala. 271; Hefley *v.* Baker, 19 Kan. 9 (amounting to wantonness); Atlantic, etc., Consol. Coal Co. *v.* Maryland Coal Co., 62 Md. 135; Cumberland Tel., etc., Co. *v.* Poston, 94 Tenn. 696, 30 S. W. 1040; Cox *v.* Crumley, 5 Lea (Tenn.) 529; Southern Cotton Press, etc., Co. *v.* Bradley, 52 Tex. 587; Kolb *v.* Bankhead, 18 Tex. 228; Smith *v.* Sherwood, 2 Tex. 460 (such as to raise a presumption of malice); Lesk *v.* Pollard, 1 Tex. App. Civ. Cas. § 117 (such as to raise a presumption of malice).

28. *Alabama.*— Garden *v.* Houston, 163 Ala. 300, 50 So. 1030; Coleman *v.* Pepper, 159 Ala. 310, 49 So. 310; Western Union Tel. Co. *v.* Dickens, 148 Ala. 480, 41 So. 469; Terry *v.* Williams, 148 Ala. 468, 41 So. 804; Snedecor *v.* Pope, 143 Ala. 275, 39 So. 318; Garrett *v.* Sewell, 108 Ala. 521, 18 So. 737; Burns *v.* Campbell, 71 Ala. 271; Devaughn *v.* Heath, 37 Ala. 595.

California.— Dorsey *v.* Manlove, 14 Cal. 553, with wanton motive.

malicious,[29] or fraudulent.[30] So also exemplary damages may be given when the

Connecticut.— Curtiss *v.* Hoyt, 19 Conn. 154, 48 Am. Dec. 149.
Illinois.— Jones *v.* Jones, 71 Ill. 562; Stillwell *v.* Barnett, 60 Ill. 210.
Maryland.— Strasburger *v.* Barber, 38 Md. 103; Moore *v.* Schultz, 31 Md. 418.
Minnesota.— Craig *v.* Cook, 28 Minn. 232, 9 N. W. 712; Lynd *v.* Picket, 7 Minn. 184, 82 Am. Dec. 79.
Missouri.— Engle *v.* Jones, 51 Mo. 316; Green *v.* Craig, 47 Mo. 90; Prueitt *v.* Cheltenham Quarry Co., 33 Mo. App. 18.
New Hampshire.— Towle *v.* Blake, 48 N. H. 92.
New York.— Sheldon *v.* Baumann, 19 N. Y. App. Div. 61, 45 N. Y. Suppl. 1016 (unlawfully, wilfully, and wantonly); Farnsworth *v.* Western Union Tel. Co., 3 Silv. Sup. 30, 6 N. Y. Suppl. 735.
North Carolina.—Wylie *v.* Smitherman, 30 N. C. 236; Ratliff *v.* Huntly, 27 N. C. 545.
Pennsylvania.— Sperry *v.* Seidel, 218 Pa. St. 16, 66 Atl. 853; Huling *v.* Henderson, 161 Pa. St. 553, 29 Atl. 276; Kennedy *v.* Erdman, 150 Pa. St. 427, 24 Atl. 643 (aggravated by malice and ill-will); Blair Iron, etc., Co. *v.* Lloyd, 1 Walk. 158.
Tennessee.— Cumberland Tel., etc., Co. *v.* Poston, 94 Tenn. 696, 30 S. W. 1040; Burson *v.* Cox, 6 Baxt. 360.
Texas.— Lesk *v.* Pollard, 1 Tex. App. Civ. Cas. § 117, with intent to injure, harass, or vex.
Utah.— Marks *v.* Culmer, 6 Utah 419, 24 Pac. 528.
Wisconsin.— Gilman *v.* Brown, 115 Wis. 1, 91 N. W. 227.
Wyoming.— Cosgriff *v.* Miller, 10 Wyo. 190, 68 Pac. 206.
United States.— Day *v.* Woodworth, 13 How. 363, 14 L. ed. 181.
Canada.— Douglas *v.* Fox, 31 U. C. C. P. 140.
See 46 Cent. Dig. tit. "Trespass," § 144.

Where the trespass is committed with wanton disregard of rights exemplary damages may be recovered. Chicago Title, etc., Co. *v.* Core, 223 Ill. 58, 79 N. E. 108, 114 Am. St. Rep. 305 [*affirming* 126 Ill. App. 272]; Smith *v.* Thompson, 55 Md. 5, 39 Am. Rep. 409; Moore *v.* Schultz, 31 Md. 418; Trainer *v.* Wolff, 58 N. J. L. 381, 33 Atl. 1051; Ives *v.* Humphreys, 1 E. D. Smith (N. Y.) 196; Greeney *v.* Pennsylvania Water Co., 29 Pa. Super. Ct. 136; Newell *v.* Whitcher, 53 Vt. 589, 38 Am. Rep. 703.

29. *Alabama.*— Southern R. Co. *v.* McEntire, (1910) 53 So. 158; Garden *v.* Houston, 163 Ala. 300, 50 So. 1030; Coleman *v.* Pepper, 159 Ala. 310, 49 So. 310; Western Union Tel. Co. *v.* Dickens, 148 Ala. 480, 41 So. 469; Snedecor *v.* Pope, 143 Ala. 275, 39 So. 318; Louisville R. Co. *v.* Smith, 141 Ala. 335, 37 So. 490; Hicks *v.* Swift Creek Mill Co., 133 Ala. 411, 31 So. 947, 91 Am. St. Rep. 38, 57 L. R. A. 720; Garrett *v.* Sewell, 108 Ala. 521, 18 So. 737; Burns *v.* Campbell, 71 Ala. 271.
Arkansas.— Barlow *v.* Lowder, 35 Ark. 492.
California.— Dorsey *v.* Manlove, 14 Cal. 553.
Connecticut.— Curtiss *v.* Hoyt, 19 Conn. 154, 48 Am. Dec. 149.
Illinois.— Becker *v.* Dupree, 75 Ill. 167; Illinois, etc., R., etc., Co. *v.* Cobb, 68 Ill. 53; Stillwell *v.* Barnet, 60 Ill. 210.
Indiana.— Moyer *v.* Gordon, 113 Ind. 282, 14 N. E. 476; Moore *v.* Crose, 43 Ind. 30.
Iowa.— Brown *v.* Allen, 35 Iowa 306.
Kansas.— Hefley *v.* Baker, 19 Kan. 9.
Kentucky.— Ohio Valley Tel. Co. *v.* Meyer, 56 S. W. 673, 22 Ky. L. Rep. 36.
Maryland.— Smith *v.* Thompson, 55 Md. 5, 39 Am. Rep. 409; Moore *v.* Schultz, 31 Md. 418.
Minnesota.— Gardner *v.* Minea, 47 Minn. 295, 50 N. W. 199; Lynd *v.* Picket, 7 Minn. 184, 82 Am. Dec. 79.
Missouri.— Engle *v.* Jones, 51 Mo. 316; Berlin *v.* Thompson, 61 Mo. App. 234; Prueitt *v.* Cheltenham Quarry Co., 33 Mo. App. 18; McMenamy *v.* Cohick, 1 Mo. App. 529, desire to injure plaintiff.
New Hampshire.— Towle *v.* Blake, 48 N. H. 92.
New Jersey.— Miller *v.* Rambo, 73 N. J. L. 726, 64 Atl. 1053.
New York.— Farnsworth *v.* Western Union Tel. Co., 3 Silv. Sup. 30, 6 N. Y. Suppl. 735; Ives *v.* Humphreys, 1 E. D. Smith 196; Woert *v.* Jenkins, 14 Johns. 352, and cruelly.
North Carolina.—Wylie *v.* Smitherman, 30 N. C. 236; Ratliff *v.* Huntly, 27 N. C. 545; Duncan *v.* Stalcup, 18 N. C. 440.
Pennsylvania.— Blair Iron, etc., Co. *v.* Lloyd, 1 Walk. 158; Hodgson *v.* Millward, 3 Grant 406 (with moral wrong, recklessness, personal malice, violence, and outrage, in trespass to the person); Greeney *v.* Pennsylvania Water Co., 29 Pa. Super. Ct. 136.
Rhode Island.— Herreshoff *v.* Tripp, 15 R. I. 92, 23 Atl. 104.
South Carolina.— Greenville, etc., R. Co. *v.* Partlow, 14 Rich. 237, with malicious and revengeful motives. *Contra*, Stallings *v.* Corbett, 2 Speers 613, 42 Am. Dec. 388.
Tennessee.— Cox *v.* Crumley, 5 Lea 529.
Texas.— Sinclair *v.* Stanley, 69 Tex. 718, 7 S. W. 511; Smith *v.* Sherwood, 2 Tex. 460; Tignor *v.* Toney, 13 Tex. Civ. App. 518, 35 S. W. 881; Lesk *v.* Pollard, 1 Tex. App. Civ. Cas. § 117.
Utah.— Marks *v.* Culmer, 6 Utah 419, 24 Pac. 528.
Vermont.— Newell *v.* Whitcher, 53 Vt. 589, 38 Am. Rep. 702, with intent to injure.
Virginia.— Fishburne *v.* Engledove, 91 Va. 548, 22 S. E. 354.
Wyoming.— Cosgriff *v.* Miller, 10 Wyo. 190, 68 Pac. 206, 98 Am. St. Rep. 977.
United States.— Day *v.* Woodworth, 13 How. 363, 14 L. ed. 181; Berry *v.* Fletcher, 3 Fed. Cas. No. 1,357, 1 Dill. 67.
See 46 Cent. Dig. tit. "Trespass," § 144.

30. *Alabama.*— Burns *v.* Campbell, 71 Ala. 271.

act was oppressive;[31] or when the act was committed with violence,[32] or rudely,[33] or with excessive force,[34] or under circumstances of insult and outrage,[35] or with circumstances of cruelty,[36] or from a corrupt motive,[37] or in known violation

California.— Dorsey *v.* Manlove, 14 Cal. 553.

Illinois.— Chicago Title, etc., Co. *v.* Core, 223 Ill. 58, 79 N. E. 108 [*affirming* 126 Ill. App. 272].

Indiana.— Moyer *v.* Gordon, 113 Ind. 282, 14 N. E. 476.

Maryland.— Baltimore, etc., R. Co. *v.* Boyd, 63 Md. 325.

Minnesota.— Gardner *v.* Minea, 47 Minn. 295, 50 N. W. 199.

Mississippi.— Cumberland Tel., etc., Co. *v.* Cassedy, 78 Miss. 666, 29 So. 762.

Tennessee.— Cox *v.* Crumley, 5 Lea 529.

Texas.— Smith *v.* Sherwood, 2 Tex. 460; Lesk *v.* Pollard, 1 Tex. App. Civ. Cas. § 117.

Virginia.— Fishburne *v.* Engledove, 91 Va. 548, 22 S. E. 354.

See 46 Cent. Dig. tit. "Trespass," § 144.

Illustration.—Where, in trespass for cutting standing timber, defendant's agent knew that the land belonged to plaintiffs and that their father from whom it purchased the timber had no right to sell it, and connived with him to cut the timber and haul it to its mill, plaintiffs were entitled to exemplary damages. Kentucky Stave Co. *v.* Page, (Ky. 1910) 125 S. W. 170.

31. *Alabama.*— Burns *v.* Campbell, 71 Ala. 271.

Arkansas.— Barlow *v.* Lowder, 35 Ark. 492, oppression and cruel conduct.

California.— Dorsey *v.* Manlove, 14 Cal. 553, hardship and oppression.

Indiana.— Moyer *v.* Gordon, 113 Ind. 282, 14 N. E. 476 (deliberate); Moore *v.* Crose, 43 Ind. 30 (deliberate); Anthony *v.* Gilbert, 4 Blackf. 348.

Kansas.— Hefley *v.* Baker, 19 Kan. 9.

Louisiana.— Bright *v.* Bell, 113 La. 1078, 37 So. 976, against protest.

Minnesota.— Gardner *v.* Minea, 47 Minn. 295, 50 N. W. 199; Heartz *v.* Klinkhammer, 39 Minn. 488, 40 N. W. 826, against protest.

Missouri.— Engle *v.* Jones, 51 Mo. 316; Prueitt *v.* Cheltenham Quarry Co., 33 Mo. App. 18; Newman *v.* St. Louis, etc., R. Co., 2 Mo. App. 402.

New Hampshire.— Towle *v.* Blake, 48 N. H. 92.

New York.— Ives *v.* Humphreys, 1 E. D. Smith 196.

Pennsylvania.— Nagle *v.* Mullison, 34 Pa. St. 48 (oppression, outrage, and vindictiveness); Greeney *v.* Pennsylvania Water Co., 29 Pa. Super. Ct. 136.

Tennessee.— Cox *v.* Crumley, 5 Lea 529.

Texas.— Loftus *v.* Maxey, 73 Tex. 242, 11 S. W. 272 (insult and oppression); Smith *v.* Sherwood, 2 Tex. 460; Diamond *v.* Smith, 27 Tex. Civ. App. 558, 66 S. W. 141; Tignor *v.* Toney, 13 Tex. Civ. App. 518, 35 S. W. 881; Leske *v.* Pollard, 1 Tex. App. Civ. Cas. § 117.

Virginia.— Fishburne *v.* Engledove, 91 Va. 548, 22 S. E. 354.

United States.— Berry *v.* Fletcher, 3 Fed. Cas. No. 1,357, 1 Dill. 67.

32. *Missouri.*— Hickey *v.* Welch, 91 Mo. App. 4 (and with abusive language); Prueitt *v.* Cheltenham Quarry Co., 33 Mo. App. 18.

New Hampshire.— Towle *v.* Blake, 48 N. H. 92 (with wilful or wanton violence); Perkins *v.* Towle, 43 N. H. 220, 80 Am. Dec. 149.

New York.—Walker *v.* Wilson, 8 Bosw. 586, with violence to the person.

Pennsylvania.— Greeney *v.* Pennsylvania Water Co., 29 Pa. Super. Ct. 136.

Texas.— Smith *v.* Sherwood, 2 Tex. 460, wanton violence.

United States.— Berry *v.* Fletcher, 3 Fed. Cas. No. 1,357, 1 Dill. 67.

Canada.—Lunn *v.* Turner, 4 U. C. Q. B. 282.

33. Terry *v.* Williams, 148 Ala. 468, 41 So. 804; Burns *v.* Campbell, 71 Ala. 271; Gusdorff *v.* Duncan, 94 Md. 160, 50 Atl. 574; Engle *v.* Jones, 51 Mo. 316; McMenamy *v.* Cohick, 1 Mo. App. 529.

34. *Georgia.*— Henson *v.* Taylor, 108 Ga. 567, 33 S. E. 911; Shores *v.* Brooks, 81 Ga. 468, 8 S. E. 429, 12 Am. St. Rep. 332.

Mississippi.— Bonelli *v.* Bowen, 70 Miss. 142, 11 So. 791, force, putting plaintiff in fear.

New Hampshire.— Towle *v.* Blake, 48 N. H. 92.

Tennessee.— Simpson *v.* Markwood, 6 Baxt. 340.

Texas.— Sinclair *v.* Stanley, 69 Tex. 718, 7 S. W. 511; Bollinger *v.* McMinn, 47 Tex. Civ. App. 89, 104 S. W. 1079; Gillett *v.* Moody, (Civ. App. 1899) 54 S. W. 35.

United States.— McAfee *v.* Crofford, 13 How. 447, 14 L. ed. 217.

See 46 Cent. Dig. tit. "Trespass," § 144.

35. *Alabama.*— Burns *v.* Campbell, 71 Ala. 271.

Arkansas.— Barlow *v.* Lowder, 35 Ark. 492.

Indiana.— Moore *v.* Crose, 43 Ind. 30.

Kentucky.— Jennings *v.* Maddox, 8 B. Mon. 430.

New Hampshire.— Towle *v.* Blake, 48 N. H. 92.

New York.—Adams *v.* Rivers, 11 Barb. 390; Steenburgh *v.* McRorie, 60 Misc. 510, 113 N. Y. Suppl. 1118.

North Carolina.—Brame *v.* Clark, 148 N. C. 364, 62 S. E. 418, 19 L. R. A. N. S. 1033; Duncan *v.* Stalcup, 18 N. C. 440.

Pennsylvania.— Greeney *v.* Pennsylvania Water Co., 29 Pa. Super. Ct. 136.

Tennessee.—Wilkins *v.* Gilmore, 2 Humphr. 140.

United States.— Day *v.* Woodworth, 13 How. 363, 14 L. ed. 181, with gross and outrageous conduct.

See 46 Cent. Dig. tit. "Trespass," § 144.

36. Ives *v.* Humphreys, 1 E. D. Smith (N. Y.) 196; Duncan *v.* Stalcup, 18 N. C. 440; Burson *v.* Cox, 6 Baxt. (Tenn.) 360.

37. Ives *v.* Humphreys, 1 E. D. Smith (N. Y.) 196; Smith *v.* Sherwood, 2 Tex. 460.

of the law,[38] or forcibly and against protest.[39] Exemplary damages may be given in view of the enormity of the offense, rather than the compensation to plaintiff;[40] but in general they cannot be given in the absence of circumstances of the character heretofore enumerated,[41] or if plaintiff was himself a wilful trespasser,[42] although it is sometimes said that the jury can always give smart money.[43] Exemplary damages will not usually be allowed where the trespass was under claim of right in good faith,[44] but may be awarded even in such case if there are circumstances of aggravation.[45] Where defendant is liable criminally for the same act, the

38. Bentley *v.* Fischer Lumber, etc., Co., 51 La. Ann. 451, 25 So. 262 (in violation of injunction, although it has been punished); Reeves *v.* Penrose, L. R. 26 Ir. 141.

39. Koester *v.* Cowan, 37 Ill. App. 252; Kentucky Midland R. Co. *v.* Stump, 12 Ky. L. Rep. 316; Smalling *v.* Jackson, 133 N. Y. App. Div. 382, 117 N. Y. Suppl. 268; Kennedy *v.* Erdman, 150 Pa. St. 427, 24 Atl. 643.

40. Day *v.* Woodworth, 13 How. (U. S.) 363, 14 L. ed. 181.

41. *Alabama.*— Burns *v.* Campbell, 71 Ala. 271.

Illinois.— Mead *v.* Pollock, 99 Ill. App. 151.

Iowa.— Young *v.* Gormley, 119 Iowa 546, 93 N. W. 565, holding that exemplary damages will not be given in the absence of malice or intentional disregard of rights.

Kentucky.—Andrews *v.* Singer Mfg. Co., 48 S. W. 976, 19 Ky. L. Rep. 1089.

Minnesota.— Carli *v.* Union Depot, etc., Co., 32 Minn. 101, 20 N. W. 89, holding that exemplary damages will not be given where the trespass was not wanton, wilful, or malicious.

Mississippi.— Keystone Lumber, etc., Co. *v.* McGrath, (1897) 21 So. 301.

Missouri.— Prueitt *v.* Cheltenham Quarry Co., 33 Mo. App. 18 (holding that exemplary damages will not be given where there is neither violence, malice, oppression, nor wanton recklessness); Ross *v.* New Home Sewing Mach. Co., 24 Mo. App. 353; McMenamy *v.* Cohick, 1 Mo. App. 529.

North Carolina.— Gwaltney *v.* Scottish Carolina Timber, etc., Co., 115 N. C. 579, 20 S. E. 465.

Texas.— Nafe *v.* Hudson, 19 Tex. Civ. App. 381, 47 S. W. 675.

See 46 Cent. Dig. tit. "Trespass," § 144.

42. Grier *v.* Ward, 23 Ga. 145, holding that where defendant removed plaintiff's goods from his land in an improper manner, punitive damages cannot be recovered if plaintiff had wrongfully placed them there.

43. Major *v.* Pulliam, 3 Dana (Ky.) 582; Tyson *v.* Ewing, 3 J. J. Marsh. (Ky.) 185.

44. Adams *v.* Lorraine Mfg. Co., 29 R. I. 333, 71 Atl. 180. And see Backer *v.* Penn Lubricating Co., 162 Fed. 627, 89 C. C. A. 419.

Claim of title to land.— Georgia R., etc., Co. *v.* Gardner, 115 Ga. 954, 42 S. E. 250; Scott *v.* Mathis, 72 Ga. 119; Goldstein *v.* Miller, 93 Ill. App. 103 (as of right to enter under process); Leiter *v.* Day, 35 Ill. App. 248; Allison *v.* Chandler, 11 Mich. 542 (right as owner to remove roof of a house in tenant's possession); Hollister *v.* Ruddy, 66 N. J. L. 68, 48 Atl. 520 (claim of license to enter realty and cut trees); Hays *v.* Askew, 52 N. C. 272; Blair Iron, etc., Co. *v.* Lloyd, 1 Walk. (Pa.) 158; Perry *v.* Jefferies, 61 S. C. 292, 39 S. E. 515; Scheer *v.* Kriesel, 109 Wis. 125, 85 N. W. 138; Hazelton *v.* Week, 49 Wis. 661, 6 N. W. 309, 35 Am. Rep. 796 (mistake as to ownership); Murray *v.* Pannaci, 130 Fed. 529, 65 C. C. A. 153; McArthur *v.* Cornwall, [1892] A. C. 75, 61 L. J. P. C. 1, 65 L. T. Rep. N. S. 718.

Mistake as to ownership of personalty taken under process see Sullivan *v.* Dee, 8 Ill. App. 263.

Personalty.— Mistake as to legal right to destroy another's personalty (Franz *v.* Hilterbrand, 45 Mo. 121, entry on plaintiff's land and killing his horses in the belief that they had glanders and that that gave a right), or to take it (Stell *v.* Paschal, 41 Tex. 640).

45. See cases cited *infra*, this note.

Applications of rule.— Defendant is liable for punitive damages where the act is done against plaintiff's protest (Goodson *v.* Stewart, (Ala. 1908) 46 So. 239; Louisville, etc., R. Co. *v.* Smith, 141 Ala. 335, 37 So. 490, trespass by railroad after written protest of landowner; Clinton *v.* Franklin, 83 S. W. 142, 26 Ky. L. Rep. 1053, laying a sidewalk on plaintiff's land by a city after repeated protests to its officers; Cumberland Tel., etc., Co. *v.* Cassedy, 78 Miss. 666, 29 So. 762, cutting out the top of plaintiff's trees in the street by a telephone company after permission refused, although authorized by city council and marshal); or if the act was done from a bad motive (Miller *v.* Rambo, 73 N. J. L. 726, 64 Atl. 1053, use by road overseer of his office to pay a private grudge); and defendant is liable, although he acted under claim of right if the act is done forcibly (Hammond *v.* Sullivan, 112 N. Y. App. Div. 788, 99 N. Y. Suppl. 472); and also either against protest (Medairy *v.* McAllister, 97 Md. 488, 55 Atl. 461, holding that where defendant seized plaintiff's goods on the false idea that he was guilty of a criminal offense in having them in his possession, being protected by a detective and against plaintiff's protest, punitive damages may be given, although plaintiff acted by advice of counsel and in an effort to punish violators of the law; Cosgriff *v.* Miller, 10 Wyo. 190, 68 Pac. 206, 98 Am. St. Rep. 977, grazing sheep on plaintiff's land after warning not to, and arming the herders); or with gross negligence of defendant in ascertaining his rights (Beaudrot *v.* Southern R. Co., 69 S. C. 160, 48 S. E. 106).

doctrine is occasionally held that exemplary damages cannot be recovered,[46] or at least that the court will be slow to inflict them where defendant has been punished criminally.[47] It is not necessary to a recovery of exemplary damages that plaintiff recover substantial actual damages.[48] There is considerable conflict of authority on the question of the liability of a master or principal for exemplary damages for acts committed by his agent or servant. This conflict of authority is not peculiar to acts of trespass and the whole question is considered elsewhere in this work.[49]

(xx) *Excessive or Inadequate Damages.* An award of damages will not be disturbed unless manifestly excessive.[50] The court will not set aside the verdict because it would have given less,[51] but if clearly unwarranted in amount the verdict will not be permitted to stand.[52] Similarly when the amount of

46. Moyer *v.* Gordon, 113 Ind. 282, 14 N. E. 476 (for forcible entry); Beddall *v.* Maitland, 17 Ch. D. 174, 50 L. J. Ch. 401, 44 L. T. Rep. N. S. 248, 29 Wkly. Rep. 484. *Contra,* Cosgriff *v.* Miller, 10 Wyo. 190, 68 Pac. 206, 98 Am. St. Rep. 977.

47. Bendich *v.* Scobel, 107 La. 242, 31 So. 703.

48. Goodson *v.* Stewart, 154 Ala. 660, 46 So. 239; Louisville, etc., R. Co. *v.* Smith, 141 Ala. 335, 37 So. 490; Rothschild *v.* Bay City Lumber Co., 139 Ala. 571, 36 So. 785; Batson *v.* Higgenbothem, 7 Ga. App. 835, 68 S. E. 455; Merest *v.* Harvey, 1 Marsh. 139, 5 Taunt. 442, 15 Rev. Rep. 548, 1 E. C. L. 230. *Contra,* McCarthy *v.* Miller, (Tex. Civ. App. 1900) 57 S. W. 973.

Where failure to recover substantial damages is due to the state of plaintiff's pleadings, not to the absence of such damages, exemplary damages may be recovered. Favorite *v.* Cottrill, 62 Mo. App. 119.

49. See Damages, 13 Cyc. 114 *et seq.*

50. Major *v.* Pulliam, 3 Dana (Ky.) 582; North *v.* Cates, 2 Bibb (Ky.) 591; Allen *v.* Craig, 13 N. J. L. 294; Weed *v.* Brush, 89 Hun (N. Y.) 62, 34 N. Y. Suppl. 1025.

Amounts held not excessive.— Five thousand dollars for posting on plaintiff's door a challenge to a duel. Ogden *v.* Gibbons, 5 N. J. L. 612. See Gibbons *v.* Ogden, 5 N. J. L. 1005. Two hundred dollars against a justice of the peace who connived at dispossess proceedings. Evertson *v.* Sutton, 5 Wend. (N. Y.) 281, 21 Am. Dec. 217. Three hundred and twenty-five dollars for tearing down the wall of plaintiff's building and converting the bricks, although the actual damage was only one hundred dollars. Zimmerman *v.* Bonzar, (Pa. 1888) 16 Atl. 71. Five hundred dollars for breaking into plaintiff's house to distrain for rent, although he was absent at the time and so was not disturbed. Mayfield *v.* White, 1 Browne (Pa.) 241. Three thousand dollars in trespass *quare clausum* accompanied by violence and insult, although twenty dollars covered the actual damage. Johnson *v.* Hannahan, 3 Strobh. (S. C.) 425. Five hundred dollars for a trespass committed in a violent, high-handed way, although in the belief by defendant that he had a right of way. Golding *v.* Williams, Dudley (S. C.) 92. Five hundred dollars for pulling down plaintiff's house after threat to do so if plaintiff's daughter did not yield to his solicitations to sexual intercourse. Chapman *v.* Kincaid, 8 Humphr. (Tenn.) 150. Six hundred dollars for forcibly expelling plaintiff's wife and removing his furniture and pulling down the house which was of little value. Cook *v.* Garza, 9 Tex. 358. Five hundred pounds for entering plaintiff's lands while drunk, threatening to shoot game, swearing at him and threatening as a magistrate to commit him, although there was no actual damage. Merest *v.* Harvey, 1 Marsh. 139, 5 Taunt. 442, 15 Rev. Rep. 548, 1 E. C. L. 230. Fifty dollars for attaching sixteen telephone wires to plaintiff's chimney. Bunke *v.* New York Tel. Co., 188 N. Y. 600, 81 N. E. 1161 [*affirming* 110 N. Y. App. Div. 241, 97 N. Y. Suppl. 66]. One hundred and fifty dollars for breaking a cellar door by defendant to get its gas meter, although there was no actual damage and the circumstances did not warrant punitive damages. Reed *v.* New York, etc., Gas Co., 93 N. Y. App. Div. 453, 87 N. Y. Suppl. 810. Forty dollars for a net worth twelve dollars is not excessive where plaintiff was fishing in a navigable stream and defendant cut it, claiming exclusive right to fish there. Rose *v.* Belyea, 12 N. Brunsw. 109. For other decisions in which the verdict was held not excessive see Kentucky Stave Co. *v.* Page, (Ky. 1910) 125 S. W. 170; Dobson *v.* Postal Tel.-Cable Co., 79 S. C. 429, 60 S. E. 948.

51. Bennett *v.* Allcott, 2 T. R. 166, 100 Eng. Reprint 90.

52. Cumberland Tel., etc., Co. *v.* Cassedy, 78 Miss. 666, 29 So. 762 (five hundred dollars for cutting eight feet from the top of ornamental shade-trees where actual damage is small); Slingerland *v.* East Jersey Co., 58 N. J. L. 411, 33 Atl. 843 (five thousand dollars for using force in overcoming resistance of a female minor who resisted defendant in laying pipe on her father's farm over which a right of way had been condemned); Thompson *v.* Morris Canal, etc., Co., 17 N. J. L. 480 (holding that damages to the full value of the land in trespass are excessive as title does not pass); Pyramid Land, etc., Co. *v.* Pierce, 30 Nev. 237, 95 Pac. 210 (holding that in an action for damages resulting from defendants' sheep grazing over about three hundred and sixty acres of plaintiff's land

damages is obviously inadequate, the verdict should be set aside and a new trial granted.[53]

j. Costs. As has been shown in another volume of this work, it is a rule of almost universal application under the statute relating to costs, that in actions at law the prevailing party in the action is entitled to costs unless there is some special statute which on the facts of the case takes it out of the operation of the general rule.[54] This rule applies to actions for trespass as well as other actions at law,[55] and the prevailing party is of course entitled to full costs if a statute expressly so provides.[56] The question of costs in actions of trespass is almost entirely regulated by statutes specially relating to that class of action; and varying to a considerable extent in their provisions. Some statutes give plaintiff full costs if the court certifies that the trespass was wilful and malicious.[57] Under these statutes it is for the court before whom the action is tried to determine whether the trespass was wilful and malicious, and this refusal to so certify will not be reviewed.[58] So some statutes allow a reduction of costs in case of unintentional trespass if damages are tendered.[59] Under some statutes plaintiff is entitled to full costs if he recover in trespass *quare clausum*, regardless of the issue or the amount recovered,[60] but usually in such an action, if it is brought in a court

in February, 1906, where it appeared that plaintiff's cattle were on the land in March, and his sheep lambed and fed there in April, and that the feed was as good as usual ninety days after the trespass, a verdict for six hundred dollars was excessive); Broughton *v.* Singleton, 2 Nott & M. (S. C.) 338 (three hundred dollars for hunting in plaintiff's field apparently abandoned and not knowing it was plaintiff's, plaintiff having previously forbidden hunting on his land and having ordered defendant off, but having himself precipitated a scuffle which ensued).

In New Brunswick it has been held that the verdict will not be disturbed although excessive. Ingraham *v.* Parks, 19 N. Brunsw. 101.

53. Hardeman *v.* Williams, 157 Ala. 422, 48 So. 108.

54. See Costs, 11 Cyc. 27.

55. *Alabama.*— Williams *v.* Perkins, 1 Port. 471, holding that a statute providing that no more costs than damages can be recovered in an action of "slander or trespass, assault and battery" does not apply to trespass *quare clausum fregit.*

District of Columbia.— Cahill *v.* Harris, 6 D. C. 214, holding that on recovery by plaintiff in trespass *quare clausum* he is entitled to full costs as St. 22 & 23 Car. 2, c. 9, regulating costs where a recovery is less than forty shillings does not apply to trespass *quare clausum.*

Kentucky.— See Le Moyne *v.* Anderson, 123 Ky. 584, 96 S. W. 843, 29 Ky. L. Rep. 1017.

North Carolina.— Murray *v.* Spencer, 92 N. C. 264.

Pennsylvania.— Hower *v.* Gamby, 22 Pa. Co. Ct. 338.

South Carolina.— Bolton *v.* Hendrix, 84 S. C. 35, 65 S. E. 947; Vassey *v.* Spake, 83 S. C. 566, 65 S. E. 825, both holding that certain statutory provisions did not take the case out of the general rule.

Tennessee.— Winters *v.* McGhee, 3 Sneed 128.

In New Jersey it has been held that defendant will not be allowed costs where plaintiff has possession and good reason to suppose the land his. Cullum *v.* Williams, 9 N. J. L. J. 375.

56. Bragg *v.* Brooks, 8 Mo. 40; Grant *v.* Brinegar, 6 Mo. 450.

57. Heath *v.* McInroy, 6 Johns. (N. Y.) 277; Dodge *v.* Carpenter, 18 Vt. 509; Sherwin *v.* Swindall, 1 D. & L. 999. And see Winger *v.* Rife, 101 Pa. St. 152.

A mere voluntary trespass is not wilful and malicious within the meaning of such statutes. It should appear to be done *mala fide*, or with an intention to injure or vex plaintiff, or with a consciousness of violating right. Heath *v.* McInroy, 6 Johns. (N. Y.) 277.

58. Heath *v.* McInroy, 6 Johns. (N. Y.) 277; Dodge *v.* Carpenter, 18 Vt. 509.

59. Brown *v.* Neal, 36 Me. 407; Smith *v.* Morgan, 73 Wis. 375, 41 N. W. 532.

When involuntary.— Trespass is involuntary where done under a mistake of fact as to the land being defendant's (Brown *v.* Neal, 36 Me. 407); or its being land on which he has actual permission to go (Brown *v.* Neal, *supra*); but not where done under a mistake of law as to his rights (Brown *v.* Neal, *supra*); or want of care in ascertaining them (Brown *v.* Neal, *supra*); and a trespass on land is negligent, although involuntary when done by mistake of fact, caused by lack of care, as to the land being defendant's (Brown *v.* Neal, *supra*).

Effect of refusal or acceptance of offer.— If plaintiff refuses he is liable for costs thereafter. If he accepts and continues the writ, the tender is deducted from the recovery and his right to costs is determined by the residue. Slack *v.* Brown, 13 Wend. (N. Y.) 390.

60. Sawyer *v.* Ryan, 13 Metc. (Mass.) 144 (Rev. St. c. 121, §§ 3, 13); Dummer *v.* Foster, 7 Mass. 476 (St. (1807) c. 122). And see Durfee *v.* Granite Mountain Min. Co., 13 Mont. 181, 33 Pac. 3.

of general jurisdiction costs are by statute dependent on the amount of recovery [61] or occasionally on the amount demanded,[62] unless it appears that title is involved, in which case plaintiff is entitled to full costs if he recovers judgment.[63] Title

61. See cases cited *infra*, this note.

If more than the sum prescribed by statute is recovered plaintiff can recover full costs. Sutherland *v.* Venard, 32 Ind. 483; Hower *v.* Gamby, 22 Pa. Co. Ct. 338 (a recovery of five dollars and thirty-three cents is the same as five dollars, thirty-three and one-third cents); Stewart *v.* Hughes, 1 Del. Co. (Pa.) 143.

If less than the statutory amount is recovered by plaintiff statutes have variously provided that on a recovery plaintiff is entitled to no more costs than damages (White *v.* Fuller, 36 Conn. 149; Bishop *v.* Seeley, 18 Conn. 389; Mackison *v.* Clegg, 95 Ind. 373; Dodd *v.* Sheeks, 5 Blackf. (Ind.) 592; Jones *v.* Lane, 63 N. H. 331; Crosby *v.* Moore, 6 N. H. 57; Forsaith *v.* Clogston, 3 N. H. 401; Ward *v.* Bartlett, 1 N. H. 14); or that only one quarter as much costs as damages may be recovered (Robbins *v.* Sawyer, 3 Gray (Mass.) 375); or that plaintiff cannot recover costs (Forsaith *v.* Clogston, 3 N. H. 401; White *v.* Hunt, 6 N. J. L. 415; Nevils *v.* Hartzog, 4 Rich. (S. C.) 552); or that neither party can recover costs (Van Buskirk *v.* Dunlap, 2 Ohio Dec. (Reprint) 233, 2 West. L. Month. 125); or that costs are in the discretion of the court (Turner *v.* Holleran, 8 Minn. 451; Clary *v.* McGlynn, 46 Vt. 347); or that plaintiff must pay costs to defendant (Wickham *v.* Seely, 18 Wend. (N. Y.) 649; Benton *v.* Dale, 1 Cow. (N. Y.) 160; Crane *v.* Comstock, 11 Johns. (N. Y.) 404; Sing *v.* Annin, 10 Johns. (N. Y.) 302; Benson *v.* Waukesha, 74 Wis. 31, 41 N. W. 1017, Rev. St. 2918, 2920); even though by reason of the amount claimed the lower court had no jurisdiction (Turner *v.* Van Riper, 43 How. Pr. (N. Y.) 33).

62. Norton *v.* Hart, 1 Ohio 154.

63. *Connecticut.*— Adgate *v.* Stores, 2 Root 160; Granger *v.* Hancock, 2 Root 88.

Indiana.— Branson *v.* Studabaker, 133 Ind. 147, 33 N. E. 98; Mackison *v.* Clegg, 95 Ind. 373; Burnett *v.* Coffin, 4 Ind. 218.

Maine.— Maxwell *v.* Potter, 47 Me. 487; Burnham *v.* Ross, 47 Me. 456.

Massachusetts.— Butterfield *v.* Pearson, 10 Mass. 410.

Michigan.— Druse *v.* Wheeler, 22 Mich. 439.

New York.— Slingerland *v.* International Contracting Co., 43 N. Y. App. Div. 215, 60 N. Y. Suppl. 12 [*affirmed* in 169 N. Y. 60, 61 N. E. 995, 56 L. R. A. 494]; Brotherton *v.* Wright, 15 Wend. 237; Rogers *v.* McGregor, 4 Cow. 531.

Oregon.— Crossman *v.* Lander, 3 Oreg. 495.

Pennsylvania.— Winger *v.* Rife, 101 Pa. St. 152; Bowers *v.* Taylor, 3 Del. Co. 334; Cheney *v.* Dallett, 1 Del. Co. 225. Some Pennsylvania decisions, however, draw a distinction between cases where costs are awarded by the verdict of the jury or an award of arbitrators, and cases where they are awarded by the court. In the former case it is held that plaintiff if successful is entitled to full costs irrespective of the amount of recovery or whether title was in issue (Painter *v.* Kistler, 59 Pa. St. 331; Wilkinson *v.* Grey, 14 Serg. & R. 345; Hinds *v.* Knox, 4 Serg. & R. 417); and assign as a reason why the court is bound while the jury are not, that there being no measure of damages in those cases which fall within these statutes, the jury are not bound to give damages *eo nomine*, but may substantially do the same thing in another form, by increasing the costs to the amount of the damages intended to be given (Hinds *v.* Knox, 4 Serg. & R. 417).

Vermont.— Hibbard *v.* Foster, 24 Vt. 542; Powers *v.* Leach, 22 Vt. 226.

Wisconsin.— Maxim *v.* Wedge, 69 Wis. 547, 35 N. W. 11; Soper *v.* Barker, 36 Wis. 648.

See 46 Cent. Dig. tit. "Trespass," § 164.

The record must show that title was involved so as to be decided and settled; in order to entitle plaintiff to full costs it is not sufficient that title merely came in question incidentally (Bishop *v.* Seley, 18 Conn. 389; Weiand *v.* Dillinger, 1 Leg. Gaz. (Pa.) 115); however, the fact that title was involved so as to be decided may appear either from the pleadings or the evidence (Ward *v.* Bartlett, 1 N. H. 14); or by a certificate from the trial court (Arnold *v.* Kellogg, 25 Conn. 248; Miller *v.* Howard, 4 Pa. Dist. 70; Bowers *v.* Taylor, 3 Del. Co. (Pa.) 334).

Where possession only is alleged title is not in issue (Burnet *v.* Kelly, 10 How. Pr. (N. Y.) 406); this, it has been held, is true, although evidence of title is admitted for the purpose of defining the extent of the possession (Burnet *v.* Kelly, *supra*); and so is not in issue in trespass generally as possession is in general the only right involved (Wausau Boom Co. *v.* Plumer, 49 Wis. 112, 4 N. W. 1072); and the only right denied by the general issue (Bishop *v.* Seeley, 18 Conn. 389; Ostrom *v.* Potter, 104 Mich. 115, 62 N. W. 170; Squires *v.* Seward, 16 How. Pr. (N. Y.) 478).

If the right alleged is not denied title is not in issue. White *v.* Fuller, 36 Conn. 149; O'Reilly *v.* Davies, 4 Sandf. (N. Y.) 722. It is not in issue where defendant admits the title alleged but denies other allegations of the plea (Lynk *v.* Weaver, 128 N. Y. 171, 28 N. E. 508; Dunster *v.* Kelly, 110 N. Y. 558, 18 N. E. 361); as that the place of trespass is on the land (Heintz *v.* Dellinger, 28 How. Pr. (N. Y.) 39. *Contra*, Washburn *v.* Tinkham, 8 N. H. 507; Brown *v.* Mathes, 5 N. H. 229; Long *v.* Ober, 51 Vt. 73); or pleads in mitigation of damages only (Dexter *v.* Alfred, 74 Hun (N. Y.) 259, 26 N. Y. Suppl. 592); or where he pleads in confession and avoidance as a license (Keiny *v.* Ingra-

must be essential to plaintiff's recovery or defeat, or it is not involved, within

ham, 66 Barb. (N. Y.) 250; William *v.* Price, 53 Barb. (N. Y.) 442, 37 How. Pr. 15; O'Reilly *v.* Davies, 4 Sandf. (N. Y.) 722; Launitz *v.* Barnum, 4 Sandf. (N. Y.) 637; Muller *v.* Bayard, 15 Abb. Pr. (N. Y.) 449; Turner *v.* Van Riper, 43 How. Pr. (N. Y.) 33; Utter *v.* Gifford, 25 How. Pr. (N. Y.) 289; Wickham *v.* Seely, 18 Wend. (N. Y.) 649; People *v.* New York C. Pl., 18 Wend. (N. Y.) 579; Chandler *v.* Duane, 10 Wend. (N. Y.) 563, 25 Am. Dec. 578; *Ex p.* Coburn, 1 Cow. (N. Y.) 568. *Contra*, Cuming *v.* Prang, 24 Mich. 514; Bowers *v.* Taylor, 3 Del. Co. (Pa.) 334; Stewart *v.* Hughes, 1 Del. Co. (Pa.) 143); or misuse of a license (Bloomingdale *v.* Steubing, 14 Misc. (N. Y.) 549, 35 N. Y. Suppl. 1074); or possession with plaintiff's consent under a lease made to plaintiff for defendant's benefit (Muller *v.* Bayard, 15 Abb. Pr. (N. Y.) 449).

Plea of a right to enter and remove plaintiff's personalty from the land does not put title to the land in issue. Corcoran *v.* Webster, 50 Wis. 125, 6 N. W. 513.

Issues made by pleadings but not submitted to jury.—Where the recovery is not on an issue involving title, it is not in issue, although in issue under the pleadings, as where it is not involved in the only issue submitted to the jury (Robbins *v.* Sawyer, 3 Gray (Mass.) 375; Pevare *v.* Towne, 57 N. H. 220); or is not involved in the issue on which plaintiff recovered (Crosby *v.* Moore, 6 N. H. 57, not involved in the count in which title was in issue; Shall *v.* Green, 34 How. Pr. (N. Y.) 418, plea of title to part but trespasses shown on other parts only; Squires *v.* Seward, 16 How. Pr. (N. Y.) 478; Burhans *v.* Tibbits, 7 How. Pr. (N. Y.) 74, recovery solely for a chattel on the land, jury finding title to the land to be in defendant; Brainerd *v.* Casey, 37 Vt. 479, issue of boundary in which the jury found the boundary was as defendant claimed but that the trespass was on plaintiff's land). But see Ryder *v.* Hathaway, 2 Metc. (Mass.) 96, holding that where defendant pleaded title but the recovery was for trespass on part of the land not claimed by him, plaintiff could recover full costs, although the question of title had been settled in a previous trial and the present trial was only to determine damages).

If plaintiff alleges title it is in issue if denied by the pleadings (Labeau *v.* Labeau, 61 Mich. 81, 27 N. W. 861; Ames *v.* Meehan, 63 Wis. 408, 23 N. W. 586; Lipsky *v.* Borgmann, 52 Wis. 256, 9 N. W. 158, 38 Am. Rep. 735); as where defendant alleges he has no knowledge on the subject and puts plaintiff to his proof (Willard *v.* Baker, 2 Gray (Mass.) 336); or denies each and every allegation of the complaint (Crowell *v.* Smith, 35 Hun (N. Y.) 182 [*affirmed* in 102 N. Y. 730]; Dempsey *v.* Hall, 35 N. Y. Super. Ct. 201).

If the general issue is pleaded with notice that title would come in question title is in issue. Mansfield *v.* Church, 21 Conn. 73; Walters *v.* Tefft, 57 Mich. 390, 24 N. W. 117; Washburn *v.* Tinkham, 8 N. H. 507; Radley *v.* Brice, 6 Wend. (N. Y.) 539.

Where plaintiff claims damages for an injury to the freehold, title is in issue in states holding that in such case he must prove title. Kelly *v.* New York, etc., R. Co., 81 N. Y. 233; Crowell *v.* Smith, 35 Hun (N. Y.) 182 [*affirmed* in 102 N. Y. 730].

If defendant pleads title it is in issue, whether alleged as in himself (Adgate *v.* Stores, 2 Root (Conn.) 160; Budd *v.* Stille, 16 N. J. L. 263; Hill *v.* McMahon, 81 N. Y. App. Div. 324, 81 N. Y. Suppl. 431); or a third person under whom defendant claims (Farrell *v.* Hill, 69 Hun (N. Y.) 455, 23 N. Y. Suppl. 402).

Miscellaneous cases where title was held to be in issue.—Where the question was whether or not the *locus in quo* was a highway title is in issue (Anderson *v.* Buchanan, 8 Ind. 132; Heath *v.* Barmour, 53 Barb. (N. Y.) 444; Dinehart *v.* Wells, 2 Barb. (N. Y.) 432); or a public or private way (Hall *v.* Hodskins, 30 How. Pr. (N. Y.) 15; Heaton *v.* Ferris, 1 Johns. (N. Y.) 146; Merring *v.* Sparrer, 1 Del. Co. (Pa.) 457). So also where plaintiff alleges title and possession and defendant alleges entry under a deed of the land from himself to plaintiff, reserving to himself the right to enter and commit the acts claimed to be a trespass (Powell *v.* Rust, 8 Barb. (N. Y.) 567, Code Rep. N. S. 172); and an action for damages for trespass on plaintiff's land under water in the Hudson river, and for impairment of his navigable access to his uplands, where the question was whether plaintiff's easement of right of way to and from his uplands by water was appurtenant to such land, and whether his ownership of the lands under water was absolute, or so qualified as to preclude him from complaining if the government deposited dredged material thereon, title to real estate is involved (Slingerland *v.* International Contracting Co., 43 N. Y. App. Div. 215, 60 N. Y. Suppl. 12 [*affirmed* in 169 N. Y. 60, 61 N. E. 995, 56 L. R. A. 494]).

Although the issue included other matter title is in issue if involved and the verdict is general. Spalbergh *v.* Walrod, 1 Johns. Cas. (N. Y.) 162.

Where constructive possession from title is relied on without proof of actual possession it is in issue (Booth *v.* Sherwood, 12 Minn. 426; Dickerson *v.* Wadsworth, 33 N. J. L. 357); even though defendant admits it at the trial (Dunckel *v.* Farley, 1 How. Pr. (N. Y.) 180; Brown *v.* Majors, 7 Wend. (N. Y.) 495, *semble*; Hubbell *v.* Rochester, 8 Cow. (N. Y.) 115).

Where title is involved in the first trial plaintiff can recover full cost, although not involved in the second. Ryder *v.* Hathaway, 2 Metc. (Mass.) 96; Bachelder *v.* Green, 38 N. H. 265.

Where title is in issue on a second trial, but was not at the first, plaintiff cannot recover full costs of the original suit. Woodbury *v.* Parshley, 10 N. H. 392.

the meaning of the statutes relating to costs.[64] Where by a statute an action of trespass to land is removed from the justice's court to an upper court on plea of title, plaintiff is generally entitled to full costs on a recovery,[65] and if defendant recovers on the issue of title he is entitled to costs.[66]

k. The Trial[67]— (i) *Mode and Conduct of Trial in General.* All the issues in trespass *quare clausum* must be tried, although it appears on an issue of possession that plaintiff has not possession.[68] Several actions of trespass to the same close on the same day between the same parties may be tried together in the discretion of the trial court.[69] An equitable defense on which the validity of the legal defense rests must be tried first and not both issues given to the jury.[70] Plaintiff may abandon the action as to some of the trespassers and proceed only for others.[71]

(ii) *Questions For the Jury.* Questions of fact on which evidence is presented are in general for the jury,[72] and the inference to be drawn from the

An admission of title at the trial will not deprive plaintiff of his costs if it was in issue under the pleadings. Niles *v.* Lindsley, 1 Duer (N. Y.) 610, 8 How. Pr. 131.

It is not necessary that the action be brought first in the justice's court and then removed to entitle plaintiff to full costs if title came in issue. Hill *v.* McMahon, 81 N. Y. App. Div. 324, 81 N. Y. Suppl. 431; Rogers *v.* McGregor, 4 Cow. (N. Y.) 531.

64. Ostrom *v.* Potter, 71 Mich. 44, 38 N. W. 670; Powers *v.* Leach, 22 Vt. 226.

Granting a certificate that the action was brought to try a right so that plaintiff is entitled to costs is in the discretion of the court. McGillivray *v.* McIsaac, 2 Nova Scotia 155.

65. See cases cited *infra*, this note.

Title is in issue where plaintiff alleges title and defendant denies it and avers title in himself (Huddleston *v.* Johnson, 71 Wis. 336, 37 N. W. 407); or defendant pleads a right of way generally, although the recovery is for acts done outside the way (Heath *v.* Barmour, 35 How. Pr. (N. Y.) 1).

If plaintiff recovers on the plea of title he gets full costs, although title was not contested at the trial (Carpenter *v.* Britton, 61 N. H. 430), or defendant suffered a default (Locklin *v.* Casler, 50 How. Pr. (N. Y.) 43), or recovered on other issues (Tuthill *v.* Clark, 11 Wend. (N. Y.) 642).

If plaintiff does not recover on the issue of title he is not entitled to full costs, if the damages recovered are less than a certain sum fixed by the statute, and so is not entitled to recover where the action is changed so as to become a new action in the upper court as where plaintiff new assigns there and defendant pleads not guilty (People *v.* Rensselaer C. Pl., 2 Wend. (N. Y.) 647. *Contra*, Van Pelt *v.* Phillips, 24 N. J. L. 560); or plaintiff enlarges his *ad damnum* (Chambers *v.* Wambough, 28 N. J. L. 530). So plaintiff is not entitled to full costs if he recovers on an issue other than that in which title was pleaded as where title is pleaded as to part and the recovery is on other parts. Morss *v.* Salisbury, 48 N. Y. 636; Shull *v.* Green, 49 Barb. (N. Y.) 311; Morss *v.* Jacobs, 35 How. Pr. (N. Y.) 90.

66. Labeau *v.* Labeau, 61 Mich. 81, 27 N. W. 861.

67. **For trial in actions** generally see Trial.

68. Fry *v.* Monckton, 2 M. & Rob. 303.

69. Field *v.* Lang, 89 Me. 454, 36 Atl. 984.

70. Carroll *v.* Bohan, 43 Wis. 218.

71. Robbins *v.* Wolcott, 19 Conn. 356.

72. Dyer *v.* Tyrrell, 142 Mo. App. 467, 127 S. W. 114. And see cases cited *infra*, this note.

Possession is a question for the jury. Owings *v.* Gibson, 2 A. K. Marsh. (Ky.) 515; New Windsor *v.* Stocksdale, 95 Md. 196, 52 Atl. 596; Kinney *v.* Ferguson, 101 Mich. 178, 59 N. W. 401; Willard *v.* Meeks, 59 N. J. L. 56, 35 Atl. 455; Firth *v.* Veeder, 12 N. Y. Suppl. 579; Hulse *v.* Brantley, 110 N. C. 134, 14 S. E. 510; French *v.* Cresswell, 13 Oreg. 418, 11 Pac. 62. Exclusive possession where there is some evidence of mixed possession and no valid title is shown in the other party is a question for the jury. Hale *v.* Monroe, 28 Md. 98. Possession in defendant's grantor (Smith *v.* Morrow, 14 N. Brunsw. 200); or character of occupancy where the terms of the contract do not distinctly appear (Robertson *v.* George, 7 N. H. 306); or whether possession of one working a farm on shares excludes the owner so that he cannot maintain trespass (West *v.* Atherton, 7 N. Brunsw. 653) are questions for the jury.

Necessity of cutting trees to build a line fence is for the jury. Newberry *v.* Bunda, 137 Mich. 69, 100 N. W. 277.

Title where the evidence is conflicting is for the jury (Grove *v.* McAlevy, 5 Pa. Cas. 124, 8 Atl. 210); but they must be properly instructed as to what constitutes title (Boreing *v.* Hurst, 45 S. W. 522, 20 Ky. L. Rep. 184).

The location of the locus is for the jury in trespass to realty (Hatch *v.* Pendergast, 15 Md. 251; Harriman *v.* Whitney, 196 Mass. 466, 82 N. E. 671; Clark *v.* Boardman, 42 Vt. 667); as what land is included in condemnation proceedings where the location on the ground is in doubt (Bassett *v.* Pennsylvania R. Co., 201 Pa. St. 226, 50 Atl. 772); and whether it was a part of the land covered by plaintiff's title (Whitehouse Cannel Coal

evidence;[73] but they cannot draw an inference from the evidence which is not warranted by it.[74] The case should not be taken from the jury where the evidence tends to prove the issue in favor of one party so that the jury might reasonably find for him,[75] or where there is a question for the jury as to part of the issues,[76] although the evidence is conflicting,[77] or circumstantial,[78] and although nominal damages only could be given;[79] but where the jury reasonably could find only one way the case may be taken from it,[80] and an immaterial issue need not be

Co. *v.* Wells, 74 S. W. 736, 25 Ky. L. Rep. 60).

The existence of a highway under a plea of highway is for the jury. Cortelyou *v.* Van Brundt, 2 Johns. (N. Y.) 357, 3 Am. Dec. 439.

Reasonable time is for the jury. Arizona, etc., R. Co. *v.* Denver, etc., R. Co., 13 N. M. 345, 84 Pac. 1018 (to file a map by a railroad is required by statute); Halstead *v.* American Natural Gas Co., 17 Pa. Super. Ct. 605 (to enter to remove a pipe line after abandonment of the easement).

Location of a disputed boundary is a question for the jury. Enterprise Transit Co. *v.* Hazelwood Oil Co., 20 Pa. Super. Ct. 127; Reilly *v.* Howe, 101 Wis. 108, 76 N. W. 1114.

Damages are a question for the jury. Drake *v.* Palmer, 4 Cal. 11; Solomon *v.* Grosbeck, 65 Mich. 540, 36 N. W. 163; Archibald *v.* Davis, 49 N. C. 133. The question whether exemplary damages shall be given in a case where the evidence warrants them is usually held to be in the discretion of the jury. Blair Iron, etc., Co. *v.* Lloyd, 1 Walk. (Pa.) 158; Simpson *v.* Markwood, 6 Baxt. (Tenn.) 340. But it has been held in South Carolina that in such case plaintiff is entitled to them as matter of right and the jury must give them. Beaudrot *v.* Southern R. Co., 69 S. C. 160, 48 S. E. 106. The jury may give any amount of damages warranted by the evidence not exceeding the claim in the declaration (McGhee *v.* Smith, 6 Heisk. (Tenn.) 315); and the court should not interfere unless they are excessive and disproportionate to the injury (Davis *v.* Pitman, 7 Fed. Cas. No. 3,647*a*, Hempst. 44).

Whether defendant obtained deeds under which he justifies fraudulently is a question for the jury. Foy *v.* Blades Lumber Co., 152 N. C. 595, 68 S. E. 6.

73. Oswalt *v.* Smith, 97 Ala. 627, 12 So. 604; Merwin *v.* Morris, 71 Conn. 555, 42 Atl. 855. And see cases cited *infra*, this note; and TRIAL.

Applications of rule.— Defendant's motive as shown by the evidence (Longfellow *v.* Quimby, 29 Me. 196, 48 Am. Dec. 525); or his intent (Post *v.* Kreischer, 103 N. Y. 110, 8 N. E. 365, whether one having a right to build a dock was exercising it in putting material there or only using the land as a dump; Madras Bd. *v.* Ryan, (Mich. T. 1861) Stevens N. Brunsw. Dig. 746, whether entry was with intent to take possession under registered deed or as a trespasser); or good faith (Conway *v.* Russell, 151 Mass. 581, 25 N. E. 1026, abatement of nuisance under authority of board of health; Pettit *v.* Frothingham, 48 Tex. Civ. App. 105, 106 S. W. 907); or excessive force in making an entry (Lambert *v.* Robinson, 162 Mass. 34, 37 N. E. 753, 44 Am. St. Rep. 326); or force (Frick *v.* Fiscus, 164 Pa. St. 623, 30 Atl. 515); fraud (Kulin *v.* Heller, 69 N. J. L. 33, 54 Atl. 519; Baldwin *v.* Postal Tel. Cable Co., 78 S. C. 419, 59 S. E. 67); or whether a purchase was made as owner or agent (Kelly *v.* Davidson, 7 N. Y. St. 481); or whether mutual grants of rights of way over adjoining lands were shown by evidence of user (Veeder *v.* Relyea, 70 Hun (N. Y.) 541, 24 N. Y. Suppl. 188) are questions for the jury.

74. Smith *v.* Smith, 110 Mass. 302.

75. *Alabama.*—Wilmer Lumber Co. *v.* Eisely, 163 Ala. 290, 50 So. 225; Carter *v.* Fulgham, 134 Ala. 238, 32 So. 684; De Poister *v.* Gilmer, 82 Ala. 435, 2 So. 878; Jones *v.* Welch, 15 Ala. 306.

Georgia.— Tolbert *v.* Rome, 134 Ga. 136, 67 S. E. 540.

Maine.— Heard *v.* Blazo, (1886) 5 Atl. 534.

Mississippi.— Catchot *v.* Ocean Springs, 78 Miss. 509, 29 So. 468.

New Jersey.— Willard *v.* Meeks, 59 N. J. L. 56, 35 Atl. 455.

Texas.—Alexander *v.* St. Louis Southwestern R. Co., (Civ. App. 1909) 122 S. W. 572.

76. Kulin *v.* Heller, 69 N. J. L. 33, 54 Atl. 519.

77. Wickliffe *v.* Peyton, 35 S. W. 112, 18 Ky. L. Rep. 15; Kidder *v.* Kennedy, 43 Vt. 717.

78. Jones *v.* Welch, 15 Ala. 306; Janvrin *v.* Scammon, 29 N. H. 280.

79. Sayles *v.* Bemis, 57 Wis. 315, 15 N. W. 432.

80. McDonald *v.* Mahoney, 31 Nova Scotia 523.

Nonsuit or direction of verdict.— Plaintiff may be nonsuited if he fails to make out a case (Downing *v.* Howlett, 6 Colo. App. 291, 40 Pac. 505); or the court may direct a verdict for defendant (Crookshank *v.* Kellogg, 8 Blackf. (Ind.) 256). Where plaintiff gives uncontradicted evidence of possession a verdict may be directed for him if his possession is the issue. Des Barres *v.* Bell, 20 Nova Scotia 482. Where plaintiff shows thirty years adverse possession a verdict may be directed for him if his title is the issue. Argotsinger *v.* Vines, 82 N. Y. 308. Where trespass to land is admitted but it is denied that it was done wrongfully, plaintiff is entitled to a peremptory instruction for damages (Johns *v.* Cumberland Tel., etc., Co., 80 S. W. 165, 25 Ky. L. Rep. 2074); and where there is no evidence to support a justification it is error to refuse to instruct the jury

submitted to the jury.[81] So where there is no evidence to support a particular issue, it need not be submitted to the jury.[82] The jury may reconcile conflicting testimony on the theory of a mistake.[83] Questions of law are for the court and it is erroneous to submit them to the jury.[84]

(III) *INSTRUCTIONS.* The rules relating to instructions in actions generally, considered in another part of this work,[85] apply in actions of trespass. The charge of course should correctly state the law,[86] and a requested instruction misstating the law is properly refused.[87] Instructions given should be accurate [88] and not misleading [89] or contradictory.[90] So instructions should not be given which are not applicable to the issues made by the pleadings [91] or evidence;[92] which ignore

in plaintiff's favor (Barrett *v.* Mobile, 129 Ala. 179, 30 So. 36, 87 Am. St. Rep. 54).

81. Dower *v.* Richards, 73 Cal. 477, 15 Pac. 105. But see Allison *v.* Little, 93 Ala. 150, 9 So. 388.

82. See cases cited *infra*, this note.

Applications of rule.— Thus where there is no evidence to warrant punitive damages it is not error to charge that as to this the jury must find for defendant (Carter *v.* Fulgham, 134 Ala. 238, 32 So. 684); or to nonsuit plaintiff on that point and leave only the question of actual damages to the jury (Baldwin *v.* Postal Tel. Co., 78 S. C. 419, 59 S. E. 67).

83. Taylor *v.* Young, 61 Wis. 314, 21 N. W. 408.

84. Gusdorff *v.* Duncan, 94 Md. 160, 50 Atl. 574.

Whether a writ was duly executed.—An instruction leaving it to the jury to find whether a writ was duly executed, without informing them what would constitute such execution, is bad. Gusdorff *v.* Duncan, 94 Md. 160, 50 Atl. 574.

Whether defendant was unlawfully on the premises.—An instruction leaving to the jury the question of whether defendant was unlawfully on premises without instructions as to what facts in evidence would, if believed, make it unlawful, is bad. Gusdorff *v.* Duncan, 94 Md. 160, 50 Atl. 574.

Title.— Where defendant claims title and that plaintiff is a trespasser, if the court has defined what is necessary for plaintiff to show to prove title it must define also what defendant must show where it charges that defendant can recover if he has title. Seale *v.* Shepherd, 29 S. W. 31, 16 Ky. L. Rep. 563.

85. See TRIAL.

86. Covington *v.* Simpson, 3 Pennew. (Del.) 269, 52 Atl. 349; Frazer *v.* Fuller, 184 Mass. 499, 69 N. E. 217.

87. Mattingly *v.* Houston, (Ala. 1909) 52 So. 78, holding that in an action for trespass to property, accompanied by insulting and aggravating circumstances, a charge requiring the jury to find for defendant unless actual damages were shown was properly refused.

88. See Wetzel *v.* Satterwhite, (Tex. Civ. App. 1910) 125 S. W. 93.

89. Davis *v.* Miller-Brent Lumber Co., 151 Ala. 580, 44 So. 639; Haskins *v.* Andrews, 12 Wyo. 458, 76 Pac. 588.

Illustration.— Where defendant is not in possession under the widow of the late owner of a dwelling-house, a charge as to her right to possession is misleading. Harnit *v.* Thompson, 46 Ill. 460.

Refusal of requested instructions which are misleading is proper. Wilmer Lumber Co. *v.* Eisely, 163 Ala. 290, 50 So. 225; Bufford *v.* Little, 159 Ala. 300, 48 So. 697.

90. Rector *v.* Outzen, 93 Miss. 254, 46 So. 408.

91. Snedecor *v.* Pope, 143 Ala. 275, 39 So. 318 (where plaintiff claimed part of a house was moved it is error to instruct as to the moving of the whole); Peters *v.* Tilghman, 111 Md. 227, 73 Atl. 726; Emmons *v.* Quade, 176 Mo. 22, 75 S. W. 103; Howie *v.* California Co., 35 Mont. 264, 88 Pac. 1007 (questions of license not involved or negligence not raised by the pleadings).

Thus an instruction founded on negligence is erroneous when the action is not for negligence but trespass. Emmons *v.* Quade, 176 Mo. 22, 75 S. W. 103.

A refusal to instruct concerning a justification not pleaded is proper. Flynn *v.* Sparks, 11 S. W. 206, 10 Ky. L. Rep. 960.

92. *Alabama.*— Abercrombie *v.* Windham, 127 Ala. 179, 28 So. 387, holding that an instruction that plaintiff can recover the difference in the market value of land before and after the trespass is erroneous where the evidence showed no permanent injury. And see Fulgham *v.* Carter, 142 Ala. 227, 37 So. 932.

Georgia.—Postal Tel.-Cable Co. *v.* Kuhnen, 127 Ga. 20, 55 S. E. 967; Georgia R., etc., Co. *v.* Gardner, 115 Ga. 954, 42 S. E. 250, holding that where there is no evidence to warrant punitive damages it is error to give the code section regarding them in the charge.

Illinois.— Chicago Title, etc., Co. *v.* Core, 223 Ill. 58, 79 N. E. 108 [*affirming* 126 Ill. App. 272].

New York.— Ogden *v.* Jennings, 62 N. Y. 526, holding that where defendant claimed under a lease of school lands "with the appurtenances" a charge that he had a right to as much land adjoining as was necessary for school purposes is bad both because the question of necessity was immaterial and because there was no evidence of necessity.

Pennsylvania.— Stephenson *v.* Brown, 147 Pa. St. 300, 23 Atl. 443, charge that a wilful trespass warrants exemplary damages when there is no evidence of wilfulness.

evidence,[93] issues,[94] pleas,[95] or defenses;[96] which give undue prominence to parts of the evidence,[97] which assume the existence of facts in controversy;[98] as to which no evidence has been offered,[99] which assume that pleadings contain an admission when such is not the case;[1] that there is a conflict in the evidence when there is none;[2] which disparage testimony which has been permitted to go to the jury[3] or which misstate the degree of proof required.[4] It is very generally held to be the duty of the court to give requested instructions correct in point of law and applicable to the case[5] unless such instructions are covered by

Vermont.— Clark *v.* Boardman, 42 Vt. 667, holding that possession of defendant's grantors in possession under claim of right gives him title when there is no evidence of any such claim by them.

Evidence held sufficient to warrant submission of issue see Faris *v.* American Tel., etc., Co., 84 S. C. 102, 65 S. E. 1017; Beauchamp *v.* Williams, (Tex. Civ. App. 1908) 115 S. W. 130.

93. Gilliland *v.* Martin, (Ala. 1906) 42 So. 7 (holding that an instruction that defendant is not liable for malice of his agents is not proper where there is evidence that defendant participated in the malice himself); Haskins *v.* Andrews, 12 Wyo. 458, 76 Pac. 588.

Instruction bad as ignoring evidence.— Mere instruction that defendant's prior possession will defeat plaintiff's recovery is improper where there is evidence of possession in plaintiff prior to defendant's prior possession, as it ignores such evidence. Illinois, etc., R., etc., Coal Co. *v.* Cobb, 82 Ill. 183.

94. Lakenan *v.* Prophett, 61 Ark. 631, 32 S. W. 384; Stephenson *v.* Brown, 147 Pa. St. 300, 23 Atl. 443, holding that an instruction that, if the jury finds defendant's act wilful, plaintiff could recover and the amount is for them gives a false impression that plaintiff could not recover if it was not wilful.

Instruction held to properly submit issues see Davidson *v.* Jenkins, (Ky. 1908) 113 S. W. 901.

95. Sullivan *v.* Dee, 8 Ill. App. 263.

For instruction held not to ignore plea see Clevenger *v.* Blount, (Tex. Civ. App. 1908) 114 S. W. 868.

96. Brooke *v.* O'Boyle, 27 Ill. App. 384, holding that where defendant claims that a fence destroyed was in a street, it is error to charge plaintiff can recover if she proved possession and the trespass as it takes from the jury the question of whether the fence was in the street which would be a defense.

97. Davis *v.* Miller Brent Lumber Co., 151 Ala. 580, 44 So. 639; Fulgham *v.* Carter, 142 Ala. 227, 37 So. 932 (holding that in trespass for taking mules where one J acted under authority of H by direction of defendant F, a charge that the jury cannot find F guilty unless the jury believe J acted by authority of F was properly refused as misleading); Lindsay *v.* Latham, 107 S. W. 267, 32 Ky. L. Rep. 867 (unduly emphasizing title and possession of plaintiff and his vendors); Montgomery *v.* Somers, 50 Oreg. 259, 90 Pac. 674.

Instruction held not objectionable as giving undue prominence to evidence see Peters *v.* Tilghman, 111 Md. 227, 73 Atl. 726.

98. Peters *v.* Tilghman, 111 Md. 227, 73 Atl. 726.

Applications of rule.— Charge that plaintiff "is entitled to recover . . . all damages proved to have been sustained by him on account of the trespass committed by the defendant . . . as alleged in the declaration" assumes that defendant committed the trespass and is bad. Small *v.* Brainard, 44 Ill. 355. In trespass to land where it appeared that defendant had moved on a section of plaintiff's pasture which plaintiff has a lease of, an instruction that defendant is not liable if he had no more stock in his close than allowed by law is bad, as assuming that defendant owned the section, although there was also testimony that he had leased another section in the pasture. Lake *v.* Copeland, 31 Tex. Civ. App. 358, 72 S. W. 99.

99. Clay *v.* Postal Tel.-Cable Co., 70 Miss. 406, 11 So. 658, holding that an assumption that a highway is thirty feet wide is erroneous where public roads need only be ten feet wide but cannot exceed thirty feet and there was no evidence of a uniform width of thirty feet.

1. Lakenan *v.* Prophett, 61 Ark. 631, 32 S. W. 384.

2. Trexler *v.* Africa, 33 Pa. Super. Ct. 395.

3. Botts *v.* Williams, 17 B. Mon. (Ky.) 687.

4. Rich *v.* Lence, 147 Ill. App. 110, holding that an instruction is erroneous which requires a "clear preponderance" of evidence.

"Preponderance."— An instruction requiring plaintiff to sustain his claim by a preponderance of the evidence is correct. Peters *v.* Tilghman, 111 Md. 227, 73 Atl. 726.

5. *Alabama.*— Wilmer Lumber Co. *v.* Eisely, 163 Ala. 290, 50 So. 225; Abercrombie *v.* Windham, 127 Ala. 179, 28 So. 387, holding that where a continuing trespass is alleged and several distinct trespasses are shown it is error not to instruct that nominal damages only can be recovered.

Iowa.— Harding *v.* Fahey, 1 Greene 377.

Kansas.— Mecartney *v.* Smith, (App. 1900) 62 Pac. 540.

Vermont.— Capen *v.* Sheldon, 78 Vt. 39, 61 Atl. 864.

Wisconsin.— Whitney *v.* Brunette, 3 Wis. 621, holding that refusal to charge that a prior sale by the owner of personalty would defeat plaintiff's right to recover based on possession under a subsequent attachment against the vendor is error as the jury would infer valid transfer from "sold."

other instructions given;[6] but the mere omission to charge as to some phase of the case, in the absence of a request therefor, is not assignable as error.[7] If a charge states a general proposition of law correctly a party who wishes it made more specific must request it.[8] In giving instructions, technical or legal terms may be used if properly defined.[9] The court may instruct the jury to find for plaintiff if they find certain facts to be true, said facts being all the facts involved in the issue.[10] If such is the case the court may charge that there was evidence tending to show certain facts,[11] and may point out the evidence;[12] and where the trespass is admitted may properly define the elements of the damages more fully than was done in the complaint.[13] An instruction which is correct on the whole is not bad because certain statements are objectionable if controlled and explained by other statements,[14] and if it is erroneous and a party requests it be corrected by giving certain instructions a statement to the jury that that was what was meant by the charge is sufficient.[15] Where a charge is more favorable to a party than he is entitled to he cannot complain of it, although erroneous;[16] nor of an erroneous statement of law on an immaterial point where a correct statement would have been of no benefit to the party;[17] nor of other errors of law which do not prejudicially affect him.[18]

6. Merwin *v.* Morris, 71 Conn. 555, 42 Atl. 855 (holding that where the court has charged that if plaintiff grantor was disseized at the time of making a deed, it is void, defendant cannot complain of a refusal to charge that to entitle plaintiff to recover he must show that he retook actual possession); Jenks *v.* Lansing Lumber Co., 97 Iowa 342, 66 N. W. 231 (holding that where damages are denied generally and the case is submitted to the jury on that issue, it is not error to disregard a denial of special damages).

7. Temple *v.* Duran, (Tex. Civ. App. 1908) 121 S. W. 253.

A failure to charge as to exemplary damages is not assignable as error in the absence of a request for such instruction. Carter *v.* Bedortha, 124 Mich. 548, 83 N. W. 277.

8. See cases cited *infra*, this note.

Illustrations.— Where the damages are properly restricted to those covered by the evidence the omission to specifically charge that an element of damages averred, as to which no proof was offered, could not be recovered is not error where it was not requested. Henson *v.* Taylor, 108 Ga. 567, 33 S. E. 911. Where it is charged that the declaration and the plea form the issue, in the absence of a request, the court need not charge that the trespasses involved were those committed before the action was brought. Gunn *v.* Harris, 88 Ga. 439, 14 S. E. 593. "The difference in the value of the farm with the ditches and turnpike, and without them" is correct and sufficient if there is no request that it be more specific. Ziebarth *v.* Nye, 42 Minn. 541, 44 N. W. 1027. Instruction that one holding land under color of title can maintain trespass *quare clausum* against one without title is correct, and if one wishes it limited so as not to include a case where defendant has possession he must request it. Connor *v.* Johnson, 53 S. C. 90, 30 S. E. 833.

9. Erbes *v.* Wehmeyer, 69 Iowa 85, 28 N. W. 447, "wrongfully and illegally" applied to permitting cattle to enter plaintiff's land.

10. Thacker *v.* Howell, 26 S. W. 719, 16 Ky. L. Rep. 134 (holding that where the only issue is whether defendant obtained the land by a certain deed, an instruction to find for him if the deed embraced the land in controversy and defendant entered with consent and took the timber is proper); Lyman *v.* Brown, 73 N. H. 411, 62 Atl. 650.

11. Lee *v.* Lord, 76 Wis. 582, 45 N. W. 601.

12. Davison *v.* Burnham, Cass. Dig. (Can.) 846. But it must not give the impression that the evidence as matter of law proved the disputed facts. Payne *v.* Clark, 20 Conn. 30.

13. Fischer *v.* Coons, 26 Nebr. 400, 42 N. W. 417.

14. Hawthorne *v.* Siegel, 88 Cal. 159, 25 Pac. 1114, 22 Am. St. Rep. 291; Neal *v.* Gilmore, 141 Mich. 519, 104 N. W. 609; Trout *v.* Kennedy, 47 Pa. St. 387.

Mention in the charge of the amount of damages claimed is not error if the jury is not confined to that amount on its finding. Williams *v.* Meadville, etc., R. Co., 31 Pa. Super. Ct. 580.

15. Fitch *v.* New York, etc., R. Co., 59 Conn. 414, 20 Atl. 345, 10 L. R. A. 188.

16. Flynn *v.* Sparks, 11 S. W. 206, 10 Ky. L. Rep. 960; Brown *v.* McKimmie, 102 Mich. 35, 60 N. W. 298; Oklahoma City *v.* Hill, 6 Okla. 114, 50 Pac. 242; Kidder *v.* Kennedy, 43 Vt. 717.

17. Gloyd *v.* Stansberry, 15 Okla. 259, 81 Pac. 428, holding that where defendant claims title by bill of sale from plaintiff's partner in justification and it appears that plaintiff was sole owner defendant cannot complain of errors in the statement of the law as to the rights of cotenants.

18. Betz *v.* Kansas City Home Tel. Co., 121 Mo. App. 473, 97 S. W. 207, holding that where plaintiff can recover for the mere act, as cutting of his trees, a failure

(iv) *VERDICT AND FINDINGS.* As is the case with verdicts in other actions,[19] the verdict in actions of trespass is sufficient, although informal, if the meaning is clear,[20] and may be amended in such case by the court.[21] The verdict need not find specifically the damages to each article in an action for injury to personalty,[22] but is bad if uncertain [23] or inconsistent,[24] or not decisive of the case,[25] or if it fails to cover all the issues,[26] or includes damages which plaintiff is not entitled to recover.[27] A finding on the controlling issue alone is sufficient.[28] Surplusage in a verdict may be disregarded.[29] In an action for trespass, where numerous acts of trespass were charged in the complaint, and a general verdict was rendered for plaintiff, it was error to direct a verdict for defendant notwithstanding the general verdict, although special findings as to certain trespasses apparently conflicted with the general verdict.[30]

l. New Trial. A new trial will not be granted unless error was committed at the first trial,[31] which must be made to appear affirmatively; [32] but if it appears

to define "unlawful" cutting as used in the charge is not prejudicial to defendant.

19. See TRIAL.

20. See cases cited *infra*, this note.

Illustrations.— Four hundred dollars "for rent" and fifty dollars damages is a good verdict where defendant occupied a year and alleged in defense a lease for a year at four hundred dollars. Johnson *v.* Park, 17 S. W. 273, 13 Ky. L. Rep. 437. A verdict for nominal damages "and all costs of suit" is a giving of damages *eo nomine* and costs, and is good. Hinds *v.* Knox, 4 Serg. & R. (Pa.) 417 In trespass for cutting trees a verdict "we, the jury, find the defendant guilty and impose a fine of one hundred dollars" is good. Kolb *v.* Bankhead, 18 Tex. 228. On the general issue a finding "for the plaintiff" and assessing damages is a good verdict. Dyer *v.* Hatch, 1 Ark. 339; Matson *v* Connelly, 24 Ill. 142. Where the jury finds defendant had title at the *locus* he is entitled to a general verdict. South Hampton *v.* Fowler, 54 N. H. 197.

21. Chaffee *v.* Pease, 10 Allen (Mass.) 537.

22. Mecartney *v* Smith, (Kan. App. 1900) 62 Pac. 540. If damages are not assessed the verdict may be amended by inserting nominal damages. Phillips *v.* Kent, 23 N. J. L. 155, holding that where on special issues the jury find a general verdict consistent only with a special finding for plaintiff the verdict may be amended by the court *in banc* without remanding.

23. Cheswell *v.* Chapman, 42 N. H. 47 (holding that a general verdict on a traverse of a plea of a way and a new assignment of acts *extra viam* is bad); Holman *v.* Kingsbury, 4 N. H. 104; Hill *v.* McMahon, 81 N. Y. App. Div. 324, 81 N. Y. Suppl. 431; Kemp *v.* Seely, 47 Wis. 687, 3 N. W. 830 (holding that a verdict that "defendant did not take, carry away, or convert the property of the plaintiff" is bad as leaving it uncertain whether there was no taking or the goods were not plaintiff's, the last not being in issue).

24. Turner *v.* Beatty, 24 N. J. L. 644, holding that where defendant pleaded not guilty and also a justification, a verdict of guilty on the first and not guilty on the second is bad. But a general verdict of not guilty has been held good in such a case. Cooper *v.* Morris, 48 N. J. L. 607, 7 Atl. 427.

25. Stiles *v.* Estabrook, 66 Vt. 535, 29 Atl. 961, holding that where both parties claimed a division fence had stood on the line but differed as to the location a finding that plaintiff has acquired title to the disputed land by adverse possession is not decisive of the case.

26. Hanly *v.* Levin, 5 Ohio 227.

27. Price *v.* Greer, 76 Ark. 426, 88 S. W. 985, holding that in trespass for cutting trees on several tracts of land, some of which were not shown to be plaintiff's and the amount cut from each tract not being shown, a verdict for the gross value of all the timber cut is bad.

28. Buntin *v.* Duchane, 1 Blackf. (Ind.) 56; Curl *v.* Lowell, 19 Pick. (Mass.) 25 (holding that a verdict for defendant on a plea in bar entitles him to a verdict on the general issue also); McNeil *v.* Train, 5 U. C. Q. B. 91.

29. Huxford *v.* Southern Pine Co., 124 Ga. 181, 52 S. E. 439; Peytavin *v.* Winter, 6 La. 553.

What amounts to surplusage.— On a general finding for plaintiff assessing damages a finding that plaintiff is entitled to possession is superfluous. Jolly *v.* Single, 16 Wis. 280. Where damages are admitted by the pleadings the jury's finding as to them is immaterial. McLaughlin *v.* Kelly, 22 Cal. 211.

30. Boyer *v.* Essington, (Ind. App. 1910) 90 N. E. 478.

31. Little Pittsburg Consol. Min. Co. *v.* Little Chief Consol. Min. Co., 11 Colo. 223, 17 Pac. 760, 7 Am. St. Rep. 226.

Where the best evidence in plaintiff's possession was given when more convincing evidence might have been obtained the verdict will not be set aside for failure to obtain it. Crozer *v.* New Chester Water Co., 148 Pa. St. 130, 23 Atl. 1123.

Verdict for greater damages than the court directed is not ground for a new trial. Lough *v.* Coleman, 29 U. C. Q. B. 367.

32. See cases cited *infra*, this note.

Thus it must appear that the law was erroneously given to the jury (Tappan *v.* Burnham, 8 Allen (Mass.) 65), that the finding

that errors were committed a new trial will be granted,[33] unless they were not prejudicial to the party asking the new trial,[34] or were too insignificant to affect the result.[35] A verdict clearly against the evidence will be set aside,[36] and where a verdict is set aside by the trial court on the ground that there is no evidence to support it a new trial will be granted if there was such evidence.[37] Where the evidence is conflicting a verdict approved by the trial court will not be set aside,[38] nor where there is any evidence to support the verdict.[39]

m. Judgment.[40] Defendant is entitled to judgment if he obtains a verdict on one of several justifications pleaded,[41] or if on several pleas he obtains a general verdict in his favor.[42] So on a special verdict that plaintiff owned the land but defendant did not trespass on it defendant is entitled to judgment.[43] Plaintiff is in general entitled to a judgment for nominal damages if he establishes a trespass.[44] Recitals in a judgment should contain only what is involved in the jury's finding.[45] Where the contrary does not appear in the record matter essential to the validity of a judgment will be presumed.[46]

n. Appeal and Error. Formal objections cannot be first made on appeal.[47] It is prejudicial error if the court fails to follow a statute relating to costs,[48] or

was contrary to law (Shreves *v.* Liveson, 2 N. J. L. 247), or that instructions given were inapplicable to the evidence (Duncan *v.* Stalcup, 18 N. C. 440).

33. See cases cited *infra*, this note.

Illustrations.—Where in trespass to distinct parcels of land defendant proves title to one a new trial will be granted where a verdict is given for plaintiff generally without apportioning damages (White *v.* Smith, 9 N. Brunsw. 335); and a new trial will be granted if the jury fail to give as damages the value of the property taken (Porteous *v.* Hazel, Harp. (S. C.) 332; Fowler *v.* Stonum, 6 Tex. 60); or where actual damages are largely in excess of the verdict (Coffman *v.* Burkhalter, 98 Ill. App. 304); unless there were circumstances of provocation from plaintiff's wanton acts (Henderson *v.* Lyles, 2 Hill (S. C.) 504). So where the damages given are very excessive a new trial may be granted. Steadman *v.* Venning, 22 N. Brunsw. 639.

34. Rhodes *v.* Bunch, 3 McCord (S. C.) 66.

Where plaintiff is entitled to nominal damages at most and a verdict for plaintiff is not necessary for the vindication of a right a verdict for defendant will not be set aside. Green *v.* Buckingham, 26 Ill. App. 240; O'Flaherty *v.* Devine, 10 N. Brunsw. 434. *Contra,* Norvell *v.* Thompson, 2 Hill (S. C.) 470; at least if defendant remits costs (Bradley *v.* Flewitt, 6 Rich. (S. C.) 69); but if the trespass, if continued, would ripen into title plaintiff is entitled to a new trial (Wing *v.* Seske, (Iowa 1906) 109 N. W. 717).

35. Kennedy *v.* Erdman, 150 Pa. St. 427, 24 Atl. 643, holding that the exclusion of matters which, while relevant and so admissible, are of no weight, is not reversible error.

36. Wedge *v.* Spencer, 4 Silv. Sup. (N. Y.) 171, 7 N. Y. Suppl. 173.

37. Gates *v.* Davidson, Cass. Dig. (Can.) 848.

38. Crockett *v.* Sibley, 3 Ga. App. 554, 60 S. E. 326.

39. *Illinois.*— Keating *v.* Hayden, 30 Ill. App. 433 [*affirmed* in 132 Ill. 308, 23 N. E. 1023].

Indiana.— Delaware, etc., Counties Tel. Co. *v.* Fiske, 40 Ind. App. 348, 81 N. E. 1100.

Michigan.— Hecock *v.* Van Dusen, 80 Mich. 359, 45 N. W. 343.

Missouri.—Watts *v.* Loomis, 81 Mo. 236.

South Carolina.— Beaudrot *v.* Southern R. Co., 69 S. C. 160, 48 S. E. 106.

40. **Conclusiveness of adjudication** see JUDGMENTS, 23 Cyc. 1340, 1341.

Merger and bar of causes of action see JUDGMENTS, 23 Cyc. 1179, 1188.

41. Redman *v.* Taylor, 3 Ind. 144.

42. Hodges *v.* Raymond, 9 Mass. 316.

43. J. L. Roper Lumber Co. *v.* Elizabeth City Lumber Co., 135 N. C. 742, 47 S. E. 757.

44. Jolly *v.* Single, 16 Wis. 280. But it has been held that where an action is tried on the theory of trespass to an entire tract and defendant shows title to part and it does not appear how much damage was done to each part plaintiff should be nonsuited. Granger *v.* Postal Tel. Co., 70 S. C. 528, 50 S. E. 193, 106 Am. St. Rep. 750.

45. Berry *v.* Ivanice, 53 Cal. 653, recitals that plaintiffs are owners is erroneous when possession only was involved.

46. See cases cited *infra*, this note.

To support a judgment for costs it will be presumed that title was in issue (Burnett *v.* Coffin, 4 Ind. 218; Stewart *v.* Henry, 5 Blackf. (Ind.) 445), or the reverse (Dodge *v.* Carpenter, 18 Vt. 509).

Where the legitimate evidence authorized the verdict it will be presumed that irrelevant evidence was not considered by the jury. Kentucky Midland R. Co. *v.* Stump, 12 Ky. L. Rep. 316.

A verdict for single damages will not be set aside, although the action is for treble damages, where under the statute single damages might in a certain case be recovered and the court has not the evidence before it. Walther *v.* Warner, 26 Mo. 143.

47. Kerr *v.* Sharp, 14 Serg. & R. (Pa.) 399, omission of "unlawful" in a complaint for breaking plaintiff's close.

48. Smith *v.* Valentine, 23 Utah 539, 66 Pac. 295.

admits testimony as to trespass committed after filing the declaration, although there is no distinct proof of it;[49] but it is harmless error to admit improper evidence if it had no effect on the verdict,[50] or to exclude evidence which if admitted could not have altered the result,[51] or where the issue included the general question as to whom the land belonged, not to submit the issue as to another's title at the same time plaintiff's was submitted.[52] Instructions will be presumed correct unless the contrary is shown.[53]

B. Joint Rights and Liabilities — 1 Joint Right in Plaintiffs. Joint owners[54] or persons jointly in possession[55] can sue jointly for a trespass, but the joint right must be shown,[56] and, except where otherwise provided by statutes,[57] parties jointly interested in the property injured must join in the action;[58] but there must be a joint interest in the thing injured,[59] and non-joinder can only be taken advantage of by plea in abatement,[60] except where apparent on the face of the pleadings when it may be taken advantage of by demurrer.[61] Persons having separate interests which are affected by the trespass can sue jointly,[62]

49. Gulf, etc., R. Co. *v.* Hartley, 88 Miss. 674, 41 So. 382.

50. Crockett *v.* Sibley, 3 Ga. App. 554, 60 S. E. 326, holding that admission of hearsay as to location of landmarks is harmless where the fact of trespass is admitted.

51. Guentherodt *v.* Ross, 121 Mich. 47, 79 N. W. 920 (holding that where plaintiff claimed title both of record and by adverse possession and the jury found he had record title exclusion of defendant's evidence of interruption of adverse possession is harmless); Beeman *v.* Black, 49 Mich. 598, 14 N. W. 560.

52. Ohio, etc., R. Co. *v.* Wooten, 46 S. W. 681, 20 Ky. L. Rep. 383.

53. Jernigan *v.* Clark, 134 Ala. 313, 32 So. 686, where the bill of exceptions does not purport to set out all the evidence it will be presumed that there was evidence to justify the charge.

54. Realty.— Blackburn *v.* Baker, 1 Ala. 173; Eckerson *v.* Haverstraw, 6 N. Y. App. Div. 102, 39 N. Y. Suppl. 635 [*affirmed* in 162 N. Y. 652, 57 N. E. 1109]; Van Deusen *v.* Young, 29 Barb. (N. Y.) 9 [*reversed* in 29 N. Y. 9]; Walker *v.* Read, 59 Tex. 187.

Growing crops.— Foote *v.* Colvin, 3 Johns. (N. Y.) 216, 3 Am. Dec. 478.

Personalty.— Moulton *v.* Robinson, 27 N. H. 550.

55. Indianapolis, etc., R. Co. *v.* McLaughlin, 77 Ill. 275, husband and wife jointly possessed of land.

56. Storer *v.* Hobbs, 52 Me. 144; Myers *v.* Myers, 1 Bailey (S. C.) 306.

Grantor and grantee of land cannot join. Steinke *v.* Bentley, 6 Ind. App. 663, 34 N. E. 97.

Possession by one under claim of a right in both is sufficient to authorize joinder. Kinney *v.* Service, 91 Mich. 629, 52 N. W. 53.

57. Palmer *v.* Dougherty, 33 Me. 502, 54 Am. Dec. 636; Van Deusen *v.* Young, 29 N. Y. 9.

58. Realty.— Parks *v.* Dial, 56 Tex. 261 (tenants in common); May *v.* Slade, 24 Tex. 205.

Personalty.— Pickering *v.* Pickering, 11 N. H. 141.

Growing crops.— Pruitt *v.* Ellington, 59 Ala. 454; Cutting *v.* Cox, 19 Vt. 517.

Limitations of rule.— Some decisions have recognized certain limitations of the rule. Thus it has been held that for injury to the common inheritance in land, all the heirs must sue; but when for any reason there is no joint interest between the heirs in the damages the remedy is severable. Lowery *v.* Rowland, 104 Ala. 420, 16 So. 88. And that where a will leaves real estate to the widow and heirs in certain proportions, the heirs may maintain an action of trespass without joining the widow, but can only recover for their proportion of the injury. Johnson *v.* Meyer, 4 Ohio Dec. (Reprint) 383, 2 Clev. L. Rep. 81, heir and widow.

59. Larkin *v.* Taylor, 5 Kan. 433, holding that the landlord need not be joined with the tenant for injury to the latter's crop, although he is to receive part as rent.

60. *Massachusetts.*— Putney *v.* Lapham, 10 Cush. 232; Thompson *v.* Hoskins, 11 Mass. 419.

New Hampshire.— Pickering *v.* Pickering, 11 N. H. 141.

Pennsylvania.— Cheney *v.* Dallett, 1 Del. Co. (Pa.) 225.

Tennessee.— Winters *v.* McGhee, 3 Sneed 128.

Texas.— May *v.* Slade, 24 Tex. 205; Cummings *v.* Masterson, 42 Tex. Civ. App. 549, 93 S. W. 500.

Vermont.— Cutting *v.* Cox, 19 Vt. 517.

Wisconsin.— Lefebre *v.* Utter, 22 Wis. 189.

See 46 Cent. Dig. tit. "Trespass," § 74.

In the absence of a plea in abatement plaintiff will be permitted to recover damages in an amount proportionate to his interest in the property (Gulf, etc., R. Co. *v.* Cusenberry, 86 Tex. 525, 26 S. W. 43; May *v.* Slade, 24 Tex. 205); but no more (Winters *v.* McGhee, 3 Sneed (Tenn.) 128).

61. May *v.* Slade, 24 Tex. 205; Lefebre *v.* Utter, 22 Wis. 189.

62. Realty — Tenant for life and remainder-man.— Western, etc., R. Co. *v.* Tate, 129 Ga. 526, 528, 59 S. E. 266 (in which it was said: "Such joinder can not possibly hurt the defendant, or deprive it of any de-

but need not do so.[63] At common law where plaintiffs sue jointly all must recover or none can recover,[64] but this rule does not prevail in equity.[65] Where the use only is joint but title is in one separately, the other cannot recover the value of the property, but only for the injury to his use.[66]

2. Joint Liability in Defendants — a. Definition. "Persons who unite in the commission of a trespass" are joint trespassers.[67] Joint trespass is a term applied to "two or more persons who unite in committing a trespass."[68]

b. The Act. The act is a joint trespass where done by two or more persons acting in concert and coöperation,[69] although they did not personally participate in the specific act causing the damage,[70] or although all their acts were done separately, if done with a common purpose.[71] Any one who aids, abets, assists, or advises a trespasser in committing a trespass is equally liable with the one who does the act complained of.[72] It is essential, however, that there be some coöperation and concert of action between them,[73] and to render liable as joint

fense. A recovery would be a bar to any subsequent action by any of the plaintiffs for the same cause. The defendant is in no way inconvenienced in making its defense, and it is to its benefit that it may adjudicate in one suit its liability to all who have an interest in the freehold. The difficulty of apportioning the damages, in case of a recovery, between the life-tenant and the remaindermen, in no wise concerns the defendant; for it will be protected in any event by the judgment"); McIntire *v.* Westmoreland Coal Co., 118 Pa. St. 108, 11 Atl. 808.

Injury to the person.—Where defendant's single act damages both husband and wife they may unite and recover the aggregate damage. Cooper *v.* Cappel, 29 La. Ann. 213.

63. Dale *v.* Southern R. Co., 132 N. C. 705, 44 S. E. 399.

Illustrations.— Persons whose lands are inclosed with plaintiff's under a common fence need not be joined (Adair *v.* Witherspoon, (Tex. Civ. App. 1905) 86 S. W. 926); nor need a landlord with a lessee for injury to the land (Strohlburg *v.* Jones, 78 Cal. 381, 20 Pac. 705); or to growing crops (Bridgers *v.* Dill, 97 N. C. 222, 1 S. E. 767), although his rent is payable out of them (Texas, etc., R. Co. *v.* Bayliss, 62 Tex. 570); nor cotenants with their cotenant who has exclusive possession by consent (Thorn *v.* Maurer, 85 Mich. 569, 48 N. W. 640).

64. Murray *v.* Webster, 5 N. H. 391; Fraser *v.* Hunter, 9 Fed. Cas. No. 5,063, 5 Cranch C. C. 470.

Where it appears that one of plaintiffs acquired his right after the beginning of the action there can be no joint recovery. May *v.* Slade, 24 Tex. 205.

By statute in West Virginia where one coplaintiff dies the action survives to the others and they settle with decedent's estate. Rowe *v.* Shenandoah Pulp Co., 42 W. Va. 551, 26 S. E. 320, 57 Am. St. Rep. 870.

65. Ivey *v.* Cowart, 124 Ga. 159, 52 S. E. 436, 110 Am. St. Rep. 160.

66. Harms *v.* Solem, 79 Ill. 460.

67. Abbott L. Dict. [*quoted* in Kansas City *v.* File, 60 Kan. 157, 161, 55 Pac. 877].

68. Black L. Dict. [*quoted* in Bonte *v.* Postel, 109 Ky. 64, 72, 58 S. W. 536, 22 Ky. L. Rep. 583, 51 L. R. A. 187].

69. Brooks *v.* Ashburn, 9 Ga. 297; Bright *v.* Bell, 113 La. 1078, 37 So. 976; Cooper *v.* Cappel, 29 La. Ann. 213; Murphy *v.* Wilson, 44 Mo. 313, 100 Am. Dec. 290; Dyer *v.* Tyrrell, 142 Mo. App. 467, 127 S. W. 114; Walters *v.* Hamilton, 75 Mo. App. 237; Myrick *v.* Downer, 18 Vt. 360.

That they do not share alike in the profits of the trespass is immaterial.— Williams *v.* Sheldon, 10 Wend. (N. Y.) 654.

70. Murphy *v.* Wilson, 44 Mo. 313, 100 Am. Dec. 290; Kirkwood *v.* Miller, 5 Sneed (Tenn.) 455, 73 Am. Dec. 134; McFadden *v.* Schill, 84 Tex. 77, 19 S. W. 368.

Where the purchaser of timber knew that the vendor had no right to sell, purchase of the timber even when cut made the purchaser a joint trespasser. Kentucky Stave Co. *v.* Page, (Ky. 1910) 125 S. W. 170.

71. Ferguson *v.* Savoy, 9 N. Brunsw. 263.

72. Dyer *v.* Tyrrell, 142 Mo. App. 467, 127 S. W. 114; Wetzel *v.* Satterwhite, (Tex. Civ. App. 1910) 125 S. W. 93.

What is not aiding and abetting.— Since, in an action against defendant for trespass upon plaintiff's land by one to whom defendant sold timber on his own land, defendant could offer evidence as to the location of the line between his and plaintiff's line on the question of whether the purchaser trespassed upon plaintiff's land, he did not by offering such evidence aid or abet the purchaser in committing the trespass. Gerbig *v.* Bell, 143 Wis. 157, 126 N. W. 871.

73. Stoneman-Zearing Lumber Co. *v.* McComb, 92 Ark. 297, 122 S. W. 648; Eddy *v.* Howard, 23 Iowa 175; Lamb *v.* Willis, 125 N. Y. App. Div. 183, 109 N. Y. Suppl. 75 [*affirmed* in 196 N. Y. 512, 89 N. E. 1103].

Thus it is not enough that defendants were present and together at the time the trespass was committed (Eddy *v.* Howard, 23 Iowa 175); and several owners of animals trespassing together are not liable jointly (Cogswell *v.* Murphy, 46 Iowa 44); and where a master is liable for his servant's acts he is not liable as a joint trespasser if the servant acted jointly with others, but was not authorized to (Guttner *v.* Pacific Steam Whaling Co., 96 Fed. 617). The buyer of timber, who goes over the line on adjoining land and cuts timber thereon, is alone responsible

trespassers those who did not actively participate in the commission of the trespass, it must appear that they did something by way of encouragement, advice, or suggestion which led or helped to lead to the commission of the trespass.[74] Persons ordering an act are jointly liable with those who do it.[75] Principals are jointly liable with their agents,[76] and partners with their copartners.[77] When they direct the commission of the act, and where the act is done by one for the benefit of another and afterward ratified by him they are joint trespassers.[78] But there is no joint trespass where defendant's independent acts contributed to the result,[79] or where they coöperated to do a lawful act and in doing it some of them committed a trespass.[80]

c. Defenses. A license is a good defense.[81] And a release to one of the joint tort-feasors discharges all,[82] as does a satisfaction by one tort-feasor,[83] and partial payment by one operates for the benefit of all.[84] The general rule is that a several judgment against one joint trespasser does not bar an action against the others,[85] but there must be satisfaction of judgment against one in order to bar action against another.[86] Satisfaction of one judgment satisfies all, although they are for different amounts,[87] and partial satisfaction precludes any recovery of more than the balance due on the judgment so partially satisfied.[88] It has been held, however, that a judgment in favor of one who did the act bars an action against one who was alleged merely to have incited the other to it,[89] and a previous partial

therefor, and the seller is not liable, where it does not appear that he was responsible for the buyer mistaking the boundary, or authorized the cutting (Stoneman-Zearing Lumber Co. *v.* McComb, 92 Ark. 297, 122 S. W. 648).

74. Wetzel *v.* Satterwhite, (Tex. Civ. App. 1910) 125 S. W. 93.

75. Horton *v.* Hensley, 23 N. C. 163; Drake *v.* Kiely, 93 Pa. St. 492.

Applications of rule.—An attorney issuing a writ is liable jointly with his client where judgment had been paid (Mooney *v.* Maughan, 25 U. C. C. P. 244), or when the court issuing the writ was without jurisdiction (Marks *v.* Culmer, 6 Utah 419, 24 Pac. 528). A justice and one committing a trespass under a void judgment rendered by him are jointly liable. McVea *v.* Walker, 11 Tex. Civ. App. 46, 31 S. W. 839. And two plaintiffs having separate executions where the levy and sale is under the direction and for the benefit of both. Lough *v.* Coleman, 29 U. C. Q. B. 367.

76. Baker *v.* Davis, 127 Ga. 649, 57 S. E. 62; Smith *v.* Morgan, 68 Wis. 358, 32 N. W. 135; Ferguson *v.* Roblin, 17 Ont. 167.

77. Gerhardt *v.* Swaty, 57 Wis. 24, 14 N. W. 851.

78. The act must have been done by the one for the benefit of the other (Horton *v.* Hensley, 23 N. C. 163; Wilson *v.* Barker, 4 B. & Ad. 614, 1 N. & M. 409, 24 E. C. L. 271, 110 Eng. Reprint 587), although it has been held that a purchaser with notice can be sued jointly with the trespasser (Smith *v.* Briggs, 64 Wis. 497, 25 N. W. 558).

79. Bard *v.* Yohn, 26 Pa. St. 482.

80. Gerbig *v.* Bell, 143 Wis. 157, 126 N. W. 871; Richardson *v.* Emerson, 3 Wis. 319, 62 Am. Dec. 694.

Application of rule.— The owner of land on which timber was sold, and other adjoining owners who paid part of the expense of running a survey to determine the true boundaries of their land as well as to enable the purchaser of the timber to cut it, would not necessarily be liable for the trespasses of the purchaser of the timber, even though he had an unlawful purpose. Gerbig *v.* Bell, 143 Wis. 157, 126 N. W. 871.

81. Roper *v.* Harper, 4 Bing. N. Cas. 20, 5 Scott 250, 33 E. C. L. 575, holding that where obtained by fraud of one it is still good as to those not privy to the fraud.

Authority from one joint tenant to commit the act complained of is a defense to a joint action by them all. Lowery *v.* Rowland, 104 Ala. 420, 16 So. 88.

82. Gunther *v.* Lee, 45 Md. 60, 24 Am. Rep. 504.

83. Ashcraft *v.* Knoblock, 146 Ind. 169, 45 N. E. 69.

84. Bailey *v.* Berry, 3 Ohio Dec. (Reprint) 483, 8 Am. L. Reg. N. S. 270.

85. Western Coal, etc., Co. *v.* Petty, 132 Fed. 603, 65 C. C. A. 667. If, however, separate judgments are recovered plaintiff must elect as to which he will proceed under. Blann *v.* Crocheron, 20 Ala. 320.

86. Livingston *v.* Bishop, 1 Johns. (N. Y.) 290, 3 Am. Dec. 330. But see Fleming *v.* McDonald, 50 Ind. 278, 19 Am. Rep. 711, holding that levy of execution is a bar.

87. Roodhouse *v.* Christian, 55 Ill. App. 107 [*affirmed* in 158 Ill. 137, 41 N. E. 748]; Ashcraft *v.* Knoblock, 146 Ind. 169, 45 N. E. 69; Schultz *v.* Hunter, 2 Browne (Pa.) 233. If a judgment against one tort-feasor is satisfied, plaintiff cannot recover even nominal damages in a pending suit against another tort-feasor. Ayer *v.* Ashmead, 31 Conn. 447, 83 Am. Dec. 154.

Payment to the clerk of the court not accepted by plaintiff is not satisfaction. Blann *v.* Crocheron, 20 Ala. 320.

88. United Shakers Soc. *v.* Underwood, 11 Bush (Ky.) 265, 21 Am. Rep. 214; Brison *v.* Dougherty, 3 Baxt. (Tenn.) 93.

89. Swygert *v.* Wingard, 48 S. C. 321, 26 S. E. 653; Lawton *v.* Adams, 10 N. Brunsw. 274.

recovery against one is a defense *pro tanto* in an action where he is a joint defendant.[90] Payment to one cotenant is not a bar to an action by another cotenant previously begun.[91]

d. Extent of Liability — (I) *In General.* A verdict against all defendants jointly cannot be sustained unless all are shown to have been implicated in the trespass,[92] nor against all for all the trespasses where several are alleged, unless they all took part in each trespass.[93] But if all participated in all the acts alleged there can be a joint recovery against all.[94] Where one or some only of several joint defendants are proved guilty plaintiff can recover against them alone, the others being acquitted,[95] and may waive the trespass shown against some only and prove one either against all the other defendants,[96] or only some of them.[97] Plaintiff, however, cannot waive a joint trespass proved against all defendants and show one against part only.[98] Nor where plaintiff has produced evidence of a trespass committed by part of the defendants can he prove an additional trespass by all, even against those who are proved to have committed the first trespass proved,[99] or by part, some not being implicated in the first trespass proved,[1] except where there are several counts in the complaint.[2] A trespasser is not entitled to contribution from a co-trespasser if he pays the whole judgment.[3]

(II) *For Damages.* Each joint trespasser against whom a joint action is brought is liable for the whole injury.[4] Damages must be assessed against all

90. Power *v.* Fleming, Ir. R. 4 C. L. 404.

91. Longfellow *v.* Quimby, 29 Me. 196, 48 Am. Dec. 525.

92. Grusing *v.* Shannon, 2 Ill. App. 325; Olzen *v.* Schierenberg, 3 Daly (N. Y.) 100; Williams *v.* Sheldon, 10 Wend. (N. Y.) 654; Guille *v.* Swan, 19 Johns. (N. Y.) 381, 10 Am. Dec. 234.

93. Myrick *v.* Downer, 18 Vt. 360; McMillan *v.* Fairly, 12 N. Brunsw. 504.

Extent and limits of rule.— Persons cutting trees separately but uniting to carry them away are jointly liable for the carrying away only (Keen *v.* Seymour, 11 N. Brunsw. 44); and if the entry is joint but the cutting and taking several plaintiff can recover nominal damages only against them jointly (Bosworth *v.* Sturtevant, 2 Cush. (Mass.) 392).

94. Myrick *v.* Downer, 18 Vt. 360.

95. *Alabama.*— Blackburn *v.* Baker, 7 Port. 284.

California.— McCarron *v.* O'Connell, 7 Cal. 152.

Georgia.— Ivey *v.* Cowart, 124 Ga. 159, 52 S. E. 436, 110 Am. St. Rep. 160.

Indiana.— Ashcraft *v.* Knoblock, 146 Ind. 169, 45 N. E. 69; Ridge *v.* Wilson, 1 Blackf. 409.

New York.—Drake *v.* Barrymore, 14 Johns. 166.

Virginia.— Fishfurne *v.* Engledove, 91 Va. 548, 22 S. E. 354.

England.— Feltham *v.* Cartwright, 5 Bing. N. Cas. 569, 9 L. J. C. P. 67, 7 Scott 695, 35 E. C. L. 306; Harris *v.* Butterley, Cowp. 483, 98 Eng. Reprint 1199.

Canada.— Campbell *v.* Kemp, 16 U. C. C. P. 244

See 46 Cent. Dig. tit. "Trespass," § 70.

The trespass shown need not be a joint trespass, but plaintiff can recover against a single defendant for a several trespass by him. Blanchard *v.* Burbank, 16 Ill. App. 375.

Dismissal as to defendant not implicated. — The action should be dismissed against one who is not implicated by the evidence, at his request (Hoxsie *v.* Nodine, 123 Fed. 379, 61 C. C. A. 223), or on plaintiff's own motion; such dismissal does not bar recovery against other defendants (Gusdorff *v.* Duncan, 94 Md. 160, 50 Atl. 574).

Where there is no evidence of coöwnership, a joint judgment against two as coöwners will be reversed. Ragor *v.* Kendall, 70 Ill. 95.

96. Roper *v.* Harper, 4 Bing. N. Cas. 20, 5 Scott 250, 33 E. C. L. 575.

97. Maloney *v.* Purdon, 5 N. Brunsw. 515, proof of the second is an abandonment of the first.

98. McCarron *v.* O'Connell, 7 Cal. 152; Douglas *v.* Hoffman, 72 Ill. App. 110; Roper *v.* Harper, 4 Bing. N. Cas. 20, 5 Scott 250, 33 E. C. L. 575; Lawton *v.* Adams, 10 N. Brunsw. 274. *Contra*, it is held in some decisions that plaintiff may waive the first in the discretion of the trial judge (Ache *v.* Alexander, 11 N. Brunsw. 522; Lawton *v.* Adams, 10 N. Brunsw. 274), and may give evidence of it without waiving the first if it is a continuation of it (Atkinson *v.* McAuley, 9 N. Brunsw. 243; Creelman *v.* Atkinson, 8 N. Brunsw. 450).

99. Prichard *v.* Campbell, 5 Ind. 494.

1. Sedley *v.* Sutherland, 3 Esp. 202.

2. Where there are two counts and the proof is as to some under one and others under the other plaintiff must elect as to which he will proceed under. Maloney *v.* Purdon, 5 N. Brunsw. 515.

3. Wehle *v.* Haviland, 42 How. Pr. (N. Y.) 399.

4. *Missouri.*— Allred *v.* Bray, 41 Mo. 484, 97 Am. Dec. 283.

South Carolina.— Chanet *v.* Parker, 1 Mill 333; Whitaker *v.* English, 1 Bay 15.

Texas.— Cunningham *v.* Coyle, 2 Tex. App. Civ. Cas. § 422.

defendants jointly,[5] and cannot be apportioned among them,[6] except where otherwise provided by statute.[7] In general, the damages are to be estimated according to the injury inflicted by the most culpable defendant.[8] This rule does not apply, however, where exemplary damages are sought.[9] It is said that if plaintiff seeks aggravated damages he ought to select the party against whom he desires to get such damages.[10]

e. The Action — (I) *VENUE.* Under some statutes the action may be brought in the county of the residence of either defendant,[11] but if it appears that the trespass was not joint, there can be no recovery against a non-resident, although it appears he was separately liable.[12]

(II) *PLEADING.* Joint trespassers may be sued either jointly or severally.[13] Plaintiff need not set out his evidence in the complaint.[14] Where defendants justify jointly they must set forth a defense good for all defendants,[15] and a joint justification by all in rejoinder to a replication to an affirmative plea by part only is bad;[16] but a joint plea of "not guilty" amounts to a separate denial by

United States.— Johnson *v.* Tompkins, 13 Fed. Cas. No. 7,416, Baldw. 571.

Canada.— Grantham *v.* Severs, 25 U. C. Q. B. 468.

See 46 Cent. Dig. tit. "Trespass," § 70.

5. *Alabama.*— Layman *v.* Hendrix, 1 Ala. 212.

Illinois.— Pardridge *v.* Brady, 7 Ill. App. 639.

New Jersey.— Allen *v.* Craig, 13 N. J. L. 294.

Pennsylvania.— Smith *v.* Bradley, 16 Leg. Int. 188.

United States.— Berry *v.* Fletcher, 3 Fed. Cas. No. 1,357, 1 Dill. 67.

If the jury wrongfully assess the damages severally, plaintiff may have a new trial or take judgment against any one for the amount assessed against such one (Layman *v.* Hendrix, 1 Ala. 212; Stone *v.* Matherly, 3 T. B. Mon. (Ky.) 136), or enter judgment against all for the largest amount (Simpson *v.* Perry, 9 Ga. 508; Halsey *v.* Woodruff, 9 Pick. (Mass.) 555).

6. *Alabama.*— Layman *v.* Hendrix, 1 Ala. 212.

Indiana.— Carney *v.* Reed, 11 Ind. 417; Ridge *v.* Wilson, 1 Blackf. 409.

Massachusetts.— Halsey *v.* Woodruff, 9 Pick. 555.

Ohio.— Perine *v.* Deans, Tapp. 204.

Pennsylvania.— Duane *v.* Mierkin, 2 Browne 238 note; Schultz *v.* Hunter, 2 Browne 233.

Contra.— Beyersdorf *v.* Sump, 39 Minn. 495, 41 N. W. 101, 12 Am. St. Rep. 678 (holding that "where, in trespass *de bonis,* two defendants are found jointly liable for a portion of the goods, and one severally liable for the balance, the verdict may be according to the facts as found"); White *v.* McNeil, 1 Bay (S. C.) 11.

7. Ivey *v.* Cowart, 124 Ga. 159, 52 S. E. 436, 110 Am. St. Rep. 160; Hay *v.* Collins, 118 Ga. 243, 44 S. E. 1002; Barney *v.* De Russy, 1 Rob. (La.) 75; Villeré *v.* Grœter, 7 Rob. (La.) 203; Loussade *v.* Hartman, 16 La. 117.

8. Clark *v.* Bales, 15 Ark. 452; Berry *v.* Fletcher, 3 Fed. Cas. No. 1,357, 1 Dill. 67.

9. Nightingale *v.* Scannell, 18 Cal. 315; Becker *v.* Dupree, 75 Ill. 167; Clark *v.* Newsam, 1 Exch. 131, 140, 16 L. J. Exch. 296, in which it was said: "It would be very unjust to make the malignant motive of one party a ground of aggravation of damage against the other party, who was altogether free from any improper motive."

10. Clark *v.* Newsam, 1 Exch. 130, 16 L. J. Exch. 296. And see Becker *v.* Dupree, 75 Ill. 167, in which it was said that where only one of two trespassers has so acted as to become liable for exemplary damages, the suit should be brought against him alone if the recovery of exemplary damages is sought.

Unless plaintiff dismisses against those not liable to exemplary damages, actual damages only can be recovered. Pardridge *v.* Brady, 7 Ill. App. 639.

11. Baker *v.* Davis, 127 Ga. 649, 57 S. E. 62; Barfield *v.* Coker, 73 S. C. 181, 53 S. E. 170.

12. Lee *v.* West, 47 Ga. 311.

13. *Alabama.*— Du Bose *v.* Marx, 52 Ala. 506.

Minnesota.— Heartz *v.* Klinkhammer, 39 Minn. 488, 40 N. W. 826.

Missouri.— Page *v.* Freeman, 19 Mo. 421.

Nevada.— Mandlebaum *v.* Russell, 4 Nev. 551.

New York.— Pasthoff *v.* Banendahl, 6 N. Y. St. 613.

Ohio.— Wright *v.* Lathrop, 2 Ohio 33, 15 Am. Dec. 529.

South Carolina.— Hawkins *v.* Hatton, 1 Nott & M. 318, 9 Am. Dec. 700.

See 46 Cent. Dig. tit. "Trespass," § 70.

In Louisiana co-trespassers must be joined. Loussade *v.* Hartman, 16 La. 117.

14. Commonwealth Co. *v.* Nunn, 17 Colo. App. 117, 67 Pac. 342, holding that plaintiff need not specify what acts were done by each defendant.

15. Pico *v.* Colimas, 32 Cal. 578. Any separate defense which one might have pleaded is unavailable. Bradley *v.* Powers, 7 Cow. (N. Y.) 330.

16. Morrow *v.* Belcher, 4 B. & C. 704, 7 D. & R. 187, 4 L. J. K. B. O. S. 42, 10 E. C. L. 766, 107 Eng. Reprint 1223.

each defendant.[17] As in other actions, to sustain the defense, the proof must conform to the pleading.[18]

(III) *EVIDENCE.* Statements by defendant subsequent to the commission of the trespass are admissible to show that he was a joint trespasser.[19]

(IV) *TRIAL* — (A) *In General.* Joint defendants in trespass are not entitled as of course to separate trials,[20] and the court may in its discretion refuse them.[21] Where part of defendants plead the general issue, it is proper to try the issue as to them.[22]

(B) *Questions For the Jury.*[23] Whether the act complained of was committed by defendants jointly is a question of fact for the jury.[24]

(V) *VERDICT.* A general verdict for plaintiff is equivalent to a finding that all of the defendants are guilty,[25] and is bad if the evidence does not implicate one of the defendants.[26] A verdict against some of the defendants is good, although it does not name the others.[27] Where a verdict is against one joint defendant on evidence applying to both, a verdict cannot be entered against the other.[28] Proof of a joint trespass on one count entitles plaintiff to a verdict, although he fails to prove one alleged in another count.[29] Directing a verdict where there is no evidence against a defendant is within the judge's discretion.[30]

(VI) *COSTS.* Where plaintiff recovers in separate actions against co-trespassers, he is entitled to costs in each action;[31] but where plaintiff recovers in an action against one joint trespasser while an action against another is pending, and, on plea of payment, dismisses said pending action, defendant therein is entitled to costs.[32]

(VII) *NEW TRIAL.* Where the verdict is erroneous as to one co-defendant only, he should make a separate motion for new trial.[33]

(VIII) *JUDGMENT.* In trespass against several, jointly separate judgments are erroneous,[34] except where otherwise provided by statute,[35] and a judgment cannot be given in favor of one if the jury find against the others but make no finding as to him.[36] It is not necessary that all be found guilty, but verdict and judgment may be given against one or more or all, in accordance with the facts.[37]

(IX) *APPEAL AND ERROR.* Plaintiff must appeal from the whole judgment.[38]

17. Drake *v.* Barrymore, 14 Johns. (N. Y.) 166.

18. See cases cited *infra*, this note.

Applications of rule.—A joint justification must be good or bad as to all (Gleason *v.* Edmunds, 3 Ill. 448; Anonymous, Lofft 364, 98 Eng. Reprint 696); and several justifications cannot be shown (Walker *v.* Read, 59 Tex. 187; Sears *v.* Palmer, 8 N. Brunsw. 400).

19. McLaughlin *v.* Pryor, C. & M. 354, 41 E. C. L. 196, 11 L. J. C. P. 169, 4 M. & G. 48, 4 Scott N. R. 655, 43 E. C. L. 34; Oliphant *v.* Leslie, 24 U. C. Q. B. 398.

20. Meloon *v.* Read, 73 N. H. 153, 59 Atl. 946; Allen *v.* Craig, 13 N. J. L. 294.

21. Johnson *v.* Hannahan, 3 Strobh. (S. C.) 425.

22. Johnson *v.* Jones, 44 Ill. 142, 92 Am. Dec. 159.

23. Glanville *v.* Rittlesdorf, 73 Ill. 475.

24. Owens *v.* Derby, 3 Ill. 26; Marshall *v.* Reynolds, 2 Speers (S. C.) 166 (holding that where evidence against one is slight his name cannot be stricken from the record or the question as to him submitted first to the jury); Hoxsie *v.* Nodine, 123 Fed. 379, 61 C. C. A. 223.

25. Cane *v.* Watson, Morr. (Iowa) 52; Sutliff *v.* Gilbert, 8 Ohio 405.

26. Menton *v.* Lee, 30 U. C. Q. B. 281.

27. Wilderman *v.* Sandusky, 15 Ill. 59.

28. Starling *v.* Cozens, 3 Dowl. P. C. 790.

29. Watson *v.* Riorden, 5 U. C. Q. B. O. S. 322.

30. Sowell *v.* Champion, 6 A. & E. 407, 7 L. J. Q. B. 197, 2 N. & P. 627, W. W. & D. 667, 33 E. C. L. 226, 112 Eng. Reprint 156.

31. Livingston *v.* Bishop, 1 Johns. (N. Y.) 290, 3 Am. Dec. 330.

32. Western Coal, etc., Co. *v.* Petty, 132 Fed. 603, 65 C. C. A. 667.

33. Kentucky, etc., Cement Co. *v.* Morgan, 28 Ind. App. 89, 62 N. E. 68.

34. Fields *v.* Williams, 91 Ala. 502, 8 So. 808; Ashcraft *v.* Knoblock, 146 Ind. 169, 45 N. E. 69; Thompson *v.* Albright, (Tex. App. 1889) 14 S. W. 1020.

35. Milner *v.* Milner, 101 Ala. 599, 14 So. 373.

36. Thompson *v.* Albright, (Tex. App. 1889) 14 S. W. 1020.

37. Gillerson *v.* Mansur, 45 Me. 17.

38. Allen *v.* Feland, 10 B. Mon. (Ky.) 306, holding that where some of defendants are acquitted and some convicted, plaintiff cannot appeal from the first part only.

Where only one defendant appeals, the judgment below is final as to the others,[39] and a dismissal as to some is final unless appealed from.[40]

C. Statutory Actions For Penalties and Multiple Damages — 1. Provisions of the Statutes. Statutes in many states give a special remedy for cutting trees or other things growing on land by allowing the recovery of treble damages[41] or a penalty.[42] Other statutes allow the recovery of treble damages for a forcible disseizin,[43] for malicious injury to personalty,[44] or give a penalty for entry on realty without the owner's consent.[45] These statutes, it has been said, are to be strictly construed.[46]

2. The Right Invaded. Title alone, without actual possession, is sufficient to enable an owner of land to recover treble damages for cutting and removing trees or other products of the land,[47] or to recover a penalty for such cutting and removal given by statute;[48] and according to some decisions the owner of the title need not have either actual or constructive possession, but may bring the action against one in adverse possession,[49] although the weight of authority is that the statutes do not change, the common-law rule requiring either actual or constructive possession.[50] According to some decisions the statutes are regarded as not creating

39. May *v.* Bliss, 22 Vt. 477.

40. Burns *v.* Horkan, 126 Ga. 161, 54 S. E. 946.

41. Simpson *v.* Woodward, 5 Kan. 571, holding, however, that the thing taken must be of value.

"Coal is a mineral" within a statute giving treble damages for taking minerals. Henry *v.* Lowe, 73 Mo. 96.

A subsequent carrying away does not create liability where the cutting is by mistake. Batchelder *v.* Kelly, 10 N. H. 436, 34 Am. Dec. 174, except where either the cutting alone or the carrying away alone is enough under the terms of the statute (Keystone Lumber, etc., Co. *v.* McGrath, (Miss. 1897) 21 So. 301).

42. Givens *v.* Kendrick, 15 Ala. 648, holding that cutting without carrying away is sufficient.

Trees not exceeding six or eight inches in diameter are, within the provisions of a statute giving a penalty for wilfully cutting, "trees." Clay *v.* Postal Tel.-Cable Co., 70 Miss. 406, 11 So. 658.

Taking from inclosure.— Taking trees from a "yard" or "orchard" is *prima facie* a taking from an "inclosure," an orchard being defined as "inclosure containing fruit trees," and "yard" meaning by common acceptance an "inclosure." Wright *v.* Sample, 162 Ala. 222, 50 So. 268.

43. The force must be personal violence and breaking the lock of a building is not enough (Schrier *v.* Shaffer, 123 N. Y. App. Div. 543, 107 N. Y. Suppl. 1107; Yeamans *v.* Nichols, 81 N. Y. Suppl. 500; Willard *v.* Warren, 17 Wend. (N. Y.) 257); nor are acts rendering the premises untenantable (Labro *v.* Campbell, 56 N. Y. Super Ct. 70, 2 N. Y. Suppl. 129).

44. Herman *v.* Owen, 42 Mo. App. 387, holding that throwing goods out of a second story window shows malice.

45. Kellogg *v.* Robinson, 32 Conn. 335, holding, however, that remaining on land to hunt after a license has been revoked is not an entry within the meaning of the statute.

What is an inclosure.— Under a statute giving a penalty for wilful entry on inclosed lands to shoot, etc., inclosure means more than an imaginary boundary line. It must be surrounded by visible objects, natural or artificial, and an imaginary boundary line is not sufficient. So it is more than a joint inclosure with adjoining lands, although plaintiff has the exclusive shooting rights over such other land. Payne *v.* Gould, 74 Vt. 208, 52 Atl. 421.

46. Lott *v.* Leventhal, (N. J. Sup. 1910) 76 Atl. 328; Henning *v.* Keiper, 37 Pa. Super. Ct. 488.

47. Arn *v.* Matthews, 39 Kan. 272, 18 Pac. 65; Sullivan *v.* Davis, 29 Kan. 28 (cutting and carrying away by a trespasser of timber from vacant and unoccupied land of plaintiff); Fitzpatrick *v.* Gebhart, 7 Kan. 35.

Leased land.— The owner of the land may bring the action, although a tenant is in actual possession against the tenant for acts wholly outside the authority of the lease (Arn *v.* Matthews, 39 Kan. 272, 18 Pac. 65; Fitzpatrick *v.* Gebhardt, 7 Kan. 35); or against persons other than the tenant (Cramer *v.* Groseclose, 53 Mo. App. 648).

48. Long *v.* Cummings, 156 Ala. 577, 47 So. 109; White *v.* Farris, 124 Ala. 461, 27 So. 259; Gravlee *v.* Williams, 112 Ala. 539, 20 So. 952; Turner Coal Co. *v.* Glover, 101 Ala. 289, 13 So. 478; Allison *v.* Little, 93 Ala. 150, 9 So. 388.

49. Coppage *v.* Griffith, 40 S. W. 908, 19 Ky. L. Rep. 459; Achey *v.* Hull, 7 Mich. 423, defendant in possession as a disseizor.

50. Beatty *v.* Brown, 76 Ala. 267 (defendant in possession under contract for purchase which had been repudiated by plaintiff, the vendor); Newman *v.* Mountain Park Land Co., 85 Ark. 208, 107 S. W. 391, 122 Am. St. Rep. 27; Brown *v.* Hartzell, 87 Mo. 564; Holladay-Klotz Land, etc., Co. *v.* T. J. Moss Tie Co., 79 Mo. App. 543; Avitt *v.* Farrell, 68 Mo. App. 665. See also White *v.* Farris, 124 Ala. 461, 27 So. 259 [*explaining* Rogers *v.* Brooks, 99 Ala. 31, 11

a new cause of action, but merely as affecting the measure of damages for a common-law action of trespass.[51] Under this view if a right would be sufficient to support an action of trespass at common law, it would be sufficient under the statute; but if not sufficient at common law it would not be sufficient under the statute.[52] While it has been held that possession under color of title and claim of ownership is sufficient to maintain the action,[53] in most jurisdictions the cause of action is only available to the owner of the fee.[54] Bare possession in plaintiff without title is not enough;[55] nor possession under contract for purchase, in an action against the vendor;[56] and so where title to the *locus* is in defendant, plaintiff cannot recover.[57] One from whom the land was obtained by fraud is not liable in this form of action, unless plaintiff was a purchaser for value without notice

So. 753], holding that the action does not lie against one in actual adverse possession under color of title *bona fide* claiming to own the same, and Long *v.* Cummings, 156 Ala. 577, 47 So. 109, in which this case is cited with approval.

Notwithstanding there is outstanding an unexpired lease granted by plaintiff the action will lie provided there is no one in possession under the lease. Austin *v.* Huntsville Coal, etc., Co., 72 Mo. 535, 37 Am. Rep. 446.

51. Statute giving treble damages for cutting trees.— Eklund *v.* B. R. Lewis Lumber Co., 13 Ida. 581, 92 Pac. 532; Sprague *v.* Irwin, 27 How. Pr. (N. Y.) 51 (by reason of this it is unnecessary to indorse the summons with a reference to the statute); Hathaway *v.* Goslant, 77 Vt. 199, 59 Atl. 835; Davenport *v.* Newton, 71 Vt. 11, 42 Atl. 1087; Willey *v.* Laraway, 64 Vt. 559, 25 Atl. 436; Montgomery *v.* Edwards, 45 Vt. 75.

In Pennsylvania mere equitable title is enough against a mere intruder. Arnold *v.* Pfoutz, 117 Pa. St. 103, 11 Atl. 871; Walton *v.* Pollock, 2 Pa. Dist. 607, 12 Pa. Co. Ct. 216.

In Vermont a mere possessor cannot sue for treble damages given by statute (Guild *v.* Prentis, 83 Vt. 212, 74 Atl. 1115; Davenport *v.* Newton, 71 Vt. 11, 42 Atl. 1087); but a tenant for a term of years is an "owner" entitled to sue for treble damages (Guild *v.* Prentis, 83 Vt. 212, 74 Atl. 1115).

52. Yocum *v.* Zahner, 162 Pa. St. 468, 29 Atl. 778, holding that under a statute giving multiple damages for cutting trees, the action does not lie by remainder-man against assignee of life-estate, in possession.

53. Carpenter *v.* Savage, 93 Miss. 233, 46 So. 537. And see Johnson *v.* Davis, 91 Miss. 708, 45 So. 979, in which it was held that under the direct provisions of Code (1906), § 1959, a certificate from the register of the land-office of the location of public land vests the full legal title to the land in the person to whom the certificate is granted, his heirs and assigns, so far as to enable him to maintain an action thereon against a trespasser, and is admissible as evidence of title, saving the paramount rights of other persons.

54. Under statute giving treble damages for cutting and removing trees, etc.— Newman *v.* Mountain Park Land Co., 85 Ark. 208, 107 S. W. 391, 122 Am. St. Rep. 27; Taylor *v.* State, 65 Ark. 595, 47 S. W. 1055; Arn *v.* Matthews, 39 Kan. 272, 18 Pac. 65; Achey *v.* Hull, 7 Mich. 423; Reynolds *v.* Maynard, (Mich. 1904) 100 N. W. 174 (here the *locus* was a highway); Kellar *v.* Central Tel., etc., Co., 53 Misc. (N. Y.) 523, 105 N. Y. Suppl. 63. Thus a lessee cannot recover. Van Deusen *v.* Young, 29 N. Y. 9 (Mullin, J.); Lewis *v.* Thompson, 3 N. Y. App. Div. 329, 38 N. Y. Suppl. 316 (of a term for years).

Under statute giving a penalty for cutting trees.— Smythe Lumber Co. *v.* Austin, 162 Ala. 110, 49 So. 875; Shelby Iron Co. *v.* Ridley, 135 Ala. 513, 33 So. 331; White *v.* Farris, 124 Ala. 461, 27 So. 259; Higdon *v.* Kennemer, 120 Ala. 193, 24 So. 439, 112 Ala. 351, 20 So. 470; Gravlee *v.* Williams, 112 Ala. 539, 20 So. 952; Turner Coal Co. *v.* Glover, 101 Ala. 289, 13 So. 478; Allison *v.* Little, 93 Ala. 150, 9 So. 388; Edwards *v.* Hill, 11 Ill. 22; Clay *v.* Boyer, 10 Ill. 506; Whiteside *v.* Divers, 5 Ill. 336; David *v.* Correll, 68 Ill. App. 123; Behymer *v.* O'Dell, 45 Ill. App. 616, 31 Ill. App. 350. Thus a life-estate is not enough to recover a statutory penalty (Clay *v.* Boyer, 10 Ill. 506; Jarrot *v.* Vaughn, 7 Ill. 132; Whiteside *v.* Divers, 5 Ill. 336; Wright *v.* Bennett, 4 Ill. 258; Abney *v.* Austin, 6 Ill. App. 49); nor ownership of growing trees where another owns the land (Clifton Iron Co. *v.* Curry, 108 Ala. 581, 18 So. 554), except where the statute gives the right of action to the owner of timber (Brasher *v.* Shelby Iron Co., 144 Ala. 659, 40 So. 80; Harrison Naval Stores Co. *v.* Johnson, 91 Miss. 747, 45 So. 465).

55. Under statute giving a penalty for cutting and removing trees, etc.—Shelby Iron Co. *v.* Ridley, 135 Ala. 513, 33 So. 331; McCleary *v.* Anthony, 54 Miss. 708; Davenport *v.* Newton, 71 Vt. 11, 42 Atl. 1087.

Under statute giving damages for malicious injury to property.— Scott *v.* Trebilcock, 21 S. C. 333, 112 N. W. 847.

56. Under statute giving penalty for cutting trees.—Gravlee *v.* Williams, 112 Ala. 539, 20 So. 952.

57. Under statute giving treble damages for forcible disseizin.— Schrier *v.* Shaffer, 123 N. Y. App. Div. 543, 107 N. Y. Suppl. 1107; Marchand *v.* Haber, 16 Misc. (N. Y.) 322, 37 N. Y. Suppl. 952.

of the fraud.[58] While absence of proof of title cannot be supplied by mere proof of possession,[59] actual possession under claim of right and color of title is a sufficient *prima facie* showing of ownership to throw upon the party contesting the title the burden of rebutting the presumption so raised.[60] No higher evidence of freehold is necessary than in trespass at common law.[61] Defendant is not allowed to show title in a third person with whom he does not connect himself.[62] In any case it is of course clear that if plaintiff has neither title nor possession he cannot recover.[63]

3. The Intent. To authorize a recovery, the violation of the statute must be wilful [64] or accompanied by inexcusable negligence or carelessness;[65] but malice or evil intent is unnecessary.[66] It has been held, however, that where the liability is stated broadly in the statute and certain exceptions made, no others are a defense.[67] The act is wilful, although defendant did not know that the land belonged to the one who was in fact the owner, but thought he was trespassing on lands of another than such owner,[68] as it is enough that defendant knew he had no right to cut.[69] But where defendant acted in good faith the element of wilfulness is lacking.[70] The rule applies both where the statute expressly excepts liability

58. Under statute giving a penalty for cutting trees.— Shelby Iron Co. *v.* Ridley, 135 Ala. 513, 33 So. 331.

59. Whitesides *v.* Divers, 5 Ill. 336.

60. Higdon *v.* Kennemer, 112 Ala. 351, 20 So. 470; Mason *v.* Park, 4 Ill. 532; Abney *v.* Austin, 6 Ill. App. 49. And see McCleary *v.* Anthony, 54 Miss. 708.

61. Higdon *v.* Kennemer, 120 Ala. 193, 24 So. 439.

62. Under statute giving a penalty for cutting trees.— Higdon *v.* Kennemer, 120 Ala. 193, 24 So. 439.

63. Under statute giving a penalty for cutting and removing trees, etc.— Dejarnett *v.* Haynes, 23 Miss. 600.

64. Under statute giving treble damages for trespass "without lawful authority" (McDonald *v.* Montana Wood Co., 14 Mont. 88, 35 Pac. 668, 43 Am. St. Rep. 616); or for cutting and removing trees (Stewart *v.* Sefton, 108 Cal. 197, 41 Pac. 293; Michigan Land, etc., Co. *v.* Deer Lake Co., 60 Mich. 143, 27 N. W. 10, 1 Am. St. Rep. 491).

Under statute giving treble damages against one who wilfully injures timber.— Koonz *v.* Hempy, 142 Iowa 337, 120 N. W. 976.

Under statute giving a penalty for cutting and removing trees, etc. Long *v.* Cummings, 165 Ala. 342, 51 So. 743; Glenn *v.* Adams, 129 Ala. 189, 29 So. 836; White *v.* Harris, 124 Ala. 461, 27 So. 259; Postal Tel. Cable Co. *v.* Lenoir, 107 Ala. 640, 18 So. 266; Russell *v.* Irby, 13 Ala. 131; Watkins *v.* Gale, 13 Ill. 152; Whitecraft *v.* Vanderver, 12 Ill. 235; Belt *v.* Reid, 84 Ill. App. 501; David *v.* Correll, 74 Ill. App. 47; Cumberland Tel., etc., Co. *v.* Martin, 93 Miss. 505, 46 So. 247; Therrell *v.* Ellis, 83 Miss. 494, 35 So. 826; McCleary *v.* Anthony, 54 Miss. 708; Mhoon *v.* Greenfield, 52 Miss. 434; Perkins *v.* Hackleman, 26 Miss. 41, 59 Am. Dec. 243; Batchelder *v.* Kelly, 10 N. H. 436, 34 Am. Dec. 174.

Under a statute giving treble damages for forcible disseizin a mere trespass is not enough. There must be personal violence or tendency thereto. Willard *v.* Warren, 17 Wend. (N. Y.) 257.

65. Under statute giving a penalty for cutting and removing trees, etc.— Harrison Naval Stores Co. *v.* Johnson, 91 Miss. 747, 45 So. 465; Therrell *v.* Ellis, 83 Miss. 494, 35 So. 826; Keirn *v.* Warfield, 60 Miss. 799; McCleary *v.* Anthony, 54 Miss. 708; Mhoon *v.* Greenfield, 52 Miss. 434.

In Maine the doctrine that the trespass must be wilful is not accepted. Black *v.* Mace, 66 Me. 49, treble damages for taking property.

66. Louisville, etc., R. Co. *v.* Hill, 115 Ala. 334, 22 So. 163; Wright *v.* Brown, 5 Kan. 600. But see Morrison *v.* Bedell, 22 N. H. 234.

67. Loewenberg *v.* Rosenthal, 18 Oreg. 178, 22 Pac. 601. And see McCloskey *v.* Powell, 123 Pa. St. 62, 16 Atl. 420, 10 Am. St. Rep. 512; O'Reilly *v.* Shadle, 33 Pa. St. 489.

68. Under statute giving treble damages for cutting and removing trees, etc.— Longyear *v.* Gregory, 110 Mich. 277, 68 N. W. 116; Emerson *v.* Beavaus, 12 Mo. 511.

Under statute giving a penalty for cutting and removing trees, etc.— Givens *v.* Kendrick, 15 Ala. 648; Perkins *v.* Hackleman, 26 Miss. 41, 59 Am. Dec. 243.

69. Under statute giving a penalty for cutting trees.— Watkins *v.* Gale, 13 Ill. 152.

70. *Alabama.*—Long *v.* Cummings, 156 Ala. 577, 47 So. 109; Glenn *v.* Adams, 129 Ala. 189, 29 So. 836; Williams *v.* Hedricks, 115 Ala. 27, 22 So. 439, 67 Am. St. Rep. 32, 41 L. R. A. 650; Postal Tel. Cable Co. *v.* Lenoir, 107 Ala. 640, 18 So. 266; Russell *v.* Irby, 13 Ala. 131.

Illinois.—Watkins *v.* Gale, 13 Ill. 152 (mistake as to boundaries); Whitecraft *v.* Vanderver, 12 Ill. 235.

Iowa.— Werner *v.* Flies, 91 Iowa 146, 59 N. W. 18.

Mississippi.— Cumberland Tel., etc., Co. *v.* Martin, 93 Miss. 505, 46 So. 247; Lusby *v.* Kansas City, etc., R. Co., 73 Miss. 360, 19 So. 239, 36 L. R. A. 510.

Missouri.— Chilton *v.* Missouri Lumber, etc., Co., 144 Mo. App. 315, 127 S. W. 941.

New Hampshire.— Batchelder *v.* Kelly, 10 N. H. 436, 34 Am. Dec. 174.

in such cases [71] and where it does not.[72] In such a case, belief in good faith that defendant was legally entitled to commit the acts complained of is essential.[73] In some jurisdictions the *bona fide* belief of a right to do the act is sufficient defense if the belief was reasonable,[74] even though the act was forbidden by plaintiff.[75] There can be no recovery under the statutes where the trespass was casual or involuntary.[76]

4. Persons Liable. One who causes the trespass to be committed is liable.[77] An employer is liable for the act of his servants acting within the scope of his authority,[78] but not for acts committed by them without his authority, express or implied.[79] Nor is a partner liable for the acts of his copartner which he did not know of or assent to.[80] A purchaser for value in good faith is not liable,[81]

Treble damages for cutting and removing trees, etc.— Skeels *v.* Starrett, 57 Mich. 350, 24 N. W. 98; Russell *v.* Myers, 32 Mich. 522; Wallace *v.* Finch, 24 Mich. 255; Emerson *v.* Beavaus, 12 Mo. 511; Smith *v.* Morse, 70 N. Y. App. Div. 318, 75 N. Y. Suppl. 126.

Treble damages for injury to land.— Kilgannon *v.* Jenkinson, 57 Mich. 325, 23 N. W. 830.

Penalty for cutting trees.— Bradford *v.* Boozer, 139 Ala. 502, 36 So. 716; Glenn *v.* Adams, 129 Ala. 189, 29 So. 836; White *v.* Farris, 124 Ala. 461, 27 So. 259; Belt *v.* Reid, 84 Ill. App. 501. But see Louisville, etc., R. Co. *v.* Hill, 115 Ala. 334, 22 So. 163.

Limitations of rule.— Unfounded belief in supposed legal authority to commit the act complained of has been held to furnish no ground for denying treble damages, as, for instance, where the act is committed by road overseers, under the mistaken belief that they had the right to do so for the purpose of opening a road. Macey *v.* Carter, 76 Mo. App. 490; Rousey *v.* Wood, 57 Mo. App. 650.

Under a statute of Pennsylvania giving treble damages for timber cut and converted "against any person who shall cut down, or fell, or employ any persons to cut down or fell any timber trees growing upon the land of another, without the consent of the owner thereof," to enable the party injured to recover treble damages, it is only necessary to prove that the timber was cut without the owner's consent, knowledge on defendant's part that the trees were on the land of another is unnecessary. The party committing the trespass is liable for treble damages, although he, or one acting in his behalf, makes a mistake as to the ownership of the land. McCloskey *v.* Powell, 123 Pa. St. 62, 16 Atl. 420, 10 Am. St. Rep. 512; Watson *v.* Rynd, 76 Pa. St. 59; O'Reilly *v.* Shadle, 33 Pa. St. 489.

71. Missouri Lumber, etc., Co. *v.* Zeitinger, 45 Mo. App. 114, treble damages for cutting and removing trees, etc.

72. **Penalty for cutting and removing trees, etc.**— Postal Tel. Cable Co. *v.* Lenoir, 107 Ala. 640, 18 So. 266.

Treble damages for cutting and removing trees.— Barnes *v.* Jones, 51 Cal. 303; Lindell *v.* Hannibal, etc., R. Co., 25 Mo. 550; Shiffer *v.* Broadhead, 134 Pa. St. 539, 19 Atl. 688; Kramer *v.* Goodlander, 98 Pa. St. 353; Brown *v.* Mead, 68 Vt. 215, 34 Atl. 950; Gardner *v.* Lovegren, 27 Wash. 356, 67 Pac. 615; Cohn *v.* Neeves, 40 Wis. 393.

73. White *v.* Farris, 124 Ala. 461, 27 So. 259 (penalty for cutting trees); Davis *v.* Cotey, 70 Vt. 120, 39 Atl. 628 (treble damages for cutting trees).

74. **Penalty for cutting trees.**—Belt *v.* Reid, 84 Ill. App. 501; Cox *v.* St. Louis, etc., R. Co., 111 Mo. App. 394, 85 S. W. 989.

75. Cox *v.* St. Louis, etc., R. Co., 111 Mo. App. 394, 85 S. W. 989, treble damages for taking part of realty. And see Long *v.* Cummings, 165 Ala. 342, 51 So. 743, holding that one who cuts timber openly, claiming the trees are on his land, notwithstanding the claim of the adjacent owner to the land, because of a dispute as to the boundary, is not liable to the penalty prescribed by Code (1907), § 6035, imposing a penalty for cutting trees on the land of another wilfully and knowingly, without the consent of the owner.

Mistake of law seems not to constitute good faith. Ward *v.* Rapp, 79 Mich. 469, 44 N. W. 934.

76. Gardner *v.* Lovegreen, 27 Wash. 356, 67 Pac. 615, treble damages for cutting trees.

77. McCloskey *v.* Powell, 138 Pa. St. 383, 21 Atl. 148, 150 [*affirming* 123 Pa. St. 62, 16 Atl. 420, 10 Am. St. Rep. 512], treble damages for cutting and removing trees, etc.

78. Van Siclen *v.* Jamaica Electric Light Co., 45 N. Y. App. Div. 1, 61 N. Y. Suppl. 210 [*affirmed* in 168 N. Y. 650, 61 N. E. 1135], treble damages for cutting and removing trees.

79. Cushing *v.* Dill, 3 Ill. 460; Potulni *v.* Saunders, 37 Minn. 517, 35 N. W. 379; Smith *v.* Saucier, (Miss. 1906) 40 So. 328; Therrell *v.* Ellis, 83 Miss. 494, 35 So. 826; McCleary *v.* Anthony, 54 Miss. 708. But see Gates *v.* Comstock, 113 Mich. 127, 71 N. W. 515.

Appropriation of trees cut by mistake.— Where the servant of another, by mistake or accident, cuts trees beyond the line of his employer, and the master, knowing such mistake, afterward drew off and appropriated the trees to his own use, it was held that this did not show an original wilful and intentional cutting, within the statute. Batchelder *v.* Kelly, 10 N. H. 436, 34 Am. Dec. 174.

80. Williams *v.* Hendricks, 115 Ala. 277, 22 So. 439, 67 Am. St. Rep. 32, 41 L. R. A. 650.

81. O'Reilly *v.* Shadle, 33 Pa. St. 489, treble damages for cutting trees.

nor is a mere purchaser who took no part in the trespass, although he took with notice.[82]

5. Defenses. Consent or license of the owner is a good defense,[83] but must authorize the act done,[84] and defendant is not liable if he is within the exceptions contained in the statute,[85] or had authority under a statute for the act.[86] Possession under contract for purchase is no defense.[87] Nor is it a defense that the act benefited the land,[88] or was done to protect defendant's adjoining land.[89] Payment to one tenant in common does not discharge liability to another.[90]

6. The Action — a. Parties. The action must be brought by the parties entitled under the statute,[91] and all parties interested in the land must join,[92] or at least are proper parties plaintiff;[93] but defendant cannot take advantage of non-joinder for the first time on appeal.[94]

b. Process. It is not necessary to indorse the summons with a reference to the statute,[95] but the date of issue must be indorsed on it.[96]

c. Pleadings — (i) *The Form of the Action.* In general trespass is the proper remedy for the treble damages given by statute for injury to realty.[97] But under some statutes debt will lie.[98] Where a penalty is provided for a trespass on realty debt is the proper remedy.[99] The action is in fact founded on a tort.[1] But inasmuch as the statutes giving the penalty do not prescribe the

82. Alabama State Land Co. *v.* Reed, 99 Ala. 19, 10 So. 238. *Contra,* Caris *v.* Nimmons, 92 Mo. App. 66; Holladay-Klotz Land, etc., Co. *v.* T. J. Moss Tie Co., 79 Mo. App. 543.

83. Werner *v.* Flies, 91 Iowa 146, 59 N. W. 18, wilful trespass in injuring trees on land of another.

84. Jernigan *v.* Clark, 134 Ala. 313, 32 So. 686, penalty for cutting trees.

85. **Statute giving treble damages for cutting and removing trees,** etc., unless defendant had probable cause. Clark *v.* Field, 42 Mich. 342, 4 N. W. 19; Russell *v.* Myers, 32 Mich. 522; Wallace *v.* Finch, 24 Mich. 255; Pitt *v.* Daniel, 82 Mo. App. 168.

Mistake of law is sufficient probable cause see Pitt *v.* Daniel, 82 Mo. App. 168; Cramer *v.* Groseclose, 53 Mo. App. 648.

Where the statute applies to cutting trees except where taken for use on public roads, a taking to build a bridge is within the exception. Courtney *v.* Smylie, Walk. (Miss.) 497.

86. Van Siclen *v.* Jamaica Electric Light Co., 45 N. Y. App. Div. 1, 61 N. Y. Suppl. 210 [*affirmed* in 168 N. Y. 650, 61 N. E. 1135], holding that under a statutory right to cut trees in a street in order to put up telephone wires, defendant must show that the cutting was necessary, in an action for treble damages for cutting trees.

If the statutory requirements are not followed, a right to condemn under eminent domain is no defense in an action for a penalty for cutting trees (Farrow *v.* Nashville, etc., R. Co., 109 Ala. 448, 20 So. 303); nor in an action for a penalty for cutting and removing trees, etc. (Cox *v.* St. Louis, etc., R. Co., 111 Mo. App. 394, 85 S. W. 989).

87. Van Deusen *v.* Young, 29 Barb. (N. Y.) 9 [*reversed* on other grounds in 29 N. Y. 9]. But see Taylor *v.* Lyon Lumber Co., 13 Pa. Co. Ct. 235.

88. Van Deusen *v.* Young, 29 Barb. (N. Y.) 9 [*reversed* on other grounds in 29 N. Y. 9].

89. Walker *v.* Davis, 83 Mo. App. 374.

90. Wagoner *v.* Silva, 139 Cal. 559, 73 Pac. 433, treble damages for cutting trees.

91. Newcomb *v.* Butterfield, 8 Johns. (N. Y.) 342, holding that under the statute in New York trespass to school lands must be brought by overseers of the poor, not the supervisors.

92. Edwards *v.* Hill, 11 Ill. 22, penalty for cutting trees.

93. Wagoner *v.* Silva, 139 Cal. 559, 73 Pac. 433 (husband and wife may be joint plaintiffs); Van Deusen *v.* Young, 29 Barb. (N. Y.) 9 [*reversed* on other grounds in 29 N. Y. 9] (holding that remainder-men in fee may join in action for injury to inheritances).

94. Darrill *v.* Dodds, 78 Miss. 912, 30 So. 4.

95. Sprague *v.* Irwin, 27 How. Pr. (N. Y.) 51.

96. Bowen *v.* Fuller, 2 Tyler (Vt.) 85.

97. Pierce *v.* Spring, 15 Mass. 489; Prescott *v.* Tufts, 4 Mass. 146; Miller *v.* Wesson, 58 Miss. 831; Rhemke *v.* Clinton, 2 Utah 230; Guild *v.* Prentis, 83 Vt. 212, 74 Atl. 1115.

In Pennsylvania under the wording of the statute, trover also will lie. O'Reilly *v.* Shadle, 33 Pa. St. 489; Welsh *v.* Anthony, 16 Pa. St. 254.

98. Ellis *v.* Whitlock, 10 Mo. 781; Papin *v.* Ruelle, 2 Mo. 28; Morrison *v.* Bedell, 22 N. H. 234.

99. Wright *v.* Sample, 162 Ala. 222, 50 So. 268; Crawford *v.* Slaton, 133 Ala. 393, 31 So. 940; Higdon *v.* Kennemer, 120 Ala. 193, 24 So. 439; Rogers *v.* Brooks, 99 Ala. 31, 11 So. 753; Janvrin *v.* Scammon, 29 N. H. 280; Morrison *v.* Bedell, 22 N. H. 234; Lott *v.* Leventhal, (N. J. Sup. 1910) 76 Atl. 328; Miller *v.* Stoy, 5 N. J. L. 476; Crane *v.* ——, 1 N. J. L. 53; Cato *v.* Gill, 1 N. J. L. 11; Hoagland Stephens [*cited* in Cato *v.* Gill, 1 N. J. L. 11].

1. Wright *v.* Sample, 162 Ala. 222, 50 So. 268; Crawford *v.* Slaton, 133 Ala. 393, 31

remedy to be pursued, the common-law principle applies that when a statute gives a penalty and provides no remedy, an action of debt is the appropriate remedy because the sum demanded is certain and fixed.[2]

(II) *COMPLAINT.* The declaration or complaint must show that the action was brought under the provisions of the statute relied on,[3] so that defendant may shape his defense accordingly.[4] It must allege all the facts which the statute makes necessary to constitute a cause of action,[5] as that plaintiff was the owner,[6] that the act was done wilfully,[7] the place of its commission,[8] that plaintiff did not consent to the acts complained of,[9] and that defendant had no interest in the thing taken;[10] but for this purpose it is ordinarily held sufficient to describe the cause of action in the language of the statute.[11] There is a conflict of authority as to whether it is necessary to specify the statute on which the action is based. According to some decisions no reference to the statute is necessary provided the facts stated constitute a cause of action within its provisions.[12] Other decisions, however, take the contrary view.[13] If it clearly appears that the action was

So. 940; Higdon *v.* Kennemer, 120 Ala. 193, 24 So. 439.

2. Higdon *v.* Kennemer, 120 Ala. 193, 24 So. 439.

3. Miller *v.* Stoy, 5 N. J. L. 476; Brown *v.* Bristol, 1 Cow. (N. Y.) 176; Newcomb *v.* Butterfield, 8 Johns. (N. Y.) 342; Dunbar Furnace Co. *v.* Fairchild, 121 Pa. St. 563, 15 Atl. 656; Hughes *v.* Stevens, 36 Pa. St. 320; Tommany *v.* Whittaker, 4 Watts (Pa.) 221; Campbell *v.* Finney, 3 Watts (Pa.) 84; Henning *v.* Keiper, 37 Pa. Super. Ct. 488; Montgomery *v.* Edwards, 45 Vt. 75.

If a repealed statute is declared on, the declaration cannot be referred to the existing statute. Hubbell *v.* Rochester, 8 Cow. (N. Y.) 115.

Where damages are claimed under a designated statutory provision, damages for breach of another provision of the statute are not recoverable. Jackson *v.* Gunton, 26 Pa. Super. Ct. 203 [*affirmed* in 218 Pa. St. 275, 67 Atl. 467].

4. Hughes *v.* Stevens, 36 Pa. St. 320.

5. Rogers *v.* Brooks, 99 Ala. 31, 11 So. 753 (wilful cutting of trees, etc.); Whitecraft *v.* Vanderver, 12 Ill. 235 (penalty for cutting trees); Hewitt *v.* Harvey, 46 Mo. 368; Lott *v.* Leventhal, (N. J. Sup. 1910) 76 Atl. 328. And see DAMAGES, 13 Cyc. 178.

For complaint held to allege a cause of action trespass quare clausum and not for statutory penalty see **Floyd** *v.* **Wilson,** 163 Ala. 283, 50 So. 122.

6. Wright *v.* Bennett, 4 Ill. 258, in an action for cutting trees, etc. See also Miller *v.* Stoy, 5 N. J. L. 476.

7. Snelling *v.* Garfield, 114 Mass. 443 (in an action for treble damages for cutting and removing trees, etc.); Yeamans *v.* Nichols, 81 N. Y. Suppl. 500 (unlawfully and wilfully injuring property — allegation that it was "wrongfully" done held insufficient).

8. Miller *v.* Stoy, 5 N. J. L. 476.

9. **Action for penalty for cutting trees.—** Whitecraft *v.* Vanderver, 12 Ill. 235; Hall's Case, 5 Me. 409; Lott *v.* Leventhal, (N. J. Sup. 1910) 76 Atl. 328; Miller *v.* Stoy, 5 N. J. L. 476.

The lack of an averment that the consent of the owner was not obtained is fatal even after verdict. Whitecraft *v.* Vanderver, 12 Ill. 235.

10. In an action for treble damages for cutting trees (Hewitt *v.* Harvey, 46 Mo. 368; Miller *v.* Stoy, 5 N. J. L. 476); or for taking things part of the realty (O'Bannon *v.* St. Louis, etc., R. Co., 106 Mo. App. 316, 80 S. W. 321; Pitt *v.* Daniel, 82 Mo. App. 168).

11. *Alabama.*— Rogers *v.* Brooks, 99 Ala. 31, 11 So. 753.

Illinois.— Gebhart *v.* Adams, 23 Ill. 397, 76 Am. Dec. 702.

Missouri.— Hewitt *v.* Harvey, 46 Mo. 368; Holladay-Klotz Land, etc., Co. *v.* T. J. Moss Tie Co., 79 Mo. App. 543.

New York.— Keiny *v.* Ingraham, 66 Barb. 250; Von Hoffman *v.* Kendall, 17 N. Y. Suppl. 713.

Pennsylvania.— Weiser *v.* Schauble, 1 Leg. Rec. 291.

12. Rogers *v.* Brooks, 99 Ala. 31, 11 So. 753; Hewitt *v.* Harvey, 46 Mo. 368; Holladay-Klotz Land, etc., Co. *v.* T. J. Moss Tie Co., 79 Mo. App. 543; Rockefeller *v.* Lamora, 106 N. Y. App. Div. 345, 94 N. Y. Suppl. 549 [*affirmed* in 186 N. Y. 567, 79 N. E. 1115].

13. Miller *v.* Story, 5 N. J. L. 476; Brown *v.* Bristol, 1 Cow. (N. Y.) 176; Dunbar Furnace Co. *v.* Fairchild, 121 Pa. St. 563, 15 Atl. 656; Hughes *v.* Stevens, 36 Pa. St. 320; Montgomery *v.* Edwards, 45 Vt. 75; Keyes *v.* Prescott, 32 Vt. 86.

What reference sufficient.—According to some decisions it will be sufficient for this purpose that the declaration conclude with an averment that the trespass was contrary to the statute for such cases made and provided, the facts necessary to constitute a cause of action within the statute being alleged. Black *v.* Mace, 66 Me. 49; Dunbar Furnace Co. *v.* Fairchild, 121 Pa. St. 563, 15 Atl. 656; Hughes *v.* Stevens, 36 Pa. St. 320. This, however, would be insufficient in Vermont. Montgomery *v.* Edwards, 45 Vt. 75. But it has been held in that state that a count in trespass for cutting down and carrying away a tree from plaintiff's land, which commences like a count in trespass *quare clausum fregit,* but concludes with an allegation that the trespass is "contrary to the statute in such case made and provided,

based on the statute it is not necessary that the complaint should allege that the act was done contrary to the form of the statute.[14] An allegation of the exact time of cutting is not necessary,[15] nor a description and statement of the timber cut on each tract.[16] But the declaration should set out and distinguish the different classes to which the trees belonged where there are different penalties annexed to the felling of different trees.[17] It is not necessary to negative mere exceptions in the statute,[18] unless under the wording of the statute they form part of plaintiff's cause of action.[19] Nor is plaintiff required specifically to allege that he is entitled to treble damages for the acts complained of.[20]

(III) *ANSWER.* It is not necessary to affirmatively plead that the act of which complaint was made was a casual or involuntary act.[21] This may be shown under a general denial;[22] nor is it necessary to plead that defendant had probable cause to believe that the land trespassed on was his own.[23] But where defendant relies on an implied license to do the acts complained of he should specially plead the facts relied on to create such implied license.[24] If the answer admits the trespass and denies only that it was knowingly and wilfully committed, the admission is sufficient to show that the act complained of was wrongful and unlawful.[25]

(IV) *VARIANCE.* The proofs must conform to the pleadings, and if the complaint alleges a malicious destruction of property it is not supported by evidence of a taking.[26]

d. Evidence — (I) *PRESUMPTIONS AND BURDEN OF PROOF.* The burden of proof is on plaintiff to prove the elements of the trespass, including his title,[27] the wilfulness of the act,[28] and that it was without his consent.[29] The burden of proof of matters of justification is on defendant,[30] such as a right of way,[31] or a

whereby the plaintiff is entitled to recover of the defendant treble the aforesaid value of said tree, &c.," will be construed to be a count for the penalty prescribed by the statute (Comp. St. § 32, p. 550), and not a count in trespass at common law. Keyes *v.* Prescott, 32 Vt. 86.

Amendments.— The complaint may be amended so as to refer specifically to the statute. Jackson *v.* Gunton, 26 Pa. Super. Ct. 203 [*affirmed* in 218 Pa. St. 275, 67 Atl. 467].

14. Whitecraft *v.* Vanderver, 12 Ill. 235; Black *v.* Mace, 66 Me. 49; Hewitt *v.* Harvey, 46 Mo. 368; Holladay-Klotz Land, etc., Co. *v.* T. J. Moss Tie Co., 79 Mo. App. 543.

15. Gebhart *v.* Adams, 23 Ill. 397, 76 Am. Dec. 702, in which it was said that proving the act to have been done on any day after the day first alleged and before the commencement of the suit would be sufficient.

16. Stoneman-Zearing Lumber Co. *v.* McComb, 92 Ark. 297, 122 S. W. 648.

17. Whitecraft *v.* Vanderver, 12 Ill. 235. *Compare* Clark *v.* Collins, 15 N. J. L. 473.

18. Beekman *v.* Chalmers, 1 Cow. (N. Y.) 584 (holding that in an action for multiple damages for cutting and removing trees it is not necessary to negative plaintiff's consent); Snelling *v.* Garfield, 114 Mass. 443 (holding that it is not necessary to negative defendant's good faith).

19. **Double or treble damages for cutting and removing trees, etc.**— Padman *v.* Rhodes, 126 Mich. 434, 85 N. W. 1130; Mishler Lumber Co. *v.* Craig, 112 Mo. App. 454, 87 S. W. 41; O'Bannon *v.* St. Louis, etc., R. Co., 111 Mo. App. 202, 85 S. W. 603.

20. Black *v.* Mace, 66 Me. 49; Snelling *v.* Garfield, 114 Mass. 443. And see Worster *v.* Proprietors Canal Bridge, 16 Pick. (Mass.) 541; Clark *v.* Worthington, 12 Pick. (Mass.) 571. *Contra*, Neff *v.* Pennoyer, 17 Fed. Cas. No. 10,085, 3 Sawy. 495.

21. Osburn *v.* Lovell, 36 Mich. 246; Van Siclen *v.* Jamaica Electric Light Co., 45 N. Y. App. Div. 1, 61 N. Y. Suppl. 210 [*affirmed* in 168 N. Y. 650, 61 N. E. 1135]. And see Humes *v.* Proctor, 73 Hun (N. Y.) 265, 26 N. Y. Suppl. 315. *Contra*, Neff *v.* Pennoyer, 17 Fed. Cas. No. 10,085, 3 Sawy. 495.

22. Osburn *v.* Lovell, 36 Mich. 246.

23. Walther *v.* Warner, 26 Mo. 143.

24. Jernigan *v.* Clark, 134 Ala. 313, 32 So. 686; Turner Coal Co. *v.* Glover, 101 Ala. 289, 13 So. 478.

25. Wagoner *v.* Silva, 139 Cal. 559, 73 Pac. 433.

26. Miller *v.* Clark, 78 Mo. App. 447.

27. Brasher *v.* Shelby Iron Co., 144 Ala. 659, 40 So. 80, penalty for cutting trees.

28. Shelby Iron Co. *v.* Ridley, 135 Ala. 513, 33 So. 331, penalty for cutting trees.

29. **Action for cutting trees.**— Farrow *v.* Nashville, etc., R. Co., 109 Ala. 448, 20 So. 303; Rogers *v.* Brooks, 105 Ala. 549, 17 So. 97.

Treble damages for cutting and removing trees.— Padman *v.* Rhodes, 126 Mich. 434, 85 N. W. 1130.

30. Chilton *v.* Missouri Lumber, etc., Co., 144 Mo. App. 315, 127 S. W. 941.

31. Farrow *v.* Nashville, etc., R. Co., 109 Ala. 448, 20 So. 303, penalty for cutting trees.

right of a third person under whom he acted.[32] It has been held that the burden is on defendant to show that the act was done by mistake,[33] or that defendant had exercised reasonable care;[34] and where the statute provides that where certain facts appear the liability shall be limited or defeated, the burden of showing them is on defendant, as probable cause,[35] that the act was done casually or involuntarily,[36] or under *bona fide* claim of right.[37] Where defendant lost his title by fraud, the burden of proof is on plaintiff to show that he is a *bona fide* purchaser.[38]

(II) *ADMISSIBILITY.* Title may be shown by parol evidence, if not objected to.[39] On the question of possession and abandonment of a right of way by a railroad, the fact that there was a continuous road-bed embracing the *locus* is admissible.[40] To show consent, knowledge by plaintiff of the act complained of is admissible,[41] and so is his failure to object.[42] To show value, the price in an adjoining town may be given,[43] and the value of stumpage on the land,[44] but not the use made of a tree which is not shown to be the one cut.[45] Value of standing trees may be shown by their market value, as lumber, at the mill where it was sawed, less the cost of the intermediate steps.[46] Accompanying acts are admissible to show the character of the trespass,[47] and to show probable cause to believe the land his own, a *bona fide* claim of right is admissible,[48] or a license from a supposed agent to show good faith,[49] and to rebut good faith evidence of fraud is admissible.[50] Evidence of a previous controversy as to cutting of trees on other lands is properly excluded as irrelevant,[51] as is also evidence of a license to cut other trees.[52] A recital of payment of value in a deed from a third person is not evidence of its payment as against the true owner of the land.[53] Evidence of title to realty is irrelevant in an action for double damages for malicious injury to personalty thereon, and therefore inadmissible.[54] A notice forbidding the trespass is admissible where given by the real party in interest.[55] The act may be proved before connecting defendant with it where plaintiff undertakes to make such proof thereafter.[56]

32. Ladd *v.* Shattock, 90 Ala. 134, 7 So. 764, cutting and removing trees, etc.

33. Davis *v.* Cotey, 70 Vt. 120, 39 Atl. 628, treble damages for cutting and removing trees.

34. Keirn *v.* Warfield, 60 Miss. 799, penalty for cutting and removing trees, etc.

35. **Treble damages for cutting and removing trees, etc.**— Henry *v.* Lowe, 73 Mo. 96; Walther *v.* Warner, 26 Mo. 143; Avitt *v.* Farrell, 68 Mo. App. 665; Humes *v.* Proctor, 151 N. Y. 520, 45 N. E. 948; Van Siclen *v.* Jamaica Electric Light Co., 45 N. Y. App. Div. 1, 61 N. Y. Suppl. 210 [*affirmed* in 168 N. Y. 650, 61 N. E. 1135].

36. **Treble damages for cutting and removing trees.**— Hart *v.* Doyle, 128 Mich. 257, 87 N. W. 219; Michigan Land, etc., Co. *v.* Deer Lake Co., 60 Mich. 143, 27 N. W. 10, 1 Am. St. Rep. 491; Van Siclen *v.* Jamaica Electric Light Co., 45 N. Y. App. Div. 1, 61 N. Y. Suppl. 210 [*affirmed* in 168 N. Y. 650, 61 N. E. 1135].

37. **Treble damages for cutting and removing trees.**— Davis *v.* Cotey, 70 Vt. 120, 39 Atl. 628.

38. Shelby Iron Co. *v.* Ridley, 135 Ala. 513, 33 So. 331.

39. Caris *v.* Nimmons, 92 Mo. App. 66, treble damages for cutting trees.

40. Farrow *v.* Nashville, etc., R. Co., 109 Ala. 448, 20 So. 303, penalty for cutting trees.

41. Farrow *v.* Nashville, etc., R. Co., 109 Ala. 448, 20 So. 303 (penalty for cutting trees); Dunbar Furnace Co. *v.* Fairchild, 121 Pa. St. 563, 15 Atl. 656 (treble damages for cutting trees).

42. Rogers *v.* Brooks, 105 Ala. 549, 17 So. 97, penalty for cutting trees.

43. Davis *v.* Cotey, 70 Vt. 120, 39 Atl. 628, multiple damages for cutting trees.

44. Wagoner *v.* Silva, 139 Cal. 559, 73 Pac. 433, multiple damages for cutting and removing trees.

45. Hathaway *v.* Goslant, 77 Vt. 199, 59 Atl. 835, multiple damages for cutting trees.

46. **Action for cutting trees.**— Skeels *v.* Starett, 57 Mich. 350, 24 N. W. 98.

47. Louisville, etc., R. Co. *v.* Hill, 115 Ala. 334, 22 So. 163, penalty for cutting trees.

48. Pitt *v.* Daniel, 82 Mo. App. 168 (multiple damages for cutting trees); Brown *v.* Carter, 52 Mo. 46.

49. **Action for cutting timber.**— Clark *v.* Field, 42 Mich. 342, 4 N. W. 19.

50. **Penalty for cutting trees.**— White *v.* Farris, 124 Ala. 461, 27 So. 259.

51. Jernigan *v.* Clark, 134 Ala. 313, 32 So. 686, penalty for cutting trees.

52. Jernigan *v.* Clark, 134 Ala. 313, 32 So. 686, penalty for cutting trees.

53. Shelby Iron Co. *v.* Ridley, 135 Ala. 513, 33 So. 331, penalty for cutting and removing trees.

54. Herman *v.* Owen, 42 Mo. App. 387.

55. Veeder *v.* Cooley, 2 Hun (N. Y.) 74.

56. Louisville, etc., R. Co. *v.* Hill, 115 Ala. 334, 22 So. 163, penalty for cutting trees.

(III) *WEIGHT AND SUFFICIENCY.* The proof need not be beyond a reasonable doubt.[57] Possession under color and claim of title is sufficient *prima facie* evidence of title,[58] which is not rebutted by proof of title in another forty years before,[59] and putting in evidence a deed to defendant of all certain land except a portion belonging to plaintiff admits plaintiff's title.[60] But a mere deed without evidence of possession in either grantor or grantee is not sufficient proof of plaintiff's title,[61] although the claim of title runs back to the state.[62] Wilfulness is sufficiently proved by showing defendant went out of his way to do the act which was of no benefit to him;[63] and under statutes placing the burden of proof of mistake or *bona fide* claim of right on defendant, the act alone is sufficient *prima facie* proof of the cause of action.[64] Admissions by a partner in a matter pertinent to the business are sufficient evidence against the other members of the firm.[65] A prohibition in a lease is *prima facie* evidence of non-consent.[66]

e. Damages — (I) *WHAT IS TO BE MULTIPLIED.* Where the statute gives treble the damage done, the damage to the land is trebled, not merely the value of timber or other thing taken,[67] and the value of the land with and without the trees is a proper test;[68] but damages for trespasses other than the injury to the land,[69] purely consequential damages,[70] or indirect injury cannot be trebled.[71] Where the statute gives treble the value of the thing severed such value only can be trebled,[72] and the market value of the thing severed is the measure of damages to be multiplied.[73] Interest will not be allowed on the treble damages,[74] nor can interest on the single damages be trebled.[75] In trespass for cutting trees

57. Louisville, etc., R. Co. *v.* Hill, 115 Ala. 334, 22 So. 163, penalty for cutting trees.

58. Action for cutting trees.— McCleary *v.* Anthony, 54 Miss. 708; Ware *v.* Collins, 35 Miss. 223, 72 Am. Dec. 122; Gerhardt *v.* Swaty, 57 Wis. 24, 14 N. W. 851.

Penalty for cutting and removing trees, etc.— Higdon *v.* Kennemer, 112 Ala. 351, 20 So. 470; Abney *v.* Austin, 6 Ill. App. 49; Darrill *v.* Dodds, 78 Miss. 912, 30 So. 4.

Treble damages for forcible disseizin.— Willard *v.* Warren, 17 Wend. (N. Y.) 257.

59. Higdon *v.* Kennemer, 120 Ala. 193, 24 So. 439, penalty for cutting trees.

60. Humes *v.* Proctor, 151 N. Y. 520, 45 N. E. 948, treble damages for cutting trees.

61. Behymer *v.* Odell, 45 Ill. App. 616, penalty for cutting trees.

62. Darrill *v.* Dodds, 78 Miss. 912, 30 So. 4.

63. Wilson *v.* Gunning, 80 Iowa 331, 45 N. W. 920, treble damages for cutting and removal of trees, etc.

64. Davis *v.* Cotey, 70 Vt. 120, 39 Atl. 628, treble damages for cutting trees.

65. Caris *v.* Nimmons, 92 Mo. App. 66, multiple damages for cutting and removing trees, etc.

66. Rogers *v.* Brooks, 105 Ala. 549, 17 So. 97, penalty for cutting trees.

67. Action for cutting trees.— Skeels *v.* Starrett, 57 Mich. 350, 24 N. W. 98; Achey *v.* Hull, 7 Mich. 423; McCruden *v.* Rochester R. Co., 5 Misc. (N. Y.) 59, 25 N. Y. Suppl. 114 [*affirmed* in 77 Hun 609, 28 N. Y. Suppl. 1135 (*affirmed* in 151 N. Y. 623, 45 N. E. 1133)]; King *v.* Havens, 25 Wend. (N. Y.) 420.

68. Van Deusen *v.* Young, 29 Barb. (N. Y.) 9 [*reversed* on other grounds in 29 N. Y. 9].

Enhanced value by labor.— The value to be trebled does not include the additional value given to the timber cut by its being manufactured into shingles by the trespasser. Oregon, etc., R. Co. *v.* Jackson, 21 Oreg. 360, 28 Pac. 74.

69. Thayer *v.* Sherlock, 4 Mich. 173; Kirchner *v.* New Home Sewing-Mach. Co., 16 N. Y. Suppl. 761. Or other injury not embraced in the statute. Van Deusen *v.* Young, 29 N. Y. 9, per Mullin, J.

70. Atchison, etc., R. Co. *v.* Grant, 75 Kan. 344, 89 Pac. 658, holding that removing gravel does not authorize a recovery of treble damages for the consequent depreciation in value of the farm.

71. Atchison, etc., R. Co. *v.* Grant, 75 Kan. 344, 89 Pac. 658.

72. Removing gravel.—Atchison, etc., R. Co. *v.* Grant, 75 Kan. 344, 89 Pac. 658; Cox *v.* St. Louis, etc., R. Co., 111 Mo. App. 394, 85 S. W. 989.

Cutting trees.— Michigan Land, etc., Co. *v.* Deer Lake Co., 60 Mich. 143, 27 N. W. 10, 1 Am. St. Rep. 491 (holding that it is not necessary to a recovery of the value of all the trees cut that all be removed if plaintiff did not refuse to permit a removal); Herron *v.* Hornback, 24 Mo. 492; Labeaunie *v.* Woolfolk, 18 Mo. 514.

Destroying part of realty.— Shrewsbury *v.* Bawtlitz, 57 Mo. 414; Ewing *v.* Leaton, 17 Mo. 465.

73. Arn *v.* Matthews, 39 Kan. 272, 18 Pac. 65, cutting trees.

74. McCloskey *v.* Powell, 138 Pa. St. 383, 21 Atl. 148, 150; McCloskey *v.* Powell, 8 Pa. Co. Ct. 22. *Contra*, Gates *v.* Comstock, 113 Mich. 127, 71 N. W. 515.

75. Dunbar Furnace Co. *v.* Fairchild, 121 Pa. St. 563, 15 Atl. 656, cutting trees.

the statutory penalty is not the measure of damages where defendant pleaded title in a prior action by plaintiff for the penalty.[76]

(II) *How the Multiplication Is to Be Made.* The usual practice is for the jury to find single damages and for the court to treble them,[77] and the court must do so [78] in the absence of an affirmative finding of the excuse given by the statute, although it appears in the evidence.[79] The upper court will treble the damages on appeal if the trial court does not.[80] But in Missouri the doctrine is held that the jury can only find the fact of trespass and the court determines whether the evidence warrants the increased damages; [81] and in Kansas it is held that the treble damages must be assessed by the jury; [82] and the courts of Massachusetts and Pennsylvania hold that either method is proper.[83] Nevertheless, the court can only treble the damages where it clearly appears that the court gave only single damages.[84]

(III) *Recovery of Actual Damages.* Single damages can be recovered where such are shown, but plaintiff does not bring himself within the terms of the statute allowing a penalty or enhanced damages.[85]

f. Trial — (I) *Instructions.* The rules applicable to instructions generally [86] apply in actions of the character under consideration. Thus instructions which have a tendency to mislead the jury are erroneous,[87] and when requested are properly refused.[88] An instruction is properly refused if there are no facts in evidence to which it relates.[89] A party cannot complain of an instruction which on the undisputed facts does not prejudice him.[90]

76. Thompson *v.* Burdsall, 4 N. J. L. 170.

77. Black *v.* Mace, 66 Me. 49; George *v.* Rook, 7 Mo. 149; Withington *v.* Hilderbrand, 1 Mo. 280; Nixon *v.* Stillwell, 52 Hun (N. Y.) 353, 5 N. Y. Suppl. 248; Starkweather *v.* Quigley, 7 Hun (N. Y.) 26; Marchand *v.* Haber, 16 Misc. (N. Y.) 322, 37 N. Y. Suppl. 952; Loewenberg *v.* Rosenthal, 18 Oreg. 178, 22 Pac. 601.

78. Yeamans *v.* Nichols, 81 N. Y. Suppl. 500; King *v.* Havens, 25 Wend. (N. Y.) 420.

79. Humes *v.* Proctor, 73 Hun (N. Y.) 265, 26 N. Y. Suppl. 315 [*affirmed* in 151 N. Y. 520, 45 N. E. 948].

80. King *v.* Havens, 25 Wend. (N. Y.) 420.

81. Wood *v.* St. Louis, etc., R. Co., 58 Mo. 109; Walther *v.* Warner, 26 Mo. 143; Chilton *v.* Missouri Lumber, etc., Co., 144 Mo. App. 315, 127 S. W. 941; Pitt *v.* Daniel, 82 Mo. App. 168.

Hearing further evidence after verdict.— Where, in trespass to recover treble damages for cutting timber, as authorized by Rev. St. (1899), § 4575 (Annot. St. (1906), p. 2487), it was the duty of the court to pass on the issue of probable cause in ascertaining whether the damages should be trebled, it was proper for the court, after verdict for single damages, to hear further competent evidence bearing on such issue. Chilton *v.* Missouri Lumber, etc., Co., 144 Mo. App. 315, 127 S. W. 941.

82. Chicago, etc., R. Co. *v.* Watkins, 43 Kan. 50, 22 Pac. 985.

83. Snelling *v.* Garfield, 114 Mass. 443; Hughes *v.* Stevens, 36 Pa. St. 320; Welsh *v.* Anthony, 16 Pa. St. 254; Henning *v.* Keiper, 37 Pa. Super. Ct. 488.

84. Robbins *v.* Farwell, 193 Pa. St. 37, 44 Atl. 260; Clark *v.* Sargeant, 112 Pa. St. 16, 5 Atl. 44; Henning *v.* Keiper, 37 Pa. Super. Ct. 488.

85. Malicious injury to property.— Scott *v.* Trebilcock, 21 S. D. 333, 112 N. W. 847.

Treble damages for cutting and removing trees, etc.— Clark *v.* Field, 42 Mich. 342, 4 N. W. 19; Holliday *v.* Jackson, 21 Mo. App. 660; Dubois *v.* Beaver, 25 N. Y. 123, 82 Am. Dec. 326; Starkweather *v.* Quigley, 7 Hun (N. Y.) 26; Von Hoffman *v.* Kendall, 17 N. Y. Suppl. 713; Gardner *v.* Lovegren, 27 Wash. 356, 67 Pac. 615; Cohn *v.* Neeves, 40 Wis. 393.

Treble damages for trespass.— Clark *v.* Field, 42 Mich. 342, 4 N. W. 19.

86. See Trial.

87. Glenn *v.* Adams, 129 Ala. 189, 29 So. 836 (ignoring question of good faith); White *v.* Farris, 124 Ala. 461, 27 So. 259.

88. Morris *v.* West, 101 Ala. 534, 14 So. 364.

89. Jernigan *v.* Clark, 134 Ala. 313, 32 So. 686 (holding that in trespass for a penalty for cutting trees where it does not appear that the cutting was on an old road or to reopen it, an instruction that if defendant had permission to haul across the land and it was necessary to cut the trees in order to reopen an old road the jury must find for defendant is properly refused); Dunbar Furnace Co. *v.* Fairchild, 121 Pa. St. 563, 15 Atl. 656 (holding that where the *bona fides* of defendant is fairly impeachable under his own evidence of title, it is not error to refuse to charge that if defendant cut and removed the timber under a *bona fide* claim of right, there could not be a recovery of treble damages).

90. Miller *v.* Wellman, 75 Mich. 353, 42 N. W. 843, holding that plaintiff cannot complain of failure to instruct that he had

(II) *Questions For the Jury.* Questions of fact are for the jury,[91] and it is for the jury to determine whether the trespass was of a nature to warrant enhanced damages,[92] or whether the trespass was wilful or careless, so as to subject defendant to a penalty;[93] and in case of a default the jury must determine the amount of the damages.[94] Where the testimony is conflicting, the case will not be taken from the jury.[95]

(III) *Verdict.* A general verdict of guilty authorizes a judgment for the multiple damages given by the statute,[96] except where it does not necessarily apply solely to the issue under the statute,[97] and in jurisdictions where the jury has the right to multiply the damages a general verdict is held to include them[98] unless the record shows affirmatively that single damages only were given.[99]

g. The Judgment. In an action for a penalty, the judgment must be for some multiple of it.[1]

h. Costs. The general statute as to costs applies if there is no special provision in the statute under which the action is brought.[2] In general, it is held that as damages are given only to the owner, the action relates to realty, and plaintiff is entitled to costs regardless of the amount of the recovery;[3] but there are cases holding that plaintiff must pay costs if the recovery is less than a certain sum;[4] but in such case the damages as multiplied, not the single damages, are

a right to maintain the action if in possession where it appears that defendant is in possession.

91. **Possession.**— Farrow *v.* Nashville, etc., R. Co., 109 Ala. 448, 20 So. 303.

Defendant's good faith.— Bradford *v.* Boozer, 139 Ala. 502, 36 So. 716; David *v.* Correll, 68 Ill. App. 123.

Knowledge of the trespass where defendant is a purchaser for value. Holladay-Klotz Land, etc., Co. *v.* T. J. Moss Tie Co., 79 Mo. App. 543.

92. **Treble damages for cutting and removing trees, etc.**— Starkweather *v.* Quigley, 7 Hun (N. Y.) 26; King *v.* Havens, 25 Wend. (N. Y.) 420.

But in Missouri the jury finds only the fact of trespass and the judge determines whether it is proper to multiply the damages. Wood *v.* St. Louis, etc., R. Co., 58 Mo. 109 (treble damages for cutting and removing trees); Walther *v.* Warner, 26 Mo. 143 (treble damages for cutting and removing trees); Rousey *v.* Wood, 57 Mo. App. 650 (treble damages for trespass on realty).

93. **Penalty for cutting trees.**— Cumberland Tel., etc., Co. *v.* Odeneal, (Miss. 1899) 26 So. 966; Clay *v.* Postal Tel.-Cable Co., 70 Miss. 406, 11 So. 658.

94. Byrne *v.* Haines, Minor (Ala.) 286, penalty for cutting timber.

95. Agnew *v.* Albert Lewis Lumber, etc., Co., 218 Pa. St. 505, 67 Atl. 779.

96. Withington *v.* Young, 4 Mo. 564, action for cutting and removing trees, etc.

97. **Where there is also a count for common-law trespass,** a general verdict cannot be multiplied. Cooper *v.* Maupin, 6 Mo. 624, 35 Am. Dec. 456; Benton *v.* Dale, 1 Cow. (N. Y.) 160, although the trial judge certifies that the evidence applied on the statutory count. And it is error in such case for the court to amend the verdict by applying it to the statutory count. Russell *v.* Myers, 32 Mich. 522. The rule has been applied in actions for treble damages for cutting and removing trees, etc. Shrewsbury *v.* Bawtlitz, 57 Mo. 414; Ewing *v.* Leaton, 17 Mo. 465; Lowe *v.* Harrison, 8 Mo. 350; Mooers *v.* Allen, 2 Wend. (N. Y.) 247.

Where the statute allows the value of the thing severed only to be multiplied a verdict awarding general damages cannot be multiplied (Shrewsbury *v.* Bawtlitz, 57 Mo. 414; Labeaume *v.* Woolfolk, 18 Mo. 514; Ewing *v.* Leaton, 17 Mo. 465); unless the general damages were limited to the value of the thing severed either by the judge's instructions (Henry *v.* Lowe, 73 Mo. 96, treble damages for injury to realty; Bell *v.* Clark, 30 Mo. App. 224, treble damages for cutting and removing trees, etc.) or by the nature of the trespass proved (Beekman *v.* Chalmers, 1 Cow. (N. Y.) 584, treble damages for cutting and removing trees, etc.).

Where the general verdict included trees cut both before and after the revocation of a license to cut, damages cannot be multiplied (Smith *v.* Morse, 70 N. Y. App. Div. 318, 75 N. Y. Suppl. 126); nor where the statute allows general damages to be trebled but the declaration included a claim for conversion of personalty (Yeamans *v.* Nichols, 81 N. Y. Suppl. 500).

98. **Statutory trespass generally.**—Clark *v.* Sargeant, 112 Pa. St. 16, 5 Atl. 44; Hughes *v.* Stevens, 36 Pa. St. 320.

Treble damages for cutting and removing trees, etc.— Tait *v.* Thomas, 22 Minn. 537; Livingston *v.* Platner, 1 Cow. (N. Y.) 175.

99. Kulp *v.* Bird, 5 Pa. Cas. 541, 8 Atl. 618, multiple damages for cutting and removing trees, etc.

1. Behymer *v.* Odell, 31 Ill. App. 350.

2. Dolahanty *v.* Lucey, 101 Mich. 113, 59 N. W. 415.

3. Crowell *v.* Smith, 35 Hun (N. Y.) 182 [*affirmed* in 102 N. Y. 730]; Jermain *v.* Booth, 1 Den. (N. Y.) 639.

4. Hasbrouck *v.* Schoonmaker, 9 Cow. (N. Y.) 692, treble damages for cutting trees.

the test.[5] Where, in pursuance of a statute, a judgment for treble damages is rendered upon a verdict ascertaining the actual damages sustained, no costs will be taxed against the successful party on account of a tender made by the other, if the tender was less than the amount of the judgment. It is not sufficient that it was as great as the verdict.[6]

i. Appeal and Error. When the pleadings do not appear from the record it will be presumed that the general issue was pleaded.[7] A party cannot complain of errors in his own favor.[8] Where the trial court has trebled the damages erroneously, judgment will be entered on appeal for the damages given by the jury,[9] and so also where the record does not disclose a case for trebling.[10]

II. CRIMINAL TRESPASS.[11]

A. At Common Law — 1. In General. No trespass to property is a crime at common law unless it is accompanied by or tends to create a breach of the peace.[12] This is so, although the act be committed forcibly,[13] wilfully,[14] or maliciously.[15] Something more must be done than what amounts to a mere civil trespass, expressed by the terms *vi et armis*. The peace must be actually broken or the act complained of must directly and manifestly tend to it, as being done in the presence of the owner, to his terror or against his will.[16]

2. To Personalty. Forcible trespass to personalty differs from robbery in that it lacks an *animus furandi*.[17] The taking of personalty from the direct possession of the owner by actual force is a forcible trespass,[18] and there is no liability in the absence of actual force,[19] except where there is a display of force which intimidates the person in possession,[20] or is calculated to alarm or intimidate,[21] or tends to a breach of the peace.[22] The taking must be from the actual presence of the prosecutor,[23] but need not be expressly forbidden by him.[24]

5. Keiny *v.* Ingraham, 66 Barb. (N. Y.) 250.

6. Henry *v.* Lowe, 73 Mo. 96.

7. Bradford *v.* Boozer, 139 Ala. 502, 36 So. 716, penalty for cutting trees.

8. Defendant cannot complain where plaintiff is given nominal damages instead of the penalty the statute allowed. Rockefeller *v.* Lamora, 106 N. Y. App. Div. 345, 94 N. Y. Suppl. 549 [*affirmed* in 186 N. Y. 567, 79 N. E. 1115].

9. Scott *v.* Trebilcock, 21 S. D. 333, 112 N. W. 847.

10. Skeels *v.* Starrett, 57 Mich. 350, 24 N. W. 98.

11. **Breach of the peace by trespass** see BREACH OF THE PEACE, 5 Cyc. 1023 *et seq.*

Malicious mischief see MALICIOUS MISCHIEF, 25 Cyc. 1671 *et seq.*

On realty see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1113 *et seq.*

Trespass to the person see ASSAULT AND BATTERY, 3 Cyc. 1014 *et seq.*

12. *Arkansas.*— Cole *v.* State, 61 Ark. 405, 33 S. W. 529, driving away horse without knowledge or consent of owner.

North Carolina.— State *v.* Phipps, 32 N. C. 17 (shooting a dog in owner's absence); State *v.* Love, 19 N. C. 267; State *v.* Mills, 13 N. C. 420; State *v.* Flowers, 6 N. C. 225.

Tennessee.— State *v.* Watkins, 4 Humphr. 256; State *v.* Farnsworth, 10 Yerg. 261.

Texas.— Illies *v.* Knight, 3 Tex. 312.

Virginia.— Com. *v.* Powell, 8 Leigh 719.

See 46 Cent. Dig. tit. "Trespass," § 166.

13. State *v.* Phipps, 32 N. C. 17; State *v.* Watkins, 4 Humphr. (Tenn.) 256; State *v.* Farnsworth, 10 Yerg. (Tenn.) 261; Illies *v.* Knight, 3 Tex. 312; State *v.* Wheeler, 3 Vt. 344, 23 Am. Dec. 212.

14. State *v.* Tincher, 57 Kan. 136, 45 Pac. 91; Com. *v.* Powell, 8 Leigh (Va.) 719, to realty.

15. State *v.* Tincher, 57 Kan. 136, 45 Pac. 91; Kilpatrick *v.* People, 5 Den. (N. Y.) 277.

16. State *v.* Phipps, 32 N. C. 17.

17. State *v.* Sowls, 61 N. C. 151.

18. State *v.* Trexler, 4 N. C. 188, 6 Am. Dec. 558.

19. State *v.* Flowers, 4 N. C. 13, 6 N. C. 225.

20. State *v.* Gray, 109 N. C. 790, 14 S. E. 55; State *v.* Barefoot, 89 N. C. 565.

21. State *v.* Barefoot, 89 N. C. 565 (taking by virtue of a false warrant is a forcible trespass); State *v.* Pearman, 61 N. C. 371; State *v.* Ray, 32 N. C. 39; State *v.* Armfield, 27 N. C. 207.

22. State *v.* Pearman, 61 N. C. 371; State *v.* Ray, 32 N. C. 39. As by a multitude of people. State *v.* McAdden, 71 N. C. 207; State *v.* Simpson, 12 N. C. 504.

23. State *v.* Love, 19 N. C. 267; State *v.* McDowell, 8 N. C. 449. Taking prosecutrix' slave who was five hundred yards away in custody of another is not forcible trespass to prosecutrix. State *v.* McDowell, *supra.*

Force used in repelling recaption.— There is no liability if prosecutor was not present when the goods were taken, but his attempt to retake was repulsed with force. State *v.* Flowers, 6 N. C. 225.

24. State *v.* Webster, 121 N. C. 586, 28 S. E. 254; State *v.* Barefoot, 89 N. C. 565.

3. To Realty. Questions relating to criminal liability for trespasses to realty are considered elsewhere in this work.[25]

B. Under Statutes — 1. In General. By statutes in various jurisdictions many civil trespasses have been made criminal.[26] These statutes are not intended to redress private wrongs or determine title to property.[27] The purpose is to protect the actual possession of real estate against unlawful and forcible invasion and to remove occasion for acts of violence and breach of the peace.[28] The term "trespass" as used in these statutes is not in general used in its broadest sense.[29]

2. Elements of the Offense — a. The Act — (I) *In General.* The act must involve a common-law trespass.[30] It is not the purpose of the statutes to make that a criminal trespass which would not be a civil trespass.[31]

(II) *Cutting and Removal of Trees.* Under statutes making it an offense to cut timber on the land of another, actual cutting is necessary,[32] and the injury must be substantial.[33] The cutting of a number of trees at one time is a single offense,[34] although the trees are not contiguous.[35] Either cutting or carrying away is an offense under some of the statutes,[36] but if the cutting and carrying away are all part of a single transaction the offense is a single one.[37] Where the statute prohibits merely the cutting of timber asportation is not necessary to constitute the offense.[38] A wrongful entry is not necessary to constitute the offense.[39] It has been held that all standing or growing trees are "timber" within statutes prohibiting cutting of "timber" on lands of another,[40] although there is authority for the position that wood suitable for fuel only is not "timber" within the meaning of the statutes.[41] Oak and hickory trees standing on the border of a public highway and on the land of an owner abutting on the highway are "shade trees" within a statute punishing the cutting down of "shade trees."[42]

(III) *Trespass on Inclosed or Cultivated Lands.* Under statutes making it an offense to trespass on inclosed or cultivated land there can be no

25. See Forcible Entry and Detainer, 13 Cyc. 1108.

26. See the following sections of this chapter.

Repeal of statutes.—The act of 1838 (Mansfield Dig. § 1658), as to taking wood from another's land, is not repealed by the act of March 17, 1883 (Mansfield Dig. § 1659), being neither inconsistent with it nor professing to revise the whole law on the point. State *v.* Malone, 46 Ark. 140. Fla. Rev. St. § 2516, has not been repealed. Long *v.* State, 42 Fla. 509, 28 So. 775. Pamphl. Laws 352 as to wilful trespass are repealed by Pamphl. Laws 82. Com. *v.* Burns, 17 Lanc. L. Rev. (Pa.) 171. Ballinger Annot. Codes & St. § 7141, provides an exclusive punishment for cutting down and removing trees and to that extent repeals §§ 7108, 7109, defining larceny. Tacoma Mill Co. *v.* Perry, 32 Wash. 650, 73 Pac. 801.

Proceedings under a repealed statute are illegal. Com. *v.* Burns, 17 Lanc. L. Rev. (Pa.) 171.

27. Watson *v.* State, 63 Ala. 19; Hughes *v.* State, 103 Ind. 344, 2 N. E. 956; Dawson *v.* State, 52 Ind. 478; Windsor *v.* State, 13 Ind. 375; Knight *v.* State, 64 Miss. 802, 2 So. 252; State *v.* House, 71 N. C. 518; Deaderick *v.* State, 122 Tenn. 222, 122 S. W. 975; Dotson *v.* State, 6 Coldw. (Tenn.) 545.

28. Dotson *v.* State, 6 Coldw. (Tenn.) 545.

29. See cases cited *infra*, this note.

Thus it has been held that passing a counterfeit coin is not a "trespass" under a statute requiring the prosecutor's name to be indorsed on indictments for "trespass" (Gabe *v.* State, 6 Ark. 540); nor libel under a statute making prosecutor liable for costs of a prosecution for "trespass" (Cowan *v.* Jones, 79 Mo. App. 222).

30. State *v.* Hunnerwardle, 44 Mo. App. 471; State *v.* McCracken, 118 N. C. 1240, 24 S. E. 530 (removing a fence); State *v.* Reynolds, 95 N. C. 616; State *v.* Watson, 86 N. C. 626; State *v.* Williams, 44 N. C. 197; Dotson *v.* State, 6 Coldw. (Tenn.) 545; State *v.* Johnson, 7 Wyo. 512, 54 Pac. 502.

31. State *v.* Hunnerwardle, 44 Mo. App. 471.

32. Employing one to cut who does not is not enough. Com. *v.* Bechtel, 4 Pa. L. J. Rep. 306.

33. State *v.* Towle, 62 N. H. 373, slight abrasion insufficient.

34. State *v.* Moultrieville, Rice (S. C.) 158.

35. State *v.* Paul, 81 Iowa 596, 47 N. W. 773.

36. State *v.* McConkey, 20 Iowa 574.

37. State *v.* Paul, 81 Iowa 596, 47 N. W. 773; Com. *v.* Searls, 3 Ky. L. Rep. 394.

38. Johnson *v.* State, 61 Ala. 9.

39. Tufts *v.* State, 41 Fla. 663, 27 So. 218.

40. Brown *v.* State, 100 Ala. 92, 14 So. 761.

41. Wilson *v.* State, 17 Tex. App. 393.

42. Russellville Home Tel. Co. *v.* Com., 109 S. W. 340, 33 Ky. L. Rep. 132.

conviction for a trespass committed on open or uncultivated land.[43] An inclosure is sufficient, although it incloses fields owned by one other than prosecutor,[44] or is out of repair,[45] or is not a "lawful fence" under the fencing laws;[46] and any barrier sufficient to protect the land from depredation is a sufficient inclosure, whether natural or artificial,[47] except an artificial barrier placed there for a purpose other than that of inclosing.[48] If cultivation is necessary by the terms of the statute the state of cultivation must have existed before the trespass.[49] But it is not necessary that a crop be growing at the time.[50]

(IV) *TRESPASS AFTER NOTICE OR WARNING.* Unlawful entry after being forbidden is the gravamen of the charge.[51] The word "premises" as used in the statutes prohibiting entry after warning means any real estate, and is not limited to the curtilage of a dwelling-house.[52] The statutes have no application to customary or private ways on land leading to highways from property on which the owner had built tenement houses to which the only access was over such ways.[53] The notice given must be actual notice,[54] and must be perfectly clear and explicit.[55] The notice must be given by the person in possession[56] or his agent[57]

43. Wiggins *v.* State, 119 Ga. 216, 46 S. E. 86.

44. State *v.* Sparrow, 52 Mo. App. 374, unlawful hunting.

45. State *v.* Sparrow, 52 Mo. App. 374 (unlawful hunting); Haynie *v.* State, 45 Tex. Cr. 204, 75 S. W. 24 (gathering nuts on inclosed lands).

46. State *v.* Sparrow, 52 Mo. App. 374.

47. Haynie *v.* State, 45 Tex. Cr. 204, 75 S. W. 24 (mill-dam); Daley *v.* State, 40 Tex. Cr. 101, 48 S. W. 515 (stream).

Cultivation.—The lands if inclosed need not be cultivated. Daley *v.* State, 40 Tex. Cr. 101, 48 S. W. 515.

48. Daniels *v.* State, 91 Ga. 1, 16 S. E. 97, lumber accidentally so piled as to form a barrier.

49. Wiggins *v.* State, 119 Ga. 216, 46 S. E. 86.

50. Bryce *v.* State, 113 Ga. 705, 39 S. E. 282.

51. Beggs *v.* State, 122 Ind. 54, 23 N. E. 693.

52. Wright *v.* State, 136 Ala. 139, 34 So. 233; Sandy *v.* State, 60 Ala. 18.

53. Com. *v.* Burford, 225 Pa. St. 93, 73 Atl. 1064 [*affirming* 38 Pa. Super. Ct. 201] (in which it was held, applying this principle, that a tradesman using such ways to deliver goods to the house of one of the tenants was not liable to the penalty imposed as for a trespass on posted land); Com. *v.* Shapiro, 41 Pa. Super. Ct. 96 (which makes the same application of the principle but holds that such tradesman is amenable to the provisions of the statute, if in addition to making such delivery he solicits orders from other tenants).

54. Owens *v.* State, 74 Ala. 401, holding that constructive notice from posting notices on the land is not enough.

55. Murphey *v.* State, 115 Ga. 201, 41 S. E. 685 (holding that notice to keep off prosecutor's place did not sufficiently clearly notify defendant to keep off a footpath across a corner of prosecutor's land commonly used by the public); Ryan *v.* State, 5 Ind. App. 396, 31 N. E. 1127 (holding that telling a trespasser who is doing an unlawful act on the land to "quit" is merely warning him to desist, and not sufficient).

56. **Warning by the landlord where his tenant has possession** is insufficient. Morrison *v.* State, 155 Ala. 115, 46 So. 43; Sewell *v.* State, 82 Ala. 57, 2 So. 622; Matthews *v.* State, 81 Ala. 66, 1 So. 43.

Where the prosecutors and owners were in actual possession, notice to defendant to leave was properly given by them, although other parties were, by their permission, also on the land, but without paying rent, and under an agreement to leave at the owner's request. Wright *v.* State, 136 Ala. 139, 34 So. 233.

Guardian.—A guardian of the person has control under a statute punishing trespasses done against the order of one having control. Gray *v.* Parke, 162 Mass. 582, 39 N. E. 191.

57. Arrington *v.* State, (Ala. 1910) 52 So. 928.

What agency sufficient.—Where an employee of a landowner was only a rider on the plantation to see that the negroes worked, and there was no proof that he was the landowner's general agent, he had no sufficient contract of management of the land to give warning to an alleged trespasser, so as to establish the offense of trespass after warning. Arrington *v.* State, (Ala. 1910) 52 So. 928. But a general superintendent of a coal, iron, and railway company has, by virtue of his office, authority to instruct another agent of the company to warn persons not to trespass on the company's premises, in violation of Cr. Code (1896), § 5606, providing that a person who, without legal cause, enters on the premises of another after warning not to do so shall be punished as therein prescribed. Morrison *v.* State, 155 Ala. 115, 46 So. 646.

A warning given by one as an officer of the law, and not as the owner's agent, will not sustain a conviction of trespass after warning, although he was also an agent of the owner, with authority to warn trespassers. Templin *v.* State, 159 Ala. 128, 48 So. 1027.

unless the statute provides otherwise.[58] It must be given before the entry,[59] except where the statute, in terms, applies also to a refusal to leave after notice,[60] in which latter case defendant must be unlawfully on the land when it is given.[61] The notice may be oral or written.[62]

b. The Right Invaded. Most of the statutes making trespass an offense are intended to protect possession,[63] and the offense is one against possession.[64] Under these statutes the prosecutor must have actual or constructive possession,[65] but it is not necessary that he have a fee simple title [66] unless the statute so provides.[67] The possession required may be by someone occupying under the prosecutor's direction.[68] Some statutes, however, are designed to protect the owner against injuries to the freehold, and under these statutes it is essential that the prosecutor have title,[69] although possession under these statutes is unnecessary.[70]

58. Bryce *v.* State, 113 Ga. 705, 39 S. E. 282 (holding that the notice may be given by three classes of persons: the owner, the person entitled to possession for the time being, or the authorized agent); Beggs *v.* State, 122 Ind. 54, 23 N. E. 693 (owner or occupant or agent); State *v.* Green, 35 S. C. 266, 14 S. E. 619 (holding that the notice may be given by the equitable owner or tenant at will).

Who is owner or tenant.—Where a tenant leases land for a calendar year, but does not go into actual possession until several days after the first of January, the tenant for the former year is the owner or tenant of the land, under Cr. Code (1902), § 186, providing that every entry after notice from the owner or tenant prohibiting the same, shall be a misdemeanor, and one entering on the land on January 1, after such notice, is guilty of a misdemeanor. State *v.* Gay, 76 S. C. 83, 56 S. E. 668.

One occupying land under an invalid parol lease is not such a tenant as can give a valid notice under this statute, at least against one entering under the owner in accordance with law, although equity might give him specific performance of his parol agreement for a lease. State *v.* Mays, 24 S. C. 190.

59. Sherman *v.* State, 105 Ala. 115, 17 So. 103; Goldsmith *v.* State, 86 Ala. 55, 5 So. 480.

A warning while defendant was in possession and kept it is not sufficient. McLeod *v.* McLeod, 73 Ala. 42.

60. Brunson *v.* State, 140 Ala. 201, 37 So. 197; Wright *v.* State, 136 Ala. 139, 34 So. 233.

61. Ryan *v.* State, 5 Ind. App. 396, 31 N. E. 1127. And the notice must be given while the prosecutor also is on the land. Ryan *v.* State, *supra*.

Effect of warning.—Where defendant is lawfully on the land a warning to depart makes his being there unlawful so that a refusal to leave after a second warning renders him liable. Manning *v.* State, 6 Ind. App. 259, 33 N. E. 253.

Being "unlawfully" on land — What constitutes.— One on a highway directing the removal of pipe unlawfully laid there is there "unlawfully," so that on refusal to depart after notice by the owner he is liable. Huffman *v.* State, 21 Ind. App. 449, 52 N. E. 713, 69 Am. St. Rep. 368.

62. Watson *v.* State, 63 Ala. 19.

63. Watson *v.* State, 63 Ala. 19; Dotson *v.* State, 6 Coldw. (Tenn.) 545.

64. Maddox *v.* State, 122 Ala. 110, 26 So. 305.

65. Bohannon *v.* State, 73 Ala. 47; Hester *v.* State, 67 Miss. 129, 6 So. 687 (holding that one cannot be convicted of trespass on the inclosed land of another, where the latter had no title, but had occupied the land under license from the owner and had abandoned it, intending to return at some indefinite time); State *v.* Reynolds, 95 N. C. 616.

Occupancy by licensee.— Mere occupancy as licensees by third persons does not interrupt the owner's possession. Wright *v.* State, 136 Ala. 139, 34 So. 233.

Oral license to plant vegetables does not give possession. State *v.* Gadsden, 20 S. C. 456.

66. Fogarty *v.* State, 9 Ohio S. & C. Pl. Dec. 477, 6 Ohio N. P. 248, lease sufficient.

Mere actual possession by prosecutor is sufficient. Withers *v.* State, 117 Ala. 89, 23 So. 147; Harper *v.* State, 109 Ala. 28, 19 So. 857; State *v.* Gurnee, 14 Kan. 111; Deaderick *v.* State, 122 Tenn. 222, 122 S. W. 975; Daley *v.* State, 40 Tex. Cr. 101, 48 S. W. 515.

67. Wellington *v.* State, 52 Ark. 266, 12 S. W. 562.

68. Windsor *v.* State, 13 Ind. 375.

Occupation by a servant for his master is sufficient possession by the master. Maddox *v.* State, 122 Ala. 110, 26 So. 305.

Occupation by agent is sufficient. State *v.* Yellowday, 152 N. C. 793, 67 S. E. 480.

69. Derixson *v.* State, 65 Ind. 385 (cutting timber); State *v.* Boyce, 109 N. C. 739, 14 S. E. 98 (cutting timber); White *v.* State, 14 Tex. App. 449 (cutting timber); Campbell *v.* Com., 2 Rob. (Va.) 791 (destruction of fences).

Unauthorized lease.— A prosecution under Pen. Code, art. 687, making it criminal to enter on land of another, and remove rock, sand, etc., without consent of the owner, cannot be maintained where complainant's only title to the land from which sand is alleged to have been taken is an unauthorized lease from the state. Dean *v.* State, 34 Tex. Cr. 474, 31 S. W. 378.

70. Derixson *v.* State, 65 Ind. 385, immaterial that possession in defendant.

c. The Intent — (I) *WHERE STATUTE IS SILENT AS TO INTENT.* In accordance with the general rule that the existence of a criminal intent is an essential element of a statutory offense,[71] the weight of authority is that criminal intent is an essential element of the statutory offense of trespass, even though the statute is silent as to intent, and if the act prohibited is committed in good faith under claim of right, color of title,[72] accidentally,[73] or in ignorance,[74] no conviction will lie, the view taken being that when the statute affixes to a trespass the consequences of a criminal offense, it will not be presumed that the legislature intended to punish criminally acts committed in ignorance, by accident, or under claim of right, and in the *bona fide* belief that the land is the property of the trespasser, unless the terms of the statute forbid any other construction.[75] It has been frequently held, however, in jurisdictions where this view prevails, that a mere belief in the right to enter is insufficient to exonerate defendant. There must be proof of a claim of title or of facts upon which he could reasonably and *bona fide* believe he had the right.[76] On the other hand, there are numerous decisions in which the statutes relating to trespass, although silent as to intent, are construed as making the act an offense irrespective of any specific criminal intent. In other words all must take care that the statutory prohibition be observed, and if they fail to do so they act at their peril and render themselves liable to the punishment prescribed by the statutes.[77] The failure to take care that the statutory direction is observed evidences the criminal intent, or rather supplies it.[78] Where this view prevails the fact that defendant acted in good

71. See CRIMINAL LAW, 12 Cyc. 148.

72. See cases cited *infra*, this note.

Tearing down or destroying buildings, fences, etc.— Shrouder *v.* State, 121 Ga. 615, 49 S. E. 702; Wilcher *v.* State, 118 Ga. 196, 44 S. E. 995.

Entry on lands of another.— Hewitt *v.* Newburger, 141 N. Y. 538, 36 N. E. 593; People *v.* Stevens, 109 N. Y. 159, 16 N. E. 53.

Entry on land after warning or notice.— Under a statute making it a misdemeanor to enter on lands of another after being forbidden, one who enters under right or under a *bona fide* claim of right or title cannot be convicted (State *v.* Wells, 142 N. C. 519, 55 S. E. 210; State *v.* Crawley, 103 N. C. 353, 9 S. E. 409; State *v.* Winslow, 95 N. C. 649; State *v.* Crosset, 81 N. C. 579; State *v.* Hause, 71 N. C. 518; State *v.* Ellen, 68 N. C. 281; State *v.* Hanks, 66 N. C. 612), and the rule has been held to apply to a servant who enters under the orders of a *bona fide* claimant (State *v.* Winslow, *supra*).

Taking and carrying away growing fruit. — State *v.* Luther, 8 R. I. 151.

Cutting timber.—Wagstaff *v.* Schippel, 27 Kan. 450; State *v.* Prince, 42 La. Ann. 817, 8 So. 591; Baker *v.* Hannibal, etc., R. Co., 36 Mo. 543.

73. State *v.* Parker, 81 N. C. 548 (killing or injuring animals); State *v.* Simpson, 73 N. C. 269 (killing or injuring animals).

74. State *v.* Hause, 71 N. C. 518.

75. State *v.* Hause, 71 N. C. 518. To the same effect see Dotson *v.* State, 6 Coldw. (Tenn.) 545, which case, however, was overruled in Deaderick *v.* State, 122 Tenn. 222, 122 S. W. 975.

76. State *v.* Wells, 142 N. C. 590, 55 S. E. 210; State *v.* Durham, 121 N. C. 546, 28 S. E. 22; State *v.* Glenn, 118 N. C. 1194, 23 S. E. 1004; State *v.* Fisher, 109 N. C. 817, 13 S. E. 878; State *v.* Crawley, 103 N. C. 353, 9 S. E. 409; State *v.* Bryson, 81 N. C. 595. See also People *v.* Stevens, 109 N. Y. 159, 16 N. E. 53; State *v.* Mallard, 143 N. C. 666, 57 S. E. 351.

77. See cases cited *infra*, this and following notes.

Entry on lands after notification or warning.—Lawson *v.* State, 100 Ala. 7, 14 So. 870; Watson *v.* State, 63 Ala. 19; Raiford *v.* State, 87 Miss. 359, 39 So. 897; Knight *v.* State, 64 Miss. 802, 2 So. 252; State *v.* Green, 35 S. C. 266, 14 S. E. 619; State *v.* Cockfield, 15 Rich. (S. C.) 53.

Entry on inclosed land to fish.— State *v.* Turner, 60 Conn. 222, 22 Atl. 542.

Cutting timber on land of another without license.— Derixson *v.* State, 65 Ind. 385; Deaderick *v.* State, 122 Tenn. 222, 122 S. W. 975 [*overruling* Dotson *v.* State, 6 Coldw. (Tenn.) 545].

Taking animal for temporary use without owner's consent.— Bellinger *v.* State, 92 Ala. 86, 9 So. 399.

Unlawful killing of animals.— Thompson *v.* State, 67 Ala. 106, 42 Am. Rep. 101.

78. State *v.* Turner, 60 Conn. 222, 22 Atl. 542; Knight *v.* State, 64 Miss. 802, 2 So. 252, in which it was said, when a certain act, without reference to the intent with which it may be done, is prohibited by statute, intent to do the forbidden act is a sufficient evil intent, and none other is necessary, in such case. The law presumes that every person intends to do that which he does, and when one does an act in itself unlawful, the law presumes the intent to do that act, and the act itself is evidence of the illegal intent. And see State *v.* Green, 35 S. C. 266, 14 S. E. 619, in which it is said that in this class of cases "the act and the intent are inseparable."

faith under a *bona fide* claim of right or title,[79] or by accident or mistake,[80] will not exonerate him.

(II) *Where Statutes Require a Specific Intent* — (A) *In General.* Where the statute makes a specific intent an element of the offense, it is of course obvious that there can be no conviction where such intent does not accompany the act;[81] and it has been uniformly so held on prosecutions based on statutes which in describing the offense use in characterizing the act forbidden such words or terms as "knowingly,"[82] "wilfully,"[83] "unlawfully and wilfully,"[84] "knowingly and wilfully,"[85] "maliciously,"[86] "wilfully and maliciously,"[87] or "wilfully or maliciously."[88] In consequence, where the statute on which the prosecution is based contains any of the words or terms enumerated in describing the act prohibited, a conviction will not lie, in case the act was committed by defendant in a *bona fide* belief that he had the right to do so,[89] or where the act is committed

79. Lawson *v.* State, 100 Ala. 7, 14 So. 870; Watson *v.* State, 63 Ala. 19; Derixson *v.* State, 65 Ind. 385; Knight *v.* State, 64 Miss. 802, 2 So. 252; Deaderick *v.* State, 122 Tenn. 222, 122 S. W. 975 [*overruling* Dotson *v.* State, 6 Coldw. (Tenn.) 545].

80. State *v.* Turner, 60 Conn. 222, 22 Atl. 542.

81. *Alabama.*— Pippen *v.* State, 77 Ala. 81; Johnson *v.* State, 61 Ala. 9.

Georgia.— Hateley *v.* State, 118 Ga. 79, 44 S. E. 852; Harvey *v.* State, 6 Ga. App. 241, 64 S. E. 669.

Illinois.— Mettler *v.* People, 135 Ill. 410, 25 N. E. 748.

Minnesota.— Price *v.* Denison, 95 Minn. 106, 103 N. W. 728.

New Jersey.— Folwell *v.* State, 49 N. J. L. 31, 6 Atl. 619.

New York.— Hewitt *v.* Newburger, 141 N. Y. 538, 36 N. E. 593.

Texas.— Allsup *v.* State, (Cr. App. 1901) 62 S. W. 1062.

Canada.— *Ex p.* Donovan, 15 N. Brunsw. 389.

And see cases cited *infra*, this section.

82. Allsup *v.* State, (Tex. Cr. App. 1901) 62 S. W. 1062; Yarbrough *v.* State, 28 Tex. App. 481, 13 S. W. 775; Lackey *v.* State, 14 Tex. App. 164.

83. *Connecticut.*— State *v.* Foote, 71 Conn. 737, 43 Atl. 488.

Florida.— Preston *v.* State, 41 Fla. 627, 26 So. 736; Boykin *v.* State, 40 Fla. 484, 24 So. 141.

Georgia.— Hateley *v.* State, 118 Ga. 79, 44 S. E. 852; Murphey *v.* State, 115 Ga. 201, 41 S. E. 685; Black *v.* State, 3 Ga. App. 297, 59 S. E. 823.

New York.— McMorris *v.* Howell, 89 N. Y. App. Div. 272, 85 N. Y. Suppl. 1018.

Canada.— *Ex p.* Donovan, 15 N. Brunsw. 389.

84. State *v.* McCracken, 118 N. C. 1240, 24 S. E. 530; State *v.* Roseman, 70 N. C. 235.

85. Mettler *v.* People, 135 Ill. 410, 25 N. E. 748; Ratcliffe *v.* Com., 5 Gratt. (Va.) 657,

86. State *v.* Cole, 90 Ind. 112; Lossen *v.* State, 62 Ind. 437; Dawson *v.* State, 52 Ind. 478; Palmer *v.* State, 45 Ind. 388; Cookman *v.* Nill, 81 Mo. App. 297.

87. Pippen *v.* State, 77 Ala. 81; Johnson *v.* State, 61 Ala. 9; State *v.* Newkirk, 49 Mo. 84; Folwell *v.* State, 49 N. J. L. 31, 6 Atl. 619.

It is not sufficient that the act be wilful; it must also be malicious where the statute makes it an element of the offense that the act shall be done wilfully and maliciously. Pippen *v.* State, 77 Ala. 81; Johnson *v.* State, 61 Ala. 9.

88. Com. *v.* Williams, 110 Mass. 401, holding that under a statute providing for the punishment of one who "wilfully or maliciously" injures a building, it is not enough that the injury was wilful and intentional, but it must have been done out of a spirit of cruelty, hostility, or revenge.

89. *Connecticut.*— State *v.* Foote, 71 Conn. 737, 43 Atl. 488, holding that wilful injury, within the meaning of Gen. St. § 1423, providing that every person who shall wilfully injure any public building shall be punished, etc., is an injury done wantonly, or with an evil intent, and does not include a slight injury to a building done under an honest although erroneous belief of authority in the performance of a supposed duty.

Georgia.— Wiggins *v.* State, 119 Ga. 216, 46 S. E. 86 (holding that an agent who *bona fide* believes that his principal is the owner, and entitled to the possession of land, is not guilty of "wilfully" entering on another's land when he goes upon the land in obedience to the commands of his principal); Hateley *v.* State, 118 Ga. 79, 44 S. E. 852 (cutting timber on land to which defendant has such title as to justify an honest belief that he has the right to do so); Murphey *v.* State, 115 Ga. 201, 41 S. E. 685; Black *v.* State, 3 Ga. App. 297, 59 S. E. 823.

Illinois.— Mettler *v.* People, 135 Ill. 410, 25 N. E. 748, holding that it is a defense to a criminal prosecution of one for unlawfully and wilfully cutting and removing trees from cemetery grounds, to show that such act was done in pursuance of the advice and consent of those having charge of the cemetery grounds, being the board of trustees thereof, although such consent was not formally given by the passage of a resolution.

Indiana.— Lossen *v.* State, 62 Ind. 437 (belief in good faith in right to use way); Dawson *v.* State, 52 Ind. 478 (removal of fence under claim of ownership of land on which fence erected, and color of title);

with the owner's consent.[90] It has been held, however, that the belief in the right to do the act complained of must have a fair and reasonable foundation,[91] and that whether there is or is not is a question for the jury to decide from all the facts and circumstances of the case.[92]

(B) *Scope and Meaning of Terms Descriptive of the Act Forbidden* — (1) "WILFUL," "WILFULLY." In another treatise in this work it has been said that the term "wilfulness" is "vague in its meaning," [93] and this statement is fully borne out by the divergence of views which an examination of the decisions discloses. But however much the decisions may differ as to the scope and meaning of the words "wilful" or "wilfully," as used in statutes of the character under consideration, it is probable that they all agree on the proposition that it means something more than a voluntary act and also something more than an intentional act which in fact is wrongful.[94] It includes the idea of an "act intentionally done with a

Palmer *v.* State, 45 Ind. 388 (holding that where one has for a long time been in the habit of using a way across the land of another, and he believes in good faith that he has a right to use it, he will not be guilty of "malicious" trespass for removing a fence placed across such way); Windsor *v.* State, 13 Ind. 375 (holding that while a person without color of title could not defeat a criminal prosecution, for malicious trespass upon lands, by setting up title in himself; but where he has a paper title apparently valid on its face, and claims in good faith to be owner, and is in possession, by himself or by another occupying by his direction, a prosecution for malicious trespass to the damage of a third person will not lie, although such person, in the end, prove to have the better title).

Minnesota.— Price *v.* Denison, 95 Minn. 106, 103 N. W. 728, severing growing crops from lands of another in the honest belief of a legal right to do so.

Missouri.— State *v.* Newkirk, 49 Mo. 84, breaking and severing from building of another, plank partition, platform scales, etc., under mistaken view as to right.

New York.— McMorris *v.* Howell, 89 N. Y. App. Div. 272, 85 N. Y. Suppl. 1018, holding that a statute making it an offense to "wilfully" sever from the freehold anything attached thereto does not apply to one who, being employed to make repairs in the interior of a building, in order to gain admittance broke the padlock which had been placed on an unoccupied part thereof by one claiming to own the building, as against the employer of the person arrested.

North Carolina.— State *v.* McCracken, 118 N. C. 1240, 24 S. E. 530 (removing fence with supposed permission from owner); State *v.* Roseman, 70 N. C. 235.

Texas.—Allsup *v.* State, (Cr. App. 1901) 62 S. W. 1062 (holding that under a statute providing a punishment for "knowingly" cutting timber on the land of another, to render one guilty of the offense he must knowingly cut timber on land not his own; and a conviction will not be sustained where it appears that the ownership of the land is in extreme doubt, defendant believing it to belong to him); Yarbrough *v.* State, 28 Tex. App. 481, 13 S. W. 775; Lackey *v.* State, 14 Tex. App. 164 (carrying away timber from land of another believing that the person from whom he bought the timber was the owner).

Virginia.—Wise *v.* Com., 98 Va. 837, 36 S. W. 479 (tearing down fence under claim of right believing it to be his own); Dye *v.* Com., 7 Gratt. 662; Ratcliffe *v.* Com., 5 Gratt. 657 (removal of fence under *bona fide* claim of right).

Canada.— *Ex p.* Donovan, 15 N. Brunsw. 389 (holding that where timber is cut under a *bona fide* claim of right, wilfulness is negatived); Reg. *v.* McDonald, 12 Ont. 381 (removal of gate in *bona fide* belief in right to do so); Reg. *v.* Davidson, 45 U. C. Q. B. 91.

To what acts statutes apply.— Statutes to punish malicious trespasses are intended to apply to acts of trespass upon the property of another without color of title or claim of right *bona fide*, and not feigned for the occasion, and not to cases where there is a *bona fide* claim of right to the property. Dye *v.* Com., 7 Gratt. (Va.) 662.

90. Preston *v.* State, 41 Fla. 627, 26 So. 736.

91. Boykin *v.* State, 40 Fla. 484, 24 So. 141; Reg. *v.* Davy, 27 Ont. App. 508, under special statutory requirement to that effect. And see Lindley *v.* State, (Tex. Cr. App. 1898) 44 S. W. 165; Dye *v.* Com., 7 Gratt. (Va.) 662.

Evidence insufficient to show bona fide claim.—In a prosecution, under Code, § 1070, for the wilful and unlawful entering upon the lands of another and carrying off wood, defendant, in support of a plea of jurisdiction under a *bona fide* claim to the land, gave in evidence an entry of public land, reciting that he had entered and located "640 acres of land in Caldwell County, N. C., on the headquarters of Wilson's creek, beginning on a pine . . . and runs southeast 40 poles, thence northeast, and various other courses so as to include 640 acres." No survey was ever made, and no grant made by the state. It was held that the entry was insufficient to support a claim to the land. State *v.* Calloway, 119 N. C. 864, 26 S. E. 46.

92. Boykin *v.* State, 40 Fla. 484, 24 So. 141.

93. See CRIMINAL LAW, 12 Cyc. 151.

94. Hewitt *v.* Newburger, 141 N. Y. 538, 36 N. E. 593; McMorris *v.* Howell, 89 N. Y.

wrongful purpose." [95] The principal conflict in the decisions is on the question whether it includes malice. The sense of the words has been variously described as follows: "Wilfulness" embodies an element of "malice." [96] "Wilfully" means intentionally, malevolently, with a bad purpose, an evil purpose, without ground for believing the act to be lawful,[97] "with an evil intent and without justifiable excuse." [98] "With a bad or evil purpose, as in violation of law, or wantonly and in disregard of the rights of others, or knowingly and of stubborn purpose, or contrary to a known duty, or without authority, and careless whether he have the right or not." [99] On the other hand it has been held that the term "wilfully" does not include malice; it is sufficient that the act was done intentionally and with design;[1] that malice to the person injured is not included in the term.[2] One who commits a trespass on property after being forbidden to do so, and without any *bona fide* claim thereto or license to enter, commits the trespass "wilfully." [3]

(2) "Maliciously." If the act forbidden is described by the statute as malicious, something more than a mere intentional or wilful trespass must be shown.[4] Malice, it is said, implies a spirit of hostility, cruelty, or revenge;[5] an evil mind in doing the act forbidden,[6] but absolute recklessness and indifference to the consequences of an act dangerous to the person and property of others supplies malice.[7] The malice must ordinarily be directed against the person injured,[8] although this is unnecessary where the act is of a dangerous character and is committed with such recklessness as to be tantamount to malice toward all men,[9] or where the statute expressly provides that under enumerated circumstances it shall not be necessary to show that the offense was committed from malice toward the owner of the property.[10] Malice is not present where the trespass is committed for the sake of gain.[11]

(3) "Wantonly." "Wantonly" may be defined as the reckless disregard of the lawful rights of the person against whose property the trespass has been committed.[12]

3. Against Whom Prosecution May Be Brought. The possession invaded must be the possession of some person other than defendant.[13] He is not liable for acts done while he was himself in actual possession,[14] or when he acted by direction

App. Div. 272, 85 N. Y. Suppl. 1018. And see cases cited *infra*, the following notes.

95. McMorris *v.* Howell, 89 N. Y. App. Div. 272, 85 N. Y. Suppl. 1018.

96. Price *v.* Denison, 95 Minn. 106, 103 N. W. 728; State *v.* Dahlstrom, 90 Minn. 72, 95 N. W. 580.

97. Hateley *v.* State, 118 Ga. 79, 44 S. E. 852; Black *v.* State, 3 Ga. App. 297, 59 S. E. 823.

98. Tufts *v.* State, 41 Fla. 663, 27 So. 218.

99. Parker *v.* Parker, 102 Iowa 500, 506, 71 N. W. 421.

1. Anderson *v.* How, 116 N. Y. 336, 22 N. E. 695.

2. State *v.* Sneed, 121 N. C. 614, 28 S. E. 365.

3. State *v.* Yellowday, 152 N. C. 793, 67 S. E. 480.

4. Pippen *v.* State, 77 Ala. 81; Johnson *v.* State, 61 Ala. 9; Com. *v.* Williams, 110 Mass. 401.

5. Com. *v.* Williams, 110 Mass. 401. And see State *v.* Cole, 90 Ind. 112, holding that the injuries against which this statute is directed are those which arise out of a spirit of wanton cruelty, malicious, or mischievous destructiveness, or revenge.

6. Folwell *v.* State, 49 N. J. L. 31, 6 Atl. 619.

7. Porter *v.* State, 83 Miss. 23, 35 So. 218, in which it was held that where defendant was running his horse, in a buggy, down a public highway from one side of the road to the other, and, on being warned that he might run over women in the highway, said, "D—— the women!" and thereafter ran into the horse of the prosecuting witness, injuring it, and the road was some twenty feet wide, and if defendant had turned to the right he would not have injured the horse, he was properly convicted under a statute punishing any person guilty of wilful and malicious trespass on the property of another.

8. Johnson *v.* Stone, 61 Ala. 9.

9. Porter *v.* State, 83 Miss. 23, 35 So. 218.

10. State *v.* Guernsey, 9 Mo. App. 312.

11. State *v.* Cole, 90 Ind. 112; Hannel *v.* State, 4 Ind. App. 485, 30 N. E. 1118.

12. Werner *v.* State, 93 Wis. 266, 272, 67 N. W. 417.

13. Dotson *v.* State, 6 Coldw. (Tenn.) 545.

14. *Alabama.*—Brunson *v.* State, 140 Ala. 201, 37 So. 197; McLeod *v.* McLeod, 73 Ala. 42; Watson *v.* State, 63 Ala. 19. And see Neareu *v.* State, 156 Ala. 156, 47 So. 338.

Indiana.—Windsor *v.* State, 13 Ind. 375; Howe *v.* State, 10 Ind. 492.

North Carolina.— State *v.* Jones, 129 N. C.

of a tenant in possession,[15] even though he held possession jointly with the prosecutor.[16] A husband cannot be convicted for an entry on his wife's lands, after having been forbidden by her to enter.[17] One who hires a contractor to cut timber is not liable for "wilfully" cutting timber on the lands of another, where the contractor by mistake cuts timber on lands which he has no right to cut over, and where this is done without defendant's knowledge or consent.[18]

4. DEFENSES. An alleged defense must be credible as well as natural and reasonable.[19] A license is a good defense,[20] but not for acts done after it has been revoked,[21] or to persons other than the licensee,[22] or for acts not within the scope of the license.[23] That the act benefited the land is not a defense.[24] Legal cause or just excuse is expressly a defense under some statutes,[25] but not avoidable necessity.[26] It is no defense that the entry was to visit a person on the land,[27] at the request of a third person;[28] that defendant was prosecutor's tenant on other lands;[29] that defendant had a contract to repair the premises which had been rescinded;[30] that the house on the premises entered after warning was vacant and unoccupied;[31] that the act was not done *lucri causa*,[32] or that it was done

508, 39 S. E. 795; State *v.* Reynolds, 95 N. C. 616; State *v.* Watson, 86 N. C. 626; State *v.* Roseman, 66 N. C. 634; State *v.* Williams, 44 N. C. 197; State *v.* Mason, 35 N. C. 341.

Tennessee.— Dotson *v.* State, 6 Coldw. 545.

Wisconsin.—Werner *v.* State, 93 Wis. 266, 67 N. W. 417.

If defendant has the present right of the usufruct, control, occupation, and power of entry, it is sufficient, although the fee is in another. Binhoff *v.* State, 49 Oreg. 419, 90 Pac. 586.

If defendant is in possession under a lease he is not punishable for injury to a building on the leased premises. In law, the lessee is the owner during the continuance of his term. State *v.* Whitener, 92 N. C. 798; State *v.* Mason, 35 N. C. 341.

One who removes a fence situated wholly on land in his possession and to which he has title is not subject to criminal prosecution, although the fence had by agreement been established as a line fence between his land and prosecutor's. State *v.* Watson, 86 N. C. 626.

A tenant having rightful possession of a crop in which he has a beneficial interest, and who is in actual possession of the premises, does not by removing some of it from the premises render himself liable to prosecution under a statute making it an offense to take and carry away any cotton from the land of another without the consent of the owner. Padgett *v.* State, 81 Ga. 466, 8 S. E. 445.

Land between high and low water mark is in actual possession of the person in possession of the upland. U. S. *v.* Roth, 2 Alaska 257.

Prior acts of trespass do not give defendant possession. Bentley *v.* State, (Ala. 1905) 39 So. 649.

15. State *v.* Williams, 44 N. C. 197 (removing a fence); Werner *v.* State, 93 Wis. 266, 67 N. W. 417.

16. Withers *v.* State, 121 Ala. 394, 25 So. 568.

Tenancy in common is a good defense. Bowles *v.* State, (Miss., 1894) 14 So. 261.

Title in common of personalty is a good defense. State *v.* Hunnerwardle, 44 Mo. App. 471.

One tenant in common of cultivated land is not criminally liable for turning stock loose on such land. Mays *v.* State, 89 Ala. 37, 8 So. 28.

17. State *v.* Jones, 132 N. C. 1043, 43 S. E. 939, 95 Am. St. Rep. 688, 61 L. R. A. 777.

18. Boarman *v.* State, 66 Ark. 65, 48 S. W. 899.

19. Long *v.* State, 42 Fla. 509, 28 So. 775.

20. State *v.* McCracken, 118 N. C. 1240, 24 S. E. 530 (removing fence); State *v.* Glenn, 118 N. C. 1194, 23 S. E. 1004; Hames *v.* State, 46 Tex. Cr. 562, 81 S. W. 708 (tearing down a fence). See also Guthrie *v.* State, (Miss. 1908) 47 So. 639.

A license from a tenant in possession is sufficient, although the owner forbids the act. Freeman *v.* Wright, 113 Ill. App. 159; State *v.* Lawson, 101 N. C. 717, 7 S. E. 905, 9 Am. St. Rep. 42.

21. Cross *v.* State, 147 Ala. 125, 41 So. 875.

22. Cross *v.* State, 147 Ala. 125, 41 So. 875.

23. Com. *v.* Clark, 3 Pa. Super. Ct. 141, holding that license to cut trees merely is not a defense to a wanton cutting of ornamental trees.

24. Mettler *v.* People, 36 Ill. App. 324.

25. State *v.* Simons, 145 Ala. 95, 40 So. 662, holding that statutory authority to enter is sufficient.

26. Morrison *v.* State, (Ala. 1907) 44 So. 150; Wilson *v.* State, 87 Ala. 117, 6 So. 394.

27. State *v.* Cockfield, 15 Rich. (S. C.) 53.

28. Holland *v.* State, 139 Ala. 120, 35 So. 1009.

29. Holland *v.* State, 139 Ala. 120, 35 So. 1009.

30. Davis *v.* State, 146 Ala. 120, 41 So. 681.

31. Randle *v.* State, 155 Ala. 121, 46 So. 750.

32. Johnson *v.* State, 61 Ala. 9; Long *v.* State, 42 Fla. 509, 28 So. 775.

to invite a civil suit for the trespass.[33] So it is not a defense that defendant failed to foresee or expect indictment.[34] Under some statutes it has been held that if the prosecutor is in actual possession of the land trespassed on, it is no defense that defendant had title thereto. It has been so held under statutes making it an offense to trespass on lands of another after being warned[35] or to unlawfully and wilfully demolish, injure, or remove any building, or fence,[36] or to cut down or destroy valuable timber on the land of another.[37] So it has been held that defendant cannot show title in a third person as a defense.[38]

C. Prosecution and Punishment — 1. Affidavit or Complaint, and Warrant. In prosecutions for trespass begun before a justice of the peace, or other inferior court, by affidavit, or complaint and warrant, the affidavit or complaint must state, with definiteness[39] and certainty,[40] every substantial matter necessary to constitute the offense as defined by statute;[41] but the affidavit is generally considered sufficient when it follows[42] or substantially follows the language of the statute.[43] As, in some jurisdictions at least, the warrant in a prosecution

33. State *v.* Graham, 53 N. C. 397.

34. State *v.* Graham, 53 N. C. 397.

35. Randle *v.* State, 155 Ala. 121, 46 So. 759; Bentley *v.* State, (Ala. 1905) 39 So. 649; Wright *v.* State, 136 Ala. 139, 34 So. 233; Lawson *v.* State, 100 Ala. 7, 14 So. 870; Raiford *v.* State, 87 Miss. 359, 39 So. 897; Knight *v.* State, 64 Miss. 802, 2 So. 252. And see Withers *v.* State, 120 Ala. 394, 25 So. 568 (title); Burks *v.* State, 117 Ala. 148, 23 So. 530. *Contra*, Watson *v.* State, 63 Ala. 19.

36. State *v.* Campbell, 133 N. C. 640, 45 S. E. 344; State *v.* Fender, 125 N. C. 649, 34 S. E. 448; State *v.* Howell, 107 N. C. 835, 12 S. E. 569; State *v.* Marsh, 91 N. C. 632; State *v.* Hovis, 76 N. C. 117, 118, in which it was said: "If the defendant has a better title than the prosecutor to the premises or to the possession thereof, he can assert it by due course of law, but he cannot do so by violating the criminal law of the State."

In Texas it has been held under a statute providing that if any person, without the consent of the owner, shall knowingly cut down any timber upon any land not his own, the prosecution must show that defendant did not own the timber. White *v.* State, 14 Tex. App. 449.

37. Deaderick *v.* State, 122 Tenn. 222, 122 S. W. 975.

38. State *v.* Burns, 123 Ind. 427, 24 N. E. 154; Ryan *v.* State, 5 Ind. App. 396, 31 N. E. 1127; Knight *v.* State, 64 Miss. 802, 2 So. 252.

39. State *v.* McKee, 109 Ind. 497, 10 N. E. 405.

40. State *v.* Young, 21 Ind. App. 546, 52 N. E. 760; Binhoff *v.* State, 49 Oreg. 419, 90 Pac. 586, holding necessary the certainty which is required in an indictment.

41. Binhoff *v.* State, 49 Oreg. 419, 90 Pac. 586, holding further that where the statute denounces acts done only by persons of a particular class, and under particular conditions, the exceptions constitute a material part of the offense and must be negatived.

Particular allegations necessary. — It is necessary that the affidavit state the name of the owner of the property (Withers *v.* State, 117 Ala. 89, 23 So. 147), and the injury to the property (State *v.* McKee, 109 Ind. 497, 10 N. E. 405), together with the amount of damage (State *v.* McKee, *supra*), and some identification or description of the premises, although a general description will suffice (State *v.* French, 120 Ind. 229, 22 N. E. 108, 735; Fogarty *v.* State, 9 Ohio S. & C. Pl. Dec. 477, 6 Ohio N. P. 248. And see Randle *v.* State, 155 Ala. 121, 46 So. 759; Mayhall *v.* State, 146 Ala. 124, 41 So. 290). On a prosecution for trespass by entering upon land after being forbidden to do so, an affidavit which does not allege that the land on which accused entered was the land upon which he was forbidden to enter is fatally defective (State *v.* Young, 21 Ind. App. 546, 52 N. E. 760); but when an affidavit for unlawfully and wilfully entering upon the land of another alleges the possession of an agent for the owner named, the owner is in constructive possession, and the allegation of possession is sufficient (State *v.* Yellowday, 152 N. C. 793, 67 S. E. 480). An allegation that the lawful occupant of the land forbade the entry thereon is sufficient as against a special plea in bar that ownership was in a third person, as the fair inference is that the person alleged to be the lawful occupant was a tenant lawfully in possession. State *v.* Burns, 123 Ind. 427, 24 N. E. 154.

By and before whom affidavit may be made.—An affidavit charging criminal trespass may be taken by a justice of the peace and need not be made by an officer. Lindley *v.* State, (Tex. Cr. App. 1898) 44 S. W. 165.

42. Mayhall *v.* State, 146 Ala. 124, 41 So. 290; Holland *v.* State, 139 Ala. 120, 35 So. 1009; State *v.* Maddox, 85 Ind. 585, holding that where the word "unlawfully" does not appear in the statute, it need not be used in the affidavit.

43. State *v.* French, 120 Ind. 229, 22 N. E. 108, 735; State *v.* Yellowday, 152 N. C. 793, 67 S. E. 480; State *v.* Tenny, 58 S. C. 215, 36 S. E. 555 [*following* State *v.* Hallback, 40 S. C. 298, 18 S. E. 919], holding that an allegation of "trespass after notice" is a sufficient allegation of entry "after notice from the owner or tenant prohibiting the same," as specified in the statute.

before a justice of the peace answers the purpose of an indictment,[44] it too must state an offense;[45] but this requirement is satisfied when the warrant incorporates the allegations of the complaint or affidavit by reference,[46] and amendments of both the affidavit and warrant are freely allowed.[47]

2. Indictment or Information[48] — a. Requisites and Sufficiency in General. In passing upon the sufficiency of an indictment or information for trespass, the courts apply the tests applicable to indictments and informations generally,[49] such as the rules that while an indictment must set out every matter which is necessary to give a description of the offense charged,[50] and is bad if its allegations, when taken as true, are not inconsistent with the innocence of accused,[51] it is generally sufficient if the allegations are couched in the language of the statute creating the offense,[52] or if an offense is charged with such certainty as to apprise accused of the offense charged against him and enable the court to pronounce judgment according to the law of the case.[53] Mere matters of evidence need not be alleged,[54] nor need defenses be anticipated;[55] but exceptions must be negatived when, in the enacting clause, the statute makes them a part of the description of the defense.[56]

44. State *v.* Winslow, 95 N. C. 649.

Under the Canadian statutes relating to trespass on railroad tracks, an arrest is necessary before a justice of the peace has jurisdiction to proceed to a summary conviction of the offender. Reg. *v.* Hughes, 26 Ont. 486.

45. State *v.* Whitaker, 85 N. C. 566.

Details and circumstances need not be alleged. People *v.* Upton, 9 N. Y. Suppl. 684. And see Lindsay *v.* West, 6 Ga. App. 284, 64 S. E. 1005.

46. State *v.* Yellowday, 152 N. C. 793, 67 S. E. 480; State *v.* Winslow, 95 N. C. 649.

47. Holland *v.* State, 139 Ala. 120, 35 So. 1009; Wright *v.* State, 136 Ala. 139, 34 So. 233; State *v.* Yellowday, 152 N. C. 793, 67 S. E. 480 (holding that an order of court authorizing an amendment is self-executing and that the amendment will be considered made, although it is not actually made); State *v.* Smith, 103 N. C. 410, 9 S. E. 200.

48. **Forms of indictments and informations held sufficient** see State *v.* Hooker, 72 Ark. 382, 383, 81 S. W. 231; Tufts *v.* State, 41 Fla. 663, 664, 27 So. 218; State *v.* Marlett, 26 Ind. 198; State *v.* Merrill, 3 Blackf. (Ind.) 346; Hannel *v.* State, 4 Ind. App. 485, 30 N. E. 1118; State *v.* Whitehurst, 70 N. C. 85.

49. See Indictments and Informations, 22 Cyc. 285.

A statutory requirement that the name of the prosecutor be indorsed on the indictment or information is not applicable to a prosecution for trespass to school lands. State *v.* Brown, 10 Ark. 104; State *v.* Roberts, 11 Mo. 510.

50. State *v.* Bullard, 72 N. C. 445.

51. Stribbling *v.* State, 56 Ind. 79, holding that an allegation of unlawful removal of rails from a fence is insufficient under a statute making punishable the unlawful removal of any valuable articles from land, as the rails might have been removed from one part of the fence to another, or simply thrown upon the ground.

52. *Alabama.*— Brown *v.* State, 100 Ala. 92, 14 So. 761.

Arkansas.— State *v.* Hooker, 72 Ark. 382, 81 S. W. 231.

Florida.— Long *v.* State, 42 Fla. 509, 28 So. 775; Tufts *v.* State, 41 Fla. 663, 27 So. 218.

Illinois.— Mettler *v.* People, 135 Ill. 410, 25 N. E. 748.

Iowa.— State *v.* Watrous, 13 Iowa 489.

Kansas.— State *v.* Blakesley, 39 Kan. 152, 18 Pac. 170.

Texas.— State *v.* West, 10 Tex. 553.

See 46 Cent. Dig. tit. "Trespass," § 176.

The rule is otherwise where the statute does not specify the particular acts which constitute the defense (Com. *v.* Moore, 30 S. W. 873, 17 Ky. L. Rep. 212. And see Reg. *v.* Spain, 18 Ont. 385), or where the construction placed upon the statute by the courts is narrower than the broad meaning of the words used (Bates *v.* State, 31 Ind. 72).

In the indictment, it is proper to omit words of the statute which form no element or ingredient of the offense, but were inserted by the legislature, out of abundant caution, to exclude any inference of an intention to confound malicious trespasses and felonies. Dye *v.* Com., 7 Gratt. (Va.) 662.

53. State *v.* Watrous, 13 Iowa 489; State *v.* Whitehurst, 70 N. C. 85.

54. State *v.* West, 10 Tex. 553.

55. Bellinger *v.* State, 92 Ala. 86, 9 So. 399; State *v.* Whitehurst, 70 N. C. 85; State *v.* West, 10 Tex. 553.

56. State *v.* Bullard, 72 N. C. 445, entry "without a license therefor."

When negation is necessary, all the exceptions must be negatived. Thus, under a statute forbidding hunting on inclosed lands "without the consent of the owner or person in charge" non-consent of both must be alleged. State *v.* Sparrow, 52 Mo. App. 374; Holtzgraft *v.* State, 23 Tex. App. 404, 5 S. W. 117. However, it has been held that the want of consent of the lessor or person in control need be alleged only when the

b. Particular Allegations — (I) *THE ACT.* While the means employed by accused in committing the trespass need not ordinarily be alleged,[57] where the statute is directed against the doing of a specific act, the indictment must substantially at least follow the language of the statute in describing the act.[58]

(II) *DESIGNATION OF PARTY INJURED.* The name of the owner of the property upon or against which the alleged trespass was committed, or, as sometimes stated, the name of the injured party, must be stated in the indictment.[59]

(III) *DESCRIPTION OF PROPERTY INJURED.* The property must be described [60] with particularity and accuracy where the offense is against a particular kind of property; [61] but otherwise only generally, no specific description being required, on account of the locality of the trespass being a minor element of the offense,[62] and a statement of the county and state, coupled with the owner's name, is frequently held sufficient.[63]

person in possession is the lessor or is simply in control. Haynie *v.* State, 45 Tex. Cr. 204, 75 S. W. 24.

Sufficient allegation of the doing of the act "without a license so to do from competent authority" see State *v.* Marlett, 26 Ind. 198.

57. State *v.* Merrill, 3 Blackf. (Ind.) 346.

58. Maskill *v.* State, 8 Blackf. (Ind.) 299, holding that an allegation that accused "cut" a timber tree is insufficient under a statute authorizing the infliction of punishment upon one who shall "cut down" a tree.

The time of doing the act must be alleged where it is an element of the statutory offense, as trespass within six months after warning under the Alabama statute. Musgrove *v.* State, 139 Ala. 137, 35 So. 884.

Where the statute specifies two or more different acts, the doing of all may be alleged in the same indictment, especially where they may be taken together and considered as one continuous act. State *v.* Watrous, 13 Iowa 489; State *v.* Myers, 20 Mo. 409. A misjoinder is not fatal when not prejudicial to the interests of accused (Long *v.* State, 42 Fla. 509, 28 So. 775); but under a statute specifying two acts in the conjunctive, an indictment which charges the doing of one act only is fatally defective (State *v.* Moultrieville, Rice (S. C.) 158).

59. State *v.* McConkey, 20 Iowa 574.

An allegation that the land belongs to the "estate," or to the estate and heirs, of a named person, is not indefinite under a statute directed against the cutting of timber on the lands of another (Boarman *v.* State, 66 Ark. 65, 48 S. W. 899; State *v.* Paul, 81 Iowa 596, 47 N. W. 773); but in such a case it is improper to allege title in the executor of the estate, unless followed by allegations showing that the will vested title in him; the proper averment is one of ownership in the devisees, if any, or in the heirs (McMillan *v.* State, 160 Ala. 115, 49 So. 680).

Where the property is the separate property of a married woman, it is proper, under the Texas statute so providing, to allege ownership either in her or in her husband. Hames *v.* State, 46 Tex. Cr. 562, 81 S. W. 708.

An allegation of ownership in several persons, without connecting the names with the word "and," is bad, as it leaves it uncertain whether the property was owned jointly or severally. McMillan *v.* State, 160 Ala. 115, 49 So. 680.

The person in possession, such as the lessee, may properly be described as the injured party, where the offense is one against possession. State *v.* Mason, 35 N. C. 341.

A general allegation of ownership is sufficient. Thus it has been held that an allegation that the ice taken and removed was the property of the owner of the land is sufficient, as it will warrant any proof by which its truth can be shown. State *v.* Pottmeyer, 30 Ind. 287.

60. Long *v.* State, 42 Fla. 509, 28 So. 775, holding that lands are sufficiently described when described in accordance with the prevailing and approved method of designating lands that have been surveyed in accordance with the system of surveying adopted by the United States.

61. Bates *v.* State, 31 Ind. 72; McCauley *v.* State, 43 Tex. 374 (holding that an indictment charging the carrying away of "fence rails" is not sufficient under a statute prohibiting the carrying away of "timber," as the terms are not synonymous). And see People *v.* O'Brien, 60 Mich. 8, 26 N. W. 795.

Sufficient allegation.— An averment that defendant cut down timber sufficiently indicates that it was standing or growing within the meaning of the statute. Boarman *v.* State, 66 Ark. 65, 48 S. W. 899.

62. *Indiana.*— State *v.* Smith, 7 Ind. App. 166, 34 N. E. 127; State *v.* Murphy, 7 Ind. App. 44, 34 N. E. 248; Ostler *v.* State, 3 Ind. App. 122, 29 N. E. 270.

Louisiana.— State *v.* Prince, 42 La. Ann. 817, 8 So. 591.

Missouri.— State *v.* Guernsey, 9 Mo. App. 312.

Pennsylvania.— Moyer *v.* Com., 7 Pa. St. 439.

Texas.— State *v.* Warren, 13 Tex. 45.

See 46 Cent. Dig. tit. "Trespass," § 179.

Contra.— People *v.* Carpenter, 5 Park. Cr. (N. Y.) 228.

63. Winlock *v.* State, 121 Ind. 531, 23 N. E. 514 [*distinguishing* State *v.* French, 120 Ind. 229, 22 N. E. 108, 735]; Newland *v.* State 30 Ind. 111; State *v.* Smith, 7 Ind. App. 166, 34 N. E. 127. And see Gilmore

(IV) *VALUE OF PROPERTY INJURED.* The value of the property need not be alleged,[64] unless the statute requires it to be of some value,[65] or the fine to be imposed is regulated by the value of the property.[66]

(V) *DESCRIPTION OF INJURIES.* The nature, character, and extent of the injury must also be stated,[67] but reasonable certainty in this respect is all that is required.[68]

(VI) *INTENT.* Where the statute creating the offense makes intent an element, the statutory language descriptive of the intent must be substantially followed in the indictment;[69] but words such as "wilfully," which are not used in the statute, need not be inserted in the indictment,[70] and it is sufficient to employ the statutory language without enlargement.[71]

3. ISSUES, PROOF, AND VARIANCE. The offense must be proved as charged in the indictment,[72] and a material variance is fatal to conviction.[73] However, matters which are not essential to the description of the offense need not be proved

v. Dawson, 64 Mo. 310. *Compare* Heard *v.* State, 4 Ga. App. 572, 61 S. E. 1055.

In Alabama, on account of the necessity of a statement of venue being dispensed with by statute, no more particular description is required than that the trespass was on the premises of another, who is named. Watson *v.* State, 63 Ala. 19 [*followed* in Owens *v.* State, 74 Ala. 401].

Where venue has been once stated in the indictment, it need not afterward be alleged. State *v.* Watrous, 13 Iowa 489.

64. Boarman *v.* State, 66 Ark. 65, 48 S. W. 899. And see Kingston *v.* Wallace, 25 N. Brunsw. 573.

65. Gilreath *v.* State, 96 Ga. 303, 22 S. E. 907.

66. See State *v.* Shadley, 16 Ind. 230; State *v.* Grewell, 19 Kan. 189, holding that under a statute providing for the imposition of a minimum fine of double the amount of damage, there must be an averment either of the value of the thing injured, or the amount of damage committed.

Value at time of trespass.—An averment that timber was removed on a certain day and was worth a certain amount is a sufficient statement that it was worth that amount when it was removed. State *v.* Blackwell, 3 Ind. 529.

67. Brown *v.* State, 76 Ind. 85; State *v.* Aydelott, 7 Blackf. (Ind.) 157. But see State *v.* Shadley, 16 Ind. 230, holding that, under a statute different from the one involved in the above cases and prescribing a fine of five times the value of the property, an information which states the value of the property need not go further and allege the damage to the owners of the property.

68. Hannel *v.* State, 4 Ind. App. 485, 30 N. E. 1118; State *v.* Watrous, 13 Iowa 489.

69. Com. *v.* Israel, 4 Leigh (Va.) 675, statute using the words "knowingly and wilfully without lawful authority."

What are equivalent expressions.— Under a statute using the word "knowingly," an indictment employing the word "unlawfully" is insufficient, as the two words are not equivalent in meaning. State *v.* Arnold, 39 Tex. 74; State *v.* Stalls, 37 Tex. 440.

In Tennessee, the word "unlawfully" is held to be broad enough to include "wilfully" and "knowingly" and to be sufficient in an indictment, but this decision was made to meet a judicial construction of the statute (Dotson *v.* State, 6 Coldw. (Tenn.) 545), and not on account of the words being used in the statute (State *v.* Hartman, 8 Baxt. (Tenn.) 384).

70. Wilcher *v.* State, 118 Ga. 196, 44 S. E. 995.

71. Tufts *v.* State, 41 Fla. 663, 27 So. 218.

72. Brunson *v.* State, 140 Ala. 201, 37 So. 197; Sevy *v.* State, 71 Ga. 361 (holding that a person indicted for trespass cannot be convicted upon testimony showing him to be guilty of simple larceny); State *v.* McConkey, 20 Iowa 574 (holding that an indictment for cutting down and destroying standing timber is not supported by evidence of carrying away of timber); State *v.* Graves, 74 N. C. 396.

Possession and ownership.— On a prosecution for trespass, it devolves upon the state to prove that the property was not defendant's. Belverman *v.* State, 16 Tex. 130; Werner *v.* State, 93 Wis. 266, 67 N. W. 417. A charge of a single act of trespass upon the lands of two persons is not supported by proof that the lands belong to one only (Eubank *v.* State, 105 Ga. 612, 31 S. E. 741); nor is an allegation of ownership supported by proof of possession as agent, for whatever physical occupancy and control the agent may have exercised was in his representative capacity and merely went to constitute the possession of his principal (Jackson *v.* State, 124 Ga. 135, 52 S. E. 155). However, there is no variance between an allegation of ownership and proof that the person in possession was a lessee (Fogarty *v.* State, 9 Ohio S. & C. Pl. Dec. 477, 6 Ohio N. P. 248), nor between an allegation that the property belonged to a certain person, and proof that the title and management were in him and that other persons were interested in the profits thereof (Long *v.* State, 42 Fla. 509, 28 So. 775).

Burden of proving defenses see *infra,* II, C, 4.

73. Eubank *v.* State, 105 Ga. 612, 31 S. E. 741.

Evidence sufficient to support verdict see *infra,* II, C, 4.

as laid in the indictment,[74] and under the provisions of some statutes, a variance which is not material to the merits of the case may be cured by an amendment of the indictment.[75]

4. Evidence. While the state, in a prosecution for trespass, is required to prove all the elements of the offense beyond a reasonable doubt,[76] *prima facie* proof of ownership in a person other than accused is sufficient to cast upon defendant the burden of proving affirmative defenses, such as a right to enter, or a *bona fide* belief of a right to enter,[77] supported by reasonable grounds.[78] Evidence tending to show the commission of the offense as charged is relevant and admissible,[79] as is also evidence bearing on the defenses of accused;[80] and the courts act with liberality in receiving evidence touching on the character and extent of the title and possession of both prosecutor and defendant, as showing their respective rights and defendant's good faith.[81] It is of course essential to a conviction

74. Winlock *v.* State, 121 Ind. 531, 23 N. E. 514. *Compare* Evans *v.* State, (Tex. Cr. App. 1897) 40 S. W. 988, holding that while it is not necessary for the information to designate the land on which the timber was cut by the name of the survey when the name of the survey is stated, it becomes part of the description of the offense and must be proved.

Unnecessary allegations, which relate to no element which is a necessary ingredient of the offense charged, may be treated as surplusage and need not be proved. Shrouder *v.* State, 121 Ga. 615, 49 S. E. 702.

75. Knight *v.* State, 64 Miss. 802, 2 So. 252.

76. See Mann *v.* State, 47 Tex. Cr. 250, 83 S. W. 195.

This does not mean that the jury must acquit in all cases depending upon circumstantial evidence, where accused denies the incriminative circumstances, nor that the state must assume the burden of showing the falsity of explanations given by accused, when such explanations are not credible. Long *v.* State, 42 Fla. 509, 28 So. 775.

77. Owens *v.* State, 74 Ala. 401; State *v.* Wells, 142 N. C. 590, 55 S. E. 210; State *v.* Durham, 121 N. C. 546, 28 S. E. 22; Belverman *v.* State, 16 Tex. 130.

78. Boykin *v.* State, 40 Fla. 484, 24 So. 141; State *v.* Durham, 121 N. C. 546, 28 S. E. 22.

79. Arrington *v.* State, (Ala. 1910) 52 So. 928; McMillan *v.* State, 160 Ala. 115, 49 So. 680 (holding admissible evidence that accused was engaged in the cross tie business, where other evidence tended to show that the place from which the timber was cut showed indications of hewing usually done in making cross ties); Mayhall *v.* State, 146 Ala. 124, 41 So. 290 (holding that on a prosecution for trespass in cutting timber, it is proper to admit evidence that stumps of trees were seen around where defendant's wagon and team were seen standing, and that, within a few feet of the wagon, there was a tree cut into three sticks); State *v.* Watrous, 13 Iowa 489 (holding evidence of the value of the property injured admissible); People *v.* O'Brien, 60 Mich. 8, 26 N. W. 795; Werner *v.* State, 93 Wis. 266, 67 N. W. 417.

For the purpose of showing defendant's knowledge and intent, it is proper for the state to show that a previous prosecution against accused for a similar trespass upon the same land was settled by accused agreeing not to go on the land again. Champion *v.* State, 9 Ohio Cir. Ct. 627, 6 Ohio Cir. Dec. 777.

The evidence must relate to the time and place of the alleged trespass. Thus, evidence of an offense committed after the issuance of the warrant is incompetent as a ground of conviction (Chappell *v.* State, 86 Ala. 54, 5 So. 419); and in a prosecution for trespass after warning, an objection is properly sustained to a question asked defendant, whether the open space in front of the post-office and the row of houses, where the one lived against whom he had gone to collect a bill, was not used by the public at will, where it did not appear with sufficient clearness that the space referred to was the space in respect to which the warning was given or where defendant was arrested (Morrison *v.* State, 155 Ala. 115, 46 So. 646).

80. State *v.* Underwood, 37 Mo. 225 (holding admissible any evidence which tends to disprove intent and malice); Wise *v.* Com., 98 Va. 837, 36 S. E. 479.

81. Morrison *v.* State, 155 Ala. 115, 46 So. 646; Wright *v.* State, 136 Ala. 139, 34 So. 233 (holding it not to be error to permit a witness to state generally that he had possession, as such a statement is one of a collective fact rather than an opinion or conclusion); Parham *v.* State, 125 Ala. 57, 27 So. 778; Harper *v.* State, 109 Ala. 28, 19 So. 857; Bohannon *v.* State, 73 Ala. 47; Com. *v.* Quiggle, 19 Pa. Super. Ct. 343. *Compare* Withers *v.* State, 120 Ala. 394, 25 So. 568, holding that where title or ownership is founded upon title deeds, it cannot be shown by parol testimony without first having laid the proper predicate for the introduction of such testimony.

Matters affecting the credibility of a witness, such as the fact that while he testifies as to the ownership of the property alleged to have been taken by accused, he is unable to distinguish and separate it from other similar property, is no ground for excluding his testimony. Long *v.* State, 42 Fla. 509, 28 So. 775.

that the evidence support the verdict;[82] but in determining whether or not it does, title is frequently held to be sufficiently proved by parol evidence,[83] and intent, by the presumption which arises from the act itself.[84]

5. Trial, Punishment, and Review. It is the province of the jury to determine the guilt or innocence of accused by passing on the facts[85] under instructions by the court which not only correctly define the elements of the offense,[86] but state the law as to the defenses of accused,[87] where there is any evidence tending to sustain such defenses.[88] While the court should not charge upon the weight of evidence,[89] it may enumerate acts and conduct which, if established by the evidence, would authorize a verdict of guilty,[90] and it is proper for the court to refuse a requested instruction which asserts no proposition of law,[91] or which contains a misleading,[92] erroneous,[93] or incomplete statement.[94] A special verdict must state all the elements of the offense,[95] together with the value of the property,[96] and the punishment is of course regulated by statute.[97] Upon a joint indictment

Where no claim of a previous actual possession by defendant is made, it is not error to exclude deeds or contracts for deeds to him or his vendor, as it is not the purpose of a criminal action of trespass to settle all questions of title. Bentley *v.* State, (Ala. 1905) 39 So. 649.

82. Jeter *v.* State, 71 Ark. 472, 75 S. W. 929, where there was a failure of evidence as to the ownership of the land.

Evidence held sufficient to sustain conviction.— See Wilcher *v.* State, 118 Ga. 196, 44 S. E. 995; Cox *v.* State, 105 Ga. 610, 31 S. E. 650; Russellville Home Tel. Co. *v.* Com., 109 S. W. 340, 33 Ky. L. Rep. 132; State *v.* Praul, 57 Wash. 198, 106 Pac. 763.

Proof of immaterial matters does not vitiate the verdict where the state has, in addition, proved sufficient material matters to warrant a conviction. Hames *v.* State, 46 Tex. Cr. 562, 81 S. W. 708.

83. Harper *v.* State, 109 Ala. 28, 19 So. 857; Fogarty *v.* State, 9 Ohio S. & C. Pl. Dec. 477, 6 Ohio N. P. 248; Belverman *v.* State, 16 Tex. 130; Welsh *v.* State, 11 Tex. 368, where defendant's oral admission was held to be sufficient proof of title.

Evidence of possession is sufficient proof of title. People *v.* Horr, 7 Barb. (N. Y.) 9.

84. Campbell *v.* State, 127 Ga. 307, 56 S. E. 417 (holding, however, that the presumption of criminal intent arising from the act is rebutted by proof that prosecutor and defendant were adjoining landowners and that both were so ignorant of the exact location of the true line between them that they frequently crossed it by mistake); Hannel *v.* State, 4 Ind. App. 485, 30 N. E. 1118; Walpole *v.* State, 9 Baxt. (Tenn.) 370 (applying a statute making an entry upon the premises of another, by one disguised or in mask, *prima facie* evidence of an intention to commit a felony).

Where the attending circumstances rebut the presumption of malice arising from the act, other proof must be given that defendant did not act in good faith. Lossen *v.* State, 62 Ind. 437.

85. Boykin *v.* State, 40 Fla. 484, 24 So. 141; Com. *v.* Quiggle, 19 Pa. Super. Ct. 343.

86. Morrison *v.* State, 155 Ala. 115, 46 So. 646; Boykin *v.* State, 40 Fla. 484, 24 So. 141; Werner *v.* State, 93 Wis. 266, 67 N. W. 417.

The court's charge to the jury will be reviewed only when defendant takes exceptions (Clark *v.* State, 23 Tex. App. 260, 5 S. W. 115), which are sufficiently definite and specific to point out the error complained of (People *v.* Upton, 9 N. Y. Suppl. 684).

87. Boykin *v.* State, 40 Fla. 484, 24 So. 141; Thomas *v.* State, 54 Tex. Cr. 377, 112 S. W. 1049.

88. Goldsmith *v.* State, 86 Ala. 55, 5 So. 480; State *v.* Yellowday, 152 N. C. 793, 67 S. E. 480; State *v.* Durham, 121 N. C. 546, 28 S. E. 22.

89. Haynie *v.* State, 45 Tex. Cr. 204, 75 S. W. 24, holding that an instruction as to the kind of fence required to make an inclosure, within the meaning of the statute, is not on the weight of evidence.

90. Cox *v.* State, 105 Ga. 610, 31 S. E. 650.

91. Morrison *v.* State, 155 Ala. 115, 46 So. 646.

92. Morrison *v.* State, 155 Ala. 115, 46 So. 646; Carl *v.* State, 125 Ala. 89, 28 So. 505.

Where there is no evidence to support the theory of a requested instruction, or where the instruction ignores part of the testimony, it is proper for the court to refuse to give it. Long *v.* State, 42 Fla. 509, 28 So. 775.

93. Morrison *v.* State, 155 Ala. 115, 46 So. 646; Long *v.* State, 42 Fla. 509, 28 So. 775.

94. Maddox *v.* State, 122 Ala. 110, 26 So. 305.

95. Com. *v.* Percavil, 4 Leigh (Va.) 686.

96. Long *v.* State, 42 Fla. 509, 28 So. 775.

The rule is otherwise where the verdict is a general one of guilty, and the kind and amount of punishment is not dependent on the value of the property. State *v.* Gigher, 23 Iowa 318.

No prejudice results from an omission in the verdict of an express statement of the value of the property, where the property was alleged to be worth a certain amount, the evidence showed it to be worth that much, and the jury found defendant guilty as charged. Simpson *v.* State, 70 Ark. 19, 65 S. W. 932.

97. Schreitz *v.* State, 1 Pennew. (Del.) 18, 39 Atl. 453 (holding that under a statute providing that the justice finding a person

of several persons for trespass, part of them may be convicted and part acquitted.[98]

TRESPASS DE BONIS ASPORTATIS. See DE BONIS ASPORTATIS, 13 Cyc. 392 note 59; TRESPASS, *ante*.

TRESPASSER. One who does an unlawful act, or a lawful act in an unlawful manner, to the injury of the person or property of another;[1] one who, not having the title to land, without the consent of the true owner, makes an entry thereon.[2] (Trespasser: Ab Initio, Liability as — Of Officer Acting Under Search Warrant, see SEARCHES AND SEIZURES, 35 Cyc. 1275; Of Sheriff or Constable Arising Out of the Custody of Property, see SHERIFFS AND CONSTABLES, 35 Cyc. 1672. Acts of as Constituting Breach of Covenant For Quiet Enjoyment, see COVENANTS, 11 Cyc. 1119. Liability For Injury to — In General, see NEGLIGENCE, 29 Cyc. 442; By Railroad, see RAILROADS, 33 Cyc. 754; By Street Railroad, see STREET RAILROADS, 36 Cyc. 1485. Liability of — Owner of Motor Vehicle For Injuries Resulting From Operation of Vehicle by, see MOTOR VEHICLES, 28 Cyc. 40; Railroad Company For Injuries to Servant Resulting From Acts of, see MASTER AND SERVANT, 26 Cyc. 1127 note 22; United States Government For Acts of, see INTERNATIONAL LAW, 22 Cyc. 1753 note 86. Ownership of Crops Raised by, see CROPS, 12 Cyc. 977. Possession by as Constituting Adverse Possession, see CHAMPERTY AND MAINTENANCE, 6 Cyc. 873. Summary Proceedings Against as Deprivation of Property Without Due Process of Law, see CONSTITUTIONAL LAW, 8 Cyc. 1124. See also TRESPASS, *ante*, and Cross-References Thereunder.)

TRESPASSING ANIMAL. See ANIMALS, 2 Cyc. 392, 414; RAILROADS, 33 Cyc. 1163.

TRESPASS ON THE CASE. A form of action devised to cover all cases where an actionable wrong is claimed under the particular circumstances of the case stated.[3] (See CASE, ACTION ON, 6 Cyc. 681.)

TRESPASS QUARE CLAUSUM FREGIT. See TRESPASS, *ante*.

guilty of trespass shall impose a fine of not more than five dollars and costs, a fine of the costs alone is unauthorized); State *v.* Moultrieville, Rice (S. C.) 158; Jordan *v.* State, 9 Lea (Tenn.) 404.

98. Long *v.* State, 42 Fla. 509, 28 So. 775.

1. Little *v.* State, 89 Ala. 99, 102, 8 So. 82. He is not an outlaw and it is within the bounds to state that it is actionable to wilfully injure such an one. Brooks *v.* Pittsburgh, etc., R. Co., 158 Ind. 62, 69, 62 N. E. 694.

A child of tender years cannot be a trespasser in the legal signification of the word. Barre *v.* Reading City Pass. R. Co., 155 Pa. St. 170, 173, 26 Atl. 99.

2. Pilcher *v.* Kirk, 55 Tex. 208, 216.

3. Nolan *v.* New York, etc., R. Co., 70 Conn. 159, 188, 39 Atl. 115, 43 L. R. A. 305.

TRESPASS TO TRY TITLE

By Alexander Stronach*

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For Matters Relating to:

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Right of Possession and Right to Damages For Being Deprived Thereof, see EJECTMENT, 15 Cyc. 1.
Right of Property, see REAL ACTIONS, 33 Cyc. 1541.
Jurisdiction of Justice of the Peace of Actions to Recover Realty, see JUSTICES OF THE PEACE, 24 Cyc. 454.
Payment of Rent Pending Action Against Lessor to Recover Possession or Determine Title, see LANDLORD AND TENANT, 24 Cyc. 1189.
Slander to Try Title or Action of Jactitation, see LIBEL AND SLANDER, 25 Cyc. 565.
Trespass to Try Title:
Application of Doctrine of Lis Pendens to, see LIS PENDENS, 25 Cyc. 1459.
As Remedy of Owner For Compensation For Taking or Injuring Property, see EMINENT DOMAIN, 15 Cyc. 994.
Between Cotenants, see TENANCY IN COMMON, *ante*, p. 95.
Conclusiveness of Judgment in, see JUDGMENTS, 23 Cyc. 1336.
To Recover Land on Breach of Contract of Sale, see VENDOR AND PURCHASER.

I. RIGHT OF ACTION AND DEFENSES.

A. Nature and Scope. In Texas, in which state principally this form of action is resorted to, the action of trespass to try title serves the purpose of an action of ejectment, but in it the question of title as well as the right to possession is determined, and as fully settled as it would be in a suit to quiet title.[1] Almost all manner of conflicting claims to land, regardless of which of the contending parties may have possession, can be therein determined.[2] In Texas, in this action, it is not necessary to prove an actual trespass by defendant, except in cases where there is no controversy about the title but only as to boundaries, and where plaintiff having superior title charges defendant with trespassing on his land.[3] Since trespass to try title is a simple remedy for determining conflicting and disputed claims to land, irrespective of its actual occupancy or possession, for the purpose of this action the owner may consider himself as having been ousted by an adverse claimant, even though such claimant has never been in actual possession of the land.[4]

1. Thomson *v.* Locke, 66 Tex. 383, 1 S. W. 112; Hays *v.* Texas, etc., R. Co., 62 Tex. 397.

2. Hays *v.* Texas, etc., R. Co., 62 Tex. 397; English *v.* Hutchins, 2 Tex. Unrep. Cas. 407; Edrington *v.* Butler, (Tex. Civ. App. 1895) 33 S. W. 143; St. Louis, etc., R. Co. *v.* Hargrove, (Tex. Civ. App. 1895) 31 S. W. 696, holding that trespass to try title will lie against a railroad company which has entered on land without any license or condemnation proceedings, although it had occupied the land before plaintiff purchased it. See also Raines *v.* Wheeler, 76 Tex. 390, 13 S. W. 324; Titus *v.* Johnson, 50 Tex. 224; Grimes *v.* Hobson, 46 Tex. 416; Shepard *v.* Cummings, 44 Tex. 502; Moody *v.* Holcomb, 26 Tex. 714; Dangerfield *v.* Paschal, 20 Tex. 536.

Disputes as to boundaries may be determined in trespass to try title. Railway *v.* Uribe, 85 Tex. 386, 20 S. W. 153; Weaver *v.* Vandervanter, 84 Tex. 691, 19 S. W. 889; Nye *v.* Hawkins, 65 Tex. 600; Rountree *v.* Haynes, (Tex. Civ. App. 1903) 73 S. W. 435. See also Rodriguez *v.* Hernandez, 35 Tex. Civ. App. 78, 79 S. W. 343.

Indebtedness for house on land. — The court can, in an action of trespass to try title, determine and settle an indebtedness growing out of defendant's building a house on the land, although the amount is not within the court's jurisdiction, since the court can settle in such an action all the equities between the parties. Kay *v.* Hathaway, 21 Tex. Civ. App. 466, 51 S. W. 663.

The validity of a will under which defendant claims cannot be contested in an action of trespass to try title to the lands devised in such will. A direct proceeding to set aside the will is necessary. Acklin *v.* Paschal, 48 Tex. 147.

The equities of the owners of the lands in controversy cannot be adjusted for the benefit of naked trespassers. Rogers *v.* Wallace, (Tex. Civ. App. 1894) 28 S. W. 246.

3. Viesca *v.* Wyche, 28 Fed. Cas. No. 16,940, 3 Woods 336.

4. Day Land, etc., Co. *v.* State, 68 Tex. 526, 4 S. W. 865; Thompson *v.* Locke, 66 Tex. 383, 1 S. W. 112; Titus *v.* Johnson, 50 Tex. 224; Heath *v.* Cleburne First Nat. Bank, (Tex. Civ. App. 1895) 32 S. W. 778, holding that it must be alleged that defendant is

But in South Carolina an actual trespass by defendant must be proved in order to enable plaintiff to maintain this action.[5]

B. Title to Support Action — 1. In General. In trespass to try title plaintiff can recover only by proving title in himself from the state, or a superior title from a common source.[6] Even as against a naked trespasser, plaintiff must prove his title to the land, not only against defendant but as against all other persons.[7] The holder of the bare legal title may, however, maintain an action of trespass to try title.[8] Plaintiff must show title in himself at the commencement of the action,[9] and if it appears that he has parted with his title before that time he cannot recover;[10] and a remainder-man cannot bring trespass to try title during the existence of the life-estate.[11] A mere executory agreement to convey land, a deed being required to give plaintiff title and right to possession, will not support an action of trespass to try title;[12] but an executed parol contract for the sale of land, the purchase-money having been paid, the possession taken, and valuable improvements placed thereon by the vendee, will constitute such a title in the vendee as will enable him to bring this action.[13] One claiming land under a bond to convey such land may recover against a mere trespasser, although the consideration has not been paid.[14] An assignment of land not under seal will not, however, invest an assignee with such a title as will enable him to maintain trespass to try title.[15] A mortgagee is not entitled to bring an action of trespass to try title, even though there has been a default in the payment of the sum secured by the mortgage, as his remedy is a suit to foreclose.[16] The vendor of land has the superior title thereto until the purchase-money is paid, and may bring an action of trespass to try title: (1) Where the conveyance is executory, as where a bond for title has been given;[17] (2) where a mortgage for unpaid purchase-money is given simultaneously with the deed;[18] and (3) where an express

either in possession or is setting up a claim to possession or ownership.

5. Underwood *v.* Simms, 2 Bailey (S. C.) 81; Corneil *v.* Bickley, 1 McCord (S. C.) 466; Massey *v.* Trantham, 2 Bay (S. C.) 421. See also Binda *v.* Benbow, 9 Rich. (S. C.) 15; Watson *v.* Hill, 1 Strobh. (S. C.) 78.

Erection of obstruction across right of way.—Where the proprietors of adjacent land are each entitled to a right of way over a dam which forms a dividing line between them, and each is seized of the freehold in severalty to the center of the dam, and one of them assumes to appropriate the dam to himself, by the erection of a fence or gate across it, the other may maintain trespass to try title against him. Jerman *v.* Mathews, 2 Bailey (S. C.) 271.

6. Young *v.* Watson, 1 McMull. (S. C.) 449 (holding that in trespass to try title where defendant has not acquired his possession by tortious eviction or actual disseizin, plaintiff must make out a perfect title in himself); Peterson *v.* Kilgore, 58 Tex. 88; Jemison *v.* Halbert, 47 Tex. 180 (holding that where in trespass to try title neither party exhibits a legal title, and the equities of defendant are superior, plaintiff cannot recover); Hughes *v.* Lane, 6 Tex. 289; Moore *v.* Kempner, 41 Tex. Civ. App. 86, 91 S. W. 336; Hardy *v.* Brown, (Tex. Civ. App. 1898) 46 S. W. 385; Barnes *v.* McArthur, 4 Tex. Civ. App. 71, 22 S. W. 770; Hollingsworth *v.* Flint, 101 U. S. 591, 25 L. ed. 1028. See also Goudeloch *v.* Massey, 2 Strobh. (S. C.) 187. And see *infra*, I, B, 11.

Sound and sufficient title necessary.—A plaintiff who sets up several inconsistent titles cannot recover upon the ground that one or the other of them is a good title; some sound and sufficient title must be deduced and established. Brownsville *v.* Basse, 36 Tex. 461.

7. Tally *v.* Thorn, 33 Tex. 727; Hooper *v.* Hall, 35 Tex. 82.

8. Dean *v.* Jagoe, 46 Tex. Civ. App. 389, 103 S. W. 195; Cocke *v.* Texas, etc., R. Co., 46 Tex. Civ. App. 363, 103 S. W. 407; Aldridge *v.* Pardee, 24 Tex. Civ. App. 254, 60 S. W. 789.

9. Simpson *v.* McLemore, 8 Tex. 448.

10. Simpson *v.* McLemore, 8 Tex. 448.

11. Cook *v.* Caswell, 81 Tex. 678, 17 S. W. 385; Adams *v.* Ramsey, 19 Tex. Civ. App. 294, 46 S. W. 265; Friedman *v.* Payne, (Tex. Civ. App. 1896) 35 S. W. 47.

12. Prusiecke *v.* Ramzinski, (Tex. Civ. App. 1904) 81 S. W. 771.

13. Newcomb *v.* Cox, 27 Tex. Civ. App. 583, 66 S. W. 338.

14. Wright *v.* Dunn, 73 Tex. 293, 11 S. W. 330; Ann Berta Lodge No. 42 I. O. O. F. *v.* Leverton, 42 Tex. 18; Folwell *v.* Clifton, (Tex. Civ. App. 1894) 28 S. W. 569.

15. Ansley *v.* Nolan, 6 Port. (Ala.) 379. See also Falkner *v.* Jones, 12 Ala. 165.

16. Edrington *v.* Kneeland, 57 Tex. 627; Webster *v.* Mann, 52 Tex. 416; Wiggins *v.* Wiggins, (Tex. Civ. App. 1897) 40 S. W. 643.

17. Webster *v.* Mann, 52 Tex. 416; Baker *v.* Compton, 52 Tex. 252; Baumgarten *v.* Smith, 37 Tex. 439; Walker *v.* Emerson, 20 Tex. 706, 73 Am. Dec. 207.

18. Webster *v.* Mann, 52 Tex. 416; Dunlap

lien is retained in the deed for the payment of the purchase-money.[19] Since in Texas a verbal partition of land is valid, one who has thus acquired ownership may bring an action of trespass to try title.[20] The title of plaintiff in such an action is sufficiently established where he shows that defendants entered possession as tenants and retain such possession, and further shows the death of the landlord and plaintiff's heirship.[21] A less estate in land than a fee simple may form the basis of an action to try title.[22] Where a regular probate proceeding shows a valid administration, an order to sell land at public or private sale, and the return of the sale, which does not, however, show whether the sale was public or private, and an order of confirmation, the title is thereby *prima facie* vested in the purchaser and he may maintain an action of trespass to try title.[23] In trespass to try title, where plaintiff claims as the heir of the former owner who executed a deed of trust of the premises, where neither the trustee, nor the mortgagee nor his assigns, nor those claiming under void sales by the trustee are in possession, the payment of the mortgage debt is not a condition precedent to plaintiff's recovery.[24] Persons claiming title as against a judgment debtor under a sheriff's deed are not required to connect him with the sovereignty of the soil, in order to recover judgment against him in an action of trespass to try title.[25]

2. Undivided Interest or Title to Part of Land. Proof of an undivided interest in the land in controversy will authorize a recovery of the entire tract sued for as against a stranger to the title.[26] But actual possession of a part of a tract of land, under a conveyance of all of it, cannot prevail as to another part of such grant against an elder title to all of such other part and actual possession of a part of the latter tract.[27] In an action of trespass to try title, to recover an entire tract of land, plaintiff may recover the whole or any part thereof according to his proof of title, legal or equitable.[28]

3. Title Acquired After Accruing of Cause of Action or Commencement of Suit. Plaintiff must have such title as is necessary to sustain an action of trespass to

v. Wright, 11 Tex. 597, 62 Am. Dec. 506; Howard *v.* Davis, 6 Tex. 174.

19. Webster *v.* Mann, 52 Tex. 416; Peters *v.* Clements, 46 Tex. 114; Baker *v.* Ramey, 27 Tex. 52; Curran *v.* Texas Land, etc., Co., 24 Tex. Civ. App. 499, 60 S. W. 466. See also Smith *v.* Cottingham, 20 Tex. Civ. App. 303, 49 S. W. 145; McRae *v.* Poor, (Tex. Civ. App. 1898) 48 S. W. 47; Abernethy *v.* Bass, 9 Tex. Civ. App. 239, 29 S. W. 398. *Compare* Club Land, etc., Co. *v.* Wall, 99 Tex. 591, 91 S. W. 778, (Tex. 1906) 92 S. W. 984, 122 Am. St. Rep. 666 [*reversing* (Civ. App. 1905) 88 S. W. 534]. And see Vendor and Purchaser.

20. Johnson *v.* Johnson, 65 Tex. 87. See also Shannon *v.* Taylor, 16 Tex. 413.

21. Hintze *v.* Krabbenschmidt, (Tex. Civ. App. 1897) 44 S. W. 38.

22. Lewis *v.* Goguette, 3 Stew. & P. (Ala.) 184 (holding that even a leasehold estate is sufficient to authorize a recovery against one who can establish no legal right either of property or possession); Thurber *v.* Conners, 57 Tex. 96 (construing Rev. St. art. 4786, subd. 3).

23. Erhart *v.* Bass, 54 Tex. 97.

24. Harris *v.* Wilson, (Tex. Civ. App. 1897) 40 S. W. 868.

25. Frazier *v.* Waco Bldg. Assoc., 25 Tex. Civ. App. 476, 61 S. W. 132.

26. Jett *v.* Hunter, 51 Tex. Civ. App. 92, 111 S. W 176; Branch *v.* Deussen, (Tex. Civ. App. 1908) 108 S. W. 164; Hutcheson *v.* Chandler, 47 Tex. Civ. App. 124, 104 S. W. 434; Wilcoxon *v.* Howard, 26 Tex. Civ. App. 281, 62 S. W. 802, 63 S. W. 938; Maxson *v.* Jennings, 19 Tex. Civ. App. 700, 48 S. W. 781 (holding that a person who claims title by several conveyances of undivided interests in lands may dispossess a trespasser, if one of the conveyances is effectual); Webster *v.* McCarty, 16 Tex. Civ. App. 160, 40 S. W. 823; Hill *v.* Smith, 6 Tex. Civ. App. 312, 25 S. W. 1079; Minor *v.* Powers, (Tex. Civ. App. 1893) 24 S. W. 710; Ford *v.* Ballard, 1 Tex. Civ. App. 376, 21 S. W. 146. See also Murrell *v.* Wright, 78 Tex. 519, 15 S. W. 156; Sowers *v.* Peterson, 59 Tex. 216; Minor *v.* Powers, (Tex. Civ. App. 1893) 24 S. W. 710.

One tenant in common can recover the entire tract owned by all the cotenants from one holding without title. Hughes *v.* Wright, 100 Tex. 511, 101 S. W. 789, 123 Am. St. Rep. 827, 11 L. R. A. N. S. 643; Gray *v.* Kauffman, 82 Tex. 65, 17 S. W. 513; Boone *v.* Knox, 80 Tex. 642, 16 S. W. 448, 26 Am. St. Rep. 767; Mitchell *v.* Mitchell, 80 Tex. 101, 15 S. W. 705; Russell *v.* Oliver, 78 Tex. 11, 14 S. W. 264; Alexander *v.* Gilliam, 39 Tex. 227; Gorham *v.* Settegast, 44 Tex. Civ. App. 254, 98 S. W. 665; Davidson *v.* Wallingford, (Tex. Civ. App. 1895) 30 S. W. 286 [*reversed* on other grounds in 88 Tex. 619, 32 S. W. 1030].

27. Carothers *v.* Covington, (Tex. Civ. App. 1894) 27 S. W. 1040.

28. Zimpleman *v.* Power, 38 Tex. Civ. App. 263, 85 S. W. 69.

try title at the time such action is begun.[29] Plaintiff in an action of trespass to try title having *prima facie* a good title at the time of instituting such action, has, however, a right to protect himself by buying in an outstanding title even after issue joined.[30]

4. Title Acquired in Defective Judicial Proceedings. In an action of trespass to try title a subsequent purchaser at a sheriff's sale may show that a prior sheriff's sale of the same land, as the property of the same defendant in execution, was fraudulent and void, although there have been no proceedings in equity setting aside such prior sale.[31] When an action is brought to recover land allotted to a plaintiff in partition, his right to recover against a defendant showing no title will not be defeated by showing the invalidity of the proceedings under which the partition was made, as such plaintiff has an undivided interest and is therefore entitled to recover against a mere trespasser.[32] Where realty is attached in a pending suit, a sheriff's sale made after the death of defendant in such suit upon whom no personal service of process had been made will not vest in the purchaser such a title as will enable him to maintain an action of trespass to try title.[33] A marshal's deed to the United States under a void execution, together with a judgment in favor of the United States against the ancestor of plaintiff, on which such execution and sale under it were based, and a deed from the United States to plaintiff in consideration of the payment of the judgment, show no title in the United States and do not prevent an action of trespass to try title by plaintiff or his ancestor.[34]

5. Adverse Possession. Plaintiff in an action of trespass to try title may rely upon a sufficient adverse possession,[35] but where he does so, the full statutory time must have run before the commencement of the suit to enable him to recover.[36] Limitations run in favor of the possession of land by the federal government, and its grantee may, in an action of trespass to try title, raise the defense that the government had acquired title by possession for the statutory period.[37]

6. Interest in Public Lands. In trespass to try title where plaintiff claims under a patent from the United States government to himself as the legal vendee

29. State Bank *v.* South Carolina Mfg. Co., 3 Strobh. (S. C.) 190, 49 Am. Dec. 640 (holding that an action of trespass to try title cannot be sustained on a sheriff's deed bearing date subsequent to the commencement of the action, although the sale had been made prior to that time); Harrison *v.* McMurray, 71 Tex. 122, 8 S. W. 612; Teal *v.* Terrell, 48 Tex. 491; Walker *v.* Downs, (Tex. Civ. App. 1901) 61 S. W. 725, 64 S. W. 682 (holding that the right of a plaintiff having a superior title to recover in trespass to try title is not defeated, on the ground that he claims under an after-acquired title, because a deed in his chain of title was not acknowledged until after suit brought); Kerr *v.* Hill, (Tex. Civ. App. 1894) 31 S. W. 1089 (holding that where, in trespass to try title, a judgment for defendants is reversed, and a new trial ordered, with costs against defendants, plaintiff may sell defendants' interest in the land under an execution on the judgment for costs, and, on purchasing such interest, may file an amended petition and abstract of title setting up the title acquired under the sale).

Admissibility of deed dated after entry.—A deed to plaintiff, dated after the entry alleged in the petition but before the action is begun, is admissible. Jenkins *v.* Adams, 71 Tex. 1, 8 S. W. 603; Schmidt *v.* Huff, 7 Tex. Civ. App. 593, 28 S. W. 1053; Ford *v.* Ballard, 1 Tex. Civ. App. 376, 21 S. W. 146.

30. Martin *v.* Parker, 26 Tex. 253.

31. Martin *v.* Ranlett, 5 Rich. (S. C.) 541, 57 Am. Dec. 770.

32. Truehart *v.* McMichael, 46 Tex. 222.

33. Graham *v.* Boynton, 35 Tex. 712.

34. Moody *v.* Moeller, 72 Tex. 635, 10 S. W. 727, 13 Am. St. Rep. 839.

35. Scott *v.* Woodward, 2 McCord (S. C.) 161; Stubblefield *v.* Hanson, (Tex. Civ. App. 1906) 94 S. W. 406. See also Gilbert *v.* Rankin, 3 Tex. Civ. App. 78, 21 S. W. 994.

36. Hood *v.* Palmer, 7 Rich. (S. C.) 138; Young *v.* Watson, 1 McMull. (S. C.) 449.

Actual possession.—Where plaintiff and defendant each claim title to land by limitation, introducing sufficient evidence to recover against the true owner, and each is in actual possession of a part only, claiming title as against the other to the whole by constructive possession, whatever may be the rights of either as against the true owner neither acquires title as against the other to any of the land which is not in his actual possession, and plaintiff cannot maintain trespass against defendant showing the same character of title. Morris *v.* Jacks, (Tex. Civ. App. 1906) 96 S. W. 637.

37. El Paso *v.* Ft. Dearborn Nat. Bank, 96 Tex. 496, 74 S. W. 21 [*reversing* (Civ. App. 1903) 71 S. W. 799].

of an Indian reservee under a treaty with the Indians, and defendant claims under an older patent from the government, plaintiff must prove the location of the Indian reservee as well as that he succeeded to the rights of such reservee.[38] In Texas, by virtue of statutory provisions, the location and survey of public land under a head right certificate, bounty warrant, land scrip, or any other evidence of right to such land recognized by the laws of that state, give sufficient title to authorize the maintenance of an action of trespass to try title.[39] Under the statute giving a *bona fide* settler who has bought one section of agricultural land the right to buy three pastoral sections, such a settler who has applied for

38. Stephens *v.* Westwood, 20 Ala. 275.

39. See Shepard *v.* Avery, 89 Tex. 301, 34 S. W. 440 (construing Paschal Dig. art. 4522, and holding that it will be presumed that the land was surveyed and the patent was issued in accordance with the requirements of the law); Duren *v.* Houston, etc., R. Co., 86 Tex. 287, 24 S. W. 258; Von Rosenberg *v.* Cuellar, 80 Tex. 249, 16 S. W. 58; Murrell *v.* Wright, 78 Tex. 519, 15 S. W. 156 (holding that one who has located a land certificate, under an oral agreement by which he was to have one half the land, may recover his share in trespass to try title); Tom *v.* Sayers, 64 Tex. 339 (holding that where one of the parties to an action of trespass to try title seeks to show title in himself from the one to whom the original patent issued as an assignee, he need not show, as against one who asserts no legal or equitable claim to the certificate, the right of the assignee to the certificate on which the patent was issued); Wilson *v.* Williams, 25 Tex. 54; Hughes *v.* Lane, 6 Tex. 289; Earnes *v.* Lake, 45 Tex. Civ. App. 463, 101 S. W. 479; Stubblefield *v.* Hanson, (Tex. Civ. App. 1906) 94 S. W. 406 (construing Rev. St. (1895) art. 5259); Lewis *v.* Bergess, 22 Tex. Civ. App. 252, 54 S. W. 609 (a certificate issued in name of patentee after his death will support action brought by his heirs); Creswell Ranche, etc., Co. *v.* Waldstein, (Tex. Civ. App. 1894) 28 S. W. 260; Dickey *v.* Grace, (Tex. Civ. App. 1894) 25 S. W. 41. *Compare* Brown *v.* Roberts, 75 Tex. 103, 12 S. W. 807; Baldwin *v.* Roberts, 13 Tex. Civ. App. 563, 36 S. W. 789, holding that in the absence of a showing of legal title a mere unrecommended land certificate is insufficient to support an action of trespass to try title.

Right determined by priority of survey.— Where in an action of trespass to try title it appeared that plaintiff had title by patent to the land under a survey made on a certain date, and that defendant had title by patent to the same land under another survey made two days later, it was held that the prior survey constituted an appropriation of the land which would enable plaintiff to recover. Mohler *v.* Welge, (Tex. Civ. App. 1892) 20 S. W. 850. See also Lockwood *v.* Ogden, (Tex. Civ. App. 1899) 50 S. W. 1077.

Such compliance with the law as entitled him to an award of the land sued for must be shown by one bringing an action to try title to school lands; and a defect in the title of defendant will not help him. Willoughby *v.* Townsend, 93 Tex. 80, 53 S. W. 581 [*reversing* (Civ. App. 1899) 51 S. W. 335].

Location and survey are both necessary under the statute now in force in Texas. Thomson *v.* Locke, 66 Tex. 383, 1 S. W. 112; Fall *v.* Nations, 17 Tex. Civ. App. 160, 43 S. W. 46. See also Sanborn *v.* Gunter, 84 Tex. 273, 17 S. W. 117, 20 S. W. 72.

Classification and appraisal.—A purchaser of school lands cannot maintain trespass to try title to recover such lands without showing that they have been classified and appraised. Corrigan *v.* Fitzsimmons, (Tex. Civ. App. 1903) 76 S. W. 68 [*reversed* on other grounds in 97 Tex. 595, 80 S. W. 989]; Thompson *v.* Autry, (Tex. Civ. App. 1899) 52 S. W. 581. But this need not be shown by direct evidence as it will be presumed that the officer acted in conformity with the law. Corrigan *v.* Fitzsimmons, 97 Tex. 595, 80 S. W. 989 [*reversing* (Tex. Civ. App. 1903) 76 S. W. 68].

Occupation and payment of purchase-money.— In trespass to try title plaintiff cannot recover where he relies upon an application for preëmption and fails to show compliance with the law with respect to occupation of the land or payment of the purchase-money. Conn *v.* Franklin, (Tex. 1892) 19 S. W. 126. *Compare* Dowding *v.* Ditmore, 26 Tex. Civ. App. 606, 65 S. W. 486. An order of the commissioner's court for the sale of school lands, a certified copy of which is furnished vendee, and which, although possession of the land is given, reserves the title to the county until the price is paid, with the right to rescind and resume possession on default, with repayment of the money already paid, conveys a title good against one not showing a better. Clay County Land, etc., Co. *v.* Wood, 71 Tex. 460, 9 S. W. 340.

Action by preëmptor.— Under Paschal Dig. Tex. art. 5303, one who, as preëmptor, has procured and filed a survey of vacant land on which he has settled, may maintain an action of trespass to try title. Buford *v.* Gray, 51 Tex. 331. And under the statute permitting a preëmptor of public land to assign his right, the assignee takes an equitable, although defeasible, title which is sufficient to support an action of trespass to try title. Horne *v.* Gambrell, 1 Tex. App. Civ. Cas. § 996. See also New York, etc., Land Co. *v.* Gardner, (Tex. Civ. App. 1894) 25 S. W. 737. The issuance of the patent to the mortgagee of the preëmptor, although it invests the former with the legal title, makes him a

pastoral sections and whose application has been refused because the commissioner of the general land-office has wrongfully sold the land to another, may bring trespass to try title against such wrongful purchaser.[40]

7. Paper Title. Where in trespass to try title plaintiff makes out a *prima facie* paper title and defendant fails to prove title in himself, plaintiff is entitled to recover.[41]

8. Equitable Title. In the courts of Texas an equitable as well as a legal title will support an action of trespass to try title,[42] but in the federal courts it has been held otherwise.[43]

9. Title From Common Source. In trespass to try title, when the parties to the action claim through a common source of title, it is not necessary for plaintiff

trustee holding it for the benefit of the mortgagor, subject to the lien for the satisfaction of the mortgage, and such mortgagee cannot bring trespass to try title. Pratt *v.* Godwin, 61 Tex. 331.

Certificate in excess of legal amount.— Where one has received the patent to land in excess of the amount authorized by law, it can only be successfully attacked by one who has an antecedent title. Lemberg *v.* Cabaniss, 75 Tex. 228, 12 S. W. 844.

40. Burnett *v.* Winburn, (Tex. Civ. App. 1894) 25 S. W. 969.

41. Richardson *v.* Powell, 83 Tex. 588, 19 S. W. 262 (holding that where plaintiff introduces as a link in his title a deed with general covenants of warranty from defendant to the land described in the petition, the warranty operates as an estoppel and dispenses with the necessity of plaintiff's proving title in defendant at the time the latter executed such warranty); Montgomery *v.* Carlton, 56 Tex. 361; Webster *v.* Mann, 52 Tex. 416.

Mistake in reference to record of deed.— The right of a plaintiff having superior title to recover in trespass to try title is not defeated by the fact that a deed in his chain of title refers to another deed for the description of the property conveyed, by giving the names of the parties and the date of such deed, but misstates the page of the record on which it shall be found. Walker *v.* Downs, (Tex. Civ. App. 1901) 61 S. W. 725, 64 S. W. 682.

Deed in blank.—A power orally conferred, along with the delivery of a deed complete in all parts, except that the name of the grantee and the amount of the consideration are left blank, to fill said blank, is valid, and by the exercise of such power the title under the deed is made perfect, enabling the grantee therein to bring an action of trespass to try title. Runge *v.* Schleicher, (Tex. Civ. App. 1892) 21 S. W. 423. See also Threadgill *v.* Butler, 60 Tex. 599.

Deed for homestead not signed by wife.— In this action recovery cannot be based on a deed for defendant's homestead which was not signed by his wife. Pinkston *v.* West, (Tex. Civ. App. 1905) 85 S. W. 1014.

An unauthorized conveyance by the president of a corporation will not entitle the grantee therein to recover in an action of trespass to try title. Franco-Texan Land Co. *v.* McCormick, 85 Tex. 416, 23 S. W. 123, 34 Am. St. Rep. 815 [*reversing* (Civ. App. 1892) 23 S. W. 118].

42. Hardy *v.* Beaty, 84 Tex. 562, 19 S. W. 778, 31 Am. St. Rep. 80; Downing *v.* Diaz, 80 Tex. 436, 16 S. W. 49; Hermann *v.* Reynolds, 52 Tex. 391 (holding that a sale under a power of attorney to sell the county claims of the principal, "or any land that may be secured thereby," vests such equitable title in the purchaser as, under Paschal Dig. art. 5303, will enable him to maintain trespass to try title against a trespasser); Titus *v.* Johnson, 50 Tex. 224 (holding that the owner of land has such seizin by reason of his title, whether legal or equitable, as will support an action of trespass to try title, and he may elect to consider himself ousted, and bring suit against an adverse claimant of the land, even though such claimant has never been in actual possession of it); Walker *v.* Howard, 34 Tex. 478; Martin *v.* Weyman, 26 Tex. 460; Martin *v.* Parker, 26 Tex. 253; Miller *v.* Alexander, 8 Tex. 36; Easterling *v.* Blythe, 7 Tex. 210, 56 Am. Dec. 45; Neill *v.* Keese, 5 Tex. 23, 51 Am. Dec. 746; Kirby *v.* Cartwright, 48 Tex. Civ. App. 8, 106 S. W. 742 (holding that the title, whether legal or equitable, of one holding under a contract to convey land, which contains an acknowledgment of the receipt of the purchase-money, will support or defend against an action of trespass to try title); Craig *v* Harless, 33 Tex. Civ. App. 257, 76 S. W. 594; Wade *v.* Boyd, 24 Tex. Civ. App. 492, 60 S. W. 360; Neyland *v.* Ward, 22 Tex. Civ. App. 369, 54 S. W. 604; O'Connor *v.* Vineyard, (Tex. Civ. App. 1897) 43 S. W. 55.

The equitable lien of the holder of a note given for the purchase-money for land is not sufficient to enable him to maintain trespass to try title against the vendee or a subsequent purchaser, when, by laches, the remedy upon the note has become barred by limitation. Elliott *v.* Blanc, 54 Tex. 216.

Equitable title.— The transfer of a land-office certificate prior to a location of the land thereunder, and a subsequent issuance of the patent, confers on the assignee an equitable title sufficient to entitle him to recover the land, in an action of trespass to try title against the locator's heirs. Ehrenberg *v.* Baker, (Tex. Civ. App. 1899) 54 S. W. 435.

43. Kircher *v.* Murray, 60 Fed. 48, 8 C. C. A. 448 [*affirming* 54 Fed. 617]; Lerma *v.* Stevenson, 40 Fed. 356.

to deraign title back of such common source;[44] and in Texas there is an express statutory provision to this effect.[45] When it is shown that both plaintiff and defendant claim title from a common source, and that of the two titles emanating from such source the former's title is the superior one, plaintiff then has a right to recover,[46] unless defendant shows a title superior to the common source which

44. Martin *v.* Ranlett, 5 Rich. (S. C.) 541, 57 Am. Dec. 770; Powers *v.* Minor, 87 Tex. 83, 26 S. W. 1071; Evans *v.* Foster, 79 Tex. 48, 15 S. W. 170; Lasater *v.* Van Hook, 77 Tex. 650, 14 S. W. 270; Tapp *v.* Corey, 64 Tex. 594; Stegall *v.* Huff, 54 Tex. 193; San Antonio Mach., etc., Co. *v.* Campbell, (Tex. Civ. App. 1908) 110 S. W. 770; Young *v.* Trahan, 43 Tex. Civ. App. 611, 97 S. W. 147 (holding that where adjoining owners have purchased from a common vendor, and on a dispute as to the boundary line each claims that his tract extends over that claimed by the other, the vendor is the common source of title); Lutcher *v.* Allen, 43 Tex. Civ. App. 102, 95 S. W. 572; Tinsley *v.* Magnolia Park Co., (Tex. Civ. App. 1900) 59 S. W. 629 (holding that where both parties claim under a common source of title, it is not necessary for plaintiff to show title from the government); Parsons *v.* Hart, 19 Tex. Civ. App. 300, 46 S. W. 856; Byne *v.* Wise, (Tex. Civ. App. 1895) 31 S. W. 1069; Paschal *v.* Evans, (Tex. Civ. App. 1895) 30 S. W. 923 (holding that where in trespass to try title plaintiff claims through the beneficiaries in a trust deed, a deed from the heirs of the trustee to defendant does not show a common source of title, as estates in trust do not descend to heirs upon the death of the trustee); Bailey *v.* Laws, 3 Tex. Civ. App. 529, 23 S. W. 20; Hilburn *v.* Harris, 2 Tex. Civ. App. 395, 21 S. W. 572 (holding that where in trespass to try title both parties claim under a judgment in partition, defendant is precluded by the rule of common source from attacking the validity of such judgment); Fox *v.* Brady, 1 Tex. Civ. App. 590, 20 S. W. 1024; Cooke *v.* Avery, 147 U. S. 375, 13 S. Ct. 340, 37 L. ed. 209.

Defect in title of common source.— In trespass to try title one of the parties cannot assert that the other is not entitled to the land because of an irregularity in procuring the patent under which both claim. Cuellar *v.* Dewitt, 5 Tex. Civ. App. 568, 24 S. W. 671.

Where an action is by a widow against the heirs and devisees of the husband, plaintiff can recover as against the devisee without showing title prior to that of her husband, he being a common source, but as against the other defendants she must establish her title from the government. Mitchell *v.* Mitchell, 80 Tex. 101, 15 S. W. 705.

Conveyance to wife and execution against husband as a common source.—Where one party claims under a conveyance to the wife as her separate property, and the other under a subsequent execution sale as the property of the husband, a *prima facie* case of common source of title is made out. Edrington *v.* Butler, (Tex. Civ. App. 1895) 33 S. W. 143.

45. Tex. Rev. St. (1895) art. 5266 [*construed* in Smith *v.* Davis, 18 Tex. Civ. App. 563, 47 S. W. 101]. And see Ogden *v.* Boose, 86 Tex. 336, 24 S. W. 798 (construing Rev. St. (1871) art. 4802).

46. Skidmore *v.* Smith, 84 S. W. 1163, 27 Ky. L. Rep. 323; Simmons Hardware Co. *v.* Davis, 87 Tex. 146, 27 S. W. 62 [*reversing* on other grounds (Civ. App. 1894) 27 S. W. 426] (holding that where in trespass to try title it is agreed that both parties claim through a common grantor, and plaintiff shows a title in himself under an execution sale against such grantor, he shows a *prima facie* right of recovery, and he is not required to show the nature of defendant's title and the falsity of it); Wallace *v.* Berry, 83 Tex. 328, 18 S. W. 595; Hendricks *v.* Stone, 78 Tex. 358, 14 S. W. 570; Howard *v.* Masterson, 77 Tex. 41, 13 S. W. 635; Tapp *v.* Corey, 64 Tex. 594; Sellman *v.* Hardin, 58 Tex. 86; Young *v.* Trahan, 43 Tex. Civ. App. 611, 97 S. W. 147; Gilmer *v.* Beauchamp, 40 Tex. Civ. App. 125, 87 S. W. 907; Wade *v.* Boyd, 24 Tex. Civ. App. 492, 60 S. W. 360; Halley *v.* Fontaine, (Tex. Civ. App. 1895) 33 S. W. 260; Bradford *v.* Stoneroad, (Tex. Civ. App. 1895) 33 S. W. 156; Collins *v.* Davidson, 6 Tex. Civ App. 73, 24 S. W. 858; Starr *v.* Kennedy, 5 Tex. Civ. App. 502, 27 S. W. 26.

Complete chain to common source necessary.—Where plaintiff in trespass to try title fails to connect himself by a complete chain of title with the common source, he cannot recover. San Antonio Mach., etc., Co. *v.* Campbell, (Tex. Civ. App. 1908) 110 S. W. 770.

Necessity for common source.— It makes no difference whether the title defendant claims under is good or not, if that title is not derived from the same source with that of plaintiff, because possession with evidence of claim under any title not derived from the same source as plaintiff's is sufficient to require plaintiff to prove a superior title. Story *v* Birdwell, (Tex. Civ. App. 1898) 45 S. W. 847. See also Haney *v.* Brown, (Tex. Civ. App. 1898) 46 S. W. 55.

Evidence must connect defendant with common source. Where a plaintiff suing for the recovery of land desires to relieve himself from proving a chain of title connecting himself with the sovereignty of the soil, by establishing it from a common source, he must not only show a title to himself originating in the common source, but he must also see that the evidence connects defendant's claim of title with the same source. Hendricks *v.* Stone, 78 Tex. 358, 14 S. W. 570; Halley *v.* Fontaine, (Tex. Civ. App. 1895) 33 S. W. 260.

Plaintiff without title.— Even when the parties claim through a common source,

he has acquired, or that the title never vested in the common source.[47] The rule of common source is, however, one of evidence and not of estoppel,[48] and does not preclude the parties from asserting any other title. On the contrary, either party has the right to assert as many different and conflicting titles as he may be able to produce.[49] Where plaintiff in trespass to try title claims only an undivided interest, he must prove the amount of interest to recover against one who also has an undivided interest, from a common source of title.[50]

10. Title Acquired Through Foreclosure of Mortgage or Other Lien. A purchaser of lands at a sheriff's sale, in an action of trespass to try title to recover such lands from a third person, must show a title in the person against whom the execution issued.[51] The purchaser at a sheriff's sale in foreclosing a vendor's lien, although a third party, may maintain trespass to try title against a subsequent vendee in possession.[52] Where in an action of trespass to try title no direct attack is made on a deed obtained by defendant at a sheriff's sale, plaintiff cannot

plaintiff cannot recover when it is shown that he has no title. Jones *v.* Lee, (Tex. Civ. App. 1897) 41 S. W. 195 [*distinguishing* Rice *v.* St. Louis, etc., R. Co., 87 Tex. 90, 26 S. W. 1047, 47 Am. St. Rep. 72 (*affirming* 6 Tex. Civ. App. 355, 24 S. W. 1099)].

47. Rice *v.* St. Louis, etc., R. Co., 87 Tex. 90, 26 S. W. 1047, 47 Am. St. Rep. 72 [*affirming* 6 Tex. Civ. App. 355, 24 S. W. 1099]; Tiemann *v.* Cobb, 35 Tex. Civ. App. 289, 80 S. W. 250 (holding that in order to show a superior, outstanding title back of the common source, it must be shown that the common source did not claim under the title which is claimed to be the outstanding title); Gann *v.* Roberts, 32 Tex. Civ. App. 561, 74 S. W. 950; Gordon *v.* Hall, 29 Tex. Civ. App. 230, 69 S. W. 219; Easterwood *v.* Dunn, (Tex. Civ. App. 1898) 47 S. W. 285; Smith *v.* Davis, 18 Tex. Civ. App. 563, 47 S. W. 101; West *v.* Keeton, 17 Tex. Civ. App. 139, 42 S. W. 1034. See also Sage *v.* Clopper, 19 Tex. Civ. App. 502, 48 S. W. 36; Gilbert *v.* Rankin, 3 Tex. Civ. App. 78, 21 S. W. 994.

Necessary to show common source without title.—Where in trespass to try title both parties claim under a common source, one party cannot defeat a recovery by the other by merely showing that a person other than the common grantor at one time held the title, but he must show at least *prima facie* that the common grantor was without title. Cocke *v.* Texas, etc, R. Co., 46 Tex. Civ. App. 363, 103 S. W. 407 [*distinguishing* Ellis *v.* Lewis, (Tex. Civ. App. 1904) 81 S. W. 1034]. See also Foster *v.* Johnson, 89 Tex. 640, 36 S. W. 67.

Unnecessary for defendant to connect himself with outstanding title.—Where plaintiff has shown that defendant claimed under a common source with him, defendant may prove an outstanding legal title without showing his connection therewith. Rice *v.* St. Louis, etc., R. Co., 87 Tex. 90, 26 S. W. 1047, 47 Am. St. Rep. 72 [*affirming* 6 Tex. Civ. App. 355, 24 S. W. 1099]. But see Pfouts *v.* Thompson, (Tex. Civ. App. 1894) 27 S. W. 904; Swearingen *v.* Reed, 2 Tex. Civ. App. 364, 21 S. W. 383; Dycus *v.* Hart, 2 Tex. Civ. App. 354, 21 S. W. 299; Cooke *v.* Avery, 147 U. S. 375, 13 S. Ct. 340, 37 L. ed. 209; Cox *v.* Hart, 145 U. S. 376, 12 S. Ct. 962, 36 L. ed. 741.

48. Rice *v.* St. Louis, etc., R. Co., 87 Tex. 90, 26 S. W. 1047, 47 Am. St. Rep. 72 [*affirming* 6 Tex. Civ. App. 355, 24 S. W. 1099]; Taylor *v.* Doom, 43 Tex. Civ. App. 59, 95 S. W. 4; Gilmer *v.* Beauchamp, 40 Tex. Civ. App. 125, 87 S. W. 907; Starr *v.* Kennedy, 5 Tex. Civ. App. 502, 27 S. W. 26.

Common source a question of evidence and not of estoppel.—"The whole question of common source is one of evidence and not of estoppel. The plaintiff, in order to prevail, must recover upon the strength of his title, and this may be shown by evidence of common source and the superiority of his title from that source; but it by no means follows, when this is done, that the defendant is not permitted to overcome and destroy the effect of the *prima facie* title established by the plaintiff, by evidence tending to show that this title is worthless and that the plaintiff has no superior title." Rice *v.* St. Louis, etc., R. Co., 87 Tex. 90, 26 S. W. 1047, 47 Am. St. Rep. 72 [*affirming* 6 Tex. Civ. App. 355, 357, 24 S. W. 1099].

49. Finn *v.* Williamson, 75 Tex. 336, 12 S. W. 852; Mayfield *v.* Robinson, 22 Tex. Civ. App. 385, 55 S. W. 399; Story *v.* Birdwell, (Tex. Civ. App. 1098) 45 S. W. 847; Starr *v.* Kennedy, 5 Tex. Civ. App. 502, 27 S. W. 26. See also Hill *v.* Robertson, 1 Strobh. (S. C.) 1.

Defective title insufficient.—The effect of the proof of common source by plaintiff cannot be met and overcome by defendant merely by showing that he claims land under another source of title which is defective and legally insufficient as evidence of title. He can prove any title which he possesses, but he cannot escape from the rule of common source by showing a different chain of title under muniments which do not invest title in him. Smith *v.* Davis, 18 Tex. Civ. App. 563, 47 S. W. 101. See also Burns *v.* Goff, 79 Tex. 236, 14 S. W. 1009.

50. Baldwin *v.* Goldfrank, 88 Tex. 249, 31 S. W. 1064; Howard *v.* Masterson, 77 Tex. 41, 13 S. W. 635.

51. Galt *v.* Lewis, 3 Brev. (S. C.) 261.

52. Foster *v.* Powers, 64 Tex. 247.

recover by showing that the consideration for such deed was inadequate, unless such inadequacy is gross.[53]

11. Weakness of Defendant's Title. In an action of trespass to try title, plaintiff must recover, if at all, upon the strength of his own title and not upon the weakness of the title of his adversary.[54]

C. Possession of Plaintiff. In trespass to try title plaintiff may recover by virtue of priority of possession, without proof of title as against a mere trespasser.[55] Proof of such possession raises a presumption of ownership;[56] but

53. Smith *v.* Olsen, 23 Tex. Civ. App. 458, 56 S. W. 568.

54. *Alabama.*— Lewis *v.* Goguette, 3 Stew. & P. 184.

Kentucky.— Slusher *v.* Pennington, 104 S. W. 354, 31 Ky. L. Rep. 950.

South Carolina.— Gambling *v.* Prince, 2 Nott & M. 138; Toomer *v.* Purkey, 1 Mill 323, 12 Am. Dec. 634; Harlock *v.* Jackson, 1 Treadw. 135.

Texas.— Willoughby *v.* Townsend, 93 Tex. 80, 53 S. W. 581 [*reversing* on other grounds (Civ. App. 1899) 51 S. W. 335]; Gracey *v.* Hendrix, 93 Tex. 26, 51 S. W. 846; Caplen *v.* Drew, 54 Tex. 493; Linthicum *v.* March, 37 Tex. 349; Hooper *v.* Hall, 35 Tex. 82; Sullivan *v.* Dimmitt, 34 Tex. 114; Dalby *v.* Booth, 16 Tex. 563 (it is not necessary that defendant should have title to enable him to resist plaintiff's recovery); Hughes *v.* Lane, 6 Tex. 289; Brown *v.* Orange County, 48 Tex. Civ. App. 470, 107 S. W. 607; Jaggers *v.* Stringer, 47 Tex. Civ. App. 571, 106 S. W. 151; Fellers *v.* McFatter, 46 Tex. Civ. App. 335, 101 S. W. 1065; Mann *v.* Hossack, (Civ. App. 1906) 96 S. W. 767; Knippa *v.* Brown, (Civ. App. 1904) 82 S. W. 658; Smith *v.* Rothe, (Civ. App. 1900) 55 S. W. 754; Allen *v.* Worsham, (Civ. App. 1899) 50 S. W. 157; Soape *v.* Doss, 18 Tex. Civ. App. 649, 45 S. W. 387; Barnes *v.* McArthur, 4 Tex. Civ. App. 71, 22 S. W. 770.

United States.— Lerma *v.* Stevenson, 40 Fed. 356.

And see 46 Cent. Dig. tit. "Trespass to Try Title," § 16.

55. Cox *v.* Davis, 17 Ala. 714, 52 Am. Dec. 199; Watkins *v.* Smith, 91 Tex. 589, 45 S. W. 560; Foster *v.* Johnson, 89 Tex. 640, 36 S. W. 67; Parker *v.* Ft. Worth, etc., R. Co., 71 Tex. 132, 8 S. W. 541; Caplen *v.* Drew, 54 Tex. 493; Duren *v.* Strong, 53 Tex. 379; Keyes *v.* Mason, 44 Tex. 140; Alexander *v.* Gilliam, 39 Tex. 227; Wilson *v.* Palmer, 18 Tex. 592; Kolb *v.* Bankhead, 18 Tex. 228; Teagarden *v.* Patten, 48 Tex. Civ. App. 571, 107 S. W. 909; McAdams *v.* Hooks, 47 Tex. Civ. App. 79, 104 S. W. 432; Lynch *v.* Pittman, (Tex. Civ. App. 1903) 73 S. W. 862; Estes *v.* Turner, (Tex. Civ. App. 1902) 70 S. W. 1007. See also Lewis *v.* Goguette, 3 Stew. & P. (Ala.) 184; Hallet *v.* Eslava, 3 Stew. & P. (Ala.) 105, 2 Stew. 115; Mackay *v.* Reynolds, 2 Bay (S. C.) 474. *Compare* San Antonio *v.* Rowley, (Tex. Civ. App. 1908) 106 S. W. 753, holding that where a city has title to land dedicated to it as a street, and has not lost it by limitation, and takes possession of the land, it is not a trespasser against whom the actual possessor can recover by merely showing his possession.

Actual possession.— In order for plaintiff in trespass to try title to recover on the strength of possession alone, he must show that it was actual and corporeal and not merely constructive. Lea *v.* Hernandez, 10 Tex. 137; Lynn *v.* Burnett, (Tex. Civ. App. 1904) 79 S. W. 64.

Possession of land sued for.— Prior possession as title against a trespasser cannot avail one who is not shown to be in possession of the very land sued for. Soape *v.* Doss, 18 Tex. Civ. App. 649, 45 S. W. 387.

Time of possession.— Where plaintiffs, in trespass to try title against trespassers, show title by a prior possession, recovery by them will not be defeated because they have not been in actual possession for several years. Teagarden *v.* Patten, 48 Tex. Civ. App. 571, 107 S. W. 909. See also Boyd *v.* Miller, 22 Tex. Civ. App. 165, 54 S. W. 411. But a remote or abandoned prior possession is insufficient to entitle plaintiff in such an action to recover. Evans *v.* Ashe, 50 Tex. Civ. App. 54, 108 S. W. 398, 1190; Romine *v.* Littlejohn, (Tex. Civ. App. 1907) 106 S. W. 439.

Title to land in state.— Prior possession will not support a judgment for plaintiff where the title to the land in question is admittedly in the state. Corrigan *v.* Fitzsimmons, (Tex. Civ. App. 1903) 76 S. W. 68 [*reversed* on other grounds in 97 Tex. 595, 80 S. W. 989]; Collyns *v.* Cain, 9 Tex. Civ. App. 193, 28 S. W. 544.

56. Lockhett *v.* Glenn, (Tex. 1901) 65 S. W. 482; Watkins *v.* Smith, 91 Tex. 589, 45 S. W. 560; Pacific Express Co. *v.* Dunn, 81 Tex. 85, 16 S. W. 792; Webster *v.* Mann, 52 Tex. 416; Kemper *v.* Victoria Corp., 3 Tex. 159; Mann *v.* Hassock, (Tex. Civ. App. 1906) 96 S. W. 767; Lynn *v.* Burnett, 34 Tex. Civ. App. 335, 79 S. W. 64; Boston *v.* McMenamy, 29 Tex. Civ. App. 272, 68 S. W. 201; Cartmell *v.* Gammage, (Tex. Civ. App. 1901) 64 S. W. 315; Robertson *v.* Kelley, 25 Tex. Civ. App. 472, 61 S. W. 967; Allen *v.* Boggess, (Tex. Civ. App. 1900) 58 S. W. 833, (Civ. App. 1900) 56 S. W. 195; Boyd *v.* Miller, 22 Tex. Civ. App. 165, 54 S. W. 411; Edrington *v.* Butler, (Tex. Civ. App. 1895) 33 S. W. 143; Welder *v.* McComb, 10 Tex. Civ. App. 85, 30 S. W. 822. *Compare* Lerma *v.* Stevenson, 40 Fed. 356, holding that the fact that a person or his ancestor had cattle wandering over a grant of land fifty leagues in extent affords no presumption that he owned or claimed the land.

this presumption is rebuttable, being a rule of evidence and not a rule of property.[57]

D. Possession of Defendant. Where it appears that defendant took possession as the tenant of plaintiff, plaintiff is entitled to recover.[58] Trespass to try title will lie against a landlord, although he never was in possession, entry having been made by his tenant.[59] Where in trespass to try title defendant is a lien-holder in possession, he cannot be dispossessed, unless plaintiff discharges his lien.[60]

E. Notice to Quit. It has been held that as against a person not entitled to possession, but who is a mere trespasser, notice to quit is not necessary before an action of trespass to try title can be brought.[61]

F. Defenses — 1. In General. In trespass to try title defendant may impeach a conveyance under which plaintiff claims, by showing that it was obtained by duress or fraud, or that the consideration of it was the compounding a felony.[62] But one in possession of land as a mere trespasser, having no title, cannot show want of registry or notice of plaintiff's title,[63] or the invalidity of plaintiff's patent,[64] or that plaintiff did not pay a valuable consideration for his title.[65] The fact that plaintiff did not pay to the sheriff the costs of a former suit, under which he obtained title, will not avail defendant.[66] A defendant who denies possession and claims title by a sale under execution against plaintiff will not be heard to object to the validity of the title prior to plaintiff's possession.[67] Where the only claim of the occupants of land is a title by adverse possession, the fact that such land is occupied by them as community property constitutes no defense.[68]

2. Title or Right of Possession of Third Person. It is a good defense to trespass to try title for defendant to show a valid,[69] outstanding legal title to the land sued for, superior to that of plaintiff,[70] although defendant does not connect

57. Watkins *v.* Smith, 91 Tex. 589, 45 S. W. 560; Bates *v.* Bacon, 66 Tex. 348, 1 S. W. 256 (holding that the production of a patent in evidence, in connection with the validating act, rebuts the presumption of title arising from prior possession); Lynn *v.* Burnett, (Tex. Civ. App. 1904) 79 S. W. 64; Austin *v.* Espuela Land, etc., Co., 34 Tex Civ. App. 39, 77 S. W. 830 (holding that in trespass to try title, the *prima facie* inference that the possessor is the owner of the property is entirely rebutted where such property is shown to be vacant public domain); Boyd *v.* Miller, 22 Tex. Civ. App. 165, 54 S. W. 411.

Grant from state not connected with plaintiff's title.— House *v.* Reavis, 89 Tex. 626, 35 S. W. 1063 [*reversing* (Civ. App. 1896) 34 S. W. 646] (holding that the presumption of superior title in plaintiff, from prior possession, as against a trespasser, is not overcome by proof of a grant from the state to one with whose patent plaintiff's chain of title does not connect); Teagarden *v.* Patten, 48 Tex. Civ. App. 571, 107 S. W. 909.

Failure to connect with sovereignty of soil.— Mere failure of one having prior possession to connect himself with the sovereignty of the soil does not destroy the presumption created by such possession; such presumption being rebutted only where it is conclusively shown that the title under which possession is taken is invalid. Kirby *v.* Boaz, 41 Tex. Civ. App. 282, 91 S. W. 642.

58. King *v.* Maxey, (Tex. Civ. App. 1894) 28 S. W. 401.

59. Binda *v.* Benbow, 11 Rich. (S. C.) 24.

60. Carleton *v.* Hausler, 20 Tex. Civ. App. 275, 49 S. W. 118.

61. Woods *v.* Nabors, 1 Stew. (Ala.) 172.

62. Price *v.* McGee, 1 Brev. (S. C.) 373.

63. White *v.* Sabariego, 23 Tex. 243.

64. Yarbrough *v.* De Martin, 28 Tex. Civ. App. 276, 67 S. W. 177.

65. Ann Berta Lodge No. 42 I. O. O. F. *v.* Leverton, 42 Tex. 18.

66. Russell *v.* Nall, 2 Tex. Civ. App. 60, 20 S. W. 1006, 23 S. W. 901.

67. Pearson *v.* Flanagan, 52 Tex. 266.

68. Breath *v.* Flowers, 43 Tex. Civ. App. 516, 95 S. W. 26.

69. Holland *v.* Ferris, (Tex. Civ. App. 1908) 107 S. W. 102 [*reversed* on other grounds in 102 Tex. 177, 114 S. W. 346]; La Pice *v.* Caddenhead, 21 Tex. Civ. App. 363, 53 S. W. 66. See also Carlisle *v.* Gibbs, 44 Tex. Civ. App. 189, 98 S. W. 192.

A conveyance by the holder of a head right land certificate located and surveyed for a given number of acres, to be surveyed in the northeast corner of the survey, the land subsequently having been patented to the grantee named in the certificate, conveys the legal title to the land so described, and is admissible as an outstanding title in trespass to try title. Daniel *v.* Bridges, 73 Tex. 149, 11 S. W. 121.

70. Slusher *v.* Pennington, 104 S. W. 354, 31 Ky. L. Rep. 950; Branch *v.* Baker, 70 Tex. 190, 7 S. W. 808; Bates *v.* Bacon, 66 Tex. 348, 1 S. W. 256; Kauffman *v.* Shellworth, 64 Tex. 179; Adams *v.* House, 61 Tex.

himself therewith;[71] but in case of an outstanding equity, defendant must connect himself therewith for it to constitute a defense.[72] In trespass to try title an outstanding superior title in a third person to a part of the land claimed will not defeat a right of recovery as to the part for which plaintiff can prove his title.[73]

3. Equitable Defenses. Where the distinction between law and equity is recognized, an equitable title cannot be set up as a defense against a legal title, in an action of trespass to try title;[74] but where this distinction is disregarded in an action of trespass to try title a defendant may set up an equitable title only.[75]

639; La Pice *v.* Caddenhead, 21 Tex. Civ. App. 363, 53 S. W. 66; House *v.* Revis, (Tex. Civ. App. 1896) 34 S. W. 646. See also Hallett *v.* Eslava, 2 Stew. (Ala.) 115.

Setting up adverse title against purchaser of defendant's title.— In trespass to try title defendant cannot set up a paramount title in another, in order to defeat a purchaser of his own title at a sheriff's sale. McElwee *v.* Beason, 2 Rich. (S. C.) 26.

Sale to plaintiff's attorney.—A sale of a part interest in the land in controversy, by plaintiff to his attorney, as a fee for prosecuting the suit to a successful termination, is not such an outstanding title as to avail defendants. Mealy *v.* Lipp, 16 Tex. Civ. App. 163, 40 S. W. 824.

71. Branch *v.* Baker, 70 Tex. 190, 7 S. W. 808; Bates *v.* Bacon, 66 Tex. 348, 1 S. W. 256; Burleson *v.* Burleson, 28 Tex. 383; Portis *v.* Hill, 14 Tex. 69, 65 Am. Dec. 99; Styles *v.* Gray, 10 Tex. 503; Mann *v.* Hossack, (Tex. Civ. App. 1906) 96 S. W. 767; Poole *v.* Foster, (Tex. Civ. App. 1899) 49 S. W. 923; Dupree *v.* Frank, (Tex. Civ. App. 1897) 39 S. W. 988; Collyns *v.* Cain, 9 Tex. Civ. App. 193, 28 S. W. 544. See also Jones *v.* Perkins, 1 Stew. (Ala.) 512. *Compare* Cook *v.* Spencer, (Tex. Civ. App. 1906) 91 S. W. 813, holding that where plaintiff in trespass to try title shows that the state has parted with title to the land, and also shows a deed to himself and actual possession of the deed prior to the possession of defendant or his predecessors in interest, he is entitled to recover, although he fails to deraign title from the state to himself, and proof is made of the issuance of a patent from the state to a stranger.

Adverse possession of third person.— Proof by defendant, in possession, of a former adverse possession by a third person sufficient to bar plaintiff's claim, will prevent a recovery. Faysoux *v.* Prather, 1 Nott & M. (S. C.) 296, 9 Am. Dec. 691; Branch *v.* Baker, 70 Tex. 190, 7 S. W. 808.

Deed from plaintiff who is a tenant in common.— Defendants in trespass to try title cannot avail themselves of any benefit of a deed from one of plaintiffs, who are tenants in common, to a third person without connecting themselves with such title. Hintze *v.* Krabbenschmidt, (Tex. Civ. App. 1897) 44 S. W. 38; Pendleton *v.* Robertson, (Tex. Civ. App. 1895) 32 S. W. 442.

72. Ballard *v.* Carmichael, 83 Tex. 355, 18 S. W. 734; Robertson *v.* DuBose, 76 Tex. 1, 13 S. W. 300; Boone *v.* Miller, 73 Tex. 557, 11 S. W. 551; Goode *v.* Jasper, 71 Tex. 48, 9 S. W 132; Capt *v.* Stubbs, 68 Tex. 222, 4 S. W. 467; Tapp *v.* Corey, 64 Tex. 594; Gullett *v.* O'Connor, 54 Tex. 408; Fitch *v.* Boyer, 51 Tex. 336; Johnson *v.* Timmons, 50 Tex. 521; Shields *v.* Hunt, 45 Tex. 424; Caudle *v.* Williams, (Tex. Civ. App. 1899) 51 S. W. 560; Pool *v.* Foster, (Tex. Civ. App. 1899) 49 S. W. 923; Donovan *v.* Ladner, 3 Tex. Civ. App. 203, 22 S. W. 61; Tarlton *v.* Kirkpatrick, 1 Tex. Civ. App. 107, 21 S. W. 405.

Character of title uncertain.—Where the evidence leaves it uncertain whether the outstanding title is legal or equitable a judgment for defendant cannot be sustained. Meyer *v.* Hale, (Tex. Civ. App. 1893) 23 S. W. 990.

Interest of husband in community property.—Where real estate is derived by a woman as community property from her first husband, upon her remarriage her second husband acquires only an equitable interest, and such outstanding title in him, with which defendant does not connect, is no defense in trespass to try title as against a plaintiff showing the legal title. Reed *v.* Coffey, (Tex. Civ. App. 1897) 40 S. W. 1027.

Bond for title to third person inadmissible. — In an action of trespass to try title a bond for title to the land in controversy, executed to a third person who is not shown to have any connection with it by title or possession, is not admissible to prove an outstanding title. Darst *v.* Trammell, 27 Tex. 129.

73. Riddle *v.* Bickerstaff, 50 Tex. 155. See also Roosevelt *v.* Davis, 49 Tex. 463, holding that the fact that an intervener may show title to an undivided interest in the land sued for does not affect the right of plaintiff to recover when he shows title to the remaining interest as against defendant who is a mere trespasser.

74. Thomson *v.* Peake, 7 Rich. (S. C.) 353; Williman *v.* Robertson, 1 Brev. (S. C.) 201.

75. Neill *v.* Keese, 5 Tex. 23, 51 S. W. 746. See also Gullett *v.* O'Connor, 54 Tex. 408; Wilkin *v.* Owens, (Tex. Civ. App. 1908) 110 S. W. 552 [*reversed* on other grounds in 102 Tex. 197, 114 S. W. 104, 115 S. W. 1174, 117 S. W. 425, 32 Am. St. Rep. 867]; Flash *v.* Hearn, (Tex. Civ App. 1898) 44 S. W. 608.

Fraud.— In trespass to try title the allegations of an answer setting up an agreement for an exchange of lands, and specific acts of fraud on the part of plaintiff, inducing and relating to the exchange, states a valid defense. Herring *v.* Mason, 17 Tex. Civ. App. 559, 43 S. W. 797.

Defective deed.—Where a *de facto* president of a corporation attempts to convey land to which the corporation holds an equitable

One who asserts equitable title to land cannot defeat the legal title without showing that the holder of the same purchased with notice of the equitable claim, or that he is not a purchaser for value.[76]

4. Title or Right of Possession of Defendant. Irrespective of title, one in actual possession of land is entitled to retain possession as against naked trespassers.[77] Trespass to try title must be brought against the tenant in possession, irrespective of ownership, and it is no defense for defendant that he holds under a will for the benefit of others.[78] Title in defendant cannot be shown by a promise under seal to make a title in fee simple at some future time to the land in controversy, provided the passage of an act of congress can be obtained to authorize such conveyance.[79] A landlord admitted to defend the title for his tenant will recover against plaintiff who had purchased the land at a sheriff's sale under an execution against the tenant, if he proves such title as will enable him to recover against the tenant himself.[80]

5. Defending Cotenant's Title. A person claiming as a tenant in common of an estate in lands, not being a trespasser, can defend his cotenant's title as well as his own in an action of trespass to try title.[81]

6. Set-Off and Counter-Claim. In a suit to try title to land and to recover damages, defendant may plead in reconvention,[82] praying that the pretended title of plaintiff may be canceled and that a writ of possession and damages may be awarded to him.[83]

G. Successive Actions. A second action by an unsuccessful plaintiff in trespass to try title must be brought within the time prescribed by statute.[84] And under the statute now in force in Texas a final judgment in an action of trespass to try title is conclusive, and a second action cannot be brought at all.[85]

H. Joinder of Causes of Action. Both equitable and legal causes of action or defense may be united in an action of trespass to try title;[86] and it is no misjoinder of causes of action to claim, in an action of trespass to try title, damages for trespasses committed on the premises, such as destroying timber, tearing down fences, and the like.[87] One who claims title to land may bring one action against all the tenants in possession, although they may severally possess

title, but the deed lacks the corporate seal, the grantee takes such an equitable title as will permit him to plead the equitable title of his grantor, in trespass to try title by the holder of the legal title. Dawson *v.* McLeary, (Tex. Civ. App. 1894) 25 S. W. 705 [*reversed* on the facts in 87 Tex. 524, 29 S. W. 1044].

The principle of laches does not apply to the setting up, against an action of trespass to try title, of an instrument giving defendant an equitable title, it not appearing that the right of those claiming under it has ever been denied or in any way disregarded. Tompkins *v.* Broocks, (Tex. Civ. App. 1897) 43 S. W. 70.

76. Baldwin *v.* Root, 90 Tex. 546, 40 S. W. 3. See also Barnes *v.* Jamison, 24 Tex. 362; Fordtran *v.* Perry, (Tex. Civ. App. 1901) 60 S. W. 1000; Saunders *v.* Isbeel, 5 Tex. Civ. App. 513, 24 S. W. 307.

77. Magerstadt *v.* Lambert, 39 Tex Civ. App. 472, 87 S. W. 1068.

78. Bonner *v.* Greenlee, 6 Ala. 411.

79. James *v.* Tait, 8 Port. (Ala.) 476.

80. Pope *v.* Clarke, 2 Strobh. (S. C.) 361.

81. Linnartz *v.* McCulloch, (Tex. Civ. App. 1893) 27 S. W. 279.

82. Moore *v.* Smith, (Tex. 1892) 19 S. W. 781; Hill *v.* Templeton, (Tex. Civ. App. 1895) 29 S. W. 535, holding that a plea of reconvention creates an issue with plaintiff and the other defendants.

Independent suit.— A plea in reconvention or cross bill occupies the same attitude as an independent suit, so that the determination of the main suit will not affect the reconvention or cross bill. Defendant in the main suit is plaintiff in the cross bill, and plaintiff in the main suit, against whom the cross bill is filed, occupies the position of defendant, with reference to the pleading. Harris *v.* Schlinke, 95 Tex 88, 65 S. W. 172 [*reversing* (Civ. App. 1901) 62 S. W. 72].

83. Egery *v.* Power, 5 Tex. 501.

84. Dyson *v.* Leeke, 5 Strobh. (S. C.) 141 (action brought within two years); Lynch *v.* Withers, 2 Bay (S. C.) 115; Brownsville *v.* Cavazos, 4 Fed. Cas. No. 2,043, 3 Woods 293 (action brought within one year).

Who is plaintiff.— The party first invoking the action of the court upon the controversy, as against the adverse party, is plaintiff and is alone authorized to bring a second action of trespass to try title. Magee *v.* Chadoin, 44 Tex. 488.

85. Tex. Rev. St. (1895) § 275. And see Hall *v.* Wooters, 54 Tex. 231.

86. Thomson *v.* Locke, 66 Tex. 383, 1 S. W. 112.

87. Hillman *v.* Baumbach, 21 Tex. 203.

distinct portions of it, and defendants may protect themselves from the joint judgment for damages by showing the character and extent of their possession.[88] Several owners of distinct parcels of the entire tract of land cannot, however, maintain a joint suit for the recovery of the entire tract, but each must sue for his respective part.[89] Where a sheriff levies on and sells land as the property of one who has in fact no interest in the land, but only lives on it with the real owner, a joint action of trespass to try title will not lie by the purchaser against such person and the real owner.[90] Defendants in such an action may sever, although they have jointly pleaded not guilty, on showing that each holds under a separate claim of title, neither having any interest in that part of the land claimed by the other.[91] Where in trespass to try title the petition alleges a joint taking of the land by two defendants, and they without objection to the joint action defend jointly, they cannot complain of a judgment against each for a several parcel of land, the rent thereof, and the value of the crop thereon, as they are not prejudiced by a judgment which declares a more limited liability than that demanded.[92]

II. PROCEEDINGS.

A. Jurisdiction and Venue — 1. JURISDICTION. In Texas the district court has jurisdiction of actions of trespass to try title.[93] Since the Texas courts have both law and equity jurisdiction, an action of trespass to try title based upon or involving equitable principles may be determined therein.[94]

2. VENUE. An action of trespass to try title should be brought in the county where the land in dispute, or a part thereof, lies.[95] Where the land sued for lies in a county other than that in which the suit is brought, the defect of venue as a defense must be suggested by a proper and seasonable pleading.[96]

B. Limitations and Laches — 1. LIMITATIONS. As is the case with other actions,[97] an action of trespass to try title cannot be maintained unless it is brought before the expiration of the period prescribed by statute.[98]

88. Rowland *v.* Ladiga, 21 Ala. 91.

89. Paschal *v.* Dangerfield, 37 Tex. 273.

90. Bauskett *v.* Holsonback, 2 Rich. (S. C.) 624.

91. Clay County Land, etc., Co. *v.* Wood, 71 Tex. 460, 9 S. W. 340.

92. Lastovica *v.* Sulik, (Tex. Civ. App. 1895) 33 S. W. 909.

93. Thurber *v.* Conners, 57 Tex. 96 (holding that the district court has jurisdiction to try an action of trespass to try title brought by a lessee for a term of years against a tenant holding over); Houghton *v.* Rice, 15 Tex. Civ. App. 561, 40 S. W. 349, 1057 (holding that the district court having jurisdiction of an action to try title, which rests on an execution sale, may determine the validity of the execution on which plaintiff's title is based, although defendant if he so desired could have instituted a proceeding in the court that issued the writ of execution to set it aside).

94. Altgelt *v.* Escadero, 51 Tex. Civ. App. 108, 110 S. W. 989; Sloan *v.* Thompson, 4 Tex. Civ. App. 419, 23 S. W. 613.

95. Murrell *v.* Wright, 78 Tex. 519, 15 S. W. 156 (holding that trespass to try title should be brought in the county in which the land lies, although defendant is a resident of the state and has his domicile in another county); Thomson *v.* Locke, 66 Tex. 383, 1 S. W. 112; Stark *v.* Burr, 56 Tex. 130; Hanner *v.* Caudle, (Tex. Civ. App. 1899) 49 S. W. 411; Grant *v.* Ravis, (Tex. Civ. App. 1896) 34 S. W. 132; Ft. Worth, etc., R. Co. *v.* Jenkins, (Tex. Civ. App. 1895) 29 S. W. 1113 (holding that an action of trespass to try title, brought against a railroad company, must be brought in the county in which the land in controversy lies, although it is provided by statute that a railroad company may be sued in any county through which its road extends). *Compare* Tevis *v.* Armstrong, 71 Tex. 59, 9 S. W. 134.

When title to land in another county determined.— Where plaintiff has brought an action for the recovery of land in the court of the county where such land is situated, such court has jurisdiction to pass upon all defenses to such suit, although involving title to land in another county exchanged by defendant for that in controversy. Herring *v.* Mason, 17 Tex. Civ. App. 529, 43 S. W. 797.

96. State *v.* Patterson, 17 Tex. Civ. App. 231, 42 S. W. 369.

97. See, generally, LIMITATIONS OF ACTIONS, 25 Cyc. 963 *et seq.*

98. Wade *v.* Goza, 78 Ark. 7, 96 S. W. 388 (where limitations are relied on as a defense, the running of the statute should be reckoned from the date of the deeds under which the parties in possession claim title, until the beginning of the suit against them for possession); Travis *v.* Hall, 95 Tex. 116, 65 S. W. 1078, 27 Tex. Civ. App. 95, 65 S. W. 1077; Chamberlain *v.* Boon, 74 Tex.

2. Laches.[99] When the title asserted by plaintiff is sufficient to sustain an action of trespass to try title, it matters not whether such title be legal or equitable; the defense of stale demand is not available, and plaintiff's right to recover in such case is barred only when defendant shows such adverse possession of the premises as will entitle him to prescribe under the statute of limitations.[1] And

659, 12 S. W. 727; Gulf, etc., R. Co. *v.* Poindexter, 70 Tex. 98, 7 S. W. 316; Sidbury *v.* Ware, 65 Tex. 252; Williams *v.* Conger, 49 Tex. 582 (holding that the landowner's failure to pay taxes or delay in suing to recover such land, where he holds a legal title, will not defeat his action where there has not been actual adverse possession for a sufficient length of time to support a plea of limitation); Kimbro *v.* Hamilton, 28 Tex. 560; Sapp *v.* Newsom, 27 Tex. 537 (holding that where one pleads the three-year statute of limitations under title to land derived through an administrator's sale, it need not appear that all the links in the chain of title are recorded); Mitchell *v.* Burdett, 22 Tex. 633; Hutcheson *v.* Chandler, 47 Tex. Civ. App. 124, 104 S. W. 434 (holding that where plaintiff claims title under a deed from one tenant in common, and defendant claims under the statute of limitations, the statute ceases to run in defendant's favor as to plaintiff's interest acquired from the tenant in common, when the pleading setting up that title is filed, but continues to run against the interest of the other cotenants; and if at the time of trial the statutory period has lapsed as to their interest, plaintiff can recover only the interest of his donor); Kirby *v.* Hayden, 44 Tex. Civ. App. 207, 99 S. W. 746 (holding that an action of trespass to try title, requiring for the relief sought the showing that the premises were by mistake included in a deed, is in effect one for the correction of a deed and is barred by the four-year statute); Mason *v.* Bender, (Tex. Civ. App. 1906) 97 S. W. 715 (holding that the four-year statute of limitations is not applicable to an action of trespass to try title to recover land, on payment of a vendor's lien, such an action not being equivalent to an action for specific performance); Titel *v.* Garland, (Tex. Civ. App. 1904) 85 S. W. 466 [*affirmed* in 99 Tex. 201, 87 S. W. 1152]; Tenzler *v.* Tyrrell, 32 Tex. Civ. App. 443, 75 S. W. 57; Stern *v.* Marx, 23 Tex. Civ. App. 439, 56 S. W. 93 (limitation, when the action, although in the form of trespass to try title, is in reality an action by a creditor to set aside a fraudulent conveyance by his debtor); Durst *v.* Skillern, (Tex. Civ. App. 1898) 45 S. W. 840 (holding that the possession of a purchaser under an executory contract of sale, the purchase-money remaining unpaid, may be made adverse by an unequivocal repudiation of the relation with notice to the vendor of such repudiation); Kerr *v.* Hill, (Tex. Civ. App. 1894) 31 S. W. 1089 (holding that where plaintiff claims under a location prior to that on which defendant's claim to title is based, plaintiff's cause of action is barred by five and not by four years' adverse possession); Morris *v.* Duncan, (Tex. Civ. App. 1894) 25 S. W. 48; Shortridge *v.* Allen, 2 Tex. Civ. App. 193, 21 S. W. 419. *Compare* Hammond *v.* Hammond, 43 Tex. Civ. App. 284, 94 S. W. 1067, 20 S. W. 945; Beall *v.* Evans, 1 Tex. Civ. App. 443, 20 S. W. 945.

Debt secured by mortgage barred.— The defense that a deed under which plaintiff claimed is a mortgage, and that the debt secured thereby is barred by limitation, is available without tender of the amount of the debt. McKeen *v.* James, 87 Tex. 193, 25 S. W. 408, 27 S. W. 59 [*affirming* (Civ. App. 1893) 23 S. W. 460]; Boggess *v.* Brownson, 59 Tex. 417; Mann *v.* Falcon, 25 Tex. 271.

Suspension during coverture.— Where defendant entered into possession and continued in such possession during the coverture of the owner of the land, limitations did not begin to run in favor of defendant until the termination of the coverture. Wren *v.* Howland, 33 Tex. Civ. App. 87, 75 S. W. 894.

99. See Equity, 16 Cyc. 154.

1. Stafford *v.* Stafford, 96 Tex. 106, 70 S. W. 75; Martin *v.* Parker, 26 Tex. 253; Secrest *v.* Jones, 21 Tex. 121; Lyster *v.* Leighton, 36 Tex. Civ. App. 62, 81 S. W. 1033; Betzer *v.* Goff, 35 Tex. Civ. App. 406, 80 S. W. 671 (holding that stale demand is no defense whether plaintiff's title be legal or equitable, if it be a title as distinguished from a mere equitable right to acquire title); Lochridge *v.* Corbett, 31 Tex. Civ. App. 676, 73 S. W. 96; Schleicher *v.* Gutbrod, (Tex. Civ. App. 1894) 34 S. W. 657; New York, etc., Land Co. *v.* Hyland, 8 Tex. Civ. App. 601, 28 S. W. 206; Trinity County Lumber Co. *v.* Pinckard, 4 Tex. Civ. App. 671, 23 S. W. 720, 1015. *Compare* Frost *v.* Wolf, 77 Tex. 455, 14 S. W. 440, 19 Am. St. Rep. 761.

Where a legal title is asserted by plaintiff, the plea of stale demand is not applicable. Humphreys *v.* Edwards, 89 Tex. 512, 36 S. W. 333, 434; Clark *v.* Adams 80 Tex. 674, 16 S. W. 552; Daniel *v.* Bridges, 73 Tex. 149, 11 S. W. 121 (holding that upon the issuance of a patent the legal title passes by estoppel to the patentee's prior grantee, and as the deed by operation of law gives constructive possession, the doctrine of stale demand does not apply); Bullock *v.* Smith, 72 Tex. 545, 10 S. W. 687; Murphy *v.* Welder, 58 Tex. 235; Hunter *v.* Hodgson, (Tex. Civ. App. 1906) 95 S. W. 637; Overby *v.* Johnston, 42 Tex. Civ. App. 348, 94 S. W. 131; Tinsley *v.* Magnolia Park Co., (Tex. Civ. App. 1900) 59 S. W. 629; Texas Tram, etc., Co. *v.* Gwin, (Tex. Civ. App. 1899) 52 S. W. 110; Batcheller *v.* Besancon, 19 Tex. Civ. App. 137, 47 S. W. 296; Staley *v.* Hankla, (Tex. Civ. App. 1897) 43 S. W. 20.

when there is no adverse possession, neither limitation nor the rule of stale demand begin to operate against one claiming the equitable right until some act has been done by the holder of the legal title indicative of an intention to claim adversely.[2] Where defendant asserts an equitable title sufficient to afford a good defense, and does not seek affirmative relief, pleas of laches and stale demand are not available.[3] Coverture will defeat a plea of stale demand when interposed against an equitable right asserted by a married woman.[4]

C. Parties — 1. Parties Plaintiff. An action of trespass to try title must be brought in the name of the real party in interest, and one person cannot maintain this action in his own name for the use and benefit of another.[5] Remaindermen are proper parties plaintiff,[6] and so are the heirs,[7] and the widow and children [8] of the deceased owner of the land in controversy. The administrator is a proper party plaintiff to an action brought by the sole heir of his intestate.[9]

2. Parties Defendant. Under the Texas statute, defendant must be the person in possession, if the premises are occupied, or some person claiming title thereto in case they are unoccupied.[10] A purchaser of title *pendente lite* may be made defendant with the consent of plaintiff.[11] The public surveyor, whose duty it is to measure the land for the rightful owner, may be joined as a defendant with the adverse claimant.[12] The refusal of the court to make defendant's vendee a party, even though he might properly have been made one, is not an error of which defendant can complain.[13] Where several parties claiming interest in land are not made defendants, it is not error to try the case as to the parties in court, where no partition is sought, as the interested parties not joined will not be bound

Against one claiming land under a valid certificate of location and survey, the plea of stale demand cannot be interposed. Duren *v.* Houston, etc., R. Co., 86 Tex. 287, 24 S. W. 258; League *v.* Henecke, (Tex. Civ. App. 1894) 28 S. W. 220 [*affirming* (Civ. App. 1894) 27 S. W. 1049, 26 S. W. 729]; Olcott *v.* Ferris, (Tex. Civ. App. 1894) 24 S. W. 848.

Where one equitable claim is asserted against another, the plea of stale demand is not available as a defense. Wright *v.* Dunn, 73 Tex. 293, 11 S. W. 330; Scarborough *v.* Arrant, 25 Tex. 129; Stipe *v.* Shirley, 27 Tex. Civ. App. 97, 64 S. W. 1012.

A mere trespasser cannot set up the defense of stale demand against the holder of an equitable title. Wright *v.* Dunn, 73 Tex. 293, 11 S. W. 330; McCoy *v.* Pease, 19 Tex. Civ. App. 657, 48 S. W. 208; Carmichael *v.* Ballard, (Tex. Civ. App. 1895) 31 S. W. 80; Grant *v.* Hill, (Tex. Civ. App. 1894) 30 S. W. 952; Edwards *v.* Gill, 5 Tex. Civ. App. 203, 23 S. W. 742.

2. Runge *v.* Schleicher, (Tex. Civ. App. 1892) 21 S. W. 423. See also Threadgill *v.* Bickerstaff, 87 Tex. 520, 29 S. W. 757 [*affirming* 7 Tex. Civ. App. 406, 26 S. W. 739]; Hasseldenz *v.* Doffiemyre, (Tex. Civ. App. 1898) 45 S. W. 830.

3. Kirby *v.* Cartwright, 48 Tex. Civ. App. 8, 106 S. W. 742; Whisler *v.* Cornelius, (Tex. Civ. App. 1904) 79 S. W. 360; Hensel *v.* Kegans, 8 Tex. Civ. App. 583, 28 S. W. 705. See also Broussard *v.* Dull, 3 Tex. Civ. App. 59, 21 S. W. 937.

4. Hill *v.* Moore, 85 Tex. 335, 19 S. W. 162.

5. Hooper *v.* Hall, 30 Tex. 154; Smith *v.* Olsen, (Tex. Civ. App. 1898) 44 S. W. 874, holding that one who purchases the interest of plaintiff *pendente lite* does not thereby become a party to the action.

6. Combest *v.* Wall, (Tex. Civ. App. 1907) 102 S. W. 147.

7. Baker *v.* Hamblen, (Tex. Civ. App. 1903) 75 S. W. 362.

8. Fowler *v.* Agnew, 43 Tex. Civ. App. 540, 95 S. W. 36.

9. Cassidy *v.* Kluge, 73 Tex. 154, 12 S. W. 13.

10. Tex. Rev. St. (1895) art. 5254. And see Houston, etc., R. Co. *v.* State, 89 Tex. 294, 34 S. W. 734; Rains *v.* Wheeler, 76 Tex. 390, 13 S. W. 324; Clay County Land, etc., Co. *v.* Wood, 71 Tex. 460, 9 S. W. 340; Hetherington *v.* Texas Trunk R. Co., (Tex. Civ. App. 1896) 34 S. W. 994; Heidenheimer *v.* Loring, 6 Tex. Civ. App. 560, 26 S. W. 99 (holding that where the petition alleges that defendants claim under a judgment obtained by fraud, the representatives of the original parties to the judgment and any one claiming an interest in the property are proper parties); Slator *v.* Trostel, (Tex. Civ. App. 1892) 21 S. W. 285. *Compare* Brown *v.* Humphrey, 43 Tex. Civ. App. 23, 95 S. W. 23; Gillean *v.* Frost, 25 Tex. Civ. App. 371, 61 S. W. 345.

Mortgagees are not necessary parties to actions of trespass to try title brought against mortgagors. Galveston, etc., R. Co. *v.* State, (Tex. Civ. App. 1896) 36 S. W. 111.

Where the legal title is held by defendant for a third person, such third person is properly admitted as a party defendant to protect his interest. McPherson *v.* Johnson, 69 Tex. 484, 6 S. W. 798.

11. Jemison *v.* Halbert, 47 Tex. 180.

12. Thomson *v.* Locke, 66 Tex. 383, 1 S. W. 112.

13. Stewart *v.* Kemp, 54 Tex. 248.

thereby.[14] But where partition is sought, all persons owning any interest in the land must be made parties.[15] In Alabama it has been held that, in an action of trespass to try title, instituted against a mortgagor in possession, the mortgagee, if entitled to the right of entry, may be admitted as a party defendant.[16]

3. INTERVENTION. The right to intervene in an action of trespass to try title is governed by the general rules regulating this right.[17] Where an action of trespass to try title is brought against the tenant in possession, the landlord may become or may be made a party defendant.[18]

4. BRINGING IN WARRANTOR AND OTHERS. Under the Texas statute, the real owner or warrantor may make himself, or be made, a party defendant;[19] but such warrantors should not be brought in at such a time or in such a manner as to unreasonably delay the trial of the case.[20] Any other person who claims or has any interest in the premises or any part thereof, which is adverse to plaintiff, may be brought in and made a defendant.[21] A defendant in possession by virtue of his wife's claim cannot have proceedings in an action of trespass to try title suspended until she can be made a co-defendant.[22] The fact that one of the parties to an action of trespass to try title claims under a deed alleged to be void does not make it necessary that the vendor in the deed should be made a party to the action.[23]

D. Process. Plaintiff's writ should be indorsed with a notice that the action is brought to try the title to the land, as well as to recover damages,[24] unless as in Texas it is provided by statute that such indorsement shall be made upon the petition.[25] Where defendant resides in a district other than that in which the land is situated, plaintiff is not bound to have him served in the district where he resides, but may proceed in the usual course by original, *alias* and *pluries*, until defendant is served in the district where the land lies.[26] A variance between the description of the land in the petition and the citation, consisting of a difference

14. Tevis *v.* Armstrong, 71 Tex. 59, 9 S. W. 134.

15. Carnes *v.* Swift, (Tex. Civ. App. 1900) 56 S. W. 85.

16. Noble *v.* Coleman, 16 Ala. 77.

17. Del Rio Bldg., etc., Co. *v.* King, 71 Tex. 729, 12 S. W. 65; Butts *v.* Caffall, (Tex. Civ. App. 1893) 24 S. W. 373, holding that one may intervene where it appears that the title to his property is directly involved in the action, and that he was interested in the subject-matter of the litigation at the time the action was commenced, and that this interest may be affected by the decree rendered therein. *Compare* Thomas *v.* Beaton, 25 Tex. Suppl. 318.

Leave of court necessary.— One occupying the position of intervener cannot become a party to an action of trespass to try title without leave of court. Riviere *v.* Wilkens, 31 Tex. Civ. App. 454, 72 S. W. 608.

18. Falkner *v.* Jones, 12 Ala. 165; Evans *v.* Hinds, 2 Hill (S. C.) 527; Crosby *v.* Floyd, 2 Bailey (S. C.) 116; Campbell *v.* Kennedy, 2 Treadw. (S. C.) 760; Kennedy *v.* Campbell, 3 Brev. (S. C.) 553.

Setting aside judgment.—A judgment in trespass to try title will be set aside on the application of the landlord, who shows that the action was against his tenant, and that he had no notice of the proceeding until after the judgment. Hough *v.* Hammond, 36 Tex. 657; Dallas Oil, etc., Co. *v.* Portwood, (Tex. Civ. App. 1902) 68 S. W. 1017.

19. Tex. Rev. St. (1895) art. 5252. And see Cobb *v.* Robertson, 99 Tex. 138, 86 S. W. 746, 87 S. W. 1148, 122 Am. St. Rep. 609; Norton *v.* Schmucker, 83 Tex. 212, 18 S. W. 720; Stark *v.* Homuth, (Tex. Civ. App. 1898) 45 S. W. 761; Meade *v.* Jones, 13 Tex. Civ. App. 320, 35 S. W. 310; Blount *v.* Bleker, 13 Tex. Civ. App. 227, 35 S. W. 863; Grant *v.* Hill, (Tex. Civ. App. 1890) 30 S. W. 952; Norton *v.* Collins, 1 Tex. Civ. App. 272, 20 S. W. 1113, holding that plaintiff, as well as defendant, has the right to have his warrantor cited to come into court and maintain the title conveyed by him.

20. Kirby *v.* Estill, 75 Tex. 484, 12 S. W. 807.

21. Nye *v.* Gribble, 70 Tex. 458, 8 S. W. 608; Furrh *v.* Winston, 66 Tex. 521, 1 S. W. 527. *Compare* Meyer *v.* Oppermann, 76 Tex. 105, 13 S. W. 174; Bonner *v.* Ogilvie, 24 Tex. Civ. App. 237, 58 S. W. 1027.

22. Thomas *v.* Quarles, 64 Tex. 491.

23. Cox *v.* Shropshire, 25 Tex. 113.

24. James *v.* Tait, 8 Port. (Ala.) 476 (holding that the indorsement "that the action is brought as well to try titles, as to recover damages" is sufficient, and that any unnecessary description of the premises and the injury committed will be regarded as surplusage); Lehre *v.* Murray, 2 Brev. (S. C.) 5 (holding that where the capias ad respondendum was not indorsed with a notice that the title to the land trespassed on was to be tried, but the declaration was so indorsed before defendant had pleaded, this was a virtual compliance with the statute doing away with proceedings in ejectment).

25. See *infra*, II, F, 1, a.

26. Renwick *v.* Renwick, 9 Rich. (S. C.) 50.

in the spelling of the name of a street on which the land is stated to be situated, does not render the citation void.[27]

E. Surveys and Abstracts of Title — 1. Surveys. In an action of trespass to try title a survey may be ordered by the court, where the *locus in quo* cannot well be ascertained otherwise.[28]

2. Abstracts of Title. Under the Texas statute either party may by notice in writing duly served demand an abstract of the title or claim of his adversary to the land in question, and when this is done the documentary evidence of title is confined to the matters contained in such abstract.[29]

F. Pleading — 1. Declaration or Petition — a. In General. Where the form and contents of a declaration or petition are provided by statute,[30] it must of course conform to the statutory requirements; a substantial compliance, however, being sufficient.[31] But where no form is prescribed, it may be in the usual form of one in trespass *quare clausum fregit*.[32] After appearance and plea to the declaration or petition, no objection can be taken to any defect therein.[33] An action of trespass to try title remains such, even though the petition also contains a prayer for partition.[34]

b. Interest and Possession of Plaintiff. Under the Texas statute[35] the petition must state the interest which plaintiff claims in the premises, whether it be in fee simple or otherwise;[36] and, if he claims an undivided interest, that

27. Swain *v.* Mitchell, 27 Tex. Civ. App. 62, 66 S. W. 61.

28. Scriven *v.* Heyward, Cheves (S. C.) 119. *Compare* Thomas *v.* Jeter, 1 Hill (S. C.) 308, holding that a survey is not necessary where the *locus in quo* can be established by other evidence.

Certifying plat.—Where a trial for land has taken place and a verdict has been given, the judge certifies the survey or plat as a memorial that that very plat is the one referred to by the jury as presenting an accurate map of the land adjudged to plaintiff or defendant. But where plaintiff has discontinued the suit, he has no right to call upon the judge to certify his plat, and a certificate given after such discontinuance is extrajudicial. Heyward *v.* Searson, 2 McMull. (S. C.) 231.

In Texas, the matter of ordering a survey in an action of trespass to try title is regulated by statute. Tex. Rev. St. (1895) arts. 5264, 5265. And see Schunior *v.* Russell, 83 Tex. 83, 18 S. W. 484; Dalby *v.* Booth, 16 Tex. 563; Castro *v.* Wurzbach, 13 Tex. 128.

29. Tex. Rev. St. (1895) arts. 5260–5263. And see Barth *v.* Green, 78 Tex. 678, 15 S. W. 112; Bitter *v.* Calhoun, (Tex. 1888) 8 S. W. 523 (holding that where defendant claims title through plaintiff, the deed of plaintiff's grantor is admissible, although no abstract of plaintiff's title was filed when it was demanded by defendant); Hayes *v.* Groesbeck, (Tex. Civ. App. 1902) 69 S. W. 237; Stokes *v.* Riley, 29 Tex. Civ. App. 373, 68 S. W. 703; Taffender *v.* Merrill, (Tex. Civ. App. 1901), 61 S. W. 936 [*affirmed* in 95 Tex. 95, 65 S. W. 177, 93 Am. St. Rep. 814]; Parker *v.* Cockrell, (Tex. Civ. App. 1895) 31 S. W. 221; Grant *v.* Hill, (Tex. Civ. App. 1894) 30 S. W. 952; Marlin *v.* Kosmyroski, (Tex. Civ. App. 1894) 27 S. W. 1042; Smith *v.* Powell, 5 Tex. Civ. App. 373, 23 S. W. 1109 (holding that defendants cannot give in evidence a power of attorney not contained in the abstract which they had filed on notice from plaintiff).

30. See Tex. Rev. St. (1895) § 5250.

31. Leigh *v.* De Ganahl, (Tex. Sup. 1891) 61 S. W. 1037. And see Bassett *v.* Martin, 83 Tex. 339, 18 S. W. 587; Rains *v.* Wheeler, 76 Tex. 390, 13 S. W. 324; Houston *v.* Calahan, (Tex. 1888) 10 S. W. 97; Bender *v.* Damon, 72 Tex. 92, 9 S. W. 747; McCurry *v.* McCurry, (Tex. Civ. App. 1906) 95 S. W. 35; Willoughby *v.* Long, (Tex. Civ. App. 1902) 69 S. W. 646 [*reversed* on other grounds in 96 Tex. 194, 71 S. W. 545]; Conklin *v.* El Paso, (Tex. Civ. App. 1897) 44 S. W. 879; Werner *v.* Kasten, (Tex. Civ. App. 1894) 26 S. W. 322; Heidenheimer *v.* Loring, 6 Tex. Civ. App. 560, 26 S. W. 99. *Compare* Cates *v.* Alston, 25 Tex. Civ. App. 454, 61 S. W. 979.

Adverse possession.—A petition which does not allege an adverse possession or claim is insufficient and subject to general demurrer. Nye *v.* Hawkins, 65 Tex. 600.

Indorsement on petition.—In Texas it is provided by statute (Rev. St. (1895) art. 5251) that plaintiff "shall indorse on his petition that the action is brought as well to try title as for damages." See Bradley *v.* Deroche, 70 Tex. 465, 7 S. W. 779; Day Land, etc., Co. *v.* State, 68 Tex. 526, 4 S. W. 865; Dangerfield *v.* Paschal, 20 Tex. 536; Wade *v.* Converse, 18 Tex. 233; Shannon *v.* Taylor, 16 Tex. 413; Bone *v.* Walters, 14 Tex. 564.

32. Carwile *v.* House, 6 Ala. 710. See also Thrash *v.* Johnson, 6 Port. (Ala.) 458; Masters *v.* Eastis, 3 Port. (Ala.) 368.

33. James *v.* Tait, 8 Port. (Ala.) 476; Hamner *v.* Eddins, 3 Stew. (Ala.) 192.

34. Watson *v.* Hewett, 45 Tex. 472; Bridges *v.* Cundiff, 45 Tex. 440.

35. Tex. Rev. St. (1895) art. 5250.

36. See Leigh *v.* De Ganahl, (Tex. 1891) 16 S. W. 1037; Gaither *v.* Hanrick, 69 Tex.

must be stated and the amount thereof.[37] It must also be stated that plaintiff was in possession of the premises or entitled to such possession.[38] But an allegation of ownership in plaintiff, and of adverse claim by defendant, is sufficient without alleging possession or right of possession in plaintiff.[39] It is not necessary for plaintiff to state the evidence of his title, but if the petition purports to do so the substantial elements of the title must be stated.[40] And where plaintiff alleges generally his ownership of the land in question, but proceeds to set out the facts constituting his title, a general demurrer to the petition should be sustained if the facts set out do not constitute a good title.[41] It is not necessary for plaintiff to allege that both he and defendant claim title from a common source in order to entitle him to prove that fact.[42] In Alabama it has been held that where the declaration alleges that plaintiff was seized of the premises in question on a certain day and month, it will be presumed that the time of the seizin was previous to the commencement of the suit, although the year is not stated.[43]

c. Description of Land. The land in controversy should be described with so much particularity and precision that defendant will be informed of what he is to defend against, the court for what it is to render judgment, and the officer executing the writ of possession of what he is to give possession to the successful party.[44] And where the description of the land given in the petition is so inaccurate

92, 6 S. W. 619; Ufford *v.* Wells, 52 Tex. 612; Hardy *v.* De Leon, 5 Tex. 211; Meade *v.* Logan, (Tex. Civ. App. 1908) 110 S. W. 188; Bullock *v.* Sprowls, (Tex. Civ. App. 1899) 54 S. W. 657 [*affirmed* in 93 Tex. 188, 54 S. W. 661, 77 Am. St. Rep. 849, 47 L. R. A. 326]; McConnico *v.* Thompson, 19 Tex. Civ. App. 539, 47 S. W. 537; Byrn *v.* Kleas, 15 Tex. Civ. App. 205, 39 S. W. 980. *Compare* Paul *v.* Perez, 7 Tex. 338.

37. Telfener *v.* Dillard, 70 Tex. 139, 7 S. W. 847; Nehring *v.* McMurrain, (Tex. Civ. App. 1898) 45 S. W. 1032.

38. O'Connor *v.* Luna, 75 Tex. 592, 12 S. W. 1125.

39. Rains *v.* Wheeler, 76 Tex. 390, 13 S. W. 324; Tevis *v.* Armstrong, 71 Tex. 59, 9 S. W. 134.

40. Hughes *v.* Lane, 6 Tex. 289.

41. Snyder *v.* Nunn, 66 Tex. 255, 18 S. W. 340.

42. Keys *v.* Mason, 44 Tex. 140.

43. Whiteside *v.* Decatur Branch Bank, 10 Ala. 249. And see Parker *v.* Haggerty, 1 Ala. 632.

44. Sturdevant *v.* Murrell, 8 Port. (Ala.) 317; Edwards *v.* Smith, 71 Tex. 156, 9 S. W. 77. See also Goldman *v.* Douglass, 81 Tex. 648, 17 S. W. 235 (holding that where the petition defines the boundaries of the premises, and then excepts therefrom land previously conveyed to a third person, without describing it, the dismissal of the action because of the insufficiency of the description is error, since plaintiff, on obtaining judgment, may aid the officer who executes the writ of possession by then producing the deeds and performing such acts as may be required to definitely point out the land to which the description in the petition and the judgment applies); Roche *v.* Lovell, 74 Tex. 191, 11 S. W. 1079. *Compare* Broughton *v.* Broughton, 4 Rich. (S. C.) 491.

Sufficiency of particular descriptions.—The premises may be sufficiently described by a particular name by which they are known (Crabtree *v.* Whiteselle, 65 Tex. 111), by their boundaries (Boydston *v.* Sumpter, 78 Tex. 402, 14 S. W. 996. See also Cook *v.* Spencer, (Tex. Civ. App. 1906) 91 S. W. 813), by number (Hamner *v.* Eddins, 3 Stew. (Ala.) 192; Edwards *v.* Smith, 71 Tex. 156, 9 S. W. 77), or it may be sufficient to describe the land as a part of a section, survey, lot, or tract (See Heifner *v.* Porter, 12 Ala. 470; Sawyer *v.* Fitts, 4 Stew. & P. (Ala.) 365; Slack *v.* Dawes, 3 Tex. Civ. App. 520, 22 S. W. 1053. *Compare* Halley *v.* Fontaine, (Tex. Civ. App. 1895) 33 S. W. 260). A description may be sufficient which describes the premises by the structures or improvements erected thereon (Echols *v.* Jacobs Mercantile Co., 38 Tex. Civ. App. 65, 84 S. W. 1082), or by reference to a map, deed, or other document describing the property (Edwards *v.* Smith, 71 Tex. 156, 9 S. W. 77; Croft *v.* Rains, 10 Tex. 520; Bracken *v.* Barnes, (Tex. Civ. App. 1902) 70 S. W. 326; Henry *v.* McNew, 29 Tex. Civ. App. 288, 69 S. W. 213). But an insufficient description will not be cured by reference to a deed, in which the description is as indefinite as that given in the petition. Halley *v.* Fontaine, (Tex. Civ. App. 1895) 33 S. W. 260.

Rejection of false description.—Where the petition correctly describes the land sought to be recovered by general description and by history of the title, and then in attempting to bound the land by giving the names and directions of the adjoining surveys gives a false description, the latter will be rejected. Bayne *v.* Denny, 21 Tex. Civ. App. 435, 52 S. W. 983.

Mistake cured by indorsement.—Where the declaration in some of the counts describes the land by the wrong township number, and the indorsement on the writ shows the correct number, the misdescription is corrected by such indorsement. Hamner *v.* Eddins, 3 Stew. (Ala.) 192.

and incomplete as not to identify the land, and it is impossible for the land in dispute to be contained in the description given, the petition is demurrable.[45] A declaration which fails to describe the premises properly is not cured by a special finding specifically locating the land.[46]

2. Plea or Answer — a. In General. Under the Texas statute, defendant need file only the plea of not guilty, which should state in substance that he is not guilty of the injury complained of in the petition filed by plaintiff against him;[47] but when other pleas are filed, the material facts necessary to constitute the defense or right to relief set up must be alleged [48] in a clear and unequivocal manner.[49] Where defendant files an admission of plaintiff's cause of action set forth in the petition, except so far as it may be defeated by the facts of the answer constituting a good defense, the court must direct a verdict for plaintiff, unless on inspection of the pleadings of defendant there are allegations showing a right in defendant to the possession of land, notwithstanding the ownership of plaintiff, and, where there are no such pleadings, there is no basis for a judgment for defendant.[50] And an answer is insufficient where the matters pleaded therein have no legal significance, and in no way affect the rights of the parties to the action.[51] Where defendant seeks to recover land which is part of a larger tract, he should in his plea set out by metes and bounds the particular part to which he claims to be entitled.[52] A defendant is not entitled, under a plea of reconvention, to recover land not sued for by plaintiff;[53] and where defendant interpleads his grantor on his warranty, it is proper to sustain exceptions to that part of the latter's answer in which he seeks a recovery against plaintiff for a debt disconnected with the subject-matter of such action, in the absence of any allegation that plaintiff is insolvent, or that there is danger that such grantor will lose his debt if his claim is not adjudicated therein.[54] A plea setting up that defendant is entitled to the land by prescription under the statute of limitations is not inconsistent with the plea that he is entitled thereto in right of his wife as heir.[55] In trespass to try title to land for which defendant has been induced by plaintiff's fraudulent representations to exchange land in another county, an answer setting up such representations and asking judgment for damages therefor, and for a cancellation of the deed to the latter tract, is not multifarious.[56] Where a plaintiff sues to recover on a note given for the purchase-price of land and to enforce a vendor's lien, and defendant by pleading the statute of limitations forces plaintiff to change the action to one of trespass to try title, and joins issue therein and rests his case on the question of title without offering to pay the balance of the price, his right to plead his equities is lost.[57]

b. Disclaimer. A defendant who has no claim to the land in controversy may avoid the consequences of an action of trespass to try title, by confessing the trespass, disclaiming the title, and tendering the damages.[58] If a defendant,

45. Thomas *v.* Tompkins, 47 Tex. Civ. App. 592, 105 S. W. 1175. See also Parker *v.* Cameron, 39 Tex. Civ. App. 30, 86 S. W. 647.

46. Cruikshanks *v.* Frean, 3 McCord (S. C.) 84.

47. Tex. Rev. St. (1895) § 5256. And see Long *v.* Long, 30 Tex. Civ. App. 368, 70 S. W. 587; Bracken *v.* Bounds, (Tex. Civ. App. 1902) 70 S. W. 326 [*reversed* on other grounds in 96 Tex. 200, 71 S. W. 547]; Morrow *v.* Fleming, 29 Tex. Civ. App. 547, 69 S. W. 244.

48. Capt *v.* Stubbs, 68 Tex. 222, 4 S. W. 467; Sullivan *v.* Creamer, (Tex. Civ. App. 1899) 50 S. W. 431 (where defendant avails himself of the right to have judgment against his warrantor, if his title fails he must allege in his pleadings the facts essential to afford him such relief); Collins *v.* Davidson, 6 Tex. Civ. App. 73, 24 S. W. 858.

49. Anderson *v.* Anderson, 13 Tex. Civ. App. 527, 36 S. W. 816. See also Wells *v.* Dyer, 45 Tex. 432; Delaney *v.* Campbell, (Tex. Civ. App. 1906) 97 S. W. 519.

50. Meade *v.* Logan, (Tex. Civ. App. 1908) 110 S. W. 188.

51. Teal *v.* Sevier, 26 Tex. 516.

52. Simpson *v.* Johnson, (Tex. Civ. App. 1898) 44 S. W. 1076.

53. Cissel *v.* Lewis, 20 Tex. Civ. App. 415, 50 S. W. 425.

54. McCarthy *v.* Burtis, 3 Tex. Civ. App. 439, 22 S. W. 422.

55. Smith *v.* De la Garza, 15 Tex. 150, 60 Am. Dec. 147.

56. Herring *v.* Mason, 17 Tex. Civ. App. 559, 43 S. W. 797.

57. White *v.* Cole, 87 Tex. 500, 29 S. W. 759.

58. Watson *v.* Hill, 1 Strobh. (S. C.) 78.

in an action of trespass to try title, pleads not guilty and at the same time files a disclaimer as to the entire tract of land sued for by plaintiff, his plea should be disregarded, and plaintiff should have judgment for the land, unless damages are claimed, in which case it puts upon plaintiff the proof of the trespass only.[59] Under the Texas statute, where defendant claims a part of the premises only, his answer is equivalent to a disclaimer of the balance.[60]

c. Withdrawal of Plea. The withdrawal of defendant's plea should not be allowed, if the rights of plaintiff would be materially affected thereby.[61]

3. Reply. Where defendant pleads his title specially and asks for affirmative relief, if plaintiff has matter in avoidance he must put in a reply alleging it.[62]

4. Amended and Supplemental Pleadings. Plaintiff may by amended petition allege a trespass subsequent to the institution of the suit,[63] title acquired by him since the date of the alleged ouster,[64] and may describe a tract of land and a chain of title other than those described in the original petition.[65] A supplemental petition should not embody a description of the land according to a survey made since the action was begun, unless such description operates as a reply to the averments in defendant's answer.[66] And it is not proper in an amended petition to allege a sale of the land in controversy after the commencement of the suit, and the prosecution of the suit in the name of plaintiff for the grantee's benefit.[67] An averment of coverture, in a supplemental pleading in replication to defendant's plea of limitation, is good as against a general demurrer.[68] Where, during the trial and without defendant's concurrence, plaintiff agreed that judgment might be rendered in favor of certain interveners for a part of the land and of himself for the balance, but filed no pleading setting up title derived from such interveners, he is not entitled to judgment for the portion of the land agreed upon, since to be available he must set up such agreement by supplemental pleading.[69] Where defendant answers that the deed under which plaintiff claims is really only a mortgage, plaintiff may amend so as to demand foreclosure in case his deed should be declared a mortgage.[70]

5. Issues, Proof, and Variance — a. In General. In accordance with the general rules of pleading in civil actions,[71] in an action of trespass to try title only such matters are in issue as are properly put in issue by the pleadings and the proof.[72] And to authorize a judgment for the relief demanded there must be

59. Herring *v.* Swain, 84 Tex. 523, 19 S. W. 774; Tate *v.* Wyatt, 77 Tex. 492, 14 S. W. 25.

60. Tex. Rev. St. (1895) art. 5269. And see Stipe *v.* Shirley, 33 Tex. Civ. App. 223, 76 S. W. 307.

61. Parker *v.* Nusbaumer, 21 Tex. Civ. App. 180, 50 S. W. 646; Texas, etc., R. Co. *v.* Ford, 9 Tex. Civ. App. 557, 30 S. W. 372.

62. Lapowski *v.* Smith, 1 Tex. Civ. App. 391, 20 S. W. 957.

63. Ballard *v.* Carmichael, 83 Tex. 355, 18 S. W. 734.

64. Schmidt *v.* Huff, 7 Tex. Civ. App. 593, 28 S. W. 1053.

65. Hunter *v.* Morse, 49 Tex. 219.

66. Stanus *v.* Smith, 8 Tex. Civ. App. 685, 30 S. W. 262.

67. Smith *v.* Olsen, 92 Tex. 181, 46 S. W. 631 [*reversing* (Civ. App. 1898) 44 S. W. 874].

68. McAllen *v.* Alonzo, 46 Tex. Civ. App. 449, 102 S. W. 475.

69. Matula *v.* Lane, (Tex. Civ. App. 1900) 56 S. W. 112.

70. Nye *v.* Gribble, 70 Tex. 458, 8 S. W. 608.

71. See Pleading, 31 Cyc. 670 *et seq.*

72. Pope *v.* Clarke, 2 Strobh. (S. C.) 361; Gaston *v.* Wright, 83 Tex. 282, 18 S. W. 576; Koenigheim *v.* Miles, 67 Tex. 113, 2 S. W. 81; Mann *v.* Falcon, 25 Tex. 271; Grandjean *v.* Story, 2 Tex. Unrep. Cas. 520; Bumpass *v.* McLendon, 45 Tex. Civ. App. 519, 101 S. W. 491; Bonner *v.* Bonner, 34 Tex. Civ. App. 348, 78 S. W. 535; Eddy *v.* Bosley, 34 Tex. Civ. App. 116, 78 S. W. 565; Corrigan *v.* Fitzsimmons, (Tex. Civ. App. 1903) 76 S. W. 68 [*reversed* on other grounds in 97 Tex. 595, 80 S. W. 989]; Gordon *v.* Hall, 29 Tex. Civ. App. 230, 69 S. W. 219; Gillum *v.* Fuqua, (Tex. Civ. App. 1901) 61 S. W. 938 (holding that a question as to the minority of plaintiff's remote grantors should not be made an issue in an action of trespass to try title, when it can bring no advantage); Collins *v.* Ferguson, 22 Tex. Civ. App. 552, 56 S. W. 225; Van Zandt *v.* Brantley, 16 Tex. Civ. App. 420, 42 S. W. 617 (holding that where plaintiff sued to rescind a contract of sale, and defendant pleaded his right to the land but filed a cross bill for improvements, the value of the land was immaterial); Cox *v.* Finks, (Tex. Civ. App. 1897) 41 S. W. 95; Mahurin *v.* McClung, (Tex. Civ. App. 1896) 34 S. W. 1046 (holding that where the issue

proof in support of all material allegations of the pleadings,[73] but an immaterial allegation not essential to establish the right alleged need not be proved.[74] Any evidence, otherwise legally sufficient, which corresponds with the allegations and is restricted to the issues, is admissible,[75] but evidence not conforming thereto is generally inadmissible.[76] A plaintiff, in trespass to try title, who only states in his petition that he is seized and possessed of the property and is entitled to the immediate possession, without specially pleading his title, may introduce in evidence facts supporting any character of title acquired at any time, except that resting upon limitation alone;[77] but a plaintiff who specially pleads his title is limited in his testimony to facts which will establish the character of title pleaded.[78]

of title depends upon a boundary line discoverable by the evidence, it is not necessary that the trial court should adjudicate the line between the parties but simply the title to the land in controversy).

The value of the use and occupation of land cannot be recovered in an action of trespass to try title, no claim therefor being asserted in the pleadings. Foster *v.* Eoff, 19 Tex. Civ. App. 405, 47 S. W. 399.

Elimination of issue.—A petition in the ordinary form of trespass to try title presents two issues, title and boundary, either or both of which may be adjudicated therein; and the parties may by oral agreement eliminate the issue of title and try that of boundary alone. Freeman *v.* McAninch, 6 Tex. Civ. App. 644, 24 S. W. 922.

73. Greenlee *v.* Taylor, 79 Tex. 149, 14 S. W. 1056; McNamara *v.* Meunsch, 66 Tex. 68, 7 S. W. 397; Robbins *v.* Hubbard, (Tex. Civ. App. 1908) 108 S. W. 773; Temple *v.* Brank Saw Co., 39 Tex. Civ. App. 606, 88 S. W. 442.

Admission of defendant's possession.— Under the Texas statute (Rev. St. (1895) art. 5228) providing that the plea of not guilty, or any other answer to the merits, shall be an admission by defendant that he was in possession of the premises sued for, such plea does not admit that the premises sued for are included in the calls of any particular muniment of title (Echols *v.* McKie, 60 Tex. 41; Blume *v.* Rice, 12 Tex. Civ. App. 1, 32 S. W. 1056), and a plea of not guilty is not such an admission of possession as will support a judgment for rents (Green *v.* Benton, 3 Tex. Civ. App. 92, 22 S. W. 256). This plea merely relieves plaintiff from the formal proof of possession, and does not admit possession as to defendant's warrantor over against whom he asks judgment. Johns *v.* Hardin, 81 Tex. 37, 16 S. W. 623.

Proof of defendant's possession dispensed with.— In Alabama it has been held that an admission that plaintiff is entitled to a certain sum for mesne profits, if he obtains judgment, dispenses with proof that defendant was in possession at the time of the suit. Samuels *v.* Findley, 7 Ala. 635.

74. Welder *v.* McComb, 10 Tex. Civ. App. 85, 30 S. W. 822.

75. Schmidt *v.* Talbert, 74 Tex. 451, 12 S. W. 284; Clay County Land, etc., Co. *v.* Wood, 71 Tex. 460, 9 S. W. 340 (holding that the vendee, under an order of commissioners to convey land, reserving title until the purchase-money is due and all taxes are paid, may give the order in evidence under an allegation of title in fee); Morris *v.* Rhine, (Tex. 1888) 8 S. W. 315; Edwards *v.* Barwise, 69 Tex. 84, 6 S. W. 677 (holding that where plaintiff showed that certain land was conveyed to a firm, it was not error to allow him also to show that he was a member of the firm, although that fact was not specially alleged in his pleadings); Stanley *v.* Epperson, 45 Tex. 644; Darst *v.* Trammell, 27 Tex. 129 (holding that where plaintiff alleged that the conveyance to defendant was a mere sham, made to defraud the grantor's creditors of the property, it was error to exclude testimony tending to sustain this allegation); McKeon *v.* Roan, (Tex. Civ. App. 1907) 106 S. W. 404; Allen *v.* Allen, (Tex. Civ. App. 1907) 105 S. W. 53 [*reversed* on the facts in 101 Tex. 362, 107 S. W. 528]; Berry *v.* Jagoe, 45 Tex. Civ. App. 6, 100 S. W. 815; Bowie County *v.* Powell, (Tex. Civ. App. 1901) 66 S. W. 237 (holding that where a county, sued in trespass to try title, justifies its entry and claim by virtue of condemnation proceedings, proof of service of notice therein is admissible without special pleadings); Travis *v.* Hall, 27 Tex. Civ. App. 95, 65 S. W. 1077 [*reversed* on the facts in 95 Tex. 116, 65 S. W. 1078]; Webster *v.* McCarty, 16 Tex. Civ. App. 160, 40 S. W. 823; Puckett *v.* Williams, 11 Tex. Civ. App. 308, 32 S. W. 364; Hale *v.* Hensley, (Tex. Civ. App. 1894) 27 S. W. 1033; Huth *v.* Herrmann, 5 Tex. Civ. App. 655, 24 S. W. 664; Broussard *v.* Dull, 3 Tex. Civ. App. 59, 21 S. W. 937; Johnson *v.* James, (Tex. Civ. App. 1893) 21 S. W. 372 (holding that a special answer, alleging that defendant acquired title by purchase under an order of sale in partition proceedings, is sufficient to admit the instruments evidencing such title, without specially pleading them).

76. Lahiffe *v.* Hunter, Harp. (S. C.) 184; Collins *v.* Ballow, 72 Tex. 330, 10 S. W. 248; Bailey *v.* Baker, 4 Tex. Civ. App. 395, 23 S. W. 454. *Compare* Stewart *v.* Lapsley, 11 Tex. 41.

77. Edwards *v.* Barwise, 69 Tex. 84, 6 S. W. 677; Bridges *v.* Cundiff, 45 Tex. 440; Meade *v.* Logan, (Tex. Civ. App. 1908) 110 S. W. 188.

78. Mayers *v.* Paxton, 78 Tex. 196, 14 S. W. 568; Meade *v.* Logan, (Tex. Civ. App. 1908) 110 S. W. 188; Robbins *v.* Hubbard, (Tex. Civ. App. 1908) 108 S. W. 773; San Antonio *v.* Rowley, 48 Tex. Civ. App. 376,

The fact that limitation has been specially pleaded will not, however, preclude a plaintiff from establishing any other title upon which he may rely.[79]

b. Matters Provable Under Plea of Not Guilty or General Issue. Under the Texas statute,[80] with the exception of the defense of limitations which must be specially pleaded,[81] any matter of defense, whether legal or equitable, may be proved under the plea of not guilty.[82] But if defendant wishes to assert an independent equitable title not involved in the issue as to title directly in controversy, he must present the facts by proper averments.[83] Under the plea of not guilty defendant may give in evidence any special matter of defense,[84] but where he pleads not guilty, and in addition sets up special defenses, his plea of not guilty is thereby waived except only so far as to impose upon plaintiff the burden of showing a *prima facie* right to the land in controversy, and he is restricted

106 S. W. 753. *Compare* Benavides *v.* Molino, (Tex. Civ. App. 1900) 60 S. W. 260 [*affirmed* in 94 Tex. 413, 875]; Stevens *v.* Stoner, (Tex. Civ. App. 1900) 54 S. W. 934.

79. Mayers *v.* Paxton, 78 Tex. 196, 14 S. W. 568; San Antonio *v.* Rowley, 48 Tex. Civ. App. 376, 106 S. W. 753.

80. Tex. Rev. St. (1895) art. 5257.

81. Miller *v.* Gist, 91 Tex. 335, 43 S. W. 263; Williams *v.* Barnett, 52 Tex. 130; Hughes *v.* Lane, 25 Tex. 356; Horton *v.* Crawford, 10 Tex. 382; Moore *v.* Kempner, 41 Tex. Civ. App. 86, 91 S. W. 336; Stevens *v.* Stoner, (Tex. Civ. App. 1900) 54 S. W. 934; Taffinder *v.* Merrell, 18 Tex. Civ. App. 661, 45 S. W. 477; Lumkins *v.* Coates, (Tex. Civ. App. 1897) 42 S. W. 580; Gist *v.* East, 16 Tex. Civ. App. 274, 41 S. W. 396. See also Harris *v.* Wilson, (Tex. Civ. App. 1897) 40 S. W. 868.

82. Taylor *v.* Ferguson, 87 Tex. 1, 26 S. W. 46; Kauffman *v.* Brown, 83 Tex. 41, 18 S. W. 425; Gruner *v.* Westin, 66 Tex. 209, 18 S. W. 512; McKamey *v.* Thorp, 61 Tex. 648 (holding that it may be shown that plaintiff's title was acquired by fraud, or that it had failed on account of a sale to an innocent purchaser); Adams *v.* House, 61 Tex. 639; Watson *v.* Aiken, 55 Tex. 536; Williams *v.* Barnett, 52 Tex. 130; Watson *v.* Hewitt, 45 Tex. 472; Ragsdale *v.* Gohlke, 36 Tex. 286; Mann *v.* Falcon, 25 Tex. 271; Blair *v.* Cisneros, 10 Tex. 34 (holding that the nullity of the appointment of plaintiff suing as administrator may be shown); Harlan *v.* Haynie, 9 Tex. 459; Houston, etc., R. Co. *v.* Ennis-Calvert Compress Co., 23 Tex. Civ. App. 441, 56 S. W. 367; Herndon *v.* Burnett, 21 Tex. Civ. App. 25, 50 S. W. 581 (holding that circumstances raising the presumption of a grant by the ancestor of plaintiff may be proved); Hardy *v.* Brown, (Tex. Civ. App. 1898) 46 S. W. 385; Taffinder *v.* Merrell, 18 Tex. Civ. App. 661, 45 S. W. 477; Lumkins *v.* Coates, (Tex. Civ. App. 1897) 42 S. W. 580; Johnson *v.* Foster, (Tex. Civ. App. 1896) 34 S. W. 821 [*reversed* on other grounds in 89 Tex. 640, 36 S. W. 67].

The defense of estoppel may be proved under the plea of not guilty. Guest *v.* Guest, 74 Tex. 664, 12 S. W. 831; Dooley *v.* Montgomery, 72 Tex. 429, 10 S. W. 451, 2 L. R. A. 715; Wright *v.* Dougherty, 50 Tex. 34; Mayer *v.* Ramsey, 46 Tex. 371; Daugherty *v.* Templeton, 50 Tex. Civ. App. 304, 110 S. W. 553; Mars *v.* Morris, 48 Tex. Civ. App. 216, 106 S. W. 430; Lamar County *v.* Talley, (Tex. Civ. App. 1906) 94 S. W. 1069; Parker *v.* Cockrell, (Tex. Civ. App. 1895) 31 S. W. 221; Eddie *v.* Tinnin, 7 Tex. Civ. App. 371, 26 S. W. 732.

Deed shown to be a mortgage.— Under the plea of not guilty it may be shown that a deed absolute on its face, under which plaintiff claims, is in fact a mortgage. Hanrick *v.* Gurley, (Tex. Civ. App. 1899) 48 S. W. 994; Herring *v.* White, 6 Tex. Civ. App. 249, 25 S. W. 1016.

The equitable defense of stale demand can be made under the plea of not guilty. Montgomery *v.* Noyes, 73 Tex. 203, 11 S. W. 138.

Abandonment of homestead.— The abandonment of the homestead claimed by plaintiff may be shown by defendant under the plea of not guilty. Burcham *v.* Gann, 1 Tex. Unrep. Cas. 333.

Ambiguity in the description of a deed introduced by defendant may be shown under the general issue, independent of a cross action to reform the instrument and correct the mistakes. Stuart *v.* Duffy, 23 Tex. Civ. App. 221, 56 S. W. 142.

Failure of consideration, mistake, or fraud. — It is competent for defendant to give in evidence, under the plea of not guilty, proof of either failure of consideration for his deed or that his deed was induced by mistake or fraud, and that he did not know that he was conveying title thereby. Salazar *v.* Ybarra, (Tex. Civ. App. 1900) 57 S. W. 303.

83. Groesbeeck *v.* Crow, 85 Tex. 200, 20 S. W. 49; Swink *v.* Motley, 78 Tex. 579, 14 S. W. 799; Perego *v.* White, 77 Tex. 196, 13 S. W. 974; Fuller *v.* O'Neil, 69 Tex. 349, 6 S. W. 181, 5 Am. St. Rep. 59; Rippetoe *v.* Dwyer, 49 Tex. 498; Ayres *v.* Duprey, 27 Tex. 593, 86 Am. Dec. 657; Central City Trust Co. *v.* Waco Bldg. Assoc., (Tex. Civ. App. 1901) 63 S. W. 1133 [*affirmed* in 95 Tex. 48, 64 S. W. 998]; Matthews *v.* Moses, 21 Tex. Civ. App. 494, 52 S. W. 113 (holding that evidence of defendant's right to have a warranty deed, by which plaintiff claims title, reformed or canceled by showing that it was intended to be a will, is inadmissible under the plea of not guilty); Crow *v.* Fiddler, 3 Tex. Civ. App. 576, 23 S. W. 17.

84. Mann *v.* Falcon, 25 Tex. 271; Punderson *v.* Love, 3 Tex. 60.

in the introduction of evidence to such as tends to establish his special defenses.[85] A special plea of limitation does not, however, deprive defendant of any defense available under the plea of not guilty.[86] Where not guilty is the only plea filed by defendant, plaintiff may introduce evidence in rebuttal or avoidance of affirmative matter admitted under such general issue, without having alleged the same in his pleadings. But where not guilty and a special plea other than limitation are filed, plaintiff cannot rebut or avoid the evidence put in under the special plea without himself making allegations under which the evidence offered by him would be admissible in other cases.[87] In South Carolina it has been decided that defendant need not plead his title specially.[88]

c. Variance. As is the case in other civil actions,[89] the allegations and proof in an action of trespass to try title must substantially correspond,[90] and any material variance between the proof and allegations is fatal to a recovery.[91] But where

85. Ogden *v.* Bosse, 86 Tex. 336, 24 S. W. 798; Joyner *v.* Johnson, 84 Tex. 465, 19 S. W. 522; St. Louis, etc., R. Co. *v.* Whitaker, 68 Tex. 630, 5 S. W. 448; Koenigheim *v.* Miles, 67 Tex. 113, 2 S. W. 81; Custard *v.* Musgrove, 47 Tex. 217; Dean *v.* Lyons, 47 Tex. 18; Shields *v.* Hunt, 45 Tex. 424; Turner *v.* Ferguson, 39 Tex. 505; North *v.* Coughran, 49 Tex. Civ. App. 101, 108 S. W. 165; Garrison *v.* Richards, (Tex. Civ. App. 1908) 107 S. W. 861 (holding that where defendants plead their title specially, without any reference to a deed under which plaintiff claimed, they were not entitled under the pleadings to attack such deed by showing that it was fraudulent); Hutcheson *v.* Chandler, 47 Tex. Civ. App. 124, 104 S. W. 434 (holding that the fact that defendant specially pleads his title does not relieve plaintiff from showing a title enabling him to recover, but only limits defendant, in showing title in himself superior to that of plaintiff, to proof of the title specially pleaded); Tiemann *v.* Cobb, 35 Tex. Civ. App. 289, 80 S. W. 250; Matador Land, etc., Co. *v.* State, (Tex. Civ. App. 1899) 54 S. W. 256; Abilene Live-Stock Co. *v.* Guinn, (Tex. Civ. App. 1899) 51 S. W. 885; Hayes *v.* Gallaher, 21 Tex. Civ. App. 88, 51 S. W. 280; Wardlow *v.* Harmon, (Tex. Civ. App. 1898) 45 S. W. 828; Long Mfg. Co. *v.* Gray, 13 Tex. Civ. App. 172, 35 S. W. 32; Beer *v.* Thomas, 13 Tex. Civ. App. 30, 34 S. W. 1010; Cooke *v.* Avery, 147 U. S. 375, 13 S. Ct. 340, 37 L. ed. 209. *Compare* Sayers *v.* Texas Land, etc., Co., 78 Tex. 244, 14 S. W. 578; Kirby *v.* Boaz, 41 Tex. Civ. App. 282, 91 S. W. 642; Buckner *v.* Vancleave, 34 Tex. Civ. App. 312, 78 S. W. 541 (holding that a plea setting up improvements in good faith, in which as evidence of such good faith defendant states as facts the deeds under which he claims, does not deprive him of taking advantage of the defense of an outstanding title); Tenzler *v.* Tyrrell, 32 Tex. Civ. App. 443, 75 S. W. 57; Wiggins *v.* Wiggins, 16 Tex. Civ. App. 335, 40 S. W. 643.

A cross bill attacking plaintiff's title on the ground of fraud does not waive a plea of not guilty. Campbell *v.* Antis, 21 Tex. Civ. App. 161, 51 S. W. 343.

Plea attacking execution sale.— In an action by one claiming title under an execution sale, a special plea in the answer attacking the sale and asking affirmative relief is not a waiver of a plea of not guilty. Mexia *v.* Lewis, 12 Tex. Civ. App. 102, 34 S. W. 158.

86. Meyers *v.* Paxton, 78 Tex. 196, 14 S. W. 568; Refugio *v.* Byrne, 25 Tex. 193; McAdams *v.* Hoops, 47 Tex. Civ. App. 79, 104 S. W. 432; Sheirburn *v.* Hunter, 21 Fed. Cas. No. 12,744, 3 Woods 281.

87. McSween *v.* Yett, 60 Tex. 183; Rivers *v.* Foote, 11 Tex. 662; Paul *v.* Perez, 7 Tex. 338; Robbins *v.* Hubbard, (Tex. Civ. App. 1908) 108 S. W. 773; Lapowski *v.* Smith, 1 Tex. Civ. App. 391, 20 S. W. 957.

The question is one of notice, and while a plaintiff is generally allowed to show facts in confession and avoidance of any defense admissible under a plea of not guilty, when defendant notifies plaintiff by a special plea what defense he will rely upon, and thus cuts himself off from any defense other than the one so pleaded, plaintiff must then plead such facts as he may wish to prove in avoidance of defendant's special plea. Fields *v.* Rye, 24 Tex. Civ. App. 272, 59 S. W. 306.

88. Stockdale *v.* Young, 3 Strobh. (S. C.) 501 note (holding that the acquisition of title by defendant, since the last continuance of the case, need not be pleaded, but may be given in evidence under the general issue); Anderson *v.* Harris, 1 Bailey (S. C.) 315 (holding that a defendant may, under the general issue, give in evidence a lease from one under whom plaintiff claims, executed prior to the conveyance to plaintiff).

89. See PLEADING, 31 Cyc. 700 *et seq.*

90. Stokes *v.* Riley, 29 Tex. Civ. App. 373, 68 S. W. 703; Frazier *v.* Waco Bldg. Assoc., 25 Tex. Civ. App. 476, 61 S. W. 132; Perkins *v.* Davidson, 23 Tex. Civ. App. 31, 56 S. W. 121; Matula *v.* Lane, 22 Tex. Civ. App. 391, 55 S. W. 504 (holding that an allegation of fee simple ownership is established by proof of a trust deed, the legal title being in the trustee); Willis *v.* Smith, 17 Tex. Civ. App. 543, 43 S. W. 325.

Discrepancies in description.— Partial discrepancies between the description of the land as set out in the pleadings and as given in the deed or other instrument offered in evidence do not raise a question of variance but only a question of identity. Smith *v.* Chatham, 14 Tex. 322; Fischer *v.* Giddings, (Tex. Civ. App. 1903) 74 S. W. 85.

91. White *v.* Kingsbury, 77 Tex. 610, 14 S. W. 201; Jones *v.* Andrews, 62 Tex. 652

the proof substantially supports the pleading, the fact that there is a variance as to some immaterial matter is not fatal,[92] if the adverse party is not surprised or misled thereby.[93]

G. Evidence — 1. Presumptions and Burden of Proof. In an action of trespass to try title, it devolves upon plaintiff to show title in himself;[94] and until he makes out at least a *prima facie* case defendant is not required to offer any evidence at all.[95] As has been previously stated, however, proof of plaintiff's possession of the land in controversy raises, as against a mere trespasser, a presumption of ownership,[96] and plaintiff establishes a *prima facie* case by showing a common source of title and the superiority of his title from that source.[97] As in other civil actions,[98] the burden is upon plaintiff to establish at least *prima facie* every fact essential to his case, and as to the existence of which he has the affirmative under the pleadings.[99] Thus plaintiff in trespass to try title, who contends

(holding that defendant is entitled to verdict, where the boundary lines of the survey established by the evidence do not correspond with the description in the petition); Texas Land, etc., Co. *v.* Bridgeman, 1 Tex. Civ. App. 383, 21 S. W. 141.

92. Houston, etc., R. Co. *v.* Blagge, 73 Tex. 24, 12 S. W. 616 (holding that a variance of three years between the alleged and proven date of a lost deed, it being immaterial which was the correct date, will not prevent proof of its execution and contents); Broxson *v.* McDougal, 70 Tex. 64, 7 S. W. 591; Smith *v.* Shinn, 58 Tex. 1; Goethal *v.* Reed, 35 Tex. Civ. App. 461, 81 S. W. 592; Weinert *v.* Simang, 29 Tex. Civ. App. 435, 68 S. W. 1011; Anderson *v.* Anderson, (Tex. Civ. App. 1902) 68 S. W. 297 (holding that a variance between the petition which alleges joint ownership in plaintiff and evidence showing sole ownership in one of plaintiffs does not defeat the right of the latter to recover); Kent *v.* Berryman, 15 Tex. Civ. App. 487, 40 S. W. 33.

93. Smith *v.* Shinn, 58 Tex. 1; Weinert *v.* Simang, 29 Tex. Civ. App. 435, 68 S. W. 1011.

94. Chenault *v.* Quisenberry, 56 S. W. 410, 57 S. W. 234, 22 Ky. L. Rep. 79; Stroud *v.* Springfield, 28 Tex. 649; Parker *v.* Campbell, (Tex. Civ. App. 1901) 65 S. W. 484; Hill *v.* Grant, (Tex. Civ. App. 1898) 44 S. W. 1016. And see *supra*, I, B, 11.

95. Sims *v.* Randal, 1 Brev. (S. C.) 85 (holding that proof on the part of plaintiff of a judgment, sale, and conveyance by the sheriff, and that the party was in possession and was the reputed owner of the land at the time of the sale, is not sufficient to impose on defendant the burden of showing a better title); Brown *v.* Roberts, 75 Tex. 103, 12 S. W. 807; Jaggers *v.* Stringer, 47 Tex. Civ. App. 571, 106 S. W. 151. See also Baldwin *v.* Roberts, 13 Tex. Civ. App. 563, 36 S. W. 789.

96. See *supra*, I, C.

97. See *supra*, I, B, 9.

98. See Evidence, 16 Cyc. 926 *et seq.*

99. Alston *v.* McDowall, 1 McMull. (S. C.) 444; Jones *v.* Wright, 98 Tex. 457, 84 S. W. 1053 [*reversing* (Civ. App. 1904) 81 S. W. 569]; Baldwin *v.* Root, 90 Tex. 546, 40 S. W. 3 [*reversing* (Civ. App. 1896) 38 S. W. 630]; Jester *v.* Steiner, 86 Tex. 415, 25 S. W. 411 [*reversing* (Civ. App. 1893) 23 S. W. 718]; Cook *v.* Dennis, 61 Tex. 246; Johnson *v.* Newman, 43 Tex. 628; Hillmann *v.* Meyer, 35 Tex. 538 (holding that where the title to land depended upon whether the registration of a judgment or the execution of a deed was prior in point of time, the burden of proof was on plaintiff to show that the judgment was prior to the deed, and that there was no presumption to that effect); Altgelt *v.* Escalera, 51 Tex. Civ. App. 108, 110 S. W. 989; Wallis *v.* Dehart, (Tex. Civ. App. 1908) 108 S. W. 180; San Antonio *v.* Rowley, 48 Tex. Civ. App. 376, 106 S. W. 753; Newnom *v.* Williamson, 46 Tex. Civ. App. 615, 103 S. W. 656; Cochran *v.* Kapner, 46 Tex. Civ. App. 342, 103 S. W. 469; Stith *v.* Moore, 42 Tex. Civ. App. 528, 95 S. W. 587; Wallis *v.* Turner, (Tex. Civ. App. 1906) 95 S. W. 61; Kimball *v.* Houston Oil Co., (Tex. Civ. App. 1906) 94 S. W. 423; Dorsey *v* Sternenberg, 42 Tex. Civ. App. 568, 94 S. W. 413 (holding that where, in an action to recover certain land, plaintiffs claim title under a certain person who was the patentee, while defendants claim that their ancestor, having the same name as the person under whom plaintiffs claim, was the patentee, the burden is on plaintiffs to show that their ancestor was the original grantee); Smith *v.* Hughes, 39 Tex. Civ. App. 113, 86 S. W. 936; New York, etc., Land Co. *v.* Votaw, (Tex. Civ. App. 1899) 52 S. W. 125 (holding that where plaintiff alleges that he is the owner of certain lands, and that defendant has fenced a portion of such lands and claims a tract which embraces within its limits portions of plaintiff's lands, and casts a cloud upon his title, the burden rests upon plaintiff); Renner *v.* Peterson, (Tex. Civ. App. 1899) 51 S. W. 867 (holding that where plaintiff claims as an actual settler on state school lands he must rely upon the strength of his own title, and the burden of proof is on him to show that he was an actual settler at the time he made his application); Estell *v.* Kirby, (Tex. Civ. App. 1898) 48 S. W. 8; McKinney *v.* Baldwin, 14 Tex. Civ. App. 12, 36 S. W. 346 (holding that where plaintiff alleges that the land had been left vacant between two older surveys, and that he claims title under patent, the burden of proof is on plaintiff to show that the land was in

that lands claimed by defendant are included in the former's grant or location, has the burden of proving such fact.[1] And one cannot recover in trespass to try title by alleging and proving that he owned some undivided portion of the land, without establishing what that portion is.[2] One claiming by collateral descent must show who was last entitled to the land, and his death without issue, the line of descent from him, and the extinction of all other lines of descent which would be preferred to the claimant, and the death of all intermediate heirs between himself and the ancestor.[3] Plaintiff having made out a *prima facie* case entitling him to recover the land in question, the burden then shifts to defendant to offer evidence in rebuttal,[4] and the burden is upon defendant to establish any matter of affirmative defense.[5] The fact that defendant took a lease from plaintiff's devisor to the land in dispute is such an admission of plaintiff's title as will cast upon defendant the burden of showing a paramount title.[6] Where a grant of

fact vacant when patented); Atwell *v.* Watkins, 13 Tex. Civ. App. 668, 36 S. W. 103 (holding that where one claims title under a deed to himself, which recites payment of the consideration by another, the burden is on him as against one claiming title through such other to show that he acquired by the deed the equitable as well as the legal title to the land); House *v.* Robertson, (Tex. Civ. App. 1896) 34 S. W. 640 [*reversed* on other grounds in 89 Tex. 681, 36 S. W. 251]; Bosse *v.* Cadwallader, (Tex. Civ. App. 1893) 23 S. W. 260 (holding that where plaintiff admits that the legal title is in defendant, but avers that it is founded on fraudulent conveyances, he cannot rest his case on proof of title in himself, but must establish the invalidity of defendant's title); French *v.* McGinnis, 3 Tex. Civ. App. 86, 21 S. W. 941; Medlin *v.* Wilkens, 1 Tex. Civ. App. 465, 20 S. W. 1026 (holding that where defendant in trespass to try title denies that he is in possession of the land sued for, but says that he is in possession of other land, the burden is on plaintiff to prove him in possession of the land in controversy).

One claiming under a junior location has the burden of showing that the land included within it does not conflict with a previous location under a prior patent. Allen *v.* Worsham, (Tex. Civ. App. 1899) 49 S. W. 525.

Heirship.— One claiming under an instrument purporting to have been made by heirs must prove their heirship. McCoy *v.* Pease, 17 Tex. Civ. App. 303, 42 S. W. 659. And the heirship of grantors cannot be proved by their grantees, by deeds in which they allege their heirship, nor by a petition in another suit between other parties. Watkins *v.* Smith, 91 Tex. 589, 45 S. W. 560.

Identifying land.— Where plaintiff claimed title to land as a part of a certain grant which he had described with reference to a certain creek, the burden is on him to identify the land sued for as a part of the grant, and to show the existence and location of the creek. McDonald *v.* Downs, 45 Tex. Civ. App. 215, 99 S. W. 892.

1. Morrow *v.* Fleming, 29 Tex. Civ. App. 547, 69 S. W. 244; Clawson *v.* Williams, 27 Tex. Civ. App. 130, 66 S. W. 702; Blume *v.* Rice, 12 Tex. Civ. App. 1, 32 S. W. 1056.

2. Perkins *v.* Davidson, 23 Tex. Civ. App. 31. 56 S. W. 121.

3. Gorham *v.* Settegast, 44 Tex. Civ. App. 254, 98 S. W. 665.

4. Smith *v.* Gillum, 80 Tex. 120, 15 S. W. 794; Jones *v.* Wright, (Tex. Civ. App. 1904) 81 S. W. 569 [*reversed* on the facts in 98 Tex. 457, 84 S. W. 1053].

5. Jones *v.* Lee, 86 Tex. 25, 22 S. W. 386, 1092; Ballard *v.* Carmichael, (Tex. 1891) 17 S. W. 393, 83 Tex. 355, 18 S. W. 734 (holding that where defendant pleads in reconvention to quiet title, in order to obtain affirmative relief the burden of proof is on him to show title in himself, and a decree in his favor based upon presumptions which are unsupported by any evidence cannot stand); Irvin *v.* Johnson, 44 Tex. Civ. App. 436, 98 S. W. 405; Catrett *v.* J. S. Brown Hardware Co., (Tex. Civ. App. 1905) 86 S. W. 1045 (holding that in an action of trespass to try title, by the owner of the legal title, against one claiming an equitable interest, the burden is on defendant to show that plaintiff was not a purchaser for value); Bogart *v.* Moody, 35 Tex. Civ. App. 1, 79 S. W. 633; Wade *v.* Boyd, 24 Tex. Civ. App. 492, 60 S. W. 360; Barnett *v.* Squyres, (Tex. Civ. App. 1899) 52 S. W. 612 (holding that under the plea of not guilty, the burden of proof is upon defendant claiming to be an innocent purchaser for a valuable consideration, without notice, to establish that at the time a judgment lien was fixed on the land in controversy the creditor had no notice of an unrecorded mortgage); Silverman *v.* Landrum, 19 Tex. Civ. App. 402, 47 S. W. 404 (holding that where plaintiff claims as a *bona fide* purchaser under a power of sale contained in a trust deed, and defendants rely on a parol extension of time for the payment of the debt to defeat the sale, notice to plaintiff of such extension must be shown); San Antonio *v.* Ostrom, 18 Tex. Civ. App. 678, 45 S. W. 961 (holding that where defendant, a municipal corporation, disclaims title to any of the land but claims an easement over it for a highway by prescription and by dedication, plaintiff need not show title in himself, and the burden is on such municipality to prove the existence of such easement); Silliman *v.* Thornton, 10 Tex. Civ. App. 303, 30 S. W. 700; Watkins *v.* Hill, 2 Tex. Civ. App. 358, 21 S. W. 374.

6. Gourdin *v.* Davis, 2 Rich. (S. C.) 481, 45 Am. Dec. 745.

land introduced in evidence in an action of trespass to try title contains what purports to be an actual survey, it will be presumed that a survey was actually made;[7] and the presumption is that a surveyor actually surveyed all lines called for by him in a survey certified to by him, and the party asserting the contrary has the burden of proving it.[8] Where it is shown that a patent for the land in controversy was issued, it will be presumed that the field notes and certificate of the survey were duly returned to the land-office within the time prescribed by law.[9] Where defendants claim under an alleged transfer of a land certificate, their proof of which is not legally admissible, and it is shown that they and their grantors have made open, notorious, and continuous claim of title to the land for nearly fifty years from and after the date of such alleged transfer, and have paid all taxes on the property, and that during such time plaintiffs have made no claim of title, a transfer of such certificate will be presumed.[10]

2. Admissibility[11] — a. In General. Subject to the general rules as to relevancy, competency, and materiality of evidence, which obtain in civil actions generally,[12] any evidence is admissible in an action of trespass to try title which tends to prove or disprove plaintiff's case or defendant's defense thereto.[13] Thus

7. Clark *v.* Hills, 67 Tex. 141, 2 S. W. 356.

8. Cochran *v.* Kapner, 46 Tex. Civ. App. 342, 103 S. W. 469.

9. Shepard *v.* Avery, 89 Tex. 301, 34 S. W. 440.

10. Baldwin *v.* Roberts, 13 Tex. Civ. App. 563, 36 S. W. 789. See also Stafford *v.* Kreinhop, (Tex. Civ. App. 1901) 63 S. W. 166.

11. **Evidence admissible under pleadings** see *supra*, II, F, 5, a.

12. See, generally, Evidence, 16 Cyc. 821.

13. **Evidence held admissible** see Byers *v.* Wallace, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760; Smith *v.* Estill, 87 Tex. 264, 28 S. W. 801 (petition in another action against the same defendant for land in another county admissible); Harris *v.* Nations, 79 Tex. 409, 15 S. W. 262 (agreement between an agent of the patentee and defendant's grantor to locate the certificate for an interest in the land admissible); Boydston *v.* Sumpter, 78 Tex. 402, 14 S. W. 996; Lasater *v.* Van Hook, 77 Tex. 650, 14 S. W. 270 (lease for an undivided interest in the land in controversy admissible); Warren *v.* Frederichs, 76 Tex. 647, 13 S. W. 643 (where a decree of partition between the heirs of one under whom defendant claims is in evidence, it is competent to prove that a parol partition making the same disposition of the land had been previously made); Chamberlain *v.* Boon, 74 Tex. 659, 12 S. W. 727 (evidence as to the making of a former contract for the sale of the land, which was accidentally destroyed, admissible); Powell *v.* Haley, 28 Tex. 52 (affidavit of defendant claiming as tenant that he believed the premises to be public land admissible); Wilson *v.* Williams, 25 Tex. 54 (evidence of notoriety in the neighborhood of the land, of a prior claim under a head right certificate admissible); Loring *v.* Jackson, 43 Tex. Civ. App. 306, 95 S. W. 19 (holding that where defendant claims that a deed to a certain person, which is a necessary link in plaintiff's chain of title, is a forgery, evidence as to the general reputation which such person bore in the county where he lived, about the date of the alleged forged deed as a forger of land titles, is admissible); Lamar County *v.* Talley, (Tex. Civ. App. 1906) 94 S. W. 1069; Stubblefield *v.* Hanson, (Tex. Civ. App. 1906) 94 S. W. 406; Lawder *v.* Larkin, (Tex. Civ. App. 1906) 94 S. W. 171; Jones *v.* Wright, (Tex. Civ. App. 1906) 92 S. W. 1010; Latta *v.* Wiley, (Tex. Civ. App. 1905) 92 S. W. 433 (holding that it is proper to show defendant's possession, claim of ownership, and ouster by a writ of sequestration in order to charge plaintiff, a subsequent purchaser, with notice of his claim of ownership); Field *v.* Field, 39 Tex. Civ. App. 1, 87 S. W. 726 (holding that evidence that the witness was picking cotton on the land when the citation was served on him is admissible as tending to show that he was in possession of the land, exercising acts of ownership over it at the time); Jinks *v.* Moppin, (Tex. Civ. App. 1904) 80 S. W. 390; Long *v.* Long, 30 Tex. Civ. App. 368, 70 S. W. 587; Lane *v.* De Bode, 29 Tex. Civ. App. 602, 69 S. W. 437; Barrett *v.* Eastham, 28 Tex. Civ. App. 189, 67 S. W. 198; French *v.* McCready, (Tex. Civ. App. 1900) 57 S. W. 894; Huff *v.* Maroney, 23 Tex. Civ. App. 465, 56 S. W. 754 (holding that where plaintiff claims the land as an innocent purchaser, without notice of a prior unrecorded deed to defendant, evidence is admissible as to the value of such land); Bayne *v.* Denny, 21 Tex. Civ. App. 435, 52 S. W. 983 (holding that it is competent for a party in identifying land referred to in a deed to testify to the execution of a deed to the land to him, and to the loss of the deed, and to the description therein, so far as he is able, and that he sent the deed to the opposite party who returned it, claiming to have a better title to the same land); Texas Tram, etc., Co. *v.* Gwin, (Tex. Civ. App. 1899) 52 S. W. 110; Estell *v.* Kirby, (Tex. Civ. App. 1898) 48 S. W. 8; Perry *v.* Blakey, (Tex. Civ. App. 1898) 47 S. W. 843; Walker *v.* Pittman, 18 Tex. Civ. App. 519, 46 S. W. 117; Benson *v.* Cahill, (Tex. Civ. App. 1896) 37 S. W. 1088; Llano County *v.* Johnson, (Tex. Civ. App. 1895) 29 S. W. 56; Mardes *v.* Meyers, 8 Tex. Civ. App. 542, 28

plaintiff may give in evidence a notice served by him on defendant, apprising him of his title and of his intention to claim rent.[14] And where plaintiff claims under an executor's deed made by defendant's father, declarations by plaintiff to defendant that he bid the land in at the executor's sale for defendant's father are admissible in evidence against him.[15] Evidence that plaintiffs by their acts had for many years asserted title to the land in question, and had conveyed it by deeds of trust, which were recorded long prior to the time that they asserted any right to the land, is admissible.[16] But evidence that plaintiff has not paid taxes on the land since the commencement of the action,[17] or that defendant was in possession of adjoining land not included in the controversy,[18] is inadmissible. Where plaintiff parted with his title to the land after the commencement of the action, evidence offered by his counsel, not for his benefit but for the benefit of the purchaser, is not admissible.[19]

S. W. 693; Heidenheimer *v.* Loring, 6 Tex. Civ. App. 560, 26 S. W. 99 (where defendant claims under a judgment obtained by fraud, evidence that the judgment creditor was warned not to improve the property, because the judgment was obtained by fraud, is admissible); Meriwether *v.* Asbeck, (Tex. Civ. App. 1894) 25 S. W. 1100; Gibson *v.* Brown, (Tex. Civ. App. 1893) 24 S. W. 574; Berry *v.* House, 1 Tex. Civ. App. 562, 21 S. W. 711; Lee *v.* Wysong, 128 Fed. 833, 63 C. C. A. 483.

Evidence held inadmissible see Love *v.* Powell, 5 Ala. 58 (holding that evidence of what plaintiff gave for the land in controversy is not pertinent to the question of damages); Bullock *v.* Wilson, 5 Port. (Ala.) 338 (holding that the value of the land in controversy cannot be shown either in the direct or cross-examination); Davidson *v.* Wallingford, 88 Tex. 619, 32 S. W. 1030; Barth *v.* Green, 78 Tex. 678, 15 S. W. 112 (holding that evidence as to the levy of an attachment on certain land, as the property of one under whom defendant claims, and the institution of a suit against him to recover the interest in such land, is inadmissible when the land was not that in controversy, and the attachment and suit were both voluntarily abandoned); Sebastian *v.* Martin Brown Co., 75 Tex. 291, 12 S. W. 986 (where plaintiff claims under a sheriff's deed, evidence that at the sale defendant gave notice that he claimed by purchase from the execution debtor is of itself irrelevant); Byler *v.* Johnson, 45 Tex. 509; Styles *v.* Gray, 10 Tex. 503; Isaacks *v.* Wright, 50 Tex. Civ. App. 312, 110 S. W. 970; San Antonio *v.* Rowley, (Tex. Civ. App. 1907) 106 S. W. 753; Mars *v.* Morris, 48 Tex. Civ. App. 216, 106 S. W. 430; Broom *v.* Herring, 45 Tex. Civ. App. 653, 101 S. W. 1023; Carlisle *v.* Gibbs, 44 Tex. Civ. App. 189, 98 S. W. 192; Loring *v.* Jackson, 43 Tex. Civ. App. 306, 95 S. W. 19 (holding that where plaintiff's right to recover depends on the validity of a deed claimed by defendants to be a forgery, plaintiff being an innocent purchaser without notice of a prior deed if the deed in question is genuine, evidence concerning such prior deed is irrelevant); Stith *v.* Moore, 42 Tex. Civ. App. 528, 95 S. W. 587 (holding that where defendants did not claim under plaintiff, or derive their title from any transactions with him, evidence tending to show that plaintiff suffered from serious mental aberration for several years is immaterial); Staley *v.* Stone, 41 Tex. Civ. App. 299, 92 S. W. 1017; Smithers *v.* Lowrance, (Tex. Civ. App. 1906) 91 S. W. 606 [*reversed* on other grounds in 100 Tex. 77, 93 S. W. 1064]; Goethal *v.* Reed, 35 Tex. Civ. App. 461, 81 S. W. 592; Ellis *v.* Le Bow, 30 Tex. Civ. App. 449, 71 S. W. 576 [*affirmed* in 96 Tex. 532, 74 S. W. 528]; Long *v.* Long, 30 Tex. Civ. App. 368, 70 S. W. 587; Boston *v.* McMenamy, 29 Tex. Civ. App. 272, 68 S. W. 201; Davidson *v.* Pickard, (Tex. Civ. App. 1900) 56 S. W. 608; Pope *v.* Riggs, (Tex. Civ. App. 1897) 43 S. W. 306 (holding that evidence of particular instances where plaintiffs have sold a part of the same tract of land to different persons is not relevant, where the parcels so sold are in no way connected with the land in controversy); House *v.* Williams, 16 Tex. Civ. App. 122, 40 S. W. 414; Atwell *v.* Watkins, 13 Tex. Civ. App. 668, 36 S. W. 103; Pendleton *v.* Robertson, (Tex. Civ. App. 1895) 32 S. W. 442.

Parol evidence is not admissible to show an outstanding title. Darst *v.* Trammel, 27 Tex. 129.

Assertion of ownership, unaccompanied by long continued possession, is not admissible in support of a presumption that a conveyance once existed in favor of the person making the assertion. Herndon *v.* Davenport, 75 Tex. 462, 12 S. W. 1111.

Knowledge of deed from original grantee to a third person.— Evidence as to whether plaintiff knew of a deed from the original grantee to a third person when he accepted a conveyance of the premises is inadmissible. Dotson *v.* Moss, 58 Tex. 152.

14. Herbert *v.* Hanrick, 16 Ala. 581.

15. Guest *v.* Guest, 74 Tex. 664, 12 S. W. 831.

16. Pope *v.* Riggs, (Tex. Civ. App. 1897) 43 S. W. 306.

17. Texas Tram, etc., Co. *v.* Gwin, 29 Tex. Civ. App. 1, 67 S. W. 892, 68 S. W. 721.

18. White *v.* Kingsbury, 77 Tex. 610, 14 S. W. 201.

19. Smith *v.* Olsen, (Tex. Civ. App. 1898) 44 S. W. 874.

b. Documentary Evidence. Documentary evidence,[20] such as grants and patents, land-office proceedings,[21] private deeds and other conveyances,[22] tax

20. Mackey *v.* Armstrong, 84 Tex. 159, 19 S. W. 463; Richardson *v.* Powell, 83 Tex. 588, 19 S. W. 262; Edens *v.* Simpson, (Tex. 1891) 17 S. W. 788; Park *v.* Glover, 23 Tex. 469; Sydnor *v.* Texas Sav., etc., Inv. Assoc., 42 Tex. Civ. App. 138, 94 S. W. 451 (holding that an affidavit that a certain deed in defendant's chain of title is a forgery, which affidavit was made under the statute for the purpose of requiring defendants to prove execution of the deed, is not admissible); Bracken *v.* Bounds, (Tex. Civ. App. 1902) 70 S. W. 326 [*reversed* on other grounds in 96 Tex. 200, 71 S. W. 547]; Karnes *v.* Butler, (Tex. Civ. App. 1901) 62 S. W. 950; McCoy *v.* Pease, 19 Tex. Civ. App. 657, 48 S. W. 208; Atwell *v.* Watkins, 13 Tex. Civ. App. 668, 36 S. W. 103; Lee *v.* Wysong, 128 Fed. 833, 63 C. C. A. 483.

Defendant's abstract of title.— Plaintiff may show common source of title by introducing in evidence defendant's abstract of title filed in the suit. Gonzales *v.* Batts, 20 Tex. Civ. App. 421, 50 S. W. 403.

An instrument creating a lien on land as security for a deed cannot be considered as conveying the title to the grantee, and is not admissible as a muniment of title. Hardy *v.* Brown, (Tex. Civ. App. 1898) 46 S. W. 385.

Necessity for filing recorded instruments and giving notice see Riddle *v.* Bickerstaff, 50 Tex. 155; Halbert *v.* De Bode, (Tex. Civ. App. 1894) 28 S. W. 58; Hendricks *v.* Huffmeyer, (Tex. Civ. App. 1894) 27 S. W. 777.

21. Ballard *v.* Carmichael, 83 Tex. 355, 18 S. W. 734; Jobe *v.* Ollre, 80 Tex. 185, 15 S. W. 1042; Capp *v.* Terry, 75 Tex. 391, 13 S. W. 52; Cook *v.* Dennis, 61 Tex. 246; Kimbro *v.* Hamilton, 28 Tex. 560 (holding that the patent under which plaintiff claims is admissible as evidence of the genuineness of the certificate on which it issued); Peck *v.* Moody, 23 Tex. 93 (holding that conveyances of certificates of claims for bounty land cannot be received as evidence of right or title, without evidence that they have been presented to the commissioner of claims for registration and approval); Chambers *v.* Fisk, 22 Tex. 504; Jones *v.* Menard, 1 Tex. 771; Fields *v.* Burnett, (Tex. Civ. App. 1908) 108 S. W. 1048; Simmonds *v.* Simmonds, 35 Tex. Civ. App. 151, 79 S. W. 630; Ward *v.* Cameron, (Tex. Civ. App. 1903) 76 S. W. 240; Lynch *v.* Pittman, 31 Tex. Civ. App. 553, 73 S. W. 862; Collier *v.* Couts, (Tex. Civ. App. 1898) 45 S. W. 485 [*reversed* on other grounds in 92 Tex. 234, 47 S. W. 525]; Baldwin *v.* Roberts, 13 Tex. Civ. App. 563, 36 S. W. 789; Walker *v.* Peterson, (Tex. Civ. App. 1895) 33 S. W. 269; Olcott *v.* Ferris, (Tex. Civ. App. 1894) 24 S. W. 848; Busk *v.* Lowrie, (Tex. Civ. App. 1893) 22 S. W. 414.

A transfer of a land certificate made before the issuance of a patent to the transferees, and hence not a link in the chain of title of their remote grantees, is nevertheless admissible in favor of such grantees, where such certificate is afterward referred to in a deed of partition between the transferees, and is necessary to show what land was partitioned to each transferee. Talbert *v.* Dull, 70 Tex. 675, 8 S. W. 530.

22. Lindsay *v.* Hoke, 21 Ala. 542 (holding that where several plaintiffs join in an action of trespass to try title, a deed conveying the land in controversy to some of them is admissible in evidence for the grantees therein named); Herndon *v.* Vick, 89 Tex. 469, 35 S. W. 141 [*reversing* (Civ. App. 1895) 33 S. W. 1011]; Bassett *v.* Martin, 83 Tex. 339, 18 S. W. 587; Ballard *v.* Carmichael, (Tex. 1891) 17 S. W. 393; Burns *v.* Goff, 79 Tex. 236, 14 S. W. 1009; Robertson *v.* Du Bose, 76 Tex. 1, 13 S. W. 300; Parker *v.* Chancellor, 73 Tex. 475, 11 S. W. 503; Parker *v.* Ft. Worth, etc., R. Co., 71 Tex. 132, 8 S. W. 541 (holding that a deed under which plaintiff claims, and evidence of his continued possession thereunder until defendant's entry, are admissible and sufficient to show a *prima facie* title); Mynders *v.* Ralston, 68 Tex. 498, 4 S. W. 854; Fitch *v.* Boyer, 51 Tex. 336; Linthicum *v.* March, 37 Tex. 349; Sullivan *v.* Dimmitt, 34 Tex. 114; Ballard *v.* Perry, 28 Tex. 347; Walker *v.* Emerson, 20 Tex. 706, 73 Am. Dec. 207; Sanders *v.* Ward, 50 Tex. Civ. App. 294, 110 S. W. 205; Fields *v.* Burnett, 49 Tex. Civ. App. 446, 108 S. W. 1048; Frugia *v.* Trueheart, 48 Tex. Civ. App. 513, 106 S. W. 736; Mars *v.* Morris, 48 Tex. Civ. App. 216, 106 S. W. 430; Broussard *v.* Hinds, (Tex. Civ. App. 1907) 101 S. W. 855; Cobb *v.* Bryan, (Tex. Civ. App. 1906) 97 S. W. 513; Davis *v.* Ragland, 42 Tex. Civ. App. 400, 93 S. W. 1099; Sydnor *v.* Texas Sav.. etc., Inv. Assoc., 42 Tex. Civ. App. 138, 94 S. W. 451 (holding that a deed passing title from defendant's remote grantor, who is not shown to have previously acquired the title, is admissible in evidence; the objection that the grantor in that deed is not shown to have previously acquired title going to the probative value of such deed and not its admissibility); Arnall *v.* Newcomb, 29 Tex. Civ. App. 521, 69 S. W. 92; Boston *v.* McMenamy, 29 Tex. Civ. App. 272, 68 S. W. 201 (holding that a recorded deed of the premises to plaintiff's ancestor having been received in evidence, it is not error to admit a subsequent unrecorded deed in evidence, to the ancestor from the same grantor); McCrory *v.* Lutz, (Tex. Civ. App. 1901) 62 S. W. 1094 [*affirmed* in 94 Tex. 650, 64 S. W. 780] (holding that where certain property intended to be conveyed was omitted from a deed by mistake, a subsequent deed rectifying the mistake is admissible); Ferguson *v.* Ricketts, (Tex. Civ. App. 1900) 55 S. W. 975 [*reversed* on other grounds in 93 Tex. 565, 57 S. W. 19]; Watkins *v.* Atwell, (Tex. Civ. App. 1898) 45 S. W. 404; Green *v.* White, 18 Tex. Civ.

deeds,[23] judicial proceedings, judgments, and official conveyances,[24] surveyor's field

App. 509, 45 S. W. 389; McCown *v.* Terrell, 9 Tex. Civ. App. 66, 29 S. W. 484; Carothers *v.* Covington, (Tex. Civ. App. 1894) 27 S. W. 1040; Baird *v.* Patillo, (Tex. Civ. App. 1894) 24 S. W. 813; Jones *v.* Reus, 5 Tex. Civ. App. 628, 24 S. W. 674 (holding that a deed to defendant, which his testimony shows was intended to convey part of the land in controversy, is admissible, although it does not in fact convey such land); Roemer *v.* Shackelford, (Tex. Civ. App. 1892) 23 S. W. 87; Womack *v.* Slade, (Tex. Civ. App. 1892) 20 S. W. 947; Wallace *v.* Pruitt, 1 Tex. Civ. App. 231, 20 S. W. 728; Cox *v.* Hart, 145 U. S. 376, 12 S. Ct. 962, 36 L. ed. 741; Hollingsworth *v.* Flint, 101 U. S. 591, 25 L. ed. 1028; White *v.* Thacker, 78 Fed. 862, 24 C. C. A. 374.

A deed which is not connected with the source through which a party claims title is not admissible in evidence in support of such title. Hawley *v.* Brooks, (Tex. Civ. App. 1897) 39 S. W. 316. See also Stubblefield *v.* Hanson, (Tex. Civ. App. 1906) 94 S. W. 406. And it is improper to admit in evidence a deed offered by plaintiff to show common source of title, where he fails to connect defendant's title with such deed. Boston *v.* McMenamy, 29 Tex. Civ. App. 272, 68 S. W. 201.

Bond for title.— Since a bond for title acknowledging the receipt of purchase-money conveys to a grantee an equitable interest, on which he may maintain trespass to try title, a bond for title is admissible in evidence, although plaintiff has been guilty of laches and no decree for specific performance or occupation of the land by either party has been shown. Neyland *v.* Ward, 22 Tex. Civ. App. 369, 54 S. W. 604.

Admissibility of lease.—A written lease of the land in controversy, from plaintiff to defendant, is admissible to show by what right defendant was admitted into the possession of the land. Collins *v.* Davidson, 6 Tex. Civ. App. 73, 24 S. W. 858. See also Camp *v.* League, (Tex. Civ. App. 1906) 92 S. W. 1062. But it is proper to exclude a lease of school lands to plaintiff's grantor, where the lease has been abandoned and canceled, and the grantor has afterward made an application to purchase such lands. Abilene Live-Stock Co. *v.* Guinn, (Tex. Civ. App. 1899) 51 S. W. 885.

Deed executed after action brought.— Where plaintiff is the equitable owner of the land when the action is begun, a deed conveying the legal title, although executed after suit brought, is admissible. Vineyard *v.* Brundrett, 17 Tex. Civ. App. 147, 42 S. W. 232. And a deed executed after the commencement of the action is admissible to show a ratification by the grantor of the act of another in executing a deed prior to the action, as his attorney in fact. McCulloch County Land, etc., Co. *v.* Whitefort, 21 Tex. Civ. App. 314, 50 S. W. 1042. Where an amended petition is founded upon conveyances to the petitioners, executed after the commencement of the action, such conveyances are properly admitted in evidence. Ballard *v.* Carmichael, 83 Tex. 355, 18 S. W. 734.

A deed executed by an attorney in fact is admissible, although the authority of the attorney is not shown, where it is the common source of title under which both parties claim. Glover *v.* Thomas, 75 Tex. 506, 12 S. W. 684.

A void deed under which defendant claims may be put in evidence by plaintiff to show common source of title. Wren *v.* Howland, 33 Tex. Civ. App. 87, 75 S. W. 894; Culmore *v.* Genove, (Tex. Civ. App. 1893) 24 S. W. 83.

Uncertainty or inadequacy of description.— A deed which recites that it is a substitute for one "made heretofore, in which the situation of the land was not properly described." is admissible for the purpose of showing title in the grantee. Curdy *v.* Stafford, 88 Tex. 120, 30 S. W. 551 (*reversing* (Civ. App. 1894) 27 S. W. 823]. It is error to exclude, because of uncertainty of description, a deed through which defendant claims title, offered together with various other conveyances showing a regular chain of title from the original grantor; such deed being offered to show privity of possession and continuity of claim, for the purpose of establishing a claim by adverse possession. Craig *v.* Cartwright, 65 Tex. 413. Deeds are admissible in evidence, although the land described in them is different from the land set forth in the petition, if it is shown that the land is in fact the same. Gray *v.* Kauffmann, 82 Tex. 65, 17 S. W. 513. A deed, the description of which is insufficient to identify the land, and which is on its face apparently inaccurate and incomplete, is inadmissible. Thomas *v.* Tompkins, 47 Tex. Civ. App. 592, 105 S. W. 1175. Where there is neither written allegation nor proof that the description of land in an instrument recorded subsequent to a deed between the same parties was intended as, or in fact was, a description of the land in controversy, such description should not be considered for any purpose. Turner *v.* Cochran, (Tex. Civ. App. 1901) 63 S. W. 151.

Although an instrument not under seal cannot convey the legal title to land, yet, in an action of trespass, it may be competent evidence to show a license or authority from the owner of the land to defendant to enter thereon. Floyd *v.* Ricks, 14 Ark. 286, 58 Am. Dec. 374.

23. Schleicher *v.* Gatlin, 85 Tex. 270, 20 S. W. 120; Garner *v.* Lasker, 71 Tex. 431, 9 S. W. 332; Eels *v.* Blair, (Tex. Civ. App. 1901) 60 S. W. 462; De Garcia *v.* Lozano, (Tex. Civ. App. 1899) 54 S. W. 280.

24. Collins *v.* Ball, 82 Tex. 259, 17 S. W. 614, 27 Am. St. Rep. 877; Smith *v.* Gillum, 80 Tex. 120, 15 S. W. 794 (admissibility of mortgage and foreclosure proceedings); Beall *v.* Chatham, (Tex. Civ. App. 1906) 94 S. W. 1086; Greer *v.* Bringhurst, 23 Tex. Civ. App.

notes, maps, plats,[25] exemplifications, transcripts, and certified copies[26] is admissible, subject to such general rules of evidence.

582, 56 S. W. 947; Benson *v.* Cahill, (Tex. Civ. App. 1896) 37 S. W. 1088 (holding that where in an action of trespass to try title no question of innocent purchaser is involved, a record of probate proceedings material to prove the chain of title is admissible, although not recorded in the county where the land is situated); Buchanan *v.* Park, (Tex. Civ. App. 1896) 36 S. W. 807; Baldwin *v.* Roberts, 13 Tex. Civ. App. 563, 36 S. W. 789; Galbraith *v.* Howard, 11 Tex. Civ. App. 230, 32 S. W. 803; Ingram *v.* Walker, 7 Tex. Civ. App. 74, 26 S. W. 477; Evans *v.* Martin, 6 Tex. Civ. App. 331, 25 S. W. 688 (admissibility of petition for partition and appointment of administrator).

A controller's certificate showing the rendition of the land for taxes to defendants, and that it was not rendered by plaintiff or those under whom he claims, is admissible to prove ownership. Hirsch *v.* Patton, 49 Tex. Civ. App. 499, 108 S. W. 1015.

Replevin bond.—Where a defendant has disclaimed any interest in the land, and sets up that he is only a tenant, his replevin bond may be introduced to show that he replevied the land and therefore claims an interest therein. Capt *v.* Stubbs, 68 Tex. 222, 4 S. W. 467.

Admissibility of official conveyances see Burns *v.* Goff, 79 Tex. 236, 14 S. W. 1009 (admissibility of deed of foreign guardian made by order of foreign court); Ammons *v.* Dwyer, 78 Tex. 639, 15 S. W. 1049; Snow *v.* Starr, 75 Tex. 411, 12 S. W. 673; Wilkins *v.* Owens, (Tex. Civ. App. 1908) 110 S. W. 552 [*reversed* on other grounds in 114 S. W. 104] (holding that where the application and order for the sale of realty belonging to an estate does not cover the land sold, and the order confirming the sale does not identify the land, neither the administrator's deed nor subsequent deeds thereunder are admissible in evidence); Moore *v.* Kempner, 41 Tex. Civ. App. 86, 91 S. W. 336; Perry *v.* Blakey, (Tex. Civ. App. 1898) 47 S. W. 843; Collier *v.* Couts, (Tex. Civ. App. 1898) 45 S. W. 485 (holding that a sheriff's deed is properly admitted in evidence to show privity of claim between defendant's predecessor in title and himself, where there is testimony tending to show that it rested upon a valid judgment against that predecessor, as adverse possession need not be in the same person for the entire period, in case a privity of claim is shown to exist between those in possession); McCown *v.* Terrell, 9 Tex. Civ. App. 66, 29 S. W. 484; Baird *v.* Patillo, (Tex. Civ. App. 1894) 24 S. W. 813.

Admissibility of judgment and order see Harvey *v.* Edens, 69 Tex. 420, 6 S. W. 306; Frederick *v.* Hamilton, 38 Tex. 321 (holding that a judgment relating to land which is not recorded in the county where the land lies is properly excluded); Shirley *v.* Walker, (Tex. Civ. App. 1908) 110 S. W. 995; Teague *v.* Swazey, 46 Tex. Civ. App. 151, 102 S. W. 458 (holding that where an order for a guardian's sale gives a minute description of the land, the failure of the order confirming the sale to contain a full description does not affect its admissibility); Barrett *v.* McKinney, (Tex. Civ. App. 1906) 93 S. W. 240; Veatch *v.* Gray, 41 Tex. Civ. App. 145, 91 S. W. 324; Tinsley *v.* Corbett, 27 Tex. Civ. App. 633, 66 S. W. 910; Ferguson *v.* Ricketts, (Tex. Civ. App. 1900) 55 S. W. 975 [*reversed* on other grounds in 93 Tex. 565, 57 S. W. 19]; Campbell *v.* Antis, 21 Tex. Civ. App. 161, 51 S. W. 343; Kerr *v.* Oppenheimer, 20 Tex. Civ. App. 140, 49 S. W. 149 (holding that where plaintiff claims under a sheriff's deed issued on execution sale under a judgment rendered in another county against defendant's grantor, the judgment, execution, and return are admissible); Owens *v.* New York, etc., Land Co., (Tex. Civ. App. 1898) 45 S. W. 601 (holding that a judgment vesting title to land in plaintiff's ancestors is admissible against one whose ancestors were not parties to the action, as a muniment or link in plaintiff's chain of title); Clark *v.* Groce, 16 Tex. Civ. App. 453, 41 S. W. 668; Driggs *v.* Grantham, (Tex. Civ. App. 1897) 41 S. W. 408; Hendricks *v.* Huffmeyer, 15 Tex. Civ. App. 93, 38 S. W. 523 (holding that an order of sale made by a probate court, although not admissible for the purpose of showing title in any one to the land described therein, may be admitted to show in connection with other evidence what land was intended to be described in a prior decree of partition of the lands described in the order).

25. Keenan *v.* Keenan, 7 Rich. (S. C.) 345; Tucker *v.* Smith, 68 Tex. 473, 3 S. W. 671; Taylor *v.* Burke, 66 Tex. 643, 1 S. W. 910; Kimbro *v.* Hamilton, 28 Tex. 560; Logan *v.* Robertson, (Tex. Civ. App. 1904) 83 S. W. 395; Yeary *v.* Crenshaw, 30 Tex. Civ. App. 399, 70 S. W. 579; Pardee *v.* Adamson, 19 Tex. Civ. App. 263, 46 S. W. 43.

26. Bullock *v.* Wilson, 5 Port. (Ala.) 338; Mackey *v.* Armstrong, 84 Tex. 159, 19 S. W. 463; Capp *v.* Terry, 75 Tex. 391, 13 S. W. 52; Frugia *v.* Trueheart, 48 Tex. Civ. App. 573, 106 S. W. 736 (holding that an abstract of title made by a county clerk and certified by him to have been taken from the record of deeds in his office is admissible); Simmonds *v.* Simmonds, 35 Tex. Civ. App. 151, 79 S. W. 630; Karnes *v.* Butler, (Tex. Civ. App. 1901) 62 S. W. 950; Barton *v.* Davidson, (Tex. Civ. App. 1898) 45 S. W. 400; Burleson *v.* Collins, (Tex. Civ. App. 1895) 28 S. W. 898 (holding that where plaintiff attacks as a forgery the deed under which defendant claims, a certified copy of such deed from the records of the proper county is admissible, in connection with evidence that the original was executed by the person who was the common source of title); Bosse *v.* Cadwallader, (Tex. Civ. App. 1893) 23 S. W. 260.

3. Weight and Sufficiency. The general rules which govern in other civil actions in regard to the weight and sufficiency of evidence are applicable to actions of trespass to try title, and a preponderance of evidence showing any material fact in issue is sufficient, the degree of certainty demanded in criminal prosecutions not being required.[27] A charge that a party to this action must establish his case

27. See Evidence, 17 Cyc. 753 *et seq.* And see Freeman *v.* Slay, (Tex. Civ. App. 1905) 88 S. W. 404.

Evidence held sufficient to support verdict for plaintiff.— Cook *v.* Caswell, 81 Tex. 678, 17 S. W. 385; Norfleet *v.* McCall, 80 Tex. 236, 15 S. W. 785; Barron *v.* Henry, (Tex. 1890) 15 S. W. 221; Russell *v.* Oliver, 78 Tex. 11, 14 S. W. 264; Butler *v.* Brown, 77 Tex. 342, 14 S. W. 136; Walker *v.* Stroud, (Tex. 1887) 6 S. W. 202; Ayres *v.* Patton, 51 Tex. Civ. App. 186, 111 S. W. 1079; Daugherty *v.* Templeton, 50 Tex. Civ. App. 304, 110 S. W. 553; Jackson *v.* Tonahill, 49 Tex. Civ. App. 169, 108 S. W. 178; Jaggers *v.* Stringer, 47 Tex. Civ. App. 571, 106 S. W. 151; J. S. Brown Hardware Co. *v.* Catrett, 45 Tex. Civ. App. 647, 101 S. W. 559; Beall *v.* Chatham, (Tex. Civ. App. 1906) 94 S. W. 1086; Hymer *v.* Holyfield, (Tex. Civ. App. 1905) 87 S. W. 722 (evidence sufficient to show that a will under which plaintiff claims has been duly probated); McKee *v.* Ellis, (Tex. Civ. App. 1904) 83 S. W. 880; Barclay *v.* Waller, 37 Tex. Civ. App. 242, 83 S. W. 721; Booth *v.* Clark, 34 Tex. Civ. App. 315, 78 S. W. 392; Johnson *v.* Franklin, (Tex. Civ. App. 1903) 76 S. W. 611; Henry *v.* Thomas, (Tex. Civ. App. 1903) 74 S. W. 599; Turner *v.* Cochran, 30 Tex. Civ. App. 549, 70 S. W. 1024; Yeary *v.* Crenshaw, 30 Tex. Civ. App. 399, 70 S. W. 579; Stokes *v.* Riley, 29 Tex. Civ. App. 373, 68 S. W. 703; Anderson *v.* Wynne, 25 Tex. Civ. App. 440, 62 S. W. 119; Galveston, etc., R. Co. *v.* Everett, (Tex. Civ. App. 1900) 58 S. W. 547; Ferguson *v.* Cochran, (Tex. Civ. App. 1898) 45 S. W. 30; Hodges *v.* Reynolds, (Tex. Civ. App. 1896) 37 S. W. 45; Thompson *v.* Swann, (Tex. Civ. App. 1896) 35 S. W. 828; Galbraith *v.* Howard, 11 Tex. Civ. App. 230, 32 S. W. 803; Brown *v.* Perez, (Tex. Civ. App. 1895) 32 S. W. 546; Palmer *v.* Texas Tram, etc., Co., 3 Tex. Civ. App. 469, 23 S. W. 38.

Evidence held insufficient to support verdict for plaintiff.— Hendricks *v.* Huffmeyer, 90 Tex. 577, 40 S. W. 1 [*affirming* 15 Tex. Civ. App. 93, 38 S. W. 523]; Guest *v.* Guest, 74 Tex. 664, 12 S. W. 831; Rhodus *v.* Sansom, (Tex. 1887) 6 S. W. 849; San Antonio Mach., etc., Co. *v.* Campbell, (Tex. Civ. App. 1908) 110 S. W. 770; Smyth *v.* Saigling, (Tex. Civ. App. 1908) 110 S. W. 550; Romine *v.* Littlejohn, (Tex. Civ. App. 1907) 106 S. W. 439 (evidence insufficient to establish plaintiff's right to recover by reason of prior possession); McAdams *v.* Hooks, 47 Tex. Civ. App. 79, 104 S. W. 432; New Orleans State Nat. Bank *v.* Roberts, (Tex. Civ. App. 1907) 103 S. W. 454; Ball *v.* Carroll, 42 Tex. Civ. App. 323, 92 S. W. 1023; Roos *v.* Basham, 41 Tex. Civ. App. 551, 91 S. W. 656; Cobb *v.* Bryan, 37 Tex. Civ. App. 339, 83 S. W. 887; Schultz *v.* Tonty Lumber Co., 36 Tex. Civ. App. 448, 82 S. W. 353; Stafford *v.* Kreinhop, (Tex. Civ. App. 1901) 63 S. W. 166; Morgan *v.* Butler, 23 Tex. Civ. App. 470, 56 S. W. 689; Ehrenberg *v.* Baker, (Tex. Civ. App. 1899) 54 S. W. 435; McCoy *v.* Pease, 17 Tex. Civ. App. 303, 42 S. W. 659; Schoellkopf *v.* Cameron, (Tex. Civ. App. 1897) 40 S. W. 1072; Story *v.* Jones, 16 Tex. Civ. App. 60, 40 S. W. 417; League *v.* Trepagnier, 13 Tex. Civ. App. 523, 36 S. W. 772; Small *v.* McMurphy, 11 Tex. Civ. App. 409, 32 S. W. 788; Kern *v.* Reynolds, (Tex. Civ. App. 1895) 32 S. W. 711; Paschal *v.* Evans, (Tex. Civ. App. 1895) 30 S. W. 923; Purinton *v.* Gunter, 3 Tex. Civ. App. 525, 22 S. W. 1008; Dunman *v.* Cloud, 3 Tex. Civ. App. 457, 22 S. W. 529; Guerra *v.* San Antonio, 1 Tex. Civ. App. 422, 20 S. W. 935.

Evidence held sufficient to support verdict for defendant.— Crain *v.* Huntington, 81 Tex. 614, 17 S. W. 243; Swan *v.* Acres, 80 Tex. 245, 16 S. W. 62; Rodriguez *v.* Haynes, 76 Tex. 225, 13 S. W. 296; Byrne *v.* Fagan, 16 Tex. 391; Evans *v.* Ashe, 50 Tex. Civ. App. 54, 108 S. W. 398, 1190; Brown *v.* Orange County, 48 Tex. Civ. App. 470, 107 S. W. 607; Henderson County *v.* Carpenter, (Tex. Civ. App. 1906) 98 S. W. 413; Smith *v.* Hughes, (Tex. Civ. App. 1905) 86 S. W. 936; Logan *v.* Robertson, (Tex. Civ. App. 1904) 83 S. W. 395; State *v.* Texas Land, etc., Co., 34 Tex. Civ. App. 460, 78 S. W. 957; Bays *v.* Stone, 33 Tex. Civ. App. 146, 76 S. W. 59; Robles *v.* Cooksey, (Tex. Civ. App. 1902) 70 S. W. 584; Scates *v.* Fohn, (Tex. Civ. App. 1900) 59 S. W. 837; Payton *v.* Love, 20 Tex. Civ. App. 613, 49 S. W. 1109; Petrucio *v.* Gross, (Tex. Civ. App. 1898) 47 S. W. 43 (evidence sufficient to show possession of defendant for a certain length of time); Richardson *v.* Richardson, (Tex. Civ. App. 1897) 42 S. W. 248; Ballaster *v.* Mann, (Tex. Civ. App. 1893) 24 S. W. 561; Wells *v.* Burts, 3 Tex. Civ. App. 430, 22 S. W. 419.

Evidence held insufficient to support verdict for defendant.—Williams *v.* McGee, 1 Mill (S. C.) 85; Utzfield *v.* Bodman, 76 Tex. 359, 13 S. W. 474; Yellow Pine Lumber Co. *v.* Carroll, 76 Tex. 135, 13 S. W. 261 (holding that evidence that plaintiff's grantor, before conveying to plaintiff, had transferred to a third person an equitable right to a conveyance of the land sued for, is not sufficient to sustain the defense of outstanding title); Taliaferro *v.* Rice, 47 Tex. Civ. App. 3, 103 S. W. 464; Tenzler *v.* Tyrrell, (Tex. Civ. App. 1903) 75 S. W. 57; Texas Tram, etc., Co. *v.* Gwin, 29 Tex. Civ. App. 1, 67 S. W. 892, 68 S. W. 721; Herndon *v.* De Cordova, 22 Tex. Civ. App. 202, 54 S. W. 401; Clements *v.* Clements, 18 Tex. Civ. App. 617, 46 S. W. 61; Niemann *v.* Silber, (Tex. Civ. App. 1897) 41 S. W. 712; Bondies *v.* Ivey, (Tex. Civ. App. 1895) 31 S. W. 244, 15 Tex. Civ. App.

by clear and positive testimony is erroneous as imposing too great a burden as to the *quantum* of proof.[28]

4. Effect of Plaintiff's Evidence of Common Source. In making proof of a common source of title, plaintiff has the right to introduce his evidence for that purpose only, and when so introduced it will not be considered for the purpose of showing title in defendant, unless introduced by him. The proof of common source does not mean that defendant has title under the claim proved, but that he claims to have title under it.[29]

290, 39 S. W. 156; Byers *v.* Wallace, (Tex. Civ. App. 1894) 25 S. W. 1043.

Evidence held sufficient to show location and description of land.— Smith *v.* Olsen, 92 Tex. 181, 46 S. W. 631; Miller *v.* Gist, 91 Tex. 335, 43 S. W. 263; Bassett *v.* Martin, 83 Tex. 339, 18 S. W. 587; Ikard *v.* Thompson, 81 Tex. 285, 16 S. W. 1019; Parrish *v.* Jackson, 69 Tex. 614, 7 S. W. 486; Cochran *v.* Kapner, 46 Tex. Civ. App. 342, 103 S. W. 469; Brodbend *v.* Carper, (Tex. Civ. App. 1907) 100 S. W. 183; Warner *v.* Sapp, (Tex. Civ. App. 1906) 97 S. W. 125; Stone *v.* Crenshaw, 30 Tex. Civ. App. 394, 70 S. W. 582; Clawson *v.* Williams, 27 Tex. Civ. App. 130, 66 S. W. 702; Bartell *v.* Kelsey, (Tex. Civ. App. 1900) 59 S. W. 631; Payton *v.* Caplen, 24 Tex. Civ. App. 364, 59 S. W. 624; Rector *v.* Erath Cattle Co., 18 Tex. Civ. App. 412, 45 S. W. 427; Bateman *v.* Jackson, (Tex. Civ. App. 1898) 45 S. W. 224; Gist *v.* East, 16 Tex. Civ. App. 274, 41 S. W. 396.

Evidence held insufficient to show location and description of land.— Wallace *v.* Berry, 83 Tex. 328, 18 S. W. 595; Keller *v.* Hollingsworth, 78 Tex. 653, 15 S. W. 110; McDonald *v.* Hamblen, 78 Tex. 628, 14 S. W. 1042; Butler *v.* Brown, 77 Tex. 342, 14 S. W. 136; Keyser *v.* Meusback, 77 Tex. 64, 13 S. W. 967; Devine *v.* Keller, 73 Tex. 364, 11 S. W. 379; Catlett *v.* Starr, 70 Tex. 485, 7 S. W. 844; Jones *v.* Fancher, 61 Tex. 698; McDonald *v.* Downs, 45 Tex. Civ. App. 215, 99 S. W. 892; Lewis *v.* Brown, 39 Tex. Civ. App. 139, 87 S. W. 704; Cochran *v.* Moerer, 39 Tex. Civ. App. 75, 87 S. W. 160; Wilcoxon *v.* Howard, 26 Tex. Civ. App. 281, 62 S. W. 802, 63 S. W. 938; Scanlan *v.* Hitchler, 19 Tex. Civ. App. 689, 48 S. W. 762; Forstall *v.* Bocock, (Tex. Civ. App. 1897) 41 S. W. 502; Rosson *v.* Miller, 15 Tex. Civ. App. 603, 40 S. W. 861; Riley *v.* Pool, 5 Tex. Civ. App. 346, 24 S. W. 85; Linam *v.* Anderson, 2 Tex. Civ. App. 631, 21 S. W. 768.

Sufficiency of evidence as to issuance of patent to plaintiff's ancestor see Dorsey *v.* Sternenberg, 42 Tex. Civ. App. 568, 94 S. W. 413; Buster *v.* Warren, 35 Tex. Civ. App. 644, 80 S. W. 1063.

Sufficiency of evidence to establish parol partition of land see Haines *v.* West, (Tex. Civ. App. 1907) 102 S. W. 436 [*affirmed* in 101 Tex. 226, 105 S. W. 1118, 130 Am. St. Rep. 839]; Long *v.* Long, 30 Tex. Civ. App. 368, 70 S. W. 587.

Sufficiency of evidence to show common source see Moore *v.* Kempner, 41 Tex. Civ. App. 86, 91 S. W. 336; Webster *v.* McCarty, 16 Tex. Civ. App. 160, 40 S. W. 823; Hendricks *v.* Huffmeyer, 15 Tex. Civ. App. 93, 38 S. W. 523 [*affirmed* in 90 Tex. 577, 40 S. W. 1]; Greenwood *v.* Fontaine, (Tex. Civ. App. 1896) 34 S. W. 826.

Sufficiency of evidence to show title out of state see Sanger *v.* McCan, 48 Tex. Civ. App. 230, 106 S. W. 752; Ortiz *v.* State, (Tex. Civ. App. 1905) 86 S. W. 45 [*affirmed* in 99 Tex. 475, 90 S. W. 1084]; Graham *v.* Billings, (Tex. Civ. App. 1899) 51 S. W. 645; San Antonio *v.* Ostrom, 18 Tex. Civ. App. 678, 45 S. W. 961.

Evidence sufficient to make prima facie case.— Evidence that plaintiff was an actual settler on an agricultural section on the date of his application to purchase it, and also other sections as additional land, and that the lands were all awarded to him on his application, makes a *prima facie* case in his favor in trespass to try title. Walker *v.* Marchbanks, 32 Tex. Civ. App. 303, 74 S. W. 929. Possession of a land certificate with a blank indorsement thereon, prior to its location, followed by a location, is, when unexplained, *prima facie* evidence of title. Fisher *v.* Ullman, 3 Tex. Civ. App. 322, 22 S. W. 523. The general rule is that in deraigning title identity of name is *prima facie* evidence of identity of person. Dorsey *v.* Sternenberg, 42 Tex. Civ. App. 568, 94 S. W. 413; Clark *v.* Groce, 16 Tex. Civ. App. 453, 41 S. W. 668. Where in trespass to try title one party shows that he purchased the land at a legal execution sale under a judgment against a former owner, he establishes a *prima facie* case and it devolves upon the adverse party to prove the superiority of his title. Taylor *v.* Doom, 43 Tex. Civ. App. 59, 95 S. W. 4. In trespass to try title a recital in a deed to plaintiff, which is introduced by him in evidence, that the title conveyed has passed through certain mesne conveyances is *prima facie* evidence against a defendant claiming title from a common source; and where defendant introduces no evidence on the question whether either of the recited conveyances was ever made, plaintiff is entitled to recover. Burk *v.* Turner, 79 Tex. 276, 15 S. W. 256.

Proof of the death of a patentee of land and the heirship of plaintiff to such patentee is sufficient to establish the right of the heir as against a trespasser. Brandon *v.* McNelly, 43 Tex. 76.

28. Matador Land, etc., Co. *v.* Cooper, 39 Tex. Civ. App. 99, 87 S. W. 235; Smith *v.* Eastham, (Tex. Civ. App. 1900) 56 S. W. 218; Moore *v.* Stone, (Tex. Civ. App. 1896) 36 S. W. 909.

29. Ogden *v.* Bosse, 86 Tex. 336, 24 S. W. 798 [*reversing* (Civ. App. 1893) 23 S. W.

H. Trial [30] — **1. Order of Proof.** In trespass to try title, deeds constituting links in a chain of title need not be introduced in the order of their execution, beginning with the original grant from the sovereign, but the order may be varied to suit the convenience of the party offering them, subject to the direction of the court in its discretion.[31]

2. Nonsuit. Under a statute providing that at any time before the jury retires plaintiff may take a nonsuit, but he shall not thereby prejudice the right of an adverse party to be heard on his claim for affirmative relief,[32] where in an action of trespass to try title defendant asks that his title be quieted, the court may hear and grant his plea, although plaintiff has been nonsuited.[33]

3. Questions For Jury. As in other civil cases,[34] questions of law are for the determination of the court,[35] and questions of fact are for the jury.[36] An issue not raised by the pleadings and the evidence should not be submitted to the jury,[37] but issues so raised should be submitted.[38] Where plaintiff establishes his title by undisputed evidence, and defendant fails to show a superior title, it is proper to direct a finding for plaintiff.[39] Where all the evidence tends to prove a fact, so that but one finding can be made by the jury, it is proper for the court to withdraw the issue from them and decide the matter itself,[40] and where, there is no conflict in the evidence, and it fails to prove or tend to prove the allegations of plaintiff, a verdict may be directed for defendant.[41] The case should be sub-

260]; Young *v.* Trahan, 43 Tex. Civ. App. 611, 97 S. W. 147; Greenwood *v.* Fontaine, (Tex. Civ. App. 1896) 34 S. W. 826.

Certified copies of deeds.— Under Tex. Rev. St. (1895) art. 5266, certified copies of deeds introduced in evidence by plaintiff for the purpose of proving common source are not evidence of title in defendant, unless offered in evidence by him. Story *v.* Birdwell, (Tex. Civ. App. 1898) 45 S. W. 847.

30. See, generally, Trial.

31. Frugia *v.* Trueheart, 48 Tex. Civ. App. 513, 106 S. W. 736.

32. Tex. Rev. St. (1895) art. 1301. And see Peck *v.* McKellar, 33 Tex. 234.

33. French *v.* Groesbeck, 8 Tex. Civ. App. 19, 27 S. W. 43.

34. See Trial.

35. Beaumont Pasture Co. *v.* Cleveland, (Tex. Civ. App. 1894) 26 S. W. 93, holding that it is the duty of a court to construe a written instrument offered in evidence by plaintiff in an action of trespass to try title.

36. Herndon *v.* Vick, 89 Tex. 469, 35 S. W. 141 [*reversing* (Civ. App. 1895) 33 S. W. 1011]; Baker *v.* Clepper, 26 Tex. 629, 84 Am. Dec. 591 (holding that where defendant claims under an execution sale, the validity of which is contested, excess of levy and gross inadequacy of price are proper questions to be submitted to the jury); Simpson *v.* McLemore, 8 Tex. 448 (holding that abandonment of the possession of the land in controversy is a question of fact); Stipe *v.* Shirley, 27 Tex. Civ. App. 97, 64 S. W. 1012 (holding that a husband's authority to make a deed of the community interest is a question for the jury); Laughlin *v.* Tips, 8 Tex. Civ. App. 649, 28 S. W. 551 (holding that where the parties claim under titles arising from two deeds by the same grantor, and it becomes necessary for the identity of the tracts described in them to be established, the question of notice by the record of the one to the grantee of the other becomes a mixed one of law and fact).

37. Davidson *v.* Wallingford, (Tex. Civ. App. 1895) 30 S. W. 827.

38. Bateson *v.* Choate, 85 Tex. 239, 20 S. W. 64; Donley *v.* Coleman, (Tex. Civ. App. 1901) 62 S. W. 77 (holding that where the pleadings and evidence develop no issue except as to the location of a described boundary, it is not error to submit such issue to the jury); Atwell *v.* Watkins, 13 Tex. Civ. App. 668, 36 S. W. 103; Gilbert *v.* Rankin, 3 Tex. Civ. App. 78, 21 S. W. 994 (holding that, although the principal issue is one of boundary, it is not improper to submit the question of limitation where the deed of each party covers the land in dispute, since where this is true the party showing adverse possession for the statutory period may hold by limitation).

39. Benson *v.* Cahill, (Tex. Civ. App. 1896) 37 S. W. 1088. See also Forsod *v.* Golson, 77 Tex. 666, 14 S. W. 232; Van Sickle *v.* Catlett, 75 Tex. 404, 13 S. W. 31; Kirby *v.* National Loan, etc., Co., 22 Tex. Civ. App. 257, 54 S. W. 1081.

Evidence as to possession.— Before the court is authorized to direct a verdict for plaintiff, based on the presumption of ownership from prior possession, against one entering without title, the evidence must be conclusive, leaving no room for doubt as to the fact of actual possession, and it is not enough that the evidence is without conflict in establishing the facts relied on to show actual possession, but these facts must themselves conclusively prove such possession. Lynn *v.* Burnett, (Tex. Civ. App. 1904) 79 S. W. 64.

40. New York, etc., Land Co. *v.* Dooley, 33 Tex. Civ. App. 636, 77 S. W. 1030.

41. Gulf, etc., R. Co. *v.* Cornell, 84 Tex. 541, 19 S. W. 703; Howard *v.* Stubblefield, 79 Tex. 1, 14 S. W. 1044; Motl *v.* Stephens,

mitted to the jury if there is any evidence reasonably tending to support the issues arising under the pleadings;[42] and where the evidence is conflicting it should be passed upon by the jury.[43]

4. INSTRUCTIONS. The rules as to framing and submitting instructions applicable in civil cases generally govern as to instructions in actions of trespass to try title;[44] thus instructions must be in conformity with the evidence,[45] and with the pleadings and issues,[46] and must not invade the province of the jury,[47] be

49 Tex. Civ. App. 8, 108 S. W. 1018; Grayson v. Breckenridge, 108 Fed. 583, 47 C. C. A. 504.

42. Schmidt v. Huff, (Tex. 1892) 19 S. W. 131; Freeman v. Brundage, 57 Tex. 253; Texas, etc., R. Co. v. Texas Tram, etc., Co., 50 Tex. Civ. App. 182, 110 S. W. 140; Wallis v. Dehart, (Tex. Civ. App. 1908) 108 S. W. 180; Gray v. Fussell, 49 Tex. Civ. App. 261, 106 S. W. 454 (whether a deed was executed to plaintiff's husband); Romine v. Littlejohn, (Tex. Civ. App. 1907) 106 S. W. 439; Hutcheson v. Chandler, 47 Tex. Civ. App. 124, 104 S. W. 434 (title by limitation); Taliaferro v. Rice, 47 Tex. Civ. App. 3, 103 S. W. 464 (execution of a deed); West v. Houston Oil Co., 46 Tex. Civ. App. 102, 102 S. W. 927 (genuineness of a deed); Rankin v. Moore, 46 Tex. Civ. App. 44, 101 S. W. 1049; Gorham v. Settegast, 44 Tex. Civ. App. 254, 98 S. W. 665 (whether interveners were the heirs of the last surviving owner of the land); Field v. Field, 39 Tex. Civ. App. 1, 87 S. W. 726; Ellis v. Lewis, (Tex. Civ. App. 1904) 81 S. W. 1034; Jones v. Wright, (Tex. Civ. App. 1904) 81 S. W. 569 [*reversed* on other grounds in 98 Tex. 457, 84 S. W. 1053]; Lynn v. Burnett, 34 Tex. Civ. App. 335, 79 S. W. 64; San Antonio v. Sullivan, 23 Tex. Civ. App. 619, 57 S. W. 42; Texas Tram, etc., Co. v. Gwin, (Tex. Civ. App. 1899) 52 S. W. 110; Herndon v. Burnett, 21 Tex. Civ. App. 25, 50 S. W. 581; Estell v. Kirby, (Tex. Civ. App. 1898) 48 S. W. 8; Smith v. Davis, 18 Tex. Civ. App. 563, 47 S. W. 101; Schott v. Pellerim, (Tex. Civ. App. 1897) 43 S. W. 944; Burnett v. Friedenhaus, 2 Tex. Civ. App. 596, 21 S. W. 544; White v. Burnley, 20 How. (U. S.) 235, 15 L. ed. 886.

43. Warren v. Frederichs, 76 Tex. 647, 13 S. W. 643; Graves v. Campbell, 74 Tex. 576, 12 S. W. 238; Anderson v. Anderson, 13 Tex. Civ. App. 527, 36 S. W. 816; Dawson v. McLeary, (Tex. Civ. App. 1894) 25 S. W. 705; Tompkins v. Creighton-McShane Oil Co., 160 Fed. 303, 87 C. C. A. 427.

44. See TRIAL.

45. Musselman v. Strohl, 83 Tex. 473, 18 S. W. 857; Bohny v. Petty, 81 Tex. 524, 17 S. W. 80; Van Sickle v. Catlett, 75 Tex. 404, 13 S. W. 31; Hirsch v. Patton, 49 Tex. Civ. App. 499, 108 S. W. 1015; Texas Tram, etc., Co. v. Gwin, 29 Tex. Civ. App. 1, 67 S. W. 892, 68 S. W. 721; Estell v. Kirby, (Tex. Civ. App. 1898) 48 S. W. 8; Bateman v. Jackson, (Tex. Civ. App. 1898) 45 S. W. 224 (holding that where there is no evidence that a tenant of defendant held the land under a claim of ownership or denied defendant's title thereto, an instruction that the tenant's possession, while holding adversely to the landlord, could not be regarded as the latter's possession in computing limitation, is properly refused); Bond v. Texas, etc., R. Co., 15 Tex. Civ. App. 281, 39 S. W. 978 (holding that in an action to recover land it is proper to submit the question whether the strip in controversy is included in the description in plaintiff's deed, when such description designates the land by lot number, by metes and bounds, and as containing a certain quantity, and there is testimony by a surveyor that, according to his survey, only a part of the strip is embraced in such description); Daugherty v. Yates, 13 Tex. Civ. App. 646, 35 S. W. 937; Davidson v. Wallingford, (Tex. Civ. App. 1895) 30 S. W. 286.

46. White v. McFarlin, 77 Tex. 596, 14 S. W. 200; Heflin v. Burns, 70 Tex. 347, 8 S. W. 48 (holding that where there is a plea of limitation, it is proper to charge that the deeds under which defendant claims were duly filed and recorded on certain days, stating also the date of the commencement of the action, although there is no controversy about that fact); Carlisle v. Gibbs, 44 Tex. Civ. App. 189, 98 S. W. 192; Staley v. Stone, 41 Tex. Civ. App. 299, 92 S. W. 1017; Field v. Field, 39 Tex. Civ. App. 1, 87 S. W. 726 (holding that where under the pleadings the form of the suit is trespass to try title, and defendant pleads a parol gift to the land in controversy, and plaintiff in response does not set up any homestead right to the land, such right is not in issue and an instruction in relation thereto is properly refused); Graham v. Billings, (Tex. Civ. App. 1899) 51 S. W. 645 (holding that it is error to submit to the jury the issue of plaintiff's right of possession by reason of defendant's written and actual renouncement of possession, subsequently invaded by defendant, where the fact of such renouncement is not disputed, and only the validity of the instrument and act is in dispute); Herndon v. Burnett, 21 Tex. Civ. App. 25, 50 S. W. 581; Silverman v. Landrum, 19 Tex. Civ. App. 402, 47 S. W. 404; Frank v. Frank, (Tex. Civ. App. 1894) 25 S. W. 819 (holding that where defendant offered a deed from the person claiming an outstanding title, although it established no title, a charge that any after-acquired title in such defendant would inure to plaintiff vendee is not erroneous as submitting an issue not raised by the testimony); Gray v. Thompson, 5 Tex. Civ. App. 32, 23 S. W. 926; Steiner v. Jester, (Tex. Civ. App. 1893) 23 S. W. 718.

47. Badger v. Lyon, 7 Ala. 564; Gresham v. Chambers, 80 Tex. 544, 16 S. W. 326.

Burden of proof.— In an action of trespass

misleading,[48] too broad,[49] argumentative,[50] ambiguous,[51] conflicting, inconsistent, or contradictory.[52] A requested instruction may be refused when it has been substantially embodied in the instructions given by the court,[53] or where it is in part inaccurate,[54] or on an immaterial or unessential matter;[55] but it is erroneous to refuse proper instructions upon a matter in issue not already covered.[56] Mere errors of form such as are not calculated to mislead the jury or prejudice the rights of the parties are immaterial.[57] Instructions embodying abstract propositions of law not applicable to the case on trial should not be given, as they tend to confuse the jury.[58] An erroneous instruction cannot be complained of by the party whom it favors.[59]

5. Verdict and Findings — a. In General. The rules obtaining in civil actions generally are applicable as to verdicts or findings in actions of trespass to try title.[60] Thus the verdict or findings must be specific, certain, and consistent,[61]

to try title, it is not error to charge as to the burden of proof. Moore *v.* Dunn, 16 Tex. Civ. App. 371, 41 S. W. 530.

Weight and sufficiency.— In trespass to try title an instruction as to the weight and sufficiency of evidence is erroneous. Staley *v.* Stone, 41 Tex. Civ. App. 299, 92 S. W. 1017; Hintze *v.* Krabbenschmidt, (Tex. Civ. App. 1897) 44 S. W. 38; Gallon *v.* Van Wormer, (Tex. Civ. App. 1892) 21 S. W. 547. See also Mayo *v.* Tudor, 74 Tex. 471, 12 S. W. 117.

48. Davidson *v.* Wallingford, 88 Tex. 619, 32 S. W. 1030; Ivey *v.* Williams, 78 Tex. 685, 15 S. W. 163 (holding that where plaintiffs have shown title in themselves, if not defeated by the adverse possession of defendants, and there is no evidence of title in any one else, it is misleading to charge that plaintiffs must show a good title not only against defendants but against all other persons); Kirby *v.* Estill, 75 Tex. 484, 12 S. W. 807; Wilkins *v.* Clawson, 50 Tex. Civ. App. 82, 110 S. W. 103; Hirsch *v.* Patton, 49 Tex. Civ. App. 499, 108 S. W. 1015; Brodbent *v.* Carper, (Tex. Civ. App. 1907) 100 S. W. 183; Carlisle *v.* Gibbs, 44 Tex. Civ. App. 189, 98 S. W. 192; Yarborough *v.* Mayes, 41 Tex. Civ. App. 446, 91 S. W. 624; Jinks *v.* Moppin, (Tex. Civ. App. 1904) 80 S. W. 390; Burleson *v.* Alvis, 28 Tex. Civ. App. 51, 66 S. W. 235; Bayne *v.* Denny, 21 Tex. Civ. App. 435, 52 S. W. 983 (holding that where the issue is whether there was any contract in writing for the conveyance of land, a charge referring to the contract as a "transfer or conveyance" is not misleading); Smith *v.* Davis, 18 Tex. Civ. App. 563, 47 S. W. 101; Merrell *v.* Kenney, (Tex. Civ. App. 1898) 45 S. W. 423; House *v.* Williams, 16 Tex. Civ. App. 122, 40 S. W. 414; Busk *v.* Mangham, (Tex. Civ. App. 1894) 27 S. W. 893.

49. Burleson *v.* Alvis, 28 Tex. Civ. App. 51, 66 S. W. 235; Scales *v.* Marshall, (Tex. Civ. App. 1900) 60 S. W. 336.

50. Mitchell *v.* Mitchell, 80 Tex. 101, 15 S. W. 705.

51. Barron *v.* Hinman, (Tex. 1890) 15 S. W. 221; Wilkins *v.* Clawson, 50 Tex. Civ. App. 82, 110 S. W. 103.

52. Jones *v.* Wright, (Tex. Civ. App. 1904) 81 S. W. 569 [*reversed* on other grounds in 98 Tex. 457, 84 S. W. 1053]; Taffinder *v.* Merrell, 18 Tex. Civ. App. 661, 45 S. W. 477, holding that an instruction to find for defendant if he had adverse possession, containing no reference to, and not being referred to, by a separate and distinct instruction that limitations will not run against married women and minors, is inconsistent and calculated to confuse.

53. Terrell *v.* McCown, 91 Tex. 231, 43 S. W. 2; Shifflet *v.* Morelle, 68 Tex. 382, 4 S. W. 843; Smith *v.* Clay, (Tex. Civ. App. 1900) 57 S. W. 74; Smith *v.* Cantrel, (Tex. Civ. App. 1899) 50 S. W. 1081; Driggs *v.* Grantham, (Tex. Civ. App. 1897) 41 S. W. 408; Brown *v.* Perez, (Tex. Civ. App. 1895) 32 S. W. 546 [*affirmed* in 89 Tex. 282, 34 S. W. 725]; Blackburn *v.* Norman, (Tex. Civ. App. 1895) 30 S. W. 718.

54. Salazar *v.* Ybarra, (Tex. Civ. App. 1900) 57 S. W. 303.

55. Angel *v.* Simmonds, 7 Tex. Civ. App. 231, 26 S. W. 910.

56. Byers *v.* Wallace, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760; Ivey *v.* Williams, 78 Tex. 685, 15 S. W. 163; Combest *v.* Wall, (Tex. Civ. App. 1907) 102 S. W. 147; Carlisle *v.* Gibbs, 44 Tex. Civ. App. 189, 98 S. W. 192; Kruger *v.* Buttelman, (Tex. Civ. App. 1900) 56 S. W. 930; Chesser *v.* Baughman, 22 Tex. Civ. App. 435, 55 S. W. 132; Cox *v.* Sherman Hotel Co., (Tex. Civ. App. 1898) 47 S. W. 808 (holding that where defendant claims adverse possession by reason of having inclosed the land and used it as a pasture, it is error to refuse an instruction as to what would constitute a fence or inclosure of the land); Tucker *v.* Hagan, (Tex. Civ. App. 1895) 32 S. W. 336.

57. Frugia *v.* Trueheart, 48 Tex. Civ. App. 513, 106 S. W. 736; Smith *v.* Davis, 18 Tex. Civ. App. 563, 47 S. W. 101.

58. Estell *v.* Kirby, (Tex. Civ. App. 1898) 48 S. W. 8.

59. Louder *v.* Schluter, 78 Tex. 103, 14 S. W. 205, 207; Sickels *v.* White, 66 Tex. 178, 7 S. W. 543.

60. See, generally, Trial.

61. Sawyer *v.* Fitts, 2 Port. (Ala.) 9, 4 Stew. & P. 365; Nichols *v.* Nichols, 79 Tex. 332, 15 S. W. 272; Van Valkenberg *v.* Ruby, 68 Tex. 139, 3 S. W. 746; Eastham *v.* Sims, 11 Tex. Civ. App. 133, 32 S. W. 359. *Com-*

and should conform to the pleadings,[62] and be responsive to the issues,[63] and to the charge of the court.[64] A natural and fair construction should be placed upon the verdict,[65] and a verdict which is general, although not very formal, will support a judgment.[66] Where the trial below is by the court alone, without any special findings of fact or law in the record, it will be presumed on appeal that the court did find facts to be such as would support the judgment.[67] Where defendant claims title, and the jury finds against defendant's claim but disagrees as to plaintiff's title, the finding against defendant does not entitle plaintiff to judgment.[68] In trespass to try title against two defendants, although their plea be joint, the jury may find against one and for the other.[69] Where a plaintiff makes a claim against some of defendants as to the whole title to the premises in controversy, but against others only on a question of boundary, the trial being by the court, there is no error in announcing the decision as to the former controversy before proceeding to try the latter.[70]

b. Description of Premises. The verdict in trespass to try title must describe with reasonable certainty the premises intended to be covered thereby.[71] The verdict of the jury may, however, be aided by a reference to the pleadings to identify the premises;[72] and it is not error for the court to explain its findings by referring to a map filed therewith, which was used by one of the witnesses in connection with his testimony but not offered in evidence.[73] Where the question of boundary is raised between owners of adjoining lots, the jury should determine by their verdict the exact location of the dividing line.[74]

I. Judgment and Enforcement of Judgment — 1. Judgment[75] — a. In General. A judgment in an action of trespass to try title, although informal, if it adjudge the damages found by the jury and a writ of possession, is sufficient.[76] As in other civil actions the judgment must be in conformity with the pleadings[77]

pare Kimball *v.* Morris, (Tex. Civ. App. 1903) 71 S. W. 759.

A conditional verdict should not be received. Hutchins *v.* Bacon, 46 Tex. 408.

62. Musselman *v.* Strohl, 83 Tex. 473, 18 S. W. 857.

63. Kuechler *v.* Wilson, 82 Tex. 638, 18 S. W. 317; Harkey *v.* Cain, 69 Tex. 146, 6 S. W. 637.

64. Edwards *v.* Barwise, 69 Tex. 84, 6 S. W. 677; Clark *v.* Hills, 67 Tex. 141, 2 S. W. 356.

65. Hines *v.* Greenlee, 3 Ala. 73. See also Wolf *v.* Gibbons, (Tex. Civ. App. 1902) 69 S. W. 238.

66. Stephens *v.* Westwood, 25 Ala. 716.

A verdict is general which finds in general terms in favor of one part or the other, although special facts may be stated as the grounds of the jury's conclusion. Shifflet *v.* Morelle, 68 Tex. 382, 4 S. W. 843.

67. Prideaux *v.* Glasgow, 2 Tex. Civ. App. 183, 21 S. W. 176.

68. Secord *v.* Eller, (Tex. Civ. App. 1901) 63 S. W. 933.

69. Foster *v.* Foster, 2 Stew. (Ala.) 356.

70. Hill *v.* Smith, 6 Tex. Civ. App. 312, 25 S. W. 1079.

71. Henley *v.* Mobile Branch Bank, 16 Ala. 552; Crommelin *v.* Minter, 9 Ala. 594; Bennet *v.* Morris, 9 Port. (Ala.) 171; Jinkins *v.* Noel, 3 Stew. (Ala.) 60 (holding that scrupulous accuracy of description is not necessary); Jones *v.* Owens, 5 Strobh. (S. C.) 134. See also Cochran *v.* Schreiber, 107 Fed. 371, 46 C. C. A. 349.

72. Bumpass *v.* Webb, 3 Ala. 109; Reed *v.* Phillips, (Tex. Civ. App. 1896) 33 S. W. 986.

73. Scott *v.* Weisburg, 3 Tex. Civ. App. 46, 21 S. W. 769.

74. Merrell *v.* Kenney, (Tex. Civ. App. 1898) 45 S. W. 423.

75. **As to conclusiveness of judgment** see Judgments, 23 Cyc. 1236.

76. Hamner *v.* Eddins, 3 Stew. (Ala.) 192.

77. Smithers *v.* Smith, 98 Tex. 83, 81 S. W. 283 [*affirming* 35 Tex. Civ. App. 508, 80 S. W. 646]; Anderson *v.* Anderson, 95 Tex. 367, 67 S. W. 404; Murrell *v.* Wright, 78 Tex. 519, 15 S. W. 156 (holding that under an allegation that plaintiff is the sole owner of the land he may recover an undivided interest, and that if he prays partition and the necessary parties are before the court, it should be awarded); Russell *v.* Oliver, 78 Tex. 11, 14 S. W. 264; St. Louis, etc., R. Co. *v.* Prather, 75 Tex. 53, 12 S. W. 969; Koenigheim *v.* Miles, 67 Tex. 113, 2 S. W. 81 (holding that, where plaintiff sues for a tract of land and shows title to a part of it only, no prayer in defendants' pleadings is necessary to support a judgment that he recover such part, and that he take nothing, as against some of defendants, as to the remainder); Gatlin *v.* Organ, 57 Tex. 11; Fleming *v.* Ball, 25 Tex. Civ. App. 209, 60 S. W. 985 (holding that, where in trespass to try title by purchasers at a void sale under a judgment after the death of a sole defendant therein, and after the expiration of the time within which administration on his estate could be had, no equitable relief was asked, the money paid at the sale will

and the verdict,[78] and supported by the evidence.[79] An adjudication cannot be made as to the rights of persons who are not parties to the action.[80] Where, however, a warrantor becomes or is brought in as a defendant, as he may be under the Texas statute,[81] plaintiff may have judgment against him.[82] But, although defendant by his answer prays judgment against his grantor on his warranty, in the event of judgment for plaintiff, he is not entitled to such judgment where his grantor is not made a party to the action.[83] Where plaintiff fails to make out his case, defendant is entitled to a judgment forever conclusive of all claims of plaintiff as to the premises in controversy.[84] Where, however, plaintiff fails to appear and prosecute his action, and no affirmative relief is asked by defendant, the proper practice is to dismiss the action for want of prosecution.[85] If defendant does not appear or answer, judgment cannot be rendered against him on a new cause of action set up in an amended petition of which he had no notice.[86] And where in trespass to try title defendant on appearance day files a cross bill setting up title in himself, the court cannot enter judgment on the cross bill in favor of defendant, without service of it on plaintiff who fails to appear.[87] Affirmative relief cannot be granted defendant upon the plea of not guilty;[88] and where defendant sets up title to a part of the land, to entitle him to affirmative relief he must prove the facts constituting this title, and as to such facts the burden is upon him.[89] Where in trespass to try title against several defendants the evidence discloses that none of them were in possession of a part of the premises sued for, and all having answered, failed to disclaim as to any part of the land, and plaintiff exhibits a perfect title, the judgment should be against all defendants for all the land to which he establishes a right, and for the costs of the suit.[90] Where a judgment is rendered in favor of plaintiff, from which an

not be required to be repaid before title will be decreed to the heirs or those claiming under them); Scales *v.* Marshall, (Tex. Civ. App. 1900) 60 S. W. 336; Chaney *v.* Saunders, 24 Tex. Civ. App. 379, 59 S. W. 836; Greer *v.* Bringhurst, 23 Tex. Civ. App. 582, 56 S. W. 947 (holding that, in an action of trespass to try title against several defendants holding jointly, it is error to decree a partition of the property among such defendants, in the absence of any pleading praying such relief); Matador Land, etc., Co. *v.* State, (Tex. Civ. App. 1899) 54 S. W. 256; Munnink *v.* Jung, 3 Tex. Civ. App. 395, 22 S. W. 293.

78. Anderson *v.* Anderson, 95 Tex. 367, 67 S. W. 404; Conner *v.* Downes, 32 Tex. Civ. App. 588, 74 S. W. 781, 75 S. W. 335.

79. Anderson *v.* Anderson, 95 Tex. 367, 67 S. W. 404; Richardson *v.* Powell, 83 Tex. 588, 19 S. W. 262; Herring *v.* Mason, 17 Tex. Civ. App. 559, 43 S. W. 797; Bering *v.* Ashley, (Tex. Civ. App. 1895) 30 S. W. 838. See also Zimpleman *v.* Power, 38 Tex. Civ. App. 263, 85 S. W. 69.

80. Gillean *v.* Frost, 25 Tex. Civ. App. 371, 61 S. W. 345; Maury *v.* Keller, (Tex. Civ. App. 1898) 53 S. W. 59, holding that, although a judgment against plaintiffs in trespass to try title is inoperative as to defendants not before the court, because not served with process, it is valid as between a defendant who was served and plaintiffs, and concludes the latter from recovering the lands.

81. Tex. Rev. St. (1895) art. 5252. And see Kirby *v.* Estill, 75 Tex. 484, 12 S. W. 807. See *infra*, II, C, 2.

82. Johns *v.* Hardin, 81 Tex. 37, 16 S. W. 623; Hollingsworth *v.* Mexia, 14 Tex. Civ. App. 363, 37 S. W. 455, holding that plaintiff may have judgment against defendant's warrantor, who is brought in by defendant alone, and who pleads not guilty and adopts defendant's pleas so far as he is required to defend against plaintiff.

Reformation of warrantor's deed.—All the facts to show the grantor's liability having been established in trespass to try title, wherein the grantor was impleaded on his warranty, it is unnecessary for the judgment to order a reformation of the deed so as to correctly describe the land intended to be conveyed. Meade *v.* Jones, 13 Tex. Civ. App. 320, 35 S. W. 310.

83. Greening *v.* Keel, 84 Tex. 326, 19 S. W. 435.

84. Hill *v.* Grant, (Tex. Civ. App. 1898) 44 S. W. 1016. *Compare* Wilson *v.* Swasey, (Tex. 1892) 20 S. W. 48.

85. Harris *v.* Schlinke, 95 Tex. 88, 65 S. W. 172 [*reversing* (Civ. App. 1901) 62 S. W. 72]; Hill *v.* Friday, (Tex. Civ. App. 1902) 70 S. W. 567.

86. Coreth *v.* McNatt, 33 Tex. Civ. App. 473, 77 S. W. 33.

87. Harris *v.* Schlinke, 95 Tex. 88, 65 S. W. 172 [*reversing* (Civ. App. 1901) 62 S. W. 72]. See also Clements *v.* Clements, (Tex. Civ. App. 1898) 46 S. W. 61.

88. St. Louis, etc., R. Co. *v.* Prather, 75 Tex. 53, 12 S. W. 969.

89. Ballard *v.* Carmichael, 83 Tex. 355, 18 S. W. 734.

90. Koenigheim *v.* Miles, 67 Tex. 113, 2 S. W. 81.

appeal is taken by defendants but never perfected, the fact that defendants continued in possession of the land does not affect the conclusiveness of the judgment as far as the title to such land up to the date of the rendition of such judgment is concerned.[91] In Texas the wife of defendant, who is joined with him as defendant, is not liable to a personal judgment for use and occupation and for costs, where the husband claims as the purchaser himself.[92]

b. Description of Land. It is necessary to the validity of a judgment in trespass to try title that it should describe the land recovered with sufficient certainty to identify it.[93] But the description of the premises in a judgment is sufficient, where it follows the pleadings and furnishes sufficient means to identify the land.[94]

c. Disclaimer. Upon disclaimer by a defendant in trespass to try title, a judgment should be entered for plaintiff for the land in controversy, and for defendant for the costs of the action.[95] Where the defendants disclaim as to a part of the land in controversy, judgment should be entered for plaintiff for such part,[96] and if defendant, after disclaiming as to a part of the land, lays claim by metes and bounds to the remainder, and it is found that he is entitled thereto, judgment should be entered for him therefor.[97] Where plaintiff obtains judgment in an action to recover land, defendant having pleaded not guilty and having also filed a disclaimer as to a portion of the land sued for, such defendant is not prejudiced by the entry of a judgment against him for all the land sued for by plaintiff.[98] Where in trespass to try title one of defendants pleads not guilty, and also that he holds possession only as a tenant of his co-defendant, and the co-defendant obtains a judgment against plaintiff, judgment should not be rendered against such defendant as in the case of an ordinary disclaimer.[99]

d. Reforming Judgment. By consent, the court after judgment may reform the judgment and permit plaintiff to dismiss or remit the judgment against one or more of several defendants.[1]

2 Enforcement of Judgment. On a recovery in trespass to try title of a whole or a part of the land sued for, plaintiff is entitled to a writ of possession for that which is recovered.[2] But a writ of possession cannot be awarded against persons

91. Weisman *v.* Thomson, (Tex. Civ. App. 1903) 78 S. W. 728.

92. Cooke *v.* Avery, 147 U. S. 375, 13 S. Ct. 340, 37 L. ed. 209.

93. Giddings *v.* Fischer, 97 Tex. 184, 77 S. W. 209 [*reversing* (Civ. App. 1903) 74 S. W. 85]; Miller *v.* Moss, (Tex. 1888) 9 S W. 257; Jones *v.* Andrews, 72 Tex. 5, 9 S. W. 170; Hearne *v.* Erhard, 33 Tex. 60; Reast *v.* Hughes, (Tex. Civ. App. 1896) 33 S. W. 1003. See also Campbell *v.* McCaleb, (Tex. Civ. App. 1907) 99 S. W. 129. *Compare* Lumpkin *v.* Draper, (Tex. 1891) 18 S. W. 1058.

Inserting field notes in judgment.—In describing the boundary lines of land in a judgment for its recovery, it is proper to insert undisputed field notes concerning the lines found by the jury, although the notes were not inserted in the verdict. Coughran *v.* Alderete, (Tex. Civ. App. 1894) 26 S. W. 109

Bearings of a resurvey.—Where a verdict has been rendered in favor of a plaintiff who claims under a certain survey, a judgment may be rendered giving the calls of said survey with the bearings of a resurvey, and also directing the mode of fixing the locality of the land to correspond with the verdict in plaintiff's claim, although the petition did not call for the bearings. McFarlin *v.* Vaughn, (Tex. 1889) 12 S. W. 813.

94. Adams *v.* Mauermann, (Tex. Civ. App. 1897) 40 S. W. 22, 90 Tex. 438, 39 S. W. 280; Sen *v.* Rehling, (Tex. Civ. App. 1895) 29 S. W. 1114. *Compare* Edwards *v.* Smith, 71 Tex. 156, 9 S. W. 77.

95. Tate *v.* Wyatt, 77 Tex. 492, 14 S. W. 25; Johnson *v.* Schumacher, 72 Tex. 334, 12 S. W. 207; McDaniel *v.* Martin, (Tex. Civ. App. 1894) 25 S. W. 1041. See also Brown *v.* Reed, (Tex. Civ. App. 1898) 48 S. W. 537; Easterwood *v.* Dunn, 19 Tex. Civ. App. 320, 47 S. W. 285. And see *infra*, II, L, 2.

96. Converse *v.* Langshaw, 81 Tex. 275, 61 S. W. 1031; Pouns *v.* Zachary, 46 Tex. Civ. App. 604, 103 S. W. 234; Busk *v.* Manghum, 14 Tex. Civ. App. 621, 37 S. W. 459; Snyder *v.* Compton, (Tex. Civ. App. 1895) 29 S. W. 73.

97. Dodge *v.* Richardson, 70 Tex. 209, 8 S. W. 30.

98. Houston, etc., R. Co. *v.* Bowie, 2 Tex. Civ. App. 437, 21 S. W. 304.

99. Smithwick *v.* Kelly, 79 Tex. 564, 15 S. W. 486.

1. Jones *v.* Andrews, 72 Tex. 5, 9 S. W. 170.

2. Dupont *v.* Ervin, 2 Brev. (S. C.) 400; Dorn *v.* Beasley, 6 Rich. Eq. (S. C.) 408;

other than defendants who entered upon the premises recovered, prior to the institution of the action.[3] The enforcement of a judgment adjudging the land to plaintiff and the value of the improvements thereon to defendant is expressly provided for by statute in Texas.[4]

J. New Trial. In trespass to try title it is not error to refuse to postpone the hearing of a motion for a new trial to permit the moving party to acquire an outstanding superior title relied on by him to defeat a recovery.[5]

K. Appeal and Error.[6] In Texas the determination of the lower court, in an action of trespass to try title, is reviewable either by appeal or by writ of error.[7] A question not raised, or which has been abandoned, in the court below, will not be considered on appeal.[8] As a general rule the action of the court in instructing the jury will not be reviewed without a statement of facts or a bill of exceptions.[9] And by rule of court in Texas, in the absence of any assignment of error, an appellate court will not consider any error but one of law appearing upon the record.[10] The action of the lower court, even though erroneous, will not be disturbed where the appellant was not prejudiced thereby.[11] It will be presumed that the action of the lower court and the judgment thereof is in accordance with law, in the absence of anything in the record showing otherwise.[12] Where the interest of the parties can be rightly severed, the appellate court may affirm as to some of the parties and reverse as to others.[13] Where an issue was raised in the court below which should have been submitted to a jury, the cause will be remanded for a new trial.[14] But where a question has been fully presented to the jury,

Meyer *v.* Kirlicks, (Tex. Civ. App. 1894) 25 S. W. 652.

Against sureties on replevin bond.— In trespass to try title where the land is sequestered and replevied, the judgment for plaintiff need not award a writ of possession against the sureties on the replevin bond. Zimmerman *v.* Pearson, (Tex. Civ. App. 1899) 51 S. W. 523.

Quashing writ of possession.— Where a writ of possession, executed after a petition in error to have the judgment revised on which the writ issued, has been filed and served, it is not too late to file a motion to quash the writ. McFarland *v.* Mooring, 56 Tex. 118. Want of certainty in a motion to quash a writ of possession, and the return thereof not sufficiently describing the judgment on which the writ issued and the manner in which it was executed, is cured by the answer of the sheriff, who was made a party defendant, which fully describes the judgment and the manner in which the writ was executed. McFarland *v.* Mooring, 56 Tex. 118.

3. Jones *v.* Burget, 38 Tex. 396.

4. Tex. Rev. St. (1895) arts. 5281–5283. And see Bailey *v.* White, 13 Tex. 114; Cox *v.* Hart, 145 U. S. 376, 12 S. Ct. 962, 36 L. ed. 741.

5. Hayes *v.* Gallaher, 21 Tex. Civ. App. 88, 51 S. W. 280.

6. See, generally, APPEAL AND ERROR.

7. Magee *v.* Chadoin, 44 Tex. 488.

8. Miller *v.* Gist, 91 Tex. 335, 43 S. W. 263; Henry *v.* Whitaker, 82 Tex. 5, 17 S. W. 509; Gaither *v.* Hanrick, 69 Tex. 92, 6 S. W. 619; Schneider *v.* Sellers, 25 Tex. Civ. App. 226, 61 S. W. 541; Focke *v.* Garcia, (Tex. Civ. App. 1898) 48 S. W. 755.

9. McDannel *v.* Martin, (Tex. Civ. App. 1894) 25 S. W. 1041.

10. Clements *v.* Clements, 18 Tex. Civ. App. 617, 46 S. W. 61.

11. Ferguson *v.* Ricketts, 93 Tex. 565, 57 S. W. 19 (holding that where the parties claim title from a common source the error, if any, in allowing plaintiff to introduce a copy of the deed from the original grantee to the common grantor, is harmless, plaintiff's case being as complete without such deed as with it); Ballard *v.* Carmichael, 83 Tex. 355, 18 S. W. 734 [*affirming* (Civ. App. 1891) 17 S. W. 393] (holding that permitting a party to read from a deed having no relation to the property in controversy is not a ground for reversal); Wanke *v.* Foit, 80 Tex. 591, 16 S. W. 329 (holding that a misdescription of the land, in a verdict for defendant, is no cause for reversal where it is not shown that he is prejudiced thereby); Hickey *v.* Behrens, 75 Tex. 488, 12 S. W. 679; Odom *v.* Woodward, 74 Tex. 41, 11 S. W. 925; Forsgard *v.* League, (Tex. Civ. App. 1898) 45 S. W. 173; Griggs *v.* Grantham, (Tex. Civ. App. 1897) 41 S. W. 408 (holding that a judgment will not be reversed on plaintiff's appeal for errors in the instructions, where he recovers all he is entitled to recover under any fair presentation of the case to the jury); Cox *v.* Finks, (Tex. Civ. App. 1897) 41 S. W. 95; Jones *v.* Reus, 5 Tex. Civ. App. 628, 24 S. W. 674. *Compare* Huff *v.* Crawford, (Tex. Civ. App. 1895) 32 S. W. 592 [*reversed* on other grounds in 89 Tex. 214, 34 S. W. 606]; Parker *v.* Chancellor, 73 Tex. 475, 11 S. W. 503.

12. Lyon *v.* McDonald, 78 Tex. 71, 14 S. W. 261, 9 L. R. A. 295; Lockhart *v.* Keller, (Tex. Sup. 1888) 9 S. W. 179; Lynch *v.* Pitman, 31 Tex. Civ. App. 553, 73 S. W. 862.

13. Anders *v.* Spalding, (Tex. Civ. App. 1898) 44 S. W. 298.

14. Kirby *v.* Boaz, 41 Tex. Civ. App. 282,

and there is evidence to support their verdict, the judgment of the lower court will not be disturbed.[15] The appellate court will remand the cause and will not, acting upon the evidence in the record, reform and affirm a judgment where the description of land in a petition was inaccurate, uncertain, and insufficient to identify the land, and there were no allegations of extraneous facts which would clear up the misdescription and uncertainty.[16] Where several defendants claim to have made improvements, the appellate court may remand the cause in order that the pleadings may be amended so as to describe the respective portions of the land in controversy, which defendants claim to have improved.[17]

L. Costs[18] **— 1. In General.** In an action of trespass to try title, where defendant litigates title to the whole or to a part of the land in controversy, in the event plaintiff recovers any part of the land so litigated he is entitled to recover costs;[19] but where plaintiff fails to maintain his action the costs should be adjudged against him.[20] And where plaintiff by amendment sets up a new cause of action,[21] such as title to the land sued for, acquired after the institution of the action,[22] he makes himself liable to pay all costs which have accrued up to the time of the amendment.

2. Effect of Disclaimer A defendant in an action of trespass to try title, who does not desire to contest the title of plaintiff, may absolve himself from the payment of costs by entering a disclaimer as to the land for which suit is brought, provided plaintiff sees fit to prosecute the matter no further and accept the disclaimer.[23] But in an action of trespass to try title and for damages for the unlawful detention, defendant, even though he disclaims title, will be held liable for the costs if he is found liable for damages for the detention.[24] A defendant who denies plaintiff's right to any portion of the lands sued for, but afterward disclaims as to a part of them, is liable for the costs accruing up to the date of filing the disclaimer;[25] and the same rule applies where defendant first claims a part of the land and subsequently disclaims as to that part or to a part of that part.[26]

91 S. W. 642; Cobb *v.* Bryan, 37 Tex. Civ. App. 339, 83 S. W 887.

15. Oates *v.* Osborn, (Tex. Civ. App. 1893) 24 S. W 369. See also McFarlin *v.* Baughn, (Tex. 1889) 12 S. W. 813.

16. Thomas *v.* Tompkins, 47 Tex. Civ. App. 592, 105 S. W. 1175.

17. Miller *v.* Moss, (Tex. 1888) 9 S. W. 257.

18. See, generally, Costs.

19 Bexar County *v.* Voght, 91 Tex. 285, 43 S. W. 14 [*affirming* 16 Tex. Civ. App. 567, 42 S. W. 127]; Dutton *v.* Thompson, 85 Tex. 115, 19 S. W. 1026; Ballard *v.* Carmichael, 83 Tex. 355, 18 S. W. 734; King *v.* Boch, 80 Tex. 156, 15 S. W. 804; Wade *v.* Boyd, 24 Tex. Civ. App. 492, 60 S. W. 360; Frank *v.* Zigmond, 22 Tex. Civ. App. 161, 54 S W. 271. See also Brown *v.* Humphrey, 43 Tex. Civ. App. 23, 95 S. W. 23. *Compare* Woodward *v.* Moore, 9 Rich. (S. C.) 340.

20. Cahill *v.* Benson, 19 Tex. Civ. App. 30, 46 S. W. 888 (holding that, where a judgment for plaintiff in trespass to try title is reversed only on the issue of improvements in good faith, and defendants afterward recover for their improvements, costs accruing after the filing of the mandate of the supreme court are properly taxed against plaintiff); Kent *v.* Berryman, 15 Tex. Civ. App. 487, 40 S. W. 33 (holding that, where defendant pleaded not guilty and proved possession under a lease from plaintiff, and showed that he was not in default as to rent, and plaintiff was adjudged to have title to the land but was denied damages for injuries alleged to have been caused thereto by defendant while in possession, it was proper to tax plaintiff with costs); Sulphur Springs, etc., R. Co. *v.* St. Louis, etc., R. Co., 2 Tex. Civ. App. 650, 22 S. W. 107, 23 S. W. 1012 (holding that, where defendant vouches in several parties alleged to be his warrantors, and judgment is rendered against plaintiff, the costs of bringing in the warrantors are correctly adjudged against plaintiff).

21. Wade *v.* Boyd, 24 Tex. Civ. App. 492, 60 S. W. 360.

22. Ballard *v.* Carmichael, 83 Tex. 355, 18 S. W. 734; Matula *v.* Lane, (Tex. Civ. App. 1900) 56 S. W. 112.

23. Bexar County *v.* Voght, 91 Tex. 285, 43 S. W. 14 [*affirming* 16 Tex. Civ. App. 567, 42 S. W. 127]; Tate *v.* Wyatt, 77 Tex. 492, 14 S. W. 25; Johnson *v.* Schumacher, 72 Tex. 334, 12 S. W. 207; McDaniel *v.* Martin, (Tex. Civ. App. 1894) 25 S. W. 1041.

24. Durst *v.* Mann, (Tex. Civ. App. 1896) 35 S. W. 949. See also Willburn *v.* Tow, (Tex. Civ. App. 1893) 23 S. W. 853.

25. Vineyard *v.* O'Connor, (Tex. Civ. App. 1896) 35 S. W. 1084 [*reversed* on other grounds in 90 Tex. 59, 36 S. W. 424]. See also Capt *v.* Stubbs, 68 Tex. 222, 4 S. W. 467.

26. Bexar County *v.* Voght, 91 Tex. 285, 43 S. W. 14 [*affirming* 16 Tex. Civ. App. 567, 42 S. W. 127].

III. DAMAGES, USE AND OCCUPATION, IMPROVEMENTS, AND TAXES.

A. Damages. Both actual and exemplary damages may be awarded to plaintiff in an action of trespass to try title.[27] One who makes an unauthorized entry on land in possession under a lease is liable to the tenant for the actual damages sustained by him on account of such entry, but damages for permanent injury to the land cannot be recovered by the tenant.[28] Where, after an action of trespass to try title has been brought, defendant buys at a sheriff's sale, under execution against plaintiff, the land in dispute, plaintiff is entitled to such damages as he had sustained before the sale.[29]

B. Use and Occupation — 1. In General. In trespass to try title the reasonable value of the rents and profits arising from the use and occupation of the land, as well as the land itself, is recoverable.[30] Damages for such use and occupation are to be computed from the time when the title was cast upon plaintiff,[31] and the possession of defendant became adverse.[32] And rents accruing up to the time of the verdict are recoverable.[33] One who, in fencing in land belonging to him, incloses a tract belonging to another and uses the entire inclosure as his own, is liable for the use and occupation of the land belonging to the latter, although he never disputes the latter's title or right of possession.[34] Rent cannot be recovered for the use and occupation of land where defendant is in possession under a valid lease,[35] or under a voidable deed purporting to convey the land in fee simple with covenants of warranty, until such deed is repudiated and possession demanded.[36] On a recovery of land which would have been unproductive without the improvements placed upon it in good faith by defendant, plaintiff is not entitled to recover rent.[37] Damages for use and occupation can only be recovered when the facts authorizing such recovery are alleged and proved.[38] And if there is any reason why defendant is not liable for rent, it should be set up in the answer.[39]

27. See Moore *v.* Smith, (Tex. 1892) 19 S. W. 781; Texas Land, etc., Co. *v.* Nations, (Tex. Civ. App. 1901) 63 S. W. 915.

28. Holland *v.* San Antonio, (Tex. Civ. App. 1893) 23 S. W. 756.

29. Stockdale *v.* Young, 3 Strobh. (S. C.) 501 note.

30. Avent *v.* Read, 2 Port. (Ala.) 480, 27 Am. Dec. 663; Field *v.* Field, 39 Tex. Civ. App. 1, 87 S. W. 726. See also Hart *v.* Meredith, 27 Tex. Civ. App. 271, 65 S. W. 507.

Agreed rental value.—Where plaintiff has entered into a written rental contract with a person who agreed to pay him a certain sum for the use of the land, defendants by unlawfully withholding possession of the land and refusing to allow the plaintiff to put his lessee in possession become liable for the agreed rental value. Burge *v.* Hinds, 46 Tex. Civ. App. 134, 101 S. W. 855.

Recovery limited by pleadings.— Plaintiff in trespass to try title cannot recover rents at a higher rate than he claims in his pleadings. Bishop *v.* Lusk, 8 Tex. Civ. App. 30, 27 S. W. 306. *Compare* Bumpass *v.* Webb, 3 Ala. 109.

Expenses of action in addition to rent.— It has been held that plaintiff is entitled, in addition to rent, to recover the expenses incurred in prosecuting his action. Bullock *v.* Wilson, 3 Port. (Ala.) 382.

One of several tenants in common, recovering land held by a trespasser or by one without license from one of the owners, can recover rents *pro rata* against such occupant, but a lessee occupying land held in common under a license from one of the tenants in common is not liable to be charged with rent at the suit of another tenant in common. Whitaker *v.* Allday, 71 Tex. 623, 9 S. W. 483.

Forfeiture by failure to pay state taxes see Bailey *v.* White, 13 Tex. 114, construing Hart. Dig. art. 3234.

31. Brewster *v.* Buckholts, 3 Ala. 20.

32. Illg *v.* De La Luz Garcia, (Tex. Civ. App. 1898) 45 S. W. 857.

33. Shumake *v.* Nelms, 25 Ala. 126.

34. Hastings *v.* O'Connor, (Tex. Civ. App. 1899) 52 S. W. 567; Durst *v.* Mann, (Tex. Civ. App. 1896) 35 S. W. 949; St. Louis Cattle Co. *v.* Vaught, 1 Tex. Civ. App. 388, 20 S. W. 855.

35. Whitaker *v.* Allday, 71 Tex. 623, 9 S. W. 483.

36. Club Land, etc., Co. *v.* Dallas County, 26 Tex. Civ. App. 449, 64 S. W. 872 [*modified* on another point in 95 Tex. 200, 66 S. W. 294].

37. Morris *v.* Wells, 27 Tex. Civ. App. 363, 66 S. W. 248; Cahill *v.* Benson, 19 Tex. Civ. App. 30, 46 S. W. 888; Spicer *v.* Henderson, (Tex. Civ. App. 1897) 43 S. W. 27; Benson *v.* Cahill, (Tex. Civ. App. 1896) 37 S. W. 1088. See also Akin *v.* Jefferson, 65 Tex. 137; Osborn *v.* Osborn, 62 Tex. 495; Neil *v.* Schackelford, 45 Tex. 119.

38. O'Connor *v.* Luna, 75 Tex. 592, 12 S. W. 1125; Parsons *v.* Hart, 19 Tex. Civ. App. 300, 46 S. W. 856.

39. Miller *v.* Knowles, (Tex. Civ. App. 1898) 44 S. W. 927.

2. Set-Off Against Improvements. Where in an action of trespass to try title there is a claim for valuable improvements made in good faith, the owner of the land is entitled to set off against such claim the value of the use and occupation of the land.[40]

3. Effect of Disclaimer. If defendant in an action of trespass to try title desires to put an end to the action and prevent the recovery of damages for a longer period of occupancy, he should make a disclaimer in open court, or in some other manner, and yield the possession to plaintiff.[41] The fact that a defendant files a disclaimer in trespass to try title will not, however, absolve him from liability to pay the rental value of the land during the time he occupied it.[42]

C. Improvements — 1. In General. Where plaintiff prevails in an action of trespass to try title he is entitled to the improvements placed upon the land by defendant, as well as to the land itself.[43] In Texas, however, there is express statutory provision for compensation to possessors in good faith, who have made permanent and valuable improvements upon the land of another.[44] And, independent of statute under the principles of equity, one who has in good faith placed improvements upon the land of another is entitled to recover their value.[45]

2. Good Faith. The question of good faith is one of fact to be determined by

40. Hollinger *v.* Smith, 4 Ala. 367; Nichols *v.* Nichols, 79 Tex. 332, 15 S. W. 272; Ammons *v.* Dwyer, 78 Tex. 639, 15 S. W. 1049; Bonner *v.* Wiggins, 52 Tex. 125; Hearn *v.* Camp, 18 Tex. 545; Scott *v.* Mather, 14 Tex. 235; Ingram *v.* Winters, 46 Tex. Civ. App. 392, 102 S. W. 432; Meurin *v.* Kopplin, (Tex. Civ. App. 1907) 100 S. W. 894; Robert *v.* Ezell, 11 Tex. Civ. App. 176, 32 S. W. 362; Connor *v.* Parsons, (Tex. Civ. App. 1895) 30 S. W. 83. See also Jackson *v.* Munford, 74 Tex. 104, 11 S. W. 1061.

Rental value of improvements excluded.— Under Tex. Rev. St. (1895) § 5278, the value of the use and occupation should be estimated without reference to the improvements. Morris *v.* Wells, 27 Tex. Civ. App. 363, 66 S. W. 248; Mahon *v.* Barnett, (Tex. Civ. App. 1897) 45 S. W. 24; Lumpkin *v.* Nicholson, 10 Tex. Civ. App. 108, 30 S. W. 568. Formerly the rule was otherwise. Evetts *v.* Tendick, 44 Tex. 570. Where it is found that defendant's improvements were not made in good faith, plaintiff should be allowed the rental value of the land inclusive of the improvements, instead of rent for the land alone. Gilley *v.* Williams, (Tex. Civ. App. 1897) 43 S. W. 1094.

No judgment against owner for excess.— The statute allowing a party who is ejected from land the value of his improvements, when he is shown to have been a possessor in good faith, and deferring the owner's right of possession until he pays such party the excess of the value of such improvements over the rents, is valid, but such statute cannot be extended beyond its letter, and a judgment awarding damages against the owner cannot be sustained. Van Valkenburg *v.* Ruby, 68 Tex. 139, 3 S. W. 746.

41. Bumpass *v.* Webb, 3 Ala. 109.

42. Galbraith *v.* Howard, 11 Tex. Civ. App. 230, 32 S. W. 803, the period for which rent can be recovered is limited to two years.

43. Bonner *v.* Wiggins, 52 Tex. 125.

44. Tex. Rev. St. (1895) arts. 5277, 5279 [*construed* in Wood *v.* Cahill, 21 Tex. Civ. App. 38, 50 S. W. 1071]; Overton *v.* Meggs, (Tex. Civ. App. 1907) 105 S. W. 208; Boyd *v.* Miller, 22 Tex. Civ. App. 165, 54 S. W. 411; Watt *v.* Hunter, 20 Tex. Civ. App. 76, 48 S. W. 593, 49 S. W. 412.

Constitutionality of statute.— This statute is not unconstitutional as impairing the obligation of contracts. Cahill *v.* Benson, 19 Tex. Civ. App. 30, 46 S. W. 888.

For construction of previous statutes see Miller *v.* Moss, (Tex. 1898) 9 S. W. 257; Bitner *v.* New York, etc., Land Co., 67 Tex. 341, 3 S. W. 301.

Value of property not enhanced.—Where the value of the property for which the action is brought is not enhanced by the structures erected upon it, as where buildings are placed upon the right of way of a railroad, which interfere with the use of such right of way, there can be no recovery for such structures as constituting valuable improvements. Olive *v.* Sabin, etc., R. Co., 11 Tex. Civ. App. 208, 33 S. W. 139.

Nature of improvements.— The law of improvements in good faith under Tex. Rev. St. art. 4813, is applicable to such improvements as have been placed upon the land under such circumstances as to make them a part of the realty, but does not apply to such as have been placed upon land under such circumstances as to constitute them personal property. Harkey *v.* Cain, 69 Tex. 146, 6 S. W. 637.

Good faith and possession necessary.— Improvements on the land of another, not shown to have been made in good faith or while defendant was in possession, cannot be allowed in an action of trespass to try title brought by the owner. Ferguson *v.* Cochran, (Tex. Civ. App. 1898) 45 S. W. 30. See also Overton *v.* Meggs, (Tex. Civ. App. 1907) 105 S. W. 208.

45. Wood *v.* Cahill, 21 Tex. Civ. App. 38, 50 S. W. 1071. See also Long *v.* Cude, 75 Tex. 225, 12 S. W. 827; Bailey *v.* White, 13 Tex. 114; Van Zandt *v.* Brantley, 16 Tex. Civ. App. 420, 42 S. W. 617.

the jury under proper instructions by the court,[46] depending upon the circumstances of the particular case in which it is asserted.[47] As a general rule to constitute one a possessor in good faith, he must not only believe that he is the true owner, and have reasonable grounds for the belief,[48] but he must be ignorant that his title is contested by one having a better right.[49] But there may be cases when, although aware of the adverse claim, the possessor may have reasonable and strong grounds to believe such claim to be destitute of any just or legal foundation, and so be in possession in good faith.[50] And he may also have good faith where he makes an innocent

46. Schleicher *v.* Gatlin, 85 Tex. 270, 20 S. W. 120; Louder *v.* Schluter, 78 Tex. 103, 14 S. W. 205, 207; Netzorg *v.* Green, 26 Tex. Civ. App. 119, 62 S. W. 789; Cahill *v.* Benson, 19 Tex. Civ. App. 30, 46 S. W. 888.

47. Wortham *v.* Boyd, 66 Tex. 401, 1 S. W. 109; Netzorg *v.* Green, 26 Tex. Civ. App. 119, 62 S. W. 789.

How good faith established.— "The existence of good faith is a fact to be established in such cases by evidence of other facts tending to show that the person asserting it at the time he made improvements on the land believed himself to be its owner and had grounds for such belief such as would ordinarily be satisfactory to one unlearned in the law but of ordinary intelligence, after having made such inquiry as the law presumes every person desiring to buy land will make and as an ordinarily prudent man for his protection ought to make." Holstein *v.* Adams, 72 Tex. 485, 490, 10 S. W. 560 [*quoted* in Netzorg *v.* Green, 26 Tex. Civ. App. 119, 123, 62 S. W. 789].

48. Armstrong *v.* Oppenheimer, 84 Tex. 365, 19 S. W. 520 (holding that a purchaser by warranty deed from a naked trespasser cannot invoke the doctrine of good faith, where the slightest inquiry would have disclosed the absence of title in his vendor); Louder *v.* Schluter, 78 Tex. 103, 14 S. W. 205, 207; Cardwell *v.* Rogers, 76 Tex. 37, 12 S. W. 1006; Thompson *v.* Jones, (Tex. 1889) 12 S. W. 77 (holding that to justify a charge on lands for improvements made in good faith, it is not necessary that the purchaser should show a complete chain of title); Gaither *v.* Hanrick, 69 Tex. 92, 6 S. W. 619; Miller *v.* Brownson, 50 Tex. 583 (holding that a deed from one having neither the title nor possession of land is insufficient to support suggestions of good faith); Fowler *v.* Agnew, 43 Tex. Civ. App. 540, 95 S. W. 36; Rowan *v.* Rainey, 25 Tex. Civ. App. 593, 63 S. W. 1031; Cahill *v.* Benson, 19 Tex. Civ. App. 30, 46 S. W. 888; Hintze *v.* Krabbenschmidt, (Tex. Civ. App. 1897) 44 S. W. 38; Bassett *v.* Sherrod, 13 Tex. Civ. App. 327, 35 S. W. 312; Robert *v.* Ezell, 11 Tex. Civ. App. 176, 32 S. W. 362 (holding that, although a married woman is not estopped from revoking a parol gift of land by admitting title in the grantee and allowing him to remain in possion, the grantee in such case is entitled to the value of improvements made in good faith with the consent of the grantor).

Mistake in boundary line.— Where, owing to a mistake as to his boundary line, defendant improves plaintiff's land under an honest belief that it is his own, he is a possessor in good faith within the meaning of the statute and, on recovery of the land by plaintiff, is entitled to compensation for improvements. Houston *v.* Brown, (Tex. 1888) 8 S. W. 318. See also Gatlin *v.* Organ, 57 Tex. 11. But where a person purchases a lot without showing the slightest diligence to ascertain its boundaries, and as a result erects improvements partly on another's lot, he cannot, in an action against him establishing the true boundary, claim compensation as for improvements made in good faith. Werkheiser *v.* Foard, (Tex. Civ. App. 1908) 108 S. W. 983.

Void tax title.— It cannot be held as a matter of law that improvements made by a purchaser were not made in good faith because he held under a void tax title. Schleicher *v.* Gatlin, 85 Tex. 270, 20 S. W. 120; Louder *v.* Schluter, 78 Tex. 103, 14 S. W. 205, 207; House *v.* Stone, 64 Tex. 677; Hill *v.* Spear, 48 Tex. 583; Netzorg *v.* Green, 26 Tex. Civ. App. 119, 62 S. W. 789. *Compare* Crumbley *v.* Busse, 11 Tex. Civ. App. 319, 32 S. W. 438, holding that a tax deed void on its face for ambiguity of description will not support a claim for improvements made in good faith.

Want of proper acknowledgment.— The mere fact that a deed is invalid for want of a proper acknowledgment does not preclude the vendee from being a possessor in good faith. Veeder *v.* Gilmer, 47 Tex. Civ. App. 464, 105 S. W. 331. See also Johnson *v.* Bryan, 62 Tex. 623; Cole *v.* Bammel, 62 Tex. 108.

Deeds void for want of description will not, without other evidence, sustain a claim for improvements made in good faith. Simpson *v.* Johnson, (Tex. Civ. App. 1898) 44 S. W. 1076 [*reversed* on other grounds in 92 Tex. 159, 46 S. W. 628].

49. Bell *v.* Wright, 94 Tex. 407, 60 S. W. 873; Louder *v.* Schluter, 78 Tex. 103, 14 S. W. 205, 207; Boothe *v.* Best, 75 Tex. 568, 12 S. W. 1000; Polk *v.* Chaison, 72 Tex. 500, 10 S. W. 581; Gaither *v.* Hanrick, 69 Tex. 92, 6 S. W. 619; Henderson *v.* Ownby, 56 Tex. 647, 42 Am. Rep. 691 (holding that where a defendant in trespass to try title, or his assignee, makes improvements after the action is brought, he does so at the risk of losing them, if the suit is decided against him); Wilcoxon *v.* Howard, 26 Tex. Civ. App. 281, 62 S. W. 802, 63 S. W. 938; Cahill *v.* Benson, 19 Tex. Civ. App. 30, 46 S. W. 888; Gilley *v.* Williams, (Tex. Civ. App. 1897) 43 S. W. 1094; Greenwood *v.* McLeary, (Tex. Civ. App. 1894) 25 S. W. 708.

50. Louder *v.* Schluter, 78 Tex. 103, 14

mistake in point of law, for instance as to the construction of a demise, the due execution of a power, and the like, where, although aware of the opposing claim, he may have taken possession in full confidence of his title. Of course, however, when one is cognizant of the claims of another he must have reasonably strong grounds to believe in the soundness of his own title, otherwise he cannot claim as a holder in good faith.[51]

3. Proceedings For Recovery of Compensation. Where defendant seeks to recover for improvements he must allege adverse possession in good faith,[52] the making of improvements,[53] and must state specifically the grounds constituting his claim of good faith.[54] And where the making of improvements[55] and good faith[56] are not alleged, evidence as to these matters is inadmissible. The time when the improvements were made must also be alleged.[57] Where there are several defendants, each having a distinct and separate claim to a portion of the land and improvements thereon, each of such defendants in his pleadings must make distinct from his co-defendants his claim to the land and improvements.[58] Where an action is brought for an entire tract of land and plaintiff has recovered an undivided half thereof, being found to be a tenant in common with defendant, and there is no prayer for partition, there can be no adjudication as to defendant's right to improvements, this being ascertainable only in a partition proceeding.[59] Defendant is not precluded from recovery for improvements by the fact that his answer is found to have misdescribed the land on which they were made, such misdescription being based on a mistake as to his boundary which is the main question at issue in the suit, unless it appears that his mistake was the result of negligence.[60] In trespass to try title the burden is upon defendant to show that he has improved the land,[61] and the value of the improvements.[62] The value of the land with and without such improvements must also be shown by him.[63] Evidence of a tax-sale at which defendant purchased is admissible in support of a claim for improvements made in good faith;[64] and a void tax deed is admissible for this purpose.[65] Evidence that defendant was ignorant of plaintiff's existence

S. W. 205, 207; Sartain *v.* Hamilton, 12 Tex. 219, 62 Am. Dec. 524; Cahill *v.* Benson, 19 Tex. Civ. App. 30, 46 S. W. 888. *Compare* McCown *v.* Terrell, (Tex. Civ. App. 1897) 40 S. W. 54 [*reversed* on other grounds in 91 Tex. 231, 43 S. W. 27], holding that mere knowledge of an adverse claim is not conclusive against the good faith of the person making the improvements.

51. Parrish *v.* Jackson, 69 Tex. 614, 7 S. W. 486; House *v.* Stone, 64 Tex. 677; Hill *v.* Spear, 48 Tex. 583; Berry *v.* Donley, 26 Tex. 737; Dorn *v.* Dunham, 24 Tex. 366; Sartain *v.* Hamilton, 12 Tex. 219, 62 Am. Dec. 524; Fellers *v.* McFatter, 46 Tex. Civ. App. 335, 101 S. W. 1065; Staley *v.* Stone, 41 Tex. Civ. App. 299, 92 S. W. 1017 (holding that one who acquires land with the hope that he may perfect his title by the statute of limitations does not act in such good faith as to entitle him to reimbursement for improvements); Texas, etc., R. Co. *v.* Barber, 31 Tex. Civ. App. 84, 71 S. W. 393; Cahill *v.* Benson, 19 Tex. Civ. App. 30, 46 S. W. 888; Settegast *v.* O'Donnell, 16 Tex. Civ. App. 56, 41 S. W. 84; Franklin *v.* Campbell, 5 Tex. Civ. App. 174, 23 S. W. 1003.

52. Campbell *v.* McCaleb, (Tex. Civ. App. 1907) 99 S. W. 129. See also Marshall *v.* Crawford, 2 Tex. Unrep. Cas. 477.

53. Campbell *v.* McCaleb, (Tex. Civ. App. 1907) 99 S. W. 129.

54. Powell *v.* Davis, 19 Tex. 380; Campbell *v.* McCaleb, (Tex. Civ. App. 1907) 99 S. W. 129; Riggs *v.* Nafe, (Tex. Civ. App. 1895) 30 S. W. 706. *Compare* Holstein *v.* Adams, 72 Tex. 485, 10 S. W. 560.

55. Stephens *v.* Westwood, 25 Ala. 716; Rogers *v.* Bracken, 15 Tex. 564; Alford *v.* Alford, 1 Tex. Civ. App. 245, 21 S. W. 283.

56. Crumbley *v.* Busse, 11 Tex. Civ. App. 319, 32 S. W. 438.

57. Crumbley *v.* Busse, 11 Tex. Civ. App. 319, 32 S. W. 438.

58. Benson *v.* Cahill, (Tex. Civ. App. 1896) 37 S. W. 1088. See also Jobe *v.* Ollre, 80 Tex. 185, 15 S. W. 1042.

59. Kesterson *v.* Bailey, 35 Tex. Civ. App. 235, 80 S. W. 97.

60. Butts *v.* Caffall, (Tex. Civ. App. 1893) 24 S. W. 373.

61. Herndon *v.* Reed, 82 Tex. 647, 18 S. W. 665.

62. Herndon *v.* Reed, 82 Tex. 647, 18 S. W. 665; Veeder *v.* Gilmer, 47 Tex. Civ. App. 464, 105 S. W. 331 (holding that the evidence introduced to show the value of such improvements must be responsive to the allegations in the pleading); Wilson *v.* Wilson, 35 Tex. Civ. App. 192, 79 S. W. 839.

63. McCown *v.* McCafferty, 14 Tex. Civ. App. 77, 36 S. W. 517. See also Thomas *v.* Quarles, 64 Tex. 491.

64. Traylor *v.* Lide, (Tex. 1887) 7 S. W. 58.

65. Schleicher *v.* Gatlin, 85 Tex. 270, 20 S. W. 120.

and of his claim to the land is properly admitted on the issue of good faith.[66] In accordance with the general rules on the subject,[67] instructions upon questions as to which no evidence has been offered are properly refused;[68] and instructions are proper which conform to the pleadings and the evidence offered in support thereof.[69] Error in submitting to the jury the right to recover for improvements of one who has parted with his interest is harmless where he recovers nothing.[70] A verdict giving to each defendant the same amount for improvements is unwarranted where there is sufficient evidence to show that the improvements of the respective defendants are of different values.[71] Where there is a verdict for plaintiff merely for the land, and there is evidence that the value of the rents and damages is the same as the value of the improvements, it will be inferred that the jury set off one against the other.[72] Although a parol gift of land constituting part of a homestead is void, a purchaser from the donee in possession, who places improvements on the land in good faith, is entitled on a recovery of the land by the donor to a personal judgment against such donor for the value of the improvements.[73]

D. Reimbursement of Taxes Paid. The payment of taxes on land by a trespasser in possession gives him no right to reimbursement from the true owner in an action by the latter to recover possession.[74] In order for defendant to recover for taxes paid on the land in controversy, in an action of trespass to try title, he must not only prove that he paid the taxes but that plaintiff failed or neglected to pay them.[75] Where a vendor suing the vendee for land offers to do equity by refunding the price paid with interest, the vendee cannot recover taxes paid by him without showing their amount, or excepting to the vendor's offer for failure to include them.[76]

TRESPASS VI ET ARMIS. At common law the name of an action for an injury committed with direct and immediate force or violence against the plaintiff or his property.[1] (See TRESPASS, *ante*, and Cross-References Thereunder.)

TRESTLE. A framework for supporting string-pieces, as of a railway, a bridge, or other elevated structure, composed of uprights with diagonal braces, and either with or without horizontal timbers below the stringers.[2] (Trestle: Crossing as Contributory Negligence, see RAILROADS, 33 Cyc. 828. Duty of Master as to Construction and Maintenance of, see MASTER AND SERVANT, 26 Cyc. 1129. Injury to Animal on, see RAILROADS, 33 Cyc. 1213.)

TRIABLE. A term used as having reference to the place of trial as indicated by the venue.[3] (See, generally, VENUE.)

66. Polk *v.* Chaison, 72 Tex. 500, 10 S. W. 581.
67. See, generally, TRIAL.
68. Cahill *v.* Benson, 19 Tex. Civ. App. 30, 46 S. W. 888.
69. Kent *v.* Berryman, 15 Tex. Civ. App. 487, 40 S. W. 33.
70. Cahill *v.* Benson, 19 Tex. Civ. App. 30, 46 S. W. 888.
71. Johnson *v.* Schumacher, 72 Tex. 334, 12 S. W. 207.
72. O'Mahoney *v.* Flanagan, 34 Tex. Civ. App. 244, 78 S. W. 245.
73. Morris *v.* Wells, 27 Tex. Civ. App. 363, 66 S. W. 248. See also Paris, etc., R. Co. *v.* Greiner, 84 Tex. 443, 19 S. W. 564.
74. Capt *v.* Stubbs, 68 Tex. 222, 4 S. W. 467.
75. Clark *v.* Smith, 59 Tex. 275; Pope *v.* Davenport, 52 Tex. 206; Settegast *v.* O'Donnell, 16 Tex. Civ. App. 56, 41 S. W. 84.
76. Robinson *v.* Kampmann, 5 Tex. Civ. App. 605, 24 S. W. 529.

1. Munal *v.* Brown, 70 Fed. 967, 968.
Distinguished from "trespass on the case" see Legaux *v.* Feasor, 1 Yeates (Pa.) 586, 587; Taylor *v.* Rainbow, 2 Hen. & M. (Va.) 423, 438.

2. Century Dict.

3. Burgdorf *v.* Brooklyn, etc., R. Co., 130 N. Y. App. Div. 253, 254, 114 N. Y. Suppl. 718, where such construction was given to the term as used in a statute regulating the recovery of costs in cases triable in certain counties.
All offenses "triable" in a court are offenses of which such court has jurisdiction. Jackson *v.* State, 33 Fla. 620, 624, 15 So. 250.
"County where the action is triable," in a statute held to mean nothing more nor less than the "place of trial" see Chubbuck *v.* Morrison, 6 How. Pr. (N. Y.) 367, 369.
"Or triable therein" see Heymann *v.* Cunningham, 51 Wis. 506, 517, 8 N. W. 401.
"Triable by jury" see Cooper *v.* Stockard, 16 Lea (Tenn.) 140, 142.
"Triable in the county of New York" see Seymour *v.* Wheeler, 137 N. Y. App. Div. 52, 53, 122 N. Y. Suppl. 183.

TRIAL

By Roderick E. Rombauer*

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Electricity, see ELECTRICITY, 15 Cyc. 480.
Explosives, see EXPLOSIVES, 19 Cyc. 17.
Steam, see STEAM, 36 Cyc. 1269.
Due to Dangerous or Defective Condition of Demised Premises, see LANDLORD AND TENANT, 24 Cyc. 1124.
From Construction and Maintenance of:
Railroads, see RAILROADS, 33 Cyc. 373.
Telegraph or Telephone Lines, see TELEGRAPHS AND TELEPHONES, 37 Cyc. 1646.
From Defects or Obstructions in:
Highways, see STREETS AND HIGHWAYS, 37 Cyc. 314.
Streets, see MUNICIPAL CORPORATIONS, 28 Cyc. 1500.
Turnpikes or Toll Roads, see TOLL ROADS, *ante*, p. 398.
From Negligence:
Of Agricultural Societies, see AGRICULTURE, 2 Cyc. 75.
Or Default in Transmission or Delivery of Telegraph or Telephone Message, see TELEGRAPHS AND TELEPHONES, 37 Cyc. 1742.
From Sale of Liquors, see INTOXICATING LIQUORS, 23 Cyc. 331.
From Use of Weapon, see WEAPONS.
Incident to Driving or Rafting Logs, see LOGGING, 25 Cyc. 1579.
On Wharves, see WHARVES.
To Adjoining Property, see ADJOINING LANDOWNERS, 1 Cyc. 784.
To Animals, see ANIMALS, 2 Cyc. 425.
To Easements, see EASEMENTS, 14 Cyc. 1224.
To Landlord's Reversion, see LANDLORD AND TENANT, 24 Cyc. 933.
To Servants, see MASTER AND SERVANT, 26 Cyc. 1459.
To Vessels at Wharf, see WHARVES.
Insurance Benefits, see MUTUAL BENEFIT INSURANCE, 29 Cyc. 247.
Judgment Against Real Property on Sale For Taxes, see TAXATION, 37 Cyc. 1312

For Matters Relating to — (*continued*)
Trial of Particular Civil Actions or Proceedings — (*continued*)
Actions or Suits For — (*continued*)
Libel or Slander, see LIBEL AND SLANDER, 25 Cyc. 541.
Loss or Injury to Goods:
Shipped, see SHIPPING, 36 Cyc. 278.
Stored, see WAREHOUSEMEN.
Malicious Prosecution, see MALICIOUS PROSECUTION, 26 Cyc. 104.
Misdelivery or Non-Delivery of Goods Stored, see WAREHOUSEMEN.
Money:
Lent, see MONEY LENT, 27 Cyc. 831.
Received, see MONEY RECEIVED, 29 Cyc. 885.
Necessaries Furnished Child, see PARENT AND CHILD, 29 Cyc. 1615.
Negligence, see NEGLIGENCE, 29 Cyc. 627.
Negligent Use of Highways, see STREETS AND HIGHWAYS, 37 Cyc. 283.
Obstruction of Watercourse, see WATERS.
Partition, see PARTITION, 30 Cyc. 242.
Penalties:
In General, see PENALTIES, 30 Cyc. 1358.
For Exacting Usury, see USURY.
For Refusal or Failure to Transmit Telegram, see TELEGRAPHS AND TELEPHONES, 37 Cyc. 1707.
For Violation of:
Liquor Laws, see INTOXICATING LIQUORS, 23 Cyc. 171.
Municipal Regulations, see MUNICIPAL CORPORATIONS, 28 Cyc. 811.
Passenger Acts by Vessels, see SHIPPING, 36 Cyc. 325.
Personal Injuries:
Caused by Use of Electricity, see ELECTRICITY, 15 Cyc. 480.
To Servants, see MASTER AND SERVANT, 26 Cyc. 1459.
Pollution of Watercourse, see WATERS.
Possession by Landlord, see LANDLORD AND TENANT, 24 Cyc. 1448.
Price of Land Sold, see VENDOR AND PURCHASER.
Price or Value of Goods Sold, see SALES, 35 Cyc. 574.
Private Nuisance, see NUISANCES, 29 Cyc. 1268.
Recovery of:
Dower, see DOWER, 14 Cyc. 995.
Purchase-Money, see VENDOR AND PURCHASER.
Purchase-Money Paid, see VENDOR AND PURCHASER.
Removal of Guardian, see GUARDIAN AND WARD, 21 Cyc. 59.
Rent, see LANDLORD AND TENANT, 24 Cyc. 1230.
Rescission of Contract of Sale of:
Goods, see SALES, 35 Cyc. 157.
Lands, see VENDOR AND PURCHASER.
Rewards, see REWARDS, 34 Cyc. 1758.
Sale of Land to Enforce Assessment For Public Improvements, see MUNICIPAL CORPORATIONS, 28 Cyc. 1240.
Salvage, see SALVAGE, 35 Cyc. 782.
Seduction, see SEDUCTION, 35 Cyc. 1325.
Services of Child, see PARENT AND CHILD, 29 Cyc. 1636.
Specific Performance, see SPECIFIC PERFORMANCE, 36 Cyc. 788.
Supplies, Services, and Expenditures For Paupers, see PAUPERS, 30 Cyc. 1159.
Torts.
In General, see TORTS, *ante*.
Of Municipal Corporations, see MUNICIPAL CORPORATIONS, 28 Cyc. 1500.

For Matters Relating to — (*continued*)
Trial of Particular Civil Actions or Proceedings — (*continued*)
Actions or Suits For — (*continued*)
Trespass:
In General, see TRESPASS, *ante*.
By Animals, see ANIMALS, 2 Cyc. 413.
Unfair Competition in Trade, see TRADE-MARKS AND TRADE-NAMES, *ante*.
Unlawful Detainer of Summary Proceedings by Landlord For Possession, see LANDLORD AND TENANT, 24 Cyc. 1448.
Unpaid Taxes, see TAXATION, 37 Cyc. 1253.
Use and Occupation, see USE AND OCCUPATION.
Violation of Usury Laws, see USURY.
Wages of Seamen, see SEAMEN, 35 Cyc. 1240.
Waste, see WASTE.
Wharfage, see WHARVES.
Work and Labor, see WORK AND LABOR.
Wrongful Enforcement of Tax, see TAXATION, 37 Cyc. 1279.
Actions or Suits to:
Abate or Enjoin:
Liquor Nuisance, see INTOXICATING LIQUORS, 23 Cyc. 306.
Nuisances in General, see NUISANCES, 29 Cyc. 1247.
Avoid Fraudulent Conveyances, see FRAUDULENT CONVEYANCES, 20 Cyc. 802.
Confirm or Try Tax Title, see TAXATION, 37 Cyc. 1519.
Construe Wills, see WILLS.
Determine Right to:
Damages and Mesne Profits in Ejectment, see EJECTMENT, 15 Cyc. 217.
Property of Religious Society, see RELIGIOUS SOCIETIES, 34 Cyc. 1173.
Enforce:
Assessment For Drains, see DRAINS, 14 Cyc. 1070.
Escheat, see ESCHEAT, 15 Cyc. 556.
Forfeiture Under:
Liquor Laws, see INTOXICATING LIQUORS, 26 Cyc. 300.
Revenue Laws, see INTERNAL REVENUE, 22 Cyc. 1690.
Homestead Rights, see HOMESTEADS, 21 Cyc. 641.
Mechanics' Liens, see MECHANICS' LIENS, 27 Cyc. 419.
Tax Liens, see TAXATION, 37 Cyc. 1253.
Vendor's Lien, see VENDOR AND PURCHASER.
Establish Claims of Third Persons to Property:
Attached, see ATTACHMENT, 4 Cyc. 750.
Taken on Execution, see EXECUTIONS, 17 Cyc. 1219.
Foreclose:
Liens or Mortgages on Railroads, see RAILROADS, 33 Cyc. 577.
Mortgages:
In General, see CHATTEL MORTGAGES, 7 Cyc. 100; MORTGAGES, 27 Cyc. 1634.
By Writ of Entry, see MORTGAGES, 27 Cyc. 1447.
Protect Water Rights, see WATERS.
Quiet Title:
In General, see QUIETING TITLE, 32 Cyc. 1374.
To Mining Property, see MINES AND MINERALS, 27 Cyc. 656.
Recover:
Duties Paid, see CUSTOMS DUTIES, 12 Cyc. 1164.
Goods Delivered or Proceeds Thereof, see SALES, 35 Cyc. 518.
Goods Sold, see SALES, 35 Cyc. 614.

For Matters Relating to — (*continued*)
Trial of Particular Civil Actions or Proceedings — (*continued*)
Actions or Suits to — (*continued*)
Recover — (*continued*)
Goods Sold Conditionally, see SALES, 35 Cyc. 710.
Payments, see PAYMENT, 30 Cyc. 1325.
Penalties For Violation of Police Regulations, see MUNICIPAL CORPORATIONS, 28 Cyc. 811.
Possession of Demised Premises, see LANDLORD AND TENANT, 24 Cyc. 1448.
Price of Goods Paid, see SALES, 35 Cyc. 611.
Taxes Paid, see TAXATION, 37 Cyc. 1185.
Redeem From:
Mortgage, see MORTGAGES, 27 Cyc. 1858.
Tax-Sale, see TAXATION, 37 Cyc. 1419.
Reform Written Instruments, see REFORMATION OF INSTRUMENTS, 34 Cyc. 991.
Set Aside Fraudulent Transfer, see FRAUDULENT CONVEYANCES, 20 Cyc. 802.
Support or Enforce Attachment in Justices' Courts, see JUSTICES OF THE PEACE, 24 Cyc. 543.
Vacate Sales of Guardians Under Order of Court, see GUARDIAN AND WARD, 21 Cyc. 144.
Actions Relating to:
Gifts, see GIFTS, 20 Cyc. 1227.
Party-Walls, see PARTY-WALLS, 30 Cyc. 798.
Admiralty Suit, see ADMIRALTY, 1 Cyc. 887.
Agreed Case, see SUBMISSION OF CONTROVERSY, 37 Cyc. 353.
Attachment For Rent, see LANDLORD AND TENANT, 24 Cyc. 1242.
Audita Querela, see AUDITA QUERELA, 4 Cyc. 1071.
Bastardy Proceedings, see BASTARDS, 5 Cyc. 665.
Boundary Proceedings, see BOUNDARIES, 5 Cyc. 969.
Charges of Fraud Against Poor Debtor Applying For Discharge, see EXECUTIONS, 17 Cyc. 1563.
Creditors' Suits, see CREDITORS' SUITS, 12 Cyc. 53.
Discharge of Insolvent, see INSOLVENCY, 22 Cyc. 1341.
Election Contests, see ELECTIONS, 15 Cyc. 432.
Insolvency Proceedings, see INSOLVENCY, 22 Cyc. 1270, 1275.
Interpleader, see INTERPLEADER, 23 Cyc. 30.
Involuntary Bankruptcy Proceedings, see BANKRUPTCY, 5 Cyc. 312.
Issue Between Plaintiff and Garnishee, see GARNISHMENT, 20 Cyc. 1102.
Mandamus Proceedings, see MANDAMUS, 26 Cyc. 478.
Pleas in Abatement, see PLEADING, 31 Cyc. 186.
Probate Proceedings and Actions Relating to Wills or Probate, see WILLS.
Proceedings:
For Recovery of Land by Writ of Entry, see ENTRY, WRIT OF, 15 Cyc. 1081.
On Application For Discharge From Custody Under Execution, see EXECUTIONS, 17 Cyc. 1539.
To Confirm or Revise Assessment For Public Improvements, see MUNICIPAL CORPORATIONS, 28 Cyc. 1180.
To Establish:
Boundaries, see BOUNDARIES, 5 Cyc. 969.
Trust For Person Entitled Where Patent Improperly Issued to Person Not Entitled, see PUBLIC LANDS, 32 Cyc. 1064.
To Fine or Amerce Sheriffs or Constables, see SHERIFFS AND CONSTABLES, 35 Cyc. 1899

For Matters Relating to — (*continued*)
Trial of Particular Civil Actions or Proceedings — (*continued*)
Proceedings — (*continued*)
To Remove:
Executors or Administrators, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 168.
Trustees, see TRUSTS.
To Revoke Letters of Administration, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 157.
To Supply or Restore Lost or Destroyed Records, see RECORDS, 34 Cyc. 610.
Quo Warranto Proceedings, see QUO WARRANTO, 32 Cyc. 1462.
Review, see REVIEW, 34 Cyc. 1716.
Scire Facias:
In General, see SCIRE FACIAS, 35 Cyc. 1158.
To Enforce Assessment For Public Improvements, see MUNICIPAL CORPORATIONS, 28 Cyc. 1224.
To Revive Judgments, see JUDGMENTS, 23 Cyc. 1458.
Summary Proceedings Against Officers, see SHERIFFS AND CONSTABLES, 35 Cyc. 1879.
Writ of Right, see REAL ACTIONS, 33 Cyc. 1547.

I. DEFINITION.

A trial is the judicial examination of the issues between the parties, whether they be issues of law or fact.[1]

II. NOTICE OF TRIAL AND PRELIMINARY PROCEEDINGS.[2]

A. Preliminary Proceedings in General. A trial without an issue is erroneous.[3] In the absence of a replication to affirmative pleas, which are not abandoned, it is error to proceed to trial on other pleas and issues,[4] over the objec-

1. *Kansas.*— State *v.* Clifton, 57 Kan. 448, 449, 46 Pac. 715; Brookover *v.* Esterly, 12 Kan. 149, 152.
Missouri.— State *v.* Brown, 63 Mo. 439, 444.
New York.— Pach *v.* Gilbert, 9 N. Y. Suppl. 546, 547.
North Dakota.— Grand Forks Second Nat. Bank *v.* St. Thomas First Nat. Bank, 8 N. D. 50, 55, 76 N. W. 504.
Washington.— J. F. Hart Lumber Co. *v.* Rucker, 17 Wash. 600, 602, 50 Pac. 484.
And see Vertrees *v.* Newport News, etc., R. Co., 95 Ky. 314, 25 S. W. 1, 15 Ky. L. Rep. 680.
Other definitions are: "The examination before a competent tribunal, according to the law of the land, of the facts or law put in issue in a cause, for the purpose of determining such issue." Finn *v.* Spagnoli, 67 Cal. 330, 332, 7 Pac. 746; Tregambo *v.* Comanche Mill, etc., Co., 57 Cal. 501, 505; *In re* Chauncey, 32 Hun (N. Y.) 429, 431.
"A judicial examination of the issues in an action." Spencer *v.* Thistle, 13 Nebr. 227, 229, 13 N. W. 214; Swan Tp. *v.* McClannahan, 53 Ohio St. 403, 411, 42 N. E. 34.
"The examination before a competent tribunal, according to the laws of the land, of the facts put in issue in a cause, for the purpose of determining such issue." Bouvier L. Dict.

2. In criminal prosecutions see CRIMINAL LAW, 12 Cyc. 504 *et seq.*
In probate proceedings see WILLS.
In trials before justices of the peace see JUSTICES OF THE PEACE, 24 Cyc. 581.
In trial before referee see REFERENCES, 34 Cyc. 796, 798.
On trial of issues between plaintiff and garnishee see GARNISHMENT, 20 Cyc. 1103.
Place of trial see VENUE.

3. Neely *v.* Chinn, 8 Blackf. (Ind.) 84; Mahan *v.* Sherman, 8 Blackf. (Ind.) 63; Dunn *v.* Hall, 8 Blackf. (Ind.) 32; Shiel *v.* Ferriter, 7 Blackf. (Ind.) 574; Smith *v.* Redmond, 141 Iowa 105, 119 N. W. 271; Alexander *v.* Bowne, 1 Fed. Cas. No. 180, 1 Cranch C. C. 124; Schnertzel *v.* Purcell, 21 Fed. Cas. No. 12,472, 1 Cranch C. C. 246. It is error to go to trial without a plea, in the absence of counsel, although there is an affidavit of defense filed. The court, however, might have ordered the affidavit to stand as a plea. Ensly *v.* Wright, 3 Pa. St. 501.

4. Benbow *v.* Marquis, 17 Fla. 441; McKinnon *v.* McCollum, 6 Fla. 376; Seavey *v.* Rogers, 69 Ill. 534; Richeson *v.* Ryan, 15 Ill. 13; Maxwell *v.* Habel, 92 Ill. App. 510; Metropolitan Inner Circle R. Co. *v.* Metropolitan R. Co., 5 Ex. D. 196, 49 L. J. Exch. 505, 28 Wkly. Rep. 510. It is error to submit an

tion of defendant,[5] or in his absence.[6] But according to some decisions, if the parties appear and go to trial without making the objection that the issues are incomplete, or proceed with the trial by agreement, it will be considered, after verdict, as a waiver of this defect,[7] on the principle that parties by consent may dispense with formal written issues,[8] and, as a *similiter* may be put in to a plea at any stage by an attorney or by a party himself, it is not error to proceed to trial without it.[9] Where the issues are once made up, the court may ignore its order that the cause be remanded to rules to permit plaintiff to file an amended petition, if the record does not disclose the filing of such petition, and where defendant was in court at the time the trial was had and did not object thereto.[10]

B. Trial of Separate Causes at Same Time. A pending trial should be concluded before members of the jury are charged with another case. Hence, it is improper to withdraw a case after the evidence is all in, proceed to other business with some of the same jury, and afterward resume and finish.[11] However, it has been held that where the court suspends the trial of a cause, and impanels a jury, hears evidence, receives a verdict, and renders judgment in another cause, it is not a ground for reversal of a judgment in the latter cause.[12]

C. Separate Trials in Same Cause. In a civil action defendants are not entitled to a separate trial as a matter of right,[13] and this is so, although they may have pleaded different defenses.[14] Whether a severance shall be granted is in the discretion of the trial court,[15] and this discretion will not be reviewed on

issue to a jury on one plea while other pleas containing new matter remain undisposed of, and defendant is absent and plaintiff is in default in pleading. Gunning *v.* Heron, 25 Fla. 849, 6 So. 856.

5. Maxwell *v.* Habel, 92 Ill. App. 510.

6. Blake *v.* Miller, 118 Ill. 500, 8 N. E. 828.

7. Beesley *v.* Hamilton, 50 Ill. 88; Bunker *v.* Green, 48 Ill. 243; Armstrong *v.* Mock, 17 Ill. 166; Ellinger *v.* Caspary, 76 Ill. App. 523; Wheatley *v.* Chicago Trust, etc., Bank, 64 Ill. App. 612 [*affirmed* in 167 Ill. 480, 47 N. E. 711]; Bass *v.* Smith, 61 Ind. 72.

• **Limitation of time for framing issues.**— Parties to an action can waive the statutory limitation as to time in which to frame the issues for trial, and by proceeding to trial by agreement or without objection the limitation will be deemed waived. Darrah *v.* Juel, 1 Nebr. (Unoff.) 834, 96 N. W. 166. But see Webster *v.* Tiernan, 4 How. (Miss.) 352; Price *v.* Sinclair, 5 Sm. & M. (Miss.) 254; Tucker *v.* Satterthwaite, 120 N. C. 118, 27 S. E. 45.

8. Barnett *v.* Graff, 52 Ill. 170; Kelsey *v.* Lamb, 21 Ill. 559; Ensly *v.* Wright, 3 Pa. St. 501.

9. Highley *v.* Metzger, 186 Ill. 253, 57 N. E. 811 [*affirming* 86 Ill. App. 573]; Gillespie *v.* Smith, 29 Ill. 473, 81 Am. Dec. 328; Davis *v.* Ransom, 26 Ill. 100; Stumps *v.* Kelley, 22 Ill. 140; Swan *v.* Rary, 2 Blackf. (Ind.) 291.

10. Nutter *v.* Sydenstricker, 11 W. Va. 535.

11. Tribble *v.* Anderson, 63 Ga. 31.

12. Legnard *v.* Crane Co., 55 Ill. App. 496.

13. *Alabama.*— Englehart *v.* Richter, 136 Ala. 562, 33 So. 939.

Colorado.— Saint *v.* Guerrerio, 17 Colo. 448, 30 Pac. 335, 31 Am. St. Rep. 320.

Georgia.— Pool *v.* Gramling, 88 Ga. 653, 16 S. E. 52.

Indiana.— Black *v.* Marsh, 31 Ind. App. 53, 67 N. E. 201.

Iowa.— Mulvihill *v.* Thompson, 114 Iowa 734, 87 N. W. 693.

Kansas.— Crane *v.* Cox, 6 Kan. App. 405, 49 Pac. 796.

Kentucky.— Dougherty *v.* Dorsey, 4 Bibb 207.

Louisiana.— Prall *v.* Peets, 3 La. 274.

Missouri.— Hunt *v.* Missouri R. Co., 14 Mo. App. 160.

Texas.— Chambers *v.* Fisk, 15 Tex. 335.

See 46 Cent. Dig. tit. "Trial," § 6.

Exceptions to rule.— In a suit for damages, where one of defendants is charged with aiding and abetting the other in the commission of a wrong or injury, he has the right to demand a severance. Fonda *v.* Broom, 12 La. Ann. 768.

14. Haupt *v.* Simington, 27 Mont. 480, 71 Pac. 672, 94 Am. St. Rep. 839; Eames *v.* Stevens, 26 N. H. 117; Hoyt *v.* Heister, 7 Ohio Dec. (Reprint) 420, 2 Cinc. L. Bul. 5; Walton *v.* Payne, 18 Tex. 60.

15. *Indiana.*— Wright *v.* Stuart, 5 Blackf. 120; Carpenter *v.* Crane, 5 Blackf. 119.

Iowa.— Reed *v.* Lane, 96 Iowa 454, 65 N. W. 380.

Kansas.— Latham *v.* Brown, 48 Kan. 190, 29 Pac. 400.

Massachusetts.— Dorrell *v.* Johnson, 17 Pick. 263.

Montana.— Haupt *v.* Simington, 27 Mont. 480, 71 Pac. 672, 94 Am. St. Rep. 839.

New Hampshire.— Townsley *v.* Hornbuckle, 2 Mont. 580; Story *v.* Concord, etc., R. Co., 70 N. H. 364, 48 Atl. 288.

United States.— Denver *v.* Sherret, 88 Fed. 226, 31 C. C. A. 499.

See 46 Cent. Dig. tit. "Trial," § 7.

appeal,[16] unless it can be clearly seen that the discretion was abused.[17] The court will, on good cause shown, direct separate trials on separate issues between plaintiff and several defendants.[18]

D. Trial of Causes Together.[19] The court may order several causes of the same nature in which the parties are the same to be tried together;[20] and where several actions are brought by one plaintiff against different defendants, or by different plaintiffs against one defendant, and the issues are the same in each action, the court may, in order to avoid unnecessary delay and expense, order them to be tried together.[21] It has been held that the order may be made, although defendants employ different counsel, and the evidence in the several cases is different.[22] The order does not have the effect of merging the several actions into one. Its only effect is that the suits be tried together.[23] Each case retains its distinctive characteristics and the judgment in each case is several.[24] And if

Effect of special statutes.— Wis. Rev. St. § 2844, providing that a separate trial between plaintiff and any of the several defendants in an action on a joint contract may be allowed by the court whenever in its opinion justice will be thereby promoted, is inapplicable to the case where one defendant is served and the other appears voluntarily. Cudahy *v.* Crittenden, 74 Wis. 463, 44 N. W. 1152.

Time to move for separate trial.— A firm was sued; one partner was defaulted; after plaintiff had closed his testimony, the other defendant who denied the partnership demanded a separate trial. The application came too late. He did practically have a separate trial as to his own issues. Williams *v.* Soutter, 7 Iowa 435.

16. Denver *v.* Sherret, 88 Fed. 226, 31 C. C. A. 499.

17. Hoskinson *v.* Bagby, 46 Kan. 758, 27 Pac. 110; Hill *v.* Alvord, 19 Hun (N. Y.) 77; National Exch. Bank *v.* McFarlan, 13 N. Y. Suppl. 202; Ballard *v.* Perry, 28 Tex. 347.

18. Gregg *v.* Berkshire, (Kan. App. 1900) 62 Pac. 550; Young *v.* Adams, 14 B. Mon. (Ky.) 127, 58 Am. Dec. 654; Clement *v.* Wafer, 12 La. Ann. 599; Bell *v.* Woodward, 32 N. H. 64.

Setting aside of severance.— Where in an action against several defendants to recover an undivided interest in lands, plaintiffs tender to any defendant claiming any particular tract the right to a severance, they cannot, after defendant has accepted a severance, and the case has so stood for years, have it set aside on the sole ground that in case of their success, difficulties might arise in the adjustment of equities if the whole controversy was not tried at the same time. Grigsby *v.* May, 84 Tex. 240, 19 S. W. 343.

Under the statutes of Nebraska, an action including a counter-claim shall be tried as an entirety and not as separate suits. Miller *v.* McGannon, 79 Nebr. 609, 113 N. W. 170; Citizens' Ins. Co. *v.* Herpolsheimer, 77 Nebr. 232, 109 N. W. 160.

19. **For consolidation of actions** see CONSOLIDATION AND SEVERANCE OF ACTIONS, 8 Cyc. 589.

20. Field *v.* Lang, 89 Me. 454, 36 Atl. 984.

21 *Arkansas.*— St. Louis, etc., R. Co. *v.* Harden, 83 Ark. 255, 103 S. W. 614.

Georgia.— Walker *v.* Conn, 112 Ga. 314, 37 S. E. 403; Western Assur. Co. *v.* Way, 98 Ga. 746, 27 S. E. 167.

Kentucky.— Anderson *v.* Sutton, 2 Duv. 480.

Massachusetts.— Sullivan *v.* Boston Electric Light Co., 181 Mass. 294, 63 N. E. 904; Springfield *v.* Sleeper, 115 Mass. 587; Witherlee *v.* Ocean Ins. Co., 24 Pick. 67.

New Jersey.— Worley *v.* Glentworth, 10 N. J. L. 241; Den *v.* Fen, 9 N. J. L. 335.

New York.— Jackson *v.* Leggett, 5 Wend. 83.

Ohio.— Taylor *v.* Standard Brick Co., 66 Ohio St. 360, 64 N. E. 428.

Washington.— Peterson *v.* Dillon, 27 Wash. 78, 67 Pac. 397.

United States.— New York Mut. L. Ins. Co. *v.* Hillmon, 145 U. S. 285, 12 S. Ct. 909, 36 L. ed. 706; American Window Glass Co. *v.* Arnold, 158 Fed. 781, 86 C. C. A. 137; American Window Glass Co. *v.* Noe, 158 Fed. 777, 86 C. C. A. 133; Denver City Tramway Co. *v.* Norton, 141 Fed. 599, 73 C. C. A. 1; Andrews *v.* Spear, 1 Fed. Cas. No. 379, 4 Dill. 470; Wiede *v.* Insurance Co. of North America, 29 Fed. Cas. No. 17,617.

See 46 Cent. Dig. tit. "Trial," § 3.

Necessity for order.— Two causes can only be tried together upon an order so directing, unless the parties consent that they should be tried together. Howard *v.* Gregory, 79 Ga. 617, 4 S. E. 881.

Stipulation that causes be tried together.— Plaintiff having brought two actions against the same defendant on the same written guaranty, it was error to dispose of both cases on the evidence taken in one, in the absence of any stipulation that both cases should be tried together, or that the one tried should govern the other, or that the evidence taken should be considered as taken in both cases. Auerbach *v.* Lamchick, 115 N. Y. Suppl. 226.

22. Springfield *v.* Sleeper, 115 Mass. 587.

23. Valdosta Guano Co. *v.* Hart, 119 Ga. 909, 47 S. E. 212; Brown *v.* Louisville, etc., R. Co., 117 Ga. 222, 43 S. E. 498; Purvis *v.* Ferst, 114 Ga. 689, 40 S. E. 723; Wells *v.* Coker Banking Co., 113 Ga. 857, 39 S. E. 298; Erwin *v.* Ennis, 104 Ga. 861, 31 S. E. 444.

24. Anderson *v.* Sutton, 2 Duv. (Ky.) 480.

the proceedings and judgment in either of the cases are erroneous, such error must be fatal to that judgment, although the others may be free from error.[25] It is within the discretion of the trial judge at what time to submit each case to the jury.[26] Where the defenses in the several cases are different it is erroneous to order them to be tried together.[27] But error in ordering a trial of separate causes together is harmless if the final result reached was right.[28]

E. Trial of Separate Issues[29] — **1. In General.** Whether all or a part only of the issues in an action shall be tried at one time, and which shall be tried first, is a question of justice and convenience, and ordinarily a matter of fact to be determined at the trial term;[30] as is also the question whether legal or equitable issues shall be first tried.[31] But that one should be first tried which will be most likely to dispose of the whole case.[32] Where two causes of action are united in one petition, or two defenses in the same answer, one in law and one in equity, there must be separate trials;[33] but where there are several defendants the issues

25. Anderson *v.* Sutton, 2 Duv. (Ky.) 480.

26 Sullivan *v.* Boston Electric Light Co., 181 Mass. 294, 63 N. E. 904; McMartin *v.* Taylor, 2 Barb. (N. Y.) 356.

27. Worley *v.* Glentworth, 10 N. J. L. 241.

28. Thiebaud *v.* Tait, 138 Ind. 238, 36 N. E. 525.

29. **On intervention in attachment** see ATTACHMENT, 4 Cyc. 750.

30. *Iowa.*— Childs *v.* Dobbins, 61 Iowa 109, 15 N. W. 849.

Louisiana.— Cunningham *v.* Erwin, 4 La. Ann. 198.

Missouri.— Roberts *v.* Central Lead Co., 95 Mo. App. 581, 69 S. W. 630.

New Hampshire.— Owen *v.* Weston, 63 N. H. 599, 4 Atl. 801, 56 Am. Rep. 547.

Texas.— Caswell *v.* Hopson, (Civ. App. 1898) 47 S. W. 54.

England.— *Re* Woodfine, 47 L. J. Ch. 832, 38 L. T. Rep. N. S. 753, 26 Wkly. Rep. 678.

Canada.— Fitzsimmons *v.* McIntyre, 5 Ont. Pr. 119.

See 46 Cent. Dig. tit. "Trial," § 8.

Genuineness of deed.— Where a deed offered in evidence is assailed as a forgery, the issue of genuineness must be separately tried unless tried with the main case by consent. Hill *v.* Nisbet, 58 Ga. 586. But see Quarles *v.* Jenkins, 98 N. C. 258, 3 S. E. 395.

The defense that an adjudication by consent was had by attorneys without authority should be tried like any issue of fact. Wipff *v.* Heder, (Tex. Civ. App. 1897) 41 S. W. 164.

31. Crosby *v.* Scott-Graff Lumber Co., 93 Minn. 475, 101 N. W. 610; Du Bose *v.* Kell, 76 S. C. 313, 56 S. E. 968; McCreery Land, etc., Co. *v.* Myers, 70 S. C. 282, 49 S. E. 848; Knox *v.* Campbell, 52 S. C. 461, 30 S. E. 485. Where the petition contained two counts, one in law and one in equity, the court properly tried one as a court of law and the other as a court of equity. Estes *v.* Fry, 166 Mo. 70, 65 S. W. 741.

Where a counter-claim asks the reformation of a contract sued on and cancellation, defendant is entitled to have the counter-claim separately tried in equity. Thomas *v.* Bronx Realty Co., 60 N. Y. App. Div. 365, 70 N. Y. Suppl. 206, Code Civ. Proc. § 974.

Effect of special statutory provisions.— Under Wis. Rev. St. (1898) § 2647, where an action of damages is joined in a complaint with an action for an injunction, the court may in its discretion decline to try the legal action first. Haubner *v.* Milwaukee, 124 Wis. 153, 101 N. W. 930, 102 N. W. 578.

32. Morris *v.* Merritt, 52 Iowa 496, 3 N. W. 504; Du Bose *v.* Kell, 76 S. C. 313, 56 S. E. 968; Greig *v.* Rice, 66 S. C. 171, 44 S. E. 729; Kimball *v.* McIntyre, 3 Utah 77, 1 Pac. 167.

Illustration.—Where the right to partition or to stay waste is dependent on the decision of the buyer to set aside a deed for fraud, the issue of title must be tried before the other issues. Du Bose *v.* Kell, 76 S. C. 313, 56 S. E. 968. If a legitimate equitable counter-claim is pleaded, on the determination of which depends the prosecution of the main action, then, although an improper note of issue is filed for a special term, the equitable issues may be first tried there, on a seasonable motion being made, and the legal issues stayed until after the equitable issues had been decided. Cohen *v.* American Surety Co., 129 N. Y. App. Div. 166, 113 N. Y. Suppl. 375.

33. Swasey *v.* Adair, 88 Cal. 179, 25 Pac. 1119; Petty *v.* Malier, 15 B. Mon. (Ky.) 591; Tapley *v.* Herman, 95 Mo. App. 537, 69 S. W. 482; Winn *v.* Farmers Mut. F. Ins. Co., 83 Mo. App. 123; McHoney *v.* German Ins. Co., 44 Mo. App. 426; Boeckler *v.* Missouri Pac. R. Co., 10 Mo. App. 448; Sheeful *v.* Murty, 30 Ohio St. 50.

Where defendant pleads matter available as a defense either at law or in equity it is not error for the court to refuse to segregate and try the equitable issues first (Bennett *v.* Edison Electric Illuminating Co., 164 N. Y. 131, 58 N. E. 7 [*affirming* 26 N. Y. App. Div. 363, 49 N. Y. Suppl. 833]; Sweeney *v.* Pacific Coast El. Co., 14 Wash. 562, 45 Pac. 151); although the defense is presented in the guise of an equitable counter-claim and the statute provides that where there is a counter-claim, the nature of the counter-claim shall determine the manner of trial (Bennett *v.* Edison Electric Illuminating Co., 18 N. Y. App. Div. 410, 46 N. Y. Suppl. 459).

must be so tried that each defendant will have an opportunity to be heard on all the matters affecting his interests.[34] Error in the order of trial of issues will not be ground for reversal where no prejudice resulted therefrom.[35]

2. Matters in Abatement.[36] Objections like the denial of plaintiff's right to sue should be heard before the merits are reached, so as to prevent unnecessary costs and delay;[37] but it is to a great degree a matter of discretion with the trial court whether an issue upon a plea in abatement should be submitted to the jury together with the issue upon the merits,[38] unless tried together by consent.[39] If the issue on the plea in abatement appears to the court to be important, it should be first tried and found before evidence is heard on the merits.[40] The question of the final liability of one defendant cannot be submitted to the jury in connection with and as determining a plea to the jurisdiction.[41]

3. Issues of Law and Fact. Where there are issues of law and issues of fact raised by the pleadings, the issues of law should be determined before proceeding to the determination of the issues of fact,[42] and this is so on new trial, although the issues of fact have once been tried.[43]

F. Notice of Trial and Note of Issue[44] **— 1. In General.** In the absence of statute providing otherwise, the parties to a cause, when the court has properly obtained jurisdiction over them, are not entitled to a notice of the trial, or of fixing a day for trial,[45] other than the setting of the case on the docket.[46] But where an order in a cause provides that the same shall be heard in vacation on a day to be fixed by the judge of which notice shall be given to the counsel of all the parties, the judge is without jurisdiction to proceed when neither the party nor his counsel has received the notice.[47]

34. Sliney *v.* Davis, 11 Colo. App. 480, 53 Pac. 686; Reed *v.* Provident Sav. L. Assur. Soc., 79 N. Y. App. Div. 163, 79 N. Y. Suppl. 665.

35. Byers *v.* Tritch, 12 Colo. App. 377, 55 Pac. 622; Stevens *v.* Roth, 65 S. W. 361, 23 Ky. L. Rep. 1531.

36. **On plea in abatement in attachment proceedings** see Attachment, 4 Cyc. 804.

37. Stewart *v.* Smith, 98 Me. 104, 56 Atl. 401; Terry *v.* Davy, 107 Fed. 50, 46 C. C. A. 141; Graham *v.* Temperance, etc., L. Assur. Co. of North America, 16 Ont. Pr. 536.

Illustration.— An exception of no cause of action which has been referred to the merits, and which has not been waived by answer, but duly reserved, should be passed on before passing on the merits, without regard to what evidence may have been, with or without objection, admitted on the merits. Rogers *v.* Southern Fiber Co., 119 La. 714, 44 So. 442, 121 Am. St. Rep. 537.

Waiver of right to object.—Where a rule of court provides that dilatory pleas shall be tried at the first term at which the attention of the court is called to the same, unless passed by agreement of the parties, the right is waived if not called to the attention of the court. Huffman *v.* Hardeman, (Tex. 1886) 1 S. W. 575.

38. Voss *v.* Evans Marble Co., 101 Ill. App. 373; Robertson *v.* Ephraim, 18 Tex. 118; Harrell *v.* Hill, 15 Tex. 270; Nixon *v.* Jacobs, 22 Tex. Civ. App. 97, 53 S. W. 595. The plea in abatement and issue in bar should be submitted to the same jury. Hawkins *v.* Albright, 70 Ill. 87.

39. Brown County *v.* Van Stralen, 45 Wis. 675.

40. Robertson *v.* Ephraim, 18 Tex. 118.

41. Central of Georgia R. Co. *v.* Brown, 113 Ga. 414, 38 S. E. 989, 84 Am. St. Rep. 250.

42. *California.*— Brooks *v.* Douglass, 32 Cal. 208.

Colorado.— Fischer *v.* Hanna, 8 Colo. App. 471, 47 Pac. 303.

Mississippi.— Anderson *v.* Robertson, 24 Miss. 389.

New York.— Pittstown Overseers of Poor *v.* Plattsburgh Overseers of Poor, 15 Johns. 398, although plaintiff has his election which shall be first tried.

Pennsylvania.—Vail *v.* Friend, 6 Pa. L. J. 334. *Contra*, Moore *v.* Savings Fund, 4 Pa. L. J. Rep. 54.

Vermont.— Gray *v.* Pingry, 17 Vt. 419, 44 Am. Dec. 345.

See 46 Cent. Dig. tit. "Trial," § 9.

Contra.— Knox *v.* Campbell, 52 S. C. 461, 30 S. E. 485.

43. Zacharie *v.* Bryan, 2 Tex. 274.

44. **On appeal from justice of the peace** see Justices of the Peace, 24 Cyc. 724.

Waiver by noticing cause of right to jury trial see Juries, 24 Cyc. 159.

45. Union Brewing Co. *v.* Cooper, 15 Colo. App. 65, 60 Pac. 946; Welch *v.* Jepson, 13 Colo. App. 520, 58 Pac. 789; Davis *v.* Peck, 12 Colo. App. 259, 55 Pac. 192; Cochrane *v.* Parker, 12 Colo. App. 169, 54 Pac. 1027; Glos *v.* Gleason, 209 Ill. 517, 70 N. E. 1045; Foster *v.* Hinson, 76 Iowa 714, 39 N. W. 682; Chappell *v.* Real Estate Pooling Co., 89 Md. 258, 42 Atl. 936.

46. Gullett *v.* Swinney, 61 Mo. App. 226; Summers *v.* Home Ins. Co., 56 Mo. App. 653.

47. Dixon *v.* Hawkins, 100 Ga. 5, 27 S. E. 188.

2. Under Statutes and Rules — a. United States. Under the federal practice, an amended answer unless stricken out by the court nullifies a notice of trial served by plaintiff before the amendment,[48] but a continuance from term to term by consent does not.[49]

b. California. Under the California statutes five days' notice of the setting of a cause for trial is required,[50] and dismissal of the cause for failure of plaintiff to appear on the trial, without any showing that such notice has been given, is reversible error.[51]

c. Connecticut. In Connecticut the filing by plaintiff of a request for entry of an action on the jury docket, after thirty days from the return-day, is insufficient to warrant placing the cause on the jury docket then, but such request not having been recalled was a continuing authority, and plaintiff was not required to file another request within ten days after joinder of issue of fact.[52]

d. Florida. Under the statutes of Florida, where issue was joined on all of defendant's pleas except one, as to which motion to strike had been filed before the beginning of a term of court, and the cause had not been entered on the trial docket by reason of the pending motion, the trial court could, after disposing of the motion, order the case placed on the trial docket for the term.[53]

e. Illinois. Under the Illinois statutes, the notice of trial is not invalid because the cause is not tried on the first day on which it appears on the calendar, the calendar being continuous.[54] Under rules of court in Cook county, the notice must be served on the opposite party, or his attorneys, or someone representing them.[55]

f. Iowa. In Iowa, under a rule that the court may, in its discretion, by order entered of record, permit notices of trial to be entered at a certain time, the order need not be general but may be restricted to a particular case.[56] Under a rule, providing that a case once continued, where an answer is on file, a ten days' notice must be given prior to the term at which the party desires the cause to be tried, causes in which the answer is filed subsequently to the continuance are not included.[57]

g. Michigan. The Michigan statutes provide for a written notice of trial to be served fourteen days before the first day of the term at which the cause is to be tried.[58] If it states that the cause will be brought on for hearing at the next term of court, it is not inoperative because not dated.[59] It cannot be served until after the return-day in the writ.[60] It must be signed by the party or attorney giving it,[61] and may be served by mail on a party who appears in person.[62]

48. Cramer *v.* Mack, 12 Fed. 803, 20 Blatchf. 479.

49. King of Spain *v.* Oliver, 14 Fed. Cas. No. 7,812, Pet. C. C. 217, in which it was said to be the duty of the parties to be ready for trial at any subsequent time.

50. *In re* Dean, 149 Cal. 487, 87 Pac. 13; Granger *v.* Sherriff, 133 Cal. 416, 65 Pac. 873.

Where the trial is stayed until additional security for costs is given, a new notice of trial is necessary. *In re* Dean, 149 Cal. 487, 87 Pac. 13.

51. *In re* Dean, 149 Cal. 487, 87 Pac. 13.

52. Fuller *v.* Johnson, 80 Conn. 493, 68 Atl. 977 (under Gen. St. (1902) § 720, providing that certain actions "shall be entered on the jury docket upon the written request of either party made to the clerk within thirty days after the return-day, and if an issue of fact is joined, after said period, the case may, within ten days after such issue of fact is joined, be entered in the jury docket upon the request of either party made to the clerk," and "may at any time, be entered in the jury docket . . . by order of court").

53. Seaboard Air Line R. Co. *v.* Scarborough, 52 Fla. 425, 42 So. 706.

54. Hansen *v.* Hale, 44 Ill. App. 474.

55. Leslie *v.* Reed, 107 Ill. App. 248.

56. Baldwin *v.* St. Louis, etc., R. Co., 75 Iowa 297, 39 N. W. 507, 9 Am. St. Rep. 479.

57. Erickson *v.* Barber, 83 Iowa 367, 49 N. W. 838.

58. Hathaway *v.* Marquette Cir. Judge, 117 Mich. 323, 75 N. W. 761.

Notice held sufficient as to form see Franklin *v.* Mansfield, 8 Mich. 99.

Probate appeals require no separate notice of trial for the first term after they are taken, but only at subsequent terms. People *v.* Wayne Cir. Judge, 39 Mich. 1.

59. Brushaber *v.* Stegemann, 22 Mich. 199.

60. Miles *v.* Goffinet, 16 Mich. 280.

61. Hathaway *v.* Marquette Cir. Judge, 117 Mich. 323, 75 N. W. 761.

62. People *v.* St. Clair Cir. Judge, 41 Mich. 549, 49 N. W. 923.

h. Minnesota. Under the Minnesota statutes, the term for which a notice of trial may be given includes a special term as well as a general term.[63] Where, after the commencement of an action, defendants and their attorneys remove from the state the notice may be served on the attorney at his place of residence in the state to which he has removed.[64] An amendment of the pleadings, of a cause at issue, which has been duly noticed and placed on the calendar, does not necessitate another notice of trial.[65] A cause not tried at the term for which it is noticed need not be noticed for a subsequent term, but where an appeal is taken from an order granting a new trial, pending which the proceedings are stayed, upon affirmance a new notice is necessary.[66] An error in the notice will not invalidate it if it does not mislead the opposite party.[67]

i. Montana. Under the rules of the district court in Montana attorneys residing at the county-seat, as well as those residing elsewhere, interested in a case and not present at the setting thereof, must be notified by the clerk of the setting thereof.[68]

j. New Jersey. Under the New Jersey statutes, the provision for short notice of trial refers to cases in which defendant asks the favor.[69] Where defendant is not misled thereby notice may be given to his attorney of record after a lapse of several years, although such attorney is then clerk of the county.[70] If given to plaintiff personally, and left at the office of his attorney who has been absent from the state one year, it is sufficient.[71] Plaintiff's oath is sufficient to prove service of the notice.[72] If mailed, proof of mailing, by depositing in the post-office properly directed, is *prima facie* proof of service, but may be repelled by the affidavit of the attorney to whom it was directed stating that it was not received.[73]

k. New York — (i) *NOTICE OF TRIAL.* The New York statutes require notice of trial to be served fourteen days, or in case it is given by mail sixteen days, before the term at which the cause is to be tried.[74] A deposit of the notice in the post-office at any hour of the day, without regard to the closing or departure of the mail, is sufficient,[75] and, if the notice is properly mailed, the fact that it

63. Colt *v.* Vedder, 19 Minn. 539.

64. Olmstead *v.* Firth, 64 Minn. 243, 66 N. W. 988.

65. Griggs *v.* Edelbrock, 59 Minn. 485, 61 N. W. 555; Stevens *v.* Currey, 10 Minn. 316.

66. Mead *v.* Billings, 43 Minn. 239, 45 N. W. 228.

67. Homberger *v.* Brandenberg, 35 Minn. 401, 29 N. W. 123.

68. Collier *v.* Fitzpatrick, 22 Mont. 553, 57 Pac. 181.

69. Van Valkenburgh *v.* Keer, 9 N. J. L. J. 316. A notice of trial and countermand is such a proceeding within the year as supersedes the necessity for a term's notice of trial. Denn *v.* McDonald, 1 N. J. L. 244.

70. Martinis *v.* Johnson, 21 N. J. L. 239.

71. Smethurst *v.* Harwood, 30 N. J. L. 230.

72. Darlings *v.* Corey, 1 N. J. L. 200.

73. McCourry *v.* Doremus, 10 N. J. L. 245.

74. Germania L. Ins. Co. *v.* Powell, 29 Misc. (N. Y.) 424, 61 N. Y. Suppl. 942.

Waiver of service.— Defendant by serving notice of trial does not waive his right to take advantage of plaintiff's failure to serve such notice. Yates *v.* McAdam, 18 Misc. (N. Y.) 295, 42 N. Y. Suppl. 109. But where, without objection in the presence of both parties, a day is fixed for trial so that plaintiff may examine defendant before trial, and defendant consents to the examination, plaintiff is not entitled to a notice of trial from defendant. Haven *v.* Meteer, 3 Misc. (N. Y.) 617, 23 N. Y. Suppl. 192.

Shortening time of notice.— The court has no power to shorten the time of notice required by statute over a party's objection; and judgment entered against him on such short notice is irregular and should be vacated without imposing conditions. Grindal *v.* De Lano, 15 N. Y. Suppl. 823, 21 N. Y. Civ. Proc. 224.

Waiver of proceedings under previous notice.—Where, before the close of a circuit at which a cause is pending, it is noticed for a subsequent circuit, the notice should contain a reservation to the effect that the cause will nevertheless be tried at the current circuit, if reached; otherwise the adverse party may treat the motion as a waiver of proceedings under previous notices of trial. Carpenter *v.* Tuffs, 2 How. Pr. (N. Y.) 166; Faulkner *v.* Brooklyn, 2 How. Pr. (N. Y.) 151.

Effect of want of notice.— In the absence of notice of trial and note of issue, an order directing the clerk to place the cause on the trial term calendar as of its date of issue, which order contained no provision for the filing of notice of trial or note of issue, is unauthorized. Poerschke *v.* Baldwin, 83 N. Y. App. Div. 284, 82 N. Y. Suppl. 159.

75. Elliott *v.* Kennedy, 26 How. Pr. (N. Y.) 422.

is not received does not affect the right of the court to make an order of reference thereon.[76] The notice of trial must be given for the same term at which the note of issue is filed,[77] and this statutory requirement cannot be evaded by the stipulation of attorneys.[78] It cannot be served before joinder of issue,[79] and is premature if served before answer, although the answer is served on the same day.[80] The court has no power to relieve a party where notice has not been filed in time.[81] Plaintiff has a reasonable time after the issues are made up to prepare for trial and is not required to bring the case on for trial until such time.[82] If he then fails to bring it on, defendant should bring it on.[83] If proper notice has been served, and the attorney of the opposite party declines to receive the same, the proper practice is to bring the case on for trial and not to file a motion to compel the attorney to receive the notice.[84] The notice must identify the cause to which it relates.[85] In determining its sufficiency, the court will inquire whether the party has been misled thereby.[86] It is sufficient, where in fact it has not misled, if it correctly specifies the term, although incorrectly stating the day of the commencement thereof.[87] Where several defendants appear, each is entitled to notice and the court cannot dispense with it;[88] but where of several defendants some plead and others default, the cause may be noticed before an interlocutory judgment is taken as to the defendants in default.[89] Where the notice is irregular, the party receiving it should return it promptly.[90] Where an amended pleading is served after service of the notice of trial and filing of note of issue, a new notice of trial must be served and a new note of issue filed,[91] although the pleading be an answer not setting up a counter-claim,[92] or, the amendment be in the amount

Registration of package containing notice. —That a package containing plaintiff's notice of trial, served by mail, was registered does not make such service void. Sears *v.* Tenhagen, 50 Misc. (N. Y.) 275, 100 N. Y. Suppl. 469.

76. Schwartz *v.* Linington, 18 N. Y. Suppl. 879.

77. Finelite *v.* Dorian, 14 N. Y. App. Div. 125, 43 N. Y. Suppl. 446.

78. Leonard *v.* Faber, 31 N. Y. App. Div. 137, 52 N. Y. Suppl. 772.

79. Pritchard *v.* Nederland L. Ins. Co., 38 N. Y. App. Div. 109, 56 N. Y. Suppl. 636.

When issue considered as joined.— Under Code Civ. Proc. § 977, permitting either party to serve notice of trial at any time after joinder of issues, issue is not joined until the last pleading presenting the issues to be tried is served. Grant *v.* Cananea Consol. Copper Co., 129 N. Y. App. Div. 77, 113 N. Y. Suppl. 502.

Issue joined except as to defaulting party. —Notice of trial was proper where the issues had been joined as to all defendants except one who had defaulted. Grant *v.* Cananea Consol. Copper Co., 129 N. Y. App. Div. 77, 113 N. Y. Suppl. 502.

80. Wallace *v.* Syracuse, etc., R. Co., 27 N. Y. App. Div. 457, 50 N. Y. Suppl. 329, holding that this is so notwithstanding the fact that the rules provide that in case of extension of time to answer, the date of the issue shall be as of the time when the answer would have been served in the absence of an extension.

81. Roberts *v.* Schaf, 76 N. Y. App. Div. 433, 78 N. Y. Suppl. 778.

82. Cusson *v.* Whalon, 1 Code Rep. N. S. (N. Y.) 27, 5 How. Pr. 302.

83. Schroeder *v.* Kohlenback, 6 Abb. Pr. (N. Y.) 66, holding further that an order dismissing the cause unless plaintiff does is improper.

84. Lauferty *v.* Mutual Reserve Fund Life Assoc., 25 Misc. (N. Y.) 624, 56 N. Y. Suppl. 121; Koehler *v.* Kelly, 7 N. Y. Civ. Proc. 81.

85. Lisher *v.* Parmelee, 1 Wend. (N. Y.) 22.

86. Bander *v.* Covill, 4 Cow. (N. Y.) 60.

87. New-York Cent. Ins. Co. *v.* Kelsey, 13 How. Pr. (N. Y.) 535; Silliman *v.* Clark, 2 How. Pr. (N. Y.) 160.

Although deficient in time, it is sufficient to put the opposite party on inquiry as to the proceedings. Hinde *v.* Tubbs, 10 Johns. (N. Y.) 486.

88. Tracy *v.* New York Steam Faucet Mfg. Co., 1 E. D. Smith (N. Y.) 349.

89. Rochester Bank *v.* Boulton, 5 Wend. (N. Y.) 106.

90. Ward *v.* Smith, 45 Misc. (N. Y.) 169, 91 N. Y. Suppl. 905 [*reversed* on other grounds in 103 N. Y. App. Div. 375, 92 N. Y. Suppl. 1107].

91. Ostrander *v.* Conkey, 20 Hun (N. Y.) 421; Evans *v.* Olmstead, 31 Misc. (N. Y.) 692, 66 N. Y. Suppl. 63; Yates *v.* McAdam, 18 Misc. (N. Y.) 295, 42 N. Y. Suppl. 109; Grindal *v.* De Lano, 15 N. Y. Suppl. 823, 21 N. Y. Civ. Proc. 224; Graham *v.* Stirling Ins. Co., 13 N. Y. Suppl. 562, 19 N. Y. Civ. Proc. 452. And see Murphy *v.* Lyon, 127 N. Y. App. Div. 448, 112 N. Y. Suppl. 152; Ward *v.* Smith, 103 N. Y. App. Div. 375, 92 N. Y. Suppl. 1107.

If the cause is then on the calendar it should be stricken from it. Coler *v.* Lamb, 19 N. Y. App. Div. 236, 46 N. Y. Suppl. 117.

92. Jones *v.* Seaman, 30 Misc. (N. Y.) 65, 62 N. Y. Suppl. 883.

of damages asked,[93] or, in changing the venue,[94] or, although the amendment creates no new issues between the original parties, if it brings in new parties,[95] unless the court, as a condition of permitting the amendment, orders the case to retain its place on the calendar,[96] or, unless the court is satisfied that the amendment is made in bad faith.[97] But the fact that the time for amending pleadings has not expired, at the time of noticing for trial, will not invalidate the notice, if in fact no amended pleading is actually served.[98] If served at a time when all proceedings are stayed by an order of court it is invalid.[99] When a trial, entered upon, has been discontinued to permit the bringing in of another party,[1] or to permit an amended pleading to be filed, where the order does not dispense with a new notice, a new notice of trial is necessary.[2] It is too late to make objection for the first time to a want of a new notice after an amendment of the pleadings when the case appears for the second time on the calendar.[3] Although a case was ready to be noticed for trial when notice was served, new issues created by the subsequent service of a reply must be noticed for trial before the cause can be placed on the calendar for trial.[4] Where defendant appeared by a firm of attorneys, the notice may be served on the survivor of such firm, although no substitution has been made.[5] If the cause is not placed on the calendar at the term for which the notice is given, an inquest cannot be taken at a subsequent term upon that notice.[6]

(II) *NOTE OF ISSUE.* The note of issue should show what the issue for trial is,[7] and state the day and term for which the notice of trial has been given.[8] It must be filed at least two days before the commencement of the term for which the case is noticed for trial, or the case will be stricken from the calendar,[9] and

93. Wright *v.* Zimmermann, 21 Misc. (N. Y.) 407, 47 N. Y. Suppl. 954.

94. Clark *v.* Belden, 19 Johns. (N. Y.) 174.

95. Fisher *v.* Gunn, 12 Misc. (N. Y.) 207, 34 N. Y. Suppl. 27.

96. Myers *v.* Metropolitan El. R. Co., 16 Daly (N. Y.) 410, 12 N. Y. Suppl. 2, 19 Civ. Proc. 448; Hoeflin *v.* Gedney, 23 Misc. (N. Y.) 518, 51 N. Y. Suppl. 871; Miller *v.* Mestaniz, 84 N. Y. Suppl. 503; Gair *v.* Birmingham, 15 N. Y. Suppl. 147, 20 N. Y. Civ. Proc. 233; McBride *v.* Langan, 11 N. Y. Suppl. 626, 19 N. Y. Civ. Proc. 41; Honeywell *v.* Shaffer, 9 N. Y. Suppl. 540, 18 N. Y. Civ. Proc. 336. *Contra*, Coler *v.* Lamb, 19 N. Y. App. Div. 236, 46 N. Y. Suppl. 117.

Waiver of objections.— By answering under an extension granted on condition that the issue be of date of the original time for answering, and that plaintiff be permitted to serve short notice of trial for the next succeeding term, and afterward amending as of course, and retaining in the meanwhile a notice of trial served before answering, defendant waived any objection that the notice of trial was inapplicable to issues made by pleadings served after the notice. Knowles *v.* Lichtenstein, 33 N. Y. App. Div. 605, 54 N. Y. Suppl. 49.

97. Minrath *v.* Teachers' Land, etc., Co., 21 N. Y. Suppl. 204.

Objection, how raised.— The good faith of an answer cannot be questioned in resisting a motion to strike from the calendar, but should be raised by motion to strike out the answer. Evans *v.* Olmstead, 31 Misc. (N. Y.) 692, 66 N. Y. Suppl. 63.

98. Townsend *v.* Hillman, 9 N. Y. Suppl. 629, 18 N. Y. Civ. Proc. 213. On serving replications, plaintiff may deliver a notice of trial, but the proceeding is subject to be defeated or modified, by the subsequent delivery of a *bona fide* demurrer, and the decision thereon. Miller *v.* Stocking, 22 Wend. (N. Y.) 623.

99. Roberts *v.* Schaf, 76 N. Y. App. Div. 433, 78 N. Y. Suppl. 778; Dayton *v.* Vincent, 1 How. Pr. (N. Y.) 6.

1. Romanoski *v.* Union R. Co., 64 N. Y. Suppl. 1147 [*reversing* 30 Misc. 830, 61 N. Y. Suppl. 1097].

2. Wollett *v.* Seaman's Sav. Bank, 36 Misc. (N. Y.) 494, 73 N. Y. Suppl. 1005.

3. Levey *v.* Tribune Assoc., 22 Misc. (N. Y.) 245, 49 N. Y. Suppl. 608. Or for the third time. Stanfield *v.* Stanfield, 21 Misc. (N. Y.) 409, 47 N. Y. Suppl. 1010.

4. Grant *v.* Cananea Consol. Copper Co., 129 N. Y. App. Div. 77, 113 N. Y. Suppl. 502, holding further that a demurrer to the reply would not affect the position of the action on the calendar, although the demurrer would have to be disposed of before the action could be placed on the trial calendar.

5. Saxton *v.* Dodge, 46 How. Pr. (N. Y.) 467.

6. Culver *v.* Felt, 4 Rob. (N. Y.) 681.

7. *In re* Circuit Calendar Regulations, 13 How. Pr. (N. Y.) 345.

8. Miner *v.* Galvanotype Engraving Co., 30 Misc. (N. Y.) 200, 61 N. Y. Suppl. 1102.

9. Miner *v.* Galvanotype Engraving Co., 30 Misc. (N. Y.) 200, 61 N. Y. Suppl. 1102.

Filing nunc pro tunc.—Where no note of issue was filed at the term for which notice of trial was given, plaintiff was not entitled to an order authorizing a note of issue to

it cannot be filed before the cause has been noticed for trial.[10] A fee of three dollars is required on filing a note of issue in certain of the New York courts, and it will not be refunded, although the action be discontinued.[11]

l. North Dakota. The North Dakota statutes provide for notice of trial and note of issue preliminary to bringing an issue to trial, and this although the cause has been on the trial calendar on an issue of law.[12] If the notice correctly states the month and year, it is immaterial that it contains an error in the date of the commencement of the term.[13]

m. Pennsylvania. In Pennsylvania, under rule, parties are entitled to notice of trial.[14] Where plaintiff gives the notice, it is not necessary for defendant to do so likewise;[15] but, defendant claiming a set-off, must give the ten days' notice as well as plaintiff;[16] and, if the same is to be proved by acknowledgment of the party, he must so expressly state in the notice, otherwise he will be compelled to bring an action for the matter claimed as a set-off.[17] Where the requirements have been complied with a party is entitled to proceed to trial in the absence of the opposite party, although such party had in fact no notice of the date of trial.[18]

n. South Carolina. Under the South Carolina statutes notice, if by mail, must be served sixty days before the day fixed by law for the commencement of the term.[19]

o. South Dakota. Under the South Dakota statutes the filing of an amended complaint necessitates a new notice of trial and note of issue.[20] When the case is reached on the calendar, after having been properly noticed by defendant, he is entitled to a trial thereof, or to a dismissal of the complaint.[21] Notice of trial operates as a withdrawal of a demurrer to the answer.[22]

p. Utah. Under rule providing that the clerk should make up a trial calendar before each term, including all cases at issue noticed for the term prior to the making up of the calendar, that notice of the placing of any case upon the calendar might be made by serving the opposite party with a copy thereof, and that cases not placed upon the calendar under the rule should not be heard except for good cause shown, either plaintiff's attorney or defendant's attorney must serve the notice before each term of court to entitle the case to be tried at that term, or, in the absence of the notice, a special order of the court must be made setting it for trial.[23]

be filed *nunc pro tunc*. National Carbonating Co. *v.* Standard Aerating Co., 47 N. Y. Suppl. 1016. But see Clinton *v.* Myers, 43 How. Pr. (N. Y.) 95, where note of issue was permitted to be filed, when want of filing was caused by neglect of attorney.

Neglect of clerk.—An affidavit of a party's attorney to the effect that the failure to file a note of issue was due to the neglect of a clerk to comply with instructions so to do, when unaccompanied with the name of the clerk, or reasons why the affidavit of such clerk was not presented by him showing how the omission occurred, was insufficient to justify an order placing the cause on the general calendar for trial. Loftus *v.* Oppenheim, 84 N. Y. App. Div. 464, 82 N. Y. Suppl. 1037.

10. McMann *v.* Brown, 92 N. Y. App. Div. 249, 87 N. Y. Suppl. 38.

Filing on same day.—A cause in which the note of issue was filed before one o'clock on a certain day, and the notice of trial served at four o'clock on the same day, is not improperly on the docket on the ground that the notice of trial should have been served first; this is because the law does not often take account of fractions of a day. Lederer *v.* Adler, 44 Misc. (N. Y.) 217, 88 N. Y. Suppl. 1010.

11. Kerwin *v.* Valentine, 13 N. Y. St. 331, 13 N. Y. Civ. Proc. 334.

12. Oswald *v.* Moran, 9 N. D. 170, 82 N. W. 741.

13. Smith *v.* Northern Pac. R. Co., 3 N. D. 17, 53 N. W. 173.

14. Cecil *v.* Lebenstone, 2 Dall. (Pa.) 95, 1 L. ed. 304.

15. Peelet *v.* Hess, 1 Yeates (Pa.) 302.

16. Woodward *v.* McClung, 1 Phila. (Pa.) 176.

17. Beatty *v.* Smith, 4 Yeates (Pa.) 102.

18. Meckes *v.* Pocono Mountain Water Supply Co., 203 Pa. St. 13, 52 Atl. 16.

19. Green *v.* Charlotte, etc., R. Co., 6 S. C. 342.

20. J. I. Case Threshing Mach. Co. *v.* Eichinger, 15 S. D. 530, 91 N. W. 82.

21. Moody *v.* Lambert, 18 S. D. 572, 101 N. W. 717.

22. Wyman *v.* Werner, 14 S. D. 300, 85 N. W. 584.

23. Riddle *v.* Quinn, 32 Utah 341, 90 Pac. 893.

q. Washington. The Washington statutes requiring notice of trial contemplate notice that the cause will be set for trial and not notice of the time when the cause will be tried.[24]

r. Wisconsin. Under the Wisconsin statutes either party may notice a cause for trial after it is at issue and the failure of plaintiff so to do is not a cause for nonsuit.[25] A party who has not noticed a cause for trial cannot compel his adversary who has so noticed it to proceed with the trial.[26] All defendants who have appeared in the case are entitled to notice.[27] A mistake in the notice, if it does not mislead, does not vitiate it.[28]

s. Canada. In Canada the time for serving notice of trial is regulated by the practice of the superior courts of common law in England.[29] Notice of trial is essential in interpleader and feigned issues as in ordinary cases,[30] and is necessary, although the cause is referred to the county court sittings by an order made in the queen's bench.[31] It cannot be given before the cause is at issue,[32] or while it is pending on appeal.[33] Where defendant has time to plead *de novo*, a new notice of trial is required;[34] but not so where it is postponed by order of the judge on defendant's application.[35] If a new trial is granted upon payment of costs, notice of trial cannot be given before the costs are paid.[36] It may be given before an order of revivor is confirmed, if given after the order is made and for a day later than that of the confirmation of the order,[37] or given pending a summons to dismiss an action for breach of an order to examine, where the judge who granted the summons struck out the part relating to stay, and the summons was afterward enlarged without any mention of a stay.[38] The time prescribed by rule for giving notice of trial cannot be shortened except by consent, or unless short notice of trial is imposed as a term of granting an indulgence.[39] Short notice of necessity has reference to the state of the cause and not the convenience of the parties.[40] Sundays and holidays are excluded in computing five days necessary

24. Western Security Co. *v.* Lafleur, 17 Wash. 406, 49 Pac. 1061.

25. Roberts *v.* Delaney, 2 Wis. 382.

26. Buckley *v.* Lewis, 20 Wis. 490.

27. Rose *v.* Barr, 2 Wis. 492.

28. Conkey *v.* Northern Bank, 6 Wis. 447.

29. Drummond *v.* Carritt, 2 Nova Scotia 268.

Ten days' notice.—Rule 226, Ont. Jud. Act, requires only ten days' notice of trial of causes coming within its provisions. Barker *v.* Furze, 9 Ont. Pr. 83. Ten days' notice is now required in replevin instead of eight as under the old practice. Wallace *v.* Cowan, 9 Ont. Pr. 144.

Effect of absence of notice.—In the absence of a notice of trial the verdict may be set aside without an affidavit of merits or notice. Consumers Gas Co. *v.* Kisseck, 5 U. C. Q. B. 542.

30. Wilson *v.* Dewar, 4 Ont. Pr. 13.

31. Carruthers *v.* Rykert, 7 Can. L. J. 184.

32. McMaster *v.* King, 14 Can. L. J. N. S. 79; Skelsey *v.* Manning, 8 Can. L. J. 166; Hermann *v.* Mandarin Gold Min. Co., 18 Ont. Pr. 34; Irwin *v.* Turner, 16 Ont. Pr. 349; McIlroy *v.* McIlroy, 14 Ont. Pr. 264; Broderick *v.* Broatch, 12 Ont. Pr. 561; Schneider *v.* Proctor, 9 Ont. Pr. 11. This is so, although the cause is at issue between the original parties when a third party order is made. Confederation Life Assoc. *v.* Labatt, 18 Ont. Pr. 238.

A reply and demurrer to the same matter closes the pleadings. Gibson *v.* Nelson, 19 Ont. Pr. 265.

Filing of replication.—Where the filing of a replication is all that is necessary to complete the pleadings and the time for filing that has expired notice may be given. Sawyer *v.* Short, 9 Ont. Pr. 85.

33. Goldie *v.* Date's Patent Steel Co., 7 Ont. Pr. 1.

34. McBride *v.* Carroll, 14 Ont. Pr. 70; Montreal Bank *v.* Cameron, 7 Ont. Pr. 188.

35. Donovan *v.* Boultbee, 10 Ont. Pr. 52. *Contra*, Macaulay *v.* Phillips, 6 Ont. Pr. 77.

36. Stock *v.* Shewan, 18 U. C. C. P. 185.

37. New York Piano Co. *v.* Stevenson, 10 Ont. Pr. 270.

38. Merchants' Bank *v.* Pierson, 8 Ont. Pr. 129.

39. Whitney *v.* Stark, 13 Ont. Pr. 129; Hamilton Provident, etc., Soc. *v.* McKim, 13 Ont. Pr. 125; Tecumseh Salt Co. *v.* Platt, 6 Ont. Pr. 251.

Effect of filing sham demurrer.—Defendant is entitled to short notice, although by filing a sham demurrer he has so delayed the cause that there is not sufficient time to give the notice before the next assizes. Truscott *v.* Goldie, 5 U. C. Q. B. O. S. 138.

Where defendant obtains time to plead on the "usual terms" he is bound to take short notice of trial. Senior *v.* McEwen, 2 U. C. Q. B. 95.

40. McMurray *v.* Grand Trunk R. Co., 5 Ont. Pr. 272.

Imperfect short notice see Provident Permanent Bldg., etc., Soc. *v.* McPherson, 3 Ont. Pr. 96.

for short notice.[41] The first day is excluded and the last day included.[42] The notice must be served on the solicitor personally, notice to his clerk,[43] or by shoving it under the door of his office,[44] being insufficient. If a mistake in a notice is such that it cannot mislead defendant's attorney it will not vitiate the notice.[45] An application to set aside a notice for irregularity must be made without delay,[46] and before trial.[47] The notice is merely irregular if it states the wrong venue,[48] or is signed by one partner of plaintiff's attorneys when the other partner appears as attorney of record,[49] or where the pleadings are not closed.[50]

3. Waiver of Notice or Irregularities Therein. Notice of trial [51] or irregularities therein [52] may be waived. Proceeding to trial,[53] or procuring a postponement of a trial,[54] or consenting to an adjournment,[55] waives notice of trial. So irregularities in a notice, or service thereof, may be waived by accepting and retaining it,[56] without objection [57] promptly made.[58]

III. Dockets, Lists, and Calendars.[59]

A. In General. Trial docket is the name of the book containing cases liable to be tried at the special term of the court.[60] Causes should be entered on the trial docket in the order in which the issues are made up,[61] and when on the docket,

41. O'Donnell *v.* O'Donnell, 10 Ont. Pr. 264.

42. Love *v.* Armour, (Trin. T. 3 & 4 Vict.) 3 Ont. Case Law Dig. 6987. But see *contra*, Williams *v.* Lee, 2 U. C. C. P. 157.

Although a party takes short notice of trial he is not bound to take short notice of assessment. Wright *v.* McPherson, 3 U. C. Q. B. 145.

43. Hermann *v.* Mandarin Gold Min. Co., 18 Ont. Pr. 34.

A managing clerk in an office has power to bind his principal by accepting a notice of trial as of an earlier date than it was actually delivered, unless the principal promptly repudiates the acceptance, and gives notice thereof to the opposite party. Orr *v.* Stabback, (Trin. T. 3 & 4 Vict.) 3 Ont. Case Law Dig. 6983.

44. Grand River Nav. Co. *v.* Wilkes, 8 U. C. Q. B. 249, when he did not return until the day of the assizes.

Service on the solicitor's town agent with notice for whom intended is sufficient. Senior *v.* McEwen, 2 U. C. Q. B. 95.

Notice left at the office of defendant's solicitors before six o'clock, but after the solicitor and his clerks had left for the day, takes effect only from the time when the notice came to the knowledge of the solicitor. Davies *v.* Hubbard, 10 Ont. Pr. 148.

45. De Blaquiere *v.* Cottle, 4 Ont. Pr. 167; McMillan *v.* Fergusson, (Mich. T. 2 Vict.) 3 Ont. Case Law Dig. 6988.

Amendment.—Such notice may be amended *nunc pro tunc.* Walker *v.* Terry, 7 Ont. Pr. 340.

46. Anderson *v.* Culver, 10 Can. L. J. 159, 3 Ont. Pr. 306; Whitney *v.* Stark, 13 Ont. Pr. 129; Bell *v.* Graham, 2 U. C. Q. B. 37.

47. Skelsey *v.* Manning, 8 Can. L. J. 166; Gordon *v.* Cleghorn, 7 U. C. Q. B. 171.

48. Brown *v.* Blackwell, 6 Ont. Pr. 165.

49. Macaulay *v.* Phillips, 6 Ont. Pr. 77; Gamble *v.* Rees, 7 U. C. Q. B. 406.

50. Campau *v.* Randall, 17 Ont. Pr. 325.

51. Davidson *v.* Middleton, 3 Rich. (S. C.) 349.

52. Commercial Bank *v.* Lee, 6 Can. L. J. 21.

53. Jones *v.* Anderson, 5 N. Y. Wkly. Dig. 422. And see Cook *v.* Perry, 43 Mich. 623, 5 N. W. 1054.

N. Y. Code, § 980, authorizes only the party who has served a notice of trial to move the cause for trial, and where defendant neglected such notice plaintiff by proceeding to trial did not waive notice of trial, thereby placing defendant in a position to urge the cause for trial. Dart *v.* Soloman, 5 N. Y. St. 911.

54. Granger *v.* Sherriff, 133 Cal. 416, 65 Pac. 873; Rosenthal *v.* Friedman, 60 Misc. (N. Y.) 553, 112 N. Y. Suppl. 449; Haberstich *v.* Fischer, 6 N. Y. Civ. Proc. 82.

55. Brady *v.* Martin, 11 N. Y. Suppl. 424.

56. Walker *v.* Chilson, 65 Hun (N. Y.) 529, 20 N. Y. Suppl. 527; Magone *v.* Metropolitan St. R. Co., 21 Misc. (N. Y.) 565, 48 N. Y. Suppl. 644; Weiss *v.* Morrell, 7 Misc. (N. Y.) 539, 28 N Y. Suppl. 59, 23 N. Y. Civ. Proc. 352; Meislahn *v.* Hanken, 18 N. Y. Suppl. 361.

An objection that a notice of trial was served by mail without sufficient postage is waived by accepting the notice and failing to return it. Germania L. Ins. Co. *v.* Powell, 29 Misc. (N. Y.) 424, 61 N. Y. Suppl. 942.

57. Cerussite Min. Co. *v.* Anderson, 19 Colo. App. 307, 75 Pac. 158.

58. Highley *v.* Metzger, 86 Ill. App. 573 [*affirmed* in 186 Ill. 253, 57 N. E. 811, 187 Ill. 237, 58 N. E. 407]; Treftz *v.* Stahl, 46 Ill. App. 462, 18 L. R. A. 500.

59. **In criminal prosecutions** see Criminal Law, 12 Cyc. 505.

Recovery of docket fees as costs see Costs, 11 Cyc. 106.

60. Morgan Hastings Co. *v.* Gray Dental Co., 108 Ill. App. 98.

61. McBride *v.* Ellis, 8 Rich. (S. C.) 226.

a cause will be presumed to be there in pursuance of law in the absence of any showing to the contrary.[62] If omitted from the printed docket by mistake a cause will be ordered placed thereon.[63] But where the statute requires some action by the clerk to place the cause on the calendar, it is not properly for trial without such action.[64] Where issues are made up at the same time the clerk should regard the directions of plaintiff's counsel as to the order in which the cases should be docketed.[65] Where notice within a given time is required to entitle a cause to a place on the calendar, a party is not entitled to have it placed thereon by showing that although the notice was not given his clerk was instructed to give the same.[66] Upon failure of plaintiff to docket a cause within the time prescribed by law, defendant may docket the same.[67] Issues against separate garnishees, no joint indebtedness to defendant being alleged, cannot be docketed as one suit.[68] The court has some discretion in the regulation of its calendar.[69] Where the court consists of divisions, the control of the docket is entirely with the judge of the division to which the cause is assigned.[70] Where suits identical in every respect are filed for the purpose of obtaining the allotment of one of them to a certain division of the court, the first assignment of one will carry the others to the same division.[71] Where a petition combines a legal and an equitable cause of action, the clerk cannot place it on the jury calendar over defendant's objection.[72] A party in default cannot complain that a cause was improperly docketed.[73] A cause retaining its place on the docket by a subterfuge of the parties should upon discovery of the subterfuge be sent to the foot of the docket.[74] An objection to an irregularity in the allotment of a case must be timely made, otherwise it is waived.[75] The objection that a case is improperly on the docket comes too late if made for the first time on the day of trial.[76] It is likewise waived by an application to adjourn the trial,[77] or by a consent to a reference.[78]

B. Time or Term of Court For Trial.[79] The statutes and court rules of

Where there are several issues of law joined at different times, in the same cause, its order on the calendar is determined by the date of the first issue. Griswold *v.* Stewart, 3 Cow. (N. Y.) 16.

62. Sanders *v.* Hartge, 17 Ind. App. 243, 46 N. E. 604.

63. Wilcox *v.* Wilmington City R. Co., (Del. 1898) 41 Atl. 975; Rice *v.* Holden, 55 N. H. 398.

64. Steffens *v.* Bulwinkle, 48 S. E. 357, 26 S. E. 666.

65. McBride *v.* Ellis, 8 Rich. (S. C.) 226.

66. Hix *v.* Edison Electric Light Co., 78 N. Y. App. Div. 384, 79 N. Y. Suppl. 1016.

67. Claussen *v.* Johnson, 32 S. C. 86, 11 S. E. 209; Pudigon *v.* Goblet, 24 S. C. 476.

As to a redocketing of cause after reversal and remand see Smith *v.* Brittenham, 94 Ill. 624.

In South Carolina all cases to be passed on by the court are placed on calendar 2. Melchers *v.* Moore, 62 S. C. 386, 40 S. E. 773.

68. Maryland Fidelity, etc., Co. *v.* Seymour, 29 Tex. Civ. App. 542, 66 S. W. 686.

69. Byrne *v.* Wood, 8 Ohio Dec. (Reprint) 760, 9 Cinc. L. Bul. 308; Rubrecht *v.* Powers, 1 Tex. Civ. App. 282, 21 S. W. 318.

70. Hindman *v.* Toney, 97 Ky. 413, 30 S. W. 1006, 17 Ky. L. Rep. 286; Maretzek *v.* Cauldwell, 4 Rob. (N. Y.) 666. The justice presiding at the special term for trials has no power to modify the order of the special term for motions setting a case for trial at the instance of one of the parties, without notice to the other. Martin *v.* Universal Trust Co., 76 N. Y. App. Div. 320, 78 N. Y. Suppl. 465.

71. State *v.* Judges Civ. Dist. Ct., 47 La. Ann. 1601, 18 So. 632.

72. Trasselli *v.* Allen, 14 Misc. (N. Y.) 183, 35 N. Y. Suppl. 469.

73. Jones *v.* Garlington, 44 S. C. 533, 22 S. E. 741.

74. Robertson *v.* Merz Universal Extractor Co., 2 N. Y. App. Div. 515, 37 N. Y. Suppl. 1054.

75. State *v.* Judge Orleans Parish Civ. Dist. Ct. Div. A, 44 La. Ann. 190, 10 So. 768; James *v.* Meyer, 43 La. Ann. 38, 8 So. 575.

76. Osborn *v.* Osborn, 114 Mass. 515.

77. Smith *v.* Grant, 11 N. Y. Civ. Proc. 354.

78. Allis *v.* Day, 14 Minn. 516.

79. **Constitutionality of statute, postponing time of trial** see CONSTITUTIONAL LAW, 8 Cyc. 1011.

In bastardy proceedings see BASTARDS, 5 Cyc. 565.

In contempt proceedings see CONTEMPT, 9 Cyc. 46.

In criminal prosecutions see CRIMINAL LAW, 12 Cyc. 498.

In justice's court see JUSTICES OF THE PEACE, 24 Cyc. 582 text and note 8.

Place of trial see VENUE.

Terms of court see COURTS, 11 Cyc. 726 *et seq.*

Time of hearing: In demurrer see PLEADING, 31 Cyc. 345. In equitable actions see

the different jurisdictions vary considerably in their provisions relating to the time for the trial of actions, the most common provision being for their trial at the first term of court ensuing after the service of process and the lapse of a prescribed number of days.[80] In the absence of statute, the particular day of the term at which the trial shall be had is within the discretion of the court; [81] but,

EQUITY, 16 Cyc. 408. In references see REFERENCES, 34 Cyc. 814.

80. *Alabama.*— Ware *v.* Willis, 45 Ala. 120; Cumming *v.* Richards, 32 Ala. 459.

Connecticut.— Noren *v.* Wood, 72 Conn. 96, 43 Atl. 649, holding that, under Pub. Acts (1897), c. 118, p. 834, a party is entitled to have the action put on the jury docket within ten days after the joining of issue, where issue is joined after the expiration of thirty days from the return-day of the suit.

Georgia.— Merritt *v.* Gate City Nat. Bank, 100 Ga. 147, 27 S. E. 979, 38 L. R. A. 749.

Illinois.— Hecht *v.* Feldman, 153 Ill. 390, 39 N. E. 121 [*affirming* 54 Ill. App. 144].

Indiana.— Doe *v.* Griffin, 3 Blackf. 136.

Kentucky.— Hedger *v.* Downs, 2 Metc. 160 (holding that Civ. Code, tit. 9, art. 7, § 392, providing that an action on contract wherein part of defendants only have been duly served with process shall stand for trial at the first term as to those summoned, and continued as to the others, and that in other actions plaintiff can demand a trial at any term as to part of defendants, when he has, on the first day of the term, discontinued as to the others, applies only to actions in which part of defendants only have been served with process and part have not); Peyton *v.* Moore, 12 Ky. L. Rep. 121.

Louisiana.— Ricou *v.* Hart, 47 La. Ann. 1370, 17 So. 878, holding that a rule of court excluding ordinary cases from trial during certain days does not necessarily apply to a summary case.

Mississippi.— Oglesby *v.* Stribling, 67 Miss. 666, 7 So. 463.

Missouri.— Carpenter *v.* Meyers, 32 Mo. 213; Ridgley *v.* The Reindeer, 27 Mo. 442; Armstrong *v.* Johnson, 27 Mo. 420; Finney *v.* Brant, 19 Mo. 42. However, Acts (1838–1839), p. 99, § 4, containing a provision for trial of certain actions at the return-term, provided defendant shall have been properly served with process twenty days before the commencement of the term, does not apply to an action in debt (Southack *v.* Morris, 6 Mo. 351), nor to a partition suit, unless the parties consent to a trial at the return-term (Smith *v.* Davis, 27 Mo. 298). Particular provision is also made in this jurisdiction for the trial of causes brought in counties having less than forty thousand inhabitants. Huff *v.* Shepard, 58 Mo. 242; Miller *v.* Gordon, 96 Mo. App. 395, 70 S. W. 269.

Virginia.— Mandeville *v.* Mandeville, 3 Call 225.

See 46 Cent. Dig. tit. "Trial," § 11.

Trial at same term process is amended.— It is not error to try a cause at the term at which a sheriff is permitted to amend his return, showing that a party was duly served with notice, when in fact such party had been actually served, in due time, with notice to appear at that term. Trimble *v.* Patton, 5 W. Va. 432.

Beyond term.— An uncompleted trial may continue beyond the term, until it is completed. Bridgewater *v.* Bridgewater, 62 Ind. 82. And see COURTS, 11 Cyc. 735.

Special and criminal terms.— It is provided by Va. Code, c. 158, § 33, that at any special term any civil cause may be tried which could lawfully have been, but was not, tried at the last preceding regular term (Patton *v.* Hoge, 22 Gratt. (Va.) 443); but under Conn. Gen. St. (1902) § 454, no contested issue can be tried at a special session of the superior court except by written agreement of the parties or their counsel, unless twenty days' notice of the time and place of such session shall be given (O'Keefe *v.* Scovill Mfg. Co., 78 Conn. 286, 61 Atl. 961). Under the Pennsylvania act of April 10, 1782, passed with the intention of accelerating trials by providing for the calling of a special court, a joint defendant is entitled to such a court, although he has a resident partner who could remain to defend the cause, and who did not join in the application. *Ex p.* Holker, 2 Dall. (Pa.) 111, 1 L. ed. 311. On the other hand, it is held that a special court will not be ordered on the ground that one of plaintiffs has assigned all his interest to the other, and that the latter is about to depart from the country. Kunckel *v.* Baker, 1 Dall. (Pa.) 169, 1 L. ed. 85. It seems that a court may set aside a court rule providing for separate civil and criminal terms, and try civil causes at a criminal term. Hill *v.* Penn Mut. L. Ins. Co., 120 Ky. 190, 85 S. W. 759, 27 Ky. L. Rep. 567; Monarch *v.* Brey, 106 Ky. 688, 51 S. W. 191, 21 Ky. L. Rep. 279.

81. Foster *v.* Hinson, 76 Iowa 714, 39 N. W. 682; Gager *v.* Paul, 111 Wis. 638, 87 N. W. 875, holding that the court has discretionary power over its calendar. And see Flournoy *v.* Munson Bros. Co., 51 Fla. 198, 41 So. 398, holding that the Florida circuit court rules expressly confer upon the court power to hear and dispose of a demurrer during the term it is filed, in its discretion.

The fixing of a time in vacation for the trial of a cause is within the express powers, conferred by the Indiana statute, upon a judge granting a change of venue. Aurora F. Ins. Co. *v.* Johnson, 46 Ind. 315 [*followed* in Germania Ins. Co. *v.* Johnson, 46 Ind. 331]. In Georgia such a time may be fixed for the hearing of a cause only with the consent of and notice to the parties. Dixon *v.* Hawkins, 100 Ga. 5, 27 S. E. 188.

Proceeding with the trial in defendant's absence is no abuse of discretion, where defendant's counsel have been notified by letter

both under and independently of statute, an action can neither legally be tried nor assigned for trial until issue is joined [82] and the parties are afforded opportunity to prepare their proof.[83] While it is reversible error to compel a party to go to trial, over his objection, at a term during which the action is not legally triable,[84] the time of trial is often fixed by stipulation of parties,[85] and a party is held to waive irregularities relating to the time of trial when he fails to object thereto at the earliest opportunity.[86] In this connection, it seems that a party

of the day set for hearing. Richards *v.* Enlow Cattle Co., 5 Nebr. (Unoff.) 327, 98 N. W. 659.

Trial on holidays or Sundays see HOLIDAYS, 21 Cyc. 444; SUNDAY, 37 Cyc. 588.

82. Smith *v.* Redmond, 141 Iowa 105, 119 N. W. 271; Dougherty *v.* Porter, 18 Kan. 206, holding that St. (1871) c. 116, § 5, directing that actions shall be triable at the first term after issues have been made up ten days, means ten days after issues have actually been made up, and not after they should have been. And see Forwood *v.* Forwood, 67 S. W. 842, 24 Ky. L. Rep. 18, holding that the fact that the answer of an intervener is made a cross petition does not postpone the time of trial, where such cross petition does not change the only issue in the case.

Trial during same term.— Under Nebr. Code Civ. Proc. § 281*a*, an action may be tried at the same term at which issues have been joined. Osgood *v.* Grant, 44 Nebr. 350, 62 N. W. 894. In West Virginia, on the other hand, no case not matured and ready for trial before the commencement of a term can be tried at such term. Higginbotham *v.* Haselden, 3 W. Va. 266. The Kansas statutes have been construed to mean that an issue at law is triable at any time, but that an issue of fact is not triable at the term of court at which it is joined, over the objection of a party to the action, unless such issue of fact is joined by permission of the court upon the overruling of a demurrer adjudged to be frivolous. Eureka *v.* Ross, 64 Kan. 372, 67 Pac. 849 [*following* Gapen *v.* Stephenson, 18 Kan. 140].

83. Gray *v.* Alderson, (Ky. 1900) 123 S. W. 317; Palm *v.* Howard, 102 S. W. 267, 1199, 31 Ky. L. Rep. 316, 814. And see Finlen *v.* Heinze, 32 Mont. 354, 80 Pac. 918.

Delay of one term.— Under the practice of some jurisdictions, the parties are entitled to a term, after the pleadings and issues have been made up, to prepare for trial, and a cause is not triable, except by consent, until after such term has elapsed. Elliot *v.* Solzkotter, 4 Sneed (Tenn.) 581; Boyer *v.* Roberts, 3 Fed. Cas. No. 1,754, 1 Cranch C. C. 73.

The filing of amended pleadings, however, does not change or postpone the time of trial (Wells *v.* Wells, 118 Ga. 812, 45 S. E. 669; Swope *v.* Burnham, 6 Okla. 736, 52 Pac. 924), and it is not reversible error to proceed immediately thereafter with the trial (Taylor *v.* Hosick, 13 Kan. 518; Burkholder *v.* Farmers' Bank, 67 S. W. 832, 23 Ky. L. Rep. 2449), especially where the adverse party does not ask for a continuance (Quigley *v.* Beam, 137 Ky. 325, 125 S. W. 727). The filing of a petition for equitable relief, as ancillary to a statutory garnishment proceeding, is nothing more in effect than an amendment of the original cause of action and does not necessarily postpone the trial of the case. Gunn *v.* Gunn, 103 Ga. 607, 30 S. E. 541.

The distance of the subject-matter from the place of trial is only one of the elements to be considered in determining whether the parties are afforded ample opportunity for preparation, and is not of itself conclusive that sufficient opportunity has not been afforded. Chelan County *v.* Navarre, 38 Wash. 684, 80 Pac. 845.

Want of preparation as ground for continuance see CONTINUANCES IN CIVIL CASES, 9 Cyc. 87.

84. Harris *v.* Anthony Salt Co., 57 Kan. 24, 45 Pac. 58; Gapen *v.* Stephenson, 18 Kan. 140; Sanger *v.* Wise County Coal Co., 40 Tex. Civ. App. 610, 90 S. W. 518.

85. Schultz *v.* McLean, 109 Cal. 437, 42 Pac. 557; Baldwin *v.* Tillson, 1 How. Pr. (N. Y.) 173, 1 Den. 621; Jones *v.* Kimbro, 6 Humphr. (Tenn.) 319. And see Jacobs *v.* Hooker, 1 Barb. (N. Y.) 71; Ross *v.* Vaughan, 3 Johns. (N. Y.) 442.

86. Rummel *v.* Dealy, 112 Iowa 503, 84 N. W. 526; Harmon *v.* Thompson, 119 Ky. 528, 84 S. W. 569, 27 Ky. L. Rep. 181 (holding that a delay of several years in bringing a case to trial cannot affect the right of plaintiff to recover what is due him, where defendant failed to insist on an earlier trial); Bean *v.* Everett, 56 S. W. 403, 21 Ky. L. Rep. 1790; State *v.* Barnett, 111 Mo. App. 552, 86 S. W. 460; Den *v.* Bacon, 8 N. J. L. 84 (holding that where a party neglects to take advantage of the first failure of his adversary to proceed to trial within the time prescribed, he cannot avail himself of a subsequent failure without having previously obtained a rule *nisi*, giving his adversary such time to go to trial as the court shall direct). And see Huffman *v.* Hardeman, (Tex. 1886) 1 S. W. 575, holding that a party waives his right to have dilatory pleas passed upon at the first term of court by failing to bring them to the attention of the court during such term.

Waiver by other party.— Where defendants, by answering, waive their right to have the cause passed over to another term, plaintiff cannot complain because the cause was not so continued. Lang *v.* Henke, 22 Tex. Civ. App. 490, 55 S. W. 374.

Waiver of right to continuance by proceeding to trial without asking for one see CONTINUANCES IN CIVIL CASES, 9 Cyc. 156.

in default as to the time of filing his pleadings cannot complain that the trial is had before the time he desires.[87]

C. Order of Calling and Hearing Causes — 1. In General. A cause cannot be heard, in opposition to the wishes of either party, before it stands regularly for hearing,[88] and causes should ordinarily be tried in the order in which they are entered on the trial docket.[89] But the court has power and discretion to take up a case out of the regular order,[90] for good cause,[91] provided the parties are not prejudiced thereby,[92] and a cause may properly thus be taken up to prevent a continuance by reason of anticipated absence of leading counsel.[93] After a cause is once regularly set for hearing, it may be reset without regard for priority,[94] and

87. Neitzel *v.* Hunter, 19 Kan. 221; Bohannon *v.* Ellison, 9 Ky. L. Rep. 616; Cincinnati Southern R. Co. *v.* Hogan, 7 Ky. L. Rep. 820.

88. Blair *v.* Manson, 9 Ind. 357; Mattingly *v.* Bosley, 2 Metc. (Ky.) 443; Fall *v.* Sinking Fund Com'rs, 3 Sm. & M. (Miss.) 127; Kirkland *v.* Sullivan, 43 Tex. 233.

Trial of part of case.—A court cannot try part of a case before it is called in its turn and leave the remainder untried. Gerber *v.* Marzoni, 3 Rob. (La.) 370.

Assignment for hearing.—A rule providing that the court may on the first day of the term make an assignment of the trial causes, which shall fix the day of the term on which each case shall be tried, does not require the court to make assignments. Slocum *v.* Brown, 105 Iowa 209, 74 N. W. 936.

89. Osgood *v.* Grant, 44 Nebr. 350, 62 N. W. 894.

Harmless error.— Under Rev. St. (1895) art. 1287, providing that suits shall be called for trial in the order in which they stand on the docket unless otherwise ordered by the court, it not being shown that defendant has any meritorious defense, a judgment rendered for plaintiff will not be reversed because the suit was called for trial out of its regular order. Bartlett *v.* S. M. Jones Co., (Tex. Civ. App. 1907) 103 S. W. 705.

90. Bonney *v.* McClelland, 138 Ill. App. 449 [*affirmed* in 235 Ill. 259, 85 N. E. 242]; Fergus *v.* Miln, 128 Ill. App. 434; Ramseyer *v.* Heissler, etc., Co., 60 Ill. App. 317; French *v.* Howard, 14 Ind. 455; Cooley *v.* Seymour, 9 La. 274.

Application of rule.— About ten months after beginning a suit, and almost five months after suing out an attachment and levying on property of a defendant, plaintiff, on demand of defendants on a notice of almost a month, was compelled to go to trial. Defendants admitted in open court that all of the witnesses whose attendance plaintiff said on a motion for a continuance was necessary and desirable at the trial would testify, as plaintiffs in their affidavit had claimed. It was held that there was no abuse of discretion in advancing the cause for trial. Fergus *v.* Miln, 128 Ill. App. 434. So it has been held not erroneous to advance a cause for trial out of its regular place on the calendar, where no showing was made against the motion to advance it, and where it had been pending nearly nine years, and there had been two previous trials. O. S. Richardson Fueling Co. *v.* Seymour, 235 Ill. 319, 85 N. E. 496.

The power may be exercised with the consent of all counsel interested in cases on the docket (Hines *v.* Brunswick, etc., R. Co., 51 Ga. 218); or where it appears from the record that there is no defense (Matthews *v.* Bates, 93 Ga. 317, 20 S. E. 320; Duggar *v.* Lackey, 85 Ga. 631, 11 S. E. 1025).

Consolidated actions.— The order in which consolidated actions shall be tried is in the discretion of the trial court, and its ruling is not reviewable. Jones *v.* Jones, 94 N. C. 111.

Moving papers.—An affidavit of facts showing that the defense is made in good faith so as to entitle the cause to hearing on the regular call of the docket must not only show good faith but a good defense as well. Titsworth *v.* Hyde, 54 Ill. 386.

A call of the docket for the purpose of continuing all cases except such as are undefended is a regular call of the docket as to an undefended case. Collins *v.* Gauche, 23 Ark. 646.

Notice to parties of advancement of cause. — The court having power under Pr. Act, § 16 (Hurd Rev. St. (1905) c. 110, § 17), to advance a cause on the docket for trial, plaintiff is presumed to know that it might make such an order, and both parties are bound to take notice of the action of the court, and special notice is not required in the absence of statute or rule of court requiring it. Bonney *v.* McClelland, 235 Ill. 259, 85 N. E. 242 [*affirming* 138 Ill. App. 449].

Review of discretion.— The discretion of the court in advancing a cause will not be interfered with except in cases where it has been manifestly abused. O. S. Richardson Fueling Co. *v.* Seymour, 235 Ill. 319, 85 N. E. 496; Bonney *v.* McClelland, 235 Ill. 259, 85 N. E. 242 [*affirming* 138 Ill. App. 449]; Fergus *v.* Miln, 128 Ill. App. 434.

91. O. S. Richardson Fueling Co. *v.* Seymour, 235 Ill. 319, 85 N. E. 496, holding that what constitutes good cause is determinable by the condition of the docket, the despatch of business, saving of time, and expense to litigants, etc.

92. Mann *v.* Howe, 9 Iowa 546; Missouri Pac. R. Co. *v.* Shuford, 72 Tex. 165, 10 S. W. 408.

93. White *v.* Haslett, 49 Ga. 280.

94. Pennsylvania Coal Co. *v.* Kelly, 156 Ill. 9, 40 N. E. 938 [*affirming* 54 Ill. App.

upon a day upon which a cause has been properly set for trial,[95] or thereafter,[96] and the court may pass over intervening cases and try the case. Where the statute requires cases to be called in their order, the court thus calling them may set cases ready for trial on a day thereafter.[97] A statute providing that the court may for good and sufficient reason order a cause heard out of the regular order confers on the court a wide discretion,[98] and what is a good and sufficient reason is for the trial court to determine, which determination will not be reviewed unless the trial court has grossly abused its discretion.[99] But such statute does not confer power upon the court by rule to permit cases generally to be taken up and disposed of out of the regular order.[1] In the absence of acts amounting to a waiver of error, where a case has been improperly called a judgment rendered therein should be set aside.[2] But error in advancing a cause on the docket,[3] and trying it out of its order,[4] is waived by consenting to go to trial.

2. The Short Cause Calendar — a. In Illinois. The Illinois statutes provide a short cause calendar, on which cases, for the trial of which not more than one hour is required, may be placed upon ten days' notice to the opposite party and upon filing an affidavit that the cause will not occupy more than one hour's time.[5] Unless the affidavit is filed, it is error to place the cause upon such calendar.[6] Personal service of the notice on defendant, his agent or attorney is required.[7] Where the last day of the notice falls on a Sunday, defendant will be entitled to no further time.[8] It is not necessary to serve a copy of the affidavit, and if the same is served a mistake therein is not ground for complaint, unless someone has been injured thereby.[9] If, upon receiving the notice, the adverse party has any

622]; Tifft *v.* Verden, 11 Sm. & M. (Miss.) 153.

95. Curran *v.* Belding Mfg. Co., 59 Ill. App. 76; Blanchard *v.* Hunt, 18 Mo. App. 284; Ellis *v.* Mabry, 25 Tex. Civ. App. 164, 60 S. W. 571; Juch *v.* Hanna, 11 Wash. 676, 40 Pac. 341.

96. Woomack *v.* Bookman, 34 Ala. 38, upon the refusal of defendant to state his defense.

97. Seifert *v.* Holt, 82 Ga. 757, 9 S. E. 843.

Order setting cause for trial.— A continuance on the trial day of a cause to a day certain, on the application for a continuance within the term, was equivalent to a further order setting the cause for trial on such day. Cochrane *v.* Parker, 12 Colo. App. 169, 54 Pac. 1027.

98. Staunton Coal Co. *v.* Menk, 197 Ill. 369, 64 N. E. 278 [*affirming* 99 Ill. App. 254], even in the absence of counsel.

99. Crosby *v.* Kiest, 135 Ill. 458, 26 N. E. 589 [*affirming* 36 Ill. App. 425]; Smith *v.* St. Louis Third Nat. Bank, 79 Ill. 118.

1. Clapp *v.* Rauch, 90 Ill. 468; Benson *v.* Johnson, 90 Ill. 94; Griswold *v.* Shaw, 79 Ill. 449.

2. King *v.* Meyer, 97 Ga. 379, 24 S. E. 32.

3. Courtney *v.* Hogan, 93 Ill. 101; Munson *v.* Adams, 89 Ill. 450.

4. Union Surety, etc., Co. *v.* Tenney, 200 Ill. 349, 65 N. E. 688 [*affirming* 102 Ill. App. 95]; Anderson *v.* McCormick, 129 Ill. 308, 21 N. E. 803.

5. Kaestner *v.* Farmers', etc., State Bank, 112 Ill. App. 158; Donnerstag *v.* Loewenthal, 77 Ill. App. 159; Oliver *v.* Gerstle, 58 Ill. App. 615.

Sufficiency of affidavit see Angus *v.* Orr, etc., Hardware Co., 64 Ill. App. 378.

Filing.— The original affidavit must be filed, a copy will not suffice. Casey *v.* Jordan, 94 Ill. App. 405; Parsley *v.* Halloran, 87 Ill. App. 581. As to facts sufficient to show that an affidavit filed was the original affidavit see McDonald *v.* People, 222 Ill. 325, 78 N. E. 609 [*affirming* 123 Ill. App. 346].

Reinstated cause.— A cause reinstated "on the several dockets of the court" by an order made on a stipulation that a former order dismissing the cause and entering judgment for defendants should be vacated and the cause reinstated on the general calendar may be placed on the short cause calendar upon compliance with the statutory provisions. Eggleston *v.* Royal Trust Company, 205 Ill. 170, 68 N. E. 709.

Presumption as to time of placing on calendar.— Where it does not appear when a cause made its first appearance on a short cause calendar, the fact that it was not called for trial for more than a month after the service of notice raises a presumption that the clerk did not put the case on the calendar till after the lapse of ten days from the service of the notice. Hansen *v.* Hale, 44 Ill. App. 474.

6. Donnerstag *v.* Lowenthal, 77 Ill. App. 159.

7. Genius *v.* Rayfield, 121 Ill. App. 549; O'Brien *v.* Lynch, 90 Ill. App. 26.

Insufficient service.— Service upon an attorney who appeared on behalf of the party in an inferior court is not sufficient, where it is affirmatively shown that such party had no attorney in the case after it was appealed to the court above, and none had appeared for him. Brinton *v.* Lafond, 80 Ill. App. 227. Service by registered letter is insufficient. Genius *v.* Rayfield, 121 Ill. App. 549.

8. Pettit *v.* Hall, 80 Ill. App. 376.

9. Stockham *v.* Simmons, 67 Ill. App. 83.

objection to the suit going upon such calendar, he must appear and make his objection known.[10] An objection to the notice, or to any irregularity in its service, comes too late when the case is reached for trial.[11] The cause must be at issue before it is noticed for trial on the short cause calendar,[12] otherwise it should be stricken from the calendar;[13] but a motion to strike a cause from the short cause calendar must be made in apt time[14] and based on sufficient grounds,[15] otherwise any grounds of objection for trying the case on the short cause calendar are waived.[16] A suit stricken from a short cause calendar because of an arrangement for a settlement may be properly restored to the short cause calendar in case of failure of the settlement.[17] The beneficial plaintiff being entitled to control the action may have the cause stricken from the short cause calendar when placed there by the nominal plaintiff without his consent.[18] Much discretion is reposed in the trial judge as to what he will do in respect to allowing causes to remain upon, be tried on, or be stricken off the short cause calendar;[19] and it is within his discretion to keep on with the trial of a cause on such calendar after more than one hour has been consumed in its trial,[20] even though the trial occupy half a day.[21] Monday of each week is by rule of court set apart for trial of causes on the short cause calendar, but this does not prevent the court from continuing the hearing of such cases from day to day if necessary in order to clear the docket.[22] The calendar is personal to each judge, and a continuance takes the case from the calendar.[23] A consent to the trial of a cause when reached on such calendar is a waiver of any error in overruling a motion previously made to strike the case

10. Oliver *v.* Gerstle, 58 Ill. App. 615.

As to what is a sufficient notice see Highley *v.* Metzger, 186 Ill. 253, 57 N. E. 811 [*affirming* 86 Ill. App. 573].

11. Kaestner *v.* Farmers', etc., State Bank, 112 Ill. App. 158; Belinski *v.* Brand, 76 Ill. App. 464; Stewart *v.* Carbray, 59 Ill. App. 397.

12. McRae *v.* Houdeshell, 88 Ill. App. 428; Condon *v.* Cohn, 88 Ill. App. 333.

As to when a cause will be considered at issue see McDonald *v.* People, 222 Ill. 325, 78 N. E. 609 [*affirming* 123 Ill. App. 346].

13. McRae *v.* Houdeshell, 88 Ill. App. 428; Dyniewicz *v.* Benziger, 87 Ill. App. 590.

Application of rule.— Where a rule of court provided that no cause should be noticed for trial on the short cause calendar until the same was at issue, and defendant was not summoned and required to appear until the November term of the court, which began the 21st of that month, and on the 15th day of November affidavit was filed by defendant's counsel for the purpose of placing the case on the short cause calendar, and on the 17th of the month notice was served on defendant's counsel, whereupon the latter moved, November 25th, to strike the case from the short cause calendar; the motion should have been granted, since the case was not at issue as to defendant before the expiration of the time within which he was required to appear. McRae *v.* Houdeshell, 88 Ill. App. 428.

14. McDonald *v.* People, 222 Ill. 325, 78 N. E. 609 [*affirming* 123 Ill. App. 346]; Fortune *v.* Gilbert, 210 Ill. 354, 71 N. E. 442; Winterburn *v.* Parlow, 102 Ill. App. 368; McGuire *v.* Gilbert, 99 Ill. App. 517; Malcolm *v.* Shanklin, 70 Ill. App. 367.

The motion comes too late when made two and one-half months after notice to place it on the short cause calendar has been given (Freund *v.* Huylers, 102 Ill. App. 486); and when the case is called for trial (Pierpont *v.* Johnson, 104 Ill. App. 27; Freund *v.* Huylers, *supra*).

15. Lindgren-Mahan Chemical Fire Engine Co. *v.* Senger, 69 Ill. App. 40, holding that a motion to strike a cause from a short cause calendar is properly denied when based merely on the fact that the attorney on receiving notice that the affidavit had been filed did not find it where it should have been and found no registry of such affidavit, it not appearing whether he had made any inquiry for the affidavit, or whether the affidavit was on file or not.

16. Haines *v.* Thompson, 129 Ill. App. 436; Christie *v.* Walker, 126 Ill. App. 424 [*overruling* O'Brien *v.* Lynch, 90 Ill. App. 29].

17. Angus *v.* Chicago Trust, etc., Bank, 170 Ill. 298, 48 N. E. 946 [*affirming* 68 Ill. App. 425].

18. Weckler Brick Co. *v.* McLean, 124 Ill. App. 309.

19. Walsh *v.* Hettinger, 58 Ill. App. 619.

20. Strickland Wine Co. *v.* Hayes, 94 Ill. App. 476; Griesheimer *v.* Meyers, 89 Ill. App. 665; Thom *v.* Hess, 51 Ill. App. 274. And see Haines *v.* Thompson, 129 Ill. App. 436, holding that the fact that a cause tried upon the short cause calendar is commenced upon one day and continued and completed upon the next is not ground for reversal, although the continuance was ordered after it was found that the trial would consume more than the hour contemplated by the statute.

21. Evans *v.* Marden, 154 Ill. 443, 40 N. E. 446 [*affirming* 54 Ill. App. 291].

22. Armstrong *v.* Crilly, 152 Ill. 646, 38 N. E. 396 [*affirming* 51 Ill. App. 504]; Dickinson *v.* Bull, 72 Ill. App. 75.

23. Gudgeon *v.* Casey, 62 Ill. App. 599.

from such calendar.[24] Where a cause has been placed on the short cause calendar, it cannot again properly appear on the regular trial calendar until placed there by order based on notice to the opposite party, or his counsel; and this is true notwithstanding the cause has been stricken from the short cause calendar "without prejudice." [25]

b. In New York. In New York the power of a trial court to order an action to be taken from its regular place on the calendar, and placed on a short cause calendar for speedy trial, if justice so requires, is recognized,[26] the statutory provisions for preferring causes on the calendar not being exclusive; [27] but the fact that a case is entitled to a preference thereunder does not determine its right to a place on the short cause calendar.[28] An order which places a cause on the special calendar of short causes for trial must be served on the opposite party before the action can be brought to trial under it. If such service is omitted, and an inquest taken under the order, the inquest will be set aside on motion.[29] One day's notice of such order is sufficient.[30] A motion to transfer a case to such calendar will be denied, where the moving affidavit admits that it will be necessary to examine several witnesses on the part of the moving party, and the affidavit of the opposite party states that he will be obliged to examine at least six witnesses.[31] Where the record of the cause will determine the issue, it is error to refuse to place such cause on such calendar.[32] It is no abuse of discretion to set for trial on the short cause calendar on defendant's motion, an action for breach of contract of employment, because it would cut off plaintiff from obtaining the damages he might have obtained, had the trial of the case been delayed until it could have been tried on the regular calendar.[33] An order placing a cause on the short cause calendar should not be granted a party where he has failed to pay motion costs awarded to his opponent by a prior general term of court.[34]

3. Preferred Causes — a. In General. A trial court may, in its discretion, for good and sufficient cause, direct that a case be advanced and tried out of the regular order on the docket.[35] It is sufficient reason for preferring a case that the property in dispute is held in the interest of a municipal corporation, and that

24. Wheatley *v.* Chicago Trust, etc., Bank, 167 Ill. 480, 47 N. E. 711.

25. Black *v.* Exley, 121 Ill. App. 254.

26. McHugh *v.* Astrophe, 2 Misc. (N. Y.) 478, 22 N. Y. Suppl. 79 [*reversing* 1 Misc. 218, 20 N. Y. Suppl. 877, 878].

Time necessary for trial.— An order placing a cause on a short cause calendar is erroneous, where the trial court found there was reasonable doubt whether it could be tried in two hours. Uvalde Asphalt Paving Co. *v.* Dunn, 77 N. Y. App. Div. 467, 79 N. Y. Suppl. 328. Where the trial will necessarily consume over two hours the court should in the exercise of its discretion send the case to the foot of the general calendar. Guaranty Trust Co. *v.* Griffiths, 81 N. Y. App. Div. 631, 80 N. Y. Suppl. 679.

27. Weiss *v.* Morrell, 7 Misc. (N. Y.) 539, 28 N. Y. Suppl. 59, 23 N. Y. Civ. Proc. 352.

28. Porath *v.* O'Shaughnessy, 23 Misc. (N. Y.) 252, 51 N. Y. Suppl. 169, holding that the right to preference is waived where the notice of trial is not accompanied with the notice of motion, for preference. And see Fox *v.* Quinn, 12 N. Y. Suppl. 725; Manhattan Co. *v.* Dunn, 13 N. Y. Civ. Proc. 166.

An action against a corporation on a note, the trial of which is not likely to occupy more than an hour, cannot be placed on the short cause calendar in part 4, under rule 14 of the city court of New York, where plaintiff's only claim for preference has been based on the provisions of the code authorizing a preference in an action against a corporation and founded on a note. Marsh *v.* Standard Structural Co., 35 Misc. (N. Y.) 381, 71 N. Y. Suppl. 1025.

29. Johnston *v.* Green, 3 Abb. Pr. N. S. (N. Y.) 342.

30. Henry Huber Co. *v.* Soles, 12 Misc. (N. Y.) 548, 34 N. Y. Suppl. 17.

31. Guerineau *v.* Weil, 8 Misc. (N. Y.) 94, 28 N. Y. Suppl. 775.

32. Kellogg *v.* Gage, 48 N. Y. App. Div. 623, 62 N. Y. Suppl. 818.

33. Jaffe *v.* Mindlin, 110 N. Y. Suppl. 978.

34. McHugh *v.* Astrophe, 2 Misc. (N. Y.) 478, 22 N. Y. Suppl. 79.

35. *In re* Wincox, 186 Ill. 445, 57 N. E. 1073 [*affirming* 85 Ill. App. 613]; Merchants' Nat. Bank *v.* Glendon Co., 120 Mass. 97; Hutchinson *v.* Stevens, 1 Jur. 524, 1 Keen 659, 15 Eng. Ch. 659, 48 Eng. Reprint 461, 6 L. J. Ch. 296, 2 Myl. & C. 452, 14 Eng. Ch. 452, 40 Eng. Reprint 712, in any case ripe for a hearing.

Injunction suits.—An appeal from an order overruling a demurrer will generally be advanced if the right to an injunction is involved. London, etc., R. Co. *v.* Imperial Mercantile Credit Assoc., L. R. 3 Ch. 231.

the public interests require an early termination of the controversy,[36] or that the cause is one of importance,[37] or that the parties thereto are numerous,[38] or for the purpose of taking the bill *pro confesso*,[39] or for the convenience of a public witness.[40] *Qui tam* and popular actions are not entitled to that preference over other actions on the docket which is extended to criminal prosecutions.[41]

b. Under Statutes — (I) *LOUISIANA, MARYLAND, AND MASSACHUSETTS.* Under the Louisiana statutes suits relating to taxes or licenses are preference suits,[42] as are also suits involving alleged intrusion into office.[43] In Maryland an action on a contract of insurance is a proper cause of action to be brought under a statute authorizing actions on contracts, express or implied, to stand for trial on the first day of the term.[44] And the Massachusetts statutes provide for the advancing of a cause upon the filing of an affidavit of no defense.[45]

(II) *NEW YORK.* The New York statutes provide that certain cases are entitled to preference on the calendar,[46] under certain conditions enumerated.[47] The statute provides for preference in cases of slander,[48] or libel, although falsity and malice are not pleaded;[49] in cases in which the city of New York is a party;[50] in actions for absolute divorce in which an order has been made granting temporary alimony;[51] in actions in which an executor or administrator is the sole party plaintiff or defendant,[52] in which event either party may move for a prefer-

36. Morrison *v.* Hedenberg, 138 Ill. 22, 27 N. E. 460; Clyde Coal Co. *v.* Pittsburgh, etc., R. Co., 13 Pa. Dist. 415; Jennings *v.* Lehigh Valley R. Co., 3 Lack. Leg. N. (Pa.) 104.

37. Wood *v.* Wood, 19 Wkly. Rep. 972.

38. Eyre *v.* Marsden, 7 L. J. Ch. 194.

39. Barwick *v.* Ward, 4 L. J. Ch. 58, 5 Sim. 676, 9 Eng. Ch. 676, 58 Eng. Reprint 494; Hart *v.* Ashton, 1 Madd. 175, 56 Eng. Reprint 66.

40. Swift *v.* Grace, 9 Price 146.

41. Anonymous, 2 Cai. (N. Y.) 246, Col. & C. Cas. 399; *In re* Atty.-Gen., Mart. & Y. (Tenn.) 285.

42. Morgan's Louisiana, etc., R., etc., Co. *v.* Pecot, 50 La. Ann. 737, 23 So. 948.

43. State *v.* Reid, 120 La. 200, 45 So. 103.

44. Continental Ins. Co. *v.* Reynolds, 107 Md. 96, 68 Atl. 277.

45. Merchants' Nat. Bank *v.* Glendon Co., 120 Mass. 97.

46. Code Civ. Proc. § 791.

Jurisdictional amount as affecting right.— The statutory preference will not be denied because the action is for an amount within the jurisdiction of the municipal court. Jackson *v.* Jackson, 44 Misc. (N. Y.) 44, 89 N. Y. Suppl. 715.

47. Veinstok *v.* Veinstok, 63 N. Y. App. Div. 16, 71 N. Y. Suppl. 195; Code Civ. Proc. § 791 *et seq.*

In the first judicial district, an application for a preference under the code, and rule 3 of the special rules for the regulation of trial terms, must be made at part 2 of the trial term. But if the application be made and granted at special term, it should not be vacated by trial term, part 2, on motion, but the proper remedy is by appeal. Haskin *v.* Murray, 29 N. Y. App. Div. 376, 51 N. Y. Suppl. 545.

Several motions to advance cause.—Where a motion to advance is made on the ground that a case is a short cause, and has been submitted, another motion to the same effect and on the same grounds cannot be granted while the first motion is pending, although the party in his second notice gave notice that the first motion was withdrawn. McCaffrey *v.* Butler, 87 N. Y. App. Div. 535, 84 N. Y. Suppl. 776.

48. Blumenthal *v.* Schweinburg, 51 N. Y. App. Div. 378, 64 N. Y. Suppl. 605.

49. Morrison *v.* Smith, 37 Misc. (N. Y.) 32, 74 N. Y. Suppl. 743.

50. New York *v.* Shack, 81 N. Y. App. Div. 575, 81 N. Y. Suppl. 392. In an action to which the city of New York is a party, where notice has been given at the time of service of notice of trial, of a particular day in the term in which the city would move the cause for trial, the city is entitled to have the case tried at the term for which it has been noticed, without regard to the position of the case on the calendar. Sheerin *v.* New York, 74 N. Y. App. Div. 308, 77 N. Y. Suppl. 511.

Action against police commissioner.— Code Civ. Proc. § 791, subd. 2, giving preference to an action in which the city of New York or a board of officers exercising statutory powers for the prevention or punishment of statutory violations, etc., enacted while the head of the police department of New York city consisted of a board of officers, gives preference to an action against the police commissioner who is, under Laws (1901), p. 1, c. 466, the head of the police department, with powers and duties of the board constituting the head of the department under prior laws. National Athletic Club of America *v.* Bingham, 63 Misc. (N. Y.) 62, 115 N. Y. Suppl. 1103.

51. An action for separation, although including an order for alimony, is not within the rule. Seligman *v.* Seligman, 52 Misc. (N. Y.) 9, 100 N. Y. Suppl. 770.

52. Rudolph *v.* Third Ave. R. Co., 54 N. Y. App. Div. 194, 66 N. Y. Suppl. 603; Jackson

ence;[53] in actions by or against a sheriff in his representative capacity;[54] in actions in which an infant is the sole plaintiff;[55] in actions in which an attachment has been issued under which property of defendant is held;[56] in actions in which the sole party plaintiff or defendant is the committee of a lunatic;[57] in an action against a corporation founded upon a note, or other evidence of debt, for the absolute payment of money;[58] and in a class of cases consisting of those to which a preference is given by a special order of court in a particular case, which, however, does not authorize the court in its discretion to give preference to a case simply because it would be advantageous to one or more of the parties to have it promptly tried.[59] The statute does not give preference to a cause begun by a receiver in bankruptcy,[60] or by a receiver in supplementary proceedings.[61] A party desiring a preference must serve on the opposite party, with his notice of trial,[62] or thereafter, and within the time limited by the statute,[63] a notice that an application will be made to the court at the opening thereof for leave to move the same as a preferred cause, otherwise his right to a preference is lost.[64] It is

v. Jackson, 44 Misc. (N. Y.) 44, 89 N. Y. Suppl. 715.

Application of rule.—Where plaintiff, an executor, claimed a fund held by the sole defendant and that defendant interpleaded and made defendant another claimant to the fund, plaintiff was entitled to a preference. Vandewater *v.* Mutual Reserve Fund L. Ins. Co., 44 Misc. (N. Y.) 316, 89 N. Y. Suppl. 845.

Where the same party is joined as a party in his individual capacity as well as in the prescribed capacity the statute does not apply. Ahern *v.* Ahern, 29 Misc. (N. Y.) 421, 61 N. Y. Suppl. 931. *Contra,* Specht *v.* Helfer, 112 N. Y. Suppl. 457.

53. Siefermann *v.* Wolfrath, 24 Misc. (N. Y.) 406, 53 N. Y. Suppl. 263, 28 N. Y. Civ. Proc. 55; Specht *v.* Helfer, 112 N. Y. Suppl. 457.

54. Walker *v.* Tamsen, 18 Misc. (N. Y.) 734, 43 N. Y. Suppl. 507.

55. Lesser *v.* Dry Dock, etc., R. Co., 33 Misc. (N. Y.) 388, 67 N. Y. Suppl. 587, 8 N. Y. Annot Cas. 483.

56. Eckhard *v.* Jones, 45 N. Y. App. Div. 562, 61 N. Y. Suppl. 257.

57. Hardy *v.* Knickerbocker Trust Co., 23 Misc. (N. Y.) 503, 52 N. Y. Suppl. 616.

58. Polhemus *v.* Fitchburgh R. Co., 113 N. Y. 617, 20 N. E. 601.

Particular actions to which rules extend.—An action on an insurance policy, brought after the death of the assured and expiration of the time therein given within which to pay it, is such action. Studwell *v.* Charter Oak Ins. Co., 19 Hun (N. Y.) 127. So is an action by a foreign corporation on a foreign bill of exchange accepted by defendant corporation in the city of New York. Martin's Bank *v.* Amazonas Co., 98 N. Y. App. Div. 146, 90 N. Y. Suppl. 734. But an action against a consolidated road on coupons issued before the consolidation by one of the component roads is not. Polhemus *v.* Fitchburgh R. Co., 113 N. Y. 617, 20 N. E. 601.

Effect of right on right to other preferences.— One entitled to a preference because his suit is against a corporation on a note is not thereby precluded from having the cause afterward advanced under city court rule 2, of New York, authorizing the advancement of causes triable in two hours. Ferraca *v.* Aaron Miller Realty Co., 54 Misc. (N. Y.) 84, 104 N. Y. Suppl. 496.

59. Haskin *v.* Murray, 29 N. Y. App. Div. 370, 51 N. Y. Suppl. 542.

60. Hough *v.* Canfield, 54 N. Y. App. Div. 510, 66 N. Y. Suppl. 961.

61. Daly *v.* Wood, 29 Misc. (N. Y.) 105, 60 N. Y. Suppl. 194.

62. Meyerson *v.* Levy, 117 N. Y. App. Div. 475, 102 N. Y. Suppl. 704; Haskin *v.* Murray, 29 N. Y. App. Div. 370, 51 N. Y. Suppl. 542; Cohen *v.* Thomas, 63 Misc. (N. Y.) 378, 116 N. Y. Suppl. 725; Koerner *v.* Kelley, 56 Misc. (N. Y.) 605, 107 N. Y. Suppl. 538; Hardy *v.* Knickerbocker Trust Co., 23 Misc. (N. Y.) 503, 52 N. Y. Suppl. 616; Porath *v.* O'Shaughnessy, 23 Misc. (N. Y.) 252, 51 N. Y. Suppl. 169. But see Thompson *v.* Post, 125 N. Y. App. Div. 397, 109 N. Y. Suppl. 724, holding that where plaintiff was otherwise entitled to a preference, her right was not lost because her notice of motion therefor was not served with the notice of trial.

Necessity for notice of trial.— The cause cannot be preferred where no notice of trial has been served. Ritchie *v.* Seaboard Nat. Bank, 12 Misc. (N. Y.) 146, 32 N. Y. Suppl. 1073; Dart *v.* Soloman, 5 N. Y. St. 911.

Motions for preference addressed to discretion of court.— The provisions of the code requiring notice of motion for preference to be served with the notice of trial do not apply to motions for preference addressed to the discretion of the court, under rule 10 of the special term rules, providing that in actions to foreclose mortgages either party may on two days' notice move to have the case placed on the preferred calendar. Germania L. Ins. Co. *v.* Powell, 29 Misc. (N. Y.) 424, 61 N. Y. Suppl. 942.

63. Rudolph *v.* Third Ave. R. Co., 54 N. Y. App. Div. 194, 66 N. Y. Suppl. 603; Gilbert *v.* Finch, 46 N. Y. App. Div. 75, 61 N. Y. Suppl. 300.

The unnecessary service of a new notice of trial does not revive the right to a preference after it has been waived. Fox *v.* Quinn, 12 N. Y. Suppl. 725.

64. Williamson *v.* Standard Structural Co.,

not sufficient that the notice of trial contains an allegation that plaintiff claims a preference and states the ground of such claim.[65] The application to prefer the cause cannot be entertained at chambers, but must be made at the opening of the court;[66] and unless made on the day for which the notice is given, the right to preference is lost.[67] It must be made at the commencement of the term for which the notice of trial is served,[68] although the notice of trial was not followed by a note of issue.[69] Failure to move at the proper time is fatal to the right of preference,[70] and cannot be cured by again noticing the case for trial for a later term and making the motion at the opening thereof.[71] Nor can the right be revived by an amendment of the complaint which does not change the cause of action.[72] The right to a preference is not lost by not applying for it during the time when a stay order and order requiring security for costs are in effect.[73] It is not necessary that a case be on the calendar when the notice of trial and application for preference are served,[74] nor that plaintiff notice his cause for the first term after issue,[75] the only condition prescribed being that the notice of application should be served with notice of trial, and that the application should be made at the term at which it is noticed.[76] Where the right to give a cause a preference on the trial calendar does not appear from the pleadings, the order giving the preference should be obtained before notice of trial, and served either before or with the notice, otherwise the right to preference is waived.[77] An application

48 N. Y. App. Div. 186, 62 N. Y. Suppl. 815; Eckhard *v.* Jones, 45 N. Y. App. Div. 562, 61 N. Y. Suppl. 257.

Effect of amending complaint.—A right to a preference on the calendar, lost through failure to serve notice of motion therefor at the time of serving the notice of trial, is not regained by amending the complaint, and thereby making the service of a new notice of trial and the filing of a new note of issue necessary. Ziegler *v.* Trenkman, 26 Misc. (N. Y.) 432, 57 N. Y. Suppl. 576.

65. Hardy *v.* Knickerbocker Trust Co., 23 Misc. (N. Y.) 503, 52 N. Y. Suppl. 616; Porath *v.* O'Shaughnessy, 23 Misc. (N. Y.) 252, 51 N. Y. Suppl. 169. *Contra*, Meislahn *v.* Hanken, 18 N. Y. Suppl. 361.

Effect of special provisions in rules of court. — Code Civ. Proc. § 793, requiring the party desiring a preference to serve a notice of motion therefor with his notice of trial is not complied with by merely including in the notice of trial a statement that a preference is claimed, in spite of special rule 14 of the city court of New York, authorizing a party entitled to preference to have the cause placed on the special calendar for trial, on motion made at special term, since said rule cannot override the provisions of the code. Hamilton *v.* Fourth Estate Company, 56 N. Y. Suppl. 656, 28 N. Y. Civ. Proc. 262.

66. Walker *v.* Tamsen, 43 N. Y. Suppl. 507.

67. Bazuro *v.* Johnson, 71 N. Y. App. Div. 255, 75 N. Y. Suppl. 822.

68. Marks *v.* Murphy, 27 N. Y. App. Div. 160, 50 N. Y. Suppl. 622, 27 N. Y. Civ. Proc. 179.

69. American Exch. Nat. Bank *v.* Yule Mach. Co., 58 N. Y. App. Div. 320, 68 N. Y. Suppl. 1097.

70. Bazuro *v.* Johnson, 71 N. Y. App. Div. 255, 75 N. Y. Suppl. 822.

71. Gegan *v.* Union Trust Co., 120 N. Y. App. Div. 382, 105 N. Y. Suppl. 243; Meyerson *v.* Levy, 117 N. Y. App. Div. 475, 102 N. Y. Suppl. 704; American Exch. Nat. Bank *v.* Yule Mach. Co., 58 N. Y. App. Div. 320, 68 N. Y. Suppl. 1097; Marks *v.* Murphy, 27 N. Y. App. Div. 160, 50 N. Y. Suppl. 622, 27 N. Y. Civ. Proc. 179; Emerick *v.* Metropolitan St. R. Co., 38 Misc. (N. Y.) 45, 76 N. Y. Suppl. 901.

72. Gegan *v.* Union Trust Co., 120 N. Y. App. Div. 382, 105 N. Y. Suppl. 243; Ziegler *v.* Trenkman, 26 Misc. (N. Y.) 432, 57 N. Y. Suppl. 576.

73. Seletsky *v.* Third Ave. R. Co., 44 N. Y. App. Div. 632, 60 N. Y. Suppl. 405.

74. *Contra*, Veinstok *v.* Veinstok, 63 N. Y. App. Div. 16, 71 N. Y. Suppl. 195; Warden *v.* Post Steamboat Co., 39 N. Y. App. Div. 543, 57 N. Y. Suppl. 332.

75. Rhoads *v.* Metropolitan St. R. Co., 50 N. Y. App. Div. 160, 63 N. Y. Suppl. 724; Levy *v.* Hanneman, 47 N. Y. App. Div. 32, 62 N. Y. Suppl. 240; Bailey *v.* Miles, 46 N. Y. App. Div. 607, 61 N. Y. Suppl. 977.

76. Rhoads *v.* Metropolitan St. R. Co., 50 N. Y. App. Div. 160, 63 N. Y. Suppl. 724.

Where there is no unreasonable delay or neglect in noticing a cause for trial and claiming a preference, it is error to deny preference because the cause was not noticed for trial at any particular term after issue, the only penalty imposed on failure so to do being dismissal for failure to prosecute within a reasonable time. Blumenthal *v.* Schweinburg, 51 N. Y. App. Div. 378, 64 N. Y. Suppl. 605.

Motion at subsequent term.—Where a cause has been properly noticed for trial by plaintiff at a certain term and no motion for preference is made by plaintiff at that term, defendant cannot notice for trial for a subsequent term and move for preference. Montgomery *v.* Daniell, 91 N. Y. App. Div. 18, 86 N. Y. Suppl. 344.

77. City Nat. Bank *v.* National Park Bank,

for preference is one addressed to the discretion of the court, and to the end that it should be exercised favorably or unfavorably to the applicant, some facts should be presented to the court other than that the case is one that might be preferred, and it is not sufficient that the pleadings disclose that it is a case which from the nature of the action might be preferred.[78] A preference cannot be granted until all issues of fact are made up.[79] It should not be granted merely because there is no opposition.[80] Causes entitled to preference are entitled to preference over causes on the calendar for the term at which the preference is moved, and not, unless for good cause shown, over issues on preceding calendars awaiting trial;[81] but if the court does prefer the same over issues on preceding calendars, the action of the court will not be interfered with, although seemingly without justification.[82] In case the pleadings are amended after order granting preference, a new notice of trial and note of issue are required.[83] If it appears to the judge that something has occurred since the cause was put on the preferred calendar which renders it

62 How. Pr. (N. Y.) 495; Robertson *v.* Schellhaas, 62 How. Pr. (N. Y.) 489.

The practice in this respect seems to have been changed by a later amendment of the statute see Fox *v.* Quinn, 12 N. Y. Suppl. 725.

Preferences under rules of practice.— Code Civ. Proc. § 793, providing that, where the right to have a cause preferred on a calendar does not appear in the pleadings, the party desiring a preference must procure an order therefor and notice to the adverse party, and that a copy of the order must be served with or before the notice of trial, covers preferences under the rules of practice as well as under the statute. Angle *v.* Kaufman, 4 N. Y. Civ. Proc. 201; Manhattan Co. *v.* Dunn, 13 N. Y. Civ. Proc. 166.

78. Gegan *v.* Union Trust Co., 120 N. Y. App. Div. 382, 105 N. Y. Suppl. 243; Carroll *v.* Pennsylvania Steel Co., 96 N. Y. App. Div. 165, 89 N. Y. Suppl. 199; Morse *v.* Press Pub. Co., 71 N. Y. App. Div. 351, 75 N. Y. Suppl. 976; Ortner *v.* New York City R. Co., 54 Misc. (N. Y.) 83, 104 N. Y. Suppl. 502; Davis *v.* Westervelt, 38 Misc. (N. Y.) 13, 76 N. Y. Suppl. 695; Eising *v.* Young, 38 Misc. (N. Y.) 12, 76 N. Y. Suppl. 698; Peck *v.* Maher, 116 N. Y. Suppl. 574; Gehrt *v.* Deane, 109 N. Y. Suppl. 679. *Contra*, McArthur *v.* Commercial F. Ins. Co., 67 How. Pr. (N. Y.) 510.

Application of rule.— Where an action for the death of an infant was brought by his administrator, the mere fact that the infant was of tender years and was killed while playing in an air shaft into which defendant caused certain material to fall does not entitle plaintiff to a preference under Code Civ. Proc. § 791, subd. 5, authorizing the preference of certain actions by administrators, etc., since for aught that appears the infant's estate may be a very wealthy one and in no immediate need of the judgment prayed for. Gehrt *v.* Deane, 109 N. Y. Suppl. 679.

Suits in representative capacity.— The ground for preference being that the sole plaintiff was an administratrix, the rule is satisfied where the affidavit alleges that plaintiff was absolutely dependent upon her intestate for support. Dooley *v.* Paget, 38 Misc. (N. Y.) 44, 76 N. Y. Suppl. 906. A distinction in this respect is made between the trial term and special term calendars in that on the special term calendar a party is entitled to a preference without any further showing than that the party is an administrator or executor. Jackson *v.* Jackson, 44 Misc. (N. Y.) 44, 89 N. Y. Suppl. 715.

79. New York Contracting, etc., Co. *v.* Hawkes, 41 Misc. (N. Y.) 125, 83 N. Y. Suppl. 919.

Change of date of issue.— Under Code Civ. Proc. § 977, by the provisions of which the time when the last pleading is served determines and fixes the date of issue, and the clerk must place the case on the calendar according to that date, where, after the note of issue is filed, notice of trial served, and claim to a preference made, some of the defendants serve an amended answer, the date of issue is thereby changed; and, the case not being properly on the day calendar after such change, the order for such preference is improper; and this is the case so long as the amended answer remains the pleading of defendants, although it does not change the issue, but merely amplifies the original answer filed. Van Norden Trust Co. *v.* Murphy, 125 N. Y. App. Div. 369, 109 N. Y. Suppl. 725.

80. Ahern *v.* Ahern, 29 Misc. (N. Y.) 421, 61 N. Y. Suppl. 931.

81. Morse *v.* Press Pub. Co., 71 N. Y. App. Div. 351, 75 N. Y. Suppl. 976; Davis *v.* Westervelt, 38 Misc. (N. Y.) 13, 76 N. Y. Suppl. 695; Eising *v.* Young, 38 Misc. (N. Y.) 12, 76 N. Y. Suppl. 698; Schuman *v.* Brooklyn Heights R. Co., 71 N. Y. Suppl. 1095, 32 N. Y. Civ. Proc. 25. Since Laws (1904), p. 312, c. 173, amending Code Civ. Proc. § 793, requiring preferred causes to be set down for a day certain, is unconstitutional, a plaintiff entitled to a preference in the absence of special facts calling for the exercise of the court's judicial discretion should only be allowed preference over non-preferred cases noticed for the same term. Martin's Bank *v.* Amazonas Co., 98 N. Y. App. Div. 146, 90 N. Y. Suppl. 734.

82. Morse *v.* Press Pub. Co., 71 N. Y. App. Div. 351, 75 N. Y. Suppl. 976.

83. Haskin *v.* Murray, 29 N. Y. App. Div. 370, 51 N. Y. Suppl. 542.

unjust to compel either party to go to trial, he has power to give such direction regarding the case as circumstances require.[84]

(III) *South Carolina.* The South Carolina statutes provide for summary trials of suits for money received by a vendue master upon the sale of goods.[85]

c. Under Rules of Court. A rule which permits a plaintiff in certain cases, on affidavit that the defense is merely for delay, and on five days' notice, to bring up his cause for trial, contravenes no constitutional enactment.[86] A failure by a defendant to verify a special plea by his own affidavit, when the plea is not by law required to be so verified, is not a cause for trying a case out of its order under such rule.[87] Where a rule of practice provides that an action may be preferred if defendant be imprisoned under an order of arrest in an action, or if the property of defendant be held under attachment, it may be preferred at the instance of plaintiff as well as at the instance of defendant; [88] but plaintiff is not entitled to a preference under such rule where defendant has given bail and been discharged from arrest.[89] Under the rules in New York city, actions brought for the foreclosure of mortgages or mechanics' liens may be placed on the preferred calendar, on application, where it appears to the court that the trial will not be a protracted one, or that for any special reason the case should be promptly disposed of.[90] Under these same rules, all issues and special proceedings to be tried by jury, and any issue in an equity action as to which parties are entitled by law to a jury trial, are to be placed on a special calendar; and as to these cases and issues it is not necessary to claim a preference in the notice for trial or to make an application for preference, but the application may be made at any time after service of notice of trial and placing the case on the calendar,[91] upon two days' notice.[92] A rule giving a preference to all equity cases is not applicable when an action at law has become an equitable one by interpleader proceedings.[93] Applications under the rules need not conform to the requirements prescribed for applications under the statutes.[94]

D. Transfer of Causes — 1. In General. It is a rule of general application that a suit brought in equity, which should have been brought in law,[95] or

84. Brady *v.* Kinetoscope Exhibiting Co., 19 N. Y. App. Div. 226, 46 N. Y. Suppl. 168.

85. Missroon *v.* Frean, 1 McCord (S. C.) 38, as to whether defendant acted in the capacity of vendue master or not is a question for the jury.

86. Wallbaum *v.* Haskin, 49 Ill. 313.

87. Booth *v.* Storrs, 54 Ill. 472.

88. Boeger *v.* Hoffman, 58 N. Y. App. Div. 540, 69 N. Y. Suppl. 258; Knox *v.* Dubroff, 17 N. Y. App. Div. 290, 45 N. Y. Suppl. 271.

89. Boeger *v.* Hoffman, 58 N. Y. App. Div. 540, 69 N. Y. Suppl. 258.

90. Coffin *v.* McLaughlin, 24 Misc. (N. Y.) 107, 53 N. Y. Suppl. 297, 6 N. Y. Annot. Cas. 18.

91. Southack *v.* Central Trust Co., 62 N. Y. App. Div. 260, 70 N. Y. Suppl. 1122; People *v.* Feitner, 39 N. Y. App. Div. 532, 57 N. Y. Suppl. 313.

92. Marden *v.* Marden, 28 N. Y. App. Div. 301, 50 N. Y. Suppl. 1002.

93. Schreiber *v.* Dry Dock Sav. Inst., 59 Misc. (N. Y.) 408, 112 N. Y. Suppl. 360.

94. Coffin *v.* McLaughlin, 24 Misc. (N. Y.) 107, 53 N. Y. Suppl. 297, 6 N. Y. Annot. Cas. 18.

95. Chandler *v.* Lazarus, 55 Ark. 312, 18 S. W. 181; Catchings *v.* Harcrow, 49 Ark. 20, 3 S. W. 884; Robinson *v.* Luther, 134 Iowa 463, 109 N. W. 775; Kentucky Mut. Security Fund Co. *v.* Turner, 89 Ky. 665, 13 S. W. 104, 11 Ky. L. Rep. 793; Burton *v.* Monticello, etc., Turnpike Co., 109 S. W. 319, 33 Ky. L. Rep. 85; Gilbert *v.* Bunnell, 92 N. Y. App. Div. 284, 86 N. Y. Suppl. 1123.

Sufficiency of order of transfer.—An order "that this cause is stricken from the equity docket, per ordinary docket," entered upon a motion in proper form to transfer the case to the ordinary docket, is sufficient to show the court's intention to so transfer the case, it being thereafter treated by both parties as an ordinary action. Combs *v.* Combs, 41 S. W. 7, 19 Ky. L. Rep. 439.

Change from equitable to legal action.—Where a cause of action to foreclose an equitable lien is properly brought in equity, defendant is not entitled to have it transferred to the law docket, although by giving bond he releases the lien and reduces plaintiff's claim to a mere money demand. Crissman *v.* McDuff, 114 Iowa 83, 86 N. W. 50.

Actions in which complex accounts involved.—Where accounts in dispute are so complex that the verdict of a jury thereon would necessarily be mere guess work, a refusal to transfer the cause to the common-law docket is not error. Hely *v.* Hoertz, 82 S. W. 402, 26 Ky. L. Rep. 644, 119 Ky. 119, 82 S. W. 985, 26 Ky. L. Rep. 1016. But it has been held that an action is not transferable to the

vice versa,[96] or brought as an action at law in a court having common-law and probate jurisdiction, when it should have been presented as a matter of probate jurisdiction;[97] or improperly brought before the judge at chambers;[98] or which is properly brought, but incorrectly docketed, will not be dismissed;[99] but the court may, on motion of plaintiff or defendant,[1] or on its own motion,[2] transfer it to the proper court or docket. Failure of the court to order the transfer in a proper case on motion of a party is error.[3] But if neither party moves to transfer, and the cause is not transferred on the court's own motion, it is the duty of the court to render judgment according to the rights of the parties.[4] Where courts of law and equity have concurrent jurisdiction of the issues raised by the answer or cross bill the cause should not be transferred to the equity docket,[5] but judgment will not be reversed because of such transfer unless prejudice appears.[6] So, if the decision of the issues in an action

chancery court merely because a long and complicated account between the parties is involved. Bagnell Tie, etc., Co. *v.* Goodrich, 82 Ark. 547, 102 S. W. 228.

96. Little Rock, etc., R. Co. *v.* Perry, 37 Ark. 164; Iowa Falls State Bank *v.* Brown, 142 Iowa 190, 119 N. W. 81, 134 Am. St. Rep. 412; Hawley *v.* Exchange State Bank, 97 Iowa 187, 66 N. W. 152; Kassing *v.* Walter, (Iowa 1896) 65 N. W. 832; Galliers *v.* Peppers, 76 Iowa 521, 41 N. W. 205; Wrather *v.* Stacey, 82 S. W. 420, 26 Ky. L. Rep. 683; Sallee *v.* Eades, 50 S. W. 1102, 21 Ky. L. Rep. 109.

When a complaint joins both an equitable and a law cause of action in the same paragraph, it is not error, after issue is joined, without objection being made to the complaint, to refuse to send the whole cause to the law calendar to be tried before a jury. Pipestone First Nat. Bank *v.* Rowley, 92 Iowa 530, 61 N. W. 195.

97. Garrettsville First Nat. Bank *v.* Green, 59 Iowa 171, 13 N. W. 75.

98. Coleman *v.* Coleman, 148 N. C. 299, 62 S. E. 415.

99. Harris *v.* Lowe, 81 Ga. 676, 8 S. E. 419; Everett *v.* De Fontaine, 78 N. Y. App. Div. 219, 79 N. Y. Suppl. 692; Coleman *v.* Coleman, 148 N. C. 299, 62 S. E. 415.

Order for transfer.— The transfer cannot be made by the clerk of the court without an order. Noble *v.* Burney, 116 Ga. 626, 42 S. E. 1009.

Where a summons was improperly made returnable before the judge at chambers, instead of to the regular term, the judge should not dismiss the action, but transfer it to the civil issue docket, making the necessary amendments therefor. Martin *v.* Clark, 135 N. C. 178, 47 S. E. 397.

1. Little Rock, etc., R. Co. *v.* Perry, 37 Ark. 164; Phelps *v.* Jackson, 27 Ark. 585; Sharrock *v.* Kreiger, 6 Indian Terr. 466, 98 S. W. 161; Kentucky Mut. Security Fund Co. *v.* Turner, 89 Ky. 665, 13 S. W. 104, 11 Ky. L. Rep. 793.

Allegations on which motion decided.— For the purpose of a motion to transfer a case from the equity to the law side of the docket, the allegation of the petition and prayer for relief are conclusive on the court. Gigray *v.* Mumper, 141 Iowa 396, 118 N. W. 393.

2. Catchings *v.* Harcrow, 49 Ark. 20, 3 S. W. 884; Little Rock, etc., R. Co. *v.* Perry, 37 Ark. 164; Kentucky Mut. Security Fund Co. *v.* Turner, 89 Ky. 665, 13 S. W. 104, 11 Ky. L. Rep. 793; Shipley *v.* Bolduc, 93 Minn. 414, 101 N. W. 952.

Retransfer of cause.— The transfer of an equity case to the jury calendar does not prevent the court at a subsequent term, upon wholly different issues being presented, from withdrawing the case from the jury, and trying the case as in equity. Pruitt *v.* Pruitt, 57 S. C. 155, 35 S. E. 485.

3. McCormick Harvesting Mach. Co. *v.* Markert, 107 Iowa 340, 78 N. W. 33.

Where the issue in an action is triable at law, but the prayer is for equitable relief, it is not error to refuse to transfer the entire cause to equity. Welch *v.* Union Cent. L. Ins. Co., 108 Iowa 224, 78 N. W. 853, 50 L. R. A. 774.

When error harmless.— The erroneous refusal to transfer a cause to the law docket is not prejudicial where the pleadings under the undisputed evidence present only questions of law. McCormick Harvesting Mach. Co. *v.* Markert, 107 Iowa 340, 78 N. W. 33. So a refusal to transfer a cause of equitable cognizance to the equity docket is error without prejudice where under the record as made the complainant was not entitled to relief in equity (Dickinson *v.* Stevenson, 142 Iowa 567, 120 N. W. 324), or where the issue of fact raised by the answer could be as well investigated and determined in an action at law as in an equitable action (Eaves *v.* Harbin, 12 Bush (Ky.) 445).

4. Munday *v.* Collier, 52 Ark. 126, 12 S. W. 240; Catchings *v.* Harcrow, 49 Ark. 20, 3 S. W. 884; Little Rock, etc., R. Co. *v.* Perry, 37 Ark. 164; Sparks *v.* Childers, 2 Indian Terr. 187, 47 S. W. 316; Kentucky Mut. Security Fund Co. *v.* Turner, 89 Ky. 665, 13 S. W. 104, 11 Ky. L. Rep. 793; Hartford Ins. Co. *v.* Haas, 87 Ky. 531, 9 S. W. 720, 10 Ky. L. Rep. 573, 2 L. R. A. 64; Murtha *v.* Curley, 90 N. Y. 372, 3 N. Y. Civ. Proc. 1, 12 Abb. N. Cas. 12; Hayes *v.* Kerr, 2 Misc. (N. Y.) 164, 21 N. Y. Suppl. 793.

5. Frick *v.* Kabaker, 116 Iowa 494, 90 N. W. 498; Rabb *v.* Albright, 93 Iowa 50, 61 N. W. 402; Richards *v.* Monroe, 85 Iowa 359, 52 N. W. 339, 39 Am. St. Rep. 301.

6. Harris *v.* Remmel, 83 Ark. 1, 102 S. W. 716.

at law would be decisive of those raised on an equitable counter-claim, a transfer of the cause to the equity docket is properly refused.[7] Likewise, where the controversy is not of equitable cognizance a motion to transfer it to the equity docket should be refused;[8] and the transfer of the action to the equity docket is error,[9] and does not confer jurisdiction,[10] unless the transfer is made by consent of parties, in which event the equity court may render a law judgment therein.[11] However, the error is not prejudicial if there is no disputed question of fact for the jury to pass on,[12] or if the court arrived at the only result which could have been reached on a trial by jury.[13] Similarly, where the controversy is of equitable cognizance, a motion to transfer it to the law docket should be refused,[14] and the transfer of such cause to the law docket is error.[15] Where, in an equity proceeding, the greater part of the testimony had been taken by depositions, many of which could not have been used in a trial at law, the court acted within its discretion in refusing, after the evidence was taken for a determination of the case in equity, to transfer it to the law docket for trial.[16] It is not error to refuse to transfer to the equity docket a case involving the question of the existence of a partnership, although on it being determined that a partnership existed between the parties it will be necessary to transfer the case to the equity docket and have the partnership settled.[17]

2. **Transfers of Particular Issues.** A transfer to the ordinary docket of any legal issue in an equitable action,[18] or to the equity docket of an equitable issue

7. Keller *v.* Harrison, 139 Iowa 383, 116 N. W. 327.

8. Security Sav. Bank *v.* Smith, (Iowa 1909) 119 N. W. 726; Faville *v.* Lloyd, 140 Iowa 501, 118 N. W. 871; Kinkead *v.* Peet, 136 Iowa 590, 111 N. W. 48; John King Co. *v.* Louisville, etc., R. Co., 131 Ky. 46, 114 S. W. 308, (1909) 116 S. W. 1201. And see Loeb *v.* German Nat. Bank, 88 Ark. 108, 113 S. W. 1017; Ayer-Lord Tie Co. *v.* Greer, 87 Ark. 543, 113 S. W. 209.

Applications of rule.—Where defendant in a damage suit settled with plaintiff, and paid him the entire proceeds of the settlement, notwithstanding notice of an attorney's lien for fifty per cent of the amount that might be received from defendant, an action by the attorneys to enforce their lien against defendant in the damage suit is an action at law, and a motion to transfer the cause to the equity calendar was properly denied. Barthell *v.* Chicago, etc., R. Co., 138 Iowa 688, 116 N. W. 813. An action by a principal for the recovery of money paid to the agent in reliance on the latter's false representations, and defended by the latter denying the material allegations of the complaint, is an action at law, and it is proper to refuse to transfer it to the chancery court. Jones *v.* Lewis, 89 Ark. 368, 117 S. W. 561.

9. North American Trust Co. *v.* Chappell, 70 Ark. 507, 69 S. W. 546; Roberts *v.* Jacks, 31 Ark. 597, 25 Am. Rep. 584; Cole *v.* Cole, 139 Iowa 609, 117 N. W. 988; Klinker *v.* Schmidt, 106 Iowa 70, 75 N. W. 672; Boggs *v.* Douglass, 105 Iowa 344, 75 N. W. 185; Kelly *v.* Andrews, 94 Iowa 484, 62 N. W. 853; Ingersoll *v.* Hayward, 92 Iowa 159, 60 N. W. 512; Beroud *v.* Lyons, 85 Iowa 482, 52 N. W. 486; Creager *v.* Walker, 7 Bush (Ky.) 1; Rubel *v.* Avritt, 47 S. W. 460, 20 Ky. L. Rep. 764.

10. Dorsey County *v.* Whitehead, 47 Ark. 205, 1 S. W. 97.

11. Ogden *v.* Ogden, 60 Ark. 70, 28 S. W. 796, 46 Am. St. Rep. 151.

12. Croft *v.* Colfax Electric Light, etc., Co., 113 Iowa 455, 85 N. W. 761.

13. Rattroy *v.* Talcott, 124 Iowa 398, 100 N. W. 36. And see Stewart *v.* Blue Grass Canning Co., 133 Ky. 118, 117 S. W. 401, (1909) 120 S. W. 375, holding that the transfer of a common-law action to equity after a verdict for plaintiff, resulting in a decree for plaintiff for the same amount as the verdict, was not prejudicial to defendants.

14. Gigray *v.* Mumper, 141 Iowa 396, 118 N. W. 393.

15. Dickenson *v.* Stevenson, 142 Iowa 567, 120 N. W. 324; Irwin *v.* Deming, 142 Iowa 299, 120 N. W. 645.

When error harmless.—Error in transferring a cause from the equity to the law docket is not prejudicial where the cause was tried in substantial accordance with the practice in equitable proceedings, unless the reviewing court on a *de novo* consideration of the issues and evidence find that a different result should have been reached. Irwin *v.* Deming, 142 Iowa 299, 120 N. W. 645.

16. Saunders *v.* Wells, 135 Iowa 11, 112 N. W. 205.

17. Blodgett *v.* Miller, 110 S. W. 864, 33 Ky. L. Rep. 682.

18. Meek *v.* McCall, 80 Ky. 371, 4 Ky. L. Rep. 255; Davis *v.* J. I. Case Threshing Mach. Co., 80 S. W. 1145, 26 Ky. L. Rep. 235; Merriwether *v.* Bell, 58 S. W. 987, 22 Ky. L. Rep. 844; Brann *v.* Brann, 44 S. W. 424, 19 Ky. L. Rep. 1814; Loan, etc., Bank *v.* Peterkin, 52 S. C. 236, 29 S. E. 546, 68 Am. St. Rep. 900.

Where the issues are concurrently triable at law or in equity the right to demand a transfer does not exist. Louisville, etc., R.

in a legal action, may be had on motion of either party,[19] although the court is not bound to make such transfer unless requested.[20] However, the court may on its own motion make such transfer,[21] and proceed to try the cause, in accordance with the principles involved, either equitable or legal, as set up in the pleadings.[22] Before the transfer of a legal issue in an equity cause can be made to the ordinary docket, either party may require every equitable issue to be first disposed of,[23] unless the exercise of equitable jurisdiction is made to depend on the result of the legal issues, in which event the transfer may be made at once.[24] Where the equitable issue is transferred, the legal claim should be tried by the jury in the ordinary action and if the judgment is in favor of the claim, it may be suspended until the determination of the equitable issue.[25] When a suit is commenced by ordinary petition and an answer or cross bill sets up an equitable defense, either party has the right, by motion, to have such issues as were, prior to the adoption of the code, exclusively cognizable in chancery tried in the manner prescribed in cases of equitable proceedings and to have the suit transferred to the proper docket,[26] a refusal on the part of the court to do so being error;[27] or the court may of its own motion transfer the cause.[28] Where no motion to transfer is made,

Co. *v.* Carter, 66 S. W. 508, 23 Ky. L. Rep. 2017.

Where the only issue of fact is the one upon which the equitable right depends, the right to demand a transfer does not exist. Mercer County *v.* Harrodsburg, 66 S. W. 10, 23 Ky. L. Rep. 1744, 56 L. R. A. 583.

19. Geoghegan *v.* Ditto, 2 Metc. (Ky.) 433, 74 Am. Dec. 413.

An intervener tendering an equitable issue, in an action at law, cannot delay the action by having the case transferred to the equity docket. Kassing *v.* Ordway, 100 Iowa 611, 69 N. W. 1013.

20. Chenault *v.* Eastern Kentucky Timber, etc., Co., 119 Ky. 170, 83 S. W. 552, 26 Ky. L. Rep. 1078; Jonesville Perpetual Bldg., etc., Assoc. *v.* Beverly, 107 S. W. 770, 32 Ky. L. Rep. 1102.

21. Boggs *v.* Douglass, 105 Iowa 344, 75 N. W. 185; Johnston *v.* Robuck, 104 Iowa 523, 73 N. W. 1062; Cumberland Tel., etc., Co. *v.* Cartwright Creek Tel. Co., 128 Ky. 395, 108 S. W. 875, 32 Ky. L. Rep. 1357; Geoghegan *v.* Ditto, 2 Metc. (Ky.) 433, 74 Am. Dec. 413; Kineon *v.* Rich, 100 S. W. 249, 30 Ky. L. Rep. 1107; Wallace *v.* Friend, 49 S. W. 181, 20 Ky. L. Rep. 1270; Henderson *v.* Baker, 47 S. W. 211, 20 Ky. L. Rep. 580; West End Trust, etc., Co. *v.* Johnson, 29 N. Y. App. Div. 629, 51 N. Y. Suppl. 1080.

22. Rogers *v.* Nidiffer, 5 Indian Terr. 55, 82 S. W. 673.

23. Meek *v.* McCall, 80 Ky. 371, 4 Ky. L. Rep. 255; Pryor *v.* Warford, 54 S. W. 838, 21 Ky. L. Rep. 1311; Baxter *v.* Knox, 31 S. W. 284, 17 Ky. L. Rep. 489; Williams *v.* Pidgeon, 5 Ky. L. Rep. 517. But see Gibson *v.* Seney, 138 Iowa 383, 116 N. W. 325.

24. Small *v.* Reeves, 104 Ky. 289, 46 S. W. 726, 20 Ky. L. Rep. 504; Meek *v.* McCall, 80 Ky. 371, 4 Ky. L. Rep. 255; Baxter *v.* Knox, 31 S. W. 284, 17 Ky. L. Rep. 489.

25. Geoghegan *v.* Ditto, 2 Metc. (Ky.) 433, 74 Am. Dec. 413.

26. American Soda Fountain Co. *v.* Futrall, 73 Ark. 464, 84 S. W. 505, 108 Am. St. Rep. 64; Daniel *v.* Garner, 71 Ark. 484, 76 S. W. 1063; Castle *v.* Hillman, 70 Ark. 157, 66 S. W. 648; Weaver *v.* Rush, 62 Ark. 51, 34 S. W. 256; McLeod *v.* Tisdale, 57 Ark. 352, 21 S. W. 465; Ames Iron Works *v.* Rea, 56 Ark. 450, 19 S. W. 1063; Ivey *v.* Drake, 36 Ark. 228; Rogers *v.* Nidiffer, 5 Indian Terr. 55, 82 S. W. 673; Grasmier *v.* Wolf, (Iowa 1902) 90 N. W. 813; Croft *v.* Colfax Electric Light, etc., Co., 113 Iowa 455, 85 N. W. 761; Calumet Paper Co. *v.* Stotts Inv. Co., 96 Iowa 147, 64 N. W. 782, 59 Am. St. Rep. 362; Thatcher *v.* Stickney, 88 Iowa 454, 55 N. W. 488; Hackett *v.* Schad, 3 Bush (Ky.) 353; Bosley *v.* Mattingly, 14 B. Mon. (Ky.) 89; Burnett *v.* Frazier, 40 S. W. 697, 19 Ky. L. Rep. 299; Gray *v.* Marshall, 13 S. W. 913, 12 Ky. L. Rep. 103. *Contra,* Mordecai *v.* Stewart, 37 Ga. 364; Edwards *v.* Edwards, (Miss. 1894) 15 So. 42.

Showing grounds for change.— In a suit to recover possession of real estate, defendant's claim to transfer the case to the equity docket was properly refused, where he did not state the nature of his equitable defense, and it being inferable that he depended on a title bond, there was no suggestion that it was not forfeited, or that he had paid or offered to fulfil the contract on his part. Abbott *v.* Chase, 13 Iowa 453.

Waiver of objection to transfer.—A stipulation that the issues arising on the petition may be tried with those on the cross bill, with a waiver of a jury is a waiver of objection to the transfer of the law case to the equity docket. Shehan *v.* Stuart, 117 Iowa 207, 90 N. W. 614.

27. Castle *v.* Hillman, 70 Ark. 157, 66 S. W. 648.

When error harmless.— Error in failing to transfer an issue to the law docket is harmless where there was not sufficient evidence to authorize a submission of the issue to the jury. Davis *v.* J. I. Case Threshing Mach. Co., 80 S. W. 1145, 26 Ky. L. Rep. 235.

28. Hammond *v.* Harper, 39 Ark. 248; Johnston *v.* Robuck, 104 Iowa 523, 73 N. W. 1062.

it is discretionary with the trial court to try the issue or to order it transferred.[29] If the court improperly transfers legal with equitable issues, and rightfully adjudges in favor of an equitable defense to the action, it may properly refuse to retransfer the legal issues to the ordinary docket, because the action has been defeated and there is nothing to try at law.[30] Where the grounds of a motion to transfer a cause from the chancery to the law court are not established on the face of the pleadings proof must be taken and presented to the court upon the question.[31]

3. Time For Moving Transfer. The motion to transfer the cause should be made at the time of filing the answer to the original petition,[32] and cannot be made until after the answer is filed.[33] In case there is an unreasonable delay,[34] the motion should be overruled. It comes too late after several orders have been made in the cause,[35] after the cause has been noticed for trial by both parties,[36] or if not made until fifteen months after the institution of the suit,[37] or after the case had been prepared for trial[38] or after one trial of the cause,[39] after the jury has been impaneled,[40] after the trial has progressed for two days and a half,[41] or after a cause is submitted for trial and proof taken[42] or partly taken,[43] unless the party moving is for the first time by the evidence apprised of the facts affecting the jurisdiction.[44]

4. Waiver of Error in Transfer. Error in transferring a cause from the law to the equity docket is waived if not objected to at the time.[45] Such error is also waived if at the trial plaintiff expressly declines a hearing before a jury,[46] or consents to the transfer.[47] But merely going to trial does not waive the error of the court in thus changing the form of action.[48]

E. Striking Cause From Docket or Calendar. Where the court discovers that it has no jurisdiction of a cause,[49] or that the interests of all parties have become vested in one of the parties thereto,[50] it should strike it from its

Accounting and settlement.— Where the issues as made involved the consideration of a long account and several intricate settlements, the court did not abuse its discretion in transferring the cause from the ordinary to the equity docket under a statute empowering it to do so whenever it shall be of opinion that such transfer is necessary because of the peculiar questions involved, or because the case involves accounts so complicated, or of such great detail of facts, as to render it impracticable for a jury to intelligently try the case. Peak *v.* Grover, 14 Ky. L. Rep. 206.

29. Harmon *v.* Thompson, 119 Ky. 528, 84 S. W. 569, 27 Ky. L. Rep. 181; Tucker *v.* Russell, 83 S. W. 555, 26 Ky. L. Rep. 1086.

30. Wimmer *v.* Ficklin, 14 Bush (Ky.) 193.

31. Haggart *v.* Ranney, 73 Ark. 344, 84 S. W. 703.

32. Moore *v.* Union Dist. Tp., 28 Iowa 425.

33. McHenry *v.* Sypher, 12 Iowa 585.

34. Manders *v.* Eastern State Hospital, 84 S. W. 761, 27 Ky. L. Rep. 254.

35. Schmidt *v.* Mitchell, 98 Ky. 218, 32 S. W. 599, 33 S. W. 408, 17 Ky. L. Rep. 850.

36. Groden *v.* Jacobson, 129 N. Y. App. Div. 508, 114 N. Y. Suppl. 183; Tubbs *v.* Embree, 89 Hun (N. Y.) 475, 35 N. Y. Suppl. 320.

37. Chenault *v.* Eastern Kentucky Timber, etc., Co., 119 Ky. 170, 83 S. W. 552, 26 Ky. L. Rep. 1078.

38. Adams *v.* Curran, 110 S. W. 280, 33 Ky. L. Rep. 498.

39. Hartford Ins. Co. *v.* Haas, 87 Ky. 531, 9 S. W. 720, 10 Ky. L. Rep. 573, 2 L. R. A. 64; Jacob *v.* Thompson, 80 N. Y. App. Div. 526, 80 N. Y. Suppl. 1028.

40. Gray Tie Co. *v.* Clark, 98 S. W. 1000, 30 Ky. L. Rep. 409. But see Boltz *v.* Colsch, 134 Iowa 480, 109 N. W. 1106.

41. Smith *v.* Stack, 89 Ark. 143, 115 S. W. 1145.

42. Com. *v.* Tate, 33 S. W. 405, 17 Ky. L. Rep. 1045.

43. Duis *v.* Fisher, 65 S. W. 337, 23 Ky. L. Rep. 1425.

44. Pegram *v.* New York El. R. Co., 59 N. Y. Super. Ct. 570, 14 N. Y. Suppl. 769.

45. Cogswell *v.* McKeogh, 46 Ark. 524; Brewer *v.* Winston, 46 Ark. 163; Parshall *v.* Moody, 24 Iowa 314.

46. Thomas *v.* Thomas, 64 Nebr. 581, 90 N. W. 630.

47. Shehan *v.* Stuart, 117 Iowa 207, 90 N. W. 614; Hooven, etc., Co. *v.* Featherstone, 111 Fed. 81, 49 C. C. A. 229.

48. Shehan *v.* Stuart, 117 Iowa 207, 90 N. W. 614; Johnston *v.* Robuck, 104 Iowa 523, 73 N. W. 1062; Rabb *v.* Albright, 93 Iowa 50, 61 N. W. 402. In Palmer *v.* Palmer, 90 Iowa 17, 57 N. W. 645, it was held that an agreement, made after an order of transfer, to try the case as in equity, did not waive the error of the court in sending the case to the equity side of the docket. To the same effect is Ingersoll *v.* Hayward, 92 Iowa 159, 60 N. W. 512.

49. Wildman *v.* Rider, 23 Conn. 172.

50. Harp *v.* Abbeville Inv., etc., Co., 108 Ga. 168, 33 S. E. 998.

docket. Such action does not place the cause out of court, so that it cannot again be brought before the court in some mode,[51] but merely suspends further proceedings till some other steps are taken by which a final disposition thereof can be made.[52] The fact that an attorney agreed to give notice of all proceedings to his adversary does not bind the court to permit a cause to remain on its docket when reached in the absence of such notice.[53] Upon a motion to strike the cause from the calendar, the court will not consider questions going to the merits of the action,[54] or defects of form in the note of issue.[55] Where the issue represented on the calendar was not made up before the case was placed on the calendar,[56] or has been superseded by a new issue,[57] or is improperly on the list,[58] or a reply creating new issues is filed, on an order requiring a reply without providing that the case should remain on the calendar without further notice,[59] the cause will be stricken from the docket on motion. And an improper denial of a motion made in apt time to strike a case from the calendar, and proceeding with the trial over the protest of the objecting party, is reversible error.[60] A motion to strike from the calendar is made in time if made when the cause is reached on the day calendar;[61] otherwise, however, where made several weeks after the case has been placed on the calendar and on the day the case is called for trial;[62] or several years after a judgment in the case has been rendered and after the court has lost control of the judgment.[63] So where an action has been docketed some time before a motion to dismiss for failure to pay the docket fee is made, the motion to dismiss is properly overruled.[64] And where the clerk, of his own volition and without plaintiff's consent, left the case off the docket for a year, and after its reinstatement by order of court, defendant obtained a continuance, it was proper to refuse to strike the cause from the docket.[65] The right of plaintiff to move to strike the cause from the calendar because all necessary defendants are not before the court is waived where after receipt of defendant's notice of trial plaintiff gives notice of trial.[66] Moving to strike from the docket is not the proper manner for a defendant to obtain a jury trial in a mechanic's lien suit.[67]

F. Holding or Passing Cases Pending Engagement of Counsel. Absence of an attorney,[68] or, where there are several, of the principal attorneys,[69] is a sufficient cause for passing a cause temporarily and resetting it for trial. Where there are several counsel, and the only question presented is one of law, it is not

51. Welch *v.* Louis, 31 Ill. 446.

52. Hayden *v.* Huff, 62 Nebr. 375, 87 N. W. 184.

53. Hamilton *v.* Stafford, 78 Ill. App. 54.

54. Rappaport *v.* Werner, 34 N. Y. App. Div. 525, 54 N. Y. Suppl. 481; U. S. Class Co. *v.* Levett, 24 N. Y. App. Div. 624, 48 N. Y. Suppl. 887; Stanfield *v.* Stanfield, 21 Misc. (N. Y.) 409, 47 N. Y. Suppl. 1010.

55. Moody *v.* Lambert, 18 S. D. 572, 101 N. W. 717.

56. Marvin *v.* Bowlby, 135 Mich. 640, 98 N. W. 399; Brown *v.* Timmins, 11 Pa. Dist. 181, 26 Pa. Co. Ct. 350, 27 Pa. Co. Ct. 112. But the cause need, however, only be substantially at issue in order to be entitled to a place on the docket. Martin *v.* Sherwood, 74 Conn. 475, 51 Atl. 526; Lincoln *v.* Schwartz, 70 Ill. 134.

57. Romaine *v.* Bowdoin, 70 Hun (N. Y.) 366, 24 N. Y. Suppl. 67.

58. Levy *v.* Robinson, 1 Marv. (Del.) 108, 40 Atl. 661.

59. Grant *v.* Cananea Consol. Copper Co., 129 N. Y. App. Div. 77, 113 N. Y. Suppl. 502.

60. McDonald *v.* People, 123 Ill. App. 346 [*affirmed* in 222 Ill. 325, 78 N. E. 609]; Parsley *v.* Halloran, 87 Ill. App. 581; Donnerstag *v.* Loewenthal, 77 Ill. App. 159. *Compare* Killackey *v.* Killackey, 156 Mich. 127, 120 N. W. 680, holding that the error in refusing to strike the cause from the calendar is not ground for reversal, unless defendant was prejudiced.

61. Poindexter *v.* Carlton, 30 Misc. (N. Y.) 202, 61 N. Y. Suppl. 1116.

62. McDonald *v.* People, 123 Ill. App. 346 [*affirmed* in 222 Ill. 325, 78 N. E. 609]; Freund *v.* Huylers, 102 Ill. App. 486; Winterburn *v.* Parlow, 102 Ill. App. 368.

63. Louisville *v.* Hughes, 97 S. W. 1096, 30 Ky. L. Rep. 231.

64. Dye *v.* Augur, (Iowa 1907) 110 N. W. 323.

65. Sellers *v.* Farmer, 151 Ala. 487, 43 So. 967.

66. Ligouri *v.* Hutkoff, 74 N. Y. App. Div. 327, 77 N. Y. Suppl. 572.

67. Schillinger Fire-Proof Cement, etc., Co. *v.* Arnett, 152 N. Y. 584, 46 N. E. 956.

68. Crosby *v.* Kiest, 135 Ill. 458, 26 N. E. 589 [*affirming* 36 Ill. App. 425]; Willard *v.* Saunders, 83 Ill. App. 375.

69. Isgrigg *v.* Coleman, 107 Ill. App. 625.

prejudicial error to require a party to proceed to trial in the absence of one of his counsel.[70] A verbal arrangement between counsel that a cause should not be proceeded with until counsel for defendant could appear is subject to the disposition of the case as directed by the trial judge, who has the control of the calendar, and who may insist on the action being tried when reached.[71] Where an appellate court has adopted a rule that engagements of counsel in the lower court will not be regarded as a reason for continuance or postponement of a cause in the appellate court, the lower court should not commence the trial of a cause when counsel is engaged in the supreme court.[72] There being a conflict of rules between the superior and city courts as to the engagements of counsel, the rules of the superior court govern.[73] The circuit court of the United States is a court of record in the county in which it sits within the meaning of a rule providing for the passing of a case, where counsel is engaged in the trial of a case in a court of record within the county.[74]

IV. CONDUCT OF TRIAL.[75]

A. In General. A trial according to the course of the common law is a trial before a jury under right rulings made by the trial judge in the presence of the jury.[76] All matters necessary to the proper administration of justice in a court, which are not regulated by precise rules, are within the discretion of the judge.[77] He should allow cases to be heard on their merits, wherever possible, without doing positive violence to rules of procedure and practice.[78] It is his duty to give the case such direction as will prevent a result which would be inconsistent

70. Hazelwood *v.* Webster, 78 S. W. 123, 25 Ky. L. Rep. 1388.

71. Eppoletto *v.* Zuhr, 60 Misc. (N. Y.) 86, 111 N. Y. Suppl. 565.

72. Peterson *v.* Atlantic City R. Co., 177 Pa. St. 335, 35 Atl. 621, 34 L. R. A. 593.

73. Bibb Land Lumber Co. *v.* Lima Mach. Works, 98 Ga. 279, 25 S. E. 445.

74. Spero *v.* Supreme Council A. L. H., 95 N. Y. App. Div. 499, 88 N. Y. Suppl. 989.

75. **As ground for new trial** see NEW TRIAL, 29 Cyc. 771 *et seq.*

Bills and notes, actions on see COMMERCIAL PAPER, 8 Cyc. 285.

Criminal prosecutions see CRIMINAL LAW, 12 Cyc. 519 *et seq.*

Effect of change of venue see VENUE.

Ejectment see EJECTMENT, 15 Cyc. 154 *et seq.*

In justice's court see JUSTICES OF THE PEACE, 24 Cyc. 581 *et seq.*

In particular actions or proceedings:

Malicious prosecution see MALICIOUS PROSECUTION, 26 Cyc. 104.

Mechanics' liens, suits to enforce see MECHANICS' LIENS, 27 Cyc. 420.

Mortgages, suits to foreclose see MORTGAGES, 27 Cyc. 1638 *et seq.*

On appeal from justice of the peace see JUSTICES OF THE PEACE, 24 Cyc. 742 *et seq.*

Presumptions on appeal see APPEAL AND ERROR, 3 Cyc. 298 *et seq.*

Probate proceedings see WILLS.

76. Mutual Reserve L. Ins. Co. *v.* Heidel, 161 Fed. 535, 88 C. C. A. 477.

77. Goldsmith *v.* Solomons, 2 Strobh. (S. C.) 296. And see Frech *v.* Lewis, 32 Pa. Super. Ct. 279 [*reversed* on other grounds in 218 Pa. St. 141, 67 Atl. 65, 11 L. R. A. N. S. 948]; Chesapeake, etc., R. Co. *v.* Rowsey, 108 Va. 632, 62 S. E. 363.

For instance he may permit a trustee, who has announced ready for trial, who has discovered a variance between his pleadings and proof, to withdraw his announcement (Sanger *v.* Henderson, 1 Tex. Civ. App. 412, 21 S. W. 114); may permit a witness to consult with his attorney before answering a question calling for the disclosure of a trade secret (Nauman *v.* Zoerhlaut, 21 Wis. 466); may require a party to unveil her face for purposes of identification (Rice *v.* Rice, (N. J. Ch. 1890) 19 Atl. 736); may call a commissioner appointed by the court to examine the injuries of plaintiff, if the parties fail to call him (Fullerton *v.* Fordyce, 144 Mo. 519, 44 S. W. 1053); may exclude from the court room articles introduced therein for the purpose of influencing the jury, but not offered in evidence (Rand *v.* Syms, 162 Mass. 163, 38 N. E. 196); may strike out the evidence of a witness because the witness by his absence deprived a party of his right of cross-examination (Townsend's Succession, 40 La. Ann. 66, 3 So. 488; Rieger's Succession, 37 La. Ann. 104; Ward *v.* Fuller, 7 Gray (Mass.) 179; Price *v.* Wilson, 67 Barb. (N. Y.) 9; Burnett *v.* Phalon, 11 Abb. Pr. (N. Y.) 157, 19 How. Pr. 530; or in the absence of anything to show that she was unable to walk into court, to decline to permit plaintiff to be brought into court on a stretcher (Blanchard *v.* Holyoke St. R. Co., 186 Mass. 582, 72 N. E. 94); so the court may decline to exclude from the court room the wife and children of a plaintiff who sues for personal injuries (Louisville, etc., R. Co. *v.* Foard, 104 Ky. 456, 47 S. W. 342, 20 Ky. L. Rep. 646); or may regulate the time when defendant shall make his opening statement (Sands *v.* Potter, 165 Ill. 397, 46 N. E. 282, 56 Am. St. Rep. 253 [*affirming* 59 Ill. App. 206).

78. Pacific Window Glass Co. *v.* Smith, 8

with the law,[79] and he must conduct the proceedings on some consistent theory,[80] and rule in accordance with his best judgment on every question raised which is pertinent to the issues.[81] A case at law cannot be tried on equitable principles,[82] nor a jury case by the court without consent of the parties.[83] An equitable action tried in a court of law must be tried in accordance with the practice in jury trials.[84] Cross complaints entitling defendant to affirmative relief should be tried by substantially the same rules as a complaint.[85] A change of the presiding judge during the trial is not necessarily prejudicial error.[86] Where defendants appear jointly, plead jointly, but are represented on trial by separate counsel, only one of such counsel should be permitted to cross-examine a witness.[87] Where there are several counsel, the leader may interfere and take the examination out of the hands of the junior.[88] A party cannot be heard in person and by counsel,[89] nor can he delegate his wife to appear for him.[90] Only one counsel can be heard on each side upon the trial of a question of fact.[91]

B. Presence of Judge.[92] It is the duty of the trial judge to be present from the opening until the close of the trial.[93] This is necessary in order that he may superintend the proceedings and give protection and security to the parties interested in the trial and to restrain counsel in their arguments from traveling outside of the record or transcending the bounds of legitimate discussion.[94] If he finds it necessary to absent himself from the court when a trial is in progress, he should suspend all proceedings until he has returned.[95] It has been held that if the judge absent himself during the trial for a considerable length of time, without the consent of the parties, the judgment should be reversed.[96] And on the other hand it has been held that absence of the judge during the trial with the consent

Cal. App. 762, 97 Pac. 898. And see Vinson *v.* Los Angeles Pac. R. Co., 147 Cal. 479, 82 Pac. 53.

79. Kelly *v.* Strouse, 116 Ga. 872, 43 S. E. 280.

80. Murphy *v.* Murphy, 141 Cal. 471, 75 Pac. 60.

81. Reynolds *v.* McManus, 139 Iowa 242, 117 N. W. 667.

82. Darby *v.* Metropolitan St. R. Co., 78 N. Y. App. Div. 631, 79 N. Y. Suppl. 1053.

83. Garret *v.* Gault, 13 B. Mon. (Ky.) 378.

84. Summers *v.* Greathouse, 87 Ind. 205.

85. Wadkins *v.* Hill, 106 Ind. 543, 7 N. E. 253; Conger *v.* Miller, 104 Ind. 592, 4 N. E. 300.

86. Hedrick *v.* Bell, 84 Ill. App. 523, unless prejudicial. *Contra,* Rossman *v.* Moffett, 75 Minn. 289, 77 N. W. 960.

87. Walker *v.* McMillan, 6 Can. Sup. Ct. 241.

88. Doe *v.* Roe, 2 Campb. 280, 11 Rev. Rep. 711.

89. Brewer *v.* National Union Bldg. Assoc., 166 Ill. 221, 46 N. E. 752 [*affirming* 41 Ill. App. 223]; Newton *v.* Ricketts, 12 Jur. 106, 238, 16 L. J. Ch. 372 note, 2 Phil. 624, 22 Eng. Ch. 624, 41 Eng. Reprint 1084; Moscatti *v.* Lawson, 1 M. & Rob. 454; Shuttleworth *v.* Nicholson, 1 M. & Rob. 254. When represented by counsel, counsel controls the conduct of the litigation even as against the wishes of his client. Steinheimer *v.* Coleman, 39 Ga. 119; Marks *v.* Benjamin, 2 M. & Rob. 225.

90. Cobbett *v.* Hudson, 1 E. & B. 11, 17 Jur. 488, 22 L. J. Q. B. 11, 1 Wkly. Rep. 54, 72 E. C. L. 11.

91. Covington *v.* Gilliatt, 1 Ch. D. 694, 45 L. J. Ch. 273, 34 L. T. Rep. N. S. 123, 24 Wkly. Rep. 269. But an assistant counsel may interpose an objection on cross-examination, although other counsel examined the witness in chief. Baumier *v.* Antiau, 65 Mich. 31, 31 N. W. 888.

92. **In criminal prosecutions** see CRIMINAL LAW, 12 Cyc. 522.

93. *Georgia.*— Horne *v.* Rogers, 110 Ga. 362, 35 S. E. 715, 49 L. R. A. 176.

Illinois.— Wells *v.* O'Hare, 209 Ill. 627, 70 N. E. 1056.

Iowa.— Allen *v.* Ames, etc., R. Co., 106 Iowa 602, 76 N. W. 848.

Missouri.— Nichols *v.* Metzger, 43 Mo. App. 607; Brownlee *v.* Hewitt, 1 Mo. App. 360.

Texas.— Dehougne *v.* Western Union Tel. Co., (Civ. App. 1905) 84 S. W. 1066.

Wisconsin.— Smith *v.* Sherwood, 95 Wis. 558, 70 N. W. 682.

See 46 Cent. Dig. tit. "Trial," § 38.

94. O'Brien *v.* People, 17 Colo. 561, 31 Pac. 230; Brownlee *v.* Hewitt, 1 Mo. App. 360. And see Wells *v.* O'Hare, 209 Ill. 627, 637, 70 N. E. 1056, in which it was said: "The absence of the trial judge during the course of a trial, civil as well as criminal, not only opens the way for, but invites, abuses and misconduct that may obstruct and defeat a fair and impartial hearing and decision of the case and pervert the administration of the law to injustice, and such conduct on the part of the judge is always detrimental to the decorum and dignity of a judicial tribunal."

95. Wells *v.* O'Hare, 209 Ill. 627, 70 N. E. 1056.

96. Smith *v.* Sherwood, 95 Wis. 558, 70 N. W. 682. And see Dehougne *v.* Western Union Tel. Co., (Tex. Civ. App. 1905) 84 S. W. 1066.

of the parties is not a ground for reversal,[97] especially where a deputized attorney is left in charge.[98] So it has been held that judgment should not be reversed because of the judge's retirement to chambers, when he could see and hear what was going on and no prejudice appears to have resulted;[99] and that the absence of the judge during trial should in no case operate as a ground for reversal where it affirmatively appears that no prejudice resulted.[1]

C. Publicity of Proceedings.[2] A statute providing for private trials of issues of fact in certain actions does not authorize the court to forbid in such cases the publication of the testimony.[3] A party is not entitled as of right to have an offer of proof made publicly to the court.[4] In England the court will order a private hearing of a cause if the parties request it;[5] but, except as to cases which relate to lunatics or wards of the court, cases in which the whole object would be defeated by a trial in public, and cases in which the practice of the ecclesiastical courts is preserved, the court has no power to order a trial in private.[6]

D. Appointment and Services of Interpreter.[7] A court has power, in its discretion,[8] independent of statute,[9] to appoint an interpreter to translate the evidence into intelligible English, and a witness may translate to the court plaintiff's book of account, kept in a foreign language.[10] The court's refusal to require an interpreter is not error unless the discretion is abused.[11]

E. Appointment and Services of Stenographer.[12] A statutory provision for taking down evidence and noting exceptions by a shorthand reporter appointed by the court is not exclusive;[13] and, although his notes are made the best authority in any matter in dispute, the court may modify the notes in accordance with what may judicially be found to be the facts.[14] In the absence of prejudice, a refusal to employ a stenographer for the trial of a cause is not reversible error,[15] nor is the refusal to instruct the stenographer to take down every word which is said by the judge in the progress of the trial in the hearing of parties and the jury, as the stenographer is only required to report such remarks of the judge as are addressed to the jury or counsel in their presence and concerning the case.[16] All or none of the testimony should be taken down in writing, and therefore a

97. Gorham *v.* Sioux City Stock Yards Co., 118 Iowa 749, 92 N. W. 698; De Hougne *v.* Western Union Tel. Co., (Tex. Civ. App. 1905) 84 S. W. 1066. It will be presumed that the judge absented himself with consent of counsel, in the absence of proof to the contrary. Gorham *v.* Sioux City Stock Yards Co., 118 Iowa 749, 92 N. W. 698.

98. Nichols *v.* Metzger, 43 Mo. App. 607. See also Western Union Tel. Co. *v.* Lewelling, 58 Ind. 367, holding that where the trial judge temporarily absents himself and calls an attorney to preside in his place, there is no available error where no objection is made thereto. *Compare* Brownlee *v.* Hewitt, 1 Mo. App. 360, holding that where the trial judge absents himself during argument, with consent of counsel which he has obtained by request, the judgment should be reversed. To refuse such request might operate to prejudice counsel with the jury.

99. Chicago City R. Co. *v.* Creech, 207 Ill. 400, 69 N. E. 919.

1. Chicago City R. Co. *v.* Anderson, 93 Ill. App. 419 [*affirmed* in 193 Ill. 9, 61 N. E. 999]; Allen *v.* Ames, etc., R. Co., 106 Iowa 602, 76 N. W. 848.

2. **In criminal prosecutions** see CRIMINAL LAW, 12 Cyc. 520.

3. *In re* Shortridge, 99 Cal. 526, 34 Pac. 227, 37 Am. St. Rep. 78, 21 L. R. A. 755.

4. Bagley *v.* Mason, 69 Vt. 175, 37 Atl. 287.

5. Matter of Portsmouth, Coop. 106, 10 Eng. Ch. 106, 35 Eng. Reprint 495; Malan *v.* Young, 53 J. P. 822.

6. Andrew *v.* Raeburn, L. R. 9 Ch. 522, 31 L. T. Rep. N. S. 73, 22 Wkly. Rep. 564; Mellor *v.* Thompson, 31 Ch. D. 55, 55 L. J. Ch. 942, 54 L. T. Rep. N. S. 219; Nagle-Gillman *v.* Christopher, 4 Ch. D. 173, 46 L. J. Ch. 60. *Contra*, Ogle *v.* Brandling, 2 Russ. & M. 688, 11 Eng. Ch. 688, 39 Eng. Reprint 557.

7. **In criminal prosecutions** see CRIMINAL LAW, 12 Cyc. 520.

8. State *v.* Severnson, 78 Iowa 653, 43 N. W. 533.

9. The Georgia code provides for interpreters. Sehall *v.* Eisner, 58 Ga. 190.

10. Yick Wo *v.* Underhill, 5 Cal. App. 519, 90 Pac. 967.

11. Kozlowski *v.* Chicago, 113 Ill. App. 513; Brzozowski *v.* National Box Co., 104 Ill. App. 338.

12. **In criminal prosecutions** see CRIMINAL LAW, 12 Cyc. 521.

13. Chicago, etc., R. Co. *v.* McEwen, 35 Ind. App. 251, 71 N. E. 926.

14. Taylor *v.* Preston, 79 Pa. St. 436.

15. Home F. Ins. Co. *v.* Johnson, 43 Nebr. 71, 61 N. W. 84.

16. Gilchrist *v.* Brande, 58 Wis. 184, 15 N. W. 817.

request to have the testimony reduced to writing, if not made at the beginning of the trial, is properly refused.[17] The absence of the official stenographer for a few minutes, unknown to the judge, and unnoticed by counsel, does not render the proceedings while he was gone void or erroneous.[18]

F. Presence of Parties or Attorneys.[19] A party has the right to be present at the trial.[20] After issue joined, the court may permit either party to proceed to trial at the time the case is set, in the absence of the opposite party [21] or his attorney, when the court has done all it could to secure his presence,[22] and it not appearing that counsel could not have been present.[23] So the court may in the absence of counsel question a witness, when counsel on his return is given an opportunity to examine the witness,[24] may render a decision,[25] or may require an attorney to impanel a jury in the absence of his client.[26] Where courts render decisions in the absence of counsel, they should direct notice to be given to the parties' attorneys.[27]

G. Adjournments Pending Trial. A court has power to adjourn a cause pending trial.[28] Where, by statute, the power of a court to adjourn a case is limited as to time, a longer adjournment than the period prescribed by statute deprives the court of jurisdiction.[29] A motion by a party which necessitates an adjournment is equivalent to an application therefor,[30] but a demand for a bill of particulars is not.[31] It is within the discretion of the court whether it shall adjourn a case, to wait for witnesses to arrive, and allow the case to stand open and permit the evidence to be introduced after the witnesses arrive; [32] or to wait for a witness who has not been subpœnaed but who has merely promised to attend the trial,[33] or a witness who has not been subpœnaed, sworn, or placed under rule as a witness.[34] So it is within the discretion of the court whether it shall adjourn, after other testimony has been given, to enable a party to procure the

17. Durke *v.* Crane, 112 La. 156, 36 So. 306.

18. Magoohan *v.* Curran, 71 Conn. 551, 42 Atl. 656.

19. **Absence of as ground for judgment by default** see JUDGMENTS, 23 Cyc. 743.

In bastardy proceedings see BASTARDY, 5 Cyc. 665.

In criminal prosecutions see CRIMINAL LAW, 12 Cyc. 523, 530, 543.

On communications to jury after retirement of jury see *infra*, X, E, 7.

On rendition of verdict see *infra*, XI, B, 2, c.

20. Ziegler *v.* Funkhouser, 42 Ind. App. 428, 85 N. E. 984; Louisville, etc., R. Co. *v.* Kelly, 100 Ky. 421, 38 S. W. 852, 40 S. W. 452, 19 Ky. L. Rep. 69, also holding that she may be accompanied by her children.

21. Comstock *v.* Castle Stove Company *v.* Galland, 6 Kan. App. 831, 49 Pac. 690; Gaskell *v.* Cowan, 14 Misc. (N. Y.) 254, 35 N. Y. Suppl. 711. But see Diment *v.* Bloom, 67 Minn. 111, 69 N. W. 700; Vail *v.* Wright, 3 N. J. L. 681.

Opportunity to examine jurors.— In the trial of a cause, the attorney for defendant first appeared after the jurors had been called and sworn on their *voir dire*, when he informed the court that he was engaged in another trial in another court. The court directed counsel to proceed with the examination of the jurors. The counsel for defendant was absent from the court room until the examination of the twelfth juror was finished by plaintiff's counsel, when the trial proceeded. It was held not to show that an opportunity was refused to defendant's counsel to examine the twelve jurors on their *voir dire*. McFern *v.* Gardner, 121 Mo. App. 1, 97 S. W. 972.

22. Kyle *v.* Chase, 14 Nebr. 528, 16 N. W. 821.

23. Mooney *v.* Olsen, 22 Kan. 69.

24. Chicago City R. Co. *v.* Anderson, 193 Ill. 9, 61 N. E. 999 [*affirming* 93 Ill. App. 419].

25. Marshall *v.* Livingston, 77 Ga. 21.

26. Culley *v.* Walkeen, 80 Mich. 443, 45 N. W. 368.

Objections on appeal.— An objection to the calling of a case and impaneling a jury in the absence of one party cannot be made for the first time in the appellate court. Wasson *v.* Palmer, 13 Nebr. 376, 14 N. W. 171.

27. Linville *v.* Scheeline, 30 Nev. 106, 93 Pac. 225.

28. Stager *v.* Harrington, 27 Kan. 414; Sherburne *v.* Semmes, 21 Fed. Cas. No. 12,760, 2 Cranch C. C. 446.

29. Redfield *v.* Florence, 2 E. D. Smith (N. Y.) 339.

30. Ives *v.* Quinn, 7 Misc. (N. Y.) 660, 28 N. Y. Suppl. 267.

31. New York Lumber, etc., Co. *v.* Noone, 46 Misc. (N. Y.) 470, 92 N. Y. Suppl. 349.

32. Illinois Cent. R. Co. *v.* Slater, 139 Ill. 190, 28 N. E. 830.

33. Kozlowski *v.* Chicago, 113 Ill. App. 513.

34. Missouri, etc., R. Co. *v.* Price, 48 Tex. Civ. App. 210, 106 S. W. 700.

testimony of an expert [35] or other witness,[36] or to enable defendant to obtain or produce a paper in evidence.[37] It is likewise discretionary with the court whether or not it will adjourn court to permit counsel to talk with witnesses who have come in since the trial began; [38] or to permit a party to get a copy of a document, where proof of the substance of the document was sufficient on the question involved, and he had an opportunity to obtain that on the trial and declined to do so; [39] or to permit a witness to leave court to search for papers mentioned in a subpœna *duces tecum* served on the witness a short time before he was sworn; [40] or to direct a deed of land to be executed by the sheriff to one of the parties; [41] or whether it will adjourn court on the ground of the illness of defendant's counsel, when the case proceeded in the same manner as if counsel had not been ill; [42] or on the ground of surprise, because of a variance between the allegations of the petition and the proof adduced, as to a written instrument, when the evidence is immaterial; [43] or in order that counsel may have an opportunity to examine a deposition which has been taken in the case, so as to enable him to move to suppress the same; [44] or to enable a party who objects to the admission of a judgment as evidence to file a bill of exceptions to the judgment and obtain a supersedeas; [45] or to consider a motion to amend the process in another case affecting the one on trial; [46] or to permit a party to procure authenticated copies of the laws of another state.[47] A court is not bound to suspend the trial of a cause to enable a party to procure additional evidence.[48] It is error to decline to adjourn a case until a witness who has departed without the consent of the party can be brought in on attachment,[49] or on account of the non-arrival of depositions which constituted defendant's case, and which should have arrived before the trial and were expected to arrive; [50] or to decline to adjourn to the following day when witnesses who have been in attendance all day leave before the cause is called for trial at six o'clock in the afternoon.[51] In granting a request for an adjournment pending trial, the court may impose conditions.[52] On the court's refusal to postpone the trial at the request of a plaintiff, he is not required to submit to a dismissal in order to obtain a review of such order.[53]

H. Right to Open and Close [54] — **1. In General.** Ordinarily the right to open and close the argument is determined by the same considerations as determine the right to open and close the evidence,[55] and the right to open and close is determined by the state of the pleadings at the beginning of the trial.[56] While

35. Silver *v.* Elias, 34 Misc. (N. Y.) 760, 68 N. Y. Suppl. 851.
36. Midland Valley R. Co. *v.* Hamilton, 84 Ark. 81, 104 S. W. 540; Block *v.* Sherry, 43 Misc. (N. Y.) 342, 87 N. Y. Suppl. 160, in the absence of surprise.
37. Knapp *v.* Order of Pendo, 36 Wash. 601, 79 Pac. 209.
38. Rogers *v.* Louisville, etc., R. Co., 35 S. W. 109, 17 Ky. L. Rep. 1421.
39. Reynolds, etc., Constr. Co. *v.* Monroe, 47 La. Ann. 1289, 17 So. 802.
40. Fairbanks *v.* Corlies, 3 E. D. Smith (N. Y.) 582.
41. Russell *v.* Slaton, 25 Ga. 193.
42. Wiedekind *v.* Tuolumne County Water Co., 83 Cal. 198, 23 Pac. 311.
43. Nieberg *v.* Greenberg, 91 N. Y. Suppl. 83.
44. Trammell *v.* Hudmon, 86 Ala. 472, 6 So. 4.
45. Watson *v.* Warnock, 31 Ga. 694.
46. Phillips *v.* Holland, 78 N. C. 31.
47. Griffin *v.* McKinney, 25 Tex. Civ. App. 432, 62 S. W. 78.
48. Zipperer *v.* Savannah, 128 Ga. 135, 57 S. E. 311.
49. Blasland-Parcels-Jordan Shoe Co. *v.* Hicks, 70 Mo. App. 301.
50. Sun Ins. Co. *v.* Stegar, 129 Ky. 808, 112 S. W. 922.
51. Schwarzschild, etc., Co. *v.* New York City R. Co., 90 N. Y. Suppl. 374.
52. Reiss *v.* Pfeiffer, 117 N. Y. App. Div. 880, 103 N. Y. Suppl. 478; Spangehl *v.* Spangehl, 39 N. Y. App. Div. 5, 57 N. Y. Suppl. 7.
53. Dart *v.* Solomon, 5 N. Y. St. 911.
54. **In criminal prosecutions** see CRIMINAL LAW, 12 Cyc. 535.
In probate proceedings see WILLS.
55. Perkins *v.* Ermel, 2 Kan. 325; Wright *v.* Northwestern Mut. L. Ins. Co., 91 Ky. 208, 15 S. W. 242, 12 Ky. L. Rep. 850; Muldoon *v.* Meriwether, 79 S. W. 1183, 25 Ky. L. Rep. 2085; Tarvin *v.* Timberlake, 38 S. W. 491, 18 Ky. L. Rep. 807; Hudson *v.* Wetherington, 79 N. C. 3.
56. *Indiana.*— Mason *v.* Seitz, 36 Ind. 516; Woodruff *v.* Hensley, 26 Ind. App. 592, 60 N. E. 312.
New York.— Trenkmann *v.* Schneider, 23 Misc. 336, 51 N. Y. Suppl. 232 [*affirmed* in 26 Misc. 659, 56 N. Y. Suppl. 770].

in some jurisdictions the open and close of the evidence and argument is a matter resting in the discretion of the court,[57] the weight of authority is that the matter of opening and closing the evidence or argument is a right and not a privilege, and not subject to the court's discretion,[58] and the denial of the right is very generally held to be erroneous,[59] although, according to the weight of authority, not necessarily a ground for new trial or a reversal.[60] The party to whom under the pleadings, in the absence of evidence for either party, the finding would necessarily be adverse has the right to open and close,[61] with this modification, that where plaintiff's right to recover is admitted by the pleadings, but the amount

South Carolina.— Kennington *v.* Catoe, 68 S. C. 470, 47 S. E. 719; Thompson *v.* Security Trust, etc., Co., 63 S. C. 290, 41 S. E. 464.

Vermont.— Farrington *v.* Jennison, 67 Vt. 569, 32 Atl. 641; Harvey *v.* Brouilette, 61 Vt. 525, 17 Atl. 722.

England.— Pontifex *v.* Jolley, 9 C. & P. 202, 38 E. C. L. 127.

57. *Iowa.*— Smith *v.* Coopers, 9 Iowa 376.

Minnesota.— Aultman *v.* Falkum, 47 Minn. 414, 50 N. W. 471.

Missouri.— Lucas *v.* Sullivan, 33 Mo. 389; Wade *v.* Scott, 7 Mo. 509; Oexner *v.* Loehr, 133 Mo. App. 211, 113 S. W. 727.

Pennsylvania.— Smith *v.* Frazier, 53 Pa. St. 226; Hartman *v.* Keystone Ins. Co., 21 Pa. St. 466; Robeson *v.* Whitesides, 16 Serg. & R. 320.

Tennessee.— Woodward *v.* Iowa L. Ins. Co., 104 Tenn. 49, 56 S. W. 1020.

United States.— Lancaster *v.* Collins, 115 U. S. 222, 6 S. Ct. 33, 29 L. ed. 373; Hall *v.* Weare, 92 U. S. 728, 23 L. ed. 500; Day *v.* Woodworth, 13 How. 363, 14 L. ed. 181; Florence Oil, etc., Co. *v.* Farrar, 109 Fed. 254, 48 C. C. A. 345.

58. *Massachusetts.*— Davis *v.* Mason, 4 Pick. 156.

Mississippi.— Porter *v.* Still, 63 Miss. 357.

New Hampshire.— Probate Judge *v.* Stone, 44 N. H. 593.

New Jersey.— Farmers' Nat. Bank *v.* Gaskill, 9 N. J. L. J. 204.

New York.— Lake Ontario Nat. Bank *v.* Judson, 122 N. Y. 278, 25 N. E. 367; Millerd *v.* Thorn, 56 N. Y. 402; Lindsley *v.* European Petroleum Co., 3 Lans. 176; Parrish *v.* Sun Printing, etc., Assoc., 6 N. Y. App. Div. 585, 39 N. Y. Suppl. 540; Penhryn Slate Co. *v.* Meyer, 8 Daly 61.

Texas.— Smith *v.* Traders' Nat. Bank, 74 Tex. 541, 12 S. W. 221; Ramsey *v.* Thomas, 14 Tex. Civ. App. 431, 38 S. W. 259.

59. Tobin *v.* Jenkins, 29 Ark. 151; Colwell *v.* Brower, 75 Ill. 516; Edwards *v.* Hushing, 31 Ill. App. 223; Ferguson-McKinney Dry Goods Co. *v.* Citv Nat. R. Co., 31 Tex. Civ. App. 238, 71 S. W. 604; Bozzio *v.* Vaglio, 10 Wash. 270, 38 Pac. 1042.

Correction of error.— The court may properly correct a mistake in awarding the opening and closing after evidence is presented. McCalla *v.* American Freehold Land Mortg. Co., 90 Ga. 113, 15 S. E. 687.

60. See *infra*, IV, 4, 7.

61. *Arkansas.*— Pierce *v.* Lyman, 28 Ark. 550.

Colorado.— Teller *v.* Ferguson, 24 Colo. 432, 51 Pac. 429.

Georgia.— Brunswick, etc., R. Co. *v.* Wiggins, 113 Ga. 842, 39 S. E. 551, 61 L. R. A. 513.

Illinois.— Chronister *v.* Anderson, 73 Ill. App. 524.

Indiana.— Lindley *v.* Sullivan, 133 Ind. 588, 32 N. E. 738, 33 N. E. 361; Rahm *v.* Deig, 121 Ind. 283, 23 N. E. 141; Wright *v.* Abbott, 85 Ind. 154; Aurora *v.* Cobb, 21 Ind. 492.

Iowa.— Names *v.* Boston Dwelling House Ins. Co., 95 Iowa 642, 64 N. W. 628; Viele *v.* Germania Ins. Co., 26 Iowa 9, 96 Am. Dec. 83.

Kentucky.— Doerhoefer *v.* Shewmaker, 123 Ky. 646, 97 S. W. 7, 29 Ky. L. Rep. 1193; Crabtree *v.* Atchison, 93 Ky. 338, 20 S. W. 260, 14 Ky. L. Rep. 313; Nelson County *v.* Bardstown, etc., Turnpike R. Co., 100 S. W. 1181, 30 Ky. L. Rep. 1254; Frankfort, etc., Tract. Co. *v.* Marshall, 98 S. W. 1035, 30 Ky. L. Rep. 431; Barker Cedar Co. *v.* Roberts, 65 S. W. 123, 23 Ky. L. Rep. 1345; Tarvin *v.* Timberlake, 38 S. W. 491, 18 Ky. L. Rep. 807.

Missouri.— Crapson *v.* Wallace, 81 Mo. App. 680.

Nebraska.— Kraus *v.* Clark, 81 Nebr. 575, 116 N. W. 164; Zweibel *v.* Myers, 69 Nebr. 294, 95 N. W. 597; Sorensen *v.* Sorensen, 68 Nebr. 483, 94 N. W. 540, 98 N. W. 837, 100 N. W. 930, 103 N. W. 455; Johnson *v.* Nelson, (1902) 91 N. W. 526; Hewit *v.* Indian Territory Bank, 64 Nebr. 463, 90 N. W. 250, 92 N. W. 741; Axthelm *v.* Chicago, etc., R. Co., (1902) 89 N. W. 313; Brumback *v.* American Bank, 53 Nebr. 714, 74 N. W. 264; Welsh *v.* Burr, 56 Nebr. 361, 76 N. W. 905; Rea *v.* Bishop, 41 Nebr. 202, 59 N. W. 555; Cortelyou *v.* Hiatt, 36 Nebr. 584, 54 N. W. 964; Mizer *v.* Bristol, 30 Nebr. 138, 46 N. W. 293; Osborne *v.* Kline, 18 Nebr. 344, 25 N. W. 360; Rolfe *v.* Pilloud, 16 Nebr. 21, 19 N. W. 615, 970.

New Hampshire.— Thurston *v.* Kennett, 22 N. H. 151; Seavy *v.* Dearborn, 19 N. H. 351.

New York.— Murray *v.* New York L. Ins. Co., 85 N. Y. 236; Cilley *v.* Preferred Acc. Ins. Co., 109 N. Y. App. Div. 394, 96 N. Y. Suppl. 282 [*affirmed* in 187 N. Y. 517, 79 N. E. 1102]; Slauson *v.* Englehart, 34 Barb. 198; Katz *v.* Kuhn, 9 Daly 166; Brennan *v.* Security L. Ins., etc., Co., 4 Daly 296; Trenkmann *v.* Schneider, 23 Misc. 336, 51 N. Y. Suppl. 232. Although at the close of the evidence only a single question is left and as

of recovery, beyond a mere nominal amount, is in controversy, plaintiff is entitled to open and close.[62] The general rule is that the party who asserts the affirmative of an issue has the right to open and close in a trial before the court or jury,[63]

to that the burden is on defendant. Bender *v.* Terwilliger, 166 N. Y. 590, 59 N. E. 1118 [*affirming* 48 N. Y. App. Div. 371, 63 N. Y. Suppl. 269].

North Carolina.— Stronach *v.* Bledsoe, 85 N. C. 473.

South Carolina.— Sanders *v.* Sanders, 30 S. C. 207, 9 S. E. 94.

Texas.— Sanders *v.* Bridges, 67 Tex. 93, 2 S. W. 663; Baum *v.* Sanger, (Civ. App. 1898) 49 S. W. 650.

England.— Mercer *v.* Whall, 5 Q. B. 447, 9 Jur. 576, 14 L. J. Q. B. 267, 48 E. C. L. 447; Leete *v.* Gresham L. Ins. Soc., 15 Jur. 1161, 7 Eng. L. & Eq. 578.

Canada.— Miller *v.* Confederation L. Assur. Co., 11 Ont. 120.

See 46 Cent. Dig. tit. "Trial," § 481.

Application of rule.— Under Kirby Dig. § 6196, providing that in the argument the party having the burden of proof shall have the opening and closing, and that the burden of proof lies on him who would be defeated if no evidence were given, where, in an action on a note by the assignee, defendant admitted its execution, pleaded failure of consideration, and denied that the note was transferred before maturity, or that the assignee was a *bona fide* purchaser for value, defendant was entitled to open and close. Roberts *v.* Padgett, 82 Ark. 331, 101 S. W. 753.

In Georgia, a qualification of the rule is recognized where defendant introduces no evidence. Where this is the case defendant has the right to open and close the argument. Moore *v.* Carey, 116 Ga. 28, 42 S. E. 258; East Tennessee, etc., R. Co. *v.* Fleetwood, 90 Ga. 23, 15 S. E. 778; Cade *v.* Hatcher, 72 Ga. 359.

62. *Arkansas.*— St. Louis, etc., R. Co. *v.* Taylor, 57 Ark. 136, 20 S. W. 1083; Springfield, etc., R. Co. *v.* Rhea, 44 Ark. 258.

Colorado.— Filby *v.* Turner, 9 Colo. App. 202, 47 Pac. 1037.

Indiana.— Baltimore, etc., R. Co. *v.* McWhinney, 36 Ind. 436; Cox *v.* Vickers, 35 Ind. 27; Aurora *v.* Cobb, 21 Ind. 492; Starnes *v.* Schofield, 5 Ind. App. 4, 31 N. E. 480.

Nebraska.— Summers *v.* Simms, 58 Nebr. 579, 79 N W. 155.

New York.— Tallmadge *v.* Press Pub. Co., 14 N. Y. Suppl. 331; Hecker *v.* Hopkins, 16 Abb. Pr. 301 note; Huntington *v.* Conkey, 33 Barb. 218.

Wisconsin.— Cunningham *v.* Gallagher, 61 Wis. 170, 20 N. W. 925.

England.— Doe *v.* Rowlands, 9 C. & P. 734, 5 Jur. 177, 38 E. C. L. 425; Hoggett *v.* Oxley, 9 C. & P. 324, 2 M. & Rob. 251, 38 E. C. L. 196; Lewis *v.* Wells, 7 C. & P. 221, 32 E. C. L. 582; Reeve *v.* Underhill, 6 C. & P. 773, 25 E. C. L. 682; Burrell *v.* Nicholson, 6 C. & P. 202, 1 M. & Rob. 304, 25 E. C. L. 394; Cooper *v.* Wakley, 3 C. & P. 474, M. & M. 248, 14 E. C. L. 670; Wootton *v.* Barton, 1 M. & Rob. 518; Carter *v.* Jones, 1 M. & Rob. 281.

63. *Arkansas.*— St. Louis, etc., R. Co. *v.* Thomason, 59 Ark. 140, 26 S. W. 598; Steel *v.* Stames, (1891) 15 S. W. 17; Tobin *v.* Jenkins, 29 Ark. 151; Pogue *v.* Joyner, 7 Ark. 462; Sillivant *v.* Reardon, 5 Ark. 140. And see Mine la Motte Lead, etc., Co. *v.* Consolidated Anthracite Coal Co., 85 Ark. 123, 107 S. W. 174.

Colorado.— Macdermid *v.* Watkins, 41 Colo. 231, 92 Pac. 701; Fairbanks *v.* Irwin, 15 Colo. 366, 25 Pac. 701.

Connecticut.—Young *v.* Newark F. Ins. Co., 59 Conn. 41, 22 Atl. 32.

Delaware.— Lofland *v.* McDaniel, 1 Pennew. 416, 41 Atl. 882; Jackson *v.* Delaplaine, 6 Houst. 358; Tatnall *v.* Kiamensi Woolen Co., 4 Houst. 287. But see Bonwill *v.* Dickson, 1 Harr. 105, holding that it is discretionary with the court.

Georgia.— Horton *v.* Pintchunck, 110 Ga. 355, 35 S. E. 663; Levens *v.* Smith, 102 Ga. 480, 31 S. E. 104; Scott *v.* Wheeler, 99 Ga. 326, 23 S. E. 700; Dodd *v.* Norman, 99 Ga. 319, 25 S. E. 650; Fidelity Banking, etc., Co. *v.* Kangara Valley Tea Co., 95 Ga. 172, 22 S. E. 50; Gunn *v.* Pettygrew, 93 Ga. 327, 20 S. E. 328; Horn *v.* Sims, 92 Ga. 421, 17 S. E. 670; Rigden *v.* Jordan, 81 Ga. 668, 7 S. E. 857; Doyle *v.* Donovan, 76 Ga. 44; Henderson *v.* Francis, 75 Ga. 178; Phelps *v.* Thurman, 74 Ga. 837; Augusta Factory *v.* Barnes, 72 Ga. 217, 53 Am. Rep. 838; Bones *v.* Printup, 64 Ga. 753; Buchanan *v.* McDonald, 40 Ga. 286; Johnson *v.* Martin, 25 Ga. 268; Mason *v.* Croom, 24 Ga. 211.

Illinois.— Bemis *v.* Horner, 165 Ill. 347, 46 N. E. 277; Razor *v.* Razor, 149 Ill. 621, 36 N. E. 963; Chicago, etc., R. Co. *v.* Bryan, 90 Ill. 126; Colwell *v.* Brower, 75 Ill. 516; Kells *v.* Davis, 57 Ill. 261; Harvey *v.* Ellithorpe, 26 Ill. 418; Shadholt *v.* Findeisen, 88 Ill. App. 432; Chicago, etc., R. Co. *v.* Hill, 130 Ill. App. 218; Semler Milling Co. *v.* Fyffe, 127 Ill. App. 514; Gibson *v.* Reiselt, 123 Ill. App. 52.

Indiana.— Long, etc., Co. *v.* Barnes, 162 Ind. 22, 69 N. E. 454; Stingley *v.* Nichols, 131 Ind. 214, 30 N. E. 34; Robbins *v.* Spencer, 121 Ind. 594, 22 N. E. 660; Kinney *v.* Dodge, 101 Ind. 573; Whitesides *v.* Hunt, 97 Ind. 191, 49 Am. Rep. 441; Stevens *v.* Overturf, 62 Ind. 331; Lynam *v.* Buckner, 60 Ind. 402; Indiana State Bd. of Agriculture *v.* Gray, 54 Ind. 91; List *v.* Kortepeter, 26 Ind. 27; Zehner *v.* Kepler, 16 Ind. 290; Burroughs *v.* Hunt, 13 Ind. 178; Jackson *v.* Pittsford, 8 Blackf. 194; Kimble *v.* Adair, 2 Blackf. 320; Union Cent. L. Ins. Co. *v.* Loughmiller, 33 Ind. App. 309, 69 N. E. 264; Woodruff *v.* Hensley, 26 Ind. App. 592, 60 N. E. 312; Myers *v.* Binkley, 26 Ind. App. 208, 59 N. E. 333; Brower *v.* Nellis, 16 Ind. App. 183, 44 N. E. 939; Donahoe *v.* Rich, 2 Ind. App. 540, 28 N. E. 1001.

Indian Territory.— Craggs *v.* Bohart, 4 Indian Terr. 443, 69 S. W. 931.

provided such party offers any proof whatever in his own behalf which has a

Iowa.—Wilson *v.* Big Joe Block Coal Co., 142 Iowa 521, 119 N. W. 604; Fenton *v.* Iowa State Traveling Men's Assoc. 139 Iowa 166, 117 N. W. 251; *In re* Wharton, 132 Iowa 714, 109 N. W. 492; Shaffer *v.* Warren, (1905) 102 N. W. 497; Milwaukee Harvesting Co. *v.* Crabtree, 101 Iowa 526, 70 N. W. 704; Oxtoby *v.* Henley, 112 Iowa 697, 84 N. W. 942; Lowe *v.* Lowe, 40 Iowa 220.

Kansas.— Baughman *v.* Baughman, 32 Kan. 538, 4 Pac. 1003; Perkins *v.* Ermel, 2 Kan. 325.

Kentucky.— Givens *v.* Berkley, 108 Ky. 236, 56 S. W. 158, 21 Ky. L. Rep. 1653; Kentucky Wagon Mfg. Co. *v.* Louisville, 97 Ky. 548, 31 S. W. 130, 17 Ky. L. Rep. 366; American Acc. Co. *v.* Reigart, 95 Ky. 547, 23 S. W. 191, 14 Ky. L. Rep. 469, 42 Am. St. Rep. 274, 21 L. R. A. 651; Lieb *v.* Craddock, 87 Ky. 525, 9 S. W. 838, 10 Ky. L. Rep. 570; Louisville, etc., R. Co. *v.* Brown, 13 Bush 475; Vance *v.* Vance, 2 Metc. 581; Tipton *v.* Triplett, 1 Metc. 570; Waller *v.* Morgan, 18 B. Mon. 136; Caskey *v.* Lewis, 15 B. Mon. 27; Page *v.* Carter, 8 B. Mon. 192; Daviess *v.* Arbuckle, 1 Dana 525; Louisville, etc., R. Co. *v.* Melby, 104 S. W. 785, 31 Ky. L. Rep. 1197; Ashland, etc., R. Co. *v.* Hoffman, 82 S. W. 566, 26 Ky. L. Rep. 778; Stepp *v.* Hatcher, 67 S. W. 819, 23 Ky. L. Rep. 244; Rudy *v.* Katz, 66 S. W. 18, 23 Ky. L. Rep. 1697; Louisville, etc., R. Co. *v.* Harmon, 64 S. W. 640, 23 Ky. L. Rep. 871; Denhard *v.* Hirst, 64 S. W. 393, 23 Ky. L. Rep. 789; Blackwell *v.* Johnston, 56 S. W. 12, 21 Ky. L. Rep. 1720; Monarch *v.* Carter, 49 S. W. 953, 20 Ky. L. Rep. 1765; Kentucky Cent. R. Co. *v.* Gerreiss, 14 Ky. L. Rep. 397.

Louisiana.— Beaulieu *v.* Furst, 3 Rob. 345.

Massachusetts.— Hurley *v.* O'Sullivan, 137 Mass. 86.

Minnesota.—Viehman *v.* Boelter, 105 Minn. 60, 116 N. W. 1023.

Mississippi.— Porter *v.* Still, 63 Miss. 357; Thornton *v.* West Feliciana R. Co., 29 Miss. 143.

Missouri.— James *v.* Mutual Reserve Fund L. Assoc., 148 Mo. 1, 49 S. W. 978; Bates *v.* Forcht, 89 Mo. 121, 1 S. W. 120; Colt *v.* Beaumont, 32 Mo. 118; Abscher *v.* Franklin, 121 Mo. App. 29, 97 S. W. 1002; Grant Quarry Co. *v.* Lyons Constr. Co., 72 Mo. App. 530; Lafayette County Bank *v.* Metcalf, 29 Mo. App. 384.

New Hampshire.— Probate Judge *v.* Stone, 44 N. H. 593; Chesley *v.* Chesley, 37 N. H. 229; Bills *v.* Vose, 27 N. H. 212; Thurston *v.* Kennett, 22 N. H. 151; Toppan *v.* Jenness, 21 N. H. 232.

New Jersey.— Farmers Nat. Bank *v.* Gaskill, 9 N. J. L. J. 204.

New York.— Heilbronn *v.* Herzog, 165 N. Y. 98, 58 N. E. 759 [*reversing* 33 N. Y. App. Div. 311, 53 N. Y. Suppl. 841]; Elwell *v.* Chamberlin, 31 N. Y. 611; Miller *v.* Meyerhoff, 79 N. Y. App. Div. 532, 81 N. Y. Suppl. 234; Woodriff *v.* Hunter, 65 N. Y. App. Div. 404, 73 N. Y. Suppl. 210; Howard *v.* Hayes, 47 N. Y. Super. Ct. 89 [*affirmed* in 90 N. Y. 643]; Lange *v.* Garfunkel, 25 Misc. 525, 54 N. Y. Suppl. 993.

North Carolina.— Love *v.* Dickerson, 85 N. C. 5; Churchill *v.* Lee, 77 N. C. 341.

Ohio.— Beatty *v.* Hatcher, 13 Ohio St. 115; Lexington F., etc., Ins. Co. *v.* Paver, 16 Ohio 324; Chicago Cottage Organ Co. *v.* Biggs, 22 Ohio Cir. Ct. 392, 12 Ohio Cir. Dec. 497.

Pennsylvania.—VonStorch *v.* VonStorch, 196 Pa. St. 545, 46 Atl. 1062; Smaltz *v.* Ryan, 112 Pa. St. 423, 3 Atl. 772; Richards *v.* Nixon, 20 Pa. St. 19; McCausland *v.* McCausland, 1 Yeates 304; Com. *v.* Desilver, 2 Ashm. 163.

South Carolina.— Beckham *v.* Southern R. Co., (1897) 27 S. E. 611; Hagood *v.* Cathcart, Rice 262.

Texas.— Parks *v.* Young, 75 Tex. 278, 12 S. W. 986; Milburn Wagon Co. *v.* Kennedy, 75 Tex. 212, 13 S. W. 28; Steed *v.* Petty, 65 Tex. 490; Willis *v.* Stamps, 36 Tex. 48; Blackwell *v.* Coleman County, (Civ. App. 1901) 60 S. W. 572.

Vermont.— Goss *v.* Turner, 21 Vt. 437; State *v.* Windsor Bank, 14 Vt. 562.

Virginia.— Overton *v.* Davisson, 1 Gratt. 211, 42 Am. Dec. 544.

Washington.— McDougall *v.* Walling, 19 Wash. 80, 52 Pac. 530; Hall *v.* Elgin Dairy Co., 15 Wash. 542, 46 Pac. 1049.

United States.—Armstrong *v.* U. S., 1 Fed. Cas. No. 548, Gilp. 399; Beall *v.* Newton, 2 Fed. Cas. No. 1,164, 1 Cranch C. C. 404; Davidson *v.* Henop, 7 Fed. Cas. No. 3,605, 1 Cranch C. C. 280; Dunlop *v.* Peter, 8 Fed. Cas. No. 4,168, 1 Cranch C. C. 403; Henderson *v.* Casteel, 11 Fed. Cas. No. 6,350, 3 Cranch C. C. 365; Murray *v.* Mason, 17 Fed. Cas. No. 9,966, 1 Hayw. & H. 120; Sutton *v.* Mandeville, 23 Fed. Cas. No. 13,651, 1 Cranch C. C. 187.

England.— Osborn *v.* Thompson, 9 C. & P. 337, 2 M. & Rob. 254, 38 E. C. L. 203; Sanford *v.* Hunt, 1 C. & P. 118, 12 E. C. L. 79; Brooks *v.* Clarke, 4 F. & F. 484; Pim *v.* Eastern Counties R. Co., 2 F. & F. 133.

Canada.— Neville *v.* Fox, 28 U. C. Q. B. 231; Jacobs *v.* Equitable Ins. Co., 19 U. C. Q. B. 250.

See 46 Cent. Dig. tit. "Trial," § 47.

In Alabama plaintiff is entitled to the opening and closing no matter what the form of the issue may be. Chamberlain *v.* Gaillard, 26 Ala. 504.

In California it has been held that plaintiff always in contemplation of law has the affirmative and has the right to open and conclude. Benham *v.* Rowe, 2 Cal. 387, 56 Am. Dec. 342.

If the pleadings attempt to raise an issue plaintiff is entitled to open and close, although it is questionable whether they do so. Boehm *v.* Lies, 60 N. Y. Super Ct. 436, 18 N. Y. Suppl. 577.

Where a complaint is confessed and avoided and the answer is wholly denied and also confessed and avoided, defendant has the

tendency to support such issue,[64] and this rule is applicable notwithstanding the opposite party may have the burden of proof on an intermediate matter.[65] But in determining who has the affirmative of the issue, it is not so much the form as the substance and effect of the issues which is to be regarded.[66] Ordinarily admission by defendant of a *prima facie* case for plaintiff entitles him to open and close,[67] and this right is not lost because plaintiff does not introduce any evidence.[68] However, to entitle defendant to open and close, because of admissions made by him, such admissions must cover the entire cause of action,[69] and be so clear and comprehensive as to leave nothing, no matter how inconsequential, to be proved by plaintiff to establish a *prima facie* case;[70] and if the general issue be pleaded, an

right under the code to open and close. Judah *v.* Vincennes University, 23 Ind. 272.

Although defendant in his pleas may take the affirmative upon certain issues plaintiff has the right to open and conclude the argument when the burden is on him. Ryals *v.* Powell, 83 Ga. 278, 9 S. E. 613.

64. Page *v.* Carter, 8 B. Mon. (Ky.) 192; Young *v.* Haydon, 3 Dana (Ky.) 145; Daviess *v.* Arbuckle, 1 Dana (Ky.) 525.

65. Maurice *v.* Worden, 54 Md. 233, 39 Am. Rep. 384; People *v.* Detroit, etc., Plank-Road Co., 125 Mich. 366, 84 N. W. 290 (*puis darrein continuance*).

66. *Arkansas.*— Beal, etc., Dry Goods Co. *v.* Barton, 80 Ark. 326, 97 S. W. 58.

Kentucky.— Bush *v.* Wathen, 104 Ky. 548, 47 S. W. 599, 20 Ky. L. Rep. 731; Young *v.* Haydon, 3 Dana 145; Denny *v.* Booker, 2 Bibb 427.

Mississippi.— Porter *v.* Still, 63 Miss. 357.

Missouri.— Oexner *v.* Loehr, 133 Mo. App. 211, 113 S. W. 727.

New Hampshire.— Chesley *v.* Chesley, 37 N. H. 229.

New York.— Huntington *v.* Conkey, 33 Barb. 218; Lewis *v.* Donohue, 27 Misc. 514, 58 N. Y. Suppl. 319.

Ohio.—Webb *v.* Cincinnati, 32 Ohio St. 215.

Pennsylvania.— Huston *v.* Ticknor, 99 Pa. St. 231.

See 46 Cent. Dig. tit. "Trial," § 47.

Application of rule.—An affirmative plea, amounting to the general issue, will not give a party the right to open and close. Denny *v.* Booker, 2 Bibb (Ky.) 427.

If it appear that defendant pleaded affirmatively for sole purpose of gaining an unjust advantage, the opening and conclusion of the cause may be denied him. Sodousky *v.* McGee, 4 J. J. Marsh. (Ky.) 267.

67. Turner *v.* Elliott, 127 Ga. 338, 56 S. E. 434; Stiles *v.* Shedden, 2 Ga. App. 317, 58 S. E. 515; E. Van Winkle Gin, etc., Works *v.* Matthews, 2 Ga. App. 249, 58 S. E. 396; Rich *v.* Bailey, 123 Ky. 827, 97 S. W. 747, 30 Ky. L. Rep. 155; Early *v.* Early, 75 S. C. 15, 54 S. E. 827; Beckham *v.* Southern R. Co., 50 S. C. 25, 27 S. E. 611; Addison *v.* Duncan, 35 S. C. 165, 14 S. E. 305; Fain *v.* Nelms, (Tex. Civ. App. 1908) 113 S. W. 1002.

68. Dickey *v.* Smith, 127 Ga. 645, 56 S. E. 756.

69. *Georgia.*— Phœnix Ins. Co. *v.* Gray, 113 Ga. 424, 38 S. E. 992; Western, etc., R. Co. *v.* Brown, 102 Ga. 13, 29 S. E. 130; Johnson *v.* Palmour, 87 Ga. 244, 13 S. E. 637; Bertody *v.* Ison, 69 Ga. 317.

Indiana.— Hyatt *v.* Clements, 65 Ind. 12; Camp *v.* Brown, 48 Ind. 575; Rouyer *v.* Miller, 16 Ind. App. 519, 44 N. E. 51, 45 N. E. 674; Boyd *v.* Smith, 15 Ind. App. 324, 43 N. E. 1056, (App. 1894) 39 N. E. 208; McCloskey *v.* Davis, 8 Ind. App. 190, 35 N. E. 187.

Iowa.— Goodpaster *v.* Voris, 8 Iowa 334, 74 Am. Dec. 313.

Kentucky.— Louisville, etc., R. Co. *v.* Schwab, 127 Ky. 82, 105 S. W. 110, 31 Ky. L. Rep. 1313.

Nebraska.— Sorensen *v.* Sorensen, 68 Nebr. 483, 94 N. W. 540, 98 N. W. 837, 100 N. W. 930, 103 N. W. 455.

Texas.— Sanders *v.* Bridges, 67 Tex. 93, 2 S. W. 663; Harris *v.* Pinckney, (Civ. App. 1900) 55 S. W. 38; Jones *v.* Smith, 21 Tex. Civ. App. 440, 52 S. W. 561; Clarkson *v.* Graham, 21 Tex. Civ. App. 355, 52 S. W. 269; Mutual L. Ins. Co. *v.* Simpson, (Civ. App. 1894) 28 S. W. 837.

England.— Doe *v.* Tucker, M. & M. 536, 22 E. C. L. 580.

See 46 Cent. Dig. tit. "Trial," § 50.

As to what is a sufficient admission see Blooming Grove Cotton-Oil Co. *v.* Blooming Grove First Nat. Bank, (Tex. Civ. App. 1900) 56 S. W. 552.

Illustrations.—Where, in a suit by a passenger for being pushed by the conductor from a moving train, defendant did not justify such act, but denied that plaintiff was so pushed, alleging that he was refused admission because of his condition, the justification was not a complete answer to the action, so that defendant was properly denied the burden of proof. Louisville, etc., R. Co. *v.* McNally, 105 S. W. 124, 31 Ky. L. Rep. 1357. And where, in an action on a promissory note containing a provision for attorney's fees, written notice of intention to sue, as required by law, was alleged, an admission in the answer, limited to the execution of the note, and accompanied by a denial of the allegation as to notice of intention to sue, is not sufficient to entitle defendant to open and close. E. Van Winkle Gin, etc., Works *v.* Pittman, 2 Ga. App. 246, 58 S. E. 379.

Admission of conceded facts.— The party cannot acquire the right by making an admission in the face of the conceded facts. Royce *v.* Gazan, 76 Ga. 79.

70. Cilley *v.* Preferred Acc. Ins. Co., 109

admission of plaintiff's right of action on another part of the record will not avail.[7] In some of the states, in order to entitle defendant to open and close his admission of plaintiff's cause of action, except as it is attempted to defeat the same by facts which constitute, if true, a good defense must be entered of record.[72] While in others it must be made by the pleadings.[73] If defendant by admission is willing to undertake the burden of proof, he must make such admission before the trial begins.[74] Such admission comes too late if made after the written declaration and specification of defense has been read to the jury,[75] after plaintiff has made a *prima facie* case,[76] after the evidence is concluded,[77] or after the opening argument has been made.[78] Where there are several defendants, each defendant must file the statutory admission if plaintiff's right to open and close is to be precluded.[79] The right cannot be obtained where after the admission is made it is withdrawn.[80] In jurisdictions where the admission must be filed, to be effective, it must be filed before the announcement of ready for trial.[81]

2. Several Pleas and Issues. Where there are several issues and plaintiff is called on to sustain any of them, the right to open and close is with him.[82] It has

N. Y. App. Div. 394, 96 N. Y. Suppl. 282 [*affirmed* in 187 N. Y. 517, 79 N. E. 1102].

That the admission must be so specific that the jury can understand what facts are admitted see Alstin *v.* Cundiff, 52 Tex. 453.

71. Fletcher *v.* McMillan, 132 Ga. 477, 64 S. E. 268; Buzzell *v.* Snell, 25 N. H. 474.

72. Merriam *v.* Cunningham, 11 Cush. (Mass.) 40; Wigglesworth *v.* Atkins, 5 Cush. (Mass.) 212; Buzzell *v.* Snell, 25 N. H. 474; Hittson *v.* State Nat. Bank, (Tex. 1890) 14 S. W. 780; Ayers *v.* Lancaster, 64 Tex. 305; Ney *v.* Rothe, 61 Tex. 374; Joy *v.* Liverpool, etc., Ins. Co., (Tex. Civ. App. 1903) 74 S. W. 822; Munn *v.* Martin, (Tex. App. 1890) 15 S. W. 195.

That the admission must be made in the manner required by law see Halsell *v.* Neal, 23 Tex. Civ. App. 26, 56 S. W. 137; Smith *v.* Eastham, (Tex. Civ. App. 1900) 56 S. W. 218.

Insufficient admissions.—Where the admissions made by defendant entered of record are not sufficient to relieve plaintiff of the necessity of showing any fact or of introducing any evidence necessary to authorize recovery, it is error to deprive plaintiff of his right to open and close. Meade *v.* Logan, (Tex. Civ. App. 1908) 110 S. W. 188.

An admission of all facts necessary to be proved by plaintiff in order to make out a *prima facie* case does not preclude defendant, who thereby obtains the right to open and close, from introducing evidence to show that plaintiff has no title to a note on which he sued defendant as maker, he suing as an indorser. Spaulding *v.* Hood, 8 Cush. (Mass.) 602.

73. Fletcher *v.* McMillan, 132 Ga. 477, 64 S. E. 268; Mitchern *v.* Allen, 128 Ga. 407, 57 S. E. 721; Crankshaw *v.* Schweitzer Mfg. Co., 1 Ga. App. 363, 58 S. E. 222; Leesville Mfg. Co. *v.* Morgan Wood, etc., Works, 75 S. C. 342, 55 S. E. 768; Addison *v.* Duncan, 35 S. C. 165, 14 S. E. 305; Boyce *v.* Lake, 17 S. C. 481, 43 Am. Rep. 618; Johnson *v.* Wideman, Dudley (S. C.) 325.

Oral admissions by defendant are not sufficient to entitle him to open and close, but admissions for that purpose must be made in his pleadings. E. Van Winkle Gin, etc., Works *v.* Pittman, 2 Ga. App. 246, 58 S. E. 379.

74. Massengale *v.* Pounds, 100 Ga. 770, 28 S. E. 510; Abel *v.* Jarrett, 100 Ga. 732, 28 S. E. 453; Schoonover *v.* Osborne, 117 Iowa 427, 90 N. W. 844; Merriam *v.* Cunningham, 11 Cush. (Mass.) 40; Dugey *v.* Hughes, 2 Tex. App. Civ. Cas. § 4.

75. Wigglesworth *v.* Atkins, 5 Cush. (Mass.) 212.

During progress of trial.—As to the argument it is in the discretion of the trial court if the admission is made during the progress of the trial. Gardner *v.* Meeker, 169 Ill. 40, 48 N. E. 307; Gardner *v.* Girtin, 69 Ill. App. 422.

76. Cook *v.* Coffey, 103 Ga. 384, 30 S. E. 27.

77. Georgia Cent. R. Co. *v.* Morgan, 110 Ga. 168, 35 S. E. 345; Guess *v.* Stone Mountain Granite, etc., Co., 72 Ga. 320; Iverson *v.* Saulsbury, 65 Ga. 724; New York Mut. L. Ins. Co. *v.* Simpson, (Tex. Civ. App. 1894) 28 S. W. 837.

78. Fred Miller Brewing Co. *v.* De France, 90 Iowa 395, 57 N. W. 959; Valley Mut. Life Assoc. *v.* Teewalt, 79 Va. 421.

79. Guerguin *v.* Boone, 33 Tex. Civ. App. 622, 77 S. W. 630.

80. Jones *v.* Smith, 21 Tex. Civ. App. 440, 52 S. W. 561.

81. Clements *v.* McCain, (Tex. Civ. App. 1899) 49 S. W. 122.

82. *Arkansas.*— Bertrand *v.* Taylor, 32 Ark. 470.

Illinois.— Carpenter *v.* Joliet First Nat. Bank, 119 Ill. 352, 10 N. E. 18.

Indiana.— Bowen *v.* Spears, 20 Ind. 146; Shaw *v.* Barnhart, 17 Ind. 183; Jackson *v.* Pittsford, 8 Blackf. 194.

Kentucky.— Jennings *v.* Maddox, 8 B. Mon. 430; Stringfield *v.* Louisville R. Co., (1908) 113 S. W. 513.

Louisiana.—Abat *v.* Sigura, 5 Mart. N. S. 73.

Maine.— Lunt *v.* Wormell, 19 Me. 100.

Massachusetts.—Ayer *v.* Austin, 6 Pick. 225. But see Bangs *v.* Snow, 1 Mass. 181.

been held, however, in a jurisdiction where the matter of opening and closing is within the discretion of the court, that the court may in its discretion permit defendant to open and close where the main issue is with him.[83]

3. Co-Parties. Where there are several defendants and the burden is on plaintiff as to each of them, he is entitled to open and close.[84] Where the burden of proof is upon one of two defendants, and as to the other the burden is on plaintiff, the order of argument is in the sound discretion of the court.[85]

4. Trial of Causes Together. Where several causes are tried together by consent, the party who is plaintiff in the cause standing first on the docket is entitled to open and close.[86]

5. Time For Claiming. The right to open and close must be claimed and denied in order that complaint may be made of denial.[87] It must be claimed at the opening of the case.[88] The party claiming the right must make it affirmatively appear.[89] Where there are two defendants a claim by one comes too late after the answer of the other is read.[90] Objection cannot be made for the first time on appeal that the right to open and close was given the wrong party.[91]

6. Right to Open and Close in Particular Actions — a. Assault and Battery. Where the plea is *son assault demesne*, defendant has the right to open and close.[92]

b. Attachment and Garnishment Proceedings. If, however, the plea only partially admits the commission of the acts charged, it is not a plea of justification and does not entitle defendant to open and close the argument.[93] Where the issue is on a traverse to an attachment affidavit, plaintiff has the right to open and close.[94] Plaintiff also has this right where the property is claimed by an interpleader,[95] where plaintiff admits the transfer to the intervener prior to the

Mississippi.— Porter *v.* Still, 63 Miss. 357.

New Hampshire.— Chesley *v.* Chesley, 37 N. H. 229; Buzzell *v.* Snell, 25 N. H. 474; Belknap *v.* Wendell, 21 N. H. 175.

New York.— Stilwell *v.* Archer, 64 Hun 169, 18 N. Y. Suppl. 888; Bick *v.* Reese, 3 N. Y. Suppl. 737.

North Carolina.— Johnson *v.* Maxwell, 87 N. C. 18.

Ohio.— Lexington F., etc., Ins. Co. *v.* Paver, 16 Ohio 324.

United States.— Henderson *v.* Casteel, 11 Fed. Cas. No. 6,350, 3 Cranch C. C. 365.

England.— Geach *v.* Ingall, 9 Jur. 691, 15 L. J. Exch. 37, 14 M. & W. 95; Rawlins *v.* Desborough, 2 M. & Rob. 328.

See 46 Cent. Dig. tit. "Trial," § 49.

If there be a negative and affirmative plea, plaintiff's counsel must begin and conclude argument on the negative issue, and counsel for defendant must begin and conclude argument on the affirmative issue, but both must, in the argument, confine themselves strictly to the issue they are discussing. Vuyton *v.* Brenell, 28 Fed. Cas. No. 17,026, 1 Wash. 467.

83. Cheesman *v.* Hart, 42 Fed. 98.

84. Clodfelter *v.* Hulett, 92 Ind. 426; Kirkpatrick *v.* Armstrong, 79 Ind. 384. *Contra*, Sodousky *v.* McGee, 4 J. J. Marsh. (Ky.) 267.

85. Simons *v.* Pearson, 61 S. W. 259, 22 Ky. L. Rep. 1707.

86. Boykin *v.* Epstein, 94 Ga. 750, 22 S. E. 218; Griffin *v.* Inman, 57 Ga. 370. *Compare* Gaus, etc., Mfg. Co. *v.* Magee, etc., Mfg. Co., 42 Mo. App. 307, holding that the open and close may be awarded to the party plaintiff in either suit according to the discretion of the court.

87. Wheatly *v.* Phelps, 3 Dana (Ky.) 302.

88. McKibbon *v.* Folds, 38 Ga. 235; Crawford *v.* Tyng, 7 Misc. (N. Y.) 239, 27 N. Y. Suppl. 424 [*reversed* on other grounds in 10 Misc. 103, 30 N. Y. Suppl. 907].

89. Claflin *v.* Baere, 28 Hun (N. Y.) 204.

90. Hittson *v.* State Nat. Bank, (Tex. 1890) 14 S. W. 780.

91. New York Mut. L. Ins. Co. *v.* Tillman, 84 Tex. 31, 19 S. W. 294.

92. *Georgia.*— Strickland *v.* Atlanta, etc., R. Co., 99 Ga. 124, 24 S. E. 981.

Indiana.— Downey *v.* Day, 4 Ind. 531.

Kentucky.— Goldsberry *v.* Stuteville, 3 Bibb 345; Walls *v.* Robb, 15 Ky. L. Rep. 159.

South Carolina.— McKenzie *v.* Milligan, 1 Bay 248.

England.— Bedell *v.* Russell, R. & M. 293, 27 Rev. Rep. 749, 21 E. C. L. 755.

See 46 Cent. Dig. tit. "Trial," § 71.

Contra.— Johnson *v.* Josephs, 75 Me. 544. And see Dragoo *v.* Whisner, 31 Ohio St. 192, in which it was held that if defendant justifies on the ground of self-defense, it is not error for the court to permit plaintiff to open and close.

As to what is not a sufficient plea of justification so as to entitle defendant to open and close see Seymour *v.* Bailey, 76 Ga. 338.

93. Berkner *v.* Dannenberg, 116 Ga. 954, 43 S. E. 463, 60 L. R. A. 559.

94. Einstein *v.* Munnerlyn, 32 Fla. 381, 13 So. 926; Olds Wagon Co. *v.* Benedict, 27 Nebr. 344, 43 N. W. 108, 25 Nebr. 372, 41 N. W. 254.

95. Marmiche *v.* Commagere, 6 Mart. N. S. (La.) 657; Meredith *v.* Wilkinson, 31 Mo.

attachment,[96] even though the issue is so framed that the intervener affirms fairness and good faith in the transfer.[97] But where the affirmative is on the intervener, the court may award the open and close to him.[98] Where in a suit for wrongful attachment it is incumbent under the pleadings for plaintiff to show the amount of damages he should open and close.[99]

c. Suits on Bills and Notes. Where the defense to a bill or note is a general denial the opening and closing is with plaintiff,[1] so also where the defense is a denial of the holder's right to sue,[2] or where the execution is only qualifiedly admitted.[3] But the right to open and close is with defendant where he has assumed the burden of proof;[4] where the execution is admitted and liability denied;[5] or where the defense is usury,[6] coverture,[7] duress,[8] payment,[9] or mistake,[10] or that the paper is accommodation paper merely[11] or was given without consideration;[12] where defendant admits execution and pleads an affirmative defense;[13] where the execution and assignment is admitted and new matter pleaded in defense;[14] where the defense is an alteration after acceptance;[15] where defendant admits execution and denies indorsement and delivery[16] or claims that the note was given for an unlawful purpose of which the holder had knowledge,[17] or that the indorsee took the note with knowledge of facts rendering it invalid,[18] or that defendant surety is discharged by reason of an advance payment of interest;[19] or where the defense is a set-off.[20]

App. 1; Temple Nat. Bank *v.* Warner, (Tex. Civ. App. 1898) 44 S. W. 1025.

Confession and avoidance.—A plaintiff in an attachment suit, whose answer to an interplea admits an assignment under which the interpleader claims, but alleges it to be fraudulent, is entitled to open and close the case both in the introduction of evidence and in the argument. Hazell *v.* Tipton Bank, 95 Mo. 60, 8 S. W. 173, 6 Am. St. Rep. 22.

96. Mansur, etc., Implement Co. *v.* Davis, 61 Ark. 627, 33 S. W. 1074.

97. Grady *v.* Hammond, 21 Ala. 427.

98. Randolph Bank *v.* Armstrong, 11 Iowa 515.

99. Whitney *v.* Brownewell, 71 Iowa 251, 32 N. W. 285.

1. Stayner *v.* Joyce, 120 Ind. 99, 22 N. E. 89; Pate *v.* Aurora First Nat. Bank, 63 Ind. 254; Jarboe *v.* Scherb, 34 Ind. 350; Bates *v.* Forcht, 89 Mo. 121, 1 S. W. 120.

2. Loggins *v.* Buck, 33 Tex. 113. And see Mastin *v.* Bartholomew, 41 Colo. 328, 92 Pac. 682.

3. Redmond *v.* Tone, 10 N. Y. Suppl. 506. See also Oexner *v.* Loehr, 133 Mo. App. 211, 113 S. W. 727.

Illustration.—Where the answer in an action on a note admits that the note was executed, but denies that it was executed and delivered on a week-day, the admission, not being as broad as the note itself, is not sufficient to entitle plaintiff to judgment without introducing evidence, and he is properly allowed to open and close the argument. Cammack *v.* Newman, 86 Ark. 249, 110 S. W. 802.

4. Berry *v.* Joiner, 45 Tex. Civ. App. 461, 101 S. W. 289.

5. Plenty *v.* Rendle, 43 Hun (N. Y.) 568.

6. Seekel *v.* Norman, 78 Iowa 254, 43 N. W. 190; Suiter *v.* Park Nat. Bank, 35 Nebr. 372, 53 N. W. 205; Hoxie *v.* Greene, 37 How. Pr. (N. Y.) 97; Sammons *v.* Hawvers, 25 W. Va. 678.

Where one of the issues is usury the court may permit defendant to close the argument. State Cent. Bank *v.* St. John, 17 Wis. 157.

7. Martin *v.* Suber, 39 S. C. 525, 18 S. E. 125; Cannam *v.* Farmer, 2 C. & K. 746, 3 Exch. 698, 61 E. C. L. 746; Woodgate *v.* Potts, 2 C. & K. 457, 61 E. C. L. 457.

8. Hoxie *v.* Greene, 37 How. Pr. (N. Y.) 97.

9. Stone *v.* Pettus, 47 Tex. Civ. App. 14, 103 S. W. 413; Sammons *v.* Hawvers, 25 W. Va. 678; Smart *v.* Rayner, 6 C. & P. 721, 25 E. C. L. 656; Booth *v.* Millns, 4 D. & L. 52, 15 L. J. Exch. 354, 5 M. & W. 669.

10. Addison *v.* Duncan, 35 S. C. 165, 14 S. E. 305.

11. Conselyea *v.* Swift, 103 N. Y. 604, 9 N. E. 489; Lone Star Leather Co. *v.* City Nat. Bank, 12 Tex. Civ. App. 128, 34 S. W. 297.

12. McShane *v.* Braender, 66 How. Pr. (N. Y.) 294; Hoxie *v.* Greene, 37 How. Pr. (N. Y.) 97; Franklin *v.* Smith, 1 Tex. Unrep. Cas. 229; Dahlman *v.* Hammel, 45 Wis. 466; Mills *v.* Oddy, 6 C. & P. 728, 25 E. C. L. 659.

13. Montgomery *v.* Hunt, 93 Ga. 438, 21 S. E. 59; Lindsley *v.* European Petroleum Co., 3 Lans. (N. Y.) 176, 10 Abb. Pr. N. S. 107, 41 How. Pr. 56; McDougall *v.* Walling, 19 Wash. 80, 52 Pac. 530.

14. Shank *v.* Fleming, 9 Ind. 189.

15. Barker *v.* Malcolm, 7 C. & P. 101, 32 E. C. L. 520.

16. Kenny *v.* Lynch, 61 N. Y. 654.

17. Bingham *v.* Stanley, 9 C. & P. 374, 38 E. C. L. 224.

18. Smith *v.* Martin, C. & M. 58, 1 Dowl. P. C. N. S. 418, 11 L. J. Exch. 129, 9 M. & W. 304, 41 E. C. L. 37.

19. Columbia Finance, etc., Co. *v.* Mitchell, 72 S. W. 350, 24 Ky. L. Rep. 1844.

20. Bowen *v.* Spears, 20 Ind. 146.

d Contracts. In actions on contract plaintiff is entitled to open and close when defendant denies a breach of the contract,[21] denies that plaintiff has performed his obligations thereunder,[22] or denies that the contract is as set out in the petition,[23] or where the defense is that the contract is founded on an illegal consideration[24] or was procured by fraud;[25] where the breach is admitted and justified,[26] or the claim is made that the contract was abrogated by agreement;[27] or where the defense is performance[28] or payment,[29] or defendant relies on a custom,[30] or where defendant claims the contract to be conditional,[31] or that the transaction is tainted with usury[32] or fraud,[33] or where the defense is discharge under the Insolvent Debtors' Act,[34] or where defendant admits the entire case stated in the petition but claims a breach of a condition contained in the contract,[35] or that he has paid the purchase-price in a note not due.[36]

e. Condemnation Suits. In condemnation cases, where the right to condemn is admitted, defendant is entitled to open and conclude the argument.[37]

f. Proceedings By or Against Executor or Administrator. Upon an issue on a plea of *plene administravit* the burden is on plaintiff.[38] In proceedings to impeach an executor's account the executor is entitled to the opening and closing.[39] A party claiming property in the hands of an administrator is entitled to open and conclude.[40] Where the administrator files a general denial to a claim against the estate he may thereafter withdraw the same, assume the burden of the issues, and secure the right to open and close.[41]

g. Libel and Slander. Where defendant to a suit for libel or slander pleads justification he assumes the burden of proof and is entitled to open and close,[42]

21. Edwards *v.* Murray, 5 Wyo. 153, 38 Pac. 681.

22. Penhryn Slate Co. *v.* Meyer, 8 Daly (N. Y.) 61; Graham *v.* Gautier, 21 Tex. 111.

23. Bradley *v.* Clark, 1 Cush. (Mass.) 293; Fiedeldey *v.* Reis, 9 Ohio Dec. (Reprint) 296, 12 Cinc. L. Bul. 77; McConnell *v.* Kitchens, 20 S. C. 430, 47 Am. Rep. 845.

24. Overbury *v.* Muggridge, 1 F. & F. 137 note; Hill *v.* Fox, 1 F. & F. 136.

25. Reeve *v.* Underhill, 6 C. & P. 773, 25 E. C. L. 682.

26. Steinkeller *v.* Newton, 9 C. & P. 313, 38 E. C. L. 190; Harnett *v.* Johnson, 9 C. & P. 206, 38 E. C. L. 129; Harrison *v.* Gould, 7 C. & P. 580, 32 E. C. L. 768; Wootton *v.* Barton, 1 M. & Rob. 518.

27. Stanton *v.* Paton, 1 C. & K. 148, 47 E. C. L. 148.

28. Scott *v.* Hull, 8 Conn. 296; Norris *v.* Insurance Co. of North America, 3 Yeates (Pa.) 84, 2 Am. Dec. 360; Pinson *v.* Puckett, 35 S. C. 178, 14 S. E. 393; Addison *v.* Duncan, 35 S. C. 165, 14 S. E. 305.

29. Birt *v.* Leigh, 1 C. & K. 611, 47 E. C. L. 611; Coxhead *v.* Huish, 7 C. & P. 63, 32 E. C. L. 501; Richardson *v.* Fell, 4 Dowl. P. C. 10.

30. Bastard *v.* Smith, 2 M. & Rob. 129.

31. Stormont *v.* Waterloo L., etc., Ins. Co., 1 F. & F. 22.

32. Broach *v.* Kelly, 71 Ga. 698.

33. Patton *v.* Hamilton, 12 Ind. 256.

34. Lambert *v.* Hale, 9 C. & P. 506, 38 E. C. L. 298.

35. Beller *v.* Supreme Lodge K. P., 66 Mo. App. 449.

36. Edge *v.* Hillary, 3 C. & K. 43.

37. Calvert, etc., R. Co. *v.* Smith, (Tex. Civ. App. 1902) 68 S. W. 68; Gulf, etc., R. Co. *v.* Brugger, 24 Tex. Civ. App. 367, 59 S. W. 556.

38. Marquis *v.* Rogers, 8 Blackf. (Ind.) 118; Ely *v.* Com. 5 Dana (Ky.) 398.

39. Taylor *v.* Burk, 91 Ind. 252; Higgs *v.* Garrison, (Tex. Civ. App. 1894) 27 S. W. 34.

40. Campbell *v.* Roberts, 66 Ga. 733.

41. McCloskey *v.* Davis, 8 Ind. App. 190, 35 N. E. 187.

42. *Georgia.*— Ransone *v.* Christian, 56 Ga. 351.

Indiana.— Palmer *v.* Adams, 137 Ind. 72, 36 N. E. 695; Heilman *v.* Shanklin, 60 Ind. 424; Gaul *v.* Fleming, 10 Ind. 253.

Kansas.— Stith *v.* Fullinwider, 40 Kan. 73, 19 Pac. 314.

Maryland.— Kearney *v.* Gough, 5 Gill & J. 457.

Missouri.— Buckley *v.* Knapp, 48 Mo. 152.

Nebraska.— Sheibley *v.* Fales, 81 Nebr. 795, 116 N. W. 1035.

South Carolina.— Moses *v.* Gatewood, 5 Rich. 234. *Compare* Burckhalter *v.* Coward, 16 S. C. 435.

England.— Cooper *v.* Wakley, 3 C. & P. 474, M. & M. 248, 14 E. C. L. 670.

See 46 Cent. Dig. tit. "Trial," § 73.

Contra.— Sawyer *v.* Hopkins, 22 Me. 268; Parrish *v.* Sun Printing, etc., Assoc., 6 N. Y. App. Div. 585, 39 N. Y. Suppl. 540; Fry *v.* Bennett, 3 Bosw. (N. Y.) 200, 9 Abb. Pr. 45 [*affirmed* in 28 N. Y. 324]; Opdyke *v.* Weed, 18 Abb. Pr. (N. Y.) 223 note; Cincinnati Gazette *v.* Bishop, 6 Ohio Dec. (Reprint) 1113, 10 Am. L. Rec. 488.

Justification in part.—A partial plea of justification will not entitle defendant in a slander suit to open and conclude. Taylor *v.* Chambers, 2 Ga. App. 178, 58 S. E. 369. In libel, when there is no general issue, but

although he also pleads the general issue,[43] notwithstanding he denies that the publication was malicious or that the words were slanderous.[44] Where he pleads justification as to part and not guilty as to the residue, he is entitled to open as to the first defense.[45] Defendant is entitled to open and close where the answer is merely in mitigation of damages;[46] but not where it is a mere argumentative denial,[47] or merely denies malice and damages,[48] nor if he does not offer evidence in support of his plea.[49]

h. Set-Off, Counter-Claim, or Cross Bill. Defendant is entitled to open and close where he admits plaintiff's cause of action and pleads a counter-claim or set-off,[50] or where plaintiff voluntarily withdraws the only claim disputed by defendant.[51] If, in addition to a counter-claim, defendant files a general denial he is not entitled to open and close.[52] So it has been held that where the counter-claim affirmatively asserts the same matter which the denials of the answer put in issue, plaintiff has the right to open and close.[53]

i. Plea of Tender, Payment. Where the defense is payment or tender the burden is on defendant and gives him the right to open and close.[54]

j. Trespass. Defendant has the burden on a plea of *liberum tenementum*,[55] or that the trespass was justifiable, and is entitled to open and close.[56]

7. Effect of Denial of Right to Open and Close. There is a wide divergence of views in respect of the effect of a denial of the right to open and close, and decisions even in the same jurisdiction are not always reconcilable. Some decisions hold without qualification, that a denial of the right to open and close to the

a justification is pleaded as to part, and judgment is suffered by default as to the residue, plaintiff is entitled to begin. Wood *v.* Pringle, 1 M. & Rob. 277.

Withdrawing the plea of justification and afterward renewing it does not affect defendant's right to open and close, unless by the court imposing terms. Ransome *v.* Christian, 56 Ga. 351.

43. Johnson *v.* Bradstreet Co., 81 Ga. 425, 7 S. E. 867.

44. Louisville Courier-Journal Co. *v.* Weaver, 17 S. W. 1018, 13 Ky. L. Rep. 599.

45. Flagg *v.* Hobart, Quincy (Mass.) 332.

46. McCoy *v.* McCoy, 106 Ind. 492, 7 N. E. 188.

47. Shulse *v.* McWilliams, 104 Ind. 512, 3 N. E. 243.

48. Fountain *v.* West, 23 Iowa 9, 92 Am. Dec. 405; Vifquain *v.* Finch, 15 Nebr. 505, 19 N. W. 706.

49. Vanzant *v.* Jones, 3 Dana (Ky.) 464.

50. *Illinois.*— Truesdale Mfg. Co. *v.* Hoyle, 39 Ill. App. 532; Williams *v.* Shup, 12 Ill. App. 454.

Indiana.—Schee *v.* McQuilken, 59 Ind. 269; Bowen *v.* Spears, 20 Ind. 146.

Kentucky.— Churchill *v.* Rogers, Hard. 182; American Bridge Co. *v.* Glenmore Distilleries Co., 107 S. W. 279, 32 Ky. L. Rep. 873.

Montana.— Power *v.* Turner, 37 Mont. 521, 97 Pac. 950.

New York.— Bodine *v.* Andrews, 47 N. Y. App. Div. 495, 62 N. Y. Suppl. 385; Harley *v.* Fitzgerald, 84 Hun 305, 32 N. Y. Suppl. 414.

South Carolina.— Brown *v.* Kirkpatrick, 5 S. C. 267.

Wisconsin.— Bonnell *v.* Jacobs, 36 Wis. 59.

See 46 Cent. Dig. tit. "Trial," § 58.

Contra.— Page *v.* Osgood, 2 Gray (Mass.) 260.

The filing of an answer in the nature of a cross bill does not entitle defendant to open and close. Guernsey *v.* Reeves, 58 Ga. 290.

51. Fischer *v.* Frohne, 51 Misc. (N. Y.) 578, 100 N. Y. Suppl. 1016.

52. Hollander *v.* Farber, 52 Misc. (N. Y.) 507, 102 N. Y. Suppl. 506.

53. Maxwell *v.* Thompson, 15 S. C. 612; Wausau Boom Co. *v.* Dunbar, 75 Wis. 133, 43 N. W. 739.

54. *Delaware.*— Saulsbury *v.* Ford, 5 Houst. 575.

Illinois.— Truesdale Mfg. Co. *v.* Hoyle, 39 Ill. App. 532. *Contra*, Kent *v.* Mason, 79 Ill. 540.

Kentucky.—Wheatly *v.* Phelps, 3 Dana 302; Churchill *v.* Rogers, Hard. 182.

North Carolina.— Love *v.* Dickerson, 85 N. C. 5.

Ohio.— Fewster *v.* Goddard, 25 Ohio St. 276.

Pennsylvania.— Smaltz *v.* Ryan, 112 Pa. St. 423, 3 Atl. 772.

United States.—Auld *v.* Hepburn, 2 Fed. Cas. No. 650, 1 Cranch C. C. 122.

See 46 Cent. Dig. tit. "Trial," § 59.

Effect of special rules of practice.— Under the rules of practice adopted by the Massachusetts court of common pleas, when defendant relies on a discharge under the insolvent law, and plaintiff admits the discharge, but denies its validity on the ground of fraud, plaintiff has the right to open and close. Robinson *v.* Hitchcock, 8 Metc. (Mass.) 64.

55. Pearson *v.* Coles, 1 M. & Rob. 206.

56. Chapman *v.* Rawson, 8 Q. B. 673, 10 Jur. 287, 15 L. J. Q. B. 225, 55 E. C. L. 673 (where substantial damages are not asked);

party entitled thereto is reversible error.[57] Other decisions, however, take a diametrically opposite position to the above view, and hold that it is never a ground for reversal[58] or for setting aside the verdict.[59] So it has been variously held that a denial of the right will necessitate a reversal unless the record shows that no prejudice resulted,[60] or where it appears that prejudice resulted,[61] where it does not appear that no prejudice resulted,[62] where prejudice may have resulted,[63] or where the evidence did not demand the verdict.[64] So other decisions have held that, to warrant a reversal or the allowance of a new trial, injury to the party complaining must affirmatively appear;[65] that there is no available error where it is apparent that no prejudice resulted,[66] or that substantial justice has been

Fish *v.* Travers, 3 C. & P. 578, 14 E. C. L. 724 (even though special damages be asked).

57. *Georgia.*— Buchanan *v.* McDonald, 40 Ga. 286.

Indiana.— Haines *v.* Kent, 11 Ind. 126.

Kansas.— Degan *v.* Tufts, 8 Kan. App. 338, 56 Pac. 1126.

Kentucky.— O'Connor *v.* Henderson Bridge Co., 95 Ky. 633, 27 S. W. 251, 983, 16 Ky. L. Rep. 244; Crabtree *v.* Atchison, 93 Ky. 338, 20 S. W. 260, 14 Ky. L. Rep. 313; Fitch *v.* Parker, 47 S. W. 627, 20 Ky. L. Rep. 842; Fireman's Ins. Co. *v.* Schwing, 11 S. W. 14, 10 Ky. L. Rep. 883.

Massachusetts.— Davis *v.* Mason, 4 Pick. 156.

Nebraska.— Olds Wagon Co. *v.* Benedict, 25 Nebr. 372, 41 N. W. 254, 27 Nebr. 344, 43 N. W. 108.

New Hampshire.— Probate Judge *v.* Stone, 44 N. H. 593.

New Jersey.— Farmers' Nat. Bank *v.* Gaskill, 9 N. J. L. 204.

New York.— Lindsley *v.* European Petroleum Co., 3 Lans. 176, 10 Abb. Pr. N. S. 107, 41 How. Pr. 56; Penhryn Slate Co. *v.* Meyer, 8 Daly 61; Miller *v.* Meyerhoff, 79 N. Y. App. Div. 532, 81 N. Y. Suppl. 234; Hurd *v.* Wing, 56 N. Y. App. Div. 595, 67 N. Y. Suppl. 227; Auerbach *v.* Peetsch, 18 N. Y. Suppl. 452.

Texas.— Gulf Coast, etc., R. Co. *v.* Ross, (App. 1890) 16 S. W. 536.

See 46 Cent. Dig. tit. "Trial," § 56.

In support of this view it is said: "The right to open and conclude, in a jury trial, is of prime importance. The right to open is important. It enables the party to give direction to the case, very often to choose the ground on which the battle shall be fought. And the right to conclude is more important still. Even in fair and legitimate argument, the party concluding has the advantage of knowing precisely the line of his opponent, and therefore of directing his attention to it, and arraying everything in the case, that fairly illustrates and sustains his view of it." Buchanan *v.* McDonald, 40 Ga. 286, 288.

58. White *v.* Clements, 39 Ga. 232.

59. Scott *v.* Hull, 8 Conn. 296; Comstock *v.* Hadlyme Ecclesiastical Soc., 8 Conn. 254, 20 Am. Dec. 100.

60. Millerd *v.* Thorn, 56 N. Y. 402; Ney *v.* Rothe, 61 Tex. 374; Ramsey *v.* Thomas, 14 Tex. Civ. App. 431, 38 S. W. 259.

61. Parrish *v.* Sun Printing, etc., Assoc., 6 N. Y. App. Div. 585, 39 N. Y. Suppl. 540.

62. Abat *v.* Sigura, 5 Mart. N. S. (La.) 73.

63. Mann *v.* Scott, 32 Ark. 593; Probate Judge *v.* Stone, 44 N. H. 593.

64. Reid *v.* Sewell, 111 Ga. 880, 36 S. E. 937; Massengale *v.* Pounds, 100 Ga. 770, 28 S. E. 510.

65. *Iowa.*— Dent *v.* Smith, 53 Iowa 262, 5 N. W. 143.

Missouri.— McClintock *v.* Curd, 32 Mo. 411; Reichard *v.* Manhattan L. Ins. Co., 31 Mo. 518; Tibeau *v.* Tibeau, 22 Mo. 77; Oexner *v.* Loehr, 133 Mo. App. 211, 113 S. W. 727.

New Hampshire.— Seely *v.* Manhattan L. Ins. Co., 73 N. H. 339, 61 Atl. 585; Patten *v.* Cilley, 67 N. H. 520, 42 Atl. 47; Hilliard *v.* Beattie, 59 N. H. 462; Schoff *v.* Laithe, 58 N. H. 503.

Ohio.— Dille *v.* Lovell, 37 Ohio St. 415.

Texas.— Gaines *v.* Ann, 26 Tex. 340.

Virginia.— Steptoe *v.* Harvey, 7 Leigh 501.

Wisconsin.— Bannon *v.* Insurance Co. of North America, 115 Wis. 250, 91 N. W. 666; Parker *v.* Kelly, 61 Wis. 552, 21 N. W. 539; Second Ward Sav. Bank *v.* Shakman, 30 Wis. 333; Marshall *v.* American Express Co., 7 Wis. 1, 73 Am. Dec. 381.

United States.— New York Dry Goods Store *v.* Pabst Brewing Co., 112 Fed. 381, 50 C. C. A. 295.

66. *Colorado.*— Denver Land, etc., Co. *v.* Rosenfeld Constr. Co., 19 Colo. 539, 36 Pac. 146.

Illinois.— Nagle *v.* Schnadt, 239 Ill. 595, 88 N. E. 178.

Indian Territory.— Gentry *v.* Singleton, 4 Indian Terr. 346, 69 S. W. 898.

Iowa.— Fenton *v.* Iowa State Travelling Men's Assoc., 139 Iowa 166, 117 N. W. 257; Farmer *v.* Norton, 129 Iowa 88, 105 N. W. 371.

Missouri.— Colt *v.* Beaumont, 32 Mo. 118; Loy *v.* Rorick, 100 Mo. App. 105, 71 S. W. 842.

Nebraska.— Citizens' State Bank *v.* Baird, 42 Nebr. 219, 60 N. W. 551.

New York.— Lake Ontario Nat. Bank *v.* Judson, 122 N. Y. 278, 25 N. E. 367.

Texas.— Belt *v.* Raguet, 27 Tex. 471; Phillips *v.* Texas Loan Co., 26 Tex. Civ. App. 505, 63 S. W. 1080; Robb *v.* Robb, (Civ. App. 1901) 62 S. W. 125.

West Virginia.— Ogle *v.* Adams, 12 W. Va. 213.

done,[67] or where the verdict of the jury is merely advisory [68] or was more favorable to the complaining party than he was entitled to.[69] In some jurisdictions where the matter is subject to the discretion of the court, this discretion is not reviewable in the absence of an abuse thereof,[70] and in others it is absolute and not subject to review.[71]

8. Waiver of Right. The right to open and close is waived where the opposite party is permitted to open without objection.[72] A party must open if he desires the right to reply.[73] If both parties waive the opening argument, the right to reply is lost.[74] But if defendant makes an argument, plaintiff is entitled to close, although he did not open.[75]

I. Experiments and Test — 1. In General. Experiments and tests, and evidence of experiments and tests, relevant and material to the issue on trial, are admissible in evidence;[76] but before an experiment or evidence of an experiment can be submitted to a jury as tending to prove an issue before them there must at least be identity of conditions;[77] and the evidence of an experiment

Wisconsin.—Winn *v.* Itzel, 125 Wis. 19, 103 N. W. 220.

And see Greene *v.* Georgia Cent. R. Co., 112 Ga. 859, 38 S. E. 360.

When the court directed a verdict for plaintiff, an exception that defendant was improperly denied the affirmative of the issues became unavailing. Redmond *v.* Tone, 10 N. Y. Suppl. 506.

Where the case might have been taken from the jury, error in refusing defendant the right to open and close is harmless. Seiler *v.* Economic L. Assoc., 105 Iowa 87, 74 N. W. 941, 43 L. R. A. 537.

67. Moore *v.* Brown, 81 Ga. 10, 6 S. E. 833; Kells *v.* Davis, 57 Ill. 261; Huddle *v.* Martin, 54 Ill. 258.

68. Blanchard *v.* Blanchard, 191 Ill. 450, 61 N. E. 481.

69. Walker *v.* Bryant, 112 Ga. 412, 37 S. E. 749.

70. Wade *v.* Scott, 7 Mo. 509; Oexner *v.* Loehr, 133 Mo. App. 211, 113 S. W. 727; Florence Oil, etc., Co. *v.* Farrar, 109 Fed. 254, 48 C. C. A. 345.

71. Smith *v.* Frazier, 53 Pa. St. 226; Hartman *v.* Keystone Ins. Co., 21 Pa. St. 466; Robeson *v.* Whitesides, 16 Serg. & R. (Pa.) 320.

72. Northington *v.* Granada, 118 Ga. 584, 45 S. E. 447; Kassing *v.* Walter, (Iowa 1896) 65 N. W. 832; Sherman *v.* Hale, 76 Iowa 383, 41 N. W. 48; Burgess *v.* Burgess, 44 Nebr. 16, 62 N. W. 242.

73. Gebhardt *v.* England, 8 N. J. L. J. 146.

74. Creager *v.* Blank, 32 Ill. App. 615; Gebhardt *v.* England, 8 N. J. L. J. 146; Bender *v.* Terwilliger, 48 N. Y. App. Div. 371, 63 N. Y. Suppl. 269 [*affirmed* in 166 N. Y. 590, 59 N. E. 1118].

75. Trask *v.* People, 151 Ill. 523, 38 N. E. 248; Hickman *v.* Layne, 47 Nebr. 177, 66 N. W. 298.

76. *Indiana.*—Chicago, etc., R. Co. *v.* Champion, 9 Ind. App. 510, 36 N. E. 221, 37 N. E. 21, 53 Am. St. Rep. 357.

Iowa.—Stockwell *v.* Chicago, etc., R. Co., 43 Iowa 470.

Michigan.—National Cash Register Co. *v.* Blumenthal, 85 Mich. 464, 48 N. W. 622.

Oregon.—Leonard *v.* Southern Pac. Co., 21 Oreg. 555, 28 Pac. 837, 15 L. R. A. 221.

Rhode Island.—Carr *v.* American Locomotive Co., 26 R. I. 180, 58 Atl. 678.

Washington.—Rowe *v.* Northport Smelting, etc., Co., 35 Wash. 101, 76 Pac. 529.

See 46 Cent. Dig. tit. "Trial," § 76.

Illustrations.—Where, in an action on a contract for the sale of telephones, defendant claimed a breach of warranty, it was within the discretion of the court to permit plaintiff to make tests of the telephones in the presence of the jury. Chicago Tel. Supply Co. *v.* Marne, etc., Tel. Co., 134 Iowa 252, 111 N. W. 935.

In an action for damages for flooding plaintiff's land with water from defendant's mill-pond, it is not competent for the court to grant an order for the survey of the pond and adjacent lands, to ascertain the rise of the stream complained of by plaintiff, and that defendant shall draw off the water from his pond to facilitate such survey. Speer *v.* Duval, 5 Rich. (S. C.) 13.

77. *Georgia.*—Central R., etc., Co. *v.* Dottenheim, 92 Ga. 425, 17 S. E. 662.

Illinois.—Libby *v.* Scherman, 146 Ill. 540, 34 N. E. 801, 37 Am. St. Rep. 191.

Indiana.—Hagee *v.* Grossman, 31 Ind. 223; Chicago, etc., R. Co. *v.* Champion, 9 Ind. App. 570, 36 N. E. 221, 37 N. E. 21, 53 Am. St. Rep. 357.

Iowa.—Chicago Tel. Supply Co. *v.* Maine, etc., Tel. Co., 134 Iowa 252, 111 N. W. 935.

Michigan.—National Cash Register Co. *v.* Blumenthal, 85 Mich. 464, 48 N. W. 622; Klanowski *v.* Grand Trunk R. Co., 64 Mich. 279, 31 N. W. 275.

Oregon.—Leonard *v.* Southern Pac. Co., 21 Oreg. 555, 28 Pac. 887, 15 L. R. A. 221.

Pennsylvania.—Newbold *v.* Mead, 57 Pa. St. 487.

Washington.—Rowe *v.* Northport Smelting, etc., Co., 35 Wash. 101, 76 Pac. 529.

See 46 Cent. Dig. tit. "Trial," § 76.

Where the conditions are identical it is not necessary that test be made with the identical article. Taylor *v.* McGrath, 9 Ind. App. 30, 36 N. E. 163; Owen *v.* Missouri Pac. R. Co., 38 Fed. 571.

Similar articles.—Articles similar to the

made in court is restricted to such features thereof as to which an offer is made; otherwise, evidence might be introduced without giving a party an opportunity to object.[78] Evidence of experiments which have no legitimate bearing upon the issues before the jury should be excluded.[79] Permission to perform experiments in the presence of the jury cannot be demanded as a matter of right, but it is within the discretion of the trial judge to grant or refuse such permission.[80] The judge should be guided by the apparent importance and weight of the proposed experiment and the time it is likely to consume.[81]

2. In Personal Injuries' Cases. In personal injuries' cases plaintiff may be permitted [82] or the court has the power, under proper circumstances, to direct plaintiff to do [83] a physical act in the presence of the jury that will illustrate or show the character of his injuries; but the propriety of such order rests largely in the discretion of the trial court and will only be reviewed on showing a plain case of abuse of discretion.[84] A physical examination suggested for the first time after the close of the evidence,[85] or during the argument,[86] is properly denied. The court may also permit the torn clothing of the injured party to be introduced in evidence, in its discretion, if thereby the manner in which plaintiff was injured or the character and extent of the injury can be better explained.[87] But it may be reversible error to permit a dramatic exhibition, in the presence of the jury, as a demonstration of the extent of plaintiff's disability,[88] or for the purpose of appealing to their feelings;[89] and it is error for the court to send the jury and the parties to make a physical examination of plaintiff out of the presence of the

one in controversy should not be shown to the jury. Brady *v.* Shirley, 14 S. D. 447, 85 N. W. 1002.

78. Probert *v.* Phipps, 149 Mass. 258, 21 N. E. 370.

79. Libby *v.* Scherman, 146 Ill. 540, 34 N. E. 801, 37 Am. St. Rep. 191.

80. Homan *v.* Franklin County, 98 Iowa 692, 68 N. W. 559; Smith *v.* St. Paul City R. Co., 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550; Carr *v.* American Locomotive Co., 26 R. I. 180, 58 Atl. 678; Stones *v.* Menhem, 2 Exch. 382, 17 L. J. Exch. 215. And see Matter of Gartland, 60 Misc. (N. Y.) 33, 112 N. Y. Suppl. 719.

The refusal of the court to allow an experiment to be made outside the court room before the jury without the consent of both parties is not error. Wheeling, etc., R. Co. *v.* Parker, 29 Ohio Cir. Ct. 1.

Applying chemical test to will.—After a paper had been propounded as a last will, permission to apply a chemical test in open court to determine the quality and composition of ink, without preliminary preparations for safeguarding the present actual condition of the paper offered, will not be granted. *In re* Gartland, 60 Misc. (N. Y.) 33, 112 N. Y. Suppl. 719.

81. Carr *v.* American Locomotive Co., 26 R. I. 180, 58 Atl. 678.

82. Louisville, etc., R. Co. *v.* Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; Barber *v.* Perry, 67 Iowa 146, 25 N. W. 100; Adams *v.* Thief River Falls, 84 Minn. 30, 86 N. W. 767; Mulhado *v.* Brooklyn City R. Co., 30 N. Y. 370; Harvey *v.* Fargo, 99 N. Y. App. Div. 599, 91 N. Y. Suppl. 84.

Injuries of party other than plaintiff.—Another party's injuries cannot be so exhibited for the purpose of contradicting plaintiff. Sornberger *v.* Canadian Pac. R. Co., 24 Ont. App. 263.

83. Hatfield *v.* St. Paul, etc., R. Co., 33 Minn. 130, 22 N. W. 176, 53 Am. Rep. 14.

Physical test by juror.—Where a party is permitted to exhibit his injuries to the jury, it is not error to allow a juror to take hold of plaintiff's arm and move it up and down to ascertain for himself the extent and nature of the injury complained of. American Brake Shoe, etc., Co. *v.* Jankus, 121 Ill. App. 267.

84. Hatfield *v.* St. Paul, etc., R. Co., 33 Minn. 130, 22 N. W. 176, 53 Am. Rep. 14.

Denial of a motion to compel plaintiff to submit to an examination is not prejudicial where by consent of plaintiff's counsel an examination is subsequently made by a physician appointed by the court. St. Louis Southwestern R. Co. *v.* Smith, 38 Tex. Civ. App. 507, 86 S. W. 943.

85. Bagley *v.* Mason, 69 Vt. 175, 37 Atl. 287.

86. Howell *v.* Hartford F. Ins. Co., 12 Fed. Cas. No. 6,780.

87. Tudor Iron-Works *v.* Weber, 129 Ill. 535, 21 N. E. 1078 [*affirming* 31 Ill. App. 306]; Indiana Car Co. *v.* Parker, 100 Ind. 181.

88. Felsch *v.* Babb, 72 Nebr. 736, 101 N. W. 1011; Minden *v.* Vedene, 72 Nebr. 657, 101 N. W. 330; Butez *v.* Fonda, etc., R. Co., 20 Misc. (N. Y.) 123, 45 N. Y. Suppl. 808.

89. Louisville, etc., R. Co. *v.* Pearson, 97 Ala. 211, 12 So. 176.

Harmless error.—Even though the purpose of the inspection is to excite the sympathy of the jury, it is not prejudicial error where the damages awarded are not excessive. Clay *v.* Chicago, etc., R. Co., 104 Minn. 1, 115 N. W. 949.

court.[90] It is within the discretion of the trial court to grant or refuse a request to permit a jury to visit the home of a party whose counsel claims that she is too badly injured to appear in court.[91] Where injuries are sustained by breaking machinery, the court may order defendant to permit plaintiff to cut a portion of the machinery for examination and test.[92]

J. View and Inspection[93]**— 1. In General.** The jury may inspect a paper in evidence.[94] At common law, the trial judge may, in real and personal actions, permit the jury in his discretion, with or without the consent of the parties, to view the property in litigation, or the premises where any material fact occurred,[95] or may require a party to produce an object in court for the inspection of the jury.[96] The view may be granted, although the condition of the property has changed since the time of the injury complained of,[97] if the change is not material;[98] but it should not be granted where it appears that material physical changes have occurred in the character of the premises between the time of the injury and the time of trial,[99] or, where the place is a well-known street and there is nothing com-

90. If defendant upon returning to the court room excepts, the error is not cured by the court's offer to retire with them for another examination. Fordyce *v.* Key, 74 Ark. 19, 84 S. W. 797. *Compare* Sheldon *v.* Wright, 80 Vt. 298, 67 Atl. 807, where, on the trial of an action against a physician for malpractice in treating a fractured limb, the jury was taken into the judge's room, where the limb was shown to them in the presence of defendant's counsel. Meanwhile the attention of the judge, who was in the court room, but near the door which led into the judge's room, was called to the fact that the door was closed, and he had it partly opened, but not enough so that any one in the court room could see what was going on. It was held not to constitute prejudicial error. Sheldon *v.* Wright, 80 Vt. 298, 67 Atl. 807.

91. Blanchard *v.* Holyoke St. R. Co., 186 Mass. 582, 72 N. E. 94.

92. Baran *v.* Reading Iron Co., 26 Pa. Co. Ct. 14.

93. In criminal cases see Criminal Law, 12 Cyc. 537.

Instructions as to application of knowledge by jurors see *infra*, IX, E, 16, b.

Purpose for which view and inspection allowed see *infra*, X, D, 3, c.

Unauthorized view and inspection see *infra*, X, B, 4.

94. Gable *v.* Rauch, 50 S. C. 95, 27 S. E. 555.

95. *Arkansas.*— Fitzgerald *v.* La Porte, 67 Ark. 263, 54 S. W. 342.

Georgia.— Bibb County *v.* Reese, 115 Ga. 346, 41 S. E. 636.

Illinois.— Pike *v.* Chicago, 155 Ill. 656, 40 N. E. 567; Danville, etc., R. Co. *v.* Tidrick, 137 Ill. App. 553; Springfield *v.* McCarthy, 79 Ill. App. 388; St. Louis, etc., R. Co. *v.* Claunch, 41 Ill. App. 592; Chicago, etc., R. Co. *v.* Leah, 41 Ill. App. 584.

Indiana.— Cleveland, etc., R. Co. *v.* Penketh, 27 Ind. App. 210, 60 N. E. 1095.

Michigan.— Williams *v.* Grand Rapids, 53 Mich. 271, 18 N. W. 811.

New Hampshire.— Lydston *v.* Rockingham County Light, etc., Co., 75 N. H. 23, 70 Atl. 385.

Pennsylvania.— Mintzer *v.* Greenough, 192 Pa. St. 137, 43 Atl. 465.

Wisconsin.— Koepke *v.* Milwaukee, 112 Wis. 475, 88 N. W. 238.

Statutes as affecting common-law right.— The statute requiring view in cases of eminent domain does not restrict the common-law power of the court to order view in other real and personal actions. Springer *v.* Chicago, 135 Ill. 552, 26 N. E. 514, 12 L. R. A. 609 [*affirming* 37 Ill. App. 206].

View of premises after dark.— The jury may view premises after dark, if there is no evidence that with the lights furnished they could not properly view the place. Maysville, etc., R. Co. *v.* Dover Christian Church, 39 S. W. 35, 18 Ky. L. Rep. 1111.

Operation of machine causing injury.— Where the injuries sued for were occasioned by a machine, it is not error to permit the jury to see the machine in operation, when the operation of the machine did not contribute anything to the determination of the particular question involved. Olsen *v.* North Pac. Lumber Co., 106 Fed. 298.

On an issue whether a building was constructed in accordance with plans and specifications the jury should not be allowed to inspect the work. Snell *v.* Evans, 55 Ill. App. 670.

96. Groundwater *v.* Washington, 92 Wis. 56, 65 N. W. 871.

97. Osgood *v.* Chicago, 154 Ill. 194, 41 N. E. 40; Springer *v.* Chicago, 135 Ill. 552, 26 N. E. 514, 12 L. R. A. 609 [*affirming* 37 Ill. App. 206].

Where the condition of things has been changed, a view by the jury may be generally regarded as of doubtful utility. Lydston *v.* Rockingham County Light, etc., Co., 75 N. H. 23, 70 Atl. 385.

98. Northwestern Mut. L. Ins. Co. *v.* Sun Ins. Office, 85 Minn. 65, 88 N. W. 272; Dewey *v.* Williams, 43 N. H. 384.

99. Broyles *v.* Prisock, 97 Ga. 643, 25 S. E. 389; Henderson, etc., Gravel-Road Co. *v.* Cosby, 103 Ky. 182, 44 S. W. 639, 19 Ky. L. Rep. 1851; Stewart *v.* Cincinnati, etc., R. Co., 89 Mich. 315, 50 N. W. 852, 17 L. R. A. 539; Sell *v.* Ernsberger, 8 Ohio Cir. Ct. 499, 4 Ohio Cir. Dec. 100.

plicated in the facts, or obscure in the locality.[1] Where bodily production in court of an object is impossible the court may permit a view thereof at a convenient place to which it may be brought.[2] It is within the discretion of the court to refuse to permit representatives of the parties to accompany the jury on their view of premises to which the action relates, although it is the better practice to grant such permission.[3] Whether the jury shall be permitted to view the premises,[4] or at what period during the progress of the trial they shall be permitted to do so,[5] is in the discretion of the court and will not be reviewed where no abuse is shown. The irregularity of proceedings to obtain a view are not cause for setting aside the order where the opposite party has participated therein.[6]

2. Under Statutes. The statutes of some of the states expressly empower the court to order the jury to take a view of the real property in litigation,[7] and the place where any material fact occurred.[8] These statutes are not mandatory, and the court is vested with a sound discretion in granting or refusing the

1 Niosi *v.* Empire Steam Laundry, 117 Cal. 257, 49 Pac. 185.

2. Nutter *v.* Ricketts, 6 Iowa 92; Lincoln County Bd. of Internal Imp. *v.* Moore, 66 S. W. 417, 23 Ky. L. Rep. 1885; Beaver *v.* Whiteley, 3 Pa. Co. Ct. 613.

3. Chicago *v.* Baker, 98 Fed. 830, 39 C. C. A. 318.

4. *Colorado.*— Saint *v.* Guerrerio, 17 Colo. 448, 30 Pac. 335, 31 Am. St. Rep. 320.

Illinois.— Pike *v.* Chicago, 155 Ill. 656, 40 N. E. 567; Lake Erie, etc., R. Co. *v.* Purcell, 75 Ill. App. 573.

Iowa.— Banning *v.* Chicago, etc., R. Co., 89 Iowa 74, 56 N. W. 277.

Kentucky.— Valley Turnpike, etc., Co. *v.* Lyons, 58 S. W. 502, 22 Ky. L. Rep. 646; Central Kentucky Insane Asylum *v.* Hauns, 50 S. W. 978, 21 Ky. L. Rep. 22.

Michigan.— Duppuis *v.* Saginaw Valley Traction Cod., 146 Mich. 151, 109 N. W. 413; Mulliken *v.* Corunna, 110 Mich. 212, 68 N. W. 141; Leidlein *v.* Meyer, 95 Mich. 586, 55 N. W. 367; Leonard *v.* Armstrong, 73 Mich. 577, 41 N. W. 695; Richmond *v.* Atkinson, 58 Mich. 413, 25 N. W. 328.

Minnesota.— Brown *v.* Kohout, 61 Minn. 113, 63 N. W. 248.

Missouri.— Ellis *v.* St. Louis, etc., R. Co., 131 Mo. App. 395, 111 S. W. 839.

North Carolina.— Jenkins *v.* Wilmington, etc., R. Co., 110 N. C. 438, 15 S. E. 193.

Wisconsin.— Rickman *v.* Williamsburg City F. Ins. Co., 120 Wis. 655, 98 N. W. 960; Andrews *v.* Youmans, 82 Wis. 81, 52 N. W. 23.

See 46 Cent. Dig. tit. "Trial," § 76.

Exercise of discretion.— In an action by an employee against a railroad company for injury received while loading rails, it is not error for the court to refuse to allow the jury to visit the place of the accident, on their informing him that a view of the place would be of no use. Bodie *v.* Charleston, etc., R. Co., 66 S. C. 302, 44 S. E. 943.

Review.— The discretion of the trial court in this respect is not subject to review. Jackson County *v.* Nichols, 139 Ind. 611, 38 N. E. 526; Shelby County *v.* Castetter, 7 Ind. App. 309, 33 N. E. 986, 34 N. E. 687; Rudolph *v.* Pennsylvania Schuylkill Valley R. Co., 186 Pa. St. 541, 40 Atl. 1083, 47 L. R. A. 782.

5. Kentucky Cent. R. Co. *v.* Smith, 93 Ky. 449, 20 S. W. 392, 14 Ky. L. Rep. 455, 18 L. R. A. 63.

After jury retires.— The court may order the view, at the request of the jury, after they have retired to their room to consider their verdict. Louisville, etc., R. Co. *v.* Schick, 94 Ky. 191, 21 S. W. 1036, 14 Ky. L. Rep. 833.

A request for a view should be made before the introduction of any evidence. Chicago Sanitary Dist. *v.* McGuirl, 86 Ill. App. 392.

6. Brown *v.* O'Brien, 4 Pa. L. J. 501.

7. Coughlen *v.* Chicago, etc., R. Co., 36 Kan. 422, 13 Pac. 813; Maloney *v.* King, 30 Mont. 158, 76 Pac. 4.

Application for review.— Under a statute providing that a view in a civil case can be granted only on motion of one of the parties, an order granting a view requested by the jury, but not until defendant's counsel expressed a desire therefor, should be construed as granted on application of defendant. Yore *v.* Newton, 194 Mass. 250, 80 N. E. 472.

8. *Indiana.*— Ohio, etc., R. Co. *v.* Wrape, 4 Ind. App. 100, 30 N. E. 428.

Iowa.— Moore *v.* Chicago, etc., R. Co., 93 Iowa 484, 61 N. W. 992.

Kentucky.— Louisville, etc., R. Co. *v.* Schick, 94 Ky. 191, 21 S. W. 1036, 14 Ky. L. Rep. 833.

Washington.— *In re* Jackson St., 47 Wash. 243, 91 Pac. 970.

West Virginia.— Gunn *v.* Ohio River R. Co., 36 W. Va. 165, 14 S. E. 465, 32 Am. St. Rep. 842.

Wisconsin.— Boardman *v.* Westchester F. Ins. Co., 54 Wis. 364, 11 N. W. 417.

See 46 Cent. Dig. tit. "Trial," § 77.

In Kentucky the method provided by the statute is not exclusive. The court may accompany the jury to the yard of the courthouse for the purpose of having a phaëton introduced in evidence. Lincoln County Bd. of Internal Imp. *v.* Moore, 66 S. W. 417, 23 Ky. L. Rep. 1885.

In New York, Code Civ. Proc. § 1659, directs a compulsory view in actions for waste only. Buffalo Structural Steel Co. *v.* Dickinson, 98 N. Y. App. Div. 355, 90 N. Y. Suppl. 268.

order.[9] The jury should be conducted to the place in a body under charge of an officer, and the property or place shown to them by some person appointed by the court, and no person other than the person appointed by the court should speak to them on any subject connected with the trial.[10] Evidence should not be taken at the place of the accident, although the jury, parties, and attorneys are present.[11]

K. Control of Examination of Witnesses. The judge may see to it that the examination of witnesses is conducted in an orderly manner,[12] and a large discretion is given to him in controlling such examination.[13] He may state that a question has been sufficiently answered when such is the case,[14] or state wherein a line of examination is immaterial and restrict the same,[15] and may admonish a witness to speak the truth if the circumstances warrant it,[16] or rebuke an over-

9. *Kansas.*— Coughlen *v.* Chicago, etc., R. Co., 36 Kan. 422, 13 Pac. 813.

Kentucky.— Memphis, etc., Packet Co. *v.* Buckner, 108 Ky. 701, 57 S. W. 482, 22 Ky. L. Rep. 401; Cohankus Mfg. Co. *v.* Rogers, 96 S. W. 437, 29 Ky. L. Rep. 747; Green *v.* Maysville, etc., R. Co., 78 S. W. 439, 25 Ky. L. Rep. 1623.

Montana.— Maloney *v.* King, 30 Mont. 158, 76 Pac. 4.

Nebraska.— Beck *v.* Staats, 80 Nebr. 482, 114 N. W. 633, 16 L. R. A. N. S. 768; Alberts *v.* Husenetter, 77 Nebr. 699, 110 N. W. 657.

Washington.— Klepsch *v.* Donald, 4 Wash. 436, 30 Pac. 991, 31 Am. St. Rep. 936.

West Virginia.— Gunn *v.* Ohio River R. Co., 36 W. Va. 165, 14 S. E. 465, 32 Am. St. Rep. 842.

Wisconsin.— Boardman *v.* Westchester F. Ins. Co., 54 Wis. 364, 11 N. W. 417.

Application of rule.—Where in a negligence suit drawings of the machinery causing the injury were presented to the jury, who stated that they understood the situation, the court acted within its discretion in refusing to allow them to view the premises. Stephens *v.* Elliott, 36 Mont. 92, 92 Pac. 45. Under a statute authorizing the jury to be taken to view the premises in question at the request of either party when it seems proper to the court, it was not an abuse of discretion by the court to refuse to permit a view of the machinery where plaintiff's intestate was injured when diagrams of the machinery were presented by both parties. McCarley *v.* Glenn-Lowry Mfg. Co., 75 S. C. 390, 56 S. E. 1.

10. Webber *v.* Emmerson, 3 Colo. 248; Ledward *v.* Kuder, 103 Iowa 739, 72 N. W. 545; Moore *v.* Chicago, etc., R. Co., 93 Iowa 484, 61 N. W. 992. *Compare* Emporia *v.* Juengling, 78 Kan. 595, 96 Pac. 850, 19 L. R. A. N. S. 223, holding that the omission to appoint a person to show the jury the place to be inspected, as required by statute, is immaterial, where the jury found the right place and inspected it.

However, it is not ground for reversal that a plaintiff furnished lanterns, and assisted the jury in viewing the church alleged to have been damaged by reason of the construction of a railroad, where he acted at the request of the sheriff who had the jury in charge, and did not speak in the jury's presence, and there is no evidence that the sheriff was absent at any time during the examination of the property. Maysville, etc., R. Co. *v.* Dover Christian Church, 39 S. W. 35, 18 Ky. L. Rep. 1111.

A person other than a bailiff may, under the provisions of the Washington statutes, be appointed to point out the place or property to the jury. *In re* Jackson St., 47 Wash. 243, 91 Pac. 970.

Administering oath to officer in charge of jury.— A statute requiring the court, ordering the jury to view a place, to order that the jury shall be conducted in a body, under the charge of an officer, to the place, etc., does not require the administering to the officer selected to have charge of the jury any additional oath. Emporia *v.* Juengling, 78 Kan. 595, 96 Pac. 850, 19 L. R. A. N. S. 223.

Omission to appoint person to conduct jury to place.—Where the jury found and inspected the right place, the omission of the court ordering an inspection to appoint, as required by Gen. St. (1901) § 4724, a person to show the jury the place was immaterial. Emporio *v.* Juengling, 78 Kan. 595, 96 Pac. 850, 19 L. R. A. N. S. 223.

11. *Iowa.*— Moore *v.* Chicago, etc., R. Co., 93 Iowa 484, 61 N. W. 992.

Kentucky.— Hughes *v.* General Electric Light, etc., Co., 107 Ky. 485, 54 S. W. 723, 21 Ky. L. Rep. 1202; Meier *v.* Weikel, 59 S. W. 496, 22 Ky. L. Rep. 953.

New Mexico.— Murray *v.* Silver City, etc., R. Co., 3 N. M. 337, 9 Pac. 369.

New York.— Kahn *v.* New York El. R. Co., 7 Misc. 53, 27 N. Y. Suppl. 339.

Texas.— Travelers' Ins. Co. *v.* Hunter, 30 Tex. Civ. App. 489, 70 S. W. 798.

12. Birmingham R., etc., Co. *v.* Ellard, 135 Ala. 433, 33 So. 276; Bushnell *v.* Crooke Min., etc., Co., 12 Colo. 247, 21 Pac. 931.

13. Williams *v.* West Bay City, 119 Mich. 395, 78 N. W. 328.

14. Highley *v.* Metzger, 187 Ill. 237, 58 N. E. 407 [*affirming* 86 Ill. App. 573]; Chicago City R. Co. *v.* McLaughlin, 146 Ill. 353, 34 N. E. 796 [*affirming* 40 Ill. App. 496].

15. Olson *v.* Solverson, 71 Wis. 663, 38 N. W. 329. And see Farley *v.* Gate City Gas Light Co., 105 Ga. 323, 31 S. E. 193; Rankin *v.* Sharples, 206 Ill. 301, 69 N. E. 9.

16. Bell, etc., Co. *v.* Applegate, 62 S. W. 1124, 23 Ky. L. Rep. 470.

willing witness,[17] or caution a witness not to disclose his testimony to other witnesses,[18] or criticize witnesses for apparently improper conduct;[19] and, where the recall of a witness is entirely discretionary with the court, may say that he would not have permitted the witness to be recalled if he had known what his testimony would be.[20] So he may say to counsel when such is the case that he is not allowing the witness a sufficient time to answer the question.[21] He should not, however, say anything calculated to influence the testimony of a witness,[22] or comment on the credibility of witnesses.[23]

L. Examination of Witnesses by Trial Judge. It is within the authority of the trial judge to examine witnesses for the purpose of eliciting facts material to the case.[24] Indeed circumstances may arise upon the trial which will render such action on the part of the court necessary.[25] Nevertheless the rules governing the examination of witnesses by counsel apply as well to the examination of witnesses by the court.[26] He should not ask leading and suggestive questions of a hestitating witness during the cross-examination of such witness,[27] or ask questions concerning immaterial matters that are calculated to arouse the passions of the jury.[28] So in the conduct of the examination the court should be careful not to indicate by words or manner his disbelief of the witness,[29] and should not make remarks or comments on the witnesses or their testimony which may tend either to magnify or diminish in the minds of the jury the effect of such testimony either as to credibility or value.[30] Although the conduct of the examination is improper the judgment will not be reversed if it is apparent from the verdict that no prejudice resulted.[31]

M. Remarks and Conduct of Judge[32] — **1. In General.** During the trial, the judge should refrain from making any unnecessary comments which might tend to a result prejudicial to a litigant,[33] and when calculated to influence the minds of the jury, such remarks constitute ground for reversal.[34] Nevertheless, not every unguarded remark of a trial judge, in the presence of the jury is ground for reversal. To be so, it must be shown to be prejudicial to the rights of the party complaining, or at least appear probable that prejudice resulted.[35] It is

17. State *v.* King, 88 Minn. 175, 92 N. W. 965.

18. Broyles *v.* Prisock, 97 Ga. 643, 25 S. E. 389.

19. Wynn *v.* City, etc., R. Co., 91 Ga. 344, 17 S. E. 649; Seawell *v.* Carolina Cent. R. Co., 132 N. C. 856, 44 S. E. 610, 133 N. C. 515, 45 S. E. 850.

20. De Berry *v.* Carolina Cent. R. Co., 100 N. C. 310, 6 S. E. 723.

21. Birmingham R., etc., Co. *v.* Ellard, 135 Ala. 433, 33 So. 276.

22. Artz *v.* Robertson, 50 Ill. App. 27.

23. See *infra*, IV, M, 4.

24. Barlow Bros. Co. *v.* Parsons, 73 Conn. 696, 49 Atl. 205; Huffman *v.* Cauble, 86 Ind. 591; Lefever *v.* Johnson, 79 Ind. 554; Wilson *v.* Ohio River, etc., R. Co., 52 S. C. 537, 30 S. E. 406.

25. Baur *v.* Beall, 14 Colo. 383, 23 Pac. 345.

26. State *v.* Crotts, 22 Wash. 245, 60 Pac. 403.

27. Kramer *v.* Riss, 77 Ill. App. 623; Bolte *v.* Third Ave. R. Co., 38 N. Y. App. Div. 234, 56 N. Y. Suppl. 1038.

28. Flinn *v.* Ferry, 127 Cal. 648, 60 Pac. 434.

29. See Stelpflug *v.* Wolfe, 127 Iowa 192, 102 N. W. 1130, holding, however, that in a case tried by the court without a jury a disregard of these requirements would not be a ground for reversal where the witness was not thereby induced to testify as to anything beyond the truth as he actually knew it.

30. Hudson *v.* Hudson, 90 Ga. 581, 16 S. E. 349.

31. Knox *v.* Fuller, 23 Wash. 34, 62 Pac. 131.

32. **In criminal prosecutions** see Criminal Law, 12 Cyc. 538 *et seq.*

33. Pinkerton *v.* Sydnor, 87 Ill. App. 76. And see *infra*, IV, M, 2, 4, 5, 6, 7, 8, 9, 10, 11.

34. Texas, etc., Lumber Co. *v.* Rose, (Tex. Civ. App. 1907) 103 S. W. 444. And see *infra*, IV, M, 2, 5, 6, 7, 8, 11.

35. *Alabama.*— Phillips *v.* Beene, 16 Ala. 720; Greene *v.* Tims, 16 Ala. 541.

Arkansas.— Midland Valley R. Co. *v.* Hamilton, 84 Ark. 81, 104 S. W. 540.

California.— Bradbury *v.* McHenry, (1899) 57 Pac. 999. And see Gay *v.* Torrance, 145 Cal. 144, 78 Pac. 540; Koyer *v.* Willmon, 12 Cal. App. 87, 106 Pac. 599.

Colorado.— Hill *v.* Corcoran, 15 Colo. 270, 25 Pac. 171.

Florida.— Hoey *v.* Fletcher, 39 Fla. 325, 22 So. 716.

Georgia.— Georgia Cent. R. Co. *v.* Mote, 131 Ga. 166, 62 S. E. 164; Hampton *v.* Macon, 113 Ga. 93, 38 S. E. 387; McLeod *v.* Wilson, 108 Ga. 790, 33 S. E. 851; Columbus

not enough that there is a possibility that the remarks were prejudicial.[36] And it is ordinarily held that error in making improper remarks is cured by instructing the jury to disregard the remarks.[37] So a remark objectionable in itself which did not reach the ears of the jury is not a ground for reversal,[38] for remarks made during the discussion as to the law to be incorporated in the instructions, although ordinarily improper to be made in the presence of the jury, constitute no ground for reversal when the jury were present by agreement of counsel.[39]

2. Comments on Weight of Evidence. As is shown in a subsequent chapter, where the subject is considered at length, it is the rule in most jurisdictions that the trial judge in charging the jury must carefully refrain from expressing or intimating his opinion on the facts in the case,[40] and in the great majority of jurisdictions it is equally well settled that it is erroneous for the judge to express or intimate an opinion on the facts by remarks made during the course of the trial.[41]

v. Ogletree, 102 Ga. 293, 29 S. E. 749; Tift *v.* Jones, 77 Ga. 181, 3 S. E. 399; Smith *v.* Eubanks, 72 Ga. 280.

Illinois.— Chicago City R. Co. *v.* Cooney, 196 Ill. 466, 63 N. E. 1029 [*affirming* 95 Ill. App. 471]; St. Louis Southwestern R. Co. *v.* Elgin Condensed Milk Co., 175 Ill. 557, 51 N. E. 911, 67 Am. St. Rep. 238; Birmingham F. Ins. Co. *v.* Pulver, 126 Ill. 329, 18 N. E. 804, 9 Am. St. Rep. 598; Chicago, etc., R. Co. *v.* Holland, 122 Ill. 461, 13 N. E. 145; Peoria, etc., R. Co. *v.* Barnum, 107 Ill. 160; Deshler *v.* Beers, 32 Ill. 368, 83 Am. Dec. 274; Eckels *v.* Halsten, 136 Ill. App. 111.

Iowa.— Wissler *v.* Atlantic, 123 Iowa 11, 98 N. W. 131; Halley *v.* Tichenor, 120 Iowa 164, 94 N. W. 472; Crowell *v.* McGoon, 106 Iowa 266, 76 N. W. 672; Minthon *v.* Lewis, 78 Iowa 620, 43 N. W. 465; Cedar Rapids, etc., R. Co. *v.* Cowan, 77 Iowa 535, 42 N. W. 436.

Kansas.— Cone *v.* Smyth, 3 Kan. App. 607, 45 Pac. 247.

Kentucky.— Louisville, etc., R. Co. *v.* Vincent, 96 S. W. 898, 29 Ky. L. Rep. 1049; American F. Ins. Co. *v.* Bland, 40 S. W. 670, 19 Ky. L. Rep. 287.

Michigan.— Richards *v.* Ann Arbor, 152 Mich. 15, 115 N. W. 1047; Crane Lumber Co. *v.* Bellows, 117 Mich. 482, 74 N. W. 481; Connell *v.* McNett, 109 Mich. 329, 67 N. W. 344; Burns *v.* Kilpatrick, 91 Mich. 364, 51 N. W. 393, 30 Am. St. Rep. 485; Ransom *v.* Bartley, 70 Mich. 379, 38 N. W. 287.

Minnesota.— Zimmerman *v.* Lamb, 7 Minn. 421.

Missouri.— Fullerton *v.* Fordyce, 144 Mo. 519, 44 S. W. 1053; Thompson *v.* Ish, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552; Stephens *v.* Philadelphia Fire Assoc., 139 Mo. App. 369, 123 S. W. 63; Miles *v.* Miles, 137 Mo. App. 38, 119 S. W. 456; Barney *v.* Spangler, 131 Mo. App. 58, 109 S. W. 855; Hackmann *v.* Gutweiler, 66 Mo. App. 244.

Nebraska.— Hillebrand *v.* Nelson, 1 Nebr. (Unoff.) 783, 95 N. W. 1068.

New Hampshire.— Lee *v.* Dow, 73 N. H. 101, 59 Atl. 374.

New York.— Van Rensselaer *v.* Bouton, 3 Keyes 260; Diamond *v.* Planet Mills Mfg. Co., 97 N. Y. App. Div. 43, 89 N. Y. Suppl. 635; Baker *v.* Riedel, 24 Misc. 119, 52 N. Y. Suppl. 832; Lederman *v.* Rahaim, 102 N. Y. Suppl. 526; Mann *v.* Barrows, 14 N. Y. St. 10.

North Carolina.— Williams *v.* Crosby Lumber Co., 118 N. C. 928, 24 S. E. 800; Malloy *v.* Bruden, 86 N. C. 251.

North Dakota.— Zink *v.* Lahart, (1907) 110 N. W. 931.

Oklahoma.— Guthrie *v.* Carey, 15 Okla. 276, 81 Pac. 431.

Pennsylvania.— Sperry *v.* Seidel, 218 Pa. St. 163, 66 Atl. 853; Beardslee *v.* Columbia Tp., 188 Pa. St. 496, 41 Atl. 617, 68 Am. St. Rep. 883; McFeaters *v.* Pattison, 188 Pa. St. 270, 41 Atl. 609.

South Carolina.— Miles *v.* Telegraph Co., 55 S. C. 403, 33 S. E. 493; Tucker *v.* Charleston, etc., R. Co., 51 S. C. 306, 28 S. E. 943.

Texas.— Trezevant *v.* Rains, (1892) 19 S. W. 567; Conner *v.* Littlefield, 79 Tex. 76, 15 S. W. 217; Little *v.* State, 75 Tex. 616, 12 S. W. 965; Dallas Consol. Electric St. R. Co. *v.* Broadhurst, 28 Tex. Civ. App. 630, 68 S. W. 315; The Oriental *v.* Barclay, 16 Tex. Civ. App. 193, 41 S. W. 117.

Washington.— Robertson *v.* King County, 20 Wash. 259, 55 Pac. 52.

Wisconsin.—Lightfoot *v.* Winnebago Tract. Co., 123 Wis. 479, 102 N. W. 30; Shafer *v.* Phœnix Ins. Co., 53 Wis. 361, 10 N. W. 381.

United States.— Pennsylvania Co. *v.* Whitney, 169 Fed. 572, 95 C. C. A. 70.

See 46 Cent. Dig. tit. "Trial," § 80.

36. Chattanooga, etc., R. Co. *v.* Palmer, 89 Ga. 161, 15 S. E. 34; Pinkerton *v.* Sydnor, 87 Ill. App. 76; Enid First Nat. Bank *v.* Yoeman, 17 Okla. 613, 90 Pac. 412.

37. Weinacker Ice, etc., Co. *v.* Ott, 163 Ala. 230, 50 So. 901; Dodge *v.* Brown, 22 Mich. 446; Roseberry *v.* Nixon, 58 Hun (N. Y.) 121, 11 N. Y. Suppl. 523; Ray *v.* Pecos, etc., R. Co., 40 Tex. Civ. App. 99, 88 S. W. 466.

38. Gracz *v.* Anderson, 104 Minn. 476, 116 N. W. 1106.

39. Moore *v.* Rose, 130 Mo. App. 668, 108 S. W. 1105.

40. See *infra*, IX, C, 5, b.

41. *California.*— Howland *v.* Oakland Consol. St. R. Co., 115 Cal. 487, 47 Pac. 255; McMinn *v.* Whalen, 27 Cal. 300.

Georgia.— Atlantic Coast Line R. Co. *v.* Powell, 127 Ga. 805, 56 S. E. 1006, 9 L. R. A. N. S. 769; Woodson *v.* Holmes, 117 Ga. 19,

Remarks of this character, it has been said, and with good reason, have precisely

42 S. E. 467; Florida Cent., etc., R. Co. *v.* Lucas, 110 Ga. 121, 35 S. E. 283; Bryant *v.* Anderson, 5 Ga. App. 517, 63 S. E. 638; Americus *v.* Tower, 3 Ga. App. 159, 59 S. E. 434; Georgia R., etc., Co. *v.* Baker, 1 Ga. App. 832, 58 S. E. 88.

Idaho.— McKissick *v.* Oregon Short Line R. Co., 13 Ida. 195, 89 Pac. 629.

Illinois.— Andreas *v.* Ketcham, 77 Ill. 377; Chicago City R. Co. *v.* Enroth, 113 Ill. App. 285; Swenson *v.* Erickson, 90 Ill. App. 358.

Indiana.— Brunker *v.* Cummins, 133 Ind. 443, 32 N. E. 732.

Iowa.— *In re* Knox, 123 Iowa 24, 98 N. W. 468; Coldren *v.* Le Gore, 118 Iowa 212, 91 N. W. 1066.

Kansas.— Atchison, etc., R. Co. *v.* Ayers, 56 Kan. 176, 42 Pac. 722; Chicago, etc., R. Co. *v.* Broquet, 47 Kan. 571, 28 Pac. 717.

Michigan.— Hewitt *v.* Flint, etc., R. Co., 67 Mich. 61, 34 N. W. 659.

Minnesota.— Kramer *v.* Northwestern El. Co., 91 Minn. 346, 98 N. W. 96.

Missouri.— Schmidt *v.* St. Louis, etc., R. Co., 149 Mo. 269, 50 S. W. 921, 73 Am. St. Rep. 380; State *v.* Manhattan Rubber Mfg. Co., 149 Mo. 181, 50 S. W. 321.

North Carolina.— Marcom *v.* Adams, 122 N. C. 222, 29 S. E. 333.

Ohio.— P., etc., R. Co. *v.* Burroughs, 6 Ohio S. & C. Pl. Dec. 527, 5 Ohio N. P. 12.

Oklahoma.— Guthrie *v.* Carey, 15 Okla. 276, 81 Pac. 431.

South Carolina.— Willis *v.* Western Union Tel. Co., 73 S. C. 379, 53 S. E. 639.

Texas.— St. Louis, etc., R. Co. *v.* Lane, 49 Tex. Civ. App. 541, 110 S. W. 530; Thomson *v.* Kelley, (Civ. App. 1906) 97 S. W. 326; Howorth *v.* Carter, 23 Tex. Civ. App. 469, 56 S. W. 539; Sargent *v.* Lawrence, 16 Tex. Civ. App. 540, 40 S. W. 1075; Hynes *v.* Winston, (Tex. Civ. App. 1897) 40 S. W. 1025; Smith *v.* Dunman, 9 Tex. Civ. App. 319, 29 S. W. 432.

Washington.— Cummings *v.* Weir, 37 Wash. 42, 79 Pac. 487.

Wisconsin.— Davis *v.* Dragne, 120 Wis. 63, 97 N. W. 512.

See 46 Cent. Dig. tit. "Trial," § 81.

Remarks improperly discrediting the evidence of one of the parties are improper. Singer Mfg. Co. *v.* Greenleaf, 100 Ala. 272, 14 So. 109; Perkins *v.* Knisely, 204 Ill. 275, 68 N. E. 486; West *v.* Black, 65 Ga. 647.

Commenting unfavorably on the reliability of evidence of a character about to be offered is erroneous. P., etc., R. Co. *v.* Burroughs, 6 Ohio S. & C. Pl. Dec. 527, 5 Ohio N. P. 12; Schneider *v.* Great Northern R. Co., 47 Wash. 45, 91 Pac. 565.

Comments on expert testimony.— Comments of the court tending to weaken or strengthen the effect of expert testimony are improper as encroaching on the province of the jury (Chicago, etc., R. Co. *v.* Du Bois, 56 Ill. App. 181; Thompson *v.* Ish, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552; Herndon *v.* Springfield, 137 Mo. App. 513, 119 S. W. 467), and a ground for reversal if probable that prejudice resulted (Chicago, etc., R. Co. *v.* Du Bois, 56 Ill. App. 181) but not otherwise (Thompson *v.* Ish, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552; Herndon *v.* Springfield, 137 Mo. App. 513, 119 S. W. 467).

What is not an opinion on weight of evidence.— A chancellor's remark: "You may prove that, though it may do you no good," is not an opinion expressed as to the weight of the evidence, where an objection to the introduction of the evidence, showing that a person who was a party to a transaction out of which the suit has grown was at a time prior to the transaction a director of the bank sought to be held liable. Continental Nat. Bank *v.* First Nat. Bank, 1 Tenn. Ch. App. 449. In an action for broker's commissions, a remark of the judge, on overruling a motion to strike testimony, that "I think that this evidence under the whole record now disclosed is proper," and ruling at the time was reserved in order to ascertain if the evidence would show the full extent of the authority, "I think that this evidence was proper, and the motion is overruled," is not prejudicial as a remark on the weight of evidence. Fritz *v.* Chicago Grain, etc., Co., 136 Iowa 699, 114 N. W. 193. The statement of the court, on refusing a motion to strike out the testimony of a witness, that "the jury will determine what weight is to be given this testimony," is proper; this not being a comment on the testimony, but the statement of a reason for not striking it out. Sotebier *v.* St. Louis Transit Co., 203 Mo. 702, 102 S. W. 651. For other illustrative cases see American Standard Jewelry Co. *v.* Hill, 90 Ark. 78, 117 S. W. 781; Kaack *v.* Stanton, 51 Tex. Civ. App. 495, 112 S. W. 702; Houston, etc., R. Co. *v.* Shepard, (Tex. Civ. App. 1909) 118 S. W. 596.

The Massachusetts statute, providing that courts shall not "charge juries with respect to matters of fact," refers only to instructions given after the evidence has been heard and the arguments of counsel concluded, and does not apply to remarks made by the judge during the examination of witnesses. Partelow *v.* Newton, etc., R. Co., 196 Mass. 24, 81 N. E. 894.

The Connecticut statutes of 1888 permit the court in submitting questions of fact to make such observations on the evidence as it thinks proper. Beach *v.* Travellers' Ins. Co., 73 Conn. 118, 46 Atl. 867; State *v.* Fetterer, 65 Conn. 281, 32 Atl. 394.

In Rhode Island the expression of opinion by the judge on matters of fact is not ground of exception, unless the party against whom it operates yields to it and does not argue against it, and then only in the discretion of the court, if incorrect and injurious to the party. Hartshorn *v.* Ives, 4 R. I. 471.

In the federal courts, the opinion of the trial court expressed to the jury on matters of fact, which are ultimately submitted to

the same effect as if given in a formal instruction to the jury,[42] and, if they are calculated to mislead the jury and prejudice the rights of one of the parties, they constitute a ground for reversal.[43] However, an expression of opinion on the weight of the evidence is not necessarily a ground of reversal. Improper comments on evidence are ordinarily considered cured where the court instructs the jury that they are the exclusive judges of all questions of fact,[44] and the judgment will not be reversed where it is apparent that no prejudice resulted,[45] as where the undisputed evidence shows the fact to be as stated by the judge,[46] or where

them for their decision, is not reviewable error in a national court so long as no rule of law is incorrectly stated. Rucker *v.* Wheeler, 127 U. S. 85, 8 S. Ct. 1142, 32 L. ed. 102; U. S. *v.* Philadelphia, etc., R. Co., 123 U. S. 113, 8 S. Ct. 77, 31 L. ed. 138; St. Louis, etc., R. Co. *v.* Vickers, 122 U. S. 360, 7 S. Ct. 1216, 30 L. ed. 1161; Union Pac. R. Co. *v.* Thomas, 152 Fed. 365, 81 C. C. A. 491.

42. People *v.* Bonds, 1 Nev. 33. And see Schneider *v.* Great Northern R. Co., 47 Wash. 45, 47, 91 Pac. 565, in which it is said: "It is no justification to say that the comment occurred when the court was ruling on the admission of evidence, and not in the charge to the jury, as it is just as harmful to the party offering the evidence to have it discredited by the trial judge in advance of its admission as it is to have it discredited afterwards."

43. *Georgia.*— West *v.* Black, 65 Ga. 647. And see Ficken *v.* Atlanta, 114 Ga. 970, 41 S. E. 58.

Illinois.— Andreas *v.* Ketcham, 77 Ill. 377; Deshler *v.* Beers, 32 Ill. 368, 83 Am. Dec. 274; Chicago City R. Co. *v.* Enroth, 113 Ill. App. 285; Swenson *v.* Erickson, 90 Ill. App. 358.

Indiana.— Brunker *v.* Cummins, 133 Ind. 443, 32 N. E. 732.

Iowa.— Coldren *v.* La Gore, 118 Iowa 212, 91 N. W. 1066; Shakman *v.* Potter, 98 Iowa 61, 66 N. W. 1045.

Michigan.— Hewitt *v.* Flint, etc., R. Co., 67 Mich. 61, 34 N. W. 659.

Minnesota.— Kramer *v.* Northwestern El. Co., 91 Minn. 346, 98 N. W. 96.

Missouri.— Schmidt *v.* St. Louis, etc., R. Co., 149 Mo. 269, 50 S. W. 921, 73 Am. St. Rep. 380; State *v.* Manhattan Rubber Mfg. Co., 149 Mo. 181, 50 S. W. 321.

Ohio.— P., etc., R. Co. *v.* Burroughs, 6 Ohio S. & C. Pl. Dec. 527, 5 Ohio N. P. 12.

Washington.— Schneider *v.* Great Northern R. Co., 47 Wash. 45, 91 Pac. 565.

Wisconsin.— Davis *v.* Dragne, 120 Wis. 63, 97 N. W. 512.

See 46 Cent. Dig. tit. "Trial," § 81.

Instances of remarks held ground for reversal.— Where counsel on cross-examination is directing his questions to matters pertinent and material, a remark as follows: "It is just as important as it is to ask him what he had for breakfast"— is, in a close case, ground for reversal. Chicago City R. Co. *v.* Enroth, 113 Ill. App. 285. Where during the examination of a witness the court, referring to the witness, remarked, "Evidently, sir, this man is making his evidence out of whole cloth," such remark was calculated to discredit the witness, and was prejudicial error. Swenson *v.* Erickson, 90 Ill. App. 358. In an action against an administrator to recover for support of an infant child of deceased, defendant claimed that plaintiff agreed to care for the child without compensation. In answer to an objection to the argument of defendant's counsel, the court remarked that it appeared there "was no original agreement by the terms of which there was to be payment made." It was held that the remark was error prejudicial to plaintiff. Coldren *v.* La Gore, 118 Iowa 212, 91 N. W. 1066.

Effect of instructions directing jury to disregard remark.— While ruling against defendant's objection to certain evidence offered by plaintiff, a remark of the court that he preferred that if there was to be any stealing done on technicalities the supreme court should say so, it was ground for reversal, although the jurors were subsequently cautioned by the court in an attempt to remove the impression and leave the jurors unprejudiced as to the main issue. Kramer *v.* Northwestern El. Co., 91 Minn. 346, 98 N. W. 96. So in an action against father and son for negligence of the son in driving the father's team, the court's remark to counsel, in the presence of the jury, that, "from the manner of these parties on the stand, the court does not believe" there was a bailment of the team, made in connection with the other remarks showing a belief that the son was acting as the father's servant, was prejudicial to them, although the court warned the jury not to be influenced by the remark. Davis *v.* Dragne, 120 Wis. 63, 97 N. W. 512.

44. Peyser *v.* Western Dry Goods Co., 53 Wash. 633, 102 Pac. 750.

45. *Illinois.*— Spohr *v.* Chicago, 206 Ill. 441, 69 N. E. 515; Skelly *v.* Boland, 78 Ill. 438.

Indiana.— Elwood *v.* Addison, 26 Ind. App. 28, 59 N. E. 47.

New York.— Yunkeich *v.* Brooklyn Heights R. Co., 69 N. Y. App. Div. 619, 75 N. Y. Suppl. 86.

Oklahoma.— Guthrie *v.* Carey, 15 Okla. 276, 81 Pac. 431.

Washington.— Cummings *v.* Weir, 37 Wash. 42, 79 Pac. 487.

46. *Kansas.*— Gentry *v.* Kelley, 49 Kan. 82, 30 Pac. 186.

Michigan.— Lee *v.* Huron Indemnity Union, 135 Mich. 291, 97 N. W. 709.

South Carolina.— Willis *v.* Western Union Tel. Co., 73 S. C. 379, 53 S. E. 639; Pratt *v.* Frasier, 72 S. C. 368, 51 S. E. 983.

the issue on which the court expressed an opinion was decided in appellant's favor.[47]

3. Remarks on Admission or Exclusion of Evidence. Error cannot be assigned to remarks of the trial judge necessary in deciding a motion to reject evidence offered.[48] So the court may comment on the materiality and value of evidence, in rejecting it,[49] and may state what is or is not proper testimony on an issue, where objections to testimony are continually being made.[50] He may state that no more questions will be allowed as to matters which the court had ruled to be irrelevant.[51] In admitting evidence, he may state the theory of its admissibility,[52] and in passing on the competency of evidence may state that it is "very competent."[53] Even though remarks made in ruling on evidence are improper, the judgment will not be reversed where it is apparent that no prejudice resulted.[54]

4. Comments on Credibility of Witnesses. The question of the credibility of the witnesses is solely for the determination of the jury,[55] and it is improper for the court to comment on or express an opinion directly or by implication on the credibility of the witnesses.[56] The reason is that words or conduct of the trial judge may on the one hand support the character or testimony of a witness, or on the

Texas.— Conner *v.* Littlefield, 79 Tex. 76, 15 S. W. 217.

Wisconsin.— Olson *v.* Soherson, 71 Wis. 663, 38 N. W. 329.

47. Kozlowski *v.* Chicago, 113 Ill. App. 513.

48. Reinhart *v.* Miller, 22 Ga. 402, 68 Am. Dec. 506; Pennsylvania Co. *v.* Conlan, 101 Ill. 93. And see Deshler *v.* Beers, 32 Ill. 368, 83 Am. Dec. 274.

49. Manhattan Bldg. Co. *v.* Seattle, 52 Wash. 226, 100 Pac. 330. And see Hill *v.* Montgomery, 184 Ill. 220, 56 N. E. 320.

50. Fleming *v.* Pullen, (Tex. Civ. App. 1906) 97 S. W. 109.

51 Crowell *v.* McGoon, 106 Iowa 266, 76 N. W. 672.

52. Bethune *v.* Berry, 76 Ga. 662; Queen Ins. Co. *v.* Studebaker Bros. Mfg. Co., 117 Ind. 416, 20 N. E. 299.

53. Continental Nat. Bank *v.* First Nat. Bank, 1 Tenn. Ch. App. 449.

54. Elgin, etc., R. Co. *v.* Lawlor, 229 Ill. 621, 82 N. E. 407 [*affirming* 132 Ill. App. 280]; Fitzgerald *v.* Benner, 219 Ill. 485, 76 N. E. 709 [*affirming* 120 Ill. App. 447]; Logan *v.* Lenawee County Agricultural Soc., 156 Mich. 537, 121 N. W. 485; Reilly *v.* Eastman's Co., 28 Misc. (N. Y.) 125, 58 N. Y. Suppl. 1089; Nunn *v.* Jordan, 31 Wash. 506, 72 Pac. 124. And see Missouri, etc., R. Co. *v.* Sneed, 85 Ark. 293, 107 S. W. 1182; Sterling *v.* De Laune, 47 Tex. Civ. App. 470, 105 S. W. 1169.

Unless prejudice appears.—A judgment will not be reversed because of remarks made by a court to counsel in ruling upon the admission of evidence during a trial. McMahon *v.* Eau Claire Water-Works Co., 95 Wis. 640, 70 N. W. 829.

Remarks not made in hearing of jury.— Remarks made by the trial court to the effect that there was nothing in the deposition offered in evidence that was material were not prejudicial to the party offering it when not made in the hearing of the jury. Coulter *v.* Goulding, 98 Minn. 68, 107 N. W. 823.

Remarks made by way of pleasantry.— Evidence that the "authorities at the courthouse" were notified of a defect in a sidewalk was introduced. It was held that the judge's remark that he had not been notified of the defect, made in mere pleasantry, while the objection to the above evidence was being argued, was harmless. Columbus *v.* Ogletree, 102 Ga. 293, 29 S. E. 749.

Comments on evidence which has been excluded, although erroneous, are not prejudicial. Corrigan *v.* Wilkes-Barre, etc., Tract. Co., 225 Pa. St. 560, 74 Atl. 420.

Where the jury is directed to disregard statements made on a motion to offer testimony the statements so made will not be ground for reversing the judgment. Caperton *v.* Ballard, 4 W. Va. 420.

55. See *infra*, VII, B, 3.

56. *California.*— McMinn *v.* Whelan, 27 Cal. 300.

Connecticut.— Barlow Bros. Co. *v.* Parsons, 73 Conn. 696, 49 Atl. 205.

District of Columbia.— Ruppert *v.* Wolf, 4 App. Cas. 556.

Florida.— Robertson *v.* State, 40 Fla. 509, 24 So. 474.

Georgia.— Morrison *v.* Dickey, 119 Ga. 698, 46 S. E. 863; Alexander *v.* State, 114 Ga. 266, 40 S. E. 231.

Illinois.— Merritt *v.* Bush, 122 Ill. App. 189; Chicago City R. Co. *v.* Wall, 93 Ill. App. 411; Swenson *v.* Erickson, 90 Ill. App. 358; Kane *v.* Kinnare, 69 Ill. App. 81.

Indiana.— Kintner *v.* State, 45 Ind. 175.

Iowa.— Edwards *v.* Cedar Rapids, 138 Iowa 421, 116 N. W. 323.

Kansas.— State *v.* Hughes, 33 Kan. 23, 5 Pac. 381.

Michigan.— Haynes *v.* Hillsdale, 113 Mich. 44, 71 N. W. 466; Raymond *v.* Woolfenden, 99 Mich. 165, 58 N. W. 41; McDuff *v.* Detroit Evening Journal Co., 84 Mich. 1, 47 N. W. 671, 22 Am. St. Rep. 673.

Missouri.— Landers *v.* Quincy, etc., R. Co., 134 Mo. App. 80, 114 S. W. 543.

Oklahoma.— Newkirk *v.* Dimmers, 17 Okla. 525, 87 Pac. 603.

other may destroy the same, in the estimation of the jury; and thus his personal and official influence is exerted to the unfair advantage of one of the parties, with a corresponding detriment to the cause of the other.[57] However the judgment will not be reversed for error in commenting on the credibility of witnesses where it is apparent that no prejudice resulted.[58]

5. Statements as to Whether Evidence on Certain Matters Has Been Introduced. An incorrect statement by the judge that evidence material in its nature had or had not been given is ground for reversal where it is probable that prejudice resulted.[59] But the mere statement by the court as to what it understood a witness to testify to is not prejudicial where the witness had in fact testified as the court stated.[60]

6. Remarks as to Law of Case. Remarks of the trial judge calculated to mislead the jury as to the law governing the case constitute reversible error.[61] But judgment will not be reversed on account of a remark of the judge to the jury that all questions raised by the demurrer have been settled by the supreme court in a companion case, where the pleadings were substantially the same as in the case on trial, such being the fact;[62] and remarks of the court in a discussion with counsel as to the law applicable to the case, in the jury's presence, which announced a correct rule of law, if error, do not constitute prejudicial error.[63]

7. Remarks Showing Bias of Judge or Tending to Create Prejudice Against Party. Remarks of the trial judge showing bias in favor of one of the parties constitute prejudicial error.[64] So it is ordinarily held to be reversible error for

Tennessee.— Graham *v.* McReynolds, 90 Tenn. 673, 18 S. W. 272.

Texas.— Riddle *v.* Riddle, (Civ. App. 1901) 62 S. W. 970.

See 46 Cent. Dig. tit. "Trial," § 82.

Compare Southwestern Tel., etc., Co. *v.* Myane, 86 Ark. 548, 111 S. W. 987.

Illustration of rule.— The remark of the court on objection to the character of the cross-examination of a physician, "I think the doctor has given a very fair and unbiased statement of the condition he found this patient in," is prejudicial error. Edwards *v.* Cedar Rapids, 138 Iowa 421, 116 N. W. 323.

Intimating that a witness has probably been mistaken in his testimony is erroneous. Smith *v.* Dunman, 9 Tex. Civ. App. 319, 29 S. W. 432.

57. McMinn *v.* Whelan, 27 Cal. 300.

58. Doan *v.* Willow Springs, 101 Wis. 112, 76 N. W. 1104.

Remarks not necessarily tending to discredit witness.— Reference by the trial judge to certain witnesses as "saloon keepers and gentlemen of elegant leisure," although not a remark to be approved, did not constitute reversible error, as it did not necessarily tend to discredit the testimony of such witnesses. Frankfort *v.* Coleman, 19 Ind. App. 368, 49 N. E. 474, 65 Am. St. Rep. 412. Where the trial court, in response to an objection to a question, stated that while the witness was not sufficiently informed on the subject to testify, in deference to a possible construction of the opinion of the supreme court on a former appeal, he would overrule the objection. It was held that the fact involved having been established without dispute by witnesses for both parties, the remarks of the court were not prejudicial and did not have a tendency to destroy the credibility of the witness. Souchek *v.* Karr, 83 Nebr. 645, 120 N. W. 210. Where a witness became confused, the court's conduct in asking him if he was certain about his testimony, and in stating that it seemed incredible, was not error, where witness was not discredited, and upon reflection found he was mistaken and corrected his statement. Elgin, etc., R. Co. *v.* Lawlor, 229 Ill. 621, 82 N. E. 407 [*affirming* 132 Ill. App. 280].

Where the depositions of a witness for both parties were palpably conflicting, it was not prejudicial error for the court to remark that the witness "must be an awful liar." Connor *v.* Wilkie, 1 Kan. App. 492, 41 Pac. 71.

59. Rose *v.* Kansas City, 125 Mo. App. 231, 102 S. W. 578; McLaughlin *v.* Syracuse Rapid Transit Co., 115 N. Y. App. Div. 774, 101 N. Y. Suppl. 196; Texas, etc., Lumber Co. *v.* Rose, (Tex. Civ. App. 1907) 103 S. W. 444.

60. Norfolk, etc., Tract. Co. *v.* O'Neill, 109 Va. 670, 64 S. E. 948. And see The Oriental *v.* Barclay, 16 Tex. Civ. App. 193, 41 S. W. 117; Olson *v.* Solverson, 71 Wis. 663, 38 N. W. 329.

61. Southwestern Tel., etc., Co. *v.* Myane, 86 Ark. 548, 111 S. W. 987; Illinois Cent. R. Co. *v.* Souders, 178 Ill. 585, 53 N. E. 408; Brinckerhoff *v.* Briggs, 92 Ill. App. 537. *Compare* McCurdy *v.* Binion, 80 Ga. 691, 6 S. E. 275, holding that a statement of law made by the court, in the presence of the jury, to counsel while arguing a question of law whether erroneous or not is not such error as to require a new trial, where the jury was afterward correctly instructed in the charge.

62. International, etc., R. Co. *v.* Smith, (Tex. 1886) 1 S. W. 565.

63. Kreuger *v.* Sylvester, 100 Iowa 647, 69 N. W. 1059.

64. McDuff *v.* Detroit Evening Journal

him to make remarks which will tend to excite prejudice or hostility in the minds of the jury toward one of the parties and sympathy for the other,[65] and it has been held in a number of cases that the error is not cured by directing the jury to disregard the remarks.[66]

8. Censure or Disparagement of Counsel. It is perfectly proper for the court to censure counsel for manifestly improper conduct,[67] such as making an unwarranted attack on a witness[68] or persisting in asking questions which the court had ruled were improper,[69] or improperly interfering with the examination of a witness by opposing counsel.[70] It is improper, however, for the court to censure counsel for alleged misconduct on his part in cases other than the one on trial,[71] or to say to the jury on request of counsel for written instructions that such requests were never made except when counsel was angry with the court,[72] and it is reversible error to ask questions of a witness which reflect on the integrity of counsel, nothing having developed to warrant the court in so doing,[73] or without justification to make remarks calculated to disparage counsel in the eyes of the jury,[74] or to assume

Co., 84 Mich. 1, 47 N. W. 671, 22 Am. St. Rep. 673.

Illustration.— In an action of trespass, based on the fact that defendant's building extended over on to the land of plaintiff, it was reversible error for the court to state to the jury that plaintiff had refused to adopt the court's suggestion that the parties should permit the jury to assess the entire damages sustained by plaintiff, and to refer to plaintiff's refusal in such a manner as to lead the jury to believe that the court thought that plaintiff was stubborn, and that the action was brought for spite. Allen *v.* Kidd, 197 Mass. 256, 84 N. E. 122.

Remarks held not to show bias.— Where plaintiff's physician, on cross-examination in a personal injury case, said that he hoped plaintiff would in time be able to walk without a cane, a remark of the judge, "You expect what is probable; your hope may be very improbable," was not error, on the ground that it showed bias for plaintiff. Devlin *v.* New York City R. Co., 116 N. Y. App. Div. 894, 102 N. Y. Suppl. 430. In an action under the civil damage laws on a liquor dealer's bond, a statement by the court to the jury that "nobody here is entitled to anything but their legal rights, and that is all anybody is asking for," was not prejudicial to defendant, the remark being general and applicable alike to both parties. Palmer *v.* Schurz, 22 S. D. 283, 117 N. W. 150. For further illustrations see Webb *v.* Atlantic Coast Line R. Co., 76 S. C. 193, 56 S. E. 954, 9 L. R. A. N. S. 1218.

65. Bulen *v.* Granger, 56 Mich. 207, 22 N. W. 306; Kramer *v.* Northwestern El. Co., 91 Minn. 346, 98 N. W. 96; Hogan *v.* Central Park, etc., R. Co., 124 N. Y. 64, 26 N. E. 950; Swan *v.* Keough, 35 N. Y. App. Div. 80, 54 N. Y. Suppl. 474; Davison *v.* Herring, 24 N. Y. App. Div. 402, 48 N. Y. Suppl. 760; Jennings *v.* Kosmak, 20 Misc. (N. Y.) 300, 45 N. Y. Suppl. 802; Hynes *v.* Winston, (Tex. Civ. App. 1897) 40 S. W. 1025. *Compare* Gross *v.* Feehan, 110 Iowa 163, 169, 81 N. W. 235. In this case defendant was setting up his criminal act as a defense to civil liability. The trial court in ruling said: "The grand jury had better be looking after him." It was held that the remark, if not justified, was not prejudicial.

Illustration.— Where the issue was whether a certain person was a habitual drunkard, it was error for the court in the presence of the jury to warn such person at the close of the testimony that he must stay sober until the close of the trial. Wilson *v.* White, 29 Tex. Civ. App. 588, 69 S. W. 989.

Remarks not objectionable.— The use by the court of "this man" as the term to designate plaintiff, and "Mr. Johnson," as that to designate defendant, in announcing an interlocutory ruling, is not subject to the criticism that it tended to cast a slur on the former. Fuller *v.* Johnson, 80 Conn. 493, 68 Atl. 977.

66. Kramer *v.* Northwestern El. Co., 91 Minn. 346, 98 N. W. 96; Swan *v.* Keough, 35 N. Y. App. Div. 80, 54 N. Y. Suppl. 474; Davison *v.* Herring, 24 N. Y. App. Div. 402, 48 N. Y. Suppl. 760.

67. Tuller *v.* Ginsburg, 99 Mich. 137, 57 N. W. 1099.

68. Heffernan *v.* O'Neill, 1 Nebr. (Unoff.) 363, 96 N. W. 244, in which it was said that where a witness is on the stand and is wantonly attacked without provocation by counsel, it is the duty of the trial judge to protect the witness. And see Trimmier *v.* Thomson, 41 S. C. 125, 19 S. E. 291.

69. Hein *v.* Mildebrandt, 134 Wis. 582, 115 N. W. 121, in which the court characterized the acts of counsel as unprofessional and uncourteous.

70. Laporte *v.* Cook, 22 R. I. 554, 48 Atl. 798.

71. Friemark *v.* Rosenkrans, 81 Wis. 359, 51 N. W. 557, holding, however, that the error is not ground for reversal where it appears that the client was not prejudiced.

72. McLeod *v.* Wilson, 108 Ga. 790, 33 S. E. 851.

73. State *v.* Allen, 100 Iowa 7, 69 N. W. 274.

74. Shakman *v.* Potter, 98 Iowa 61, 66 N. W. 1045; Williams *v.* West Bay City, 119 Mich. 395, 78 N. W. 328; McDuff *v.* Detroit Evening Journal Co., 84 Mich. 1, 47 N. W. 671, 22 Am. St. Rep. 673; McIntosh *v.* McIntosh, 79 Mich. 198, 44 N. W. 592; Wheeler

a manifestly hostile attitude toward counsel of one of the parties.[75] An attorney at law as an officer of the court is entitled to such treatment from the trial court that the interest of his client will not be prejudiced.[76]

9. Remarks in Denying Motion For Nonsuit. Remarks by the judge in overruling a motion for nonsuit are not charges to the jury within the constitutional prohibition against charging the jury on the facts.[77] Nevertheless in overruling such motion the court should not make remarks tending to discredit the witnesses of a party,[78] or intimate his opinion as to what the verdict should be,[79] nor make remarks as to the nature of the action, inconsistent with instructions subsequently given and that are misleading to defendant;[80] but the court may, in discussing with counsel his reasons for his ruling on a motion for nonsuit, refer to the evidence and say what it would be sufficient to establish.[81]

10. Remarks in Ruling on Motion to Direct Verdict. Where the judge correctly gives binding directions to the jury, remarks that he may make before doing so,[82] or in connection therewith,[83] are immaterial and not assignable as error. While the better practice is to send the jury out of the room when a motion for peremptory instruction is to be made, argued, or decided, there can be no reversal because of remarks of the court thereon in the presence of the jury on denying the motion, where there was no exception and no request that the jury retire.[84] So it has been held that a remark of the trial court in denying a motion to direct a verdict for defendant to the effect that the record may show that the court considers this one of the close cases which should go to the jury, and that different minds might draw different conclusions from the evidence, was not prejudicial to plaintiff.[85]

11. Miscellaneous. It is reversible error for the court, in the presence of the jury, and before all the witnesses have been examined, to state that he will dismiss the suit at defendant's cost,[86] to emphasize information of counsel as to the result of a trial in the court from which the cause was appealed, and reprimand opposing counsel for objecting to such statements,[87] or to make misleading remarks which naturally cause a party to refrain from introducing all his evidence whereby

v. Wallace, 53 Mich. 355, 364, 19 N. W. 33, 37.

75. Tuchfeld *v.* Plattner, 116 N. Y. Suppl. 693.

76. Williams *v.* West Bay City, 119 Mich. 395, 78 N. W. 328.

77. MacFeat *v.* Philadelphia, etc., R. Co., 6 Pennew. (Del.) 513, 69 Atl. 744; Cave *v.* Anderson, 50 S. C. 293, 27 S. E. 693.

Instructions counteracting effect of previous remarks.— There is no ground for the contention that the court's remarks in denying a nonsuit tending to influence the minds of the jury against plaintiff's right to recover upon the evidence presented by him, where the court, after making such remarks, instructed the jury that the court has nothing to do with the facts or evidence in the case, that the jury were the sole judges of the effect and weight of the testimony, and that, having heard all the evidence, it was the jury's duty to carefully consider it, applying thereto the law declared by the court. MacFeat *v.* Philadelphia, etc., R. Co., 6 Pennew. (Del.) 513, 69 A. 744.

78. Davis *v.* Dragne, 120 Wis. 63, 97 N. W. 512. And see Realty Co. *v.* Ellis, 4 Ga. App. 402, 61 S. E. 832.

79. Louisville, etc., R. Co. *v.* Tift, 100 Ga. 86, 27 S. E. 765.

80. Harkison *v.* Harkiffson, 101 Fed. 71, 41 C. C. A. 201.

81. Continental Ins. Co. *v.* Wickham, 110 Ga. 129, 35 S. E. 287; Favors *v.* Johnson, 79 Ga. 553, 4 S. E. 925; Patchen *v.* Parke, etc., Mach. Co., 6 Wash. 486, 33 Pac. 976; Blue *v.* McCabe, 5 Wash. 125, 31 Pac. 431. *Compare* Skelly *v.* Boland, 78 Ill. 438. In this case after plaintiff had closed his case, and had shown a right to recover, defendant moved for a nonsuit, which the court denied, and remarked in the hearing of the jury that on the evidence then in plaintiff would be entitled to recover, unless defendant made a defense. It was held that any interference by the court by remark or otherwise, within the hearing of the jury, except by way of instructions, is improper, but the supreme court would not reverse for that reason, when it is apparent that the remark did not prejudice defendant's case.

82. Hall *v.* Aitkin, 25 Nebr. 360, 41 N. W. 192.

83. Wilson *v.* Johnson, 51 Fla. 370, 41 So. 395; Central Guarantee Trust, etc., Co. *v.* White, 206 Pa. St. 611, 56 Atl. 76.

84. Illinois Cent. R. Co. *v.* Griffin, 80 Fed. 278, 25 C. C. A. 413.

85. Sosnofski *v.* Lake Shore, etc., R. Co., 134 Mich. 72, 95 N. W. 1077.

86. Wright *v.* Richmond, 21 Mo. App. 76.

87. Adams *v.* Fisher, 83 Nebr. 686, 120 N. W. 194.

prejudice results to him.[88] On the other hand, it is not error or at least not prejudicial error, for the court to remark that certain matters between the parties had been adjusted, when they admittedly had been,[89] to suggest a settlement of the case,[90] to state to counsel for the parties that one of the jurors is sick, and inquire whether counsel will go on with eleven jurors by consent; [91] to remark that court would be adjourned if necessary to allow plaintiff's counsel to secure the attendance of a witness; [92] to make remarks in settling the pleadings not in the presence of the jury as to the desirability of an early trial; [93] or to say, in declining to grant a continuance, that the case had already been sufficiently manipulated on the docket for the convenience of counsel,[94] or, where one of the parties is plainly trifling with the court, for the court to so characterize his conduct; [95] to express a doubt as to the sufficiency of the evidence to warrant the court in submitting an issue to the jury; [96] to say in response to an inquiry of counsel that he does not care to have the law discussed; [97] or to caution jurors not to be guided by newspaper articles or to express condemnation of such articles; [98] or, after the jury has been fully instructed as to the issues, to say that it seemed to him that the matter had narrowed itself down to certain questions; [99] to remark to one of the counsel, in the hearing of the jury, that he and such counsel agree as to the law of the case; [1] to notify counsel that his client who has been unruly and disobedient to the orders of the court will be attached for contempt; [2] to make remarks which were part of a discussion following a suggestion made by the complaining witness; [3] to say that a particular decision is not applicable to the case on trial; [4] to say that, if certain illegal evidence already admitted without objection had been objected to, he would have excluded it; [5] or, in denying instructions, to state that they do not conform to his view of the law.[6] So it is not misconduct warranting a reversal that during the trial and when reading the evidence to the jury, the judge moved to a table within the bar in front of the jury,[7] or spoke to a witness in an undertone in the presence of the jury,[8] or, at the close of the argument, secured from defendant's attorney a transcript of the testimony of some of the witnesses.[9] And where a witness came into court in a drunken condition, the court properly had him arrested, although in the presence of the jury, since his presence under such circumstances and in such condition was an offense to the court and jury, and he was in contempt.[10]

12. **Objections and Exceptions.** In order to obtain a review of the question of the propriety of remarks or conduct of the judge during the trial, the remarks

88. Harrison *v.* Harrison, 48 Kan. 443, 29 Pac. 572.

89. Bottom *v.* Croal, 89 Mo. App. 613.

90. Atherton *v.* Atherton, 82 Hun (N. Y.) 179, 31 N. Y. Suppl. 977 [*affirmed* on other grounds in 155 N. Y. 129, 49 N. E. 933, 63 Am. St. Rep. 650, 40 L. R. A. 291 (*reversed* in 181 U. S. 155, 21 S. Ct. 544, 45 L. ed. 794)].

91. Crosby *v.* Seaboard Air Line R. Co., 81 S. C. 24, 61 S. E. 1064.

92. Chicago City R. Co. *v.* McDonough, 125 Ill. App. 223 [*affirmed* in 221 Ill. 69, 77 N. E. 577], holding that this was in the interest of a full investigation of the facts.

93. Fidelity Mut. F. Ins. Co. *v.* Murphy, 4 Nebr. (Unoff.) 578, 95 N. W. 702.

94. Clow *v.* Pittsburgh Tract. Co., 158 Pa. St. 410, 27 Atl. 1004.

95. Krapp *v.* Hauer, 38 Kan. 430, 16 Pac. 702.

96. Texas Cent. R. *v.* Stuart, 1 Tex. Civ. App. 642, 20 S. W. 962.

97. Wildey *v.* Crane, 69 Mich. 17, 36 N. W. 734.

98. Wynn *v.* City, etc., R. Co., 91 Ga. 344, 17 S. E. 649.

99. Continental Nat. Bank *v.* Tradesmen's Nat. Bank, 173 N. Y. 272, 65 N. E. 1108 [*affirming* 59 N. Y. App. Div. 103, 69 N. Y. Suppl. 82].

1. Almond *v.* Gairdner, 76 Ga. 699.

2. Bowden *v.* Bailes, 101 N. C. 612, 8 S. E. 342.

3. Elgin, etc., R. Co. *v.* Lawlor, 132 Ill. App. 280 [*affirmed* in 229 Ill. 621, 82 N. E. 407].

4. Martin *v.* Peddy, 120 Ga. 1079, 48 S. E. 420.

5. Nelson *v.* Foster, 66 Mo. 381.

6. Lake Shore, etc., R. Co. *v.* Ford, 18 Ohio Cir. Ct. 239, 9 Ohio Cir. Dec. 786.

7. Seawell *v.* Carolina Cent. R. Co., 132 N. C. 856, 44 S. E. 610, 133 N. C. 515, 45 S. E. 850.

8. Macon City Bank *v.* Kent, 57 Ga. 283.

9. Hyde *v.* Mendel, 75 Conn. 140, 52 Atl. 744.

10. Marcum *v.* Hargis, 104 S. W. 693, 31 Ky. L. Rep. 1117.

must be specially called to the attention of the trial court when made,[11] and a correction thereof asked,[12] or they must be objected to [13] or excepted to at the time.[14]

N. Misconduct of Parties. When the attention of the court is called to alleged misconduct of a party it may investigate the matter openly in the presence of the jury, or in the first instance privately and out of the hearing of the jury. The latter is the preferable course unless the fact of such charge has in some way reached the ear of the jury, in which case it may be better that the jury should know the entire truth, rather than render a decision with a suspicion in their minds of something wrong.[15] The misconduct of parties during the examination of witnesses before the jury is no ground for new trial, where the judge, upon his attention being called to it, promptly ordered it stopped and threatened to punish the offending party in case of repetition of the offense.[16] A judgment should not be reversed for misconduct of a party where it is apparent that such misconduct was not prejudicial.[17]

O. Presence and Conduct of Bystander. In an action for breach of marriage promise, there was no error in refusing to grant a mistrial because plaintiff's mother fainted during the argument of the case.[18] It is not a ground for the reversal of a cause that the judge of the same circuit consults with counsel of the successful party during the trial where there is no evidence that the jury were prejudiced thereby.[19]

P. Waiver of Irregularities in Conduct of Trial. The parties to an action may consent to a departure in the usual course of the trial, or may waive irregularities therein, either expressly or impliedly.[20] Thus the losing litigant cannot complain of an irregularity in the trial of which he had notice and to which he consented previous to the verdict.[21] So voluntary compliance with an erroneous

11. Medis *v.* Bentley, 216 Pa. St. 324, 65 Atl. 758; Earles *v.* Bigelow, 7 Wash. 581, 35 Pac. 390.

12. Gaudette *v.* Travis, 11 Nev. 149; Fraim *v.* National F. Ins. Co., 170 Pa. St. 151, 32 Atl. 613, 50 Am. St. Rep. 753.

13. Pennsylvania Co. *v.* Barton, 130 Ill. App. 573; Chicago Belt R. Co. *v.* Confrey, 111 Ill. App. 473 [*affirmed* in 209 Ill. 344, 70 N. E. 773]; Elwell *v.* Sullivan, 80 Me. 207, 13 Atl. 901. To the same effect see McCormick *v.* Ketchum, 48 Wis. 643, 4 N. W. 798; Illinois Cent. R. Co. *v.* Griffin, 80 Fed. 278, 25 C. C. A. 413.

14. *Kansas.*— Cone *v.* Smyth, 3 Kan. App. 607, 45 Pac. 247.

Minnesota.— Haug *v.* Haugan, 51 Minn. 558, 53 N. W. 874.

Nebraska.— Republican Valley R. Co. *v.* Arnold, 13 Nebr. 485, 14 N. W. 478.

Oklahoma.— Drumm-Flato Commission Co. *v.* Edmisson, 17 Okla. 344, 87 Pac. 311.

Rhode Island.— Campbell *v.* Campbell, 29 R. I. 428, 71 Atl. 1058.

Texas.— Sabine, etc., R. Co. *v.* Brousard, 75 Tex. 597, 12 S. W. 1126.

Wisconsin.— Pelton *v.* Spider Lake Sawmill, etc., Co., 132 Wis. 219, 112 N. W. 29, 122 Am. St. Rep. 963.

See 46 Cent. Dig. tit. "Trial," § 84.

Motion to set aside verdict.— Where an improper remark by the court was not made in the charge to the jury, it may be reviewed only on a special motion to set aside the verdict. Jennings *v.* Kosmak, 20 Misc. (N. Y.) 300, 45 N. Y. Suppl. 802 [*reversing* 19 Misc. 433, 43 N. Y. Suppl. 1134].

15. Atchison, etc., R. Co. *v.* Wagner, 19 Kan. 335.

16. Lake *v.* Weaver, 20 R. I. 46, 37 Atl. 302.

17. Ashland Land, etc., Co. *v.* May, 59 Nebr. 735, 82 N. W. 10; Ledwith *v.* Campbell, 1 Nebr. (Unoff.) 695, 95 N. W. 838.

18. Graves *v.* Rivers, 3 Ga. App. 510, 60 S. E. 274.

19. Polo Exch. Nat. Bank *v.* Darrow, 154 Ill. 107, 39 N. E. 974 [*affirming* 45 Ill. App. 466].

20. Duplex Printing Press Co. *v.* Journal Printing Co., 1 Pennew. (Del.) 565, 43 Atl. 840.

21. *Arizona.*— Williams *v.* Jones, 10 Ariz. 70, 85 Pac. 399.

Arkansas.— Arkansas Southwestern R. Co. *v.* Dickinson, 78 Ark. 483, 95 S. W. 802, 115 Am. St. Rep. 54.

California.— Perkins *v.* Fish, 121 Cal. 317, 53 Pac. 901.

Georgia.— Desverges *v.* Goette, 121 Ga. 65, 48 S. E. 693; Heavner *v.* Saeger, 79 Ga. 471, 4 S. E. 767.

Illinois.— Pike *v.* Pike, 112 Ill. App. 243.

Kentucky.— Louisville, etc., R. Co. *v.* Kirby, 43 S. W. 441, 19 Ky. L. Rep. 1383.

See 46 Cent. Dig. tit. "Trial," § 970.

Consent to the continuance of a trial with eleven jurors is a waiver of any right to predicate error thereon. Rehm *v.* Halverson, 197 Ill. 378, 64 N. E. 388 [*affirming* 94 Ill. App. 627]; San Antonio Traction Co. *v.* White, (Tex. Civ. App. 1900) 60 S. W. 323 [*reversed* on other grounds in 94 Tex. 468, 61 S. W. 706].

order of the court is a waiver of the right to except.[22] Errors in rulings by the court during the progress of the trial, which are clearly corrected by it before the trial closes or in the charge of the court to the jury, are not generally fatal to the judgment.[23]

V. RECEPTION OF EVIDENCE.[24]

A. Introduction, Offer, and Admission of Evidence in General —

1. NECESSITY AND SCOPE OF PROOF[25] — a. In General. A party may as a general rule offer evidence to prove the truth of any fact pleaded by him and not admitted,[26] although the averment is informal,[27] and although the evidence only slightly tends to prove the issue.[28] The relevancy of evidence offered is determined by the pleadings.[29] Although the court may have erroneously stricken from the pleadings averments to which evidence offered would be relevant,[30] and although a plea tenders an immaterial issue, if issue has been taken thereon, it is error to reject testimony in support of it.[31] A party may also introduce evidence of collateral facts having a tendency to show that the testimony of witnesses on one side is more reasonable than that of the other,[32] or, within the sound discretion

Submission by consent of a cause which is already under submission for trial is a waiver of any error in not having the former submission set aside. Miles *v.* Buchanan, 36 Ind. 490.

Consent to a reference is a waiver of the objection that the case was not referable. Biglow *v.* Biglow, 39 N. Y. App. Div. 103, 56 N. Y. Suppl. 794.

Consent to an adjournment is a waiver of all objections to it. Mason *v.* Campbell, 1 Hilt. (N. Y.) 291.

Improper view of premises.—Where a party participates in a proceeding by attending at the prothonotary's office and striking the jury, and by being present at the view of the premises, he waives an objection to the view on the ground that it was had without being allowed by the court. Brown *v.* O'Brien, 4 Pa. L. J. 501.

22. Macon *v.* Humphries, 122 Ga. 800, 50 S. E. 986 (holding that, although the court erroneously orders a party to produce on the trial a paper, a compliance with such order, although under protest, is a waiver of the right to except); Ellsworth *v.* Fairbury, 41 Nebr. 881, 60 N. W. 336 (holding that the error of the judge in making an order at chambers requiring plaintiff, in an action for personal injuries, to submit to an examination of a board of physicians appointed for that purpose, is waived by submitting to the examination, and then allowing the physicians to testify in the case without objection).

23. Union Pac. R. Co. *v.* Thomas, 152 Fed. 365, 81 C. C. A. 491.

Where a court erroneously refers a case to a referee where only questions of law are in issue, and afterward adopts the conclusions of law stated by the referee as its own and renders its own judgment, the error is cured, and any exception must be to the ruling and judgment of the court. Territory *v.* Cooper, 11 Okla. 699, 69 Pac. 813.

24. **Arbitrators, proceedings before** see ARBITRATION AND AWARD, 3 Cyc. 645.

Criminal prosecutions see CRIMINAL LAW, 12 Cyc. 543 *et seq.*

Equitable actions see EQUITY, 16 Cyc. 411.

Errors and irregularities in as ground for new trial see NEW TRIAL, 29 Cyc. 779 *et seq.*

Executors and administrators, actions by and against see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1036.

In justice's court see JUSTICES OF THE PEACE, 24 Cyc. 582.

On reference of cause see REFERENCES, 34 Cyc. 821 *et seq.*

On trial by court see *infra*, XII, A, 2.

Patents, suits for infringement of see PATENTS, 30 Cyc. 1046.

Probate proceedings see WILLS.

Rules of court as to reception of evidence see COURTS, 11 Cyc. 741.

25. **Compelling production of evidence in criminal prosecution** see CRIMINAL LAW, 12 Cyc. 548 *et seq.*

26. Waller *v.* Carter, 8 Ill. App. 511; Greenlee *v.* Mosnat, 126 Iowa 330, 101 N. W. 1122; Fawdrey *v.* Brooklyn Heights R. Co., 64 N. Y. App. Div. 418, 72 N. Y. Suppl. 283.

27. Kinney *v.* Hosea, 3 Harr. (Del.) 456.

28. Farwell *v.* Tyler, 5 Iowa 535.

29. Marshall *v.* Haney, 9 Gill (Md.) 251; Bewley *v.* Graves, 17 Oreg. 274, 20 Pac. 322.

30. Lonergan *v.* Lonergan, 55 Nebr. 641, 76 N. W. 16.

31. Agnew *v.* Walden, 84 Ala. 502, 4 So. 672. *Contra*, Tozer *v.* Hershey, 15 Minn. 257.

32. Branstetter *v.* Morgan, 3 N. D. 290, 55 N. W. 758; Thompson *v.* Franks, 37 Pa. St. 327.

Discretion of court.—The admission of such evidence is in the discretion of the trial court. Philips *v.* Mo, 91 Minn. 311, 97 N. W. 969.

Evidence as to qualifications of expert.—He cannot after a witness has qualified as an expert introduce opinions of other experts as to the qualification of the witness to draw correct conclusions in the science. Tullis *v.* Kidd, 12 Ala. 648.

Where there have been several trials of a case, he may account for the production of

of the court, of collateral facts tending to show the probability of the main fact.[33] It is no objection to the admission of evidence that it does not prove plaintiff's whole case, if it be a link in the chain of evidence afterward to be given,[34] and, where the issue is not strictly defined, it should be admitted if it would be competent in any view of the case, which might be thereafter taken.[35] Where there are several issues, evidence is admissible to support one issue, although it has no tendency to support another issue;[36] and a party is not precluded from giving evidence material to any issue because the decision of another issue may be such as to preclude him from relying on the facts proved by such evidence.[37] Where issuable allegations are made in the complaint and admitted in the answer, it is not necessary to introduce the pleading.[38] The court cannot compel a party to introduce evidence to sustain an issue;[39] and a party is not required to put in evidence letters as to which he is examining a witness,[40] or documents he has given notice to produce;[41] nor, when offering a letter of his adversary, to offer his letter to which the letter offered was in reply.[42]

b. As Affected by Opening Statement. A party is not confined in his evidence to the facts recited in the opening statement of his counsel to the court;[43] and it has been held that if the evidence is competent under the pleadings the fact that it is inconsistent with the case stated in the opening does not render it inadmissible,[44] although there is authority to the contrary.[45] Statement by counsel of what they expect to prove, in opposition to the statement on the other side, is not sufficient to lay a foundation for letting in testimony otherwise inadmissible.[46]

c. As Affected by Admissions. A party is bound by the admissions of his pleadings, and cannot complain of the sufficiency of evidence to show a fact so admitted;[47] by agreements of his counsel as to what admissions are contained in the pleadings;[48] by express or implied admissions of fact by his counsel at the trial,[49]

new evidence for the first time. Seligman *v.* Ten Eyck, 74 Mich. 525, 42 N. W. 134.

33. *Iowa.*— Lacy *v.* Kossuth County, 106 Iowa 16, 75 N. W. 689.

Kansas.— Highland University Co. *v.* Long, 7 Kan. App. 173, 53 Pac. 766.

Massachusetts.— Leary *v.* Fitchburg R. Co., 173 Mass. 373, 53 N. E. 817.

Nebraska.— Lonergan *v.* Lonergan, 55 Nebr. 641, 76 N. W. 16.

North Dakota.— Otto Gas Engine Works *v.* Knerr, 7 N. D. 195, 73 N. W. 87.

34. Pegg *v.* Warford, 7 Md. 582; Gilchrist *v.* Brande, 58 Wis. 184, 15 N. W. 817.

35. Robinson *v.* Allison, 36 Ala. 525; Harris *v.* Holmes, 30 Vt. 352.

36. Parker *v.* Foster, 26 Ga. 465, 71 Am. Dec. 221; Sheaffer *v.* Eakman, 56 Pa. St. 144.

37. Hinkley *v.* Arkansas City, 69 Fed. 768, 16 C. C. A. 395.

38. McCaskill *v.* Walker, 147 N. C. 195, 61 S. E. 46; Leathers *v.* Blackwell Durham Tobacco Co., 144 N. C. 330, 57 S. E. 11, 9 L. R. A. N. S. 349.

39. Crowell *v.* Kirk, 14 N. C. 355; Patton *v.* Elk River Nav. Co., 13 W. Va. 259.

40. Bonelli *v.* Bowen, 70 Miss. 142, 11 So. 791.

41. Laufer *v.* Bridgeport Tract. Co., 68 Conn. 475, 37 Atl. 379, 37 L. R. A. 533.

42. Barnes *v.* Northern Trust Co., 169 Ill. 112, 48 N. E. 31.

43. *Illinois.*— De Wane *v.* Hansow, 56 Ill. App. 575.

Iowa.— Nosler *v.* Chicago, etc., R. Co., 73 Iowa 268, 34 N. W. 850; Frederick *v.* Gaston, 1 Greene 401.

New York.— Nearing *v.* Bell, 5 Hill 291.

Texas.— Allen *v.* Hagan, (App. 1900) 16 S. W. 176.

Wisconsin.— Kelly *v.* Troy F. Ins. Co., 3 Wis. 254.

Canada.— Carrick *v.* Atkinson, 10 N. Brunsw. 515.

See 46 Cent. Dig. tit. "Trial," § 91.

44. Minchin *v.* Minchin, 157 Mass. 265, 32 N. E. 164. Especially when promptly retracted. Jeannette *v.* Great Western R. Co., 4 U. C. C. P. 488.

A mere remark made by counsel in answer to a question by the opposing counsel is no part of his opening statement, and does not lay the foundation for the admission of evidence. Stewart *v.* Shaw, 55 Mich. 613, 22 N. W. 63.

45. Hood *v.* Olin, 80 Mich. 296, 45 N. W. 341.

46. Davis *v.* Calvert, 5 Gill & J. (Md.) 269, 25 Am. Dec. 282; Fox *v.* Peninsular White Lead, etc., Works, 84 Mich. 676, 48 N. W. 203.

47. Duncan *v.* Duncan, 111 Wis. 75, 86 N. W. 562.

48. Munson *v.* Hagerman, 10 Barb. (N. Y.) 112, 5 How. Pr. 223 [*reversed* on other grounds in Seld. 63].

49. Walsh *v.* Missouri Pac. R. Co., 102 Mo. 582, 14 S. W. 873, 15 S. W. 757; Brooks *v.* Brooks, 90 N. C. 142.

Withdrawal of admission.—An admission once made cannot be withdrawn. Colwell *v.* Lawrence, 38 Barb. (N. Y.) 643, 24 How. Pr. 324 [*affirmed* in 38 N. Y. 71, 5 Transcr. App. 307, 36 How. Pr. 306]. But if the admission

by formal admissions of record made by his counsel,[50] or by suggestions on the record by his adversary, without objection by him;[51] and, when he ignores his pleading and insists that the only question for trial is one then specified by him, he thereby waives all other grounds of defense.[52] An admission of a judgment implies the validity of the judgment;[53] but an admission that there was such a contract as was offered in evidence implies merely its execution and not its contents.[54]

d. As Affected by Stipulations and Agreed Facts. Agreements as to certain facts in a case are evidentiary, concluding the parties so far as they go,[55] and cannot be withdrawn by one party without the consent of the other or an order of court.[56] However, the agreement does not preclude either party from introducing additional evidence not inconsistent with the stipulated facts;[57] and a stipulation that a party is competent to testify on certain subjects does not preclude the opposite party from cross-examining him on these subjects.[58] If by stipulation testimony taken in another case is read, no objection can be taken to it that was not taken upon the trial at which it was admitted.[59] Unless the purpose of the evidence is limited by agreement, the facts agreed upon are in the case for all proper purposes.[60] The judgment will be on the finding of facts and not on the agreed case.[61] In the absence of other evidence, the agreed statement must show all the facts necessary to a recovery if one is to be had.[62]

e. Uncontroverted Facts. It is not error to admit relevant evidence, although the adverse party admits the fact sought to be proved,[63] and on the other hand the court is not bound to hear evidence of admitted facts.[64] However, a party is not bound to accept in evidence an admission in lieu of a record where the admission was not broad enough to embrace all the facts which such record disclosed;

is conditional and the condition is not complied with a party may withdraw it. Irwin *v.* McKnight, 76 Ga. 669.

50. Perkins *v.* Douglass, 11 La. Ann. 471.

51. Henderson *v.* Reeves, 6 Blackf. (Ind.) 101.

52. Leonard *v.* New England Mut. L. Ins. Co., 22 R. I. 519, 48 Atl. 808.

53. McCurdy *v.* Ryan, 56 Nebr. 511, 76 N. W. 1079.

54. Erdman *v.* Upham, 70 N. Y. App. Div. 315, 75 N. Y. Suppl. 241.

55. Munford *v.* Wilson, 15 Mo. 540; Rowe *v.* Brooklyn Heights R. Co., 71 N. Y. App. Div. 474, 75 N. Y. Suppl. 893; Frey *v.* Myers, (Tex. Civ. App. 1908) 113 S. W. 592; Berry *v.* Fairbanks, 51 Tex. Civ. App. 558, 112 S. W. 427; General Electric Co. *v.* Wagner Electric Mfg. Co., 123 Fed. 101 [*affirmed* in 130 Fed. 772, 66 C. C. A. 82]. And see Dronenburg *v.* Harris, 108 Md. 597, 71 Atl. 81.

Illustration.—Where, in an action against a railroad company for killing plaintiff's horse, alleged to have escaped through an unfenced right of way, it was stipulated at the trial that defendant owned and operated the railway at all times mentioned in the complaint, plaintiff was not required to prove that the train which caused the injury belonged to defendant or was operated by it. Meier *v.* Northern Pac. R. Co., 51 Oreg. 69, 93 Pac. 691.

56. General Electric Co. *v.* Wagner Electric Mfg. Co., 123 Fed. 101 [*affirmed* in 130 Fed. 772, 66 C. C. A. 82].

57. Burnham *v.* North Chicago St. R. Co., 88 Fed. 627, 32 C. C. A. 64 [*reversing* 78 Fed. 101, 23 C. C. A. 677].

58. Chankalian *v.* Powers, 89 N. Y. App. Div. 395, 85 N. Y. Suppl. 753.

59. Burgess *v.* New York Cent., etc., R. Co., 34 Hun (N. Y.) 233.

60. Baltimore, etc., R. Co. *v.* Kirby, 91 Md. 313, 46 Atl. 975.

61. Munford *v.* Wilson, 15 Mo. 540.

62. Brown *v.* Rogers, 61 Ind. 449; Gillett *v.* Detroit Bd. of Trade, 46 Mich. 309, 9 N. W. 428.

63. Clayton *v.* Brown, 30 Ga. 490; Terre Haute Electric Co. *v.* Kieley, 35 Ind. App. 180, 72 N. E. 658; Branner *v.* Nichols, 61 Kan. 356, 59 Pac. 633; Dunning *v.* Maine Cent. R. Co., 91 Me. 87, 39 Atl. 352, 64 Am. St. Rep. 208.

64. *California.*—Silcox *v.* Lang, 78 Cal. 118, 20 Pac. 297.

Georgia.—Hendrick *v.* Daniel, 119 Ga. 358, 46 S. E. 438.

Illinois.—Chicago *v.* English, 180 Ill. 476, 54 N. E. 609 [*modifying* 80 Ill. App. 163]; Jenkins *v.* Hollingsworth, 83 Ill. App. 139.

Indiana.—Burton *v.* Figg, 18 Ind. App. 284, 47 N. E. 1081.

Iowa.—Creager *v.* Johnson, 114 Iowa 249, 86 N. W. 275; Lacy *v.* Kossuth County, 106 Iowa 16, 75 N. W. 689; Leach *v.* Hill, 97 Iowa 81, 66 N. W. 69; Donnelly *v.* Burkett, 75 Iowa 613, 34 N. W. 330; Hinkson *v.* Morrison, 47 Iowa 167. *Contra*, Stevens *v.* Citizens' Gas, etc., Co., 132 Iowa 597, 109 N. W. 1090.

Massachusetts.—Whiteside *v.* Lowney, 171 Mass. 431, 50 N. E. 931; Dorr *v.* Tremont Nat. Bank, 128 Mass. 349.

Minnesota.—Chicago County *v.* Nelson, 81 Minn. 443, 84 N. W. 301.

and even if it had been sufficiently comprehensive in this particular it would not preclude the party of his strict legal right to have the record read, because the parol admission of a party made *in pais* is competent evidence only of those facts which may lawfully be established by parol evidence; it cannot be received to supply the place of existing evidence by matter of record.[65]

2. Offer of Proof — a. Propriety of. In order to enable a trial court to determine whether facts sought to be proved by a witness are admissible in evidence, it is proper to make an offer to prove the facts which the party assumes his questions will elicit.[66] In considering the propriety of a refusal to permit counsel to make a formal offer of testimony, because a similar offer had already been made and ruled, much must be left to the sound discretion of the judge.[67]

b. Necessity For. A question, addressed to the party's own witness if objected to, must be followed by an offer of what is expected to be proved by the answer of the witness, if it is desired to complain of the exclusion of the question,[68]

Missouri.—Gentry County *v.* Black, 32 Mo. 542; McGraw *v.* O'Neil, 123 Mo. App. 691, 101 S. W. 132.

Nebraska.—Wittenberg *v.* Mollyneaux, 60 Nebr. 583, 83 N. W. 842.

New Hampshire.— Anderson *v.* Scott, 70 N. H. 534, 49 Atl. 568.

New York.— Rowland *v.* Hall, 121 N. Y. App. Div. 459, 106 N. Y. Suppl. 55. And see Gannett *v.* Independent Tel. Co., 55 Misc. 555, 106 N. Y. Suppl. 3.

North Carolina.— Blackburn *v.* St. Paul F. & M. Ins. Co., 117 N. C. 531, 23 S. E. 456; Pridgen *v.* Bannerman, 53 N. C. 53.

Pennsylvania.— Ridgway *v.* Longaker, 18 Pa. St. 215.

South Carolina.— Cobb *v.* Cater, 59 S. C. 462, 38 S. E. 114.

Vermont.—Ainsworth *v.* Hutchins, 52 Vt. 554.

Washington. — Schwede *v.* Hemrich, 29 Wash. 124, 69 Pac. 643.

Wisconsin.— Anderson *v.* Arpin Hardwood Lumber Co., 131 Wis. 34, 110 N. W. 788.

United States.— Meigs *v.* London Assur. Co., 126 Fed. 781 [*affirmed* in 134 Fed. 1021, 68 C. C. A. 249]; Tribune Assoc. *v.* Follwell, 107 Fed. 646, 46 C. C. A. 526.

England.— The Hardwick, 9 P. D. 32, 5 Aspin. 199, 53 L. J. P. D. & Adm. 23, 50 L. T. Rep. N. S. 128, 32 Wkly. Rep. 598.

See 46 Cent. Dig. tit. "Trial," § 89.

Contra.—Webster *v.* Moore, 108 Md. 572, 71 Atl. 466; Baumier *v.* Antiau, 79 Mich. 509, 44 N. W. 939; John Hancock Mut. L. Ins. Co. *v.* Moore, 34 Mich. 41.

Presumption of law.—It is error to reject evidence to prove a presumption of law, as that a grantor is sane, there being no evidence to the contrary. Dearmond *v.* Dearmond, 12 Ind. 455.

65. Bank of North America *v.* Crandall, 87 Mo. 208.

66. Eagon *v.* Eagon, 60 Kan. 697, 57 Pac. 942.

67. Sprague *v.* Reilly, 34 Pa. Super. Ct. 332, 336, in which it was said: "It is not only his right, but his duty, to prevent waste of the public time and the incumbrance of the public records by useless repetitions of what has been once fairly done."

68. *Arizona.*— Snead *v.* Tietjen, (1890) 24 Pac. 324.

District of Columbia.—Turner *v.* American Security, etc., Co., 29 App. Cas. 460; Pickford *v.* Talbott, 28 App. Cas. 498.

Georgia.—Leverett *v.* Bullard, 121 Ga. 534, 49 S. E. 591; Hawkinsville Bank, etc., Co. *v.* Walker, 99 Ga. 242, 25 S. E. 205.

Illinois.— Beeler *v.* Webb, 113 Ill. 436; Nonotuck Silk Co. *v.* Levy, 75 Ill. App. 55; Howard *v.* Tedford, 70 Ill. App. 660; Brewer *v.* National Union Bldg. Assoc., 64 Ill. App. 161.

Indiana.— State *v.* Cox, 155 Ind. 593, 58 N. E. 849; LaPlante *v.* State, 152 Ind. 80, 52 N. E. 452; Bischof *v.* Mikels, 147 Ind. 115, 46 N. E. 348; Kern *v.* Bridwell, 119 Ind. 226, 21 N. E. 664, 12 Am. St. Rep. 409; Ford *v.* Ford, 110 Ind. 89, 10 N. E. 648; Conden *v.* Morningstar, 94 Ind. 150; Bake *v.* Smiley, 84 Ind. 212; Robinson Mach. Works *v.* Chandler, 56 Ind. 575; Huntington *v.* Burke, 21 Ind. App. 655, 52 N. E. 415; Russell *v.* Stoner, 18 Ind. App. 543, 47 N. E. 645, 48 N. E. 650; Toledo, etc., R. Co. *v.* Jackson, 5 Ind. App. 547, 32 N. E. 793.

Iowa.— Tuttle *v.* Wood, 115 Iowa 507, 88 N. W. 1056.

Kentucky.—Palatine Ins. Co. *v.* Weiss, 109 Ky. 464, 59 S. W. 509, 22 Ky. L. Rep. 994.

Massachusetts. — Boisvert *v.* Ward, 199 Mass. 594, 85 N. E. 849; Lawlor *v.* Wolff, 180 Mass. 448, 62 N. E. 973.

Minnesota.— Peterson *v.* Mille Lacs Lumber Co., 51 Minn. 90, 52 N. W. 1082.

Missouri.— McCormick *v.* St. Louis, 166 Mo. 315, 65 S. W. 1038; Hutchins *v.* Missouri Pac. R. Co., 97 Mo. App. 548, 71 S. W. 473; Summers *v.* Metropolitan L. Ins. Co., 90 Mo. App. 691.

Nebraska.— Riley *v.* Missouri Pac. R. Co., 69 Nebr. 82, 95 N. W. 20; Green *v.* Tierney, 62 Nebr. 561, 87 N. W. 331; Brennan-Love Co. *v.* McIntosh, 62 Nebr. 522, 87 N. W. 327; Farmers', etc., Ins. Co. *v.* Dobney, 62 Nebr. 213, 86 N. W. 1070, 97 Am. St. Rep. 624; Wittenberg *v.* Mollyneaux, 60 Nebr. 583, 83 N. W. 842; Nebraska Tel. Co. *v.* Jones, 60 Nebr. 396, 83 N. W. 197, 59 Nebr. 510, 81 N. W. 435; Johnson *v.* Opfer, 58 Nebr. 631, 79 N. W. 547; Union Pac. R. Co. *v.* Vincent, 58 Nebr. 171, 78 N. W. 457; Morsch *v.* Besack, 52 Nebr. 502, 72 N. W. 953.

New York.— Millard *v.* Holland Trust Co.,

where the purpose of the question is not apparent,[69] and the question does not indicate whether the answer of the witness would be material,[70] or relevant,[71] or competent;[72] but where the question shows its purpose and the materiality of the evidence sought to be elicited, an offer to prove is not necessary.[73] Where

157 N. Y. 681, 51 N. E. 1092 [*affirming* 35 N. Y. Suppl. 948]; Enright *v.* Franklin Pub. Co., 24 Misc. 180, 52 N. Y. Suppl. 704.

North Dakota. — Madson *v.* Rutten, 16 N. D. 281, 113 N. W. 872.

Texas.—Willis *v.* Sanger, 15 Tex. Civ. App. 655, 40 S. W. 229. But see Dunman *v.* Murphey, 48 Tex. Civ. App. 539, 107 S. W. 70.

Vermont.— Hathaway *v.* Goslant, 77 Vt. 199, 59 Atl. 835; Mullin *v.* Flanders, 73 Vt. 95, 50 Atl. 813; Fuller *v.* Valquette, 70 Vt. 502, 41 Atl. 579; Westcott *v.* Westcott, 69 Vt. 234, 39 Atl. 199.

Wisconsin.— Spuhr *v.* Kolb, 111 Wis. 119, 86 N. W. 562; Plane Mfg. Co. *v.* Bergmann, 102 Wis. 21, 78 N. W. 157.

See 46 Cent. Dig. tit. "Trial," § 113.

Application of rule.— The rule applies to the examination of witnesses in rebuttal as well as in chief. Meeker *v.* Browning, 17 Ohio Cir. Ct. 548, 9 Ohio Cir. Dec. 108.

Presumptions on appeal.— If the party offering testimony fails to object to the ruling of the court excluding it, the reviewing court will presume in favor of the ruling of the trial court. Snead *v.* Tietjen, (Ariz. 1890) 24 Pac. 324.

69. McLean *v.* Spratt, 20 Fla. 515; Swanson *v.* Allen, 108 Iowa 419, 79 N. W. 132; Votaw *v.* Diehl, 62 Iowa 676, 13 N. W. 757, 18 N. W. 305; La Fiam *v.* Missisquoi Pulp Co., 74 Vt. 125, 52 Atl. 526.

70. *Alabama.*— Boland *v.* Louisville, etc., R. Co., 106 Ala. 641, 18 So. 99. And see Nevers Lumber Co. *v.* Fields, 151 Ala. 367, 44 So. 81.

Dakota.— Cheatham *v.* Wilber, 1 Dak. 335, 46 N. W. 580.

Illinois.— James T. Hair Co. *v.* Manly, 102 Ill. App. 570.

Indiana.— Sullivan County *v.* Arnett, 116 Ind. 438, 19 N. E. 299.

Kansas.—Wicks *v.* Smith, 18 Kan. 508.

Massachusetts.— Leland *v.* Converse, 181 Mass. 487, 63 N. E. 939.

Michigan.—Wyngert *v.* Norton, 4 Mich. 286.

Minnesota.—Warner *v.* Fischbach, 29 Minn. 262, 13 N. W. 47.

New York.— Pratt *v.* Strong, 3 Abb. Dec. 620, 3 Keyes 53, 33 How. Pr. 287; Blum *v.* Langfeld, 37 N. Y. App. Div. 590, 56 N. Y. Suppl. 298; Jaeckel *v.* David, 34 Misc. 791, 69 N. Y. Suppl. 998.

South Dakota.— Hanson *v.* Red Rock Tp., 7 S. D. 38, 63 N. W. 156.

Wisconsin.— Atkinson *v.* Goodrich Transp. Co., 69 Wis. 5, 31 N. W. 164.

See 46 Cent. Dig. tit. "Trial," § 116.

That rule applies to series of questions see Daley *v.* People's Bldg., etc., Assoc., 172 Mass. 533, 52 N. E. 1090.

71. *Illinois.*—Cook *v.* Haussen, 51 Ill. App. 269.

Indiana.— Sullivan County *v.* Arnett, 116 Ind. 438, 19 N. E. 299; Cones *v.* Binford, 54 Ind. 516; Waterbury *v.* Miller, 13 Ind. App. 197, 41 N. E. 383.

Iowa. — Haney-Campbell Co. *v.* Preston Creamery Assoc., 119 Iowa 188, 93 N. W. 297; Kuhn *v.* Gustafson, 73 Iowa 633, 35 N. W. 660.

Massachusetts. — Hathaway *v.* Tinkham, 148 Mass. 85, 19 N. E. 18.

Minnesota.— Tillman *v.* International Harvester Co., 93 Minn. 197, 101 N. W. 71; Scofield *v.* Walrath, 35 Minn. 356, 28 N. W. 926; McAlpine *v.* Foley, 34 Minn. 251, 25 N. W. 452; Norris *v.* Clark, 33 Minn. 476, 24 N. W. 128.

Pennsylvania.— Kershner *v.* Kemmerling, 24 Pa. Super. Ct. 181.

Vermont.— McKinstry *v.* Collins, 76 Vt. 221, 56 Atl. 985; Fuller *v.* Valiquette, 70 Vt. 502, 41 Atl. 579.

United States.— U. S. *v.* Gilbert, 25 Fed. Cas. No. 15,204, 2 Sumn. 19.

See 46 Cent. Dig. tit. "Trial," § 116.

Cross-examination.— The rule is not ordinarily applicable to what is strictly cross-examination. Martin *v.* Elden, 32 Ohio St. 282; Cunningham *v.* Austin, etc., R. Co., 88 Tex. 534, 31 S. W. 629. An exclusion of a question on cross-examination without asking its purpose is error if the record shows that the inquiry could in any manner be relevant. Campau *v.* Dewey, 9 Mich. 381.

72. Sullivan County *v.* Arnett, 116 Ind. 438, 19 N. E. 299; Edington *v.* Mutual L. Ins. Co., 67 N. Y. 185 [*affirming* 5 Hun 1]; Potter *v.* Greene, 51 Hun (N. Y.) 61, 3 N. Y. Suppl. 605.

73. *Iowa.*— Mitchell *v.* Harcourt, 62 Iowa 349, 17 N. W. 581.

Maryland.— Calvert County *v.* Gantt, 78 Md. 286, 28 Atl. 101, 29 Atl. 610.

New York.— *In re* Potter, 161 N. Y. 84, 55 N. E. 387 [*affirming* 17 N. Y. App. Div. 267, 45 N. Y. Suppl. 563].

West Virginia.— Gunn *v.* Ohio River R. Co., 36 W. Va. 165, 14 S. E. 465, 32 Am. St. Rep. 842, 37 W. Va. 421, 16 S. E. 628.

United States.— Buckstaff *v.* Russell, 151 U. S. 626, 14 S. Ct. 448, 38 L. ed. 292; Stanley *v.* Beckham, 153 Fed. 152, 82 C. C. A. 304.

"If the question is in proper form and clearly admits of an answer relevant to the issues and favorable to the party on whose side the witness is called, it will be error to exclude it. Of course, the court, in its discretion, or on motion, may require the party, in whose behalf the question is put, to state the facts proposed to be proved by the answer. But if that be not done, the rejection of the answer will be deemed error or not, according as the question, upon its face, if proper in form, may or may not clearly admit of an answer favorable to the party in whose behalf it is propounded." Buckstaff

the real purpose of the evidence,[74] or its relevancy,[75] materiality,[76] admissibility,[77] or competency [78] is not apparent; where the evidence is generally incompetent, but is admissible for a certain purpose,[79] or against certain parties,[80] or where the evidence is apparently offered for an improper purpose,[81] or the witness offered is apparently incompetent,[82] there must be an offer to prove; and in such event it is error for the trial court to refuse an opportunity to counsel to state what he proposes to prove by the evidence offered.[83] That the witness is offered in rebuttal will not dispense with the necessity of an offer.[84] Where the court rules that the evidence is not admissible under the pleadings,[85] that no evidence is admissible under the pleadings,[86] or that the witness is incompetent,[87] or where the rulings of the court show that plaintiff cannot as a matter of law recover

v. Russell, 151 U. S. 626, 637, 14 S. Ct. 448, 38 L. ed. 292.

74. *Alabama.*— Farley *v.* Bay Shell Road Co., 125 Ala. 184, 27 So. 770.

California.— Howard *v.* Howard, 134 Cal. 346, 66 Pac. 367; Baum *v.* Roper, 132 Cal. 42, 64 Pac. 128.

Colorado.— John V. Farwell Co. *v.* McGraw, 13 Colo. App. 467, 59 Pac. 231.

Massachusetts.— Powers *v.* Boston, etc., R. Co., 175 Mass. 466, 56 N. E. 710.

Minnesota.— Holman *v.* Kempe, 70 Minn. 422, 73 N. W. 186.

New York.— Yates *v.* New York Cent., etc., R. Co., 67 N. Y. 100; Seidenspinner *v.* Metropolitan L. Ins. Co., 70 N. Y. App. Div. 476, 74 N. Y. Suppl. 1108 [*reversed* on other grounds in 175 N. Y. 95, 67 N. E. 123].

Pennsylvania.— Jeanette Bottle Works *v.* Schall, 13 Pa. Super. Ct. 96.

South Carolina.— Allen *v.* Cooley, 53 S. C. 77, 30 S. E. 721.

Where the evidence on its face shows the purpose of the offer, it is not error for the court to refuse to compel a party to state the purpose. Myers *v.* Kingston Coal Co., 126 Pa. St. 582, 17 Atl. 891.

75. *Alabama.*—Ashley *v.* Robinson, 29 Ala. 112, 65 Am. Dec. 387; Bilberry *v.* Mobley, 21 Ala. 277; Abney *v.* Kingsland, 10 Ala. 355, 44 Am. Dec. 491; Innerarrity *v.* Byrne, 8 Port. 176.

California. — McGarrity *v.* Byington, 12 Cal. 426.

Georgia.— Greer *v.* Caldwell, 14 Ga. 207, 58 Am. Dec. 553.

Indiana.— Grover, etc., Sewing Mach. Co. *v.* Newby, 58 Ind. 570.

Louisiana.— Pasquier's Succession, 12 La. Ann. 758.

Maryland.— Baker *v.* Swan, 32 Md. 355; Wellersburg, etc., Plank Road Co. *v.* Bruce, 6 Md. 457; Stewart *v.* Spedden, 5 Md. 433.

Nebraska.— Spirk *v.* Chicago, etc., R. Co., 57 Nebr. 565, 78 N. W. 272.

New York.— Fairchild *v.* Case, 24 Wend. 381; VanBuren *v.* Wells, 19 Wend. 203.

Pennsylvania.— Piper *v.* White, 56 Pa. St. 90.

Wisconsin.— Defrance *v.* Hazen, 1 Chandl. 195.

United States.— U. S. *v.* Gibert, 25 Fed. Cas. No. 15,204, 2 Sumn. 19.

See 46 Cent. Dig. tit. "Trial," § 116.

Where evidence is proper by reason of extrinsic facts attention must be called to these facts. Fitzgerald *v.* Barker, 96 Mo. 661, 10 S. W. 45, 9 Am. St. Rep. 375.

76. *Missouri.*—Loker *v.* Southwestern Missouri Electric R. Co., 94 Mo. App. 481, 68 S. W. 373.

Nebraska.—Davis *v.* Getchell, 32 Nebr. 792, 49 N. W. 776.

New York.— Erdman *v.* Upham, 70 N. Y. App. Div. 315, 75 N. Y. Suppl. 241; A. B. Cleveland Co. *v.* A. C. Nellis Co., 18 N. Y. Suppl. 448; Anson *v.* Schultze, 9 N. Y. St. 308.

Pennsylvania.—Williams *v.* Williams, 34 Pa. St. 312.

Rhode Island.— Otis *v.* VonStorch, 15 R. I. 41, 23 Atl. 39.

See 46 Cent. Dig. tit. "Trial," § 116.

77. Krumrine *v.* Grenoble, 165 Pa. St. 98, 30 Atl. 824; Conrow *v.* Conrow, 24 Wkly. Notes Cas. (Pa.) 339.

78. British Columbia Bank *v.* Frese, 116 Cal. 9, 47 Pac. 783; Alton *v.* Hartford F. Ins. Co., 72 Ill. 328; Rhodes *v.* Pray, 36 Minn. 392, 32 N. W. 86; Crosby *v.* Hotaling, 99 N. Y. 661, 2 N. E. 39.

79. Hathaway *v.* Tinkham, 148 Mass. 85, 19 N. E. 18; Atherton *v.* Atkins, 139 Mass. 61, 29 N. E. 223.

80. Thorne *v.* Joy, 15 Wash. 83, 45 Pac. 642.

81. *Colorado.*— Baldwin *v.* Central Sav. Bank, 17 Colo. App. 7, 67 Pac. 179; Byers *v.* Tritch, 12 Colo. App. 377, 55 Pac. 622.

Michigan.— Chase *v.* Ainsworth, 135 Mich. 119, 97 N. W. 404.

Minnesota.— Nichols, etc., Co. *v.* Wiedemann, 72 Minn. 344, 75 N. W. 208, 76 N. W. 41.

Missouri.— Kischman *v.* Scott, 166 Mo. 214, 65 S. W. 1031.

New York.— Flagg *v.* Fisk, 93 N. Y. App. Div. 169, 87 N. Y. Suppl. 530 [*affirmed* in 179 N. Y. 590, 72 N. E. 1141].

82. Reynolds *v.* Reynolds, 45 Mo. App. 622; Hoffman *v.* Joachim, 86 Wis. 188, 56 N. W. 636; Mechelke *v.* Bramer, 59 Wis. 57, 17 N. W. 682.

83. Maxwell *v.* Habel, 92 Ill. App. 510.

84. Plano Mfg. Co. *v.* Frawley, 68 Wis. 577, 32 N. W. 768.

85. Feldman *v.* McGraw, 1 N. Y. App. Div. 574, 37 N. Y. Suppl. 434.

86. Starr *v.* Hunt, 25 Ind. 313; Plattner Implement Co. *v.* International Harvester Co., 133 Fed. 376, 66 C. C. A. 438.

87. Foree *v.* Smith, 1 Dana (Ky.) 151;

on the theory on which he sues,[88] or so limit the issues as to make an offer a mere formality,[89] it is not necessary for the party to state definitely what he proposes to prove. And where the court refuses to admit in evidence the contract upon which plaintiff sued, treating it as void, and, in granting plaintiff leave to amend its petition, declares that no change in pleading could affect the court's construction of the contract, plaintiff's submission of the case to the jury without renewing his offer to introduce the contract after the amendment of its complaint does not preclude it from basing error on the exclusion.[90] An intimation by the court on cross-examination that a certain line of proof is incompetent will not excuse defendant's failure to offer the same if he desires to complain of its exclusion.[91]

c. **Form, Requisites, and Sufficiency** — (i) *In General.* An offer to prove must be certain,[92] and must definitely state the facts sought to be proved,[93] either by reference to the evidence proposed to be offered or to the facts to be proved,[94] and objections to the exclusion of evidence are unavailing where no sufficient offer to prove is made.[95] The offer must embrace but one proposition and must

New York Mut. L. Ins. Co. *v.* Oliver, 95 Va. 445, 28 S. E. 594.

88. Brundage *v.* Mellon, 5 N. D. 72, 63 N. W. 209.

89. Pastene *v.* Pardini, 135 Cal. 431, 67 Pac. 681.

90. Mebius, etc., Co. *v.* Mills, 150 Cal. 229, 88 Pac. 917. And see Lichtenstein Millinery Co. *v.* Peck, 59 Misc. (N. Y.) 193, 110 N. Y. Suppl. 410.

91. Ingram *v.* Harris, 9 Pa. Super. Ct. 301, 43 Wkly. Notes Cas. 550.

92. *Alabama.*— Shields *v.* Henry, 31 Ala. 53.

District of Columbia.— Riddle *v.* Gibson, 29 App. Cas. 237.

Nebraska.— Pike *v.* Hauptman, 83 Nebr. 172, 119 N. W. 231.

Pennsylvania.— Morgan *v.* Browne, 71 Pa. St. 130.

Texas.—Etter *v.* Dugan, 1 Tex. Unrep. Cas. 175.

Wisconsin.—Wood *v.* Washington, 135 Wis. 299, 115 N. W. 810; Driscoll *v.* Damp, 16 Wis. 106.

United States.— Johnson *v.* Merry Mt. Granite Co., 53 Fed. 569.

93. *Florida.*— Langston *v.* National China Co., 57 Fla. 92, 49 So. 155.

Illinois.— Reavely *v.* Harris, 239 Ill. 526, 88 N. E. 238; Pronskevitch *v.* Chicago, etc., R. Co., 232 Ill. 136, 83 N. E. 545; Court of Honor *v.* Dinger, 123 Ill. App. 406 [*affirmed* in 221 Ill. 176, 77 N. E. 557].

Indiana.— Smith *v.* Gorham, 119 Ind. 436, 21 N. E. 1096.

Iowa.— Kilburn *v.* Mullen, 22 Iowa 498.

Kentucky.— Louisville, etc., R. Co. *v.* Williamson, 96 S. W. 1130, 29 Ky. L. Rep. 1165.

Maryland.— Bauernschmidt *v.* Maryland Ins. Co., 89 Md. 507, 43 Atl. 790.

Massachusetts.— Goyette *v.* Keenan, 196 Mass. 416, 82 N. E. 427.

Michigan.— Reynolds *v.* Continental Ins. Co., 36 Mich. 131.

Missouri.— Smart *v.* Kansas City, 208 Mo. 162, 105 S. W. 709, 123 Am. St. Rep. 415, 14 L. R. A. N. S. 565; Seibert *v.* Hatcher, 205 Mo. 83, 102 S. W. 962.

Montana.— Palmer *v.* McMaster, 10 Mont. 390, 25 Pac. 1056.

North Carolina.—Bernhardt *v.* Dutton, 146 N. C. 206, 59 S. E. 651; Hicks *v.* Hicks, 142 N. C. 231, 55 S. E. 106; Bland *v.* O'Hagan, 64 N. C. 471.

Oregon.— Baines *v.* Coos Bay Nav. Co., 49 Oreg. 192, 89 Pac. 371.

Pennsylvania.—Kittanning Borough *v.* Garrett's Run Gas Co., 35 Pa. Super. Ct. 167; Hentzler *v.* Weniger, 32 Pa. Super. Ct. 164; Tague *v.* Westinghouse Electric, etc., Co., 30 Pittsb. Leg. J. N. S. 67.

Tennessee.— Carlton *v.* State, 8 Heisk. 16.

Vermont.— McQuiggan *v.* Ladd, 79 Vt. 90, 64 Atl. 503, 14 L. R. A. N. S. 689; Willard *v.* Pike, 59 Vt. 202, 9 Atl. 907.

Washington.— Nason *v.* Northwestern Milling, etc., Co., 17 Wash. 142, 49 Pac. 235.

West Virginia.— Delmar Oil Co. *v.* Bartlett, 62 W. Va. 700, 59 S. E. 634.

See 46 Cent. Dig. tit. "Trial," § 114.

If the offer is as to values it must state the amounts and values desired to be proved. Taylor *v.* Calvert, 138 Ind. 67, 37 N. E. 531.

An offer by counsel of two defendants to call one of them as a witness is not an offer on behalf of both defendants. Wilson *v.* Elwood, 28 N. Y. 117.

An offer of a document by name only is insufficient. Chicago Gen. St. R. Co. *v.* Capek, 68 Ill. App. 500.

Construction of offer.— In an action for the purchase-price of certain franchises transferred by plaintiff to defendant, an offer by defendant to show that the franchises were wholly void, and were defective under the laws of the state where they were granted, cannot be construed as an offer to prove that the laws of such state did not permit the transfer of a franchise without the consent of the state. O'Sullivan *v.* Griffith, 153 Cal. 502, 95 Pac. 873, 96 Pac. 323.

94. De St. Aubin *v.* Field, 27 Colo. 414, 62 Pac. 199.

95. *Florida.*— Vaughan's Seed Store *v.* Stringfellow, 56 Fla. 708, 48 So. 410.

Georgia.— Holland *v.* Williams, 126 Ga. 617, 55 S. E. 1023.

Minnesota.— Grimestad *v.* Lofgren, 105 Minn. 286, 117 N. W. 515, 127 Am. St. Rep. 566, 17 L. R. A. N. S. 990.

Nebraska.— Olmsted *v.* Noll, 82 Nebr. 147,

show that its admission if responsive would have affected the final disposition of the case [96] It must be positive in the statement of the purpose for which it is offered,[97] in case the court requires a statement of the purpose,[98] unconditional,[99] and not in the alternative.[1] Where it is open to two constructions, the construction favorable to its exclusion will be adopted by the appellate court.[2] It must show the materiality,[3] competency,[4] admissibility,[5] and relevancy [6] of

117 N. W. 102; Green *v.* Tierney, 62 Nebr. 561, 87 N. W. 331.

Oregon.— Ireland *v.* Ward, 51 Oreg. 102, 93 Pac. 932; Baines *v.* Coos Bay Nav. Co., 49 Oreg. 192, 89 Pac. 371.

South Dakota.— Phelan *v.* Neary, 22 S. D. 265, 117 N. W. 142.

Refusal to permit a party to state what he expects to prove by a witness on objections to questions asked the witness being made. Ehrhardt *v.* Stevenson, 128 Mo. App. 476, 106 S. W. 1118.

96. Kennedy *v.* Currie, 3 Wash. 442, 28 Pac. 1028.

97 *Alabama.*— Farley *v.* Bay Shell Road Co., 125 Ala. 184, 27 So. 770.

California.— Howard *v.* Howard, 134 Cal. 346, 66 Pac. 367.

Georgia.— Atlanta Consol. R. Co. *v.* Bagwell, 107 Ga. 157, 33 S. E. 191; Middle Georgia, etc., R. Co. *v.* Reynolds, 99 Ga. 638, 26 S. E. 61.

Minnesota.— Northern Pac. R. Co. *v.* Duncan, 87 Minn. 91, 91 N. W. 271.

Missouri.— Hutchins *v.* Missouri Pac. R. Co., 97 Mo. App. 548, 71 S. W. 473.

Former offer for improper purpose.—Where offer is for a proper purpose, it is no ground for exclusion that it was formerly excluded when offered for an improper purpose. Stearns *v.* Cox, 17 Ohio 590.

Where the evidence is such that it is discretionary with the court to admit it, failure to state the purpose of the offer will be taken into account in determining the propriety of its exclusion. Citizens St. R. Co. *v.* Heath, 29 Ind. App. 395, 62 N. E. 107.

Where it did not appear what answer was expected to a question put to a witness its exclusion did not show error. Dunbar *v.* Central Vermont R. Co., 79 Vt. 474, 65 Atl. 528.

A general offer of documentary evidence, without any statement of its purpose, is insufficient under the practice in the federal courts as the basis for an exception to a ruling excluding the offered evidence. Canada-Atlantic, etc., Steamship Co. *v.* Flanders, 145 Fed. 875, 76 C. C. A. 1 [*affirmed* in 165 Fed. 321, 91 C. C. A. 307].

98. Winter *v.* Donovan, 8 Gill (Md.) 370; King *v.* Faber, 51 Pa. St. 387; Richardson *v.* Stewart, 4 Binn. (Pa.) 198; Sprecker *v.* Wakeley, 11 Wis. 432.

99. Lee *v.* McLeod, 15 Nev. 158.

1. Ives *v.* Farmers' Bank, 2 Allen (Mass.) 236. If the evidence is not proper in the aspect in which it is offered, it may properly be excluded although admissible in some other aspect. Bond *v.* Corbett, 2 Minn. 248; Tochman *v.* Brown, 33 N. Y Super. Ct. 409.

2. Reynolds *v.* Continental Ins. Co., 36 Mich. 131; Lowman *v.* Maney, 65 Mo. App. 619; Daniels *v.* Patterson, 3 N. Y. 47; Button *v.* McCauley, 38 Barb. (N. Y.) 413 [*reversed* on other grounds in 1 Abb. Dec. 282]; Buck *v.* Troy Aqueduct Co., 76 Vt. 75, 56 Atl. 285. *Contra*, Horbach *v.* Boyd, 64 Nebr. 129, 89 N. W. 644.

3. *Alabama.*— Floyd *v.* Hamilton, 33 Ala. 235.

California.— Oldham *v.* Ramsuer, 149 Cal. 540, 87 Pac. 18.

Connecticut.— Dunham *v.* Boyd, 64 Conn. 397, 30 Atl. 62.

Florida.— Stearns, etc., Lumber Co. *v.* Adams, 55 Fla. 394, 46 So. 156.

Georgia.— Sweeney *v.* Sweeney, 121 Ga. 293, 48 S. E. 984.

Kentucky.— Winlock *v.* Hardy, 4 Litt. 272.

Massachusetts.— Fiske *v.* Cole, 152 Mass. 335, 25 N. E. 608.

Minnesota.— Knatvold *v.* Wilkinson, 83 Minn. 265, 86 N. W. 99; Wolford *v.* Farnham, 47 Minn. 95, 49 N. W. 528; Lucy *v.* Wilkins, 33 Minn, 441, 23 N. W. 861; Austin *v.* Robertson, 25 Minn. 431.

Missouri.— Berthold *v.* O'Hara, 121 Mo. 88, 25 S. W. 845; Best *v.* Hoeffner, 39 Mo. App. 682.

Montana.— Borden *v.* Lynch, 34 Mont. 503, 87 Pac. 609.

New York.— Crate *v.* Dacora, 15 N. Y. Suppl. 607.

Pennsylvania.— Davenport *v.* Wright, 51 Pa. St. 292.

Vermont.— Gregg *v.* Willis, 71 Vt. 313, 45 Atl. 229.

Wisconsin.— Barker *v.* Ring, 97 Wis. 53, 72 N. W. 222.

See 46 Cent. Dig. tit. "Trial," § 116.

Illustration.— The issue being whether a payment of one hundred dollars, indorsed on a note as of June 12, 1898, was made, and so took the note out of the bar of the statute, an offer in evidence of a check of one hundred and forty dollars, drawn by a firm of mule dealers, in May, 1898, in favor of the maker of the note, and indorsed by him in blank, having no apparent connection with the indorsement on the note, was properly rejected, in the absence of an offer to show connection between the check and the indorsement on the note. Brown *v.* Carson, 132 Mo. App. 371, 111 S. W. 1181.

4. Young *v.* Otto, 57 Minn. 307, 59 N. W. 199; Howard *v.* Coshow, 33 Mo. 118; McClenahan *v.* Humes, 25 Pa. St. 85; Johns *v.* Northcutt, 49 Tex. 444.

5. VanArsdale *v.* Buck, 82 N. Y. App. Div. 383, 81 N. Y. Suppl. 1017.

6. *Connecticut.*— Dunham *v.* Boyd, 64 Conn. 397, 30 Atl. 62.

the evidence offered. The offer cannot be made in general terms;[7] but must be so made as to give the court an opportunity to rule on the specific testimony, complaint of the exclusion of which is made,[8] and must be so specific as to show the error of the court in refusing to admit it.[9] If the offer is substantially correct, it is immaterial that it is technically inaccurate.[10] It need not state all the facts necessary to make a full case,[11] nor facts going to the sufficiency but not to the admissibility of the evidence;[12] but it must embrace all the facts showing the admissibility of the evidence.[13] The offer must be of facts and not of conclusions;[14] and must be made good when the party is requested so to do.[15] It must be accompanied by documents offered, or by witnesses called and questioned,[16] and must correspond with[17] and not be broader than[18] the question; but where the court rules that it will not hear plaintiff's witnesses, he need not produce

Georgia.— Sweeney *v.* Sweeney, 121 Ga. 293, 48 S. E. 984.

Kentucky.—Winlock *v.* Hardy, 4 Litt. 272.

Missouri.— Berthold *v.* O'Hara, 121 Mo. 88, 25 S. W. 845.

Nebraska.— Blondel *v.* Bolander, 80 Nebr. 531, 114 N. W. 574.

New Hampshire.— Currier *v.* Boston, etc., R. Co., 34 N. H. 498.

New York.— Bingham *v.* New York Mar. Nat. Bank, 112 N. Y. 661, 19 N. E. 416; Pendleton *v.* Weed, 17 N. Y. 72; Akersloot *v.* Second Ave. R. Co., 8 N. Y. Suppl. 926 [*affirmed* in 131 N. Y. 599, 30 N. E. 195, 15 L. R. A. 489].

Pennsylvania.— Pryor *v.* Morgan, 170 Pa. St. 568, 33 Atl. 98; Davenport *v.* Wright, 51 Pa. St. 292; Corning *v.* Tyson, 2 Phila. 34.

Vermont.— Gregg *v.* Willis, 71 Vt. 313, 45 Atl. 229; Hayward Rubber Co. *v.* Duncklee, 30 Vt. 29.

Wisconsin.— Barker *v.* Ring, 97 Wis. 53, 72 N. W. 222; Wilson *v.* Noonan, 35 Wis. 321.

United States.— German Ins. Co. *v.* Frederick, 58 Fed. 144, 7 C. C. A. 122.

See 46 Cent. Dig. tit. "Trial," § 116.

7. Alexander *v.* Thompson, 42 Minn. 498, 44 N. W. 534. But see Gorham *v.* Moor, 197 Mass. 522, 84 N. E. 436, holding that an offer of evidence "because it bears on witness' credibility" is a general offer, and enables the party to sustain his exception to its exclusion by showing that it contradicted any material evidence by the witness.

8. *California.*— Smith *v.* East Branch Min. Co., 54 Cal. 164.

Georgia.—Atlanta Consol. St. R. Co. *v.* Bagwell, 107 Ga. 157, 33 S. E. 191.

Maryland.— Steuart *v.* Mason, 3 Harr. & J. 507.

Missouri.— Lyon *v.* Batz, 42 Mo. App. 606.

New Hampshire.—Wiggin *v.* Plumer, 31 N. H. 251.

South Carolina.— Taylor *v.* Glenn, 29 S. C. 292, 7 S. E. 483, 13 Am. St. Rep. 724.

9. Russell *v.* Lake, 68 Ill. App. 440.

Application of rule.— It is not sufficient to offer to prove that a paper, on which the right of one of the parties depends, was procured through false and fraudulent representations, without stating what they were. Lewis *v.* Nenzel, 38 Pa. St. 222.

10. Pearl *v.* Omaha, etc., R. Co., 115 Iowa 535, 88 N. W. 1078.

11. Hall *v.* Patterson, 51 Pa. St. 289.

12. Brooke *v.* Quynn, 13 Md. 379.

13. Hill *v.* Truby, 117 Pa. St. 320, 11 Atl. 89, 300.

An offer which, taken in its entirety, fails to show a cause of action is properly rejected. Logan *v.* McMullen, 4 Cal. App. 154, 87 Pac. 285.

14. Manning *v.* Den, (Cal. 1890) 24 Pac. 1092; Martin *v.* Hertz, 224 Ill. 84, 79 N. E. 558; Somers *v.* Loose, 127 Mich. 77, 86 N. W. 386; Howard *v.* Coshow, 33 Mo. 118.

15. Lincoln Lucky, etc., Min. Co. *v.* Hendry, 9 N. M. 149, 50 Pac. 330.

16. *Illinois.*— Stevens *v.* Newman, 68 Ill. App. 549.

Indiana.— Sauntman *v.* Maxwell, 154 Ind. 114, 54 N. E. 397; Tobin *v.* Young, 124 Ind. 507, 24 N. E. 121; Higham *v.* Vanosdol, 101 Ind. 160; Evansville *v.* Thacker, 2 Ind. App. 370, 28 N. E. 559.

Maryland.— Eschbach *v.* Hurtt, 47 Md. 61.

Montana.— Schilling *v.* Curran, 30 Mont. 370, 76 Pac. 998.

Nebraska.— Erickson *v.* Schmill, 62 Nebr. 368, 87 N. W. 166.

Utah.— Llsonbee *v.* Monroe Irr. Co., 18 Utah 343, 54 Pac. 1009, 72 Am. St. Rep. 784.

If the offer is of documents in connection with former testimony, the offer must show what they are and how proved. Dwyer *v.* Rippetoe, 72 Tex. 520, 10 S. W. 668.

An offer to prove by a witness not summoned is not good when the witness is not present, although the witness comes into the court room during the making of the offer, if the court's attention is not called to that fact. Lewis *v.* Newton, 93 Wis. 405, 67 N. W. 724.

17. Gray *v.* Elzroth, 10 Ind. App. 587, 37 N. E. 551, 53 Am. St. Rep. 400; Darnell *v.* Sallee, 7 Ind. App. 581, 34 N. E. 1020; Hallwood Cash Register Co. *v.* Prouty, 196 Mass. 313, 82 N. E. 6; Barr *v.* Post, 56 Nebr. 698, 77 N. W. 123; Keens *v.* Robertson, 46 Nebr. 837, 65 N. W. 897.

18. Hallwood Cash Register Co. *v.* Prouty, 196 Mass. 313, 82 N. E. 6.

The offer need not be confined to the specific answer if both relate to the same subject-matter (Johnson *v.* Winston, 68 Nebr. 425, 94 N. W. 607), unless other questions

each of them before the court.[19] The court may require the offer of proof to be in writing,[20] although not requested so to do by opposing counsel.[21] The offer must be confined to admissible evidence;[22] if the offer is of a witness, it should be confined to matters as to which he is competent.[23] The court is bound to accept the allegations of the offer as true for the purpose of ruling thereon.[24] Where an objection to an offer is not put on the ground of the improper method of making the offer, that objection cannot avail in the appellate court.[25]

(II) *DOCUMENTARY EVIDENCE.* An offer of documentary evidence must be accompanied by the documents offered.[26] If offered as a whole they must be admitted or rejected as such,[27] and the whole of it must be read if required.[28] If it is desired to offer certain portions of the document merely, they must be specifically pointed out.[29] The offer of an instrument includes the certificates thereto,[30] or file marks placed thereon by public officers,[31] and bills of item referred to in the instrument.[32] The offer of the record of a suit includes motions on file and the answers thereto,[33] but not the copy of a note on which the suit was founded.[34] The offer of an instrument is not an offer of the assignments,[35] or other indorsements thereon.[36]

(III) *EVIDENCE ADMISSIBLE IN PART.* Where evidence is offered as a whole, and part of it is inadmissible, the court may properly reject the whole.[37]

follow the offer (Masons' Union L. Ins. Co. *v.* Brockman, 20 Ind. App. 206, 50 N. E. 493).

19. Tathwell *v.* Cedar Rapids, 114 Iowa 180, 86 N. W. 291.

20. Wise *v.* Wakefield, 118 Cal. 107, 50 Pac. 310, holding further that the court may permit the offer to be made orally.

Oral offer.— It is not error to permit an oral offer if it does not appear that it was made in the presence of the jury and when it was taken down by a competent stenographer. McFarland *v.* Schuler, 12 S. D. 83, 80 N. W. 161.

21. Quinn *v.* White, 26 Nev. 42, 62 Pac. 995, 64 Pac. 818.

22. Hidy *v.* Murray, 101 Iowa 65, 69 N. W. 1138; Hamberg *v.* St. Paul F. & M. Ins. Co., 68 Minn. 335, 71 N. W. 388; Mundis *v.* Emig, 171 Pa. St. 417, 32 Atl. 1135. *Compare* Hurlburt *v.* Hurlburt, 63 Vt. 667, 22 Atl. 850, holding that it is not error for the court to permit proof to be made under an offer to prove, although the offer is of inadmissible as well as of admissible evidence, where the proof as made is of admissible evidence only.

23. Teats *v.* Flanders, 118 Mo. 660, 24 S. W. 126.

24. Bechtel *v.* Hoffman, Woodw. (Pa.) 130.

25. Biddick *v.* Kobler, 110 Cal. 191, 42 Pac. 578.

26. See *infra*, V, A, 3, a.

27. Jones *v.* Grantham, 80 Ga. 472, 5 S. E. 764.

28. South Carolina Bank *v.* Brown, Dudley (Ga.) 62; Young *v.* Smith, 25 Mo. 341; Southwark Ins. Co. *v.* Knight, 6 Whart. (Pa.) 327.

Where a document is admitted by consent the party need not read the whole. Galveston, etc., R. Co. *v.* Eckles, (Tex. Civ. App. 1899) 54 S. W. 651.

Reading of so much as is relevant.—Where either party introduces a document, the opposite party may read as evidence introduced by the party who offers it so much of the balance as is relevant. Crawford *v.* Roney, 126 Ga. 763, 55 S. E. 499.

In determining the meaning or purpose of the answer to an interrogatory propounded to a witness, the answer must be considered in connection with the interrogatory. Butler *v.* Ederheimer, 55 Fla. 544, 47 So. 23.

29. Jones *v.* Grantham, 80 Ga. 472, 5 S. E. 764.

30. Dillrance *v.* Murphy, 1 Nebr. (Unoff.) 298, 95 N. W. 608; Laurent *v.* Lanning, 32 Oreg. 11, 51 Pac. 80.

A record of a mortgage showing entry of satisfaction carries the entry of satisfaction with it. Cary *v.* Cary, 189 Pa. St. 65, 42 Atl. 19.

31. Williams *v.* Stroub, 168 Mo. 346, 67 S. W. 875.

32. Knoche *v.* Perry, 90 Mo. App. 483.

33. Walker *v.* Villavaso, 18 La. Ann. 715.

34. Chance *v.* Summerford, 25 Ga. 662.

35. Johnson *v.* English, 53 Nebr. 530, 74 N. W. 47.

36. Comstock *v.* Kerwin, 57 Nebr. 1, 77 N. W. 387 (unless sufficiently broad); Levy *v.* Cunningham, 56 Nebr. 348, 76 N. W. 882.

37. *Alabama.*— Bain *v.* Bain, 150 Ala. 453, 43 So. 562; Holman *v.* Clark, 148 Ala. 286, 41 So. 765; Pike County *v.* Hanchey, 119 Ala. 36, 24 So. 751; McCutcheon *v.* Loggins, 109 Ala. 457, 19 So. 810; Clark *v.* Ryan, 95 Ala. 406, 11 So. 22; Buffington *v.* Cook, 39 Ala. 64; Crutcher *v.* Memphis, etc., R. Co., 38 Ala. 579; Gregory *v.* Walker, 38 Ala. 26; Jeans *v.* Lawler, 32 Ala. 340; Brantley *v.* Gunn, 29 Ala. 387; Barlow *v.* Lambert, 28 Ala. 704, 65 Am. Dec. 374; Gibson *v.* Hatchett, 24 Ala. 201; Pritchett *v.* Munroe, 22 Ala. 501; Smith *v.* Wooding, 20 Ala. 324; West *v.* Kelly, 19 Ala. 353, 54 Am. Dec. 192; Kenan *v.* Holloway, 16 Ala. 53, 50 Am. Dec. 162; Melton *v.* Troutman, 15 Ala. 535; Johnson *v.* Cunningham, 1 Ala. 249.

Arkansas.— George *v.* Norris, 23 Ark. 121.

California.— Bostwick *v.* Mahoney, 73 Cal.

It is not the duty of the court to separate the admissible from the inadmissible evidence.[38] The court may in its discretion reject the entire evidence, or receive in evidence those parts which are admissible and reject the other parts.[39]

d. Presence of Jury During Offer. Testimony addressed to the judge alone, in order to determine the admissibility of evidence, need not be taken in the presence of the jury.[40] It is discretionary with the court to require that offers of evidence be made so as not to reach the ears of the jury,[41] as in the case of

238, 14 Pac. 832. *Contra*, Board of Education *v.* Keenan, 55 Cal. 642.

District of Columbia.—Wallach *v.* MacFarland, 31 App. Cas. 130.

Georgia.— Burch *v.* Swift, 118 Ga. 931, 45 S. E. 698; Seaboard Air-Line R. Co. *v.* Phillips, 117 Ga. 98, 43 S. E. 494; Smith *v.* Southside Mfg. Co., 113 Ga. 77, 38 S. E. 312; Herndon *v.* Black, 87 Ga. 327, 22 S. E. 924; Skellie *v.* Central R., etc., Co., 81 Ga. 56, 6 S. E. 811.

Illinois.— Cressey *v.* Kimmel, 78 Ill. App. 27.

Indiana.— Indianapolis, etc., Rapid Transit Co. *v.* Hall, 165 Ind. 557, 76 N. E. 242; Cincinnati, etc., R. Co. *v.* Roesch, 126 Ind. 445, 26 N. E. 171; Shewalter *v.* Bergman, 123 Ind. 155, 23 N. E. 686; Terre Haute *v.* Hudnut, 112 Ind. 542, 13 N. E. 686; Over *v.* Schiffling, 102 Ind. 191, 26 N. E. 91; Sohn *v.* Jervis, 101 Ind. 578, 1 N. E. 73; Cuthrell *v.* Cuthrell, 101 Ind. 375; Hart *v.* Miller, 29 Ind. App. 222, 64 N. E. 239; Vurpillat *v.* Zehner, 2 Ind. App. 397, 28 N. E. 556.

Iowa.— Hidy *v.* Murray, 101 Iowa 65, 69 N. W. 1138.

Kentucky.— Chiles *v.* Conley, 2 Dana 21.

Maine.— Steward *v.* Norton, 71 Me. 128; Tibbetts *v.* Baker, 32 Me. 25.

Maryland.— Modern Woodmen of America *v.* Cecil, 108 Md. 357, 70 Atl. 331. *Contra*, Gorsuch *v.* Rutledge, 70 Md. 272, 17 Atl. 76; Percy *v.* Clary, 32 Md. 245; Carroll *v.* Granite Mfg. Co., 11 Md. 399.

Michigan.—Angell *v.* Loomis, 97 Mich. 5, 55 N. W. 1008.

Minnesota.— Graham *v.* Graham, 84 Minn. 325, 87 N. W. 923; Hamberg *v.* St. Paul F. & M. Ins. Co., 68 Minn. 335, 71 N. W. 388; Reynolds *v.* Franklin, 47 Minn. 145, 49 N. W. 648; Beard *v.* Minneapolis First Nat. Bank, 41 Minn. 153, 43 N. W. 7, 8; Mueller *v.* Jackson, 39 Minn. 431, 40 N. W. 565; Stees *v.* Leonard, 20 Minn. 494.

Missouri.— McGrew *v.* Missouri Pac. R. Co., 109 Mo. 582, 19 S. W. 53; Howard *v.* Vaughan-Monnig Shoe Co., 82 Mo. App. 405.

Montana.— Farleigh *v.* Kelley, 28 Mont. 421, 72 Pac. 756, 63 L. R. A. 319.

New York.— Hosley *v.* Black, 28 N. Y. 438, 26 How. Pr. 97; Harger *v.* Edmonds, 4 Barb. 256; Stevens *v.* Rhinelander, 5 Rob. 285; Wamsley *v.* Darragh, 14 Misc. 566, 35 N. Y. Suppl. 1075; Western Nat. Bank *v.* Flannagan, 14 Misc. 317, 35 N. Y. Suppl. 848.

Ohio.— Root *v.* Monroeville, 16 Ohio Cir. Ct. 617, 4 Ohio Cir. Dec. 53.

Pennsylvania.— Mease *v.* United Traction Co., 208 Pa. St. 434, 57 Atl. 820; Brown *v.* White, 202 Pa. St. 297, 51 Atl. 962, 58 L. R. A. 321; Parry *v.* Parry, 130 Pa. St. 94, 18 Atl. 628; Citizens', etc., Sav. Bank, etc., Co. *v.* Gillespie, 115 Pa. St. 564, 9 Atl. 73; Smith *v.* Arsenal Bank, 104 Pa. St. 518; Wharton *v.* Douglass, 76 Pa. St. 273; Ephrata Water Co. *v.* Ephrata Borough, 20 Pa. Super. Ct. 149; Beam *v.* Gardner, 18 Pa. Super. Ct. 245; Jacoby *v.* Westchester F. Ins. Co., 10 Pa. Super. Ct. 171; Keeler *v.* Schott, 1 Pa. Super. Ct. 458; O'Neill *v.* Patterson, 10 Pittsb. Leg. J. N. S. 189. But not on general objection. Lock Haven First Nat. Bank *v.* Peltz, 176 Pa. St. 513, 35 Atl. 218, 53 Am. St. Rep. 686, 36 L. R. A. 832.

South Dakota.— Canton First Nat. Bank *v.* North, 2 S. D. 480, 51 N. W. 96.

Texas.— Hill *v.* Taylor, 77 Tex. 295, 14 S. W. 366; Cole *v.* Horton, (Civ. App. 1901) 61 S. W. 503.

Vermont.— Gregg *v.* Willis, 71 Vt. 313, 45 Atl. 229.

Wyoming.— Stickney *v.* Hughes, 12 Wyo. 397, 75 Pac. 945.

See 46 Cent. Dig. tit. "Trial," § 120.

Contra.— Le Bret *v.* Belzons, 13 La. 93; Driscoll *v.* Damp, 16 Wis. 106.

Illustration.— The exclusion of all of a bundle of letters offered, without any attempt to show how any of them bore on the issues, was proper, where many of them were incompetent, and but little light could have been thrown on the case by the admission of any of them. Crucible Steel Co. of America *v.* Moen, 167 Fed. 956, 93 C. C. A. 356.

Limitation of rules.—When the evidence offered consists of a single writing, a portion of which is competent on a material issue, it cannot be rejected because it contains irrelevant evidence. Nick *v.* Rector, 4 Ark. 251; Allen *v.* Moss, 27 Mo. 354; Dutchess Co. *v.* Harding, 49 N. Y. 321; Southern Pac. Co. *v.* Schoer, 114 Fed. 466, 52 C. C. A. 268, 57 L. R. A. 707. Evidence immaterial in itself may be competent if inseparably interwoven with material evidence. Sullivan *v.* Sullivan, 139 Ill. App. 378.

38. Jacoby *v.* Westchester F. Ins. Co., 10 Pa. Super. Ct. 171.

39. Jones *v.* Stevens, 5 Metc. (Mass.) 373; Texas Portland Cement Co. *v.* Ross, 35 Tex. Civ. App. 597, 81 S. W. 94. And see Chicago *v.* Cohen, 139 Ill. App. 244; *In re* Young, 33 Utah 382, 94 Pac. 731, 126 Am. St. Rep. 843, 17 L. R. A. N. S. 108.

40. McDonald *v.* McDonald, 142 Ind. 55, 41 N. E. 336; State *v.* Allen, 37 La. Ann. 385.

41. Birmingham Nat. Bank *v.* Bradley, 108 Ala. 205, 19 So. 791; Henrietta Coal Co. *v.* Campbell, 211 Ill. 216, 71 N. E. 863; Tucker

documentary evidence, by directing the same to be submitted to the counsel and court, without stating its purport.[42] The better practice is to have the jury retire;[43] but an offer in the presence of the jury is not error in the absence of a request that the jury retire,[44] although the offer be of incompetent evidence.[45] Where defendant excepted to the court's refusal to permit a witness to answer certain questions objected to, it was within the court's discretion to permit defendant to make its offer of proof in the presence of the jury for the purpose of reserving its bill of exceptions.[46] Counsel may, in the presence of the jury, state his offer to prove in as many forms as is necessary to present the question in any phase favorable to him, but the court may on motion, or by rule or order of court, require the offer to be stated out of the hearing of the jury.[47] But evidence of the same kind as that previously ruled incompetent should not be repeatedly offered in the hearing of the jury, and if so offered, even though rejected, may be ground for reversal.[48] The court may require the question of the admissibility of evidence to be raised by interrogatories instead of by an offer to prove in order to prevent abuse.[49]

e. Time For Making. The court may permit an offer of proof to be made after the exclusion of the evidence;[50] but the exclusion of evidence is not error, when the offer to prove is not made until after its exclusion,[51] unless made immediately thereafter.[52]

3. Introduction of Documentary Evidence[53] — a. In General. It is not necessary to serve the opposite party with a copy of a writing or give him an opportunity to inspect it before the trial.[54] But he must be permitted to inspect it before it is admitted.[55] A document may be read at any time after it is proved.[56] If properly in evidence, it may be read to the jury by a witness who has no per-

v. Burkitt, 49 Ill. App. 278; McDonald *v.* McDonald, 142 Ind. 55, 41 N. E. 336; Marcum *v.* Hargis, 104 S. W. 693, 31 Ky. L. Rep. 1117.

Where the offer to be made threatens to prejudice the party objecting, if heard by the jury, the court should adopt this course. Omaha Coke, etc., Co. *v.* Fay, 37 Nebr. 68, 55 N. W. 211.

42. Scripps *v.* Reilly, 38 Mich. 10; Brill *v.* Flagler, 23 Wend. (N. Y.) 354; Polk *v.* Robertson, 19 Fed. Cas. No. 11,250, Brunn. Col. Cas. 103, 1 Overt. (Tenn.) 456.

Illustration.—A paper signed with the name of a witness who cannot read or write, when produced at a trial as a memorandum to refresh his recollection, is not to be read in the presence of the jury; but the witness should withdraw with one of the counsel on each side, and have it read to him by them without comment. Com. *v.* Fox, 7 Gray (Mass.) 585.

43. Leicher *v.* Keeney, 98 Mo. App. 394, 72 S. W. 145.

44. Hedlun *v.* Holy Terror Min. Co., 16 S. D. 261, 92 N. W. 31.

45. Consumers' Paper Co. *v.* Eyer, 160 Ind. 424, 66 N. E. 994. But see Jones *v.* Portland, 88 Mich. 598, 50 N. W. 731, 16 L. R. A. 437, holding that where the court permits a party to make a prejudicial and untenable offer of proof in the presence and hearing of the jury, without calling attention to the impropriety of the offer, it is reversible error.

46. Moss *v.* Gulf, etc., R. Co., 46 Tex. Civ. App. 463, 103 S. W. 221.

47. Carroll County *v.* O'Connor, 137 Ind. 622, 35 N. E. 1006, 37 N. E. 16, in which it was further said that this practice is subject to abuse and the court may regulate it.

48. Scripps *v.* Reilly, 38 Mich. 10.

49. Osgood *v.* Bauder, 82 Iowa 171, 47 N. W. 1001.

50. Fidelity, etc., Co. *v.* Weise, 80 Ill. App. 499.

51. Pittsburg, etc., R. Co. *v.* Martin, 157 Ind. 216, 61 N. E. 229; Menaugh *v.* Bedford Belt R. Co., 157 Ind. 20, 60 N. E. 694; State *v.* Cox, 155 Ind. 593, 58 N. E. 849; Wilson *v.* Carrico, 155 Ind. 570, 58 N. E. 847; Gunder *v.* Tibbits, 153 Ind. 591, 55 N. E. 762; Famous Mfg. Co. *v.* Harmon, 28 Ind. App. 117, 62 N. E. 306; Chicago, etc., Coal R. Co. *v.* De Baum, 2 Ind. App. 281, 28 N. E. 447.

52. Breedlove *v.* Breedlove, 27 Ind. App. 560, 61 N. E. 797.

53. **Actions on bills or notes** see Commercial Paper, 8 Cyc. 285 *et seq.*

Production and inspection of writings before trial see Discovery, 14 Cyc. 368 *et seq.*

54. Robinson *v.* Martell, 11 Tex. 149; Beebe *v.* Redward, 35 Wash. 615, 77 Pac. 1052.

Special statutory provisions.— The Texas statutes require notice of certain evidence, but as the manner of giving notice is not prescribed it is sufficient if the party or his attorney have notice. Fulton *v.* Bayne, 18 Tex. 50.

55. Pope *v.* Dalton, 40 Cal. 638; Wimpfheimer *v.* Harris, 62 Misc. (N. Y.) 5, 114 N. Y. Suppl. 441.

56. Bushee *v.* Wright, 1 Pinn. (Wis.) 104.

On closing argument.— The court may permit reading on closing argument. Harter

sonal knowledge of the facts.[57] It is ordinarily in the discretion of the trial judge whether it shall be read or put in the hands of the jury.[58] A document is not put in evidence by handing it to opposite counsel for inspection,[59] by placing it on the files of the court,[60] by having it identified by a witness and marked by the stenographer,[61] by admonishing a witness to consult the document,[62] by its production on notice [63] and inspection by the opposite party,[64] or by proof of its execution.[65] However, where the court and parties treat an instrument as in evidence, a formal introduction is waived,[66] and the reading of a document by a witness without objection,[67] or such reference thereto by counsel in his examination as necessarily leads the jury to the conclusion that they are listening to testimony concerning the contents thereof,[68] or other treatment thereof by both parties as if in evidence,[69] puts it in evidence. A written résumé of books in evidence may be admitted,[70] and if there is no objection the court may permit a witness to state deductions from bulky documents.[71] So if it is necessary to take the deposition of a large number of witnesses to prove payments made by them, it would be admissible to have an intelligent and brief summary of the essential facts stated by them made up in such form that the court or jury might understand it without the necessity of hearing all that the witnesses had to say.[72] Letters should not be admitted in mass for the jury to read or not as they please.[73]

b. Pleadings as Evidence. The pleadings in a cause may ordinarily be used as evidence without being formally introduced,[74] but a pleading which has been

v. Seaman, 3 Blackf. (Ind.) 27; Clapp *v.* Wilson, 5 Den. (N. Y.) 285.

57. Keith *v.* Wells, 14 Colo. 321, 23 Pac. 991.

58. O'Reilly *v.* Duffy, 105 Mass. 243. But where the object of introduction would otherwise be lost, a party has a right to insist on reading it to the jury. Billings' Appeal, 49 Conn. 456.

59. Austin *v.* Thomson, 45 N. H. 113; Withers *v.* Gillespy, 7 Serg. & R. (Pa.) 10; Farmers', etc., Bank *v.* Israel, 6 Serg. & R. (Pa.) 293.

60. Liberty *v.* Haines, 101 Me. 402, 64 Atl. 665.

61. Stockwell *v.* New York Mut. L. Ins. Co., 140 Cal. 198, 73 Pac. 833, 98 Am. St. Rep. 25; Casteel *v.* Millison, 41 Ill. App. 61; Shelton *v.* Holzwasser, 46 Misc. (N. Y.) 76, 91 N. Y. Suppl. 328.

Laying in evidence.— The fact that defendants identified testator's account book, and "laid the same in evidence," without objection, does not make all the contents thereof evidence which may be considered by the court in making its findings, defendants having afterward called the court's attention to specific entries, and argued their admissibility without claiming that they were already in the case. Peck *v.* Pierce, 63 Conn. 310, 28 Atl. 524.

62. Stanley *v.* Whipple, 22 Fed. Cas. No. 13,286, 2 McLean 35, 2 Robb Pat. Cas. 1.

63. Marsh *v.* French, 82 Ill. App. 76.

64. Ellis *v.* Randle, 24 Tex. Civ. App. 475, 60 S. W. 462. But see Saunders *v.* Duval, 19 Tex. 467.

65. Clapp *v.* Wilson, 5 Den (N. Y.) 285.

Part of book proved and read.— Where a book is proved and portions read it is error to charge that entire book is in evidence. Duke *v.* Cahawba Nav. Co., 10 Ala. 82, 44 Am. Dec. 472.

66. Clay County School Dist. No. 68 *v.* Allen, 83 Ark. 491, 104 S. W. 172.

67. Benson *v.* Wilmington, 9 Houst. (Del.) 359, 32 Atl. 1047; Fitzsimmons *v.* Paul, 31 Pittsb. Leg. J. N. S. (Pa.) 137.

68. Lombard *v.* Chaplin, 98 Me. 309, 56 Atl. 903; Wolfe *v.* Supreme Lodge K. L. H., 160 Mo. 675, 61 S. W. 637; Steuben County Bank *v.* Stephens, 14 Wend. (N. Y.) 243; Bevington *v.* State, 2 Ohio St. 160.

Especially is this true where the documents are left in the custody of the court under its orders. Wright *v.* Roseberry, 81 Cal. 87, 22 Pac. 336.

69. Zieverink *v.* Kemper, 50 Ohio St. 208, 34 N. E. 250.

70. State *v.* Salverson, 87 Minn. 40, 91 N. W. 1. *Contra*, Guilfoyle *v.* Pierce, 4 N. Y. App. Div. 612, 38 N. Y. Suppl. 697.

71. Thornburgh *v.* Newcastle, etc., R. Co., 14 Ind. 499; Rollins *v.* Rio Grande County, 90 Fed. 575, 33 C. C. A. 181.

72. Maryland Fidelity Deposit Co. *v.* Champion Ice Mfg., etc., Co., 133 Ky. 74, 117 S. W. 393.

73. Barber's Appeal, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90.

74. Boeker *v.* Hess, 34 Ill. App. 332; Tucker *v.* Hyatt, 144 Ind. 635, 41 N. E. 1047, 43 N. E. 872; Monticello School Town *v.* Grant, 104 Ind. 168, 1 N. E. 302; Colter *v.* Calloway, 68 Ind. 219; Carpenter *v.* Carpenter, 126 Mich. 217, 85 N. W. 576; Page *v.* Commonwealth L. Ins. Co., 131 N. C. 115, 42 S. E. 543. *Contra*, Smith *v.* Nimocks, 94 N. C. 243; Cotton *v.* Jones, 37 Tex. 34.

An order substituting new parties is a part of the pleadings and may be read to the jury. Hotchkiss *v.* Auburn, etc., R. Co., 36 Barb. (N. Y.) 600.

withdrawn and superseded by an amended pleading is not in evidence unless it is introduced like other evidence.[75]

4. Admission and Exclusion or Withdrawal of Evidence — a. In General. The admission of evidence is a question for the judge, and the jury has no right to disregard evidence although erroneously admitted.[76] The extent to which evidence of collateral matters may be admitted rests in the discretion of the court.[77] In determining the admissibility of evidence, the pleadings should be liberally construed,[78] and ambiguous evidence should be given the construction favoring admissibility.[79] Where the court is evenly divided as to admission, the evidence should be rejected.[80] Where there is a sharp conflict in the evidence the rulings with respect to the admission and exclusion of evidence should be especially accurate.[81] The court may of its own motion rule out irrelevant, immaterial,[82] or opinion,[83] but not secondary, evidence;[84] or it may exclude improper evidence, although not properly objected to,[85] but need not do so.[86] The court may on its own motion exclude an improper question,[87] as a question calling for hearsay evidence,[88] or for immaterial as well as material evidence.[89] However, the fact that the court permitted an answer to an improper question furnishes no ground of complaint if the answer was proper testimony,[90] or could not have damaged the party objecting.[91] It is not the question but the response to it, when incompetent and improper as evidence, upon which error can be assigned.[92] Evidence once generally admitted cannot be offered again.[93] In doubtful cases evidence may be admitted and the effect adjudged afterward;[94] but the practice of admitting all the evidence adduced

75. Leach *v.* Hill, 97 Iowa 81, 66 N. W. 69.

76. Hogan *v.* Gibson, 12 La. 457; Sherwood *v* Sissa, 5 Nev. 349; Drew *v.* Watertown Ins. Co., 6 S. D. 335, 61 N. W. 34.

77. Peters *v.* Schultz, 107 Minn. 29, 119 N. W. 385; Philips *v.* Mo, 91 Minn. 311, 97 N. W. 969.

78. Bunker *v.* Taylor, 10 S. D. 526, 74 N. W. 450.

79. Storr *v.* James, 84 Md. 282, 35 Atl. 965; Shannon *v.* Marchbanks, 35 Tex. Civ. App. 615, 80 S. W. 860.

80. Ferrall *v.* Kent, 4 Gill (Md.) 209; Jackson *v.* Miller, 25 N. J. L. 90.

81. Sheppelman *v.* People, 134 Ill. App. 556; Chicago Union Tract. Co. *v.* Arnold, 131 Ill. App. 599.

82. *Alabama.*— Durrett *v.* State, 62 Ala. 434.

Georgia.— Goodrum *v.* State, 60 Ga. 509.

Illinois.— Peyton *v.* Morgan Park, 172 Ill 102, 49 N. E. 1003.

North Carolina.— State *v.* Arnold, 35 N. C. 184.

South Carolina.— Bromonia Co. *v.* Greenwood Drug Co., 78 S. C. 482, 59 S. E. 363.

Wyoming.— Farrell *v.* Alsop, 2 Wyo. 135.

See 46 Cent. Dig tit. "Trial," § 130.

Instances.—As where the evidence is not relevant at any stage of the trial (Torrey *v.* Fisk, 10 Sm. & M. (Miss.) 590); where the evidence does not tend to sustain the defense (Ervin *v.* Hays, 135 Ill. App. 429); or where similar evidence of the opposite party has been objected to and excluded (Smith *v.* Burrill, 131 Mass. 92; Powers *v.* Hazelton, etc., R. Co., 33 Ohio St. 429); but the irrelevancy must be clear (Granger *v.* Warrington, 8 Ill. 299. But see Oliver *v.* Columbia, etc., R. Co., 65 S. C. 1, 43 S. E. 307. to the effect that the relevancy of a question is largely in the discretion of the trial court).

83. Whittemore *v.* Weiss, 33 Mich. 348.

84. Davis *v.* Strohm, 17 Iowa 421; James *v.* Langdon, 7 B. Mon. (Ky.) 193; Ames *v.* People's Tel., 5 La. Ann. 183.

85. Allen *v.* Smith, 22 Ala. 416; Baker *v.* Mathew, 137 Iowa 410, 115 N. W. 15; McCartney *v.* Washington, 124 Iowa 382, 100 N. W. 80; Schilling *v.* Curran, 30 Mont. 370, 76 Pac. 998; Chezum *v.* Parker, 19 Wash. 645, 54 Pac. 22. *Contra,* Magie *v.* Herman, 50 Minn. 424, 52 N. W. 909, 36 Am. St. Rep. 660. But it may exclude by instructions to the jury on proper request, although the evidence was admitted over another objection. Russell *v.* Schurmier, 9 Minn. 28.

86. Hindle *v.* Holcomb, 34 Wash. 336, 75 Pac. 873.

87. Buck *v.* Maddock, 167 Ill. 219, 47 N. E. 208 [*affirming* 67 Ill. App. 466]; Com. *v.* Tate, 33 S. W. 405, 17 Ky. L. Rep. 1045. Although proper evidence is sought to be elicited thereby. Badesch *v.* Willna Cong. Brothers, 23 Misc. (N. Y.) 160, 50 N. Y. Suppl. 958; Cobb *v.* U. S., 5 Ct. Cl. 176.

88. Dunlap *v.* Elks Social Club, 25 Mo. App. 180.

89. Western Nat. Bank *v.* Flannagan, 14 Misc. (N. Y.) 317, 35 N. Y. Suppl. 848.

90. Miller *v.* Houcke, 2 Ill. 501; Cornville *v.* Brighton, 39 Me. 333; Danenbaum *v.* Person, 3 N. Y. Suppl. 129; Reichman *v.* Second Ave R. Co., 1 N. Y. Suppl. 836; Summers *v.* Darne, 31 Gratt. (Va.) 791.

91. Bardin *v.* Stevenson, 75 N. Y. 164.

92. Perry *v.* Jackson, 88 N. C. 103; Bost *v.* Bost, 87 N. C. 477.

93. Fox *v.* Stockton Combined Harvester, etc., Works, 83 Cal. 333, 23 Pac. 295.

94. Allen *v.* McMasters, 3 Watts (Pa.) 181.

and then instructing the jury as to its effect and then distinguishing the legal from the illegal evidence is irregular.[95] Excluded evidence is not in the case for any purpose.[96] After issue joined, every witness must testify in open court or under commission.[97]

b. Evidence Admissible For Specific Purpose. Evidence competent for any purpose,[98] or for or against certain parties,[99] should be admitted, if offered generally,[1] or for a proper purpose.[2] If inadmissible for some purposes or for or against some parties, the court should by instruction,[3] if requested so to do, limit its operation[4]

95. Florey *v.* Florey, 24 Ala. 241; De Graffenreid *v.* Thomas, 14 Ala. 681.

96. Fraley *v.* Peale, 2 Phila. (Pa.) 269.

97. Sandeman *v.* Deake, 17 La. 332.

98. *Alabama.*— Cook *v.* Parham, 24 Ala. 21.

California.— San Luis Obispo County *v.* White, 91 Cal. 432, 24 Pac. 864, 27 Pac. 756.

Connecticut.— New Haven Trust Co. *v.* Doherty, 74 Conn. 348, 50 Atl. 890.

Georgia.— Capital City Brick Co. *v.* Atlanta Ice, etc., Co., 5 Ga. App. 436, 63 S. E. 562.

Indiana.— Louisville, etc., R. Co. *v.* Donnegan, 111 Ind. 179, 12 N. E. 153; Pape *v.* Ferguson, 28 Ind. App. 298, 62 N. E. 712.

Iowa.— Citizens' Nat. Bank *v.* Converse, 105 Iowa 669, 75 N. W. 506.

Massachusetts.— James *v.* Cummings, 132 Mass. 78.

Michigan.— Haines *v.* Lake Shore, etc., R. Co., 129 Mich. 475, 89 N. W. 349.

Missouri.— Rechow *v.* American Cent. Ins. Co., 65 Mo. App. 52.

North Carolina.— Gaylord *v.* Gaylord, 150 N. C. 222, 63 S. E. 1028.

Pennsylvania.— McClelland *v.* Lindsay, 1 Watts & S. 360; Stockwell *v.* Loecher, 9 Pa. Super. Ct. 241.

Texas.— Moore *v.* Kirby, (Civ. App. 1908) 115 S. W. 632.

See 46 Cent. Dig. tit. "Trial," § 126.

99. *Alabama.*— Smith *v.* Collins, 94 Ala. 394, 10 So. 334; Collins *v.* Mountain, 53 Ala. 201.

Iowa.— Hanson *v.* Kline, 136 Iowa 101, 113 N. W. 504.

Minnesota.— Schell *v.* St. Paul Second Nat. Bank, 14 Minn. 43.

Missouri.— St. Louis Agricultural, etc., Assoc. *v.* Delano, 37 Mo. App. 284.

New York.— Gardner *v.* Friederich, 163 N. Y. 568, 57 N. E. 1110 [*affirming* 25 N. Y. App. Div. 521, 49 N. Y. Suppl. 1077]; Fox *v.* Jackson, 8 Barb. 355; Von Kamen *v.* Roes, 20 N. Y. Suppl. 548.

Virginia.— Olinger *v.* Shepherd, 12 Gratt. 462.

See 46 Cent. Dig. tit. "Trial," § 127.

But see Evans *v.* Scott, (Tex. Civ. App. 1906) 97 S. W. 116.

1. Boddy *v.* Henry, 126 Iowa 31, 101 N. W. 447; Emrich *v.* Union Stock Yard Co., 86 Md. 482, 38 Atl. 943; Farnsworth *v.* Nevada Co., 102 Fed. 578, 42 C. C. A. 509. But see Paquette *v.* Prudential Ins. Co., 143 Mass. 215, 79 N. E. 250, holding that where evidence is offered generally against general objection and exception, the court may submit the evidence to the jury or exclude it and no exception lies to the exercise of its discretion.

2. New Haven Trust Co. *v.* Doherty, 74 Conn. 348, 50 Atl. 890; Weeks *v.* Lyndon, 54 Vt. 638.

3. *Georgia.*— Southern States Exploring, etc., Syndicate *v.* McManus, 113 Ga. 982, 39 S. E. 480.

Indiana.— Hart *v.* Miller, 29 Ind. App. 222, 64 N. E. 239.

Iowa.— Breiner *v.* Nugent, 136 Iowa 322, 111 N. W. 446.

Kentucky.— South Covington, etc., St. R. Co. *v.* Riegler, 82 S. W. 382, 26 Ky. L. Rep. 666. And see Louisville, etc., R. Co. *v.* Stewart, 131 Ky. 665, 115 S. W. 775.

Massachusetts.— O'Connell *v.* Cox, 179 Mass. 250, 60 N. E. 580.

New York.— Price *v.* Keyes, 1 Hun 177 [*reversed* on other grounds in 62 N. Y. 378].

Texas.— Galveston, etc., R. Co. *v.* Worcester, 45 Tex. Civ. App. 501, 100 S. W. 990; State *v.* Dittfurth, (Civ. App. 1904) 79 S. W. 52; Clark *v.* Clark, 21 Tex. Civ. App. 371, 51 S. W. 337; Missouri, etc., R. Co. *v.* Rose, 19 Tex. Civ. App. 470, 49 S. W. 133; Western Union Tel. Co. *v.* Seals, (Civ. App. 1898) 45 S. W. 964.

4. *Alabama.*— Guice *v.* Thornton, 76 Ala. 466; Lewis *v.* Lee County, 66 Ala. 480; Goodman *v.* Walker, 30 Ala. 482, 68 Am. Dec. 134.

Illinois.— Consolidated Ice Mach. Co. *v.* Keifer, 134 Ill. 481, 25 N. E. 799, 23 Am. St. Rep. 688, 10 L. R. A. 696; Miller *v.* Potter, 59 Ill. App. 125.

Indiana.— Terrell *v.* Butterfield, 92 Ind. 1; Keesling *v.* Doyle, 8 Ind. App. 43, 35 N. E. 126.

Iowa.— Aughey *v.* Windrem, 137 Iowa 315, 114 N. W. 1047; Considine *v.* Dubuque, 126 Iowa 283, 102 N. W. 102.

Massachusetts.— Clark *v.* Hull, 184 Mass. 164, 68 N. E. 60.

Minnesota.— Cronfeldt *v.* Arrol, 50 Minn. 327, 52 N. W. 857, 36 Am. St. Rep. 648; Appleton Mill Co. *v.* Warder, 42 Minn. 117, 43 N. W. 791.

Missouri.— Union Sav. Assoc. *v.* Edwards, 47 Mo. 445.

New Hampshire.— Guertin *v.* Hudson, 71 N. H. 505, 53 Atl. 736.

New York.— Stowell *v.* Hazelett, 66 N. Y. 635; Fox *v.* Erbe, 100 N. Y. App. Div. 343, 91 N. Y. Suppl. 832; Black *v.* Foster, 28 Barb. 387; Fagan *v.* Interurban St. R. Co., 85 N. Y. Suppl. 340.

Pennsylvania.— Long *v.* Maguire, 22 Pa. St. 163.

Texas.— Robinson *v.* Marietta First Nat. Bank, 98 Tex. 184, 82 S. W. 505; Keowne *v.* Love, 65 Tex. 152; Houston, etc., R. Co. *v.* Poole, 63 Tex. 246; Bluestein *v.* Collins, (Civ.

or effect.[5] Where the evidence is stated to be introduced for a certain purpose, it should be restricted to that purpose,[6] for it is manifest that any other rule would result in surprise and injustice.[7] Impeaching evidence is not to be used as primary evidence.[8] If offered generally, it will be presumed to be offered for a proper purpose.[9] Where evidence is offered for one purpose only, although admissible generally or for some other purpose,[10] or where it is offered for several purposes for one of which it is inadmissible,[11] it may be properly rejected. That evidence relevant to one of several issues produced the verdict

App. 1907) 103 S. W. 687; Bell *v.* Missouri, etc., R. Co., 36 Tex. Civ. App. 569, 82 S. W. 1073; Ft. Worth, etc., R. Co. *v.* Harlan, (Civ. App. 1901) 62 S. W. 971.

Necessity for request.— That evidence was not properly limited to a certain effect cannot be complained of, in the absence of request for the limitation. Illinois Steel Co. *v.* Paczocha, 139 Wis. 23, 119 N. W. 550. Where evidence is competent for any purpose, it is not rendered incompetent because it also tends to influence the mind in a direction for which alone it is incompetent; the remedy being by application to have it restricted to the purpose for which it is admissible. Hubbard *v.* Allyn, 200 Mass. 166, 86 N. E. 356.

5. *Alabama.*— Ponder *v.* Cheeves, 104 Ala. 307, 16 So. 145; Park *v.* Wooten, 35 Ala. 242; Cook *v.* Parham, 24 Ala. 21.

California.— Bode *v.* Lee, 102 Cal. 583, 36 Pac. 936.

Georgia.— Maryland Fidelity, etc., Co. *v.* Nisbet, 119 Ga. 316, 46 S. E. 444.

Illinois.— Mighell *v.* Stone, 175 Ill. 261, 51 N. E. 906 [*affirming* 74 Ill. App. 129]; Chicago, etc., R. Co. *v.* Clark, 108 Ill. 113; Marder *v.* Leary, 35 Ill. App. 420.

Indiana.— Smith *v.* Smith, 106 Ind. 43, 5 N. E. 411; Lipprant *v.* Lipprant, 52 Ind. 273.

Iowa.— Fink *v.* Des Moines Ice Co., 84 Iowa 321, 51 N. W. 155; Allison *v.* Chicago, etc., R. Co., 42 Iowa 274.

Louisiana.— Thompson *v.* Chauveau, 6 Mart. N. S. 458.

Maryland.— Carroll *v.* Ridgaway, 8 Md. 328; Pegg *v.* Warford, 7 Md. 582.

Massachusetts.— Com. *v.* Wunsch, 129 Mass. 477.

Michigan.— John Hancock Mut. L. Ins. Co. *v.* Moore, 34 Mich. 41.

Missouri.— Babb *v.* Ellis, 76 Mo. 459.

Nebraska.— Chicago, etc., R. Co. *v.* Holmes, 68 Nebr. 826, 94 N. W. 1007.

New Hampshire.— Norris *v.* Morrill, 40 N. H. 395; Jenness *v.* Berry, 17 N. H. 549.

New York.— Sherman *v.* Oneonta, 21 N. Y. Suppl. 137 [*affirmed* in 142 N. Y. 637, 37 N. E. 566].

Tennessee.— Mariner *v.* Smith, 7 Baxt. 423.

Texas.— State Land Mortg. Bank *v.* Quanah Hotel Co., (Civ. App. 1895) 32 S. W. 573 [*affirmed* in 89 Tex. 332, 34 S. W. 730].

Wisconsin.— Domasek *v.* Kluck, 113 Wis. 336, 89 N. W. 139; Viellesse *v.* Green Bay, 110 Wis. 160, 85 N. W. 665.

United States.— Lastrapes *v.* Blanc, 14 Fed. Cas. No. 8,100, 3 Woods 134.

See 46 Cent. Dig. tit. "Trial," § 126.

The party offering the evidence should limit its effect by instruction. Sandig *v.* Hill, 70 Mo. App. 71.

What instruction sufficient.— When the statement of a witness is admitted by the court on the express ground that it is taken to be the statement of a fact and not the expression of an opinion, there is sufficient caution to the jury that as an expression of opinion it would be inadmissible. St. Louis Gaslight Co. *v.* American F. Ins. Co., 33 Mo. App. 348.

6. Byrne *v.* Byrne, 113 Cal. 294, 45 Pac. 536; Henry *v.* Everts, 29 Cal. 610; Jones *v.* Read, 1 La. Ann. 200; Emory *v.* Owings, 3 Md. 178; Bullard *v.* Smith, 28 Mont. 387, 72 Pac. 761. And see Atoka Coal, etc., Co. *v.* Miller, 7 Ind. Terr. 104, 104 S. W. 555; Deering *v.* Mortell, 21 S. D. 159, 110 N. W. 86, 16 L. R. A. N. S. 352.

When not shown to have been used for an incompetent purpose it is not error not to do so. Rogers *v.* Kenrick, 63 N. H. 335.

7. Barasch *v.* Kramer, 62 Misc. (N. Y.) 475, 115 N. Y. Suppl. 176.

Evidence admitted over general objection. — Evidence competent for one purpose, offered for a special purpose, admitted over general objection as to its competency for any purpose, is in the case for all legal purposes. Sears *v.* Starbird, 78 Cal. 225, 20 Pac. 547.

8. Kennedy *v.* State, 85 Ala. 326, 5 So. 300; Catlin *v.* Michigan Cent. R. Co., 66 Mich. 358, 33 N. W. 515; Howard *v.* Patrick, 38 Mich. 795; Maxwell Land-Grant Co. *v.* Dawson, 151 U. S. 586, 14 S. Ct. 458, 38 L. ed. 279 [*reversing* 7 N. M. 133, 34 Pac. 191].

9. Morris *v.* Atlantic Ave. R. Co., 116 N. Y. 552, 22 N. E. 1097.

10. *Alabama.*— Thompson *v.* Drake, 32 Ala. 99.

Maryland.— Byers *v.* Horner, 47 Md. 23; Green *v.* Caulk, 16 Md. 556; McTavish *v.* Carroll, 13 Md. 429.

Minnesota.— Colby *v.* Colby, 64 Minn. 549, 67 N. W. 663.

New Jersey.— Delaware, etc., R. Co. *v.* Dailey, 37 N. J. L. 526.

New York.— Pendleton *v.* Weed, 17 N. Y. 72; Tochman *v.* Brown, 33 N. Y. Super. Ct. 409.

Pennsylvania.— Benner *v.* Hauser, 11 Serg. & R. 352.

South Carolina.— Martin *v.* Jennings, 52 S. C. 371, 29 S. E. 807.

Texas.— O'Brien *v.* Hilburn, 22 Tex. 616.

Especially is this true where the purpose is improper. Perry *v.* Smith, 29 N. J. L. 74.

11. Hicks *v.* Lawson, 39 Ala. 90; Johnson *v.* Marshall, 34 Ala. 522; Davis *v.* Gibson, 70 Ill. App. 273.

is not alone cause for reversal, unless an improper use was made of it, and the verdict resulted from such improper use.[12]

c. Cumulative Evidence. The admission or rejection of cumulative evidence is within the discretion of the trial court.[13] It has been held, however, that the exclusion of evidence offered by defendant, and important as affecting the chief question of fact involved, on the ground that the evidence was merely cumulative, is erroneous.[14] Where the court excludes cumulative evidence of a fact which

12. Kelland *v.* Jos. W. Noones Sons, 75 N. H. 168, 71 Atl. 168.

13. *Alabama.*— Western Steel Car, etc., Co. *v.* Cunningham, 158 Ala. 369, 48 So. 109; Barnett *v.* Wilson, 132 Ala. 375, 31 So. 521.

California.— U. S. Oil, etc., Co. *v.* Bell, 153 Cal. 781, 96 Pac. 901; Spitler *v.* Keading, 133 Cal. 500, 65 Pac. 1040.

Florida.— Atlantic Coast Line R. Co. *v.* Crosby, 53 Fla. 400, 43 So. 318.

Illinois.— Rock Island *v.* Starkey, 189 Ill. 515, 59 N. E. 971 [*reversing* 91 Ill. App. 592]; Chicago, etc., R. Co. *v.* Pearson, 184 Ill. 386, 56 N. E. 633; Lake Shore, etc., R. Co. *v.* Brown, 123 Ill. 162, 14 N. E. 197, 5 Am. St. Rep. 510; Stern *v.* Smith, 127 Ill. App. 640 [*affirmed* in 225 Ill. 430, 80 N. E. 307, 116 Am. St. Rep. 151].

Indiana.— Owen *v.* Williams, 114 Ind. 179, 15 N. E. 678, especially where the supreme court takes as established, the facts which it tends to prove.

Iowa.— Strand *v.* Grinnell Automobile Garage Co., 136 Iowa 68, 113 N. W. 488; Germinder *v.* Machinery Mut. Ins. Assoc., 120 Iowa 614, 94 N. W. 1108; Frick *v.* Kabacker, 116 Iowa 494, 90 N. W. 498; Cory *v.* Hamilton, 84 Iowa 594, 51 N. W. 54; McConnell *v.* Osage, 80 Iowa 293, 45 N. W. 550, 8 L. R. A. 778.

Kansas.— Kansas Ins. Co. *v.* Berry, 8 Kan. 159.

Kentucky.— Hollingsworth *v.* Warnock, 112 Ky. 96, 65 S. W. 163, 23 Ky. L. Rep. 1395; New York Mut. L. Ins. Co. *v.* Thomson, 94 Ky. 253, 22 S. W. 87, 14 Ky. L. Rep. 800; Talbott *v.* Bedford, 53 S. W. 294, 21 Ky. L. Rep. 897.

Massachusetts.— Tobin *v.* Brimfield, 182 Mass. 117, 65 N. E. 28; Coker *v.* Ropes, 125 Mass. 577. *Compare* Perkins *v.* Rice, 187 Mass. 28, 72 N. E. 323.

Minnesota.— Johnson *v.* Crookston Lumber Co., 92 Minn. 393, 100 N. W. 225.

Missouri.— Crow *v.* Marshall, 15 Mo. 499; Siegelman *v.* Jones, 103 Mo. App. 172, 77 S. W. 307.

Nebraska.— Ogden *v.* Sovereign Camp W. W., 78 Nebr. 806, 113 N. W. 524.

New York.— Bradford *v.* Bradford, 51 N. Y. 669; Wittleder *v.* Citizens' Electric Illuminating Co., 47 N. Y. App. Div. 410, 62 N. Y. Suppl. 297; Kuhn *v.* American Automatic Knife, etc., Co., 9 Misc. 54, 29 N. Y. Suppl. 73; Sanders *v.* Euling, 8 N. Y. Civ. Proc. 166. But see Cohen *v.* Simon, 36 Misc. 858, 74 N. Y. Suppl. 921, holding that where a witness was not called as an expert or to testify as to opinion, but as to whether certain admissions were made, it was error to reject him because his testimony would be mere repetition.

Rhode Island.— Carr *v.* American Locomotive Co., 26 R. I. 180, 58 Atl. 678.

Texas.— Galveston, etc., R. Co. *v.* Matula, 79 Tex. 577, 15 S. W. 573; Couts *v.* Neer, 70 Tex. 468, 9 S. W. 40; Delgado *v.* Gonzales, (Civ. App. 1894) 28 S. W. 459.

Washington.— Nunn *v.* Jordan, 31 Wash. 506, 72 Pac. 124.

Wisconsin.— Griswold *v.* Nichols, 126 Wis. 401, 105 N. W. 815; Kreider *v.* Wisconsin River Paper, etc., Co., 110 Wis. 645, 86 N. W. 662; Sawyer *v.* Choate, 92 Wis. 533, 66 N. W. 689.

United States.— Ragsdale *v.* Southern R. Co., 121 Fed. 924; Tribune Assoc. *v.* Follwell, 107 Fed. 646, 46 C. C. A. 526; Sommer *v.* Carbon Hill Coal Co., 107 Fed. 230, 46 C. C. A. 255.

See 46 Cent. Dig. tit. "Trial," § 131.

But see Walker *v.* Walker, 14 Ga. 242 (in which it was said that cases are very rare in which the court should not receive at any time additional confirmatory cumulative, and corroborative evidence of facts previously proved, or which tends to strengthen or add force or probability to such evidence); Calvert *v.* Carter, 18 Md. 73 (holding that it is not ground for excluding evidence, otherwise admissible, that it is cumulative).

Exclusion of testimony of a witness to prove a fact established by a number of other witnesses is not erroneous. Sherman Gas, etc., Co. *v.* Belden, (Tex. Civ. App. 1909) 115 S. W. 897.

Opinion evidence.— The exclusion of opinion evidence which is merely cumulative is within the discretion of the court. Royal Exch. Assur. *v.* Graham, etc., Transp. Co., 166 Fed. 32, 92 C. C. A. 66.

Facts already testified to by witness.— It was not error to sustain an objection to a question asked a witness where the fact sought to be brought out by the question had been stated by the witness before. Hale *v.* Milliken, 5 Cal. App. 344, 90 Pac. 365.

Permitting a witness to testify to a fact admitted or already testified to is not assignable as error. Haapa *v.* Metropolitan L. Ins. Co., 150 Mich. 467, 114 N. W. 380, 121 Am. St. Rep. 627, 16 L. R. A. N. S. 1165.

What is not cumulative testimony.— Testimony of an expert that certain conditions could have been ascertained by inspection is not cumulative of testimony that the conditions were ascertained by inspection. Ouilette *v.* Overman Wheel Co., 162 Mass. 305, 38 N. E. 511.

14. Capron *v.* Douglass, 193 N. Y. 11, 85 N. E. 827, 20 L. R. A. N. S. 1003 [*reversing*

plaintiff is bound to establish in order to recover, on the ground that sufficient evidence of the fact had been given to establish a cause of action, it is reversible error to instruct the jury that plaintiff must establish such fact to their satisfaction.[15]

d. Rebutting Evidence.[16] Either party is entitled to introduce evidence to rebut that of his adversary,[17] and where a party offers relevant testimony in rebuttal it is error to reject it,[18] although it tends to support his case in

119 N. Y. App. Div. 919, 105 N. Y. Suppl. 1110].

15. Lyon *v.* Brown, 34 N. Y. App. Div. 323, 54 N. Y. Suppl. 315.

16. **For definitions** see REBUTTING EVIDENCE, 33 Cyc. 1571.

17. Green *v.* Dodge, 79 Vt. 73, 64 Atl. 499.

18. *Indiana.*— Miller *v.* Preble, 142 Ind. 632, 42 N. E. 220.

Maryland.— Wellersburg, etc., Plank Road Co. *v.* Bruce, 6 Md. 457.

Michigan.— Chase *v.* Lee, 59 Mich. 237, 26 N. W. 483.

Mississippi.— Mosely *v.* Jamison, 66 Miss. 52, 5 So. 524.

New York.— O'Dell *v.* McGrath, 21 N. Y. App. Div. 252, 47 N. Y. Suppl. 601.

Ohio.— Graham *v.* Davis, 4 Ohio St. 362, 62 Am. Dec. 285.

South Carolina.— Martin *v.* Western Union Tel. Co., 81 S. C. 432, 62 S. E. 833.

Texas.— Hunt *v.* Turner, 9 Tex. 385, 60 Am. Dec. 167. And see Meyer Bros. Drug Co. *v.* Madden, 45 Tex. Civ. App. 74, 99 S. W. 723.

Vermont.— Baker *v.* Sherman, 71 Vt. 439, 46 Atl. 57.

Virginia.— Brooks *v.* Wilcox, 11 Gratt. 411.

United States.— Stanley *v.* Beckham, 153 Fed. 152, 82 C. C. A. 304.

England.— Whittingham *v.* Bloxham, 4 C. & P. 597, 19 E. C. L. 667.

Testimony in rebuttal confined to new matter brought out by opposite party see Longino *v.* Shreveport Traction Co., 120 La. 803, 45 So. 732; Wade *v.* Galveston, etc., R. Co., (Tex. Civ. App. 1908) 110 S. W. 84.

What is new matter illustrated.— In a personal injury case, defendant's testimony tending to show that plaintiff died of disease and not injuries is new matter that may be rebutted. Guenther *v.* Metropolitan R. Co., 23 App. Cas. (D. C.) 493. In a suit on a promissory note by several plaintiffs suing as copartners, in which the issue is as to the existence of the partnership, the sworn statements of plaintiffs in other suits denying the existence of the partnership, offered by defendant after plaintiffs have closed their case, constitute new matter which plaintiffs are entitled to rebut. Robinson *v.* Parker, 11 App. Cas. (D. C.) 132. As to what new matter is in will contest see Savage *v.* Bulger, 77 S. W. 717, 25 Ky. L. Rep. 1269, 76 S. W. 361, 25 Ky. L. Rep. 763.

What is proper rebutting testimony illustrated.— Where defendant, in an action for personal injuries, applied certain tests to determine whether plaintiff had curvature of the spine, it was proper for plaintiff, in rebuttal, to inquire of an expert witness whether the tests so applied were fair or proper. Rowe *v.* Whatcom County R., etc., Co., 44 Wash. 658, 87 Pac. 921. Testimony denying an *alibi* is properly in rebuttal. Campion *v.* Lattimer, 70 Nebr. 245, 97 N. W. 290. Where defendant's witnesses testified that certain notes had been executed and delivered to plaintiff's district manager in full payment of the claim sued on, such manager was entitled to testify in rebuttal that such was not the agreement. American Car, etc., Co. *v.* Alexandria Water Co., 218 Pa. St. 542, 67 Atl. 861. On a hearing of a petition to compel the issuance of a municipal liquor license, to rebut evidence tending to show the municipal board, in refusing a license, was actuated by race prejudice, the city could show that the petitioner, while holding a license, was tried and convicted before the mayor for selling liquor on Sunday. Cooke *v.* Loper, 151 Ala. 546, 44 So. 78. For further illustrations of proper rebutting testimony see Stodenmeyer *v.* Hart, 155 Ala. 243, 46 So. 488; Birmingham R., etc., Co. *v.* Mullen, 138 Ala. 614, 35 So. 701; Pronskavirtch *v.* Chicago, etc., R. Co., 232 Ill. 136, 83 N. E. 545; William Grace Co. *v.* Larson, 227 Ill. 101, 81 N. E. 44; Chicago *v.* Johnson, 98 Ill. 618; Chicago, etc., R. Co. *v.* Grimm, 25 Ind. App. 494, 57 N. E. 640; Hammond, etc., Electric R. Co. *v.* Spyzchalski, 17 Ind. App. 7, 46 N. E. 47; Tathwell *v.* Cedar Rapids, 114 Iowa 180, 86 N. W. 291; Mussellam *v.* Cincinnati, etc., R. Co., 126 Ky. 500, 104 S. W. 337, 31 Ky. L. Rep. 908; South Covington, etc., R. Co. *v.* Pelzer, 39 S. W. 496, 19 Ky. L. Rep. 88; Wineman *v.* Grummond, 90 Mich. 280, 51 N. W. 509; Burk *v.* Pence, 206 Mo. 315, 104 S. W. 23; Bode *v.* Hibberd, 50 Oreg. 501, 93 Pac. 364; Smith *v.* Mutual Cash Guaranty F. Ins. Co., 21 S. D. 433, 113 N. W. 94; Bounds *v.* Little, 79 Tex. 128, 15 S. W. 225; Houston, etc., R. Co. *v.* Cheatham, (Tex. Civ. App. 1908) 113 S. W. 777; St. Louis Southwestern R. Co. *v.* Garber, (Tex. Civ. App. 1908) 108 S. W. 742; Wilkins *v.* Brock, 81 Vt. 332, 70 Atl. 572; Willard *v.* Norcross, 81 Vt. 293, 69 Atl. 942; Morgan *v.* Hendrick, 80 Vt. 284, 67 Atl. 702; Perry *v.* Vermont Farm Mach. Co., 70 Vt. 276, 40 Atl. 731; Southern Express Co. *v.* Jacobs, 109 Va. 27, 63 S. E. 17; Atlantic, etc., R. Co. *v.* Reiger, 95 Va. 418, 28 S. E. 590.

What is not proper rebutting testimony illustrated.— Where, in an action for the death of a pedestrian attempting to cross a street cartrack at night, plaintiff offered testimony as to the absence of signal lights at the place, at the close of defendant's case, it was not error to exclude similar testimony; the evidence being not in rebuttal, and no

chief.[19] The fact that it was not then introduced does not make it discretionary with the trial court to subsequently exclude it.[20] So it has been held that when the character of evidence, whether it be rebutting or not, depends upon the effect which the jury may give to evidence which was introduced to rebut, it is not error to admit it, although its tendency as rebutting evidence is doubtful.[21] On the other hand, it is not competent for a party to go into a collateral matter on cross-examination and afterward rebut the testimony so called out,[22] or to introduce evidence to rebut matters which are not proved but merely attempted to be proved.[23] And witnesses should not be permitted to reiterate their testimony under the guise of rebuttal.[24] So the admission of improper or immaterial evidence on behalf of one party without objection will not justify a resort by the other party to immaterial and irrelevant evidence to rebut it.[25] The general rule is that parties cannot create a right to try an immaterial issue or introduce irrelevant evidence by mere silence or consent, when they might have had the adverse evidence kept out or stricken out.[26]

e. Provisional or Conditional Admission of Evidence. While the practice is not favored, the courts sometimes admit evidence which on its face appears to be

reason being given tending to appeal to the discretion of the court, nor excuse given for not offering the testimony when the other was given. Higgins *v.* Los Angeles R. Co., 5 Cal. App. 748, 91 Pac. 344. A witness for plaintiff stated on cross-examination that he had not testified in a justice's court that the work performed by plaintiff had not been completed as specified. A witness for defendant testified that plaintiff's witness had testified in the justice's court that the contract was not completed, whereupon plaintiff's witness was recalled and asked to state what he testified to in the justice's court relative to the contract. It was held that objection was properly sustained to the question, as it did not specifically meet any of the testimony offered by defendant. Wood *v.* Washington, 135 Wis. 299, 115 N. W. 810. For other illustrated cases see Boies *v.* Henney, 32 Ill. 130; Louisville R. Co. *v.* Gaar, (Ky. 1908) 112 S. W. 1130; Ayers *v.* Harris, 77 Tex. 108, 13 S. W. 768.

Where evidence is ruled to be in reply but afterward ruled to be new matter, the other party is properly allowed to introduce rebutting evidence. Woody *v.* Dean, 24 S. C. 499.

19. *California.*— Hardy *v.* Sexton, (1884) 5 Pac. 162.

Indiana.— Pittsburgh, etc., R. Co. *v.* Kitley, 118 Ind. 152, 20 N. E. 727.

Iowa.— Lawson *v.* Campbell, 4 Greene 413; Davidson *v.* Overhulser, 3 Greene 196.

Kentucky.—Andrews *v.* Hayden, 88 Ky. 455, 11 S. W. 428, 10 Ky. L. Rep. 1049.

New York.—Ankersmit *v.* Tuch, 114 N. Y. 51, 20 N. E. 819 [*reversing* 48 Hun 1].

Texas.— Gulf, etc., R. Co. *v.* Holliday, 65 Tex. 512.

Wisconsin.—Waterman *v.* Chicago, etc., R. Co., 82 Wis. 613, 52 N. W. 247, 1136.

United States.— Stirneman *v.* Smith, 100 Fed. 600, 40 C. C. A. 581; Manhattan L. Ins. Co. *v.* O'Neil, 90 Fed. 463, 33 C. C. A. 607.

See 46 Cent. Dig. tit. "Trial," § 149.

Interrogatories by court.—Where the court by interrogating a witness draws out a new fact tending against the party, it is bound to hear testimony in reply. Shepard *v.* Potter, 4 Hill (N. Y.) 202.

20. Ankersmit *v.* Tuch, 114 N. Y. 51, 20 N. E. 819.

21. Hollister *v.* Brown, 19 Mich. 163.

22. Buckley *v.* Silverberg, 113 Cal. 673, 45 Pac. 804; Sloan *v.* Edwards, 61 Md. 89.

Illustration.—A witness cannot be cross-examined upon irrelevant matter, impertinent to the issues in the cause, for the purpose of impeaching him; and when such immaterial evidence has been brought out, it will not authorize the introduction of contradictory proof for such purposes merely. Goodhand *v.* Benton, 6 Gill & J. (Md.) 481.

23. Chicago, etc., R. Co. *v.* Ryan, 57 Ill. App. 612.

24. People *v.* Van Ewan, 111 Cal. 144, 43 Pac. 520.

25. *Alabama.*— Avery *v.* Searcy, 50 Ala. 54.

California.— Donelly *v.* Curran, 54 Cal. 282.

Illinois.— Maxwell *v.* Durkin, 185 Ill. 546, 57 N. E. 433; Wickenkamp *v.* Wickenkamp, 77 Ill. 92; Roth *v.* Smith, 54 Ill. 431.

Indiana.—Indianapolis Journal Newspaper Co. *v.* Pugh, 6 Ind. App. 510, 33 N. E. 991.

Maryland.— Lake Roland El. R. Co. *v.* Weir, 86 Md. 273, 37 Atl. 714.

Nebraska.— McCartny *v.* Territory, 1 Nebr. 121.

New York.— Farmers', etc., Bank *v.* Whinfield, 24 Wend. 419.

West Virginia.— State *v.* Hatfield, 48 W. Va. 561, 37 S. E. 626.

United States.— Stringer *v.* Young, 3 Pet. 320, 7 L. ed. 693.

See 46 Cent. Dig. tit. "Trial," § 148.

Compare Cheek *v.* Watson, 90 N. C. 302, in which it was held that if one party gets the advantage of evidence not strictly admissible, the adverse party should be allowed like latitude in combating the same, under the direction of the court.

26. Maxwell *v.* Durkin, 185 Ill. 546, 57 N. E. 433.

inadmissible subject to the right to strike it out.[27] Thus evidence not competent and relevant at the time it is offered may be admitted on the condition that the party introducing it will subsequently introduce other evidence which will make it admissible.[28] Where testimony is introduced on condition that counsel shall subsequently introduce other evidence making it relevant and competent, and this is not done, the court may strike out the evidence of its own motion,[29] and it should strike out such evidence when a proper request is made therefor.[30] However, in the absence of such request, error cannot be assigned to the failure of the court to strike out such evidence.[31] Where documents are received in evidence subject to objection, and are not afterward excluded, they must be treated as properly before the court.[32]

f. Limiting the Number of Witnesses — (I) *POWER OF COURT TO MAKE OR RESCIND ORDER.* Ordinarily, the court has the right, in its discretion, to limit the number of witnesses,[33] and the number of depositions to be read, to prove a particular fact.[34] The rule has been applied when the fact is collateral to the main issue,[35] or the testimony is for the purpose of impeaching a witness,[36] or is expert[37]

27. McKee *v.* Bassick Min. Co., 8 Colo. 392, 8 Pac. 561.

28. See *infra*, V, B, 1, a, (II).

29. Smith *v.* Hubbell, 151 Mich. 59, 114 N. W. 865; Barker *v.* Deignan, 25 S. C. 252; Brady *v.* Berwind-White Coal Min. Co., 106 Fed. 824, 45 C. C. A. 662.

30. Frorer *v.* Landon, 130 Ill. App. 93; Blackburn *v.* Beall, 21 Md. 208; Little Klamath Water Ditch Co. *v.* Ream, 27 Oreg. 129, 39 Pac. 998; Walde County *v.* Oppenheimer, (Tex. Civ. App. 1909) 115 S. W. 904; Huckins *v.* Kapf, (Tex. Civ. App. 1889) 14 S. W. 1016.

Where some connecting proof is made the court may decline to strike out the evidence. Holmes *v.* Rogers, 4 N. Y. St. 426.

31. Crosett *v.* Whelan, 44 Cal. 200; Hix *v.* Gulley, 124 Ga. 547, 52 S. E. 890; Leipird *v.* Stotler, 97 Iowa 169, 66 N. W. 150; Bayliss *v.* Cockcroft, 81 N. Y. 363. See also Camden, etc., R. Co. *v.* Williams, 61 N. J. L. 646, 40 Atl. 634; International Bldg., etc., Assoc. *v.* Fortassain, (Tex. Civ. App. 1893) 23 S. W. 496. *Compare* Wilson *v.* Jernigan, 51 Fla. 277, 49 So. 44, holding that if evidence is conditionally received, and the necessary connecting evidence is not introduced, so as to show the relevancy of the admitted evidence, the court should exclude the evidence so received on its own motion, but if the failure to connect be not apparent or glaring, the objecting party should move to exclude it.

32. German-American Bank *v.* Manning, 133 Mo. App. 294, 113 S. W. 251.

33. *Colorado.*— Outcalt *v.* Johnston, 9 Colo. App. 519, 49 Pac. 1058.

Illinois.— Gray *v.* St. John, 35 Ill. 222.

Iowa.— Preston *v.* Cedar Rapids, 95 Iowa 71, 6 N. W. 577; Bays *v.* Hunt, 60 Iowa 251, 14 N. W. 785; Everett *v.* Union Pac. R. Co., 59 Iowa 243, 13 N. W. 109; Bays *v.* Herring, 51 Iowa 286, 1 N. W. 558; Kesee *v.* Chicago, etc., R. Co., 30 Iowa 78, 6 Am. Rep. 643.

Massachusetts.— Cushing *v.* Billings, 2 Cush. 158.

Michigan.— Detroit City R. Co. *v.* Mills, 85 Mich. 634, 48 N. W. 1007.

Missouri.— Markham *v.* Herrick, 82 Mo. App. 327.

New York.— Anthony *v.* Smith, 4 Bosw. 503.

Ohio.— Hupp *v.* Boring, 8 Ohio Cir. Ct. 259, 4 Ohio Cir. Dec. 560.

Washington.— Swope *v.* Seattle, 36 Wash. 113, 78 Pac. 607.

Wisconsin.— Larson *v.* Eau Claire, 92 Wis. 86, 65 N. W. 731.

United States.— American Stove Co. *v.* Cleveland Foundry Co., 158 Fed. 978, 86 C. C. A. 182 [*reversing* 157 Fed. 562].

See 46 Cent. Dig. tit. "Trial," § 133.

Illustration.— Where, in an action for the price of cattle sold at a public sale, the issues involved the amount of the buyer's bid, etc., and more than two hundred persons were at the sale, the court properly limited the number of witnesses on any issue to five. Austin *v.* Smith, (Iowa 1906) 109 N. W. 289.

34. Mueller *v.* Rebhan, 94 Ill. 142; Gray *v.* St. John, 35 Ill. 222; Cox *v.* Pruitt, 25 Ind. 90, especially where such fact is not controverted.

35. Bays *v.* Hunt, 60 Iowa 251, 14 N. W. 785; Everett *v.* Union Pac. R. Co., 59 Iowa 243, 13 N. W. 109; Bays *v.* Herring, 51 Iowa 286, 1 N. W. 558; Hollywood *v.* Reed, 57 Mich. 234, 23 N. W. 792; Biester *v.* State, 65 Nebr. 276, 91 N. W. 416; Bissell *v.* Cornell, 24 Wend. (N. Y.) 354.

36. Bunnell *v.* Butler, 23 Conn. 65; Traders' Ins. Co. *v.* Catlin, 71 Ill. App. 569. But to limit the number to three only is error. Haag *v.* Cooley, 33 Kan. 387, 6 Pac. 585.

Expression of opinion as to character of witness.— The action of a judge in limiting the number of impeaching witnesses, by saying to counsel that if he called any more it would be at his expense, is not erroneous, as an intimation that the character of the person attacked was sustained. Overstreet *v.* Dunlap, 56 Ill. App. 486.

37. *Colorado.*— Huett *v.* Clark, 4 Colo. App. 231, 35 Pac. 671.

Indiana.— Union R. Transfer, etc., Co. *v.* Moore, 80 Ind. 458.

Kansas.— State *v.* Burkholder, 42 Kan. 641, 22 Pac. 722.

or opinion evidence.[38] There are, however, cases holding that the court cannot limit the number of witnesses to a controlling and controverted fact,[39] especially during the time that witnesses are being examined.[40] But the court may even as to such facts limit the right of a party to call witnesses to the extent of ordering that additional witnesses shall be called only at the cost of the party calling them.[41] It is improper for the court to limit the number of witnesses which may be called by defendant to a particular number, where those witnesses who are called by him appear to be hostile.[42] Where an abuse of discretion in limiting the number of witnesses is clearly shown, an exception will lie.[43] In counting the number of witnesses to any point witnesses who prove incompetent,[44] or have no knowledge of the matter in dispute,[45] or who testify to the fact as experts,[46] or who testify thereto, although not specially called for that purpose,[47] must be counted. The parties to a cause may by stipulation limit the number of expert witnesses.[48] A rule limiting the number of witnesses permitted to be called to establish a fact does not apply to a fact that can only be established by a number of observations.[49] The court may, after limiting the number of witnesses, permit a party to introduce more than the number limited.[50]

Michigan.— Fraser *v.* Jennison, 42 Mich. 206, 3 N. W. 882.

New Hampshire.— Hilliard *v.* Beattie, 59 N. H. 462.

New York.— Sixth Ave. R. Co. *v.* Metropolitan El. R. Co., 138 N. Y. 548, 34 N. E. 400.

United States.—American Stove Co. *v.* Cleveland Foundry Co., 158 Fed. 978 [*reversing* 157 Fed. 562].

See 46 Cent. Dig. tit. "Trial," § 136.

38. Carpenter *v.* Knapp, 21 N. Y. Suppl. 297.

39. *Connecticut.*— Ward *v.* Dick, 45 Conn. 235, 29 Am. Rep. 677.

Illinois.— Green *v.* Phœnix Mut. L. Ins. Co., 134 Ill. 310, 25 N. E. 583, 10 L. R. A. 576; White *v.* Hermann, 51 Ill. 243, 99 Am. Dec. 543; Union Nat. Bank *v.* Baldenwick, 45 Ill. 375; Cooke-Brewing Co. *v.* Ryan, 98 Ill. App. 444; Crane Co. *v.* Stammers, 83 Ill. App. 329; Larned *v.* Platt, 26 Ill. App. 278.

Kentucky.— Kash *v.* Miller, 2 Bush 568; Covington *v.* Taffee, 68 S. W. 629, 24 Ky. L. Rep. 373; McPhillips *v.* Livezey, 11 Ky. L. Rep. 898.

Michigan.— Barhyte *v.* Summers, 68 Mich. 341, 36 N. W. 93.

Missouri.— Ellis *v.* St. Louis, etc., R. Co., 131 Mo. App. 395, 111 S. W. 839.

North Carolina.— Outlaw *v.* Hurdle, 46 N. C. 150. And see Taylor *v.* Security Life etc., Co., 145 N. C. 383, 59 S. E. 139, 15 L. R. A. N. S. 583.

See 46 Cent. Dig. tit. "Trial," § 133.

Contra.— Minthon *v.* Lewis, 78 Iowa 620, 43 N. W. 465.

Application of rule.— In condemnation proceedings, after plaintiff had called three witnesses on the question of damages, which was the principal issue in the case, the action of the trial court in limiting the number of witnesses allowed each side on that issue to four years, was arbitrary and erroneous. St. Louis, etc., R. Co. *v.* Aubuchon, 199 Mo. 352, 97 S. W. 867, 116 Am. St. Rep. 499.

Where a court sets aside a default as a matter of favor, it may, in its discretion, limit the number of witnesses to be heard on the different points involved. Burhans *v.* Norwood Park, 138 Ill. 147, 27 N. E. 1088.

40. St. Louis, etc., R. Co. *v.* Aubuchon, 199 Mo. 352, 97 S. W. 867, 116 Am. St. Rep. 499; Ellis *v.* St. Louis, etc., R. Co., 131 Mo. App. 395, 111 S. W. 839.

41. Chicago City R. Co. *v.* Wall, 93 Ill. App. 411; Kash *v.* Miller, 2 Bush (Ky.) 568.

42. Chicago Sanitary Dist. *v.* Curran, 132 Ill. App. 241.

43. *Indiana.*— Hubble *v.* Osborn, 31 Ind. 249.

Iowa.— Kesee *v.* Chicago, etc., R. Co., 30 Iowa 78, 6 Am. Rep. 643.

Missouri.— Markham *v.* Herrick, 82 Mo. App. 327; Nelson *v.* Wallace, 57 Mo. App. 397.

New York.—Ward *v.* Washington Ins. Co., 6 Bosw. 229. But see Anthony *v.* Smith, 4 Bosw. 503, which apparently hold that the discretion of the court is absolute.

Tennessee.— Powers *v.* McKenzie, 90 Tenn. 167, 16 S. W. 559.

But see Cushing *v.* Billings, 2 Cush. (Mass.) 158.

44. Preston *v.* Cedar Rapids, 95 Iowa 71, 63 N. W. 577.

45. Giordano *v.* Brandywine Granite Co., 3 Pennew. (Del.) 423, 52 Atl. 332.

46. Love *v.* Barnesville Mfg. Co., 3 Pennew. (Del.) 152, 50 Atl. 536. Where the order of the presiding judge limited each party to seven expert witnesses, petitioner, who had already put his seven on the stand, could not, on cross-examination of a witness called by defendant as an ordinary witness, extract an expert opinion from him. White *v.* Boston, 186 Mass. 65, 71 N. E. 75.

47. Martin *v.* Baltimore, etc., R. Co., 2 Marv. (Del.) 123, 42 Atl. 442.

48. Chicago Terminal Transfer R. Co. *v.* Bugbee, 184 Ill. 353, 56 N. E. 386.

49. Pritchard *v.* Henderson, 3 Pennew. (Del.) 128, 50 Atl. 217.

50. Brady *v.* Shirley, 18 S. D. 608, 101 N. W. 886.

(II) *TIME OF MAKING ORDER.* The better practice is to make the order before any witnesses are introduced,[51] but the order may be made when the witness whose evidence is excluded is called.[52]

g. Effect of Admission.[53] Evidence introduced in a case may be availed of by either party without reintroduction;[54] if elicited on plaintiff's cross-examination by defendant, plaintiff is entitled to the benefit thereof[55] as part of his case in chief.[56] Evidence admitted generally is presumed to be admitted for any legal purpose for which it is admissible,[57] although introduced for a special purpose.[58] But it cannot be used for an improper purpose.[59] Where by express ruling it is limited to one purpose, without exception, it cannot be used for another purpose.[60] Where the admissibility of evidence depends on disputed facts, the court should admit the evidence with instructions on the rules of law governing the different states of fact as they may find them.[61] Evidence received subject to a charge to be given is in the case, although no charge be given thereon.[62]

h. Rulings on Admission or Exclusion of Evidence. A party who objects to the introduction of evidence is entitled to a ruling from the court which should go into the record;[63] and a failure of the court to rule on evidence received subject to objection,[64] upon request so to do,[65] is error. However, it is held that in the absence of such request a failure to rule on the evidence offered is not error,[66] and although the court has erred in failing to rule on the admission or exclusion of evidence, the judgment will not be reversed therefor if no prejudice could have resulted.[67] The court having warned the jury to disregard certain evidence need not repeat its ruling on motion to strike out this evidence;[68] nor need it repeat a

51. Greene *v.* Phœnix Mut. L. Ins. Co., 134 Ill. 310, 25 N. E. 583, 10 L. R. A. 576; Everett *v.* Union Pac. R. Co., 59 Iowa 243, 13 N. W. 109; Markham *v.* Herrick, 82 Mo. App. 327. *Contra,* Williams *v.* McKee, 98 Tenn. 139, 38 S. W. 730.

52. Larson *v.* Eau Claire, 92 Wis. 86, 65 N. W. 731.

53. See also *infra,* V, A, 4, i.

54. *Illinois.*— Deshler *v.* Beers, 32 Ill. 368, 83 Am. Dec. 274.

Louisiana.— Hunter *v.* Smith, 6 Mart. N. S. 351.

Michigan.— Rickey *v.* Morrison, 69 Mich. 139, 37 N. W. 56; Barker *v.* Cleveland, 19 Mich. 230.

New York.— Fitch *v.* New York, 88 N. Y. 500.

Pennsylvania.— Boyle *v.* Hamburg-Bremen F. Ins. Co., 169 Pa. St. 349, 32 Atl. 553.

See 46 Cent. Dig. tit. "Trial," § 129.

55. Smith *v.* Zeigler, 17 N. Y. Suppl. 338.

56. Wilson *v.* Harris, 21 Mont. 374, 54 Pac. 46, 19 Mont. 69, 47 Pac. 1101.

57. Snodgrass *v.* Reynolds, 79 Ala. 452, 58 Am. Rep. 601; Jenkins *v.* McConico, 26 Ala. 213.

A paper admitted for what it is worth is unqualifiedly admitted. Carter *v.* Graves, 6 How. (Miss.) 9.

58. Kelly *v.* Schenectady Dutch Church, 2 Hill (N. Y.) 105.

59. Dibble *v.* Dimick, 143 N. Y. 549, 38 N. E. 724.

60. Sherman *v.* Pedrick, 35 N. Y. App. Div. 15, 54 N. Y. Suppl. 467; Sweetser *v.* Davis, 26 N. Y. App. Div. 398, 49 N. Y. Suppl. 874, 5 N. Y. Annot. Cas. 227.

61. Lackman *v.* Wood, 25 Cal. 147; McIntyre *v.* Clapp, 31 N. Y. 569; King *v.* Hanson, 13 N. D. 85, 99 N. W. 1085.

62. International Bldg., etc., Assoc. *v.* Fortassain, (Tex. Civ. App. 1893) 23 S. W. 496.

63. Faulkner *v.* I. L. Elwood Mfg. Co., 79 Ill. App. 544.

Limitation of rule.— Where, in a suit to quiet title, rulings on evidence were reserved by consent of both parties, it was not error for the court, in its final disposition of the case, to sustain the objections to the evidence which were specific, without stating reasons for the rulings; the matter being such that the objections could not have been obviated by other evidence supplied through unobjectionable means. Preston *v.* Hirsch, 5 Cal. App. 485, 90 Pac. 965.

64. Stockton *v.* Dunham, 59 Cal. 609.

65. Fuller *v.* Metropolitan L. Ins. Co., 68 Conn. 55, 35 Atl. 766, 57 Am. St. Rep. 84.

66. Gable *v.* Hainer, 83 Iowa 457, 49 N. W. 1024; Johanson *v.* Hoff, 67 Minn. 148, 69 N. W. 705; Nestal *v.* Schmid, 39 N. J. L. 686; Graham *v.* McReynolds, 90 Tenn. 673, 18 S. W. 272. And see Flam *v.* Lee, 116 Iowa 289, 90 N. W. 70, 93 Am. St. Rep. 242; Cave *v.* Anderson, 50 S. C. 293, 27 S. E. 693.

67. *California.*— Doe *v.* Allen, 1 Cal. App. 560, 82 Pac. 568.

Iowa.— Finnegan *v.* Sioux City, 112 Iowa 232, 83 N. W. 907.

Kentucky.— Roots *v.* Merriwether, 8 Bush 397.

Missouri.— State *v.* Elliott, 82 Mo. App. 458.

Montana.— Quinn *v.* Quinn, 22 Mont. 403, 56 Pac. 824.

New York.— Hopkins *v.* Clark, 90 Hun 4, 35 N. Y. Suppl. 360.

Virginia.— Motley *v.* Frank, 87 Va. 432, 13 S. E. 26.

68. Rollins *v.* O'Farrel, 77 Tex. 90, 13

ruling excluding evidence.[69] Improper evidence should not be admitted at counsel's risk,[70] but should be excluded in express terms,[71] or the intention of the court to exclude the evidence made to clearly appear.[72] The exclusion of an answered question excludes the answer as well as the question.[73] Counsel who is unable to comprehend the reason for the exclusion of evidence is entitled upon request to a statement from the court of its reasons for exclusion.[74] Evidence cannot be excluded without assigning a reason, where the probability is that the reason for the exclusion could have been obviated if known.[75] The giving of an incorrect reason for the proper exclusion of evidence does not taint the ruling with error.[76]

i. Withdrawal of Evidence. When competent evidence is once put into a case it becomes the property of all the parties for use in the case, and cannot be withdrawn by the party offering it,[77] or withdrawn by the court on its own motion.[78] This is so although it be only in part competent,[79] unless the evidence in the first instance was admitted over the objection of the opposite party,[80] or unless it was elicited on cross-examination.[81] But where improper[82] or immate-

S. W. 1021. *Contra*, Hastings *v.* Brooklyn L. Ins. Co., 3 Silv. Sup. (N. Y.) 545, 6 N. Y. Suppl. 374.

69. Bailey *v.* Ormsby, 3 Mo. 580.

70. Mayer *v.* Detroit, etc., R. Co., 152 Mich. 276, 116 N. W. 429; Collins *v.* Janesville, 111 Wis. 348, 87 N. W. 241, 1087.

71. Louisville, etc., R. Co. *v.* Collinsworth, 45 Fla. 403, 33 So. 513; Clark *v.* Carr, 45 Ill. App. 469.

A statement that evidence should be stricken out does not strike out the evidence. Richards *v.* Moore, 14 N. Y. Suppl. 851.

72. Ocobeck *v.* Myer, 127 Mich. 181, 86 N. W. 534; Dallas Consol. St. R. Co. *v.* Rutherford, (Tex. Civ. App. 1904) 78 S. W. 558; Lee *v.* Heuman, 10 Tex. Civ. App. 666, 32 S. W. 93; Nye *v.* Kelly, 19 Wash. 73, 52 Pac. 528. And see Johnson *v.* Northport Smelting, etc., Co., 50 Wash. 567, 97 Pac. 746.

Illustration.—A statement by the court in passing on evidence "my judgment would be" is equivalent to a ruling. Whitlatch *v.* Fidelity, etc., Co., 21 N. Y. App. Div. 124, 47 N. Y. Suppl. 331.

73. Consumers' Ice Co. *v.* Jennings, 100 Va. 719, 42 S. E. 879.

74. Avery *v.* Stewart, 134 N. C. 287, 46 S. E. 519; Colburn *v.* Chicago, etc., R. Co., 109 Wis. 377, 85 N. W. 354.

75. Wright *v.* Smith, 82 Ill. 527.

76. Campbell *v.* Collins, 133 Iowa 152, 110 N. W. 435.

77. Gray *v.* Gray, 3 Litt. (Ky.) 465; Hubner *v.* Metropolitan St. R. Co., 77 N. Y. App. Div. 290, 79 N. Y. Suppl. 153 [*affirmed* in 177 N. Y. 523, 69 N. E. 1124]; Frohle *v.* Brooklyn Heights R. Co., 41 N. Y. App. Div. 344, 58 N. Y. Suppl. 561; Clinton *v.* Rowland, 24 Barb. (N. Y.) 634; Decker *v.* Bryant, 7 Barb. (N. Y.) 182; Nashville *v.* Nichol, 3 Baxt. (Tenn.) 338. See also Alabama Great Southern R. Co. *v.* Hardy, 131 Ga. 238, 62 S. E. 71; Zipperrer *v.* Savannah, 128 Ga. 135, 57 S. E. 311. But see King *v.* Cooper, Walk. (Miss.) 359.

Limitation of the rule.—Where plaintiff puts in evidence a rule of defendant and defendant's evidence shows the adoption of a later rule, plaintiff may withdraw the evidence as to the rule introduced by him. Clark *v.* Boston, etc., R. Co., 164 Mass. 434, 41 N. E. 666.

One who declares he does not intend to use a paper offered by his opponent cannot object to its withdrawal. Livingston *v.* Heerman, 9 Mart. (La.) 656.

Repudiation in argument.—Evidence offered by a party cannot be repudiated by him in his argument. Dickson *v.* St. Louis, etc., R. Co., 168 Mo. 90, 67 S. W. 642.

78. Lewers *v.* Weaver, 121 Pa. St. 268, 15 Atl. 514; Rhodes *v.* Rhodes, 18 Pa. Super. Ct. 231.

79. Ferguson *v.* Davidson, 147 Mo. 664, 49 S. W. 859.

80. Graham *v.* Hopkins, 101 Ga. 121, 28 S. E. 609; Sittig *v.* Birkestack, 38 Md. 158; Providence L. Ins., etc., Co. *v.* Martin, 32 Md. 310; American Bank-Note Co. *v.* Metropolitan El. R. Co., 63 Hun (N. Y.) 506, 18 N. Y. Suppl. 532; Kepetzky *v.* Metropolitan El. R. Co., 14 Misc. (N. Y.) 311, 35 N. Y. Suppl. 766 [*affirmed* in 159 N. Y. 539, 53 N. E. 1127]. And see Alabama Great Southern R. Co. *v.* Hardy, 131 Ga. 238, 62 S. E. 71; Pittsburgh, etc., R. Co. *v.* Montgomery, 152 Ind. 1, 49 N. E. 582, 71 Am. St. Rep. 301.

Discretion of court.—Where the admission of evidence has been objected to it is within the discretion of the court to permit its withdrawal. Bell *v.* Clarion, 120 Iowa 332, 94 N. W. 907.

By objecting to the admission of evidence, the party so objecting loses the right to object to its voluntary withdrawal by the party introducing it. Sittig *v.* Birkestack, 38 Md. 158.

If the opposite party procures the withdrawal of the evidence, he loses the right to avail himself of it. Hooker *v.* Yale, 56 Miss. 197.

81. Sweeney *v.* Sweeney, 121 Ga. 293, 48 S. E. 984; Fuller *v.* Jamestown St. R. Co., 75 Hun (N. Y.) 273, 26 N. Y. Suppl. 1078 [*affirmed* in 148 N. Y. 741, 42 N. E. 1093]; Faulcon *v.* Johnston, 102 N. C. 264, 9 S. E. 394, 11 Am. St. Rep. 737.

82. Spence *v.* McMillan, 10 Ala. 583;

rial[83] evidence has been admitted the court may permit its withdrawal, or may, on its own motion, withdraw the testimony from the jury,[84] at the close of the trial.[85] The court may permit the withdrawal of original exhibits upon the substitution of copies or duplicates,[86] and such withdrawal and substitution do not constitute a withdrawal of the evidence.[87] A withdrawal by plaintiff of one of several counts in a petition carries with it the evidence admitted under the count withdrawn.[88] An objection to the withdrawal of evidence must assign a reason.[89]

B. Order of Proof and Reopening Case[90] — **1. Order of Proof — a. Order in Which Individual Items in Chain of Evidence Admitted** — (I) *In General.* Subject to the limitations that in order to be admissible as a matter of strict right, evidence must be admissible at the time it is offered;[91] and that a party must introduce all his evidence in support of his case or defense before resting, unless the court, as it may do, relaxes the strict operation of the rule in the interests of justice,[92] a party may, as a general rule, introduce the various items of evidence which go to establish his case or defense, in whatever order he pleases, and the court will not control his choice in this regard.[93] Of necessity a party is obliged

Davenport *v.* Harris, 27 Ga. 68; Salter *v.* Doe 10 Ga. 187; Wright *v.* Gillespie, 43 Mo. App. 244. Although in consequence of the admission of the improper evidence, the opposite party has put in evidence which puts him at a disadvantage. Alabama Great Southern R. Co. *v.* Burgess, 119 Ala. 555, 25 So. 251, 72 Am. St. Rep. 943.

At any time before the case is submitted a party may withdraw evidence submitted subject to exception. Spinney *v.* Meloon, 74 N. H. 384, 68 Atl. 410; Mason *v.* Knox, 66 N. H. 545, 27 Atl. 305.

83. Davenport *v.* Harris, 27 Ga. 68; Chapin *v.* Curtenius, 15 Ill. 427.

84. *Georgia.*— Salter *v.* Doe, 10 Ga. 186.

Illinois.— Clark *v.* Carr, 45 Ill. App. 469.

Iowa.— Payne *v.* Dicus, 88 Iowa 423, 55 N. W. 483.

Michigan.— Bronson *v.* Leach, 74 Mich. 713, 42 N. W. 174.

New York.— Hogan *v.* Mutual Aid, etc., Assoc., 75 Hun 271, 26 N. Y. Suppl. 1081 [*reversed* on other grounds in 121 N. Y. 147, 24 N. E. 186]; Harrington *v.* Buffalo, 2 N. Y. Suppl. 333.

North Carolina.— McAllister *v.* McAllister, 34 N. C. 184.

Pennsylvania.— Pennsylvania Nat. Gas Co. *v.* Cook, 123 Pa. St. 170, 16 Atl. 762.

United States.— Specht *v.* Howard, 16 Wall. 564, 21 L. ed. 348.

See 46 Cent. Dig. tit. "Trial," § 137.

85. Christian *v.* Tucker, 1 Colo. 49; Portland First Nat. Bank *v.* Home Ins. Co., 33 Oreg. 234, 52 Pac. 1055 (timely notice being given that the court would withdraw the evidence); Coheck *v.* George, 2 Am. L. J. (Pa.) 257.

86. *In re* More, 121 Cal. 609, 54 Pac. 97; Macfarland *v.* West Side Imp. Co., 47 Nebr. 661, 66 N. W. 637.

87. Silverman *v.* McCormick, 189 Ill. 394, 59 N. E. 949.

88. Roysdon *v.* Carr, 63 Cal. 191.

89. Collin *v.* Farmers' Alliance Mut. F. Ins. Co., 18 Colo. App. 170, 70 Pac. 698.

90. In criminal prosecutions see CRIMINAL LAW, 12 Cyc. 555 *et seq.*

In proceedings before referee see REFERENCES, 34 Cyc. 824.

On trial by court see *infra*, XII, A, 2, b.

91. See *infra*, V, B, 1, a, (II).

92. See *infra*, V, B, 1, b, (I).

93. *Alabama.*— Spears *v.* Cross, 7 Port. 437. And see Louisville, etc., R. Co. *v.* Hill, 115 Ala. 334, 22 So. 163.

California.—Doll *v.* Anderson, 27 Cal. 248; Palmer *v.* McCafferty, 15 Cal. 334.

Georgia.— McCurdy *v.* Terry, 33 Ga. 49.

Illinois.— McDaneld *v.* Logi, 143 Ill. 487, 32 N. E. 423; Hall *v.* Barnes, 82 Ill. 228; Mix *v.* Osby, 62 Ill. 193.

Indiana.— Heilman *v.* Shanklin, 60 Ind. 424; Pittsburgh, etc., R. Co. *v.* Conway, 57 Ind. 52; Goings *v.* Chapman, 18 Ind. 194; Fowler *v.* Hawkins, 17 Ind. 211; Nordyke *v.* Shearon, 12 Ind. 346; Throgmorton *v.* Davis, 4 Blackf. 174.

Iowa.— Foley *v.* Tipton Hotel Assoc., 102 Iowa 272, 71 N. W. 236; Cook *v.* Robinson, 42 Iowa 474; Woolheather *v.* Risley, 38 Iowa 486; Van Orman *v.* Spafford, 16 Iowa 186.

Kentucky.— Sidwell *v.* Worthington, 8 Dana 74; Cotton *v.* Haskins, Litt. Sel. Cas. 151.

Maine.— Hovey *v.* Chase, 52 Me. 304, 83 Am. Dec. 514.

Maryland.— Mills *v.* Bailey, 88 Md. 320, 41 Atl. 780; Warner *v.* Hardy, 6 Md. 525; Wellersburg, etc., Plank Road Co. *v.* Bruce, 6 Md. 457; Caton *v.* Carter, 9 Gill & J. 476.

Massachusetts.— Sumner *v.* Gardiner, 184 Mass. 433, 68 N. E. 850.

Michigan.— Louden *v.* Vinton, 108 Mich. 313, 66 N. W. 222.

Mississippi.— Pegram *v.* Newman, 54 Miss. 612; Tinnin *v.* Garrett, 4 Sm. & M. 207; Byrd *v.* State, 1 How. 247.

New Jersey.— Lusk *v.* Colvin, 8 N. J. L. 62.

North Carolina.— Ripley *v.* Arledge, 94 N. C. 467.

Ohio.— Wilson *v.* Barkalow, 11 Ohio St. 470.

Texas.— Frugia *v.* Trueheart, 48 Tex. Civ. App. 513, 106 S. W. 736.

Vermont.— F. R. Patch Mfg. Co. *v.* Pro-

to offer his evidence progressively; [94] and it has been said that in those cases which depend on more than one fact it cannot be a matter of much importance at which end of the testimony the proof is commenced.[95] According to some decisions, the right of a party to introduce evidence, relevant and competent when offered,[96] or which he promises to make relevant and competent by other evidence to be subsequently introduced,[97] is absolute and not subject to the discretion of the court; while others hold that the exercise of the right is within the discretion of the court.[98] In one state the decisions apparently hold that the court cannot control the order in which the party introduces his evidence, whether relevant and competent at the time the offer is made, or not.[99] This doctrine, however, so far as the reported decisions show, finds no support in the decisions of any other jurisdiction.[1]

(II) *Evidence Whose Admissibility Depends on Proof of Other Facts.*[2] According to the great weight of authority, in order to entitle a party to introduce evidence as a matter of right, it must be admissible at the time when it is offered. If proof of other facts is necessary to render it admissible the court may properly reject it,[3] or require proof of such facts before admitting

tection Lodge No. 215 I. A. M., 77 Vt. 294, 60 Atl. 74, 107 Am. St. Rep. 765; Jenne *v.* Joslyn, 41 Vt. 478.

West Virginia.— Winkler *v.* Chesapeake, etc., R. Co., 12 W. Va. 699.

See 46 Cent. Dig. tit. "Trial," § 138.

94. Mills *v.* Bailey, 88 Md. 320, 41 Atl. 780.

95. Spears *v.* Cross, 7 Port. (Ala.) 437; McCurdy *v.* Terry, 33 Ga. 49.

96. Fowler *v.* Hawkins, 17 Ind. 211; Clawson *v.* Lowry, 7 Blackf. (Ind.) 140; Sidwell *v.* Worthington, 8 Dana (Ky.) 74; Cotton *v.* Haskins, Litt. Sel. Cas. (Ky.) 151; Mills *v.* Bailey, 88 Md. 320, 41 Atl. 780; Wellersburg, etc., Plank Road Co. *v.* Bruce, 6 Md. 457; Caton *v.* Carter, 9 Gill & J. (Md.) 476; Byrd *v.* State, 1 How. (Miss.) 247.

97. McCurdy *v.* Terry, 33 Ga. 49; Mix *v.* Osby, 62 Ill. 193; Pegram *v.* Newman, 54 Miss. 612. And see Warner *v.* Hardy, 6 Md. 525; Wilson *v.* Barkalow, 11 Ohio St. 470, holding, however, that the right of the party must be limited to cases when the fact subsequently to be made relevant is itself established by competent evidence.

Illustration.— A party is entitled to introduce a deed in evidence without first showing that there was competent authority to execute it, if, at the time, he offers to show authority subsequently. Pegram *v.* Newman, 54 Miss. 612.

98. Foley *v.* Tipton Hotel Assoc., 102 Iowa 272, 71 N. W. 236; Cook *v.* Robinson, 42 Iowa 474; Ripley *v.* Arledge, 94 N. C. 467; Frugia *v.* Trueheart, 48 Tex. Civ. App. 513, 106 S. W. 736. And see Millard *v.* Webster City, 113 Iowa 220, 84 N. W. 1044.

99. Gusman *v.* Hearsey, 26 La. Ann. 251; Gordon *v.* Millaudon, 16 La. Ann. 347; Doyle *v.* Estornet, 13 La. Ann. 318; Jones *v.* Young, 19 La. 553; Brander *v.* Ferriday, 16 La. 296; Maurin *v.* Chambers, 16 La. 207.

1. See *infra*, V, B, 1, a, (II).

2. In action to charge principal for acts of agent see PRINCIPAL AND AGENT, 31 Cyc. 1670.

3. *Alabama.*— Laster *v.* Blackwell, 128 Ala. 143, 30 So. 663; McCurry *v.* Hooper, 12 Ala. 823, 46 Am. Dec. 280; Wiswall *v.* Ross, 4 Port. 321; Peck *v.* Dinsmore, 4 Port. 212.

Arkansas.— Jones *v.* St. Louis, etc., R. Co., 53 Ark. 27, 13 S. W. 416, 22 Am. St. Rep. 175; Main *v.* Gordon, 12 Ark. 651.

California.— Petterson *v.* Stockton, etc., R. Co., 134 Cal. 244, 66 Pac. 304; Santa Cruz Butchers' Union *v.* I X L Lime Co., (1896) 46 Pac. 382.

Florida.— Carter *v.* Bennett, 4 Fla. 283.

Georgia.— Gress Lumber Co. *v.* Coody, 94 Ga. 519, 21 S. E. 217.

Illinois.— Germania F. Ins. Co. *v.* McKee, 94 Ill. 494; People *v.* Courson, 87 Ill. App. 254; McClure *v.* Osborne, 86 Ill. App. 465.

Indiana.— Breckenridge *v.* McAfee, 54 Ind. 141.

Iowa.— Pearson *v.* South, 61 Iowa 232, 16 N. W. 99.

Kentucky.— Bruen *v.* Grahn, 5 Ky. L. Rep. 312.

Maryland.— Warner *v.* Hardy, 6 Md. 525; Stewart *v.* Spedden, 5 Md. 433; Goodhand *v.* Benton, 6 Gill & J. 481.

Massachusetts.— Oberlander *v.* Carstens, 151 Mass. 18, 23 N. E. 575; Emerson *v.* Lowell Gaslight Co., 6 Allen 146, 83 Am. Dec. 621; Collins *v.* Stephenson, 8 Gray 438; Parmenter *v.* Coburn, 6 Gray 509.

Michigan.— Wierman *v.* Bay City-Michigan Sugar Co., 142 Mich. 422, 106 N. W. 75; Fredonia Nat. Bank *v.* Tommei, 131 Mich. 674, 92 N. W. 348; Smith *v.* Bye, 116 Mich. 84, 74 N. W. 302; Lungerhausen *v.* Crittenden, 103 Mich. 173, 61 N. W. 270; Bourreseau *v.* Detroit Evening Journal Co., 63 Mich. 425, 30 N. W. 376, 6 Am. St. Rep. 320.

Minnesota.— Bradley *v.* Dinneen, 88 Minn. 334, 93 N. W. 116.

New York.— Brigger *v.* Mutual Reserve Fund Life Assoc., 75 N. Y. App. Div. 149, 77 N. Y. Suppl. 362; Downing *v.* De Klyn, 1 E. D. Smith 563; Guggolz *v.* Callan, 25 Misc. 762, 54 N. Y. Suppl. 149; Mechanics', etc., Bank *v.* Livingston, 6 Misc. 81, 26 N. Y. Suppl. 25.

it.[4] However, it is very generally held that the court may in its discretion admit evidence in advance of the introduction of other facts on which its admissibility depends,[5] and other decisions, without going so far, hold that such action on the part of the court is harmless error when such other facts are subsequently proved.[6] Nevertheless, when evidence of the character under consideration is admitted out of its regular order, it is usually on a promise made by the party, or upon express requirement by the court, that proof of facts on which the admissibility of the evidence

North Carolina.— Brittain *v.* Westall, 137 N. C. 30, 49 S. E. 54.

Oregon.— Sloan *v.* Sloan, 46 Oreg. 36, 78 Pac. 893.

Pennsylvania.— Hagan *v.* Carr, 198 Pa. St. 606, 48 Atl. 688.

South Carolina.— Going *v.* Mutual Ben. L. Ins. Co., 58 S. C. 201, 36 S. E. 556; Merchants', etc., Nat. Bank *v.* Clifton Mfg. Co., 56 S. C. 320, 33 S. E. 750.

Texas.— Harvey *v.* Edens, 69 Tex. 420, 6 S. W. 306; Johnson *v.* Brown, 25 Tex. Suppl. 120; Withee *v.* Fearing, 23 Tex. 503; Lee *v.* Wharton, 11 Tex. 61.

Wisconsin.— Gibbs *v.* Holcomb, 1 Wis. 23.

See 46 Cent. Dig. tit. "Trial," § 141 *et seq.*

Contra.— Miller *v.* New Orleans Canal, etc., Co., 8 Rob. (La.) 236; Perkins *v.* Nettles, 17 La. 253.

4. *Indiana.*— Hanna *v.* Fisher, 95 Ind. 383; Goings *v.* Chapman, 18 Ind. 194; Nordyke *v.* Shearon, 12 Ind. 346.

Massachusetts.— Oberlander *v.* Carstens, 151 Mass. 18, 23 N. E. 575.

Michigan.— Sullings *v.* Shakespeare, 46 Mich. 408, 9 N. W. 451, 41 Am. Rep. 166.

New York.— Downing *v.* De Klyn, 1 E. D. Smith 563.

Texas.— Johnson *v.* Brown, 25 Tex. Suppl. 120; Lee *v.* Wharton, 11 Tex. 61.

5. *California.*— Crosett *v.* Whelan, 44 Cal. 200; Jackson *v.* Feather River, etc., Water Co., 14 Cal. 18.

Colorado.— Robert E. Lee Silver Min. Co. *v.* Englebach, 18 Colo. 106, 31 Pac. 771, agency.

Connecticut.— Watson *v.* New Milford, 72 Conn. 561, 45 Atl. 167, 77 Am. St. Rep. 345; Hammond *v.* Hammond Buckle Co., 72 Conn. 130, 44 Atl. 25; Dougherty *v.* Welch, 53 Conn. 558, 5 Atl. 704 (agency); Stirling *v.* Buckingham, 46 Conn. 461 (agency).

Florida.— Wilson *v.* Jernigan, 57 Fla. 277, 49 So. 44.

Georgia.— Lanier *v.* Hebard, 123 Ga. 626, 51 S. E. 632.

Indiana.— Wilson *v.* Wilson, 86 Ind. 472; Catterlin *v.* Douglass, 17 Ind. 213; Stephenson *v.* Doe, 8 Blackf. 508, 46 Am. Dec. 489.

Iowa.— Peterson *v.* Walter A. Wood Mowing, etc., Mach. Co., 97 Iowa 148, 66 N. W. 96, 59 Am. St. Rep. 399; Roberts *v.* Roberts, 91 Iowa 228, 59 N. W. 25; Pearson *v.* South, 61 Iowa 232, 16 N. W. 99.

Massachusetts.— Henderson *v.* Raymond Syndicate, 183 Mass. 443, 67 N. E. 427.

Michigan.— Campbell *v.* Sherman, 49 Mich. 534, 14 N. W. 484.

Minnesota.— Woodbury *v.* Larned, 5 Minn. 339, agency.

Missouri.— McDermott *v.* Judy, 67 Mo. App. 647.

Nebraska.— Ponca *v.* Crawford, 18 Nebr. 551, 26 N. W. 365.

New York.— Place *v.* Minster, 65 N. Y. 89; Staring *v.* Bowen, 6 Barb. 109; Downing *v.* De Klyn, 1 E. D. Smith 563; Kraus *v.* J. H. Mohlman Co., 18 Misc. 430, 42 N. Y. Suppl. 23.

North Carolina.— Earnhardt *v.* Clement, 137 N. C. 91, 49 S. E. 49.

Ohio.— Shahan *v.* Swan, 48 Ohio St. 25, 26 N. E. 222, 29 Am. St. Rep. 517.

Pennsylvania.— Eisenhart *v.* Slaymaker, 14 Serg. & R. 153.

South Carolina.— Perry *v.* Jefferies, 61 S. C. 292, 39 S. E. 515.

Tennessee.— Sweat *v.* Rogers, 6 Heisk. 117.

Vermont.— Chamberlin *v.* Fuller, 59 Vt. 247, 9 Atl. 832, agency.

Wisconsin.— Wausau First Nat. Bank *v.* Conway, 67 Wis. 210, 30 N. W. 215.

United States.— Metropolis Bank *v.* Guttschlick, 14 Pet. 19, 10 L. ed. 335; Loder *v.* Jayne, 142 Fed. 1010 [*reversed* on other grounds in 149 Fed. 21, 78 C. C. A. 653, 7 L. R. A. N. S. 984]; Wright *v.* Stewart, 130 Fed. 905 [*affirmed* in 147 Fed. 321, 77 C. C. A. 499]; Walton *v.* Wild Goose Min., etc., Co., 123 Fed. 209, 60 C. C. A. 155.

See 46 Cent. Dig. tit. "Trial," § 141 *et seq.*

6. *Alabama.*— La Fayette R. Co. *v.* Tucker, 124 Ala. 514, 27 So. 447.

California.— White *v.* Spreckels, 75 Cal. 610, 17 Pac. 715.

Connecticut.— Cook *v.* Ansonia, 66 Conn. 413, 34 Atl. 183.

District of Columbia.— Hazleton *v.* Le Duc, 10 App. Cas. 379.

Illinois.— Williams *v.* Carterville, 97 Ill. App. 160.

Kansas.— Taylor *v.* Mason, 28 Kan. 381; Gannon *v.* Stevens, 13 Kan. 447.

Michigan.— Bullock *v.* Tompkins, 125 Mich. 17, 83 N. W. 1029.

Nebraska.— Jones *v.* Loree, 37 Nebr. 816, 56 N. W. 390.

New Hampshire.— Tilton *v.* Tilton, 41 N. H. 479.

New Jersey.— American Popular L. Ins. Co. *v.* Day, 39 N. J. L. 89, 23 Am. Rep. 198.

New York.— Wanamaker *v.* Megraw, 48 N. Y. App. Div. 54, 62 N. Y. Suppl. 692 [*reversed* on other grounds in 168 N. Y. 125, 61 N. E. 112].

Pennsylvania.— Singer Mfg. Co. *v.* Christian, 211 Pa. St. 534, 60 Atl. 1087; Martin *v.* Bray, 1 Mona. 155, 16 Atl. 515.

West Virginia.— Winkler *v.* Chesapeake, etc., R. Co., 12 W. Va. 699.

depends shall subsequently be made.[7] The better practice, it has been said, is not to depart from the rule requiring such preliminary proof except under particular and urgent circumstances,[8] and then only conditionally upon assurance of counsel that he will furnish such proof.[9]

b. Stage of Trial at Which Evidence Admitted — (i) *General Rules Governing Procedure.* In order to prevent injurious surprises, and annoying delays in the administration of justice, rules of practice, looking to the orderly introduction of evidence by the respective parties, are essential. The trial has its regular stage of process, and the evidence should be introduced with reference thereto.[10] "Otherwise, the trial will be in perpetual confusion." [11] The general rule is, that plaintiff having the burden of proof must in the first instance produce all the evidence he has in support of his case, then defendant must offer all his evidence in defense, plaintiff then replies, confining his evidence to a direct answer to defendant's case.[12] Ordinarily the rebutting evidence offered by him upon whom the burden of proof rests concludes the introduction of evidence, but not always. Within the discretion of the court, for good reasons, in furtherance of justice, the other party may be permitted to introduce evidence in response to that called forth by the rebuttal testimony,[13] but nothing further in chief, except by permission of the court.[14]

(ii) *Discretion of Court in Enforcing Rules.* The rules set forth in the preceding section, it has been said, are rules of practice, and are considered as under the control of the court, and subject to be varied in the exercise of a sound judicial discretion.[15] They must be enforced or relaxed by the court in further-

7. *Alabama.*— McCurry *v.* Hooper, 12 Ala. 823, 46 Am. Dec. 280.

California.— Kenniff *v.* Caulfield, 140 Cal. 34, 73 Pac. 803.

Connecticut.— Hammond *v.* Hammond Buckle Co., 72 Conn. 130, 44 Atl. 25; Dougherty *v.* Welch, 53 Conn. 558, 5 Atl. 704.

Florida.—Wilson *v.* Jernigan, 57 Fla. 277, 49 So. 44; Pittman *v.* State, 51 Fla. 94, 41 So. 385.

Illinois.— Italian-Swiss Agricultural Colony *v.* Pease, 194 Ill. 98, 62 N. E. 317 [*affirming* 96 Ill. App. 45].

Indiana.— Haller *v.* Gibson, 30 Ind. App. 10, 65 N. E. 293.

Iowa.— Leipird *v.* Stotler, 97 Iowa 169, 66 N. W. 150.

Maryland.—Warner *v.* Hardy, 6 Md. 525.

Missouri.— Gage *v.* Averill, 57 Mo. App. 111.

New York.— Bayliss *v.* Cockcroft, 81 N. Y. 363; Downing *v.* De Klyn, 1 E. D. Smith 563; Lanahan *v.* Henry Zeltner Brewing Co., 20 Misc. 551, 46 N. Y. Suppl. 431; Hadcock *v.* O'Rourke, 6 N. Y. Suppl. 549 [*affirmed* in 127 N. Y. 681, 28 N. E. 256].

Vermont.— Earl *v.* Tupper, 45 Vt. 275.

See 46 Cent. Dig. tit. "Trial," § 141 *et seq.*

8. McKee *v.* Bassick Min. Co., 8 Colo. 392, 8 Pac. 561; Gage *v.* Averill, 57 Mo. App. 111; Place *v.* Minster, 65 N. Y. 89; Russell *v.* Farrell, 102 Tenn. 248, 52 S. W. 146.

9. Dougherty *v.* Welch, 53 Conn. 558, 5 Atl. 704; Lombard *v.* Cheever, 8 Ill. 469.

Necessity for suggestion that evidence may become competent.—Where evidence offered is clearly objectionable, and there is no suggestion that it may become competent through circumstances not then disclosed, it is improper to admit it subject to the objection. Hagan *v.* McDermott, 134 Wis. 490, 115 N. W. 138.

10. Robinson *v.* Parker, 11 App. Cas. (D. C.) 132; Bannon *v.* Warfield, 42 Md. 22.

11. 1 Greenleaf Ev. (16th ed.) 466*a*.

12. *Connecticut.*— Hathaway *v.* Hemingway, 20 Conn. 191.

District of Columbia.— Robinson *v.* Parker, 11 App. Cas. 132.

Georgia.—Walker *v.* Walker, 14 Ga. 242.

Kentucky.— Hocker *v.* Davis, 2 T. B. Mon. 118.

Maryland.— Bannon *v.* Warfield, 42 Md. 22.

New Hampshire.—Pierce *v.* Wood, 23 N. H. 519.

New York.— Marshall *v.* Davies, 78 N. Y. 414, 58 How. Pr. 231; Seeley *v.* Chittenden, 4 How. Pr. 265.

Ohio.— Graham *v.* Davis, 4 Ohio St. 362, 62 Am. Dec. 285.

South Carolina.— Clinton *v.* McKenzie, 5 Strobh. 36.

Vermont.— Watkins *v.* Rist, 68 Vt. 486, 35 Atl. 431.

United States.— Chicago First Unitarian Soc. *v.* Faulkner, 91 U. S. 415, 23 L. ed. 283.

And see 1 Greenleaf Ev. (16th ed.) § 466*a*.

Will contest.— One contesting the validity of a will on the ground of want of testamentary capacity must offer all his evidence on this point in chief. Brown *v.* Ward, 53 Md. 376, 36 Am. Rep. 422.

13. Gray *v.* Sharp, 17 Colo. App. 139, 67 Pac. 351; Walker *v.* Walker, 14 Ga. 242; Graham *v.* Davis, 4 Ohio St. 362, 62 Am. Dec. 285; Thompson Trials, § 306 *et seq.*

14. Walker *v.* Walker, 14 Ga. 242.

15. Goss *v.* Turner, 21 Vt. 437.

ance of justice, and are not to be applied with such technical precision and unbending rigor as to produce injustice;[16] and it is almost universally held that it is discretionary with the court whether it shall admit or reject evidence which is not offered in accordance with the rules prescribing the stage of the trial at which it must be offered,[17] and that the exercise of this discretion in permitting evidence

16. Gray *v.* Sharp, 17 Colo. App. 139, 67 Pac. 351; Tierney *v.* Spiva, 76 Mo. 279.

17. *Alabama.*— Louisville, etc., R. Co. *v.* Hill, 115 Ala. 334, 22 So. 163; Drum *v.* Harrison, 83 Ala. 384, 3 So. 715; Conoly *v.* Gayle, 61 Ala. 116.

California.— Gordon *v.* Searing, 8 Cal. 49; Bashore *v.* Mooney, 4 Cal. App. 276, 87 Pac. 553.

Connecticut.— Watson *v.* New Milford, 72 Conn. 561, 45 Atl. 167, 77 Am. St. Rep. 345; Dale's Appeal, 57 Conn. 127, 17 Atl. 757; Doane *v.* Cummins, 11 Conn. 152.

Dakota.— Cheatham *v.* Wilber, 1 Dak. 335, 46 N. W. 580.

District of Columbia.— Olmstead *v.* Webb, 5 App. Cas. 38.

Florida.— Wilson *v.* Jernigan, 57 Fla. 277, 49 So. 44; Donnelly *v.* Russ, 54 Fla. 285, 45 So. 496; Atlantic Coast Line R. Co. *v.* Crosby, 53 Fla. 400, 43 So. 318; Richbourg *v.* Rose, 53 Fla. 173, 44 So. 69, 125 Am. St. Rep. 1061.

Georgia.— White *v.* Wallen, 17 Ga. 106.

Illinois.— Cook County *v.* Harley, 174 Ill. 412, 51 N. E. 754 [*affirming* 75 Ill. App. 218]; Chicago *v.* Goldman, 129 Ill. App. 282 [*affirmed in* 225 Ill. 625, 80 N. E. 349]; Bussey *v.* Hemp, 48 Ill. App. 195.

Indiana.— Pittsburgh, etc., R. Co. *v.* Noel, 77 Ind. 110; Lautman *v.* Pepin, 26 Ind. App. 427, 59 N. E. 1073.

Iowa.— Witt *v.* Latimer, 139 Iowa 273, 117 N. W. 680; Fritz *v.* Chicago Grain, etc., Co., 136 Iowa 699, 114 N. W. 193; Fitch *v.* Mason City, etc., Tract. Co., 124 Iowa 665, 100 N. W. 618; Peterson *v.* Walter A. Wood Mowing, etc., Mach. Co., 97 Iowa 148, 66 N. W. 96, 59 Am. St. Rep. 399; Wells *v.* Kavanagh, 74 Iowa 372, 37 N. W. 780; Huey *v.* Huey, 26 Iowa 525; Rutledge *v.* Evans, 11 Iowa 287.

Kansas.— McBride *v.* Steinweden, 72 Kan. 508, 83 Pac. 822; Taylor *v.* Mason, 28 Kan. 381; Blake *v.* Powell, 26 Kan. 320.

Maryland.— Miller *v.* Leib, 109 Md. 414, 72 Atl. 466 (in the absence of any rule of court); Bannon *v.* Warfield, 42 Md. 22. *Contra,* Mills *v.* Bailey, 88 Md. 320, 41 Atl. 780; Warner *v.* Hardy, 6 Md. 525; Wellersburg, etc., Plank Road Co. *v.* Bruce, 6 Md. 457; Caton *v.* Carter, 9 Gill & J. 476.

Massachusetts.— Burnside *v.* Everett, 186 Mass. 4, 71 N. E. 82; Smith *v.* Paul Boyton Co., 176 Mass. 217, 57 N. E. 367; Hodgkins *v.* Chappell, 128 Mass. 197; Proprietors Liverpool Wharf *v.* Prescott, 4 Allen 22; Cushing *v.* Billings, 2 Cush. 158.

Michigan.— Blickley *v.* Luce, 148 Mich. 233, 111 N. W. 752; Watson *v.* Watson, 53 Mich. 168, 18 N. W. 605, 51 Am. Rep. 111; Brown *v.* Marshall, 47 Mich. 576, 11 N. W. 392, 41 Am. Rep. 728; Hoffman *v.* Harrington, 44 Mich. 183, 6 N. W. 225.

Minnesota.— Bradley *v.* Dinneen, 88 Minn. 334, 93 N. W. 116; McDonald *v.* Peacock, 37 Minn. 512, 35 N. W. 370; Crandall *v.* McIlrath, 24 Minn. 127; Griffiths *v.* Wolfram, 22 Minn. 185; Groff *v.* Ramsey, 19 Minn. 44; Foster *v.* Berkey, 8 Minn. 351.

Mississippi.— Myrick *v.* Wells, 52 Miss. 149. *Contra,* Tinnin *v.* Garrett, 4 Sm. & M. 207.

Missouri.— Garland *v.* Smith, 127 Mo. 567, 28 S. W. 191, 29 S. W. 836; Ober *v.* Carson, 62 Mo. 209; Seibert *v.* Allen, 61 Mo. 482; State *v.* Linney, 52 Mo. 40; St. Louis Public Schools *v.* Risley, 40 Mo. 356; Powell *v.* Hannibal, etc., R. Co., 35 Mo. 457; Dozier *v.* Jerman, 30 Mo. 216; Krup *v.* Corley, 95 Mo. App. 640, 69 S. W. 609.

Montana.— Noyes *v.* Clifford, 37 Mont. 138, 94 Pac. 842; Stephens *v.* Elliott, 36 Mont. 92, 92 Pac. 45.

Nebraska.— McDermott *v.* Manley, 65 Nebr. 194, 90 N. W. 1119; Ream *v.* State, 52 Nebr. 727, 73 N. W. 227; Ponce *v.* Crawford, 23 Nebr. 662, 37 N. W. 609, 8 Am. St. Rep. 144; Ponca *v.* Crawford, 18 Nebr. 551, 26 N. W. 365.

New Hampshire.— Kent *v.* Tyson, 20 N. H. 121.

New Mexico.— Richardson *v.* Pierce, 14 N. M. 334, 43 Pac. 715.

New York.— Marks *v.* King, 67 Barb. 225 [*affirmed* in 64 N. Y. 628]; Bedell *v.* Powell, 13 Barb. 183; Johnston *v.* Mutual Reserve L. Ins. Co., 43 Misc. 251, 87 N. Y. Suppl. 438 [*affirmed* in 45 Misc. 316, 90 N. Y. Suppl. 539 (*affirmed* in 110 N. Y. App. Div. 888, 96 N. Y. Suppl. 1132)]; Stock *v.* Le Boutillier, 19 Misc. 112, 43 N. Y. Suppl. 248; Duffus *v.* Schwinger, 7 Misc. 499, 27 N. Y. Suppl. 949; Totten *v.* New York, etc., R. Co., 10 N. Y. Suppl. 572.

North Carolina.— Smith *v.* Smith, 30 N. C. 29.

North Dakota.— Branstetter *v.* Morgan, 3 N. D. 290, 55 N. W. 758; Bowman *v.* Eppinger, 1 N. D. 21, 44 N. W. 1000.

Oregon.— Crosby *v.* Portland R. Co., 53 Oreg. 496, 100 Pac. 300, 101 Pac. 204; Barrett *v.* Schleich, 37 Oreg. 613, 62 Pac. 792.

Pennsylvania.— American Car, etc., Co. *v.* Alexandria Water Co., 218 Pa. St. 542, 67 Atl. 861; Bowers *v.* Still, 49 Pa. St. 65; Garrigues *v.* Harris, 17 Pa. St. 344; Levers *v.* Van Buskirk, 4 Pa. St. 309; Corkery *v.* O'Neill, 9 Pa. Super. Ct. 335, 43 Wkly. Notes Cas. 420; Columbia Bridge Co. *v.* Kline, 6 Pa. L. J. 317, 4 Pa. L. J. Rep. 39.

Rhode Island.— Tucker *v.* Rhode Island Co., (1908) 69 Atl. 850; Spink *v.* New York, etc., R. Co., 26 R. I. 115, 58 Atl. 499.

South Carolina.— Webster *v.* Atlantic Coast Line R. Co., 81 S. C. 46, 61 S. E. 1080; Rearden *v.* State Mut. L. Ins. Co., 79 S. C. 526, 60 S. E. 1106.

to be introduced out of the order prescribed by the rules is not assignable as error except in a clear case of abuse of such discretion.[18]

(III) *ANTICIPATING EVIDENCE OF ADVERSARY.* Neither party is bound to anticipate the evidence of the other; and until the party having the burden of the issue has introduced evidence in support thereof, it is unnecessary for the other to introduce evidence to defeat it,[19] and it is not error for the court to decline to permit him to do so.[20] However, it is very generally held that the court may in its discretion permit a party to introduce evidence in chief which would have been proper in rebuttal.[21] As has been said, where the materiality of evidence,

Tennessee.— Morris *v.* Swaney, 7 Heisk. 591.

Texas.— Rains *v.* Hood, 23 Tex. 555; Frugia *v.* Trueheart, 48 Tex. Civ. App. 513, 106 S. W. 736; Caraway *v.* Citizens' Nat. Bank, (Civ. App. 1895) 29 S. W. 506; Myers *v.* Maverick, (Civ. App. 1894) 27 S. W. 1083; Gulf, etc., R. Co. *v.* Dunlap, (Civ. App. 1894) 26 S. W. 655.

Utah.— Neilson *v.* Nebo Brown Stone Co., 25 Utah 37, 69 Pac. 289; Stephens *v.* Union Assur. Soc., 16 Utah 22, 50 Pac. 626, 67 Am. St. Rep. 595.

Vermont.— Wells *v.* Boston, etc., R. Co., 82 Vt. 108, 71 Atl. 1103; Chamberlin *v.* Fuller, 59 Vt. 247, 9 Atl. 832; Goss *v.* Turner, 21 Vt. 437.

Virginia.— Southern R. Co. *v.* Stockdon, 106 Va. 693, 56 S. E. 713.

Wisconsin.— Warren *v.* Rosenberg, 94 Wis. 523, 69 N. W. 339.

See 46 Cent. Dig. tit. "Trial," § 139.

Contra.— Sidwell *v.* Worthington, 8 Dana (Ky.) 74; Cotton *v.* Haskins, Litt. Sel. Cas. (Ky.) 151; Gordon *v.* Millaudon, 16 La. Ann. 347; Doyle *v.* Estornet, 13 La. Ann. 318; Jones *v.* Young, 19 La. 553; Brander *v.* Ferriday, 16 La. 296; Maurin *v.* Chambers, 16 La. 207.

Genuineness of instrument.—The court may decline to hear further evidence as to the genuineness of an instrument after a ruling has been made excluding the instrument. Kruse *v.* Chester, 66 Cal. 353, 5 Pac. 613.

18. *Alabama.*— Henry *v.* Frohlichstein, 149 Ala. 330, 43 So. 126.

District of Columbia.— Olmstead *v.* Webb, 5 App. Cas. 38.

Indiana.— Miller *v.* Dill, 149 Ind. 326, 49 N. E. 272; Western Union Tel. Co. *v.* Buskirk, 107 Ind. 549, 8 N. E. 557.

Iowa.— Cook *v.* Robinson, 42 Iowa 474; Lusk *v.* Colvin, 8 N. J. L. 62, where the matters to be proved are distinct but component parts of a party's case.

Massachusetts.— Boisvert *v.* Ward, 199 Mass. 594, 85 N. E. 849.

Minnesota.—Lynd *v.* Pickett, 7 Minn. 184, 82 Am. Dec. 79.

Missouri.— Jefferson *v.* Ummelmann, 56 Mo. App. 440.

Nebraska.— McCleneghan *v.* Reid, 34 Nebr. 472, 51 N. W. 1037.

Ohio.— Cincinnati, etc., R. Co. *v.* Urbana Third Nat. Bank, 1 Ohio Cir. Ct. 199, 1 Ohio Cir. Dec. 109.

Oklahoma.— Higgins *v.* Street, 19 Okla. 42, 92 Pac. 155.

Oregon.— Pomeroy First Nat. Bank *v.* McCullough, 50 Oreg. 508, 93 Pac. 366, 126 Am. St. Rep. 758, 17 L. R. A. N. S. 1105.

Pennsylvania.— Dosch *v.* Diem, 176 Pa. St. 603, 35 Atl. 207.

Virginia.— McIntyre *v.* Smythe, 108 Va. 736, 62 S. E. 930.

See 46 Cent. Dig. tit. "Trial," § 139.

Evidence relating to different points of fact may be so blended in the same transaction as to render a separation impossible in which event the whole may be submitted in mass at the same time. Allen *v.* Parish, 3 Ohio 107.

Admission of evidence out of its regular order is not prejudicial, where it is followed by the necessary proof. Butte Consol. Min. Co. *v.* Barker, 35 Mont. 327, 89 Pac. 302, 90 Pac. 177; Richardson *v.* Pierce, 14 N. M. 334, 93 Pac. 715. And see Chicago *v.* Hutchinson, 129 Ill. App. 239. If not followed by such proof, however, it may be stricken out. Schmitt *v.* Kurrus, 234 Ill. 578, 85 N. E. 261; German Ins. Bank *v.* Martin, 131 Ky. 57, 114 S. W. 319.

Presumptions.— Abuse of discretion will not be presumed. Liverpool Wharf *v.* Prescott, 4 Allen (Mass.) 22.

19. *Illinois.*— Chicago, etc., R. Co. *v.* Phelps, 125 Ill. 482, 17 N. E. 769.

Indiana.—Terre Haute, etc., R. Co. *v.* Baker, 122 Ind. 433, 24 N. E. 83; Dodge *v.* Dunham, 41 Ind. 186.

Iowa.— Luke *v.* Bruner, 15 Iowa 3.

New York.— Bancroft *v.* Sheehan, 21 Hun 550.

Washington.— Rowe *v.* Whatcom County R., etc., Co., 44 Wash. 658, 87 Pac. 921.

20. *California.*— Turner *v.* Southern Pac. Co., 142 Cal. 580, 76 Pac. 384.

Kansas.— Prosser *v.* Pretzel, (App. 1899) 55 Pac. 854.

Massachusetts.— York *v.* Pease, 2 Gray 282.

Michigan.— Mowich *v.* Elsey, 47 Mich. 10, 8 N. W. 587, 10 N. W. 57.

Montana.— Lisker *v.* O'Rourke, 28 Mont. 129, 72 Pac. 416, 755.

Rhode Island.— Bowen *v.* White, 26 R. I. 68, 58 Atl. 252.

21. *Alabama.*— Ross *v.* Pearson, 21 Ala. 473.

California.— Cashman *v.* Harrison, 90 Cal. 297, 27 Pac. 283. And see Wendling Lumber Co. *v.* Glenwood Lumber Co., 153 Cal. 411, 95 Pac. 1029.

Georgia.— East Tennessee, etc., R. Co. *v.* Hesters, 90 Ga. 11, 15 S. E. 828.

Illinois.— Mayer *v.* Brensinger, 180 Ill. 110, 54 N. E. 159, 72 Am. St. Rep. 196 [*affirm-*

although properly rebutting, is foreshadowed by the line of defense it is within the discretion of the court to admit it in advance of the evidence which it is intended to rebut.[22] However, if this is done, the party is not entitled as a matter of right to introduce further evidence to the same point in rebuttal of his adversaries' case.[23] Having elected to rebut it in advance, he should put in all his evidence upon that point then.[24] Hence, the court in its discretion may properly refuse to admit further evidence to the same point in rebuttal,[25] and ordinarily it should do so.[26]

(IV) *Introducing Evidence in Support of Case or Defense on Cross-Examination.* The court may permit a party to introduce evidence in support of his case or defense, during the cross-examination of his adversaries or his adversaries' witnesses;[27] but refusal of such permission is not error.[28] The order of testimony both as regards the examination of the particular witness and the general course of the trial is within the discretion of the court.[29]

(V) *Evidence in Chief on Rebuttal.* The court may, in its discretion, decline to permit either party to introduce evidence in support of his case in chief on rebuttal,[30] especially upon a subject fully covered in his case in

ing 74 Ill. App. 475]; Hintz *v.* Graupner, 138 Ill. 158, 27 N. E. 935.

Iowa.— Alquist *v.* Eagle Iron Works, 126 Iowa 67, 101 N. W. 520; Patterson *v.* Chicago, etc., R. Co., 70 Iowa 593, 33 N. W. 228.

Kentucky.— Camden Interstate R. Co. *v.* Lester, (1909) 118 S. W. 268. *Compare* Kentucky Cent. R. Co. *v.* Lebus, 14 Bush 518.

Michigan.— Mawich *v.* Elsey, 47 Mich. 10, 8 N. W. 587, 10 N. W. 57.

Missouri.— Easley *v.* Missouri Pac. R. Co., 113 Mo. 236, 20 S. W. 1073.

Montana.— Tague *v.* John Caplice Co., 28 Mont. 51, 72 Pac. 297.

Nevada.— Gillson *v.* Price, 18 Nev. 109, 1 Pac. 459.

Pennsylvania.— Lilly *v.* Person, 168 Pa. St. 219, 32 Atl. 23; Wells *v.* Leek, 151 Pa. St. 431, 25 Atl. 101; Carey *v.* Bright, 58 Pa. St. 70; Fisher *v.* Ruch, 12 Pa. Super. Ct. 240.

South Dakota.— Atlas Lumber, etc., Co. *v.* Flint, 20 S. D. 118, 104 N. W. 1046.

Utah.— Neilson *v.* Nebo Brown Stone Co., 25 Utah 37, 69 Pac. 289.

Vermont.— Walker *v.* Westfield, 39 Vt. 246.

Washington.—Croft *v.* Northwestern Steamship Co., 20 Wash. 175, 55 Pac. 42.

See 46 Cent. Dig. tit. "Trial," § 147.

Illustrations.— In a personal injury suit, the introduction of evidence in chief to anticipate an affirmative defense that plaintiff is simulating is proper, and, although it may more properly be introduced in rebuttal, the order of proof rests largely within the discretion of the trial court. Stephens *v.* Elliott, 36 Mont. 92, 92 Pac. 45. So in an action on a note by the indorser the court may in its discretion admit evidence of failure of consideration before all the evidence as to time of its transfer was offered. Bussey *v.* Hemp, 48 Ill. App. 195.

Evidence admissible in chief for some purposes and in rebuttal for others may be admitted in chief, the purpose of its admission being properly restricted. Lind *v.* Uniform Stave, etc., Co., 140 Wis. 183, 120 N. W. 839.

22. Dimick *v.* Downs, 82 Ill. 570; Williams *v.* Dewitt, 12 Ind. 309.

23. Holbrook *v.* McBride, 4 Gray (Mass.) 215; York *v.* Pease, 2 Gray (Mass.) 282.

Where defendant brings out a matter on cross-examination of plaintiff's witness, it is not competent to introduce evidence in surrebuttal to explain such matter. Hendershott *v.* Western Union Tel. Co., 114 Iowa 415, 87 N. W. 288.

24. Casey *v.* Le Roy, 38 Cal. 697.

25. Casey *v.* Le Roy, 38 Cal. 697; Muntz *v.* Cottage Hill Land Co., 222 Pa. St. 621, 72 Atl. 247.

26. Williams *v.* Dewitt, 12 Ind. 309; York *v.* Pease, 2 Gray (Mass.) 282.

27. *California.*— Moody *v.* Peirano, 4 Cal. App. 411, 88 Pac. 380.

Missouri.— Patton *v.* Fox, 179 Mo. 525, 78 S. W. 804.

Nevada.— McLeod *v.* Lee, 17 Nev. 103, 28 Pac. 124.

South Dakota.— Lemon *v.* Little, 21 S. D. 628, 114 N. W. 1001.

Vermont.— Ranney *v.* St. Johnsbury, etc., R. Co., 67 Vt. 594, 32 Atl. 810.

Wisconsin.— Tietz *v.* Tietz, 90 Wis. 66, 62 N. W. 939.

Compare Conant *v.* Jones, 120 Ga. 568, 48 S. E. 234, holding that this should not be permitted except by consent.

Facts showing that plaintiff never had any cause of action may be shown on his cross-examination. Lemon *v.* Little, 21 S. D. 628, 114 N. W. 1001.

28. *Illinois.*— Peyton *v.* Morgan Park, 172 Ill. 102, 49 N. E. 1003; Wheeler, etc., Mfg. Co. *v.* Barrett, 70 Ill. App. 222.

New York.— American Encaustic Tiling Co. *v.* Reich, 12 N. Y. Suppl. 927.

Oregon.— McGregor *v.* Oregon R., etc., Co., 50 Oreg. 527, 93 Pac. 465, 14 L. R. A. N. S. 668.

Rhode Island.— Bowen *v.* White, 26 R. I. 68, 58 Atl. 252.

United States.— Wilson *v.* Hoffman, 123 Fed. 984 [*reversed* on other grounds in 130 Fed. 694, 134 Fed. 844].

29. Ranney *v.* St. Johnsbury, etc., R. Co., 67 Vt. 594, 32 Atl. 810.

30. *Alabama.*— Gosdin *v.* Williams, 151 Ala. 592, 44 So. 611.

chief,[31] as it is not offered in conformity with the rules relating to the order of proof. After he has rested neither party can, as a matter of right, introduce any further testimony which may properly be considered testimony in chief.[32] "The strict rule is that he must try his case out when he commences," [33] and cannot divide his evidence and give part in chief and part in rebuttal.[34] Any relaxation of this rule is but an appeal to the sound discretion of the court.[35] Nevertheless, the court

California.— Young *v.* Brady, 94 Cal. 128, 29 Pac. 489; Kohler *v.* Wells, 26 Cal. 606; Yankee Jim's Union Water Co. *v.* Crary, 25 Cal. 504, 85 Am. Dec. 145. See also Schearer *v.* Deming, 154 Cal. 138, 97 Pac. 155.

Colorado.— Mouat *v.* Hildebrand, 15 Colo. 382, 24 Pac. 1042; Union Pac., etc., R. Co. *v.* Perkins, 7 Colo. App. 184, 42 Pac. 1047.

District of Columbia.—Robinson *v.* Parker, 11 App. Cas. 132; Birmingham *v.* Pettit, 21 D. C. 209; Prindle *v.* Campbell, 18 Mackey 598.

Florida.— Coker *v.* Hayes, 16 Fla. 368.

Illinois.— Hoopeston First Nat. Bank *v.* Lake Erie, etc., R. Co., 174 Ill. 36, 50 N. E. 1023; Sandwich *v.* Dolan, 141 Ill. 430, 31 N. E. 416 [*affirming* 42 Ill. App. 53]; Mosher *v.* Rogers, 117 Ill. 446, 5 N. E. 583.

Indiana.— Hilker *v.* Hilker, 153 Ind. 425, 55 N. E. 81; Johnson *v.* Brown, 130 Ind. 534, 28 N. E. 698; Brown *v.* Marshall, 120 Ind. 323, 22 N. E. 312; Bowen *v.* Jones, 13 Ind. App. 193, 41 N. E. 400; Indiana Farmer's Live Stock Ins. Co. *v.* Byrkett, 9 Ind. App. 443, 36 N. E. 779.

Iowa.— Manning *v.* Burlington, etc., R. Co., 64 Iowa 240, 20 N. W. 169.

Kentucky.— Morehead *v.* Anderson, 125 Ky. 77, 100 S. W. 340, 30 Ky L. Rep. 1137.

Maryland.— Lurssen *v.* Lloyd, 76 Md. 360, 25 Atl. 294.

Massachusetts.— Wheeler *v.* Wheeler, 116 Mass. 297; Macullar *v.* Wall, 6 Gray 507.

Michigan.— Shearer *v.* Middleton, 88 Mich. 621, 50 N. W. 737; Beebe *v.* Koshnic, 55 Mich. 604, 22 N. W. 59; McHugh *v.* Butler, 39 Mich. 185.

Mississippi.— Jamison *v.* Moseley, 69 Miss. 478, 10 So. 582.

Missouri.— Feary *v.* Metropolitan St. R. Co., 162 Mo. 75, 62 S. W. 452; Jackson *v.* Grand Ave. R. Co., 118 Mo. 199, 24 S. W. 192; Babcock *v.* Babcock, 46 Mo. 243.

Nebraska.— Omaha Coal, etc., Co. *v.* Suess, 54 Nebr. 379, 74 N. W. 620; Chicago, etc., R. Co. *v.* Hazels, 26 Nebr. 364, 42 N. W. 93; Kansas Mfg. Co. *v.* Wagoner, 25 Nebr. 439, 41 N. W. 287.

Nevada.— Lamance *v.* Byrnes, 17 Nev. 197, 30 Pac. 700.

New Hampshire.— Saucier *v.* New Hampshire Spinning Mills, 72 N. H. 292, 56 Atl. 545.

New York.— Marshall *v.* Davies, 78 N. Y. 414, 58 How. Pr. 231 [*reversing* 16 Hun 606]; Speyer *v.* Stern, 2 Sweeny 516; Silverman *v.* Foreman, 3 E. D. Smith 322.

Oregon.— Multnomah County *v.* Willamette Towing Co., 49 Oreg. 204, 89 Pac. 389.

Pennsylvania.—Acklin *v.* McCalmont Oil Co., 201 Pa. St. 257, 50 Atl. 955.

South Carolina.— Steedman *v.* South Carolina, etc., R. Co., 66 S. C. 542, 45 S. E. 84.

Washington.— Jones *v.* Western Mfg. Co., 32 Wash. 375, 73 Pac. 359; Seattle, etc., R. Co. *v.* Roeder, 30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 864.

West Virginia.— McManus *v.* Mason, 43 W. Va. 196, 27 S. E. 293.

Wisconsin.— Stanhilber *v.* Graves, 97 Wis. 515, 73 N. W. 48; Lang *v.* Sanger, 76 Wis. 71, 44 N. W. 1095; Joyce *v.* Conlin, 72 Wis. 607, 40 N. W. 212.

United States.— Chateaugay Ore, etc., Co. *v.* Blake, 144 U. S. 476, 12 S. Ct. 731, 36 L. ed. 510; Marande *v.* Texas, etc., R. Co., 124 Fed. 42, 59 C. C. A. 562.

See 46 Cent. Dig. tit. "Trial," §§ 152, 154.

Compare Clayes *v.* Ferris, 10 Vt. 112, in which it is said that plaintiff is entitled to rest on making a *prima facie* case and afterward to adduce additional as well as rebutting testimony, but that defendant is in general required to go through with his proofs before resting.

The discretion must be exercised at the time the ruling is made, and a ruling made on other and improper grounds cannot be sustained on the ground that the evidence was not in order and that the court might properly have rejected it on that account. French *v.* Hall, 119 U. S. 152, 7 S. Ct. 170, 30 L. ed. 375.

A reëxamination of a witness, in order to afford him an opportunity to reply to a question asked him on cross-examination, should be made at the conclusion of his cross-examination, instead of calling the witness in rebuttal. Struth *v.* Decker, 100 Md. 368, 59 Atl. 727.

31. Kuznik *v.* Orient Ins. Co., 73 Ill. App. 201; Gibson *v.* Johnson, 21 Misc. (N. Y.) 59, 46 N. Y. Suppl. 870; Gilpins *v.* Consequa, 10 Fed. Cas. No. 5,452, Pet. C. C. 85, 3 Wash. 184. Unless a sufficient reason is assigned for not offering in chief. Hills *v.* Ludwig, 46 Ohio St. 373, 24 N. E. 596.

32. *California.*— Yankee Jim's Union Water Co. *v.* Crary, 25 Cal. 504, 85 Am. Dec. 145.

Connecticut.— Hathaway *v.* Hemingway, 20 Conn. 191.

Florida.— Coker *v.* Hayes, 16 Fla. 368.

Georgia.— Walker *v.* Walker, 14 Ga. 242.

Kansas.— Meixell *v.* Kirkpatrick, 33 Kan. 282, 6 Pac. 241.

New York.— Speyer *v.* Stern, 2 Sweeny 516.

Ohio.— Graham *v.* Davis, 4 Ohio St. 362, 62 Am. Dec. 285.

33. 1 Thompson Trials, § 346.

34. Kohler *v.* Wells, 26 Cal. 606; Stewart *v.* Smith, 111 Ind. 526, 13 N. E. 48.

35. Graham *v.* Davis, 4 Ohio St. 362, 62 Am. Dec. 285.

may in its discretion admit in rebuttal evidence which more properly should have been introduced in chief, and this discretion is not reviewable except in a case clear of abuse.[36] "The proper rule for the exercise of this discretion," it has been said

36. *Alabama.*— Birmingham R., etc., Co. *v.* Martin, 148 Ala. 8, 42 So. 618; Southern R. Co. *v.* Wilson, 138 Ala. 510, 35 So. 561.

Arkansas.— Kansas City Southern R. Co. *v.* Henrie, 87 Ark. 443, 112 S. W. 967.

California.— Moody *v.* Peirano, 4 Cal. App. 411, 88 Pac. 380.

Colorado.— Buckingham *v.* Harris, 10 Colo. 455, 15 Pac. 817; Gray *v.* Sharp, 17 Colo. App. 139, 67 Pac. 351; Fairbanks *v.* Weeber, 15 Colo. App. 268, 62 Pac. 368; Charles *v.* Varian, 4 Colo. App. 227, 35 Pac. 672; Brown *v.* Hillen, 4 Colo. App. 45, 34 Pac. 911.

Connecticut.— Barlow Bros. Co. *v.* Parsons, 73 Conn. 696, 49 Atl. 205; Hoadley *v.* Danbury Sav. Bank, 71 Conn. 599, 42 Atl. 667, 44 L. R. A. 321; Dubuque *v.* Coman, 64 Conn. 475, 30 Atl. 777.

Florida.— Jacksonville, etc., R. Co. *v.* Peninsular Land, etc., Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33, 65; Jacksonville, etc., R. Co. *v.* Wellman, 26 Fla. 344, 7 So. 845.

Georgia.— Central R., etc., Co. *v.* Nash, 81 Ga. 580, 7 S. E. 808; Bryan *v.* Walton, 20 Ga. 480.

Illinois.— Floto *v.* Floto, 233 Ill. 605, 84 N. E. 712; Decatur *v.* Vaughan, 233 Ill. 50, 84 N. E. 50; Maxwell *v.* Durkin, 185 Ill. 546, 57 N. E. 433; Franklin *v.* Krum, 171 Ill. 378, 49 N. E. 513; Chytraus *v.* Chicago, 160 Ill. 18, 43 N. E. 335; Willard *v.* Petitt, 153 Ill. 663, 39 N. E. 991; Chamberlain *v.* Chamberlain, 116 Ill. 480, 6 N. E. 444; Young *v.* Bennett. 5 Ill. 43; Rabbermann *v.* Pierce, 77 Ill. App. 405; Stinchfield *v.* Chicago, 60 Ill. App. 338; Gray *v.* Bonfield, 59 Ill. App. 381; Schumann *v.* Pilcher, 36 Ill. App. 43.

Indiana.—Tinkle *v.* Wallace, 167 Ind. 382, 79 N. E. 355; Miller *v.* Preble, 142 Ind. 632, 42 N. E. 220; Bedford, etc., R. Co. *v.* Rainbolt, 99 Ind. 551; Nave *v.* Flack, 90 Ind. 205, 46 Am. Rep. 205; Wines *v.* Hamilton State Bank, 22 Ind. App. 114, 53 N. E. 389; Freeman *v.* Hutchinson, 15 Ind. App. 639, 43 N. E. 16; Price *v.* Boyce, 10 Ind. App. 145, 36 N. E. 766; Taylor *v.* McGrath, 9 Ind. App. 30, 36 N. E. 163; Noblesville Gas, etc., Co. *v.* Teter, 1 Ind. App. 322, 27 N. E. 635.

Iowa.— Perin *v.* Cathcart, 115 Iowa 553, 89 N. W. 12; Hess *v.* Wilcox, 58 Iowa 380, 10 N. W. 847; Carman *v.* Roennan, 45 Iowa 135.

Kansas.— Rheinhart *v.* State, 14 Kan. 318.

Kentucky.— Spencer *v.* Shakers Soc., 64 S. W. 468, 23 Ky. L. Rep. 854.

Louisiana.— Vicksburg Liquor, etc., Co. *v.* Jefferies, 45 La. Ann. 621, 12 So. 743; Stone *v.* Carter, 5 La. 448; Sterling *v.* Carruthers, 7 Mart. N. S. 55; Richardson *v.* Debuys, 4 Mart. N. S. 127.

Maryland.— Lewis *v.* Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385.

Massachusetts.— Burnside *v.* Everett, 186 Mass. 4, 71 N. E. 82; Hodgkins *v.* Chappell, 128 Mass. 197; Lansky *v.* West End St. R. Co., 173 Mass. 20, 53 N. E. 129; Watts *v.* Stevenson, 165 Mass. 518, 43 N. E. 497; Wright *v.* Foster, 109 Mass. 57; Ray *v.* Smith, 9 Gray 141; Martin *v.* McGuire, 7 Gray 177; Robinson *v.* Fitchburg, etc., R. Co., 7 Gray 92; Chadbourn *v.* Franklin, 5 Gray 312; Morse *v.* Potter, 4 Gray 292; Ashworth *v.* Kittridge, 12 Cush. 193, 59 Am. Dec. 178.

Michigan.— Maier *v.* Massachusetts Ben. Assoc., 107 Mich. 687, 65 N. W. 552; Chamberlain *v.* Detroit Stove Works, 103 Mich. 124, 61 N. W. 532; Torrent *v.* Damm, 66 Mich. 105, 33 N. W. 49; Chase *v.* Lee, 59 Mich. 237, 26 N. W. 483.

Minnesota.— Hale *v.* Life Indemnity, etc., Co., 65 Minn. 548, 68 N. W. 182; Romer *v.* Conter, 53 Minn. 171, 54 N. W. 1052; Rosquist *v.* D. M. Gilmore Furniture Co., 50 Minn. 192, 52 N. W. 385; Plummer *v.* Mold, 22 Minn. 15; Thayer *v.* Barney, 12 Minn. 502; Beaulieu *v.* Parsons, 2 Minn. 37.

Mississippi.— French *v.* Canton, etc., R. Co., 74 Miss. 542, 21 So. 299; Wood *v.* Gibbs, 35 Miss. 559.

Missouri.— Fullerton *v.* Fordyce, 144 Mo. 519, 44 S. W. 1053; Taylor *v.* Cayce, 97 Mo. 242, 10 S. W. 832; Burns *v.* Whelan, 52 Mo. 520.

Nebraska.— McDermott *v.* Manley, 65 Nebr. 194, 90 N. W. 1119; McClellan *v.* Hein, 56 Nebr. 600, 77 N. W. 120. But see Sieber *v.* Weiden, 17 Nebr. 582, 24 N. W. 215.

Nevada.— McLeod *v.* Lee, 17 Nev. 103, 28 Pac. 124; Carlyon *v.* Lannan, 4 Nev. 156.

New Jersey.— Minard *v.* West Jersey, etc., R. Co., 74 N. J. L. 39, 64 Atl. 1054; Crosby *v.* Wells, 73 N. J. L. 790, 67 Atl. 295; Foley *v.* Brunswick Tract. Co., 69 N. J. L. 481, 55 Atl. 803.

New York.— New Jersey Steamboat Co. *v.* New York, 109 N. Y. 621, 15 N. E. 877, 2 Silv. App. 23; Bennett *v.* Edison Electric Illuminating Co., 26 N. Y. App. Div. 363, 49 N. Y. Suppl. 833 [*affirmed* in 184 N. Y. 131, 58 N. E. 7]; Niendorff *v.* Manhattan R. Co., 4 N. Y. App. Div. 46, 38 N. Y. Suppl. 690; Fox *v.* Matthiessen, 84 Hun 396, 32 N. Y. Suppl. 356, 24 N. Y. Civ. Proc. 285 [*reversed* on other grounds in 155 N. Y. 177, 49 N. E. 673]; Lindheim *v.* Duys, 11 Misc. 16, 31 N. Y. Suppl. 870; Jaffe *v.* Nagel, 114 N. Y. Suppl. 905; Hastings *v.* Palmer, 20 Wend. 225.

North Dakota.— Pease *v.* Magill, 17 N. D. 166, 115 N. W. 260.

Ohio.— Gishwiler *v.* Dodez, 4 Ohio St. 615; Graham *v.* Davis, 4 Ohio St. 362, 62 Am. Dec. 285; Loewenstein *v.* Bennet, 19 Ohio Cir. Ct. 616, 10 Ohio Cir. Dec. 530; Schaal *v.* Heck, 17 Ohio Cir. Ct. 38, 8 Ohio Cir. Dec. 596.

Oregon.— Crosby *v.* Portland R. Co., 53 Oreg. 496, 100 Pac. 300, 101 Pac. 204.

Pennsylvania.— Campbell *v.* Brown, 183 Pa. St. 112, 38 Atl. 516; Holthouse *v.* Rynd,

by an eminent author, "is, that material testimony should not be excluded because offered by the plaintiff after the defendant has rested, although not in rebuttal, unless it has been kept back by a trick, and for the purpose of deceiving the defendant and affecting his case injuriously." [37] It is of course a limitation on the exercise of this discretion that it must not be exercised to the prejudice of the adverse party.[38]

(VI) *Right of Reply to New Matter Introduced in Rebuttal.* When plaintiff in rebuttal is permitted to introduce new matter, defendant is properly permitted to introduce evidence in surrebuttal,[39] and to decline to permit him to do so is error,[40] especially where the evidence offered in surrebuttal is for the first time made competent by the evidence introduced by plaintiff in rebuttal.[41]

155 Pa. St. 43, 25 Atl. 760; Sample *v.* Robb, 16 Pa. St. 305; Wilson *v.* Jamieson, 7 Pa. St. 126.

South Carolina.— Ludden, etc., Southern Music House *v.* Sumter, 47 S. C. 335, 25 S. E. 150; Weaver *v.* Whilden, 33 S. C. 190, 11 S. E. 686; McCoy *v.* Phillips, 4 Rich. 463; Clinton *v.* McKenzie, 5 Strobh. 36.

South Dakota.— Kime *v.* Edgemont Bank, 22 S. D. 630, 119 N. W. 1003; Schott *v.* Swan, 21 S. D. 639, 114 N. W. 1005.

Tennessee.— Saunders *v.* City, etc., R. Co., 99 Tenn. 130, 41 S. W. 1031; Louisville, etc., R. Co. *v.* Parker, 12 Heisk. 49.

Texas.— San Antonio, etc., R. Co. *v.* Robinson, 79 Tex. 608, 15 S. W. 584; Ayers *v.* Harris, 77 Tex. 108, 13 S. W. 768; Karner *v.* Stump, 12 Tex. Civ. App. 460, 34 S. W. 656.

Vermont.— Stillwell *v.* Farewell, 64 Vt. 286, 24 Atl. 243.

Virginia.— Norfolk, etc., Terminal Co. *v.* Morris, 101 Va. 422, 44 S. E. 719.

Washington.— Cogswell *v.* West St., etc., Electric R. Co., 5 Wash. 46, 31 Pac. 411.

West Virginia.— Kerr *v.* Lunsford, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668.

Wisconsin.— McGowan *v.* Chicago, etc., R. Co., 91 Wis. 147, 64 N. W. 891; Barnes *v.* Stacy, 79 Wis. 55, 48 N. W. 53; Campbell *v.* Moore, 3 Wis. 767.

United States.— St. Paul Plow-Works *v.* Starling, 140 U. S. 184, 11 S. Ct. 803, 35 L. ed. 404 [*affirming* 29 Fed. 790]; Johnston *v.* Jones, 1 Black 209, 17 L. ed. 117; Wilmoth *v.* Hamilton, 127 Fed. 48, 61 C. C. A. 584; Yazoo, etc., R. Co. *v.* Wagner, 87 Fed. 855, 31 C. C. A. 261; Turner *v.* U. S., 66 Fed. 280, 13 C. C. A. 436; Kansas City, etc., R. Co. *v.* McDonald, 51 Fed. 178, 2 C. C. A. 153.

Canada.— Herbert *v.* Mercantile F. Ins. Co., 43 U. C. Q. B. 384.

See 46 Cent. Dig. tit. "Trial," § 152 *et seq.*

Application and extent of rule.— The rule has been applied where the omission is inadvertent (Denver *v.* Dunsmore, 7 Colo. 328, 3 Pac. 705); where the evidence had been erroneously rejected when offered at the proper time (Dutton *v.* Philadelphia, etc., R. Co., 32 Pa. Super. Ct. 630); where it is clear that no improper advantage has been sought in withholding it and no necessary injury will occur to the opposite party through surprise (Offenstein *v.* Bryan, 20 App. Cas. (D. C.) 1); where the opposite party is given an opportunity to reply (Meade *v.* Bowles, 123 Mich. 696, 82 N. W. 658); or makes no objection (Alling *v.* Forbes, 68 Conn. 575, 37 Atl. 390); where plaintiff has made *prima facie* case (Bedford, etc., R. Co. *v.* Rainbolt, 99 Ind. 551; Mayer *v.* Walker, 82 Tex. 222, 17 S. W. 505); or although plaintiff does not make a *prima facie* case on opening (Cutbush *v.* Gilbert, 4 Serg. & R. (Pa.) 551); or although the evidence is entirely variant from that in support of the ground originally taken (Topliff *v.* Jackson, 12 Gray (Mass.) 565; Morris *v.* Wadsworth, 17 Wend. (N. Y.) 103. And plaintiff having the right, during the introduction in chief of her evidence, to assume that defendant would read the deposition it had caused to be taken, it was not an abuse of discretion, on defendant's failure to do so, to allow plaintiff to read it after defendant had concluded the introduction of testimony. Western Union Tel. Co. *v.* Hanley, 85 Ark. 263, 107 S. W. 1168.

Necessity for offer in rebuttal.— Where testimony offered on the examination in chief is properly excluded because no foundation is laid for its introduction, if such foundation is subsequently laid, it is admissible in rebuttal, but no complaint can be made of its exclusion when no offer is made to introduce it in rebuttal. Maurice *v.* Hunt, 80 Ark. 476, 97 S. W. 664.

37. 1 Thompson Trials, § 346; Dozier *v.* Jerman, 30 Mo. 216; Richardson *v.* Stewart, 4 Binn. (Pa.) 198.

38. Gray *v.* Sharp, 17 Colo. App. 139, 67 Pac. 351. And see the following section.

39. *Alabama.*— Davenport *v.* Drake, 3 Port. 342.

Indiana.— Basye *v.* Goodman, 37 Ind. 331.

Michigan.— Devonshire *v.* Peters, 104 Mich. 501, 63 N. W. 973.

Pennsylvania.— Asay *v.* Hay, 89 Pa. St. 77.

South Carolina.— Woody *v.* Dean, 24 S. C. 499.

Vermont.— Kent *v.* Lincoln, 32 Vt. 591.

40. Rock Island *v.* Starkey, 189 Ill. 515, 59 N. E. 971 [*reversing* 91 Ill. App. 592]; Stewart *v.* Anderson, 111 Iowa 329, 82 N. W. 770; State *v.* Buchler, 103 Mo. 203, 15 S. W. 331; Maloney *v.* King, 30 Mont. 158, 76 Pac. 4.

41. Anderson *v.* Anderson, 136 Wis. 328, 117 N. W. 801.

In exercising its discretion by permitting a party to introduce evidence out of its regular order, the court should not prejudice the rights of his adversary by cutting off his right to reply to the new matter.[42] The court may, in its discretion, refuse to permit a party to introduce evidence in chief, on surrebuttal, where the ground alleged for its introduction is that the party had just learned that the witness would testify favorably for him.[43]

c. Harmless Error in Admitting Evidence Out of Order. As it is presumed that the jury considers the evidence in its entirety, irrespective of the time and order it is introduced,[44] and as the order of proof is ordinarily deemed to be a matter within the discretion of the trial court,[45] the action of the court in requiring, or permitting, evidence to be introduced out of its proper, logical, and regular order is not ground for reversal, unless it appears to be a great abuse of discretion and the other party is prejudiced thereby.[46] Thus it has been held that no prejudicial error results from the consent of the court to the introduction, as part of the party's case, of evidence which is strictly speaking rebuttal evidence,[47] or to the

42. Asay *v.* Hay, 89 Pa. St. 77. And see Beyer *v.* Hermann, 173 Mo. 295, 73 S. W. 164.

43. Beyer *v.* Hermann, 173 Mo. 295, 73 S. W. 164.

44. Beach *v.* Schroeder, 47 Colo. 312, 107 Pac. 271.

45. See *supra*, IV, B.

46. *Colorado.*— Beach *v.* Schroeder, 47 Colo. 312, 107 Pac. 271.

Georgia.— Hutchinson *v.* Jackson, 53 Ga. 56, holding that the fact that the court required one party to put certain papers in evidence, whereas they should have been introduced by the other party, is not cause for reversal, where the merits of the case are not affected.

Illinois.— Chicago, etc., R. Co. *v.* Duggan, 60 Ill. 137; Concordia F. Ins. Co. *v.* Bowen, 121 Ill. App. 35.

Indiana.— Pittsburgh, etc., R. Co. *v.* Nicholas, 165 Ind. 679, 76 N. E. 522 [*affirming* (App. 1905) 73 N. E. 195]. And see Hoffbauer *v.* Morgan, 172 Ind. 273, 88 N. E. 337.

Michigan.—Hulbert *v.* Hammond, 41 Mich. 343, 1 N. W. 1040; Hutchins *v.* Kimmell, 31 Mich. 126, 18 Am. Rep. 164.

Missouri.—Himmelberger-Harrison Lumber Co. *v.* Deneen, 220 Mo. 184, 119 S. W. 365; Wheeler *v.* Reynolds Land Co., 193 Mo. 279, 91 S. W. 1050 [*followed* in Ferguson *v.* Girard Trust Co., (Mo. 1906) 91 S. W. 1055] (holding that, in an action to quiet title to lands conveyed to plaintiff by patent, the fact that defendant was permitted to introduce evidence to show that the patent was without consideration before plaintiff had announced that he had closed his case in chief was not reversible error, where plaintiff stated that he had no evidence to offer on the question of consideration and it appeared that the merits of his case were not affected); Cox *v.* Polk, 139 Mo. App. 260, 123 S. W. 102; Siegle *v.* Phœnix Ins. Co., 107 Mo. App. 456, 81 S. W. 637; Farley *v.* Pettes, 5 Mo. App. 262.

Nebraska.— Milligan *v.* Butcher, 23 Nebr. 683, 37 N. W. 596.

New York.— Fine *v.* Interurban St. R. Co., 45 Misc. 587, 91 N. Y. Suppl. 43.

North Dakota.— Aultman *v.* Jones, 15 N. D. 130, 106 N. W. 688.

Texas.— Davis *v.* Willis, 47 Tex. 154.

Wisconsin.— Stephenson *v.* Wilson, 50 Wis. 95, 6 N. W. 240; Martineau *v.* May, 18 Wis. 54.

United States.— Chicago Great Western R. Co. *v.* Price, 97 Fed. 423, 38 C. C. A. 239.

If the evidence is competent and relevant to the issues appellate courts do not as a rule consider the question as to the order in which it was introduced. *In re* Winslow, (Iowa 1909) 122 N. W. 971; Pence *v.* Wabash R. Co., 116 Iowa 279, 90 N. W. 59.

Matters to be proved on preliminary hearing.— A judgment, rendered in an appropriation proceeding by a railroad company, where it is essential to a judgment of condemnation that it should prove its corporate existence, will not be reversed for failure to make such proof on a hearing before the court preliminary to the impaneling of the jury, if it be made at any time during the trial before judgment. Powers *v.* Hazelton, etc., R. Co., 33 Ohio St. 429.

Introduction of evidence after close of trial or argument.— A judgment will not be reversed because certain evidence was allowed to be introduced after the close of the trial, where substantially the same evidence was given during the trial, and no evidence in contradiction thereof was offered (Phillips *v.* Richardson, 12 N. Y. Suppl. 282), or where the other party does not request a continuance or opportunity to prevent further testimony (American Bridge Co. *v.* Robinson, 31 Wash. 407, 71 Pac. 1099). It is also held not to be reversible error to permit the introduction of evidence after plaintiff's counsel has concluded his argument (Hill *v.* Miller, 7 La. Ann. 621), or after the argument on both sides has been concluded (Crawford *v.* Furlong, 21 Kan. 698), especially where the counsel for the adverse party is given an opportunity to reargue the case on the additional testimony and it appears that, even if the evidence had been excluded, the verdict would necessarily have been the same (Western Union Tel. Co. *v.* Roberts, 34 Tex. Civ. App. 76, 78 S. W. 522).

47. Wolfort *v.* Hochbaum, (Ark. 1909) 117

introduction, in rebuttal, of evidence which should have been given in chief,[48] or to the reception, in surrebuttal, of testimony which would have been more properly received in rebuttal.[49] Similarly, there will be no reversal for a refusal of the court to admit certain evidence at a particular stage of the case, where no harm has resulted.[50]

2. Reopening Case — a. In General. A motion to reopen a case for the purpose of introducing further evidence in the cause is addressed to the sound discretion of the court,[51] which is not subject to review,[52] unless there has been an abuse

S. W. 525; Cashman *v.* Harrison, 90 Cal. 297, 27 Pac. 283; Easley *v.* Missouri Pac. R. Co., 113 Mo. 236, 20 S. W. 1073.

48. *Arkansas.*— Midland Valley R. Co. *v.* Hoffman Coal Co., 91 Ark. 180, 120 S. W. 380.

Colorado.— Beach *v.* Schroeder, 47 Colo. 312, 107 Pac. 271; Updegraff *v.* Lesem, 15 Colo. App. 297, 62 Pac. 342, holding that the admission of evidence in rebuttal which ought to have been given in chief is harmless, where the new proof added nothing to the case already made. And see Buckingham *v.* Harris, 10 Colo. 455, 15 Pac. 817.

Illinois.— Chicago, etc., R. Co. *v.* Duggan, 60 Ill. 137.

Indiana.— Pittsburgh, etc., R. Co. *v.* Noel, 77 Ind. 110, holding that no wrong was done, as defendant was not denied an opportunity to introduce evidence opposing that so admitted.

Iowa.— Yeager *v.* Spirit Lake, 115 Iowa 593, 88 N. W. 1095.

Missouri.— Weller *v.* Chicago, etc., R. Co., 164 Mo. 180, 64 S. W. 141, 86 Am. St. Rep. 592.

United States.— Omaha *v.* Omaha Water Co., 171 Fed. 647, 96 C. C. A. 419.

49. *In re* Winslow, (Iowa 1909) 122 N. W. 971.

50. Jernigan *v.* Clark, 134 Ala. 313, 32 So. 686 (where the opposing party admitted the fact proposed to be proved); Davis *v.* Chaplin, 110 Ga. 322, 35 S. E. 312 (where it did not affirmatively appear that the party offering the evidence could have recovered if it had been admitted at the time in question); Fuller *v.* Fuller, 83 Ky. 345 (holding that where the court, after a contestant of a will had concluded his testimony, refused to permit the propounder to testify in chief, but allowed her to testify in rebuttal, the error, if any, is harmless, where there is nothing to show that she did not testify as to everything she knew concerning the matter). And see Hoban *v.* Piquette, 52 Mich. 346, 17 N. W. 797.

51. *California.*— Loewenthal *v.* Coonan, 135 Cal. 381, 67 Pac. 324, 1033, 68 Pac. 303.

Colorado.— Plummer *v.* Struby-Estabrooke Mercantile Co., 23 Colo. 190, 47 Pac. 294.

District of Columbia.— American Stove Co. *v.* Detroit Stove Works, 31 App. Cas. 304; Consaul *v.* Cummings, 30 App. Cas. 540.

Georgia.— Luckie *v.* Johnston, 89 Ga. 321, 15 S. E. 459; Central R., etc., Co. *v.* Curtis, 87 Ga. 416, 13 S. E. 757; Cutter-Tower Co. *v.* Clements, 5 Ga. App. 291, 63 S. E. 58.

Illinois.— Kingsley *v.* Kingsley, 130 Ill. App. 53; Hock *v.* Magerstadt, 124 Ill. App. 140; Robinson *v.* Kirkwood, 91 Ill. App. 54.

Kentucky.— Ballowe *v.* Hillman, 37 S. W. 950, 18 Ky. L. Rep. 677.

Louisiana.— Jones' Succession, 120 La. 986, 45 So. 965; Pharr *v.* Shadel, 115 La. 82, 38 So. 914; Means *v.* Ross, 106 La. 175, 30 So. 300.

Michigan.— McClung *v.* McClung, 40 Mich. 493.

Nebraska.— Union Pac. R. Co. *v.* Edmondson, 77 Nebr. 682, 110 N. W. 650.

New Jersey.— Foley *v.* Brunswick Traction Co., 69 N. J. L. 481, 55 Atl. 803.

New Mexico.— Lacey *v.* Woodward, 5 N. M. 583, 25 Pac. 785.

New York.— Potsdam Electric Light, etc., Co. *v.* Potsdam, 112 N. Y. App. Div. 810, 99 N. Y. Suppl. 551; Meyer *v.* Goedel, 31 How. Pr. 456.

South Dakota.— Citizens' Bank *v.* Show, 14 S. D. 197, 84 N. W. 779.

Texas.— Gulf, etc., R. Co. *v.* Johnson, 83 Tex. 628, 19 S. W. 151.

Washington.— Knapp *v.* Order of Pendo, 36 Wash. 601, 79 Pac. 209; Thorne *v.* Joy, 15 Wash. 83, 45 Pac. 642.

Wisconsin.— Blewett *v.* Gaynor, 77 Wis. 378, 46 N. W. 547.

See 46 Cent. Dig. tit. "Trial," § 156.

After continuance.— Where a cause was taken under advisement by the judge and continued from one term to the next, the court had jurisdiction at the second term to receive further evidence. Gross *v.* Watts, 206 Mo. 373, 104 S. W. 30.

Where a case has been tried by the court without a jury, it is proper for the court to permit a party to reopen his case and introduce further evidence. Burgener *v.* Lippold, 128 Ill. App. 590. Where the district court, after trial of a case without a jury, takes it under advisement, and a party on the next day applies to introduce further testimony, which is refused for the reason that it should have been presented at the proper time, the court on appeal cannot say that there was an abuse of discretion. Michener *v.* Ford, 78 Kan. 837, 98 Pac. 273.

52. *Alabama.*— Gilbert *v.* Gilbert, 22 Ala. 529, 58 Am. Dec. 268; James *v.* Tait, 8 Port. 476.

Colorado.— Wyatt *v.* Freeman, 4 Colo. 14.

District of Columbia.— American Stove Co. *v.* Detroit Stove Works, 31 App. Cas. 304.

Illinois.— Gordon *v.* Reynolds, 114 Ill. 118, 28 N. E. 455; Sprague *v.* Craig, 51 Ill. 288; Chillicothe Ferry, etc., Co. *v.* Jameson, 48 Ill. 281; Bloom *v.* Goodner, 1 Ill. 63.

Maryland.— Cumberland, etc., R. Co. *v.* Slack, 45 Md. 161.

thereof.[53] While the exercise of the court's discretion should not be hampered by unreasonable conditions,[54] such discretion is judicial and not arbitrary.[55] It should be reasonably exercised so as not to injure the opposite party through surprise or otherwise,[56] and so as not to deprive either party of the opportunity to introduce material evidence;[57] and an improper exercise thereof may warrant a reversal.[58] Where a good reason is given for the prior omission to introduce evidence, the request to reopen should ordinarily be granted.[59] The discretion of the court

Massachusetts.— Boynton *v.* Laighton, 1 Allen 509; Marble *v.* Keyes, 9 Gray 221.

Michigan.— Detroit, etc., R. Co. *v.* Van Steinburg, 17 Mich. 99.

New York.— Burger *v.* White, 2 Bosw. 92; Ford *v.* Niles, 1 Hill 300.

North Carolina.— Dupree *v.* Virginia Home Ins. Co., 92 N. C. 417.

South Carolina.— Couch *v.* Charlotte, etc., R. Co., 22 S. C. 557.

Canada.— Gleason *v.* Williams, 27 U. C. C. P. 93.

See 46 Cent. Dig. tit. "Trial," §§ 159, 160.

53. *Arkansas.*— St. Louis, etc., R. Co. *v.* Philadelphia, etc., Fire Assoc., 55 Ark. 163, 18 S. W. 43.

California.— Douglass *v.* Willard, 129 Cal. 38, 61 Pac. 572.

District of Columbia.— Consaul *v.* Cummings, 30 App. Cas. 540. And see Central Nat. Bank *v.* National Metropolitan Bank, 31 App. Cas. 391, 17 L. R. A. N. S. 520.

Georgia.— Jowers *v.* Lott, 96 Ga. 333, 23 S. E. 189; Maddox *v.* Cole, 81 Ga. 325, 6 S. E. 601; Harrison *v.* Kiser, 79 Ga. 588, 4 S. E. 320; McDowell *v.* Sutlive, 78 Ga. 142, 2 S. E. 937; Harrison *v.* Powers, 76 Ga. 218; Clay *v.* Barlow, 73 Ga. 787; Augusta, etc., R. Co. *v.* Dorsey, 68 Ga. 228; Owens *v.* Sanders, 44 Ga. 610; Stewart *v.* Grimes, Dudley 209.

Illinois.— Mueller *v.* Rebhan, 94 Ill. 142; Elgin *v.* Renwick, 86 Ill. 498; Chicago, etc., R. Co. *v.* Harrington, 77 Ill. App. 499; Casteel *v.* Millison, 41 Ill. App. 61; Jobbins *v.* Gray, 34 Ill. App. 208.

Indiana.— McNutt *v.* McNutt, 116 Ind. 545, 19 N. E. 115, 2 L. R. A. 372; Colton *v.* Vandervolgen, 87 Ind. 361; Coats *v.* Gregory, 10 Ind. 345.

Iowa.— Thomas *v.* Chicago, etc., R. Co., 114 Iowa 169, 86 N. W. 259; Wicke *v.* Iowa State Ins. Co., 90 Iowa 4, 57 N. W. 632; Des Moines Sav. Bank *v.* Colfax Hotel Co., 88 Iowa 4, 55 N. W. 67; Le Moyne *v.* Braden, 87 Iowa 739, 55 N. W. 14; Kimball *v.* Saguin, 86 Iowa 186, 53 N. W. 116; Wheeler *v.* Smith, 13 Iowa 564.

Kentucky.— Payton *v.* McQuown, 97 Ky. 757, 31 S. W. 874, 17 Ky. L. Rep. 518, 31 L. R. A. 33, 53 Am. St. Rep. 437; Braydon *v.* Goulman, 1 T. B. Mon. 115; Chesapeake, etc., R. Co. *v.* Dupee, 67 S. W. 15, 23 Ky. L. Rep. 2349.

Michigan.— Wagar *v.* Bowley, 104 Mich. 38, 62 N. W. 293; Wendell *v.* Highstone, 52 Mich. 552, 18 N. W. 354.

Mississippi.— Lott *v.* Payne, 82 Miss. 218, 33 So. 948, 100 Am. St. Rep. 632; Meacham *v.* Moore, 59 Miss. 561.

Missouri.— Dozier *v.* Jerman, 30 Mo. 216; Owen *v.* O'Reilly, 20 Mo. 603; Rucker *v.* Eddings, 7 Mo. 115; Houston *v.* Thompson, 87 Mo. App. 63.

Nebraska.— McClellan *v.* Hein, 56 Nebr. 600, 77 N. W. 120; Gillette *v.* Morrison, 9 Nebr. 395, 2 N. W. 853.

New Jersey.— Foley *v.* Brunswick Traction Co., 69 N. J. L. 481, 55 Atl. 803.

New York.— Kellogg *v.* Kellogg, 6 Barb. 116; Marx *v.* Pennsylvania F. Ins. Co., 32 Misc. 637, 66 N. Y. Suppl. 481; Bahnsen *v.* Horwitz, 90 N. Y. Suppl. 428.

North Carolina.— Williams *v.* Averitt, 10 N. C. 308.

Ohio.— Cincinnati, etc., R. Co. *v.* Barcalow, 4 Ohio Cir. Ct. 49, 2 Ohio Cir. Dec. 413.

Pennsylvania.— Lauer *v.* Yetzer, 3 Pa. Super. Ct. 461.

Tennessee.— Thompson *v.* Clendening, 1 Head 287.

Texas.— Gulf, etc., R. Co. *v.* Johnson, 83 Tex. 628, 19 S. W. 151; Harper *v.* Marion County, 33 Tex. Civ. App. 653, 77 S. W. 1044; Mattfeld *v.* Huntington, 17 Tex. Civ. App. 716, 43 S. W. 53; Collier *v.* Myers, 14 Tex. Civ. App. 312, 37 S. W. 183; Missouri, etc., R. Co. *v.* Bless, (Civ. App. 1894) 27 S. W. 219.

Vermont.— Buchanan *v.* Cook, 70 Vt. 168, 40 Atl. 102.

Washington.— Carmack *v.* Drum, 27 Wash. 382, 67 Pac. 808.

Wisconsin.— Kerslake *v.* McInnis, 113 Wis. 659, 89 N. W. 895.

United States.— Alaska United Gold Min. Co. *v.* Keating, 116 Fed. 561, 53 C. C. A. 655; Goddard *v.* Crefield Mills, 75 Fed. 818, 21 C. C. A. 530.

See 46 Cent. Dig. tit. "Trial," § 16 *et seq.*

54. Cutter-Tower Co. *v.* Clements, 5 Ga. App. 291, 63 S. E. 58.

55. Sun Ins. Office *v.* Stegar, 129 Ky. 808, 112 S. W. 922.

56. Mueller *v.* Rebhan, 94 Ill. 142; Tomer *v.* Densmore, 8 Nebr. 384, 1 N. W. 315; Foley *v.* Brunswick Traction Co., 69 N. J. L. 481, 55 Atl. 803. And see Harrison *v.* Powers, 76 Ga. 218; Dozier *v.* Jerman, 30 Mo. 216; Peckham *v.* Leroy, 6 Duer (N. Y.) 494.

57. Mueller *v.* Rebhan, 94 Ill. 142.

58. *Michigan.*—Wagar *v.* Bowley, 104 Mich. 38, 62 N. W. 293.

Mississippi.— Meacham *v.* Moore, 59 Miss. 561.

Missouri.— Moreland *v.* McDermott, 10 Mo. 605.

New Jersey.— Wait *v.* Krewson, 59 N. J. L. 71, 35 Atl. 742.

New York.— Lewis *v.* Ryder, 13 Abb. Pr. 1.

59. *Georgia.*—Penn *v.* Georgia, etc., R. Co.,

in reopening the case and permitting the introduction of further evidence is properly exercised, where the evidence so introduced has been omitted through inadvertence or mistake on the part of counsel,[60] of a witness,[61] of the court,[62] or is newly discovered; [63] or where the opposite party attempts to take advantage of some formal point inadvertently overlooked,[64] where the counsel charges that the judge has misstated the evidence in his recapitulation thereof to the jury,[65] or where a party has been surprised by the testimony of a witness.[66] And, on the other hand, if the moving party fails to show good cause for reopening the case, it is a proper exercise of discretion to refuse to permit him to do so.[67] The discretion of the court is not abused by refusing to reopen the case to admit merely cumulative evidence,[68] especially where no diligence was used to secure the evidence; [69] to permit the taking of further evidence, the existence and materiality of which were known to the party offering it before the case was closed; [70] on account of the sickness of the party, when his counsel announced ready during the absence of the party and failed to ask a postponement; [71] in the absence of any showing as to the materiality of the evidence or the reason it was not sooner produced; [72] to permit further testimony in behalf of one party after the other

129 Ga. 856, 60 S. E. 172; Mathews *v.* Bosworth, 76 Ga. 19; Jones *v.* Smith, 64 Ga. 711; Bone *v.* Ingram, 27 Ga. 382; Wadsworth *v.* Thompson, 18 Ga. 709.

Idaho.— Giffen *v.* Lewiston, 6 Ida. 231, 55 Pac. 545.

Iowa.— Cathcart *v.* Rogers, 115 Iowa 30, 87 N. W. 738; Cowan *v.* Musgrave, 73 Iowa 384, 35 N. W. 496; Smith *v.* State Ins. Co., 58 Iowa 487, 12 N. W. 542.

Louisiana.— State *v.* Powell, 40 La. Ann. 241, 4 So. 447.

Missouri.— Moreland *v.* McDermott, 10 Mo. 605.

Pennsylvania.— Yeager *v.* Cassidy, 16 Lanc. L. Rev. 305, 13 York Leg. Rec. 61.

Tennessee.— Watterson *v.* Watterson, 1 Head 1.

Virginia.— George *v.* Pilcher, 28 Gratt. 299, 26 Am. Rep. 350.

Wisconsin.— Hanson *v.* Michelson, 19 Wis. 498.

See 46 Cent. Dig. tit. "Trial," § 159 *et seq.*

60. *California.*— Priest *v.* Union Canal Co., 6 Cal. 170.

Georgia.— Penn *v.* Georgia, etc., R. Co., 129 Ga. 856, 60 S. E. 172; Jones *v.* Smith, 64 Ga. 711.

Missouri.— Hood *v.* Mathis, 21 Mo. 308; De Soto *v.* Brown, 44 Mo. App. 148.

New York.— Charleston Bank *v.* Emeric, 2 Sandf. 718.

Rhode Island.— Hampson *v.* Taylor, 15 R. I. 83, 8 Atl. 331, 23 Atl. 732.

South Carolina.— Davis *v.* Collins, 69 S. C. 460, 48 S. E. 469.

South Dakota.— Citizens' Bank *v.* Shaw, 14 S. D. 197, 84 N. W. 779.

Texas.— Sun Ins. Office *v.* Beneke, (Civ. App. 1899) 53 S. W. 98.

Wisconsin.— Remlinger *v.* Young, 22 Wis. 426.

United States.— Hart *v.* Bowen, 86 Fed. 877, 31 C. C. A. 31.

61. Parker *v.* Johnson, 25 Ga. 576.

62. Where misapprehension of the judge as to whether a fact had been admitted is the reason for failure to introduce evidence thereof, the case may be reopened to admit evidence of such fact. Cantey *v.* Whitaker, 17 S. C. 527.

63. *Georgia.*— Hook *v.* Stovall, 26 Ga. 704.

Indiana.— Williams *v.* Allen, 40 Ind. 295.

Iowa.— Thatcher *v.* Stickney, 88 Iowa 454, 55 N. W. 488; Le Moyne *v.* Braden, 87 Iowa 739, 55 N. W. 14.

Louisiana.— State *v.* Powell, 40 La. Ann. 241, 4 So. 447.

Texas.— Cotton *v.* Jones, 37 Tex. 34.

Wisconsin.— Leary *v.* Leary, 68 Wis. 662, 32 N. W. 623.

64. Hampson *v.* Taylor, 15 R. I. 83, 8 Atl. 331, 23 Atl. 732.

65. Meyer *v.* Goedel, 31 How. Pr. (N. Y.) 456.

66. Bone *v.* Ingram, 27 Ga. 382.

67. *California.*— San Francisco Breweries *v.* Schurtz, 104 Cal. 420, 38 Pac. 92.

Iowa.— Banning *v.* Purinton, 105 Iowa 642, 75 N. W. 639; Seekel *v.* Norman, 78 Iowa 254, 43 N. W. 190.

Kentucky.— Treeman *v.* Deer, 14 Ky. L. Rep. 813; Pierce *v.* Brown, 12 Ky. L. Rep. 292; Paducah, etc., R. Co. *v.* Com., 4 Ky. L. Rep. 625.

Michigan.— Wendell *v.* Highstone, 52 Mich. 552, 18 N. W. 354.

Virginia.— Wilkie *v.* Richmond Traction Co., 105 Va. 290, 54 S. E. 43.

68. Eureka Co. *v.* Edwards, 80 Ala. 250; Macon *v.* Harris, 75 Ga. 761; Hinton *v.* Cream City R. Co., 65 Wis. 323, 27 N. W. 147.

69. Seekel *v.* Norman, 78 Iowa 254, 43 N. W. 190.

70. Loftus *v.* Fischer, 113 Cal. 286, 45 Pac. 328; Commercial Bank *v.* Brinkerhoff, 110 Mo. App. 429, 85 S. W. 121; Martin *v.* Union Mut. Ins. Co., 13 Wash. 275, 43 Pac. 53.

71. Oliver *v.* Cooper First Nat. Bank, 12 Tex. Civ. App. 78, 33 S. W. 706.

72. Patrick *v.* Perryman, 52 Ill. App. 514; McCloud-Love Live Stock Commission Co. *v.* Doud, 56 Nebr. 270, 76 N. W. 569. And see Bartlett *v.* Illinois Surety Co., 142 Iowa 538, 119 N. W. 729.

parties' witnesses have gone away,[73] when failure to sooner produce did not occur through oversight;[74] where the witness sought to be introduced was in court upon subpœna of plaintiff before the motion was made;[75] by declining to permit a witness to be recalled for the purpose of stating what his testimony was;[76] to ask him in regard to a statement made by him in the presence of plaintiff's intestate, which was not contradicted by the intestate, nor was his attention particularly called to it;[77] to permit a party to show the impertinency of testimony which was competent at the time it was offered;[78] by refusing permission to defendant to introduce expert evidence to impeach entries in an account-book, when he had not reserved the right or asked permission so to do and the suspicious entries were open to an ordinary inspection of the book;[79] or by declining to permit parties, or witnesses, who reside in the county where the case is tried, but not present until after the evidence is closed, to then testify.[80] It is abused when the court permits amendments to the pleadings to be made after the evidence is closed and then declines to hear evidence on the new issues;[81] refuses to allow plaintiff to produce additional evidence sufficient to avoid a nonsuit, unless defendant would be prejudiced thereby;[82] or refuses to permit depositions to be read after argument, having previously improperly refused an adjournment on account of the non-arrival of the depositions;[83] or where the court after plaintiff's opening argument declines to permit an important witness of defendant who became sick to testify;[84] and if, after the close of the evidence, material evidence on a controlling point in the case is discovered and the witnesses are in court, it is an abuse of discretion for the court to deny admission of such testimony, where it does not appear that the testimony would have taken the opposite party by surprise.[85]

b. Stage of Trial at Which Evidence Offered — (i) *After Party Offering Proof Has Rested.* It is within the discretion of the court whether or not to admit further evidence after the party offering the evidence has rested, and this discretion will not be reviewed except where it has clearly been abused.[86]

73. Davis *v.* Central R. Co., 75 Ga. 645; Osgood *v.* Bauder, 82 Iowa 171, 47 N. W. 1001; Wood *v.* Washington, 135 Wis. 299, 115 N. W. 810. Although the witnesses are experts. Peppett *v.* Michigan Cent. R. Co., 119 Mich. 640, 78 N. W. 900.

74. Banning *v.* Purinton, 105 Iowa 642, 75 N. W. 639.

75. Goodrich *v.* Kansas City, etc., R. Co., 152 Mo. 222, 53 S. W. 917.

76. Green *v.* Ford, 35 Md. 82.

77. Beale *v.* Hall, 22 Ga. 431.

78. Morrissett *v.* Wood, 123 Ala. 384, 26 So. 307, 82 Am. St. Rep. 127.

79. Nelson *v.* Finseth, 55 Minn. 417, 57 N. W. 141.

80. Maddox *v.* Cole, 81 Ga. 325, 6 S. E. 601; Clinton Nat. Bank *v.* Torry, 30 Iowa 85.

81. Miller *v.* Hibben, 17 Ind. 441.

82. Ellenberg *v.* Southern R. Co., 5 Ga. App. 389, 63 S. E. 240.

83. Sun Ins. Office *v.* Stegar, 129 Ky. 808, 112 S. W. 992.

84. Ft. Worth, etc., R. Co. *v.* Johnson, 5 Tex. Civ. App. 24, 23 S. W. 827.

85. St. Louis, etc., R. Co. *v.* Philadelphia Fire Assoc., 55 Ark. 163, 18 S. W. 43; Glenn *v.* Stewart, 167 Mo. 584, 67 S. W. 237. *Compare* Sisler *v.* Shaffer, 43 W. Va. 769, 28 S. E. 721.

86. *Arkansas.*—Wolfort *v.* Hochbaum, (1909) 117 S. W. 525.

Florida.— Hoey *v.* Fletcher, 39 Fla. 325, 22 So. 716.

Georgia.— Georgia R., etc., Co. *v.* Churchill, 113 Ga. 12, 38 S. E. 336; Orr *v.* Garabold, 85 Ga. 373, 11 S. E. 778; Jordan *v.* Pollock, 14 Ga. 145.

Illinois.— Hartrich *v.* Hawes, 202 Ill. 334, 67 N. E. 13 [*affirming* 103 Ill. App. 433]; Mueller *v.* Rebhan, 94 Ill. 142; Rowley *v.* Hughes, 40 Ill. 316; Wilborn *v.* Odell, 29 Ill. 456; St. Louis Consol. Coal Co. *v.* Jones, etc., Co., 120 Ill. App. 139; Chicago City R. Co. *v.* Carroll, 102 Ill. App. 202 [*affirmed* in 206 Ill. 318, 69 N. E. 1087]; Johnston *v.* Campiau, 78 Ill. App. 267; Mauzy *v.* Kinzel, 19 Ill. App. 571.

Indiana.— Ellison *v.* Branstrator, 153 Ind. 146, 54 N. E. 433.

Iowa.— Cannon *v.* Iowa City, 34 Iowa 203.

Kentucky.—Western Union Tel. Co. *v.* Parsons, 72 S. W. 800, 24 Ky. L. Rep. 2008; Ballowe *v.* Hillman, 37 S. W. 950, 18 Ky. L. Rep. 677.

Louisiana.— Means *v.* Ross, 106 La. 175, 30 So. 300.

Maryland.— State *v.* Duvall, 83 Md. 123, 34 Atl. 831.

Massachusetts.— Morena *v.* Winston, 194 Mass. 378, 80 N. E. 473; Cushing *v.* Cushing, 180 Mass. 150, 61 N. E. 814; Brittain *v.* West End St. R. Co., 168 Mass. 10, 46 N. E. 111.

Missouri.— St. Louis Public Schools *v.*

Thus it has been held proper to reopen the case and admit evidence after a party has rested where the evidence has been inadvertently omitted,[87] or is only such as the opposite party might have anticipated; [88] where the opposite party attempts to take advantage of some formal point inadvertently overlooked; [89] where the evidence offered is shown to be newly discovered; [90] or where the purpose of the evidence is to correct evidence previously offered.[91] On the other hand the court may properly refuse to reopen the case to admit facts shown to have been within the knowledge of the party before he rested his case,[92] or which would be ineffectual for the purpose offered.[93]

(II) *After Both Parties Have Rested, or Close of Evidence.* Whether or not a case shall be reopened for the introduction of evidence after both parties have rested their cases in chief,[94] or after the close of the evi-

Risley, 40 Mo. 356; Jones *v.* Relfe, 10 Mo. 623; De Soto *v.* Brown, 44 Mo. App. 148.

Montana.— Schilling *v.* Curran, 30 Mont. 370, 76 Pac. 998.

Nebraska.— Union Pac. R. Co. *v.* Edmondson, 77 Nebr. 682, 110 N. W. 650; Chicago, etc., R. Co. *v.* Goracke, 32 Nebr. 90, 48 N. W. 879; Pence *v.* Uhl, 11 Nebr. 320, 9 N. W. 40.

New Hampshire.— Gerrish *v.* Whitfield, 72 N. H 222, 55 Atl. 551.

New Jersey.— Vogel *v.* North Jersey St. R. Co., 69 N. J. L. 219, 54 Atl. 563; Black *v.* Lamb, 12 N. J. Eq. 108.

New York.— Carradine *v.* Hotchkiss, 120 N. Y. 608, 24 N. E. 1020; Barson *v.* Mulligan, 77 N. Y. App. Div. 192, 79 N. Y. Suppl. 31; Matter of Wormser, 51 N. Y. App. Div. 441, 64 N. Y. Suppl. 897; Frindel *v.* Schaikewitz, 16 N. Y. App. Div. 143, 45 N. Y. Suppl. 104; Woolsey *v.* Ellenville, 84 Hun 236, 32 N. Y. Suppl. 543 [*affirmed* in 155 N. Y. 573, 50 N. E. 270]; Peckham *v.* Leary, 6 Duer 494; Fell *v.* New York Locomotive Works, 3 N. Y. Suppl. 381; Steele *v.* Martin, 10 N. Y. St. 154.

South Carolina.— Davis *v.* Collins, 69 S. C. 460, 48 S. E. 469; Virginia-Carolina Chemical Co. *v.* Kirven, 57 S. C. 445, 35 S. E. 745.

Texas.— Jacobs *v.* Crum, 62 Tex. 401; Pontiac Buggy Co. *v.* Dupree, 23 Tex. Civ. App. 298, 56 S. W. 703; Greer *v.* Bringhurst, 23 Tex. Civ. App. 582, 56 S. W. 947; Johnson *v.* Patterson, (Civ. App. 1896) 33 S. W. 1038.

Washington.— Knapp *v.* Order of Pendo, 36 Wash. 601, 79 Pac. 209.

Wisconsin.— Lauterbach *v.* Netzo, 111 Wis. 322, 87 N. W. 230; Humphrey *v.* State, 78 Wis. 569, 47 N. W. 836.

Wyoming.— Hellman *v.* Wright, 1 Wyo. 190.

United States.— Philadelphia, etc., R. Co. *v.* Stimpson, 14 Pet. 448, 10 L. ed. 535.

See 46 Cent. Dig. tit. "Trial," § 157.

87. Penn *v.* Georgia, etc., R. Co., 129 Ga. 856, 60 S. E. 172; De Soto *v.* Brown, 44 Mo. App. 148; Davis *v.* Collins, 69 S. C. 460, 48 S. E. 469. And see Meacham *v.* Moore, 59 Miss. 561, holding that refusal to permit plaintiffs in attachment to introduce their judgment against defendant, which they omitted at the trial of a claimant's issue until after they announced the closing of their evidence, is such an exercise of discretion as will cause a reversal of a judgment for the claimant.

Subsequent discovery of original document. — If a copy of a paper has been admitted as secondary evidence, and the original is subsequently found, it is within the discretion of the court to permit the original to be put in evidence after the opening of the case of the adverse party. Blake *v.* Sawin, 10 Allen (Mass.) 340.

The court may call the attention of the party to an omission of proof after plaintiff has closed his case, and on request permit the omission to be supplied. Hart *v.* Bowen, 86 Fed. 877, 31 C. C. A. 31.

88. Chesapeake, etc., R. Co. *v.* Dupee, 67 S. W. 15, 23 Ky. L. Rep. 2349.

89. Hampson *v.* Taylor, 15 R. I. 83, 8 Atl. 331, 23 Atl. 732.

90. Williams *v.* Allen, 40 Ind. 295; German Sav. Bank *v.* Kerlin, 53 Mo. 382; Cotton *v.* Jones, 37 Tex. 34.

91. Humphry *v.* State, 78 Wis. 569, 47 N. W. 836.

92. Green County Commercial Bank *v.* Brinkerhoff, 110 Mo. App. 429, 85 S. W. 121.

93. Pence *v.* Uhl, 11 Nebr. 320, 9 N. W. 40.

94. *California.*— Cousins *v.* Partridge, 79 Cal. 224, 21 Pac. 745; Fairchild *v.* California Stage Co., 13 Cal. 599; Priest *v.* Union Canal Co., 6 Cal. 170.

Florida.— Volusia County Bank *v.* Bigelow, 45 Fla. 638, 33 So. 704.

Illinois.— Mueller *v.* Rebhan, 94 Ill. 142.

Kansas.— Hill *v.* Miller, 50 Kan. 659, 32 Pac. 354.

Kentucky.— Mutual L. Ins. Co. *v.* Thomson, 94 Ky. 253, 22 S. W. 87, 14 Ky. L. Rep. 800.

Louisiana.— Stone *v.* Carter, 5 La. 448; Sterling *v.* Carruthers, 7 Mart. N. S. 55.

Michigan.— Minkley *v.* Springwell's Tp., 113 Mich. 347, 71 N. W. 649; McHugh *v.* Butler, 39 Mich. 185.

Mississippi.— Wood *v.* Gibbs, 35 Miss. 559.

Missouri.— Roe *v.* Versailles Bank, 167 Mo. 406, 67 S. W. 303.

New Mexico.— Lacey *v.* Woodward, 5 N. M. 583, 25 Pac. 785.

New York.— Henry *v.* Lowell, 16 Barb. 268; Anthony *v.* Smith, 4 Bosw. 503; Abenheim *v.* Samuels, 1 N. Y. Suppl. 868.

North Carolina.— Gregg *v.* Mallett, 111 N. C. 74, 15 S. E. 936.

Pennsylvania.— McCoy *v.* Niblick, 221 Pa. St. 123, 70 Atl. 577.

dence,[95] is within the discretion of the trial court, whose action in granting or refusing a motion to reopen at this stage of the trial is not subject to review unless the discretion of the court has been abused. The discretion, however, should be reasonably exercised so as not to prejudice the rights of the parties.[96] The court's discretion is not abused by permitting the case to be reopened to admit evidence which, through inadvertence or mistake, was not introduced at the proper time;[97] but it is wholly within the court's discretion whether it will do so.[98] Nor in any case

Tennessee.— Louisville, etc., R. Co. *v.* Parker, 12 Heisk. 49.

Texas.— Galveston, etc., R. Co. *v.* Parrish, (Civ. App. 1897) 40 S. W. 191.

Virginia.— Brooks *v.* Wilcox, 11 Gratt. 411.

West Virginia.— Perdue *v.* Caswell Creek Coal, etc., Co., 40 W. Va. 372, 21 S. E. 870.

Wisconsin.— Maxwell *v.* Wellington, 138 Wis. 607, 120 N. W. 505; Murphy *v.* Herold Co., 137 Wis. 609, 119 N. W. 294; McDermott *v.* Chicago, etc., R. Co., 85 Wis. 102, 55 N. W. 179.

See 46 Cent. Dig. tit. "Trial," § 158.

95. *Alabama.*— Chandler *v.* Higgins, 156 Ala. 511, 47 So. 284.

California.— Consolidated Nat. Bank *v.* Pacific Coast Steamship Co., 95 Cal. 1, 30 Pac. 96, 29 Am. St. Rep. 85; Priest *v.* Union Canal Co., 6 Cal. 170; Mowry *v.* Starbuck, 4 Cal. 274; O'Brien *v.* Big Casino Gold Min. Co., 9 Cal. App. 283, 99 Pac. 209.

Colorado.— Lewis *v.* Helm, 40 Colo. 17, 90 Pac. 97; French *v.* Guyot, 30 Colo. 222, 70 Pac. 683; Layton *v.* Kirkendall, 20 Colo. 236, 38 Pac. 55.

Georgia.— Cushman *v.* Coleman, 92 Ga. 772, 19 S. E. 46; Luckie *v.* Johnston, 89 Ga. 321, 15 S. E. 459; Central R. Co. *v.* Curtis, 87 Ga. 416, 13 S. E. 757; Augusta, etc., R. Co. *v.* Dorsey, 68 Ga. 228; Wells *v.* Walker, 29 Ga. 450.

Illinois.— Montag *v.* Linn, 23 Ill. 551.

Indiana.— Holmes *v.* Hinkle, 63 Ind. 518; McIntire *v.* Young, 6 Blackf. 496, 39 Am. Dec. 443; State *v.* Beem, 3 Blackf. 222.

Iowa.— Hartley State Bank *v.* McCorkell, 91 Iowa 660, 60 N. W. 197; McManus *v.* Finan, 4 Iowa 283.

Kansas.— Stevens *v.* Clemmons, 52 Kan. 369, 34 Pac. 1043.

Kentucky.— Taylor *v.* Shemwell, 4 B. Mon. 575; Prather *v.* Naylor, 1 B. Mon. 244; Hocker *v.* Davis, 2 T. B. Mon. 118; Louisville R. Co. *v.* Williams, 109 S. W. 874, 33 Ky. L. Rep. 168.

Louisiana.— State *v.* Sims, 106 La. 453, 31 So. 71; Buel *v.* New York Steamer, 17 La. 541.

Maine.— McDonald *v.* Smith, 14 Me. 99.

Maryland.— Green *v.* Ford, 35 Md. 82.

Massachusetts.— Marble *v.* Keyes, 9 Gray 221.

Michigan.— Detroit, etc., R. Co. *v.* Van Sternburg, 17 Mich. 99.

Missouri.— Jackson *v.* Grand Ave. R. Co., 118 Mo. 199, 24 S. W. 192; Doyle *v.* St. Louis Transit Co., 124 Mo. App. 504, 101 S. W. 598; Pearson *v.* Gillett, 55 Mo. App. 312; Roland *v.* Beshears, 54 Mo. App. 227.

New Hampshire.— Wells *v.* Burbank, 17 N. H. 393.

New York.— Harpell *v.* Curtis, 1 E. D. Smith 78; Bierschenk *v.* Stokes, 6 Misc. 607, 26 N. Y. Suppl. 88 [*affirmed* in 7 Misc. 692, 28 N. Y. Suppl. 11]; Meyer, Jr. *v.* Goedel, 31 How. Pr. 456.

North Carolina.— Dupree *v.* Virginia Home Ins. Co., 92 N. C. 417.

South Carolina.— Drake *v.* Boyce, Riley 222.

South Dakota.— Citizens' Bank *v.* Shaw, 14 S. D. 197, 84 N. W. 779; Calkins *v.* Seabury-Calkins Consol. Min. Co., 5 S. D. 299, 58 N. W. 797.

Texas.— Moss *v.* Sanger, (1889) 12 S. W. 616; Manley *v.* Culver, 20 Tex. 143; St. Louis, etc., R. Co. *v.* Cassidy Southwestern Commission Co., 48 Tex. Civ. App. 484, 107 S. W. 628; Folts *v.* Ferguson, (Civ. App. 1894) 24 S. W. 657.

Virginia.— Bertha Zinc Co. *v.* Martin, 93 Va. 791, 22 S. E. 869, 70 L. R. A. 999.

Washington.— Reiff *v.* Coulter, 47 Wash. 678, 92 Pac. 436; Bergman *v.* London, etc., F. Ins. Co., 34 Wash. 398, 75 Pac. 989; Thorne *v.* Joy, 15 Wash. 83, 45 Pac. 642.

Wisconsin.— Riha *v.* Pelnar, 86 Wis. 408, 57 N. W. 51.

See 46 Cent. Dig. tit. "Trial," §§ 159, 160.

On the trial of a cause by the court, the introduction of evidence after the proofs have been closed rests within the discretion of the court. People *v.* Cole, 227 Ill. 59, 81 N. E. 7; People *v.* Wiemers, 225 Ill. 17, 80 N. E. 45.

Where clerk has not made entry of close of evidence.—Although the evidence of plaintiff be closed, if the clerk has not made an entry to that effect, he may still prove a material fact. Code Civ. Pr. arts. 476, 477, 484; Labarre *v.* Hopkins, 10 La. Ann. 466.

Effect of rule of court.—A rule of court forbidding a party to offer any additional testimony after he has closed his evidence and made a prayer thereon will not exclude such evidence as comes to the court and jury from the necessary proceedings in the cause. Main *v.* Lynch, 54 Md. 658.

Where plaintiff withheld an important witness until the defense closed, and then offered him on the main facts, such action, although very bad practice, and capable of working great injustice, was not of itself sufficient to cause reversal. Southern R. Co. *v.* Hays, 78 Miss. 319, 28 So. 939.

96. Mueller *v.* Rebhan, 94 Ill. 142; Sprague *v.* Craig, 51 Ill. 288.

97. Priest *v.* Union Canal Co., 6 Cal. 170; Lacey *v.* Woodward, 5 N. M. 583, 25 Pac. 785.

98. Leake *v.* J. R. King Dry Goods Co., 5 Ga. App. 102, 62 S. E. 729.

can it be considered an abuse of discretion to reopen a case for further evidence, where it is not claimed that the adverse party suffered any injustice,[99] or where the court permits him the same latitude in introducing further evidence.[1] Likewise there is no abuse of discretion in refusing to reopen a case for the admission of merely cumulative evidence,[2] evidence to refute other evidence immaterial to any issue,[3] parol evidence to prove title where it is not shown that the written evidence is either lost or destroyed,[4] or evidence, the existence and materiality of which were known to the party offering it before the close of the case,[5] and which it does not appear that he could not have produced before the close of the case.[6]

(III) *After Demurrer to Evidence, Motion For Nonsuit, or to Direct Verdict.* It is within the discretion of the court whether it shall grant or deny a motion to reopen the case and admit evidence after a demurrer to evidence, or after a motion for nonsuit or to direct a verdict has been made,[7] after the court has announced its intention as to its ruling thereon [8] or has denied the

99. Alaska United Gold Min. Co. *v.* Keating, 116 Fed. 561, 53 C. C. A. 655.

1. Bergman *v.* London, etc., F. Ins Co., 34 Wash. 398, 75 Pac. 989.

2. Macon *v.* Harris, 75 Ga. 761; Hinton *v.* Cream City R. Co., 65 Wis. 323, 27 N. W. 147.

3. Layton *v.* Kirkendall, 20 Colo. 236, 38 Pac. 55.

4. Leake *v.* J. R. King Dry Goods Co., 5 Ga. App. 102, 62 S. E. 729.

5. Loftus *v.* Fischer, 113 Cal. 286, 45 Pac. 328; Maddox *v.* Cole, 81 Ga. 325, 6 S. E. 601; Banning *v.* Purinton, 105 Iowa 642, 75 N. W. 639. And see Wendell *v.* Highstone, 52 Mich. 552, 18 N. W. 354.

6. Wilkie *v.* Richmond Traction Co., 105 Va. 290, 54 S. E. 43.

7. *Alabama.*—Fant *v.* Cathcart, 8 Ala. 725. And see Gluck *v.* Cox, 90 Ala. 331, 8 So. 161.

California.— Tuller *v.* Arnold, 98 Cal. 522, 33 Pac. 445; May *v.* Hanson, 5 Cal. 360, 63 Am. Dec. 135.

Colorado.— Kelly *v.* E. F. Hallack Lumber, etc., Co., 22 Colo. 221, 43 Pac. 1003.

Georgia.— Bridger *v.* Atlanta Exch. Bank, 126 Ga. 821, 56 S. E. 97, 115 Am. St. Rep. 118, 8 L. R. A. N. S. 463; Levy *v.* Simmons, 42 Ga. 53; Moore *v.* Central of Georgia R. Co., 1 Ga. App. 514, 58 S. E. 63.

Iowa.— Hill *v.* Glenwood, 124 Iowa 479, 100 N. W. 522; Botkin *v.* Cassady, 106 Iowa 334, 76 N. W. 722; Sawin *v.* Union Bldg., etc., Assoc., 95 Iowa 477, 64 N. W. 401.

Kansas.— Farmers', etc., Bank *v.* Glen Elder Bank, 46 Kan. 376, 26 Pac. 680; Oberlander *v.* Confrey, 38 Kan. 462, 17 Pac. 88.

Kentucky.— Larman *v.* Huey, 13 B. Mon. 436.

Michigan.— American Eagle Tobacco Co. *v.* Pierce, 70 Mich. 633, 38 N. W. 605.

Missouri.— Tierney *v.* Spiva, 76 Mo. 279.

New Hampshire.—Stone *v.* Boscawen Mills, 71 N. H. 288, 52 Atl. 119.

Ohio.— Hackman *v.* Cedar, 13 Ohio Cir. Ct. 618, 5 Ohio Cir. Dec. 293; White *v.* Francis, 5 Ohio Dec. (Reprint) 323, 4 Am. L. Rec. 501.

Pennsylvania.— Buck *v.* McKeesport, 223 Pa. St. 211, 72 Atl. 514; Delaney *v.* Mulligan, 148 Pa. St. 157, 23 Atl. 1056.

South Carolina.—Wingo *v.* Caldwell, (1892) 14 S. E. 827; Hornsby *v.* South Carolina R. Co., 26 S. C. 187, 1 S. E. 594; Kairson *v.* Puckhaber, 14 S. C. 626; Poole *v.* Mitchell, 1 Hill 404.

South Dakota.— Bourne *v.* Johnson, 10 S. D. 36, 71 N. W. 140.

Washington.— Richardson *v.* Agnew, 46 Wash. 117, 89 Pac. 404; Knapp *v.* Order of Pendo, 36 Wash. 601, 79 Pac. 209; Kane *v.* Kane, 35 Wash. 517, 77 Pac. 842; Carmack *v.* Drum, 27 Wash. 382, 67 Pac. 808.

West Virginia.— Hunter *v.* Snyder, 11 W. Va. 198.

Wisconsin.— Remlinger *v.* Young, 22 Wis. 426.

United States.— Illinois Cent. R. Co. *v.* Griffin, 80 Fed. 278, 25 C. C. A. 413.

See 46 Cent. Dig. tit. "Trial," §§ 164, 165.

Amendment after argument of motion.— If, upon the conclusion of the argument of a motion for a nonsuit, plaintiff so amends his declaration that the facts newly alleged, if proven, would entitle him to recover, it is error to either refuse a motion by him to reopen the case to allow the submission of additional evidence in support of the amendment, or to impose upon plaintiff, as a condition to the grant of such a motion, that he shall not himself be further sworn as a witness. Pitts *v.* Florida Cent., etc., R. Co., 98 Ga. 655, 27 S. E. 189.

What is an abuse of discretion.—Where, in an action for the price of cotton, defendant's whole case rested upon the existence of a custom, plaintiff ought to have been permitted to reopen his case, after motion for a peremptory instruction for defendant, and prove, if he could, the non-existence of the custom, and the discretion of the court was improperly exercised in refusing to permit him to do so. Moreland *v.* Newberger Cotton Co., 94 Miss. 572, 48 So. 187.

What is not an abuse of discretion.— It is not an abuse of discretion to decline to permit plaintiff to introduce additional evidence after motion for a nonsuit if before making the motion defendant inquired whether plaintiff had any further testimony to offer. Gilreath *v.* Furman, 57 S. C. 289, 35 S. E. 516.

8. Currie *v.* Consolidated R. Co., 81 Conn.

same,[9] or after the motion has been granted, if the order has not been written, or entered upon the minutes [10] or signed.[11]

(IV) *AFTER COMMENCEMENT OR CONCLUSION OF ARGUMENT.* On trials before a jury, when the evidence has been closed on both sides and the argument of the cause has commenced, as a general rule no further evidence should be received from either party;[12] but the judge presiding at the trial, in the exercise of a sound discretion, may relax the rule under peculiar circumstances.[13] Whether or not the court will reopen the case for further evidence, after commencement of the argument,[14] or after it has been concluded,[15] is within the discretion of the court. But if the introduction of such additional evidence takes the adverse party by surprise, he should be allowed time and opportunity, if desired, to meet

383, 71 Atl. 356; Stewart *v.* Mundy, 131 Ga. 586, 62 S. E. 986; Freyermuth *v.* South Bound R. Co., 107 Ga. 31, 32 S. E. 668; Browning *v.* Huff, 2 Bailey (S. C.) 174.

9. Carr *v.* Georgia L. & T. Co., 108 Ga. 757, 33 S. E. 190; Worth *v.* Ferguson, 122 N. C. 381, 29 S. E. 574; Anderton *v.* Blais, 28 R. I. 78, 65 Atl. 602; Shafer *v.* Phœnix Ins. Co., 53 Wis. 361, 10 N. W. 381.

For waiver of right to introduce evidence after overruling of demurrer see Collins *v.* Wayne Lumber Co., 128 Mo. 451, 31 S. W. 24.

10. Pitts *v.* Florida Cent., etc., R. Co., 115 Ga. 1013, 42 S. E. 383.

11. Penn *v.* Georgia, etc., R. Co., 129 Ga. 856, 60 S. E. 172. See also Rich *v.* Ware, 3 Ga. App. 573, 60 S. E. 301.

12. George *v.* Pilcher, 28 Gratt. (Va.) 299, 26 Am. Rep. 350.

13. George *v.* Pilcher, 28 Gratt. (Va.) 299, 26 Am. Rep. 350.

14. *Alabama.*—Western Union Tel. Co. *v.* Bowman, 141 Ala. 175, 37 So. 493; Hutchins *v.* Childress, 4 Stew. & P. 34.

Georgia.— Bigelow *v.* Young, 30 Ga. 121; Russell *v.* Kearney, 27 Ga. 96.

Illinois.— Hunt *v.* Weir, 29 Ill. 83; Bloom *v.* Goodner, 1 Ill. 63; Springer *v.* Schwitters, 137 Ill. App. 103 [*affirmed* in 236 Ill. 271, 86 N. E. 102].

Iowa.— Oakland Independent School Dist. *v.* Hewitt, 105 Iowa 663, 75 N. W. 497; Hamilton Buggy Co. *v.* Iowa Buggy Co., 88 Iowa 364, 55 N. W. 496.

Louisiana.— New Orleans *v.* Locke, 10 La. Ann. 730.

Maine.— Ruggles *v.* Coffin, 70 Me. 468.

Maryland.— Dailey *v.* Grimes, 27 Md. 440.

Massachusetts.— Smith *v.* Merrill, 9 Gray 144.

Michigan.— Thompson *v.* Ellsworth, 39 Mich. 719.

Minnesota.— Buze *v.* Arper, 6 Minn. 220.

New York.— Charleston Bank *v.* Emeric, 2 Sandf. 718; Jackson *v.* Tallmadge, 4 Cow. 450.

Pennsylvania.— Moloney *v.* Davis, 48 Pa. St. 512.

South Carolina.— Dobson *v.* Cothran, 34 S. C. 518, 13 S. E. 679; Cantey *v.* Whitaker, 17 S. C. 527.

Texas.— Pridgen *v.* Hill, 12 Tex. 374; Hayes *v.* Gallaher, 21 Tex. Civ. App. 88, 51 S. W. 280; Phœnix Ins. Co. *v.* Swann, (Civ. App. 1897) 41 S. W. 519; Walker *v.* Taul, 1 Tex. App. Civ. Cas. § 28.

Vermont.— McMurphey *v.* Harvey, 58 Vt. 549, 4 Atl. 864.

Virginia.— Georgia *v.* Pilcher, 28 Gratt. 299, 26 Am. Rep. 350.

United States.— Union Pac. R. Co. *v.* Chicago, etc., R. Co., 166 U. S. 564, 16 S. Ct. 1173, 41 L. ed. 265 [*affirming* 51 Fed. 309, 2 C. C. A. 174].

See 46 Cent. Dig. tit. "Trial," §§ 161, 162.

Reopening of the case is proper where the opposite party is not deprived of an opportunity to introduce countervailing evidence (Hill *v.* Miller, 7 La. Ann. 621); or counsel for the opposite party is permitted to reargue the case on the additional testimony (McDonald *v.* Fairbanks, (Tex. Civ. App. 1903) 78 S. W. 522); or when witnesses have been retained for the purpose and the other side notified of the fact and nature of the proof, and when there is a rule of court investing it with that discretion (Dailey *v.* Grimes, 27 Md. 440).

Presumptions as to court's action.— If the court declines to reopen the case after the arguments have commenced, the presumption is that it wisely exercised its discretion. Moloney *v.* Davis, 48 Pa. St. 512.

15. *Georgia.*— Merchants Nat. Bank *v.* Vandiver, 108 Ga. 768, 33 S. E. 430; Mathis *v.* Colbert, 24 Ga. 384, where it causes no surprise to opposing counsel and has no effect on the verdict. But see Owens *v.* Sanders, 44 Ga. 610.

Illinois.— Indiana, etc., R. Co. *v.* Hendrian, 190 Ill. 501, 60 N. E. 902.

Indiana.— Stipp *v.* Claman, 123 Ind. 532, 24 N. E. 131; Watt *v.* Alvord, 25 Ind. 533; Stewart *v.* Stewart, 28 Ind. App. 378, 62 N. E. 1023.

Iowa.—Hamilton Buggy Co. *v.* Iowa Buggy Co., 88 Iowa 364, 55 N. W. 496; Darland *v.* Rosencrans, 56 Iowa 122, 8 N. W. 776.

Maryland.— Sellers *v.* Zimmerman, 18 Md. 255.

Michigan.— Gray *v.* Willcox, 56 Mich. 58, 22 N. W. 109, unless opposite party prejudiced.

Missouri.— Hood *v.* Mathis, 21 Mo. 308.

Nebraska.— Fremont, etc., R. Co. *v.* Crum, 30 Nebr. 70, 46 N. W. 217.

Pennsylvania.— Tracey *v.* Good, 3 Pa. L. J. 136.

Wisconsin.— Everman *v.* Menomonie, 81 Wis. 624, 11 N. W. 1013.

See 46 Cent. Dig. tit. "Trial," § 163.

it with further evidence on his side.[16] And in a case where the rejection of further testimony causes peculiar hardship, a new trial may be granted.[17]

(v) *MISCELLANEOUS.* It is discretionary with the court whether or not it shall reopen the case and admit further evidence during the charge to the jury,[18] after the charge,[19] at any time before the case is submitted to the jury,[20] after submission,[21] after the jury has retired [22] if the jury come into court for information,[23] after verdict [24] or finding,[25] or before judgment,[26] but not after judgment.[27]

c. What Further Evidence Admitted. It is discretionary with the court what

16. Casteel *v.* Millison, 41 Ill. App. 61; George *v.* Pilcher, 28 Gratt. (Va.) 299, 26 Am. Rep 350. And see Mathis *v.* Colbert, 24 Ga. 384.

17. Williams *v.* Averitt, 10 N. C. 308.

18. Case *v.* Dodge, 18 R. I. 661, 29 Atl. 785

19. Sanford Mfg. Co. *v.* Wiggin, 14 N. H. 441, 40 Am. Dec. 198; Meyer *v.* Goedel, 31 How. Pr. (N. Y.) 456; Russell *v.* Koonce, 104 N. C. 237, 10 S. E. 256.

20. *California.*—Loewenthal *v.* Coonan, 135 Cal. 381, 67 Pac. 324, 1033, 68 Pac. 303.

Florida.— Hooker *v.* Johnson, 6 Fla. 730.

Illinois.— Robinson *v.* Kirkwood, 91 Ill. App. 54; Guinea *v.* People, 37 Ill. App. 450.

Kentucky.— Schwertman *v.* Voss, 51 S. W. 183, 21 Ky. L. Rep. 209, 50 S. W. 832.

South Carolina.— Allen *v.* Watson, 2 Hill 319; Poole *v.* Mitchell, 1 Hill 404.

See 46 Cent. Dig. tit. "Trial," § 166.

21. *Arkansas.*— Bynum *v.* Brady, (1907) 100 S. W. 66.

California.— Haines *v.* Young, 132 Cal. 512, 64 Pac. 1079; San Francisco Breweries Co. *v.* Schurtz, 104 Cal. 420, 38 Pac. 92.

Illinois.—Ware *v.* Hirsch, 19 Ill. App. 277.

Iowa.— Thatcher *v.* Stickney, 88 Iowa 454, 55 N. W. 488 (on affidavit of newly discovered evidence); Code (1873), 2799; Dunn *v.* Wolf, 81 Iowa 688, 47 N. W. 887.

Kansas.— Cook *v.* Ottawa University, 14 Kan. 548.

Michigan.— Chivers *v.* Lytle, 97 Mich. 477, 76 N. W. 862.

Nebraska.— Tomer *v.* Densmore, 8 Nebr. 384, 1 N. W. 315.

New York.— Stacy *v.* Graham, 3 Duer 444 [*affirmed* in 14 N. Y. 492]; Law *v.* Merrills, 6 Wend. 268.

Ohio.— Keeveny *v.* Ottman, 11 Ohio Dec. (Reprint) 301, 26 Cinc. L. Bul. 65.

South Carolina. — Derry *v.* Holman, 27 S. C. 621, 2 S. E. 841; Colclough *v.* Rhodes, 2 Rich. 76.

Washington.— Lueders *v.* Tenino, 49 Wash. 521, 95 Pac. 1089.

See 46 Cent. Dig. tit. "Trial," § 166.

Contra.— King *v.* Thompson, 59 Ga. 380.

After argument and submission to the court for determination, the court has no power of its own motion, and without a hearing, to open the same and by mere verbal notice to the attorney of the party whose interests are to be affected proceed to take further testimony on the issues involved. Stein *v.* Roeller, 66 Minn. 283, 68 N. W. 1087. So the trial court has no power to reopen a case *sua sponte* long after its full submission at a previous term. Hagerle *v.* Beebe, 123 Iowa 620, 99 N. W. 303.

By consent examination of witnesses may be privately had thereafter see Brown *v.* Cowell, 12 Johns. (N. Y.) 384.

It is proper to decline to reopen to admit evidence inadvertently omitted, upon unverified application made two months after the hearing. Houston *v.* Thompson, 87 Mo. App. 63.

22. Royston *v.* Illinois Cent. R. Co., 67 Miss. 376, 7 So. 320.

After return with verdict.—After the jury has retired, and returned into court to give their verdict, the court will not permit a witness to be examined who has come into court since the jury retired. Riley *v.* Cooper, 19 Fed. Cas. No. 11,836, 1 Cranch C. C. 1661.

The judge may hear evidence after the retirement of the jury if the jury is not cognizant of the fact. McComb *v.* Council Bluffs Ins. Co., 83 Iowa 247, 48 N. W. 1038.

Presence of parties necessary.—A witness cannot be reëxamined by the jury at their request in the absence of the parties. Perine *v.* Van Note, 4 N. J. L. 146.

23. Parish *v.* Fite, 6 N. C. 258; Van Huss *v.* Rainbolt, 2 Coldw. (Tenn.) 139. *Contra,* Taylor *v.* Louisville Public Warehouse Co., 72 S. W. 20, 24 Ky. L. Rep. 1656; Wait *v.* Krewson, 59 N. J. L. 71, 35 Atl. 742.

Disagreement of jury as to testimony of witness.— Under Rev. St. art. 1309, providing that, if the jury disagree as to the statement of a particular witness, they may have such witness again brought on the stand, and he shall be directed by the judge to detail his testimony to the particular point of disagreement, and no other, it was error to permit certain witnesses to go over their evidence, and testify again, when recalled at the request of the jury, after submission of the cause, and to allow the jurors to interrogate them at length. Griffin *v.* Barbee, 29 Tex. Civ. App. 325, 68 S. W. 698.

24. Handcock *v.* Bethune, 2 U. C. Q. B. 286. Where the same privilege is accorded to both parties. Clavey *v.* Lord, 87 Cal. 413, 25 Pac. 493.

25. Leary *v.* Leary, 68 Wis. 662, 32 N. W. 623, on statement of discovery of new and material evidence.

26. Maynard *v.* Shorb, 85 Ind. 501, even after the motions for new trial and in arrest of judgment have been overruled.

27. Webb *v.* Galloway, 1 Litt. (Ky.) 78. *Contra,* Atkinson *v.* Felder, 78 Miss. 83, 29 So. 767.

further evidence it will hear after the case has been reopened.[28] Thus if the court grants leave to introduce further specific testimony, it is discretionary with the court whether it will permit the introduction of other evidence than that specified,[29] and, unless an abuse of this discretion appears, refusal to permit evidence other than that specified is not ground for reversal.[30]

d. Right of Opposite Party to Reply to Additional Evidence. If the other party can show that he can probably repel evidence which the court permits to be introduced after reopening the case,[31] and that it takes him by surprise,[32] the court should permit him to do so,[33] and should postpone [34] or continue [35] the case, upon his request immediately made that the court should do so.[36]

e. Application to Reopen Case For Further Evidence. The party desiring to have the case reopened must make a proper application therefor,[37] and should show a sufficient excuse for not introducing the evidence before, and also that it would materially influence the verdict.[38]

C. Separation and Exclusion of Witnesses [39] **— 1. In General.** The separate examination of witnesses at the trial is a matter within the discretion of the court,[40] which may order witnesses to be separated and examined, each out of

28. *California.*—Lee *v.* Murphy, 119 Cal. 364, 51 Pac. 549, 955.

Connecticut. — Alling *v.* Weissman, 77 Conn. 394, 59 Atl. 419.

Minnesota.—Cook *v.* Kittson, 68 Minn. 474, 71 N. W. 670.

Nebraska.— Omaha Real Estate, etc., Co. *v.* Reiter, 47 Nebr. 592, 66 N. W. 658.

New York.—Stephens *v.* Fox, 83 N. Y. 313; Silverman *v.* Simons, 15 Misc. 64, 36 N. Y. Suppl. 447.

29. Alling *v.* Weissman, 77 Conn. 394, 59 Atl. 419; Omaha Real Estate, etc., Co. *v.* Reiter, 47 Nebr. 592, 66 N. W. 658. And see Bridger *v.* Atlanta Exch. Bank, 126 Ga. 821, 56 S. E. 97, 115 Am. St. Rep. 118, 8 L. R. A. N. S. 463, holding that where on application of the parties the judge permitted the reopening of a case to allow certain evidence on a particular point to be introduced, he was not compelled to reopen it for the introduction of evidence generally.

30. Omaha Real Estate, etc., Co. *v.* Reiter, 47 Nebr. 592, 66 N. W. 658.

31. Mathews *v.* Bosworth, 76 Ga. 19. Party should ask adjournment. Fell *v.* New York Locomotive Works, 3 N. Y. Suppl. 381.

32. George *v.* Pilcher, 28 Gratt. (Va.) 299, 26 Am. Rep. 350.

33. McDonald *v.* Moore, 65 Iowa 171, 21 N. W. 504; Hendron *v.* Robinson, 9 B. Mon. (Ky.) 503.

Impeaching testimony.—When the court reopens the case to hear an additional witness, the opposite party should be permitted to impeach the witness by showing that he made contradictory statements. Hendron *v.* Robinson, 9 B. Mon. (Ky.) 503.

34. Mathews *v.* Bosworth, 76 Ga. 19.

35. Taylor *v.* Shemwell, 4 B. Mon. (Ky.) 575.

36. Schellhous *v.* Ball, 29 Cal. 605.

37. Hedstrom *v.* Union Trust Co., 7 Cal. App. 278, 94 Pac. 386.

38. Haley *v.* Hickman, Litt. Sel. Cas. (Ky.) 266. And see Hedstrom *v.* Union Trust Co., 7 Cal. App. 278, 94 Pac. 386.

39. **In criminal prosecutions** see Criminal Law, 12 Cyc. 546 *et seq.*

Witnesses in general see Witnesses.

40. *Arkansas.*— St. Louis, etc., R. Co. *v.* Pate, 90 Ark. 135, 118 S. W. 260.

California.— People *v.* McCarty, 117 Cal. 65, 48 Pac. 984.

Illinois.— Errissman *v.* Errissman, 25 Ill. 136.

Indiana.— Detrick *v.* McGlone, 46 Ind. 291; Sanders *v.* Johnson, 6 Blackf. 50, 36 Am. Dec. 564.

Kentucky.— Johnson *v.* Clem, 82 Ky. 84; Kentucky Union Lumber Co. *v.* Abney, 31 S. W. 279, 17 Ky. L. Rep. 401; Civ. Code, § 601.

Michigan.— Johnston *v.* Farmers' F. Ins. Co., 106 Mich. 96, 64 N. W. 5.

Nebraska.— Halbert *v.* Rosenbalm, 49 Nebr. 498, 68 N. W. 622.

North Dakota.— King *v.* Hanson, 13 N. D. 85, 99 N. W. 1085.

Texas.— Texas, etc., R. Co. *v.* Pearl, 3 Tex. App. Civ. Cas. § 4; Watts *v.* Holland, 56 Tex. 54, holding that in a suit to establish a nuncupative will, where it is alleged that the witnesses to it have fraudulently combined to fabricate testimony, the contestant has the right to have the court apply the rule requiring the witnesses to give their testimony separately and not within each other's hearing.

See 46 Cent. Dig. tit. "Trial," § 101.

But see Rainwater *v.* Elmore, 1 Heisk. (Tenn.) 363, holding that if an affidavit of a party sets forth that justice to the party requires that the witness shall be put under the rule, the court has no discretion but must do so.

Sufficient separation.—Where a witness was allowed to hear the opening of the case, and being the first witness sworn was, after his examination, separated from the other witnesses, this was a sufficient separation. State *v.* McElmurray, 3 Strobh. (S. C.) 33.

Reëxamination.— The court has discretion to permit witnesses to be reëxamined at any time before the verdict, although they were

the hearing of the others,[41] or that a witness be excluded while the deposition of another witness is read.[42] The discretion of the court will not be reviewed on appeal,[43] unless there is a manifest abuse thereof.[44] Witnesses in rebuttal should not be put under the rule.[45] As to whether a particular witness, or witnesses, should be released or excepted from the rule is within the sound discretion of the court.[46] Where a witness is excused from the rule on the statement of counsel that he will not be called as a witness, it is not an abuse of discretion on the part of the court to decline to permit him to testify even as an impeaching witness.[47] And where witnesses are put under the rule, and excluded from hearing the testimony, there is no error in refusing to allow a physician summoned as a witness by defendant to hear plaintiff's testimony so that he may be used as an expert.[48]

2. PARTIES AND COUNSEL. It is settled that a party to an action,[49] or his

removed before their first examination, and have since been together. State *v.* Silver, 14 N. C. 332.

41. Joice *v.* Alexander, 13 Fed. Cas. No. 7,435, 1 Cranch C. C. 528.

Medical experts.— The rule applies to medical experts in personal injuries' cases. Paul *v.* Omaha, etc., R. Co., 82 Mo. App. 500.

42. Patton *v.* Janney, 18 Fed. Cas. No. 10,836, 2 Cranch C. C. 71.

43. Ryan *v.* Couch, 66 Ala. 244; St. Louis, etc., R. Co. *v.* Pate, 90 Ark. 135, 118 S. W. 260; Staver, etc., Mfg. Co. *v.* Coe, 49 Ill. App. 426; Detrick *v.* McGlone, 46 Ind. 291.

44. Texas, etc., R. Co. *v.* Pearl, 3 Tex. App. Civ. Cas. § 4. It is not an abuse of discretion to exclude a witness from the court room after he has testified, under a rule previously made. Com. *v.* Phillips, 14 S. W. 378, 12 Ky. L. Rep. 410.

45. Heaton *v.* Dennis, 103 Tenn. 155, 52 S. W. 175.

46. *California.*— People *v.* McCarty, 117 Cal. 65, 48 Pac. 984; People *v.* Hong Ah Duck, 61 Cal. 387.

Georgia.— City Electric R. Co. *v.* Smith, 121 Ga. 663, 49 S. E. 724; Central R., etc., Co. *v.* Phillips, 91 Ga. 526, 17 S. E. 952.

Indiana.— Xenia Real-Estate Co. *v.* Macy, 147 Ind. 568, 47 N. E. 147.

Kansas.— Russell First Nat. Bank *v.* Knoll, 7 Kan. App. 352, 52 Pac. 619.

Michigan.— Johnston *v.* Farmers' F. Ins. Co., 106 Mich. 96, 64 N. W. 5; People *v.* Burns, 67 Mich. 537, 35 N. W. 154.

Texas.— Roach *v.* State, 41 Tex. 261; Cooper *v.* Sawyer, 31 Tex. Civ. App. 620, 73 S. W. 992; Missouri, etc., R. Co. *v.* Smith, 31 Tex. Civ. App. 332, 72 S. W. 418; Colbert *v.* Garrett, (Civ. App. 1900) 57 S. W. 853; Galveston, etc., R. Co. *v.* Burnett, (Civ. App. 1897) 42 S. W. 314; Voorheis *v.* Waller, (Civ. App. 1896) 35 S. W. 807; Gulf, etc., R. Co. *v.* Burleson, (Civ. App. 1894) 26 S. W. 1107; Phillips *v.* Edelstein, 2 Tex. App. Civ. Cas. § 449; Texas Express Co. *v.* Dupree, 2 Tex. App. Civ. Cas. § 318.

Virginia.— Hopper *v.* Com., 6 Gratt. 684.

See 46 Cent. Dig. tit. "Trial," § 102.

Illustration.—Allowing a witness to stay in the court room to assist in the trial, while others are excluded, under the rule, is in the discretion of the trial court. Matthews *v.* Louisville, etc., R. Co., 130 Ky. 551, 113 S. W. 459. It is not an abuse of sound discretion to allow the president of a company which is a party to remain in the court room, although he was a witness, and the other witnesses were put under rule, since the court may allow a corporation's agent to remain in the court room to assist in managing its case. Warden *v.* Madisonville, etc., R. Co., 125 Ky. 644, 101 S. W. 914, 31 Ky. L. Rep. 234.

Harmless error.—Although refusal to excuse from the rule, under which the witnesses were placed, a witness for defendant, who was its only representative present, except its attorney, was error, it will be considered harmless, it being presumed, in the absence of a showing to the contrary, that the attorney was not denied an opportunity to consult with such witness while under the rule. American Cent. Ins. Co. *v.* Nunn, (Tex. Civ. App. 1904) 79 S. W. 88.

47. Bulliner *v.* People, 95 Ill. 394.

48. Atlantic, etc., R. Co. *v.* Johnson, 127 Ga. 392, 56 S. E. 482.

49. *Alabama.*— Smith *v.* Collins, 94 Ala. 394, 10 So. 334; Ryan *v.* Couch, 66 Ala. 244.

Florida.— Seaboard Air-Line R. Co. *v.* Scarborough, 53 Fla. 425, 42 So. 706.

Georgia.— St. Paul F. & M. Ins. Co. *v.* Brunswick Grocery Co., 113 Ga. 786, 39 S. E. 483.

Indiana.— Xenia Real-Estate Co. *v.* Macy, 147 Ind. 568, 47 N. E. 147; Shew *v.* Hews, 126 Ind. 474, 26 N. E. 483; Cottrell *v.* Cottrell, 81 Ind. 87; Larue *v.* Russell, 26 Ind. 386.

Michigan.— McIntosh *v.* McIntosh, 79 Mich. 198, 44 N. W. 592.

Mississippi.— Bernheim *v.* Dibrell, 66 Miss. 199, 5 So. 693; French *v.* Sale, 63 Miss. 386.

Missouri.— Crowe *v.* Peters, 63 Mo. 429; H. T. Simon-Gregory Dry Goods Co. *v.* McMahan, 61 Mo. App. 499.

Oregon.— Schneider *v.* Haas, 14 Oreg. 174, 12 Pac. 236, 58 Am. Rep. 296.

Texas.— Colbert *v.* Garrett, (Civ. App. 1900) 57 S. W. 853; Rotan Grocery Co. *v.* Martin, (Civ. App. 1900) 57 S. W. 706; Willis *v.* Nichols, 5 Tex. Civ. App. 154, 23 S. W. 1025.

Vermont.— Streeter *v.* Evans, 44 Vt. 27.

Canada.— Strachan *v.* Jones, 3 U. C. C. P. 253; McFarlane *v.* Martin, 3 U. C. C. P. 64.

Contra, Winter *v.* Mixer, 10 U. C. Q. B. 110.

See 46 Cent. Dig. tit. "Trial," § 103.

Contra.— Randolph *v.* McCain, 34 Ark. 696.

attorney,[50] who is a witness in the case, cannot be put under the rule for the exclusion of witnesses, and the doctrine applies, although the parties are numerous.[51] The doctrine also applies to parties in interest, although not parties to the record.[52] The party should, however, be called first,[53] and if he then declines to testify, the court may exclude him from the court room while other witnesses are testifying.[54]

3. Agents and Officers of Parties. Where the party is necessarily absent, his agent, whose presence is required by counsel on account of his knowledge of the case, should not be excluded.[55] Where defendant is a corporation it is not error to refuse to permit an officer[56] or employee[57] thereof to remain for the purpose of advising with counsel, unless it appears that he has been put in control of the litigation.[58] And where two officers of a corporation are witnesses, one of them may be put under the rule.[59]

4. Disobedience of the Rule. The court may, in its discretion, permit a witness who has disobeyed the rule to testify,[60] especially if the witness has not heard any of the evidence,[61] or if it does not appear that harm resulted there-

Wisner *v.* Maupin, 2 Baxt. (Tenn.) 342. [But since changed by Shannon's Code, § 5599.]

A guardian of an infant defendant to a suit cannot be excluded from the court room during the trial. Cottrell *v.* Cottrell, 81 Ind. 87. But the infant may. Stanton *v.* Ruggles, 4 Ohio Dec. (Reprint) 355, 2 Clev. L. Rep. 9.

Obedience to rule as waiver of error.— Where a party is wrongfully put under the rule, he does not lose his right to object on appeal by obeying the rule, rather than remaining in the court room and taking an exception if his testimony is excluded on that ground. Heaton *v.* Dennis, 103 Tenn. 155, 52 S. W. 175.

Who may complain of exclusion.— The only person who would be in a position to complain of the exclusion of a party from the court room would be the party so excluded, and no error is committed by the trial court in refusing to order the party so excluded to come into the court room, at the instance of the opposing party, for the purpose of identification by a witness. Seaboard Air Line R. Co. *v.* Scarborough, 52 Fla. 425, 42 So. 706.

50. Wisener *v.* Maupin, 2 Baxt. (Tenn.) 342. *Contra,* State *v.* Brookshire, 2 Ala. 303.

51. Rotan Grocery Co. *v.* Martin, (Tex. Civ. App. 1900) 57 S. W. 706.

52. Chester *v.* Bower, 55 Cal. 46; Adolff *v.* Irby, 110 Tenn. 222, 75 S. W. 710.

53. Tift *v.* Jones, 52 Ga. 538; French *v.* Sale, 63 Miss. 386. But failure to require this is not error. Kline *v.* Hazzlerigg, (Miss. 1896) 21 So. 11.

54. Smith *v.* Team, (Miss. 1894) 16 So. 492; French *v.* Sale, 63 Miss. 386.

55. Ryan *v.* Couch, 66 Ala. 244; Indianapolis Cabinet Co. *v.* Herrman, 7 Ind. App. 462, 34 N. E. 579.

56. Kentucky Union Lumber Company *v.* Abney, 31 S. W. 279, 17 Ky. L. Rep. 401; Trotter *v.* Stayton, 45 Oreg. 301, 77 Pac. 395.

57. Central R., etc., Co. *v.* Phillips, 91 Ga. 526, 17 S. E. 952.

58. Lenoir Car Co. *v.* Smith, 100 Tenn. 127, 42 S. W. 879; Gulf, etc., R. Co. *v.* Bruce, (Tex. Civ. App. 1893) 24 S. W. 927.

59. Atlanta Terra Cotta Co. *v.* Georgia R., etc., Co., 132 Ga. 537, 64 S. E. 563.

60. *Alabama.*— Thorn *v.* Kemp, 98 Ala. 417, 13 So. 749; Sidgreaves *v.* Myatt, 22 Ala. 617; State *v.* Brookshire, 2 Ala. 303.

Georgia.— Etheridge *v.* Hobbs, 77 Ga. 531, 3 S. E. 251.

Kentucky.— Illinois Cent. R. Co. *v.* Taylor, 70 S. W. 825, 24 Ky. L. Rep. 1169.

Ohio.— Laughlin *v.* State, 18 Ohio 99, 51 Am. Dec. 444.

Tennessee.— Record *v.* Chickasaw Cooperage Co., 108 Tenn. 657, 69 S. W. 334.

Washington.— Handelman *v.* Kahan, 50 Wash. 247, 97 Pac. 109.

Wisconsin.— Benaway *v.* Conyne, 3 Pinn. 196, 3 Chandl. 214.

England.— Except in the exchequer where he is peremptorily excluded. Parker *v.* McWilliam, 6 Bing. 683, 8 L. J. C. P. O. S. 276, 4 M. & P. 480, 19 E. C. L. 308.

See 46 Cent. Dig. tit. "Trial," § 105.

Knowledge of witness of matters testified to by other witnesses.— Where a witness who is under the rule has been told what a witness for plaintiff had sworn, the court may in its discretion permit such witness to testify as to matters tending to impeach plaintiff's witness. Crawleigh *v.* Galveston, etc., R. Co., 28 Tex. Civ. App. 260, 67 S. W. 140.

61. Timberlake *v.* Thayer, 76 Miss. 76, 23 So. 767.

Illustration.— Where a witness was placed under the rule, but violated it by remaining in the court room during the examination of other witnesses, but it appeared that he unintentionally violated the rule on account of being deaf and believing that he had been discharged therefrom, and that he heard but little of the evidence, and that plaintiff's counsel was unaware of his presence in the court room during the examination of other witnesses, there was no abuse of discretion in permitting such witness to testify for plaintiff. International, etc., R. Co. *v.* Hugen, 45 Tex. Civ. App. 326, 100 S. W. 1000.

from,[62] or if the witness is called to testify to a different branch of the case from that testified to by other witnesses.[63] And if the disobedience is without the fault of the party calling the witness, it must permit him to testify,[64] and leave the party calling him to suffer such loss as an impairment of the witness' credit may sustain by disobedience of the rule.[65] It is the witness and not the party who should be punished.[66] The court's discretion is reviewable on appeal,[67] if the abuse thereof is apparent.[68] If the rule has been disobeyed with the knowledge or by the procurement of the party seeking to use the witness, the court may refuse to admit the testimony.[69]

5. Time and Manner of Making Application For Exclusion. The application for an exclusion of witnesses from the court room will be refused if it is not made until after testimony has been received.[70] The proper practice is to furnish opposing counsel with a list of witnesses so that they may be put under the rule;[71] but failure to furnish a complete list will not deprive a party of the right to call a witness who in fact was not in the court room during the progress of the trial, and has not been put under the rule.[72] But the court may decline to permit such witness to testify if his evidence is merely cumulative and if no reason is assigned for failure to have him summoned in time to be put under the rule.[73]

6. Right of Attorneys to Confer With Excluded Witnesses. Attorneys should not be allowed *ad libitum* to confer with witnesses who are under the rule, but conferences should be held in the presence of an officer.[74]

D. Objections, Motions to Strike Out, and Exceptions[75] **— 1. Objections — a. Right to Object** —(I) *In General.* A party in default cannot

62. Bone *v.* State, 86 Ga. 108, 12 S. E. 205; Bulliner *v.* People, 95 Ill. 394.

63. Gran *v.* Houston, 45 Nebr. 813, 64 N. W. 245.

64. *California.*— People *v.* Boscovitch, 20 Cal. 436.

Colorado.— Behrman *v.* Terry, 31 Colo. 155, 71 Pac. 1118.

Illinois.— Bulliner *v.* People, 95 Ill. 394.

Indiana.— State *v.* Thomas, 111 Ind. 575, 13 N. E. 35, 60 Am. Rep. 620; Burke *v.* Andis, 98 Ind. 59; Davis *v.* Byrd, 94 Ind. 525; Stewart *v.* Stewart, 28 Ind. App. 378, 62 N. E. 1023; State *v.* David, 25 Ind. App. 297, 58 N. E. 83.

Iowa.— Grimes *v.* Martin, 10 Iowa 347.

Kansas.— Davenport *v.* Ogg, 15 Kan. 363.

Mississippi.— Timberlake *v.* Thayer, 76 Miss. 76, 23 So. 767; Ferguson *v.* Brown, 75 Miss. 214, 21 So. 603.

Missouri.— O'Bryan *v.* Allen, 95 Mo. 68, 8 S. W. 225; Keith *v.* Wilen, 6 Mo. 435, 35 Am. Dec. 443.

Nebraska.—Mangold *v.* Oft, 63 Nebr. 397, 88 N. W. 507; Murray *v.* Allerton, 3 Nebr. (Unoff.) 291, 91 N. W. 518; Clemmons *v.* Clemmons, 1 Nebr. (Unoff.) 880, 96 N. W. 404.

New York.— Friedman *v.* Myers, 14 N. Y. Suppl. 142.

Ohio.— Dickson *v.* State, 39 Ohio St. 73.

Oregon.— Hubbard *v.* Hubbard, 7 Oreg. 42.

England.— Thomas *v.* David, 7 C. & P. 350, 32 E. C. L. 651; Cook *v.* Nethercote, 6 C. & P. 741, 25 E. C. L. 666; Beamon *v.* Ellice, 4 C. & P. 585, 19 E. C. L. 661; Cobbett *v.* Hudson, 1 E. & B. 11, 17 Jur. 488, 22 L. J. Q. B. 11, 1 Wkly. Rep. 54, 72 E. C. L. 11; Chandler *v.* Horne, 2 M. & Rob. 423.

See 46 Cent. Dig. tit. "Trial," § 105.

But see St. L. & S. F. R. Co. *v.* Akers, (Tex. Civ. App. 1903) 73 S. W. 848, holding that where witnesses have been placed under the rule and the same is violated the court on ascertainment of its violation should withdraw the case from the jury and allow a postponement.

Harmless error.— Refusal to permit a witness to testify because he had been placed under the rule and had remained in court is harmless where he was called to testify as to contradictory statements made to him prior to the trial by another witness, and no predicate for such testimony had been laid. Gulf, etc., R. Co. *v.* Duvall, 12 Tex. Civ. App. 348, 35 S. W. 699.

65. Timberlake *v.* Thayer, 76 Miss. 76, 23 So. 767; Ferguson *v.* Brown, 75 Miss. 214, 21 So. 603.

66. Illinois Cent. R. Co. *v.* Ely, 83 Miss. 519, 35 So. 873.

67. South Covington St. R. Co. *v.* McCleave, 38 S. W. 1055, 18 Ky. L. Rep. 1036. *Contra,* Benaway *v.* Conyne, 3 Pinn. (Wis.) 196, 3 Chandl. 214.

68. Garlington *v.* McIntosh, (Tex. Civ. App. 1895) 33 S. W. 389.

69. Kelly *v.* Atkins, 14 Colo. App. 208, 59 Pac. 841; Dyer *v.* Morris, 4 Mo. 214; Mangold *v.* Oft, 63 Nebr. 397, 88 N. W. 507; Murray *v.* Allerton, 3 Nebr. (Unoff.) 291, 91 N. W. 518.

70. Pritchard *v.* Henderson, 3 Pennew. (Del.) 128, 50 Atl. 217.

71. Anonymous, 1 Hill (S. C.) 251.

72. Timberlake *v.* Thayer, 76 Miss. 76, 23 So. 767; Anonymous, 1 Hill (S. C.) 251.

73. Crenshaw *v.* Gardner, 76 S. W. 26, 25 Ky. L. Rep. 506.

74. Brown *v.* State, 3 Tex. App. 294.

75. As basis for new trial see New Trial,

object to testimony offered.[76] And where a party consents to the admission of evidence he cannot thereafter object to its competency,[77] since he will not be permitted to take inconsistent positions.[78] An objection to an answer, solely on the ground of want of responsiveness is available only to the party asking the question.[79]

(II) *Evidence Elicited or Introduced by Objecting Party.* A party cannot complain of evidence elicited,[80] or introduced,[81] by himself. But a party may attack the genuineness of an instrument introduced by himself,[82] or show that it is not the original of the instrument,[83] if he announces his intention so to do at the time of offering the document. And the fact that proceedings

29 Cyc. 762, 763, 764, 768, 771, 777, 792, 813, 875.

As basis for review on appeal see APPEAL AND ERROR, 2 Cyc. 677 *et seq.*

In criminal prosecutions see CRIMINAL LAW, 12 Cyc. 561 *et seq.*

In proceedings before referee see REFERENCES, 34 Cyc. 828 *et seq.*

On trial by court see *infra*, XII, A, 2, f.

To competency of witnesses see WITNESSES.

To depositions see DEPOSITIONS, 13 Cyc. 1008.

76. Wright *v.* Lacy, 52 Iowa 248, 3 N. W. 47, he can only cross-examine the witnesses.

77. Walker *v.* Walker, 64 N. H. 55, 5 Atl. 460. But consent that evidence may be read in one case is not consent that it may be read in another. Sowder *v.* McMillan, 4 Dana (Ky.) 456.

78. *Alabama.*—Hodges *v.* Winston, 95 Ala. 514, 11 So. 200, 36 Am. St. Rep. 241.

Florida.— Hooker *v.* Johnson, 10 Fla. 198.

Iowa.— Wallerich *v.* Smith, 97 Iowa 308, 66 N. W. 184; Stephenson *v.* Stephenson, 62 Iowa 163, 17 N. W. 456; Leon First Nat. Bank *v.* Warrington, 40 Iowa 528.

Michigan.— Hope's Appeal, 48 Mich. 518, 12 N. W. 682.

Texas.— New York Mut. L. Ins. Co. *v.* Baker, 10 Tex. Civ. App. 515, 31 S. W. 1072.

United States.— New York El. R. Co. *v.* Fifth Nat. Bank, 135 U. S. 432, 10 S. Ct. 743, 34 L. ed. 231 [*affirming* 28 Fed. 231].

See 46 Cent. Dig. tit. "Trial," § 171.

79. Alabama City, etc., R. Co. *v.* Bullard, 157 Ala. 618, 47 So. 578; Christenson *v.* Thompson, 123 Iowa 717, 99 N. W. 591; Diamond Joe Line Steamers *v.* Davenport, etc., R. Co., 115 Iowa 480, 88 N. W. 959.

80. *Alabama.*— Southern Coal, etc., Co. *v.* Swinney, 149 Ala. 405, 42 So. 808; Georgia Cent. R., etc., Co. *v.* Ingram, 98 Ala. 395, 12 So. 801; East Tennessee, etc., R. Co. *v.* Turvaville, 97 Ala. 122, 12 So. 63; Hughes *v.* Taylor, 52 Ala. 518; Jenkins *v.* McConico, 26 Ala. 213.

Arizona.—Murphy *v.* Whitlow, 1 Ariz. 340, 25 Pac. 532.

Colorado.—Beckwith *v.* Talbot, 2 Colo. 639.

Georgia.— Sims *v.* Sims, 131 Ga. 262, 62 S. E. 192; Birmingham Lumber Co. *v.* Brinson, 94 Ga. 517, 20 S. E. 437.

Illinois.— Moyer *v.* Swygart, 125 Ill. 262, 17 N. E. 450; Capen *v.* De Steiger Glass Co., 105 Ill. 185; Ferguson *v.* Miles, 8 Ill. 358, 44 Am. Dec. 702; Dougherty *v.* Knowlton, 19 Ill. App. 283.

Indiana.— McCarty *v.* Waterman, 96 Ind. 594.

Iowa.— Nagle *v.* Fulmer, 98 Iowa 585, 67 N. W. 369; Riordan *v.* Guggerty, 74 Iowa 688, 39 N. W. 107.

Louisiana.— Lafon *v.* Gravier, 1 Mart. N. S. 243.

Maine.— Wheeler *v.* Hill, 16 Me. 329; Kelley *v.* Merrill, 14 Me. 228.

Michigan.— Barry *v.* Davis, 33 Mich. 515.

Missouri.—Wheeler *v.* Wheeler, 63 Mo. App. 298.

Montana.— Hogan *v.* Shuart, 11 Mont. 498, 28 Pac. 969.

Nebraska.— Republican Valley R. Co. *v.* Hayes, 13 Nebr. 489, 14 N. W. 521.

New York.— Artcher *v.* McDuffie, 5 Barb. 147; Vibbard *v.* Staats, 3 Hill 144; Crowe *v.* Brady, 5 Redf. Surr. 1.

North Carolina.— State *v.* Apple, 121 N. C. 584, 28 S. E. 469; Wiggins *v.* Guthrie, 101 N. C. 661, 7 S. E. 761.

Rhode Island.— Hampson *v.* Taylor, 15 R. I. 83, 8 Atl. 331, 23 Atl. 732.

South Carolina.—Smith *v.* Youmans, (1897) 26 S. E. 651.

Texas.— San Antonio, etc., R. Co. *v.* Cockrill, 72 Tex. 613, 10 S. W. 702; Smith *v.* Oldham, 26 Tex. 533; El Paso, etc., R. Co. *v.* Smith, 49 Tex. Civ. App. 10, 108 S. W. 988; White *v.* Holman, 25 Tex. Civ. App. 152, 60 S. W. 437.

Washington.— Gilmore *v.* H. W. Baker Co., 12 Wash. 468, 41 Pac. 124.

Wisconsin.— Sullivan *v.* Oshkosh, 55 Wis. 508, 13 N. W. 468.

United States.— Greenleaf *v.* Birth, 5 Pet. 132, 8 L. ed. 72.

See 46 Cent. Dig. tit. "Trial," §§ 177, 178.

Excluded testimony.— A party cannot, on cross-examination, call out incompetent testimony favorable to plaintiff and then have the judgment reversed when the court excludes it, because it may have influenced the jury in their finding. Chicago, etc., R. Co. *v.* Fietsam, 123 Ill. 518, 15 N. E. 169 [*affirming* 24 Ill. App. 210].

81. Carter *v.* Fischer, 127 Ala. 52, 28 So. 376; Packard *v.* Johnson, (Cal. 1884) 4 Pac. 632; Reeves *v.* Harrington, 85 Iowa 741, 52 N. W. 517; Hudson *v.* Roos, 76 Mich. 173, 42 N. W. 1099.

82. Cole *v.* Cole, 39 La. Ann. 878, 2 So. 794.

83. Western Union Tel. Co. *v.* Hines, 96 Ga. 688, 23 S. E. 845, 51 Am. St. Rep. 159.

in the cause are introduced for a certain purpose does not prevent the party so introducing them from showing that they were improper in other respects.[84]

b. Necessity of Objections — (i) *In General.* A party by failing to object to the admission or exclusion of evidence waives his right to object.[85]

(ii) *In Case of Improper Answers to Proper Questions.*[86] There need be no objection to a proper question in order to object to an improper answer.[87] If the answer to a proper question is not responsive,[88] or is otherwise objectionable,[89] the proper practice is to move to strike out the answer, and not

84. Connor *v.* New England Steam, etc., Co., 40 N. H. 537.

85. See *infra*, V, D, 1, e, (II).

86. And see *infra*, V, D, 2.

87. Malm *v.* Thelin, 47 Nebr. 686, 66 N. W. 650; Helmken *v.* New York, 90 N. Y. App. Div. 135, 85 N. Y. Suppl. 1048; Patterson Gas Governor Co. *v.* Glenby, 4 Misc. (N. Y.) 532, 24 N. Y. Suppl. 575 [*affirmed* in 9 Misc. 126, 29 N. Y. Suppl. 279].

Effect of objection to question.— And an objection to a question merely advises the court that the propriety of the question and of a responsive answer thereto is put in issue, and does not reach unresponsive statements included in the answer, which may only be put in issue by motion to strike out. Murphy *v.* Metropolitan St. R. Co., 125 Mo. App. 269, 102 S. W. 64. And see Elliff *v.* Oregon R., etc., Co., 53 Oreg. 66, 99 Pac. 76.

88. *Alabama.*— Coghill *v.* Kennedy, 119 Ala. 641, 24 So. 459; Louisville, etc., R. Co. *v.* Binion, 107 Ala. 645, 18 So. 75; East Tennessee, etc., R. Co. *v.* Bayliss, 74 Ala. 150; Gilmer *v.* Montgomery, 26 Ala. 665.

California.— *In re* McKenna, 143 Cal. 580, 77 Pac. 461; Fox *v.* Fox, 25 Cal. 587.

Florida.— Lakeside Press, etc., Engraving Co. *v.* Campbell, 39 Fla. 523, 22 So. 878.

Illinois.— Cobb Chocolate Co. *v.* Knudson, 207 Ill. 452, 69 N. E. 816 [*affirmed* in 107 Ill. App. 668].

Indiana.— Skelley *v.* Vail, 27 Ind. App. 87, 60 N. E. 961; Chicago, etc., R. Co. *v.* Champion, 9 Ind. App. 510, 36 N. E. 221, 37 N. E. 21, 53 Am. St. Rep. 357; Grisell *v.* Noel Bros. Flour-Feed Co., 9 Ind. App. 251, 36 N. E. 452.

Iowa.— Germinder *v.* Machinery Mut. Ins. Assoc., 120 Iowa 614, 94 N. W. 1108.

Kansas.— Borin *v.* Johnson, 63 Kan. 885, 65 Pac. 640; Missouri Pac. R. Co. *v.* Shumaker, 46 Kan. 769, 27 Pac. 126; Manspeaker *v.* Pipher, 5 Kan. App. 879, 48 Pac. 868.

Massachusetts.— O'Driscoll *v.* Faxon, 156 Mass. 527, 31 N. E. 685.

Michigan.—Weiser *v.* Welch, 112 Mich. 134, 70 N. W. 438.

Minnesota.— Hall *v.* Austin, 73 Minn. 134, 75 N. W. 1121.

Missouri.— State *v.* Purcell, 131 Mo. 312, 33 S. W. 13.

Nebraska.— Missouri Pac. R. Co. *v.* Fox, 60 Nebr. 531, 83 N. W. 744; German Nat. Bank *v.* Leonard, 40 Nebr. 676, 59 N. W. 107.

New York.—Warren Chemical, etc., Co. *v.* Holbrook, 118 N. Y. 586, 23 N. E. 908, 16 Am. St. Rep. 788; Crippen *v.* Morse, 49 N. Y. 63; Delameter *v.* Prudential Ins. Co., 5 N. Y. Suppl. 586; Larrison *v.* Payne, 5 N. Y. Suppl. 221.

Pennsylvania.— Broadnax *v.* Cheraw, etc., R. Co., 157 Pa. St. 140, 27 Atl. 412.

South Dakota.—Wendt *v.* Chicago, etc., R. Co., 4 S. D. 476, 57 N. W. 226.

Vermont.— Luce *v.* Hassam, 76 Vt. 450, 58 Atl. 725.

See 46 Cent. Dig. tit. "Trial," § 222.

89. *Alabama.*—Western Union Tel. Co. *v.* Bowman, 141 Ala. 175, 37 So. 493; Bibby *v.* Thomas, 131 Ala. 350, 31 So. 432; McDonald *v.* Wood, 118 Ala. 589, 24 So. 86; Liverpool, etc., Ins. Co. *v.* Tillis, 110 Ala. 201, 17 So. 672; Eagle, etc., Mfg. Co. *v.* Gibson, 62 Ala. 369; Barnes *v.* Ingalls, 39 Ala. 193.

District of Columbia.—Woodiey *v.* Baltimore, etc., R. Co., 19 D. C. 542.

Illinois.— Hill *v.* Bahrns, 158 Ill. 314, 41 N. E. 912; National Syrup Co. *v.* Carlson, 155 Ill. 210, 40 N. E. 492; Chicago, etc., R. Co. *v.* Blume, 137 Ill. 448, 27 N. E. 601.

Iowa.— Bailey *v.* Bailey, 94 Iowa 598, 63 N. W. 341; Harrington *v.* Hamburg, 85 Iowa 272, 52 N. W. 201; Britton *v.* Des Moines, etc., R. Co., 59 Iowa 540, 13 N. W. 710.

Kansas.— Kansas Farmers' F. Ins. Co. *v.* Hawley, 46 Kan. 746, 27 Pac. 176; Atchison *v.* Rose, 43 Kan. 605, 23 Pac. 561; Reiley *v.* Haynes, 38 Kan. 259, 16 Pac. 440, 5 Am. St. Rep. 737; Wyandotte *v.* Gibson, 25 Kan. 236; Stone *v.* Bird, 16 Kan. 488; Hynes *v.* Jungren, 8 Kan. 391.

Michigan.— Burt *v.* Olcott, 33 Mich. 178.

Missouri.—Vette *v.* Johnson, 43 Mo. App. 300.

New York.—Turner *v.* Newburgh, 109 N. Y. 301, 16 N. E. 344, 4 Am. St. Rep. 453; Farmers' Bank *v.* Cowan, 2 Abb. Dec. 88, 2 Keyes 217; Nelson *v.* Young, 91 N. Y. App. Div. 457, 87 N. Y. Suppl. 69 [*affirmed* in 180 N. Y. 523, 72 N. E. 1146]; Butterworth *v.* Pecare, 8 Bosw. 671; Van Doren *v.* Jelliffe, 1 Misc. 354, 20 N. Y. Suppl. 636; Cowan *v.* Third-Ave. R. Co., 9 N. Y. Suppl. 610 [*affirmed* in 132 N. Y. 598, 30 N. E. 1152]; Partridge *v.* Russell, 2 N. Y. Suppl. 529.

Texas.— Galveston, etc., R. Co. *v.* Hertzig, 3 Tex. Civ. App. 296, 22 S. W. 1013.

Wisconsin.— Prentiss *v.* Strand, 116 Wis. 647, 93 N. W. 816.

United States.— Gould *v.* Day, 94 U. S. 405, 24 L. ed. 232; Ward *v.* Cochran, 71 Fed. 127, 18 C. C. A. 1.

See 46 Cent. Dig. tit. "Trial," § 222.

Where the answer of a witness is objected to, and the objection sustained, such answer may still be considered by the jury, unless it be expressly excluded from them, or they be instructed to disregard it. Galley *v.* Knapp, 14 Nebr. 262, 15 N. W. 329.

to interpose an objection to the question;[90] or instructions should be asked that the objectionable matter be disregarded.[91]

c. Requisites and Sufficiency of Objections — (I) *In General.* Objections to the introduction of evidence should be made openly.[92] They must be based on proper assumptions of fact.[93] And an objection to evidence which assumes facts in dispute under the pleadings is properly overruled.[94] An objection to a question is to be judged by the then state of the case.[95]

(II) *Definiteness Required.* An objection to evidence must be so definite as to enable the court to intelligently rule upon it,[96] and to show the opposite party the point of the objection,[97] and must be specific enough to show the trial court its harmful bearing from the standpoint of the objector.[98]

90. Standard L., etc., Ins. Co. *v.* Davis, 59 Kan. 521, 53 Pac. 856.

91. Union Ins. Co. *v.* Hall, 90 Minn. 252, 95 N. W. 1112; Mollineaux *v.* Clapp, 99 N. Y. App. Div. 543, 90 N. Y. Suppl. 880; Payne *v.* Williams, 83 N. Y. App. Div. 388, 82 N. Y. Suppl. 284 [*affirmed* in 178 N. Y. 589, 70 N. E. 1104].

92. Quincy Gas, etc., Co. *v.* Baumann, 203 Ill. 295, 67 N. E. 807 [*affirming* 104 Ill. App. 600], holding, however, that if the court entertains an objection in private and states it openly it becomes a part of the record notwithstanding the impropriety.

93. Carhart *v.* Oddenkirk, 20 Colo. App. 402, 79 Pac. 303.

94. Armour *v.* Ross, 75 S. C. 201, 55 S. E. 315.

95. Schmuck *v.* Hill, 2 Nebr. (Unoff.) 79, 96 N. W. 158.

96. *Alabama.*— Ballow *v.* Collins, 139 Ala. 543, 36 So. 712; Dryer *v.* Lewis, 57 Ala. 551. And see Merrill *v.* Worthington, 155 Ala. 281, 46 So. 477.

California.— Steele *v.* Pacific Coast R. Co., 74 Cal. 323, 15 Pac. 851.

Colorado.— Pratt *v.* Seamons, 43 Colo. 517, 95 Pac. 929.

Florida.— McKinnon *v.* Johnson, 57 Fla. 120, 48 So. 910. And see Seaboard Air Line R. Co. *v.* Scarborough, 52 Fla. 425, 42 So. 706.

Illinois.— Chicago City R. Co. *v.* Foster, 226 Ill. 288, 80 N. E. 762 [*affirming* 128 Ill. App. 571]; Clevenger *v.* Dunaway, 84 Ill. 367; Coffeen Coal, etc., Co. *v.* Barry, 56 Ill. App. 587; Tucker *v.* Burkitt, 49 Ill. App. 278.

Indiana.— Pennsylvania Co. *v.* Horton, 132 Ind. 189, 31 N. E. 45; Bundy *v.* Cunningham, 107 Ind. 360, 8 N. E. 174; Hammond, etc., Electric R. Co. *v.* Antonia, 41 Ind. App. 335, 83 N. E. 766.

Iowa.— De Laval Separator Co. *v.* Sharpless, 142 Iowa 60, 120 N. W. 657.

Louisiana.— Horn *v.* Bayard, 11 Rob. 259; Kees *v.* Lefebvre, 4 Rob. 15; Langfitt *v.* Clinton, etc., R. Co., 2 Rob. 217; Barataria, etc., Canal Co. *v.* Field, 17 La. 421.

Massachusetts.— Williams *v.* Clarke, 182 Mass. 316, 65 N. E. 419.

Michigan.— Detzur *v.* B. Stroh Brewing Co., 119 Mich. 282, 77 N. W. 948, 44 L. R. A. 500.

Minnesota.— Nelson *v.* Chicago, etc., R. Co., 35 Minn. 170, 28 N. W. 215; Bedal *v.* Spurr, 33 Minn. 207, 22 N. W. 390; Gilbert *v.* Thompson, 14 Minn. 544.

Missouri.— Kinlen *v.* Metropolitan St. R. Co., 216 Mo. 145, 115 S. W. 523; Spaulding *v.* Edina, 122 Mo. App. 65, 97 S. W. 545.

Nebraska.— McPherson *v.* Commercial Nat. Bank, 61 Nebr. 695, 85 N. W. 895; Weatherford *v.* Union Pac. R. Co., 5 Nebr. (Unoff.) 464, 98 N. W. 1089.

New Hampshire.— Hayward *v.* Bath, 38 N. H. 179.

New York.— Innes *v.* Manhattan R. Co., 3 N. Y. App. Div. 541, 38 N. Y. Suppl. 286; Scott *v.* Lilienthal, 9 Bosw. 224.

Oregon.— Hildebrand *v.* United Artisans, 50 Oreg. 159, 91 Pac. 542.

South Carolina.— Jumper *v.* Commercial Bank, 48 S. C. 430, 26 S. E. 725.

Washington.—Liebenthal *v.* Price, 8 Wash. 206, 35 Pac. 1078.

United States.— Nassau Electric R. Co. *v.* Corliss, 126 Fed. 355, 61 C. C. A. 257; Sigafus *v.* Porter, 84 Fed. 430, 28 C. C. A. 443.

An objection to a judgment that it is not properly rendered is insufficient. Jennison *v.* Haire, 29 Mich. 207.

"Not within the issues" is a sufficient objection to comparisons of rental values in a condemnation proceeding between the property in question and properties in a widely separated district. Stuyvesant *v.* New York El. R. Co., 4 N. Y. App. Div. 159, 38 N. Y. Suppl. 595.

An objection to the introduction of a will in evidence "on the ground that no sufficient foundation was laid for the same" was sufficient to raise the objection that the will had never been proved or admitted to probate. Hicks *v.* Deemer, 187 Ill. 164, 58 N. E. 252.

97. McKinnon *v.* Johnson, 57 Fla. 120, 48 So. 910; Donk Brothers Coal, etc., Co. *v.* Tetherington, 128 Ill. App. 256; Kinlen *v.* Metropolitan St. R. Co., 216 Mo. 145, 115 S. W. 523; O'Neill *v.* Kansas City, 178 Mo. 91, 77 S. W. 64.

98. Cochran *v.* O'Keefe, 34 Cal. 554; Aledo *v.* Honeyman, 208 Ill. 415, 70 N. E. 338 [*affirming* 108 Ill. App. 536]; People's Casualty Claim Adjustment Co. *v.* Darrow, 172 Ill. 62, 49 N. E. 1005 [*affirming* 70 Ill. App. 22]; Chicago, etc., R. Co. *v.* Champion, 9 Ind. App. 510, 36 N. E. 221, 37 N. E. 21, 53 Am. St. Rep. 357.

Objection sufficiently specific.— An objection to a question as to whether a certain

(III) *Pointing Out Evidence Objected to.* A general objection to evidence, oral or documentary, will not avail if any part of the evidence objected to is admissible. It is the duty of the party objecting to point out specifically the evidence which he claims is inadmissible.[99] It has been held, however, that

party was a foreign corporation that it is not the proper way to prove whether it is a corporation is sufficiently specific. Nicoll *v.* Clark, 13 Misc. (N. Y.) 128, 34 N. Y. Suppl. 159.

99. *Alabama.*— Nicholas *v.* Sands, 136 Ala. 267, 33 So. 815; Arnold *v.* Cofer, 135 Ala. 364, 33 So. 539; Hamilton *v.* Maxwell, 133 Ala. 233, 32 So. 13; Edmondson *v.* Anniston City Land Co., 128 Ala. 589, 29 So. 596; Coghill *v.* Kennedy, 119 Ala. 641, 24 So. 459; Montgomery Furniture Co. *v.* Hardaway, 104 Ala. 100, 16 So. 29; Cofer *v.* Scroggins, 98 Ala. 342, 13 So. 115, 39 Am. St. Rep. 54; Bell *v.* Kendall, 93 Ala. 489, 8 So. 492; Giddens *v.* Bolling, 92 Ala. 586, 9 So. 274; Richmond, etc., R. Co. *v.* Jones, 92 Ala. 218, 9 So. 276; Fonville *v.* State, 91 Ala. 39, 8 So. 688; Badders *v.* Davis, 88 Ala. 367, 6 So. 834; Cannon *v.* Lindsey, 85 Ala. 198, 3 So. 676, 7 Am. St. Rep. 38; Thompson *v.* Jones, 84 Ala. 279, 4 So. 169; State *v.* Houston, 78 Ala. 576, 56 Am. Rep. 59; Warren *v.* Wagner, 75 Ala. 188, 51 Am. Rep. 446; Jenks *v.* Terrell, 73 Ala. 238; Hayes *v.* Woods, 72 Ala. 92; David *v.* David, 66 Ala. 139; Dillar *v.* Webb, 55 Ala. 468; Bullard *v.* Lambert, 40 Ala. 204; Sterrett *v.* Kaster, 37 Ala. 366; Webb *v.* Kelly, 37 Ala. 333; Murphy *v.* State, 37 Ala. 142; Wood *v.* Barker, 37 Ala. 60, 76 Am. Dec. 346; McGill *v.* Monette, 37 Ala. 49; Newsom *v.* Huey, 36 Ala. 37; Sayre *v.* Durwood, 35 Ala. 247; Weaver *v.* Alabama Coal Min. Co., 35 Ala. 176; Gunn *v.* Howell, 35 Ala. 144, 73 Am. Dec. 484; Moore *v.* Lea, 32 Ala. 375; Robinson *v.* Tipton, 31 Ala. 595; Bigelow *v.* Ward, 29 Ala. 471; Brantley *v.* Gunn, 29 Ala. 387; Upson *v.* Raiford, 29 Ala. 188; Smith *v.* Causey, 28 Ala. 655, 65 Am. Dec. 372; Hudson *v.* Crow, 26 Ala. 515; Smoot *v.* Eslava, 23 Ala. 659, 58 Am. Dec. 310; Newton *v.* Jackson, 23 Ala. 335; Allen *v.* Smith, 22 Ala. 416; Rowland *v.* Ladiga, 21 Ala. 9; Murrah *v.* Decatur Branch Bank, 20 Ala. 392; Fontaine *v.* Beers, 19 Ala. 722; Price *v.* Decatur Branch Bank, 17 Ala. 374.

Arkansas.— St. Louis, etc., R. Co. *v.* Stroud, 67 Ark. 112, 56 S. W. 870; Central Coal, etc., Co. *v.* Niemeyer Lumber Co., 65 Ark. 106, 44 S. W. 1122, 53 S. W. 570; St. Louis, etc., R. Co. *v.* Hendricks, 48 Ark. 177, 2 S. W. 783, 3 Am. St. Rep. 220.

California.— People *v.* McFarlane, 138 Cal. 481, 71 Pac. 568, 72 Pac. 48, 61 L. R. A. 245; Jarman *v.* Rea, 137 Cal. 339, 70 Pac. 216; Schwartz *v.* Wright, (1899) 56 Pac. 608; Shatto *v.* Crocker, 87 Cal. 629, 25 Pac. 921; Coveny *v.* Hale, 49 Cal. 552; Nightingale *v.* Scannell, 18 Cal. 315.

Colorado.— Denver *v.* Cochran, 17 Colo. App. 72, 67 Pac. 23.

Connecticut.— Martin *v.* Sherwood, 74 Conn. 475, 51 Atl. 526; Rowland *v.* Philadelphia, etc., R. Co., 63 Conn. 415, 28 Atl. 102; Bissell *r.* Beckwith, 32 Conn. 509; State *v.* Alford, 31 Conn. 40; Fitch *v.* Woodruff, etc., Iron Works, 29 Conn. 82; Nichols *v.* Turney, 15 Conn. 101.

Florida.— Hoodless *v.* Jernigan, 46 Fla. 213, 35 So. 656.

Georgia.— Robertson *v.* Heath, 132 Ga. 310, 64 S. E. 73; Dolvin *v.* American Harrow Co., 131 Ga. 300, 62 S. E. 198; Sims *v.* Sims, 131 Ga. 262, 62 S. E. 192; Martin *v.* Gainesville, 126 Ga. 577, 55 S. E. 499; Hixon *v.* Asbury, 120 Ga. 385, 47 S. E. 901; McCrary *v.* Pritchard, 119 Ga. 876, 47 S. E. 341; Sweeney *v.* Sweeney, 119 Ga. 76, 46 S. E. 76, 100 Am. St. Rep. 159; Bass Dry Goods Co. *v.* Granite City Mfg. Co., 116 Ga. 176, 42 S. E. 415; Southern R. Co. *v.* Gilmore, 115 Ga. 890, 42 S. E. 220; Southern R. Co. *v.* Coursey, 115 Ga. 602, 41 S. E. 1013; Maynard *v.* Interstate Bldg., etc., Assoc., 112 Ga. 443, 37 S. E. 741; Ray *v.* Camp, 110 Ga. 818, 36 S. E. 242; Minter *v.* State, 104 Ga. 743, 30 S. E. 989; Fleming *v.* Shepherd, 83 Ga. 338, 9 S. E. 789; Powell *v.* Augusta, etc., R. Co., 77 Ga. 192, 3 S. E. 757.

Illinois.— Fitzsimons, etc., Co. *v.* Braun, 199 Ill. 390, 65 N. E. 249 [*affirming* 94 Ill. App. 533]; Central R. Co. *v.* Allmon, 147 Ill. 471, 35 N. E. 725 [*affirming* 45 Ill. App. 389]; Myers *v.* People, 26 Ill. 173; McKeown *v.* Dyniewicz, 83 Ill. App. 509.

Indiana.— McGuffey *v.* McClain, 130 Ind. 327, 30 N. E. 296; Logansport *v.* Dykeman, 116 Ind. 15, 17 N. E. 587; State *v.* Hawkins, 81 Ind. 486; Iowa L. Ins. Co. *v.* Houghton, (App. 1908) 85 N. E. 127, (1909) 87 N. E. 702; State *v.* Hughes, 19 Ind. App. 266, 49 N. E. 393; Mock *v.* Muncie, 9 Ind. App. 536, 37 N. E. 281 [*affirmed* in (1892) 32 N. E. 718].

Iowa.— Boylan *v.* McMillan, 137 Iowa 142, 114 N. W. 630; Vedder *v.* Delaney, 122 Iowa 583, 98 N. W. 373; Perin *v.* Cathcart, 115 Iowa 553, 89 N. W. 12; Spurrier *v.* McLennan, 115 Iowa 461, 88 N. W. 1062; Jeffries *v.* Snyder, 110 Iowa 359, 81 N. W. 678; Walrod *v.* Webster County, 110 Iowa 349, 81 N. W. 598, 47 L. R. A. 480.

Kansas.— Parker *v.* Richolson, 46 Kan. 283, 26 Pac. 729.

Kentucky.— Wicks *v.* Dean, 103 Ky. 69, 44 S. W. 397, 19 Ky. L. Rep. 1708.

Maryland.— Horner *v.* Beasley, 105 Md. 193, 65 Atl. 820; Baltimore, etc., R. Co. *v.* Whitehill, 104 Md. 295, 64 Atl. 1033; Smith *v.* Humphreys, 104 Md. 285, 65 Atl. 57; Wilson *v.* Pritchett, 99 Md. 583, 58 Atl. 360; Duckworth *v.* Duckworth, 98 Md. 92, 56 Atl. 490; Wheeler *v.* Harrison, 94 Md. 147, 50 Atl. 523; Moore *v.* McDonald, 68 Md. 321, 12 Atl. 117; Trahern *v.* Colburn, 63 Md. 99; Everett *v.* Neff, 28 Md. 176; Folk *v.* Wilson, 21 Md. 538, 83 Am. Dec. 599; Oelrichs *v.* Ford, 21 Md. 489; Colvin *v.* Warford, 20 Md. 357; Morrison *v.* Whiteside, 17 Md. 452, 79 Am. Dec. 661; Wright *v.* Brown, 5 Md. 37;

the rule that a general objection to evidence will not avail when any portion is admissible does not apply without modification to an objection on the oral examina-

Marshall *v.* Haney, 4 Md. 498, 59 Am. Dec. 92; Emory *v.* Owings, 3 Md. 178; Budd *v.* Brooke, 3 Gill 198, 43 Am. Dec. 321.

Massachusetts.— Smith *v.* Duncan, 181 Mass. 435, 63 N. E. 938; Fairman *v.* Boston, etc., R. Co., 169 Mass. 170, 47 N. E. 613; Waters *v.* Gilbert, 2 Cush. 27.

Michigan.— Timmerman *v.* Bidwell, 62 Mich. 205, 28 N. W. 866.

Minnesota.— Kanne *v.* Minneapolis, etc., R. Co., 30 Minn. 423, 15 N. W. 871; Craig *v.* Cook, 28 Minn. 232, 9 N. W. 712; Gilbert *v.* Thompson, 14 Minn. 544.

Missouri.— Wilkins *v.* St. Louis, etc., R. Co., 101 Mo. 93, 13 S. W. 893; Stephan *v.* Metzger, 95 Mo. App. 609, 69 S. W. 625; Stevens *v.* Atchison, etc., R. Co., 87 Mo. App. 26; Dysart *v.* Forsythe, 84 Mo. App. 190; Grimm *v.* Dundee Land, etc., Co., 55 Mo. App. 457; Wright *v.* Gillespie, 43 Mo. App. 244.

Nebraska.— Union Pac. R. Co. *v.* Stanwood, 71 Nebr. 150, 91 N. W. 191, 98 N. W. 656; Skow *v.* Locke, 3 Nebr. (Unoff.) 176, 91 N. W. 204; Western Union Tel. Co. *v.* Church, 3 Nebr. (Unoff.) 22, 90 N. W. 878, 57 L. R. A. 905.

New York.— Wallace *v.* Vacuum Oil Co., 128 N. Y. 579, 27 N. E. 956 [*affirming* 12 N. Y. Suppl. 425]; Hinman *v.* Hare, (1887) 10 N. E. 41, 1 Silv. App. 241; Wallis *v.* Randall, 81 N. Y. 164; Wilson *v.* New York Cent. R. Co., 4 Abb. Dec. 618, 3 Keyes 381, 2 Transcr. App. 298; Hochrieter *v.* People, 2 Abb. Dec. 363, 1 Keyes 66; Webb *v.* Yonkers R. Co., 51 N. Y. App. Div. 194, 64 N. Y. Suppl. 491; Whitney *v.* Supreme Commandery U. O. G. C., 30 N. Y. App. Div. 397, 51 N. Y. Suppl. 617; Sherlock *v.* German-American Ins. Co., 21 N. Y. App. Div. 18, 47 N. Y. Suppl. 315 [*affirmed* in 162 N. Y. 656, 57 N. E. 1124]; Stever *v.* New York Cent., etc., R. Co., 7 N. Y. App. Div. 392, 39 N. Y. Suppl. 944; Westervelt *v.* Burns, 27 Misc. 781, 57 N. Y. Suppl. 749; Tobias *v.* Wierck, 21 Misc. 763, 48 N. Y. Suppl. 146 [*reversed* on other grounds in 30 N. Y. App. Div. 486, 52 N. Y. Suppl. 313]; Costello *v.* Herbst, 18 Misc. 176, 41 N. Y. Suppl. 574; Brown *v.* Wakeman, 18 N. Y. Suppl. 363; Malcolm *v.* Metropolitan El. R. Co., 13 N. Y. Suppl. 283; Beebe *v.* Bull, 12 Wend. 504, 27 Am. Dec. 150.

North Carolina.— Hammond *v.* Schiff, 100 N. C. 161, 6 S. E. 753; McRae *v.* Malley, 93 N. C. 154; Barnhardt *v.* Smith, 86 N. C. 473.

Ohio.— Chapman *v.* Seely, 8 Ohio Cir. Ct. 179, 4 Ohio Cir. Dec. 395.

Oregon.— Hawley *v.* Dawson, 16 Oreg. 344, 18 Pac. 592.

Pennsylvania.— Hamilton *v.* Pittsburgh, etc., R. Co., 194 Pa. St. 1, 45 Atl. 67; Martin *v.* Kline, 157 Pa. St. 473, 27 Atl. 753; Philadelphia *v.* Leidy, 10 Pa. St. 45; Peters *v.* Horbach, 4 Pa. St. 134.

Tennessee.— Knoxville, etc., R. Co. *v.* Beeler, 90 Tenn. 548, 18 S. W. 391.

Texas.— Tuttle *v.* Moody, 100 Tex. 240, 97 S. W. 1037; Jamison *v.* Dooley, 98 Tex. 206, 82 S. W. 780 [*affirming* 34 Tex. Civ. App. 428, 79 S. W. 91]; Galveston, etc., R. Co. *v.* Gormley, 91 Tex. 393, 43 S. W. 877, 66 Am. St. Rep. 894 [*reversing* (Civ. App. 1897) 42 S. W. 314]; Houston *v.* Perry, 5 Tex. 462; Stubbs *v.* Marshall, (Civ. App. 1909) 117 S. W. 1030; Hudson *v.* Slate, (Civ. App. 1909) 117 S. W. 469; Texas Cent. R. Co. *v.* Wheeler, (Civ. App. 1909) 116 S. W. 83; Sullivan *v.* Fant, 51 Tex. Civ. App. 6, 110 S. W. 507; International, etc., R. Co. *v.* Cuneo, 47 Tex. Civ. App. 622, 108 S. W. 714; Wandelohr *v.* Grayson County Nat. Bank, (Civ. App. 1907) 106 S. W. 413 [*affirmed* in 102 Tex. 20, 108 S. W. 1154, 112 S. W. 1046]; Goodloe *v.* Goodloe, 47 Tex. Civ. App. 493, 105 S. W. 533; Sun Mfg. Co. *v.* Egbert, 37 Tex. Civ. App. 512, 84 S. W. 667; Wren *v.* Howland, 33 Tex. Civ. App. 87, 75 S. W. 894; Texas, etc., R. Co. *v.* Hall, 31 Tex. Civ. App. 464, 72 S. W. 1052; Travellers' Ins. Co. *v.* Hunter, 30 Tex. Civ. App. 489, 70 S. W. 798; Rhodes-Haverty Furniture Co. *v.* Henry, (Civ. App. 1902) 67 S. W. 340; Brin *v.* McGregor, (Civ. App. 1901) 64 S. W. 78; Keating Implement, etc., Co. *v.* Erie City Iron Works, (Civ. App. 1901) 63 S. W. 546; Holt *v.* Hunt, 18 Tex. Civ. App. 363, 44 S. W. 889; Rio Grande R. Co. *v.* Cross, 5 Tex. Civ. App. 454, 23 S. W. 529, 1004; Fant *v.* Willis, (Civ. App. 1893) 23 S. W. 99.

Utah.— Grout *v.* Oregon Short Line R. Co., 34 Utah 152, 96 Pac. 1019.

Vermont.— Whitney Wagon Works *v.* Moore, 61 Vt. 230, 17 Atl. 1007.

Virginia.— Hughes *v.* Kelly, (1898) 30 S. E. 387; Washington Southern R. Co. *v.* Lacey, 94 Va. 460, 26 S. E. 834.

Washington.— Spurlock *v.* Port Townsend Southern R. Co., 13 Wash. 29, 42 Pac. 520.

West Virginia.— Cobb *v.* Dunlevie, 63 W. Va. 398, 60 S. E. 384; Holly River Coal Co. *v.* Howell, 36 W. Va. 489, 15 S. E. 214; Brown *v.* Point Pleasant, 36 W. Va. 290, 15 S. E. 209; Baltimore, etc., R. Co. *v.* Wilson, 2 W. Va. 528.

Wisconsin.— Gutzman *v.* Clancy, 114 Wis. 589, 90 N. W. 1081, 58 L. R. A. 744; Notre Dame du Lac University *v.* Shanks, 40 Wis. 352.

United States.— U. S. *v.* McMasters, 4 Wall. 680, 18 L. ed. 311; Kerbaugh *v.* Caldwell, 151 Fed. 194, 80 C. C. A. 470; Chicago, etc., R. Co. *v.* DeClow, 124 Fed. 142, 61 C. C. A. 34; American Express Co. *v.* Lankford, 93 Fed. 380, 35 C. C. A. 353; Paxson *v.* Brown, 61 Fed. 874, 10 C. C. A. 135; Carr *v.* Gale, 5 Fed. Cas. No. 2,434, 2 Ware 330.

See 46 Cent. Dig. tit. "Trial," §§ 223, 224, 225.

If the objection is to a document it must be addressed to the document and not to the testimony of a witness as to its execution. Shumate *v.* Heman, 181 U. S. 402, 21 S. Ct. 645, 45 L. ed. 916 [*affirming* 156 Mo. 534, 57 S. W. 559].

If the objection is to a question on the ground that it calls for a conclusion it should separate the good from the bad and be lim-

tion of a witness to a question including several different propositions, part of which are not subject to the objection; that ordinarily it is incumbent upon the examiner to frame his question so that in its entirety it is free from the objection made, which otherwise the objection should have sustained.[1]

(IV) *STATEMENT OF GROUNDS OF OBJECTION* — (A) *Necessity* — (1) GENERAL RULE. The general rule is that an objection to evidence must state the specific grounds on which it is based;[2] that an objection which states no ground therefor will not suffice.[3] This rule is so well settled and has been applied

ited to so much as asks for a conclusion. Selma St., etc., R. Co. *v.* Campbell, 158 Ala. 438, 48 So. 378.

Erroneous instructions.— When on a general objection the court admits evidence partly competent and partly incompetent and then by instruction designates the incompetent evidence as competent, it commits reversible error. Budd *v.* Brooke, 3 Gill (Md.) 198, 43 Am. Dec. 321.

1. Cooper *v* Bower, 78 Kan. 156, 164, 96 Pac. 59, 794

2. *Alabama.*— Stowers Furniture Co. *v.* Brake, 158 Ala. 639, 48 So. 89; Birmingham R. Light, etc., Co. *v.* Landrum, 153 Ala. 192, 45 So. 198; Louisville, etc., R. Co. *v.* Banks, 132 Ala. 471, 31 So. 573; Barron *v.* Barron, 122 Ala. 194, 25 So. 55.

Colorado.— Oakes *v.* Miller, 11 Colo. App. 374, 55 Pac. 193.

Florida.— Vaughan's Seed Store *v.* Stringfellow, 56 Fla. 708, 48 So. 410.

Georgia.—Monahan *v.* National Realty Co., 4 Ga App. 680, 62 S. E. 127.

Illinois.— Chicago, etc., R. Co. *v.* Rathneau, 225 Ill. 278, 80 N. E. 119 [*affirming* 124 Ill App. 427]; Chicago City R. Co. *v.* Foster, 128 Ill App. 571 [*affirmed* in 226 Ill. 288, 80 N. E. 762].

Kansas.— Atchison, etc., R. Co. *v.* Hays, 8 Kan App. 545, 54 Pac. 322.

Missouri.— Jordan *v.* Missouri, etc., Tel. Co., 136 Mo. App. 192, 116 S. W. 432.

Nebraska.— Western Union Tel. Co. *v.* Church, 3 Nebr. (Unoff.) 22, 90 N. W. 878, 57 L. R. A. 905.

New York.— Anonymous, 21 Misc. 656, 48 N. Y. Suppl. 277; Van Doren *v.* Jelliffe, 1 Misc. 354, 20 N. Y. Suppl. 636.

Vermont.— Sheldon *v.* Wright, 80 Vt. 298, 67 Atl. 807.

United States.— Patrick *v.* Graham, 132 U. S. 627, 10 S. Ct. 194, 33 L. ed. 460; Baltimore, etc., R. Co. *v.* Hellenthal, 88 Fed. 116, 31 C. C. A. 414.

3. *Alabama.*— Montgomery Furniture Co. *v.* Hardaway, 104 Ala. 100, 16 So. 29; Richmond, etc., R. Co. *v.* Jones, 92 Ala. 218, 9 So. 276; Tuskaloosa Cotton-Seed Oil Co. *v.* Perry, 85 Ala. 158, 4 So. 635; Dryer *v.* Lewis, 57 Ala. 551; Steele *v.* Tutwiler, 57 Ala. 113.

California.— San Luis Water Co. *v.* Estrada, 117 Cal. 168, 48 Pac. 1075; Winans *v.* Hassey, 48 Cal. 634; Martin *v.* Travers, 12 Cal. 243; Kiler *v.* Kimbal, 10 Cal. 267.

Colorado.— Colorado City *v.* Smith, 17 Colo. App. 172, 67 Pac. 909; Hindry *v.* McPhee, 11 Colo. App. 398, 53 Pac. 389; Kern *v.* Cummings, 10 Colo. App. 365, 50 Pac. 1051; Nelson *v.* La Junta First Nat. Bank, 8 Colo. App. 531, 46 Pac. 879.

Connecticut.— Erie Preserving Co. *v.* Miller, 52 Conn. 444, 52 Am. Rep. 607.

District of Columbia.— Bell *v.* Sheridan, 21 D. C. 370; Rapley *v.* Shehan, 21 D. C. 152.

Florida.— Carter *v.* Bennett, 4 Fla. 283.

Georgia.— Cole *v.* Byrd, 83 Ga. 207, 9 S. E. 613; Hughes *v.* Griswold, 82 Ga. 299, 9 S. E. 1092; Bray *v.* Parker, 82 Ga. 234, 7 S. E. 922; Hart *v.* Slade, 74 Ga. 840; Fuller *v.* Smith, 74 Ga. 835; Mercier *v.* Copelan, 73 Ga. 636; Banks *v.* Sloat, 69 Ga. 330.

Illinois.— Taylor *v.* Adams, 115 Ill. 570, 4 N. E. 837; Gillespie *v.* Smith, 29 Ill. 473, 81 Am. Dec. 328; Buntain *v.* Bailey, 27 Ill. 409; Indiana, etc., R. Co. *v.* Otstot, 113 Ill. App. 37 [*affirmed* in 212 Ill. 429, 72 N. E. 387;]; Illinois Cent. R. Co. *v.* Burke, 112 Ill. App. 415; Schanzenbach *v.* Brough, 58 Ill. App. 526; Marthaler *v.* Druiding, 58 Ill. App. 336; Godfrey *v.* Knodle, 44 Ill. App. 638.

Indiana.— Hasper *v.* Weitcamp, 167 Ind. 371, 79 N. E. 191; Sievers *v.* Peters Box, etc., Co., 151 Ind. 642, 50 N. E. 877, 52 N. E. 399; Miller *v.* Dill, 149 Ind. 326, 49 N. E. 272; Indiana Imp. Co. *v.* Wagner, 138 Ind. 658, 38 N. E. 49; Litten *v.* Wright School Tp., 127 Ind. 81, 26 N. E. 567; L'Hommedieu *v.* Cincinnati, etc., R. Co., 120 Ind. 435, 22 N. E. 125; Vickery *v.* McCormick, 117 Ind. 594, 20 N. E. 495; Ohio, etc., R. Co. *v.* Walker, 113 Ind. 196, 15 N. E. 234, 3 Am. St. Rep. 638; Louisville, etc., R. Co. *v.* Jones, 108 Ind. 551, 9 N. E. 476; Byard *v.* Harkrider, 108 Ind. 376, 9 N. E. 294; McCullough *v.* Davis, 108 Ind. 292, 9 N. E. 276; Bundy *v.* Cunningham, 107 Ind. 360, 8 N. E. 174; Chapman *v.* Moore, 107 Ind. 223, 8 N. E. 80; Louisville, etc., R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Grubbs *v.* Morris, 103 Ind. 166, 2 N. E. 579; Shafer *v.* Ferguson, 103 Ind. 90, 2 N. E. 302; Indiana, etc., R. Co. *v.* Cook, 102 Ind. 133, 26 N. E. 203; Forbing *v.* Weber, 99 Ind. 588; Wabash, etc., R. Co. *v.* Tretts, 96 Ind. 450; Jones *v.* Angell, 95 Ind. 376; Harvey *v.* Huston, 94 Ind. 527; Lake Erie, etc., R. Co. *v.* Parker, 94 Ind. 91; Cox *v.* Stout, 85 Ind. 422; Delphi *v.* Lowery, 74 Ind. 520, 39 Am. Rep. 98; Wood *v.* Rice, 68 Ind. 320; Whitecotton *v.* Landon, 64 Ind. 420; Phillips *v.* Cox, 61 Ind. 345; Pittsburgh, etc., R. Co. *v.* Nuzum, 60 Ind. 533; Miller *v.* Wild Cat Gravel Road Co., 57 Ind. 241; Rosenbaum *v.* Schmidt, 54 Ind. 231; Leffler *v.* Rice, 44 Ind. 103; Temple *v.* Aders, 38 Ind. 506; Jemison *v.* Walsh, 30 Ind. 388; Ammerman

with such frequency that the citation of authority is almost useless. Its operation

v. Crosby, 26 Ind. 451; Mugg *v.* Graves, 22 Ind. 236; Aurora *v.* Cobb, 21 Ind. 492; Swails *v.* Coverdill, 21 Ind. 271; Hobbs *v.* Cowden, 20 Ind. 310; Shurtz *v.* Woolsey, 18 Ind. 435; Miller *v.* Powers, 16 Ind. 410; Denny *v.* Northwestern Christian University, 16 Ind. 220; Alexander *v.* Gaar, 15 Ind. 89; Dickerson *v.* Turner, 15 Ind. 4; Mumford *v.* Thomas, 10 Ind. 167; Jeffersonville R. Co. *v.* Butler, 9 Ind. 205; Stump *v.* Fraley, 7 Ind. 679; Anderson *v.* Fry, 6 Ind. 76; Crabs *v.* Mickle, 5 Ind. 145; Houston *v.* Houston, 4 Ind. 139; Thomas *v.* Reister, 3 Ind. 369; Jones *v.* Ransom, 3 Ind. 327; Carter *v.* Hanna, 2 Ind. 45; Galbreath *v.* Doe, 8 Blackf. 366; Russell *v.* Branham, 8 Blackf. 277; Hamilton *v.* Pierson, Smith 336; Gharkey *v.* Halstead, Smith 208; State *v.* Hughes, 19 Ind. App. 266, 49 N. E. 393; Ætna Ins. Co. *v.* Le Roy, 15 Ind. App. 49, 43 N. E. 570; Rhea *v.* Crunk, 12 Ind. App. 23, 39 N. E. 879; State Nat. Bank *v.* Bennett, 8 Ind. App. 679, 36 N. E. 551; Evansville *v.* Thacker, 2 Ind. App. 370, 28 N. E. 559.

Iowa.— West Branch State Bank *v.* Haines, 135 Iowa 313, 112 N. W. 552; Puth *v.* Zimbleman, 99 Iowa 641, 68 N. W. 895; Stevenson *v.* Chicago, etc., R. Co., 94 Iowa 719, 61 N. W. 964; Peck *v.* McKean, 45 Iowa 18; Lake *v.* Miller, 31 Iowa 596; Chase *v.* Walters, 28 Iowa 460; O'Hagan *v.* Clinesmith, 24 Iowa 249; Davison *v.* Smith, 20 Iowa 466; Carleton *v.* Byington, 18 Iowa 482.

Kansas.— Howard *v.* Howard, 52 Kan. 469, 34 Pac. 1114; Smith *v.* Morrill, 39 Kan. 665, 18 Pac. 915; Missouri Pac. R. Co. *v.* Morrow, 32 Kan. 217, 4 Pac. 87; Stout *v.* Baker, 32 Kan. 113, 4 Pac. 141; Osborn *v.* Woodford, 31 Kan. 290, 1 Pac. 548; Humphrey *v.* Collins, 23 Kan. 549; Cross *v.* Burlington Nat. Bank, 17 Kan. 336; Willis *v.* Sproule, 13 Kan. 257; Marshall *v.* Shibley, 11 Kan. 114; Wilson *v.* Fuller, 9 Kan. 176; Walker *v.* Armstrong, 2 Kan. 198.

Louisiana.—Heiss *v.* Corcoran, 15 La. Ann. 694.

Maine.— Hunter *v.* Randall, 69 Me. 183; White *v.* Chadbourne, 41 Me. 149; Lee *v.* Oppenheimer, 34 Me. 181.

Massachusetts.— New Hampshire F. Ins. Co. *v.* Healey, 151 Mass. 537, 24 N. E. 913.

Michigan.—Abrey *v.* Detroit, 127 Mich. 374, 86 N. W. 785; Marvin *v.* Ruhmohr, 115 Mich. 687, 74 N. W. 208; Holman *v.* Union St. R. Co., 114 Mich. 208, 72 N. W. 202; Mahiat *v.* Codde, 106 Mich. 387, 64 N. W. 194; Lungerhausen *v.* Crittenden, 103 Mich. 173, 61 N. W. 270; Hutchinson *v.* Whitmore, 95 Mich. 592, 55 N. W. 438; Abbott *v.* Chaffee, 83 Mich. 256, 47 N. W. 216; Merkle *v.* Bennington Tp., 68 Mich. 133, 35 N. W. 846; Brown *v.* Weightman, 62 Mich. 557, 29 N. W. 98; Heymes *v.* Champlin, 52 Mich. 25, 17 N. W. 226; Michigan State Ins. Co. *v.* Soule, 51 Mich. 312, 16 N. W. 662; Baylis *v.* Stout, 49 Mich. 215, 13 N. W. 521; Advertiser, etc., Co. *v.* Detroit, 43 Mich. 116, 5 N. W. 72; Campbell *v.* People, 34 Mich. 351; Turner *v.* People, 33 Mich. 363; Comstock *v.* Smith, 26 Mich. 306; Gilbert *v.* Kennedy, 22 Mich. 117.

Minnesota.— Mousseau *v.* Mousseau, 42 Minn. 212, 44 N. W. 193; State *v.* Hyde, 27 Minn. 153, 6 N. W. 555; Weide *v.* Davidson, 15 Minn. 327; Tozer *v.* Hershey, 15 Minn. 257.

Missouri.— Rice *v.* Waddill, 168 Mo. 99, 67 S. W. 605; Hall *v.* Gallemore, 138 Mo. 638, 40 S. W. 891; Liggett *v.* Morgan, 98 Mo. 39, 11 S. W. 241; Masonic Mut. Ben. Soc. *v.* Lackland, 97 Mo. 137, 10 S. W. 895, 10 Am. St. Rep. 298; Bogie *v.* Nolan, 96 Mo. 85, 9 S. W. 14; State *v.* Brannum, 95 Mo. 19, 8 S. W. 218; Parsons *v.* Missouri Pac. R. Co., 94 Mo. 286, 6 S. W. 464; Boston *v.* Murray, 94 Mo. 175, 7 S. W. 273; Brennan *v.* St. Louis, 92 Mo. 482, 2 S. W. 481; Geer *v.* Redman, 92 Mo. 375, 4 S. W. 745; Peck *v.* Chouteau, 91 Mo. 138, 3 S. W. 577, 60 Am. Rep. 236; Keim *v.* Union R., etc., Co., 90 Mo. 314, 2 S. W. 427; Baier *v.* Berberich, 85 Mo. 50 [*affirming* 13 Mo. App. 587]; Shelton *v.* Durham, 76 Mo. 434; Bauer *v.* Franklin County, 51 Mo. 205; Buckley *v.* Knapp, 48 Mo. 152; St. Louis Public Schools *v.* Risley, 40 Mo. 356; Woodburn *v.* Cogdal, 39 Mo. 222; Rosenheim *v.* America Ins. Co., 33 Mo. 230; Grimm *v.* Gamache, 25 Mo. 41; Mathews *v.* Lecompte, 24 Mo. 545; Clark *v.* Conway, 23 Mo. 438; Ruth *v.* St. Louis Transit Co., 98 Mo. App. 1, 71 S. W. 1055; Glenville *v.* St. Louis R. Co., 51 Mo. App. 629; Babb *v.* State University, 40 Mo. App. 173; Strauss *v.* Ayers, 34 Mo. App. 248; Merchants' Nat. Bank *v.* Abernathy, 32 Mo. App. 211; Steinkamper *v.* McManus, 26 Mo. App. 51; Corrister *v.* Kansas City, etc., R. Co., 25 Mo. App. 619; Jackson *v.* Russell, 24 Mo. App. 678; McCormick *v.* Hickey, 24 Mo. App. 362; Davis *v.* Hilton, 17 Mo. App. 319; McHale *v.* Oertel, 15 Mo. App. 583; Kelly *v.* Clancy, 15 Mo. App. 519; Rhorer *v.* Brockhage, 15 Mo. App. 16; Naughton *v.* Stagg, 4 Mo. App. 271.

Montana.— Maddox *v.* Teague, 18 Mont. 512, 46 Pac. 535; Tucker *v.* Jones, 8 Mont. 225, 19 Pac. 571; Herman *v.* Jeffries, 4 Mont. 513, 1 Pac. 11.

Nebraska.— Dunbier *v.* Day, 12 Nebr. 596, 12 N. W. 109, 41 Am. Rep. 772; Catron *v.* Shepherd, 8 Nebr. 308, 1 N. W. 204; Wright *v.* Greenwood Warehouse Co., 7 Nebr. 435.

Nevada.— Lightle *v.* Berning, 15 Nev. 389.

New Jersey.— Mooney *v.* Peck, 49 N. J. L. 232, 12 Atl. 177; Columbia Delaware Bridge Co. *v.* Geisse, 38 N. J. L. 39 [*affirmed* in 38 N. J. L. 580]; Moran *v.* Green, 21 N. J. L. 562.

New York.—Wilson *v.* Kings County El. R. Co., 114 N. Y. 487, 21 N. E. 1015; Schwarz *v.* Oppold, 74 N. Y. 307; Cowperthwaite *v.* Sheffield, 3 N. Y. 243; American Distributing Co. *v.* Ashley, 87 Hun 225, 35 N. Y. Suppl. 1049; Walker *v.* Erie R. Co., 63 Barb. 260; Elwood *v.* Deifendorf, 5 Barb. 398; Wilson *v.* Steers, 18 Misc. 364, 41 N. Y. Suppl. 550; Goldenson *v.* Lawrence, 16 Misc. 570, 38 N. Y. Suppl. 991; Burborn *v.* McDonough, 14 Misc.

is the same whether the evidence is oral,[4] or documentary,[5] or whether the objection is to the form or substance of a hypothetical question asked an expert.[6]

(2) APPLICATIONS OF RULE — (a) IN GENERAL. General objections are not

4, 35 N. Y. Suppl. 132; Adams *v.* Burr, 13 Misc. 247, 34 N. Y. Suppl. 156; Strong *v.* Prentice Brown Stone Co., 10 Misc. 380, 31 N. Y. Suppl. 144; Johnson *v.* Parker, 7 Misc. 685, 28 N. Y. Suppl. 146; Carroll *v.* O'Shea, 2 Misc. 437, 21 N. Y. Suppl. 956; Millard *v.* Holland Trust Co., 35 N. Y. Suppl. 948 [*affirmed* in 157 N. Y. 681, 51 N. E. 1092]; Erickson *v.* Smith, 38 How. Pr. 454; Jackson *v.* Christman, 4 Wend. 277.

North Carolina.— Tilley *v.* Bivens, 110 N. C. 343, 14 S. E. 920.

Pennsylvania.— Jessup *v.* Loucks, 55 Pa. St. 350; Cullum *v.* Wagstaff, 48 Pa. St. 300; Milliken *v.* Barr, 7 Pa. St. 23.

South Carolina.— Riser *v.* Southern R. Co., 67 S. C. 419, 46 S. E. 47; Bodie *v.* Charleston, etc., R. Co., 66 S. C. 302, 44 S. E. 943; Pearson *v.* Spartanburg County, 51 S. C. 480, 29 S. E. 193.

Tennessee.— Continental Nat. Bank *v.* Nashville First Nat. Bank, 108 Tenn. 374, 68 S. W. 497; Rogers *v.* Hollingsworth, 95 Tenn. 357, 32 S. W. 197; Crane *v.* State, 94 Tenn. 86, 28 S. W. 317; Knoxville Iron Co. *v.* Dobson, 15 Lea 409; Louisville, etc., R. Co. *v.* Fleming, 14 Lea 128; Pickett *v.* Boyd, 11 Lea 498; Ingram *v.* Smith, 1 Head 411.

Texas.— Cobb *v.* Norwood, 11 Tex. 556; San Antonio *v.* Potter, 31 Tex. Civ. App. 263, 71 S. W. 764; Houston, etc., R. Co. *v.* Williams, (Civ. App. 1895) 31 S. W. 556.

Utah.— Culmer *v.* Clift, 14 Utah 286, 47 Pac. 85.

Vermont.— Norton *v.* Parsons, 67 Vt. 526, 32 Atl. 481; Kane *v.* Garfield, 60 Vt. 79, 13 Atl. 800; Willard *v.* Pike, 59 Vt. 202, 9 Atl. 907.

Wisconsin.— Bonner *v.* Home Ins. Co., 13 Wis. 677.

United States.— Toplitz *v.* Hoddon, 146 U. S. 252, 13 S. Ct. 70, 36 L. ed. 961; Burton *v.* Driggs, 20 Wall. 125, 22 L. ed. 299; Camden *v.* Doremus, 3 How. 515, 11 L. ed. 705; Massenberg *v.* Denison, 107 Fed. 18, 46 C. C. A. 120; New York, etc., R. Co. *v.* O'Leary, 93 Fed. 737, 35 C. C. A. 562; Rhodes *v.* U. S., 79 Fed. 740, 25 C. C. A. 186; Tabor *v.* Commercial Nat. Bank, 62 Fed. 383, 10 C. C. A. 429; Mitchell *v.* Marker, 62 Fed. 139, 10 C. C. A. 306, 25 L. R. A. 33; St. Louis, etc., R. Co. *v.* Henson, 58 Fed. 531, 7 C. C. A. 349; Charleston Ice Mfg. Co. *v.* Joyce, 54 Fed. 332, 4 C. C. A. 368; Fischer *v.* Neil, 6 Fed. 89.

See 46 Cent. Dig. tit. "Trial," § 195.

A specific objection in the motion for new trial does not aid a general objection. Clark *v.* People's Collateral Loan Co., 46 Mo. App. 248.

A general objection is entitled to little weight see Routh *v.* Agricultural Bank, 12 Sm. & M. (Miss.) 161.

Where the specific ground of objection to a witness has been removed a general objection overruled permits the party objecting to avail himself of all grounds of exception. Irwin *v.* Shumaker, 4 Pa. St. 199.

If evidence is apparently of a kind admissible in proof of a fact, the general objection goes to its competency in kind and not to its own particular competency. Rindskoff *v.* Malone, 9 Iowa 540, 74 Am. Dec. 367.

4. See cases cited in the preceding notes in this section.

5. *Alabama.*— Tuskaloosa Cotton-Seed Oil Co. *v.* Perry, 85 Ala. 158, 4 So. 635; Sawyer *v.* Patterson, 11 Ala. 523, where the objecting party is requested to make specific objection and declines to do so.

California.— McDonald *v.* Bear River, etc., Water, etc., Co., 13 Cal. 220, unless the document on its face is plainly inadmissible and void.

Illinois.— Buntain *v.* Bailey, 27 Ill. 409.

Indiana.— Pennsylvania Mortg. Trust Co. *v.* Moore, 150 Ind. 465, 50 N. E. 72; Baldwin *v.* Runyan, 8 Ind. App. 344, 35 N. E. 569.

Iowa.— Rindskoff *v.* Malone, 9 Iowa 540, 74 Am. Dec. 367.

Michigan.— Rodgers *v.* Wells, 44 Mich. 411, 6 N. W. 860.

Minnesota.— Califf *v.* Hillhouse, 3 Minn. 311.

Missouri.— Three States Lumber Co. *v.* Rogers, 145 Mo. 445, 46 S. W. 1079; Morgan *v.* Joy, 121 Mo. 677, 26 S. W. 670; Kuntz *v.* Tempel, 48 Mo. 71; McCartney *v.* Shepard, 21 Mo. 573, 64 Am. Dec. 250; State *v.* Gates, 20 Mo. 400; Eisminger *v.* Stanton, 129 Mo. App. 403, 107 S. W. 460; Schmucker *v.* Spelbrink, 25 Mo. App. 356; Adler *v.* Lange, 21 Mo. App. 516.

New York.— Brookfield *v.* Remsen, 1 Abb. Dec. 210, 4 Transcr. App. 278.

Wisconsin.— State *v.* Pierce County, 71 Wis. 327, 37 N. W. 233.

United States.—Western Coal, etc., Co. *v.* Berberich, 94 Fed. 329, 36 C. C. A. 364; Thomas *v.* Lawson, 21 How. 331, 16 L. ed. 82.

See 46 Cent. Dig. tit. "Trial," § 202 *et seq.*

6. *California.*— Howland *v.* Oakland Consol. St. R. Co., 110 Cal. 513, 42 Pac. 983.

Illinois.— Chicago, etc., R. Co. *v.* Wallace, 202 Ill. 129, 66 N. E. 1096; Chatsworth *v.* Rowe, 166 Ill. 114, 46 N. E. 763; Lake St. El. R. Co. *v.* Sandy, 137 Ill. App. 244 [*affirmed* in 235 Ill. 194, 85 N. E. 300]; Aledo *v.* Honeyman, 108 Ill. App. 536 [*affirmed* in 208 Ill. 415, 70 N. E. 338].

Iowa.— State *v.* Ginger, 80 Iowa 574, 46 N. W. 657.

Nebraska.— Chicago, etc., R. Co. *v.* Archer, 46 Nebr. 907, 65 N. W. 1043.

New York.— McCready *v.* Staten Island Electric R. Co., 51 N. Y. App. Div. 338, 64 N. Y. Suppl. 996.

Wisconsin.— Davey *v.* Janesville, 111 Wis. 628, 87 N. W. 813.

See 46 Cent. Dig. tit. "Trial," § 215.

available where the evidence offered is admissible for any purpose,[7] where the evidence is admissible under one plea, although not under another,[8] if the evidence is such that the party producing the same might obviate an objection thereto by further proof,[9] if the evidence is not improper on its face, but requires some fact to

7. *Alabama.*— Gill *v.* Daily, 105 Ala. 323, 16 So. 932; Martin *v.* Hill, 42 Ala. 273; Fountain *v.* Brown, 38 Ala. 72.

California.— Baker *v.* Varney, (1900) 59 Pac. 778; Sneed *v.* Osborn, 25 Cal. 619.

Colorado.— Curr *v.* Hundley, 3 Colo. App. 54, 31 Pac. 939.

Connecticut.— General Hospital Soc. *v.* New Haven Rendering Co., 79 Conn. 581, 65 Atl. 1065; Starr Burying Ground Assoc. *v.* North Lane Cemetery Assoc., 77 Conn. 83, 58 Atl. 467; Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 70 Conn. 516, 40 Atl. 534.

Florida.— Gainesville, etc., R. Co. *v.* Pack, 55 Fla. 402, 46 So. 1019.

Georgia.— Chambers *v.* Wesley, 113 Ga. 343, 38 S. E. 848; Monahan *v.* National Realty Co., 4 Ga. App. 680, 62 S. E. 127.

Illinois.— Gage *v.* Eddy, 179 Ill. 492, 53 N. E. 1008; Grimes *v.* Hilliary, 150 Ill. 141, 36 N. E. 977; Conway *v.* Case, 22 Ill. 127.

Iowa.— Bell *v.* Byerson, 11 Iowa 233, 77 Am. Dec. 142.

Kansas.— Jones *v.* Inness, 32 Kan. 177, 4 Pac. 95.

Maryland.— United R., etc., Co. *v.* Seymour, 92 Md. 425, 48 Atl. 850; Nutwell *v.* Tongue, 22 Md. 419; Carroll *v.* Ridgaway, 8 Md. 328; Pegg *v.* Warford, 7 Md. 582.

Massachusetts.— Com. *v.* Wunsch, 129 Mass. 477; Moody *v.* Sabin, 9 Cush. 505.

Minnesota.— Stearns *v.* Johnson, 17 Minn. 142; Schell *v.* St. Paul Second Nat. Bank, 14 Minn. 43; Califf *v.* Hillhouse, 3 Minn. 311.

Missouri.— Connor *v.* Black, 119 Mo. 126, 24 S. W. 184; Margrave *v.* Ausmuss, 51 Mo. 561; St. Louis Public Schools *v.* Risley, 40 Mo. 356; George *v.* St. Joseph, 97 Mo. App. 56, 71 S. W. 110; Wibracht *v.* Annan, 89 Mo. App. 363; Gubernator *v.* Retallack, 86 Mo. App. 184; Lycan *v.* Miller, 56 Mo. App. 79; Clark *v.* People's Collateral Loan Co., 46 Mo. App. 248; Schlicker *v.* Gordon, 19 Mo. App. 479.

Montana.— Murray *v.* Montana Lumber, etc., Co., 25 Mont. 14, 63 Pac. 719.

New York.— Davis *v.* Bouton Motor Co., 132 N. Y. App. Div. 64, 116 N. Y. Suppl. 508; Union Trust Co. *v.* Leighton, 83 N. Y. App. Div. 568, 82 N. Y. Suppl. 7; Hand *v.* Miller, 58 N. Y. App. Div. 126, 68 N. Y. Suppl. 531; Donohue *v.* Brooklyn, etc., R. Co., 53 N. Y. App. Div. 348, 65 N. Y. Suppl. 634; Kahnweiler *v.* Smith, 14 Daly 142, 6 N. Y. St. 241 [*affirmed* in 111 N. Y. 688, 19 N. E. 287]; Holmes *v.* Moffat, 9 N. Y. St. 41 [*affirmed* in 120 N. Y. 159, 24 N. E. 275].

Ohio.— Brooklyn St. R. Co. *v.* Kelley, 6 Ohio Cir. Ct. 155, 3 Ohio Cir. Dec. 393.

Pennsylvania.— Cullum *v.* Wagstaff, 48 Pa. St. 300; Christian *v.* Dripps, 28 Pa. St. 271; Benner *v.* Hauser, 11 Serg. & R. 352.

Tennessee.— East Tennessee, etc., R. Co. *v.* Gurley, 12 Lea 46.

Utah.— Olson *v.* Oregon Short Line R. Co., 24 Utah 460, 68 Pac. 148; Snowden *v.* Pleasant Valley Coal Co., 16 Utah 366, 52 Pac. 599.

Virginia.— Schaubuch *v.* Dillemuth, 108 Va. 86, 60 S. E. 745; Meyers *v.* Falk, 99 Va. 385, 38 S. E. 178.

West Virginia.— Stansbury *v.* Stansbury, 20 W. Va. 23.

Wisconsin.— Crawford *v.* Witherbee, 77 Wis. 419, 46 N. W. 545, 9 L. R. A. 561; State *v.* Norton, 46 Wis. 332, 1 N. W. 22.

United States.— Chess *v.* Grant, 163 Fed. 500, 90 C. C. A. 46; Pittsburgh, etc., R. Co. *v.* Thompson, 82 Fed. 720, 27 C. C. A. 333.

Restricting purpose of evidence.—Where evidence is admissible for a particular purpose and the objection to it is general, it is not reversible error to admit it without restricting it to that purpose. Schaubuch *v.* Dillemuth, 108 Va. 86, 60 S. E. 745; Meyers *v.* Falk, 99 Va. 385, 38 So. 178.

8. People's Nat. Bank *v.* Haralson, 1 Ga. App. 311, 57 S. E. 991.

9. *Alabama.*— Gayle *v.* Cahawba, etc., R. Co., 8 Ala. 586.

California.— Eversdon *v.* Mayhew, 85 Cal. 1, 21 Pac. 431, 24 Pac. 382; Dunning *v.* Rankin, 19 Cal. 640.

Colorado.— Higgins *v.* Armstrong, 9 Colo. 38, 10 Pac. 232; Cowell *v.* Colorado Springs Co., 3 Colo. 82; McCraw *v.* Welch, 2 Colo. 284; Cody *v.* Butterfield, 1 Colo. 377.

Connecticut.—Bennett *v.* Gibbons, 55 Conn. 450, 12 Atl. 99.

District of Columbia.— Gilbert *v.* Fay, 4 App. Cas. 38.

Georgia.— Blount *v.* Bowne, 82 Ga. 346, 9 S. E. 164.

Illinois.— Chicago City R. Co. *v.* Matthieson, 212 Ill. 292, 72 N. E. 443 [*affirming* 113 Ill. App. 246]; Richardson *v.* Roberts, 195 Ill. 27, 62 N. E. 840; Gage *v.* Eddy, 186 Ill. 432, 57 N. E. 1030; Thomasson *v.* Wilson, 146 Ill. 384, 34 N. E. 432 [*affirming* 46 Ill. App. 398]; Benefield *v.* Albert, 132 Ill. 665, 24 N. E. 634; Chicago, etc., R. Co. *v.* People, 120 Ill. 667, 12 N. E. 207; Clevenger *v.* Dunaway, 84 Ill. 367; Hyde *v.* Heath, 75 Ill. 381; Chicago, etc., R. Co. *v.* Morgan, 69 Ill. 492; Swift *v.* Whitney, 20 Ill. 144; Sargeant *v.* Kellogg, 10 Ill. 273; Chicago *v.* Didier, 131 Ill. App. 406 [*affirmed* in 227 Ill. 571, 81 N. E. 698]; Mueller *v.* Kuhn, 59 Ill. App. 353; Schroeder *v.* Walsh, 10 Ill. App. 36.

Iowa.— Iowa Homestead Co. *v.* Duncombe, 51 Iowa 525, 1 N. W. 725.

Kansas.—Walker *v.* Armstrong, 2 Kan. 198.

Minnesota.— King *v.* Nichols, etc., Co., 53 Minn. 453, 55 N. W. 604; White *v.* Harrigan, 41 Minn. 414, 43 N. W. 89; Gilbert *v.* Thompson, 14 Minn. 544.

Missouri.— State *v.* Lounsberry, 125 Mo. 157, 28 S. W. 448; Western *v.* Flanagan, 120 Mo. 61, 25 S. W. 531; Wayne County *v.* St.

be brought to the notice of the court to show its inadmissibility,[10] or if the objection is formal rather than substantial,[11] as for instance, an objection that a question is leading,[12] or otherwise defective in form.[13] So a general objection will not raise the question that the evidence, although relevant, is too remote,[14] that the proper foundation has not been laid for the evidence presented,[15] that the evidence

Louis, etc., R. Co., 66 Mo. 77; Waldo *v.* Russell, 5 Mo. 387; Drew *v.* Drum, 44 Mo. App. 25.

New Hampshire.—Sanborn *v.* Wilder, 68 N. H. 471, 41 Atl. 172; Hayward *v.* Bath, 38 N. H. 179.

New York.—McIntee *v.* Middletown, 80 N. Y. App. Div. 434, 81 N. Y. Suppl. 124; Friedman *v.* Breslin, 51 N. Y. App. Div. 268, 65 N. Y. Suppl. 5 [*affirmed* in 169 N. Y. 574, 61 N. E. 1129]; McDonald *v.* North, 47 Barb. 530; Daly *v.* Byrne, 43 N. Y. Super. Ct. 261 [*affirmed* in 77 N. Y. 182]; Kiernan *v.* Ballin, 26 Misc. 826, 56 N. Y. Suppl. 949; Brown *v.* Third Ave. R. Co., 19 Misc. 504, 43 N. Y. Suppl. 1094.

North Dakota.—Kolka *v.* Jones, 6 N. D. 461, 71 N. W. 558, 66 Am. St. Rep. 615.

Oklahoma.—Enid, etc., R. Co. *v.* Wiley, 14 Okla. 310, 78 Pac. 96.

South Dakota.—Pitts Agricultural Works *v.* Young, 6 S. D. 557, 62 N. W. 432.

Texas.—McCarty *v.* Johnson, 20 Tex. Civ. App. 184, 49 S. W. 1098.

Wisconsin.—Shafer *v.* Eau Claire, 105 Wis. 239, 81 N. W. 409; Nicolai *v.* Davis, 91 Wis. 370, 64 N. W. 1001.

United States.—Stebbins *v.* Duncan, 108 U. S. 32, 2 S. Ct. 313, 27 L. ed. 641; Burton *v.* Driggs, 20 Wall. 125, 22 L. ed. 299; Stout *v.* Rigney, 107 Fed. 545, 46 C. C. A. 459; New York Electric Equipment Co. *v.* Blair, 79 Fed. 896, 25 C. C. A. 216; St. Louis Southwestern R. Co. *v.* Henson, 58 Fed. 531, 7 C. C. A. 349.

See 46 Cent. Dig. tit. "Trial," § 194.

Limiting effect of evidence.—Such objection does not necessitate that the court limit the effect of the evidence so admitted (McDermott *v.* Jackson, 97 Wis. 64, 72 N. W. 375), unless requested so to do (Limerick Nat. Bank *v.* Adams, 70 Vt. 132, 40 Atl. 166).

10. *Alabama.*—Phillips *v.* Kelly, 29 Ala. 628.

Connecticut.—Leonard *v.* Charter Oak L. Ins. Co., 65 Conn. 529, 33 Atl. 511.

Kansas.—Van Fleet *v.* Stout, 44 Kan. 523, 24 Pac. 960.

Kentucky.—Murphy *v.* Murphy, 65 S. W. 165, 23 Ky. L. Rep. 1460.

Louisiana.—Bogan *v.* Finlay, 19 La. Ann. 94.

Missouri.—Adair *v.* Mette, 156 Mo. 496, 57 S. W. 551.

United States.—Guarantee Co. of North America *v.* Phenix Ins. Co., 124 Fed. 170, 59 C. C. A. 376.

11. Westfield Cigar Co. *v.* Insurance Co. of North America, 169 Mass. 382, 47 N. E. 1026; Hunt *v.* Hoboken Land, etc., Co., 1 Hilt. (N. Y.) 161; Tattersall *v.* Hass, 1 Hilt. (N. Y.) 56; Campbell *v.* Campbell, 3 Head (Tenn.) 325.

12. *Alabama.*—Yarborough *v.* Moss, 9 Ala. 382.

California.—Eachus *v.* Los Angeles Consol. Electric R. Co., 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149.

Illinois.—North Chicago St. R. Co. *v.* Balhatchett, 86 Ill. App. 60; Edmanson *v.* Andrews, 35 Ill. App. 223.

Iowa.—Mills *v.* Mabon, 9 Iowa 484.

Minnesota.—Clague *v.* Hodgson, 16 Minn. 329.

New York.—People *v.* Lohman, 2 Barb. 216 [*affirmed* in 1 N. Y. 379, 49 Am. Dec. 340].

Texas.—Waller *v.* Leonard, 89 Tex. 507, 35 S. W. 1045.

Wisconsin.—Teegarden *v.* Caledonia, 50 Wis. 292, 6 N. W. 875.

See 46 Cent. Dig. tit. "Trial," § 194.

13. *Illinois.*—Chicago, etc., R. Co. *v.* Nix, 137 Ill. 141, 27 N. E. 81; Jewell Belting Co. *v.* Hamilton Rubber Mfg. Co., 121 Ill. App. 13; Maneaty *v.* Steele, 112 Ill. App. 19.

Michigan.—Detzur *v.* B. Stroh Brewing Co., 119 Mich. 282, 77 N. W. 948, 44 L. R. A. 500.

Minnesota.—Stillman *v.* Northern Pac., etc., R. Co., 34 Minn. 420, 26 N. W. 399; Cannady *v.* Lynch, 27 Minn. 435, 8 N. W. 164; Goodell *v.* Ward, 17 Minn. 17.

New York.—New Jersey Steamboat Co. *v.* New York, 109 N. Y. 621, 15 N. E. 877, 2 Silv. App. 23; Currier *v.* Henderson, 85 Hun 300, 32 N. Y. Suppl. 953.

Wisconsin.—Pool *v.* Milwaukee Mechanics' Ins. Co., 94 Wis. 447, 69 N. W. 65.

14. Pollock *v.* Brennan, 39 N. Y. Super. Ct. 477. And see Dean *v.* Kansas City, etc., R. Co., 199 Mo. 386, 97 S. W. 910, holding that in an action for injuries to a sectionman by a piece of coal thrown from the tender of a train, an objection to evidence of the condition of the track six months before the injury, on the ground that it was immaterial, was insufficient to sustain a contention that the evidence was too remote.

Incompetent and remote.—Where evidence that a witness had previously fallen at the same place where plaintiff was injured by an alleged defect in a city sidewalk was objected to as incompetent and too remote, the objection was insufficient to present the question that such evidence was incompetent for any purpose, either as bearing on notice to the city or the dangerous character of the walk. O'Flynn *v.* Butte, 36 Mont. 493, 93 Pac. 643.

15. *California.*—Western Union Oil Co. *v.* Newlove, 145 Cal. 772, 79 Pac. 542; Crocker *v.* Carpenter, 98 Cal. 418, 33 Pac. 271.

District of Columbia.—Washington Gas Light Co. *v.* Poore, 3 App. Cas. 127.

Illinois.—McDonald *v.* Stark, 176 Ill. 456, 52 N. E. 37; Chicago, etc., R. Co. *v.* Nix,

relates to matters not pleaded or within the issues,[16] that it is not the best evidence,[17] that it is incompetent as a mere opinion of the witness,[18] that the fact is not one to be proved by opinion evidence,[19] that the examination is not proper cross-examination,[20] that it relates to matters since the commencement of the suit,[21] that the party is seeking to impeach his own witnesses,[22] or that parol evidence has been introduced tending to establish [23] or vary the contents of a writing.[24] So such objection is not sufficient to exclude a question capable of a construction making it proper,[25] calling for a conclusion of law,[26] to raise the objection that the evidence is inadmissible as against one of two defendants,[27] that it is not the proper manner of proving the facts sought to be proved thereby,[28] that there

137 Ill. 141, 27 N. E. 81; Lewinsohn *v.* Stevens, 70 Ill. App. 307.

Iowa.— Bussard *v.* Bullitt, 95 Iowa 736, 64 N. W. 658.

Minnesota.— Clague *v.* Hodgson, 16 Minn. 329.

New York.— Stouter *v.* Manhattan R. Co., 127 N. Y. 661, 27 N. E. 805 [*affirming* 3 Silv. Sup. 413, 6 N. Y. Suppl. 163].

South Dakota.— Tanderup *v.* Hansen, 8 S. D. 375, 66 N. W. 1073.

Washington.— Coleman *v.* Montgomery, 19 Wash. 610, 53 Pac. 1102.

Wisconsin.— State *v.* Norton, 46 Wis. 332, 1 N. W. 22.

United States.— *In re* Wong Sing, 83 Fed. 147.

16. Shewalter *v.* Hamilton Oil Co., 28 Ind. App. 312, 62 N. E. 708; Heddle *v.* City Electric R. Co., 112 Mich. 547, 70 N. W. 1096; Bartleson *v.* Munson, 105 Minn. 348, 117 N. W. 512; Cranford *v.* Brooklyn, 13 N. Y. App. Div. 151, 43 N. Y. Suppl. 246; Merrick *v.* Hill, 77 Hun (N. Y.) 30, 28 N. Y. Suppl. 237, 23 N. Y. Civ. Proc. 413; Merritt *v.* Seaman, 6 Barb. (N. Y.) 330 [*reversed* on other grounds in 6 N. Y. 168]; Claflin *v.* New York Standard Watch Co., 7 Misc. (N. Y.) 668, 28 N. Y. Suppl. 42; Columbus Safe-Deposit Co. *v.* Burke, 88 Fed. 630, 32 C. C. A. 67; Burlington Ins. Co. *v.* Miller, 60 Fed. 254, 8 C. C. A. 612.

17. *Colorado.*— Rice *v.* Williams, 18 Colo. App. 330, 71 Pac. 433.

Connecticut.— Cunningham *v.* Cunningham, 75 Conn. 64, 52 Atl. 318.

Illinois.— Rich *v.* Township 11 School Trustees, 158 Ill. 242, 41 N. E. 924; Huntington *v.* Aurand, 10 Ill. App. 28; Cooper *v.* Cooper, 29 Ill. App. 356.

Iowa.— Matthews *v.* J. H. Luers Drug Co., 110 Iowa 231, 81 N. W. 464; Weis *v.* Morris, 102 Iowa 327, 71 N. W. 208; Mathews *v.* Herron, 102 Iowa 45, 67 N. W. 226, 70 N. W. 736; Buettner *v.* Steinbrecher, 91 Iowa 588, 60 N. W. 177; Kenosha Stove Co. *v.* Shedd, 82 Iowa 540, 48 N. W. 933; Gelpecke *v.* Lovell, 18 Iowa 17.

Kansas.— Topeka Capital Co. *v.* March, 10 Kan. App. 40, 61 Pac. 876.

Massachusetts.— Niles *v.* Patch, 13 Gray 254.

Minnesota.— Cullman *v.* Bottcher, 58 Minn. 381, 59 N. W. 971.

Missouri.— Roe *v.* Versailles Bank, 167 Mo. 406, 67 S. W. 303.

New York.— Atkins *v.* Elwell, 45 N. Y. 753; Ackley *v.* Welch, 85 Hun 178, 32 N. Y. Suppl. 577; Trankla *v.* McLean, 18 Misc. 221, 41 N. Y. Suppl. 385.

Texas.— Folts *v.* Ferguson, (Civ. App. 1894) 24 S. W. 657.

Illustration.— A general objection to the introduction of the record of a deed without showing the loss of the original, that it was incompetent and irrelevant, is not sufficient. Merchants', etc., State Bank *v.* Dawdy, 230 Ill. 199, 82 N. E. 606.

18. Ft. Collins Dev. R. Co. *v.* France, 41 Colo. 512, 92 Pac. 953; Lake Erie, etc., R. Co. *v.* Parker, 94 Ind. 91; Mortimer *v.* Manhattan R. Co., 129 N. Y. 81, 29 N. E. 5 [*affirming* 57 N. Y. Super. Ct. 509, 8 N. Y. Suppl. 536, 59 N. Y. Super. Ct. 579, 14 N. Y. Suppl. 952]; Ward *v.* Kilpatrick, 85 N. Y. 413, 39 Am. Rep. 674; McCooey *v.* Forty-Second St., etc., Ferry R. Co., 79 Hun (N. Y.) 255, 29 N. Y. Suppl. 368; Haviland *v.* Manhattan R. Co., 15 N. Y. Suppl. 898 [*affirmed* in 131 N. Y. 630, 30 N. E. 864].

19. Wilson *v.* Harnette, 32 Colo. 172, 75 Pac. 395; Kernochan *v.* New York El. R. Co., 128 N. Y. 559, 29 N. E. 65 [*affirming* 59 N. Y. Super. Ct. 561, 13 N. Y. Suppl. 624].

An objection to the admission of evidence that the witness is not an expert is not sufficient to raise the question that the fact is not one to be proved by expert testimony. Crawford *v.* Metropolitan El. R. Co., 120 N. Y. 624, 24 N. E. 305.

20. Allen B. Wrisley Co. *v.* Burke, 203 Ill. 250, 67 N. E. 818; Millers' Nat. Ins. Co. *v.* Jackson County Milling, etc., Co., 60 Ill. App. 224; Schlencker *v.* State, 9 Nebr. 241, 1 N. W. 857; Knapp *v.* Schneider, 24 Wis. 70.

As for instance.— That the cross-examination was within the scope of the direct examination. Levering *v.* Miller, 127 Ill. App. 235.

21. Wicks *v.* Ross, 37 Mich. 464.

22. H. F. Cady Lumber Co. *v.* Wilson Steam Boiler Co., 80 Nebr. 607, 114 N. W. 774.

23. Stuart *v.* Mitchum, 135 Ala. 546, 33 So. 670; Currier *v.* Boston, etc., R. Co., 34 N. H. 498.

24. Union Cash Register Co. *v.* John, 49 Minn. 481, 52 N. W. 48.

25. Briant *v.* Trimmer, 47 N. Y. 96.

26. Steiner *v.* Tranum, 98 Ala. 315, 13 So. 365.

27. Allen *v.* Barrett, 100 Iowa 16, 69 N. W. 272.

28. Com. *v.* King, 150 Mass. 221, 22 N. E. 905, 5 L. R. A. 536; J. R. Alsing Co. *v.* New England Quartz, etc., Co., 66 N. Y. App. Div.

is a variance between the evidence offered and the pleadings,[29] that the witness is not competent,[30] or has not qualified as an expert,[31] that evidence has been admitted not in the regular order,[32] or that a party was permitted to impeach a witness of the opposite party after calling him as his witness.[33]

(b) Documentary Evidence. In respect of documentary evidence it has been held that a general objection raises no question where the objection is not apparent on the face of the document.[34] Such objection, it is held, does not raise the question that no sufficient foundation was laid for the introduction of such evidence,[35] or as to the genuineness,[36] form,[37] execution,[38] acknowledg-

473, 73 N. Y. Suppl. 347 [*affirmed* in 174 N. Y. 536, 66 N. E. 1110].

29. *Alabama.*— White *v.* Craft, 91 Ala. 139, 8 So. 420; Richards *v.* Bestor, 90 Ala. 352, 8 So. 30.

Arizona.— Walker *v.* Gray, 6 Ariz. 359, 57 Pac. 614.

California.— Davey *v.* Southern Pac. Co., (1896) 45 Pac. 170; Knox *v.* Higby, 76 Cal. 264, 18 Pac. 381.

Illinois.— Schott *v.* Youree, 142 Ill. 233, 31 N. E. 591; Espen *v.* Hinchliffe, 131 Ill. 468, 23 N. E. 592; Ohio, etc., R. Co. *v.* Brown, 49 Ill. App. 40.

Minnesota.— Keigher *v.* St. Paul, 73 Minn. 21, 75 N. W. 732; Smith *v.* Kingman, 70 Minn. 453, 73 N. W. 253; Vaughan *v.* McCarthy, 63 Minn. 221, 65 N. W. 249.

United States.— Walsh *v.* Colclough, 56 Fed. 778, 6 C. C. A. 114.

Where the ground of objection sufficiently appears it is not necessary that the variance should be claimed in terms. Shrimpton *v.* Dworsky, 2 Misc. (N. Y.) 123, 21 N. Y. Suppl. 461.

30. Burdick *v.* Raymond, 107 Iowa 228, 77 N. W. 833; Boyce *v.* Manhattan R. Co., 54 N. Y. Super. Ct. 286 [*affirmed* in 118 N. Y. 314, 23 N. E. 304]; *In re* New York El. R. Co., 12 N. Y. Suppl. 857.

31. *Arkansas.*— Little Rock, etc., R. Co. *v.* Shoecraft, 56 Ark. 465, 29 S. W. 272.

California.— Howland *v.* Oakland Consol. St. R. Co., 110 Cal. 513, 42 Pac. 983; Brumley *v.* Flint, 87 Cal. 471, 25 Pac. 683.

Illinois.— Chicago, etc., R. Co. *v.* Holland, 122 Ill. 461, 13 N. E. 145.

Kansas.— Chicago, etc., R. Co. *v.* Behney, 48 Kan. 47, 28 Pac. 980.

Missouri.— Schlereth *v.* Missouri Pac. R. Co., 115 Mo. 87, 21 S. W. 1110, (1892) 19 S. W. 1134.

New York.— New Jersey Steamboat Co. *v.* New York, 109 N. Y. 621, 15 N. E. 877, 2 Silv. App. 23; Gilbert *v.* Third Ave. R. Co., 54 N. Y. Super. Ct. 286; Mallory *v.* Perkins, 9 Bosw. 572; Abenheim *v.* Samuel, 1 N. Y. Suppl. 868.

United States.— Missouri Pac. R. Co. *v.* Hall, 66 Fed. 868, 14 C. C. A. 153.

See 46 Cent. Dig. tit. "Trial," § 214.

32. Whitaker *v.* White, 69 Hun (N. Y.) 258, 23 N. Y. Suppl. 487.

33. Wise *v.* Wakefield, 118 Cal. 107, 50 Pac. 310.

34. Conway *v.* Case, 22 Ill. 127; Heap *v.* Parrish, 104 Ind. 36, 3 N. E. 549.

35. *Illinois.*— Crawford *v.* Chicago, etc., R. Co., 112 Ill. 314.

Indiana.— McDaneld *v.* McDaneld, 136 Ind. 603, 36 N. E. 286.

Michigan.— Krolik *v.* Graham, 64 Mich. 226, 31 N. W. 307.

Mississippi.— Morris *v.* Henderson, 37 Miss. 492.

Missouri.— Hoselton *v.* Hoselton, 166 Mo. 182, 65 S. W. 1005.

New York.— Morris *v.* Murray, 22 Misc. 697, 49 N. Y. Suppl. 1093.

Oklahoma.— Enid, etc., R. Co. *v.* Wiley, 14 Okla. 310, 78 Pac. 96.

South Dakota.— Bright *v.* Ecker, 9 S. D. 449, 69 N. W. 824.

See 46 Cent. Dig. tit. "Trial," § 217.

Jurisdiction of court to enter decree.— An objection to the admission in evidence of the exemplification of the record of a court of a sister state, in a suit to set aside a conveyance on the ground that the court did not have jurisdiction to enter a decree affecting real estate in Missouri, does not challenge the jurisdiction of the court, except so far as it attempted to enter a decree affecting Missouri real estate. McCune *v.* Goodwillie, 204 Mo. 306, 102 S. W. 997.

36. Franklin *v.* Krum, 171 Ill. 378, 49 N. E. 513 [*affirming* 70 Ill. App. 649]; Newton *v.* Tyner, 128 Ind. 466, 27 N. E. 168, 28 N. E. 59; Young *v.* Stephens, 9 Mich. 500; Krull *v.* State, 59 Nebr. 97, 80 S. W. 272.

37. Gregory *v.* Langdon, 11 Nebr. 166, 7 N. W. 871.

38. *Illinois.*— Walcott *v.* Gibbe, 97 Ill. 118.

Indiana.— Stanley *v.* Holliday, 130 Ind. 464, 30 N. E. 634; Myers *v.* State, 47 Ind. 293.

Missouri.— Drew *v.* Drum, 44 Mo. App. 25.

Nebraska.— Jewett *v.* Black, 60 Nebr. 73, 82 N. W. 375; Gregory *v.* Langdon, 11 Nebr. 166, 7 N. W. 871.

New York.— Porter *v.* Valentine, 18 Misc. 213, 41 N. Y. Suppl. 507; Mackinstry *v.* Smith, 16 Misc. 351, 38 N. Y. Suppl. 93.

Oklahoma.— Long Bell Lumber Co. *v.* Martin, 11 Okla. 192, 66 Pac. 328.

Oregon.— J. D. Spreckles, etc., Co. *v.* Bender, 30 Oreg. 577, 48 Pac. 418.

South Dakota.— Park *v.* Robinson, 15 S. D. 551, 91 N. W. 344.

Washington.— McElroy *v.* Williams, 14 Wash. 627, 45 Pac. 306.

See 46 Cent. Dig. tit. "Trial," § 217.

Objection that preliminary proof of the execution of an instrument had not been made is not raised by a general objection. Sargeant *v.* Kellogg, 10 Ill. 273; Thompson *v.* Ellenz, 58 Minn. 301, 59 N. W. 1023;

ment,[39] attestation,[40] or authentication[41] of the documents offered in evidence. Nor does it raise any question as to the sufficiency of the description of property therein,[42] or that it is not the best evidence.[43] So a general objection raises no question as to the validity of an ordinance offered in evidence,[44] or that the official character of an officer issuing a writ was not shown.[45]

(3) EXCEPTIONS TO RULE. But a general objection is sufficient where the ground therefor is so manifest that the trial court could not fail to understand it,[46] as when the evidence offered is clearly irrevelant or incompetent,[47] or inadmissible for any purpose,[48] or the objection is of such nature that it could not have been

McDonald *v.* Peacock, 37 Minn. 512, 35 N. W. 370.

39. McCarthy *v.* Hetzner, 70 Ill. App. 480 (want of authority of officer taking acknowledgment); Hewitt *v.* Watertown Steam Engine Co., 65 Ill. App. 153; Gregory *v.* Langdon, 11 Nebr. 166, 7 N. W. 871; Mabbett *v.* White, 12 N. Y. 442; Leon & H. Blum Land Co. *v.* Dunlap, 4 Tex. Civ. App. 315, 23 S. W. 473.

40. Rupert *v.* Penner, 35 Nebr. 587, 53 N. W. 598, 17 L. R. A. 824.

41. *California.*— Union Sav. Bank *v.* Rinaldo, 6 Cal. App. 637, 92 Pac. 873, affidavit.

Dakota.— Caledonia Gold Min. Co. *v.* Noonan, 3 Dak. 189, 14 N. W. 426.

Illinois.— Cantwell *v.* Welch, 187 Ill. 275, 58 N. E. 414, failure of certificate to show authority of officer making it.

Kansas.— Mechanics' Sav. Bank *v.* Harding, 65 Kan. 655, 70 Pac. 655, judgments.

Louisiana.— Horn *v.* Bayard, 11 Rob. 259, records of assignments.

Minnesota.— Hall *v.* Conn. Mut. L. Ins. Co., 76 Minn. 401, 79 N. W. 497, will.

Missouri.— People's Bank *v.* Scalzo, 127 Mo. 164, 29 S. W. 1032, certificates of protest.

Nebraska.— Dworak *v.* More, 25 Nebr. 735, 41 N. W. 777, judgments.

New York.—Huber *v.* Ehlers, 76 N. Y. App. Div. 602, 79 N. Y. Suppl. 150 (record in another suit); Accetta *v.* Zupa, 54 N. Y. App. Div. 33, 66 N. Y. Suppl. 303, 8 N. Y. Annot. Cas. 190; Keene *v.* Clarke, 2 Abb. Pr. N. S. 34.

Tennessee.— Carlton *v.* State, 8 Heisk. 16; Ingram *v.* Smith, 1 Head 411.

Wisconsin.— Best *v.* Davis, 18 Wis. 206, copy of mortgage.

United States.— Noonan *v.* Caledonian Gold Min. Co., 121 U. S. 393, 7 S. Ct. 911, 30 L. ed. 1061 [*affirming* 3 Dak. 189, 14 N. W. 426]; Wood *v.* Weimar, 104 U. S. 786, 26 L. ed. 779.

See 46 Cent. Dig. tit. "Trial," § 217.

42. Preston *v.* Davis, 112 Ill. App. 636.

43. Bennet *v.* North Colorado Springs Land, etc., Co., 23 Colo. 470, 48 Pac. 812, 58 Am. St. Rep. 281.

44. Payne *v.* South Springfield, 161 Ill. 285, 44 N. E. 105; Wabash R. Co. *v.* Kamradt, 109 Ill. App. 203.

45. McCraw *v.* Welch, 2 Colo. 284.

46. *California.*— Swan *v.* Thompson, 124 Cal. 193, 56 Pac. 878.

Michigan.— Hynes *v.* Hickey, 109 Mich. 188, 66 N. W. 1090; Rivard *v.* Rivard, 109 Mich. 98, 66 N. W. 681, 63 Am. St. Rep. 566.

Missouri.— Guinotte *v.* Egelhoff, 64 Mo. App. 366.

New York.— Tozer *v.* New York Cent., etc., R. Co., 105 N. Y. 659, 11 N. E. 846; Porter *v.* Parks, 2 Hun 654.

Texas.— Cheatham *v.* Riddle, 8 Tex. 162.

United States.— Deering Harvester Co. *v.* Kelly, 103 Fed. 261, 43 C. C. A. 225.

47. St. Louis, etc., R. Co. *v.* Sweet, 60 Ark. 550, 31 S. W. 571; Groh *v.* Groh, 177 N. Y. 8, 68 N. E. 992 [*reversing* 80 N. Y. App. Div. 85, 80 N. Y. Suppl. 438]; McDannell *v.* Horrell, 1 Tex. Unrep. Cas. 521. But it must be clearly so. Louisville, etc., R. Co. *v.* Stewart, 128 Ala. 313, 29 So. 562; Plattsburgh First Nat. Bank *v.* Heaton, 3 Hun (N. Y.) 414, 6 Thomps. & C. 37.

Application of rule to hearsay evidence see Parker *v.* U. S., 1 Indian Terr. 592, 43 S. W. 858; Hodges *v.* Hodges, 106 N. C. 374, 11 S. E. 364; Richardson *v.* Agnew, 46 Wash. 117, 89 Pac. 404. But see Dillard *v.* Olalla Min. Co., 52 Oreg. 126, 94 Pac. 966, 96 Pac. 678, where a general objection was held insufficient.

48. *Alabama.*— Sanders *v.* Davis, 153 Ala. 375, 44 So. 979; Larkin *v.* Baty, 111 Ala. 303, 18 So. 666; Washington *v.* State, 106 Ala. 58, 17 So. 546; Bates *v.* Morris, 101 Ala. 282, 13 So. 138; Lecroy *v.* Wiggins, 31 Ala. 13; Pool *v.* Devers, 30 Ala. 672; Cunningham *v.* Cochran, 18 Ala. 479, 52 Am. Dec. 230; Davis *v.* State, 17 Ala. 415.

Arizona.— Rush *v.* French, 1 Ariz. 99, 25 Pac. 816.

California.— Roche *v.* Llewellyn Iron Works Co., 140 Cal. 563, 74 Pac. 147; Morehouse *v.* Morehouse, 140 Cal. 88, 73 Pac. 738, (1902) 69 Pac. 625; Arnold *v.* Producers' Fruit Co., 128 Cal. 637, 61 Pac. 283; Nightingale *v.* Scannell, 18 Cal. 315; McDonald *v.* Bear River, etc., Water, etc., Co., 13 Cal. 220.

Colorado.— Ward *v.* Wilms, 16 Colo. 86, 27 Pac 247.

Florida.— Seaboard Air Line R. Co. *v.* Harby, 55 Fla. 555, 46 So. 590.

Illinois.— Chicago, etc., R. Co. *v.* Rathneau, 225 Ill. 278, 80 N. E. 119 [*affirming* 124 Ill. App. 427]; Coles County *v.* Messer, 195 Ill. 540, 63 N. E. 391 [*reversing* 92 Ill. App. 432]; Sidwell *v.* Schumacher, 99 Ill. 426; Curtis *v.* Marrs, 29 Ill. 508; Clauser *v.* Stone, 29 Ill. 114, 81 Am. Dec. 299.

Iowa.— Rindskoff *v.* Malone, 9 Iowa 540, 74 Am. Dec. 367.

Kansas.— Topeka *v.* Sherwood, 39 Kan. 690, 18 Pac. 933.

obviated.[49] A general objection to a question is also sufficient where a specific objection,[50] or repeated specific objections, have been made to the same line of questioning,[51] or where there is no evidence in support of any cause of action alleged.[52] Where evidence is excluded on a general objection the action of the court will be sustained if any tenable objection to its admission in fact existed.[53] But if no possible ground appears upon which the ruling of the court in excluding evidence can be sustained a reversal will follow.[54] The fact that the objection is not specific will not prevent a review of the ruling of the court, and a reversal, if the testimony was competent.[55]

(4) What Are General Objections Illustrated. The following objections have been held bad for generality: That the evidence is incompetent,[56]

Mississippi.— Wood *v.* American L. Ins., etc., Co., 7 How. 609.

Missouri.— Connor *v.* Black, 119 Mo. 126, 24 S. W. 184; Alcorn *v.* Chicago, etc., R. Co., 108 Mo. 81, 18 S. W. 188; Alcorn *v.* Chicago, etc., R. Co., (1891) 16 S. W. 229, (1890) 14 S. W. 543; State *v.* Meyers, 99 Mo. 107, 12 S. W. 516; Rogers *v.* Troost, 51 Mo. 470; Spaulding *v.* Edina, 122 Mo. App. 65, 97 S. W. 545; Beard *v.* American Car Co., 63 Mo. App. 382.

New Hampshire.— Dow *v.* Merrill, 65 N. H. 107, 18 Atl. 317.

New York.— Turner *v.* Newburgh, 109 N. Y. 301, 16 N. E. 344, 4 Am. St. Rep. 453; Tozer *v.* New York Cent., etc., R. Co., 105 N. Y. 659, 11 N. E. 846; Hinman *v.* Hare, (1887) 10 N. E. 41, 1 Silv. App. 241; Quinby *v.* Strauss, 90 N. Y. 664; Eccles *v.* Radam, 75 Hun 535, 27 N. Y. Suppl. 486; Dooley *v.* Moan, 57 Hun 535, 11 N. Y. Suppl. 239; O'Brien *v.* New York City R. Co., 55 Misc. 228, 105 N. Y. Suppl. 238; Gilroy *v.* Loftus, 21 Misc. 317, 47 N. Y. Suppl. 138 [*affirming* 20 Misc. 724, 45 N. Y. Suppl. 1141]; Martin *v.* Faragher, 14 N. Y. St. 170; Boldt *v.* Murray, 2 N. Y. St. 232 [*affirmed* in 113 N. Y. 670, 21 N. E. 1116].

Pennsylvania.— Garsed *v.* Turner, 71 Pa. St. 56; Klein *v.* Franklin Ins. Co., 13 Pa. St. 247.

Tennessee.— Lowenstein *v.* McCadden, 92 Tenn. 614, 22 S. W. 426.

Texas.— Stiles *v.* Giddens, 21 Tex. 783; Cheatham *v.* Riddle, 8 Tex. 162.

United States.— Westinghouse Electric, etc., Co. *v.* Stanley Instrument Co., 133 Fed. 167, 68 C. C. A. 523.

See 46 Cent. Dig. tit. "Trial," § 196.

Where a question calls for conclusions and not facts a general objection is sufficient. Rodgers *v.* Fletcher, 13 Abb. Pr. (N. Y.) 299.

49. Bufford *v.* Little, 159 Ala. 300, 48 So. 697; Holcombe *v.* Munson, (N. Y. 1886) 9 N. E. 443; Fillo *v.* Jones, 2 Abb. Dec. (N. Y.) 121, 4 Keyes 328; Eccles *v.* Radam, 75 Hun (N. Y.) 535, 27 N. Y. Suppl. 486.

Where the question on its face calls for illegal evidence a general objection is sufficient. Nevers Lumber Co. *v.* Fields, 151 Ala. 367, 44 So. 81.

50. Floyd *v.* State, 82 Ala. 16, 2 So. 683; Gray *v.* Brooklyn Union Pub. Co., 35 N. Y. App. Div. 286, 55 N. Y. Suppl. 35.

51. Iverson *v.* McDonnell, 36 Wash. 73, 78 Pac. 202.

52. Larned *v.* Hudson, 57 N. Y. 151.

53. *California.*— Spottiswood *v.* Weir, 80 Cal. 448, 22 Pac. 289; Miller *v.* Van Tassel, 24 Cal. 459; People *v.* Graham, 21 Cal. 261.

Illinois.— Spohr *v.* Chicago, 206 Ill. 441, 69 N. E. 515; North Chicago St. R. Co. *v.* Cotton, 140 Ill. 486, 29 N. E. 899.

Indiana.— Storms *v.* Lemon, 7 Ind. App. 435, 34 N. E. 644.

Missouri.— McDermott *v.* Judy, 67 Mo. App. 647; Crow *v.* Stevens, 44 Mo. App. 137.

Nebraska.— Imhoff *v.* Richards, 48 Nebr. 590, 67 N. W. 483; Hurlbut *v.* Hall, 39 Nebr. 889, 58 N. W. 538.

New York.— Tooley *v.* Bacon, 70 N. Y. 34; People *v.* Brandreth, 36 N. Y. 191.

North Carolina.— Gidney *v.* Moore, 86 N. C. 484.

South Dakota.— International Harvester Co. of America *v.* McKeever, 21 S. D. 91, 109 N. W. 642.

If counsel offering the evidence asks opposing counsel to make a specific objection, which he declines to do, the rule is otherwise. Colburn *v.* Chicago, etc., R. Co., 109 Wis. 377, 85 N. W. 354. The object of making objections is not solely to enable the objecting party to insist on error in the appellate court but also to enable counsel putting the questions to avoid error and more effectually to prove his case or defense.

On appeal it will be assumed in the absence of any request on the part of the opposing party, or the court, to make the objection more definite, that it was understood, and that the ruling was placed upon the right ground. Tooley *v.* Bacon, 70 N. Y. 34.

If the true objections could not have been obviated on being stated, the ruling of the court will be sustained in excluding evidence without regard to the grounds of objection stated by counsel. Miller *v.* Van Tassel, 24 Cal. 459.

54. Clark *v.* Connor, 28 Iowa 311.

55. Chaffe *v.* Memphis, etc., R. Co., 64 Mo. 193.

56. *Alabama.*— Ladd *v.* State, 92 Ala. 58, 9 So. 401.

Georgia.— Sharpton *v.* Johnson, 86 Ga. 443, 12 S. E. 646.

Indiana.— McKinsey *v.* McKee, 109 Ind. 209, 9 N. E. 771; Ringgenberg *v.* Hartman, 102 Ind. 537, 26 N. E. 91; Indiana, etc., R. Co. *v.* Cook, 102 Ind. 133, 26 N. E. 203; McClellan *v.* Bond, 92 Ind. 424; Weik *v.*

irrelevant,[57] or immaterial;[58] incompetent and immaterial;[59] irrelevant and immaterial;[60] illegal;[61] inadmissible;[62] illegal, irrelevant, and immaterial;[63] or incompetent, illegal, and not responsive to the issues;[64] that it is not proper testimony for the jury;[65] "on all the grounds ever known or heard of;"[66] that the testimony is illegal and the witness incompetent;[67] that the evidence is illegal and incompetent;[68] incompetent and improper,[69] or irrelevant, incompetent, and immaterial,[70] or not authorized by the pleadings;[71] or that the evidence is incompetent under the circumstances of the case.[72]

Pugh, 92 Ind. 382; Noftsger *v.* Smith, 6 Ind. App. 54, 32 N. E. 1024.

Michigan.—Abbott *v.* Chaffee, 83 Mich. 256, 47 N. W. 216.

Missouri.—Tygard *v.* Falor, 163 Mo. 234, 63 S. W. 672; Clark *v.* Conway, 23 Mo. 438; Hutchinson *v.* Morris, 131 Mo. App. 258, 110 S. W. 684; Glenville *v.* St. Louis R. Co., 51 Mo. App. 629.

Montana.—Helena *v.* Albertose, 8 Mont. 499, 20 Pac. 817.

New Hampshire.—Bundy *v.* Hyde, 50 N. H. 116.

New York.—Whitman *v.* Foley, 125 N. Y. 651, 26 N. E. 725; Kernochan *v.* New York El. R. Co., 59 N. Y. Super. Ct. 561, 13 N. Y. Suppl. 624 [*affirming* 8 N. Y. Suppl. 648, and *affirmed* in 128 N. Y. 559, 29 N. E. 65]; Kahnweiler *v.* Smith, 14 Daly 142, 6 N. Y. St 241 [*affirmed* in 111 N. Y. 688, 19 N. E. 287].

Texas.—Perkins *v.* Buaas, (Civ. App. 1895) 32 S. W. 240.

United States.—Minchen *v.* Hart, 72 Fed. 294, 18 C. C. A. 570.

See 46 Cent. Dig. tit. "Trial," § 199.

57. Owen *v.* Frink, 24 Cal. 171; Dreux *v.* Domec, 18 Cal. 83; Armour *v.* Ross, 75 S. C. 201, 55 S. E. 315; Postal Tel.-Cable Co. *v.* Sunset Constr. Co., (Tex. Civ. App. 1908) 109 S. W. 265 [*reversed* on other grounds in 102 Tex. 148, 114 S. W. 98]. But see Stoner *v.* Royar, 200 Mo. 444, 98 S. W. 601, in which it was held that an objection to evidence that it is irrelevant is sufficiently specific, for it means that it does not bear on any issue in the case, but an objection that the evidence is incompetent, without a specification in what respect it is incompetent, is insufficient.

58. Brown *v.* Wakeman, 18 N. Y. Suppl. 363.

59. Chapman *v.* Moore, 107 Ind. 223, 8 N. E. 80; Ranson *v.* Weston, 110 Mich. 240, 68 N. W. 152; Olson *v.* Burlington, etc., R. Co., 12 S. D 326, 81 N. W. 634; McKarsie *v.* Citizens' Bldg., etc., Assoc., (Tenn. Ch. App. 1899) 53 S. W. 1007.

60. Keesling *v.* Doyle, 8 Ind. App. 43, 35 N. E. 126; National Soc. U. S. D. *v.* American Surety Co., 56 Misc. (N. Y.) 627, 107 N. Y. Suppl. 820; Furnish *v.* Burge, (Tenn. Ch. App. 1899) 54 S. W. 90; Galveston, etc., R. Co. *v.* Powers, (Tex. Civ. App. 1907) 101 S. W. 250 [*reversed* on other grounds in 101 Tex. 161, 105 S. W. 491]; Leftwich *v.* State, (Tex. Cr. App. 1900) 55 S. W. 571.

61. Ingram *v.* Little, 14 Ga. 173, 58 Am. Dec. 549.

62. Leet *v.* Wilson, 24 Cal. 398; Fowler *v.* Wallace, 131 Ind. 347, 31 N. E. 53; Heymes *v.* Champlin, 52 Mich. 25, 17 N. W. 226.

63. McClesky *v.* Howell Cotton Co., 147 Ala. 573, 42 So. 67.

64. Margrave *v.* Ausmuss, 51 Mo. 561.

65. Withers *v.* Sandlin, 36 Fla. 619, 18 S. W. 856.

66. Johnston *v.* Clements, 25 Kan. 376.

67. Carter *v.* Bennett, 4 Fla. 283; Elwood *v.* Deifendorf, 5 Barb. (N. Y.) 398.

68. Clark *v.* Conway, 23 Mo. 438.

69. Evansville, etc., R. Co. *v.* Fettig, 130 Ind. 61, 29 N. E. 407; Cincinnati, etc., R. Co. *v.* Howard, 124 Ind. 280, 24 N. E. 892, 19 Am. St. Rep. 96, 8 L. R. A. 593.

70. Swaim *v.* Swaim, 134 Ind. 596, 53 N. E. 792; Johnson *v.* Brown, 130 Ind. 534, 28 N. E. 698; Evansville, etc., R. Co. *v.* Fettig, 130 Ind. 61, 29 N. E. 407; Stringer *v.* Frost, 116 Ind. 477, 19 N. E. 331, 9 Am. St. Rep. 875, 2 L. R. A. 614; Byard *v.* Harkrider, 108 Ind. 376, 9 N. E. 294; McCullough *v.* Davis, 108 Ind. 292, 9 N. E. 276; Voss *v.* State, 9 Ind. App. 294, 36 N. E. 654; Diether *v.* Ferguson Lumber Co., 9 Ind. App. 173, 35 N. E. 843, 36 N. E. 765; Wabash Valley Protective Union *v.* James, 8 Ind. App. 449, 35 N. E. 919; McCloskey *v.* Davis, 8 Ind. App. 190, 35 N. E. 187; Ohio, etc., R. Co. *v.* Wrape, 4 Ind. App. 108, 30 N. E. 427; Russell *v.* Davis, 51 Minn. 482, 53 N. W. 766; Alexander *v.* Thompson, 42 Minn. 498, 44 N. W. 534; Three States Lumber Co. *v.* Rogers, 145 Mo. 445, 46 S. W. 1079; Glenville *v.* St. Louis R. Co., 51 Mo. App. 629; Churchman *v.* Kansas City, 49 Mo. App. 366; Merchants' Exch. Nat. Bank *v.* Cardozo, 35 N. Y. Super Ct. 162; Landis Mach. Co. *v.* Konantz Saddlery Co., 17 N. D. 310, 116 N. W. 333; Bottineau First Nat. Bank *v.* Warner, 17 N. D. 76, 114 N. W. 1085. *Contra*, Bennett *v.* McDonald, 59 Nebr. 234, 80 N. W. 826; Madison First Nat. Bank *v.* Carson, 30 Nebr. 104, 46 N. W. 276.

Limitation of rule.—Where a witness is asked what a party, in whose behalf he is called, had said about the litigation, an objection that a self-serving declaration is thereby called for is sufficiently indicated by the use of the word "incompetent," and the addition of the words, "irrelevant and immaterial," does not so far detract from its force as to render it unavailing on review. Cooper *v.* Bower, 78 Kan. 164, 156, 96 Pac. 794, 59.

71. Metzger *v.* Franklin Bank, 119 Ind. 359, 21 N. E. 973; Walter *v.* Walter, 117 Ind. 247, 20 N. E. 148; Fallon *v.* Rapid City, 17 S. D. 570, 97 N. W. 1009.

72. Merritt *v.* Seaman, 6 Barb. (N. Y.)

(B) *Requisites and Sufficiency of Statement* — (1) IN GENERAL. In applying the rule that the objection must state the specific grounds on which it is based it has been held that if the objection is on the ground that there is a variance between the pleadings and proof, it must specify wherein the variance consists;[73] if that there is better evidence, the nature of such evidence must be disclosed;[74] if, on the ground of incompetency, the reasons why it is incompetent should be pointed out;[75] if that an instrument is not made and certified according to law the objection must point out in what respect it is lacking;[76] if that it has been altered it must point out wherein the alteration consists;[77] if that a proper bill of particulars has not been served, it must point out the defects in the bill;[78] if that preliminary facts have not been proved it must specify what is lacking.[79] If the objection is that a hypothetical question does not correctly state the facts it must point out wherein the defect lies,[80] and if it is asserted that a hypothetical question varies from the proof, it should be pointed out in which respect the question does so vary.[81]

(2) SPECIFICATION OF GROUNDS AS AFFECTING GROUNDS NOT SPECIFIED. It is a rule of universal application that the objection is deemed to be limited to the ground or grounds specified and does not cover others not specified.[82] In other words, where specific grounds are stated the implication is that there are

330 [*reversed* on other grounds in 6 N. Y. 168].

73. *Alabama.*—Alabama Midland R. Co. *v.* Darby, 119 Ala. 531, 24 So. 713.

California.— Georges *v.* Kessler, 131 Cal. 183, 63 Pac. 466.

Illinois.— Swift *v.* Rutkowski, 182 Ill. 18, 54 N. E. 1038; Murchie *v.* Peck, 160 Ill. 175, 43 N. E. 356 [*affirming* 57 Ill. App. 396]; St. Clair County Benev. Society *v.* Fietsam, 97 Ill. 474 [*affirming* 6 Ill. App. 151].

Michigan.— McDonald *v.* Smith, 139 Mich. 211, 102 N. W. 668.

United States.— Illinois Car, etc., Co. *v.* Linstroth Wagon Co., 112 Fed. 737, 50 C. C. A. 504.

74. Leavens *v.* Smith, 102 Ga. 480, 31 S. E. 104; McKarsie *v.* Citizens' Bldg., etc., Assoc., (Tenn. Ch. App. 1899) 53 S. W. 1007.

75. Chicago Sanitary Dist. *v.* Bernstein, 175 Ill. 215, 51 N. E. 720; Baldwin *v.* Runyan, 8 Ind. App. 344, 35 N. E. 569; Westfield Cigar Co. *v.* Insurance Co. of North America, 169 Mass. 382, 47 N. E. 1026; Sloan *v.* Hunter, 56 S. C. 385, 34 S. E. 658, 879, 76 Am. St. Rep. 551.

76. Fitzpatrick *v.* Papa, 89 Ind. 17; New Orleans, etc., R. Co. *v.* Moye, 39 Miss. 374; Maul *v.* Drexel, 55 Nebr. 446, 76 N. W. 163; People *v.* Tobey, 153 N. Y. 381, 47 N. E. 800; Hunter *v.* Walter, (N. Y. 1891) 29 N. E. 1030; Hunter *v.* Walker, 128 N. Y. 668, 29 N. E. 145.

77. Stratton *v.* Lockhart, 1 Ind. App. 380, 27 N. E. 715.

78. Laraway *v.* Fischer, 49 Hun (N. Y.) 611, 3 N. Y. Suppl. 691.

79. Rash *v.* Whitney, 4 Mich. 495.

80. *Connecticut.*— Barber's Appeal, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90.

Illinois.— Catlin *v.* Traders' Ins. Co., 83 Ill. App. 40.

Michigan.— Styles *v.* Decatur, 131 Wis. 443, 91 N. W. 622.

Missouri.— O'Neill *v.* Kansas City, 178 Mo. 91, 77 S. W. 64; Orr *v.* Bradley, 126 Mo. App. 146, 103 S. W. 1149.

Montana.— Prosser *v.* Montana Cent. R. Co., 17 Mont. 372, 43 Pac. 81, 30 L. R. A. 814.

United States.— Missouri Pac. R. Co. *v.* Hall, 66 Fed. 868, 14 C. C. A. 153.

See 46 Cent. Dig. tit. "Trial," § 198.

But see Frigstad *v.* Great Northern R. Co., 101 Minn. 40, 111 N. W. 838, holding that where a hypothetical question omits material evidence or contains a statement of a material fact as to which there is no evidence, an objection that the question does not contain a correct statement of the evidence is sufficiently specific unless the trial judge asks that his attention be called to the evidence which is omitted or the matter which is improperly included.

81. Chicago Union Traction Co. *v.* Roberts, 131 Ill. App. 476 [*affirmed* in 229 Ill. 481, 82 N. E. 401].

82. *Alabama.*— Emrich *v.* Gilbert Mfg. Co., 138 Ala. 316, 35 So. 322; Coghill *v.* Kennedy, 119 Ala. 641, 24 So. 459.

Arizona.— Rush *v.* French, 1 Ariz. 99, 25 Pac. 816.

Arkansas.— Kahn *v.* Lucchesi, 65 Ark. 371, 46 S. W. 729.

California.— Berliner *v.* Travellers' Ins. Co., 121 Cal. 451, 53 Pac. 922; Natoma Water, etc., Co. *v.* Clarkin, 14 Cal. 544.

Colorado.— Whitehead *v.* Jessup, 2 Colo. App. 76, 29 Pac. 916.

Connecticut.— Plumb *v.* Curtis, 66 Conn. 154, 33 Atl. 998.

Florida.— Jacksonville, etc., R. Co. *v.* Peninsular Land, etc., Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33, 65.

Georgia.— Waxelbaum *v.* Berry, 99 Ga. 280, 25 S. E. 775; Pearson *v.* Forsyth, 61 Ga. 537.

Illinois.— Millers' Nat. Ins. Co. *v.* Jackson County Milling, etc., Co., 60 Ill. App. 224; Hess *v.* Ferris, 57 Ill. App. 37.

Indiana.— Myers *v.* State, 47 Ind. 293.

no others,[83] or if others that they are waived.[84] If the objection is to the identity of an instrument, it is not met by an objection to the competency of the witness.[85] If the objection is to the competency of the witness,[86] or that he is not qualified as an expert,[87] an objection to the competency of the question asked is not sufficient. An objection on the ground of variance raises no question that the evidence was hearsay.[88] An objection that a copy of a contract was not shown to be a true copy does not raise the question that no sufficient reason was shown for not producing the original.[89] An objection to the relevancy, competency, and materiality of the subject-matter of a question raises no question as to its form.[90] So an objection that sufficient facts are not stated will not raise the question whether the facts assumed have been proved.[91] An objection to the introduction of a document based on the incompetency of the witness offering it does not raise the objection that the document was incompetent because of extraneous matter.[92] An objection to the competency of a witness on the ground of interest does not raise the question of his competency on the ground of public policy.[93] An objection that a deed was defectively acknowledged does not raise the objection that the execution was not duly proven.[94] An objection to the competency of an attorney that it is not shown that he was not acting for his client is not sufficient to raise the question that an attorney is not competent to testify without the consent of his client.[95] And an objection that the evidence is in its nature inadmissible is

Iowa.— Mathews *v.* Herron, 102 Iowa 45, 67 N. W. 226, 70 N. W. 736.

Kansas.— Kansas Farmers' F. Ins. Co. *v.* Hawley, 46 Kan. 746, 27 Pac. 176.

Kentucky.— Huling *v.* Fort, 2 Litt. 193.

Massachusetts.— Hildreth *v.* Martin, 3 Allen 371; Howard *v.* Hayward, 10 Metc. 408.

Michigan.— Detzur *v.* B. Stroh Brewing Co., 119 Mich. 282, 77 N. W. 948, 44 L. R. A. 500.

Minnesota.— Triggs *v.* Jones, 46 Minn. 277, 48 N. W. 1113; Smith *v.* Bean, 46 Minn. 138, 48 N. W. 687; Vaughan *v.* McCarthy, 63 Minn. 221, 65 N. W. 249.

Mississippi.— Alexander *v.* Eastland, 37 Miss. 554.

Missouri.— Drew *v.* Drum, 44 Mo. App. 25; Griveaud *v.* St. Louis Cable, etc., R. Co., 33 Mo. App. 458.

Montana.— Dorcas *v.* Doll, 33 Mont. 314, 83 Pac. 884.

Nebraska.— Lincoln Supply Co. *v.* Graves, 73 Nebr. 214, 102 N. W. 457.

New Hampshire.— Willey *v.* Portsmouth, 64 N. H. 214, 9 Atl. 220.

New York.— Union Trust Co. *v.* Leighton, 83 N. Y. App. Div. 568, 82 N. Y. Suppl. 7; Bullock *v.* Oppman, 1 N. Y. Suppl. 203 [*affirmed* in 119 N. Y. 637, 23 N. E. 1148].

North Carolina.— Rollins *v.* Henry, 78 N. C. 342.

Oregon.— Ladd *v.* Sears, 9 Oreg. 244.

Pennsylvania.— Mills *v.* Buchanan, 14 Pa. St. 59.

Tennessee.— Monteeth *v.* Caldwell, 7 Humphr. 13; Pillow *v.* Shannon, 3 Yerg. 508.

Texas.— Folts *v.* Ferguson, (Civ. App. 1894) 24 S. W. 657.

Vermont.— Willett *v.* St. Albans, 69 Vt. 330, 38 Atl. 72.

Virginia.— Richmond Ice Co. *v.* Crystal Ice Co., 103 Va. 465, 49 S. E. 650.

Washington.— Gustin *v.* Jose, 11 Wash. 348, 39 Pac. 687.

Wisconsin.— Shaw *v.* Sun Prairie, 74 Wis. 105, 42 N. W. 271; Ripon *v.* Bittel, 30 Wis. 614.

United States.— Stebbins *v.* Duncan, 108 U. S. 32, 2 S. Ct. 313, 27 L. ed. 641; Nassau Electric R. Co. *v.* Corliss, 126 Fed. 355, 61 C. C. A. 257.

See 46 Cent. Dig. tit. "Trial," § 211 *et seq.*

83. Bass *v.* State, 136 Ind. 165, 36 N. E. 124.

84. See *infra*, V, D, 1, e, (II).

85. Bullen *v.* Arnold, 31 Me. 583.

86. *Colorado.*— United Oil Co. *v.* Roseberry, 30 Colo. 177, 69 Pac. 588.

Kansas.— Topeka *v.* Griffey, 6 Kan. App. 920, 51 Pac. 296.

Minnesota.— Parsons Band Cutter, etc., Co. *v.* Haub, 83 Minn. 180, 86 N. W. 14.

Vermont.— Watriss *v.* Trendall, 74 Vt. 54, 52 Atl. 118.

Wisconsin.— Sucke *v.* Hutchinson, 97 Wis. 373, 72 N. W. 880.

87. Evansville, etc., R. Co. *v.* Swift, 128 Ind. 34, 27 N. E. 420; State *v.* Rue, 72 Minn. 296, 75 N. W. 235; Young *v.* Kansas City, etc., R. Co., 52 Mo. App. 530.

88. Plumb *v.* Curtis, 66 Conn. 154, 33 Atl. 998.

89. Kollock *v.* Parcher, 52 Wis. 393, 9 N. W. 67.

90. Hildebrand *v.* United Artisans, 50 Oreg. 159, 91 Pac. 542.

91. Mount *v.* Brooklyn Union Gas Co., 72 N. Y. App. Div. 440, 76 N. Y. Suppl. 533.

92. Gustin *v.* Jose, 11 Wash. 348, 39 Pac. 687.

93. Fulton Ins. Co. *v.* Goodman, 32 Ala. 108.

94. Alexander *v.* Eastland, 37 Miss. 554.

95. Faylor *v.* Faylor, 136 Cal. 92, 68 Pac. 482.

not raised by an objection that the evidence cannot be introduced under the pleadings.[96] But an objection that the testimony is not in the cognizance of the witness, an expert,[97] or of any witness,[98] is sufficient to challenge the evidence for incompetency as expert testimony.

(v) *Joint Objections.* Evidence is properly admitted over a joint objection by several parties where it is competent as to any of them.[99] Where evidence is admissible as to one party, others desiring to object must make the objection in such form that the appellate court can clearly see the error complained of.[1]

(vi) *Objection Embracing Two Subjects.* If an objection is double and one of the grounds assigned is untenable, error cannot be assigned to the overruling of the objection. No duty rests on the court to separate that part of the objection which is tenable from that part which is not.[2]

d. Time For Making. For reasons which are perfectly obvious, an objection to the introduction of testimony must be made in apt time,[3] at the earliest possible opportunity after the objection becomes apparent.[4] However, it cannot be made in advance of the offer of the evidence sought to be introduced.[5] And where a question is so framed that the court cannot say whether an answer thereto would be inadmissible until after the answer is given, an objection to the question is premature.[6] It must be made at the trial,[7] and at the time the evidence is offered,[8]

96. Barber *v.* Rose, 5 Hill (N. Y.) 76.

97. Blum *v.* Manhattan R. Co., 1 Misc. (N. Y.) 119, 20 N. Y. Suppl. 722.

98. Jefferson *v.* New York El. R. Co., 132 N. Y. 483, 30 N. E. 981 [*reversing* 11 N. Y. Suppl. 488].

99. *California.*— Gilfillan *v.* Shattuck, 142 Cal. 27, 75 Pac. 646; Voorman *v.* Voight, 46 Cal. 392.

Connecticut.— Starr Burying Ground Assoc. *v.* North Lane Cemetery Assoc., 77 Conn. 83, 58 Atl. 467.

Georgia.— Clarke *v.* East Atlanta Land Co., 113 Ga. 21, 38 S. E. 323.

Indiana.— Elliott *v.* Russell, 92 Ind. 526; Hogue *v.* McClintock, 76 Ind. 205.

Iowa.— Allen *v.* Barrett, 100 Iowa 16, 69 N. W. 272.

Massachusetts.— American Tube, etc., Co. *v.* Crafts, 156 Mass. 257, 30 N. E. 1024.

New York.— Fox *v.* Erbe, 100 N. Y. App. Div. 343, 91 N. Y. Suppl. 832 [*affirmed* in 184 N. Y. 542, 76 N. E. 1095]; Gardner *v.* Friederich, 25 N. Y. App. Div. 521, 49 N. Y. Suppl. 1077 [*affirmed* in 163 N. Y. 568, 57 N. E. 1110].

1. Cowing *v.* Greene, 45 Barb. (N. Y.) 585.

2. Campbell *v.* Hughes, 155 Ala. 591, 47 So. 45.

3. Kidder *v.* McIlhenny, 81 N. C. 123.

Administration of oath.— Where a witness is competent for some purposes the objection need not be interposed to the administration of the oath. Chew *v.* Holt, 111 Iowa 362, 82 N. W. 901.

4. Sharon *v.* Minnock, 6 Nev. 377.

5. *California.*— Valensin *v.* Valensin, 73 Cal. 106, 14 Pac. 397.

Indiana.— Wolfe *v.* Pugh, 101 Ind. 293.

New York.— Krakowski *v.* North New York Bldg., etc., Assoc., 7 Misc. 188, 27 N. Y. Suppl. 314.

Texas.— Missouri, etc., R. Co. *v.* Johnson, 95 Tex. 409, 67 S. W. 768 [*affirming* (Civ. App. 1901) 67 S. W. 769].

Vermont.— Crane *v.* Darling, 71 Vt. 295, 44 Atl. 359.

See 46 Cent. Dig. tit. "Trial," § 184.

Application of rule.— An objection to the admission of evidence, on the ground of incompetency, taken after the testimony has been given, is premature as to any further evidence that may be given by the witness, if it is not repeated on the next question to the witness. *In re* Morgan, 104 N. Y. 74, 9 N. E. 861.

That the court may rule upon testimony before it has been actually offered see Fath *v.* Thompson, 58 N. J. L. 180, 33 Atl. 391.

6. Louisville, etc., R. Co. *v.* Jones, 108 Ind. 551, 9 N. E. 476.

7. Doe *v.* Daniel, 15 N. Brunsw. 372.

8. *Arkansas.*— Johnston *v.* Ashley, 7 Ark. 470.

California.— Willeford *v.* Bell, (1897) 49 Pac. 6.

Colorado.— Bennet *v.* North Colorado Springs Land, etc., Co., 23 Colo. 470, 48 Pac. 812, 58 Am. St. Rep. 281.

Georgia.— Thompson *v.* Waterman, 100 Ga. 586, 28 S. E. 286; Garner *v.* Hopgood, Ga. Dec. Pt. II, 131.

Illinois.— Illinois Cent. R. Co. *v.* Foulks, 191 Ill. 57, 60 N. E. 890 [*affirming* 92 Ill. App. 391]; Conway *v.* Case, 22 Ill. 127.

Indiana.— Wood *v.* State, 130 Ind. 364, 30 N. E. 309; Crawford *v.* Anderson, 129 Ind. 117, 28 N. E. 314; Newlon *v.* Tyner, 128 Ind. 466, 27 N. E. 168, 28 N. E. 59; Elred *v.* State, 72 Ind. 292; Darnall *v.* Hazlett, 11 Ind. 494; Crabs *v.* Mickle, 5 Ind. 145; Garrett *v.* Winterich, 44 Ind. App. 322, 87 N. E. 161, 88 N. E. 308; Bowell *v.* De Wald, 2 Ind. App. 303, 28 N. E. 430, 50 Am. St. Rep. 240.

Iowa.— Culbertson *v.* Salinger, (1908) 117 N. W. 6; Hutton *v.* Doxsee, 116 Iowa 13, 89 N. W. 79; Moore *v.* McKinley, 60 Iowa 367, 14 N. W. 768; Le Grand Quarry Co. *v.* Reichard, 40 Iowa 161; McGlassen *v.* Wright, 10 Iowa 591.

if counsel is then aware of the objection,[9] and if not then within a reasonable time after he is informed of the objection.[10] An objection to an improper question, it is held, must be made when the question is asked,[11] and before it is

Kansas.— Wilson *v.* Fuller, 9 Kan. 176; Johnson *v.* Mathews, 5 Kan. 118.

Louisiana.—Gaiennie *v.* Freret, 14 La. Ann. 488; Crow *v.* Griffin, 6 La. Ann. 316; Langfitt *v.* Clinton, etc., R. Co., 2 Rob. 217; Huey *v.* Drinkgrave, 19 La. 482.

Maine.— Bucksport *v.* Buck, 89 Me. 320, 36 Atl 456; Frost *v.* Goddard, 25 Me. 414.

Maryland.— North *v.* Mallory, 94 Md. 305, 51 Atl. 89; Shanks *v.* Dent, 8 Gill 120.

Michigan.— Wilcox *v.* Toledo, etc., R. Co., 45 Mich. 280, 7 N. W. 892; Locke *v.* Farley, 41 Mich. 405, 1 N. W. 955; Johnstone *v.* Scott, 11 Mich. 232.

Minnesota.—Aultman *v.* Kennedy, 33 Minn. 339, 23 N. W. 528; Dufolt *v.* Gorman, 1 Minn. 301, 66 Am. Dec. 543.

Mississippi.— Skinner *v.* Collier, 4 How. 396; Wilson *v.* Owens, 1 How. 126.

Missouri.— Roe *v.* Versailles Bank, 167 Mo. 406, 67 S. W. 303; Dlauhi *v.* St. Louis, etc., R. Co., 139 Mo. 291, 40 S. W. 890; Wayne County *v.* St. Louis, etc., R. Co., 66 Mo. 77; Waldo *v.* Russell, 5 Mo. 387; Ramsey *v.* Waters, 1 Mo. 406; Orr, etc., Shoe Co. *v.* Hance, 44 Mo. App. 461.

Nebraska.— Haverly *v.* Elliott, 39 Nebr. 201, 57 N. W. 1010; Morgan *v.* Larsh, 1 Nebr. 361.

New Hampshire.— Bassett *v.* Salisbury Mfg. Co., 28 N. H. 438; Proprietors of Concord *v.* McIntire, 6 N. H. 527.

New York.— Cullinan *v.* Horan, 116 N. Y. App Div. 711, 102 N. Y. Suppl. 132; Hutchinson *v.* Washburn, 80 N. Y. App. Div. 367, 80 N. Y. Suppl. 691; Seaman *v.* Benson, 4 Barb. 444; Carr *v.* New York, 43 N. Y. Super. Ct. 158; Ottinger *v.* New York El. R. Co., 17 N. Y Suppl. 912; Daniels *v.* Smith, 8 N. Y. Suppl. 128; Town *v.* Needham, 3 Paige 545, 24 Am. Dec. 246; Carson *v.* Murray, 3 Paige 483.

North Carolina.— Wiggins *v.* Guthrie, 101 N. C 661, 7 S. E. 761; Forbes *v.* Sheppard, 98 N. C. 111, 3 S. E. 817.

Pennsylvania.— Ephrata Water Co. *v.* Ephrata Borough, 24 Pa. Super. Ct. 353; Dee *v.* Sharon Hill Academy, 2 Pa. Dist. 228.

South Carolina.— Gwynn *v.* Citizens' Tel. Co., 69 S. C. 434, 48 S. E. 460; McGahan *v.* Crawford, 47 S. C. 566, 25 S. E. 123; Fripp *v.* Williams, 14 S. C. 502; Pool *v.* Dial, 10 S. C. 440.

South Dakota.— Yetzger *v.* Young, 3 S. D. 263, 52 N. W. 1054.

Texas.— Bohanan *v.* Hans, 26 Tex. 445; Hunter *v.* Waite, 11 Tex. 85; Schneider *v.* Sanders, 26 Tex. Civ. App. 169, 61 S. W. 727; Western Union Tel. Co. *v.* Ward, (App. 1892) 19 S. W. 898.

Vermont.— Dunnett *v.* Slack, 78 Vt. 439, 63 Atl. 141; Hills *v.* Marlboro, 40 Vt. 646.

Wisconsin.— Charlesworth *v.* Tinker, 18 Wis. 633.

See 46 Cent. Dig. tit. "Trial," § 183.

Excuses for failure to object.—Counsel may have the testimony of an incompetent witness excluded, although he did not object to the swearing of the witness, if at that time counsel was suffering from a severe headache and failed to object for that reason. South Covington, etc., R. Co. *v.* McCleave, 38 S. W. 1055, 18 Ky. L. Rep. 1036.

9. North *v.* Mallory, 94 Md. 305, 51 Atl. 89; Dent *v.* Hancock, 5 Gill (Md.) 120, 127 (in which it was said: "To allow a greater latitude, as to the time of raising such objections to testimony, might be productive of much inconvenience and injustice"); Roberts *v.* Johnson, 37 N. Y. Super. Ct. 157 [*affirmed* in 58 N. Y. 613].

Where documentary evidence is not submitted to opposing counsel but is introduced and read in part, it may then be objected to by motion to strike out. Marsh *v.* Hand, 35 Md. 123.

10. Dent *v.* Hancock, 5 Gill (Md.) 120.

An objection to testimony given without a question calling therefor is sufficient if recognized by the court as seasonably made. Blum *v.* Manhattan R. Co., 1 Misc. (N. Y.) 119, 20 N. Y. Suppl. 722.

11. *Alabama.*— Western Union Tel. Co. *v.* Bowman, 141 Ala. 175, 37 So. 493; Washington *v.* State, 106 Ala. 58, 17 So. 546; Memphis, etc., R. Co. *v.* Bibb, 37 Ala. 699; Towns *v.* Alford, 2 Ala. 378.

Illinois.— Kreigh *v.* Sherman, 105 Ill. 49.

Indiana.— Lake Shore, etc., R. Co. *v.* McIntosh, 140 Ind. 261, 38 N. E. 476; Brown *v.* Owen, 94 Ind. 31; Taylor *v.* McGrath, 9 Ind. App. 30, 36 N. E. 163.

Iowa.— Stanley *v.* Core, 119 Iowa 417, 93 N. W. 343; Duer *v.* Allen, 96 Iowa 36, 64 N. W. 682; Smith *v.* Dawley, 92 Iowa 312, 60 N. W. 625; Egan *v.* Murray, 80 Iowa 180, 45 N. W. 563.

Louisiana.— Voisin *v.* Jewell, 9 La. 112.

Maine.— State *v.* Nutting, 39 Me. 359.

Michigan.— Williams *v.* Grand Rapids, 53 Mich. 271, 18 N. W. 811; Morrissey *v.* People, 11 Mich. 327.

Missouri.— Foster *v.* Missouri Pac. R. Co., 115 Mo. 165, 21 S. W. 916.

New York.— Link *v.* Sheldon, 136 N. Y. 1, 32 N. E. 696; *In re* Morgan, 104 N. Y. 74, 9 N. E. 861; People *v.* Lohman, 2 Barb. 216 [*affirmed* in 1 N. Y. 379, 49 Am. Dec. 340]; Zoller *v.* Grant, 56 N. Y. Super. Ct. 279, 3 N. Y. Suppl. 539; Pearson *v.* Fiske, 2 Hilt. 146; Tanzer *v.* New York City R. Co., 46 Misc. 86, 91 N. Y. Suppl. 334; Perkins *v.* Brainerd Quarry Co., 11 Misc. 328, 32 N. Y. Suppl. 230.

North Carolina.— Kidder *v.* McIlhenny, 81 N. C. 123.

North Dakota.— Hogen *v.* Klabe, 13 N. D. 319, 100 N. W. 847.

South Dakota.— Vermillion Artesian Well, etc., Co. *v.* Vermillion, 6 S. D. 466, 61 N. W. 802.

Texas.— Holland *v.* Riggs, (Civ. App. 1909)

answered,[12] unless the witness answers the question before an objection can be interposed;[13] otherwise it is proper for the court to decline to strike out the answer thereto if the answer is directly responsive to the question.[14] It cannot be made after the evidence is admitted,[15] at the close of the testimony of the witness whose testimony is objected to,[16] after the close of the entire evidence,[17] after asking an instruction on the effect of the evidence,[18] after the argument has commenced,[19]

116 S. W. 167; Paul *v.* Chenault, (Civ. App. 1898) 44 S. W. 682.

Utah.— Garr *v.* Cranney, 25 Utah 193, 70 Pac. 853.

See 46 Cent. Dig. tit. "Trial," §§ 183, 185.

Contra.— Day *v.* Crawford, 13 Ga. 508.

12. *Alabama.*— Cohn, etc., Lumber Co. *v.* Robbins, 159 Ala. 289, 48 So. 853; Montgomery *v.* Shirley, 159 Ala. 239, 48 So. 679; Western Union Tel. Co. *v.* Northcutt, 158 Ala. 539, 48 So. 553, 132 Am. St. Rep. 38; Birmingham R., etc., Co. *v.* Chastain, 158 Ala. 421, 48 So. 85; Birmingham R., etc., Co. *v.* Taylor, 152 Ala. 105, 44 So. 580; West Pratt Coal Co. *v.* Andrews, 150 Ala. 368, 43 So. 348.

Delaware.— Remington Mach. Co. *v.* Wilmington Candy Co., 6 Pennew. 288, 66 Atl. 465.

Iowa.—Oxford Junction Sav. Bank *v.* Cook, 134 Iowa 185, 111 N. W. 805; Brooks *v.* Sioux City, 114 Iowa 641, 87 N. W. 682.

Missouri.— Thomas *v.* Metropolitan St. R. Co., 125 Mo. App. 131, 100 S. W. 1121; Lutz *v.* Metropolitan St. R. Co., 123 Mo. App. 499, 100 S. W. 46.

New Jersey.— Willett *v.* Morse, 71 N. J. L. 104, 58 Atl. 72.

New York.— Kemble *v.* Rondout Nat. Bank, 94 N. Y. App. Div. 544, 88 N. Y. Suppl. 246; McKee *v.* Nelson, 4 Cow. 355, 15 Am. Dec. 384.

North Carolina.— Dobson *v.* Southern R. Co., 132 N. C. 900, 44 S. E. 593.

Applications of rule.—Objections to the competency of a witness to testify as an expert was waived where no objection was made to his competency until after much of his testimony had been given. Adams *v.* Atlas Mut. Ins. Co., 135 Iowa 299, 112 N. W. 651. An objection to a question as leading should be made at the time the question was put, and before it is answered. Baltimore, etc., R. Co. *v.* State, 107 Md. 642, 69 Atl. 439, 72 Atl. 340. Where, in assault and battery, defendant did not object to questions as to whether a witness knew the reputation of defendant as to peace and quietude, and whether that reputation was good or bad, until after the questions had been answered, the objection came too late; a question which discloses that the answer will be incompetent requiring a prompt objection. Stewart *v.* Watson, 133 Mo. App. 44, 112 S. W. 762.

Where the answer is not made so quickly as to preclude a prior objection, an objection after the answer is made is too late. Birmingham R., etc., Co. *v.* Turner, 154 Ala. 542, 45 So. 671.

Improper question by witness.— If a witness in response to counsel, in order to get a proper understanding of the question, asks an improper question, an objection taken thereto after the answer to the main question is too late. Gray *v.* Brooklyn Heights R. Co., 72 N. Y. App. Div. 424, 76 N. Y. Suppl. 20, 11 N. Y. Annot. Cas. 37.

13. Pratt *v.* New York Cent., etc., R. Co., 77 Hun (N. Y.) 139, 28 N. Y. Suppl. 463; Szuchy *v.* Lehigh Traction Co., 12 Luz. Leg. Reg. (Pa.) 123.

14. *Alabama.*— Richmond, etc., R. Co. *v.* Greenwood, 99 Ala. 501, 14 So. 495.

Indiana.— Ellinger *v.* Rawlings, 12 Ind. App. 336, 40 N. E. 146; Storms *v.* Lemon, 7 Ind. App. 435, 34 N. E. 644.

Kansas.— Missouri River, etc., R. Co. *v.* Owen, 8 Kan. 409.

Minnesota.— Barnes *v.* Christofferson, 62 Minn. 318, 64 N. W. 821.

Missouri.—Martin *v.* Block, 24 Mo. App. 60.

New York.— Prentice *v.* Goodrich, 1 N. Y. App. Div. 15, 36 N. Y. Suppl. 740; Kilpatrick *v.* Dean, 15 Daly 182, 4 N. Y. Suppl. 708.

An objection after answer should be by request for instruction to jury to disregard and not by motion to strike out. McCoy *v.* Munro, 76 N. Y. App. Div. 435, 78 N. Y. Suppl. 849.

15. *Florida.*— McKay *v.* Lane, 5 Fla. 268.

Georgia.— Hanks *v.* Phillips, 39 Ga. 550; Williams *v.* Rawlins, 33 Ga. 117; King *v.* State, 21 Ga. 220.

Iowa.— Parker *v.* Ottumwa, 113 Iowa 649, 85 N. W. 805; Iowa State Sav. Bank *v.* Black, 91 Iowa 490, 59 N. W. 283; Thompson *v.* Wilson, 26 Iowa 120.

Michigan.— Rayburn *v.* Mason Lumber Co., 57 Mich. 273, 23 N. W. 811; Perrott *v.* Shearer, 17 Mich. 48.

Nevada.— Sharon *v.* Minnock, 6 Nev. 377.

New York.— McCoy *v.* Munro, 76 N. Y. App. Div. 435, 78 N. Y. Suppl. 849; Boehme *v.* Michael, 5 N. Y. St. 492.

South Carolina.— Kiddell *v.* Bristow, 67 S. C. 175, 45 S. E. 174; Powers *v.* Standard Oil Co., 53 S. C. 358, 31 S. E. 276.

Washington.— Price *v.* Scott, 13 Wash. 574, 43 Pac. 634.

United States.— Illinois Car, etc., Co. *v.* Linstroth Wagon Co., 112 Fed. 737, 50 C. C. A. 504.

See 46 Cent. Dig. tit. "Trial," §§ 183, 185.

16. White *v.* Pyron, (Tex. Civ. App. 1901) 62 S. W. 82.

17. Dupuis *v.* Thompson, 16 Fla. 69; Brown *v.* Kolb, 8 Pa. Super. Ct. 413, 43 Wkly. Notes Cas. 26.

18. Dent *v.* Hancock, 5 Gill (Md.) 120.

19. Gulf, etc., R. Co. *v.* Gillespie, (Tex. Civ. App. 1909) 118 S. W. 628; Laurent *v.* Vaughn, 30 Vt. 90; Russel *v.* Union Ins. Co., 4 Dall. (U. S.) 421, 1 L. ed. 892, 21 Fed. Cas. No. 12,146, 1 Wash. 409.

in the shape of a request for instructions to the jury,[20] by exceptions to instructions,[21] after the case is argued and the jury charged,[22] after the case has been submitted to the jury,[23] after verdict,[24] on motion for nonsuit,[25] in new trial,[26] in arrest of judgment,[27] after trial,[28] on the third trial of a case,[29] or for the first time on appeal.[30] The rule applies irrespective of the character of the objection, as that the evidence is hearsay,[31] or otherwise not the best evidence,[32] that the proper foundation has not been laid,[33] that it is not proper cross-examination [34] or not within the issues,[35] or that the witness is incompetent [36] or was not sworn.[37] To complain of the exclusion of evidence, there must be an objection and exception at the time of the exclusion.[38]

e. Waiver of Objections — (I) *IN GENERAL.* Objections to admission of evidence may be waived by the party.[39]

(II) *BY FAILURE TO OBJECT* — (A) *Statement of Rule.* It is very generally held that a failure to object to evidence [40] in the trial court [41] at the time it is

20. *Georgia.*— Harrison *v.* Young, 9 Ga. 359.

Illinois.— Vierling *v.* Iroquois Furnace Co., 170 Ill. 189, 48 N. E. 1069.

Maryland.— Lamb *v.* Taylor, 67 Md. 85, 8 Atl. 760.

Michigan.— Burke *v.* Wilber, 42 Mich. 327, 3 N. W. 861.

Missouri.— Drehman *v.* Stifel, 41 Mo. 184, 97 Am. Dec. 268; Singer Mfg. Co. *v.* Clay, 53 Mo. App. 412.

Texas.— Missouri Pac. R. Co. *v.* Mitchell, 75 Tex. 77, 12 S. W. 810; Brown *v.* Lessing, 70 Tex. 544, 7 S. W. 783; Nalle *v.* Gates, 20 Tex. 315; Robson *v.* Watts, 11 Tex. 764; Robertson *v.* Coates, 1 Tex. Civ. App. 664, 20 S. W. 875.

Washington.— Holly St. Land Co. *v.* Beyer, 48 Wash. 422, 93 Pac. 1065.

See 46 Cent. Dig. tit. "Trial," § 186.

21. Rush *v.* Stevenson, 91 Iowa 684, 60 N. W. 217; Le Grand Quarry Co. *v.* Reichard, 40 Iowa 161; Pope *v.* Machias Water Power, etc., Co., 52 Me. 535; Gardner *v.* Gooch, 48 Me. 487; Chamberlain *v.* Porter, 9 Minn. 260.

22. Frost *v.* Goddard, 25 Me. 414; Roll *v.* Rea, 57 N. J. L. 647, 32 Atl. 214; Hodson *v.* Goodale, 22 Oreg. 68, 29 Pac. 70.

23. Arons *v.* Smit, 173 Pa. St. 630, 34 Atl. 234.

24. *Florida.*— Gallaher *v.* State, 17 Fla. 370.

Indian Territory.— Long-Bell Lumber Co. *v.* Thomas, 1 Indian Terr. 225, 40 S. W. 773.

Michigan.— Maxted *v.* Seymour, 56 Mich. 129, 22 N. W. 219.

Minnesota.— Chamberlain *v.* Porter, 9 Minn. 260.

Mississippi.— Phillips *v.* Lane, 4 How. 122.

New York.— Sutton *v.* Corning, 59 N. Y. App. Div. 589, 69 N. Y. Suppl. 670.

North Carolina.— State *v.* Smith, 61 N. C. 302.

Pennsylvania.— Chase *v.* Goldsborough, 1 Phila. 179.

Texas.— Collins *v.* Cook, 40 Tex. 238.

See 46 Cent. Dig. tit. "Trial," § 186.

25. Colrick *v.* Swinburne, 105 N. Y. 503, 12 N. E. 427.

26. Carhart *v.* Wynn, 22 Ga. 24; Manning *v.* Burlington, etc., R. Co., 64 Iowa 240, 20 N. W. 169; Mathias *v.* Lebret, 10 Rob. (La.) 94; Cook *v.* Ligon, 54 Miss. 368; Skinner *v.* Collier, 4 How. (Miss.) 396.

Necessity for renewing objection in motion for new trial see NEW TRIAL, 29 Cyc. 742 *et seq.*

27. McCoy *v.* Jones, 9 Tex. 363.

28. Patrick *v.* Graham, 132 U. S. 627, 10 S. Ct. 194, 33 L. ed. 460.

29. Garrett *v.* Weinberg, 54 S. C. 127, 31 S. E. 341, 34 S. E. 70.

30. See APPEAL AND ERROR, 2 Cyc. 693 *et seq.*

31. Pickett *v.* Bates, 3 La. Ann. 627; Eastman *v.* Harris, 4 La. Ann. 193; Yeatman *v.* Erwin, 5 La. 264.

32. Clay *v.* Boyer, 10 Ill. 506.

33. Perrott *v.* Shearer, 17 Mich. 48.

34. Horton *v.* Brown, 130 Ind. 113, 29 N. E. 414.

35. Leavenworth Electric R. Co. *v.* Cusick, 60 Kan. 590, 57 Pac. 519, 72 Am. St. Rep. 374; Wynn *v.* Central Park, etc., R. Co., 14 N. Y. Suppl. 172.

36. Spence *v.* Repass, 94 Va. 716, 27 S. E. 583.

37. Slauter *v.* Whitelock, 12 Ind. 338; Nesbitt *v.* Dallam, 7 Gill & J. (Md.) 494, 28 Am. Dec. 236; Cady *v.* Norton, 14 Pick. (Mass.) 236.

38. Cook *v.* Conestoga Traction Co., 21 Lanc. L. Rev. (Pa.) 161.

39. Hoxie *v.* Home Ins. Co., 32 Conn. 21, 85 Am. Dec. 240.

40. Thomason *v.* Odum, 31 Ala. 108, 68 Am. Dec. 159; Bishop *v.* Taylor, 41 Fla. 77, 25 So. 287, in absence of motion to strike out.

41. *Alabama.*— Allred *v.* Kennedy, 74 Ala. 326.

Arkansas.— Cogswell *v.* McKeogh, 46 Ark. 524; Peel *v.* Ringgold, 6 Ark. 546.

California.— Union Sav. Bank *v.* Rinaldo, 6 Cal. App. 637, 92 Pac. 873.

Colorado.— Seerie *v.* Brewer, 40 Colo. 299, 90 Pac. 508, 122 Am. St. Rep. 1065, 17 L. R. A. N. S. 329; Morris *v.* Everly, 19 Colo. 529, 36 Pac. 150.

Connecticut.— Simeoli *v.* Derby Rubber Co., 81 Conn. 423, 71 Atl. 546; Bissell *v.* Beckwith, 32 Conn. 509.

Florida.— Western Union Tel. Co. *v.* Mer-

offered [42] is a waiver of all objections to its admissibility. It is equally well settled that, although the evidence would have been inadmissible over proper objection, it is properly in the case,[43] and cannot be excluded from the jury by

ritt, 55 Fla. 462, 46 So. 1024, 127 Am. St. Rep. 169.

Georgia.— Walton *v.* Twiggs, 91 Ga. 90, 16 S. E. 313.

Illinois.— Conway *v.* Case, 22 Ill. 127; Smith *v.* Forth, 24 Ill. App. 198.

Indiana.— Cox *v.* Stout, 85 Ind. 422; Moore *v.* Worley, 24 Ind. 81.

Iowa.—Davidson *v.* Dwyer, 62 Iowa 332, 17 N. W. 575.

Kentucky.— Sutton *v.* Western Union Tel. Co., 129 Ky. 166, 110 S. W. 874, 33 Ky. L. Rep. 577; Hackwith *v.* Damron, 1 T. B. Mon. 235; Edwards *v.* Morris, 2 A. K. Marsh. 65.

Louisiana.— Zabriska's Succession, 119 La. Ann. 1076, 44 So. 893.

Massachusetts.— Garfield, etc., Coal Co. *v.* Pennsylvania Coal, etc., Co., 199 Mass. 22, 84 N. E. 1020.

Mississippi.— McComb *v.* Turner, 14 Sm. & M. 119.

Missouri.— Heiberger *v.* Missouri, etc., Tel. Co., 133 Mo. App. 452, 113 S. W. 730; Joseph *v.* Metropolitan St. R. Co., 129 Mo. App. 603, 107 S. W. 1055.

Nebraska.— Chicago, etc., R. Co. *v.* Wiebe, 25 Nebr. 542, 41 N. W. 297.

North Carolina.— Miller *v.* Asheville, 112 N. C. 759, 16 S. E. 762.

Pennsylvania.— Martin *v.* Bray, 1 Mona. 155, 16 Atl. 515.

Tennessee.— Richmond *v.* Richmond, 10 Yerg. 343.

Texas.— Hill *v.* Baylor, 23 Tex. 261; Abel *v.* Bargas, 45 Tex. Civ. App. 243, 100 S. W. 191.

Vermont.— Morrill *v.* Palmer, 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411.

Wyoming.— Weidenhoft *v.* Primm, 16 Wyo. 340, 94 Pac. 453.

United States.— Excelsior Coal Co. *v.* Gildersleeve, 160 Fed. 47, 87 C. C. A. 202; Hunt *v.* U. S., 61 Fed. 795, 10 C. C. A. 74.

See 46 Cent. Dig. tit. "Trial," § 172.

42. *Alabama.*— Ladd *v.* Smith, (1892) 10 So. 836.

Colorado.— Morris *v.* Everly, 19 Colo. 529, 36 Pac. 150.

Georgia.— Parke *v.* Foster, 26 Ga. 465, 71 Am. Dec. 221; Brown *v.* Robinson, 25 Ga. 144; Low *v.* Pilotage, R. M. Charlt. 302.

Illinois.— Peoria, etc., R. Co. *v.* Neill, 16 Ill. 269.

Minnesota.— Russell *v.* Schurmier, 9 Minn. 28.

Mississippi.—Exum *v.* Brister, 35 Miss. 391.

Missouri.— Reno *v.* St. Joseph, 169 Mo. 642, 70 S. W. 123; Bruns *v.* Capstick, 46 Mo. App. 397.

New York.— Lipschitz *v.* Schwartz, 107 N. Y. Suppl. 579.

Pennsylvania.— McInroy *v.* Dyer, 47 Pa. St. 118.

Vermont.— Wead *v.* St. Johnsbury, etc., R. Co., 66 Vt. 420, 29 Atl. 631.

See 46 Cent. Dig. tit. "Trial," § 172.

Admission before an arbitrator without objection is not a waiver of an objection at the trial that the evidence is illegal. Cox *v.* Norton, 1 Penr. & W. (Pa.) 412.

43. *Alabama.*— Moon *v.* Crowder, 72 Ala. 79; Langford *v.* Cummings, 4 Ala. 46.

California.— Bullard *v.* Stone, 67 Cal. 477, 8 Pac. 17.

Colorado.— Mouat *v.* Wood, 22 Colo. 404, 45 Pac. 389.

Connecticut.— New Haven County Bank *v.* Mitchell, 15 Conn. 206; Nichols *v.* Turney, 15 Conn. 101.

Georgia.— Francis *v.* Dickel, 68 Ga. 255; Jones *v.* Mobile, etc., R. Co., 55 Ga. 122; Thomas *v.* Ellis, 25 Ga. 137; Goodlittle *v.* Roe, 20 Ga. 135; Morrison *v.* Hays, 19 Ga. 294; Bishop *v.* State, 9 Ga. 121.

Illinois.— Petersen *v.* Elgin, etc., Traction Co., 238 Ill. 403, 87 N. E. 345 [*affirming* 142 Ill. App. 34].

Iowa.— Livingston *v.* Stevens, 122 Iowa 62, 94 N. W. 925.

Kansas.— Grandstaff *v.* Brown, 23 Kan. 176.

Kentucky.— Norton *v.* Sanders, 3 J. J. Marsh. 3; Outen *v.* Merrill, 2 Litt. 305.

Louisiana.— Scott *v.* Jackson, 12 La. Ann. 640.

Maine.— Brown *v.* Moran, 42 Me. 44; Jacobs *v.* Bangor, 16 Me. 187, 33 Am. Dec. 652.

Maryland.— Struth *v.* Decker, 100 Md. 368, 59 Atl. 727; Slingluff *v.* Andrew Volk Builders' Supply Co., 89 Md. 557, 43 Atl. 759; Atwell *v.* Grant, 11 Md. 101.

Massachusetts.— Hubbard *v.* Allyn, 200 Mass. 166, 86 N. E. 356; Rice *v.* Bancroft, 11 Pick. 469; Wait *v.* Maxwell, 5 Pick. 217, 16 Am. Dec. 391.

Missouri.— Freiermuth *v.* McKee, 86 Mo. App. 64; McDonald *v.* Cash, 45 Mo. App. 66. *Compare* Jones *v.* Plummer, 137 Mo. App. 337, 118 S. W. 109, holding that the chancellor may disregard hearsay, although admitted without objection.

Nebraska.— Omaha Southern R. Co. *v.* Beeson, 36 Nebr. 361, 54 N. W. 557; Western Mattress Co. *v.* Potter, 1 Nebr. (Unoff.) 627, 95 N. W. 841.

New York.— Harris *v.* Panama R. Co., 5 Bosw. 312; Austin *v.* Southworth, 13 Misc. 45, 34 N. Y. Suppl. 88; Wallach *v.* Kind, 16 N. Y. Suppl. 204.

Pennsylvania.— Scott *v.* Sheakly, 3 Watts 50.

South Carolina.— Mitchell *v.* Allen, 81 S. C. 340, 61 S. E. 1087, 62 S. E. 399; Nesbitt *v.* Louisville, etc., R. Co., 2 Speers 697.

Vermont.— Porter *v.* Gile, 44 Vt. 520.

United States.—Loew Filter Co. *v.* German-American Filter Co., 164 Fed. 855, 90 C. C. A. 637 [*modifying* 155 Fed. 124].

See 46 Cent. Dig. tit. "Trial," § 261.

Where evidence has been taken and filed out of time, but no motion to suppress has

instructions,[44] limited to a particular issue,[45] or disregarded by the appellate court.[46]

(B) *Application of Rule.* The failure to object when evidence is offered waives previous objections to the admissibility of the fact testified to,[47] and objections to depositions previously made on motion to suppress.[48] So a failure to object waives objections that the witness was not sworn;[49] that the answer states a legal conclusion;[50] that the opinion of an expert is based on an *ex parte* statement;[51] that there was an irregularity in the taking of an affidavit;[52] that there is a variance between the evidence and the pleadings;[53] and that the evidence is hearsay[54]

been filed, it may be considered. Matthews *v.* Spangenberg, 19 Fed. 823, 20 Blatchf. 482.

44. *Arkansas.*— Phelan *v.* Bonham, 9 Ark. 389.

Iowa.— Becker *v.* Becker, 45 Iowa 239.

Kentucky.— Maysville *v.* Guilfoyle, 110 Ky. 670, 62 S. W. 493, 23 Ky. L. Rep. 43.

Mississippi.— Edge *v.* Keith, 13 Sm. & M. 295.

Missouri.— B. F. Coombs, etc., Commission Co. *v.* Block, 130 Mo. 668, 32 S. W. 1139; Maxwell *v.* Hannibal, etc., R. Co., 85 Mo. 95; Hall *v.* Jennings, 87 Mo. App. 627.

New York.— Hall *v.* Earnest, 36 Barb. 585. *Contra,* Hamilton *v.* New York Cent. R. Co., 51 N. Y. 100.

See 46 Cent. Dig. tit. "Trial," § 261.

Contra.— Inloes *v.* American Exch. Bank, 11 Md. 173, 69 Am. Dec. 190.

Discretion of court.— It has been held that where testimony is received without objection and a motion is made to strike it out on the ground of its incompetency, what disposition shall be made of the motion is a matter discretionary with the court. McClellan *v.* Hein, 56 Nebr. 600, 77 N. W. 120.

45. Dolphin *v.* Plumley, 175 Mass. 304, 56 N. E. 281.

Absence of request to limit purpose of evidence.— Where proofs of death were admitted in evidence generally in an action on a policy, and the insurer made no request to limit the use of such papers to the special purpose for which they were offered, it could not complain that the evidence was not subsequently limited. Paquette *v.* Prudential Ins. Co., 193 Mass. 215, 79 N. E. 250.

46. Tucker *v.* Donald, 60 Miss. 460, 45 Am. Rep. 416.

47. Beardstown *v.* Smith, 150 Ill. 169, 37 N. E. 211; Baltimore, etc., R. Co. *v.* State, 81 Md. 371, 32 Atl. 201.

48. Union Pac. R. Co. *v.* Reese, 56 Fed. 288, 5 C. C. A. 510.

49. Cogswell *v.* Hoguet, 40 Ill. App. 645; Leach *v.* Ackerman, 2 Ind. App. 91, 28 N. E. 216, where there is nothing to show that the objection was not known in time to have been made in that court.

50. Sterne *v.* State, 20 Ala. 43.

51. Atchison, etc., R. Co. *v.* Frazier, 27 Kan. 463, where it coincides with that of other experts.

52. Adams *v.* Hubbard, 25 Gratt. (Va.) 129.

53. *Alabama.*— Russell *v.* Barrow, 7 Port. 106.

Alaska.— Black *v.* Teeter, 1 Alaska 561.

California.— Boyce *v.* California Stage Co., 25 Cal. 460; Aitken *v.* Mendenhall, 25 Cal. 212.

Georgia.— Georgia R. Co. *v.* Lawrence, 74 Ga. 534; Savannah, etc., R. Co. *v.* Barber, 71 Ga. 644; Artope *v.* Goodall, 53 Ga. 318.

Indiana.— Jacobs *v.* Finkel, 7 Blackf. 432.

Iowa.— Collins *v.* Collins, 46 Iowa 60.

Kansas.— Douthitt *v.* Applegate, 33 Kan. 395, 6 Pac. 575, 52 Am. Rep. 533.

Louisiana.— Wells *v.* Blackman, 121 La. 394, 46 So. 437; Wykoff *v.* Miller, 48 La. Ann. 475, 19 So. 478; Coon *v.* Brashear, 7 La. 265; Baines *v.* Higgins, 2 La. 220. Unless the evidence admitted is also applicable to an issue made by the pleadings. McAdam *v.* Soria, 31 La. Ann. 862.

Michigan.— Kuhn *v.* Freund, 87 Mich. 545, 49 N. W. 867.

Missouri.— Rivers *v.* Blom, 163 Mo. 442, 63 S. W. 812; Spengler *v.* St. Louis Transit Co., 108 Mo. App. 329, 83 S. W. 312; Albin *v.* Chicago, etc., R. Co., 103 Mo. App. 308, 77 S. W. 153; Twelkemeyer *v.* St. Louis Transit Co., 102 Mo. App. 190, 76 S. W. 682; McNichols *v.* Nelson, 45 Mo. App. 446.

Nebraska.— Kitchen Bros. Hotel Co. *v.* Dixon, 71 Nebr. 293, 98 N. W. 816.

New Hampshire.— Nutt *v.* Manchester, 58 N. H. 226.

New York.— Ryan *v.* Providence Washington Ins. Co., 79 N. Y. App. Div. 316, 79 N. Y. Suppl. 460; Person *v.* Stoll, 72 N. Y. App. Div. 141, 76 N. Y. Suppl. 324 [*affirmed* in 174 N. Y. 548, 67 N. E. 1089]; Jones *v.* Niagara Junction R. Co., 63 N. Y. App. Div. 607, 71 N. Y. Suppl. 647; Downer *v.* Metropolitan St. R. Co., 54 N. Y. App. Div. 315, 66 N. Y. Suppl. 719; Harding *v.* Elliott, 47 N. Y. App. Div. 624, 62 N. Y. Suppl. 293; People *v.* Jefferson County, 35 N. Y. App. Div. 239, 54 N. Y. Suppl. 782.

Washington.— Washington Bridge Co. *v.* Everett Land, etc., Imp. Co., 12 Wash. 272, 40 Pac. 982.

West Virginia.— Smith *v.* Townsend, 21 W. Va. 486.

See 46 Cent. Dig. tit. "Trial," § 266.

Contra.— New Idea Pattern Co. *v.* Whelan, 75 Conn. 455, 53 Atl. 953.

Limitation of rule.— The fact that evidence not within the issues was admitted without objection would not sustain a charge thereon, nor would such facts support a judgment. Moody *v.* Rowland, 100 Tex. 363, 99 S. W. 1112; Western Union Tel. Co. *v.* Smith, 88 Tex. 9, 28 S. W. 931, 30 S. W. 549; Cooper *v.* Loughlin, 75 Tex. 524, 13 S. W. 37.

54. *Indiana.*— Judah *v.* Mieure, 5 Blackf. 171.

or opinion evidence,[55] or not the best evidence,[56] or that it is incompetent.[57] So failure to object is a waiver of objections to the manner of proof,[58] to the order of proof,[59] that the proper foundation was not laid for the introduction of the evidence,[60] that a document is not what it purports to be on its

Louisiana.— Berryman *v.* Dahlgren, 6 Rob. 188.

Missouri.— Meyer *v.* Christopher, 176 Mo. 580, 75 S. W. 750.

New Jersey.— Smith *v.* Delaware, etc., Tel., etc., Co., 63 N. J. Eq. 93, 51 Atl. 464.

Texas.— Western Union Tel. Co. *v.* Hirsch, (Civ. App. 1904) 84 S. W. 394; Hatch *v.* Pullman Sleeping Car Co., (Civ. App. 1904) 84 S. W. 246; Western Union Tel. Co. *v.* Brown, (Civ. App. 1903) 75 S. W. 359.

Washington.— Beebe *v.* Redward, 35 Wash. 615, 77 Pac. 1052; State *v.* Cranney, 30 Wash. 594, 71 Pac. 50.

Contra.— Eastlick *v.* Southern R. Co., 116 Ga. 48, 42 S. E. 499.

Objection on retrial.— But a failure to object at one trial to hearsay evidence is not a waiver of the right to object to the same testimony on retrial. Meekins *v.* Norfolk, etc., R. Co., 136 N. C. 1, 48 S. E. 501.

55. Gagnet *v.* New Orleans, 23 La. Ann. 207; Brightman *v.* Buffington, 184 Mass. 401, 68 N. E. 828; Case *v.* Perew, 46 Hun (N. Y.) 57 [*affirmed* in 122 N. Y. 665, 26 N. E. 753]; Pollock *v.* Brennan, 39 N. Y. Super. Ct. 477.

Instructions to disregard.— Where opinion evidence is admitted without objection the proper remedy is to ask an instruction to the jury to disregard it. Smith *v.* Nassau Electric R. Co., 57 N. Y. App. Div. 152, 67 N. Y. Suppl. 1044.

56. *Arkansas.*— Phelan *v.* Bonham, 9 Ark. 389.

California.— Filippini *v.* Trobock, (1900) 62 Pac. 1066; Peters *v.* Gracia, 110 Cal. 89, 42 Pac. 455.

Georgia.— Goodwyn *v.* Goodwyn, 20 Ga. 600.

Illinois.— Illinois Watch Case Co. *v.* Ecaubert, 177 Ill. 587, 52 N. E. 861 [*affirming* 75 Ill. App. 418]; Chicago, etc., R. Co. *v.* Logue, 158 Ill. 621, 42 N. E. 53 [*affirming* 58 Ill. App. 142]; Walsh *v.* Wright, 101 Ill. 178; Cairo, etc., R. Co. *v.* Woosley, 85 Ill. 370; Daggett *v.* Gage, 41 Ill. 465; Potter *v.* Potter, 41 Ill. 80; Clay *v.* Boyer, 10 Ill. 506.

Indiana.—Hommell *v.* Gamewell, 5 Blackf. 5.

Iowa.— Jaffray *v.* Thompson, 65 Iowa 323, 21 N. W. 659.

Kansas.— Berry *v.* Carter, 19 Kan. 135.

Kentucky.— Blight *v.* Atwell, 7 T. B. Mon. 264.

Louisiana.—Pacquetet *v.* Mossy, 6 La. 157; Brown *v.* Frantum, 6 La. 39; Pannell *v.* Coe, 1 Mart. N. S. 614.

Maine.— Moore *v.* Protection Ins. Co., 29 Me. 97, 48 Am. Dec. 514.

Maryland.— Myers *v.* Smith, 27 Md. 43.

Massachusetts.— Fritz *v.* Crean, 182 Mass. 433, 65 N. E. 832.

Missouri.—Wilson *v.* Wilson, 106 Mo. App. 501, 80 S. W. 711; De Soto *v.* Brown, 44 Mo. App. 148.

New York.— Flora *v.* Carbean, 38 N. Y. 111; Harris *v.* Eggleston, 47 N. Y. App. Div. 169, 62 N. Y. Suppl. 221; Smith *v.* Kirtland, 45 N. Y. App. Div. 25, 60 N. Y. Suppl. 812.

South Carolina.— Dingle *v.* Mitchell, 20 S. C. 202; Charleston *v.* Moorhead, 2 Rich. 430.

Texas.—Warren *v.* Kohr, 26 Tex. Civ. App. 331, 64 S. W. 62; Hunt *v.* Siemers, 22 Tex. Civ. App. 94, 53 S. W. 387.

Vermont.— Davis *v.* Goodrich, 45 Vt. 56.

Virginia.— Kyle *v.* Kyle, 1 Gratt. 526.

West Virginia.—Washington *v.* Burnett, 4 W. Va. 84. *Contra,* Warren *v.* Syme, 7 W. Va. 474.

Wisconsin.— Gerhardt *v.* Swaty, 57 Wis. 24, 14 N. W. 851; Manning *v.* McClurg, 14 Wis. 350.

See 46 Cent. Dig. tit. "Trial," § 265.

57. Robinson *v.* Halley, 124 Iowa 443, 100 N. W. 328; Fish *v.* Chicago, etc., R. Co., 81 Iowa 280, 46 N. W. 998; Secrist *v.* Eubank, 104 Mo. App. 113, 78 S. W. 315; McVey *v.* Barker, 92 Mo. App. 498; Walters *v.* George A. Fuller Co., 74 N. Y. App. Div. 388, 77 N. Y. Suppl. 681; Jarvis *v.* Metropolitan St. R. Co., 65 N. Y. App. Div. 490, 72 N. Y. Suppl. 829; Dean *v.* Ætna L. Ins. Co., 2 Hun 358, 4 Thomps. & C. 497, 48 How. Pr. 36 [*reversed* in 62 N. Y. 642]; Westervelt *v.* Burns, 27 Misc. (N. Y.) 781, 57 N. Y. Suppl. 749; American Gas Control Co. *v.* Kramer, 21 Misc. (N. Y.) 57, 46 N. Y. Suppl. 871; Hyland *v.* Southern Bell Tel., etc., Co., 70 S. C. 315, 49 S. E. 879.

Even though it is incompetent for any purpose the rule applies. Webb *v.* Sweeney, 32 Ind. App. 54, 69 N. E. 200.

Evidence competent for some purpose admitted without objection cannot be made the basis of a finding on another subject as to which it is inadmissible. Kittel *v.* Schmieder, 89 N. Y. App. Div. 618, 85 N. Y. Suppl. 977; Gunther *v.* Liverpool, etc., Ins. Co., 85 Fed. 846.

58. Carson *v.* State Bank, 4 Ala. 148; Empie *v.* Empie, 35 N. Y. App. Div. 51, 54 N. Y. Suppl. 402; U. S. *v.* Homestake Min. Co., 117 Fed. 481, 54 C. C. A. 303.

59. Malmstrom *v.* Northern Pac. R. Co., 20 Wash. 195, 55 Pac. 38.

60. *California.*—Leonard *v.* Leonard, (1902) 70 Pac. 1071; McLeod *v.* Barnum, 131 Cal. 605, 63 Pac. 924; Napa *v.* Howland, 87 Cal. 84, 25 Pac. 247.

Colorado.— Eisenhart *v.* McGarry, 15 Colo. App. 1, 61 Pac. 56.

Iowa.—Aultman, etc., Co. *v.* Trainer, 74 Iowa 417, 38 N. W. 126.

Michigan.— Eklund *v.* Toner, 121 Mich. 687, 80 N. W. 791, 123 Mich. 302, 82 N. W. 62.

New Hampshire.— Illinois University *v.* Spalding, 71 N. H. 163, 51 Atl. 731, 62 L. R. A. 817.

New York.— Eder *v.* Gildersleeve, 85 Hun 411, 32 N. Y. Suppl. 1056 [*affirmed* in 155

face,[61] that the instrument offered is not the instrument sued on,[62] that proper proof of authentication,[63] execution,[64] genuineness,[65] or of indorsements on the instrument[66] has not been made; that the certification of the instrument is invalid,[67] that it is not dated[68] or is not relevant,[69] or that books offered in evidence contain erasures or irregularities.[70] And where evidence is introduced as a part of plaintiff's case in chief without objection the court may permit plaintiff to re-offer it in rebuttal over defendant's general objection.[71] Failure to object to evidence is not a waiver of an objection to the sufficiency of the evidence;[72] but a party may have its sufficiency[73] or effect[74] limited by instruction, or the party may argue its sufficiency to the jury.[75] The admission of improper evidence without objection does not render proper the admission of subsequent testimony to the same effect,[76] or of similar testimony to other facts,[77] over objection.

(III) *By Statement of Improper Ground of Objection.* The statement of one or more specific grounds of objection to the introduction of evidence is a waiver of all other grounds of objection.[78] Where evidence is admissible as

N. Y. 672, 49 N. E. 1096]; Boughton *v.* Smith, 22 N. Y. Suppl. 148.

South Dakota.— Balcom *v.* O'Brien, 13 S. D. 425, 83 N. W. 562.

Texas.—Willis *v.* Thompson, 85 Tex. 301, 20 S. W. 155.

61. Patton *v.* Coen, etc., Carriage Mfg. Co., 3 Colo. 265.

62. Fitzgerald *v.* Barker, 85 Mo. 13.

63. Weber *v.* Mick, 131 Ill. 520, 23 N. E. 646; Fougard *v.* Tourregaud, 3 Mart. N. S. (La.) 464; West Springfield Fourth Parish *v.* Root, 18 Pick. (Mass.) 318; Moelling *v.* Lehigh Coal, etc., Co., 8 Wkly. Notes Cas. (Pa.) 194.

64. *Georgia.*— Bowen *v.* Frick, 75 Ga. 786.

Indiana.— Myers *v.* State, 47 Ind. 293.

Louisiana.— Tyler *v.* Marcelin, 8 La. Ann. 312.

Mississippi.—Clanton *v.* Laird, 12 Sm. & M. 568.

Nevada.— Sharon *v.* Minnock, 6 Nev. 377.

South Carolina.— General Electric Co. *v.* Blacksburg Land, etc., Co., 46 S. C. 75, 24 S. E. 43.

United States.— Falk *v.* Gast Lith., etc., Co., 54 Fed. 890, 4 C. C. A. 648.

See 46 Cent. Dig. tit. "Trial," § 264.

Contra.— Skillman *v.* Quick, 4 N. J. L. 102.

65. *Alabama.*— Carlton *v.* King, 1 Stew. & P. 472, 23 Am. Dec. 295.

Kentucky.— Harris *v.* Granger, 4 B. Mon. 369.

Mississippi.— Randolph *v.* Doss, 3 How. 205.

New York.— Schrader *v.* Musical Mut. Protective Union, 8 N. Y. Suppl. 706.

Vermont.— Sanderson *v.* Osgood, 52 Vt. 309.

66. Bell *v.* Keefe, 42 La. Ann. 340.

67. Hyatt *v.* Cochran, 69 Ind. 436.

68. Kimball *v.* Irish, 26 Me. 444.

69. Whiting *v.* Edmunds, 94 N. Y. 309.

70. Mary Lee Coal, etc., Co. *v.* Knox, 110 Ala. 632, 19 So. 67.

71. Delmore *v.* Long, 35 Mont. 139, 88 Pac. 778.

72. Roberts *v.* Chan Tin Pen, 23 Cal. 259; Lowe *v.* Bliss, 24 Ill. 168, 76 Am. Dec. 742; Hulick *v.* Scovil, 9 Ill. 159; Pettis County *v.* Gibson, 73 Mo. 502; Price *v.* St. Louis, etc., R. Co., 72 Mo. 414; Minter *v.* Southern Kansas R. Co., 56 Mo. App. 282; State *v.* Kaufman, 45 Mo. App. 656.

73. Pace *v.* Roberts, etc., Shoe Co., 103 Mo. App. 662, 78 S. W. 52; Stanton *v.* Bannister, 2 Vt. 464.

74. Gillaspie *v.* Murray, 27 Tex. Civ. App. 580, 66 S. W. 252.

75. Williams *v.* Soutter, 7 Iowa 435.

76. Smith *v.* Sovereign Camp W. W., 179 Mo. 119, 77 S. W. 862.

77. Hawkins *v.* Rice, 40 Iowa 435; Lyons *v.* Teal, 28 La. Ann. 592.

78. *Alabama.*—Emrich *v.* Gilbert Mfg. Co., 138 Ala. 316, 35 So. 322; Alabama Great Southern R. Co. *v.* Bailey, 112 Ala. 167, 20 So. 313; Sharp *v.* Hall, 86 Ala. 110, 5 So. 497, 11 Am. St. Rep. 28; Gaston *v.* Weir, 84 Ala. 193, 4 So. 258; Garrett *v.* Trabue, 82 Ala. 227, 3 So. 149; Floyd *v.* State, 82 Ala. 16, 2 So. 683; Alexander *v.* Wheeler, 78 Ala. 167; Garrett *v.* Garrett, 27 Ala. 687; Creagh *v.* Savage, 9 Ala. 959.

Arkansas.— Kahn *v.* Lucchesi, 65 Ark. 371, 46 S. W. 729; St. Louis, etc., R. Co. *v.* Hackett, 58 Ark. 381, 24 S. W. 881, 41 Am. St. Rep. 105.

California.— St. Vincent's Insane Inst. *v.* Davis, 129 Cal. 20, 61 Pac. 477; Berliner *v.* Travelers' Ins. Co., 121 Cal. 451, 53 Pac. 922; Natoma Water, etc., Co. *v.* Clarkin, 14 Cal. 544.

Colorado.—Whitehead *v.* Jessup, 2 Colo. App. 76, 29 Pac. 916.

Connecticut.— Plumb *v.* Curtis, 66 Conn. 154, 33 Atl. 998; Erie Preserving Co. *v.* Miller, 52 Conn. 444, 52 Am. Rep. 607.

Florida.— Sullivan *v.* Richardson, 33 Fla. 1, 14 So. 692.

Georgia.— Southern Pine Co. *v.* Smith, 113 Ga. 629, 38 S. E. 960; Waxelbaum *v.* Berry, 99 Ga. 280, 25 S. E. 775; Cox *v.* Cody, 75 Ga. 175; Pearson *v.* Forsyth, 61 Ga. 537; Goodtitle *v.* Roe, 20 Ga. 135.

Illinois.— Ewen *v.* Wilbor, 208 Ill. 492, 70 N. E. 575 [*affirming* 99 Ill. App. 132]; Gage *v.* Eddy, 179 Ill. 492, 53 N. E. 1008; Garrick *v.* Chamberlain, 97 Ill. 620.

Indiana.— Carroll County *v.* O'Connor, 137 Ind. 622, 35 N. E. 1006, 37 N. E. 16; Bass *v.* State, 136 Ind. 165, 36 N. E. 124.

against a specific objection raised, error in admitting the evidence will not be imputed.[79]

(iv) *By Introduction of Rebutting Evidence or by Cross-Examination as to Improper Evidence.* Objection to the erroneous admission of evidence is not waived by introducing rebutting evidence,[80] although it be

Iowa.— Mallory Commission Co. *v.* Elwood, 120 Iowa 632, 95 N. W. 176; State *v.* Van Tassel, 103 Iowa 6, 72 N. W. 497; Taylor *v.* Wendling, 66 Iowa 562, 24 N. W. 40; Farwell *v.* Tyler, 5 Iowa 535.

Kansas.— Priest *v.* Robinson, 64 Kan. 416, 67 Pac. 850; Kansas Farmers' F. Ins. Co. *v.* Lawley, 46 Kan. 746, 27 Pac. 176; Botkin *v.* Livingston, 16 Kan. 39.

Kentucky.— Huling *v.* Fort, 2 Litt. 193.

Louisiana.— Cockerham *v.* Perot, 48 La. Ann. 209, 18 So. 122.

Maryland.— Du Val *v.* Du Val, 21 Md. 149.

Massachusetts.— Com. *v.* Mead, 153 Mass. 284, 26 N. E. 855; Holbrook *v.* Jackson, 7 Cush. 136.

Michigan.— Spencer *v.* Terry, 133 Mich. 39, 94 N. W. 372; Jochen *v.* Tibbells, 50 Mich. 33, 14 N. W. 690; Hollister *v.* Brown, 19 Mich. 163.

Minnesota.—Stahl *v.* Duluth, 71 Minn. 341, 74 N. W. 143; Graves *v.* Backus, 69 Minn. 532, 72 N. W. 811; Triggs *v.* Jones, 46 Minn. 277, 48 N. W. 1113; Smith *v.* Bean, 46 Minn. 138, 48 N. W. 687; Schwartz *v.* Germania L. Ins. Co., 21 Minn. 215.

Missouri.— Walser *v.* Wear, 141 Mo. 443, 42 S. W. 928; Russell *v.* Glasser, 93 Mo. 353, 6 S. W. 362; Hannibal, etc., R. Co. *v.* Moore, 37 Mo. 338; Latimer *v.* Metropolitan St. R. Co., 126 Mo. App. 70, 103 S. W. 1102; Barnard State Bank *v.* Fesler, 89 Mo. App. 217; Walker *v.* Hoeffner, 54 Mo. App. 554; Griveaud *v.* St. Louis Cable, etc., R. Co., 33 Mo. App. 458; Taussig *v.* Schields, 26 Mo. App. 318; Ring *v.* Canada Southern Line, 14 Mo. App. 579.

Montana.— O'Keefe *v.* Dyer, 20 Mont. 477, 52 Pac. 196; Story *v.* Black, 5 Mont. 26, 1 Pac. 1, 51 Am. Rep. 37.

Nebraska.— Lincoln Supply Co. *v.* Graves, 73 Nebr. 214, 102 N. W. 457.

New Hampshire.— Managle *v.* Parker, 75 N. H. 139, 71 Atl. 637.

New York.— Evans *v.* Keystone Gas Co., 148 N. Y. 112, 42 N. E. 513, 51 Am. St. Rep. 681, 30 L. R. A. 651; McCulloch *v.* Hoffman, 73 N. Y. 615; Jurgin *v.* Ireland, 14 N. Y. 322; Newton *v.* Harris, 6 N. Y. 345; Friedman *v.* Breslin, 51 N. Y. App. Div. 268, 65 N. Y. Suppl. 5 [*affirmed* in 169 N. Y. 574, 61 N. E. 1127]; Hawkins *v.* Ringler, 47 N. Y. App. Div. 262, 62 N. Y. Suppl. 56; Asbestos Pulp Co. *v.* Gardner, 39 N. Y. App. Div. 654, 57 N. Y. Suppl. 353; Horn *v.* New Jersey Steamboat Co., 23 N. Y. App. Div. 302, 48 N. Y. Suppl. 348; Harris *v.* Panama R. Co., 5 Bosw. 312.

North Carolina.— Avent *v.* Arrington, 105 N. C. 377, 10 S. E. 991; Gidney *v.* Moore, 86 N. C. 484. *Compare* Presnell *v.* Garrison, 121 N. C. 366, 28 S. E. 409, holding that the court must exclude parol evidence of facts not properly provable by parol, although objected to on an untenable ground.

Oregon.— Hildebrand *v.* United Artisans, 50 Oreg. 159, 91 Pac. 542; Ladd *v.* Sears, 9 Oreg. 244.

Pennsylvania.— Mills *v.* Buchanan, 14 Pa. St. 59.

South Carolina.— Springs *v.* South Bound R. Co., 46 S. C. 104, 24 S. E. 166.

South Dakota.— Port Huron First Nat. Exch. Bank *v.* Sherman, 9 S. D. 492, 70 N. W. 647; Bailey *v.* Chicago, etc., R. Co., 3 S. D. 531, 54 N. W. 596, 19 L. R. A. 653.

Tennessee.— Shea *v.* Mabry, 1 Lea 319.

Texas.— Missouri, etc., R. Co. *v.* Rich, 51 Tex. Civ. App. 312, 112 S. W. 114; Northern Texas Traction Co. *v.* Caldwell, 44 Tex. Civ. App. 374, 99 S. W. 869; Patrick *v.* Badger, (Civ. App. 1897) 41 S. W. 538; Hampton *v.* Hampton, 9 Tex. Civ. App. 497, 29 S. W. 423.

Vermont.— Hathaway *v.* Goslant, 77 Vt. 199, 59 Atl. 835; Morrisette *v.* Canadian Pac. R. Co., 76 Vt. 267, 56 Atl. 1102; Willett *v.* St. Albans, 69 Vt. 330, 38 Atl. 72.

Washington.— Kinnane *v.* Conroy, 52 Wash. 651, 101 Pac. 223.

Wisconsin.— Kollock *v.* Parcher, 52 Wis. 393, 9 N. W. 67.

United States.— Texas, etc., R. Co. *v.* Watson, 190 U. S. 287, 23 S. Ct. 681, 47 L. ed. 1057 [*affirming* 112 Fed. 402, 50 C. C. A. 230]; Hinde *v.* Longworth, 11 Wheat. 199, 6 L. ed. 454; Delaware, etc., R. Co. *v.* Devore, 122 Fed. 791, 58 C. C. A. 543; Rhoades *v.* Selin, 20 Fed. Cas. No. 11,740, 4 Wash. 715; Fischer *v.* Neil, 6 Fed. 89.

See 46 Cent. Dig. tit. "Trial," § 179.

79. Dorough *v.* Harrington, 148 Ala. 305, 42 So. 557.

80. *Alabama.*— Kansas City, etc., R. Co. *v.* Crocker, 95 Ala. 412, 11 So. 262.

Colorado.— T. & H. Pueblo Bldg. Co. *v.* Klein, 5 Colo. App. 348, 38 Pac. 608.

Indiana.— Washington Tp. Farmers' Co-operative Fuel, etc., Co. *v.* McCormick, 19 Ind. App. 663, 49 N. E. 1085.

Iowa.— Richardson *v.* Webster City, 111 Iowa 427, 82 N. W. 920; Sims *v.* Moore, 61 Iowa 128, 16 N. W. 58.

Maine.—White *v.* Chadbourne, 41 Me. 149; Gage *v.* Wilson, 17 Me. 378.

Michigan.— McKinnon *v.* Gates, 102 Mich. 618, 61 N. W. 74; Kost *v.* Bender, 25 Mich. 515.

Nebraska.— *In re* Cheney, 78 Nebr. 274, 110 N. W. 731.

New Hampshire.— Nebonne *v.* Concord R. Co., 67 N. H. 531, 38 Atl. 17.

New York.— Woods *v.* Buffalo R. Co., 35 N. Y. App. Div. 203, 54 N. Y. Suppl. 735.

of the same kind,[81] or by cross-examination in relation to the objectionable matter.[82]

(v) *By Failure to Repeat Objections.* Where an objection to evidence is distinctly made and overruled, it need not be repeated to the same class of evidence to save the objection,[83] although the question is asked of another witness.[84] The court may treat the objection as a continuing one;[85] but if the evidence, when offered, is on objection excluded,[86] or if a question asked and objected to is not answered by the witness,[87] it is necessary to repeat the objection when the evidence is again offered or the question asked. Where an objection is once specifically made, it is sufficient for the party thereafter to state that he objects on the same grounds as before.[88]

(vi) *By Other Acts.* A party cannot object to the introduction of evidence of a fact when he permits the same fact to be testified to without objection,[89]

81. Chicago City R. Co. *v.* Uhter, 212 Ill. 174, 72 N. E. 195; Martin *v.* New York, etc., R. Co., 103 N. Y. 626, 9 N. E. 505; Winters *v.* Manhattan R. Co., 15 Misc. (N. Y.) 8, 36 N. Y. Suppl. 772; Pfeil *v.* Kemper, 3 Wis 315.

82. *Alabama.*— Scarborough *v.* Blackman, 108 Ala. 656, 18 So. 735.

Illinois.— Ætna L. Ins. Co. *v.* Paul, 23 Ill. App. 611.

Iowa.— Peacock *v.* Gleesen, 117 Iowa 291, 90 N. W. 610. *Contra,* Klopp *v.* Chicago, etc., R. Co., 142 Iowa 483, 119 N. W. 377.

Missouri.—Barker *v.* St. Louis, etc., R. Co., 126 Mo. 143, 28 S. W. 866, 47 Am. St. Rep. 646, 26 L. R. A. 843; Diel *v.* Stegner, 56 Mo. App. 535; Pugh *v.* Ayres, 47 Mo. App. 590; Costigan *v.* Michael Transp. Co., 33 Mo. App. 269.

Nebraska.—Marsh *v.* Synder, 14 Nebr. 237, 15 N. W. 341.

New York.— Duff *v.* Lyon, 1 E. D. Smith 536.

Contra.— Brown *v.* Morrill, 45 Minn. 483, 48 N. W. 328.

83. *California.*— Diamond Coal Co. *v.* Cook, (1900) 61 Pac. 578; Sharon *v.* Sharon, 79 Cal. 633, 22 Pac. 26, 131.

Colorado.— Thomas *v.* Carey, 26 Colo. 485, 58 Pac. 1093; Gilpin *v.* Gilpin, 12 Colo. 504, 21 Pac. 612.

Illinois.— Anglo American Packing, etc., Co. *v.* Baier, 20 Ill. App. 376.

Iowa.— Metropolitan Nat. Bank *v.* Commercial State Bank, 104 Iowa 682, 74 N. W. 26.

Kansas.— Cooper *v.* Bower, 78 Kan. 156, 164, 96 Pac. 59, 794.

Minnesota.— Griswold *v.* Edson, 32 Minn. 436, 21 N. W. 475.

New York.— Carlson *v.* Winterson, 147 N. Y. 652, 42 N. E. 347 [*affirming* 10 Misc. 388, 31 N. Y. Suppl. 430]; Sherman *v.* Delaware, etc., R. Co., 106 N. Y. 542, 13 N. E. 616; Hoffman *v.* Conner, 76 N. Y. 121; Dilleber *v.* Home L. Ins. Co., 69 N. Y. 256, 25 Am. Rep. 182; Wilson *v.* Nassau Electric R. Co., 56 N. Y. App. Div. 570, 67 N. Y. Suppl. 486; McGrath *v.* Alger, 43 N. Y. App. Div. 496, 60 N. Y. Suppl. 122; Montignani *v.* E. V. Crandall Co., 34 N. Y. App. Div. 228, 54 N. Y. Suppl. 517; Lyons *v.* New York El. R. Co., 26 N. Y. App. Div. 57, 49 N. Y. Suppl. 610; Thompson *v.* Manhattan R. Co., 11 N. Y. App. Div. 182, 42 N. Y. Suppl. 896; Scott *v.* Dillon, 58 Misc. 522, 109 N. Y. Suppl. 877; *In re* Manhattan Bridge No. 3, 108 N. Y. Suppl. 366; Wheeler *v.* Kuntz, 9 N. Y. St. 496; Englert *v.* Kruse, 8 N. Y. St. 375.

North Dakota.— American Mortg. Co. *v.* Mouse River Live Stock Co., 10 N. D. 290, 86 N. W. 965.

Pennsylvania.— Chase *v.* Goldsborough, 1 Phila. 179.

United States.— Salt Lake City *v.* Smith, 104 Fed. 457, 43 C. C. A. 637.

See 46 Cent. Dig. tit. "Trial," § 192.

But see State *v.* Gage, 52 Mo. App. 464; Sanger *v.* Craddock, (Tex. 1886) 2 S. W. 196; St. Louis Southwestern R. Co. *v.* Huffman, (Tex. Civ. App. 1895) 32 S. W. 30; Galveston, etc., R. Co. *v.* Garteiser, 9 Tex. Civ. App. 456, 29 S. W. 939.

Presumptions.— The presumption is that the evidence was excluded for that reason. Bowen *v.* Sweeney, 63 Hun (N. Y.) 224, 17 N. Y. Suppl. 752, 22 N. Y. Civ. Proc. 79.

Scope of objection.— The objection relates to all questions springing naturally from the question objected to. Barton *v.* Kane, 17 Wis. 37, 84 Am. Dec. 728.

84. Green *v.* Southern Pac. Co., 122 Cal. 563, 55 Pac. 577; Schierbaum *v.* Schemme, 157 Mo. 1, 57 S. W. 526, 80 Am. St. Rep. 604; Louisville, etc., R. Co. *v.* Gower, 85 Tenn. 465, 3 S. W. 824.

85. People *v.* Melvane, 39 Cal. 614.

86. Bailey *v.* Ogden, 75 Ga. 874.

87. Norris *v.* Norris, 3 Ind. App. 500, 28 N. E. 1014; Wheeler *v.* Van Sickle, 37 Nebr. 651, 56 N. W. 196.

88. Hancock *v.* Flynn, 5 Silv. Sup. (N. Y.) 122, 8 N. Y. Suppl. 133.

89. *California.*— Wheelock *v.* Godfrey, 100 Cal. 578, 35 Pac. 317.

Illinois.— Graham *v.* Mattoon City R. Co., 234 Ill. 483, 84 N. E. 1070 [*affirming* 138 Ill. App. 70].

Iowa.— Hunt *v.* Dubuque, 96 Iowa 314, 65 N. W. 319.

Maine.— Thomson *v.* Sebasticook, etc., R. Co., 81 Me. 40, 16 Atl. 332.

Massachusetts.— Boston Woven Hose, etc., Co. *v.* Kendall, 178 Mass. 232, 59 N. E. 657, 86 Am. St. Rep. 478, 57 L. R. A. 781.

Missouri.— Shaefer *v.* Missouri Pac. R.

or himself testifies thereto,[90] or introduces evidence thereof.[91] The erroneous admission of evidence is waived by a subsequent withdrawal of objections thereto.[92] Nor can he complain of improper admission of evidence to prove a fact, when he admits the fact.[93] And if he permits a question and answer without objection he cannot object to a question calling for a correction of the answer.[94] Objections to the admission of evidence are waived by demurring to the evidence,[95] or by a motion to dismiss [96] or to direct a verdict,[97] or by objecting to a withdrawal of the evidence.[98] And the admission of incompetent evidence is waived where the complaining party asks and obtains an instruction which assumes the competency of the evidence complained of.[99] If the objection is to the qualification of a witness as an expert, it is waived by his introduction as such by the objecting party.[1] Objection to secondary evidence is waived where the best evidence when offered is excluded at the request of the objecting party,[2] when the best evidence is in his possession and he fails to produce it on notice,[3] if the party objecting subsequently produces the best evidence himself,[4] or where he concedes

Co., 98 Mo. App. 445, 72 S. W. 154; Bruce *v.* Bombeck, 79 Mo. App. 231.

New York.— People *v.* Chacon, 102 N. Y. 669, 6 N. E. 303 [*affirming* 3 N. Y. Cr. 418].

North Carolina.— Albert *v.* New York Mut. L. Ins. Co., 122 N. C. 92, 30 S. E. 327, 65 Am. St. Rep. 693.

Texas.— Ft. Worth, etc., R. Co. *v.* Harlan, (Civ. App. 1901) 62 S. W. 971.

Washington.— Reiff *v.* Coulter, 47 Wash. 678, 92 Pac. 436.

Application of rule.—Plaintiffs cannot complain of the admission of a letter in evidence, where, on it being offered, they objected, "unless" the whole letter should be read, and the court ordered the whole letter admitted. Hutchinson *v.* Morris, 131 Mo. App. 258, 110 S. W. 684.

90. State *v.* Eifert, 102 Iowa 188, 65 N. W. 309, 71 N. W. 248, 63 Am. St. Rep. 433, 38 L. R. A. 485; Seay *v.* Fennell, 15 Tex. Civ. App. 261, 39 S. W. 181.

91. *Alabama.*— Union Naval Stores Co. *v.* Pugh, 156 Ala. 369, 47 So. 48.

California.— Packard *v.* Johnson, (1884) 4 Pac. 632.

Indiana.— Hobbs *v.* Tipton County, 116 Ind. 376, 19 N. E. 186.

Maine.—Ward *v.* Abbott, 14 Me. 275.

Michigan.— Kost *v.* Bender, 25 Mich. 515.

Missouri.— South St. Louis R. Co. *v.* Plate, 92 Mo. 614, 5 S. W. 199; Joseph *v.* Metropolitan St. R. Co., 129 Mo. App. 603, 107 S. W. 1055.

Nebraska.— Chicago, etc., R. Co. *v.* Wiebe, 25 Nebr. 542, 41 N. W. 297.

New York.— Edington *v.* Mutual L. Ins. Co., 67 N. Y. 185.

North Carolina.— Tatom *v.* White, 95 N. C. 453.

South Carolina.— Robinson *v.* Blakely, 4 Rich. 586, 55 Am. Dec. 703.

South Dakota.— Evenson *v.* Webster, 5 S. D. 266, 58 N. W. 669.

Washington.— Carstens *v.* Stetson, etc., Mill Co., 14 Wash. 643, 45 Pac. 313.

United States.— New York Mut. L. Ins. Co. *v.* Selby, 72 Fed. 980, 19 C. C. A. 331.

An objection to reading extracts from books is waived if the objecting party himself reads extracts therefrom. Gaff *v.* Greer, 88 Ind. 122, 45 Am. Rep. 449.

Cross-examination of witness.— A party cannot complain of the refusal of the court to exclude testimony brought out by his own examination of a witness. Union Naval Stores Co. *v.* Pugh, 156 Ala. 369, 47 So. 48.

Documentary evidence.— A party waives objections to the admissibility of a document in evidence, where he afterward offers the document he sought to have excluded. Jenkins *v.* Salmen Brick, etc., Co., 120 La. 549, 45 So. 435. But the benefit of his exception is not waived where, after a document has been admitted and marked in evidence over his objection and exception, he asks that it be shown to the jury. Zimmerman *v.* Shapiro, 55 Misc. (N. Y.) 299, 105 N. Y. Suppl. 104.

92. Dufour *v.* Chapotel, 75 Miss. 656, 23 So. 387; Ham *v.* St. Louis, etc., R. Co., 136 Mo. App. 17, 117 S. W. 108.

93. Miller *v.* Williams, 27 Colo. 34, 59 Pac. 740; Ryan *v.* Logan County Bank, 132 Ky. 625, 116 S. W. 1179, 119 S. W. 768; Com. *v.* Nefus, 135 Mass. 533. And see Ford *v.* Parker, 131 Ga. 443, 62 S. E. 526.

94. Banderob *v.* Wisconsin Cent. R. Co., 133 Wis. 249, 113 N. W. 738.

95. Southern R. Co. *v.* Leinart, 107 Tenn. 635, 64 S. W. 899.

96. Roscoe *v.* John L. Roper Lumber Co., 124 N. C. 42, 32 S. E. 389.

97. Battis *v.* McCord, 70 Iowa 46, 30 N. W. 11.

98. Mitchell *v.* Davis, 23 Cal. 381.

99. Shannon *v.* Potts, 117 Ill. App. 80; McNeal *v.* Talbott, 7 Ky. L. Rep. 604. *Contra*, Arnold *v.* Maryville, 110 Mo. App. 254, 85 S. W. 107; Sandige *v.* Hill, 70 Mo. App. 71.

1. Wheelock *v.* Godfrey, 100 Cal. 578, 35 Pac. 317.

2. National State Bank *v.* Delahaye, 82 Iowa 34, 47 N. W. 999.

3. Doon *v.* Donaher, 113 Mass. 151.

4. Mullins *v.* Columbia County Bank, 87 Ark. 554, 113 S. W. 206; Rich *v.* Rich, 16 Wend. (N. Y.) 663; Glover *v.* Thomas, 75 Tex. 506, 12 S. W. 684; McCracken *v.* Robison, 57 Fed. 375, 6 C. C. A. 400.

that the evidence offered is a correct copy of the original [5] or proves the loss thereof.[6] No objection can be taken to evidence which has already been admitted without objection in previous portions of the examination,[7] or where similar evidence has been elicited from other witnesses without objection,[8] or to competent evidence when the preliminary evidence, although incompetent, was admitted without objection.[9] Where evidence is excluded and the judge afterward offers to admit it and counsel declines to re-offer it objection to its exclusion is waived.[10] Objection to evidence is not waived by failing to demur to a petition showing that improper evidence is relied on,[11] or by moving to strike out the entire evidence of the witness,[12] or if the objection is not to a fact but to the manner of proving it, by the party putting in evidence of the same fact.[13]

2. Motions to Strike Out Evidence [14] — a. Necessity. Where evidence has been introduced to which objection was not made, and no motion to strike it out has been made, acquiescence in its introduction will be presumed;[15] and unless a motion to strike it out is made, an objection after admission is not available on appeal.[16] A motion to strike out is necessary as a basis of complaint of the admission of evidence which is apparently proper when admitted,[17] where

Where a verbal order for goods is given to a traveling salesman, and a memorandum thereof is made by him, and a copy of such memorandum forwarded to his principal, the error, if any, in admitting the copy in an action for the price to prove the sale, is cured where the salesman, after refreshing his memory by his memorandum made at the time, testifies that he then sold the goods mentioned to defendant. Hodges *v.* Tarrant, 31 S. C. 608, 9 S. E. 1038.

5. Samuel & Jessie Kenney Presb. Home *v.* Kenney, 45 Wash. 106, 88 Pac. 108.

6. Louis Cook Mfg. Co. *v.* Randall, 62 Iowa 244, 17 N. W. 507.

7. *Colorado.*— Denver, etc., Co. *v.* Morrison, 3 Colo. App. 194, 32 Pac. 859.

Indiana.— Mills *v.* Snypes, 10 Ind. App. 19, 37 N. E. 422; Westfield Bank *v.* Inman, 8 Ind. App. 239, 34 N. E. 21, 670.

Maryland.— Clarke *v.* Ray, 1 Harr. & J. 318.

Minnesota.— Shrimpton *v.* Philbrick, 53 Minn. 366, 55 N. W. 551.

Nebraska.— Hickman *v.* Layne, 47 Nebr. 177, 66 N. W. 298.

South Carolina.— Brice *v.* Miller, 35 S. C. 537, 15 S. E. 272.

Texas.— International, etc., R. Co. *v.* Quinones, (Civ. App. 1904) 81 S. W. 757. *Contra,* McLane *v.* Paschal, 74 Tex. 20, 11 S. W. 837.

8. Monahan *v.* Kansas City Clay, etc., Co., 58 Mo. App. 68; Bouknight *v.* Charlotte, etc., R. Co., 41 S. C. 415, 19 S. E. 915.

9. McConnell *v.* Bowdry, 4 T. B. Mon. (Ky.) 392; Wallis *v.* Schneider, 79 Tex. 479, 15 S. W. 492. *Contra,* Trenton Mut. L., etc., Ins. Co. *v.* Johnson, 24 N. J. L. 576.

10 Mann *v.* Maxwell, 83 Me. 146, 21 Atl. 844.

11. Ruckman *v.* Imbler Lumber Co., 42 Oreg. 231, 70 Pac. 811.

12. Elliott *v.* Campbell, 117 Ky. 719, 78 S. W. 1122, 25 Ky. L. Rep. 1841.

13. Worrall *v.* Parmalee, 1 N. Y. 519, 49 Am. Dec. 350.

14. In criminal cases see Criminal Law, 12 Cyc. 564 *et seq.*

15. *Alabama.*— Higdon *v.* Kennemer, 112 Ala. 351, 20 So. 470; Thomason *v.* Odum, 31 Ala. 108, 68 Am. Dec. 159.

Georgia.— Kehoe *v.* Hanley, 95 Ga. 321, 22 S. E. 539.

Illinois.— Lake Shore, etc., R. Co. *v.* Bodemer, 139 Ill. 596, 29 N. E. 692, 32 Am. St. Rep. 218 [*affirming* 33 Ill. App. 479].

Iowa.— Smith *v.* Dawley, 92 Iowa 312, 60 N. W. 625.

Michigan.— Corcoran *v.* Detroit, 95 Mich. 84, 54 N. W. 692.

Missouri.— Chouteau *v.* Jupiter Iron-Works, 94 Mo. 388, 7 S. W. 467.

New Jersey.—Fath *v.* Thompson, 58 N. J. L. 180, 33 Atl. 391.

New York.— Link *v.* Sheldon, 136 N. Y. 1, 32 N. E. 696; Mackey *v.* Locke, 5 Silv. Sup. 394, 8 N. Y. Suppl. 210.

Texas.— Collins *v.* Cook, 40 Tex. 238.

See 46 Cent. Dig. tit. "Trial," § 235.

16. Totten *v.* Burhans, 103 Mich. 6, 61 N. W. 58; Hollenbeck *v.* Missouri Pac. R. Co., (Mo. 1896) 34 S. W. 494; Kelly *v.* Cohoes Knitting Co., 8 N. Y. App. Div. 156, 40 N. Y. Suppl. 477; Sternwald *v.* Siegel, 7 Misc. (N. Y.) 70, 27 N. Y. Suppl. 375; Wilson *v.* Boasberg, 1 Misc. (N. Y.) 436, 21 N. Y. Suppl. 915.

17. *Arizona.*— Pringle *v.* King, 9 Ariz. 76, 78 Pac. 367.

California.— White *v.* Spreckels, 75 Cal. 610, 17 Pac. 715.

Illinois.— Cassell *v.* Vincennes First Nat. Bank, 169 Ill. 380, 48 N. E. 701.

Indiana.— Sims *v.* Givan, 2 Blackf. 461.

Kentucky.— Bannon *v.* Clark County Cement Co., 37 S. W. 76, 18 Ky. L. Rep. 504.

Maine.— Beaudette *v.* Gagne, 87 Me. 534, 33 Atl. 23.

New York.— Brady *v.* Nally, 151 N. Y. 258, 45 N. E. 547; Mersereau *v.* Mersereau, 49 N. Y. App. Div. 647, 63 N. Y. Suppl. 336.

South Carolina.— Shealey *v.* South Carolina, etc., R. Co., 67 S. C. 61, 45 S. E. 119.

Application and extent of rule.— The rule applies, although the court in ruling on its admission states that if it should be shown

evidence is admitted subject to be supplemented by other evidence which is not introduced,[18] where evidence is admitted by consent, but subject to objection,[19] where the witness testifies without a question being addressed to him,[20] where a question is answered before a sustained objection thereto has been interposed [21] or after an objection thereto has been interposed and sustained,[22] or if the witness testifies beyond the ruling of the court prescribing the limits within which he may answer.[23] It is not necessary where the evidence was admitted over repeated objections and exceptions,[24] or after deliberate discussion.[25]

b. Grounds. It is a sufficient ground for a motion to strike out that want of knowledge of a witness testifying appeared on cross-examination after the court had ruled that the witness was competent,[26] or that the answer to a question asked is not responsive; [27] and it is error to deny a motion to strike out an answer

to be improper it should be excluded from the consideration of the jury. Cassell *v.* Vincennes First Nat. Bank, 169 Ill. 380, 48 N. E. 701.

Rule in Pennsylvania.— Motions to strike out are unknown to the Pennsylvania practice. Objection should be made by request to jury for instructions. Robinson *v.* Snyder, 25 Pa. St. 203; Owen *v.* Schmidt, 14 Phila. 183.

Where evidence is proper when admitted but becomes improper because the cause is dismissed as to some of the parties a motion to strike out is necessary. Tuomey *v.* O'Reilly, etc., Co., 3 Misc. (N. Y.) 302, 22 N. Y. Suppl. 930.

18. *California.*—Ah Tong *v.* Earle Fruit Co., 112 Cal. 679, 45 Pac. 7.

Colorado.—Wood *v.* Chapman, 24 Colo. 134, 49 Pac. 136.

Delaware.— Remington Mach. Co. *v.* Wilmington Candy Co., 6 Pennew. 288, 66 Atl. 465.

Georgia.— Scott *v.* Newsom, 27 Ga. 125.

Illinois.— Chicago, etc., R. Co. *v.* Vipond, 212 Ill. 199, 72 N. E. 22 [*affirming* 112 Ill. App. 558].

Indiana.— Flint, etc., Mfg. Co. *v.* Beckett, 167 Ind. 491, 79 N. E. 503, 12 L. R. A. N. S. 924; Heady *v.* Brown, 151 Ind. 75, 49 N. E. 805, 51 N. E. 85; Heilman *v.* Shanklin, 60 Ind. 424.

Iowa.— Leipird *v.* Stotler, 97 Iowa 169, 66 N. W. 150.

Michigan.— Williams *v.* Grand Rapids, 53 Mich. 271, 18 N. W. 811.

New Jersey.— Camden, etc., R. Co. *v.* Williams, 61 N. J. L. 646, 40 Atl. 634.

New York.— U. S. Vinegar Co. *v.* Schlegel, 143 N. Y. 537, 38 N. E. 729; Bayliss *v.* Cockcroft, 81 N. Y. 363; Cruse *v.* Findlay, 16 Misc. 576, 38 N. Y. Suppl. 741.

Utah.— Faulkner *v.* Mammoth Min. Co., 23 Utah 437, 66 Pac. 799.

West Virginia.— Hargreaves *v.* Kimberly, 26 W. Va. 787, 57 Am. Rep. 121.

United States.—Bailey *v.* Warner, 118 Fed. 395, 55 C. C. A. 329; Central Vermont R. Co. *v.* Soper, 59 Fed. 879, 8 C. C. A. 341.

Compare Wilson *v.* Jernigan, 57 Fla. 277, 49 So. 44, holding that evidence conditionally received, on assurance that the foundation will be thereafter supplied, should be excluded on the court's own motion, where the necessary connecting evidence is not produced; but, if the failure to connect is not apparent or glaring, the objecting party should move to exclude it.

Request for instructions.— The objection may also be made by a request for instructions covering that portion of the case. Reeve *v.* Dennett, 145 Mass. 23, 11 N. E. 938.

19. *Indiana.*— Jenney Electric Co. *v.* Branham, 145 Ind. 314, 41 N. E. 448, 33 L. R. A. 395.

Maryland.— Roberts *v.* Bonaparte, 73 Md. 191, 29 Atl. 918, 10 L. R. A. 689; Basshor *v.* Forbes, 36 Md. 154.

Michigan.— Metropolitan L. Ins. Co. *v.* Ethier, 34 Mich. 277.

Minnesota.— Lake Superior, etc., R. Co. *v.* Greve, 17 Minn. 322.

Ohio.— Thayer *v.* Luce, 22 Ohio St. 62; Pross *v.* Bradstreet, 8 Ohio Dec. (Reprint) 731, 9 Cinc. L. Bul. 244 [*affirmed* in 9 Ohio Dec. (Reprint) 154, 11 Cinc. L. Bul. 117].

South Dakota.— Warder, etc., Co. *v.* Ingli, 1 S. D. 155, 46 N. W. 181.

20. Southern R. Co. *v.* Crowder, 135 Ala. 417, 33 So. 335.

21. Yaeger *v.* Southern California R. Co., (Cal. 1897) 51 Pac. 190; Vernon Ins. Co. *v.* Glenn, 13 Ind. App. 340, 40 N. E. 759, 41 N. E. 829; North Pac. Lumber Co. *v.* Spore, 44 Oreg. 462, 75 Pac. 890.

22. Birmingham Rolling Mill Co. *v.* Rockhold, 143 Ala. 115, 42 So. 96; Yaeger *v.* Southern California R. Co., (Cal. 1897) 51 Pac. 190; Bigelow *v.* Sickles, 80 Wis. 98, 49 N. W. 106, 27 Am. St. Rep. 25. And see Adams Express Co. *v.* Metropolitan St. R. Co., 126 Mo. App. 471, 103 S. W. 583.

23. Patton *v.* Sanborn, 133 Iowa 650, 110 N. W. 1032; Crawford *v.* Southern R. Co., 56 S. C. 136, 34 S. E. 80.

24. Gilpin *v.* Gilpin, 12 Colo. 504, 21 Pac. 612.

25. Anglo-American Packing, etc., Co. *v.* Baier, 20 Ill. App. 376.

26. Beans *v.* Denny, 141 Iowa 52, 117 N. W. 1091.

27. *Alabama.*— Stowers Furniture Co. *v.* Brake, 158 Ala. 639, 48 So. 89.

California.— Tate *v.* Fratt, 112 Cal. 613, 44 Pac. 1061; Johnston *v.* Beadle, 6 Cal. App. 251, 91 Pac. 1011; Spotswood *v.* Spotswood, 4 Cal. App. 711, 89 Pac. 362.

Florida.— Jacksonville Electric Co. *v.* Sloan, 52 Fla. 257, 42 So. 516.

to a proper question, when such answer is irresponsive.[28] So it has been held sufficient ground to strike out that the answer is indefinite,[29] or that evidence is prejudicial hearsay.[30] And evidence received subject to be connected should be stricken out on motion where it is not so connected.[31] Relevant evidence should not be stricken out, although the witness is not positive in his opinion or recollection;[32] although the source of information of the witness is meager;[33] although the evidence is in part contradictory,[34] even though such witness be a party,[35] or because the credibility of the testimony of a witness is shaken on cross-examination,[36] or is so modified on cross-examination as to render it of little value,[37] or although the witness suppresses or alters his testimony.[38] But where the cross-examination shows that the witness is not testifying from his personal knowledge, it is error to decline to strike out his testimony.[39] A party cannot insist that pertinent and relevant evidence be stricken out because insufficient;[40] but the court may under such circumstances exclude the testimony,[41] unless there is some testimony to sustain the party's case.[42] The mere fact that evidence is prejudicial to a party is no ground for moving to strike it out.[43] Evidence competent for any purpose,[44] and evidence adduced by the party moving, although illegal,[45] cannot be stricken out on motion. That a witness testifies to a document not introduced but the introduction of which would make the testimony clearer is not ground for motion to strike out;[46] nor is the fact that a party, par-

Iowa.— Ross *v.* Ross, 140 Iowa 51, 117 N. W. 1105.

New York.— Shaw *v.* New York El. R. Co., 187 N. Y. 186, 79 N. E. 984 [*affirming* 96 N. Y. Suppl. 1145]; Kramer *v.* Haeger Storage Warehouse Co., 123 N. Y. App. Div. 316, 108 N. Y. Suppl. 1.

Oregon.— Elliff *v.* Oregon R., etc., Co., 53 Oreg. 66, 69 Pac. 76.

Texas.—Western Union Tel. Co. *v.* Johnsey, 49 Tex. Civ. App. 487, 109 S. W. 251.

Wisconsin.— Chase *v.* Woodruff, 138 Wis. 641, 120 N. W. 499.

28. Jacksonville, etc., R. Co. *v.* Peninsular Land Transp., etc., Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33, 65; Hite *v.* Stimmell, 45 Kan. 469, 25 Pac. 352; Supple *v.* Suffolk Sav. Bank for Seamen, 198 Mass. 393, 84 N. E. 432, 126 Am. St. Rep. 451; Swearingen *v.* Hartford Ins. Co., 52 S. C. 309, 29 S. E. 722. *Contra,* Arabian Horse Co. *v.* Bivens, (Nebr. 1903) 96 N. W. 621.

Instructions to disregard evidence after refusal to strike out.—Where the answer given was such as the witness might fairly understand the question to call for, it was responsive and it was not error to refuse to strike it out as not responsive; the court subsequently instructing the jury to disregard it. Palmer *v.* Smith, 76 Conn. 210, 56 Atl. 516.

29. Spotswood *v.* Spotswood, 4 Cal. App. 711, 89 Pac. 362.

30. Skinner Mfg. Co. *v.* Douville, 54 Fla. 251, 44 So. 1014; Thaxter *v.* Missouri Pac. R. Co., 123 Mo. App. 636, 100 S. W. 1102; Com. *v.* Howe, 35 Pa. Super. Ct. 554. And see Greve *v.* Echo Oil Co., 8 Cal. App. 275, 96 Pac. 904.

31. Gieger *v.* Levin, 110 N. Y. Suppl. 203.

32. New Albany, etc., R. Co. *v.* Huff, 19 Ind. 315; Maybin *v.* Webster, 8 Ind. App. 547, 35 N. E. 194, 36 N. E. 373; Fitschen *v.* Thomas, 9 Mont. 52, 22 Pac. 450.

33. Farmer's Bank *v.* Saling, 33 Oreg. 394, 54 Pac. 190.

34. Powell *v.* Olds, 9 Ala. 861; Cohen *v.* Metropolitan St. R. Co., 170 N. Y. 588, 63 N. E. 1116 [*affirming* 63 N. Y. App. Div. 165, 71 N. Y. Suppl. 268]; Stockwell *v.* Holmes, 33 N. Y. 53.

35. Thorne *v.* Weldin, 6 Houst. (Del.) 453.

36. Wilson *v.* Jernigan, 57 Fla. 277, 49 So. 44; Platt *v.* Rowand, 54 Fla. 237, 45 So. 32.

37. Niendorff *v.* Manhattan R. Co., 4 N. Y. App. Div. 46, 38 N. Y. Suppl. 690.

38. State *v.* Roe, 12 Vt. 93.

39. Bennett *v.* Smith, 40 Mich. 211. *Contra,* Rushmore *v.* Hall, 12 Abb. Pr. (N. Y.) 420.

40. *Florida.*— Platt *v.* Rowand, 54 Fla. 237, 45 So. 32; Wilcox *v.* Stephenson, 30 Fla. 377, 11 So. 659.

Iowa.— Campbell *v.* Ormsby, 65 Iowa 518, 22 N. W. 656.

Montana.— Murray *v.* Montana Lumber, etc., Co., 25 Mont. 14, 63 Pac. 719.

New York.— Gawtry *v.* Doane, 51 N. Y. 84.

North Dakota.— Kolka *v.* Jones, 6 N. D. 461, 71 N. W. 558, 66 Am. St. Rep. 615.

41. Mississippi, etc., Packet Co. *v.* Edwards, 62 Miss. 534; Chicago, etc., R. Co. *v.* Doyle, 60 Miss. 977. *Contra,* McFarland *v.* Bellows, 49 Mo. 311; Hannibal, etc., R. Co. *v.* Moore, 37 Mo. 338.

42. Coulter *v.* Blatchley, 51 W. Va. 163, 41 S. E. 133.

43. Golibart *v.* Sullivan, 30 Ind. App. 428, 66 N. E. 188.

44. Deutschmann *v.* Third Ave. R. Co., 87 N. Y. App. Div. 503, 84 N. Y. Suppl. 887; Jones *v.* Peterson, 44 Oreg. 161, 74 Pac. 661; Olinger *v.* Shepherd, 12 Gratt. (Va.) 462.

45. Hunnicutt *v.* Higginbotham, 138 Ala. 472, 35 So. 469, 100 Am. St. Rep. 645. Unless such evidence was elicited on cross-examination. Arrington *v.* Roach, 42 Ala. 155.

46. Ellison *v.* Branstrator, 153 Ind. 146, 54 N. E. 433.

tially cross-examined, fails to appear for further cross-examination when no notice of the fact that further cross-examination is desired is given.[47]

c. Form and Requisites. A motion to strike out must be so specific that there can be no mistake as to what evidence is sought to be stricken out.[48] It should set out the exact testimony sought to be stricken out.[49] It must be confined to the improper testimony,[50] and must separate the proper evidence from

47. Clark *v.* Harmer, 9 App. Cas. (D. C.) 1.

48. Newton *v.* Jackson, 23 Ala. 335; Donnell *v.* Jones, 13 Ala. 490, 48 Am. Dec. 59; Glover *v.* Millings, 2 Stew. & P. (Ala.) 28; Moore *v.* Brewer, 94 Ga. 260, 21 S. E. 460; Miller *v.* St. Paul City R. Co., 62 Minn. 216, 64 N. W. 554; Warden *v.* Philadelphia, 167 Pa. St. 523, 31 Atl. 928.

49. It should designate the witnesses who testified to the evidence objected to or specify the particular questions and answers sought to be stricken out. Wysor Land Co. *v.* Jones, 24 Ind. App. 451, 56 N. E. 46.

50. *Alabama.*— Atlanta, etc., R. Co. *v.* Wheeler, 154 Ala. 530, 46 So. 262; Hunnicutt *v.* Higginbotham, 138 Ala. 472, 35 So. 469; Brown *v.* Fowler, 133 Ala. 310, 32 So. 584; Alabama Midland R. Co. *v.* Darby, 119 Ala. 531, 24 So. 713.

Arkansas.— St. Louis, etc., R. Co. *v.* Taylor, 87 Ark. 331, 112 S. W. 745; Taylor *v.* McClintock, 87 Ark. 243, 112 S. W. 405.

Colorado.— Colorado Farm, etc., Co. *v.* York, 38 Colo. 239, 88 Pac. 181; Ritchey *v.* People, 23 Colo. 314, 47 Pac. 272, 384.

Connecticut.— Waterbury *v.* Waterbury Traction Co., 74 Conn. 152, 50 Atl. 3.

Florida.— Herrin *v.* Abbe, 55 Fla. 769, 46 So. 183, 18 L. R. A. N. S. 907; Gainesville, etc., R. Co. *v.* Peck, 55 Fla. 402, 46 So. 1019; Platt *v.* Rowand, 54 Fla. 237, 45 So. 32.

Georgia.— Hobbs *v.* Crawford, 4 Ga. App. 585, 62 S. E. 157.

Illinois.— Steel Co. *v.* Hanson, 195 Ill. 106, 62 N. E. 918 [*affirming* 97 Ill. App. 469]; Elgin, etc., R. Co. *v.* Lawlor, 132 Ill. App. 280 [*affirmed* in 229 Ill. 621, 82 N. E. 407]; Chicago, etc., R. Co. *v.* American Strawboard Co., 91 Ill. App. 635 [*affirmed* in 190 Ill. 268, 60 N. E. 518].

Indiana.— Harless *v.* Harless, 144 Ind. 196, 41 N. E. 592; Snideman *v.* Snideman, 118 Ind. 162, 20 N. E. 723.

Iowa.— Schultz *v.* Ford, 133 Iowa 402, 109 N. W. 614; Hollingworth *v.* Ft. Dodge, 125 Iowa 627, 101 N. W. 455; Germinder *v.* Machinery Mut. Ins. Assoc., 120 Iowa 614, 94 N. W. 1108; *In re* Evans, 114 Iowa 240, 86 N. W. 283; Sullivan *v.* Nicoulin, 113 Iowa 76, 84 N. W. 978; Randolph Bank *v.* Armstrong, 11 Iowa 515.

Kansas.— Elliott *v.* Missouri Pac. R. Co., 8 Kan. App. 191, 55 Pac. 490.

Kentucky.— Worthley *v.* Hammond, 13 Bush 510.

Maryland.— Mt. Vernon Brewing Co. *v.* Teschner, 108 Md. 158, 69 Atl. 702, 16 L. R. A. N. S. 758; Darrin *v.* Whittingham, 107 Md. 46, 68 Atl. 269; Carroll *v.* Granite Mfg. Co., 11 Md. 399.

Michigan.— Larkin *v.* Mitchell, etc., Lumber Co., 42 Mich. 296, 3 N. W. 904.

Minnesota.— Witzel *v.* Zuel, 90 Minn. 340, 96 N. W. 1124.

Missouri.— Hopkins *v.* Modern Woodmen of America, 94 Mo. App. 402, 68 S. W. 226.

New York.— Spaulding *v.* Hallenbeck, 35 N. Y. 204; Fein *v.* Weir, 129 N. Y. App. Div. 299, 114 N. Y. Suppl. 426; Pescia *v.* Societa Co-Operativa Corleonese Francesco Bentivegna, 91 N. Y. App. Div. 506, 86 N. Y. Suppl. 952; Powell *v.* Hudson Valley R. Co., 88 N. Y. App. Div. 133, 84 N. Y. Suppl. 337; Matter of Woodward, 69 N. Y. App. Div. 286, 74 N. Y. Suppl. 755; Bartnik *v.* Erie R. Co., 36 N. Y. App. Div. 246, 55 N. Y. Suppl. 266; Bryan *v.* Olsen, 20 Misc. 604, 46 N. Y. Suppl. 349; Stock *v.* Le Boutillier, 19 Misc. 112, 43 N. Y. Suppl. 248; Gundlin *v.* Hamburg-American Packet Co., 8 Misc. 291, 28 N. Y. Suppl. 572.

Ohio.— Circleville *v.* Sohn, 20 Ohio Cir. Ct. 368, 11 Ohio Cir. Dec. 193.

Oregon.— Jennings *v.* Garner, 30 Oreg. 344, 48 Pac. 177.

South Carolina.—Keys *v.* Winnsboro Granite Co., 76 S. C. 284, 56 S. E. 949.

Tennessee.— Knoxville, etc., R. Co. *v.* Beeler, 90 Tenn. 548, 18 S. W. 391.

Texas.— Brown *v.* Mitchell, 88 Tex. 350, 31 S. W. 621, 36 L. R. A. 64; Galveston, etc., R. Co. *v.* Janert, 49 Tex. Civ. App. 17, 107 S. W. 963.

Virginia.— Hughes *v.* Kelly, (1898) 30 S. E. 387.

West Virginia.—Bluefield *v.* McClaugherty, 64 W. Va. 536, 63 S. E. 363.

United States.— Chicago Great Western R. Co. *v.* McDonough, 161 Fed. 657, 88 C. C. A. 517.

See 46 Cent. Dig. tit. "Trial," § 248 *et seq.*

Limitations of rule.— The rule that, where a portion of the testimony is unobjectionable, the party moving to strike out must designate with precision the particular portion challenged, has no application where the whole answer is subject to the objection made. Sterne *v.* Mariposa Commercial, etc., Co., 153 Cal. 516, 97 Pac. 66.

Unintelligible answer.— The motion may be overruled if it is addressed to a portion of an answer of a witness, if the balance of the answer would be unintelligible. Under such circumstances the motion should ask for the exclusion of the entire answer. Spitzer *v.* Nassau Newspaper Delivery Express Co., 20 Misc. (N. Y.) 327, 45 N. Y. Suppl. 682 [*affirming* 44 N. Y. Suppl. 1129].

Part of answer uncontroverted.— Where the motion is addressed to certain testimony, the overruling of the motion cannot be justified on the ground that a portion of the testimony embraced in the motion is material, where such portion is a mere incident

the improper with such certainty as to leave no doubt as to the evidence challenged.[51] It must specifically assign a tenable reason for striking out the evidence;[52] and the statement of one ground of objection is a waiver of all other grounds.[53] Where a motion to strike out evidence is made on several grounds stated in the conjunctive, it need not be denied where only a part of the grounds are well taken.[54] The motion must include all the similar objectionable evidence

and is not controverted. Antle *v.* Craven, 109 Iowa 346, 80 N. W. 396.

Restatement of motion.— Counsel for defendant objected to a line of evidence elicited on cross-examination, and moved to have it excluded. The court sustained the objection, and, on inquiry as to whether the motion would be sustained, replied that a part of the evidence ought to stand, but that a part of it might be irrelevant. It was held that the motion to strike should have been restated in such a manner that it could be determined what evidence was intended to be left in the record, and on failure to restate the motion defendant may not urge error on appeal. Zetsche *v.* Chicago, etc., R. Co., 238 Ill. 240, 87 N. E. 412 [*affirming* 143 Ill. App. 428].

51. *Alabama.*— Commercial Bank *v.* King, 107 Ala. 484, 18 So. 243; Buford *v.* Shannon, 95 Ala. 205, 10 So. 263; Roberts *v.* Burgess, 85 Ala. 192, 4 So. 733; McGill *v.* Monette, 37 Ala. 49; Martin *v.* Hardesty, 27 Ala. 458, 62 Am. Dec. 773; Wyatt *v.* Steele, 26 Ala. 639; Loughridge *v.* Thompson, 20 Ala. 828; Hrabowski *v.* Herbert, 4 Ala. 265.

Arkansas.— Haney *v.* Caldwell, 35 Ark. 156; Gracie *v.* Robinson, 14 Ark. 438; Camp *v.* Gullett, 7 Ark. 524; Johnston *v.* Ashley, 7 Ark. 470.

California.— Hunt *v.* Swyney, (1893) 33 Pac. 854; Hellman *v.* McWilliams, 70 Cal. 449, 11 Pac. 659; Chester *v.* Bower, 55 Cal. 46.

Colorado.— Colorado Mortg., etc., Co. *v.* Rees, 21 Colo. 435, 42 Pac. 42; Davis *v.* Hopkins, 18 Colo. 153, 32 Pac. 70.

Georgia.— Birmingham Lumber Co. *v.* Brinson, 94 Ga. 517, 20 S. E. 437.

Indiana.— Evansville, etc., R. Co. *v.* Swift, 128 Ind. 34, 27 N. E. 420; Waymire *v.* Lank, 121 Ind. 1, 22 N. E. 735; Binford *v.* Young, 115 Ind. 174, 16 N. E. 142; Louisville, etc., R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Wolfe *v.* Pugh, 101 Ind. 293.

Iowa.— McBride *v.* McBride, 142 Iowa 169, 120 N. W. 709; Randolph Bank *v.* Armstrong, 11 Iowa 515.

Kansas.— Smythe *v.* Parsons, 37 Kan. 79, 14 Pac. 444.

Michigan.— Wilhelm *v.* Voss, 118 Mich. 106, 76 N. W. 308; Totten *v.* Burhans, 103 Mich. 6, 61 N. W. 58.

Minnesota.— Roeller *v.* Hall, 62 Minn. 241, 64 N. W. 559; Smith *v.* Minneapolis Library Bd., 58 Minn. 108, 59 N. W. 979, 25 L. R. A. 280; Bennett *v.* Minneapolis, etc., R. Co., 42 Minn. 245, 44 N. W. 10.

Nevada.— State *v.* Hymer, 15 Nev. 49.

New York.— McCabe *v.* Brayton, 38 N. Y. 196; Tuomey *v.* O'Reilly, etc., Co., 3 Misc. 302, 22 N. Y. Suppl. 930.

North Dakota.— Minneapolis, etc., R. Co. *v.* Nester, 3 N. D. 480, 57 N. W. 510.

Pennsylvania.— Eifert *v.* Lytle, 172 Pa. St. 356, 33 Atl. 573; Wilson *v.* Equitable Gas Co., 152 Pa. St. 566, 25 Atl. 635; Miller *v.* Windsor Water Co., 148 Pa. St. 429, 23 Atl. 1132.

Virginia.— Norfolk, etc., R. Co. *v.* Ampey, 93 Va. 108, 25 S. E. 226 (if evidence has been introduced without objection); Friend *v.* Wilkinson, 9 Gratt. 31.

Washington.— Yake *v.* Pugh, 13 Wash. 78, 42 Pac. 528, 52 Am. St. Rep. 17.

See 46 Cent. Dig. tit. "Trial," § 248.

52. *Alabama.*— Alabama Securities Co. *v.* Dewey, 156 Ala. 530, 47 So. 55.

California.— Goodnow *v.* Parker, 112 Cal. 437, 44 Pac. 738.

Illinois.— Butler *v.* Cornell, 148 Ill. 276, 35 N. E. 767.

Indiana.— Pittsburgh, etc., R. Co. *v.* Collins, 168 Ind. 467, 80 N. E. 415; Bernhamer *v.* Dawson, 124 Ind. 126, 24 N. E. 743; Vannatta *v.* Duffy, 4 Ind. App. 168, 30 N. E. 807.

Iowa.— *In re* Evans, 114 Iowa 240, 86 N. W. 283; Stevenson *v.* Chicago, etc., R. Co., 94 Iowa 719, 61 N. W. 964; Smith *v.* Dawley, 92 Iowa 312, 60 N. W. 625.

Michigan.— Lindley *v.* Detroit, 131 Mich. 8, 90 N. W. 665; Wilhelm *v.* Voss, 118 Mich. 106, 76 N. W. 308; Runnells *v.* Pentwater, 109 Mich. 512, 67 N. W. 558.

Minnesota.— Towle *v.* Sherer, 70 Minn. 312, 73 N. W. 180.

New York.— Lippett *v.* St. Louis Dressed Beef, etc., Co., 27 Misc. 222, 57 N. Y. Suppl. 747; Caldwell *v.* Central Park, etc., R. Co., 7 Misc. 67, 27 N. Y. Suppl. 397; Richie *v.* Martin, 1 Misc. 285, 20 N. Y. Suppl. 693.

North Dakota.— Nokken *v.* Avery Mfg. Co., 11 N. D. 399, 92 N. W. 487.

South Dakota.— Gaffney *v.* Mantele, 23 S. D. 38, 119 N. W. 1030.

Washington.— Guarantee L. & T. Co. *v.* Galliher, 12 Wash. 507, 41 Pac. 887.

United States.— Central Vermont R. Co. *v.* Ruggles, 75 Fed. 953, 21 C. C. A. 575.

See 46 Cent. Dig. tit. "Trial," § 247.

Unless the evidence is clearly obnoxious to the objection stated in the motion it will not be granted. Chester *v.* Bakersfield Town Hall Assoc., 64 Cal. 42, 27 Pac. 1104.

A statement that the evidence is in its nature hearsay and is not supported by a proper foundation is sufficient to raise the question of competency. Chicago City R. Co. *v.* Miller, 111 Ill. App. 446.

53. Morrison *v.* Wright, 7 Port. (Ala.) 67.

54. U. S. Oil, etc., Co. *v.* Bell, 153 Cal. 781, 96 Pac. 901.

offered on the subject by either party during the trial.[55] If the objection is made on the ground of variance between the pleadings and proof, it must point out wherein the variance consists.[56]

d. Necessity For Previous Objection. Where it is not apparent from a question that the answer will be inadmissible, the question need not be objected to, to entitle the opposing party to move to strike out the answer.[57] Ordinarily, however, where evidence is admitted without objection, the overruling of a subsequent motion to strike out is not error,[58] especially where no reason is given

55. Freeman *v.* Hutchinson, 15 Ind. App. 639, 43 N. E. 16; Daniels *v.* Smith, 130 N. Y. 696, 29 N. E. 1098 [*affirming* 5 Silv. Sup. 117, 8 N. Y. Suppl. 128].

56. Flanagan *v.* Wells Bros. Co., 237 Ill. 82, 86 N. E. 609, 127 Am. St. Rep. 315 [*affirming* 139 Ill. App. 237]; Chicago *v.* Seben, 165 Ill. 371, 46 N. E. 244, 56 Am. St. Rep. 245. But see McCormick Harvesting Mach. Co. *v.* Burandt, 136 Ill. 170, 26 N. E. 588 [*affirming* 37 Ill. App. 165], holding that the objection that there is a variance between the pleadings and proof cannot be raised by motion to exclude the entire evidence.

57. People *v.* Lawrence, 143 Cal. 148, 76 Pac. 893, 68 L. R. A. 193; Johnston *v.* Beadle, 6 Cal. App. 251, 91 Pac. 1011.

58. *Alabama.*— Stowers Furniture Co. *v.* Brake, 158 Ala. 639, 48 So. 89; Southern Coal, etc., Co. *v.* Swinney, 149 Ala. 405, 42 So. 808; King *v.* Franklin, 132 Ala. 559, 31 So. 467; Pittman *v.* Pittman, 124 Ala. 306, 27 So. 242; New England Mortg. Security Co. *v.* Payne, 107 Ala. 578, 18 So. 164; East Tennessee, etc., R. Co. *v.* Turvaville, 97 Ala. 122, 12 So. 63.

California.— Evans *v.* Johnston, 115 Cal. 180, 46 Pac. 906; Giffen *v.* Selma Fruit Co., 5 Cal. App. 50, 89 Pac. 855; Churchill *v.* More, 4 Cal. App. 219, 88 Pac. 290.

Florida.— Wilson *v.* Jarnigan, 57 Fla. 277, 49 So. 44; Skinner Mfg. Co. *v.* Douville, 54 Fla. 251, 44 So. 1014; Platt *v.* Rowland, 54 Fla. 237, 45 So. 32.

Illinois.— Poehlmann *v.* Kertz, 204 Ill. 418, 68 N. E. 467 [*affirming* 105 Ill. App. 249]; Western Union Tel. Co. *v.* Hope, 11 Ill. App. 289.

Indiana.— Gurley *v.* Park, 135 Ind. 440, 35 N. E. 279; Cleveland, etc., R. Co. *v.* Wynant, 134 Ind. 681, 34 N. E. 569; Treschman *v.* Treschman, 28 Ind. App. 206, 61 N. E. 961; Wysor Land Co. *v.* Jones, 24 Ind. App. 451, 56 N. E. 46; Campbell *v.* Connor, 15 Ind. App. 23, 42 N. E. 688, 43 N. E. 453; Chicago, etc., R. Co. *v.* Champion, 9 Ind. App. 510, 36 N. E. 221, 37 N. E. 21, 53 Am. St. Rep. 357.

Iowa.— McClure *v.* Great Western Acc. Assoc., 141 Iowa 350, 118 N. W. 269; Aughay *v.* Windrem, 137 Iowa 315, 114 N. W. 1047; Slattery *v.* Slattery, 120 Iowa 717, 95 N. W. 201; Mallory Commission Co. *v.* Elwood, 120 Iowa 632, 95 N. W. 176; Tuttle *v.* Wood, 115 Iowa 507, 88 N. W. 1056.

Kansas.— Anthony *v.* Atwood, (App. 1900) 62 Pac. 720.

Maine.— Cook *v.* Brown, 39 Me. 443.

Maryland.— Maryland, etc., R. Co. *v.* Brown, 109 Md. 304, 71 Atl. 1005; Darrin *v.* Whittingham, 107 Md. 46, 68 Atl. 269.

Michigan.— McWilliams *v.* Lake Shore, etc., R. Co., 146 Mich. 216, 109 N. W. 272.

Montana.— Yoder *v.* Reynolds, 28 Mont. 183, 72 Pac. 417.

Nebraska.— Fulton *v.* Ryan, 60 Nebr. 9, 82 N. W. 105; Palmer *v.* Witcherly, 15 Nebr. 98, 17 N. W. 364; Garrison *v.* Murphy, 2 Nebr. (Unoff.) 696, 89 N. W. 766.

New York.— Hornum *v.* McNeil, 80 N. Y. App. Div. 637, 80 N. Y. Suppl. 728; National Radiator Co. *v.* Hull, 79 N. Y. App. Div. 109, 79 N. Y. Suppl. 519; Lindemann *v.* Brooklyn Heights R. Co., 69 N. Y. App. Div. 442, 74 N. Y. Suppl. 988; Jones *v.* New York Cent., etc., R. Co., 46 N. Y. App. Div. 470, 61 N. Y. Suppl. 721; Hall *v.* Earnest, 36 Barb. 585; Walker *v.* McCormick, 88 N. Y. Suppl. 406; *In re* Ramsdell, 3 N. Y. Suppl. 499 [*affirmed* in 117 N. Y. 636, 22 N. E. 1130]. *Contra*, Griffin *v.* Barton, 22 Misc. 228, 49 N. Y. Suppl. 1021.

Pennsylvania.— Lowrey *v.* Robinson, 141 Pa. St. 189, 21 Atl. 513; Dallmeyer *v.* Dallmeyer, (1888) 16 Atl. 72; Montgomery *v.* Cunningham, 104 Pa. St. 349; Oswald *v.* Kennedy, 48 Pa. St. 9; Ashton *v.* Sproule, 35 Pa. St. 492.

Rhode Island.— McGarrity *v.* New York, etc., R. Co., 25 R. I. 269, 55 Atl. 718.

South Carolina.— Lee *v.* Unkefer, 77 S. C. 460, 58 S. E. 343.

South Dakota.— La Rue *v.* St. Anthony, etc., El. Co., 17 S. D. 91, 95 N. W. 292.

Texas.— Western Union Tel. Co. *v.* Gibson, (Civ. App. 1899) 53 S. W. 712; Atchison, etc., R. Co. *v.* Bryan, (Civ. App. 1896) 37 S. W. 234.

United States.— Bailey *v.* Warner, 118 Fed. 395, 55 C. C. A. 329; Brockett *v.* New Jersey Steam-Boat Co., 18 Fed. 156 [*affirmed* in 121 U. S. 637, 7 S. Ct. 1039, 30 L. ed. 1049].

See 46 Cent. Dig. tit. "Trial," § 242.

Issues not raised by pleadings.— If the evidence is in support of an issue not raised by the pleadings, and manifestly unjust to the party complaining, the court should exclude it on motion, after the evidence has closed, and instruct the jury to disregard it. Galveston, etc., R. Co. *v.* Scott, 18 Tex. Civ. App. 321, 44 S. W. 589.

Limiting effect of evidence by instruction.— The effect of evidence admitted without objection may be limited by instruction, although no right to have it stricken out on motion exists. Hatch *v.* Attrill, 118 N. Y. 383, 23 N. E. 549; Marks *v.* King, 64 N. Y.

case [71] or defense,[72] or the conclusion of the evidence,[73] after the close of the case,[74] or after the case has been partly argued,[75] where there is nothing to excuse the delay.[76] If the objection goes to the competency of the witness it is too late to move to strike out after the close of the testimony.[77] Where, however, the direct examination does not show the incompetency of the testimony,[78] or the ground for the exclusion of the evidence appears for the first time on cross-examination,[79] the motion to strike out may be made as soon as the impropriety of the evidence appears. The motion is premature if addressed to evidence the competency or relevancy of which may thereafter be made to appear [80] The court, however, may on motion strike out evidence improperly admitted, although the motion was not made in due time,[81] and it may do so at any time during the day of trial,[82] at the close of plaintiff's case,[83] before the case is given to the jury,[84] at any stage of the case,[85] or even after the closing arguments.[86]

f. Hearing and Determination of Motion. Unless the right to have the evidence stricken out clearly appears the court is not bound to strike it out.[87] In determining the propriety of the motion the court cannot pass on disputed facts.[88] It is not error for the court to take the motion under advisement where the ruling sustaining the motion is accompanied by an instruction to the jury

v. Webber, 188 Ill. 126, 58 N. E. 949 [*affirming* 89 Ill. App. 474]; Warden *v.* Philadelphia, 167 Pa. St. 523, 31 Atl. 928.

71. Manning *v.* Ft. Atkinson School Dist. No. 6, 124 Wis. 84, 102 N. W. 356.

72. Birmingham R., etc., Co. *v.* Wise, 149 Ala. 492, 42 So. 821.

73. Bienville Water Supply Co. *v.* Hieronymus, 149 Ala. 265, 43 So. 124.

74. Stroup *v.* State, 70 Ind. 495; Heverly *v.* Elliott, 39 Nebr. 201, 57 N. W. 1010. A motion comes too late after close of plaintiff's case and the overruling of defendant's motion to dismiss on account of the insufficiency of the complaint and the want of proof in support of it. Olansky *v.* Berlin, 37 Misc. (N. Y.) 775, 76 N. Y. Suppl. 945.

75. Kansas City, etc., R. Co. Co. Phillips, 98 Ala. 159, 13 So. 65; Stockton *v.* Frey, 4 Gill (Md.) 406, 45 Am. Dec. 138.

Evidence introduced by party complaining. —Where evidence that plaintiff's fellow servant, by whose negligence he was injured, was a fair average for a Mexican helper, but that "when you speak of Mexican helpers you are not talking about much" was contained in an answer to a cross-interrogatory in a deposition introduced by defendant, not inadvertently, defendant, after the trial and the arguments had closed, was not entitled to an instruction withdrawing such evidence from the jury. Kansas City Consol. Smelting, etc., Co. *v.* Taylor, (Tex. Civ. App. 1908) 107 S. W. 889.

76. Falvey *v.* Jackson, 132 Ind. 176, 31 N. E. 531.

77. Newsom *v.* Huey, 36 Ala. 37.

78. Mills *v.* Kernochan, 3 N. Y. St. 152.

79. *Alabama.*—American Oak Extract Co. *v.* Ryan, 112 Ala. 337, 20 So. 644.

California.— Kiler *v.* Kimbal, 10 Cal. 267.

Georgia.— Turner *v.* Tubersing, 67 Ga. 161.

Illinois.— Rowell *v.* Chicago, etc., R. Co., 92 Ill. App. 103.

Iowa.— Comes *v.* Chicago, etc., R. Co., 78 Iowa 391, 43 N. W. 235.

Minnesota.—Wolford *v.* Farnham, 44 Minn. 159, 46 N. W. 295.

New Jersey.— Delguard *v.* New York, etc., R. Co., 74 N. J. L. 805, 67 Atl. 609.

New York.—Loveridge *v.* Hill, 96 N. Y. 222; Schuhle *v.* Cunningham, 14 Daly 404, 13 N. Y. St. 81; Silsby *v.* Packer, 9 N. Y. St. 112.

South Carolina.— Swearingen *v.* Hartford Ins. Co., 52 S. C. 309, 29 S. E. 722.

Texas.— Landa *v.* Obert, 78 Tex. 33, 14 S. W. 297; Missouri, etc., R. Co. *v.* Renfro, (Civ. App. 1904) 83 S. W. 21; Gulf, etc., R. Co. *v.* Ryon, (Civ. App. 1903) 72 S. W. 72; Tyler, etc., R. Co. *v.* Hitchins, 26 Tex. Civ. App. 400, 63 S. W. 1069.

See 46 Cent. Dig. tit. "Trial," § 245.

80. Withers *v.* Kemper, 25 Mont. 432, 65 Pac. 422; Ward *v.* Wheeler, 18 Tex. 249.

81. Clark *v.* Douglas, 58 Nebr. 571, 79 N. W. 158.

82. Moody *v.* Dillemuth, 119 Iowa 372, 93 N. W. 360, although the parties have rested.

83. Dyson *v.* Baker, 54 Miss. 24.

84. Pennsylvania Min. Co. *v.* Brady, 14 Mich. 260.

85. Pool *v.* Devers, 30 Ala. 672; Pearsall *v.* McCartney, 28 Ala. 110; Wilborn *v.* Odell, 29 Ill. 456; Dugger *v.* McKesson, 100 N. C. 1, 6 S. E. 746; Creed *v.* White, 11 Humphr. (Tenn.) 549.

86. Probate Judge *v.* Stone, 44 N. H. 593.

A motion to suppress testimony, after notice to bring on, must be brought on before the hearing in chief, otherwise the objection is waived. Partridge *v.* Stocker, 36 Vt. 108, 84 Am. Dec. 664.

87. Haggarty *v.* Strong, 10 S. D. 585, 74 N. W. 1037.

88. King *v.* Davis, 34 Cal. 100.

Where it is apparent that testimony was taken by an inexpert commissioner, all the circumstances will be considered to gather what the witness meant by inaccurate expressions. Nelson *v.* Iverson, 24 Ala. 9, 60 Am. Dec. 442.

not to regard the testimony.[89] Where the court is evenly divided the evidence should not be stricken out.[90]

g. Waiver of Motion. Similarly where the objection to the evidence is subsequently withdrawn,[91] or the evidence is stricken out by consent,[92] no error can be assigned on the action of the court in denying the motion; and the same result follows where the moving party refuses to consent to an offer of the other party to withdraw the evidence, thus causing it to remain before the jury.[93]

3. Exceptions[94] — a. Necessity For. To make an objection available on appeal, it must be followed by an exception,[95] which must appear in the bill of exceptions.[96] The place of an exception cannot be taken by a request to exclude the evidence from the jury.[97]

b. Form and Requisites. The exception should show by which party it is taken, and if it relates to the admission of evidence, whether it was taken to the remarks of the judge in respect to its admissibility, or to his refusal to admit such evidence.[98] It must be based upon a prior objection.[99] It must be specific and show clearly what was excepted to,[1] and must state the grounds of objection.[2]

89. Faulk *v.* Iowa County, 103 Iowa 442, 72 N. W. 757.

90. Ferrall *v.* Kent, 4 Gill (Md.) 209.

91. Nelson *v.* Masterson, 2 Ind. App. 524, 28 N. E. 731.

92. Weber Wagon Co. *v.* Kehl, 139 Ill. 644, 29 N. E. 714.

93. Kahn *v.* Triest-Rosenberg Cap Co., 139 Cal. 340, 73 Pac. 164; Mitchell *v.* Davis, 23 Cal. 381.

94. **As basis for appeal** see Appeal and Error, 2 Cyc. 714 *et seq.*

In criminal prosecutions see Criminal Law, 12 Cyc. 566 *et seq.*

95. *Indiana.*— Vance *v.* Cowing, 13 Ind. 460.

Kentucky.—Crooks *v.* Dillion, 1 Ky. L. Rep. 62.

Louisiana.— Cochran *v.* Dewees, 2 La. Ann. 960, or the objection must be otherwise emphasized.

Maryland.— Berrett *v.* Oliver, 7 Gill & J. 191, if the evidence is objected to on grounds other than its sufficiency.

Missouri.—Parsons *v.* Missouri Pac. R. Co., 94 Mo. 286, 6 S. W. 464; Heiberger *v.* Missouri, etc., Tel. Co., 133 Mo. App. 452, 113 S. W. 730.

West Virginia.—Bluefield *v.* McClaugherty, 64 W. Va. 536, 63 S. E. 363.

United States.— Scott *v.* Lloyd, 9 Pet. 418, 9 L. ed. 178; Paine *v.* Willson, 146 Fed. 488, 77 C. C. A. 44.

In New Jersey, formal exceptions are not necessary in actions in the district court involving less than two hundred dollars. Oliphant *v.* Brearley, 54 N. J. L. 521, 24 Atl. 660.

96. Ann Bertha Lodge No. 42 I. O. O. F. *v.* Leverton, 42 Tex. 18.

97. East St. Louis Connecting R. Co. *v.* Eggmann, 71 Ill. App. 32.

98. Wickenkamp *v.* Wickenkamp, 77 Ill. 92.

99. Collin *v.* Farmers' Alliance Mut. F. Ins. Co., 18 Colo. App. 170, 70 Pac. 698.

Renewal of objection.— A party objecting to a question asked a witness, and excepting to the court overruling it, need not, to save his exception, renew the objection when the question is renewed. Louisville, etc., R. Co. *v.* Williamson, 96 S. W. 1130, 29 Ky. L. Rep. 1165.

1. *Alabama.*— Gager *v.* Doe, 29 Ala. 341.

Georgia.— Chambers *v.* Walker, 80 Ga. 642, 6 S. E. 165; Abercrombie *v.* Salisbury, 67 Ga. 734.

Indiana.— Dunnington *v.* Syfers, 157 Ind. 458, 62 N. E. 29.

Maryland.— Berrett *v.* Oliver, 7 Gill & J. 191.

Massachusetts.— Nash *v.* Hunt, 116 Mass. 237; Hackett *v.* King, 8 Allen 144, 85 Am. Dec. 695.

South Carolina.— Land Mortg. Inv., etc., Co. of America *v.* Gillan, 49 S. C. 345, 26 S. E. 990, 29 S. E. 203.

Texas.— Rains *v.* Hood, 23 Tex. 555; Shippers Compress, etc., Co. *v.* Davidson, 35 Tex. Civ. App. 558, 80 S. W. 1032; Vance *v.* Saathoff, 2 Tex. Unrep. Cas. 658.

Vermont.— Morisette *v.* Canadian Pac. R. Co., 76 Vt. 267, 56 Atl. 1102.

United States.— U. S. *v.* McMasters, 4 Wall. 680, 18 L. ed. 311.

See 46 Cent. Dig. tit. "Trial," § 256.

Several objections to rulings.— Where several objections to rulings are set out in the bill, which concludes with the words to which defendant excepted, the exceptions applies only to the ruling immediately preceding. Sammis *v.* Johnson, 22 Ala. 690.

2. *District of Columbia.*— Hutchins *v.* Langley, 27 App. Cas. 234; Prindle *v.* Campbell, 7 Mackey 598.

Georgia.— Tift *v.* Jones, 77 Ga. 181, 3 S. E. 399; Fuller *v.* Smith, 74 Ga. 835.

Illinois.— Schanzenbach *v.* Brough, 58 Ill. App. 526.

Iowa.— Keough *v.* Scott County, 28 Iowa 337; Kilburn *v.* Mullen, 22 Iowa 498.

Maine.—Johnson *v.* Day, 78 Me. 224, 3 Atl. 647.

Mississippi.— Helm *v.* Natchez Ins. Co., 8 Sm. & M. 197.

Missouri.— Lohart *v.* Buchanan, 50 Mo. 201; Miller *v.* Duff, 34 Mo. 167.

New Hampshire.— Leavitt *v.* New England

for not interposing the objection at the time the evidence was offered,[59] and where the question to the witness shows that it is designed to elicit incompetent evidence,[60] or where the motion is based on the incompetency of the witness and his incompetency was apparent before the testimony was given; [61] but the court may in its discretion strike out incompetent evidence, although such evidence was given without objection,[62] and although the motion to strike out is not made until all the evidence is in.[63]

e. Time For Motion. Ordinarily a motion to strike out objectionable testimony must be made at the time the testimony is given,[64] if the objection to the testimony is then apparent.[65] If the objection is not then apparent it should be made immediately upon the impropriety of the testimony becoming apparent.[66] The court may properly overrule it if not made until after cross-examination of the witness,[67] after the witness has fully concluded [68] or has been excused from the stand,[69] after other witnesses have been examined,[70] at the close of the party's

628; Parker *v.* Paine, 37 Misc. (N. Y.) 768, 76 N. Y. Suppl. 942.

59. Walrod *v.* Webster County, 110 Iowa 349, 81 N. W. 598, 47 L. R. A. 480.

60. Burke *v.* Claughton, 12 App. Cas. (D. C.) 182 (unless in case of plain injustice); Murphy *v.* McCarthy, 108 Iowa 38, 78 N. W. 819; Larson *v.* Kelly, 72 Minn. 116, 75 N. W. 13; Watts *v.* Howard, 70 Minn. 122, 72 N. W. 840; Spiking *v.* Consolidated R., etc., Co., 33 Utah 313, 93 Pac. 838.

61. Hughes *v.* Ward, 38 Kan. 452, 16 Pac. 810; State *v.* Williams, 28 La. Ann. 604; Hickman *v.* Green, 123 Mo. 165, 22 S. W. 455, 27 S. W. 440, 29 L. R. A. 39. *Contra*, Saetelle *v.* Metropolitan L. Ins. Co., 81 Mo. App. 509.

If incompetency was not apparent and discoverable by ordinary inquiry, and motion is made as soon as discovered, the motion should be granted. Robinson *v.* Snyder, 25 Pa. St. 203.

62. *Alabama.*— Payne *v.* Long, 121 Ala. 385, 25 So. 780.

California.— Davey *v.* Southern Pac. Co., 116 Cal. 325, 48 Pac. 117; Parker *v.* Smith, 4 Cal. 105; Spotswood *v.* Spotswood, 4 Cal. App. 711, 89 Pac. 362.

Iowa.— Cronk *v.* Wabash R. Co., 123 Iowa 349, 98 N. W. 884.

Maryland.— Mt. Vernon Brewing Co. *v.* Teschner, 108 Md. 158, 69 Atl. 702, 16 L. R. A. N. S. 758; Baltimore, etc., R. Co. *v.* State, 107 Md. 642, 69 Atl. 439, 72 Atl. 340.

Minnesota.— Larson *v.* Kelly, 72 Minn. 116, 75 N. W. 13; Wilson *v.* Northern Pac. R. Co., 26 Minn. 278, 3 N. W. 333, 37 Am. Rep. 410; Brady *v.* Brennan, 25 Minn. 210; Davis *v.* Mendenhall, 19 Minn. 149; Russell *v.* Schurmier, 9 Minn. 28.

Nebraska.— Gran *v.* Houston, 45 Nebr. 813, 64 N. W. 245; McCormick Harvesting Mach. Co. *v.* Carpenter, 1 Nebr. (Unoff.) 273, 95 N. W. 617.

New York.— Stokes *v.* Johnson, 57 N. Y. 673; Pescia *v.* Societa Co-Operativa Corleonese Francesco Bentivegna, 91 N. Y. App. Div. 506, 86 N. Y. Suppl. 952; Provost *v.* New York, 15 Daly 87, 3 N. Y. Suppl. 531 [*affirmed* in 117 N. Y. 626, 22 N. E. 1128]; Westervelt *v.* Burns, 27 Misc. 781, 57 N. Y. Suppl. 749; Flynn *v.* Manhattan R. Co., 1 Misc. 188, 20 N. Y. Suppl. 652; Doyle *v.* Manhattan R. Co., 13 N. Y. Suppl. 536; Meigs *v.* Buffalo, 7 N. Y. St. 855; De Caumont *v.* Morgan, 5 N. Y. St. 541. *Contra*, Quin *v.* Lloyd, 41 N. Y. 349.

Pennsylvania.— Robison *v.* Snyder, 25 Pa. St. 203; *In re* Hutman, 13 Pittsb. Leg. J. 385. *Contra*, Lewars *v.* Weaver, 121 Pa. St. 268, 15 Atl. 514.

Texas.— Ft. Worth, etc., R. Co. *v.* Andrews, (Civ. App. 1893) 29 S. W. 920.

Vermont.— Rollins *v.* Chalmers, 51 Vt. 592.

United States.— Farmers', etc., Nat. Bank *v.* Greene, 74 Fed. 439, 20 C. C. A. 500.

See 46 Cent. Dig. tit. "Trial," § 242.

In New Jersey it has been held that evidence admitted without objection cannot be stricken out except when its exclusion is demanded by some consideration of public policy. Rowland *v.* Rowland, 40 N. J. Eq. 281 [*affirming* 38 N. J. Eq. 181].

63. Edisto Phosphate Co. *v.* Standford, 112 Ala. 493, 20 So. 613; *In re* Lasak, 131 N. Y. 624, 30 N. E. 112.

64. District of Columbia *v.* Dietrich, 23 App. Cas. (D. C.) 577; McKeown *v.* Dyniewicz, 83 Ill. App. 509; Wheeler *v.* Detroit Electric R. Co., 128 Mich. 656, 87 N. W. 886.

Evidence not within issues.—A motion to strike out evidence of damages not pleaded may be made at any time before the close of the evidence. Wilkins *v.* Nassau Newspaper Delivery Express Co., 98 N. Y. App. Div. 130, 90 N. Y. Suppl. 678.

65. District of Columbia *v.* Dietrich, 23 App. Cas. (D. C.) 577.

66. Metropolitan R. Co. *v.* Loud, 20 App. Cas. (D. C.) 330; Flannery *v.* Central Brewing Co., 70 N. J. L. 715, 59 Atl. 157.

67. King *v.* Haney, 46 Cal. 560, 13 Am. Rep. 217; Bower *v.* Bower, 142 Ind. 194, 14 N. E. 523; Newman *v.* Buzard, 24 Wash. 225, 64 Pac. 139. *Contra*, Saetelle *v.* Metropolitan L. Ins. Co., 81 Mo. App. 509.

68. De Laval Separator Co. *v.* Sharpless, 142 Iowa 60, 120 N. W. 657.

69. Toledo, etc., R. Co. *v.* Stevenson, 122 Ill. App. 654.

70. Phelan *v.* Bonham, 9 Ark. 389; Shorb

An exception cannot be taken in gross.[3] It must specify the questions and answers to which exception is taken.[4] An exception to the reading of each answer and question of a deposition is insufficient.[5] If to the exclusion of evidence, it must show what the witness would have answered in response to the question.[6] But where an objection to the competency of a witness is sustained, it is not necessary to state in the exception what the party offering him expected to prove by him.[7]

c. Time For Taking. It is very generally held that exceptions to rulings on evidence must be taken at the trial,[8] at the time the ruling is made,[9] before the retirement of the jury,[10] and before the jury has delivered its verdict.[11] They must be taken at the time the court decides to admit or reject the evidence, but if then noted they may be reduced to form later,[12] and entered on the

Tel., etc., Co., 72 N. H. 290, 56 Atl. 462, where it relates to the form of the evidence.

North Carolina.— Burwell *v.* Sneed, 104 N. C. 118, 10 S. E. 152.

Ohio.— Neff *v.* Cincinnati, 32 Ohio St. 215.

South Carolina.— Jumper *v.* Columbia Commercial Bank, 48 S. C. 430, 26 S. E. 725; Adler *v.* Cloud, 42 S. C. 272, 20 S. E. 393.

Texas.— Cheek *v.* Herndon, 82 Tex. 146, 17 S. W. 763; Gulf, etc., R. Co. *v.* Locker, 78 Tex. 279, 14 S. W. 611; McAuley *v.* Harris, 71 Tex. 631, 9 S. W. 679; Watson *v.* Mathews, 36 Tex. 278.

United States.— Stockwell *v.* U. S., 23 Fed. Cas. No. 13,466, 3 Cliff. 284.

See 46 Cent. Dig. tit. "Trial," § 256.

An exception to the admission of evidence relevant to any issue generally raises no question of law. Robinson *v.* Stahl, 74 N. H. 310, 67 Atl. 577.

3. Leyner *v.* State, 8 Ind. 490. Such an exception is available only where the entire testimony is illegal in substance as well as in form. Hampson *v.* Taylor, 15 R. I. 83, 8 Atl. 331, 23 Atl. 732.

4. Baltimore, etc., Turnpike Co. *v.* Hebb, 88 Md. 132, 40 Atl. 879; Jones *v.* Galbrath, (Tenn. Ch. App. 1900) 59 S. W. 350.

5. Milton *v.* Rowland, 11 Ala. 732; Louisville, etc., R. Co. *v.* Montgomery, 32 S. W. 738, 17 Ky. L. Rep. 807.

6. *Massachusetts.*— Chelsea First Nat. Bank *v.* Hall, 170 Mass. 526, 49 N. E. 917.

New Hampshire.— Heath *v.* Heath, 58 N. H. 292.

New Jersey.—Donnelly *v.* State, 26 N. J. L. 463.

North Carolina.— Everett *v.* Williamson, 107 N. C. 204, 12 S. E. 187.

South Carolina.— Sims *v.* Jones, 43 S. C. 91, 20 S. E. 905.

Virginia.— Barker *v.* Barker, 2 Gratt. 344.

7. Martz *v.* Martz, 25 Gratt. (Va.) 361; Metz *v.* Snodgrass, 9 W. Va. 190.

8. Clemson *v.* Kruper, 1 Ill. 210; Cline *v.* Caldwell, 4 La. 19; Brent *v.* Ervin, 3 Mart. N. S. (La.) 303, 15 Am. Dec. 157; Babineau *v.* Cormier, 1 Mart. N. S. (La.) 456; Highlander *v.* Fluke, 5 Mart. (La.) 442; Farr *v.* Swan, 2 Pa. St. 245; Jones *v.* Thurmond, 5 Tex. 318. *Contra*, Clark *v.* Farrar, 3 Mart. (La.) 247.

A memorandum filed in a cause, objecting to the competency of testimony, not signed by counsel, is not an exception within Acts (1832), c. 302, § 5. Sindall *v.* Campbell, 7 Gill (Md.) 66.

9. *Arkansas.*— George *v.* Norris, 23 Ark. 121.

California.— Raymond *v.* Glover, 122 Cal. 471, 55 Pac. 398.

Indiana.— Chicago, etc., R. Co. *v.* Linn, 30 Ind. App. 88, 65 N. E. 552.

Michigan.— Foley *v.* Comstock, 122 Mich. 349, 81 N. W. 96.

United States.— Lucas *v.* U. S., 163 U. S. 612, 16 S. Ct. 1168, 48 L. ed. 282.

See 46 Cent. Dig. tit. "Trial," § 254.

Where objection included in written exceptions.— Although no exception is taken at the time of the admission over appellant's objection, the matter is reviewable on appeal where the objection is included in the written exceptions. Johns *v.* Charlotte, etc., R. Co., 39 S. C. 162, 17 S. E. 698, 39 Am. St. Rep. 709, 20 L. R. A. 520.

Exceptions cannot be taken at term subsequent to trial see Dayton *v.* Hinsey, 32 Ohio St. 258.

After nonsuit.—An exception to the exclusion of evidence cannot be made for the first time after nonsuit. Guillou *v.* Redfield, 205 Pa. St. 293, 54 Atl. 886.

Where, after objection to a question put by counsel, the court asks the witness the same question an exception thereto after answer is in time. Thompson *v.* Manhattan R. Co., 11 N. Y. App. Div. 182, 42 N. Y. Suppl. 896.

10. Greenbrier Industrial Exposition *v.* Ocheltree, 44 W. Va. 626, 30 S. E. 78.

11. Jones *v.* Van Patten, 3 Ind. 107; Peery *v.* Peery, 26 Gratt. (Va.) 320.

After return of verdict.— An exception is not in time if taken after return of verdict but before delivery. Lanuse *v.* Barker, 10 Johns. (N. Y.) 312; Morris *v.* Buckley, 8 Serg. & R. (Pa.) 211; Jones *v.* Insurance Co. of North America, 1 Binn. (Pa.) 38, 4 Dall. 249, 1 L. ed. 820.

12. *Alabama.*— Powers *v.* Wright, Minor 66.

Indiana.— Stump *v.* Fraley, 7 Ind. 769.

Kentucky.— Hughes *v.* Robertson, 1 T. B. Mon. 215, 15 Am. Dec. 104.

Maine.— McKown *v.* Powers, 86 Me. 291, 29 Atl. 1079.

Maryland.— Cecil Bank *v.* Heald, 25 Md. 562.

Missouri.— Mays *v.* Mays, 114 Mo. 536, 21

minutes.[13] If to a question, the exception must be taken before other questions are asked.[14] Exceptions to rulings limiting the number of witnesses should be taken at the time the rulings are made.[15]

d. Waiver of Exceptions. An exception to the exclusion of evidence is waived, if the party declines to re-offer the evidence upon a withdrawal of the objection,[16] unless in the meantime the witness has departed;[17] or by action of the party inconsistent with the exception;[18] or if the exclusion is based upon an assumed fact, as to the existence of which counsel upon request declines to throw doubt.[19] An exception to the admission of evidence is waived by a demurrer to the evidence, or a motion to dismiss for insufficiency;[20] but not by failure to except to the overruling of a motion that the evidence be stricken out,[21] or by a subsequent amendment of the record making the evidence admissible.[22]

E. Effect of Error in Admitting, Excluding, or Striking Out Evidence[23] — **1. Admission of Evidence**[24] — **a. In General** — (I) *When Harmless.* Error in the admission of evidence is not ground for a reversal where it was not prejudicial to the party complaining, as where it was so utterly irrelevant or immaterial or unimportant that it was obviously harmless.[25] A judgment

S. W. 921; Smith *v.* Dunklin County, 83 Mo. 195; Shaler *v.* Van Wormer, 33 Mo. 386.

Pennsylvania.— Stewart *v.* Huntingdon Bank, 11 Serg. & R. 267, 14 Am. Dec. 628; Morris *v.* Buckley, 8 Serg. & R. 211; Liggett *v.* Pennsylvania Bank, 7 Serg. & R. 218.

United States.— Poole *v.* Fleeger, 11 Pet. 185, 9 L. ed. 680, 955; *Ex p.* Bradstreet, 4 Pet. 102, 7 L. ed. 796; Locke *v.* U. S., 15 Fed. Cas. No. 8,442, 2 Cliff. 574.

See 46 Cent. Dig. tit. "Trial," § 254.

Where a ruling on an objection is reserved and not made, exception cannot be taken as if the ruling had been made. Adams *v.* Elwood, 176 N. Y. 106, 68 N. E. 126.

13. McIntyre *v.* Ledyard, Sm. & M. Ch. (Miss.) 91.

14. Barkly *v.* Copeland, 86 Cal. 483, 25 Pac. 1; Kenney *v.* Hampton, 73 N. H. 45, 58 Atl. 1046; Clark *v.* Hodges, 65 Vt. 273, 26 Atl. 726.

15. Meier *v.* Morgan, 82 Wis. 289, 52 N. W. 174, 33 Am. St. Rep. 39.

16. Roberts *v.* Boston, 149 Mass. 346, 21 N. E. 668.

17. Foster *v.* Thompson, 5 Gray (Mass.) 453.

18. Harnden *v.* Milwaukee Mechanics' Ins. Co., 164 Mass. 382, 41 N. E. 658, 49 Am. St. Rep. 467; Reed *v.* Spaulding, 42 N. H. 114; Howland *v.* Day, 56 Vt. 318.

19. Page *v.* Sumpter, 53 Wis. 652, 11 N. W. 60, the existence or non-existence of such fact being readily ascertainable.

20. Wilkins *v.* Germania F. Ins. Co., 57 Iowa 529, 10 N. W. 916.

21. Gaspar *v.* Heimbach, 53 Minn. 414, 55 N. W. 559.

22. Dexter *v.* Billings, 110 Pa. St. 135, 1 Atl. 180.

23. **Waiver of objections** see *supra*, V, D, 1, e.

24. **On trial by court without jury** see XII, A, 2, c.

25. *Alabama.*— Hamrick *v.* Gilbreath, 164 Ala. 292, 51 So. 336; Maddox *v.* Dunklin, 163 Ala. 278, 50 So. 277; Louisville, etc., R. Co. *v.* Davener, 162 Ala. 660, 50 So. 276; Central of Georgia R. Co. *v.* Alexander, 144 Ala. 257, 40 So. 424; Birmingham R., etc., Co. *v.* Jackson, 136 Ala. 279, 34 So. 994.

Arkansas.—Western Coal, etc., Co. *v.* Buchanan, 88 Ark. 7, 114 S. W. 694; St. Louis, etc., R. Co. *v.* Brady, 83 Ark. 489, 104 S. W. 160; Rector *v.* Robins, 82 Ark. 424, 102 S. W. 209; Arkansas, etc., R. Co. *v.* Stroude, 82 Ark. 117, 100 S. W. 760; St. Louis, etc., R. Co. *v.* Boyles, 78 Ark. 374, 95 S. W. 783.

California.— Kimic *v.* San Jose-Los Gatos Interurban R. Co., 156 Cal. 379, 104 Pac. 986; Perkins *v.* Sunset Tel., etc., Co., 155 Cal. 712, 103 Pac. 190; Taylor *v.* McCowen, 154 Cal. 798, 99 Pac. 351; Anglo-California Bank *v.* Field, 154 Cal. 513, 98 Pac. 267; Pearsall *v.* Henry, 153 Cal. 314, 95 Pac. 154, 159.

Colorado.— Hildreth *v.* Longmont, 47 Colo. 79, 105 Pac. 107; Reed *v.* Interstate Oil Co., 41 Colo. 463, 92 Pac. 911; Vindicator Consol. Gold Min. Co. *v.* Firstbrook, 36 Colo. 498, 86 Pac. 313; Denver City Tramway Co. *v.* Nicholas, 35 Colo. 462, 84 Pac. 813; Fisk Min., etc., Co. *v.* Reed, 32 Colo. 506, 77 Pac. 240.

Connecticut.— Lowndes *v.* City Nat. Bank, 82 Conn. 8, 72 Atl. 150, 22 L. R. A. N. S. 408; Mooney *v.* Mooney, 80 Conn. 446, 68 Atl. 985; Fisk *v.* Ley, 76 Conn. 295, 56 Atl. 559; Hayes *v.* Candee, 75 Conn. 131, 52 Atl. 826; Main's Appeal, 73 Conn. 638, 48 Atl. 965.

Dakota.— Burdick *v.* Haggart, 4 Dak. 13, 22 N. W. 589.

District of Columbia.—Macabee *v.* Higgins, 31 App. Cas. 355; Scott *v.* Herrell, 31 App. Cas. 45; Burke *v.* Claughton, 12 App. Cas. 182.

Florida.—Atlantic Coast Line R. Co. *v.* Peeples, 56 Fla. 145, 47 So. 392; Rhodus *v.* Heffernan, 47 Fla. 206, 36 So. 572; Bacon *v.* Green, 36 Fla. 325, 18 So. 870.

Georgia.—Watters *v.* Rome, etc., R. Co., 133 Ga. 641, 66 S. E. 884; Averett *v.* Walker, 131 Ga. 611, 62 S. E. 1046; Chandler *v.* Georgia Mut. Life, etc., Assoc., 131 Ga. 82, 61 S. E. 1036; Maddox *v.* Stewart, 127 Ga. 669, 56 S. E. 745.

should not be reversed where the evidence had no bearing on the issues in the case

Illinois.— Tebow *v.* Wiggins Ferry Co., 241 Ill. 582, 89 N. E. 658; Court of Honor *v.* Dinger, 221 Ill. 176, 77 N. E. 557 [*affirming* 123 Ill. App. 406]; Brown *v.* White, 219 Ill. 632, 76 N. E. 833; Schneider *v.* Sulzer, 212 Ill. 87, 72 N. E. 19; Reynolds *v.* Palmer, 70 Ill. 288.

Indiana.— New Castle *v.* Grubbs, 171 Ind. 482, 86 N. E. 757; Swygart *v.* Willard, 166 Ind. 25, 76 N. E. 755; Stametz *v.* Mitchenor, 165 Ind. 672, 75 N. E. 579; Hohn *v.* Shideler, 164 Ind. 242, 72 N. E. 575; Indianapolis St. R. Co. *v.* Schmidt, 163 Ind. 360, 71 N. E. 201.

Indian Territory.— Purcell Cotton Seed Oil Mills *v.* Bell, 7 Indian Terr. 717, 104 S. W. 944; Sparks *v.* Childers, 2 Indian Terr. 187, 47 S. W. 316; Citizens' Bank *v.* Carey, 2 Indian Terr. 84, 48 S. W. 1012; Gulf Coast, etc., R. Co. *v.* Jones, 1 Indian Terr. 354, 37 S. W. 208.

Iowa.— Mathre *v.* Story City Drug Co., 130 Iowa 111, 106 N. W. 368; Willis *v.* Weeks, 129 Iowa 525, 105 N. W. 1012; Hunter *v.* Davis, 128 Iowa 216, 103 N. W. 373; Vohs *v.* A. E. Shorthill Co., 124 Iowa 471, 100 N. W. 495; Hamilton *v.* Thoen, 97 Iowa 737, 66 N. W. 166.

Kansas.— Bonebrake *v.* Tauer, 67 Kan. 827, 72 Pac. 521; Atchison, etc., R. Co. *v.* Temple, 47 Kan. 7, 27 Pac. 98, 13 L. R. A. 362; Osborn *v.* Woodford, 31 Kan. 290, 1 Pac. 548; Moon *v.* Helfer, 25 Kan. 139; Willis *v.* Sproule, 13 Kan. 257.

Kentucky.— Eilerman *v.* Farmer, (1909) 118 S. W. 289; Louisville R. Co. *v.* Johnson, 131 Ky. 277, 115 S. W. 207, 20 L. R. A. N. S. 133; Cunningham *v.* Clay, (1908) 112 S. W. 852; Garrard County Ct. *v.* McKee, 11 Bush 234.

Louisiana.— Stoker *v.* Hodge Fence, etc., Co., 116 La. 926, 41 So. 211; Rouly *v.* Berard, 11 Rob. 478; Robillard *v.* Robillard, 4 Mart. 603.

Maine.— Davis *v.* Alexander, 99 Me. 40, 58 Atl. 55; Jewell *v.* Gagné, 82 Me. 430, 19 Atl. 917; Smithfield *v.* Waterville, 64 Me. 412.

Maryland.— Baltimore, etc., R. Co. *v.* Howard County Com'rs, 111 Md. 176, 73 Atl. 656; Buck *v.* Brady, 110 Md. 568, 73 Atl. 277, 132 Am. St. Rep. 459; Baltimore Refrigerating, etc., Co. *v.* Kreiner, 109 Md. 361, 71 Atl. 1066; Mt. Vernon Brewing Co. *v.* Teschner, 108 Md. 158, 69 Atl. 702, 16 L. R. A. N. S. 758; Bowman *v.* Little, 101 Md. 273, 61 Atl. 223, 657, 1084.

Massachusetts.— Jaquith *v.* Morrill, 204 Mass. 181, 90 N. E. 556; Allen *v.* Kidd, 197 Mass. 256, 84 N. E. 122; McGonigle *v.* Victor H. J. Belleisle Co., 186 Mass. 310, 71 N. E. 569; Downey *v.* Lancy, 178 Mass. 465, 59 N. E. 1015; Buffum *v.* York Mfg. Co., 175 Mass. 471, 56 N. E. 599.

Michigan.— Meilke *v.* Schabble, 159 Mich. 163, 123 N. W. 552; Lockard *v.* Van Alstyne, 155 Mich. 507, 120 N. W. 1; Lansky *v.* Prettyman, 140 Mich. 40, 103 N. W. 538; Dodge *v.* Reynolds, 135 Mich. 692, 98 N. W. 737; Mathews *v.* Phelps, 61 Mich. 327, 28 N. W. 108, 1 Am. St. Rep. 581.

Minnesota.— Morris *v.* St. Paul City R. Co., 105 Minn. 276, 117 N. W. 500, 17 L. R. A. N. S. 598; Clay *v.* Chicago, etc., R. Co., 104 Minn. 1, 115 N. W. 949; Crowley *v.* Burns Boiler, etc., Co., 100 Minn. 178, 110 N. W. 969; Rettner *v.* Minnesota Cold-Storage Co., 88 Minn. 352, 93 N. W. 120; Evenson *v.* Keystone Mfg. Co., 83 Minn. 164, 86 N. W. 8.

Mississippi.— McGlothlin *v.* Meaux, (1905) 38 So. 317; Alabama, etc., R. Co. *v.* Fried, 81 Miss. 314, 33 So. 74; Bacon *v.* Bacon, 76 Miss. 458, 24 So. 968; Busby *v.* Voyles, (1895) 18 So. 318.

Missouri.— Phelps *v.* Conqueror Zinc Co., 218 Mo. 572, 117 S. W. 705; Orcutt *v.* Century Bldg. Co., 214 Mo. 35, 112 S. W. 532; Roe *v.* Versailles Bank, 167 Mo. 406, 67 S. W. 303; Hurst *v.* Kansas City, etc., Co., 163 Mo. 309, 63 S. W. 695, 85 Am. St. Rep. 539; Foster *v.* Nowlin, 4 Mo. 18.

Montana.— Knipe *v.* Washoe Copper Min. Co., 37 Mont. 161, 95 Pac. 129; Anderson *v.* Red Metal Min. Co., 36 Mont. 312, 93 Pac. 44; Portland First Nat. Bank *v.* Carroll, 35 Mont. 302, 88 Pac. 1012; Martin *v.* Corscadden, 34 Mont. 308, 86 Pac. 33; Merchants' Nat. Bank *v.* Greenhood, 16 Mont. 395, 41 Pac. 250, 851.

Nebraska.— Zelenka *v.* Union Stock Yards Co., 82 Nebr. 511, 118 N. W. 103; Joyce *v.* Miller, 81 Nebr. 578, 116 N. W. 506; State *v.* Smith, 77 Nebr. 824, 110 N. W. 557; Lexington *v.* Kreitz, 73 Nebr. 770, 103 N. W. 444; Wittenberg *v.* Mollyneaux, 60 Nebr. 583, 83 N. W. 842.

Nevada.— Costello *v.* Scott, 30 Nev. 43, 93 Pac. 1, 94 Pac. 222; Yori *v.* Cohn, 26 Nev. 206, 65 Pac. 945, 67 Pac. 212; Chiatovich *v.* Davis, 17 Nev. 133, 28 Pac. 239; Beatty *v.* Sylvester, 3 Nev. 228.

New Hampshire.— Perry *v.* Maryland Casualty Co., 75 N. H. 199, 72 Atl. 369; Proctor *v.* Blanchard, 75 N. H. 186, 72 Atl. 210; Bunker *v.* Manchester Real Estate, etc., Co., 75 N. H. 131, 71 Atl. 866; Curtice *v.* Dixon, 74 N. H. 386, 68 Atl. 587; Page *v.* Hazelton, 74 N. H. 252, 66 Atl. 1049.

New Jersey.—Whitaker *v.* Miller, 63 N. J. L. 587, 44 Atl. 643; Vliet *v.* Simanton, 63 N. J. L. 458, 43 Atl. 738; Myers *v.* Weger, 62 N. J. L. 432, 42 Atl. 280.

New York.— Post *v.* Brooklyn Heights R. Co., 195 N. Y. 62, 87 N. E. 771 [*affirming* 122 N. Y. App. Div. 914, 107 N. Y. Suppl. 1142]; Sweet *v.* Henry, 175 N. Y. 268, 67 N. E. 574 [*reversing* 66 N. Y. App. Div. 383, 72 N. Y. Suppl. 868]; Corn Exch. Bank *v.* American Dock, etc., Co., 163 N. Y. 332, 57 N. E. 477 [*modifying* 14 N. Y. App. Div. 453, 43 N. Y. Suppl. 1028]; Fonner *v.* Johnson, 78 N. Y. 617; Miller *v.* Uvalde Asphalt Paving Co., 134 N. Y. App. Div. 212, 118 N. Y. Suppl. 885; Delafield *v.* J. K. Armsby Co., 131 N. Y. App. Div. 572, 116 N. Y. Suppl. 71 [*affirmed* in 199 N. Y. 518, 92 N. E. 1083].

North Carolina.— Shaw *v.* Western Union Tel. Co., 151 N. C. 638, 66 S. E. 668; Cald-

and was without benefit to either party.[26] A judgment will not be reversed because of the erroneous admission of evidence, where it did not affect the result or could

well Land, etc., Co. *v.* Globe Lumber Co., 151 N. C. 390, 66 S. E. 310; Crawford *v.* Masters, 140 N. C. 205, 52 S. E. 663; Belding *v.* Archer, 131 N. C. 287, 42 S. E. 800; Rollins *v.* Henry, 84 N. C. 569.

North Dakota.—Anderson *v.* Minneapolis, etc., R. Co., (1909) 123 N. W. 281; S. J. Vidger Co. *v.* Great Northern R. Co., 15 N. D. 501, 107 N. W. 1083; Kinney *v.* Brotherhood of American Yeomen, 15 N. D. 21, 106 N. W. 44.

Ohio.— Fuller *v.* Coats, 18 Ohio St. 343; Dickey *v.* Beatty, 14 Ohio St. 389; Banning *v.* Banning, 12 Ohio St. 437.

Oklahoma.— Funk *v.* Hendricks, 24 Okla. 837, 105 Pac. 352; Mullen *v.* Thaxton, 24 Okla. 643, 104 Pac. 359; Kennon *v.* Territory, 5 Okla. 685, 50 Pac. 172.

Oregon.— Mahon *v.* Rankin, 54 Oreg. 328, 102 Pac. 608, 103 Pac. 53; Quick *v.* Swing, 53 Oreg. 149, 99 Pac. 418; North Pac. Lumber Co. *v.* Spore, 44 Oreg. 462, 75 Pac. 890; Galloway *v.* Bartholomew, 44 Oreg. 75, 74 Pac. 467; Mitchell *v.* La Follett, 38 Oreg. 178, 63 Pac. 54.

Pennsylvania.— Hager *v.* Wharton Tp., 200 Pa. St. 281, 49 Atl. 757; Oster *v.* Schuylkill Traction Co., 195 Pa. St. 320, 45 Atl. 1006; Kitchen *v.* Union Tp., 171 Pa. St. 145, 33 Atl. 76; Wright *v.* Cumpsty, 41 Pa. St. 102; Daniel *v.* Daniel, 39 Pa. St. 191.

Rhode Island.— Carr *v.* American Locomotive Co., 29 R. I. 276, 70 Atl. 196; McHugh *v.* Rhode Island Co., 29 R. I. 206, 69 Atl. 853; McDonald *v.* New York, etc., R. Co., 25 R. I. 40, 54 Atl. 795; Guckian *v.* Newbold, 23 R. I. 553, 594, 51 Atl. 210; Ames *v.* Potter, 7 R. I. 265.

South Carolina.— Humphries *v.* Union, etc., R. Co., 84 S. C. 202, 65 S. E. 1051; Crosland *v.* Graham, 83 S. C. 228, 65 S. E. 233; Nickles *v.* Seaboard Air Line R. Co., 74 S. C. 102, 54 S. E. 255; Willis *v.* Western Union Tel. Co., 73 S. C. 379, 53 S. E. 639; Tyler *v.* Williams, 53 S. C. 367, 31 S. E. 298.

South Dakota.— Grant *v.* Powers Dry Goods Co., 23 S. D. 195, 121 N. W. 95; Breeden *v.* Martens, 21 S. D. 357, 112 N. W. 960; Thompson *v.* Roberts, 16 S. D. 403, 92 N. W. 1079; Mattes *v.* Engel, 15 S. D. 330, 89 N. W. 651; Blackman *v.* Hot Springs, 14 S. D. 497, 85 N. W. 996.

Tennessee.— Knights of Pythias *v.* Allen, 104 Tenn. 623, 58 S. W. 241; Stamps *v.* Tennessee Producers' Marble Co., (Ch. App. 1900) 59 S. W. 769.

Texas.— Campbell *v.* Upson, 98 Tex. 442, 84 S. W. 817; Sanborn *v.* Murphy, 86 Tex. 437, 25 S. W. 610; Bassett *v.* Martin, 83 Tex. 339, 18 S. W. 587; Titus *v.* Johnson, 50 Tex. 224; Hartford F. Ins. Co. *v.* Becton, (Civ. App. 1909) 124 S. W. 474 [writ of error *denied* in (1910) 125 S. W. 883]; Texas, etc., R. Co. *v.* Crowley, (Civ. App. 1905) 86 S. W. 342.

Utah.— Garr *v.* Cranney, 25 Utah 193, 70 Pac. 853.

Vermont.— Lathrop *v.* Levarn, 83 Vt. 1, 74 Atl. 331; Ware *v.* Childs, 82 Vt. 359, 73 Atl. 994; Willard *v.* Norcross, 81 Vt. 293, 69 Atl. 942; McGowan *v.* Bowman, 79 Vt. 295, 64 Atl. 1121; McDowell *v.* McDowell, 75 Vt. 401, 56 Atl. 98, 98 Am. St. Rep. 831.

Virginia.—Virginia R. Co. *v.* Jeffries, 110 Va. 471, 66 S. E. 731; Hurricane Lumber Co. *v.* Lowe, 110 Va. 380, 66 S. E. 66; New York, etc., Co. *v.* Wilson, 109 Va. 754, 64 S. E. 1060; Chesapeake, etc., R. Co. *v.* Hoffman, 109 Va. 44, 63 S. E. 432; New River Mineral Co. *v.* Painter, 100 Va. 507, 42 S. E. 300.

Washington.— Dunkin *v.* Hoquiam, 56 Wash. 47, 105 Pac. 149; Collins *v.* Hazel Lumber Co., 54 Wash. 524, 103 Pac. 798; Cook *v.* Pittock, etc., Lumber Co., 51 Wash. 316, 98 Pac. 1130; McCowan *v.* Northeastern Siberian Co., 41 Wash. 675, 84 Pac. 614; Shannon *v.* Tacoma, 41 Wash. 220, 83 Pac. 186.

West Virginia.— Scott *v.* Hughes, 66 W. Va. 573, 66 S. E. 737; Hollen *v.* Crim, 62 W. Va. 451, 59 S. E. 172; Loverin, etc., Co. *v.* Bumgarner, 59 W. Va. 46, 52 S. E. 1000; Tucker *v.* Colonial F. Ins. Co., 58 W. Va. 30, 51 S. E. 86; Shroyer *v.* Miller, 3 W. Va. 158.

Wisconsin.—Winkler *v.* Power, etc., Mach. Co., 141 Wis. 244, 124 N. W. 273; Pfister *v.* Milwaukee Free Press Co., 139 Wis. 627, 121 N. W. 938; Rhodes *v.* Halvorson, 120 Wis. 99, 97 N. W. 514; Schroeder *v.* Wisconsin Cent. R. Co., 117 Wis. 33, 93 N. W. 837; Kellogg *v.* Adams, 51 Wis. 138, 8 N. W. 115, 37 Am. Rep. 815.

Wyoming.— Slothower *v.* Hunter, 15 Wyo. 189, 88 Pac. 36; Cramer *v.* Redman, 10 Wyo. 328, 68 Pac. 1003.

United States.— Fidelity Mut. Life Assoc. *v.* Mettler, 185 U. S. 308, 22 S. Ct. 662, 46 L. ed. 922; Klein *v.* Hoffheimer, 132 U. S. 367, 10 S. Ct. 130, 33 L. ed. 373; Philadelphia, etc., R. Co. *v.* Howard, 13 How. 307, 14 L. ed. 157; Alaska-Treadwell Gold Min. Co. *v.* Cheney, 162 Fed. 593, 89 C. C. A. 351; Rainey *v.* Potter, 120 Fed. 651, 57 C. C. A. 113; Third Ave. R. Co. *v.* Krausz, 112 Fed. 379, 50 C. C. A. 293.

Fact subsequently becoming immaterial.— Where improper evidence is introduced for the purpose of proving a fact which subsequently becomes immaterial, the verdict will not be set aside in the absence of a showing that such immaterial evidence tended to influence the jury on other points. Buddington *v.* Shearer, 22 Pick. (Mass.) 427.

Estoppel to deny prejudice.—A case having been tried on the theory that a particular issue was presented, a party cannot claim on appeal that there was no such issue, for the purpose of claiming as harmless error in admitting evidence thereon. Ryan *v.* Pacific Axle Co., (Cal. 1902) 68 Pac. 498.

26. Hoskovec *v.* Omaha St. R. Co., 85 Nebr. 295, 123 N. W. 305.

not have done so,[27] or where it is apparent that the verdict would or must have been the same had the evidence not been admitted.[28] If the complaining party could not recover in any event, or the successful party was entitled to recover in

27. *Alabama.*— Lyles *v.* Clements, 49 Ala. 445; Bibb *v.* McQueen, 42 Ala. 408.
Arkansas.— Weaver *v.* Caldwell, 9 Ark. 339.
California.— Eppinger *v.* Scott, 112 Cal. 369, 42 Pac. 301, 44 Pac. 723, 53 Am. St. Rep. 220; Hogan *v.* Cowell, 73 Cal. 211, 14 Pac. 780.
Colorado.— Downing *v.* Ernst, 40 Colo. 137, 92 Pac. 230; Cowles *v.* Robinson, 11 Colo. 587, 19 Pac. 654.
Florida.— Nickels *v.* Mooring, 16 Fla. 76; Carter *v.* Bennett, 4 Fla. 283.
Georgia.— Brackett *v.* Americus Grocery Co., 127 Ga. 672, 56 S. E. 762; Thompson *v.* Thompson, 77 Ga. 692, 3 S. E. 261.
Idaho.—Bradbury *v.* Idaho, etc., Land Imp. Co., 2 Ida. (Hasb.) 239, 10 Pac. 620.
Illinois.— Peck *v.* Cooper, 112 Ill. 192, 54 Am. Rep. 231; Pennsylvania Co. *v.* Rudel, 100 Ill. 603.
Indiana.— Indianapolis Union R. Co. *v.* Boettcher, 131 Ind. 82, 28 N. E. 551; Robinson *v.* Shanks, 118 Ind. 125, 20 N. E. 713.
Iowa.— Andres *v.* Schlueter, 140 Iowa 389, 118 N. W. 429; *In re* Wiltsey, 135 Iowa 430, 109 N. W. 776.
Kansas.— Rich *v.* Northwestern Cattle Co., 48 Kan. 197, 29 Pac. 466; Parker *v.* Richolson, 46 Kan. 283, 26 Pac. 729.
Kentucky.— Kercheval *v.* Ambler, 4 Dana 166; Smart *v.* Easley, 5 J. J. Marsh. 214.
Louisiana.— Ferguson *v.* Whipple, 3 Rob. 344; Le Bret *v.* Belzons, 13 La. 93.
Maine.— Brogan *v.* McEachern, 103 Me. 198, 68 Atl. 822; Barrett *v.* Bangor, 70 Me. 335.
Maryland.— Clements *v.* Smith, 9 Gill 156.
Massachusetts.— Dumphy *v.* New York, etc., R. Co., 196 Mass. 471, 82 N. E. 675, 13 L. R. A. N. S. 1152; Norwich, etc., R. Co. *v.* Worcester, 147 Mass. 518, 18 N. E. 409.
Michigan.— Ashton *v.* Detroit City R. Co., 78 Mich. 587, 44 N. W. 141; Shipman *v.* Seymour, 40 Mich. 274.
Minnesota.— Hinds *v.* Backus, 45 Minn. 170, 47 N. W. 655; De Laittre *v.* Jones, 36 Minn. 519, 32 N. W. 709.
Missouri.— Moss *v.* Kauffman, 131 Mo. 424, 33 S. W. 20; Avery *v.* Fitzgerald, 94 Mo. 207, 7 S. W. 6.
Nebraska.— Jacobsen *v.* Omaha, 80 Nebr. 56, 113 N. W. 792; Terry *v.* Beatrice Starch Co., 43 Nebr. 866, 62 N. W. 255.
Nevada.— Costello *v.* Scott, 30 Nev. 43, 93 Pac. 1, 94 Pac. 222; Cahill *v.* Hirschman, 6 Nev. 57.
New Hampshire.— Wason *v.* Burnham, 68 N. H. 553, 44 Atl. 693; Martin *v.* Towle, 59 N. H. 31.
New Jersey.— Schenck *v.* Cuttrell, 21 N. J. L. 5.
New York.— Beaver *v.* Beaver, 137 N. Y. 59, 32 N. E. 998; De Graaf *v.* Wyckoff, 118 N. Y. 1, 22 N. E. 1118.
North Carolina.— Waggoner *v.* Ball, 95 N. C. 323; Ripley *v.* Arledge, 94 N. C. 467.
Ohio.— Dickey *v.* Beatty, 14 Ohio St. 389; Young *v.* Young, 28 Ohio Cir. Ct. 179.
Pennsylvania.— Commercial Nat. Bank *v.* Henninger, 105 Pa. St. 496; Hill *v.* Grant, 49 Pa. St. 200.
Rhode Island.— Tillinghast *v.* Sawyer, (1901) 68 Atl. 478; Forbes *v.* Howard, 4 R. I. 364.
South Carolina.— McCutchen *v.* McCutchen, 77 S. C. 129, 57 S. E. 678, 12 L. R. A. N. S. 1140; Roberts *v.* Western Union Tel. Co., 76 S. C. 275, 56 S. E. 960.
Tennessee.— Miller *v.* Koger, 9 Humphr. 231.
Texas.— Parrish *v.* Mills, 101 Tex. 276, 106 S. W. 882 [*affirming* (Civ. App. 1907) 102 S. W. 184]; Bennett *v.* Kiber, 76 Tex. 385, 13 S. W. 220.
Vermont.— Graves *v.* Waitsfield, 81 Vt. 84, 69 Atl. 137; Spaulding *v.* Warner, 57 Vt. 654.
Virginia.— Bugg *v.* Seay, 107 Va. 648, 60 S. E. 89, 122 Am. St. Rep. 877; Southern Mut. Ins. Co. *v.* Trear, 29 Gratt. 255.
West Virginia.— Jones *v.* Singer Mfg. Co., 38 W. Va. 147, 18 S. E. 478.
Wisconsin.— Barnes *v.* Stacey, 79 Wis. 55, 48 N. W. 53; Wesling *v.* Kroll, 78 Wis. 636, 47 N. W. 943.
Wyoming.— Alsop *v.* Hutton, 1 Wyo. 284.
United States.— Union Consol. Silver Min. Co. *v.* Taylor, 100 U. S. 37, 25 L. ed. 541; Southern R. Co. *v.* St. Louis Hay, etc., Co., 153 Fed. 728, 82 C. C. A. 614 [*affirming* 149 Fed. 609, *reversed* on other grounds in 214 U. S. 297, 29 Sup. Ct. 678, 53 L. ed. 1004].

28. *Alabama.*— Saunders *v.* Tuscumbia Roofing, etc., Co., 148 Ala. 519, 41 So. 982.
California.— Petitpierre *v.* Maguire, 155 Cal. 242, 100 Pac. 690; Davies *v.* Oceanic Steamship Co., 89 Cal. 280, 26 Pac. 827.
Georgia.— Burns *v.* Vereen, 132 Ga. 349, 64 S. E. 113.
Illinois.— Clifford *v.* Pioneer Fire-Proofing Co., 232 Ill. 150, 83 N. E. 448; Turner *v.* Osgood Art Colortype Co., 223 Ill. 629, 79 N. E. 306 [*affirming* 125 Ill. App. 602].
Maryland.— Moneyweight Scale Co. *v.* McCormick, 109 Md. 170, 72 Atl. 537.
Missouri.— Shearer *v.* Hill, 125 Mo. App. 375, 102 S. W. 673.
New York.— Maldonado *v.* Espen, 195 N. Y. 541, 88 N. E. 14 [*affirming* 123 N. Y. App. Div. 925, 108 N. Y. Suppl. 1139]; Ianne *v.* U. S. Gypsum Co., 126 N. Y. App. Div. 244, 110 N. Y. Suppl. 496 [*reversed* on other grounds in 194 N. Y. 88, 86 N. E. 809].
Oregon.— Montgomery *v.* Somers, 50 Oreg. 259, 90 Pac. 674.
South Carolina.— Tindal *v.* Sublett, 82 S. C. 199, 63 S. E. 960.
Texas.— Rainey *v.* Kemp, (Civ. App. 1909) 118 S. W. 630; Keck *v.* Woodward, (Civ. App. 1909) 116 S. W. 75.

any event, error in the admission of evidence is not ground for reversal.[29] The improper admission of evidence to contradict evidence previously erroneously admitted is no ground for reversal,[30] and error in the admission of evidence is not ground for reversal, where the party complaining introduces evidence of the same kind.[31]

29. *Alabama.*— Simmons *v.* Sharpe, 148 Ala. 217, 42 So. 441.

Arkansas.— Burton *v.* Baird, 44 Ark. 556; George *v.* Norris, 23 Ark. 121.

California.— McLennan *v.* State Bank, 87 Cal. 569, 25 Pac. 760; White *v.* Mitchell, 11 Cal. App. 202, 104 Pac. 333.

Colorado.— Wells *v.* Baker, 38 Colo. 149, 88 Pac. 152.

Connecticut.— Downie *v.* Nettleton, 61 Conn. 593, 24 Atl. 977; Cowles *v.* Coe, 21 Conn. 220.

Georgia.— Akers *v.* Kirke, 91 Ga. 590, 18 S. E. 366.

Illinois.— Winnesheik Ins. Co. *v.* Schueller, 60 Ill. 465; Charter *v.* Graham, 56 Ill. 19.

Iowa.— Tucker *v.* Tucker, 138 Iowa 344, 116 N. W. 119.

Kentucky.— Franklin *v.* Louisville, etc., R. Co., (1909) 116 S. W. 765.

Massachusetts.— Hinckley *v.* Somerset, 145 Mass. 326, 14 N. E. 166.

Missouri.— Deal *v.* Cooper, 94 Mo. 62, 6 S. W. 707; Myres *v.* Diamond Joe Line, 58 Mo. App. 199.

Nebraska.— Adams, etc., Co. *v.* Cook, 82 Nebr. 684, 118 N. W. 662.

Nevada.—Robinson *v.* Imperial Silver Min. Co., 5 Nev. 44.

New Jersey.— Smith *v.* Clayton, 29 N. J. L. 357; State *v.* Engle, 21 N. J. L. 347.

New Mexico.— New Mexican R. Co. *v.* Hendricks, 6 N. M. 611, 30 Pac. 901.

New York.— Kilmer *v.* Quackenbush, 125 N. Y. App. Div. 352, 109 N. Y. Suppl. 444; Porter *v.* Magnetic Separator Co., 115 N. Y. App. Div. 333, 100 N. Y. Suppl. 888 [*affirmed* in 190 N. Y. 511, 83 N. E. 1130].

North Carolina.— Marable *v.* Southern R. Co., 142 N. C. 557, 55 S. E. 355.

Ohio.— Way *v.* Langley, 15 Ohio St. 392.

Texas.— Ellwood *v.* Stallcup, (Civ. App. 1909) 122 S. W. 906; Henry *v.* Red Water Lumber Co., 46 Tex. Civ. App. 179, 102 S. W. 749.

Vermont.— Houghton *v.* Slack, 10 Vt. 520.

Virginia.— Gerst *v.* Jones, 32 Gratt. 518, 34 Am. Rep. 773.

Washington.— Kimble *v.* Ford, 7 Wash. 603, 35 Pac. 395.

Wisconsin.— Knapp *v.* Runals, 37 Wis. 135.

Wyoming.— Link *v.* Union Pac. R. Co., 3 Wyo. 680, 29 Pac. 741.

United States.— Holmes *v.* Goldsmith, 147 U. S. 150, 13 S. Ct. 288, 37 L. ed. 118; Anonymous, 30 Fed. Cas. No. 18,224, Hempst. 215.

30. *California.*— Peterson *v.* Mineral King Fruit Co., 140 Cal. 624, 74 Pac. 162; Berliner *v.* Travelers' Ins. Co., 121 Cal. 451, 53 Pac. 922.

Connecticut.— Budd *v.* Meriden Electric R. Co., 69 Conn. 272, 37 Atl. 683; Havens *v.* Wethersfield, 67 Conn. 533, 35 Atl. 503.

Indiana.— Talburt *v.* Berkshire L. Ins. Co., 80 Ind. 434.

Iowa.— Ashley *v.* Sioux City, (1903) 93 N. W. 303; *In re* Myers, 111 Iowa 584, 82 N. W. 961.

Maine.— Page *v.* Homans, 14 Me. 478.

Maryland.— Whitridge *v.* Baltimore, 103 Md. 412, 62 Atl. 808; Dryden *v.* Barnes, 101 Md. 346, 61 Atl. 342.

Massachusetts.— Meigs *v.* Dexter, 172 Mass. 217, 52 N. E. 75; Treat *v.* Curtis, 124 Mass. 348; Cole *v.* Cheshire, 1 Gray 441.

Minnesota.— Spoonick *v.* Backus Brooks Co., 89 Minn. 354, 94 N. W. 1079; Harrington *v.* St. Paul, etc., R. Co., 17 Minn. 215.

Missouri.— Lindsay *v.* Kansas City, 195 Mo. 166, 93 S. W. 273; Hammer *v.* Crawford, (App. 1906) 93 S. W. 348.

Nebraska.— Scott *v.* Flowers, 60 Nebr. 675, 84 N. W. 81.

New York.— Iacquinto *v.* Bauer, 104 N. Y. App. Div. 56, 93 N. Y. Suppl. 388; Riker *v.* Clopton, 83 N. Y. App. Div. 310, 82 N. Y. Suppl. 65; Ramell *v.* Duffy, 82 N. Y. App. Div. 496, 81 N. Y. Suppl. 600.

Oregon.— Brock *v.* Weiss, 40 Oreg. 80, 66 Pac. 575.

South Carolina.— Hankinson *v.* Charlotte, etc., R. Co., 41 S. C. 1, 19 S. E. 206.

South Dakota.— Davis *v.* Holy Terror Min. Co., 20 S. D. 399, 107 N. W. 374; Fallon *v.* Rapid City, 17 S. D. 570, 97 N. W. 1009.

Tennessee.— Knoxville Iron Co. *v.* Pace, 101 Tenn. 476, 48 S. W. 232.

Texas.— San Antonio *v.* Talerico, 98 Tex. 151, 81 S. W. 518 [*affirming* (Civ. App. 1903) 78 S. W. 28]; Southern Kansas R. Co. *v.* Sage, 96 Tex. 438, 54 S. W. 814 [*reversing* (Civ. App. 1904) 80 S. W. 1038].

Vermont.— Hathaway *v.* Goslant, 77 Vt. 199, 59 Atl. 835.

Washington.— Hart *v.* Cascade Timber Co., 39 Wash. 279, 81 Pac. 738; Earles *v.* Bigelow, 7 Wash. 581, 35 Pac. 390.

United States.— Scofield *v.* U. S., 174 Fed. 1, 98 C. C. A. 39; Pennsylvania R. Co. *v.* Palmer, 127 Fed. 956, 62 C. C. A. 588.

31. *Alabama.*— Griffin *v.* Head, 122 Ala. 441, 25 So. 185, 82 Am. St. Rep. 80.

California.— Jaegel *v.* Johnson, 148 Cal. 695, 84 Pac. 175.

Illinois.— Voight *v.* Anglo-American Provision Co., 202 Ill. 462, 66 N. E. 1054 [*affirming* 104 Ill. App. 423]; Kehler *v.* Wilton, 99 Ill. App. 228.

Indiana.— Lyon *v.* Lenon, 106 Ind. 567, 7 N. E. 311; Campbell *v.* Conner, 15 Ind. App. 23, 42 N. E. 688, 43 N. E. 453.

Iowa.— Lewis *v.* Susmilch, 130 Iowa 203, 106 N. W. 624; Mathre *v.* Devendorf, 130 Iowa 107, 106 N. W. 366. *Compare* Manning *v.* Burlington, etc., R. Co., 64 Iowa 240, 20 N. W. 169.

(II) *When Prejudicial.* Error in the admission of evidence which apparently affected the jury in their verdict is ground for reversal,[32] and this is especially

Kentucky.— Kentucky Cent. R. Co. *v.* Musselman, 14 Ky. L. Rep. 893.

Maryland.— Marfield *v.* Davidson, 8 Gill & J. 209.

Michigan.— Hoffman *v.* Adams, 106 Mich. 111, 64 N. W. 7.

Missouri.— Chambers *v.* Chester, 172 Mo. 461, 72 S. W. 904; South St. Louis R. Co. *v.* Plate, 92 Mo. 614, 5 S. W. 199; Peck *v.* Kansas City Metal Roofing, etc., Co., 96 Mo. App. 212, 70 S. W. 169.

New York.— Beyer *v.* Isaacs, 104 N. Y. App. Div. 12, 93 N. Y. Suppl. 312; Warner *v.* Randolph, 18 N. Y. App. Div. 458, 45 N. Y. Suppl. 1112; Hand *v.* Shaw, 16 Misc. 498, 38 N. Y. Suppl. 965 [*reversed* on other grounds in 41 N. Y. Suppl. 16, 1117]. *Compare* Farmers', etc., Bank *v.* Whinfield, 24 Wend. 419.

Rhode Island.— Ennis *v.* Little, 25 R. I. 342, 401, 55 Atl. 884, 56 Atl. 110.

South Carolina.— Brown *v.* Carolina Midland R. Co., 67 S. C. 481, 46 S. E. 283, 100 Am. St. Rep. 756; Mathis *v.* Southern R. Co., 53 S. C. 246, 31 S. E. 240.

Texas.— Gulf, etc., R. Co. *v.* Tullis, 41 Tex. Civ. App. 219, 91 S. W. 317; Sheldon Canal Co. *v.* Miller, 40 Tex. Civ. App. 460, 90 S. W. 206.

Wisconsin.— Kreuziger *v.* Chicago, etc., R. Co., 73 Wis. 158, 40 N. W. 657.

32. *Alabama.*— Tennessee Coal, etc., Co. *v.* Kelly, 163 Ala. 348, 50 So. 1008.

Arkansas.— Murphy *v.* St. Louis, etc., R. Co., 92 Ark. 159, 122 S. W. 636.

California.— Sterne *v.* Mariposa Commercial, etc., Co., 153 Cal. 516, 97 Pac. 66; Title Ins., etc., Co. *v.* Ingersoll, 153 Cal. 1, 94 Pac. 94; Ferguson *v.* Basin Consol. Mines, 152 Cal. 712, 93 Pac. 867; Hardy *v.* Martin, 150 Cal. 341, 89 Pac. 111; Pyle *v.* Piercy, 122 Cal. 383, 55 Pac. 141; Lissak *v.* Crocker Estate Co., 119 Cal. 442, 51 Pac. 688, holding that a party cannot, after insisting on the admission of incompetent testimony over an objection, insist that the error in admitting it was harmless.

Colorado.— Howe *v.* Frith, 43 Colo. 75, 95 Pac. 603, 127 Am. St. Rep. 79, 17 L. R. A. N. S. 672 (holding that where a plaintiff seeks recovery of damages on several grounds, but the complaint does not specify the amount of damages suffered from any one of the causes stated, and there is a verdict for a lump sum, if evidence was improperly admitted in support of any ground relied on, and on which plaintiff had no right to recover, the judgment must be reversed, for it cannot be determined what influenced the jury in reaching their verdict); Ilfeld *v.* Ziegler, 40 Colo. 401, 91 Pac. 825 (holding that where the answer contained no positive allegation of a fact, but only by way of recital, the error in admitting evidence to prove such fact was prejudicial).

Illinois.— Shaughnessy *v.* Holt, 236 Ill. 485, 86 N. E. 256, 21 L. R. A. N. S. 826 [*reversing* 140 Ill. App. 572]; Haywood *v.* Dering Coal Co., 145 Ill. App. 506; Sheppelman *v.* People, 134 Ill. App. 556, holding that the admission of hearsay with respect to material matters is ground for reversal.

Indiana.— Brunker *v.* Cummings, 133 Ind. 443, 32 N. E. 732; Hessin *v.* Heck, 88 Ind. 449; Buffalo Oölitic Limestone Quarries Co. *v.* Davis, (App. 1910) 90 N. E. 327; Ohio Valley Trust Co. *v.* Wernke, 42 Ind. App. 326, 84 N. E. 999.

Iowa.— Peters *v.* Snavely-Ashton, (1909) 120 N. W. 1048; Titus *v.* Chicago, etc., R. Co., 128 Iowa 194, 103 N. W. 343.

Kansas.— Cincinnati Punch, etc., Co. *v.* Thompson, 80 Kan. 467, 102 Pac. 848.

Kentucky.— Chesapeake, etc., R. Co. *v.* Wiley, 134 Ky. 461, 121 S. W. 402; Louisville, etc., R. Co. *v.* Payne, 133 Ky. 539, 118 S. W. 352, holding that where the ground relied on for a recovery is the commission of a negligent act in one respect, it is prejudicial to permit evidence establishing another and different negligent act.

Michigan.— Baker *v.* Temple, 160 Mich. 318, 125 N. W. 63; Germain *v.* Central Lumber Co., 116 Mich. 245, 74 N. W. 644.

Missouri.— Riggs *v.* Metropolitan St. R. Co., 216 Mo. 304, 115 S. W. 969; Woods *v.* Poplar Bluff, 136 Mo. App. 155, 116 N. W. 1109; Wrightsman *v.* Herrick, 130 Mo. App. 266, 109 S. W. 104; Cullen *v.* Insurance Co. of North America, 126 Mo. App. 412, 104 S. W. 117; Jones *v.* Cooley Lake Club, 122 Mo. App. 113, 98 S. W. 82; F. E. Creelman Lumber Co. *v.* De Lisle, 107 Mo. App. 615, 82 S. W. 205.

Nebraska.— Faulkner *v.* Gilbert, 61 Nebr. 602, 85 N. W. 843, holding that where the answer admits the execution of a contract sued on, it is prejudicial error to receive evidence on the trial tending to show that such contract did not exist at the time the answer admits defendant executed it, or for some years thereafter.

New Hampshire.— Gibson *v.* Boston, 75 N. H. 405, 75 Atl. 103; Finkelstein *v.* Keene Electric R. Co., 75 N. H. 303, 73 Atl. 705, holding that, in suit for injuries to a passenger, error in admitting the conductor's report, stating that the accident was wholly due to plaintiff's want of care, was prejudicial to him.

New York.— Statler *v.* George A. Ray Mfg. Co., 195 N. Y. 478, 88 N. E. 1063 [*reversing* 125 N. Y. App. Div. 69, 109 N. Y. Suppl. 172]; Connolly *v.* Brooklyn Heights R. Co., 179 N. Y. 7, 71 N. E. 265 [*reversing* 86 N. Y. App. Div. 245, 83 N. Y. Suppl. 833]; M. Groh's Sons *v.* Groh, 177 N. Y. 8, 68 N. E. 992, 177 N. Y. 554, 69 N. E. 1127 [*reversing* 80 N. Y. App. Div. 851, 80 N. Y. Suppl. 438] (holding that the reception of evidence is reversible error, over an objection to it as immaterial, where it is so clearly immaterial as to be also incompetent and irrelevant); Haydel *v.* Gould, 136 N. Y. App. Div. 594, 121 N. Y. Suppl. 194; Davenport *v.* Matthews, 130 N. Y. App. Div. 257, 114 N. Y.

true where the case is close on the facts or the point is not clearly established.[33] So the admission of evidence which, although immaterial, tends to mislead the jury,[34]

Suppl. 715; Morison *v.* American Tel., etc., Co., 126 N. Y. App. Div. 575, 110 N. Y. Suppl. 801; Kupfersmith *v.* Hopper, 122 N. Y. App. Div. 31, 106 N. Y. Suppl. 797; Linden *v.* Thieriot, 96 N. Y. App. Div. 256, 89 N. Y. Suppl. 273; Tuffy *v.* Humphrey, 88 N. Y. App. Div. 420, 84 N. Y. Suppl. 616; O'Neill *v.* Crane, 65 N. Y. App. Div. 358, 72 N. Y. Suppl. 812.

Oklahoma.— Meek *v.* Daugherty, 21 Okla. 859, 97 Pac. 557.

South Dakota.— Crane, etc., Co. *v.* Jones, 21 S. D. 393, 113 N. W. 80.

Texas.— Pennington *v.* Thompson Bros. Lumber Co., (Civ. App. 1909) 122 S. W. 923; Goodson *v.* Fitzgerald, (Civ. App. 1908) 115 S. W. 50; Fielder *v.* St. Louis, etc., R. Co., 51 Tex. Civ. App. 244, 112 S. W. 699; Mars *v.* Morris, 48 Tex. Civ. App. 216, 106 S. W. 430; Stockton *v.* Brown, (Civ. App. 1907) 106 S. W. 423; Southwestern Tel., etc., Co. *v.* Tucker, (Civ. App. 1906) 98 S. W. 909, holding that where evidence of certain injuries was erroneously admitted in an action for personal injuries, the judgment should be reversed, although the amount recovered is not excessive for the injuries properly proved.

Vermont.— Fowlie *v.* McDonald, 82 Vt. 230, 72 Atl. 989, holding that in the absence of a statement of facts on which a non-expert witness bases his opinion, the court cannot say that the admission of the opinion was harmless.

Wisconsin.— Trego *v.* Roosevelt Min. Co., 136 Wis. 315, 117 N. W. 855; Jackman *v.* Inman, 134 Wis. 297, 114 N. W. 489; Standard Mfg. Co. *v.* Slot, 121 Wis. 14, 98 N. W. 923, 105 Am. St. Rep. 1016 (holding that the intent with which false representations were made being immaterial on the question of fraud, allowing evidence of transactions entirely independent of that in question to show guilty intent is prejudicial error); Rueping *v.* Chicago, etc., R. Co., 116 Wis. 625, 93 N. W. 843, 96 Am. St. Rep. 1013.

United States.— Klauder-Weldon Dyeing Mach. Co. *v.* Gagnon, 166 Fed. 286, 92 C. C. A. 204 (holding that where evidence improperly admitted was of special value to plaintiff for a purpose other than that for which it was received, the error was not harmless); Leedy *v.* Lehfeldt, 162 Fed. 304, 89 C. C. A. 184.

33. *Alabama.*— Montgomery St. R. Co. *v.* Hastings, 138 Ala. 432, 35 So. 412.

Arkansas.— McCown *v.* Wilson, 92 Ark. 153, 122 S. W. 478.

California.— Peterson *v.* Mineral King Fruit Co., 140 Cal. 624, 74 Pac. 162; Boone *v.* Oakland Transit Co., 139 Cal. 490, 73 Pac. 243.

Florida.— Mizell *v.* Travelers' Ins. Co., 44 Fla. 799, 33 So. 454.

Georgia.— Georgia Cent. R. Co. *v.* Ross, 107 Ga. 73, 32 S. E. 904.

Idaho.— Haner *v.* Northern Pac. R. Co., 7 Ida. 305, 62 Pac. 1028.

Illinois.— Brossman *v.* Drake Standard Mach. Works, 232 Ill. 412, 83 N. E. 936; Farlow *v.* Camp Point, 156 Ill. 256, 57 N. E. 781.

Indiana.— Indianapolis St. R. Co. *v.* Whitaker, 160 Ind. 125, 66 N. E. 433; Morningstar *v.* Musser, 129 Ind. 470, 28 N. E. 1119.

Iowa.— Lanza *v.* Le Grand Quarry Co., 124 Iowa 659, 100 N. W. 488; Vohs *v.* S. E. Shorthill Co., 124 Iowa 471, 100 N. W. 495.

Kansas.— Gilleland *v.* Schuyler, 9 Kan. 569.

Kentucky.— Louisville, etc., R. Co. *v.* Frazee, 71 S. W. 437, 24 Ky. L. Rep. 1273.

Maryland.— Baltimore, etc., R. Co. *v.* Dever, 112 Md. 296, 75 Atl. 352, 26 L. R. A. N. S. 712.

Massachusetts.— Morton *v.* Clark, 181 Mass. 134, 63 N. E. 409.

Michigan.— Wright *v.* Crane, 142 Mich. 508, 106 N. W. 71; Newell *v.* McLarney, 49 Mich. 232, 13 N. W. 529.

Missouri.— Redmon *v.* Metropolitan St. R. Co., 185 Mo. 1, 84 S. W. 26, 105 Am. St. Rep. 558; Stout *v.* Columbia, 118 Mo. App. 439, 94 S. W. 307.

Nebraska.— New Kentucky Coal Co. *v.* Union Pac. R. Co., 52 Nebr. 127, 71 N. W. 948.

New Jersey.—Curry *v.* Congress Hall Hotel Co., 75 N. J. L. 735, 73 Atl. 124.

New York.— Cobb *v.* United Engineering, etc., Co., 191 N. Y. 475, 84 N. E. 395 [*reversing* 118 N. Y. App. Div. 904, 103 N. Y. Suppl. 1119]; Hindley *v.* Manhattan R. Co., 185 N. Y. 335, 78 N. E. 276 [*reversing* 103 N. Y. App. Div. 504, 93 N. Y. Suppl. 33]

Oklahoma.— Boise *v.* Atchison, etc., R. Co., 6 Okla. 243, 51 Pac. 662.

Oregon.— McIntosh *v.* McNair, 53 Oreg. 87, 99 Pac. 74.

Rhode Island.— Havens *v.* Rhode Island Suburban R. Co., 26 R. I. 48, 58 Atl. 247.

Tennessee.— Nashville, etc., R. Co. *v.* Brundige, 114 Tenn. 31, 84 S. W. 805.

Texas.— Griffis *v.* Payne, 92 Tex. 293, 47 S. W. 973; W. A. Arthur Cotton Co. *v.* Willis, (Civ. App. 1910) 125 S. W. 584.

Utah.— Meyers *v.* San Pedro, etc., R. Co., (1909) 104 Pac. 736; Lee *v.* Salt Lake City, 30 Utah 35, 83 Pac. 562.

West Virginia.— Wheeling Mold, etc., Co. *v.* Wheeling Steel, etc., Co., 58 W. Va. 62, 51 S. E. 129.

34. *California.*— Marsteller *v.* Leavitt, 130 Cal. 149, 62 Pac. 384.

Illinois.— Crane Co. *v.* Stammers, 83 Ill. App. 329.

Maine.— Dutch *v.* Bodwell Granite Co., 94 Me. 34, 46 Atl. 787.

Michigan.— Pennsylvania Min. Co. *v.* Brady, 14 Mich. 260.

Nebraska.— Kuhlman *v.* Cole, 5 Nebr. (Unoff.) 302, 98 N. W. 419.

New Hampshire.— Haskell *v.* Manchester St. R. Co., 73 N. H. 587, 64 Atl. 186.

New York.— *In re* Bradbury, 105 N. Y. App. Div. 250, 93 N. Y. Suppl. 418.

or to inflame their minds against one of the parties to the cause, is also ground for reversal.[35]

(III) *Evidence Admitted Without Preliminary Proof.* Error in admitting evidence without the necessary preliminary proof to render it competent is not ground for reversal, where the complaining party was not prejudiced thereby.[36]

b. Facts Otherwise Established — (I) *By Prior Admission of Same Evidence.* The admission of objectionable evidence is not cause for reversal,

North Carolina.— McNeill *v.* Durham, etc., R. Co., 130 N. C. 256, 41 S. E. 383.

Oregon.— Aldrich *v.* Columbia St. R. Co., 39 Oreg. 263, 64 Pac. 455.

Pennsylvania.— Stopper *v.* Kantner, 29 Pa. Super. Ct. 48; Colonial Trust Co. *v.* Getz, 28 Pa. Super. Ct. 619.

Texas.— Perry *v.* Rutherford, 39 Tex. Civ. App. 477, 87 S. W. 1054; Halsey *v.* Bell, (Civ. App. 1901) 62 S. W. 1088.

Washington.— Sudden *v.* Morse, 48 Wash. 101, 92 Pac. 901.

Illustration.— In a personal injury suit it nas been held to be prejudicial to allow plaintiff to show the number and ages of plaintiff's children. Atchison, etc., R. Co. *v.* Ringle, 71 Kan. 839, 80 Pac. 43; Galion *v.* Lauer, 55 Ohio St. 392, 45 N. E. 1044; Ft. Worth Iron Works *v.* Stokes, 33 Tex. Civ. App. 218, 76 S. W. 231.

Error held to be harmless see Central R. Co. *v.* Rouse, 77 Ga. 393, 3 S. E. 307; Zetsche *v.* Chicago, etc., R. Co., 238 Ill. 240, 87 N. E. 412 [*affirming* 143 Ill. App. 428]; Chicago, etc., R. Co. *v.* Steckman, 224 Ill. 500, 79 N. E. 602 [*affirming* 125 Ill. App. 299]; Shull *v.* Arie, 113 Iowa 170, 84 N. W. 1031; Louisville, etc., R. Co. *v.* Taaffe, 106 Ky. 535, 50 S. W. 850, 21 Ky. L. Rep. 64; Bahr *v.* Northern Pac. R. Co., 101 Minn. 314, 112 N. W. 267.

35. Woodbridge Ice Co. *v.* The Semon Ice Cream Corp., 81 Conn. 479, 71 Atl. 577; Sheldon *v.* Wright, 80 Vt. 298, 67 Atl. 807; Green *v.* Ashland Water Co., 101 Wis. 258, 77 N. W. 722, 70 Am. St. Rep. 911, 43 L. R. A. 117.

36. *Illinois.*— Daugherty *v.* Heckard, 189 Ill. 239, 59 N. E. 569 [*affirming* 89 Ill. App. 544], holding that the admission of declarations of an alleged copartner in aid of *prima facie* proof of the partnership before, instead of after, such *prima facie* case is made is harmless.

Indian Territory.— Woolsey *v.* Jackson, 3 Indian Terr. 597, 64 S. W. 548.

Kentucky.— Belcher *v.* Polly, 106 S. W. 818, 32 Ky. L. Rep. 623, holding that where, an instrument having been lost, there was proof of its execution and contents, it was immaterial that a copy thereof made by the county court clerk was read in evidence, although such instrument was not so acknowledged as to entitle it to record.

Mississippi.— Mitchell *v.* Tishomingo Sav. Inst., 56 Miss. 444, holding that error in allowing a letter written by a witness to one of the parties litigant to be introduced to discredit his testimony, without first calling his attention thereto, and affording him an opportunity of explanation, is not ground for reversal, if the verdict is clearly right upon the whole evidence, and is fully supported by competent evidence.

Missouri.— Merchants', etc., Ins. Co. *v.* Linchey, 3 Mo. App. 588, holding that the admission of by-laws of an insurance company without proof of their adoption was not prejudical.

Error in admitting account books without proper preliminary proof held harmless see B. Roth Tool Co. *v.* Champ Spring Co., (Mo. App. 1909) 123 S. W. 513. Error held prejudicial see Hoogewerff *v.* Flack, 101 Md. 371, 61 Atl. 184.

Error in admitting declarations of alleged agent without proof of authority held harmless see Brock *v.* Des Moines Ins. Co., 106 Iowa 30, 75 N. W. 683; Hume *v.* Mason, etc., Co., 122 Mich. 346, 81 N. W. 110; Chicago First Unitarian Soc. *v.* Faulkner, 91 U. S. 415, 23 L. ed. 283; Western Union Beef Co. *v.* Thurman, 70 Fed. 960, 17 C. C. A. 542.

Error in admitting document without proof of execution held harmless see Matthews *v.* Lindsay, 20 Fla. 962; Missouri, etc., R. Co. *v.* Russell, 64 Kan. 884, 67 Pac. 451; Chellis *v.* Coble, 37 Kan. 558, 15 Pac. 505; Bernard *v.* Com., 4 Litt. (Ky.) 148; Rutland *v.* Southern R. Co., 81 S. C. 448, 62 S. E. 865. But in an action to foreclose a mortgage, in which no judgment was demanded against the makers of the note which the mortgage was given to secure, the note being necessarily plaintiff's cause of action, its admission without proof of execution was not harmless error. Stoddard *v.* Lyon, 18 S. D. 207, 99 N. W. 1116.

Error in admitting opinion evidence without proper preliminary proof held harmless see Shively *v.* Eureka Tellurium Gold Min. Co., 5 Cal. App. 236, 89 Pac. 1073; St. Louis Southwestern R. Co. *v.* Hall, (Tex. Civ. App. 1907) 106 S. W. 194; Bixby *v.* Montpelier, etc., R. Co., 49 Vt. 123.

Error in admitting record without proof of authenticity held harmless see Carter *v.* Cairo, etc., R. Co., 240 Ill. 152, 88 N. E. 493; Union R., etc., Co. *v.* Shacklett, 19 Ill. App. 145; Kin Kaid *v.* Lee, (Tex. Civ. App. 1909) 119 S. W. 342.

Error in admitting secondary evidence held harmless see Moline Plow Co. *v.* Gilbert, 3 Dak. 239, 15 N. W. 1; Kelly *v.* Kauffman Milling Co., 92 Ga. 105, 18 S. E. 363; Wallace *v.* Oregon Short Line R. Co., 16 Ida. 103, 100 Pac. 904; Mattingly *v.* Crowley, 42 Ill. 300; Baker *v.* Gerrish, 14 Allen (Mass.) 201; Miller *v.* Canton, 123 Mo. App. 325, 100 S. W 571; Greenspau *v.* American Star Order, 1 Misc. (N. Y.) 406, 20 N. Y. Suppl.

where the same, or substantially the same, evidence has been previously received without or over objection,[37] and it does not appear that the evidence, when admitted the second time, exerts more influence than when admitted the first time,[38] or that other prejudice has resulted.[39] The drawing out of improper testimony from a witness on cross-examination is harmless, where the witness has testified to the same effect on direct examination,[40] as it is also harmless for a witness to reassert, when called in rebuttal, a statement which he had made on his examination in chief,[41] or to restate, on redirect examination, what he testified to on cross-examination.[42]

(II) *By Other Evidence* — (A) *In General.* A rule which has been stated and applied many times by reviewing courts is that the admission of improper and objectionable evidence is harmless error, where the fact involved is fully and clearly established by other evidence which is competent.[43] This rule applies

945; Maloney *v.* Geiser Mfg. Co., 17 N. D. 195, 115 N. W. 669; Toye *v.* Exeter Borough School Dist., 225 Pa. St. 236, 74 Atl. 60; *In re* McClellan, 20 S. D. 498, 107 N. W. 681, 21 S. D. 209, 111 N. W. 540; St. Louis, etc., R. Co. *v.* White, (Tex. Civ. App. 1907) 103 S. W. 673; George Campbell Co. *v.* Angus, 91 Va. 438, 22 S. E. 167.

Want of notice to produce original held harmless see Leidigh, etc., Lumber Co. *v.* Clark, 78 Ark. 539, 94 S. W. 686; Wagstaff *v.* Smith, 9 N. C. 45; Burton *v.* Seifert, 108 Va. 338, 61 S. E. 933.

37. *Alabama.*— Birmingham Paint, etc., Co. *v.* Gillespie, 163 Ala. 408, 50 So. 1032; New Connellsville Coal, etc., Co. *v.* Kilgore, 162 Ala. 642, 50 So. 205; Napier *v.* Elliot, 162 Ala. 129, 50 So. 148.

California.— Central Pac. R. Co. *v.* Feldman, 152 Cal. 303, 92 Pac. 849; Eppinger *v.* Kendrick, (1896) 44 Pac. 234; Doyle *v.* Eschen, 5 Cal. App. 55, 89 Pac. 836.

Georgia.— Atlanta, etc., R. Co. *v.* Haralson, 133 Ga. 231, 65 S. E. 437.

Indiana.— Mills *v.* Snypes, 10 Ind. App. 19, 37 N. E. 422.

Iowa.— Witt *v.* Latimer, 139 Iowa 273, 117 N. W. 680, holding that after a witness had testified, without objection, that the walk where plaintiff was injured was repaired before and after the accident, it is harmless to allow him to testify to the dates of such repairs.

Maryland.— United R., etc., Co. *v.* Corbin, 109 Md. 442, 72 Atl. 606.

Massachusetts.—Hindle *v.* Healy, 204 Mass. 48, 90 N. E. 511.

Michigan.—Buxton *v.* Ainsworth, 153 Mich. 315, 116 N. W. 1094; Mawich *v.* Elsey, 47 Mich. 10, 8 N. W. 587, 10 N. W. 57.

New York.— Pharo *v.* Beadleston, 2 Misc. 424, 21 N. Y. Suppl. 989.

South Carolina.— Johnson *v.* Western Union Tel. Co., 82 S. C. 87, 63 S. E. 1; Contos *v.* Jamison, 81 S. C. 488, 62 S. E. 867, 19 L. R. A. N. S. 498.

South Dakota.— Miller *v.* McConnell, 23 S. D. 137, 120 N. W. 888.

Texas.— Texas, etc., R. Co. *v.* Walker, (Civ. App. 1910) 125 S. W. 99; Missouri, etc., R. Co. *v.* Pettit, (Civ. App. 1909) 117 S. W. 894; Hudson *v.* Slate, (Civ. App. 1909) 117 S. W. 469; St. Louis, etc., R. Co. *v.* Sizemore, (Civ. App.) 116 S. W. 403; Kaack *v.* Stanton, 51 Tex. Civ. App. 495, 112 S. W. 702; Galveston, etc., R. Co. *v.* Cherry, 44 Tex. Civ. App. 344, 98 S. W. 898.

Report of evidence given on former trial.— Where two witnesses have testified substantially as they had done on a former trial, no prejudice results from the court's erroneous admission of the report of their evidence on the former trial. Citizens' Sav. Bank *v.* Boswell, 127 Ky. 21, 104 S. W. 1014, 31 Ky. L. Rep. 1259.

Copies of instruments.— The admission of one copy of a will or other paper in evidence, after another copy has properly been introduced, is no ground for reversal (Corbett *v.* Nutt, 18 Gratt. (Va.) 624); nor is the admission of letters of administration, when the other party has already put in evidence a transcript of the records of the probate court, including a copy of such letters (Sadler *v.* Sadler, 16 Ark. 628).

38. Lewis *v.* Paull, 42 Ala. 136; Covenant Mut. Ben. Assoc. *v.* Spies, 114 Ill. 463, 2 N. E. 482, where the testimony first given was conclusive, and was not contradicted by the adverse party.

39. Woods *v.* Miller, 55 Iowa 168, 7 N. W. 484, 39 Am. Rep. 170.

Previous testimony to same effect by party objecting.— In an action for rent of a boat, the refusal to exclude part of a memorandum showing the number of days the boat was worked is not prejudicial to defendant, where he has testified that he sent to plaintiff a statement corresponding with such entry. Dickens *v.* Murray, 163 Ala. 556, 50 So. 1019.

40. Holmes *v.* Rivers, (Iowa 1910) 124 N. W. 801; Reese *v.* Detroit United R. Co., 159 Mich. 600, 124 N. W. 539.

41. Baltimore, etc., Turnpike Road *v.* Parks, 74 Md. 282, 22 Atl. 399.

42. Dunham *v.* Wabash R. Co., 126 Mo. App. 643, 105 S. W. 21.

43. *Alabama.*— Georgia Cent. R. Co. *v.* McNab, 150 Ala. 332, 43 So. 222; Tyson *v.* Chestnut, 118 Ala. 387, 24 So. 73.

Arkansas.— Bispham *v.* Turner, 83 Ark. 331, 103 S. W. 1135; Greer *v.* Laws, 56 Ark. 37, 18 S. W. 1038.

California.— Payne *v.* Neuval, 155 Cal. 46, 99 Pac. 476; Zihn *v.* Zihn, 153 Cal. 405, 95 Pac. 868.

not only where the evidence improperly admitted consists of oral testimony, but

Colorado.— Stratton Cripple Creek Min., etc., Co. *v.* Ellison, 42 Colo. 498, 94 Pac. 303; Chittenden *v.* King Shoe Co., 38 Colo. 187, 88 Pac. 183.

Connecticut.— Beach *v.* Whittlesey, 73 Conn. 530, 48 Atl. 350; Platt *v.* Waterbury, 72 Conn. 531, 45 Atl. 154, 77 Am. St. Rep. 335, 48 L. R. A. 691.

District of Columbia.— District of Columbia *v.* Dietrich, 23 App. Cas. 577; Washington, etc., R. Co. *v.* McLane, 11 App. Cas. 220.

Florida.— Mansfield *v.* Johnson, 51 Fla. 239, 40 So. 196; Pensacola, etc., R. Co. *v.* Anderson, 26 Fla. 425, 8 So. 127.

Georgia.—Allen *v.* Farmers', etc., Nat. Bank, 129 Ga. 748, 59 S. E. 813; Summerford *v.* Davenport, 126 Ga. 153, 54 S. E. 1025.

Idaho.— Shurtliff *v.* Extension Ditch Co., 14 Ida. 416, 94 Pac. 574.

Illinois.— Casey *v.* Chicago City R. Co., 237 Ill. 140, 86 N. E. 606 [*affirming* 139 Ill. App. 655]; Lake Erie, etc., R. Co. *v.* Zoffinger, 107 Ill. 199.

Indiana.— Indianapolis St. R. Co. *v.* Schmidt, 163 Ind. 360, 71 N. E. 201; Stumph *v.* Miller, 142 Ind. 442, 41 N. E. 812.

Indian Territory.— Rulison *v.* Collins, 5 Indian Terr. 282, 82 S. W. 748; Gulf, etc., R. Co. *v.* Jones, 1 Indian Terr. 354, 37 S. W. 208.

Iowa.— Ford *v.* Oliver, (1910) 124 N. W. 1067; Phillips *v.* Hazen, 132 Iowa 628, 109 N. W. 1096.

Kansas.— St. Louis, etc., R. Co. *v.* Gaba, 78 Kan. 432, 97 Pac. 435; Continental Casualty Co. *v.* Colvin, 77 Kan. 561, 95 Pac. 565.

Kentucky.— Moody Coal Co. *v.* Rush, (1910) 125 S. W. 707; Travelers' Ins. Co. *v.* Crawford, 106 S. W. 290, 32 Ky. L. Rep. 517.

Louisiana.— Briggs *v.* Stafford, 14 La. 381; Holmes *v.* Holmes, 9 La. 348.

Maine.— Portland *v.* Rolfe, 37 Me. 400; McKenney *v.* Waite, 20 Me. 349.

Maryland.— Philadelphia, etc., R. Co. *v.* Diffendal, 109 Md. 494, 72 Atl. 193, 458; Turnbull *v.* Maddux, 68 Md. 579, 13 Atl. 334.

Massachusetts.— Conner *v.* Standard Pub. Co., 183 Mass. 474, 67 N. E. 596; Clarke *v.* Warwick Cycle Mfg. Co., 174 Mass. 434, 54 N. E. 887.

Michigan.— Chamberlain *v.* Eddy, 154 Mich. 593, 118 N. W. 499; McDonald *v.* Smith, 139 Mich. 211, 102 N. W. 668.

Minnesota.— Union Cent. L. Ins. Co. *v.* Prigge, 90 Minn. 370, 96 N. W. 917; People's Bank *v.* Howes, 64 Minn. 457, 67 N. W. 355.

Mississippi.— Bonds *v.* Thomas J. Lipton Co., 85 Miss. 209, 37 So. 805; Louisville, etc., R. Co. *v.* Ryan, 64 Miss. 399, 8 So. 173.

Missouri.— Julian *v.* Kansas City Star Co., 209 Mo. 35, 107 S. W. 496; Harrison *v.* Kansas City Electric Light Co., 195 Mo. 606, 93 S. W. 951, 7 L. R. A. N. S. 293. *Contra*, Gotwald *v.* St. Louis Transit Co., 102 Mo. App. 492, 77 S. W. 125.

Montana.— McAuley *v.* America Casualty Co., 39 Mont. 185, 102 Pac. 586; O'Flynn *v.* Butte, 36 Mont. 493, 93 Pac. 643.

Nebraska.— Munger *v.* Yeiser, 80 Nebr. 285, 114 N. W. 166; Western Travelers' Acc. Assoc. *v.* Munson, 73 Nebr. 858, 103 N. W. 688, 1 L. R. A. N. S. 1068.

Nevada.— Turley *v.* Thomas, 31 Nev. 181, 101 Pac. 568, 135 Am. St. Rep. 667; Todman *v.* Purdy, 5 Nev. 238.

New Hampshire.— Mechanicks Nat. Bank *v.* Comins, 72 N. H. 12, 55 Atl. 191, 101 Am. St. Rep. 650; Rollins *v.* Chester, 46 N. H. 411.

New Jersey.— Campbell *v.* McCrellis, 73 N. J. L. 271, 62 Atl. 1129; Graham *v.* Whitely, 26 N. J. L. 254.

New York.— Misner *v.* Strong, 181 N. Y. 163, 73 N. E. 965 [*affirming* 88 N. Y. App. Div. 621, 84 N. Y. Suppl. 1136]; McGean *v.* Manhattan R. Co., 117 N. Y. 219, 22 N. E. 957.

North Carolina.— *In re* Thorp, 150 N. C. 487, 64 S. E. 379; Blake *v.* Broughton, 107 N. C. 220, 12 S. E. 127.

North Dakota.— Kepner *v.* Ford, 16 N. D. 50, 111 N. W. 619; Waldner *v.* Bowden State Bank, 13 N. D. 604, 102 N. W. 169.

Ohio.— Black *v.* Hill, 32 Ohio St. 313; Stetson *v.* New Orleans City Bank, 2 Ohio St. 167.

Oregon.— Siglin *v.* Coos Bay, etc., R., etc., Co., 35 Oreg. 79, 56 Pac. 1011, 76 Am. St. Rep. 463; Krewson *v.* Purdom, 15 Oreg. 589, 16 Pac. 480.

Pennsylvania.— Van Eman *v.* New York Fidelity, etc., Co., 201 Pa. St. 537, 51 Atl. 177; Holthouse *v.* Rynd, 155 Pa. St. 43, 25 Atl. 760.

Rhode Island.— Williams *v.* Smith, 29 R. I. 562, 72 Atl. 1093; Hall *v.* New York, etc., R. Co., 27 R. I. 525, 65 Atl. 278.

South Carolina.— Marthinson *v.* McCutchen, 84 S. C. 256, 66 S. E. 120; Hyland *v.* Southern Bell Tel., etc., Co., 70 S. C. 315, 49 S. E. 879.

South Dakota.— Fowler *v.* Iowa Land Co., 18 S. D. 131, 99 N. W. 1095; Bennett *v.* Chicago, etc., R. Co., 8 S. D. 394, 66 N. W. 934.

Tennessee.— Pennsylvania R. Co. *v.* Naive, 112 Tenn. 239, 79 S. W. 124, 64 L. R. A. 443; Knoxville Iron Co. *v.* Pace, 101 Tenn. 476, 48 S. W. 232.

Texas.— St. Louis, etc., R. Co. *v.* Boshear, 102 Tex. 76, 113 S. W. 6 [*affirming* (Civ. App. 1908) 108 S. W. 1032]; Kalteyer *v.* Wipff, 92 Tex. 673, 52 S. W. 63.

Utah.— Johnson *v.* Union Pac. R. Co., 35 Utah 285, 100 Pac. 390.

Vermont.— Massucco *v.* Tomassi, 80 Vt. 186, 67 Atl. 551; Nye *v.* Daniels, 75 Vt. 81, 53 Atl. 150.

Virginia.— Lane *v.* Bott, 104 Va. 615, 52 S. E. 258; Morotock Ins. Co. *v.* Fostoria Novelty Co., 94 Va. 361, 26 S. E. 850.

Washington.— Teater *v.* King, 41 Wash. 134, 83 Pac. 8; Morrison *v.* Northern Pac. R. Co., 34 Wash. 70, 74 Pac. 1064.

also where it consists of photographs [44] or depositions,[45] and, although, as stated, it is supported by numerous cases, it has even greater force when the evidence properly received is admitted without objection,[46] or is of a more conclusive character than that improperly admitted,[47] or where, not only the fact in question, but the whole of the prevailing party's case is amply sustained by competent evidence.[48] It must be borne in mind, however, that, in order to render harmless, error in admitting improper evidence, the other evidence must be sufficient to

West Virginia.— Ball *v.* Kearns, 41 W. Va. 657, 24 S. E. 633; Richardson *v.* Donehoo, 16 W. Va. 685.

Wisconsin.— Stumm *v.* Western Union Tel. Co., 140 Wis. 528, 122 N. W. 1032; Clithero *v.* Fenner, 122 Wis. 356, 99 N. W. 1027, 106 Am. St. Rep. 978.

Wyoming.— Kuhn *v.* McKay, 7 Wyo. 42, 49 Pac. 473, 51 Pac. 205.

United States.— Cooper *v.* Coates, 21 Wall. 105, 22 L. ed. 481; The William H. Webb *v.* Barling, 14 Wall. 406, 20 L. ed. 774.

44. Johnson *v.* Union Pac. R. Co., 35 Utah 285, 100 Pac. 390.

45. *California.*— German Sav., etc., Soc. *v.* Collins, 145 Cal. 192, 78 Pac. 637.

Indiana.— Billingsley *v.* State Bank, 3 Ind. 375.

Iowa.— Stone *v.* Ballingall, 41 Iowa 291; McCrary *v.* Deming, 38 Iowa 527.

Kansas.— Concordia First Nat. Bank *v.* Marshall, 56 Kan. 441, 43 Pac. 774.

Michigan.— Wattles *v.* Moss, 46 Mich. 52, 8 N. W. 567.

Missouri.— Scharff *v.* McGaugh, 205 Mo. 344, 103 S. W. 550; O'Keefe *v.* St. Louis United R.'s Co., 124 Mo. App. 613, 101 S. W. 1144.

New York.— Matter of Bradbury, 105 N. Y. App. Div. 250, 93 N. Y. Suppl. 418; Hetzel *v.* Easterly, 96 N. Y. App. Div. 517, 89 N. Y. Suppl. 154; Slocum *v.* Slocum, 10 N. Y. Suppl. 873.

Texas.— Hartford F. Ins. Co. *v.* Becton, (Civ. App. 1909) 124 S. W. 474.

United States.— Wilson *v.* Hoss, 131 U. S. appendix ccx, 24 L. ed. 270.

Where another deposition of the same witness is taken, so that his testimony is fully before the court, the error in admitting the first deposition is harmless. Cress *v.* Belknap Hardware, etc., Co., (Ky. 1908) 113 S. W. 93; Ayers *v.* Harris, 77 Tex. 108, 13 S. W. 768.

Where part of a deposition is erroneously admitted, or only a portion should have been admitted and the remainder excluded, the error is harmless, where other evidence in the case amply establishes the facts which the objectionable parts tended to prove. Clark *v.* Moss, 11 Ark. 736; Hutchinson *v.* Watkins, 17 Iowa 475; Hawkeye First State Bank *v.* Noel, 94 Mo. App. 498, 68 S. W. 235; Davidson *v.* Wallingford, 88 Tex. 619, 32 S. W. 1030. To the same affect see Cohen *v.* Oliver, 9 Tex. Civ. App. 35, 29 S. W. 81.

46. *Alabama.*— Hutto *v.* Stough, 157 Ala. 566, 47 So. 1031.

Iowa.— Slaughter *v.* Jasper County, (1907) 113 N. W. 545.

Missouri.— Hoge *v.* Hubb, 94 Mo. 489, 7 S. W. 443.

South Carolina.— Brown *v.* Southern R. Co., 83 S. C. 30, 64 S. E. 961.

Texas.—Austin *v.* Jackson Trust, etc., Bank, (Civ. App. 1910) 125 S. W. 936; Hatzfeld *v.* Walsh, (Civ. App. 1909) 120 S. W. 525; International, etc., R. Co. *v.* McCullough, (Civ. App. 1909) 118 S. W. 558; Missouri, etc., R. Co. *v.* Williams, (Civ. App. 1909) 117 S. W. 1043; Galveston, etc., R. Co. *v.* Conuteson, 51 Tex. Civ. App. 1, 111 S. W. 187.

Washington.— Dennis *v.* Gary, 56 Wash. 112, 105 Pac. 172.

Where like or similar evidence is received without objection, error in the erroneous admission of evidence is without injury. Laughlin *v.* Southern Public Service Corp., 83 S. C. 62, 64 S. E. 1010; Plunkett *v.* Clearwater Bleachery, etc., Co., 80 S. C. 310, 61 S. E. 431; Galveston, etc., R. Co. *v.* Norton, (Tex. Civ. App. 1909) 119 S. W. 702.

47. Westfield Bank *v.* Inman, 8 Ind. App. 239, 34 N. E. 21, 670; O'Dell *v.* Goff, 149 Mich. 152, 112 N. W. 736, 10 L. R. A. N. S. 989; Stanton *v.* Estey Mfg. Co., 90 Mich. 12, 51 N. W. 101; Eaton *v.* Blackburn, 52 Oreg. 300, 96 Pac. 870, 97 Pac. 539, 132 Am. St. Rep. 705, 20 L. R. A. N. S. 53.

Where the jury has viewed the premises, it is not reversible error to admit in evidence a slightly inaccurate map of the vicinity where plaintiff was injured. Mayer *v.* Milwaukee St. R. Co., 90 Wis. 522, 63 N. W. 1048.

Evidence of custom.— No prejudice results from the erroneous admission of evidence of a custom, where such evidence coincides with the terms of the agreement between the parties, shown by other evidence. Coffin *v.* Grace, 198 Mass. 104, 84 N. E. 105; Morgan *v.* Barber, (Tex. Civ. App. 1907) 99 S. W. 730.

Where the irrelevancy of evidence erroneously admitted is clearly shown by other evidence, and the jury can clearly see that it has no application to the facts of the case, no reversible error exists, as it is evident that the jury gave it no weight. Peck *v.* Hutchinson, 88 Iowa 320, 55 N. W. 511; Riley *v.* Northern Pac. R. Co., 36 Mont. 545, 93 Pac. 948.

48. *Alabama.*—Adair *v.* Stovall, 148 Ala. 465, 42 So. 596.

Colorado.— Tuttle *v.* Welty, 46 Colo. 25, 102 Pac. 1069.

Georgia.— Stevens *v.* Flowers Lumber Co., 133 Ga. 254, 65 S. E. 400.

Illinois.— Kennard *v.* Curran, 239 Ill. 122, 87 N. E. 913; Albin *v.* Kinney, 96 Ill. 214.

establish the fact involved,[49] it being held that there is prejudice where it is quite likely that the jury gave some weight to the erroneously admitted evidence on account of the remaining evidence being in sharp conflict,[50] or the other witnesses being discredited or impeached.[51]

(B) *Evidence Already Admitted.* As respects evidence already before the jury, it is clear that no prejudice attaches to the erroneous admission of evidence where the fact involved has already been established by competent evidence, and the evidence erroneously received is merely cumulative,[52] or subsidiary and

Nebraska.— Baker *v.* Montgomery, 78 Nebr. 98, 110 N. W. 695.

Rhode Island.— Dyer *v.* Union R. Co., 25 R. I. 221, 55 Atl. 688.

Texas.— Merriman *v.* Blalack, (Civ. App. 1909) 122 S. W. 403; Watkins *v.* Watkins, (Civ. App. 1909) 119 S. W. 145.

Wisconsin.— Boyle *v.* Robinson, 129 Wis. 567, 109 N. W. 623.

United States.—Armour *v.* Skene, 153 Fed. 241, 82 C. C. A. 385.

Compare Shannon *v.* Mastin, (Mo. App. 1908) 108 S. W. 1116, holding that it is reversible error, in an action at law, to improperly admit evidence which, if competent, would compel a finding in plaintiff's favor, even though the other evidence might be sufficient to support his cause of action.

If a verdict is properly directed in favor of plaintiff, upon evidence properly in the case, defendant can be in no way prejudiced by the admission of improper testimony. Bailey *v.* O'Neil, 92 Ark. 327, 122 S. W. 503, 135 Am. St. Rep. 185; Badger Tel. Co. *v.* Wolf River Tel. Co., 120 Wis. 169, 97 N. W. 907.

Other evidence showing damages.— The erroneous admission of evidence relating to damages is unprejudicial, where there is admitted competent evidence to the same effect (Williams *v.* Hewitt, 57 Wash. 62, 106 Pac. 496, 135 Am. St. Rep. 971) showing the damage suffered to be equal to, if not greater than, that shown by the incompetent testimony (Obenauer *v.* Solomon, 151 Mich. 570, 115 N. W. 696; Haurigan *v.* Chicago, etc., R. Co., 80 Nebr. 132, 113 N. W. 983; Nichols *v.* New York, etc., Tel., etc., Co., 126 N. Y. App. Div. 184, 110 N. Y. Suppl. 325; Kirby Lumber Co. *v.* Cummings, (Tex. Civ. App. 1909) 122 S. W. 273).

49. *California.*— San Francisco Teaming Co. *v.* Gray, 11 Cal. App. 314, 104 Pac. 999.

Connecticut.— New England Mfg. Co. *v.* Starin, 60 Conn. 369, 22 Atl. 953.

Indiana.— Ohio, etc., R. Co. *v.* Stein, 133 Ind. 243, 31 N. E. 180, 32 N. E. 831, 19 L. R. A. 733.

Kentucky.— Wall *v.* Dimmett, 132 Ky. 747, 117 S. W. 299, where the evidence erroneously admitted was not cumulative but was the strongest evidence introduced in the case.

Missouri.— Wonderly *v.* Lafayette County, 150 Mo. 635, 51 S. W. 745, 73 Am. St. Rep. 474, 45 L. R. A. 386.

New York.— Jones *v.* Perkins, 29 N. Y. App. Div. 37, 51 N. Y. Suppl. 380.

Texas.— Testard *v.* Butler, 20 Tex. Civ. App. 106, 48 S. W. 753. And see Dallas Consol. Electric St. R. Co. *v.* Summers, 48 Tex. Civ. App. 474, 106 S. W. 891.

Virginia.— Southern R. Co. *v.* Simmons, 105 Va. 651, 55 S. E. 459, holding that the admission of evidence that plaintiff, in an action for personal injuries, had a wife and child dependent on him was not rendered harmless by the admission of other evidence that he was married, where there was no other evidence of the existence of a child dependent on him.

50. *Minnesota.*— Larson *v.* Lammers, 81 Minn. 239, 83 N. W. 981.

Missouri.— Eberson *v.* Continental Inv. Co., 130 Mo. App. 296, 109 S. W. 62.

New York.— Textile Pub. Co. *v.* Smith, 31 Misc. 271, 64 N. Y. Suppl. 123.

Texas.— Texas, etc., R. Co. *v.* White, 25 Tex. Civ. App. 278, 62 S. W. 133, where the testimony properly admitted and that erroneously admitted were at variance.

Washington.— Kline *v.* Stein, 30 Wash. 189, 70 Pac. 235.

Wisconsin.— Brown *v.* Warner, 116 Wis. 358, 93 N. W. 17.

Where the verdict is for a gross sum, made up of sundry items of damages, and there is no way of determining from the record by what evidence the jury were influenced in arriving at their verdict, there is no room for the application of the rule that error in the reception of evidence is harmless if the facts sought to be proved are clearly established by other evidence. Townley *v.* Oregon R., etc., Co., 33 Oreg. 323, 54 Pac. 150.

51. Matter of Blair, 99 N. Y. App. Div. 81, 91 N. Y. Suppl. 378.

52. *Alabama.*— Whilden *v.* Merchants', etc., Nat. Bank, 64 Ala. 1, 38 Am. Rep. 1.

California.— Lanigan *v.* Neely, 4 Cal. App. 760, 89 Pac. 441.

District of Columbia.— Young *v.* Norris Peters Co., 27 App. Cas. 140.

Iowa.— Bartlett *v.* Illinois Surety Co., 142 Iowa 538, 119 N. W. 729; Breiner *v.* Nugent, 136 Iowa 322, 111 N. W. 446; Brattebo *v.* Tjernagel, 91 Iowa 283, 59 N. W. 278.

Kentucky.— Illinois Cent. R. Co. *v.* Houchins, 125 Ky. 483, 101 S. W. 924, 31 Ky. L. Rep. 93; Rothenburger *v.* Schoniger, 99 S. W. 1150, 30 Ky. L. Rep. 1018.

Maryland.— Murphy *v.* American Can Co., 106 Md. 190, 67 Atl. 17.

Massachusetts.— Warner *v.* Jones, 140 Mass. 216, 5 N. E. 645.

Michigan.— Mott *v.* Penoyar, 153 Mich. 273, 116 N. W. 1110; Woolston *v.* Smead, 42 Mich. 54, 3 N. W. 251.

corroborative.[53] Thus the courts hold that the erroneous admission of documentary evidence is harmless where testimony concerning the contents thereof has previously been given;[54] and, conversely, that it is not reversible error to receive secondary evidence, where proper primary evidence has already been introduced.[55]

(c) *Testimony of Other Witnesses.* Among the ways in which the fact involved in evidence erroneously admitted may be otherwise established so as to render the error harmless[56] is its establishment by the testimony of other witnesses,[57] especially where such evidence is received without objection,[58] or the witnesses are offered by the objecting party.[59]

Minnesota.— Stone *v.* Evans, 32 Minn. 243, 20 N. W. 149.

Montana.— McAuley *v.* Casualty Co. of America, 39 Mont. 185, 102 Pac. 586.

Nebraska.— Smith *v.* Chicago, etc., R. Co., 81 Nebr. 186, 115 N. W. 755; Coffey *v.* Omaha, etc., R. Co., 79 Nebr. 286, 112 N. W. 589.

New Jersey.— Chase *v.* Caryl, 57 N. J. L. 545, 31 Atl. 1024.

New York.— Van Epps *v.* Harns, 88 Hun 229, 34 N. Y. Suppl. 337.

South Dakota.— Bailey *v.* Walton, (1909) 123 N. W. 701.

Texas.— Wallis *v.* Schneider, 79 Tex. 479, 15 S. W. 492; Hittson *v.* State Nat. Bank, (1890) 14 S. W. 993; U. S. Gypsum Co. *v.* Shields, (Civ. App. 1907) 106 S. W. 724 [*affirmed* in 101 Tex. 473, 108 S. W. 1165].

Virginia.— Douglas Land Co. *v.* T. W. Thayer Co., 107 Va. 292, 58 S. E. 1101.

Wisconsin.— Osborn *v.* Rider, 62 Wis. 235, 22 N. W. 394.

Wyoming.— Rock Springs Nat. Bank *v.* Luman, (1896) 43 Pac. 514.

Even though a witness is wholly incompetent to testify concerning transactions with a person since deceased, permitting him to testify is harmless error, where the point involved has been otherwise established. Moore *v.* Decell, (Miss. 1895) 17 So. 681. And see Curtis *v.* Hunt, 158 Ala. 78, 48 So. 598.

53. Neff *v.* Williamson, 154 Ala. 329, 46 So. 238; Ellis *v.* Guggenheim, 20 Pa. St. 287; Burton Lumber Corp. *v.* Houston, 45 Tex. Civ. App. 363, 101 S. W. 822; Galveston, etc., R. Co. *v.* Still, 45 Tex. Civ. App. 169, 100 S. W. 176.

54. *Colorado.*— Beach *v.* Schroeder, 47 Colo. 312, 107 Pac. 271.

Indiana.— Wilber *v.* Scherer, 13 Ind. App. 428, 41 N. E. 837.

Michigan.— Weaver *v.* Richards, 156 Mich. 320, 120 N. W. 818.

Montana.— Davidson *v.* Bordeaux, 15 Mont. 245, 38 Pac. 1075.

New York.— Griebel *v.* Brooklyn Heights R. Co., 95 N. Y. App. Div. 214, 88 N. Y. Suppl. 767 [*affirmed* in 184 N. Y. 528, 76 N. E. 1096]; Grout *v.* Cottrell, 22 N. Y. Suppl. 336.

Texas.— Munoz *v.* Brassel, (Civ. App. 1908) 108 S. W. 417.

55. Tyree *v.* Parham, 66 Ala. 424; Brewer *v.* McCain, 21 Colo. 382, 41 Pac. 822; Walker *v.* Shelbyville, etc., Turnpike Co., 80 Ind. 452; Evans *v.* Martin, 6 Tex. Civ. App. 331, 25 S. W. 688. And see Waters *v.* Riggin, 19 Md. 536.

56. See *supra*, V, E, 1, b, (II).

57. *Arkansas.*— St. Louis, etc., R. Co. *v.* Caldwell, 89 Ark. 218, 116 S. W. 210.

California.— Perkins *v.* Sunset Tel., etc., Co., 155 Cal. 712, 103 Pac. 190; Dondero *v.* O'Hara, 3 Cal. App. 633, 86 Pac. 985.

Illinois.— Graybeal *v.* Gardner, 146 Ill. 337, 34 N. E. 528 [*affirming* 48 Ill. App. 305]; Chicago, etc., R. Co. *v.* Bivans, 142 Ill. 401, 32 N. E. 456 [*affirming* 42 Ill. App. 450]; Eckels *v.* Bryant, 137 Ill. App. 234.

Indiana.— Knickerbocker Ice Co. *v.* Gray, 171 Ind. 395, 84 N. E. 341.

Iowa.— Gibson *v.* Seney, 138 Iowa 383, 116 N. W. 325.

Kentucky.— Chesapeake, etc., R. Co. *v.* Perkins, 127 Ky. 110, 105 S. W. 148, 31 Ky. L. Rep. 1350; Hubbard *v.* Louisville, etc., R. Co., 108 S. W. 331, 32 Ky. L. Rep. 1337; Louisville, etc., R. Co. *v.* Lucas, 98 S. W. 308, 30 Ky. L. Rep. 359.

Missouri.— Gibbs *v.* Haughowout, 207 Mo. 384, 105 S. W. 1067; Julian *v.* Calkins, 85 Mo. 202.

New York.— Eiseman *v.* Heine, 2 N. Y. App. Div. 319, 37 N. Y. Suppl. 861 [*reversed* on other grounds in 158 N. Y. 45, 52 N. E. 667]; Crary *v.* Sprague, 12 Wend. 41, 27 Am. Dec. 110.

South Dakota.— Gaffney *v.* Mentele, 23 S. D. 38, 119 N. W. 1030.

Texas.— Ft. Worth, etc., R. Co. *v.* Greathouse, 82 Tex. 104, 17 S. W. 834; Houston, etc., R. Co. *v.* Hill, 70 Tex. 51, 7 S. W. 659; Harlan *v.* Harlan, (Civ. App. 1910) 125 S. W. 950; Missouri, etc., R. Co. *v.* Gober, (Civ. App. 1909) 125 S. W. 383; Parrish *v.* Adwell, (Civ. App. 1910) 124 S. W. 441; Missouri, etc., R. Co. *v.* Pettit, (Civ. App. 1909) 117 S. W. 894; Huff *v.* Crawford, (Civ. App. 1895) 32 S. W. 592 [*reversed* on other grounds in 89 Tex. 214, 34 S. W. 606].

Virginia.— New York, etc., R. Co. *v.* Wilson, 109 Va. 754, 64 S. E. 1060.

Wisconsin.—Redepenning *v.* Rock, 136 Wis. 372, 117 N. W. 805.

The admission of hearsay evidence is harmless where the same facts were testified to by another witness having knowledge thereof. Chicago, etc., R. Co. *v.* Gregory, 58 Ill. 272.

58. Nagle *v.* Fulmer, 98 Iowa 585, 67 N. W. 369; Sims *v.* American Ice Co., 109 Md. 68, 71 Atl. 522; Taylor *v.* Austin, 32 Minn. 247, 20 N. W. 157.

59. St. Louis Nat. Bank *v.* Flanagan, 129 Mo. 178, 31 S. W. 773; Knowles *v.* Dow, 22 N. H. 387, 55 Am. Dec. 163; Reavis *v.* Oren-

(D) *Evidence Showing Correctness of Opinion.* A rule frequently applied is that the admission of incompetent opinion evidence is harmless error where the other evidence admitted is sufficient to establish the fact involved, or, as it is sometimes stated, the erroneous admission of the opinion or conclusion of either an ordinary or expert witness is harmless error, where the correctness of the opinion or conclusion is shown by other evidence, such as evidence embracing the specific facts upon which the opinion or conclusion is based.[60] This is especially true where the conclusion given is a mere matter of computation.[61]

(E) *Evidence Admitted Without Preliminary Proof.* Error in admitting evidence without the necessary preliminary proof to render it competent is harmless

shaw, 105 N. C. 369, 10 S. E. 907; Letcher *v.* Morrison, 79 Tex. 240, 14 S. W. 1010; Pennsylvania F. Ins. Co. *v.* Faires, 13 Tex. Civ. App. 111, 35 S. W. 55.

60. *Alabama.*— Tutwiler Coal, etc., Co. *v.* Farrington, 144 Ala. 157, 39 So. 898; Southern R. Co. *v.* Posey, 124 Ala. 486, 26 So. 914.

California.— Jersey Island Dredging Co. *v.* Whitney, 149 Cal. 269, 86 Pac. 509, 691; Williams *v.* Fresno Canal, etc., Co., 96 Cal. 14, 30 Pac. 961, 31 Am. St. Rep. 172.

Colorado.— Denver, etc., R. Co. *v.* Mitchell, 42 Colo. 43, 94 Pac. 289; United Oil Co. *v.* Roseberry, 30 Colo. 177, 69 Pac. 588.

Florida.— Jacksonville, etc., R. Co. *v.* Peninsular Land, etc., Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33, 65.

Georgia.— Georgia Cent. R. Co. *v.* Stancel, 118 Ga. 142, 44 S. E. 975; Acme Brewing Co. *v.* Central R., etc., Co., 115 Ga. 494, 42 S. E. 8.

Illinois.— Asmossen *v.* Swift, 243 Ill. 93, 90 N. E. 250; Marquette Cement Mfg. Co. *v.* Williams, 230 Ill. 26, 82 N. E. 424 [*affirming* 132 Ill. App. 629]; Chicago *v.* Jarvis, 226 Ill. 614, 80 N. E. 1079.

Indiana.— McReynolds *v.* Smith, 172 Ind. 336, 86 N. E. 1009; Swygart *v.* Willard, 166 Ind. 25, 76 N. E. 755.

Indian Territory.— Bolen-Darnall Coal Co. *v.* Williams, 7 Indian Terr. 648, 104 S. W. 867.

Iowa.— Wilder *v.* Great Western Cereal Co., 134 Iowa 451, 109 N. W. 789; Gibson *v.* Burlington, etc., R. Co., 107 Iowa 596, 78 N. W. 190; Medearis *v.* Anchor Mut. F. Ins. Co., 104 Iowa 88, 73 N. W. 495, 65 Am. St. Rep. 428.

Kansas.— Chandler *v.* Bowersock, 81 Kan. 606, 106 Pac. 54; Sun Ins. Office *v.* Western Woolen-Mill Co., 72 Kan. 41, 82 Pac. 513.

Kentucky.— Mathis *v.* Taylorsville Bank, 136 Ky. 634, 124 S. W. 876; Louisville, etc., R. Co. *v.* Plummer, 35 S. W. 1113, 18 Ky. L. Rep. 228.

Maryland.— Baltimore, etc., R. Co. *v.* Sattler, 100 Md. 306, 59 Atl. 654.

Michigan.— Brunswick-Balke Collender Co. *v.* Northern Assur. Co., 150 Mich. 311, 113 N. W. 1113; Boehm *v.* Detroit, 141 Mich. 277, 104 N. W. 626.

Minnesota.— Williams *v.* Griffin Wheel Co., 84 Minn. 279, 87 N. W. 773.

Missouri.— Waddell *v.* Metropolitan St. R. Co., 213 Mo. 8, 111 S. W. 542; Robertson *v.* Wabash, etc., R. Co., 84 Mo. 119; Impkamp *v.* St. Louis Transit Co., 108 Mo. App. 655, 84 S. W. 119. *Compare* Keyes-Marshall Bros. Livery Co. *v.* St. Louis, etc., R. Co., 105 Mo. App. 556, 80 S. W. 53.

Montana.— Yergy *v.* Helena Light, etc., Co., 39 Mont. 213, 102 Pac. 310.

Nebraska.— Chicago, etc., R. Co. *v.* Holmes, 68 Nebr. 826, 94 N. W. 1007; Missouri Pac. R. Co. *v.* Fox, 60 Nebr. 531, 83 N. W. 744.

New Hampshire.— Bourassa *v.* Grand Trunk R. Co., 75 N. H. 359, 74 Atl. 590.

New York.— La Rue *v.* Smith, 153 N. Y. 428, 47 N. E. 796 [*affirming* 36 N. Y. Suppl. 1127]; Walker *v.* Dunspaugh, 20 N. Y. 170.

Ohio.— Duhme Jewelry Co. *v.* Hazen, 27 Ohio Cir. Ct. 679.

Oregon.— Aikin *v.* Leonard, 1 Oreg. 224.

South Carolina.— Woodstock Hardwood, etc., Mfg. Co. *v.* Charleston Light, etc., Co., 84 S. C. 306, 66 S. E. 194.

Texas.— St. Louis, etc., R. Co. *v.* Boshear, 102 Tex. 76, 113 S. W. 6 [*affirming* (Civ. App. 1908) 108 S. W. 1032]; Gulf, etc., R. Co. *v.* Smith, 74 Tex. 276, 11 S. W. 1104; Houston, etc., R. Co. *v.* Larkin, 64 Tex. 454.

Utah.— Johnson *v.* Union Pac. R. Co., 35 Utah 285, 100 Pac. 390; Farnsworth *v.* Union Pac. Coal Co., 32 Utah 112, 89 Pac. 74; Davis *v.* Oregon Short Line R. Co., 31 Utah 307, 88 Pac. 2.

Vermont.— *In re* Esterbrook, 83 Vt. 229, 75 Atl. 1; Moore *v.* Haviland, 61 Vt. 58, 17 Atl. 725.

Washington.— Hodd *v.* Tacoma, 45 Wash. 436, 88 Pac. 842; Ingram *v.* Wishkah Boom Co., 35 Wash. 191, 77 Pac. 34.

Wisconsin.— Kohl *v.* Bradley, 130 Wis. 301, 110 N. W. 265; Butterfield *v.* Graves, 85 Wis. 199, 55 N. W. 171.

United States.— Puget Sound Nav. Co. *v.* Lavender, 160 Fed. 851, 87 C. C. A. 655; Columbia Box, etc., Co. *v.* Drown, 156 Fed. 459, 84 C. C. A. 269. And see EVIDENCE, 17 Cyc. 60.

Argumentative opinion.— The erroneous admission of the opinions of witnesses as to the cause of an explosion was without prejudice, where the material facts were not in dispute, and the opinions were merely arguments therefrom. Castner Electrolyptic Alkali Co. *v.* Davies, 154 Fed. 938, 83 C. C. A. 510.

Opinion not justified by facts.— Although the facts do not justify the opinion, yet its admission is deemed harmless, because, the facts being in evidence, the jury could not be misled. Bond *v.* International, etc., R. Co., (Tex. Civ. App. 1909) 118 S. W. 867.

61. Milhollen *v.* A. Y. McDonald, etc., Mfg.

where the fact sought to be thus proved is conclusively established by other competent evidence,[62] or is admitted by the objecting party in his testimony [63] or pleadings,[64] or where there is no dispute on the only point to which such evidence relates.[65]

c. Admitted or Undisputed Facts — (1) *In General.* The general rule is well settled that it is harmless error for the court, in the conduct of the trial, to permit the introduction of improper evidence relating to a fact which is admitted, conceded, uncontroverted, or one which has been placed beyond the realm of dispute by uncontradicted evidence which has been adduced.[66] Various appli-

Co., 137 Iowa 114, 112 N. W. 812. And see St. Louis, etc., R. Co. *v.* Smith, (Tex. Civ. App. 1908) 115 S. W. 882.

62. *Alabama.*— Alabama Lumber Co. *v.* Cross, 152 Ala. 562, 44 So. 563, 126 Am. St. Rep. 55.

Georgia.— McMillan *v.* Savannah Guano Co., 133 Ga. 760, 66 S. E. 943.

Illinois.— Rehfuss *v.* Hill, 243 Ill. 140, 90 N. E. 187; American Bonding, etc., Co. *v.* New Amsterdam Casualty Co., 125 Ill. App. 33.

Missouri.— Philes *v.* Missouri Pac. R. Co., 141 Mo. App. 561, 125 S. W. 553; Anderson *v.* Wheeler, 125 Mo. App. 406, 102 S. W. 628.

Nebraska.— Ward *v.* Beals, 14 Nebr. 114, 15 N. W. 353.

North Carolina.— Bivings *v.* Gosnell, 141 N. C. 341, 53 S. E. 861.

Pennsylvania.— Patterson *v.* Wyomissing Woolen Mfg. Co., 2 Woodw. 215.

Texas.— Waller *v.* Leonard, (Civ. App. 1896) 34 S. W. 799.

Wisconsin.— Hopkins *v.* Stefan, 77 Wis. 45, 45 N. W. 676.

63. Soaps *v.* Eichberg, 42 Ill. App. 375; Borden *v.* Isherwood, 120 Iowa 677, 94 N. W. 1128; Newcombe *v.* Hyman, 16 Misc. (N. Y.) 25, 37 N. Y. Suppl. 649 [*reversing* on other grounds 14 Misc. 438, 35 N. Y. Suppl. 1026].

64. Valle *v.* North Missouri R. Co., 37 Mo. 445.

65. McGregor *v.* Filer, 69 Ill. 514; Borden *v.* Isherwood, 120 Iowa 677, 94 N. W. 1128; Eisenbud *v.* Gellert, 26 Misc. (N. Y.) 367, 55 N. Y. Suppl. 952.

66. *Alabama.*— Milliken *v.* Maund, 110 Ala. 332, 20 So. 310; Wolfe *v.* Underwood, 97 Ala. 375, 12 So. 234.

Arkansas.— Sparks *v.* Forrest, 85 Ark. 425, 108 S. W. 835; Standard L., etc., Ins. Co. *v.* Schmaltz, 66 Ark. 588, 53 S. W. 49, 74 Am. St. Rep. 112.

California.— Nathan *v.* Dierssen, 146 Cal. 63, 79 Pac. 739; Paulson *v.* Nunan, 72 Cal. 243, 13 Pac. 626.

Colorado.— Sheridan *v.* Patterson, 34 Colo. 267, 82 Pac. 539; Sellers *v.* Floyd, 24 Colo. 484, 52 Pac. 674.

Connecticut.— Pickles *v.* Ansonia, 76 Conn. 278, 56 Atl. 552; Crosby *v.* Fitch, 12 Conn. 410, 31 Am. Dec. 745.

Florida.— Daniel *v.* Siegel-Cooper Co., 54 Fla. 265, 44 So. 949. But see Briggs *v.* Brown, 55 Fla. 417, 46 So. 325.

Georgia.— Wrens *v.* Sammons, 129 Ga. 755, 59 S. E. 776; Georgia R., etc., Co. *v.* Knight, 122 Ga. 290, 50 S. E. 124.

Illinois.— Consolidated Coal Co. *v.* Oeltjen, 189 Ill. 85, 59 N. E. 600 [*affirming* 91 Ill. App. 123]; E. A. Moore Furniture Co. *v.* Sloane, 166 Ill. 457, 46 N. E. 1128 [*affirming* 64 Ill. App. 581].

Indiana.— Platter *v.* Elkhart County, 103 Ind. 360, 2 N. E. 544; Indianapolis St. R. Co. *v.* Taylor, 39 Ind. App. 592, 80 N. E. 436.

Iowa.— Borst *v.* Lynch, 133 Iowa 567, 110 N. W. 1031; Murray *v.* Wells, 57 Iowa 26, 10 N. W. 288.

Kansas.— Heery *v.* Reed, 80 Kan. 380, 102 Pac. 846; Kansas Pac. R. Co. *v.* Little, 19 Kan. 267.

Kentucky.— Anderson, etc., Distilleries Co. *v.* Hair, 103 Ky. 196, 44 S. W. 658; Tinsley *v.* Ogg, 7 Dana 385. *Compare* Illinois Cent. R. Co. *v.* Winslow, 119 Ky. 877, 84 S. W. 1175, 27 Ky. L. Rep. 329.

Maryland.— Rock Creek Steamboat Co. *v.* Boyd, 111 Md. 189, 73 Atl. 662; Supreme Conclave I. O. H. *v.* Miles, 92 Md. 613, 48 Atl. 845, 84 Am. St. Rep. 528.

Massachusetts.— Baker *v.* Wentworth, 155 Mass. 338, 29 N. E. 589; Hinckley *v.* Somerset, 145 Mass. 326, 14 N. E. 166; Bragg *v.* Boston, etc., R. Corp., 9 Allen 54.

Michigan.— Leach *v.* Detroit Electric R. Co., 129 Mich. 286, 88 N. W. 635; Willet *v.* Goetz, 125 Mich. 581, 84 N. W. 1071.

Missouri.— Clifford Banking Co. *v.* Donovan Commission Co., 195 Mo. 262, 94 S. W. 527; Wilcoxson *v.* Darr, 139 Mo. 660, 41 S. W. 227.

Montana.— Whipple *v.* Stuart, 26 Mont. 219, 66 Pac. 941; Snook *v.* Anaconda, 26 Mont. 128, 66 Pac. 756.

Nebraska.— Wittenberg *v.* Mollyneaux, 60 Nebr. 583, 83 N. W. 842; Otis *v.* Claussen, 56 Nebr. 100, 73 N. W. 465.

Nevada.— Gotelli *v.* Cardelli, 26 Nev. 382, 69 Pac. 8.

New Hampshire.— Lee *v.* Dow, 73 N. H. 101, 59 Atl. 374; Wiggin *v.* Damrell, 4 N. H. 69.

New York.— Healy *v.* Pennsylvania Ins. Co., 50 N. Y. App. Div. 327, 63 N. Y. Suppl. 1055; Beals *v.* Home Ins. Co., 36 Barb. 614 [*affirmed* in 36 N. Y. 522]; Radin *v.* Paul, 90 N. Y. Suppl. 1072.

North Carolina.— Farris *v.* Southern R. Co., 151 N. C. 483, 66 S. E. 457; Loftin *v.* Cobb, 126 N. C. 58, 35 S. E. 230

Oregon.— Oliver *v.* Oregon Sugar Co., 45 Oreg. 77, 76 Pac. 1086; Koshland *v.* Hartford F. Ins. Co., 31 Oreg. 402, 49 Pac. 866.

cations of the rule have been made, among them being cases in which the evidence improperly received consisted of hearsay,[67] irrelevant,[68] secondary,[69] incompetent,[70] and opinion evidence,[71] as well as cases in which the improper evidence consisted of conclusions,[72] declarations,[73] letters,[74] maps,[75] a bill of exceptions filed in an ancillary proceeding,[76] and evidence relating to safe or unsafe conditions,[77]

Rhode Island.— Wilson *v.* New York, etc., R. Co., 29 R. I. 146, 69 Atl. 364; Hall *v.* New York, etc., R. Co., 27 R. I. 525, 65 Atl. 278.

South Carolina.— Young *v.* Seaboard Air Line R. Co., 75 S. C. 190, 55 S. E. 225.

South Dakota.— Schott *v.* Swan, 21 S. D. 639, 114 N. W. 1005; Greenwald *v.* Ford, 21 S. D. 28, 109 N. W. 516.

Texas.— Missouri Pac. R. Co. *v.* Johnson, 72 Tex. 95, 10 S. W. 325; Goldman *v.* Hadley, (Civ. App. 1909) 122 S. W. 282; Hudson *v.* Slate, (Civ. App. 1909) 117 S. W. 469; Rogers *v.* Frazier Bros., (Civ. App. 1908) 108 S. W. 727.

Vermont.— McKindly *v.* Drew, 71 Vt. 138, 41 Atl. 1039.

Washington.— Matthews *v.* Spokane, 50 Wash. 107, 96 Pac. 827; Ash *v.* Clark, 32 Wash. 390, 73 Pac. 351.

Wisconsin.— McDermott *v.* Jackson, 97 Wis. 64, 72 N. W. 375; Cannon *v.* Home Ins. Co., 53 Wis. 585, 11 N. W. 11; Holmes *v.* Fairbank, 17 Wis. 434.

United States.— Armour *v.* Skene, 153 Fed. 241, 82 C. C. A. 385; National Masonic Acc. Assoc. *v.* Sparks, 83 Fed. 225, 28 C. C. A. 399.

67. Ah Tong *v.* Earl Fruit Co., 112 Cal. 679, 45 Pac. 7; Cline *v.* Robbins, 112 Cal. 581, 44 Pac. 1023; Franklin County Lumber Co. *v.* Grady County, 133 Ga. 557, 66 S. E. 264; St. Louis Southwestern R. Co. *v.* Eccles, (Tex. Civ. App. 1909) 115 S. W. 648.

68. Commercial Bank *v.* Hurt, 99 Ala. 130, 12 So. 568, 42 Am. St. Rep. 38, 19 L. R. A. 701; El Paso First Nat. Bank *v.* Miller, 235 Ill. 135, 85 N. E. 312; Allen *v.* Chicago, etc., R. Co., 82 Nebr. 726, 118 N. W. 655, 23 L. R. A. N. S. 278. *Contra*, Higgins *v.* Long Island R. Co., 129 N. Y. App. Div. 415, 114 N. Y. Suppl. 262, holding that in an action against a railroad for injuries from a fire, evidence of other fires along defendant's right of way in plaintiff's neighborhood earlier in the year and during previous years, introduced ostensibly to prove that plaintiff's land and that in his neighborhood was subject to fires, which fact was indisputable and admitted by defendant, was prejudicial since it suggested the inference that defendant caused the fires.

69. *Alabama.*— Penry *v.* Dozier, 161 Ala. 292, 49 So. 909; Tayloe *v.* Bush, 75 Ala. 432; Thompson *v.* Ives, 11 Ala. 239.

Arkansas.— Triplett *v.* Rugby Distilling Co., 66 Ark. 219, 49 S. W. 975.

California.— Hobbs *v.* Duff, 43 Cal. 485.

Florida.— Daniel *v.* Siegel-Cooper Co., 54 Fla. 265, 44 So. 949.

Illinois.— Dorrance *v.* Dearborn Power Co., 233 Ill. 354, 84 N. E. 269 [*reversing* 136 Ill. App. 86].

Minnesota.— Miller *v.* Irish Catholic Colonization Assoc., 36 Minn. 357, 31 N. W. 215.

Mississippi.— Williams *v.* Brickell, 37 Miss. 682, 75 Am. Dec. 88.

70. *Colorado.*— Temple *v.* Teller Lumber Co., 46 Colo. 497, 106 Pac. 8.

Kansas.— Kinsley *v.* Morse, 40 Kan. 577, 20 Pac. 217.

Kentucky.— Farmers' Bank *v.* Wickliffe, 134 Ky. 627, 121 S. W. 498.

Michigan.— Kennedy *v.* London, etc., F. Ins. Co., 157 Mich. 411, 122 N. W. 134.

New York.— *In re* Crawford, 113 N. Y. 560, 21 N. E. 692, 5 L. R. A. 71.

West Virginia.— Talbott *v.* Woodford, 48 W. Va. 449, 37 S. E. 580.

71. *Arizona.*— Miller *v.* Green, 3 Ariz. 205, 73 Pac. 399.

California.— Kline *v.* Santa Barbara Consol. R. Co., 150 Cal. 741, 90 Pac. 125; Murphy *v.* Coppieters, 136 Cal. 317, 68 Pac. 970; Walters *v.* Mitchell, 6 Cal. App. 410, 92 Pac. 315.

Michigan.— Burrell *v.* Gates, 112 Mich. 307, 70 N. W. 574.

Missouri.— Smiley *v.* St. Louis, etc., R. Co., 160 Mo. 629, 61 S. W. 667; Hartpence *v.* Rogers, 143 Mo. 623, 45 S. W. 650.

New York.— Birch *v.* Metropolitan El. R. Co., 15 Daly 453, 8 N. Y. Suppl. 325.

Vermont.— Hyde *v.* Swanton, 72 Vt. 242, 47 Atl. 790.

Opinion evidence of value.—Beach *v.* Huntsman, 42 Ind. App. 205, 85 N. E. 523; Knox *v.* Noble, 25 Kan. 449; McLouth *v.* Myers, 16 N. Y. Suppl. 779; Ft. Worth, etc., R. Co. *v.* Hickox, (Tex. Civ. App. 1907) 103 S. W. 202; Browning *v.* Goodrich Transp. Co., 78 Wis. 391, 47 N. W. 428, 23 Am. St. Rep. 414, 10 L. R. A. 415.

72. Seivert *v.* Galvin, 133 Wis. 391, 113 N. W. 680.

73. Putnam *v.* Harris, 193 Mass. 58, 78 N. E. 747; Murphy *v.* Southern Pac. Co., 31 Nev. 120, 101 Pac. 322; Baldwin *v.* Short, 125 N. Y. 553, 26 N. E. 928 [*affirming* 54 Hun 473, 7 N. Y. Suppl. 717]; Loos *v.* Wilkinson, 110 N. Y. 195, 18 N. E. 99, 1 L. R. A. 250.

74. Bartlett *v.* Fireman's Fund Ins. Co., 77 Iowa 155, 41 N. W. 601; International, etc., R. Co. *v.* Moody, 71 Tex. 614, 9 S. W. 465; J. T. Stark Grain Co. *v.* Harry Bros. Co., (Tex. Civ. App. 1909) 122 S. W. 947.

75. Victoria *v.* Victoria County, (Tex. Civ. App. 1908) 115 S. W. 67; Portland, etc., R. Co. *v.* Ladd, 47 Wash. 88, 91 Pac. 573.

76. Young *v.* Germania Sav. Bank, 133 Ga. 699, 66 S. E. 925.

77. *Georgia.*— Gainesville *v.* Caldwell, 81 Ga. 76, 7 S. E. 99; Central R., etc., Co. *v.* Smith, 80 Ga. 526, 5 S. E. 772.

Illinois.— Schillinger Bros. Co. *v.* Smith, 225 Ill. 74, 80 N. E. 65.

Texas.— St. Louis Southwestern R. Co. *v.*

payment,[78] partnership agreements,[79] and the authority of an agent or deputy.[80]

(II) *ADMISSIONS IN PLEADINGS.* As matters admitted in the pleadings of an opponent require no proof,[81] it is harmless error to admit improper evidence tending to prove or disprove facts so admitted.[82] The rule applies not only where facts are expressly admitted in the pleadings, but also where they are admitted by being properly pleaded by one party and not denied by the other.[83]

Hawkins, 49 Tex. Civ. App. 545, 108 S. W. 736.

Utah.— Wells *v.* Denver, etc., R. Co., 7 Utah 482, 27 Pac. 688.

Washington.— Matthews *v.* Spokane, 50 Wash. 107, 96 Pac. 827.

78. Butler *v.* Delafield, 1 Cal. App. 367, 82 Pac. 260; Newcombe *v.* Fox, 1 N. Y. App. Div. 389, 37 N. Y. Suppl. 294 [*affirmed* in 154 N. Y. 754, 49 N. E. 1101].

79. Meinhard *v.* Bedingfield Mercantile Co., 4 Ga. App. 176, 61 S. E. 34; Gross *v.* Hays, 73 Tex. 515, 11 S. W. 523.

80. Garden *v.* Houston, 163 Ala. 300, 50 So. 1030; Gambill *v.* Cargo, 151 Ala. 421, 43 So. 866.

81. See PLEADING, 31 Cyc. 676.

82. *California.*— Gill *v.* Dunham, (1893) 34 Pac. 68; West Coast Lumber Co. *v.* Newkirk, 80 Cal. 275, 22 Pac. 231; Wells *v.* McPike, 21 Cal. 215; Mendocino County *v.* Peters, 2 Cal. App. 24, 82 Pac. 1122.

Colorado.— Sills *v.* Hawes, 14 Colo. App. 157, 59 Pac. 422.

Connecticut.— Colchester Sav. Bank *v.* Brown, 75 Conn. 69, 52 Atl. 316.

Georgia.— Hicks *v.* Webb, 127 Ga. 170, 56 S. E. 307; Battle *v.* Braswell, 107 Ga. 128, 32 S. E. 838. See also Atlantic, etc., R. Co. *v.* Brown, 129 Ga. 622, 59 S. E. 278.

Idaho.— Hawkins *v.* Pocatello Water Co., 3 Ida. 766, 35 Pac. 711.

Kentucky.— Helm *v.* Hardin, 2 B. Mon. 231.

Maryland.— Hardey *v.* Coe, 5 Gill 189.

Minnesota.— Hahn *v.* Penney, 62 Minn. 116, 63 N. W. 843; Benton *v.* Nicoll, 24 Minn. 221; Coit *v.* Waples, 1 Minn. 134.

Missouri.— Barkley *v.* Barkley Cemetery Assoc., 153 Mo. 300, 54 S. W. 482; Wonderly *v.* Lafayette County, 150 Mo. 635, 51 S. W. 745, 73 Am. St. Rep. 474, 45 L. R. A. 386; Price *v.* Morning Star Min. Co., 83 Mo. App. 470; Thomas *v.* Walnut Land, etc., Co., 43 Mo. App. 653. And see Scheffer *v.* Hardin, 140 Mo. App. 13, 124 S. W. 569; Cobb *v.* Holloway, 129 Mo. App. 212, 108 S. W. 109.

Montana.— Thornton-Thomas Mercantile Co. *v.* Bretherton, 32 Mont. 80, 80 Pac. 10.

Nebraska.— Shelton Implement Co. *v.* Parlor Furniture, etc., Co., 79 Nebr. 411, 112 N. W. 618; Maul *v.* Drexel, 55 Nebr. 446, 76 N. W. 163; Chadron Banking Co. *v.* Mahoney, 43 Nebr. 214, 61 N. W. 594; Rosenbaum *v.* Russell, 35 Nebr. 513, 53 N. W. 384; Consaul *v.* Sheldon, 35 Nebr. 247, 52 N. W. 1104; Brooks *v.* Dutcher, 22 Nebr. 644, 36 N. W. 128.

New York.— Robert *v.* Good, 36 N. Y. 408; Williams *v.* Guile, 46 Hun 645 [*affirmed* in 117 N. Y. 343, 22 N. E. 1071, 6 L. R. A. 366]; Diven *v.* Phelps, 34 Barb. 224; Coffey *v.* Lyons, 16 Daly 207, 10 N. Y. Suppl. 317; Greenspau *v.* American Star Order, 1 Misc. 406, 20 N. Y. Suppl. 945; Ostonovitsky *v.* Rosenthal, 110 N. Y. Suppl. 250.

North Carolina.— Fisher *v.* Brown, 135 N. C. 198, 47 S. E. 398; Brown *v.* McKee, 108 N. C. 387, 13 S. E. 8.

North Dakota.—Aultman, etc., Co. *v.* Jones, 15 N. D. 130, 106 N. W. 688.

Ohio.— Todd *v.* East Liverpool Pub. Co., 29 Ohio Cir. Ct. 155.

Pennsylvania.— Montgomery *v.* Waynesburg Exch. Bank, 3 Pa. Cas. 461, 6 Atl. 133.

South Dakota.— Stephens *v.* Fans, 20 S. D. 367, 106 N. W. 56.

Tennessee.— Ingram *v.* Smith, 1 Head 411.

Texas.— Consolidated Kansas City Smelting, etc., Co. *v.* Gonzales, 50 Tex. Civ. App. 79, 109 S. W. 946.

Utah.— Camp *v.* Simon, 23 Utah 56, 63 Pac. 332.

Vermont.— Wilder *v.* Wilder, 82 Vt. 123, 72 Atl. 203.

Washington.— Fitzgerald *v.* School Dist. No. 20, 5 Wash. 112, 31 Pac. 427.

Wisconsin.— Fisher *v.* Waupaca Electric Light, etc., Co., 141 Wis. 515, 124 N. W. 1005; Bannon *v.* Aultman, 80 Wis. 307, 49 N. W. 967, 27 Am. St. Rep. 37; Cooper *v.* Blood, 2 Wis. 62.

Offer of compromise.— The admission in evidence of an offer of compromise made by defendant is prejudicial error in a case where defendant has not denied plaintiff's claim, but has pleaded affirmative defenses. Smith *v.* Satterlee, 130 N. Y. 677, 29 N. E. 225 [*reversing* 12 N. Y. St. 626].

83. Alabama Great Southern R. Co. *v.* Hardy, 131 Ga. 238, 62 S. E. 71; Perseverance Min. Co. *v.* Bisaner, 87 Ga. 193, 13 S. E. 461 (holding that where a suit is brought against a corporation, and it files its pleas as such, it is not reversible error to admit parol evidence that it is a corporation); Brown *v.* Robinson, 25 Ga. 144; Hall *v.* Barnard, 138 Iowa 523, 116 N. W. 604; Pfantz *v.* Culver, 13 Iowa 312; Tucker *v.* Wilkins, 105 N. C. 272, 11 S. E. 575; Palmer *v.* Schultz, 138 Wis. 455, 120 N. W. 348.

Denial under oath.— Under statutes requiring verification or a denial under oath in order to raise an issue, the admission of incompetent evidence to prove matters not so denied is harmless error. Huerfano County School Dist. No. 26 *v.* McComb, 18 Colo. 240, 32 Pac. 424; Wooliver *v.* Boylston Ins. Co., 104 Mich. 132, 62 N. W. 149; Armstrong *v.* Crump, 25 Okla. 452, 106 Pac. 855.

Failure to attack consideration of mortgage.— Where the answer to an interplea

d. Matters Requiring no Proof — (i) *Matters of Common and Judicial Knowledge.* As matters of law, such as the contents of a statute, require no proof, the admission of evidence tending to prove the same is harmless error.[84] So too it is not prejudicial to admit evidence to establish matters which, in the absence of any evidence, the court or jury would be presumed to know,[85] or which necessarily follow, as legal conclusions, or presumptions from the facts already established.[86] It is thus unprejudicial to receive evidence relating to a matter of

claiming under a chattel mortgage property attached by plaintiff does not attack the *bona fides* of the mortgage, and on its face it shows a consideration, error in admitting testimony as to the amount of indebtedness secured thereby is harmless. Rice Stix Dry Goods Co. *v.* Sally, 198 Mo. 682, 96 S. W. 1030.

84. *Alabama.*— Sloss-Sheffield Steel, etc., Co. *v.* Green, 159 Ala. 178, 49 So. 301.

California.— *In re* Dunphy, 147 Cal. 95, 81 Pac. 315.

Indiana.—Adams *v.* Shaffer, 132 Ind. 331, 31 N. E. 1108.

Minnesota.— Slosson *v.* Hall, 17 Minn. 95.

Missouri.— Whittelsey *v.* Kellogg, 28 Mo. 404.

New York.— Hine *v.* Cushing, 53 Hun 519, 6 N. Y. Suppl. 850.

Rhode Island.— Robinson *v.* Morris, 30 R. I. 132, 73 Atl. 611.

Wisconsin.— Hoffman *v.* Rib Lake Lumber Co., 136 Wis. 388, 117 N. W. 789; Thompson *v.* Johnston Bros. Co., 86 Wis. 576, 57 N. W. 298.

Rights and liabilities.— It is error without prejudice to admit evidence bearing on the rights (Union Sheet Metal Works *v.* Dodge, 129 Cal. 390, 62 Pac. 41; Toluca, etc., R. Co. *v.* Haws, 194 Ill. 92, 62 N. E. 312) and liabilities (West Chicago St. R. Co. *v.* Martin, 154 Ill. 523, 39 N. E. 140; Blumenthal *v.* Union Electric Co., 129 Iowa 322, 105 N. W. 588) of parties, where such rights and liabilities are fixed by law and the evidence admitted does not establish greater rights or duties. Even though the facts of the case are such as not to call for any application of the rule of care testified to by a witness, the admission of his testimony is harmless where it is obviously true (Ft. Worth, etc., R. Co. *v.* Wilkinson, 50 Tex. Civ. App. 48, 110 S. W. 470).

Matters adjudicated.— It is harmless error to admit evidence bearing on the validity of orders in a probate proceeding, when such question has been finally adjudicated (Kalteyer *v.* Wipff, 92 Tex. 673, 52 S. W. 63), as it is also harmless, in an action upon a judgment, to admit in evidence the full transcript of the court proceedings leading up to the judgment (Whitley *v.* General Electric Co., 18 Tex. Civ. App. 674, 45 S. W. 959).

85. *Arkansas.*— Braddock *v.* Wertheimer, 68 Ark. 423, 59 S. W. 761.

Georgia.— Nelson *v.* Spence, 129 Ga. 35, 58 S. E. 697.

Maine.— Hutchinson *v.* Moody, 18 Me. 393.

Minnesota.— Horton *v.* Williams, 21 Minn. 187.

Missouri.— Beck *v.* Dowell, 40 Mo. App. 71 [*affirmed* in 111 Mo. 506, 20 S. W. 209, 33 Am. St. Rep. 547].

Montana.—Golden *v.* Northern Pac. R. Co., 39 Mont. 435, 104 Pac. 549.

New York.— Loder *v.* Whelpley, 111 N. Y. 239, 18 N. E. 874, 16 N. Y. Civ. Proc. 89; Hogan *v.* Rosenthal, 127 N. Y. App. Div. 312, 111 N. Y. Suppl. 676.

86. *Alabama.*— Manchester F. Assur. Co. *v.* Feibelman, 118 Ala. 308, 23 So. 759.

California.— King *v.* Lamb, 117 Cal. 401, 49 Pac. 561 (holding that where the proceedings for a street improvement were sufficient to create a lien for the work done, any error in admitting evidence that the owner of the property affected desired the work done was without prejudice); Eppinger *v.* Kendrick, (1896) 44 Pac. 234; Bryan *v.* Tormey, (1889) 21 Pac. 725; Tarpy *v.* Shepherd, 30 Cal. 180; Shively *v.* Eureka Tellurium Gold Min. Co., 5 Cal. App. 236, 89 Pac. 1073.

Connecticut.— Jacobs *v.* Button, 79 Conn. 360, 65 Atl. 150.

Georgia.— Favors *v.* Johnson, 79 Ga. 553, 4 S. E. 925.

Illinois.— Matson *v.* Ripley, 196 Ill. 269, 63 N. E. 677 [*affirmed* in 98 Ill. App. 479].

Missouri.— State *v.* Ballentine, 106 Mo. App. 190, 80 S. W. 317, holding that where a forfeited recognizance bore the official indorsement of the court's acceptance thereof, and was in the possession of the clerk, the indorsement was conclusive of such fact; and hence testimony of the judge that he accepted and approved the recognizance, and delivered the same to the clerk, and testimony of the clerk that he placed the recognizance in a box in his office was harmless.

New York.—Ward *v.* Kilpatrick, 85 N. Y. 413, 39 Am. Rep. 674; Foster *v.* Oldham, 4 Misc. 201, 23 N. Y. Suppl. 1024.

Oregon.— Fisher *v.* Oregon, etc., R. Co., 22 Oreg. 533, 30 Pac. 425, 16 L. R. A. 519. And see New York Evening Journal Pub. Co. *v.* Simon, 147 Fed. 224, 77 C. C. A. 366.

Corporate existence.— One who has dealt with a corporation, as such, cannot complain of the admission of incompetent evidence to prove incorporation, as the establishment of the fact of the dealing between the parties renders unnecessary proof of corporate existence. Falls *v.* U. S. Savings, etc., Co., 97 Ala. 417, 13 So. 25, 38 Am. St. Rep. 194, 24 L. R. A. 174; Stuyvesant *v.* Western Mortg., etc., Co., 22 Colo. 28, 43 Pac. 144.

Legality of marriage.— After plaintiff's marriage has been proved by competent evidence, in an action in which its validity was attacked, defendant is not injured by the admission of a copy of a decree of divorce

which the court takes judicial notice,[87] or for a witness to express an opinion on a matter of common knowledge, experience, or observation.[88] Where, as a matter of law, a person is bound to know a certain thing, it is not reversible error to admit evidence for the purpose of showing knowledge or lack of knowledge.[89]

(II) *Construction of Writing in Evidence.* Although the construction of contracts and other written instruments is ordinarily one of law for the court,[90] and parol evidence affecting such writings is generally incompetent and inadmissible,[91] the admission of testimony tending to show the intent of the parties to a clear and unambiguous instrument, or their understanding of its terms and the construction put upon it by them, is harmless error when in consonance with the plain meaning of the instrument and the interpretation given it by the court.[92]

dissolving the marriage between plaintiff's husband and his former wife, as the presumption in favor of the legality of plaintiff's marriage made it unnecessary for plaintiff to prove the divorce. Erwin *v.* English, 61 Conn. 502, 23 Atl. 753.

87. Ham *v.* State, 156 Ala. 645, 47 So. 126; Whitney *v.* Jasper Land Co., 119 Ala. 497, 24 So. 259; Wabash R. Co. *v.* Campbell, 219 Ill. 312, 76 N. E. 346, 3 L. R. A. N. S. 1092 [*affirming* 117 Ill. App. 630]; Chicago, etc., R. Co. *v.* Neff, 25 Ind. App. 107, 56 N. E. 927.

Judicial notice see Evidence, 16 Cyc. 849.

Although the popular and ordinary meaning of all English words is supposed to be within the knowledge of the court, the admission of the testimony of a witness as to the meaning of a word is harmless error, where the definition given is correct. Rodgers *v.* Kline, 56 Miss. 808, 31 Am. Rep. 389.

To like effect see Floral Creamery Co. *v.* Dillon, (Conn. 1910) 75 Atl. 82.

88. *Illinois.*— Illinois Steel Co. *v.* Mann, 197 Ill. 186, 64 N. E. 328 [*affirming* 100 Ill. App. 367].

Iowa.—Morgan *v.* Dallas County, 103 Iowa 57, 72 N. W. 304.

Kansas.— Pittsburg *v.* Broderson, 10 Kan. App. 430, 62 Pac. 5.

Kentucky.— Louisville, etc., Packet Co. *v.* Samuels, 59 S. W. 3, 22 Ky. L. Rep. 979.

Michigan. — McHugh *v.* Fitzgerald, 103 Mich. 21, 61 N. W. 354.

Missouri.— Blackwell *v.* Hill, 76 Mo. App. 46.

New York.— Menard *v.* Stevens, 44 N. Y. Super. Ct. 515.

Ohio.— Lake Shore, etc., R. Co. *v.* Terry, 14 Ohio Cir. Ct. 536, 7 Ohio Cir. Dec. 597.

Texas.— Gulf, etc., R. Co. *v.* Boyce, 39 Tex. Civ. App. 195, 87 S. W. 395; Missouri, etc., R. Co. *v.* Nordell, 20 Tex. Civ. App. 462, 50 S. W. 601; Galveston, etc., R. Co. *v.* Bohan (Civ. App. 1898) 47 S. W. 1050.

Washington.— Keating *v.* Pacific Steam-Washing Co., 21 Wash. 415, 58 Pac. 224.

Use of common knowledge by jurors see Evidence, 16 Cyc. 852, 924.

89. New La Junta, etc., Canal Co. *v.* Kreybill, 17 Colo. App. 26, 67 Pac. 1026; Union Traction Co. *v.* Barnett, 31 Ind. App. 467, 67 N. E. 205; Merchants' Nat. Bank *v.* Haverhill Iron Works, 159 Mass. 158, 34 N. E. 93.

Where knowledge is unnecessary by reason of other holdings in the case, the admission of testimony showing lack of knowledge is error without prejudice. Skinner *v.* Norman, 165 N. Y. 565, 59 N. E. 309, 80 Am. St. Rep. 776 [*reversing* 18 N. Y. App. Div. 609, 46 N. Y. Suppl. 65].

Waiver of notice.— The fact that an insurance company waived the written notice required by the policy renders harmless error in the admission of notice of loss given to a local agent not authorized to receive proofs of loss. Germania F. Ins. Co. *v.* Stewart, 13 Ind. App. 627, 42 N. E. 286.

90. See Contracts, 9 Cyc. 591; Deeds, 13 Cyc. 610; Landlord and Tenant, 24 Cyc. 916; Wills.

91. See Evidence, 17 Cyc. 567, 666, 668.

92. *Alabama.*— McCreary *v.* Jackson Lumber Co., 148 Ala. 247, 41 So. 822; Learned-Letcher Lumber Co. *v.* Fowler, 109 Ala. 169, 19 So. 396; Falls *v.* U. S. Savings, etc., Co., 97 Ala. 417, 13 So. 25, 38 Am. St. Rep. 194, 24 L. R. A. 174.

Arkansas.— See St. Louis, etc., R. Co. *v.* Caldwell, 89 Ark. 218, 116 S. W. 210.

California.— Wilson *v.* Alcatraz Asphalt Co., 142 Cal. 182, 75 Pac. 787; Scudders-Gale Grocery Co. *v.* Gregory Fruit Co., 9 Cal. App. 553, 99 Pac. 978.

Connecticut.— Butler *v.* Elliott, 15 Conn. 187. And see Alling *v.* Forbes, 68 Conn. 575, 37 Atl. 390, holding that, where the court adopts defendant's construction of the written contract sued on, defendant cannot complain of error in admitting the testimony of a witness as to a conversation had between him and defendant at the time of signing the agreement.

Florida.— Roof *v.* Chattanooga Wood Split Pulley Co., 36 Fla. 284, 18 So. 597.

Georgia.— Cochran *v.* Hudson, 110 Ga. 762, 36 S. E. 71; London Assur. Corp. *v.* Paterson, 106 Ga. 538, 32 S. E. 650.

Illinois.— Queen Ins. Co. *v.* Dearborn Sav., etc., Assoc., 175 Ill. 115, 51 N. E. 717 [*affirming* 75 Ill. App. 371].

Indiana.— Garrigue *v.* Kellar, 164 Ind. 676, 74 N. E. 523, 108 Am. St. Rep. 324, 69 L. R. A. 870; Montgomery *v.* Hines, 134 Ind. 221, 33 N. E. 1100; Lieb *v.* Lichtenstein, 121 Ind. 483, 23 N. E. 284; Spencer *v.* Robbins, 106 Ind. 580, 5 N. E. 726; Mitchell *v.* French, 100 Ind. 334; Strunk *v.* Pritchett, 27 Ind. App. 582, 61 N. E. 973.

Kentucky.— Louisville Ins. Co. *v.* Monarch,

So also, where one instrument is before the court for construction, the introduction in evidence of other written instruments to show the same construction as the court derives from the instrument itself is error without prejudice.[93]

e. Cure of Errors — (I) *By Evidence Subsequently Admitted* — (A) *In General* — (1) Same or Similar Evidence. The admission of improper evidence is harmless if the facts are afterward established by proper evidence,[94]

99 Ky. 578, 36 S. W. 563, 18 Ky. L. Rep. 444.

Massachusetts.— Atkins *v.* Thompson, 155 Mass. 326, 29 N. E. 627; Stetson *v.* Dow, 16 Gray 372; Crittenden *v.* Field, 8 Gray 621.

Michigan.— Final *v.* Backus, 18 Mich. 218. And see Seitz *v.* People's Sav. Bank, 140 Mich. 106, 103 N. W. 545.

Minnesota.— Howard *v.* Barton, 28 Minn. 116, 9 N. W. 584.

Missouri.— Strother *v.* McMullen Lumber Co., 200 Mo. 647, 98 S. W. 34.

Nevada.— Costello *v.* Scott, 30 Nev. 43, 93 Pac. 1, 94 Pac. 222.

New Hampshire.— Marsh *v.* Concord Mut. F. Ins. Co., 71 N. H. 253, 51 Atl. 898.

New York.— Matter of King, 115 N. Y. App. Div. 751, 100 N. Y. Suppl. 1089 [*affirmed* in 188 N. Y. 626, 81 N. E. 1167]; Tilden *v.* Tilden, 8 N. Y. App. Div. 99, 40 N. Y. Suppl. 403; Grosvenor *v.* Atlantic F. Ins. Co., 1 Bosw. 469. And see Burden *v.* Burden, 159 N. Y. 287, 54 N. E. 17 [*affirming* 8 N. Y. App. Div. 160, 40 N. Y. Suppl. 499].

North Carolina.— Taylor *v.* Hodges, 105 N. C. 344, 11 S. E. 156.

Pennsylvania.— McMahan *v.* Davis, 19 Pa. St. 354.

South Carolina.— Rakestraw *v.* Floyd, 54 S. C. 288, 32 S. E. 419.

Texas.— Callahan *v.* Houston, 78 Tex. 494, 14 S. W. 1027; Orthwein *v.* Wichita Mill, etc., Co., 32 Tex. Civ. App. 600, 75 S. W. 364.

Wisconsin.— Twentieth Century Co. *v.* Quilling, 136 Wis. 481, 117 N. W. 1007; Hill *v.* Chipman, 59 Wis. 211, 18 N. W. 160.

Void judgment.— Where the record of a judgment on its face shows the same to be void, a party claiming under the judgment is not prejudiced, nor are his rights impaired, by the admission of parol evidence attacking the judgment. Knopf *v.* Morel, 111 Ind. 570, 13 N. E. 51; State *v.* Martin, 3 Ind. App. 20, 29 N. E. 164.

Libelous article.— Permitting a witness, in a libel suit, to testify as to what he understood the alleged libelous article to mean is harmless error, where no other construction of the article was possible. Jacksonville Journal Co. *v.* Beymer, 42 Ill. App. 443.

Consideration.— The admission of evidence of the actual consideration of the contract sued on is unprejudicial error, where the contract sufficiently expresses the consideration on its face. Howard *v.* Holbrook, 9 Bosw. (N. Y.) 237, 23 How. Pr. 64. So also, it is error without injury to receive evidence showing a consideration for a deed, as a deed implies a consideration, in the absence of evidence to the contrary. Brockway *v.* Harrington, 82 Iowa 23, 47 N. W. 1013.

Usage.—Where an express contract establishes a liability the reception of evidence of usage to show the same liability is harmless error. Emmons *v.* Lord, 18 Me. 351. See also Mitau *v.* Roddan, 149 Cal. 1, 84 Pac. 145, 6 L. R. A. N. S. 275. Likewise, it has been held that, where the jury construed a contract of sale of timber as the court should have done, by considering its terms alone, the error in admitting proof of the custom of the trade as to when title passes was not prejudicial. St. Louis, etc., R. Co. *v.* Wynne Hoop, etc., Co., 81 Ark. 373, 99 S. W. 375.

In a scire facias proceeding, the admission of oral evidence, merely corroborative of facts sufficiently proved by production of the appropriate record and files, which establish all the essential recitals in the writ, is not ground for reversal of the judgment. Hunt *v.* U. S., 61 Fed. 795, 10 C. C. A. 74.

93. Skinner *v.* Skinner, 77 Mo. 148; Christal *v.* Kelly, 88 N. Y. 285; Farquhar *v.* McAlevy, 142 Pa. St. 233, 21 Atl. 811, 24 Am. St. Rep. 497; Pinckney *v.* Young, (Tex. Civ. App. 1908) 107 S. W. 622. See also Mandell *v.* Fulcher, 86 Ga. 166, 12 S. E. 469.

94. *Alabama.*— Georgia Cent. R. Co. *v.* Martin, 138 Ala. 531, 36 So. 426.

Arkansas.— Rosewater *v.* Schwab Clothing Co., 58 Ark. 446, 25 S. W. 73.

California.— Jones *v.* Tallant, 90 Cal. 386, 27 Pac. 305; Nemo *v.* Farrington, 7 Cal. App. 443, 94 Pac. 874, 877.

Colorado.— Ft. Collins Dev. R. Co. *v.* France, 41 Colo. 512, 92 Pac. 953.

Illinois.— Bearss *v.* Ford, 108 Ill. 16; Williamson *v.* Ohnemus, 67 Ill. App. 341.

Iowa.— Bixby *v.* Carskaddon, 63 Iowa 164, 18 N. W. 875; Des Moines *v.* Casady, 21 Iowa 570; Davenport *v.* Cummings, 15 Iowa 219.

Kansas.— McCormick *v.* Roberts, 36 Kan. 552, 13 Pac. 827.

Kentucky.— Miller *v.* Shackleford, 4 Dana 264; Covington St. R. Co. *v.* Covington, 4 Ky. L. Rep. 833.

Maine.— Harmon *v.* Wright, 65 Me. 516; Fogg *v.* Babcock, 41 Me. 347.

Maryland.— Baltimore, etc., R. Co. *v.* Cain, 81 Md. 87, 31 Atl. 801, 28 L. R. A. 688.

Massachusetts.— Priest *v.* Groton, 103 Mass. 530; Potter *v.* Tyler, 2 Metc. 58; Jones *v.* Fales, 5 Mass. 101.

Michigan.— Lothrop *v.* Southworth, 5 Mich. 436.

New Jersey.— Lyons *v.* Davis, 30 N. J. L. 301.

New York.— Dart *v.* Laimbeer, 107 N. Y. 664, 14 N. E. 291; McCormick *v.* United L., etc., Ins. Assoc., 79 Hun 340, 29 N. Y. Suppl. 364; Raven *v.* Smith, 78 Hun 269, 28 N. Y. Suppl. 909; Donahue *v.* Wippert, 7 Misc. 506,

introduced without objection.[95] This rule has been applied to error in the admission of hearsay evidence,[96] depositions,[97] improperly certified records or other documents,[98] and conclusions of a witness.[99] Similarly, it has been decided that error in admitting secondary evidence of the contents of a writing is not prejudicial where the writing is thereafter read in evidence,[1] or is shown to be

28 N. Y. Suppl. 495; Norris *v.* Badger, 6 Cow. 449; Miller *v.* Starks, 13 Johns. 517.

Pennsylvania.—Wollenweber *v.* Ketterlinus, 17 Pa. St. 389; Hart *v.* Gregg, 10 Watts 185, 36 Am. Dec. 166.

Texas.— Ballard *v.* Carmichael, 83 Tex. 355, 18 S. W. 734; Glover *v.* Thomas, 75 Tex. 506, 12 S. W. 684; Portis *v.* Ennis, 27 Tex. 574; Chicago, etc., R. Co. *v.* Hiltibrand, 44 Tex. Civ. App. 614, 99 S. W. 707; Wheeler *v.* Belleville First Nat. Bank, (Civ. App. 1897) 41 S. W. 376; Gulf, etc., R. Co. *v.* Jagoe, (Civ. App. 1895) 32 S. W. 717; Slocum *v.* Putnam, (Civ. App. 1894) 25 S. W. 52.

Virginia.— Faulcon *v.* Harriss, 2 Hen. & M. 550.

Washington.— Johnson *v.* Northport Smelting, etc., Co., 50 Wash. 567, 97 Pac. 746.

Wisconsin.— Reed *v.* Madison, 85 Wis. 667, 56 N. W. 182.

95. Mahler *v.* Beishline, 46 Colo. 603, 105 Pac. 874; Iowa Homestead Co. *v.* Duncombe, 51 Iowa 525, 1 N. W. 725; Ludins *v.* Metropolitan L. Ins. Co., 117 N. Y. Suppl. 156; Waters-Pierce Oil Co. *v.* Snell, 47 Tex. Civ. App. 413, 106 S. W. 170. *Contra*, Merchants L. & T. Co. *v.* Boucher, 115 Ill. App. 101, holding that the mere fact that, after the erroneous admission of evidence received over the objection and exception of the complaining party, like evidence is received without any objection or exception, will not cure the original error.

Any error in permitting a witness to answer, over objection, a leading question, is cured by his subsequent testimony to the same effect in answer to questions not objected to. Hammond *v.* Decker, 46 Tex. Civ. App. 232, 102 S. W. 453.

96. *Colorado.*— Baldwin Coal Co. *v.* Davis, 15 Colo. App. 371, 62 Pac. 1041.

Illinois.— Protection L. Ins. Co. *v.* Foote, 79 Ill. 361.

Michigan.—Williams *v.* Towl, 65 Mich. 204, 31 N. W. 835.

Minnesota.— Milton *v.* Biesanz Stone Co., 99 Minn. 439, 109 N. W. 999.

New York.— Tooker *v.* Gormer, 2 Hilt. 71.

Texas.— Berry *v.* Joiner, 45 Tex. Civ. App. 461, 101 S. W. 289.

United States.— Smith *v.* Sun Printing, etc., Assoc., 55 Fed. 240, 5 C. C. A. 91.

But see Baltimore, etc., R. Co. *v.* State, 75 Md. 526, 24 Atl. 14.

97. See cases cited *infra*, this note.

Illustrations.—Any error in admitting a deposition in evidence is harmless, where another which is unobjectionable, and substantially a duplicate of the first, is introduced (McPhelemy *v.* McPhelemy, 78 Conn. 180, 61 Atl. 477; Looper *v.* Bell, 1 Head (Tenn.) 373), or where the matter deposed to is shown by the deponent, on being called as a witness (St. Louis Nat. Bank *v.* Flanagan, 129 Mo. 178, 31 S. W. 773; Bridwell *v.* Swank, 84 Mo. 455; Texas, etc., R. Co. *v.* Watson, 190 U. S. 287, 23 S. Ct. 681, 47 L. ed. 1057 [*affirming* 112 Fed. 402, 50 C. C. A. 230]), or by other witnesses (Farmers', etc., Bank *v.* Zook, 133 Mo. App. 603, 113 S. W. 678).

98. Fish *v.* Smith, 73 Conn. 377, 47 Atl. 711, 84 Am. St. Rep. 161; Vermillion County *v.* Hammond, 83 Ind. 453; Rich *v.* Lancaster R. Co., 114 Mass. 514 (holding, however, that when an exception is well taken to the admission in evidence of a copy of a record because improperly certified, the error is not cured by producing a copy properly certified at the argument of the exceptions, for the whole case is not then before the court, but only the question of law); McDugald *v.* Smith, 33 N. C. 576.

99. Mucci *v.* Houghton, 89 Iowa 608, 57 N. W. 305; Churchill *v.* Mace, 148 Mich. 456, 111 N. W. 1034.

1. *Alabama.*— Tutwiler Coal, etc., Co. *v.* Wheeler, 149 Ala. 354, 43 So. 15; Dorough *v.* Harrington, 148 Ala. 305, 42 So. 557; Union Foundry, etc., Co. *v.* Langford, 145 Ala. 667, 39 So. 765; Moore *v.* Barber Asphalt Paving Co., 118 Ala. 563, 23 So. 798; Steiner *v.* Tranum, 98 Ala. 315, 13 So. 365.

California.— Heinlen *v.* Heilbron, 97 Cal. 101, 31 Pac. 838.

Georgia.— Stewart *v.* De Loach, 86 Ga. 729, 12 S. E. 1067; Berry *v.* Cooper, 33 Ga. Suppl. 155.

Kansas.— McGarry *v.* Averill, 50 Kan. 362, 31 Pac. 1082, 34 Am. St. Rep. 120, holding that in an action to enforce a mechanic's lien, when plaintiff, instead of introducing his books, testifies to the account, although some of the sales were made by his employee, the error is harmless where the books are subsequently brought into court, although not formally introduced in evidence, and found to correspond with plaintiff's testimony.

Maryland.— Mt. Vernon Brewing Co. *v.* Teschner, 108 Md. 158, 69 Atl. 702, 16 L. R. A. N. S. 758.

Michigan.— Gould *v.* Young, 143 Mich. 572, 107 N. W. 281; McDonald *v.* Smith, 139 Mich. 211, 102 N. W. 668; Emlaw *v.* Travelers' Ins. Co., 108 Mich. 554, 66 N. W. 469.

Minnesota.— Cooper *v.* Breckenridge, 11 Minn. 341.

Mississippi.— Pass Canning Co. *v.* Torsch, 87 Miss. 694, 40 So. 228.

Missouri.— Bethune *v.* Cleveland, etc., R. Co., 139 Mo. 574, 41 S. W. 213.

New York.— Braun *v.* Hothan, 87 N. Y. App. Div. 611, 84 N. Y. Suppl. 8.

North Dakota.— Stewart *v.* Gregory, 9 N. D. 618, 84 N. W. 553.

Pennsylvania.— Messner *v.* Lancaster

lost.[2] Conversely, the erroneous admission of written evidence may be cured by proper oral testimony on the same point.[3] But in order to effect a cure in such cases the subsequent evidence must be substantially the same as that improperly admitted.[4]

(2) Evidence Curing Defects and Supplying Omissions. The admission of incompetent testimony where subsequently explained by the witness so as to work no prejudice will not constitute reversible error.[5]

(B) *Evidence Admitted in Favor of Adverse Party.* Error in the admission of evidence offered by one party is cured where practically the same evidence is afterward introduced by the adverse party,[6] or elicited on cross-examination.[7] Similarly defects or omissions in evidence introduced by one party may be cured or supplied by evidence subsequently introduced by his adversary,[8] or brought out on cross-examination.[9] But an error in admitting evidence is not cured by the objecting party offering evidence in rebuttal thereof.[10]

County, 23 Pa. St. 291; Mulhearn *v.* Roach, 24 Pa. Super. Ct. 483.

South Carolina.— Murdock *v.* Courtenay Mfg. Co., 52 S. C. 428, 29 S. E. 856, 30 S. E. 142.

Texas.— McAlpin *v.* Ziller, 17 Tex. 508; St. Louis Southwestern R. Co. *v.* Marshall, (Civ. App. 1909) 120 S. W. 512; Gulf, etc., R. Co. *v.* Frost, (Civ. App. 1896) 34 S. W. 167, holding that the error is not cured by a subsequent offer to put the writing in evidence, where it is excluded because not properly verified.

Washington.—Cummings *v.* Weir, 37 Wash. 42, 79 Pac. 487.

2. Goldstein *v.* Lathrop-Hatten Lumber Co., 164 Ala. 505, 51 So. 150; Leffler *v.* Watson, 13 Ind. App. 176, 40 N. E. 1107, 41 N. E. 467; Huff *v.* Curtis, 65 Me. 287.

3. McDonald *v.* McCrabb, 47 Tex. Civ. App. 259, 105 S. W. 238.

4. Arnold *v.* Rockland Lake Trap Rock Co., 123 N. Y. App. Div. 659, 108 N. Y. Suppl. 296.

5. *Iowa.*— Hetland *v.* Bilstad, 140 Iowa 411, 118 N. W. 422; Hilliker *v.* Allen, 128 Iowa 607, 105 N. W. 120; Richardson *v.* Douglas, 100 Iowa 239, 69 N. W. 530.

New York.— Markgraf *v.* Klinge, 36 Misc. 167, 73 N. Y. Suppl. 155 [*affirming* 35 Misc. 196, 71 N. Y. Suppl. 590].

Ohio.— Michigan Cent. R. Co. *v.* Waterworth, 21 Ohio Cir. Ct. 495, 11 Ohio Cir. Dec. 621.

Wisconsin.— Gregory *v.* Rosenkrans, 78 Wis. 451, 47 N. W. 832.

United States.— Atlantic Ave. R. Co. *v.* Van Dyke, 72 Fed. 458, 18 C. C. A. 632.

6. *Connecticut.*— Darrigan *v.* New York, etc., R. Co. *v.* 52 Conn. 285, 52 Am. Rep. 590.

Iowa.— Rea *v.* Jaffray, 82 Iowa 231, 48 N. W. 78.

Kansas.— Kansas Mill-Owners', etc., Mut. F. Ins. Co. *v.* Central Nat. Bank, 60 Kan. 630, 57 Pac. 524; Reed *v.* New, 35 Kan. 727, 12 Pac. 139.

Kentucky.— Foor *v.* Coombs, 15 Ky. L. Rep. 845.

Louisiana.— Brown *v.* Penn, McGloin 265.

Minnesota.— Anderson *v.* St. Croix Lumber Co., 47 Minn. 24, 49 N. W. 407.

New Hampshire.— Morrill *v.* Richey, 18 N. H. 295.

New York.— Machin *v.* Lamar F. Ins. Co., 90 N. Y. 689; Vallance *v.* King, 3 Barb. 548; Chase *v.* Nichols, 9 N. Y. Suppl. 878; Hearsey *v.* Pruyn, 7 Johns. 179.

Tennessee.— Neal *v.* Peden, 1 Head 546.

The error in admitting an improperly executed deed in evidence is cured when the adverse party proves the facts sought to be proved by the deed. Gale *v.* Shillock, 4 Dak. 182, 29 N. W. 661.

7. Diamond Rubber Co. *v.* Harryman, 41 Colo. 415, 92 Pac. 922, 15 L. R. A. N. S. 775; Covington *v.* Sloan, (Tex. Civ. App. 1910) 124 S. W. 690; Missouri, etc., R. Co. *v.* Pettit, (Tex. Civ. App. 1909) 117 S. W. 894.

8. Ætna Indemnity Co. *v.* Ryan, 53 Misc. (N. Y.) 614, 103 N. Y. Suppl. 756; Houston, etc., R. Co. *v.* McHale, 47 Tex. Civ. App. 360, 105 S. W. 1149; Smith *v.* Dow, 43 Wash. 407, 86 Pac. 555.

Any error in allowing plaintiff to introduce only selected parts of a deposition is cured by defendant placing the entire deposition in evidence. Farmers', etc., Bank *v.* Wood, 143 Iowa 635, 118 N. W. 282, 120 N. W. 625. So error in permitting plaintiff, over defendant's objection, to read the examination in chief of defendant's deposition, taken by plaintiff, without also reading the cross-examination, is cured where the residue of the deposition was read in evidence by defendant at a later stage of the trial. Scott *v.* Indianapolis Wagon Works, 48 Ind. 75.

9. John Deere Plow Co. *v.* Sullivan, 158 Mo. 440, 59 S. W. 1005; Shaw *v.* New York El. R. Co., 187 N. Y. 186, 79 N. E. 984 [*affirming* 110 N. Y. App. Div. 892, 96 N. Y. Suppl. 1145]; Little *v.* Iron River, 102 Wis. 250, 78 N. W. 416.

If the statement of a witness amounts to a conclusion of law or fact or an argument to the jury, the error may be eradicated by such cross-examination as sifts out all the facts on which the conclusion is based; and if by taking the whole examination into consideration it is clear that the erroneous answer would not have influenced the verdict, it will not be held to be reversible error. John Deere Plow Co. *v.* Lancaster, 158 Mo. 440, 59 S. W. 1005.

10. Short *v.* Frink, 151 Cal. 83, 90 Pac. 200; Georgia R., etc., Co. *v.* Wallace, 122 Ga.

(c) *Evidence Rendering Incompetent Evidence Admissible* — (1) In General. The erroneous admission of evidence, which is at the time inadmissible, is cured by the subsequent introduction of evidence which renders it admissible.[11] Thus error in admitting evidence as part of the cause of action which can be relevant only in rebuttal is harmless where it afterward becomes relevant in rebuttal.[12] Similarly cross-examination on a fact not brought out on direct examination is harmless, where the fact is subsequently shown.[13] But the fact that evidence, incompetent for the purpose for which it was offered and admitted, subsequently becomes admissible for another purpose, as the case is developed, does not render the ruling harmless.[14]

(2) Supplying Necessary Preliminary Proof.[15] The order of proof is largely within the discretion of the court, and the admission of evidence without the requisite preliminary or connecting proof is not prejudicial error, where such proof is subsequently introduced,[16] or offered, and withdrawn only on the opposite

547, 50 S. E. 478; Rouch *v.* Zehring, 59 Pa. St. 74.

11. *Alabama.* — Shannon *v.* Simms, 146 Ala. 673, 40 So. 574; Belmont Coal, etc., Co. *v.* Smith, 74 Ala. 206; Montgomery, etc., R. Co. *v.* Edmonds, 41 Ala. 667; Bell *v.* Chambers, 38 Ala. 660; Scott *v.* State, 30 Ala. 503; King *v.* Pope, 28 Ala. 601.

Arkansas.— St. Louis, etc., R. Co. *v.* Deshong, 63 Ark. 443, 39 S. W. 260.

California.—Wise *v.* Collins, 121 Cal. 147, 53 Pac. 640.

Florida.— Hinote *v.* Brigman, 44 Fla. 589, 33 So. 303.

Georgia.— East Tenessee, etc., R. Co. *v.* Hesters, 90 Ga. 11, 15 S. E. 828.

Iowa.— Beem *v.* Farrell, (1906) 108 N. W. 1044; Leebrick *v.* Stahle, 68 Iowa 515, 27 N. W. 490.

Kentucky.— Rucker *v.* Hamilton, 3 Dana 36; Wilson *v.* Bibb, 1 Dana 7, 25 Am. Dec. 118.

Maryland.— Roberts *v.* Woven Wire Mattress Co., 46 Md. 374; Wyeth *v.* Walzl, 43 Md. 426.

Michigan.— Superior Drill Co. *v.* Carpenter, 150 Mich. 262, 114 N. W. 67.

Minnesota.—Madigan *v.* De Graff, 17 Minn. 52.

New Hampshire.— Eastman *v.* Amoskeag Mfg. Co., 44 N. H. 143, 82 Am. Dec. 201.

New York.—Neumeyer *v.* Hooker, 131 N. Y. App. Div. 592, 116 N. Y. Suppl. 204; Black *v.* Camden, etc., R., etc., Co., 45 Barb. 40.

Pennsylvania.— Laird *v.* Campbell, 100 Pa. St. 159; Hannay *v.* Stewart, 6 Watts 487; Carn *v.* Fillman, 10 Wkly. Notes Cas. 152.

South Dakota.— Miller *v.* McConnell, 23 S. D. 137, 120 N. W. 888.

Tennessee.— Mullins *v.* Lyles, 1 Swan 337.

Subsequent evidence introduced by objecting party.— Error in the admission of evidence is cured by the adverse party subsequently introducing evidence which removes the objection which originally rendered the evidence incompetent. Shaw *v.* Jones, 133 Ga. 446, 66 S. E. 240. Thus where an insurance policy is admitted without the application, the error is cured by the opposite party giving the application in evidence. Sun Fire Office *v.* Wich, 6 Colo. App. 103, 39 Pac. 587; Edington *v.* Mutual L. Ins. Co., 67 N. Y. 185; Lycoming Mut. Ins. Co. *v.* Sailer, 67 Pa. St. 108.

Error in admitting the declarations of an agent to bind the principal is cured where the agent is subsequently called by the principal and denies that such statements were made, the declarations then becoming admissible to impeach the agent. Roux *v.* Blodgett, etc., Lumber Co., 94 Mich. 607, 54 N. W. 492; Rounsavell *v.* Pease, 45 Wis. 506. And see Gano *v.* Chicago, etc., R. Co., 66 Wis. 1, 27 N. W. 628, 838.

12. Cashman *v.* Harrison, 90 Cal. 297, 27 Pac. 283; Nuckolls *v.* San Francisco College of Physicians, etc., 7 Cal. App. 233, 94 Pac. 81.

13. Williams *v.* Myer, 150 Cal. 714, 89 Pac. 972.

14. *In re* Boyes, 151 Cal. 143, 90 Pac. 454.

15. **Discretion of court as to admission of evidence without proof of facts making admissible** see *supra*, V, B, 1, a, (II).

16. *Alabama.*— Hart *v.* Sharpton, 124 Ala. 638, 27 So. 450; Savage *v.* Walshe, 26 Ala. 619.

Iowa.— Esterly *v.* Eppelsheimer, 73 Iowa 260, 34 N. W. 846.

Maryland.— Hays *v.* State, 40 Md. 633.

Michigan.—Johnson *v.* Detroit, etc., R. Co., 135 Mich. 353, 97 N. W. 760; Roberts *v.* Pepple, 55 Mich. 367, 21 N. W. 319.

New York.— Manson *v.* Metropolitan Surety Co., 128 N. Y. App. Div. 577, 112 N. Y. Suppl. 886; Homeyer *v.* New Jersey Sheep, etc., Co., 20 N. Y. Suppl. 814.

Pennsylvania.— Gaskell *v.* Morris, 7 Watts & S. 32.

South Dakota.— Hedlun *v.* Holy Terror Min. Co., 16 S. D. 261, 92 N. W. 31.

Texas.— Meyers *v.* Bloon, 20 Tex. Civ. App. 554, 50 S. W. 217.

Utah.— Pennington *v.* Redman Van, etc., Co., 34 Utah 223, 97 Pac. 115.

Washington.— Benson *v.* Hart, 10 Wash. 301, 38 Pac. 1041.

Wisconsin.— Komp *v.* State, 129 Wis. 20, 108 N. W. 46.

United States.— Swensen *v.* Bender, 114 Fed. 1, 51 C. C. A. 627.

Error in permitting witnesses to refer to a photograph of a locality, without preliminary proof of its identity, is cured by the production of such proof before such photo-

party's objection that it is immaterial.[17] This rule is applied to the admission in evidence of the acts[18] or declarations[19] of an agent, without proof of agency; of a written instrument,[20] or of the contents of a lost instrument,[21] without proof of execution; of the contents of an instrument without proof of its loss or destruction;[22] of expert evidence without proof of competency;[23] of a will without sufficient evidence to establish the identity of the testator;[24] of evidence dependent on a conspiracy, without proof of a conspiracy;[25] of a note of a corporation without proof of authority to issue same;[26] of court records without proper authentication;[27] of a plat without proof of its correctness;[28] or of handwriting without proof of genuineness.[29]

(II) *By Answer to Improper Question.* An improper question which because of the answer results in no injury to the party objecting is not ground for reversal.[30] This rule is particularly applicable where the answer is in the

graph was formally introduced in evidence. Beardslee *v.* Columbia Tp., 188 Pa. St. 496, 41 Atl. 617, 61 Am. St. Rep. 883.

Error in reading in evidence items from plaintiffs' ledger, before it was properly proved, is harmless, where the ledger is afterward proved and the items properly admitted in evidence. Corkran *v.* Taylor, 77 N. J. L. 195, 71 Atl. 124.

Error in permitting a witness to state his recollection of the evidence of a witness, since deceased, given at a former trial, without sufficient foundation therefor, is harmless, where the witness made statements which completed the foundation. Twohig *v.* Leamer, 48 Nebr. 247, 67 N. W. 152.

17. Ridgeway *v.* Herbert, 150 Mo. 606, 51 S. W. 1040, 73 Am. St. Rep. 464.

18. Brady *v.* Ranch Min. Co., 7 Cal. App. 182, 94 Pac. 85; Holmes *v.* Kortlander, 64 Mich. 591, 31 N. W. 532; Allen *v.* Bunting, 18 N. J. L. 299.

19. La Fayette R. Co. *v.* Tucker, 124 Ala. 514, 27 So. 447; Rowell *v.* Klein, 44 Ind. 290, 15 Am. Rep. 235; Bruen *v.* Grahn, 5 Ky. L. Rep. 312; Rasmussen *v.* Reedy, 14 S. D. 15, 84 N. W. 205.

20. *Alabama.* — Jackson *v.* Tribble, 156 Ala. 480, 47 So. 310; Espalla *v.* Wilson, 86 Ala. 487, 5 So. 867.

Colorado.— Lothrop *v.* Roberts, 16 Colo. 250, 27 Pac. 698.

Michigan.— Lamb *v.* Lippincott, 115 Mich. 611, 73 N. W. 887.

New York.— Byrnes *v.* Byrnes, 102 N. Y. 4, 5 N. E. 776.

Wisconsin.—Woodruff *v.* King, 47 Wis. 261, 2 N. W. 452.

United States.— Anthony *v.* Woonsocket Sav. Inst., 71 Fed. 97, 17 C. C. A. 622.

21. Ely *v.* Cavanaugh, 82 Conn. 681, 74 Atl. 1122; Ray *v.* Camp, 110 Ga. 818, 36 S. E. 242.

22. Johnson, etc., Dry Goods Co. *v.* Cornell, 4 Okla. 412, 46 Pac. 860; Maxwell *v.* Bolles, 28 Oreg. 1, 41 Pac. 661; Pidgeon *v.* Williams, 21 Gratt. (Va.) 251.

23. Farmers', etc., Nat. Bank *v.* Woodell, 38 Oreg. 294, 61 Pac. 837, 65 Pac. 520; Gilmore *v.* McBride, 156 Fed. 464, 84 C. C. A. 274.

24. Riddle *v.* Gibson, 29 App. Cas. (D. C.) 237.

25. Daniels *v.* McGinnis, 97 Ind. 549; Benjamin *v.* McElwaine-Richards Co., 10 Ind. App. 76, 37 N. E. 362.

26. St. Louis, etc., R. Co. *v.* Tiernan, 37 Kan. 606, 15 Pac. 544.

27. Carp *v.* Queens Ins. Co., 203 Mo. 295, 101 S. W. 78.

28. Greenleaf *v.* Bartlett, 146 N. C. 495, 60 S. E. 419, 14 L. R. A. N. S. 660.

29. *In re* Marchall, 126 Cal. 95, 58 Pac. 449.

30. *California.*— Redfield *v.* Oakland Consol. St. R. Co., 112 Cal. 220, 43 Pac. 1117.

Illinois.—Jacksonville, etc., R. Co. *v.* Southworth, 135 Ill. 250, 25 N. E. 1093.

Indiana.— Aurora *v.* West, 22 Ind. 88, 85 Am. Dec. 413.

Iowa.— Vannest *v.* Murphy, 135 Iowa 123, 112 N. W. 236; Phillips *v.* Hazen, 132 Iowa 628, 109 N. W. 1096; Martin *v.* Algona, 40 Iowa 390.

Maine.— Hovey *v.* Hobson, 55 Me. 256.

Massachusetts.— Bonnemort *v.* Gill, 165 Mass. 493, 43 N. E. 299.

Minnesota.—Yale *v.* Edgerton, 14 Minn. 194.

New Hampshire.— Flanders *v.* Davis, 19 N. H. 139.

New York.— Ludius *v.* Metropolitan L. Ins. Co., 117 N. Y. Suppl. 156.

North Carolina.—McDougald *v.* Coward, 95 N. C. 368.

Pennsylvania.— Scott *v.* Baker, 37 Pa. St. 330; Dean *v.* Herrold, 37 Pa. St. 150.

Rhode Island.—Vaughn *v.* Clarkson, (1896) 34 Atl. 989.

Wisconsin.— Kalbus *v.* Abbot, 77 Wis. 621, 46 N. W. 810.

Objections to evidence are to the answer and not to the question, and where the answer is not calculated to prejudice the objecting party, it becomes immaterial. McDougald *v.* Coward, 95 N. C. 368. It has accordingly been held that there cannot be a reversal of a judgment, merely on the ground that improper questions are propounded to witnesses, unless it is shown that in response to them improper evidence was elicited and admitted. Callan *v.* McDaniel, 72 Ala. 96; Clement *v.* Cureton, 36 Ala. 120; Russel *v.* Martin, 3 Ill. 492; Warson *v.* McElroy, 33 Mo. App. 553; Randolph *v.* Woodstock, 35 Vt. 291.

negative,[31] is not responsive,[32] is beneficial to the objecting party,[33] or where it discloses the ignorance of the witness on the subject.[34] And the same is true where the witness fails or refuses to answer such question.[35]

(III) *By Verdict or Findings* — (A) *In General.* Error in the admission of evidence which is shown by the determination of the action to have had no effect thereon is harmless.[36] Thus error in admitting evidence on an issue as to

31. *Arkansas.* — Bodcaw Lumber Co. *v.* Ford, 82 Ark. 555, 102 S. W. 896.

California.—Huyck *v.* Rennie, 151 Cal. 411, 90 Pac. 929.

Indiana.—Adams *v.* Main, 3 Ind. App. 232, 29 N. E. 792, 50 Am. St. Rep. 266.

Kansas.— Minx *v.* Mitchell, 42 Kan. 688, 22 Pac. 709.

Michigan.— Bartlett *v.* Jenkins, 150 Mich. 682, 114 N. W. 679; Mears *v.* Cornwall, 73 Mich. 78, 40 N. W. 931; Grand Rapids Booming Co. *v.* Jarvis, 30 Mich. 308.

Washington.— Collins *v.* Huffman, 48 Wash. 184, 93 Pac. 220.

Evidence as to character of witness.—Judgment should not be reversed for error in allowing the question, what was the character for truth of the witness under question? to be put to an impeaching witness before he has been asked the preliminary question whether he knows his character, if his answer to the question put is that he does not know such witness' character. Foulk *v.* Eckert, 61 Ill. 318.

32. Payne *v.* Neuval, 155 Cal. 46, 99 Pac. 476; Hatfield *v.* Chicago, etc., R. Co., 61 Iowa 434, 16 N. W. 336; Peck *v.* Goodberlett, 109 N. Y. 180, 16 N. E. 350; Von Kamen *v.* Roes, 20 N. Y. Suppl. 548.

33. Hill *v.* Robinson, 23 Mich. 24; Dreeland *v.* Pascoe, 39 Mont. 290, 102 Pac. 331. See also *In re* Diggins, 68 Vt. 198, 34 Atl. 696.

34. Asbach *v.* Chicago, etc., R. Co., 86 Iowa 101, 53 N. W. 90; Hill *v.* Robinson, 23 Mich. 24; Mason *v.* Apalache Mills, 81 S. C. 554, 62 S. E. 399, 871.

For example, where a witness in reply to a question, answers "I don't know" (Scott *v.* Baker, 37 Pa. St. 330; Dean *v.* Herrold, 37 Pa. St. 150), "I can't say" (Great Barrington *v.* Austin, 8 Gray (Mass.) 444; Peck *v.* Snyder, 13 Mich. 21; Dreeland *v.* Pascoe, 39 Mont. 290, 102 Pac. 331; Wallace *v.* Van Wagoner, 20 N. J. L. 175; Hoos *v.* Hempstead, 84 Hun (N. Y.) 170, 32 N. Y. Suppl. 556; Haupt *v.* Haupt, (Pa. 1888) 15 Atl. 700), "I don't remember" (Harker *v.* Woolery, 10 Wash. 484, 39 Pac. 100), or "I have heard none" (Blackwell's Durham Tobacco Co. *v.* McElwee, 100 N. C. 150, 5 S. E. 907), it is immaterial whether the question was properly or improperly allowed.

Where the answer is so indefinite and uncertain that the objecting party could not have been prejudiced by it, the fact that the question was objectionable is not reversible error. Kaufman *v.* Cooper, 38 Mont. 6, 98 Pac. 504, 1135; Bullington *v.* Newport News, etc., Co., 32 W. Va. 436, 9 S. E. 876.

35. *Alabama.*—Alabama, etc., R. Co. *v.* Frazier, 93 Ala. 45, 9 So. 303, 30 Am. St. Rep. 28; Conoly *v.* Gayle, 61 Ala. 116.

Indiana.— Louisville, etc., R. Co. *v.* Miller, 141 Ind. 533, 37 N. E. 343.

Iowa.— Kenosha Stove Co. *v.* Shedd, 82 Iowa 540, 48 N. W. 933; State *v.* Geddis, 42 Iowa 264; Campbell *v.* Chamberlain, 10 Iowa 337.

Kansas.— Kansas Pac. R. Co. *v.* Pointer, 9 Kan. 620; Atchison *v.* King, 9 Kan. 550; Wyandotte *v.* Noble, 8 Kan. 444; Missouri River, etc., R. Co. *v.* Owen, 8 Kan. 409.

Michigan.— Church *v.* Davis, 93 Mich. 477, 53 N. W. 732.

Missouri.— Gorham *v.* Kansas City, etc., R. Co., 113 Mo. 408, 20 S. W. 1060.

New York.— Flaherty *v.* Miner, 15 Daly 173, 4 N. Y. Suppl. 618 [*affirmed* in 123 N. Y. 382, 25 N. E. 418]; Anderson *v.* Rowland, 14 Misc. 401, 35 N. Y. Suppl. 1048.

Pennsylvania.— Lewis *v.* Baker, 5 Rawle 114; Allen *v.* Rostain, 11 Serg. & R. 362.

Vermont.— Maxham *v.* Place, 46 Vt. 434.

36. *Alabama.*— Hutto *v.* Stough, 157 Ala. 566, 47 So. 1031; Commercial Bank *v.* Hurt, 99 Ala. 130, 12 So. 568, 42 Am. St. Rep. 38, 19 L. R. A. 701.

California.— Osment *v.* McElrath, 68 Cal. 466, 9 Pac. 731, 58 Am. Rep. 17; Moon *v.* Rollins, 36 Cal. 333, 95 Am. Dec. 181; Cox *v.* Odell, 1 Cal. App. 682, 82 Pac. 1086.

Georgia.— Churchill *v.* Corker, 25 Ga. 479.

Idaho.— Carscallen *v.* Coeur D'Alene, etc., Transp. Co., 15 Ida. 444, 98 Pac. 622.

Illinois.— Goddard *v.* Enzler, 222 Ill. 462, 78 N. E. 805 [*affirming* 123 Ill. App. 108].

Indiana.— Kahn *v.* Gavit, 23 Ind. App. 274, 55 N. E. 268.

Iowa.— Grey *v.* Callan, 133 Iowa 500, 110 N. W. 909; Union Bldg., etc., Assoc. *v.* Soderquist, 115 Iowa 695, 87 N. W. 433; Belair *v.* Chicago, etc., R. Co., 43 Iowa 662.

Kansas.— Southern Kansas R. Co. *v.* Walsh, 45 Kan. 653, 26 Pac. 45; Atchison, etc., R. Co. *v.* Sly, 41 Kan. 729, 21 Pac. 790.

Kentucky.—Cleveland, etc., R. Co. *v.* Woodford, 7 Ky. L. Rep. 101.

Louisiana.— Lazare *v.* Peytavin, 12 Mart. 684.

Massachusetts.— Harrington *v.* Harrington, 154 Mass. 517, 28 N. E. 903.

Michigan.—Finan *v.* Babcock, 58 Mich. 301, 25 N. W. 294; Drysdall *v.* Smith, 44 Mich. 119, 6 N. W. 211.

Montana.— Gassert *v.* Black, 18 Mont. 35, 44 Pac. 401.

Nebraska.— Lincoln Vitrified Paving, etc., Co. *v.* Buckner, 39 Nebr. 83, 57 N. W. 749.

New Hampshire.— Swamscot Mach. Co. *v.* Walker, 22 N. H. 457, 55 Am. Dec. 172.

New York.— Pfeiffer *v.* Campbell, 111 N. Y. 631, 19 N. E. 498; Logeling *v.* New York El. R. Co., 5 N. Y. App. Div. 198, 38 N. Y. Suppl. 1112; White *v.* Davis, 17 N. Y. Suppl. 548.

Pennsylvania.— Countryman's Estate, 151

which no finding is made [37] or relief granted,[38] which is found in favor of the complaining party,[39] or which is rendered immaterial by a verdict or finding on another issue [40] is harmless.

Pa. St. 577, 25 Atl. 146; Conrad *v.* Richter, 13 Pa. Co. Ct. 478.

South Carolina.— Riggs *v.* Wilson, 30 S. C. 172, 8 S. E. 848.

Texas.— Downing *v.* Diaz, 80 Tex. 436, 16 S. W. 49; McClelland *v.* Fallon, 74 Tex. 236, 12 S. W. 60; Floyd *v.* Rice, 28 Tex. 341.

Utah.— Garr *v.* Cranney, 25 Utah 193, 70 Pac. 853; Western Loan, etc., Co. *v.* Desky, 24 Utah 347, 68 Pac. 141.

Wisconsin.— Robinson *v.* Waupaca, 77 Wis. 544, 46 N. W. 809; Abbot *v.* Gore, 74 Wis. 509, 43 N. W. 365; Annas *v.* Milwaukee, etc., R. Co., 67 Wis. 46, 30 N. W. 282, 58 Am. Rep. 848.

United States.— Reed *v.* Stapp, 52 Fed. 641, 3 C. C. A. 244.

37. California Bank *v.* Taaffe, 76 Cal. 626, 18 Pac. 781; Indiana Union Traction Co. *v.* Bick, 40 Ind. App. 451, 81 N. E. 617; Jamison *v.* Dooley, 34 Tex. Civ. App. 428, 79 S. W. 91 [*affirmed* in 98 Tex. 206, 82 S. W. 780].

38. McDowell *v.* McDowell, 114 Ill. 255, 2 N. E. 56.

Improper introduction of a note in evidence is harmless where no recovery is allowed on the note. McDonald *v.* Smith, 139 Mich. 211, 102 N. W. 668.

39. *Alabama.*— Gadsden Distilling Co. *v.* Kennedy Stave, etc., Co., (1905) 39 So. 622; Baird Lumber Co. *v.* Devlin, 124 Ala. 245, 27 So. 425.

Arizona.— Marks *v.* Bradshaw Mountain R. Co., 8 Ariz. 379, 76 Pac. 470.

California.— Rochat *v.* Gee, 137 Cal. 497, 70 Pac. 478; Gillespie *v.* Lake, 85 Cal. 402, 24 Pac. 891; Flynn *v.* Seale, 2 Cal. App. 665, 84 Pac. 263.

Connecticut.— Head *v.* Selleck, 76 Conn. 706, 57 Atl. 281; Palmer *v.* Hartford Dredging Co., 73 Conn. 182, 47 Atl. 125; Kaspar *v.* Dawson, 71 Conn. 405, 70 Pac. 78.

Indiana.— Fudge *v.* Marquell, 164 Ind. 447, 72 N. E. 565, 73 N. E. 895; Robbins *v.* Masteller, 147 Ind. 122, 46 N. E. 330; Miller *v.* Louisville, etc., R. Co., 128 Ind. 97, 27 N. E. 339, 25 Am. St. Rep. 416; Peden *v.* Scott, 35 Ind. App. 370, 73 N. E. 1099.

Iowa.— Steele *v.* Andrews, 144 Iowa 360, 121 N. W. 17; Cullison *v.* Lindsay, 108 Iowa 124, 78 N. W. 847; White *v.* Byam, 96 Iowa 166, 64 N. W. 765.

Massachusetts.—South Scituate *v.* Scituate, 155 Mass. 428, 29 N. E. 639.

Michigan.— McDonald *v.* Smith, 139 Mich. 211, 102 N. W. 668; Denton *v.* Smith, 61 Mich. 431, 28 N. W. 160.

Minnesota.—Torinus *v.* Matthews, 21 Minn. 99.

Missouri.— Smith *v.* Kansas City, 125 Mo. App. 150, 101 S. W. 1118.

Nebraska.— Trester *v.* Missouri Pac. R. Co., 33 Nebr. 171, 49 N. W. 1110.

New Hampshire.— Boston, etc., R. Co. *v.* Berry, 73 N. H. 603, 60 Atl. 686.

New York.— Marcly *v.* Shults, 29 N. Y. 346; Onondaga County Mut. Ins. Co. *v.* Minard, 2 N. Y. 98; Downey *v.* Owen, 98 N. Y. App. Div. 411, 90 N. Y. Suppl. 280; Winne *v.* Hills, 91 Hun 89, 36 N. Y. Suppl. 683.

North Carolina.—Vickers *v.* Leigh, 104 N. C. 248, 10 S. E. 308; Graves *v.* Trueblood, 96 N. C. 495, 1 S. E. 918; Young *v.* Harriston, 14 N. C. 55.

Ohio.— Kuhl *v.* Reichert, 25 Ohio Cir. Ct. 693.

Rhode Island.— Schnable *v.* Providence Public Market, 24 R. I. 477, 53 Atl. 634; Covell *v.* Carpenter, 24 R. I. 1, 51 Atl. 425.

Texas.— Scott *v.* Farmers', etc., Bank, 97 Tex. 31, 75 S. W. 7, 104 Am. St. Rep. 835 [*reversing* (Civ. App. 1902) 66 S. W. 485]; Scaling *v.* Wichita Falls First Nat. Bank, 39 Tex. Civ. App. 154, 87 S. W. 715; Eastham *v.* Patty, 37 Tex. Civ. App. 336, 83 S. W. 885.

Wisconsin.— Lehman *v.* Chicago, etc., R. Co., 140 Wis. 497, 122 N. W. 1059; Milwaukee Rice Mach. Co. *v.* Hamacek, 115 Wis. 422, 91 N. W. 1010; Warder Co. *v.* Angell, 99 Wis. 298, 74 N. W. 798; Alkan *v.* New Hampshire Ins. Co., 53 Wis. 136, 10 N. W. 91.

United States.— Chandler *v.* Von Roeder, 24 How. 224, 16 L. ed. 633; U. S. *v.* Coughanour, 133 Fed. 224, 66 C. C. A. 278.

40. *California.*— Hunter *v.* Milam, 133 Cal. 601, 65 Pac. 1079; Hand *v.* Scodeletti, 128 Cal. 674, 61 Pac. 373; Clavey *v.* Lord, 87 Cal. 413, 25 Pac. 493; Keller *v.* McGilliard, 5 Cal. App. 395, 90 Pac. 483.

Connecticut.— Merwin *v.* Backer, 80 Conn. 338, 68 Atl. 373; Loomis *v.* Connecticut R., etc., Co., 78 Conn. 156, 61 Atl. 539; Driscoll *v.* Ansonia, 73 Conn. 743, 47 Atl. 718.

Georgia.— Marchman *v.* City Electric R. Co., 118 Ga. 219, 44 S. E. 992; Wright *v.* Patterson, 116 Ga. 784, 43 S. E. 49; Globe Refining Co. *v.* Ft. Gaines Oil, etc., Co., 112 Ga. 366, 37 S. E. 379.

Illinois.— Jacobson *v.* Gunzburg, 150 Ill. 135, 37 N. E. 229.

Indiana.— Turpie *v.* Lowe, 158 Ind. 314, 62 N. E. 484, 92 Am. St. Rep. 310; Crane *v.* Kimmer, 77 Ind. 215; Barnett *v.* Gluting, 3 Ind. App. 415, 29 N. E. 154, 927.

Iowa.— Mansfield *v.* Mallory, 140 Iowa 206, 118 N. W. 290; Sickles *v.* Brabbitts, 82 Iowa 747, 48 N. W. 89; Rappleye *v.* Cook, 79 Iowa 564, 44 N. W. 812.

Kentucky.— Staggenborg *v.* Staggenborg, 77 S. W. 173, 25 Ky. L. Rep. 1073.

Massachusetts.— Roswell *v.* Stilson, 177 Mass. 360, 58 N. E. 1011; Parker *v.* Griffith, 172 Mass. 87, 51 N. E. 462.

Michigan.— Boyne City, etc., R. Co. *v.* Anderson, 146 Mich. 328, 109 N. W. 429, 117 Am. St. Rep. 642, 8 L. R. A. N. S. 306; Proper *v.* Lake Shore, etc., R. Co., 136 Mich. 352, 99 N. W. 283; Scheel *v.* Detroit, 130 Mich. 51, 89 N. W. 554, 90 N. W. 274.

Missouri.— Hach *v.* St. Louis, etc., R. Co., 208 Mo. 581, 106 S. W. 525; Adams Express

(B) *Direction of Verdict.* Where the court instructs the jury to return a verdict in favor of one party to an action, without submitting to their determination any issue in the case, error in the admission of evidence during the trial is harmless,[41] the same rule governing in such case as if the trial had been to the court without a jury.[42]

(C) *Special Findings.* A special finding by the jury may render objections to the admission of evidence unavailable, when the objections might otherwise be tenable,[43] as where it shows that their verdict was not affected by such evidence,[44] or that it was based upon other evidence.[45] But if there is but a single issue in a case and a general verdict, and there are no findings upon subordinate questions, error in admitting evidence as tending to prove the main issue is not cured by a statement of the jury that they have not considered it.[46] And where the finding indicates that the inadmissible evidence had some influence on the jury, the error is prejudicial.[47]

(D) *Appellant Not Entitled to Favorable Decision in Any Event.* Where the evidence for the party on whom rests the burden of proof fails to sustain the burden, the erroneous admission of evidence for the adverse party is harmless.[48]

Co. *v.* Metropolitan St. R. Co., 126 Mo. App. 471, 103 S. W. 583; Hanna *v.* Orient Ins. Co., 109 Mo. App. 152, 82 S. W. 1115.

Montana.— Pope *v.* Alexander, 36 Mont. 82, 92 Pac. 203, 575; Hamilton *v.* Woodworth, 17 Mont. 327, 42 Pac. 849.

New Hampshire.—Woodbury *v.* Whiting, 68 N. H. 607, 44 Atl. 385.

New York.— Chambers *v.* Lancaster, 160 N. Y. 342, 54 N. E. 707 [*affirming* 3 N. Y. App. Div. 215, 38 N. Y. Suppl. 253]; Petrie *v.* Petrie, 126 N. Y. 683, 27 N. E. 958 [*affirming* 2 Silv. Sup. 438, 6 N. Y. Suppl. 831]; Duclos *v.* Kelly, 122 N. Y. App. Div. 329, 106 N. Y. Suppl. 1058.

Texas.—Wright *v.* McCampbell, 75 Tex. 644, 13 S. W. 293; Douglass *v.* Mundine, 57 Tex. 344; Darst *v.* Devini, 46 Tex. Civ. App. 311, 102 S. W. 787; Cane Hill Cold Storage, etc., Co. *v.* San Antonio, etc., R. Co., (Civ. App. 1906) 95 S. W. 751.

Virginia.— Johnson *v.* Jennings, 10 Gratt. 1, 60 Am. Dec. 323.

Washington.— Loveday *v.* Anderson, 18 Wash. 322, 51 Pac. 463.

Wisconsin.— Menk *v.* Steinfort, 39 Wis. 370.

United States.— Cunningham *v.* Springer, 204 U. S. 647, 27 S. Ct. 301, 51 L. ed. 662; French *v.* French, 133 Fed. 491, 66 C. C. A. 365; Chapman *v.* Yellow Poplar Lumber Co., 69 Fed. 903, 32 C. C. A. 402.

Rejection of claim to which evidence relates.— The erroneous admission of evidence is cured by a verdict rejecting that part of the cause of action which the evidence was offered to prove. Myers *v.* Rosenback, 13 Misc. (N. Y.) 145, 34 N. Y. Suppl. 63; Bunce *v.* Stanford, 27 Pa. St. 265.

Any error in admitting evidence under one defense is harmless where the case was not decided on that defense. Harlow *v.* Parsons Lumber, etc., Co., 81 Conn. 572, 71 Atl. 734.

Where upon a special verdict upon one issue the party is entitled to the judgment rendered, error in the charge or admission of evidence as to another issue will be disregarded. Whitacre *v.* Culver, 9 Minn. 295.

41. Simons *v.* Fagan, 62 Nebr. 287, 87 N. W. 21; Gault *v.* Bradshaw, 48 Wash. 364, 93 Pac. 534.

Where the court directs a verdict for defendant, the decision must be reversed or sustained on plaintiff's evidence alone, and the admission of incompetent evidence for defendant is harmless error. Collar *v.* Patterson, 137 Ill. 403, 27 N. E. 604; Mead *v.* Phenix Ins. Co., 158 Mass. 124, 32 N. E. 945.

42. Simons *v.* Fagan, 62 Nebr. 287, 87 N. W. 21; Gault *v.* Bradshaw, 48 Wash. 364, 93 Pac. 534.

43. Walsh *v.* Thompson, (Iowa 1879) 3 N. W. 563; Wood *v.* Finson, 91 Me. 280, 39 Atl. 1007; Dresden School Dist. No. 6 *v.* Ætna Ins. Co., 62 Me. 330.

44. St. Louis Consol. Coal Co. *v.* Maehl, 130 Ill. 551, 22 N. E. 715; Pittsburgh, etc., R. Co. *v.* Indiana Horseshoe Co., 154 Ind. 322, 56 N. E. 766; Chicago, etc., R. Co. *v.* Martin, 59 Kan. 437, 53 Pac. 461 [*affirmed* in 178 U. S. 245, 20 S. Ct. 854, 44 L. ed. 1055]; Wichita, etc., R. Co. *v.* Hart, 7 Kan. App. 550, 51 Pac. 933; McGrath *v.* Crouse, 6 Kan. App. 507, 50 Pac. 969.

45. Chicago, etc., R. Co. *v.* Wolcott, 141 Ind. 267, 39 N. E. 451, 50 Am. St. Rep. 320; Chandler *v.* Parker, (Kan. 1902) 70 Pac. 368; Puget Sound Nav. Co. *v.* Lavender, 160 Fed. 851, 87 C. C. A. 655.

46. Com. *v.* Keenan, 152 Mass. 9, 25 N. E. 32.

47. Crane *v.* Reeder, 25 Mich. 303.

48. *Alabama.*—Alabama Mineral Land Co. *v.* Baker, 119 Ala. 351, 24 So. 706; McDuffee *v.* Collins, 117 Ala. 487, 23 So. 45.

California.— Fowler *v.* Carne, (1901) 64 Pac. 581; Dauphiny *v.* Red Poll Creamery Co., 123 Cal. 548, 56 Pac. 451.

Illinois.— Dorsey *v.* Brigham, 177 Ill. 250, 52 N. E. 303, 69 Am. St. Rep. 228, 42 L. R. A. 809.

Indiana.— Hanrahan *v.* Knickerbocker, 35 Ind. App. 138, 72 N. E. 1137.

Massachusetts.— Murphy *v.* Metropolitan Nat. Bank, 191 Mass. 159, 77 N. E. 693, 114 Am. St. Rep. 595.

This rule finds its most frequent application where the evidence offered by plaintiff is not sufficient to maintain the action.[49] Of course where the action is such as plaintiff cannot sustain on legal principles, error in the admission of evidence cannot be prejudicial.[50]

(E) *As to Damages* — (1) IN GENERAL. Error in the admission of evidence on the measure of damages is harmless where the amount recovered shows that such evidence did not affect the verdict or judgment,[51] as where only nominal

Nebraska.— Triska *v.* Miller, 3 Nebr. (Unoff.) 463, 91 N. W. 870.

Ohio.— Calvert *v.* Newberger, 20 Ohio Cir. Ct. 353, 11 Ohio Cir. Dec. 184.

Wyoming.— Carbon County School Dist. No. 3 *v.* Western Tube Co., 13 Wyo. 304, 80 Pac. 155.

49. *Georgia.*— Reed *v.* Travelers' Ins. Co., 117 Ga. 116, 43 S. E. 433.

Illinois.— Theodorson *v.* Ahlgren, 37 Ill. App. 140.

Indiana.— State *v.* Curry, 134 Ind. 133, 33 N. E. 685; State *v.* Beem, 3 Blackf. 222; Gross *v.* Haisley, 2 Ind. App. 23, 28 N. E. 123.

Kansas.— Booge *v.* Huntoon, 47 Kan. 250, 27 Pac. 993; Booge *v.* Scott, 47 Kan. 247, 27 Pac. 992.

Massachusetts.— Bliss *v.* Clark, 16 Gray 60.

New York.— House *v.* Lockwood, 137 N. Y. 259, 33 N. E. 595.

Ohio.— State *v.* Cincinnati Tin, etc., Co., 66 Ohio St. 182, 64 N. E. 68.

Texas.— De Leon *v.* White, 9 Tex. 598; Mosher Mfg. Co. *v.* Texas Contract Co., 32 Tex. Civ. App. 349, 74 S. W. 597.

Wisconsin.— Furlong *v.* Garrett, 44 Wis. 111.

United States.— Smyth *v.* New Orleans Canal, etc., Co., 93 Fed. 899, 35 C. C. A. 646.

Where, in an action for personal injuries, the evidence shows that plaintiff was negligent, he cannot complain of error in the admission of evidence which could not have affected the result. McLaren *v.* Alabama Midland R. Co., 100 Ala. 506, 14 So. 405.

50. Miller *v.* Warner, Brayt. (Vt.) 168.

51. *Alabama.*— Roquemore *v.* Vulcan Iron Works Co., 160 Ala. 311, 49 So. 389; Gould *v.* Cates Chair Co., 147 Ala. 629, 41 So. 675; Hart *v.* Sharpton, 124 Ala. 638, 27 So. 450.

Arkansas.— Ramsey *v.* Flowers, 72 Ark. 316, 80 S. W. 147.

California.— Bell *v.* Bean, 75 Cal. 86, 16 Pac. 521; Lowe *v.* Ozmun, 3 Cal. App. 387, 86 Pac. 729; Ennis Brown Co. *v.* Hurst, 1 Cal. App. 752, 82 Pac. 1056.

Florida.— Younglove *v.* Knox, 44 Fla. 743, 33 So. 427.

Illinois.— West Chicago St. R. Co. *v.* Maday, 188 Ill. 308, 58 N. E. 933 [*affirming* 88 Ill. App. 49]; Heffernan *v.* Bail, 109 Ill. App. 231; Barrett *v.* Campbell, 63 Ill. App. 330.

Indiana.— Pittsburgh, etc., R. Co. *v.* Indiana Horseshoe Co., 154 Ind. 322, 56 N. E. 766; Loesch *v.* Koehler, 144 Ind. 278, 41 N. E. 326, 43 N. E. 129, 35 L. R. A. 682; Majenica Tel. Co. *v.* Rogers, 43 Ind. App. 306, 87 N. E. 165.

Iowa.— Coine *v.* Chicago, etc., R. Co., 123 Iowa 458, 99 N. W. 134; Rich. *v.* Moore, 114 Iowa 80, 86 N. W. 52; Black *v.* Des Moines Mfg., etc., Co., (1898) 77 N. W. 504.

Kansas.— Allen *v.* Lizer, 9 Kan. App. 548, 58 Pac. 238.

Kentucky.— Frazier *v.* Malcolm, 62 S. W. 13, 22 Ky. L. Rep. 1876; Louisville, etc., R. Co. *v.* Piner, 11 Ky. L. Rep. 260.

Maryland.— Consolidated Gas, etc., Co. *v.* State, 109 Md. 186, 72 Atl. 651; Moneyweight Scale Co. *v.* McCormick, 109 Md. 170, 72 Atl. 537.

Massachusetts.— New York Bank Note Co. *v.* Kidder Press Mfg. Co., 192 Mass. 391, 78 N. E. 463.

Michigan.— Shane *v.* Shearsmith, 137 Mich. 32, 100 N. W. 123; Field *v.* Magee, 122 Mich. 556, 81 N. W. 354; Arndt *v.* Bourke, 120 Mich. 263, 79 N. W. 190.

Minnesota.— Paterson *v.* Chicago, etc., R. Co., 95 Minn. 57, 103 N. W. 621; Gasink *v.* New Ulm, 92 Minn. 52, 99 N. W. 624; E. W. Backus Lumber Co. *v.* Scanlon-Gipson Lumber Co., 78 Minn. 438, 81 N. W. 216.

Missouri.— Cole *v.* St. Louis Transit Co., 183 Mo. 81, 81 S. W. 1138; Dammann *v.* St. Louis, 152 Mo. 186, 53 S. W. 932; Claudius *v.* West End Heights Amusement Co., 109 Mo. App. 346, 84 S. W. 354.

Nebraska.— Pullman Palace Car Co. *v.* Woods, 76 Nebr. 694, 107 N. W. 858.

New York.— Jackson Architectural Iron Works *v.* Hurlbut, 158 N. Y. 34, 52 N. E. 665, 70 Am. St. Rep. 432 [*affirming* 15 Misc. 93, 36 N. Y. Suppl. 808]; New York Floating Dry Dock Co. *v.* New York, 97 N. Y. App. Div. 522, 90 N. Y. Suppl. 166; Walden *v.* Jamestown, 79 N. Y. App. Div. 433, 80 N. Y. Suppl. 65, 12 N. Y. Annot. Cas. 313 [*affirmed* in 178 N. Y. 213, 70 N. E. 466].

North Carolina.— Daniel *v.* Atlantic Coast Line R. Co., 145 N. C. 51, 58 S. E. 601.

Oregon.— Tobin *v.* Portland Mills Co., 41 Oreg. 269, 68 Pac. 743, 1108; Strickland *v.* Geide, 31 Oreg. 373, 49 Pac. 982.

Pennsylvania.— Johnston *v.* Brackbill, 1 Penr. & W. 364.

Texas.— Missouri, etc., R. Co. *v.* Dilworth, 95 Tex. 327, 67 S. W. 88 [*affirming* (Civ. App. 1901) 65 S. W. 502]; Banks *v.* House, 93 Tex. 58, 53 S. W. 338 [*affirming* (Civ. App. 1899) 50 S. W. 1022]; Colorado Canal Co. *v.* Sims, 42 Tex. Civ. App. 442, 94 S. W. 365.

Utah.— Sandberg *v.* Victor Gold, etc., Min. Co., 24 Utah 1, 66 Pac. 360.

Vermont.— McKenzie *v.* Boutwell, 79 Vt. 383, 65 Atl. 99; Conway *v.* Fitzgerald, 70 Vt. 103, 39 Atl. 634.

Washington.— Brown *v.* Blaine, 41 Wash.

damages are recovered,[52] or where the amount recovered is not excessive.[53] And the same rule applies where the jury renders a verdict for defendant,[54] or finds that plaintiff is not entitled to any damages[55] on the issue to which the improper evidence related.[56] But where inadmissible evidence must have been taken into consideration in order to make the damages equal the verdict, its admission is prejudicial error.[57]

(2) REMITTITUR. The erroneous admission of evidence bearing on the measure of damages is cured by a remittitur of the largest sum that the jury could have awarded under such evidence.[58] But where there is no possibility of showing to what extent the jury were influenced by such improper evidence, the error is not one which can be cured by remittitur.[59]

287, 83 Pac. 310; Sievers *v.* Dalles, etc., Nav. Co., 24 Wash. 302, 64 Pac. 539.

Wyoming.—Cosgriff *v.* Miller, 10 Wyo. 190, 68 Pac. 206, 98 Am. St. Rep. 977.

United States.— Lynch *v.* U. S., 138 Fed. 535, 71 C. C. A. 59; Moline Malleable Iron Co. *v.* York Iron Co., 83 Fed. 66, 27 C. C. A. 442.

52. Buford *v.* Christian, 149 Ala. 343, 42 So. 997.

53. *Arkansas.*— Missouri, etc., R. Co. *v.* Bratton, 92 Ark. 563, 124 S. W. 231.

California.— Cahill *v.* Murphy, 94 Cal. 29, 30 Pac. 195, 28 Am. St. Rep. 88.

Iowa.— Whitney *v.* Brownewell, 71 Iowa 251, 32 N. W. 285.

Missouri.— McKenzie *v.* United R. Co., 216 Mo. 1, 115 S. W. 13; Leine *v.* Kellerman Contracting Co., 134 Mo. App. 557, 114 S. W. 1147; Brown *v.* St. Louis, etc., R. Co., 127 Mo. App. 499, 106 S. W. 83.

Nebraska.— Nilson *v.* Chicago, etc., R. Co., 84 Nebr. 595, 121 N. W. 1128.

Texas.— McClelland *v.* Fallon, 74 Tex. 236, 12 S. W. 60; St. Louis Southwestern R. Co. *v.* Norvell, (Civ. App. 1909) 115 S. W. 861; Western Union Tel. Co. *v.* Clark, (Civ. App. 1894) 25 S. W. 990.

West Virginia.— Moore *v.* Huntington, 31 W. Va. 842, 8 S. E. 512.

The erroneous admission of evidence of exemplary damages is harmless error when actual damages only are recovered. Thomas *v.* Dansby, 74 Mich. 398, 41 N. W. 1088.

Error in the admission of evidence of special damages to defendant from replevin of property is harmless where the jury confine the damages to the value of the property. Mason *v.* Partrick, 100 Mich. 577, 59 N. W. 239.

54. Chestnut *v.* Southern Indiana R. Co., 157 Ind. 509, 62 N. E. 32; Redman *v.* Stivers, 12 S. W. 270, 11 Ky. L. Rep. 429; Ducharme *v.* Holyoke St. R. Co., 203 Mass. 384, 89 N. E. 561; Kennedy *v.* Mineola, etc., Traction Co., 178 N. Y. 508, 71 N. E. 102; Yates *v.* New York Cent., etc., R. Co., 67 N. Y. 100; Renault *v.* Simpson Crawford Co., 108 N. Y. Suppl. 700; Marshall *v.* Pierce, 15 N. Y. St. 1016.

55. *Iowa.*— Coleman *v.* Reel, 75 Iowa 304, 39 N. W. 510, 9 Am. St. Rep. 484.

Missouri.— Nicket *v.* St. Louis, etc., R. Co., 135 Mo. App. 661, 116 S. W. 477.

Oregon.— Brown *v.* Lewis, 50 Oreg. 358, 92 Pac. 1058.

South Carolina.— Parks *v.* Greenville, 44 S. C. 168, 21 S. E. 540.

Texas.— Pfeiffer *v.* Aue, (Civ. App. 1908) 115 S. W. 300.

56. Over *v.* Dehne, 38 Ind. App. 427, 75 N. E. 664, 76 N. E. 883; Sixth Ave. R. Co. *v.* Metropolitan El. R. Co., 138 N. Y. 548, 34 N. E. 400.

57. St. Louis, etc., R. Co. *v.* Courtney, 77 Ark. 431, 92 S. W. 251; Ellis *v.* Thomas, 84 N. Y. App. Div. 626, 82 N. Y. Suppl. 1064; Asher *v.* Case, 33 N. Y. App. Div. 255, 53 N. Y. Suppl. 729; Roth *v.* Spero, 48 Misc. (N. Y.) 506, 96 N. Y. Suppl. 211; Shultz *v.* Brenner, 24 Misc. (N. Y.) 522, 53 N. Y. Suppl. 972.

Where the verdict is grossly excessive the admission of incompetent evidence affecting the measure of damages will be deemed prejudicial. McDonald *v.* Champion Iron, etc., Co., 140 Mich. 401, 103 N. W. 829; Phillips *v.* Postal Tel. Cable Co., 131 N. C. 225, 42 S. E. 587, 130 N. C. 513, 41 S. E. 1022, 89 Am. St. Rep. 868.

Opinion of plaintiff as to damages suffered. — Where, in an action for injuries, plaintiff is permitted to testify as to the amount of damages sustained by him, the fact that the verdict is for a less amount does not show that the error in the admission of the testimony was harmless. Ohio, etc., R. Co. *v.* Nickless, 71 Ind. 271. *Compare* St. Louis, etc., R. Co. *v.* Green, 44 Tex. Civ. App. 13, 97 S. W. 531.

58. *California.*— Kimic *v.* San Jose-Los Gatos Interurban R. Co., 156 Cal. 379, 104 Pac. 986.

Georgia.— Central of Georgia R. Co. *v.* Harris, 108 Ga. 800, 33 S. E. 995.

Illinois.— McMahon *v.* Chicago City R. Co., 239 Ill. 334, 88 N. E. 223 [*affirming* 143 Ill. App. 608].

Indian Territory.— Atoka Coal, etc., Co. *v.* Miller, 7 Indian Terr. 104, 104 S. W. 555.

Michigan.— Tuttle *v.* White, 49 Mich. 407, 13 N. W. 796.

Missouri.— Perrette *v.* Kansas City, 162 Mo. 238, 62 S. W. 448.

Wisconsin.— Hacker *v.* Heiney, 111 Wis. 313, 87 N. W. 249.

59. See cases cited *infra*, this note.

For example where improper evidence not only tends to enhance the damages, but is also calculated to appeal to the sympathy, passions, or prejudices of a jury in such a way as to unconsciously influence them in

(IV) *By Withdrawal, Striking Out, or Instructions to Jury* — (A) *By Withdrawal or Striking Out Evidence.* The general rule is that, if evidence erroneously admitted during the progress of a trial be distinctly withdrawn by the court, the error is cured,[60] except in extreme instances where it is manifest that the prejudicial effect of the evidence on the jury remained despite its exclusion

the decision of other controverted questions of fact, a remittitur of an arbitrary portion of the damages awarded will not cure the error. Jones, etc., Co. *v.* George, 227 Ill. 64, 81 N. E. 4 [*reversing* 125 Ill. App. 503]; Cook *v.* Cleveland, etc., R. Co., 143 Ill. App. 109.

60. *Alabama.*— Houston Biscuit Co. *v.* Dial, 135 Ala. 168, 33 So. 268.

California.— Roche *v.* Baldwin, 135 Cal. 522, 65 Pac. 459, 67 Pac. 903; Banning *v.* Marleau, 133 Cal. 485, 65 Pac. 964; Dawson *v.* Schloss, 93 Cal. 194, 29 Pac. 31.

Colorado.— Schlageter *v.* Gude, 30 Colo. 310, 70 Pac. 428; King *v.* Rea, 13 Colo. 69, 21 Pac. 1084.

Georgia.— Orr *v.* Garabold, 85 Ga. 373, 11 S. E. 778; Brown *v.* Matthews, 79 Ga. 1, 4 S. E. 13.

Illinois.— Chicago, etc., R. Co. *v.* Gaeinowski, 155 Ill. 189, 40 N. E. 601; McFarlane *v.* Pierson, 21 Ill. App. 566; O'Halloran *v.* Kingston, 16 Ill. App. 659.

Indiana.— Lake Shore, etc., R. Co. *v.* Teeters, 166 Ind. 335, 77 N. E. 599, 5 L. R. A. N. S. 425 [*affirming* (App. 1905) 74 N. E. 1014]; Louisville, etc., R. Co. *v.* Miller, 141 Ind. 533, 37 N. E. 343; Ohio, etc., R. Co. *v.* Stein, 140 Ind. 61, 39 N. E. 246; Louisville, etc, R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Houser *v.* State, 93 Ind. 228; Remy *v.* Lilly, 22 Ind. App. 109, 53 N. E. 387.

Iowa.— Croft *v.* Chicago, etc., R. Co., 134 Iowa 411, 109 N. W. 723; Gray *v.* Central Minnesota Immigration Co., 127 Iowa 560, 103 N. W. 792; Coine *v.* Chicago, etc., R. Co., 123 Iowa 458, 99 N. W. 134; Bell *v.* Clarion, 120 Iowa 332, 94 N. W. 907; Shepard *v.* Chicago, etc., R. Co., 77 Iowa 54, 41 N. W. 564; Rea *v.* Scully, 76 Iowa 343, 41 N. W. 36; Phillips *v.* Runnels, Morr. 391, 43 Am. Dec. 109.

Kansas.— St. Paul F. & M. Ins. Co. *v.* Haskin, 69 Kan. 863, 77 Pac. 106; Lyons *v.* Berlau, 67 Kan. 426, 73 Pac. 52; Hogendobler *v.* Lyon, 12 Kan. 276.

Kentucky.— South Covington, etc., St. R. Co. *v.* McHugh, 77 S. W. 202, 25 Ky. L. Rep. 1112; Louisville, etc., R. Co. *v.* Montgomery, 32 S. W. 738, 17 Ky. L. Rep. 807.

Massachusetts.— Barker *v.* Mackay, 175 Mass. 485, 56 N. E. 614; Hicks *v.* New York, etc., R. Co., 164 Mass. 424, 41 N. E. 721, 49 Am. St. Rep. 471; Davis *v.* Mills, 163 Mass. 481, 40 N. E. 852.

Michigan.— Fowles *v.* Rupert, 143 Mich. 246, 106 N. W. 873; Varty *v.* Messmore, 132 Mich. 314, 93 N. W. 611; Carpenter *v.* Carpenter, 126 Mich. 217, 85 N. W. 576; Sherwood *v.* Chicago, etc., R. Co., 88 Mich. 108, 50 N. W. 101; Kehrig *v.* Peters, 41 Mich. 475, 2 N. W. 801.

Missouri.— Metropolitan St. R. Co. *v.* Walsh, 197 Mo. 392, 94 S. W. 860; Harrison *v.* Kansas City Electric Light Co., 195 Mo. 606, 93 S. W. 951, 7 L. R. A. N. S. 293; Durant *v.* Lexington Coal Min. Co., 97 Mo. 62, 10 S. W. 484; Clark *v.* Hill, 69 Mo. App. 541; Siebert *v.* Supreme Council O. C. F., 23 Mo. App. 268.

Nebraska.— Faulkner *v.* Gilbert, 62 Nebr. 126, 86 N. W. 1074, 61 Nebr. 602, 85 N. W. 843.

New York.— Gall *v.* Gall, 114 N. Y. 109, 21 N. E. 106; Fox *v.* Metropolitan St. R. Co., 93 N. Y. App. Div. 229, 87 N. Y. Suppl. 754; *In re* Buffalo Grade-Crossing Com'rs, 52 N. Y. App. Div. 122, 64 N. Y. Suppl. 1074 [*affirmed* in 164 N. Y. 575, 58 N. E. 1087]; Haffner *v.* Schmuck, 49 N. Y. App. Div. 193, 63 N. Y. Suppl. 55 [*affirmed* in 168 N. Y. 649, 61 N. E. 1130]; O'Farrell *v.* Metropolitan L. Ins. Co., 44 N. Y. App. Div. 554, 60 N. Y. Suppl. 945 [*affirmed* in 168 N. Y. 592, 60 N. E. 1117]; Rock *v.* White, 86 Hun 501, 33 N. Y. Suppl. 769; Pettee *v.* Pettee, 77 Hun 595, 28 N. Y. Suppl. 1067 [*affirmed* in 148 N. Y. 735, 42 N. E. 725]; King *v.* Second Ave. R. Co., 75 Hun 17, 26 N. Y. Suppl. 973 [*affirmed* in 148 N. Y. 739, 42 N. E. 724]; Ganiard *v.* Rochester City, etc., R. Co., 50 Hun 22, 2 N. Y. Suppl. 470 [*affirmed* in 121 N. Y. 661, 24 N. E. 1092]; O'Day *v.* Chaffee, 19 N. Y. Suppl. 559; Barney *v.* Fuller, 15 N. Y. Suppl. 694 [*affirmed* in 133 N. Y. 605, 30 N. E. 1007]; Morrison *v.* Broadway, etc., R. Co., 8 N. Y. Suppl. 436 [*affirmed* in 130 N. Y. 166, 29 N. E. 105]; Calkins *v.* Colburn, 10 N. Y. St. 778; Brown *v.* Cowell, 12 Johns. 384.

North Carolina.— Parrott *v.* Atlantic, etc., R. Co., 140 N. C. 546, 53 S. E. 432; Wilson *v.* Banning Mfg. Co., 120 N. C. 94, 26 S. E. 629.

Ohio.— Cincinnati, etc., R. Co. *v.* Criss, 15 Ohio Cir. Ct. 398, 7 Ohio Cir. Dec. 632.

Oklahoma.— Long *v.* Kendall, 17 Okla. 70, 87 Pac. 670.

Pennsylvania.— Harvey *v.* Susquehanna Coal Co., 201 Pa. St. 63, 50 Atl. 770, 88 Am. St. Rep. 800; Ewing *v.* Alcorn, 40 Pa. St. 492; Miller *v.* Miller, 4 Pa. St. 317.

South Carolina.— Du Rant *v.* Du Rant, 36 S. C. 49, 14 S. E. 929.

Tennessee.— East Tennessee, etc., R. Co. *v.* Humphreys, 12 Lea 200; Birchfield *v.* Russell, 3 Coldw. 228.

Texas.— Galveston, etc., R. Co. *v.* Duelin, 86 Tex. 450, 25 S. W. 406; Schoolher *v.* Hutchins, 66 Tex. 324, 1 S. W. 266; Willis *v.* McNeill, 57 Tex. 465; St. Louis Southwestern R. Co. *v.* Kennedy, (Civ. App. 1906) 96 S. W. 653; Western Union Tel. Co. *v.* Hamilton, 36 Tex. Civ. App. 300, 81 S. W. 1052; Galveston, etc., R. Co. *v.* Garteiser, 9 Tex. Civ. App. 456, 29 S. W. 939.

Washington.— Hart *v.* Cascade Timber Co.,

and influenced their verdict.[61] On the other hand it is held in some cases that error in admitting improper evidence is not cured by striking it out, unless it appears that such evidence did not affect the verdict.[62] In order to effect a cure the withdrawal must be as broad as the admission,[63] and the charge must be sufficiently definite to clearly identify the portion to be withdrawn,[64] and so explicit and unequivocal as to preclude the inference that the jury may have been influenced thereby.[65] Moreover the withdrawal must be by act of court and not of counsel;[66] it may be made of the court's own motion or at the request of a party.[67]

(B) *By Withdrawal of and Instructions to Disregard Evidence.* The general rule is that, if inadmissible evidence has been received during a trial, the error of its admission is cured by its subsequent withdrawal before the trial closes and by an instruction to the jury to disregard it,[68] or even by an instruction to dis-

39 Wash. 279, 81 Pac. 738; Puget Sound Iron Co. *v.* Worthington, 2 Wash. Terr. 472, 7 Pac. 882, 886.

West Virginia.— State *v.* Hill, 52 W. Va. 296, 43 S. E. 160.

United States.—Throckmorton *v.* Holt, 180 U. S. 552, 21 S. Ct. 474, 45 L. ed. 663; Texas, etc., R. Co. *v.* Volk, 151 U. S. 73, 14 S. Ct. 239, 38 L. ed. 78; Pennsylvania Co. *v.* Roy, 102 U. S. 451, 26 L. ed. 141; Chicago, etc., R. Co. *v.* Newsome, 174 Fed. 394, 98 C. C. A. 1.

Rule applied although withdrawal is after argument see Macfarland *v.* West Side Imp. Assoc., 47 Nebr. 661, 66 N. W. 637; Crenshaw *v.* Johnson, 120 N. C. 270, 26 S. E. 810.

Where testimony improperly admitted is readily separable from all other testimony, and is by the court on its own motion stricken out, and the jury charged in clear and unequivocal language to disregard it, the error in its admission is cured. Ware *v.* Pearsons, 173 Fed. 878, 98 C. C. A. 364.

61. *Illinois.*— Brown *v.* Illinois, etc., R. Co., 209 Ill. 402, 70 N. E. 905; Chicago Union Traction Co. *v.* Arnold, 131 Ill. App. 599; Chicago Union Traction Co. *v.* Daly, 129 Ill. App. 519.

Kansas.— Whittaker *v.* Voorhees, 38 Kan. 71, 15 Pac. 874.

Michigan.— Sinker *v.* Diggins, 76 Mich. 557, 43 N. W. 674; Feiertag *v.* Feiertag, 73 Mich. 297, 41 N. W. 414.

Missouri.— Wojtylak *v.* Kansas, etc., Coal Co., 188 Mo. 260, 87 S. W. 506; Buckman *v.* Missouri, etc., R. Co., 100 Mo. App. 30, 73 S. W. 270.

New York.— Tingley *v.* Long Island R. Co., 109 N. Y. App. Div. 793, 96 N. Y. Suppl. 865, 17 N. Y. Annot. Cas. 440; Hubner *v.* Metropolitan St. R. Co., 77 N. Y. App. Div. 290, 79 N. Y. Suppl. 153 [*affirmed* in 177 N. Y. 523, 69 N. E. 1124]; Chernick *v.* Independent American Ice Cream Co., 66 Misc. 177, 121 N. Y. Suppl. 352.

West Virginia.— State *v.* Hill, 52 W. Va. 296, 43 S. E. 160.

United States.—Throckmorton *v.* Holt, 180 U. S. 552, 21 S. Ct. 474, 45 L. ed. 663; Chicago, etc., R. Co. *v.* Newsome, 174 Fed. 394, 98 C. C. A. 1.

The admission of improper evidence clearly calculated to arouse the sympathy of the jury and influence the verdict is not cured by striking it out. Gulf, etc., R. Co. *v.* Levy, 59 Tex. 542, 46 Am. Rep. 269.

62. Scott *v.* Wright, 138 Ill. App. 105; Chicago City R. Co. *v.* Rublee, 136 Ill. App. 233; Chicago City R. Co. *v.* White, 110 Ill. App. 23; Maxted *v.* Fowler, 94 Mich. 106, 53 N. W. 921; Rubenstein *v.* Radt, 133 N. Y. App. Div. 57, 117 N. Y. Suppl. 893; Eldredge *v.* Eldredge, 79 Hun (N. Y.) 511, 29 N. Y. Suppl. 911.

63. Seligman *v.* Ten Eyck, 49 Mich. 104, 13 N. W. 377; Kneeland *v.* Great Western El. Co., 9 N. D. 49, 81 N. W. 67.

64. Scripps *v.* Reilly, 35 Mich. 371, 24 Am. Rep. 575; Throckmorton *v.* Holt, 180 U. S. 552, 21 S. Ct. 474, 45 L. ed. 663.

If it is left to inference what the court regarded as stricken out and what retained, the error is not cured. Matter of Hannah, 11 N. Y. St. 807.

65. Phillips *v.* New York Cent., etc., R. Co., 127 N. Y. 657, 27 N. E. 978; East Tennessee, etc., R. Co. *v.* Eanes, 8 Baxt. (Tenn.) 221.

66. Decherd *v.* Morrison, 2 Swan (Tenn.) 305 (holding that the statement of counsel to the jury that he did not ask or desire a recovery on the evidence so admitted does not cure the error); Goodwin *v.* State, 114 Wis. 318, 90 N. W. 170.

67. Durant *v.* Lexington Coal Min. Co., 97 Mo. 62, 10 S. W. 484; O'Farrell *v.* Metropolitan L. Ins. Co., 44 N. Y. App. Div. 554, 60 N. Y. Suppl. 945 [*affirmed* in 168 N. Y. 592, 60 N. E. 1117].

68. *Alabama.*— Alabama Great Southern R. Co. *v.* Frazier, 93 Ala. 45, 9 So. 303, 30 Am. St. Rep. 28.

California.— Ward *v.* Preston, 23 Cal. 468.

Colorado.— Corbin *v.* Dunklee, 14 Colo. App. 337, 59 Pac. 842.

Georgia.— Orr *v.* Garabold, 85 Ga. 373, 11 S. E. 778.

Illinois.— Illinois Cent. R. Co. *v.* Bailey, 127 Ill. App. 41 [*affirmed* in 222 Ill. 480, 78 N. E. 833].

Indiana.— Pittsburgh, etc., R. Co. *v.* Montgomery, 152 Ind. 1, 49 N. E. 582, 71 Am. St. Rep. 301, 69 L. R. A. 875; Indianapolis, etc., R. Co. *v.* Bush, 101 Ind. 582; Citizens' St. R. Co. *v.* Spahr, 7 Ind. App. 23, 33 N. E. 446.

Indian Territory.— Missouri, etc., R. Co. *v.* Truskett, 2 Indian Terr. 633, 53 S. W. 444.

regard without more,[69] the view being taken that such an instruction is equivalent

Iowa.— Baker *v.* Oughton, 130 Iowa 35, 106 N. W. 272; Blumenthal *v.* Union Electric Co., 129 Iowa 322, 105 N. W. 588; Bauer *v.* Dubuque, 122 Iowa 500, 98 N. W. 355; Keyes *v.* Cedar Falls, 107 Iowa 509, 78 N. W. 227; Burns *v.* Chicago, etc., R. Co., 102 Iowa 7, 70 N. W. 728; Mitchell *v.* Joyce, 69 Iowa 121, 28 N. W. 473.

Kentucky.— Louisville, etc., R. Co. *v.* Simpson, 111 Ky. 754, 64 S. W. 733, 23 Ky. L. Rep. 1044.

Massachusetts.— Costello *v.* Crowell, 133 Mass. 352; Hawes *v.* Gustin, 2 Allen 402.

Michigan.— McNaughton *v.* Smith, 136 Mich. 368, 99 N. W. 382; Boyce *v.* Barker, 119 Mich. 157, 77 N. W. 692; Harris *v.* Cable, 113 Mich. 192, 71 N. W. 531; Dykes *v.* Wyman, 67 Mich. 236, 34 N. W. 561; Hill *v.* Robinson, 23 Mich. 24.

Missouri.— Logan *v.* Metropolitan St. R. Co., 183 Mo. 582, 82 S. W. 126; Schmidt *v.* St. Louis R. Co., 163 Mo. 645, 63 S. W. 834.

Nebraska.— McKibbin *v.* Day, 74 Nebr. 424, 104 N. W. 752; Chicago, etc., R. Co. *v.* O'Neill, 58 Nebr. 239, 78 N. W. 521.

Nevada.— Gotelli *v.* Cardelli, 26 Nev. 382, 69 Pac. 8.

New Hampshire.— Lee *v.* Dow, 73 N. H. 101, 59 Atl. 374; Guertin *v.* Hudson, 71 N. H. 505, 53 Atl. 736.

New York.— Sakolski *v.* Schenkel, 50 Misc. 151, 98 N. Y. Suppl. 190.

North Carolina.— Medlin *v.* Simpson, 144 N. C. 397, 57 S. E. 24; Toole *v.* Toole, 112 N. C. 152, 16 S. E. 912, 34 Am. St. Rep. 479.

North Dakota.— Bishop *v.* Chicago, etc., R. Co., 4 N. D. 536, 62 N. W. 605.

Pennsylvania.— Rathgebe *v.* Pennsylvania R. Co., 179 Pa. St. 31, 36 Atl. 160; Warren *v.* Steer, 112 Pa. St. 634, 5 Atl. 4.

South Carolina.— South Carolina Terminal Co. *v.* South Carolina, etc., R. Co., 52 S. C. 1, 29 S. E. 565.

Texas.— San Antonio Traction Co. *v.* White, (Civ. App. 1900) 60 S. W. 323 [*reversed* on other grounds in 94 Tex. 468, 61 S. W. 706].

Washington.— Wilson *v.* West, etc., Mill Co., 28 Wash. 312, 68 Pac. 716; Smith *v.* Buckman, 22 Wash. 299, 61 Pac. 31.

United States.— Hopt *v.* Utah, 120 U. S. 430, 7 S. Ct. 614, 30 L. ed. 708; Pennsylvania Co. *v.* Roy, 102 U. S. 451, 26 L. ed. 141; Armour *v.* Kollmeyer, 161 Fed. 78, 88 C. C. A. 242, 16 L. R. A. N. S. 1110.

69. *Alabama.*— Tapscott *v.* Gibson, 129 Ala. 503, 30 So. 23.

Connecticut.— Gorman *v.* Fitts, 80 Conn. 531, 69 Atl. 357.

District of Columbia.— Coughlin *v.* Poulson, 2 MacArthur 308.

Georgia.— McLean *v.* Hattan, 127 Ga. 579, 56 S. E. 643.

Illinois.— Petefish *v.* Watkins, 124 Ill. 384, 16 N. E. 248; Paris, etc., R. Co. *v.* Henderson, 89 Ill. 86; Chicago City R. Co. *v.* Hyndshaw, 116 Ill. App. 367.

Indiana.— Moore *v.* Shields, 121 Ind. 267, 23 N. E. 89; Houser *v.* State, 93 Ind. 228; Taylor *v.* Wootan, 1 Ind. App. 188, 27 N. E. 502, 50 Am. St. Rep. 200.

Iowa.— Osborne *v.* Ringland, 122 Iowa 329, 98 N. W. 116; Aultman *v.* Roemer, 112 Iowa 651, 84 N. W. 668; Rice *v.* Appel, 111 Iowa 454, 82 N. W. 1001; Robinson *v.* Cedar Rapids, 100 Iowa 662, 69 N. W. 1064.

Kansas.— St. Paul F. & M. Ins. Co. *v.* Haskin, 69 Kan. 863, 77 Pac. 106; Woods *v.* Hamilton, 39 Kan. 69, 17 Pac. 335; St. Louis, etc., R. Co. *v.* Blakeley, 6 Kan. App. 814, 49 Pac. 752; Brown *v.* Cowley County School Dist. No. 41, 1 Kan. App. 530, 40 Pac. 826.

Kentucky.— Southern R. Co. *v.* Steele, 123 Ky. 262, 90 S. W. 548, 28 Ky. L. Rep. 764, 94 S. W. 653, 29 Ky. L. Rep. 690; Tingle *v.* Kelly, 92 S. W. 303, 29 Ky. L. Rep. 24; Illinois Cent. R. Co. *v.* Stewart, 63 S. W. 596, 23 Ky. L. Rep. 637.

Massachusetts.— Latham *v.* Aldrich, 166 Mass. 156, 44 N. E. 137; Eaton *v.* Littlefield, 147 Mass. 122, 16 N. E. 771; Ayer *v.* R. W. Bell Mfg. Co., 147 Mass. 46, 16 N. E. 754.

Michigan.— Butler *v.* Detroit, etc., R. Co., 131 Mich. 617, 92 N. W. 101; Leach *v.* Detroit Electric R. Co., 129 Mich. 286, 88 N. W. 635; Busch *v.* Fisher, 89 Mich. 192, 50 N. W. 788; Tolbert *v.* Burke, 89 Mich. 132, 50 N. W. 803.

Minnesota.—Williams *v.* Wood, 55 Minn. 323, 56 N. W. 1066.

Missouri.—Anderson *v.* Union Terminal R. Co., 161 Mo. 411, 61 S. W. 874; Whitmore *v.* Supreme Lodge K. & L. H., 100 Mo. 36, 13 S. W. 495; Knox *v.* Hunt, 18 Mo. 174; Buckman *v.* Missouri, etc., R. Co., 100 Mo. App. 30, 73 S. W. 270.

Nebraska.— Mueller *v.* Parcel, 71 Nebr. 795, 99 N. W. 684; Schrandt *v.* Young, 62 Nebr. 254, 86 N. W. 1085; American Bldg., etc., Assoc. *v.* Mordock, 39 Nebr. 413, 58 N. W. 107.

New Hampshire.— Stone *v.* Boston, etc., R. Co., 72 N. H. 206, 55 Atl. 359; State *v.* Saidell, 70 N. H. 174, 46 Atl. 1083, 85 Am. St. Rep. 627; Deerfield *v.* Northwood, 10 N. H. 269.

New York.— Holmes *v.* Moffat, 120 N. Y. 159, 24 N. E. 275; Riegler *v.* Tribune Assoc., 40 N. Y. App. Div. 324, 57 N. Y. Suppl. 989 [*affirmed* in 167 N. Y. 542, 60 N. E. 1119]; Rogers *v.* New York, etc., Bridge, 11 N. Y. App. Div. 141, 42 N. Y. Suppl. 1046 [*affirmed* in 159 N. Y. 556, 54 N. E. 1094]; Van Ingen *v.* Mail, etc., Pub. Co., 14 Misc. 326, 35 N. Y. Suppl. 838 [*affirmed* in 156 N. Y. 376, 50 N. E. 979]; Lawrence *v.* Mycenian Marble Co., 1 Misc. 105, 20 N. Y. Suppl. 698.

Ohio.— Gilchrist *v.* Perrysburg, etc., Transp. Co., 21 Ohio Cir. Ct. 19, 11 Ohio Cir. Dec. 350; Hoppe *v.* Parmalee, 20 Ohio Cir. Ct. 303, 11 Ohio Cir. Dec. 24; Lake Shore, etc., R. Co. *v.* Litz, 18 Ohio Cir. Ct. 646, 6 Ohio Cir. Dec. 285.

Oregon.— Pacific Live Stock Co. *v.* Isaacs, 52 Oreg. 54, 96 Pac. 460; Oldenburg *v.* Oregon Sugar Co., 39 Oreg. 564, 65 Pac. 869.

to striking the improper evidence out of the case.[70] There is this exception to the rule, where the evidence thus admitted is so impressive that in the opinion of the appellate court its effect is not removed from the minds of the jury by its subsequent withdrawal, or by an instruction of the court to disregard it, the judgment will be reversed on account of its admission, and a new trial will be granted.[71] According to another line of cases, error in the admission of evidence cannot be cured by instructing the jury to disregard it,[72] unless from the whole case it is reasonably clear that the evidence did not prejudice the party so objecting.[73]

Pennsylvania.— Beard *v.* Heck, 13 Pa. Super. Ct. 390.

Tennessee.— Yeatman *v.* Hart, 6 Humphr. 375.

Texas.— Houston, etc., R. Co. *v.* Anderson, 44 Tex. Civ. App. 394, 98 S. W. 440; Houston, etc., R. Co. *v.* Craig, 42 Tex. Civ. App. 486, 92 S. W. 1033; Ft. Worth, etc., R. Co. *v.* Hadley, 38 Tex. Civ. App. 599, 86 S. W. 932; Texas Portland Cement Co. *v.* Ross, 35 Tex. Civ. App. 597, 81 S. W. 94; Chicago, etc., R. Co. *v.* Buie, 31 Tex. Civ. App. 654, 73 S. W. 853.

Vermont.— Hawkes *v.* Chester, 70 Vt. 271, 40 Atl. 727.

Washington.—Lyts *v.* Keevey, 5 Wash. 606, 32 Pac. 534.

Wisconsin.— Domasek *v.* Kluck, 113 Wis. 336, 89 N. W. 139; Beggs *v.* Chicago, etc., R. Co., 75 Wis. 444, 44 N. W. 633; Sabine *v.* Johnson, 35 Wis. 185; Beck *v.* Cole, 16 Wis. 95.

United States.— New York, etc., R. Co. *v.* Madison, 123 U. S. 524, 8 S. Ct. 246, 31 L. ed. 258; Lazier Gas Engine Co. *v.* Du Bois, 130 Fed. 834, 65 C. C. A. 172.

70. *Georgia.*— McLean *v.* Hattan, 127 Ga. 579, 56 S. E. 643.

New York.— Holmes *v.* Moffat, 120 N. Y. 159, 24 N. E. 275.

Washington.— McDannald *v.* Washington, etc., R. Co., 31 Wash. 585, 72 Pac. 481.

Wisconsin.—Wright *v.* C. S. Graves Land Co., 100 Wis. 269, 75 N. W. 1000.

United States.— Pennsylvania Co. *v.* Roy, 102 U. S. 451, 26 L. ed. 141.

71. *Georgia.*— Rowland *v.* Carmichael, 77 Ga. 350.

Illinois.— N. K. Fairbank Co. *v.* Nicolai, 167 Ill. 242, 47 N. E. 360; Wicks *v.* Wheeler, 139 Ill. App. 412, holding that the exclusion of erroneous evidence after it has been admitted and heard by the jury does not necessarily cure the error in the admission; especially is this true where the excluded evidence was improperly commented upon in argument to the jury.

Kansas—Whittaker *v.* Voorhees, 38 Kan. 71, 15 Pac. 874.

Michigan.—Dykes *v.* Wyman, 67 Mich. 236, 34 N. W. 561.

Missouri.— Larimore *v.* Chicago, etc., R. Co., 65 Mo. App. 167.

Montana.— Nelson *v.* Spears, 16 Mont. 351, 40 Pac. 786.

New Hampshire.— Deerfield *v.* Northwood, 10 N. H. 269; Hamblett *v.* Hamblett, 6 N. H. 333.

New York.— Newman *v.* Ernst, 10 N. Y. Suppl. 310.

North Carolina.— Livingston *v.* Dunlap, 99 N. C. 268, 6 S. E. 200.

Pennsylvania.— Hamory *v.* Pennsylvania, etc., R. Co., 222 Pa. St. 631, 72 Atl. 227; Erie, etc., R. Co. *v.* Smith, 125 Pa. St. 259, 17 Atl. 443, 11 Am. St. Rep. 895; Huntingdon, etc., R., etc., Co. *v.* Decker, 82 Pa. St. 119; Pennsylvania R. Co. *v.* Butler, 57 Pa. St. 335; Delaware, etc., Canal Co. *v.* Barnes, 31 Pa. St. 193.

Texas.— Church *v.* Waggoner, 78 Tex. 200, 14 S. W. 581; Missouri, etc., R. Co. *v.* Simmons, 12 Tex. Civ. App. 500, 33 S. W. 1096.

West Virginia.— Moore *v.* Harper, 42 W. Va. 39, 24 S. E. 633.

Wisconsin.— Hanson *v.* Johnson, 141 Wis. 550, 124 N. W. 506; Remington *v.* Bailey, 13 Wis. 332; State Bank *v.* Dutton, 11 Wis. 371.

United States.— Hopt *v.* Utah, 120 U. S. 430, 7 S. Ct. 614, 30 L. ed. 708; Armour *v.* Kollmeyer, 161 Fed. 78, 88 C. C. A. 242, 16 L. R. A. N. S. 1110.

72. Englehard *v.* Sutton, 7 How. (Miss.) 99; Grout *v.* Moulton, 79 Vt. 122, 64 Atl. 453; Norton *v.* Perkins, 67 Vt. 203, 31 Atl. 148; Hall *v.* Jones, 55 Vt. 297.

In all cases where testimony is offered that in the then present aspect of the case is inadmissible, unaccompanied with any assertion on the part of the attorney offering it, that he intends and expects to introduce other evidence, which, when in, will make such testimony admissible, the testimony, if objected to, should be rejected, and to admit it is an error that is not cured by the court's directing the jury in their charge to lay it out of the case. Connecticut, etc., R. Co. *v.* Baxter, 32 Vt. 805.

73. *Illinois.*— Howe Mach. Co. *v.* Rosine, 87 Ill. 105.

Michigan.— Boydan *v.* Haberstumpf, 129 Mich. 137, 88 N. W. 386; Maxted *v.* Fowler, 94 Mich. 106, 53 N. W. 921.

Minnesota.— Juergens *v.* Thom, 39 Minn. 458, 40 N. W. 559.

Missouri.— Stephens *v.* Hannibal, etc., R. Co., 96 Mo. 207, 9 S. W. 589, 9 Am. St. Rep. 336.

New York.— Mowry *v.* Peet, 88 N. Y. 453; Furst *v.* Second Ave. R. Co., 72 N. Y. 542; Erben *v.* Lorillard, 19 N. Y. 299; Traver *v.* Eighth Ave. R. Co., 4 Abb. Dec. 422, 3 Keyes 497, 3 Transcr. App. 203, 6 Abb. Pr. N. S. 46; Newman *v.* Goddard, 3 Hun 70; Green *v.* Hudson River R. Co., 32 Barb. 25; Garofalo *v.* Errico, 7 N. Y. St. 425.

Texas.— Dallas Homestead, etc., Assoc. *v.* Thomas, 36 Tex. Civ. App. 268, 81 S. W. 1041.

In any case whether or not the improper reception of evidence is prejudicial depends upon the relation of the evidence withdrawn to all the evidence in the case, how long it is left with the jury, and the surrounding circumstances.[74] Where the incompetent evidence thus admitted is the only evidence bearing directly on the question at issue, its withdrawal by instructions cannot cure the error.[75] But where there is other evidence to support the verdict, it will be presumed that the instructions were obeyed and the error, in its admission, cured.[76] Moreover the withdrawal or cautionary instruction must be absolute,[77] and broad enough to cover all the evidence improperly admitted.[78]

(c) *By Instructions* — (1) IN GENERAL. It has been said, and with good reason, that the practice of permitting illegal evidence to go to the jury, and afterward endeavoring by the giving of oral or written directions to divert their minds from the consideration of such evidence, is one that should not be encouraged,[79] and it is said that where illegal testimony has been admitted by the court, nothing short of a direct and unequivocal charge to the jury, that they must disregard the illegal proof, can cure the error of its admission.[80] On the other hand it is held in many cases that an error in admitting improper evidence may be cured by an instruction which in effect directs the jury to disregard such evidence,[81]

Wisconsin.— Richards *v.* Noyes, 44 Wis. 609.

74. Crowley *v.* Burns Boiler, etc., Co., 100 Minn. 178, 110 N. W. 969; Mueller *v.* Weitz, 56 Mo. App. 36.

For example if the error in the reception of the evidence is corrected immediately after the same is received, and before the case had been argued to the jury, it is harmless. See Batchelder *v.* Batchelder, 2 Allen (Mass.) 105; Selkirk *v.* Cobb, 13 Gray (Mass.) 313; Travis *v.* Barger, 24 Barb. (N. Y.) 614; Brown *v.* Cowell, 12 Johns. (N. Y.) 384; Miller *v.* Miller, 4 Pa. St. 317; Unangst *v.* Kraemer, 8 Watts & S. (Pa.) 391; Smyth *v.* Caswell, 67 Tex. 567, 4 S. W. 848; Beggs *v.* Chicago, etc., R. Co., 75 Wis. 444, 44 N. W. 633; Richards *v.* Noyes, 44 Wis. 609. But where such evidence has been left with the jury for a long time and necessarily found a lodgment in their minds, the error in admitting it cannot be cured by instructions to disregard it. Tourtelotte *v.* Brown, 4 Colo. App. 377, 36 Pac. 73; Sulkowski *v.* Zynda, 160 Mich. 7, 124 N. W. 536; Taylor *v.* Adams, 58 Mich. 187, 24 N. W. 864; Yazoo, etc., R. Co. *v.* Rivers, 93 Miss. 557, 46 So. 705; Illinois Cent. R. Co. *v.* Ely, 83 Miss. 519, 35 So. 873; Mueller *v.* Weitz, 56 Mo. App. 36; Delaware, etc., Canal Co. *v.* Goldstein, 125 Pa. St. 246, 17 Atl. 442; Pennsylvania R. Co. *v.* Butler, 57 Pa. St. 335; Delaware, etc., Canal Co. *v.* Barnes, 31 Pa. St. 193.

75. Illinois Cent. R. Co. *v.* Ely, 83 Miss. 519, 35 So. 873; Mueller *v.* Weitz, 56 Mo. App. 36; Mandeville *v.* Guernsey, 51 Barb. (N. Y.) 99; Gattis *v.* Kilgo, 131 N. C. 199, 42 S. E. 584. See also Erben *v.* Lorillard, 19 N. Y. 299.

Where the proof is nearly balanced, error in admitting incompetent evidence is not cured by a subsequent instruction to disregard such evidence. Branch *v.* Levy, 44 N. Y. Super. Ct. 507.

76. Holmes *v.* Moffat, 120 N. Y. 159, 24 N. E. 275; Riegler *v.* Tribune Assoc., 40 N. Y. App. Div. 324, 57 N. Y. Suppl. 989 [*affirmed* in 167 N. Y. 542, 60 N. E. 1119]; Mandeville *v.* Guernsey, 51 Barb. (N. Y.) 99.

77. Hawes *v.* Gustin, 2 Allen (Mass.) 402; Delaware, etc., Canal Co. *v.* Barnes, 31 Pa. St. 193.

Discretion to disregard.— The admission of improper evidence is not cured by a charge which leaves it discretionary with the jury to disregard it if they choose. Winter *v.* Phelan, 27 Ala. 649; Carlisle *v.* Hunley, 15 Ala. 523.

78. Simons *v.* Mason City, etc., R. Co., 128 Iowa 139, 103 N. W. 129.

79. McCauley *v.* Long, 61 Tex. 74; Tucker *v.* Hamlin, 60 Tex. 171; Gulf, etc., R. Co. *v.* Levy, 59 Tex. 542, 46 Am. Rep. 269; Elliott *v.* Ferguson, 37 Tex. Civ. App. 40, 83 S. W. 56.

80. *Alabama.*— Carlisle *v.* Hunley, 15 Ala. 623.

New York.— Groh *v.* Groh, 177 N. Y. 8, 68 N. E. 992, 177 N. Y. 554, 69 N. E. 1127 [*reversing* 80 N. Y. App. Div. 85, 80 N. Y. Suppl. 438].

Ohio.— Henkle *v.* McClure, 32 Ohio St. 202.

Texas.— McCauley *v.* Long, 61 Tex. 74.

Washington.— Comegys *v.* American Lumber Co., 8 Wash. 661, 36 Pac. 1087.

Wisconsin.— Bradley *v.* Cramer, 66 Wis. 297, 28 N. W. 372.

For example an instruction that the evidence improperly admitted is immaterial (Farnum *v.* Farnum, 13 Gray (Mass.) 508), or incompetent, or insufficient (Glenn *v.* Clore, 42 Ind. 60), does not cure the error in admitting it.

81. *Alabama.*— Driver *v.* King, 145 Ala. 585, 40 So. 315.

Indiana.— Evansville, etc., R. Co. *v.* Montgomery, 85 Ind. 494.

Kentucky.—Louisville, etc., R. Co. *v.* Stiles, 133 Ky. 786, 119 S. W. 786, 134 Am. St. Rep. 491; Garrard County Ct. *v.* McKee, 11 Bush 234.

which renders it immaterial,[82] or which so explains it that it can work no prejudice to appellant,[83] which takes away from the party offering it all possible advantage which he might have gained from its introduction,[84] or which renders it impossible that the jury could have been misled.[85] Thus the admission of improper evidence is no cause for reversing a judgment, if the court afterward peremptorily instructs the jury that it is incompetent,[86] or insufficient to establish the fact for which it was introduced,[87] or that the facts sought to be established by such testimony, if proven, would not warrant a recovery, or constitute a defense, as the case may be.[88] But error in admitting incompetent evidence is not cured by giving an instruction showing that it is incompetent or irrelevant, where the

Michigan.— Grattan *v.* Williamston, 116 Mich. 462, 74 N. W. 668; Mallory *v.* Ohio Farmers' Ins. Co., 90 Mich. 112, 51 N. W. 188.

Missouri.— Cochran *v.* People's R. Co., 131 Mo. 607, 33 S. W. 177.

New York.— McCoy *v.* Munro, 76 N. Y. App. Div. 435, 78 N. Y. Suppl. 849.

82. Pope *v.* Machias Water-Power, etc., Co., 52 Me. 535; Stowell *v.* Goodenow, 31 Me. 538; Wreggitt *v.* Barnett, 99 Mich. 477, 58 N. W. 467; Washington L. Ins. Co. *v.* Berwald, (Tex. Civ. App. 1903) 72 S. W. 436 [*affirmed* in 97 Tex. 111, 76 S. W. 442]; Lee *v.* New Haven, etc., R. Co., 15 Fed. Cas. No. 8,197.

83. Woodward *v.* Horst, 10 Iowa 120; Cadman *v.* Markle, 76 Mich. 448, 43 N. W. 315, 5 L. R. A. 707; Seeley *v.* Garey, 109 Pa. St. 301, 5 Atl. 666.

84. Dorr *v.* Simerson, 73 Iowa 89, 34 N. W. 752.

85. *California.*— Parker *v.* Otis, 130 Cal. 322, 62 Pac. 571, 927, 92 Am. St. Rep. 56 [*affirmed* in 187 U. S. 606, 23 S. Ct. 168, 47 L. ed. 323].

Colorado.—Leadville Bank *v.* Allen, 6 Colo. 594.

Illinois.— Chicago, etc., R. Co. *v.* Kimmel, 221 Ill. 547, 77 N. E. 936 [*affirming* 123 Ill. App. 382]; Rockford City R. Co. *v.* Blake, 173 Ill. 354, 50 N. E. 1070, 64 Am. St. Rep. 122 [*affirming* 74 Ill. App. 175]; Monmouth Min., etc., Co. *v.* Erling, 148 Ill. 521, 36 N. E. 117, 39 Am. St. Rep. 187.

Indiana.— Muncie Pulp Co. *v.* Martin, 164 Ind. 30, 72 N. E. 882.

Iowa.— Renshaw *v.* Dignan, 128 Iowa 722, 105 N. W. 209; Alexander *v.* Staley, 110 Iowa 607, 81 N. W. 803; Fischer *v.* Johnson, 106 Iowa 181, 76 N. W. 658; Dorr *v.* Simerson, 73 Iowa 89, 34 N. W. 752; Reedy *v.* Reichman, 55 Iowa 601, 8 N. W. 428.

Maine.— Davis *v.* Alexander, 99 Me. 40, 58 Atl. 55.

Massachusetts.—Wilcox *v.* Forbes, 173 Mass. 63, 53 N. E. 146.

Michigan.— Scholtz *v.* Freud, 128 Mich. 72, 87 N. W. 130; Grattan *v.* Williamston, 116 Mich. 462, 74 N. W. 668; Muncey *v.* Sun Ins. Office, 109 Mich. 542, 67 N. W. 562; Kehrig *v.* Peters, 41 Mich. 475, 2 N. W. 801.

Missouri.—Burns *v.* Peck, 15 Mo. App. 580.

Nevada.— Devencenzi *v.* Cassinelli, 28 Nev. 273, 222, 81 Pac. 449, 41.

New Jersey.— Flanigan *v.* Guggenheim Smelting Co., 63 N. J. L. 647, 44 Atl. 762.

New York.— Groh *v.* Groh, 177 N. Y. 8, 68 N. E. 992 [*reversing* 80 N. Y. App. Div. 851, 80 N. Y. Suppl. 438].

North Carolina.—Cheek *v.* Oak Grove Lumber Co., 134 N. C. 225, 46 S. E. 488, 47 S. E. 400; Wilson *v.* Banning Mfg. Co., 120 N. C. 94, 26 S. E. 629; McAllister *v.* McAllister, 34 N. C. 184.

Pennsylvania.— McKee *v.* Crucible Steel Co., 213 Pa. St. 333, 62 Atl. 921.

Texas.— Missouri, etc., R. Co. *v.* Avis, 41 Tex. Civ. App. 72, 91 S. W. 877 [*affirmed* in 100 Tex. 33, 93 S. W. 424]; Houston, etc., R. Co. *v.* Bath, 40 Tex. Civ. App. 270, 90 S. W. 55; Washington L. Ins. Co. *v.* Berwald, (Civ. App. 1903) 72 S. W. 436 [*affirmed* in 97 Tex. 111, 76 S. W. 442]; Gulf, etc., R. Co. *v.* Cornell, 29 Tex. Civ. App. 596, 69 S. W. 980; Flores *v.* Maverick, (Civ. App. 1894) 26 S. W. 316; Gulf, etc., R. Co. *v.* Harmonson, (Civ. App. 1893) 22 S. W. 764.

Vermont.— Carrow *v.* Barré R. Co., 74 Vt. 176, 52 Atl. 537; Bagley *v.* Mason, 69 Vt. 175, 37 Atl. 287.

Any error in a hypothetical question to an expert, which embraces facts not proven, is cured by an instruction that the value of an opinion given by an expert upon a hypothetical question must depend on the facts proven which are embraced in the question. Thomas *v.* Dabblemont, 31 Ind. App. 146, 67 N. E. 463; Howe *v.* Richards, 112 Iowa 220, 83 N. W. 909.

86. Equitable Mortg. Co. *v.* Vore, 7 Kan. App. 629, 53 Pac. 153.

87. *California.*— Liverpool, etc., Ins. Co. *v.* Southern Pac. Co., 125 Cal. 434, 58 Pac. 55.

Connecticut.— Taylor *v.* Mertens, 82 Conn. 595, 74 Atl. 894.

Georgia.— Phœnix Ins. Co. *v.* Gray, 107 Ga. 110, 32 S. E. 948.

Maryland.— Beatty *v.* Mason, 30 Md. 409.

Missouri.—Straat *v.* Hayward, 37 Mo. App. 585.

New York.—Wynn *v.* Yonkers, 80 N. Y. App. Div. 277, 80 N. Y. Suppl. 257.

Pennsylvania.—Hood *v.* Hood, 2 Grant 229.

88. *Arkansas.*— Little Rock R., etc., Co. *v.* Dobbins, 78 Ark. 553, 95 S. W. 788.

Illinois.— Henrietta Coal Co. *v.* Martin, 221 Ill. 460, 77 N. E. 902 [*affirming* 122 Ill. App. 354].

Kentucky.— Steele *v.* Bryant, 132 Ky. 569, 116 S. W. 755.

Maine.— Stowell *v.* Goodenow, 31 Me. 538.

Michigan.— Wheaton *v.* Beecher, 79 Mich. 443, 44 N. W. 927.

New York.— Williams *v.* Metropolitan L. Ins. Co., 35 N. Y. App. Div. 82, 54 N. Y.

effect is to mislead the jury to the prejudice of a party.[89] The admission of improper testimony on the question of damages is not cured by proper instructions on the measure of damages,[90] unless the objectionable evidence is explicitly withdrawn from the consideration of the jury,[91] or it is apparent from the verdict that appellant was not harmed thereby.[92]

(2) Limiting Scope and Effect of Evidence. Error in admitting evidence for an improper purpose is cured by an instruction that the jury can consider it only on another issue as to which it is irrelevant,[93] unless the evidence is so radically wrong, and of such a dangerous character, that it must be assumed that injury resulted.[94] So where evidence, objected to when offered, is limited in its applica-

Suppl. 595; Egan *v.* Dry Dock, etc., R. Co., 12 N. Y. App. Div. 556, 42 N. Y. Suppl. 188.

Texas.— Pacific Express Co. *v.* Needham, (Civ. App. 1906) 94 S. W. 1070.

89. *Illinois.*— N. K. Fairbank Co. *v.* Nicolai, 167 Ill. 242, 47 N. E. 360 [*reversing* 66 Ill. App. 637].

Massachusetts.— Larry *v.* Sherburne, 2 Allen, 34; Reed *v.* Frederick, 8 Gray 230.

Michigan.— Miller *v.* Hoffman, 135 Mich. 319, 97 N. W. 759.

New York.— Palmer *v.* Bailey, 12 N. Y. App. Div. 6, 42 N. Y. Suppl. 933.

Virginia.— Singer Mfg. Co. *v.* Bryant, 105 Va. 403, 54 S. E. 320; Chesapeake, etc., R. Co. *v.* Rogers, 100 Va. 324, 41 S. E. 732.

Washington.— Henne *v.* J. T. Steeb Shipping Co., 37 Wash. 331, 79 Pac. 938.

United States.— Harkins *v.* Brown, 108 Fed. 576, 47 C. C. A. 501.

90. *Illinois.*— Hackett *v.* Smelsley, 77 Ill. 109.

Iowa.— Simons *v.* Mason City, etc., R. Co., 128 Iowa 139, 103 N. W. 129.

Kentucky.— Southern R. Co. *v.* Evans, 63 S. W. 445, 23 Ky. L. Rep. 568; Chesapeake, etc., R. Co. *v.* Gross, 43 S. W. 203, 19 Ky. L. Rep. 1926.

Missouri.— Jones *v.* Cooley Lake Club, 122 Mo. App. 113, 98 S. W. 82.

New Jersey.— Thompson *v.* Pennsylvania R. Co., 51 N. J. L. 42, 15 Atl. 833.

Texas.— Tucker *v.* Hamlin, 60 Tex. 171; Gulf, etc., R. Co. *v.* Ryon, (Civ. App. 1903) 72 S. W. 72; Burnett *v.* Munger, 23 Tex. Civ. App. 278, 56 S. W. 103.

Washington.— Berg *v.* Humptulips Boom, etc., Co., 38 Wash. 342, 80 Pac. 528; Kohne *v.* White, 12 Wash. 199, 40 Pac. 794.

Wisconsin.— Parry Mfg. Co. *v.* Tobin, 106 Wis. 286, 82 N. W. 154.

United States.— Washington Gaslight Co. *v.* Lansden, 172 U. S. 534, 19 S. Ct. 296, 43 L. ed. 543.

91. Wing *v.* Chapman, 49 Vt. 33; Southern R. Co. *v.* Simmons, 105 Va. 651, 55 S. E. 459.

92. *Illinois.*— Chicago, etc., R. Co. *v.* Blume, 137 Ill. 448, 27 N. E. 601.

Indiana.— Union Mut. L. Ins. Co. *v.* Buchanan, 100 Ind. 63; Evansville, etc., R. Co. *v.* Montgomery, 85 Ind. 494.

Iowa.— Coine *v.* Chicago, etc., R. Co., 123 Iowa 458, 99 N. W. 134.

Nebraska.— Jerabek *v.* Kennedy, 61 Nebr. 349, 85 N. W. 279.

New Mexico.— Lacey *v.* Woodward, 5 N. M. 583, 25 Pac. 785.

New York.— Dunford *v.* Interurban St. R. Co., 84 N. Y. Suppl. 865.

North Carolina.— Dayvis *v.* Western Union Tel. Co., 139 N. C. 79, 51 S. E. 898.

Pennsylvania.— Powers *v.* Rich, 184 Pa. St. 325, 39 Atl. 62; Closser *v.* Washington Tp., 11 Pa. Super. Ct. 112.

South Carolina.— Hipp *v.* Southern R. Co., 50 S. C. 129, 27 S. E. 623.

Texas.— Dallas *v.* Jones, (Civ. App. 1898) 54 S. W. 606.

Utah.— Hempstead *v.* Salt Lake City, 32 Utah 261, 90 Pac. 397.

Wisconsin.— Viellesse *v.* Green Bay, 110 Wis. 160, 85 N. W. 665.

93. *Colorado.*— Wolff *v.* Chapman, 7 Colo. App. 179, 42 Pac. 1018.

Illinois.— Chicago *v.* Spoor, 190 Ill. 340, 60 N. E. 540; Chicago, etc., R. Co. *v.* Kendall, 49 Ill. App. 398.

Iowa.— McDermott *v.* Mahoney, 139 Iowa 292, 115 N. W. 32, 116 N. W. 788; Gall *v.* Dickey, 91 Iowa 126, 58 N. W. 1075.

Kentucky.— Cincinnati, etc., R. Co. *v.* Dickerson, 102 Ky. 560, 44 S. W. 99, 19 Ky. L. Rep. 1817.

Michigan.— Runnells *v.* Pentwater, 109 Mich. 572, 67 N. W. 558; Wheaton *v.* Beecher, 79 Mich. 443, 44 N. W. 927; Welch *v.* Ware, 32 Mich. 77.

Missouri.— Sidekum *v.* Wabash, etc., R. Co., 93 Mo. 400, 4 S. W. 701, 3 Am. St. Rep. 549.

North Carolina.— Blalock *v.* Clark, 137 N. C. 140, 49 S. E. 88.

Pennsylvania.— Roche *v.* Wegge, 202 Pa. St. 169, 51 Atl. 738.

South Carolina.— Sanders *v.* Bagwell, 37 S. C. 145, 15 S. E. 714, 16 S. E. 770.

Vermont.— Clement *v.* Skinner, 72 Vt. 159, 47 Atl. 788.

United States.— Sunset Tel., etc., Co. *v.* Day, 70 Fed. 364, 17 C. C. A. 161.

94. *Colorado.*— T. & H. Pueblo Bldg. Co. *v.* Klein, 5 Colo. App. 348, 38 Pac. 608.

Illinois.— Chicago *v.* Jackson, 196 Ill. 496, 63 N. E. 1013, 1135 [*affirming* 88 Ill. App. 130]; McLees *v.* Niles, 93 Ill. App. 442.

Indiana.— Logansport, etc., Turnpike Co. *v.* Heil, 118 Ind. 135, 20 N. E. 703.

Iowa.— Hall *v.* Chicago, etc., R. Co., 84 Iowa 311, 51 N. W. 150.

Kentucky.— Cheatham *v.* Leather, 49 S. W. 534, 20 Ky. L. Rep. 1474.

tion by an instruction requested by the objecting party, the objection as to admission is deemed to be waived.[95]

(3) Submitting Proper Issues and Ignoring Others. Where the instructions of the court direct the attention of the jury only to the specific issues in the case,[96] and the issue sought to be proved by the improper testimony is not submitted to the jury,[97] error in the admission of such evidence is without prejudice. If, however, the evidence thus improperly admitted must have been misleading to the jury, the error will not be obviated by such instructions.[98] And where the testimony legally before the jury does not warrant their verdict, the ignoring in the charge of testimony erroneously admitted does not cure the error in its admission.[99]

(4) Withdrawing Issue on Which Evidence Admitted. Any error in admitting evidence on issues which are subsequently withdrawn is harmless.[1]

Massachusetts.— Reed *v.* Frederick, 8 Gray 230.

Michigan.— People *v.* Abbott, 97 Mich. 484, 56 N. W. 862, 37 Am. St. Rep. 360.

New York.— Russell *v.* New York Cent., etc., R. Co., 96 N. Y. App. Div. 151, 89 N. Y. Suppl. 429; McCarty *v.* Ritch, 59 N. Y. App. Div. 145, 69 N. Y. Suppl. 129; Koch *v.* Bissell, 20 N. Y. App. Div. 6, 46 N. Y. Suppl. 632.

North Carolina.— Moore *v.* Palmer, 132 N. C. 969, 44 S. E. 673.

95. Vannoy *v.* Klein, 122 Ind. 416, 23 N. E. 526; Oglebay *v.* Tippecanoe L. & T. Co., 41 Ind. App. 481, 82 N. E. 494; Reed *v.* Kibler, 91 Mo. App. 361; Rimel *v.* Hays, 32 Mo. App. 177; Manchester *v.* Duggan, (N. H. 1908) 70 Atl. 1075. But see Myers *v.* Manlove, 164 Ind. 128, 130, 71 N. E. 893 (where it is said: "Seeking to limit the effect of evidence introduced over their objection should be construed as a waiver of their exception reserved upon the introduction of the evidence"); Randall *v.* Northwestern Tel. Co., 54 Wis. 140, 11 N. W. 419, 41 Am. Rep. 17.

96. *California.*— Kishlar *v.* Southern Pac. R. Co., 134 Cal. 636, 66 Pac. 848.

Colorado.— Corbin *v.* Dunklee, 14 Colo. App. 337, 59 Pac. 842.

Iowa.— Allen *v.* Ames, etc., R. Co., 106 Iowa 602, 76 N. W. 848.

Kentucky.— Cincinnati, etc., R. Co. *v.* Sampson, 97 Ky. 65, 30 S. W. 12, 16 Ky. L. Rep. 819.

Massachusetts.— Kennedy *v.* Shea, 110 Mass. 147, 14 Am. Rep. 584.

Mississippi.— Goodwin *v.* Mitchell, (1905) 38 So. 657.

Missouri.— Harrison *v.* Lakenan, 189 Mo. 581, 88 S. W. 53; Sanders *v.* North End Bldg., etc., Assoc., 178 Mo. 674, 77 S. W. 833; Taussig *v.* Wind, 98 Mo. App. 129, 71 S. W. 1095.

New York.— Campion *v.* Rollwagen, 43 N. Y. App. Div. 117, 59 N. Y. Suppl. 308.

South Dakota.— Torrey *v.* Peck, 13 S. D. 538, 83 N. W. 585.

Texas.— Chicago, etc., R. Co. *v.* Longbottom, (Civ. App. 1904) 80 S. W. 542.

In an action on notes, where the defense was forgery, and the jury was limited to that question alone, the admission of an abandoned answer of defendant, wherein it set up want of consideration, was not prejudicial error. Sanders *v.* North End Bldg., etc., Assoc., 178 Mo. 674, 77 S. W. 833.

Where the instructions based plaintiff's right to recover upon the alleged contract, and no instruction was given allowing him to recover on *quantum meruit,* error in admitting evidence of the reasonable value of the services is harmless. Walker *v.* Guthrie, 102 Mo. App. 420, 76 S. W. 675.

Where all the instructions are predicated on the common-law requirement of diligence, error in admitting an ordinance requiring a higher degree of diligence is harmless. Sheehan *v.* Citizens' R. Co., 72 Mo. App. 524.

Where the jury were specifically told for what injuries damages could be awarded, and those enumerated did not include the element upon which evidence was improperly admitted, the error in admitting such evidence is harmless. Cincinnati, etc., R. Co. *v.* Sampson, 97 Ky. 65, 30 S. W. 12, 16 Ky. L. Rep. 819; Crow *v.* Metropolitan St. R. Co., 70 N. Y. App. Div. 202, 75 N. Y. Suppl. 377 [*affirmed* in 174 N. Y. 539, 66 N. E. 1106]; Dossett *v.* St. Paul, etc., Lumber Co., 40 Wash. 276, 82 Pac. 273.

97. *Connecticut.*— Atwood *v.* Connecticut Co., 82 Conn. 539, 74 Atl. 899.

Georgia.— Conant *v.* Jones, 120 Ga. 568, 48 S. E. 234.

Texas.— Stephenville Oil Mill *v.* McNeill, (Civ. App. 1909) 122 S. W. 911; Knowles *v.* Northern Texas Traction Co., (Civ. App. 1909) 121 S. W. 232; Colorado Canal Co. *v.* McFarland, (Civ. App. 1906) 94 S. W. 400; Gulf, etc., R. Co. *v.* St. John, (Civ. App. 1905) 88 S. W. 297; Texas, etc., R. Co. *v.* Ellerd, 38 Tex. Civ. App. 596, 87 S. W. 362.

Wisconsin.— Listman Mill Co. *v.* Miller, 131 Wis. 393, 111 N. W. 496.

United States.— Mackoy *v.* Missouri Pac. R. Co., 18 Fed. 236, 5 McCrary 538.

98. Luizzi *v.* Brady, 140 Mich. 73, 103 N. W. 574; Liberty Wall Paper Co. *v.* Stoner Wall Paper Mfg. Co., 178 N. Y. 219, 70 N. E. 501; Sterling *v.* Head Camp, Pacific Jurisdiction W. W., 28 Utah 505, 526, 80 Pac. 375, 1110.

99. Dallas Homestead, etc., Assoc. *v.* Thomas, 36 Tex. Civ. App. 268, 81 S. W. 1041.

1. *Alabama.*— Mobile Light, etc., Co. *v.*

Similarly the erroneous admission of evidence is not prejudicial where the court instructs the jury that the question upon which such evidence was admitted is not in issue,[2] or is out of the case,[3] or has been eliminated.[4]

2. Striking Out or Withdrawing Evidence — a. In General. Where competent material evidence has been admitted on a trial, it is ordinarily prejudicial error for the court to sustain a motion to strike it out,[5] even if it was introduced by the moving party,[6] if the opposite party would be prejudiced thereby. But

Walsh, 146 Ala. 295, 40 So. 560; Strawbridge *v.* Spann, 8 Ala. 820.

Arkansas.— Little Rock R., etc., Co. *v.* Dobbins, 78 Ark. 553, 95 S. W. 788.

Connecticut.— Girard *v.* Grosvenordale Co., 82 Conn. 271, 73 Atl. 747.

Illinois.— William Grace Co. *v.* Larson, 227 Ill. 101, 81 N. E. 44 [*affirming* 129 Ill. App. 290].

Indian Territory.— Perry *v.* Cobb, 4 Indian Terr. 717, 76 S. W. 289.

Iowa.— Howard *v.* Lamoni, 124 Iowa 348, 100 N. W. 62; Wood *v.* Allen, 111 Iowa 97, 82 N. W. 451.

Kansas.— Ketchum *v.* Wilcox, (App. 1897) 48 Pac. 446.

Kentucky.— Southern R. Co. *v.* Cooper, 62 S. W. 858, 23 Ky. L. Rep. 290.

Massachusetts.—Smith *v.* Smith, 167 Mass. 87, 45 N. E. 52.

Michigan.— Olivier *v.* Houghton County St. R. Co., 138 Mich. 242, 101 N. W. 530; Allington, etc., Mfg. Co. *v.* Detroit Reduction Co., 133 Mich. 427, 95 N. W. 562.

Nebraska.— American F. Ins. Co. *v.* Landfare, 56 Nebr. 482, 76 N. W. 1068; Forbes *v.* Thomas, 22 Nebr. 541, 35 N. W. 411 [*affirmed* in 145 U. S. 638, 12 S. Ct. 981, 36 L. ed. 855].

Pennsylvania.— Miles *v.* Stevens, 3 Pa. St. 21, 45 Am. Dec. 621.

Rhode Island.— Blackwell *v.* O'Gorman Co., 22 R. I. 638, 49 Atl. 28.

Texas.— El Paso Electric R. Co. *v.* Davis, (Civ. App. 1904) 83 S. W. 718; Gulf, etc., R. Co. *v.* Brown, 33 Tex. Civ. App. 269, 76 S. W. 794.

Vermont.— Armstrong *v.* Noble, 55 Vt. 428.

Washington.— Yakima Valley Bank *v.* McAllister, 37 Wash. 566, 79 Pac. 1119, 107 Am. St. Rep. 823, 1 L. R. A. N. S. 1075.

Wisconsin.— Nix *v.* C. Reiss Coal Co., 114 Wis. 493, 90 N. W. 437.

Wholly withdrawing from the jury certain defenses set up and relied upon by defendant is equivalent to withdrawing all evidence relating to these defenses, and this cures any error committed in admitting such evidence. Verdery *v.* Savannah, etc., R. Co., 82 Ga. 675, 9 S. E. 1133.

Where a jury were instructed not to give any consideration to a particular count named in plaintiff's petition, it was held that errors in the admission of evidence under said count were thereby cured. Mighell *v.* Dougherty, 86 Iowa 480, 53 N. W. 402, 41 Am. St. Rep. 511, 17 L. R. A. 755. So error, if any, in admitting evidence under a certain count of the complaint, was rendered harmless to defendant by the giving of a general charge in defendant's favor upon this count at the conclusion of all the evidence. Mobile, etc., R. Co. *v.* Bromberg, 141 Ala. 258, 37 So. 395.

Where evidence tending to increase the measure of damages is improperly admitted, but the court, in instructing the jury, directs them, in assessing the damages, not to allow anything for the kind of damages referred to in the evidence improperly admitted, and instructs them as to the proper measure of damages in the case, the error is harmless, unless it appears from the verdict that the jury were misled by the admission of such evidence. Malter *v.* Cutting Fruit Packing Co., (Cal. 1901) 66 Pac. 582; Illinois Cent. R. Co. *v.* School Trustees, 212 Ill. 406, 72 N. E. 39 [*reversing* 112 Ill. App. 488]; Illinois Steel Co. *v.* Osterowski, 194 Ill. 376, 62 N. E. 822 [*affirming* 93 Ill. App. 57]; Thompson *v.* Keokuk, etc., R. Co., 116 Iowa 215, 89 N. W. 975; Yeager *v.* Spirit Lake, 115 Iowa 593, 88 N. W. 1095; Manzer *v.* Phillips, 139 Mich. 61, 102 N. W. 292; Webb *v.* Holt, 113 Mich. 338, 71 N. W. 637; Blaisdell *v.* Scally, 84 Mich. 149, 47 N. W. 585; Learned *v.* Ogden, 80 Miss. 769, 32 So. 278, 92 Am. St. Rep. 621; Mississippi Mills Co. *v.* Smith, 69 Miss. 299, 11 So. 26, 30 Am. St. Rep. 546; Buckman *v.* Missouri, etc., R. Co., 100 Mo. App. 30, 73 S. W. 270; Moravec *v.* Grell, 78 N. Y. App. Div. 146, 79 N. Y. Suppl. 533, 12 N. Y. Annot. Cas. 294; Cleveland, etc., Traction Co. *v.* Ward, 27 Ohio Cir. Ct. 761; Stuckey *v.* Atlantic Coast Line R. Co., 60 S. C. 237, 38 S. E. 416, 85 Am. St. Rep. 842.

2. *Alabama.*— Thomas *v.* Henderson, 27 Ala. 523.

Colorado.— Leadville Bank *v.* Allen, 6 Colo. 594.

Connecticut.— Smith *v.* Ford, 82 Conn. 653, 74 Atl. 910.

Michigan.— Schneider *v.* Detroit, 72 Mich. 240, 40 N. W. 329, 2 L. R. A. 54.

Pennsylvania.— McGunnegle *v.* Pittsburg, etc., R. Co., 213 Pa. St. 383, 62 Atl. 988.

Texas.— Texas, etc., R. Co. *v.* Lester, 75 Tex. 56, 12 S. W. 955; Devine *v.* U. S. Mortgage Co., (Civ. App. 1898) 48 S. W. 585.

Wisconsin.— Conklin *v.* Parsons, 2 Pinn. 264, 1 Chandl. 240.

United States.— Hartford L., etc., Ins. Co. *v.* Unsell, 144 U. S. 439, 12 S. Ct. 671, 36 L. ed. 496 [*affirming* 32 Fed. 443].

3. Pireaux *v.* Simon, 79 Wis. 392, 48 N. W. 674.

4. Forbes *v.* Thomas, 22 Nebr. 541, 35 N. W. 411; Dudley *v.* Duval, 29 Wash. 528, 70 Pac. 68.

5. Smith *v.* Smidt, 5 Kan. 30.

6. Hubner *v.* Metropolitan St. R. Co., 77

it is not a ground for reversal that a party is permitted to withdraw evidence introduced by him where no prejudice thereby results to his adversary.[7] Conversely where a party is refused permission to withdraw testimony which his opponent would have had the right to put in evidence, the error is harmless.[8] The striking out of evidence too indefinite to be considered,[9] or which could not have affected the result,[10] is not assignable as error. So striking out evidence is not ground for reversal where there is sufficient other evidence of the same facts,[11] or where the court afterward correctly directs a verdict.[12] Nor can a party complain of a correct ruling striking out testimony, although the objecting party did not give his reasons for asking such ruling.[13] It is not error for a court to refuse to strike out evidence which has been admitted by agreement,[14] or which is immaterial,[15] irrelevant,[16] unnecessary,[17] or cumulative,[18] and which could not have affected the result.[19] Nor is a party injured by a refusal to strike out objectionable testimony, if the same party afterward introduces the same testimony,[20] or if counsel afterward concede the facts stated in such testimony,[21] or if the facts sought to be proved thereby have been established by other and competent evidence.[22] But the refusal of the court to strike out incompetent or irrelevant testimony which might have caused prejudice against the party is reversible error.[23]

b. Cure of Errors. Error in striking out testimony is cured by the subsequent reinstatement thereof before the case is submitted to the jury,[24] or by the sub-

N. Y. App. Div. 290, 79 N. Y. Suppl. 153 [*affirmed* in 177 N. Y. 523, 69 N. E. 1124].

7. Aultman *v.* Roemer, 112 Iowa 651, 84 N. W. 668; Kinney *v.* Philadelphia Watch Case Co., 76 N. J. L. 735, 71 Atl. 269; Hubner *v.* Metropolitan St. R. Co., 77 N. Y. App. Div. 290, 79 N. Y. Suppl. 153 [*affirmed* in 177 N. Y. 523, 69 N. E. 1124].

8. Henderson *v.* Francis, 75 Ga. 178.

9. Overall *v.* Bezeau, 37 Mich. 506; Chambers *v.* Emery, 13 Utah 374, 45 Pac. 192.

10. Porter *v.* Whitlock, 142 Iowa 66, 120 N. W. 649 (holding that where there was no attack on the good character of a party to a civil suit, the action of the court in withdrawing the evidence in support of his good character, and directing the jury to consider that his reputation was good, was not prejudicial); Matter of Cameron, 47 N. Y. App. Div. 120, 62 N. Y. Suppl. 187 [*affirmed* in 166 N. Y. 610, 59 N. E. 1120].

11. Metzger *v.* Manlove, 241 Ill. 113, 89 N. E. 249.

Striking out the opinion of a witness is harmless error, where the facts upon which such opinion would have been based are all placed before the jury. Merkle *v.* Bennington Tp., 68 Mich. 133, 35 N. W. 846.

Where a witness had testified to a certain fact on direct examination, and his statement was not stricken out, that his statement with reference to the same fact on cross-examination was stricken out on objection was without prejudice. Butler *v.* Davis, 119 Wis. 166, 96 N. W. 561.

12. Larkin *v.* Mitchell, etc., Lumber Co., 42 Mich. 296, 3 N. W. 904; Heisler Pumping Engine Co. *v.* Baum, 86 Nebr. 1, 124 N. W. 916.

13. Chicago, etc., R. Co. *v.* Cummings, 24 Ind. App. 192, 53 N. E. 1026; Sterling *v.* Detroit, 134 Mich. 22, 95 N. W. 986.

14. Long *v.* Girdwood, 150 Pa. St. 413, 24 Atl. 711, 23 L. R. A. 33.

15. Andrews *v.* Ohio, etc., R. Co., 14 Ind. 169; Fallon *v.* Fallon, 110 Minn. 213, 124 N. W. 994.

16. Snyder *v.* Snyder, 50 Ind. 492; Kendrick *v.* Towle, 60 Mich. 363, 27 N. W. 567, 1 Am. St. Rep. 526.

17. Manning *v.* Den, (Cal. 1890) 24 Pac. 1092.

18. Robbins *v.* Sackett, 23 Kan. 301; Redman *v.* Peirsol, 39 Mo. App. 173.

Where there is sufficient proper evidence in support of the same question, the refusal to strike out improper evidence is harmless. Riss *v.* Messmore, 58 N. Y. Super. Ct. 23, 9 N. Y. Suppl. 320 [*affirmed* in 130 N. Y. 681, 29 N. E. 1034]; Atkinson *v.* Oelsner, 10 N. Y. Suppl. 822; Silsby *v.* Packer, 9 N. Y. St. 112; Chicago, etc., R. Co. *v.* Yarbrough, (Civ. App. 1896) 35 S. W. 422.

19. *Illinois.*— Schillinger Bros. Co. *v.* Smith, 225 Ill. 74, 80 N. E. 65.

Nebraska.— Boesen *v.* Omaha St. R. Co., 83 Nebr. 378, 119 N. W. 771.

New York.— Ross *v.* Metropolitan El. R. Co., 57 N. Y. Super. Ct. 412, 8 N. Y. Suppl. 495.

Pennsylvania.— McKnight *v.* Newell, 207 Pa. St. 562, 57 Atl. 39.

Wisconsin.— Watson *v.* Milwaukee, etc., R. Co., 57 Wis. 332, 15 N. W. 468.

20. Treat *v.* Reilly, 35 Cal. 129.

21. Treat *v.* Reilly, 35 Cal. 129.

22. Roe *v.* Kansas City, 100 Mo. 190, 13 S. W. 404; Clague *v.* Tri-State Land Co., 84 Nebr. 499, 121 N. W. 570, 133 Am. St. Rep. 637.

23. Burns *v.* Lindell R. Co., 24 Mo. App. 10; Pennsylvania R. Co. *v.* Page, 9 Pa. Cas. 445, 12 Atl. 662.

24. Crane *v.* Bennett, 77 N. Y. App. Div. 102, 79 N. Y. Suppl. 66, 33 N. Y. Civ. Proc.

sequent admission of other testimony on the same point.[25] Error in refusing to strike out certain testimony is cured by subsequently striking it out,[26] by an instruction to disregard it,[27] or by other instructions rendering such refusal non-prejudicial.[28]

3. Exclusion of Evidence[29]—a. Prejudicial Effect in General—(I) *General Rules.* It is ordinarily held that the exclusion of competent material evidence on a question in issue is reversible error;[30] but if it appears that such exclusion did not prejudice the complaining party,[31] and could not have affected the

229 [*affirmed* in 177 N. Y. 106, 69 N. E. 274, 101 Am. St. Rep. 722].

Effect of failure to avail of permission to reintroduce evidence.—Failure on the part of the objecting party to avail himself of permission to reintroduce the evidence stricken out is a waiver of any objection to striking out such evidence. Foster *v.* Tanenbaum, 2 N. Y. App. Div. 168, 37 N. Y. Suppl. 722.

25. Chicago, etc., R. Co. *v.* Steckman, 224 Ill. 500, 79 N. E. 602 [*affirming* 125 Ill. App. 299]; Cotton *v.* Center Coal Min. Co., (Iowa 1909) 123 N. W. 381; Johnston *v.* Cedar Rapids, etc., R. Co., 141 Iowa 114, 119 N. W. 286; Barton *v.* Govan, 116 N. Y. 658, 22 N. E. 556.

26. Weber Wagon Co. *v.* Kehl, 139 Ill. 644, 29 N. E. 714; People *v.* Keefer, 103 Mich. 83, 61 N. W. 338; Hollen *v.* Crim, 62 W. Va. 451, 59 S. E. 172.

27. Mattes *v.* Frankel, 65 Hun (N. Y.) 203, 20 N. Y. Suppl. 145 [*affirmed* in 157 N. Y. 603, 52 N. E. 585, 68 Am. St. Rep. 804]; Dunn *v.* Parsons, 21 N. Y. Suppl. 901; Wright *v.* C. S. Graves Land Co., 100 Wis. 269, 75 N. W. 1000. And see *supra*, V, E, 1, e, (IV), (B).

28. Kimic *v.* San Jose-Los Gatos Interurban R. Co., 156 Cal. 273, 104 Pac. 312.

29. **Admission of evidence** see *supra*, V, E, 1.

On trial by court see *supra*, XII, A, 2, d.

30. *Alabama.*—Lovelady *v.* Birmingham R., etc., Co., 161 Ala. 494, 50 So. 96; Shelby Iron Co. *v.* Ridley, 135 Ala. 513, 33 So. 331.

California.—Cobb *v.* Doggett, 142 Cal. 142, 75 Pac. 785.

Colorado.—Denver, etc., R. Co. *v.* Burchard, 35 Colo. 539, 86 Pac. 749; San Juan County *v.* Tulley, 17 Colo. App. 113, 67 Pac. 346.

Illinois.—Sammis *v.* Chicago, etc., R. Co., 97 Ill. App. 28.

Indiana.—Bradburn *v.* Burget, 23 Ind. 468; Woodburn *v.* Flemming, 1 Blackf. 474; Atkinson *v.* Maris, 40 Ind. App. 718, 81 N. E. 745; Lake Erie, etc., R. Co. *v.* Shelley, (App. 1903) 67 N. E. 564.

Iowa.—Campbell *v.* Collins, 133 Iowa 152, 110 N. W. 435; Lundy *v.* Lundy, 118 Iowa 445, 92 N. W. 39; Quinlan *v.* Chicago, etc., R. Co., 113 Iowa 89, 84 N. W. 960.

Kansas.—Leis *v.* Potter, 68 Kan. 117, 74 Pac. 622; Deatherage *v.* Woods, 37 Kan. 59, 14 Pac. 474.

Massachusetts.—Ross *v.* Schrieves, 199 Mass. 401, 85 N. E. 468.

Michigan.—Moore *v.* Machen, 124 Mich. 216, 82 N. W. 892; Murray *v.* Rugg, 116 Mich. 519, 74 N. W. 878; Germain *v.* Central Lumber Co., 116 Mich. 245, 74 N. W. 644.

Minnesota.—Conan *v.* Ely, 91 Minn. 127, 97 N. W. 737.

Nebraska.—Atwood *v.* Marshall, 52 Nebr. 173, 71 N. W. 1064.

New Hampshire.—Pattee *v.* Whitcomb, 72 N. H. 249, 56 Atl. 459.

New York.—Jenks *v.* Thompson, 179 N. Y. 20, 71 N. E. 266 [*affirming* 83 N. Y. App. App. Div. 343, 82 N. Y. Suppl. 274]; Weinhandler *v.* Eastern Brewing Co., 46 Misc. 584, 92 N. Y. Suppl. 792; Clapper *v.* Race, 121 N. Y. Suppl. 317; Steele *v.* Lippman, 115 N. Y. Suppl. 1099.

North Carolina.—Janney *v.* Robbins, 141 N. C. 400, 53 S. E. 863.

Texas.—Gulf, etc., R. Co. *v.* Matthews, 100 Tex. 63, 93 S. W. 1068 [*reversing* (Civ. App. 1905) 89 S. W. 983]; Gulf, etc., R. Co. *v.* Milner, 28 Tex. Civ. App. 86, 66 S. W. 574; Ft. Worth, etc., R. Co. *v.* Wright, 27 Tex. Civ. App. 198, 64 S. W. 1001.

Wisconsin.—Falkner *v.* Guild, 10 Wis. 563.

Where the evidence is in direct conflict, the exclusion of competent evidence is a matter of much more consequence than it would be in a case where the testimony on the point was substantially all one way. Chlanda *v.* St. Louis Transit Co., 213 Mo. 244, 112 S. W. 249; Keller *v.* Morton, 63 Misc. (N. Y.) 340, 117 N. Y. Suppl. 200. Thus where the evidence is so conflicting that it is doubtful whether plaintiff has sustained his burden of producing a preponderance of evidence, almost any error in the exclusion of evidence offered by defendant becomes material. Fink *v.* Glauber, 121 N. Y. Suppl. 297. Where the evidence on some of the important phases of the case is sharply conflicting and the conclusion is determinable only on the credibility of the witnesses, the error in excluding evidence of the good character of accused is prejudicial. *In re* Darrow, (Ind. App. 1908) 83 N. E. 1026.

The exclusion of proper evidence directly corroborative of the evidence of a party, in conflict with the testimony of the adverse party, is prejudicial. Hanson *v.* Kline, 136 Iowa 101, 113 N. W. 504; Cox *v.* Mankin, 107 N. Y. Suppl. 586. Where the evidence consists principally of the testimony of the parties, each in support of his own claim, it is a substantial error to exclude any testimony legitimately bearing on the weight to be given to the testimony of the parties. Broadwell *v.* Conover, 186 N. Y. 429, 79 N. E. 402 [*reversing* 108 N. Y. App. Div. 359, 95 N. Y. Suppl. 1116].

31. *Alabama.*—**Thompson *v.* Drake, 32 Ala. 99.**

result,[32] the error is harmless. The fact that the trial court may have excluded

Arkansas.—Wassell *v.* Trapnall, 19 Ark. 677.

California.— Shepard *v.* Mace, 148 Cal. 270, 82 Pac. 1046; Grijalva *v.* Southern Pac. Co., 137 Cal. 569, 70 Pac. 622; British Columbia Bank *v.* Frese, 116 Cal. 9, 47 Pac. 783.

Dakota.— Burdick *v.* Haggart, 4 Dak. 13, 22 N. W. 589.

District of Columbia.— Crook *v.* Maryland International Trust Co., 32 App. Cas. 490.

Georgia.— Brown *v.* Hall, 108 Ga. 759, 33 S. E. 62.

Idaho.— Spongberg *v.* Montpelier First Nat. Bank, 15 Ida. 671, 99 Pac. 712.

Illinois.— Chicago, etc., R. Co. *v.* Crose, 214 Ill. 602, 73 N. E. 865, 105 Am. St. Rep. 135; Chicago, etc., R. Co. *v.* Walters, 120 Ill. App. 152 [*affirmed* in 217 Ill. 87, 75 N. E. 441]; Triggs *v.* McIntyre, 115 Ill. App. 257 [*affirmed* in 215 Ill. 369, 74 N. E. 400].

Indiana.— Metropolitan L. Ins. Co. *v.* Willis, 37 Ind. App. 48, 76 N. E. 560.

Iowa.— McNamara *v.* New Melleray Corp., 88 Iowa 502, 55 N. W. 322; Bruner *v.* Wade, 84 Iowa 698, 51 N. W. 251; Citizens' Bank *v.* Barnes, 70 Iowa 412, 30 N. W. 857; Klaman *v.* Malvin, 61 Iowa 752, 16 N. W. 356.

Kansas.— Huckins *v.* Randolph, 75 Kan. 815, 88 Pac. 540; Whittaker *v.* Voorhees, 38 Kan. 71, 15 Pac. 874.

Kentucky.— Lively *v.* Ball, 2 B. Mon. 53.

Louisiana.— Pasquier's Succession, 12 La. Ann. 758.

Maryland.— Hyatt *v.* Pollard, (1885) 1 Atl. 873; Buschman *v.* Codd, 52 Md. 202.

Massachusetts.— Temple *v.* Phelps, 193 Mass. 297, 79 N. E. 482; Koplan *v.* Boston Gaslight Co., 177 Mass. 15, 58 N. E. 183; Cushing *v.* Boston, 124 Mass. 434.

Minnesota.— Chapman *v.* Dodd, 10 Minn. 350.

Missouri.—Weller *v.* Wagner, 181 Mo. 151, 79 S. W. 941; Schroeder *v.* Seittz, 68 Mo. App. 233; *In re* Bischoff, 10 Mo. App. 474.

Nebraska.—Johnson *v.* Dahle, 85 Nebr. 450, 123 N. W. 437; Spirk *v.* Chicago, etc., R. Co., 57 Nebr. 565, 78 N. W. 272.

New Jersey.—Wallace *v.* Leber, 69 N. J. L. 312, 55 Atl. 475.

New York.— Lippe *v.* Brandner, 120 N. Y. App. Div. 230, 105 N. Y. Suppl. 225; Burnham *v.* Pidcock, 58 N. Y. App. Div. 273, 68 N. Y. Suppl. 1007 [*affirming* 33 Misc. 65, 66 N. Y. Suppl. 806]; Page *v.* Ellsworth, 44 Barb. 636; Berg *v.* Carroll, 16 N. Y. Suppl. 175.

North Carolina.— Freeman *v.* Brown, 151 N. C. 111, 65 S. E. 743; Bass *v.* Roanoke Nav., etc., Co., 111 N. C. 439, 16 S. E. 402, 19 L. R. A. 247.

Ohio.— Palmer *v.* Cowie, 27 Ohio Cir. Ct. 617.

Oklahoma.— Funk *v.* Hendricks, 24 Okla. 837, 105 Pac. 352; Mullen *v.* Thaxton, 24 Okla. 643, 104 Pac. 359; Boyce *v.* Augusta Camp No. 7429 M. W. 9., 14 Okla. 642, 78 Pac. 322.

Pennsylvania.— Hoar *v.* Leaman, (1888) 15 Atl. 716; Heysham *v.* Dettre, 89 Pa. St. 506; Armstrong *v.* Lancaster, 5 Watts 68, 30 Am. Dec. 293.

Texas.— Holstein *v.* Adams, 72 Tex. 485, 10 S. W. 560; Gatlin *v.* Street, 40 Tex. Civ. App. 304, 90 S. W. 318; Thompson *v.* Lynn, 36 Tex. Civ. App. 79, 81 S. W. 330. See also Adam *v.* Sanger, (Civ. App. 1903) 77 S. W. 954.

Vermont.— Baker *v.* Sherman, 71 Vt. 439, 46 Atl. 57; Sampson *v.* Warner, 48 Vt. 247.

Virginia.— Payne *v.* Grant, 81 Va. 164.

Washington.— Lawson *v.* Black Diamond Coal Min. Co., 53 Wash. 614, 102 Pac. 759; Smith *v.* Glenn, 40 Wash. 262, 82 Pac. 605. See also Carstens *v.* Hine, 39 Wash. 498, 81 Pac. 1004.

West Virginia.— Camden *v.* West Branch Lumber Co., 59 W. Va. 148, 53 S. E. 409; Tompkins *v.* Kanawha Board, 21 W. Va. 224; Bowyer *v.* Seymour, 13 W. Va. 12.

Wisconsin.— Gallaway *v.* Massee, 133 Wis. 638, 113 N. W. 1098; Nagle *v.* Hake, 123 Wis. 256, 101 N. W. 409.

United States.— Hornbuckle *v.* Stafford, 111 U. S. 389, 4 S. Ct. 515, 28 L. ed. 468.

32. *Alabama.*— Montgomery-Moore Mfg. Co. *v.* Leith, 162 Ala. 246, 50 So. 210; Crone *v.* Long, 159 Ala. 487, 49 So. 227; Hudson *v.* Vaughn, (1906) 40 So. 757; Marx *v.* Miller, 134 Ala. 347, 32 So. 765.

Arkansas.— Ferguson Lumber Co. *v.* Low, (1891) 17 S. W. 879; George *v.* Norris, 23 Ark. 121; State *v.* Lawson, 14 Ark. 114.

California.—Dundon *v.* McDonald, 146 Cal. 585, 80 Pac. 1034; Gasquet *v.* Pechin, 143 Cal. 515, 77 Pac. 481; Bertelsen *v.* Bertelsen, 7 Cal. App. 258, 94 Pac. 80.

Colorado.— Farmers' High Line Canal, etc., Co. *v.* New Hampshire Real Estate Co., 40 Colo. 467, 92 Pac. 290; McMillen *v.* Ferrum Min. Co., 32 Colo. 38, 74 Pac. 461, 105 Am. St. Rep. 64 [*affirmed* in 197 U. S. 343, 25 S. Ct. 533, 49 L. ed. 784]; Scott *v.* Wood, 14 Colo. App. 341, 59 Pac. 844.

Connecticut.—Wolcho *v.* Rosenbluth, 81 Conn. 358, 71 Atl. 566, 21 L. R. A. N. S. 571; Czarnecki *v.* Derecktor, 81 Conn. 338, 71 Atl. 354; Davenport *v.* Lines, 77 Conn. 473, 59 Atl. 603.

Florida.— Randall *v.* Parramore, 1 Fla. 409.

Georgia.—Weeks *v.* Hosch Lumber Co., 133 Ga. 472, 66 S. E. 168, 134 Am. St. Rep. 213; Stewart *v.* Savannah Electric Co., 133 Ga. 10, 65 S. E. 110; Hunting *v.* Quarterman, 120 Ga. 344, 47 S. E. 928.

Idaho.— Spongberg *v.* Montpelier First Nat. Bank, 15 Ida. 671, 99 Pac. 712.

Illinois.— Court of Honor *v.* Dinger, 221 Ill. 176, 77 N. E. 557 [*affirming* 123 Ill. App. 406]; Lettick *v.* Honnold, 63 Ill. 335; El Paso First Nat. Bank *v.* Miller, 139 Ill. App. 608 [*affirmed* in 235 Ill. 135, 85 N. E. 312]; Goddard *v.* Enzler, 123 Ill. App. 108 [*affirmed* in 222 Ill. 462, 78 N. E. 805].

Indiana.— Behler *v.* Ackley, 173 Ind. 173, 89 N. E. 877; New *v.* Germania F. Ins. Co., 171 Ind. 33, 85 N. E. 703, 131 Am. St. Rep. 245; Conner *v.* Citizens' St. R. Co., 146 Ind.

the evidence upon an objection that was not good in itself affords no reason for disturbing his ruling;[33] but it is otherwise where a witness is erroneously excluded as incompetent for a specified reason, although he was also incompetent on another ground, since his incompetency on such latter ground might have been removed by a release.[34]

430, 45 N. E. 662; Coburn *v.* Stephens, 137 Ind. 683, 36 N. E. 132, 45 Am. St. Rep. 218.

Iowa.—Kuhl *v.* Chamberlain, 140 Iowa 546, 118 N. W. 776, 21 L. R. A. N. S. 766; Andres *v.* Schlueter, 140 Iowa 389, 118 N. W. 429; Creager *v.* Johnson, 114 Iowa 249, 86 N. W. 275.

Kansas.— Hughes *v.* Ward, 38 Kan. 452, 16 Pac. 810; Missouri River R. Co. *v.* Richards, 8 Kan. 101; Mecartney *v.* Smith, 10 Kan. App. 580, 62 Pac. 540.

Kentucky.—Smith *v.* Doherty, 109 Ky. 616, 60 S. W. 380, 22 Ky. L. Rep. 1238; Union Casualty, etc., Co. *v.* Goddard, 76 S. W. 832, 25 Ky. L. Rep. 1035; McDowell *v.* McDowell, 73 S. W. 1022, 24 Ky. L. Rep. 2270.

Louisiana.— Pirdy *v.* Phelps, 108 La. 22, 32 So. 182; Robinson *v.* Taylor, 6 La. 393; Richard *v.* Bird, 4 La. 305.

Maine.— Merrill *v.* Milliken, 101 Me. 50, 63 Atl. 299; Comstock *v.* Smith, 23 Me. 202.

Maryland.— Horner *v.* Buckingham, 103 Md. 556, 64 Atl. 41; Black *v.* Westminster First Nat. Bank, 96 Md. 399, 54 Atl. 88.

Massachusetts.— Carroll *v.* Boston El. R. Co., 200 Mass. 527, 86 N. E. 793; Crowley *v.* Fitchburg, etc., St. R. Co., 185 Mass. 279, 70 N. E. 56; Forbes *v.* Ware, 172 Mass. 306, 52 N. E. 447.

Michigan.— *In re* McNamara, 155 Mich. 585, 119 N. W. 1074; McIntyre *v.* Murphy, 153 Mich. 342, 116 N. W. 1003; Miller *v.* Shumway, 135 Mich. 654, 98 N. W. 385; Downing *v.* Buck, 135 Mich. 636, 98 N. W. 388.

Minnesota.— Thielen *v.* Randall, 75 Minn. 332, 77 N. W. 992; Hanson *v.* Elton, 38 Minn. 493, 38 N. W. 614; Duncan *v.* Kohler, 37 Minn. 379, 34 N. W. 594.

Mississippi.— Bowling *v.* Bowling, (1908) 47 So. 802; Advance Gin, etc., Co. *v.* Thomas, 81 Miss. 486, 32 So. 316; Magee *v.* Harrington, 13 Sm. & M. 403.

Missouri.— Stark *v.* Knapp, 160 Mo. 529, 61 S. W. 669; Stokes *v.* Burnes, 132 Mo. 214, 33 S. W. 460; Caskey *v.* La Belle, 101 Mo. App. 590, 74 S. W. 113.

Montana.— Butte, etc., Min. Co. *v.* Sloan, 16 Mont. 97, 40 Pac. 217.

Nebraska.— Thomas *v.* Thomas, 64 Nebr. 581, 90 N. W. 630; Kyner *v.* Laubner, 3 Nebr. (Unoff.) 370, 91 N. W. 491.

New Hampshire.— Lapointe *v.* Berlin Mills Co., 75 N. H. 294, 73 Atl. 406.

New Jersey.— Rodenbough *v.* Rosebury, 24 N. J. L. 491; Smith *v.* Ruecastle, 7 N. J. L. 357.

New York.— Deering *v.* Starr, 118 N. Y. 665, 23 N. E. 125; Matter of Rice, 81 N. Y. App. Div. 223, 81 N. Y. Suppl. 68 [*affirmed* in 176 N. Y. 570, 68 N. E. 1123]; Sugarman *v.* Brengel, 68 N. Y. App. Div. 377, 74 N. Y. Suppl. 167, 10 N. Y. Annot. Cas. 385; Larssen *v.* Delaware, etc., R. Co., 59 N. Y. App. Div. 202, 69 N. Y. Suppl. 352.

North Carolina.— Trotter *v.* Angel, 137 N. C. 274, 49 S. E. 329; Marcom *v.* Raleigh, etc., R. Co., 126 N. C. 200, 35 S. E. 423; Patterson *v.* Galliher, 122 N. C. 511, 29 S. E. 773; Love *v.* Raleigh, 116 N. C. 296, 21 S. E. 503, 28 L. R. A. 192.

Ohio.— Hart *v.* Johnson, 6 Ohio 87; Green *v.* New York, etc., R. Co., 26 Ohio Cir. Ct. 609.

Oklahoma.— Browning *v.* Akins, 10 Okla. 536, 62 Pac. 281.

Oregon.— Christenson *v.* Nelson, 38 Oreg. 473, 63 Pac. 648.

Pennsylvania.— Steel *v.* Glass, 189 Pa. St. 283, 42 Atl. 187; Gearing *v.* Carroll, 151 Pa. St. 79, 24 Atl. 1045; Ziegler *v.* Handrick, 106 Pa. St. 87; Laubaugh *v.* Pennsylvania R. Co., 28 Pa. Super. Ct. 247.

South Carolina.—Harmon *v.* Western Union Tel. Co., 65 S. C. 490, 43 S. E. 959.

South Dakota.— Haugen *v.* Chicago, etc., R. Co., 3 S. D. 394, 53 N. W. 769.

Tennessee.— Douglas *v.* Neil, 7 Heisk. 437; Sellars *v.* Sellars, 2 Heisk. 430; Cummings *v.* Irvin, (Ch. App. 1900) 59 S. W. 153.

Texas.— Lecomte *v.* Toudouze, 82 Tex. 208, 17 S. W. 1047, 27 Am. St. Rep. 870; Harrell *v.* Broocks, (Civ. App. 1908) 113 S. W. 961; Helsley *v.* Moss, (Civ. App. 1908) 113 S. W. 599; Luhn *v.* Luhn, (Civ. App. 1906) 93 S. W. 525; San Antonio Mach., etc., Co. *v.* Josey, (Civ. App. 1906) 91 S. W. 598.

Vermont.— Fullam *v.* Goddard, 42 Vt. 162.

Virginia.— Lynchburg Milling Co. *v.* National Exch. Bank, 109 Va. 639, 64 S. E. 980; Showalter *v.* Showalter, 107 Va. 713, 60 S. E. 48. See also Cheatwood *v.* Mayo, 5 Munf. 16.

Washington.— Lilly *v.* Eklund, 37 Wash. 532, 79 Pac. 1107; Jordan *v.* Seattle, 30 Wash. 298, 70 Pac. 743; Box *v.* Kelso, 5 Wash. 360, 31 Pac. 973.

West Virginia.— Bartlett *v.* Patton, 33 W. Va. 71, 10 S. E. 21, 5 L. R. A. 523; Ruffner *v.* Hill, 31 W. Va. 428, 7 S. E. 13; Watkins *v.* Wortman, 19 W. Va. 78.

Wisconsin.— Meyer *v.* Arends, 126 Wis. 603, 106 N. W. 675; Herman *v.* Schlesinger, 114 Wis. 382, 90 N. W. 460, 91 Am. St. Rep. 922; Kelly *v.* Wright, 65 Wis. 236, 26 N. W. 610.

Wyoming.— Link *v.* Union Pac. R. Co., 3 Wyo. 680, 29 Pac. 741.

United States.— Reavis *v.* Fianza, 215 U. S. 16, 30 S. Ct. 1, 54 L. ed. —; Ivinson *v.* Hutton, 119 U. S. 604, 7 S. Ct. 403, 30 L. ed. 509; Chicago *v.* Le Moyne, 119 Fed. 662, 56 C. C. A. 278.

33. Corker *v.* Stafford, 125 Ga. 428, 54 S. E. 92; Vaughn Mach. Co. *v.* Quintard, 37 N. Y. App. Div. 368, 55 N. Y. Suppl. 1114 [*affirmed* in 165 N. Y. 649, 59 N. E. 1132].

34. Leslie *v.* Sims, 39 Ala. 161.

(II) *EVIDENCE IMMATERIAL TO ISSUE.* The exclusion of immaterial evidence is not ground for reversal,[35] even if it would have been pertinent to the

35. *Alabama.*— Southern R. Co. *v.* Dickens, 161 Ala. 144, 49 So. 766; Schloss *v.* Inman, 129 Ala. 424, 30 So. 667; Laster *v.* Blackwell, 128 Ala. 143, 30 So. 663.

Arkansas.— State *v.* Lawson, 14 Ark. 114.

California.— Matter of Higgins, 156 Cal. 257, 104 Pac. 6; McMullin *v.* McMullin, 140 Cal. 112, 73 Pac. 808, (1902) 71 Pac. 108; Coffee *v.* Haynes, 124 Cal. 561, 57 Pac. 482, 71 Am. St. Rep. 99; Hill *v.* Clark, 7 Cal. App. 609, 95 Pac. 382.

Colorado.— Bailey *v.* Carlton, 43 Colo. 4, 95 Pac. 542; Boulder, etc., Ditch Co. *v.* Leggett Consol. Ditch, etc., Co., 36 Colo. 455, 86 Pac. 101; Mulligan *v.* Smith, 32 Colo. 404, 76 Pac. 1063.

Connecticut.— Wood *v.* Holah, 79 Conn. 215, 64 Atl. 220; Norman Printers' Supply Co. *v.* Ford, 77 Conn. 461, 59 Atl. 499; Fisk *v.* Ley, 76 Conn. 295, 56 Atl. 559.

Georgia.— Hunnicutt *v.* Chambers, 111 Ga. 566, 36 S. E. 853; Deen *v.* Carter, 100 Ga. 95, 26 S. E. 473.

Illinois.— Barbee *v.* Morris, 221 Ill. 382, 77 N. E. 589; Chicago, etc., Coal Co. *v.* Moran, 210 Ill. 9, 71 N. E. 38 [*affirming* 110 Ill. App. 664]; Fender *v.* Fender, 123 Ill. App. 105.

Indiana.— Morgan *v.* Gaar, 64 Ind. 213; Indianapolis, etc., Rapid Transit Co. *v.* Haines, 33 Ind. App. 63, 69 N. E. 187; Union L. Ins. Co. *v.* Jameson, 31 Ind. App. 28, 67 N. E. 199.

Iowa.— Hilliker *v.* Allen, 128 Iowa 607, 105 N. W. 120; McMillan *v.* American Express Co., 123 Iowa 236, 98 N. W. 629; Alexander *v.* Grand Lodge A. O. U. W., 119 Iowa 519, 93 N. W. 508.

Kansas.— McCluskey *v.* Cubbison, (App. 1899) 57 Pac. 496.

Louisiana.— Sterling *v.* Luckett, 7 Mart. N. S. 198.

Maine.— Webster *v.* Calden, 55 Me. 165.

Massachusetts.— Preston *v.* West's Beach Corp., 195 Mass. 482, 81 N. E. 253; Graham *v.* Hatch Storage Battery Co., 186 Mass. 226, 71 N. E. 532; National Bank of Commerce *v.* New Bedford, 175 Mass. 257, 56 N. E. 288.

Michigan.— Jewett *v.* Bryant, 159 Mich. 345, 123 N. W. 1097; Ness *v.* Escanaba, 142 Mich. 404, 105 N. W. 879; Miller *v.* Shumway, 135 Mich. 654, 98 N. W. 385.

Minnesota.— Schmidt *v.* McCarthy, 43 Minn. 288, 46 N. W. 239.

Missouri.— Chapman *v.* Kansas City, etc., R. Co., 146 Mo. 481, 48 S. W. 646; Harris *v.* Quincy, etc., R. Co., 115 Mo. App. 527, 91 S. W. 1010; George *v.* St. Joseph, 97 Mo. App. 56, 71 S. W. 110.

Montana.— Wilhite *v.* Billings, etc., Power Co., 39 Mont. 1, 101 Pac. 168.

Nebraska.— Campion *v.* Lattimer, 70 Nebr. 245, 97 N. W. 290; Omaha School Dist. *v.* McDonald, 68 Nebr. 610, 94 N. W. 829, 97 N. W. 584; Fidelity Mut. F. Ins. Co. *v.* Lowe, 4 Nebr. (Unoff.) 159, 93 N. W. 749.

New Hampshire.— Howland *v.* Currier, 69 N. H. 202, 44 Atl. 106.

New Mexico.— Salazar *v.* Longwill, 5 N. M. 548, 25 Pac. 927.

New York.— Niagara Falls *v.* New York Cent., etc., R. Co., 168 N. Y. 610, 61 N. E. 185; Matter of Tisdale, 110 N. Y. App. Div. 857, 97 N. Y. Suppl. 494; Jackson *v.* Jackson, 100 N. Y. App. Div. 385, 91 N. Y. Suppl. 844.

North Carolina.— Burnett *v.* Roanoke Mills Co., 152 N. C. 35, 67 S. E. 30.

Ohio.— Bowman *v.* Hartman, 27 Ohio Cir. Ct. 309; Independent Coal Co. *v.* First Nat. Bank, 27 Ohio Cir. Ct. 297.

Pennsylvania.— Galbraith *v.* Zimmerman, 100 Pa. St. 374; Urket *v.* Coryell, 5 Watts & S. 60; Shortz *v.* Unangst, 3 Watts & S. 45.

Rhode Island.— McGarrity *v.* New York, etc., R. Co., 25 R. I. 269, 55 Atl. 718; Rose *v.* Mitchell, 21 R. I. 270, 43 Atl. 67.

South Carolina.— McClintock *v.* Charleston, etc., R. Co., 83 S. C. 58, 64 S. E. 1009; Burwell, etc., Co. *v.* Chapman, 59 S. C. 581, 38 S. E. 222; Garrett *v.* Weinberg, 59 S. C. 162, 37 S. E. 51, 225.

Tennessee.— Duffield *v.* Spence, (Ch. App. 1897) 51 S. W. 492.

Texas.— Texas, etc., R. Co. *v.* Texas Tram, etc., Co., 50 Tex. Civ. App. 182, 110 S. W. 140; Texas, etc., R. Co. *v.* Edrington, 46 Tex. Civ. App. 388, 102 S. W. 1171; Kirby Lumber Co. *v.* Chambers, 41 Tex. Civ. App. 632, 95 S. W. 607.

Vermont.— McKinstry *v.* Collins, 74 Vt. 147, 52 Atl. 438.

Virginia.— Stokes *v.* Southern R. Co., 104 Va. 817, 52 S. E. 855.

Washington.— W. W. Kimball Co. *v.* Cockrell, 23 Wash. 529, 63 Pac. 228.

Wisconsin.— Dralle *v.* Reedsburg, 140 Wis. 319, 122 N. W. 771; Wilson *v.* Chippewa Valley Electric R. Co., 135 Wis. 18, 114 N. W. 462, 115 N. W. 330; Ives *v.* Wisconsin Cent. R. Co., 128 Wis. 357, 107 N. W. 452.

United States.— Turner *v.* Fendall, 1 Cranch 116, 2 L. ed. 53; Farbenfabriken *v.* Beringer, 158 Fed. 802, 86 C. C. A. 62; Shoup *v.* Marks, 128 Fed. 32, 62 C. C. A. 540.

Illustrations.— Error in the exclusion of evidence is harmless where a different construction of a statute adopted on appeal renders the evidence immaterial. Smith *v.* Hazard, 110 Cal. 145, 42 Pac. 465. It is harmless error to exclude evidence that some of plaintiffs have died, where the action was not abated, or the issues changed, by such deaths. Mason *v.* Finch, 28 Mich. 282. The exclusion of proof in support of a right to reform a sheriff's deed, executed pursuant to a sale under a tax judgment, was not error, where the court was without jurisdiction to reform the deed. Dixon *v.* Hunter, 204 Mo. 382, 102 S. W. 970.

The exclusion of evidence offered to contradict a witness on an immaterial point is harmless error. Fitzgerald *v.* Hartford, (Conn. 1909) 71 Atl. 779; Common *v.*

case as subsequently developed, and its rejection, if offered subsequently, would have been erroneous.[36]

(III) *Evidence Not Beneficial to Appellant.* It is not error to reject testimony on a trial, which, if permitted to be offered, could have been of no benefit to the party.[37] Thus where evidence offered by a party to prove a certain fact does not tend to establish such fact,[38] or is insufficient for that purpose,[39] or tends to prove the issue in favor of his adversary,[40] the exclusion of such evidence is not prejudicial, if no other evidence as to the fact is either introduced or offered.[41] On the other hand the exclusion of evidence, which may form a link in the chain of testimony, is error, although it may not be sufficient of itself to establish the proposition for which it is offered,[42] and this, although at the time no disclosure is made by counsel of an intention to prove the additional facts to establish such proposition.[43] The mere fact that the rejected evidence would have been futile if received does not show that its rejection was not prejudicial, because the proposer might have introduced other evidence or have otherwise changed his course at the trial if the ruling of the court had been right and his rejected evidence had been received.[44] Similarly the fact that the objecting party has not made a case for the jury does not negative the presumption of

People, 39 Ill. App. 31 [*affirmed* in 137 Ill. 601, 27 N. E. 533]; State *v.* Gilreath, 16 S. C. 100.

Where there is nothing to indicate what relation the excluded testimony has to the controversy, and, so far as shown, it would be irrelevant to any issue, its exclusion is not prejudicial error. Grape *v.* Wiederholdt, (Iowa 1899) 80 N. W. 516; Veum *v.* Sheeran, 88 Minn. 257, 92 N. W. 965; Knatvold *v.* Wilkinson, 83 Minn. 265, 86 N. W. 99.

36. Heroy *v.* Kerr, 8 Bosw. (N. Y.) 194, 21 How. Pr. 409 [*affirmed* in 2 Abb. Dec. 359, 2 Keyes 582].

37. Estes *v.* Boothe, 20 Ark. 583; Mills *v.* Los Angeles, 90 Cal. 522, 27 Pac. 354; Morehead *v.* Anderson, 125 Ky. 77, 100 S. W. 340, 30 Ky. L. Rep. 1137; Luce *v.* Knowlton, 15 N. Y. Suppl. 825.

38. Roberge *v.* Bonner, 185 N. Y. 265, 77 N. E. 1023 [*affirming* 94 N. Y. App. Div. 342, 88 N. Y. Suppl. 91]. See also Schon *v.* Modern Woodmen of America, 51 Wash. 482, 99 Pac. 25.

Different fact.— Where it appeared that the testimony of the witness produced by plaintiff would have proved a different contract from the one declared on, it was held that he was not entitled to a new trial because the witness was rejected as having an interest in the result of the action. Emerton *v.* Andrews, 4 Mass. 653. See also Munnink *v.* Jung, 3 Tex. Civ. App. 395, 22 S. W. 293.

39. *California.*— *In re* Snowball, 156 Cal. 240, 104 Pac. 444.

Georgia.— Weeks *v.* Hosch Lumber Co., 133 Ga. 472, 66 S. E. 168, 134 Am. St. Rep. 213; Corker *v.* Stafford, 125 Ga. 428, 54 S. E. 92.

Iowa.— Frazier *v.* Steenrod, 7 Iowa 339, 71 Am. Dec. 447.

Michigan.— Bell *v.* Zelmer, 75 Mich. 66, 42 N. W. 606.

Mississippi.— Dunn *v.* Winston, 31 Miss. 135.

New York.— Pringle *v.* Burroughs, 185 N. Y. 375, 78 N. E. 150 [*affirming* 100 N. Y. App. Div. 366, 91 N. Y. Suppl. 750].

Pennsylvania.— Johns *v.* Pennsylvania R. Co., 226 Pa. St. 319, 75 Atl. 408, 28 L. R. A. N. S. 591; Ely *v.* Hager, 3 Pa. St. 154.

Texas.— Baldwin *v.* Roberts, 13 Tex. Civ. App. 563, 36 S. W. 789.

Wisconsin.— Chandler *v.* Hinds, 135 Wis. 43, 115 N. W. 339; Freeman *v.* Carpenter, 17 Wis. 126.

Where the evidence offered does not make a prima facie case its exclusion is harmless error. Alabama Mineral Land Co. *v.* Blocton-Cahaba Coal Co., 150 Ala. 566, 43 So. 831; Patt *v.* Gerst, 149 Ala. 287, 42 So. 1001.

40. Meyer *v.* Krohn, 114 Ill. 574, 2 N. E. 495; Hunt *v.* Daggett, 7 Ohio Dec. (Reprint) 260, 2 Cinc. L. Bul. 22.

41. *Alabama.*— Bradford *v.* Haggerthy, 11 Ala. 698.

Idaho.— Sponberg *v.* Montpelier First Nat. Bank, 15 Ida. 671, 99 Pac. 712.

Maine.— Temple *v.* Partridge, 42 Me. 56, holding that unless evidence is before the jury which, with that offered and excluded, may be sufficient, if found true, to establish the proposition for which it is offered, when taken in the most favorable light for the party offering it, he cannot be regarded as prejudiced by the exclusion.

Massachusetts.— Hobart *v.* Plymouth, 100 Mass. 159.

Michigan.— Partlow *v.* Swigart, 90 Mich. 61, 51 N. W. 270.

Missouri.— Kennedy *v.* Ballard, 39 Mo. App. 340.

42. Hoban *v.* Boyer, 37 Colo. 185, 85 Pac. 837; Budd *v.* Hoffheimer, 52 Mo. 297; Gartner *v.* Chicago, etc., R. Co., 71 Nebr. 444, 98 N. W. 1052, holding that where evidence on a vital proposition is erroneously excluded, it is not necessary for the party offering it to establish other propositions in his case in order to predicate error on such ruling.

43. Budd *v.* Hoffheimer, 52 Mo. 297.

44. Mutual Reserve L. Ins. Co. *v.* Heidel, 161 Fed. 535, 88 C. C. A. 477.

prejudice, for his failure to make a case may be the result of the error complained of.[45]

(IV) *EVIDENCE IMPROPER FOR PURPOSE OFFERED.* When evidence is offered accompanied with a statement that it is offered for a particular purpose, its rejection is not reversible error, because it is admissible for another purpose not called to the attention of the court,[46] especially where such other purpose is wholly inconsistent with the theory upon which the proponent is trying the action,[47] or where the evidence, if received, could have but slight effect.[48]

(V) *EVIDENCE OFFERED FOR IMPROPER PURPOSE.* The exclusion of evidence, technically admissible, is no ground for reversal, where it appears that it was offered to establish a void transaction,[49] or as introductory to other evidence which was in itself inadmissible.[50]

(VI) *EFFECT OF DETERMINATION.* The improper exclusion of evidence is often rendered harmless by the findings of the court or jury.[51] Thus the exclusion of evidence is harmless error where the jury finds as a fact the matter which such evidence would have tended to show.[52] So where the jury find against the existence of a fact, the exclusion of evidence assuming its existence becomes non-prejudicial.[53] Similarly when an issue of fact is determined in favor of the excepting party, the exclusion of evidence offered by him on that issue is not prejudicial,[54] unless it appears that the excluded evidence tended to increase or diminish in

For example where plaintiff was not permitted to introduce the first step in the proof of his case, and had no interest therefore in offering any evidence to avoid the proof of the other side, which he might have done if the court had given him a standing in the case which would have made it avail him to do so, the judgment was reversed. Peck *v.* Heurich, 167 U. S. 624, 17 S. Ct. 927, 42 L. ed. 302; Deery *v.* Cray, 5 Wall. (U. S.) 795, 18 L. ed. 653.

45. McNamara *v.* New Melleray Corp., 88 Iowa 502, 55 N. W. 322.

46. Andre *v.* Hardin, 32 Mich. 324; Mareck *v.* Minneapolis Trust Co., 74 Minn. 538, 77 N. W. 428.

47. Mareck *v.* Minneapolis Trust Co., 74 Minn. 538, 77 N. W. 428.

48. Simon *v.* Henry, 62 N. J. L. 486, 41 Atl. 692.

49. Kavanaugh *v.* Thompson, 16 Ala. 817.

50. Perry *v.* Smith, 29 N. J. L. 74.

51. *California.*— Boyd *v.* Liefer, 144 Cal. 336, 77 Pac. 953.

Indiana.— Morse *v.* Morse, 25 Ind. 156.

Iowa.— O'Neil *v.* Adams, 144 Iowa 385, 122 N. W. 976.

Michigan.— Guentherodt *v.* Ross, 121 Mich. 47, 79 N. W. 920.

Missouri.— Hendricks *v.* Calloway, 211 Mo. 536, 111 S. W. 60.

North Carolina.— Pierce *v.* Myrick, 12 N. C. 345.

Texas.— Ruis *v.* Chambers, 15 Tex. 586; Savage *v.* Umphries, (Civ. App. 1909) 118 S. W. 893.

52. Union Traction Co. *v.* Barnett, 31 Ind. App. 467, 67 N. E. 205.

53. Reed *v.* Ukiah Bank, 148 Cal. 96, 82 Pac. 845; Richmond *v.* Nye, 126 Mich. 602, 85 N. W. 1120; Burt *v.* Greene, 125 Mich. 328, 84 N. W. 317; Montana Ore Purchasing Co. *v.* Boston, etc., Consol. Copper, etc., Min. Co., 27 Mont. 288, 70 Pac. 1114, 27 Mont. 536, 71 Pac. 1005; Heine *v.* Meyer, 61 N. Y. 171; Roberts *v.* Johnstown Bank, 14 N. Y. Suppl. 432.

Illustrations.— In an action on a note, the erroneous exclusion of evidence as to the amount of protest fees was harmless, where the note was found to be void. El Paso First Nat. Bank *v.* Miller, 235 Ill. 135, 85 N. E. 312. In an action for damages sustained by inducing plaintiff to subscribe to stock in a corporation by means of a false prospectus, the error, if any, in excluding evidence of falsity not specially alleged in the declaration, becomes harmless, when the court finds as a fact that none of the statements of the prospectus operated to induce plaintiff to subscribe as alleged. Gilfillan *v.* Mawhinney, 149 Mass. 264, 21 N. E. 299.

54. *Alabama.*— Fowler *v.* Pritchard, 148 Ala. 261, 41 So. 667.

California.— Dundon *v.* McDonald, 146 Cal. 585, 80 Pac. 1034.

Georgia.— Hunnicutt *v.* Georgia Pac. R. Co., 85 Ga. 195, 11 S. E. 580.

Illinois.— Pratt *v.* Tucker, 67 Ill. 346; Phœnix Ins. Co. *v.* Stewart, 53 Ill. App. 273.

Indiana.— Moore *v.* Lynn, 79 Ind. 299; Starr *v.* Hunt, 25 Ind. 313; Union Traction Co. *v.* Barnett, 31 Ind. App. 467, 67 N. E. 205.

Kansas.— Topeka *v.* Noble, 9 Kan. App. 171, 58 Pac. 1015.

Maine.— Pitcher *v.* Webber, 104 Me. 401, 71 Atl. 1031.

Massachusetts.— Brigham *v.* Morgan, 185 Mass. 27, 69 N. E. 418; L'Herbette *v.* Pittsfield Nat. Bank, 162 Mass. 137, 38 N. E. 368, 44 Am. St. Rep. 354; Chandler *v.* Jamaica Pond Aqueduct Corp., 125 Mass. 544.

Michigan.— Hamilton *v.* Michigan Cent. R. Co., 135 Mich. 95, 97 N. W. 392; Schloss *v.* Estey, 114 Mich. 429, 72 N. W. 264; Clark *v.* Field, 42 Mich. 342, 4 N. W. 19.

Minnesota.— Greenleaf *v.* Egan, 30 Minn. 316, 15 N. W. 254.

his favor the results of the finding.[55] Exclusion of evidence material only on the question of damages is harmless where the jury find for defendant on the merits,[56] or where the damages awarded are not excessive.[57] So refusal to admit competent evidence tending to relieve from liability for exemplary damages is harmless error where the verdict allows only actual damages.[58]

(VII) *APPELLANT NOT ENTITLED TO FAVORABLE DECISION IN ANY EVENT.* Where the testimony offered and excluded, together with the testimony admitted, would not establish a cause of action, the exclusion of such evidence

Missouri.— Locke *v.* Independence, 192 Mo. 570, 91 S. W. 61; Bailey *v.* Dennis, 135 Mo. App. 93, 115 S. W. 506.

New York.—Deuterman *v.* Pollock, 54 N. Y. App. Div. 575, 66 N. Y. Suppl. 1009 [*affirmed* in 172 N. Y. 595, 64 N. E. 1120]; Bernstein *v.* Singer, 1 N. Y. App. Div. 63, 36 N. Y. Suppl. 1093.

North Carolina.— Stewart *v.* North Carolina R. Co., 136 N. C. 385, 48 S. E. 793; Cogdell *v.* Wilmington, etc., R. Co., 130 N. C. 313, 41 S. E. 541, 132 N. C. 852, 44 S. E. 618.

Pennsylvania.— Wright *v.* Wood, 23 Pa. St. 120; Woodward *v.* Consolidated Traction Co., 17 Pa. Super. Ct. 576.

Texas.— Taylor *v.* Coleman, 20 Tex. 772; Shearer *v.* Gaar, 41 Tex. Civ. App. 39, 90 S. W. 684; Kingsbury *v.* Waco State Bank, 30 Tex. Civ. App. 387, 70 S. W. 551; Moore *v.* Missouri, etc., R. Co., 30 Tex. Civ. App. 266, 69 S. W. 997.

Vermont.— Good *v.* Knox, 64 Vt. 97, 23 Atl. 520.

Washington.— Crowley *v.* Taylor, 49 Wash. 511, 95 Pac. 1016.

Wisconsin.— Hooker *v.* Brandon, 75 Wis. 8, 43 N. W. 741.

United States.— Colorado Cent. Consol. Min. Co. *v.* Turck, 70 Fed. 294, 17 C. C. A. 128.

55. Pitcher *v.* Webber, 104 Me. 401, 71 Atl. 1031.

56. *Alabama.*— Wallace *v.* North Alabama Traction Co., 145 Ala. 682, 40 So. 89.

California.— Fraser *v.* California St. Cable R. Co., 146 Cal. 714, 81 Pac. 29; Yaeger *v.* Southern California R. Co., (1897) 51 Pac. 190.

Connecticut.— Bierce *v.* Sharon Electric Light Co., 73 Conn. 300, 47 Atl. 324.

Dakota.— Knapp *v.* Sioux Falls Nat. Bank, 5 Dak. 378, 40 N. W. 587; Thompson *v.* Schuster, 4 Dak. 163, 28 N. W. 858.

Georgia.— McBride *v.* Georgia R., etc., Co., 125 Ga. 515, 54 S. E. 674; Andrew *v.* Carithers, 124 Ga. 515, 52 S. E. 653.

Illinois.— Doyle *v.* Cavanaugh, 139 Ill. App. 359; Burnett *v.* Luttrell, 52 Ill. App. 19; Parrott *v.* Swain, 29 Ill. App. 266.

Indiana.— Cline *v.* Myers, 64 Ind. 304; Bowman *v.* Clemmer, 50 Ind. 10.

Iowa.— German Sav. Bank *v.* Fritz, 135 Iowa 44, 109 N. W. 1008; Lush *v.* Parkersburg, 127 Iowa 701, 104 N. W. 336; Riley *v.* Bell, 120 Iowa 618, 95 N. W. 170.

Kansas.— Dryden *v.* St. Joseph, etc., R. Co., 23 Kan. 525; Norton *v.* Foster, 12 Kan. 44; Scott *v.* Beard, 5 Kan. App. 560, 47 Pac. 986.

Maine.— Powers *v.* Mitchell, 77 Me. 361; Stewart *v.* Belfast Foundry Co., 69 Me. 17; Moody *v.* Camden, 61 Me. 264.

Maryland.—Ziegenheim *v.* Baltimore Wholesale Grocery Co., 108 Md. 515, 69 Atl. 1071.

Massachusetts.—Morse *v.* Puffer, 182 Mass. 423, 65 N. E. 804; Parker *v.* Griffith, 172 Mass. 87, 51 N. E. 462; Geary *v.* Stevenson, 169 Mass. 23, 47 N. E. 508.

Michigan.— Brown *v.* Harris, 139 Mich. 372, 102 N. W. 960; Manning *v.* Bresnahan, 63 Mich. 584, 30 N. W. 189.

Missouri.— Donaldson Bond, etc., Co. *v.* Houck, 213 Mo. 416, 112 S. W. 242; Finnell *v.* Million, 99 Mo. App. 552, 74 S. W. 419.

New Mexico.— Cunningham *v.* Springer, 13 N. M. 259, 82 Pac. 232 [*affirmed* in 204 U. S. 647, 27 S. Ct. 301, 51 L. ed. 662].

New York.— Read *v.* Nicholas, 118 N. Y. 224, 23 N. E. 468, 7 L. R. A. 130; Lewis *v.* Brooklyn El. R. Co., 7 Misc. 286, 27 N. Y. Suppl. 889; Lippus *v.* Columbus Watch Co., 13 N. Y. Suppl. 319.

Oklahoma.— Martin *v.* Chicago, etc., R. Co., 7 Okla. 452, 54 Pac. 696.

Pennsylvania.— McHenry *v.* Bulifant, 207 Pa. St. 15, 56 Atl, 226; Bernstein *v.* Ernst, 194 Pa. St. 432, 45 Atl. 312; Shroder *v.* Brenneman, 23 Pa. St. 348.

Rhode Island.— Hynds *v.* Rhode Island Co., (1907) 67 Atl. 368.

Texas.— Cline *v.* Hackbarth, 30 Tex. Civ. App. 591, 71 S. W. 48.

Vermont.— Hyde *v.* Swanton, 72 Vt. 242, 47 Atl. 790; Fulham *v.* Howe, 60 Vt. 351, 14 Atl. 652; Nones *v.* Northouse, 46 Vt. 587.

Wisconsin.— Price *v.* Grzyll, 133 Wis. 623, 114 N. W. 100; Valley Iron-Works Mfg. Co. *v.* Grand Rapids Flouring-Mill Co., 85 Wis. 274, 55 N. W. 693; Schrubbe *v.* Connell, 69 Wis. 476, 34 N. W. 503.

57. Southern Indiana R. Co. *v.* Moore, (Ind. App. 1904) 71 N. E. 516; Webster *v.* Sherman, 33 Mont. 448, 84 Pac. 878; Hart *v.* Tuite, 75 N. Y. App. Div. 323, 78 N. Y. Suppl. 154; Gulf, etc., R. Co. *v.* Harris, (Tex. Civ. App. 1903) 72 S. W. 71.

Error in excluding evidence in mitigation of damages is not prejudicial where the damages assessed are not excessive (Carty *v.* Boeseke-Dawe Co., 2 Cal. App. 646, 84 Pac. 267; Kirby *v.* Lower, 139 Mo. App. 677, 124 S. W. 34), or where the court obviates the effect of the error by remitting part of those awarded (Myers *v.* Taylor, 107 Tenn. 364, 64 S. W. 719).

58. Temple *v.* Duran, (Tex. Civ. App. 1908) 121 S. W. 253; Cain *v.* Corley, 44 Tex. Civ. App. 224, 99 S. W. 168; Land *v.* Klein, 21 Tex. Civ. App. 3, 50 S. W. 638.

if error, is harmless.[59] Thus, in an action for personal injuries or wrongful death, any error in excluding evidence of negligence on the part of defendant is harmless, where it appears that plaintiff was guilty of contributory negligence barring recovery.[60] Similarly, where plaintiff fails to sustain his case, any error in excluding evidence offered by defendant is harmless, since, in such case, no disproof is necessary.[61]

b. Facts Otherwise Established — (I) *By Other Evidence* — (A) *In General.* It is obviously true, and such is the rule, that no prejudicial error results

59. *Alabama.*— Roberts *v.* English Mfg. Co., 155 Ala. 414, 46 So. 752; Bryant *v.* Southern R. Co., 137 Ala. 488, 34 So. 562; Jackson *v.* Singleton, 122 Ala. 323, 25 So. 204.

California.— Simmons *v.* McCarthy, 128 Cal. 455, 60 Pac. 1037; Moulton *v.* Harris, 94 Cal. 420, 29 Pac. 706.

Colorado.— H. B. Claflin Co. *v.* Lass, 17 Colo. App. 156, 67 Pac. 910; Bishop *v.* Brown, 14 Colo. App. 535, 61 Pac. 50; Downing *v.* Howlett, 6 Colo. App. 291, 40 Pac. 505.

Illinois.— Lequatte *v.* Drury, 101 Ill. 77.

Indiana.— Jordan *v.* Grand Rapids, etc., R. Co., 162 Ind. 464, 70 N. E. 524, 102 Am. St. Rep. 217; Shaffer *v.* Stern, 160 Ind. 375, 66 N. E. 1004; Hanlon *v.* Doherty, 109 Ind. 37, 9 N. E. 782; Finley *v.* Kendallville, (App. 1910) 90 N. E. 1036.

Iowa.— *In re* Kah, 136 Iowa 116, 113 N. W. 563.

Kentucky.— Reed *v.* Brooks, 3 Litt. 127; Cravens *v.* Harrison, 3 Litt. 92.

Louisiana.— Doyle *v.* Estornet, 13 La. Ann. 318.

Maryland.— McCay Engineering Co. *v.* Crocker-Wheeler Electric Co., 100 Md. 530, 60 Atl. 443; W. V. Guthrie Co. *v.* Baltimore Methodist Pub., etc., Co., 93 Md. 738, 48 Atl. 501; Conser *v.* Snowden, 54 Md. 175, 39 Am. Rep. 368.

Massachusetts.— McDonough *v.* Boston El. R. Co., 191 Mass. 509, 78 N. E. 141.

Michigan.— Bell *v.* Zelmer, 75 Mich. 66, 42 N. W. 606.

Minnesota.— Gammon *v.* Ganfield, 42 Minn. 368, 44 N. W. 125.

Missouri.— State *v.* St. Louis, etc., R. Co., 105 Mo. App. 207, 79 S. W. 714; O'Shea *v.* O'Shea, 91 Mo. App. 221.

New Mexico.— Salazar *v.* Longwill, 5 N. M. 548, 25 Pac. 927.

New York.— *In re* King, 115 N. Y. App. Div. 751, 100 N. Y. Suppl. 1089 [*affirmed* in 188 N. Y. 626, 81 N. E. 1167]; Gorlitzer *v.* Levenson, 107 N. Y. Suppl. 130.

Virginia.— Mitchel *v.* Richmond, 107 Va. 193, 57 S. E. 570, 11 L. R. A. N. S. 1114.

Washington.— Knudson-Jacob Co. *v.* Brandt, 44 Wash. 68, 87 Pac. 43; Wilson *v.* Hubbard, 39 Wash. 671, 82 Pac. 154.

Where plaintiff fails to make a prima facie case, the judgment will not be reversed on account of the exclusion of testimony which would not have tended to make such case. Hebrard *v.* Jefferson Gold, etc., Min. Co., 33 Cal. 290; Spongberg *v.* Montpelier First Nat. Bank, 15 Ida. 671, 99 Pac. 712; Ruffin *v.* Overby, 105 N. C. 78, 11 S. E. 251; Gready *v.* Ready, 40 Wis. 478. Where defendants would be entitled to an affirmative charge if all the evidence offered by plaintiff and excluded had been admitted, error, if any, in excluding it, is harmless. Andrews Mfg. Co. *v.* Porter, 112 Ala. 381, 20 So. 475; Crosby *v.* Pridgen, 76 Ala. 385.

Where the proper rejection of certain evidence requires a nonsuit, rulings as to other evidence are harmless. Conrad *v.* Kennedy, 123 Ga. 242, 51 S. E. 299.

Action barred by limitation.— The erroneous exclusion of plaintiff's evidence is no ground for reversal, if his cause of action is actually barred by limitation. Zeller *v.* Griffith, 89 Ind. 80; Murphy *v.* Reynaud, 2 Tex. Civ. App. 470, 21 S. W. 991.

Where defendant failed to prove his defense or counter-claim, even taking the excluded evidence into consideration, error in excluding such evidence is harmless. Fox *v.* Spears, 78 Ark. 71, 93 S. W. 560; Gulliver *v.* Fowler, 64 Conn. 556, 30 Atl. 852; May *v.* Augusta, etc., R. Co., 80 S. C. 552, 51 S. E. 1019; Moore *v.* Kempner, 41 Tex. Civ. App. 86, 91 S. W. 336; Illinois Car, etc., Co. *v.* Linstroth Wagon Co., 112 Fed. 737, 50 C. C. A. 504.

60. *California.*— Limberg *v.* Glenwood Lumber Co., 145 Cal. 255, 78 Pac. 728; Higgins *v.* Los Angeles R. Co., 5 Cal. App. 748, 91 Pac. 344.

Georgia.— Fowler *v.* Georgia R., etc., Co., 133 Ga. 664, 66 S. E. 900.

Indiana.— Sutherland *v.* Cleveland, etc., R. Co., 148 Ind. 308, 47 N. E. 624.

Massachusetts.— French *v.* Sabin, 202 Mass. 240, 88 N. E. 845; Lizotte *v.* New York Cent., etc., R. Co., 196 Mass. 519, 83 N. E. 362; Stackpole *v.* Boston El. R. Co., 193 Mass. 562, 79 N. E. 740; Cole *v.* New York, etc., R. Co., 174 Mass. 537, 55 N. E. 1044; Patterson *v.* Hemenway, 148 Mass. 94, 19 N. E. 15, 12 Am. St. Rep. 523.

Ohio.— McCarty *v.* Baltimore, etc., R. Co., 20 Ohio Cir. Ct. 536, 11 Ohio Cir. Dec. 229.

Texas.— Whitney *v.* Texas Cent. R. Co., 50 Tex. Civ. App. 1, 110 S. W. 70.

Wisconsin.— Koepke *v.* Wisconsin Bridge, etc., Co., 116 Wis. 92, 92 N. W. 558.

Conversely, in the absence of evidence tending to establish negligence on the part of defendant, in an action for injuries, the exclusion of evidence illustrating the care exercised by plaintiff would not constitute ground for reversal of a judgment in favor of defendant. Roberts *v.* Terre Haute Electric Co., 37 Ind. App. 664, 76 N. E. 323, 895.

61. Gates Iron Works *v.* Denver Engineering Works Co., 17 Colo. App. 15, 67 Pac. 173.

from the erroneous exclusion of admissible evidence, where the fact sought to be proved or disproved by such evidence is clearly established by other evidence,[62] where the jury is in possession of all the information which could have been given

62. *Alabama.*—Lecroix *v.* Malone, 157 Ala. 434, 47 So. 725; Ham *v.* State, 156 Ala. 645, 47 So. 126; Frost *v.* Leonard, 116 Ala. 82, 22 So. 481.

Arizona.— Marks *v.* Bradshaw Mountain R. Co., 8 Ariz. 379, 76 Pac. 470.

Arkansas.— Taylor *v.* McClintock, 87 Ark. 243, 112 S. W. 405; Jones *v.* Malvern Lumber Co., 58 Ark. 125, 23 S. W. 679.

California.— Powley *v.* Swenson, 146 Cal. 471, 80 Pac. 722; Bollinger *v.* Wright, 143 Cal. 292, 76 Pac. 1108.

Colorado.— Fidelity, etc., Co. *v.* Colorado Ice, etc., Co., 45 Colo. 443, 103 Pac. 383; Beshoar *v.* Robards, 8 Colo. App. 173, 45 Pac. 280.

Connecticut.— Handy *v.* Smith, 77 Conn. 165, 58 Atl. 694; Hayden *v.* Fair Haven, etc., R. Co., 76 Conn. 355, 56 Atl. 613.

Florida.— Carlton *v.* King, 51 Fla. 158, 40 So. 191.

Georgia.— Mackenzie *v.* Minis, 132 Ga. 323, 63 S. E. 900, 23 L. R. A. N. S. 1003; Hawes *v.* Elberton Bank, 124 Ga. 567, 52 S. E. 922.

Illinois.— Beckerle *v.* Brandon, 229 Ill. 323, 82 N. E. 266; Chicago City R. Co. *v.* Shaw, 220 Ill. 532, 77 N. E. 139.

Indiana.— Antioch Coal Co. *v.* Rockey, 169 Ind. 247, 82 N. E. 76; Hand *v.* Kidwell, 92 Ind. 409.

Indian Territory.— Gentry *v.* Singleton, 4 Indian Terr. 346, 69 S. W. 898, 3 Indian Terr. 516, 61 S. W. 990 [*affirmed* in 128 Fed. 679, 63 C. C. A. 231].

Iowa.— Van Norman *v.* Modern Brotherhood of America, 143 Iowa 536, 121 N. W. 1080; Latta *v.* Lockman, 139 Iowa 626, 117 N. W. 962; Hilliker *v.* Allen, 128 Iowa 607, 105 N. W. 120.

Kansas.— Doolittle *v.* Atchison, etc., R. Co., 20 Kan. 329; Grubb *v.* Troy, 7 Kan. App. 108, 53 Pac. 78.

Kentucky.— Stewart *v.* Louisville, etc., R. Co., 136 Ky. 717, 125 S. W. 154; Covington *v.* Gates, (1909) 117 S. W. 342.

Louisiana.— Boulard *v.* Calhoun, 13 La. Ann. 445.

Maryland.— Maryland Apartment House Co. *v.* Glenn, 108 Md. 377, 70 Atl. 216.

Massachusetts.— Hart *v.* Brierly, 189 Mass. 598, 76 N. E. 286; South Scituate *v.* Scituate, 155 Mass. 428, 29 N. E. 639. *Contra*, Perkins *v.* Rice, 187 Mass. 28, 72 N. E. 323, holding that the fact that there was uncontradicted testimony, which, if believed, was amply sufficient to prove that defendants retained control of the elevator by which plaintiff was injured, did not cure the erroneous exclusion of other evidence admissible to prove such control.

Michigan.— Pierson *v.* Illinois Cent. R. Co., 149 Mich. 167, 112 N. W. 923; Dimmock *v.* Cole, 130 Mich. 601, 90 N. W. 333; Black *v.* Delbridge, etc., Co., 90 Mich. 56, 51 N. W. 269.

Minnesota.— Harding *v.* Great Northern R. Co., 77 Minn. 417, 80 N. W. 358; Holman *v.* Kempe, 70 Minn. 422, 73 N. W. 186.

Mississippi.—Bacon *v.* Bacon, 76 Miss. 458, 24 So. 968; Wilson *v.* Williams, 52 Miss. 487.

Missouri.— Locke *v.* Independence, 192 Mo. 570, 91 S. W. 61; Roe *v.* Versailles Bank, 167 Mo. 406, 67 S. W. 303; Dameron *v.* Jamison, 143 Mo. 483, 45 S. W. 258. *Compare* Landy *v.* Kansas City, 58 Mo. App. 141.

Montana.— Gehlert *v.* Quinn, 35 Mont. 451, 90 Pac. 168, 119 Am. St. Rep. 864; Hefferlin *v.* Karlman, 30 Mont. 348, 76 Pac. 757.

Nebraska.— Schrandt *v.* Young, 62 Nebr. 254, 86 N. W. 1085; Hutchinson *v.* State, 19 Nebr. 262, 27 N. W. 113.

New Hampshire.— Litchfield *v.* Londonderry, 39 N. H. 247.

New Mexico.— Palatine Ins. Co. *v.* Santa Fe Mercantile Co., 13 N. M. 241, 82 Pac. 363.

New York.— Randazzo *v.* Brooklyn Heights R. Co., 121 N. Y. App. Div. 573, 106 N. Y. Suppl. 193; Sheppard *v.* New York City R. Co., 56 Misc. 639, 107 N. Y. Suppl. 553. *Compare* Clement *v.* Federal Union Surety Co., 122 N. Y. App. Div. 18, 106 N. Y. Suppl. 1061.

North Carolina.— McNeely *v.* Laxton, 149 N. C. 327, 63 S. E. 278; Rich *v.* Morisey, 149 N. C. 37, 62 S. E. 762; Grant *v.* Raleigh, etc., R. Co., 108 N. C. 462, 13 S. E. 209.

North Dakota.— Nystrom *v.* Lee, 16 N. D. 561, 114 N. W. 478; Becker *v.* Harvey First Nat. Bank, 15 N. D. 279, 107 N. W. 968.

Ohio.— Kilbourn *v.* Fury, 26 Ohio St. 153; Whitman *v.* Keith, 18 Ohio St. 134.

Oklahoma.— Pauly *v.* Pauly, 14 Okla. 1, 76 Pac. 148.

Oregon.— Jackson *v.* Sharff, 1 Oreg. 246.

Pennsylvania.— Creachen *v.* Bromley Bros. Carpet Co., 214 Pa. St. 15, 63 Atl. 195; Owens *v.* Lancaster, 193 Pa. St. 436, 44 Atl. 559; Thomas *v.* Harris, 43 Pa. St. 231.

South Carolina.— Keys *v.* Winnsboro Granite Co., 76 S. C. 284, 56 S. E. 949; Beaudrot *v.* Southern R. Co., 69 S. C. 160, 48 S. E. 106.

South Dakota.— Iowa Nat. Bank *v.* Sherman, 23 S. D. 8, 119 N. W. 1010; Breeden *v.* Martens, 21 S. D. 357, 112 N. W. 960.

Tennessee.— Duffield *v.* Spence, (Ch. App. 1897) 51 S. W. 492.

Texas.— Carlisle *v.* Gibbs, (Civ. App. 1909) 123 S. W. 216; El Paso, etc., R. Co. *v.* Lumbley, (Civ. App. 1909) 120 S. W. 1050; Texas, etc., R. Co. *v.* Coggin, 44 Tex. Civ. App. 423, 99 S. W. 1052.

Utah.— Teakle *v.* San Pedro, etc., R. Co., 32 Utah 276, 90 Pac. 402, 10 L. R. A. N. S. 486.

Vermont.— Ward *v.* Preferred Acc. Ins. Co., 80 Vt. 321, 67 Atl. 821.

Virginia.— Norfolk, etc., R. Co. *v.* Brame, 109 Va. 422, 63 S. E. 1018; Norfolk, etc., R. Co. *v.* Birchfield, 105 Va. 809, 54 S. E. 879.

Washington.— Shannon *v.* Tacoma, 41 Wash. 220, 83 Pac. 186.

it by the rejected evidence,[63] or where the verdict or decree is based on other sufficient evidence.[64] Illustration of the application of this principle is found in holdings that, where the fact in question is otherwise sufficiently established, no prejudicial effect attaches to the erroneous action of the court in limiting cross-examination,[65] or the number of witnesses;[66] that the rejection of the testimony of an interested witness is not prejudicial where testimony regarding the same fact is given by disinterested witnesses;[67] and that the exclusion of documentary evidence is harmless error, where the contents thereof or the claim sought to be supported or defeated by such evidence is clearly established by other evidence.[68] The rule, however, applies only where the fact involved is clearly established by other evidence, and not where the evidence is conflicting,[69] or possibly where the evidence excluded is of more probative value than that admitted.[70]

Wisconsin.— Zoesch *v.* Flambeau Paper Co., 134 Wis. 270, 114 N. W. 485; Fey *v.* I. O. O. F. Mut. L. Ins. Soc., 120 Wis. 358, 98 N. W. 206; Snell *v.* Bray, 56 Wis. 156, 14 N. W. 14.

Wyoming.— Chicago, etc., R. Co. *v.* Pollock, 16 Wyo. 321, 93 Pac. 847.

United States.— Shields *v.* Mongollon Exploration Co., 137 Fed. 539, 70 C. C. A. 123; National Acc. Soc. *v.* Dolph, 94 Fed. 743, 38 C. C. A. 1. And see Lucas *v.* Brooks, 18 Wall. 436, 21 L. ed. 779.

Where impeaching testimony is rejected, the error is harmless where, if it had been admitted, the result would not have been changed on account of there being plenty of other evidence to establish the fact in question outside of that toward which the impeaching testimony was directed. Doll *v.* People, 145 Ill. 253, 34 N. E. 413 [*affirming* 48 Ill. App. 418].

63. Kennedy *v.* Modern Woodmen of America, 243 Ill. 560, 90 N. E. 1084, 28 L. R. A. N. S. 181; Peters *v.* Tilghman & Purnell, 111 Md. 227, 73 Atl. 726; Miller *v.* Sharp, 65 Mich. 21, 31 N. W. 608, holding that the sustaining of an objection to a question is unprejudicial, where the witness states that he cannot answer it.

The rejection of an interrogatory and answer in a deposition is harmless error where, in answer to substantially the same interrogatory, the witness disclaims knowledge of the matter in question. Hovey *v.* Chase, 52 Me. 304, 83 Am. Dec. 514.

64. *Alabama.*— Bozeman *v.* Bozeman, 83 Ala. 416, 3 So. 784.

Indiana.— Slade *v.* Leonard, 75 Ind. 171; Persons *v.* McKibben, 5 Ind. 261, 61 Am. Dec. 85.

Iowa.— Williams *v.* Brown, 45 Iowa 102.

Nevada.— Rosina *v.* Trowbridge, 20 Nev. 105, 17 Pac. 751.

West Virginia.— Bartlett *v.* Patton, 33 W. Va. 71, 10 S. E. 21, 5 L. R. A. 523, holding that the improper rejection of evidence is not cause for reversal where it is not certain that the matter which such evidence tends to prove was taken into account by the jury in arriving at their verdict, and it is clear that outside of such item there was ground for finding a verdict for at least the amount found by the jury.

And see Glaser *v.* Priest, 29 Mo. App. 1.

General verdict.— It has been held that the exclusion of competent evidence offered by plaintiff is not harmless error, where defendant recovers a general verdict, as it is impossible to say that the verdict was not rendered on the very issue which plaintiff sought to support by the offered evidence. Perkins *v.* Rice, 187 Mass. 28, 72 N. E. 323.

65. Sunberg *v.* Babcock, 66 Iowa 515, 24 N. W. 19.

66. Huett *v.* Clark, 4 Colo. App. 231, 35 Pac. 671.

67. Uecker *v.* Zuercher, (Tex. Civ. App. 1909) 118 S. W. 149.

68. *Arizona.*— Copper Belle Min. Co. *v.* Costello, 11 Ariz. 334, 95 Pac. 94.

Illinois.— El Paso First Nat. Bank *v.* Miller, 235 Ill. 135, 85 N. E. 312.

Massachusetts.— Conant *v.* Johnston, 165 Mass. 450, 43 N. E. 192.

Minnesota.— Hawley *v.* Minneapolis St. R. Co., 108 Minn. 136, 121 N. W. 627.

Missouri.— Seligman *v.* Rogers, 113 Mo. 642, 21 S. W. 94.

Montana.— Erbes *v.* Smith, 35 Mont. 38, 88 Pac. 568.

Texas.— Kirby *v.* Hayden, (Civ. App. 1910) 125 S. W. 993; McCabe *v.* Brown, (Civ. App. 1894) 25 S. W. 134.

Washington.— Schon *v.* Modern Woodmen of America, 51 Wash. 482, 99 Pac. 25; Knudson-Jacob Co. *v.* Brandt, 44 Wash. 68, 87 Pac. 43.

United States.— Drumm-Flato Commission Co. *v.* Edmisson, 208 U. S. 534, 28 S. Ct. 367, 52 L. ed. 606 [*affirming* 17 Okla. 344, 87 Pac. 311].

The rejection of depositions offered by defendant to prove actual sales of hogs in the market is harmless error, where it does not appear that the offered depositions tended to prove that the hogs were of less value than they were shown to be by the testimony of plaintiff's witnesses. Sinclair *v.* Missouri, etc., R. Co., 70 Mo. App. 588.

The exclusion of photographs is not prejudicial, where the testimony of witnesses was sufficiently full to enable the jury to understand what was intended to be shown by the photographs. Kansas City Southern R. Co. *v.* Morris, 80 Ark. 528, 98 S. W. 363.

69. Crago *v.* Cedar Rapids, 123 Iowa 48, 98 N. W. 354; Grath *v.* Mound City Roofing Tile Co., 121 Mo. App. 245, 98 S. W. 812. And see Epstein *v.* Pennsylvania R. Co., 143 Mo. App. 135, 122 S. W. 366.

70. Hutkoff *v.* Moje, 20 Misc. (N. Y.)

(B) *Evidence Already Admitted.* As a party cannot be injured by the rejection of cumulative evidence, it is no ground for review that the court erroneously excluded evidence, where the same or substantially the same evidence had already been admitted,[71] especially where the evidence admitted is direct and that excluded is indirect.[72] Thus, where a written instrument is already in evidence, it is harmless error to deny a party the privilege of showing matters contained therein, either by oral testimony [73] or by deposition; [74] while conversely the exclusion of documentary evidence is harmless, where testimony has already been given concerning the contents thereof or the matters sought to be shown thereby.[75] In accordance with the rule, it is also frequently held to be error without prejudice to exclude questions and answers which, on account of the same witness having already given identically or substantially the same testimony, would amount to a mere repetition,[76] or, where the witness has testified to the facts in detail, to

632, 46 N. Y. Suppl. 905, holding that where the ability of defendant to speak English is a material fact in issue, it is error to refuse to allow him to testify that he cannot speak it, although another witness swears that defendant cannot speak it.

71. *Alabama.*— Johnson *v.* Birmingham R., etc., Co., 149 Ala. 529, 43 So. 33; Gregory *v.* Walker, 38 Ala. 26.

California.— Matter of Higgins, 156 Cal. 257, 104 Pac. 6; Lanigan *v.* Neely, 4 Cal. App. 760, 89 Pac. 441; Johnson *v.* Center, 4 Cal. App. 616, 88 Pac. 727.

Connecticut.— Stillman *v.* Thompson, 80 Conn. 192, 67 Atl. 528.

Georgia.— Conyers *v.* Kirk, 78 Ga. 480, 3 S. E. 442.

Illinois.— El Paso First Nat. Bank *v.* Miller, 235 Ill. 135, 85 N. E. 312; Chicago, etc., R. Co. *v.* Atterbury, 156 Ill. 281, 40 N. E. 826; Kern *v.* Chicago Co-operative Brewery Assoc., 140 Ill. 371, 29 N. E. 1035 [*affirming* 40 Ill. App. 356].

Indiana.— Jeffersonville, etc., R. Co. *v.* Riley, 39 Ind. 568.

Iowa.— Vedder *v.* Delaney, 122 Iowa 583, 98 N. W. 373; McKelvy *v.* Burlington, etc., R. Co., 94 Iowa 668, 63 N. W. 608, (1894) 58 N. W. 1068.

Kentucky.— Illinois Cent. R. Co. *v.* France, 130 Ky. 26, 112 S. W. 929.

Maryland.— State *v.* Flanigan, 111 Md. 481, 74 Atl. 818.

Michigan.— Burt *v.* Long, 106 Mich. 210, 64 N. W. 60.

Missouri.— Breckinridge *v.* American Cent. Ins. Co., 87 Mo. 62.

New York.— Cullen *v.* Gallagher, 15 Misc. 146, 36 N. Y. Suppl. 468.

Pennsylvania.— Daniel *v.* Daniel, 39 Pa. St. 191.

South Carolina.— Dobson *v.* Cothran, 34 S. C. 518, 13 S. E. 679.

Texas.— Willis *v.* Moore, (Civ. App. 1895) 33 S. W. 691. *Contra,* Whittaker *v.* Thayer, 48 Tex. Civ. App. 508, 110 S. W. 787; St. Louis, etc., R. Co. *v.* Boyer, 44 Tex. Civ. App. 311, 97 S. W. 1070.

United States.— Colorado Cent. Consol. Min. Co. *v.* Turck, 70 Fed. 294, 17 C. C. A. 128.

Where a copy of an instrument is in evidence, the rejection of the original is harmless error, in the absence of any showing that the copy is defective. Harrington *v.* Boehmer, 134 Cal. 196, 66 Pac. 214, 489; Wiggins *v.* Fleishel, 50 Tex. 57.

72. Talbot *v.* Talbot, 2 J. J. Marsh. (Ky.) 3; Phillips *v.* Haddock, 163 Mass. 201, 39 N. E. 1015.

73. Tower *v.* McDowell, (Cal. 1892) 31 Pac. 843; Columbus, etc., R. Co. *v.* Braden, 110 Ind. 558, 11 N. E. 357; Stillwell *v.* Patton, 108 Mo. 352, 18 S. W. 1075. And see Washington County Mut. Ins. Co. *v.* Dawes, 6 Gray (Mass.) 376.

74. Koch *v.* Wimbrow, 111 Md. 21, 73 Atl. 896.

75. *Colorado.*— Peck *v.* Farnham, 24 Colo. 141, 49 Pac. 364.

Illinois.— Chicago, etc., R. Co. *v.* Crose, 214 Ill. 602, 73 N. E. 865, 105 Am. St. Rep. 135; Barnes *v.* Northern Trust Co., 169 Ill. 112, 48 N. E. 31 [*affirming* 66 Ill. App. 282].

Indiana.— Glover *v.* Stevenson, 126 Ind. 532, 26 N. E. 486.

Iowa.— Butler *v.* Chicago, etc., R. Co., 87 Iowa 206, 54 N. W. 208.

Massachusetts.— Comerford *v.* New York, etc., R. Co., 181 Mass. 528, 63 N. E. 936.

Michigan.— Locke *v.* Gross, 48 Mich. 266, 12 N. W. 181.

New York.— De Graffenried *v.* Miller, 110 N. Y. Suppl. 826, 829.

76. *Alabama.*— U. S. Cast Iron Pipe, etc., Co. *v.* Granger, 162 Ala. 637, 50 So. 159; Penry *v.* Dozier, 161 Ala. 292, 49 So. 909; Rutledge *v.* Rowland, 161 Ala. 114, 49 So. 461; Birmingham R., etc., Co. *v.* King, 149 Ala. 504, 42 So. 612.

California.— Bundy *v.* Sierra Lumber Co., 149 Cal. 772, 87 Pac. 622; Seligman *v.* Armando, 94 Cal. 314, 29 Pac. 710; Goldman *v.* Bashore, 80 Cal. 146, 22 Pac. 82; Matteson *v.* Southern Pac. Co., 6 Cal. App. 318, 92 Pac. 101.

Illinois.— Beaty *v.* Hood, 229 Ill. 562, 82 N. E. 350; Wickenkamp *v.* Wickenkamp, 77 Ill. 92.

Iowa.— Calkins *v.* Chicago, etc., R. Co., 92 Iowa 714, 61 N. W. 423; Smith *v.* Howard, 28 Iowa 51.

Kansas.— Interstate Consol. Rapid-Transit R. Co. *v.* Simpson, 45 Kan. 714, 26 Pac. 393.

Michigan.— Skelton *v.* Fenton Electric Light, etc., Co., 100 Mich. 87, 58 N. W. 609.

exclude further questions calling for a mere summary of his previous testimony,[77] or for a deduction, opinion, or conclusion based thereon.[78]

(II) *By Facts Conceded* — (A) *In General.* The exclusion of admissible evidence to show a fact conceded by the party against whom it is offered,[79] or not

Missouri.— Masterson *v.* St. Louis Transit Co., 204 Mo. 507, 103 S. W. 48; Peck *v.* Springfield Traction Co., 131 Mo. App. 134, 110 S. W. 659; Pierson *v.* Slifer, 52 Mo. App. 273.

Montana.— Borden *v.* Lynch, 34 Mont. 503, 87 Pac. 609; Cannon *v.* Lewis, 18 Mont. 402, 45 Pac. 572; Brownfield *v.* Bier, 15 Mont. 403, 39 Pac. 461.

New Jersey.— Daggett *v.* North Jersey St. R. Co., 75 N. J. L. 630, 68 Atl. 179.

New York.— McCherry *v.* Snare, etc., Co., 130 N. Y. App. Div. 241, 114 N. Y. Suppl. 674 [*affirmed* in 198 N. Y. 532, 92 N. E. 1090]; Morris *v.* Wells, 4 Silv. Sup. 34, 7 N. Y. Suppl. 61; Heermance *v.* Bridgman, 4 Misc. 427, 23 N. Y. Suppl. 1058; *In re* Buffalo, 18 N. Y. Suppl. 771 [*affirmed* in 139 N. Y. 422, 34 N. E. 1103]; Rockwell *v.* Hurst, 13 N. Y. Suppl. 290; *In re* McArthur, 12 N. Y. Suppl. 822.

North Dakota.— McBride *v.* Wallace, 17 N. D. 495, 117 N. W. 857.

Rhode Island.— Barber *v.* James, 18 R. I. 798, 31 Atl. 264.

Texas.— Houston, etc., R. Co. *v.* Knapp, 51 Tex. 592; San Antonio Traction Co. *v.* Lambkin, (Civ. App. 1907) 99 S. W. 574; St. Louis, etc., R. Co. *v.* Conrad, (Civ. App. 1900) 99 S. W. 209; Landa *v.* Obert, 5 Tex. Civ. App. 620, 25 S. W. 342.

Vermont.— Walker *v.* Collins, 61 Vt. 542, 17 Atl. 744.

Washington.— Sanpere *v.* Sanpair, 57 Wash. 524, 107 Pac. 369.

West Virginia.— Kerr *v.* Lunsford, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668.

Wisconsin.— Estey Organ Co. *v.* Lehman, 132 Wis. 144, 111 N. W. 1097, 122 Am. St. Rep. 951, 11 L. R. A. N. S. 254; Seyring *v.* Eschweiler, 85 Wis. 117, 55 N. W. 164.

77. Scheerer *v.* Deming, 154 Cal. 138, 97 Pac. 155 (holding that refusal to permit a witness to give his estimate of the reasonable cost of completing a building according to plans is harmless, where his answer is deducible by simple arithmetical computation from matters already testified to by him); Frick *v.* Kabaker, 116 Iowa 494, 90 N. W. 498.

78. Rudd *v.* Byrnes, 156 Cal. 636, 105 Pac. 957, 26 L. R. A. N. S. 134; White *v.* New York, etc., R. Co., 142 Ind. 648, 42 N. E. 456; Mikesell *v.* Wabash R. Co., 134 Iowa 736, 112 N. W. 201.

In condemnation proceedings, a party cannot complain because his question whether there was any topographical resemblance between his land and that taken was excluded, where the witness had described the two properties (Lyman *v.* Boston, 164 Mass. 99, 41 N. E. 127), nor is he prejudiced by the exclusion of a question as to whether the witness would advise the owner to cut up the farm in question into acre tracts and sell them off with reference to a certain avenue, where the witness had fully testified as to the adaptability of the farm for platting into city property, and how to plat it after taking a strip for railroad purposes (Pierce *v.* Chicago, etc., Electric R. Co., 137 Wis. 550, 119 N. W. 297).

79. *Alabama.*— Dorlan *v.* Westervitch, 140 Ala. 283, 37 So. 382, 103 Am. St. Rep. 35; Foxworth *v.* Brown, 120 Ala. 59, 24 So. 1; McMillian *v.* Wallace, 3 Stew. 185.

California.— Rudd *v.* Byrnes, 156 Cal. 636, 105 Pac. 957, 26 L. R. A. N. S. 131; Easton Packing Co. *v.* Kennedy, (1900) 63 Pac. 130; Frisbie *v.* Rosenberg, 11 Cal. App. 638, 105 Pac. 943.

Colorado.— Richards *v.* Sanderson, 39 Colo. 270, 89 Pac. 769, 121 Am. St. Rep. 167.

Connecticut.— Bierce *v.* Sharon Electric Light Co., 73 Conn. 300, 47 Atl. 324; Boseli *v.* Doran, 62 Conn. 311, 25 Atl. 242.

Georgia.— Aikin *v.* Perry, 119 Ga. 263, 46 S. E. 93.

Illinois.— Pardridge *v.* Cutler, 168 Ill. 504, 48 N. E. 125 [*reversing* 68 Ill. App. 569]; Bromley *v.* Goodwin, 95 Ill. 118; Champaign *v.* Maguire, 56 Ill. App. 618.

Indiana.— Davis *v.* Liberty, etc., Gravel Road Co., 84 Ind. 36; Darnall *v.* State, 27 Ind. 506; Cox *v.* Cohn, 29 Ind. App. 559, 64 N. E. 889; Burton *v.* Figg, 18 Ind. App. 284, 47 N. E. 1081.

Iowa.— Allen *v.* Urdangen, 141 Iowa 280, 119 N. W. 724; Stevens *v.* Citizens' Gas, etc., Co., 132 Iowa 597, 109 N. W. 1090; Patton *v.* Lund, 114 Iowa 201, 86 N. W. 296; Thilmany *v.* Iowa Paper Bag Co., 108 Iowa 357, 79 N. W. 261, 75 Am. St. Rep. 259.

Kansas.— Wichita, etc., R. Co. *v.* Gibbs, 47 Kan. 274, 27 Pac. 991.

Kentucky.— Hoffman *v.* Price, 10 Ky. L. Rep. 777.

Massachusetts.— Perkins *v.* Rice, 187 Mass. 28, 72 N. E. 323.

Michigan.— Peoples *v.* Evening News, 51 Mich. 11, 16 N. W. 185, 691; Threadgool *v.* Litogot, 22 Mich. 271.

Missouri.— Cottle *v.* Coffee, (1908) 108 S. W. 44; Brecker *v.* Fillingham, 209 Mo. 578, 108 S. W. 41; Hartman *v.* Louisville, etc., R. Co., 48 Mo. App. 619; Claflin *v.* Sommers, 39 Mo. App. 419.

Nebraska.— Bouvier *v.* Stricklett, 40 Nebr. 792, 59 N. W. 550; Epley *v.* Lovell, 5 Nebr. (Unoff.) 251, 97 N. W. 1027.

New Mexico.— Palatine Ins. Co. *v.* Santa Fé Mercantile Co., 13 N. M. 241, 82 Pac. 363.

New York.— Rosen *v.* Stein, 54 Hun 179, 7 N. Y. Suppl. 368; Beals *v.* Home Ins. Co., 36 Barb. 614 [*affirmed* in 36 N. Y. 522, 2 Transcr. App. 25]; Leonard *v.* Crow, 22 Misc. 516, 49 N. Y. Suppl. 1011; Wheeler *v.* Timpson, 13 N. Y. Suppl. 640.

disputed,[80] by him is harmless error, provided the admission is as broad as the evidence excluded.[81] Where plaintiff obtained a verdict and judgment for no more than defendant's admitted liability, error in rejecting certain testimony offered by defendant to reduce the amount of damages claimed is no ground for reversal.[82]

(B) *In Pleadings.* The exclusion of evidence tending to prove facts admitted in the pleadings, if error, is harmless.[83]

(III) *By Presumption of Law or Judicial Notice.* It is harmless error to exclude evidence of a fact which the law presumes,[84] or of which judicial notice is required to be taken.[85]

c. Subsequent Matters Curing Error in Exclusion of Evidence[86] — (I) *By Admission of Same or Similar Evidence* — (A) *In General.* It is a general rule that a party is not harmed and cannot complain of error in the exclusion of certain evidence, when the same or substantially the same evidence is subsequently admitted,[87] it being within the authority of a trial court to revise and

North Carolina.— Lambert Hoisting Engine Co. *v.* Paschal, 151 N. C. 27, 65 S. E. 523.

Oregon.— Alberson *v.* Elk Creek Min. Co., 39 Oreg. 552, 65 Pac. 978.

Pennsylvania.— Moore *v.* Everitt, 20 Pa. Super. Ct. 13; Com. *v.* Little, 12 Pa. Super. Ct. 636.

Texas.— Barrett *v.* Featherston, 89 Tex. 567, 35 S. W. 11, 36 S. W. 245; McBride *v.* Banguss, 65 Tex. 174; Beavers *v.* Baker, (Civ. App. 1910) 124 S. W. 450.

Vermont.— Dover *v.* Winchester, 70 Vt. 418, 41 Atl. 445.

Washington.— Lilly *v.* Eklund, 37 Wash. 532, 79 Pac. 1107; Knapp *v.* Order of Pendo, 36 Wash. 601, 79 Pac. 209; Ramage *v.* Littlejohn, 17 Wash. 386, 49 Pac. 486.

West Virginia.— Blaine *v.* Chesapeake, etc., R. Co., 9 W. Va. 252.

United States.— Dempster *v.* Cochran, 174 Fed. 587, 98 C. C. A. 433; German Ins. Co. *v.* Frederick, 58 Fed. 144, 7 C. C. A. 122.

80. *California.*— Arellanes *v.* Arellanes, (1907) 90 Pac. 1059.

Indiana.— Clift *v.* Shockley, 77 Ind. 297.

Iowa.— Manatt *v.* Scott, 106 Iowa 203, 76 N. W. 717, 68 Am. St. Rep. 293.

Kentucky.— Stewart *v.* Louisville, etc., R. Co., 136 Ky. 717, 125 S. W. 154.

Nebraska.— Keller *v.* Chicago, etc., R. Co., 78 Nebr. 604, 111 N. W. 384.

New York.— Feldman *v.* Senft, 92 N. Y. Suppl. 231.

South Dakota.— Mosteller *v.* Holborn, 20 S. D. 545, 108 N. W. 13; Elkton First State Bank *v.* O'Leary, 13 S. D. 204, 83 N. W. 45.

Texas.— Little *v.* Rich, (Civ. App. 1909) 118 S. W. 1077; Cameron *v.* Realmuto, 45 Tex. Civ. App. 305, 100 S. W. 194.

Wisconsin.— Anderson *v.* Arpin Hardwood Lumber Co., 131 Wis. 34, 110 N. W. 788.

81. Wilmer Lumber Co. *v.* Eisely, 163 Ala. 290, 50 So. 225, holding that where, in trespass for cutting timber and digging holes on plaintiff's land, defendant claimed ownership of the timber and right to dig the holes as necessary to removal of the timber, error in excluding a deed to defendant conveying all the timber on the land, and granting to defendant a reasonable right of way over the land to cut and remove the timber, was not cured by an admission that defendant was the owner of the timber on the land.

82. Smith *v.* Cox, 9 Oreg. 475.

83. *Dakota.*— Dole *v.* Burleigh, 1 Dak. 227, 46 N. W. 692.

Iowa.— Prichard *v.* Hopkins, 52 Iowa 120, 2 N. W. 1028.

Kansas.— Cooley *v.* Noyes, (App. 1899) 57 Pac. 257.

Minnesota.— Dodge *v.* Chandler, 13 Minn. 114; Coit *v.* Waples, 1 Minn. 134.

Missouri.— Miller *v.* Drake, 62 Mo. 544; Emory *v.* Phillips, 22 Mo. 499; Richards *v.* McNemee, 87 Mo. App. 396.

Oklahoma.— Browning *v.* Akins, 10 Okla. 536, 62 Pac. 281.

Texas.— Sacra *v.* Stewart, 32 Tex. 185.

Exclusion of the deposition of defendant in regard to matters covered by allegations of his answer, which are responsive to the bill, is harmless error, the answer being itself evidence. Smith *v.* Smith, 92 Va. 696, 24 S. E. 280.

84. Gangawer *v.* Philadelphia, etc., R. Co., 168 Pa. St. 265, 32 Atl. 21.

A notice is presumptively executed at the place of its date, and it is harmless error to exclude extrinsic proof of this fact. Holland *v.* Bergan, 80 Ala. 622, 7 So. 770.

Interest of husband in action by wife.— In an action by a woman to recover for injuries sustained by reason of defendant's negligence, it is harmless error to exclude, on cross-examination of plaintiff's husband, a question tending to show his interest in the case, as such fact is presumed by reason of his relation. Beyer *v.* Consolidated Gas Co., 44 N. Y. App. Div. 158, 60 N. Y. Suppl. 628.

85. San Antonio *v.* Serna, 45 Tex. Civ. App. 341, 99 S. W. 875.

86. In criminal trials see Criminal Law, 12 Cyc. 926.

87. *Alabama.*— Roman *v.* Dimmick, 123 Ala. 366, 26 So. 214; Tennessee River Transp. Co. *v.* Kavanaugh, 101 Ala. 1, 13 So. 283; Massey *v.* Walker, 10 Ala. 288.

California.— Carpy *v.* Dowdell, 131 Cal.

correct its rulings on the rejection of evidence at any time before final judg-

499, 63 Pac. 780; Robinson *v.* Nevada Bank, 81 Cal. 106, 22 Pac. 478.

Colorado.— See Little Dorrit Gold Min. Co. *v.* Arapahoe Gold Min. Co., 30 Colo. 431, 71 Pac. 389; Cowan *v.* Cowan, 16 Colo. 335, 26 Pac. 934.

Connecticut.— Storms *v.* Horton, 77 Conn. 334, 59 Atl. 421; Conaty *v.* Gardner, 75 Conn. 48, 52 Atl. 416.

Florida.— Morrison *v.* McKinnon, 12 Fla. 552; Pons *v.* Hart, 5 Fla. 457.

Georgia.— Bertody *v.* Ison, 69 Ga. 317.

Illinois.— Illinois Steel Co. *v.* Ryska, 200 Ill. 280, 65 N. E. 734 [*affirming* 102 Ill. App. 347]; Chicago, etc., R. Co. *v.* Wedel, 144 Ill. 9, 32 N. E. 547.

Indiana.— Lake Erie, etc., R. Co. *v.* Charman, 161 Ind. 95, 67 N. E. 923; Houser *v.* State, 93 Ind. 228; Anderson *v.* Donnell, 78 Ind. 303.

Indian Territory.— Noble *v.* Worthy, 1 Indian Terr. 458, 45 S. W. 137.

Iowa.— Mier *v.* Phillips Fuel Co., 130 Iowa 570, 107 N. W. 621; Meyer *v.* Baird, 120 Iowa 597, 94 N. W. 1129. *Compare* Lauer *v.* Banning, 140 Iowa 319, 118 N. W. 446.

Kansas.— Central Branch Union Pac. R. Co. *v.* Andrews, 41 Kan. 370, 21 Pac. 276; Chaffee *v.* Fisher, 2 Kan. App. 720, 43 Pac. 1137.

Kentucky.— Finley *v.* Curd, 62 S. W. 501, 22 Ky. L. Rep. 1912.

Maine.— Thomson *v.* Sebasticook, etc., R. Co., 81 Me. 40, 16 Atl. 332; Howard *v.* Patterson, 72 Me. 57.

Maryland.— Owens *v.* Owens, 81 Md. 518, 32 Atl. 247; Kriete *v.* Myer, 61 Md. 558.

Massachusetts.— Dickinson *v.* Boston, 188 Mass. 595, 75 N. E. 68, 1 L. R. A. N. S. 664; Chalmers *v.* Whitmore Mfg. Co., 164 Mass. 532, 42 N. E. 98; Lyman *v.* Boston, 164 Mass. 99, 41 N. E. 127.

Michigan.—Brown *v.* Harris, 139 Mich. 372, 102 N. W. 960; Stansell *v.* Leavitt, 51 Mich. 536, 16 N. W. 892.

Minnesota.— Dalby *v.* Lauritzen, 98 Minn. 75, 107 N. W. 826; Hale *v.* Life Indemnity, etc., Co., 65 Minn. 548, 68 N. W. 182.

Missouri.— Meeker *v.* Metropolitan St. R. Co., 178 Mo. 173, 77 S. W. 58; Missouri Tent, etc., Co. *v.* Legg, 59 Mo. App. 502.

Nebraska.— Union Pac. R. Co. *v.* Connolly, 77 Nebr. 254, 109 N. W. 368; Farmers', etc., Ins. Co. *v.* Malone, 45 Nebr. 302, 63 N. W. 802.

Nevada.— Winter *v.* Fulstone, 20 Nev. 260, 21 Pac. 201, 687; Patchen *v.* Keeley, 19 Nev. 404, 14 Pac. 347.

New Jersey.— Austrian *v.* Laubheim, 78 N. J. L. 178, 73 Atl. 226; O'Brien *v.* Traynor, 69 N. J. L. 239, 55 Atl. 307.

New York.— Neil *v.* Thorn, 88 N. Y. 270; Wightman *v.* Catlin, 113 N. Y. App. Div. 24, 98 N. Y. Suppl. 1071; Vogel *v.* Weissmann, 23 Misc. 256, 51 N. Y. Suppl. 173. *Compare* Powers *v.* Metropolitan St. R. Co., 105 N. Y. App. Div. 358, 94 N. Y. Suppl. 184.

North Carolina.— West *v.* A. P. Messick Grocery Co., 138 N. C. 166, 50 S. E. 565; Worth *v.* Simmons, 121 N. C. 357, 28 S. E. 528.

Oregon.— Jennings *v.* Oregon Land Co., 48 Oreg. 287, 86 Pac. 367; Garrison *v.* Portland, 2 Oreg. 123.

Pennsylvania.— Columbian Fire Proofing Co. *v.* Great Northern Paper Co., 207 Pa. St. 232, 56 Atl. 434; Kyle *v.* Southern Electric Light, etc., Co., 174 Pa. St. 570, 34 Atl. 323.

Rhode Island.— Ballou *v.* Ballou, 30 R. I. 286, 74 Atl. 1089; Walker *v.* Walker, (1907) 67 Atl. 519; Bryan *v.* National L. Ins. Assoc., 21 R. I. 149, 42 Atl. 513.

South Carolina.— Youngblood *v.* South Carolina, etc., R. Co., 60 S. C. 9, 38 S. E. 232, 85 Am. St. Rep. 824; Virginia-Carolina Chemical Co. *v.* Kirven, 57 S. C. 445, 35 S. E. 745.

South Dakota.— Regan *v.* Whittaker, 14 S. D. 373, 85 N. W. 863; Erickson *v.* Sophy, 10 S. D. 71, 71 N. W. 758.

Tennessee.— Carroll *v.* Griffith, 117 Tenn. 500, 97 S. W. 66.

Texas.— Sears *v.* Sears, 45 Tex. 557; International Harvester Co. *v.* Campbell, 43 Tex. Civ. App. 421, 96 S. W. 93; Dallas Electric Co. *v.* Mitchell, 33 Tex. Civ. App. 424, 76 S. W. 935.

Utah.— State Bank *v.* Burton-Gardner Co., 14 Utah 420, 48 Pac. 402; Snell *v.* Crowe, 3 Utah 26, 5 Pac. 522.

Virginia.— Worrell *v.* Kinnear Mfg. Co., 103 Va. 719, 49 S. E. 988; Blankenship *v.* Chesapeake, etc., R. Co., 94 Va. 449, 27 S. E. 20.

Washington.— Quandt *v.* Smith, 28 Wash. 664, 69 Pac. 369; McKenzie *v.* Oregon Imp. Co., 5 Wash. 409, 31 Pac. 748.

West Virginia.—Vandiver *v.* Hyre, 5 W. Va. 414.

Wisconsin.— Morgenstein *v.* Nejedlo, 79 Wis. 388, 48 N. W. 652; Johnson *v.* Boorman, 63 Wis. 268, 22 N. W. 514; Yates *v.* Shepardson, 27 Wis. 238.

United States.— Repauno Chemical Co. *v.* Victor Hardware Co., 101 Fed. 948, 42 C. C. A. 106, wherein a rejected letter was admitted as part of the reports of a commercial agency.

Contra.— Whitman *v.* McComas, 11 Ida. 564, 83 Pac. 604.

Res gestæ statements.— The exclusion of certain statements of persons which are relied on as *res gestæ* statements is harmless error where the declarants testify at the trial. Louisville, etc., R. Co. *v.* Tucker, 65 S. W. 453, 23 Ky. L. Rep. 1929; Nielson *v.* Cedar County, 5 Nebr. (Unoff.) 430, 98 N. W. 1090; Gulf, etc., R. Co. *v.* Cornell, 29 Tex. Civ. App. 596, 69 S. W. 980.

Interrogatories propounded before trial.— It has been held that error in permitting the president of defendant corporation to refuse to answer certain interrogatories propounded to him before the trial is not cured by the introduction of evidence at the trial tending to show the facts in regard to the matters re-

ment.[88] Indeed, the error may be cured without the excluded evidence being actually admitted,[89] provided the party offering it is subsequently given an opportunity to introduce it, either by express offer and permission of the court,[90] or by the adverse party withdrawing his objection,[91] as the party is deemed to waive the original error when he refuses to accept full reparation thereof.[92] In some cases, error committed in rejecting written evidence may be cured by the subsequent reception of oral evidence establishing the fact sought to be proved,[93] while, con-

ferred to in such interrogatories. Gunn *v.* New York, etc., R. Co., 171 Mass. 417, 50 N. E. 1031.

88. Jerman *v.* Tenneas, 44 La. Ann. 620, 11 So. 80; Winn *v.* Cole, Walk. (Miss.) 119, holding that this is true, even though exceptions to the ruling have been taken, signed, and sealed. To like effect see Russell *v.* Gay, 33 Wash. 83, 73 Pac. 795.

The party need not repeat the question, however, but may preserve his rights by resting on the offer already made, together with his exception (Main *v.* Radney, (Ala. 1905) 39 So. 981; Barto *v.* Harrison, 138 Iowa 413, 116 N. W. 317); and where he does ask several questions along the same line, to all of which objections are sustained, he does not waive the error by withdrawing his last question before an objection thereto is made (Conover *v.* Manke, 71 Wis. 108, 36 N. W. 616).

89. See cases cited *infra*, this note.

For example, the error of excluding competent testimony may sometimes be cured by treating it as if it were in evidence. Williams *v.* U. S. Fidelity, etc., Co., 105 Md. 490, 66 Atl. 495; Smith's Appeal, 52 Mich. 415, 18 N. W. 195.

90. *Alabama.*— Davis *v.* Anderson, 163 Ala. 385, 50 So. 1002; Morrow *v.* Parkman, 14 Ala. 769.

California.— Bergtholdt *v.* Porter Bros. Co., 114 Cal. 681, 46 Pac. 738.

Indiana.— Phillips *v.* Thorne, 103 Ind. 275, 2 N. E. 747; McClellan *v.* Bond, 92 Ind. 424; Gebhart *v.* Burkett, 57 Ind. 378, 26 Am. Rep. 61.

Iowa.— Williamson *v.* Miller, 55 Iowa 86, 7 N. W. 416; Davis *v.* Simma, 14 Iowa 154, 81 Am. Dec. 462.

Michigan.— Field *v.* Magee, 122 Mich. 556, 81 N. W. 354; Burt *v.* Long, 106 Mich. 210, 64 N. W. 60.

Mississippi.—Alabama, etc., R. Co. *v.* Lowe, 73 Miss. 203, 19 So. 96.

Missouri.— Wynn *v.* Followill, 98 Mo. App. 463, 72 S. W. 140.

North Carolina.— Nail *v.* Brown, 150 N. C. 533, 64 S. E. 434, holding that the exclusion of evidence is harmless where the court at the close of all the evidence offers to allow its introduction, and there is no suggestion that the witnesses that were to give the evidence had been discharged.

Pennsylvania.— Welsh *v.* Speakman, 8 Watts & S. 257; D'Homergue *v.* Morgan, 3 Whart. 26.

Texas.— Tisdale *v.* Mitchell, 12 Tex. 68.

Virginia.— Blankenship *v.* Chesapeake, etc., R. Co., 94 Va. 449, 27 S. E. 20.

Compare Chicago, etc., R. Co. *v.* Ives, 63 Fed. 791, 11 C. C. A. 433, holding that the error of excluding a release which was pleaded, and which plaintiffs alleged was obtained by fraud, was not cured by the court suggesting that defendant incorporate into its bill of exceptions evidence admitted at a former trial on the issue as to the validity of the release, defendant having declined to adopt the suggestion.

91. *Connecticut.*— Case *v.* Marks, 20 Conn. 248.

Illinois.— Crawford *v.* Burke, 201 Ill. 581, 66 N. E. 833 [*reversed* on other grounds in 195 U. S. 176, 25 S. Ct. 9, 49 L. ed. 147]. *Compare* Edmunds Mfg. Co. *v.* McFarland, 118 Ill. App. 256.

Indiana.— Campbell *v.* Hunt, 104 Ind. 210, 2 N. E. 363, 3 N. E. 879; Remy *v.* Lilly, 22 Ind. App. 109, 53 N. E. 387.

Louisiana.— Barbineau *v.* Castille, 7 Mart. N. S. 186.

Nevada.— Mandlebaum *v.* Liebes, 17 Nev. 131, 28 Pac. 1040.

New York.— Baird *v.* Slaight, 5 Silv. Sup. 214, 8 N. Y. Suppl. 603; Flanagan *v.* Mitchell, 16 Daly 223, 10 N. Y. Suppl. 234.

North Carolina.— Marshall *v.* Flinn, 49 N. C. 199.

Pennsylvania.— Smull *v.* Jones, 6 Watts & S. 122; Ligget *v.* Commonwealth Bank, 7 Serg. & R. 218.

South Carolina.— Watts *v.* South Bound R. Co., 60 S. C. 67, 38 S. E. 240.

Vermont.— La Flam *v.* Missisquoi Pulp Co., 74 Vt. 125, 52 Atl. 526.

The withdrawal must be seasonably made, it being held that it comes too late to cure the error, when made after the other party's witnesses have been discharged and gone to their homes in another county. Gage *v.* Louisville, etc., R. Co., 88 Tenn. 724, 14 S. W. 73.

92. Alabama, etc., R. Co. *v.* Lowe, 73 Miss. 203, 19 So. 96.

93. *California.*— Big Three Min., etc., Co. *v.* Hamilton, 157 Cal. 130, 107 Pac. 301.

Illinois.— Modern Woodmen of America *v.* Davis, 184 Ill. 236, 56 N. E. 300 [*affirming* 84 Ill. App. 409]; Presley *v.* Powers, 82 Ill. 125; Chicago, etc., R. Co. *v.* Crose, 113 Ill. App. 547 [*affirmed* in 214 Ill. 602, 73 N. E. 865, 105 Am. St. Rep. 135].

Michigan.—Fowler *v.* Hoffman, 31 Mich. 215.

Missouri.— Norman *v.* Sheip, 142 Mo. App. 138, 125 S. W. 527.

Montana.— Butte Electric R. Co. *v.* Mathews, 34 Mont. 487, 87 Pac. 460.

Oklahoma.— Moore *v.* Linn, 19 Okla. 279, 91 Pac. 910.

South Carolina.— Going *v.* Mutual Ben. L. Ins. Co., 58 S. C. 201, 36 S. E. 556; Sloan *v.* Courtenay, 54 S. C. 314, 32 S. E. 431.

versely, rejected oral evidence may be supplied by documentary evidence,[94] the rule having special application where the evidence subsequently admitted is of a higher and better nature than that excluded.[95] To effect a cure of the error, however, the subsequent evidence must be substantially the same as that excluded,[96] be admitted for the same purpose,[97] and must not itself be taken

South Dakota.— Jensen *v.* Bowles, 8 S. D. 570, 67 N. W. 627. But see Kellogg *v.* Finn, 22 S. D. 578, 119 N. W. 545, 133 Am. St. Rep. 945.

And see Roanoke R., etc., Co. *v.* Young, 108 Va. 783, 62 S. E. 961, 128 Am. St. Rep. 971, where the trial court refused to permit the stenographic notes of the testimony of a witness on a former trial to be read in evidence, but permitted the stenographer to give the testimony by using his notes to refresh his memory, and it was held that the exclusion of the stenographic notes was not prejudicial.

Rejected deposition.— The error of excluding a deposition is harmless where the witness is afterward in court and examined. Benjamin *v.* Metropolitan St. R. Co., 133 Mo. 274, 34 S. W. 590; German Nat. Bank *v.* Laflin, 78 Nebr. 715, 111 N. W. 578; Clough *v.* Bowman, 15 N. H. 504.

94. Milhollen *v.* A. F. McDonald, etc., Mfg. Co., 137 Iowa 114, 112 N. W. 812; Sain *v.* Baker, 128 N. C. 256, 38 S. E. 858. And see Leggat *v.* Carroll, 30 Mont. 384, 76 Pac. 805.

95. *Alabama.*— Elliott *v.* Howison, 146 Ala. 568, 40 So. 1018; Louisville, etc., R. Co. *v.* Hall, 91 Ala. 112, 8 So. 371, 24 Am. St. Rep. 863.

California.— Kahn *v.* Triest-Rosenberg Cap Co., 139 Cal. 340, 73 Pac. 164.

Connecticut.— Dale's Appeal, 57 Conn. 127, 17 Atl. 757.

Michigan.— Reynolds *v.* Continental Ins. Co., 36 Mich. 131, holding error in excluding parol evidence to establish an agency to be harmless, where such agency is subsequently established by introducing the undisputed written agreement creating the agency.

New Jersey.— Kutzmeyer *v.* Ennis, 27 N. J. L. 371.

New York.— Arnstein *v.* Haulenbeck, 16 Daly 382, 11 N. Y. Suppl. 701.

Pennsylvania.— Swank *v.* Phillips, 113 Pa. St. 482, 6 Atl. 450.

Texas.— Equitable Mortg. Co. *v.* Norton, 71 Tex. 683, 10 S. W. 301.

Washington.— Port Townsend Southern R. Co. *v.* Nolan, 48 Wash. 382, 93 Pac. 528.

Wisconsin.— Zimmerman *v.* Fairbank, 35 Wis. 368.

Contra.— Lake Shore, etc., R. Co. *v.* Herrick, 49 Ohio St. 25, 29 N. E. 1052.

Where undisputed evidence establishing the fact in question is subsequently introduced, the improper exclusion of evidence tending to prove it is harmless error. Chicago, etc., R. Co. *v.* Neiman, (Kan. 1896) 44 Pac. 993; Rockwell *v.* Hurst, 13 N. Y. Suppl. 290. And see Santa Cruz *v.* Enright, 95 Cal. 105, 30 Pac. 197.

A party, by giving in evidence the whole of the record or pleading, thereby abandons and waives his exception to the exclusion of a part thereof. Southern L. & T. Co. *v.* Benbow, 135 N. C. 303, 47 S. E. 435; Cheek *v.* Oak Grove Lumber Co., 134 N. C. 225, 46 S. E. 488, 47 S. E. 400.

96. Pugh *v.* Porter Bros. Co., 118 Cal. 628, 50 Pac. 772; Kuhlman *v.* Wieben, 129 Iowa 188, 105 N. W. 445, 2 L. R. A. N. S. 666; Friedland *v.* McNeil, 33 Mich. 40; Allison *v.* Wood, 104 Va. 765, 52 S. E. 559. And see Middlebrooks *v.* Stephens, 148 Ala. 230, 41 So. 735 (holding that where, in an action to recover possession of lands, defendant offered to introduce a certified transcript of a deed, and exception was taken to the sustaining of an objection to the evidence on the ground that the certificate of acknowledgment was void, defendant did not lose the benefit of the exception by offering one of the grantors as a witness, who testified that he did not appear before the officer certifying the acknowledgment); Caledonian Ins. Co. *v.* Traub, 80 Md. 214, 30 Atl. 904 (holding that when the paper in question was subsequently identified but not offered in evidence the error is not cured); Johnstone *v.* Tuttle, 196 Mass. 112, 81 N. E. 886; O'Connor *v.* Slatter, 48 Wash. 493, 93 Pac. 1078 (holding that error in excluding the testimony of a witness that a certain person was not present at a particular transaction, as testified to by such person, is not cured by permitting him to give the names of the persons present at that time, which did not include the name of such person).

The fact that part of the excluded testimony indirectly found its way into the record does not cure the error. Greenlee *v.* Mosnat, 126 Iowa 330, 101 N. W. 1122.

97. Loloff *v.* Sterling, 31 Colo. 102, 71 Pac. 1113; Stoner *v.* Royar, 200 Mo. 444, 98 S. W. 601; Tallman *v.* Nelson, 141 Mo. App. 478, 125 S. W. 1181; McKown *v.* Hunter, 30 N. Y. 625; Haines *v.* Thompson, 2 Misc. (N. Y.) 385, 21 N. Y. Suppl. 991; Packard *v.* Backus, 78 Wis. 188, 47 N. W. 183, holding that in an action for the price of a pump, where defendants denied the sale and alleged that the pump had been placed on their premises by plaintiff as an advertisement, error in excluding the testimony of a disinterested witness that, at the time of the alleged sale, plaintiff said he was putting in the pump simply as an advertisement, is not cured by permitting defendants themselves to testify to that fact. But see Rowland *v.* Huggins, 28 Conn. 122.

The erroneous exclusion of substantive evidence is not cured by its subsequent admission to impeach a witness (Fisher *v.* Monroe, 2 Misc. (N. Y.) 326, 21 N. Y. Suppl. 995; Garcia *v.* Sanders, 90 Tex. 103, 37 S. W. 314), unless the jury is not instructed that

from the jury. If this is done the error is clearly prejudicial and a ground for new trial.[98]

(B) *Through Same Witness.* The rule that error in the rejection of evidence is cured by the subsequent reception of the same evidence [99] finds its most frequent application in cases where substantially the same testimony as that objected to and excluded is elicited from the same witness on further examination.[1] Thus

its admission is for purposes of impeachment only (Spence *v.* Owen County, 117 Ind. 573, 18 N. E. 513).

98. Hicks *v.* Drew, 117 Cal. 305, 49 Pac. 189.

Offer followed by adverse rulings.—An announcement by the court, after excluding evidence material on the issue of breach of contract, that defendant would be permitted to show the contract and its non-performance, does not deprive defendant of the benefit of his exception to the exclusion of such evidence, where the court, after making such announcement, excluded other evidence to the same effect. Salvinsky *v.* Levin, 27 Misc. (N. Y.) 521, 58 N. Y. Suppl. 284.

99. See *supra*, V, E, 1, e, (I), (A), (I).

1. *Alabama.*— Southern Car, etc., Co. *v.* Jennings, 137 Ala. 247, 34 So. 1002; Louisville, etc., R. Co. *v.* Banks, 132 Ala. 471, 31 So. 573; Alabama, etc., R. Co. *v.* Bailey, 112 Ala. 167, 20 So. 313.

Arizona.—Abernathy *v.* Reynolds, 8 Ariz. 173, 71 Pac. 914.

Arkansas.— Kansas City R. Co. *v.* Henrie, 87 Ark. 443, 112 S. W. 967.

California.— Spinks *v.* Clark, 147 Cal. 439, 82 Pac. 45; Anglo-California Bank *v.* Cerf, 147 Cal. 384, 81 Pac. 1077; Branson *v.* Caruthers, 49 Cal. 374.

Colorado.— Mulligan *v.* Smith, 32 Colo. 404, 76 Pac. 1063; Brewer *v.* McCain, 21 Colo. 382, 41 Pac. 822.

Connecticut.— Nichols *v.* Wentz, 78 Conn. 429, 62 Atl. 610; Smith *v.* Brockett, 69 Conn. 492, 38 Atl. 57.

Dakota.— Young *v.* Harris, 4 Dak. 367, 32 N. W. 97.

Florida.—Atlantic Coast Line R. Co. *v.* Peeples, 56 Fla. 145, 47 So. 392; Upchurch *v.* Mizell, 50 Fla. 456, 40 So. 29; Tischler *v.* Apple, 30 Fla. 132, 11 So. 273.

Georgia.— Maynard *v.* Newton, 116 Ga. 195, 42 S. E. 376; McBride *v.* Macon Tel. Pub. Co., 102 Ga. 422, 30 S. E. 999.

Illinois.— Beamer *v.* Morrison, 210 Ill. 443, 71 N. E. 402; Mitchell *v.* Hindman, 150 Ill. 538, 37 N. E. 916; Huftulin *v.* Misner, 70 Ill. 55.

Indiana.— Chicago, etc., R. Co. *v.* Brown, 157 Ind. 544, 60 N. E. 346; Wood *v.* State, 92 Ind. 269.

Iowa.— Hofacre *v.* Monticello, 128 Iowa 239, 103 N. W. 488; Mucci *v.* Houghton, 89 Iowa 608, 57 N. W. 305; Cahalan *v.* Cahalan, 82 Iowa 416, 48 N. W. 724.

Kansas.— LeRoy, etc., R. Co. *v.* Hollis, 39 Kan. 646, 18 Pac. 947; Topeka *v.* Noble, 9 Kan. App. 171, 58 Pac. 1015.

Kentucky.— Campbell *v.* Fidelity, etc., Co., 109 Ky. 661, 60 S. W. 492, 22 Ky. L. Rep. 1295; Holcomb-Loff Co. *v.* Kaufman, 96 S. W. 813, 29 Ky. L. Rep. 1006.

Maryland.— Packham *v.* Glendmeyer, 103 Md. 416, 63 Atl. 1048; Baltimore, etc., R. Co. *v.* Deck, 102 Md. 669, 62 Atl. 958.

Massachusetts.— Nelson *v.* Boston, etc., R. Co., 155 Mass. 356, 29 N. E. 586; Hodges *v.* Scott, 118 Mass. 530.

Michigan.— Howe *v.* Morey, 141 Mich. 383, 104 N. W. 643; Ellis *v.* Whitehead, 95 Mich. 105, 54 N. W. 752.

Minnesota.— Spoonick *v.* Backus-Brooks Co., 89 Minn. 354, 94 N. W. 1079; Alexander *v.* Chicago, etc., R. Co., 41 Minn. 515, 43 N. W. 481.

Mississippi.—Alabama, etc., R. Co. *v.* Harz, 88 Miss. 681, 42 So. 201; Ouilette *v.* Davis, 69 Miss. 762, 12 So. 27.

Missouri.— Meeker *v.* Metropolitan St. R. Co., 178 Mo. 173, 77 S. W. 58; Mulherin *v.* Simpson, 124 Mo. 610, 28 S. W. 86; Hamilton *v.* Rich Hill Coal Min. Co., 108 Mo. 364, 18 S. W. 977. *Compare* Murray *v.* Oliver, 18 Mo. 405 (holding that, in an action on a bond, where the admission, of the obligee, while he was owner thereof, that it had been given for an illegal consideration was erroneously excluded, the error is not cured by subsequently swearing in the obligee as a witness for the party offering such admissions); Wheeler *v.* Chestnut, 95 Mo. App. 546, 69 S. W. 621.

Montana.—Ackley *v.* Phœnix Ins. Co., 25 Mont. 272, 64 Pac. 665; Quinn *v.* Quinn, 22 Mont. 403, 56 Pac. 824.

Nebraska.—Atwood *v.* Marshall, 52 Nebr. 173, 71 N. W. 1064; Jonasen *v.* Kennedy, 39 Nebr. 313, 58 N. W. 122.

New Jersey.— Corkran *v.* Taylor, 77 N. J. L. 195, 71 Atl. 124; Redhing *v.* Central R. Co., 68 N. J. L. 641, 54 Atl. 431; Wallace *v.* Van Wagoner, 20 N. J. L. 175.

New York.— Crosby *v.* Day, 81 N. Y. 242; Havlin *v.* Krulish, 26 Misc. 381, 56 N. Y. Suppl. 275; Brill *v.* Levin, 86 N. Y. Suppl. 109.

North Carolina.— Smith *v.* Cashie, etc., R., etc., Co., 142 N. C. 26, 54 S. E. 788, 5 L. R. A. N. S. 439; Rawls *v.* White, 127 N. C. 17, 37 S. E. 68.

North Dakota.— Bristol, etc., Co. *v.* Skapple, 17 N. D. 271, 115 N. W. 841; Red River Valley Nat. Bank *v.* Monson, 11 N. D. 423, 92 N. W. 807.

Ohio.— Mauk *v.* Brundage, 68 Ohio St. 89, 67 N. E. 152, 62 L. R. A. 477 (holding that as, in the case in question, the subsequent inquiry was fully pursued by both parties, it is not necessary to overrule Reynolds *v.* Tucker, 6 Ohio St. 516, 67 Am. Dec. 353, but that the principle of that case, namely, that error in ruling against the competency of evidence is not cured by the offer of the party in whose favor the ruling is made, to go into the same inquiry should not be extended by

the error is waived or cured where the party, on whose objection the evidence is excluded, questions the witness concerning the same matter,[2] or where the testimony is ruled out on cross-examination and later brought out when the party asking the question makes the witness his own.[3] The rule is also applicable where the witness answers a question notwithstanding the fact that an objection thereto has been sustained;[4] where testimony relating to a particular phase of a matter is ruled out but the witness is later allowed to tell all he knows about the matter;[5] where the whole testimony of a witness is excluded, but he is subsequently permitted to testify;[6] and where the testimony is by deposition instead of in open court.[7]

(c) *Through Other Witnesses.* No prejudicial error results from the exclusion

implication); Allen *v.* Lowe, 19 Ohio Cir. Ct. 353, 10 Ohio Cir. Dec. 353.

Pennsylvania.— Hicks *v.* Harbison-Walker Co., 212 Pa. St. 437, 61 Atl. 958; Acklin *v.* McCalmont Oil Co., 201 Pa. St. 257, 50 Atl. 955.

Rhode Island.— Rose *v.* Mitchell, 21 R. I. 270, 43 Atl. 67.

South Carolina.— Sims *v.* Jones, 43 S. C. 91, 20 S. E. 905; Taylor *v.* Dominick, 36 S. C. 368, 15 S. E. 591.

South Dakota.— Buchanan *v.* Randall, 21 S. D. 44, 109 N. W. 513; Winn *v.* Sanborn, 10 S. D. 642, 75 N. W. 201.

Tennessee.— Illinois Cent. R. Co. *v.* Spence, 93 Tenn. 173, 23 S. E. 211, 42 Am. St. Rep. 907.

Texas.— Denison, etc., R. Co. *v.* Powell, 35 Tex. Civ. App. 454, 80 S. W. 1054; Sherman Oil, etc., Co. *v.* Dallas Oil, etc., Co., (Civ. App. 1903) 77 S. W. 961; Denison, etc., R. Co. *v.* O'Malley, 18 Tex. Civ. App. 200, 45 S. W. 225, 227.

Utah.—Anderson *v.* Mammoth Min. Co., 26 Utah 357, 73 Pac. 412; Connor *v.* Raddon, 16 Utah 418, 52 Pac. 764.

Vermont.— *In re* Claflin, 75 Vt. 19, 52 Atl. 1053, 58 L. R. A. 261; Knapp *v.* Wing, 72 Vt. 334, 47 Atl. 1075.

Virginia.— Virginia, etc., R. Co. *v.* Bailey, 103 Va. 205, 49 S. E. 33; Crescent Horse-Shoe, etc., Co. *v.* Eynon, 95 Va. 151, 27 S. E. 935.

Washington.— Taylor *v.* Modern Woodmen, 42 Wash. 304, 84 Pac. 867; Nunn *v.* Jordan, 31 Wash. 506, 72 Pac. 124.

Wisconsin.— Illinois Steel Co. *v.* Jeka, 123 Wis. 419, 101 N. W. 399; Cowan *v.* Chicago, etc., R. Co., 80 Wis. 284, 50 N. W. 180.

United States.— Texas State Fair *v.* Brittain, 118 Fed. 713, 56 C. C. A. 499; Louisville, etc., R. Co. *v.* White, 100 Fed. 239, 40 C. C. A. 352.

Where the testimony admitted is not as broad or as comprehensive as that excluded the error still remains. The Madison *v.* Wells, 14 Mo. 360; Jennings *v.* Supreme Council R. A. B. A., 81 N. Y. App. Div. 76, 81 N. Y. Suppl. 90.

2. Doyle *v.* Kansas City, etc., R. Co., 113 Mo. 280, 20 S. W. 970; Dewey *v.* Komar, 21 S. D. 117, 110 N. W. 90; Churchill *v.* Price, 44 Wis. 540. *Contra*, Reynolds *v.* Tucker, 6 Ohio St. 516, 67 Am. Dec. 353.

3. Adams *v.* Farnsworth, (Cal. 1894) 37 Pac. 221; East Dubuque *v.* Burhyte, 173 Ill. 553, 50 N. E. 1077 [*affirming* 74 Ill. App. 99]; Hemminger *v.* Western Assur. Co., 95 Mich. 355, 54 N. W. 949; Dennis *v.* Van Voy, 31 N. J. L. 38. And see Mills Novelty Co. *v.* Peck, 158 Fed. 811, 86 C. C. A. 71, holding that the sustaining of an objection to a question asked a witness as not proper cross-examination was not prejudicial error where the party asking the question subsequently placed the witness on the stand as its own, but did not ask such question.

4. Vaughan's Seed Store *v.* Stringfellow, 56 Fla. 708, 48 So. 410; Chicago City R. Co. *v.* Menely, 79 Ill. App. 679.

5. Williams *v.* Anniston Electric, etc., Co., 164 Ala. 84, 51 So. 385; North Chicago Rolling-Mill Co. *v.* Johnson, 114 Ill. 57, 29 N. E. 186.

Refreshing memory of witness.— Where, after an answer to a question intended to refresh the witness' recollection has been excluded, such witness states unequivocally that he has told all he knows about the matter, there is no error in excluding such answer. Ellis *v.* Whitehead, 95 Mich. 105, 54 N. W. 752.

Error in excluding the opinion of a witness is cured where the witness is subsequently permitted to testify to all the facts from which his opinion would have been drawn. Alexander *v.* Central Lumber, etc., Co., 104 Cal. 532, 38 Pac. 410; Kendall *v.* Limberg, 69 Ill. 355; Bath *v.* Houston, etc., R. Co., 34 Tex. Civ. App. 234, 78 S. W. 993. And see Schroeder *v.* Seittz, 68 Mo. App. 233. *Contra*, Pattee *v.* Whitcomb, 72 N. H. 249, 56 Atl. 459.

6. Rogers *v.* Kichline, 36 Pa. St. 293.

After qualification as expert.— Any error in refusing to permit a witness to testify on a certain subject without qualifying as an expert is cured by subsequently permitting the witness to testify on the same subject after his qualification as an expert. Yarborough *v.* Banking L. & T. Co., 142 N. C. 377, 55 S. E. 296.

7. Stewart *v.* Bradford, 26 Ala. 410; Leary *v.* Leary, 18 Ga. 696; Hovey *v.* Chase, 52 Me. 304, 83 Am. Dec. 514; Long *v.* Steiger, 8 Tex. 460.

Where a witness dies between two trials, the error, if any, in excluding, on the second trial, the testimony given by him on the first trial, is cured by the admission of his deposition taken prior to the first trial and containing practically the same testimony.

of particular evidence when the facts sought to be elicited are subsequently covered in full by the testimony of other witnesses,[8] provided the credibility of such witnesses is not shaken,[9] and it is clear that no harm has resulted to the party first offering the evidence.[10] This is true even where the excluded evidence is documentary and the admitted evidence is oral testimony,[11] or where the subsequent witnesses are offered by the adverse party, as the proponent of the excluded evidence has the benefit of cross-examination.[12]

(II) *By Instructions.* In its instructions to the jury, the trial court often cures whatever error it may have committed in ruling out evidence,[13] as where it so defines the issues and grounds of liability as to render the excluded evidence

Standard Mar. Ins. Co. *v.* Nome Beach Lighterage, etc., Co., 167 Fed. 119, 92 C. C. A. 571 [*affirming* 156 Fed. 484].

Deposition to supply rejected oral testimony.— If, after a refusal to receive evidence of the handwriting of a witness to a bond, who resides out of the state, plaintiff resorts to his deposition to prove the execution of the bond, such refusal cannot be assigned for error. State *v.* Bodly, 7 Blackf. (Ind.) 355.

8. *Alabama.*— McLendon *v.* Grice, 119 Ala. 513, 24 So. 846.

California.— San Joaquin Valley Bank *v.* Bours, 73 Cal. 200, 14 Pac. 673.

Connecticut.— Bierce *v.* Sharon Electric Light Co., 73 Conn. 300, 47 Atl. 324; Dale's Appeal, 57 Conn. 127, 17 Atl. 757.

Dakota.— Ostland *v.* Porter, 4 Dak. 98, 25 N. W. 731.

Idaho.— Lewis *v.* Utah Constr. Co., 10 Ida. 214, 77 Pac. 336.

Illinois.— Richardson *v.* Nelson, 221 Ill. 254, 77 N. E. 583 [*affirming* 123 Ill. App. 550]; Eames *v.* Rend, 105 Ill. 506.

Indiana.— Conner *v.* Citizens' St. R. Co., 146 Ind. 430, 45 N. E. 662; Gurley *v.* Park, 135 Ind. 440, 35 N. E. 279; Haverstick *v.* State, 6 Ind. App. 595, 32 N. E. 785, 34 N. E. 99.

Iowa.— State *v.* Conable, 81 Iowa 60, 46 N. W. 759.

Kentucky.— Carson *v.* Singleton, 65 S. W. 821, 23 Ky. L. Rep. 1626.

Maryland.— Shockley *v.* Pennsylvania R. Co., 109 Md. 123, 71 Atl. 437; Baltimore City Pass. R. Co. *v.* Cooney, 87 Md. 261, 39 Atl. 859.

Michigan.— O'Connor *v.* Hogan, 140 Mich. 613, 104 N. W. 29.

Minnesota.— Lindahl *v.* Supreme Court I. O. F., 100 Minn. 87, 110 N. W. 358, 117 Am. St. Rep. 666, 8 L. R. A. N. S. 916; Laib *v.* Brandenburg, 34 Minn. 367, 25 N. W. 803.

Missouri.— Kirkbride *v.* Gash, 34 Mo. App. 256.

Nevada.— Bianchi *v.* Maggini, 17 Nev. 322, 30 Pac. 1004.

New York.—Matter of Gihon, 44 N. Y. App. Div. 621, 60 N. Y. Suppl. 65 [*affirmed* in 163 N. Y. 595, 57 N. E. 1110]; Hunt *v.* Fish, 4 Barb. 324; McSwyny *v.* Broadway, etc., R. Co., 4 Silv. Sup. 495, 7 N. Y. Suppl. 456; Sagalowitz *v.* Pellman, 32 Misc. 508, 66 N. Y. Suppl. 433.

Pennsylvania.— Fitzpatrick *v.* Union Traction Co., 206 Pa. St. 335, 55 Atl. 1050.

South Carolina.— Perry *v.* Jefferies, 61 S. C. 292, 39 S. E. 515; Wallingford *v.* Western Union Tel. Co., 60 S. C. 201, 38 S. E. 443, 629; Murdock *v.* Courtenay Mfg. Co., 52 S. C. 428, 29 S. E. 856, 30 S. E. 142.

Texas.— Perry *v.* Patton, (Civ. App. 1902) 68 S. W. 1018.

9. McDonough *v.* Williams, 86 Ark. 600, 112 S. W. 164; Bibbins *v.* Chicago, 193 Ill. 359, 61 N. E. 1030 [*reversing* 94 Ill. App. 319]; Mohrenstecher *v.* Westervelt, 87 Fed. 157, 30 C. C. A. 584. And see Chicago Union Traction Co. *v.* Miller, 212 Ill. 49, 72 N. E. 25; Hartney *v.* Gosling, 10 Wyo. 346, 68 Pac. 1118, 98 Am. St. Rep. 1005, where it appeared that the trial court did not give much weight to the subsequent testimony.

10. *Alabama.*— Holland *v.* Barnes, 53 Ala. 83, 25 Am. Rep. 595.

Arkansas.— Miles *v.* St. Louis, etc., R. Co., 90 Ark. 485, 119 S. W. 837.

New York.— Crossman *v.* Lurman, 33 N. Y. App. Div. 422, 54 N. Y. Suppl. 72, holding that it is impossible to say that injury has not been done a defeated party by the exclusion of part of his evidence on the only disputed question in the case. And see Wallach *v.* Manhattan R. Co., 105 N. Y. App. Div. 422, 94 N. Y. Suppl. 574, 17 N. Y. Annot. Cas. 68.

North Carolina.— Burns *v.* Ashboro, etc., R. Co., 125 N. C. 304, 34 S. E. 495, holding that error in not permitting plaintiff to testify as to what her deceased husband earned is not cured by the testimony of defendant's superintendent on that point, as the evidence in question bore directly on the question of damages.

Texas.— Dallas Consol. Electric St. R. Co. *v.* McAllister, 41 Tex. Civ. App. 131, 90 S. W. 933; Landes *v.* Eichelberger, 2 Tex. App. Civ. Cas. § 133; Pierrepont *v.* Sassee, 1 Tex. App. Civ. Cas. § 1294.

Wisconsin.— Smith *v.* Milwaukee Electric R., etc., Co., 127 Wis. 253, 106 N. W. 829.

11. Christy *v.* Spring Valley Water Works, 97 Cal. 21, 31 Pac. 1110.

12. Bressler *v.* Beach, 21 Ill. App. 423; Smith *v.* Eckford, (Tex. 1891) 18 S. W. 210. *Contra*, Flanigan *v.* Lampman, 12 Mich. 58.

13. Franklin *v.* Krum, 171 Ill. 378, 49 N. E. 513 [*affirming* 70 Ill. App. 649]; Willet *v.* Goetz, 125 Mich. 581, 84 N. W. 1071; McCracken *v.* Smathers, 122 N. C. 799, 29 S. E. 354; Maryland Fidelity, etc., Co. *v.* Courtney, 186 U. S. 342, 22 S. Ct. 833, 46 L. ed. 1193 [*affirming* 103 Fed. 599, 43 C. C. A. 331].

immaterial and outside the issues,[14] or where it assumes the existence or proof of the fact sought to be established by the evidence in question and thus gives the party all the benefit which he could have derived from its admission.[15] On the other hand, the error is not eradicated, but is aggravated, by instructions which lay emphasis upon the fact which the excluded evidence would have tended to prove or disprove.[16]

(III) *MISCELLANEOUS.* It often happens that, although there is error in the exclusion of evidence, it is absolutely unprejudicial and is not cause for reversal,[17] as where the facts sought to be established by the evidence excluded are subsequently admitted by the adverse party,[18] or where the claim which it tended to

14. *Illinois.*— Merchants' Nav. Co. *v.* Amsden, 25 Ill. App. 307.

Iowa.— Keyes *v.* Bradley, 73 Iowa 589, 35 N. W. 656.

Kentucky.— Reeves *v.* French, 45 S. W. 771, 46 S. W. 217, 20 Ky. L. Rep. 220.

Michigan.— Vicborn *v.* Pollock, 133 Mich. 524, 95 N. W. 576; Wooliver *v.* Boylston Ins. Co., 104 Mich 132, 62 N. W. 149; Hake *v.* Buell, 50 Mich. 89, 14 N. W. 710.

Missouri.— Senf *v.* St. Louis, etc., R. Co., 112 Mo. App. 74, 86 S. W. 887; Esterly *v.* Campbell, 44 Mo. App. 621.

New York.— Blaustein *v.* Warburton, 11 Misc. 631, 32 N. Y. Suppl. 786.

Texas.— Missouri, etc., R. Co. *v.* Matherly, 35 Tex. Civ. App. 604, 81 S W. 589.

Wisconsin.— Craven *v.* Smith, 89 Wis. 119, 61 N. W. 317.

United States.— Frizzell *v.* Omaha St. R. Co., 124 Fed. 176, 59 C. C. A. 382 (holding that error committed by rejecting two rules of defendant company offered by plaintiff to the effect that, after a car is stopped, it should only be started on signal from the conductor after the passenger has alighted, is not prejudicial, where the court charges that, if the car was started after it had stopped and while plaintiff was alighting, she was entitled to a verdict); Northern Pac. R Co. *v* Beaton, 64 Fed. 563, 12 C. C. A. 301.

15. *California.*— Pimental *v.* Marques, 109 Cal. 406, 42 Pac. 159.

Connecticut.— Fitch *v.* Chapman, 10 Conn. 8. And see Merwin *v.* Morris, 71 Conn. 555, 42 Atl. 855.

Iowa.— Gross *v.* Feehan, 110 Iowa 163, 81 N. W. 235; Liston *v.* Central Iowa R. Co., 70 Iowa 714, 29 N. W. 445.

Massachusetts.— Cole *v.* New York, etc., R. Co., 174 Mass. 537, 55 N. E. 1044.

Michigan.— Clark *v.* Cox, 32 Mich. 204.

Nebraska.— Pullman Palace Car Co. *v.* Woods, 76 Nebr. 694, 107 N. W. 858, holding that a litigant is not prejudiced by the rejection of evidence to prove the common law of a sister state, where the court embodies it in an instruction as a part of the law of the case.

New York.— Jones *v.* Oppenheim, 91 N. Y. Suppl. 343.

North Carolina.— Morehead *v.* Brown, 51 N. C. 367; Thompson *v.* Morris, 50 N. C. 151.

Pennsylvania.— Evans *v.* See, 23 Pa. St. 88; Sheehan *v.* Rosen, 12 Pa. Super. Ct. 298; Ernest *v.* Wible, 10 Pa. Super. Ct. 576.

Texas.— Asher *v.* Jones County, 29 Tex. Civ. App. 353, 68 S. W. 551.

Virginia.— Virginia, etc., R. Co. *v.* Bailey, 103 Va. 205, 49 S. E. 33.

United States.— Relfe *v.* Wilson, 131 U. S. Appendix clxxxix, 26 L. ed. 212.

16. Lewin *v.* Barry, 15 Colo. App. 461, 63 Pac. 121; Guinn *v.* Iowa, etc., R. Co., 125 Iowa 301, 101 N. W. 94; Woodhaven Bank *v.* Brooklyn Hills Imp. Co., 69 N. Y. App. Div. 489, 74 N. Y. Suppl. 1023; Heintz *v.* Caldwell, 16 Ohio Cir. Ct. 630, 9 Ohio Cir. Dec. 412. See also Haines *v.* Thompson, 2 Misc. (N. Y.) 385, 21 N. Y. Suppl. 991.

17. Curr *v.* Hundley, 3 Colo. App. 54, 31 Pac. 939; Boozer *v.* Teague, 27 S. C. 348, 3 S. E. 551 (where the excluded evidence was insufficient to entitle the party offering it to a new trial); Toole *v.* Dibrell, (Tex. Civ. App. 1895) 29 S. W. 387.

Waiver of erroneous exclusion of impeaching testimony.— A party to an action, by calling one of his opponent's witnesses as his own, and examining him on his own behalf, thereby precludes himself from insisting on exceptions previously taken to rulings excluding testimony offered by him to impeach the credibility of the same witness. Linden *v.* Brustein, 23 Misc. (N. Y.) 655, 52 N. Y. Suppl. 120.

Offering other evidence when error is prejudicial.— When the court has erroneously ruled out evidence without which plaintiff could not possibly recover, his failure to go on and prove other essential facts will not cure the error and sanction a judgment of nonsuit. Vaughn *v.* Burton, 113 Ga. 103, 38 S. E. 310; Miller *v.* Speight, 61 Ga. 460. Neither does the party lose the benefit of his exception by going on with the remainder of his case and making the best of it. McNeill *v.* Galveston, etc., R. Co., (Tex. Civ. App. 1905) 86 S. W. 32.

18. Liston *v.* Central Iowa R. Co., 70 Iowa 714, 29 N. W. 445; Loudy *v.* Clarke, 45 Minn. 477, 48 N. W. 25; Carlson *v.* Small, 32 Minn. 492, 21 N. W. 737.

Testimony taken at former trial.— Where, by agreement of parties, the testimony of a witness taken on a former trial is read in evidence, all rulings excluding evidence when offered on the first trial are waived. Furlong *v.* Carraher, 108 Iowa 492, 79 N. W. 277.

Stipulation relating to new trial.— Any

support or defeat is afterward withdrawn.[19] Also a party whose tendered evidence has been erroneously rejected waives the error when he objects to the same or similar evidence offered by the other party,[20] as he also does by amending his pleadings, where the evidence has been erroneously held inadmissible under the pleadings.[21] However, it is not essential to the preservation of the rights of a party taking an exception to the exclusion of testimony that he urge the same ground of objection by an exception to an instruction given or refused.[22]

VI. ARGUMENTS AND CONDUCT OF COUNSEL.[23]

A. Right to Argue Case to Jury — 1. IN GENERAL. A party litigant has the right to address the jury by his counsel where there is an issue in the case to be submitted to the jury,[24] and the party is not in default.[25] This is so although the facts may appear plain to the court.[26] This right includes the right to reargue the case where after argument the original instructions are withdrawn and materi-

error in exclusion of evidence at a jury trial is waived by a party stipulating as a condition to refusal of new trial that the court should decide the issues on the testimony given at the jury trial. Dooley *v.* Burlington Gold Min. Co., (Ariz. 1909) 100 Pac. 797. However, a party is not obliged to consent to unreasonable conditions in order to obtain a new trial on the ground of improper rejection of evidence. Heath *v.* Shelby, 1 Blackf. (Ind.) 228.

19. Howard *v.* Lamoni, 124 Iowa 348, 100 N. W. 62; Illingworth *v.* Greenleaf, 11 Minn. 235; Potter *v.* Washburn, 13 Vt. 558, 37 Am. Dec. 615. And see Kinyon *v.* Chicago, etc., R. Co., 118 Iowa 349, 92 N. W. 40, 96 Am. St. Rep. 382.

Abandonment of defense by asking instruction.—Where by asking an instruction defendant abandons a defense, he thereby waives an exception taken to the exclusion of evidence offered to sustain such defense. Stephens *v.* Quigley, 126 Fed. 148, 61 C. C. A. 214.

20. Lewis *v.* Healy, 73 Conn. 744, 48 Atl. 212; Doyle *v.* Kansas City, etc., R. Co., 113 Mo. 280, 20 S. W. 970 (holding that error in refusing to allow defendant to prove declarations made by plaintiff's deceased father is cured by plaintiff endeavoring to bring out the whole of the conversation in which such declarations were made and defendant's objection thereto); Wees *v.* Page, 47 Wash. 213, 91 Pac. 766.

21. Rees *v.* Leech, 10 Iowa 439; Cotes *v.* Davenport, 9 Iowa 227; Hackler *v.* Miller, 79 Nebr. 209, 114 N. W. 274; Winterringer *v.* Warder, etc., Co., 1 Nebr. (Unoff.) 413, 95 N. W. 619; Harrison *v.* Forsyth, 33 N. Y. Super. Ct. 269.

22. Rosenthal *v.* Ogden, 50 Nebr. 218, 69 N. W. 779.

Judgment or directed verdict.— It has been held, in an action to recover on a written agreement by defendant to pay certain notes and an account against a decedent, that a judgment for the amount of the account only, entered on a verdict directed by the court, which direction was not excepted to, does not preclude plaintiff from insisting on an exception to the exclusion of the notes when offered in evidence (Rowell *v.* Dunwoodie, 69 Vt. 111, 37 Atl. 227); but that where, in a bastardy proceeding, defendant failed to object to the judgment for support rendered against him, or to move for its modification, such failure will be regarded as a waiver of any supposed error of the trial court in refusing to hear evidence offered (Scott *v.* State, 102 Ind. 277, 1 N. E. 691).

23. Errors and irregularities as ground for new trial see NEW TRIAL, 29 Cyc. 773 *et seq.*

In particular actions or proceedings: Bastardy proceedings see BASTARDS, 5 Cyc. 666. Criminal prosecutions see CRIMINAL LAW, 12 Cyc. 568. Equitable actions see EQUITY, 16 Cyc. 412. Probate proceedings see WILLS. On appeal from justice's court see JUSTICES OF THE PEACE, 24 Cyc. 742. On hearing before referee see REFERENCES, 34 Cyc. 826.

24. *Georgia.*— Van Dyke *v.* Martin, 55 Ga. 466, holding that if not enough of the term remains to allow a reasonable time for argument the entire cause should be postponed until the following term.

Illinois.— Emmons *v.* Hilton, 72 Ill. App. 124; Kintz *v.* Starkey, 70 Ill. App. 53; Lanan *v.* Hibbard, 63 Ill. App. 54.

Kansas.— Douglass *v.* Hill, 29 Kan. 527.

Kentucky.— Wilken *v.* Exterkamp, 102 Ky. 143, 42 S. W. 1140, 19 Ky. L. Rep. 1132, irrespective of the condition of the docket.

Nebraska.— Houck *v.* Gue, 30 Nebr. 113, 46 N. W. 280.

New York.— Cornwell *v.* Dickel, 6 N. Y. Civ. Proc. 416.

See 46 Cent. Dig. tit. "Trial," § 269.

Where there are several defendants with a several liability, each defendant is entitled to be heard in argument by counsel. Lyman *v.* Fidelity, etc., Co., 65 N. Y. App. Div. 27, 72 N. Y. Suppl. 498.

Motion for continuance and argument of demurrer.— Where counsel enters his appearance only for the avowed purpose of moving for a continuance and arguing a demurrer, which he states as the limit of his authority, it is not error for the court to decline to permit him to argue the case on the merits. Gunn *v.* Gunn, 95 Ga. 439, 22 S. E. 552.

25. Stephens *v.* Gate City Gas-Light Co., 81 Ga. 150, 6 S. E. 838.

26. Fareira *v.* Smith, 3 Misc. (N. Y.) 255, 22 N. Y. Suppl. 939.

ally different instructions are given, if a seasonable request is made;[27] but not the right to reargue the case where the jury after retirement requests additional instructions, in which event the right of reargument is discretionary with the court.[28] Where the issues are issues of law only,[29] where the evidence is not sufficient to sustain a verdict,[30] where there is nothing fairly debatable,[31] or where the facts are admitted and capable of but one inference[32] the court may decline to permit counsel to address the jury. So the court is not bound to hear arguments as to the admissibility of evidence,[33] and it may also decline to permit an attorney who has testified for his client to address the jury in that cause.[34] But the court may, in its discretion, permit such counsel to address the jury, although a rule of court prohibits it.[35] To furnish the basis of complaint a denial of the right of argument must be express and not by implication,[36] and must not have been acquiesced in by counsel.[37]

2. WAIVER OF RIGHT. The right to argue the case to the jury may be waived,[38] and is waived by counsel's silence and failure to demand the right to argue upon a query in the presence of the court, after inquiry by opposing counsel whether he desired to argue the case,[39] or by replying to the court, in answer to an inquiry as to whether he desired time to argue the case that he only wishes for time to prepare instructions.[40]

B. General Considerations Affecting. The conduct of counsel in presenting their cases to juries is a matter to be left largely to the ethics of the profession and the discretion of the trial judge.[41] Counsel may bring to his use in the discussion of the case well-established historical facts and may allude to such principles of divine law relating to transactions of men as may be appropriate to the case.[42] He may argue matters of which judicial notice is bound to be taken,[43] and state matters which the law presumes,[44] and he may indulge in impassioned bursts of oratory, or what he may consider oratory, so long as he introduces no facts not disclosed by the evidence.[45] It is not impassioned oratory which the law condemns and discredits in the advocate, but the introduction of facts not disclosed by the evidence.[46] It has been held that he may even shed tears during the argument, the only limitation on this right being that they must not be indulged in to such excess as to impede or delay the business of the court.[47] It is for the

27. Pugh *v.* Nichols, 56 Mo. App. 394.

28. Wilkinson *v.* St. Louis Sectional Deck Co., 102 Mo. 130, 14 S. W. 177.

29. *Georgia.*— Gunn *v.* Head, 116 Ga. 325, 42 S. E. 343.

Illinois.— Bradish *v.* Grant, 119 Ill. 606, 9 N. E. 332.

Indiana.— Heagy *v.* State, 85 Ind. 260.

Kentucky.— Harrison *v.* Park, 1 J. J. Marsh. 170; Deering *v.* Halbert, 2 Litt. 290.

Nebraska.— Neidig *v.* Cole, 13 Nebr. 39, 13 N. W. 18.

South Carolina.— Young *v.* McNeill, 78 S. C. 143, 59 S. E. 986.

See 46 Cent. Dig. tit. "Trial," § 269.

30. Smith *v.* Marx, 93 Ala. 311, 9 So. 194; Hooks *v.* Frick, 75 Ga. 715; Bankard *v.* Baltimore, etc., R. Co., 34 Md. 197, 6 Am. Rep. 321.

31. Warner *v.* Close, 120 Mo. App. 211, 96 S. W. 491.

32. Gilreath *v.* Furman, 57 S. C. 289, 35 S. E. 516.

33. Olive *v.* State, 11 Nebr. 1, 7 N. W. 444.

34. Johns *v.* Bolton, 12 Pa. St. 339; Voss *v.* Bender, 32 Wash. 566, 73 Pac. 697, under rule.

35. Branson *v.* Caruthers, 49 Cal. 374.

36. Cartright *v.* Clopton, 25 Ga. 85.

37. Foley *v.* Abbott, 66 Ga. 115.

38. Piatt *v.* Head, 35 Kan. 282, 10 Pac. 822.

39. Piatt *v.* Head, 35 Kan. 282, 10 Pac. 822.

40. Herrington *v.* Pouley, 26 Ill. 94.

41. Ferguson *v.* Moore, 98 Tenn. 342, 39 S. W. 341.

42. Western, etc., R. Co. *v.* York, 128 Ga. 687, 58 S. E. 183.

43. Wilson *v.* Van Leer, 127 Pa. St. 371, 17 Atl. 1097, 14 Am. St. Rep. 854, holding that for that purpose he may use an almanac to show the coincidence of the days of the week and days of the month, although the almanac has not been introduced in evidence.

44. Jacquelin *v.* Morning Journal Assoc., 39 N. Y. App. Div. 515, 57 N. Y. Suppl. 299.

45. Western, etc., R. Co. *v.* York, 128 Ga. 687, 58 S. E. 183. And see St. Louis, etc., R. Co. *v.* Boback, 71 Ark. 427, 75 S. W. 473; Harless *v.* Southwest Missouri Electric R. Co., 123 Mo. App. 22, 99 S. W. 793.

46. Western, etc., R. Co. *v.* York, 128 Ga. 687, 58 S. E. 183.

47. Ferguson *v.* Moore, 98 Tenn. 342, 352, 39 S. W. 341, in which it was said that if

court and not counsel to lay down to the jury the rules of law for their guidance,[48] and if counsel advises the jury to disregard the instructions it is the duty of the court to stop him at the instance of the adverse party or of its own motion.[49]

C. Regulation of Argument by Court — 1. In General. License of speech of counsel in addressing the jury is largely within the discretion of the trial court,[50] which has power to regulate or control the argument,[51] and it is its duty to interpose to restrain counsel from indulging in unwarranted and improper argument and illustrations before the jury,[52] and it may reprove or rebuke counsel, in the presence of the jury, for the use of contemptuous language and conduct tending to bring the court into contempt,[53] and in proper cases may punish by fine and imprisonment.[54] So it may interrupt counsel for the purpose of excluding from the consideration of the jury improper testimony admitted in behalf of his client,[55] and may properly direct counsel to desist from discussing to the jury immaterial evidence,[56] or evidence that has been ruled out,[57] or evidence admitted but for one purpose as to its bearing on other issues.[58] It may rule out improper statements made during argument,[59] and instruct the jury to disregard

counsel has tears at his command, it may be seriously questioned whether it is not his professional duty to shed them whenever proper occasion arises. It would appear to be one of the natural rights of counsel, which no court or constitution could take away. It is certainly, if no more, a matter of the highest personal privilege.

48. Ruthruff *v.* Faust, 154 Mich. 409, 117 N. W. 902.

49. Louisville, etc., R. Co. *v.* Hurst, 20 S. W. 817, 14 Ky. L. Rep. 632. And see Hurst *v.* Williams, 102 S. W. 1176, 31 Ky. L. Rep. 658.

50. Chicago City R. Co. *v.* Donnelley, 136 Ill. App. 204 [*affirmed* in 235 Ill. 35, 85 N. E. 233]; Rutter *v.* Collins, 103 Mich. 143, 61 N. W. 267; Olfermann *v.* Union Depot R. Co., 125 Mo. 408, 28 S. W. 742, 46 Am. St. Rep. 483; Straus *v.* Kansas City, etc., R. Co., 86 Mo. 421; State *v.* Hamilton, 55 Mo. 520.

51. Chicago, etc., Electric R. Co. *v.* Judge, 135 Ill. App. 377; Henry *v.* Huff, 143 Pa. St. 548, 22 Atl. 1046.

Conduct of counsel in refusing to acquiesce in the rulings of the trial court is objectionable. Oliver *v.* Jessup, 137 Mich. 642, 100 N. W. 900.

Limiting to pleadings and issues.— The court may confine counsel to the case made by the pleadings (Suhr *v.* Hoover, 15 Ohio Cir. Ct. 690, 8 Ohio Cir. Dec. 738), and to the issues of fact in the case (Norfolk, etc., R. Co. *v.* Harman, 83 Va. 553, 8 S. E. 251).

52. *Illinois.*— North Chicago St. R. Co. *v.* Cotton, 140 Ill. 486, 29 N. E. 899; England *v.* Mississippi Valley Traction Co., 139 Ill. App. 572; Chicago, etc., Electric R. Co. *v.* Judge, 135 Ill. App. 377.

Indiana.— St. Louis, etc., R. Co. *v.* Myrtle, 51 Ind. 566.

Maryland.— Hitchins *v.* Frostburg, 68 Md. 100, 11 Atl. 826, 6 Am. St. Rep. 422; Baltimore, etc., R. Co. *v.* Boyd, 67 Md. 32, 10 Atl. 315, 1 Am. St. Rep. 362.

North Carolina.— Jenkins *v.* North Carolina Ore Dressing Co., 65 N. C. 563; State *v.* Williams, 65 N. C. 505.

Texas.— Houston, etc., R. Co. *v.* White, 23 Tex. Civ. App. 280, 56 S. W. 204.

Failure to do so on request is error, although the court states that it will charge the jury on the law of the case. Jennings *v.* Kosmak, 20 Misc. (N. Y.) 300, 45 N. Y. Suppl. 802 [*reversing* 19 Misc. 433, 43 N. Y. Suppl. 1134].

Correcting error in charge.— It has been held to be within a trial court's discretion either to stop improper argument of counsel or to permit it to proceed and correct the error in the charge. Sayles *v.* Quinn, 196 Mass. 492, 82 N. E. 713.

53. Lisonbee *v.* Monroe Irr. Co., 18 Utah 343, 54 Pac. 1009, 72 Am. St. Rep. 784.

54. Lisonbee *v.* Monroe Irr. Co., 18 Utah 343, 54 Pac. 1009, 72 Am. St. Rep. 784.

55. Dunn *v.* Jaffray, 36 Kan. 408, 13 Pac. 781, counsel being permitted ample time thereafter to discuss the evidence properly received in the case.

56. Houser *v.* Beam, 111 N. C. 501, 16 S. E. 335.

57. Bailey *v.* Ogden, 75 Ga. 874; Southern R. Co. *v.* Shaw, 86 Fed. 865, 31 C. C. A. 70.

Reading excluded depositions.— A judgment will not be set aside for misconduct of counsel in reading parts of a deposition which were excluded, where it appears that they were read while arguing the question of their admissibility to the court. Rogers *v.* Winch, 76 Iowa 546, 41 N. W. 214.

58. Wells *v.* Wells, 144 Mo. 198, 45 S. W. 1095.

Where the testimony was competent for impeachment purposes only, it was error for the court to permit counsel, in a personal injuries' case, to say that everyone knew that trains ran faster than six miles an hour as based on the testimony of the engineer that he "could not do his work by running six miles an hour." Heddles *v.* Chicago, etc., R. Co., 74 Wis. 239, 42 N. W. 237.

59. Moody *v.* Alabama Great Southern R. Co., 99 Ala. 553, 13 So. 233; Maddox *v.* Morris, 110 Ga. 309, 35 S. E. 170; Koplan *v.* Boston Gaslight Co., 177 Mass. 15, 58 N. E. 183; Clark *v.* Lowell, 1 Allen (Mass.) 180;

them;[60] and may prohibit counsel, whose associate is arguing the case to the jury, from making audible suggestions to such associate during the argument,[61] or may, where counsel attempts to influence the jury by reading findings of fact in a similar reported case, dismiss the panel.[62] Where an attorney persists in arguing matters outside of the record, after repeated objections by the opposite party and admonitions by the court, it is ground for setting the verdict aside and awarding a new trial,[63] or the court may suspend the argument and discharge the jury,[64] or the judgment may be reversed by the appellate court.[65]

2. Limiting Number of Arguments. The number of attorneys who may address the jury for either side is within the discretion of the trial court.[66] Where there are several counsel on a side, the court may require that objections for each party be made by but one counsel at a time.[67] But the court may permit more than one attorney for a party to address the jury.[68]

3. Limiting Time of Argument.[69] The court may exercise a reasonable discretion in limiting the time for arguments to the jury,[70] or to the court;[71] but it should not limit the argument merely from considerations of personal convenience.[72] The court may interpose and stop counsel in his argument where it becomes obvious that he is consuming time unnecessarily,[73] or may urge counsel who has been speaking for a long time to hurry his argument,[74] and the appellate court will not interfere unless this discretion has been abused.[75] For a limitation of the time for argument to authorize a reversal, it must amount practically to a denial of the right to argue the cause.[76] The discretion of the court is not abused

Amperse *v.* Fleckenstein, 67 Mich. 247, 34 N. W. 564.

Unauthorized pathos.— The court may require counsel to refrain from making pathetic remarks about his client, there being no warrant for such remarks in the evidence. Conley *v.* Redwine, 109 Ga. 640, 35 S. E. 92, 77 Am. St. Rep. 398.

60. Chicago, etc., R. Co. *v.* Martin, 28 Ind. App. 468, 63 N. E. 247; Texas Cent. R. Co. *v.* Parker, 33 Tex. Civ. App. 514, 77 S. W. 42.

61. Hathaway *v.* Detroit, etc., R. Co., 124 Mich. 610, 83 N. W. 598.

62. Cunningham *v.* Fair Haven, etc., R. Co., 72 Conn. 244, 43 Atl. 1047.

63. Chicago City R. Co. *v.* Ahler, 107 Ill. App. 397, although the judge admonished the jury to disregard all statements of fact not in evidence. Brown *v.* Swineford, 44 Wis. 282, 28 Am. Rep. 582.

64. Ensor *v.* Smith, 57 Mo. App. 584.

65. Lindsay *v.* Pettigrew, 10 S. D. 228, 72 N. W. 574, especially where the verdict is against the weight of the evidence. Wilburn *v.* St. Louis, etc., R. Co., 48 Mo. App. 224.

66. Carruthers *v.* McMurry, 75 Iowa 173, 39 N. W. 255.

67. Simonds *v.* Cash, 136 Mich. 558, 99 N. W. 754.

68. Roose *v.* Perkins, 9 Nebr. 304, 2 N. W. 715, 31 Am. Rep. 409, although the attorneys for the other side have withdrawn.

69. **In criminal prosecutions** see Criminal Law, 12 Cyc. 568.

Undue limitation of time as ground for new trial see New Trial, 29 Cyc. 792.

70. Mitchell *v.* State, 86 Ark. 486, 111 S. W. 806; Christiansen *v.* William Graver Tank Works, 126 Ill. App. 86 [*affirmed* in 223 Ill. 142, 79 N. E. 97]; Douglass *v.* Hill, 29 Kan. 527.

Reducing time fixed by statute. — Where the statute provides that unless for special reasons the court otherwise permits, the time of argument shall not exceed two hours on either side, the court in its discretion may reduce the time. Hurst *v.* Burnside, 12 Oreg. 520, 8 Pac. 888.

71. Groth *v.* Kersting, 4 Colo. App. 395, 36 Pac. 156.

72. Senior *v.* Brogan, 66 Miss. 178, 6 So. 649.

73. Rosser *v.* McColly, 9 Ind. 587.

74. Polhill *v.* Brown, 84 Ga. 338, 10 S. E. 921.

75. *Arkansas.*— Brooks *v.* Perry, 23 Ark. 32; Dobbins *v.* Oswalt, 20 Ark. 619.

California.— People *v.* Tock Chew, 6 Cal. 636.

Colorado.— Rockwell Stock, etc., Co. *v.* Castroni, 6 Colo. App. 521, 42 Pac. 180; Hill *v.* Colorado Nat. Bank, 2 Colo. App. 324, 30 Pac. 489.

Georgia.— Sparks *v.* East Tennessee, etc., R. Co., 82 Ga. 156, 8 S. E. 424.

Illinois.— Hansell-Elcock Foundry Co. *v.* Clark, 214 Ill. 399, 73 N. E. 787 [*affirming* 115 Ill. App. 209]; Foster *v.* Magill, 119 Ill. 75, 8 N. E. 771; Schneider *v.* North Chicago St. R. Co., 80 Ill. App. 306.

Iowa.—Fletcher *v.* Burroughs, 10 Iowa 557.

Mississippi.— Dunlap *v.* Fox, (1887) 2 So. 169.

Missouri.— Trice *v.* Hannibal, etc., R. Co., 35 Mo. 416; Freligh *v.* Ames, 31 Mo. 253.

New York.—Rehberg *v.* New York, 99 N. Y. 652, 2 N. E. 11.

See 46 Cent. Dig. tit. "Trial," § 274.

The abuse must be clear in order to warrant interference. Sylvester *v.* Jerome, 19 Colo. 128, 34 Pac. 760; Reagan *v.* St. Louis Transit Co., 180 Mo. 117, 79 S. W. 435.

76. May *v.* Hahn, 22 Tex. Civ. App. 365, 54 S. W. 416.

by limiting the time to seven minutes on a side in a suit on the short cause calendar in which but few witnesses were sworn;[77] or to fifteen minutes on a side[78] where the issues are not complicated[79] and the amounts involved are small;[80] or to twenty minutes on a side[81] where the amount involved is sixty dollars,[82] or where the evidence is not conflicting and the instructions are simple;[83] or to forty-five minutes in an action for personal injuries where there was little material conflict as to the facts of the case;[84] or to an hour and a half on a side in a personal injuries case,[85] or in a slander suit;[86] or to thirty minutes on a side, in such a case, where the evidence is brief and the issues are plain,[87] or to forty-five minutes in such suit,[88] or by limiting the time to ten minutes.[89] It is abused, where the evidence is conflicting, by limiting the time of counsel for one party to five minutes,[90] or by an intimation made when limiting the time that the verdict must be made within a few minutes, under the alternative of the jury remaining over from Saturday until Monday.[91] Liberality should be extended in assigning the time for argument, so that the jury may not think the court regards the claim of plaintiff as of no consequence.[92] Where the greater portion of the time allotted counsel is consumed by interruptions by the court and by opposing counsel, without special fault on his part, he should be granted additional time.[93] If counsel wishes to complain of the shortness of time allotted him, he should consume the time allotted and then if he cannot complete his argument should except to the court's refusal to allow him additional time.[94]

4. Order of Argument.[95] Plaintiff may waive his right to open the argument.[96] If he does so and defendant makes an argument, plaintiff has the right to close.[97] Where defendant declines to argue the case after plaintiff makes his opening argument the court may refuse to allow plaintiff to make a second argument,[98] although represented by several counsel,[99] and although in his opening argument he consumes only one-half the time allotted to counsel on each side for argument,[1] but the court, in its discretion, may permit him to do so.[2] If he

77. People's Casualty Claim Adjustment Co. *v.* Darrow, 172 Ill. 62, 49 N. E. 1005 [*affirming* 70 Ill. App. 22].

78. Murphy *v.* Colton, 4 Okla. 181, 44 Pac. 208.

79. Reagan *v.* St. Louis Transit Co., 180 Mo. 117, 79 S. W. 435.

80. Seymour *v.* Phillips, 61 Nebr. 282, 85 N. W. 72.

81. Skeen *v.* Mooney, 8 Utah 157, 30 Pac. 363.

82. Baldwin *v.* Burrows, 95 Ind. 81.

83. Louisville, etc., R. Co. *v.* Earl, 94 Ky. 368, 22 S. W. 607, 15 Ky. L. Rep. 184.

84. Christiansen *v.* William Graver Tank Works, 126 Ill. App. 86 [*affirmed* in 223 Ill. 142, 79 N. E. 97].

85. Elgin *v.* Nofs, 212 Ill. 20, 72 N. E. 43 [*modifying* 113 Ill. App. 618]; Monmouth Min., etc., Co. *v.* Erling, 148 Ill. 521, 36 N. E. 117, 39 Am. St. Rep. 187.

86. Musselman *v.* Pratt, 44 Ind. 126.

87. Cobb Chocolate Co. *v.* Knudson, 207 Ill. 452, 69 N. E. 816 [*affirming* 107 Ill. App. 668].

88. Hansell-Elcock Foundry Co. *v.* Clark, 214 Ill. 399, 73 N. E. 787 [*affirming* 115 Ill. App. 209].

89. Gaylord *v.* Karst, 13 N. Y. Suppl. 589 [*reversed* on other grounds in 17 N. Y. Suppl. 720]. *Contra*, Nesbitt *v.* Walters, 38 Tex. 576.

90. Zweitusch *v.* Lowy, 57 Ill. App. 106.

91. Senior *v.* Brogan, 66 Miss. 178, 6 So. 649.

92. May *v.* Hahn, 22 Tex. Civ. App. 365, 54 S. W. 416.

93. Neumann *v.* St. Louis Transit Co., 109 Mo. App. 221, 84 S. W. 189.

94. American Surety Co. *v.* U. S., 77 Ill. App. 106.

95. In equitable actions see Equity, 16 Cyc. 412.

96. Pennsylvania Co. *v.* Greso, 79 Ill. App. 127.

97. Trask *v.* People, 151 Ill. 523, 38 N. E. 248; Pennsylvania Co. *v.* Greso, 79 Ill. App. 127.

98. Conrad *v.* Cleveland, etc., R. Co., 34 Ind. App. 133, 72 N. E. 489; Collins *v.* Clark, 30 Tex. Civ. App. 341, 72 S. W. 97; Seattle, etc., R. Co. *v.* Roeder, 30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 864.

99. St. Louis, etc., R. Co. *v.* Vanzego, 71 Kan. 427, 80 Pac. 944; Hackney *v.* Delaware, etc., Tel., etc., Co., 69 N. J. L. 335, 55 Atl. 252.

1. Southern Kansas R. Co. *v.* Michaels, 49 Kan. 388, 30 Pac. 408.

2. Pittsburgh, etc., R. Co. *v.* Martin, 82 Ind. 476; Conrad *v.* Cleveland, etc., R. Co., 34 Ind. App. 133, 72 N. E. 489; Henry *v.* Dussell, 71 Nebr. 691, 99 N. W. 484; Hackney *v.* Delaware, etc., Tel., etc., Co., 69 N. J. L. 335, 55 Atl. 252; New York, etc., R. Co. *v.* Garrity, 63 N. J. L. 50, 42 Atl. 842. *Contra*, St. Louis, etc., R. Co. *v.* Vanzego, 71 Kan. 427, 80 Pac. 944.

Waiver of objection to reargument.— An

is permitted to do so, it is reversible error to refuse defendant's request to answer.[3] After the arguments are concluded, counsel has no right to address the court or jury upon the law or facts of the case, except by leave of the presiding judge.[4] While it is the duty of counsel to present the whole case as he relies upon it in his opening argument,[5] and while, in conclusion, he should be confined to the points, grounds, and authorities exhibited,[6] the fact that he is not confined to a strict reply to the arguments of opposing counsel is not ground for reversal[7] where it does not appear that he was permitted to wander from the issues in the case.[8] When plaintiff has the close, he cannot complain that he was not allowed to anticipate and answer the defense in opening.[9]

D. Scope and Effect of Opening Statement[10] — **1. In General.** In a case involving issues of fact, a party is of right entitled to make an opening statement to the jury,[11] and may outline what he expects to prove,[12] unless it is manifest that such proof is incompetent.[13] The time when such statement should be made,[14] and its general manner and character,[15] are within the discretion of the trial court, such discretion being subject to review only when abused to the prejudice of the party complaining.[16] The purpose of an opening statement is to advise the jury of the facts relied on by plaintiff as constituting his right of action, together with the principles of law applicable thereto,[17] and the party making it is bound thereby.[18] In making such statement, counsel has no right to state his views of the law of the case,[19] to introduce matters foreign to the issue before the jury,[20] to refer to subjects about which the jury should not have heard,[21] to read documents that he intends to offer in evidence,[22] or to state an anticipated

objection to plaintiff being permitted to reargue the case under such circumstances is waived by defendant replying to such argument. Citizens' St. R. Co. *v.* Huffer, 26 Ind. App. 575, 60 N. E. 316.

3. Nemaha County *v.* Allbert, 6 Kan. App. 165, 51 Pac. 307; New York, etc., R. Co. *v.* Garrity, 63 N. J. L. 50, 42 Atl. 842. But the mere granting of the right to one party to reread a record upon the coming in of the jury for instructions, where both parties had waived argument, does not revive the right of the other to reargue the case. Cotten *v.* Rutledge, 33 Ala. 110.

4. Ela *v.* Cockshott, 119 Mass. 416.

5. Wills Point Bank *v.* Bates, 72 Tex. 137, 10 S. W. 348.

6. Wynn *v.* Lee, 5 Ga. 217.

7. Wills Point Bank *v.* Bates, 72 Tex. 137, 10 S. W. 348; Kaime *v.* Omro, 49 Wis. 371, 5 N. W. 838.

8 Kaime *v.* Omro, 49 Wis. 371, 5 N. W. 838.

9. Ayrault *v.* Chamberlain, 33 Barb. (N. Y.) 229.

10. **In criminal prosecutions** see Criminal Law, 12 Cyc. 570.

11. Hettinger *v.* Beiler, 54 Ill. App. 320. **Under the Indiana statutes,** if defendant wishes to make an opening statement he must do so immediately upon the close of the opening statement by plaintiff. Dehler *v.* State, 22 Ind. App. 383, 53 N. E. 850.

Waiver of right.—Defendant does not waive his right to make such statement by not making it before plaintiff begins his evidence, especially where plaintiff makes no statement and the case is one before a justice without pleadings. Hettinger *v.* Beiler, 54 Ill. App. 320.

12. O'Connell *v.* Dow, 182 Mass. 541, 66 N. E. 788.

13. Pritchard *v.* Henderson, 3 Pennew. (Del.) 128, 50 Atl. 217.

In a personal injuries case he may state that one man was killed in the accident if such was the fact. Falkenau *v.* Abrahamson, 66 Ill. App. 352. And see Chicago, etc., R. Co. *v.* Poore, 49 Tex. Civ. App. 191, 108 S. W. 504, holding that where, in an action against a carrier for injuries from a collision, what befell plaintiff in connection with another passenger is one of the features of the collision and wreck, counsel for plaintiff may be permitted to discuss it in his opening argument.

14. D. Sinclair Co. *v.* Waddill, 200 Ill. 17, 65 N. E. 437 [*affirming* 99 Ill. App. 334].

15. Ayrault *v.* Chamberlain, 33 Barb. (N. Y.) 229.

16. D. Sinclair Co. *v.* Waddill, 200 Ill. 17, 65 N. E. 437 [*affirming* 99 Ill. App. 334].

17. Paige *v.* Illinois Steel Co., 233 Ill. 313, 84 N. E. 239 [*affirming* 136 Ill. App. 410].

18. Frisby *v.* St. Louis Transit Co., 214 Mo. 567, 113 S. W. 1059.

19. San Miguel Consol. Gold Min. Co. *v.* Bonner, 33 Colo. 207, 79 Pac. 1025; Giffen *v.* Lewiston, 8 Ida. 231, 55 Pac. 545.

20. Perry Matthews-Buskirk Stone Co. *v.* Wilson, 160 Ind. 435, 67 N. E. 183; Barto *v.* Detroit Iron, etc., Co., 155 Mich. 94, 118 N. W. 738; Rickabus *v.* Gott, 51 Mich. 227, 16 N. W. 384.

21. Glover *v.* Atchison, etc., R. Co., 129 Mo. App. 563, 108 S. W. 105.

22. Scupps *v.* Reilly, 35 Mich. 371, 24 Am. Rep. 575, holding that error in permitting counsel to read to the jury publications not offered in evidence, and not admissible, is

defense[23] and his answer to it;[24] nor can he argue the facts of the case.[25] And it is ground for reversal to call attention in such statement to collateral matters calculated to prejudice the jury,[26] unless the court warns the jury not to accept it as evidence.[27] And it has been held ground for reversal that counsel in a personal injury case stated that plaintiff had a wife and children.[28] On the other hand it is not ground for reversal that counsel states that the case has been to the supreme court;[29] that the nature of the action is other than that alleged in the complaint, if defendant is not misled thereby;[30] that defendant took a change of venue without stating the reason for the change;[31] or that counsel discusses an issue tendered by his pleadings, which he afterward abandons,[32] refreshes his recollection by referring to an account-book,[33] refers to the wealth of the opposite party and states that such party is trying to crush his client,[34] refers to matters extraneous to the case, evidence of which is excluded when offered,[35] or on retrial states that the appeal was taken by defendant.[36] So mere reference to extraneous matter, which is excluded when offered, is not error,[37] especially where the reference is made in good faith,[38] and where no request was made for an instruction that such statement was not proper for the consideration of the jury.[39] The court may permit plaintiff, in opening, to omit the reading of the pleadings.[40] Counsel may in his opening argument state that he could not produce a material witness and the reasons why he could not do so,[41] or excuse his failure to introduce the books of his adversary, the court not having permitted him to do so.[42] Failure of counsel in his opening statement to recite all the material facts necessary to a recovery will not warrant the court in taking the case from the jury,[43] nor will the mere fact that there is a substantial variance between the statement and the pleadings warrant a judgment in favor of the opposite party.[44]

2. Statement of Facts Which Preclude Recovery. If plaintiff, in opening, distinctly states facts, the existence of which absolutely preclude his recovery, the court may dismiss the complaint upon the opening statement.[45] But, in order

not cured by instructing the jury to disregard them.

23. Kansas City Southern R. Co. *v.* Murphy, 74 Ark. 256, 85 S. W. 428.

24. Maxfield *v.* Jones, 76 Me. 135, the matter being in the discretion of the court. But he may state the nature of the defense interposed as shown by the record. Mulligan *v.* Smith, 32 Colo. 404, 76 Pac. 1063; Ayrault *v.* Chamberlain, 33 Barb. (N. Y.) 229.

25. Zucker *v.* Karpeles, 88 Mich. 413, 50 N. W. 373.

26. Pioneer Reserve Assoc. *v.* Jones, 111 Ill. App. 156; Doggett *v.* Blanke, 70 Mo. App. 499; Hecht *v.* Metzler, 14 Utah 408, 48 Pac. 37, 60 Am. St. Rep. 906.

27. Miller *v.* John, 208 Ill. 173, 70 N. E. 27.

28. McCarthy *v.* Spring Valley Coal Co., 232 Ill. 473, 83 N. E. 957.

29. Smith *v.* Nippert, 79 Wis. 135, 48 N. W. 253.

30. Lee *v.* Campbell, 77 Wis. 340, 46 N. W. 497.

31 Vawter *v.* Hultz, 112 Mo. 633, 20 S. W. 689.

32. Hall *v.* Needles, 1 Indian Terr. 146, 38 S. W. 671.

33. Hunkins *v.* Kent, 151 Mich. 482, 115 N. W. 410.

34. Louden *v.* Vinton, 108 Mich. 313, 66 N. W. 222, the statement not being persisted in and no charge being requested.

35. Marder *v.* Leary, 137 Ill. 319, 26 N. E. 1093; Campbell *v.* Kalamazoo, 80 Mich. 655, 45 N. W. 652.

36. Elliott *v.* Luengene, 20 Misc. (N. Y.) 18, 44 N. Y. Suppl. 775.

37. Keim *v.* Maurer, 2 Woods (Pa.) 412.

38. Hoffman *v.* Adams, 106 Mich. 111, 64 N. W. 7.

39. McFadden *v.* Morning Journal Assoc., 28 N. Y. App. Div. 508, 51 N. Y. Suppl. 275; Bonner *v.* Glenn, 79 Tex. 531, 15 S. W. 572.

40. Hackman *v.* Maguire, 20 Mo. App. 286.

41. Phillips *v.* U. S. Ben. Soc., 120 Mich. 142, 79 N. W. 1.

42. Sigua Iron Co. *v.* Greene, 104 Fed. 854, 44 C. C. A. 221.

43. Brashear *v.* Rabenstein, 71 Kan. 455, 80 Pac. 950. But, where facts stated in the opening constitute a departure from the petition, it is error for the court to try the cause without either having the petition amended or striking out one or the other causes of action. Hunter Milling Co. *v.* Allen, 65 Kan. 158, 69 Pac. 159.

44. Lusk *v.* Throop, 189 Ill. 127, 59 N. E. 529 [*affirming* 89 Ill. App. 509]; Stewart *v.* Rogers, 71 Kan. 53, 80 Pac. 58; Meade *v.* Bowles, 123 Mich. 696, 82 N. W. 658.

45. *Kansas.*— Coffeyville Min., etc., Co. *v.* Carter, 65 Kan. 565, 70 Pac. 635; Missouri Pac. R. Co. *v.* Hartman, 5 Kan. App. 581, 49 Pac. 109.

New Jersey.— Jordan *v.* Reed, 77 N. J. L. 584, 71 Atl. 280.

New York.— Denenfeld *v.* Baumann, 40

that the entry of a judgment against a party on his opening statement be authorized, the admissions therein should be distinct and such as absolutely preclude a recovery.[46] Nothing should be taken without full consideration against the party making the statement. He should be allowed to qualify or explain it so far as the truth will permit.[47] "The practice of disposing of a case upon the mere opening of counsel is generally a very unsafe method of deciding controversies, where there is or ever was anything to decide." [48] If counsel in opening distinctly states that he relies solely on a certain specified cause of action set out in the complaint, he thereby waives any other ground of recovery stated in the complaint.[49] Neglect of defendant to refer to a certain defense in his opening statement does not bar the establishment of such defense on trial.[50]

E. Presentation of Evidence.[51] No improper inferences arise from the exercise by an attorney of his duty in talking with witnesses before the trial.[52] As a general rule, in cases not determined by a single central fact, the party should be permitted to offer all his evidence before submitting to a ruling of the court on its sufficiency.[53] Counsel in examining witnesses should not comment on answers to his questions until the time for argument has arrived,[54] or on sustained objections to questions by his adversary; [55] but harmless questions or comments are not ground for reversal,[56] nor will they authorize the trial court to withdraw

N. Y. App. Div. 502, 58 N. Y. Suppl. 110; Garrison *v.* McCullough, 28 N. Y. App. Div. 467, 51 N. Y. Suppl. 128, in the absence of protest by counsel.

Washington.— Brooks *v.* McCabe, 39 Wash. 62, 80 Pac. 1004.

United States.— Oscanyan *v.* Winchester Repeating Arms Co., 103 U. S. 261, 26 L. ed. 539. And see Butler *v.* National Home for Disabled Volunteer Soldiers, 144 U. S. 64, 12 S. Ct. 581, 36 L. ed. 346.

And *compare* Fillingham *v.* St. Louis Transit Co., 102 Mo. App. 573, 77 S. W. 314.

Contra.— Nesbitt *v.* Turner, 155 Pa. St. 429, 26 Atl. 750.

Where the complaint is dismissed on the opening statement all the facts alleged in the complaint and also those referred to in the statement should be considered in determining the propriety of the action of the court. Scott *v.* New York, 27 N. Y. App. Div. 240, 50 N. Y. Suppl. 191.

Effect of motion for judgment.— In moving for judgment on the pleadings and on the admissions and statements of counsel in his opening remarks to the jury, it is admitted that his remarks are all true. Roberts *v.* Colorado Springs, etc., R. Co., 45 Colo. 188, 101 Pac. 59.

46. Emmerson *v.* Weeks, 58 Cal. 382; Jordan *v.* Reed, 77 N. J. L. 584, 71 Atl. 280; Kelly *v.* Bergen County Gas Co., 74 N. J. L. 604, 67 Atl. 21; Hoffman House *v.* Foote, 172 N. Y. 348, 65 N. E. 169; Gross *v.* Bennington, 52 Wash. 417, 100 Pac. 846. And see Barto *v.* Detroit Iron, etc., Steel Co., 155 Mich. 94, 118 N. W. 738.

Application of rule.—An opening statement by plaintiff's counsel that defendant's testator, who was the promoter and manager of a certain company, indorsed and delivered, for a valuable consideration, to plaintiff, who was the backer of another company, the note in suit, made by the former company to the latter company, and that, before the maturity of the note, defendant's testator by an executed bargain with the company of which he was promoter and manager agreed in consideration of a conveyance of all of its lands to himself to take care of the note, although somewhat loose and meager, sufficiently showed facts which if proved would present a case for the consideration of the jury, so as to render the refusal of a nonsuit on the opening proper. Jordan *v.* Reed, 77 N. J. L. 584, 71 Atl. 280.

47. Oscanyan *v.* Winchester Repeating Arms Co., 103 U. S. 261, 26 L. ed. 539.

48. Hoffman House *v.* Foote, 172 N. Y. 348, 65 N. E. 169.

49. Metlen *v.* Oregon Short Line R. Co., 33 Mont. 45, 81 Pac. 737.

50. Petherick *v.* General Assembly O. A., 114 Mich. 420, 72 N. W. 262; Meeks *v.* Meeks, 122 N. Y. App. Div. 461, 106 N. Y. Suppl. 907 [*reversing* 51 Misc. 538, 100 N. Y. Suppl. 667].

51. In criminal prosecutions see CRIMINAL LAW, 12 Cyc. 571.

52. North Chicago St. R. Co. *v.* Anderson, 70 Ill. App. 336.

53. Noble *v.* Frack, 5 Kan. App. 786, 48 Pac. 1004; Eckes *v.* Stetler, 98 N. Y. App. Div. 76, 90 N. Y. Suppl. 473; Garrison *v.* McCullough, 28 N. Y. App. Div. 467, 51 N. Y. Suppl. 128.

54. Cleveland, etc., R. Co. *v.* Pritschau, 69 Ohio St. 438, 69 N. E. 663, 100 Am. St. Rep. 682.

55. Thompson *v.* Toledo, etc., R. Co., 91 Mich. 255, 51 N. W. 995.

56. Pullman Co. *v.* Chicago, 224 Ill. 248, 79 N. E. 572; Cleveland, etc., R. Co. *v.* Davis, 56 Ill. App. 41; Gould *v.* Gregory, 133 Mich. 382, 95 N. W. 414; Baker *v.* Sherman, 71 Vt. 439, 46 Atl. 57; Bagley *v.* Mason, 69 Vt. 175, 37 Atl. 287. And see Orscheln *v.* Scott, 106 Mo. App. 583, 80 S. W. 982.

To ask questions in good faith the propriety of which is debatable is not reversible error. Henning *v.* Stevenson, 118 Ky. 318,

the case from the jury and dismiss the action.[57] Counsel should not offer in the presence of the jury testimony which he knows is incompetent,[58] and it is highly improper for him to persist in asking a question which has been excluded,[59] unless the question was excluded as being out of time,[60] or questions reflecting on the character of the witness when the questions are asked in bad faith,[61] or to ask irrelevant questions merely for the purpose of embarrassing the witness or causing the jury to draw some unfavorable inference against the witness,[62] or by suggestive questions to endeavor to get collateral matters before the jury.[63] Ordinarily the mere asking of an improper question which the court refuses to allow is not ground for reversal; [64] but where the mere putting of a question conveys to the jury improper information which tends to render the trial unfair the question alone is ground for reversal.[65] It is not available error to permit counsel in his opening statement to state that he will prove matters which are excluded when offered in evidence,[66] or to state in good faith what he could prove by questions propounded to witnesses, which questions the witnesses are not permitted to answer,[67] the jury being instructed to disregard the offer,[68] or for counsel to offer an incompetent witness when he has reasonable ground to believe that the incompetency will be waived,[69] or to state in response to an inquiry of the court that the

80 S. W. 1135, 26 Ky. L. Rep. 159; Young *v.* Fox, 26 N. Y. App. Div. 261, 49 N. Y. Suppl. 634.

57. Rothschild *v.* Hudson, 8 Ohio Dec. (Reprint) 259, 6 Cinc. L. Bul. 752 [*affirmed* in 12 Cinc. L. Bul. 263].

58. Phillips *v.* U. S. Benevolent Soc., 120 Mich. 142, 79 N. W. 1.

59. *Michigan.*— McDonald *v.* City Electric R. Co., 144 Mich. 379, 108 N. W. 85.

New Hampshire.— Batchelder *v.* Manchester St. R. Co., 72 N. H. 329, 56 Atl. 752.

New York.— Quinn *v.* New York City R. Co., 94 N. Y. Suppl. 560.

Ohio.— Cleveland, etc., R. Co. *v.* Pritschau, 69 Ohio St. 438, 69 N. E. 663, 100 Am. St. Rep. 682.

Texas.— St. Louis, etc., R. Co. *v.* Knowles, 44 Tex. Civ. App. 172, 99 S. W. 867.

Vermont.—Fraser *v.* Blanchard, 83 Vt. 136, 73 Atl. 995, 75 Atl. 797.

Where ground for reversal.—Where counsel for the successful party persistently pursued a line of interrogation of witnesses which the court ruled to be wrong, and which one reasonably acquainted with the rules of evidence knew to be improper, and the course pursued was to prejudice the jury, his conduct was reversible error. Louisville, etc., R. Co. *v.* Payne, 133 Ky. 539, 118 S. W. 352.

When not ground for reversal.— In an action for breach of contract, although it was improper for plaintiff's attorney to persist in attempting to show a proposition by defendant to compromise, it was harmless error where the evidence was excluded. F. W. Brockman Commission Co. *v.* Kilbourne, 111 Mo. App. 542, 86 S. W. 275.

Where after objection had been sustained to a question counsel does not pursue the matter, he is not chargeable with misconduct in attempting to get improper testimony before the jury. Peterson *v.* Chicago Consol. Traction Co., 231 Ill. 324, 83 N. E. 159. And see Chesapeake, etc., R. Co. *v.* Grigsby, 131 Ky. 363, 115 S. W. 237.

60. Irlbeck *v.* Bierl, 101 Iowa 240, 67 N. W. 400, 70 N. W. 206.

61. Coan *v.* Brownstown Tp., 126 Mich. 626, 86 N. W. 130; Barton *v.* Bruley, 119 Wis. 326, 96 N. W. 815.

62. Atchison *v.* McKinnie, 233 Ill. 106, 84 N. E. 208.

63. Pioneer Reserve Assoc. *v.* Jones, 111 Ill. App. 156.

64. *Illinois.*— Normal *v.* Bright, 125 Ill. App. 478 [*affirmed* in 223 Ill. 99, 79 N. E. 90].

Iowa.— Furlong *v.* Northern Assur. Co., (1907) 113 N. W. 1090.

Michigan.— Carter *v.* Bedortha, 124 Mich. 548, 83 N. W. 277.

Texas.— International, etc., R. Co. *v.* Collins, 33 Tex. Civ. App. 58, 75 S. W. 814.

Vermont.— Fraser *v.* Blanchard, 83 Vt. 136, 73 Atl. 995, 75 Atl. 797.

Wisconsin.— Lee *v.* Hammond, 114 Wis. 550, 90 N. W. 1073.

65. Dow *v.* Weare, 68 N. H. 345, 44 Atl. 489; Manigold *v.* Black River Traction Co., 81 N. Y. App. Div. 381, 80 N. Y. Suppl. 861; Yarborough *v.* Weaver, 6 Tex. Civ. App. 215, 25 S. W. 468.

66. Schmitz *v.* Kirchan, 32 Wash. 546, 73 Pac. 678. And see Potter *v.* Cava, 123 Iowa 98, 98 N. W. 569; French-Glenn Live-Stock Co. *v.* Springer, (Oreg. 1899) 58 Pac. 102 [*affirmed* in 185 U. S. 47, 22 S. Ct. 563, 46 L. ed. 800].

67. Chicago City R. Co. *v.* McLaughlin, 146 Ill. 353, 34 N. E. 796 [*affirming* 40 Ill. App. 496]; Allington, etc., Mfg. Co. *v.* Detroit Reduction Co., 133 Mich. 427, 95 N. W. 562; Gilbert *v.* Michigan Cent. R. Co., 116 Mich. 610, 74 N. W. 1010; North Texas Constr. Co. *v.* Crawford, 39 Tex. Civ. App. 56, 87 S. W. 223.

68. Illinois Cent. R. Co. *v.* Treat, 179 Ill. 576, 54 N. E. 290 [*affirming* 75 Ill. App. 327]; International, etc., R. Co. *v.* Anchonda, 33 Tex. Civ. App. 24, 75 S. W. 557.

69. Zimmerman *v.* Whiteley, 134 Mich. 39, 95 N. W. 989.

object of evidence was to show that a written instrument relied on by defendants was a forgery.[70] Where the court suspects that the statement is not made in good faith he may order it made out of the hearing of the jury.[71] Asking defendant, in a suit for death caused by his negligence, whether liability insurance had been secured at the time of the accident has been held reversible error in the absence of a reprimand by the court and a special instruction requiring the jury to disregard the matter.[72] It has been held, however, that the judgment will not be reversed if it is apparent from the verdict that the jury were not influenced by the improper statement.[73] The fact that counsel asks an improper question that is not objected to until answered is not ground for reversal.[74]

F. Scope of Argument and Comment[75] — **1. Confining Arguments to Law and Evidence.** The arguments of counsel must be confined to the law and the evidence in the case under consideration,[76] and it is error for the presiding justice to permit counsel in addressing the jury to proceed with his argument upon asserted facts not in evidence and having no legitimate pertinency to the issue,[77] where such line of argument is seasonably objected to,[78] unless the court admonishes the jury that they must try the case on the law and the evidence, and not on statements made by counsel.[79] If counsel misstated evidence as to a material matter, and it is apparent that such misstatements were likely to mislead the jury,[80] or there is doubt as to the sufficiency of the evidence to sustain the verdict,[81] or the evidence on the issues is evenly balanced,[82] or the verdict rendered is excessive,[83] the judgment should be reversed. Especially is this true when the court takes no steps to correct the error.[84] However, a misstatement of the evidence will not be ground for reversal if in respect of a matter of trifling or of no importance.[85]

70. Walker *v.* Dickey, 44 Tex. Civ. App. 110, 98 S. W. 658.

71. Maxwell *v.* Habel, 92 Ill. App. 510.

72. Kerr *v.* National Fulton Brass Mfg. Co., 155 Mich. 191, 118 N. W. 925; Manigold *v.* Black River Traction Co., 81 N. Y. App. Div. 381, 80 N. Y. Suppl. 861; Iverson *v.* McDonnell, 36 Wash. 73, 78 Pac. 202. To the same effect see Stratton *v.* C. H. Nichols Lumber Co., 39 Wash. 323, 81 Pac. 831, 109 Am. St. Rep. 881. *Compare* Somers *v.* Jacobs, 91 N. Y. Suppl. 332, holding that in an action for injuries a question to defendant's witness on cross-examination tending to show that defendants had accident insurance was not reversible error where the character and extent of the injuries was the only issue.

73. Eldorado Coal, etc., Co. *v.* Swan, 227 Ill. 586, 81 N. E. 691.

74. Hollenbeck *v.* Missouri Pac. R. Co., 141 Mo. 97, 38 S. W. 723, 41 S. W. 887.

75. In criminal prosecutions see Criminal Law, 12 Cyc. 572 *et seq.*

In equitable actions see Equity, 16 Cyc. 412.

On appeal from justice of the peace see Justices of the Peace, 24 Cyc. 742.

76. *Arkansas.*— St. Louis, etc., R. Co. *v.* Warren, 65 Ark. 619, 48 S. W. 222.

Michigan.— Randall *v.* Evening News Assoc., 97 Mich. 136, 56 N. W. 361.

Missouri.— Robertson *v.* Wabash R. Co., 152 Mo. 382, 53 S. W. 1082; Williams *v.* St. Louis, etc., R. Co., 123 Mo. 573, 27 S. W. 387; Harper *v.* Western Union Tel. Co., 92 Mo. App. 304.

New Hampshire.— Tucker *v.* Henniker, 41 N. H. 317.

New York.— Fry *v.* Bennett, 3 Bosw. 200 [*affirmed* in 28 N. Y. 324]; Matter of Booth, 13 N. Y. St. 344.

Ohio.— Dew *v.* Reid, 52 Ohio St. 519, 40 N. E. 718.

Texas.— Chicago, etc., R. Co. *v.* Jones, (Civ. App. 1904) 81 S. W. 60; Houston, etc., R. Co. *v.* Newman, 2 Tex. App. Civ. Cas. § 349.

77. Hundley *v.* Chadick, 109 Ala. 575, 19 So. 845; Johnson *v.* Slappey, 85 Ga. 576, 11 S. E. 862; Dickerson *v.* Burke, 25 Ga. 225; Rolfe *v.* Rumford, 66 Me. 564; Union Pac. R. Co. *v.* Field, 137 Fed. 14, 69 C. C. A. 536.

78. Jackson *v.* Robinson, 93 Ala. 157, 9 So. 391; Rolfe *v.* Rumford, 66 Me. 564; Tucker *v.* Henniker, 41 N. H. 317.

79. Miller *v.* Pryse, 49 S. W. 776, 20 Ky. L. Rep. 1544.

80. Chase *v.* Chicago, 20 Ill. App. 274. And see Harper *v.* Western Union Tel. Co., 92 Mo. App. 304.

81. Mullarkey *v.* Interurban St. R. Co., 48 Misc. (N. Y.) 638, 96 N. Y. Suppl. 115.

82. Massengale *v.* Rice, 94 Mo. App. 430, 68 S. W. 233.

83. St. Louis, etc., R. Co. *v.* Warren, 65 Ark. 619, 48 S. W. 222.

84. Steen *v.* Friend, 20 Ohio Cir. Ct. 459, 11 Ohio Cir. Dec. 235.

85. O'Connor *v.* Langdon, 3 Ida. 61, 26 Pac. 659; Beckman *v.* Hampton, 74 N. H. 48, 65 Atl. 254; Kohman *v.* Baldwin, (Tex. Civ. App. 1898) 46 S. W. 396. And see Varty *v.* Messmore, 132 Mich. 314, 316, 93 N. W. 611, in which it was said that "it is only in a very clear case of a misstatement, which is not open to correction, that the court would interfere to vacate a verdict."

2. Stating or Reading Law to the Jury, or to the Court in the Presence of the Jury.[86] Counsel may, in arguing the case to the jury, state the positions of law on which he relies,[87] and what he believes the law to be,[88] if he does not encroach on the province of the court to finally state the law to the jury.[89] He may state so much of the law, as he asserts it to be, as will enable him to lay before the jury an intelligent idea of the force, effect, and bearing of the testimony on the case;[90] on the other hand it has been held that he should not be permitted to discuss before the jury any points upon which the court has decided,[91] or to criticize opinions on legal questions expressed by the court during the trial,[92] or by the appellate court on a former appeal,[93] or to refer to rejected prayers for the purpose of influencing the conclusions of the jury upon the facts in evidence.[94] According to many decisions it is improper to permit counsel to read law to the jury.[95] But according to others the court may in its discretion permit counsel to read law to it in the presence of the jury,[96] if the law read be good

86. In criminal prosecutions see Criminal Law, 12 Cyc. 583.

87. Warmock *v.* State, 56 Ga. 503; Ransone *v.* Christian, 56 Ga. 351. But it is the duty of the jury to decide the law as given by the court. Vocke *v.* Chicago, 208 Ill. 192, 70 N. E. 325; Johnson *v.* Culver, 116 Ind. 278, 19 N. E. 129.

88. Chicago Consol. Traction Co. *v.* Kinane, 138 Ill. App. 636, holding, however, that it is not proper for counsel to state absolutely what the law is.

Reading argument of counsel.— It is not error for the court in a personal injury case to permit plaintiff's counsel to read an argument of opposing counsel incorporated in a reported personal injury suit, wherein the latter was attorney for plaintiff. Port Royal, etc., R. Co. *v.* Davis, 95 Ga. 292, 22 S. E. 833.

89. Coyne *v.* Avery, 189 Ill. 378, 59 N. E. 788 [*affirming* 91 Ill. App. 347].

90. Edwards *v.* Three Rivers, 96 Mich. 625, 55 N. W. 1003; Fosdick *v.* Van Arsdale, 74 Mich. 302, 41 N. W. 931; Dow *v.* Electric Co., 68 N. H. 59, 31 Atl. 22; Fitzgerald *v.* Long Island R. Co., 117 N. Y. 653, 22 N. E. 1133 [*affirming* 3 N. Y. Suppl. 230].

Defects in the law.— The court may permit counsel to state what he regards as defects in the law. Kean *v.* Detroit Copper, etc., Rolling-Mills, 66 Mich. 277, 33 N. W. 395, 11 Am. St. Rep. 492.

91. Smith *v.* Morrison, 3 A. K. Marsh. (Ky.) 81; Bell *v.* State, 57 Md. 108; Johnson *v.* Harris, 13 Fed. Cas. No. 7,388, 1 Cranch C. C. 257.

92. Linderman *v.* Linderman, 1 Woodw. (Pa.) 60.

93. Martin *v.* Courtney, 81 Minn. 112, 83 N. W. 503.

94. Maenner *v.* Carroll, 46 Md. 193.

95. *Georgia.*— Hudson *v.* Hudson, 90 Ga. 581, 16 S. E. 349.

Illinois.— Chicago *v.* McGiven, 78 Ill. 347; Philpot *v.* Taylor, 75 Ill. 309, 20 Am. Rep. 241; Tuller *v.* Talbot, 23 Ill. 357, 76 Am. Dec. 695.

Indiana.— Johnson *v.* Culver, 116 Ind. 278, 19 N. E. 129.

Michigan.— Phœnix Ins. Co. *v.* Allen, 11 Mich. 501, 83 Am. Dec. 756.

Minnesota.— Steffenson *v.* Chicago, etc., R. Co., 48 Minn. 285, 51 N. W. 610.

Missouri.— St. Louis Clothing Co. *v.* J. D. Hail Dry-Goods Co., 156 Mo. 393, 56 S. W. 1112; Heller *v.* Pulitzer Pub. Co., 153 Mo. 205, 54 S. W. 457, holding that the rule applies in libel cases as well as in all others.

New York.— Griebel *v.* Rochester Printing Co., 24 N. Y. App. Div. 288, 48 N. Y. Suppl. 505.

Texas.— Belo *v.* Fuller, 84 Tex. 450, 19 S. W. 616, 31 Am. St. Rep. 75; Matthews *v.* Thatcher, 33 Tex. Civ. App. 133, 76 S. W. 61; Knapp *v.* Campbell, 14 Tex. Civ. App. 199, 36 S. W. 765.

Washington.— Williams *v.* Spokane Falls, etc., R. Co., 39 Wash. 77, 80 Pac. 1100; Filley *v.* Christopher, 39 Wash. 22, 80 Pac. 834, 109 Am. St. Rep. 853; Gallagher *v.* Buckley, 31 Wash. 380, 72 Pac. 79.

Wisconsin.— Boltz *v.* Sullivan, 101 Wis. 608, 77 N. W. 870; Mullen *v.* Reinig, 72 Wis. 388, 39 N. W. 861.

See 46 Cent. Dig. tit. "Trial," § 290.

And see People *v.* Anderson, 44 Cal. 65.

Reason for rule.— On the trial of civil cases, decisions of courts and especially their comments upon the facts of cases should not be read by counsel to the jury. Such a practice cannot aid the jury in ascertaining the law applicable, for this they must take from the court; nor in arriving at the truth of the case on the facts, for this they must get from the evidence. Hudson *v.* Hudson, 90 Ga. 581, 16 S. E. 349.

96. *Connecticut.*— Miles *v.* Strong, 68 Conn. 273, 36 Atl. 55.

District of Columbia.— Denison *v.* Lewis, 5 App. Cas. 328.

Georgia.— Rome R. Co. *v.* Barnett, 94 Ga. 446, 20 S. E. 355.

Maryland.— Baltimore, etc., R. Co. *v.* Kean, 65 Md. 394, 5 Atl. 325.

Missouri.— Barnett *v.* Sweringen, 77 Mo. App. 64.

Nebraska.— Stratton *v.* Dole, 45 Nebr. 472, 63 N. W. 875.

New Jersey.— Allaire *v.* Allaire, 39 N. J. L. 113.

New York.— Fitzgerald *v.* Long Island R. Co., 3 N. Y. Suppl. 230 [*affirmed* in 117 N. Y. 653, 22 N. E. 1133].

law and relevant to the case.[97] This, it has been held, is especially true where no objection is made;[98] but an abuse of this discretion is reviewable.[99] Whatever views may be held as to the propriety of permitting counsel to read law to the jury from reported decisions or other law books, it is very generally held proper to refuse such permission,[1] and the discretion of the court in so doing is ordinarily not reviewable.[2] Reading from law books to the jury is ordinarily not a ground for reversal, unless it appears that the jury was misled or the opposite party was prejudiced thereby.[3] The reading by counsel from decisions is not a ground for reversal where they are in accord with the law given by the court in its instruc-

Texas.— Missouri, etc., R. Co. *v.* Dunbar, 49 Tex. Civ. App. 12, 108 S. W. 500; Missouri, etc., R. Co. *v.* Smith, (Civ. App. 1907) 101 S. W. 453; Gulf, etc., R. Co. *v.* Bell, 24 Tex. Civ. App. 579, 58 S. W. 614; Gulf, etc., R. Co. *v.* Dunlap, (Civ. App. 1894) 26 S. W. 655; Western Union Tel. Co. *v.* Wingate, 6 Tex. Civ. App. 394, 25 S. W. 439; Galveston, etc., R. Co. *v.* Wesch, (Civ. App. 1893) 21 S. W. 62; Texas, etc., R. Co. *v.* Wills, 2 Tex. App. Civ. Cas. § 796; Britton *v.* Thrash, 1 Tex. App. Civ. Cas. § 237. But see San Antonio Traction Co. *v.* Lambkin, (Tex. Civ. App. 1907) 99 S. W. 574.

Virginia.— Chesapeake, etc., R. Co. *v.* Rowsey, 108 Va. 632, 62 S. E. 363.

West Virginia.— Gregory *v.* Ohio River R. Co., 37 W. Va. 606, 16 S. E. 819.

United States.— Hastings *v.* Northern Pac. R. Co., 53 Fed. 224.

See 46 Cent. Dig. tit. "Trial," § 290.

After opening argument.— The court may permit counsel to read law to it, even after the opening argument to the jury has been made. Davis *v.* Gerber, 69 Mich. 246, 37 N. W. 281.

Illustrating remarks of counsel.— It is within the discretion of the trial court to allow counsel during his argument to read a law book to the jury not for the purpose of instructing the jury as to the law but for the purpose of illustrating the remarks of counsel. Gilberson *v.* Miller Min., etc., Co., 4 Utah 46, 5 Pac. 699.

Professional opinions of the law may be read as arguments. Steiner *v.* Coxe, 4 Pa. St. 13.

97. Ray *v.* Chesapeake, etc., R. Co., 57 W. Va. 333, 50 S. E. 413; Gregory *v.* Ohio River R. Co., 37 W. Va. 606, 16 S. E. 819.

98. Missouri, etc., R. Co. *v.* Dunbar, 49 Tex. Civ. App. 12, 108 S. W. 500.

99. Stratton *v.* Dole, 45 Nebr. 472, 65 N. W. 875; Griebel *v.* Rochester Printing Co., 24 N. Y. App. Div. 288, 48 N. Y. Suppl. 505; Gregory *v.* Ohio River R. Co., 37 W. Va. 606, 16 S. E. 819. But see Baltimore, etc., R. Co. *v.* Kean, 65 Md. 394, 5 Atl. 325, in which it was said that from the action of the court in permitting counsel to read law books to the jury no appeal lies.

1. *California.*— Meyer *v.* Foster, 147 Cal. 166, 81 Pac. 402; Sullivan *v.* Royer, 72 Cal. 248, 13 Pac. 655, 1 Am. St. Rep. 51.

Georgia.— Georgia Cent. R. Co. *v.* Hardin, 114 Ga. 548, 40 S. E. 738; Douglass *v.* Boynton, 59 Ga. 283.

Illinois.— Sprague *v.* Craig, 51 Ill. 288.

Maine.— Crosby *v.* Maine Cent. R. Co., 69 Me. 418.

Massachusetts.— Stone *v.* Com., 181 Mass. 438, 63 N. E. 1074.

Missouri.— Heller *v.* Pulitzer Pub. Co., 153 Mo. 205, 54 S. W. 457.

Pennsylvania.— Good *v.* Mylin, 13 Pa. St. 538; Noble *v.* McClintock, 6 Watts & S. 58.

Texas.— Mayfield *v.* Cotton, 37 Tex. 229.

Virginia.— Newport News, etc., R., etc., Co. *v.* Bradford, 100 Va. 231, 40 S. E. 900; Delaplane *v.* Crenshaw, 15 Gratt. 457.

Washington.— Ryan *v.* Lambert, 49 Wash. 649, 96 Pac. 232; Swope *v.* Seattle, 36 Wash. 113, 78 Pac. 607.

West Virginia.— Ray *v.* Chesapeake, etc., R. Co., 57 W. Va. 333, 50 S. E. 413.

Wisconsin.— Mullen *v.* Reinig, 72 Wis. 388, 39 N. W. 861; Baker *v.* Madison, 62 Wis. 137, 22 N. W. 141, 583.

See 46 Cent. Dig. tit. "Trial," §§ 290, 291.

But see Horah *v.* Knox, 87 N. C. 483, which holds that counsel has the right to read and comment on reported cases.

Comments on refusal to permit reading of law to jury.— It is error for counsel, when directed by the court to refrain from reading law to the jury, to state that it does not appear right to him to direct the jury to disregard that which is the law and persist that he should be permitted to make an argument in the language of the judges of the supreme court. Hughes *v.* Chicago, etc., R. Co., 122 Wis. 258, 99 N. W. 897.

2. Crosby *v.* Maine Cent. R. Co., 69 Me. 418.

3. *Minnesota.*— Steffenson *v.* Chicago, etc., R. Co., 48 Minn. 285, 51 N. W. 610.

Mississippi.— Southern R. Co. *v.* Isom, 92 Miss. 82, 45 So. 424.

Missouri.— Hollenbeck *v.* Missouri Pac. R. Co., 141 Mo. 97, 38 S. W. 723, 41 S. W. 887.

Montana.— Mahoney *v.* Dixon, 34 Mont. 454, 87 Pac. 452.

North Carolina.— Mason *v.* Pelletier, 82 N. C. 40.

Texas.— Knapp *v.* Campbell, 14 Tex. Civ. App. 199, 36 S. W. 765; Gulf, etc., R. Co. *v.* Dunlap, (Civ. App. 1894) 26 S. W. 655.

Washington.— Mooney *v.* Seattle, etc., R. Co., 47 Wash. 540, 92 Pac. 408; Williams *v.* Spokane Falls, etc., R. Co., 39 Wash. 77, 80 Pac. 1100; Gallagher *v.* Buckley, 31 Wash. 380, 72 Pac. 79.

West Virginia.— Ray *v.* Chesapeake, etc., R. Co., 57 W. Va. 333, 50 S. E. 413.

Wisconsin.— Boltz *v.* Sullivan, 101 Wis. 608, 77 N. W. 870.

See 46 Cent. Dig. tit. "Trial," § 290.

tions.[4] If, however, the law is bad or not pertinent to the case, the reading thereof to the jury is ground for reversal,[5] unless instructions after such argument propound the sound law on the very points to which the bad law relates.[6] It is in general ground for reversal for the court to permit counsel to read reported cases and compare the facts with those of the case at bar,[7] to read the facts in a reported decision as evidence of their existence in another case,[8] to read such portions of an opinion rendered on a motion for new trial in the same case as relate to the weight of the evidence, or the credibility of the witnesses,[9] or to read to the jury reports of cases showing recovery of large verdicts in similar cases.[10]

3. Reading or Commenting on Pleadings.[11] Where the pleadings are in evidence, counsel may read to the jury such parts thereof as they desire to.[12] And, according to some decisions, the allegations of a pleading are admissions of record proper for the consideration of the jury and binding on the party making them, and may be read or referred to by counsel in closing to the jury, although not introduced in evidence.[13] But counsel is not entitled to read or comment on

And see Port Royal, etc., R. Co. *v.* Davis, 95 Ga. 292, 22 S. E. 833; Chicago City R. Co. *v.* Strong, 129 Ill. App. 511 [*affirmed* in 230 Ill. 58, 82 N. E. 335].

Illustration.— Permitting counsel in a common-law action for personal injuries, not bottomed on any statute, to read to the jury a statute of another state declaring how statutes shall be construed is harmless error. Hollenbeck *v.* Missouri Pac. R. Co., 141 Mo. 97, 38 S. W. 723, 41 S. W. 887.

4. Gallagher *v.* Buckley, 31 Wash. 380, 72 Pac. 79; Ray *v.* Chesapeake, etc., R. Co., 57 W. Va. 333, 50 S. E. 413.

5. Hughes *v.* General Electric Light, etc., Co., 107 Ky. 485, 54 S. W. 723, 21 Ky. L. Rep. 1202; Lesser *v.* Perkins, 39 Hun (N. Y.) 341; Ray *v.* Chesapeake, etc., R. Co., 57 W. Va. 333, 50 S. E. 413. *Compare* Charrier *v.* Boston, etc., R. Co., 75 N. H. 59, 70 Atl. 1078.

6. Ray *v.* Chesapeake, etc., R. Co., 57 W. Va. 333, 50 S. E. 413.

7. Bell *v.* McMaster, 29 Hun (N. Y.) 272; Reich *v.* New York, 12 Daly (N. Y.) 72; St. Louis, etc., R. Co. *v.* Holmes, (Tex. Civ. App. 1899) 49 S. W. 658; Ray *v.* Chesapeake, etc., R. Co., 57 W. Va. 333, 50 S. E. 413. And see Phenix Ins. Co. *v.* Allen, 11 Mich. 501, 83 Am. Dec. 756.

Counsel has no right to introduce any evidentiary matter not in evidence, and cannot, under pretense of reading law books, read passages which bear on questions of fact before the jury. Ray *v.* Chesapeake, etc., R. Co., 57 W. Va. 333, 50 S. E. 413.

8. Horah *v.* Knox, 87 N. C. 483; Mason *v.* Pelletier, 82 N. C. 40.

9. Allaire *v.* Allaire, 39 N. J. L. 113.

10. Porter *v.* Choen, 60 Ind. 338; Galveston, etc., R. Co. *v.* Wesch, 85 Tex. 593, 22 S. W. 957; Houston, etc., R. Co. *v.* Gee, 27 Tex. Civ. App. 414, 66 S. W. 78; Western Union Tel. Co. *v.* Teague, 8 Tex. Civ. App. 444, 27 S. W. 958; Dillingham *v.* Wood, 8 Tex. Civ. App. 71, 27 S. W. 1074; Ricketts *v.* Chesapeake, etc., R. Co., 33 W. Va. 433, 10 S. E. 801, 25 Am. St. Rep. 901, 7 L. R. A. 354. *Contra*, Norfolk, etc., R. Co. *v.* Harman, 83 Va. 553, 8 S. E. 251.

Such error is not cured by counsel's withdrawal of the obnoxious matter, or by the court's charge that the matter had nothing to do with the case and they were to give it no significance. Bagully *v.* Morning Journal Assoc., 38 N. Y. App. Div. 522, 56 N. Y. Suppl. 605. And see Evansville *v.* Wilter, 86 Ind. 414.

11. **In criminal prosecutions** see Criminal Law, 12 Cyc. 573.

12. Raynolds *v.* Vinier, 125 N. Y. App. Div. 18, 109 N. Y. Suppl. 293.

13. Dyas *v.* Southern Pac. Co., 140 Cal. 296, 73 Pac. 972; Knight *v.* Russ, 77 Cal. 410, 19 Pac. 698; Garfield *v.* Knight's Ferry, etc., Water Co., 14 Cal. 35; Holmes *v.* Jones, 121 N. Y. 461, 24 N. E. 701 [*reversing* 50 Hun 345, 3 N. Y. Suppl. 156]; Tisdale *v.* Delaware, etc., Canal Co., 116 N. Y. 416, 22 N. E. 700; Field *v.* Surpless, 83 N. Y. App. Div. 268, 82 N. Y. Suppl. 127; Tobin *v.* Sykes, 71 Hun (N. Y.) 469, 24 N. Y. Suppl. 943; Claflin *v.* New York Standard Watch Co., 3 Misc. (N. Y.) 629, 23 N. Y. Suppl. 324; Foley *v.* Young Men's Christian Assoc., 92 N. Y. Suppl. 781. *Contra*, Louisville, etc., R. Co. *v.* Hull, 113 Ky. 561, 68 S. W. 433, 24 Ky. L. Rep. 375, 57 L. R. A. 771; Nicholson *v.* Merritt, 67 S. W. 5, 23 Ky. L. Rep. 2281. And *compare* Johnston *v.* Johnston, (Tex. Civ. App. 1902) 67 S. W. 123, holding that counsel cannot read and comment to the jury on alleged admissions in an original pleading, where it has not been put in evidence but only its file mark.

The sworn plea of defendant may be commented on as a sworn statement and may be compared with his testimony to disparage it. McLendon *v.* Frost, 57 Ga. 448.

Under the Massachusetts statute the pleadings are not evidence, but allegations only whereby the party making them is bound. Demelman *v.* Burton, 176 Mass. 363, 57 N. E. 665.

When the pleadings contain irrelevant allegations and raise immaterial issues, it is proper for the court not to permit the pleadings to be read to the jury. Willis *v.* Forrest, 2 Duer (N. Y.) 310.

Petition for discovery.—A party filing a pe-

pleadings that have been withdrawn,[14] or that have been superseded by an amended pleading;[15] or to comment on the fact that an amended pleading containing an additional defense has been filed during the trial,[16] or, when the complaint has not formally been offered in evidence, to comment on the fact that no answer has been filed,[17] or to read from pleadings allegations to which exceptions have been sustained,[18] or where the issue is well defined to read to the jury extracts from the pleadings on the ground that his opponent, by failing to deny, admits a material allegation, which admission affects his credibility as a witness on his own behalf,[19] or where there are several defendants, for counsel for one of them to comment on averments of the petition relating solely to another defendant as to whom a nonsuit has been granted.[20] Where a pleading could only be legitimately used to establish a fact concerning which there is no controversy, the refusal of the court to permit the pleading to be read to the jury is not reversible error.[21]

4. Reading Transcript of Stenographer's Notes.[22] The court may permit counsel, in argument, to read to the jury a transcript of the stenographer's notes of the testimony,[23] but not from the transcript of the testimony given on a former trial.[24] For the purpose of argument and comment counsel may read such part of the testimony of a witness as he desires to read, and it is error to require him to read the whole of the testimony of a witness.[25]

5. Reading or Commenting on Instructions Asked or Given.[26] It is not obligatory on the court to require counsel to read the whole, instead of a part, of a given instruction to the jury.[27] Counsel is not entitled as of right to comment upon instructions which the court has indicated its intention to give,[28] or to comment on and construe instructions given by the court.[29] But the court may, in its discretion, permit counsel to read to the jury and comment on instructions previously settled by the court,[30] and he may illustrate his argument by reading the

tition for discovery has no right to read his petition to the jury in connection with the answer, unless it is necessary to a proper understanding of the answer, although at the time the court instruct the jury that the petition is not evidence. Lancaster *v.* Arendell, 2 Heisk. (Tenn.) 434.

Written evidence attached to pleadings.— After a case has been submitted to the jury, it is within the discretion of the court to permit written evidence attached to the pleadings to be read in argument, although it was not read to the jury. Huffman *v.* Alderson, 9 W. Va. 616.

14. Riley *v.* Iowa Falls, 83 Iowa 761, 50 N. W. 33.

15. Owens, etc., Mach. Co. *v.* Pierce, 5 Mo. App. 576.

16. Demelman *v.* Burton, 176 Mass. 363, 57 N. E. 665; Taft *v.* Fiske, 140 Mass. 250, 5 N. E. 621, 54 Am. Rep. 459.

17. Smith *v.* Smith, 106 N. C. 498, 11 S. E. 188.

18. Smith *v.* Boatman Sav. Bank, 1 Tex. Civ. App. 115, 20 S. W. 1119.

19. Cook *v.* Merritt, 15 Colo. 212, 25 Pac. 176.

20. North America Constr. Co. *v.* Patry, 10 Kan. App. 55, 61 Pac. 871.

21. Howard *v.* Tedford, 70 Ill. App. 660.

22. **In criminal prosecutions** see Criminal Law, 12 Cyc. 573.

23. Western Tube Co. *v.* Polobinski, 192 Ill. 113, 61 N. E. 451 [*affirming* 94 Ill. App. 640]; Bradley *v.* Spickardsville, 90 Mo. App. 416; Gwaltney *v.* Scottish Carolina Timber, etc., Co., 115 N. C. 579, 20 S. E. 465. *Contra*, Padgitt *v.* Moll, 159 Mo. 143, 60 S. W. 121, 81 Am. St. Rep. 347, 52 L. R. A. 854.

24. Western Tube Co. *v.* Polobinski, 192 Ill. 113, 61 N. E. 451 [*affirming* 94 Ill. App. 640]; Martin *v.* Orndorff, 22 Iowa 504.

25. Goodson *v.* Des Moines, 66 Iowa 255, 23 N. W. 655. But see Stuckey *v.* Fritsche, 77 Wis. 329, 46 N. W. 59, in which it is intimated that a party may insist on having the whole of his testimony read.

When entire evidence of party read.— Where the court permits a part of a party's evidence to be read to the jury, if the real effect of the evidence touching certain facts is not fairly presented in the portion read, the court should permit his entire evidence touching such matter to be read if he so desires. McConkie *v.* Babcock, 101 Iowa 126, 70 N. W. 103.

26. **In criminal prosecutions** see Criminal Law, 12 Cyc. 573.

27. Ward *v.* Bass, 4 Indian Terr. 291, 69 S. W. 879.

28. Blizzard *v.* Applegate, 77 Ind. 516.

29. Scott *v.* Scott, 124 Ind. 66, 24 N. E. 666. But a judgment will not be reversed for improper conduct in this respect where it appears that such conduct was not prejudicial. Humbarger *v.* Carey, 145 Ind. 324, 42 N. E. 749, 44 N. E. 302.

30. Boreham *v.* Byrne, 83 Cal. 23, 23 Pac. 212; Coyne *v.* Avery, 189 Ill. 378, 59 N. E. 788 [*affirming* 91 Ill. App. 347].

instructions.[31] It is not good practice for an attorney to read to the jury the instructions which he proposes to ask,[32] but such conduct is not cause for reversal.[33] It is improper for counsel in his argument to the jury to state that he would not ask for instructions, and that the case was not one which needed instructions.[34] The fact that one of plaintiff's attorneys wrote the charge which was given to the jury, and that he told the jury in his closing argument that, if the charge did not contain a certain word, he was willing for them to find for defendant, will not warrant a reversal, the instruction containing such word.[35]

6. Reading or Stating Scientific Authorities to Jury.[36] The reading of books of medicine and science to the jury is not allowable,[37] unless the court cautions the jury that they are not authority but are read merely for the purpose of illustration;[38] and error in reading to the jury from a medical book is not cured by sustaining an objection to the question whether the witness had read the extract.[39] Where, however, counsel reads from a standard authority without objection this will not be ground for reversal.[40] And the court has a wide discretion to permit counsel to quote from books of science by way of illustration, as long as nothing is introduced that may affect the jury as evidence.[41] The reading from books of statements of facts and opinions in relation to the case on trial is reversible error.[42] While the practice is not to be commended, it is not reversible error for the court to permit counsel to read from a magazine article criticisms of the character of business in which defendants are engaged,[43] or to read articles from newspapers, the substance of which could properly have been stated by counsel.[44]

7. Use of Objects and Diagrams.[45] The court may in its discretion permit counsel to make use of physical objects in illustrating his remarks to the jury,[46] and may permit counsel in opening his case,[47] or in closing his case in argument before the jury to use diagrams,[48] the jury being informed that the diagram is

31. Storm *v.* Butte, 35 Mont. 385, 89 Pac. 726.

Harmless error.— Error in refusing permission of counsel in a civil trial to use the instructions in illustrating his argument to the jury was harmless, where it did not appear that he was unable to properly argue the case without them, or that he could not recall to the jury the substance of the charge given. Storm *v.* Butte, 35 Mont. 385, 89 Pac. 726.

32. Jansen *v.* Grimshaw, 125 Ill. 468, 17 N. E. 850 [*affirming* 26 Ill. App. 287].

33. Jansen *v.* Grimshaw, 125 Ill. 468, 17 N. E. 850 [*affirming* 26 Ill. App. 287].

34. Illinois Steel Co. *v.* Paige, 136 Ill. App. 410 [*affirmed* in 233 Ill. 313, 84 N. E. 239].

35. Houston, etc., R. Co. *v.* Grych, 46 Tex. Civ. App. 439, 103 S. W. 703.

36. **In criminal prosecutions** see Criminal Law, 12 Cyc. 573.

37. *Illinois.*— Gale *v.* Rector, 5 Ill. App. 481.

Indiana.— Epps *v.* State, 102 Ind. 539, 1 N. E. 491.

Iowa.— Etzkorn *v.* Oelwein, 142 Iowa 107, 120 N. W. 636.

Massachusetts.—Washburn *v.* Cuddihy, 8 Gray 430.

North Carolina.— Huffman *v.* Click, 77 N. C. 55.

See 46 Cent. Dig. tit. "Trial," § 289.

38. Cory *v.* Silcox, 6 Ind. 39.

Refusal to permit defendant's counsel to read an extract from a text-book to defendant's witness on nervous diseases resulting from accident and injury, although it would have aided defendant's counsel in arguing the case to the jury is not ground for reversal. Chicago, etc., R. Co. *v.* Barnes, 50 Tex. Civ. App. 46, 111 S. W. 447.

39. Etzkorn *v.* Oelwein, 142 Iowa 107, 120 N. W. 636.

40. Byers *v.* Nashville, etc., R. Co., 94 Tenn. 345, 29 S. W. 128.

41. Legg *v.* Drake, 1 Ohio St. 286; Wade *v.* De Witt, 20 Tex. 398.

42. New Jerusalem Church Gen. Convention *v.* Crocker, 7 Ohio Cir. Ct. 327, 4 Ohio Cir. Dec. 619.

43. Minter *v.* Bradstreet Co., 174 Mo. 444, 73 S. W. 668.

44. Williams *v.* Brooklyn El. R. Co., 10 N. Y. Suppl. 929 [*reversed* on other grounds in 126 N. Y. 96, 26 N. E. 1048].

45. **In criminal prosecutions** see Criminal Law, 12 Cyc. 572.

46. Hoffman *v.* Bloomsburg, etc., R. Co., 143 Pa. St. 503, 22 Atl. 823; Louisville, etc., R. Co. *v.* Ray, 101 Tenn. 1, 46 S. W. 554.

47. Hill *v.* Watkins Water, etc., Com'rs, 77 Hun (N. Y.) 491, 28 N. Y. Suppl. 805.

48. Stafford *v.* Oskaloosa, 64 Iowa 251, 20 N. W. 174. *Contra,* Zube *v.* Weber, 67 Mich. 52, 34 N. W. 264.

Diagram used by expert.—Where a diagram used by an expert in explaining his method of calculations, although not evidence, is necessary for an intelligent understanding of the evidence, a refusal to allow counsel in summing up to use such diagram is error. Hagan *v.* Carr, 198 Pa. St. 606, 48 Atl. 688.

not evidence;[49] or to refer to calculations,[50] although such diagrams and calculations have not been put in evidence. If counsel claims that the diagram he desires to use before the jury in making his opening statement is correct and offers to show by witnesses that it is correct, it is error to deny him the right to use the diagram in making his opening statement, and such error is not cured by the admission of the diagram during a subsequent portion of the trial upon proof of its correctness.[51]

8. Reading or Commenting on Special Interrogatories. Where the statute authorizes special interrogatories to be submitted to the jury, counsel has the right to read such interrogatories to the jury and to comment on them and to tell them how to answer the same,[52] and may array the evidence necessary to be considered in answering them,[53] and explain what findings will support a general verdict,[54] and, although improper, it is not reversible error to comment on such interrogatory and tell the jury that it is a trap by which they should not be caught.[55] It is improper for counsel to request the jury to give specific answers not supported by the evidence,[56] to say to the jury that such interrogatories were asked merely with a view ultimately of reversing the case in the event of an adverse judgment,[57] or to direct the jury to find their general verdict and answer the special interrogatories so that they may agree with their general verdict;[58] or where the jury has found a general verdict and has failed to answer the special interrogatories and is sent back for that purpose, to say that the special interrogatories are practically covered by the general verdict.[59]

9. Comments on Evidence.[60] Counsel should not be subjected to unreasonable restraint in commenting on the evidence,[61] but should be allowed a wide latitude,[62] this being matter for the sound discretion of the trial judge.[63] He may discuss such facts as are in evidence without limit or restriction,[64] but may not urge the

49. Clisby *v.* Mobile, etc., R. Co., 78 Miss. 937, 29 So. 913.

50. Royston *v.* Royston, 29 Ga. 82.

51. Battishill *v.* Humphreys, 64 Mich. 494, 31 N. W. 894.

52. Chicago, etc., R. Co. *v.* Gore, 202 Ill. 188, 66 N. E. 1063, 95 Am. St. Rep. 224; Himrod Coal Co. *v.* Beckwith, 111 Ill. App. 379; Pittsburgh, etc., R. Co. *v.* Lightheiser, 168 Ind. 438, 78 N. E. 1033; Gresley *v.* State, 123 Ind. 72, 24 N. E. 332; Clear Creek Stone Co. *v.* Carmichael, 37 Ind. App. 413, 73 N. E. 935, 76 N. E. 320; Timins *v.* Chicago, etc., R. Co., 72 Iowa 94, 33 N. W. 379; Stacy *v.* Cook, 62 Kan. 50, 61 Pac. 399. But where counsel is permitted to fully argue on all the evidence bearing on such interrogatories, it is not error for the court to refuse him the privilege of reading the same to the jury and advising them how they should be answered. Chestnut *v.* Southern Indiana R. Co., 157 Ind. 509, 62 N. E. 32.

53. Pittsburgh, etc., R. Co. *v.* Lightheiser, 168 Ind. 438, 78 N. E. 1033.

54. Powell *v.* Chittick, 89 Iowa 513, 56 N. W. 652; Zucker *v.* Karpeles, 88 Mich. 413, 50 N. W. 373.

55. Pape *v.* Hartwig, 23 Ind. App. 333, 55 N. E. 271, his purpose being to convey his contention to the jury that the question is misleading and subject to more than one construction.

56. Schlesinger *v.* Rogers, 80 Ill. App. 420.

57. Himrod Coal Co. *v.* Beckwith, 111 Ill. App. 379.

58. Southern Indiana R. Co. *v.* Fine, 163 Ind. 617, 72 N. E. 589.

59. Brassel *v.* Minneapolis, etc., R. Co., 101 Mich. 5, 59 N. W. 426.

60. **In criminal prosecutions** see Criminal Law, 12 Cyc. 573.

61. Chicago City R. Co. *v.* Creech, 207 Ill. 400, 69 N. E. 919; North American Restaurant, etc. *v.* McElligott, 129 Ill. App. 498 [*affirmed* in 227 Ill. 317, 81 N. E. 388]; Kay *v.* Usher, 110 S. W. 415, 33 Ky. L. Rep. 575; Retan *v.* Lake Shore, etc., R. Co., 94 Mich. 146, 53 N. W. 1094. And see Gibson *v.* Fidelity, etc., Co., 232 Ill. 49, 83 N. E. 539.

62. *Illinois.*— Supreme Lodge M. W. W. *v.* Jones, 113 Ill. App. 241.

Missouri.— Loyd *v.* Hannibal, etc., R. Co., 53 Mo. 509.

New Hampshire.— Charrier *v.* Boston, etc., R. Co., 75 N. H. 59, 70 Atl. 1078.

Pennsylvania.— Com. *v.* Miller, 139 Pa. St. 77, 21 Atl. 138, 23 Am. St. Rep. 170.

South Dakota.— Kirby *v.* Berguin, 15 S. D. 444, 90 N. W. 856. And see Ultima Thule, etc., R. Co. *v.* Calhoun, 83 Ark. 318, 103 S. W. 726; Grayson-McLeod Lumber Co. *v.* Carter, (Ark. 1906) 98 S. W. 699.

63. Chicago City R. Co. *v.* Creech, 207 Ill. 400, 69 N. E. 919; East Tennessee, etc., R. Co. *v.* Gurley, 12 Lea (Tenn.) 46.

64. Louisville Gas Co. *v.* Kentucky Heating Co., 111 S. W. 374, 33 Ky. L. Rep. 912; Hobbs *v.* Hobbs, (N. H. 1909) 72 Atl. 290. And see Bodcaw Lumber Co. *v.* Ford, 82 Ark. 555, 102 S. W. 896; Taylor *v.* Blackwell, (Tex. Civ. App. 1907) 105 S. W. 214.

If the issue is whether an instrument has been altered, counsel may comment on the fact that the contract appears to be in five

jury to predicate their verdict on what they know outside of the evidence.[65] He may state all proper inferences from the evidence,[66] and may draw conclusions from the evidence on his own system of reasoning,[67] although such inferences are inconclusive,[68] illogical,[69] or even erroneous,[70] and denial of the right to comment on the evidence is error.[71] He may express his opinions on the weight of the evidence,[72] and may state that as proved about which the testimony is con-

different handwritings. Harrison *v.* Lakenan, 189 Mo. 581, 88 S. W. 53.

Apparent alterations and erasures in documents offered in evidence may properly be commented upon. Robinson *v.* Woodmansee, 80 Ga. 249, 4 S. E. 497.

Where a petition contains several causes of action in support of all of which evidence was introduced and thereafter some of the causes of action are withdrawn, he may argue on all the evidence in the absence of a motion to exclude all testimony introduced in support of the counts withdrawn. Meyer *v.* Goedel, 31 How. Pr. (N. Y.) 456.

Immaterial evidence.— To refuse to permit counsel in addressing the jury to discuss immaterial evidence is not reversible error. Gandy *v.* Bissell, 81 Nebr. 102, 115 N. W. 571, 81 Nebr. 117, 117 N. W. 349.

Denial of the right to comment on evidence is equivalent to the exclusion of the evidence in the first instance. Home-Riverside Coal Min. Co. *v.* Fores, 64 Kan. 39, 67 Pac. 445.

65. Rafter *v.* Chicago City R. Co., 139 Ill. App. 81.

66. *Alabama.*— Birmingham Mineral R. Co. *v.* Harris, 98 Ala. 326, 13 So. 377.

Georgia.— Gray *v.* Cole, 20 Ga. 203.

Illinois.— Cheltenham Stone, etc., Co. *v.* Gates Iron Works, 124 Ill. 623, 16 N. E. 923; Joyce *v.* Chicago, 111 Ill. App. 443 [*affirmed* in 216 Ill. 466, 75 N. E. 184]; Illinois Cent. R. Co. *v.* Cole, 62 Ill. App. 480.

Michigan.— Warren *v.* Halley, 107 Mich. 120, 64 N. W. 1058; People *v.* Kenyon, 93 Mich. 19, 52 N. W. 1033.

New Hampshire.— Seely *v.* Manhattan L. Ins. Co., 73 N. H. 339, 61 Atl. 585; Miller *v.* Boston, etc., R. Co., 73 N. H. 330, 61 Atl. 360; Yeaton *v.* Boston, etc., R. Co., 73 N. H. 285, 61 Atl. 522; Walker *v.* Boston, etc., R. Co., 71 N. H. 271, 51 Atl. 918; Liscomb *v.* Manchester, etc., R. Co. 70 N. H. 312, 48 Atl. 284.

Pennsylvania.— Phœnix Brewing Co. *v.* Weiss, 23 Pa. Super. Ct. 519.

Rhode Island.— Heltzen *v.* Union R. Co., 26 R. I. 576, 59 Atl. 918.

Texas.— Sutor *v.* Wood, 76 Tex. 403, 13 S. W. 321; Galveston, etc., R. Co. *v.* Worth, (Civ. App. 1907) 107 S. W. 958; Texas, etc., R. Co. *v.* Conway, 44 Tex. Civ. App. 68, 98 S. W. 1070; Southern Cotton Oil Co. *v.* Wallace, (Civ. App. 1899) 54 S. W. 638; Gulf, etc., R. Co. *v.* Brown, 16 Tex. Civ. App. 93, 49 S. W. 608.

Washington.— Taylor *v.* Ballard, 24 Wash. 191, 64 Pac. 143.

Wisconsin.— Hacker *v.* Heiney, 111 Wis. 313, 87 N. W. 249; Valley Iron Works Mfg. Co. *v.* Grand Rapids Flouring Mill Co., 85 Wis. 274, 55 N. W. 693.

Application of rule.— In an action for the value of services in moving a building, testimony by plaintiff, that he knew of no one in the state who did as heavy work of that nature as he did, justified a statement in argument that plaintiff was the only man in the state who could do the work. Theobald *v.* Shepard, 75 N. H. 52, 71 Atl. 26. Where, in an action for injuries to a passenger, the carrier showed that it had settled with most of the persons injured, and that it settled ninety-nine cases out of one hundred where a reasonable settlement could be made, the argument of plaintiff's counsel that the settlements showed an admission of its liability for the damage done by the wreck was not improper. Johnson *v.* Union Pac. R. Co., 35 Utah 285, 100 Pac. 390.

67. *Illinois.*— Chicago, etc., R. Co. *v.* Gore, 105 Ill. App. 16 [*affirmed* in 202 Ill. 188, 66 N. E. 1063, 95 Am. St. Rep. 224].

Indiana.—Brower *v.* Goodyear, 88 Ind. 572.

Kentucky.— Standard Oil Co. *v.* Doyle, 82 S. W. 271, 26 Ky. L. Rep. 544.

Massachusetts.— Briggs *v.* Rafferty, 14 Gray 525.

Michigan.— Henry C. Hart Mfg. Co. *v.* Mann's Boudoir Car Co., 65 Mich. 564, 32 N. W. 820.

New Hampshire.— Lord *v.* Manchester St. R. Co., 74 N. H. 295, 67 Atl. 639.

Texas.— Moore *v.* Rogers, 84 Tex. 1, 19 S. W. 283; Missouri, etc., R. Co. *v.* Hibbitts, 49 Tex. Civ. App. 419, 109 S. W. 228; Galveston, etc., R. Co. *v.* Worth, (Civ. App. 1908) 107 S. W. 958; Texas Tel., etc., Co. *v.* Seiders, 9 Tex. Civ. App. 431, 29 S. W. 258.

Washington.— Hammock *v.* Tacoma, 44 Wash. 623, 87 Pac. 924.

Wisconsin.— Gallinger *v.* Lake Shore Traffic Co., 67 Wis. 529, 30 N. W. 790.

See 46 Cent. Dig. tit. "Trial," § 296.

Where the evidence is in sharp conflict, counsel in argument may urge on the jury his view based on the testimony favorable to his client. Scheer *v.* Detroit United R. Co., 155 Mich. 561, 119 N. W. 1084.

To express an opinion that the legal effect of the defense made is to charge his client with forgery is not error. Brown *v.* Johnston, 135 Ala. 608, 33 So. 683.

68. Seely *v.* Manhattan L. Ins. Co., 73 N. H. 339, 61 Atl. 585.

69. Mosier *v.* Stoll, 119 Ind. 244, 20 N. E. 752; Wheeler *v.* Jenison, 120 Mich. 422, 79 N. W. 643; Dikeman *v.* Arnold, 83 Mich. 218, 47 N. W. 113; Sears *v.* Seattle Consol. St. R. Co., 6 Wash. 227, 33 Pac. 389, 1081.

70. Houston, etc., R. Co. *v.* Cheatham, (Tex. Civ. App. 1908) 113 S. W. 777.

71. Southern R. Co. *v.* McLellan, 80 Miss. 700, 32 So. 283.

72. Home-Riverside Coal Min. Co. *v.* Fores, 64 Kan. 39, 67 Pac. 445; Montmorency

flicting,[73] or that he does not see how the testimony can be reconciled when it is in fact conflicting;[74] and the court may permit him to state the substance of instruments offered in evidence,[75] or read to the jury a version of the evidence prepared by himself, so long as he does not misquote or misrepresent it.[76] Exaggerated language concerning matters in evidence and within the issues, if permitted by the court, is not ground for reversal.[77] And neither are misstatements nor improper ones, unless they relate to material matters of fact as distinguished from mere opinion, and are such as to have prejudiced the adverse party.[78] And error in permitting counsel to comment on evidence is harmless where the evidence was admitted without objection and the remarks were by way of recital and description and were withdrawn when objected to.[79]

10. Comments on the Credibility or Conduct of Parties, Attorneys, or Witnesses.[80] It is improper for counsel in argument to make statements about the opposite party[81] or his attorney,[82] or the officers,[83] employees,[84] or witnesses[85] of such party, or concerning their testimony,[86] which are not sustained by the facts,

County *v.* Putnam, 122 Mich. 581, 81 N. W. 573; Texas, etc., R. Co. *v.* Parsons, (Tex. Civ. App. 1908) 109 S. W. 240 [*affirmed* in 102 Tex. 157, 113 S. W. 914, 132 Am. St. Rep. 857]; Morrill *v.* Palmer, 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411.

73. McNabb *v.* Lockhart, 18 Ga. 495; Hatcher *v.* State, 18 Ga. 460.

74. Fillingham *v.* Michigan United R. Co., 154 Mich. 233, 117 N. W. 635.

75. Gonzales *v.* Batts, 20 Tex. Civ. App. 421, 50 S. W. 403.

76. Stull *v.* Stull, 1 Nebr. (Unoff.) 380, 389, 96 N. W. 196.

77. Kain *v.* Bare, 4 Ind. App. 440, 31 N. E. 205. And see Pierce *v.* C. H. Bidwell Thrasher Co., 158 Mich. 356, 122 N. W. 628.

78. Clements *v.* Watson, 7 Cal. App. 74, 93 Pac. 385.

79. Peerless Stone Co. *v.* Wray, 152 Ind. 27, 51 N. E. 326.

80. In criminal prosecutions see Criminal Law, 12 Cyc. 575 *et seq.*

81. *Illinois.*— Chicago Union Traction Co. *v.* Wirkus, 131 Ill. App. 485.

Michigan.—Atherton *v.* Defreeze, 129 Mich. 364, 88 N. W. 886; Grabowsky *v.* Baumgart, 128 Mich. 267, 87 N. W. 891; Strudgeon *v.* Sand Beach, 107 Mich. 496, 65 N. W. 616; Geist *v.* Detroit City R. Co., 91 Mich. 446, 51 N. W. 1112.

Minnesota.— Fisher *v.* Weinholzer, 91 Minn. 22, 97 N. W. 426; Wells *v.* Moses, 87 Minn. 432, 92 N. W. 334.

New Hampshire.— Hallock *v.* Young, 72 N. H. 416, 57 Atl. 236; Perkins *v.* Burley, 64 N. H. 524, 15 Atl. 21.

Texas.— Beville *v.* Jones, 74 Tex. 148, 11 S. W. 1128; Crow *v.* Ball, (Civ. App. 1907) 99 S. W. 583; Hanna *v.* Gulf, etc., R. Co., 27 Tex. Civ. App. 492, 65 S. W. 493; Missouri, etc., R. Co. *v.* Huggins, (Civ. App. 1901) 61 S. W. 976; Wichita Valley Mill, etc., Co. *v.* Hobbs, 5 Tex. Civ. App. 34, 23 S. W. 923; Ft. Worth, etc., R. Co. *v.* Johnson, 5 Tex. Civ. App. 15, 23 S. W. 826.

Vermont.— Foss *v.* Smith, 79 Vt. 434, 65 Atl. 553; Ranchau *v.* Rutland R. Co., 71 Vt. 142, 43 Atl. 11, 76 Am. St. Rep. 761.

Wisconsin.— Sullivan *v.* Collins, 107 Wis. 291, 83 N. W. 310.

See 46 Cent. Dig. tit. "Trial," § 302.

And see Bradford *v.* National Ben. Assoc., 26 App. Cas. (D. C.) 268.

Right of party to show falsity of statements.— Where counsel goes outside of the record to disparage the opposite party or his claims, it is error for the court to decline to permit such party to show the falsity of such statements. Merritt *v.* New York, etc., R. Co., 162 Mass. 326, 38 N. E. 447; Beecroft *v.* New York Athletic Club, 80 N. Y. App. Div. 524, 81 N. Y. Suppl. 1069.

82. Giffen *v.* Lewiston, 6 Ida. 231, 55 Pac. 545; Chicago, etc., R. Co. *v.* Garner, 83 Ill. App. 118; Troyer *v.* State, 115 Ind. 331, 17 N. E. 569; Missouri Pac. R. Co. *v.* Metzger, 24 Nebr. 90, 38 N. W. 27. And see Neff *v.* Cameron, 213 Mo. 350, 111 S. W. 1139, 127 Am. St. Rep. 606, 18 L. R. A. N. S. 320.

83. Davis *v.* Alexander City, 137 Ala. 206, 33 So. 863; Long *v.* Evening News Assoc., 113 Mich. 261, 71 N. W. 492.

84. Texas, etc., R. Co. *v.* Rea, 27 Tex. Civ. App. 549, 65 S. W. 1115. *Compare* Yazoo, etc., R. Co. *v.* Rivers, 93 Miss. 557, 565, 46 So. 705, holding that on a trial for slander against a railroad, it was not reversible error for plaintiff's counsel to state that the railroad had seen fit to employ time checkers who were no more than spies on honest men, and who, if they could not report some of them, would lose their positions. In this case it was said: "The twelve men who sit in the jury box are presumed to be men of common sense, honest, and desirous only of trying the case according to the law and the evidence, not according to the remarks of counsel, wise or foolish."

85. *Illinois.*— West Chicago St. R. Co. *v.* Groshon, 51 Ill. App. 463.

Iowa.— Belcher *v.* Ballou, 124 Iowa 507, 100 N. W. 474; Hood *v.* Chicago, etc., R. Co., 95 Iowa 331, 64 N. W. 261.

Michigan.— Potter *v.* Detroit, etc., R. Co., 122 Mich. 179, 81 N. W. 80, 82 N. W. 245.

Nebraska.—Young *v.* Kinney, 79 Nebr. 421, 112 N. W. 558.

New Hampshire.— Perkins *v.* Burley, 64 N. H. 524, 15 Atl. 21.

86. Chicago City R. Co. *v.* Barron, 57 Ill. App. 469.

and if prejudicial to the rights of the opposite party is ground for reversal,[87] but not otherwise.[88] Thus it is improper where the domicile of a party is the issue to say that the party was dodging the officers of the law in one state and another,[89] or to say of a party that he was like a upas tree, shedding pestilence and corruption all around him, and that no man who lived in his neighborhood could have anything but a bad character; [90] or where on proper objection by defendant certain testimony was excluded to argue that defendant had taken advantage of a technicality; [91] or in a suit for libel to remark that judgment had been rendered against defendants in another action for libel and that they stood convicted as libelers of character,[92] or in such case to say that plaintiff committed the murder charged in the alleged libelous article; [93] or in a case involving the conduct of a national bank to denounce national banks in general and state that in all failures they have habitually perpetrated fraud upon honest creditors; [94] or to make remarks tending to impress the jury with the idea that a witness for the opposite party was hired or otherwise influenced to swear falsely,[95] or was tampered with by one of the parties [96] and induced to stay away; [97] or to state that corporate agents will always try to swear you out of court,[98] or that it is a part of their contract to swear for the company or be discharged; [99] or to state that a witness is in the employ of a party and comment on his non-production; [1] or to state as a reason for failure to produce a witness who had testified on a former trial for plaintiff that the witness had since been employed by defendant and it would be unsafe to produce him; [2] or to state that if employees of defendant corporation had not testified in the manner desired by defendant they would have been discharged; [3]

87. Columbus R. Co. *v.* Connor, 27 Ohio Cir. Ct. 229; Ft. Worth, etc., R. Co. *v.* Burton, 25 Tex. Civ. App. 63, 60 S. W. 316.

88. Beck *v.* Ann Arbor R. Co., 156 Mich. 252, 120 N. W. 983; Walker *v.* Walker, (R. I. 1907) 67 Atl. 519; St. Louis Southwestern R. Co. *v.* Browning, (Tex. Civ. App. 1909) 118 S. W. 245; Southern Pac. Co. *v.* Hart, (Tex. Civ. App. 1909) 116 S. W. 415, holding that where counsel remarked in argument that, if a witness for defendant had told the truth, his job with defendant would not have lasted longer than a snowball in Yuma, and the court verbally instructed the jury at the time not to consider the language, and defendant did not request a written instruction, and the verdict for plaintiff was not immoderate, the remark, although improper, was not so obviously prejudicial as to call for a reversal.

If the verdict is the only one that could have been returned under the evidence it is immaterial what statements were made. Patterson *v.* Hawley, 33 Nebr. 440, 50 N. W. 324.

Applying offensive and unwarranted epithets to witnesses is not ordinarily ground for reversal but should be corrected by the court as a breach of decorum and an offense against the dignity of the court. Franklin *v.* St. Louis, etc., R. Co., 188 Mo. 533, 87 S. W. 930.

89. Young *v.* Pollak, 85 Ala. 439, 5 So. 279.

90. Coble *v.* Coble, 79 N. C. 789, 28 Am. Rep. 338.

91. Carvajal *v.* Casanova, (Tex. Civ. App. 1900) 62 S. W. 428, where the court declined to charge that such remarks of counsel should be disregarded.

92. Belo *v.* Fuller, 84 Tex. 450, 19 S. W. 616, 31 Am. St. Rep. 75.

93. Jones *v.* Murray, 167 Mo. 25, 66 S. W. 981, where counsel is not rebuked by the court and the jury informed that the evidence did not sustain the charge.

94. Baum *v.* Sanger, (Tex. Civ. App. 1898) 49 S. W. 650.

95. Chicago Union Traction Co. *v.* Faurot, 136 Ill. App. 347; Chicago City R. Co. *v.* Barron, 57 Ill. App. 469; Hopkins *v.* Hopkins, 132 N. C. 25, 43 S. E. 506; Magoon *v.* Boston, etc., R. Co., 67 Vt. 177, 31 Atl. 156.

If not shown to be unwarranted by the facts or circumstances in evidence, a statement by counsel that since a first deposition was taken the records were examined and the witness was forced to testify differently cannot be held improper argument. Maffi *v.* Stephens, 49 Tex. Civ. App. 354, 108 S. W. 1008.

96. Sullivan *v.* Deiter, 86 Mich. 404, 49 N. W. 261 (where the whole defense depends upon the testimony of such witness); Hitchcock *v.* Moore, 70 Mich. 112, 37 N. W. 914, 14 Am. St. Rep. 474; Ashland Land, etc., Co. *v.* May, 51 Nebr. 474, 71 N. W. 67; Missouri, etc., R. Co. *v.* Wood, 26 Tex. Civ. App. 500, 63 S. W. 654.

97. Augusta, etc., R. Co. *v.* Randall, 85 Ga. 297, 11 S. E. 706.

98. Wabash R. Co. *v.* Billings, 212 Ill. 37, 72 N. E. 2 [*reversing* 105 Ill. App. 111]; Chicago, etc., R. Co. *v.* Jones, (Tex. Civ. App. 1904) 81 S. W. 60; St. Louis Southwestern R. Co. *v.* Dickens, (Tex. Civ. App. 1900) 56 S. W. 124.

99. Missouri, etc., R. Co. *v.* Woods, (Tex. Civ. App. 1894) 25 S. W. 741.

1. Hinchman *v.* Pere Marquette R. Co., 136 Mich. 341, 99 N. W. 277, 65 L. R. A. 553.

2. Schillinger *v.* Verona, 88 Wis. 317, 60 N. W. 272.

3. St. Louis, etc., R. Co. *v.* Boback, 71

or, defendant being a railroad corporation, to say that railroad companies had a coercive method of compelling men to make statements;[4] or to state that the employees of defendant corporation were hired to rob citizens;[5] or to state what persons who were not called as witnesses would have testified.[6] But counsel may make vituperative remarks when the evidence warrants them.[7] He may, in that event, reflect on the character or conduct of a witness,[8] of a party,[9] or of persons under the control of a party,[10] and in that event it is not available error that he exaggerates and uses inflammatory language.[11] He may affirm that the natural presumptions are against the testimony of one or more witnesses, although their testimony is uncontradicted.[12] He may properly refer to the possible interest of a party to the transaction, although he is not a party to the then suit, as affecting the credibility of officials of such party who have testified,[13] and he may refer to the interest[14] or want of interest,[15] or the natural bias[16] of a witness, as where the witness is an employee of defendant and the question of negligence

Ark. 427, 75 S. W. 473; St. Louis, etc., R. Co. *v.* Waren, 65 Ark. 619, 48 S. W. 222; Wabash R. Co. *v.* Billings, 212 Ill. 37, 72 N. E. 2 [*reversing* 105 Ill. App. 111]; Illinois Cent. R. Co. *v.* Jolly, 119 Ky. 452, 84 S. W. 330, 27 Ky. L. Rep. 118.

4. MacCarthy *v.* Whitcomb, 110 Wis. 113, 85 N. W. 707.

5. Missouri, etc., R. Co. *v.* Huggins, (Tex. Civ. App. 1901) 61 S. W. 976, where the verdict is for a larger sum than is authorized by the evidence.

6. Pringle *v.* Miller, 111 Mich. 663, 70 N. W. 345.

7. Chicago City R. Co. *v.* Shreve, 128 Ill. App. 462 [*affirmed* in 226 Ill. 530, 80 N. E. 1049]; Hedlun *v.* Holy Terror Min. Co., 16 S. D. 261, 92 N. W. 31; Texas Consol. Compress, etc., Assoc. *v.* Dublin Compress, etc., Co., (Tex. Civ. App. 1896) 38 S. W. 404.

8. *Illinois.*— Chicago City R. Co. *v.* Bennett, 214 Ill. 26, 73 N. E. 343; Chicago City R. Co. *v.* Shreve, 128 Ill. App. 462 [*affirmed* in 226 Ill. 530, 80 N. E. 1049].

Indiana.— Lake Erie, etc., R. Co. *v.* Close, 5 Ind. App. 444, 32 N. E. 588.

Michigan.— Stowell *v.* Standard Oil Co., 139 Mich. 18, 102 N. W. 227; Leach *v.* Detroit Electric R. Co., 129 Mich. 286, 88 N. W. 635; Mott *v.* Detroit, etc., R. Co., 120 Mich. 127, 79 N. W. 3.

Missouri.— Gidionsen *v.* Union Depot R. Co., 129 Mo. 392, 31 S. W. 800.

New York.— Loudoun *v.* Eighth Ave. R. Co., 16 N. Y. App. Div. 152, 44 N. Y. Suppl. 742 [*reversed* on other grounds in 162 N. Y. 380, 56 N. E. 988].

Texas.— Sterling *v.* St. Louis, etc., R. Co., 38 Tex. Civ. App. 451, 86 N. W. 655; Missouri, etc., R. Co. *v.* Folin, 29 Tex. Civ. App. 512, 68 S. W. 810.

Vermont.— Morrill *v.* Palmer, 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411.

Washington.— Reeder *v.* Traders' Nat. Bank, 28 Wash. 139, 68 Pac. 461.

Waiver of privileged communications.—A waiver of privilege by plaintiff, in a personal injury action after his physician is produced in court as a witness for defendant, does not bar comment by counsel of plaintiff on the conduct of the physician, where improper disclosures were made by the physician which led to his being summoned as a witness. Hodge *v.* St. Louis, 146 Mich. 173, 109 N. W. 252.

9. *Illinois.*— Salem *v.* Webster, 192 Ill. 369, 61 N. E. 323 [*affirming* 95 Ill. App. 120]; Chicago City R. Co. *v.* Shreve, 128 Ill. App. 462 [*affirmed* in 226 Ill. 530, 80 N. E. 1049].

Kentucky.— Cincinnati Times-Star Co. *v.* France, 61 S. W. 18, 22 Ky. L. Rep. 1666.

Michigan.— Muncie Wheel, etc., Co. *v.* Finch, 150 Mich. 274, 113 N. W. 1107; Friesenhan *v.* Maines, 137 Mich. 10, 100 N. W. 172; Wheeler *v.* Detroit Electric R. Co., 128 Mich. 656, 87 N. W. 886; Williams *v.* Cleveland, etc., R. Co., 102 Mich. 537, 61 N. W. 52.

New Hampshire.— Hallock *v.* Young, 72 N. H. 416, 57 Atl. 236; Guertin *v.* Hudson, 71 N. H. 505, 53 Atl. 736; Felch *v.* Weare, 66 N. H. 582, 27 Atl. 226.

Oregon.— Huber *v.* Miller, 41 Oreg. 103, 68 Pac. 400.

Texas.— Hickey *v.* Behrens, 75 Tex. 488, 12 S. W. 679; Burton *v.* O'Niell, 6 Tex. Civ. App. 613, 25 S. W. 1013.

Vermont.— Morrill *v.* Palmer, 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411.

Wisconsin.— Hocks *v.* Sprangers, 113 Wis. 123, 87 N. W. 1101, 89 N. W. 113.

Wyoming.— Bunce *v.* McMahon, 6 Wyo. 24, 42 Pac. 23.

See 46 Cent. Dig. tit. "Trial," § 302.

10. Wheeler *v.* Detroit Electric R. Co., 128 Mich. 656, 87 N. W. 886; Galveston, etc., R. Co. *v.* Duelin, 86 Tex. 450, 25 S. W. 406; Galveston, etc., R. Co. *v.* Duelm, (Tex. Civ. App. 1893) 24 S. W. 334.

11. Prather *v.* McClelland, (Tex. Civ. App. 1894) 28 S. W. 94. Although the trial court declines to interfere and check him. Cawfield *v.* Asheville St. R. Co., 111 N. C. 597, 16 S. E. 703.

12. Bronson *v.* Leach, 74 Mich. 713, 42 N. W. 174.

13. Birmingham Nat. Bank *v.* Bradley, 116 Ala. 142, 23 So. 53.

14. Morehouse *v.* Heath, 99 Ind. 509; Wimber *v.* Iowa Cent. R. Co., 114 Iowa 551, 87 N. W. 505.

15. Cook *v.* Carroll Land, etc., Co., (Tex. Civ. App. 1897) 39 S. W. 1006.

16. Central R. Co. *v.* Mitchell, 63 Ga. 173.

or want of negligence of the employer turns on the question whether the witness was negligent or not,[17] and may state that experience shows that unfavorable testimony would have resulted in a dismissal of the witness.[18] He may call attention to the conduct and the manner of the witness while on the stand.[19] Where there is a conflict in the testimony counsel may claim that the witnesses of his adversary swore falsely.[20] If one of his own witnesses has given testimony favorable to the opposite party and has been contradicted by other witnesses, he may argue that the witness has committed perjury and has been bribed.[21] So the method in which a party conducts his case in court is a matter of legitimate comment by opposing counsel, even though in strict law the party has the right to conduct his case in that manner.[22] But conduct of counsel in seeking to render ineffective the remarks of opposing counsel by making him appear ludicrous is improper, and ground for reversal.[23] Refusal to allow counsel to comment unfavorably on the testimony of a witness, although justified by the facts, is not ground for reversal where he is subsequently given an opportunity to do so but does not avail himself of the opportunity.[24]

11. Comments on Non-Production of Evidence or Witnesses.[25] Counsel may comment on the absence of evidence, which is in the possession of the opposite party, which should naturally be introduced;[26] or where depositions were taken at several places, he may comment on the failure to take depositions at the place where the fact to be proved was best known,[27] on the failure to produce the deposition of an employee of defendant familiar with the facts who was sick at the time of trial,[28] on the failure of a party to ask his witness, who is shown to be familiar with a material fact, concerning such fact,[29] or on the action of the adverse party in excluding relevant and material evidence on the ground that it was a privileged communication.[30] He may also comment on the failure of his adversary to produce more than two witnesses to a fact, which if true should be known to many people.[31] So the non-production of documents, in posses-

17. Werner *v.* Chicago, etc., R. Co., 105 Wis. 300, 81 N. W. 416.

18. International, etc., R. Co. *v.* Rhoades, 21 Tex. Civ. App. 459, 52 S. W. 979, (Civ. App. 1899) 51 S. W. 517.

19. Commonwealth Electric Co. *v.* Rose, 214 Ill. 545, 73 N. E. 780.

20. Story *v.* Concord, etc., R. Co., 70 N. H. 364, 48 Atl. 288.

21. East St. Louis Connecting R. Co. *v.* O'Hara, 150 Ill. 580, 37 N. E. 917 [*affirming* 49 Ill. App. 282].

22. Georgia, etc., R. Co. *v.* Sasser, 4 Ga. App. 276, 61 S. E. 505.

23. Parlin, etc., Co. *v.* Scott, 137 Ill. App. 454.

24. Southern R. Co. *v.* Simmons, 105 Va. 651, 55 S. E. 459.

25. **In criminal prosecutions** see Criminal Law, 12 Cyc. 578.

26. *Alabama.*— Matthews *v.* Farrell, 140 Ala. 298, 37 So. 325.

Massachusetts.— Huntsman *v.* Nichols, 116 Mass. 521.

Minnesota.—Whitehead *v.* Wisconsin Cent. R. Co., 103 Minn. 13, 114 N. W. 254, 467.

Missouri.— Ryans *v.* Hospes, 167 Mo. 342, 67 S. W. 285.

New Hampshire.— Concord Land, etc., Co. *v.* Clough, 70 N. H. 627, 47 Atl. 704; Liscomb *v.* Manchester, etc., R. Co., 70 N. H. 312, 48 Atl. 284; Hersey *v.* Hutchins, 70 N. H. 130, 46 Atl. 33.

North Carolina.— Chambers *v.* Greenwood, 68 N. C. 274.

See 46 Cent. Dig. tit. "Trial," § 299.

Illustration.— The fact that plaintiff in a personal injury action, who proved the employment of physicians to treat her for the injuries and the nature and extent of the treatment, failed to prove the value thereof, is legitimate ground for argument that probably the physicians' bills were of small amount. Moran *v.* Dover, etc., St. R. Co., 74 N. H. 500, 69 Atl. 884, 124 Am. St. Rep. 994, 19 L. R. A. N. S. 920. Defendant's counsel, in an action for personal injuries, may comment on the failure of the physician who attended plaintiff to testify, especially when plaintiff on her cross-examination has sought to explain his absence and failure to testify. Brotherton *v.* Barber Asphalt Paving Co., 117 N. Y. App. Div. 791, 102 N. Y. Suppl. 1089.

Where a party invokes benefit of the rule that he need not incriminate himself, it is not proper for opposing counsel to comment on that fact. Carne *v.* Litchfield, 2 Mich. 340.

27. Lee *v.* Dow, 73 N. H. 101, 59 Atl. 374.

28. Story *v.* Concord, etc., R. Co., 70 N. H. 364, 48 Atl. 288.

29. McKinstry *v.* Collins, 74 Vt. 147, 52 Atl. 438.

30. Phillips *v.* Chase, 201 Mass. 444, 87 N. E. 755, 131 Am. St. Rep. 406; McCool *v.* Dighton, etc., St. R. Co., 173 Mass. 117, 53 N. E. 133.

31. Mitchell *v.* Boston, etc., R. Co., 68 N. H. 96, 34 Atl. 674.

sion of a party, which he has been notified to produce at the trial,[32] or which the court has ordered him to produce,[33] is proper subject of comment by counsel. But it is improper for him to comment on the non-introduction of books excluded by the court,[34] or which the court has declined to order the party to produce on the ground that they contain incriminating matter,[35] or to comment on the failure to produce evidence which would not have been competent.[36] So where defendant introduces no evidence but rests when plaintiff rests, no adverse presumption arises because of its omission to introduce any evidence, and adverse comment because of such omission is improper.[37] It has likewise been held improper for counsel, during the conduct of the trial, to comment on the failure of the adverse party to call witnesses where such witnesses are incompetent [38] or equally accessible to either party,[39] when there is no evidence that the witnesses could have been produced,[40] or where the evidence shows that the party knew nothing of the witnesses' whereabouts.[41] And if one of the parties admits what the other expects to prove by absent witnesses, he cannot comment on the failure to call them, although they subsequently appear.[42] Such comments are likewise considered to be improper unless such witnesses are shown to be cognizant of the facts in the case,[43] and

32. Tobin *v.* Shaw, 45 Me. 331, 71 Am. Dec. 547; Hill *v.* Houser, 51 Tex. Civ. App. 359, 115 S. W. 112.

33. Williams *v.* Cleveland, etc., R. Co., 102 Mich. 537, 61 N. W. 52.

34. Martin Brown Co. *v.* Perrill, 77 Tex. 199, 13 S. W. 975.

35. Boyle *v.* Smithman, 146 Pa. St. 255, 23 Atl. 397.

36. Blaisdell *v.* Davis, 72 Vt. 295, 48 Atl. 14; Shaw *v.* Gilbert, 111 Wis. 165, 86 N. W. 188. And see Missouri, etc., R. Co. *v.* Rogers, (Tex. Civ. App. 1909) 117 S. W. 939, holding that where the nature and extent of plaintiff's injuries were seriously controverted, and defendant did not offer expert testimony on the subject, it was prejudicial error for plaintiff's counsel to argue that defendant's counsel could not complain of the lack of medical testimony because they knew that defendant could require plaintiff to be examined by competent physicians, and, if he refused to submit thereto, could require the court to appoint physicians to make such examination, defendant not having such right.

Unless it appears probable that prejudice resulted the judgment will not be reversed. Gulf, etc., R. Co. *v.* Curb, 66 Fed. 519, 13 C. C. A. 587.

37. McDuffee *v.* Boston, etc., R. Co., 81 Vt. 52, 69 Atl. 124, 130 Am. St. Rep. 1019.

38. Laird *v.* Laird, 127 Mich. 24, 86 S. W. 436; Wright *v.* Davis, 72 N. H. 448, 57 Atl. 335, the witness being incompetent and there being nothing in the record to show a waiver of this incompetency by defendant other than statement of counsel in argument that the incompetency would have been waived if the witness had been offered.

39. Sears *v.* Duling, 79 Vt. 334, 65 Atl. 90; Wood *v.* Agostines, 72 Vt. 51, 47 Atl. 108.

40. Kansas City, etc., R. Co. *v.* Sokal, 61 Ark. 130, 32 S. W. 497; Stewart *v.* Metropolitan St. R. Co., 72 N. Y. App. Div. 459, 76 N. Y. Suppl. 540; MacCarthy *v.* Whitcomb, 110 Wis. 113, 85 N. W. 707.

41. Industrial Mut. Indemnity Co. *v.* Perkins, 81 Ark. 87, 98 S. W. 709.

42. St. Louis Southwestern R. Co. *v.* Garber, (Tex. Civ. App. 1908) 108 S. W. 742.

43. *Alabama.*— Louisville, etc., R. Co. *v.* Sullivan Timber Co., 126 Ala. 95, 27 So. 760.

California.— Sesler *v.* Montgomery, 78 Cal. 486, 21 Pac. 185, 12 Am. St. Rep. 76, 3 L. R. A. 653.

Georgia.—Western, etc., R. Co. *v.* Morrison, 102 Ga. 319, 29 S. E. 104, 66 Am. St. Rep. 173, 40 L. R. A. 84.

Illinois.— St. Louis Consol. Coal Co. *v.* Scheiber, 167 Ill. 539, 47 N. E. 1052 [*affirming* 65 Ill. App. 304].

Indiana.—Warsaw *v.* Fisher, 24 Ind. App. 46, 55 N. E. 42.

Iowa.— State *v.* Toombs, 79 Iowa 741, 45 N. W. 300.

Massachusetts.—McKim *v.* Foley, 170 Mass. 426, 49 N. E. 625.

Michigan.—Airikainen *v.* Houghton County St. R. Co., 138 Mich. 194, 101 N. W. 264; Wilkins *v.* Flint, 128 Mich. 262, 87 N. W. 195.

Missouri.— Brandt *v.* Schuchmann, 60 Mo. App. 70.

Nebraska.— Chicago, etc., R. Co. *v.* Krayenbuhl, 70 Nebr. 766, 98 N. W. 44.

New Hampshire.— Lambert *v.* Hamlin, 73 N. H. 138, 59 Atl. 941; Mitchell *v.* Boston, etc., R. Co., 68 N. H. 96, 34 Atl. 674.

North Carolina.— State *v.* Kiger, 115 N. C. 746, 20 S. E. 456; City Nat. Bank *v.* Bridgers, 114 N. C. 383, 19 S. E. 666; Grubbs *v.* North Carolina Home Ins. Co., 108 N. C. 472, 13 S. E. 236, 23 Am. St. Rep. 62; Hudson *v.* Jordan, 108 N. C. 10, 12 S. E. 1029.

Texas.— Missouri Pac. R. Co. *v.* White, 80 Tex. 202, 15 S. W. 808; Gray *v.* Burk, 19 Tex. 228; Galveston, etc., R. Co. *v.* Duelm, (Civ. App. 1893) 23 S. W. 596; Mayes *v.* State, 33 Tex. Cr. 33, 24 S. W. 421; Jackson *v.* State, 31 Tex. Cr. 342, 20 S. W. 921.

Vermont.— *In re* McCabe, 73 Vt. 175, 50 Atl. 804.

West Virginia.— Robinson *v.* Woodford, 37 W. Va. 377, 16 S. E. 602.

within the jurisdiction of the trial court.[44] So also it is improper to comment on the failure of a party's attorney to testify in his behalf.[45] Improper comments on failure to produce witnesses and the use of their depositions will not constitute ground for reversal, where testimony of other witnesses is to the same effect.[46] So comments on failure to produce witnesses,[47] or on the refusal of defendant's wife to permit an inspection of the *locus in quo* until told that the court had so ordered,[48] is not ground for reversal where no prejudice results. But it has been held prejudicial error not to sustain objection to argument commenting on the opposite party's failure to produce a witness whose testimony would have been merely cumulative, especially where counsel argued that her testimony related to material facts and would not merely have supported an examined witness as to an immaterial fact.[49] If comments are made on the failure of the adverse party to introduce witnesses, his counsel may refer to anything which the evidence discloses which tends to explain such failure.[50]

12. Comments on Failure of Party to Testify.[51] Counsel may comment on the failure of a party to testify in explanation of testimony against him,[52] and may read to the jury interrogatories which he refused to answer and his ground for such refusal and comment thereon[53] where the party is present at the trial,[54] if the circumstances are such as to justify comment.[55] The rule as to comments on failure of parties to testify is governed by the same considerations as control comments on the introduction or non-introduction of any other witness.[56]

13. Comments on Prior Proceedings in Cause.[57] Matters shown by the files, not pertaining to the trial at bar, and not brought before the jury in connection with it, cannot be made use of in argument;[58] hence it is error for counsel to state to the jury what appeared in affidavits for continuance at a previous term,[59] to read the record of facts shown by an affidavit for change of venue and to comment thereon,[60] to state the result of a former trial,[61] or what the rulings on a

Wisconsin.— Kircher *v.* Milwaukee Mechanics' Mut. Ins. Co., 74 Wis. 470, 43 N. W. 487, 5 L. R. A. 779.

United States.— U. S. *v.* Candler, 65 Fed. 308.

See 46 Cent. Dig. tit. "Trial," § 299.

44. Van Slyke *v.* Chicago, etc., R. Co., 80 Iowa 620, 45 N. W. 396; Gavigan *v.* Scott, 51 Mich. 373, 16 N. W. 769; Mitchell *v.* Tacoma R., etc., Co., 9 Wash. 120, 37 Pac. 341.

45. Sanger *v.* McDonald, 82 Ark. 432, 102 S. W. 690.

46. Louisville St. R. Co. *v.* Brownfield, 96 S. W. 912, 29 Ky. L. Rep. 1097.

47. Lambert *v.* Hamlin, 73 N. H. 138, 59 Atl. 941.

48. Sullivan *v.* Nicoulin, 113 Iowa 76, 84 N. W. 978.

49. Jordan *v.* Austin, 161 Ala. 585, 50 So. 70.

50. Peck *v.* Springfield Traction Co., 131 Mo. App. 134, 110 S. W. 659; Willard *v.* Norcross, 81 Vt. 293, 69 Atl. 942.

51. **In criminal prosecutions** see Criminal Law, 12 Cyc. 576.

52. Lynch *v.* Peabody, 137 Mass. 92; Cook *v.* Standard L., etc., Ins. Co., 86 Mich. 554, 49 N. W. 474; Gilman *v.* Williams, 74 Vt. 327, 52 Atl. 428, although the party be one of a partnership and had no other connection wth the transaction. *Contra,* Gragg *v.* Wagner, 77 N. C. 246.

Agreement that party shall not testify.— Counsel does not lose the right to comment upon the omission of a party to a suit to testify, by an agreement made before the trial that the party should not testify. Hurd *v.* Marple, 10 Ill. App. 418.

53. Morris *v.* McClellan, 154 Ala. 639, 45 So. 641.

54. Goodman *v.* Sapp, 102 N. C. 477, 9 S. E. 483, in the discretion of the court.

55. Hudson *v.* Jordan, 108 N. C. 10, 12 S. E. 1029, 110 N. C. 250, 14 S. E. 741.

56. Devries *v.* Phillips, 63 N. C. 53.

57. **In criminal prosecutions** see Criminal Law, 12 Cyc. 573.

58. Blaisdell *v.* Davis, 72 Vt. 295, 48 Atl. 14.

59. Louisville, etc., R. Co. *v.* Van Eaton, (Miss. 1893) 14 So. 267; Blaisdell *v.* Davis, 72 Vt. 295, 48 Atl. 14. *Contra,* Hanners *v.* McClelland, 74 Iowa 318, 37 N. W. 389; Cross *v.* Garrett, 35 Iowa 480, which so held, although the affidavit was not filed in the case in which it was used, but in another case pending between other parties, where it appears that it was filed with the understanding that it should be treated as applying also to the case in which it was read and that it was so treated. Brannum *v.* O'Connor, 77 Iowa 632, 42 N. W. 504.

Where both counsel refer to such affidavits, the verdict will not be set aside on that ground. Donovan *v.* Richmond, 61 Mich. 467, 28 N. W. 516.

60. Kansas City, etc., R. Co. *v.* Sokal, 61 Ark. 130, 32 S. W. 497; Hilliard *v.* Beattie, 59 N. H. 462.

61. *Alabama.*— Harsh *v.* Heflin, 76 Ala. 499.

particular point were on such trial,[62] or to read to the jury in the concluding argument the charge delivered by the judge on such trial;[63] or on second trial to read to the jury the opinion of the supreme court on a question of fact in the same case and to remark that the supreme court said that the testimony on the first trial tended to show the fact;[64] or on retrial to read a discussion from the opinion on the former appeal as to whether under the facts then presented plaintiff was negligent as matter of law,[65] or to state to the jury that there was want of unanimity in the appellate court in its decision on appeal from the former judgment;[66] or on the trial of a condemnation case before a jury to read and comment on the report of the viewers appointed to assess the damages,[67] to state that a former judgment was reversed on a technicality and that defendant was preparing to appeal from any judgment that might be rendered,[68] or to make abusive remarks concerning a decision of the supreme court on a former appeal of the same case;[69] or, in an action of libel, to read to the jury the decision of another judge in overruling a demurrer to the complaint to the effect that the writing complained of apparently charges a breach of trust.[70] But a cause should not be reversed for such references by counsel where the jury is cautioned that such matters should have no influence upon them,[71] where the court tells the jury that the statement is improper and opposite counsel does not ask the court to do more,[72] where the references do not go to the extent of telling the jury the result of the trial or amount of the verdict,[73] where the statement is a mere restatement of matter stated by opposing counsel,[74] or where the verdict is correct,[75] or unless there would otherwise be a failure of justice.[76] It is legitimate for counsel in argument to comment

Illinois.— Springfield Consol. R. Co. *v.* Bell, 134 Ill. App. 426.

Missouri.— Evans *v.* Trenton, 112 Mo. 390, 20 S. W. 614; Chowning *v.* Parker, 104 Mo. App. 674, 78 S. W. 677.

Nebraska.— Bolar *v.* Williams, 14 Nebr. 386, 15 N. W. 716.

Pennsylvania.— Fisher *v.* Pennsylvania Co., 34 Pa. Super. Ct. 500.

Texas.— Prewitt *v.* Southwestern Tel., etc., Co., 46 Tex. Civ. App. 123, 101 S. W. 812 (as for instance that plaintiff had been unable to get a verdict); Underwriters' Fire Assoc. *v.* Henry, (Civ. App. 1904) 79 S. W. 1072; Houston, etc., R. Co. *v.* Gee, 27 Tex. Civ. App. 414, 66 S. W. 78; Atwood *v.* Brooks, (App. 1890) 16 S. W. 535.

Vermont.— See *In re* Barney, 71 Vt. 217, 44 Atl. 75, holding that a statement by counsel for the contestant of a will that, unless the proponent succeeded better in his proof than on a former trial he would not be able to substantiate the facts stated by his counsel, is improper and cannot be held harmless.

See 46 Cent. Dig. tit. "Trial," § 283.

To state that on a former trial plaintiff recovered a verdict on the same evidence is erroneous. Attaway *v.* Mattax, (Tex. App. 1889) 14 S. W. 1017. But a mere reference to such verdict in discussing a legal proposition with the court is not. Heddles *v.* Chicago, etc., R. Co., 77 Wis. 228, 46 N. W. 115, 20 Am. St. Rep. 106.

Trial in court from which appeal taken.— On the trial of a cause in the district court on appeal from the county court, it was error for counsel to inform the jury as to the result of the trial in the county court, and for the court to emphasize the fact, and reprimand opposing counsel for objecting to such statements. Adams *v.* Fisher, 83 Nebr. 686, 120 N. W. 194.

62. Bulen *v.* Granger, 58 Mich. 274, 25 N. W. 188.

63. Butler *v.* Slam, 50 Pa. St. 456.

64. Laughlin *v.* Grand Rapids St. R. Co., 80 Mich. 154, 44 N. W. 1049.

65. Olney *v.* Boston, etc., R. Co., 73 N. H. 85, 59 Atl. 387, holding further that this is so although counsel states that he wishes the jury to consider what was said merely as his opinion of the law.

66. Philadelphia Trust, etc., Co. *v.* Philadelphia, etc., R. Co., 177 Pa. St. 38, 35 Atl. 688.

67. Goodwine *v.* Evans, 134 Ind. 262, 33 N. E. 1031.

68. Illinois Cent. R. Co. *v.* Jolly, 119 Ky. 452, 84 S. W. 330, 27 Ky. L. Rep. 118.

69. Martin *v.* Courtney, 81 Minn. 112, 83 N. W. 503.

70. Press Pub. Co. *v.* McDonald, 63 Fed. 238, 11 C. C. A. 155, 26 L. R. A. 53.

71. Ball *v.* Keokuk, etc., R. Co., 74 Iowa 132, 37 N. W. 110; Garvin *v.* Luttrell, 10 Humphr. (Tenn.) 16.

72. Smiley *v.* Scott, 77 Ill. App. 555 [*affirmed* in 179 Ill. 142, 53 N. E. 544].

73. Chicago Union Traction Co. *v.* Lawrence, 113 Ill. App. 269 [*affirmed* in 211 Ill. 373, 71 N. E. 1024].

74. Olsen *v.* Solverson, 71 Wis. 663, 38 N. W. 329.

75. Beatty *v.* Clarkson, 110 Mo. App. 1, 83 S. W. 1033.

76. Stancell *v.* Kenan, 33 Ga. 56; Chicago, etc., R. Co. *v.* Dillon, 123 Ill. 570, 15 N. E. 181, 5 Am. St. Rep. 559 [*affirming* 24 Ill. App. 203]; Brusie *v.* Pack, 16 N. Y. Suppl. 648 [*reversed* on other grounds in 135 N. Y. 622, 32 N. E. 76].

on the fact that there was a delay of several terms before defendant in a civil case filed a plea setting up the real defense on which he relied.[77]

14. Comments on Matters Not in Evidence or Within the Issues.[78] Counsel on either side should be confined to the issues and the evidence and should not be permitted to state facts in argument not in evidence,[79] or not within the issues,[80]

77. McBride *v.* Macon Tel. Pub. Co., 102 Ga. 422, 30 S. E. 999.

78. In criminal prosecutions see Criminal Law, 12 Cyc. 574, 575.

79. *Alabama.*— Metcalf *v.* St. Louis, etc., R. Co., 156 Ala. 240, 47 So. 158; Wolffe *v.* Minnis, 74 Ala. 386.

Arkansas.— St. Louis, etc., R. Co. *v.* Briggs, 87 Ark. 581, 113 S. W. 644; Boone *v.* Holder, 87 Ark. 461, 112 S. W. 1081; Little Rock, etc., R. Co. *v.* Cavenesse, 48 Ark. 106, 2 S. W. 505.

Georgia.— Georgia, etc., R. Co. *v.* Pound, 111 Ga. 6, 36 S. E. 312.

Illinois.— Mississippi Valley Traction Co. *v.* Coburn, 132 Ill. App. 624; Emery Dry Goods Co. *v.* Hart, 130 Ill. App. 244; Supreme Lodge M. W. W. *v.* Jones, 113 Ill. App. 241.

Indiana.—Indianapolis Journal Newspaper Co. *v.* Pugh, 6 Ind. App. 510, 33 N. E. 991.

Kentucky.— Davis *v.* Brown, 98 Ky. 475, 32 S. W. 614, 36 S. W. 534, 17 Ky. L. Rep. 1428.

Massachusetts.— Menard *v.* Boston, etc., R. Co., 150 Mass. 386, 23 N. E. 214.

Michigan.— Liebler *v.* Carrel, 155 Mich. 196, 118 N. W. 975; *In re* More, 153 Mich. 695, 117 N. W. 329; Reed *v.* Louden, 153 Mich. 521, 116 N. W. 1073; Hirshfield *v.* Waldron, 83 Mich. 116, 47 N. W. 239.

Missouri.— Neff *v.* Cameron, 213 Mo. 350, 111 S. W. 1139, 127 Am. St. Rep. 606, 18 L. R. A. N. S. 320; Koch *v.* Habel, 32 Mo. App. 103.

New Hampshire.—Cross *v.* Grant, 62 N. H. 675, 13 Am. St. Rep. 607.

New York.— Horton *v.* Terry, 126 N. Y. App. Div. 479, 110 N. Y. Suppl. 646; Keenan *v.* Metropolitan St. R. Co., 118 N. Y. App. Div. 56, 103 N. Y. Suppl. 61; Cook *v.* Ritter, 4 E. D. Smith 253.

Pennsylvania.— Saxton *v.* Pittsburg R. Co., 219 Pa. St. 492, 68 Atl. 1022.

Texas.— Gulf, etc., R. Co. *v.* Dickens, (Civ. App. 1909) 118 S. W. 612; Missouri, etc., R. Co. *v.* Moore, 47 Tex. Civ. App. 531, 105 S. W. 532; Taylor *v.* Blackwell, (Civ. App. 1907) 105 S. W. 214; Texas, etc., R. Co. *v.* Beezley, 46 Tex. Civ. App. 108, 101 S. W. 1051; Missouri, etc., R. Co. *v.* Cherry, 44 Tex. Civ. App. 232, 97 S. W. 712; Phœnix Assur. Co. *v.* Stenson, (Civ. App. 1901) 63 S. W. 542; Rotan *v.* Maedgen, 24 Tex. Civ. App. 558, 59 S. W. 585; Trinity, etc., R. Co. *v.* O'Brien, 18 Tex. Civ. App. 690, 46 S. W. 389; Atchison, etc., R. Co. *v.* Bryan, (Civ. App. 1894) 28 S. W. 98; International, etc., R. Co. *v.* Greenwood, 2 Tex. Civ. App. 76, 21 S. W. 559.

Vermont.—Daggett *v.* Champlain Mfg. Co., 71 Vt. 370, 45 Atl. 755.

Washington.— Sullivan *v.* Seattle Electric Co., 51 Wash. 71, 97 Pac. 1109, 130 Am. St. Rep. 1082.

Wisconsin.— Schaefer *v.* Fond du Lac, 104 Wis. 39, 80 N. W. 59.

See 46 Cent. Dig. tit. "Trial," §§ 285, 286.

Leaving propriety of statement to jury.— Where there is evidence on a subject and the court does not recollect the exact evidence, and the official stenographer is not present, it is not error to leave it to the jury to say whether the evidence warranted the remarks of counsel. Obert *v.* Strube, 51 Mo. App. 621; Grace *v.* McArthur, 76 Wis. 641, 45 N. W. 518.

80. *Arkansas.*— St. Louis, etc., R. Co. *v.* Crowder, 82 Ark. 562, 103 S. W. 172; Ft. Smith Light, etc., Co. *v.* Flint, 81 Ark. 231, 99 S. W. 79; Monte Ne R. Co. *v.* Phillips, 80 Ark. 292, 96 S. W. 1060.

Georgia.— Cone *v.* Augusta, 120 Ga. 80, 47 S. E. 633.

Kentucky.— Berger *v.* Standard Oil Co., 126 Ky. 155, 103 S. W. 245, 31 Ky. L. Rep. 613, 11 L. R. A. N. S. 238; Hurst *v.* Williams, 102 S. W. 1176, 31 Ky. L. Rep. 658.

Louisiana.— See Coreil *v.* Walsh, 120 La. 557, 45 So. 438.

Michigan.— Phœnix Ins. Co. *v.* Allen, 11 Mich. 501, 83 Am. Dec. 756.

New Jersey.— Humphreys *v.* Eastlack, 63 N. J. Eq. 136, 51 Atl. 775.

Pennsylvania.— Freeman *v.* Wilkes-Barre, etc., Traction Co., 36 Pa. Super. Ct. 166.

Texas.— Clark *v.* Bohms, (Civ. App. 1896) 37 S. W. 347.

Vermont.— Montpelier, etc., R. Co. *v.* Macchi, 74 Vt. 403, 52 Atl. 960.

Washington.— Sullivan *v.* Seattle Electric Co., 51 Wash. 71, 97 Pac. 1109, 130 Am. St. Rep. 1082.

Applications of rule.— It has been held error in personal injuries cases to state that plaintiff has refused to submit to a physical examination (Missouri, etc., R. Co. *v.* Walden, (Tex. Civ. App. 1898) 46 S. W. 87), or that defendant had for a long time tolerated a practice admittedly dangerous (Heald *v.* Concord, etc., R. Co., 68 N. H. 49, 44 Atl. 77), or where the case grew out of a collision with a street car, for counsel in his closing argument to challenge defendant to make experiments showing the distance in which such car could be stopped (Little *v.* Boston, etc., R. Co., 72 N. H. 61, 55 Atl. 190); where the negligence complained of is want of a watchman, to say that other persons had been injured at the same place on that account (St. Louis Southwestern R. Co. *v.* Boyd, 40 Tex. Civ. App. 93, 88 S. W. 509); where the injuries occurred at a railroad crossing, to say that he could show how many hundred persons had come near being killed at the crossing and ask the jury to set a price on human life (Schaidler *v.* Chicago, etc., R.

or to indulge in denunciations based on assumed facts.[81] It has accordingly been held error for the court to permit counsel in summing up to read to the jury a paper which has not been introduced in evidence,[82] to state its contents to the jury,[83] to convey to the jury the impression that the writing is adverse to his opponent,[84] to refer to it in argument,[85] and state what it would show,[86] or to comment on evidence which has been improperly admitted,[87] or base an argument thereon,[88] unless such evidence was admitted without objection,[89] or over a general

Co., 102 Wis. 564, 78 N. W. 732); where plaintiff is a minor, to say that it is against public policy to place minors who have no means of support but their labor in dangerous occupations, which tended to make paupers of them, dependent on the jury for support (Gulf, etc., R. Co. *v.* Jones, 73 Tex. 232, 11 S. W. 185); to intentionally misquote the deposition of a physician so as to include in the statement of injuries sustained a portion of the body of the patient, there being a question whether the injury extended to such portion of the patient's body (Lake St. El. R. Co. *v.* Shaw, 203 Ill. 39, 67 N. E. 374 [*reversing* 103 Ill. App. 662); in an action for injuries to an elderly person for defendant's counsel to say that the statute only gives a limited amount for injuries resulting in death and that the amount sued for is largely in excess of such amount (Olfermann *v.* Union Depot R. Co., 125 Mo. 408, 28 S. W. 742, 46 Am. St. Rep. 483); to refer to injuries received by another at the same time and place at which plaintiff received his injuries and to refer to plaintiff's condition in life (Evans *v.* Trenton, 112 Mo. 390, 20 S. W. 614); to appeal to the jury on account of a supposed public interest in the matter (St. Louis Southwestern R. Co. *v.* Boyd, 40 Tex. Civ. App. 93, 88 S. W. 509); to say that defendant had failed to take care of plaintiff and furnish him with food and a doctor after he was injured (Greenville Oil, etc., Co. *v.* Davenport, (Tex. Civ. App. 1896) 37 S. W. 624); or where the action was for negligence causing the death of a child which was struck by a car not equipped with a fender to say that ordinary care required street cars to have fenders (Carney *v.* Concord St. R., 72 N. H. 364, 57 Atl. 218). So it is improper to say that the jury, in determining the amount of the verdict, should take into consideration that defendant will appeal (Selby *v.* Detroit R. Co., 122 Mich. 311, 81 N. W. 106); that if the verdict is too small the appellate court will not raise but if too large will cut it down and therefore the jury should err on the right side (Missouri, etc., R. Co. *v.* Nesbit, 40 Tex. Civ. App. 209, 88 S. W. 891); to permit counsel to ask the jury to give his client compensation for the expenses of the litigation (Britton *v.* Michigan Cent. R. Co., 118 Mich. 491, 76 N. W. 1043); or where a city is defendant for plaintiff's attorney in reply to a reference by defendant's attorney to the amount of the claim made to the city counsel "on the basis of a prompt adjustment, but without prejudice to her rights in the event of a suit" to say that the city counselor had himself recommended to the city council that a larger amount be paid plaintiff (Ross *v.* Detroit, 96 Mich. 447, 56 N. W. 11); or where the uncontradicted evidence showed that a release intended for defendant was made to another by mistake, to argue that the release was not intended for defendant (The Oriental *v.* Barclay, 16 Tex. Civ. App. 193, 41 S. W. 117); or to state by inference that he had certain testimony which he could have introduced (Wood *v.* Augostines, 72 Vt. 51, 47 Atl. 108); or that he could show certain facts but for the incompetency of a witness (Blaisdell *v.* Davis, 72 Vt. 295, 48 Atl. 14); or for plaintiff's counsel to state that defendant had made an offer of judgment (De Grazia *v.* Ferretti, 31 Misc. (N. Y.) 761, 64 N. Y. Suppl. 403 [*reversing* 31 Misc. 805, 62 N. Y. Suppl. 1124].

81. Fry *v.* Bennett, 3 Bosw. (N. Y.) 200 [*affirmed* in 28 N. Y. 324].

Illustration.— Where, in an action on a note given for the price of a threshing machine, defendant before trial dismissed the counter-claim for damages for wrongful attachment and for malicious criminal prosecution, it was improper for his counsel in his address to the jury to denounce plaintiff as one who used the criminal laws of the state for the collection of a debt. Keniston *v.* Todd, 139 Iowa 287, 117 N. W. 674.

82. Koelges *v.* Guardian L. Ins. Co., 57 N. Y. 638; State *v.* Bryan, 89 N. C. 531; Mullen *v.* Union Cent. L. Ins. Co., 182 Pa. St. 150, 37 Atl. 988.

83. Koelges *v.* Guardian L. Ins. Co., 57 N. Y. 638.

84. Baldwin *v.* Grand Trunk R. Co., 64 N. H. 596, 15 Atl. 411.

85. Hoxie *v.* Home Ins. Co., 33 Conn. 471; Cohen *v.* Drake, 13 Wash. 102, 42 Pac. 529.

86. Potter *v.* Detroit, etc., R. Co., 122 Mich. 179, 81 N. W. 80, 82 N. W. 245.

87. Houston, etc., R. Co. *v.* Patterson, (Tex. Civ. App. 1900) 57 S. W. 675.

88. St. Louis, etc., R. Co. *v.* Buckner, 89 Ark. 58, 115 S. W. 923, 20 L. R. A. N. S. 458.

89. *Alabama.*— Birmingham R., etc., Co. *v.* Wildman, 119 Ala. 547, 24 So. 548.

Illinois.— Chicago, etc., R. Co. *v.* Mochell, 193 Ill. 208, 61 N. E. 1028, 86 Am. St. Rep. 318 [*affirming* 96 Ill. App. 178].

Missouri.— Hax *v.* Quincy, etc., R. Co., 123 Mo. App. 172, 100 S. W. 693.

New York.— Wendt *v.* Craig, 147 N. Y. 697, 41 N. E. 516 [*reversing* 17 N. Y. Suppl. 748].

South Carolina.— State *v.* Free, 1 McMull. 494.

Where the remarks are by way of recital and description and are withdrawn when objected to there is no ground for reversal.

objection.[90] So it is error to permit counsel to comment upon evidence incompetent in itself, but subject to be made competent by other proof which is not adduced,[91] to use evidence admitted for one purpose for a purpose for which it was not admissible,[92] or to express regret that the court should have excluded certain evidence from the jury.[93] It is error for counsel to comment upon excluded evidence and to treat it as evidence,[94] especially where this is done over objection and the admonition of the judge,[95] or to state facts of his personal experience,[96] or his own knowledge of the facts unless he has testified thereto as a witness,[97] or refer to matters of common knowledge outside of the issue where harm may be fairly inferred to have resulted,[98] or insinuate that he has knowledge of facts,[99] which are calculated to prejudice the opposite party, or comment to the jury on his reasons for asking for instruction, where such reason does not appear on the record,[1] or to read

Peerless Stone Co. *v.* Wray, 152 Ind. 27, 51 N. E. 326.

90. Brennan *v.* St. Louis, 92 Mo. 482, 2 S. W. 481.

91. Logan *v.* Monroe, 20 Me. 257.

92. Williams *v.* Chapman, 7 Ga. 467; Waldron *v.* Waldron, 156 U. S. 361, 15 S. Ct. 383, 39 L. ed. 453.

93. Hine's Appeal, 68 Conn. 551, 37 Atl. 384.

94. *Illinois.*— Wicks *v.* Wheeler, 139 Ill. App. 412; Parlin, etc., Co. *v.* Scott, 137 Ill. App. 454; Chicago, etc., R. Co. *v.* Judge, 135 Ill. App. 377.

Michigan.— Hinchman *v.* Pere Marquette R. Co., 136 Mich. 341, 99 N. W. 277, 65 L. R. A. 553; Turner *v.* Muskegon Mach., etc., Co., 97 Mich. 166, 56 N. W. 356; McDuff *v.* Detroit Evening Journal Co., 84 Mich. 1, 47 N. W. 671, 22 Am. St. Rep. 673.

Missouri.— Ritter *v.* Springfield First Nat. Bank, 87 Mo. 574.

Nebraska.— Courier Printing, etc., Co. *v.* Wilson, (1902) 90 N. W. 1120; Cleveland Paper Co. *v.* Banks, 15 Nebr. 20, 16 N. W. 833, 48 Am. Rep. 334.

Texas.— Whittaker *v.* Thayer, 48 Tex. Civ. App. 508, 110 S. W. 787.

Failure of court to charge on improper argument.— A counsel in his argument to the jury commented, over the objection of the adverse party, on evidence which the court had excluded because immaterial. The adverse party requested the court to charge that the jury should disregard any statement concerning evidence which had been offered, but rejected. The court failed to charge on the question. It was held that the argument of counsel was reversible error. Hanstad *v.* Canadian Pac. R. Co., 44 Wash. 505, 87 Pac. 832.

95. Haynes *v.* Trenton, 108 Mo. 123, 18 S. W. 1003.

Contents of letter excluded.— It is reversible error for counsel to attempt to get before the jury the contents of a letter by persistent statement of its contents and offer to prove made after the letter has been excluded. Rudd *v.* Rounds, 64 Vt. 432, 25 Atl. 438, holding further that this error can be cured only by showing that the letter was admissible.

96. *Kentucky.*— Louisville, etc., R. Co. *v.* Hull, 113 Ky. 561, 68 S. W. 433, 24 Ky. L. Rep. 375, 57 L. R. A. 771; Cunningham *v.* Speagle, 106 Ky. 278, 50 S. W. 244, 20 Ky. L. Rep. 1833.

Michigan.— Atherton *v.* Defreeze, 129 Mich. 364, 88 N. W. 886; Britton *v.* Michigan Cent. R. Co., 118 Mich. 491, 76 N. W. 1043.

Missouri.— Doggett *v.* Blanke, 70 Mo. App. 499.

New Hampshire.— Bullard *v.* Boston, etc., R. Co., 64 N. H. 27, 5 Atl. 838, 10 Am. St. Rep. 367.

North Carolina.— Perry *v.* Western North Carolina R. Co., 128 N. C. 471, 39 S. E. 27.

Texas.— Missouri, etc., R. Co. *v.* Cherry, 44 Tex. Civ. App. 232, 97 S. W. 712; Halsey *v.* Bell, (Civ. App. 1901) 62 S. W. 1088; Fordyce *v.* Withers, 1 Tex. Civ. App. 540, 20 S. W. 766.

Vermont.— Cutler *v.* Skeels, 69 Vt. 154, 37 Atl. 228.

Wisconsin.— Gutzman *v.* Clancy, 114 Wis. 589, 90 N. W. 1081, 58 L. R. A. 744.

Directions to the jury not to consider such statements does not cure the error. Smith *v.* Western Union Tel. Co., 55 Mo. App. 626.

Illustration.— In an action for damages for the unlawful furnishing of liquor to plaintiff's son, it was improper for plaintiff's counsel in argument to state that in all his years of practice he had never before known counsel for liquor dealers to ask the jury to go by the evidence. Hilliker *v.* Farr, 149 Mich. 444, 112 N. W. 1116.

97. Southwestern Tel., etc., Co. *v.* Taylor, (Tex. Civ. App. 1909) 118 S. W. 188.

Illustration.— The argument of counsel, in an action for injuries received by a passenger, that the passenger was his neighbor, that he wished the jury knew her as he knew her, that if they did they could not be made to believe that she was shamming, and that she was swearing to a lie, etc., was reversible error. Texas, etc., R. Co. *v.* Harrington, 44 Tex. Civ. App. 386, 98 S. W. 653.

98. Chicago City R. Co. *v.* Reddick, 139 Ill. App. 160. *Compare* Foss *v.* Smith, 79 Vt. 434, 65 Atl. 553, holding that the argument of counsel that, as a matter of common knowledge, it is easier to copy handwriting with a lead pencil than with a pen, is not reversible error, counsel merely appealing to the general experience of the jury.

99. Moran *v.* Baldi, 71 N. H. 490, 53 Atl. 307.

1. Illinois Cent. R. Co. *v.* Weiland, 179 Ill. 609, 54 N. E. 300.

to the jury records or opinions in other cases out of proceedings in which the cause at bar originated,[2] or instructions given on a former trial between the same parties in a different action.[3] Comments on matters not in evidence will not operate to reverse where no prejudice resulted,[4] and if counsel discusses facts not in evidence, he cannot complain if opposing counsel is permitted to do the same,[5] although he objects thereto and no objection was made to his doing so.[6]

15. Statements as to Damages. Counsel may properly state to the jury the amount of damages claimed in his declaration,[7] or the amount of damages which he thinks will be fair compensation for personal injuries received;[8] and he may state that damages are to be assessed for the future as well as for the past, where there is evidence tending to show a continuing injury.[9] It is not proper, however, for him to state that the law fixes the damages at a designated amount;[10] and it has been held that where such statements are approved by the court the judgment should be reversed.[11] But where the court instructs as to the measure of damages and the verdict shows that the jury were not influenced by an improper statement of counsel as to the measure of damages, there is no ground for reversal.[12] So it has been held that a statement as to damages, which counsel does not complete and which he offers to withdraw when interrupted, and does not argue further is not a ground for reversal;[13] and that remarks which merely go to the amount of damages, although erroneous, are not ground for reversal because the verdict could be remedied by remittitur if excessive;[14] and a statement that if the jury fixed plaintiff's damages at too low a sum the court could not raise it will not operate to reverse where there is nothing in the verdict to indicate that any portion of it was due to the improper statement.[15]

16. Reference to Verdicts in Similar Cases. It is improper and usually a ground for reversal for counsel in argument to refer to verdicts in similar cases and state the amount of damages awarded, and that such verdicts had been sustained by the courts.[16] If, however, it is apparent from the verdict that the jury was not influenced thereby, the verdict will be permitted to stand.[17]

17. Reference to Protection of Defendant by Insurance or Other Indemnity.[18] It is highly improper and ordinarily a ground for reversal for counsel in argument to tell the jury that defendant is insured against or has indemnity against any

2. Wolf *v.* Shannon, 50 Ill. App. 396; Nash *v.* Burns, 35 Ill. App. 296; Corning *v.* Woodin, 46 Mich. 44, 8 N. W. 572.

3. Harris *v.* Miner, 28 Ill. 135.

4. Tingley *v.* Times-Mirror Co., 151 Cal. 1, 89 Pac. 1097; Shull *v.* Avie, 113 Iowa 170, 84 N. W. 1031; Campbell Turnpike Road Co. *v.* Maxfield, 91 S. W. 1135, 28 Ky. L. Rep. 1198; Kerlin *v.* Swart, 143 Mich. 228, 106 N. W. 710; Benedict *v.* Port Huron, 124 Mich. 600, 83 N. W. 614; San Antonio Traction Co. *v.* Davis, (Tex. Civ. App. 1907) 101 S. W. 554.

5. Linsey *v.* Ramsey, 22 Ga. 627; Reeves *v.* State, 84 Ind. 116.

6. Reeves *v.* State, 84 Ind. 116.

7. West Chicago St. R. Co. *v.* Dedloff, 92 Ill. App. 547.

8. Graham *v.* Mattoon City R. Co., 234 Ill. 483, 84 N. E. 1070 [*affirming* 138 Ill. App. 70].

9. Chicago, etc., R. Co. *v.* Patton, 122 Ill. App. 174 [*affirmed* in 219 Ill. 214, 76 N. E. 381].

10. Chicago City R. Co. *v.* Reddick, 139 Ill. App. 160; Illinois Cent. R. Co. *v.* Rothschild, 134 Ill. App. 504.

11. Chicago City R. Co. *v.* Reddick, 139 Ill. App. 160.

12. Modlin *v.* Jones, 84 Nebr. 551, 121 N. W. 984.

13. Chicago, etc., R. Co. *v.* Vipond, 212 Ill. 199, 72 N. E. 22.

14. De la Vergne Refrigerating Mach. Co. *v.* Stahl, 24 Tex. Civ. App. 471, 60 S. W. 319.

15. Gibbs *v.* Poplar Bluff Light, etc., Co., 142 Mo. App. 19, 125 S. W. 840.

16. *Illinois.*— Quincy Gas, etc., Co. *v.* Bauman, 104 Ill. App. 600 [*affirmed* in 203 Ill. 295, 67 N. E. 807]. And see as sustaining this view Richardson *v.* Nelson, 221 Ill. 254, 77 N. E. 583.

Michigan.— Finn *v.* Adrian, 93 Mich. 504, 53 N. W. 614.

New Hampshire.— Noble *v.* Portsmouth, 67 N. H. 183, 30 Atl. 419.

New York.— Bagully *v.* Morning Journal Assoc., 38 N. Y. App. Div. 522, 56 N. Y. Suppl. 605.

Pennsylvania.— Stern *v.* Germantown Pass. R. Co., 28 Leg. Int. 30.

Tennessee.— Pullman Co. *v.* Pennock, 118 Tenn. 565, 102 S. W. 73.

17. Finn *v.* Adrian, 93 Mich. 504, 53 N. W. 614.

18. Asking questions as to whether defendant is indemnified see *supra*, VI, E.

verdict rendered against him in the case on trial.[19] Where, however, the court censures counsel and directs the jury to disregard the remarks and no motion is made for a mistrial the reviewing court will not interfere;[20] and the reviewing court will not reverse where the jury was instructed to disregard the remarks and the evidence on the merits is strongly in plaintiff's favor.[21] It has also been held that where the fact that defendant carries casualty insurance is brought out by him on cross-examination of one of plaintiff's witnesses, he cannot complain that continual references by plaintiff to such fact influenced the jury to return a liberal verdict.[22]

18. Appeals to Sympathy, Passion, or Prejudice[23]— a. Appeals to Sympathy. Appeals to sympathy so long as they are based on the facts in the case are not ordinarily considered improper and furnish no ground for complaint.[24] Some flights of eloquence, and the introduction of some touches of pathos in the discussion of the case, is allowable, provided there is no violation of the rule against the discussion of facts not in evidence, or which are not inferable from the sworn testimony in the case.[25] However, appeals to sympathy based on matters not in evidence and which cannot in any legitimate way be brought to the attention of the jury, may be ground for reversal.[26]

b. Appeals to Passion or Prejudice — (i) *In General.* In addressing the jury it is improper for counsel, by reference to extraneous matters, to appeal to the passions and prejudices of the jury;[27] and when the language used is such

19. *Illinois.*— Emery Dry Goods Co. *v.* De Hart, 130 Ill. App. 244; Himrod Coal Co. *v.* Beckwith, 111 Ill. App. 379; George A. Fuller Co. *v.* Darragh, 101 Ill. App. 664.

Kentucky.— Kentucky Wagon Mfg. Co. *v.* Duganics, (1908) 113 S. W. 128.

New York.— Hordern *v.* Salvation Army, 124 N. Y. App. Div. 674, 109 N. Y. Suppl. 131; Lassig *v.* Barsky, 87 N. Y. Suppl. 425; Lipschutz *v.* Ross, 84 N. Y. Suppl. 632. And see Frahm *v.* Siegel-Cooper Co., 131 N. Y. App. Div. 747, 116 N. Y. Suppl. 90.

Pennsylvania.— Hollis *v.* U. S. Glass Co., 220 Pa. St. 49, 69 Atl. 55; Walsh *v.* Wilkes Barre, 215 Pa. St. 226, 64 Atl. 407.

Tennessee.— Prewitt-Spurr Mfg. Co. *v.* Woodall, 115 Tenn. 605, 90 S. W. 623.

Texas.— Lone Star Brewing Co. *v.* Voith, (Civ. App. 1905) 84 S. W. 1100.

Vermont.— Daggett *v.* Champlain Mfg. Co., 71 Vt. 370, 45 Atl. 755.

Wisconsin.— See Waukowski *v.* Crivitz Pulp, etc., Co., 137 Wis. 123, 118 N. W. 643.

And see Tremblay *v.* Hornden, 162 Mass. 383, 38 N. E. 972.

Remarks not within rule.—A remark that the jury did not need "to worry much about the verdict against defendant" is not to be construed as an invitation to the jury to consider evidence excluded by the court to the effect that defendant was insured against liability for plaintiff's damages, in the absence of evidence showing such meaning. Burgess *v.* Stowe, 134 Mich. 204, 96 N. W. 29.

20. O'Neill *v.* Pruitt, 110 Ga. 577, 36 S. E. 59. But see Hordern *v.* Salvation Army, 124 N. Y. App. Div. 674, 109 N. Y. Suppl. 131.

21. Tanner *v.* Harper, 32 Colo. 156, 75 Pac. 404.

22. McTague *v.* Dowst, 51 N. Y. App. Div. 206, 64 N. Y. Suppl. 949.

23. **In criminal prosecutions** see Criminal Law, 12 Cyc. 581.

24. *Arkansas.*— Stecher Cooperage Works *v.* Steadman, 78 Ark. 381, 94 S. W. 41.

Georgia.—Atlantic Coast Line R. Co. *v.* Jones, 132 Ga. 189, 63 S. E. 834.

Iowa.— See Dowdell *v.* Wilcox, 64 Iowa 721, 21 N. W. 147.

New Hampshire.— Shute *v.* Exeter Mfg. Co., 69 N. H. 210, 40 Atl. 391.

Tennessee.— Ferguson *v.* Moore, 98 Tenn. 342, 39 S. W. 341.

Texas.— Gulf, etc., R. Co. *v.* Norfleet, 78 Tex. 321, 14 S. W. 703. But see Texas Cent. R. Co. *v.* Pledger, 36 Tex. Civ. App. 248, 81 S. W. 755.

25. Atlantic Coast Line R. Co. *v.* Jones, 132 Ga. 189, 63 S. E. 834.

26. McCarthy *v.* Spring Valley Coal Co., 232 Ill. 473, 83 N. E. 957; Chicago City R. Co. *v.* Math, 114 Ill. App. 350; Hopkins *v.* Hopkins, 132 N. C. 25, 43 S. E. 506.

27. *Florida.*— Seaboard Air Line R. Co. *v.* Smith, 53 Fla. 375, 43 So. 235.

Georgia.— Southern R. Co. *v.* Barlow, 104 Ga. 213, 30 S. E. 732, 69 Am. St. Rep. 166.

Illinois.— Peoria, etc., Traction Co. *v.* Vance, 234 Ill. 36, 84 N. E. 607; England *v.* Mississippi Valley Traction Co., 139 Ill. App. 572; Parlin, etc., Co. *v.* Scott, 137 Ill. App. 454; Chicago Union Traction Co. *v.* Arnold, 131 Ill. App. 599; Donk Brothers Coal, etc., Co. *v.* Hetherington, 128 Ill. App. 256; Chicago City R. Co. *v.* Schaefer, 121 Ill. App. 334; Chicago City R. Co. *v.* Math, 114 Ill. App. 350.

Indiana.— U. S. Cement Co. *v.* Cooper, 172 Ind. 599, 88 N. E. 69 [*reversing* (App. 1907) 82 N. E. 981; Southern R. Co. *v.* Bulleit, 40 Ind. App. 457, 82 N. E. 474.

Iowa.—Wheeler, etc., Mfg. Co. *v.* Sterrett, 94 Iowa 158, 62 N. W. 675.

as evinces a studied purpose to arouse the prejudices of the jury based upon facts not in the case, the court cannot overlook it or consider that a party against whom such effort has been made has had a fair consideration of his case at the hands of the jury.[28]

(II) *APPEALS TO PREJUDICE AGAINST CORPORATIONS AS SUCH.* It is very generally held improper for counsel in argument to make statements calculated to prejudice the jury against a party who is a corporation, because it is a corporation.[29] Whether such remarks will authorize a reversal depends on the particular language of the remarks, the circumstances under which they were made, and the probability that the jury were influenced thereby. Not all improper remarks will justify a reversal. If it does not appear probable that the jury was improperly influenced the judgment should not be reversed.[30] It is other-

Kansas.— Surface *v.* Douglas, 1 Kan. App. 78, 41 Pac. 207.

Kentucky.— Kentucky Wagon Mfg. Co. *v.* Duganics, (1908) 113 S. W. 128; Louisville, etc., R. Co. *v.* Carter, 86 S. W. 685, 27 Ky. L. Rep. 748; Louisville, etc., R. Co. *v.* Smith, 84 S. W. 755, 27 Ky. L. Rep. 257; Warren *v.* Nash, 68 S. W. 658, 24 Ky. L. Rep. 479.

Michigan.— Holmes *v.* Loud, 149 Mich. 410, 112 N. W. 1109; Dolph *v.* Lake Shore, etc., R. Co., 149 Mich. 278, 112 N. W. 981; Detroit Nat. Bank *v.* Union Trust Co., 145 Mich. 656, 108 N. W. 1092, 116 Am. St. Rep. 319; Hillman *v.* Detroit United R. Co., 137 Mich. 184, 100 N. W. 399; Cluett *v.* Rosenthal, 100 Mich. 193, 58 N. W. 1009, 43 Am. St. Rep. 446. And see Hyman *v.* Kirt, 153 Mich. 113, 116 N. W. 536.

Missouri.— Beck *v.* Quincy, etc., R. Co., 129 Mo. App. 7, 108 S. W. 132; Mahner *v.* Linck, 70 Mo. App. 380.

Nebraska.— Stratton *v.* Nye, 45 Nebr. 619, 63 N. W. 928.

New York.— Loughlin *v.* Brassil, 187 N. Y. 128, 79 N. E. 854 [*reversing* 102 N. Y. App. Div. 617, 92 N. Y. Suppl. 1132]; Cleveland *v.* New York, etc., R. Co., 123 N. Y. App. Div. 732, 108 N. Y. Suppl. 362; Kelsey *v.* New York, 123 N. Y. App. Div. 381, 107 N. Y. Suppl. 1089.

North Carolina.— Hopkins *v.* Hopkins, 132 N. C. 25, 43 S. E. 506.

Ohio.— Union Cent. L. Ins. Co. *v.* Cheever, 36 Ohio St. 201, 38 Am. Rep. 573 [*reversing* 7 Ohio Dec. (Reprint) 254, 2 Cinc. L. Bul. 19].

South Carolina.— Kirby *v.* Western Union Tel. Co., 77 S. C. 404, 58 S. E. 10, 122 Am. St. Rep. 580.

Texas.— Gulf, etc., R. Co. *v.* Butcher, 83 Tex. 309, 18 S. W. 583; Ivy *v.* Ivy, 51 Tex. Civ. App. 397, 112 S. W. 110; Ft. Worth, etc., R. Co. *v.* Hays, 51 Tex. Civ. App. 114, 111 S. W. 446; Colorado Canal Co. *v.* McFarland, 50 Tex. Civ. App. 92, 109 S. W. 435; San Antonio Traction Co. *v.* Lambkin, (Civ. App. 1907) 99 S. W. 574; Missouri, etc., R. Co. *v.* Cherry, 44 Tex. Civ. App. 232, 97 S. W. 712.

Virginia.— Southern R. Co. *v.* Simmons, 105 Va. 651, 55 S. E. 459.

Wisconsin.— Neumeister *v.* Goddard, 133 Wis. 405, 113 N. W. 733; Waterman *v.* Chicago, etc., R. Co., 82 Wis. 613, 52 N. W. 247, 1136; Bremmer *v.* Green Bay, etc., R. Co., 61 Wis. 114, 20 N. W. 687.

See 46 Cent. Dig. tit. "Trial," § 303 *et seq.*

28. Cluett *v.* Rosenthal, 100 Mich. 193, 58 N. W. 1009, 43 Am. St. Rep. 446.

29. *Alabama.*— Commercial F. Ins. Co. *v.* Allen, 80 Ala. 571, 1 So. 202.

Georgia.— Western, etc., R. Co. *v.* Cox, 115 Ga. 715, 42 S. E. 74.

Illinois.— Wabash R. Co. *v.* Billings, 212 Ill. 37, 72 N. E. 2; Lake Erie, etc., R. Co. *v.* Middleton, 142 Ill. 550, 32 N. E. 453; Swift *v.* Rennard, 128 Ill. App. 181; Chicago, etc., R. Co. *v.* Pelligreen, 59 Ill. App. 558; Chicago, etc., R. Co. *v.* Brogonier, 13 Ill. App. 467.

Iowa.— Wheeler, etc., Mfg. Co. *v.* Sterrett, 94 Iowa 158, 62 N. W. 675.

Kentucky.—Louisville, etc., R. Co. *v.* Chandler, 70 S. W. 666, 24 Ky. L. Rep. 998, 72 S. W. 805, 24 Ky. L. Rep. 2035.

Michigan.— Whipple *v.* Michigan Cent. R. Co., 143 Mich. 41, 106 N. W. 690; Hillman *v.* Detroit United R. Co., 137 Mich. 184, 100 N. W. 399; Johnson *v.* Detroit, etc., R. Co., 135 Mich. 353, 97 N. W. 760; People *v.* Detroit, etc., Plank-Road Co., 125 Mich. 366, 84 N. W. 290.

New York.— Williams *v.* Brooklyn El. R. Co., 126 N. Y. 96, 26 N. E. 1048; Kinne *v.* International R. Co., 90 N. Y. Suppl. 930.

Texas.— Galveston, etc., R. Co. *v.* Kutac, 72 Tex. 643, 11 S. W. 127; Galveston, etc., R. Co. *v.* Cooper, 70 Tex. 67, 8 S. W. 68; Hartford F. Ins. Co. *v.* Becton, (Civ. App. 1909) 124 S. W. 474, (1910) 125 S. W. 883; Texas Cent. R. Co. *v.* Parker, 33 Tex. Civ. App. 514, 77 S. W. 42; Ft. Worth, etc., R. Co. *v.* Lock, 30 Tex. Civ. App. 426, 70 S. W. 456; Gulf, etc., R. Co. *v.* Scott, 7 Tex. Civ. App. 619, 26 S. W. 998; Galveston, etc., R. Co. *v.* Silegman, (Civ. App. 1893) 23 S. W. 298; Houston Water Works Co. *v.* Harris, 3 Tex. Civ. App. 475, 23 S. W. 46.

Wisconsin.— Masterson *v.* Chicago, etc., R. Co., 102 Wis. 571, 78 N. W. 757.

See 46 Cent. Dig. tit. "Trial," § 305.

30. Lake Erie, etc., R. Co. *v.* Middleton, 142 Ill. 550, 32 N. E. 453; Lake Erie, etc., R. Co. *v.* Close, 5 Ind. App. 444, 32 N. E. 588; Louisville, etc., R. Co. *v.* Chandler, 70 S. W. 666, 24 Ky. L. Rep. 998, 72 S. W. 805, 24 Ky. L. Rep. 2035; Williams *v.* Cleveland, etc., R. Co., 102 Mich. 537, 61 N. W. 52. *Compare*

wise, however, where it appears probable that the verdict was influenced by the improper remarks.[31]

(III) *Appeals to National, Patriotic, Sectional, Local, or Racial Prejudice.* Appeals to national, patriotic, racial, sectional, or local prejudice in argument are very generally condemned,[32] and may or may not constitute reversible error according to the circumstances of the case and the nature of the remarks made. It has accordingly been held that if it is apparent or probable that the verdict was affected by the remarks the judgment should be reversed,[33]

Newman *v.* Vicksburg, etc., R. Co., 64 Miss. 115, 8 So. 172.

Remarks held not to warrant reversal.— It is not reversible error for counsel in a personal injuries case for injuries resulting in death to say that railroad companies have somehow or other fixed, by an act of the legislature, a limit beyond which jurors cannot go (Chicago, etc., R. Co. *v.* Perkins, 125 Ill. 127, 17 N. E. 1); or that thousands of men annually lost their lives by negligence of railroads in failing to provide proper and suitable appliances for operation of their machines, and that more employees lost their lives from this cause than were killed in the war between Russia and Japan (Louisville, etc., R. Co. *v.* Wilson, 99 S. W. 634, 30 Ky. L. Rep. 734); or "You should render such a verdict here as will teach this railroad company it must obey the law," and "give us such a sum of money as will show the railroad company that it cannot violate the law" (Louisville, etc., R. Co. *v.* Chandler, 70 S. W. 666, 24 Ky. L. Rep. 998, 72 S. W. 805, 24 Ky. L. Rep. 2035).

31. Swift *v.* Rennard, 128 Ill. App. 181; Chicago, etc., R. Co. *v.* Pelligreen, 59 Ill. App. 558; Orendorf *v.* New York Cent., etc., R. Co., 119 N. Y. App. Div. 638, 104 N. Y. Suppl. 222; Galveston, etc., R. Co. *v.* Cooper, 70 Tex. 67, 8 S. W. 68; Ft. Worth, etc., R. Co. *v.* Lock, 30 Tex. Civ. App. 426, 70 S. W. 456; Houston Water Works Co. *v.* Harris, 3 Tex. Civ. App. 475, 23 S. W. 46.

Remarks held to authorize reversal.— It is reversible error for counsel in a suit against a corporation to say that corporations have no soul, no conscience, no sympathy, and no God, and that the only way to reach them is to make them pay money (Western, etc., R. Co. *v.* Cox, 115 Ga. 715, 42 S. E. 74); to say that they have rights that other parties do not have, that they can condemn graveyards and disturb the resting place of the sacred dead (Gulf, etc., R. Co. *v.* Scott, 7 Tex. Civ. App. 619, 26 S. W. 998); to say that these bloated corporations that can run their road right through a man's house or yard ought to be severely dealt with (Galveston, etc., R. Co. *v.* Cooper, 70 Tex. 67, 8 S. W. 68); to say that railroad corporations will not do justice to any one unless compelled to do so, that they will tell parties injured to sue and will fight them with all their power, and take any advantage they can regardless of the merits of the case, and to advise the jury to make them pay the last cent (Galveston, etc., R. Co. *v.* Kutac, 72 Tex. 643, 11 S. W. 127); to say of such a corporation defendant that it murders people and kills innocent women and children sometimes (Pittsburg, etc., R. Co. *v.* Story, 63 Ill. App. 239); or to state that such corporations can prostitute justice and to say that the facts pointed strongly to subornation of perjury by defendant corporation (Masterson *v.* Chicago, etc., R. Co., 102 Wis. 571, 78 N. W. 757); or in a suit against a railroad corporation, by one of its employees, for personal injuries, for counsel to read to the jury a newspaper paragraph calculated to convey the idea that railroad corporations are wholly indifferent to the lives and safety of their employees (Chicago, etc., R. Co. *v.* Brogonier, 13 Ill. App. 467); or to read to the jury a newspaper article, entirely irrelevant to the facts of the case, commenting on the utter disregard by corporations of the rights of private citizens (Williams *v.* Brooklyn El. R. Co., 126 N. Y. 96, 26 N. E. 1048 [*reversing* 10 N. Y. Suppl. 929]).

32. *Alabama.*— Davis *v.* Alexander City, 137 Ala. 206, 33 So. 863.

Illinois.— Freeman *v.* Dempsey, 41 Ill. App. 554.

Iowa.— Dowdell *v.* Wilcox, 64 Iowa 721, 21 N. W. 147.

Michigan.— Smith *v.* Jennings, 121 Mich. 393, 80 N. W. 236; Cluett *v.* Rosenthal, 100 Mich. 193, 58 N. W. 1009, 43 Am. St. Rep. 446; Bedford *v.* Penny, 58 Mich. 424, 25 N. W. 381.

Missouri.— Fathman *v.* Tumilty, 34 Mo. App. 236.

Texas.— Moss *v.* Sanger, 75 Tex. 321, 12 S. W. 619; Ferguson-McKinney Dry Goods Co. *v.* City Nat. Bank, 31 Tex. Civ. App. 238, 71 S. W. 604; Garritty *v.* Rankin, (Civ. App. 1900) 55 S. W. 367.

See 46 Cent. Dig. tit. "Trial," § 304.

Argument not objectionable to rule.— Argument of counsel for a negro to a jury of white men that the negro was entitled to the same rights in court as a white man, and was equal to the white man before the law, was merely an argument for justice, and was not objectionable as appealing to the prejudice of the jury. Texas, etc., R. Co. *v.* McCoy, (Civ. App. 1909) 117 S. W. 446. So in action for injuries it was held not erroneous for plaintiff's counsel to refer to her as "this honest German girl," though nearly all the members of the jury were Germans, it not appearing that counsel sought a verdict because his client was an "honest German girl." G. A. Duerler Mfg. Co. *v.* Eichorn, 44 Tex. Civ. App. 638, 99 S. W. 715.

33. Freeman *v.* Dempsey, 41 Ill. App. 554 (in which case plaintiff was denounced as "a Jew, a Christ-killer, a murderer of our

On the other hand the judgment should not be reversed where it is not probable that prejudice resulted.[34]

(iv) *References to Poverty or Wealth of Parties.* Statements in argument unsupported by evidence, relating to the poverty of one of the parties or the wealth of the other, are very generally held improper,[35] and this impropriety may or may not be ground for reversal according to circumstances. If the court directs the jury not to consider such statements,[36] or tells the jury that the parties stand on an equal footing,[37] such statements will not ordinarily warrant a reversal. But it has been held otherwise where the trial court refused to withdraw the remarks from the jury,[38] and such statements are ground for reversal when coupled with a persistent effort to induce the jury to favor a resident as against a non-resident.[39] A mere reference to the poverty of plaintiff when shown by the evidence will not be ground for reversal;[40] and where there is evidence of plaintiff's want of means it is legitimate argument to state that the rudeness of plaintiff's plans used in evidence was due to that fact.[41] So it has been held not improper to state that the reason why plaintiff returned to work before fully recovering from his injuries was because he had to work to support his family, especially where counsel disclaimed any intent to influence the jury as to the amount of recovery;[42] and it is within the fair province of argument to refer to the standing and wealth of a party when such reference is pertinent to a plausible argument competent in the cause, and is not in any way made an issue before the jury.[43]

19. Retaliatory Statements and Remarks.[44] Improper language used in argument is not ground for reversal, where such language was provoked by the remarks of counsel for the adverse party,[45] unless it appears quite plainly that

Savior"); Cluett *v.* Rosenthal, 100 Mich. 193, 58 N. W. 1009, 43 Am. St. Rep. 446; Fathman *v.* Tumilty, 34 Mo. App. 236; Moss *v.* Sanger, 75 Tex. 321, 12 S. W. 619.

34. Dowdell *v.* Wilcox, 64 Iowa 721, 21 N. W. 147; Gulf, etc., R. Co. *v.* Coon, 69 Tex. 730, 7 S. W. 492.

35. U. S. Cement Co. *v.* Cooper, (Ind. App. 1907) 82 N. E. 981; Louisville, etc., R. Co. *v.* Morgan, 110 Ky. 740, 62 S. W. 736, 23 Ky. L. Rep. 121; Davis *v.* Adrian, 147 Mich. 300, 110 N. W. 1084; Johnson *v.* Detroit, etc., R. Co., 135 Mich. 353, 97 N. W. 760; Burt *v.* Staffeld, 121 Mich. 390, 80 N. W. 236; Ft. Worth Belt R. Co. *v.* Johnson, (Tex. Civ. App. 1910) 125 S. W. 387; Wells *v.* Boyle, (Tex. Civ. App. 1906) 98 S. W. 441 [*reversed* on other grounds in 100 Tex. 577, 102 S. W. 107]; Texas Cent. R. Co. *v.* Pledger, 36 Tex. Civ. App. 248, 81 S. W. 755; Chicago, etc., R. Co. *v.* Langston, 19 Tex. Civ. App. 568, 47 S. W. 1027, 48 S. W. 610; The Oriental *v.* Barclay, 16 Tex. Civ. App. 193, 41 S. W. 117. And see Norris *v.* Whyte, 158 Mo. 20, 57 S. W. 1037.

36. Dugan *v.* Chicago, etc., R. Co., 85 Wis. 609, 55 N. W. 894.

37. Davis *v.* Adrian, 147 Mich. 300, 110 N. W. 1084.

38. U. S. Cement Co. *v.* Cooper, (Ind. App. 1907) 82 N. E. 981.

39. Smith *v.* Jennings, 121 Mich. 393, 80 N. W. 236.

40. Chicago *v.* Todd, 50 Ill. App. 609; Gilman *v.* Laconia, 71 N. H. 212, 51 Atl. 631.

41. Hersey *v.* Hutchins, 70 N. H. 130, 46 Atl. 33.

42. Cook *v.* Smith-Lowe Co., 135 Iowa 31, 109 N. W. 798.

43. McKinnie *v.* Lane, 133 Ill. App. 438 [*affirmed* in 230 Ill. 544, 82 N. E. 878].

44. **In criminal prosecutions** see Criminal Law, 12 Cyc. 582.

45. *Illinois.*— Marder *v.* Leary, 137 Ill. 319, 26 N. E. 1093; Ellsworth *v.* Cummins, 134 Ill. App. 397; Chicago City R. Co. *v.* Shreve, 128 Ill. App. 462 [*affirmed* in 226 Ill. 530, 80 N. E. 1049].

Kansas.—Atchison, etc., R. Co. *v.* Dickerson, 4 Kan. App. 345, 45 Pac. 975; Illinois Cent. R. Co. *v.* Colly, 86 S. W. 536, 27 Ky. L. Rep. 730.

Michigan.— Sterling *v.* Detroit, 134 Mich. 22, 95 N. W. 986; Wilkins *v.* Flint, 128 Mich. 262, 87 N. W. 195; Little *v.* Williams, 107 Mich. 652, 65 N. W. 568; Eastman *v.* Lake Shore, etc., R. Co., 101 Mich. 597, 60 N. W. 309.

Missouri.— Huckshold *v.* St. Louis, etc., R. Co., 90 Mo. 548, 2 S. W. 794.

Tennessee.— Jackson *v.* Pool, 91 Tenn. 448, 19 S. W. 324.

Texas.— Paschal *v.* Owen, 77 Tex. 583, 14 S. W. 203; Gulf, etc., R. Co. *v.* Witte, 68 Tex. 295, 4 S. W. 490; International, etc., R. Co. *v.* Goswick, (Civ. App. 1904) 83 S. W. 423 [*affirmed* in 98 Tex. 477, 85 S. W. 785]; Belknap *v.* Groover, (Civ. App. 1900) 56 S. W. 249; San Antonio, etc., R. Co. *v.* Barnett, 12 Tex. Civ. App. 321, 34 S. W. 139; St. Louis, etc., R. Co. *v.* Daugherty, (Civ. App. 1895) 31 S. W. 705; Gulf, etc., R. Co. *v.* Scott, (Civ. App. 1894) 26 S. W. 995. See also St. Louis Southwestern R. Co. *v.* Granger, (Civ. App. 1907) 100 S. W. 987.

Vermont.— McMullin *v.* Erwin, 69 Vt. 338, 38 Atl. 62.

See 46 Cent. Dig. tit. "Trial," § 310.

the verdict was influenced thereby;[46] and especially is this true where exceptions to the argument are sustained,[47] and the jury specifically instructed to disregard it.[48] Moreover, the rule applies, although the language used would clearly authorize a reversal in the absence of such provocation.[49] So, where a party while testifying, charged the counsel of the adverse party with the suppression of evidence, and the counsel replied that the party was a liar, and the court reproved the counsel, his remark was not ground for reversal.[50]

G. Admissibility of Evidence to Rebut Statements. As statements of counsel to the jury on summing up are not testimony, evidence cannot be introduced to contradict them.[51] Statements of counsel as to what he expects to prove do not have the weight of testimony, and if not proved are to be disregarded, and hence evidence not otherwise competent cannot be admitted to discredit a statement which there is no attempt made to prove.[52]

H. Withdrawal or Correction of Improper Remarks.[53] Where an improper remark of counsel in argument is promptly withdrawn,[54] and the with-

But see Welch *v.* Union Cent. L. Ins. Co., 117 Iowa 394, 90 N. W. 828; Concord Land, etc., Co. *v.* Clough, 70 N. H. 627, 47 Atl. 704; Baldwin *v.* Grand Trunk R. Co., 64 N. H. 596, 15 Atl. 411; Bullard *v.* Boston, etc., R. Co., 64 N. H. 27, 5 Atl. 838, 10 Am. St. Rep. 367.

The practice of using language in an argument referable to facts not in evidence, and calculated to rouse the prejudices of the jury against a party to the cause, should not be permitted. But when such language is used in response to similar language used by the adverse counsel, and equally unauthorized, the party provoking such a course of argument will not be heard to complain on appeal. Lyon *v.* Hammond, etc., R. Co., 167 Ill. 527, 47 N. E. 775; Galvin *v.* Meridian Nat. Bank, 129 Ind. 439, 28 N. E. 847; Reeves *v.* State, 84 Ind. 116; Miner *v.* Lorman, 66 Mich. 530, 33 N. W. 866; Texas, etc., R. Co. *v.* Garcia, 62 Tex. 285; McMullin *v.* Erwin, 69 Vt. 338, 38 Atl. 62. Thus where counsel goes outside the record and makes unwarrantable statements favorable to the character of a witness, he cannot complain if opposing counsel, in answer thereto, makes unfavorable statements not warranted by the record. Sterling *v.* Detroit, 134 Mich. 22, 95 N. W. 986. But, although a party may be estopped to complain of the other party going out of the record in argument, by himself going out of it, the estoppel arises only when he is followed out of the record by the party undertaking to reply, and does not serve as a license to ignore the record generally. St. Louis, etc., R. Co. *v.* Dickens, (Tex. Civ. App. 1900) 56 S. W. 124.

After defendant's counsel has challenged plaintiff's counsel to show why certain testimony is not produced, it is not an abuse of judicial discretion to allow plaintiff's counsel to explain the absence of the testimony to the jury. King *v.* Rea, 13 Colo. 69, 21 Pac. 1084.

Where defendant's counsel comments on a case handed to him by the opposite counsel, as the law on which he relies, the latter in his turn may do the same. Linsey *v.* Ramsey, 22 Ga. 627.

46. Sweet *v.* Michigan Cent. R. Co., 87 Mich. 559, 49 N. W. 882; Atchison, etc., R. Co. *v.* Bryan, (Tex. Civ. App. 1894) 28 S. W. 98.

47. San Antonio *v.* Wildenstein, 49 Tex. Civ. App. 514, 109 S. W. 231.

48. Western Union Tel. Co. *v.* Sloss, 45 Tex. Civ. App. 153, 100 S. W. 354.

49. Ellsworth *v.* Cummins, 134 Ill. App. 397.

50. Muncie Wheel, etc., Co. *v.* Finch, 150 Mich. 274, 113 N. W. 1107.

51. Munzer *v.* Stern, 105 Mich. 523, 63 N. W. 513, 55 Am. St. Rep. 468, 29 L. R. A. 859; Hirshfield *v.* Waldron, 83 Mich. 116, 47 N. W. 239.

Ex parte affidavits and letters of plaintiff's attorney are inadmissible to rebut imputations of fraud and bad faith against defendant, made by such attorney in his preliminary statement to the jury. Nunn *v.* Mayes, 9 Tex. Civ. App. 366, 30 S. W. 479.

52. Howard *v.* Illinois Trust, etc., Bank, 189 Ill. 568, 59 N. E. 1106; Nunn *v.* Mayes, 9 Tex. Civ. App. 366, 30 S. W. 479.

53. **In criminal prosecutions** see CRIMINAL LAW, 12 Cyc. 584 *et seq.*

54. *Alabama.*— Tutwiler Coal, etc., Co. *v.* Nail, 141 Ala. 374, 37 So. 634. *Compare* Wolffe *v.* Minnis, 74 Ala. 386.

Arkansas.— St. Louis, etc., R. Co. *v.* Pell, 89 Ark. 87, 115 S. W. 957.

Iowa.— Erb *v.* German American Ins. Co., 98 Iowa 606, 67 N. W. 583, 40 L. R. A. 845.

Michigan.— Wheeler *v.* Jenison, 120 Mich. 422, 79 N. W. 643.

Missouri.— Wellman *v.* Metropolitan St. R. Co., 219 Mo. 126, 118 S. W. 31; Nolan *v.* Johns, 126 Mo. 159, 28 S. W. 492; Almond *v.* Modern Woodmen of America, 133 Mo. App. 382, 113 S. W. 695; Hayes *v.* Continental Casualty Co., 98 Mo. App. 410, 72 S. W. 135.

Nebraska.— Golder *v.* Lund, 50 Nebr. 867, 70 N. W. 379.

New Hampshire.— Illinois University *v.* Spalding, 71 N. H. 163, 51 Atl. 731, 62 L. R. A. 817.

New York.— Patterson *v.* Heiss, 110 N. Y. Suppl. 1042.

Texas.— Texas Standard Cotton Oil Co. *v.* Hanlon, 79 Tex. 678, 15 S. W. 703; St. Louis

drawal is frank,[55] and the court instructs the jury to disregard the improper remark,[56] and rebukes counsel for making the same;[57] or where the court instructs the jury to disregard such remark and it is subsequently withdrawn,[58] an exception thereto will not avail, in the absence of a showing that the remark was prejudicial,[59] or where it is apparent that it was not harmful.[60] Improper remarks of counsel in argument are not cause for reversal where the court rebukes counsel,[61] and the remarks are not shown to have been prejudicial,[62] or where no further action

Southwestern R. Co. *v.* Browning, (Civ. App. 1909) 118 S. W. 245; Texas Midland R. Co. *v.* Geraldon, (Civ. App. 1909) 117 S. W. 1004; Chicago, etc., R. Co. *v.* Johnson, (Civ. App. 1908) 111 S. W. 758; Missouri, etc., R. Co. *v.* Hibbitts, 49 Tex. Civ. App. 419, 109 S. W. 228; San Antonio, etc., R. Co. *v.* Martin, 49 Tex. Civ. App. 197, 108 S. W. 981; G. A. Duerler Mfg. Co. *v.* Eichhorn, 44 Tex. Civ. App. 638, 99 S. W. 715; San Antonio, etc., R. Co. *v.* McMillan, (Civ. App. 1906) 98 S. W. 421 [*reversed* on other grounds in 100 Tex. 562, 102 S. W. 103].

Vermont.— Bolton *v.* Ovitt, 80 Vt. 362, 67 Atl. 881; McKenzie *v.* Boutwell, 79 Vt. 383, 65 Atl. 99; Kilpatrick *v.* Grand Trunk R. Co., 74 Vt. 288, 52 Atl. 531; Currier *v.* Robinson, 61 Vt. 196, 18 Atl. 147.

Wisconsin.— Hinton *v.* Cream City R. Co., 65 Wis. 323, 27 N. W. 147.

United States.— Dunlop *v.* U. S., 165 U. S. 486, 17 S. Ct. 375, 41 L. ed. 799; Alaska-Treadwell Gold Min. Co. *v.* Cheney, 162 Fed. 593, 89 C. C. A. 351; St. Louis, etc., R. Co. *v.* Rose, 159 Fed. 129, 86 C. C. A. 144.

See 46 Cent. Dig. tit. "Trial," § 315.

Contra.— Illinois Cent. R. Co. *v.* Souders, 178 Ill. 585, 53 N. E. 408; West Chicago St. R. Co. *v.* Musa, 80 Ill. App. 223.

Withdrawal if made before the case is submitted to the jury is in time. Hollenbeck *v.* Missouri Pac. R. Co., 141 Mo. 97, 38 S. W. 723, 41 S. W. 887.

55. Kennedy *v.* Sullivan, 136 Ill. 94, 26 N. E. 382 [*affirming* 34 Ill. App. 46].

Spirit and manner of retracting remark.— While it is, in general, true, that a full retraction by counsel of an improper remark to the jury is held to cure the mischief done, this must depend upon the spirit and manner of retraction. Douglas *v.* Carr, 80 Vt. 392, 67 Atl. 1089.

56. *Alabama.*—Alabama Great Southern R. Co. *v.* Frazier, 93 Ala. 45, 9 So. 303, 30 Am. St. Rep. 28.

Arkansas.— St. Louis, etc., R. Co. *v.* Pell, 89 Ark. 87, 115 S. W. 957; Arden Lumber Co. *v.* Henderson Iron Works, etc., Co., 83 Ark. 240, 103 S. W. 185; Little Rock, etc., R. Co. *v.* Cavenesse, 48 Ark. 106, 2 S. W. 505.

Illinois.— Chicago, etc., R. Co. *v.* McDonnell, 194 Ill. 82, 62 N. E. 308 [*affirming* 91 Ill. App. 488]. *Contra,* Porter *v.* Day, 44 Ill. App. 256.

Iowa.— Westercamp *v.* Brooks, 115 Iowa 159, 88 N. W. 372.

Michigan.— Leslie *v.* Jackson, etc., Traction Co., 134 Mich. 518, 96 N. W. 580; Evans *v.* Montgomery, 95 Mich. 497, 55 N. W. 362.

Missouri.— Parker *v.* St. Louis Transit Co., 108 Mo. App. 465, 83 S. W. 1016.

Ohio.— Cleveland City R. Co. *v.* Roebuck, 22 Ohio Cir. Ct. 99, 12 Ohio Cir. Dec. 262.

Texas.— Gulf, etc., R. Co. *v.* Johnson, 83 Tex. 628, 19 S. W. 151; Sinclair *v.* Stanley, 69 Tex. 718, 7 S. W. 511; San Antonio, etc., R. Co. *v.* Martin, 49 Tex. Civ. App. 197, 108 S. W. 981; Consolidated Kansas City Smelting, etc., Co. *v.* Binkley, 45 Tex. Civ. App. 100, 99 S. W. 181; Cane Belt R. Co. *v.* Crosson, 39 Tex. Civ. App. 369, 87 S. W. 867; International, etc., R. Co. *v.* Mercer, (Civ. App. 1904) 78 S. W. 562.

Vermont.— McKenzie *v.* Boutwell, 79 Vt. 383, 65 Atl. 99.

Wisconsin.— Glettler *v.* Sheboygan Light, etc., R. Co., 130 Wis. 137, 109 N. W. 973.

See 46 Cent. Dig. tit. "Trial," § 315.

Contra.— McHenry Coal Co. *v.* Sneddon, 98 Ky. 684, 34 S. W. 228.

A withdrawal without an instruction to disregard is not sufficient. Robertson *v.* Madison, 67 N. H. 205, 29 Atl. 777.

57. McKnight *v.* Detroit, etc., R. Co., 135 Mich. 307, 97 N. W. 772; Leach *v.* Detroit Electric R. Co., 125 Mich. 373, 84 N. W. 316; Christensen *v.* Lambert, 66 N. J. L. 531, 49 Atl. 577; Chicago, etc., R. Co. *v.* Musick, 33 Tex. Civ. App. 177, 76 S. W. 219, holding, however, that the rebuke must be prompt.

58. West Chicago St. R. Co. *v.* Annis, 165 Ill. 475, 46 N. E. 264 [*affirming* 62 Ill. App. 180]; International, etc., R. Co. *v.* Reeves, 35 Tex. Civ. App. 162, 79 S. W. 1099; Billings *v.* Metropolitan L. Ins. Co., 70 Vt. 477, 41 Atl. 516.

59. Baker *v.* Independence, 93 Mo. App. 165; Brown *v.* Perex, 89 Tex. 282, 34 S. W. 725; Texas, etc., R. Co. *v.* McDonald, (Tex. Civ. App. 1905) 85 S. W. 493; Meyer *v.* Milwaukee Electric R., etc., Co., 116 Wis. 336, 93 N. W. 6.

60. Furnald *v.* Burbank, 67 N. H. 595, 30 Atl. 409; Gulf, etc., R. Co. *v.* McMahan, 6 Tex. Civ. App. 601, 26 S. W. 159.

61. Cullar *v.* Missouri, etc., R. Co., 84 Mo. App. 340; Brown *v.* Silver, 2 Nebr. (Unoff.) 164, 96 N. W. 281; Kiekhoefer *v.* Hidershide, 113 Wis. 280, 89 N. W. 189.

62. *Illinois.*— Chicago, etc., R. Co. *v.* Zapp, 209 Ill. 339, 70 N. E. 623 [*affirming* 110 Ill. App. 553].

Kentucky.— Louisville, etc., R. Co. *v.* Pointer, 113 Ky. 952, 69 S. W. 1108, 24 Ky. L. Rep. 772.

Michigan.— Glasier *v.* Ypsilanti, 127 Mich. 674, 87 N. W. 52, the court immediately placing the matter in the right light before the jury.

Missouri.— Bradley *v.* Spickardsville, 90 Mo. App. 416.

is asked by the complaining party.[63] So there is no ground for reversal if the court promptly sustains an objection thereto,[64] and directs the jury to disregard them;[65] or without sustaining an objection thereto tells the jury to disregard

Pennsylvania.— Moore *v.* Neubert, 21 Pa. Super Ct. 144.

Texas.— Texas, etc., R. Co. *v.* Kingston, 30 Tex. Civ. App. 24, 68 S. W. 518; Sherman etc., R. Co. *v.* Bell, (Civ. App. 1900) 58 S. W. 147; Brown *v.* Perez, (Civ. App. 1895) 32 S. W. 546.

63. *California.*— Matts *v.* Borba, (1894) 37 Pac. 159.

Georgia.— Southern R. Co. *v.* Brown, 126 Ga 1, 54 S. E. 911.

Illinois.— Chicago *v.* Leseth, 142 Ill. 642, 32 N. E. 428.

Massachusetts.—American Electrical Works *v.* New England Electric R. Constr. Co., 186 Mass. 546, 72 N. E. 64.

Michigan.— Warn *v.* Flint, 140 Mich. 573, 104 N. W. 37.

Missouri.— Wendler *v.* People's House Furnishing Co., 165 Mo. 527, 65 S. W. 737; McGinnis *v.* B. M. Rigby Printing Co., 122 Mo. App. 227, 99 S. W. 4.

New Hampshire.— Lee *v.* Dow, 73 N. H. 101, 59 Atl. 374.

64. Swift *v.* Rutkowski, 182 Ill. 18, 54 N. E. 1038; Springfield Boiler, etc., Co. *v.* Parks, 123 Ill. App. 503 [*affirmed* in 222 Ill. 355, 78 N. E. 809]; Chicago, etc., Electric R. Co. *v.* Herbert, 115 Ill. App. 248; U. S. *v.* Alexander, 119 Fed. 1015; Portland Gold Min Co. *v.* Flaherty, 111 Fed. 312, 49 C. C. A. 361.

65. *Arkansas.*— Carpenter *v.* Hammer, 75 Ark. 347, 87 S. W. 646; Ft. Smith Lumber Co. *v.* Cathey, 74 Ark. 604, 86 S. W. 806; Day *v.* Ferguson, 74 Ark. 298, 85 S. W. 771.

California.—Allen *v.* McKay, (1902) 70 Pac. 8; Lanigan *v.* Neely, 4 Cal. App. 760, 89 Pac. 441.

Georgia.— Towner *v.* Thompson, 82 Ga. 740, 9 S. E. 672; City Electric R. Co. *v.* Salmon, 1 Ga. App. 491, 57 S. E. 926.

Illinois.— Springfield Boiler, etc., Co. *v.* Parks, 222 Ill. 355, 78 N. E. 809 [*affirming* 123 Ill. App. 503]; Schwartz *v.* McQuaid, 214 Ill. 357, 73 N. E. 582, 105 Am. St. Rep. 112; Indiana, etc., R. Co. *v.* Otstot, 212 Ill. 429, 72 N. E. 387 [*affirming* 113 Ill. App. 37]; Felix *v.* Scharnweber, 119 Ill. 445, 10 N. E. 16; Chicago City R. Co. *v.* McDonough, 125 Ill. App. 223 [*affirmed* in 221 Ill. 69, 77 N. E. 577]; Gibson *v.* Murray, 120 Ill. App. 296 [*affirmed* in 216 Ill. 589, 75 N. E. 319]; Brzozowski *v.* National Box Co., 104 Ill. App. 338.

Indiana.— Pittsburgh, etc., R. Co. *v.* Lightheiser, 168 Ind. 438, 78 N. E. 1033; Malott *v.* Central Trust Co., 168 Ind. 428, 79 N. E. 369; West Muncie Strawboard Co. *v.* Slack, 164 Ind. 21, 72 N. E. 879; Johnson *v.* Brown, 130 Ind. 534, 28 N. E. 698; Southern R. Co. *v.* Bulleit, 40 Ind. App. 457, 82 N. E. 474; Southern Indiana R. Co. *v.* Davis, 32 Ind. App. 569, 69 N. E. 550.

Iowa.— Richardson *v.* Centerville, 137 Iowa 253, 114 N. W. 1071; Shipley *v.* Edwards, 87 Iowa 310, 54 N. W. 151.

Kansas.— Strowger *v.* Sample, 44 Kan. 298, 24 Pac. 425.

Kentucky.— Chesapeake, etc., R. Co. *v.* Perkins, 127 Ky. 110, 105 S. W. 148, 31 Ky. L. Rep. 1350; Louisville, etc., R. Co. *v.* McDonald, 111 S. W. 289, 33 Ky. L. Rep. 762; Kentucky, etc., R. Co. *v.* Nuttall, 96 S. W. 1131, 29 Ky. L. Rep. 1167.

Michigan.— Brown *v.* Evans, 149 Mich. 429, 112 N. W. 1079; Brockmiller *v.* Industrial Works, 148 Mich. 642, 112 N. W. 688; Detroit *v.* C. H. Little Co., 146 Mich. 373, 109 N. W. 671; Greenfield *v.* Detroit, etc., R. Co., 133 Mich. 557, 95 N. W. 546; Cameron Lumber Co. *v.* Somerville, 129 Mich. 552, 89 N. W. 346; Phippen *v.* Bay Cities Consol. R. Co., 110 Mich. 351, 68 N. W. 216.

Missouri.—American Storage, etc., Co. *v.* Harding, 126 Mo. App. 489, 104 S. W. 484; Ætna Ins. Co. *v.* Missouri Pac. R. Co., 123 Mo. App. 513, 100 S. W. 569; Mason *v.* Fourteen Min. Co., 82 Mo. App. 367.

Nebraska.— Church *v.* Chicago, etc., R. Co., 81 Nebr. 615, 116 N. W. 520; Mehagan *v.* McManus, 35 Nebr. 633, 53 N. W. 574.

New York.— Chesebrough *v.* Conover, 140 N. Y. 382, 35 N. E. 633; Blair *v.* M. McCormack Constr. Co., 123 N. Y. App. Div. 30, 907, 107 N. Y. Suppl. 750, 752; Sweeney *v.* New York Cent., etc., R. Co., 83 N. Y. App. Div. 565, 81 N. Y. Suppl. 1112; Bates *v.* Davis, 57 Misc. 557, 109 N. Y. Suppl. 1094; Brown *v.* Wakeman, 18 N. Y. Suppl. 363 [*affirming* 16 N. Y. Suppl. 846, where the instruction is sufficiently strong to remove the effect of the remark].

North Dakota.— Lund *v.* Upham, 17 N. D. 210, 116 N. W. 88.

Ohio.— Devon *v.* Cincinnati International R. Co., 29 Ohio Cir. Ct. 113.

Pennsylvania.— Shaffer *v.* Coleman, 35 Pa. Super. Ct. 386.

Rhode Island.— McHugh *v.* Rhode Island Co., 29 R. I. 206, 69 Atl. 853; Ellis *v.* Rhode Island Co., (1907) 67 Atl. 428.

South Carolina.— Leesville Mfg. Co. *v.* Morgan Wood, etc., Works, 75 S. C. 342, 55 S. E. 768.

Texas.— San Antonio, etc., R. Co. *v.* Kiersey, 101 Tex. 513, 109 S. W. 862 [*reversing* on other grounds (Civ. App. 1907) 106 S. W. 163]; Robertson *v.* Trammell, 98 Tex. 364, 83 S. W. 1098, (Civ. App. 1904) 83 S. W. 258; International, etc., R. Co. *v.* Morin, (Civ. App. 1909) 116 S. W. 656; Missouri, etc., R. Co. *v.* Malone, (Civ. App. 1908) 110 S. W. 958; Metropolitan L. Ins. Co. *v.* Wagner, 50 Tex. Civ. App. 233, 109 S. W. 1120; International, etc., R. Co. *v.* Munn, 46 Tex. Civ. App. 276, 102 S. W. 442; Houston, etc., R. Co., *v.* Davis, 45 Tex. Civ. App. 212, 100 S. W. 1013; St. Louis, etc., R. Co. *v.* Knowles, 44 Tex. Civ. App. 172, 99 S. W. 867; Texas, etc., R. Co. *v.*

them,[66] and they are not repeated; [67] or where they are promptly dealt with by the court and are not persisted in by counsel.[68] Improper remarks are not ground for reversal if the court rebukes counsel and instructs the jury to disregard them,[69]

Conway, 44 Tex. Civ. App. 68, 98 S. W. 1070; Gulf, etc., R. Co. *v.* Bell, 24 Tex. Civ. App. 579, 58 S. W. 614.

Vermont.— James Smith Woolen Mach. Co. *v.* Holden, 73 Vt. 396, 51 Atl. 2.

Washington.— Rangenier *v.* Seattle Electric Co., 52 Wash. 401, 100 Pac. 842; Jones *v.* Seattle, etc., R. Co., 47 Wash. 550, 92 Pac. 379.

Wisconsin.— Lee *v.* Hammond, 114 Wis. 550, 90 N. W. 1073.

United States.— Weeks *v.* Scharer, 129 Fed. 333, 64 C. C. A. 11.

See 46 Cent. Dig. tit. "Trial," § 315.

Oral instructions.— Such instructions may be oral. Lindsay *v.* Des Moines, 74 Iowa 111, 37 N. W. 9.

66. *Illinois.*— Illinois Cent. R. Co. *v.* Leiner, 202 Ill. 624, 67 N. E. 398, 95 Am. St. Rep. 226 [*affirming* 103 Ill. App. 438].

Indiana.— Pittsburg etc., R. Co. *v.* Lightheiser, 168 Ind. 438, 78 N. E. 1033; Southern Indiana R. Co. *v.* Fine, 163 Ind. 617, 72 N. E. 589.

Iowa.— Wilson *v.* Big Joe Block Coal Co., 142 Iowa 521, 119 N. W. 604.

Kentucky.— Cumberland Tel., etc., Co. *v.* Quigley, 129 Ky. 788, 112 S. W. 897, 19 L. R. A. N. S. 575.

Massachusetts.— Sayles *v.* Quinn, 196 Mass. 492, 82 N. E. 713.

Michigan.— Fillingham *v.* Michigan United R. Co., 154 Mich. 233, 117 N. W. 635; Beauerle *v.* Michigan Cent. R. Co., 152 Mich. 345, 116 N. W. 424.

New York.— Lawson *v.* Wells, 113 N. Y. Suppl. 647.

Texas.— Metropolitan L. Ins. Co. *v.* Bradley, 98 Tex. 230, 82 S. W. 1031, 68 L. R. A. 509 [*reversing* (Civ. App. 1904) 79 S. W. 367]; Chicago, etc., R. Co. *v.* Trippett, 50 Tex. Civ. App. 279, 111 S. W. 761; Missouri, etc., R. Co. *v.* Lightfoot, 48 Tex. Civ. App. 120, 106 S. W. 395.

Washington.— Passage *v.* Stimson Mill Co., 52 Wash. 661, 101 Pac. 239.

Wisconsin.— Neumeister *v.* Goddard, 133 Wis. 405, 113 N. W. 733; Listman Mill Co. *v.* Miller, 131 Wis. 393, 111 N. W. 496.

67. *Colorado.*— Denver, etc., R. Co. *v.* Nye, 9 Colo. App. 94, 47 Pac. 654.

Georgia.— Western, etc., R. Co. *v.* Ledbetter, 99 Ga. 318, 25 S. E. 663.

Illinois.— Chicago, etc., R. Co. *v.* Cleminger, 178 Ill. 536, 53 N. E. 320 [*affirming* 77 Ill. App. 186], although counsel knew the remarks to be improper.

Massachusetts.— Collins *v.* Greeley, 162 Mass. 273, 38 N. E. 195.

Michigan.— Ford *v.* Cheever, 113 Mich. 440, 71 N. W. 837; Wenzel *v.* Johnston, 112 Mich. 243, 70 N. W. 549.

Missouri.— Marble *v.* Walters, 19 Mo. App. 134.

Nebraska.— Golder *v.* Lund, 50 Nebr. 867, 70 N. W. 379.

New York.— Gould *v.* Moore, 40 N. Y. Super. Ct. 387, unless the remarks were prejudicial and were made in bad faith.

68. *Illinois.*— Pittsburg, etc., R. Co. *v.* Kinnare, 203 Ill. 388, 67 N. E. 826 [*affirming* 105 Ill. App. 566]; Quincy Gas, etc., Co. *v.* Baumann, 203 Ill. 295, 67 N. E. 807 [*affirming* 104 Ill. App. 600].

Indiana.— Southern Indiana R. Co. *v.* Fine, 163 Ind. 617, 72 N. E. 589.

Massachusetts.— American Electrical Works *v.* New England Electric R. Constr. Co., 186 Mass. 546, 72 N. E. 64; O'Connell *v.* Dow, 182 Mass. 541, 66 N. E. 788.

Michigan.— Tunnicliffe *v.* Bay Cities Consol. R. Co., 107 Mich. 261, 65 N. W. 226.

Missouri.— McKee *v.* St. Louis Transit Co., 108 Mo. App. 470, 83 S. W. 1013; George *v.* Chicago, etc., R. Co., 57 Mo. App. 358.

Vermont.— Rea *v.* Harrington, 58 Vt. 181, 2 Atl. 475, 56 Am. Rep. 561.

69. *Georgia.*— O'Neill Mfg. Co. *v.* Pruitt, 110 Ga. 577, 36 S. E. 59; Richmond, etc., R. Co. *v.* Mitchell, 95 Ga. 78, 22 S. E. 124; Robinson *v.* Stevens, 93 Ga. 535, 21 S. E. 96, in the absence of a request that a mistrial be declared.

Illinois.— Chicago City R. Co. *v.* Van Vleck, 143 Ill. 480, 32 N. E. 262 [*affirming* 40 Ill. App. 367]; Joliet St. R. Co. *v.* Call, 143 Ill. 177, 32 N. E. 389 [*affirming* 42 Ill. App. 41]; Chicago City R. Co. *v.* Pelletier, 134 Ill. 120, 24 N. E. 770; Chicago, etc., R. Co. *v.* Kuster, 22 Ill. App. 188.

Indiana.— Coble *v.* Eltzroth, 125 Ind. 429, 25 N. E. 544; Kern *v.* Bridwell, 119 Ind. 226, 21 N. E. 664, 12 Am. St. Rep. 409; Carter *v.* Carter, 101 Ind. 450; Leach *v.* Ackerman, 2 Ind. App. 91, 28 N. E. 216.

Iowa.— Nicks *v.* Chicago, etc., R. Co., 84 Iowa 27, 50 N. W. 222; Egan *v.* Murray, 80 Iowa 180, 45 N. W. 563.

Michigan.— Talmage *v.* Smith, 101 Mich. 370, 59 N. W. 656, 45 Am. St. Rep. 414.

Minnesota.— Witzel *v.* Zuel, 90 Minn. 340, 96 N. W. 1124; State *v.* Reid, 39 Minn. 277, 39 N. W. 796; Johnson *v.* Chicago, etc., R. Co., 37 Minn. 519, 35 N. W. 438.

Missouri.— Fink *v.* Lancashire Ins. Co., 66 Mo. App. 513; Willison *v.* Smith, 60 Mo. App. 469.

New York.— Cole *v.* Fall Brook Coal Co., 87 Hun 584, 34 N. Y. Suppl. 572 [*affirmed* in 159 N. Y. 59, 53 N. E. 670].

South Dakota.— Yankton *v.* Douglass, 8 S. D. 441, 66 N. W. 923.

Texas.— Hogan *v.* Missouri, etc., R. Co., 88 Tex. 679, 32 S. W. 1035; Galveston, etc., R. Co. *v.* Duelin, 86 Tex. 450, 25 S. W. 406; Sutor *v.* Wood, 76 Tex. 403, 13 S. W. 321; Jackson *v.* Harby, 70 Tex. 410, 8 S. W. 71; International, etc., R. Co. *v.* Greenwood, 2 Tex. Civ. App. 76, 21 S. W. 559.

Vermont.— Lockwood *v.* Fletcher, 74 Vt. 72, 52 Atl. 119.

or, without rebuking counsel, tells the jury to disregard them,[70] or, where they are not shown to be prejudicial, if the court directs counsel to keep within the record.[71] But where remarks are improper and are calculated to prejudice the jury the mere sustaining of objections thereto does not cure the error in using them,[72] the proper action of the court being an instruction to disregard the remarks or, if the seriousness of the remarks warrants, an order of mistrial.[73] Where the remarks are plainly prejudicial they are ground for reversal, although the court remarked to the jury that they could not consider such remarks,[74] or reprimanded counsel and told the jury to disregard the remarks; [75] and the same is the case

Washington.— Graves *v.* Smith, 7 Wash. 14, 34 Pac. 213.

Wisconsin.— Grace *v.* McArthur, 76 Wis. 641, 45 N. W. 518; Nelson *v.* Harrington, 72 Wis. 591, 40 N. W. 228, 7 Am. St. Rep. 900, 1 L. R. A. 719.

See 46 Cent. Dig. tit. "Trial," § 316.

70. *Illinois.*— Gundlach *v.* Schott, 192 Ill. 509, 61 N. E. 332, 85 Am. St. Rep. 348 [*affirming* 95 Ill. App. 110].

Kentucky.— Pittsburgh, etc., R. Co. *v.* Lewis, 38 S. W. 482, 18 Ky. L. Rep. 957.

Michigan.— Hammond *v.* Pullman, 129 Mich. 567, 89 N. W. 358, where the remarks are provoked by opposing counsel.

Minnesota.— Hartley *v.* Pennsylvania F. Ins. Co., 91 Minn. 382, 98 N. W. 198, 103 Am. St. Rep. 512.

New Hampshire.—Demars *v.* Glen Mfg. Co., 67 N. H. 404, 40 Atl. 902. And see Billingsley *v.* Dutton, 81 Nebr. 667, 116 N. W. 301.

Sufficiency of instruction.— An instruction that the jury "must not regard that, or any other argument by him or any of the attorneys in this case, if the arguments are not warranted by the evidence" sufficiently informs the jury that they are not to consider or be influenced by the particular improper argument with reference to which the instruction was given. Houston, etc., R. Co. *v.* Weaver, (Tex. Civ. App. 1897) 41 S. W. 846.

71. Monmouth Min., etc., Co. *v.* Erling, 148 Ill. 521, 36 N. E. 117, 39 Am. St. Rep. 187; Britt *v.* Burghart, 16 Tex. Civ. App. 78, 41 S. W. 389.

72. *Alabama.*— Hundley *v.* Chadick, 109 Ala. 575, 19 So. 845.

Georgia.— Collins Park, etc., R. Co. *v.* Ware, 112 Ga. 663, 37 S. E. 975.

Illinois.— Illinois Cent. R. Co. *v.* Seitz, 111 Ill. App. 242 [*affirmed* in 214 Ill. 350, 73 N. E. 585, 105 Am. St. Rep. 168]; Pioneer Reserve Assoc. *v.* Jones, 111 Ill. App. 156; Illinois Cent. R. Co. *v.* Souders, 79 Ill. App. 41.

Texas.— St. Louis Southwestern R. Co. *v.* McLendon, (Civ. App. 1894) 26 S. W. 307.

Wisconsin.— Andrews *v.* Chicago, etc., R. Co., 96 Wis. 348, 71 N. W. 372.

73. Collins Park, etc., R. Co. *v.* Ware, 112 Ga. 663, 37 S. E. 975.

Where the remarks are presumptively prejudicial the court's condemnation thereof must be emphatic, otherwise the cause will be reversed. Nelson *v.* Welch, 115 Ind. 270, 16 N. E. 634, 17 N. E. 569.

74. Stein *v.* Brooklyn, etc., R. Co., 62 Misc. (N. Y.) 309, 114 N. Y. Suppl. 791; Swift *v.* Martine, (Tex. Civ. App. 1909) 117 S. W. 209; Harry Bros. Co. *v.* Brady, (Tex. Civ. App. 1905) 86 S. W. 615; Hunstock *v.* Roberts, (Tex. Civ. App. 1901) 65 S. W. 675.

Illustration of rule.— In an action against an employer for personal injuries to plaintiff's son, plaintiff's counsel, in his address, said: "Lay aside the fact that this man — you cannot give him compensation for suffering he undergoes when he sees his boy crippled for life. Your hearts rush out to him in sympathy, but you cannot do that. But you can compensate him for his pecuniary loss, and you can do something that will perhaps make it more safe for me, and your boy, and mine, and everybody else that has occasion to deal with these people, to see that they treat us as reasonably prudent men ought to treat others." It was held not so inflammatory as to be ground for reversal, where the jury were pointedly charged not to consider it. Swift *v.* Martine, (Tex. Civ. App. 1909) 117 S. W. 209.

75. *Arkansas.*— English *v.* Anderson, 75 Ark. 577, 88 S. W. 583; German-American Ins. Co. *v.* Harper, 70 Ark. 305, 67 S. W. 755.

Colorado.— Coe *v.* Van Why, 33 Colo. 315, 80 Pac. 894.

Georgia.— Morris *v.* Maddox, 97 Ga. 575, 25 S. E. 487.

Illinois.— Peoria, etc., Traction Co. *v.* Vance, 234 Ill. 36, 84 N. E. 607; Chicago, etc., R. Co. *v.* Scott, 232 Ill. 419, 83 N. E. 938; Wabash R. Co. *v.* Billings, 212 Ill. 37, 72 N. E. 2 [*reversing* 105 Ill. App. 111].

Kentucky.— Louisville, etc., R. Co. *v.* Reaume, 128 Ky. 90, 107 S. W. 290, 32 Ky. L. Rep. 946; Murphy *v.* Hoaglund, 107 S. W. 303, 32 Ky. L. Rep. 839.

Michigan.— Remey *v.* Detroit United R. Co., 141 Mich. 116, 104 N. W. 420; Hillman *v.* Detroit United R. Co., 137 Mich. 184, 100 N. W. 399.

New Hampshire.— Olney *v.* Boston, etc., R. Co., 73 N. H. 85, 59 Atl. 387.

New York.—Benoit *v.* New York Cent., etc., R. Co., 94 N. Y. App. Div. 24, 87 N. Y. Suppl. 951.

Pennsylvania.— Holden *v.* Pennsylvania R. Co., 169 Pa. St. 1, 32 Atl. 103.

Tennessee.— Pullman Co. *v.* Pennock, 118 Tenn. 565, 102 S. W. 73.

Washington.— Spencer *v.* Arlington, 49 Wash. 121, 94 Pac. 904.

Wisconsin.— Rudiger *v.* Chicago, etc., R. Co., 101 Wis. 292, 77 N. W. 169.

although counsel voluntarily withdraws the remarks.[76] If the court refuses to withdraw from the jury improper remarks of counsel by an appropriate instruction, this will ordinarily be ground for reversal.[77] It has been held, however, that the mere failure of the court to rule on objections to alleged improper remarks of counsel is not equivalent to overruling the objections.[78] An exception does not generally lie to a remark of counsel, but to the refusal to instruct the jury in regard thereto, when seasonably requested so to do.[79]

I. Objections and Exceptions[80]— **1. In General.** A party has the right to have the stenographer enter upon his notes any objectionable remarks made by counsel in argument.[81]

2. Necessity For. While an improper argument should be checked by the trial court, without waiting for counsel to object,[82] and the court should caution the jury against being influenced by improper considerations urged therein;[83] yet, in order that such remarks may be considered on appeal, an objection thereto must be made at the trial and a ruling had thereon.[84] It is sufficient, however,

The mere fact that objection to an improper argument is sustained does not necessarily cure the injury inflicted. Donk Brothers Coal, etc., Co. *v.* Tetherington, 128 Ill. App. 256.

A mild rebuke does not remove the effect of improper argument of counsel. Swift *v.* Rennard, 128 Ill. App. 181.

76. Douglas *v.* Carr, 80 Vt. 392, 67 Atl. 1089.

77 Sanger *v.* McDonald, 82 Ark. 432, 102 S. W. 690; St. Louis, etc., R. Co. *v.* Harrison, 76 Ark. 430, 89 S. W. 53; Georgia R., etc., Co. *v.* Dougherty, 4 Ga. App. 614, 62 S. E. 158; Southwestern Tel., etc., Co. *v.* Taylor, (Tex. Civ App. 1909) 118 S. W. 188.

Absence of request to limit evidence.— In a broker's action for compensation, where the complaint in an action by the alleged purchaser against defendant was introduced to show the purchaser's willingness to buy, a refusal to instruct the jury to disregard comments of defendant's counsel on certain allegations as comments on matters not in evidence was not error in absence of a request by plaintiff to limit the evidence to the point suggested when the complaint was offered. Kinnane *v.* Conroy, 52 Wash. 651, 101 Pac. 223.

78. Shults *v.* Shults, 229 Ill. 420, 82 N. E. 312.

79. Pressey *v.* Rhode Island Co., (R. I. 1906) 67 Atl. 447.

80. **In criminal prosecutions** see Criminal Law, 12 Cyc. 584 *et seq.*

81. Henry *v.* Huff, 143 Pa. St. 548, 22 Atl. 1046.

82. *Georgia.*— Forsyth *v.* Cothran, 61 Ga. 278, Bulloch *v.* Smith, 15 Ga. 395.

Kentucky.— Beavers *v.* Bowen, 80 S. W. 1165, 26 Ky. L. Rep. 291.

Michigan.— McDonald *v.* Champion Iron, etc., Co., 140 Mich. 401, 103 N. W. 829.

New Jersey.— Minard *v.* West Jersey, etc., R Co., 74 N. J. L. 39, 64 Atl. 1054.

North Carolina.— Moseley *v.* Johnson, 144 N C. 257, 56 S. E. 922.

Texas.— Willis *v.* McNeill, 57 Tex. 465; St. Louis Southwestern R. Co. *v.* Granger, (Civ App. 1907) 100 S. W. 987.

United States.— Union Pac. R. Co. *v.* Field, 137 Fed. 14, 69 C. C. A. 536.

Limitations of rule.— Facts stated by counsel in his argument, not in evidence, and calculated to prejudice the jury, are a ground for new trial, although not objected to. Prather *v.* McClelland, (Tex. Civ. App. 1894) 26 S. W. 657.

83. Davis *v.* Kingsley, 13 Conn. 285.

84. *Alabama.*— Nelson *v.* Shelby Mfg., etc., Co., 96 Ala. 515, 11 So. 695, 38 Am. St. Rep. 116.

Arkansas.— Fayetteville, etc., R. Co. *v.* Combs, 51 Ark. 324, 11 S. W. 418.

California.— Morgan *v.* Hugg, 5 Cal. 409.

Colorado.— Klink *v.* People, 16 Colo. 467, 27 Pac. 1062.

Georgia.— Mayo *v.* Walden, 57 Ga. 42.

Illinois.— Pike *v.* Chicago, 155 Ill. 656, 40 N. E. 567; Vane *v.* Evanston, 150 Ill. 616, 37 N. E. 901; Halloran *v.* Halloran, 137 Ill. 100, 27 N. E. 82; Holloway *v.* Johnson, 129 Ill. 367, 21 N. E. 798; Snyder *v.* Travers, 45 Ill. App. 253; Hunter *v.* Harris, 29 Ill. App. 200; Chicago, etc., R. Co. *v.* Bryant, 29 Ill. App. 17.

Indiana.— White *v.* Gregory, 126 Ind 95, 25 N. E. 806; Vannatta *v.* Duffy, 4 Ind. App. 168, 30 N. E. 807; Evansville *v.* Thacker, 2 Ind. App. 370, 28 N. E. 559.

Kansas.— State *v.* Nusbaum, 52 Kan. 52, 34 Pac. 407; St. Louis, etc., R. Co. *v.* Irwin, 37 Kan. 701, 16 Pac. 146, 1 Am. St. Rep. 266; Cone *v.* Smyth, 3 Kan. App. 607, 45 Pac. 247.

Kentucky.— Morris *v.* Morton, 20 S. W. 287, 14 Ky. L. Rep. 360; Bland *v.* Gaither, 11 S. W. 423, 10 Ky. L. Rep. 1033.

Michigan.— Munroe *v.* Godkin, 111 Mich. 183, 69 N. W. 244; Henry C. Hart Mfg. Co. *v.* Mann's Boudoir Car Co., 65 Mich. 564, 32 N. W. 820.

Minnesota.— Ludwig *v.* Spicer, 99 Minn. 400, 109 N. W. 832; Schultz *v.* Schneckenberger, 81 Minn. 380, 84 N. W. 119; Corrigan *v.* Elsinger, 81 Minn. 42, 83 N. W. 492.

Missouri.— Mahaney *v.* St. Louis, etc., R. Co., 108 Mo. 191, 18 S. W. 895; Sidekum *v.* Wabash, etc., R. Co., 93 Mo. 400, 4 S. W. 701, 3 Am. St. Rep. 549.

Nebraska.— Bankers' Life Assoc. *v.* Lisco, 47 Nebr. 340, 66 N. W. 412; Bullis *v.* Drake, 20 Nebr. 167, 29 N. W. 292.

that there is by implication an adverse ruling,[85] and it is not necessary that the objection and exception be repeated upon repetition of the improper argument.[86] No question is raised by mere objection and the court's admonishing counsel to keep within the record.[87] An agreement of counsel that an argument shall not in fact be objected to, but shall be considered as excepted to, the court not being called upon to deal with the objectionable remarks at the time they were made, raises no question for review.[88]

3. Requisites of. The objection must be specific,[89] and must state the reason of the objection,[90] unless the ground of objection is self-evident.[91] And, an objection on a ground that it is not tenable will not suffice to save an objection on another ground that is tenable.[92] So if the objection is to the entire argument it will be unavailing, where parts only thereof are improper.[93] An exception to improper remarks is in itself not sufficient but the action of the trial court must be invoked by motion to exclude, or otherwise.[94] It is sufficient that objection be made to the judge and exception taken to the ruling, without interrupting the argument.[95] The extent to which an exception is taken to the remarks of counsel is a question of fact for the trial court.[96] The record must clearly show the misconduct and it is not sufficient that it shows a ruling of the court founded on affidavits of opposing counsel as to what statements were made.[97]

4. Time of Making. It must be made when the objectionable language is used and the exception must be taken when the ruling is procured.[98] It must be made before counsel closes his address.[99] The court should allow counsel to

New York.— Brooker *v.* Filkins, 25 N. Y. Suppl. 514 [*affirmed* in 9 Misc. 146, 29 N. Y. Suppl. 68].

North Carolina.— Byrd *v.* Hudson, 113 N. C. 203, 18 S. E. 209.

Rhode Island.— Enos *v.* Rhode Island Suburban R. Co., 29 R. I. 297, 70 Atl. 1011.

Tennessee.— Ferguson *v.* Moore, 98 Tenn. 342, 39 S. W. 341; Morgan *v.* Duffy, 94 Tenn. 686, 30 S. W. 735.

Texas.— Gulf, etc., R. Co. *v.* Brown, 16 Tex. Civ. App. 93, 40 S. W. 608.

Wisconsin.— Mayer *v.* Milwaukee St. R. Co., 90 Wis. 522, 63 N. W. 1048; Heucke *v.* Milwaukee City R. Co., 69 Wis. 401, 34 N. W. 243.

United States.— Union Pac. R. Co. *v.* Field, 137 Fed. 14, 69 C. C. A. 536; Portland Gold Min. Co. *v.* Flaherty, 111 Fed. 312, 49 C. C. A. 361; Northern Pac. R. Co. *v.* Conger, 56 Fed. 20, 5 C. C. A. 410.

See 46 Cent. Dig. tit. "Trial," § 312.

85. Blackman *v.* West Jersey, etc., R. Co., 68 N. J. L. 1, 52 Atl. 370; Baker *v.* Sherman, 71 Vt. 439, 46 Atl. 57. *Contra*, Southern Indiana R. Co. *v.* Fine, 163 Ind. 617, 72 N. E. 589.

86. Waldron *v.* Waldron, 156 U. S. 361, 15 S. Ct. 383, 39 L. ed. 453.

87. Chicago, etc., R. Co. *v.* Champion, 9 Ind. App. 510, 36 N. E. 221, 37 N. E. 21, 53 Am. St. Rep. 357.

88. Burdoin *v.* Trenton, 116 Mo. 358, 22 S. W. 728.

89. Dimon *v.* New York Cent., etc., R. Co., 173 N. Y. 356, 635, 66 N. E. 1, 628. And see Enos *v.* Rhode Island Suburban R. Co., 29 R. I. 297, 70 Atl. 1011.

90. Waid *v.* Hobson, 17 Colo. App. 54, 67 Pac. 176; North Chicago St. R. Co. *v.* Southwick, 165 Ill. 494, 46 N. E. 377; Coble *v.* Eltzroth, 125 Ind. 429, 25 N. E. 544; Louisville, etc., R. Co. *v.* Norman, 17 Ind. App. 355, 46 N. E. 702; Dimon *v.* New York Cent., etc., R. Co., 173 N. Y. 356, 635, 66 N. E. 1, 628.

91. Chicago, etc., R. Co. *v.* Martin, 28 Ind. App. 468, 63 N. E. 247.

92. Ft. Worth, etc., R. Co. *v.* Wooldridge, (Tex. Civ. App. 1907) 105 S. W. 845 [*affirmed* in 101 Tex. 471, 108 S. W. 1159].

93. Louisville, etc., R. Co. *v.* Hurt, 101 Ala. 34, 13 So. 130; Allaire *v.* Allaire, 39 N. J. L. 113.

94. Lunsford *v.* Dietrich, 93 Ala. 565, 9 So. 308, 30 Am. St. Rep. 79; West Chicago St. R. Co. *v.* Annis, 165 Ill. 475, 46 N. E. 264; Chicago, etc., R. Co. *v.* Smedley, 65 Ill. App. 644; Columbia, etc., R. Co. *v.* Hawthorne, 3 Wash. Terr. 353, 19 Pac. 25. *Contra*, St. Louis, etc., R. Co. *v.* Dickens, (Tex. Civ. App. 1900) 56 S. W. 124.

95. Texas Cent. R. Co. *v.* Pledger, 36 Tex. Civ. App. 248, 81 S. W. 755.

96. Walker *v.* Boston, etc., R. Co., 71 N. H. 271, 51 Atl. 918.

97. Everett *v.* Central Iowa R. Co., 73 Iowa 442, 35 N. W. 609.

98. Latham *v.* Gregory, 9 Colo. App. 292, 47 Pac. 975; Chicago, etc., R. Co. *v.* Krayenbuhl, 70 Nebr. 766, 98 N. W. 44; Fitzgerald *v.* Fitzgerald, 16 Nebr. 413, 20 N. W. 269; Gulf, etc., R. Co. *v.* Greenlee, 70 Tex. 553, 8 S. W. 129; Gulf, etc., R. Co. *v.* Hockaday, 14 Tex. Civ. App. 613, 37 S. W. 475. And see Fordtran *v.* Stowers, (Tex. Civ. App. 1908) 113 S. W. 631.

Where no objection is made until after the close of the argument the party must be content with an instruction to disregard the improper remarks. Skagit R., etc., Co. *v.* Cole, 2 Wash. 57, 25 Pac. 1077.

99. Western Union Tel. Co *v.* Apple, (Tex. Civ. App. 1894) 28 S. W. 1022, where the remarks objected to are not of the most flagrant

interrupt his opponent who is making an improper argument to the jury;[1] and a refusal to do so is error;[2] but counsel's right to complain of failure of the court to permit this to be done is waived if no objection is taken to the court's ruling forbidding interruption.[3] It comes too late, if made the first time after verdict,[4] especially where the remarks appear to have been provoked by what was said by opposing counsel,[5] after an agreement on a verdict has been announced by the jury,[6] after the case has been submitted to the jury,[7] or after the jury has retired.[8] If to language used in the opening statement, it must be made before the testimony has been taken.[9] If exception is taken to language, the propriety of which depends upon proof to be thereafter made, it is not error for the court to decline to rebuke counsel, although questionable whether the proof warrants the remark, the court's attention not being again called thereto.[10]

J. Harmless Error.[11] A judgment will not be reversed because of improper arguments or conduct of counsel where the verdict is right and shows that the improper acts of counsel had no influence thereon.[12] To warrant a reversal it must appear probable that the acts complained of influenced the jury in arriving at their verdict.[13] If, however, it is apparent that the acts complained of were

character. *Contra*, Melvin *v.* Easley, 46 N. C. 386, 62 Am. Dec. 171.

1. West Chicago St. R. Co. *v.* Sullivan, 165 Ill. 302, 46 N. E. 234.

2. Halpern *v.* Nassau Electric R. Co., 16 N. Y. App. Div. 90, 45 N. Y. Suppl. 134.

3. West Chicago St. R. Co. *v.* Sullivan, 165 Ill. 302, 46 N. E. 234.

4. Blair *v.* Madison County, 81 Iowa 313, 46 N. W. 1093; Nichols, etc., Co. *v.* Metzger, 43 Mo. App. 607; Skaggs *v.* Given, 29 Mo. App. 612; Roeder *v.* Studt, 12 Mo. App. 566; Horah *v.* Knox, 87 N. C. 483; Ames *v.* Potter, 7 R. I. 265.

5. Moore *v.* Moore, 73 Tex. 383, 11 S. W. 396.

6. Ackerman *v.* Third Ave. R. Co., 76 Hun (N. Y.) 484, 27 N. Y. Suppl. 1020 [*affirmed* in 143 N. Y. 643, 37 N. E. 823].

7. Riche *v.* Martin, 1 Misc. (N. Y.) 285, 20 N. Y. Suppl. 693 [*affirming* 17 N. Y. Suppl. 723]; Knight *v.* Houghtalling, 85 N. C. 17.

8. Ohio, etc., R. Co. *v.* Wrape, 4 Ind. App. 100, 30 N. E. 428.

An exception taken after the close of the argument and not brought to the notice of counsel until after the jury has retired comes too late. Bond *v.* Beam, 72 N. H. 444, 57 Atl. 340, 101 Am. St. Rep. 686.

9. Welch *v.* Palmer, 85 Mich. 310, 48 N. W. 552.

10. Mulligan *v.* Metropolitan St. R. Co., 89 N. Y. App. Div. 207, 85 N. Y. Suppl. 791.

11. For specific applications of principle see *supra*, this chapter *passim*.

12. *Colorado.*— Tanner *v.* Harper, 32 Colo. 156, 75 Pac. 404.

Illinois.— Eldorado Coal, etc., Co. *v.* Swan, 227 Ill. 586, 81 N. E. 691 [*affirming* 128 Ill. App. 237]; Chicago Union Traction Co. *v.* Lawrence, 211 Ill. 373, 71 N. E. 1024; Maywood Co. *v.* Maywood, 140 Ill. 216, 29 N. E. 704; Metzger *v.* Manlove, 145 Ill. App. 419 [*affirmed* in 241 Ill. 113, 89 N. E. 249]; Savage *v.* Hayes Bros. Co., 142 Ill. App. 316; Salem *v.* Webster, 95 Ill. App. 120 [*affirmed* in 192 Ill. 369, 61 N. E. 323].

Kentucky.— Louisville, etc., R. Co. *v.* Brown, (1908) 113 S. W. 465; Kentucky Wagon Mfg. Co. *v.* Duganics, (1908) 113 S. W. 128; Illinois Cent. R. Co. *v.* Whittaker, 57 S. W. 465, 22 Ky. L. Rep. 395.

Michigan.— Clement *v.* Crosby, 157 Mich. 643, 122 N. W. 263; Chamberlain *v.* Lake Shore, etc., R. Co., 122 Mich. 477, 81 N. W. 339; Daniels *v.* Weeks, 90 Mich. 190, 51 N. W. 273.

Missouri.— Brady *v.* Springfield Traction Co., 140 Mo. App. 421, 124 S. W. 1070; Tuck *v.* Springfield Traction Co., 140 Mo. App. 335, 124 S. W. 1079; Beatty *v.* Clarkson, 110 Mo. App. 1, 83 S. W. 1033; Orscheln *v.* Scott, 106 Mo. App. 583, 80 S. W. 982; Sackewitz *v.* American Biscuit Mfg. Co., 78 Mo. App. 144.

Nebraska.— Festner *v.* Omaha, etc., R. Co., 17 Nebr. 280, 22 N. W. 557.

New Jersey.— Christensen *v.* Lambert, 66 N. J. L. 531, 49 Atl. 577.

New York.— Riche *v.* Martin, 17 N. Y. Suppl. 723 [*affirmed* in 1 Misc. 285, 20 N. Y. Suppl. 693].

Oklahoma.— Culbertson *v.* Alexander, 17 Okla. 370, 87 Pac. 863.

Rhode Island.— Sherman *v.* J. W. Bishop Co., 23 R. I. 6, 49 Atl. 39.

Texas.— Kettler Brass Mfg. Co. *v.* O'Neil, (Civ. App. 1909) 122 S. W. 900; Gulf, etc., R. Co. *v.* Adams, (Civ. App. 1909) 121 S. W. 876; Chicago, etc., R. Co. *v.* Barnes, 50 Tex. Civ. App. 46, 111 S. W. 447; Missouri, etc., R. Co. *v.* Wall, (Civ. App. 1908) 110 S. W. 453; Crawford *v.* Johnson, (Civ. App. 1908) 107 S. W. 553; Ft. Worth, etc., R. Co. *v.* Walker, 48 Tex. Civ. App. 86, 106 S. W. 400; Houston Electric Co. *v.* Robinson, (Civ. App. 1903) 76 S. W. 209; Kentucky Mut. L. Ins. Co. *v.* Mellott, (Civ. App. 1900) 57 S. W. 887; Western Union Tel. Co. *v.* Clark, (Civ. App. 1894) 25 S. W. 990.

Vermont.— McKinstry *v.* Collins, 74 Vt. 147, 52 Atl. 438; Lamoille County Nat. Bank *v.* Hunt, 71 Vt. 251, 44 Atl. 347.

13. *Arkansas.*— St. Louis, etc., R. Co. *v.* Boback, 71 Ark. 427, 75 S. W. 473.

prejudicial,[14] as for instance, where the verdict is greatly against the preponderance of the evidence,[15] or is excessive,[16] the judgment should be reversed. So where the case is closely contested or there is a doubt as to the sufficiency of the evidence to sustain the verdict the judgment should be reversed,[17] and if the remarks are in fact prejudicial, it is of no consequence that they are not designedly so.[18]

California.— Fogel *v.* San Francisco, etc., R. Co., (1895) 42 Pac. 565; Morgan *v.* Hugg, 5 Cal. 409.

Illinois.— Maywood Co. *v.* Maywood, 140 Ill. 216, 29 N. E. 704; Dorsett *v.* Clother, 133 Ill. 195, 24 N. E. 525 [*affirming* 35 Ill. App. 281]; Eckels *v.* Donohue, 137 Ill. App. 106; Springfield Mut. County F. Ins. Co. *v.* Merriman, 134 Ill. App. 249; Chicago City R. Co. *v.* Foster, 128 Ill. App. 571 [*affirmed* in 226 Ill. 288, 80 N. E. 762]; Eldorado Coal, etc., Co. *v.* Swan, 128 Ill. App. 237 [*affirmed* in 227 Ill. 586, 81 N. E. 691].

Indiana.— Roose *v.* Roose, 145 Ind. 162, 44 N. E. 1; Buscher *v.* Scully, 107 Ind. 246, 5 N. E. 738, 8 N. E. 37; Carter *v.* Carter, 101 Ind. 450; Southern Indiana R. Co. *v.* Baker, 37 Ind. App. 405, 77 N. E. 64.

Iowa.— Aken *v.* Clark, (1909) 123 N. W. 379; Miller *v.* Boone County, 95 Iowa 5, 63 N. W. 352.

Maine.— Stephenson *v.* Portland R. Co., 103 Me. 57, 68 Atl. 453.

Michigan.— Burgess *v.* Stowe, 134 Mich. 204, 96 N. W. 29; Avery *v.* Burrall, 118 Mich. 672, 77 N. W. 272; Baumier *v.* Antiau, 79 Mich. 509, 44 N. W. 939 (holding that the rule applies to the opening statement as well as to final arguments); Porter *v.* Throop, 47 Mich. 313, 11 N. W. 174.

Minnesota.— Rheiner *v.* Stillwater St. R. etc., Co., 31 Minn. 193, 17 N. W. 279.

Missouri.— Union Sav. Assoc. *v.* Clayton, 6 Mo. App. 587.

Nebraska.— Angle *v.* Bilby, 25 Nebr. 595, 41 N. W. 397; Heater *v.* Penrod, 2 Nebr. (Unoff.) 711, 89 N. W. 762.

New York.— Kunz *v.* Troy, 1 N. Y. Suppl. 596.

Ohio.— Hayes *v.* Smith, 15 Ohio Cir. Ct. 300, 8 Ohio Cir. Dec. 92.

Pennsylvania.— Huffman *v.* McIlvaine, 13 Pa. Super. Ct. 108.

Texas.— Missouri Pac. R. Co. *v.* White, 80 Tex. 202, 15 S. W. 808; McLane *v.* Paschal, 74 Tex. 20, 11 S. W. 837; Gulf, etc., R. Co. *v.* Witte, 68 Tex. 295, 4 S. W. 490; Willis *v.* Lowry, 66 Tex. 540, 2 S. W. 449; Texas, etc., R. Co. *v.* Zink, (Civ. App. 1906) 92 S. W. 812; Houston Electric Co. *v.* Robinson, (Civ. App. 1903) 76 S. W. 209; Cook *v.* Carroll Land, etc., Co., (Civ. App. 1897) 39 S. W. 1006; Texas, etc., R. Co. *v.* Beckworth, (Civ. App. 1895) 32 S. W. 809; Western Union Tel. Co. *v.* Jobe, 6 Tex. Civ. App. 403, 25 S. W. 168, 1036; Galveston, etc., R. Co. *v.* Croskell, 6 Tex. Civ. App. 160, 25 S. W. 486.

Washington.— Gallagher *v.* Buckley, 31 Wash. 380, 72 Pac. 79; Chezum *v.* Parker, 19 Wash. 645, 54 Pac. 22.

Wisconsin.— Boltz *v.* Sullivan, 101 Wis. 608, 77 N. W. 870; Tucker *v.* Cole, 54 Wis. 539, 11 N. W. 703.

See 46 Cent. Dig. tit. "Trial," § 275½.

But see Louisville, etc., R. Co. *v.* Orr, 91 Ala. 548, 555, 8 So. 360 (in which it was said: "When counsel trespass on the domain of unproven facts, the presiding judge should promptly set aside any verdict the jury may render, unless he is clearly and affirmatively convinced the verdict is right, and would have been the same in the absence of such unauthorized argument"); Jordon *v.* Wallace, 67 N. H. 175, 32 Atl. 174; Bullard *v.* Boston, etc., R. Co., 64 N. H. 27, 5 Atl. 838, 10 Am. St. Rep. 367 (holding that the party in fault is bound, after verdict in his favor, to obtain a finding that the result was not affected by his tort, and ought not to be annulled on account of it; that a verdict will be set aside for unwarranted remarks of counsel to the jury unless the presiding judge finds as a matter of fact that the jury were not influenced thereby, or that the effect upon their minds was wholly removed by a retraction of counsel, the charge of the court, or in some other way).

Substantial injustice must have been done by the remarks to warrant reversal (Chicago, etc., R. Co. *v.* Pillsbury, 123 Ill. 9, 14 N. E. 22, 5 Am. St. Rep. 483); as where the verdict is against the great preponderance of the evidence (Blum *v.* Simpson, 66 Tex. 84, 17 S. W. 402).

Remarks of counsel addressed to the court, made in good faith, and not necessarily prejudicial do not constitute a ground for reversal. Rawlings *v.* Anheuser-Busch Brewing Assoc., 1 Nebr. (Unoff.) 555, 95 N. W. 792.

14. Springfield Consol. R. Co. *v.* Bell, 134 Ill. App. 426; Thompson *v.* Hopperd, 120 Ill. App. 588; Holloway *v.* Johnson, 28 Ill. App. 463 [*reversed* on other grounds in 129 Ill. 367, 21 N. E. 798]; Buckley *v.* Buckley, 14 Nev. 262; Galveston, etc., R. Co. *v.* Cooper, 70 Tex. 67, 8 S. W. 68.

15. Blum *v.* Simpson, 66 Tex. 84, 17 S. W. 402.

16. Nicholson *v.* O'Donald, 79 Ill. App. 195; Chicago, etc., R. Co. *v.* Langston, 92 Tex. 709, 50 S. W. 574, 51 S. W. 331 [*affirming* 19 Tex. Civ. App. 568, 47 S. W. 1027, 48 S. W. 610].

17. West Chicago St. R. Co. *v.* Kean, 104 Ill. App. 147; McDonald *v.* Ft. Dearborn Nat. Bank, 72 Ill. App. 17; Massengale *v.* Rice, 94 Mo. App. 430, 68 S. W. 233; Mullarkey *v.* Interurban St. R. Co., 48 Misc. (N. Y.) 638, 96 N. Y. Suppl. 115; Colorado Canal Co. *v.* Sims, (Tex. Civ. App. 1904) 82 S. W. 531; The Oriental *v.* Barclay, 16 Tex. Civ. App. 193, 41 S. W. 117.

18. Chicago Union Traction Co. *v.* Lauth, 216 Ill. 176, 74 N. E. 738; Ward *v.* Reed, 134 Mich. 392, 96 N. W. 438.

VII. PROVINCE OF COURT AND JURY.[19]

A. General Considerations Affecting. It is a rule of practically universal application that questions of law are for the determination of the court.[20] It is obviously the right of every suitor to have the opinion of the judge upon questions of law material to the proper determination of his case. The jury are not qualified to determine such questions, and they are calculated to confuse, embarrass, and mislead them.[21] In consequence, it is erroneous to instruct the jury that they are judges of the law,[22] and to submit questions of law to them,[23] and requested

19. As to particular matters or issues see ACCORD AND SATISFACTION, 1 Cyc. 307; ADVERSE POSSESSION, 1 Cyc. 1153 *et seq.*; CRIMINAL LAW, 12 Cyc. 587 *et seq.*; DAMAGES, 13 Cyc. 233 *et seq.*; FRAUD, 20 Cyc. 123 *et seq.*; LOST INSTRUMENTS, 25 Cyc. 1628; NEGLIGENCE, 29 Cyc. 626 *et seq.* And see other titles in this work.

In actions by or against particular classes of parties see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1036; GUARDIAN AND WARD, 21 Cyc. 217; INFANTS, 22 Cyc. 692; INSANE PERSONS, 22 Cyc. 1242; LANDLORD AND TENANT, 24 Cyc. 1320 *et seq.*; PRINCIPAL AND AGENT, 31 Cyc. 1670 *et seq.* See also other titles in Cyc.

In particular actions or proceedings see ASSUMPSIT, 4 Cyc. 358; ATTACHMENT, 4 Cyc. 750; COMPROMISE AND SETTLEMENT, 8 Cyc. 541; CONSPIRACY, 8 Cyc. 619; MALICIOUS PROSECUTION, 26 Cyc. 104; MANDAMUS, 26 Cyc. 482; PATENTS, 30 Cyc. 1044; REPLEVIN, 34 Cyc. 1518; and other titles in this work.

20. *Alabama.*— Stewart *v.* Sonneborn, 49 Ala. 178; Price *v.* Mazange, 31 Ala. 701; Thomason *v.* Odum, 31 Ala. 108, 68 Am. Dec. 159.

Indiana.— Lawler *v.* McPheeters, 73 Ind. 577; Riley *v.* Watson, 18 Ind. 291.

Kentucky.— Thomas *v.* Thomas, 15 B. Mon. 178.

Maryland.— Ragan *v.* Gaither, 11 Gill & J. 472.

Michigan.— Roby Lumber Co. *v.* Gray, 73 Mich. 356, 41 N. W. 420.

Mississippi.— Whitney *v.* Cook, 53 Miss. 551.

Missouri.— Hickey *v.* Ryan, 15 Mo. 63; Fugate *v.* Carter, 6 Mo. 267.

New York.— Outhouse *v.* Baird, 121 N. Y. App. Div. 556, 116 N. Y. Suppl. 246.

Pennsylvania.— Denison *v.* Wertz, 7 Serg. & R. 372.

Vermont.— State *v.* Croteau, 23 Vt. 14, 54 Am. Dec. 90.

Under the statutes of Louisiana the jury are judges of the law and the facts when submitted for their verdict subject to the right of the court to grant a new trial when it considers the verdict contrary to law. Spofford *v.* Pemberton, 12 Rob. (La.) 162; Miller *v.* New Orleans Canal, etc., Co., 8 Rob. (La.) 236; Thomas *v.* Turnley, 3 Rob. (La.) 206; Bostwick *v.* Gasquet, 10 La. 80.

21. 1 Thompson Trials, § 1016.

22. Livingston *v.* Taylor, 132 Ga. 1, 63 S. E. 694.

23. *Alabama.*— Hays *v.* Lemoine, 156 Ala. 465, 47 So. 97.

California.— Dean *v.* Grimes, 72 Cal. 442, 14 Pac. 178; People *v.* Ivey, 49 Cal. 56.

Georgia.—Atlantic, etc., R. Co. *v.* Bowen, 125 Ga. 460, 54 S. E. 105; Higginbotham *v.* Campbell, 85 Ga. 638, 11 S. E. 1027.

Illinois.— Central R. Co. *v.* Bannister, 195 Ill. 48, 62 N. E. 864 [*affirming* 96 Ill. App. 332]; Merritt *v.* Boyden, 191 Ill. 136, 60 N. E. 907, 85 Am. St. Rep. 246; Gehr *v.* Hagerman, 26 Ill. 438; Cowie *v.* Kinser, 138 Ill. App. 143 [*affirmed* in 235 Ill. 383, 85 N. E. 623, 126 Am. St. Rep. 221]; American Home Circle *v.* Eggers, 137 Ill. App. 595; Beggs *v.* Arcola First Nat. Bank, 134 Ill. App. 403; American Bonding, etc., Co. *v.* New Amsterdam Casualty Co., 125 Ill. App. 33; Taylor *v.* Crowe, 122 Ill. App. 518; Harmison *v.* Fleming, 105 Ill. App. 43; Thomas Brass, etc., Works *v.* Leonard, 91 Ill. App. 599; La Porte *v.* Wallace, 89 Ill. App. 517; Brownback *v.* Fraley, 78 Ill. App. 262.

Indiana.— Riley *v.* Watson, 18 Ind. 291; Erie Crawford Oil Co. *v.* Meeks, 40 Ind. App. 156, 81 N. E. 518; Brown *v.* Langner, 25 Ind. App. 538, 58 N. E. 743.

Kansas.—Atchison, etc., R. Co. *v.* Woodson, 79 Kan. 567, 100 Pac. 633.

Kentucky.— Cincinnati, etc., R. Co. *v.* Evans, 129 Ky. 152, 110 S. W. 844, 33 Ky. L. Rep. 596; McGee *v.* Gibson, 1 B. Mon. 105; Burt, etc., Lumber Co. *v.* Hurst, 110 S. W. 242, 33 Ky. L. Rep. 270; Whitehouse Cannel Coal Co. *v.* Wells, 74 S. W. 736, 25 Ky. L. Rep. 60; Smith *v.* Cornett, 38 S. W. 689, 18 Ky. L. Rep. 818.

Maryland.— Caledonian Ins. Co. *v.* Traub, 80 Md. 214, 30 Atl. 904; Ragan *v.* Gaither, 11 Gill & J. 472; Plater *v.* Scott, 6 Gill & J. 116.

Michigan.— Simons *v.* Haberkorn, 139 Mich. 130, 102 N. W. 659; George W. Roby Lumber Co. *v.* Gray, 73 Mich. 356, 41 N. W. 420.

Mississippi.—Whitney *v.* Cook, 53 Miss. 551.

Missouri.—Albert *v.* Besel, 88 Mo. 150; Jordan *v.* Hannibal, 87 Mo. 673; Massey *v.* Tingle, 29 Mo. 437; Hickey *v.* Ryan, 15 Mo. 63; Coleman *v.* Roberts, 1 Mo. 97; White *v.* Reitz, 129 Mo. App. 307, 108 S. W. 601; Barton *v.* Odessa, 109 Mo. App. 76, 82 S. W. 1119; Lesser *v.* St. Louis, etc., R. Co., 85 Mo. App. 326.

Montana.— Gallick *v.* Bordeaux, 31 Mont. 328, 78 Pac. 583.

instructions submitting questions of law to the jury are properly refused.[24] On the other hand it is the exclusive province of the jury to decide all questions of fact, and erroneous for the court to eliminate any material fact in issue from the consideration of the jury.[25]

B. Particular Questions of Law or Fact — 1. Questions Relating to Pleadings. It is the duty of the court to construe the pleadings as a matter of

Pennsylvania.— Poundstone *v.* Jones, 182 Pa. St. 574, 38 Atl. 714; Cook *v.* Mackrell, 70 Pa. St. 12; Gilchrist *v.* Rogers, 6 Watts & S. 488; Work *v.* Maclay, 2 Serg. & R. 415; Norton *v.* Lehn, 13 Wkly. Notes Cas. 559.

South Carolina.— Duren *v.* Kee, 41 S. C. 171, 19 S. E. 492.

South Dakota.— Bockoven *v.* Lincoln Tp., 13 S. D. 317, 83 N. W. 335.

Tennessee.— Ferguson *v.* Moore, 98 Tenn. 342, 39 S. W. 341; Fink *v.* Evans, 95 Tenn. 413, 32 S. W. 307; Mills *v.* Faris, 12 Heisk. 451.

Texas.— Southwestern Tel., etc., Co. *v.* Getcher, 93 Tex. 114, 53 S. W. 686; Rogers *v.* Broadnax, 24 Tex. 538; Ft. Worth, etc., R. Co. *v.* Eddleman, (Civ. App. 1908) 114 S. W. 425.

Virginia.—Keen *v.* Monroe, 75 Va. 424.

United States.—What Cheer Coal Co. *v.* Johnson, 56 Fed. 810, 6 C. C. A. 148.

See 46 Cent. Dig. tit. "Trial," § 467.

Invited error.— Complaint of submission of questions of law to the jury cannot be made by a party at whose instance the submission was made. Random *v.* Toby, 11 How. (U. S.) 493, 13 L. ed. 784.

24. *Alabama.*— Montgomery *v.* Bradley, 159 Ala. 230, 48 So. 809; Wright *v.* Bolling, 27 Ala. 259.

California.—Tompkins *v.* Montgomery, 123 Cal. 219, 55 Pac. 997; Branger *v.* Chevalier, 9 Cal. 353.

District of Columbia.— Reid *v.* Anderson, 13 App. Cas. 30.

Illinois.—American Home Circle *v.* Fromm, 134 Ill. App. 605; American Home Circle *v.* Schneider, 134 Ill. App. 604; American Home Circle *v.* Schneider, 134 Ill. App. 600; Martensen *v.* Arnold, 78 Ill. App. 336.

Maryland.—Dronenburg *v.* Harris, 108 Md. 597, 71 Atl. 81; Gusdorff *v.* Duncan, 94 Md. 160, 50 Atl. 574.

Missouri.— Barree *v.* Cape Girardeau, 132 Mo. App. 182, 112 S. W. 724; Alms *v.* Conway, 78 Mo. App. 490.

Texas.— Martin Brown Co. *v.* Perrill, 77 Tex. 199, 13 S. W. 975.

Wisconsin.— Large *v.* Orvix, 20 Wis. 696.

United States.— Pence *v.* Langdon, 99 U. S. 578, 25 L. ed. 420.

See 46 Cent. Dig. tit. "Trial," § 467.

Instructions held not to submit questions of law to jury.— The court does not submit a question of law to the jury by instructing them to find liability upon finding all the constitutive facts which are stated in the instruction (Abbitt *v.* St. Louis Transit Co., 106 Mo. App. 640, 81 S. W. 484); by telling them that it is for them to determine whether a certain act under all the circumstances of the case amounted to negligence, negligence having been fully defined in the instructions (Conner *v.* Citizens' St. R. Co., 146 Ind. 430, 45 N. E. 662); by charging that they are to determine whether due and proper care was used (Schmidt *v.* Sinnott, 103 Ill. 160), or whether canceling a contract and rescinding it did not mean the same in common parlance (Lett *v.* Horner, 5 Blackf. (Ind.) 296), or that both the questions of probable cause and malice are for the jury to determine and find from the evidence (Lewton *v.* Hower, 35 Fla. 58, 16 So. 616); by instructing that they are to determine the issue on the evidence (Lake Shore, etc., R. Co. *v.* Anthony, 12 Ind. App. 126, 38 N. E. 831), or that, if the changes made in a building were so different from the old plans as to provide for a new and materially different job plaintiff was not bound by the old contract (Cook County *v.* Harms, 108 Ill. 151); by telling the jury what negligence is by defining the duty resting on a party and the consequences of a failure to perform it (Houston, etc., R. Co. *v.* Hubbard, (Tex. Civ. App. 1896) 37 S. W. 25), or that they are to find for plaintiff if they find from the evidence that he has made out his case as laid in the declaration (Laflin, etc., Powder Co. *v.* Tearney, 131 Ill. 322, 23 N. E. 389, 19 Am. St. Rep. 34, 7 L. R. A. 262; North Chicago St. R. Co. *v.* Zeiger, 78 Ill. App. 463), or that they are to so find, if they believe from the evidence that he has proven his declaration or any one count thereof in manner and form as therein set forth (Illinois Cent. R. Co. *v.* Harris, 162 Ill. 200, 44 N. E. 498); or if, after stating the facts necessary to constitute a cause of action, by instructing that if plaintiff under the instructions herein became vested with a cause of action (Davenport *v.* The City of Hannibal, 108 Mo. 471, 18 S. W. 1122); or to notice and consider the extent to which some instructions qualify others (Chicago Union Traction Co. *v.* Hanthorn, 211 Ill. 367, 71 N. E. 1022); so that the burden of proof was on defendant to prove by a preponderance of evidence that plaintiff was negligent, unless plaintiff's evidence showed such fact, in which event the verdict should be for defendant (Texas, etc., R. Co. *v.* Conway, 44 Tex. Civ. App. 68, 98 S. W. 1070), is not objectionable as submitting to the jury the question on whom the burden of proof rested.

25. *Georgia.*— Mattheson *v.* Tennile, 115 Ga. 999, 42 S. E. 394; Mooney *v.* Tarver, 103 Ga. 573, 30 S. E. 257; Davis *v.* Kirkland, 1 Ga. App. 5, 58 S. E. 209.

Illinois.— Fairbury *v.* Rogers, 98 Ill. 554; McKechney *v.* Columbian Powder Co., 86 Ill. App. 27.

Indiana.— Grimes *v.* Alsop, 7 Blackf. 269; Colton *v.* Lewis, 8 Ind. App. 40, 35 N. E. 301.

law and to determine the issues made,[26] the sufficiency of the allegations,[27] and whether or not they are sufficiently denied.[28] The question whether there is variance between the pleadings and the proofs is also for the court to determine.[29] So it is the province of the court to instruct as to the sufficiency of the pleading,[30] as to what are the material allegations,[31] or what is alleged therein,[32] or what is the nature of the action alleged therein,[33] or what allegations are admitted or denied;[34] and if such be the case, that the facts proved do not tend to support the allegations of the petition.[35] And instructions containing propositions as to the law of pleading are properly refused.[36]

2. Questions Relating to Evidence — a. Admissibility, Relevancy, Etc. The rule seems to be well settled that, although the determination of a question of fact is thereby involved it is for the court to determine the admissibility,[37]

Iowa.— Scow *v.* Farmers', etc., Sav. Bank, 136 Iowa 1, 111 N. W. 32; Muldowney *v.* Illinois Cent. R. Co., 32 Iowa 176.

Kentucky.— Salter *v.* Myers, 5 B. Mon. 280; Forbes *v.* Hunter, 102 S. W. 246, 31 Ky. L. Rep. 285.

Maine.— Bigelow *v.* Bigelow, 95 Me. 17, 49 Atl. 49.

Michigan.—Williams *v.* Shelden, 61 Mich. 311, 28 N. W. 115; Newman *v.* Bowman, How. N. P. 46.

Missouri.— Winfrey *v.* Ragan, 136 Mo. App. 250, 117 S. W. 83.

Nebraska.— Morrill *v.* McNeill, 3 Nebr. (Unoff.) 220, 91 N. W. 602.

New Hampshire.— Newport First Nat. Bank *v.* Hunton, 69 N. H. 509, 45 Atl. 351.

Oklahoma.— Farmers' State Bank *v.* Spencer, 12 Okla. 597, 73 Pac. 297.

Pennsylvania.— Pfeiffer *v.* Pittsburg Safe Deposit, etc., Co., 183 Pa. St. 197, 38 Atl. 622.

United States.— Hogan *v.* Page, 2 Wall. 605, 17 L. ed. 854.

And see *infra*, XI, C, 5, 6, 7.

26. Birmingham R., etc., Co. *v.* Hayes, 153 Ala. 178, 44 So. 1032; Alexander *v.* Wheeler, 69 Ala. 332; Pharo *v.* Johnson, 15 Iowa 560; Hall *v.* Renfro, 3 Metc. (Ky.) 51.

Amendment.— That plaintiff amends his petition so as to change certain allegations does not raise an issue with himself which must be submitted to the jury. Hester *v.* Gairdner, 128 Ga. 531, 58 S. E. 165.

27. Sherwood *v.* Chicago, etc., R. Co., 88 Mich. 108, 50 N. W. 101.

28. Becker *v.* Crow, 7 Bush (Ky.) 198; Yeiser *v.* Brown, 6 Bush (Ky.) 190; Steil *v.* Ackli, 15 Mo. 289.

29. Oxley *v.* Storer, 54 Ill. 159; Hendrick *v.* Kellogg, 3 Greene (Iowa) 215; Birch *v.* Benton, 26 Mo. 153.

30. Burgess *v.* Lloyd, 7 Md. 178.

31. Lodge *v.* Hampton, 116 Ill. App. 414; Davenport, etc., R. Co. *v.* De Yaeger, 112 Ill. App. 537; Chicago Terminal Transfer R. Co. *v.* Schmelling, 197 Ill. 619, 64 N. E. 714 [*affirming* 99 Ill. App. 577]; Davies *v.* Cobb, 11 Ill. App. 587; Williams *v.* Iowa Cent. R. Co., 121 Iowa 270, 96 N. W. 774; Becker *v.* Crow, 7 Bush (Ky.) 198; Allard *v.* Smith, 2 Metc. (Ky.) 297; Tipton *v.* Triplett, 1 Metc. (Ky.) 570; Dicken *v.* Liverpool Salt, etc., Co., 41 W. Va. 511, 23 S. E. 582.

Instructions which leave to the jury the determination of what are the material allegations of a pleading are erroneous. St. Clair County School Trustees *v.* Yoch, 133 Ill. App. 32; Chicago, etc., R. Co. *v.* Walker, 127 Ill. App. 212; Illinois Cent. R. Co. *v.* Hicks, 122 Ill. App. 349; Peoria, etc., R. Co. *v.* Hoerr, 120 Ill. App. 65.

32. Erb *v.* German-American Ins. Co., 112 Iowa 357, 83 N. W. 1053; Oliver *v.* Chapman, 15 Tex. 400.

33. Beebe *v.* Stutsman, 5 Iowa 271.

34. Potter *v.* Wooster, 10 Iowa 334; Fannon *v.* Robinson, 10 Iowa 272.

35. Jaccard *v.* Anderson, 37 Mo. 91.

36. Peck *v.* Springfield Traction Co., 131 Mo. App. 134, 110 S. W. 659.

37. *Connecticut.*— Robinson *v.* Ferry, 11 Conn. 460.

Georgia.— Carroll *v.* Roberts, 23 Ga. 492.

Indiana.—Indiana Farmers' Live Stock Ins. Co. *v.* Byrkett, 9 Ind. App. 443, 36 N. E. 779.

Kentucky.— Swearingen *v.* Leach, 7 B. Mon. 285.

Maryland.— United R., etc., Co. *v.* Corbin, 109 Md. 442, 72 Atl. 606.

Virginia.— Bogle *v.* Sullivant, 1 Call 561.

Wisconsin.— Dr. Harter Medicine Co. *v.* Hopkins, 83 Wis. 309, 53 N. W. 501.

And see Theobald *v.* Shepard, 75 N. H. 52, 71 Atl. 26.

Illustrations.— Thus, where the competency of a fact offered as evidence depend upon the existence of certain preliminary facts, these latter facts must be passed upon by the court. De Graffenreid *v.* Thomas, 14 Ala. 681; Claytor *v.* Anthony, 6 Rand. (Va.) 285; Snooks *v.* Wingfield, 52 W. Va. 441, 44 S. E. 277. So, where in order to render admissible evidence of acts and declarations of persons not parties to the action, it is necessary to prove a common unlawful design, the existence of such common design is for the court. Jones *v.* Hurlburt, 39 Barb. (N. Y.) 403. Where, in order to prove the value of certain lands, evidence of the amount paid for other land in the vicinity is offered, it is for the court to say whether such sales were of a too remote time to have any bearing on the question in issue. Kendall *v.* Flanders, 72 N. H. 11, 54 Atl. 285. Whether there is sufficient proof of agency to warrant the admission of the acts and declarations of the agent (Emerson *v.* Province Hat Mfg. Co.,

materiality,[38] relevancy,[39] or competency of evidence,[40] or the competency of witnesses;[41] and it is error for the judge to submit to the jury the competency of evidence,[42] or to instruct them that they may exclude such testimony as they see is improper.[43] Where, however, the evidence as to a preliminary fact on which the admissibility of evidence depends is conflicting and doubtful, the court may, if it chooses, submit the matter to the jury, with instructions to disregard the evidence offered unless they find in favor of the preliminary fact;[44] and the court should, in no case, withhold evidence from the jury, where by so doing it assumes to decide the very fact in issue.[45]

b. Legal Sufficiency of Evidence to Go to Jury. It is held to be a question of law for the court to determine whether there is any evidence in support of the material issues of the case which will warrant its submission to the jury.[46] So it is for the court to determine when certain evidence, as a matter of law, is not sufficient to establish one of the ultimate facts in issue,[47] or to support one of

12 Mass. 237, 7 Am. Dec. 66; Cliquot *v.* U. S., 3 Wall. (U. S.) 114, 18 L. ed. 116); whether letters testamentary are properly authenticated (Sullivan *v.* Honacker, 6 Fla. 372); whether an answer to a question may reasonably have a tendency to incriminate the witness (Wyckoff *v.* Wagner Typewriter Co., 99 Fed. 158); or whether, when parol proof of a contract is objected to on the ground that the contract is in writing, the written instrument testified to relates to the same agreement as the oral contract sought to be proved (Ratliff *v.* Huntly, 27 N. C. 545) are questions for the court.

38. People *v.* Ivey, 49 Cal. 56; Nickey *v.* Zonker, 31 Ind. App. 88, 67 N. E. 277; Hansberger *v.* Sedalia Electric R., etc., Co., 82 Mo. App. 566; Waters Pierce Oil Co. *v.* Davis, 24 Tex. Civ. App. 508, 60 S. W. 453.

39. Roach *v.* Hulings, 16 Pet. (U. S.) 319, 10 L. ed. 979.

40. Dominick *v.* Randolph, 124 Ala. 557, 27 So. 481; Weston *v.* Teufel, 213 Ill. 291, 72 N. E. 908; Colby *v.* Portman, 115 Mich. 95, 72 N. W. 1098; Ross *v.* Espy, 66 Pa. St. 481, 5 Am. Rep. 394. And see Seaboard Air Line R. Co. *v.* Phillips, 108 Md. 285, 70 Atl. 232.

41. Indiana Farmers' Live Stock Ins. Co. *v.* Byrkett, 9 Ind. App. 443, 36 N. E. 779. *Compare* Dowdy *v.* Watson, 115 Ga. 42, 41 S. E. 266, holding that where the competency of a witness depends on conflicting evidence, the question of competency should be submitted to the jury with instructions that if they find him incompetent they should disregard his testimony.

Instances.— Whether a person by reason of youthfulness does not sufficiently understand the nature of an oath to be a competent witness (Com. *v.* Reagan, 175 Mass. 335, 56 N. E. 577, 78 Am. St. Rep. 496); or whether the relation of attorney and client exists so as to render a witness incompetent to testify to a particular fact (Kitz *v.* Buckmaster, 45 N. Y. App. Div. 283, 61 N. Y. Suppl. 64), are questions of law for the court.

42. Chattahoochee Nat. Bank *v.* Schley, 58 Ga. 369; Jones *v.* Roberts, 37 Mo. App. 163.

43. Karnes *v.* Belleville, etc., R. Co., 89 Ill. 269; Wolcott *v.* Heath, 78 Ill. 433.

44. *Alabama.*— Scott *v.* Coxe, 20 Ala. 294. But see De Graffenreid *v.* Thomas, 14 Ala. 681.

California.— Verzan *v.* McGregor, 23 Cal. 339.

Maine.— Winslow *v.* Bailey, 16 Me. 319.

Maryland.— Funk *v.* Kincaid, 5 Md. 404.

New Hampshire.— Bartlett *v.* Hoyt, 33 N. H. 151.

See 46 Cent. Dig. tit. "Trial," § 322.

Where there is no substantial evidence of the existence of the preliminary fact, the evidence should be entirely excluded by the court. Guinn *v.* Phœnix Ins. Co., 80 Iowa 346, 45 N. W. 880.

45. Frazier *v.* Griffie, 8 Md. 50; Hastings *v.* Allen, 14 Ohio 58, 45 Am. Dec. 522.

46. *Connecticut.*—Loomis *v.* Norman Printers' Supply Co., 81 Conn. 343, 71 Atl. 358.

Delaware.— Daniels *v.* Liebig Mfg. Co., 2 Marv. 207, 42 Atl. 447.

Georgia.— Georgia R., etc., Co. *v.* Harris, 1 Ga. App. 714, 57 S. E. 1076.

Illinois.— Libby *v.* Banks, 209 Ill. 109, 70 N. E. 599; Cleveland, etc., R. Co. *v.* Sparks, 122 Ill. App. 400.

Maryland.— Consolidated Gas, etc., Co. *v.* State, 109 Md. 186, 72 Atl. 651; Knell *v.* Briscoe, 49 Md. 414; Belt *v.* Marriott, 9 Gill 331.

Missouri.— Charles *v.* Patch, 87 Mo. 450.

New York.— Tuttle *v.* Buck, 41 Barb. 417; Thalheimer *v.* Lamont, 9 N. Y. St. 439.

North Carolina.— Universal Metal Co. *v.* Durham, etc., R. Co., 145 N. C. 293, 59 S. E. 950; Wittkowsky *v.* Wasson, 71 N. C. 451.

Pennsylvania.— De France *v.* De France, 34 Pa. St. 385; Payne *v.* Ulmer, 1 Walk. 516; Stouffer *v.* Latshaw, 2 Watts 165, 27 Am. Dec. 297.

Texas.— Galveston, etc., R. Co. *v.* Murray, (Civ. App. 1906) 99 S. W. 144.

Utah.— See Palmer *v.* Oregon Short Line R. Co., 34 Utah 466, 98 Pac. 689.

United States.— Crookston Lumber Co. *v.* Boutin, 149 Fed. 680, 79 C. C. A. 368; First Nat. Gold Min. Co. *v.* Altvater, 149 Fed. 393, 79 C. C. A. 213; Cole *v.* German Sav., etc., Soc., 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A. 416; Cruikshank *v.* Fourth Nat. Bank, 26 Fed. 584.

See 46 Cent. Dig. tit. "Trial," § 339.

47. *Alabama.*— Huggins *v.* Southern R. Co., 148 Ala. 153, 41 So. 856.

District of Columbia.—Otterback *v.* Brown, 2 MacArthur 541.

several issues,[48] it is proper for the court to so instruct the jury, and it should do so.[49] Where there are special findings of fact, or if the facts be undisputed,[50] and but one conclusion can be drawn therefrom, by reasonable minds,[51] where there is no ground for anything more than a mere surmise of the existence of a fact,[52] or where there is a total failure of proof by plaintiff,[53] the right of a party to recover on such findings or facts is a question of law.[54] But it is only where

Georgia.— East Tennessee, etc., R. Co. *v.* Markens, 88 Ga. 60, 13 S. E. 855, 14 L. R. A. 281.

Illinois.— Feitl *v.* Chicago City R. Co., 211 Ill. 279, 71 N. E. 991 [*affirming* 113 Ill. App. 381].

Indiana.—Kline *v.* Spahr, 56 Ind. 296.

Maryland.—Webb *v.* McCloskey, 68 Md. 196, 11 Atl. 715; Lewis *v.* Baltimore, etc., R. Co., 38 Md. 588, 17 Am. Rep. 521; Thurston *v.* Lloyd, 4 Md. 283; Belt *v.* Marriott, 9 Gill 331; Farmers' Bank *v.* Duvall, 7 Gill & J. 78; Mercer *v.* Walmsley, 5 Harr. & J. 27, 9 Am. Dec. 486.

Michigan.— Snyder *v.* Lake Shore, etc., R. Co., 131 Mich. 418, 91 N. W. 643.

Missouri.— King *v.* King, 155 Mo. 406, 56 S. W. 534; Tyler *v.* Hall, 106 Mo. 313, 17 S. W. 319, 27 Am. St. Rep. 337.

Nebraska.— Graham *v.* Hartnett, 10 Nebr. 517, 7 N. W. 280.

Oregon.— Latshaw *v.* Territory, 1 Oreg. 140.

South Carolina.— Bryce *v.* Cayce, 62 S. C. 546, 40 S. E. 948.

Tennessee.— Slattery *v.* Lea, 11 Lea 9.

United States.— Parks *v.* Ross, 11 How. 362, 13 L. ed. 730.

See 46 Cent. Dig. tit. "Trial," § 500.

48. *Georgia.*— Underwood *v.* American Mortg. Co., 97 Ga. 238, 24 S. E. 847.

Maine.— Rogers *v.* Percy, (1887) 12 Atl. 545.

Massachusetts.— Farnum *v.* Pitcher, 151 Mass. 470, 24 N. E. 590.

South Carolina.— Gallman *v.* Union Hardwood Mfg. Co., 65 S. C. 192, 43 S. E. 524.

United States.— Connecticut Mut. L. Ins. Co. *v.* McWhirter, 73 Fed. 444, 19 C. C. A. 519.

49. *Alabama.*— Sims *v.* Sims, 2 Ala. 117.

Indiana.— Hynds *v.* Hays, 25 Ind. 31.

Massachusetts.— Lane *v.* Old Colony, etc., R. Co., 14 Gray 143.

Michigan.— Scripps *v.* Reilly, 38 Mich. 10.

Mississippi.—Garnett *v.* Kirkman, 33 Miss. 389.

Nebraska.— Hiatt *v.* Brooks, 17 Nebr. 33, 22 N. W. 73.

North Carolina.— Satterwhite *v.* Hicks, 44 N. C. 105, 57 Am. Dec. 577; Brown *v.* Patton, 35 N. C. 446.

Pennsylvania.— Thomas *v.* Thomas, 21 Pa. St. 315.

West Virginia.— Rowan *v.* Hull, 55 W. Va. 335, 47 S. E. 92.

See 46 Cent. Dig. tit. "Trial," § 500.

To decline to state a plain legal conclusion arising from the undisputed facts is error. Rhodes *v.* Otis, 33 Ala. 578, 73 Am. Dec. 439; Rowell *v.* Vershire, 62 Vt. 405, 19 Atl. 990, 8 L. R. A. 708.

50. *Colorado.*— Behrens *v.* Kansas Pac. R. Co., 5 Colo. 400.

Illinois.— Chicago Gen. R. Co. *v.* Novneck, 94 Ill. App. 178.

Michigan.— Scheibeck *v.* VanDerbeck, 122 Mich. 29, 80 N. W. 880.

Missouri.— Rogers *v.* Carey, 47 Mo. 232, 4 Am. Rep. 322; State Ins. Co. *v.* Irwin, 67 Mo. App. 90.

New York.—Wunch *v.* Shankland, 69 N. Y. App. Div. 482, 69 N. Y. Suppl. 349; Holbrook *v.* Wilson, 4 Bosw. 64.

51. *District of Columbia.*— Morgan *v.* Adams, 29 App. Cas. 198.

Indiana.— Baltimore, etc., R. Co. *v.* Walborn, 127 Ind. 142, 26 N. E. 207; Valparaiso *v.* Schwerdt, 40 Ind. App. 608, 82 N. E. 923; Chicago, etc., R. Co. *v.* Martin, 31 Ind. App. 308, 65 N. E. 591; Indianapolis *v.* Mitchell, 27 Ind. App. 589, 61 N. E. 947.

Iowa.— Kern *v.* Des Moines City R. Co., 141 Iowa 620, 118 N. W. 451.

Maryland.— Sheppard *v.* Willis, 28 Md. 631; Davis *v.* Davis, 7 Harr. & J. 36.

Nebraska.— Schwanenfeldt *v.* Chicago, etc., R. Co., 80 Nebr. 790, 115 N. W. 285; Sovereign Camp W. W. *v.* Hruby, 70 Nebr. 5, 96 N. W. 998; Chicago, etc., R. Co. *v.* Pollard, 53 Nebr. 730, 74 N. W. 331; Omaha St. R. Co. *v.* Loehneisen, 40 Nebr. 37, 58 N. W. 535; Omaha, etc., R. Co. *v.* Brady, 39 Nebr. 27, 57 N. W. 767; American Water-works Co. *v.* Dougherty, 37 Nebr. 373, 55 N. W. 1051; Lincoln *v.* Gillilan, 18 Nebr. 114, 24 N. W. 444.

North Carolina.— Hardy *v.* Simpson, 35 N. C. 132.

Texas.—Walker *v.* Erwin, 47 Tex. Civ. App. 637, 106 S. W. 164.

Wisconsin.— Deuster *v.* Mittag, 105 Wis. 459, 81 N. W. 643; Morrison *v.* Madison, 96 Wis. 452, 71 N. W. 882.

United States.— McDermott *v.* Severe, 202 U. S. 600, 604, 26 S. Ct. 709, 50 L. ed. 1162, 1165; Mosheuvel *v.* District of Columbia, 191 U. S. 247, 24 S. Ct. 57, 48 L. ed. 170.

52. Carter *v.* Goff, 141 Mass. 123, 5 N. E. 471; Hinson *v.* King, 50 N. C. 393.

53. Deshler *v.* Beers, 32 Ill. 368, 83 Am. Dec. 274; Case *v.* Hannahs, 2 Kan. 490; Kearns *v.* Southern R. Co., 139 N. C. 470, 52 S. E. 131; Robinson *v.* Louisville, etc., R. Co., 2 Lea (Tenn.) 594.

54. Jevons *v.* Union Pac. R. Co., 70 Kan. 491, 78 Pac. 817.

Illustrations.— Thus, whether under given facts a party ever owned or acquired an interest in certain land (Laufer *v.* Powell, 30 Tex. Civ. App. 604, 71 S. W. 549; Oaks *v.* West, (Tex. Civ. App. 1901) 64 S. W. 1033), or whether there has been a legal delivery of a deed (Rogers *v.* Carey, 47 Mo.

all reasonable men can draw but one inference from the undisputed facts that the question to be determined is one of law for the court.[55]

c. Weight and Sufficiency of Evidence.[56] The weight [57] and sufficiency of the evidence [58] are for the jury, and therefore if there is evidence in the case which

232, 4 Am. Rep. 322), are questions of law for the court.

Conflict of evidence.— Whether there is a conflict of evidence is a question of law. Chambliss *v.* Mary Lee Coal, etc., Co., 104 Ala. 655, 16 So. 572.

55. *District of Columbia.*— Barstow *v.* Capital Traction Co., 29 App. Cas. 362; Jennings *v.* Philadelphia, etc., R. Co., 29 App. Cas. 219.

Michigan.— Putnam *v.* Phœnix Preferred Acc. Ins. Co., 155 Mich. 134, 118 N. W. 922.

New York.— Hallett *v.* S. Liebmann's Sons Brewing Co., 129 N. Y. App. Div. 617, 114 N. Y. Suppl. 232.

Texas.— Stephenville First Nat. Bank *v.* Thomas, (Civ. App. 1909) 118 S. W. 221; Walker *v.* Erwin, 47 Tex. Civ. App. 637, 106 S. W. 164.

United States.— Crookston Lumber Co. *v.* Boutin, 149 Fed. 680, 79 C. C. A. 368; Chicago, etc., R. Co. *v.* Price, 97 Fed. 423, 38 C. C. A. 239.

56. **Demurrer to evidence** see *infra*, VIII, B.

Directing verdict see *infra*, VIII, D.

Dismissal or nonsuit see *infra*, VIII, C.

57. *Alabama.*— Prestwood *v.* Eldridge, 119 Ala. 72, 24 So. 729; Wiswall *v.* Ross, 4 Port. 321.

Arkansas.—Ong Chair Co. *v.* Cook, 85 Ark. 390, 108 S. W. 203; Ingram *v.* Marshall, 23 Ark. 115.

Connecticut.— Wetherell *v.* Hollister, 73 Conn. 622, 48 Atl. 826.

Dakota.— Territory *v.* Egan, 3 Dak. 119, 13 N. W. 568.

Delaware.— Daniels *v.* Liebig Mfg. Co., 2 Marv. 207, 42 Atl. 447.

Georgia.— Warner *v.* Robertson, 13 Ga. 370.

Illinois.— Kinser *v.* Cowie, 225 Ill. 383, 85 N. E. 623 [*affirming* 138 Ill. App. 143]; Paige *v.* Illinois Steel Co., 233 Ill. 313, 84 N. E. 239 [*affirming* 136 Ill. App. 410]; Landgraf *v.* Kuh, 188 Ill. 484, 59 N. E. 501 [*reversing* 90 Ill. App. 134]; Louisville, etc., R. Co. *v.* Patchen, 167 Ill. 204, 47 N. E. 368; Paton *v.* Stewart, 78 Ill. 481; Stacy *v.* Cobbs, 36 Ill. 349; Gruenendahl *v.* Consolidated Coal Co., 108 Ill. App. 644; Chicago City R. Co. *v.* Iverson, 108 Ill. App. 433; Chicago City R. Co. *v.* Bohnow, 108 Ill. App. 346; Hartung *v.* North Chicago St. R. Co., 102 Ill. App. 470; Achenbach *v.* Fesser, 55 Ill. App. 580.

Iowa.— City Deposit Bank *v.* Green, 138 Iowa 156, 115 N. W. 893; Frick *v.* Kabaker, 116 Iowa 494, 90 N. W. 498.

Kansas.— Harrod *v.* Latham Mercantile, etc., Co., 77 Kan. 466, 95 Pac. 11; Missouri, etc., R. Co. *v.* L. A. Watkins Merchandise Co., 76 Kan. 813, 92 Pac. 1102; Kelley *v.* Ryus, 48 Kan. 120, 29 Pac. 144.

Kentucky.— Louisville, etc., R. Co. *v.* Mount, 125 Ky. 593, 101 S. W. 1182, 31 Ky. L. Rep. 210; Champion Ice Mfg., etc., Co. *v.* Delsiquore, 105 S. W. 1181, 32 Ky. L. Rep. 427; Perry County *v.* Eversole, 30 Ky. L. Rep. 453, 98 S. W. 1019.

Maryland.— United R., etc., Co. *v.* Corbin, 109 Md. 442, 72 Atl. 606; General Acc., etc., Assur. Corp. *v.* Homely, 109 Md. 93, 71 Atl. 524; National Enameling, etc., Co. *v.* Brady, 93 Md. 646, 49 Atl. 845; Jackson *v.* Jackson, 82 Md. 17, 33 Atl. 317, 34 L. R. A. 773.

Michigan.—Woodruff *v.* Schultz, 155 Mich. 11, 118 N. W. 579.

Mississippi.— Mobile, etc., R. Co. *v.* Jackson, 92 Miss. 517, 46 So. 142; Gibson *v.* W. C. Wood Lumber Co., 91 Miss. 702, 45 So. 834.

Missouri.— State *v.* Chick, 146 Mo. 645, 48 S. W. 829; Chouquette *v.* Barada, 28 Mo. 491; State *v.* Upton, 20 Mo. 397; Patterson *v.* McClanahan, 13 Mo. 507; Railey *v.* Metropolitan St. R. Co., 133 Mo. App. 473, 113 S. W. 680; Peck *v.* Springfield Traction Co., 131 Mo. App. 134, 110 S. W. 659.

New Mexico.— Territory *v.* O'Donnell, 4 N. M. 66, 12 Pac. 743.

New York.— Van Gaasbeek *v.* Staples, 177 N. Y. 524, 69 N. E. 1132 [*affirming* 85 N. Y. App. Div. 271, 83 N. Y. Suppl. 225].

North Carolina.— Craft *v.* Norfolk, etc., R. Co., 136 N. C. 49, 48 S. E. 519; Southern L. & T. Co. *v.* Benbow, 135 N. C. 303, 47 S. E. 435; Fry *v.* Currie, 91 N. C. 436; Wittkowsky *v.* Wasson, 71 N. C. 451.

Ohio.— Perin *v.* Cincinnati, etc., R. Co., 9 Ohio Dec. (Reprint) 113, 17 Cinc. L. Bul. 261.

Oregon.— Multnomah *v.* Willamette Towing Co., 49 Oreg. 204, 89 Pac. 389.

Pennsylvania.— Kiester *v.* Miller, 25 Pa. St. 481.

Texas.— Russell *v.* Mason, 8 Tex. 226; Hall *v.* Cook, (Civ. App. 1909) 117 S. W. 449; Shelton *v.* Willis, 23 Tex. Civ. App. 547, 58 S. W. 176; Wood *v.* Samuels, 1 Tex. App. Civ. Cas. § 922.

Utah.— Meyers *v.* Highland Boy Gold Min. Co., 28 Utah 96, 77 Pac. 347; Whitmore *v.* Rio Grande Western R. Co., 24 Utah 215, 66 Pac. 1066.

Virginia.— Metropolitan L. Ins. Co. *v.* De Vault, 109 Va. 392, 63 S. E. 982; Hardaway *v.* Manson, 2 Munf. 230.

Washington.— Herbert *v.* Hillman, 50 Wash. 83, 96 Pac. 837.

Wisconsin.— Kuenster *v.* Woodhouse, 101 Wis. 216, 77 N. W. 165; Zonne *v.* Wiersom, 3 Pinn. 217, 3 Chandl. 240.

United States.— Goldsmith *v.* Thuringia Ins. Co., 114 Fed. 914, 52 C. C. A. 534; Ambs *v.* Atchison, etc., R. Co., 114 Fed. 317; Fetters *v.* Union Traction Co., 95 Fed. 68.

See 46 Cent. Dig. tit. "Trial," § 322.

58. *Alabama.*— Western Union Tel. Co. *v.* Rowell, 153 Ala. 295, 45 So. 73.

fairly tends to support plaintiff's right to recover the court may properly refuse to take the case from the jury.[59]

d. Inferences From Evidence. Subject to the limitation that, in certain cases, the facts being established, the law conclusively draws the inference, which is often called a presumption of law.[60] The inferences to be deduced from the facts in evidence are for the jury,[61] who are at liberty to draw such inferences as are reasonably deducible therefrom; [62] and it is error for the court to draw infer-

Dakota.— Territory *v.* Egan, 3 Dak. 119, 13 N. W. 568.

Georgia.— Warner *v.* Robertson, 13 Ga. 370.

Illinois.— Fairbury *v.* Rogers, 98 Ill. 554; Paton *v.* Stewart, 78 Ill. 481; Stacy *v.* Cobbs, 36 Ill. 349; Achenbach *v.* Fesser, 55 Ill. App. 580.

Kentucky.— Young *v.* Smith, 10 B. Mon. 293.

Maryland.— Jackson *v.* Jackson, 82 Md. 17, 33 Atl. 317, 34 L. R. A. 773.

Missouri.— Seehorn *v.* American Nat. Bank, 148 Mo. 256, 49 S. W. 886; Choquette *v.* Barada, 28 Mo. 491; State *v.* Upton, 20 Mo. 397; Patterson *v.* McClanahan, 13 Mo. 507.

New Mexico.— Territory *v.* O'Donnell, 4 N. M. 66, 12 Pac. 743.

North Carolina.— Southern L. & T. Co. *v.* Benbow, 135 N. C. 303, 47 S. E. 435.

Pennsylvania.— Kiester *v.* Miller, 25 Pa. St. 481.

Texas.— Wood *v.* Samuels, 1 Tex. App. Civ. Cas. § 922.

Wisconsin.— Zonne *v.* Wiersom, 3 Pinn. 217, 3 Chandl. 240.

See 46 Cent. Dig. tit. "Trial," § 322.

The relative weight of positive and negative testimony is for the jury. Rhoades *v.* Chicago, etc., R. Co., 58 Mich. 263, 25 N. W. 182. And see Van Salvellergh *v.* Green Bay Traction Co., 132 Wis. 166, 111 N. W. 1120.

59. *Idaho.*— York *v.* Pacific, etc., R. Co., 8 Ida. 574, 69 Pac. 1042.

Illinois.— Chicago *v.* Jarvis, 226 Ill. 614, 80 N. E. 1079; Anthony Ittner Brick Co. *v.* Ashby, 198 Ill. 562, 64 N. E. 1109 [*affirming* 100 Ill. App. 604]; Wolf *v.* Collins, 196 Ill. 281, 63 N. E. 638.

Kentucky.— Adams *v.* Simpson, 103 S. W. 247, 31 Ky. L. Rep. 604; Brooks *v.* Brooks, 53 S. W. 645, 21 Ky. L. Rep. 940.

New Jersey.— Sutphen *v.* Hedden, 67 N. J. L. 324, 51 Atl. 721.

New York.— Fay *v.* Brooklyn Heights R. Co., 69 N. Y. App. Div. 563, 75 N. Y. Suppl. 113.

Oklahoma.— Myers *v.* Perry First Presb. Church, 11 Okla. 544, 69 Pac. 874.

South Carolina.— Davis *v.* Atlanta, etc., R. Co., 63 S. C. 370, 577, 41 S. E. 468, 892.

Texas.— Ney *v.* Ladd, (Civ. App. 1902) 68 S. W. 1014.

See 46 Cent. Dig. tit. "Trial," § 322.

60. 1 Thompson Trials, § 1039. And see to same effect Roots *v.* Tyner, 10 Ind. 87; Evans *v.* J. S. Scofield's Sons Co., 120 Ga. 961, 48 S. E. 358; Sovereign Camp W. W. *v.* Hruby, 70 Nebr. 5, 96 N. W. 998; Shiverick *v.* R. J. Gunning Co., 58 Nebr. 29, 78 N. W. 460; Brotherson *v.* Jones, Lalor (N. Y.) 171; Hardy *v.* Simpson, 35 N. C. 132; Smith *v.* Richardson Lumber Co., (Tex. Civ. App. 1898) 47 S. W. 386, 753; Sessions *v.* Newport, 23 Vt. 9; Norvell *v.* Camm, 2 Rand. (Va.) 68; Cowley *v.* La Crosse City R. Co., 101 Wis. 145, 77 N. W. 179; Morrison *v.* Madison, 96 Wis. 452, 71 N. W. 882.

61. *Alabama.*— Mobile, etc., R. Co. *v.* Glover, 150 Ala. 386, 43 So. 719; Kansas City, etc., R. Co. *v.* Childers, 132 Ala. 611, 32 So. 717; White *v.* Hass, 32 Ala. 430, 70 Am. Dec. 548; Crum *v.* Williams, 29 Ala. 446.

Indiana.— Siebe *v.* Heilman Mach. Works, 38 Ind. App. 37, 77 N. E. 300.

Kentucky.— Adams *v.* Tiernan, 5 Dana 394.

Massachusetts.— Leighton *v.* Morrill, 159 Mass. 271, 34 N. E. 256; Kane *v.* Learned, 117 Mass. 190.

Michigan.— Fox *v.* Spring Lake Iron Co., 89 Mich. 387, 50 N. W. 872.

Mississippi.— Mississippi Cent. R. Co. *v.* Mason, 51 Miss. 234.

Missouri.— Chouquette *v.* Barada, 28 Mo. 491; Primm *v.* Haren, 27 Mo. 205.

New Jersey.— Conover *v.* Middleton Tp., 42 N. J. L. 382.

New York.— Gardner *v.* Friederich, 25 N. Y. App. Div. 521, 49 N. Y. Suppl. 1077 [*affirmed* in 163 N. Y. 568, 57 N. E. 1110]; Moorehead *v.* Holden, 7 N. Y. Civ. Proc. 188.

North Carolina.— Midgette *v.* Branning Mfg. Co., 150 N. C. 333, 64 S. E. 5.

Pennsylvania.— Heh *v.* Consolidated Gas Co., 201 Pa. St. 443, 50 Atl. 994, 88 Am. St. Rep. 819; Pennsylvania R. Co. *v.* Weiss, 87 Pa. St. 447.

Texas.— Texas Midland R. Co. *v.* Geraldon, (Civ. App. 1909) 117 S. W. 1004.

Vermont.— Sessions *v.* Newport, 23 Vt. 9.

Virginia.— Bass *v.* Norfolk R., etc., Co., 100 Va. 1, 40 S. E. 100.

Wisconsin.— Zentner *v.* Oshkosh Gas Light Co., 126 Wis. 196, 105 N. W. 911.

See 46 Cent. Dig. tit. "Trial," § 337.

Where intent is to be determined from disputed circumstances, the necessary inferences to be drawn are for the jury. Continental Lumber Co. *v.* Munshaw, 82 Nebr. 783, 118 N. W. 1057; Continental Lumber Co. *v.* Munshaw, 77 Nebr. 456, 109 N. W. 760.

62. *Illinois.*— North Chicago St. R. Co. *v.* Rodert, 203 Ill. 413, 67 N. E. 812 [*affirming* 105 Ill. App. 314].

Indiana.— Chicago, etc., R. Co. *v.* Thomas, (1900) 55 N. E. 861.

New Hampshire.— Pittsfield *v.* Barnstead, 40 N. H. 477.

South Carolina.—Brickman *v.* Southern R. Co., 74 S. C. 306, 54 S. E. 553.

ences of fact from the evidence,[63] or to influence the jury to draw certain inferences therefrom.[64]

e. Presumptions of Fact. The force and effect of presumptions of fact are for the jury,[65] as is also the question whether they have been overcome by the evidence introduced to rebut them.[66] But whether the facts proved give rise to a presumption is a question for the court.[67]

3. Credibility of Witnesses.[68] It is well settled that the credibility of witnesses is in all cases a question for the jury.[69] The rule has been applied under

Vermont.— Blaisdell *v.* Davis, 72 Vt. 295, 48 Atl. 14; Doolittle *v.* Holton, 26 Vt. 588.

See 46 Cent. Dig. tit. "Trial," § 412.

Reasonable foundation necessary.— The inference must have some reasonable foundation in the facts shown. Carey *v.* Hughes, 17 Ala. 388; Jones *v.* Lincoln First Nat. Bank, 3 Nebr. (Unoff.) 73, 90 N. W. 912; Hollister *v.* Johnson, 4 Wend. (N. Y.) 639; Wakefield *v.* Smithwick, 49 N. C. 327; Cobb *v.* Fogalman, 23 N. C. 440; Halfman *v.* Pennsylvania Boiler Ins. Co., 160 Pa. St. 202, 28 Atl. 837.

63. *Alabama.*— Joseph *v.* Southwark Foundry, etc., Co., 99 Ala. 47, 10 So. 327; Smith *v.* Collins, 94 Ala. 394, 10 So. 334; Pritchett *v.* Munroe, 22 Ala. 501.

Florida.— Ferguson *v.* Porter, 3 Fla. 27.

Georgia.—Augusta R., etc., Co. *v.* Weekly, 124 Ga. 384, 52 S. E. 444.

Illinois.— West Chicago St. R. Co. *v.* McNulty, 166 Ill. 203, 46 N. E. 784 [*affirming* 64 Ill. App. 549]; Fisher *v.* Bennehoff, 121 Ill. 426, 13 N. E. 150; Graves *v.* Colwell, 90 Ill. 612; Eames *v.* Blackhart, 12 Ill. 195; People *v.* Peden, 109 Ill. App. 560.

Indiana.— Stanley *v.* Montgomery, 102 Ind. 102, 26 N. E. 213.

Iowa.—Warfield *v.* Clark, 118 Iowa 69, 91 N. W. 833; Clark *v.* Raymond, 85 Iowa 737, 52 N. W. 489; Walthelm *v.* Artz, 70 Iowa 609, 31 N. W. 953.

Maryland.— Coffin *v.* Brown, 94 Md. 190, 50 Atl. 567, 89 Am. St. Rep. 422, 55 L. R. A. 732.

North Carolina.— Threadgill *v.* Anson County, 116 N. C. 616, 21 S. E. 425; Fleming *v.* Wilmington, etc., R. Co., 115 N. C. 676, 20 S. E. 714.

Oregon.— Keen *v.* Keen, 49 Oreg. 362, 90 Pac. 147, 10 L. R. A. N. S. 504.

Pennsylvania.— Branson *v.* Kitchenman, 148 Pa. St. 541, 24 Atl. 61; Lamb *v.* Prettyman, 33 Pa. Super. Ct. 190.

Texas.— Maverick *v.* Maury, 79 Tex. 435, 15 S. W. 686; Clay County Land, etc., Co. *v.* Montague County, 8 Tex. Civ. App. 575, 28 S. W. 704.

Virginia.— Fowler *v.* Lee, 4 Munf. 373.

Wisconsin.—Bredlau *v.* York, 115 Wis. 554, 92 N. W. 261.

64. Sultzner *v.* State, 43 Ala. 24; Brant *v.* Gallup, 5 Ill. App. 262; State *v.* Lynott, 5 R. I. 295 (if the influence is in the nature of a positive direction); Freiberg *v.* Freiberg, 74 Tex. 122, 11 S. W. 1123.

65. Foxworth *v.* Brown, 114 Ala. 299, 21 So. 413; Cummins *v.* James, 4 Ark. 616; E. Bradford Clarke Co. *v.* Baltimore, etc., R. Co., 27 Pa. Super. Ct. 251; Bigelow *v.* Doolittle, 36 Wis. 115.

66. Hancock *v.* Supreme Council C. B. L., 69 N. J. L. 308, 55 Atl. 246; Albany County Sav. Bank *v.* McCarty, 149 N. Y. 71, 43 N. E. 427; Henken *v.* Monaghan, 21 N. Y. Suppl. 235; Wynn *v.* Wood, 97 Pa. St. 216; Pennsylvania R. Co. *v.* Weiss, 87 Pa. St. 447; Elliott *v.* Curry, 1 Phila. (Pa.) 281; Sessions *v.* Newport, 23 Vt. 9.

67. Stoever *v.* Whitman, 6 Binn. (Pa.) 416.

68. **Instructions relating to credibility of witnesses** see *infra*, IX, E, 3.

69. *Alabama.*—American Oak Extract Co. *v.* Ryan, 112 Ala. 337, 20 So. 644; Foust *v.* Yielding, 28 Ala. 658; Moore *v.* Jones, 13 Ala. 296.

California.— People *v.* Wallace, 89 Cal. 158, 26 Pac. 650; Wright *v.* Carillo, 22 Cal. 595.

Colorado.— Finerty *v.* Fritz, 6 Colo. 137.

Connecticut.—Schleifenbaum *v.* Rundbaken, 81 Conn. 623, 71 Atl. 899.

Dakota.— Territory *v.* Egan, 3 Dak. 119, 13 N. W. 568.

Florida.— Newberry *v.* State, 26 Fla. 334, 8 So. 445.

Georgia.— Mills *v.* State, 104 Ga. 502, 30 S. E. 778; Amis *v.* Cameron, 55 Ga. 449; Mixon *v.* Pollok, 55 Ga. 321; McLean *v.* Clark, 47 Ga. 24; Strozier *v.* Carroll, 31 Ga. 557.

Idaho.— Carscallen *v.* Cœur D'Alene, etc., Transp. Co., 15 Ida. 444, 98 Pac. 622.

Illinois.—Quincy Gas, etc., Co. *v.* Baumann, 203 Ill. 295, 67 N. E. 807 [*affirming* 104 Ill. App. 600]; Dick *v.* Marble, 155 Ill. 137, 39 N. E. 602 [*affirming* 51 Ill. App. 351]; Clevenger *v.* Curry, 81 Ill. 432; Stampofski *v.* Steffens, 79 Ill. 303; Paton *v.* Stewart, 78 Ill. 481; Valandschoot *v.* Adams, 61 Ill. 368; Yundt *v.* Hartrunft, 41 Ill. 9; Kelly *v.* People, 29 Ill. 287; Peterson *v.* Fullerton, 106 Ill. App. 237; Supreme Tent K. M. W. *v.* Stensland, 105 Ill. App. 267 [*affirmed* in 206 Ill. 124, 68 N. E. 1098, 99 Am. St. Rep. 137]; Kean *v.* West Chicago St. R. Co., 75 Ill. App. 38; Hanke *v.* Cobiskey, 57 Ill. App. 267; Graham *v.* Sadlier, 46 Ill. App. 440; Peters *v.* Bourneau, 22 Ill. App. 177.

Indiana.— Southern R. Co. *v.* Limback, 172 Ind. 89, 85 N. E. 354; Dean *v.* State, 130 Ind. 237, 29 N. E. 911; Unruh *v.* State, 105 Ind. 117, 4 N. E. 453; Wilcox *v.* Majors, 88 Ind. 203; Pruitt *v.* Cox, 21 Ind. 15; Ball *v.* Clark, 15 Ind. 370; Cleveland, etc., R. Co. *v.* Henry, (App. 1907) 80 N. E. 636, 81 N. E. 592; Jacobs *v.* Jolley, 29 Ind. App. 25, 62 N. E. 1028.

an almost infinite variety of circumstances, as for instance where the witness is a

Iowa.— Rhodes *v.* Des Moines, etc., R. Co., 139 Iowa 327, 115 N. W. 503; Mitchell *v.* Chicago, etc., R. Co., 138 Iowa 283, 114 N. W. 622; McNight *v.* Parsons, 136 Iowa 390, 113 N. W. 858, 125 Am. St. Rep. 265, 22 L. R. A. N. S. 718; Barr *v.* Hack, 46 Iowa 308; Delvee *v.* Boardman, 20 Iowa 446.

Kansas.— Shellabarger *v.* Nafus, 15 Kan. 547.

Kentucky.— Cincinnati, etc., R. Co. *v.* Evans, 129 Ky. 152, 110 S. W. 844, 33 Ky. L. Rep. 596; Mussellam *v.* Cincinnati, etc., R. Co., 126 Ky. 500, 104 S. W. 337, 31 Ky. L. Rep. 908; Hammill *v.* Louisville, etc., R. Co., 93 Ky. 343, 20 S. W. 263, 14 Ky. L. Rep. 291; Holloway *v.* Com., 11 Bush 344; Louisville, etc., R. Co. *v.* Bell, (1908) 114 S. W. 328.

Maine.— Parsons *v.* Huff, 41 Me. 410.

Maryland.— Western Maryland R. Co. *v.* Shivers, 101 Md. 391, 61 Atl. 618; Townshend *v.* Townshend, 6 Md. 295; Morris *v.* Brickley, 1 Harr. & G. 107.

Massachusetts.— Tarbell *v.* Forbes, 177 Mass. 238, 58 N. E. 873; Hankinson *v.* Lynn Gas, etc., Co., 175 Mass. 271, 56 N. E. 604; Kane *v.* Learned, 117 Mass. 190; Tucker *v.* Welsh, 17 Mass. 160, 9 Am. Dec. 137; Amory *v.* Fellowes, 5 Mass. 219.

Michigan.— Lincoln *v.* Felt, 132 Mich. 49, 92 N. W. 780; Holmes *v.* Deppert, 122 Mich. 275, 80 N. W. 1094; Conkey *v.* Carpenter, 106 Mich. 1, 63 N. W. 990.

Mississippi.— Allen *v.* Lyles, 35 Miss. 513.

Missouri.— Rearden *v.* St. Louis, etc., R. Co., 215 Mo. 105, 114 S. W. 961; Dalton *v.* Poplar Bluff, 173 Mo. 39, 72 S. W. 1068; Mullally *v.* Greenwood, 127 Mo. 138, 29 S. W. 1001, 48 Am. St. Rep. 613; Haynes *v.* Trenton, 123 Mo. 326, 27 S. W. 622; Henry *v.* Forbes, 7 Mo. 455; Reynolds *v.* Metropolitan St. R. Co., 136 Mo. App. 282, 116 S. W. 1135; Railey *v.* Metropolitan St. R. Co., 133 Mo. App. 473, 113 S. W. 680; Woodard *v.* Cooney, 111 Mo. App. 152, 85 S. W. 598; Bissell *v.* York, 108 Mo. App. 272, 83 S. W. 282; Glasscock *v.* Swafford Bros. Dry Goods Co., 106 Mo. App. 657, 80 S. W. 364; Glasscock *v.* Swofford Bros. Dry Goods Co., (App. 1903) 74 S. W. 1039; Caris *v.* Nimmons, 92 Mo. App. 66; Cravens *v.* Hunter, 87 Mo. App. 456; Hester *v.* New York Fidelity, etc., Co., 78 Mo. App. 505; Price *v.* Lederer, 33 Mo. App. 426; St. Clair *v.* Missouri Pac. R. Co., 29 Mo. App. 76.

Montana.— Lehane *v.* Butte Electric R. Co., 37 Mont. 564, 97 Pac. 1038; Bowen *v.* Webb, 37 Mont. 479, 97 Pac. 839.

Nebraska.— Neeley *v.* Trautwein, 79 Nebr. 751, 113 N. W. 141; Davis *v.* Lambert, 69 Nebr. 242, 95 N. W. 592.

New Hampshire.— Beard *v.* Kirk, 11 N. H. 397.

New Jersey.— Kearns *v.* Waldron, 76 N. J. L. 370, 69 Atl. 960; Acolia *v.* Elizabeth, etc., R. Co., (Sup. 1904) 57 Atl. 257.

New Mexico.— Territory *v.* O'Donnell, 4 N. M. 66, 12 Pac. 743.

New York.— Commonwealth Nat. Bank *v.* Mills, 99 N. Y. 656, 2 N. E. 27; Gelderman *v.* Curtis, 124 N. Y. App. Div. 919, 108 N. Y. Suppl. 681; Fisher *v.* Union R. Co., 86 N. Y. App. Div. 365, 83 N. Y. Suppl. 694; Bjerrum *v.* Springfield Breweries Co., 83 N. Y. App. Div. 172, 82 N. Y. Suppl. 472; Bell *v.* Mills, 78 N. Y. App. Div. 42, 80 N. Y. Suppl. 34; Cullinan *v.* Furthmann, 70 N. Y. App. Div. 110, 75 N. Y. Suppl. 90; Dickerson *v.* Wason, 48 Barb. 412; Merritt *v.* Lyon, 3 Barb. 110; Duygan *v.* Third Ave. R. Co., 6 Misc. 66, 26 N. Y. Suppl. 79.

North Carolina.— Hill *v.* Ætna L. Ins. Co., 150 N. C. 1, 63 S. E. 124; Smith *v.* Atlantic, etc., Air Line R. Co., 147 N. C. 603, 61 S. E. 575; Hancock *v.* Western Union Tel. Co., 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403; Craft *v.* Norfolk, etc., R. Co., 136 N. C. 49, 48 S. E. 519; Hinson *v.* Postal Tel. Cable Co., 132 N. C. 460, 43 S. E. 945; Edwards *v.* Atlantic Coast Line R. Co., 132 N. C. 99, 43 S. E. 585; Cogdell *v.* Southern R. Co., 129 N. C. 398, 40 S. E. 202; Crutchfield *v.* Richmond, etc., R. Co., 76 N. C. 320.

Oklahoma.— Strickler *v.* Gitchel, 14 Okla. 523, 78 Pac. 94.

Oregon.— McIntosh *v.* McNair, 53 Oreg. 87, 99 Pac. 74.

Pennsylvania.— Enright *v.* Pittsburg Junction R. Co., 204 Pa. St. 543, 54 Atl. 317; Bassett *v.* Easton, 200 Pa. St. 514, 50 Atl. 158; McClane *v.* People's Light, etc., Co., 178 Pa. St. 424, 35 Atl. 812; Mewes *v.* Crescent Pipe Line Co., 170 Pa. St. 369, 32 Atl. 1083; Colonial Trust Co. *v.* Getz, 28 Pa. Super. Ct. 619; Thomas *v.* Law, 25 Pa. Super. Ct. 19; Cobb *v.* Metropolitan L. Ins. Co., 19 Pa. Super. Ct. 228; Wells *v.* New England Mut. L. Ins. Co., 8 Kulp 348; Wilson *v.* Neshannock Iron Co., 33 Leg. Int. 445.

South Carolina.— Rykard *v.* Davenport, 61 S. C. 215, 39 S. E. 372; City Council *v.* Haywood, 2 Nott & M. 308.

Texas.— Harpold *v.* Moss, 101 Tex. 540, 109 S. W. 928 [*reversing* (Civ. App.) 106 S. W. 1131]; Kennedy *v.* Upshaw, 66 Tex. 442, 1 S. W. 308; Coats *v.* Elliott, 23 Tex. 606; Texas Midland R. Co. *v.* Geraldon, (Civ. App. 1909) 117 S. W. 1004; Galveston, etc., R. Co. *v.* Williams, 26 Tex. Civ. App. 153, 62 S. W. 808; Wood *v.* Samuels, 1 Tex. App. Civ. Cas. § 922.

Virginia.— Metropolitan L. Ins. Co. *v.* De Vault, 109 Va. 392, 63 S. E. 982; Harrison *v.* Brock, 1 Munf. 22.

Washington.— Herbert *v.* Hillman, 50 Wash. 83, 96 Pac. 837; Curtin *v.* Clear Lake Lumber Co., 47 Wash. 260, 91 Pac. 956.

West Virginia.— Parkersburg Nat. Bank *v.* Hannaman, 63 W. Va. 358, 60 S. E. 242.

Wisconsin.— Kuehn *v.* Wilson, 13 Wis. 104.

Wyoming.— Chicago, etc., R. Co. *v.* Pollock, 16 Wyo. 321, 93 Pac. 847.

United States.— Gallena *v.* Hot Springs R. Co., 13 Fed. 116, 4 McCrary 371; Huchberger *v.* Merchants' F. Ins. Co., 12 Fed. Cas. No. 6,822, 4 Biss. 265; Union Sugar Refinery *v.* Matthiesson, 24 Fed. Cas. No. 14,399, 3 Cliff. 639, 2 Fish. Pat. Cas. 600.

See 46 Cent. Dig. tit. "Trial," § 334.

party,[70] or the relative of a party,[71] or is interested,[72] or a lunatic;[73] whether the evidence of the party,[74] or other witness,[75] is contradicted or conflicts with testimony previously given by him,[76] or conflicts with statements previously made by

Expert testimony is to be considered like any other testimony and is to receive just so much weight and credit as the jury may deem it entitled to when viewed in connection with all the circumstances. Carter *v.* Baker, 5 Fed. Cas. No. 2,472, 1 Sawy. 512, 4 Fish. Pat. Cas. 404. If it runs counter to their convictions as to the truth of the matter, in the exercise of their own judgment, they may disregard it entirely. Carscallen *v.* Cœur D'Alene, etc., Co., 15 Ida. 444, 98 Pac. 622.

The credibility of books of original entries is for the jury. Taylor *v.* Tucker, 1 Ga. 231.

Directing a verdict on the ground that a witness is unworthy of belief is erroneous. Waters *v.* Davis, 145 Fed. 912, 76 C. C. A. 444.

70. *Arkansas.*— Main *v.* Tracey, 86 Ark. 27, 109 S. W. 1015; Adkins *v.* Hershy, 14 Ark. 442.

Florida.—White *v.* Ross, 35 Fla. 377, 17 So. 640.

Iowa.— McNight *v.* Parsons, 136 Iowa 390, 113 N. W. 858, 125 Am. St. Rep. 265, 22 L. R. A. N. S. 718; Murphy *v.* Hiltibridle, 132 Iowa 114, 109 N. W. 471.

Kansas.— Kansas Pac. R. Co. *v.* Little, 19 Kan. 267.

Kentucky.— Louisville Bridge Co. *v.* Allen, 107 S. W. 1191, 32 Ky. L. Rep. 1209.

New York.— Sternaman *v.* Metropolitan L. Ins. Co., 94 N. Y. App. Div. 610, 87 N. Y. Suppl. 904 [*affirmed* in 181 N. Y. 514, 73 N. E. 1133]; Greene *v.* Miller, 74 Hun 271, 26 N. Y. Suppl. 425; Dorsett *v.* Doubleday, etc., Co., 53 Misc. 598, 103 N. Y. Suppl. 792.

Pennsylvania.— Shaffer *v.* Clark, 90 Pa. St. 94; Prowattain *v.* Tindall, 80 Pa. St. 295.

South Carolina.— Hornsby *v.* South Carolina R. Co., 26 S. C. 187, 1 S. E. 594; Drago *v.* Moso, 1 Speers 212, 40 Am. Dec. 592.

Wisconsin.— Mariner *v.* Pettibone, 14 Wis. 195.

See 46 Cent. Dig. tit. "Trial," § 335.

As against several witnesses the jury may believe one witness, although he is a party. Steinle *v.* Metropolitan St. R. Co., 69 N. Y. App. Div. 85, 74 N. Y. Suppl. 482; New York Evening Journal Pub. Co. *v.* William F. Simpson Advertising Agency, 56 Misc. (N. Y.) 347, 106 N. Y. Suppl. 858 [*affirmed* in 110 N. Y. Suppl. 391].

71. Kansas Pac. R. Co. *v.* Little, 19 Kan. 267; Van Gaasbeek *v.* Staples, 85 N. Y. App. Div. 271, 83 N. Y. Suppl 225 [*affirmed* in 177 N. Y. 524, 69 N. E. 1132]; Dorsett *v.* Doubleday, etc., Co., 53 Misc. (N. Y.) 598, 103 N. Y. Suppl. 792.

72. Lounsbury *v.* Knights of Maccabees of World, 128 N. Y. App. Div. 394, 112 N. Y. Suppl. 921.

73. Coleman *v.* Com., 25 Gratt. (Va.) 865, 18 Am. Rep. 711.

74. *New York.*— Hickman *v.* Nassau Electric R. Co., 46 N. Y. App. Div. 627, 61 N. Y. Suppl. 698.

Pennsylvania.— Kitler *v.* People's St. R. Co., 27 Pa. Super. Ct. 602.

Tennessee.— Citizens' St. R. Co. *v.* Howard, 102 Tenn. 474, 52 S. W. 864.

Texas.— International, etc., R. Co. *v.* Ives, 34 Tex. Civ. App. 49, 78 S. W. 36.

Wisconsin.— O'Brien *v.* Chicago, etc., R. Co., 92 Wis. 340, 66 N. W. 363.

United States.— Sigua Iron Co. *v.* Greene, 88 Fed. 207, 31 C. C. A. 477.

See 46 Cent. Dig. tit. "Trial," § 335.

75. *Alabama.*— Callan *v.* Anderson, 131 Ala. 228, 31 So. 427.

Illinois.— Chicago City R. Co. *v.* Tuohy, 196 Ill. 410, 63 N. E. 997, 58 L. R. A. 270 [*affirming* 95 Ill. App. 314]; Craig *v.* Rohrer, 63 Ill. 325.

Iowa.— Henry *v.* Sioux City, etc., R. Co., 75 Iowa 84, 39 N. W. 193, 9 Am. St. Rep. 457.

Missouri.— Bond *v.* Chicago, etc., R. Co., 110 Mo. App. 131, 84 S. W. 124; Cravens *v.* Hunter, 87 Mo. App. 456.

New York.— McCoy *v.* Munro, 76 N. Y. App. Div. 435, 78 N. Y. Suppl. 849; Murr *v.* Western Assur. Co., 50 N. Y. App. Div. 4, 64 N. Y. Suppl. 12; Bradley *v.* Second Ave. R. Co., 34 N. Y. App. Div. 284, 54 N. Y. Suppl. 256.

Pennsylvania.— Sandford *v.* Hestonville, etc., R. Co., 136 Pa. St. 84, 20 Atl. 799.

Texas.—International, etc., R. Co. *v.* Hugen, 45 Tex. Civ. App. 326, 100 S. W. 1000; Galveston, etc., R. Co. *v.* Butshek, 34 Tex. Civ. App. 194, 78 S. W. 740.

See 46 Cent. Dig. tit. "Trial," § 334.

76. *Alabama.*—Alabama Gold L. Ins. Co. *v.* Mobile Mut. Ins. Co., 81 Ala. 329, 1 So. 561.

California.— Zipperlan *v.* Southern Pac. Co., 7 Cal. App. 206, 93 Pac. 1049.

Georgia.—Wilson *v.* Huguenin, 117 Ga. 546, 43 S. E. 857.

Illinois.— Illinois Cent. R. Co. *v.* Byrne, 205 Ill. 9, 68 N. E. 720 [*affirming* 105 Ill. App. 96]; Stampofski *v.* Steffens, 79 Ill. 303; Chicago, etc., R. Co. *v.* Northern Illinois Coal, etc., Co., 36 Ill. 60; Junction Min. Co. *v.* Ench, 111 Ill. App. 346; Dick *v.* Zimmerman, 105 Ill. App. 615 [*affirmed* in 207 Ill. 636, 69 N. E. 754].

Iowa.—American L. Ins. Co. *v.* Melcher, 132 Iowa 324, 109 N. W. 805.

Kansas.— Young *v.* Irwin, 70 Kan. 796, 79 Pac. 678.

Massachusetts.— Ryan *v.* Fall River Iron Works, 200 Mass. 188, 86 N. E. 310; Nagle *v.* Boston, etc., R. Co., 188 Mass. 38, 73 N. E. 1019.

Michigan.— Piehl *v.* Piehl, 138 Mich. 515, 101 N. W. 628; Preuschoff *v.* B. Stroh Brewing Co., 132 Mich. 107, 92 N. W. 945.

Minnesota.—White *v.* Collins, 90 Minn. 165,

him,[77] or is shaken on cross-examination,[78] or whether the credibility of the witness is questioned,[79] or his testimony given under circumstances such as would naturally throw discredit on him.[80] So the rule applies, although the testimony of the party,[81] or of interested witnesses,[82] or of other witnesses [83] is uncontradicted. The weight to be given to the testimony of witnesses is a question for the jury.[84] It is for the jury to determine whether all the testimony of a party who has testified falsely to a material question is false,[85] whether the testimony of a witness is rendered suspicious by any of the facts proved,[86] or by his demeanor on the stand,[87] or whether the witness is mistaken or knowingly testifies falsely.[88] It is for the jury to determine the credibility of a witness whose testimony has been impeached,[89] or how far his credibility is affected thereby.[90] It is also for the jury to determine whether a witness has been successfully impeached,[91] whether a witness is or is not corrob-

95 N. W. 765; Keene *v.* Masterman, 66 Minn. 72, 68 N. W. 771.

Nebraska.— Steele *v.* State, 80 Nebr. 9, 113 N. W. 798, 127 Am. St. Rep. 741.

New York.— Hunt *v.* Dexter Sulphite Pulp, etc., Co., 100 N. Y. App. Div. 119, 91 N. Y. Suppl. 279 [*affirmed* in 183 N. Y. 544, 76 N. E. 1097]; Lytle *v.* Crawford, 69 N. Y. App. Div. 273, 74 N. Y. Suppl. 660; Burke *v.* Ireland, 47 N. Y. App. Div. 428, 62 N. Y. Suppl. 453; Fellows *v.* Barton, 66 Barb. 608; Lawrence *v.* Maxwell, 58 Barb. 511; Smith *v.* Tiffany, 36 Barb. 23; Scheuer *v.* Rosenbaum, 33 Misc. 768, 67 N. Y. Suppl. 936 [*reversing* 32 Misc. 750, 65 N. Y. Suppl. 664]; Clement *v.* Congress Spring Co., 35 N. Y. Suppl. 1004 [*affirmed* in 158 N. Y. 692, 53 N. E. 1124].

North Carolina.— Hawk *v.* Pine Lumber Co., 149 N. C. 16, 62 S. E. 754; Gwyn Harper Mfg. Co. *v.* Carolina Cent. R. Co., 128 N. C. 280, 38 S. E. 894, 83 Am. St. Rep. 675.

Ohio.— Stacy *v.* Norwich Union F. Ins. Soc., 25 Ohio Cir. Ct. 67.

Pennsylvania.—Wilson *v.* Pennsylvania R. Co., 177 Pa. St. 503, 35 Atl. 677; Smith *v.* Jackson Tp., 26 Pa. Super. Ct. 234.

Texas.—Alley *v.* Booth, 16 Tex. 94; Houston, etc., R. Co. *v.* Davis, 45 Tex. Civ. App. 212, 100 S. W. 1013.

United States.— Northern Pac. R. Co. *v.* Conger, 56 Fed. 20, 5 C. C. A. 410; McKay *v.* Irvine, 10 Fed. 725, 11 Biss. 168.

See 46 Cent. Dig. tit. "Trial," §§ 334, 335.

77. Payne *v.* Union Life Guards, 136 Mich. 416, 99 N. W. 376, 112 Am. St. Rep. 368; Lebeau *v.* Dyerville Mfg. Co., 26 R. I. 34, 57 Atl. 1092; Ferguson *v.* Truax, 136 Wis. 637, 118 N. W. 251, upon different trials.

Illustration.—Where a six-year-old child testifies in a contradictory way in respect to a vital point in issue, it is competent for the jury to say which of the conflicting statements is correct. Van Salvellergh *v.* Green Bay Traction Co., 132 Wis. 166, 111 N. W. 1120.

78. Plefka *v.* Detroit United R. Co., 155 Mich. 53, 118 N. W. 731; Hogan *v.* Mutual Aid, etc., Assoc., 75 Hun (N. Y.) 271, 26 N. Y. Suppl. 1081.

79. Reynolds *v.* Manning, 15 Md. 510; Payne *v.* Union Life Guards, 136 Mich. 416, 99 N. W. 376, 112 Am. St. Rep. 368; Allis *v.* Leonard, 58 N. Y. 288; Spaulding *v.* Toledo Consol. St. R. Co., 20 Ohio Cir. Ct. 99, 10 Ohio Cir. Dec. 660.

80. Ball-Barnhart-Putman Co. *v.* Lane, 135 Mich. 275, 97 N. W. 727; Stevenson *v.* Chapman, 12 N. H. 524.

81. Seehorn *v.* American Nat. Bank, 148 Mo. 256, 49 S. W. 886; Gannon *v.* Laclede Gaslight Co., 145 Mo. App. 502, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 505; Corwith First State Bank *v.* Hammond, 124 Mo. App. 177, 101 S. W. 677; Hugumin *v.* Hinds, 97 Mo. App. 346, 71 S. W. 479; Poplar Bluff *v.* Hill, 92 Mo. App. 17; Engel *v.* New York City R. Co., 55 Misc. (N. Y.) 203, 105 N. Y. Suppl. 80; Burleson *v.* Tinnin, (Tex. Civ. App. 1906) 100 S. W. 350.

82. Canajoharie Nat. Bank *v.* Diefendorf, 123 N. Y. 191, 25 N. E. 402, 10 L. R. A. 676; International, etc., R. Co. *v.* Johnson, 23 Tex. Civ. App. 160, 55 S. W. 772 (section foreman whose alleged negligence caused death, damages for which suit was brought); Sonnentheil *v.* Christian Moerlein Brewing Co., 172 U. S. 401, 19 S. Ct. 233, 43 L. ed. 492 (creditor of insolvent secured by fraudulent deed of trust sued on). But see Hauss *v.* Lake Erie, etc., R. Co., 105 Fed. 733, 46 C. C. A. 94.

83. Nelson *v.* Warren, 93 Ala. 408, 8 So. 413; Ryan *v.* Fall River Iron Works Co., 200 Mass. 188, 86 N. E. 310; Lindenbaum *v.* New York, etc., R. Co., 197 Mass. 314, 84 N. E. 129; Lautner *v.* Kann, 184 Pa. St. 334, 39 Atl. 55; West Branch Sav. Bank *v.* Donaldson, 6 Pa. St. 179; Barnett *v.* Becker, 25 Pa. Super. Ct. 22.

84. Murphy *v.* Hiltibridle, 132 Iowa 114, 109 N. W. 471; Cravens *v.* Hunter, 87 Mo. App. 456; Hester *v.* New York Fidelity, etc., Co., 78 Mo. App. 505.

85. Root *v.* Boston El. R. Co., 183 Mass. 418, 67 N. E. 365; Schuek *v.* Hagar, 24 Minn. 339. But whether the rule, "*Falsus in uno, falsus in omnibus*," applies to the consideration of the evidence in a case is primarily a question for the court. Pumorlo *v.* Merrill, 125 Wis. 102, 103 N. W. 464.

86. Van Vacter *v.* McKillip, 7 Blackf. (Ind.) 578.

87. Pierce *v.* Selleck, 18 Conn. 321.

88. Carey *v.* Henderson, 61 Ill. 378.

89. Hedrick *v.* Bell, 84 Ill. App. 523; Warren *v.* Haight, 62 Barb. (N. Y.) 490.

90. Bankers' Union of World *v.* Schiverin, 67 Nebr. 303, 92 N. W. 158.

91. *California.*— Schneider *v.* Market St. R. Co., 134 Cal. 482, 66 Pac. 734.

orated by facts and circumstances,[92] what credit shall be given to the testimony of an impeached witness,[93] or how far ignorance [94] or immorality [95] is to be considered as affecting the testimony of the witness. However, the jury should not reject the testimony of a witness arbitrarily.[96] But where the undisputed circumstances show that the story told by a witness cannot be true,[97] or is so impossible, absurd, and self-contradictory that it should be deemed a nullity by the court,[98] the right to a submission of an issue of fact depending on the credibility of the witness does not exist.

4. Construction of Writings.[99] The construction of documents or writings in evidence is a question of law, and it is the duty of the court to construe them[1]

Georgia.— Hodgkins *v.* State, 89 Ga. 761, 15 S. E. 695.

Illinois.— Roy *v.* Goings, 112 Ill. 656; Evans *v.* George, 80 Ill. 51; Hartford L., etc., Ins. Co. *v.* Gray, 80 Ill. 28.

Indiana.— Oliver *v.* Pate, 43 Ind. 132.

Massachusetts.— Bates *v.* Barber, 4 Cush. 107.

New York.— Culhane *v.* New York Cent., etc., R. Co., 67 Barb. 562.

North Carolina.— State *v.* Smallwood, 75 N. C. 104.

See 46 Cent. Dig. tit. "Trial," § 334.

92. Evergreen Park *v.* Bailey, 107 Ill. App. 420; Haggerty *v.* New York City R. Co., 90 N. Y. Suppl. 336.

93. McCoy *v.* State, 78 Ga. 490, 3 S. E. 768; Shorter *v.* Marshall, 49 Ga. 31; Western, etc., R. Co. *v.* Carlton, 28 Ga. 180, where rebutting evidence has been introduced in support of his testimony.

94. Louisville, etc., R. Co. *v.* Hurst, (Ky. 1892) 20 S. W. 817.

95. Bowman *v.* Smith, 1 Strobh. (S. C.) 246.

96. Evans *v.* George, 80 Ill. 57; Hartford L., etc., Ins. Co. *v.* Gray, 80 Ill. 28; Oliver *v.* Pate, 43 Ind. 132; Littlefield *v.* Lawrence, 83 N. Y. App. Div. 327, 82 N. Y. Suppl. 25; Culhane *v.* New York Cent., etc., R. Co., 67 Barb. (N. Y.) 562; State *v.* Smallwood, 75 N. C. 104.

97. Blumenthal *v.* Boston, etc., R. Co., 97 Me. 255, 54 Atl. 747; Schaub *v.* Kansas City Southern R. Co., 133 Mo. App. 444, 113 S. W. 1163; Wolf *v.* City R. Co., 50 Oreg. 64, 85 Pac. 620, 91 Pac. 460. And see Smitson *v.* Southern Pac. Co., 37 Oreg. 74, 60 Pac. 907.

Evidence inconsistent with reasonable probabilities.— Where there was evidence which was not incredible, but merely inconsistent with reasonable probabilities, and the circumstances were such that it might be believed by a jury, it required the submission of the question to the jury. Chicago City R. Co. *v.* Hagenback, 228 Ill. 290, 81 N. E. 1014.

98. Graham *v.* Chicago, etc., R. Co., 143 Iowa 604, 119 N. W. 708, 122 N. W. 573. And see Steltzer *v.* Condon, 139 Iowa 754, 118 N. W. 39; Stafford *v.* Chippewa Valley Electric R. Co., 110 Wis. 331, 85 N. W. 1036.

99. **Construction of contracts** see Contracts, 9 Cyc. 776 *et seq.*

Construction of ordinances see Municipal Corporations, 28 Cyc. 390 *et seq.*

1. *Alabama.*— Moore *v.* Leseur, 18 Ala. 606.

Arkansas.— Estes *v.* Boothe, 20 Ark. 583.

California.— Grant *v.* Dreyfus, (1898) 52 Pac. 1074; Carpenter *v.* Thirston, 24 Cal. 268; McGarvey *v.* Little, 15 Cal. 27.

Connecticut.— Rathbun *v.* Geer, 64 Conn. 421, 30 Atl. 60; Thompson School Dist. No. 8 *v.* Lynch, 33 Conn. 330.

Delaware.— Schilansky *v.* Merchants', etc., F. Ins. Co., 4 Pennew. 293, 55 Atl. 1014.

Florida.— Upchurch *v.* Mizell, 50 Fla. 456, 40 So. 29.

Georgia.— McCullough *v.* Armstrong, 118 Ga. 424, 45 S. E. 379; Berry *v.* Clark, 117 Ga. 964, 44 S. E. 824; Willson *v.* Whitfield, 38 Ga. 269.

Illinois.— Streeter *v.* Streeter, 43 Ill. 155; Montag *v.* Linn, 23 Ill. 551; Recke *v.* Lagare, 106 Ill. App. 283; Hutchinson *v.* Dunham, 41 Ill. App. 107.

Indiana.— Zenor *v.* Johnson, 107 Ind. 69, 7 N. E. 751; Gaff *v.* Greer, 88 Ind. 122, 45 Am. Rep. 449; Symmes *v.* Brown, 13 Ind. 318; Leviston *v.* Junction R. Co., 7 Ind. 597.

Iowa.— Johnson *v.* Miller, 63 Iowa 529, 17 N. W. 34, 50 Am. Rep. 758; Avery *v.* Chapman, 62 Iowa 144, 17 N. W. 454; Pickerell *v.* Carson, 8 Iowa 544; Eyser *v.* Weissgurber, 2 Iowa 463.

Kentucky.— Crump *v.* Bennett, 2 Litt. 209.

Maine.— Libby *v.* Deake, 97 Me. 377, 54 Atl. 856; Cocheco Bank *v.* Berry, 52 Me. 293; Warren *v.* Jones, 51 Me. 146.

Maryland.— American Exch. Bank *v.* Inloes, 7 Md. 380.

Massachusetts.— Smith *v.* Faulkner, 12 Gray 251; Dunnell *v.* Fiske, 11 Metc. 551.

Michigan.— Stadden *v.* Hazzard, 34 Mich. 76.

Missouri.— Milstead *v.* Equitable Mortg. Co., 49 Mo. App. 191; Wright *v.* Fonda, 44 Mo. App. 634.

New York.— Porter *v.* Havens, 37 Barb. 343; St. John *v.* Bumpstead, 17 Barb. 100.

North Carolina.— Sellars *v.* Johnson, 65 N. C. 104; Rhodes *v.* Chesson, 44 N. C. 336.

Pennsylvania.— Ryon *v.* Starr, 214 Pa. St. 310, 63 Atl. 701; Miller *v.* Fichthorn, 31 Pa. St. 252; McCoy *v.* Lightner, 2 Watts 347.

South Carolina.— Bedenbaugh *v.* Southern R. Co., 69 S. C. 1, 48 S. E. 53; Thompson *v.* Family Protective Union, 66 S. C. 459, 45 S. E. 19; Jones *v.* Swearingen, 42 S. C. 58, 19 S. E. 947.

Texas.— Blair *v.* Baird, 43 Tex. Civ. App. 134, 94 S. W. 116; Tinsley *v.* McIlhenny, 30

and state to the jury their terms and legal effect.[2] By so doing the court does not violate the rule against charging on the weight of the evidence.[3] It is error for the court to leave to the jury the construction of documents or writings,[4] especially where a request for their construction is made,[5] and a requested instruction submitting to the jury the construction of written instruments is properly

Tex. Civ. App. 352, 70 S. W. 793; Howell *v.* Hanrick, (Civ. App. 1894) 24 S. W. 823.

Virginia.— Richmond *v.* Gallego Mills Co., 102 Va. 165, 45 S. E. 877.

United States.— Bliven *v.* New England Screw Co., 23 How. 420, 433, 16 L. ed. 510, 514; Turner *v.* Yates, 16 How. 14, 14 L. ed. 824; U. S. *v.* Shire, 27 Fed. Cas. No. 16,278, Baldw. 510; U. S. *v.* Willard, 28 Fed. Cas. No. 16,698, 1 Paine 539.

See 46 Cent. Dig. tit. "Trial," §§ 326, 470.

The rule has been applied in the case of deeds (Rathbun *v.* Geer, 64 Conn. 421, 30 Atl. 60; Symmes *v.* Brown, 13 Ind. 318; Simpson *v.* Norton, 45 Me. 281; American Exch. Bank *v.* Inloes, 7 Md. 380; Stadden *v.* Hazzard, 34 Mich. 76; Brewer *v.* White, 110 Mo. App. 571, 85 S. W. 641; St. John *v.* Bumpstead, 17 Barb. (N. Y.) 100; Weir *v.* McGee, 25 Tex. Suppl. 20; McCormick *v.* Cheveral, 2 Tex. Unrep. Cas. 146; Howell *v.* Hanrick, (Tex. Civ. App. 1894) 24 S. W. 823), court records (Dean *v.* Grimes, 72 Cal. 442, 14 Pac. 178; McGarvey *v.* Little, 15 Cal. 27; Gallup *v.* Fox, 64 Conn. 491, 30 Atl. 756; Crump *v.* Bennett, 2 Litt. (Ky.) 209; Andrews *v.* Graves, 1 Fed. Cas. No. 376, 1 Dill. 108), letters and telegrams (Dobbs *v.* Campbell, 66 Kan. 805, 72 Pac. 273; Slater *v.* U. S. Health, etc., Ins. Co., 133 Mich. 347, 95 N. W. 89; Milstead *v.* Equitable Mortg. Co., 49 Mo. App. 191; Boulevard Globe, etc., Co. *v.* Kern Incandescent Gaslight Co., 67 N. J. L. 279, 51 Atl. 704; Foster *v.* Berg, 104 Pa. St. 324; Rankin *v.* Fidelity Ins., etc., Co., 189 U. S. 242, 23 S. Ct. 553, 47 L. ed. 792; Bliven *v.* New England Screw Co., 23 How. (U. S.) 420, 16 L. ed. 510, 514; Higgins *v.* Fidelity Ins., etc., Co., 108 Fed. 475, 46 C. C. A. 509 [*affirmed* in 189 U. S. 242, 23 S. Ct. 553, 47 L. ed. 792]. But see Riordon *v.* Doty, 56 S. C. 111, 34 S. E. 68), leases (Bettman *v.* Shadle, 22 Ind. App. 542, 53 N. E. 662), bills of sale (Nason *v.* U. S., 17 Fed. Cas. No. 10,024, 1 Gall 53), transcripts of accounts (U. S. *v.* Willard, 28 Fed. Cas. No. 16,698, 1 Paine 539), bank charters (U. S. *v.* Shive, 27 Fed. Cas. No. 16,278, Baldw. 510), charter-parties (Phœnix Ins. Co. *v.* Moog, 78 Ala. 284, 56 Am. Rep. 31), drafts (Turner *v.* Yates, 16 How. (U. S.) 14, 14 L. ed. 824), rules of a board of trade (Wright *v.* Fonda, 44 Mo. App. 634; Gill *v.* O'Rourke, 6 Pa. Super. Ct. 605), records of boards of school trustees (Alexander *v.* Johnson, 144 Ind. 82, 41 N. E. 811), and statutes (Bank of China, etc. *v.* Morse, 44 N. Y. App. Div. 435, 61 N. Y. Suppl. 268 [*affirmed* in 168 N. Y. 458, 61 N. E. 774, 85 Am. St. Rep. 676, 56 L. R. A. 139]; Laferiere *v.* Richards, 28 Tex. Civ. App. 63, 67 S. W. 125).

A deposition is not a document within the meaning of this rule. Marine Ins. Co. *v.* Young, 5 Cranch (U. S.) 187, 3 L. ed. 74.

Ambiguity.— It is for the court and not for the jury to determine what is a patent ambiguity. Newman *v.* Lawless, 6 Mo. 279.

2. *Illinois.*— Bradish *v.* Grant, 119 Ill. 606, 9 N. E. 332.

Indiana.— Louthain *v.* Miller, 85 Ind. 161; Nipp *v.* Diskey, 81 Ind. 214, 42 Am. Rep. 124; Leas *v.* Grubbs, Wils. 301.

Iowa.— Warren *v.* Chandler, 98 Iowa 237, 67 N. W. 242; Durham *v.* Daniels, 2 Greene 518; Lucas *v.* Snyder, 2 Greene 499.

Maryland.— Baltimore, etc., R. Co. *v.* Resley, 14 Md. 424.

Massachusetts.— Fay *v.* Dudley, 124 Mass. 266.

Michigan.— Battershall *v.* Stephens, 34 Mich. 68.

Mississippi.— Randolph *v.* Govan, 14 Sm. & M. 9.

Texas.— San Antonio *v.* Lewis, 9 Tex. 69.

See 46 Cent. Dig. tit. "Trial," § 470.

3. Durham *v.* Daniels, 2 Greene (Iowa) 518; Lucas *v.* Snyder, 2 Greene (Iowa) 499; Randolph *v.* Govan, 14 Sm. & M. (Miss.) 9.

4. *California.*— Dean *v.* Grimes, 72 Cal. 442, 14 Pac. 178; Carpentier *v.* Thirston, 24 Cal. 268.

Illinois.— Streeter *v.* Streeter, 43 Ill. 155; Turner *v.* Owen, 122 Ill. App. 501; Standard Mfg. Co. *v.* Sloughter, 122 Ill. App. 479; Peoria Grape Sugar Co. *v.* Frazer, 26 Ill. App. 60.

Kansas.— Akin *v.* Davis, 11 Kan. 580.

Maryland.— Williams *v.* Woods, 16 Md. 220; Baltimore, etc., R. Co. *v.* Resley, 14 Md. 424.

Missouri.— Cooper *v.* St. Louis, etc., R. Co., 123 Mo. App. 141, 100 S. W. 494.

Pennsylvania.— Schofield *v.* Simpson, 6 Leg. Gaz. 70.

Texas.— Houston, etc., R. Co. *v.* Shirley, 89 Tex. 95, 31 S. W. 291; Collins *v.* Ball, 82 Tex. 259, 17 S. W. 614, 27 Am. St. Rep. 877.

See 46 Cent. Dig. tit. "Trial," § 470.

Instructions not obnoxious to rule.— The construction of documents is not left to the jury by an instruction that several documents in evidence must be construed together. Anglo-American Provision Co. *v.* Prentiss, 157 Ill. 506, 42 N. E. 157; Chicago, etc., R. Co. *v.* Matthews, 48 Ill. App. 361.

When submission not erroneous.— It is no ground of exception that the court submitted the construction of a written instrument to the jury, if such submission was at the request of the party excepting, and, if the true legal construction of such instrument be against such party. Raudon *v.* Toby, 11 How. (U. S.) 493, 13 L. ed. 784. And where the jury correctly decides the legal effect of a writing, the submission of the question to them is harmless error. Simpson *v.* Norton, 45 Me. 281.

5. Long *v.* Rogers, 17 Ala. 540; Mobile

refused.[6] However, it is generally held that the rule that the interpretation of written instruments is for the court does not apply where the writing is ambiguous and must be solved by extrinsic unconceded facts,[7] or where the dispute is not as to the legal meaning of documents, but as to their tendency to prove one side or the other of an issue of fact and different inferences may be fairly drawn from them as to what the truth was. Under these circumstances it is for the jury to say what is the proper inference.[8]

5. Foreign Laws. What is the law of a foreign jurisdiction is a question of fact for the jury to determine, unless the evidence is uncontradicted and consists entirely of statutes and law reports,[9] in which event their construction and effect are usually for the determination of the court;[10] but where the decisions are conflicting, or where inferences of fact must be drawn,[11] or bear upon the subject only collaterally, or by analogy,[12] or when conflicting expert testimony is

Branch Bank *v.* Boykin, 9 Ala. 320; Earbee *v.* Craig, 1 Ala. 607; Coyle *v.* McNabb, (Tex. App. 1892) 18 S. W. 198.

6. Phœnix Ins. Co. *v.* Moog, 78 Ala. 284, 56 Am. Rep. 31; Ellis *v.* Littlefield, 41 Tex. Civ. App. 318, 93 S. W. 171.

7. *Connecticut.*— Thompson School Dist. No. 8 *v.* Lynch, 33 Conn. 330; Jennings *v.* Sherwood, 8 Conn. 122.

Georgia.— Hanlon *v.* Hanlon, 103 Ga. 562, 29 S. E. 712.

Missouri.— Mantz *v.* Maguire, 52 Mo. App. 136.

Pennsylvania.— McKean *v.* Wagenblach, 2 Grant 462.

Texas.— Smith *v.* Covenant Mut. Ben. Assoc., 16 Tex. Civ. App. 593, 43 S. W. 819. *Compare* Long *v.* McCauley, (1887) 3 S. W. 689, holding that if parol evidence has been admitted to explain an instrument, the court should give a construction applicable to each phase of the case developed by the evidence.

And see Warner *v.* Miltenberger, 21 Md. 264, 83 Am. Dec. 573.

8. Chapman *v.* Kansas City, etc., R. Co., 146 Mo. 481, 48 S. W. 646; Primm *v.* Heren, 27 Mo. 205; Carp *v.* Queen Ins. Co., 104 Mo. App. 502, 79 S. W. 757; Young *v.* Stephens, 66 Mo. App. 222; Bass *v.* Jacobs, 63 Mo. App. 393; Mantz *v.* Maguire, 52 Mo. App. 136; Overton *v.* Tracey, 14 Serg. & R. (Pa.) 311; Reynolds *v.* Richards, 14 Pa. St. 205; McKean *v.* Wagenblast, 2 Grant (Pa.) 462.

9. *California.*— Colman *v.* Clements, 23 Cal. 245.

Massachusetts.— Coe *v.* Hill, 201 Mass. 15, 86 N. E. 649; Cook *v.* Bartlett, 179 Mass. 576, 61 N. E. 266; Ufford *v.* Spalding, 156 Mass. 65, 30 N. E. 360; Haven *v.* Foster, 9 Pick. 112, 19 Am. Dec. 353.

Missouri.— Wear *v.* Sanger, 91 Mo. 348, 2 S. W. 307. And see White *v.* Reitz, 129 Mo. App. 307, 108 S. W. 601.

New York.— Bank of China, etc. *v.* Morse, 168 N. Y. 458, 61 N. E. 774.

Ohio.— Nienaber *v.* Tarvin, 9 Ohio S. & C. Pl. Dec. 561, 7 Ohio N. P. 110.

Texas.— Williams *v.* State, 27 Tex. App. 466, 11 S. W. 481, holding that it is for the court to determine when the laws of another state have been established in evidence.

United States.— Mexican Cent. R. Co. *v.* Chantry, 136 Fed. 316, 69 C. C. A. 454.

See 46 Cent. Dig. tit. "Trial," § 327.

10. *Alabama.*— Inge *v.* Murphy, 10 Ala. 885.

Illinois.— Mexican Cent. R. Co. *v.* Gehr, 66 Ill. App. 173.

Massachusetts.— Electric Welding Co. *v.* Prince, 200 Mass. 386, 86 N. E. 947, 128 Am. St. Rep. 434; Hancock Nat. Bank *v.* Ellis, 172 Mass. 39, 51 N. E. 207, 70 Am. St. Rep. 232, 42 L. R. A. 396; Shoe, etc., Nat. Bank *v.* Wood, 142 Mass. 563, 8 N. E. 753; Ely *v.* James, 123 Mass. 36.

Michigan.— Rice *v.* Rankans, 101 Mich. 378, 59 N. W. 660.

Missouri.— Slaughter *v.* Metropolitan St. R. Co., 116 Mo. 269, 23 S. W. 760; White *v.* Reitz, 129 Mo. App. 307, 108 S. W. 601. And see Ghio *v.* Metropolitan St. R. Co., 125 Mo. App. 710, 103 S. W. 142.

New York.— Bank of China, etc. *v.* Morse, 168 N. Y. 458, 61 N. E. 774, 85 Am. St. Rep. 676, 56 L. R. A. 139.

Ohio.— Nienaber *v.* Tarvin, 9 Ohio S. & C. Pl. Dec. 561, 7 Ohio N. P. 110.

Pennsylvania.— Sidwell *v.* Evans, 1 Penr. & W. 383, 21 Am. Dec. 387.

South Carolina.— Frasier *v.* Charleston, etc., R. Co., 73 S. C. 140, 52 S. E. 964.

Virginia.— Union Cent. L. Ins. Co. *v.* Pollard, 94 Va. 146, 26 S. E. 421, 64 Am. St. Rep. 715, 36 L. R. A. 271.

United States.— Mexican Cent. R. Co. *v.* Chantry, 136 Fed. 316, 69 C. C. A. 454; Consequa *v.* Willings, 6 Fed. Cas. No. 3,128, Pet. C. C. 225.

See 46 Cent. Dig. tit. "Trial," § 327.

Existence of decisions for jury.— Where decisions of another state are given in evidence, it is for the jury to determine whether or not the decisions have been made, and for the court to construe the rules of law which they establish. Alexander *v.* Pennsylvania Co., 48 Ohio St. 623, 30 N. E. 69.

11. Electric Welding Co. *v.* Prince, 200 Mass. 386, 86 N. E. 947, 128 Am. St. Rep. 434; Hancock Nat. Bank *v.* Ellis, 172 Mass. 39, 51 N. E. 207, 70 Am. St. Rep. 232, 42 L. R. A. 396; Wylie *v.* Cotter, 170 Mass. 356, 49 N. E. 746, 64 Am. St. Rep. 305; Ufford *v.* Spaulding, 156 Mass. 65, 30 N. E. 360.

12. Electric Welding Co. *v.* Prince, 200 Mass. 386, 86 N. E. 947, 128 Am. St. Rep. 434.

introduced,[13] or the only evidence is the testimony of an attorney of the foreign state, especially when inconclusive,[14] the question of what is the law of the foreign state must be submitted to the jury.

6. Existence and Terms of Oral Agreements. The existence and terms of an oral contract are questions of fact for the jury;[15] but the terms when ascertained are to be construed by the court, and it is error to leave this question to the jury.[16]

7. Questions of Identity. Identity of person is a question of fact for the jury,[17] as is also the question of identity of causes of action.[18]

8. Intent. An issue, involving the determination of the mental attitude or intent of a person or persons with respect to acts done by them, is for the jury,[19] even though the evidence be not conflicting.[20] A question of intent is always a question of fact. The rule that a man is taken to have intended the probable result of his own acts is at most a rule of evidence to be applied by the triers in inquiring into the intent, but is never a rule of law.[21]

9. Time or Place. Where place becomes material, under conflicting evidence,[22] or if the time of doing an act becomes material,[23] the question of place or time is for the jury.[24] So what is a reasonable time is ordinarily a question of

13. Morrisette *v.* Canadian Pac. R. Co., 74 Vt. 232, 52 Atl. 520.

14. St. Louis, etc., R. Co. *v.* Conrad, (Tex. Civ. App. 1906) 99 S. W. 209.

15. *Illinois.*—White *v.* Murtland, 71 Ill. 250, 22 Am. Rep. 100.

Massachusetts.—Cunningham *v.* Cambridge Sav. Bank, 138 Mass. 480.

New York.—Gilbert *v.* Warren, 44 N. Y. App. Div. 631, 60 N. Y. Suppl. 456; Chapin *v.* Potter, 1 Hilt. 366.

Pennsylvania.—Hastings *v.* Eckley, 8 Pa. St. 194; Frothingham *v.* Laflin, etc., Powder Co., 8 Pa. Cas. 28, 4 Atl. 720.

Wisconsin.—Teesdale *v.* Bennett, 123 Wis. 355, 101 N. W. 688.

See 46 Cent. Dig. tit. "Trial," § 326.

16. Short *v.* Woodward, 13 Gray (Mass.) 86; Rhodes *v.* Chesson, 44 N. C. 336.

17. Carleton *v.* Townsend, 28 Cal. 219; Swicard *v.* Hooks, 85 Ga. 580, 11 S. E. 863; O'Laughlin *v.* Hammond, 4 N. Y. Suppl. 582 [*affirmed* in 121 N. Y. 699, 24 N. E. 1100].

18. Ball *v.* Biggam, 6 Kan. App. 42, 49 Pac. 678; Corey *v.* Bath, 35 N. H. 530; O'Neale *v.* Stewart, Riley (S. C.) 266.

19. *Alabama.*—Cox *v.* Knight, 49 Ala. 173.

Connecticut.—Quinebaug Bank *v.* Brewster, 30 Conn. 559.

Iowa.—Murphy *v.* Murphy, 95 Iowa 271, 63 N. W. 697; Avery *v.* Chapman, 62 Iowa 144, 17 N. W. 454.

Maine.—Burnham *v.* Toothaker, 19 Me. 371; Locke *v.* Brown, 14 Me. 108.

Michigan.—Hough *v.* Comstock, 97 Mich. 11, 55 N. W. 1011.

New York.—Gansberg *v.* Sagemohl, 67 N. Y. App. Div. 554, 73 N. Y. Suppl. 984.

South Carolina.—Riordan *v.* Doty, 56 S. C. 111, 34 S. E. 68.

Wisconsin.—Carson *v.* Milwaukee Produce Co., 133 Wis. 85, 113 N. W. 393.

Where the intent of a party is to be ascertained from ambiguous disputed circumstances, the necessary inferences to be drawn are for the jury. Continental Lumber Co. *v.* Munshaw, 77 Nebr. 456, 109 N. W. 760; Langan *v.* Whalen, 67 Nebr. 299, 93 N. W. 393.

20. Cox *v.* Knight, 49 Ala. 173.

Applications of rule.—Thus the jury should determine under which of two contracts money has been paid by one to another (Indiana, etc., R. Co. *v.* Cavett, 12 Ind. 316), or under which of two agreements the parties acted (Wilhelm *v.* Voss, 118 Mich. 106, 76 N. W. 308; Piedmont Mfg. Co. *v.* Columbia, etc., R. Co., 19 S. C. 353); whether a sale of bonds by a pledgee was or was not made in pursuance of a certain agreement (Globe Nat. Bank *v.* Ingalls, 130 Mass. 8); whether a transaction was intended as a sale or as a lease (Iroquois Furnace Co. *v.* Ross, 76 Ill. App. 549); whether the abandonment of a criminal prosecution was in consideration of a certain act or as the consequence only (Grover *v.* Bruere, 9 N. J. L. 319); what was the intention of the parties with reference to a sum of money paid by a sheriff selling property under a mortgage to the mortgagee (Teague *v.* Maddox, 150 U. S. 128, 14 S. Ct. 46, 37 L. ed. 1025); in what capacity and with what intention a party took possession of certain property, whether as his own or as belonging to someone else (Miersch *v.* Bivin, 22 N. Y. Suppl. 135; Gilkey *v.* Peeler, 22 Tex. 663); or whether a party abandoned one residence and took up another, the question being as to his citizenship (Rucker *v.* Bolles, 80 Fed. 504, 25 C. C. A. 600); intent being the controlling element in all these cases.

21. Quinebaug Bank *v.* Brewster, 30 Conn. 559.

22. Way *v.* Butterworth, 106 Mass. 75; Lennan *v.* Hamburg-American Steamship Co., 73 N. Y. App. Div. 357, 77 N. Y. Suppl. 60.

23. Hammond *v.* Warfield, 2 Harr. & J. (Md.) 151.

24. **Applications of rule.**—Thus, whether a certain conversation occurred before or after the delivery of a deed (Wilson *v.* Irish, 62 Iowa 260, 17 N. W. 511); whether a blank in a bond was filled in before or after delivery (Keen *v.* Monroe, 75 Va. 424); which of

fact.[25] But where the facts are undisputed and different inferences cannot be drawn therefrom, the question is one of law for the court.[26]

10. Meaning of Equivocal Words and Phrases. The meaning of words and phrases, in the connection in which they are used, is a question for the jury, when fairly susceptible of more than one reasonable interpretation.[27]

11. Questions of Philosophy, Art, and Science. Questions of natural philosophy,[28] art,[29] and science[30] are not matters of law, in respect of which it is the duty of the court to charge the jury.

12. Miscellaneous Questions of Law or Fact. The nature of the action[31] or the form in which it should be brought[32] is a question of law. The question whether a person is precluded from equitable relief by the staleness of his demand,[33] or the legal consequences of failure to complete work in accordance with a contract therefor,[34] or the measure of the landlord's duty to a tenant who had abandoned the premises,[35] or what constitutes ownership,[36] is for the court and not for the jury. The question of the boundary line between two counties,[37] of the reasonableness of the rule of a carrier,[38] whether statements claimed to be a part of the *res gestæ* are really such,[39] whether machinery was included in a mortgage and whether the same was sold in accordance with the power contained in the mortgage,[40] whether failure to serve process has worked a discontinuance of an action,[41] whether certain facts do or do not constitute a sale,[42] whether and under

two instruments on the same subject, one being undated, was first executed (Coons *v.* Chambers, 1 Abb. Dec. (N. Y.) 439); when and by whom words found under the signature of a note were written (Burr *v.* Williams, 20 Ark. 171); or whether one suit was disposed of before a second was commenced (Ball *v.* Biggam, 6 Kan. App. 42, 49 Pac. 678) are questions of this nature and for the jury to determine.

25. Burks *v.* Stam, 65 Mo. App. 455; Crane *v.* Standard L., etc., Ins. Co., 6 Ohio S. & C. Pl. Dec. 118, 4 Ohio N. P. 309; Luhn *v.* Fordtran, (Tex. Civ. App. 1909) 115 S. W. 667.

Where the facts are in dispute in respect of what is a reasonable time, or the inferences to be drawn from undisputed facts are in doubt, the question of reasonableness is for the jury. Burr *v.* Adams Express Co., 71 N. J. L. 263, 58 Atl. 609. And see Timlin *v.* Dilworth, 76 N. J. L. 568, 71 Atl. 33.

26. *Massachusetts.*—Williams *v.* Powell, 101 Mass. 467, 3 Am. Rep. 396; Joy *v.* Sears, 9 Pick. 4. And see Loring *v.* Boston, 7 Metc. 409.

New Jersey.—Rosengarten *v.* Delaware, etc., R. Co., 77 N. J. L. 71, 71 Atl. 35.

New York.—Wright *v.* Bank of Metropolis, 110 N. Y. 237, 18 N. E. 79, 6 Am. St. Rep. 356, 1 L. R. A. 289; Colt *v.* Owens, 90 N. Y. 368; Hedges *v.* Hudson River R. Co., 49 N. Y. 223.

Pennsylvania.—Zineman *v.* Harris, 6 Pa. Super. Ct. 303.

Texas.—Luhn *v.* Fordham, (Civ. App. 1909) 115 S. W. 667.

United States.—Long-Bell Lumber Co. *v.* Stump, 86 Fed. 574, 30 C. C. A. 260.

27. Darling *v.* Dodge, 36 Me. 370.

Applications of rule.—Thus, it is for the jury to decide what is included in the phrase "soft cordwood" (Darling *v.* Dodge, 36 Me. 370); whether a way twenty-one feet wide is "necessary" to the construction of a road on which to operate lumber trains (Waters *v.* Greenleaf-Johnson Lumber Co., 115 N. C. 648, 20 S. E. 718); what is "furniture in a store"; what articles are legitimately a part of a stock of goods of a particular nature, or what tools a particular artisan uses (Brody *v.* Chittenden, 106 Iowa 340, 76 N. W. 740); whether a lot is an "out-lot" within the meaning of a statute, and has been inhabited as such (Savignac *v.* Garrison, 18 How. (U. S.) 136, 15 L. ed. 290); whether certain pieces of wood are shingles, or mere chips (Morton *v.* Fairbanks, 11 Pick. (Mass.) 368); whether a mile and a half from a given point is "near" that point (Shaw *v.* Davis, 7 Mich. 318); or whether a direction by the owner to "clear up the land" included land within the highway (Knight *v.* Luce, 116 Mass. 586).

28. Case *v.* Weber, 2 Ind. 108.

29. Howland *v.* Marine Ins. Co., 12 Fed. Cas. No. 6,798, 2 Cranch C. C. 474.

30. Sewanee Min. Co. *v.* Best, 3 Head (Tenn.) 701.

31. Beebe *v.* Stutsman, 5 Iowa 271.

32. Estes *v.* Boothe, 20 Ark. 583.

33. Raymond *v.* Flavel, 27 Oreg. 219, 40 Pac. 158.

34. Harrison *v.* Franklin, 126 Mo. App. 366, 103 S. W. 585.

35. Woodbury *v.* Print, 198 Mass. 1, 84 N. E. 441.

36. Bake *v.* Summers, 201 Ill. 52, 66 N. E. 302; Ware *v.* Souders, 120 Ill. App. 209.

37. State *v.* Thompson, 85 Me. 189, 27 Atl. 97; Hecker *v.* Sterling, 36 Pa. St. 423.

38. South Florida R. Co. *v.* Rhodes, 25 Fla. 40, 5 So. 633, 23 Am. St. Rep. 506, 3 L. R. A. 733.

39. Southern R. Co. *v.* Brown, 126 Ga. 1, 54 S. E. 911.

40. McEntyre *v.* Hairston, 152 Ala. 251, 44 So. 417.

41. Tyler *v.* Mutual Dist. Messenger Co., 17 App. Cas. (D. C.) 85.

42. Gowen *v.* Kehoe, 71 Ill. 66; Kendall Boot, etc., Co. *v.* Bain, 46 Mo. App. 581.

what circumstances the making and indorsing of a note by a partner binds his firm,[43] what are the duties of a carrier,[44] what compensation is fixed by statute as compensation to trustees for their services,[45] whether on uncontroverted facts the act incorporating a town and the assessment of a tax under it are constitutional and valid,[46] whether a person in possession of property is entitled thereto,[47] what part of the testimony of a witness consists of statements of fact and what part of conclusions of the witness,[48] how far parol evidence is inconsistent with the record,[49] whether an act is that of a religious or charitable association so that it may be done on Sunday within the exception of a law,[50] whether the record of a foreign judgment is properly authenticated,[51] whether municipal authorities had a legal right to assign children of African descent to separate schools,[52] whether a certain institution was required to have a license to practise medicine,[53] as to the weight to be attached to an admission made by a party in a former action, wherein he was opposed by a different defendant,[54] as to the authority of plaintiff's attorney to bring the action,[55] whether a contract should be reformed,[56] or whether a party whose witness has given unfavorable testimony was surprised as affecting his right to show inconsistent statements by the witness[57] are questions of law to be determined by the court. So the issue on a plea of *nul tiel record* should be tried by the court.[58] On the other hand waiver is a question of fact[59] determinable by all the circumstances surrounding the transaction.[60] Disputed questions as to the genuineness of a signature,[61] or the character of a party's possession of property,[62] or as to whether an instrument was properly stamped or duly delivered,[63] should be submitted to the jury. So also should the question of the happening of any controverted event, as whether or not certain conversations took place;[64] whether a conversation was heard by a third person present at the time,[65] whether or not a certain writ was issued;[66] whether an owner of property lost title by abandonment;[67] whether a party to a transaction had knowledge of the insanity of the other party thereto[68] or had knowledge of and consented to the filling in of a blank in a deed after delivery;[69] whether an act was done under particular orders;[70] whether prices on a certain day were fictitious as based on a manipulated market, or were true market values;[71] whether one saw an object;[72] which of two papers, both purporting to be copies of the same instrument, is in fact

43. Thomas *v.* Presbrey, 5 App. Cas. (D. C.) 217.
44. Madden *v.* Port Royal, etc., R. Co., 41 S. C. 440, 19 S. E. 951, 20 S. E. 65.
45. Burney *v.* Spear, 17 Ga. 223.
46. Maltus *v.* Shields, 2 Metc. (Ky.) 553.
47. Jordan *v.* Duke, 4 Ariz. 278, 36 Pac. 896.
48. Chicago Trust, etc., Bank *v.* Landfield, 73 Ill. App. 173.
49. Thomason *v.* Odum, 31 Ala. 108, 68 Am. Dec. 159.
50. Toll *v.* Crimean, 13 Montg. Co. Rep. (Pa.) 33.
51. Clark *v.* Eltinge, 38 Wash. 376, 80 Pac. 556, 107 Am. St. Rep. 858.
52. People *v.* Alton, 193 Ill. 309, 61 N. E. 1077, 56 L. R. A. 95.
53. Wellman *v.* Jones, 124 Ala. 580, 27 So. 416.
54. Taylor *v.* State Ins. Co., 107 Iowa 275, 77 N. W. 1032.
55. Savery *v.* Savery, 3 Iowa 271.
56. Guernsey *v.* American Ins. Co., 17 Minn. 104.
57. Zipperlin *v.* Southern Pac. Co., 7 Cal. App. 206, 93 Pac. 1049.
58. Hooker *v.* State, 7 Blackf. (Ind.) 272; Becker *v.* Whitehill, 55 Md. 572.
59. Minor *v.* Edwards, 12 Mo. 137, 49 Am. Dec. 121; Ball Electric Light Co. *v.* Sanderson Bros. Steel Co., 14 N. Y. Suppl. 429; Mullan *v.* U. S., 42 Ct. Cl. 157; Hooe *v.* U. S., 41 Ct. Cl. 378.
60. Hooe *v.* U. S., 41 Ct. Cl. 378.
61. Ayrhart *v.* Wilhelmy, 135 Iowa 290, 112 N. W. 782; Magee *v.* Osborn, 32 N. Y. 669.
62. Smallwood *v.* Jones, 128 Ga. 41, 57 S. E. 99.
63. Alexander *v.* Lieth, 39 Ga. 180.
64. McCarthy *v.* Peach, 186 Mass. 67, 70 N. E. 1029.
65. Wilson *v.* Irish, 62 Iowa 260, 17 N. W. 511.
66. Brown *v.* Vandeuzer, 10 Johns. (N. Y.) 51, even though this be matter of record.
67. Johnson *v.* Dooly, 80 Ga. 307, 7 S. E. 225.
68. Judd *v.* Gray, 156 Ind. 278, 59 N. E. 849.
69. Keen *v.* Monroe, 75 Va. 424.
70. Brakebill *v.* Leonard, 40 Ga. 60.
71. Kent *v.* Miltenberger, 15 Mo. App. 480.
72. Palmer *v.* Oregon Short Line R. Co., 34 Utah 466, 98 Pac. 689.

a true copy;[73] whether a party is or is not indebted, or to what amount indebted;[74] whether a certain custom exists;[75] of the degree of the variations of a compass in a given latitude;[76] what constitutes an approach to a railway crossing;[77] whether a fair held in the name of a former society is in fact held by such society or by individuals;[78] whether an account is for tavern debts so that a defendant may avail himself of the tavern law;[79] whether a witness in testifying is referring to previous answers,[80] or testifies from personal knowledge or merely from books;[81] or of the place of residence of a party, if material,[82] are questions for the jury. So it is a question for the jury whether a certain result is a necessary sequence of the operation of natural laws,[83] whether duress entered into a particular transaction,[84] whether the facts relied on to constitute probable cause are established by the evidence,[85] whether a person acted honestly or in good faith,[86] whether goods tendered under a contract of sale were of merchantable quality,[87] or whether there is sufficient evidence to shift the burden of proof from one party to the other.[88] Where, in the absence of an official stenographer, the court and counsel disagree, or are in doubt, as to the testimony given by a witness,[89] or the court has forgotten whether there was, or was not, any evidence in support of a particular material point,[90] it is proper to leave the matter to the jury.

C. Questions of Mixed Law and Fact. It is very generally declared to be erroneous for the court to submit a mixed question of law and fact to the jury,[91] unless under proper instructions from the court.[92] In other words, where the

73. Holbrook *v.* Nichol, 36 Ill. 161.

74. Jordan *v.* Farthing, 117 N. C. 181, 23 S. E. 244.

75. Branch *v.* Palmer, 65 Ga. 210; Western *v.* Page, 94 Wis. 251, 68 N. W. 1003. *Contra*, Nolte *v.* Hill, 7 Ohio Dec. (Reprint) 297, 2 Cinc. L. Bul. 86.

76. Harlan *v.* Brown, 2 Gill (Md.) 475, 41 Am. Dec. 436.

77. Missouri, etc., R. Co. *v.* Connelly, 14 Tex. Civ. App. 529, 39 S. W. 145.

78. Latham *v.* Roach, 72 Ill. 179.

79. Hepburn *v.* Gaston, 3 N. J. L. 623.

80. Toulman *v.* Swain, 47 Mich. 82, 10 N. W. 117.

81. Fleming *v.* Shepherd, 83 Ga. 338, 9 S. E. 789.

82. Louisville, etc., R. Co. *v.* Munford, 68 S. W. 635, 24 Ky. L. Rep. 416.

83. Valentine *v.* Minneapolis, etc., R. Co., 155 Mich. 151, 118 N. W. 970.

84. Atwood *v.* Jarrett, 81 Conn. 532, 71 Atl. 569.

85. Humphries *v.* Parker, 52 Me. 502; Hygienic Fleeced Underwear Co. *v.* Way, 35 Pa. Super. Ct. 229.

86. Hoyt *v.* Duluth, etc., R. Co., 103 Minn. 396, 115 N. W. 263.

87. Hess *v.* Kaufherr, 128 N. Y. App. Div. 526, 112 N. Y. Suppl. 832.

88. Baltimore Refrigerating, etc., Co. *v.* Kreiner, 109 Md. 361, 71 Atl. 1066.

89. *Delaware.*— Hoffecker *v.* New Castle County Mut. Ins. Co., 5 Houst. 101.
Georgia.— Ivey *v.* State, 23 Ga. 576.
New York.— Fry *v.* Bennett, 3 Bosw. 200 [*affirmed* in 28 N. Y. 324].
North Carolina.— Spence *v.* Baxter, 95 N. C. 170.
Virginia.— Porter *v.* Platt, 57 Vt. 533.

90. Glover *v.* Flowers, 101 N. C. 134, 7 S. E. 579.

91. *Illinois.*—Wallard *v.* Worthman, 84 Ill. 446; White *v.* Murtland, 71 Ill. 250, 22 Am. Rep. 100; Electric Vehicle Co. *v.* Price, 138 Ill. App. 594.
Maryland.— Plater *v.* Scott, 6 Gill & J. 116.
Missouri.—Jordan *v.* Hannibal, 87 Mo. 673.
New York.— Campbell *v.* Wright, 8 N. Y. St. 471; Deems *v.* Crook, 1 Edm. Sel. Cas. 95.
South Carolina.— Connor *v.* Johnson, 59 S. C. 115, 37 S. E. 240.
See 46 Cent. Dig. tit. "Trial," § 319.

92. *Indiana.*— Fitzgerald *v.* Goff, 99 Ind. 28.
Kansas.—Atchison, etc., R. Co. *v.* Anderson, (App. 1897) 50 Pac. 603.
Maryland.—Williams *v.* Woods, 16 Md. 220.
Massachusetts.— Ridgway *v.* Bowman, 7 Cush. 268.
Mississippi.— Baldwin *v.* McKay, 41 Miss. 358; Young *v.* Power, 41 Miss. 197.
Missouri.— Stewart *v.* Sparkman, 75 Mo. App. 106.
North Carolina.— Hooper *v.* Moore, 50 N. C. 130.
Pennsylvania.— Hastings *v.* Eckley, 8 Pa. St. 194.
South Carolina.— Glover *v.* Gasque, 67 S. C. 18, 45 S. E. 113.
Texas.— Missouri Pac. R. Co. *v.* Lehmberg, 75 Tex. 61, 12 S. W. 838; Walker *v.* Brown, 66 Tex. 556, 1 S. W. 797; St. Louis Southwestern R. Co. *v.* Kennemore, (Civ. App. 1904) 81 S. W. 802; Hardin *v.* Hodges, 33 Tex. Civ. App. 155, 76 S. W. 217; Galveston, etc., R. Co. *v.* Karrer, (Civ. App. 1902) 70 S. W. 328; Galveston, etc., R. Co. *v.* Jenkins, 29 Tex. Civ. App. 440, 69 S. W. 233; Texas, etc., R. Co. *v.* Rice, 24 Tex. Civ. App. 374, 59 S. W. 833; Thompson *v.* Johnson, 24 Tex. Civ. App. 246, 58 S. W. 1030; Phœnix Ins. Co. *v.* Neal, 23 Tex. Civ. App. 427, 56 S. W. 91; Gulf, etc., R. Co. *v.* Duvall, 12 Tex. Civ. App.

evidence presents mixed questions of law and fact, it is the duty of the court to submit the evidence to the jury with hypothetical instructions as to the law applicable to the facts as they may find them,[93] or to direct the jury to find the facts, and then to apply the law to the facts so found and render judgment.[94] The first of these two methods is the one most commonly adopted.[95]

D. Reservation of Questions of Law. Under the practice in some jurisdictions, the court may reserve questions of law to be determined after a verdict has been rendered.[96] The points of law thus reserved,[97] and the facts upon which they arose,[98] must be stated specifically in the record,[99] and such reservation should refer, on its face, to questions of law of controlling effect.[1] Where the real point reserved, and actually decided, is one of law, the judgment will not be reversed because the point reserved was bad in form in presenting on its face a question of fact.[2] If the reservation refers to questions that do not affect a material aspect of the case,[3] or if it embraces a mixed question of law and fact,[4]

348, 35 S. W. 699; Southwestern Tel., etc., Co. *v.* Dale, (Civ. App. 1894) 27 S. W. 1059.

Virginia.— Green *v.* Crain, 12 Gratt. 252.

Washington.— Carstens *v.* Earles, 26 Wash. 676, 67 Pac. 404.

United States.— District of Columbia *v.* Robinson, 180 U. S. 92, 21 S. Ct. 283, 45 L. ed. 440 [*affirming* 14 App. Cas. (D. C.) 512]; Sadler *v.* Peoples, 105 Fed. 712; U. S. *v.* Burnham, 24 Fed. Cas. No. 14,690, 1 Mason 57.

93. *Illinois.*— Cook *v.* Scott, 6 Ill. 333.

Maryland.— Orear *v.* McDonald, 9 Gill 350, 52 Am. Dec. 703.

Missouri.— Marshall *v.* Schricker, 63 Mo. 308; O'Reilly *v.* Miller, 52 Mo. 210.

New Hampshire.— Kent *v.* Tyson, 20 N. H. 121.

Pennsylvania.— Hamill *v.* Firth, 175 Pa. St. 46, 34 Atl. 211.

See 46 Cent. Dig. tit. "Trial," § 319.

94. 1 Thompson Trials, § 1031.

95. 1 Thompson Trials, § 1031; St. Louis Fourth Nat. Bank *v.* Heuschen, 52 Mo. 207.

Application of foregoing principles.— Thus on questions of title, it is error for the court to leave the whole question to the jury, but it should be instructed what facts, if proved, are sufficient to show title in either party, under which instructions the jury must determine in whom the evidence shows the title to be vested (Greenwade *v.* Mills, 31 Misc. 464; Egan *v.* Bissell, 54 S. C. 80, 32 S. E. 1); if the fact of disseizin is in issue, the court should instruct what constitutes disseizin, and the jury should decide whether upon the facts presented there has been a disseizin (Dunn *v.* Hayes, 21 Me. 76); the question as to what in a given case is a "reasonable time" (Green *v.* Dingley, 24 Me. 131; Derosia *v.* Winona, etc., R. Co., 18 Minn. 133); or what is a "reasonable" search and inquiry for a person, upon whose life property rights depend (Clarke *v.* Cummings, 5 Barb. (N. Y.) 339); or as to whether a person has used "due diligence" (Davis *v.* Herrick, 6 Ohio 55); or whether acts other than actual restraint of one's liberty alleged to constitute duress exist and whether they had such influence on the mind of a particular person to overcome his will (The Oriental *v.* Barclay, 16 Tex. Civ. App. 193, 41 S. W. 117) are matters to be submitted to the jury under proper instructions, unless, upon the facts presented, the question can be determined by the court by the application of well-settled legal principles (Pollak *v.* Davidson, 87 Ala. 551, 6 So. 312; Derosia *v.* Winona, etc., R. Co., 18 Minn. 133). Where the question whether a man acted with probable cause is material, as in actions for malicious prosecution, the court should instruct the jury what facts will amount to probable cause, and leave it to them to determine whether such facts are disclosed by the evidence. Humphries *v.* Parker, 52 Me. 502.

96. Barge *v.* Haslam, 65 Nebr. 656, 91 N. W. 528; Fulton *v.* Bates, 1 Ohio Dec. (Reprint) 59, 1 West. L. J. 404; Phœnix Silk Mfg. Co. *v.* Reilly, 187 Pa. St. 526, 41 Atl. 523; Williams *v.* Crystal Lake Water Co., 7 Pa. Dist. 456.

97. Barge *v.* Haslam, 65 Nebr. 656, 91 N. W. 528; Fayette City Borough *v.* Huggins, 112 Pa. St. 1, 4 Atl. 927; Patton *v.* Pittsburgh, etc., R. Co., 96 Pa. St. 169.

98. Fayette City Borough *v.* Huggins, 112 Pa. St. 1, 4 Atl. 927; Patton *v.* Pittsburgh, etc., R. Co., 96 Pa. St. 169; Konicz *v.* Orient Ins. Co., 17 Pa. Super. Ct. 550.

99. Phœnix Silk Mfg. Co. *v.* Reilly, 187 Pa. St. 526, 41 Atl. 523, holding, however, that the statement may be by reference to the petition.

Conflicting recitals.— A reservation which contains several points, the recitals in some of the points being irreconcilable with those in others, so that upon the same reservations plaintiff would be entitled to judgment and upon others of which judgment ought to be rendered for defendant is bad. Wolf *v.* Jacobs, 10 Pa. Super. Ct. 54.

1. Williams *v.* Crystal Lake Water Co., 191 Pa. St. 98, 43 Atl. 206.

2. Williams *v.* Crystal Lake Water Co., 191 Pa. St. 98, 43 Atl. 206.

3. Zinnel *v.* Bergdoll, 9 Pa. Super. Ct. 522, 7 Del. Co. 369, 44 Wkly. Notes Cas. 54.

4. Coolbroth *v.* Pennsylvania R. Co., 209 Pa. St. 433, 58 Atl. 808; Mayne *v.* Maryland Fidelity, etc., Co., 198 Pa. St. 490, 48 Atl. 469.

it is erroneous. The general question whether there is any evidence that will support a verdict,[5] or that will support a particular essential issue,[6] may properly be reserved.[7] The reservation of a question whether there be any evidence which entitles plaintiff to recover is a good reservation, without further statement upon the record of the facts upon which the point is based.[8]

E. Effect of Erroneous Submission of Questions of Law to Jury. The erroneous submission of questions of law to the jury will not be ground for reversal where no prejudice resulted to appellant.[9] Error in submitting a question of law to the jury is harmless where the jury decides the question correctly,[10]

5. Boyle *v.* Mahanoy City, 187 Pa. St. 1, 40 Atl. 1093; Fisher *v.* Scharadin, 186 Pa. St. 565, 40 Atl. 1091; Koons *v.* Western Union Tel. Co., 102 Pa. St. 164; Hays *v.* Oil City, 8 Pa. Cas. 185, 11 Atl. 63; Gedusky *v.* Rubinsky, 21 Pa. Co. Ct. 549; Carstairs *v.* American Bonding, etc., Co., 116 Fed. 449, 54 C. C. A. 85. *Contra,* Barge *v.* Haslam, 63 Nebr. 296, 88 N. W. 516, 65 Nebr. 656, 91 N. W. 528; Konicz *v.* Orient Ins. Co., 17 Pa. Super. Ct. 550.

6. Keefer *v.* Pacific Mut. L. Ins. Co., 201 Pa. St. 448, 51 Atl. 366, 88 Am. St. Rep. 822; Casey *v.* Pennsylvania Asphalt Pav. Co., 198 Pa. St. 348, 47 Atl. 1128; Scott *v.* Dewey, 23 Pa. Super. Ct. 396.

7. McCallin *v.* Herzer, 4 Pa. Cas. 64, 7 Atl. 149, holding, however, that this is not so where the material facts are not admitted, or inferences of fact are to be drawn from the testimony.

8. Newhard *v.* Pennsylvania R. Co., 153 Pa. St. 417, 26 Atl. 105, 19 L. R. A. 563; Bauschard Co. *v.* New York Fidelity, etc., Co., 21 Pa. Super. Ct. 370.

9. *Alabama.*— Bernstein *v.* Humes, 78 Ala. 134; Courtland *v.* Tarlton, 8 Ala. 532.

California.— Cutten *v.* Pearsall, 146 Cal. 690, 81 Pac. 25.

Colorado.— Emblem *v.* Bicksler, 34 Colo. 496, 83 Pac. 636.

Georgia.— Bell *v.* Hutchings, 86 Ga. 562, 12 S. E. 974.

Illinois.— Shepard *v.* Mills, 173 Ill. 223, 50 N. E. 709 [*affirming* 70 Ill. App. 72]; Consolidated Coal Co. *v.* Schaefer, 135 Ill. 210, 25 N. E. 788.

Iowa.— Taylor *v.* Wabash R. Co., 112 Iowa 157, 83 N. W. 892; Gibson *v.* Burlington, etc., R. Co., 107 Iowa 596, 78 N. W. 190; Larkin *v.* Burlington, etc., R. Co., 91 Iowa 654, 60 N. W. 195.

Kansas.—Akin *v.* Davis, 11 Kan. 580.

Maine.— Simpson *v.* Norton, 45 Me. 281; Osgood *v.* Lansil, 33 Me. 360; Pike *v.* Warren, 15 Me. 390.

Maryland.— Castleberg *v.* Wheeler, 68 Md. 266, 12 Atl. 3.

Massachusetts.— Hinds *v.* Cottle, 143 Mass. 310, 9 N. E. 654; Krebs *v.* Oliver, 12 Gray 239.

Minnesota.— McArthur *v.* Craigie, 22 Minn. 351.

Missouri.— Sedalia Third Nat. Bank *v.* Faults, 115 Mo. App. 42, 90 S. W. 755; Spiers *v.* Woodhill, 71 Mo. App. 373.

New York.— Bennett *v.* Lycoming County Mut. Ins. Co., 67 N. Y. 274.

North Carolina.— Vincent *v.* Corbin, 85 N. C. 108; Stokes *v.* Arey, 53 N. C. 66; Woodward *v.* Hancock, 52 N. C. 384.

Oregon.— Johnson *v.* Shively, 9 Oreg. 333.

South Carolina.— Prater *v.* Wilson, 55 S. C. 468, 33 S. E. 561.

Tennessee.— Roberts *v.* Alexander, 5 Lea 412.

Texas.— Lindsley *v.* Sparks, 20 Tex. Civ. App. 56, 48 S. W. 204; Simpson *v.* Edens, 14 Tex. Civ. App. 235, 38 S. W. 474.

Vermont.— Dean *v.* Shattuck, 56 Vt. 512.

United States.— Thompson *v.* Roberts, 24 How. 233, 16 L. ed. 648; Wilmoth *v.* Hamilton, 127 Fed. 48, 61 C. C. A. 584.

See 46 Cent. Dig. tit. "Trial," § 467.

10. *Alabama.*— Millard *v.* Hall, 24 Ala. 209.

Arkansas.— Woods *v.* Carl, 75 Ark. 328, 87 S. W. 621 [*affirmed* in 203 U. S. 358, 27 S. Ct. 99, 51 L. ed. 219].

Connecticut.— McWilliams *v.* McNamara, 81 Conn. 310, 70 Atl. 1043.

District of Columbia.— Staples *v.* Johnson, 25 App. Cas. 155; Kelly *v.* Moore, 22 App. Cas. 9 [*affirmed* in 196 U. S. 38, 25 S. Ct. 169, 49 L. ed. 376].

Iowa.— Pleasantville Citizens' Bank *v.* Pleasantville First Nat. Bank, 135 Iowa 605, 113 N. W. 481, 13 L. R. A. N. S. 303; Hasbrouck *v.* Western Union Tel. Co., 107 Iowa 160, 77 N. W. 1034, 70 Am. St. Rep. 181.

Kansas.— Davis *v.* Wilson, 11 Kan. 74; Germania F. Ins. Co. *v.* Curran, 8 Kan. 9.

Kentucky.— Bramel *v.* Bramel, 101 Ky. 64, 39 S. W. 520, 18 Ky. L. Rep. 1074.

Maine.— Osgood *v.* Lansil, 33 Me. 360; Copeland *v.* Wadleigh, 7 Me. 141.

Maryland.— Harmony F. & M. Ins. Co. *v.* Hazlehurst, 30 Md. 380.

Massachusetts.— Bouve *v.* Cottle, 143 Mass. 310, 9 N. E. 654; Krebs *v.* Oliver, 12 Gray 239.

Michigan.—Allen *v.* Duffie, 43 Mich. 1, 4 N. W. 427, 38 Am. Rep. 159.

Missouri.— Chilton *v.* St. Louis, etc., R. Co., 114 Mo. 88, 21 S. W. 457, 19 L. R. A. 269; Nelson *v.* Hirsch, etc., Iron, etc., Co., 102 Mo. App. 498, 77 S. W. 590; Pettingill *v.* Jones, 30 Mo. App. 280.

New York.— Ming *v.* Corbin, 142 N. Y. 334, 37 N. E. 105; Haebler *v.* Luttgen, 2 N. Y. App. Div. 390, 37 N. Y. Suppl. 794 [*affirmed* in 158 N. Y. 693, 53 N. E. 1125]; Stolz *v.* Syracuse, 59 Misc. 600, 111 N. Y. Suppl. 467 [*affirmed* in 134 N. Y. App. Div. 993, 119 N. Y. Suppl. 1146]; Cumpston *v.* McNair, 1 Wend. 457; Pangburn *v.* Bull, 1 Wend. 345.

North Carolina.— Cordell *v.* Western Union

as for instance where the jury correctly construes a written instrument [11] or decree,[12] or correctly decides the question of the existence of probable cause in a suit for malicious prosecution,[13] whether a railroad regulation is reasonable,[14] or the existence of a partnership,[15] or the sufficiency of proof offered to show the loss of an instrument.[16] Error in submitting a question of law is also harmless where it gives the appellant an additional chance for a favorable verdict,[17] where the court in denying a motion for new trial virtually held as matter of law that appellee was entitled to recover,[18] where the questions of law so submitted were not in controversy upon the trial,[19] or where the verdict of the jury is merely advisory.[20] On the other hand, error in submitting the construction of a written instrument to the jury is ground for reversal where it cannot be determined how the jury construed the contract.[21] And where in addition to the submission of a question

Tel. Co., 149 N. C. 402, 63 S. E. 71, 22 L. R. A. N. S. 540; Petteway *v.* McIntyre, 131 N. C. 432, 42 S. E. 851; Thornburgh *v.* Mastin, 93 N. C. 258; Ellison *v.* Rix, 85 N. C. 77; Woodbury *v.* Taylor, 48 N. C. 504; Brock *v.* King, 48 N. C. 45.

Ohio.— Chapman *v.* Seely, 8 Ohio Cir. Ct. 179, 4 Ohio Cir. Dec. 395.

Oregon.— Christenson *v.* Nelson, 38 Oreg. 473, 63 Pac. 648; Johnson *v.* Shively, 9 Oreg. 333.

Pennsylvania.— Davis *v.* Snyder Tp., 196 Pa. St. 273, 46 Atl. 301.

Rhode Island.— Crafts *v.* Carr, 24 R. I. 397, 53 Atl. 275, 96 Am. St. Rep. 721, 60 L. R. A. 128.

Texas.—Austin *v.* Townes, 10 Tex. 24; Utley *v.* Smith, (Civ. App. 1895) 32 S. W. 906.

Washington.— Nickelson *v.* Cameron Lumber Co., 39 Wash. 569, 81 Pac. 1059.

West Virginia.— Miller *v.* White, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. Rep. 791.

Wisconsin.— Patten *v.* Chicago, etc., R. Co., 32 Wis. 524.

11. *Alabama.*— Hill *v.* Townsend, 69 Ala. 286; Jones *v.* Pullen, 66 Ala. 306.

Georgia.— Capital City Brick Co. *v.* Atlanta Ice, etc., Co., 5 Ga. App. 436, 63 S. E. 562; R. L. Moss Mfg. Co. *v.* Carolina Portland Cement Co., 1 Ga. App. 232, 57 S. E. 914.

Illinois.— Gettys *v.* Marsh, 145 Ill. App. 291.

Kentucky.— Stringtown, etc., Turnpike Road Co. *v.* Riley, 8 Ky. L. Rep. 267.

Maine.— Woodman *v.* Chesley, 39 Me. 45; Emerson *v.* Coggswell, 16 Me. 77.

Maryland.— Warner *v.* Miltenberger, 21 Md. 264, 83 Am. Dec. 573; Hanson *v.* Campbell, 20 Md. 223.

Massachusetts.— Goodnow *v.* Davenport, 115 Mass. 568; Ricker *v.* Cutter, 8 Gray 248.

Michigan.— Stadden *v.* Hazzard, 34 Mich. 76.

Minnesota.— Gross *v.* Diller, 33 Minn. 424, 23 N. W. 837; Hooper *v.* Webb, 27 Minn. 485, 8 N. W. 589.

Missouri.— Comfort *v.* Ballingal, 134 Mo. 281, 35 S. W. 609; Streeper *v.* Abeln, 59 Mo. App. 485.

New York.— Haebler *v.* Luttgen, 2 N. Y. App. Div. 390, 37 N. Y. Suppl. 794 [*affirmed* in 158 N. Y. 693, 53 N. E. 1125]; Herst *v.* De Comeau, 1 Sweeny 590; Hannay *v.* Zerban, 1 Misc. 329, 20 N. Y. Suppl. 656.

North Carolina.— Glenn *v.* Charlotte, etc., R. Co., 63 N. C. 510; Smith *v.* Shepard, 12 N. C. 461.

Pennsylvania.— Jones *v.* Kroll, 116 Pa. St. 85, 8 Atl. 857.

Tennessee.— Knoxville, etc., R. Co. *v.* Beeler, 90 Tenn. 548, 18 S. W. 391.

Texas.—Adoue *v.* Jemison, 65 Tex. 680; Poe *v.* Brownrigg, 55 Tex. 133.

Vermont.— Castleton *v.* Langdon, 19 Vt. 210; Danforth *v.* Evans, 16 Vt. 538.

Wisconsin.— Martineau *v.* Steele, 14 Wis. 272.

United States.— Pence *v.* Langdon, 99 U. S. 578, 25 L. ed. 420.

12. Charles *v.* St. Louis, etc., R. Co., 124 Mo. App. 293, 101 S. W. 680.

13. Pangburn *v.* Bull, 1 Wend. (N. Y.) 345.

14. Chilton *v.* St. Louis, etc., R. Co., 114 Mo. 88, 21 S. W. 457, 19 L. R. A. 269.

15. Cumpston *v.* McNair, 1 Wend. (N. Y.) 457.

16. Ellison *v.* Rix, 85 N. C. 77.

17. Mooney *v.* Hough, 84 Ala. 80, 4 So. 19; Taylor *v.* Kelly, 31 Ala. 59, 68 Am. Dec. 150; Miller *v.* Root, 77 Iowa 545, 42 N. W. 502; Aransas Pass Land Co. *v.* Hanaford, 4 Tex. Civ. App. 286, 23 S. W. 566; Currier *v.* Robinson, 61 Vt. 196, 18 Atl. 147. And see Spence *v.* Owen County, 117 Ind. 573, 18 N. E. 513.

Illustrations.— Thus in an action by a landlord to enforce a lien where the legal question as to his right to the lien should have been decided by the court in favor of the landlord, submission of the question to the jury would not prejudice defendant. Mooney *v.* Hough, 84 Ala. 80, 4 So. 19. And where, in an action for injuries to a servant, the evidence was undisputed and conclusively showed that defendant was operating the railroad in question, the court's error in submitting such issue to the jury was in favor of and not prejudicial to defendant. Cunningham *v.* Neal, 49 Tex. Civ. App. 613, 109 S. W. 455.

18. Emblem *v.* Bicksler, 34 Colo. 496, 83 Pac. 636.

19. American Home Circle *v.* Eggers, 137 Ill. App. 595.

20. Cockrell *v.* McIntyre, 161 Mo. 59, 61 S. W. 648.

21. Northrup *v.* Porter, 17 N. Y. App. Div. 80, 44 N. Y. Suppl. 814.

of law to the jury, the case is submitted on an erroneous theory, the causes which produced the verdict must be largely a matter of conjecture, and the judgment should be reversed.[22]

VIII. TAKING CASE FROM JURY.

A. Considerations Governing Exercise of This Function — 1. In General. Whenever the evidence adduced presents an issue of fact, which if determined in plaintiff's favor would entitle him to recover, the case should be submitted to the determination of jury.[23] Where there is some evidence,[24] although

22. Hinman *v.* F. C. Austin Mfg. Co., 65 Nebr. 187, 90 N. W. 934.

23. *Alabama.*— Davis Wagon Co. *v.* Cannon, 129 Ala. 301, 29 So. 841.

Georgia.— Matheson *v.* Tennille, 115 Ga. 999, 42 S. E. 394; Jones *v.* Dannenberg Co., 115 Ga. 769, 42 S. E. 65.

Idaho.— Swinehart *v.* Pocatello Meat, etc., Co., 8 Ida. 710, 70 Pac. 1054.

Illinois.— Marquette Third Vein Coal Co. *v.* Dielie, 208 Ill. 116, 70 N. E. 17; Pittsburg, etc., R. Co. *v.* Banfill, 206 Ill. 553, 69 N. E. 499 [*affirming* 107 Ill. App. 254]; Chicago Junction R. Co. *v.* McGrath, 203 Ill. 511, 68 N. E. 69 [*affirming* 107 Ill. App. 100]; Chicago, etc., R. Co. *v.* Huff, 104 Ill. App. 594; Flanagan *v.* Means, 94 Ill. App. 362; Brezinski *v.* Swift, 91 Ill. App. 537.

Kentucky.— Maltus *v.* Shields, 2 Metc. 553; Payne *v.* Vandever, 17 B. Mon. 14.

Maine.— Bigelow *v.* Bigelow, 95 Me. 17, 49 Atl. 49.

Massachusetts.— Kane *v.* Learned, 117 Mass. 190; Pettingill *v.* Porter, 8 Allen 1, 85 Am. Dec. 671.

Michigan.— Reid *v.* Detroit Ideal Paint Co., 132 Mich. 528, 94 N. W. 3.

Mississippi.— Williams *v.* Southern R. Co., (1903) 33 So. 972.

Missouri.— Fields *v.* Missouri Pac. R. Co., 113 Mo. App. 642, 88 S. W. 134; James *v.* Kansas City, 85 Mo. App. 20.

Nebraska.— Morrill *v.* McNeill, 3 Nebr. (Unoff.) 220, 91 N. W. 602.

New Hampshire.— Newport First Nat. Bank *v.* Hunton, 69 N. H. 509, 45 Atl. 351.

New York.— Sundheimer *v.* New York, 176 N. Y. 495, 68 N. E. 867.

North Carolina.— Bottoms *v.* Seaboard, etc., R. Co., 109 N. C. 72, 13 S. E. 738; White *v.* White, 15 N. C. 257.

Oklahoma.— Farmers' State Bank *v.* Spencer, 12 Okla. 597, 73 Pac. 297; Richardson *v.* Fellner, 9 Okla. 513, 60 Pac. 270.

Pennsylvania.— Rosevere *v.* Osceola Mills, 169 Pa. St. 555, 32 Atl. 548; Smith *v.* Easton Transit Co., 167 Pa. St. 209, 31 Atl. 557; Heere *v.* Penn Nat. Bank, 160 Pa. St. 314, 28 Atl. 688; Jackson *v.* Pittsburg, etc., Traction Co., 159 Pa. St. 399, 28 Atl. 257; Rafferty *v.* Masonic Bank, 4 Pa. Cas. 71, 7 Atl. 93; Molloy *v.* U. S. Express Co., 22 Pa. Super. Ct. 173; Prindle *v.* Kountz Bros. Co., 15 Pa. Super. Ct. 258.

South Carolina.— Riordan *v.* Doty, 56 S. C. 111, 34 S. E. 68.

Texas.— Nixon *v.* Jacobs, 22 Tex. Civ. App. 97, 53 S. W. 595.

United States.— Mexican Cent. R. Co. *v.* Conway, 108 Fed. 932, 48 C. C. A. 147; Brockett *v.* New Jersey Steam-Boat Co., 18 Fed. 156.

24. *Alabama.*— Sanders *v.* Edmons, 98 Ala. 157, 13 So. 505; Bromley *v.* Birmingham Mineral R. Co., 95 Ala. 397, 11 So. 341.

Connecticut.— Pigeon *v.* Lane, 80 Conn. 237, 67 Atl. 886.

Florida.— Starks *v.* Sawyer, 56 Fla. 596, 47 So. 513; Florala Saw Mill Co. *v.* Smith, 55 Fla. 447, 46 So. 332.

Georgia.— McCord *v.* Thompson, 131 Ga. 126, 61 S. E. 1121; Southern R. Co. *v.* Hardeman, 130 Ga. 222, 60 S. E. 539; Georgia R., etc., Co. *v.* Adams, 127 Ga. 408, 56 S. E. 409.

Illinois.— Donnelly *v.* Chicago City R. Co., 235 Ill. 35, 85 N. E. 233 [*affirming* 136 Ill. App. 204]; Eldorado Coal, etc., Co. *v.* Swan, 227 Ill. 586, 81 N. E. 691 [*affirming* 128 Ill. App. 237]; Schillinger Bros. Co. *v.* Smith, 225 Ill. 74, 80 N. E. 65 [*affirming* 128 Ill. App. 30]; Illinois Cent. R. Co. *v.* Bailey, 222 Ill. 480, 78 N. E. 833 [*affirming* 127 Ill. App. 41]; Centralia *v.* Ayres, 133 Ill. App. 290; Donk Bros. Coal, etc., Co. *v.* Slata, 133 Ill. App. 280; Packer *v.* Sheppard, 127 Ill. App. 598; Swift *v.* O'Brien, 127 Ill. App. 26.

Iowa.— Cahill *v.* Illinois Cent. R. Co., 137 Iowa 577, 115 N. W. 216.

Kansas.— Darling *v.* Atchison, etc., R. Co., 76 Kan. 893, 93 Pac. 612, 94 Pac. 202.

Kentucky.— Meade *v.* Ashland Steel Co., 125 Ky. 114, 100 S. W. 821, 30 Ky. L. Rep. 1164; Smith *v.* Garrison, 108 S. W. 293, 32 Ky. L. Rep. 1278; Louisville, etc., R. Co. *v.* Brown, 107 S. W. 321, 32 Ky. L. Rep. 1002; Supreme Lodge K. of P. *v.* Bradley, 107 S. W. 209, 32 Ky. L. Rep. 743, 109 S. W. 1178, 33 Ky. L. Rep. 413; Switchmen's Union of North America *v.* Johnson, 105 S. W. 1193, 32 Ky. L. Rep. 583.

Massachusetts.—Cahill *v.* Phelps, 198 Mass. 332, 84 N. E. 496.

Michigan.— Croze *v.* St. Mary's Canal Mineral Land Co., 153 Mich. 363, 117 N. W. 81.

Minnesota.—Rundlett *v.* G. Heileman Brewing Co., 104 Minn. 337, 116 N. W. 833.

Missouri.— Gordon *v.* Park, 202 Mo. 236, 100 S. W. 621; Stevens *v.* Stevens, 132 Mo. App. 624, 112 S. W. 35.

New Jersey.— Bowell *v.* Public Service Corp., 77 N. J. L. 231, 71 Atl. 119.

New Mexico.— Sherman *v.* Hicks, 14 N. M. 439, 94 Pac. 959.

New York.— Kornfeld *v.* David Stevenson Brewing Co., 111 N. Y. Suppl. 641.

North Carolina.— Cox *v.* Norfolk, etc., R. Co., 123 N. C. 604, 31 S. E. 848; Hardison *v.* Atlantic, etc., R. Co., 120 N. C. 492, 26 S. E.

slight,[25] the case should be submitted to the jury if there is more than a scintilla of evidence,[26] and although the only evidence in support of the case is the party's own testimony;[27] if the evidence will sustain a verdict.[28] This is so, regardless of the views of the judge of the weight of the evidence,[29] or of the fact that the weight or preponderance of the evidence is decidedly in favor of the adverse party.[30] On the other hand, it is held that if there is no evidence in the case[31]

630; Spruill *v.* Northwestern Mut. L. Ins. Co., 120 N. C. 141, 27 S. E. 39; Wittkowsky *v.* Wasson, 71 N. C. 451.

Oklahoma.— Wakita Citizens' Bank *v.* Garnett, 21 Okla. 200, 95 Pac. 755; St. Louis, etc., R. Co. *v.* Jamieson, 20 Okla. 654, 95 Pac. 417; Cole *v.* Missouri, etc., R. Co., 20 Okla. 227, 94 Pac. 540, 15 L. R. A. N. S. 268.

South Carolina.— Logan *v.* Atlanta, etc., Air Line R. Co., 82 S. C. 518, 64 S. E. 515.

Texas.— Allen *v.* Camp, 101 Tex. 260, 106 S. W. 315; Trimble *v.* Burroughs, (Civ. App. 1908) 113 S. W. 551; Texas Brokerage Co. *v.* Barkley, 49 Tex. Civ. App. 632, 109 S. W. 1001; Citizens' R. Co. *v.* Griffin, 49 Tex. Civ. App. 569, 109 S. W. 999; Gray *v.* Fussell, 48 Tex. Civ. App. 261, 106 S. W. 454.

Vermont.— McDuffee *v.* Boston, etc., R. Co., 81 Vt. 52, 69 Atl. 124, 130 Am. St. Rep. 1019.

West Virginia.— Null *v.* Bowman, 64 W. Va. 224, 61 S. E. 154.

Wisconsin.— Gessner *v.* Roeming, 135 Wis. 535, 116 N. W. 171; Paulus *v.* O'Neill, 131 Wis. 69, 111 N. W. 333.

United States.— Southern R. Co. *v.* Hopkins, 161 Fed. 266, 88 C. C. A. 312.

But see Begenish *v.* Gates, 2 Alaska 511; Gibson *v.* Canadian Pac. Nav. Co., 1 Alaska 407, holding that to entitle plaintiff's cause to go to the jury, he must have established every material part thereof by his evidence, and his evidence and the law must correspondingly show a *prima facie* legal right to judgment in his favor.

The fact that undue credence might be given the evidence does not alter the rule. Baltimore, etc., R. Co. *v.* State, 107 Md. 642, 69 Atl. 439, 72 Atl. 340.

25. *Florida.*— C. B. Rogers Co. *v.* Meinhardt, 37 Fla. 480, 19 So. 878.

Kentucky.— Meade *v.* Ashland Steel Co., 125 Ky. 114, 100 S. W. 821, 30 Ky. L. Rep. 1164; Illinois Cent. R. Co. *v.* Walters, 56 S. W. 706, 22 Ky. L. Rep. 137.

Missouri.— Clark *v.* Shrimski, 77 Mo. App. 166; Hadley *v.* Orchard, 77 Mo. App. 141.

Oklahoma.— Snyder *v.* Stribling, 18 Okla. 168, 89 Pac. 222.

Pennsylvania.— French *v.* Spencer, 23 Pa. Super. Ct. 428.

South Carolina.— Riordan *v.* Doty, 56 S. C. 111, 34 S. E. 68.

Texas.— Heatherly *v.* Little, (Civ. App. 1897) 40 S. W. 445.

26. Louisville R. Co. *v.* Buckner, (Ky. 1908) 113 S. W. 90; Currie *v.* Gilchrist, 147 N. C. 648, 61 S. E. 581; Cox *v.* High Point, etc., R. Co., 147 N. C. 353, 61 S. E. 183; Coble *v.* Huffines, 133 N. C. 422, 45 S. E. 760, 132 N. C. 399, 43 S. E. 909; Cogdell *v.* Southern R. Co., 129 N. C. 398, 40 S. E. 202. And see Walters *v.* Syracuse Rapid Transit R. Co., 178 N. Y. 50, 78 N. E. 98 [*reversing* 84 N. Y. App. Div. 64, 82 N. Y. Suppl. 82].

27. McCormick *v.* Kreinke, 179 Ill. 301, 53 N. E. 549; Cravens *v.* Hunter, 87 Mo. App. 456.

Contradictory evidence.— The fact that plaintiff's testimony on a material point was contradictory and confused does not warrant the judge in withdrawing the case from the jury. Campbell *v.* Preferred Mut. Acc. Assoc., 172 Pa. St. 561, 33 Atl. 564.

28. Venice *v.* Griffin, 109 Ill. App. 410; Harley *v.* Chicago Sanitary Dist., 107 Ill. App. 546; Wallen *v.* North Chicago St. R. Co., 82 Ill. App. 103; Lekas *v.* Schwartz, 56 Misc. (N. Y.) 594, 107 N. Y. Suppl. 145.

29. St. Louis Nat. Stock Yards *v.* Godfrey, 101 Ill. App. 40 [*affirmed* in 198 Ill. 288, 65 N. E. 90]; Walker *v.* Erwin, 47 Tex. Civ. App. 637, 106 S. W. 164; Messir *v.* McLean, 51 Wash. 140, 98 Pac. 106.

30. Cohen *v.* Sioux City Traction Co., 141 Iowa 469, 119 N. W. 964; Lynch *v.* Snead Architectural Iron Works, 132 Ky. 241, 116 S. W. 693, 21 L. R. A. N. S. 852; Louisville R. Co. *v.* Buckner, (Ky. 1908) 113 S. W. 90; Ogden *v.* Sergeant, 112 N. Y. Suppl. 1085.

31. *Alabama.*— Southern Bell Tel., etc., Co. *v.* Mayo, 134 Ala. 641, 33 So. 16; Wright *v.* Burt, 5 Ala. 29.

California.— Lacey *v.* Porter, 103 Cal. 597, 37 Pac. 635; Selden *v.* Cashman, 20 Cal. 56, 81 Am. Dec. 93.

Colorado.— Denver Jobber's Assoc. *v.* Rumsey, 18 Colo. App. 320, 71 Pac. 1001; Savage *v.* Pelton, 1 Colo. App. 148, 27 Pac. 948.

District of Columbia.— Adams Express Co. *v.* Adams, 29 App. Cas. 250.

Illinois.— Frazer *v.* Howe, 106 Ill. 563.

Indiana.— Ohio, etc., R. Co. *v.* Dunn, 138 Ind. 18, 36 N. E. 702, 37 N. E. 546; Weis *v.* Madison, 75 Ind. 241, 39 Am. Rep. 135; Sunnyside Coal, etc., Co. *v.* Reitz, 14 Ind. App. 478, 39 N. E. 541, 43 N. E. 46.

Iowa.— Gillespie *v.* Ashford, 125 Iowa 729, 101 N. W. 649; Shuman *v.* Supreme Lodge K. H., 110 Iowa 480, 81 N. W. 717; Murphy *v.* Chicago, etc., R. Co., 45 Iowa 661.

Maine.— Connor *v.* Giles, 76 Me. 132; Thorn *v.* Rice, 15 Me. 263.

Maryland.— Nailor *v.* Bowie, 3 Md. 251; Belt *v.* Marriott, 9 Gill 331.

Massachusetts.— Denny *v.* Williams, 5 Allen 1.

Michigan.— Cronin *v.* Philadelphia Fire Assoc., 119 Mich. 74, 77 N. W. 648.

Missouri.— Carroll *v.* Interstate Rapid Transit Co., 107 Mo. 653, 17 S. W. 889.

from which the jury can properly find in favor of the party upon whom rests the burden of proof,[32] or if there is no more than a mere scintilla of evidence,[33] or where the evidence is free from conflict, and admits of but one conclusion,[34] the court

Montana.— Tague *v.* John Caplice Co., 28 Mont. 51, 72 Pac. 297.

Nebraska.—Anderson *v.* Chicago, etc., R. Co., 84 Nebr. 311, 120 N. W. 1114, 133 Am. St. Rep. 626; Dodds *v.* McCormick Harvesting Mach. Co., 62 Nebr. 759, 87 N. W. 911; Jandt *v.* Denanleau, 57 Nebr. 497, 78 N. W. 22; Morgan *v.* Stone, 4 Nebr. (Unoff.) 115, 93 N. W. 743; Holdreye *v.* Watson, 1 Nebr. (Unoff.) 687, 96 N. W. 67.

New Jersey.— Sommers *v.* Myers, 69 N. J. L. 24, 54 Atl. 812.

New York.— Milbank *v.* Dennistoun, 21 N. Y. 386, 19 How. Pr. 126; Carpenter *v.* Smith, 10 Barb. 663; Railway Advertising Co. *v.* Posner, 35 Misc. 285, 71 N. Y. Suppl. 742; Friend *v.* Jetter, 19 Misc. 101, 43 N. Y. Suppl. 287; McGarragher *v.* Gaskell, 6 N. Y. St. 87.

North Carolina.— Matthis *v.* Matthis, 48 N. C. 132; Sutton *v.* Madre, 47 N. C. 320.

Ohio.— Ruffner *v.* Cincinnati, etc., R. Co., 5 Ohio Dec. (Reprint) 569, 6 Am. L. Rec. 685.

Pennsylvania.— Hyatt *v.* Johnston, 91 Pa. St. 196; Raby *v.* Cell, 85 Pa. St. 80; Dean *v.* Fuller, 40 Pa. St. 474; Lower *v.* Clement, 25 Pa. St. 63; McCracken *v.* Roberts, 19 Pa. St. 390; Kittanning Borough *v.* Kittanning Consol. Natural Gas Co., 26 Pa. Super. Ct. 355; Slease *v.* Naysmith, 14 Pa. Super. Ct. 134; Brooks *v.* Pennsylvania R. Co., 2 Pa. Super. Ct. 581, 39 Wkly. Notes Cas. 212.

Texas.— Lea *v.* Hernandez, 10 Tex. 137; Parker *v.* Leman, 10 Tex. 116; Honaker *v.* Jones, (Civ. App. 1909) 115 S. W. 649; Texas, etc., R. Co. *v.* Willard, (Civ. App. 1906) 98 S. W. 220; Chicago, Rock Island, etc., R. Co. *v.* Harton, 36 Tex. Civ. App. 475, 81 S. W. 1236; International Order of Twelve K. & D. T. *v.* Boswell, (Civ. App. 1899) 48 S. W. 1108; San Antonio, etc., R. Co. *v.* Griffin, 20 Tex. Civ. App. 91, 48 S. W. 542.

Washington.—Anderson *v.* Harper, 30 Wash. 378, 70 Pac. 965.

Wisconsin.— Dryden *v.* Britton, 19 Wis. 22.

United States.— Central Nat. Bank *v.* Royal Ins. Co., 103 U. S. 783, 26 L. ed. 459; Wyandotte, etc., R. Co. *v.* King Bridge Co., 100 Fed. 197, 40 C. C. A. 325.

Submission to the jury of issues as to which there is no evidence is error. Kampmann *v.* McCormick, (Tex. Civ. App. 1907) 99 S. W. 1147.

32. Orne *v.* Cook, 31 Ill. 238; Ware *v.* Raven, 6 N. Y. St. 259. And see Aldrich *v.* Laul, 126 N. Y. App. Div. 427, 110 N. Y. Suppl. 897.

33. *Illinois.*— Libby *v.* Cook, 222 Ill. 206, 78 N. E. 599 [*affirming* 123 Ill. App. 574].

Indiana.— Dunnington *v.* Syfers, 157 Ind. 458, 62 N. E. 29; Meyer *v.* Manhattan L. Ins. Co., 144 Ind. 439, 43 N. E. 448; Oleson *v.* Lake Shore, etc., R. Co., 143 Ind. 405, 42 N. E. 736, 32 L. R. A. 149; Gipe *v.* Pittsburgh, etc., R. Co., 41 Ind. App. 156, 82 N. E. 471.

Maine.— Connor *v.* Giles, 76 Me. 132.

Maryland.— Consolidated Gas, etc., Co. *v.* State, 109 Md. 186, 72 Atl. 651; Baltimore, etc., R. Co. *v.* State, 71 Md. 590, 18 Atl. 969; Davis *v.* Davis, 7 Harr. & J. 36.

Massachusetts.— Hillyer *v.* Dickinson, 154 Mass. 502, 28 N. E. 905.

Missouri.— Strauss *v.* American Chewing Gum Co., 134 Mo. App. 110, 114 S. W. 73.

New Jersey.— Baldwin *v.* Shannon, 43 N. J. L. 596.

New York.— Linkau *v.* Lombard, 137 N. Y. 417, 33 N. E. 472, 33 Am. St. Rep. 743, 20 L. R. A. 40; Baulec *v.* New York, etc., R. Co., 59 N. Y. 356, 17 Am. Rep. 325; Deyo *v.* New York Cent. R. Co., 34 N. Y. 9, 88 Am. Dec. 418.

North Carolina.— Wittkowsky *v.* Wasson, 71 N. C. 451. But see Craft *v.* Norfolk, etc., R. Co., 136 N. C. 49, 48 S. E. 519.

Pennsylvania.— Hyatt *v.* Johnston, 91 Pa. St. 196.

West Virginia.— Ketterman *v.* Dry Fork R. Co., 48 W. Va. 606, 37 S. E. 683 [*explaining* Carrico *v.* West Virginia Cent., etc., R. Co., 35 W. Va. 389, 14 S. E. 12]; Guinn *v.* Bowers, 44 W. Va. 507, 29 S. E. 1027.

United States.— Pleasants *v.* Fant, 22 Wall. 116, 22 L. ed. 780; Schuylkill, etc., Improvement, etc., R. Co. *v.* Munson, 14 Wall. 442, 20 L. ed. 867; Ozanne *v.* Illinois Cent. R. Co., 151 Fed. 900 [*affirmed* in 157 Fed. 1004, 85 C. C. A. 678]; Berry *v.* Chase, 146 Fed. 625, 77 C. C. A. 161; Mt. Adams, etc., R. Co. *v.* Lowery, 74 Fed. 463, 20 C. C. A. 596; Bagley *v.* Cleveland Rolling-Mill Co., 21 Fed. 159.

England.— Ryder *v.* Wombwell, L. R. 4 Exch. 32, 38 L. J. Exch. 8, 19 L. T. Rep. N. S. 491, 17 Wkly. Rep. 167; Jewell *v.* Parr, 13 C. B. 909, 76 E. C. L. 909; Toomey *v.* London, etc., R. Co., 3 C. B. N. S. 146, 27 L. J. C. P. 39, 6 Wkly. Rep. 44, 91 E. C. L. 146.

Contra.— Mason, etc., Co. *v.* Highland, (Ky. 1909) 116 S. W. 320; McFarland *v.* Harbison, etc., Co., 82 S. W. 430, 26 Ky. L. Rep. 746.

34. *Alabama.*— Tutwiler Coal, etc., Co. *v.* Wheeler, 149 Ala. 354, 43 So. 15.

Arkansas.— Rock Island Plow Co. *v.* Rankin, 89 Ark. 24, 115 S. W. 943; American Cent. Ins. Co. *v.* Noe, 75 Ark. 406, 88 S. W. 572.

Colorado.— Colorado Midland R. Co. *v.* Brady, 45 Colo. 230, 101 Pac. 62; Stearns *v.* Hazen, 45 Colo. 67, 101 Pac. 339; Denver *v.* Murray, 18 Colo. App. 142, 70 Pac. 440; Aliunde Consol. Min. Co. *v.* Arnold, 16 Colo. App. 542, 67 Pac. 28; Des Moines Life Assoc. *v.* Owen, 16 Colo. App. 60, 63 Pac. 781.

Florida.—American Process Co. *v.* Florida White Pressed Brick Co., 56 Fla. 116, 47 So.

should withdraw the case from the jury. So it has been very generally held that if

942; Tedder *v.* Fraleigh-Iines-Smith Co., 55 Fla. 496, 46 So. 419.

Georgia.— Willingham *v.* Huguenin, 129 Ga. 835, 60 S. E. 186; Blackburn *v.* Woodward, 128 Ga. 226, 57 S. E. 318; Smith *v.* Green, 128 Ga. 90, 57 S. E. 98; Chambless *v.* Melton, 127 Ga. 414, 56 S. E. 414. And see Perkins Co. *v.* Wilcox, 132 Ga. 166, 63 S. E. 831.

Illinois.— Lasher *v.* Colton, 225 Ill. 234, 80 N. E. 122 [*affirming* 126 Ill. App. 119].

Indiana.— Gaston *v.* Bailey, 21 Ind. App. 24, 53 N. E. 1021.

Iowa.—Arnd *v.* Aylesworth, 136 Iowa 297, 111 N. W. 407; Johnson *v.* Buffalo Center State Bank, 134 Iowa 731, 112 N. W. 165.

Kentucky.— Cooper *v.* Ratliff, (1909) 116 S. W. 748; Central Consumers' Co. *v.* Booher, 107 S. W. 198, 32 Ky. L. Rep. 794; Hall *v.* Louisville, etc., R. Co., 104 S. W. 275, 31 Ky. L. Rep. 853.

Maryland.— Vogeler *v.* Devries, 98 Md. 302, 56 Atl. 782; Parkhurst *v.* Northern Cent. R. Co., 19 Md. 472, 81 Am. Dec. 648.

Michigan.— English *v.* Yore, 119 Mich. 444, 78 N. W. 476.

Mississippi.— Thigpen *v.* Mississippi Cent. R. Co., 32 Miss. 347.

Missouri.— Cornovski *v.* St. Louis Transit Co., 207 Mo. 263, 106 S. W. 51; Deschner *v.* St. Louis, etc., R. Co., 200 Mo. 310, 98 S. W. 737; Holmes *v.* Missouri Pac. R. Co., 190 Mo. 98, 88 S. W. 623; Peary *v.* Quincy, etc., R. Co., 122 Mo. App. 177, 99 S. W. 14; Holden *v.* Missouri R. Co., 108 Mo. App. 665, 84 S. W. 133; Windsor *v.* Hannibal, etc., R. Co., 45 Mo. App. 123.

Montana.— McCabe *v.* Montana Cent. R. Co., 30 Mont. 323, 76 Pac. 701; Cain *v.* Gold Mountain Min. Co., 27 Mont. 529, 71 Pac. 1004; Taylor *v.* Stewart, 1 Mont. 316.

Nebraska.— Baker *v.* Swift, 77 Nebr. 749, 110 N. W. 654; Jesson *v.* Donahue, (1903) 96 N. W. 639; Rogers *v.* Marriott, 59 Nebr. 759, 82 N. W. 21; Dayton *v.* Lincoln, 39 Nebr. 74, 57 N. W. 754.

New Hampshire.— Moore *v.* Phœnix F. Ins. Co., 64 N. H. 140, 6 Atl. 27, 10 Am. St. Rep. 384.

New Jersey.— Belcher *v.* Manchester Bldg., etc., Assoc., 74 N. J. L. 833, 67 Atl. 399.

New York.— Valentine *v.* Long Island R. Co., 187 N. Y. 121, 79 N. E. 849 [*reversing* 102 N. Y. App. Div. 419, 92 N. Y. Suppl. 645]; Lomer *v.* Meeker, 25 N. Y. 361; Freifeld *v.* Groh, 116 N. Y. App. Div. 409, 101 N. Y. Suppl. 863; Keene *v.* Newark Watch Case Material Co., 112 N. Y. App. Div. 7, 98 N. Y. Suppl. 68 [*affirmed* in 188 N. Y. 598, 81 N. E. 1167]; Lawson *v.* Lawson, 67 N. Y. Suppl. 356, 56 N. Y. App. Div. 535; Weaver *v.* Darby, 42 Barb. 411.

Ohio.— Cincinnati Gas, etc., Co. *v.* Archdeacon, 80 Ohio St. 27, 88 N. E. 125.

Oklahoma.— Choctaw, etc., R. Co. *v.* Garrison, 18 Okla. 461, 90 Pac. 730.

South Carolina.— McLean *v.* Atlantic Coast Line R. Co., 81 S. C. 100, 61 S. E. 900, 1071, 128 Am. St. Rep. 892, 18 L. R. A. N. S. 763; John Sloughter Co. *v.* King Lumber Co., 79 S. C. 338, 60 S. E. 705; Sexton *v.* Hollis, 26 S. C. 231, 1 S. E. 893. *Contra,* Lowndes *v.* King, 1 S. C. 102.

Texas.— New York L. Ins. Co. *v.* English, 96 Tex. 268, 72 S. W. 58 [*reversing* 70 S. W. 440]; Levy *v.* Campbell, (1892) 19 S. W. 438; Chicago, etc., R. Co. *v.* Poore, 49 Tex. Civ. App. 191, 108 S. W. 504; Southern Pac. Co. *v.* Godfrey, 48 Tex. Civ. App. 616, 107 S. W. 1135; St. Louis, etc., R. Co. *v.* Groves, 44 Tex. Civ. App. 63, 97 S. W. 1084; Collins *v.* Kelsey, (Civ. App. 1906) 97 S. W. 122; Sullivan *v.* Owens, (Civ. App. 1904) 78 S. W. 373; New York, etc., Land Co. *v.* Dooley, 33 Tex. Civ. App. 636, 77 S. W. 1030; American Tel., etc., Co. *v.* Kersh, 27 Tex. Civ. App. 127, 66 S. W. 74; Fayssoux *v.* Kendall County, (Civ. App. 1909) 55 S. W. 583.

Washington.— Sessions *v.* Warnick, 46 Wash. 165, 89 Pac. 482.

West Virginia.— Hutchinson *v.* U. S. Express Co., 63 W. Va. 128, 59 S. E. 949, 14 L. R. A. N. S. 393.

Wisconsin.— O'Brien *v.* Chicago, etc., R. Co., 102 Wis. 628, 78 N. W. 1084; Berg *v.* Chicago, etc., R. Co., 50 Wis. 419, 7 N. W. 347.

United States.— Muskogee Land Co. *v.* Mullins, 165 Fed. 179, 91 C. C. A. 213; Bell *v.* Carter, 164 Fed. 417, 90 C. C. A. 555, 19 L. R. A. N. S. 833; Southern R. Co. *v.* Hardin, 157 Fed. 645, 85 C. C. A. 329; St. Louis, etc., R. Co. *v.* Dewees, 153 Fed. 56, 82 C. C. A. 190; Waters-Pierce Oil Co. *v.* Van Elderen, 137 Fed. 557, 70 C. C. A. 255; Speer *v.* Kearney County, 88 Fed. 749, 32 C. C. A. 101.

See 46 Cent. Dig. tit. "Trial," § 336.

Contra.— Mitchell *v.* Carolina Cent. R. Co., 124 N. C. 236, 32 S. E. 671, 44 L. R. A. 515.

Where undisputed evidence is of such a character as to preclude a ruling thereon, as a matter of law, in behalf of one party, such party cannot complain that the issue was submitted to the jury. Tracy *v.* Grand Trunk R. Co., 76 Vt. 313, 57 Atl. 104.

What is not undisputed evidence.— The testimony of one witness as to the intoxication of insured before his application for insurance was not undisputed evidence precluding submission to the jury, where the witness was uncertain as to the time, and his memory appeared defective. Des Moines L. Ins. Co. *v.* Clay, 89 Ark. 230, 116 S. W. 232.

In Massachusetts it is held that the fact that there is no testimony directly contradicting evidence in favor of defendant is no ground for directing a verdict in its favor, since the jury have a right to disbelieve its witnesses *in toto.* McGourty *v.* De Marco, 200 Mass. 57, 85 N. E. 891; Lindenbaum *v.* New York, etc., R. Co., 197 Mass. 314, 84 N. E. 129.

In Pennsylvania where the evidence is oral, although not disputed, the case is necessarily for the jury. Perkiomen R. Co. *v.* Kremer,

the facts are admitted,[35] or only one inference can reasonably be deduced therefrom,[36] or the evidence is such that the jury could only guess which one of several causes produced a certain result,[37] or such that mere conjecture alone could induce the jury to find the verdict that is sought,[38] or such that it would not warrant the jury in finding a verdict in favor of the party introducing such testimony,[39] the court should withdraw the case from the jury. But although there be no conflict in the evidence, the case is for the jury where the witnesses are interested,[40] where one of the parties to the contract sued on is dead,[41] where the facts admit of different constructions or inferences,[42] where the ultimate facts depend solely on the truth of the statements made by the witnesses or other evidence offered, or where the ultimate facts must be determined by inferences and deductions from evidence, or by weighing and estimating the value of facts stated, as warranting a particular finding which can only be proven indirectly by circumstances.[43] Where the sole question is one of law, it is proper for the judge to discharge the jury and decide the case.[44]

2. Where Evidence Is Conflicting. The rule is well settled that questions as

218 Pa. St. 641, 67 Atl. 913; Reel *v.* Elder, 62 Pa. St. 308, 1 Am. Rep. 414; Hygienic Fleeced Underwear Co. *v.* Way, 35 Pa. Super. Ct. 229; Colonial Trust Co. *v.* Getz, 28 Pa. Super. Ct. 619; Rodgers *v.* Black, 15 Pa. Super. Ct. 498.

35. Missouri Real Estate Syndicate *v.* Sims, 121 Mo. App. 156, 98 S. W. 783; Harton *v.* Forest City Tel. Co., 146 N. C. 429, 59 S. E. 1022, 14 L. R. A. N. S. 956; McMillin *v.* Titus, 222 Pa. St. 500, 72 Atl. 240; Missouri, etc., R. Co. *v.* Plunkett, (Tex. Civ. App. 1907) 103 S. W. 663.

A party is bound by his testimony, and, where his testimony is uncontradicted, no issue of fact can be framed. State *v.* Lichtman-Goodman, 131 Mo. App. 65, 109 S. W. 819.

36. *Georgia.*— Carter *v.* Georgia Cent. R. Co., 3 Ga. App. 222, 59 S. E. 603.

Idaho.— Pilmer *v.* Boise Traction Co., 14 Ida. 327, 94 Pac. 432, 125 Am. St. Rep. 161, 15 L. R. A. N. S. 254.

Indiana.— Nelson *v.* Chicago, etc., R. Co., 41 Ind. App. 397, 83 N. E. 1019.

New York.—Ashcroft *v.* Hammond, 132 N. Y. App. Div. 3, 116 N. Y. Suppl. 362 [*reversed* on other grounds in 197 N. Y. 488, 90 N. E. 1117]; White *v.* Prudential Ins. Co., 120 N. Y. App. Div. 260, 105 N. Y. Suppl. 87; Seybold *v.* Supreme Tent K. M. W., 86 N. Y. App. Div. 195, 83 N. Y. Suppl. 149.

Wisconsin.— Johns *v.* Northwestern Mut. Relief Assoc., 90 Wis. 332, 63 N. W. 276, 41 L. R. A. 587.

37. Fuller *v.* Ann Arbor R. Co., 141 Mich. 66, 104 N. W. 414.

38. Perley *v.* Little, 3 Me. 97; Ferguson *v.* Tucker, 2 Harr. & G. (Md.) 182. And see Virginia, etc., R. Co. *v.* Hawk, 160 Fed. 348, 87 C. C. A. 300.

39. Guenther *v.* Metropolitan R. Co., 23 App. Cas. (D. C.) 493; Chicago, etc., R. Co. *v.* Sporer, 69 Nebr. 8, 94 N. W. 991; Weed *v.* Chicago, etc., R. Co., 5 Nebr. (Unoff.) 623, 99 N. W. 827; Spokane, etc., Lumber Co. *v.* Loy, 21 Wash. 501, 58 Pac. 672, 60 Pac. 1119; New York Cent., etc., R. Co. *v.* Difendaffer, 125 Fed. 893, 62 C. C. A. 1. See also Karsten *v.* Weichman, 135 Wis. 1, 114 N. W. 499. *Contra*, McDonald *v.* Metropolitan St. R. Co., 167 N. Y. 66, 60 N. E. 282; Lewis *v.* Erie R. Co., 105 N. Y. App. Div. 292, 94 N. Y. Suppl. 765; Smith *v.* Metropolitan St. R. Co., 66 N. Y. App. Div. 600, 73 N. Y. Suppl. 254; Marshall *v.* Buffalo, 63 N. Y. App. Div. 603, 71 N. Y. Suppl. 719 [*affirmed* in 176 N. Y. 545, 68 N. E. 1119]; Mitchell *v.* Third Ave. R. Co., 62 N. Y. App. Div. 371, 70 N. Y. Suppl. 1118.

40. Canajoharie Nat. Bank *v.* Diefendorf, 123 N. Y. 191, 25 N. E. 402, 10 L. R. A. 676; Gorman *v.* Williams, 26 Misc. (N. Y.) 776, 56 N. Y. Suppl. 1031; Carrere *v.* Dun, 26 Misc. (N. Y.) 717, 57 N. Y. Suppl. 82 [*affirming* 26 Misc. 848, 55 N. Y. Suppl. 441]; Ross *v.* St. Louis Southwestern R. Co., 47 Tex. Civ. App. 24, 103 S. W. 708; International, etc., R. Co. *v.* Johnson, 23 Tex. Civ. App. 160, 55 S. W. 772; Gulf, etc., R. Co. *v.* Baugh, (Tex. Civ. App. 1897) 43 S. W. 557.

Uncontradicted testimony of party.— Although the only evidence on an issue is the uncontradicted evidence of a party having the burden of proof, a question of fact is presented requiring the submission of the issue to the jury. Harrison *v.* Franklin, 126 Mo. App. 366, 103 S. W. 585; Fuller Buggy Co. *v.* Waldron, 112 N. Y. App. Div. 814, 99 N. Y. Suppl. 561 [*affirmed* in 188 N. Y. 630, 81 N. E. 1165]; St. Louis Southwestern R. Co. *v.* Thompson, (Tex. Civ. App. 1907) 103 S. W. 684. But see Lambert *v.* Elmendorf, 124 N. Y. App. Div. 758, 109 N. Y. Suppl. 574; Maher *v.* Benedict, 123 N. Y. App. Div. 579, 108 N. Y. Suppl. 228; Oppenheimer *v.* Mittenthal, 107 N. Y. Suppl. 48; Smith *v.* Humphreyville, 47 Tex. Civ. App. 140, 104 S. W. 495.

41. Spec *v.* Berliner, 85 N. Y. Suppl. 370.

42. Powers *v.* St. Louis Transit Co., 202 Mo. 267, 100 S. W. 655; Berry *v.* Missouri Pac. R. Co., 124 Mo. 223, 25 S. W. 229.

43. Craver *v.* Ragon, (Tex. Civ. App. 1908) 110 S. W. 489.

44. Brown *v.* Cory, 9 Kan. App. 702, 59 Pac. 1097.

to which there is a conflict of evidence must be submitted to the jury,[45] if the

45. *Alabama.*—Neff *v.* Williamson, 154 Ala. 329, 46 So. 238; Sloss Iron, etc., Co. *v.* Tilson, 141 Ala. 152, 37 So. 427; Louisville, etc., R. Co. *v.* Sullivan Timber Co., 138 Ala. 379, 35 So. 327; Garren *v.* Fields, 131 Ala. 304, 30 So. 775; Birmingham Mineral R. Co. *v.* Tennessee Coal, etc., R. Co., 127 Ala. 137, 28 So. 679; Bomar *v.* Rosser, 123 Ala. 641, 26 So. 510; Alabama Midland R. Co. *v.* Johnson, 123 Ala. 197, 26 So. 160; Bufford *v.* Raney, 122 Ala. 565, 26 So. 120; Southern R. Co. *v.* Guyton, 122 Ala. 231, 25 So. 34; Louisville, etc., R. Co. *v.* Lancaster, 121 Ala. 471, 25 So. 733; Marbury Lumber Co. *v.* Westbrook, 121 Ala. 179, 25 So. 914; Alabama State Land Co. *v.* Slaton, 120 Ala. 259, 24 So. 720; Alabama Midland R. Co. *v.* Darby, 119 Ala. 531, 24 So. 713; Wells *v.* Cody, 112 Ala. 278, 20 So. 381; Anniston Lime, etc., Co. *v.* Lewis, 107 Ala. 535, 18 So. 326; Smart *v.* Hodges, 105 Ala. 634, 17 So. 22; Loeb *v.* Huddleston, 105 Ala. 257, 16 So. 714; Chambliss *v.* Mary Lee Coal, etc., Co., 104 Ala. 655, 16 So. 572; Sanders *v.* Edmonds, 98 Ala. 157, 13 So. So. 505; East Tennessee, etc., R. Co. *v.* Turvaville, 97 Ala. 122, 12 So. 63; Avary *v.* Perry Stove Mfg. Co., 96 Ala. 406, 11 So. 417; Bromley *v.* Birmingham Mineral R. Co., 95 Ala. 397, 11 So. 341; Payne *v.* Mathis, 92 Ala. 585, 9 So. 605; Dorgan *v.* Weeks, 86 Ala. 329, 5 So. 581; Hall *v.* Posey, 79 Ala. 84; Seals *v.* Edmondson, 73 Ala. 295, 49 Am. Rep. 51; Tuttle *v.* Walker, 69 Ala. 172; Morris *v.* Hall, 41 Ala. 510; Buffington *v.* Cook, 35 Ala. 312, 73 Am. Dec. 491; Peebles *v.* Tomlinson, 33 Ala. 330; Robinson *v.* Brooks, 32 Ala. 222; Traun *v.* Keiffer, 31 Ala. 136; Woolfork *v.* Sullivan, 23 Ala. 548, 58 Am. Dec. 305; Browning *v.* Grady, 10 Ala. 999; Vaughn *v.* Wood, 5 Ala. 304.

Arkansas.— Jones *v.* Lewis, 89 Ark. 368, 117 S. W. 561; Kansas City Southern R. Co. *v.* Henrie, 87 Ark. 443, 112 S. W. 967; Deal *v.* Beck, 83 Ark. 631, 103 S. W. 736.

California.— Powley *v.* Swensen, 146 Cal. 471, 80 Pac. 722; Pacific Mut. L. Ins. Co. *v.* Fisher, 109 Cal. 566, 42 Pac. 154; Simpson *v.* Applegate, 67 Cal. 471, 8 Pac. 39; Ferris *v.* Coover, 10 Cal. 589.

Colorado.— Mayhew *v.* Smith, 42 Colo. 534, 95 Pac. 549; Posten *v.* Denver Consol. Tramway Co., 20 Colo. App. 324, 78 Pac. 1067; McQuown *v.* Thompson, 5 Colo. App. 466, 39 Pac. 68.

Florida.— Wilson *v.* Jernigan, 57 Fla. 277, 49 So. 44; Starks *v.* Sawyer, 56 Fla. 596, 47 So. 513; Smith *v.* Klay, 47 Fla. 216, 36 So. 54.

Georgia.— McFarland *v.* Darien, etc., R. Co., 127 Ga. 97, 56 S. E. 74; Harriss *v.* Howard, 126 Ga. 325, 55 S. E. 59; Allen *v.* Harris, 108 Ga. 762, 33 S. E. 72; Hall *v.* Worley, 99 Ga. 310, 25 S. E. 698; Morris *v.* Winn, 98 Ga. 482, 25 S. E. 562; Lathrop *v.* White, 81 Ga. 29, 6 S. E. 834; Mixon *v.* Pollok, 55 Ga. 321; Scott *v.* Winship, 20 Ga. 429.

Illinois.— Woodman *v.* Illinois Trust, etc., Bank, 211 Ill. 578, 71 N. E. 1099; Kehl *v.* Abram, 210 Ill. 218, 71 N. E. 347, 102 Am. St. Rep. 158 [*affirming* 112 Ill. App. 77]; Chicago Union Traction Co. *v.* Browdy, 206 Ill. 615, 69 N. E. 570 [*reversing* 108 Ill. App. 177]; Joliet R. Co. *v.* McPherson, 193 Ill. 629, 61 N. E. 1061 [*affirming* 96 Ill. App. 286]; American Strawboard Co. *v.* Chicago, etc., R. Co., 177 Ill. 513, 53 N. E. 97 [*reversing* 75 Ill. App. 420]; Chicago City R. Co. *v.* Matthieson, 113 Ill. App. 246 [*affirmed* in 212 Ill. 292, 72 N. E. 443]; Chipps *v.* Buxton, 109 Ill. App. 88; Crabtree *v.* Potts, 108 Ill. App. 627; Chicago Union Traction Co. *v.* Ludlow, 108 Ill. App. 357; Parry *v.* Squair, 79 Ill. App. 324; Beidler *v.* Beinaert, 25 Ill. App. 422; Lill *v.* Brant, 1 Ill. App. 266.

Indiana.— Baltimore, etc., R. Co. *v.* Spaulding, 21 Ind. App. 323, 52 N. E. 410; Leiter *v.* Jackson, 8 Ind. App. 98, 35 N. E. 289.

Iowa.— Sheker *v.* Machovec, 139 Iowa 1, 116 N. W. 1042; Marshalltown Stone Co. *v.* Des Moines Brick Mfg. Co., (1905) 101 N. W. 1124; Oliver *v.* Iowa Cent. R. Co., 122 Iowa 217, 97 N. W. 1072; Wilkins *v.* Missouri Valley, (1903) 96 N. W. 868; Anderson *v.* Wedeking, 102 Iowa 446, 71 N. W. 360; Larkin *v.* Burlington, etc., R. Co., 91 Iowa 654, 60 N. W. 195; Powers *v.* Council Bluffs, 45 Iowa 652, 24 Am. Rep. 792.

Kansas.—Robinson *v.* Lamoureaux, 71 Kan. 850, 80 Pac. 595.

Kentucky.— Evening Post Co. *v.* Richardson, 113 Ky. 641, 68 S. W. 665, 24 Ky. L. Rep. 456; Hurt *v.* Miller, 3 A. K. Marsh. 336; Louisville, etc., R. Co. *v.* Mahan, (1908) 113 S. W. 886; Louisville, etc., R. Co. *v.* Dick, 78 S. W. 914, 25 Ky. L. Rep. 1831; Louisville, etc., Packet Co. *v.* Bottorff, 77 S. W. 920, 25 Ky. L. Rep. 1324; Mill Creek Distilling Co. *v.* Pleasure Ridge Park Distilling Co., 59 S. W. 486, 22 Ky. L. Rep. 998; Rogers *v.* Louisville, etc., R. Co., 35 S. W. 109, 17 Ky. L. Rep. 1421; Lingenfelter *v.* Louisville, etc., R. Co., 4 S. W. 185, 9 Ky. L. Rep. 116.

Maine.— Young *v.* Chandler, 102 Me. 251, 66 Atl. 539; Sweetser *v.* Lowell, 33 Me. 446.

Massachusetts.— Jellow *v.* Fore River Ship Bldg. Co., 201 Mass. 464, 87 N. E. 906; Hood *v.* Adams, 128 Mass. 207; Reed *v.* Deerfield, 8 Allen 522.

Michigan.— Scheer *v.* Detroit United R. Co., 155 Mich. 561, 119 N. W. 1084; McMillan *v.* Reaume, 137 Mich. 1, 100 N. W. 166, 109 Am. St. Rep. 666; Pomaski *v.* Grant, 119 Mich. 675, 78 N. W. 891; Peppett *v.* Michigan Cent. R. Co., 119 Mich. 640, 78 N. W. 900; Litchfield *v.* Ripley, 73 Mich. 464, 41 N. W. 504; Buhl Iron Works *v.* Teuton, 67 Mich. 623, 35 N. W. 804; Charon *v.* George W. Roby Lumber Co., 66 Mich. 68, 32 N. W. 925; Marcott *v.* Marquette, etc., R. Co., 47 Mich. 1, 10 N. W. 53; Rider *v.* Kern, 46 Mich. 455, 9 N. W. 490; Maas *v.* White, 37 Mich. 126; Brook *v.* Grand Trunk R. Co., 15 Mich. 332.

Minnesota.— Price *v.* Standard L., etc., Ins. Co., 92 Minn. 238, 99 N. W. 887.

Mississippi.— Bell *v.* Southern R. Co., 94

evidence is sufficient to warrant a verdict either way, and it is erroneous for the

Miss. 440, 49 So. 120; Skipworth *v.* Mobile, etc., R. Co., (1909) 48 So. 964; Moore *v.* Mobile, etc., R. Co., (1899) 24 So. 964; Strauss *v.* National Parlor Furniture Co., 76 Miss. 343, 24 So. 703; Scott *v.* Bonner, (1892) 11 So. 791; Adams *v.* Berg, 65 Miss. 3, 3 So. 465.

Missouri.— Meily *v.* St. Louis, etc., R. Co., 215 Mo. 567, 114 S. W. 1013; Young *v.* Webb City, 150 Mo. 333, 51 S. W. 709; Baird *v.* Citizens' R. Co., 146 Mo. 265, 48 S. W. 78; Huston *v.* Tyler, 140 Mo. 252, 36 S. W. 654, 41 S. W. 795; Giddings *v.* Phœnix Ins. Co., 90 Mo. 272, 2 S. W. 139; Waller *v.* Missouri, etc., R. Co., 59 Mo. App. 410; Gooch *v.* Hollan, 30 Mo. App. 450; Gibson *v.* Zimmerman, 27 Mo. App. 90.

Nebraska.— Doyle *v.* Franek, 82 Nebr. 606, 118 N. W. 468; Husenetter *v.* Little, 78 Nebr. 220, 110 N. W. 541; New Omaha Thompson-Houston Electric Light Co. *v.* Rombold, 68 Nebr. 54, 93 N. W. 966, 97 N. W. 1030; Morton *v.* Harvey, 57 Nebr. 304, 77 N. W. 808; Houck *v.* Gue, 30 Nebr. 113, 46 N. W. 280.

New Jersey.— More-Jonas Glass Co. *v.* West Jersey, etc., R. Co., 76 N. J. L. 708, 72 Atl. 65; Dederick *v.* New Jersey Cent. R. Co., 74 N. J. L. 424, 65 Atl. 833; Lee *v.* North Jersey St. R. Co., 66 N. J. L. 336, 49 Atl. 528; Hanley *v.* North Jersey St. R. Co., 65 N. J. L. 447, 47 Atl. 630; Aycrigg *v.* New York, etc., R. Co., 30 N. J. L. 460.

New York.— Grube *v.* Hamburg American Steamship Co., 176 N. Y. 383, 68 N. E. 666 [*reversing* 82 N. Y. Suppl. 429]; Kelsey *v.* Northern Light Oil Co., 45 N. Y. 505; Sloane *v.* Van Wyck, 4 Abb. Dec. 250, 5 Transcr. App. 98 [*affirming* 47 Barb. 634]; Lee *v.* Ingraham, 106 N. Y. App. Div. 167, 94 N. Y. Suppl. 284; Tanenbaum *v.* Josephi, 93 N. Y. App. Div. 341, 87 N. Y. Suppl. 839; Miller *v.* Erie R. Co., 34 N. Y. App. Div. 217, 54 N. Y. Suppl. 606; Reilly *v.* Atlas Iron Constr. Co., 3 N. Y. App. Div. 363, 38 N. Y. Suppl. 485 [*affirmed* in 157 N. Y. 718, 53 N. E. 1131]; Coloney *v.* Farrow, 91 Hun 82, 36 N. Y. Suppl. 164; Eisenlord *v.* Clum, 67 Hun 518, 22 N. Y. Suppl. 574; Denton *v.* Merrill, 43 Hun 224; Bentley *v.* Oswego Mut. Ben. Assoc., 1 Silv. Sup. 177, 5 N. Y. Suppl. 223; Halprin *v.* Schachne, 27 Misc. 195, 57 N. Y. Suppl. 735 [*reversing* 25 Misc. 797, 54 N. Y. Suppl. 1103]; Zeitlin *v.* Arkaway, 26 Misc. 761, 56 N. Y. Suppl. 1058; Marine *v.* Peyser, 8 Misc. 521, 28 N. Y. Suppl. 759; Molloner *v.* State Bank, 8 Misc. 512, 28 N. Y. Suppl. 740; Blumberg *v.* Marks, 87 N. Y. Suppl. 512; Morel *v.* Stearns, 84 N. Y. Suppl. 521; Luxenburgh *v.* Cohen, 59 N. Y. Suppl. 188; Conde *v.* Wiltsie, 17 N. Y. Suppl. 929; Bush *v.* Christopher, etc., St. R. Co., 16 N. Y. Suppl. 212; Scott *v.* Central Park, etc., R. Co., 13 N. Y. St. 551; Bidwell *v.* Lament, 17 How. Pr. 357.

North Carolina.— North Carolina Corp. Commission *v.* Atlantic Coast Line R. Co., 137 N. C. 1, 49 S. E. 191, 115 Am. St. Rep. 636; Cook *v.* Southern R. Co., 128 N. C. 333, 38 S. E. 925; Crinkley *v.* Egerton, 113 N. C. 142, 18 S. E. 341; McCoy *v.* Lassiter, 95 N. C. 88; Long *v.* Pool, 68 N. C. 479.

North Dakota.— Higgs *v.* Minneapolis, etc., R. Co., 16 N. D. 446, 114 N. W. 722, 15 L. R. A. N. S. 1162; McRea *v.* Hillsboro Nat. Bank, 6 N. D. 353, 70 N. W. 813.

Ohio.— Farmers' Ins. Co. *v.* McCluckin, 40 Ohio St. 42; Hollenbeck *v.* McMahon, 28 Ohio St. 1; Hamilton *v.* Bonham, 20 Ohio Cir. Ct. 252, 10 Ohio Cir. Dec. 834.

Pennsylvania.— Daley *v.* Wingert, 210 Pa. St. 169, 59 Atl. 982; Nudd *v.* Lansdowne, 190 Pa. St. 89, 42 Atl. 474; Alexander *v.* Maryland Steel Co., 189 Pa. St. 582, 42 Atl. 286; Ragan *v.* Pennsylvania R. Co., 189 Pa. St. 572, 42 Atl. 287; McKnight *v.* Bell, 168 Pa. St. 50, 31 Atl. 942; Fitzwater *v.* Roberts, 166 Pa. St. 454, 31 Atl. 204; Fick *v.* Pennsylvania R. Co., 157 Pa. St. 622, 27 Atl. 783; Frederick *v.* Lansdale Borough, 156 Pa. St. 613, 27 Atl. 563; Brownfield *v.* Hughes, 128 Pa. St. 194, 18 Atl. 340, 15 Am. St. Rep. 667; Moore *v.* Miller, 8 Pa. St. 272; Cummings *v.* Cummings, 5 Watts & S. 553; Babb *v.* Clemson, 12 Serg. & R. 328; Oehm *v.* Royal Gas Co., 10 Pa. Super. Ct. 593; Eardley *v.* Keeling, 10 Pa. Super. Ct. 339, 44 Wkly. Notes Cas. 437; Breunniger *v.* Pennsylvania R. Co., 9 Pa. Super. Ct. 461, 43 Wkly. Notes Cas. 523; Jones *v.* Harvey, 9 Pa. Super. Ct. 326; Keller *v.* Hostetter, 3 Lanc. Bar Sept. 9, 1871.

Rhode Island.— Dunbar *v.* Bristol County Gas, etc., Co., 29 R. I. 211, 69 Atl. 925; Quinn *v.* Rhode Island Co., (1907) 67 Atl. 364.

South Carolina.—Roberts *v.* Western Union Tel. Co., 76 S. C. 275, 56 S. E. 960; Willis *v.* Hammond, 41 S. C. 153, 19 S. E. 310.

South Dakota.— Edwards *v.* Chicago, etc., R. Co., 21 S. D. 504, 110 N. W. 832; Weller *v.* Hilderbrandt, 19 S. D. 45, 101 N. W. 1108.

Texas.— Alley *v.* Booth, 16 Tex. 94; Buchanan *v.* Western Union Tel. Co., (Civ. App. 1907) 100 S. W. 974; Galveston, etc., R. Co. *v.* McAdams, 37 Tex. Civ. App. 575, 84 S. W. 1076; Alexander *v.* Von Koehring, (Civ. App. 1903) 77 S. W. 629; Shelton *v.* Willis, 23 Tex. Civ. App. 547, 58 S. W. 176; Houston, etc., R. Co. *v.* Harvin, (Civ. App. 1899) 54 S. W. 629; Galveston, etc., R. Co. *v.* Simon, (Civ. App. 1899) 54 S. W. 309; Jaeger *v.* Biering, (Civ. App. 1899) 51 S. W. 50; Boyd *v.* Cross, (Civ. App. 1896) 33 S. W. 1093; Fitzgerald *v.* Hart, (Civ. App. 1893) 23 S. W. 933.

Vermont.— Billings *v.* Metropolitan L. Ins. Co., 70 Vt. 477, 41 Atl. 516; Baker *v.* Ufford, 63 Vt. 133, 21 Atl. 426.

Virginia.— Farley *v.* Thalhimer, 103 Va. 504, 49 S. E. 644.

Washington.— McKay *v.* Anderson Steamboat Co., 51 Wash. 679, 99 Pac. 1030; Garretson *v.* Tacoma R., etc., Co., 50 Wash. 24, 96 Pac. 511; Norman *v.* Western Union Tel. Co., 31 Wash. 577, 72 Pac. 474; Swadling *v.* Barneson, 21 Wash. 699, 59 Pac. 506.

court to take the case from the jury, on demurrer to the evidence, or on motion for nonsuit or to direct a verdict.[46]

3. When Men of Reasonable Minds Might Draw Different Conclusions From Evidence. Where men of reasonable minds might draw different conclusions

West Virginia.— Johnson *v.* Bank, 60 W. Va. 320, 55 S. E. 394.

Wisconsin.— Gallaway *v.* Massee, 133 Wis. 638, 113 N. W. 1098; Clark *v.* Slaughter, 129 Wis. 642, 109 N. W. 556; Strasser *v.* Goldberg, 120 Wis. 621, 98 N. W. 554; Baushka *v.* McKey, 118 Wis. 359, 95 N. W. 372; Batavian Bank *v.* North, 114 Wis. 637, 90 N. W. 1016; Benham *v.* Purdy, 48 Wis. 99, 4 N. W. 133.

Wyoming.— Boswell *v.* Laramie First Nat. Bank, 16 Wyo. 161, 92 Pac. 624, 93 Pac. 661.

United States.— District of Columbia *v.* Robinson, 180 U. S. 92, 21 S. Ct. 283, 45 L. ed. 440 [*affirming* 14 App. Cas. (D. C.) 512]; Weightman *v.* Washington Corp., 1 Black 39, 17 L. ed. 52; De Lamar *v.* Herdeley, 167 Fed. 530, 93 C. C. A. 239; Union Pac. R. Co. *v.* Lucas, 136 Fed. 374, 69 C. C. A. 218; Chicago Great Western R. Co. *v.* Roddy, 131 Fed. 712, 65 C. C. A. 470; Chicago, etc., R. Co. *v.* Olney, 71 Fed. 95, 17 C. C. A. 620; O'Neil *v.* St. Louis, etc., R. Co., 9 Fed. 337, 3 McCrary 423; Schmeider *v.* Barney, 21 Fed. Cas. No. 12,462, 13 Blatchf. 37.

See 46 Cent. Dig. tit. "Trial," § 342.

When evidence considered conflicting.— Evidence is conflicting when there is substantial evidence on either side in the controversy. Chicago, etc., R. Co. *v.* Sporer, 69 Nebr. 8, 94 N. W. 991.

Conflict on immaterial matters.— That the evidence is conflicting in immaterial matters does not render direction of a verdict erroneous, where, by giving the opposite party the benefit of the most favorable view of the evidence, the verdict against him is demanded. Skinner *v.* Braswell, 126 Ga. 761, 55 S. E. 914.

The rule applies, although plaintiff is contradicted by one of his own witnesses and several of defendant's. Todd *v.* Philadelphia, etc., R. Co., 201 Pa. St. 558, 51 Atl. 332.

46. *Georgia.*— Seymore *v.* Rice, 94 Ga. 183, 21 S. E. 293; Fraser *v.* Charleston, etc., R. Co., 75 Ga. 222; Woodruff *v.* Alabama Great Southern R. Co., 75 Ga. 47; Thornton *v.* Gibson, 43 Ga. 395; Dyson *v.* Beckam, 35 Ga. 132; Phillips *v.* Brigham, 26 Ga. 617, 71 Am. Dec. 237; Tison *v.* Yawn, 15 Ga. 491, 60 Am. Dec. 708.

Idaho.— Black *v.* Lewiston, 2 Ida. (Hasb.) 276, 13 Pac. 80.

Illinois.— Chicago, etc., R. Co. *v.* Smith, 162 Ill. 185, 44 N. E. 390; Kinnare *v.* Klein, 88 Ill. App. 304; Ward *v.* Chicago, 15 Ill. App. 98.

Indiana.— Adams *v.* Kennedy, 90 Ind. 318; Stanford *v.* Davis, 54 Ind. 45.

Indian Territory.— Doherty *v.* Arkansas, etc., R. Co., 5 Indian Terr. 537, 82 S. W. 899.

Iowa.— Woodrow *v.* Cooper, 3 Iowa 214.

Kentucky.— Fugate *v.* Somerset, 97 Ky. 48, 29 S. W. 970, 16 Ky. L. Rep. 807.

Maine.— Works *v.* Croswell, (1887) 10 Atl. 494; Eaton *v.* Lancaster, 79 Me. 477, 10 Atl. 449; Fickett *v.* Swift, 41 Me. 65, 66 Am. Dec. 214.

Maryland.— Planters' Bank *v.* Alexandria Bank, 10 Gill & J. 346.

Michigan.— Des Jardins *v.* Thunder Bay River Boom Co., 95 Mich. 140, 54 N. W. 718; Stevens *v.* Pendleton, 85 Mich. 137, 48 N. W. 478; Stockham *v.* Cheney, 62 Mich. 10, 28 N. W. 692; Demill *v.* Moffat, 45 Mich. 410, 8 N. W. 79.

Mississippi.— Holmes *v.* Simon, 71 Miss. 245, 15 So. 70.

Missouri.— Holliday *v.* Jones, 59 Mo. 482; Sackewitz *v.* American Biscuit Mfg. Co., 78 Mo. App. 144.

Nebraska.— Sorenson *v.* Townsend, 77 Nebr. 499, 109 N. W. 749; Van Etten *v.* Edwards, 48 Nebr. 25, 66 N. W. 1013; McKinney *v.* Hopwood, 46 Nebr. 871, 65 N. W. 1055; Hargrave *v.* Home F. Ins. Co., 43 Nebr. 271, 61 N. W. 611.

New Hampshire.— Dailey *v.* Blake, 35 N. H. 29.

New Jersey.— Consolidated Traction Co. *v.* Chenowith, 61 N. J. L. 554, 35 Atl. 1067.

New Mexico.— U. S. *v.* Gumm, 9 N. M. 611, 58 Pac. 398.

New York.— G. H. Haulenbeck Advertising Agency *v.* November, 27 Misc. 836, 60 N. Y. Suppl. 573; Cielfield *v.* Browning, 9 Misc. 98, 29 N. Y. Suppl. 710.

North Carolina.— Young *v.* Alford, 118 N. C. 215, 23 S. E. 973.

Pennsylvania.— Lyon *v.* Lyon, 197 Pa. St. 212, 47 Atl. 193; Harrold *v.* McDonald, 194 Pa. St. 359, 45 Atl. 44; Lehman *v.* Kellerman, 65 Pa. St. 489; Dougherty *v.* Stephenson, 20 Pa. St. 210.

South Carolina.— Holley *v.* Walker, 7 S. C. 142; O'Neall *v.* South Carolina R. Co., 9 Rich. 465; Means *v.* Means, 5 Strobh. 167.

South Dakota.— Lockhart *v.* Hewitt, 18 S. D. 522, 101 N. W. 355; Consolidated Land, etc., Co. *v.* Hawley, 7 S. D. 229, 63 N. W. 904.

Texas.— Eastham *v.* Hunter, 98 Tex. 560, 86 S. W. 323 [*reversing* (Civ. App. 1904) 81 S. W. 336]; Harris *v.* Higden, (Civ. App. 1897) 41 S. W. 412.

Wisconsin.— Wheeler *v.* Seamans, 123 Wis. 573, 102 N. W. 28; Johnson *v.* Chicago, etc., R. Co., 56 Wis. 274, 14 N. W. 181; Jucker *v.* Chicago, etc., R. Co., 52 Wis. 150, 8 N. W. 862; Dodge *v.* McDonnell, 14 Wis. 553; Barden *v.* Smith, 7 Wis. 439.

United States.— Schuchardt *v.* Allens, 1 Wall. 359, 17 L. ed. 642; Ætna Indem. Co. *v.* Ladd, 135 Fed. 636, 68 C. C. A. 274; Chicago Great Western R. Co. *v.* Price, 97 Fed. 423, 38 C. C. A. 239; Eddy *v.* Evans, 58 Fed. 151, 7 C. C. A. 129.

See 46 Cent. Dig. tit. "Trial," § 338.

When the contents of a writing are proved by parol evidence, admitted without objection, the case will not be withdrawn from

from the evidence the case is for the jury;[47] and this is so, although the evidence is uncontradicted.[48] When facts proved without dispute require the exercise of reason and judgment, so that one reasonable mind may infer that a controlling fact exists, and another, that it does not exist, there is a question of fact.[49]

4. WAIVER OF RIGHT TO HAVE CASE TAKEN FROM JURY. The right to have the case taken from the jury for want of sufficient evidence is waived where defendant fails

the jury for lack of evidence of such contents, the parol evidence not having been objected to, being properly before the jury. Western Union Tel. Co. *v.* Cline, 8 Ind. App. 364, 35 N. E. 564.

47. *Alabama.*— Allman *v.* Gann, 29 Ala. 240.

California.— Still *v.* San Francisco, etc., R. Co., 154 Cal. 559, 98 Pac. 672, 129 Am. St. Rep. 177, 20 L. R. A. N. S. 322; Copriviza *v.* Rilovich, 4 Cal. App. 26, 87 Pac. 398.

Florida.— German-American Lumber Co. *v.* Brock, 55 Fla. 577, 46 So. 740.

Georgia.— Gunn *v.* Gunn, 74 Ga. 555, 58 Am. Dec. 447.

Idaho.— Pilmer *v.* Boise Traction Co., 14 Ida. 327, 94 Pac. 432, 125 Am. St. Rep. 161, 15 L. R. A. N. S. 254; Adams *v.* Bunker Hill, etc., Min. Co., 12 Ida. 637, 89 Pac. 624.

Illinois.— W. W. Kimball Co. *v.* Cruikshank, 123 Ill. App. 580; Whalen *v.* Utica Hydraulic Cement Co., 103 Ill. App. 149; Otstot *v.* Indiana, etc., R. Co., 103 Ill. App. 136; Garrity *v.* Geo. A. Fuller Co., 82 Ill. App. 185; Wallen *v.* North Chicago St. R. Co., 82 Ill. App. 103; Corbin *v.* Western Electric Co., 78 Ill. App. 516; Kean *v.* West Chicago St. R. Co., 75 Ill. App. 38.

Indiana.— Illinois Cent. R. Co. *v.* Cheek, 152 Ind. 663, 53 N. E. 641.

Iowa.— Rothrock *v.* Cedar Rapids, 128 Iowa 252, 103 N. W. 475.

Kentucky.— Patterson *v.* Hansel, 4 Bush 654.

Maryland.— Maryland, etc., R. Co. *v.* Hammond, 110 Md. 124, 72 Atl. 650; Ziehm *v.* United Electric Light, etc., Co., 104 Md. 48, 64 Atl. 61.

Massachusetts.— Coffin *v.* Phenix Ins. Co., 15 Pick. 291.

Michigan.— Wager *v.* Lamont, 135 Mich. 521, 98 N. W. 1.

Missouri.— Baird *v.* Citizens' R. Co., 146 Mo. 265, 48 S. W. 78; Huth *v.* Dohle, 76 Mo. App. 671; Young *v.* Stephens, 66 Mo. App. 222; Voegeli *v.* Pickel Marble, etc., Co., 56 Mo. App. 678.

Nebraska.— Henry *v.* Omaha Packing Co., 81 Nebr. 237, 115 N. W. 777; Ogden *v.* Sovereign Camp W. W., 78 Nebr. 806, 113 N. W. 524, 78 Nebr. 804, 111 N. W. 797; Suiter *v.* Park Nat. Bank, 35 Nebr. 372, 53 N. W. 205.

New Hampshire.— Stone *v.* Danbury, 46 N. H. 139.

New Jersey.— McCarthy *v.* Metropolitan L. Ins. Co., 75 N. J. L. 887, 69 Atl. 170; Weston *v.* Pennsylvania R. Co., 74 N. J. L. 484, 65 Atl. 1015; Hummer *v.* Lehigh Valley R. Co., 74 N. J. L. 196, 65 Atl. 126; Mumma *v.* Easton, etc., R. Co., 73 N. J. L. 653, 65 Atl. 208; Bahr *v.* Lombard, 53 N. J. L. 233, 21 Atl. 190, 23 Atl. 167; Pennsylvania R. Co. *v.* Matthews, 36 N. J. L. 531.

New York.— Toppi *v.* McDonald, 128 N. Y. App. Div. 443, 112 N. Y. Suppl. 821; Auld *v.* Manhattan L. Ins. Co., 34 N. Y. App. Div. 491, 54 N. Y. Suppl. 222 [*affirmed* in 165 N. Y. 610, 58 N. E. 1085]; Howard *v.* Smith, 33 N. Y. Super. Ct. 124; Moreland *v.* Delhaye, 111 N. Y. Suppl. 641.

Oklahoma.— Lane *v.* Choctaw, etc., R. Co., 19 Okla. 324, 91 Pac. 883.

Oregon.— Jackson *v.* Sumpter Valley R. Co., 50 Oreg. 455, 93 Pac. 356.

Pennsylvania.— Philadelphia Trust, etc., Co. *v.* Philadelphia, etc., R. Co., 160 Pa. St. 590, 28 Atl. 960; Portland Ice Co. *v.* Connor, 32 Pa. Super. Ct. 428.

South Carolina.— Pickens *v.* South Carolina, etc., R. Co., 54 S. C. 498, 32 S. E. 567.

South Dakota.— Sweet *v.* Chicago, etc., R. Co., 6 S. D. 281, 60 N. W. 77.

Texas.— St. Louis Southwestern R. Co. *v.* Thompson, (Civ. App. 1907) 108 S. W. 453 [*reversed* on other grounds in (1908) 113 S. W. 144]; Red River Nat. Bank *v.* De Berry, 47 Tex. Civ. App. 96, 105 S. W. 998.

Wisconsin.— Roedler *v.* Chicago, etc., R. Co., 129 Wis. 270, 109 N. W. 88.

United States.— Sioux City, etc., R. Co. *v.* Stout, 17 Wall. 657, 21 L. ed. 745; Hocking *v.* Hamilton, 122 Fed. 417, 59 C. C. A. 43.

See 46 Cent. Dig. tit. "Trial," § 337.

If the court cannot say that but one conclusion should be reached on the facts, the case is for the jury. Harrison Granite Co. *v.* Pennsylvania R. Co., 145 Mich. 712, 108 N. W. 1081.

Receipt of a letter, receipt of which is denied, is, upon evidence tending to prove that it was properly addressed, stamped, and mailed, a question for the jury. Lee *v.* Gorham, 165 Mass. 130, 42 N. E. 556; Lee *v.* Huron Indemnity Union, 135 Mich. 291, 97 N. W. 709; National Masonic Acc. Assoc. *v.* Burr, 57 Nebr. 437, 77 N. W. 1098; Hastings *v.* Brooklyn L. Ins. Co., 138 N. Y. 473, 34 N. E. 289; Greenwood Grocery Co. *v.* Canadian County Mill, etc., Co., 77 S. C. 219, 57 S. E. 867.

48. Moellman *v.* Gieze-Henselmeier Lumber Co., 134 Mo. App. 485, 114 S. W. 1023; Ogden *v.* Sovereign Camp W. W., 78 Nebr. 806, 113 N. W. 524, 78 Nebr. 804, 111 N. W. 797; Brownwell *v.* Fuller, 60 Nebr. 558, 83 N. W. 669; Habig *v.* Layne, 38 Nebr. 743, 57 N. W. 539; More-Jonas Glass Co. *v.* West Jersey, etc., R. Co., 76 N. J. L. 708, 72 Atl. 65; Nolan *v.* Bridgeton, etc., Traction Co., 74 N. J. L. 559, 65 Atl. 992.

49. Tousey *v.* Hastings, 194 N. Y. 79, 86 N. E. 831 [*affirming* 127 N. Y. App. Div. 94, 111 N. Y. Suppl. 344]; Hirsch *v.* Jones, 191

to make a proper request therefor or to make such request seasonably. Failure to take the proper steps is equivalent to an admission that the evidence is sufficient to go to the jury.[50] So where a party, after his motion to withdraw the case from the jury is overruled, introduces evidence in his own behalf, he waives error in overruling the motion.[51] This principle has been applied where the procedure to withdraw the case from the jury was by demurrer to the evidence,[52] by motion for dismissal or nonsuit,[53] or for a directed verdict.[54]

B. Demurrer to Evidence[55] — **1. Definition and Nature.** A demurrer to evidence is analogous to a demurrer to pleading,[56] and although not precisely similar to a motion for nonsuit, bears a close analogy thereto.[57] It arises on an issue in law on the facts established by the evidence,[58] and is a proceeding by which the court in which the action is pending is called upon to decide what the law is upon the facts shown in evidence.[59]

2. Right to Demur. Either party may demur to the evidence introduced by his adversary in support of the affirmative of an issue.[60] But the party upon whom the burden of proof rests cannot demur to the evidence of the other party, for he cannot assume that he has made out his case.[61] The right to demur to the evidence is not "*stricti juris*" and should not be allowed when there is no colorable

N. Y. 195, 83 N. E. 786; *In re* Totten, 179 N. Y. 112, 70 L. R. A. 711. And see cases cited in preceding notes.

50. *Illinois.*— Chicago, etc., R. Co. *v.* Kinnare, 76 Ill. App. 394; Chicago *v.* Fitzgerald, 75 Ill. App. 174; Arnold *v.* Hart, 75 Ill. App. 165.

Maryland.— Philadelphia, etc., R. Co. *v.* Holden, 93 Md. 417, 49 Atl. 625.

Michigan.— Johnson *v.* London Guarantee, etc., Co., 115 Mich. 86, 72 N. W. 1115, 69 Am. St. Rep. 549, 40 L. R. A. 440.

Missouri.— James *v.* Hicks, 76 Mo. App. 108.

New Hampshire.— Gendron *v.* St. Pierre, 73 N. H. 419, 62 Atl. 966; Elwell *v.* Roper, 72 N. H. 585, 58 Atl. 507.

New York.— Wanger *v.* Grimm, 169 N. Y. 421, 62 N. E. 569; Jones *v.* Daly, 73 N. Y. App. Div. 220, 76 N. Y. Suppl. 725 [*affirmed* in 175 N. Y. 520, 67 N. E. 1083]; Bendix *v.* Saul, 34 Misc. 774, 68 N. Y. Suppl. 800; Harlam *v.* Green, 31 Misc. 261, 64 N. Y. Suppl. 79; Kirchner *v.* Reichardt, 27 Misc. 530, 58 N. Y. Suppl. 314; Sulyewski *v.* Windholz, 9 Misc. 498, 30 N. Y. Suppl. 230; Hart *v.* McConnell, 5 N. Y. St. 900.

Pennsylvania.— Carr *v.* H. C. Frick Coke Co., 170 Pa. St. 62, 32 Atl. 656; Wray *v.* Spence, 145 Pa. St. 399, 22 Atl. 693; Cannell *v.* Smith, 142 Pa. St. 25, 21 Atl. 793, 12 L. R. A. 395; Caldwell *v.* Holler, 40 Pa. St. 160; Pennsylvania R. Co. *v.* Page, 9 Pa. Cas. 445, 12 Atl. 662.

Texas.— Cook Bros. Carriage Co. *v.* Cleburne Nat. Bank, 38 Tex. Civ. App. 441, 85 S. W. 1169.

United States.— Freese *v.* Kemplay, 118 Fed. 428, 55 C. C. A. 258; Texas, etc., R. Co. *v.* Behymer, 112 Fed. 35, 50 C. C. A. 106 [*affirmed* in 189 U. S. 468, 23 S. Ct. 622, 47 L. ed. 905].

See 46 Cent. Dig. tit. "Trial," § 345.

51. Riggs *v.* Turnbull, 105 Md. 135, 66 Atl. 13, 8 L. R. A. N. S. 824; Johnson *v.* Johnson, 105 Md. 81, 65 Atl. 918, 121 Am. St. Rep. 570; Baltimore, etc., R. Co. *v.* State, 101 Md. 359, 61 Atl. 189; Keyser *v.* Warfield, 100 Md. 72, 59 Atl. 189; Medairy *v.* McAllister, 97 Md. 488, 55 Atl. 461; Consolidated Gas Co. *v.* Getty, 96 Md. 683, 54 Atl. 660, 94 Am. St. Rep. 603.

52. See *infra*, VIII, B, 9.

53. See *infra*, VIII, C, 8.

54. See *infra*, VIII, D, 8.

55. In criminal prosecutions see Criminal Law, 12 Cyc. 594.

In probate proceedings see Wills.

On trial by court see *infra*, XII, A, 3, b.

56. Mobile, etc., R. Co. *v.* McArthur, 43 Miss. 180; Kleinschmidt *v.* McAndrews, 4 Mont. 8, 223, 5 Pac. 281, 2 Pac. 286; 2 Tidd Pr. 865.

57. Kleinschmidt *v.* McAndrews, 4 Mont. 8, 5 Pac. 281.

58. Goodman *v.* Ford, 23 Miss. 592; Hall *v.* Browder, 4 How. (Miss.) 224.

59. Mobile, etc., R. Co. *v.* McArthur, 43 Miss. 180; Patteson *v.* Ford, 2 Gratt. (Va.) 18; Van Stone *v.* Stillwell, etc., Mfg. Co., 142 U. S. 128, 12 S. Ct. 181, 35 L. ed. 961; Surdam *v.* Williamson, 20 How. (U. S.) 427, 16 L. ed. 742; 2 Tidd Pr. 865.

60. *Alabama.*— Gluck *v.* Cox, 90 Ala. 331, 8 So. 161.

Louisiana.— Durnford *v.* Johnson, 2 Mart. 306.

Mississippi.— Stiles *v.* Inman, 55 Miss. 469.

Texas.— Booth *v.* Cotton, 13 Tex. 359; Mitchell *v.* Wright, 4 Tex. 283; Towner *v.* Sayre, 4 Tex. 28.

Virginia.— Johnson *v.* Chesapeake, etc., R. Co., 91 Va. 171, 21 S. E. 238.

West Virginia.— Shaw *v.* Upshur County Ct., 30 W. Va. 488, 4 S. E. 439; Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888.

United States.— Pickel *v.* Isgrigg, 6 Fed. 676, 10 Biss. 230.

See 46 Cent. Dig. tit. "Trial," § 350.

61. Goodman *v.* Ford, 23 Miss. 592; Bennett *v.* Perkins, 47 W. Va. 425, 35 S. E. 8; Pickel *v.* Isgrigg, 6 Fed. 676, 10 Biss. 230.

cause of demurrer,[62] and is not permissible in a case tried on an agreed statement of facts.[63]

3. Operation and Effect. A demurrer to the evidence raises the question of the legal sufficiency of the evidence to sustain the issue of fact in support of which it is offered.[64] Except in a few states where an anomalous and indefensible rule of procedure has grown up,[65] the rule is well settled that when a party demurs to the evidence, no evidence introduced by him can be considered on the demurrer. By demurring to his adversaries' evidence he waives his own.[66] On a demurrer to the evidence, the evidence must be considered in the light most favoring the

62. Jones *v.* Ireland, 4 Iowa 63; Trout *v.* Virginia, etc., R. Co., 23 Gratt. (Va.) 619.

63. Bridgeport Wooden-Ware Mfg. Co. *v.* Railroads, 103 Tenn. 490, 53 S. W. 739.

64. *Alabama.*— Bryan *v.* State, 26 Ala. 65.

Indiana.— Lindley *v.* Kelley, 42 Ind. 294.

Kansas.— Coy *v.* Missouri Pac. R. Co., 69 Kan. 321, 76 Pac. 844.

Pennsylvania.—West Branch Bank *v.* Donaldson, 6 Pa. St. 179.

Texas.— Thiers *v.* Holmes, (1888) 9 S. W. 191. *Compare* Harwood *v.* Blythe, 32 Tex. 800; Pitt *v.* Texas Storage Co., (App. 1892) 18 S. W. 465, in which cases it was said that a demurrer to the evidence is a demurrer to the competency of the evidence and admits its sufficiency. This is the reverse of what a demurrer to the evidence is usually held to be, and these cases are not in harmony with other decisions of this state.

Vermont.— Bass *v.* Rublee, 76 Vt. 395, 57 Atl. 965.

See 46 Cent. Dig. tit. "Trial," § 346.

65. In Virginia and West Virginia the evidence of both parties is put in the demurrer, and the party demurring does not waive the benefit of his evidence in all respects. The rule in these states is that the party demurring to the evidence admits the truth of his adversaries' evidence, together with the just inferences which can be drawn therefrom and waives all of his own evidence conflicting with that of his adversary, together with the inferences from his own evidence which do not necessarily result therefrom. Richmond *v.* Barry, 109 Va. 274, 63 S. E. 1074; Hot Springs Lumber, etc., Co. *v.* Sterrett, 108 Va. 710, 62 S. E. 797; State University *v.* Snyder, 100 Va. 567, 42 S. E. 337; Richmond, etc., Land, etc., Co. *v.* West Point, 94 Va. 668, 27 S. E. 460; Johnson *v.* Chesapeake, etc., R. Co., 91 Va. 171, 21 S. E. 238; Orange, etc., R. Co. *v.* Miles, 76 Va. 773; Creekmur *v.* Creekmur, 75 Va. 430; Richmond, etc., R. Co. *v.* Anderson, 31 Gratt. (Va.) 812, 31 Am. Rep. 750; Backhouse *v.* Selden, 29 Gratt. (Va.) 581; Gillett *v.* American Stove, etc., Co., 29 Gratt. (Va.) 565; Tutt *v.* Slaughter, 5 Gratt. (Va.) 364; Horner *v.* Speed, 2 Patt. & H. (Va.) 616; Robinson *v.* Sheets, 63 W. Va. 394, 61 S. E. 347; Vance *v.* Ravenswood, etc., R. Co., 53 W. Va. 338, 44 S. E. 461; Shaver *v.* Edgell, 48 W. Va. 502, 37 S. E. 664; Gunn *v.* Ohio River R. Co., 42 W. Va. 676, 26 S. E. 546, 36 L. R. A. 575; Talbott *v.* West Virginia, etc., R. Co., 42 W. Va. 560, 26 S. E. 311; Nuzum *v.* Pittsburgh, etc., R. Co., 30 W. Va. 228, 4 S. E. 242; Garrett *v.* Ramsey, 26 W. Va. 345; Fowler *v.* Baltimore, etc., R. Co., 18 W. Va. 579; Lee *v.* Virginia, etc., Bridge Co., 18 W. Va. 299; Levy *v.* Peabody Ins. Co., 10 W. Va. 560, 27 Am. Rep. 598; Stolle *v.* Ætna F. & M. Ins. Co., 10 W. Va. 546, 27 Am. Rep. 593; Miller *v.* Franklin Ins. Co., 8 W. Va. 515. So he is not entitled to the benefit of evidence offered in the case by him, nor to any inferences to be drawn therefrom, which evidence is incompetent and inadmissible but which has been improperly admitted over objection. Huntington Nat. Bank *v.* Loar, 51 W. Va. 540, 41 S. E. 901. He is, however, ordinarily entitled to the benefit of his unimpeached evidence not in conflict with that of his adversary. Bowers *v.* Bristol Gas, etc., Co., 100 Va. 533, 42 S. E. 296.

Instructions in nature of demurrer to evidence.— In Missouri, in passing on an instruction in the nature of a demurrer to the evidence, ordinarily plaintiff's evidence alone should be considered, but, if defendant's evidence aids plaintiff's case, it is also to be taken into account. Jordan *v.* St. Louis Transit Co., 202 Mo. 418, 101 S. W. 11. And see Crawford *v.* Kansas City Stock Yards Co., 215 Mo. 394, 114 S. W. 1057.

66. *Illinois.*— Pratt *v.* Stone, 10 Ill. App. 633.

Indiana.— Lake Shore, etc., R. Co. *v.* Foster, 104 Ind. 293, 4 N. E. 20, 54 Am. Rep. 319; Reynolds *v.* Baldwin, 93 Ind. 57; Plant *v.* Edwards, 85 Ind. 588; Fritz *v.* Clark, 80 Ind. 591 [*overruling* Baker *v.* Baker, 69 Ind. 399; Thomas *v.* Ruddell, 66 Ind. 326].

Mississippi.— Goodman *v.* Ford, 23 Miss. 592.

Missouri.— St. Clair *v.* Missouri Pac. R. Co., 29 Mo. App. 76.

Texas.— Thiers *v.* Holmes, (1888) 9 S. W. 191.

England.— See Cocksedge *v.* Fanshaw, 1 Dougl. 119, 99 Eng. Reprint 80; Gibson *v.* Hunter, 2 H. Bl. 187.

See 46 Cent. Dig. tit. "Trial," § 355.

Reason for rule.— The demurrant attacks the evidence of his adversary, and, in the very nature of things, this attack cannot be aided by his own evidence. The sufficiency of the adversary's evidence to support the issue upon his part is the only question presented by the demurrer, and this question must be determined without reference to the evidence of the demurring party; indeed, such party does not and cannot have any evidence. The evidence of the adversary is alone involved in the issue raised by the demurrer. Fritz *v.* Clark, 80 Ind. 591.

adversary of the party demurring.[67] The court cannot weigh conflicting evidence or determine its effect, but must consider as true every part of the case of the party resisting the demurrer;[68] all facts which the evidence in support of the issue tends to establish, or which may reasonably be inferred therefrom, are taken as admitted, and all evidence conflicting therewith is considered as waived.[69] Forced

67. McGee *v.* Wabash R. Co., 214 Mo. 530, 114 S. W. 33; Parsons-Applegate Co. *v.* Louisville, etc., R. Co., 136 Mo. App. 494, 118 S. W. 101; Dahmer *v.* Metropolitan St. R. Co., 136 Mo. App. 443, 118 S. W. 496; Merritt *v.* Matchett, 135 Mo. App. 176, 115 S. W. 1066; Hall *v.* Compton, 130 Mo. App. 675, 108 S. W. 1122; Fassbinder *v.* Missouri Pac. R. Co., 126 Mo. App. 563, 104 S. W. 1154. And see Chesapeake, etc., R. Co. *v.* Hall, 109 Va. 296, 63 S. E. 1007.

Limitation of rule.—Where a party has in his possession or under his control evidence by the introduction of which he could render certain a fact material to his success otherwise left in doubt, and he withholds such evidence, the court on demurrer to the evidence introduced by his adversary will presume the fact was against him. Kirchner *v.* Smith, 61 W. Va. 434, 58 S. E. 614; Heffebower *v.* Detrick, 27 W. Va. 16.

68. *Indiana.*— Lake Shore, etc., R. Co. *v.* Foster, 104 Ind. 293, 302, 4 N. E. 20, 54 Am. Rep. 319, in which it was said: "If a party seeks to make available a conflict in the evidence as to any fact, he must go to the jury or to the court sitting as a trier of the facts."

Kansas.— Jones *v.* Adair, 76 Kan. 343, 91 Pac. 78; Coon *v.* Atchison, etc., R. Co., 75 Kan. 282, 89 Pac. 682; Marion Mfg. Co. *v.* Bowers, 71 Kan. 260, 80 Pac. 565; Buoy *v.* Clyde Milling, etc., Co., 68 Kan. 436, 75 Pac. 466; Loob *v.* Fenaughty, 60 Kan. 570, 55 Pac. 841; Wolf *v.* Washer, 32 Kan. 533, 4 Pac. 1036; Bequillard *v.* Bartlett, 19 Kan. 382, 27 Am. Rep. 120; Union Tp. *v.* Hester, 8 Kan. App. 725, 54 Pac. 923.

Missouri.— Riggs *v.* Metropolitan St. R. Co., 216 Mo. 304, 115 S. W. 969.

Oklahoma.— Shawnee Light, etc., Co. *v.* Sears, 21 Okla. 13, 95 Pac. 449; Edmisson *v.* Drumm-Flato Commission Co., 13 Okla. 440, 73 Pac. 958.

Pennsylvania.— Davis *v.* Steiner, 14 Pa. St. 275, 53 Am. Dec. 547; Feay *v.* Decamp, 15 Serg. & R. 227.

Texas.— Thiers *v.* Holmes, (1888) 9 S. W. 191.

West Virginia.—Allen *v.* Bartlett, 20 W. Va. 46; Fowler *v.* Baltimore, etc., R. Co., 18 W. Va. 579.

See 46 Cent. Dig. tit. "Trial," § 355.

Illustration.— If plaintiff calls several witnesses to prove the same transaction, some of whom testify unfavorably to him, and others in his favor, defendant, by demurring to the evidence, admits that the latter have told the truth, and so the court must take it, although the jury would have believed the former. 2 Tidd Pr. 865 note.

In Tennessee on demurrer to evidence that is conflicting, plaintiff is not entitled to have the evidence viewed in the most favorable light to himself. The evidence must be looked to as a whole, and all reasonable inferences drawn from it in plaintiff's favor, but none of it must be excluded because unfavorable, but only if shown by other evidence to be incorrect. Corbett *v.* Smith, 101 Tenn. 368, 47 S. W. 694.

69. *Alabama.*—Bates *v.* Bates, 33 Ala. 102; Shaw *v.* White, 28 Ala. 637; Bryan *v.* State, 26 Ala. 65; Holman *v.* Whiting, 19 Ala. 703; Dearing *v.* Smith, 4 Ala. 432; Carrington *v.* Caller, 2 Stew. 175.

Florida.— Hanover F. Ins. Co. *v.* Lewis, 23 Fla. 193, 1 So. 863; Higgs *v.* Shehee, 4 Fla. 382.

Illinois.— Frazer *v.* Howe, 106 Ill. 563; Pennsylvania Co. *v.* Conlan, 101 Ill. 93; Fent *v.* Toledo, etc., R. Co., 59 Ill. 349, 14 Am. Rep. 13; Hober *v.* W. P. Nelson Co., 101 Ill. App. 336; Kane *v.* Cicero, etc., Electric R. Co., 100 Ill. App. 181; Ward *v.* Chicago, 15 Ill. App. 98; Morris *v.* Indianapolis, etc., R. Co., 10 Ill. App. 389.

Indiana.— Palmer *v.* Chicago, etc., R. Co., 112 Ind. 250, 14 N. E. 70; North British, etc., Ins. Co. *v.* Crutchfield, 108 Ind. 518, 9 N. E. 458; Lake Shore, etc., R. Co. *v.* Foster, 104 Ind. 293, 4 N. E. 20, 54 Am. Rep. 319; Stockwell *v.* State, 101 Ind. 1; Nordyke, etc., Co. *v.* Van Sant, 99 Ind. 188; Ruff *v.* Ruff, 85 Ind. 431; Geiser Mfg. Co. *v.* Lee, 33 Ind. App. 38, 66 N. E. 701; Shearer *v.* Peale, 9 Ind. App. 282, 36 N. E. 455; Hartman *v.* Cincinnati, etc., R. Co., 4 Ind. App. 370, 30 N. E. 930.

Iowa.— Jones *v.* Ireland, 4 Iowa 63; Stanchfield *v.* Palmer, 4 Greene 33.

Kansas.— Christie *v.* Barnes, 33 Kan. 317, 6 Pac. 599.

Kentucky.— Middleton *v.* Com., 1 Litt. 347.

Massachusetts.— Copeland *v.* New England Ins. Co., 22 Pick. 135.

Michigan.— Strong *v.* Grand Trunk Western R. Co., 156 Mich. 66, 120 N. W. 683.

Mississippi.— Hicks *v.* Steigleman, 49 Miss. 377; Raiford *v.* Mississippi Cent. R. Co., 43 Miss. 233; Mobile, etc., R. Co. *v.* McArthur, 43 Miss. 180; Chewning *v.* Gatewood, 5 How. 552.

Missouri.— Kinlen *v.* Metropolitan St. R. Co., 216 Mo. 145, 115 S. W. 523; Meily *v.* St. Louis, etc., R. Co., 215 Mo. 567, 114 S. W. 1013; Von Trebra *v.* Laclede Gaslight Co., 209 Mo. 648, 108 S. W. 559; Charlton *v.* St. Louis, etc., R. Co., 200 Mo. 413, 98 S. W. 529; Ft. Scott First Nat. Bank *v.* Simpson, 152 Mo. 638, 54 S. W. 506; St. Louis *v.* Missouri Pac. R. Co., 114 Mo. 13, 21 S. W. 202; Noeninger *v.* Vogt, 88 Mo. 589; Boland *v.* Missouri R. Co., 36 Mo. 484; National Live Stock Commission Co. *v.* Marion State Bank, 130 Mo. App. 464, 110 S. W. 34; Ben-

and violent inferences are not, however, considered as admitted.[70] If a party does not object to the admission of evidence at the time it is offered, the objection cannot be taken on a demurrer to the evidence,[71] and according to the weight of authority, a party by demurring to the evidence waives any objections taken to the admission of the evidence demurred to,[72] although there is authority to the contrary;[73] and by demurring to the evidence a party cannot deprive his adversary of the right to make available questions upon rulings excluding evidence.[74] Defects in the pleadings cannot be considered as a reason for sustaining a demurrer to the evidence,[75] but by demurring to the evidence a party does not waive his objections based on such defects. After judgment on the demurrer, defendant may take advantage of defects in the declaration or complaint by motion in arrest of judgment or writ of error.[76]

siek *v.* St. Louis Transit Co., 125 Mo. App. 121, 102 S. W. 587; Chinn *v.* Chicago, etc., R. Co., 100 Mo. App. 576, 75 S. W. 375; Creighton *v.* Modern Woodmen of America, 90 Mo. App. 378; Steube *v.* Christopher, etc., Architectural Iron, etc., Co., 85 Mo. App. 640; Davis *v.* Clark, 40 Mo. App. 515; George *v.* Wabash Western R. Co., 40 Mo. App. 433.

New York.— Patrick *v.* Hallett, 1 Johns. 241; Forbes *v.* Church, 3 Johns. Cas. 159.

North Carolina.— Snider *v.* Newell, 132 N. C. 614, 44 S. E. 354; Hopkins *v.* Bowers, 111 N. C. 175, 16 S. E. 1.

Oklahoma.— Shawnee Light, etc., Co. *v.* Sears, 21 Okla. 13, 95 Pac. 449; Ziska *v.* Ziska, 20 Okla. 634, 95 Pac. 254, 23 L. R. A. N. S. 1; Edmisson *v.* Drumm-Flato Commission Co., 13 Okla. 440, 73 Pac. 958; Jaffray *v.* Wolf, 4 Okla. 303, 47 Pac. 496.

Oregon.— Hawley *v.* Dawson, 16 Oreg. 344, 18 Pac. 592.

Pennsylvania.— McKowen *v.* McDonald, 43 Pa. St. 441, 82 Am. Dec. 576; Tucker *v.* Bitting, 32 Pa. St. 428; Davis *v.* Steiner, 14 Pa. St. 275, 53 Am. Dec. 547; Feay *v.* Decamp, 15 Serg. & R. 227; Dickey *v.* Schreider, 3 Serg. & R. 413; Peaceable *v.* Eason, 4 Yeates 54.

Texas.— Thiers *v.* Holmes, (1888) 9 S. W. 191; Hollimon *v.* Griffin, 37 Tex. 453; Booth *v.* Cotton, 13 Tex. 359; Chicago, etc., R. Co. *v.* Cleaver, 48 Tex. Civ. App. 294, 106 S. W. 721; Galveston, etc., R. Co. *v.* Templeton, (Civ. App. 1894) 25 S. W. 135.

United States.— Thornton *v.* Washington Bank, 3 Pet. 36, 7 L. ed. 594; Fowle *v.* Alexandria, 11 Wheat. 320, 6 L. ed. 484; U. S. Bank *v.* Smith, 11 Wheat. 171, 6 L. ed. 443; Pawling *v.* U. S., 4 Cranch 219, 2 L. ed. 601; Salmons *v.* Norfolk, etc., R. Co., 162 Fed. 722; Des Moines Life Assoc. *v.* Crim, 134 Fed. 348, 67 C. C. A. 330; Miller *v.* Baltimore, etc., R. Co., 17 Fed. Cas. No. 9,560.

England.— Gibson *v.* Hunter, 1 H. Bl. 187.

See 46 Cent. Dig. tit. "Trial," § 356.

Suits in equity.— In suits in equity as in actions at law a demurrer to the evidence concedes every fact which the evidence tends to prove and every inference fairly deducible from the facts proved. Healey *v.* Simpson, 113 Mo. 340, 20 S. W. 881.

70. *Indiana.*— Lake Shore, etc., R. Co. *v.* Foster, 104 Ind. 293, 4 N. E. 20, 54 Am. Rep. 319; Talkington *v.* Parish, 89 Ind. 202; Doe *v.* Rue, 4 Blackf. 263, 29 Am. Dec. 368; Smock *v.* Henderson, Wils. 241.

Massachusetts.— Copeland *v.* New England Ins. Co., 22 Pick. 135.

Missouri.— Buesching *v.* St. Louis Gaslight Co., 73 Mo. 219, 39 Am. Rep. 503.

New York.— People *v.* Roe, 1 Hill 470.

Texas.— Bradbury *v.* Reed, 23 Tex. 258.

Virginia.— Clopton *v.* Morris, 6 Leigh 278; Hansbrough *v.* Thom, 3 Leigh 147.

United States.— Jacob *v.* U. S., 13 Fed. Cas. No. 7,157, 1 Brock. 520; Jones *v.* Vanzandt, 13 Fed. Cas. No. 7,501, 2 McLean 596; U. S. *v.* Williams, 28 Fed. Cas. No. 16,724, 1 Ware 173.

See 46 Cent. Dig. tit. "Trial," § 356.

71. Foster *v.* McDonald, 5 Ala. 376; Lewis *v.* Few, 5 Johns. (N. Y.) 1.

72. *Alabama.*— Foster *v.* McDonald, 5 Ala. 376.

Indiana.— Palmer *v.* Chicago, etc., R. Co., 112 Ind. 250, 14 N. E. 70; Washburn *v.* Shelby County, 104 Ind. 321, 3 N. E. 757, 54 Am. Rep. 332; McLean *v.* Equitable L. Assur. Soc., 100 Ind. 127, 50 Am. Rep. 779; Miller *v.* Porter, 71 Ind. 521; Hartman *v.* Cincinnati, etc., R. Co., 4 Ind. App. 370, 30 N. E. 930.

Kentucky.— Chapize *v.* Bane, 1 Bibb 612.

New York.— See Lewis *v.* Few, 5 Johns. 1.

Tennessee.— Southern R. Co. *v.* Leinhart, 107 Tenn. 635, 64 S. W. 899.

United States.— Suydam *v.* Williamson, 20 How. 427, 15 L. ed. 978.

73. Dishazer *v.* Maitland, 12 Leigh (Va.) 524 [*overruling* Bigger *v.* Alderson, 1 Hen. & M. (Va.) 54]. And see Gillett *v.* Burlington Ins. Co., 53 Kan. 108, 36 Pac. 52, holding that where incompetent testimony is received over objection, it is within the province of the court to correct such error at any time before the final disposition of the case; and, upon a demurrer to plaintiff's evidence, it is not improper for the court to strike out or to disregard such incompetent testimony.

74. Washburn *v.* Shelby County, 104 Ind. 321, 3 N. E. 757, 54 Am. Rep. 332.

75. Palmer *v.* Logan, 4 Ill. 56; Stockwell *v.* State, 101 Ind. 1; McLean *v.* Equitable L. Assur. Soc., 100 Ind. 127, 50 Am. Rep. 779; Hartman *v.* Cincinnati, etc., R. Co., 4 Ind. App. 370, 30 N. E. 930; Lindley *v.* Kelley, 42 Ind. 294; Cort *v.* Birkbeck, 1 Dougl. 218, 99 Eng. Reprint 143.

76. McLean *v.* Equitable L. Assur. Soc.,

4. Time For Demurrer. The demurrer cannot be made until all of plaintiff's proof is heard;[77] but according to the weight of authority it should be interposed at the close of plaintiff's evidence.[78] The demurrant may, however, cross-examine plaintiff's witnesses.[79] A joinder in the demurrer is a waiver of the objection that the demurrer was not interposed in time.[80]

5. Form and Requisites of Demurrer. A demurrer to the evidence must be in writing,[81] and all the testimony on both sides should be inserted in those jurisdictions where evidence of the demurrant may also be considered in passing on the demurrer.[82] But in most jurisdictions evidence of the demurrant should not, according to the well settled practice, be inserted in the demurrer. This is because the court cannot consider it for any purpose in passing on the demurrer.[83] Written portions of the evidence are sufficiently incorporated in the demurrer by reference thereto.[84] The demurrer must definitely state what facts favorable to the adverse party the evidence tends to establish,[85] and not merely the evidence conducing to prove such facts.[86] Judgment will not be rendered on a loose and uncertain statement of facts in the demurrer, even though there be a joinder, but the court will set aside the demurrer and award a venire *de novo*.[87] The

100 Ind. 127, 50 Am. Rep. 779; Lindley *v.* Kelley, 42 Ind. 294; U. S. Bank *v.* Smith, 11 Wheat. (U. S.) 171, 6 L. ed. 443 [*reversing* 2 Fed. Cas. No. 935, 2 Cranch C. C. 319].

77. Proprietary *v.* Ralston, 1 Dall. (Pa.) 18, 1 L. ed. 18; Campbell *v.* Strong, 4 Fed. Cas. No. 2,367*a*, Hempst. 265.

78. Hart *v.* Calloway, 2 Bibb (Ky.) 460; Clow *v.* Plummer, 85 Mich. 550, 48 N. W. 795; Hinchman *v.* Weeks, 85 Mich. 535, 48 N. W. 790; Sands *v.* Southern R. Co., 108 Tenn. 1, 64 S. W. 478; Summers *v.* Louisville, etc., R. Co., 96 Tenn. 459, 35 S. W. 210.

After defendant has offered evidence.— The court may properly refuse to allow him to withdraw it and demur to plaintiff's evidence. Catlin *v.* Gilder, 3 Ala. 536.

Defendant must rest case. A defendant cannot demur to plaintiff's testimony, unless he also rests his case. Brown *v.* Lewis, 50 Oreg. 358, 92 Pac. 1058.

79. McCreary *v.* Fike, 2 Blackf. (Ind.) 374; Burton *v.* Brashear, 3 A. K. Marsh. (Ky.) 276; Cooley *v.* Galyon, 109 Tenn. 1, 70 S. W. 607, 97 Am. St. Rep. 823, 60 L. R. A. 139. *Contra*, Skillman *v.* Jones, 3 Mart. N. S. (La.) 686.

80. Tierney *v.* Frazier, 57 Tex. 437.

81. Rockhill *v.* Congress Hotel Co., 237 Ill. 98, 86 N. E. 740, 22 L. R. A. N. S. 576; Creach *v.* Taylor, 3 Ill. 277; Golden *v.* Knowles, 120 Mass. 336; Green *v.* Judith, 5 Rand. (Va.) 1. See also Palmer *v.* Chicago, etc., R. Co., 112 Ind. 250, 14 N. E. 70; Western Assur. Co. *v.* Mayer, 64 Miss. 795, 2 So. 173.

Motion to direct verdict.—A motion by defendant at the close of plaintiff's testimony reciting that plaintiff had failed to prove certain things, wherefore defendant moves the court to instruct the jury to direct a verdict, is not a demurrer to the evidence. Woldert Grocery Co. *v.* Veltman, (Tex. Civ. App. 1904) 83 S. W. 224.

82. Green *v.* Judith, 5 Rand. (Va.) 1; Childers *v.* Deane, 4 Rand. (Va.) 406; Hyers *v.* Wood, 2 Call (Va.) 574; Hyers *v.* Green, 2 Call (Va.) 555.

83. Reynolds *v.* Baldwin, 93 Ind. 57; Ruddell *v.* Tyner, 87 Ind. 529; Plant *v.* Edwards, 85 Ind. 588; Fritz *v.* Clark, 80 Ind. 591 [*overruling* Baker *v.* Baker, 69 Ind. 399; Thomas *v.* Ruddell, 66 Ind. 326, and *disapproving dictum* in Strough *v.* Gear, 48 Ind. 100]; Woodgate *v.* Threlkeld, 3 Bibb (Ky.) 527; Hart *v.* Calloway, 2 Bibb (Ky.) 460; Fowle *v.* Alexandria, 11 Wheat. (U. S.) 320, 6 L. ed. 484.

84. Baker *v.* Baker, 69 Ind. 399.

85. *Illinois.*— Rockhill *v.* Congress Hotel Co., 237 Ill. 98, 86 N. E. 740, 22 L. R. A. N. S. 576; Creach *v.* Taylor, 3 Ill. 277; Indianapolis, etc., R. Co. *v.* Link, 10 Ill. App. 292.

Indiana.— Strough *v.* Gear, 48 Ind. 100.

Maryland.— Parr *v.* City Trust, etc., Co., 95 Md. 291, 52 Atl. 512.

Massachusetts.— Copeland *v.* New England Ins. Co., 22 Pick. 135.

New York.— Pomeroy *v.* Underhill, 7 Hill 388.

Tennessee.—Bridgeport Wooden-Ware Mfg. Co. *v.* Louisville, etc., R. Co., 103 Tenn. 490, 53 S. W. 739.

Virginia.— See Newport News, etc., R., etc., Co. *v.* Nicolopoolos, 109 Va. 165, 63 S. E. 443, holding that practice of inserting in demurrers to evidence the proceedings at the trial verbatim is not to be commended, on account of the unnecessary expense to litigants and the unnecessary labor it imposes upon courts in the examination of cases, but the old practice of stating the substance of the material oral evidence is the better one.

See 46 Cent. Dig. tit. "Trial," § 351.

Omission of material fact.— If, by mistake or otherwise, a material fact is omitted, which the court judicially knows to exist, the demurrer will be set aside for uncertainty. Taliaferro *v.* Gatewood, 6 Munf. (Va.) 320.

86. Creach *v.* Taylor, 3 Ill. 277; Dormady *v.* State Bank, 3 Ill. 236; Western Assur. Co. *v.* Mayer, 64 Miss. 795, 2 So. 173; Waul *v.* Kirkman, 27 Miss. 823.

87. Ingram *v.* Jacksonville St. R. Co., 43 Fla. 324, 30 So. 800; Fee *v.* Florida Sugar

record need not state that the evidence set forth is all that was offered,[88] and, where the evidence is plain and direct, it is not necessary to state the inferences deducible from it;[89] nor is it necessary to specify in what particulars the evidence is insufficient to warrant a judgment.[90]

6. JOINDER IN DEMURRER. There must be a joinder in demurrer before the court has authority to pass thereon,[91] and it is reversible error to render judgment on a demurrer where there has been no joinder therein.[92] Whether the court shall compel a joinder in demurrer is a matter within its discretion.[93] This discretion, however, is not an arbitrary but a judicial discretion, the exercise of which is subject to review.[94] A joinder in demurrer should not be compelled until a statement of the evidence is set out in the demurrer.[95] Where the evidence is all matter of record as in writing, unless it is very clearly sufficient, the court will compel a joinder,[96] because the facts which it proves are certain and cannot be varied.[97] So if the evidence, although parol, be clear and uncontradicted, a party has the right to demur to it, and his adversary should be compelled to join.[98] Parol evidence is sometimes certain and no more admitting of any variance than a matter in writing.[99] The reason for the rule requiring joinder in case of the two classes of evidence just considered has no application in the case of parol evidence which is loose and indeterminate, in which case, unless the demurrant distinctly admits of record every fact which the evidence fairly tends to establish, or which may fairly be inferred from it, the other party will not be required to join in the demurrer.[1] If evidence be given on both sides, and be complicated

Mfg. Co., 36 Fla. 612, 18 So. 853; Higgs *v.* Shehee, 4 Fla. 382.

88. Adkins *v.* Fry, 38 W. Va. 549, 18 S. E. 737.

89. Ditto *v.* Ditto, 4 Dana (Ky.) 502.

90. Artenberry *v.* Southern R. Co., 103 Tenn. 266, 52 S. W. 878.

91. Golden *v.* Knowles, 120 Mass. 336; Dozier *v.* Anstill, 8 Sm. & M. (Miss.) 528; Booth *v.* Cotton, 13 Tex. 359; Pickel *v.* Isgrigg, 6 Fed. 676, 10 Biss. 230.

Presumption as to joinder.— Where the record shows that the demurrer was argued by counsel for both sides and the court pronounced judgment thereon without objection, it will be presumed that there was a formal joinder, or that it was waived. Gluck *v.* Cox, 90 Ala. 331, 8 So. 161.

92. Dozier *v.* Anstill, 8 Sm. & M. (Miss.) 528.

93. *Alabama.*— Brandon *v.* Planters', etc., Bank, 1 Stew. 320, 18 Am. Dec. 48.

Florida.— Morrison *v.* McKinnon, 12 Fla. 552.

Kentucky.— Walker *v.* Kendall, Hard. 404.

Pennsylvania.— Maus *v.* Montgomery, 11 Serg. & R. 329.

Virginia.— State University *v.* Snyder, 100 Va. 567, 42 S. E. 337.

United States.— Young *v.* Black, 7 Cranch 565, 3 L. ed. 440.

See 46 Cent. Dig. tit. "Trial," § 354.

Where the party may properly insist on his demurrer, a joinder will be required. Johnson *v.* Chesapeake, etc., R. Co., 91 Va. 171, 21 S. E. 238; Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888.

94. Rohr *v.* Davis, 9 Leigh (Va.) 30.

95. Newport News, etc., R., etc., Co. *v.* Nicolopoolos, 109 Va. 165, 63 S. E. 443.

96. Booth *v.* Cotton, 13 Tex. 359; Boyd *v.* City Sav. Bank, 15 Gratt. (Va.) 501; Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888; Gibson *v.* Hunter, 2 H. Bl. 208. And see *dictum* in Hampton *v.* Windham, 2 Root (Conn.) 199.

97. Booth *v.* Cotton, 13 Tex. 359.

98. Shields *v.* Arnold, 1 Blackf. (Ind.) 109; Burton *v.* Brashear, 3 A. K. Marsh. (Ky.) 276; Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888; Gibson *v.* Hunter, 2 H. Bl. 187. *Contra*, Fowler *v.* Macomb, 2 Root (Conn.) 388; Hampton *v.* Windham, 2 Root (Conn.) 199.

99. Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888; Gibson *v.* Hunter, 2 H. Bl. 187.

Where the evidence does not tend to show any right of recovery the court is authorized to compel a joinder in demurrer thereto. Shaw *v.* White, 28 Ala. 637.

1. *Alabama.*— Sawyer *v.* Fitts, 2 Port. 9.

Florida.— Morrison *v.* McKinnon, 12 Fla. 552.

Illinois.— Crowe *v.* People, 92 Ill. 231; Dormady *v.* State Bank, 3 Ill. 236.

Iowa.— Coates *v.* Galena, etc., R. Co., 18 Iowa 277; Jones *v.* Ireland, 4 Iowa 63.

Mississippi.— Steele *v.* Palmer, 41 Miss. 88.

Pennsylvania.— Maus *v.* Montgomery, 11 Serg. & R. 329.

Tennessee.— Illinois Cent. R. Co. *v.* Brown, 96 Tenn. 559, 35 S. W. 560; Summers *v.* Louisville, etc., R. Co., 96 Tenn. 459, 35 S. W. 210.

Vermont.— Bass *v.* Rublee, 76 Vt. 395, 57 Atl. 965.

United States.— Jacob *v.* U. S., 13 Fed. Cas. No. 7,157, 1 Brock. 520; Johnson *v.* U. S., 13 Fed. Cas. No. 7,419, 5 Mason 425; Jordan *v.* Sawyer, 13 Fed. Cas. No. 7,521, 2 Cranch C. C. 373; Young *v.* Black, 7 Cranch 565, 3 L. ed. 440.

See 46 Cent. Dig. tit. "Trial," § 353.

and conflicting, the court will not compel a joinder.[2] By joining in the demurrer, the opposite party admits that the evidence is correctly set out,[3] and the court will infer what the jury might infer.[4] If the demurree refuses to join, except on terms which the court disapproves, the court will direct a verdict against him.[5] By joining issue on demurrer to plaintiff's evidence the cause is withdrawn from the jury and submitted to the court.[6]

7. Withdrawal of Demurrer. After a party has filed a demurrer to the evidence and before any joinder therein by the other party, the court may permit a withdrawal of the demurrer.[7]

8. Hearing and Determination — a. When Sustained. The whole operation of conducting a demurrer to the evidence and of directing the admissions which the party demurring shall make is under the control of the court.[8] The circumstances under which a demurrer to the evidence will be sustained have been variously stated as follows: Where there is a total failure of proof;[9] when plaintiff's evidence is *prima facie* insufficient for a recovery;[10] where the evidence would not sustain a verdict;[11] where there is no evidence to sustain plaintiff's cause of action;[12] where evidence introduced by plaintiff is clearly insufficient to form the basis of a judgment for him;[13] if on any theory of the evidence plaintiff cannot recover;[14] if plaintiff's evidence shows affirmatively that he is not entitled to recover;[15] where no evidence is introduced tending to prove the cause of action set up;[16] where the evidence does not reasonably tend to show a cause of action;[17] where there is an entire failure to prove one fact essential to the existence of the cause of action;[18] when plaintiff's testimony is wholly insufficient to prove the material allegations in his declaration;[19] where the evidence demurred to fails to prove any defense;[20] where the evidence does not show a *prima facie* case,[21] or when there is a fatal variance between the allegations and the proof.[22]

Although the evidence is plainly against the party demurring joinder may be compelled (State University *v.* Snyder, 100 Va. 567, 42 S. E. 337 [*overruling* Deaton *v.* Taylor, 90 Va. 219, 17 S. E. 944]; Brockenbrough *v.* Ward, 4 Rand. (Va.) 352; Moseley *v.* Jones, 5 Munf. (Va.) 23), unless the demurrant's object appears to be merely to delay the decision (Rohr *v.* Davis, 9 Leigh (Va.) 30; Green *v.* Buckner, 6 Leigh (Va.) 82).

2. State University *v.* Snyder, 100 Va. 567, 42 S. E. 337; Stuart *v.* Columbia Ins. Co., 23 Fed. Cas. No. 13,554, 2 Cranch C. C. 442.

3. Valtez *v.* Ohio, etc., R. Co., 85 Ill. 500; Lindley *v.* Kelley, 42 Ind. 294.

4. Patty *v.* Edelin, 18 Fed. Cas. No. 10,840, 1 Cranch C. C. 60.

5. Crawford *v.* Jackson, 1 Rawle (Pa.) 427.

6. Nashville, etc., R. Co. *v.* Sansom, 113 Tenn. 683, 84 S. W. 615.

7. Holmes *v.* Phœnix Mut. L. Ins. Co., 49 Ind. 356.

8. Booth *v.* Cotton, 13 Tex. 359; Gibson *v.* Hunter, 2 H. Bl. 187; 2 Tidd Pr. 866. And see Dickey *v.* Schreider 3 Serg. & R. (Pa.) 413; Fowle *v.* Alexandria, 11 Wheat. (U. S.) 320, 6 L. ed. 484.

9. Kennedy *v.* Metropolitan St. R. Co., 128 Mo. App. 297, 107 S. W. 16.

10. State *v.* Goetz, 131 Mo. 675, 33 S. W. 161; Smith *v.* Missouri Pac. R. Co., 113 Mo. 70, 20 S. W. 896.

11. Yingling *v.* Redwine, 12 Okla. 64, 69 Pac. 810; Sanders *v.* Chicago, etc., R. Co., 10 Okla. 325, 61 Pac. 1075; Corbett *v.* Smith, 101 Tenn. 368, 47 S. W. 694.

12. Ritchie *v.* Fowler, 132 N. C. 788, 44 S. E. 616; Watkins *v.* Harighorst, 13 Okla. 128, 74 Pac. 318; Yingling *v.* Redwine, 12 Okla. 64, 69 Pac. 810; Archer *v.* U. S., 9 Okla. 569, 60 Pac. 268.

13. Cottom *v.* National F. Ins. Co., 65 Kan. 511, 70 Pac. 357; Holm *v.* Waters, (Kan. App. 1899) 56 Pac. 507.

14. Loeffler *v.* West Tampa, 55 Fla. 276, 46 So. 426.

15. Sissel *v.* St. Louis, etc., R. Co., 214 Mo. 515, 113 S. W. 1104; Bond *v.* Sanford, 134 Mo. App. 477, 114 S. W. 570; Gerity *v.* Haley, 29 W. Va. 98, 11 S. E. 901.

16. Milliken *v.* Thyson Commission Co., 202 Mo. 637, 100 S. W. 604.

17. Norman *v.* Groves, 22 Okla. 98, 97 Pac. 561.

18. Lyons *v.* Terre Haute, etc., R. Co., 101 Ind. 419.

19. New Orleans, etc., R. Co. *v.* Enochs, 42 Miss. 603.

20. Willoughby *v.* Ball, 18 Okla. 535, 90 Pac. 1017. And see Burnett *v.* Hinshaw, (Kan. App. 1901) 63 Pac. 461.

21. Copeland *v.* New England Ins. Co., 22 Pick. (Mass.) 135.

22. Loeffler *v.* West Tampa, 55 Fla. 276, 46 So. 426; Ellis *v.* Flaherty, 65 Kan. 621, 70 Pac. 586.

Where the party was not surprised, misled, or prejudiced by a variance, it will not be regarded as fatal and a demurrer on that ground will not be sustained. Collier *v.* Monger, 75 Kan. 550, 89 Pac. 1011.

b. When Overruled. Where plaintiff's evidence construed most strongly in his own favor fairly sustains every fact essential to his cause of action, the demurrer should be overruled.[23] In some jurisdictions, when the case is tried before a jury, the demurrer is sustained only when there is no substantial evidence whatever in support of some essential fact of plaintiff's case;[24] in others, the demurrer is sustained when the evidence, although conflicting, so decidedly preponderates in favor of defendant that a verdict for plaintiff would be set aside by the court on motion.[25] The demurrer should be overruled where the evidence is sufficient, if believed, to justify a verdict for plaintiff,[26] where the evidence fairly tends to sustain any cause of action,[27] if the proof sustained one of several counts[28] or one of several elements of damage alleged,[29] or a right to recover nominal damages.[30] And where several defendants join in a demurrer and a case has been made out against one of them, the demurrer should be overruled.[31]

c. Judgment on Demurrer. On issue joined, on demurrer to the evidence, the sole question for determination is whether the evidence does or does not support the issue.[32] If a demurrer to the evidence is sustained, final judgment is properly rendered for the party demurring[33] without giving his adversary opportunity to offer any further evidence whatever.[34] In most jurisdictions if the demurrer is

Exceptions as to variance will not be very critically examined. Emerick *v.* Kroh, 14 Pa. St. 315.

Where the remedy therefor is provided by statute a variance is not ground for demurrer. Wallich *v.* Morgan, 39 Mo. App. 469.

23. *Kansas.*— Suess *v.* Lane County, (App. 1901) 63 Pac. 451; Gilmore *v.* Garnett Bank, 10 Kan. App. 496, 63 Pac. 89; Atchison, etc., R. Co. *v.* Chenoweth, 5 Kan. App. 810, 49 Pac. 155. And see Atchison *v.* Acheson, 9 Kan. App. 33, 57 Pac. 248.

Missouri.— Baum *v.* Fryrear, 85 Mo. 151; Deitring *v.* St. Louis Transit Co., 109 Mo. App. 524, 85 S. W. 140.

Oklahoma.— Belcher *v.* Whitlock, 6 Okla. 691, 56 Pac. 23.

Texas.— Harwood *v.* Blythe, 32 Tex. 800.

Virginia.— Chesapeake, etc., R. Co. *v.* Pierce, 103 Va. 99, 48 S. E. 534.

24. *Florida.*— Knight *v.* Empire Land Co., 55 Fla. 301, 45 So. 1025.

Kansas.— Wilson *v.* Beck, 44 Kan. 497, 24 Pac. 957; Gardner *v.* King, 37 Kan. 671, 15 Pac. 920; Brown *v.* Atchison, etc., R. Co., 31 Kan. 1, 1 Pac. 605; Continental Ins. Co. *v.* Gaston, (App. 1899) 56 Pac. 1129; Skinner *v.* Mitchell, 5 Kan. App. 366, 48 Pac. 450.

Missouri.— Young *v.* Webb City, 150 Mo. 333, 51 S. W. 709; Bender *v.* St. Louis, etc., R. Co., 137 Mo. 240, 37 S. W. 132; Hazell *v.* Tipton Bank, 95 Mo. 60, 8 S. W. 173, 6 Am. St. Rep. 22; Davis *v.* Kroyden, 60 Mo. App. 441.

Oklahoma.— Belcher *v.* Whitlock, 6 Okla. 691, 56 Pac. 23.

Texas.— Harwood *v.* Blythe, 32 Tex. 800.

25. Michael *v.* Roanoke Mach. Works, 90 Va. 492, 19 S. E. 261, 44 Am. St. Rep. 927; Eubank *v.* Smith, 77 Va. 206; Barrett *v.* Raleigh Coal, etc., Co., 55 W. Va. 395, 47 S. E. 154; Bowman *v.* Dewing, 50 W. Va. 445, 40 S. E. 576; Bulkley *v.* Sims, 48 W. Va. 104, 35 S. E. 971; Lewis *v.* Chesapeake, etc., R. Co., 47 W. Va. 656, 35 S. E. 908, 81 Am. St. Rep. 816; Gunn *v.* Ohio River R. Co., 42 W. Va. 676, 26 S. E. 546, 36 L. R. A. 575.

26. Smith *v.* Lyle Rock Co., 132 Mo. App. 297, 111 S. W. 831; Richmond *v.* Barry, 109 Va. 274, 63 S. E. 1074; Massey *v.* Southern R. Co., 106 Va. 515, 56 S. E. 275. And see Milton *v.* Norfolk, etc., R. Co., 108 Va. 752, 62 S. E. 960, holding that where, on a demurrer to the evidence, the evidence is such that a jury might have found a verdict for the demurree, or where reasonably fair-minded men might differ about the question, the decision must be against the demurrer.

27. Hennis *v.* Bowers, 79 Kan. 463, 100 Pac. 71; Shuler *v.* American Benev. Assoc., 132 Mo. App. 123, 111 S. W. 618. And see Horne *v.* Hewger Salt, etc., Co., 52 Kan. 617, 35 Pac. 200.

28. Knoxville Traction Co. *v.* Lane, 103 Tenn. 376, 53 S. W. 557, 46 L. R. A. 549.

29. Coleman *v.* Bennett, 111 Tenn. 705, 69 S. W. 734.

30. Patterson *v.* Blakeney, 33 Ala. 338.

31. Morehead *v.* Hall, 126 N. C. 213, 35 S. E. 428.

32. Gates *v.* Nobles, 1 Root (Conn.) 344; Humphrey *v.* West, 3 Rand. (Va.) 516; Riddle *v.* Core, 21 W. Va. 530; U. S. Bank *v.* Smith, 11 Wheat. (U. S.) 171, 6 L. ed. 443.

33. Obaugh *v.* Finn, 4 Ark. 110, 37 Am. Dec. 773; Umscheid *v.* Scholz, 84 Tex. 265, 16 S. W. 1065; Thiers *v.* Holmes, (Tex. 1888) 9 S. W. 191. And see Gray *v.* McNeal, 12 Ga. 424; Egan *v.* Downing, 55 Ind. 65.

Analogous to final judgment on demurrer to pleading.— Where a demurrer to the evidence is sustained, the judgment is substantially the same as a final judgment on demurrer to complaint or answer. Lindley *v.* Kelley, 42 Ind. 294.

34. Thiers *v.* Holmes, (Tex. 1888) 9 S. W. 191.

In Kansas, by special statutory provision, the court, after sustaining a demurrer to the evidence, may reopen the case and permit other evidence to be introduced. Farmers', etc., Bank *v.* Glen Elder Bank, 46 Kan. 376,

overruled, plaintiff is entitled to judgment.[35] It is not competent for defendant to reopen the merits and retry the issues by a jury.[36] In other jurisdictions, after demurrer overruled, defendant is permitted to introduce his evidence and submit the case to the jury.[37] Where the demurrer is overruled, the court has no power to assess damages[38] except in cases where they are liquidated.[39] The damages may be assessed either before or after the decision on the demurrer. In the first instance, they are assessed by the jury originally impaneled conditionally on the overruling of the demurrer; in the second, they are assessed by another jury impaneled for that purpose.[40] Upon sustaining a demurrer to evidence in support of a plea, judgment in favor of plaintiff should be rendered on the plea.[41] If there are several defenses, the sustaining of a demurrer to the evidence in support of one of them does not withdraw from the jury the evidence as to the others.[42] If an appeal be taken, the appellate court will review the evidence and render such judgment as it warrants.[43]

9. WAIVER OF OBJECTIONS TO RULINGS ON DEMURRER. Where, at the close of plaintiff's case, the court refuses an instruction in the nature of a demurrer to the evidence, defendant may save the point by standing on his demurrer and abandoning the case at that point.[44] But where defendant fails to take this course, and introduces evidence in his own behalf, after his demurrer has been overruled, he thereby waives objection to the court's action thereon,[45] especially where such

26 Pac. 680; St. Joseph, etc., R. Co. *v.* Dryden, 17 Kan. 278; Cook *v.* Ottawa University, 14 Kan. 548.

35. *Massachusetts.*— Golden *v.* Knowles, 120 Mass. 336; Copeland *v.* New England Ins. Co., 22 Pick. 135.

Mississippi.— Hall *v.* Browder, 4 How. 224.

Texas.— Galveston, etc., R. Co. *v.* Templeton, 87 Tex. 42, 26 S. W. 1066.

Virginia.— Nuttall *v.* McDouall, 6 Call 53.

West Virginia.— Quarrier *v.* Baltimore, etc., R. Co., 20 W. Va. 424.

United States.— Fowle *v.* Alexandria, 11 Wheat. 320, 6 L. ed. 484.

England.— Gibson *v.* Hunter, 2 H. Bl. 187.

And see Atherton *v.* Sugar Creek, etc., Turnpike Co., 67 Ind. 334.

In Tennessee it is held that on the overruling of the demurrer, plaintiff's right to recover some damages is settled, and the case is submitted to the jury for the assessment of damages without any further evidence on either side. Coleman *v.* Bennett, 111 Tenn. 705, 69 S. W. 734; Ritt *v.* True Tag Paint Co., 108 Tenn. 646, 69 S. W. 324; Southern Queen Mfg. Co. *v.* Morris, 105 Tenn. 654, 58 S. W. 651; Mitchell *v.* Nashville, etc., R. Co., 100 Tenn. 329, 45 S. W. 337, 40 L. R. A. 426. Although after the overruling of a demurrer to evidence the case has to be submitted to the jury on the evidence as it then stands, the verdict for plaintiff will not be disturbed on appeal if there is any evidence. Coleman *v.* Bennett, 111 Tenn. 705, 69 S. W. 734.

36. Gluck *v.* Cox, 90 Ala. 331, 8 So. 161.

37. Levy *v.* Simmons, 42 Ga. 53; Dunn *v.* Bozarth, 59 Nebr. 244, 80 N. W. 811.

38. Young *v.* Foster, 7 Port. (Ala.) 420; Hanover F. Ins. Co. *v.* Lewis, 23 Fla. 193, 1 So. 863.

39. Galveston, etc., R. Co. *v.* Templeton, 87 Tex. 42, 26 S. W. 1066 (in which it is said that in that event there is no issue to submit to the jury); Mathews *v.* Traders' Bank, (Va. 1897) 27 S. E. 609.

40. *Alabama.*— Boyd *v.* Gilchrist, 15 Ala. 849; Young *v.* Foster, 7 Port. 420.

Arkansas.— Obaugh *v.* Finn, 4 Ark. 110, 57 Am. Dec. 773.

Florida.— Hanover F. Ins. Co. *v.* Lewis, 23 Fla. 193, 1 So. 863.

Indiana.— Holmes *v.* Phœnix Mut. L. Ins. Co., 49 Ind. 356; Lindley *v.* Kelley, 42 Ind. 294.

Virginia.—Humphrey *v.* West, 3 Rand. 516. See also 2 Tidd Pr. 866.

In Texas it is said that after the demurrer has been overruled, the damages may be assessed either by the jury originally impaneled or another jury impaneled for that purpose. Galveston, etc., R. Co. *v.* Templeton, 87 Tex. 42, 26 S. W. 1066. This, however, seems to be an innovation on the common-law practice, and it has been expressly held in one state that if damages are assessed after the demurrer is overruled, a new jury must be impaneled. Obaugh *v.* Finn, 4 Ark. 110, 37 Am. Dec. 773.

41. Williams *v.* McConico, 27 Ala. 572.

42. Troutma *v.* Behoteguy, 69 Kan. 176, 76 Pac. 446.

43. Stephens *v.* Hix, 38 Tex. 656.

44. Gallagher *v.* Edison Illuminating Co., 72 Mo. App. 576; Goodger *v.* Finn, 10 Mo. App. 226.

45. *District of Columbia.*— Prindle *v.* Campbell, 7 Mackey 598.

Illinois.— Grimes *v.* Hilliary, 150 Ill. 141, 36 N. E. 977; Joliet, etc., R. Co. *v.* Velie, 140 Ill. 59, 29 N. E. 706 [*affirming* 36 Ill. App. 450]; Geary *v.* Bangs, 138 Ill. 77, 27 N. E. 462; Dowie *v.* Priddle, 116 Ill. App. 184 [*affirmed* in 216 Ill. 553, 75 N. E. 243].

Kansas.— Supreme Forest W. C. *v.* Stretton, 68 Kan. 403, 75 Pac. 472.

Missouri.— Riggs *v.* Metropolitan St. R.

evidence supplies the deficiencies of plaintiff's evidence,[46] except that the appellate court may consider the same in connection with all the evidence in the case.[47] But the fact that, after a demurrer to the evidence is overruled, defendant asks instructions on other theories, does not waive whatever point may be properly raised under the demurrer.[48]

10. HARMLESS ERROR IN RULINGS ON DEMURRER. Error in refusing to compel plaintiff to join in a demurrer to his evidence is harmless where the evidence set forth in the demurrer shows that plaintiff is entitled to recover.[49] So error in overruling a demurrer to evidence is harmless where evidence supplying the omission is afterward introduced by either party,[50] or where the court afterward sets aside its order and allows plaintiff to take a nonsuit, and reinstates the cause;[51] and although a demurrer to evidence is not applicable to proceedings in equity, an order sustaining it is not a ground for reversal where plaintiff's case is defective for want of equity.[52] Where the court erroneously entertains a demurrer to evidence of defendant on whom is the burden of proof, this will not warrant a reversal if the

Co., 216 Mo. 304, 115 S. W. 969; Felver *v.* Central Electric R. Co., 216 Mo. 195, 115 S. W. 980; Fuchs *v.* St. Louis, 167 Mo. 620, 67 S. W. 610, 57 L. R. A. 136; Mirrielees *v.* Wabash R. Co., 163 Mo. 470, 63 S. W. 718; Jennings *v.* St. Louis, etc., R. Co., 112 Mo. 268, 20 S. W. 490; Hilz *v.* Missouri Pac. R. Co., 101 Mo. 36, 13 S. W. 946; Pope *v.* Kansas City Cable R. Co., 99 Mo. 400, 12 S. W. 891; McPherson *v.* St. Louis, etc., R. Co., 97 Mo. 253, 10 S. W. 846; Guenther *v.* St. Louis, etc., R. Co., 95 Mo. 286, 8 S. W. 371; Bowen *v.* Chicago, etc., R. Co., 95 Mo. 268, 8 S. W. 230; Brock *v.* St. Louis Transit Co., 107 Mo. App. 109, 81 S. W. 219; McLain *v.* St. Louis, etc., R. Co., 100 Mo. App. 374, 73 S. W. 909; King *v.* National Oil Co., 81 Mo. App. 155; Price *v.* Barnard, 65 Mo. App. 649; Cadmus *v.* St. Louis Bridge, etc., Co., 15 Mo. App. 86.

West Virginia.— Young *v.* West Virginia, etc., R. Co., 42 W. Va. 112, 24 S. E. 615; Core *v.* Ohio River R. Co., 38 W. Va. 456, 18 S. E. 596.

United States.— McCabe, etc., Constr. Co. *v.* Wilson, 209 U. S. 275, 28 S. Ct. 558, 52 L. ed. 788; U. S. Fidelity, etc., Co. *v.* Woodson County, 145 Fed. 144, 76 C. C. A. 114; Tamblyn *v.* Johnston, 126 Fed. 267, 62 C. C. A. 601; Barnard *v.* Randle, 110 Fed. 906, 49 C. C. A. 177 [*affirming* 99 Fed. 348]; American Cent. Ins. Co. *v.* Heiserman, 67 Fed. 947, 15 C. C. A. 95; German Ins. Co. *v.* Frederick, 58 Fed. 144, 7 C. C. A. 122.

46. Missouri Pac. R. Co. *v.* Bentley, 78 Kan. 221, 93 Pac. 150; Pine *v.* Western Nat. Bank, 63 Kan. 462, 65 Pac. 690; Atchison, etc., R. Co. *v.* Cross, 58 Kan. 424, 49 Pac. 599; Atchison, etc., R. Co. *v.* Reecher, 24 Kan. 228; Chicago, etc., R. Co. *v.* Doyle, 18 Kan. 58; Simpson *v.* Kimberlin, 12 Kan. 579; Klockenbrink *v.* St. Louis, etc., R. Co., 172 Mo. 678, 72 S. W. 900; Weber *v.* Kansas City Cable R. Co., 100 Mo. 194, 12 S. W. 804, 13 S. W. 587, 18 Am. St. Rep. 541, 7 L. R. A. 819; Eswin *v.* St. Louis, etc., R. Co., 96 Mo. 290, 9 S. W. 577; Bowen *v.* Chicago, etc., R. Co., 95 Mo. 268, 8 S. W. 230; King *v.* National Oil Co., 81 Mo. App. 155; Gallagher *v.* Edison Illuminating Co., 72 Mo. App. 576; Price *v.* Barnard, 65 Mo. App. 649; Kerr *v.* Cusenbary, 60 Mo. App. 558; Taylor *v.* Penquite, 35 Mo. App. 389.

The converse of this proposition is not true, and where a demurrer to the evidence of plaintiff is improperly sustained, the error cannot be cured by the evidence which may be given by defendant, as such evidence merely creates a conflict which plaintiff is entitled to have submitted to the jury. Keystone Iron Works *v.* Wilkie, 6 Kan. App. 654, 49 Pac. 706.

47. Riggs *v.* Metropolitan St. R. Co., 216 Mo. 304, 115 S. W. 969; Felver *v.* Central Electric R. Co., 216 Mo. 195, 115 S. W. 980; Kenefick *v.* Norwich Union F. Ins. Soc., 205 Mo. 294, 103 S. W. 957; Klockenbrink *v.* St. Louis, etc., R. Co., 172 Mo. 678, 72 S. W. 900; Weber *v.* Kansas City Cable R. Co., 100 Mo. 194, 12 S. W. 804, 13 S. W. 587, 18 Am. St. Rep. 541, 7 L. R. A. 819; McPherson *v.* St. Louis, etc., R. Co., 97 Mo. 253, 10 S. W. 846; Clark *v.* Chicago, etc., R. Co., 93 Mo. App. 456, 67 S. W. 746; Gallagher *v.* Edison Illuminating Co., 72 Mo. App. 576; Smith-Anthony Stove Co. *v.* Spear, 65 Mo. App. 87; Kerr *v.* Cusenbary, 60 Mo. App. 558.

48. Kenefick *v.* Norwich Union F. Ins. Soc., 205 Mo. 294, 103 S. W. 957; Steckman *v.* Galt State Bank, 126 Mo. App. 664, 105 S. W. 674; Warwick *v.* North American Inv. Co., 112 Mo. App. 633, 87 S. W. 78; Brock *v.* St. Louis Transit Co., 107 Mo. App. 109, 81 S. W. 219; Palmer *v.* Kinloch Tel. Co., 91 Mo. App. 106; Bealey *v.* Blake, 70 Mo. App. 229.

49. Boyd *v.* City Sav. Bank, 15 Gratt. (Va.) 501; Brockenbrough *v.* Ward, 4 Rand. (Va.) 352.

50. Stephens *v.* Scott, 43 Kan. 285, 23 Pac. 555; Goddard *v.* Donaha, 42 Kan. 754, 22 Pac. 708; Atchison, etc., R. Co. *v.* Reecher, 24 Kan. 228; Weber *v.* Kansas City Cable R. Co., 100 Mo. 194, 12 S. W. 804, 13 S. W. 587, 18 Am. St. Rep. 541, 7 L. R. A. 819; Berg *v.* Parsons, 84 Hun (N. Y.) 60, 31 N. Y. Suppl. 1091; Meyers *v.* Cohn, 4 Misc. (N. Y.) 185, 23 N. Y. Suppl. 996.

51. Oakland Home Ins. Co. *v.* Davis, (Tex. Civ. App. 1895) 33 S. W. 587.

52. Powell *v.* Canaday, 95 Mo. App. 713, 69 S. W. 686.

facts be found for defendant.[53] And refusal to allow an amendment to the grounds of demurrer to the evidence by adding another ground was not prejudicial to defendant, where it had a right to and did argue in its petition for writ of error the point proposed to be made and relied on by the amendment.[54]

C. Dismissal or Nonsuit[55] — **1. Power of Court to Grant.** In many jurisdictions the rule is that plaintiff cannot be nonsuited against his will for lack of evidence,[56] or on any other grounds.[57] But in other jurisdictions the power of courts to allow nonsuits against plaintiff's consent in a proper case is well settled.[58]

2. Operation and Effect of Motion. A motion for nonsuit is in effect a demurrer to the evidence,[59] is governed by the same principles,[60] and presents for the consideration of the court a pure question of law.[61] It admits the truth of plaintiff's evidence and every inference of fact that can legitimately be drawn,[62] and on such motion the evidence will be interpreted most strongly against defendant.[63] It submits to the court the single question whether plaintiff has proved a case sufficient to be submitted to the jury.[64]

53. Bennett *v.* Perkins, 47 W. Va. 425, 35 S. E. 8.

54. Virginia Iron, etc., Co. *v.* Munsey, 110 Va. 156, 65 S. E. 478.

55. **As an infringement of the right to jury trial** see Juries, 24 Cyc. 193.

In particular actions or proceedings: Divorce see Divorce, 14 Cyc. 701. Ejectment see Ejectment, 15 Cyc. 164 *et seq.* Malicious prosecutions see Malicious Prosecution, 26 Cyc. 111.

On other grounds than insufficiency of evidence see Dismissal and Nonsuit, 14 Cyc. 387.

On trial by court see *infra*, XII, A, 3, c.

Probate proceedings see Wills. See also other specific titles in this work.

Right to costs as affected by dismissal see Costs, 11 Cyc. 65 *et seq.*

Voluntary nonsuit or dismissal see Dismissal and Nonsuit, 14 Cyc. 394 *et seq.*

56. *Alabama.*— Phillips *v.* Jordon, 3 Stew. 38; Smith *v.* Seaton, Minor 75.

Arkansas.— Hill *v.* Rucker, 14 Ark. 706; State *v.* Roper, 8 Ark. 491; Ringe *v.* Field, 6 Ark. 43.

Dakota.— Holt *v.* Van Eps, 1 Dak. 206, 46 N. W. 689.

Illinois.— Poleman *v.* Johnson, 84 Ill. 269; Deshler *v.* Beers, 32 Ill. 368, 83 Am. Dec. 274.

Indiana.— Plymouth *v.* Milner, 117 Ind. 324, 20 N. E. 235; Diamond Block Coal Co. *v.* Edmonson, 14 Ind. App. 594, 43 N. E. 242.

Kansas.—Williams *v.* Norton, 3 Kan. 295; Case *v.* Hannahs, 2 Kan. 490.

Louisiana.— Kernion *v.* Guenon, 7 Mart. N. S. 171; Bore *v.* Bush, 6 Mart. (N. S. 1.

Nebraska.— Thompson *v.* Missouri Pac. R. Co., 51 Nebr. 527, 71 N. W. 61; Zittle *v.* Schlesinger, 46 Nebr. 844, 65 N. W. 892; Chicago, etc., R. Co. *v.* Richardson, 28 Nebr. 118, 44 N. W. 103.

Pennsylvania.— Lyon *v.* Daniels, 14 Pa. St. 197; Irving *v.* Taggart, 1 Serg. & R. 360; Widdifield *v.* Widdifield, 2 Binn. 245; Girard *v.* Gettig, 2 Binn. 234. The rule is otherwise now. Munn *v.* Pittsburgh, 40 Pa. St. 364.

Tennessee.— Scruggs *v.* Brackin, 4 Yerg. 528.

Vermont.— French *v.* Smith, 4 Vt. 363, 24 Am. Dec. 616.

United States.— D'Wolf *v.* Rabaud, 1 Pet. 476, 7 L. ed. 227; Northern Pac. R. Co. *v.* Charles, 51 Fed. 562, 2 C. C. A. 380; Bunt *v.* Sierra Buttes Gold Min. Co., 24 Fed. 847, 11 Sawy. 178.

See 46 Cent. Dig. tit. "Trial," § 368.

57. See Dismissal and Nonsuit, 14 Cyc. 425.

58. See Dismissal and Nonsuit, 14 Cyc. 425 *et seq.* And see cases cited in the following sections of this chapter.

59. *California.*— Goldstone *v.* Merchants' Ice, etc., Co., 123 Cal. 625, 56 Pac. 876; Wassermann *v.* Sloss, 117 Cal. 425, 49 Pac. 566, 59 Am. St. Rep. 209, 38 L. R. A. 176; Bush *v.* Wood, 8 Cal. App. 647, 97 Pac. 709; Archibald *v.* Matteson, 5 Cal. App. 441, 90 Pac. 723.

New Jersey.— Hayward *v.* North Jersey St. R. Co., 74 N. J. L. 678, 65 Atl. 737, 8 L. R. A. N. S. 1062; Kaufman *v.* Bush, 69 N. J. L. 645, 56 Atl. 291.

North Carolina.— Brittam *v.* Westhall, 135 N. C. 492, 47 S. E. 616; Capital Printing Co. *v.* Raleigh, 126 N. C. 516, 36 S. E. 33; Purnell *v.* Raleigh, etc., R. Co., 122 N. C. 832, 29 S. E. 953.

Pennsylvania.— Kaufman *v.* Abeles, 11 Pa. Super. Ct. 616.

Utah.— Smalley *v.* Rio Grande Western R. Co., 34 Utah 423, 98 Pac. 311.

60. Smalley *v.* Rio Grande Western R. Co., 34 Utah 423, 98 Pac. 311. And see Pendleton *v.* Atlantic Lumber Co., 3 Ga. App. 714, 60 S. E. 377.

61. Warner *v.* Darrow, 91 Cal. 309, 27 Pac. 737; Schroeder *v.* Schmidt, 74 Cal. 459, 16 Pac. 243; Donahue *v.* Gallavan, 43 Cal. 573; Archibald *v.* Matteson, 5 Cal. App. 441, 90 Pac. 723.

62. Goldstone *v.* Merchants' Ice, etc., Co., 123 Cal. 625, 56 Pac. 776; Warner *v.* Darrow, 91 Cal. 309, 27 Pac. 737; Wright *v.* Roseberry, 81 Cal. 87, 22 Pac. 336; Miller *v.* Bealer, 100 Pa. St. 583; Maynes *v.* Atwater, 88 Pa. St. 496; Kaufman *v.* Abeles, 11 Pa. Super. Ct. 616.

63. Goldstone *v.* Merchants' Ice, etc., Co., 123 Cal. 625, 56 Pac. 776.

64. Carroll *v.* Grande Bonde Electric Co., 49 Oreg. 477, 90 Pac. 903.

3. Form and Requisites of Motion. The motion should state the particular ground or grounds on which it is based,[65] so that the attention of the court and counsel may be called thereto, and an opportunity given to obviate the objections.[66] It must specify wherein the evidence is insufficient,[67] unless it be shown that there was a defect which could not have been remedied if plaintiff's attention had been called to it.[68] Thus a motion to dismiss "on the usual grounds," [69] "because plaintiff has shown no right to recover," [70] has "failed to prove the cause of action alleged," [71] that there is no evidence of defendant's negligence,[72] on the ground of plaintiff's contributory negligence without specifying wherein plaintiff was negligent,[73] or on the ground that there was no evidence to show a violation of law by defendant in an action against him for a penalty [74] is too general to be considered and should be overruled. A motion on the ground that plaintiff "had failed to prove a single allegation of his complaint" has been held sufficiently definite.[75] If the ground stated is that the testimony has not shown a fair preponderance in favor of plaintiff, it is an implied admission that the case is for the jury.[76]

4. Time For Motion.[77] A motion for nonsuit for failure of evidence must be seasonably made.[78] It is premature and should not be sustained when made before the close of plaintiff's evidence.[79] According to some decisions it should be made at the close of plaintiff's case,[80] according to others it may be made at the close of all the evidence,[81] at least if defendant's evidence does not supply the

65. *California.*— Palmer *v.* Marysville Democrat Pub. Co., 90 Cal. 168, 27 Pac. 21; Coffey *v.* Greenfield, 62 Cal. 602.

Montana.— Kavanaugh *v.* Flavin, 35 Mont. 133, 88 Pac. 764.

Oregon.— Meier *v.* Northern Pac. R. Co., 51 Oreg. 69, 93 Pac. 691.

South Carolina.— State *v.* Malony, 81 S. C. 226, 62 S. E. 215.

Utah.— Smalley *v.* Rio Grande Western R. Co., 34 Utah 423, 98 Pac. 311; Gesas *v.* Oregon Short Line R. Co., 33 Utah 156, 93 Pac. 274, 13 L. R. A. N. S. 1074; Wild *v.* Union Pac. R. Co., 23 Utah 265, 62 Pac. 886; Lewis *v.* Silver King Min. Co., 22 Utah 51, 61 Pac. 860.

66. Kavanaugh *v.* Flavin, 35 Mont. 133, 88 Pac. 764; Smalley *v.* Rio Grande Western R. Co., 34 Utah 423, 98 Pac. 311; Gesas *v.* Oregon Short Line R. Co., 33 Utah 156, 93 Pac. 274, 13 L. R. A. N. S. 1074.

67. *Idaho.*—Idaho Mercantile Co. *v.* Kalanquin, 7 Ida. 295, 62 Pac. 925.

Montana.— Jacobs Sultan Co. *v.* Union Mercantile Co., 17 Mont. 61, 42 Pac. 109.

New Jersey.— Jackson *v.* Consolidated Traction Co., 59 N. J. L. 25, 35 Atl. 754.

New York.— Weber *v.* Germania F. Ins. Co., 16 N. Y. App. Div. 596, 44 N. Y. Suppl. 976; Gowing *v.* Warner, 30 Misc. 593, 62 N. Y. Suppl. 797; Boldt *v.* Epstein, 29 Misc. 583, 61 N. Y. Suppl. 248; Falk *v.* Beeckman, 2 N. Y. Suppl. 650. But see Kuflick *v.* Glasser, 114 N. Y. Suppl. 870, holding that a motion to dismiss on the ground that plaintiffs "have failed to establish a cause of action" was sufficient to entitle defendants to the benefit of an exception to its denial.

South Carolina.— Sloan *v.* Courtenay, 54 S. C. 314, 32 S. E. 431.

Utah.—Wild *v.* Union Pac. R. Co., 23 Utah 265, 63 Pac. 886.

See 46 Cent. Dig. tit. "Trial," § 371.

68. Daley *v.* Russ, 86 Cal. 114, 24 Pac. 867; Stapf *v.* Loewer's Gambrinus Brewing Co., 1 N. Y. App. Div. 405, 37 N. Y. Suppl. 256.

69. Hartley *v.* Mullane, 20 Misc. (N. Y.) 418, 45 N. Y. Suppl. 1023.

70. St. Mary's Church *v.* Cagger, 6 Barb. (N. Y.) 576.

71. Kafka *v.* Levensohn, 18 Misc. (N. Y.) 202, 41 N. Y. Suppl. 368.

72. White *v.* Rio Grande Western R. Co., 22 Utah 138, 61 Pac. 568; Lewis *v.* Silver King Min. Co., 22 Utah 51, 61 Pac. 860.

73. Skeen *v.* Oregon Short-Line R. Co., 22 Utah 413, 62 Pac. 1020.

74. State *v.* Malony, 81 S. C. 226, 62 S. E. 215.

75. Carter *v.* Hopkins, 79 Cal. 82, 21 Pac. 549. But see Belcher *v.* Murphy, 81 Cal. 39, 22 Pac. 264.

76. Hilgert *v.* Black, 90 N. Y. Suppl. 1067.

77. See, generally, Dismissal and Nonsuit, 14 Cyc. 450 *et seq.*

78. Farnham *v.* Anderson, 74 N. H. 405, 68 Atl. 459. And see cases cited in subsequent notes in this section.

79. Walker *v.* Supple, 54 Ga. 178; Hansen *v.* Burt, 10 Misc. (N. Y.) 235, 30 N. Y. Suppl. 1061; Tiger *v.* Interurban St. R. Co., 94 N. Y. Suppl. 395.

80. Bennett *v.* Agricultural Ins. Co., 51 Conn. 504 (under statute expressly so providing); Benoist *v.* Sylvester, 26 Mo. 585; Kidd *v.* New Hampshire Traction Co., 74 N. H. 160, 66 Atl. 127. And see Bennett *v.* Northern Pac. Express Co., 12 Oreg. 49, 6 Pac. 160, holding that error in overruling a motion for a nonsuit is not available where defendant goes into his defense and plaintiff then supplies his proofs so as to render them sufficient.

81. Jansen *v.* Acker, 23 Wend. (N. Y.) 480; Fort *v.* Collins, 21 Wend. (N. Y.) 109; Smalley *v.* Rio Grande Western R. Co., 34

defect, and all the evidence is insufficient to sustain a verdict,[82] or when the entire evidence is such that if the motion had been denied and a verdict found for plaintiff it would have been the duty of the court to set the verdict aside as not supported by the evidence.[83] Under the statutes of one state, the motion may be made at the close of plaintiff's evidence, and if overruled may be renewed at the close of all the evidence.[84] The motion comes too late after the case has been submitted to the jury,[85] or after the court has given a peremptory instruction and discharged the jury,[86] or after judgment.[87]

5. HEARING AND DETERMINATION OF MOTION.[88] When a motion for compulsory nonsuit is based on the opening statement of counsel, plaintiff is entitled to the benefit of all allegations in the pleading, all facts referred to by his counsel, and all his offers of proof.[89] So on motion for nonsuit, plaintiff is entitled to the most favorable construction of the evidence that can be given it. All the facts given in evidence to support the material allegations of the declaration or complaint are taken to be true, and plaintiff is entitled to the most favorable inferences deducible from the evidence.[90] All the relevant evidence received must be given

Utah 423, 98 Pac. 311. And see Cooper *v.* Waldron, 50 Me. 80 (holding that the presiding judge may either order a nonsuit of plaintiff, or direct a verdict for defendant, if, in his opinion, the facts admitted, or clearly established, are not sufficient to prove a want of probable cause, notwithstanding evidence, in defense, has been introduced, and overruling without mention); Brown *v.* Massachusetts Mut. L. Ins. Co., 59 N. H. 298, 47 Am. Rep. 205 (holding that a motion for a nonsuit, not made until the evidence is closed on both sides, and not objected to by plaintiff on that ground, will be regarded as seasonably made); Brown *v.* Atlanta, etc., Air Line R. Co., 131 N. C. 455, 42 S. E. 911 (holding that the motion may be made at the close of all the evidence, but that defendant's evidence will not be considered); Bragdon *v.* Appleton Mut. F. Ins. Co., 42 Me. 259; Emerson *v.* Joy, 34 Me. 347; Lyon *v.* Sibley, 32 Me. 576.

82. Brown *v.* Massachusetts Mut. L. Ins. Co., 59 N. H. 298, 47 Am. Rep. 205; Fletcher *v.* Thompson, 55 N. H. 308; Oakes *v.* Thornton, 28 N. H. 44; Pillsbury *v.* Pillsbury, 20 N. H. 90; Rudd *v.* Davis, 7 Hill (N. Y.) 529.

83. Fagundes *v.* Central Pac. R. Co., 79 Cal. 97, 21 Pac. 437, 3 L. R. A. 824.

84. Parlier *v.* Southern R. Co., 129 N. C. 262, 39 S. E. 961; Means *v.* Carolina Cent. R. Co., 126 N. C. 424, 35 S. E. 813.

85. Farnham *v.* Anderson, 74 N. H. 405, 68 Atl. 459; Kidd *v.* New Hampshire Traction Co., 74 N. H. 160, 66 Atl. 127; Glendron *v.* St. Pierre, 73 N. H. 419, 62 Atl. 966; Elwell *v.* Hooper, 72 N. H. 585, 58 Atl. 507; Baldwin *v.* Wentworth, 67 N. H. 408, 36 Atl. 365; Labar *v.* Koplin, 4 N. Y. 547.

Presumptions.— If the motion is interposed after the case is submitted to the jury, the presumption is, unless the facts in evidence disclose the contrary, that the deficiency in the evidence is capable of being supplied; but, as plaintiff then has no opportunity to supply it, the motion comes too late. Farnham *v.* Anderson, 74 N. H. 405, 68 Atl. 459.

86. Drummond *v.* Louisville, etc., R. Co., 109 Fed. 531, although the jury have not yet left their seats.

87. Baltimore, etc., R. Co. *v.* Trennepohl, 44 Ind. App. 105, 87 N. E. 1059.

88. **Presumption on appeal as to correctness of ruling** see APPEAL AND ERROR, 3 Cyc. 306.

89. Green *v.* Duvergey, 146 Cal. 379, 80 Pac. 234; Clews *v.* New York Nat. Banking Assoc. Bank, 105 N. Y. 398, 11 N. E. 814; Roberton *v.* New York, 7 Misc. (N. Y.) 645, 28 N. Y. Suppl. 13 [*affirmed* in 149 N. Y. 609, 44 N. E. 218].

90. *California.*—Hanly *v.* California Bridge, etc., Co., 127 Cal. 232, 59 Pac. 577, 47 L. R. A. 597; Paolini *v.* Fresno Canal, etc., Co., 9 Cal. App. 1, 97 Pac. 1130; Non-Refillable Bottle Co. *v.* Robertson, 8 Cal. App. 103, 96 Pac. 324; Archibald *v.* Matteson, 5 Cal. App. 441, 90 Pac. 723; Doyle *v.* Eschen, 5 Cal. App. 55, 89 Pac. 836.

Idaho.— Colvin *v.* Lyons, 15 Ida. 180, 96 Pac. 572; Palmer *v.* Boise Traction Co., 14 Ida. 327, 94 Pac. 432, 125 Am. St. Rep. 161, 15 L. R. A. N. S. 254; Later *v.* Haywood, 12 Ida. 78, 85 Pac. 494.

Kentucky.— Shay *v.* Richmond, etc., Turnpike Road Co., 1 Bush 108; Gregory *v.* Nesbit, 5 Dana 419; Curle *v.* Beers, 3 J. J. Marsh. 170; Dodge *v.* Commonwealth Bank, 2 A. K. Marsh. 610.

Missouri.— Lee *v.* Knapp, 137 Mo. 385, 38 S. W. 1107.

Montana.— Cummings *v.* Helena, etc., Smelting, etc., Co., 26 Mont. 434, 68 Pac. 852; Cameron *v.* Kenyon-Connell Commercial Co., 22 Mont. 312, 56 Pac. 358, 74 Am. St. Rep. 602, 44 L. R. A. 508; Soyer *v.* Great Falls Water Co., 15 Mont. 1, 37 Pac. 838; State *v.* Benton, 13 Mont. 306, 34 Pac. 301.

Nevada.— Fox *v.* Myers, 29 Nev. 169, 86 Pac. 793; Patchen *v.* Kelly, 19 Nev. 404, 14 Pac. 347.

New Hampshire.— Charrier *v.* Boston, etc., R. Co., 75 N. H. 59, 70 Atl. 1078; Stevens *v.* United Gas, etc., Co., 73 N. H. 159, 60 Atl. 848, 70 L. R. A. 119.

New York.— McNally *v.* Phœnix Ins. Co., 137 N. Y. 389, 33 N. E. 475; Janvey *v.* Loketz, 122 N. Y. App. Div. 411, 106 N. Y. Suppl. 690; Locker *v.* American Tobacco Co., 121 N. Y. App. Div. 443, 106 N. Y. Suppl.

the effect of its full probative force, regardless of whether it has been erroneously admitted.[91] All the testimony offered which is favorable to plaintiff is considered as credible,[92] whether given by interested or disinterested witnesses.[93] The question of the credibility of witnesses cannot arise on a motion for a nonsuit, except in so far as the rule requires for the purpose of the motion that the testimony shall be given the benefit of its probative power.[94] All doubts arising from conflicting testimony are resolved in plaintiff's favor.[95] The evidence on cross as well as direct examination of plaintiff's witnesses is considered,[96] and where the motion is made at the close of all the evidence, plaintiff has the benefit of defendant's evidence as well as his own.[97] Facts proved as matter of defense cannot be con-

115 [*affirmed* in 195 N. Y. 565, 88 N. E. 289]; Walsh *v.* Metropolitan L. Ins. Co., 105 N. Y. App. Div. 186, 93 N. Y. Suppl. 445; Schwarzbaum *v.* Third Ave. R. Co., 54 N. Y. App. Div. 164, 66 N. Y. Suppl. 367; Morss *v.* Osborn, 64 Barb. 543; Konigsberg *v.* Davis, 57 Misc. 630, 108 N. Y. Suppl. 595; Graff *v.* Blumberg, 53 Misc. 296, 103 N. Y. Suppl. 184; Schiller *v.* Dry Dock, etc., R. Co., 26 Misc. 392, 56 N. Y. Suppl. 184; Hassett *v.* McArdle, 2 Misc. 461, 21 N. Y. Suppl. 1040 [*affirmed* in 62 Misc. 622, 26 N. Y. Suppl. 1135]; Jacobs *v.* F. V. Smith Contracting Co., 113 N. Y. Suppl. 531; Kinsella *v.* Gallaher, 111 N. Y. Suppl. 732; Berlin *v.* Weir, 108 N. Y. Suppl. 1063; Cox *v.* Hawke, 93 N. Y. Suppl. 1117; Robinson *v.* New York City R. Co., 90 N. Y. Suppl. 368.

North Carolina.—Ford *v.* Stroud, 150 N. C. 362, 64 S. E. 1; Cotton *v.* North Carolina R. Co., 149 N. C. 227, 62 S. E. 1093; Thompson *v.* Aberdeen, etc., R. Co., 149 N. C. 155, 62 S. E. 883; McCaskill *v.* Walker, 145 N. C. 252, 58 S. E. 1073; Sikes *v.* Virginia L. Ins. Co., 144 N. C. 626, 57 S. E. 391; Biles *v.* Seaboard Air Line R. Co., 143 N. C. 78, 55 S. E. 512; Daniel *v.* Atlantic Coast Line R. Co., 136 N. C. 517, 48 S. E. 816, 67 L. R. A. 455; Brittain *v.* Westhall, 135 N. C. 492, 47 S. E. 616; Hopkins *v.* Norfolk, etc., R. Co., 131 N. C. 463, 42 S. E. 902; House *v.* Seaboard Air Line R. Co., 131 N. C. 103, 42 S. E. 553; Coley *v.* North Carolina R. Co., 129 N. C. 407, 40 S. E. 195, 57 L. R. A. 817.

Ohio.— Ellis *v.* Ohio L. Ins., etc., Co., 4 Ohio St. 628, 64 Am. Dec. 610.

Oregon.— Patty *v.* Salem Flouring Mills Co., 53 Oreg. 350, 96 Pac. 1106, 98 Pac. 521, 100 Pac. 298; Dillard *v.* Olalla Min. Co., 52 Oreg. 126, 94 Pac. 966, 96 Pac. 678; Putnam *v.* Stalker, 50 Oreg. 210, 91 Pac. 363; *In re* Morgan, 46 Oreg. 233, 77 Pac. 608, 78 Pac. 1029.

Pennsylvania.— Jones *v.* Bland, 116 Pa. St. 190, 9 Atl. 275; American Mfg. Co. *v.* S. Morgan Smith Co., 33 Pa. Super. Ct. 469; Bellman *v.* Pittsburg, etc., R. Co., 31 Pa. Super. Ct. 389; Black *v.* Barr, 14 Pa. Super. Ct. 98.

South Carolina.— Walterboro, etc., R. Co. *v.* Hampton R., etc., Co., 64 S. C. 383, 42 S. E. 191.

Washington.— Degginger *v.* Martin, 48 Wash. 1, 92 Pac. 674.

Wisconsin.— Imhoff *v.* Chicago, etc., R. Co., 22 Wis. 681.

See 46 Cent. Dig. tit. "Trial," § 374.

Where plaintiff's testimony is contradictory and uncertain, the court should construe the evidence most strongly against him. Ray *v.* Green, 113 Ga. 920, 39 S. E. 470.

91. Wassermann *v.* Sloss, 117 Cal. 425, 49 Pac. 566, 59 Am. St. Rep. 209, 38 L. R. A. 176; Bush *v.* Wood, 8 Cal. App. 647, 97 Pac. 709; Non-Refillable Bottle Co. *v.* Robertson, 8 Cal. App. 103, 96 Pac. 324; Archibald *v.* Matteson, 5 Cal. App. 441, 90 Pac. 723. And see O'Connor *v.* Hooper, 102 Cal. 528, 36 Pac. 939.

Competency of evidence.— A motion for nonsuit does not raise the question of the competency of the evidence by which a certain issue is established. Dean *v.* Ætna L. Ins. Co., 2 Hun (N. Y.) 358, 4 Thomps. & C. 497, 48 How. Pr. 36 [*reversed* on other grounds in 62 N. Y. 642].

92. *Georgia.*— Strouse *v.* Kelly, 113 Ga. 575, 38 S. E. 957; Reeves *v.* Jackson, 113 Ga. 182, 38 S. E. 314.

Maine.— Davis *v.* Greene, 22 Me. 254.

New York.— Levin *v.* Habicht, 45 Misc. 381, 90 N. Y. Suppl. 349.

North Carolina.— Moore *v.* Charlotte Electric St. R. Co., 128 N. C. 455, 39 S. E. 57.

Oregon.— *In re* Morgan, 46 Oreg. 233, 77 Pac. 608, 78 Pac. 1029.

93. Bishops *v.* McNary, 2 B. Mon. (Ky.) 132, 36 Am. Dec. 592.

94. Archibald *v.* Matteson, 5 Cal. App. 441, 90 Pac. 723.

95. Wassermann *v.* Sloss, 117 Cal. 425, 49 Pac. 566, 59 Am. St. Rep. 209, 38 L. R. A. 176; Ledley *v.* Hays, 1 Cal. 160; Bush *v.* Wood, 8 Cal. App. 647, 97 Pac. 709; Sheridan *v.* Brooklyn City, etc., R. Co., 36 N. Y. 39, 93 Am. Dec. 490, 1 Transcr. App. 49, 34 How. Pr. 217.

Doubts should be resolved in favor of submission to the jury see Olson *v.* Oregon Short Line R. Co., 24 Utah 460, 68 Pac. 148.

Discrepancies between the testimony of the witnesses called by plaintiff cannot avail defendant upon a motion for nonsuit. Kaufman *v.* Bush, 69 N. J. L. 645, 56 Atl. 291.

96. McDonough *v.* Grand Trunk R. Co., 98 Me. 304, 56 Atl. 913; Eastman *v.* Howard, 30 Me. 58, 50 Am. Dec. 611.

97. Storck *v.* Mesker, 55 Mo. App. 26; Means *v.* Carolina Cent. R. Co., 126 N. C. 424, 35 S. E. 813. The court may take a motion for nonsuit, for insufficiency of proof, made at the close of plaintiff's case under advisement and sustain it at the close of defendant's case if defendant's evidence does

sidered on the hearing of the motion,[98] but where a defense pleaded by defendant is established by plaintiff's evidence, a nonsuit is properly granted.[99] After motion made, the court may in its discretion permit plaintiff to introduce further evidence before passing on the motion,[1] and usually does so as a matter of course. When the statute of limitations would be a bar to a new action, refusal of the court to permit plaintiff to adduce additional evidence is error.[3] Such refusal is likewise error where to allow the production of additional evidence, would occasion no unreasonable delay or interfere with the trial.[4] When the motion is sustained, plaintiff's case should be dismissed without prejudice to another action and without judgment on the merits.[5] Upon denial of the motion the court cannot give judgment for plaintiff, but the case should go to the jury.[6]

6. When Granted or Refused — a. On Trial by Jury — (i) *When Granted.* It has been said that to avoid a nonsuit, the evidence of plaintiff must be sufficient to raise more than a mere surmise or conjecture that the fact is as alleged. It must be such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists.[7] The circumstances under which a nonsuit will be granted for insufficiency of evidence have been variously stated as follows: Where plaintiff does not prove a sufficient case to go to the jury; [8] where it appears

not supply the defects of plaintiff's evidence. Manning *v.* Manchester Mills, 70 N. H. 582, 49 Atl. 91.

98. *Connecticut.*— Fitch *v.* Bill, 71 Conn. 24, 40 Atl. 910; Chappell *v.* Bates, 56 Conn. 568, 16 Atl. 673.

New Hampshire.— Pillsbury *v.* Pillsbury, 20 N. H. 90.

North Carolina.— Powell *v.* Southern R. Co., 125 N. C. 370, 34 S. E. 530.

Oregon.— Rader *v.* McElvane, 21 Oreg. 56, 27 Pac. 97.

South Carolina.— Jones *v.* Weathersbee, 4 Strobh. 50, 51 Am. Dec. 653.

See 46 Cent. Dig. tit. "Trial," § 362.

Contra.— Rudd *v.* Davis, 3 Hill (N. Y.) 287.

99. Burraston *v.* Nephi First Nat. Bank, 22 Utah 328, 62 Pac. 425.

1. Featherston *v.* Wilson, 123 N. C. 623, 31 S. E. 843.

2. McColgan *v.* McKay, 25 Ga. 631.

3. Low *v.* Warden, 70 Cal. 19, 11 Pac. 350.

4. Gesas *v.* Oregon Short Line R. Co., 33 Utah 156, 93 Pac. 274, 13 L. R. A. N. S. 1074.

5. See Judgments, 23 Cyc. 1136 *et seq.*

6. Smyth *v.* Craig, 3 Watts & S. (Pa.) 14.

7. Janin *v.* London, etc., Bank, 92 Cal. 14, 27 Pac. 1100, 27 Am. St. Rep. 82, 14 L. R. A. 320; Hercules Oil Refining Co. *v.* Hocknell, 5 Cal. App. 702, 91 Pac. 341.

8. *California.*— Harney *v.* McLeran, 66 Cal. 34, 4 Pac. 884; Ensminger *v.* McIntire, 23 Cal. 593; Ringgold *v.* Haven, 1 Cal. 108.

Colorado.— Rensberger *v.* Britton, 31 Colo. 79, 71 Pac. 380; Denver, etc., R. Co. *v.* Costes, 1 Colo. App. 336, 28 Pac. 1129.

Delaware.— Baker *v.* Johnson, 2 Marv. 219, 42 Atl. 449.

Georgia.— Kirk *v.* Kirk, 123 Ga. 104, 50 S. E. 928; Hood *v.* Hendrickson, 122 Ga. 795, 50 S. E. 994; Evans *v.* J. S. Schofield's Sons Co., 120 Ga. 961, 48 S. E. 358; Sibley *v.* Carmichael, 120 Ga. 904, 48 S. E. 389; Barnes *v.* Carter, 120 Ga. 895, 48 S. E. 387; Blackstock *v.* Southern R. Co., 120 Ga. 414, 47 S. E. 902; Ritter *v.* Fagin, 119 Ga. 848, 47 S. E. 188; Payne *v.* Atlanta Consol. St. R. Co., 105 Ga. 848, 32 S. E. 650; Baker *v.* Tillman, 84 Ga. 401, 11 S. E. 355; Jackson *v.* Scroggin, 42 Ga. 183.

Idaho.— Lalande *v.* McDonald, 2 Ida. (Hasb.) 307, 13 Pac. 347.

Kentucky.— Gregory *v.* Nesbit, 5 Dana 419.

Louisiana.— Richard *v.* Bergeron, 40 La. Ann. 717, 5 So. 15; Van Wick *v.* Rist, 14 La. Ann. 56; Turner *v.* Lockwood, 4 Rob. 444; Hervy *v.* Russell, 3 Mart. N. S. 59; Foster *v.* Randolph, 2 Mart. N. S. 495.

Maine.— Prescott *v.* Hobbs, 30 Me. 345; Head *v.* Sleeper, 20 Me. 314.

Massachusetts.— Wentworth *v.* Leonard, 4 Cush. 414.

Minnesota.— Searles *v.* Thompson, 18 Minn. 316.

Missouri.— Mt. Vernon Bank *v.* Porter, 148 Mo. 176, 49 S. W. 982; State *v.* Devitt, 107 Mo. 573, 17 S. W. 900, 28 Am. St. Rep. 440; Ryan *v.* Spalding, 40 Mo. 165.

Montana.— Briggs *v.* Collins, 27 Mont. 405, 71 Pac. 307.

Nevada.— Burns *v.* Rodefer, 15 Nev. 59.

New Hampshire.— Bailey *v.* Kimball, 26 N. H. 351.

New Jersey.— Rosengarten *v.* Delaware, etc., R. Co., 77 N. J. L. 71, 71 Atl. 35; U. S. Fidelity, etc., Co. *v.* Donnelly, 68 N. J. L. 654, 54 Atl. 457.

New York.— Krower *v.* Reynolds, 99 N. Y. 245, 1 N. E. 775; Smith *v.* Sanger, 3 Barb. 360 [*reversed* on other grounds in 4 N. Y. 577]; Fox *v.* Decker, 3 E. D. Smith 150; Winfield *v.* Cauchois, 27 Misc. 773, 57 N. Y. Suppl. 763; Burbridge *v.* Kilgannon, 14 Misc. 450, 35 N. Y. Suppl. 1022; Regulus Cigar Co. *v.* Flannery, 105 N. Y. Suppl. 95; Dixon *v.* Marlow, 104 N. Y. Suppl. 762; Tallon *v.* New York Contracting Co., 104 N. Y. Suppl. 723; McKee *v.* Owen, 104 N. Y. Suppl. 373; Pearsall *v.* New York Min., etc., Co., 90 N. Y. Suppl. 380; Tucker *v.* Tucker, 18 N. Y. Suppl. 629; Martin *v.* Crehan, 15 N. Y. Suppl.

on plaintiff's own evidence that he is not entitled to recover;[9] where he fails to make out a *prima facie* case, and defendant offers no proof;[10] where it would be the duty of the court to set aside a verdict for plaintiff as against the evidence whether the motion be made at the close of plaintiff's evidence or at the close of all the evidence;[11] where admitting all the facts proved and all the reasonable deductions therefrom plaintiff ought not to recover;[12] where on the whole evidence in the case, the jury must necessarily return a verdict for defendant;[13] where the

449; Baldwin *v.* Rood, 1 N. Y. Suppl. 713; Van Wormer *v.* Albany, 18 Wend. 169.

Ohio.— Ellis *v.* Ohio L. Ins., etc., Co., 4 Ohio St. 628, 64 Am. Dec. 610.

Pennsylvania.— Sternbergh *v.* Chickies Iron Co., 156 Pa. St. 34, 26 Atl. 812; Maguire *v.* Price, 155 Pa. St. 60, 25 Atl. 828; Holmes *v.* Tyson, 147 Pa. St. 305, 23 Atl. 564, 15 L. R. A. 209.

South Carolina.— Smalley *v.* Southern R. Co., 57 S. C. 243, 35 S. E. 489; Fell *v.* Charleston, etc., R. Co., 33 S. C. 198, 11 S. E. 691; Sanders *v.* Etiwan Phosphate Co., 19 S. C. 510.

Washington.—Tolmie *v.* Dean, 1 Wash. Terr. 46.

Wisconsin.— Hoeflinger *v.* Stafford, 38 Wis. 391; Gardinier *v.* Otis, 13 Wis. 460; Woodward *v.* McReynolds, 2 Pinn. 268, 1 Chandl. 244.

See 46 Cent. Dig. tit. "Trial," § 360.

9. *Connecticut.*— Beckwith *v.* Farmington, 77 Conn. 318, 59 Atl. 43; Wallingford *v.* Hall, 64 Conn. 426, 30 Atl. 47.

Georgia.— Evans *v.* Josephine Mills, 119 Ga. 448, 46 S. E. 674; Smith *v.* Central R., etc., Co., 82 Ga. 801, 10 S. E. 111; McCook *v.* Dublin, etc., R. Co., 2 Ga. App. 374, 58 S. E. 491.

Iowa.— Edwards *v.* Louisa County, 89 Iowa 499, 56 N. W. 656; Osgood *v.* Bauder, 82 Iowa 171, 47 N. W. 1001.

Maine.— Bryant *v.* Great Northern Paper Co., 103 Me. 32, 68 Atl. 379.

Montana.— Cummings *v.* Helena, etc., Smelting, etc., Co., 26 Mont. 434, 68 Pac. 852.

New York.— Carpenter *v.* Smith, 10 Barb. 663; Ely *v.* Cook, 2 Hilt. 406, 9 Abb. Pr. 366; Bishop *v.* Goshen, 10 N. Y. St. 401.

Pennsylvania.— Smith *v.* Cohn, 170 Pa. St. 132, 32 Atl. 565; Wissahickon Mut. F. Ins. Co. *v.* Wannemacher, 15 Pa. Super. Ct. 580.

Washington.—Easter *v.* Hall, 12 Wash. 160, 40 Pac. 728; Sayward *v.* Carlson, 1 Wash. 29, 23 Pac. 830.

Wisconsin.—Wheeler *v.* Meriden Cutlery Co., 23 Wis. 584.

Where from the unquestioned facts it is evident that plaintiff's action cannot be maintained, it is proper for the justice to direct a nonsuit. Bryant *v.* Great Northern Paper Co., 103 Me. 32, 68 Atl. 379.

Whenever plaintiff's evidence conclusively establishes a defense the court may direct a judgment by way of nonsuit. Goldstone *v.* Merchants' Ice, etc., Co., 123 Cal. 625, 56 Pac. 776; McQuilken *v.* Central Pac. R. Co., 50 Cal. 7.

10. Zipperer *v.* Savannah, 128 Ga. 135, 57 S. E. 311.

11. *California.*—*In re* Morey, 147 Cal. 495, 82 Pac. 57; Goldstone *v.* Merchants' Ice, etc., Co., 123 Cal. 625, 56 Pac. 776; Downing *v.* Murray, 113 Cal. 455, 45 Pac. 869; Vanderford *v.* Foster, 65 Cal. 49, 2 Pac. 736; McQuilken *v.* Central Pac. R. Co., 50 Cal. 7; Geary *v.* Simmons, 39 Cal. 224; Ringgold *v.* Haven, 1 Cal. 108; Bush *v.* Wood, 8 Cal. App. 647, 97 Pac. 709.

Colorado.—Watson *v.* Manitou, etc., R. Co., 41 Colo. 138, 92 Pac. 17, 17 L. R. A. N. S. 916; Snyder *v.* Colorado Springs, etc., R. Co., 36 Colo. 288, 85 Pac. 686, 8 L. R. A. N. S. 781; Chivington *v.* Colorado Springs Co., 9 Colo. 597, 14 Pac. 212.

Iowa.— Mason *v.* Lewis, 1 Greene 494.

Massachusetts.— Hoyt *v.* Gilman, 8 Mass. 336.

Montana.— Coulter *v.* Union Laundry Co., 34 Mont. 590, 87 Pac. 973.

New York.— Lane *v.* Hancock, 142 N. Y. 510, 37 N. E. 473; Hemmens *v.* Nelson, 138 N. Y. 517, 34 N. E. 342, 20 L. R. A. 440; Linkauf *v.* Lombard, 137 N. Y. 418, 33 N. E. 472, 33 Am. St. Rep. 743, 20 L. R. A. 48; Cohn *v.* David Mayer Brewing Co., 38 N. Y. App. Div. 5, 56 N. Y. Suppl. 293; Ernst *v.* Hudson River R. Co., 32 How. Pr. 262; Ernst *v.* Hudson River R. Co., 24 How. Pr. 97. But see McDonald *v.* Metropolitan St. R. Co., 167 N. Y. 66, 60 N. E. 282; Fealey *v.* Bull, 163 N. Y. 397, 57 N. E. 631, which decisions, it is believed, overrule the prior New York decisions, although an attempt is made to distinguish them.

Oregon.— Grant *v.* Baker, 12 Oreg. 329, 7 Pac. 318.

Wisconsin.— Dryden *v.* Britton, 19 Wis. 22; Hunter *v.* Warner, 1 Wis. 141.

Contra.—Wallace *v.* Southern Cotton Oil Co., 91 Tex. 18, 40 S. W. 399; Galveston, etc., R. Co. *v.* Pigott, (Tex. Civ. App. 1909) 116 S. W. 841.

Limitations of rule.— The above rule does not mean that in every case where the trial court might properly grant a new trial for insufficiency of evidence for plaintiff, it should grant a motion for nonsuit, if made after both parties rest their case, but only that it should do so in very clear cases, which is practically the rule which controls in directing a verdict. *In re* Morey, 147 Cal. 495, 82 Pac. 57; Colt *v.* Sixth Ave. R. Co., 49 N. Y. 671. And see Howell *v.* New York Cent., etc., R. Co., 68 N. Y. App. Div. 409, 73 N. Y. Suppl. 994.

12. Johnson *v.* Rycroft, 4 Ga. App. 547, 61 S. E. 1052; Golden *v.* Ellis, 104 Me. 177, 71 Atl. 649.

13. Lyons *v.* Waycross Air-Line R. Co., 114 Ga. 727, 40 S. E. 698; Weems *v.* Simpson, 93 Ga. 364, 20 S. E. 548; Akin *v.* Feagin, 90 Ga. 72, 15 S. E. 654; Stevens *v.* United Gas, etc., Co., 73 N. H. 159, 60 Atl. 848, 70

evidence would not sustain a finding for plaintiff;[14] or where his counsel, in making his opening statement, admits or states facts which preclude a recovery.[15] But the statement must not only be insufficient, but must contain admissions fatal to the action.[16] The motion should in no case be granted merely because counsel in his opening statement fails to state facts sufficient to constitute a cause of action, because, notwithstanding the opening statement, the evidence might warrant a recovery.[17] Where defendant relies on an affirmative defense, plaintiff may move the court to instruct that the plea is not supported, the issue thus raised to be decided by the rules of nonsuit.[18]

(II) *When Refused.* To authorize a nonsuit, it has been said, the evidence must be so conclusive that all reasonable men in the exercise of an honest and impartial judgment can draw but one conclusion from it.[19] The circumstances under which a nonsuit should be refused have been variously stated as follows: When the essential elements of plaintiff's cause of action are admitted by defendant's pleading;[20] where plaintiff makes out a *prima facie* case,[21] unless a verdict for plaintiff would be against the clear weight and effect of the defensive evidence whatever may be its character;[22] when, on the evidence adduced, plaintiff is entitled to have his case, as made by his pleadings,[23] submitted to the jury;[24] when the

L. R. A. 119; Ernst *v.* Hudson River R. Co., 24 How. Pr. (N. Y.) 97.

14. *Colorado.*— King Powder Co. *v.* Dillon, 42 Colo. 316, 96 Pac. 439.

Connecticut.— Crotty *v.* Danbury, 79 Conn. 379, 65 Atl. 147.

Minnesota.— Minneapolis Threshing Mach. Co. *v.* Jones, 95 Minn. 127, 103 N. W. 1017.

New York.— Meschneck *v.* Brooklyn, etc., R. Co., 125 N. Y. App. Div. 265, 109 N. Y. Suppl. 594; Masten *v.* Deyo, 2 Wend. 424; Porpeglia *v.* Beam, 108 N. Y. Suppl. 1072; Jonasson *v.* Eames, 21 N. Y. Suppl. 714 [*affirmed* in 142 N. Y. 653, 37 N. E. 569].

Rhode Island.— Greene *v.* Steere Worsted Mills, (1908) 69 Atl. 922.

Action against two defendants.— If in an action against two defendants there is no evidence on which a verdict could be rendered against one of them, a dismissal of the action as to one of them is not error. Steele *v.* Grahl-Peterson Co., (Iowa 1906) 109 N. W. 882.

15. Miner *v.* Hopkinton, 73 N. H. 232, 60 Atl. 433; Sims *v.* Metropolitan St. R. Co., 65 N. Y. App. Div. 270, 72 N. Y. Suppl. 835; Coyle *v.* Nies, 6 N. Y. St. 194.

16. Emmerson *v.* Weeks, 58 Cal. 382; Darton *v.* Interborough Rapid Transit Co., 125 N. Y. App. Div. 836, 110 N. Y. Suppl. 171; Stewart *v.* Hamilton, 3 Rob. (N. Y.) 672, 18 Abb. Pr. 298, 28 How. Pr. 265.

In Wisconsin, the practice of granting a nonsuit, on the opening statement of the case by counsel for plaintiff, does not prevail, and never has prevailed. Haley *v.* Western Transit Co., 76 Wis. 344, 45 N. W. 16; Smith *v.* Commonwealth Ins. Co., 49 Wis. 322, 5 N. W. 804; Fisher *v.* Fisher, 5 Wis. 472.

17. Darton *v.* Interborough Rapid Transit Co., 125 N. Y. App. Div. 836, 110 N. Y. Suppl. 171; Stewart *v.* Hamilton, 3 Rob. (N. Y.) 672, 18 Abb. Pr. 298, 28 How. Pr. 265; Sullivan *v.* Williamson, 21 Okla. 844, 98 Pac. 1001. And see Hoffman House *v.* Foote, 172 N. Y. 348, 350, 65 N. E. 169, in which it was said: "The practice of disposing of cases upon the mere opening of counsel is generally a very unsafe method of deciding controversies, where there is or ever was anything to decide. It cannot be resorted to in many cases with justice to the parties, unless the counsel stating the case to the jury deliberately and intentionally states or admits some fact that, in any view of the case, is fatal to the action.

18. Clay *v.* Johnson, 6 T. B. Mon. (Ky.) 644; McMichael *v.* Raeul, 14 La. Ann. 307.

19. Hallett *v.* S. Liebmann's Sons Brewing Co., 129 N. Y. App. Div. 617, 114 N. Y. Suppl. 232.

20. Reagin *v.* Almand, 112 Ga. 740, 37 S. E. 968; Potter *v.* Sewall, 54 Me. 142; Frost *v.* Ainslie Lumber Co., 3 Wash. 241, 28 Pac. 354, 915; Dickson *v.* Cole, 34 Wis. 621.

21. *California.*— Non-Refillable Bottle Co. *v.* Robertson, 8 Cal. App. 103, 96 Pac. 324.

Georgia.— Joiner *v.* Stallings, 127 Ga. 203, 56 S. E. 304; Robinson *v.* Leatherbee Tie, etc., Co., 120 Ga. 901, 48 S. E. 380; Kelly *v.* Strouse, 116 Ga. 872, 43 S. E. 280; Savannah, etc., R. Co. *v.* Ladson, 114 Ga. 762, 40 S. E. 699; Pendleton *v.* Atlantic Lumber Co., 3 Ga. App. 714, 60 S. E. 377.

Idaho.— Kroetch *v.* Empire Mill Co., 9 Ida. 277, 74 Pac. 868.

New York.— Kohl *v.* Metropolitan St. R. Co., 32 Misc. 765, 66 N. Y. Suppl. 482.

Washington.— Wood *v.* Earls, 39 Wash. 21, 80 Pac. 837.

Refusal of nonsuit proper.— Where plaintiff's evidence makes out a *prima facie* case in its favor, it is not error to refuse to grant a nonsuit. Jenkins *v.* Jones, 128 Ga. 801, 58 S. E. 354; Rounsaville *v.* Leonard Mfg. Co., 127 Ga. 735, 56 S. E. 1030; Jonesville Mfg. Co. *v.* Southern R. Co., 77 S. C. 480, 58 S. E. 422.

22. Rudd *v.* Davis, 3 Hill (N. Y.) 287.

23. Tifton, etc., R. Co. *v.* Chastain, 122 Ga. 250, 50 S. E. 105; Southern Bauxite Min., etc., Co. *v.* Fuller, 116 Ga. 695, 43 S. E. 64; Niland *v.* Geer, 46 N. Y. App. Div. 194, 61 N. Y. Suppl. 696.

24. *Colorado.*— De St. Aubin *v.* Field, 27

evidence, although not direct, tends to establish plaintiff's case;[25] where there is some substantial evidence in support of plaintiff's case;[26] where there is a conflict in the evidence,[27] notwithstanding discrepancies between testimony of witnesses called for plaintiff,[28] and regardless of the preponderance of the evidence.[29] So a nonsuit should be refused where the evidence and the presumptions arising therefrom are legally sufficient to prove the material allegations of the complaint;[30] where there is any evidence, although it may be slight,[31]

Colo. 414, 62 Pac. 199; Hazy *v.* Woitke, 23 Colo. 556, 48 Pac. 1048.

Georgia.— Jesup *v.* Atlantic, etc., R. Co., 123 Ga. 269, 51 S. E. 315; Sheppard *v.* Lang, 122 Ga. 607, 50 S. E. 371; Akridge *v.* Georgia Cent. R. Co., 120 Ga. 338, 47 S. E. 904; Bellinger *v.* Thompson, 112 Ga. 111, 37 S. E. 110; Green *v.* Collins, 36 Ga. 581.

Idaho.— Rauh *v.* Oliver, 10 Ida. 3, 77 Pac. 20; Idaho Mercantile Co. *v.* Kalanquin, 7 Ida. 295, 62 Pac. 925.

Minnesota.— Sexton *v.* Steele, 60 Minn. 336, 62 N. W. 392.

New York.— Rosenstock *v.* Dessar, 85 N. Y. App. Div. 501, 83 N. Y. Suppl. 334 [*reversing* 33 Misc. 419, 67 N. Y. Suppl. 657].

North Carolina.— Tyson *v.* Jones, 150 N. C. 181, 63 S. E. 734; Cooper *v.* Rowland, 149 N. C. 353, 63 S. E. 6.

South Carolina.—Austin *v.* Piedmont Mfg. Co., 67 S. C. 122, 45 S. E. 135.

25. Lamkin *v.* Johnson, 72 N. H. 344, 56 Atl. 750; Meehan *v.* Judson, 43 N. Y. App. Div. 46, 59 N. Y. Suppl. 578; Puryear *v.* Ould, 81 S. C. 456, 62 S. E. 863; Hupfer *v.* National Distilling Co., 119 Wis. 417, 96 N. W. 809. And see Wade *v.* McLean Contracting Co., 149 N. C. 177, 62 S. E. 919.

26. Lally *v.* Prudential Ins. Co., 75 N. H. 188, 72 Atl. 208.

27. Wassermann *v.* Sloss, 117 Cal. 425, 49 Pac. 566, 59 Am. St. Rep. 209, 38 L. R. A. 176; Pacific Mut. L. Ins. Co. *v.* Fisher, 109 Cal. 566, 42 Pac. 154; Archibald *v.* Matteson, 5 Cal. App. 441, 90 Pac. 723; Place *v.* New York Cent., etc., R. Co., 167 N. Y. 345, 60 N. E. 632 [*reversing* 45 N. Y. App. Div. 629, 61 N. Y. Suppl. 1145]; Kelly *v.* Brooklyn Heights R. Co., 64 N. Y. Suppl. 64 [*affirmed* in 54 N. Y. App. Div. 627, 66 N. Y. Suppl. 1134]; Cassidy *v.* Spingarn, 32 Misc. 752, 65 N. Y. Suppl. 798; Short *v.* Gill, 126 N. C. 803, 36 S. E. 336; West *v.* Eley, 39 Oreg. 461, 65 Pac. 798. And see Hayward *v.* North Jersey St. R. Co., 74 N. J. L. 678, 65 Atl. 737, 8 L. R. A. N. S. 1062.

28. Kaufman *v.* Bush, 69 N. J. L. 645, 56 Atl. 291.

29. Ellis *v.* Ohio L. Ins., etc., Co., 4 Ohio St. 628, 64 Am. Dec. 610; Bartholomew *v.* Kemmerer, 211 Pa. St. 277, 60 Atl. 908. *Contra*, Kohn *v.* Consolidated Butter, etc., Co., 30 Misc. (N. Y.) 725, 63 N. Y. Suppl. 265.

30. Goldstone *v.* Merchants' Ice, etc., Co., 123 Cal. 625, 56 Pac. 776; Higgins *v.* Ragsdale, 83 Cal. 219, 23 Pac. 316; Felton *v.* Millard, 81 Cal. 540, 21 Pac. 533, 22 Pac. 750; Alvarado *v.* De Celis, 54 Cal. 588; McKee *v.* Greene, 31 Cal. 418; De Ro *v.* Cordes, 4 Cal. 117; Hercules Oil Refining Co. *v.* Hocknell, 5 Cal. App. 702, 91 Pac. 341; Archibald *v.* Matteson, 5 Cal. App. 441, 90 Pac. 723; Wheaton *v.* Newcombe, 48 N. Y. Super. Ct. 215.

31. *Georgia.*— Jackson *v.* Georgia R., etc., Co., 120 Ga. 1009, 48 S. E. 420; Augusta Amateur Musical Club *v.* Cotton States Mechanics', etc., Fair Assoc., 50 Ga. 436; Greene *v.* Barnwell, 11 Ga. 282.

Idaho.— Small *v.* Harrington, 10 Ida. 499, 79 Pac. 461; Idaho Comstock Min., etc., Co. *v.* Lundstrum, 9 Ida. 257, 74 Pac. 975.

Kentucky.— Smith *v.* Park, 84 S. W. 1167, 27 Ky. L. Rep. 351.

Minnesota.— Hamm Realty Co. *v.* New Hampshire F. Ins. Co., 80 Minn. 139, 83 N. W. 41.

Montana.— Nord *v.* Boston, etc., Consol. Copper, etc., Min. Co., 30 Mont. 48, 75 Pac. 681.

New Hampshire.—State *v.* Collins, 68 N. H. 299, 44 Atl. 495, some evidence to support allegations.

Ohio.— Cleveland Axle Co. *v.* Zilch, 12 Ohio Cir. Ct. 578, 6 Ohio Cir. Dec. 699; Gates *v.* Home Mut. L. Ins. Co., 5 Ohio Dec. (Reprint) 313, 4 Am. L. Rec. 395; Miller *v.* Armleder, 6 Ohio S. & C. Pl. Dec. 340, 4 Ohio N. P. 234.

Oregon.— North Pac. Lumber Co. *v.* Spore, 44 Oreg. 462, 75 Pac. 890; Perkins *v.* McCullough, 36 Oreg. 146, 59 Pac. 182; Richmond *v.* McNeill, 31 Oreg. 342, 49 Pac. 879; Vanbebber *v.* Plunkett, 26 Oreg. 562, 38 Pac. 707, 27 L. R. A. 811; Wallace *v.* Suburban R. Co., 26 Oreg. 174, 37 Pac. 477, 25 L. R. A. 663; Hedin *v.* Suburban R. Co., 26 Oreg. 155, 37 Pac. 540; Herbert *v.* Dufur, 23 Oreg. 462, 32 Pac. 302; Ryberg *v.* Portland Cable R. Co., 22 Oreg. 224, 29 Pac. 614; Salomon *v.* Cress, 22 Oreg. 177, 29 Pac. 439; Anderson *v.* North Pac. Lumber Co., 21 Oreg. 281, 28 Pac. 5; Salmon *v.* Olds, 9 Oreg. 488; Southwell *v.* Beexley, 5 Oreg. 458; Tippin *v.* Ward, 5 Oreg. 450.

Pennsylvania.— Dinan *v.* Supreme Council C. M. B. A., 210 Pa. St. 456, 60 Atl. 10; Bellman *v.* Pittsburg, etc., R. Co., 31 Pa. Super. Ct. 389; Kelton *v.* Fifer, 26 Pa. Super. Ct. 603; Kaufman *v.* Abeles, 11 Pa. Super. Ct. 616.

South Carolina.— Koon *v.* Southern R. Co., 69 S. C. 101, 48 S. E. 86; Hughes *v.* Lancaster County School Dist. No. 37, 66 S. C. 259, 44 S. E. 784; Salley *v.* Manchester, etc., R. Co., 62 S. C. 127, 40 S. E. 111; Marshall *v.* Mitchell, 59 S. C. 523, 38 S. E. 158; Jenkins *v.* Charleston St. R. Co., 58 S. C. 373, 36 S. E. 703; Beckham *v.* Southern R. Co., 50 S. C. 25, 27 S. E. 611; Whaley *v.* Bartlett, 42 S. C. 454, 20 S. E. 745; Kinard *v.* Columbia, etc., R. Co., 39 S. C. 514, 18 S. E. 119; Munroe *v.*

if it amounts to more than a scintilla;[32] where the evidence would authorize a finding for either party,[33] where upon any construction which the jury is authorized to put upon the evidence, or by any inference they are authorized to draw from it, plaintiff is entitled to recover;[34] or where the evidence in any reasonable view, giving plaintiff the benefit of the most reasonable inference, will support a verdict in his favor.[35] It is not a ground for nonsuit or dismissal that recovery must be limited to nominal damages,[36] or to only a portion of the amount sued for in the petition,[37] provided a cause of action of any kind is stated in plaintiff's petition and supported by the evidence.[38] Where there are several defendants and the evidence warrants a recovery as to one of them only, a motion to nonsuit as to all should be denied.[39] The same is true where there are several plaintiffs and but one of them is shown to have a cause of action.[40] A general motion to dismiss an action by several plaintiffs should be denied, where a cause of action is shown as to two.[41] A nonsuit goes to the whole of a case, and it is error to sustain a nonsuit as to part of plaintiff's cause of action.[42]

Williams, 35 S. C. 572, 15 S. E. 279; Petrie *v.* Columbia, etc., R. Co., 29 S. C. 303, 7 S. E. 515; Bridger *v.* Asheville, etc., R. Co., 25 S. C. 24; Clason *v.* Bird, 2 Brev. 370.

32. Butts *v.* Atlantic, etc., R. Co., 133 N. C. 82, 45 S. E. 472; Bellman *v.* Pittsburg, etc., R. Co., 31 Pa. Super. Ct. 389; Kaufman *v.* Abeles, 11 Pa. Super. Ct. 616.

33. Ambrose *v.* Seaboard, etc., R. Co., 115 Ga. 475, 41 S. E. 566; Dover, etc., R. Co. *v.* Deal, 115 Ga. 42, 41 S. E. 256; Flewellen *v.* Flewellen, 114 Ga. 403, 40 S. E. 301; Harris *v.* Eggleston, 47 N. Y. App. Div. 169, 62 N. Y. Suppl. 221; Lindsay *v.* Murphy, (Tex. Civ. App. 1898) 48 S. W. 531; Beyer *v.* St. Paul F. & M. Ins. Co., 112 Wis. 138, 88 N. W. 57.

Where there is sufficient evidence to authorize a verdict for plaintiff, a nonsuit is properly refused. Malcolm *v.* Dobbs, 127 Ga. 487, 56 S. E. 622; Adams *v.* Haigler, 2 Ga. App. 99, 58 S. E. 330.

34. Cochrell *v.* Langley Mfg. Co., 5 Ga. App. 317, 63 S. E. 244; Pendleton *v.* Atlantic Lumber Co., 3 Ga. App. 714, 60 S. E. 377; Adams *v.* Bunker Hill, etc., Min. Co., 12 Ida. 637, 89 Pac. 624.

35. Kortendick *v.* Waterford, 135 Wis. 77, 115 N. W. 331; Badger *v.* Janesville Cotton Mills, 95 Wis. 599, 70 N. W. 687; Gower *v.* Chicago, etc., R. Co., 45 Wis. 182.

36. *California.*— Hancock *v.* Hubbell, 71 Cal. 537, 12 Pac. 618.

Georgia.— Bloom *v.* Americus Grocery Co., 116 Ga. 784, 43 S. E. 54; Roberts *v.* Glass, 112 Ga. 456, 37 S. E. 704; Howard *v.* Dayton Coal, etc., Co., 94 Ga. 416, 20 S. E. 336.

Minnesota.— Farmer *v.* Crosby, 43 Minn. 459, 45 N. W. 866; Potter *v.* Mellen, 36 Minn. 122, 30 N. W. 438.

New Hampshire.— Watts *v.* Sawyer, 55 N. H. 38.

New York.— Van Rensselaer *v.* Jewett, 2 N. Y. 135, 51 Am. Dec. 275; Rumsey *v.* New York, etc., R. Co., 63 Hun 200, 17 N. Y. Suppl. 672 [*affirmed* in 137 N. Y. 563, 33 N. E. 338]; Toop *v.* New York, 13 N. Y. Suppl. 280; People *v.* Metropolitan Tel., etc., Co., 11 Abb. N. Cas. 304, 64 How. Pr. 120.

North Carolina.— Edwards *v.* Erwin, 148 N. C. 429, 62 S. E. 545.

Limitation of rule.— Where the sole object of the recovery is damages, a failure to prove substantial damages is a failure to prove the substance of the issue and entitles defendant to a judgment of nonsuit, or a judgment that the appellant take nothing by his action. It is only where the verdict of the jury will determine some property or permanent personal right that the verdict must be taken regardless of the question whether the amount returned is substantial or nominal. Woodhouse *v.* Powles, 43 Wash. 617, 86 Pac. 1062, 117 Am. St. Rep. 1079, 8 L. R. A. N. S. 783. See also Commercial Inv. Co. *v.* National Bank of Commerce, 36 Wash. 287, 78 Pac. 910; Johnson *v.* Cook, 24 Wash. 474, 64 Pac. 729.

37. Philpot *v.* Chattanooga, etc., R. Co., 114 Ga. 295, 40 S. E. 266; Teasley *v.* Bradley, 110 Ga. 497, 35 S. E. 782, 78 Am. St. Rep. 113; Pendleton *v.* Atlantic Lumber Co., 3 Ga. App. 714, 60 S. E. 377.

38. Rettner *v.* Minnesota Cold-Storage Co., 88 Minn. 352, 93 N. W. 120; McClure *v.* New York Cent. Trust Co., 165 N. Y. 108, 58 N. E. 777, 53 L. R. A. 153; Andrews *v.* Brewster, 11 N. Y. Suppl. 324.

39. Howard *v.* Dayton Coal, etc., Co., 94 Ga. 416, 20 S. E. 336; Howard *v.* Snelling, 28 Ga. 469; Lewis *v.* Iba, 10 N. Y. Suppl. 537; Norman *v.* Carter, 1 N. Y. Suppl. 253; Gerhardt *v.* Swaty, 57 Wis. 24, 14 N. W. 851.

40. Lord *v.* Lord, 11 N. Y. Suppl. 389.

41. Wolverton *v.* Rogers, 123 N. Y. App. Div. 45, 107 N. Y. Suppl. 883.

42. Southern States Exploring, etc., Syndicate *v.* McManus, 113 Ga. 982, 39 S. E. 480; Southern R. Co. *v.* Hardin, 107 Ga. 379, 33 S. E. 436; Talbotton R. Co. *v.* Gibson, 106 Ga. 229, 32 S. E. 151; Central R., etc., Co. *v.* Bryant, 89 Ga. 457, 15 S. E. 537; Buchanan *v.* Cheseborough, 5 Duer (N. Y.) 238; Williams *v.* Freeman, 7 N. Y. St. 274, 12 N. Y. Civ. Proc. 334. And see Atchison, etc., R. Co. *v.* Adcock, 38 Colo. 369, 88 Pac. 180.

Where plaintiff relies for recovery on several acts of wrong or negligence, proof of any one of them, itself actionable, is sufficient to prevent a nonsuit. Brooks *v.* Atlanta, 1 Ga. App. 678, 57 S. E. 1081.

The admission of improper evidence is not ground for nonsuit.[43] Where a petition sets forth a cause of action against all of the defendants and one fails to answer, the allegations against him are to be taken as true, and a nonsuit should not be rendered in his favor.[44]

b. On Trial by Court. According to some decisions where the case is tried without a jury, on motion for nonsuit or dismissal at the close of plaintiff's evidence, the court should decide the motion according to the preponderance of the evidence.[45] Other decisions, however, hold that the rules as to nonsuit are the same whether the trial is by the court or by a jury.[46] According to these decisions the motion is not addressed to the court sitting as a jury when the latter has been waived, but is a question of law alone submitted to the judgment of the court as such, and the court sitting as a jury has no more concern with it than it could have with the decision of a question on demurrer to a pleading.[47]

7. Exceptions to Rulings. If a motion for nonsuit is sustained an exception by plaintiff lies to the sustaining of the motion.[48] In some jurisdictions the granting of a motion for nonsuit is purely a matter of discretion, and a denial of the motion is not ground of exception by defendant.[49] And, in some jurisdictions, while the refusal of the motion is reviewable, the remedy is by motion for new trial and not by exception.[50] In other jurisdictions the right to except to the denial of the motion is recognized.[51]

8. Waiver of Error in Rulings on Motion. It is well settled that error in overruling a motion for dismissal or nonsuit at the close of plaintiff's case is waived where defendant introduces evidence which supplies the defects in plaintiff's proof,[52] and according to the weight of authority, such error is waived by

43. Lee *v.* Unkefer, 77 S. C. 460, 58 S. E. 343; Ashe *v.* Carolina, etc., R. Co., 65 S. C. 134, 46 S. E. 393.

44. Caudell *v.* Caudell, 127 Ga. 1, 55 S. E. 1028.

45. Hayward *v.* Jackman, 96 Iowa 77, 64 N. W. 667; Neuberger *v.* Keim, 134 N. Y. 35, 31 N. E. 268; Lambuth *v.* Stetson, etc., Mill Co., 14 Wash. 187, 190, 44 Pac. 148, in which it was said: "When the trial is without a jury, the court must eventually weigh the testimony for the purpose of determining where the preponderance is, and there is no reason why it should not so weigh it at the earliest possible time, when the rights of the plaintiff will not be cut off by its so doing."

46. Goldstone *v.* Merchants' Ice, etc., Co., 123 Cal. 625, 56 Pac. 776; Archibald *v.* Matteson, 5 Cal. App. 441, 90 Pac. 723.

Evidence insufficient to support judgment.— Where the trial is by the court a nonsuit should be granted if the evidence is insufficient to support a judgment for plaintiff. Downing *v.* Murray, 113 Cal. 455, 45 Pac. 869.

47. Archibald *v.* Matteson, 5 Cal. App. 441, 90 Pac. 723.

48. Bragdon *v.* Appleton Mut. F. Ins. Co., 42 Me. 259.

49. Dubuque *v.* Coman, 64 Conn. 475, 30 Atl. 777; Bennett *v.* Agricultural Ins. Co., 51 Conn. 504; Wetherbee *v.* Potter, 99 Mass. 354; Morgan *v.* Ide, 8 Cush. (Mass.) 420.

50. Bunker *v.* Gouldsboro, 81 Me. 188, 16 Atl. 543; Bragdon *v.* Appleton Mut. F. Ins. Co., 42 Me. 259.

51. See cases cited in this and following notes in this section.

Questions raised by exception.—Where it is the practice for defendant to except to such ruling, the exception merely raises the question whether there is sufficient evidence to sustain a verdict for plaintiff. Szuchy *v.* Hillside Coal, etc., Co., 150 N. Y. 219, 44 N. E. 974.

Effect of failure to except.— Defendant by failing to except concedes that the testimony is sufficient to warrant the submission of the case to the jury. Einson *v.* North River Electric Light, etc., Co., 34 Misc. (N. Y.) 191, 68 N. Y. Suppl. 836.

Sufficiency of exception.—Plaintiff need not necessarily use the technical phrase "I except." Woolsey *v.* Lasher, 35 N. Y. App. Div. 108, 54 N. Y. Suppl. 737.

Where there are several defendants, plaintiff's failure to except to a nonsuit as to one or more of them amounts to an abandonment of the joint action and an election to proceed against defendant not discharged. Ellis *v.* Almand, 115 Ga. 333, 47 S. E. 642.

In South Carolina.— Where defendant introduces evidence after his motion for nonsuit at the close of plaintiff's evidence is overruled, he waives any right he has under such motion, but may renew the motion at the close of all the evidence. Parlier *v.* Southern R. Co., 129 N. C. 262, 39 S. E. 961; Means *v.* Carolina Cent. R. Co., 126 N. C. 424, 35 S. E. 813. If he fails to do so he has no ground of complaint because of the overruling of the motion. Bordeaux *v.* Atlantic Coast Line R. Co., 150 N. C. 528, 64 S. E. 439.

52. *California.*— Lowe *v.* San Francisco etc., R. Co., 154 Cal. 573, 98 Pac. 678; Lyor *v.* United Moderns, 148 Cal. 470, 83 Pac. 804 113 Am. St. Rep. 291, 4 L. R. A. N. S. 247;

the mere fact of defendant's introducing evidence,[53] at least unless the motion

Higgins *v.* Ragsdale, 83 Cal. 219, 23 Pac. 316; Levy *v.* Wolf, 2 Cal. App. 491, 84 Pac. 313.

Colorado.— Weil *v.* Nevitt, 18 Colo. 10, 31 Pac. 487; Horn *v.* Reitler, 15 Colo. 316, 25 Pac. 501; Denver, etc., R. Co. *v.* Henderson, 10 Colo. 1, 13 Pac. 910; Denver, etc., R. Co. *v.* Robinson, 6 Colo. App. 432, 40 Pac. 840 [*affirmed* in 24 Colo. 98, 49 Pac. 37].

Georgia.— Alabama Constr. Co. *v.* Continental Car, etc., Co., 131 Ga. 365, 62 S. E. 160; Georgia R., etc., Co. *v.* Reeves, 123 Ga. 697, 51 S. E. 610; Werner *v.* Footman, 54 Ga. 128.

Minnesota.—Ingalls *v.* Oberg, 70 Minn. 102, 72 N. W. 841.

Mississippi.— Maclin *v.* Bloom, 54 Miss. 365.

Montana.—Van Vranken *v.* Granite County, 35 Mont. 427, 90 Pac. 164.

New Hampshire.— Lane *v.* Manchester Mills, 75 N. H. 102, 71 Atl. 629.

New Jersey.— Van Cott *v.* North Jersey St. R. Co., 72 N. J. L. 229, 62 Atl. 407; Farnsworth *v.* Miller, (Sup. 1905) 60 Atl. 1100 [*affirmed* in 74 N. J. L. 599, 70 Atl. 1100]; Carey *v.* Hamburg American Packet Co., 72 N. J. L. 56, 60 Atl. 179; Bostwick *v.* Willett, 72 N. J. L. 21, 60 Atl. 398; Esler *v.* Camden, etc., R. Co., 71 N. J. L. 180, 58 Atl. 113.

New York.— Bopp *v.* New York Electric Vehicle Transp. Co., 177 N. Y. 33, 69 N. E. 122 [*affirming* 78 N. Y. App. Div. 337, 79 N. Y. Suppl. 1035]; Painton *v.* Northern Cent. R. Co., 83 N. Y. 7; Jones *v.* Union R. Co., 18 N. Y. App. Div. 267, 46 N. Y. Suppl. 321; O'Connell *v.* Samuel, 81 Hun 357, 30 N. Y. Suppl. 889; Reshofsky *v.* Weisz, 53 Misc. 602, 103 N. Y. Suppl. 718.

Ohio.— Doren *v.* Fleming, 27 Ohio Cir. Ct. 737.

Oregon.— Trickey *v.* Clark, 50 Oreg. 516, 93 Pac. 457; Weinhard *v.* Commercial Nat. Bank, 41 Oreg. 359, 68 Pac. 806 [*affirmed* in 192 U. S. 243, 24 S. Ct. 253, 48 L. ed. 425].

South Carolina.— Hicks *v.* Southern R. Co., (1901) 38 S. E. 725, 866, 63 S. C. 559, 41 S. E. 753; Martin *v.* Southern R. Co., 51 S. C. 150, 28 S. E. 303.

Washington.— Schon *v.* Modern Woodmen of America, 51 Wash. 482, 99 Pac. 25; Dignam *v.* Shaff, 51 Wash. 412, 98 Pac. 1113, 22 L. R. A. N. S. 996; Elmendorf *v.* Golden, 37 Wash. 664, 80 Pac. 264; Cattell *v.* Fergusson, 3 Wash. 541, 28 Pac. 750.

Wisconsin.— Barton *v.* Kane, 17 Wis. 37, 84 Am. Dec. 728; Dodge *v.* McDonnell, 14 Wis. 553.

See 46 Cent. Dig. tit. "Trial," § 982.

53. *Idaho.*— Chamberlain *v.* Woodin, 2 Ida. (Hasb.) 642, 23 Pac. 177.

Illinois.— Chicago, etc., R. Co. *v.* Wedel, 144 Ill. 9, 32 N. E. 547 [*affirming* 44 Ill. App. 215]; Joliet, etc., R. Co. *v.* Velie, (1891) 26 N. E. 1086.

Iowa.— Field *v.* Thornell, 106 Iowa 7, 75 N. W. 685, 68 Am. St. Rep. 281.

Maryland.—New York, etc., R. Co. *v.* Jones, 94 Md. 24, 50 Atl. 423; United R., etc., Co. *v.* State, 93 Md. 619, 49 Atl. 923, 86 Am. St. Rep. 453, 54 L. R. A. 942; Cowen *v.* Watson, 91 Md. 344, 46 Atl. 996.

Massachusetts.— Hall *v.* Wakefield, etc., St. R. Co., 178 Mass. 98, 59 N. E. 668; Goss *v.* Calkins, 162 Mass. 492, 39 N. E. 469; Hurley *v.* O'Sullivan, 137 Mass. 86; Bradley *v.* Poole, 98 Mass. 169, 93 Am. Dec. 144; McGregory *v.* Prescott, 5 Cush. 67.

Michigan.— Lynch *v.* Johnson, 109 Mich. 640, 67 N. W. 908.

New York.— Wangner *v.* Grimm, 169 N. Y. 421, 62 N. E. 569 [*affirming* 53 N. Y. App. Div. 626, 65 N. Y. Suppl. 1134]; Littlejohn *v.* Shaw, 159 N. Y. 188, 53 N. E. 810 [*affirming* 6 N. Y. App. Div. 492, 39 N. Y. Suppl. 595]; Hopkins *v.* Clark, 158 N. Y. 299, 53 N. E. 27; Cefola *v.* Siegel-Cooper Co., 127 N. Y. App. Div. 903, 111 N. Y. Suppl. 1112; Reade *v.* Continental Trust Co., 49 N. Y. App. Div. 400, 63 N. Y. Suppl. 395 [*modifying* 28 Misc. 721, 60 N. Y. Suppl. 258]; McDowell *v.* Syracuse Land, etc., Co., 44 Misc. 627, 90 N. Y. Suppl. 148; Leber *v.* Campbell Stores, 31 Misc. 474, 64 N. Y. Suppl. 464 [*affirming* 31 Misc. 804, 62 N. Y. Suppl. 1124]; Morgan *v.* Onward Constr. Co., 115 N. Y. Suppl. 1069.

North Carolina.— Jones *v.* Warren, 134 N. C. 390, 46 S. E. 740; Ratliff *v.* Ratliff, 131 N. C. 425, 42 S. E. 887, 63 L. R. A. 963.

Utah.— Thompson *v.* Avery, 11 Utah 214, 39 Pac. 829.

Vermont.— Carr *v.* Manahan, 44 Vt. 246.

United States.— Sigafus *v.* Porter, 179 U. S. 116, 21 S. Ct. 34, 45 L. ed. 113; Runkle *v.* Burnham, 153 U. S. 216, 14 S. Ct. 837, 38 L. ed. 694; Union Pac. R. Co. *v.* Snyder, 152 U. S. 684, 14 S. Ct. 756, 38 L. ed. 597; Columbia, etc., R. Co. *v.* Hawthorne, 144 U. S. 202, 12 S. Ct. 591, 36 L. ed. 405; Northern Pac. R. Co. *v.* Mares, 123 U. S. 710, 8 S. Ct. 321, 31 L. ed. 296; Levy *v.* Larson, 167 Fed. 110, 92 C. C. A. 562; Northwestern Steamship Co. *v.* Griggs, 146 Fed. 472, 77 C. C. A. 28; Walton *v.* Wild Goose Min., etc., Co., 123 Fed. 209, 60 C. C. A. 155; Fulkerson *v.* Chisna Min., etc., Co., 122 Fed. 782, 58 C. C. A. 582; Hughes County *v.* Livingston, 104 Fed. 306, 43 C. C. A. 541; Commercial Travelers' Mut. Acc. Assoc. *v.* Fulton, 93 Fed. 621, 35 C. C. A. 493; Keener *v.* Baker, 93 Fed. 377, 35 C. C. A. 350; Philadelphia, etc., R. Co. *v.* Young, 90 Fed. 709, 33 C. C. A. 251; Jefferson *v.* Burhans, 85 Fed. 924, 29 C. C. A. 487; Union Casualty, etc., Co. *v.* Schwerin, 80 Fed. 638, 26 C. C. A. 45; Western Union Tel. Co. *v.* Thorn, 64 Fed. 287, 12 C. C. A. 104.

See 46 Cent. Dig. tit. "Trial," § 982.

In North Carolina it was held in Means *v.* Carolina Cent. R. Co., 126 N. C. 424, 35 S. E. 813, construing Act (1897), c. 109, as amended by Act (1899), c. 131, that, if defendant introduced evidence after making a motion to dismiss, he thereby waived any rights he had under said motion. But at the close of all the evidence he might renew his motion to dismiss, and this motion stood upon a con-

is renewed at the close of all the evidence.[54] Nevertheless, it is the rule in a num ber of jurisdictions that defendant does not waive an erroneous ruling on a motio for nonsuit by introducing evidence after the motion is overruled, unless in s doing he supplies the defects in plaintiff's case.[55] If he does not, the motio may, without further renewal, on a proper assignment of error, be sustained an a nonsuit granted on appeal.[56]

9. Harmless Error in Rulings on Motion. The erroneous denial of a nonsui for want of sufficient evidence is harmless error, where subsequently to such denial the defect in plaintiff's proof is supplied by evidence introduced by eithe party.[57] If, however, the omission is supplied in part only the judgment shoul

sideration of the whole evidence introduced by plaintiff and defendant. This construction has since been made the law by the legislature. Acts (1901), c. 594. See McCall *v.* Southern R. Co., 129 N. C. 298, 40 S. E. 67; Parlier *v.* Southern R. Co., 129 N. C. 262, 39 S. E. 961.

54. Barrow *v.* B. R. Lewis Lumber Co., 14 Ida. 698, 95 Pac. 682; Shields *v.* Johnson, 12 Ida. 329, 85 Pac. 972; Spencer *v.* State, 187 N. Y. 484, 80 N. E. 375 [*affirming* 110 N. Y. App. Div. 585, 97 N. Y. Suppl. 154]; Hopkins *v.* Clark, 158 N. Y. 299, 53 N. E. 27 [*affirming* 7 N. Y. App. Div. 207, 40 N. Y. Suppl. 130]; Faulkner *v.* Cornell, 80 N. Y. App. Div. 161, 80 N. Y. Suppl. 526; Clements *v.* Beale, 53 N. Y. App. Div. 416, 65 N. Y. Suppl. 1093; McDowell *v.* Syracuse Land, etc., Co., 44 Misc. (N. Y.) 627, 90 N. Y. Suppl. 148; Fraser *v.* Alpha Combined Heating, etc., Mfg. Co., 25 Misc. (N. Y.) 422, 54 N. Y. Suppl. 1087; Dunham *v.* Harlam, 22 Misc. (N. Y.) 318, 49 N. Y. Suppl. 102; Scott *v.* Yeandle, 20 Misc. (N. Y.) 89, 45 N. Y. Suppl. 87 [*affirming* 19 Misc. 713, 43 N. Y. Suppl. 1164]; Carroll *v.* O'Shea, 2 Misc. (N. Y.) 437, 21 N. Y. Suppl. 956 [*affirming* 19 N. Y. Suppl. 374]; Teal *v.* Templeton, 149 N. C. 32, 62 S. E. 737; Blalock *v.* Clark, 137 N. C. 140, 49 S. E. 88; Earnhardt *v.* Clement, 137 N. C. 91, 49 S. E. 49; Illstad *v.* Anderson, 2 N. D. 167, 49 N. W. 659; Bowman *v.* Eppinger, 1 N. D. 21, 44 N. W. 1000.

Effect of failure to renew motion.— The failure to renew or make a motion for a nonsuit at the close of all of the evidence will be regarded as an admission that there is some question of fact to be passed upon and a waiver of the right to have the complaint and case dismissed as a matter of law. Spencer *v.* State, 187 N. Y. 484, 80 N. E. 375; Hopkins *v.* Clark, 158 N. Y. 299, 53 N. E. 27; Faulkner *v.* Cornell, 80 N. Y. App. Div. 161, 80 N. Y. Suppl. 526; Hobson *v.* New York Condensed Milk Co., 25 N. Y. App. Div. 111, 49 N. Y. Suppl. 209; Greenspan *v.* Newman, 37 Misc. (N. Y.) 784, 76 N. Y. Suppl. 894; Brown *v.* Levy, 34 Misc. (N. Y.) 812, 68 N. Y. Suppl. 941; Wright *v.* May, 29 Misc. (N. Y.) 300, 60 N. Y. Suppl. 534 [*affirming* 27 Misc. 831, 57 N. Y. Suppl. 1151]; Hardy *v.* Eagle, 25 Misc. (N. Y.) 471, 54 N. Y. Suppl. 1045 [*affirming* 23 Misc. 441, 51 N. Y. Suppl. 501]; Kraetzer *v.* Thomas, 23 Misc. (N. Y.) 329, 51 N. Y. Suppl. 209; Kaufman *v.* Canary, 21 Misc. (N. Y.) 302, 47 N. Y. Suppl. 152 [*affirming* 20 Misc. 726, 45 N. Y. Suppl. 1143].

55. *California.*— Elmore *v.* Elmore, 11 Cal. 516, 46 Pac. 458.

Colorado.—Alta Inv. Co. *v.* Worden, 2 Colo. 215, 53 Pac. 1047.

Montana.— Cain *v.* Gold Mountain Min Co., 27 Mont. 529, 71 Pac. 1004.

New Jersey.—Van Ness *v.* North Jerse St. R. Co., 75 N. J. L. 273, 67 Atl. 1027.

Oregon.— Dryden *v.* Pelton-Armstrong Co. 53 Oreg. 418, 101 Pac. 190; Patty *v.* Salen Flouring Mills Co., 53 Oreg. 350, 96 Pac 1106, 98 Pac. 521, 100 Pac. 298; Trickey *v* Clark, 50 Oreg. 516, 93 Pac. 457; Ferguso *v.* Ingle, 38 Oreg. 43, 62 Pac. 760; Carney *v* Duniway, 35 Oreg. 131, 57 Pac. 192, 58 Pac 105.

Washington.— Dimuria *v.* Seattle Trans fer Co., 50 Wash. 633, 97 Pac. 657, 22 L. R. A N. S. 471; Matson *v.* Port Townsend Southern R. Co., 9 Wash. 449, 37 Pac. 705. *Contra* Adams *v.* Peterman Mfg. Co., 47 Wash. 484 92 Pac. 339; Curtin *v.* Clear Lake Lumbe Co., 47 Wash. 260, 91 Pac. 956; Gilmer *v* Holland Inv. Co., 37 Wash. 589, 79 Pac. 1103 And *compare* Ryan *v.* Lambert, 49 Wash. 649 96 Pac. 232; Mooney *v.* Seattle, etc., R. Co. 47 Wash. 540, 92 Pac. 408.

See 46 Cent. Dig. tit. "Trial," § 982.

In Utah, under Sess. Laws (1894), p. 42, the offer of evidence after the overruling of a motion for nonsuit is not a waiver of the exception taken to the order overruling such motion. Ensign *v.* Fisher, 14 Utah 477, 47 Pac. 950.

56. Dimuria *v.* Seattle Transfer Co., 50 Wash. 633, 97 Pac. 657, 22 L. R. A. N. S. 471; Matson *v.* Port Townsend Southern R. Co., 9 Wash. 449, 37 Pac. 705.

57. *California.*— Hill *v.* Clark, 7 Cal. App 609, 95 Pac. 382.

Colorado.— Jennings *v.* Colorado Springs First Nat. Bank, 13 Colo. 417, 22 Pac. 777, 16 Am. St. Rep. 210; Hochstadter *v.* Hays 11 Colo. 118, 17 Pac. 289; Denver, etc., R Co. *v.* Henderson, 10 Colo. 1, 13 Pac 910.

Georgia.— Rice *v.* Ware, 3 Ga. App. 573 60 S. E. 301.

Iowa.— Slater *v.* Capital Ins. Co., 89 Iowa 628, 57 N. W. 422, 23 L. R. A. 181.

Kentucky.— Rucker *v.* Hamilton, 3 Dana 36.

Minnesota.— Frederickson *v.* Sugar Mfg Co., 38 Minn. 356, 37 N. W. 453; Keith *v* Briggs, 32 Minn. 185, 20 N. W. 91; Cole *v.* Curtis, 16 Minn. 182.

Montana.— State *v.* Second Judicial Dist Ct., 40 Mont. 206, 105 Pac. 721; Yergy *v*

be reversed.[58] So also error in denying a motion for nonsuit is harmless where the court instructs the jury to find for defendant,[59] where both parties demand a judgment on the merits by final submission of the cause,[60] or where a judgment for nonsuit at the close of all the evidence is denied.[61] Erroneously granting a nonsuit is harmless where the jury, under proper instructions, would have been bound to find against appellant,[62] where defendant was entitled to have a verdict directed,[63] or where plaintiff's case was so radically defective that it could not have been remedied by further proof.[64] However, if there is any evidence sufficient to go to the jury the granting of the motion is prejudicial error;[65] and in at least one state it is held that this is so even though the court would be justified in setting aside the verdict as against the weight of the evidence.[66]

D. Direction of Verdict[67] **— 1. Power of Court to Direct Verdict — a. In General.** The trial judge, in the exercise of sound discretion, may in a proper case direct the verdict.[68] And it is the duty of the court to do so when the facts

Helena Light, etc., Co., 39 Mont. 213, 102 Pac. 310.

Nevada.— Reno Brewing Co. *v.* Packard, 31 Nev. 433, 103 Pac. 415, 104 Pac. 801.

New Hampshire.— Oakes *v.* Thornton, 28 N. H. 44.

New Jersey.—Van Ness *v.* North Jersey St. R. Co., 77 N. J. L. 551, 73 Atl. 509; Farnsworth *v.* Miller, 74 N. J. L. 599, 60 Atl. 1100 [*affirmed* in (1907) 70 Atl. 1100]; Esler *v.* Camden, etc., R. Co., 71 N. J. L. 180, 58 Atl. 113; May *v.* North Hudson R. Co., 49 N. J. L. 445, 9 Atl. 688; Delaware, etc., R. Co. *v.* Dailey, 37 N. J. L. 526; Mershon *v.* Hobensack, 23 N. J. L. 580.

New York.— Kokomo Strawboard Co. *v.* Inman, 134 N. Y. 92, 31 N. E. 248; Horowitz *v.* Pakas, 22 Misc. 520, 49 N. Y. Suppl. 1008.

Oregon.— Crosby *v.* Portland R. Co., 53 Oreg. 496, 100 Pac. 300, 101 Pac. 204.

South Carolina.— Davis *v.* Blue Ridge R. Co., 81 S. C. 466, 62 S. E. 856; Hicks *v.* Southern R. Co., 63 S. C. 559, 41 S. E. 753.

Wisconsin.— Harriman *v.* Queen Ins. Co., 49 Wis. 71, 5 N. W. 12; Harper *v.* Milwaukee, 30 Wis. 365.

58. Lambert *v.* Seely, 17 How. Pr. (N. Y.) 432.

59. Pacific Vinegar, etc., Works *v.* Smith, 152 Cal. 507, 93 Pac. 85.

60. Reclamation Dist. No. 535 *v.* Clark, 155 Cal. 345, 100 Pac. 1091.

61. Van Allen *v.* Shulenburgh, 58 Misc. (N. Y.) 136, 110 N. Y. Suppl. 464.

62. Case *v.* Hannahs, 2 Kan. 490.

63. Zittle *v.* Schlesinger, 46 Nebr. 844, 65 N. W. 892; People's Bank *v.* Ætna Ins. Co., 74 Fed. 507, 20 C. C. A. 630.

64. Caldwell *v.* Bodine, 18 N. Y. Suppl. 627.

65. Baldwin Star Coal Co. *v.* Quinn, 46 Colo. 590, 105 Pac. 1101.

66. Yates *v.* New York Cent., etc., R. Co., 107 N. Y. App. Div. 629, 95 N. Y. Suppl. 497.

67. **As infringement of right to jury trial** see Juries, 24 Cyc. 193.

In action: Against sheriffs and constables see Sheriffs and Constables, 35 Cyc. 1850. From malicious prosecutions see Malicious Prosecution, 26 Cyc. 111. Of ejectment see Ejectment, 15 Cyc. 163. Of replevin see Replevin, 34 Cyc. 1519. On bonds see Bonds, 5 Cyc. 855.

In criminal prosecutions see Criminal Law, 12 Cyc. 594 *et seq.*

In probate proceedings see Wills.

68. *Alabama.*— Touart *v.* Yellow Pine Lumber Co., 128 Ala. 61, 29 So. 4; Gulf City Constr. Co. *v.* Louisville, etc., R. Co., 121 Ala. 621, 25 So. 579.

Alaska.— Begenish *v.* Gates, 2 Alaska 511.

Arizona.— Ewing *v.* U. S., 11 Ariz. 1, 89 Pac. 593; Hoff *v.* Adams, 6 Ariz. 395, 59 Pac. 111.

Arkansas.— Catlett *v.* St. Louis, etc., R. Co., 57 Ark. 461, 21 S. W. 1062, 38 Am. St. Rep. 254.

California.— Meyer *v.* Lovdal, 6 Cal. App. 369, 92 Pac. 322.

Colorado.— Western *v.* Livezey, 45 Colo. 142, 100 Pac. 404; Stearns *v.* Hazen, 45 Colo. 67, 101 Pac. 339.

Connecticut.— Kelley *v.* Torrington, 81 Conn. 615, 71 Atl. 939.

District of Columbia.—Walker *v.* Warner, 31 App. Cas. 76.

Florida.— Mugge *v.* Jackson, 53 Fla. 323, 43 So. 91.

Georgia.— Leathers *v.* Leathers, 132 Ga. 211, 63 S. E. 1118; Peavey *v.* Dure, 131 Ga. 104, 62 S. E. 47. Earlier Georgia decisions denied this right. Manning *v.* Mitchell, 73 Ga. 660; Martin *v.* Anderson, 21 Ga. 301.

Illinois.— Chicago, etc., Coal Co. *v.* Hartwell, 122 Ill. App. 330; Smithley *v.* Snowden, 120 Ill. App. 86.

Indiana.—Wamsley *v.* Cleveland, etc., R. Co., 41 Ind. App. 147, 82 N. E. 490, 83 N. E. 640.

Indian Territory.— Brunson *v.* Southwestern Development Co., 7 Indian Terr. 209, 104 S. W. 593.

Iowa.— Ketterman *v.* Ida Grove, (1909) 120 N. W. 641.

Kentucky.—Waldharber *v.* Lunkenheimer, 108 S. W. 327, 32 Ky. L. Rep. 1221; Leamon *v.* Louisville, etc., R. Co., 98 S. W. 1016, 30 Ky. L. Rep. 443.

Maine.—Wellington *v.* Corinna, 104 Me. 252, 71 Atl. 889; Bennett *v.* Talbot, 90 Me. 229, 38 Atl. 112.

Maryland.— State *v.* Baltimore Mfg. Co., 109 Md. 404, 72 Atl. 602; Baltimore, etc., R. Co. *v.* Belinski, 106 Md. 452, 67 Atl. 249.

warrant it,[69] although statutes require issues of fact to be submitted to the jury.[70] Such action does not deprive the party against whom the verdict is directed of his constitutional right to a jury trial;[71] nor is this power in any way affected by the fact that statutes expressly confer on the parties the right to demur to the evidence.[72]

b. Direction Subject to Opinion of Court. In some jurisdictions the court has power to direct a verdict, subject to the opinion of the court, when the sole question presented is whether plaintiff, on the undisputed facts, is entitled to recover.[73] Such action is not proper when there are disputed facts to be settled on conflicting evidence,[74] or where exceptions have been saved to the court's rulings on the admissibility of evidence.[75]

Massachusetts.— James *v.* Boston El. R. Co., 201 Mass. 263, 87 N. E. 474.

Mississippi.— Clark *v.* J. L. Moyse, (1909) 48 So. 721; Swan *v.* Liverpool, etc., Ins. Co., 52 Miss. 704; Perry *v.* Clarke, 5 How. 495.

Missouri.— Ferguson *v.* Venice Transp. Co., 79 Mo. App. 352.

Nebraska.— Keckler *v.* Modern Brotherhood of America, 77 Nebr. 301, 109 N. W. 157.

New Jersey.— Crosby *v.* Wells, 73 N. J. L. 790, 67 Atl. 295.

New Mexico.—Alexander *v.* Tennessee, etc., Gold, etc., Min. Co., 3 N. M. 173, 3 Pac. 735.

New York.— Harding *v.* St. Peter Roman Catholic Church, 113 N. Y. App. Div. 685, 99 N. Y. Suppl. 945 [*affirmed* in 188 N. Y. 631, 81 N. E. 1165].

Oklahoma.— Cockrell *v.* Schmitt, 20 Okla. 207, 94 Pac. 521, 129 Am. St. Rep. 737.

Pennsylvania.—Warmcastle *v.* Castner, 34 Pa. Super. Ct. 464.

South Carolina.— Slaughter Co. *v.* King Lumber Co., 79 S. C. 338, 60 S. E. 705; Uzzell *v.* Horn, 71 S. C. 426, 51 S. E. 253; Stepp *v.* National Life, etc., Assoc., 37 S. C. 417, 16 S. E. 134.

South Dakota.— Greenwald *v.* Ford, 21 S. D. 28, 109 N. W. 516; McKeever *v.* Homestake Min. Co., 10 S. D. 599, 74 N. W. 1053; Longley *v.* Daly, 1 S. D. 257, 46 N. W. 247.

Tennessee.— Norman *v.* Southern R. Co., 119 Tenn. 401, 104 S. W. 1088; Knoxville Traction Co. *v.* Brown, 115 Tenn. 3, 89 S. W. 319; Tyrus *v.* Kansas City, etc., R. Co., 114 Tenn. 579, 86 S. W. 1074; Greenlaw *v.* Louisville, etc., R. Co., 114 Tenn. 187, 86 S. W. 1072. This is the first decision in this state where the power of the court to direct a verdict is directly affirmed. Prior to this the court, while disapproving the practice, held that if the trial judge reached a correct conclusion, the verdict based on his direction would not be disturbed. Cantrell *v.* Knoxville, etc., R. Co., 90 Tenn. 638, 18 S. W. 271; Jones *v.* Cherokee Iron Co., 14 Lea 157; Gregory *v.* Underhill, 6 Lea 207; Ayres *v.* Moulton, 5 Coldw. 154; Kirtland *v.* Montgomery, 1 Swan 452.

Texas.— Choate *v.* San Antonio, etc., R. Co., 90 Tex. 85, 36 S. W. 247, 37 S. W. 319; San Antonio *v.* Lane, 32 Tex. 405 [*disapproving* Reynolds *v.* Williams, 1 Tex. 311]; Murphy *v.* Galveston, etc., R. Co., (Civ. App. 1906) 96 S. W. 940 [*reversed* on other grounds in 100 Tex. 490, 101 S. W. 439, 9 L. R. A. N. S. 762].

West Virginia.— Diddle *v.* Continental Casualty Co., 65 W. Va. 170, 63 S. E. 962, 22 L. R. A. N. S. 779.

United States.— Baltimore, etc., R. Co. *v.* Jones, 95 U. S. 439, 24 L. ed. 506; Teis *v.* Smuggler Min. Co., 158 Fed. 260, 85 C. C. A. 478, 15 L. R. A. N. S. 893.

Setting aside verdict and directing verdict for opposite party.—Where the court directs a verdict for plaintiff, without submitting anything to the jury, so that Code Civ. Proc. § 1187, providing that on a special verdict the court may direct a general verdict, does not apply, and the verdict is not directed "subject to the opinion of the court," so that section 1185, providing that in such case the court can set aside the verdict and direct a judgment, does not apply, it cannot, after the trial has closed and the jury been discharged, set aside the verdict and direct one for defendant; but it has authority merely to set it aside and grant a new trial. Wilson, etc., Mfg. Co. *v.* New York, 122 N. Y. App. Div. 621, 107 N. Y. Suppl. 524.

69. Hibner *v.* Westover, 78 Nebr. 161, 110 N. W. 732.

70. Catlett *v.* St. Louis, etc., R. Co., 57 Ark. 461, 21 S. W. 1062, 38 Am. St. Rep. 254; Tyrus *v.* Kansas City, etc., R. Co., 114 Tenn. 579, 86 S. W. 1074; People's Sav. Bank *v.* Bates, 120 U. S. 556, 7 S. Ct. 679, 30 L. ed. 754.

71. Mallen *v.* Longworthy, 70 Ill. App. 376.

72. Merrill *v.* Smith, 158 Ala. 186, 48 So. 495.

73. Durant *v.* Abendroth, 69 N. Y. 148, 25 Am. Rep. 158; Howell *v.* Adams, 68 N. Y. 314; People *v.* Ransom, 56 Barb. (N. Y.) 514; Whitaker *v.* Merrill, 28 Barb. (N. Y.) 526.

74. Durant *v.* Abendroth, 69 N. Y. 148, 25 Am. Rep. 158; Purchase *v.* Mattison, 25 N. Y. 211, 15 Abb. Pr. 402, 25 How. Pr. 161; Sackett *v.* Spencer, 29 Barb. (N. Y.) 180; Purchase *v.* New York Exch. Bank, 10 Bosw. (N. Y.) 564; Brower *v.* Orser, 2 Bosw. (N. Y.) 365.

75. Durant *v.* Abendroth, 69 N. Y. 148, 25 Am. Rep. 158; Bell *v.* Shibley, 33 Barb. (N. Y.) 610; Sackett *v.* Spencer, 29 Barb. (N. Y.) 180; Whitesboro Fire Dept. *v.* Thompson, 16 Hun (N. Y.) 474; Purchase *v.* New York Exch. Bank, 10 Bosw. (N. Y.) 564; Flandreau *v.* Elsworth, 8 Misc. (N. Y.) 428, 28 N. Y. Suppl. 671.

2. Nature and Effect of Motion to Direct Verdict. A motion to direct a verdict is in the nature of a demurrer to the evidence and is governed by practically the same rules,[76] and concedes as true the evidence in behalf of the adverse party with all fair and reasonable inferences to be deduced from it.[77] It does not question the sufficiency of the pleadings, but raises merely the question of the legal sufficiency of the evidence to sustain a verdict against the moving party.[78] But the court may examine the writ, which is not part of the pleadings, and say that no proper pleading under the form of action brought would warrant a recovery under the proof adduced.[79] The same question presented by a motion for a nonsuit may be raised by a motion to direct a verdict.[80] A motion by defendant to direct a verdict is an abandonment of a plea of set-off.[81] A motion by plaintiff to direct a verdict against one of two defendants is in effect a dismissal as to the other defendant.[82]

3. Direction of Verdict on Motion of One Party — a. General Principles Applicable to Allowance or Denial of Motion — (i) *In General* — (A) *When Granted.* Where the case involves only questions of law;[83] where but one reasonable conclusion can be drawn from the proof adduced;[84] where there is a fatal

76. *Alabama.*— Georgia Cent. R., etc., Co. *v.* Roquemore, 96 Ala. 236, 11 So. 475.

District of Columbia.— Ubhoff *v.* Brandenburg, 26 App. Cas. 3; Hardy *v.* Wise, 5 App. Cas. 108.

Illinois.— Wolf *v.* Chicago Sign Printing Co., 233 Ill. 501, 84 N. E. 614; Udwin *v.* Spirkel, 136 Ill. App. 155; Chicago *v.* O'Brien, 128 Ill. App. 350; McLean *v.* Dow, 125 Ill. App. 174.

Kentucky.— Hobbs *v.* Ray, 96 S. W. 589, 29 Ky. L. Rep. 999.

Nebraska.— Harris *v.* Lincoln Traction Co., 78 Nebr. 681, 111 N. W. 580.

77. Glaria *v.* Washington Southern R. Co., 30 App. Cas. (D. C.) 559; Ubhoff *v.* Brandenburg, 26 App. Cas. (D. C.) 3; McLean *v.* Dow, 125 Ill. App. 174; Lane *v.* Yeomen of America, 125 Ill. App. 406; W. W. Kimball Co. *v.* Cruikshank, 123 Ill. App. 580; Hobbs *v.* Ray, 96 S. W. 589, 29 Ky. L. Rep. 999; Harton *v.* Forest City Tel. Co., 146 N. C. 429, 59 S. E. 1022, 14 L. R. A. N. S. 956.

78. Donelson *v.* East St. Louis, etc., R. Co., 235 Ill. 625, 85 N. E. 914 [*affirming* 140 Ill. App. 185]; Prairie State Loan, etc., Assoc. *v.* Gorrie, 167 Ill. 414, 47 N. E. 739; Gerke *v.* Fancher, 158 Ill. 375, 41 N. E. 982; Dahlin *v.* Sherwin, 132 Ill. App. 566; Chicago, etc., R. Co. *v.* Henderson, 126 Ill. App. 530; Smith *v.* Eitel, 121 Ill. App. 464; Mullen *v.* Pryor, 12 Mo. 307; Bury *v.* St. Louis, 12 Mo. 298; Romaine *v.* New York, etc., R. Co., 91 N. Y. App. Div. 1, 86 N. Y. Suppl. 248 [*affirmed* in 181 N. Y. 523, 73 N. E. 1131].

Illustration.— The question presented by a motion to direct a verdict is not whether the judge would infer that defendant had been negligent, but whether the jury might legitimately find from the testimony that negligence had been established. Dirigolano *v.* Jersey City, etc., St. R. Co., 76 N. J. L. 505, 71 Atl. 257; Mumma *v.* Easton, etc., R. Co., 73 N. J. L. 653, 65 Atl. 208.

79. Richardson *v.* Milburn, 11 Md. 340.

80. Adams *v.* Peterman Mfg. Co., 47 Wash. 484, 92 Pac. 339.

81. Garcia *v.* Candelaria, 9 N. M. 374, 54 Pac. 342. *Contra,* Miller *v.* McGannon, 79 Nebr. 609, 113 N. W. 170. And *compare* Frye *v.* Phillips, 46 Wash. 190, 89 Pac. 559, 93 Pac. 668, holding that in an action on account against a partnership where one member set up an affirmative defense, plaintiff, by moving for judgment at the close of defendant's case, does not waive his right to contest the affirmative matter set up in the answer.

82. Ætna Indemnity Co. *v.* Little Rock, 89 Ark. 95, 115 S. W. 960.

83. *Indiana.*— Meikel *v.* Greene, 94 Ind. 344.

Iowa.— Brown *v.* Cunningham, 82 Iowa 512, 48 N. W. 1042, 12 L. R. A. 583.

Minnesota.— Woodling *v.* Knickerbocker, 31 Minn. 268, 17 N. W. 387.

Missouri.— Hawk *v.* McLeod Lumber Co., 166 Mo. 121, 65 S. W. 1022; Wolff *v.* Campbell, 110 Mo. 114, 19 S. W. 622; Hendley *v.* Globe Refinery Co., 106 Mo. App. 20, 79 S. W. 1163.

Montana.— Michener *v.* Fransham, 29 Mont. 240, 74 Pac. 448.

New York.— Porter *v.* Havens, 37 Barb. 343; Glynn *v.* Seaman's Sav. Bank, 9 N. Y. St. 499.

Ohio.— Beucker *v.* Baker, 21 Ohio Cir. Ct. 540, 11 Ohio Cir. Dec. 642.

Pennsylvania.— Webb *v.* Mears, 45 Pa. St. 222; Koons *v.* Steele, 19 Pa. St. 203.

South Carolina.— Reid *v.* Courtenay Mfg. Co., 68 S. C. 466, 47 S. E. 718; Rice *v.* Bamberg, 68 S. C. 184, 46 S. E. 1009.

Vermont.— St. Johnsbury *v.* Thompson, 59 Vt. 300, 9 Atl. 571, 59 Am. Rep. 731.

84. *California.*— Wilson *v.* Alcatraz Asphalt Co., 142 Cal. 182, 75 Pac. 787; Martin *v.* Ward, 69 Cal. 129, 10 Pac. 276.

Georgia.— Crockett *v.* Mitchell, 88 Ga. 166, 14 S. E. 118.

Illinois.— Chicago, etc., R. Co. *v.* O'Leary, 102 Ill. App. 665.

Indiana.— Hall *v.* Durham, 109 Ind. 434, 9 N. E. 926, 10 N. E. 581; Wabash R. Co. *v.* Williamson, 104 Ind. 154, 3 N. E. 814.

Maine.— Heath *v.* Jaquith, 68 Me. 433.

Missouri.— Houts *v.* St. Louis Transit Co.,

variance between the pleadings and the proof;[85] where the questions of fact are clearly established by undisputed evidence;[86] where there is no substantial evidence to overcome a *prima facie* case;[87] where there is no disputed evidence on

108 Mo. App. 686, 84 S. W. 161; Adams County Bank *v.* Hainline, 67 Mo. App. 483.

Nebraska.— Shiverick *v.* R. J. Gunning Co., 58 Nebr. 29, 78 N. W. 460; Chesley *v.* Rocheford, 4 Nebr. (Unoff.) 768, 96 N. W. 241; Ellsworth *v.* Newby, 3 Nebr. (Unoff.) 285, 91 N. W. 517; Hill *v.* Pitt, 2 Nebr. (Unoff.) 151, 96 N. W. 339; Linton *v.* Baker, 1 Nebr. (Unoff.) 896, 96 N. W. 251.

New Hampshire.—Dame *v.* Dame, 20 N. H. 28.

New Jersey.— McCormack *v.* Standard Oil Co., 60 N. J. L. 243, 37 Atl. 617.

New Mexico.—Solomon *v.* Yrisarri, 9 N. M. 480, 54 Pac. 752; Gildersleeve *v.* Atkinson, 6 N. M. 250, 27 Pac. 477; Armijo *v.* New Mexico Town Co., 3 N. M. 244, 5 Pac. 709.

Ohio.— Roots *v.* Kilbreth, 10 Ohio Dec. (Reprint) 20, 18 Cinc. L. Bul. 58.

Pennsylvania.— Gudfelder *v.* Pittsburg, etc., R. Co., 207 Pa. St. 629, 57 Atl. 70; Bube *v.* Weatherly Borough, 25 Pa. Super. Ct. 88.

Tennessee.— Norman *v.* Southern R. Co., 119 Tenn. 401, 104 S. W. 1088.

Texas.— Eason *v.* Eason, 61 Tex. 225; Gilbreath *v.* State, (Civ. App. 1904) 82 S. W. 807; Rickards *v.* Bemis, (Civ. App. (1903) 78 S. W. 239; McCartney *v.* McCartney, (Civ. App. 1899) 53 S. W. 388 [*reversed* in 93 Tex. 359, 55 S. W. 367]; Smith *v.* T. M. Richardson Lumber Co., (Civ. App. 1898) 47 S. W. 753, 386.

Wisconsin.— Cawley *v.* La Crosse City R. Co., 101 Wis. 145, 77 N. W. 179; Gammon *v.* Abrams, 53 Wis. 323, 10 N. W. 479.

United States.— Teis *v.* Smuggler Min. Co., 158 Fed. 260, 85 C. C. A. 478, 15 L. R. A. N. S. 893; Mason, etc., R. Co. *v.* Yockey, 103 Fed. 265, 43 C. C. A. 228; Tucker *v.* Baltimore, etc., R. Co., 59 Fed. 968, 8 C. C. A. 416.

See 46 Cent. Dig. tit. "Trial," § 377 *et seq.*

A verdict demanded by the evidence is properly directed. Walker *v.* O'Neill Mfg. Co., 128 Ga. 831, 58 S. E. 475; Brockhan *v.* Hirsch, 128 Ga. 819, 58 S. E. 468; Smith *v.* Duke, 6 Ga. App. 75, 64 S. E. 292.

85. Peckinpaugh *v.* Lamb, 70 Kan. 799, 79 Pac. 673; Ferguson *v.* Miami Powder Co., 9 Ohio Cir. Ct. 445, 6 Ohio Cir. Dec. 408.

In New York, where there is a material variance and plaintiff's case fails on the proof, the court should dismiss the complaint instead of directing a verdict. Gallaudet *v.* Kellogg, (1892) 31 N. E. 337.

86. *Alabama.*— Converse Bridge Co. *v.* Collins, 119 Ala. 534, 24 So. 561.

Georgia.— Midville, etc., R. Co. *v.* Bruhl, 117 Ga. 329, 43 S. E. 717; Reynolds *v.* Nevin, 1 Ga. App. 269, 57 S. E. 918.

Iowa.— Kitteringham *v.* Dance, 58 Iowa 632, 12 N. W. 612.

Kentucky.— Morris *v.* Louisville, etc., R. Co., 61 S. W. 41, 22 Ky. L. Rep. 1593; Louisville, etc., R. Co. *v.* Arnold, 56 S. W. 809, 22 Ky. L. Rep. 199.

Michigan.— Nester *v.* Garaga Tp., 133 Mich. 640, 95 N. W. 722; Hicks *v.* Steel, 126 Mich. 408, 85 N. W. 1121.

Missouri.— Badger Lumber Co. *v.* Muehlebach, 109 Mo. App. 646, 83 S. W. 546; Vermont Marble Co. *v.* Achuff, 83 Mo. App. 42. *Compare* Milliken *v.* Thyson Commission Co., 202 Mo. 637, 100 S. W. 604.

Nebraska.— Monmouth Second Nat. Bank *v.* Snoqualmie Trust Co., 83 Nebr. 645, 120 N. W. 182; Nelson *v.* Omaha, 62 Nebr. 823, 88 N. W. 154; Garneau *v.* Cohn, 61 Nebr. 500, 85 N. W. 531; Keeley Institute *v.* Wade, 61 Nebr. 313, 85 N. W. 288; Nye *v.* Northern Assur. Co., 55 Nebr. 776, 76 N. W. 464; McCleneghan *v.* Norton, 4 Nebr. (Unoff.) 209, 93 N. W. 695; Wagoner *v.* Landon, 1 Nebr. (Unoff.) 38, 85 N. W. 496.

New Jersey.— Ryle *v.* Manchester Bldg., etc., Assoc., 74 N. J. L. 840, 67 Atl. 87; Belcher *v.* Manchester Bldg., etc., Assoc., 74 N. J. L. 833, 67 Atl. 399.

New Mexico.— Heisch *v.* Bell, 11 N. M. 523, 70 Pac. 572.

New York.— Mitterwallner *v.* Supreme Lodge K. & L. G. S., 90 N. Y. Suppl. 1076.

North Carolina.— Halton *v.* Southern R. Co., 127 N. C. 255, 37 S. E. 262.

Oklahoma.— Cockrell *v.* Schmitt, 20 Okla. 207, 94 Pac. 521, 129 Am. St. Rep. 737.

Pennsylvania.—Meyer-Burns *v.* Pennsylvania Mut. L. Ins. Co., 189 Pa. St. 579, 42 Atl. 297.

South Carolina.— Barrett *v.* Moise, 61 S. C. 569, 39 S. E. 755.

Texas.— Brockenbrow *v.* Stafford, (Civ. App. 1903) 76 S. W. 576; Flores *v.* Atchison, etc., R. Co., 24 Tex. Civ. App. 328, 66 S. W. 709; Western Union Tel. Co. *v.* Burgess, (Civ. App. 1901) 60 S. W. 1023; Maupin *v.* McCall, (Civ. App. 1899) 54 S. W. 623.

Utah.— Centennial Eureka Min. Co. *v.* Juab County, 22 Utah 395, 62 Pac. 1024.

Washington.— West Seattle Land, etc., Co. *v.* Novelty Mill Co., 31 Wash. 435, 72 Pac. 69; Carmack *v.* Drum, 27 Wash. 382, 67 Pac. 808; Underwood *v.* Stack, 15 Wash. 497, 46 Pac. 1031.

West Virginia.— La Rue *v.* Lee, 63 W. Va. 388, 60 S. E. 388, 129 Am. St. Rep. 978, 14 L. R. A. N. S. 968; Kuykendall *v.* Fisher, 61 W. Va. 87, 56 S. E. 48, 8 L. R. A. N. S. 94.

United States.— Robinson *v.* Denver City Tramway Co., 164 Fed. 174, 90 C. C. A. 160

87. *Georgia.*— Baxley *v.* Holton, 114 Ga. 724, 40 S. E. 728.

Illinois.— Franklin Park *v.* Franklin, 231 Ill. 380, 83 N. E. 214.

Michigan.— Brudin *v.* Inglis, 121 Mich. 410, 80 N. W. 115.

Missouri.— Gannon *v.* Laclede Gaslight Co., 145 Mo. 502, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 505; Poindexter *v.* McDowell, 110 Mo. App. 233, 84 S. W. 1133; Hendley *v.* Globe Refinery Co., 106 Mo. App. 20, 79 S. W. 1163.

material points;[88] where, although the evidence is conflicting, a conceded fact shows that the evidence on one side cannot be true;[89] or, where by giving to the opposite party the benefit of the most favorable view of the evidence the verdict against him is demanded,[90] a verdict should be directed. So the trial court may properly direct a verdict against plaintiff on the opening statement of counsel where he states or concedes facts which clearly show that plaintiff is not entitled to recover.[91] The power to direct a verdict on counsel's opening statement must, however, be exercised with caution and never without careful consideration and opportunity for counsel to explain and qualify his statement so far as truth will permit.[92] And the mere fact that the statement falls short of stating facts sufficient to warrant recovery will not authorize the direction of a verdict.[93] And where counsel merely outlines the case, leaving the details to be supplied by the testimony, a verdict should not be directed on the ground that no case is stated.[94]

(B) *When Denied.* Doubts should in all cases be resolved in favor of the submission of the case to the jury.[95] It is only when the court can find no evidence which in its deliberate and ultimate judgment is entitled to be weighed that the jury should be instructed in terms that there is no evidence to support the burden of proof which rests upon the party.[96] A verdict should not be directed except in cases where the evidence is so conclusive that reasonable minds could not differ as to the result to be reached.[97] A verdict should not be directed unless

New Jersey.— Polhemus *v.* Prudential Realty Corp., 74 N. J. L. 570, 67 Atl. 303.

88. *Indiana.*— James *v.* Fowler, 90 Ind. 563.

New York.— Nichols *v.* Goldsmith, 7 Wend. 160.

Ohio.— Crosby *v.* Hill, 39 Ohio St. 100 [*affirming* 8 Ohio Dec. (Reprint) 663, 9 Cinc. L. Bul. 156].

Tennessee.— Norman *v.* Southern R. Co., 119 Tenn. 401, 104 S. W. 1088.

Washington.— Pacific Nat. Bank *v.* Ætna Indem. Co., 33 Wash. 428, 74 Pac. 590.

89. Baumann *v.* Hamburg-American Packet Co., 67 N. J. L. 250, 51 Atl. 461; Musbach *v.* Wisconsin Chair Co., 108 Wis. 57, 84 N. W. 36.

90. Sanders Mfg. Co. *v.* Dollar Sav. Bank, 110 Ga. 559, 35 S. E. 777; Mattson *v.* Qualey Constr. Co., 90 Ill. App. 260. And see Riddle *v.* Gibson, 29 App. Cas. (D. C.) 237.

91. *District of Columbia.*— Hornblower *v.* George Washington University, 31 App. Cas. 64; Brown *v.* District of Columbia, 29 App. Cas. 273.

Kansas.— Lindley *v.* Atchison, etc., R. Co., 47 Kan. 432, 28 Pac. 201.

Michigan.— Spicer *v.* Bonker, 45 Mich. 630, 8 N. W. 518.

Minnesota.— Barrett *v.* Minneapolis, etc., R. Co., 106 Minn. 51, 117 N. W. 1047, 130 Am. St. Rep. 585, 18 L. R. A. N. S. 416.

United States.— Butler *v.* National Home for Disabled Volunteer Soldiers, 144 U. S. 64, 12 S. Ct. 581, 36 L. ed. 346; Oscanyan *v.* Winchester Repeating Arms Co., 103 U. S. 261, 26 L. ed. 539. As where the opening statement of plaintiff's counsel discloses that the suit is based on a void or illegal contract, or a contract that is against public policy.

See 46 Cent. Dig. tit. "Trial," § 386.

92. Barrett *v.* Minneapolis, etc., R. Co., 106 Minn. 51, 117 N. W. 1047, 130 Am. St. Rep. 585, 18 L. R. A. N. S. 416; Spicer *v.* Bonker, 45 Mich. 630, 8 N. W. 518. And see Hornblower *v.* George Washington University, 31 App. Cas. (D. C.) 64.

93. Redding *v.* Puget Sound Iron, etc., Works, 36 Wash. 642, 79 Pac. 308.

94. Jones *v.* Baltimore, etc., R. Co., 5 Mackey (D. C.) 8; Martin Emerich Outfitting Co. *v.* Siegel, 108 Ill. App. 364.

95. U. P. Steam Baking Co. *v.* Omaha St. R. Co., 4 Nebr. (Unoff.) 396, 94 N. W. 533; Hirsch *v.* American Dist. Tel. Co., 90 N. Y. Suppl. 464; Mexican Central R. Co. *v.* Murray, 102 Fed. 264, 42 C. C. A. 334; Nyback *v.* Champagne Lumber Co., 90 Fed. 774, 33 C. C. A. 269.

96. Le Baron *v.* Old Colony St. R. Co., 197 Mass. 289, 83 N. E. 674; Hillyer *v.* Dickinson, 154 Mass. 502, 28 N. E. 905.

97. *California.*— Paolini *v.* Fresno Canal, etc., Co., 9 Cal. App. 1, 97 Pac. 1130.

District of Columbia.— Glaria *v.* Washington Southern R. Co., 30 App. Cas. 559.

Maine.— Young *v.* Chandler, 102 Me. 251, 66 Atl. 539.

Michigan.— Putnam *v.* Phœnix Preferred Acc. Ins. Co., 155 Mich. 134, 118 N. W. 922.

New York.— Luhrs *v.* Brooklyn Heights R. Co., 11 N. Y. App. Div. 173, 42 N. Y. Suppl. 606.

South Dakota.— Eggland *v.* South, 22 S. D. 467, 118 N. W. 719; Roberts *v.* Ruh, 22 S. D. 13, 114 N. W. 1097.

Tennessee.— Norman *v.* Southern R. Co., 119 Tenn. 401, 104 S. W. 1088; Knoxville Traction Co. *v.* Brown, 115 Tenn. 323, 89 S. W. 319.

Texas.— Proffitt *v.* Missouri, etc., R. Co., 95 Tex. 593, 68 S. W. 979; Galveston, etc., R. Co. *v.* Thompson, (Civ. App. 1909) 116 S. W. 163; Gulf Coast, etc., R. Co. *v.* Jackson, 49 Tex. Civ. App. 573, 109 S. W. 478; Titterington *v.* Harry, (Civ. App. 1906) 97

the proof is free from substantial conflict,[98] although the evidence preponderate

S. W. 840; Bonn *v.* Galveston, etc., R. Co., (Civ. App. 1904) 82 S. W. 808.

United States.—Teis *v.* Smuggler Min. Co., 158 Fed. 260, 85 C. C. A. 478, 15 L. R. A. N. S. 893; Crookston Lumber Co. *v.* Boutin, 149 Fed. 680, 79 C. C. A. 368; Chicago, etc., R. Co. *v.* Price, 97 Fed. 423, 38 C. C. A. 239.

98. *Alabama.*— Birmingham R., etc., Co. *v.* Enslen, 144 Ala. 343, 39 So. 74; Southern R. Co. *v.* Bunnell, 138 Ala. 247, 36 So. 380; Aarnes *v.* Windham, 137 Ala. 513, 34 So. 816; Moore *v.* Nashville, etc., R., 137 Ala. 495, 34 So. 617; McWhorter *v.* Blumenthal, 136 Ala. 568, 33 So. 552, 96 Am. St. Rep. 43; Folmar *v.* Siler, 132 Ala. 297, 31 So. 719; Louisville, etc., R. Co. *v.* Quick, 125 Ala. 553, 28 So. 14.

Arkansas.— Neal *v.* St. Louis, etc., R. Co., 71 Ark. 445, 78 S. W. 220 [*reversed* on other grounds in 210 U. S. 261, 28 S. Ct. 616, 52 L. ed. 1061].

Georgia.—Wilcox *v.* Evans, 127 Ga. 580, 56 S. E. 635; Central of Georgia R. Co. *v.* Gortatowsky, 123 Ga. 366, 51 S. E. 469; Dobbs *v.* Woodstock Iron Works, 122 Ga. 833, 50 S. E. 914; Ford *v.* Fargason, 120 Ga. 708, 48 S. E. 180; Cunningham *v.* Central of Georgia R. Co., 118 Ga. 276, 45 S. E. 246; Wallace *v.* Central of Georgia R. Co., 116 Ga. 230, 42 S. E. 209; Denson *v.* Denson, 111 Ga. 809, 35 S. E. 680; Ware *v.* McCall, 110 Ga. 574, 35 S. E. 774; Thornton *v.* Perry, 105 Ga. 837, 31 S. E. 797.

Illinois.— Chicago City R. Co. *v.* Martensen, 198 Ill. 511, 34 N. E. 1017 [*affirming* 100 Ill. App. 306]; Hartley *v.* Chicago, etc., R. Co., 197 Ill. 440, 64 N. E. 382 [*reversing* 96 Ill. App. 227]; Starkweather *v.* Maginnis, 196 Ill. 274, 63 N. E. 692 [*affirming* 98 Ill. App. 143]; Rubenstein *v.* Le Sage, 135 Ill. App. 424; Wetherell *v.* Chicago City R. Co., 104 Ill. App. 357; Central R. Co. *v.* Mehlenbeck, 103 Ill. App. 17; White-Kingsland Mfg. Co. *v.* Herdrich, 98 Ill. App. 607; Gravadahl *v.* Chicago Refining Co., 85 Ill. App. 342.

Iowa.— Prouty *v.* McCormick Harvesting Mach. Co., (1905) 103 N. W. 155; Morey *v.* Laird, 108 Iowa 670, 77 N. W. 835.

Kentucky.— Thompson *v.* Thompson, 17 B. Mon. 22; Louisville, etc., R. Co. *v.* Munford, 68 S. W. 635, 24 Ky. L. Rep. 416; Middleton *v.* Kentucky Lumber Co., 66 S. W. 42, 23 Ky. L. Rep. 1751.

Maine.— Noyes *v.* Smith, (1886) 5 Atl. 529.

Maryland.— Newbold *v.* Hayward, 96 Md. 247, 54 Atl. 67; Conolly *v.* Kettlewell, 1 Gill 260.

Michigan.— Newman *v.* Meddaugh, 131 Mich. 595, 92 N. W. 102; Lau *v.* Fletcher, 104 Mich. 295, 62 N. W. 357; Fay *v.* Jenks, 78 Mich. 304, 44 N. W. 378.

Minnesota.— Dailey *v.* Linnehan, 39 Minn. 346, 40 N. W. 250.

Missouri.— Brown *v.* Mays, 80 Mo. App. 81.

Montana.— Kline *v.* Hanke, 14 Mont. 361, 36 Pac. 454.

Nebraska.— New Orleans Coffee Co. *v.* Cady, 69 Nebr. 412, 95 N. W. 1017; Chicago etc., R. Co. *v.* Sporer, 69 Nebr. 8, 94 N. W 991; Hale *v.* Ripp, 32 Nebr. 259, 49 N. W 218; Dempster Mill Mfg. Co. *v.* Lofquist, Nebr. (Unoff.) 388, 91 N. W. 524.

New Jersey.— Gwynne *v.* Hitchner, 6 N. J. L. 654, 52 Atl. 997; Baumann *v.* Hamburg-American Packet Co., 67 N. J. L. 250, 5 Atl. 461; Stone *v.* Somers, 65 N. J. L. 191 46 Atl. 758; Meyers *v.* Birch, 59 N. J. L 238, 36 Atl. 95.

New York.— Ballard *v.* Beveridge, 17 N. Y. 194, 63 N. E. 960; Philips *v.* Philips 77 N. Y. App. Div. 113, 78 N. Y. Suppl. 100 [*affirmed* in 179 N. Y. 585, 72 N. E. 1149] Lytle *v.* Crawford, 69 N. Y. App. Div. 273, 7 N. Y. Suppl. 660; Slade *v.* Montgomery, 5 N. Y. App. Div. 343, 65 N. Y. Suppl. 709 Hoyer *v.* Reade, 51 N. Y. App. Div. 616, 6 N. Y. Suppl. 454; Kelly *v.* Brooklyn Height R. Co., 51 N. Y. App. Div. 602, 64 N. Y Suppl. 64; Crown Cotton Mills *v.* Turner, 4 N. Y. App. Div. 270, 59 N. Y. Suppl. 1 Eisenlord *v.* Clum, 67 Hun 518, 22 N. Y Suppl. 574; Kind *v.* Bacon, 34 Misc. 783 69 N. Y. Suppl. 949 [*modifying* 67 N. Y Suppl. 960]; Malberg *v.* Sun Printing, etc. Assoc., 32 Misc. 715, 65 N. Y. Suppl. 690 Duryea *v.* Matranga, 31 Misc. 789, 65 N. Y Suppl. 319; Chambers *v.* Goldklang, 31 Misc 247, 64 N. Y. Suppl. 36 [*reversing* 60 N. Y Suppl. 998]; Brokman *v.* Myers, 13 N. Y Suppl. 732 [*affirmed* in 128 N. Y. 682, 2 N. E. 149].

North Carolina.— Crudup *v.* Thomas, 12 N. C. 333, 35 S. E. 602.

North Dakota.— Pewonka *v.* Stewart, 1 N. D. 117, 99 N. W. 1080.

Ohio.— Leber *v.* Kelley Island Lime, etc. Co., 21 Ohio Cir. Ct. 773; 11 Ohio Cir. Dec 568; Mendenhall *v.* Haven, 19 Ohio Cir. Ct 685, 9 Ohio Cir. Dec. 609.

Oregon.— Stager *v.* Troy Laundry Co., 4 Oreg. 141, 68 Pac. 405; Huber *v.* Miller, 4 Oreg. 103, 68 Pac. 400.

Pennsylvania.—Montelius *v.* Montelius, 20 Pa. St. 541, 58 Atl. 910; Corcoran *v.* Pennsylvania R. Co., 203 Pa. St. 380, 53 Atl. 240 Charles D. Kaier Co. *v.* O'Brien, 202 Pa. St 153, 51 Atl. 760.

South Carolina.— Earle *v.* Poat, 63 S. C 439, 41 S. E. 525.

Texas.— Parker *v.* Stroud, 39 Tex. Civ App. 448, 87 S. W. 734; Halliday *v.* Lambright, 29 Tex. Civ. App. 226, 68 S. W. 712 Ellis *v.* Rosenberg, (Civ. App. 1895) 2 S. W. 519; Johnston *v.* Luling Mfg. Co., (Civ App. 1894) 24 S. W. 996.

Washington.— Menasha Wooden Ware Co *v.* Nelson, 45 Wash. 543, 88 Pac. 1018.

West Virginia.— White *v.* L. Hoster Brewing Co., 51 W. Va. 259, 41 S. E. 180.

Wisconsin.— Allen *v.* Voje, 114 Wis. 1, 8 N. W. 924.

United States.— Gardner *v.* Michigan Cent R. Co., 150 U. S. 349, 14 S. Ct. 140, 37 L. ed 1107; Minahan *v.* Grand Trunk Western R Co., 138 Fed. 37, 70 C. C. A. 463; Chicago etc., R. Co. *v.* De Clow, 124 Fed. 142, 6

in favor of one of the parties,[99] or although the conflict arises only by indirection.[1] A verdict should not be directed when it must be based on some fact which must be inferred from the evidence, and which is not a legal presumption therefrom;[2] where the evidence would warrant a finding either way;[3] where, although there is no conflict in the testimony of the witnesses,[4] or although the facts be conceded,[5] the evidence reasonably tends to contradictory conclusions.[6] Nor should a ver-

C. C. A. 34; Fidelity, etc., Co. *v.* Dorough, 107 Fed. 389, 46 C. C. A. 364; Cochran *v.* Schreiber, 107 Fed. 371, 46 C. C. A. 349; Chicago, Great Western R. Co. *v.* Healy, 86 Fed. 245, 30 C. C. A. 11.

Testimony of single witness.—A verdict should not be rendered on the testimony of a single witness who contradicts himself on cross-examination in material respects. Paul *v.* Van da Linda, 12 N. Y. Suppl. 638.

Corroboration of testimony open to suspicion.— If testimony which might be open to suspicion is corroborated by a disinterested and unimpeached witness, the court is warranted in directing a verdict in accordance therewith. Howe *v.* Schweinberg, 4 Misc. (N. Y.) 73, 23 N. Y. Suppl. 607.

99. *Kansas.*— Jansen *v.* Atchison, 16 Kan. 358.

Minnesota.— Farrell *v.* St. Paul, etc., R. Co., 38 Minn. 394, 38 N. W. 100. *Contra,* Boston Northwest Real-Estate Co. *v.* Benz, 66 Minn. 99, 68 N. W. 602.

Mississippi.— Harris *v.* Perkins, (1899) 25 So. 154.

New York.— Cleveland *v.* New Jersey Steam-Boat Co., 2 Silv. Sup. 93 [*reversed* on other grounds in 125 N. Y. 299, 26 N. E. 327, 7 N. Y. Suppl. 28]; Rosenkranz *v.* Saberski, 40 Misc. 650, 83 N. Y. Suppl. 257; McQueen *v.* Brown, 18 Misc. 740, 41 N. Y. Suppl. 549; Bean *v.* Carleton, 6 N. Y. St. 641.

Pennsylvania.— Baker *v.* Irish, 172 Pa. St. 528, 33 Atl. 558; Howard Express Co. *v.* Wile, 64 Pa. St. 201.

Texas.— Berry *v.* Osborn, (1899) 52 S. W. 623; Daggett *v.* Webb, 30 Tex. Civ. App. 415, 70 S. W. 457.

United States.— Union Pac. R. Co. *v.* James, 56 Fed. 1001, 6 C. C. A. 217.

1. Wilson *v.* Royal Neighbors of America, 139 Mich. 423, 102 N. W. 957.

2. Luke *v.* Calhoun County, 52 Ala. 115; Morris *v.* Hall, 41 Ala. 510; White *v.* Hass, 32 Ala. 430, 70 Am. Dec. 548; Crum *v.* Williams, 29 Ala. 446; Alexander *v.* Staley, 110 Iowa 607, 81 N. W. 803.

3. *Georgia.*— Binion *v.* Georgia Southern, etc., R. Co., 111 Ga. 878, 36 S. E. 938; Murray *v.* Marshall, 106 Ga. 522, 32 S. E. 634.

Illinois.— Chicago City R. Co. *v.* Bennett, 214 Ill. 26, 73 N. E. 343; Henry *v.* Stewart, 185 Ill. 448, 57 N. E. 190; Birch *v.* Charleston Light, etc., Co., 113 Ill. App. 229; Toledo, etc., R. Co. *v.* Patterson, 94 Ill. App. 670; Drey *v.* Parker, 90 Ill. App. 598.

Minnesota.— Gaffney *v.* St. Paul City R. Co., 81 Minn. 459, 84 N. W. 304.

Missouri.— Jesse French Piano, etc., Co. *v.* Wallace, 84 Mo. App. 378.

Nebraska.— Paxton *v.* State, 60 Nebr. 763, 84 N. W. 254.

New Jersey.—Maurer *v.* Gould, (Sup. 1904) 59 Atl. 28; Friedman *v.* North Hudson County R. Co., 65 N. J. L. 298, 47 Atl. 631; Kulman *v.* Erie R. Co., 65 N. J. L. 241, 47 Atl. 497.

South Dakota.— Kielbach *v.* Chicago, etc., R. Co., 13 S. D. 629, 84 N. W. 192.

Texas.— Taylor *v.* Flint, 24 Tex. Civ. App. 394, 59 S. W. 1126.

4. *Alabama.*— Peters *v.* Southern R. Co., 135 Ala. 533, 33 So. 332.

Illinois.— Illinois Cent. R. Co. *v.* McNicholas, 98 Ill. App. 54.

Kansas.— Chicago, etc., R. Co. *v.* Wood, 66 Kan. 613, 72 Pac. 215.

Texas.— Mitchell *v.* McLaren, (Civ. App. 1899) 51 S. W. 269.

Vermont.— Tracy *v.* Grand Trunk R. Co., 76 Vt. 313, 57 Atl. 104.

5. *Maine.*— Whitehouse *v.* Bolster, 95 Me. 458, 50 Atl. 240.

Mississippi.— Mississippi Cent. R. Co. *v.* Mason, 51 Miss. 234.

Missouri.— Primm *v.* Haren, 27 Mo. 205.

Nebraska.— Thomson *v.* Shelton, 49 Nebr. 644, 68 N. W. 1055.

New Jersey.— New Jersey School, etc., Furniture Co. *v.* Somerville Bd. of Education, 58 N. J. L. 646, 35 Atl. 397.

New York.— Elmira Second Nat. Bank *v.* Weston, 161 N. Y. 520, 55 N. E. 1080, 76 Am. St. Rep. 283.

Pennsylvania.— Loeb *v.* Mellinger, 12 Pa. Super. Ct. 592.

Contra.— Atchison, etc., R. Co. *v.* Lamoreux, 5 Kan. App. 813, 49 Pac. 152.

6. *Alabama.*— Sanders *v.* Edmonds, 98 Ala. 157, 13 So. 505; Avary *v.* Perry Stove Mfg. Co., 96 Ala. 406, 11 So. 417; Bromley *v.* Birmingham Mineral R. Co., 95 Ala. 397, 11 So. 341; Payne *v.* Mathis, 92 Ala. 585, 9 So. 605.

Illinois.— Chicago, etc., R. Co. *v.* Steckman, 224 Ill. 500, 79 N. E. 602; Aurora *v.* Scott, 185 Ill. 539, 57 N. E. 440; Nolan *v.* Morris, 108 Ill. App. 261; McFadden *v.* Sollitt, 94 Ill. App. 271; West Chicago St. R. Co. *v.* Shiplett, 85 Ill. App. 683.

Indiana.— Roots *v.* Tyner, 10 Ind. 87; Compton *v.* Benham, 44 Ind. App. 51, 85 N. E. 365.

Kentucky.— Trotter *v.* Sanders, 7 J. J. Marsh. 321; Dallam *v.* Handley, 2 A. K. Marsh. 418.

Massachusetts.— Carpenter *v.* Fisher, 175 Mass. 9, 55 N. E. 479; Kane *v.* Learned, 117 Mass. 190.

Michigan.— Fox *v.* Spring Lake Iron Co., 89 Mich. 387, 50 N. W. 872.

Missouri.— Chouquette *v.* Barada, 28 Mo. 491; Carr *v.* Ubsdell, 97 Mo. App. 326, 71 S. W. 112; Herf, etc., Chemical Co. *v.* Lacka-

dict be directed where a party is the sole witness in his own behalf,[7] and his evidence, although uncontroverted, is confusing,[8] or on the uncontroverted testimony of an interested witness,[9] or of a witness shown to be hostile to the opposite party,[10] or where the only person who could have contradicted the witness is dead.[11] A verdict should not, in any case, be directed on testimony heard by the court at a former trial, but not read to the jury.[12] Where defendant admits a part of the items of an account sued on, an instruction to find for him on the whole case is properly refused.[13]

(II) *Where Court Would Set Aside Any Other Verdict.* A verdict should never be directed unless the evidence is of such a conclusive character as to make it the duty of the court in the exercise of a sound legal discretion to set aside a verdict in opposition to it.[14] Where a cause fairly depends upon the

wanna Line, 85 Mo. App. 667; Hester *v.* New York Fidelity, etc., Co., 78 Mo. App. 505; Sonnenfeld Millinery Co. *v.* People's R. Co., 59 Mo. App. 668; Workingmen's Banking Co. *v.* Blell, 57 Mo. App. 410.

Nebraska.— Brownell *v.* Fuller, 60 Nebr. 558, 83 N. W. 669.

New Jersey.— Conover *v.* Middletown Tp., 42 N. J. L. 382.

New York.— Hagan *v.* Sone, 174 N. Y. 317, 66 N. E. 973 [*reversing* 74 N. Y. Suppl. 109]; Elmira Second Nat. Bank *v.* Weston, 161 N. Y. 520, 55 N. E. 1080, 76 Am. St. Rep. 283; Auld *v.* Manhattan L. Ins. Co., 34 N. Y. App. Div. 491, 54 N. Y. Suppl. 222 [*affirmed* in 165 N. Y. 610, 58 N. E. 1085]; Gardner *v.* Friederich, 25 N. Y. App. Div. 521, 49 N. Y. Suppl. 1077 [*affirmed* in 163 N. Y. 568, 57 N. E. 1110]; Schusterman *v.* Schwartz, 66 N. Y. Suppl. 512; McGarragher *v.* Gaskell, 6 N. Y. St. 87; Moorehead *v.* Holden, 7 N. Y. Civ. Proc. 188.

North Carolina.— Blackledge *v.* Clark, 24 N. C. 394.

Pennsylvania.— Dinan *v.* Supreme Council C. M. B. A., 210 Pa. St. 456, 60 Atl. 10; Heh *v.* Consolidated Gas Co., 201 Pa. St. 443, 50 Atl. 994, 88 Am. St. Rep. 819; Bevan *v.* Insurance Co., 9 Watts & S. 187.

Washington.— Nelson *v.* S. Willey Steamship, etc., Co., 26 Wash. 548, 67 Pac. 237.

United States.— Standard L., etc., Ins. Co. *v.* Sale, 121 Fed. 664, 57 C. C. A. 418, 61 L. R. A. 337; Standard L., etc., Ins. Co. *v.* Thornton, 100 Fed. 582, 40 C. C. A. 564, 49 L. R. A. 116.

Application and extent of rule.— This rule is especially applicable to questions of negligence as they must ordinarily be determined by inferences from the facts proved rather than from direct evidence. Richardson *v.* Swift, 96 Fed. 699, 37 C. C. A. 557.

7. Honegger *v.* Wettstein, 94 N. Y. 252; Strong *v.* Walton, 47 N. Y. App. Div. 114, 62 N. Y. Suppl. 353 [*reversing* 27 Misc. 302, 58 N. Y. Suppl. 761]; Hull *v.* Littauer, 8 N Y. App. Div. 227, 40 N. Y. Suppl. 338 [*affirmed* in 162 N. Y. 569, 57 N. E. 102]; Miller *v.* Boyer, 79 Hun 131, 29 N. Y. Suppl. 479; Fisher *v.* Rankin, 78 Hun 407, 29 N. Y. Suppl. 143; Van Mater *v.* Burns, 76 Hun 3, 27 N. Y. Suppl. 624; Goldsmith *v.* Coverly, 75 Hun 48, 27 N. Y. Suppl. 116, 31 Abb. N. Cas. 149; Stay *v.* Du Bois, 74 Hun 134, 26 N. Y. Suppl. 240; Rumsey *v.* Boutwell, 61 Hun 165, 15 N. Y. Suppl. 765; Hodge *v.* Buffalo, Sheld. 418, 1 Abb. N. Cas. 356; Lesser *v.* Wunder, 9 Daly 70; Corn *v.* Rosenthal, 1 Misc. 168, 20 N. Y. Suppl. 632 [*affirmed* in 3 Misc. 72, 22 N. Y. Suppl. 700]; Jonassen *v.* Eames, 21 N. Y. Suppl. 714 [*affirmed* in 142 N. Y. 653, 37 N. E. 569]; Condit *v.* Sill, 18 N. Y. Suppl. 97; Slater *v.* McGuire, 16 N. Y. Suppl. 682 [*affirmed* in 137 N. Y. 614, 33 N. E. 744]. *Contra,* Bryson *v.* Wallace, 4 Indian Terr. 101, 69 S. W. 814.

8. Whalen *v.* Harrison, 26 Mont. 316, 67 Pac. 934.

9. Gildersleeve *v.* Landon, 73 N. Y. 609; Brush *v.* Long Island R. Co., 10 N. Y. App. Div. 535, 42 N. Y. Suppl. 103 [*affirmed* in 158 N. Y. 742, 53 N. E. 1123]; Connolly *v.* Central Vermont R. Co., 4 N. Y. App. Div. 221, 38 N. Y. Suppl. 587 [*affirmed* in 158 N. Y. 675, 52 N. E. 1124]; Wilcox *v.* Selleck, 92 Hun (N. Y.) 37, 36 N. Y. Suppl. 633; Roseberry *v.* Nixon, 58 Hun (N. Y.) 121, 11 N. Y. Suppl. 523; Michigan Carbon Works *v.* Schad, 38 Hun (N. Y.) 71; Finn *v.* Peterson, 24 Misc. (N. Y.) 737, 53 N. Y. Suppl. 787; Lowey *v.* Fidelity Printing Co., 16 Misc. (N. Y.) 549, 38 N. Y. Suppl. 711; Gair *v.* Cohen, 56 N. Y. Suppl. 180; Crosby *v.* Delaware, etc., Canal Co., 21 N. Y. Suppl. 83 [*affirmed* in 141 N. Y. 589, 36 N. E. 332]; Leavitt *v.* Dodge, 16 N. Y. Suppl. 309; Sherry *v.* Fredericks, 13 N. Y. St. 23; Pool *v.* Harris, 11 N. Y. St. 673; Heierman *v.* Robinson, 26 Tex. Civ. App. 491, 63 S. W. 657.

As to who are interested witnesses see Stevens *v.* Metropolitan L. Ins. Co., 13 N. Y. App. Div. 16, 43 N. Y. Suppl. 60; Kingsland Land Co. *v.* Newman, 1 N. Y. App. Div. 1, 36 N. Y. Suppl. 960; Howe *v.* Schweinberg, 1 Misc. (N. Y.) 481, 21 N. Y. Suppl. 469 [*affirmed* in 4 Misc. 73, 23 N. Y. Suppl. 607].

10. Dudley *v.* Satterlee, 8 Misc. (N. Y.) 538, 28 N. Y. Suppl. 741.

11. Bloomingdale *v.* Southern Nat. Bank, 63 N. Y. App. Div. 72, 71 N. Y. Suppl. 306; Chicago Great Western R. Co. *v.* Price, 97 Fed. 423, 38 C. C. A. 239.

12. Barney *v.* Schmeider, 9 Wall. (U. S.) 248, 19 L. ed. 648.

13. Carter *v.* Fischer, 127 Ala. 52, 28 So. 376.

14. *Connecticut.*— Currie *v.* Consolidated

effect or weight of testimony, it is one for the consideration and determination of the jury, under proper directions as to the principles of law involved.[15] On the other hand, it is a well-settled rule of practice in most jurisdictions that the court may withdraw a case from the jury altogether and direct a verdict for plaintiff or defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character, or so preponderates in favor of one party that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it.[16] In these juris-

R. Co., 81 Conn. 383, 71 Atl. 356; Bradbury *v.* South Norwalk, 80 Conn. 298, 68 Atl. 321.

Illinois.— Chicago, etc., R. Co. *v.* Steckman, 224 Ill. 500, 79 N. E. 602; Illinois Cent. R. Co. *v.* Bailey, 222 Ill. 480, 78 N. E. 833; Pullman Palace Car Co. *v.* Laack, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215.

Indiana.— Diezi *v.* G. H. Hammond Co., 156 Ind. 583, 60 N. E. 353; Wolfe *v.* McMillan, 117 Ind. 587, 20 N. E. 509; Gregory *v.* Cleveland, etc., R. Co., 112 Ind. 385, 14 N. E. 228; Governor *v.* Shelby, 2 Blackf. 26.

Mississippi.—Anderson *v.* Cumberland Tel., etc., Co., 86 Miss. 341, 38 So. 786.

New York.— Rich *v.* Rich, 16 Wend. 663.

Texas.— Walker *v.* Texas, etc., R. Co., 51 Tex. Civ. App. 391, 112 S. W. 430.

West Virginia.— Mahaffey *v.* J. L. Rumbarger Lumber Co., 61 W. Va. 571, 56 S. E. 893, 8 L. R. A. N. S. 1263; Cobb *v.* Glenn Boom, etc., Co., 57 W. Va. 49, 49 S. E. 1005, 110 Am. St. Rep. 734; Ketterman *v.* Dry Fork R. Co., 48 W. Va. 606, 37 S. E. 683.

United States.— Connecticut Mut. L. Ins. Co. *v.* Lathrop, 111 U. S. 612, 4 S. Ct. 533, 28 L. ed. 536; Montclair Tp. *v.* Dana, 107 U. S. 162, 2 S. Ct. 403, 27 L. ed. 436; Phœnix Mut. L. Ins. Co. *v.* Doster, 106 U. S. 30, 1 S. Ct. 18, 27 L. ed. 65; Patton *v.* Southern R. Co., 82 Fed. 979, 27 C. C. A. 287.

See 46 Cent. Dig. tit. "Trial," § 383.

15. Connecticut Mut. Ins. Co. *v.* Lathrop, 111 U. S. 612, 4 S. Ct. 533, 28 L. ed. 536; Phœnix Mut. L. Ins. Co. *v.* Doster, 106 U. S. 30, 1 S. Ct. 18, 27 L. ed. 65.

16. *Arizona.*— Ewing *v.* U. S., 11 Ariz. 1, 89 Pac. 593; Haupt *v.* Maricopa County, 8 Ariz. 102, 68 Pac. 525; Haff *v.* Adams, 6 Ariz. 395, 59 Pac. 111; Root *v.* Fay, 5 Ariz. 19, 43 Pac. 527.

California.— Meyer *v.* Lovdal, 6 Cal. App. 369, 92 Pac. 322.

Colorado.— Weston *v.* Livezey, 45 Colo. 142, 100 Pac. 404; Murphy *v.* Cobb, 5 Colo. 281; Brown *v.* Potter, 13 Colo. App. 512, 58 Pac. 785.

Connecticut.— Hinckley *v.* Danbury, 81 Conn. 241, 70 Atl. 590.

Dakota.— Knapp *v.* Sioux Falls Nat. Bank, 5 Dak. 378, 40 N. W. 587.

District of Columbia.— Walker *v.* Warner, 31 App. Cas. 76; Scott *v.* District of Columbia, 27 App. Cas. 413; Ford *v.* Ford, 27 App. Cas. 401, 6 L. R. A. N. S. 442; Kohner *v.* Capital Traction Co., 22 App. Cas. 181, 62 L. R. A. 875; Prigg *v.* Lansburgh, 5 App. Cas. 30; Howes *v.* District of Columbia, 2 App. Cas. 188.

Georgia.— Walker *v.* O'Neill Mfg. Co., 128 Ga. 831, 58 S. E. 475; McCullough *v.* Pritchett, 120 Ga. 585, 48 S. E. 148; McWaters *v.* Equitable Mortg. Co., 115 Ga. 723, 42 S. E. 52; Cameron *v.* Citizens' Banking Co., 115 Ga. 405, 41 S. E. 629; Whisenant *v.* Sappington, 115 Ga. 14, 41 S. E. 252; Wright *v.* Schofield, 92 Ga. 537, 17 S. E. 929; Smith *v.* Duke, 6 Ga. App. 75, 64 S. E. 292.

Illinois.— Chicago City R. Co. *v.* McCaughna, 216 Ill. 202, 74 N. E. 819 [*affirming* 117 Ill. App. 538]; Illinois Third Vein Coal Co. *v.* Cioni, 215 Ill. 583, 74 N. E. 751 [*affirming* 115 Ill. App. 455]; Hahl *v.* Brooks, 213 Ill. 134, 72 N. E. 727 [*affirming* 114 Ill. App. 644]; Illinois Cent. R. Co. *v.* Prickett, 210 Ill. 140, 71 N. E. 435 [*affirming* 109 Ill. App. 468]; Nelson *v.* Fehd, 203 Ill. 120, 67 N. E. 828 [*affirming* 104 Ill. App. 114]; Hartrich *v.* Hawes, 202 Ill. 334, 67 N. E. 13 [*affirming* 103 Ill. App. 433]; Anthony Ittner Brick Co. *v.* Ashby, 198 Ill. 562, 64 N. E. 1109 [*affirming* 100 Ill. App. 604]; Salem *v.* Webster, 192 Ill. 369, 61 N. E. 323 [*affirming* 95 Ill. App. 120]; West Side Auction House Co. *v.* Connecticut Mut. L. Ins. Co., 186 Ill. 156, 57 N. E. 839; Offutt *v.* World's Columbian Exposition Co., 175 Ill. 472, 51 N. E. 651; Simmons *v.* Chicago, etc., R. Co., 110 Ill. 340; Chicago Hardware Co. *v.* Matthews, 124 Ill. App. 89; Chicago, etc., R. Co. *v.* Stratton, 111 Ill. App. 142; Nolan *v.* Morris, 108 Ill. App. 261; Continental Nat. Bank *v.* Metropolitan Nat. Bank, 107 Ill. App. 455; Chicago City R. Co. *v.* Ahler, 107 Ill. App. 397; Pittsburg, etc., R. Co. *v.* Banfill, 107 Ill. App. 254 [*affirmed* in 206 Ill. 553, 69 N. E. 499]; Chicago, etc., R. Co. *v.* Burridge, 107 Ill. App. 23; Chicago Title, etc., Co. *v.* Standard Fashion Co., 106 Ill. App. 135; Martin *v.* Chicago, etc., R. Co., 92 Ill. App. 133; Cleveland, etc., R. Co. *v.* Chinsky, 92 Ill. App. 50; Haecker *v.* Chicago, etc., R. Co., 91 Ill. App. 570; Finley *v.* West Chicago St. R. Co., 90 Ill. App. 368; Boyle *v.* Illinois Cent. R. Co., 88 Ill. App. 255; Barr *v.* Paris, 87 Ill. App. 503; Bjork *v.* Illinois Cent. R. Co., 85 Ill. App. 269; Ryan *v.* Chicago, 79 Ill. App. 28; Illinois Cent. R. Co. *v.* Meyer, 65 Ill. App. 531. But see Cicero, etc., R. Co. *v.* Hughes, 125 Ill. App. 186.

Indiana.— Westfall *v.* Wait, 165 Ind. 353, 73 N. E. 1089; Wolfe *v.* McMillan, 117 Ind. 587, 20 N. E. 509; Cleveland, etc., R. Co. *v.* Heath, 22 Ind. App. 47, 53 N. E. 198. *Contra,* Haynes *v.* Thomas, 7 Ind. 38; New

dictions this is perhaps the most familiar test for determining whether or not a verdict should be directed. There is no object, it is said, in permitting a jury to

Albany *v.* Ray, 3 Ind. App. 321, 29 N. E. 611.

Indian Territory.— Truskett *v.* Bronaugh, 4 Indian Terr. 731, 76 S. W. 294; De Graffenried *v.* Wallace, 2 Indian Terr. 657, 53 S. W. 452.

Iowa.— Tucker *v.* Tucker, 138 Iowa 344, 116 N. W. 119; Calwell *v.* Minneapolis, etc., R. Co., 137 Iowa 32, 115 N. W. 605; Cherry *v.* Des Moines Leader, 114 Iowa 298, 86 N. W. 323, 89 Am. St. Rep. 365, 54 L. R. A. 855; Hurd *v.* Neilson, 100 Iowa 555, 69 N. W. 867; Barnhart *v.* Chicago, etc., R. Co., 97 Iowa 654, 66 N. W. 902; Reeder *v.* Dupuy, 96 Iowa 729, 65 N. W. 338; Beckman *v.* Consolidation Coal Co., 90 Iowa 252, 57 N. W. 889; Meyer *v.* Houck, 85 Iowa 319, 52 N. W. 235; Citizens Bank *v.* Rhutasel, 67 Iowa 316, 25 N. W. 261; Sperry *v.* Etheridge, 63 Iowa 543, 19 N. W. 657.

Maine.— Wellington *v.* Corinna, 104 Me. 252, 71 Atl. 889; Young *v.* Chandler, 102 Me. 251, 66 Atl. 539; Day *v.* Boston, etc., R. Co., 97 Me. 528, 55 Atl. 420; Coleman *v.* Lord, 96 Me. 192, 52 Atl. 645; Moore *v.* McKenney, 83 Me. 80, 21 Atl. 749, 23 Am. St. Rep. 753; Heath *v.* Jaquith, 68 Me. 433.

Maryland.— Baltimore El. Co. *v.* Neal, 65 Md. 438, 5 Atl. 338.

Massachusetts.— Davis *v.* Maxwell, 12 Metc. 286.

Minnesota.— Krenz *v.* Lea, 104 Minn. 455, 116 N. W. 832; Giermann *v.* St. Paul, etc., R. Co., 42 Minn. 5, 43 N. W. 483; Abbett *v.* Chicago, etc., R. Co., 30 Minn. 482, 16 N. W. 266; Dawson *v.* Helmes, 30 Minn. 107, 14 N. W. 462.

Mississippi.— Clark *v.* Moyse, (1909) 48 So. 721; Flora *v.* American Express Co., 92 Miss. 66, 45 So. 149; Wooten *v.* Mobile, etc., R. Co., 89 Miss. 322, 42 So. 131.

Missouri.— Hite *v.* Metropolitan St. R. Co., 130 Mo. 132, 31 S. W. 262, 32 S. W. 33, 51 Am. St. Rep. 555; Reichenbach *v.* Ellerbe, 115 Mo. 588, 22 S. W. 573; Jackson *v.* Hardin, 83 Mo. 175; Landis *v.* Hamilton, 77 Mo. 554; Powell *v.* Missouri Pac. R. Co., 76 Mo. 80.

Nebraska.— Sattler *v.* Chicago, etc., R. Co., 71 Nebr. 213, 98 N. W. 663; Kielbeck *v.* Chicago, etc., R. Co., 70 Nebr. 571, 97 N. W. 750; Palmer *v.* Fidelity Mut. F. Ins. Co., (1902) 92 N. W. 575; Zimmerman *v.* Kearney County Bank, (1902) 91 N. W. 497; Burke *v.* Pender First Nat. Bank, 61 Nebr. 20, 84 N. W. 408, 87 Am. St. Rep. 447; Knapp *v.* Jones, 50 Nebr. 490, 70 N. W. 19; Chaffee *v.* Park Falls Lumber Co., 1 Nebr. (Unoff.) 632, 96 N. W. 495; Wagoner *v.* London, 1 Nebr. (Unoff.) 38, 95 N. W. 496.

New Hampshire.— Boston, etc., R. Co. *v.* Sargent, 72 N. H. 455, 57 Atl. 688.

New Jersey.— Vandergrift Constr. Co. *v.* Camden, etc., R. Co., 74 N. J. L. 669, 65 Atl. 986; Crosby *v.* Wells, 73 N. J. L. 790, 67 Atl. 295; Maurer *v.* Gould, 72 N. J. L. 314, 60 Atl. 1134 [*affirming* (Sup. 1904) 59 Atl. 28]; Loper *v.* Somers, 71 N. J. L. 657, 61 Atl. 85; Markey *v.* Consolidated Traction Co., 65 N. J. L. 682, 48 Atl. 1117 [*affirming* 65 N. J. L. 82, 46 Atl. 573]; Coyle *v.* Griffing Iron Co., 63 N. J. L. 609, 44 Atl. 665, 47 L. R. A. 147; Regan *v.* Palo, 62 N. J. L. 30, 41 Atl. 364; McCormack *v.* Standard Oil Co., 60 N. J. L. 243, 37 Atl. 617; Baldwin *v.* Shannon, 43 N. J. L. 596.

New Mexico.— Armstrong *v.* Aragon, 13 N. M. 19, 79 Pac. 291; Lutz *v.* Atlantic, etc., R. Co., 6 N. M. 496, 30 Pac. 912, 16 L. R. A. 819; Gildersleeve *v.* Atkinson, 6 N. M. 250, 27 Pac. 477.

North Carolina.— Wittkowsky *v.* Wasson, 71 N. C. 451.

North Dakota.— Bowman *v.* Eppinger, 1 N. D. 21, 44 N. W. 1000.

Oklahoma.— Guss *v.* Federal Trust Co., 19 Okla. 138, 91 Pac. 1045; Neeley *v.* Southwestern Cotton Seed Oil Co., 13 Okla. 356, 75 Pac. 537, 64 L. R. A. 145; Kentucky Refining Co. *v.* Purcell Cotton Seed Oil Mills, 13 Okla. 220, 73 Pac. 945.

Oregon.— Patty *v.* Salem Flouring Mills Co., 53 Oreg. 350, 96 Pac. 1106, 98 Pac. 521, 100 Pac. 298; Coffin *v.* Hutchinson, 22 Oreg. 554, 30 Pac. 424.

South Dakota.— Greenwald *v.* Ford, 21 S. D. 28, 109 N. W. 516; Fisher *v.* Porter, 11 S. D. 311, 77 N. W. 112; Haugen *v.* Chicago, etc., R. Co., 3 S. D. 394, 53 N. W. 769; Peet *v.* Dakota F., etc., Ins. Co., 1 S. D. 462, 47 N. W. 532.

Texas.— Wills *v.* Central Ice, etc., Co., 39 Tex. Civ. App. 483, 88 S. W. 265; Long *v.* Red River, etc., R. Co., (Civ. App. 1905) 85 S. W. 1048; Lancaster Gin, etc., Co. *v.* Murray Ginning System Co., 19 Tex. Civ. App. 110, 47 S. W. 387; Washington *v.* Missouri, etc., R. Co., (Civ. App. 1896) 36 S. W. 778.

West Virginia.— Cobb *v.* Glenn Boom, etc., Co., 57 W. Va. 49, 49 S. E. 1005, 110 Am. St. Rep. 734; Williams *v.* Belmont Coal, etc., Co., 55 W. Va. 84, 46 S. E. 802; White *v.* L. Hoster Brewing Co., 51 W. Va. 259, 41 S. E. 180.

United States.— Marande *v.* Texas, etc., R. Co., 184 U. S. 173, 22 S. Ct. 340, 46 L. ed. 487; Elliott *v.* Chicago, etc., R. Co., 150 U. S. 245, 14 S. Ct. 85, 37 L. ed. 1068; Delaware, etc., R. Co. *v.* Converse, 139 U. S. 469, 11 S. Ct. 569, 35 L. ed. 213; North Pennsylvania R. Co. *v.* Commercial Nat. Bank, 123 U. S. 727, 8 S. Ct. 266, 31 L. ed. 287; Anderson County *v.* Beal, 113 U. S. 227, 5 S. Ct. 433, 28 L. ed. 966; Bowditch *v.* Boston, 101 U. S. 16, 25 L. ed. 980; Marion County *v.* Clark, 94 U. S. 278, 24 L. ed. 59; Pleasants *v.* Fant, 22 Wall. 116, 22 L. ed. 780; Schuylkill, etc., Imp., etc., R. Co. *v.* Munson, 14 Wall. 442, 20 L. ed. 867; Hickman *v.* Jones, 9 Wall. 197, 19 L. ed. 551; Parks *v.* Ross, 11 How. 362, 13 L. ed. 730; U. S. *v.* American Surety Co., 161 Fed. 149 [*reversed* on other grounds in 163 Fed. 228, 89

find a verdict which a court would set aside as soon as found.[17] There are jurisdictions, however, in which it is held that the fact that it would be the duty of the court to set aside a verdict in opposition to the verdict for which a motion to direct is made furnishes no grounds to grant the motion if there be any conflict in the evidence whatever.[18] The rule in these jurisdictions is that the court

C. C. A. 658]; International Text Book Co. *v.* Heartt, 136 Fed. 129, 69 C. C. A. 127; Riley *v.* Louisville, etc., R. Co., 133 Fed. 904, 66 C. C. A. 598; Chicago Great Western R. Co. *v.* Roddy, 131 Fed. 712, 65 C. C. A. 470; Patillo *v.* Allen-West Commission Co., 131 Fed. 680, 65 C. C. A. 508; Gentry *v.* Singleton, 128 Fed. 679, 63 C. C. A. 231; Shoup *v.* Marks, 128 Fed. 32, 62 C. C. A. 540; Marquardt *v.* Ball Engine Co., 122 Fed. 374, 58 C. C. A. 462; Thomason *v.* Southern R. Co., 113 Fed. 80, 51 C. C. A. 67; Pennsylvania R. Co. *v.* Martin, 111 Fed. 586, 49 C. C. A. 474, 55 L. R. A. 361; Thompson *v.* McConnell, 107 Fed. 33, 46 C. C. A. 124; Hodges *v.* Kimball, 104 Fed. 745, 44 C. C. A. 193; Ponder *v.* Jerome Hill Cotton Co., 100 Fed. 373, 40 C. C. A. 416; Railway Officials', etc., Acc. Assoc. *v.* Wilson, 100 Fed. 368, 40 C. C. A. 411; Detroit Crude-Oil Co. *v.* Grable, 94 Fed. 73, 36 C. C. A. 94; Smyth *v.* New Orleans Canal, etc., Co., 93 Fed. 899, 35 C. C. A. 646; Motey *v.* Pickle Marble, etc., Co., 74 Fed. 155, 20 C. C. A. 366; Supreme Council C. K. A. *v.* Fidelity, etc., Co., 63 Fed. 48, 11 C. C. A. 96; U. S. *v.* Shapleigh, 54 Fed. 126, 4 C. C. A. 237; Monroe *v.* British, etc., Mar. Ins. Co., 52 Fed. 777, 3 C. C. A. 280; Harris *v.* Louisville, etc., R. Co., 35 Fed. 116; National Exch. Bank *v.* White, 30 Fed. 412; Hathaway *v.* East Tennessee, etc., R. Co., 29 Fed. 489; Bagley *v.* Cleveland Rolling-Mill Co., 21 Fed. 159; Adams *v.* Spangler, 17 Fed. 133, 5 McCrary 334.

See 46 Cent. Dig. tit. "Trial," §§ 379 383, 391.

17. Ketterman *v.* Dry Fork R. Co., 48 W. Va. 606, 37 S. E. 683.

18. *Arkansas.*— Little Rock, etc., R. Co. *v.* Henson, 39 Ark. 413; Little Rock, etc., R. Co. *v.* Perry, 37 Ark. 164.

Kentucky.— Couadeau *v.* American Acc. Co., 95 Ky. 280, 25 S. W. 6, 15 Ky. L. Rep. 667; Buford *v.* Louisville, etc., R. Co., 82 Ky. 286; Thompson *v.* Thompson, 17 B. Mon. 22; Smith *v.* Park, 84 S. W. 1167, 27 Ky. L. Rep. 351; Gladstone Baptist Church *v.* Scott, 74 S. W. 1075, 25 Ky. L. Rep. 237; Chesapeake, etc., R. Co. *v.* Ogles, 73 S. W. 751, 24 Ky. L. Rep. 2160; Illinois Cent. R. Co. *v.* Crady, 69 S. W. 706, 24 Ky. L. Rep. 643; Illinois Cent. R. Co. *v.* Jackson, 65 S. W. 342, 23 Ky. L. Rep. 1405; Dick *v.* Louisville, etc., R. Co., 64 S. W. 725, 23 Ky. L. Rep. 1068; Payne Clothing Co. *v.* Payne, 54 S. W. 709, 21 Ky. L. Rep. 1226.

New York.— McDonald *v.* Metropolitan St. R. Co., 167 N. Y. 66, 60 N. E. 282; Fealey *v.* Bull, 163 N. Y. 397, 57 N. E. 631; Faulkner *v.* Cornell, 80 N. Y. App. Div. 161, 80 N. Y. Suppl. 526; Philips *v.* Philips, 77 N. Y. App. Div. 113, 78 N. Y. Suppl. 1001 [*affirmed* in 179 N. Y. 585, 72 N. E. 1149]; Allison *v.* Long Clove Trap Rock Co., 75 N. Y. App. Div. 267, 78 N. Y. Suppl. 69; Smith *v.* Metropolitan St. R. Co., 66 N. Y. App. Div. 600, 73 N. Y. Suppl. 254; Marshall *v.* Buffalo, 63 N. Y. App. Div. 603, 71 N. Y. Suppl. 719 [*affirmed* in 176 N. Y. 545, 68 N. E. 1119]; Luhrs *v.* Brooklyn Heights R. Co., 11 N. Y. App. Div. 173, 42 N. Y. Suppl. 606, 13 N. Y. App. Div. 126, 42 N. Y. Suppl. 1101; Wagner *v.* Einhorn, 88 N. Y. Suppl. 370; McCrystal *v.* O'Neill, 86 N. Y. Suppl. 84; Padbury *v.* Metropolitan St. R. Co., 75 N. Y. Suppl. 952. That prior to the decision of the two court of appeals decisions cited above, the rule was in accordance with that which prevails in the majority of jurisdictions see Hemmens *v.* Nelson, 138 N. Y. 517, 34 N. E. 342, 20 L. R. A. 440; Linkauf *v.* Lombard, 137 N. Y. 417, 33 N. E. 472, 33 Am. St. Rep. 743, 20 L. R. A. 48; Dwight *v.* Germania L. Ins. Co., 103 N. Y. 341, 8 N. E. 654, 57 Am. Rep. 729; Neuendorff *v.* World Mut. L. Ins. Co., 69 N. Y. 389; Cagger *v.* Lansing, 64 N. Y. 417; Appleby *v.* Astor F. Ins. Co., 54 N. Y. 253; Kelsey *v.* Northern Light Oil Co., 45 N. Y. 505; Corning *v.* Troy Iron, etc., Factory, 44 N. Y. 577; Wilds *v.* Hudson River R. Co., 24 N. Y. 430; Herring *v.* Hoppock, 15 N. Y. 409; People *v.* Cook, 8 N. Y. 67, 59 Am. Dec. 451; People *v.* Metropolitan Police Dist. Bd., 35 Barb. 651; Reading Braid Co. *v.* Stewart, 19 Misc. 431, 43 N. Y. Suppl. 1129 [*affirmed* in 20 Misc. 86, 45 N. Y. Suppl. 69]; Rudd *v.* Davis, 3 Hill 287 [*affirmed* in 7 Hill 529]; Stuart *v.* Simpson, 1 Wend. 376.

Ohio.— Clark *v.* Stitt, 12 Ohio Cir. Ct. 759, 4 Ohio Cir. Dec. 51; Gates *v.* Home Mut. L. Ins. Co., 5 Ohio Dec. (Reprint) 313, 4 Am. L. Rec. 395.

Pennsylvania.— Dinan *v.* Supreme Council C. M. B. A., 210 Pa. St. 456, 60 Atl. 10.

South Carolina.— Altee *v.* South Carolina R. Co., 21 S. C. 550.

Wisconsin.— Lewis *v.* Prien, 98 Wis. 87, 73 N. W. 654 [which seems to *overrule* by implication Cutler *v.* Hurlbut, 29 Wis. 152; Dryden *v.* Britton, 19 Wis. 22].

See 46 Cent. Dig. tit. "Trial," § 379.

Reasons assigned in support of doctrine.— The rule that a verdict may be directed whenever the proof is such that a decision to the contrary might be set aside as against the weight of evidence would be both uncertain and delusive. There is no standard by which to determine when a verdict may be thus set aside. It depends upon the discretion of the court. The result of setting aside a verdict and the result of directing one are widely different and should not be controlled by the same conditions or circumstances. In one case there is a re-trial. In the other the judgment is final. One rests in discretion; the other upon legal right. One involves a mere matter of remedy or

cannot, in any case where the right of trial by jury exists and the evidence presents an actual issue of fact, properly direct a verdict; if in such a case it is dissatisfied with the verdict because against the weight or preponderance of evidence, it may be set aside, but a new trial must be granted before another jury, and the direction of a verdict under such circumstances is reversible error.[19] So in Massachusetts, it has been said that if the evidence is such that the court would set aside any number of verdicts rendered upon it, *toties quoties*, then the cause should be taken from the jury, by instructing them to find a verdict for defendant. On the other hand, if the evidence is such that, although one or two verdicts rendered upon it would be set aside on motion, yet a second or third verdict would be suffered to stand, the cause should not be taken from the jury, but should be submitted to them under instructions.[20]

b. When Verdict Directed For Plaintiff. Where plaintiff has clearly made out his case and there is no evidence to the contrary,[21] where defendant relies on an affirmative defense and the evidence introduced would not warrant a finding

procedure. The other determines substantive and substantial rights. Such a rule would have no just principle upon which to rest. While in many cases, even where the evidence is sufficient to sustain it, a verdict may be properly set aside and a new trial ordered, yet, that in every case the trial court may, whenever it sees fit, direct a verdict and thus forever conclude the parties, has no basis in the law, which confides to juries and not to courts the determination of the facts in this class of cases. McDonald *v.* Metropolitan St. R. Co., 167 N. Y. 66, 60 N. E. 282.

19. McDonald *v.* Metropolitan St. R. Co., 167 N. Y. 66, 60 N. E. 282. And see cases cited in preceding note.

20. Denny *v.* Williams, 5 Allen (Mass.) 1.

21. *Alabama.*— McClaskey *v.* Howell Cotton Co., 147 Ala. 573, 42 So. 67; Sims *v.* Herzfeld, 95 Ala. 145, 10 So. 227; Smith *v.* Marx, 93 Ala. 311, 9 So. 194.

California.—Los Angeles Farming, etc., Co. *v.* Thompson, 117 Cal. 594, 49 Pac. 714; Terry *v.* Sickles, 13 Cal. 427.

Colorado.— Israel *v.* Day, 41 Colo. 52, 92 Pac. 698.

Dakota.— Star Wagon Co. *v.* Matthiessen, 3 Dak. 233, 14 N. W. 107.

District of Columbia.— Green *v.* Stewart, 23 App. Cas. 570.

Georgia.— Shumate *v.* Ryan, 127 Ga. 118, 56 S. E. 103; Murphy *v.* Davis, 122 Ga. 306, 50 S. E. 99; Wall *v.* Brewer, 115 Ga. 1021, 42 S. E. 394; Amicalola Marble, etc., Co. *v.* Thomason, 111 Ga. 873, 36 S. E. 950; Medlock *v.* Gainesville First Nat. Bank, 108 Ga. 762, 33 S. E. 72; Taylor *v.* American Freehold Land Mortg. Co., 106 Ga. 238, 32 S. E. 153.

Illinois.— Marshall *v.* John Grosse Clothing Co., 184 Ill. 421, 56 N. E. 807, 75 Am. St. Rep. 181; Barrett *v.* Boddie, 158 Ill. 479, 42 N. E. 143, 49 Am. St. Rep. 172; Heinsen *v.* Lamb, 117 Ill. 549, 7 N. E. 75; De Witt County *v.* Spaulding, 111 Ill. App. 364.

Indiana.— Friedline *v.* State, 93 Ind. 366; Fowler Utilities Co. *v.* Chaffin Coal Co., 43 Ind. App. 438, 87 N. E. 689.

Indian Territory.— Yocum *v.* Cary, 1 Indian Terr. 626, 43 S. W. 756.

Kansas.— Hillis *v.* Clyde First Nat. Bank, 54 Kan. 421, 38 Pac. 565; MacRitchie *v.* Johnson, 49 Kan. 321, 30 Pac. 477; Irwin *v.* Dole, 7 Kan. App. 84, 52 Pac. 916.

Maine.— Woodstock *v.* Canton, 91 Me. 62, 39 Atl. 281.

Massachusetts.— Goldstein *v.* D'Arcy, 201 Mass. 312, 87 N. E. 584; Pratt *v.* Langdon, 12 Allen 544. *Contra*, Devine *v.* Murphy, 168 Mass. 249, 46 N. E. 1066.

Michigan.— Rasch *v.* Bissell, 52 Mich. 455, 18 N. W. 216.

Missouri.— Magoffin *v.* Missouri Pac. R. Co., 102 Mo. 540, 15 S. W. 76, 22 Am. St. Rep. 798; Weese *v.* Brown, 102 Mo. 299, 14 S. W. 945; Crawford *v.* Stayton, 131 Mo. App. 263, 110 S. W. 665; Hoster *v.* Lange, 80 Mo. App. 234.

New Jersey.— U. S. Fidelity, etc., Co. *v.* Donnelly, 72 N. J. L. 295, 61 Atl. 445.

New York.— Harding *v.* St. Peter's Roman Catholic Church, 113 N. Y. App. Div. 685, 99 N. Y. Suppl. 945 [*affirmed* in 188 N. Y. 631, 81 N. E. 1165]; Decker *v.* Sexton, 19 Misc. 59, 43 N. Y. Suppl. 167; Balcom *v.* Manhattan Athletic Club, 9 Misc. 718, 29 N. Y. Suppl. 600.

Pennsylvania.— White *v.* Blanchard, 164 Pa. St. 345, 30 Atl. 204; Maynard *v.* Lumberman's Nat. Bank, 7 Pa. Cas. 399, 11 Atl. 529.

South Carolina.— Uzzell *v.* Horn, 71 S. C. 426, 51 S. E. 253.

South Dakota.— Yankton F. Ins. Co. *v.* Fremont, etc., R. Co., 7 S. D. 428, 64 N. W. 514.

Texas.— Parker *v.* Leman, 10 Tex. 116.

Washington.— Murray *v.* Bush, 29 Wash. 662, 70 Pac. 133; Clancy *v.* Reis, 5 Wash. 371, 31 Pac. 971.

United States.— Robertson *v.* Edelhoff, 132 U. S. 614, 10 S. Ct. 186, 33 L. ed. 477; Marshall *v.* Hubbard, 117 U. S. 415, 6 S. Ct. 806, 29 L. ed. 919; Macon County *v.* Shores, 97 U. S. 272, 24 L. ed. 889. To the same effect see Hendrick *v.* Lindsay, 93 U. S. 143, 23 L. ed. 855.

Contra.— Crews *v.* Cantwell, 125 N. C. 516, 34 S. E. 688; Anniston Nat. Bank *v.* Durham School Committee, 121 N. C. 107, 28 S. E. 134.

in his favor thereon,[22] or where the answer admits plaintiff's case and fails to state a defense,[23] it is proper for the court to direct a verdict in favor of plaintiff. But the court should not so direct a verdict where plaintiff's pleading is bad in substance,[24] where he fails to make out a *prima facie* case,[25] where his case is not admitted,[26] where a jury question is raised as to any issue dispositive of plaintiff's case,[27] where he might have been nonsuited on the same evidence on which he asks the direction of a verdict,[28] where there is a substantial conflict in the evidence as to some essential element of plaintiff's case[29] or as to some affirmative defense[30] or counter-claim[31] pleaded by defendant, or as to the amount which plaintiff ought to recover,[32] or, where no matter how strong may be plaintiff's

22. *Alabama.*—Bynum *v.* Hewlett, 137 Ala. 333, 34 So. 391.

Arkansas.— Graham *v.* St. Louis, etc., R. Co., 69 Ark. 562, 65 S. W. 1048, 66 S. W. 344.

Georgia.— Martin *v.* Reynolds, etc., Estate Mortg. Co., 113 Ga. 1170, 39 S. E. 476; Tilley *v.* Cox, 119 Ga. 867, 47 S. E. 219; McCall *v.* Herrin, 118 Ga. 522, 45 S. E. 442; Tidwell *v* New South Bldg., etc., Assoc., 111 Ga. 807, 35 S. E. 648; McNeel *v.* Smith, 106 Ga. 215, 32 S. E. 119; Jones *v.* Achey, 105 Ga. 493, 30 S. E. 810; Tucker *v.* Equitable Mortg. Co., 102 Ga. 558, 27 S. E. 664; Faircloth *v.* Fulghum, 97 Ga. 357, 23 S. E. 838.

Illinois.— West Side Auction House Co. *v.* Connecticut Mut. L. Ins. Co., 186 Ill. 156, 57 N. E. 839.

Indiana.— Hasselman Printing Co. *v.* Fry, 9 Ind. App. 393, 35 N. E. 1045, 36 N. E. 863.

Iowa.— American Hosiery Co. *v.* Stuart, (1898) 74 N. W. 740.

Kansas.— Fox *v.* Campbell, 49 Kan. 331, 30 Pac. 479; Snider *v.* Koehler, 17 Kan. 432.

Missouri.— Ford *v.* Dyer, 148 Mo. 528, 49 S. W. 1091; Mosby *v.* McKee, etc., Commission Co., 91 Mo. App. 500.

Nebraska.— Henry *v.* Dussell, 71 Nebr. 691, 99 N. W. 484; Omaha School District *v.* McDonald, 68 Nebr. 610, 94 N. W. 829, 97 N. W. 584; Osborne *v.* Kline, 18 Nebr. 344, 25 N. W. 360; Boughn *v.* Security State Bank, 1 Nebr. (Unoff.) 490, 95 N. W. 680; Winterringer *v.* Warder, etc., Co., 1 Nebr. (Unoff.) 413, 95 N. W. 619.

New York.— Harding *v.* Jenkins, 26 Misc. 827, 56 N. Y. Suppl. 1086.

Pennsylvania.— Gilchrist *v.* Brown, 165 Pa. St. 275, 30 Atl. 839; Oppenheimer *v.* Wright, 106 Pa. St. 569; Phillipz *v.* Meily, 106 Pa. St. 536; Dean *v.* Fuller, 40 Pa. St. 474.

Texas.— Grinnan *v.* Dean, 62 Tex. 218.

Wisconsin.— Rochester Mach. Tool Works *v.* Weiss, 108 Wis. 545, 84 N. W. 866.

Where the only defense is bad as a question of law, it is not error to direct a verdict for plaintiff. Baxley Tie Co. *v.* Simpson, 1 Ga. App. 670, 57 S. E. 1090.

23. *Connecticut.*— Whitney *v.* Brooklyn First Ecclesiastical Soc., 5 Conn. 405.

Georgia.— Kahrs *v.* Kahrs, 115 Ga. 288, 41 S. E. 649.

Kansas.— Ft. Scott Coal, etc., Co. *v.* Sweeney, 15 Kan. 244; Gifford *v.* Ammer, 7 Kan. App. 365, 54 Pac. 802.

Missouri.— Stephens *v.* Koken Barber Supply Co., 67 Mo. App. 587.

Nebraska.— Hrabak *v.* Dodge, 62 Nebr. 591, 87 N. W. 358; Sloan Commission Co. *v.* Fry, 4 Nebr. (Unoff.) 647, 95 N. W. 862.

24. Kelly *v.* Strouse, 116 Ga. 872, 43 S. E. 280.

25. Moultrie Lumber Co. *v.* Driver Lumber Co., (Ga. 1905) 49 S. E. 729.

26. Reynolds *v.* Hood, 209 Mo. 611, 108 S. W. 86.

27. Martin *v.* Kelley, 76 N. J. L. 263, 69 Atl. 969.

28. Jordon *v.* Read, 77 N. J. L. 584, 71 Atl. 280.

29. *Alabama.*— McKissack *v.* Witz, 120 Ala. 412, 25 So. 21.

Indiana.— Wiggins *v.* Holley, 11 Ind. 2.

Michigan.— Gurney *v.* Collins, 64 Mich. 458, 31 N. W. 429.

Missouri.— Lewellen *v.* Patton, 73 Mo. App. 472; Kuhl *v.* Meyer, 42 Mo. App. 474; Paxson *v.* Pierce, 25 Mo. App. 59.

New Jersey.— Hartman *v.* Alden, 34 N. J. L. 518.

New York.— Lewinson *v.* Reich, 6 Misc. 59, 26 N. Y. Suppl. 82.

North Carolina.— Paul *v.* Ward, 15 N. C. 247.

Pennsylvania.— Schrimpton *v.* Bertolet, 155 Pa. St. 638, 26 Atl. 776.

Texas.— Eberstadt *v.* State, 92 Tex. 94, 45 S. W. 1007.

30. *Alabama.*— Forst *v.* Leonard, 116 Ala. 82, 22 So. 481; Birmingham Nat. Bank *v.* Bradley, 116 Ala. 142, 23 So. 53.

Georgia.— Henry *v.* Leet, 123 Ga. 97, 50 S. E. 929; Dooley *v.* Gorman, 104 Ga. 767, 31 S. E. 203.

Kansas.— Weatherford *v.* Strawn, 8 Kan. App. 206, 55 Pac. 485.

Michigan.— Drosdowski *v.* Supreme Council O. C. F., 114 Mich. 178, 72 N. W. 169.

Missouri.— Davis *v.* Vories, 141 Mo. 234, 42 S. W. 707.

Wisconsin.— Minnesota Thresher Mfg. Co. *v.* Wolfram, 96 Wis. 481, 71 N. W. 809; Leiser *v.* Kieckhefer, 95 Wis. 4, 69 N. W. 979.

31. Vogel *v.* Mossler, 51 Iowa 360, 1 N. W. 650; Crane Co. *v.* Collins, 103 N. Y. App. Div. 480, 93 N. Y. Suppl. 174; Wilbur Lumber Co. *v.* Oberbeck Bros. Mfg. Co., 96 Wis. 383, 71 N. W. 605.

32. Brown *v.* Baird, 5 Okla. 133, 48 Pac. 180.

proof, there is some substantial evidence to support the defense set up.[33] It is error for the court when plaintiff rests to direct a verdict in his favor before defendant has had an opportunity to put in contradictory evidence.[34]

c. When Verdict Directed For Defendant. When the motion is grounded upon the insufficiency of plaintiff's proof, the question presented is whether there is any substantial evidence tending to establish the cause of action sued on.[35]

33. *Colorado.*— Colorado Coal, etc., Co. *v.* John, 5 Colo. App. 213, 38 Pac. 399.

Florida.— McKinnon *v.* Johnson, 57 Fla. 120, 48 So. 910.

Georgia.— Mixon *v.* Warren, 94 Ga. 688, 21 S. E. 716.

Illinois.— Bailey *v.* Robison, 233 Ill. 614, 84 N. E. 660 [*reversing* 137 Ill. App. 470].

Iowa.— McNight *v.* Parsons, 136 Iowa 390, 113 N. W. 858, 125 Am. St. Rep. 265, 22 L. R. A. N. S. 718; Fleming *v.* Linder, (1906) 109 N. W. 771; Campbell *v.* Park, 128 Iowa 181, 101 N. W. 861.

Kansas.— Kansas Pac. R. Co. *v.* Anderson, 23 Kan. 44.

Kentucky.— Provident Sav. L. Assur. Soc. *v.* Johnson, 99 S. W. 1159, 30 Ky. L. Rep. 1031.

Massachusetts.— O'Kelly *v.* O'Kelly, 8 Metc. 436.

Michigan.— Henry *v.* Henry, 122 Mich. 6, 80 N. W. 800; Woodin *v.* Durfee, 46 Mich. 424, 9 N. W. 457.

Missouri.— Columbia Incandescent Lamp Co. *v.* American Electrical Mfg. Co., 64 Mo. App. 115.

Nebraska.— Continental Lumber Co. *v.* Munshaw, 77 Nebr. 456, 109 N. W. 760.

New Jersey.— Haines *v.* Merrill Trust Co., 56 N. J. L. 312, 28 Atl. 796.

New York.— O'Sullivan *v.* York Lumber Corp., 30 Misc. 773, 62 N. Y. Suppl. 487.

North Carolina.— Jordan *v.* Lassiter, 51 N. C. 130.

United States.— Caskey *v.* Chenoweth, 62 Fed. 712, 10 C. C. A. 605.

34. Nelson *v.* Metz Bros. Brewing Co., 3 Nebr. (Unoff.) 81, 90 N. W. 766; Porter *v.* White, 127 N. C. 73, 37 S. E. 88.

35. *Alabama.*— Birmingham R., etc., Co. *v.* Hinton, 141 Ala. 606, 37 So. 635; Sanders *v.* Edmonds, 98 Ala. 157, 13 So. 505; Avary *v.* Perry Stove Mfg. Co., 96 Ala. 406, 11 So. 417; Bromley *v.* Birmingham Mineral R. Co., 95 Ala. 397, 11 So. 341; Freeman *v.* Scurlock, 27 Ala. 407.

Arkansas.— State *v.* May, 22 Ark. 445.

California.— Wells *v.* Snow, (1895) 41 Pac. 858; Ramish *v.* Kirschbraun, 107 Cal. 659, 40 Pac. 1045; Heilbron *v.* Last Chance Water Ditch Co., (1886) 9 Pac. 456; Craven *v.* Nolan, (1885) 8 Pac. 518; McKee *v.* Greene, 31 Cal. 418; Cravens *v.* Dewey, 13 Cal. 40; Ringgold *v.* Haven, 1 Cal. 108.

District of Columbia.— Rouser *v.* Washington, etc., R. Co., 13 App. Cas. 320.

Georgia.— Davis *v.* Kent, 97 Ga. 275, 23 S. E. 88; Cunningham *v.* Brooks, 73 Ga. 145; Bryan *v.* Southwestern R. Co., 37 Ga. 26.

Illinois.— Central Union Bldg. Co. *v.* Kolander, 212 Ill. 27, 72 N. E. 50; Pennsylvania Co. *v.* Backes, 133 Ill. 255, 24 N. E. 563; Pennsylvania Co. *v.* Conlan, 101 Ill. 93; Reese *v.* Henck, 14 Ill. 482; Davis *v.* Hoxey, 2 Ill. 406; Schickle-Harrison, etc., Iron Co. *v.* Beck, 112 Ill. App. 444; Smith *v.* Birdsall, 106 Ill. App. 264; Sherwood *v.* Rieck, 104 Ill. App. 368; Webster Mfg. Co. *v.* Goodrich, 104 Ill. App. 76; Wood *v.* Illinois Cent. R. Co., 23 Ill. App. 370.

Indiana.— Kincaid *v.* Nicely, 90 Ind. 403; Crookshank *v.* Kellogg, 8 Blackf. 256; Kearns *v.* Burling, 14 Ind. App. 143, 42 N. E. 646.

Iowa.— Ridler *v.* Ridler, 93 Iowa 347, 61 N. W. 994; Way *v.* Illinois Cent. R. Co., 35 Iowa 585; Crawford *v.* Burton, 6 Iowa 476; Wiley *v.* Shoemak, 2 Greene 205.

Kansas.— Harter *v.* Atchison, etc., R. Co., 55 Kan. 250, 38 Pac. 778; McMullen *v.* Carson, 48 Kan. 263, 29 Pac. 317; Benninghoff *v.* Cubbison, 45 Kan. 621, 26 Pac. 14; Kansas City, etc., R. Co. *v.* Foster, 39 Kan. 329, 18 Pac. 285; Sullivan *v.* Phenix Ins. Co., 34 Kan. 170, 8 Pac. 112; Rowland *v.* Shaw, 29 Kan. 438; Kansas Pac. R. Co. *v.* Couse, 17 Kan. 571; Wichita *v.* Coggshall, 3 Kan. App. 540, 43 Pac. 842; Cherokee, etc., Coal, etc., Co. *v.* Britton, 3 Kan. App. 292, 45 Pac. 100; Hagan *v.* American Bldg., etc., Assoc., 2 Kan. App. 711, 43 Pac. 1138; Steelsmith *v.* Union Pac. R. Co., 1 Kan. App. 10, 40 Pac. 992.

Kentucky.— Com. *v.* Tate, 89 Ky. 587, 13 S. W. 113, 12 Ky. L. Rep. 1; Easley *v.* Easley, 18 B. Mon. 86; Rowland *v.* Hanna, 2 B. Mon. 129; Taylor *v.* White, 2 T. B. Mon. 94; Barrett *v.* Meek, 2 Ky. Dec. 34; Humboldt Bldg. Assoc. *v.* Ducker, 82 S. W. 969, 26 Ky. L. Rep. 931; Lingenfelter *v.* Louisville, etc., R. Co., 4 S. W. 185, 9 Ky. L. Rep. 116; Nichols *v.* Chesapeake, etc., R. Co., 2 S. W. 181, 8 Ky. L. Rep. 519.

Maine.— Williamson *v.* Carlton, 51 Me. 449; Foster *v.* Dixfield, 18 Me. 380.

Maryland.— Morrison *v.* Whiteside, 17 Md. 452, 79 Am. Dec. 661.

Massachusetts.— O'Neil *v.* Hanscom, 175 Mass. 313, 56 N. E. 587; Denny *v.* Williams, 5 Allen 1; Wilkinson *v.* Scott, 17 Mass. 249.

Michigan.— McDonald *v.* Ortman, 88 Mich. 645, 50 N. W. 644; Rosie *v.* Willard, 44 Mich. 382, 6 N. W. 872; Conely *v.* McDonald, 40 Mich. 150; Hardwick *v.* Richardson, 28 Mich. 508.

Minnesota.— Young *v.* Ege, 63 Minn. 219, 65 N. W. 249, 67 N. W. 4.

Missouri.— Groll *v.* Tower, 85 Mo. 249, 55 Am. Rep. 358; Moody *v.* Deutsch, 85 Mo. 237; Mathews *v.* St. Louis Grain El. Co., 50 Mo. 149; McKown *v.* Craig, 39 Mo. 156; Fine *v.* St. Louis Public Schools, 39 Mo. 59; Chouteau *v.* The St. Anthony, 12 Mo. 389.

Nebraska.— Westover *v.* Lewis, 36 Nebr. 692, 54 N. W. 961; Johnson *v.* Missouri Pac. R. Co., 18 Nebr. 690, 26 N. W. 347.

New Hampshire.— Burnham *v.* Concord R.

The rule supported by the great weight of authority and by reason is that it is only where the court must say that, as a matter of law, no recovery can be had under any reasonable view of the evidence, that a verdict for defendant will be directed.[36]

Co., 69 N. H. 280, 45 Atl. 563; Page *v.* Parker, 43 N. H. 363, 80 Am. Dec. 172.

New Jersey.— Gallagher *v.* McBride, 63 N. J. L. 422, 44 Atl. 203; Synear *v.* Wharton, 48 N. J. L. 97, 2 Atl. 664; Bartow *v.* Brands, 15 N. J. L. 248; Coxe *v.* Field, 13 N. J. L. 215.

New York.— Forbes *v.* Chichester, 125 N. Y. 769, 26 N. E. 914; Rollins *v.* Brooklyn Heights R. Co., 44 N. Y. App. Div. 474, 60 N. Y. Suppl. 897; De Wolf *v.* Crandall, 1 Sweeny 556; Carland *v.* Day, 4 E. D. Smith 251; Coykendall *v.* Eaton, 55 Barb. 188, 37 How. Pr. 438; Thompson *v.* Dickerson, 12 Barb. 108, Code Rep. N. S. 213; Kelly *v.* Kelly, 3 Barb. 419; Smith *v.* Young, 2 Barb. 545; Baker *v.* Manhattan R. Co., 54 N. Y. Super. Ct. 394 [*affirmed* in 118 N. Y. 533, 23 N. E. 885]; Davidoff *v.* Wheeler, etc., Mfg. Co., 16 Misc. 31, 37 N. Y. Suppl. 661; Hassett *v.* McArdle, 2 Misc. 461, 21 N. Y. Suppl. 1040 [*affirmed* in 6 Misc. 622, 26 N. Y. Suppl. 1135].

North Carolina.— Jones *v.* Call, 93 N. C. 170.

Ohio.— Ellis *v.* Ohio L. Ins., etc., Co., 4 Ohio St. 628, 64 Am. Dec. 610; Mack *v.* Great Western Despatch, 3 Ohio Cir. Ct. 36, 2 Ohio Cir. Dec. 22; Cameron *v.* Heister, 10 Ohio Dec. (Reprint) 651, 22 Cinc. L. Bul. 384; Lucas *v.* Scott, 13 Cinc. L. Bul. 64; McManus *v.* P. C. & St. L. R. Co., 8 Ohio Dec. (Reprint) 796, 9 Cinc. L. Bul. 364.

Oregon.— State *v.* Daly, 16 Oreg. 240, 18 Pac. 357.

Pennsylvania.— Dietz *v.* Metropolitan L. Ins. Co., 168 Pa. St. 504, 32 Atl. 119; Perdue *v.* Taylor, 146 Pa. St. 163, 23 Atl. 317; Fitzwater *v.* Stout, 16 Pa. St. 22; Irving *v.* Taggart, 1 Serg. & R. 360; Stewart *v.* Grimstone, 6 Phila. 591.

South Carolina.— Morrow *v.* Gaffney Mfg. Co., 70 S. C. 242, 49 S. E. 573; Salinas *v.* Aultman, 45 S. C. 283, 22 S. E. 889; Norris *v.* Clinkscales, 44 S. C. 315, 22 S. E. 1; Dulany *v.* Elford, 22 S. C. 304; Davis *v.* Columbia, etc., R. Co., 21 S. C. 93; State *v.* Boles, 18 S. C. 534; Miller *v.* Bolt, 16 S. C. 636; Richardson *v.* Provost, 4 Strobh. 57; Rogers *v.* Madden, 2 Bailey 321.

Texas.— Fitzgerald *v.* Hart, (1891) 17 S. W. 369; Sharp *v.* Baker, 22 Tex. 306; Newberger *v.* Heintze, 3 Tex. Civ. App. 259, 22 S. W. 867; Johnston *v.* Drought, (Civ. App. 1893) 22 S. W. 290.

West Virginia.— Powell *v.* Love, 36 W. Va. 96, 14 S. E. 405; Carrico *v.* West Virginia Cent., etc., R. Co., 35 W. Va. 389, 14 S. E. 12.

Wisconsin.— Fitts *v.* Cream City R. Co., 59 Wis. 323, 18 N. W. 186; Jackson *v.* Jacksonport, 56 Wis. 310, 14 N. W. 296; Sabotta *v.* St. Paul F. & M. Ins. Co., 54 Wis. 687, 12 N. W. 18, 381; Spensley *v.* Lancashire Ins. Co., 54 Wis. 433, 11 N. W. 894; Schomer *v.* Hekla F. Ins. Co., 50 Wis. 575, 7 N. W. 544; Johnston *v.* Hamburger, 13 Wis. 175.

United States.— Union Pac. R. Co. *v.* James, 163 U. S. 485, 16 S. Ct. 1109, 41 L. ed. 236; Van Stone *v.* Stillwell, etc., Mfg. Co., 142 U. S. 128, 12 S. Ct. 181, 35 L. ed. 961; Barney *v.* Schmeider, 9 Wall. 248, 19 L. ed. 648; Hickman *v.* Jones, 9 Wall. 197, 19 L. ed. 551; Drakeley *v.* Gregg, 8 Wall. 242, 19 L. ed. 409; Alabama Great Southern R. Co. *v.* O'Brien, 69 Fed. 223, 16 C. C. A. 216.

36. *Alabama.*— Tennessee Coal, etc., Co. *v.* Stevens, 115 Ala. 461, 22 So. 80; Lawler *v.* Norris, 28 Ala. 675.

District of Columbia.— Warthen *v.* Hammond, 5 App. Cas. 167.

Georgia.— Pritchett *v.* Moore, 116 Ga. 757, 42 S. E. 1013; A. P. Brantley Co. *v.* Lee, 106 Ga. 313, 32 S. E. 101. And see McLamb *v.* Lambertson, 4 Ga. App. 553, 62 S. E. 107.

Illinois.— Boyce *v.* Tallerman, 183 Ill. 115, 55 N. E. 703; Missouri Malleable Iron Co. *v.* Hoover, 179 Ill. 107, 53 N. E. 560; Lake Erie, etc., R. Co. *v.* Morrissey, 177 Ill. 376, 52 N. E. 299; Scott *v.* Stuart, 115 Ill. App. 535; Lange *v.* Seiter, 81 Ill. App. 192; Hill *v.* Western Union Cold Storage Co., 80 Ill. App. 423; Roberts *v.* Chicago, etc., R. Co., 78 Ill. App. 526; Lehigh *v.* World's Columbian Exposition, 67 Ill. App. 27; Zeigler *v.* Pennsylvania Co., 63 Ill. App. 410.

Indiana.— Louisville, etc., R. Co. *v.* Kemper, 153 Ind. 618, 53 N. E. 931; Dill *v.* Marmon, (App. 1904) 71 N. E. 669.

Iowa.— Agne *v.* Slitsinger, 96 Iowa 181, 64 N. W. 836, 36 L. R. A. 701; Lane *v.* Central Iowa R. Co., 69 Iowa 443, 29 N. W. 419.

Kansas.— Hanlen *v.* Baden, 6 Kan. App. 635, 49 Pac. 615; St. Louis, etc., R. Co. *v.* Toomey, 6 Kan. App. 410, 49 Pac. 819.

Kentucky.— Ballard *v.* Louisville, etc., R. Co., 41 S. W. 299, 42 S. W. 1132, 19 Ky. L. Rep. 785; Marx *v.* Hess, 39 S. W. 249, 19 Ky. L. Rep. 42.

Michigan.— Swanson *v.* Menominee Electric Light, etc., Co., 113 Mich. 603, 71 N. W. 1098.

Mississippi.— Griffin *v.* Brock, (1903) 33 So. 968.

Missouri.— Woods *v.* Atlantic Mut. Ins. Co., 50 Mo. 112.

Nebraska.— Rogers *v.* Kansas City, etc., R. Co., 52 Nebr. 86, 71 N. W. 977.

New Jersey.— Underfeed Stoker Co. *v.* Hudson County Consumers' Brewing Co., 70 N. J. L. 649, 58 Atl. 296.

New York.— Eisenlord *v.* Clum, 67 Hun 518, 22 N. Y. Suppl. 574; Hanley *v.* Brennan, 1 N. Y. St. 302.

North Carolina.— Weeks *v.* Southern R. Co., 119 N. C. 740, 26 S. E. 124.

Ohio.— Hughes *v.* Lehan, 1 Ohio Cir. Ct. 9, 1 Ohio Cir. Dec. 5.

Pennsylvania.— Crawford *v.* Wittish, 4 Pa. Super. Ct. 585.

Texas.— San Antonio Traction Co. *v.* Levyson, (Civ. App. 1908) 113 S. W. 569; Mc-

Where plaintiff makes out a *prima facie* case,[37] where the evidence clearly entitles plaintiff to nominal damages,[38] where by any fair and legitimate inference plaintiff's case can be supported,[39] or where there is any evidence which would support a verdict for plaintiff,[40] where the proof admits of any

Gregor *v.* Sima, 12 Tex. Civ. App. 105, 33 S. W. 1014; Fitzgerald *v.* Hart, (Civ. App. 1893) 23 S. W. 933.

Wisconsin.— Dirimple *v.* Phillips State Bank, 91 Wis. 601, 65 N. W. 501; Schmidt *v.* Chicago, etc., R. Co., 90 Wis. 504, 63 N. W. 1057.

United States.— Connecticut Mut. L. Ins. Co. *v.* Lathrop, 111 U. S. 612, 4 S. Ct. 533, 28 L. ed. 536; Montclair Tp. *v.* Dana, 107 U. S. 162, 2 S. Ct. 403, 27 L. ed. 436; Phœnix Mut. L. Ins. Co. *v.* Doster, 106 U. S. 30, 1 S. Ct. 18, 27 L. ed. 65; Travelers' Ins. Co. *v.* Randolph, 78 Fed. 754, 24 C. C. A. 305; Phœnix Assur. Co. *v.* Lucker, 77 Fed. 243, 23 C. C. A. 139; U. S. *v.* Babcock, 24 Fed. Cas. No. 14,486, 3 Dill. 577.

See 46 Cent. Dig. tit. "Trial," § 382 *et seq.*

The fact that plaintiff's witnesses contradict themselves affects their credibility but does not authorize direction of verdict for defendant. Platz *v.* McKean Tp., 178 Pa. St. 601, 36 Atl. 136.

37. Cobb *v.* Holloway, 129 Mo. App. 212, 108 S. W. 109.

Limitation of rule.—It does not necessarily follow that because plaintiff has made a *prima facie* case it must be submitted to the jury, for such a case may be so destroyed by the uncontradicted evidence of defendant as to demonstrate beyond doubt that plaintiff had no case, in which event it becomes the duty of the court to so instruct the jury. Keith *v.* Guedry, (Tex. Civ. App. 1908) 114 S. W. 392.

38. Missouri Real Estate Syndicate *v.* Sims, 121 Mo. App. 156, 98 S. W. 783.

39. *Alabama.*— Rogers *v.* Brooks, 105 Ala. 549, 17 So. 97.

District of Columbia.— Adams *v.* Washington, etc., R. Co., 9 App. Cas. 26; District of Columbia *v.* Boswell, 6 App. Cas. 402; Baltimore, etc., R. Co. *v.* Golway, 6 App. Cas. 143.

Georgia.— Phillips *v.* Southern R. Co., 112 Ga. 197, 37 S. E. 418; Hopkins *v.* Goolsby, 102 Ga. 564, 27 S. E. 675.

Illinois.— Illinois Cent. R. Co. *v.* Heisner, 192 Ill. 571, 61 N. E. 656 [*affirming* 93 Ill. App. 469]; North Chicago St. R. Co. *v.* Wiswell, 168 Ill. 613, 48 N. E. 407; Siddall *v.* Jansen, 168 Ill. 43, 48 N. E. 191, 39 L. R. A. 112; Gartside Coal Co. *v.* Turk, 147 Ill. 120, 35 N. E. 467; Pullman Palace Car Co. *v.* Laack, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; News Pub. Co. *v.* Associated Press, 114 Ill. App. 241; Berkowsky *v.* Viall, 66 Ill. App. 349; Godfrey *v.* Steator R. Co., 56 Ill. App. 378.

Indiana.— Governor *v.* Shelby, 2 Blackf. 26.

Kansas.— Burnett *v.* Hinshaw, 64 Kan. 886, 67 Pac. 1101.

Kentucky.— Jenkins *v.* Louisville, etc., R. Co., 104 Ky. 673, 47 S. W. 761, 20 Ky. L. Rep. 865; Richards *v.* Louisville, etc., R. Co., 49 S. W. 419, 20 Ky. L. Rep. 1478; Louisville, etc., R. Co. *v.* Peltier, 45 S. W. 518, 20 Ky. L. Rep. 169; Memphis, etc., Packet Co. *v.* Abell, 30 S. W. 658, 17 Ky. L. Rep. 191.

Maryland.— Baltimore City Pass. R. Co. *v.* Cooney, 87 Md. 261, 39 Atl. 859; Franklin *v.* Long, 7 Gill & J. 407.

Massachusetts.— Hadlock *v.* Brooks, 178 Mass. 425, 59 N. E. 1009.

Missouri.— Tapley *v.* Herman, 95 Mo. App. 537, 69 S. W. 482.

New Mexico.— Lockhart *v.* Wills, 9 N. M. 263, 50 Pac. 318.

New York.— Schanck *v.* Morris, 2 Sweeny 464.

North Carolina.— Rickett *v.* Southern R. Co., 123 N. C. 255, 31 S. E. 497.

Pennsylvania.— Devlin *v.* Beacon Light Co., 198 Pa. St. 583, 48 Atl. 482.

Texas.— Willis *v.* Thacker, 20 Tex. Civ. App. 233, 49 S. W. 128.

United States.— Texas, etc., R. Co. *v.* Cox, 145 U. S. 593, 12 S. Ct. 905, 36 L. ed. 829; Pittsburgh, etc., R. Co. *v.* Thompson, 82 Fed. 720, 27 C. C. A. 333.

40. *District of Columbia.*— Dobbins *v.* Thomas, 30 App. Cas. 511.

Florida.— Jacksonville Electric Co. *v.* Sloan, 52 Fla. 257, 42 So. 516; Florida Cent., etc., R. Co. *v.* Williams, 37 Fla. 406, 20 So. 558.

Georgia.— Connelly *v.* Connelly, 126 Ga. 656, 55 S. E. 916; Meager *v.* Linder Lumber Co., 1 Ga. App. 426, 57 S. E. 1004.

Illinois.— Chicago *v.* Jarvis, 226 Ill. 614, 80 N. E. 1079; Donelson *v.* East St. Louis, etc., R. Co., 140 Ill. App. 185 [*affirmed* in 235 Ill. 625, 85 N. E. 914]; Maxwell *v.* Chicago, etc., R. Co., 140 Ill. App. 156; St. Louis Nat. Stock Yards *v.* Godfrey, 101 Ill. App. 40.

Indiana.— Cleveland, etc., R. Co. *v.* Gossett, 172 Ind. 525, 87 N. E. 723; Indianapolis Traction, etc., Co. *v.* Romans, 40 Ind. App. 184, 79 N. E. 1068; Pittsburgh, etc., R. Co. *v.* Cozatt, 39 Ind. App. 682, 79 N. E. 534; Green *v.* Eden, 24 Ind. App. 583, 56 N. E. 240.

Kentucky.— Louisville, etc., R. Co. *v.* Fowler, 123 Ky. 450, 96 S. W. 568, 29 Ky. L. Rep. 905.

Maryland.— Acker, etc., Co. *v.* McGaw, 106 Md. 536, 68 Atl. 17.

Massachusetts.— Lewis *v.* Coupe, 200 Mass. 182, 85 N. E. 1053.

Missouri.— Heman *v.* Larkin, (App. 1902) 70 S. W. 907.

Montana.— Forquer *v.* Slater Brick Co., 37 Mont. 426, 97 Pac. 843; Ball *v.* Gussenhoven, 29 Mont. 321, 74 Pac. 871.

Nebraska.—Allen *v.* Gerny, 68 Nebr. 211, 94 N. W. 151; Habig *v.* Layne, 38 Nebr. 743, 57 N. W. 539.

North Carolina.—Tyson *v.* Jones, 150 N. C. 181, 63 S. E. 734.

doubt,[41] even though the facts testified to by plaintiff are improbable,[42] or although plaintiff's evidence may be inconsistent,[43] the motion to direct a verdict should be denied. And where issue is taken on a defective plea, it is error for the court to direct a verdict for defendant, although the proof supports the plea.[44] Where there is no evidence that will support a cause of action;[45] where plaintiff fails to make out a *prima facie* case;[46] where plaintiff fails to introduce any evidence in support of some essential element of his cause of action;[47] where the testimony

Oklahoma.— Hanna *v.* Mosher, 22 Okla. 501, 98 Pac. 358.

South Carolina.— Taber *v.* Seaboard Air Line R. Co., 81 S. C. 317, 62 S. E. 311.

Texas.— Roth *v.* Travellers' Protective Assoc. of America, 102 Tex. 241, 115 S. W. 31, 132 Am. St. Rep. 871.

Vermont.— Schofield *v.* Metropolitan L. Ins. Co., 79 Vt. 161, 64 Atl. 1107.

And see Louisville, etc., R. Co. *v.* Stewart, 128 Ala. 313, 29 So. 562.

Where the evidence with all the reasonable inferences deducible therefrom tends to prove each and all of the material allegations of the declaration the giving of a peremptory instruction is erroneous. St. Clair County School Trustees *v.* Yoch, 133 Ill. App. 32. And see Udwin *v.* Spirkel, 136 Ill. App. 155.

41. Garrison *v.* Glass, 139 Ala. 512, 36 So. 725; Diezi *v.* G. H. Hammond Co., 156 Ind. 583, 60 N. E. 353; Swan *v.* Liverpool, etc., Ins. Co., 52 Miss. 704; Spencer *v.* Daggett, 2 Vt. 92.

42. Cook *v.* Morris, 66 Conn. 196, 33 Atl. 994.

43. Whitney *v.* Eastern R. Co., 9 Allen (Mass.) 364; Larson *v.* Jensen, 53 Mich. 427, 19 N. W. 130.

44. Kelly *v.* Strouse, 116 Ga. 872, 43 S. E. 280; Miller *v.* White River School Tp., 101 Ind. 503. *Contra,* Rasco *v.* Jefferson, 142 Ala. 705, 38 So. 246; McGhee *v.* Reynolds, 117 Ala. 413, 23 So. 68; Hazard *v.* Purdom, 3 Port. (Ala.) 43. And see Cullum *v.* Mobile Branch Bank, 4 Ala. 21, 37 Am. Dec. 725.

45. *Alabama.*— Hatch *v.* Varner, 150 Ala. 440, 43 So. 481.

Colorado.— Stearns *v.* Hazen, 45 Colo. 67, 101 Pac. 339; Mageon *v.* Alkire, 41 Colo. 338, 92 Pac. 720.

Connecticut.— Kelley *v.* Torrington, 81 Conn. 615, 71 Atl. 939.

Illinois.— Gallatin Coal, etc., Co. *v.* Jerrells, 135 Ill. App. 637; Lasher *v.* Colton, 126 Ill. App. 119 [*affirmed* in 225 Ill. 234, 80 N. E. 122]. To the same effect see Chicago, etc., Coal Co. *v.* Hartwell, 122 Ill. App. 330.

Indiana.— State *v.* Julian, 93 Ind. 292.

Indian Territory.— Brunson *v.* Southwestern Dev. Co., 7 Indian Terr. 209, 104 S. W. 593.

Iowa.— Ketterman *v.* Ida Grove, (1909) 120 N. W. 641.

Kansas.— McCormick *v.* Holmes, 41 Kan. 265, 21 Pac. 108; Ketchum *v.* Wilcox, (App. 1897) 48 Pac. 446.

Kentucky.— Wildharber *v.* Lunkenheimer, 128 Ky. 344, 108 S. W. 327, 32 Ky. L. Rep. 1221; Leamon *v.* Louisville, etc., R. Co., 98 S. W. 1016, 30 Ky. L. Rep. 443.

Massachusetts.— James *v.* Boston El. R. Co., 201 Mass. 263, 87 N. E. 474.

Nebraska.— Keckler *v.* Modern Brotherhood of America, 77 Nebr. 301, 109 N. W. 157.

Pennsylvania.— Warmcastle *v.* Castner, 34 Pa. Super. Ct. 464.

South Carolina.— Gray *v.* Charleston, etc., R. Co., 81 S. C. 370, 62 S. E. 442.

Texas.— Lone Star Brewing Co. *v.* Willie, (Civ. App. 1908) 114 S. W. 186; Gulf, etc., R. Co. *v.* Cunningham, 51 Tex. Civ. App. 368, 113 S. W. 767.

Utah.— Smalley *v.* Rio Grande Western R. Co., 34 Utah 423, 98 Pac. 311; Groat *v.* Oregon Short Line R. Co., 34 Utah 152, 96 Pac. 1019.

United States.— Railway Postal Clerks Nat. Assoc. *v.* Scott, 155 Fed. 92, 83 C. C. A. 652.

46. Begenish *v.* Gates, 2 Alaska 511; Gibson *v.* Canadian Pac. Nav. Co., 1 Alaska 407; Wamsley *v.* Cleveland, etc., R. Co., 41 Ind. App. 147, 82 N. E. 490, 83 N. E. 640; Young *v.* Chandler, 102 Me. 251, 66 Atl. 539; Heath *v.* Jaquith, 68 Me. 433.

Rule in Georgia.— If, on the conclusion of plaintiff's evidence, no *prima facie* case for recovery has been made, it is error to direct a verdict for defendant over plaintiff's objections, but a nonsuit should be awarded that plaintiff may renew his action. Equitable Mfg. Co. *v.* J. B. Davis Co., 130 Ga. 67, 60 S. E. 262; Barnes *v.* Carter, 120 Ga. 895, 48 S. E. 387; Hines *v.* McLellan, 117 Ga. 845, 45 S. E. 279; Gay *v.* Peak, 5 Ga. App. 583, 63 S. E. 650.

47. *Alabama.*— Gulf City Constr. Co. *v.* Louisville, etc., R. Co., 121 Ala. 621, 25 So. 579.

Idaho.— Haner *v.* Northern Pac. R. Co., 7 Ida. 305, 62 Pac. 1028.

Illinois.— Continental Ins. Co. *v.* Rogers, 119 Ill. 474, 10 N. E. 242; Pennsylvania Co. *v.* Canadian Pac. R. Co., 107 Ill. App. 386; Blah *v.* West Chicago St. R. Co., 100 Ill. App. 393; Kluska *v.* Chicago, 97 Ill. App. 665; Bayer *v.* Chicago, etc., R. Co., 68 Ill. App. 219; Tobin *v.* Friedman Mfg. Co., 67 Ill. App. 149.

Indiana.— Dunnington *v.* Syfers, 157 Ind. 458, 62 N. E. 29; Porter *v.* Millard, 18 Ind. 502; Jennings *v.* Ingle, 35 Ind. App. 153, 73 N. E. 945; Burns *v.* Smith, 29 Ind. App. 181, 64 N. E. 94, 94 Am. St. Rep. 268.

Iowa.— Way *v.* Illinois Cent. R. Co., 35 Iowa 585.

Kansas.— Barr *v.* Irey, 3 Kan. App. 240, 45 Pac. 111.

affords no basis for a recovery in favor of plaintiff [48] under any aspect of the case; [49] where the evidence conclusively establishes some matter which precludes recovery; [50] or where it is wholly speculative, [51] or so inconclusive that a rational mind cannot draw the conclusion sought to be deduced from it by plaintiff; [52] where with all facts in evidence taken as true and with every inference from them they fail to maintain the issue; [53] where the proof is such that had the case been submitted to the jury, they would have been bound to find for defendant, [54] or the complaint is so defective that it cannot be cured by amendment, [55] the court should on defendant's motion direct a verdict in his favor. [56]

Kentucky.— Louisville, etc., R. Co. *v.* Terry, 47 S. W. 588, 20 Ky. L. Rep. 803; Jacobs *v.* Case, 1 S. W. 6, 8 Ky. L. Rep. 54.

Missouri.— Weaver *v.* Benton-Bellefontaine R. Co., 60 Mo. App. 207.

Nebraska.—Agnew *v.* Montgomery, 72 Nebr. 9, 99 N. W. 820.

North Carolina.— Cable *v.* Southern R. Co., 122 N. C. 892, 29 S. E. 377.

Ohio.— Roots *v.* Kilbreth, 10 Ohio Dec. (Reprint) 20, 18 Cinc. L. Bul. 58.

Texas.— Joske *v.* Irvine, 91 Tex. 574, 44 S. W. 1059.

Vermont.— Brehmer *v.* Lyman, 71 Vt. 98, 42 Atl. 613; Knapp *v.* Winchester, 11 Vt. 351.

Washington.— Creagh *v.* Equitable L. Assur. Soc., 19 Wash. 108, 52 Pac. 526.

West Virginia.— Ritz *v.* Wheeling, 45 W. Va. 262, 31 S. E. 993, 43 L. R. A. 148; Knight *v.* Cooper, 36 W. Va. 232, 14 S. E. 999.

Wisconsin.— McGibbon *v.* Walsh, 109 Wis. 670, 85 N. W. 409.

United States.— Priestly *v.* Provident Sav. Co., 112 Fed. 271; Tompkins *v.* Knut, 94 Fed. 956; Chapman *v.* Yellow Poplar Lumber Co., 89 Fed. 903, 32 C. C. A. 402.

48. *Florida.*— Mugge *v.* Jackson, 53 Fla. 323, 43 So. 91.

Illinois.—Ackerstadt *v.* Chicago City R. Co., 94 Ill. App. 130.

New York.— Niagara F. Ins. Co. *v.* Campbell Stores, 101 N. Y. App. Div. 400, 92 N. Y. Suppl. 208 [*affirmed* in 184 N. Y. 582, 77 N. E. 1192].

Ohio.— Hunt *v.* Caldwell, 22 Ohio Cir. Ct. 283, 11 Ohio Cir. Dec. 562.

South Carolina.— Hillhouse *v.* Jennings, 60 S. C. 392, 38 S. E. 596.

49. Peavy *v.* Dure, 131 Ga. 104, 62 S. E. 47; State *v.* Baltimore Mfg. Co., 109 Md. 404, 72 Atl. 602; Baltimore, etc., R. Co. *v.* Belinski, 106 Md. 452, 67 Atl. 249; Mears *v.* Smith, 199 Mass. 319, 85 N. E. 165.

50. Taylor *v.* Smith, 104 Ala. 537, 16 So. 629; Columbus, etc., R. Co. *v.* Wood, 86 Ala. 164, 5 So. 463; Lane *v.* Central Iowa R. Co., 69 Iowa 443, 29 N. W. 419; Collins *v.* West Jersey Express Co., 76 N. J. L. 551, 70 Atl. 344; Blackburn *v.* Southern Pac. Co., 34 Oreg. 215, 55 Pac. 225.

51. Gerwe *v.* Consolidated Fireworks Co., 12 Ohio Cir. Ct. 420, 5 Ohio Cir. Dec. 616; Hyer *v.* Janesville, 101 Wis. 371, 77 N. W. 729.

52. Morris *v.* Brickley, 1 Harr. & G. (Md.) 107.

53. *District of Columbia.*— Dodge *v.* Rush, 28 App. Cas. 149.

Illinois.— Maxwell *v.* Durkin, 185 Ill. 546, 57 N. E. 433; Whitesides *v.* Springfield Colliery Co., 138 Ill. App. 79; Brown *v.* Chicago, 135 Ill. App. 126; Riley *v.* American Steel, etc., Co., 129 Ill. App. 123; Smith *v.* Chicago Junction R. Co., 127 Ill. App. 89; Kelly *v.* Insurance Co. of North America, 126 Ill. App. 528; Nicholls *v.* Colwell, 113 Ill. App. 219.

Indiana.— Davis *v.* Mercer Lumber Co., 164 Ind. 413, 73 N. E. 899; Andrews *v.* Hammond, 8 Blackf. 540; McCreary *v.* Fike, 2 Blackf. 374; Kearns *v.* Burling, 14 Ind. App. 143, 42 N. E. 646.

Kentucky.—Adams *v.* Tiernan, 5 Dana 394.

Maryland.— Sunderland *v.* Cowan, 106 Md. 456, 67 Atl. 141.

Michigan.— Hathaway *v.* Judie, 95 Mich. 241, 54 N. W. 871.

Mississippi.— Farmer *v.* Cumberland Tel., etc., Co., 86 Miss. 55, 38 So. 775.

Nebraska.— McLean *v.* Omaha, etc., R., etc., Co., 72 Nebr. 447, 100 N. W. 935, 103 N. W. 285.

New Jersey.— Shay *v.* Camden, etc., R. Co., 66 N. J. L. 334, 49 Atl. 547.

Texas.— Murphy *v.* Galveston, etc., R. Co., (Civ. App. 1906) 96 S. W. 940 [*reversed* on other grounds in 100 Tex. 490, 101 S. W. 439, 9 L. R. A. N. S. 762]; Williams *v.* Emberson, 22 Tex. Civ. App. 522, 55 S. W. 595.

United States.— Dwyer *v.* St. Louis, etc., R. Co., 52 Fed. 87.

54. Sinclair *v.* Illinois Cent. R. Co., 129 Ky. 828, 112 S. W. 910.

55. Austin Western Co. *v.* Weaver Tp., 136 Iowa 709, 114 N. W. 189 (that defendant is not a legal entity); Smith *v.* Burlington, etc., R. Co., 59 Iowa 73, 12 N. W. 763; Seaton *v.* Hinneman, 50 Iowa 395 (where complaint shows on its face that the suit is prematurely brought). But see Gerke *v.* Fancher, 158 Ill. 375, 41 N. E. 982.

If the defect in the complaint is such that it can be cured by amendment, a verdict should not be directed. Cahill *v.* Illinois Cent. R. Co., 137 Iowa 577, 115 N. W. 216; Wrought Iron Bridge Co. *v.* Greene, 53 Iowa 562, 5 N. W. 770. And see Meyers *v.* Syndicate Heat, etc., Co., 47 Wash. 48, 91 Pac. 549.

56. Application of foregoing principles.— Applying these principles it has been held that where, in an action to recover the value of certain cattle, there is no evidence as to

d. When Verdict Directed For One of Several Plaintiffs or Defendants. Where one of several plaintiffs has no cause of action, a separate verdict against him should be directed;[57] and when there is no liability shown on the part of one of several defendants, a separate verdict should be directed in his favor,[58] before the case against his co-defendants is submitted to the jury.[59] So where plaintiff fails to prove which one or more of several defendants was guilty of the negligence charged, it is proper to direct a verdict for defendants.[60] Where there is evidence as against one co-defendant, a request for a verdict in favor of all is properly denied;[61] and, on the other hand, a request for a verdict in favor of all the defendants should be denied if there is evidence to support a verdict against any of them.[62] In some jurisdictions, in certain cases, a verdict may be directed in favor of both plaintiff and defendant against third parties who are cited and make default.[63]

e. When Verdict Directed on One or More Counts. Where there are two counts in the declaration, and the proof sustains one of them, but not the other,

the value of the cattle or the amount of plaintiff's damages (Hearne *v.* Strahorn-Hutton-Evans Commission Co., (Tex. Civ. App. 1889) 51 S. W. 867); where in an action for malicious prosecution, there is no evidence showing want of probable cause (Doty *v.* VanVechten, (Iowa 1899) 79 N. W. 268); where it appears that the contract sued on is a wagering contract (West *v.* Sanders, 104 Ga. 727, 31 S. E. 619); where an accord and satisfaction is conclusively shown, and there is no evidence to connect defendant with alleged fraudulent acts in obtaining it (Meka *v.* Brown, 84 Iowa 711, 45 N. W. 1041, 50 N. W. 46; Hoffman *v.* Richards, 98 Mich. 489, 57 N. W. 732); where, in an action on a note indorsed in blank, it appears that plaintiff had no interest in the note and knows nothing of the suit (Hocker *v.* Jamison, 2 Watts & S. (Pa.) 438); where, in an action for money expended for defendant at his request, there is no evidence of any such request (Tanenbaum *v.* Feist, 6 Misc. (N. Y.) 368, 26 N. Y. Suppl. 748); where in a suit on a bond there is no proof of its contents (Herod *v.* State, 15 Ind. App. 648, 43 N. E. 144, 44 N. E. 378); where the execution of the bond is denied and there is no evidence either of its issue or of ratification (Post *v.* Gage County School Dist. No. 10, 19 Nebr. 135, 26 N. W. 911); where it is essential to plaintiff's right of recovery that he establish an agency, and there is no evidence tending to show an agency (Walker *v.* Vale Royal Mfg. Co., 75 Ga. 29; Milburn Wagon Co. *v.* Stevens, 43 Ill. App. 508; Russell *v.* Earl, 10 Ind. App. 513, 38 N. E. 76; Sax *v.* Detroit, etc., R. Co., 129 Mich. 502, 89 N. W. 368); where the amount of plaintiff's damage is not shown (Patterson *v.* Plummer, 10 N. D. 95, 86 N. W. 111; Baird *v.* Schuylkill River, etc., R. Co., 154 Pa. St. 463, 25 Atl. 834); where, in an action based on defendant's negligence, there is no evidence to connect defendant with the accident complained of (Wilcox *v.* Wilmington City R. Co., 2 Pennew. (Del.) 157, 44 Atl. 686), or tending to show negligence on his part (Volkman *v.* Chicago, etc., R. Co., 5 Dak. 69, 37 N. W. 731; Hoge *v.* Ohio River R. Co., 35 W. Va. 562, 14 S. E. 152); where it clearly appears that the injury complained of was caused by plaintiff's contributory negligence (Collins *v.* Burlington, etc., R. Co., 83 Iowa 346, 49 N. W. 848; White *v.* Louisville, etc., R. Co., 22 S. W. 219, 15 Ky. L. Rep. 49; Thompson *v.* Flint, etc., R. Co., 57 Mich. 300, 23 N. W. 820; Capital City Oil Works *v.* Black, 70 Miss. 8, 12 So. 26; Horn *v.* Baltimore, etc., R. Co., 54 Fed. 301, 4 C. C. A. 346), or by the negligence of a fellow servant (Herman *v.* Campbell, 56 Fed. 1013, 6 C. C. A. 229); where the evidence would not warrant a finding that the act complained of is the proximate cause of plaintiff's injury (McGrath *v.* Chicago, etc., R. Co., 95 Ill. App. 659); where the uncontradicted evidence sustains a plea of limitation (Morrow *v.* Terrell, 21 Tex. Civ. App. 28, 50 S. W. 734), or of the statute of frauds (Rigby *v.* Norwood, 34 Ala. 129), or any other plea to the merits which is a valid defense (Williams *v.* McKissack, 125 Ala. 544, 27 So. 922; Anderson *v.* Continental Ins. Co., 112 Ga. 532, 37 S. E. 766; McCormick Harvesting Mach. Co. *v.* Larson, 6 N. D. 533, 72 N. W. 921), a verdict for defendant may properly be directed.

57. Pettingill *v.* Jones, 30 Mo. App. 280.

58. Costello *v.* TenEyck, 86 Mich. 348, 49 N. W. 152, 24 Am. St. Rep. 128; Benoist *v.* Sylvester, 26 Mo. 585; Brown *v.* Lewis, 25 Mo. 335.

59. Dominick *v.* Eacker, 3 Barb. (N. Y.) 17. But see Fox *v.* Jackson, 8 Barb. (N. Y.) 355.

60. Pierce *v.* Galveston, etc., R. Co., (Tex. Civ. App. 1908) 108 S. W. 979.

61. Marks *v.* Hastings, 101 Ala. 165, 13 So. 297; Pennsylvania Steel Co. *v.* Wilkinson, 107 Md. 574, 69 Atl. 412, 16 L. R. A. N. S. 200. In an action of ejectment against two defendants, joint occupation of the premises by both must be shown to warrant a verdict for plaintiff. Murphy *v.* Campau, 33 Mich. 71.

62. Vonderhorst Brewing Co. *v.* Amshine, 98 Md. 406, 56 Atl. 833.

63. Bullis *v.* Presidio Min. Co., 75 Tex. 540, 12 S. W. 397.

a verdict should be directed on the one not sustained,[64] and the refusal of the trial court to so rule warrants a reversal of a judgment in plaintiff's favor, unless it appears that defendant could not have been prejudiced by such refusal.[65]

f. Direction of Verdict on Agreed Statement of Facts. Where a case is submitted on an agreed statement of facts, the court's charge must be based on facts specifically admitted.[66]

4. Direction of Verdict on Motion by Both Parties. The trial court has power to direct a verdict when requested by both parties.[67] There is considerable lack of harmony as to the effect of motions by both parties to direct a verdict, in respect of questions of fact. The rule is well settled in some states that the effect of such motions is under no circumstances a waiver of a right to jury trial by either party, and confers no power on the court to determine questions of fact.[68] On the other hand, while the decisions of the lower federal courts are not altogether in harmony,[69] the following rules are now definitely settled by the supreme court of the United States. Where both parties ask for a directed verdict and do nothing more, they thereby assume the facts to be undisputed, and request the court to find the facts, and they are concluded by the finding made by the court upon which the resulting instruction of law is given.[70] But, notwithstanding the fact that both parties ask for a directed verdict, this does not exclude either of them on the denial of his motion from the right to have the case go to the jury in accordance with subsequent special requests asked on his behalf.[71] Or stating this latter proposition in somewhat different language which was quoted with approval by the supreme court, "the fact that each party asks for a peremptory instruction to find in his favor does not submit the issues of fact to the court so as to deprive the party of the right to ask other instructions, and to except to the refusal to give them, nor does it deprive him of the right to have questions of fact submitted to the jury if issues are joined on which conflicting evidence has been offered." [72] In a number of other jurisdictions the rule is very similar to that which obtains in the federal courts. The general rule is that a request by both parties for the direction of a verdict amounts to a submission

64. Washington Asphalt Block, etc., Co. *v.* Mackey, 15 App. Cas. (D. C.) 410; Portsmouth St. R. Co. *v.* Reed, 102 Va. 662, 47 S. E. 850.

65. Louisville, etc., R. Co. *v.* Davis, 91 Ala. 487, 8 So. 552.

66. Gunter *v.* Leckey, 30 Ala. 591; Watts *v.* Tittabawassee Boom Co., 47 Mich. 540, 11 N. W. 377.

67. People *v.* Scannell, 172 N. Y. 316, 65 N. E. 165; Coffey *v.* Burke, 132 N. Y. App. Div. 128, 116 N. Y. Suppl. 514; People *v.* Dooling, 132 N. Y. App. Div. 50, 116 N. Y. Suppl. 371.

68. Wolf *v.* Chicago Sign Printing Co., 233 Ill. 501, 84 N. E. 614 [*reversing* 135 Ill. App. 366]; German Sav. Bank *v.* Bates Addition Imp. Co., 111 Iowa 432, 82 N. W. 1005; Stauff *v.* Bingenheimer, 94 Minn. 309, 102 N. W. 694; Poppitz *v.* German Ins. Co., 85 Minn. 118, 88 N. W. 438; National Cash Register Co. *v.* Bonneville, 119 Wis. 222, 96 N. W. 558; Thompson *v.* Brennan, 104 Wis. 564, 80 N. W. 947, expressly disapproving New York decisions. And see Lonier *v.* Ann Arbor Sav. Bank, 153 Mich. 253, 116 N. W. 1088.

69. See Mead *v.* Darling, 159 Fed. 684, 86 C. C. A. 552; Anderson *v.* Messenger, 158 Fed. 250, 85 C. C. A. 468; Defiance *v.* McGonigale, 150 Fed. 689, 80 C. C. A. 425; Love *v.* Scatcherd, 146 Fed. 1, 77 C. C. A. 1; McCormick *v.* Waco Nat. City Bank, 142 Fed. 132, 73 C. C. A. 350; West *v.* Roberts, 135 Fed. 350, 68 C. C. A. 58; Insurance Co. of North America *v.* Wisconsin Cent. R. Co., 134 Fed. 794, 67 C. C. A. 300; Phenix Ins. Co. *v.* Kerr, 129 Fed. 723, 64 C. C. A. 251, 66 L. R. A. 569; U. S. *v.* Bishop, 125 Fed. 181, 60 C. C. A. 123; Bradley Timber Co. *v.* White, 121 Fed. 779, 58 C. C. A. 55; Sigua Iron Co. *v.* Greene, 88 Fed. 207, 31 C. C. A. 477; Magone *v.* Origet, 70 Fed. 778, 17 C. C. A. 363; Merwin *v.* Magone, 70 Fed. 776, 17 C. C. A. 361.

70. Empire State Cattle Co. *v.* Atchison, etc., R. Co., 210 U. S. 1, 28 S. Ct. 607, 52 L. ed. 931; Beuttel *v.* Magone, 157 U. S. 154, 15 S. Ct. 566, 39 L. ed. 654.

When supported by any substantial evidence the verdict directed will not be disturbed. Bradley Timber Co. *v.* White, 121 Fed. 779, 58 C. C. A. 55; Merwin *v.* Magone, 70 Fed. 776, 17 C. C. A. 361.

71. Empire State Cattle Co. *v.* Atchison, etc., R. Co., 210 U. S. 1, 28 S. Ct. 607, 52 L. ed. 931.

72. Minahan *v.* Grand Trunk Western R. Co., 138 Fed. 37, 70 C. C. A. 463 [*quoted* with approval in Empire State Cattle Co. *v.* Atchison, etc., R. Co., 210 U. S. 1, 9, 28 S. Ct. 607, 52 L. ed. 931].

of the whole case to the court and its decision upon the facts has the same effect as the verdict of a jury,[73] and will not be disturbed when supported by any substantial evidence.[74] But the rule does not apply where the party whose request has been denied thereafter makes a seasonable request for a submission of the facts to the jury.[75] The motion must specifically point out the questions of fact

73. *New Mexico.*— Home Sav. Bank *v.* Woodruff, 14 N. M. 502, 94 Pac. 957.

New York.— Baker *v.* Appleton, 187 N. Y. 548, 80 N. E. 1104 [*affirming* 107 N. Y. App. Div. 358, 95 N. Y. Suppl. 125]; Leggat *v.* Leggat, 176 N. Y. 590, 68 N. E. 1119; Sigua Iron Co. *v.* Brown, 171 N. Y. 488, 64 N. E. 194; Westervelt *v.* Phelps, 171 N. Y. 212, 63 N. E. 962; Porter *v.* Traders' Ins. Co., 164 N. Y. 504, 58 N. E. 641, 52 L. R. A. 424; Trimble *v.* New York Cent., etc., R. Co., 162 N. Y. 84, 56 N. E. 532, 48 L. R. A. 115; Adams *v.* Roscoe Lumber Co., 159 N. Y. 176, 53 N. E. 805; Clason *v.* Baldwin, 152 N. Y. 204, 46 N. E. 322; East Hampton *v.* Vail, 151 N. Y. 463, 45 N. E. 1030; Thompson *v.* Simpson, 128 N. Y. 270, 28 N. E. 627; Sutter *v.* Vanderveer, 122 N. Y. 652, 25 N. E. 907; Kirtz *v.* Peck, 113 N. Y. 222, 21 N. E. 130; Stratford *v.* Jones, 97 N. Y. 586; Dillon *v.* Cockcroft, 90 N. Y. 649; O'Neill *v.* James, 43 N. Y. 84; Sandel *v.* Sommers, 131 N. Y. App. Div. 537, 115 N. Y. Suppl. 357; Maxwell *v.* Martin, 130 N. Y. App. Div. 80, 114 N. Y. Suppl. 349; Kinner *v.* Whipple, 128 N. Y. App. Div. 736, 113 N. Y. Suppl. 337 [*reversed* on other grounds in 198 N. Y. 585, 92 N. E. 1088]; Colaneri *v.* General Acc. Assur. Corp., 126 N. Y. App. Div. 591, 110 N. Y. Suppl. 678; Reed *v.* Spear, 107 N. Y. App. Div. 144, 94 N. Y. Suppl. 1007; Rosenstein *v.* Vogemann, 102 N. Y. App. Div. 39, 92 N. Y. Suppl. 86 [*affirmed* in 184 N. Y. 325, 77 N. E. 625]; Kennedy *v.* New York, 99 N. Y. App. Div. 588, 91 N. Y. Suppl. 252; German-American Bank *v.* Cunningham, 97 N. Y. App. Div. 244, 89 N. Y. Suppl. 836; Cullinan *v.* Fidelity, etc., Co., 84 N. Y. App. Div. 292, 82 N. Y. Suppl. 695 [*affirmed* in 177 N. Y. 574, 69 N. E. 1122]; Page *v.* Shainwald, 52 N. Y. App. Div. 349, 65 N. Y. Suppl. 174 [*reversed* on other grounds in 169 N. Y. 246, 62 N. E. 356, 57 L. R. A. 123]; Citizens' Nat. Bank *v.* Lilienthal, 40 N. Y. App. Div. 609, 57 N. Y. Suppl. 567; Young *v.* Roberts, 31 N. Y. App. Div. 615, 52 N. Y. Suppl. 279; Friendship First Nat. Bank *v.* Weston, 25 N. Y. App. Div. 414, 49 N. Y. Suppl. 542; Cowenhoven *v.* Pfluger, 22 N. Y. App. Div. 464, 47 N. Y. Suppl. 1122; Cutler *v.* Parsons, 13 N. Y. App. Div. 376, 43 N. Y. Suppl. 187; Dilcher *v.* Nellany, 52 Misc. 364, 102 N. Y. Suppl. 264; Griffin *v.* Interurban St. R. Co., 46 Misc. 328, 94 N. Y. Suppl. 854.

North Dakota.— Duncan *v.* Great Northern R. Co., 17 N. D. 610, 118 N. W. 826, 19 L. R. A. N. S. 952; Aber *v.* Twichell, 17 N. D. 229, 116 N. W. 95; Larson *v.* Calder, 16 N. D. 248, 113 N. W. 103; Park River Bank *v.* Norton, 12 N. D. 497, 97 N. W. 860; Grand Forks First M. E. Church *v.* Fadden, 8 N. D. 162, 77 N. W. 615; New England Mortg. Security Co. *v.* Great Western El. Co., 6 N. D. 407, 71 N. W. 130.

Ohio.—Victoria First Nat. Bank *v.* Hayes, 64 Ohio St. 100, 59 N. E. 893; Gilligan *v.* Royal Arcanum Supreme Council, 26 Ohio Cir. Ct. 42; Snow *v.* Modern Woodmen of America, 24 Ohio Cir. Ct. 142.

Oregon.— Patty *v.* Salem Flouring Mill Co., 53 Oreg. 350, 96 Pac. 1106, 98 Pac. 521, 100 Pac. 298.

South Dakota.— Lindquist *v.* Northwestern Port Huron Co., 22 S. D. 298, 117 N. W. 365; Sundling *v.* Willey, 19 S. D. 293, 103 N. W. 38; Wilson *v.* Commercial Union Ins. Co., 15 S. D. 322, 89 N. D. 649; Angier *v.* Western Assur. Co., 10 S. D. 82, 71 N. W. 761, 66 Am. St. Rep. 685; Yankton F. Ins. Co. *v.* Fremont, etc., R. Co., 7 S. D. 428, 64 N. W. 514.

See 46 Cent. Dig. tit. "Trial," § 400.

Testimony of interested witness.— The fact that the only testimony on the question of damages is given by an interested witness does not require the submission of that question to the jury, in the absence of a special request therefor. Fuller *v.* Schrenk, 58 N. Y. App. Div. 222, 68 N. Y. Suppl. 781 [*affirmed* in 171 N. Y. 671, 64 N. E. 1126].

74. Martin *v.* Home Bank, 160 N. Y. 190, 54 N. E. 717; Reck *v.* Phenix Ins. Co., 130 N. Y. 160, 29 N. E. 137; Dillon *v.* Cockcroft, 90 N. Y. 649; Sturmdorf *v.* Saunders, 117 N. Y. App. Div. 762, 102 N. Y. Suppl. 1042 [*affirmed* in 190 N. Y. 555, 83 N. E. 1132]; Beach *v.* Supreme Tent K. M. W., 74 N. Y. App. Div. 527, 77 N. Y. Suppl. 770 [*affirmed* in 177 N. Y. 100, 69 N. E. 281]; Lyman *v.* Mead, 56 N. Y. App. Div. 582, 67 N. Y. Suppl. 254; Northam *v.* International Ins. Co., 45 N. Y. App. Div. 177, 61 N. Y. Suppl. 45 [*affirmed* in 165 N. Y. 666, 59 N. E. 1127]; Birnstein *v.* Stuyvesant Ins. Co., 39 Misc. (N. Y.) 808, 81 N. Y. Suppl. 306 [*reversed* on other grounds in 83 N. Y. App. Div. 436, 82 N. Y. Suppl. 140]; Schreyer *v.* Jordan, 30 Misc. (N. Y.) 764, 61 N. Y. Suppl. 889; Stearns *v.* Farrand, 20 Misc. (N. Y.) 292, 60 N. Y. Suppl. 501; Meyer *v.* Strauss, 58 N. Y. Suppl. 904.

75. Kinner *v.* Whipple, 198 N. Y. 585, 92 N. E. 1088 [*reversing* 128 N. Y. App. Div. 736, 113 N. Y. Suppl. 337]; Shultes *v.* Sickles, 147 N. Y. 704, 41 N. E. 574; Koehler *v.* Adler, 78 N. Y. 287; Campbell *v.* Prague, 6 N. Y. App. Div. 554, 39 N. Y. Suppl. 558; Switzer *v.* Norton, 3 N. Y. App. Div. 173, 38 N. Y. Suppl. 350; Strohm *v.* Zoellner, 61 Misc. (N. Y.) 56, 112 N. Y. Suppl. 1063; Solomon *v.* Levine, 54 Misc. (N. Y.) 270, 104 N. Y. Suppl. 443; Flicker *v.* Graner, 23 Misc. (N. Y.) 112, 50 N. Y. Suppl. 769; Duncan *v.* Great Northern R. Co., 17 N. D. 610, 118 N. W. 826, 19 L. R. A. N. S. 952; Victoria First Nat. Bank *v.* Hayes, 64 Ohio St. 100, 59 N. E. 893; Gilligan *v.* Royal Arcanum Supreme Council, 26 Ohio Cir. Ct. 42.

which it is desired should be passed on by the jury.[76] The request to go to the jury may be made at any time before the directed verdict is actually rendered by the jury,[77] but not thereafter.[78] If the submission be as to part of the facts only, it is error for the court to decide the questions not submitted.[79]

5. Application and Proceedings Thereon — a. Form and Requisites of Motion. The motion need not be in writing, unless a statute so requires;[80] but in order to preserve an exception to the overruling of the motion, a written instruction directing a verdict must be presented at the time the motion is made.[81] It is not sufficient that such instruction be offered later with other instructions submitting the case to the jury.[82] The motion should be absolute and without reservation.[83] There is some conflict of authority as to the necessity of stating grounds of the motion for directing a verdict. According to some decisions the motion should state specifically the grounds on which it is based.[84] According to other decisions,

Reason for rule.— Every party is entitled to present to the court for its decision such legal questions as he thinks arise upon the testimony, without being subjected to the penalty of losing his right to have the case submitted to the jury. And it is only when no request is made to go to the jury that he will be held to have waived that right. If the rule were otherwise, it would never be safe to ask for a direction of a verdict. Switzer *v.* Norton, 3 N. Y. App. Div. 173, 38 N. Y. Suppl. 350.

Where question is one of law.—Where, after the denial of a motion for a nonsuit, defendant asked to go to the jury upon certain propositions only, which was denied, and a verdict directed for plaintiff, if there was no question for the jury upon the matters as to which there was a request, the remaining questions are to be disposed of by the court, the right to a jury being waived. Hamrah *v.* Maloof, 127 N. Y. App. Div. 331, 111 N. Y. Suppl. 509. And see Cravath *v.* Baylis, 113 N. Y. App. Div. 666, 99 N. Y. Suppl. 973 [*affirmed* in 192 N. Y. 559, 85 N. E. 1107]; Bernheimer *v.* Adams, 70 N. Y. App. Div. 114, 75 N. Y. Suppl. 93 [*affirmed* in 175 N. Y. 472, 67 N. E. 1080].

Application and extent of rule.—Especially is this true where, before decision on the motions, he recalls a witness and introduces additional testimony. Beiermeister *v.* London F. Ins. Co., 133 N. Y. 564, 30 N. E. 1149.

Particular questions of fact.—According to some of the New York decisions the party whose motion is denied is not entitled to ask to go to the jury generally but only on specific questions of fact. Maxwell *v.* Martin, 130 N. Y. App. Div. 80, 114 N. Y. Suppl. 349; Campbell *v.* Prague, 6 N. Y. App. Div. 554, 39 N. Y. Suppl. 558; Switzer *v.* Norton, 3 N. Y. App. Div. 173, 38 N. Y. Suppl. 350.

76. Mayer *v.* Dean, 115 N. Y. 556, 22 N. E. 261, 5 L. R. A. 540; Kinner *v.* Whipple, 128 N. Y. App. Div. 736, 113 N. Y. Suppl. 337 [*reversed* on other grounds in 198 N. Y. 585, 92 N. E. 1088]; Groves *v.* Acker, 85 Hun (N. Y.) 492, 33 N. Y. Suppl. 406.

77. Eldredge *v.* Mathews, 93 N. Y. App. Div. 356, 87 N. Y. Suppl. 652; Cullinan *v.* Furthmann, 70 N. Y. App. Div. 110, 75 N. Y. Suppl. 90; Herrmann *v.* Koref, 47 Misc. (N. Y.) 94, 93 N. Y. Suppl. 488; Maxwell *v.* Martin, 130 N. Y. App. Div. 80, 114 N. Y. Suppl. 349.

78. Persons *v.* Hawkins, 41 N. Y. App. Div. 171, 58 N. Y. Suppl. 831; Strohm *v.* Zoellner, 61 Misc. (N. Y.) 56, 112 N. Y. Suppl. 1063; Zajic *v.* Elian, 50 Misc. (N. Y.) 289, 98 N. Y. Suppl. 652.

79. Litt *v.* Wabash R. Co., 50 N. Y. App. Div. 550, 64 N. Y. Suppl. 108; University Press *v.* Williams, 48 N. Y. App. Div. 188, 62 N. Y. Suppl. 986.

80. Young *v.* Burlington Wire Mattress Co., 79 Iowa 415, 44 N. W. 693; Foley *v.* Chicago, etc., Co., 64 Iowa 644, 21 N. W. 124.

Under the Illinois statutes a motion to direct a verdict must be in writing. Swift *v.* Fue, 167 Ill. 443, 47 N. E. 761; Wenona Coal Co. *v.* Holmquist, 152 Ill. 581, 38 N. E. 946; Chicago, etc., R. Co. *v.* Brooks, 115 Ill. App. 5.

81. West Chicago St. R. Co. *v.* Foster, 175 Ill. 396, 51 N. E. 690; Calumet Electric St. R. Co. *v.* Christenson, 170 Ill. 383, 48 N. E. 962.

82. West Chicago St. R. Co. *v.* Foster, 175 Ill. 396, 51 N. E. 690; Hartford Deposit Co. *v.* Sollitt, 172 Ill. 222, 50 N. E. 178, 64 Am. St. Rep. 35; Calumet Electric St. R. Co. *v.* Christenson, 170 Ill. 383, 48 N. E. 962; West Chicago St. R. Co. *v.* McCallum, 169 Ill. 240, 48 N. E. 424; Gilbert *v.* Watts-De Golyer Co., 169 Ill. 129, 48 N. E. 430, 61 Am. St. Rep. 154; Western Nat. Bank *v.* Flannagan, 14 Misc. (N. Y.) 317, 35 N. Y. Suppl. 848.

83. Union Pac. R. Co. *v.* Mertes, 35 Nebr. 204, 52 N. W. 1099.

84. *California.*— Pearson *v.* Snodgrass, 5 Cal. 478.

Michigan.— Hoose *v.* Prescott Ins. Co., 84 Mich. 309, 47 N. W. 587, 11 L. R. A. 340.

South Dakota.— Howie *v.* Bratrud, 14 S. D. 648, 86 N. W. 747; Tanderup *v.* Hansen, 8 S. D. 375, 66 N. W. 1073.

Utah.— Smalley *v.* Rio Grande Western R. Co., 34 Utah 423, 98 Pac. 311 [*disapproving* Owens *v.* San Pedro, etc., R. Co., 32 Utah 208, 89 Pac. 825].

Vermont.— Bickford *v.* Travelers' Ins. Co., 67 Vt. 418, 32 Atl. 230.

United States.— Beale *v.* Burchell, 3 Fed. Cas. No. 1,157, 5 Cranch C. C. 310.

See 46 Cent. Dig. tit. "Trial," § 398.

Reason for rule.— It is due to the court

if the motion is based on the legal insufficiency of the evidence to sustain a recovery, it is sufficient if the question is raised in general terms,[85] and in one case it is said that the better practice is to state the specific grounds of the motion, but that this is not essential.[86] Where the declaration contains two counts and either of them is sustained by the evidence, a motion by defendant for a general verdict will be denied.[87] The court cannot be called upon by a motion of this character to make special findings of fact.[88] The motion should not be complicated with statements as to the law.[89] It is not necessary to state reasons for the grounds alleged.[90]

b. Time For Motion. A motion to direct a verdict may be made when the opposing party has rested his case,[91] or it may be made after all the evidence on both sides is in.[92] If overruled before the case is closed, it may be renewed when all the evidence is in, and there is no inconsistency in then sustaining it.[93] In some jurisdictions it is held to come too late after final submission of the cause,[94]

and the opposing counsel that their attention should be called to the precise defect in the evidence, or the omission of evidence, that the party claims entitle him to the direction of the verdict. It is due to the court to enable it to pass understandingly upon the motion, and it is due to counsel that he may, if possible, supply the defective or omitted evidence if permitted to do so by the court. Tanderup *v.* Hansen, 8 S. D. 375, 66 N. W. 1073; Smalley *v.* Rio Grande Western R. Co., 34 Utah 423, 98 Pac. 311.

Applications of rule.—A mere general statement that under the evidence plaintiff is not entitled to recover, or that defendant is entitled to a verdict, or that plaintiff has not made a sufficient case to go to the jury, does not specify any grounds for the direction of a verdict for defendant. Smalley *v.* Rio Grande Western R. Co., 34 Utah 423, 98 Pac. 311. If the motion is based on a variance between the pleadings and proof, the variance must be particularly specified. Zellers *v.* White, 208 Ill. 518, 70 N. E. 669, 100 Am. St. Rep. 243; Probst Constr. Co. *v.* Foley, 166 Ill. 31, 46 N. E. 750.

Qualification of rule.— The rule that a motion for a directed verdict and the direction must specify the particular grounds is qualified to the extent that, where it is made manifest on what question of law the case was taken from the jury, and the defects on which it was based do not admit of correction, a failure to specify grounds does not justify a reversal. Smalley *v.* Rio Grande Western R. Co., 34 Utah 423, 98 Pac. 311.

Waiver of grounds not specified.—A motion to direct a verdict on specified enumerated grounds excludes all grounds not enumerated. Crissman *v.* Erie R. Co., 123 N. Y. App. Div. 61, 107 N. Y. Suppl. 827.

85. Grand Fountain U. O. T. R. *v.* Murray, 88 Md. 422, 41 Atl. 896; Gerding *v.* Haskin, 141 N. Y. 514, 36 N. E. 601.

Applications of rule.— Thus an instruction that the evidence is insufficient to sustain plaintiff's case as charged in the declaration (Ames, etc., Co. *v.* Strachurski, 145 Ill. 192, 34 N. E. 48); that plaintiff has failed to prove defendant's negligence and his own freedom from contributory negligence (Cowles *v.* Chicago, etc., R. Co., (Iowa 1902) 88 N. W. 1072); or, in an action to recover a debt barred by a discharge in bankruptcy, that plaintiff has failed to establish a new promise as required by law, or prove any transaction on the part of defendant that would make him responsible for the debt (Tompkins *v.* Hazen, 165 N. Y. 18, 58 N. E. 762), has been held to be good.

86. Taylor *v.* Southerland, 7 Indian Terr. 666, 104 S. W. 874.

87. Washington Asphalt Block, etc., Co. *v.* Mackey, 15 App. Cas. (D. C.) 410.

88. Sonnentheil *v.* Christian Moerlein Brewing Co., 75 Fed. 350, 21 C. C. A. 390.

89. Thomas *v.* Carey, 26 Colo. 485, 58 Pac. 1093.

90. Smalley *v.* Rio Grande Western R. Co., 34 Utah 423, 98 Pac. 311.

91. Chicago Great Western R. Co. *v.* Mohan, 187 Ill. 281, 58 N. E. 395; Crean *v.* McMahon, 106 Md. 507, 68 Atl. 265, 14 L. R. A. N. S. 798; Nashville R., etc., Co. *v.* Henderson, 118 Tenn. 284, 99 S. W. 700; Merchants' Nat. Bank *v.* State Nat. Bank, 17 Fed. Cas. No. 9,449, 3 Cliff. 205. But see Kaley *v.* Van Ostrand, 134 Wis. 443, 114 N. W. 817, in which it is held that the motion cannot be made until both parties have rested.

92. Chicago Great Western R. Co. *v.* Mohan, 187 Ill. 281, 58 N. E. 395; Bartelott *v.* International Bank, 119 Ill. 259, 9 N. E. 898; Bunnell *v.* Rosenberg, 126 Ill. App. 196; Crean *v.* McMahon, 106 Md. 507, 68 Atl. 265, 14 L. R. A. N. S. 798; Nashville R., etc., Co. *v.* Henderson, 118 Tenn. 284, 99 S. W. 700; Travelers' Ins. Co. *v.* Randolph, 78 Fed. 754, 24 C. C. A. 305.

Waiver of motion for nonsuit.— Defendants were not precluded from insisting on a motion for a verdict in their favor, made at the close of all the testimony, by having waived a motion for nonsuit made at the close of plaintiff's testimony. Gardner *v.* Porter, 45 Wash. 158, 88 Pac. 121.

93. Smith *v.* Foster, 93 Ill. App. 138; Mattauch *v.* Riddell Automobile Co., 138 Iowa 22, 115 N. W. 509; Ward *v.* Dickson, 96 Iowa 708, 65 N. W. 997.

94. Starkweather *v.* Maginnis, 196 Ill. 274, 63 N. E. 692; Chicago Great Western R. Co. *v.* Mohan, 187 Ill. 281, 58 N. E. 395; Metro-

after other instructions have been asked and given,[95] or at the time the other instructions are presented;[96] while in others it is held that even though the jury has been instructed and the cause submitted,[97] or after the jury have disagreed,[98] or after the jury have returned a verdict contrary to the evidence,[99] a verdict may be directed in a proper case.[1] Ordinarily, it is error to direct a verdict before the opposing party has rested,[2] or without giving him an opportunity to introduce testimony in rebuttal,[3] unless there are defects in the proof which could not be cured by additional testimony.[4] A motion made by defendant, at the close of plaintiff's case, will not be entertained unless defendant elects to rest on plaintiff's showing.[5] But the fact that defendant has testified as plaintiff's witness will not defeat the motion.[6]

c. Hearing and Determination.[7] On motion to direct a verdict the court assumes to be true the evidence of the opposite party, who is entitled to the most favorable construction that it will properly bear and to the benefit of all reasonable inferences arising therefrom.[8] Only evidence tending to prove his case will

politan Bank *v.* Northern Fuel Co., 173 Ill. 345, 50 N. E. 1062; Franklin *v.* Krum, 171 Ill. 378, 49 N. E. 513; West Chicago St. R. Co. *v.* Fishman, 169 Ill. 196, 48 N. E. 447; Peirce *v.* Walters, 164 Ill. 560, 45 N. E. 1068; Hood *v.* Mathis, 21 Mo. 308.

95. Ewen *v.* Wilbor, 208 Ill. 492, 70 N. E. 575; Chicago, etc., R. Co. *v.* Murowski, 179 Ill. 77, 53 N. E. 572; Calumet Electric St. R. Co. *v.* Van Pelt, 173 Ill. 70, 50 N. E. 678; Wright *v.* Avery, 172 Ill. 313, 50 N. E. 204; Chicago, etc., R. Co. *v.* Delaney, 169 Ill. 581, 48 N. E. 476; West Chicago St. R. Co. *v.* Yund, 169 Ill. 47, 48 N. E. 208; Vallette *v.* Bilinski, 167 Ill. 564, 47 N. E. 770; Baldwin *v.* Wentworth, 67 N. H. 408, 36 Atl. 365. *Contra*, Garrett *v.* John V. Farwell Co., 102 Ill. App. 31 [*reversed* on other grounds in 199 Ill. 436, 65 N. E. 361].

96. Metropolitan Nat. Bank *v.* Merchants' Nat. Bank, 77 Ill. App. 316.

97. *Alabama.*— Gary *v.* Woodham, 103 Ala. 421, 15 So. 840.

Indiana.— McClaren *v.* Indianapolis, etc., R. Co., 83 Ind. 319.

Iowa.— Allen *v.* Wheeler, 54 Iowa 628, 7 N. W. 111.

Maine.— Heath *v.* Jaquith, 68 Me. 433.

New York.— Page *v.* Shainwald, 52 N. Y. App. Div. 349, 65 N. Y. Suppl. 174 [*reversed* on other grounds in 169 N. Y. 246, 62 N. E. 356, 56 L. R. A. 173].

See 46 Cent. Dig. tit. "Trial," § 397.

98. Byrne *v.* Boston El. R. Co., 198 Mass. 444, 85 N. E. 78; Rainger *v.* Boston Mut. Life Assoc., 167 Mass. 109, 44 N. E. 1088.

99. John Slaughter Co. *v.* King Lumber Co., 79 S. C. 338, 60 S. E. 705.

1. **The Florida statute** provides that the motion must be made at the conclusion of the argument and is premature if made prior thereto. Florida Cent., etc., Co. *v.* Seymour, 44 Fla. 557, 33 So. 424.

2. French *v.* National Laundry Co., 31 App. Cas. (D. C.) 105; Nixon *v.* Brown, 4 Blackf. (Ind.) 157; Field *v.* Clippert, 78 Mich. 26, 43 N. W. 1084; Crown Point Min. Co. *v.* Buck, 97 Fed. 462, 38 C. C. A. 278.

Where a plaintiff fails to state a case upon his opening, defendant may ordinarily request that a verdict be ordered in his favor, upon which request the presiding judge may, in his discretion, either then give a decision or wait until plaintiff's evidence or the entire evidence has been introduced before doing so. Hey *v.* Prime, 197 Mass. 474, 84 N. E. 141.

3. Mau *v.* Stoner, 10 Wyo. 125, 67 Pac. 618.

4. Davis *v.* Holbrook, 25 Colo. 493, 55 Pac. 730.

5. Denman *v.* Johnston, 85 Mich. 387, 48 N. W. 565; Morley *v.* Liverpool, etc., Ins. Co., 85 Mich. 210, 48 N. W. 502; Mexican Cent. R. Co. *v.* Glover, 107 Fed. 356, 46 C. C. A. 334; Northern Pac. R. Co. *v.* Charless, 51 Fed. 562, 2 C. C. A. 380. *Contra*, Schwanteck *v.* Berner, 96 Md. 138, 53 Atl. 670; Eberstadt *v.* State, 92 Tex. 94, 45 S. W. 1007.

6. Doyle *v.* Reid, 53 N. Y. Suppl. 365 [*affirmed* in 164 N. Y. 591, 58 N. E. 1087].

7. **Presumption as to correctness of ruling** see APPEAL AND ERROR, 3 Cyc. 306.

8. *Alabama.*— Birmingham Rolling Mill Co. *v.* Rockhold, 143 Ala. 115, 42 So. 96.

Illinois.— Savage *v.* Chicago, etc., R. Co., 238 Ill. 392, 87 N. E. 377 [*affirming* 142 Ill. App. 342]; Ramey *v.* Baltimore, etc., R. Co., 235 Ill. 502, 85 N. E. 639 [*affirming* 140 Ill. App. 203]; O'Leary *v.* Chicago City R. Co., 235 Ill. 187, 85 N. E. 233 [*affirming* 136 Ill. App. 239]; Gibson *v.* New York Fidelity, etc., Co., 232 Ill. 49, 83 N. E. 539; McKenzie Furnace Co. *v.* Mallers, 231 Ill. 561, 83 N. E. 451; Montgomery *v.* Robertson, 229 Ill. 466, 82 N. E. 396; Schillinger Bros. Co. *v.* Smith, 225 Ill. 74, 80 N. E. 65; Blakeslie's Express, etc., Co. *v.* Ford, 215 Ill. 230, 74 N. E. 135 [*affirming* 106 Ill. App. 109]; Delaware, etc., Canal Co. *v.* Mitchell, 211 Ill. 379, 71 N. E. 1026; Missouri Malleable Iron Co. *v.* Dillon, 206 Ill. 145, 69 N. E. 12; Martin *v.* Chicago, etc., R. Co., 194 Ill. 138, 62 N. E. 599; Wyckoff *v.* Chicago City R. Co., 136 Ill. App. 342 [*affirmed* in 234 Ill. 613, 85 N. E. 237]; Veach *v.* Champaign, 113 Ill. App. 151; Illinois Cent. R. Co. *v.* Burke, 112 Ill. App. 415; Nolan *v.* Morris, 108 Ill. App. 261; Illinois Cent. R. Co. *v.* Satkowski, 107 Ill. App. 524; Chadbourne *v.* Illinois Cent. R. Co., 104 Ill. App. 333; Cohen *v.* Chicago, etc., R. Co.,

be considered. All contradictory or countervailing evidence is left out of view. The trial court cannot weigh evidence and determine the preponderance thereof.[9]

104 Ill. App. 314; Meyer *v.* Meyer, 101 Ill. App. 92; West Chicago St. R. Co. *v.* Shiplett, 85 Ill. App. 683; Roberts *v.* Chicago, etc., R. Co., 78 Ill. App. 526; Henderson *v.* Chicago, etc., R. Co., 73 Ill. App. 57; Ward *v.* Chicago, 15 Ill. App. 98; Pratt *v.* Stone, 10 Ill. App. 633.

Indiana.— Howard *v.* Indianapolis St. R. Co., 29 Ind. App. 514, 64 N. E. 890.

Iowa.— Hanson *v.* Kline, 136 Iowa 101, 113 N. W. 504; Hartman *v.* Chicago Great Western R. Co., 132 Iowa 582, 110 N. W. 10; Degelau *v.* Wight, 114 Iowa 52, 86 N. W. 36.

Kentucky.— Board *v.* Chesapeake, etc., R. Co., 70 S. W. 625, 24 Ky. L. Rep. 1079; Vanardsdall *v.* Louisville, etc., R. Co., 65 S. W. 858, 23 Ky. L. Rep. 1666.

Maryland.— Newbold *v.* Hayward, 96 Md. 247, 54 Atl. 67; Kirk *v.* Garrett, 84 Md. 383, 35 Atl. 1089.

Mississippi.— Alexander *v.* Zeigler, 84 Miss. 560, 36 So. 536.

Missouri.— Glasscock *v.* Swofford Bros. Dry Goods Co., 106 Mo. App. 657, 80 S. W. 364, (App. 1903) 74 S. W. 1039; Cogan *v.* Cass Ave., etc., R. Co., 101 Mo. App. 179, 73 S. W. 738; Davis *v.* Kroyden, 60 Mo. App. 441.

Montana.— Lehane *v.* Butte Electric R. Co., 137 Mont. 564, 97 Pac. 1038; Freeman *v.* Sand Coulee Coal Co., 25 Mont. 194, 64 Pac. 347.

Nebraska.— Harris *v.* Lincoln Traction Co., 78 Nebr. 681, 111 N. W. 580; Union Stock Yards Co. *v.* Conoyer, 38 Nebr. 488, 56 N. W. 1081, 41 Am. St. Rep. 738.

New York.— New York *v.* Sands, 39 Hun 519; Craswell *v.* New York, etc., Steam Transp. Co., 28 Misc. 487, 59 N. Y. Suppl. 554 [*affirming* 27 Misc. 822, 57 N. Y. Suppl. 827].

North Carolina.— Hodges *v.* Southern R. Co., 122 N. C. 992, 29 S. E. 939.

North Dakota.— Nystrom *v.* Lee, 16 N. D. 561, 114 N. W. 478; Pirie *v.* Gillitt, 2 N. D. 255, 50 N. W. 710.

Ohio.— Ham *v.* Lake Shore, etc., R. Co., 23 Ohio Cir. Ct. 496.

Oklahoma.— Baker *v.* Nichols, etc., Co., 10 Okla. 685, 65 Pac. 100.

South Dakota.— Bohl *v.* Dell Rapids, 15 S. D. 619, 91 N. W. 315; Marshall *v.* Harney Peak Tin Min., etc., Co., 1 S. D. 350, 47 N. W. 290.

Texas.— Harpold *v.* Moss, 101 Tex. 540, 109 S. W. 928 [*reversing* (Civ. App. 1907) 106 S. W. 1131]; Eastham *v.* Hunter, 98 Tex. 560, 86 S. W. 323; Missouri, etc., R. Co. *v.* Yale, 27 Tex. Civ. App. 10, 65 S. W. 57.

Vermont.— Place *v.* Grand Trunk R. Co., 82 Vt. 42, 71 Atl. 836; Bass *v.* Rublee, 76 Vt. 395, 57 Atl. 965; Walcott *v.* Metropolitan L. Ins. Co., 64 Vt. 221, 24 Atl. 992, 33 Am. St. Rep. 923.

Wisconsin.— Woodward *v.* Smith, 100 Wis. 607, 85 N. W. 424.

United States.— Detroit Southern R. Co. *v.* Lambert, 150 Fed. 555, 80 C. C. A. 357; Williams *v.* Choctaw, etc., R. Co., 149 Fed. 104, 79 C. C. A. 146; Jenkins, etc., Co. *v.* Alpena Portland Cement Co., 147 Fed. 641, 77 C. C. A. 625; Riley *v.* Louisville, etc., R. Co., 133 Fed. 904, 66 C. C. A. 598; Milwaukee Mechanics' Ins. Co. *v.* Rhea, 123 Fed. 9, 60 C. C. A. 103; Neininger *v.* Cowan, 101 Fed. 687, 42 C. C. A. 20; Chicago Great Western R. Co. *v.* Healy, 86 Fed. 245, 30 C. C. A. 11.

See 46 Cent. Dig. tit. "Trial," § 401.

Although the evidence may seem incredible the rule applies. Powers *v.* Wyman, etc., Co., 199 Mass. 591, 85 N. E. 845.

Limitations of rule.— Evidence erroneously admitted (Mallory *v.* Fitzgerald, 69 Nebr. 312, 95 N. W. 601; Townsend *v.* Greenwich Ins. Co., 178 N. Y. 634, 71 N. E. 1140 [*affirming* 86 N. Y. App. Div. 323, 83 N. Y. Suppl. 909]; Bonn *v.* Galveston, etc., R. Co., (Tex. Civ. App. 1904) 82 S. W. 808) and excluded evidence (Riner *v.* New Hampshire F. Ins. Co., 9 Wyo. 446, 64 Pac. 1062) should be disregarded. And the rule forbidding the introduction of parol testimony to vary or contradict a written contract being one not merely of evidence, but of substantive law, such parol testimony, although introduced by plaintiff without objection, cannot be considered as against defendant's motion for a directed verdict. Mears *v.* Smith, 199 Mass. 319, 85 N. E. 165.

9. *Alabama.*— Birmingham Rolling Mill Co. *v.* Rockhold, (1904) 42 So. 96.

Illinois.— Pell *v.* Joliet, etc., R. Co., 238 Ill. 510, 87 N. E. 542 [*affirming* 142 Ill. App. 362]; Donelson *v.* East St. Louis, etc., R. Co., 235 Ill. 625, 85 N. E. 914 [*affirming* 140 Ill. App. 185]; Wyckoff *v.* Chicago City R. Co., 234 Ill. 613, 85 N. E. 237 [*affirming* 136 Ill. App. 342]; Chicago Union Traction Co. *v.* Lundahl, 215 Ill. 289, 74 N. E. 155 [*affirming* 117 Ill. App. 220]; Frazer *v.* Howe, 106 Ill. 563; Bunnell *v.* Rosenberg, 126 Ill. App. 196; Illinois Cent. R. Co. *v.* McCollum, 122 Ill. App. 531; Chicago, etc., R. Co. *v.* Condon, 121 Ill. App. 440; Fleming *v.* Ludington, 121 Ill. App. 54; Nicholls *v.* Colwell, 113 Ill. App. 219 [*reversed* on other grounds in 208 Ill. 608, 70 N. E. 628]; Riverton Coal Co. *v.* Shepherd, 111 Ill. App. 294; Illinois Cent. R. Co. *v.* Smith, 111 Ill. App. 177; McFarland *v.* Edmunds Mfg. Co., 97 Ill. App. 629.

Kentucky.— J. I. Case Threshing Mach. Co. *v.* Sanford, 97 S. W. 805, 30 Ky. L. Rep. 188.

Missouri.— Bond *v.* Chicago, etc., R. Co., 110 Mo. App. 131, 84 S. W. 124; Wacher *v.* St. Louis Transit Co., 108 Mo. App. 645, 84 S. W. 138; Hirsch *v.* U. S. Grand Lodge O. B. A., 78 Mo. App. 358.

New York.— Philips *v.* Philips, 179 N. Y. 585, 72 N. E. 1149.

If the motion is sustained, it is the practice in some jurisdictions for the court to direct the jury to return a verdict in favor of the party moving therefor, and then enter judgment on the verdict.[10] In others, the court discharges the jury and enters judgment for the party entitled thereto,[11] and thus to order judgment, without verdict, is at most a harmless irregularity and no ground for a new trial.[12] The direction of a verdict is not a technical "instruction" and may be made orally.[13] But the better practice is to put it in writing.[14] The court should state reasons for its action in directing a verdict,[15] and its failure so to do has been held reversible error.[16] That the evidence will not support a verdict is a sufficient statement of the reason.[17] The court is not required to make and file specific findings of fact.[18] Where several pleas are interposed, the direction should designate the plea on which the verdict should be based;[19] but the omission of such designation is harmless where the verdict necessarily results from the evidence.[20] Any statement of the court, in the presence of the jury, which indicates its views as to what the verdict should be will be deemed a direction of a verdict.[21] The mere fact that the court, before directing a verdict for plaintiff, stated that he intended to do so is not error.[22] Where a motion for judgment is overruled, and the moving party does not rest his case, no judgment is rendered against him,[23] but the trial proceeds as if the motion had not been made.[24] Where

South Dakota.— Mattoon *v.* Fremont, etc., R. Co., 6 S. D. 196, 60 N. W. 740.

Texas.— Harpold *v.* Moss, 101 Tex. 540, 109 S. W. 928 [*reversing* (Civ. App. 1907) 106 S. W. 1131]; Eastham *v.* Hunter, 98 Tex. 560, 86 S. W. 323.

Utah.— Law *v.* Smith, 34 Utah 394, 98 Pac. 300.

United States.— Lincoln *v.* Power, 151 U. S. 436, 14 S. Ct. 387, 38 L. ed. 224.

See 46 Cent. Dig. tit. "Trial," § 401.

10. Stroble *v.* New Albany, 144 Ind. 695, 42 N. E. 806; Engrer *v.* Ohio, etc., R. Co., 142 Ind. 618, 42 N. E. 217; Duluth Chamber of Commerce *v.* Knowlton, 42 Minn. 229, 44 N. W. 2.

After the jury has been discharged a verdict cannot be directed. Gilbert *v.* Finch, 72 N. Y. App. Div. 38, 76 N. Y. Suppl. 143 [*affirmed* in 173 N. Y. 455, 66 N. E. 133, 93 Am. St. Rep. 623, 61 L. R. A. 807].

11. Bemis *v.* Woodworth, 49 Iowa 340; Calteaux *v.* Mueller, 102 Wis. 525, 78 N. W. 1082.

Consent of the parties to the discharge of the jury is not necessary. Stepp *v.* National Life, etc., Assoc., 37 S. C. 417, 16 S. E. 134.

12. Duluth Chamber of Commerce *v.* Knowlton, 42 Minn. 229, 44 N. W. 2.

13. Harris *v.* McArthur, 90 Ga. 216, 15 S. E. 758; Leggett, etc., Tobacco Co. *v.* Collier, 89 Iowa 144, 56 N. W. 417; Young *v.* Burlington Wire Mattress Co., 79 Iowa 415, 44 N. W. 693; Milne *v.* Walker, 59 Iowa 186, 13 N. W. 101; Stone *v.* Chicago, etc., R. Co., 47 Iowa 82, 29 Am. Rep. 458; Grant *v.* Connecticut Mut. L. Ins. Co., 29 Wis. 125.

14. Swift *v.* Fue, 167 Ill. 443, 47 N. E. 761; Kean *v.* West Chicago St. R. Co., 75 Ill. App. 38; Arcade Co. *v.* Allen, 51 Ill. App. 305.

A failure to direct a verdict in writing is not a ground for reversal. Hefling *v.* Van Zandt, 162 Ill. 162, 44 N. E. 424.

15. Howey *v.* Fisher, 111 Mich. 422, 69 N. W. 741; Bergstrom *v.* Staples, 82 Mich. 654, 46 N. W. 1035; Demill *v.* Moffat, 45 Mich. 410, 8 N. W. 79; Foote *v.* American Product Co., 195 Pa. St. 190, 45 Atl. 934, 78 Am. St. Rep. 806, 49 L. R. A. 764; Smalley *v.* Rio Grande Western R. Co., 34 Utah 423, 98 Pac. 311 [*disapproving* Owens *v.* San Pedro, etc., R. Co., 32 Utah 208, 89 Pac. 825, to the contrary], where it is held that the rule is qualified to the extent that where it is made manifest on what questions of law the case was taken from the jury and the defects on which it was based do not admit of correction, a failure to specify grounds does not warrant a reversal.

16. Rayl *v.* Hammond, 95 Mich. 22, 54 N. W. 693; Demill *v.* Moffat, 45 Mich. 410, 8 N. W. 79.

17. Hanley *v.* Balch, 106 Mich. 46, 63 N. W. 981. And see Smalley *v.* Rio Grande Western R. Co., 34 Utah 423, 98 Pac. 311.

18. Griffin *v.* Chicago, etc., R. Co., 68 Iowa 638, 27 N. W. 792; Fidelity Trust Co. *v.* Palmer, 22 Wash. 473, 61 Pac. 158, 79 Am. St. Rep. 953.

19. Buffington *v.* Davis, 33 Md. 511.

20. Lewis *v.* Brown, 89 Ga. 115, 14 S. E. 881.

21. Wright *v.* Towle, 67 Mich. 255, 34 N. W. 578; Fitzgerald *v.* Alexander, 19 Wend. (N. Y.) 402; White *v.* Blum, 79 Fed. 271, 24 C. C. A. 573.

22. Brewer, etc., Brewing Co. *v.* Boddie, 162 Ill. 346, 44 N. E. 819.

23. Bass *v.* Rublee, 76 Vt. 395, 57 Atl. 965.

24. Eberstadt *v.* State, 92 Tex. 94, 45 S. W. 1007.

Extent of rule.— The rule applies notwithstanding a statutory provision that when the sufficiency of the evidence is challenged, the court shall discharge the jury and direct a final judgment. Rinear *v.* Skinner, 20 Wash. 541, 56 Pac. 24.

defendant's motion is sustained, plaintiff should be given an opportunity to take a nonsuit,[25] but he cannot be compelled to do so;[26] and if he refuses, it is proper to direct a verdict against him and render final judgment thereon,[27] unless the evidence is not only insufficient to make out plaintiff's case but shows that defendant is entitled to a judgment on the merits.[28] In some jurisdictions plaintiff is not entitled to a dismissal without prejudice,[29] while in others, if the motion be made by defendant at the close of plaintiff's case, the only judgment that can be rendered against plaintiff is that of nonsuit.[30] A party may withdraw his motion at any time before it has been acted upon by the court.[31] In New York, and some other states where a similar code is in force, a party does not waive his right to go to the jury by asking that a verdict be directed in his favor;[32] but, if his motion be overruled, he must then specifically request what particular facts he desires to have submitted to the jury.[33] The motion is equivalent to a submission to the court of all questions of fact upon which the verdict of the jury is not thus requested.[34] The giving of a peremptory instruction for one party to an action is in effect a withdrawal of all other instructions for both parties.[35]

6. Refusal of Juror to Obey Direction. When a peremptory instruction is given, the jury may be compelled over their protest to return a verdict in accordance therewith.[36] And the refusal of a juror to obey the court's instruction subjects him and those who encourage him to punishment for contempt.[37] The court may, in case of the jury's refusal, direct the entry of a verdict without their assent,[38] and its action, although technically irregular, will not be cause for reversal where no injury has resulted to defendant.[39] A verdict of eleven jurors, if given by direction of the court, will be accepted.[40]

7. Exceptions to Rulings. The rulings of the court on motions to direct verdicts are subject to exception.[41] Where the motion is made by defendant at the close of plaintiff's case and is overruled, defendant must rest or he waives

25. Simmons *v.* Cunningham, 4 Ida. 426, 39 Pac. 1109.

26. Callahan *v.* Warne, 40 Mo. 131.

27. Thompson *v.* Etowah Iron Co., 91 Ga. 538, 17 S. E. 663.

28. Dennison *v.* Musgrave, 20 Misc. (N. Y.) 678, 46 N. Y. Suppl. 530.

29. Dunkle *v.* Spokane Falls, etc., R. Co., 20 Wash. 254, 55 Pac. 51.

30. Hines *v.* McLellan, 117 Ga. 845, 45 S. E. 279; Creek *v.* McManus, 13 Mont. 152, 32 Pac. 675; McKay *v.* Montana Union R. Co., 13 Mont. 15, 31 Pac. 999; Rosenkranz *v.* Saberski, 40 Misc. (N. Y.) 650, 83 N. Y. Suppl. 257; Stern *v.* Frommer, 10 Misc. (N. Y.) 219, 30 N. Y. Suppl. 1067.

31. Gorman *v.* Williams, 26 Misc. (N. Y.) 776, 56 N. Y. Suppl. 1031.

32. Bendheim *v.* Herter, 40 N. Y. App. Div. 462, 58 N. Y. Suppl. 106; Hogan *v.* O'Brien, 29 N. Y. App. Div. 59, 51 N. Y. Suppl. 530; Switzer *v.* Norton, 3 N. Y. App. Div. 173, 38 N. Y. Suppl. 350; Clark *v.* Clark, 91 Hun (N. Y.) 295, 36 N. Y. Suppl. 294; Yale *v.* Dart, 13 N. Y. Suppl. 277, 26 Abb. N. Cas. 469.

33. State Bank *v.* Southern Nat. Bank, 54 N. Y. App. Div. 99, 66 N. Y. Suppl. 349 [*reversed* on other grounds in 170 N. Y. 1, 62 N. E. 677]; Kantrowitz *v.* Levin, 14 Misc. (N. Y.) 563, 35 N. Y. Suppl. 1072; Stanford *v.* McGill, 6 N. D. 536, 72 N. W. 938, 38 L. R. A. 760.

34. Sweetland *v.* Buell, 164 N. Y. 541, 58 N. E. 663, 79 Am. St. Rep. 676; Colligan *v.* Scott, 58 N. Y. 670; Ranken *v.* Donovan, 46 N. Y. App. Div. 225, 61 N. Y. Suppl. 542 [*affirmed* in 166 N. Y. 626, 60 N. E. 1119]; Stephens *v.* Meriden Britannia Co., 13 N. Y. App. Div. 268, 43 N. Y. Suppl. 226 [*reversed* on other grounds in 160 N. Y. 178, 54 N. E. 781, 73 Am. St. Rep. 781]; Miller *v.* Reynolds, 92 Hun (N. Y.) 400, 36 N. Y. Suppl. 660; Benson *v.* Townsend, 4 Silv. Sup. (N. Y.) 254, 7 N. Y. Suppl. 162; Green *v.* Shute, 15 Daly (N. Y.) 361, 7 N. Y. Suppl. 646; Wyckoff *v.* Curtis, 7 Misc. (N. Y.) 444, 27 N. Y. Suppl. 1012; Riley *v.* Black, 1 Misc. (N. Y.) 288, 20 N. Y. Suppl. 695; Gregory *v.* New York, 11 N. Y. St. 506; Angier *v.* Western Assur. Co., 10 S. D. 82, 71 N. W. 761, 66 Am. St. Rep. 685.

35. Crossett *v.* Ferrill, 209 Mo. 704, 108 S. W. 52.

36. Curran *v.* Stein, 110 Ky. 99, 60 S. W. 839, 22 Ky. L. Rep. 1575; W. B. Grimes Dry-Goods Co. *v.* Malcolm, 164 U. S. 483, 17 S. Ct. 158, 41 L. ed. 524.

37. Cahill *v.* Chicago, etc., R. Co., 74 Fed. 285, 20 C. C. A. 184.

38. Cahill *v.* Chicago, etc., R. Co., 74 Fed. 285, 20 C. C. A. 184.

39. Pardee *v.* Orvis, 103 Pa. St. 451.

40. Van Ness *v.* Van Ness, 28 Fed. Cas. No. 16,869, 1 Hayw. & H. 251.

41. Merchants' Nat. Bank *v.* State Nat. Bank, 17 Fed. Cas. No. 9,449, 3 Cliff. 205.

No exception lies to a refusal to direct a verdict in some jurisdictions. Gate City F. Ins. Co. *v.* Thornton, 5 Ga. App. 585, 63

his right to except,[42] unless he renews his motion at the close of all the evidence.[43] The overruling of a motion to direct a verdict, made at the close of plaintiff's case, is not error, even though plaintiff's evidence be deficient, if such deficiencies be afterward supplied by defendant's evidence.[44] Objection must be made and exception taken specifically to the direction of the verdict, and it is not sufficient to merely enter a general exception to the final judgment.[45] The objection may be in general terms, and it is not necessary that a request be made to have a particular issue submitted to the jury.[46] An exception to the court's ruling upon a motion for a peremptory instruction is a sufficient exception to the peremptory instruction itself.[47]

8. Waiver of Error in Ruling on Motion to Direct Verdict. An exception to the ruling of the court denying a motion to direct a verdict for defendant made at the close of plaintiff's evidence is not waived, where defendant does not thereafter introduce any evidence, and a formal announcement that he rests his case is not necessary.[48] But where, after denial of his motion for a verdict at the close of plaintiff's case, defendant introduces evidence,[49] the error, if any, in the ruling

S. E. 638; Wild *v.* Boston, etc., R. Co., 171 Mass. 245, 50 N. E. 533; Smith *v.* Westfield First Nat. Bank, 99 Mass. 605, 97 Am. Dec. 59; Wetherbee *v.* Potter, 99 Mass. 354; Bradley *v.* Poole, 98 Mass. 169, 93 Am. Dec. 144; Bassett *v.* Porter, 4 Cush. (Mass.) 487.

42. Detroit Crude-Oil Co. *v.* Grable, 94 Fed. 73, 36 C. C. A. 94; Boling *v.* Ohio River R. Co., 38 W. Va. 645, 18 S. E. 782, 24 L. R. A. 215. The fact that the case was not qualified by the evidence introduced after the overruling of the motion is immaterial. Walker *v.* Windsor Nat. Bank, 56 Fed. 76, 5 C. C. A. 421.

43. Humiston *v.* Wheeler, 175 Ill. 514, 51 N. E. 893; Dunham Towing, etc., Co. *v.* Dandelin, 143 Ill. 409, 32 N. E. 258; Nashville R., etc., Co. *v.* Henderson, 118 Tenn. 284, 99 S. W. 700; Grand Trunk R. Co. *v.* Cummings, 106 U. S. 700, 1 S. Ct. 493, 27 L. ed. 266.

44. Cushman *v.* Carbondale Fuel Co., 116 Iowa 618, 88 N. W. 817.

45. Robinson *v.* Linn County, 71 Iowa 224, 32 N. W. 274.

46. East Hampton *v.* Kirk, 68 N. Y. 459; Stone *v.* Flower, 47 N. Y. 566; Sawyer *v.* Chambers, 43 Barb. (N. Y.) 622; Caraher *v.* Mulligan, 4 Silv. Sup. (N. Y.) 550, 8 N. Y. Suppl. 42. *Contra*, Waters *v.* Marrin, 13 Daly (N. Y.) 57; Schroff *v.* Bauer, 42 How. Pr. (N. Y.) 348.

47. Bunnell *v.* Rosenberg, 126 Ill. App. 196.

48. Kinnear Mfg. Co. *v.* Carlisle, 152 Fed. 933, 82 C. C. A. 81.

49. *District of Columbia.*— Slye *v.* Guerdrum, 29 App. Cas. 550; Ullman *v.* District of Columbia, 21 App. Cas. 241; Hazelton *v.* Le Duc, 10 App. Cas. 379; Bell *v.* Sheridan, 21 D. C. 370; Mackey *v.* Baltimore, etc., R. Co., 19 D. C. 282 [*affirmed* in 157 U. S. 72, 15 S. Ct. 491, 39 L. ed. 624].

Illinois.— Langan *v.* Enos Fire Escape Co., 233 Ill. 308, 84 N. E. 267 [*affirming* 136 Ill. App. 631]; Chicago Union Traction Co. *v.* O'Donnell, 211 Ill. 349, 71 N. E. 1015; Knights Templars', etc., L. Indemn. Co. *v.* Crayton, 209 Ill. 550, 70 N. E. 1066 [*affirming* 110 Ill. App. 648]; Alton R., etc., Co. *v.* Foulds, 190 Ill. 367, 60 N. E. 537 [*affirming* 81 Ill. App. 322]; Baltimore, etc., R. Co. *v.* Alsop, 176 Ill. 471, 52 N. E. 253, 732; West Chicago St. R. Co. *v.* McCallum, 169 Ill. 240, 48 N. E. 424 [*affirming* 67 Ill. App. 645]; Gilbert *v.* Watts-De Golyer Co., 169 Ill. 129, 48 N. E. 430, 61 Am. St. Rep. 154 [*affirming* 66 Ill. App. 625]; Hartford Deposit Co. *v.* Pederson, 168 Ill. 224, 48 N. E. 30 [*affirming* 67 Ill. App. 142]; Lake Shore, etc., R. Co. *v.* Richards, 152 Ill. 59, 38 N. E. 773, 30 L. R. A. 33; Dowie *v.* Priddle, 116 Ill. App. 184 [*affirmed* in 216 Ill. 553, 75 N. E. 243].

Indiana.— Baltimore, etc., R. Co. *v.* Conoyer, 149 Ind. 524, 48 N. E. 352, 49 N. E. 452; Greenfield *v.* Johnson, 30 Ind. App. 127, 65 N. E. 542; Rhodius *v.* Johnson, 24 Ind. App. 401, 56 N. E. 942; Louisville, etc., R. Co. *v.* Hendricks, 13 Ind. App. 10, 40 N. E. 82, 41 N. E. 14; Citizens' St. R. Co. *v.* Stoddard, 10 Ind. App. 278, 37 N. E. 723.

Iowa.— Hanson *v.* Kline, 136 Iowa 101, 113 N. W. 504.

Maryland.— Vonderhorst Brewing Co. *v.* Amrhine, 98 Md. 406, 56 Atl. 833; Western Maryland R. Co. *v.* State, 95 Md. 637, 53 Atl. 969; Barabasz *v.* Kabat, 91 Md. 53, 46 Atl. 337.

Massachusetts.— Wild *v.* Boston, etc., R. Co., 171 Mass. 245, 50 N. E. 533; Hurley *v.* O'Sullivan, 137 Mass. 86; Kingsford *v.* Hood, 105 Mass. 495.

Michigan.— Totten *v.* Burhans, 103 Mich. 6, 61 N. W. 58; Kelso *v.* Woodruff, 88 Mich. 299, 50 N. W. 249.

Nebraska.— Mack *v.* Parkieser, 53 Nebr. 528, 74 N. W. 38.

North Dakota.— Pease *v.* Magill, 17 N. D. 166, 115 N. W. 260; Madson *v.* Rutten, 16 N. D. 281, 113 N. W. 872, 13 L. R. A. N. S. 554; Bowman *v.* Eppinger, 1 N. D. 21, 44 N. W. 1000.

Vermont.— Bellows *v.* Sowles, 71 Vt. 214, 44 Atl. 68; Noyes *v.* Parker, 64 Vt. 379, 24 Atl. 12; Paine *v.* Webster, 64 Vt. 105, 23 Atl. 615; Latremouille *v.* Bennington, etc., R. Co., 63 Vt. 336, 22 Atl. 656.

West Virginia.— Fuller *v.* Margaret Min. Co., 64 W. Va. 437, 63 S. E. 206, 131 Am. St.

is waived, unless the motion is renewed at the close of all the evidence,[50] in which case the whole of the evidence, that introduced by plaintiff originally and that introduced by either party subsequently, must be taken into consideration.[51] So, if defendant fails to offer an instruction with his motion,[52] or if he submits a peremptory instruction with a series of instructions,[53] he thereby waives, upon appeal or writ of error, his right to raise objection to the action of the trial court in refusing to peremptorily instruct in his favor. But the fact that defendant afterward submits his case to the jury is not a waiver of his right to have the refusal of such an instruction reviewed.[54] Where, after the refusal of a trial court to direct a verdict in his favor, defendant allows the jury to be discharged, and consents to a trial before the court, he will be held to have waived the error, if any, in regard

Rep. 911; Poling *v.* Ohio River R. Co., 38 W. Va. 645, 18 S. E. 782, 24 L. R. A. 215.

United States.— Hansen *v.* Boyd, 161 U. S. 397, 16 S. Ct. 571, 40 L. ed. 746; Union Pac. R. Co. *v.* Callaghan, 161 U. S. 91, 16 S. Ct. 493, 40 L. ed. 628; Robertson *v.* Perkins, 129 U. S. 233, 9 S. Ct. 279, 33 L. ed. 686; Union Ins. Co. *v.* Smith, 124 U. S. 405, 8 S. Ct. 534, 31 L. ed. 497; Accident Ins. Co. *v.* Crandal, 120 U. S. 527, 7 S. Ct. 685, 30 L. ed. 740; Grand Trunk R. Co. *v.* Cummings, 106 U. S. 700, 1 S. Ct. 493, 27 L. ed. 266; Detroit United R. Co. *v.* Nichols, 165 Fed. 289, 91 C. C. A. 257; Fidelity, etc., Co. *v.* Thompson, 154 Fed. 484, 83 C. C. A. 324, 11 L. R. A. N. S. 1069; Dakota County School Dist. No. 11 *v.* Chapman, 152 Fed. 887, 82 C. C. A. 35.

Where defendant introduces evidence which supplies the deficiency in plaintiff's evidence, error in overruling his motion to direct a verdict is waived. Grooms *v.* Neff Harness Co., 79 Ark. 401, 96 S. W. 135; Chicago, etc., R. Co. *v.* Carey, 115 Ill. 115, 3 N. E. 519; Cushman *v.* Carbondale Fuel Co., 116 Iowa 618, 88 N. W. 817; Kentucky, etc., Bridge Co. *v.* Cecil, 14 Ky. L. Rep. 477; San Antonio Traction Co. *v.* Kelleher, 48 Tex. Civ. App. 421, 107 S. W. 64.

50. *Illinois.*— Langan *v.* Enos Fire Escape Co., 233 Ill. 308, 84 N. E. 267; Streator Independent Tel. Co. *v.* Continental Tel. Constr. Co., 217 Ill. 577, 75 N. E. 546 [*affirming* 118 Ill. App. 14]; Chicago Union Traction Co. *v.* O'Donnell, 211 Ill. 349, 71 N. E. 1015; Pittsburg, etc., R. Co. *v.* Hewitt, 202 Ill. 28, 66 N. E. 829 [*affirming* 102 Ill. App. 428]; Anthony Ittner Brick Co. *v.* Ashby, 198 Ill. 562, 64 N. E. 1109 [*affirming* 100 Ill. App. 604]; Chicago, etc., R. Co. *v.* American Strawboard Co., 190 Ill. 268, 60 N. E. 518 [*affirming* 91 Ill. App. 635]; West Chicago St. R. Co. *v.* Johnson, 180 Ill. 285, 54 N. E. 334 [*affirming* 77 Ill. App. 142]; Baltimore, etc., R. Co. *v.* Alsop, 176 Ill. 471, 52 N. E. 253, 732 [*affirming* 71 Ill. App. 54]; Humiston *v.* Wheeler, 175 Ill. 514, 51 N. E. 893 [*affirming* 70 Ill. App. 349]; Chicago, etc., R. Co. *v.* Clausen, 173 Ill. 100, 50 N. E. 680 [*affirming* 70 Ill. App. 550].

Maryland.— Bernheimer *v.* Becker, 102 Md. 250, 62 Atl. 526, 111 Am. St. Rep. 356, 3 L. R. A. N. S. 221.

Michigan.— Huellmantel *v.* Vinton, 112 Mich. 47, 70 N. W. 412.

North Dakota.— McBride *v.* Wallace, 17 N. D. 495, 117 N. W. 857; Garland *v.* Keeler, 15 N. D. 548, 108 N. W. 484; Ward *v.* McQueen, 13 N. D. 153, 100 N. W. 253; Fargo First Nat. Bank *v.* Red River Valley Nat. Bank, 9 N. D. 319, 83 N. W. 221; Tetrault *v.* O'Connor, 8 N. D. 15, 76 N. W. 225; Colby *v.* McDermot, 6 N. D. 495, 71 N. W. 772.

Ohio.— Mateer *v.* Ohio Cent. Traction Co., 78 Ohio St. 431, 85 N. E. 1128; Cincinnati Traction Co. *v.* Durack, 78 Ohio St. 243, 85 N. E. 38.

South Dakota.— Greder *v.* Stahl, 22 S. D. 139, 115 N. W. 1129; Torrey *v.* Peck, 13 S. D. 538, 83 N. W. 585; Seim *v.* Krause, 13 S. D. 530, 83 N. W. 583; Brace *v.* Van Eps, 12 S. D. 191, 80 N. W. 197, 13 S. D. 452, 83 N. W. 572; Haggerty *v.* Strong, 10 S. D. 585, 74 N. W. 1037.

Tennessee.— Nashville R., etc., Co. *v.* Henderson, 118 Tenn. 284, 99 S. W. 700.

United States.— Columbia, etc., R. Co. *v.* Means, 136 Fed. 83, 68 C. C. A. 651; McCrea *v.* Parsons, 112 Fed. 917, 50 C. C. A. 612.

Failure to renew motion after reopening of case.—Where, after the close of the case, defendant moved for a directed verdict, and after the denial of the motion the case was reopened, and one witness called on each side, and a few unimportant questions asked whereupon the court proceeded to charge, defendant's failure to renew his motion for verdict was not a waiver of such motion. Weizinger *v.* Erie R. Co., 106 N. Y. App. Div. 411, 94 N. Y. Suppl. 869.

51. Detroit United R. Co. *v.* Nichols, 165 Fed. 289, 91 C. C. A. 257.

52. Chicago Union Traction Co. *v.* O'Donnell, 211 Ill. 349, 71 N. E. 1015; West Chicago St. R. Co. *v.* Foster, 175 Ill. 396, 51 N. E. 690 [*affirming* 74 Ill. App. 414]; Calumet Electric St. R. Co. *v.* Christenson, 170 Ill. 383, 48 N. E. 962; Swift *v.* Fue, 167 Ill. 443, 47 N. E. 761; Wenona Coal Co. *v.* Holmquist, 152 Ill. 581, 38 N. E. 946.

53. Chicago Union Traction Co. *v.* O'Donnell, 211 Ill. 349, 71 N. E. 1015; West Chicago St. R. Co. *v.* Foster, 175 Ill. 396, 51 N. E. 690 [*affirming* 74 Ill. App. 414]; Wright *v.* Avery, 172 Ill. 313, 50 N. E. 204; Calumet Electric St. R. Co. *v.* Christenson, 170 Ill. 383, 48 N. E. 962; West Chicago St. R. Co. *v.* Feldstein, 169 Ill. 139, 48 N. E. 193; Peirce *v.* Walters, 164 Ill. 560, 45 N. E. 1068; Alton Paving, etc., Co. *v.* Hudson, 74 Ill. App. 612 [*affirmed* in 176 Ill. 270, 52 N. E. 256].

54. Wolf *v.* Chicago Sign Printing Co., 233

to the ruling on his motion for a verdict.[55] Consent by both counsel that the court may direct a verdict for defendant is a waiver of all objections to such ruling.[56]

9. Harmless Error in Ruling on Motion to Direct Verdict. Error in granting or refusing a motion to direct a verdict will not operate to reverse where it is apparent that no prejudice could have resulted to the rights of the party complaining of the action of the court in respect of the motion.[57] As regards error in directing a verdict it has accordingly been held that the error is harmless where the question involved in the suit is solely one of law upon which the court rules correctly;[58] where the party against whom the verdict was directed could not succeed in any event;[59] where the court would have set aside a verdict for the party against whom it was directed;[60] where the right of the party in whose favor verdict is directed to judgment is established either by record evidence or admitted facts so as not to be dependent upon the credibility of oral testimony;[61] where the evidence would have justified the court in discharging the jury and rendering judgment in favor of the party for whom the verdict was directed;[62] where, pending proceedings for review, a final judgment has been rendered in another proceeding between the same parties which conclusively determines the question at issue in favor of the party for whom the verdict was directed;[63] or where the court withdraws its direction to find a verdict and the question is left to the jury.[64] So the direction of a verdict on an untenable ground will not be ground for reversal where the evidence is insufficient to sustain a recovery.[65] So where a demurrer to the evidence would have been sustained, an instruction to find for

Ill. 501, 84 N. E. 614 [*reversing* 135 Ill. App. 366]; Chicago Terminal Transfer R. Co. *v.* Schiavone, 216 Ill. 275, 74 N. E. 1048 [*reversing* 116 Ill. App. 335]; Illinois Cent. R. Co. *v.* Swift, 213 Ill. 307, 72 N. E. 737; Chicago Union Traction Co. *v.* O'Donnell, 211 Ill. 349, 71 N. E. 1015 [*affirming* 113 Ill. App. 259]; West Chicago St. R. Co. *v.* Liderman, 187 Ill. 463, 58 N. E. 367, 79 Am. St. Rep. 226, 52 L. R. A. 655 [*affirming* 87 Ill. App. 638]; Hills *v.* Strong, 132 Ill. App. 174; Wabash, etc., R. Co. *v.* Kastner, 80 Ill. App. 572; Sorensen *v.* Sorensen, 68 Nebr. 483, 94 N. W. 540, 98 N. W. 837, 100 N. W. 930, 103 N. W. 455; Atchison, etc., R. Co. *v.* Meyers, 76 Fed. 443, 22 C. C. A. 268. *Compare* Chicago Hydraulic Press Brick Co. *v.* Campbell, 116 Ill. App. 322; Omaha Packing Co. *v.* Murray, 112 Ill. App. 233; Illinois Cent. R. Co. *v.* Keegan, 112 Ill. App. 28 [*affirmed* in 210 Ill. 150, 71 N. E. 321]; Johnson Chair Co. *v.* Agresto, 73 Ill. App. 384.

55. Erickson *v.* Citizens' Nat. Bank, 9 N. D. 81, 81 N. W. 46.

56. Clifford *v.* Drake, 110 Ill. 135 [*affirming* 14 Ill. App. 75].

57. *Alabama.*—Williams *v.* Alabama Cotton Oil Co., 152 Ala. 645, 44 So. 957.

Florida.— Hoopes *v.* Crane, 56 Fla. 395, 47 So. 992.

Georgia.— Johnston *v.* Coney, 120 Ga. 767, 48 S. E. 373; Carr *v.* Georgia L. & T. Co., 108 Ga. 757, 33 S. E. 190.

Illinois.— Pittman *v.* Chicago, etc., R. Co., 231 Ill. 581, 83 N. E. 431; Chicago, etc., Coal Co. *v.* Moran, 210 Ill. 9, 71 N. E. 38; Cleveland, etc., R. Co. *v.* Brown, 53 Ill. App. 227.

Indiana.— Indianapolis St. R. Co. *v.* Taylor, 164 Ind. 155, 72 N. E. 1045; Black *v.* Mishawaka, 30 Ind. App. 104, 65 N. E. 538.

Kentucky.— Goodin *v.* Fuson, 60 S. W. 293, 22 Ky. L. Rep. 873.

Massachusetts.— Stretton *v.* New York, etc., R. Co., 198 Mass. 573, 84 N. E. 799.

New York.— National Revere Bank *v.* National Bank of Republic, 172 N. Y. 102, 64 N. E. 799; Tanenbaum *v.* Boehm, 126 N. Y. App. Div. 731, 111 N. Y. Suppl. 185; Barber *v.* Dewes, 101 N. Y. App. Div. 432, 91 N. Y. Suppl. 1059 [*affirmed* in 184 N. Y. 548, 76 N. E. 1089].

Texas.— Hill *v.* Alexander, (Civ. App. 1909) 125 S. W. 333; Berryman *v.* Biddle, 48 Tex. Civ. App. 624, 107 S. W. 922.

Wyoming.— George *v.* Emery, (1910) 107 Pac. 1.

United States.—Arthur *v.* Jacoby, 103 U. S. 677, 26 L. ed. 454; U. S. *v.* Norton, 107 Fed. 412, 46 C. C. A. 387.

58. Laing *v.* Americus, 86 Ga. 756, 13 S. E. 107; Mitchell *v.* De Witt, 20 Tex. 294.

59. Eady *v.* Napier, 96 Ga. 736, 22 S. E. 684; Daily *v.* Boudreau, 231 Ill. 228, 83 N. E. 218; Peoria M. & F. Ins. Co. *v.* Frost, 37 Ill. 333; Lucente *v.* Davis, 101 Md. 526, 61 Atl. 622; Bennett *v.* Mutual F. Ins. Co., 100 Md. 337, 60 Atl. 99. And see Finley *v.* Kendallville, (Ind. App. 1910) 90 N. E. 1036, holding that where, under the undisputed facts, defendant was not liable, it was not reversible error to direct a verdict for it.

60. Quinn *v.* Illinois Cent. R. Co., 51 Ill. 495.

61. Schloss *v.* Inman, 129 Ala. 424, 30 So. 667.

62. National Bank of Commerce *v.* Galland, 14 Wash. 502, 45 Pac. 35.

63. Lamar *v.* Spalding, 154 Fed. 27, 83 C. C. A. 111.

64. Syme *v.* Butler, 1 Call (Va.) 105.

65. Siewerssen *v.* Harris County, 41 Tex. Civ. App. 115, 91 S. W. 333; Havelock Bank *v.* Western Union Tel. Co., 141 Fed. 522, 72 C. C. A. 580.

efendant after the jury have indicated an intention to find for plaintiff is not versible error.[66] In respect of erroneous refusal to direct a verdict, it has been ld that the error is harmless if the record shows that the final judgment is right,[67] here the defects in plaintiff's case are afterward supplied by evidence offered y defendant,[68] where the verdict is for the party making the motion,[69] or where ie moving party has been granted a new trial; [70] and in one state it is held that ie reviewing court will under no circumstances reverse because of a refusal of ie trial court to direct a verdict.[71] On the other hand, if on the evidence a erdict for plaintiff could lawfully have been rendered, the direction of a verdict or defendant is error, which necessarily injures plaintiff.[72]

E. Withdrawal of Juror. The withdrawal of a juror by direction or leave f court produces a mistrial and effects a continuance,[73] and it is error, when a arty has been permitted to withdraw a juror, to enter judgment against him on he merits.[74] A motion to withdraw a juror must be based on matters occurring t the trial,[75] the granting of the motion being in the discretion of the court,[76] hich discretion is subject to review only in cases of abuse.[77] It is ground to ithdraw a juror, that the trial court made an improper remark and misstatement f law, which was applauded by the juror,[78] or that plaintiff persistently charged rimes to his brother, defendant, that had no possible relation to the questions n issue.[79] It is not a ground for the withdrawal of a juror that a juror asked uestions of a witness and indicated a possible disbelief of the witness; [80] and a notion to withdraw a juror to enable the moving party to obtain additional vidence should be denied where the moving party does not appear to have exer- ised diligence in seeking prior to the trial to obtain such evidence.[81] So where lefendant's objection to a question asked by plaintiff's counsel of a juror as to whether the juror was insured against accident was sustained, the court stating hat counsel might ask whether the jurors were stock-holders or interested in any nsurance company, and plaintiff's counsel did not thereafter pursue the matter, lefendant was not entitled to a mistrial.[82] As a condition of granting the motion he court may impose the condition that the party making the motion pay certain osts.[83] If the party deems the condition imposed unsatisfactory, he should decline to accept the order on the terms imposed and proceed with the trial.[84]

66. West End Real Estate Co. *v.* Nash, 51 W. Va. 341, 41 S. E. 182.

67. Goodrich *v.* Fritz, 4 Ark. 525; Northern Electrical Mfg. Co. *v.* H. M. Benjamin Coal Co., 116 Wis. 130, 92 N. W. 553.

68. Moore *v.* Metropolitan R. Co., 2 Mackey (D. C.) 437 [*reversed* in 121 U. S. 458, 7 S. Ct. 1334, 30 L. ed. 1022]; Cushman *v.* Carbondale Fuel Co., 116 Iowa 618, 88 N. W. 817.

69. McConnell *v.* Holderman, 24 Okla. 129, 103 Pac. 593; Northern Electrical Mfg. Co. *v.* H. M. Benjamin Coal Co., 116 Wis. 130, 92 N. W. 553.

70. Grieve *v.* Illinois Cent. R. Co., 104 Iowa 659, 74 N. W. 192.

71. Johnson *v.* Thrower, 123 Ga. 706, 51 S. E. 636.

72. Bass *v.* Ramos, 58 Fla. 161, 50 So. 945.

73. Schofield *v.* Settley, 31 Ill. 515; Smith *v.* Chicago Junction R. Co., 127 Ill. App. 89; Rosengarten *v.* New Jersey Cent. R. Co., 69 N. J. L. 220, 54 Atl. 564.

74. Planer *v.* Smith, 40 Wis. 31.

75. Usborne *v.* Stephenson, 36 Oreg. 328, 58 Pac. 1103, 78 Am. St. Rep. 778, 48 L. R. A. 432.

76. Crane *v.* Blackman, 100 Ill. App. 565; Cattano *v.* Metropolitan St. R. Co., 173 N. Y. 565, 66 N. E. 563; Yellow Pine Co. *v.* Gutwillig, 20 Misc. (N. Y.) 634, 46 N. Y. Suppl. 251; Adler *v.* Lasser, 110 N. Y. Suppl. 196.

77. Schofield *v.* Settley, 31 Ill. 515; Crane *v.* Blackman, 100 Ill. App. 565; Brown *v.* Manhattan R. Co., 82 N. Y. App. Div. 222, 81 N. Y. Suppl. 755; Yellow Pine Co. *v.* Gutwillig, 20 Misc. (N. Y.) 634, 46 N. Y. Suppl. 251.

As illustrating an abuse of discretion warranting reversal see Pirrung *v.* Supreme Council C. M. B. A., 104 N. Y. App. Div. 571, 93 N. Y. Suppl. 575; McKahan *v.* Baltimore, etc., R. Co., 223 Pa. St. 1, 72 Atl. 251.

78. McKahan *v.* Baltimore, etc., R. Co., 223 Pa. St. 1, 72 Atl. 251.

79. Hale *v.* Hale, 32 Pa. Super. Ct. 37.

80. Chicago City R. Co. *v.* Shreve, 128 Ill. App. 462 [*affirmed* in 226 Ill. 530, 80 N. E. 1049].

81. Chicago City R. Co. *v.* Shreve, 128 Ill. App. 462 [*affirmed* in 226 Ill. 530, 80 N. E. 1049].

82. Banner *v.* O'Meara, 110 N. Y. Suppl. 947.

83. Rawson *v.* Silo, 105 N. Y. App. Div. 278, 93 N. Y. Suppl. 416.

84. Rawson *v.* Silo, 105 N. Y. App. Div. 278, 93 N. Y. Suppl. 416.

The practice of withdrawing a juror, because of special statutes relating to dismissal, has fallen into disuse in some jurisdictions.[85]

IX. INSTRUCTIONS TO JURY.[86]

A. Definition. "Instructions proper are directions in reference to the law of the case";[87] "an exposition of the principles of the law applicable to the case, or some branch or phase of the case which the jury are bound to apply in order to render a verdict establishing the rights of the parties in accordance with the facts proven." [88]

B. Province of Court to Give and Duty of Jury to Obey Instructions.[89] It is the province of the court to instruct the jury on the law applicable

85. Wabash R. Co. *v.* McCormick, 23 Ind. App. 258, 55 N. E. 251.

86. **Adoption of practice of state courts by federal courts as to instructions** see COURTS, 11 Cyc. 893.

After retirement of jury see *infra*, X, E, 2, 6, b, (I), 7.

As ground for setting aside report of referee see REFERENCES, 34 Cyc. 873.

As to particular matters or issues see DAMAGES, 13 Cyc. 234 *et seq.*; ESTOPPEL, 16 Cyc. 813; PAYMENT, 30 Cyc. 1296; RELEASE, 34 Cyc. 1106; TENDER, *ante*, p. 127; and USURY. See also other titles in this work.

Declarations of law on trial by court see *infra*, XII, A, 4.

Errors and irregularities in as ground for new trial see NEW TRIAL, 29 Cyc. 786 *et seq.*

In actions by or against particular classes of parties see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1037, 1306; FACTORS AND BROKERS, 19 Cyc. 284; HUSBAND AND WIFE, 21 Cyc. 1574, 1692; INSANE PERSONS, 22 Cyc. 1242; PARTNERSHIP, 30 Cyc. 592, 647; PHYSICIANS AND SURGEONS, 30 Cyc. 1588 *et seq.*, 1604; PRINCIPAL AND AGENT, 31 Cyc. 1678; PRINCIPAL AND SURETY, 32 Cyc. 139; SHERIFFS AND CONSTABLES, 35 Cyc. 1847, 2000; STREET RAILROADS, 36 Cyc. 1632.

In criminal cases see CRIMINAL LAW, 12 Cyc. 596 *et seq.*, and the various criminal law titles in Cyc.

In equity cases on issues submitted to jury see EQUITY, 16 Cyc. 421 *et seq.*

In justice's court see JUSTICES OF THE PEACE, 24 Cyc. 583 *et seq.*

In particular actions or proceedings see ACCOUNTS AND ACCOUNTING, 1 Cyc. 492 (actions on account); ARBITRATION AND AWARD, 3 Cyc. 786 (enforcement of award); ASSAULT AND BATTERY, 3 Cyc. 1100 *et seq.*; ATTACHMENT, 4 Cyc. 751 (trial of claims of third persons in attachment proceedings); ATTORNEY AND CLIENT, 4 Cyc. 1004 (action to recover compensation); BASTARDS, 5 Cyc. 666 (proceedings under bastardy laws); BREACH OF PROMISE TO MARRY, 5 Cyc. 1018; CONSPIRACY, 8 Cyc. 691 (actions founded on); DEATH, 13 Cyc. 385 (actions for causing); DIVORCE, 14 Cyc. 706; EASEMENTS, 14 Cyc. 1224 (actions to enforce right to); EJECTMENT, 15 Cyc. 163, 236; EMINENT DOMAIN, 15 Cyc. 902 *et seq.* (proceedings to condemn property); FALSE IMPRISONMENT, 19 Cyc. 374; FIRE INSURANCE, 19 Cyc. 964 *et seq.* (actions on policy); FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1171; FRAUD, 20 Cyc. 127 *et seq.* (actions for); FRAUDULENT CONVEYANCES, 20 Cyc. 809 *et seq.* (actions to set aside); GARNISHMENT, 20 Cyc. 1104 (trial of issues between plaintiff and garnishee); HOMESTEADS, 21 Cyc. 642 (actions to enforce right to); MECHANICS' LIENS, 27 Cyc. 423 (foreclosure of); MONEY RECEIVED, 27 Cyc. 885; NEGLIGENCE, 29 Cyc. 643 *et seq.* (actions based on); NUISANCES, 29 Cyc. 1268 *et seq.* (actions for maintaining); PATENTS, 30 Cyc. 1044 (suits for infringement of); RAILROADS, 33 Cyc. 1129 *et seq.* (actions for injuries at crossing); 33 Cyc. 1398 *et seq.* (actions for injuries caused by fires); 33 Cyc. 1312 *et seq.* (in actions for injuries to animals on or near railroad track); REPLEVIN, 34 Cyc. 1348; SEDUCTION, 35 Cyc. 1325 *et seq.* (actions for).

In probate proceedings see WILLS.

On trial de novo on appeal from justice's court see JUSTICES OF THE PEACE, 24 Cyc. 743.

Presumptions on appeal of correctness of instructions given see APPEAL AND ERROR, 3 Cyc. 303 *et seq.*

Review of instructions in appellate court see APPEAL AND ERROR, 3 Cyc. 169 *et seq.*, 247 *et seq.*, 265 *et seq.*, 336.

87. Lawler *v.* McPheeters, 73 Ind. 577; McCallister *v.* Mount, 73 Ind. 559, 567. And see Hasbrouck *v.* Milwaukee, 21 Wis. 217.

88. Lehman *v.* Hawks, 121 Ind. 541, 543, 23 N. E. 670.

Other definitions are: "Any decision or declaration by the court, upon the law of the case, made in the progress of the cause, and by which the jury are influenced and the counsel controlled, is considered within the scope and meaning of the term 'instructions.'" Hilliard New Trials (2d ed.), p. 255.

"Statements of rules of law governing the matters in issue or the amount of recovery are instructions." Bradway *v.* Waddell, 95 Ind. 170, 175.

Oral directions to a jury to sign their general verdict, or to answer interrogatories, are not instructions within the meaning of the law. McCallister *v.* Mount, 73 Ind. 559.

Remarks made orally unless bearing upon questions of law or fact involved in the issue are no part of the charge. Hasbrouck *v.* Milwaukee, 21 Wis. 217.

89. **Duty of court to instruct in absence of request** see *infra*, IX, D, 2.

to the case,[90] and it is the duty of the jury to act upon the law as received by them from the court.[91]

C. Form, Elements, and Requisites of Instructions[92]— **1. Language and Style**[93]— **a. In General.** No precise form is necessary in giving instructions.[94] The duty imposed upon the trial court necessarily involves a large discretion as to the form and style in which instructions shall be given,[95] so long as the judgment of the jury is in no degree subordinated to the opinion of the court on the facts,[96] and the law is stated correctly.[97] However, it is said that departures from approved forms of instruction are to be avoided, and that this is so even though the courts may be able by such departure to state the law more concisely and intelligibly.[98] And in giving instructions to a jury, the court should avoid the employment of terms and definitions of a purely technical or scientific character,[99] especially where the questions to be submitted are well susceptible of presentation in plain, practical terms, easy of comprehension and application.[1] While it may not be improper under some circumstances to charge in language employed by the court of last resort in deciding similar propositions,[2] the embodiment in an instruction to the jury of the language used by such court does not necessarily make the instruction correct.[3] There are many things said in opinions that are sound law, but which nevertheless would be improper instructions to a jury.[4] It is very generally held that slight verbal or technical inaccuracies not calculated to mislead the jury will not vitiate the instructions.[5] On the other

Power of court to instruct in absence of request see *infra*, IX, D, 1.

90. Grout *v.* Nichols, 53 Me. 383; Bartling *v.* Behrends, 20 Nebr. 211, 29 N. W. 472; Nason *v.* U. S., 17 Fed. Cas. 10,024, 1 Gall. 53.

That the jury are made judges of the law and the facts in libel cases does not take away the province of the court to instruct the jury on the law of the case. Jones *v.* Murray, 167 Mo. 25, 66 S. W. 981.

Right of court to give instructions on its own motion see *infra*, IX, D, 1.

91. *Georgia.*— St. Mary's Bank *v.* State, 12 Ga. 475.

Indiana.— Moore *v.* Hinkle, 151 Ind. 343, 50 N. E. 822.

Nebraska.— Bartling *v.* Behrends, 20 Nebr. 211, 29 N. W. 472.

Tennessee.— McCorry *v.* King, 3 Humphr. 267, 39 Am. Dec. 165.

United States.— U. S. *v.* Ullman, 28 Fed. Cas. No. 16,593, 4 Ben. 547.

92. **In criminal prosecutions** see Criminal Law, 12 Cyc. 645 *et seq.*

93. **In criminal prosecutions** see Criminal Law, 12 Cyc. 645.

94. Walcott *v.* Keith, 22 N. H. 196; Holbrook *v.* Hyde, 1 Vt. 286.

95. Moffatt *v.* Tenney, 17 Colo. 189, 30 Pac. 348; Continental Imp. Co. *v.* Stead, 95 U. S. 161, 24 L. ed. 403.

96. Mawich *v.* Elsey, 47 Mich. 10, 8 N. W. 587, 10 N. W. 57.

97. **The mere phraseology of an instruction is not assignable as error, if its practical bearing on the result is correct.** Winter *v.* Supreme Lodge K. P., 96 Mo. App. 1, 69 S. W. 662.

98. Anderson *v.* Horlick's Malted Milk Co., 137 Wis. 569, 119 N. W. 342.

99. Aikin *v.* Weckerly, 19 Mich. 482; Watkins *v.* Wallace, 19 Mich. 57; Chappell *v.* Allen, 38 Mo. 213; Maryland Casualty Co. *v.* Finch, 147 Fed. 388, 77 C. C. A. 566, 8 L. R. A. N. S. 308.

1. Maryland Casualty Co. *v.* Finch, 147 Fed. 388, 77 C. C. A. 566, 8 L. R. A. N. S. 308.

2. Kirby *v.* Wilson, 98 Ill. 240; Hood *v.* Hood, 25 Pa. St. 417.

3. Farrall *v.* Farnan, (Md. 1886) 5 Atl. 622.

4. Southern Cotton Oil Co. *v.* Skipper, 125 Ga. 368, 54 S. E. 110; Atlanta, etc., R. Co. *v.* Hudson, 123 Ga. 108, 51 S. E. 29; Savannah R. Co. *v.* Evans, 115 Ga. 315, 41 S. E. 631, 90 Am. St. Rep. 116.

5. *Arkansas.*— St. Louis, etc., R. Co. *v.* Day, 86 Ark. 104, 110 S. W. 220.

California.— Mann *v.* Higgins, 83 Cal. 66, 23 Pac. 206.

Colorado.— Possell *v.* Smith, 39 Colo. 127, 88 Pac. 1064.

Connecticut.— Chany *v.* Hotchkiss, 79 Conn. 104, 63 Atl. 947; Smith *v.* King, 62 Conn. 515, 26 Atl. 1059.

District of Columbia.— Hubbard *v.* Perlie, 25 App. Cas. 477.

Georgia.— Central of Georgia R. Co. *v.* Mote, 131 Ga. 166, 62 S. E. 164; Turner *v.* Elliott, 127 Ga. 338, 56 S. E. 434; Southern R. Co. *v.* Merritt, 120 Ga. 409, 47 S. E. 908; Chattanooga, etc., R. Co. *v.* Owen, 90 Ga. 265, 15 S. E. 853; Central R., etc., Co. *v.* Nash, 81 Ga. 580, 7 S. E. 808; Atlanta *v.* Champe, 66 Ga. 659; Carter *v.* Buchanan, 9 Ga. 539; Coweta County *v.* Central of Georgia R. Co., 4 Ga. App. 94, 60 S. E. 1018. And see Wrightsville, etc., R. Co. *v.* Gornto, 129 Ga. 204, 58 S. E. 769.

Illinois.— Hollenbeck *v.* Cook, 180 Ill. 65, 54 N. E. 154; Nichols *v.* Mercer, 44 Ill. 250; Green *v.* Lewis, 13 Ill. 642; People *v.* Cook County, 127 Ill. App. 401; Beyer *v.* Martin, 120 Ill. App. 50; Lieserowitz *v.* West Chicago

hand, however, it is equally well settled that such a misuse of words, although a

St. R. Co., 80 Ill. App. 248; Brandt *v.* McEntee, 53 Ill. App. 467.

Indiana.— Ohio, etc., R. Co. *v.* Stansberry, 132 Ind. 533, 32 N. E. 218; Anderson *v.* Anderson, 128 Ind. 254, 27 N. E. 724; Vanvalkenberg *v.* Vanvalkenberg, 90 Ind. 433; Forgey *v.* Cambridge City First Nat. Bank, 66 Ind. 123; Lake Erie, etc., R. Co. *v.* Hobbs, 40 Ind. App. 511, 81 N. E. 90; Citizens' Gas, etc., Min. Co. *v.* Whipple, 32 Ind. App. 203, 69 N. E. 557; Coppage *v.* Gregg, 1 Ind. App. 112, 27 N. E. 570.

Iowa.— Brown *v.* West Riverside Coal Co., 143 Iowa 662, 120 N. W. 732, 28 L. R. A. N. S. 1260; Camp *v.* Chicago Great Western R. Co., 124 Iowa 238, 99 N. W. 735; Hooker *v.* Chittenden, 106 Iowa 321, 76 N. W. 706.

Kansas.— Gehrt-Patterson Milling Co. *v.* Myrick, (1901) 66 Pac. 647; State *v.* Miller, 35 Kan. 328, 10 Pac. 865.

Kentucky.— Linville *v.* Kenton, 11 Ky. L. Rep. 630.

Maine.— Jameson *v.* Weld, 93 Me 345, 45 Atl. 299; Dugan *v.* Thomas, 79 Me. 221, 9 Atl. 354.

Maryland.— Waring *v.* Edmonds, 11 Md. 424.

Massachusetts.— Kelly *v.* Beede, 141 Mass. 184, 4 N. E. 832.

Michigan.— Scheibeck *v.* Van Derbeck, 122 Mich. 29, 80 N. W. 880.

Minnesota.— Klimple *v.* Boelter, 44 Minn. 172, 46 N. W. 306.

Missouri.— Reilly *v.* Hannibal, etc., R. Co., 94 Mo. 600, 7 S. W. 407; Baskin *v.* Crews, 66 Mo. App. 22; Nichols, etc., Co. *v.* Metzger, 43 Mo. App. 607; Missouri Fire Clay Works *v.* Ellison, 30 Mo. App. 67.

Montana.— Neill *v.* Jordan, 15 Mont. 47, 38 Pac. 223.

Nebraska.— Stein *v.* Vannice, 44 Nebr. 132, 62 N. W. 464; Thayer County Bank *v.* Huddleson, 1 Nebr. (Unoff.) 261, 95 N. W. 471.

New York.— Raynor *v.* Timerson, 51 Barb. 517; Gilroy *v.* Loftus, 22 Misc. 105, 48 N. Y. Suppl. 532.

Oklahoma.— Snyder *v.* Stribling, 18 Okla. 168, 89 Pac. 222.

Pennsylvania.— McCloskey *v.* Bells Gap R. Co., 156 Pa. St. 254, 27 Atl. 246; McGeorge *v.* Hoffman, 133 Pa. St. 381, 19 Atl. 413; Pennsylvania R. Co. *v.* Peters, 116 Pa. St. 206, 9 Atl. 317; Poorman *v.* Smith, 2 Serg. & R. 464; Little *v.* Fairchild, 10 Pa. Super. Ct. 211 [*affirmed* in 195 Pa. St. 614, 46 Atl. 133].

South Carolina.— Horn *v.* Southern R. Co., 78 S. C. 67, 58 S. E. 963; Pickens *v.* South Carolina, etc., R. Co., 54 S. C. 498, 32 S. E. 567.

Texas.— St. Louis Southwestern R. Co. *v.* Wilbanks, (Civ. App. 1908) 113 S. W. 318; St. Louis Southwestern R. Co. *v.* Smith, 33 Tex. Civ. App. 520, 77 S. W. 28; International, etc., R. Co. *v.* Bonatz, (Civ. App. 1898) 48 S. W. 767; Gulf, etc., R. Co. *v.* Johnson, (Civ. App. 1897) 43 S. W. 583; Rand *v.* Johns, (App. 1891) 15 S. W. 200.

Utah.— Reese *v.* Morgan Silver Min. Co., 17 Utah 489, 54 Pac. 759.

Wisconsin.— Schultz *v.* Culbertson, 49 Wis. 122, 4 N. W. 1070.

United States.—American Bonding Co. *v.* Ottumwa, 137 Fed. 572, 70 C. C. A. 270; Portland Gold Min. Co. *v.* Flaherty, 111 Fed. 312, 49 C. C. A. 361; Walker *v.* Collins, 59 Fed. 70, 8 C. C. A. 1.

See 46 Cent. Dig. tit. "Trial," § 702.

Instances.— Thus the use of one word for another, as "plaintiff" for "defendant," or *vice versa* (Chany *v.* Hotchkiss, 79 Conn. 104, 63 Atl. 947; Stewart *v.* Ellis, 130 Ga. 685, 61 S. E. 597; Jumper *v.* Dobson, 127 Ga. 544, 56 S. E. 514; Southern Bell Tel., etc., Co. *v.* Jordan, 87 Ga. 69, 13 S. E. 202; National Enameling, etc., Co. *v.* McCorkle, 219 Ill. 557, 76 N. E. 843 [*affirming* 122 Ill. App. 344]; McKenzie *v.* Remington, 79 Ill. 388; Wilson *v.* Trafalgar, etc., Gravel Road Co., 93 Ind. 287; Reupke *v.* D. H. Stuhr, etc., Grain Co., 126 Iowa 632, 102 N. W. 509; Flam *v.* Lee, 116 Iowa 289, 90 N. W. 70, 93 Am. St. Rep. 242; Citizens' State Bank *v.* Council Bluffs Fuel Co., 89 Iowa 618, 57 N. W. 444; Shipley *v.* Reasoner, 87 Iowa 555, 54 N. W. 470; Suttie *v.* Aloe, 39 Mo. App. 38; Pittman *v.* Weeks, 132 N. C. 81, 43 S. E. 582; Bowick *v.* American Pipe Mfg. Co., 69 S. C. 360, 48 S. E. 276; Galveston, etc., R. Co. *v.* Porfert, 72 Tex. 344, 10 S. W. 207; McCollum *v.* Buckner's Orphans' Home, (Tex. Civ. App. 1909) 117 S. W. 886; Galveston, etc., R. Co. *v.* Wafer, 48 Tex. Civ. App. 279, 106 S. W. 897; Central Texas, etc., R. Co. *v.* Bush, 12 Tex. Civ. App. 291, 34 S. W. 133), or "shall" (Central R. Co. *v.* Bannister, 195 Ill. 48, 62 N. E. 864 [*affirming* 96 Ill. App. 332]; Indianapolis St. R. Co. *v.* Johnson, 163 Ind. 518, 72 N. E. 571); or "will" (North Chicago St. R. Co. *v.* Zeiger, 182 Ill. 9, 54 N. E. 1006, 74 Am. St. Rep. 157 [*affirming* 78 Ill. App. 463]); instead of the word "may" in authorizing a verdict upon finding of certain facts, or "him" for "her" (Clifton *v.* Granger, 86 Iowa 573, 53 N. W. 316), or "burden of proof" for "preponderance of evidence" (Williams *v.* Hoehle, 95 Wis. 510, 70 N. W. 556), or "and" in place of "or" or *vice versa* (O'Connor *v.* Langdon, 3 Ida. 61, 26 Pac. 659; Citizens' Gas-Light, etc., Co. *v.* O'Brien, 118 Ill. 174, 8 N. E. 310; Wachovia L. & T. Co. *v.* Forbes, 120 N. C. 355, 27 S. E. 43), or "testimony" instead of "evidence," or *vice versa* (Mann *v.* Higgins, 83 Cal. 66, 23 Pac. 206; Fitzgerald *v.* Benner, 120 Ill. App. 447 [*affirmed* in 219 Ill. 485, 76 N. E. 709]; Jones *v.* Gregory, 48 Ill. App. 228; Welch *v.* Miller, 32 Ill. App. 110; Houston, etc., R. Co. *v.* Craig, 42 Tex. Civ. App. 486, 92 S. W. 1033; Scherrer *v.* Seattle, 52 Wash. 4, 100 Pac. 144; Jones *v.* Seattle, 51 Wash. 245, 98 Pac. 743; Noyes *v.* Pugin, 2 Wash. 653, 27 Pac. 548), or "with" instead of "without" (Foote *v.* Brown, 81 Conn. 218, 70 Atl. 699), or "yes" instead of "no" (*In re* Spencer, 96 Cal. 448,

clerical error, is ground for reversal, where such error might have misled the jury.[6] Even the entire omission of a word or phrase,[7] which, when supplied, reverses the literal meaning of the sentence,[8] will not be ground for reversal if the court can clearly see, when the whole is taken together, what the idea was which was intended to be conveyed, and that it must have been understood as intended. So, mere inelegancies of expression, while not to be commended, constitute no ground for reversal.[9] Nor is it material error that instructions are not couched in the best language,[10] or that there is a lack of orderly arrangement in the propositions enunciated,[11] or that they might well have been separated into somewhat shorter and more compact paragraphs,[12] or that they are ungrammatical,[13] or not properly punctuated,[14] or inartificially drawn,[15] or prolix,[16] or contain surplusage.[17]

31 Pac. 453), is not ground for reversal, where it is improbable that the jury could have been misled. So in an action for injuries to a servant, the use of the word "platform" in an instruction, in describing the appliance on which the employee stood, where according to the evidence there was no platform, but merely a plank laid across the cross beams, there being no dispute about the evidence, was not misleading. Lee *v.* Wild Rice Lumber Co., 102 Minn. 74, 112 N. W. 887. And where, in an action for injuries to an employee, the grounds of negligence were the failure of the engineer to warn the employee of the backing of the train, and the failure to keep a brakeman stationed near the rear end of the train to warn the employee, and there was nothing in the evidence to suggest any other grounds of recovery, an instruction that if the person in charge of the engine at the time of the injury was guilty of negligence in operating the engine, followed by a distinct disjunctive statement of the two grounds of negligence alleged, is not misleading, although connected by the word "or," used in the sense of "that is." Choctaw, etc., R. Co. *v.* McLaughlin, 43 Tex. Civ. App. 523, 96 S. W. 1091.

6. *Georgia.*—Wellborn *v.* Rogers, 24 Ga. 558.

Illinois.—Mathews *v.* Granger, 71 Ill. App. 467; Hoffman *v.* Boomer, 40 Ill. App. 231.

Iowa.—Atkins *v.* Ellis, 118 Iowa 76, 91 N. W. 829; Rich *v.* Moore, 114 Iowa 80, 86 N. W. 52; Hooker *v.* Chittenden, 106 Iowa 321, 76 N. W. 706.

Kentucky.—Alter *v.* Holliday, 9 Ky. L. Rep. 972.

Pennsylvania.—Collins *v.* Leafey, 124 Pa. St. 203, 16 Atl. 765.

Texas.—Born *v.* Texas, etc., R. Co., (Civ. App. 1897) 39 S. W. 170.

See 46 Cent. Dig. tit. "Trial," § 702.

7. Columbus *v.* Neise, (Kan. 1901) 65 Pac. 643; Texas, etc., R. Co. *v.* Johnson, 48 Tex. Civ. App. 135, 106 S. W. 773.

The omission of the words "from the evidence" in an instruction is not fatal, where they can be implied. Holliday *v.* Burgess, 34 Ill. 193; McGowan *v.* St. Louis Ore, etc., Co., 109 Mo. 518, 19 S. W. 199; Milligan *v.* Chicago, etc., R. Co., 79 Mo. App. 393; Rogers *v.* Warren, 75 Mo. App. 271; Baker *v.* Kansas City, etc., R. Co., 52 Mo. App. 602. A requirement in the first part of an instruction that the jury must base their findings upon the evidence applies and extends to all subsequent clauses. Rock Island, etc., R. Co. *v.* Leisy Brewing Co., 174 Ill. 547, 51 N. E. 572.

The omission of the word "if," when clearly a clerical error, not materially affecting the meaning of the instruction, is not ground for reversal. Madrey *v.* Meyers, 140 Ill. App. 218.

8. See cases cited *infra*, this note.

The inadvertent omission of the word "not" in an instruction, where not calculated to mislead the jury, is not prejudicial error. Missouri, etc., R. Co. *v.* Redus, (Tex. Civ. App. 1909) 118 S. W. 208. But when the jury would not be likely to detect the omission, and supply the omitted word, and would have no right to do so in any case, it will be ground for reversal. Carleton Min., etc., Co. *v.* Ryan, 29 Colo. 401, 68 Pac. 279.

The omission of the prefix "un" is not reversible error where the mistake is so obvious that it could not have misled the jury. Anderson *v.* Anderson, 128 Ind. 254, 27 N. E. 724.

9. Bates *v.* Fuller, 8 Lea (Tenn.) 644, holding that to charge that "defendant cannot gouge the plaintiff out of their property in no such way," while inelegant and not of poetic rhythm, and perhaps not æsthetic in taste, and might have been stated more "mildly," and yet as "firmly," is not reversible error.

10. Langdon *v.* Wintersteen, 58 Nebr. 278, 78 N. W. 501; Stull *v.* Stull, 1 Nebr. (Unoff.) 380, 389, 96 N. W. 196; Reese *v.* Morgan Silver Min. Co., 17 Utah 489, 54 Pac. 759; Webb *v.* Ritter, 60 W. Va. 193, 54 S. E. 484; U. S. *v.* Conklin, 1 Wall. (U. S.) 644, 17 L. ed. 714.

11. Atchison, etc., R. Co. *v.* Calvert, 52 Kan. 547, 34 Pac. 976.

12. Smith *v.* Sioux City, 119 Iowa 50, 93 N. W. 81.

13. Reynolds *v.* Narragansett Electric Lighting Co., 26 R. I. 457, 59 Atl. 393; Ft. Worth, etc., R. Co. *v.* Partin, 33 Tex. Civ. App. 173, 76 S. W. 236.

14. Ft. Worth, etc., R. Co. *v.* Poteet, (Tex. Civ. App. 1908) 115 S. W. 883.

15. Swindells *v.* Dupont, 88 Minn. 9, 92 N. W. 468; Sherer *v.* Rischert, 23 Mo. App. 275.

16. Renner *v.* Thornburg, 111 Iowa 515, 82 N. W. 950.

17. Betz *v.* Kansas City Home Tel. Co., 121 Mo. App. 473, 97 S. W. 207.

So long as the law is stated correctly and intelligibly, the ultimate test of the soundness of instructions, it has been said, is not what the ingenuity of counsel can, at leisure, work out the instructions to mean, but how and in what sense, under the evidence before them, and the circumstances of the trial, would ordinary men and jurors understand the instructions.[18]

b. Instructing in Language of Statute.[19] Instructions in the language of a statute are sufficient.[20] "Laying down the law in the words of the law itself ought not to be pronounced to be error." [21]

c Covering Principles in One Instruction. The entire law of the case need not be stated in a single instruction, and it is not improper to state the law as applicable to particular questions in separate instructions if there is no conflict in the law as stated.[22] Exceptions and qualifications of a rule, if stated in the charge, need not be stated in immediate juxtaposition with the rule.[23] If all the instructions, considered as a series, present the law applicable to the case fully and accurately, it is sufficient.[24] Nevertheless, the practice of stating all the essential ideas necessary to the expression of a single rule of law in one paragraph or instruction should not be departed from.[25] The jury should be given, in direct connection with each question, every legal proposition which the court deems necessary and proper for the jury to bear in mind in considering that question.[26]

2. Certainty, Definiteness, and Particularity [27]**— a. In General.** Instructions should be in plain and simple language,[28] clear and explicit,[29] certain,[30] definite,[31]

18. Funk *v.* Babbitt, 156 Ill. 408, 41 N. E. 166; Eckels *v.* Cooper, 136 Ill. App. 60.

19. In criminal cases see Criminal Law, 12 Cyc. 645.

20. Mertens *v.* Southern Coal, etc., Co., 235 Ill. 540, 85 N. E. 743 [*affirming* 140 Ill. App. 190]; Reisch *v.* People, 229 Ill. 574, 82 N. E. 321; Kellyville Coal Co. *v.* Strine, 217 Ill. 516, 75 N. E. 375; Mt. Olive, etc., Coal Co. *v.* Rademacher, 190 Ill. 538, 60 N. E. 888 [*affirming* 92 Ill. App. 442]; Consolidated Coal Co. *v.* Dombroski, 106 Ill. App. 641; Maffi *v.* Stephens, 49 Tex. Civ. App. 354, 108 S. W. 1008. *Contra*, Kansas City, etc., R. Co. *v.* Becker, 63 Ark. 477, 39 S. W. 358.

21. Mertens *v.* Southern Coal, etc., Co., 235 Ill. 540, 551, 85 N. E. 743.

22. *Illinois.*— Chicago, etc., R. Co. *v.* Hines, 132 Ill. 161, 23 N. E. 1021, 22 Am. St. Rep. 515.

Indiana.— Conway *v.* Vizzard, 122 Ind. 266, 23 N. E. 771.

Iowa.— Deere *v.* Wolf, 77 Iowa 115, 41 N. W. 588.

Kentucky.—Louisville, etc., R. Co. *v.* Veach, 46 S. W. 493, 20 Ky. L. Rep. 403.

Nebraska.— Nebraska Nat. Bank *v.* Burke, 44 Nebr. 234, 62 N. W. 452.

Oklahoma.— Grant *v.* Milam, 20 Okla. 672, 95 Pac. 424.

South Dakota.— Davis *v.* Holy Terror Min. Co., 20 S. D. 399, 107 N. W. 374.

Texas.— Bomar *v.* Powers, (Civ. App. 1899) 50 S. W. 142.

And see Brock *v.* Wildey, 132 Ga. 19, 63 S. E. 794.

23. Stratton *v.* Central City Horse R. Co., 95 Ill. 25; Gates *v.* Manny, 14 Minn. 21.

24. Chicago, etc., R. Co. *v.* Hines, 132 Ill. 161, 23 N. E. 1021, 22 Am. St. Rep. 515; Atchison, etc., R. Co. *v.* Marks, 11 Okla. 812, 65 Pac. 996.

25. Denver Consol. Electric Co. *v.* Walters, 39 Colo. 301, 89 Pac. 815; Worden *v.* Humeston, etc., R. Co., 72 Iowa 201, 33 N. W. 629.

26. Schaidler *v.* Chicago, etc., R. Co., 102 Wis. 564, 78 N. W. 732; McDermott *v.* Jackson, 102 Wis. 419, 78 N. W. 598.

27. In criminal prosecutions see Criminal Law, 12 Cyc. 647 *et seq.*

Want of as ground for new trial see New Trial, 29 Cyc. 786 *et seq.*

28. Lincoln *v.* Beckman, 23 Nebr. 677, 37 N. W. 593.

29. *California.*— People *v.* Hobson, 17 Cal. 424.

Illinois.— Gruenendahl *v.* St. Louis Consol. Coal Co., 108 Ill. App. 644; Chicago, etc., R. Co. *v.* Appell, 103 Ill. App. 185. And see Kehl *v.* Abram, 210 Ill. 218, 71 N. E. 347, 102 Am. St. Rep. 158 [*affirming* 112 Ill. App. 77].

Minnesota.— Gaffney *v.* St. Paul City R. Co., 81 Minn. 459, 84 N. W. 304.

Missouri.— Morris *v.* Morris, 28 Mo. 114.

Nebraska.— Lincoln *v.* Beckman, 23 Nebr. 677, 37 N. W. 593.

New York.— Van Vechten *v.* Griffiths, 4 Abb. Dec. 487, 1 Keyes 104.

Texas.— Cauble *v.* Worsham, 96 Tex. 86, 70 S. W. 737, 97 Am. St. Rep. 871 [*reversing* (Civ. App. 1902) 69 S. W. 194].

Vermont.— Gragg *v.* Hull, 41 Vt. 217.

And see McWhorter *v.* Bluthenthal, 136 Ala. 568, 33 So. 552, 96 Am. St. Rep. 43.

Refusal of requested instruction.— It is not error to refuse an instruction which is unintelligible and could in no way enlighten the jury. Barnes *v.* Grafton, 61 W. Va. 408, 56 S. E. 608.

30. Crete *v.* Childs, 11 Nebr. 252, 9 N. W. 55.

31. McElwaney *v.* MacDiarmid, 131 Ga. 97, 62 S. E. 20; Virgie *v.* Stetson, 73 Me. 452; Robey *v.* State, 94 Md. 61, 50 Atl. 411; Blair *v.* Blair, 39 Md. 556; Weber *v.* Zimmer-

direct in statement,[32] and accurate.[33] Especially is this necessary where the evidence is conflicting [34] and the case close on the facts.[35] They should not leave too much to the discretion of the jury.[36] However, indefiniteness and uncertainty will not ordinarily constitute ground for reversal in the absence of a request for more specific instructions.[37]

b. Ambiguous Instructions.[38] Instructions which admit of two constructions are erroneous as tending to confuse and mislead the jury,[39] and it is of course proper to refuse them,[40] even though proper in substance.[41] If it is likely or apparent that prejudice resulted to one of the parties, the giving of such instructions is ground for reversal; [42] but it is otherwise if it is apparent that the jury were not mislead thereby.[43]

c. Vague and Obscure Instructions.[44] Instructions should be so worded that their meaning will not be obscure or vague and requested instructions defective in this regard may and should be refused.[45] However, the giving of an instruction defective in this regard is not ground for reversal unless it misleads

man, 22 Md. 156; Dorsey *v.* Harris, 22 Md. 85; Kent *v.* Holliday, 17 Md. 387; Warner *v.* Hardy, 6 Md. 525; Wheeler *v.* State, 7 Gill (Md.) 343; Herbstreit *v.* Beckwith, 35 Mich. 93.

32. Gaffney *v.* St. Paul City R. Co., 81 Minn. 459, 84 N. W. 304.

33. Summerville *v.* Klein, 140 Ill. App. 39; Chicago *v.* Sutton, 136 Ill. App. 221; Press *v.* Hair, 133 Ill. App. 528; Chicago, etc., R. Co. *v.* Neves, 130 Ill. App. 340; Register-Gazette Co. *v.* Larash, 123 Ill. App. 453; Harris *v.* Springfield First Nat. Bank, (Tex. Civ. App. 1898) 45 S. W. 311.

Substantial accuracy.— Substantial accuracy in instructions is sufficient where the evidence of plaintiff justified the verdict rendered, and the defense interposed no countervailing testimony. City of Chicago *v.* Kubler, 133 Ill. App. 520.

34. Morris *v.* Coombs, 109 Ill. App. 176.

35. Illinois Cent. R. Co. *v.* Mason, 132 Ill. App. 403; Chicago, etc., R. Co. *v.* Neves, 130 Ill. App. 340.

36. Kidwell *v.* Carson, 3 Tex. Civ. App. 327, 22 S. W. 534. Thus it is improper to instruct the jury to take into consideration all the facts, and do equal justice between the parties (Kelly *v.* Cunningham, 1 Cal. 365, in which it was said that this was submitting too much to the jury; they are to pass upon the facts, the court upon the law); or to find as they may think right and proper between the parties (Ruckersville Bank *v.* Hemphill, 7 Ga. 396).

37. Hain *v.* Mattes, 34 Colo. 345, 83 Pac. 127.

38. **As ground for new trial** see NEW TRIAL, 29 Cyc. 786 *et seq.*

In criminal prosecutions see CRIMINAL LAW, 12 Cyc. 647 *et seq.*

39. Belt *v.* Goode, 31 Mo. 128; Stewart *v.* Demming, 54 Nebr. 7, 74 N. W. 265; Gordon *v.* Richmond, 83 Va. 436, 2 S. E. 727; Virginia Cent. R. Co. *v.* Sanger, 15 Gratt. (Va.) 230.

40. *Alabama.*— Alabama Great Southern R. Co. *v.* Guest, 144 Ala. 373, 39 So. 654; Tutwiler Coal, etc., Co. *v.* Enslen, 129 Ala. 336, 30 So. 600; Partridge *v.* Forsyth, 29 Ala. 200; Rolston *v.* Langdon, 26 Ala. 660.

Illinois.— Asher *v.* East St. Louis, etc., R. Co., 140 Ill. App. 220.

Indiana.— Loeb *v.* Weis, 64 Ind. 285.

Maryland.— Baltimore, etc., R. Co. *v.* Resley, 14 Md. 424.

Missouri.— Dunn *v.* Dunnaker, 87 Mo. 597.

Montana.— Ramsey *v.* Burns, 27 Mont. 138, 69 Pac. 711.

South Carolina.— Knobeloch *v.* Germania Sav. Bank, 50 S. C. 259, 27 S. E. 962.

Virginia.—Levasser *v.* Washburn, 11 Gratt. 572.

West Virginia.— Wheeling Gas Co. *v.* Wheeling, 8 W. Va. 320; Henry *v.* Davis, 7 W. Va. 715.

See 46 Cent. Dig. tit. "Trial," §§ 569, 570.

41. Wabash R. Co. *v.* Warren, 125 Ill. App. 416.

42. Dodge *v.* Brown, 22 Mich. 446; Lackawanna, etc., R. Co. *v.* Chenewith, 52 Pa. St. 382, 91 Am. Dec. 168; White *v.* Sohn, 63 W. Va. 80, 59 S. E. 890; Harman *v.* Moddy, 57 W. Va. 66, 49 S. E. 1009.

43. Smith *v.* McDaniel, 5 Ind. App. 581, 32 N. E. 798; Harris *v.* Welch, 70 Iowa 80, 29 N. W. 811; Parkhurst *v.* Masteller, 57 Iowa 474, 10 N. W. 864; Hoitt *v.* Holcomb, 32 N. H. 185; Houston, etc., R. Co. *v.* Anglin, 45 Tex. Civ. App. 41, 99 S. W. 897. And see Sweeney *v.* Merrill, 38 Kan. 216, 16 Pac. 454, 5 Am. St. Rep. 734.

44. **In criminal prosecutions** see CRIMINAL LAW, 12 Cyc. 647.

45. *Alabama.*— Gambill *v.* Fuqua, 148 Ala. 448, 42 So. 735; Louisville, etc., R. Co. *v.* Hall, 87 Ala. 708, 6 So. 277, 13 Am. St. Rep. 84, 4 L. R. A. 710.

Illinois.— Kirk *v.* Wolf Mfg. Co., 118 Ill. 567, 8 N. E. 815; Chicago *v.* Sutton, 136 Ill. App. 221.

Indiana.— Loeb *v.* Weis, 64 Ind. 285.

Maryland.— Palatine Ins. Co. *v.* O'Brien, 107 Md. 341, 68 Atl. 484, 16 L. R. A. N. S. 1055; Gambrill *v.* Schooley, 95 Md. 260, 52 Atl. 500, 63 L. R. A. 427; Baltimore, etc., R. Co. *v.* Boyd, 67 Md. 32, 10 Atl. 315, 1 Am. St. Rep. 362.

Pennsylvania.— McKinney *v.* Snyder, 78 Pa. St. 497.

Virginia.— Kincheloe *v.* Tracewells, 11 Gratt. 587.

or is calculated to mislead to the injury of the party against whom it was given.[46] If vicious to this extent it is ground for reversal,[47] and *a fortiori* when it is obscure to the point of unintelligibility.[48]

d. Argumentative Instructions.[49] Instructions should be clear and concise, presenting only the point or matter of law on which the party presenting them may rely,[50] and it is very generally held that instructions which are argumentative in character are improper,[51] and such instructions should of course be refused i-

United States.— Bottomley *v.* U. S., 3 Fed. Cas. No. 1,688, 1 Story 135.

See 46 Cent. Dig. tit. "Trial," § 570.

Instruction held defective.— In an action on contracts for clearing a railroad right of way, an instruction which left it to the jury to determine how much of the work was done by "defendant," inadvertently naming defendant, instead of plaintiff, and, if they found that the work was not completed, then to find why it was not completed, and left it to the jury to find the legal consequences of the failure to complete the work, was erroneous, because indefinite and involved. Harrison *v.* Franklin, 126 Mo. App. 366, 103 S. W. 585. In a close case involving a personal injury, an instruction which speaks of "wrongful acts, negligence and defaults," even limiting them to such as were charged in the declaration, is too general, and liable to mislead. Chicago *v.* Sutton, 136 Ill. App. 221. On a trial of the validity of a change of beneficiary in a policy, the court instructed that "if you believe from the evidence that insured was in a weak, mental, and physical condition, and while in such condition was compelled by fear or otherwise to sign such document, or make such request as was made to change said policies," etc. It was held that the use of the word "otherwise" was misleading for not giving the jury a guide, but leaving them to speculate as to what motive influenced insured. Hazard *v.* Western Commercial Travelers' Assoc., (Tex. Civ. App. 1909) 116 S. W. 625.

Instruction held not defective.— An instruction, in an action on a note, that the note in suit was barred by limitations, and furnished no evidence of liability against defendant, unless there had been a payment made thereon by defendant within six years before action brought, and that the burden of proof to establish the payment was on plaintiff, was not objectionable as ambiguous or misleading. Gilman *v.* Cochran, 49 Oreg. 474, 90 Pac. 1001.

46. Denton *v.* Jackson, 106 Ill. 433.

47. *Illinois.*— Haskin *v.* Haskin, 41 Ill. 197.

Mississippi.— Archer *v.* Sinclair, 49 Miss. 343.

Nebraska.— Mutual Hail Ins. Co. *v.* Wilde, 8 Nebr. 427, 1 N. W. 384.

Pennsylvania.— Lackawanna, etc., R. Co. *v.* Chenewith, 52 Pa. St. 382, 91 Am. Dec. 168.

Virginia.— Gordon *v.* Richmond, 83 Va. 436, 2 S. E. 727.

48. Crole *v.* Thomas, 17 Mo. 329; Kalamazoo Nat. Bank *v.* Sides, (Tex. Civ. App. 1894) 28 S. W. 918.

49. **In criminal prosecutions** see CRIMINAL LAW, 12 Cyc. 647.

50. Bray *v.* Ely, 105 Ala. 553, 17 So. 180.

51. *Alabama.*— Kansas City, etc., R. Co. *v.* Henson, 132 Ala. 528, 31 So. 590; Fuller *v.* Gray, 124 Ala. 388, 27 So. 458; Coghill *v.* Kennedy, 119 Ala. 641, 24 So. 459; Wisdom *v.* Reeves, 110 Ala. 418, 18 So. 13.

California.— *In re* Blake, 136 Cal. 306, 68 Pac. 827, 89 Am. St. Rep. 135.

Georgia.— Macon R., etc., Co. *v.* Vining, 123 Ga. 770, 51 S. E. 719.

Illinois.— West Chicago St. R. Co. *v.* Mueller, 165 Ill. 499, 46 N. E. 373, 56 Am. St. Rep. 263; Kirk *v.* Wolf Mfg. Co., 118 Ill. 567, 8 N. E. 815.

Kentucky.— Wills *v.* Tanner, 18 S. W. 166, 13 Ky. L. Rep. 741.

Michigan.— O'Dea *v.* Michigan Cent. R. Co., 142 Mich. 265, 105 N. W. 746.

Minnesota.— Hebert *v.* Interstate Iron Co., 94 Minn. 257, 102 N. W. 451.

Pennsylvania.— March *v.* Metropolitan L. Ins. Co., 186 Pa. St. 629, 40 Atl. 1100, 65 Am. St. Rep. 887; Webb *v.* Lees, 149 Pa. St. 13, 24 Atl. 159.

Texas.— Ft. Worth, etc., R. Co. *v.* Dial, 38 Tex. Civ. App. 260, 85 S. W. 22; Cordill *v.* Moore, 17 Tex. Civ. App. 217, 43 S. W. 298; Chisum *v.* Chesnutt, (Civ. App. 1896) 36 S. W. 758; Hurlbut *v.* Boaz, 4 Tex. Civ. App. 371, 23 S. W. 446; Hanna *v.* Hanna, 3 Tex. Civ. App. 51, 21 S. W. 720.

Wisconsin.— Jones *v.* Monson, 137 Wis. 478, 119 N. W. 179.

See 46 Cent. Dig. tit. "Trial," § 561.

Instructions held argumentative.— The following instructions have been held to be argumentative and improper: That the law abhors fraud (McClendon *v.* McKissack, 143 Ala. 188, 38 So. 1020); that admissions testified to have been made by a party to a suit should be received with caution because of the improbability that a party would make statements prejudicial to himself (Riddle *v.* Webb, 110 Ala. 599, 18 So. 323); that it is a sound rule of law that the jury may disregard the whole of the testimony of a witness who is found to swear wilfully falsely in one material thing (McClendon *v.* McKissack, *supra*); that the law is that one who has by his negligence proximately contributed to his injury cannot recover damages against another who has negligently caused his death, and that the rule is applicable, although the person injured is under fourteen years of age, if he has sufficient mental capacity (Moss *v.* Mosely, 148 Ala. 168, 41 So. 1012); an instruction, in an action by a firm for corn shipped to defendant for sale, that the contract on which the suit

requested.[52] The decisions are not entirely harmonious as to the effect of giving

was based was merged into the written letters of a partner to defendant and the letters of defendant to the partner, and that the jury might look to the letters to determine with whom the contract was made (Dorough *v.* Harrington, 148 Ala. 305, 42 So. 557); an instruction that defendant had no absolute right to have plaintiff examined to determine the extent of her injuries (Birmingham R., etc., Co. *v.* King, 149 Ala. 504, 42 So 612); an instruction in an action against a railroad company for injuries resulting from a fire set by defendant's engine, that the mere fact that the fire originated from sparks emitted from an engine is not sufficient to fasten a liability upon the railroad company, and that the mere fact that a fire occurred along the line of defendant's road does not raise a presumption that it was caused by or originated from defendant's engine (Birmingham R., etc., Co. *v.* Martin, 148 Ala. 8, 42 So. 618); an instruction in an action for death of a servant while riding certain cars down an incline, that no duty rested on intestate's foreman to instruct him about riding the cars down the incline, if the danger was obvious and intestate was sufficiently developed to understand the danger (Woodstock Iron Works *v.* Kline, 149 Ala 391, 43 So. 362); instructions in ejectment, that the location of the land was a physical fact to be determined by the jury; that the testimony of certain expert witnesses should not be considered as that of experts, but merely as that of witnesses testifying to such particular physical facts; that as to physical facts, such as the location of streams or bluffs thereof and their meanderings, the testimony of those who knew the facts was as worthy of belief as that of experts (Chappelle *v.* Roberts, 150 Ala. 457, 43 So. 489); an instruction, in a case where the issue was the existence of a partnership, that, if the jury found from a preponderance of the evidence that defendant entered into a contract with the alleged firm whereby he was to share with them in any profits of the business, this would be deemed in law one of the most cogent evidences of partnership (Rector *v.* Robins, 82 Ark. 424, 102 S. W. 209); an instruction that one who owns property along the railroad must know that trains are expected to run with regularity, and if there are special risks from no want of care in the proper equipment of the trains, those risks are incident to the situation, and the extra care they demand devolves upon the other party and the consequences of not exercising it must fall on him, because the railroad is not in fault (Florida East Coast R. Co. *v.* Welch, 53 Fla. 145, 44 So. 250); an instruction in a personal injury action against a railroad, that the fact that plaintiff is deprived of the pleasure and satisfaction of life which only those having a sound body and the full use of all their members may enjoy might be considered in assessing damages invaded the province of the jury (Pittsburgh, etc., R. Co. *v.* O'Conner, 171 Ind. 686, 85 N. E. 969); an instruction in an action for delay in delivering a telegram, sent by plaintiff's agent, that it was possible that plaintiff understood that the agent was acting for her when he went to send the message, but the evidence must show that he agreed to act as agent (Western Union Tel. Co. *v.* Northcutt, 158 Ala. 539, 48 So. 553, 132 Am. St. Rep. 38); an instruction, in an action for damages to a horse and buggy from a collision with a team of oxen and wagon on a public bridge, that public bridges are for the use of oxen and drays as much as for horses and buggies (Cohn, etc., Lumber Co. *v.* Robbins, 159 Ala. 289, 48 So. 853).

Instructions held not argumentative.—An instruction is not objectionable as argumentative because the judge arranges the evidence and comments on it (Emery *v.* Estes, 31 Me. 155); or unnecessarily elaborates it (Thrall *v.* Wilson, 17 Pa. Super. Ct. 376); or admonishes the jury that in order to make conversations testified to evidence they must be satisfied that they had reference to the transaction in controversy (Whitcomb *v.* Fairlee, 43 Vt. 671); or in addition to a charge in general terms on contributory negligence, gives special instructions on contributory negligence conformable to the facts shown (Rambie *v.* San Antonio, etc., R. Co., 45 Tex. Civ. App. 422, 100 S. W. 1022); or because the instruction contains unnecessary repetitions of the matters which the jury may consider (Baltimore, etc., R. Co. *v.* Walker, 41 Ind. App. 588, 84 N. E. 730); or statements of undisputed facts (Davis *v.* Michigan Cent. R. Co., 147 Mich. 479, 111 N. W. 76).

52. *Alabama.*—Rutherford *v.* Dyer, 146 Ala. 665, 40 So. 974; Peterman *v.* Henderson, (1906) 40 So. 756; Mobile Light, etc., Co. *v.* Walsh, 146 Ala. 295, 40 So. 560; Alabama Great Southern R. Co. *v.* Sanders, 145 Ala. 449, 40 So. 402; Pullman Car Co. *v.* Krauss, 145 Ala. 395, 40 So. 398, 4 L. R. A. N. S. 103; Alabama Great Southern R. Co. *v.* Guest, 144 Ala. 373, 39 So. 654; Western R. Co. *v.* Cleghorn, 143 Ala. 392, 39 So. 133; Kansas City, etc., R. Co. *v.* Matthews, 142 Ala. 298, 39 So. 207; Southern R. Co. *v.* Howell, 135 Ala. 639, 34 So. 6; King *v.* Franklin, 132 Ala. 559, 31 So. 467; Pearson *v.* Adams, 129 Ala. 157, 29 So. 977; Louisville, etc., R. Co. *v.* York, 128 Ala. 305, 30 So. 676; Andrews *v.* Tucker, 127 Ala. 602, 29 So. 34; Morrisett *v.* Wood, 123 Ala. 384, 26 So. 307, 82 Am. St. Rep. 127; Nelms *v.* Steiner, 113 Ala. 562, 22 So. 435; Birmingham *v.* Starr, 112 Ala. 98, 20 So. 424; Wisdom *v.* Reeves, 110 Ala. 418, 18 So. 13; Teague *v.* Lindsey, 106 Ala. 266, 17 So. 538; Alabama Great Southern R. Co. *v.* Richie, 99 Ala. 346, 12 So. 612; Johnson *v.* Armstrong, 97 Ala. 731, 12 So. 72; Steed *v.* Knowles, 97 Ala. 573, 12 So. 75; Birmingham Mineral R. Co. *v.* Wilmer, 97 Ala. 165, 11 So. 886; East Tennessee, etc., R. Co. *v.* Thompson, 94 Ala. 636, 10 So. 280; Smith *v.*

argumentative instructions. Some decisions lay down the rule broadly that such instructions are not ground for reversal.[53] While in others it is held that if the giving of argumentative instructions misleads the jury and is calculated to prejudice one of the parties it is ground for reversal,[54] unless the harmful effect is removed by other instructions.[55] In any event, it is said, the reviewing court will not reverse if the law was clearly and fully given in the charge considered as a whole, and the reviewing court is satisfied that the rights of the parties were not prejudicially affected by the vice complained of.[56]

e. Confused or Misleading Instructions.[57] It is proper to refuse instructions that would tend to mislead or confuse the jury,[58] and by parity of reasoning it is

Collins, 94 Ala. 394, 10 So. 334; Birmingham Union R. Co. *v.* Hale, 90 Ala. 8, 8 So. 142, 24 Am. St. Rep. 748; Steiner *v.* Ellis, (1890) 7 So. 803; Georgia Pac. R. Co. *v.* Propst, 90 Ala. 1, 7 So. 635; Adams *v.* Thornton, 82 Ala. 260, 3 So. 20; Adams *v.* Thornton, 78 Ala. 489, 56 Am. Rep. 49.

Arkansas.— Rector *v.* Robins, 82 Ark. 424, 102 S. W. 209.

California.— *In re* Dolbeer's Estate, 149 Cal. 227, 86 Pac. 695.

Florida.— Florida East Coast R. Co. *v.* Welch, 53 Fla. 145, 44 So. 250.

Illinois.—Wickes *v.* Walden, 228 Ill. 56, 81 N. E. 798; Pittsburg, etc., R. Co. *v.* Banfill, 206 Ill. 553, 69 N. E. 499 [*affirming* 107 Ill. App. 254]; Pyle *v.* Pyle, 158 Ill. 289, 41 N. E. 999; Thompson *v.* Force, 65 Ill. 370; Chicago Union Traction Co. *v.* Neutzel, 114 Ill. App. 466; Chicago Title, etc., Co. *v.* Ward, 113 Ill. App. 327; Cleveland, etc., R. Co. *v.* Alfred, 113 Ill. App. 236; Davenport, etc., R. Co. *v.* De Yaeger, 112 Ill. App. 537; Shickle-Harrison, etc., Iron Co. *v.* Beck, 112 Ill. App. 444 [*affirmed* in 212 Ill. 268, 72 N. E. 423]; Lake Erie, etc., R. Co. *v.* Delong, 109 Ill. App. 241; West Chicago St. R. Co. *v.* Lieserowitz, 99 Ill. App. 591 [*affirmed* in 197 Ill. 607, 64 N. E. 718]; Griffin Wheel Co. *v.* Markus, 79 Ill. App. 82.

Maryland.— Fletcher *v.* Dixon, 107 Md. 420, 68 Atl. 875.

Massachusetts.—Wyman *v.* Whicher, 179 Mass. 276, 60 N. E. 612.

Minnesota.— Reem *v.* St. Paul City R. Co., 82 Minn. 98, 84 N. W. 652.

Missouri.— Riley-Wilson Grocer Co. *v.* Seymour Canning Co., 129 Mo. App. 325, 108 S. W. 628; Johnston *v.* Atchison, etc., R. Co., 117 Mo. App. 308, 93 S. W. 866; Melican *v.* Missouri Edison Electric Co., 90 Mo. App. 595; Flannery *v.* St. Louis, etc., R. Co., 44 Mo. App. 396.

New Hampshire.— Minot *v.* Boston, etc., R. Co., 74 N. H. 230, 66 Atl. 825.

Ohio.— Jackson Knife, etc., Co. *v.* Hathaway, 27 Ohio Cir. Ct. 745.

Texas.— Missouri, etc., R. Co. *v.* Carter, 95 Tex. 461, 68 S. W. 159; Rice *v.* Ward, 93 Tex. 532, 56 S. W. 747 [*reversing* (Civ. App. 1899) 54 S. W. 318]; McDonald *v.* International, etc., R. Co., 86 Tex. 1, 22 S. W. 939, 40 Am. St. Rep. 803; Mitchell *v.* Mitchell, 80 Tex. 101, 15 S. W. 705; Equitable Mortg. Co. *v.* Norton, 71 Tex. 683, 10 S. W. 301; Dallas *v.* McCullough, (Civ. App. 1906) 95 S. W. 1121; Eastern Texas R. Co. *v.* Moore, (Civ. App. 1906) 94 S. W. 394; Galveston, etc., R. Co. *v.* Roberts, (Civ. App. 1906) 91 S. W. 375; Houston, etc., R. Co. *v.* Harvin, (Civ. App. 1899) 54 S. W. 629; Hurst *v.* McMullen, (Civ. App. 1898) 47 S. W. 666, (Civ. App. 1899) 48 S. W. 744; Bonham *v.* Crider, (Civ. App. 1894) 27 S. W. 419.

Wisconsin.—Wieting *v.* Millston, 77 Wis. 523, 46 N. W. 879.

See 46 Cent. Dig. tit. "Trial," § 561.

53. Trufant *v.* White, 99 Ala. 526, 13 So. 83; Bell *v.* Kendall, 93 Ala. 489, 8 So. 492; Waxelbaum *v.* Bell, 91 Ala. 331, 8 So. 571.

54. Cothran *v.* Moore, 1 Ala. 423; Smith *v.* Hazlehurst, 122 Ga. 786, 50 S. E. 917; Wabash R. Co. *v.* Perkins, 137 Ill. App. 514 [*affirmed* in 233 Ill. 458, 84 N. E. 677]; Illinois Cent. R. Co. *v.* Collison, 134 Ill. App. 443; Dazey *v.* Stairwall, 123 Ill. App. 489; People *v.* Peden, 109 Ill. App. 560; Chisum *v.* Chesnutt, (Tex. Civ. App. 1896) 36 S. W. 758.

55. Wabash R. Co. *v.* Perkins, 137 Ill. App. 514 [*affirmed* in 233 Ill. 458, 84 N. E. 677].

56. McCormick *v.* Parriott, 33 Colo. 382, 80 Pac. 1044.

57. As ground for new trial see NEW TRIAL, 29 Cyc. 786 *et seq.*

In criminal prosecutions see CRIMINAL LAW, 12 Cyc. 647 *et seq.*

58. *Alabama.*— Sherrell *v.* Louisville, etc., R. Co., (1905) 44 So. 153; Marx *v.* Ely, (1906) 41 So. 411; Montgomery St. R. Co. *v.* Smith, 146 Ala. 316, 39 So. 757; Gates *v.* O'Gara, 145 Ala. 665, 39 So. 729; Armour Packing Co. *v.* Vietch-Young Produce Co., (1903) 39 So. 680; Fuller *v.* Stevens, (1905) 39 So. 623; Larkinsville Min. Co. *v.* Flippo, 130 Ala. 361, 30 So. 358; Southern R. Co. *v.* Lynn, 128 Ala. 297, 29 So. 573; Louisville, etc., R. Co. *v.* Cowherd, 120 Ala. 51, 23 So. 793; Cook *v.* Thornton, 109 Ala. 523, 20 So. 14; Kansas City, etc., R. Co. *v.* Webb, 97 Ala. 157, 11 So. 888; Smith *v.* Collins, 94 Ala. 394, 10 So. 334; Alabama Fertilizer Co. *v.* Reynolds, 85 Ala. 19, 4 So. 639; McWilliams *v.* Rodgers, 56 Ala. 87; Tillman *v.* Chadwick, 37 Ala. 317; Rolston *v.* Langton 26 Ala. 660.

Arkansas.—Allen-West Commission Co. *v.* Hudgins, 74 Ark. 468, 86 S. W. 289; Armistead *v.* Brooke, 18 Ark. 521; Worthington *v.* Curd, 15 Ark. 491.

California.— Davis *v.* Davis, 26 Cal. 23, 85 Am. Dec. 157.

Florida.— Florida East Coast R. Co. *v.* Welch, 53 Fla. 145, 44 So. 250; Jacksonville

error to give instructions of that nature;[59] especially is this true where the evidence is

Electric Co. *v.* Sloan, 52 Fla. 257, 42 So. 516; Jacksonville Electric Co. *v.* Adams, 50 Fla. 429, 39 So. 183.

Georgia.—Atlantic Coast Line R. Co. *v.* Powell, 127 Ga. 805, 56 S. E. 1006, 9 L. R. A. N. S. 769; Coleman *v.* Slade, 75 Ga. 61; Causey *v.* Wiley, 27 Ga. 444; Stiles *v.* Shedden, 2 Ga. App. 317, 58 S. E. 515.

Illinois.—Fitzgerald *v.* Benner, 219 Ill. 485, 76 N. E. 709; Illinois, etc., R. Co. *v.* Freeman, 210 Ill. 270, 71 N. E. 444; Dazey *v.* Stairwall, 123 Ill. App. 489; Illinois Cent. R. Co. *v.* Becker, 119 Ill. App. 221; Zipkie *v.* Chicago, 117 Ill. App. 418; Lindberg *v.* Chicago City R. Co., 83 Ill. App. 433; Hope *v.* West Chicago St. R. Co., 82 Ill. App. 311; Achenbach *v.* Fesser, 55 Ill. App. 580; Eugene Glass Co. *v.* Martin, 54 Ill. App. 288; Chicago City R. Co. *v.* Brady, 35 Ill. App. 460.

Indiana.—Roots *v.* Tyner, 10 Ind. 87; Nickey *v.* Dougan, 34 Ind. App. 601, 73 N. E. 288.

Kansas.—Gregg *v.* Gaverick, 33 Kan. 190, 5 Pac. 751.

Maryland.—Lake Roland El. R. Co. *v.* McKewen, 80 Md. 593, 31 Atl. 797; Clements *v.* Smith, 9 Gill 156; Whiteford *v.* Burckmyer, 1 Gill 127, 39 Am. Dec. 640.

Michigan.—Brown *v.* Harris, 139 Mich. 372, 102 N. W. 960; Kehrig *v.* Peters, 41 Mich. 475, 2 N. W. 801.

Minnesota.—Beard *v.* Clarke, 38 Minn. 547, 39 N. W. 63; Trainor *v.* Worman, 33 Minn. 484, 24 N. W. 297; Shartle *v.* Minneapolis, 17 Minn. 308.

Missouri.—Greer *v.* Parker, 85 Mo. 107; Clarke *v.* Kitchen, 52 Mo. 316; Hartley *v.* Calbreath, 127 Mo. App. 559, 106 S. W. 570; Kaw Brick Co. *v.* Hogsett, 82 Mo. App. 546; Sharp *v.* Sturgeon, 75 Mo. App. 651.

Nebraska.—Hibbard *v.* Wilson, 51 Nebr. 436, 71 N. W. 65.

Nevada.—Colquhoun *v.* Wells, 21 Nev. 459, 33 Pac. 977.

Oklahoma.—Friedman *v.* Weisz, 8 Okla. 392, 58 Pac. 613.

Texas.—International, etc., R. Co. *v.* Muschamp, 40 Tex. Civ. App. 358, 90 S. W. 706; Creager *v.* Yarborough, (Civ. App. 1905) 87 S. W. 376; Pitt *v.* Elser, 7 Tex. Civ. App. 47, 32 S. W. 146.

West Virginia.—Stewart *v.* Doak, 58 W. Va. 172, 52 S. E. 95; Parrish *v.* Huntington, 57 W. Va. 286, 50 S. E. 416; Wheeling Gas Co. *v.* Wheeling, 8 W. Va. 320.

Wisconsin.—Odegard *v.* North Wisconsin Lumber Co., 130 Wis. 659, 110 N. W. 809.

United States.—Union Pac. R. Co. *v.* O'Brien, 49 Fed. 538, 1 C. C. A. 354.

See 46 Cent. Dig. tit. "Trial," § 569 *et seq.*

59. *Alabama.*—McConnell *v.* Adair, 147 Ala. 599, 41 So. 419; White *v.* Ferris, 124 Ala. 461, 27 So. 259.

California.—Haight *v.* Vallet, 89 Cal. 245, 26 Pac. 897, 23 Am. St. Rep. 465.

Florida.—Meinhardt *v.* Mode, 25 Fla. 181, 5 So. 672.

Georgia.—Nelson *v.* Spence, 129 Ga. 35, 58 S. E. 697.

Illinois.—Haskin *v.* Haskin, 41 Ill. 197; Sager *v.* St. John, 109 Ill. App. 358.

Iowa.—Castner *v.* Chicago, etc., R. Co., 126 Iowa 581, 102 N. W. 499.

Louisiana.—Moller *v.* Gauche, 16 La. Ann. 43.

Maryland.—Baltimore, etc., R. Co. *v.* Blocher, 27 Md. 277.

Massachusetts.—Mooar *v.* Harvey, 125 Mass. 574.

Michigan.—Hyde *v.* Shank, 77 Mich. 517, 43 N. W. 890.

Mississippi.—Kansas City, etc., R. Co. *v.* Lilly, (1891) 8 So. 644.

Missouri.—Church *v.* Chicago, etc., R. Co., 119 Mo. 203, 23 S. W. 1056; Hickman *v.* Link, 116 Mo. 123, 22 S. W. 472; Klamp *v.* Rodewall, 19 Mo. 449; Barton *v.* Barton, 119 Mo. App. 507, 94 S. W. 574.

New York.—Sanger *v.* Seymour, 2 N. Y. Suppl. 776; Benham *v.* Cary, 11 Wend. 83.

North Carolina.—Bynum *v.* Bynum, 33 N. C. 632.

Ohio.—White *v.* Thomas, 12 Ohio St. 312, 80 Am. Dec. 347; Washington Mut. Ins. Co. *v.* Merchants', etc., Mut. Ins. Co., 5 Ohio St. 450.

Pennsylvania.—Shrader *v.* U. S. Glass Co., 179 Pa. St. 623, 36 Atl. 330; McHale *v.* McDonnell, 175 Pa. St. 632, 34 Atl. 966; Sellers *v.* Stevenson, 162 Pa. St. 262, 29 Atl. 215; Wolf *v.* Wolf, 158 Pa. St. 621, 28 Atl. 164; Gearing *v.* Lacher, 146 Pa. St. 397, 23 Atl. 229; Wenger *v.* Barnhart, 55 Pa. St. 300.

Tennessee.—East Tennessee, etc., R. Co. *v.* Smith, 89 Tenn. 114, 14 S. E. 1077.

Texas.—Spence *v.* Onstott, 3 Tex. 147; Blanchet *v.* Davis, 3 Tex. 141; Magee *v.* Oklahoma City, etc., R. Co., (Civ. App. 1906) 95 S. W. 1092; Harter *v.* Marshall, (Civ. App. 1896) 36 S. W. 294; Gulf, etc., R. Co. *v.* White, (Civ. App. 1895) 32 S. W. 322; Galveston Land, etc., Co. *v.* Levy, 10 Tex. Civ. App. 104, 30 S. W. 504.

Wisconsin.—J. H. Clark Co. *v.* Rice, 127 Wis. 451, 106 N. W. 231; Scott *v.* Clayton, 54 Wis. 499, 11 N. W. 595; Sears *v.* Loy, 19 Wis. 96.

United States.—Weiss *v.* Bethlehem Iron Co., 88 Fed. 23, 31 C. C. A. 363.

See 46 Cent. Dig. tit. "Trial," § 569 *et seq.*

Instructions held misleading.—An instruction is properly refused as misleading when it tells the jury that in determining the cause of an injury "they might look to the size and shape of the evidence" of injury on plaintiff's shoulder (Southern Bell Tel., etc., Co. *v.* Mayo, 134 Ala. 641, 33 So. 16), or, in a case where actual notice is not material and there is evidence of circumstances warranting the submission of the question of knowledge, that there is no evidence of actual notice (Clark *v.* Brookfield, 97 Mo. App. 16, 70 S. W. 934; Eldred *v.* Hazlett, 38 Pa. St. 16), or where several acts of negligence are claimed to have resulted in an injury, in singling out each separately and instructing that any one of them alone would not entail liability (Lake Shore, etc., R. Co. *v.* Whidden, 23 Ohio Cir. Ct. 85), or

conflicting [60] or the case close.[61] And this is true even though the instructions may be technically accurate.[62] In determining whether particular instructions mislead the jury, the court will credit the jury with common discernment and common sense.[63]

f. Inconsistent or Contradictory Instructions.[64] Conflicting or contradictory instructions furnish no correct guide to the jury, and the giving thereof is erroneous;[65] and it is of course proper for the court to refuse requested instructions

which permits the jury to take into consideration matters which the law considers immaterial (Clewis *v.* Malone, 131 Ala. 465, 31 So. 596). An instruction is misleading when it submits to the jury facts conclusive of the controversy in such manner as to lead the jury to believe that they are not conclusive thereof (Mexican Cent. R. Co. *v.* Goodman, (Tex. Civ. App. 1897) 43 S. W. 580); or bases the right of recovery on inconclusive facts (Gill *v.* Staylor, 93 Md. 453, 49 Atl. 650); or confuses several grounds of liability (Wilson *v.* Dickel, 7 N. Y. App. Div. 175, 40 N. Y. Suppl. 45); or, in a case where the evidence tends to establish fraud, if it tells the jury that a transaction equally capable of two constructions must be presumed to be honest and fair (A. F. Shapleigh Hardware Co. *v.* Hamilton, 70 Ark. 319, 68 S. W. 490); or where the instruction unqualifiedly makes defendant's liability depend on its negligence, where defendant is responsible for the negligence of contractors under it (Taylor, etc., R. Co. *v.* Warner, (Tex. Civ. App. 1900) 60 S. W. 442); or makes the motive with which a party brought a suit, although on a valid claim, material (Sullivan *v.* Collins, 107 Wis. 291, 83 N. W. 310).

Instructions held not misleading.—An instruction is not misleading because in limiting an issue it makes reference to a specific fact, "as alleged in the petition" (Galveston, etc., R. Co. *v.* Parvin, 27 Tex. Civ. App. 60, 64 S. W. 1008); or when it submits facts in terms employed by all of the parties during the trial (Capitol Freehold Land, etc., Co. *v.* Pecos, etc., R. Co., (Tex. Civ. App. 1900) 60 S. W. 286); or strongly urges the support of the law against mob violence (Pritchett *v.* Overman, 3 Greene (Iowa) 531); or in a malpractice suit uses the words "injuries complained of" (Miller *v.* Dumon, 24 Wash. 648, 64 Pac. 804).

60. Union Stock Yard, etc., Co. *v.* Monaghan, 13 Ill. App. 148; Finks *v.* Cox, (Tex. Civ. App. 1895) 30 S. W. 512.

61. Chicago, etc., R. Co. *v.* Cleveland, 92 Ill. App. 308.

62. Gilmore *v.* McNeil, 45 Me. 599.

Although no particular portion of a charge is clearly erroneous, if considered as a whole, it has a tendency to mislead. Renn *v.* Tallman, 25 Pa. Super. Ct. 503.

63. Chicago, etc., R. Co. *v.* Smith, 124 Ill. App. 627 [*affirmed* in 226 Ill. 178, 80 N. E. 716].

64. **As ground for new trial** see NEW TRIAL, 29 Cyc. 786 *et seq.*

In criminal prosecutions see CRIMINAL LAW, 12 Cyc. 647 *et seq.*

65. *Alabama.*— Carter *v.* Fulgham, 134 Ala. 238, 32 So. 684.

Arkansas.— Grayson-McLeod Lumber Co. *v.* Carter, 76 Ark. 69, 88 S. W. 597; Rector *v.* Robins, 74 Ark. 437, 86 S. W. 667; Maddox *v.* Reynolds, 72 Ark. 440, 81 S. W. 603.

California.— Lemasters *v.* Southern Pac. Co., 131 Cal. 105, 63 Pac. 128; Agnew *v.* Kimball, (1885) 9 Pac. 91; Monroe *v.* Cooper, (1885) 6 Pac. 378; Aguirre *v.* Alexander, 58 Cal. 21; McCreery *v.* Everding, 44 Cal. 246; Brown *v.* McAllister, 39 Cal. 573; Clark *v.* McElvy, 11 Cal. 154; Hayden *v.* Consolidated Min., etc., Co., 3 Cal. App. 136, 84 Pac. 422.

Colorado.— Arnett *v.* Huggins, 18 Colo. App. 115, 70 Pac. 765.

Connecticut.— Rosenstein *v.* Fair Haven, etc., R. Co., 78 Conn. 29, 60 Atl. 1061.

Georgia.— Macon R., etc., Co. *v.* Streyer, 123 Ga. 279, 51 S. E. 342.

Idaho.— Giffen *v.* Lewiston, 6 Ida. 231, 55 Pac. 545; Holt *v.* Spokane, etc., R. Co., 3 Ida. 703, 35 Pac. 39.

Illinois.— Illinois Linen Co. *v.* Hough, 91 Ill. 63; Chicago, etc., R. Co. *v.* Payne, 49 Ill. 499; Chicago, etc., R. Co. *v.* Jennings, 114 Ill. App. 622; Thomas *v.* Riley, 114 Ill. App. 520 [*affirmed* in 217 Ill. 494, 75 N. E. 560]; Dauchy Iron Works *v.* Toles, 107 Ill. App. 216; Knowlton *v.* Fritz, 5 Ill. App. 217.

Indiana.—Wenning *v.* Teeple, 144 Ind. 189, 41 N. E. 600; Summerlet *v.* Hamilton, 121 Ind. 87, 22 N. E. 973.

Iowa.— Blake *v.* Miller, 135 Iowa 1, 112 N. W. 158; Loomis *v.* Des Moines News Co., 110 Iowa 515, 81 N. W. 790; Kerr *v.* Topping, 109 Iowa 150, 80 N. W. 321.

Kentucky.— Ferguson *v.* Fox, 1 Metc. 83.

Maryland.— Baltimore, etc., R. Co. *v.* Blocher, 27 Md. 277.

Minnesota.— McCormick *v.* Kelly, 28 Minn. 135, 9 N. W. 675.

Mississippi.— Solomon *v.* City Compress Co., 69 Miss. 319, 10 So. 446, 12 So. 339; Kansas City, etc., R. Co. *v.* Lilly, (1891) 8 So. 644; Herndon *v.* Henderson, 41 Miss. 584.

Missouri.— Behen *v.* St. Louis Transit Co., 186 Mo. 430, 85 S. W. 346; Hickman *v.* Link, 116 Mo. 123, 22 S. W. 472; Spillane *v.* Missouri Pac. R. Co., 111 Mo. 555, 20 S. W. 293; Bluedorn *v.* Missouri Pac. R. Co., 108 Mo. 439, 18 S. W. 1103, 32 Am. St. Rep. 615; Otto *v.* Bent, 48 Mo. 23; State *v.* Bonden, 31 Mo. 402; Wood *v.* The Fleetwood, 19 Mo. 529; Schneer *v.* Lemp, 17 Mo. 142; Vermillion *v.* Parsons, 118 Mo. App. 260, 94 S. W. 298; Hurst *v.* St. Louis, etc., R. Co., 117 Mo. App. 25, 94 S. W. 794; Roberts, etc., Shoe Co. *v.* Shepherd, 96 Mo. App. 698, 70 S. W. 931; Hoover *v.* Mercantile Town Mut. Ins. Co., 93 Mo. App. 111, 69 S. W. 42; Union Bank *v.*

affected with this vice.[66] Instructions of this character are misleading, as the jury are not supposed to know when the judge states the law correctly and when incorrectly.[67] and they should not be left to reconcile conflicting principles of law.[68] The giving of contradictory instructions is ordinarily held ground for reversal.[69] The error in giving incorrect instructions is not cured by giving correct instruc-

Milan First Nat. Bank, 64 Mo. App. 253; Jones *v.* Chicago, etc., R. Co., 59 Mo. App. 137; Martinowsky *v.* Hannibal, 35 Mo. App. 70; Legg *v.* Johnson, 23 Mo. App. 590.

Montana.— Kelley *v.* Cable Co., 7 Mont. 70, 14 Pac. 633.

Nebraska.— Omaha St. R. Co. *v.* Boesen, 68 Nebr. 437, 94 N. W. 619; Denver *v.* Myers, 63 Nebr. 107, 88 N. W. 191; Faulkner *v.* Gilbert, 61 Nebr. 602, 85 N. W. 843, 62 Nebr. 126, 86 N. W. 1074.

New York.— Smith *v.* Lehigh Valley R. Co., 94 N. Y. App. Div. 125, 87 N. Y. Suppl. 1035.

North Carolina.— Pegram *v.* Seaboard Air Line R. Co., 139 N. C. 303, 51 S. E. 975.

Oklahoma.— Payne *v.* McCormick Harvesting Mach. Co., 11 Okla. 318, 66 Pac. 287.

Oregon.— Neis *v.* Whitaker, 47 Oreg. 517, 84 Pac. 699.

Pennsylvania.— Elk Tanning Co. *v.* Brennan, 203 Pa. St. 232, 52 Atl. 246; Gearing *v.* Lacher, 146 Pa. St. 397, 23 Atl. 229; Selin *v.* Snyder, 11 Serg. & R. 319.

Texas.—Williamson *v.* Smith, (Civ. App. 1904) 79 S. W. 51; Eddy *v.* Bosley, 34 Tex. Civ. App. 116, 78 S. W. 565; Gulf, etc., R. Co. *v.* Miller, 24 Tex. Civ. App. 430, 59 S. W. 550; Goldberg *v.* Bussey, (Civ. App. 1898) 47 S. W. 49; Kraus *v.* Haas, 6 Tex. Civ. App. 665, 25 S. W. 1025.

Utah.— Konold *v.* Rio Grande Western R. Co., 21 Utah 379, 60 Pac. 1021, 81 Am. St. Rep. 693.

Virginia.— Singer Mfg. Co. *v.* Bryant, 105 Va. 403, 54 S. E. 320; Winchester *v.* Carroll, 99 Va. 727, 40 S. E. 37.

Wisconsin.— Eichman *v.* Buchheit, 128 Wis. 385, 107 N. W. 325; Harrington *v.* Priest, 104 Wis. 362, 80 N. W. 442; Bleiler *v.* Moore, 94 Wis. 385, 69 N. W. 164; Gove *v.* White, 23 Wis. 282.

United States.— Deserant *v.* Cerillos Coal R. Co., 178 U. S. 409, 20 S. Ct. 967, 44 L. ed. 1127 [*reversing* 9 N. M. 495, 55 Pac. 290].

See 46 Cent. Dig. tit. "Trial," §§ 564, 565.

66. *Alabama.*—Atlanta, etc., Air Line R. Co. *v.* Wheeler, 154 Ala. 530, 46 So. 262.

Colorado.— Healey *v.* Rupp, 28 Colo. 102, 63 Pac. 319.

Illinois.— National Enameling, etc., Co. *v.* McCorkle, 219 Ill. 557, 76 N. E. 843; Chicago City R. Co. *v.* Taylor, 170 Ill. 49, 48 N. E. 831 [*affirming* 68 Ill. App. 613]; U. S. Rolling-stock Co. *v.* Wilder, 116 Ill. 100, 5 N. E. 92; Conklin Constr. Co. *v.* Walsh, 131 Ill. App. 609; Wood *v.* Olson, 117 Ill. App. 128.

Maryland.— Philadelphia, etc., R. Co. *v.* Holden, 93 Md. 417, 49 Atl. 625; Cumberland Coal, etc., Co. *v.* Tilghman, 13 Md. 74.

Massachusetts.— Percival *v.* Chase, 182 Mass. 371, 65 N. E. 800.

Missouri.— Sharp *v.* Sturgeon, 75 Mo. App. 651.

New York.— Ramsey *v.* National Contracting Co., 49 N. Y. App. Div. 11, 63 N. Y. Suppl. 286.

Vermont.— Briggs *v.* Georgia, 12 Vt. 60.

Virginia.— Southern R. Co. *v.* Daves, 108 Va. 378, 61 S. E. 748.

West Virginia.— Tower *v.* Whip, 53 W. Va. 158, 44 S. E. 179, 63 L. R. A. 937; Baltimore, etc., R. Co. *v.* Lafferty, 2 W. Va. 104.

See 46 Cent. Dig. tit. "Trial," §§ 564, 565.

67. Edwards *v.* Atlantic Coast Line R. Co., 129 N. C. 78, 39 S. E. 73. And see McCole *v.* Loehr, 79 Ind. 430.

68. Savannah Electric Co. *v.* McClelland, 128 Ga. 87, 57 S. E. 91; Savannah, etc., R. Co. *v.* Hatcher, 118 Ga. 273, 45 S. E. 239.

69. *Arkansas.*— Kansas City Southern R. Co. *v.* Brooks, 84 Ark. 233, 105 S. W. 93.

California.— James *v.* E. G. Lyons Co., 147 Cal. 69, 81 Pac. 275; Haight *v.* Vallet, 89 Cal. 245, 26 Pac. 897, 23 Am. St. Rep. 465.

Colorado.— San Miguel Consol. Gold Min. Co. *v.* Stubbs, 39 Colo. 359, 90 Pac. 842; Arnett *v.* Huggins, 18 Colo. App. 115, 70 Pac. 765.

Georgia.— Savannah Electric Co. *v.* McClelland, 128 Ga. 87, 57 S. E. 91.

Illinois.— Cummings *v.* Holland, 130 Ill. App. 315; Pendleton *v.* Chicago City R. Co., 120 Ill. App. 405.

Indiana.— Cleveland, etc., R. Co. *v.* Lynn, 171 Ind. 589, 85 N. E. 999, 86 N. E. 1017; Pittsburgh, etc., R. Co. *v.* Noftsger, 148 Ind. 101, 47 N. E. 332; Wenning *v.* Teeple, 144 Ind. 189, 41 N. E. 600; Summerlot *v.* Hamilton, 121 Ind. 87, 22 N. E. 973; Masons' Union L. Ins. Assoc. *v.* Brockman, 20 Ind. App. 206, 50 N. E. 493.

Kansas.— Union Pac. R. Co. *v.* Milliken, 8 Kan. 647.

Kentucky.— Clay *v.* Miller, 3 T. B. Mon. 146.

Mississippi.— Illinois Cent. R. Co. *v.* McGowan, 92 Miss. 603, 46 So. 55.

Missouri.— Hickman *v.* Link, 116 Mo. 123, 22 S. W. 472; James *v.* Missouri Pac. R. Co., 107 Mo. 480, 18 S. W. 31; Hickman *v.* Griffin, 6 Mo. 37, 34 Am. Dec. 124; Bowen *v.* Epperson, 136 Mo. App. 571, 118 S. W. 528; Frank *v.* Grand Tower, etc., R. Co., 57 Mo. App. 181.

Nebraska.— Crosby *v.* Ritchey, 56 Nebr. 336, 76 N. W. 895; Chadron School-Dist. *v.* Foster, 31 Nebr. 501, 48 N. W. 267; Fitzgerald *v.* Meyer, 25 Nebr. 77, 41 N. W. 123.

New York.— Hartman *v.* Joline, 112 N. Y. Suppl. 1057.

North Carolina.— Edwards *v.* Atlantic Coast Line R. Co., 129 N. C. 78, 39 S. E. 730; Bragaw *v.* Supreme Lodge K. L. H., 124 N. C. 154, 32 S. E. 544; Williams *v.* Haid, 118 N. C. 481, 24 S. E. 217.

tions in conflict with them. The error can only be cured by an explicit with-

Oregon.—Morrison *v.* McAtee, 23 Oreg. 530, 32 Pac. 400.

Pennsylvania.—Wolf *v.* Wolf, 158 Pa. St. 621, 28 Atl. 164.

Texas.—San Antonio, etc., R. Co. *v.* Robinson, 73 Tex. 277, 11 S. W. 327; Harter *v.* Marshall, (Civ. App. 1896) 36 S. W. 294; Gulf, etc., R. Co. *v.* White, (Civ. App. 1895) 32 S. W. 322.

Virginia.—Norton Coal Co. *v.* Hanks, 108 Va. 521, 62 S. E. 335; Southern R. Co. *v.* Hansbrough, 107 Va. 733, 60 S. E. 58; Chesapeake, etc., R. Co. *v.* Whitlow, 104 Va. 90, 51 S. E. 182.

Wisconsin.—Harrington *v.* Priest, 104 Wis. 362, 80 N. W. 442; Randall *v.* Northwestern Tel. Co., 54 Wis. 140, 11 N. W. 419, 41 Am. Rep. 17; Imhoff *v.* Chicago, etc., R. Co., 20 Wis. 344; Sears *v.* Loy, 19 Wis. 96.

See 46 Cent. Dig. tit. "Trial," §§ 564, 565.

Compare Eyser *v.* Weissgerber, 2 Iowa 463, where it was said that a mere conflict between instructions in chief and those given at request of a party does not necessarily mislead.

Instructions held contradictory.—In an action for injuries to a servant, the court submitted in one instruction the issue of assumption of risk, but in another instruction stated that if defendant was negligent, and the injury resulted therefrom without fault on plaintiff's part, he was entitled to recover, unless there had been a settlement. It was held that the instructions were erroneous, as conflicting. Brusseau *v.* Lower Brick Co., 133 Iowa 245, 110 N. W. 577. In an action on a contract under which plaintiffs agreed to furnish lumber for a waterway, the waterway to be equal in quality to a sample lot of material theretofore furnished by plaintiffs, and to be constructed of the "heart of yellow pine," instructions that, if plaintiffs furnished the same quality of lumber as the sample, they were entitled to recover, were in direct conflict with instructions that plaintiffs were bound to furnish "heart of yellow pine," although the sample may not have been "heart of yellow pine." San Miguel Consol. Gold Min. Co. *v.* Stubbs, 39 Colo. 359, 90 Pac. 842. Where the court had properly instructed that defendant could not be held liable as a partner unless his conduct led plaintiff to believe that he was a partner, a subsequent instruction submitting the theory of an actual partnership by virtue of a contract, was erroneous and confusing. Bowen *v.* Epperson, 136 Mo. App. 571, 118 S. W. 528. In an action for death at a railroad crossing, the court charged that the "only" duty of the engineer on approaching the crossing, so far as its condition was concerned, was to sound his whistle and to ring the bell, that if such duties were discharged, the jury could not find a verdict for plaintiff on specifications of negligence with reference to the condition of the crossing and the sounding of the whistle or bell, and also charged that the operatives of the train, in passing over the crossing, were bound, in addition, to exercise a degree of care commensurate with the danger of collision reasonably to be apprehended at that location, and if they failed to do so, and in consequence thereof decedent received the injuries from which he died, the jury should find for plaintiff. It was held that such instructions were in irreconcilable conflict. Porter *v.* Missouri Pac. R. Co., 199 Mo. 82, 97 S. W. 880.

Instructions held not contradictory.—Charges which present the different theories of the parties are not contradictory. Votaw *v.* McKeever, 76 Kan. 870, 92 Pac. 1120; Deford *v.* Dryden, 46 Md. 248. An instruction that a railroad was not liable for surface water concentrated and caused to flow on its right of way, by farm ditches constructed on a tract of land prior to plaintiff's ownership of the same, and which he maintained, was not in conflict with an instruction that the railroad was liable for maintaining an embankment obstructing the natural flow of surface water and causing the same to overflow plaintiff's land. Missouri, etc., R. Co. *v.* Arey, (Tex. Civ. App. 1907) 100 S. W. 963. An instruction, which restricts the duty of a railroad to the construction of only such culverts in its embankment, constituting its roadbed, as the natural lay of the land requires for its necessary drainage, is not in conflict with an instruction that an owner could not recover for damages done by water concentrated on the right of way through farm ditches, at a point where the water did not naturally flow, or for damages done by the concentration of surface water on the right of way through farm ditches maintained by the owner. Missouri, etc., R. Co. *v.* Arey, *supra.* An instruction, in an action for the destruction by hogs of a growing crop, which, after stating certain facts to be found to authorize a verdict for plaintiffs, tells the jury that any finding for plaintiffs shall be whatever sum they were damaged by the hogs, not exceeding the sum asked in the petition, is not in conflict with, but is to be read with, one stating the measure of damages as the value of the crop where and when it was destroyed. Hunt *v.* St. Louis, etc., R. Co., 126 Mo. App. 261, 103 S. W. 133. In an action against a railway company for damages resulting from a fire caused by its engine, an instruction that if the engine was equipped with a spark-arresting device of the best kind in general use and was carefully handled, the verdict should be for the company, was not erroneous, as conflicting with an instruction that, if the fire was caused by sparks from the engine, plaintiff should recover, unless the company exercised ordinary care to have the engine provided with one of the best devices in use by railway companies, and unless the company exercised ordinary care to see that any such device was in reasonably good repair and that the engine was handled with ordinary skill. Womack *v.* International, etc., R. Co., 100

drawal of the erroneous instructions.[70] Where instructions are inconsistent with or contradict each other, it is usually impossible to say whether the jury was controlled by the one or the other.[71] The judgment will not be reversed, however, where the inconsistency is only apparent, and not actual;[72] where, as shown by special findings, the verdict follows the correct instructions;[73] where the verdict does not depend upon and it is apparent that it was not influenced by the instructions;[74] and a well-defined exception to the general rule exists where the inconsistency or conflict in the instructions is caused by error in the instructions favorable to the appellant or plaintiff in error. In such case the error being in his favor, he cannot be heard to complain.[75] There are also a few decisions which are not, properly speaking, exceptions to the rule, but seemingly in conflict with it. Of this character are decisions holding that the judgment will not be reversed because of conflicting instructions unless it affirmatively appears from the record that the

Tex. 453, 100 S. W. 1151. In an action for injuries to a servant, an instruction that, if a certain person was intrusted by a master with power to superintend and control the servant, the master was liable for his negligence causing injuries to the servant, unless the servant was guilty of contributory negligence or assumed the risk, or he and the third person were fellow servants, was not contradictory on the question of vice-principal and fellow servant. Reeves *v.* Galveston, etc., R. Co., 44 Tex. Civ. App. 352, 98 S. W. 929. In an action against a railroad company for death of a trackman by being struck by an engine backing out of a round-house at night, an instruction that if the presence of deceased on the track was known to defendant, its agents or servants in charge of the engine, or could have been known to them by the exercise of ordinary care on their part, etc., did not conflict with an instruction that there was no proof of defendant's negligence in not having discovered decedent at or near the track in a position of peril in time, by the exercise of ordinary care, to have avoided injuring him. Cahill *v.* Chicago, etc., R. Co., 205 Mo. 393, 103 S. W. 532

70. *Georgia.*— Savannah Electric Co. *v.* McClelland, 128 Ga. 87, 57 S. E. 91; Morrison *v.* Dickey, 119 Ga. 698, 46 S. E. 863.

Indiana.— Wenning *v.* Teeple, 144 Ind. 189, 41 N. E. 600; McCroy *v.* Anderson, 103 Ind. 12, 2 N. E. 211; Uhl *v.* Bingaman, 78 Ind. 365.

Kentucky.— Clay *v.* Miller, 3 T. B. Mon. 146.

Texas.— Gulf, etc., R. Co. *v.* White, (Civ. App. 1895) 32 S. W. 322.

Wisconsin.— Imhoff *v.* Chicago, etc., R. Co., 20 Wis. 344.

71. *California.*— Haight *v.* Vallet, 89 Cal. 245, 26 Pac. 897, 23 Am. St. Rep. 465; Brown *v.* McAllister, 39 Cal. 573.

Colorado.— Boulder *v.* Niles, 9 Colo. 415, 12 Pac. 632.

Iowa.— Hawes *v.* Burlington, etc., R. Co., 64 Iowa 315, 20 N. W. 717; Hoben *v.* Burlington, etc., R. Co., 20 Iowa 562.

Nebraska.— Crosby *v.* Ritchey, 56 Nebr. 336, 76 N. W. 895; Chadron School-Dist. *v.* Foster, 31 Nebr. 501, 48 N. W. 267.

Virginia.— Richmond Pass, etc., Co. *v.* Steger, 101 Va. 319, 43 S. E. 612; Norfolk, etc., R. Co. *v.* Mann, 99 Va. 180, 37 S. E. 849; Virginia, etc., Wheel Co. *v.* Chalkley, 98 Va. 62, 34 S. E. 976.

West Virginia.— McMechen *v.* McMechen, 17 W. Va. 683, 41 Am. Rep. 682.

Wisconsin.— Randall *v.* Northwestern Tel. Co., 54 Wis. 140, 11 N. W. 419, 41 Am. Rep. 17.

72. Gill *v.* Staylor, 93 Md. 453, 49 Atl. 650; Carey *v.* Merryman, 46 Md. 89; Wood *v.* Chicago, etc., R. Co., 119 Mo. App. 78, 95 S. W. 946.

73. Hillebrant *v.* Green, 93 Iowa 661, 62 N. W. 32; Bigelow *v.* Wygal, 52 Kan. 619, 35 Pac. 200.

74. Hogg *v.* Jackson, etc., Co., (Md. 1893) 26 Atl. 869. And see Farmers', etc., Nat. Bank *v.* Woodell, 38 Oreg. 294, 61 Pac. 837, 65 Pac. 520.

75. *California.*—Williams *v.* Southern Pac. R. Co., 110 Cal. 457, 42 Pac. 974; McNamara *v.* MacDonough, 102 Cal. 575, 36 Pac. 941.

Illinois.— Graybeal *v.* Gardner, 146 Ill. 337, 34 N. E. 528 [*affirming* 48 Ill. App. 305].

Kansas.— St. Joseph, etc., R. Co. *v.* Grover, 11 Kan. 302.

Maryland.— Hogg *v.* Jackson, etc., Co., (1893) 26 Atl. 869.

Michigan.— Niagara F. Ins. Co. *v.* De Graff, 12 Mich. 124.

Missouri.— Reardon *v.* Missouri Pac. R. Co., 114 Mo. 384, 21 S. W. 731; Alexander *v.* Clark, 83 Mo. 481; Houx *v.* Batteen, 68 Mo. 84; Phister *v.* Gove, 48 Mo. App. 555; Vail *v.* Kansas City, etc., R. Co., 28 Mo. App. 372.

Oregon.— Farmers', etc., Nat. Bank *v.* Woodell, 38 Oreg. 294, 61 Pac. 837, 65 Pac. 520; Smitson *v.* Southern Pac. Co., 37 Oreg. 74, 60 Pac. 907.

See 46 Cent. Dig. tit. "Trial," § 564.

Compare Chicago, etc., R. Co. *v.* Anderson, 38 Nebr. 112, 56 N. W. 794, in which it was held that the giving of instructions which are vague and conflicting, and which probably had the effect of confusing and misleading the jury is erroneous, and the fact that the general tenor of the instructions is more favorable to the unsuccessful party than to the successful one does not cure the error.

party complaining thereof may have been injured,[76] or unless the character of the instructions was such as to afford good reason for supposing they might have had the effect of misleading or confusing the minds of the jury.[77]

g. Request For Correct Instructions as a Basis For Assigning Error. If an instruction is not sufficiently clear and explicit,[78] or is argumentative or ambiguous,[79] or is confused or has a tendency to mislead,[80] the party aggrieved must have asked to have the same modified or have asked additional instructions as a basis for assigning error to the giving of such instructions. An objection that an instruction might be misconstrued by the jury cannot be raised by merely excepting to it.[81]

3. Stating Issues Made by Pleadings — a. Necessity. Pleadings, although read at the trial in the hearing of the jury, are addressed to the court. They are in technical language, understood by the court, but often unintelligible to the jury.[82] And it is accordingly held by the great weight of authority that it is the duty of the court to state to the jury the issues made by the pleadings, and erroneous to read the pleadings to the jury or refer them to the pleadings to ascertain the issues in the case.[83] A departure from this well-settled practice, it is

76. Nuckells *v.* Gaut, 12 Colo. 361, 21 Pac. 41. And see Maier *v.* Massachusetts Ben. Assoc., 107 Mich. 687, 65 N. W. 552.

77. Garey *v.* Sangston, 64 Md. 31, 20 Atl. 1034. And see Robbins *v.* Roth, 95 Ill. 464.

78. Kennedy *v.* Roberts, 105 Iowa 521, 75 N. W. 363; People *v.* Waters, 114 N. Y. App. Div. 669, 100 N. Y. Suppl. 177 [*affirmed* in 188 N. Y. 632, 81 N. E. 1171].

79. *Alabama.*— Chandler *v.* Jost, 96 Ala. 596, 11 So. 636; Udell *v.* Schaungut, 93 Ala. 302, 9 So. 550; Waxelbaum *v.* Bell, 91 Ala. 331, 8 So. 571; Birmingham Fire Brick Works *v.* Allen, 86 Ala. 185, 5 So. 454; Callan *v.* McDaniel, 72 Ala. 96; Whilden *v.* Merchants', etc., Nat. Bank, 64 Ala. 1, 38 Am. Rep. 1; Durr *v.* Jackson, 59 Ala. 203; Smith *v.* Fellows, 58 Ala. 467; Hart *v.* Bray, 50 Ala. 446.

Georgia.— Ellis *v.* Doe, 10 Ga. 253.

Illinois.—Warner *v.* Dunnavan, 23 Ill. 380.

Minnesota.— McCormick *v.* Louden, 64 Minn. 509, 67 N. W. 366.

New York.— Springsteed *v.* Lawson, 14 Abb. Pr. 328.

Oregon.— Schoellhamer *v.* Rometsch, 26 Oreg. 394, 38 Pac. 344.

Pennsylvania.— Peirson *v.* Duncan, 162 Pa. St. 187, 29 Atl. 733.

Washington.— McQuillan *v.* Seattle, 13 Wash. 600, 43 Pac. 893; Box *v.* Kelso, 5 Wash. 360, 31 Pac. 973.

United States.— Locke *v.* U. S., 15 Fed. Cas. No. 8,442, 2 Cliff. 574.

See 46 Cent. Dig. tit. "Trial," § 629.

80. *Alabama.*— Krass *v.* Lawrence, 158 Ala. 652, 47 So. 574; Edmondson *v.* Anniston City Land Co., 128 Ala. 589, 29 So. 596; Alabama, etc., R. Co. *v.* Burgess, 119 Ala. 555, 25 So. 251, 72 Am. St. Rep. 943; Forst *v.* Leonard, 116 Ala. 82, 22 So. 481; Drennen *v.* Smith, 115 Ala. 396, 22 So. 442.

Arkansas.— Flowers *v.* Flowers, 74 Ark. 212, 85 S. W. 242.

Colorado.— Perkins *v.* Marrs, 15 Colo. 262, 25 Pac. 168.

Indiana.— Pope *v.* Branch County Sav. Bank, 23 Ind. App. 210, 54 N. E. 835.

Louisiana.— Milne *v.* Pontchartrain R. Co., 9 La. 252.

Massachusetts.— Reed *v.* Call, 5 Cush. 14.

Michigan.—Davis *v.* Michigan Cent. R. Co., 147 Mich. 479, 111 N. W. 76; Hitchcock *v.* Supreme Tent K. M. W., 107 Mich. 391, 65 N. W. 285.

Minnesota.— Lahr *v.* Kraemer, 91 Minn. 26, 97 N. W. 418.

Nebraska.— Brownell *v.* Fuller, 60 Nebr. 558, 83 N. W. 669.

New York.— Thomas *v.* Union R. Co., 18 N. Y. App. Div. 185, 45 N. Y. Suppl. 920; Gardner *v.* Picket, 19 Wend. 186.

North Carolina.— Ray *v.* Lipscomb, 48 N. C. 185.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Hagan, 47 Pa. St. 244, 86 Am. Dec. 541.

Texas.— Blum *v.* Stein, 68 Tex. 608, 5 S. W. 454; Pierce *v.* Schram, (Civ. App. 1899) 53 S. W. 716.

Wisconsin.— Anderson *v.* Horlick's Malted Milk Co., 137 Wis. 569, 119 N. W. 342.

81. Thomas *v.* Union R. Co., 18 N. Y. App. Div. 185, 45 N. Y. Suppl. 920; U. S. Smelting Co. *v.* Parry, 166 Fed. 407, 92 C. C. A. 159. And see Allend *v.* Spokane Falls, etc., R. Co., 21 Wash. 324, 58 Pac. 244.

82. Blackmore *v.* Missouri Pac. R. Co., 162 Mo. 455, 62 S. E. 993.

83. *Alabama.*— Western Union Tel. Co. *v.* Northcutt, 158 Ala. 539, 48 So. 553, 132 Am. St. Rep. 38; Alabama Great Southern R. Co. *v.* McWhorter, 156 Ala. 269, 47 So. 84; Birmingham R. Co. *v.* Hayes, 153 Ala. 178, 44 So. 1032.

Colorado.— Brooklyn Consol. Min. Co. *v.* Peterson, 11 Colo. 80, 16 Pac. 563.

Iowa.— Shebeck *v.* National Cracker Co., 120 Iowa 414, 94 N. W. 930; Hankins *v.* Hankins, (1899) 79 N. W. 278; Swanson *v.* Allen, 108 Iowa 419, 79 N. W. 132; Robinson *v.* Berkey, 100 Iowa 136, 69 N. W. 434, 62 Am. St. Rep. 549; West *v.* Averill Grocery Co., 109 Iowa 488, 80 N. W. 555; Ft. Madison *v.* Moore, 109 Iowa 476, 80 N. W. 527; Keatley *v.* Illinois Cent. R. Co., 94 Iowa 685, 63 N. W. 560; Burns *v.* Oliphant, 78 Iowa

said, is especially hurtful and to be condemned, where the pleadings are prolix

456, 43 N. W. 289; Lindsay *v.* Des Moines, 68 Iowa 368, 27 N. W. 283; Bryan *v.* Chicago, etc., R. Co., 63 Iowa 464, 19 N. W. 295; Porter *v.* Knight, 63 Iowa 365, 19 N. W. 282; Fitzgerald *v.* McCarty, 55 Iowa 702, 8 N. W. 646; Reid *v.* Mason, 14 Iowa 541. And see McDonald *v.* Bice, 113 Iowa 44, 84 N. W. 985.

Kansas.— Kansas City, etc., R. Co. *v.* Dalton, 66 Kan. 799, 72 Pac. 209; Stevens *v.* Maxwell, 65 Kan. 835, 70 Pac. 873; Kansas City, etc., R. Co. *v.* Eagan, 64 Kan. 421, 67 Pac. 887.

Kentucky.— Tipton *v.* Triplett, 1 Metc. 570; South Covington, etc., R. Co. *v.* Streh, 66 S. W. 177, 23 Ky. L. Rep. 1807, 57 L. R. A. 875.

Maine.— McLellan *v.* Wheeler, 70 Me. 285.

Missouri.— Jaffi *v.* Missouri Pac. R. Co., 205 Mo. 450, 103 S. W. 1026; Fisher *v.* St. Louis Transit Co., 198 Mo. 562, 95 S. W. 917; Blackmore *v.* Missouri Pac. R. Co., 162 Mo. 455, 62 S. W. 993; Lloyd *v.* St. Louis, etc., R. Co., 128 Mo. 595, 29 S. W. 153, 31 S. W. 110; Britton *v.* St. Louis, 120 Mo. 437, 25 S. W. 366; Dassler *v.* Wisley, 32 Mo. 498; Webb *v.* Carter, 121 Mo. App. 147, 98 S. W. 776; Proctor *v.* Loomis, 35 Mo. App. 482; Gessley *v.* Missouri Pac. R. Co., 26 Mo. App. 156; McGinnis *v.* Missouri Pac. R. Co., 21 Mo. App. 399.

Nebraska.— Home Sav. Bank *v.* Stewart, 78 Nebr. 624, 110 N. W. 947; Murray *v.* Burd, 65 Nebr. 427, 91 N. W. 278; Barney *v.* Pinkham, 37 Nebr. 664, 56 N. W. 323; Ferris *v.* Marshall, 1 Nebr. (Unoff.) 377, 96 N. W. 602.

North Carolina.— Burton *v.* Rosemary Mfg. Co., 132 N. C. 17, 43 S. E. 480.

Ohio.— Baltimore, etc., R. Co. *v.* Lockwood, 72 Ohio St. 586, 74 N. E. 1071; Madisonville *v.* Rogger, 28 Ohio Cir. Ct. 834; Russell *v.* Weiler, 28 Ohio Cir. Ct. 176.

Pennsylvania.— Herstine *v.* Lehigh Valley R. Co., 151 Pa. St. 244, 25 Atl. 104.

Tennessee.— East Tennessee, etc., R. Co. *v.* Lee, 90 Tenn. 570, 18 S. W. 268.

Texas.— Smyth *v.* Caswell, 67 Tex. 567, 4 S. W. 848; Barkley *v.* Tarrant County, 53 Tex. 251; Bradshaw *v.* Mayfield, 24 Tex. 481; Texas, etc., R. Co. *v.* Mortensen, 27 Tex. Civ. App. 106, 66 S. W. 99; San Antonio, etc., R. Co. *v.* De Ham, (Tex. Civ. App. 1899) 54 S. W. 395. *Contra*, Austin City Water Co. *v.* Capital Ice Co., 1 Tex. App. Civ. Cas. § 1132. And *compare* Houston Electric Co. *v.* Nelson, 34 Tex. Civ. App. 72, 77 S. W. 978, in which it is said that the practice of referring the jury to the pleadings although not reversible error should not be encouraged.

See 46 Cent. Dig. tit. "Trial," §§ 478, 528, 529.

But see Blair-Baker Horse Co. *v.* Columbus First Nat. Bank, 164 Ind. 77, 72 N. E. 1027 (holding that, although it is not error to incorporate the pleadings in instructions, it is the better practice for the court to advise or instruct the jury as to the issues in the case); Clouser *v.* Ruckman, 104 Ind. 588, 4 N. E. 202 (holding that the court may without error read the complaint to the jury in the course of its instructions); Baltzer *v.* Chicago, etc., R. Co., 89 Wis. 257, 60 N. W. 716 (holding that it is not error for the court to read the pleadings to the jury that they may know the real issues in the case); Sturgeon *v.* Sturgeon, 4 Ind. App. 232, 30 N. E. 805 (holding that the complaint may be read to the jury where they are informed that the burden is on plaintiff to prove its material allegations).

To leave it to the jury to determine the material issues in a case is error. McLean *v.* Clark, 47 Ga. 24; Fleischmann *v.* Miller, 38 Mo. App. 177.

Where there are no written pleadings, it is the duty of the court to frame issues from the evidence and submit to the jury the disputed issues of fact. Coxe *v.* Singleton, 139 N. C. 361, 51 S. E. 1019.

Where there is but one controverted issue, the court may properly so instruct the jury. De Graffenreid *v.* Menard, 103 Ga. 651, 30 S. E. 560.

In an action against two defendants who pleaded separate defenses, the court, in its statement of the defenses in its charge, should correctly inform the jury as to the issues separately made by each defendant. Baldwin *v.* Self, 52 Tex. Civ. App. 509, 114 S. W. 427.

Instruction not in violation of rule.— An instruction that if plaintiff was the owner of the barn, contents, and hog-pen mentioned in plaintiff's petition, and such property was destroyed by fire from one of defendant's engines, defendant was liable for the damage, regardless of whether it was negligent or not, was not objectionable as referring the jury to the petition for the issues. Big River Lead Co. *v.* St. Louis, etc., R. Co., 123 Mo. App. 394, 101 S. W. 636. An instruction which refers to the petition for the purpose of identifying a thing about which an issue was raised is not open to the objection that it refers the jury to the petition to determine what the issues are. Dwyer *v.* St. Louis Transit Co., 108 Mo. App. 152, 83 S. W. 303. For other instructions held not objectionable as referring the jury to the pleadings for the issues see Donk Bros. Coal, etc., Co. *v.* Thil, 228 Ill. 233, 81 N. E. 857 [*affirming* 128 Ill. App. 249]; Jenks *v.* Lansing Lumber Co., 97 Iowa 342, 66 N. W. 231; Taylor *v.* Scherpe, etc., Architectural Iron Co., 133 Mo. 349, 34 S. W. 581; Sherwood *v.* Grand Ave. R. Co., 132 Mo. 339, 33 S. W. 774; Britton *v.* St. Louis, 120 Mo. 437, 25 S. W. 366.

Necessity of request for more specific instructions.— It has been held that an instruction referring the jury to the petition to ascertain the acts of negligence is not error in the absence of a request for a more specific charge. St. Louis Southwestern R. Co. *v.* Harrison, 32 Tex. Civ. App. 368, 73 S. W. 38.

and contain important and intricate statements of fact;[84] and is reversible error where the pleadings are so involved as to make it doubtful whether the jury could understand the issues raised thereby,[85] or where the allegations are broader than the proofs,[86] unless the issues are clearly stated in other portions of the instructions.[87] It has been held, however, that failure to state the issues is not erroneous, or at least not prejudicial error, where the issues are simple and easily understood from the pleadings,[88] or when the parties agree that the pleadings shall form part of the instructions.[89] A reference by the court to the pleadings,[90] or the incorporation thereof in the instructions, is not prejudicial error, when the issues are clearly stated in other portions of the instructions.[91] And an instruction is not erroneous merely because it refers the jury to the pleadings for a narration of the facts therein contained.[92]

b. Requisites and Sufficiency of Statement[93]— (i) *In General.* The court should state fully to the jury the issues made by the pleadings,[94] but if the real issues be pointed out no particular method need be adopted.[95] Where the issues as stated by the court are such as enable the parties to present every phase of their contentions, the statement will be sufficient.[96] If the pleadings contain matters of evidence rather than ultimate facts, the court sufficiently states the issues by stating the ultimate facts pleaded;[97] and this, it has been said, is the

In Illinois, the practice of referring the jury to the pleadings for the issues has been frequently disapproved, but is not regarded as ground of reversal if no question of law as to what are the material allegations is submitted in that way. Dickson *v.* George B. Swift Co., 238 Ill. 62, 87 N. E. 59 [*affirming* 142 Ill. App. 655]; Pittsburg, etc., R. Co. *v.* Kinnare, 203 Ill. 388, 67 N. E. 826; West Chicago St. R. Co. *v.* Liesecowitz, 197 Ill. 607, 64 N. E. 718; Illinois Cent. R. Co. *v.* King, 179 Ill. 91, 53 N. E. 552, 70 Am. St. Rep. 93; Chicago City R. Co. *v.* Mauger, 105 Ill. App. 579.

84. Stevens *v.* Maxwell, 65 Kan. 835, 70 Pac. 873.

85. Kansas City, etc., R. Co. *v.* Dalton, 66 Kan. 799, 72 Pac. 209; Bering Mfg. Co. *v.* Femelat, 35 Tex. Civ. App. 36, 79 S. W. 869. And see *supra*, cases cited in first note in this section.

86. Remmler *v.* Shenuit, 15 Mo. App. 192.

87. Livingston *v.* Stevens, 122 Iowa 62, 94 N. W. 925.

88. McDivitt *v.* Des Moines City R. Co., 141 Iowa 689, 118 N. W. 459; Graybill *v.* Chicago, etc., R. Co., 112 Iowa 738, 84 N. W. 946; Dorr *v.* Simerson, 73 Iowa 89, 34 N. W. 752; Crawford *v.* Nolan, 72 Iowa 673, 34 N. W. 754; Little *v.* McGuire, 43 Iowa 447; City of South Omaha *v.* Ruthjen, 71 Nebr. 545, 99 N. W. 240; Lambert *v.* La Conner Trading, etc., Co., 37 Wash. 113, 79 Pac. 608. And see Union Gold Min. Co. *v.* Crawford, 29 Colo. 511, 69 Pac. 600; Kemp *v.* Slocum, 78 Nebr. 440, 110 N. W. 1024. Especially where the issues have probably been correctly stated by counsel. Cody *v.* Market St. R. Co., 148 Cal. 90, 82 Pac. 666.

89. Dean *v.* Carpenter, 134 Iowa 275, 111 N. W. 815; Trumble *v.* Happy, 114 Iowa 624, 87 N. W. 678; De Wulf *v.* Dix, 110 Iowa 553, 81 N. W. 779; Burns *v.* Oliphant, 78 Iowa 456, 43 N. W. 289.

90. Holt *v.* Smith, 74 Iowa 667, 39 N. W. 81; Drake *v.* Chicago, etc., R. Co., 70 Iowa 59, 29 N. W. 804; Paddock *v.* Bartlett, 68 Iowa 16, 25 N. W. 906; Myer *v.* Moon, 45 Kan. 580, 26 Pac. 40; Union Pac. R. Co. *v.* Sternberger, 8 Kan. App. 131, 54 Pac. 1101; East Line, etc., R. Co. *v.* Smith, 65 Tex. 167.

It is not error to say to the jury that they can take the pleadings with them and see what issues are raised where the court has stated the issues. Franklin *v.* Atlanta, etc., R. Co., 74 S. C. 332, 54 S. E. 578.

91. Hankins *v.* Hankins, (Iowa 1899) 79 N. W. 278; Morrison *v.* Burlington, etc., R. Co., 84 Iowa 663, 51 N. W. 75. And see Young *v.* Clegg, 93 Ind. 371, holding that where the issues are correctly stated in the charge, an inaccurate statement of the pleadings in a single charge is harmless, if it could not have misled the jury.

92. Marion *v.* Chicago, etc., R. Co., 64 Iowa 568, 21 N. W. 86.

93. **Failure to state as ground for new trial** see New Trial, 29 Cyc. 788.

94. Potter *v.* Chicago, etc., R. Co., 46 Iowa 399; Safety Fund Nat. Bank *v.* Westlake, 21 Mo. App. 565.

95. Fath *v.* Thompson, 58 N. J. L. 180, 33 Atl. 391.

96. Ratliff *v.* Ratliff, 131 N. C. 425, 42 S. E. 887, 63 L. R. A. 963; Coley *v.* Statesville, 121 N. C. 301, 28 S. E. 482. And see Van Orman *v.* Lake Shore, etc., R. Co., 152 Mich. 185, 115 N. W. 968, holding that where the theories of all the parties are explicitly stated by the court so far as sustained by the evidence and the issues in the case and law applicable to them are definitely explained, the instructions are sufficient.

The form and number of the issues are not material, if those submitted are germane and offer each party a fair opportunity to present his version of the facts and his view of the law, so that the case may be tried on the merits. Horne *v.* Consolidated R., etc., Co., 144 N. C. 375, 57 S. E. 19.

97. Murphey *v.* Virgin, 47 Nebr. 692, 66 N. W. 652.

better practice, because the issues might otherwise be obscured and the jurors in consequence misled.[98] In charging the jury the court is not required to make a brief presentation of the issues raised by the pleadings, as a preface to the law embodied in the charge, where the issues are sufficiently pointed out during its course.[99] Nor is it necessary that the issues be stated in a single paragraph of the charge. If they are fairly stated to the jury in some part of the charge in such manner as to be understood by the jury, this will be sufficient.[1] It is the entire series that is to be considered in determining the question whether the jury could be misled thereby.[2] Where the issues have been fairly stated by the court, a repetition thereof in instructions asked by counsel is properly refused.[3] And when it has fully instructed on the issues at the request of the parties it may omit reference thereto in instructions given on its motion.[4] Where the charge contains no adequate statement of the issues and its effect is necessarily misleading and unfair the judgment should be reversed.[5]

(II) *Misstatement of Issues and Its Effect.*[6] An instruction which misstates the issues or defenses is erroneous [7] and is properly refused,[8] and the giving thereof is a ground for reversal if it has a tendency to confuse or mislead the jury.[9] The defect is not cured by subsequent instructions correctly stating the issues.[10] Nevertheless, slight inaccuracies in stating the issues will not warrant a reversal. It is the duty of counsel, if he desires a more accurate statement of the issues, to ask for it; otherwise he will have no ground for complaint.[11]

98. Trott *v.* Chicago, etc., R. Co., 115 Iowa 80, 86 N. W. 33, 87 N. W. 722.

99. Galveston, etc., R. Co. *v.* Hitzfelder, 24 Tex. Civ. App. 318, 66 S. W. 707.

1. *Illinois.*— Catholic Order of Foresters *v.* Fitz, 181 Ill. 206, 54 N. E. 952 [*affirming* 81 Ill. App. 389]; Chicago *v.* Schmidt, 107 Ill. 186.

Indiana.— Haymond *v.* Saucer, 84 Ind. 3.

Iowa.— Timins *v.* Chicago, etc., R. Co., 72 Iowa 94, 33 N. W. 379.

Kansas.— Chicago, etc., R. Co. *v.* Groves, 56 Kan. 601, 44 Pac. 628.

Missouri.— State *v.* Hope, 102 Mo. 410, 14 S. W. 985; Fullerton *v.* St. Louis, etc., R. Co., 84 Mo. App. 498; Carroll *v.* People's R. Co., 60 Mo. App. 465.

Texas.— Missouri Valley Bridge, etc., Co. *v.* Ballard, (Civ. App. 1909) 116 S. W. 93.

2. Catholic Order of Foresters *v.* Fitz, 181 Ill. 206, 54 N. E. 952.

3. Richmond *v.* Sundburg, 77 Iowa 255, 42 N. W. 184; Coley *v.* Statesville, 121 N. C. 301, 28 S. E. 482. And see Scott *v.* Provo City, 14 Utah 31, 45 Pac. 1005.

Illustration.— Where an instruction is a correct statement of the respective contentions of the parties on a given point, it was not a good assignment of error thereon that the court failed to charge what would be the legal effect of a finding by the jury that plaintiff's contention was true. Foote *v.* Kelley, 126 Ga. 799, 55 S. E. 1045.

4. Minden *v.* Vedene, 72 Nebr. 657, 101 N. W. 330.

5. Stuart *v.* Line, 11 Pa. Super. Ct. 345.

6. **As ground for new trial** see New Trial, 29 Cyc. 788.

7. Galloway *v.* Hicks, 26 Nebr. 531, 42 N. W. 709; Chicago, etc., R. Co. *v.* Clinebell, 5 Nebr. (Unoff.) 603, 99 N. W. 839; Gulf, etc., R. Co. *v.* Walters, 49 Tex. Civ. App. 71, 107 S. W. 369.

Instruction in violation of rule.— Where, in an action for breach of contract to deliver goods, defendant pleaded a general denial, and alleged that he never agreed to deliver the goods at any specified time, a charge that defendant had pleaded the general denial, and that no contract had been made for the sale and delivery of the goods "at any time," was erroneous for misstating the defense. Earnest *v.* Waggoner, 49 Tex. Civ. App. 298, 108 S. W. 495.

8. Beauerle *v.* Michigan Cent. R. Co., 152 Mich. 345, 116 N. W. 424.

9. Nelson *v.* Spears, 16 Mont. 351, 40 Pac. 786; Howell *v.* Wilcox, etc., Sewing Mach. Co., 12 Nebr. 177, 10 N. W. 700. And see Klosterman *v.* Olcott, 27 Nebr. 685, 43 N. W. 422.

Illustration.— Where the court, in charging as to the respective contentions of the parties, fails to correctly present those of the losing party, and practically instructs the jury that he admitted the contention of the opposite party concerning one of the vital issues, a new trial is demanded. Hightower *v.* Ansley, 126 Ga. 8, 54 S. E. 939. It is reversible error for the court to submit the case on an entirely different theory from that claimed in the declaration. Reed *v.* Gould, 93 Mich. 359, 53 N. W. 356.

10. Howell *v.* Wilcox, etc., Sewing Mach. Co., 12 Nebr. 177, 10 N. W. 700.

11. Low *v.* Warden, 77 Cal. 94, 19 Pac. 235; Kimble *v.* Seal, 92 Ind. 276; Schenck *v.* Sithoff, 75 Ind. 485; Comes *v.* Chicago, etc., R. Co., 78 Iowa 391, 43 N. W. 235; Sage *v.* Haines, 76 Iowa 581, 41 N. W. 366; Milmo *v.* Adams, 79 Tex. 526, 15 S. W. 690; Bell *v.* Brazley, 18 Tex. Civ. App. 639, 45 S. W. 401. And see Wood *v.* Wells, 103 Mich. 320, 61 N. W. 503.

Illustration.— Where the court in charging the jury instructs them correctly as to the

4. Applicability of Instructions to Pleadings and Evidence [12]**— a. Confining Instructions to Issues Raised by Pleadings and Evidence** — (i) *In General.* Instructions should be confined to the issues presented by the pleadings and the evidence.[13] It is improper to give an instruction announcing a naked legal proposition, however correct it may be, unless it bears upon and is connected with the issues involved; and unless, further, there has been received some competent evidence to which the jury may apply it.[14] Such an instruction tends to distract

questions which they are called upon to consider and decide, under the pleadings and the evidence, it does not commit an error for which the judgment will be reversed, even if it misconstrues one of the pleadings in the case, in giving such instruction. Stark *v.* Willetts, 8 Kan. 203.

12. Failure to confine instructions to pleadings and evidence as ground for new trial see New Trial, 29 Cyc. 786 *et seq.*

In actions by buyer for breach of contract of sale see Sales, 35 Cyc. 650.

In actions by seller for price of goods see Sales, 35 Cyc. 576.

In actions for injuries at crossings see Railroads, 33 Cyc. 1129 *et seq.*

In actions for injuries by fires caused by operation of railroad see Railroads, 33 Cyc. 1399.

In actions for injuries to animals on or near railroad tracks see Railroads, 33 Cyc. 1313.

In actions for negligence see Negligence, 29 Cyc. 646.

In actions of tort against municipal corporations see Municipal Corporations, 28 Cyc. 1519 *et seq.*

In actions to avoid fraudulent conveyances see Fraudulent Conveyances, 20 Cyc. 810 *et seq.*

In criminal prosecutions see Criminal Law, 12 Cyc. 651 *et seq.*

Non-applicability as ground for new trial see New Trial, 29 Cyc. 786 *et seq.*

13. *Arkansas.*— Taylor *v.* McClintock, 87 Ark. 243, 112 S. W. 405.

California.— Sargent *v.* Linden Min. Co., 55 Cal. 204.

Georgia.— Humphreys *v.* Smith, 128 Ga. 549, 58 S. E. 26; Savannah Electric Co. *v.* Elarbee, 6 Ga. App. 137, 64 S. E. 570.

Illinois.— Himrod Coal Co. *v.* Clingan, 114 Ill. App. 568.

Indiana.— Patterson *v.* Doe, 8 Blackf. 237.

Iowa.— Wood *v.* Hallowell, 68 Iowa 377, 27 N. W. 263.

Kentucky.— Bauer Cooperage Co. *v.* Shelton, (1908) 114 S. W. 257.

Maryland.— Baltimore El. Co. *v.* Neal, 65 Md. 438, 5 Atl. 338.

Missouri.— Meily *v.* St. Louis, etc., R. Co., 215 Mo. 567, 114 S. W. 1013; Waddingham *v.* Hulett, 92 Mo. 528, 5 S. W. 27; Eames *v.* New York L. Ins. Co., 134 Mo. App. 331, 114 S. W. 85.

Nebraska.— Fink *v.* Busch, 83 Nebr. 599, 120 N. W. 167; Hall *v.* Strode, 19 Nebr. 658, 28 N. W. 312; Frederick *v.* Kinzer, 17 Nebr. 366, 22 N. W. 770; Rath *v.* Rath, 2 Nebr. (Unoff.) 600, 89 N. W. 612.

Texas.— Houston, etc., R. Co. *v.* Shapard, (Civ. App. 1909) 118 S. W. 596; Nash *v.* Noble, 46 Tex. Civ. App. 369, 102 S. W. 736.

No instruction necessary on issue not presented.— Birmingham R., etc., Co. *v.* Moore, 151 Ala. 327, 43 So. 841; Alsop *v.* Swathel, 7 Conn. 500; Dugane *v.* Hvezda Pokroku No. 4, (Iowa 1909) 119 N. W. 141; Russell *v.* Gregg, 49 Kan. 89, 30 Pac. 185; Westcott *v.* Garrison, 6 N. J. L. 132; Gulf Cooperage Co. *v.* Abernathy, (Tex. Civ. App. 1909) 116 S. W. 869.

An instruction referring to an abandoned issue is erroneous and properly refused. McWhorter *v.* O'Neal, 123 Ga. 247, 51 S. E. 288; Dolan *v.* Jean, 35 Iowa 413; Purdom *v.* Brussels, 66 S. W. 22, 23 Ky. L. Rep. 1796; Dronenburg *v.* Harris, 108 Md. 597, 71 Atl. 81; Gulf, etc., R. Co. *v.* Warner, 22 Tex. Civ. App. 167, 54 S. W. 1064.

14. *Alabama.*—Dunlap *v.* Robinson, 28 Ala. 100.

Arizona.— Gila Valley, etc., R. Co. *v.* Lyon, 8 Ariz. 118, 71 Pac. 957.

Arkansas.— Eureka Stone Co. *v.* Knight, 82 Ark. 164, 100 S. W. 878.

Colorado.— San Miguel Consol. Gold Min. Co. *v.* Stubbs, 39 Colo. 359, 90 Pac. 842; Atchison, etc., R. Co. *v.* Adcock, 38 Colo. 369, 88 Pac. 180; Aliunde Consol. Min. Co. *v.* Arnold, 16 Colo. App. 542, 67 Pac. 28; Beck *v.* Trimble, 14 Colo. App. 195, 59 Pac. 412.

Georgia.— Southern R. Co. *v.* O'Bryan, 115 Ga. 659, 42 S. E. 42; Coweta County *v.* Central of Georgia R. Co., 4 Ga. App. 94, 60 S. E. 1018; Stiles *v.* Shedden, 2 Ga. App. 317, 58 S. E. 515.

Illinois.— Spring Valley Coal Co. *v.* Robizas, 207 Ill. 226, 69 N. E. 925; Chicago, etc., R. Co. *v.* Utley, 38 Ill. 410; Tripoli Sav. Bank *v.* Schnadt, 135 Ill. App. 373.

Indiana.— Pelley *v.* Wills, 141 Ind. 688, 41 N. E. 354.

Iowa.— Hardwick *v.* Hardwick, 130 Iowa 230, 106 N. W. 639.

Kansas.— Arkansas City First Nat. Bank *v.* Skinner, 10 Kan. App. 517, 62 Pac. 705.

Kentucky.— The Blue Wing *v.* Buckner, 12 B. Mon. 246; Doe *v.* Garrison, 1 Dana 35; Baltimore, etc., R. Co. *v.* Sheridan, 101 S. W. 928, 31 Ky. L. Rep. 109; Hutchison *v.* Maysville, 100 S. W. 331, 30 Ky. L. Rep. 1173.

Missouri.— Camp *v.* Heelan, 43 Mo. 591; Gerber *v.* Kansas City, 105 Mo. App. 191, 79 S. W. 717.

Montana.— Mitchell *v.* Henderson, 37 Mont. 515, 97 Pac. 942; Portland First Nat. Bank *v.* Carroll, 35 Mont. 302, 88 Pac. 1012.

Nebraska.— Boesen *v.* Omaha St. R. Co., 83 Nebr. 378, 119 N. W. 771; Thom *v.* Dodge County, 64 Nebr. 845, 90 N. W. 763.

the minds of the jury from the real question submitted to them for determination, and thereby mislead them,[15] and, if requested, may properly be refused.[16] But,

Ohio.— Cincinnati Traction Co. *v.* Forrest, 73 Ohio St. 1, 75 N. E. 818; Northern Ohio Traction Co. *v.* Drown, 28 Ohio Cir. Ct. 735.

Texas.— Houston, etc., R. Co. *v.* Mathis, (Civ. App. 1898) 48 S. W. 625.

When instruction not abstract.— It has been held that an instruction is not abstract, if there be any evidence from which the jury might infer the existence of the fact supposed. Arkadelphia Lumber Co. *v.* Asman, 85 Ark. 568, 107 S. W. 1171.

15. *Colorado.*— Beck *v.* Trimble, 14 Colo. App. 195, 59 Pac. 412.

Florida.— Porter *v.* Ferguson, 4 Fla. 102.

Georgia.— Planters' Bank *v.* Richardson, 15 Ga. 277; Webb *v.* Robinson, 14 Ga. 216; Gorman *v.* Campbell, 14 Ga. 137.

Nebraska.— Meyer *v.* Midland Pac. R. Co., 2 Nebr. 319.

Texas.— Ross *v.* Hawley, 3 Tex. App. Civ. Cas. § 107.

United States.— Salmon *v.* Helena Box Co., 158 Fed. 300, 85 C. C. A. 551.

16. *Alabama.*— Woodstock Iron Works *v.* Kline, 149 Ala. 391, 43 So. 362; Moore *v.* Florence First Nat. Bank, 139 Ala. 595, 36 So. 777; Troy *v.* Rogers, 113 Ala. 131, 20 So. 999.

Arizona.— Ewing *v.* U. S., 11 Ariz. 1, 89 Pac. 593.

Arkansas.— Bryant Lumber Co. *v.* Stastney, 87 Ark. 321, 112 S. W. 740; St. Louis, etc., R. Co. *v.* Brooksher, 86 Ark. 91, 109 S. W. 1169; Ong Chair Co. *v.* Cook, 85 Ark. 390, 108 S. W. 203.

California.— Conlin *v.* San Francisco, etc., R. Co., 36 Cal. 404.

Colorado.— Colorado Springs, etc., R. Co. *v.* Nichols, 41 Colo. 272, 92 Pac. 691, 20 L. R. A. N. S. 215; Johnson *v.* Jones, 16 Colo. 138, 26 Pac. 584.

Connecticut.— Kelley *v.* Torrington, 80 Conn. 378, 68 Atl. 855; Cowles *v.* Bacon, 21 Conn. 451, 56 Am. Dec. 371.

Florida.— Whitner *v.* Hamlin, 12 Fla. 18; Judge *v.* Moore, 9 Fla. 269.

Georgia.— Mulherin *v.* Kennedy, 120 Ga. 1080, 48 S. E. 437; Conant *v.* Jones, 120 Ga. 568, 48 S. E. 234; Farmers' Banking Co. *v.* Key, 112 Ga. 301, 37 S. E. 447.

Idaho.— Johnson *v.* Fraser, 2 Ida. (Hasb.) 404, 18 Pac. 48; Henry *v.* Jones, 1 Ida. 48.

Illinois.— Kenyon *v.* Chicago City R. Co., 235 Ill. 406, 85 N. E. 660; McKenzie Furnace Co. *v.* Mallers, 231 Ill. 561, 83 N. E. 451; Martin *v.* Hertz, 224 Ill. 84, 79 N. E. 558; Chicago City R. Co. *v.* Reddick, 139 Ill. App. 160.

Indiana.— Whiteman *v.* Whiteman, 152 Ind. 263, 53 N. E. 225; Indianapolis, etc., R. Co. *v.* Bush, 101 Ind. 582; Musselman *v.* Pratt, 44 Ind. 126.

Iowa.— Ranck *v.* Cedar Rapids, 134 Iowa 563, 111 N. W. 1027; McBride *v.* Des Moines City R. Co., 134 Iowa 398, 109 N. W. 618; Wendel *v.* Mallory Commission Co., 122 Iowa 712, 98 N. W. 612.

Kansas.— Abilene *v.* Hendricks, 36 Kan. 196, 13 Pac. 121; State *v.* Medlicott, 9 Kan. 257.

Kentucky.— Hord *v.* Grimes, 13 B. Mon. 188; Brown *v.* Wilson, 1 Litt. 229.

Maine.— Norton *v.* Kidder, 54 Me. 189; Hathorn *v.* Stinson, 10 Me. 224, 25 Am. Dec. 228.

Maryland.— Jones *v.* Mechanics' Bank, 8 Gill 123.

Massachusetts.— Way *v.* Greer, 196 Mass. 237, 81 N. E. 1002; Cunningham *v.* Davis, 175 Mass. 213, 56 N. E. 2; Howes *v.* Grush, 131 Mass. 207.

Michigan.— Mosaic Tile Co. *v.* Chiera, 133 Mich. 497, 95 N. W. 537; Eklund *v.* Toner, 121 Mich. 687, 80 N. W. 791; Schoenberg *v.* Voigt, 36 Mich. 310.

Minnesota.— Shartle *v.* Minneapolis, 17 Minn. 308; Sanborn *v.* School Dist. No. 10, 12 Minn. 17; Derby *v.* Gallup, 5 Minn. 119.

Mississippi.— Brown *v.* Walker, (1892) 11 So. 724; Dennis *v.* Jones, 31 Miss. 606; O'Reilly *v.* Hendricks, 2 Sm. & M. 388.

Missouri.— De Donato *v.* Morrison, 160 Mo. 581, 61 S. W. 641; Hollein *v.* St. Louis, 130 Mo. 287, 32 S. W. 640; Gibeline *v.* Smith, 106 Mo. App. 545, 80 S. W. 961.

Nebraska.— Harvey *v.* Harvey, 75 Nebr. 557, 106 N. W. 660; Hurlbut *v.* Hall, 39 Nebr. 889, 58 N. W. 538; Rath *v.* Rath, 2 Nebr. (Unoff.) 600, 89 N. W. 612.

New Hampshire.— Atherton *v.* Tilton, 44 N. H. 452.

New Jersey.— Mehkanyies *v.* New Jersey St. R. Co., (Sup. 1902) 52 Atl. 280; New Brunswick Steamboat, etc., Transp. Co. *v.* Tiers, 24 N. J. L. 697, 64 Am. Dec. 394.

New York.— Priebe *v.* Kellogg Bridge Co., 77 N. Y. 597; Sperry *v.* Union R. Co., 129 N. Y. App. Div. 594, 114 N. Y. Suppl. 286; Weitzmann *v.* A. L. Barber Asphalt Co., 129 N. Y. App. Div. 443, 114 N. Y. Suppl. 158.

North Carolina.— Edwards *v.* Western Union Tel. Co., 147 N. C. 126, 60 S. E. 900; McMillan *v.* Baxley, 112 N. C. 578, 16 S. E. 845.

Ohio.— Lear *v.* McMillen, 17 Ohio St. 464.

Oklahoma.— Ralston First Nat. Bank *v.* Walworth, 22 Okla. 878, 98 Pac. 917; Citizens' Bank *v.* Garnett, 21 Okla. 200, 95 Pac. 755.

Oregon.— Pacific Export Lumber Co. *v.* North Pac. Lumber Co., 46 Oreg. 194, 80 Pac. 105; Robert *v.* Parrish, 17 Oreg. 583, 22 Pac. 136.

Rhode Island.— De Coursey *v.* Rhode Island Co., (1906) 67 Atl. 431.

South Carolina.— Harzburg *v.* Southern R. Co., 65 S. C. 539, 44 S. E. 75.

Tennessee.— Ford *v.* Ford, 11 Humphr. 89.

Texas.— Birge-Forbes Co. *v.* St. Louis, etc., R. Co., (Civ. App. 1909) 115 S. W. 333; Missouri, etc., R. Co. *v.* Hollan, 49 Tex. Civ. App. 55, 107 S. W. 642; Antone *v.* Miles, 47 Tex. Civ. App. 289, 107 S. W. 39.

Utah.— Manti City Sav. Bank *v.* Peterson, 33 Utah 209, 93 Pac. 566, 126 Am. St. Rep. 817.

while improper, the giving of abstract instructions will not warrant a reversal, unless injury is shown or the jury were misled.[17]

(II) *Confining Instructions to Issues Raised by Pleadings*[18] — (A) *Statement of Rule.* The general rule is well settled that instructions should

Virginia.— Richmond Traction Co. *v.* Williams, 102 Va. 253, 46 S. E. 292; Shenandoah Valley R. Co. *v.* Moose, 83 Va. 827, 3 S. E. 796; Womack *v.* Circle, 29 Gratt. 192.

West Virginia.— Delmar Oil Co. *v.* Bartlett, 62 W. Va. 700, 59 S. E. 634.

Wisconsin.— Blankavag *v.* Badger Box, etc., Co., 136 Wis. 380, 117 N. W. 852; Bowren *v.* Campbell, 5 Wis. 187.

United States.— J. W. Bishop Co. *v.* Dodson, 152 Fed. 128, 81 C. C. A. 346; Watts *v.* Southern Bell Tel., etc., Co., 66 Fed. 453.

See 46 Cent. Dig. tit. "Trial," § 596 *et seq.*

17. *Alabama.*— Central of Georgia R. Co. *v.* Hyatt, 151 Ala. 355, 43 So. 867; Southern Coal, etc., Co. *v.* Swinney, 149 Ala. 405, 42 So. 808; Owensboro Wagon Co. *v.* Hall, 149 Ala. 210, 43 So. 71.

California.— Slaughter *v.* Fowler, 44 Cal. 195.

Colorado.— Denver Tramway Co. *v.* Owens, 20 Colo. 107, 36 Pac. 848; Perot *v.* Cooper, 17 Colo. 80, 28 Pac. 391, 31 Am. St. Rep. 258.

Connecticut.— Smith *v.* Carr, 16 Conn. 450.

Florida.— Florala Sawmill Co. *v.* Smith, 55 Fla. 447, 46 So. 332; Hooker *v.* Johnson, 10 Fla. 198; Proctor *v.* Hart, 5 Fla. 465.

Georgia.— Turner *v.* Elliott, 127 Ga. 338, 56 S. E. 434.

Illinois.— Wallace *v.* Farmington, 231 Ill. 232, 83 N. E. 180; Anthony Ittner Brick Co. *v.* Ashby, 198 Ill. 562, 64 N. E. 1109 [*affirming* 100 Ill. App. 604]; Taylor *v.* Felsing, 164 Ill. 331, 45 N. E. 161; Utter *v.* Curry, 130 Ill. App. 21.

Indiana.— Salem *v.* Goller, 76 Ind. 291.

Iowa.— McGregor *v.* Armill, 2 Iowa 30.

Kansas.— Meyer *v.* Reimer, 65 Kan. 822, 70 Pac. 869; Zimmerman *v.* Knox, 34 Kan. 245, 8 Pac. 104; Raper *v.* Blair, 24 Kan. 374.

Kentucky.— McIsaacs *v.* Hobbs, 8 Dana 268; Zentzshel *v.* Richie, 110 S. W. 832, 33 Ky. L. Rep. 657.

Maine.— Copeland *v.* Copeland, 28 Me. 525.

Missouri.— Clark *v.* Cox, 118 Mo. 652, 24 S. W. 221; Burdoin *v.* Trenton, 116 Mo. 358, 22 S. W. 728 (holding that an abstract statement of law in an instruction, although erroneous, will not form the basis for a reversal, when accompanied with a further call for a finding of all the facts required by law to create a liability on defendant's part); Hemphill *v.* Kansas City, 100 Mo. App. 563, 75 S. W. 179.

Nebraska.— Sabin *v.* Cameron, 82 Nebr. 106, 117 N. W. 95; Chicago, etc., R. Co. *v.* Jamison, 71 Nebr. 252, 98 N. W. 823; Swift *v.* Holoubek, 60 Nebr. 784, 84 N. W. 249.

New Hampshire.— Smith *v.* New England Bank, 72 N. H. 4, 54 Atl. 385.

New York.— Lake *v.* Wendt, 21 N. Y. App. Div. 276, 48 N. Y. Suppl. 50.

North Carolina.— Ruffin *v.* Atlantic, etc., R. Co., 142 N. C. 120, 55 S. E. 86; Blackwell *v.* Lynchburg, etc., R. Co., 111 N. C. 151, 16 S. E. 12, 32 Am. St. Rep. 786, 17 L. R. A. 729 (holding that defendants cannot complain that, in an action for the killing of decedent by blasting, the court embodied in the charge, as an abstract proposition, what is known as the "rule of the prudent man" in response to its requests, where, in specific instructions, the court correctly applies the law of negligence and contributory negligence to the facts of the case); Evans *v.* Howell, 84 N. C. 460.

Ohio.— Cincinnati Traction Co. *v.* Forrest, 73 Ohio St. 1, 75 N. E. 818.

Oregon.— Salmon *v.* Olds, 9 Oreg. 488.

Pennsylvania.— Maus *v.* Mahoning Tp., 24 Pa. Super. Ct. 624.

South Carolina.— Holmes *v.* Weinheimer, 66 S. C. 18, 44 S. E. 82; Daniels *v.* Florida Cent., etc., R. Co., 62 S. C. 1, 39 S. E. 762, holding that it is not error to instruct, in giving a general definition of contracts, that there can be no binding contracts in case of fraud or misrepresentation, although there is no allegation or proof of fraud or misrepresentation.

Tennessee.— Knoxville Iron Co. *v.* Dobson, 15 Lea 409.

Texas.— Texas, etc., R. Co. *v.* Wright, 62 Tex. 515; Goldstein *v.* Cook, (Civ. App. 1893) 22 S. W. 762.

Vermont.— Smith *v.* Central Vermont R. Co., 80 Vt. 208, 67 Atl. 535.

Virginia.— Newport News, etc., R., etc., Co. *v.* McCormick, 106 Va. 517, 56 S. E. 281; Pasley *v.* English, 10 Gratt. 236.

Washington.— Carstens *v.* Stetson, etc., Mill Co., 14 Wash. 643, 45 Pac. 313.

West Virginia.— Claiborne *v.* Chesapeake, etc., R. Co., 46 W. Va. 363, 33 S. E. 262.

Wisconsin.— Pelton *v.* Spider Lake Sawmill, etc., Co., 132 Wis. 219, 112 N. W. 29, 122 Am. St. Rep. 963.

United States.— Northern Pac. R. Co. *v.* Teeter, 63 Fed. 527, 11 C. C. A. 332.

An erroneous charge upon an immaterial question affords no ground for a writ of error. Tartt *v.* Negris, 127 Ala. 301, 28 So. 713; Antrim Iron Co. *v.* Anderson, 140 Mich. 702, 104 N. W. 319, 112 Am. St. Rep. 434; Coleman *v.* Reynolds, 207 Mo. 463, 105 S. W. 1070; Bertram *v.* People's R. Co., 154 Mo. 639, 55 S. W. 1040; Robinson *v.* Mills, 25 Mont. 391, 65 Pac. 114; Blakeslee *v.* Geneva, 61 N. Y. App. Div. 42, 69 N. Y. Suppl. 1122; Leven *v.* Smith, 1 Den. (N. Y.) 571; Pittsburg Safe Deposit, etc., Co. *v.* Mothiral, 8 Pa. Super. Ct. 433; Endowment Rank K. P. *v.* Steele, 108 Tenn. 624, 69 S. W. 336; San Antonio, etc., R. Co. *v.* Griffin, 20 Tex. Civ. App. 91, 48 S. W. 542.

18. Failure to confine to issues made by pleadings as ground for new trial see New Trial, 29 Cyc. 786 *et seq.*

be confined to the issues made by the pleadings,[19] although the issues are not well pleaded;[20] that an instruction which is based on an issue not raised by the pleadings is erroneous,[21] and may properly be refused.[22]

(B) *Extent and Limits of Rule.* The general rule that it is erroneous to give instructions on issues not made by the pleadings has been applied in many cases

In criminal prosecutions see CRIMINAL LAW, 12 Cyc. 652.

19. *Arkansas.*— St. Louis, etc., R. Co. *v.* Fambro, 88 Ark. 12, 114 S. W. 230; St. Louis, etc., R. Co. *v.* Vaughan, 84 Ark. 311, 105 S. W. 573.

Florida.— Lewter *v.* Tomlinson, 54 Fla. 215, 44 So. 935; Jacksonville Electric Co. *v.* Batchis, 54 Fla. 192, 44 So. 933; Walter *v.* Parry, 51 Fla. 344, 40 So. 69; Hooker *v.* Johnson, 6 Fla. 730.

Georgia.— Cordele Sash, etc., Co. *v.* Wilson Lumber Co., 129 Ga. 290, 58 S. E. 860; Martin *v.* Nichols, 127 Ga. 705, 56 S. E. 995.

Indiana.— Terry *v.* Shively, 64 Ind. 106.

Iowa.— Whitsett *v.* Chicago, etc., R. Co., 67 Iowa 150, 25 N. W. 104.

Michigan.— Smitley *v.* Pinch, 148 Mich. 670, 112 N. W. 686.

Missouri.— State *v.* Allen, 124 Mo. App. 465, 103 S. W. 1090; James *v.* Hicks, 76 Mo. App. 108.

Texas.— Baldwin *v.* Self, 52 Tex. Civ. App. 509, 114 S. W. 427; Kindlea *v.* Kosub, (Civ. App. 1908) 110 S. W. 79.

Utah.— Holt *v.* Pearson, 12 Utah 63, 41 Pac. 560.

Washington.— Kirby *v.* Rainier-Grand Hotel Co., 28 Wash. 705, 69 Pac. 378.

20. Miller *v.* Balthasser, 78 Ill. 302; Low *v.* Getty, 18 Ill. 493.

Demurrer proper remedy.— If the cause of action charged in the declaration is not well pleaded, defendant's proper course is to demur. Miller *v.* Balthasser, 78 Ill. 302. So if plaintiff treats the plea as presenting a good defense, by taking issue on it, the court commits no reversible error in so regarding it, and instructing the jury accordingly, if there be evidence sustaining the plea. Mudge *v.* Treat, 57 Ala. 1. But where a plea is demurred to, and the demurrer sustained, instructions based upon such plea are properly refused. Western Union Tel. Co. *v.* Benson, 159 Ala. 254, 48 So. 712; Secor *v.* Oregon Imp. Co., 15 Wash. 35, 45 Pac. 654.

21. *Alabama.*— Garth *v.* Alabama Traction Co., 148 Ala. 96, 42 So. 627.

Connecticut.— Berman *v.* Kling, 81 Conn. 403, 71 Atl. 507.

Georgia.— Hewitt *v.* Lamb, 130 Ga. 709, 61 S. E. 716.

Illinois.— Chicago, etc., R. Co. *v.* Wolfring, 118 Ill. App. 537; Schmidt *v.* Balling, 91 Ill. App. 388.

Indiana.— Indianapolis Traction, etc., Co. *v.* Beckman, 40 Ind. App. 100, 81 N. E. 82.

Iowa.— Barrett *v.* Wheeler, 66 Iowa 560, 24 N. W. 38.

Kansas.— Oil Well Supply Co. *v.* Johnson, 78 Kan. 751, 98 Pac. 381.

Maryland.— Fletcher *v.* Dixon, 107 Md. 420, 68 Atl. 875; Dick *v.* Biddle, 105 Md. 308, 66 Atl. 21.

Missouri.— People's Bank *v.* Stewart, 136 Mo. App. 24, 117 S. W. 99; Kellogg *v.* Kirksville, 132 Mo. App. 519, 112 S. W. 296.

Montana.— Howie *v.* California Brewery Co., 35 Mont. 264, 88 Pac. 1007.

Nebraska.— Norfolk Beet-Sugar Co. *v.* Hight, 56 Nebr. 162, 76 N. W. 566; McCready *v.* Phillips, 44 Nebr. 790, 63 N. W. 7; Chicago, etc., R. Co. *v.* Clinebell, 5 Nebr. (Unoff.) 603, 99 N. W. 839.

South Dakota.— Smith *v.* Mutual Cash Guaranty F. Ins. Co., 21 S. D. 433, 113 N. W. 94.

Tennessee.— Chesapeake, etc., R. Co. *v.* Crews, 118 Tenn. 52, 99 S. W. 368.

Texas.— Texas, etc., R. Co. *v.* French, 86 Tex. 96, 23 S. W. 642; Farenthold *v.* Tell, 52 Tex. Civ. App. 110, 113 S. W. 635; Trout *v.* Gulf, etc., R. Co., (Civ. App. 1908) 111 S. W. 220; Texas, etc., R. Co. *v.* Beal, 43 Tex. Civ. App. 588, 97 S. W. 329.

Instructions as to negligence or contributory negligence not limited to that pleaded should not be given. Alabama Great Southern R. Co. *v.* McWhorter, 156 Ala. 269, 47 So. 84; Louisville, etc., R. Co. *v.* Mulder, (Ala. 1906) 42 So. 742; Morrow *v.* St. Paul City R. Co., 65 Minn. 382, 67 N. W. 1002; Galveston, etc., R. Co. *v.* Alberti, 47 Tex. Civ. App. 32, 103 S. W. 699; Chicago, etc., R. Co. *v.* Stillwell, 46 Tex. Civ. App. 647, 104 S. W. 1071.

An instruction presenting a defense not pleaded is erroneous and properly refused. Green *v.* Brady, 152 Ala. 507, 44 So. 408; Ray *v.* Sellers, 1 Duv. (Ky.) 254; Chesapeake, etc., R. Co. *v.* Vaughn, (Ky. 1909) 115 S. W. 217; Pullman Co. *v.* Hoyle, 52 Tex. Civ. App. 534, 115 S. W. 315. So the refusal of an instruction, based on a defense eliminated from the case, is not error. Johnson County Sav. Bank *v.* Walker, 82 Conn. 24, 72 Atl. 579.

22. *Alabama.*— Alabama City, etc., R. Co. *v.* Bullard, 157 Ala. 618, 47 So. 578; Birmingham R., etc., Co. *v.* Landrum, 153 Ala. 192, 45 So. 198, 127 Am. St. Rep. 25; Woodstock Iron Works *v.* Kline, 149 Ala. 391, 43 So. 362.

Arkansas.— Dunham *v.* H. D. Williams Cooperage Co., 83 Ark. 395, 103 S. W. 386; Faulkner *v.* Cook, 83 Ark. 205, 103 S. W. 384; Bagnell Tie, etc., Co. *v.* Goodrich, 82 Ark. 547, 102 S. W. 228.

California.— De Gottardi *v.* Donati, 155 Cal. 109, 99 Pac. 492; Marriner *v.* Dennison, 78 Cal. 202, 20 Pac. 386.

Florida.— Jacksonville Electric Co. *v.* Sloan, 52 Fla. 257, 42 So. 516.

Illinois.— American Home Circle *v.* Schneider, 134 Ill. App. 600; Springfield Electric Light, etc., Co. *v.* Mott, 120 Ill. App. 39.

where evidence was improperly admitted to which the instructions were applicable,[23] and in some of them it was held that it was immaterial that the evidence had been admitted without objection.[24] There are, however, numerous decisions holding that an instruction may be based on evidence admitted without objection on issues not within the pleadings but in fact litigated by the parties,[25] and this rule, it is believed, is better supported both by reason and the weight

Indiana.—Ætna L. Ins. Co. *v.* Bockting, 39 Ind. App. 586, 79 N. E. 524.

Kentucky.— Spinks *v.* Turley, 103 S. W. 321, 31 Ky. L. Rep. 676; Kirk *v.* Louisville R. Co., 98 S. W. 293, 30 Ky. L. Rep. 325; Henderson Hominy Mill Co. *v.* Watkins, 15 Ky. L. Rep. 301.

Missouri.— Merrett *v.* Poulter, 96 Mo. 237, 9 S. W. 586; Leabo *v.* Goode, 67 Mo. 126; Bond *v.* Sandford, 134 Mo. App. 477, 114 S. W. 570; Atchison *v.* St. Joseph, 133 Mo. App. 563, 113 S. W. 679; Zalotuchin *v.* Metropolitan St. R. Co., 127 Mo. App. 577, 106 S. W. 548; Brown *v.* St. Louis, etc., R. Co., 127 Mo. App. 499, 106 S. W. 83.

Nebraska.— Webster *v.* O'Shee, 13 Nebr. 428, 14 N. W. 164.

North Carolina.— Martin *v.* Knight, 147 N. C. 564, 61 S. E. 447; McElwee *v.* Blackwell, 82 N. C. 345.

South Carolina.— Heyward *v.* Christensen, 80 S. C. 146, 61 S. E. 399; Bolton *v.* Western Union Tel. Co., 76 S. C. 529, 57 S. E. 543; Richey *v.* Southern R. Co., 69 S. C. 387, 48 S. E. 285; Long *v.* Hunter, 58 S. C. 152, 36 S. E. 579.

Tennessee.— Fletcher *v.* Louisville, etc., R. Co., 102 Tenn. 1, 49 S. W. 739.

Texas.— Fordtran *v.* Stowers, 52 Tex. Civ. App. 226, 113 S. W. 631; San Antonio Light Pub. Co. *v.* Lewy, 52 Tex. Civ. App. 22, 113 S. W. 574; Bell *v.* Keays, (Civ. App. 1907) 100 S. W. 813; Smith *v.* F. W. Heitman Co., 44 Tex. Civ. App. 358, 98 S. W. 1074.

Washington.— Loveland *v.* Jenkins-Boys Co., 49 Wash. 369, 95 Pac. 490.

West Virginia.— Jenkins *v.* Chesapeake, etc., R. Co., 61 W. Va. 597, 57 S. E. 48.

United States.— Republic Iron, etc., Co. *v.* Yanuszka, 166 Fed. 684, 92 C. C. A. 280.

23. *Connecticut.*— Baldwin *v.* Walker, 21 Conn. 168.

Florida.— Jacksonville Electric Co. *v.* Batchis, 54 Fla. 192, 44 So. 933; Walker *v.* Parry, 51 Fla. 344, 40 So. 69; Finlayson *v.* Love, 44 Fla. 551, 33 So. 306; Savannah, etc., R. Co. *v.* Tiedeman, 39 Fla. 196, 22 So. 658; Jacksonville, etc., R. Co. *v.* Neff, 28 Fla. 373, 9 So. 653; Parrish *v.* Pensacola, etc., R. Co., 28 Fla. 251, 9 So. 696.

Illinois.— Hackett *v.* Chicago City R. Co., 235 Ill. 116, 85 N. E. 320.

Indiana.— Indiana R. Co. *v.* Maurer, 160 Ind. 25, 66 N. E. 156.

Kansas.— Atchison, etc., R. Co. *v.* Miller, 39 Kan. 419, 18 Pac. 486.

Missouri.— Kellogg *v.* Kirksville, 132 Mo. App. 519, 112 S. W. 296; Wright *v.* Fonda, 44 Mo. App. 634; Fitchburg Safety Fund Nat. Bank *v.* Westlake, 21 Mo. App. 565.

Nebraska.— Tootle *v.* Maben, 21 Nebr. 617, 33 N. W. 264.

Oregon.— Latourette *v.* Meldrum, 49 Oreg. 397, 90 Pac. 503; Coos Bay, etc., R., etc., Co. *v.* Siglin, 26 Oreg. 387, 38 Pac. 192; Buchtel *v.* Evans, 21 Oreg. 309, 28 Pac. 67.

Texas.— Moody *v.* Rowland, 100 Tex. 363, 99 S. W. 1112; Murchison *v.* Mansur-Tibbetts Implement Co., (Civ. App. 1896) 37 S. W. 605; Duffard *v.* Herbert, 2 Tex. App. Civ. Cas. § 612.

The issues cannot be changed by an instruction. Christian *v.* Connecticut Mut. L. Ins. Co., 143 Mo. 460, 45 S. W. 268; Glass *v.* Gelvin, 80 Mo. 297; Iron Mountain Bank *v.* Murdock, 62 Mo. 70; Moffatt *v.* Conklin, 35 Mo. 453; Kellogg *v.* Kirksville, 132 Mo. App. 519, 112 S. W. 296; Wright *v.* Fonda, 44 Mo. App. 634. Where the damages resulting from the wrong alleged are specially averred, a recovery of other damages will not be allowed, and where the instructions include such other damages, they enlarge the scope of the cause of action. Kellogg *v.* Kirksville, *supra.*

Instructions based on evidence which contradicts the pleadings of the party introducing it are erroneous. Capital Bank *v.* Armstrong, 62 Mo. 59; Bruce *v.* Sims, 34 Mo. 246.

24. Indiana R. Co. *v.* Maurer, 160 Ind. 25, 66 N. E. 156; Latourette *v.* Meldrum, 49 Oreg. 397, 90 Pac. 503; Coos Bay, etc., R., etc., Co. *v.* Siglin, 26 Oreg. 387, 38 Pac. 192; Moody *v.* Rowland, 100 Tex. 363, 99 S. W. 1112; Murchison *v.* Mansur-Tibbetts Implement Co., (Tex. Civ. App. 1896) 37 S. W. 605. And see Western Union Tel. Co. *v.* Smith, 88 Tex. 9, 28 S. W. 931, 30 S. W. 549; Cooper *v.* Loughlin, 75 Tex. 524, 13 S. W. 37.

25. *Georgia.*— Rome Hotel Co. *v.* Warlick, 87 Ga. 34, 13 S. E. 116; Ratteree *v.* Chapman, 79 Ga. 574, 4 S. E. 684; Savannah, etc., R. Co. *v.* Barber, 71 Ga. 644; Ocean Steamship Co. *v.* Williams, 69 Ga. 251.

Iowa.— Struebing *v.* Stevenson, 129 Iowa 25, 105 N. W. 341; Coppock *v.* Lampkin, 114 Iowa 664, 87 N. W. 665; Rosenberger *v.* Marsh, 108 Iowa 47, 78 N. W. 837; Collins *v.* Collins, 46 Iowa 60; Rogers *v.* Millard, 44 Iowa 466.

Minnesota.— Qualy *v.* Johnson, 80 Minn. 408, 83 N. W. 393.

Missouri.— Madison *v.* Missouri Pac. R. Co., 60 Mo. App. 599. And see Budd *v.* Hoffheimer, 52 Mo. 297; Kirby *v.* Wabash R. Co., 85 Mo. App. 345, both of which cases contain an intimation that instructions based on evidence not within the issues made by the pleadings but not objected to would not be improper if amendments were made in accordance with the facts.

Ohio.— Jarmusch *v.* Otis Iron, etc., Co., 23 Ohio Cir. Ct. 122.

of authority.[26] According to this latter doctrine, if, in the progress of a trial, evidence is introduced by either party at variance with the issues made by the pleadings, without objection as to its competency, the error is waived, and the court may properly instruct the jury in relation to the whole field of inquiry covered by the evidence.[27] It is proper to instruct in accordance with the theory upon which both parties tried the case, although the instruction be broader than the pleadings.[28] Even in those jurisdictions requiring instructions to be confined to the issues made by the pleadings, regardless of the evidence introduced, it is held that when the facts proven are not within the allegations of the pleadings, neither party can complain, if each procures instructions, declaring the rules of law applicable to the facts shown by the testimony regardless of the issues made by the pleadings, and asks a verdict in accordance therewith.[29] It has even been held error to confine the instructions to the pleadings, where the case is tried on another theory.[30] It is of course error to instruct the jury upon matters inadmissible in evidence under the pleadings, when proper objections are made, even though the court admits evidence against the objections.[31] But one who, against objection, introduced testimony upon a point not raised by the pleadings, cannot object to the giving of a charge based upon such testimony.[32]

(III) *Confining Instructions to Issues Raised by Evidence.*[33] Instructions should be confined to the issues presented by the evidence,[34] and

Pennsylvania.— Scott *v.* Sheakly, 3 Watts 50.

South Carolina.— Davis *v.* Atlanta, etc., Air Line R. Co., 63 S. C. 370, 41 S. E. 468; Chafee *v.* Aiken, 57 S. C. 507, 35 S. E. 800.

Washington.— Childs *v.* Childs, 49 Wash. 27, 94 Pac. 660; Schwaninger *v.* McNeeley, 44 Wash. 447, 87 Pac. 514.

Wisconsin.— Bowers *v.* Thomas, 62 Wis. 480, 22 N. W. 710; Marschuetz *v.* Wright, 50 Wis. 175, 6 N. W. 511; Stetler *v.* Chicago, etc., R. Co., 49 Wis. 609, 6 N. W. 303; Flanders *v.* Cottrell, 36 Wis. 564.

The admission of immaterial evidence without objection does not justify an instruction presenting an issue raised only by such evidence. Eller *v.* Loomis, 106 Iowa 276, 76 N. W. 686.

26. In discussing the opposite doctrine Judge Thompson says: "This view ignores a principle which obtains in almost every situation in a civil trial, that the court is to disregard at every stage of the trial those errors or irregularities which it is competent for the party to waive, and which the party against whom they are committed does not object to at the time. The object of pleadings being merely to notify the opposite party of the ground of action or defense, if the party comes into court, it is not perceived why he may not waive the notice as in every other case, although the pleading may not advise him of the case or defense which is actually tendered in the evidence." 2 Thompson Trial, § 2310.

27. Boyce *v.* California Stage Co., 25 Cal. 460; National Mut. F. Ins. Co. *v.* Sprague, 40 Colo. 344, 92 Pac. 227; Gayarre *v.* Tunnard, 9 La. Ann. 254; Fox *v.* Utter, 6 Wash. 299, 33 Pac. 354.

Presumption of amendment to conform with evidence.— When evidence is received without objection upon any particular ground not covered by the complaint, the court may assume that the complaint is as broad as the evidence when charging the jury, and the complaint will be deemed amended to conform with the evidence and charge, since the amendment could have been made as of course at the trial. Schwaninger *v.* McNeeley, 44 Wash. 447, 87 Pac. 514.

28. Hoyt *v.* Hoyt, 68 Iowa 703, 28 N. W. 27; Herpolsheimer *v.* Acme Harvester Co., 83 Nebr. 53, 119 N. W. 30; Blum *v.* Whitworth, 66 Tex. 350, 1 S. W. 108; Flanders *v.* Cottrell, 36 Wis. 564.

29. Chicago, etc., R. Co. *v.* Harrington, 192 Ill. 9, 61 N. E. 622; Illinois Steel Co. *v.* Novak, 184 Ill. 501, 56 N. E. 966; Chicago, etc., R. Co. *v.* Wolfring, 118 Ill. App. 537; Hilz *v.* Missouri Pac. R. Co., 101 Mo. 36, 13 S. W. 946.

30. Brusie *v.* Peck, 135 N. Y. 622, 32 N. E. 76; Phillips *v.* Lewis, 86 Hun (N. Y.) 241, 33 N. Y. Suppl. 258; Fox *v.* Utter, 6 Wash. 299, 33 Pac. 354.

31. St. Louis, etc., R. Co. *v.* Vaughan, 84 Ark. 311, 105 S. W. 573; Republic Iron, etc., Co. *v.* Radis, 106 Ill. App. 530; Bick *v.* Minneapolis, etc., R. Co., 107 Minn. 78, 119 N. W. 505.

32. Bowen *v.* Carolina, etc., R. Co., 34 S. C. 217, 13 S. E. 421.

33. **Failure to confine to issues raised by evidence as ground for new trial** see New Trial, 29 Cyc. 786 *et seq.*

In criminal prosecutions see Criminal Law, 12 Cyc. 651 *et seq.*

34. *Arkansas.*— Arkansas Cent. R. Co. *v.* Workman, 87 Ark. 471, 112 S. W. 1082.

Colorado.— Coors *v.* Brock, 44 Colo. 80, 96 Pac. 963; Rimmer *v.* Wilson, 42 Colo. 180, 93 Pac. 1110; Farmer *v.* Hughes, 38 Colo. 318, 88 Pac. 191.

Florida.— Griffing Bros. Co. *v.* Winfield, 53 Fla. 589, 43 So. 687; Mullikin *v.* Harrison, 53 Fla. 255, 44 So. 426.

where there is no evidence upon an issue, failure to instruct upon, or to present it, is not error.[35] On the contrary, instructions on issues not raised by the evidence,[36]

Georgia.— Virginia Bridge, etc., Co. *v.* Crafts, 2 Ga. App. 126, 58 S. E. 322.

Indiana.—Ætna L. Ins. Co. *v.* Nexsen, 84 Ind. 347, 43 Am. Rep. 91; Baltimore, etc., R. Co. *v.* Walker, 41 Ind. App. 588, 84 N. E. 730; Closson *v.* Bligh, 41 Ind. App. 14, 83 N. E. 263.

Kansas.— Bigelow *v.* Henniger, 33 Kan. 362, 6 Pac. 593; Long Island Ins. Co. *v.* Hall, 4 Kan. App. 641, 46 Pac. 47.

Kentucky.— Cincinnati, etc., R. Co. *v.* Earl, (1908) 113 S. W. 854.

Mississippi.— McIntyre *v.* Kline, 30 Miss. 361, 64 Am. Dec. 163.

Nebraska.— Jones *v.* Wattles, 66 Nebr. 533, 92 N. W. 765.

Ohio.— White *v.* Thomas, 12 Ohio St. 312, 80 Am. Dec. 347.

Utah.— Herndon *v.* Salt Lake City, 34 Utah 65, 95 Pac. 646.

Wisconsin.— Fox *v.* Martin, 104 Wis. 581, 80 N. W. 921.

35. *Arkansas.*— Western Coal, etc., Co. *v.* Honaker, (1906) 96 S. W. 361.

Colorado.— Rude *v.* Sisack, 44 Colo. 21, 96 Pac. 976.

Georgia.— McElwaney *v.* MacDiarmid, 131 Ga. 97, 62 S. E. 20; Mitchen *v.* Allen, 128 Ga. 407, 57 S. E. 721; Murphy *v.* Meacham, 1 Ga. App. 155, 57 S. E. 1046.

Illinois.— Crain *v.* Jacksonville First Nat. Bank, 114 Ill. 516, 2 N. E. 486; Chicago, etc., R. Co. *v.* Bautsch, 129 Ill. App. 23.

Indiana.— Browning *v.* Hight, 78 Ind. 257; Bloomington *v.* Woodworth, 40 Ind. App. 373, 81 N. E. 611; Never-Split Seat Co. *v.* Climax Specialty Co., 38 Ind. App. 616, 78 N. E. 679.

Iowa.— Kenny *v.* Des Moines Bankers' Acc. Ins. Co., 136 Iowa 140, 113 N. W. 566; Willson *v.* Phelps, 86 Iowa 735, 53 N. W. 115; McDermott *v.* Iowa Falls, etc., R. Co., (1891) 47 N. W. 1037.

Kansas.— Grant *v.* Pendery, 15 Kan. 236.

Kentucky.— Wilkins *v.* Usher, 123 Ky. 696, 97 S. W. 37, 29 Ky. L. Rep. 1232; Blaes *v.* Com., 96 S. W. 802, 29 Ky. L. Rep. 908.

Missouri.— State *v.* Hope, 102 Mo. 410, 14 S. W. 985; Feddeck *v.* St. Louis Car Co., 125 Mo. App. 24, 102 S. W. 675; Jones *v.* Missouri Pac. R. Co., 31 Mo. App. 614. And see Brown *v.* Knapp, 213 Mo. 655, 112 S. W. 474.

Nebraska.— Hinton *v.* Atchison, etc., R. Co., 83 Nebr. 835, 120 N. W. 431.

North Dakota.— Pease *v.* Magill, 17 N. D. 166, 115 N. W. 260.

Tennessee.— Three States Lumber Co. *v.* Blanks, 118 Tenn. 627, 102 S. W. 79.

Texas.— Rousel *v.* Stanger, 73 Tex. 670, 11 S. W. 906; Blackwell *v.* Hunnicutt, 69 Tex. 273, 9 S. W. 317; Gulf Coast, etc., R. Co. *v.* Dorsey, 66 Tex. 148, 18 S. W. 444.

Illustration.— An instruction is not erroneous in ignoring the defense of assumed risk where the evidence claimed to support such defense did nothing more than tend to show contributory negligence. Belvidere Gas, etc., Co. *v.* Boyer, 122 Ill. App. 116.

36. *Alabama.*— Central of Georgia R. Co. *v.* McNab, 150 Ala. 332, 43 So. 222; Chastang *v.* Chastang, 141 Ala. 451, 37 So. 799, 109 Am. St. Rep. 45; Wadsworth *v.* Dunnam, 117 Ala. 661, 23 So. 699.

Arkansas.— Snapp *v.* Stanwood, 65 Ark. 222, 45 S. W. 546; Dickerson *v.* Johnson, 24 Ark. 251; Beebe *v.* De Baun, 8 Ark. 510.

California.— Jones *v.* Goldtree Bros. Co., 142 Cal. 383, 77 Pac. 939; Preston *v.* Keys, 23 Cal. 193; Fowler *v.* Smith, 2 Cal. 39.

Colorado.— Rio Grande Southern R. Co. *v.* Campbell, 44 Colo. 1, 96 Pac. 986; Conqueror Gold Min., etc., Co. *v.* Ashton, 39 Colo. 133, 90 Pac. 1124; Bowling *v.* Chambers, 20 Colo. App. 113, 77 Pac. 16; Chapman *v.* Sargent, 6 Colo. App. 438, 40 Pac. 849.

District of Columbia.— Fay *v.* Anglim, 7 Mackey 216.

Georgia.— Georgia, etc., R. Co. *v.* Wright, 130 Ga. 696, 61 S. E. 718; Southern R. Co. *v.* Scott, 128 Ga. 244, 57 S. E. 504; Culberson *v.* Alabama Constr. Co., 127 Ga. 599, 56 S. E. 765, 9 L. R. A. N. S. 411.

Idaho.— Gwin *v.* Gwin, 5 Ida. 271, 48 Pac. 295.

Illinois.— McMahon *v.* Chicago City R. Co., 239 Ill. 334, 88 N. E. 223 [*affirming* 143 Ill. App. 608]; St. Louis Merchants' Bridge Terminal R. Assoc. *v.* Schultz, 226 Ill. 409, 80 N. E. 879 [*affirming* 126 Ill. App. 552]; Sargent Co. *v.* Baublis, 215 Ill. 428, 74 N. E. 455.

Indiana.— Blough *v.* Parry, 144 Ind. 463, 40 N. E. 70, 43 N. E. 560; Nicklaus *v.* Burns, 75 Ind. 93; Gimbel *v.* Hufford, 46 Ind. 125.

Iowa.— Douda *v.* Chicago, etc., R. Co., 141 Iowa 82, 119 N. W. 272; Vannest *v.* Murphy, 135 Iowa 123, 112 N. W. 236; Alexander *v.* Staley, 110 Iowa 607, 81 N. W. 803.

Kansas.— Ransom *v.* Getty, 37 Kan. 75, 14 Pac. 487; Dowell *v.* Williams, 33 Kan. 319, 6 Pac. 600; St. Louis, etc., R. Co. *v.* Ritz, 30 Kan. 30, 1 Pac. 27.

Kentucky.— McClain *v.* Esham, 17 B. Mon. 146; Adams *v.* Tiernan, 5 Dana 394.

Maryland.— Wilson *v.* Merryman, 48 Md. 328; Baltimore *v.* Poultney, 25 Md. 18; Hagan *v.* Hendry, 18 Md. 177.

Michigan.— Woods *v.* Palmer, 151 Mich. 30, 115 N. W. 242; Place *v.* Place, 139 Mich. 509, 102 N. W. 996; June *v.* Labadie, 132 Mich. 135, 92 N. W. 937.

Mississippi.— Kneale *v.* Lopez, 93 Miss. 201, 46 So. 715; Burnley *v.* Mullins, 86 Miss. 441, 38 So. 635; Herndon *v.* Bryant, 39 Miss. 335.

Missouri.— Wann *v.* Scullin, 210 Mo. 429, 109 S. W. 688; Progress Press Brick, etc., Co. *v.* Gratiot Brick, etc., Co., 151 Mo. 501, 52 S. W. 401, 74 Am. St. Rep. 557; Kingman *v.* Cornell-Tebbetts Mach., etc., Co., 150 Mo. 282, 51 S. W. 727.

Montana.— Power *v.* Turner, 37 Mont. 521, 97 Pac. 950; Bullard *v.* Smith, 28 Mont. 387, 72 Pac. 761.

or directly opposed to the evidence,[37] are erroneous, and properly refused,[38]

Nebraska.— Lexington First Nat. Bank *v.* Brown, 81 Nebr. 669, 116 N. W. 685; Parker *v.* Wells, 68 Nebr. 647, 94 N. W. 717; McCormick Harvesting Mach. Co. *v.* Willan, 63 Nebr. 391, 88 N. W. 497, 93 Am. St. Rep. 449, 56 L. R. A. 338.

New York.— Rouse *v.* Lewis, 4 Abb. Dec. 121, 3 Keyes 352; Gilbertson *v.* Forty-Second St., etc., R. Co., 14 N. Y. App. Div. 294, 43 N. Y. Suppl. 782.

North Carolina.— Bryan *v.* Southern R. Co., 134 N. C. 538, 47 S. E. 15; Joines *v.* Johnson, 133 N. C. 487, 45 S. E. 828; Burton *v.* Rosemary Mfg. Co., 132 N. C. 17, 43 S. E. 480.

Oregon.—Anderson *v.* Oregon R. Co., 45 Oreg. 211, 77 Pac. 119; Morris *v.* Perkins, 6 Oreg. 350.

Pennsylvania.— Dooner *v.* Delaware, etc., Canal Co., 164 Pa. St. 17, 30 Atl. 269; Hill *v.* Canfield, 56 Pa. St. 454; Musselman *v.* East Brandywine, etc., R. Co., 2 Wkly. Notes Cas. 105.

South Carolina.— Worthy *v.* Jonesville Oil Mill, 77 S. C. 69, 57 S. E. 634, 11 L. R. A. N. S. 690.

South Dakota.— Haggerty *v.* Strong, 10 S. D. 585, 74 N. W. 1037.

Tennessee.— Croft *v.* State, 6 Humphr. 317.

Texas.— San Antonio Gas Co. *v.* Robertson, 93 Tex. 503, 56 S. W. 323; Schulz *v.* Tessman, 92 Tex. 488, 49 S. W. 1031; Trinity, etc., R. Co. *v.* Walden, (Civ. App. 1909) 116 S. W. 372; Trinity, etc., R. Co. *v.* Bradshaw, (Civ. App. 1908) 107 S. W. 618.

Utah.— Smith *v.* Ogden, etc., R. Co., 33 Utah 129, 93 Pac. 185; Belnap *v.* Widdison, 32 Utah 246, 90 Pac. 393.

Vermont.— Birney *v.* Martin, 3 Vt. 236.

Virginia.— Southern R. Co. *v.* Hansbrough, 107 Va. 733, 60 S. E. 58; Norfolk, etc., R. Co. *v.* Bondurant, 107 Va. 515, 59 S. E. 1091, 122 Am. St. Rep. 867, 15 L. R. A. N. S. 443; Norfolk, etc., R. Co. *v.* Bell, 104 Va. 836, 52 S. E. 700.

West Virginia.— Bice *v.* Wheeling Electrical Co., 62 W. Va. 685, 59 S. E. 626; Chadister *v.* Baltimore, etc., R. Co., 62 W. Va. 566, 59 S. E. 523; Levy *v.* Scottish Union, etc., Ins. Co., 58 W. Va. 546, 52 S. E. 449.

Wisconsin.— Wenger *v.* Marty, 135 Wis. 408, 116 N. W. 7; Eggett *v.* Allen, 106 Wis. 633, 82 N. W. 556; Fox *v.* Martin, 104 Wis. 581, 80 N. W. 921.

United States.— Northwestern Mut. L. Ins. Co. *v.* Stevens, 71 Fed. 258, 18 C. C. A. 107; St. Louis, etc., R. Co. *v.* Spencer, 71 Fed. 93, 18 C. C. A. 114.

Qualification of charge.— It is error for a court to annex to a charge properly asked a material qualification, not required or authorized by the evidence before them. Walker *v.* Stetson, 14 Ohio St. 89, 84 Am. Dec. 362; Bain *v.* Wilson, 10 Ohio St. 14.

37. *Alabama.*— Selma St., etc., R. Co. *v.* Campbell, 158 Ala. 438, 48 So. 378; Carlisle *v.* Hill, 16 Ala. 398.

Colorado.— Fireman's Fund Ins. Co. *v.* Barker, 6 Colo. App. 535, 41 Pac. 513.

Florida.— Mullikin *v.* Harrison, 53 Fla. 255, 44 So. 426.

Kentucky.— Louisville, etc., R. Co. *v.* Onan, 110 S. W. 380, 33 Ky. L. Rep. 462.

Maryland.— Darrin *v.* Whittingham, 107 Md. 46, 68 Atl. 269.

Mississippi.—American Cent. Ins. Co. *v.* Antrim, 88 Miss. 518, 41 So. 257.

Tennessee.— Louisville, etc., R. Co. *v.* Satterwhite, 112 Tenn. 185, 79 S. W. 106.

Texas.— Texas, etc., R. Co. *v.* Carthage First Nat. Bank, (Civ. App. 1907) 112 S. W. 589.

38. *Alabama.*— Pelham *v.* Chattahoochee Grocery Co., 156 Ala. 500, 47 So. 172; Neff *v.* Williamson, 154 Ala. 329, 46 So. 238; Green *v.* Brady, 152 Ala. 507, 44 So. 408.

Arizona.— Greene *v.* Hereford, (1908) 95 Pac. 105.

Arkansas.— Rock Island Plow Co. *v.* Rankin, 89 Ark. 24, 115 S. W. 943; St. Louis, etc., R. Co. *v.* Phœnix Cotton Oil Co., 88 Ark. 594, 115 S. W. 393; Ong Chair Co. *v.* Cook, 85 Ark. 390, 108 S. W. 203.

California.— De Gottardi *v.* Donati, 155 Cal. 109, 99 Pac. 492; Meyer *v.* Foster, 147 Cal. 166, 81 Pac. 402; Tompkins *v.* Montgomery, 123 Cal. 219, 55 Pac. 997.

Colorado.— Rude *v.* Sisack, 44 Colo. 21, 96 Pac. 976; McMillen *v.* Ferrum Min. Co., 32 Colo. 38, 74 Pac. 461, 105 Am. St. Rep. 64; Oakes *v.* Miller, 11 Colo. App. 374, 55 Pac. 193.

Connecticut.— Thompson *v.* Beacon Valley Rubber Co., 56 Conn. 493, 16 Atl. 554; Miles *v.* Douglas, 34 Conn. 393.

District of Columbia.— Wallach *v.* MacFarland, 31 App. Cas. 130; Bradford *v.* National Ben. Assoc., 26 App. Cas. 268; Mitchell *v.* Potomac Ins. Co., 16 App. Cas. 241 [*affirmed* in 183 U. S. 42, 22 S. Ct. 22, 46 L. ed. 74].

Florida.— Williams *v.* Finlayson, 49 Fla. 264, 38 So. 50; Volusia County Bank *v.* Bertola, 44 Fla. 734, 33 So. 448; Jacksonville, etc., R. Co. *v.* Peninsula Land, etc., Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33, 65.

Georgia.— Mitchem *v.* Allen, 128 Ga. 407, 57 S. E. 721; Whitehead *v.* Pitts, 127 Ga. 774, 56 S. E. 1004; Standard Cotton Mills *v.* Cheatham, 125 Ga. 649, 54 S. E. 650.

Idaho.— Whitman *v.* McComas, 11 Ida. 564, 83 Pac. 604.

Illinois.— Smith *v.* Treat, 234 Ill. 552, 85 N. E. 289; Davis *v.* Illinois Collieries Co., 232 Ill. 284, 83 N. E. 836; McKenzie Furnace Co. *v.* Mallers, 231 Ill. 561, 83 N. E. 451; Cowie *v.* Kinser, 138 Ill. App. 143 [*affirmed* in 235 Ill. 383, 85 N. E. 623].

Indiana.— Reed *v.* Light, 170 Ind. 550, 85 N. E. 9; Indianapolis *v.* Cauley, 164 Ind. 304, 73 N. E. 691; Wabash, etc., R. Co. *v.* Morgan, 132 Ind. 430, 31 N. E. 661, 32 N. E. 85.

Indian Territory.— Perry *v.* Cobb, 4 Indian Terr. 717, 76 S. W. 289.

Iowa.— McGovern *v.* Inter Urban R. Co., 136 Iowa 13, 111 N. W. 412; Dean *v.* Carpenter, 134 Iowa 275, 111 N. W. 815; Frank *v.* Berry, 128 Iowa 223, 103 N. W. 358.

although correct as abstract propositions of law,[39] and although the issues are

Kansas.— Bigelow *v.* Henniger, 33 Kan. 362, 6 Pac. 593; Kansas City *v.* Smith, 8 Kan. App. 82, 54 Pac. 329.

Kentucky.— Sutton *v.* Floyd, 7 B. Mon. 3; Lexington R. Co. *v.* Vanladen, 107 S. W. 740, 32 Ky. L. Rep. 1047; Maysville, etc., R. Co. *v.* Willis, 104 S. W. 1016, 31 Ky. L. Rep. 1249.

Maine.— York *v.* Athens, 99 Me. 82, 58 Atl. 418; Coombs *v.* Mason, 97 Me. 270, 54 Atl. 728; Tibbetts *v.* Penley, 83 Me. 118, 21 Atl. 838.

Maryland.— Moneyweight Scale Co. *v.* McCormick, 109 Md. 170, 72 Atl. 537; Mt. Vernon Brewing Co. *v.* Teschner, 108 Md. 158, 69 Atl. 702, 16 L. R. A. N. S. 758; Brinsfield *v.* Howeth, 107 Md. 278, 68 Atl. 566, 24 L. R. A. N. S. 583.

Massachusetts.— Feigenspan *v.* McDonald, 201 Mass. 341, 87 N. E. 624; Dulligan *v.* Barber Asphalt Pav. Co., 201 Mass. 227, 87 N. E. 567; Wood *v.* Skelley, 196 Mass. 114, 81 N. E. 872, 124 Am. St. Rep. 516.

Michigan.—Smith *v.* Detroit United R. Co., 155 Mich. 466, 119 N. W. 640; Blakeslee *v.* Reinhold Mfg. Co., 153 Mich. 230, 117 N. W. 92; Parke *v.* Nixon, 141 Mich. 267, 104 N. W. 597.

Minnesota.— State *v.* Staley, 14 Minn. 105.

Mississippi.— Mobile, etc., R. Co. *v.* Jackson, 92 Miss. 517, 46 So. 142; Burns *v.* Kelley, 41 Miss. 339; Whitfield *v.* Westbrook, 40 Miss. 311.

Missouri.— Kinlen *v.* Metropolitan St. R. Co., 216 Mo. 145, 115 S. W. 523; Crow *v.* Houck's Missouri, etc., R. Co., 212 Mo. 589, 111 S. W. 583; Wellmeyer *v.* St. Louis Transit Co., 198 Mo. 527, 95 S. W. 925.

Montana.— Judith Inland Transp. Co. *v.* Williams, 36 Mont. 25, 91 Pac. 1061.

Nebraska.— Quinby *v.* Union Pac. R. Co., 83 Nebr. 777, 120 N. W. 453; Fink *v.* Busch, 83 Nebr. 599, 120 N. W. 167; Huber Mfg. Co. *v.* Gotchall, 1 Nebr. (Unoff.) 548, 96 N. W. 611.

Nevada.— Fulton *v.* Day, 8 Nev. 80.

New Hampshire.—Challis *v.* Lake, 71 N. H. 90, 51 Atl. 260; Hersey *v.* Hutchins, 70 N. H. 130, 46 Atl. 33; Woodbury *v.* Butler, 67 N. H. 545, 38 Atl. 379.

New Jersey.— Consolidated Traction Co. *v.* Haight, 59 N. J. L. 577, 37 Atl. 135; Humphreys *v.* Woodstown, 48 N. J. L. 588, 7 Atl. 301; Allen *v.* Wanamaker, 31 N. J. L. 370.

New Mexico.— C. J. L. Meyer, etc., Co. *v.* Black, 4 N. M. 190, 16 Pac. 620.

New York.— Lee *v.* Troy Citizens' Gas-Light Co., 98 N. Y. 115; Moore *v.* Meacham, 10 N. Y. 207; Pulcino *v.* Long Island R. Co., 125 N. Y. App. Div. 629, 109 N. Y. Suppl. 1076 [*affirmed* in 194 N. Y. 526, 87 N. E. 1126].

North Carolina.— Revis *v.* Raleigh, 150 N. C. 348, 63 S. E. 1049; Williams *v.* Harris, 137 N. C. 460, 49 S. E. 954; Stewart *v.* North Carolina R. Co., 136 N. C. 385, 48 S. E. 793.

North Dakota.— McLain *v.* Nurnberg, 16 N. D. 144, 112 N. W. 243.

Oklahoma.— Lawton *v.* McAdams, 15 Okla. 412, 83 Pac. 429.

Pennsylvania.— Harper *v.* Philadelphia Traction Co., 175 Pa. St. 129, 34 Atl. 356; Draucker *v.* Arick, 161 Pa. St. 357, 29 Atl. 32; Jordan *v.* Headman, 61 Pa. St. 176.

Rhode Island.— Guckian *v.* Newbold, 22 R. I. 279, 47 Atl. 543.

South Carolina.— Hall *v.* Latimer, 81 S. C. 90, 61 S. E. 1057; Richardson *v.* Augusta, etc., R. Co., 79 S. C. 535, 61 S. E. 83; J. C. Stevenson Co. *v.* Bethea, 79 S. C. 478, 61 S. E. 99.

South Dakota.— Quale *v.* Hazel, 19 S. D. 483, 104 N. W. 215.

Tennessee.— Louisville, etc., R. Co. *v.* Ray, 101 Tenn. 1, 46 S. W. 554; Lawrence *v.* Hudson, 12 Heisk. 671; Whitaker *v.* Pullen, 3 Humphr. 466.

Texas.— Houston, etc., R. Co. *v.* Cluck, 99 Tex. 130, 87 S. W. 817; Cleveland *v.* Heidenheimer, 92 Tex. 108, 46 S. W. 30; International, etc., R. Co. *v.* Garcia, (Civ. App. 1909) 117 S. W. 206.

Utah.— Rogers *v.* Rio Grande Western R. Co., 32 Utah 367, 90 Pac. 1075, 125 Am. St. Rep. 876; Mathews *v.* Daly-West Min. Co., 27 Utah 193, 75 Pac. 722; Fritz *v.* Western Union Tel. Co., 25 Utah 263, 71 Pac. 209.

Vermont.— French *v.* Ware, 65 Vt. 338, 26 Atl. 1096; Barron *v.* Fay, 38 Vt. 705; Wetherby *v.* Foster, 5 Vt. 136.

Virginia.— Neal *v.* Taylor, 106 Va. 651, 56 S. E. 590; Interstate Coal, etc., Co. *v.* Clintwood Coal, etc., Co., 105 Va. 574, 54 S. E. 593; Johnston *v.* George D. Witt Shoe Co., 103 Va. 611, 50 S. E. 153.

Washington.— Suell *v.* Jones, 49 Wash. 582, 96 Pac. 4; Harris *v.* Washington Portland Cement Co., 49 Wash. 345, 95 Pac. 84; Young *v.* O'Brien, 36 Wash. 570, 79 Pac. 211.

West Virginia.— Parker *v.* National Mut. Bldg., etc., Assoc., 55 W. Va. 134, 46 S. E. 811; Carrico *v.* West Virginia Cent., etc., R. Co., 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50; Coffman *v.* Hedrick, 32 W. Va. 119, 9 S. E. 65.

Wisconsin.—Johnson *v.* St. Paul, etc., Coal Co., 126 Wis. 492, 105 N. W. 1048; Plummer *v.* Johnsen, 70 Wis. 131, 35 N. W. 334; Hartwell *v.* Page, 14 Wis. 49.

United States.— Mitchell *v.* Potomac Ins. Co., 183 U. S. 42, 22 S. Ct. 22, 46 L. ed. 74 [*affirming* 16 App. Cas. (D. C.) 241]; Coffin *v.* U. S., 162 U. S. 664, 16 S. Ct. 943, 40 L. ed. 1109; Allen *v.* Field, 144 Fed. 840, 75 C. C. A. 668.

39. *Alabama.*— Moore *v.* Barber Asphalt Paving Co., 118 Ala. 563, 23 So. 798; Henry *v.* Allen, 93 Ala. 197, 9 So. 579; Keller *v.* Holland, 56 Ala. 603; Knight *v.* Clements, 45 Ala. 89, 6 Am. Rep. 693; Golding *v.* Merchant, 43 Ala. 705.

California.— People *v.* Roberts, 6 Cal. 214.

Colorado.— Coors *v.* Brock, 44 Colo. 80, 96 Pac. 963; Gray *v.* Sharp, 17 Colo. App. 139, 67 Pac. 351.

Florida.— Mayer *v.* Wilkins, 37 Fla. 244, 19 So. 632; Bacon *v.* Green, 36 Fla. 325, 18

raised by the pleadings;[40] and it is error to refuse to eliminate an issue made by the pleadings when there is no evidence to support it.[41] The propriety of an instruction is to be determined, not by whether it embodies a correct statement of the law upon a given state of facts, but whether it correctly states the law relevant to the issuable facts given in evidence on the trial.[42] An instruction cannot be given and its consideration by the jury made to depend upon whether the jury finds that there is or is not such evidence.[43] If an instruction not warranted by the evidence is calculated to mislead the jury and prejudice the objecting party it is ground for reversal.[44] But an instruction stating a correct proposition of law is not necessarily misleading, or prejudicial, merely because it is inap-

So. 870; Tischler *v.* Kurtz, 35 Fla. 323, 17 So. 661.

Georgia.— Bird *v.* Benton, 127 Ga. 371, 56 S. E. 450; Augusta, etc., R. Co. *v.* Randall, 79 Ga. 304, 4 S. E. 674; Wylly *v.* Gazan, 69 Ga. 506; Carter *v.* Dixon, 69 Ga. 82; Southern Express Co. *v.* Newby, 36 Ga. 635, 91 Am. Dec. 783; McBain *v.* Smith, 13 Ga. 315.

Illinois.— Chicago Union Traction Co. *v.* O'Brien, 219 Ill. 303, 76 N. E. 341; Holden *v.* Hulburd, 61 Ill. 280; Means *v.* Lawrence, 61 Ill. 137; Hill *v.* Ward, 7 Ill. 285; Espen *v.* Roberts, 33 Ill. App. 268.

Indiana.— Hagee *v.* Grossman, 31 Ind. 223; Hays *v.* Hynds, 28 Ind. 531; Dale *v.* Jones, 15 Ind. App. 420, 44 N. E. 316.

Iowa.— Van Tuyl *v.* Quinton, 45 Iowa 459; Ocheltree *v.* Carl, 23 Iowa 394; Hypfner *v.* Walsh, 3 Greene 509.

Kansas.— Gregg *v.* George, 16 Kan. 546; Jaedicke *v.* Scrafford, 15 Kan. 120.

Kentucky.— Mayes *v.* Farish, 11 B. Mon. 38; Sutton *v.* Floyd, 7 B. Mon. 3; Reed *v.* Greathouse, 7 T. B. Mon. 558.

Maine.— Rumrill *v.* Adams, 57 Me. 565; Treat *v.* Lord, 42 Me. 552, 66 Am. Dec. 298.

Maryland.— Marshall *v.* Haney, 4 Md. 498, 59 Am. Dec. 92.

Michigan.— Gould *v.* Sanders, 69 Mich. 5, 37 N. W. 37; Wilcox *v.* Young, 66 Mich. 687, 33 N. W. 765.

Minnesota.— State *v.* Staley, 14 Minn. 105.

Mississippi.— Whitfield *v.* Westbrook, 40 Miss. 311; Hunt *v.* Crane, 33 Miss. 669, 69 Am. Dec. 381; McIntyre *v.* Kline, 30 Miss. 361, 64 Am. Dec. 163.

Missouri.— State *v.* Bailey, 57 Mo. 131; Franz *v.* Hilterbrand, 45 Mo. 121; Muldrow *v.* Caldwell, 14 Mo. 523; Keithley *v.* Southworth, 75 Mo. App. 442.

Nebraska.— Omaha Nat. Bank *v.* Thompson, 39 Nebr. 269, 57 N. W. 997; Esterly Harvesting Mach. Co. *v.* Frolkey, 34 Nebr. 110, 51 N. W. 594; Smith *v.* Evans, 13 Nebr. 314, 14 N. W. 406; Neihardt *v.* Kilmer, 12 Nebr. 35, 10 N. W. 531.

New York.— Kiernan *v.* Rocheleau, 6 Bosw. 148; Carlson *v.* Winterson, 1 Misc. 207, 20 N. Y. Suppl. 897 [*reversed* on other grounds in 7 Misc. 15, 27 N. Y. Suppl. 368].

North Carolina.— Kelly *v.* Fleming, 113 N. C. 133, 18 S. E. 81.

Ohio.— Holmes *v.* Ashtabula Rapid Transit Co., 10 Ohio Cir. Dec. 638.

Texas.— Fordtran *v.* Ellis, 58 Tex. 245; Hancock *v.* Horan, 15 Tex. 507; Bering Mfg. Co. *v.* Femelat, 35 Tex. Civ. App. 36, 79 S. W. 869; Louisiana Extension R. Co. *v.* Carstens, 19 Tex. Civ. App. 190, 47 S. W. 36; Seligman *v.* Wilson, 1 Tex. App. Civ. Cas. § 895.

Washington.— Young *v.* O'Brien, 36 Wash. 570, 79 Pac. 211.

West Virginia.— Coffman *v.* Hedrick, 32 W. Va. 119, 9 S. E. 65.

Wisconsin.— Plummer *v.* Johnsen, 70 Wis. 131, 35 N. W. 334.

United States.— Coffin *v.* U. S., 162 U. S. 664, 16 S. Ct. 943, 40 L. ed. 1109.

40. Allyn *v.* Burns, 37 Ind. App. 223, 76 N. E. 636; Honick *v.* Metropolitan St. R. Co., 66 Kan. 124, 71 Pac. 265; Owensboro Wagon Co. *v.* Boling, 107 S. W. 264, 32 Ky. L. Rep. 816; Trinity, etc., R. Co. *v.* Bradshaw, (Tex. Civ. App. 1908) 107 S. W. 618; Graham *v.* Edwards, (Tex. Civ. App. 1906) 99 S. W. 436.

41. Chicago City R. Co. *v.* Reddick, 129 Ill. App. 160.

42. Clark *v.* Morris, 30 App. Cas. (D. C.) 553; Indiana R. Co. *v.* Maurer, 160 Ind. 25, 66 N. E. 156; Deragon *v.* Sero, 137 Wis. 276, 118 N. W. 839, 20 L. R. A. N. S. 842.

43. Rowan *v.* Hull, 55 W. Va. 335, 47 S. E. 92, 104 Am. St. Rep. 998.

44. *Alabama.*— Pullman Car Co. *v.* Krauss, 145 Ala. 395, 40 So. 398, 4 L. R. A. N. S. 103.

Arkansas.— McElvaney *v.* Smith, 76 Ark. 468, 88 S. W. 981; St. Louis, etc., R. Co. *v.* Woodward, 70 Ark. 441, 69 S. W. 55.

California.— Thomas *v.* Northwestern Mut. L. Ins. Co., 142 Cal. 79, 75 Pac. 665.

Florida.— Pensacola Electric Terminal R. Co. *v.* Haussman, 51 Fla. 286, 40 So. 196.

Georgia.— Macon R., etc., Co. *v.* Mason, 123 Ga. 773, 51 S. E. 569; Nation *v.* Jones, 3 Ga. App. 83, 59 S. E. 330.

Illinois.— Cullen *v.* Higgins, 216 Ill. 78, 74 N. E. 698.

Indiana.— Adams *v.* Vanderbeck, 148 Ind. 92, 45 N. E. 645, 47 N. E. 24, 62 Am. St. Rep. 497; Fletcher Bros. Co. *v.* Hyde, 36 Ind. App. 96, 75 N. E. 9.

Iowa.— Frick *v.* Kabaker, 116 Iowa 494, 90 N. W. 498; Case *v.* Illinois Cent. R. Co., 38 Iowa 581.

Kansas.— Martindale *v.* Stotler, 69 Kan. 669, 77 Pac. 700; Missouri Pac. R. Co. *v.* Pierce, 33 Kan. 61, 5 Pac. 378.

Maryland.— Cecil Bank *v.* Snively, 23 Md. 253; Hagan *v.* Hendry, 18 Md. 177.

Mississippi.— Alabama, etc., R. Co. *v.* Hayne, 76 Miss. 538, 24 So. 907.

Missouri.— Dakan *v.* G. W. Chase, etc.,

plicable to the facts in evidence,[45] and where it is not so, there is no ground for reversal.[46] An instruction which is correct in its application to the evidence

Mercantile Co., 197 Mo. 238, 94 S. W. 944; Turner *v.* Baker, 42 Mo. 13; Landers *v.* Quincy, etc., R. Co., 114 Mo. App. 655, 90 S. W. 117.

Montana.— Bullard *v.* Smith, 28 Mont. 387, 72 Pac. 761.

Nebraska.— Boesen *v.* Omaha St. R. Co., 79 Nebr. 381, 112 N. W. 614; Mannion *v.* Talboy, 76 Nebr. 570, 107 N. W. 750; Link *v.* Campbell, 72 Nebr. 307, 100 N. W. 409, 104 N. W. 939; McCormick Harvesting Mach. Co. *v.* Willan, 63 Nebr. 391, 88 N. W. 497, 93 Am. St. Rep. 449.

New Jersey.— Baker *v.* North Jersey St. R. Co., 77 N. J. L. 336, 72 Atl. 434; Gilmore *v.* Kane, 72 N. J. L. 167, 60 Atl. 181.

New York.— Kipp *v.* New York Cent., etc., R. Co., 89 N. Y. App. Div. 392, 85 N. Y. Suppl. 855.

Oregon.—Anderson *v.* Oregon R. Co., 45 Oreg. 211, 77 Pac. 119 (holding that where there is no evidence of certain facts in a case the mere statement of the court that, if the jury find such facts to exist, they may draw certain inferences therefrom, is erroneous as misleading and abstract); Walla Walla First Nat. Bank *v.* McDonald, 42 Oreg. 257, 70 Pac. 901.

Pennsylvania.— Greber *v.* Kleckner, 2 Pa. St. 289.

Texas.— Lee *v.* Hamilton, 12 Tex. 413; International, etc., R. Co. *v.* Gonzales, 42 Tex. Civ. App. 22, 91 S. W. 597; Texas, etc., R. Co. *v.* Nelson, 38 Tex. Civ. App. 605, 86 S. W. 616.

West Virginia.— Chadister *v.* Baltimore, etc., R. Co., 62 W. Va. 566, 59 S. E. 523; Lewis *v.* Montgomery Supply Co., 59 W. Va. 75, 52 S. E. 1017, 4 L. R. A. N. S. 132; Parker *v.* National Mut. Bldg., etc., Assoc., 55 W. Va. 134, 46 S. E. 811.

Wisconsin.—Ward *v.* Henry, 19 Wis. 76, 88 Am. Dec. 672.

45. Suell *v.* Derricott, 161 Ala. 259, 49 So. 895, 23 L. R. A. N. S. 996; Bosqui *v.* Sutro R. Co., 131 Cal. 390, 63 Pac. 682; Sparta Oil Mill *v.* Russell, 6 Ga. App. 293, 65 S. E. 37.

46. *Alabama.*— Gillespie *v.* Hester, 160 Ala. 444, 49 So. 580; Central of Georgia R. Co. *v.* Dothan Mule Co., 159 Ala. 225, 49 So. 243; Fitzpatrick Square Bale Ginning Co. *v.* McLaney, 153 Ala. 586, 44 So. 1023, 127 Am. St. Rep. 71.

Arkansas.— J. I. Porter Lumber Co. *v.* Hill, 72 Ark. 62, 77 S. W. 905; McNeill *v.* Arnold, 22 Ark. 477.

California.— Los Angeles *v.* Pomeroy, 124 Cal. 597, 57 Pac. 585; Renfro *v.* Fresno City R. Co., 2 Cal. App. 317, 84 Pac. 357.

Colorado.— Houck *v.* Williams, 34 Colo. 138, 81 Pac. 800; Witcher *v.* McPhee, 16 Colo. App. 298, 65 Pac. 806.

Florida.— Milton *v.* Blackshear, 8 Fla. 161; Belden *v.* Gray, 5 Fla. 504.

Georgia.— Georgia, etc., R. Co. *v.* Lasseter, 122 Ga. 679, 51 S. E. 15; Freeman *v.* Collins Park, etc., R. Co., 117 Ga. 78, 43 S. E. 410; Dannenberg *v.* Guernsey, 80 Ga. 549, 7 S. E. 105; Cameron *v.* American Soda Fountain Co., 3 Ga. App. 425, 60 S. E. 109.

Idaho.— Stinson *v.* Rourke, 4 Ida. 765, 46 Pac. 445.

Illinois.— Chicago, etc., R. Co. *v.* Walters, 217 Ill. 87, 75 N. E. 441 [*affirming* 120 Ill. App. 152]; South Chicago City R. Co. *v.* Dufresne, 200 Ill. 456, 65 N. E. 1075 [*affirming* 102 Ill. App. 493].

Indiana.— Indianapolis *v.* Cauley, 164 Ind. 304, 73 N. E. 691; Indianapolis St. R. Co. *v.* Hackney, 39 Ind. App. 372, 77 N. E. 1048.

Indian Territory.—Wilson *v.* U. S., 5 Indian Terr. 610, 82 S. W. 924.

Iowa.— Camp *v.* Chicago Great Western R. Co., 124 Iowa 238, 99 N. W. 735; Vedder *v.* Delaney, 122 Iowa 583, 98 N. W. 373.

Kansas.— Hackler *v.* Evans, 70 Kan. 896, 79 Pac. 669; Tallman *v.* Jones, 13 Kan. 438.

Kentucky.— Folks *v.* Folks, 107 Ky. 561, 54 S. W. 837, 21 Ky. L. Rep. 1275; Smith *v.* Louisville, etc., R. Co., 89 S. W. 694, 28 Ky. L. Rep. 439.

Maine.— McCrillis *v.* Hawes, 38 Me. 566.

Maryland.— Coffin *v.* Brown, 94 Md. 190, 50 Atl. 567, 89 Am. St. Rep. 422, 55 L. R. A. 732; Worcester County *v.* Ryckman, 91 Md. 36, 46 Atl. 317.

Massachusetts.— Shattuck *v.* Eldredge, 173 Mass. 165, 53 N. E. 377.

Michigan.— Tobin *v.* Modern Woodmen of America, 126 Mich. 161, 85 N. W. 472.

Minnesota.— Brown *v.* Nagel, 21 Minn. 415.

Mississippi.—Wood *v.* Gibbs, 35 Miss. 559; Holden *v.* Bloxum, 35 Miss. 381.

Missouri.— Coleman *v.* Reynolds, 207 Mo. 463, 105 S. W. 1070; Schafer *v.* St. Louis, etc., R. Co., 128 Mo. 64, 30 S. W. 331; Serrano *v.* Miller, etc., Commission Co., 117 Mo. App. 185, 93 S. W. 810.

Montana.— Thornton-Thomas Mercantile Co. *v.* Bretherton, 32 Mont. 80, 80 Pac. 10.

Nebraska.— South Omaha *v.* Fennell, 4 Nebr. (Unoff.) 427, 94 N. W. 632; Clark *v.* Folkers, 1 Nebr. (Unoff.) 96, 95 N. W. 328.

Nevada.— Quint *v.* Ophir Silver Min. Co., 4 Nev. 304.

New Hampshire.—Warren *v.* Manchester St. R. Co., 70 N. H. 352, 47 Atl. 735.

New York.— Goodstein *v.* Brooklyn Heights R. Co., 69 N. Y. App. Div. 617, 74 N. Y. Suppl. 1017.

North Carolina.— Eubanks *v.* Alspaugh, 139 N. C. 520, 52 S. E. 207; Pressly *v.* Dover Yarn Mills, 138 N. C. 410, 51 S. E. 69; Ratliff *v.* Huntly, 27 N. C. 545.

North Dakota.— Merchant *v.* Pielke, 10 N. D. 48, 84 N. W. 574.

Ohio.— French *v.* Millard, 2 Ohio St. 44.

Oklahoma.— Payne *v.* McCormick Harvesting Mach. Co., 11 Okla. 318, 66 Pac. 287.

Oregon.— Hough *v.* Grants Pass Power Co., 41 Oreg. 531, 69 Pac. 655; Howell *v.* Johnson, 38 Oreg. 571, 64 Pac. 659.

will be upheld,[47] and this, it has been held, is so, although it may be erroneous as an abstract proposition.[48]

(IV) *SUFFICIENCY OF EVIDENCE TO JUSTIFY INSTRUCTIONS.* In order to justify the court in giving an instruction, predicated on a supposed state of facts, it is not necessary that the court should be entirely satisfied of the existence of the facts upon which the instruction is founded.[49] According to one line of cases any evidence tending to prove a fact is sufficient to justify the court in giving an instruction applicable to it if requested so to do,[50] even though the

Pennsylvania.— Kramer *v.* Winslow, 154 Pa St. 637, 25 Atl. 766.

South Carolina.— Langston *v.* Cothran, 78 S. C. 23, 58 S. E. 956; Burns *v.* Goddard, 72 S. C. 355, 51 S. E. 915; Doolittle *v.* Southern R. Co., 62 S. C. 130, 40 S. E. 133.

Tennessee.— Southern Oil Works *v.* Bickford, 14 Lea 651; Hatfield *v.* Griffith, 1 Lea 300.

Texas.— Galveston, etc., R. Co. *v.* Smith, (Civ. App. 1906) 93 S. W. 184 [*affirmed* in 100 Tex. 267, 98 S. W. 240]; Waxahachie Cotton Oil Co. *v.* Peters, (Civ. App. 1906) 94 S. W. 431.

Virginia.— Poore *v.* Magruder, 24 Gratt. 197.

Washington.— Irwin *v.* Buffalo Pitts Co., 39 Wash. 346, 81 Pac. 849; Foster *v.* Seattle Electric Co., 35 Wash. 177, 76 Pac. 995.

West Virginia.— Maxwell *v.* Kent, 49 W. Va. 542, 39 S. E. 174.

Wisconsin.— Neumeister *v.* Goddard, 133 Wis. 405, 113 N. W. 733; Barker *v.* Knickerbocker L. Ins. Co., 24 Wis. 630.

United States.— Sanger *v.* Flow, 48 Fed. 152, 1 C. C. A. 56.

47. Allbright *v.* Hannah, 103 Iowa 98, 72 N. W. 421; Nichols, etc., Co. *v.* Steinkraus, 83 Nebr. 1, 119 N. W. 23; Joyce *v.* Miller, 81 Nebr. 578, 116 N. W. 506.

48. Shook *v.* State, 6 Ind. 113.

49. Chicago, etc., R. Co. *v.* Lewis, 109 Ill. 120; Bradford *v.* Pearson, 12 Mo. 71; Flournoy *v.* Andrews, 5 Mo. 513.

50. *Alabama.*— Knowles *v.* Ogletree, 96 Ala. 555, 12 So. 397; Hair *v.* Little, 28 Ala. 236; Bradford *v.* Marbury, 12 Ala. 520, 46 Am. Dec. 264; Clealand *v.* Walker, 11 Ala. 1058, 46 Am. Dec. 238.

Arkansas.— Goodell *v.* Bluff City Lumber Co., 57 Ark. 203, 21 S. W. 104; McNeill *v.* Arnold, 22 Ark. 477.

California.— Perlberg *v.* Gorham, 10 Cal. 120.

Florida.— Florida R., etc., Co. *v.* Webster, 25 Fla. 394, 5 So. 714.

Georgia.— Camp *v.* Phillips, 42 Ga. 289.

Illinois.— West Chicago St. R. Co. *v.* Lieserowitz, 197 Ill. 607, 64 N. E. 718 [*affirming* 99 Ill. App. 591]; Thompson *v.* Duff, 119 Ill. 226, 10 N. E. 399; Chicago, etc., R. Co. *v.* Bingenheimer, 116 Ill. 226, 4 N. E. 840; Missouri Furnace Co. *v.* Abend, 107 Ill. 44, 47 Am. Rep. 425; Eames *v.* Rend, 105 Ill. 506; Chicago, etc., R. Co. *v.* Gregory, 58 Ill. 272; Kane *v.* Torbit, 23 Ill. App. 311.

Indiana.— State *v.* Carey, 23 Ind. App. 378, 55 N. E. 261.

Iowa.— Christy *v.* Des Moines City R. Co., 126 Iowa 428, 102 N. W. 194 (holding that it is proper to submit defendant's theory of the case, although it is supported by the testimony of but one witness); Newbury *v.* Getchel, etc., Lumber, etc., Co., 100 Iowa 441, 69 N. W. 743, 62 Am. St. Rep. 582 (holding that the fact that the preponderance of the evidence is against the existence of the facts on which an instruction is based will not support an objection that the instruction is not based on the evidence); De Camp *v.* Mississippi, etc., R. Co., 12 Iowa 348.

Michigan.— Carrel *v.* Kalamazoo Cold-Storage Co., 112 Mich. 34, 70 N. W. 323.

Missouri.— Hofelman *v.* Valentine, 26 Mo. 393; Bradford *v.* Pearson, 12 Mo. 71.

South Carolina.— Brucke *v.* Hubbard, 74 S. C. 144, 54 S. E. 249; Carter *v.* Kaufman, 67 S. C. 456, 45 S. E. 1017.

Virginia.— Hopkins *v.* Richardson, 9 Gratt. 485.

West Virginia.— McMechen *v.* McMechen, 17 W. Va. 683, 41 Am. Rep. 682.

See 46 Cent. Dig. tit. "Trial," § 597.

In Virginia and West Virginia a large number of cases hold that where there is evidence tending to make out the supposed case, however inadequate in the opinion of the court, or to however little weight it may be deemed entitled, it is best and safest to give the instruction if it propound the law correctly. Southern R. Co. *v.* Oliver, 102 Va. 710, 47 S. E. 862; Richmond Pass., etc., Co. *v.* Allen, 101 Va. 200, 43 S. E. 356; Dingee *v.* Unrue, 98 Va. 247, 35 S. E. 794; Carpenter *v.* Virginia-Carolina Chemical Co., 98 Va. 177, 35 S. E. 358; Jones *v.* Morris, 97 Va. 43, 33 S. E. 377; Reusens *v.* Lawson, 96 Va. 285, 31 S. E. 528; Kimball *v.* Friend, 95 Va. 125, 27 S. E. 901; Washington Southern R. Co. *v.* Lacey, 94 Va. 460, 26 S. E. 834; Michie *v.* Cochran, 93 Va. 641, 25 S. E. 884; Early *v.* Garland, 13 Gratt. (Va.) 1; Farish *v.* Reigle, 11 Gratt. (Va.) 697, 62 Am. Dec. 666; Hopkins *v.* Richardson, 9 Gratt. (Va.) 485; Carrico *v.* West Virginia Cent., etc., R. Co., 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50; McMechen *v.* McMechen, 17 W. Va. 683, 41 Am. Rep. 682; State *v.* Betsall, 11 W. Va. 703. In some of the later cases, however, it is held that, since the abolition of the scintilla doctrine, an instruction ought not to be given when the evidence on which it is based is insufficient to sustain a verdict. American Locomotive Co. *v.* Whitlock, 109 Va. 238, 63 S. E. 991; Chesapeake, etc., R. Co. *v.* Stock, 104 Va. 97, 51 S. E. 161; McDonald *v.* Cole, 46 W. Va. 186, 32 S. E. 1033; Bloyd *v.* Pollock, 27 W. Va. 75.

evidence be so slight as to be insufficient to support a verdict founded on it.[51] Even positive testimony is not always required. It is sufficient if the assumed fact may be reasonably inferred from the circumstances proved.[52] But, even in the jurisdictions upholding this doctrine, it has been held that in order to warrant giving an instruction the evidence should be fairly sufficient to raise the question involved therein,[53] of such force that fair-minded men might doubt or debate as to whether or not it had been proven.[54] Circumstances that raise only a possibility or conjecture ought not to be left to a jury as evidence of a fact which a party is required to prove.[55] Nor should instructions be given upon trifling and indefinite statements irrelevant to the question at issue.[56] Another line of cases hold that to justify an instruction upon an issue of fact, there should not only be evidence tending to establish that fact, but it should be sufficient, either alone, or in connection with other evidence upon correlative issues, to sustain a verdict founded upon it.[57]

(v) *Basing Instructions on Evidence Improperly Admitted.*[58] An instruction based upon incompetent evidence improperly admitted is erroneous,[59]

A conflict of testimony warrants a charge to the jury on the evidence, the court leaving the finding to the jury. Walker *v.* Lee, 51 Fla. 360, 40 So. 881; Byrne *v.* Doughty, 13 Ga. 46; Lee *v.* Conrad, 140 Iowa 16, 117 N. W. 1096; Atkins *v.* Gladwish, 27 Nebr. 841, 44 N. W. 37. A party has a right to request instructions to the jury based on the hypothesis which the evidence in his favor tends to establish. Such charges are not objectionable, although based on a partial view of the evidence, since the opposite party may request charges founded on a contrary hypothesis, if there is evidence tending to establish it. Griel *v.* Marks, 51 Ala. 566.

Slight evidence of undue influence is sufficient to authorize an instruction on that subject, that being peculiarly a question for the jury. Lischy *v.* Schrader, 104 Ky. 657, 47 S. W. 611, 20 Ky. L. Rep. 843.

51. Noffsinger *v.* Bailey, 72 Mo. 216; Richmond Pass., etc., Co. *v.* Allen, 101 Va. 200, 43 S. E. 356; Southern R. Co. *v.* Wilcox, 99 Va. 394, 39 S. E. 144; Jones *v.* Morris, 97 Va. 43, 33 S. E. 377.

The probative force and weight of competent evidence is for the jury, and an instruction should not be refused because the court may believe that the weight of the evidence does not support it. Morris *v.* Platt, 32 Conn. 75; Peoria, etc., R. Co. *v.* Puckett, 42 Ill. App. 642; De Camp *v.* Mississippi, etc., R. Co., 12 Iowa 348; State *v.* Tucker, 38 La. Ann. 536; Wells *v.* Washington, 6 Munf. (Va.) 532; Sailer *v.* Barnousky, 60 Wis. 169, 18 N. W. 763. The charge should be confined to the case made out in proof; but, when there is testimony tending to raise the question, it is not for the court to pass on its sufficiency, and the charge is correct which leaves that to the jury, merely declaring its effect in law. Goodall *v.* Thurman, 1 Head (Tenn.) 209.

52. Mitchell *v.* State, 110 Ga. 272, 34 S. E. 576; Chicago, etc., R. Co. *v.* Lewis, 109 Ill. 120; Chicago, etc., R. Co. *v.* Gregory, 58 Ill. 272; Peoria Marine, etc., Ins. Co. *v.* Anapow, 45 Ill. 86; Flournoy *v.* Andrews, 5 Mo. 513; Saeger *v.* Wabash R. Co., 131 Mo. App. 282, 110 S. W. 686; Stephan *v.* Metzger, 95 Mo. App. 609, 69 S. W. 625; Missouri, etc., R. Co. *v.* Baker, (Tex. Civ. App. 1902) 68 S. W. 556; Maes *v.* Texas, etc., R. Co., (Tex. Civ. App. 1893) 23 S. W. 725.

53. Straus *v.* Minzesheimer, 78 Ill. 492; Drury *v.* Barnes, 38 Ill. App. 324; Gould *v.* Gilligan, 181 Mass. 600, 64 N. E. 409, holding that the court did not err in refusing to instruct as to a position put forward by plaintiff for the first time, at the end of the charge, for which there was but the merest scintilla, if any, evidence.

54. Peoria, etc., R. Co. *v.* Puckett, 42 Ill. App. 642.

55. Cawfield *v.* Asheville St. R. Co., 111 N. C. 597, 16 S. E. 703 (in which the reviewing court held that the judge was not bound to give instructions founded upon mere conjecture arising out of negative testimony in support of a plea which the law required defendant to sustain by a preponderance of proof); Sutton *v.* Madre, 47 N. C. 320; McMechen *v.* McMechen, 17 W. Va. 683, 41 Am. Rep. 682.

56. Dickerson *v.* Johnson, 24 Ark. 251.

57. Galveston, etc., R. Co. *v.* Faber, 77 Tex. 153, 8 S. W. 64; Antone *v.* Miles, 47 Tex. Civ. App. 289, 105 S. W. 39; International, etc., R. Co. *v.* Hall, 12 Tex. Civ. App. 11, 33 S. W. 127. See also late Virginia and West Virginia cases cited *supra*, note 50. But see Fitzgerald *v.* Hart, (Tex. 1891) 17 S. W. 369.

58. Excluding evidence improperly before jury by instruction see *infra*, IX, C. 4, c, (II).

59. *Georgia.*—American Harrow Co. *v.* Dolvin, 119 Ga. 186, 45 S. E. 983.

Indiana.—Williams *v.* Atkinson, 152 Ind. 98, 52 N. E. 603.

Iowa.—Conger *v.* Bean, 58 Iowa 321, 12 N. W. 284.

Michigan.—Knickerbocker *v.* Worthing, 138 Mich. 224, 101 N. W. 540.

New York.—Finck *v.* Schaufbacher, 34 Misc. 547, 69 N. Y. Suppl. 977.

Texas.—Rotan Grocery Co. *v.* Martin, (Civ. App. 1900) 57 S. W. 706.

and properly refused, and this, it has been held, is so, although the evidence was not objected to.[60]

(VI) *BASING INSTRUCTIONS ON EVIDENCE EXCLUDED OR WITHDRAWN.* An instruction based on evidence that has been excluded or withdrawn from the consideration of the jury is erroneous,[61] and properly refused,[62] although the action of the court in excluding the evidence was erroneous.[63] But if the error in excluding it is corrected, and there is ample proof on the subject, an instruction thereon is proper.[64]

(VII) *APPLICATION OF LAW TO FACTS.* It is not the proper course for a judge to lay down the general principles applicable to a case, and leave the jury to apply them; but it is his duty to inform the jury what the law is as applicable to the facts of the case.[65] But when the law of a case is fully, accurately, and clearly stated in instructions given to the jury, and each party has an opportunity in argument to apply the law to his view of the facts, it is not error for the court to refuse to instruct the jury on the application of the law to particular evidence.[66] And an instruction which states the law correctly, although in an abstract form, is not objectionable, where a following instruction recites the facts and applies the law as stated in the previous instruction.[67]

Virginia.— Carlin *v.* Fraser, 105 Va. 216, 53 S. E. 145; Norfolk, etc., R. Co. *v.* Stevens, 97 Va. 631, 34 S. E. 525, 46 L. R. A. 367.

West Virginia.—Anderson *v.* Lewis, 64 W. Va. 297, 61 S. E. 160.

Wisconsin.— Coman *v.* Wunderlich, 122 Wis. 138, 99 N. W. 612.

60. Weaver *v.* Hendrick, 30 Mo. 502, holding that where illegal testimony is introduced without objection, and the party introducing the same asks an instruction based upon it the court may properly refuse to grant it.

61. *Alabama.*— Rarden *v.* Cunningham, 136 Ala. 263, 34 So. 26, in which it was held that such an instruction is objectionable as abstract.

Colorado.—Walsh *v.* Jackson, 33 Colo. 454, 81 Pac. 258.

Illinois.— St. Louis Consol. Coal Co. *v.* Haenni, 146 Ill. 614, 35 N. E. 162, holding that an instruction which requires the jury to base their findings upon the evidence is not open to the objection that it authorizes them to consider evidence which has been excluded from them by the court.

Maryland.— Morrison *v.* Welty, 18 Md. 169.

New York.— Foley *v.* Xavier, 104 N. Y. App. Div. 1, 93 N. Y. Suppl. 289.

Pennsylvania.— Hasson *v.* Klee, 168 Pa. St. 510, 32 Atl. 46.

South Dakota.— Sheffield *v.* Eveleth, 17 S. D. 461, 97 N. W. 367.

Washington.— Nye *v.* Kelly, 19 Wash. 73, 52 Pac. 528.

See 46 Cent. Dig. tit. "Trial," § 598.

62. *Arkansas.*— St. Louis, etc., R. Co. *v.* Ozier, 86 Ark. 179, 110 S. W. 593, 17 L. R. A. N. S. 327; Pleasants *v.* Scott, 21 Ark. 370, 76 Am. Dec. 403.

Georgia.—Whitehead *v.* Pitts, 127 Ga. 774, 56 S. E. 1004; Salter *v.* Williams, 10 Ga. 186.

Indiana.— Laporte *v.* Henry, 41 Ind. App. 197, 83 N. E. 655,

Massachusetts.—Hayes *v.* Kelley, 116 Mass. 300.

Missouri.— Lattimore *v.* Union Electric Light, etc., Co., 128 Mo. App. 37, 106 S. W. 543.

Nebraska.— Pease Piano Co. *v.* Cameron, 56 Nebr. 561, 76 N. W. 1053; Mefford *v.* Sell, 3 Nebr. (Unoff.) 566, 92 N. W. 148.

Texas.— Texas, etc., R. Co. *v.* McCoy, (Civ. App. 1909) 117 S. W. 446; International, etc., R. Co. *v.* Moynahan, 33 Tex. Civ. App. 302, 76 S. W. 803.

63. Atkinson *v.* Gatcher, 23 Ark. 101.

64. Schmit *v.* Gillen, 41 N. Y. App. Div. 302, 58 N. Y. Suppl. 458.

65. Morris *v.* Platt, 32 Conn. 75; Ruckersville Bank *v.* Hemphill, 7 Ga. 396 (holding further that it is error in the court to submit the whole case to the jury, with direction to find as they might think right and proper between the parties, regardless alike of the law and the facts); Hanchett *v.* Kimbark, (Ill. 1885) 2 N. E. 512; Mitchusson *v.* Wadsworth, 1 Tex. App. Civ. Cas. § 976; Frizzell *v.* Omaha St. R. Co., 124 Fed. 176, 59 C. C. A. 382 (holding that a charge which applies to the facts of the case in hand the rules of law which govern the issues, and clearly states to the jury the crucial questions which they must answer, is much more helpful to them, and conduces far more to a just administration of the law, than abstract propositions of law or dissertations on sound theories, concerning the application of which to the issues they are to decide the jury is left in doubt).

Instructions which remit the jury to the pleadings to find the issue are erroneous, and are ground for a reversal if the allegations are broader than the proofs. Remmler *v.* Shenuit, 15 Mo. App. 192.

66. Fogg *v.* Moulton, 59 N. H. 499; Phœnix Mut. L. Ins. Co. *v.* Clark, 59 N. H. 345; Spalding *v.* Brooks, 58 N. H. 224.

67. McGrew *v.* Missouri Pac. R. Co., 109 Mo. 582, 19 S. W. 53.

b. Necessity For Submission of and Giving Instructions on Issues, Theories, and Defenses Supported by Evidence[68] — (i) *In General.* It is the duty of the court to submit to the jury, and give instructions thereon, any issue, theory, or defense which the evidence tends to support.[69] And this right of course is

68. **In criminal prosecutions** see CRIMINAL LAW, 12 Cyc. 653.

Instructions ignoring issues or theories see *infra*, IX, C, 4, d.

Non-compliance with rule as ground for new trial see NEW TRIAL, 29 Cyc. 788.

69. *Alabama.*— Bates *v.* Hart, 124 Ala. 427, 26 So. 898, 82 Am. St. Rep. 186. And see Louisville, etc., R. Co. *v.* Britton, 149 Ala. 552, 43 So. 108.

Arkansas.— Taylor *v.* McClintock, 87 Ark. 243, 112 S. W. 405; Hot Springs St. R. Co. *v.* Hildreth, 72 Ark. 572, 82 S. W. 245.

California.— Buckley *v.* Silverberg, 113 Cal. 673, 45 Pac. 804; Goodwin *v.* McCabe, 75 Cal. 584, 17 Pac. 705.

Connecticut.—Wilson *v.* Granby, 47 Conn. 59, 36 Am. Rep. 51.

Georgia.— Sackett *v.* Stone, 115 Ga. 466, 41 S. E. 564; Atlanta Consol. St. R. Co. *v.* Hardage, 93 Ga. 457, 21 S. E. 100; Galt *v.* Jackson, 9 Ga. 151.

Illinois.— Klopski *v.* Railway Supply Co., 235 Ill. 146, 85 N. E. 146 [*affirming* 138 Ill. App. 468]; Sampsell *v.* Rybezynski, 229 Ill. 75, 82 N. E. 244; Redfern *v.* McNaul, 179 Ill. 203, 53 N. E. 569; Baltimore, etc., R. Co. *v.* Faith, 175 Ill. 58, 51 N. E. 807; Mississippi Valley Traction Co. *v.* Coburn, 132 Ill. App. 624; Keokuk, etc., Bridge Co. *v.* Wetzel, 130 Ill. App. 81 [*affirmed* in 228 Ill. 253, 81 N. E. 864]; Suburban R. Co. *v.* Malstrom, 105 Ill. App. 631; Edwards *v.* Dettenmaier, 88 Ill. App. 366; Illinois Cent. R. Co. *v.* Bryne, 78 Ill. App. 204; Chicago Heights Land Assoc. *v.* Butler, 55 Ill. App. 461; Chicago West Div. R. Co. *v.* Haviland, 12 Ill. App. 561; Irwin *v.* Atkins, 12 Ill. App. 431.

Iowa.— Kempe *v.* Bennett, 134 Iowa 247, 111 N. W. 926; Durant *v.* Fish, 40 Iowa 559; Owen *v.* Owen, 22 Iowa 270.

Kansas.— Binkley *v.* Dewall, (App. 1899) 58 Pac. 1028.

Kentucky.— J. I. Case Threshing Mach. Co. *v.* Barnes, 133 Ky. 321, 117 S. W. 418; Louisville, etc., R. Co. *v.* King, 131 Ky. 347, 115 S. W. 196; Tully *v.* Louisville, etc., R. Co., 97 S. W. 417, 30 Ky. L. Rep. 87.

Louisiana.— Union Bank *v.* Thompson, 8 Rob. 227.

Maryland.— Singer Sewing Mach. Co. *v.* Lee, 105 Md. 663, 66 Atl. 628; Lion *v.* Baltimore City Pass. R. Co., 90 Md. 266, 44 Atl. 1045, 47 L. R. A. 127; Eureka Fertilizer Co. *v.* Baltimore Copper, etc., Co., 78 Md. 179, 27 Atl. 1035; Birney *v.* New York, etc., Printing Tel. Co., 18 Md. 341, 81 Am. Dec. 607; Fells Point Sav. Inst. *v.* Weedon, 18 Md. 320, 81 Am. Dec. 603; Wells *v.* Turner, 16 Md. 133.

Massachusetts.— Coffin *v.* Coffin, 4 Mass. 1, 3 Am. Dec. 189.

Michigan.—Trombly *v.* Trombly, 106 Mich. 227, 64 N. W. 56; Poole *v.* Consolidated St. R. Co., 100 Mich. 379, 59 N. W. 390, 25 L. R. A. 744; Comstock *v.* Norton, 36 Mich. 277; Sword *v.* Keith, 31 Mich. 247.

Minnesota.— Robertson *v.* Burton, 88 Minn. 151, 92 N. W. 538; De Foe *v.* St. Paul City R. Co., 65 Minn. 319, 68 N. W. 35.

Mississippi.— Crow *v.* Burgin, (1905) 38 So. 625; Levy *v.* Gray, 56 Miss. 318.

Missouri.— Kirchner *v.* Collins, 152 Mo. 394, 53 S. W. 1081; Coleman *v.* Roberts, 1 Mo. 97; Clapper *v.* Mendell, 96 Mo. App. 40, 69 S. W. 669; Kraft *v.* McCord, 32 Mo. App. 399.

Nebraska.— Hauber *v.* Leibold, 76 Nebr. 706, 107 N. W. 1042; Colgrove *v.* Pickett, 75 Nebr. 440, 106 N. W. 453; Omaha St. R. Co. *v.* Boeson, 68 Nebr. 437, 94 N. W. 619; Chicago, etc., R. Co. *v.* Buckstaff, 65 Nebr. 334, 91 N. W. 426; Boice *v.* Palmer, 55 Nebr. 389, 75 N. W. 849; Hancock *v.* Stout, 28 Nebr. 301, 44 N. W. 446; Lansing *v.* Wessell, 5 Nebr. (Unoff.) 199, 97 N. W. 815; Figg *v.* Donahoo, 4 Nebr. (Unoff.) 661, 95 N. W. 1020.

New Jersey.—Scott *v.* Mitchell, 41 N. J. L. 346.

New York.— Zabriskie *v.* Smith, 13 N. Y. 322, 64 Am. Dec. 551; Bronk *v.* Binghamton R. Co., 79 N. Y. App. Div. 269, 79 N. Y. Suppl. 577; Kearns *v.* Brooklyn Heights R. Co., 60 N. Y. App. Div. 631, 69 N. Y. Suppl. 856; Jacobson *v.* Fraade, 56 Misc. 631, 107 N. Y. Suppl. 706; VanHoesen *v.* VanAlstyne, 3 Wend. 75.

North Carolina.— Allen *v.* Durham Traction Co., 144 N. C. 288, 56 S. E. 942; Braswell *v.* Johnston, 108 N. C. 150, 12 S. E. 911; Arey *v.* Stephenson, 34 N. C. 24.

Oregon.— Fiere *v.* Ladd, 25 Oreg. 423, 36 Pac. 572.

Pennsylvania.— Kehoe *v.* Allentown, etc., Traction Co., 187 Pa. St. 474, 41 Atl. 310; Hamilton *v.* Menor, 2 Serg. & R. 70; Smith *v.* Thompson, 2 Serg. & R. 49; Powers *v.* McFerran, 2 Serg. & R. 44; Thomas *v.* Butler, 24 Pa. Super. Ct. 305.

South Dakota.— Troy Min. Co. *v.* Thomas, 15 S. D. 238, 88 N. W. 106.

Tennessee.— Memphis St. R. Co. *v.* Newman, 108 Tenn. 666, 69 S. W. 269.

Texas.—Whitsett *v.* Miller, 1 Tex. Unrep. Cas. 203; Lyon *v.* Bedgood, (Civ. App. 1909) 117 S. W. 897; San Antonio Mach., etc., Co. *v.* Campbell, (Civ App. 1908) 110 S. W. 770 *et seq.*; Northern Texas Traction Co. *v.* Moberly, (Civ. App. 1908) 109 S. W. 483; Texarkana, etc., R. Co. *v.* Bell, (Civ. App. 1907) 101 S. W. 1167; Texas, etc., R. Co. *v.* Huber, (Civ. App. 1906) 95 S. W. 568; Bering Mfg. Co. *v.* Femelat, 35 Tex. Civ. App. 36, 79 S. W. 869; Dabney *v.* Conley, (Civ. App. 1902) 65 S. W. 1124; Missouri, etc., R. Co. *v.* Cardena, 22 Tex. Civ. App. 300, 54 S. W. 312; McCarty *v.* Houston, etc., R. Co., 21 Tex. Civ. App. 568, 54 S. W. 421; Galveston, etc., R. Co. *v.* Kinnebrew, 7 Tex. Civ. App.

not affected by the fact that there is countervailing testimony.[70] As already shown, a party is not, however, entitled to an instruction on a theory as to which he has adduced no proof,[71] and where such is the case, the court should upon request instruct that one of several theories upon which recovery is sought is wholly unsupported by proof.[72] The theories of both parties need not, and generally should not, be stated in a single instruction,[73] and a party cannot complain that his theory of the case was not presented in his opponent's instruction,[74] if it is clearly brought out in instructions given at his request.[75]

(II) *SEVERAL COUNTS OR DEFENSES.* Where plaintiff declares upon several counts, he is entitled to an instruction that if he has proved any one of the causes of action alleged he is entitled to recover.[76] If there are defective counts in the declaration it is error for the court to refuse to instruct the jury to disregard them,[77] and instructions based thereon are erroneous.[78] It is error to give an instruction as covering the whole declaration which is applicable to only one count thereof.[79] While defendant may have the right to plead inconsistent defenses and has introduced testimony to sustain each, a charge that both cannot be true, that one must be false, is not erroneous.[80]

c. Ignoring or Excluding Evidence From Consideration of Jury[81] — (I) *IN GENERAL.* Instructions which ignore or exclude from the consideration of the jury evidence which is competent and material to the issues involved are erroneous,[82]

549, 27 S. W. 631; Bruni *v.* Garza, (Civ. App. 1894) 26 S. W. 108; Weis *v.* Dittman, 4 Tex. Civ. App. 35, 23 S. W. 229.

Vermont.— Coolidge *v.* Ayers, 76 Vt. 405, 57 Atl. 970; Whitney *v.* Lynde, 16 Vt. 579; Brainard *v.* Burton, 5 Vt. 97; Fletcher *v.* Howard, 2 Aik. 115, 16 Am. Dec. 686.

Virginia.— Tyson *v.* Williamson, 96 Va. 636, 32 S. E. 42; Bertha Zinc Co. *v.* Martin, 93 Va. 791, 22 S. E. 869, 70 L. R. A. 999; New York, etc., R. Co. *v.* Thomas, 92 Va. 606, 24 S. E. 264; Gordon *v.* Richmond, 83 Va. 436, 2 S. E. 727.

Wisconsin.— Zonne *v.* Wiersom, 3 Pinn. 217, 3 Chandl. 240.

United States.— Smith *v.* Carrington, 4 Cranch 62, 2 L. ed. 550; Douglass *v.* McAllister, 3 Cranch 298, 2 L. ed. 445; Stoll *v.* Loving, 120 Fed. 805, 57 C. C. A. 173.

See 46 Cent. Dig. tit. "Trial," §§ 478, 480.

In Virginia where the "scintilla" doctrine prevails the rule stated in the text applies, although the evidence is so slight as to be insufficient to support a verdict. Richmond Pass., etc., Co. *v.* Allen, 101 Va. 200, 43 S. E. 356.

70. King *v.* Wabash R. Co., 211 Mo. 1, 109 S. W. 671.

71. See *supra*, IX, C, 4, a, (IV).

72. Mansfield *v.* Morgan, 140 Ala. 567, 37 So. 393; Chicago Bridge, etc., Co. *v.* Hayes, 91 Ill. App. 269.

Sufficiency of instruction. — If the court instructs the jury that there is but one issue for them to determine, failure to instruct them to disregard other issues is not error. Davis *v.* Atlas Assur. Co., 16 Wash. 232, 47 Pac. 436, 885.

73. Chicago, etc., R. Co. *v.* Groves, 56 Kan. 601, 44 Pac. 628.

74. Meadows *v.* Pacific Mut. L. Ins. Co., 129 Mo. 76, 31 S. W. 578, 50 Am. St. Rep. 427.

75. Meadows *v.* Pacific Mut. L. Ins. Co., 129 Mo. 76, 31 S. W. 578, 50 Am. St. Rep. 427; State *v.* Hope, 102 Mo. 410, 14 S. W. 985; Thackston *v.* Port Royal, etc., R. Co., 40 S. C. 80, 18 S. E. 177.

76. Chicago, etc., R. Co. *v.* Filler, 195 Ill. 9, 62 N. E. 919; Chicago, etc., R. Co. *v.* Pettit, 111 Ill. App. 172 [*reversed* on other grounds in 209 Ill. 452, 70 N. E. 591]; Southern Indiana R. Co. *v.* Peyton, 157 Ind. 690, 61 N. E. 722. And see Kirk *v.* Jajko, 224 Ill. 338, 79 N. E. 577, holding that where each of the three counts of plaintiff's declaration stated a cause of action, and all of them were submitted to the jury, an instruction that, if plaintiff had proved his case as alleged in the declaration, or some count thereof, by a preponderance of evidence, the jury should find defendant guilty, was not objectionable because it predicated plaintiff's right to recover on proof of his case as alleged in the declaration or some count thereof.

Where a count in contract is joined with a count in tort for the same cause of action, the court should instruct the jury that recovery can be had on only one of the counts. Holst *v.* Stewart, 161 Mass. 516, 37 N. E. 755, 42 Am. St. Rep. 442.

77. Chicago, etc., R. Co. *v.* Eselin, 86 Ill. App. 94.

78. Grand Tower Mfg., etc., Co. *v.* Ullman, 89 Ill. 244.

79. Porter *v.* Nash, 1 Ala. 452; Chicago, etc., R. Co. *v.* Eselin, 86 Ill. App. 94; Sunderland *v.* Pioneer Fire Proof Constr. Co., 78 Ill. App. 102.

80. McGowan *v.* Larsen, 66 Fed. 910, 14 C. C. A. 178.

81. **In criminal prosecutions** see CRIMINAL LAW, 12 Cyc. 653.

82. *Alabama.*— Mobile Light, etc., Co. *v.* Walsh, 146 Ala. 295, 40 So. 560; Austill *v.* Heironymus, 117 Ala. 620, 23 So. 660; Scarborough *v.* Blackman, 108 Ala. 656, 18 So.

and this is so, although the evidence is slight;[83] and it is of course proper to refuse instructions which are defective in this respect.[84] The rule under con-

735; Louisville, etc., R. Co. *v.* Rice, 101 Ala. 676, 14 So. 639.

Arkansas.— Southwestern Tel., etc., Co. *v.* Bruce, 89 Ark. 581, 117 S. W. 564; Southern Express Co. *v.* Hill, 81 Ark. 1, 98 S. W. 371.

California.— Quint *v.* Dimond, 147 Cal. 707, 82 Pac. 310; Berliner *v.* Travelers' Ins. Co., 121 Cal. 451, 53 Pac. 922; Gallagher *v.* Williamson, 23 Cal. 331, 83 Am. Dec. 114.

Colorado.— Rio Grande, etc., R. Co. *v.* Campbell, 44 Colo. 1, 96 Pac. 986.

Florida.— Florida R., etc., Co. *v.* Webster, 25 Fla. 394, 5 So. 714.

Georgia.— Susong *v.* McKenna, 126 Ga. 433, 55 S. E. 236; Model Mill Co. *v.* McEver, 95 Ga. 701, 22 S. E. 795; Bowden *v.* Achor, 95 Ga. 243, 22 S. E. 254; Richmond, etc., R. Co. *v.* White, 88 Ga. 805, 15 S. E. 802; Towns *v.* Kellett, 11 Ga. 286.

Idaho.— Johnson *v.* Fraser, 2 Ida. (Hasb.) 404, 18 Pac. 48; Deasey *v.* Thurman, 1 Ida. 775.

Illinois.— Cushman *v.* Cogswell, 86 Ill. 62; Dean *v.* Duncan, 17 Ill. 272; Springfield Consolidated R. Co. *v.* Gregory, 122 Ill. App. 607; Lloyd *v.* Matthews, 119 Ill. App. 546; Chicago Hydraulic Press Brick Co. *v.* Campbell, 116 Ill. App. 322; Perry State Bank *v.* Elledge, 109 Ill. App. 179; Clark *v.* Smith, 87 Ill. App. 409; Felver *v.* Judd, 81 Ill. App. 529; Champion Iron Fence Co. *v.* Bradley, 10 Ill. App. 328.

Indiana.— Larue *v.* Russell, 26 Ind. 386; Roots *v.* Tyner, 10 Ind. 87; Wyman *v.* Turner, 14 Ind. App. 118, 42 N. E. 652.

Iowa.— Platt *v.* Ottumwa, 136 Iowa 221, 113 N. W. 831; Dodge *v.* Lamont, 130 Iowa 721, 107 N. W. 948; McNamara *v.* Dratt, 40 Iowa 413.

Kentucky.—Ratcliff *v.* Trimble, 12 B. Mon. 32.

Maine.—White *v.* Jordan, 27 Me. 370.

Maryland.— Miller *v.* Leib, 109 Md. 414, 72 Atl. 466; Seaboard Air Line R. Co. *v.* Phillips, 108 Md. 285, 70 Atl. 232; Cover *v.* Myers, 75 Md. 406, 23 Atl. 850, 32 Am. St. Rep. 394; Newman *v.* McComas, 43 Md. 70; Cook *v.* Carr, 20 Md. 403.

Massachusetts.— Dexter *v.* Thayer, 189 Mass. 114, 75 N. E. 223; Delaney *v.* Hall, 130 Mass. 524.

Mississippi.— Reed *v.* Yazoo, etc., R. Co., 94 Miss. 639, 47 So. 670; Dean *v.* Tucker, 58 Miss. 487; Meyer *v.* Blakemore, 54 Miss. 570.

Missouri.—Raysdon *v.* Trumbo, 52 Mo. 35; Ellis *v.* McPike, 50 Mo. 574; Warsaw First Nat. Bank *v.* Currie, 44 Mo. 91; Chappell *v.* Allen, 38 Mo. 213; Brownlow *v.* Woolard, 66 Mo. App. 636.

Nebraska.— Standard Distilling, etc., Co. *v.* Harris, 75 Nebr. 480, 106 N. W. 582; Hoover *v.* Haynes, 65 Nebr. 557, 91 N. W. 392, 93 N. W. 732; Sutherland *v.* Holliday, 65 Nebr. 9, 90 N. W. 937; Levy *v.* Cunningham, 56 Nebr. 348, 76 N. W. 882; Consaul *v.* Sheldon, 35 Nebr. 247, 52 N. W. 1104.

New Jersey.—Blackmore *v.* Ellis, 70 N. J. L. 264, 57 Atl. 1047; Consolidated Traction Co. *v.* Behr, 59 N. J. L. 477, 37 Atl. 142.

New York.— Rourke *v.* New York, 77 N. Y. App. Div. 72, 78 N. Y. Suppl. 1048; Fitzgerald *v.* Long Island R. Co., 3 N. Y. Suppl. 230 [*affirmed* in 117 N. Y. 653, 22 N. E. 1133]; Stallcup *v.* National Park Bank, 6 N. Y. St. 512 [*affirmed* in 117 N. Y. 630, 22 N. E. 1128]; Ward *v.* Forrest, 20 How. Pr. 465.

North Carolina.— Long *v.* Hall, 97 N. C. 286, 2 S. E. 229.

Pennsylvania.— Hall *v.* Vanderpool, 156 Pa. St. 152, 26 Atl. 1069; Gratz *v.* Beates, 45 Pa. St. 495; Stukey *v.* Rissinger, 31 Pa. Super. Ct. 3; Jones *v.* Cleveland, 6 Pa. Super. Ct. 640.

Rhode Island.— Tucker *v.* Rhode Island Co., (1908) 69 Atl. 850.

Texas.—Jacobs *v.* Crum, 62 Tex. 401; Pilot Point Water Works *v.* Fisher, 43 Tex. Civ. App. 28, 93 S. W. 529; Bryan Cotton-Seed Oil Mill *v.* Fuller, (Civ. App. 1900) 57 S. W. 924; Willoughby *v.* Townsend, 18 Tex. Civ. App. 724, 45 S. W. 861.

West Virginia.—Price *v.* Chesapeake, etc., R. Co., 46 W. Va. 538, 33 S. E. 255; Woodell *v.* West Virginia Imp. Co., 38 W. Va. 23, 17 S. E. 386; Thompson *v.* Douglass, 35 W. Va. 337, 13 S. E. 1015.

Wisconsin.— Benjamin *v.* Covert, 55 Wis. 157, 12 N. W. 387.

United States.— Greenleaf *v.* Birth, 9 Pet. 292, 9 L. ed. 132; Weiss *v.* Bethlehem Iron Co., 88 Fed. 23, 31 C. C. A. 363.

See 46 Cent. Dig. tit. "Trial," § 618 *et seq.*

83. Edgar *v.* McArn, 22 Ala. 796; Beale *v.* Hall, 22 Ga. 431.

84. *Alabama.*—Garth *v.* Alabama Traction Co., 148 Ala. 96, 42 So. 627; Birmingham R., etc., Co. *v.* Ryan, 148 Ala. 69, 41 So. 616; Elliott *v.* Howison, 146 Ala. 568, 40 So. 1018; Birmingham R., etc., Co. *v.* Jones, 146 Ala. 277, 41 So. 146; Alabama Great Southern R. Co. *v.* Sanders, 145 Ala. 449, 40 So. 402; Anniston Electric, etc., Co. *v.* Elwell, 144 Ala. 317, 42 So. 45; Gilliland *v.* Martin, (1906) 42 So. 7; Sloss-Sheffield Steel, etc., Co. *v.* Hutchinson, 144 Ala. 221, 40 So. 114; Central of Georgia R. Co. *v.* Larkins, 142 Ala. 375, 37 So. 660; Highland Ave., etc., R. Co. *v.* Sampson, 112 Ala. 425, 20 So. 566; Williamson *v.* Tyson, 105 Ala. 644, 17 So. 336; Griel *v.* Lomax, 94 Ala. 641, 10 So. 232.

Arizona.— Providence Gold Min. Co. *v.* Thompson, 7 Ariz. 69, 60 Pac. 874.

California.— Matteson *v.* Southern Pac. R. Co., 6 Cal. App. 318, 92 Pac. 101

Connecticut.— Scovill *v.* Baldwin, 27 Conn. 316.

Florida.— Seaboard Air Line R. Co. *v.* Smith, 53 Fla. 375, 43 So. 235; Long *v.* State, 44 Fla. 134, 32 So. 870.

Georgia.— Wylly *v.* Gazan, 69 Ga. 506; Johnson *v.* Kinsey, 7 Ga. 428.

Illinois.— Concord Apartment House Co. *v.* O'Brien, 228 Ill. 360, 81 N. E. 1038; Dunn

sideration finds frequent application in cases where the court in instructing the jury assumes to direct a verdict if the jury find the facts as summarized in the instruction; a form of instruction which according to some decisions is not in any event to be commended.[85] It is uniformly held that where a court instructs a jury upon which state of facts they must find a verdict for a party, the instruction should include all the facts in controversy material to the right of plaintiff or the defense of defendant; [86] and if an essential fact is omitted it cannot be supplied

v. Crichfield, 214 Ill. 292, 73 N. E. 386; Chicago, etc., R. Co. *v.* Rains, 203 Ill. 417, 67 N. E. 840; Pennsylvania Co. *v.* Reidy, 198 Ill. 9, 64 N. E. 698 [*affirming* 99 Ill. App. 477].

Indiana.—Diamond Block Coal Co. *v.* Cuthbertson, (1905) 73 N. E. 818; Home Ins. Co. *v.* Gagen, 38 Ind. App. 680, 76 N. E. 927.

Kansas.— Kansas City, etc., R. Co. *v.* Lane, 33 Kan. 702, 7 Pac. 587.

Maine.— Hunter *v.* Randall, 69 Me. 183.

Maryland.— B. F. Sturtevant Co. *v.* Cumberland, 106 Md. 587, 68 Atl. 351; Thomas *v.* Sternheimer, 29 Md. 268.

Massachusetts. — Casavan *v.* Sage, 201 Mass. 547, 87 N. E. 893; Berry *v.* Ingalls, 199 Mass. 77, 85 N. E. 191; Fuller *v.* New York F. Ins. Co., 184 Mass. 12, 67 N. E. 879; Henderson *v.* Raymond, 183 Mass. 443, 67 N. E. 427; Dolphin *v.* Plumley, 175 Mass. 304, 56 N. E. 281; Graves *v.* Dill, 159 Mass. 74, 34 N. E. 336.

Michigan.—Muir *v.* Kalamazoo Corset Co., 155 Mich. 441, 119 N. W. 589; Logan *v.* Lake Shore, etc., R. Co., 148 Mich. 603, 112 N. W. 506.

Missouri.— Moore *v.* St. Louis Transit Co., 193 Mo. 411, 91 S. W. 1060; Maxwell *v.* Hannibal, etc., R. Co., 85 Mo. 95; Jones *v.* Jones, 57 Mo. 138; Anderson *v.* Kincheloe, 30 Mo. 520; Fine *v.* St. Louis Public Schools, 30 Mo. 166; Flynn *v.* St. Louis Transit Co., 113 Mo. App. 185, 87 S. W. 560; Edger *v.* Kupper, 110 Mo. App. 280, 85 S. W. 949; Deitring *v.* St. Louis Transit Co., 109 Mo. App. 524, 85 S. W. 140; Grafeman Dairy Co. *v.* St. Louis Dairy Co., 96 Mo. App. 495, 70 S. W. 390; Carder *v.* Primm, 60 Mo. App. 423; Brown *v.* McCormick, 23 Mo. App. 181.

Nebraska.— Atchison, etc., R. Co. *v.* Jones, 9 Nebr. 67, 2 N. W. 363.

North Carolina.— Dobson *v.* Southern R. Co., 132 N. C. 900, 44 S. E. 593.

Pennsylvania.— Nieman *v.* Ward, 1 Watts & S. 68.

Texas.— Ellis *v.* Littlefield, 41 Tex. Civ. App. 318, 93 S. W. 171; El Paso, etc., R. Co. *v.* Darr, (Civ. App. 1906) 93 S. W. 166; Texas Cent. R. Co. *v.* Miller, (Civ. App. 1905) 88 S. W. 499; Gulf, etc., R. Co. *v.* Warner, 22 Tex. Civ. App. 167, 54 S. W. 1064.

Virginia.— Commonwealth L. Ins. Co. *v.* Hairston, 108 Va. 832, 62 S. E. 1057; Douglas Land Co. *v.* T. W. Thayer Co., 107 Va. 292, 58 S. E. 1101; Brown *v.* Rice, 76 Va. 629.

West Virginia.— Parkersburg Nat. Bank *v.* Hanneman, 63 W. Va. 358, 60 S. E. 242; Delmar Oil Co. *v.* Bartlett, 62 W. Va. 700, 59 S. E. 634; Johnson *v.* Bank, 60 W. Va. 320, 55 S. E. 394.

United States.— Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, 12 S. Ct. 679, 36 L. ed. 485; Texas, etc., R. Co. *v.* White, 101 Fed. 928, 42 C. C. A. 86, 62 L. R. A. 90.

See 46 Cent. Dig. tit. "Trial," § 618 *et seq.*

85. Martin *v.* Johnson, 89 Ill. 537; Mayr *v.* Hodge, etc., Co., 78 Ill. App. 556; St. Louis, etc., R. Co. *v.* Droddy, (Tex. Civ. App. 1908) 114 S. W. 902.

86. *Alabama.*— Louisville, etc., R. Co. *v.* Rice, 101 Ala. 676, 14 So. 639; Pritchett *v.* Munroe, 22 Ala. 501; Rowland *v.* Ladiga, 21 Ala. 9.

California.— Gallagher *v.* Williamson, 23 Cal. 331, 83 Am. Dec. 114.

Colorado.— Denver, etc., Rapid Transit Co. *v.* Dwyer, 3 Colo. App. 408, 33 Pac. 815.

Florida.— Gracy *v.* Atlantic Coast Line R. Co., 53 Fla. 350, 42 So. 903.

Georgia.— Augusta Southern R. Co. *v.* McDade, 105 Ga. 134, 31 S. E. 420; Towns *v.* Kellett, 11 Ga. 286.

Idaho.— Johnson *v.* Fraser, 2 Ida. (Hasb.) 404, 18 Pac. 48; Deasey *v.* Thurman, 1 Ida. 775.

Illinois.— Illinois Cent. R. Co. *v.* Warriner, 229 Ill. 91, 82 N. E. 246; Chicago Consol. Traction Co. *v.* Schritter, 222 Ill. 364, 78 N. E. 820; Alton Light, etc., Co. *v.* Oller, 217 Ill. 15, 75 N. E. 419, 4 L. R. A. N. S. 399 [*affirming* 119 Ill. App. 181]; Illinois Iron, etc., Co. *v.* Weber, 196 Ill. 526, 63 N. E. 1008; Harding *v.* Thuet, 124 Ill. App. 437; New Ohio Washed Coal Co. *v.* Hindman, 119 Ill. App. 287; Ford *v.* Hine Bros. Co., 115 Ill. App. 153; Chicago City R. Co. *v.* O'Donnell, 114 Ill. App. 359; Chicago City R. Co. *v.* Mauger, 105 Ill. App. 579; McNulta *v.* Jenkins, 91 Ill. App. 309; Chicago Athletic Assoc. *v.* Eddy Electric Mfg. Co., 77 Ill. App. 204; Eugene Glass Co. *v.* Martin, 54 Ill. App. 288; Hawley *v.* Dailey, 13 Ill. App. 391.

Indiana.— American Sheet, etc., Co. *v.* Bucy, 43 Ind. App. 501, 87 N. E. 1051; Dudley *v.* State, 40 Ind. App. 74, 81 N. E. 89; Voris *v.* Shotts, 20 Ind. App. 220, 50 N. E. 484; Wyman *v.* Turner, 14 Ind. App. 118, 42 N. E. 652.

Iowa.— McNamara *v.* Dratt, 40 Iowa 413.

Kentucky.—Myers *v.* Sanders, 7 Dana 506; Mitchell-Tranter Co. *v.* Ehmett, 65 S. W. 835, 23 Ky. L. Rep. 1788, 55 L. R. A. 710.

Maryland.— B. F. Sturtevant Co. *v.* Cumberland, 106 Md. 587, 68 Atl. 351; Bristol Nat. Bank *v.* Baltimore, etc., R. Co., 99 Md. 661, 59 Atl. 134, 105 Am. St. Rep. 321.

Mississippi.— Dean *v.* Tucker, 58 Miss. 487; Meyer *v.* Blakemore, 54 Miss. 570.

Missouri.— Flaherty *v.* St. Louis Transit Co., 207 Mo. 318, 106 S. W. 15; McDermott

by another instruction.[87] For even where instructions may supplement each other, each one must state the law correctly as far as it goes, and they should be in harmony, so that the jury may not be misled.[88] The error in giving the instruction can only be cured by withdrawing it from the jury.[89] The rule, however, must be taken in its reasonable sense to apply only to the substantive and controlling facts; facts essential to the validity of the hypothesis, and not to the subsidiary and evidentiary facts; otherwise it would be difficult to tell where the trial judge should stop short of a recapitulation of the evidence and reasonable inferences, which cannot be contemplated by the rule.[90]

(II) *Evidence Improperly Before Jury.* Where evidence improper for the jury to consider has been introduced, the court may and should withdraw the evidence or direct the jury to disregard it.[91] If this is done, it is ordinarily held

v. Hannibal, etc., R. Co., 87 Mo. 285; Bolles *v.* Kansas City Southern R. Co., 134 Mo. App. 696, 115 S. W. 459; Borden *v.* Falk Co., 97 Mo. App. 566, 71 S. W. 478; Boothe *v.* Loy, 83 Mo. App. 601; Henry Gaus, etc., Mfg. Co. *v.* Magee, etc., Mfg. Co., 42 Mo. App. 307.

Nebraska.— Carruth *v.* Harris, 41 Nebr. 789, 60 N. W. 106; Concaul *v.* Sheldon, 35 Nebr. 247, 52 N. W. 1104; Plattsmouth *v.* Boeck, 32 Nebr. 297, 49 N. W. 167; Nelson *v.* Johansen, 18 Nebr. 180, 24 N. W. 730, 53 Am. Rep. 806.

New York.— Hazewell *v.* Coursen, 81 N. Y. 630 [*reversing* 45 N. Y. Super. Ct. 22].

Tennessee.— James *v.* Drake, 3 Sneed 340.

Texas.— International, etc., R. Co. *v.* Kuehn, 2 Tex. Civ. App. 210, 21 S. W. 58.

Virginia.— Vaughan Mach. Co. *v.* Stanton Tanning Co., 106 Va. 445, 56 S. E. 140.

West Virginia.— Ward *v.* Ward, 47 W. Va. 766, 35 S. E. 873; Thompson *v.* Douglass, 35 W. Va. 337, 13 S. E. 1015.

See 46 Cent. Dig. tit. "Trial," § 619.

Application of rule.— In an action on a note given for a machine sold defendant and shipped to it f. o. b. at shipping point by plaintiff, and which was injured when received by defendant, a part of the evidence tended to show negligence in loading on the cars. It was held that an instruction that, if the machine was properly loaded and was in proper condition for transportation, the jury must find for plaintiff, otherwise they must find for defendant, was erroneous as leaving out of view much important evidence bearing on the issue, and the liability of the carrier to the consignee for injuries from negligent loading and those received during transportation. Vaughan Mach. Co. *v.* Stanton Tanning Co., 106 Va. 445, 56 S. E. 140. An instruction, in an action for injuries to one coming in contact with a broken wire heavily charged with electricity, that the jury on finding facts recited based on plaintiff's evidence must find that defendant was negligent and must find for plaintiff unless he was negligent, was erroneous as withdrawing from the jury defendant's evidence showing its freedom from negligence. Southwestern Tel., etc., Co. *v.* Bruce, 89 Ark. 581, 117 S. W. 564. In an action by a passenger on a freight train for injuries from a collision while he was occupying the caboose cupola, where it appeared that others not occupying the cupola were also injured, a charge that if his act in occupying the cupola contributed "in any way whatsoever" to the injury, he could not recover, although defendant was grossly negligent, etc., was erroneous as disregarding evidence tending to show that the injury was not due to plaintiff's being in the cupola. Reed *v.* Yazoo, etc., R. Co., 94 Miss. 639, 47 So. 670. In an action for killing a horse on a railroad crossing, where the evidence showed that the engineer let off steam to scare it off the track, a charge permitting a recovery upon a finding that defendant omitted to blow the whistle, ring the bell, or slack or stop the train, was held to be erroneous as ignoring that evidence. St. Louis, etc., R. Co. *v.* Droddy, (Tex. Civ. App. 1908) 114 S. W. 902.

87. Illinois Cent. R. Co. *v.* Smith, 208 Ill. 608, 70 N. E. 628; Chicago, etc., R. Co. *v.* Glover, 154 Ind. 584, 57 N. E. 244; American Sheet, etc., Plate Co. *v.* Bucy, 43 Ind. App. 501, 87 N. E. 1051; Indiana Natural Gas, etc., Co. *v.* Vouble, 31 Ind. App. 370, 68 N. E. 195. And see Harding *v.* Thuet, 124 Ill. App. 437.

88. Illinois Iron, etc., Co. *v.* Weber, 196 Ill. 526, 63 N. E. 1008.

89. Chicago, etc., R. Co. *v.* Glover, 154 Ind. 584, 57 N. E. 244; Indiana Natural Gas, etc., Co. *v.* Vouble, 31 Ind. App. 370, 68 N. E. 195.

90. Hutchinson *v.* Wenzel, 155 Ind. 49, 56 N. E. 845. To the same effect see Illinois Cent. R. Co. *v.* Byrne, 205 Ill. 9, 68 N. E. 720; Chicago, etc., R. Co. *v.* Harrington, 192 Ill. 9, 61 N. E. 622; Pennsylvania Co. *v.* Weddle, 100 Ind. 138. And see Van Winter *v.* Henry Co., 61 Iowa 684, 17 N. W. 94.

91. *Illinois.*— Pittman *v.* Gaty, 10 Ill. 186.

Indiana.— Eppert *v.* Hall, 133 Ind. 417, 31 N. E. 74, 32 N. E. 713; Utter *v.* Vance, 7 Blackf. 514.

Missouri.— Pavey *v.* Burch, 3 Mo. 477, 26 Am. Dec. 682.

New Hampshire.— Burnham *v.* Butler, 58 N. H. 568; Zollar *v.* Janvrin, 47 N. H. 324; Probate Judge *v.* Stone, 44 N. H. 593.

New York.— Durgin *v.* Ireland, 14 N. Y. 322.

North Carolina.—Wallace *v.* Western North Carolina R. Co., 101 N. C. 454, 8 S. E. 166.

sufficient to cure the error,[92] the presumption being that no prejudice resulted,[93] and it is only when it is reasonably apparent that the improper evidence has affected the verdict that there is ground for reversal.[94] If, however, it appears that the verdict was in any way affected by testimony improperly admitted, the case will be unrelieved of error regardless of an instruction not to consider the evidence.[95] In respect of the sufficiency of the action to be taken by the court in withdrawing improper evidence the decisions are not harmonious. According to some decisions nothing short of an express instruction to the jury to disregard the evidence will suffice,[96] it being said that the effect of incompetent testimony once admitted cannot be done away with, except by such a charge to the jury as

Pennsylvania.— Devling *v.* Williamson, 9 Watts 311.

Wisconsin.— Campbell *v.* Moore, 3 Wis. 767.

See 46 Cent. Dig. tit. "Trial," § 504. And see cases cited in subsequent notes in this section.

Applications of rule.— Thus if it appears that the testimony of a witness is hearsay (Pittman *v.* Gaty, 10 Ill. 186; Barr *v.* Wilmington Coal Min., etc., Co., 5 Ill. App. 442), or if evidence is admitted on the theory that it will be connected by other evidence with the fact sought to be proved, and is not so connected (Bedell *v.* Janney, 9 Ill. 193), the jury should be instructed to disregard it. So in an action for assault and battery, where witnesses have been improperly allowed to state their opinions, and the court has improperly characterized the action as trivial, the plaintiff is entitled to an instruction that "the jury are the sole judges of the facts in this case, and they are to determine this case upon their understanding of the facts introduced in evidence solely, without regard to any other person's opinion thereon, no matter whoever they may be." Zube *v.* Weber, 67 Mich. 52, 60, 34 N. W. 264. And where the court excludes certain evidence, and it is repeated by the witness, the witness should be cautioned as to the ruling, and the jury should be admonished not to consider the statement. U. S. Health, etc., Ins. Co. *v.* Jolly, (Ky. 1909) 118 S. W. 281.

92. *Georgia.*— Blount *v.* Beall, 95 Ga. 182, 22 S. E. 52.

Indiana.— Shephard *v.* Goben, 142 Ind. 318, 39 N. E. 506; Indianapolis, etc., R. Co. *v.* Bush, 101 Ind. 582; Blizzard *v.* Applegate, 77 Ind. 516; Gebhart *v.* Burkett, 57 Ind. 378, 26 Am. Rep. 61; Zehner *v.* Kepler, 16 Ind. 290.

Michigan.— Tolbert *v.* Burke, 89 Mich. 132, 50 N. W. 803.

Missouri.— Griffith *v.* Hanks, 91 Mo. 109, 4 S. W. 508; Sparr *v.* Wellman, 11 Mo. 230.

North Carolina.— Bridgers *v.* Dill, 97 N. C. 222, 1 S. E. 767.

Texas.— Missouri Pac. R. Co. *v.* Mitchell, 75 Tex. 77, 12 S. W. 810; Jones *v.* Reus, 5 Tex. Civ. App. 628, 24 S. W. 674. And see Gulf Coast, etc., R. Co. *v.* Farmer, 102 Tex. 235, 115 S. W. 260 [*reversing* (Civ. App. 1908) 108 S. W. 729].

United States.— Pennsylvania Co. *v.* Roy, 102 U. S. 451, 26 L. ed. 141.

Reason for rule.—Any other rule would make it necessary in every trial, where an error in the admission of proof is committed, of which error the court becomes aware before the final submission of the case to the jury, to suspend the trial, discharge the jury, and commence anew. A rule of practice leading to such results cannot meet with approval. Pennsylvania Co. *v.* Roy, 102 U. S. 451, 26 L. ed. 141.

93. Shephard *v.* Goben, 142 Ind. 318, 39 N. E. 506; Pennsylvania Co. *v.* Roy, 102 U. S. 451, 26 L. ed. 141.

94. Jones *v.* Reus, 5 Tex. Civ. App. 628, 24 S. W. 674; Remington *v.* Bailey, 13 Wis. 332.

95. Posey *v.* Rice, 29 Wis. 93; Castleman *v.* Griffin, 13 Wis. 535; Remington *v.* Bailey, 13 Wis. 332; State Bank *v.* Dutton, 11 Wis. 371.

96. Pavey *v.* Burch, 3 Mo. 447, 26 Am. Dec. 682; Henkle *v.* McClure, 32 Ohio St. 202; Castleman *v.* Griffin, 13 Wis. 535, holding that the fact that instructions are silent upon the subjects covered by evidence improperly admitted is not equivalent to a positive direction to disregard it and is not sufficient. And see Jones *v.* U. S. Mutual Acc. Assoc., 92 Iowa 692, 61 N. W. 485. In this case which was an action on an accident policy conditioned that it shall not cover injuries received by the insured while fighting, it appeared that insured was shot in a difficulty. Plaintiff's counsel, against defendant's objection, stated, in the presence of the jury, that he proposed to show that the person by whom deceased was shot had several days before attempted to secure a pistol, and that such person had grabbed at insured's watch and money with a drawn revolver, and evidence as to the person's attempt to secure a revolver was introduced. The evidence was afterward stricken out, and the jury were admonished to disregard the counsel's proposal and the evidence. It was held that it was error to refuse to direct the jury, in the instructions, to disregard the evidence and proposal, the previous admonition alone being insufficient to remove possible prejudice.

Instruction sufficient within the rule.—An oral instruction in respect of a letter improperly admitted. "Gentlemen, you will not further consider the letter of introduction, the contents of which have been read to you," is sufficient. Wright *v.* Gillespie, 43 Mo. App. 244.

will enforce on them the duty to disregard it completely.[97] Other decisions adopt a less stringent rule. In one case it was said that the nature of the instruction necessary to overcome the effect of evidence improperly before the jury is largely within the discretion of the trial court,[98] and in other cases it has been held that the fact of withdrawal of the evidence implies that it is not to be considered and renders it unnecessary to warn the jury in the general charge to disregard it,[99] that a direction during trial to reject evidence improperly admitted makes it unnecessary for the court to instruct the jury to disregard it,[1] that if the judge in summing up totally ignores the evidence, error cannot be predicated on a failure to expressly direct the jury not to consider it.[2] So it has been held that the court having immediately stricken out evidence, which was all he was asked to do, error cannot be predicated of failure to instruct the jury to disregard such evidence;[3] and that where a party fails to request that an instruction given by the court to correct an error in the admission of evidence be made more explicit, it will be deemed to have been satisfactory to him at the time, and he cannot afterward be heard to complain.[4] So it has been held that in the absence of a request for an instruction directing the jury to disregard evidence improperly admitted error cannot be predicated of a failure to give such instruction.[5]

(III) *Evidence Offered, But Not Admitted.* The court may refuse to instruct the jury that they are to disregard evidence that has been offered but not admitted.[6] Such a charge is equivalent to a reminder to the jury that they had been sworn to render their verdict according to the evidence and is unnecessary,[7] although it seems that it would not be improper to give such instruction.[8]

d. Ignoring or Excluding Issues, Theories, or Defenses[9]— (I) *Statement of Rule.* Instructions which ignore or exclude issues, theories, or defenses from the consideration of the jury are erroneous,[10] where there is any evidence

97. Henkle *v.* McClure, 32 Ohio St. 202.

98. Blount *v.* Beall, 95 Ga. 182, 22 S. E. 52.

99. Brown *v.* Matthews, 79 Ga. 1, 4 S. E. 13.

1. Fink *v.* Ash, 99 Ga. 106, 24 S. E. 976.

2. Seymour *v.* Harvey, 11 Conn. 275.

3. Martin *v.* McCray, 171 Pa. St. 575, 33 Atl. 108. And see Russell *v.* Nall, 79 Tex. 664, 15 S. W. 635.

4. Moore *v.* Shields, 121 Ind. 267, 23 N. E. 89.

5. *Iowa.*— Croft *v.* Chicago, etc., R. Co., 134 Iowa 411, 109 N. W. 723.

Kansas.— Gulliford *v.* McQuillen, 75 Kan. 454, 89 Pac. 927.

Michigan.— Pierson *v.* Illinois Cent. R. Co., 149 Mich. 167, 112 N. W. 923; Barnett *v.* Farmers' Mut. F. Ins. Co., 115 Mich. 247, 73 N. W. 372.

New York.— Gall *v.* Gall, 114 N. Y. 109, 21 N. E. 106; Cohn *v.* Husson, 14 Daly 200, 6 N. Y. St. 292; Martin *v.* Coleman, 14 Misc. 505, 35 N. Y. Suppl. 1069.

North Carolina.— McRae *v.* Malloy, 93 N. C. 154.

Pennsylvania.—Aitkin *v.* Young, 12 Pa. St. 15; McGee *v.* Kinsey, 1 Phila. 326.

South Carolina.— Fass *v.* Western Union Tel. Co., 82 S. C. 461, 64 S. E. 235.

See 46 Cent. Dig. tit. "Trial," § 633.

And see Ashby *v.* Elsberry, etc., Gravel Road Co., 111 Mo. App. 79, 85 S. W. 957.

6. Yezner *v.* Roberts, etc., Shoe Co., 140 Ill. App. 61; Chicago Consol. Traction Co. *v.* Gervens, 113 Ill. App. 275; Pfaffenback *v.* Lake Shore, etc., R. Co., 142 Ind. 246, 41 N. E. 530.

7. Pfaffenback *v.* Lake Shore, etc., R. Co., 142 Ind. 246, 41 N. E. 530.

8. Yezner *v.* Roberts, etc., Shoe Co., 140 Ill. App. 61.

9. As ground for new trial see New Trial, 29 Cyc. 791.

In criminal prosecutions see Criminal Law, 12 Cyc. 653.

10. *Alabama.*— Davis Wagon Co. *v.* Cannon, 129 Ala. 301, 29 So. 841; Loch *v.* Edwards, 116 Ala. 90, 22 So. 600.

Arkansas.—Wilcox *v.* Hebert, 90 Ark. 145, 118 S. W. 402; Rector *v.* Robins, 82 Ark. 424, 102 S. W. 209; Choctaw, etc., R. Co. *v.* Baskins, 78 Ark. 355, 93 S. W. 757; Bayles *v.* Daugherty, 77 Ark. 201, 91 S. W. 304.

California.— Remy *v.* Olds, (1893) 34 Pac. 216, 21 L. R. A. 645.

Colorado.— Denver, etc., R. Co. *v.* Conway, 8 Colo. 1, 5 Pac. 142, 54 Am. Rep. 537.

Connecticut.— Smith *v.* Russell Lumber Co., 82 Conn. 116, 72 Atl. 577.

Georgia.—Wilson *v.* Huguenin, 117 Ga. 546, 42 S. E. 857; Whelchel *v.* Gainesville, etc., Electric R. Co., 116 Ga. 431, 42 S. E. 776; Vaughn *v.* Miller, 76 Ga. 712.

Illinois.— Muren Coal, etc., Co. *v.* Howell, 217 Ill. 190, 75 N. E. 469 [*affirming* 119 Ill. App. 209]; Boldenwick *v.* Cahill, 187 Ill. 218, 58 N. E. 351 [*affirming* 86 Ill. App. 561]; Costly *v.* McGowan, 174 Ill. 76, 50 N. E. 1047; Brecher *v.* Chicago Junction R. Co., 119

which would warrant submission thereof to the jury,[11] and instructions defective in this regard are of course properly refused.[12] Instructions that direct a verdict

Ill. App. 554; Morris *v.* Chicago Union Traction Co., 119 Ill. App. 527; Ambrosius *v.* O'Farrell, 119 Ill. App. 265; Davis *v.* Weatherly, 119 Ill. App. 238; Edmunds Mfg. Co. *v.* McFarland, 118 Ill. App. 256; St. Louis, etc., Electric R. Co. *v.* Erlinger, 112 Ill. App. 506; Colwell *v.* Brown, 103 Ill. App. 22; Suffern *v.* Treat, 96 Ill. App. 663; Chicago, etc., R. Co. *v.* Dvorak, 7 Ill. App. 555.

Indiana.— Terry *v.* Shively, 64 Ind. 106; Chicago, etc., R. Co. *v.* Wicker, 34 Ind. App. 215, 72 N. E. 614.

Iowa.— Steele *v.* Crabtree, 130 Iowa 313, 106 N. W. 753; Faust *v.* Hosford, 119 Iowa 97, 93 N. W. 58; Carruthers *v.* Towne, 86 Iowa 318, 53 N. W. 240.

Kentucky.— Louisville *v.* Keher, 117 Ky. 841, 79 S. W. 270, 25 Ky. L. Rep. 2003; Key *v.* Usher, 99 S. W. 324, 30 Ky. L. Rep. 667.

Maryland.— North *v.* Mallory, 94 Md. 305, 51 Atl. 89; Schillinger *v.* Kratt, 25 Md. 49; Fulton *v.* Maccracken, 18 Md. 528, 81 Am. Dec. 620.

Michigan.— Commercial Bank *v.* Chatfield, 121 Mich. 641, 80 N. W. 712; White *v.* Campbell, 25 Mich. 463.

Minnesota.— Strong *v.* Knuteson, 91 Minn. 191, 97 N. W. 659; McCarvel *v.* Phenix Ins. Co., 64 Minn. 193, 66 N. W. 367; Loudy *v.* Clarke, 45 Minn. 477, 48 N. W. 25.

Mississippi.— Colored Knights of Pythias *v.* Tucker, 92 Miss. 501, 46 So. 51.

Missouri.— Tinkle *v.* St. Louis, etc., R. Co., 212 Mo. 445, 110 S. W. 1086; Austin *v.* St. Louis Transit Co., 115 Mo. App. 146, 91 S. W. 450; Bagley *v.* Harmon, 91 Mo. App. 22; Ern *v.* Rubinstein, 72 Mo. App. 337; Ruth *v.* Chicago, etc., R. Co., 70 Mo. App. 190; Laughlin *v.* Gerardi, 67 Mo. App. 372; Jacquin *v.* Grand Ave. Cable Co., 57 Mo. App. 320; Moore *v.* Streigel, 50 Mo. App. 308.

Nebraska.—Wittenberg *v.* Mollyneaux, 59 Nebr. 203, 80 N. W. 824; Knapp *v.* Chicago, etc., R. Co., 57 Nebr. 195, 77 N. W. 656; Barr *v.* Omaha, 42 Nebr. 341, 60 N. W. 591.

New York.— Kilmer *v.* Hutton, 131 N. Y. App. Div. 625, 116 N. Y. Suppl. 127; Rooney *v.* Brogan Constr. Co., 113 N. Y. App. Div. 813, 99 N. Y. Suppl. 939; Leonard *v.* Brooklyn Heights R. Co., 57 N. Y. App. Div. 125, 67 N. Y. Suppl. 985; Solomon *v.* New York City R. Co., 50 Misc. 557, 99 N. Y. Suppl. 529; Schwabeland *v.* Holahan, 6 Misc. 623, 26 N. Y. Suppl. 880 [*affirmed* in 10 Misc. 176, 30 N. Y. Suppl. 910].

North Carolina.— Currie *v.* Gilchrist, 147 N. C. 648, 61 S. E. 581; Maxwell *v.* McIver, 113 N. C. 288, 18 S. E. 320; Oakley *v.* Van Noppen, 95 N. C. 60; Kidder *v.* McIlhenny, 81 N. C. 123.

Oregon.— Mitchell *v.* La Follett, 38 Oreg. 178, 63 Pac. 54; Kearney *v.* Snodgrass, 10 Oreg. 181.

Pennsylvania.— Kennedy *v.* Forest Oil Co., 199 Pa. St. 644, 49 Atl. 133; Stuckslager *v.* Neel, 123 Pa. St. 53, 16 Atl. 94; Fisher *v.* Filbert, 6 Pa. St. 61; Relf *v.* Rapp, 3 Watts & S. 21, 37 Am. Dec. 528.

Rhode Island.— Leiter *v.* Lyons, 24 R. I. 42, 52 Atl. 78.

South Carolina.— Curnow *v.* Phœnix Ins. Co., 46 S. C. 79, 24 S. E. 74; Frick *v.* Wilson, 36 S. C. 65, 15 S. E. 331; Jeter *v.* Tucker, 1 S. C. 245.

Texas.— International, etc., R. Co. *v.* Trump, 100 Tex. 208, 97 S. W. 464 [*affirming* 42 Tex. Civ. App. 536, 94 S. W. 903, 98 S. W. 1101]; International, etc., R. Co. *v.* Ploeger, (1906) 93 S. W. 722; Smithwick *v.* Andrews, 24 Tex. 488; Missouri, etc., R. Co. *v.* Barnes, 42 Tex. Civ. App. 626, 95 S. W. 714; Gulf, etc., R. Co. *v.* Minter, 42 Tex. Civ. App. 235, 93 S. W. 516; San Antonio, etc., R. Co. *v.* Dickson, 42 Tex. Civ. App. 163, 93 S. W. 481; Kirby Lumber Co. *v.* Chambers, 41 Tex. Civ. App. 632, 95 S. W. 607; Houston Saengerbund *v.* Dunn, 41 Tex. Civ. App. 376, 92 S. W. 429; Rice *v.* Dewberry, (Civ. App. 1906) 93 S. W. 715; Miller *v.* Mosely, (Civ. App. 1905) 91 S. W. 648; Galveston, etc., R. Co. *v.* Fitzpatrick, (Civ. App. 1905) 91 S. W. 355; Bryan *v.* International, etc., R. Co., (Civ. App. 1905) 90 S. W. 693; Cleburne *v.* Gutta Percha, etc., Mfg. Co., 39 Tex. Civ. App. 604, 88 S. W. 300; Chicago, etc., R. Co. *v.* Armes, 32 Tex. Civ. App. 32, 74 S. W. 77; Dorsey Printing Co. *v.* Gainesville Cotton Seed Oil Mill, etc., Co., 25 Tex. Civ. App. 456, 61 S. W. 556; Kosminsky *v.* Hamburger, 21 Tex. Civ. App. 341, 51 S. W. 53.

Virginia.— Douglas Land Co. *v.* T. W. Thayer Co., 107 Va. 292, 58 S. E. 1101; Hughes *v.* Kelly, (1898) 30 S. E. 387; Brown *v.* Rice, 76 Va. 629.

Washington.— Digman *v.* Spurr, 3 Wash. 309, 28 Pac. 529.

West Virginia.— Delmar Oil Co. *v.* Bartlett, 62 W. Va. 700, 59 S. E. 634; McVey *v.* St. Clair Co., 49 W. Va. 412, 38 S. E. 648; McCreery *v.* Ohio River R. Co., 43 W. Va. 110, 27 S. E. 327.

Wisconsin.— Paine *v.* Roberts, 29 Wis. 642.

United States.— Carter *v.* Carusi, 112 U. S. 478, 5 S. Ct. 281, 28 L. ed. 820; Bolen-Darnell Coal Co. *v.* Williams, 164 Fed. 665, 90 C. C. A. 481.

See 46 Cent. Dig. tit. "Trial," § 613 *et seq.*

11. Providence Gold Min. Co. *v.* Thompson, 7 Ariz. 69, 60 Pac. 874; Tygett *v.* Sunnyside Coal Co., 140 Ill. App. 77; Belvidere Gas, etc., Co. *v.* Boyer, 122 Ill. App. 116; Hinton *v.* Atchison, etc., R. Co., 83 Nebr. 835, 120 N. W. 431; Levenson *v.* Arnold, 100 N. Y. Suppl. 1021.

Although the evidence in support of an issue be slight the issue should not be withdrawn from the jury. McGown *v.* International, etc., R. Co., 85 Tex. 289, 20 S. W. 80.

12. *Alabama.*— Cochran *v.* Kimbrough, 157 Ala. 454, 47 So. 709; Neff *v.* Williamson, 154 Ala. 329, 46 So. 238.

Arkansas.— Doyle *v.* Kavanaugh, 87 Ark.

upon the finding of certain facts must not ignore any theory of recovery or defense as the case may be;[13] if on the whole case the instruction must cover all theories.[14] Decisions illustrative of what instructions are or are not obnoxious to the rule are set out in the notes.[15]

364, 112 S. W. 889; St. Louis, etc., R. Co. *v.* Smith, 82 Ark. 105, 100 S. W. 884.

Colorado.— Stratton Cripple Creek Min., etc., Co. *v.* Ellison, 42 Colo. 498, 94 Pac. 303.

Florida.— Seaboard Air Line R. Co. *v.* Smith, 53 Fla. 375, 43 So. 235.

Georgia.— Susong *v.* McKenna, 126 Ga. 433, 55 S. E. 236.

Illinois.— Chicago Union Tract. Co. *v.* Ertrachter, 228 Ill. 114, 81 N. E. 816; Kirk *v.* Jajko, 224 Ill. 338, 79 N. E. 577.

Indiana.— Chicago, etc., R. Co. *v.* Pritchard, 168 Ind. 398, 79 N. E. 508, 81 N. E. 78, 9 L. R. A. N. S. 857.

Maryland.—Maryland, etc., R. Co. *v.* Brown, 109 Md. 304, 71 Atl. 1005; Mt. Vernon Brewing Co. *v.* Teschner, 108 Md. 158, 69 Atl. 702, 16 L. R. A. N. S. 758.

Missouri.— Scanlon *v.* Gulick, 199 Mo. 449, 97 S. W. 884; Bolles *v.* Kansas City Southern R. Co., 134 Mo. App. 696, 115 S. W. 459.

New York.— Pulcino *v.* Long Island R. Co., 125 N. Y. App. Div. 629, 109 N. Y. Suppl. 1076 [*affirmed* in 194 N. Y. 526, 87 N. E. 1126].

North Carolina.—Wade *v.* McLean Contracting Co., 149 N. C. 177, 62 S. E. 919.

South Carolina.— Langston *v.* Cothran, 78 S. C. 23, 58 S. E. 956.

Texas.— Missouri Valley Bridge, etc., Co. *v.* Ballard, (Civ. App. 1909) 116 S. W. 93; Chicago, etc., R. Co. *v.* Johnson, (Civ. App. 1908) 111 S. W. 758; Gulf Coast, etc., R. Co. *v.* Campbell, (Civ. App. 1908) 108 S. W. 972; Houston, etc., R. Co. *v.* Anglin, 45 Tex. Civ. App. 41, 99 S. W. 897; Pope *v.* Riggs, (Civ. App. 1897) 43 S. W. 306.

Virginia.— Chesapeake, etc., R. Co. *v.* Rowsay, 108 Va. 632, 62 S. E. 363.

West Virginia.— Diddle *v.* Continental Casualty Co., 65 W. Va. 170, 63 S. E. 962, 22 L. R. A. N. S. 779.

Instructions which, although sound as to one theory, exclude another on which recovery might be based, are properly refused (Columbus *v.* Anglin, 120 Ga. 785, 48 S. E. 318; Ludwig *v.* Petrie, 32 Ind. App. 550, 70 N. E. 280), and if given will be ground for reversal if it is not apparent from the record that the error was harmless (Manion *v.* Lake Erie, etc., R. Co., 40 Ind. App. 569, 80 N. E. 166).

13. *Alabama.*— Sloss-Sheffield Steel, etc., Co. *v.* Smith, (1905) 40 So. 91; Alabama Great Southern R. Co. *v.* Bonner, (1905) 39 So. 619.

District of Columbia.— U. S. *v.* Washington Metropolitan Club, 11 App. Cas. 180.

Illinois.— Illinois Terra Cotta Lumber Co. *v.* Hanley, 214 Ill. 243, 73 N. E. 373; Clark *v.* Farmington Coal Co., 130 Ill. App. 192; Reynolds *v.* Blake, 111 Ill. App. 53; Gruenendahl *v.* St. Louis Consol. Coal Co., 108 Ill. App. 644.

Maine.— Caven *v.* Bodwell Granite Co., 99 Me. 278, 59 Atl. 285.

Washington.— Dignan *v.* Spurr, 3 Wash. 309, 28 Pac. 529.

A party who himself asked only one instruction and that upon the same theory cannot raise objection to the instruction. Fessenden *v.* Doane, 188 Ill. 228, 58 N. E. 974 [*affirming* 89 Ill. App. 229].

14. Kellyville Coal Co. *v.* O'Connell, 134 Ill. App. 311; Scanlan *v.* Gulick, 199 Mo. 449, 97 S. W. 884; Clark *v.* Hammerle, 27 Mo. 55; Griffith *v.* Conway, 45 Mo. App. 574; Minick *v.* Gring, 1 Pa. Super. Ct. 484; Jones *v.* Rex, (Tex. Civ. App. 1895) 31 S. W. 1077. And see Central Brewing Co. *v.* American Brewing Co., 135 Ill. App. 648.

15. Instructions held obnoxious to rule ignoring defenses.—Where one of the defenses interposed is that the damages claimed have been released, it is error to instruct the jury that they may render a verdict for plaintiff without mentioning in such instruction the defense of release. Western Union Tel. Co. *v.* Nolan, 132 Ill. App. 427. An instruction, in an action against a street railway company for injuries in a collision with a car, that, if plaintiff was guilty of negligence that contributed approximately to the injury, he could not recover unless the company was guilty of subsequent negligence that proximately contributed to the injury, was erroneous, as pretermitting reference to wilfulness or wantonness on the part of the company, charged in the complaint. Garth *v.* Alabama Tract. Co., 148 Ala. 96, 42 So. 627. Where plaintiff was injured by the alleged negligence of his superintendent in prematurely directing him to uncap a mold, an instruction authorizing a recovery in case the superintendent directed the uncapping of the mold was erroneous as eliminating the question of defendant's negligence. Swiercz *v.* Illinois Steel Co., 231 Ill. 456, 83 N. E. 168. Where an action for injuries to a servant was submitted to the jury on all the counts of the declaration, and not on the third count alone, which alleged defendant's negligence in failing to provide plaintiff with sufficient help, the refusal of an instruction that the only question for decision was whether defendant was guilty of negligence in not providing sufficient help, etc., was not error. Kirk *v.* Jajko, 224 Ill. 338, 79 N. E. 577. Where, in an action by an architect, he alleged that the owner was to pay for superintendence five per cent of the lowest bid, which was six thousand one hundred and fifty dollars, and the owner alleged that he was only to pay provided a contractor was procured to erect the building for four thousand dollars, and there was evidence that the lowest bid was a little over five thousand dollars, an instruction authorizing a verdict for the archi-

(II) *LIMITATIONS OF RULE* — (A) *In General.* It is not improper to exclude

tect for the amount sued for, if the jury believed the architect's claim, was erroneous, as withdrawing from the jury the question of the amount of the lowest bid. Loftus *v.* Green, (Tex. Civ. App. 1907) 104 S. W. 396. Where, in a suit involving the location of the boundary line between tracts as partitioned among the heirs of a decedent, the controlling inquiry was as to the location of the line fixed by the commissioners and confirmed by the court, an instruction ignoring the theory that the parties had acquiesced in the line for which one of the parties contended, yielding precedence to the supposed intention of the commissioners, was erroneous. Douglas Land Co. *v.* T. W. Thayer Co., 107 Va. 292, 58 S. E. 1101. In an action against a street railway company for injury caused by a collision between a car and plaintiff's buggy, an instruction to find for plaintiffs regardless of whether they were guilty of contributory negligence, if the motorman discovered their peril in time to have prevented the accident and did not use all means in his power to prevent the accident consistent with safety to himself and passengers, was properly refused, as ignoring the question of injury. Feille *v.* San Antonio Traction Co., 48 Tex. Civ. App. 541, 107 S. W. 367. An instruction as follows: "If the jury believe from the preponderance of the evidence that plaintiff while in the exercise of ordinary care was injured by or in consequence of the negligence of defendant, as charged in the second count of his amended declaration, then you can find defendant guilty," is held erroneous as ignoring the defense of assumed risk, which was one of the defenses at the trial of the case. Harte *v.* Fraser, 130 Ill. App. 494, 500. An instruction authorizing a verdict for plaintiff upon mere proof that its marble was damaged by discharges from defendant's gas plant, but ignoring defendant's legal right to operate its machines, and whether plaintiff devoted its premises to an unusual use, is erroneous in omitting important issues. Bradbury Marble Co. *v.* Laclede Gaslight Co., 128 Mo. App. 96, 106 S. W. 594. Where a petition for injuries to the conductor of a street car in a collision affirmatively charged that the collision was caused by a defective grip on the colliding car, and that defendant knew of such defect, an instruction attempting to enumerate the facts necessary to authorize a verdict for plaintiff, but omitting to require that defendant must have had knowledge of the defective grip, was prejudicially erroneous. Toncrey *v.* Metropolitan St. R. Co., 129 Mo. App. 596, 107 S. W. 1091.

Instructions held not obnoxious to rule.— An instruction summarizing a case and telling the jury that if from a consideration of all the evidence they find the facts as stated, plaintiff is entitled to recover, is not subject to objection as ignoring the theory of the defense when it embraces all the elements essential to a recovery. Springfield Consol. R. Co. *v.* Hoeffner, 71 Ill. App. 162. Where there was no pretense that a prior locator of a mineral lode did the requisite location work within the specified time from his discovery, a charge in ejectment by a subsequent locator that, if the discovery was made by the prior locator more than sixty days before the subsequent relocation, plaintiff was entitled to recover, etc., was not erroneous as eliminating the possibility that the prior locator had done the location work, and otherwise complied with the law. Ingemarson *v.* Coffey, 41 Colo. 407, 92 Pac. 908. An instruction directing a finding for plaintiff, unless the jury found for defendant under instructions afterward given, one of which submitted the question of contributory negligence of the driver of plaintiff's team, for the killing of which the action was brought, was not objectionable, as eliminating the question of the driver's contributory negligence. St. Louis, etc., R. Co. *v.* Summers, 51 Tex. Civ. App. 133, 111 S. W. 211. An instruction that if defendant's servant sustained the injuries complained of as the direct result of an accident, and not as a direct and natural result of defendant's negligence, the jury should find for defendant, was not objectionable as eliminating negligence from the jury's consideration and warranting them in finding for defendant if the injury was accidental, although the result of negligence. De Witt *v.* Louisville, etc., R. Co., 96 S. W. 1122, 29 Ky. L. Rep. 1161. Where, in ejectment to recover a town lot located on the public domain, the court in another instruction charged with reference to defenses other than abandonment, an instruction that defendant was required by a preponderance of the evidence to establish plaintiff's abandonment set up as a defense to entitle him to a verdict, and if he did not so prove, the jury should find for plaintiff, was not erroneous, as withdrawing the other defenses from the jury. Lindblom *v.* Rocks, 146 Fed. 660, 77 C. C. A. 86. Where, in an action for injuries to a switchman, it was shown that plaintiff was in defendant's employ, and was injured by an engine on its track, a statement in an instruction that defendant railroad company contended that plaintiff was in the employment of the company and was injured by an engine on defendant's track was not misleading in that it stated only the contention of plaintiff. Macon, etc., R. Co. *v.* Joyner, 129 Ga. 683, 59 S. E. 902. Where the petition in a servant's injury action did not allege negligence of the engineer of the train with which his train collided in failing to give signals of its intention to stop sooner than he did, a requested instruction was not objectionable by ignoring any negligence in that respect. Missouri, etc., R. Co. *v.* Rogers, (Tex. Civ. App. 1909) 117 S. W. 939. In an action against a railroad company, plaintiffs claimed that insufficient culverts in the railroad's embankment over a watercourse had resulted in overflows and that the velocity of the water had been increased, to the injury of plaintiffs'

from an instruction issues sufficiently covered by other instructions,[16] or which have been properly eliminated from the case by the court,[17] or matters admitted by the pleadings.[18] So a party is not entitled to an instruction on a theory which is refuted by an admission in an agreed statement of facts,[19] or which is unavailable as a defense,[20] or where he has waived any claim for damages upon the count upon which the instruction is asked.[21] And an instruction which omits reference to the defense is sufficient where, if the facts to which the instructions apply are found to be true, the defensive matter cannot exist.[22]

(B) *Issues Withdrawn or Abandoned.* Instructions may and should be confined to issues insisted on at the trial,[23] and where issues are abandoned or expressly withdrawn by the parties, the court may[24] and should omit to submit them to the jury.[25] So issues disposed of during the trial and not to be passed on by the jury are properly omitted in the statement of the issues.[26] The court should not, however, withdraw or exclude from the consideration of the jury issues raised by the pleadings and evidence and not abandoned by the parties, and such action on its part is ordinarily ground for reversal.[27] An instruction that the jury

crops. The court charged that if any dam, embankment, and culverts diverted the water or any part thereof from its natural course, and caused it to flow on plaintiffs' land, and any of the damage was caused thereby, etc., then plaintiffs were entitled to recover, but that defendant would not be liable for any damage by overflows of the creek which would have resulted independent of the embankment, if any, etc. It was held that such instructions were not objectionable as eliminating plaintiffs' claim that the embankment increased the velocity and force of the water, which was one of the alleged causes of plaintiffs' damages. Moss *v.* Gulf, etc., R. Co., 46 Tex. Civ. App. 463, 103 S. W. 221.

16. Hinton *v.* Atchison, etc., R. Co., 83 Nebr. 835, 120 N. W. 431.

17. *Alabama.*— City Delivery Co. *v.* Henry, 139 Ala. 161, 34 So. 389, properly refused.

Iowa.— Brooke *v.* Chicago, etc., R. Co., 81 Iowa 504, 47 N. W. 74.

South Carolina.— Rose *v.* Winnsboro Nat. Bank, 41 S. C. 191, 19 S. E. 487.

Texas.— Gulf, etc., R. Co. *v.* Warner, 22 Tex. Civ. App. 167, 54 S. W. 1064.

Virginia.— Fry *v.* Leslie, 87 Va. 269, 12 S. E. 671.

18. McKee *v.* Maggard, 13 Ky. L. Rep. 304.

19. Augusta *v.* Owens, 111 Ga. 464, 36 S. E. 830.

20. Terre Haute, etc., R. Co. *v.* Peoria, etc., R. Co., 182 Ill. 501, 55 N. E. 377 [*affirming* 81 Ill. App. 435].

21. Murphy *v.* Martin, 58 Wis. 276, 16 N. W. 603.

22. Chenoweth *v.* Sutherland, 129 Mo. App. 431, 107 S. W. 6.

23. *Georgia.*— Crawford *v.* Georgia Pac. R. Co., 86 Ga. 5, 12 S. E. 176.

Illinois.— Kellogg *v.* Boyden, 126 Ill. 378, 18 N. E. 770.

Iowa.— Erb *v.* German-American Ins. Co., 112 Iowa 357, 83 N. W. 1053.

Massachusetts.— Bugbee *v.* Kendricken, 132 Mass. 349.

Virginia.— Fry *v.* Leslie, 87 Va. 269, 12 S. E. 671.

Where both parties present the case on certain issues only, the court may refuse to instruct on other issues which arise on the pleadings. Hollingsworth *v.* Holbrook, 80 Iowa 151, 45 N. W. 561, 20 Am. St. Rep. 411; Gould *v.* Gilligan, 181 Mass. 600, 64 N. E. 409; Justice *v.* Gallert, 131 N. C. 393, 42 S. E. 850; Davis *v.* Atlanta, etc., Air Line R. Co., 63 S. C. 370, 41 S. E. 468. Unless it is apparent that counsel acted inadvertently or through mistake. Hansen *v.* St. Paul Gaslight Co., 88 Minn. 86, 92 N. W. 510.

Applications of rule.—Where a party announces that he will offer no evidence except as to certain averments of his petition (Crum *v.* Yundt, 12 Ind. App. 308, 40 N. E. 79); or asks instructions on one theory of his case only, seemingly abandoning another (Leabo *v.* Goode, 67 Mo. 126), it is not error for the court to fail to instruct upon the issue so abandoned.

24. Southern Cotton Oil Co. *v.* Dukes, 121 Ga. 787, 49 S. E. 788; World's Columbian Exposition *v.* Lehigh, 196 Ill. 612, 63 N. E. 1089; German Ins. Co. *v.* Chicago, etc., R. Co., 128 Iowa 386, 104 N. W. 361; Hearn *v.* Shaw, 72 Me. 187.

25. Louisville, etc., R. Co. *v.* Hubbard, 148 Ala. 45, 41 So. 814; Hanson *v.* Kline, 136 Iowa 101, 113 N. W. 504; Trott *v.* Chicago, etc., R. Co., 115 Iowa 80, 86 N. W. 33, 87 N. W. 722; Tothwell *v.* Cedar Rapids, 114 Iowa 180, 86 N. W. 291; Columbus State Bank *v.* Crane Co., 56 Nebr. 317, 76 N. W. 557.

26. New Haven Lumber Co. *v.* Raymond, 76 Iowa 225, 40 N. W. 820; Wells *v.* Kavanagh, 74 Iowa 372, 37 N. W. 780. And see Battle Creek *v.* Haak, 139 Mich. 514, 102 N. W. 1005.

27. Snore *v.* Hammond, 140 Mich. 416, 103 N. W. 834; Galloway *v.* Hicks, 26 Nebr. 531, 42 N. W. 709; Russell *v.* Gunn, 2 Nebr. (Unoff.) 141, 96 N. W. 341; Chamblee *v.* Tarbox, 27 Tex. 139, 84 Am. Dec. 614; Eppstein *v.* Thomas, 16 Tex. Civ. App. 619, 44 S. W. 893.

For instruction held not to withdraw material issues see Munro *v.* Pacific Coast Dredging Co., 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248.

need regard only one paragraph of a complaint is a withdrawal of all other paragraphs.[28]

(c) *Immaterial Issues.* The court may properly refuse to charge on immaterial issues,[29] and it is error to submit to the jury an immaterial question which is likely to confuse them as to the issues.[30] However, where appellant is not prejudiced, the submission of immaterial issues is not a ground for reversal.[31]

(d) *Requests For Submission of Issues to Jury* — (1) NECESSITY AND SUFFICIENCY.[32] Parties who desire the submission of particular issues to the jury should make requests therefor. In the absence of such request, failure to submit a particular issue is not ordinarily assignable as error.[33] The request should be specific so that the court may pass directly upon it.[34] An exception to a charge on a question of fact,[35] or a motion at the close of the evidence to dismiss the case,[36] or a suggestion that a certain fact is in dispute[37] is not the equivalent of a request for the submission of an issue. But where a party requests that the jury shall pass on the whole case, he need not name a particular question of fact.[38]

(2) OPERATION AND EFFECT. A request that specified issues be submitted to the jury operates as a waiver of the submission of all other issues.[39] A party

28. Smith *v.* McDaniel, 5 Ind. App. 581, 32 N. E. 798.

29. *Illinois.*— Stern *v.* Smith, 127 Ill. App. 640 [*affirmed* in 225 Ill. 430, 80 N. E. 307, 116 Am. St. Rep. 151].

Iowa.— Duncombe *v.* Powers, 75 Iowa 185, 39 N. W. 261.

Mississippi.— Stevenson *v.* McReary, 12 Sm. & M. 9, 51 Am. Dec. 102.

Missouri.— Serrano *v.* Miller, etc., Commission Co., 117 Mo. App. 185, 93 S. W. 810.

Nebraska.— Boggs *v.* Boggs, 62 Nebr. 274, 87 N. W. 39.

New York.— Stokes *v.* Foote, 172 N. Y. 327, 65 N. E. 176; Inter City Realty Co. *v.* Newman, 128 N. Y. App. Div. 195, 112 N. Y. Suppl. 481; Cravath *v.* Baylis, 113 N. Y. App. Div. 666, 99 N. Y. Suppl. 973 [*affirmed* in 192 N. Y. 559, 85 N. E. 1107].

North Carolina.— Helms *v.* Helms, 137 N. C. 206, 49 S. E. 110, 135 N. C. 164, 47 S. E. 415; McDonald *v.* Carson, 94 N. C. 497.

South Carolina.— Long *v.* Hunter, 58 S. C. 152, 36 S. E. 579; Dial *v.* Valley Mut. L. Assoc., 29 S. C. 560, 8 S. E. 27.

Texas.— San Antonio, etc., R. Co. *v.* Wood, 41 Tex. Civ. App. 226, 92 S. W. 259.

Washington.— Scherrer *v.* Seattle, 52 Wash. 4, 100 Pac. 144.

30. Wall *v.* Des Moines, etc., R. Co., 89 Iowa 193, 56 N. W. 436; Flanders *v.* Stark, 37 N. H. 424; Willard Mfg. Co. *v.* Tierney, 133 N. C. 630, 45 S. E. 1026; Mendenhall *v.* North Carolina R. Co., 123 N. C. 275, 31 S. E. 480.

31. *Missouri.*— Lee *v.* Dunlap, 55 Mo. 454.

Nevada.— Conley *v.* Chedic, 7 Nev. 336.

North Carolina.— Rosemond *v.* R. Co., 131 N. C. 827, 43 S. E. 1005; Cumming *v.* Barber, 99 N. C. 332, 5 S. E. 903; Perry *v.* Jackson, 88 N. C. 103. And see Parker *v.* Atlantic Coast Line R. Co., 133 N. C. 335, 45 S. E. 658, 63 L. R. A. 827.

Texas.— Ft. Worth, etc., R. Co. *v.* Rogers, 24 Tex. Civ. App. 382, 60 S. W. 61.

Wisconsin.— Schroeder *v.* Wisconsin Cent. R. Co., 117 Wis. 33, 93 N. W. 837.

Prejudice to appellee.— Where the submission of an immaterial issue would be more likely to prejudice appellee than appellant, the judgment will not be reversed. Baltimore *v.* Norman, 4 Md. 352.

32. **When ground for new trial,** although request not made see NEW TRIAL, 29 Cyc. 791.

33. Winchell *v.* Hicks, 18 N. Y. 558; Barnes *v.* Perine, 12 N. Y. 18; Mallory *v.* Tioga R. Co., 4 Abb. Dec. (N. Y.) 139, 3 Keyes 354, 1 Transcr. App. 203, 5 Abb. Pr. N. S. 420, 36 How. Pr. 202; Dows *v.* Rush, 28 Barb. (N. Y.) 157; Hunter *v.* Osterhoudt, 11 Barb. (N. Y.) 33.

Failure to submit a particular issue as to which the evidence is undisputed (Scanlon *v.* Northwood, 147 Mich. 139, 110 N. W. 493), or conclusive (Jones *v.* St. Louis, etc., R. Co., 124 Mo. App. 246, 101 S. W. 615), is not assignable as error.

34. Flandreau *v.* Elsworth, 151 N. Y. 473, 45 N. E. 853; Mayer *v.* Dean, 115 N. Y. 556, 22 N. E. 261, 5 L. R. A. 540; Muller *v.* McKesson, 73 N. Y. 195, 29 Am. Rep. 123; Kinner *v.* Whipple, 128 N. Y. App. Div. 736, 113 N. Y. Suppl. 337; Bowers *v.* Ocean Acc., etc., Co., 110 N. Y. App. Div. 691, 97 N. Y. Suppl. 485; Taylor *v.* Atlantic Mut. Ins. Co., 9 Bosw. (N. Y.) 369 [*affirmed* in 37 N. Y. 275, 4 Transcr. App. 279]; Olean Exch. Nat. Bank *v.* Marshall, 9 N. Y. Suppl. 355.

35. Dows *v.* Rush, 28 Barb. (N. Y.) 157.

36. Hewson *v.* Interurban St. R. Co., 95 N. Y. App. Div. 112, 88 N. Y. Suppl. 816.

37. Kinner *v.* Whipple, 128 N. Y. App. Div. 736, 113 N. Y. Suppl. 337.

38. Elmira Second Nat. Bank *v.* Weston, 161 N. Y. 520, 55 N. E. 1080, 76 Am. St. Rep. 283, in which it was said that it was not necessary for plaintiff to name a particular question of fact, any more than when a motion to nonsuit is granted. And see Clemence *v.* Auburn, 66 N. Y. 334.

39. Dounce *v.* Dow, 64 N. Y. 411; Young *v.* Macomb, 11 N. Y. App. Div. 480, 42 N. Y. Suppl. 351; Filippini *v.* Stead, 4 Misc. (N. Y.) 405, 23 N. Y. Suppl. 1061.

at whose request a particular issue is submitted to the jury cannot thereafter be heard to complain of the action of the court in so doing.[40] The request is equivalent to an admission that there is evidence sufficient to go to the jury on the issue,[41] and the party making the request is bound by the jury's finding thereon.[42]

(E) *Effect of Error in Submitting or Failing to Submit Issues or Questions to Jury* — (1) SUBMISSION OF ISSUES TO JURY — (a) WHEN GROUND FOR REVERSAL. The submission of issues not within the pleadings, if calculated to mislead the jury, or prejudicial to the rights of a litigant, is reversible error.[43] The submission of issues as to which there is no evidence is ground for reversal where it is apparent that prejudice resulted,[44] as where the issue so submitted is controlling and is decided against appellant,[45] or where the verdict could not have been reached except by a consideration of the question erroneously submitted.[46] The judgment should be reversed where the submission of such issue unsupported by evidence has a tendency to mislead the jury,[47] or where there is no way to determine whether the jury disregarded the issue as to which no evidence was submitted.[48]

40. *Alabama.*— Ripitoe *v.* Hall, 1 Stew. 166.

Arkansas.— Ft. Smith Light, etc., Co. *v.* Barnes, 80 Ark. 169, 96 S. W. 976.

Illinois.— Chicago City R. Co. *v.* Enroth, 113 Ill. App. 285; Chicago City R. Co. *v.* Fetzer, 113 Ill. App. 280; Chicago Union Traction Co. *v.* O'Donnell, 113 Ill. App. 259 [*affirmed* in 211 Ill. 349, 71 N. E. 1015].

Nebraska.— Miller Bank *v.* Richmon, 64 Nebr. 111, 89 N. W. 627, 68 Nebr. 731, 94 N. W. 998; Iowa Sav. Bank *v.* Frink, 1 Nebr. (Unoff.) 14, 26, 92 N. W. 916.

North Carolina.— Owens *v.* Phelps, 95 N. C. 286.

Pennsylvania.— Means *v.* Gridley, 164 Pa. St. 387, 30 Atl. 390.

Texas.— Houston, etc., R. Co. *v.* Higgins, 22 Tex. Civ. App. 430, 55 S. W. 744.

United States.— Jordan *v.* Philadelphia, 125 Fed. 825.

See 46 Cent. Dig. tit. "Trial," § 331.

41. Owens *v.* Phelps, 95 N. C. 286.

42. McCrary *v.* Missouri, etc., R. Co., 99 Mo. App. 518, 74 S. W. 2.

43 *Arkansas.*— St. Louis, etc., R. Co. *v.* Crowder, 82 Ark. 562, 103 S. W. 172.

Florida.— Pensacola Electric Terminal R. Co. *v.* Haussman, 51 Fla. 286, 40 So. 196.

Illinois.— St. Louis Consol. Coal Co. *v.* Stein, 122 Ill. App. 310 [*affirmed* in 220 Ill. 123, 77 N. E. 133].

Iowa.— Barrett *v.* Wheeler, 66 Iowa 560, 24 N. W. 38.

Missouri.— Crow *v.* Houck's Missouri, etc., R. Co., 212 Mo. 589, 111 S. W. 583; Ely *v.* St. Louis, etc., R. Co., 77 Mo. 34; Aultman, etc., Co. *v.* Smith, 52 Mo. App. 351.

Nebraska.—McCready *v.* Phillips, 44 Nebr. 790, 63 N. W. 7.

New Jersey.— Excelsior Electric Co. *v.* Sweet, 59 N. J. L. 441, 31 Atl. 721.

North Carolina.— Fortesque *v.* Crawford, 105 N. C. 29, 10 S. E. 910.

Ohio.— Cincinnati Traction Co. *v.* Stephens, 75 Ohio St. 171, 79 N. E. 235.

Oklahoma.— Kingfisher Nat. Bank *v.* Johnson, 22 Okla. 228, 98 Pac. 343.

Texas.— Loving *v.* Dixon, 56 Tex. 75; Houston, etc., R. Co. *v.* Terry, 42 Tex. 451; Houston, etc., R. Co. *v.* Shepard, (Civ. App. 1909) 118 S. W. 596; Farenthold *v.* Tell, 52 Tex. Civ. App. 110, 113 S. W. 635; Gulf, etc., R. Co. *v.* Walters, 49 Tex. Civ. App. 71, 107 S. W. 369; San Antonio Traction Co. *v.* Kelleher, 48 Tex. Civ. App. 421, 107 S. W. 64; Walker *v.* Tomlinson, 44 Tex. Civ. App. 446, 98 S. W. 906; Work *v.* Cross, (Civ. App. 1906) 98 S. W. 208; Fouts *v.* Ayres, 11 Tex. Civ. App. 338, 32 S. W. 435 (holding, however, that, although the court may have used words not in the pleadings, in submitting the issue to the jury, it was not reversible error where no new issue was presented); Missouri, etc., R. Co. *v.* Wickham, (Civ. App. 1895) 28 S. W. 917; Galveston, etc., R. Co. *v.* Silegman, (Civ. App. 1893) 23 S. W. 298.

44. Dondero *v.* Frumveller, 61 Mich. 440, 28 N. W. 712; Jonasson *v.* Weir, 130 N. Y. App. Div. 528, 115 N. Y. Suppl. 6; Graham *v.* McCarty, 69 Tex. 323, 7 S. W. 342; American F. Ins. Co. *v.* Bell, 33 Tex. Civ. App. 11, 75 S. W. 319; Kuykendall *v.* Fisher, 61 W. Va. 87, 56 S. E. 48, 8 L. R. A. N. S. 94.

45. Du Bois City First Nat. Bank *v.* Williamsport First Nat. Bank, 114 Pa. St. 1, 6 Atl. 366; Missouri, etc., R. Co. *v.* Harrison, 44 Tex. Civ. App. 58, 99 S. W. 124.

46. Bowen *v.* King, 146 N. C. 385, 59 S. E. 1044.

47. *Colorado.*— Walsh *v.* Jackson, 33 Colo. 454, 81 Pac. 258.

Iowa.— Duncan *v.* Gray, 108 Iowa 599, 79 N. W. 362.

Michigan.— Comstock *v.* Norton, 36 Mich. 277.

Mississippi.— Fairfield *v.* Louisville, etc., R. Co., 94 Miss. 887, 48 So. 513.

Missouri.— Home Bank *v.* Towson, 64 Mo. App. 97.

New Mexico.— Cerrillos Coal R. Co. *v.* Deserant, 9 N. M. 49, 49 Pac. 807.

Texas.— St. Louis Southwestern R. Co. *v.* Lewellen, (Civ. App. 1909) 116 S. W. 116; Galveston, etc., R. Co. *v.* Herring, (Civ. App. 1896) 36 S. W. 129; Gulf, etc., R. Co. *v.* Thompson, (Civ. App. 1896) 35 S. W. 319; Hartford F. Ins. Co. *v.* Josey, 6 Tex. Civ. App. 290, 25 S. W. 685.

48. *In re* Overpeck, 144 Iowa 400, 120

(b) When Error Harmless. Error in submitting an issue to the jury will not be ground for reversal if it could not have operated to appellant's prejudice.[49] The decision will not be reversed where the findings on issues properly submitted control the verdict,[50] and the finding on the issue improperly submitted could not affect the verdict,[51] where the finding on other issues renders a finding on the issue erroneously submitted immaterial,[52] where the jury made no finding as to the issue erroneously submitted,[53] where the record shows that the jury did not consider it [54] or was not influenced thereby in the determination reached,[55] where no other determination than that reached by the jury is possible,[56] where the erroneous submission of the issue is in appellant's favor,[57] where the finding on the issue erroneously submitted is in appellant's favor,[58] or where the court rejects an allowance of damages on items of damage improperly submitted to the jury [59] or requires plaintiff to remit a sum sufficient to cover such items.[60]

(2) Failure to Submit Issues to Jury — (a) In General. Failure of the court to submit to the jury, in a proper case, a material issue arising at the trial

N. W. 1044, 122 N. W. 928; Clark *v.* Grand Trunk Western R. Co., 149 Mich. 400, 112 N. W. 1121; Weidinger *v.* Third Ave. R. Co., 40 N. Y. App. Div. 197, 57 N. Y. Suppl. 851; Southern R. Co. *v.* Hardin, 157 Fed. 645, 85 C. C. A. 329.

49. *Arkansas.*— Ft. Smith Light, etc., Co. *v.* Carr, 78 Ark. 279, 93 S. W. 990.

Indian Territory.— Atoka Coal, etc., Co. *v.* Miller, 7 Indian Terr. 104, 104 S. W. 555.

Kentucky.— Pioneer Bldg., etc., Assoc. *v.* Jones, 56 S. W. 657, 22 Ky. L. Rep. 41.

Massachusetts.— Fay *v.* Harrington, 176 Mass. 270, 57 N. E. 369.

Michigan.— Swanson *v.* Menominee Electric Light, etc., Co., 113 Mich. 603, 71 N. W. 1098.

Mississippi.— Arky *v.* Cameron, 92 Miss. 632, 46 So. 54, 170.

Missouri.— Morgan *v.* Wabash R. Co., 159 Mo. 262, 60 S. W. 195; Turner *v.* Wabash R. Co., 114 Mo. App. 539, 90 S. W. 391.

Nebraska.— Chapel *v.* Franklin County, 58 Nebr. 544, 78 N. W. 1062.

North Carolina.— J. L. Roper Lumber Co. *v.* Elizabeth City Lumber Co., 137 N. C. 431, 49 S. E. 946, 135 N. C. 742, 47 S. E. 757.

Texas.— Texas, etc., R. Co. *v.* Shoemaker, (Civ. App. 1904) 81 S. W. 1019 [*reversed* on other grounds in 98 Tex. 451, 84 S. W. 1049]; Wright *v.* Wright, 50 Tex. Civ. App. 459, 110 S. W. 158; Gonzales *v.* Galveston, etc., R. Co., (Civ. App. 1908) 107 S. W. 896; Ft. Worth, etc., St. R. Co. *v.* Hawes, 48 Tex. Civ. App. 487, 107 S. W. 556; Denison, etc., R. Co. *v.* Scholz, (Civ. App. 1898) 44 S. W. 560; Armstrong *v.* Ames, etc., Co., 17 Tex. Civ. App. 46, 43 S. W. 302.

West Virginia.— Miller *v.* White, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. Rep. 791.

United States.— Coopersville Co-Operative Creamery Co. *v.* Lemon, 163 Fed. 145, 89 C. C. A. 595.

50. *Arkansas.*— St. Louis, etc., R. Co. *v.* Ledford, 90 Ark. 543, 119 S. W. 1123.

Michigan.— Gates *v.* Detroit, etc., R. Co., 147 Mich. 523, 111 N. W. 101.

Minnesota.— Elwood *v.* Saterlie, 68 Minn. 173, 71 N. W. 13.

North Carolina.— Walker *v.* Walker, 151 N. C. 164, 65 S. E. 923; Rudisill *v.* Whitener, 149 N. C. 439, 63 S. E. 101; Hayes *v.* Southern R. Co., 141 N. C. 195, 53 S. E. 847; Cumming *v.* Barber, 99 N. C. 332, 5 S. E. 903.

Texas.— Memphis Coffin Co. *v.* Patton, (Civ. App. 1908) 106 S. W. 697; Texas, etc., R. Co. *v.* Prude, 39 Tex. Civ. App. 144, 86 S. W. 1046.

Wisconsin.— Hebbe *v.* Maple Creek, 121 Wis. 668, 99 N. W. 442.

51. O'Farrell *v.* O'Farrell, (Tex. Civ. App. 1909) 119 S. W. 899.

52. Cornell *v.* Standard Oil Co., 91 N. Y. App. Div. 345, 86 N. Y. Suppl. 633.

53. Harris *v.* Jackson, (Tex. Civ. App. 1908) 106 S. W. 1144, holding that defendant was not prejudiced by the erroneous submission of an issue to the jury, where no damages were found with reference thereto.

54. Wood *v.* Gulf, etc., R. Co., 15 Tex. Civ. App. 322, 40 S. W. 24.

55. Texas Cent. R. Co. *v.* Clifton, 2 Tex. App. Civ. Cas. § 489.

56. Fail *v.* Western Union Tel. Co., 80 S. C. 207, 60 S. E. 697, 61 S. E. 258.

57. Spilker *v.* Abrahams, 133 N. Y. App. Div. 226, 117 N. Y. Suppl. 376, holding that, where, in an action for malicious prosecution, the court would have been justified in instructing that there was no probable cause, defendant was not prejudiced by the court's submission of that issue to the jury.

58. *Iowa.*— Davis *v.* Huber Mfg. Co., 119 Iowa 56, 93 N. W. 78.

Michigan.— Allington, etc., Mfg. Co. *v.* Detroit Reduction Co., 113 Mich. 427, 95 N. W. 562.

Missouri.— Goodfellow *v.* Shannon, 197 Mo. 271, 94 S. W. 979.

Texas.— Cahill *v.* Benson, 19 Tex. Civ. App. 30, 46 S. W. 888.

Vermont.— Grout *v.* Moulton, 79 Vt. 122, 64 Atl. 453.

Washington.— Lownsdale *v.* Grays Harbor Boom Co., 36 Wash. 198, 78 Pac. 904.

59. Optenberg *v.* Skelton, 109 Wis. 241, 85 N. W. 356.

60. International, etc., R. Co. *v.* Williams, (Tex. Civ. App. 1909) 118 S. W. 758; El

may be reversible error.[61] But error in failing to submit an issue to the jury is harmless and not a ground for reversal where it is apparent that no prejudice resulted to appellant by reason thereof,[62] or if it does not appear that appellant was prejudiced,[63] or unless it is reasonably clear that appellant has been prejudiced thereby.[64] A reviewing court will not reverse for failure to submit an issue to the jury where no other verdict could have been rendered on the evidence,[65] or sustained if rendered,[66] where the evidence was insufficient to establish the issue in appellant's favor,[67] where the verdict rendered made a consideration of the issue not submitted unnecessary,[68] or where the verdict necessarily included a finding against appellant on the issue.[69] And if the issues submitted sufficiently dispose of the controversy, a party cannot complain because a particular issue was not submitted.[70]

(b) Special Interrogatories. Failure or refusal to submit special interrogatories is harmless where it is apparent that no prejudice could have resulted to appellant.[71] Refusal to submit special interrogatories is not a ground for reversal where no other general verdict could have been rendered,[72] where the answers would be immaterial under the general charge given,[73] where the answers to the interrogatories must necessarily have been answered adversely to appellant,[74] where the verdict covers all the issuable facts,[75] where the essential facts are embodied

Paso Electric R. Co. *v.* Sierra, (Tex. Civ. App. 1908) 109 S. W. 986.

61. Hyde *v.* Minnesota, etc., R. Co., (S. D. 1909) 123 N. W. 849.

62. *Dakota.*—Citizens' Nat. Bank *v.* Jenks, 6 Dak. 432, 43 N. W. 947.

Iowa.— Hunter *v.* Davis, 128 Iowa 216, 103 N. W. 373.

Maine.— Greene *v.* Dingley, 24 Me. 131.

Maryland.— Heying *v.* United R., etc., Co., 100 Md. 281, 59 Atl. 667.

New Jersey.— Koch *v.* Bamford Bros. Silk Mfg. Co., 69 N. J. L. 252, 55 Atl. 271.

New York.— Williams *v.* Boehan, 60 N. Y. Super. Ct. 319, 17 N. Y. Suppl. 484.

North Carolina.— Bradley *v.* Ohio River, etc., R. Co., 126 N. C. 735, 36 S. E. 181; Smith *v.* Arthur, 110 N. C. 400, 15 S. E. 197.

Pennsylvania.— Robinson *v.* Robinson, 203 Pa. St. 400, 53 Atl. 253.

Texas.— Boettler *v.* Tomlinson, (Civ. App. 1903) 77 S. W. 824; Bruce *v.* Weatherford First Nat. Bank, 25 Tex. Civ. App. 295, 60 S. W. 1006; Missouri, etc., R. Co. *v.* Webb, 20 Tex. Civ. App. 431, 49 S. W. 526; Sun Mut. Ins. Co. *v.* Tufts, 20 Tex. Civ. App. 147, 50 S. W. 180; Studebaker Bros. Mfg. Co. *v.* Santo Tomas Coal Co., 8 Tex. Civ. App. 194, 27 S. W. 787.

Washington.— Carroll *v.* Centralia Water Co., 5 Wash. 613, 32 Pac. 609, 33 Pac. 431.

Wisconsin.— Eaton *v.* Woolly, 28 Wis. 628; Savage *v.* Davis, 18 Wis. 608.

Wyoming.— George *v.* Emery, (1910) 107 Pac. 1.

United States.— Philip-Schneider Brewing Co. *v.* American Ice-Mach. Co., 77 Fed. 138, 23 C. C. A. 89.

63. Atlanta *v.* Alexander, 80 Ga. 637, 6 S. E. 25; Young *v.* McConnell, 110 Ill. 83; Kimsey *v.* Munday, 112 N. C. 816, 17 S. E. 583; Horne *v.* People's Bank, 108 N. C. 109, 12 S. E. 840; Faircloth *v.* Isler, 75 N. C. 551; Bonner *v.* Dale, 62 Tex. 300.

64. Jordan *v.* Farthing, 117 N. C. 181, 23 S. E. 244.

65. Sutton *v.* Walters, 118 N. C. 495, 24 S. E. 357; Myers *v.* Tennessee Bank, 3 Head (Tenn.) 330; Campbell *v.* Upson, (Tex. Civ. App. 1904) 81 S. W. 358 [*reversed* on other grounds in 98 Tex. 442, 84 S. W. 817]; Looney *v.* Linney, (Tex. Civ. App. 1892) 21 S. W. 409.

66. Houghton County *v.* Rees, 34 Mich. 481; Eister *v.* Paul, 54 Pa. St. 196; Brewster *v.* Sterrett, 32 Pa. St. 115.

67. Rogers *v.* Swanton, 54 Vt. 585.

68. Citizens' St. R. Co. *v.* Heath, 29 Ind. App. 395, 62 N. E. 107; Yeates *v.* Forrest, 152 N. C. 752, 67 S. E. 171; McColman *v.* Atlantic Coast Line R. Co., 150 N. C. 707, 64 S. E. 781, holding that in an action against a carrier for damages from vexatious delay, where the court submitted the issues of defendant's negligence and of damages, and the jury in answer to the first issue found that defendant was not negligent, plaintiff could not complain of error in not submitting issues involving punitive damages.

69. Langham *v.* Sun Pipe Line Co., 52 Tex. Civ. App. 485, 114 S. W. 451.

70. Holler *v.* Western Union Tel. Co., 149 N. C. 336, 63 S. E. 92, 19 L. R. A. N. S. 475.

71. Cormac *v.* Western White Bronze Co., 77 Iowa 32, 41 N. W. 480; Kansas City *v.* Bradbury, 45 Kan. 381, 25 Pac. 889, 23 Am. St. Rep. 731; Greene *v.* Williams, 131 Mich. 46, 90 N. W. 699.

Where it does not appear that the refusal to submit interrogatories was prejudicial the judgment will not be reversed. Dutzi *v.* Geisel, 23 Mo. App. 676.

72. Wyandotte *v.* Gibson, 25 Kan. 236; Weisel *v.* Spence, 59 Wis. 301, 18 N. W. 165.

73. Brooks *v.* Fairchild, 36 Mich. 231; Singer Mfg. Co. *v.* Sammons, 49 Wis. 316, 5 N. W. 788.

74. Clarke *v.* Missouri Pac. R. Co., 35 Kan. 350, 11 Pac. 134.

75. Berndt *v.* Cudahy, 141 Wis. 457, 124 N. W. 511; Goesel *v.* Davis, 100 Wis. 678, 76 N. W. 768.

in other interrogatories submitted,[76] where the answers to the interrogatories not submitted could not have affected the verdict,[77] where the information sought is contained in special findings of the jury in answer to interrogatories submitted,[78] where no matter what the answers to the interrogatories might have been they would be entirely consistent with the general verdict returned by the jury,[79] or where, if submitted, the jury would not have been required by its terms to answer the interrogatory.[80]

5. Charging on Weight of Evidence or as to Matters of Fact[81] — a. View That Practice Permissible — (i) *Statement of Rule.* At common law, and in the absence of any constitutional or statutory restrictions, it is not error for the trial court, in its charge to the jury, to express an opinion on disputed questions of fact, provided such questions are ultimately left to the jury for their decision, without any direction as to how they should find the facts.[82] This practice prevails in the courts of a number of states, where there are no constitutional or statutory

76. Chicago City R. Co. *v.* Foster, 226 Ill. 288, 80 N. E. 762 [*affirming* 128 Ill. App. 571]; Livingston *v.* Heck, 122 Iowa 74, 94 N. W. 1098; Union Mill Co. *v.* Prenzler, 100 Iowa 540, 69 N. W. 876.

77. House *v.* McKinney, 54 Ind. 240; Grand Rapids, etc., R. Co. *v.* Cox, 8 Ind. App. 29, 35 N. E. 183.

78. Joy *v.* Bitzer, 77 Iowa 73, 41 N. W. 575, 3 L. R. A. 184

79. Bickford *v.* Champlin, 3 Kan. App. 681, 44 Pac. 901; Swift *v.* Wyatt, 2 Kan. App. 554, 43 Pac. 984.

80. Muncie, etc., Traction Co. *v.* Hall, 173 Ind. 95, 89 N. E. 484.

81. As ground for new trial see New Trial, 29 Cyc. 788.

In criminal prosecutions see Criminal Law, 12 Cyc. 596 *et seq.*

Taking case or question from jury see *supra*, VIII.

82. *Connecticut.*— Sackett *v.* Carroll, 80 Conn. 374, 68 Atl. 442; Houghton *v.* New Haven, 79 Conn. 659, 66 Atl. 509; Crotty *v.* Danbury, 79 Conn. 379, 65 Atl. 147; Banks *v.* Connecticut R., etc., Co., 79 Conn. 116, 64 Atl. 14; Turner's Appeal, 72 Conn. 305, 44 Atl. 310; Setchel *v.* Keigwin, 57 Conn. 473, 18 Atl. 594; Comstock's Appeal, 55 Conn. 214, 10 Atl. 559; Stamford First Baptist Church *v.* Rouse, 21 Conn. 160; Swift *v.* Stevens, 8 Conn. 431.

Minnesota.— Decorah First Nat. Bank *v.* Holan, 63 Minn. 525, 65 N. W. 952; Ames *v.* Cannon River Mfg. Co., 27 Minn. 245, 6 N. W. 787.

New Jersey.— Merklinger *v.* Lambert, 76 N. J. L. 806, 72 Atl. 119; Bruch *v.* Carter, 32 N. J. L. 554.

New York.— Hurlburt *v.* Hurlburt, 128 N. Y. 420, 28 N. E. 651, 26 Am. St. Rep. 482; Rainey *v.* New York Cent., etc., R. Co., 68 Hun 495, 23 N. Y. Suppl. 80; Powell *v.* Jones, 42 Barb. 24; Lansing *v.* Russell, 13 Barb. 510; Crawford *v.* Wilson, 4 Barb. 504; Nolton *v.* Moses, 3 Barb. 31; Althof *v.* Wolf, 2 Hilt. 344 [*affirmed* in 22 N. Y. 355]; Hunt *v.* Bennett, 4 E. D. Smith 647 [*affirmed* in 19 N. Y. 173]; Cheesebrough *v.* Taylor, 12 Abb. Pr. 227; Gardner *v.* Picket, 19 Wend. 186; Durkee *v.* Marshall, 7 Wend. 312.

Ohio.— Abram *v.* Will, 6 Ohio 164.

Pennsylvania.— Pool *v.* White, 175 Pa. St. 459, 34 Atl. 801; Heydrick *v.* Hutchinson, 165 Pa. St. 208, 30 Atl. 819; Halfman *v.* Pennsylvania Boiler Ins. Co., 160 Pa. St. 202, 28 Atl. 837; Fredericks *v.* Northern Cent. R. Co., 157 Pa. St. 103, 27 Atl. 689, 22 L. R. A. 306; Didier *v.* Pennsylvania Co., 146 Pa. St. 582, 23 Atl. 801; Bonner *v.* Herrick, 99 Pa. St. 220; Greeley *v.* Thomas, 56 Pa. St. 35; Ditmars *v.* Com., 47 Pa. St. 335; Girard F. & M. Ins. Co. *v.* Stephenson, 37 Pa. St. 293, 78 Am. Dec. 423; Graff *v.* Pittsburgh, etc., R. Co., 31 Pa. St. 489; Porter *v.* Seiler, 23 Pa. St. 424, 62 Am. Dec. 341; Rapsher *v.* Wattson, 17 Pa. St. 365; Sailor *v.* Hertzogg, 10 Pa. St. 296; Hamet *v.* Dundass, 4 Pa. St. 178; Pennsylvania Co. *v.* Allen, 3 Pennyp. 170; Adams *v.* Uhler, 2 Walk. 96; Delany *v* Robinson, 2 Whart. 503; Hulett *v.* Patterson, 6 Pa. Cas. 22, 8 Atl. 917; Bernstein *v.* Walsh, 32 Pa. Super. Ct. 392.

Rhode Island.— Tucker *v.* Rhode Island Co., (1908) 69 Atl. 850; State *v.* Lynott, 5 R. I. 295.

Utah.— Rogers *v.* Rio Grande Western R. Co., 32 Utah 367, 90 Pac. 1075, 125 Am. St. Rep. 876; Loofborrow *v.* Utah Light, etc., Co., 31 Utah 355, 88 Pac. 19; People *v.* Lee, 2 Utah 441.

Vermont.— Rowell *v.* Fuller, 59 Vt. 688, 10 Atl. 853; Missisquoi Bank *v.* Evarts, 45 Vt. 293; Sawyer *v.* Phaley, 33 Vt. 69; Yale *v.* Seely, 15 Vt. 221; Gale *v.* Lincoln, 11 Vt. 152; Stevens *v.* Talcott, 11 Vt. 25. But see Gordon *v.* Tabor, 5 Vt 103.

Wisconsin.— Barndt *v.* Frederick, 78 Wis. 1, 47 N. W. 6, 11 L. R. A. 199; Goldsworthy *v.* Linden, 75 Wis. 24, 43 N. W. 656; Massuere *v.* Dickens, 70 Wis. 83, 35 N. W. 349; Holmes *v.* Cook, 50 Wis. 172, 6 N. W. 507; Ketchum *v.* Ebert, 33 Wis. 611; Fowler *v.* Colton, 1 Pinn. 331. In criminal cases, the rule prevailing is more stringent. It is there held to be error for the court to express any opinion to the jury as to the weight or sufficiency of the testimony upon any fairly controverted or debatable question of fact. Hill *v.* State, 17 Wis. 675; Benedict *v.* State, 14 Wis. 423.

England.— Solarte *v* Melville, 7 B. & C. 430, 6 L. J. K. B. O. S. 68, 1 M. & R. 198,

prohibitions against it,[83] and in the federal courts,[84] whose powers in this respect cannot be, and are not, controlled either by state, constitutional,[85] or statutory [86]

14 E. C. L. 196, 108 Eng. Reprint 784; Petty *v.* Anderson, 3 Bing. 170, 3 L. J. C. P. O. S. 223, 10 Moore C. P. 577, 11 E. C. L. 91; Sutton *v.* Sadler, 3 C. B. N. S. 87, 3 Jur. N. S. 1150, 26 L. J. C. P. 284, 5 Wkly. Rep. 880, 91 E. C. L. 87; Davidson *v.* Stanley, 2 M. & G. 721, 3 Scott N. R. 49, 40 E. C. L. 824.

See 46 Cent. Dig. tit. "Trial," § 409.

In Michigan there seems to be a conflict of authority as to whether the trial court has a right to express an opinion on the weight of the evidence. In an early case it is said that an expression of opinion from the judge does not amount to a misdirection, even though it may be quite pointed, if the jury are fully informed and understand that they are not bound to follow it, and that they have the right and it is their duty to decide for themselves. Sheahan *v.* Barry, 27 Mich. 217. See also Tunnicliffe *v.* Bay Cities Consol. R. Co., 107 Mich. 261, 65 N. W. 226; Blumeno *v.* Grand Rapids, etc., R. Co., 101 Mich. 325, 59 N. W. 594; Davidson *v.* Kolb, 95 Mich. 469, 55 N. W. 373; Richards *v.* Fuller, 38 Mich. 653. But the court has indicated that this rule is not to be extended to cases where the instruction implies a duty on the part of the jury to yield their judgment to that of the judge. Blumeno *v.* Grand Rapids, etc., R. Co., *supra*; Mawich *v.* Elsey, 47 Mich. 10, 8 N. W. 587, 10 N. W. 57. Of course a party has no right to demand that such instruction be given. Perrott *v.* Shearer, 17 Mich. 48. On the other hand there are a large number of cases which seem to hold that it is error for the trial judge to express any opinion on the weight of the evidence or the credibility of witnesses. Schweyer *v.* Jones, 152 Mich. 241, 115 N. W. 974; Harker *v.* Detroit United R. Co., 150 Mich. 697, 114 N. W. 657; Valin *v.* McKerreghan, 104 Mich. 213, 62 N. W. 340; Letts *v.* Letts, 91 Mich. 596, 52 N. W. 54; Babbitt *v.* Bumpus, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585; Davis *v.* Gerber, 69 Mich. 246, 37 N. W. 281; Henry C. Hart Mfg. Co. *v.* Mann's Boudoir Car Co., 65 Mich. 564, 32 N. W. 820; Spalding *v.* Lowe, 56 Mich. 366, 23 N. W. 46. Thus what certain statements tend to prove, or the weight to be given them, are proper questions for the jury, and the court cannot instruct them as to the weight or importance to attach to any particular part of the testimony. To do so, would be but usurping the proper province of the jury. Cartier *v.* Douville, 98 Mich. 22, 56 N. W. 1045; Wessels *v.* Beeman, 87 Mich. 481, 49 N. W. 483; Hayes *v.* Homer, 36 Mich. 374; Blackwood *v.* Brown, 32 Mich. 104; Perrott *v.* Shearer, 17 Mich. 48. So it is improper for the trial judge to refer to a witness' testimony in scathing terms, and to pass such criticisms thereon as are calculated to impress the jury with his own views of the facts. Sterling *v.* Callahan, 94 Mich. 536, 54 N. W. 495; Pokriefka *v.* Mackurat, 91 Mich. 399, 51 N. W. 1059; People *v.* Lyons, 49 Mich. 78, 13 N. W. 365.

In New Hampshire it is said not to be the ordinary practice for the court to express opinions in regard to the weight of the evidence. Cook *v.* Brown, 34 N. H. 460. See also McDougall *v.* Shirley, 18 N. H. 108. But it is not irregular for them to make such suggestions in relation to the facts as they may suppose will be useful to the jury, the matter being left to them for decision. Cook *v.* Brown, *supra*; Patterson *v.* Colebrook, 29 N. H. 94; Flanders *v.* Colby, 28 N. H. 34.

83. See cases cited in the preceding note.

84. Hansen *v.* Boyd, 161 U. S. 397, 16 S. Ct. 571, 40 L. ed. 746; Doyle *v.* Union Pac. R. Co., 147 U. S. 413, 13 S. Ct. 333, 37 L. ed. 223; Baltimore, etc., R. Co. *v.* Washington Fifth Baptist Church, 137 U. S. 568, 11 S. Ct. 185, 34 L. ed. 784; Haines *v.* McLaughlin, 135 U. S. 584, 10 S. Ct. 876, 34 L. ed. 290; Lovejoy *v.* U. S., 128 U. S. 171, 9 S. Ct. 57, 32 L. ed. 389; Rucker *v.* Wheeler, 127 U. S. 85, 8 S. Ct. 1142, 32 L. ed. 102; Williams *v.* Conger, 125 U. S. 397, 8 S. Ct. 933, 31 L. ed. 778; U. S. *v.* Philadelphia, etc., R. Co., 123 U. S. 113, 8 S. Ct. 77, 31 L. ed. 138; St. Louis, etc., R. Co. *v.* Vickers, 122 U. S. 360, 7 S. Ct. 1216, 30 L. ed. 1161; Vicksburg, etc., R. Co. *v.* Putnam, 118 U. S. 545, 7 S. Ct. 1, 30 L. ed. 257; Eastern Transp. Line *v.* Hope, 95 U. S. 297, 24 L. ed. 477; Mitchell *v.* Harmony, 13 How. (U. S.) 115, 14 L. ed. 75; Garrard *v.* Reynolds, 4 How. (U. S.) 123, 11 L. ed. 903; Roach *v.* Hulings, 16 Pet. (U. S.) 319, 10 L. ed. 979; Games *v.* Stiles, 14 Pet. (U. S.) 322, 10 L. ed. 476; Tracy *v.* Swartwout, 10 Pet. (U. S.) 80, 9 L. ed. 354; Magniac *v.* Thompson, 7 Pet. (U. S.) 348, 8 L. ed. 709; Carver *v.* Jackson, 4 Pet. (U. S.) 1, 7 L. ed. 761; Pittsburgh R. Co. *v.* Bloomer, 146 Fed. 720, 77 C. C. A. 146; Vanarsdale *v.* Hax, 107 Fed. 878, 47 C. C. A. 31; Breese *v.* U. S., 106 Fed. 680, 45 C. C. A. 535; Aerheart *v.* St. Louis, etc., R. Co., 99 Fed. 907, 40 C. C. A. 171; Doyle *v.* Boston, etc., R. Co., 82 Fed. 869, 27 C. C. A. 264; Watts *v.* Southern Bell Tel., etc., Co., 66 Fed. 453; Chicago, etc., R. Co. *v.* Stahley, 62 Fed. 363, 11 C. C. A. 88; Pullman's Palace-Car Co. *v.* Harkins, 55 Fed. 932, 5 C. C. A. 326; Smith *v.* Sun Printing, etc., Assoc., 55 Fed. 240, 5 C. C. A. 91; Van Gunden *v.* Virginia Coal, etc., Co., 52 Fed. 838, 3 C. C. A. 294; Atchison, etc., R. Co. *v.* Howard, 49 Fed. 206, 1 C. C. A. 229; Sorenson *v.* Northern Pac. R. Co., 36 Fed. 166; Behr *v.* Connecticut Mut. L. Ins. Co., 4 Fed. 357, 2 Flipp. 692; U. S. *v.* Fourteen Packages of Pins, 25 Fed. Cas. No. 15,151, Gilp. 235.

85. St. Louis, etc., R. Co. *v.* Vickers, 122 U. S. 360, 7 S. Ct. 1216, 30 L. ed. 1161.

86. Indianapolis, etc., R. Co. *v.* Horst, 93 U. S. 291, 23 L. ed. 898; Nudd *v.* Burrows, 91 U. S. 426, 23 L. ed. 286.

provisions forbidding judges to express any opinion upon the facts. Where this practice prevails the opinion of the court may properly be expressed, either directly, or inferentially through the drift of its comments and the marshaling of facts in its charge,[87] and the exercise of its discretion cannot be reviewed unless the court fails to submit the questions of fact to the jury without direction as to how they shall find the facts, or plainly abuses its discretion.[88] The fact that the opinion expressed is erroneous does not alter the rule.[89]

(II) *Necessity of Expressing Opinion.* Whether or not a trial judge will exercise his right of expressing an opinion on the facts depends upon his judicial discretion.[90] Unless the circumstances are exceptional,[91] he is not bound to do so,[92] even on request.[93]

(III) *Necessity of Informing Jury That Opinion Advisory Only.*[94] Whenever the judge delivers his opinion to the jury on a matter of fact, it should be delivered as mere opinion, and not as direction, and the jury should be left to understand clearly that they are to decide the fact upon their own view of the evidence, and that the judge interposes his opinion only to aid them in cases of difficulty, or to inspire them with confidence in cases of doubt.[95] Ordinarily this duty is best performed by expressly informing the jury that they are the exclusive judges of the facts, and are not bound by the opinion of the court,[96] and it has been held error to omit to so instruct,[97] at least where the statute expressly requires

87. Crotty *v.* Danbury, 79 Conn. 379, 65 Atl. 147.

88. Crotty *v.* Danbury, 79 Conn. 379, 65 Atl. 147.

89. Oyster *v.* Longnecker, 16 Pa. St. 269; Long *v.* Ramsay, 1 Serg. & R. (Pa.) 72; Davidson *v.* Stanley, 2 M. & G. 721, 3 Scott N. R. 49, 40 E. C. L. 824.

Slight inaccuracies in reviewing the facts, in a charge to a jury, with expressions of opinion as to the merits of the case, when accompanied by instructions that the facts are for the jury and they should remember them, and the alleged errors were not called to the attention of the court before the jury retired, are not ground for reversal. Knapp *v.* Griffin, 140 Pa. St. 604, 21 Atl. 449.

90. Crotty *v.* Danbury, 79 Conn. 379, 65 Atl. 147; Bruch *v.* Carter, 32 N. J. L. 554; Sawyer *v.* Phaley, 33 Vt. 69.

91. **Exceptional cases may arise** where it is the duty of the judge to express his opinion of the facts and guide the minds of the jury to a correct view of the evidence. Spear *v.* Philadelphia, etc., R. Co., 119 Pa. St. 61, 12 Atl. 824; Leibig *v.* Steiner, 94 Pa. St. 466; Bernstein *v.* Walsh, 32 Pa. Super. Ct. 392.

92. Cohen *v.* Pemberton, 53 Conn. 221, 2 Atl. 315, 5 Atl. 682, 55 Am. Rep. 101; Gale *v.* Lincoln, 11 Vt. 152; Vincent *v.* Stinehour, 7 Vt. 62, 29 Am. Dec. 145; Brainard *v.* Burton, 5 Vt. 97.

93. *Maine.*— George *v.* Stubbs, 26 Me. 243.
New York.— Moore *v.* Meacham, 10 N. Y. 207.
Pennsylvania.— Philadelphia, etc., R. Co. *v.* Hagan, 47 Pa. St. 244, 86 Am. Dec. 541; Lorain *v.* Hall, 33 Pa. St. 270; Thomas *v.* Thomas, 21 Pa. St. 315; Brown *v.* Campbell, 1 Serg. & R. 176; Zerger *v.* Sailer, 6 Binn. 24.
Rhode Island.— Tucker *v.* Rhode Island Co., (1908) 69 Atl. 850.
Vermont.— Doon *v.* Ravey, 49 Vt. 293.
Wisconsin.— Hamann *v.* Milwaukee Bridge Co., 136 Wis. 39, 116 N. W. 854.
United States.— Crane *v.* Morris, 6 Pet. 598, 8 L. ed. 514; Van Ness *v.* Pacard, 2 Pet. 137, 7 L. ed. 374; Smith *v.* Carrington, 4 Cranch 62, 2 L. ed. 550; Brickill *v.* Baltimore, 60 Fed. 98, 8 C. C. A. 500.

Modification of a requested instruction by striking out mere comment on the evidence is proper. Garner *v.* Metropolitan St. R. Co., 128 Mo. App. 401, 107 S. W. 427.

94. **In criminal prosecutions** see Criminal Law, 12 Cyc. 597.

95. New York Firemen Ins. Co. *v.* Walden, 12 Johns. (N. Y.) 513, 7 Am. Dec. 340.

Care should be taken to separate the law from the facts, and to leave the latter in unequivocal terms to the judgment of the jury as their true and peculiar province. New York Firemen Ins. Co. *v.* Walden, 12 Johns. (N. Y.) 513, 7 Am. Dec. 340; Starr *v.* U. S., 153 U. S. 614, 14 S. Ct. 919, 38 L. ed. 841; Nudd *v.* Burrows, 91 U. S. 426, 23 L. ed. 286. As the jurors are the triers of facts, expressions of opinion by the court should be so guarded as to leave the jury free in the exercise of their own judgments. Starr *v.* U. S., *supra*; Tracy *v.* Swartwout, 10 Pet. (U. S.) 80, 9 L. ed. 354. They should be made distinctly to understand that the instruction is not given as a point of law by which they are to be governed, but as a mere opinion as to the facts to which they should give no more weight than it was entitled to. Anderson *v.* McAleenan, 8 N. Y. Suppl. 483; Starr *v.* U. S., *supra*; Nudd *v.* Burrows, *supra*; Tracy *v.* Swartwout, *supra*.

96. Yale *v.* Seely, 15 Vt. 221; Illinois Cent. R. Co. *v.* Davidson, 76 Fed. 517, 22 C. C. A. 306; Sorenson *v.* Northern Pac. R. Co., 36 Fed. 166.

97. Anderson *v.* Avis, 62 Fed. 227, 10 C. C. A. 347.

it.[98] On the other hand it has been held that a charge on the facts is not objectionable for failure to accompany it with a statement that the jury alone are to weigh the evidence and determine the facts, especially where that power or duty is unmistakably suggested to the jury all through the charge.[99] And in one jurisdiction it is said that if a party fears undue influence upon the jury of what the court says in regard to the facts, he may request an instruction that the jury, and not the court, are to determine the facts.[1]

(IV) *How Strong Opinion May Be Expressed.* To what extent the right of expressing an opinion on the weight of evidence shall be exercised depends upon the discretion of the trial judge, subject to certain limitations.[2] It is said that a trial judge may express his opinion freely on the weight and value of evidence.[3] Very strong expressions of opinion on the facts are tolerated, indeed sometimes may be necessary;[4] and such an expression of opinion, however decided, is not the ground of an exception, if the jury are not misled,[5] and if no binding direction is given to the jury to find in accordance with such opinion,[6] and all questions of fact are fairly submitted to them to decide upon their own judgment.[7]

98. Under Minn. Pub. St. c. 61, § 22, providing that if the court, in its charge, "present the facts of the case, it must also inform the jury that they are the exclusive judges of all questions of fact," it was held error in the court to express an opinion on the facts without so informing the jury. Caldwell *v.* Kennison, 4 Minn. 47, 77 Am. Dec. 499. This provision, although retained as to the trial of criminal cases, was repealed as to the trial of civil causes in the Revision of 1866.

99. Houghton *v.* New Haven, 79 Conn. 659, 66 Atl. 509; Hunt *v.* Bennett, 4 E. D. Smith (N. Y.) 647 [*affirmed* in 19 N. Y. 173].

1. Bonness *v.* Felsing, 97 Minn. 227, 106 N. W. 909, 114 Am. St. Rep. 707; Ames *v.* Cannon River Mfg. Co., 27 Minn. 245, 6 N. W. 787.

2. Shupack *v.* Gordon, 79 Conn. 298, 64 Atl. 740; Banks *v.* Connecticut R., etc., Co., 79 Conn. 116, 64 Atl. 14; Setchel *v.* Keigwin, 57 Conn. 473, 18 Atl. 594; Stamford First Baptist Church *v.* Rouse, 21 Conn. 160; Merklinger *v.* Lambert, 76 N. J. L. 806, 72 Atl. 119 (holding that the trial judge has an undoubted right to make such comments and expressions upon the testimony as he thinks necessary for the direction of the jury); Bruch *v.* Carter, 32 N. J. L. 554; Bulkeley *v.* Keteltas, 4 Sandf. (N. Y.) 450 [*reversed* on other grounds in 6 N. Y. 384]; Nudd *v.* Burrows, 91 U. S. 426, 23 L. ed. 286; Atty.-Gen. & Good, McClell. & Y. 286.

It depends so much upon the particular circumstances of each case, upon the course and character of the argument and sometimes even upon facts outside of the case, such as popular excitement and external influences which affect, or are meant to affect, the feelings, prejudices, and judgment of jurors, that the judge alone can properly estimate them; and it becomes at times a difficult and delicate, although none the less an obligatory, duty upon him to determine what he ought to say and where he ought to stop. Sawyer *v.* Phaley, 33 Vt. 69.

3. Fredericks *v.* Northern Cent. R. Co., 157 Pa. St. 103, 27 Atl. 689, 22 L. R. A. 306; Leibig *v.* Steiner, 94 Pa. St. 466; Thomas *v.* Thomas, 21 Pa. St. 315; Repsher *v.* Wattson, 17 Pa. St. 365.

4. Leibig *v.* Steiner, 94 Pa. St. 466; Bitner *v.* Bitner, 65 Pa. St. 347; Petty *v.* Anderson, 3 Bing. 170, 3 L. J. C. P. O. S. 223, 10 Moore C. P. 577, 11 E. C. L. 91; Davidson *v.* Stanley, 2 M. & G. 721, 3 Scott N. R. 49, 40 E. C. L. 824.

5. Lindley *v.* O'Reilly, 46 N. J. L. 352; Fredericks *v.* Northern Cent. R. Co., 157 Pa. St. 103, 27 Atl. 689, 22 L. R. A. 306; Burke *v.* Maxwell, 81 Pa. St. 139; Greeley *v.* Thomas, 56 Pa. St. 35; Adams *v.* Uhler, 2 Walk. (Pa.) 96; Bughman *v.* Byers, 9 Pa. Cas. 128, 12 Atl. 357.

For example an instruction on a trial for violating the banking law that, "in his opinion, it was the duty of the jury to convict the defendant," was ground for new trial, as calculated to mislead the jury, who would, perhaps, construe the language as a direction on the part of the court. Breese *v.* U. S., 108 Fed. 804, 48 C. C. A. 36 [*reversing* 106 Fed. 680, 45 C. C. A. 535].

6. *Connecticut.*— Crotty *v.* Danbury, 79 Conn. 379, 65 Atl. 147; Banks *v.* Connecticut R., etc., Co., 79 Conn. 116, 64 Atl. 14; Setchel *v.* Keigwin, 57 Conn. 473, 18 Atl. 594; Stamford First Baptist Church *v.* Rouse, 21 Conn. 160.

Minnesota.— Ames *v.* Cannon River Mfg. Co., 27 Minn. 245, 6 N. W. 787.

New York.— Massoth *v.* Delaware, etc., Canal Co., 64 N. Y. 524.

Pennsylvania.— Fredericks *v.* Northern Cent. R. Co., 157 Pa. St. 103, 27 Atl. 689, 22 L. R. A. 306; Leibig *v.* Steiner, 94 Pa. St. 466; Burke *v.* Maxwell, 81 Pa. St. 139; Greeley *v.* Thomas, 56 Pa. St. 35; Repsher *v.* Wattson, 17 Pa. St. 365; Adams *v.* Uhler, 2 Walk. 96.

United States.— Doyle *v.* Boston, etc., R. Co., 82 Fed. 869, 27 C. C. A. 264; Behr *v.* Connecticut Mut. L. Ins. Co., 4 Fed. 357, 2 Flipp. 692.

See 46 Cent. Dig. tit. "Trial," § 436.

7. Merklinger *v.* Lambert, 76 N. J. L. 806, 72 Atl. 119; Gardner *v.* Picket, 19 Wend.

If the expression of opinion is made in such a manner that the jury may naturally regard it as a direction to them, and as excluding them from finding the fact for themselves, there being evidence, proper for them to consider, both for and against such direction, this is fatal error.[8] Moreover all comments on the evidence must be made in such a manner as not to be one-sided or unfair.[9] Within these limitations, it is the right of the court to aid them by recalling the testimony to their recollection, by collating its details, by suggesting grounds of preference where there is contradiction, by directing their attention to the most important facts, by indicating the true points of inquiry, by resolving the evidence, however complicated, into its simplest elements, and by showing the bearing of its several parts and their combined effect, stripped of every consideration which might otherwise mislead or confuse them.[10]

(N Y.) 186; Spear *v.* Philadelphia, etc., R. Co., 119 Pa. St. 61, 12 Atl. 824; Bonner *v.* Herrick, 99 Pa. St. 220; Porter *v.* Seiler, 23 Pa. St. 424, 62 Am. Dec. 341; Behr *v.* Connecticut Mut. L. Ins. Co., 4 Fed. 357, 2 Flipp 692. See also cases cited *supra*, IX, C, 5, a, (III).

The judge trying a cause should not withdraw the facts from the consideration of the jury (Turner's Appeal, 72 Conn. 305, 44 Atl. 310; Charter *v.* Lane, 62 Conn. 121, 25 Atl. 464; Baldwin *v.* Hayden, 6 Conn. 453; Norden *v.* Duke, 129 N. Y. App. Div. 158, 113 N. Y. Suppl. 494 [*affirmed* in 198 N. Y. 562, 92 N. E. 1094]; Oyster *v.* Longnecker, 16 Pa. St. 269; Taplin *v.* Marcy, 81 Vt. 428, 71 Atl. 72; Rogers *v.* Judd, 6 Vt. 191; Greenleaf *v.* Birth, 9 Pet. (U. S.) 292, 9 L. ed. 132; Behr *v.* Connecticut Mut. L. Ins. Co., 4 Fed. 357, 2 Flipp. 692), or induce the jury to infer that they are not at liberty to pass upon disputed facts (Oyster *v.* Longnecker, 16 Pa. St. 269).

8. *New York.*— Johnston *v.* New York City R. Co., 120 N. Y. App. Div. 456, 104 N Y. Suppl. 1039; Cooke *v.* Union R. Co., 111 N. Y. Suppl. 708.

Pennsylvania.— Spangler *v.* Hummer, 3 Penr. & W. 370.

Rhode Island.— State *v.* Lynott, 5 R. I. 295.

Utah.— Loofborrow *v.* Utah Light, etc., Co., 31 Utah 355, 88 Pac. 19.

Vermont.— Sawyer *v.* Phaley, 33 Vt. 69.

Wisconsin.— Ketchum *v.* Ebert, 33 Wis. 611.

England.— Pennell *v.* Dawson, 18 C. B. 355, 86 E. C. L. 355.

To warrant an unqualified direction to the jury in favor of one party or the other, the evidence must either be undisputed or the preponderance so decided that a verdict against it would be set aside and a new trial granted. Crawford *v.* Wilson, 4 Barb. (N. Y.) 504; Heydrick *v.* Hutchinson, 165 Pa. St. 208, 30 Atl. 819.

Curing error by subsequent charge.— When the effect of an instruction is to take from the jury all testimony except that of a particular witness, and to leave to the jury the construction of a paper, properly for the court, such error is not cured by telling the jury that the whole testimony is for it to pass upon Heydrick *v.* Hutchinson, 165 Pa. St. 208, 30 Atl. 819.

9. Burke *v.* Maxwell, 81 Pa. St. 139.

A charge whose tendency as a whole is to belittle and prejudice one side, and which is not in expression and tone a judicial presentation of the case, is error. Heydrick *v.* Hutchinson, 165 Pa. St. 208, 30 Atl. 819; Bughman *v.* Byers, 9 Pa. Cas. 128, 12 Atl. 357; Bernstein *v.* Walsh, 32 Pa. Super. Ct. 392; Valley Lumber Co. *v.* Smith, 71 Wis. 304, 37 N. W. 412, 5 Am. St. Rep. 216. See also Benedict *v.* Everard, 73 Conn. 157, 46 Atl. 870. But merely explanatory comments upon the weight of certain testimony, although unfavorable to one of the parties, do not disclose error for which the judgment should be reversed. Follmer *v.* McGinley, 146 Pa. St. 517, 23 Atl. 393.

10. Nudd *v.* Burrows, 91 U. S. 426, 23 L. ed. 286.

Illustrations.— The judge may direct the attention of the jury to any matter in the cause affecting the credibility of a witness. Dale's Appeal, 57 Conn. 127, 17 Atl. 757; Bruch *v.* Carter, 32 N. J. L. 554. He may point out discrepancies in the testimony. People *v.* Genung, 11 Wend. (N. Y.) 18, 25 Am. Dec. 594. He may express an opinion as to which of certain witnesses are most entitled to credit. Porter *v.* Seiler, 23 Pa. St. 424, 62 Am. Dec. 341. He may state to the jury his impressions and understanding of how a witness meant to be understood, and indicate how such impressions and understanding were derived. Missisquoi Bank *v.* Evarts, 45 Vt. 293. He may express an opinion as to the tendency of the facts in evidence. Oyster *v.* Longnecker, 16 Pa. St. 269. He may analyze the evidence, present the questions of fact, resulting from it, to the jury, and express his opinion of its weight, leaving the jury, however, at full liberty to decide for themselves. Delany *v.* Robinson, 2 Whart. (Pa.) 503. He may recite the testimony of defendant's witnesses, and characterizing it as the "material testimony in the case," where the testimony of plaintiff's witnesses is so contradictory and unsatisfactory that little reliance can be placed on it. Winther *v.* Second St., etc., Pass. R. Co., 159 Pa. St. 628, 28 Atl. 472. And he may tell the jury that a certain case, in its facts, is very like the case at bar, and the fact that he incidentally divulges the circumstances that in that case the jury found for plaintiff is immaterial, where the

b. View That Charge on Weight of Evidence Not Permissible [11]— (i) *STATEMENT OF RULE.* In a majority of the states, usually because of constitutional or statutory provisions, trial courts are not permitted, in charging juries, to comment on the facts, or express an opinion on the weight of the evidence,[12] and if an instruction asked by counsel is defective in this respect it is of course proper

jury are instructed that they are to find a verdict on the evidence before them. Anderson *v.* McAleenan, 15 Daly (N. Y.) 444, 8 N. Y. Suppl. 483.

11. **In criminal** cases see CRIMINAL LAW, 12 Cyc. 596.

12. *Alabama.*— Roe *v.* Doe, (1907) 43 So. 856; Bessemer Land, etc., Co. *v.* Jenkins, 111 Ala. 135, 18 So. 565, 56 Am. St. Rep. 26; Higginbotham *v.* Higginbotham, 106 Ala. 314, 17 So. 516; Tait *v.* Murphy, 80 Ala. 440, 2 So. 317; Newton *v.* Jackson, 23 Ala. 335; Mundine *v.* Gold, 5 Port. 215.

Arkansas.— Western Coal, etc., Co. *v.* Buchanan, 88 Ark. 7, 114 S. W. 694; McDonough *v.* Williams, 77 Ark. 261, 92 S. W. 783, 8 L. R. A. N. S. 452; Cameron *v.* Vandergriff, 53 Ark. 381, 13 S. W. 1092; Randolph *v.* McCain, 34 Ark. 696.

California.— Manning *v.* App Consol. Gold Min. Co., 149 Cal. 35, 84 Pac. 657; McNeil *v.* Barney, 51 Cal. 603; Miller *v.* Stewart, 24 Cal. 502; Battersby *v.* Abbott, 9 Cal. 565; Treadwell *v.* Wells, 4 Cal. 260.

Colorado.— Kinney *v.* Williams, 1 Colo. 191; Sopris *v.* Truax, 1 Colo. 89.

Florida.— Supreme Lodge K. P. *v.* Lipscomb, 50 Fla. 406, 39 So. 637; Wheeler *v.* Baars, 33 Fla. 696, 15 So. 584; Williams *v.* La Penotiere, 32 Fla. 491, 14 So. 157; Hanover F. Ins. Co. *v.* Lewis, 28 Fla. 209, 10 So. 297; Williams *v.* Dickenson, 28 Fla. 90, 9 So. 847.

Georgia.— Mitchell *v.* Masury, 132 Ga. 360, 64 S. E. 275; Garbutt Lumber Co. *v.* Prescott, 131 Ga. 326, 62 S. E. 228; North Georgia Milling Co. *v.* Henderson Elevator Co., 130 Ga. 113, 60 S. E. 258, 24 L. R. A. N. S. 235; Rushin *v.* Shields, 11 Ga. 636, 56 Am. Dec. 436; Respass *v.* Young, 11 Ga. 114. The rule was otherwise under the early practice. Potts *v.* House, 6 Ga. 324, 50 Am. Dec. 329.

Illinois.— New York, etc., R. Co. *v.* Blumenthal, 160 Ill. 40, 43 N. E. 809; Chicago, etc., R. Co. *v.* Robinson, 106 Ill. 142; Frame *v.* Badger, 79 Ill. 441; Stacy *v.* Cobbs, 36 Ill. 349; Frasure *v.* Zimmerly, 25 Ill. 202; Eames *v.* Blackhart, 12 Ill. 195; Bonney *v.* Weir, etc., Mfg. Co., 51 Ill. App. 380; Walsh *v.* Aylsworth, 46 Ill. App. 516.

Indiana.— Ohio, etc., R. Co. *v.* Pearcy, 128 Ind. 197, 27 N. E. 479; Fulwider *v.* Ingels, 87 Ind. 414; Wood *v.* Deutchman, 75 Ind. 148; Louisville, etc., Traction Co. *v.* Worrell, (App. 1908) 86 N. E. 78; Hammond, etc., Electric R. Co. *v.* Antonia, 41 Ind. App. 335, 83 N. E. 766.

Iowa.— Tarashonsky *v.* Illinois Cent. R. Co., 139 Iowa 709, 117 N. W. 1074; Carroll *v.* Chicago, etc., R. Co., (1901) 84 N. W. 1035; Napper *v.* Young, 12 Iowa 459; Russ *v.* The War Eagle, 9 Iowa 374; Frederick *v.* Gaston, 1 Greene 401.

Kansas.— Lorie *v.* Adams, 51 Kan. 692, 33 Pac. 599; Heithecker *v.* Fitzhugh, 41 Kan. 50, 20 Pac. 465; Cavender *v.* Roberson, 33 Kan. 626, 7 Pac. 152.

Kentucky.— Milton *v.* Hunter, 13 Bush 163; Swigert *v.* Graham, 7 B. Mon. 661; Salter *v.* Myers, 5 B. Mon. 280.

Louisiana.— Merchants', etc., Bank *v.* McKellar, 44 La. Ann. 940, 11 So. 592; Rivière *v.* McCormick, 14 La. Ann. 139; Gove *v.* Breedlove, 5 Rob. 78; Hewes *v.* Barron, 7 Mart. N. S. 134.

Maine.— Hamlin *v.* Treat, 87 Me. 310, 32 Atl. 909; Pillsbury *v.* Sweet, 80 Me. 392, 14 Atl. 742; McLellan *v.* Wheeler, 70 Me. 285. The practice was otherwise before St. (1874) c. 212. Stephenson *v.* Thayer, 63 Me. 143; Hayden *v.* Bartlett, 35 Me. 203; Gilbert *v.* Woodbury, 22 Me. 246.

Maryland.— Miller *v.* Miller, 41 Md. 623; Mason *v.* Poulson, 40 Md. 355; Maltby *v.* Northwestern Virginia R. Co., 16 Md. 422.

Massachusetts.— Ryan *v.* Fall River Iron Works Co., 200 Mass. 188, 86 N. E. 310; Plummer *v.* Boston El. R. Co., 198 Mass. 499, 84 N. E. 849; Goss *v.* Calkins, 162 Mass. 492, 39 N. E. 469. Under the early practice, expression of opinion was permissible. Mansfield *v.* Corbin, 4 Cush. 213; Whiton *v.* Old Colony Ins. Co., 2 Metc. 1; Davis *v.* Jenney, 1 Metc. 221.

Mississippi.— French *v.* Sale, 63 Miss. 386; Whitney *v.* Cook, 53 Miss. 551; Thrasher *v.* Gillespie, 52 Miss. 840.

Missouri.— Zander *v.* St. Louis Transit Co., 206 Mo. 445, 103 S. W. 1006; Kinman *v.* Cannefax, 34 Mo. 147; Farrar *v.* David, 33 Mo. 482; Chouquette *v.* Barada, 28 Mo. 491; Morris *v.* Morris, 28 Mo. 114; Schneer *v.* Lemp, 17 Mo. 142; International Bank *v.* Enderle, 133 Mo. App. 222, 113 S. W. 262; Ford *v.* Gray, 131 Mo. App. 240, 110 S. W. 692.

Montana.— Knowles *v.* Nixon, 17 Mont. 473, 43 Pac. 628; Wastl *v.* Montana Union R. Co., 17 Mont. 213, 42 Pac. 772; Hogan *v.* Shuart, 11 Mont. 498, 28 Pac. 969.

Nebraska.— Smith *v.* Meyers, 52 Nebr. 70, 71 N. W. 1006; Culbertson *v.* Holliday, 50 Nebr. 229, 69 N. W. 853; Murphey *v.* Virgin, 47 Nebr. 692, 66 N. W. 652.

Nevada.— State *v.* Tickel, 13 Nev. 502; State *v.* Harkin, 7 Nev. 377; State *v.* Ah Tong, 7 Nev. 148.

North Carolina.— Universal Metal Co. *v.* Durham, etc., R. Co., 145 N. C. 293, 59 S. E. 50; Withers *v.* Lane, 144 N. C. 184, 56 S. E. 855; Albertson *v.* Terry, 109 N. C. 8, 13 S. E. 713; Reed *v.* Shenck, 13 N. C. 415.

North Dakota.— Territory *v.* O'Hare, 1 N. D. 30, 44 N. W. 1003.

Oklahoma.— Kirk *v.* Territory, 10 Okla. 46, 60 Pac. 797.

to refuse it.[13] Such a constitutional or statutory provision is mandatory. It leaves no discretion to the judge as to whether or not he shall charge or comment on the weight of evidence, or as to whether or not he shall submit questions of fact solely to the jury.[14] A charge to a jury is perfectly unexceptionable only when the judge confines himself to the duty of setting forth the law applicable to the case, without either expressing or intimating any opinion as to the weight of the evidence, or the credibility of the witnesses.[15] Even if the knowledge of the judge trying a case may be superior to that of the witnesses in respect to facts in issue, yet the law does not permit him to bias the jury by his own opinion as to any disputed fact which is required to be proved.[16] It is generally held, however, that such a provision is not designed to deprive the courts of all power to deal with the facts proved;[17] but authorizes the court to state the testimony, with its legal effect and bearing upon the issues, and to indicate its particular application under the rules of law.[18] But in some jurisdictions, notably Texas, a more strict limitation is placed upon trial courts.[19]

(II) *Manner of Expressing Opinion* — (A) *In General.* Where charges on the weight of the evidence are prohibited, the court must not in any way indicate its opinion of the facts to the jury.[20] The whole matter of finding the facts of the case must be left entirely to the jury, without suggestions or leadings by the court.[21] Any remark made by a judge, whether direct or indirect, intentional or inadvertent, from which the jury may infer what his opinion is, as to the sufficiency or insufficiency of the evidence, or any part of it pertinent to the issue, is error;[22] and the fact that counsel or a witness was addressed, and not

Oregon.— Meyer *v.* Thompson, 16 Oreg. 194, 18 Pac. 16; State *v.* Huffman, 16 Oreg. 15, 16 Pac. 640.

South Carolina.— Latimer *v.* General Electric Co., 81 S. C. 374, 62 S. E. 438; Wilson *v.* Moss, 79 S. C. 120, 60 S. E. 313; Greene *v.* Duncan, 37 S. C. 239, 15 S. E. 956; Jackson *v.* Jackson, 32 S. C. 591, 11 S. E. 204; Brown *v.* Moore, 26 S. C. 160, 2 S. E. 9. Prior to Const. (1868) art. 4, § 26, charges on the weight of evidence were permissible. Kirkwood *v.* Gordon, 7 Rich. 474, 62 Am. Dec. 418; Martin *v.* Teague, 2 Speers 260; Farr *v.* Thompson, 1 Speers 93; Devlin *v.* Kilcrease, 2 McMull. 425.

Tennessee.— Earp *v.* Edington, 107 Tenn. 23, 64 S. W. 40; Ayres *v.* Moulton, 5 Coldw. 154; Fitzpatrick *v.* Fain, 3 Coldw. 15.

Texas.— Stooksbury *v.* Swan, 85 Tex. 563, 22 S. W. 963; McAuley *v.* Harris, 71 Tex. 631, 9 S. W. 679; Altgelt *v.* Brister, 57 Tex. 432; Kimbro *v.* Hamilton, 28 Tex. 560; Bowles *v.* Glasgow, 2 Tex. Unrep. Cas. 714; Galveston, etc., R. Co. *v.* Sullivan, (Civ. App. 1909) 115 S. W. 615; Victoria *v.* Victoria County, (Civ. App. 1908) 115 S. W. 67; McCormick *v.* Kampmann, (Civ. App. 1908) 109 S. W. 492; Missouri, etc., R. Co. *v.* Box, (Civ. App. 1906) 93 S. W. 134; Missouri Pac. R. Co. *v.* White, 3 Tex. App. Civ. Cas. § 160.

Virginia.— Tyler *v.* Chesapeake, etc., R. Co., 88 Va. 389, 13 S. E. 975; Whitelaw *v.* Whitelaw, 83 Va. 40, 1 S. E. 407; Kincheloe *v.* Tracewells, 11 Gratt. 587.

Washington.— Cook *v.* Pittock, etc., Lumber Co., 51 Wash. 316, 98 Pac. 1130; Benson *v.* Tacoma R., etc., Co., 51 Wash. 216, 98 Pac. 605, 130 Am. St Rep. 1096; Childs *v.* Childs, 49 Wash. 27, 94 Pac. 660.

West Virginia.— White *v.* Sohn, 63 W. Va. 80, 59 S. E. 890; Harman *v.* Maddy, 57 W. Va. 66, 49 S. E. 1009; State *v.* Greer, 22 W. Va. 800.

See 46 Cent. Dig. tit. "Trial," § 436 *et seq.*

13. Flanagan *v.* Scott, 102 Ga. 399, 31 S. E. 23; Robards *v.* Murphy, 75 Mo. App. 39; Williams *v.* Atlantic Coast Line R. Co., 140 N. C. 623, 53 S. E. 448; Nickles *v.* Seaboard Air Line R. Co., 74 S. C. 102, 54 S. E. 255.

14. Texas, etc., R. Co. *v.* Murphy, 46 Tex. 356, 26 Am. Rep. 272; Orange Lumber Co. *v.* Thompson, (Tex. Civ. App. 1908) 113 S. W. 563.

15. Ross *v.* State, 29 Tex. 499.

16. Andreas *v.* Ketcham, 77 Ill. 377.

17. Plummer *v.* Boston El. R. Co., 198 Mass. 499, 84 N. E. 849; Com. *v.* Barry, 9 Allen (Mass.) 276.

18. See *infra*, IX, C, 6, b.

19. See Texas, etc., R. Co. *v.* Murphy, 46 Tex. 356, 26 Am. Rep. 272.

20. State *v.* Addy, 28 S. C. 4, 4 S. E. 814.

21. State *v.* Williams, 31 S. C. 238, 9 S. E. 853.

22. Furhman *v.* Huntsville, 54 Ala. 263; State *v.* Ah Tong, 7 Nev. 148; State *v.* Dick, 60 N. C. 440, 86 Am. Dec. 439; Jackson *v.* Jackson, 32 S. C. 591, 11 S. E. 204; State *v.* Williams, 31 S. C. 238, 9 S. E. 853; Richards *v.* Munro, 30 S. C. 284, 9 S. E. 108.

By words or conduct the court may, on the one hand, support the character or testimony of a witness, or on the other may destroy the same, in the estimation of the jury. McMinn *v.* Whelan, 27 Cal. 300.

In Maine the statute of 1874, c. 212, prohibits the trial judge from expressing an opinion upon issues of fact arising in the

the jury, is a matter of no consequence. The effect upon the jury is the same.[23] Where, however, a ruling on the admissibility of evidence necessarily involves the expression of an opinion upon the evidence already introduced, such expression of opinion is not error.[24]

(B) *By Questions Addressed to Jury.* The opinion of the court on a question of fact may be as well conveyed to the jury by an interrogatory statement as by a direct, positive one. If the question is asked in such a tone and manner as to manifest the clear conviction of the court how it ought to be answered, it will be error, as an expression of opinion on the evidence;[25] but without some such peculiarity of tone or manner, intimating the opinion of the court, and influencing or tending to influence the judgment of the jury, the question may be nothing more than a proper direction of their attention to a material inquiry of fact.[26]

(III) *CHARGES ON WEIGHT OF EVIDENCE ILLUSTRATED.* A charge on the weight of evidence may be said to occur when, in the progress of a trial, a judge expresses his own opinion upon the force and effect of the testimony or of any part of it, or intimates his views of the sufficiency or insufficiency of the evidence, in whole or in part.[27] It must be an opinion on some matter of fact. It must be such an expression of opinion on a matter of fact, that thereby the jury are made to know what is his estimate of the truth or falsity of some matter in testimony, and, lastly, such expression by the judge must relate to some matter of fact at issue between the parties.[28] Thus it has been held error for the trial court to define the character and amount of evidence necessary to sustain a verdict;[29] or where the evidence is conflicting to tell the jury that they must find for a party designated if they believe certain witnesses,[30] or if they believe the evi-

case. This language has been construed to require a direct and positive expression of opinion to require a reversal of the judgment. State *v.* Benner, 64 Me. 267. It does not follow that the judge has expressed an opinion upon the issue because his opinion may be inferred from some allusion which he may make to some obvious and indisputable fact (McLellan *v.* Wheeler, 70 Me. 285); nor because an inference favorable or unfavorable to the position taken by one of the parties may be drawn from such obvious truth or fact (McLellan *v.* Wheeler, *supra*).

23. Jessup *v.* Gragg, 12 Ga. 261; State *v.* Tickel, 13 Nev. 502. See also State *v.* Lane, 47 Oreg. 526, 84 Pac. 804. In State *v.* Harkin, 7 Nev. 377, 383, the court said: "It is evident that the opinion of the court can be as effectively conveyed to the jury by expressing it in their hearing while ruling upon an objection to evidence, as by embodying it in what purports to be a declaration of the law for their instruction. Accordingly, and we think correctly, it has been held that the judge has no more right to volunteer, before the jury, his opinion upon a material fact in controversy, while deciding a question of law on the trial, than he has to charge the jury in respect to such fact. . . . The right to a decision on the facts, by a jury uninfluenced and unbiased by the opinion of the judge, has been deemed worthy of a constitutional guarantee. It cannot be lawfully denied, by the simple evasion of looking at the counsel instead of at the jury, or of foisting the opinion into a ruling upon the testimony."

24. Reed *v.* Clark, 47 Cal. 194.

25. State *v.* Norton, 28 S. C. 572, 6 S. E. 820; State *v.* Addy, 28 S. C. 4, 4 S. E. 814; State *v.* Jenkins, 21 S. C. 595; Freidrich *v.* Territory, 2 Wash. 358, 26 Pac. 976.

For example, where the trial judge, in charging the jury, asked: "Is that the way an honest man would act? . . . Do honest people act so?" it was held that the natural and almost inevitable effect of this language was to influence the jury in reaching a conclusion by conveying to them the impressions which the testimony left upon the mind of the judge; and, therefore, that the judge transcended the limits prescribed for him by the constitution. State *v.* Jenkins, 21 S. C. 595.

26. Hart *v.* Lewis, 130 Ga. 504, 61 S. E. 26; Williams *v.* Wright, 69 Ga. 759; Lewis *v.* Smart, 67 Me. 206; McRae *v.* Lilly, 23 N. C. 118; Mabry *v.* Kennedy, 49 Tex. Civ. App. 45, 108 S. W. 176.

27. Norris *v.* Clinkscales, 47 S. C. 488, 25 S. E. 797; Moore *v.* Columbia, etc., R. Co., 38 S. C. 1, 16 S. E. 781.

28. Moore *v.* Columbia, etc., R. Co., 38 S. C. 1, 16 S. E. 781. See also Lownsdale *v.* Grays Harbor Boom Co., 36 Wash. 198, 78 Pac. 904, holding that the constitutional inhibition against trial judges commenting on facts in instructing the jury refers only to disputed facts, and not to those concerning which there is no dispute or which are admitted.

29. Nall *v.* St. Louis, etc., R. Co., 59 Mo. 112.

30. *Georgia.*— Jarrett *v.* Arnold, 30 Ga. 323.

Idaho.— Ralston *v.* Plowman, 1 Ida. 595.

Illinois.— Warren *v.* Wright, 103 Ill. 298; Clement *v.* McConnel, 14 Ill. 154.

dence;[31] to give instructions directing the jury what degree of importance should be attached to particular evidence;[32] to tell the jury what is the better evidence in the case, or what they may so regard,[33] or what weight should be attached to the evidence offered by the respective parties;[34] what constitutes *prima facie* evidence of a fact, unless made so by law;[35] to instruct that one kind of evidence is entitled to more weight than another kind;[36] that certain facts are entitled to great weight[37] or to "full weight;"[38] that certain evidence is strong,[39] strong and weighty,[40] is of little value,[41] is not material,[42] not sufficient,[43] not strong, clear, and convincing,[44] or that it should be received with great caution;[45] that there is[46] or is not[47] a conflict in the testimony on a certain point, when that is

Indiana.— Lawrenceburgh, etc., R. Co. *v.* Montgomery, 7 Ind. 474.

Maryland.— Cook *v.* Duvall, 9 Gill 460.

Massachusetts.— Tufts *v.* Seabury, 11 Pick. 140.

New York.— Dolan *v.* Delaware, etc., Canal Co., 71 N. Y. 285; Chapman *v.* Erie R. Co., 55 N. Y. 579; Wagner *v.* Metropolitan St. R. Co., 79 N. Y. App. Div. 591, 81 N. Y. Suppl. 191 [*affirmed* in 176 N. Y. 610, 68 N. E. 1125]; Reilly *v.* Third Ave. R. Co., 16 Misc. 11, 37 N. Y. Suppl. 593; McGrath *v.* Metropolitan L. Ins. Co., 6 N. Y. St. 376.

North Carolina.— Hardin *v.* Murray, 68 N. C. 534; Gaither *v.* Ferebee, 60 N. C. 303; Horney *v.* Craven, 26 N. C. 513.

West Virginia.— Dickeschied *v.* Exchange Bank, 28 W. Va. 340.

See 46 Cent. Dig. tit. "Trial," § 443.

31. Louisville, etc. R. Co. *v.* Malone, 109 Ala. 509, 20 So. 33; Knight *v.* Bell, 22 Ala. 198.

32. Wood *v.* Deutchman, 75 Ind. 148; Daniel *v.* Daniel, (Miss. 1888) 4 So. 95; Murphey *v.* Virgin, 47 Nebr. 692, 66 N. W. 652.

Admissions.— It is error to instruct that an admission is a weak kind of testimony (Mauro *v.* Platt, 62 Ill. 450) and should be viewed with caution (Goss *v.* Steiger Terra Cotta, etc., Works, 148 Cal. 155, 82 Pac. 681; Phœnix Ins. Co. *v.* Gray, 113 Ga. 424, 38 S. E. 992; Rumrill *v.* Ash, 169 Mass. 341, 47 N. E. 1017).

33. Chicago, etc., R. Co. *v.* Robinson, 106 Ill. 142; Toledo, etc., R. Co. *v.* Brooks, 81 Ill. 245; Briggs *v.* Kohl, 132 Ill. App. 484.

34. Lyon *v.* George, 44 Md. 295.

35. Missouri Pac. R. Co. *v.* Byars, 58 Ark. 108, 23 S. W. 583; Hartshorn *v.* Byrne, 147 Ill. 418, 35 N. E. 622.

36. Wheeler *v.* Baars, 33 Fla. 696, 15 So. 584; Indiana, etc., R. Co. *v.* Otstot, 113 Ill. App. 37 [*affirmed* in 212 Ill. 429, 72 N. E. 387].

Positive and negative evidence.— It is error to instruct without proper qualification as to the credibility of witnesses that positive testimony is to be believed in preference to negative. Central of Georgia R. Co. *v.* Sowell, 3 Ga. App. 142, 59 S. E. 323; Sheppelman *v.* People, 134 Ill. App. 556; Chicago, etc., R. Co. *v.* Louderback, 125 Ill. App. 323; Cleveland, etc., R. Co. *v.* Schneider, 40 Ind. App. 524, 82 N. E. 538; Milligan *v.* Chicago, etc., R. Co., 79 Mo. App. 393; State *v.* Kansas City, etc., R. Co., 70 Mo. App. 634. See also Louisville, etc., R. Co. *v.* York, 128 Ala. 305, 30 So. 676. But it is not error to charge that positive testimony is rather to be believed than negative with the qualification that "other things are equal, and the witnesses are of equal credibility." Southern R. Co. *v.* O'Bryan, 119 Ga. 147, 45 S. E. 1000.

Oral testimony and depositions.— It is error to instruct that depositions are entitled to less weight than oral testimony. Works *v.* Stevens, 76 Ind. 181; Millner *v.* Eglin, 64 Ind. 197, 31 Am. Rep. 121.

Positive and circumstantial evidence.— It is error to charge that circumstantial evidence cannot outweigh positive evidence. Bowie *v.* Maddox, 29 Ga. 285, 74 Am. Dec. 61. So also it is error to charge that circumstantial evidence is just as good and just as convincing and just as reliable as direct and positive evidence, when properly linked together. Armstrong *v.* Penn, 105 Ga. 229, 31 S. E. 158; Hudson *v.* Best, 104 Ga. 131, 30 S. E. 688.

37. Williams *v.* Dickenson, 28 Fla. 90, 9 So. 847; Bourquin *v.* Bourquin, 110 Ga. 440, 35 S. E. 710; Smith *v.* Meyers, 52 Nebr. 70, 71 N. W. 1006.

38. Davis *v.* Hays, 89 Ala. 563, 8 So. 131.

39. Jenkins *v.* Tobin, 31 Ark. 306; Bonner *v.* Hodges, 111 N. C. 66, 15 S. E. 881; Earp *v.* Edgington, 107 Tenn. 23, 64 S. W. 40; Marr *v.* Marr, 5 Sneed (Tenn.) 385. But in Weisinger *v.* Gallatin Bank, 10 Lea (Tenn.) 330, it was held that to tell the jury that a thing is a "strong fact" is not equivalent to saying that it is *prima facie* evidence.

40. Cecil *v.* Johnson, 11 B. Mon. (Ky.) 35.

41. West *v.* Black, 65 Ga. 647; Wannack *v.* Macon, 53 Ga. 162.

42. Jessup *v.* Gragg, 42 Ga. 261.

43. Glasgow *v.* Copeland, 8 Mo. 268; Farmers', etc., Bank *v.* Harris, 2 Humphr. (Tenn.) 310; Winkler *v.* Chesapeake, etc., R. Co., 12 W. Va. 699.

44. Jones *v.* Warren, 134 N. C. 390, 46 S. E. 740.

45. Kauffman *v.* Maier, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124; Seligman *v.* Kalkman, 8 Cal. 207; Mayer *v.* Schneider, 112 Ill. App. 628 [*affirmed* in 212 Ill. 286, 72 N. E. 436]; Shorb *v.* Kinzie, 100 Ind. 429; Knowles *v.* Nixon, 17 Mont. 473, 43 Pac. 628; Wastl *v.* Montana Union R. Co., 17 Mont. 213, 42 Pac. 772.

46. Black *v.* Thornton, 30 Ga. 361; Canada *v.* Curry, 73 Ind. 246.

47. Thompson *v.* Galveston, etc., R. Co.,

disputed, or that the testimony pro and con does not vary much, when there is a material conflict;[48] that the evidence tends to show certain disputed facts;[49] that a fact not shown by the evidence is in fact shown;[50] that a controverted fact is or is not established;[51] that any fact is conclusively proven;[52] that there is some evidence of a fact when there is in fact none;[53] that there is no evidence of a fact when there is in fact some, however slight;[54] that while there is some evidence, it is a bare scintilla, leaving the matter not proved;[55] that certain facts in evidence should be disregarded;[56] that a presumption of fact exists,[57] the strength of such a presumption,[58] and the amount of proof necessary to overcome it;[59] that the testimony of one witness is to be preferred to that of another;[60] that certain evidence shows negligence or contributory negligence;[61] that, from

48 Tex. Civ. App. 284, 106 S. W. 910; Bardwell *v.* Ziegler, 3 Wash. 34, 28 Pac. 360.

48. Langworthy *v.* Green Tp., 88 Mich. 207, 50 N. W. 130.

49. Yundt *v.* Hartrunft, 41 Ill. 9; Junction City *v.* Blades, 1 Kan. App. 85, 41 Pac. 677; Davis *v.* Gerber, 69 Mich. 246, 37 N. W. 281; Missouri Pac. R. Co. *v.* Christman, 65 Tex. 369. But see *infra* note 88.

50. Kildow *v.* Irick, (Tex. Civ. App. 1895) 33 S. W. 315.

51. *Alabama.*— Anniston City Land Co. *v.* Edmondson, 127 Ala. 445, 30 So. 61; Commercial F. Ins. Co. *v.* Morris, 105 Ala. 498, 18 So. 34; Marble *v.* Lypes, 82 Ala. 322, 2 So. 701.

California.— People *v.* Casey, 65 Cal. 260, 3 Pac. 874.

Georgia.— Florida Cent., etc., R. Co. *v.* Lucas, 110 Ga. 121, 35 S. E. 283; Phillips *v.* Williams, 39 Ga. 597; Rushin *v.* Shields, 11 Ga. 636, 56 Am. Dec. 436.

Illinois.— Chicago Belt R. Co. *v.* Confrey, 111 Ill. App. 473 [*affirmed* in 209 Ill. 344, 70 N. E. 773].

Indiana.— Louisville, etc., Traction Co. *v.* Worrell, 44 Ind. App. 480, 86 N. E. 78.

Kansas.— Lorie *v.* Adams, 51 Kan. 692, 33 Pac. 599.

Michigan.— Hill *v.* Graham, 72 Mich. 659, 40 N. W. 779; Weyburn *v.* Kipp, 63 Mich. 79, 29 N. W. 517.

Mississippi.— Whitney *v.* Cook, 53 Miss. 551.

Texas.— Orange Lumber Co. *v.* Thompson, (Civ. App. 1908) 113 S. W. 563; Thompson *v.* Fitzgerald, (Civ. App. 1907) 105 S. W. 334; Galveston, etc., R. Co. *v.* Manns, 37 Tex. Civ. App. 356, 84 S. W. 254.

See 46 Cent. Dig. tit. "Trial," § 441.

52. Ball *v.* Cox, 7 Ind. 453; Allen *v.* Kopman, 2 Dana (Ky.) 221; Bardwell *v.* Ziegler, 3 Wash. 34, 28 Pac. 360.

53. Camden, etc., R. Co. *v.* Williams, 61 N. J. L. 646, 40 Atl. 634; Dougherty *v.* King, 22 N. Y. App. Div. 610, 48 N. Y. Suppl. 110; Cockrell *v.* Dallas, (Tex. Civ. App. 1908) 111 S. W. 977.

54. *Alabama.*— Montgomery St. R. Co. *v.* Smith, 146 Ala. 316, 39 So. 757; Montgomery St. R. Co. *v.* Rice, 142 Ala. 674, 38 So. 857; Traun *v.* Keiffer, 31 Ala. 136; Edgar *v.* McArn, 22 Ala. 796; Carlisle *v.* Hill, 16 Ala. 398.

Illinois.— Wolcott *v.* Heath, 78 Ill. 433; Dornfeld-Kunert Co. *v.* Volkmann, 138 Ill. App. 421; Stevens *v.* Snyder, 8 Ill. App. 362.

Maryland.— Tiffany *v.* Savage, 2 Gill 129; Whiteford *v.* Burckmyer, 1 Gill 127, 39 Am. Dec. 640.

Missouri.— Yates *v.* Brackenridge, 27 Mo. 531; Rippey *v.* Friede, 26 Mo. 523; Houghtaling *v.* Ball, 19 Mo. 84, 59 Am. Dec. 331; Emerson *v.* Sturgeon, 18 Mo. 170; Hays *v.* Bell, 16 Mo. 496; Obouchon *v.* Boon, 10 Mo. 442; Chamberlin *v.* Smith, 1 Mo. 482.

Nebraska.— Wiese *v.* Gerndorf, 75 Nebr. 826, 106 N. W. 1025.

New Mexico.— Vasquez *v.* Spiegelberg, 1 N. M. 464.

North Carolina.— State *v.* Allen, 48 N. C. 257; Wells *v.* Clements, 48 N. C. 168.

South Carolina.— Howard *v.* Wofford, 16 S. C. 148; Carrier *v.* Hague, 9 S. C. 454.

Washington.— Patten *v.* Auburn, 41 Wash. 644, 84 Pac. 594.

See 46 Cent. Dig. tit. "Trial," § 450.

55. Boing *v.* Raleigh, etc., R. Co., 87 N. C. 360.

56. Lamar *v.* Glawson, 38 Ga. 252; Stiles *v.* Shedden, 2 Ga. App. 317, 58 S. E. 515; Smith *v.* Gillett, 50 Ill. 290; Myers *v.* Walker, 31 Ill. 353; Orient Ins. Co. *v.* Wingfield, 49 Tex. Civ. App. 202, 108 S. W. 788; Hunter *v.* Malone, 49 Tex. Civ. App. 116, 108 S. W. 709; International, etc., R. Co. *v.* Howell, (Tex. Civ. App. 1907) 105 S. W. 560 [*affirmed* in 101 Tex. 603, 111 S. W. 142]; Texas, etc., R. Co. *v.* Bailey, 43 Tex. Civ. App. 553, 96 S. W. 1089.

57. McBride *v.* Sullivan, 155 Ala. 166, 45 So. 902; Shealy *v.* Edwards, 75 Ala. 411; Leiserowitz *v.* Fogarty, 135 Ill. App. 609; Winter *v.* Supreme Lodge K. P., 96 Mo. App. 1, 69 S. W. 662; Stooksbury *v.* Swan, 85 Tex. 563, 22 S. W. 963; Munk *v.* Stanfield, (Tex. Civ. App. 1907) 100 S. W. 213.

58. Leiserowitz *v.* Fogarty, 135 Ill. App. 609.

59. Vickers *v.* Hawkins, 128 Ga. 794, 58 S. E. 44.

60. Phillips *v.* Williams, 39 Ga. 597; Himrod Coal Co. *v.* Clingan, 114 Ill. App. 568; Muncie Pulp Co. *v.* Keesling, 166 Ind. 479, 76 N. E. 1002; Fulwider *v.* Ingels, 87 Ind. 414. But it is not error for the court to state to the jury that a witness who swears that "to the best of my recollection" an act was done testifies less positively than one who testifies that "it was done." Gable *v.* Rauch, 50 S. C. 95, 27 S. E. 555.

61. See NEGLIGENCE, 29 Cyc. 645.

the facts proven, plaintiff is [62] or is not [63] entitled to recover; that defendant has [64] or has not [65] sustained his plea; that the testimony of plaintiff [66] or of defendant [67] must be accepted as true; that plaintiff is entitled to recover a certain sum, where the amount of the judgment is an issuable fact for the determination of the jury; [68] that the remembrance of occurrences nearly a year back "is not always to be expected of a witness;" [69] that the determination of the case must be reached from the whole evidence, and not from one or more sentences alone; [70] or that plaintiff used more force than was necessary in repelling an assault.[71] So it is error to refer to a transaction as a "so-called" sale; [72] to collate the evidence on a point and direct attention thereto; [73] to express to the jury an opinion as to whether the evidence proves a gift or a loan; [74] to submit as a doubtful question a matter on which there is no conflicting evidence; [75] to intimate doubts as to the competency of legal testimony; [76] to refer to authorities cited by counsel "as being so like this case in its facts," etc.; [77] or to add an opinion as to the meaning of a witness' testimony.[78]

(IV) *CHARGES NOT ON WEIGHT OF EVIDENCE ILLUSTRATED.* General remarks of the trial judge, which have no application to the case, do not violate a statutory or constitutional provision against expressing an opinion on the weight of evidence.[79] Neither are remarks of the judge during the trial on the admissibility of the evidence, or in refusing motions for nonsuit or for a directed verdict,[80] nor illustrations given by the court, which are apposite to the evidence and questions which the jury must consider,[81] nor an inadvertent misstatement of a fact in evidence,[82] generally objectionable on this ground. The following instructions have been held not to be on the weight of the evidence: An instruction that, if the jury find from the evidence certain facts, plaintiff is entitled to recover; [83]

62. Garesche *v.* Boyce, 8 Mo. 228; Ayres *v.* Moulton, 5 Coldw. (Tenn.) 154; Keel *v.* Herbert, 1 Wash. (Va.) 203.

63. Lake Shore, etc., R. Co. *v.* O'Connor, 115 Ill. 254, 3 N. E. 501; Chipman *v.* Stansbury, 16 Md. 154; Kirtland *v.* Montgomery, 1 Swan (Tenn.) 452.

64. Foust *v.* Yielding, 28 Ala. 658.

65. Chaves *v.* Chaves, 3 N. M. 199, 5 Pac. 331.

66. Daniel *v.* Daniel, (Miss. 1888) 4 So. 95.

67. Smith *v.* Northern Bank, 1 Metc. (Ky.) 575.

68. Raoul *v.* Newman, 59 Ga. 408; State *v.* Baker, 8 Md. 44; Lederer *v.* Morrow, 132 Mo. App. 438, 111 S. W. 902; Missouri, etc., R. Co. *v.* Rich, 51 Tex. Civ. App. 312, 112 S. W. 114; Lane *v.* Delta County, (Tex. Civ. App. 1908) 109 S. W. 866.

69. Shaw *v.* People, 81 Ill. 150.

70. Riddle *v.* Webb, 110 Ala. 599, 18 So. 323.

71. Morris *v.* McClellan, 154 Ala. 639, 45 So. 641.

72. Kuhlenbeck *v.* Hotz, 53 Ill. App. 675.

73. Leeser *v.* Boekhoff, 33 Mo. App. 223; Rainey *v.* Kemp, (Tex. Civ. App. 1909) 118 S. W. 630; Ft. Worth, etc., R. Co. *v.* Watkins, 48 Tex. Civ. App. 568, 108 S. W. 487.

74. Respass *v.* Young, 11 Ga. 114.

75. Mobile, etc., R. Co. *v.* Jackson, 92 Miss. 517, 46 So. 142.

76. Potts *v.* House, 6 Ga. 324, 50 Am. Dec. 329.

77. Moore *v.* Robinson, 62 Ala. 537.

78. Drevis *v.* Woods, 71 Wis. 329, 37 N. W. 256.

79. Norris *v.* Clinkscales, 47 S. C. 488, 25 S. E. 797; Moore *v.* Columbia, etc., R. Co., 38 S. C. 1, 16 S. E. 781; Sullivan *v.* Blythe, 14 S. C. 621.

80. Goodwin *v.* Atlantic Coast Line R. Co., 82 S. C. 321, 64 S. E. 242; Latimer *v.* General Electric Co., 81 S. C. 374, 62 S. E. 438; Glover *v.* Western Union Tel. Co., 78 S. C. 505, 59 S. E. 526; Tinsley *v.* Western Union Tel. Co., 72 S. C. 350, 51 S. E. 913; Norris *v.* Clinkscales, 47 S. C. 488, 25 S. E. 797.

When such remarks amount to charge on facts.— If, while ruling upon the admissibility of evidence, or in refusing a motion for nonsuit or to direct a verdict, a judge uses language reasonably calculated to impress upon the jury his opinion as to the facts of the case, it will be error. Latimer *v.* General Electric Co., 81 S. C. 374, 62 S. E. 438; Willis *v.* Western Union Tel. Co., 73 S. C. 379, 53 S. E. 639; Georgia R., etc., Co. *v.* Baker, 1 Ga. App. 832, 58 S. E. 88.

81. Picquett *v.* Wellington-Wild Coal Co., 200 Mass. 470, 86 N. E. 899; Norris *v.* Clinkscales, 47 S. C. 488, 25 S. E. 797; Rembert *v.* South Carolina R. Co., 31 S. C. 309, 9 S. E. 968; Fitzsimons *v.* Guanahani Co., 16 S. C. 192.

82. Grows *v.* Maine Cent. R. Co., 69 Me. 412.

83. Birmingham R., etc., Co. *v.* Lee, 153 Ala. 386, 45 So. 164; Louisville, etc., R. Co. *v.* Sherrell, 152 Ala. 213, 44 So. 631; Combest *v.* Wall, (Tex. Civ. App. 1908) 115 S. W. 354; St. Louis Southwestern R. Co. *v.* Cleland, 30 Tex. Civ. App. 499, 110 S. W. 122; Gulf, etc., R. Co. *v.* Morgan, 26 Tex. Civ. App. 378, 64 S. W. 688; Thompson *v.*

that there is no evidence of a particular fact, when such is the case;[84] that no witness has testified directly to a certain fact;[85] that the undisputed evidence shows certain facts;[86] that evidence has been introduced to establish a certain fact;[87] when such is the case that the evidence tends to show certain facts;[88] that certain evidence, the admissibility of which was objected to, is competent proof;[89] that there is a conflict in the evidence, where this fact is not in dispute;[90] that the evidence is open to two constructions, without directing which to take;[91] that a party "brings evidence to show" certain facts;[92] that the evidence would warrant a certain finding;[93] that the facts proved are not conclusive evidence;[94] that the jury must be careful, and slow to reject any testimony;[95] that the jury must not let a certain circumstance prevent their looking to the whole evidence;[96] that incompetent evidence should be disregarded;[97] that two writings in evidence are or are not necessarily inconsistent in meaning;[98] that the jury are not bound to accept as true the opinions of expert witnesses;[99] or that the court does not intend to intimate what its opinion is as to any fact or facts.[1] Nor is it error to give an instruction presenting in detail the claims and contentions of the parties;[2] stating the issues;[3] applying the law to a given state of facts,[4] or to the very facts of the case;[5] assuming facts established by uncontradicted evidence;[6] reciting the uncontradicted facts;[7] reciting the facts claimed to have been proved, leaving

Johnson, 24 Tex. Civ. App. 246, 58 S. W. 1030.

84. Feitl *v.* Chicago City R. Co., 113 Ill. App. 381 [*affirmed* in 211 Ill. 279, 71 N. E. 991]; King *v.* King, 155 Mo. 406, 56 S. W. 534; Alexander *v.* Morrison, 38 Mo. 258, 90 Am. Dec. 431; Woodbury *v.* Evans, 122 N. C. 779, 30 S. E. 2 (holding that where there is no evidence to prove the affirmative of an issue, the jury may be instructed to answer it in the negative if they believe the evidence); Reed *v.* Shenck, 13 N. C. 415; Bryce *v.* Cayce, 62 S. C. 546, 40 S. E. 948; Brown *v.* Moore, 26 S. C. 160, 2 S. E. 9.

85. Smyth *v.* Caswell, 67 Tex. 567, 4 S. W. 848.

86. Moore *v.* Woodson, 44 Tex. Civ. App. 503, 99 S. W. 116; Pacific Express Co. *v.* Walters, 42 Tex. Civ. App. 355, 93 S. W. 496.

87. Atlantic Coast Line R. Co. *v.* Jones, 132 Ga. 189, 63 S. E. 834.

88. *California.*— Morris *v.* Lachman, 68 Cal. 109, 8 Pac. 799.

Indiana.— Ball *v.* Cox, 7 Ind. 453; Huntington Light, etc., Co. *v.* Beaver, 37 Ind. App. 4, 73 N. E. 1002.

Massachusetts.— Carmody *v.* Boston Gas Light Co., 162 Mass. 539, 39 N. E. 184.

Michigan.— Campau *v.* Langley, 39 Mich. 451, 33 Am. Rep. 414.

Mississippi.— Garnett *v.* Kirkman, 33 Miss. 389.

North Carolina.— Lewis *v.* Norfolk, etc., R. Co., 132 N. C. 382, 43 S. E. 919.

Oregon.— Smitson *v.* Southern Pac. Co., 37 Oreg. 74, 60 Pac. 907; Coos Bay R. Co. *v.* Siglin, 34 Oreg. 80, 53 Pac. 504.

Virginia.— Michie *v.* Cochran, 93 Va. 641, 25 S. E. 884.

But see *supra* note 49.

89. Carroll *v.* Roberts, 23 Ga. 492.

90. People *v.* Flynn, 73 Cal. 511, 15 Pac. 102; Wilson *v.* Moss, 79 S. C. 120, 60 S. E. 313.

91. Wyley *v.* Stanford, 22 Ga. 385.

92. Central R. Co. *v.* Freeman, 75 Ga. 331.

93. McKean *v.* Salem, 148 Mass. 109, 19 N. E. 21.

94. Dabney *v.* Taliaferro, 4 Rand. (Va.) 256.

95. Lyts *v.* Keevey, 5 Wash. 606, 32 Pac. 534.

96. Anderson *v.* Martindale, 61 Tex. 188.

97. Roddy *v.* Kingsbury, 5 Tex. 151.

98. Home Friendly Soc. *v.* Berry, 94 Ga. 606, 21 S. E. 583.

99. Wiley *v.* St. Joseph Gas Co., 132 Mo. App. 380, 111 S. W. 1185.

1. Chicago Terminal Transfer R. Co. *v.* Reddick, 131 Ill. App. 515 [*affirmed* in 230 Ill. 105, 82 N. E. 598].

2. *Delaware.*— Richards *v.* Richman, 5 Pennew. 558, 64 Atl. 238.

Massachusetts.— Hadlock *v.* Brooks, 178 Mass. 425, 59 N. E. 1009.

Michigan.— Rogers *v.* Ferris, 107 Mich. 126, 64 N. W. 1048.

New York.— Polykranas *v.* Krausz, 73 N. Y. App. Div. 583, 77 N. Y. Suppl. 46.

South Carolina.— Bryce *v.* Cayce, 62 S. C. 546, 40 S. E. 948; Kingman *v.* Lancashire Ins. Co., 54 S. C. 599, 32 S. E. 762.

Tennessee.— Nashville R. Co. *v.* Norman, 108 Tenn. 324, 67 S. W. 479.

Texas.— El Paso Electric R. Co. *v.* Ruckman, 49 Tex. Civ. App. 25, 107 S. W. 1158.

Wisconsin.— McCann *v.* Ullman, 109 Wis. 574, 85 N. W. 493.

3. Coleman *v.* Drane, 116 Mo. 387, 22 S. W. 801; Westbury *v.* Simmons, 57 S. C. 467, 35 S. E. 764.

4. Ryan *v.* Los Angeles Ice, etc., Co., 112 Cal. 244, 44 Pac. 471, 32 L. R. A. 524; Phœnix Ins. Co. *v.* Neal, 23 Tex. Civ. App. 427, 56 S. W. 91.

5. Houston, etc., R. Co. *v.* White, 23 Tex. Civ. App. 280, 56 S. W. 204.

6. Hogan *v.* Shuart, 11 Mont. 498, 28 Pac. 969; San Antonio, etc., R. Co. *v.* Ilse, (Tex. Civ. App. 1900) 59 S. W. 564.

7. Marshall *v.* Morris, 16 Ga. 368; Mc-

it to the jury to determine whether such facts have been so proved; [8] naming the circumstances which the jury might consider in determining the case; [9] explaining for what purpose certain testimony was admitted; [10] or stating, analyzing, comparing, and explaining the evidence.[11]

(v) *Cure by Subsequent Charge and Harmless Error.* Where the trial judge has expressed an opinion on the weight of the evidence, the error is not ordinarily considered as corrected by his subsequently telling the jury that it is their exclusive province to determine on the sufficiency or insufficiency of evidence, and that they are not bound by his opinion in regard thereto.[12] Nor will judgment be reversed for an instruction as to the sufficiency of evidence on an immaterial point.[13] And of course a party cannot complain because the judge intimates an opinion on the facts, when it is favorable to him.[14] However, a charge on the weight of the evidence will not always require the reversal of the judgment. Thus, if no other conclusion could be arrived at on the evidence, and it is apparent that no harm could have resulted, the error will not be sufficient to justify a reversal.[15]

6. Summing Up Evidence [16]— a. Definition or Description. Summing up may be described as follows: When the evidence is gone through on both sides, the judge, in the presence of the parties, the counsel, and all others, sums up the whole to the jury, omitting all superfluous circumstances, observing wherein the main question and principal issue lies, stating what evidence has been given to support it, with such remarks as he thinks necessary for their direction, and giving them his opinion in matters of law arising upon that evidence.[17] Summing up, it will be observed, is a very different thing from charging on the weight of the evidence, and to prevent confusion it is necessary to keep this distinction in mind.

b. Authority of Court to Sum Up Evidence. In the absence of any statutory or constitutional provision prohibiting such practice,[18] it is the privilege, although not necessarily the duty, of the court to sum up the evidence in its charge to the

Lellan *v.* Wheeler, 70 Me. 285; Halsell *v.* Neal, 23 Tex. Civ. App. 26, 56 S. W. 137.

8. Pritchett *v.* Overman, 3 Greene (Iowa) 531; Andrews *v.* Parker, 48 Tex. 94.

9. Shea *v.* Muncie, 148 Ind. 14, 46 N. E. 138.

10. Davis *v.* Gerber, 69 Mich. 246, 37 N. W. 281; Houston, etc., R. Co. *v.* Harris, 30 Tex. Civ. App. 179, 70 S. W. 335; Wood *v.* Samuels, 1 Tex. App. Civ. Cas. § 922, holding that an instruction which advises the jury that a certain class of testimony may be properly weighed by them in determining a fact in issue is in fact explaining to them the purpose for which it was admitted, and that it may be considered by them in the formation of their verdict.

11. **Hamlin *v.* Treat**, 87 Me. 310, 32 Atl. 909.

12. *California.*— People *v.* Kindleberger, 100 Cal. 367, 34 Pac. 852; People *v.* Chew Sing Wing, 88 Cal. 268, 25 Pac. 1099.

Indiana.— Shorb *v.* Kinzie, 100 Ind. 429.

Michigan.— People *v.* Lyons, 49 Mich. 78, 13 N. W. 365.

Nevada.— State *v.* Ah Tong, 7 Nev. 148.

North Carolina.— State *v.* Dick, 60 N. C. 440, 86 Am. Dec. 439.

North Dakota.— Territory *v.* O'Hare, 1 N. D. 30, 44 N. W. 1003.

South Carolina.— Wilson *v.* Moss, 79 S. C. 120, 60 S. E. 313; State *v.* White, 15 S. C. 381.

Contra.— Humphreys *v.* Collier, 1 Ill. 297; White *v.* Territory, 1 Wash. 279, 24 Pac. 447.

13. Pitman *v.* Breckenridge, 3 Gratt. (Va.) 121.

14. Towe *v.* Towe, 67 N. C. 298.

15. *Alabama.*— Glass *v.* Memphis, etc., R. Co., 94 Ala. 581, 10 So. 215.

California.— Pico *v.* Stevens, 18 Cal. 376.

Colorado.— Wall *v.* Livezay, 6 Colo. 550.

Georgia.— Thursby *v.* Myers, 57 Ga. 155.

Indiana.— Davis *v.* Reamer, 105 Ind. 318, 4 N. E. 857.

Massachusetts.— Curl *v.* Lowell, 19 Pick. 25.

Michigan.— Cartier *v.* Douville, 98 Mich. 22, 56 N. W. 1045.

Texas.— Wells *v.* Houston, 29 Tex. Civ. App. 619, 69 S. W. 183.

16. **In criminal cases** see Criminal Law, 12 Cyc. 603 *et seq.*

17. 2 Cooley Blackstone Comm. 375.

Another definition.— Summing up, on the trial of an action by a jury, is a recapitulation of the evidence adduced, in order to draw the attention of the jury to the salient points. The counsel for each party has the right of summing up his evidence, if he has adduced any, and the judge finally sums up the whole in his charge to the jury. Smith, Act 157; Black L. Dict.

18. See the constitutions and statutes of the several states; and the cases cited *infra*, this note.

In Louisiana, under Code Pr. arts. 516,

jury,[19] and to state its recollection of what has or has not been testified to, submitting the whole matter to their consideration and judgment.[20] Such practice is not an infringement of a statutory or constitutional provision prohibiting the expression of opinion by the trial court upon issues of fact.[21] In some states, by express provision, the court is permitted to "state the testimony," [22] provided the jury are informed that they are the exclusive judges of all questions of fact.[23]

c. Necessity of Summing Up. Ordinarily the omission of the court to sum up the evidence is no ground to set aside the verdict.[24] If the testimony is of a complicated character, difficult of recollection and comprehension, and there is a controversy between the parties litigant as to what facts are deposed to, it may be the duty of the court either to state the testimony or to recall the witness

517, the court must not recapitulate the facts so as to influence the verdict. Hewes *v.* Barron, 7 Mart. N. S. 134.

In Oregon Hill Annot. Laws, § 200, prohibits the trial court from presenting the facts of a case to the jury. Under this section it is not error to instruct the jury that there is evidence for plaintiff "to the effect," etc., and that there is evidence "tending to show," etc., since this does not amount to an attempt to state the facts to the jury, but merely calls their attention to the theories of the respective parties. Smitson *v.* Southern Pac. Co., 37 Oreg. 74, 60 Pac. 907.

In South Carolina, under Const. (1868) art. 4, § 26, a trial judge was permitted to state the testimony in his charge to the jury. See Davis *v.* Elmore, 40 S. C. 533, 19 S. E. 204; Hiott *v.* Pierson, 35 S. C. 611, 14 S. E. 853; Massey *v.* Wallace, 32 S. C. 149, 10 S. E. 937; McPherson *v.* McPherson, 21 S. C. 261. But, under Const. (1895) art. 4, § 26, any direct reference to the testimony in charging a jury, any expression as to what is in evidence, any remark that would amount to a stating of the testimony in whole or in part, is absolutely prohibited. Ballentine *v.* Hammond, 68 S. C. 153, 46 S. E. 1000; Norris *v.* Clinkscales, 47 S. C. 488, 25 S. E. 797. Under this provision it is error for a judge to state in the interrogative form to the jury facts sworn to by witnesses. Burnett *v.* Crawford, 50 S. C. 161, 27 S. E. 645.

19. *Colorado.*— Rose *v.* Otis, 5 Colo. App. 472, 39 Pac. 77.

Georgia.— City, etc., R. Co. *v.* Findley, 76 Ga. 311; Wright *v.* Central R., etc., Co., 16 Ga. 38; Shiels *v.* Stark, 14 Ga. 429.

Indiana.— McCorkle *v.* Simpson, 42 Ind. 453. *Contra,* Killian *v.* Eigenmann, 57 Ind. 480.

Kansas.— Haines *v.* Goodlander, 73 Kan. 183, 84 Pac. 986.

Nebraska.— Stephens *v.* Patterson, 29 Nebr. 697, 46 N. W. 154.

Tennessee.— Lannum *v.* Brooks, 4 Hayw. 121.

United States.— District of Columbia *v.* Robinson, 180 U. S. 92, 21 S. Ct. 283, 45 L. ed. 440; Starr *v.* U. S., 153 U. S. 614, 14 S. Ct. 919, 38 L. ed. 841; Mitchell *v.* Harmony, 13 How. 115, 14 L. ed. 75; Tracy *v.* Swartwout, 10 Pet. 80, 9 L. ed. 354.

See 46 Cent. Dig. tit. "Trial," § 408.

Contra.— Southern R. Co. *v.* Kendrick, 40 Miss. 374, 90 Am. Dec. 332.

Claims of parties.— It is the right and duty of the presiding judge to state to the jury the several contentions between the parties, the only restriction being that he shall state them fairly to each side. Rose *v.* Otis, 5 Colo. App. 472, 39 Pac. 77; City, etc., R. Co. *v.* Findley, 76 Ga. 311; Hawley *v.* Chicago, etc., R. Co., 71 Iowa 717, 29 N. W. 787.

20. Haskell *v.* Cape Ann Anchor Works, 178 Mass. 485, 59 N. E. 1113, 4 L. R. A. N. S. 220; Eddy *v.* Gray, 4 Allen (Mass.) 435.

21. Shiels *v.* Stark, 14 Ga. 429; Hamlin *v.* Treat, 87 Me. 310, 32 Atl. 909; State *v.* Benner, 64 Me. 267; Kelley *v.* Boston, 201 Mass. 86, 87 N. E. 494; Plummer *v.* Boston El. R. Co., 198 Mass. 499, 84 N. E. 849; Com. *v.* Barry, 9 Allen (Mass.) 276; Moore *v.* Columbia, etc., R. Co., 38 S. C. 1, 16 S. E. 781; Hiott *v.* Pierson, 35 S. C. 611, 14 S. E. 853; Walker *v.* Laney, 27 S. C. 150, 3 S. E. 63; Woody *v.* Dean, 24 S. C. 499.

22. See the constitutions and statutes of the several states; and the cases cited *infra,* this note.

Under Ala. Code (1896), § 3326, empowering the court to "state the evidence when the same is disputed," etc., the court may tell the jury what the evidence of a particular witness is, where it is in dispute. Folmar *v.* Siler, 132 Ala. 297, 31 So. 719.

Mass. Pub. St. c. 153, § 5.— Maynard *v.* Tyler, 168 Mass. 107, 46 N. E. 413; Moseley *v.* Washburn, 167 Mass. 345, 45 N. E. 753; Eddy *v.* Gray, 4 Allen (Mass.) 435.

23. **Cal. Code Civ. Proc. § 608** see Gately *v.* Campbell, 124 Cal. 520, 57 Pac. 567.

24. Watson *v.* Minneapolis St. R. Co., 53 Minn. 551, 55 N. W. 742; Lowe *v.* Minneapolis St. R. Co., 37 Minn. 283, 34 N. W. 33 (holding that in its instructions to the jury a court is never bound, at the request of either party, to go over the evidence in behalf of that party); Rollins *v.* Varney, 22 N. H. 99; Ames *v.* Potter, 7 R. I. 265; Lannum *v.* Brooks, 4 Hayw. (Tenn.) 121.

Where it was agreed by the counsel on both sides that the testimony need not be recapitulated, the failure of a judge to recite the testimony in his charge to the jury is not error. Wiseman *v.* Penland, 79 N. C. 197.

upon the controverted points for explanation;[25] but when there is no dispute relative to the facts deposed to, and the testimony is not complicated or difficult of recollection, the court, in its discretion, may decline exercising power given it without committing error.[26] This is a legal discretion, and the refusal to exercise it is not error unless it can be shown that injury did or might necessarily be supposed to have arisen from this refusal.[27]

d. Manner of Summing Up. The minuteness with which a trial judge, in his charge to the jury, shall recapitulate the evidence, is largely within his discretion.[28] The judge is not bound to recapitulate all the evidence in his charge to the jury,[29] or even any considerable portion thereof.[30] It is enough if he gives to the jury a general review of the evidence on the one side and the other which fairly and adequately presents the course of the respective contentions of the parties, with enough reference to the items of evidence to assist the jury in recalling it as a substantial whole and to appreciate its bearings.[31] If a party desires the entire testimony, or any specific part thereof, recapitulated to the jury, he should make the request in apt time and before verdict.[32] In stating testimony, it is not necessary to take the witnesses one by one, and give the words of each separately;[33] but the judge may, and probably should, state to the jury the various questions of fact arising out of the testimony, together with the evidence bearing upon such questions, in its natural and proper order, without regard to the order in which it was detailed by the witnesses from the stand.[34] The charge must not be inaccurate on matters of substance,[35] and, for reasons which are

25. Ivey *v.* Hodges, 4 Humphr. (Tenn.) 154.

26. Taylor *v.* Chicago, etc., R. Co., 76 Iowa 753, 40 N. W. 84; Watson *v.* Minneapolis St. R. Co., 53 Minn. 551, 55 N. W. 742; Schmidt *v.* McGill, 120 Pa. St. 405, 14 Atl. 383, 6 Am. St. Rep. 713; Ivey *v.* Hodges, 4 Humphr. (Tenn.) 154.

27. Ivey *v.* Hodges, 4 Humphr. (Tenn.) 154.

28. Shaw *v.* Tompson, 105 Mass. 345; Frost *v.* Martin, 29 N. H. 306; Rollins *v.* Varney, 22 N. H. 99; Fowler *v.* Smith, 153 Pa. St. 639, 25 Atl. 744; Borham *v.* Davis, 146 Pa. St. 72, 23 Atl. 160.

29. *Iowa.*—Hubbard *v.* Montgomery County, 140 Iowa 520, 118 N. W. 912.

New Hampshire.— Rollins *v.* Varney, 22 N. H. 99.

North Carolina.— Asheville Nat. Bank *v.* Sumner, 119 N. C. 591, 26 S. E. 129; Boon *v.* Murphy, 108 N. C. 187, 12 S. E. 1032.

Pennsylvania.— Melvin *v.* Melvin, 130 Pa. St. 6, 18 Atl. 920; Sample *v.* Robb, 16 Pa. St. 305; Taylor *v.* Burrell, 7 Pa. Super. Ct. 461.

South Carolina.— McPherson *v.* McPherson, 21 S. C. 261.

See 46 Cent. Dig. tit. "Trial," § 408.

30. Melvin *v.* Melvin, 130 Pa. St. 6, 18 Atl. 920.

Omission of minor details.— A judge should refer to the evidence only so far as is necessary to present the leading issues, and should omit reference to the minor details of the testimony. Farkas *v.* Brown, 4 Ga. App. 130, 60 S. E. 1014.

31. Asheville Nat. Bank *v.* Sumner, 119 N. C. 591, 26 S. E. 129; Boon *v.* Murphy, 108 N. C. 187, 12 S. E. 1032; Taylor *v.* Burrell, 7 Pa. Super. Ct. 461.

32. Boon *v.* Murphy, 108 N. C. 187, 12 S. E. 1032.

If anything is not made as prominent as the parties desire, it ought to be called to the attention of the court at the time. Walton *v.* Caldwell, 5 Pa. Super. Ct. 143. An omission to state evidence favorable to a party is not assignable as error unless pointed out at the time. Asheville Nat. Bank *v.* Sumner, 119 N. C. 591, 26 S. E. 129.

33. Maynard *v.* Tyler, 168 Mass. 107, 46 N. E. 413; Hiott *v.* Pierson, 35 S. C. 611, 14 S. E. 853.

Court not bound to repeat testimony verbatim.— Krepps *v.* Carlisle, 157 Pa. St. 358, 27 Atl. 741; Strawn *v.* Shank, 110 Pa. St. 259, 20 Atl. 717.

34. Maynard *v.* Tyler, 168 Mass. 107, 46 N. E. 413; Hiott *v.* Pierson, 35 S. C. 611, 14 S. E. 853.

Stating the evidence means more than repeating it.— Benedict *v.* Rose, 16 S. C. 629; Redding *v.* South Carolina R. Co., 5 S. C. 67. It includes the idea of placing it in its logical relation to the propositions which it is adduced to support or contradict, as well as to the principles and rules of law by which its bearing and force ought to be controlled. Redding *v.* South Carolina R. Co., *supra.*

It is proper for the court to collect the evidence at length, and then to state the rule of law applicable. Medearis *v.* Anchor Mut. F. Ins. Co., 104 Iowa 88, 73 N. W. 495, 65 Am. St. Rep. 428; Bailey *v.* Poole, 35 N. C. 404; McPherson *v.* McPherson, 21 S. C. 261. It is not necessary to state it in immediate connection with the rule of law that is supposed to apply to it. Ames *v.* Potter, 7 R. I. 265.

35. Krepps *v.* Carlisle, 157 Pa. St. 358, 27 Atl. 741; Borham *v.* Davis, 146 Pa. St. 72, 23 Atl. 160.

perfectly obvious, it must not omit or slur over the strong points on either side.[36]

e. Misstatement of Evidence. If the trial court misstates the evidence on a material fact to the prejudice of the party complaining it is reversible error,[37] although the testimony is elsewhere correctly stated.[38] But a trial judge is not held to a literal and *verbatim* statement of the testimony of a witness.[39] It is only necessary that he should give correctly the substance of the testimony.[40] Nor is it every misrecollection of the court of a witness' testimony, or every misstatement of his language, that works material error.[41] It must be with reference to a material point,[42] and such a misstatement as probably misleads the jury.[43] Moreover the attention of the court should be called to the matter at the time,[44] and if this is not done, exceptions will not be allowed.[45]

Misstatement of evidence see *infra*, IX, C, 5, e.

36. Borham *v.* Davis, 146 Pa. St. 72, 23 Atl. 160. While it is not error of law for the judge to state the facts on one side with more fulness, clearness, and emphasis than on the other (Kaminitsky *v.* Northeastern R. Co., 25 S. C. 53; McPherson *v.* McPherson, 21 S. C. 261), still, it is not just to present the proof prominently on one side, and omit entirely the countervailing evidence on the other (Wright *v.* Central R., etc., Co., 16 Ga. 38).

37. *Alabama.*— American Oak Extract Co. *v.* Ryan, 104 Ala. 267, 15 So. 807.

Georgia.— Georgia R., etc., Co. *v.* Baker, 1 Ga. App. 832, 58 S. E. 88.

Illinois.— Hutchinson *v.* Crain, 3 Ill. App. 20.

Indiana.— Vanvalkenberg *v.* Vanvalkenberg, 90 Ind. 433.

Michigan.— Cone *v.* American Electric Fuse Co., 145 Mich. 536, 108 N. W. 991.

Nebraska.— Barton *v.* Shull, 70 Nebr. 324, 97 N. W. 292; Stephens *v.* Patterson, 29 Nebr. 697, 46 N. W. 154.

New York.— Dougherty *v.* King, 22 N. Y. App. Div. 610, 48 N. Y. Suppl. 110.

Virginia.— Gregory *v.* Baugh, 2 Leigh 665.

West Virginia.— Cobb *v.* Dunlevie, 63 W. Va. 398, 60 S. E. 384.

See 46 Cent. Dig. tit. "Trial," § 536.

Illustrations.— Where the court instructs the jury that certain material testimony had been given, which is not shown by the record to have been given, it is ground for reversal. Dougherty *v.* King, 22 N. Y. App. Div. 610, 48 N. Y. Suppl. 110. So it has been held error to refer to the testimony of a witness as hearsay when only a portion thereof is hearsay (Fengar *v.* Brown, 57 Conn. 60, 17 Atl. 321), or to convey the impression that only one witness has sworn to a certain material fact when in fact two witnesses have testified to such fact (Idaho Mercantile Co. *v.* Kalanquin, 8 Ida. 101, 66 Pac. 933).

Where the judge is particular to give the jury only his recollection of the evidence, and the whole matter is distinctly left to their determination, the fact that the judge misstates some of the evidence has been held not to be error. Knapp *v.* Griffin, 140 Pa. St. 604, 21 Atl. 449; Green *v.* Dodge, 79 Vt. 73, 64 Atl. 499. Thus where a statement of the evidence, while not in conformity to the contention of the party objecting thereto, was supported by some testimony, and was not given as a binding statement, or as anything more than a recitation of the court's understanding thereof, error could not be predicated thereon. Dulligan *v.* Barber Asphalt Pav. Co., 201 Mass. 227, 87 N. E. 567.

38. Steinbrunner *v.* Pittsburgh, etc., R. Co., 146 Pa. St. 504, 23 Atl. 239, 28 Am. St. Rep. 806.

39. Mann *v.* Cowan, 8 Pa. Super. Ct. 30.

40. Des Moines, etc., Land, etc., Co. *v.* Polk County Homestead, etc., Co., 82 Iowa 663, 45 N. W. 773; Mann *v.* Cowan, 8 Pa. Super. Ct. 30.

41. Bellew *v.* Ahrburg, 23 Kan. 287.

42. Bellew *v.* Ahrburg, 23 Kan. 287; Moore *v.* Columbia, etc., R. Co., 38 S. C. 1, 16 S. E. 781; Gooch *v.* Addison, 13 Tex. Civ. App. 76, 35 S. W. 83.

43. Knowles *v.* Murphy, 107 Cal. 107, 40 Pac. 111; Bellew *v.* Ahrburg, 23 Kan. 287; Richards *v.* Willard, 176 Pa. St. 181, 35 Atl. 114; Udderzook *v.* Harris, 140 Pa. St. 236, 21 Atl. 395; Roberts *v.* Halstead, 9 Pa. St. 32, 49 Am. Dec. 541; Hamet *v.* Dundass, 4 Pa. St. 178; Dennis *v.* Alexander, 3 Pa. St. 50; Penn Mut. Ins. Co. *v.* Snyder, 3 Wkly. Notes Cas. (Pa.) 269.

The charge cannot be attacked piecemeal when, taken as a whole, there is nothing to mislead the jury. Mann *v.* Cowan, 8 Pa. Super. Ct. 30.

44. Bradstreet *v.* Rich, 74 Me. 303; Grows *v.* Maine Cent. R. Co., 69 Me. 412; Looran *v.* Third Ave. R. Co., 57 N. Y. Super. Ct. 165, 6 N. Y. Suppl. 504 [*affirmed* in 117 N. Y. 657, 22 N. E. 1133]; Krepps *v.* Carlisle, 157 Pa. St. 358, 27 Atl. 741; Yerkes *v.* Wilson, 81* Pa. St. 9; Mann *v.* Cowan, 8 Pa. Super. Ct. 30; Wheeler *v.* Schroeder, 4 R. I. 383.

45. *Maine.*— Bradstreet *v.* Rich, 74 Me. 303; Grows *v.* Maine Cent. R. Co., 69 Me. 412.

Massachusetts.— Wright *v.* Wright, 139 Mass. 177, 29 N. E. 380.

New York.— Arnstein *v.* Haulenbeck, 16 Daly 382, 11 N. Y. Suppl. 701.

Pennsylvania.— Knapp *v.* Griffin, 140 Pa. St. 604, 21 Atl. 449; Levers *v.* Van Buskirk, 4 Pa. St. 309.

Rhode Island.— Wheeler *v.* Schroeder, 4 R. I. 383.

7. Assumptions of Fact in Instructions[46]**— a. Material Controverted Facts—** (i) *Statement of Rule.* An instruction should not assume the existence of a material fact in dispute,[47] although the testimony to the contrary is slight,[48] unless such evidence is so vague and uncertain as to be of no value,[49] or so clearly defective as not to raise an issue.[50] The court should never assume an issue proven, unless the evidence is so conclusive one way that the minds of reasonable men could reach but one conclusion as to the result.[51] Instructions assuming material facts in dispute are objectionable as being on the weight of the evidence.[52] It follows therefore that requests for such instructions are properly refused.[53]

South Carolina.— Simmons Hardware Co. *v.* Greenwood Bank, 41 S. C. 177, 19 S. E. 502, 44 Am. St. Rep. 700.

See 46 Cent. Dig. tit. "Trial," § 536.

46. As ground for new trial see New Trial, 29 Cyc. 788.

In criminal cases see Criminal Law, 12 Cyc. 601.

47. *Illinois.*— O'Flaherty *v.* Mann, 196 Ill. 304, 63 N. E. 727; Springfield Consol. R. Co. *v.* Gregory, 122 Ill. App. 607; Faulkner *v.* Birch, 120 Ill. App. 281; Forster *v.* Peer, 120 Ill. App. 199; Papineau *v.* White, 117 Ill. App. 51; Himrod Coal Co. *v.* Clingan, 114 Ill. App. 568; Thomas *v.* Riley, 114 Ill. App. 520; Corkings *v.* Meier, 112 Ill. App. 655.

Maryland.— Bonaparte *v.* Thayer, 95 Md. 548, 52 Atl. 496; New York, etc., R. Co. *v.* Jones, 94 Md. 24, 50 Atl. 423.

Missouri.— O'Neill *v.* Blase, 94 Mo. App. 648, 68 S. W. 764.

Ohio.— Cleveland, etc., R. Co. *v.* Sivey, 27 Ohio Cir. Ct. 248.

Pennsylvania.— Fullam *v.* Rose, 181 Pa. St. 138, 37 Atl. 197; Welliver *v.* Pennsylvania Canal Co., 23 Pa. Super. Ct. 79.

Texas.— Dallas Consol. Electric St. R. Co. *v.* Lytle, 48 Tex. Civ. App. 107, 106 S. W. 900; Barstow Irr. Co. *v.* Cleghorn, (Civ. App. 1906) 93 S. W. 1023.

Washington.— Hall *v.* West, etc., Mill Co., 39 Wash. 447, 81 Pac. 915.

Wisconsin.— Kamp *v.* Coxe, 122 Wis. 206, 99 N. W. 366.

See 46 Cent. Dig. tit. "Trial," § 420 *et seq.*

48. Merrit *v.* Pollys, 16 B. Mon. (Ky.) 355; Whitaker *v.* Ballard, 178 Mass. 584, 60 N. E. 379.

49. Richison *v.* Mead, 11 S. D. 639, 80 N. W. 131.

50. Thompson *v.* Galveston, etc., R. Co., 48 Tex. Civ. App. 284, 106 S. W. 910.

51. Security Mut. L. Ins. Co. *v.* Colvert, (Tex. Civ. App. 1907) 100 S. W. 1033 [*reversed* on other grounds in 101 Tex. 128, 105 S. W. 320].

52. Orange Lumber Co. *v.* Thompson, (Tex. Civ. App. 1908) 113 S. W. 563.

53. *Alabama.*— Boswell *v.* Thompson, 160 Ala. 306, 49 So. 73; Montgomery *v.* Bradley, 159 Ala. 230, 48 So. 809; Jackson *v.* Tribble, 156 Ala. 480, 47 So. 310; Birmingham R., etc., Co. *v.* Landrum, 153 Ala. 192, 45 So. 198, 127 Am. St. Rep. 25; Green *v.* Brady, 152 Ala. 507, 44 So. 408; Birmingham R., etc., Co. *v.* Moore, 151 Ala. 327, 43 So. 841; Fletcher *v.* Prestwood, 150 Ala. 135, 43 So. 231; Farley *v.* Mobile, etc., R. Co., 149 Ala. 557, 42 So. 747; Robinson *v.* Greene, 148 Ala. 434, 43 So. 797; Garth *v.* Alabama Traction Co., 148 Ala. 96, 42 So. 627; Southern R. Co. *v.* Taylor, 148 Ala. 52, 42 So. 625; Mobile Light, etc., Co. *v.* Walsh, 146 Ala. 295, 40 So. 560; Doe *v.* Edmondson, 145 Ala. 557, 40 So. 505; Alabama Great Southern R. Co. *v.* Sanders, 145 Ala. 449, 40 So. 402; Sloss-Sheffield Steel, etc., Co. *v.* Smith, (1905) 40 So. 91; Southern R. Co. *v.* Douglass, 144 Ala. 351, 39 So. 268; Western R. Co. *v.* Cleghorn, 143 Ala. 392, 39 So. 133; Walker *v.* Alabama Great Southern R. Co., 142 Ala. 474, 39 So. 87; Montgomery St. R. Co. *v.* Shanks, 139 Ala. 489, 37 So. 166; Birmingham R., etc., Co. *v.* Mullen, 138 Ala. 614, 35 So. 701; Georgia Home Ins. Co. *v.* Allen, 128 Ala. 451, 30 So. 537; Worswick *v.* Hunt, 106 Ala. 559, 18 So. 74; Williamson *v.* Tyson, 105 Ala. 644, 17 So. 336; Nashville, etc., R. Co. *v.* Hammond, 104 Ala. 191, 15 So. 935; Steed *v.* Knowles, 97 Ala. 573, 12 So. 75; Griel *v.* Lomax, 94 Ala. 641, 10 So. 232; Mobile, etc., R. Co. *v.* George, 94 Ala. 199, 10 So. 145; Columbus, etc., R. Co. *v.* Bradford, 86 Ala. 574, 6 So. 90; Moore *v.* Watts, 81 Ala. 261, 2 So. 278; Westbrook *v.* Fulton, 79 Ala. 510; Sandlin *v.* Anderson, 76 Ala. 403; McDougald *v.* Rutherford, 30 Ala. 253; McKenzie *v.* Montgomery Branch Bank, 28 Ala. 606, 65 Am. Dec. 369; Whitsett *v.* Slater, 23 Ala. 626; Hollingsworth *v.* Martin, 23 Ala. 591; Brooks *v.* Hildreth, 22 Ala. 469; Bradford *v.* Marbury, 12 Ala. 520, 46 Am. Dec. 264.

Arkansas.— Western Coal, etc., Co. *v.* Burns, 84 Ark. 74, 104 S. W. 535; St. Louis, etc., R. Co. *v.* Evans, 80 Ark. 19, 96 S. W. 616; Little Rock, etc., R. Co. *v.* Barker, 33 Ark. 350, 34 Am. Rep. 44; Montgomery *v.* Erwin, 24 Ark. 540; Armistead *v.* Brooke, 18 Ark. 521.

California.— Still *v.* San Francisco, etc., R. Co., 154 Cal. 559, 98 Pac. 672, 129 Am. St. Rep. 177, 20 L. R. A. N. S. 322; Lyon *v.* United Moderns, 148 Cal. 470, 83 Pac. 804, 113 Am. St. Rep. 291, 4 L. R. A. N. S. 247; Anderson *v.* Seropian, 147 Cal. 201, 81 Pac. 521; Kahn *v.* Triest-Rosenberg Cap Co., 139 Cal. 340, 73 Pac. 164. To the same effect see Rogers *v.* Manhattan L. Ins. Co., 138 Cal. 285, 71 Pac. 348.

Colorado.— Downing *v.* Brown, 3 Colo. 571; Patrick Red Sandstone Co. *v.* Skoman, 1 Colo. App. 323, 29 Pac. 21.

Connecticut.—Wilson *v.* Waltersville School Dist., 46 Conn. 400; Miles *v.* Douglas, 34 Conn. 393.

So it is similarly held that the assumption by the trial judge of a material

Delaware.— Daniels *v.* State, 2 Pennew. 586, 48 Atl. 196, 54 L. R. A. 286.

District of Columbia.— Huber *v.* Teuber, 3 MacArthur 484, 36 Am. Rep. 110.

Georgia.— Forlaw *v.* Augusta Naval Stores Co., 124 Ga. 261, 52 S. E. 898; Crummey *v.* Bentley, 114 Ga. 746, 40 S. E. 765; Wylly *v.* Gazan, 69 Ga. 506; Buttram *v.* Jackson, 32 Ga. 409; Roberts *v.* Mansfield, 32 Ga. 228; Robinson *v.* Schly, 6 Ga. 515; Potts *v.* House, 6 Ga. 324, 50 Am. Dec. 329.

Illinois.— Beidler *v.* King, 209 Ill. 302, 70 N. E. 763 [*affirming* 108 Ill. App. 23]; Shannon *v.* Swanson, 208 Ill. 52, 69 N. E. 869 [*affirming* 109 Ill. App. 274]; West Chicago St. R. Co. *v.* Estep, 162 Ill. 130, 44 N. E. 404; Grim *v.* Murphy, 110 Ill. 271; Chicago, etc., R. Co. *v.* Robinson, 106 Ill. 142; Commercial Nat. Bank *v.* Proctor, 98 Ill. 558; England *v.* Selby, 93 Ill. 340; Bradley *v.* Coolbaugh, 91 Ill. 148; Straus *v.* Minzesheimer, 78 Ill. 492; Weaver *v.* Rylander, 55 Ill. 529; Chichester *v.* Whiteleather, 51 Ill. 259; Peoria M. & F. Ins. Co. *v.* Anapew, 45 Ill. 86; Duffield *v.* Delancey, 36 Ill. 258; Hopkinson *v.* People, 18 Ill. 264; Shickle-Harrison, etc., Iron Co. *v.* Beck, 112 Ill. App. 444 [*affirmed* in 212 Ill. 268, 72 N. E. 423]; Caruthers *v.* Balsley, 89 Ill. App. 559; Prairie State Paper Co. *v.* Sharp, 67 Ill. App. 477; Harley *v.* Weiner, 58 Ill. App. 340; Gillingham *v.* Christen, 55 Ill. App. 17; Chicago, etc., R. Co. *v.* Dixon, 49 Ill. App. 292; Channen *v.* Kerber, 44 Ill. App. 269; La Pointe *v.* O'Toole, 44 Ill. App. 43; Covert *v.* Nolan, 10 Ill. App. 629; Arundale *v.* Foreman, 2 Ill. App. 572.

Indiana.— Cleveland, etc., R. Co. *v.* Gossett, 172 Ind. 525, 87 N. E. 723; Kuhns *v.* Gates, 92 Ind. 66; Landers *v.* Beck, 92 Ind. 49; Finch *v.* Bergins, 89 Ind. 360; Malone *v.* Stickney, 88 Ind. 594; Staats *v.* Burke, 16 Ind. 448; Conaway *v.* Shelton, 3 Ind. 334; Southern Indiana R. Co. *v.* Hoggatt, 35 Ind. App. 348, 73 N. E. 1096.

Iowa.— Selensky *v.* Chicago Great Western R. Co., 120 Iowa 113, 94 N. W. 272; Sample *v.* Rand, 112 Iowa 616, 84 N. W. 683; Connors *v.* Chingren, 111 Iowa 437, 82 N. W. 934; Miller *v.* Boone County, 95 Iowa 5, 63 N. W. 352; Seekel *v.* Norman, 78 Iowa 254, 43 N. W. 190; Hand *v.* Langland, 67 Iowa 185, 25 N. W. 122; Bryan *v.* Brazil, 52 Iowa 350, 3 N. W. 117; Walters *v.* Chicago, etc., R. Co., 41 Iowa 71; Keenan *v.* Missouri State Mut. Ins. Co., 12 Iowa 126; Tifield *v.* Adams, 3 Iowa 487; Howes *v.* Carver, 3 Iowa 257; Luman *v.* Kerr, 4 Greene 159.

Kansas.— Baughman *v.* Penn, 33 Kan. 504, 6 Pac. 890; Jaedicke *v.* Scrafford, 15 Kan. 120.

Kentucky.— Adams *v.* Tiernan, 5 Dana 394; Lightburn *v.* Cooper, 1 Dana 273; Bowman *v.* Bartlett, 3 A. K. Marsh. 86.

Maine.— Dudley *v.* Poland Paper Co., 90 Me. 257, 38 Atl. 157; Linscott *v.* Trask, 35 Me. 150; Cowan *v.* Wheeler, 24 Me. 79.

Maryland.— Monumental Brewing Co. *v.* Larrimore, 109 Md. 682, 72 Atl. 596; Annapolis Gas, etc., Co. *v.* Fredericks, 109 Md. 595, 72 Atl. 534; Baltimore, etc., R. Co. *v.* State, 104 Md. 76, 64 Atl. 304; Baltimore Consol. R. Co. *v.* State, 91 Md. 506, 46 Atl. 1000; Jacob Tome Inst. *v.* Crothers, 87 Md. 569, 40 Atl. 261; Ricards *v.* Wedemeyer, 75 Md. 10, 22 Atl. 1101; Maltby *v.* Northwestern Virginia R. Co., 16 Md. 422; Denmead *v.* Coburn, 15 Md. 29; Augusta Ins., etc., Co. *v.* Abbott, 12 Md. 348; Peterson *v.* Ellicott, 9 Md. 52; Grove *v.* Brien, 1 Md. 438; Bullitt *v.* Musgrave, 3 Gill 31; McElderry *v.* Flannagan, 1 Harr. & G. 308.

Massachusetts.— Clark *v.* American Express Co., 197 Mass. 160, 83 N. E. 365; Picard *v.* Beers, 195 Mass. 419, 81 N. E. 246; Dexter *v.* Thayer, 189 Mass. 114, 75 N. E. 223; Knight *v.* Overman Wheel Co., 174 Mass. 455, 54 N. E. 890.

Michigan.— Parke *v.* Nixon, 141 Mich. 267, 104 N. W. 597; O'Connor *v.* Hogan, 140 Mich. 613, 104 N. W. 29; Lansky *v.* Prettyman, 140 Mich. 40, 103 N. W. 538; Steadman *v.* Keets, 129 Mich. 669, 89 N. W. 555; Gordon *v.* Alexander, 122 Mich. 107, 80 N. W. 978; Britton *v.* Grand Rapids St. R. Co., 90 Mich. 159, 51 N. W. 276; Lewis *v.* Rice, 61 Mich. 97, 27 N. W. 867.

Minnesota.— Burnett *v.* Great Northern R. Co., 76 Minn. 461, 79 N. W. 523; Macy *v.* St. Paul, etc., R. Co., 35 Minn. 200, 28 N. W. 249; Faber *v.* St. Paul, etc., R. Co., 29 Minn. 465, 13 N. W. 902; Jones *v.* Town, 26 Minn. 172, 2 N. W. 473; Chandler *v.* De Graff, 25 Minn. 88; Starkey *v.* De Graff, 22 Minn. 431; Hocum *v.* Weitherick, 22 Minn. 152; Siebert *v.* Leonard, 21 Minn. 442; Schwartz *v.* Germania L. Ins. Co., 21 Minn. 215; Lake Superior, etc., R. Co. *v.* Greve, 17 Minn. 322.

Mississippi.— Beall *v.* Bullock, (1892) 11 So. 720; McKee *v.* Munn, (1889) 5 So. 616; French *v.* Sale, 63 Miss. 386; Shelton *v.* Hamilton, 23 Miss. 496, 57 Am. Dec. 149.

Missouri.— Brady *v.* Kansas City, etc., R. Co., 206 Mo. 509, 102 S. W. 978, 105 S. W. 1195; St. Louis, etc., R. Co. *v.* Stewart, 201 Mo. 491, 100 S. W. 583; Ford *v.* Dyer, 148 Mo. 528, 49 S. W. 1091; Dowling *v.* Allen, 88 Mo. 293; Bank of North America *v.* Crandall, 87 Mo. 208; Maxwell *v.* Hannibal, etc., R. Co., 85 Mo. 95; Comer *v.* Taylor, 82 Mo. 341; Wilkerson *v.* Thompson, 82 Mo. 317; Moffatt *v.* Conklin, 35 Mo. 453; Merritt *v.* Given, 34 Mo. 98; Hartley *v.* Calbreath, 127 Mo. App. 559, 106 S. W. 570; Bond *v.* Chicago, etc., R. Co., 122 Mo. App. 207, 99 S. W. 30; Brock *v.* St. Louis Transit Co., 107 Mo. App. 109, 81 S. W. 219; Campbell *v.* Stanberry, 105 Mo. App. 56, 78 S. W. 292; Hester *v.* Fidelity, etc., Co., 78 Mo. App. 505; Connor *v.* Metropolitan L. Ins. Co., 78 Mo. App. 131; Dulaney *v.* St. Louis Sugar Refining Co., 42 Mo. App. 659; Matthews *v.* Missouri Pac. R. Co., 26 Mo. App. 75; Cahill *v.* Liggett, etc., Tobacco Co., 14 Mo. App. 596.

Montana.— Lindsley *v.* McGrath, 34 Mont. 564, 87 Pac. 961.

Nebraska.— South Omaha *v.* Wrzesinski,

controverted fact in an instruction given to the jury is error.[54] Especially is this

66 Nebr. 790, 92 N. W. 1045; Ottens *v.* Fred Krug Brewing Co., 58 Nebr. 331, 78 N. W. 622; Blue Valley Lumber Co. *v.* Smith, 48 Nebr. 293, 67 N. W. 159; Terry *v.* Beatrice Starch Co., 43 Nebr. 866, 62 N. W. 255; Chicago, etc., R. Co. *v.* Anderson, 38 Nebr. 112, 56 N. W. 794; Galligher *v.* Connell, 35 Nebr. 517, 53 N. W. 383; Paine *v.* Kohl, 14 Nebr. 580, 16 N. W. 824.

New Jersey.— Bellis *v.* Phillips, 28 N. J. L. 125.

New York.— Vroman *v.* Rogers, 132 N. Y. 167, 30 N. E. 388 [*affirming* 5 N. Y. Suppl. 426]; West *v.* Banigan, 51 N. Y. App. Div. 328, 64 N. Y. Suppl. 884 [*affirmed* in 172 N. Y. 622, 65 N. E. 1123]; White *v.* Ellisburgh, 18 N. Y. App. Div. 514, 45 N. Y. Suppl. 1122; Trask *v.* Payne, 43 Barb. 569; Schwartz *v.* Metropolitan St. R. Co., 38 Misc. 795, 78 N. Y. Suppl. 886; Schoenholtz *v.* Third Ave. R. Co., 16 Misc. 7, 37 N. Y. Suppl. 682; Rettig *v.* Fifth Ave. Transp. Co., 6 Misc. 328, 26 N. Y. Suppl. 896 [*affirmed* in 144 N. Y. 715, 39 N. E. 859].

North Carolina.— Bradley *v.* Ohio River, etc., R. Co., 126 N. C. 735, 36 S. E. 181; McMillan *v.* Baxley, 112 N. C. 578, 16 S. E. 845; Powell *v.* Wilmington, etc., R. Co., 68 N. C. 395; Wilson *v.* Holley, 66 N. C. 408; State *v.* Collins, 30 N. C. 407.

North Dakota.— Landis *v.* Fyles, 18 N. D. 587, 120 N. W. 566.

Ohio.— Northern Ohio R. Co. *v.* Rigby, 69 Ohio St. 184, 68 N. E. 1046.

Oklahoma.— Goodwin *v.* Greenwood, 16 Okla. 489, 85 Pac. 1115.

Oregon.— Owens *v.* Snell, etc., Co., 29 Oreg. 483, 44 Pac. 827.

Pennsylvania.— McHenry *v.* Bulifant, 207 Pa. St. 15, 56 Atl. 226; Karl *v.* Juniata County, 206 Pa. St. 633, 56 Atl. 78; Means *v.* Gridley, 164 Pa. St. 387, 30 Atl. 390; Dunseath *v.* Pittsburg, etc., Traction Co., 161 Pa. St. 124, 28 Atl. 1021; Haupt *v.* Haupt, 157 Pa. St. 469, 27 Atl. 768; Pennsylvania R. Co. *v.* McTighe, 46 Pa. St. 316; Braden *v.* Cook, 18 Pa. Super. Ct. 156; Jacoby *v.* North British, etc., Ins. Co., 10 Pa. Super. Ct. 366, 44 Wkly. Notes Cas. 226; Musselman *v.* East Brandy Wine, etc., R. Co., 2 Wkly. Notes Cas. 105.

South Carolina.— Frasier *v.* Charleston, etc., R. Co., 73 S. C. 140, 52 S. E. 964; Watts *v.* Blalock, 17 S. C. 157; State *v.* Gilreath, 16 S. C. 100; Bamberg *v.* South Carolina R. Co., 9 S. C. 61, 30 Am. Rep. 13.

South Dakota.— Richardson *v.* Dybedahl, 17 S. D. 629, 98 N. W. 164; Wood *v.* Steinau, 9 S. D. 110, 68 N. W. 160; Rapp *v.* Giddings, 4 S. D. 292, 57 N. W. 237.

Texas.— Martin *v.* Texas, etc., R. Co., 87 Tex. 117, 26 S. W. 1052; Goodbar *v.* City Nat. Bank, 78 Tex. 461, 14 S. W. 851; Golden *v.* Patterson, 56 Tex. 628; Kimbro *v.* Hamilton, 28 Tex. 560; Lacoste *v.* Odam, 26 Tex. 458; Wells *v.* Barnett, 7 Tex. 584; Crozier *v.* Kirker, 4 Tex. 252, 51 Am. Dec. 724; Cobb *v.* Beall, 1 Tex. 342; Boardman *v.* Woodward, (Civ. App. 1909) 118 S. W. 550; Moore *v.* Kirby, 52 Tex. Civ. App. 200, 115 S. W. 632; Victoria *v.* Victoria County, (Civ. App. 1909) 115 S. W. 67; Hansen *v.* Williams, (Civ. App. 1908) 113 S. W. 312; Texas, etc., R. Co. *v.* Powell, 51 Tex. Civ. App. 409, 112 S. W. 697; Missouri, etc., R. Co. *v.* Steele, 50 Tex. Civ. App. 634, 110 S. W. 171; Feille *v.* San Antonio Traction Co., 48 Tex. Civ. App. 541, 107 S. W. 367; St. Louis, etc., R. Co. *v.* Brosius, 47 Tex. Civ. App. 647, 105 S. W. 1131; Taylor *v.* Blackwell, (Civ. App. 1907) 105 S. W. 214; Hayward Lumber Co. *v.* Cox, (Civ. App. 1907) 104 S. W. 403; Atchison, etc., R. Co. *v.* Sowers, (Civ. App. 1906) 99 S. W. 190 [*affirmed* in 213 U. S. 55, 29 S. Ct. 397, 53 L. ed. 695]; May *v.* Hahn, (Civ. App. 1906) 97 S. W. 132; Gulf, etc., R. Co. *v.* Batte, (Civ. App. 1906) 94 S. W. 345; Messer *v.* Walton, 42 Tex. Civ. App. 488, 92 S. W. 1037; Haney *v.* Blandino, (Civ. App. 1905) 89 S. W. 1108; Abeel *v.* McDonnell, 39 Tex. Civ. App. 453, 87 S. W. 1066; Trinity, etc., R. Co. *v.* Simpson, (Civ. App. 1905) 86 S. W. 1034; Taylor *v.* Houston Electric Co., 38 Tex. Civ. App. 432, 85 S. W. 1019; Galveston, etc., R. Co. *v.* Manus, 37 Tex. Civ. App. 356, 84 S. W. 254; Metcalfe *v.* Lowenstein, 35 Tex. Civ. App. 619, 81 S. W. 362; Mundine *v.* Pauls, 28 Tex. Civ. App. 46, 66 S. W. 254; Overall *v.* Armstrong, (Civ. App. 1894) 25 S. W. 440; Waters *v.* Papex, 1 Tex. App. Civ. Cas. § 714; Texas, etc., R. Co. *v.* Lanham, 1 Tex. App. Civ. Cas. § 251.

Vermont.— Taplin *v.* Marcy, 81 Vt. 428, 71 Atl. 72.

Washington.— Bell *v.* Washington Cedar Shingle Co., 8 Wash. 27, 35 Pac. 405.

West Virginia.— Harrison *v.* Farmer's Bank, 4 W. Va. 393.

Wisconsin.— Ferguson *v.* Truax, 132 Wis. 478, 110 N. W. 395, 111 N. W. 657, 112 N. W. 513, 14 L. R. A. N. S. 350; Hoover *v.* Tibbits, 13 Wis. 79.

United States.— Dudley *v.* Sears, 16 Fed. 335.

See 46 Cent. Dig. tit. "Trial," § 420 *et seq.*

54. *Alabama.*— Southern Hardware, etc., Co. *v.* Standard Equipment Co., 158 Ala. 596, 48 So. 357; Selma St., etc., R. Co. *v.* Campbell, 158 Ala. 438, 48 So. 378; Birmingham R., etc., Co. *v.* Hayes, 153 Ala. 178, 44 So. 1032; Louisville, etc., R. Co. *v.* Christian Moerlein Brewing Co., 150 Ala. 390, 43 So. 723; Green *v.* Southern States Lumber Co., 141 Ala. 680, 37 So. 670; Going *v.* Alabama Steel, etc., Co., 141 Ala. 537, (1904) 37 So. 784; Wellman *v.* Jones, 124 Ala. 580, 27 So. 416; Bates *v.* Harte, 124 Ala. 427, 26 So. 898, 82 Am. St. Rep. 186; Birmingham R., etc., Co. *v.* City Stable Co., 119 Ala. 615, 24 So. 558, 72 Am. St. Rep. 955; Commercial F. Ins. Co. *v.* Morris, 105 Ala. 498, 18 So. 34; American Oak Extract Co. *v.* Ryan, 104 Ala. 267, 15 So. 807; Louisville, etc., R. Co. *v.* Davis, 99 Ala. 593, 12 So. 786; Marble *v.* Lypes, 82 Ala. 322, 2 So. 701; Nabors *v.* Camp, 14 Ala. 460.

Arkansas.— Bryant Lumber Co. *v.* Stast-

held to be true where the defect in the instruction so given is called to the

ney, 87 Ark. 321, 112 S. W. 740; Weil *v.* Fineran, 78 Ark. 87, 93 S. W. 568; Western Coal, etc., Co. *v.* Jones, 75 Ark. 76, 87 S. W. 440; Rector *v.* Robins, 74 Ark. 437, 86 S. W. 667.

California.— People *v.* Casey, 65 Cal. 260, 3 Pac. 874; Matteson *v.* Southern Pac. Co., 6 Cal. App. 318, 92 Pac. 101.

Colorado.— Aliunde Consol. Min. Co. *v.* Arnold, 16 Colo. App. 542, 67 Pac. 28; Bradbury *v.* Alden, 13 Colo. App. 208, 57 Pac. 490.

Connecticut.— Kelley *v.* Torrington, 80 Conn. 378, 68 Atl. 855; Irving *v.* Shethar, 71 Conn. 434, 42 Atl. 258.

Florida.— Lewter *v.* Tomlinson, 54 Fla. 215, 44 So. 935; Southern Pine Co. *v.* Powell, 48 Fla. 154, 37 So. 570; Florida Cent., etc., R. Co. *v.* Foxworth, 41 Fla. 1, 25 So. 338, 79 Am. St. Rep. 149; Doggett *v.* Jordan, 2 Fla. 541.

Georgia.—Fullbright *v.* Neely, 131 Ga. 342, 62 S. E. 188; Central of Georgia R. Co. *v.* Grady, 113 Ga. 1045, 39 S. E. 441; Buttram *v.* Jackson, 32 Ga. 409; Black *v.* Thornton, 30 Ga. 361; Atlanta, etc., Air-Line R. Co. *v.* McManus, 1 Ga. App. 302, 58 S. E. 258.

Illinois.— Illinois Cent. R. Co. *v.* Johnson, 221 Ill. 42, 77 N. E. 592; Illinois, etc., R. Co. *v.* Easterbrook, 211 Ill. 624, 71 N. E. 1116; Feitl *v.* Chicago City R. Co., 211 Ill. 279, 71 N. E. 991 [*affirming* 113 Ill. App. 381]; Rabbermann *v.* Carroll, 207 Ill. 253, 69 N. E. 759; Webster *v.* Yorty, 194 Ill. 408, 62 N. E. 907; Dady *v.* Condit, 188 Ill. 234, 58 N. E. 900; Tichenor *v.* Newman, 186 Ill. 264, 57 N. E. 826; Illinois Cent. R. Co. *v.* Anderson, 184 Ill. 294, 56 N. E. 331 [*affirming* 81 Ill. App. 137]; Carter *v.* Marshall, 72 Ill. 609; Brougham *v.* Paul, 138 Ill. App. 455; McIlwain *v.* Gaebe, 137 Ill. App. 25; Cleveland, etc., R. Co. *v.* Dukeman, 134 Ill. App. 396; Campbell *v.* Fierlein, 134 Ill. App. 207; McKinnie *v.* Lane, 133 Ill. App. 438 [*affirmed* in 230 Ill. 544, 82 N. E. 878]; White *v.* Kiggins, 130 Ill. App. 404; Cleveland, etc., R. Co. *v.* Dukeman, 130 Ill. App. 105; Chicago City R. Co. *v.* Schaefer, 121 Ill. App. 334; Swift *v.* Mutter, 115 Ill. App. 374; Cleveland, etc., R. Co. *v.* Alfred, 113 Ill. App. 236; Chicago, etc., R. Co. *v.* O'Leary, 102 Ill. App. 665; Martin *v.* Leslie, 93 Ill. App. 44; Hayes *v.* Wagner, 89 Ill. App. 390; Meyer *v.* Meyer, 86 Ill. App. 417; Crown Coal, etc., Co. *v.* Taylor, 81 Ill. App. 66; Dearborn Foundry Co. *v.* Rielly, 79 Ill. App. 281; Arnold *v.* Lomicky, 76 Ill. App. 485; Western Union Cold Storage Co. *v.* Ermeling, 73 Ill. App. 394; Derby Cycle Co. *v.* White, 64 Ill. App 245.

Indiana.— Beery *v.* Driver, 167 Ind. 127, 76 N. E. 967; Sasse *v.* Rogers, 40 Ind. App. 197, 81 N. E. 590; Huntingburgh *v.* First, 22 Ind. App. 66, 53 N. E. 246; Toledo, etc., R. Co. *v.* Mylott, 6 Ind. App. 438, 33 N. E. 135.

Iowa.— Fries *v.* Bettendorf Axle Co., 126 Iowa 138, 101 N. W. 859.

Kansas.— Metropolitan St. R. Co. *v.* McClure, 58 Kan. 109, 48 Pac. 566.

Kentucky.— Sullivan *v.* Enders, 3 Dana 66; McGrew *v.* O'Donnell, 92 S. W. 301, 28 Ky. L. Rep. 1366; Straight Creek Coal Co. *v.* Haney, 87 S. W. 1114, 27 Ky. L. Rep. 1117; Locke *v.* Lyon Medicine Co., 84 S. W. 307, 27 Ky. L. Rep. 1; Henderson County *v.* Dixon, 63 S. W. 756, 23 Ky. L. Rep. 1204; Maddox *v.* Newport News, etc., Co., 37 S. W. 494, 18 Ky. L. Rep. 635.

Louisiana.— Muscarelli *v.* Hodge Fence, etc., Co., 120 La. 335, 45 So. 268.

Maine.— Whitehouse *v.* Bolster, 95 Me. 458, 50 Atl. 240.

Maryland.— Orem Fruit, etc., Co. *v.* Northern Cent. R. Co., 106 Md. 1, 66 Atl. 436, 124 Am. St. Rep. 462; Calvert Bank *v.* Katz, 102 Md. 56, 61 Atl. 411.

Michigan.— Korrer *v.* Detroit, 142 Mich. 331, 106 N. W. 64; Butler *v.* Detroit, etc., R. Co., 138 Mich. 206, 101 N. W. 232; Jones *v.* McMillan, 129 Mich. 86, 88 N. W. 206; Blumeno *v.* Grand Rapids, etc., R. Co., 101 Mich. 325, 59 N. W. 594; Lincoln *v.* Detroit, 101 Mich. 245, 59 N. W. 617; Hill *v.* Graham, 72 Mich. 659, 40 N. W. 779; Maltby *v.* Plummer, 71 Mich. 578, 40 N. W. 3; Weyburn *v.* Kipp, 63 Mich. 79, 29 N. W. 517.

Mississippi.—American Express Co. *v.* Jennings, 86 Miss. 329, 38 So. 374, 109 Am. St. Rep. 708; Varner *v.* Gregg, 26 Miss. 590.

Missouri.— Crow *v.* Houck's Missouri, etc., R. Co., 212 Mo. 589, 111 S. W. 583; Morrell *v.* Lawrence, 203 Mo. 363, 101 S. W. 571; Shirts *v.* Overjohn, 60 Mo. 305; Christian *v.* McDonnell, 127 Mo. App. 630, 106 S. W. 1104; Muncy *v.* Bevier, 124 Mo. App. 10, 101 S. W. 157; Klein *v.* St. Louis Transit Co., 117 Mo. App. 691, 93 S. W. 281; Stanley *v.* Chicago, etc., R. Co., 112 Mo. App. 601, 87 S. W. 112; Abbott *v.* Marion Min. Co., 112 Mo. App. 550, 87 S. W. 110; Stripling *v.* Maguire, 108 Mo. App. 594, 84 S. W. 164; Kupferschmid *v.* Southern Electric R. Co., 70 Mo. App. 438; Blasland-Parcels-Jordan Shoe Co. *v.* Hicks, 70 Mo. App. 301; Walters *v.* Cox, 67 Mo. App. 299.

Montana.— Stephens *v.* Elliott, 36 Mont. 92, 92 Pac. 45; Gallick *v.* Bordeaux, 31 Mont. 328, 78 Pac. 583; Lawrence *v.* Westlake, 28 Mont. 503, 73 Pac. 119.

Nebraska.—Van Nortwick *v.* Holbine, 62 Nebr. 147, 86 N. W. 1057.

New York.— Fox *v.* Manhattan R. Co., 67 N. Y. App. Div. 460, 73 N. Y. Suppl. 896; Lawson *v.* Metropolitan St. R. Co., 40 N. Y. App. Div. 307, 57 N. Y. Suppl. 997 [*affirmed* in 166 N. Y. 589, 59 N. E. 1124]; Griffin *v.* White, 32 N. Y. App. Div. 630, 52 N. Y. Suppl. 807; Gurney *v.* Smithson, 7 Bosw. 396; Durst *v.* Ernst, 45 Misc. 627, 91 N. Y. Suppl. 13; Moran *v.* McClearns, 41 How. Pr. 289.

North Carolina.— Brewster *v.* Elizabeth City, 142 N. C. 9, 54 S. E. 784; Peoples *v.* North Carolina R. Co., 137 N. C. 96, 49 S. E. 87; Harrison *v.* Western Union Tel. Co., 136 N. C. 381, 48 S. E. 772; Ward *v.* Odell Mfg. Co., 123 N. C. 248, 31 S. E. 495.

Oklahoma.— Chicago, etc., R. Co. *v.* Stibbs,

attention of the court,[55] and it has been held that the error is not cured by the giving of other instructions, which submit for the determination of the jury the existence of such facts.[56]

(II) *APPLICATION OF RULE.* It is error, under conflicting evidence, where the fact is material to assume that a voluntary deed was executed with a fraudulent intent,[57] that the evidence establishes plaintiff's case;[58] that his evidence is true;[59] that certain representations were false and fraudulent;[60] the existence of a debt[61] or a contract,[62] or the non-existence of a contract;[63] the existence of an established custom;[64] that a contract was executed by certain parties;[65] that a party was[66] or was not negligent,[67] or was[68] or was not guilty of contributory negligence;[69]

17 Okla. 97, 87 Pac. 293; Archer *v.* U. S., 9 Okla. 569, 60 Pac. 268.

Pennsylvania.— Greenfield *v.* East Harrisburg Pass. R. Co., 178 Pa. St. 194, 35 Atl. 626; Bogle *v.* Kreitzer, 46 Pa. St. 465; Baker *v.* Moore, 29 Pa. Super. Ct. 301.

Rhode Island.— Taber *v.* New York, etc., R. Co., 28 R. I. 269, 67 Atl. 9.

Texas.—International, etc., R. Co. *v.* Brice, 100 Tex. 203, 97 S. W. 461 [*reversing* (Civ. App. 1906) 95 S. W. 660]; McGreal *v.* Wilson, 9 Tex. 426; Chicago, etc., R. Co. *v.* Groner, 51 Tex. Civ. App. 65, 111 S. W. 667; Galveston, etc., R. Co. *v.* Worth, (Civ. App. 1907) 107 S. W. 958; Seal *v.* Holcomb, 48 Tex. Civ. App. 330, 107 S. W. 916; St. Louis Southwestern R. Co. *v.* Thompson, (Civ. App. 1907) 103 S. W. 684; McCracken *v.* Lantry-Sharpe Contracting Co., 45 Tex. Civ. App. 485, 101 S. W. 520; Texas Cent. R. Co. *v.* Waldie, (Civ. App. 1907) 101 S. W. 517; Hotel Cliff Assoc. *v.* Peterman, (Civ. App. 1906) 98 S. W. 407; Texas, etc., R. Co. *v.* Felker, 42 Tex. Civ. App. 256, 93 S. W. 477; Ullman *v.* Devereux, (Civ. App. 1906) 93 S W. 472; Dallas Consol. Electric St. R. Co. *v.* Ely, (Civ. App. 1905) 91 S. W. 887; Houston, etc., R. Co. *v.* Burns, 41 Tex. Civ. App. 83, 90 S. W. 688; Missouri, etc., R. Co. *v.* Wolf, 40 Tex. Civ. App. 381, 89 S. W. 778; Robbins *v.* Voss, (Civ. App. 1901) 64 S. W. 313; St. Louis Southwestern R. Co. *v.* Smith, (Civ. App. 1901) 63 S. W. 1064; Luckie *v.* Schneider, (Civ. App. 1900) 57 S. W. 690; Clark *v.* Clark, 21 Tex. Civ. App. 371, 51 S. W. 337; St. Louis Southwestern R. Co. *v.* Casseday, (Civ. App. 1898) 48 S. W. 6 [*reversed* on other grounds in 92 Tex. 525, 50 S. W. 125]; Missouri, etc., R. Co. *v.* Brown, (Civ. App. 1896) 39 S. W. 326.

Utah.— Davidson *v.* Utah Independent Tel. Co., 34 Utah 249, 97 Pac. 124.

See 46 Cent. Dig. tit. "Trial," § 420 *et seq.*

55. Steagall *v.* McKellar, 20 Tex. 265.

56. Cahoon *v.* Marshall, 25 Cal. 197; Bressler *v.* Schwertferger, 15 Ill. App. 294; Haynor *v.* Excelsior Springs Light, etc., Co., 129 Mo. App. 691, 108 S. W. 580; Morton *v.* Harvey, 57 Nebr. 304, 77 N. W. 808.

57. Gardner *v.* Boothe, 31 Ala. 186.

58. Chicago *v.* Fields, 139 Ill. App. 250.

Prima facie case.— A charge that the burden was on defendant to prove title by adverse possession was properly refused, as assuming that plaintiffs had made a *prima facie* case. Barry *v.* Madaris, 156 Ala. 475, 47 So. 152.

59. American Nat. Bank *v.* Fountain, 148 N. C. 590, 62 S. E. 738.

60. American Ins. Co. *v.* Crawford, 89 Ill. 62.

61. Cropper *v.* Pittman, 13 Md. 190.

62. Adams *v.* Neu, 108 Ill. App. 50; Briseno *v.* International, etc., R. Co., (Tex. Civ. App. 1904) 81 S. W. 579; McCallon *v.* Cohen, (Tex. Civ. App. 1897) 39 S. W. 973.

63. Cobb *v.* Dunlevie, 63 W. Va. 398, 60 S. E. 384.

64. Cobb *v.* Dunlevie, 63 W. Va. 398, 60 S. E. 384.

65. Gaines *v.* McAllister, 122 N. C. 340, 29 S. E. 844.

66. *Georgia.*—Augusta R., etc., Co. *v.* Lyle, 4 Ga. App. 113, 60 S. E. 1075.

Illinois.— Anderson *v.* Moore, 108 Ill. App. 106; Mobile, etc., R. Co. *v.* Healy, 100 Ill. App. 586; Mohr *v.* Kinnane, 85 Ill. App. 447.

Iowa.— Bauer *v.* Dubuque, 122 Iowa 500, 98 N. W. 355.

Maryland.— Crown Cork, etc., Co. *v.* O'Leary, 108 Md. 463, 69 Atl. 1068.

Michigan.— Charette *v.* L'Anse, 154 Mich. 304, 117 N. W. 737.

Missouri.— Gessner *v.* Metropolitan St. R. Co., 132 Mo. App. 584, 112 S. W. 30.

Pennsylvania.— Hayes *v.* Pennsylvania R. Co., 195 Pa. St. 184, 45 Atl. 925.

Texas.— Galveston, etc., R. Co. *v.* Worth, (Civ. App. 1907) 107 S. W. 958; Chicago, etc., R. Co. *v.* Harton, 36 Tex. Civ. App. 475, 81 S. W. 1236; Missouri, etc., R. Co. *v.* Wood, (Civ. App. 1904) 81 S. W. 1187; St. Louis Southwestern R. Co. *v.* Gentry, (Civ. App. 1903) 74 S. W. 607.

Illustration.— Where the negligence claimed was based on the existence of a low place in a railroad track and whether there was such a place was in issue, it was error for the judge in his charge to assume that there was such a low place. Atlantic, etc., R. Co. *v.* Hattaway, 126 Ga. 333, 55 S. E. 21.

67. Western Union Tel. Co. *v.* Benson, 159 Ala. 254, 48 So. 712; Maryland, etc., R. Co. *v.* Brown, 109 Md. 304, 71 Atl. 1005; Wolf *v.* Shriver, 109 Md. 295, 72 Atl. 411; International, etc., R. Co. *v.* Garcia, (Tex. Civ. App. 1909) 117 S. W. 206; Thompson *v.* Galveston, etc., R. Co., 48 Tex. Civ. App. 284, 106 S. W. 910.

68. Western Steel Car, etc., Co. *v.* Cunningham, 158 Ala. 369, 48 So. 109; St. Louis Southwestern R. Co. *v.* Shipp, 48 Tex. Civ. App. 565, 109 S. W. 286.

69. Southern R. Co. *v.* Limback, 172 Ind.

that a person exercising ordinary care would act in a certain manner under given circumstances; [70] that plaintiff was placed in a perilous position by defendant's negligence,[71] or that a certain act was the only negligent act on defendant's part; [72] that an appliance used for coupling cars was unsafe; [73] that an immediate inspection of machinery reported to be defective should have been made; [74] that a party failed to give proper warning of a contemplated act; [75] that a servant exceeded or violated his instructions; [76] that a train became separated prior to an accident; [77] that plaintiff was ejected from a train while the same was in motion,[78] or that he was in a perilous position; [79] that plaintiff had assumed the risk of the accident by which he was injured; [80] that a sidewalk was defective,[81] that the defects in a sidewalk were obvious,[82] or that a person was caused to slip and fall by snow thereon; [83] that the wife of plaintiff, for whose injuries he sues, was injured; [84] that an act was done maliciously,[85] or wantonly; [86] that the use of land by defendant was an encroachment on a public thoroughfare; [87] that a party had knowledge of the intention of another; [88] that an absence from homestead lands was temporary; [89] that rent was in arrears; [90] that goods were exchanged at a certain price; [91] that a party had voluntarily parted with possession of property,[92] or intended to make delivery of a deed; [93] that notes had been paid; [94] that a certain structure was a scaffold; [95] that a certain danger existed; [96] that the claim in suit had been assigned,[97] the receipt of money,[98] or ownership of property in dispute; [99] that a witness has knowledge of facts concerning which he testifies; [1] that a preference was made for a particular purpose; [2] that parties to a partially performed contract could not be restored to their original position; [3] that medical services [4] or brokerage services had been performed; [5] that an estoppel *in pais* exists; [6] that certain elements of damage exist; [7] that damages, other than nominal,

89, 85 N. E. 354; Reed *v.* Yazoo, etc., R. Co., 94 Miss. 639, 47 So. 670; Southern R. Co. *v.* Hopkins, 161 Fed. 266, 88 C. C. A. 312.

70. Nelson *v.* Knetzger, 109 Ill. App. 296.

71. Texas, etc., R. Co. *v.* Berry, 32 Tex. Civ. App. 259, 72 S. W. 423.

72. Duncan *v.* St. Louis, etc., R. Co., 152 Ala. 118, 44 So. 418.

73. Kansas City Southern R. Co. *v.* Williams, (Tex. Civ. App. 1908) 111 S. W. 196.

74. Harwell *v.* Southern Furniture Co., (Tex. Civ. App. 1903) 75 S. W. 52, 888.

75. La Salle County Carbon Coal Co. *v.* Eastman, 99 Ill. App. 495.

76. Illinois Cent. R. Co. *v.* Berry, 81 Ill. App. 17.

77. Bumgardner *v.* Southern R. Co., 132 N. C. 438, 43 S. E. 948.

78. Illinois Cent. R. Co. *v.* Berry, 81 Ill. App. 17.

79. St. Louis, etc., R. Co. *v.* Sibly, 29 Tex. Civ. App. 396, 68 S. W. 516.

80. Wilson *v.* New York, etc., R. Co., 29 R. I. 146, 69 Atl. 364.

81. Baker *v.* Independence, 106 Mo. App. 507, 81 S. W. 501.

82. Waters *v.* Kansas City, 94 Mo. App. 413, 68 S. W. 366.

83. Waters *v.* Kansas City, 94 Mo. App. 413, 68 S. W. 366.

84. Freeman *v.* Metropolitan St. R. Co., 95 Mo. App. 94, 314, 68 S. W. 1057, 1060.

85. Lopez *v.* Jackson, 80 Miss. 684, 32 So. 117.

86. Perciful *v.* Coleman, 72 S. W. 29, 24 Ky. L. Rep. 1685.

87. Manion *v.* Lake Erie, etc., R. Co., 40 Ind. App. 569, 80 N. E. 166.

88. Rapid Transit Co. *v.* Lusk, (Tex. Civ. App. 1902) 66 S. W. 799.

89. White *v.* Epperson, 32 Tex. Civ. App. 162, 73 S. W. 851.

90. Bonaparte *v.* Thayer, 95 Md. 548, 52 Atl. 496.

91. McCormick *v.* McCaffray, 25 Misc. (N. Y.) 786, 55 N. Y. Suppl. 574.

92. Owen *v.* Long, 97 Wis. 78, 72 N. W. 364.

93. Walker *v.* Nix, 25 Tex. Civ. App. 596, 64 S. W. 73.

94. Chipps *v.* Buxton, 109 Ill. App. 88.

95. Conger *v.* Wiggins, 208 Pa. St. 122, 57 Atl. 341.

96. Texas Midland R. Co. *v.* Booth, 35 Tex. Civ. App. 322, 80 S. W. 121.

97. McWilliams *v.* Piper, 7 Kan. App. 289, 53 Pac. 837.

98. Coleman *v.* Adair, (Miss. 1898) 23 So. 369; Halsey *v.* Bell, (Tex. Civ. App. 1901) 62 S. W. 1088.

99. Louisville, etc., R. Co. *v.* Christian Moerlein Brewing Co., 150 Ala. 390, 43 So. 723; Lake *v.* Copeland, 31 Tex. Civ. App. 358, 72 S. W. 99.

1. Pardridge *v.* Cutler, 104 Ill. App. 89.

2. Harmon *v.* Goodbar Shoe Co., (Miss. 1895) 18 So. 118.

3. Mahaffey *v.* Ferguson, 156 Pa. St. 156, 27 Atl. 21.

4. Evans *v.* Joplin, 76 Mo. App. 20.

5. Yates *v.* Bratton, (Tex. Civ. App. 1908) 111 S. W. 416.

6. Fry *v.* Flick, 10 Pa. Super. Ct. 362.

7. York *v.* Everton, 121 Mo. App. 640, 97 S. W. 604.

had been sustained;[8] that plaintiff was entitled to recover for mental sufferings;[9] that the clearing of land had diminished its value;[10] that animals claimed to have been injured suffered in their market value;[11] that, in an action for compensation for establishing a highway across a railroad right of way, the value of the right of way would be diminished by such location;[12] that certain land is accretions;[13] that a sale was not a *bona fide* sale;[14] that full consideration for a note in suit had been received;[15] in an action for a nuisance to assume that plaintiff was the head of a family;[16] or that, in detinue by chattel mortgagees against the mortgagor's purchaser, defendant was a *bona fide* purchaser;[17] that a person of fifteen years is of tender age and imperfect discretion;[18] that a person was administrator;[19] that certain conditions were attached to the delivery of notes;[20] or that an oral contract called for the payment of a sum certain.[21]

(III) *Instructions Held Not to Be Subject to Criticism That They Assume a Material Fact.* It is not an assumption of fact for the court to state the claims of the parties upon questions of fact in the case[22] or the issues as made by the pleadings;[23] to state the facts in issue and submit them to the jury for decision;[24] to state the legal effect of documents;[25] to state that the court and jury do not make contracts for people, but simply carry them out;[26] to merely state an abstract legal proposition;[27] to direct what verdict to return in case a specified hypothetical state of facts is found to exist,[28] or where there is no conflict in the evidence and the facts are clear to charge that if the jury believe

8. Dady *v.* Condit, 188 Ill. 234, 58 N. E. 900; Judd *v.* Isenhart, 93 Ill. App. 520.
9. Glover *v.* Atchison, etc., R. Co., 129 Mo. App. 563, 108 S. W. 105.
10. Norris *v.* Laws, 150 N. C. 599, 64 S. E. 499.
11. Missouri, etc., R. Co. *v.* Light, (Tex. Civ. App. 1909) 117 S. W. 1058.
12. New York, etc., R. Co. *v.* Rhodes, 171 Ind. 521, 86 N. E. 840, 24 L. R. A. N. S. 1225.
13. Allmendinger *v.* McHie, 189 Ill. 308, 59 N. E. 517.
14. Griffin *v.* Griffin, 93 Miss. 651, 46 So. 945.
15. Ruthruff *v.* Faust, 154 Mich. 409, 117 N. W. 902.
16. Fehd *v.* Oskaloosa, 139 Iowa 621, 117 N. W. 989.
17. Hickey *v.* McDonald, 160 Ala. 300, 48 So. 1031.
18. Day *v.* Citizens R. Co., 81 Mo. App. 471.
19. Andrews *v.* Broughton, 84 Mo. App. 640.
20. Turner *v.* Grobe, 24 Tex. Civ. App. 554, 59 S. W. 583.
21. Hutton *v.* Doxsee, 116 Iowa 13, 89 N. W. 79.
22. *California.*— Jarman *v.* Rea, 137 Cal. 339, 70 Pac. 216.
Colorado.— De St. Aubin *v.* Field, 27 Colo. 414, 62 Pac. 199.
Connecticut.— Dexter *v.* McCready, 54 Conn. 171, 5 Atl. 855.
Georgia.—Weekes *v.* Cottingham, 58 Ga. 559.
New York.—Polykranas *v.* Krausz, 73 N. Y. App. Div. 583, 77 N. Y. Suppl. 46; West *v.* Banigan, 51 N. Y. App. Div. 328, 64 N. Y. Suppl. 884 [*affirmed* in 172 N. Y. 622, 65 N. E. 1123].
Pennsylvania.— Gilchrist *v.* Hartley, 198 Pa. St. 132, 47 Atl. 972.
South Carolina.— Bryce *v.* Cayce, 62 S. C. 546, 40 S. E. 948.
Tennessee.— Nashville R. Co. *v.* Norman, 108 Tenn. 324, 67 S. W. 479.
Texas.— Gulf, etc., R. Co. *v.* Morgan, 26 Tex. Civ. App. 378, 64 S. W. 688; Sherman, etc., R. Co. *v.* Bell, (Civ. App. 1900) 58 S. W. 147.
23. Missouri, etc., R. Co. *v.* Kyser, 43 Tex. Civ. App. 322, 95 S. W. 747.
24. Chicago, etc., R. Co. *v.* Harrington, 192 Ill. 9, 61 N. E. 622 [*affirming* 90 Ill. App. 638]; Sheridan *v.* Forsee, 106 Mo. App. 495, 81 S. W. 494; St. Louis Southwestern R. Co. *v.* Morrow, (Tex. Civ. App. 1906) 93 S. W. 162; Denison, etc., R. Co. *v.* Powell, 35 Tex. Civ. App. 454, 80 S. W. 1054; Missouri, etc., R. Co. *v.* Stinson, 34 Tex. Civ. App. 285, 78 S. W. 986; International, etc., R. Co. *v.* Locke, (Tex. Civ. App. 1902) 67 S. W. 1082; Triolo *v.* Foster, (Tex. Civ. App. 1900) 57 S. W. 698; Missouri, etc., R. Co. *v.* Hines, (Tex. Civ. App. 1897) 40 S. W. 152; Baldwin *v.* Lincoln County, 29 Wash. 509, 69 Pac. 1081.
25. Sudduth *v.* Sumeral, 61 S. C. 276, 39 S. E. 534, 85 Am. St. Rep. 883.
26. Holder *v.* Prudential Ins. Co., 77 S. C. 299, 57 S. E. 853.
27. Florida Cent., etc., R. Co. *v.* Foxworth, 41 Fla. 1, 25 So. 338, 79 Am. St. Rep. 149; Illinois Steel Co. *v.* Hanson, 195 Ill. 106, 62 N. E. 918 [*affirming* 97 Ill. App. 469].
28. *Illinois.*— Fitzgerald *v.* Benner, 219 Ill. 485, 76 N. E. 709; Mallen *v.* Waldowski, 203 Ill. 87, 67 N. E. 409 [*reversing* 101 Ill. App. 367]; Illinois Cent. R. Co. *v.* Turner, 194 Ill. 575, 62 N. E. 798 [*affirming* 97 Ill. App. 219]; Reynolds *v.* Blake, 111 Ill. App. 53.
Indiana.— Swygart *v.* Willard, 166 Ind. 25, 76 N. E. 755; Indianapolis St. R. Co. *v.* Schomberg, (App. 1904) 71 N. E. 237.

the evidence they must find for a specified party,[29] or which sets out the facts alleged in the declaration, and directs a verdict for plaintiff if such facts are proved;[30] or to require the jury to believe, from the evidence, in the existence of every fact stated, although that requirement is not repeated before each one of the separate facts;[31] to state what is an obvious conclusion from certain facts if found;[32] to state that defendant is liable for an injury if it occurred by reason of its neglect of a statutory duty,[33] that a breach of an admitted duty is negligence,[34] or that a plaintiff cannot recover if found guilty of contributory negligence;[35] to state that the testimony of interested parties is to be tested by the circumstances and probabilities,[36] or that a witness who swears that to the best of his recollection an act was done testifies less positively than one who testifies that it was done;[37] to advise the jury as to the elements and measure of damages,[38] or that they may award damages for any injuries plaintiff may have sustained;[39] or to state a legal presumption with reference to a fact[40] which merely applies the law to the facts of the case,[41] or limits the possible amount of the verdict to the amount claimed in the petition,[42] which directs the jury to disregard a photograph as to certain particulars wherein it is shown to be incor-

Iowa.— Christy *v.* Des Moines City R. Co., 126 Iowa 428, 102 N. W. 194.

Massachusetts.— Emmons *v.* Alvord, 177 Mass. 466, 59 N. E. 126.

Missouri.— Phippin *v.* Missouri Pac. R. Co., 196 Mo. 321, 93 S. W. 410; Harrison *v.* Kansas City Electric Light Co., 195 Mo. 606, 93 S. W. 951, 7 L. R. A. N. S. 293; Moore *v.* St. Louis Transit Co., 193 Mo. 411, 91 S. W. 1060; Wendler *v.* People's House Furnishing Co., 165 Mo. 527, 65 S. W. 737; Evans *v.* Joplin, 84 Mo. App. 296.

South Carolina.— Hollings *v.* Bankers' Union of the World, 63 S. C. 192, 41 S. E. 90.

Texas.— Missouri, etc., R. Co. *v.* Johnson, 95 Tex. 409, 67 S. W. 768; Missouri, etc., R. Co. *v.* Box, (Civ. App. 1906) 93 S. W. 134; Houston, etc., R. Co. *v.* Oram, (Civ. App. 1906) 92 S. W. 1029; Texas, etc., R. Co. *v.* McDonald, (Civ. App. 1905) 85 S. W. 493; San Antonio Foundry Co. *v.* Drish, 38 Tex. Civ. App. 214, 85 S. W. 440; Galveston, etc., R. Co. *v.* Fry, 37 Tex. Civ. App. 552, 84 S. W. 664; Chicago, etc., R. Co. *v.* Cain, 37 Tex. Civ. App. 531, 84 S. W. 682; St. Louis Southwestern R. Co. *v.* Wright, (Civ. App. 1904) 84 S. W. 270; Galveston, etc., R. Co. *v.* Karrer, (Civ. App. 1902) 70 S. W. 328; Galveston, etc., R. Co. *v.* Buch, 27 Tex. Civ. App. 283, 65 S. W. 681; Galveston, etc., R. Co. *v.* Parvin, 27 Tex. Civ. App. 60, 64 S. W. 1008; International, etc., R. Co. *v.* Martinez, (Civ. App. 1900) 57 S. W. 689; Galveston, etc., R. Co. *v.* Zantzinger, (Civ. App. 1899) 49 S. W. 677.

Washington.— Carroll *v.* Centralia Water Co., 5 Wash. 613, 32 Pac. 609, 33 Pac. 431.

29. *Alabama.*— Central R., etc., Co. *v.* Ingram, 95 Ala. 152, 10 So. 516; Bryan *v.* Ware, 20 Ala. 687; McKenzie *v.* Stevens, 19 Ala. 691.

Kentucky.— Spalding *v.* Bull, 1 Duv. 311; Swartzwelder *v.* U. S. Bank, 1 J. J. Marsh. 38.

Maine.— Todd *v.* Whitney, 27 Me. 480.

North Carolina.— Woodbury *v.* Evans, 122 N. C. 779, 30 S. E. 2; Wool *v.* Bond, 118 N. C. 1, 23 S. E. 923; Love *v.* Gregg, 117 N. C. 467, 23 S. E. 332.

Pennsylvania.— Daubert *v.* Pennsylvania R. Co., 155 Pa. St. 178, 26 Atl. 108.

Texas.— Foster *v.* Franklin L. Ins. Co., (Civ. App. 1903) 72 S. W. 91.

Virginia.— Pleasants *v.* Pendleton, 6 Rand. 473, 18 Am. Dec. 726.

See 46 Cent. Dig. tit. "Trial," § 445.

Conflicting evidence.— Such instruction is erroneous under conflicting evidence. Alabama Midland R. Co. *v.* Thompson, 134 Ala. 232, 32 So. 672; Everett *v.* Richmond, etc., R. Co., 121 N. C. 519, 27 S. E. 991.

30. Ramey *v.* Baltimore, etc., R. Co., 235 Ill. 502, 85 N. E. 639 [*affirming* 140 Ill. App. 203].

31. Schmitt *v.* Kurrus, 234 Ill. 578, 85 N. E. 261.

32. Devine *v.* Chicago, etc., R. Co., 100 Iowa 692, 69 N. W. 1042; Texas, etc., R. Co. *v.* Jones, (Tex. Civ. App. 1897) 39 S. W. 124.

33. Texas, etc., R. Co. *v.* Laverty, 4 Tex. Civ. App. 74, 22 S. W. 1047.

34. Texas R. Co. *v.* Mallon, 65 Tex. 115.

35. Campbell *v.* McCoy, 3 Tex. Civ. App. 298, 23 S. W. 34.

36. Shepard *v.* Davis, 42 N. Y. App. Div. 462, 59 N. Y. Suppl. 456.

37. Gable *v.* Rauch, 50 S. C. 95, 27 S. E. 555.

38. Illinois Cent. R. Co. *v.* Prickett, 210 Ill. 140, 71 N. E. 435; Southern Missouri, etc., R. Co. *v.* Woodard, 193 Mo. 656, 92 S. W. 470; Western Union Tel. Co. *v.* Chambers, 34 Tex. Civ. App. 17, 77 S. W. 273; Lee *v.* Hammond, 114 Wis. 550, 90 N. W. 1073.

39. Golibart *v.* Sullivan, 30 Ind. App. 428, 66 N. E. 188.

40. Anthony *v.* Seed, 146 Ala. 193, 40 So. 577; Indianapolis *v.* Mullally, 38 Ind. App. 125, 77 N. E. 1132; Virginia F. & M. Ins. Co. *v.* Hogue, 105 Va. 355, 54 S. E. 8.

41. Houston, etc., R. Co. *v.* White, 23 Tex. Civ. App. 280, 56 S. W. 204.

42. Oglesby *v.* Missouri Pac. R. Co., 150 Mo. 137, 37 S. W. 829, 51 S. W. 758.

rect,[43] or which merely refers to a dispute in the testimony.[44] Instructions in personal injuries cases in the following form have been held not to be subject to criticism as assuming a material fact: That deceased had the right to cross the track on the line of a street;[45] that if defendant failed to furnish plaintiff with a reasonably safe place in which to work, and plaintiff injured himself "while himself in the exercise of ordinary care," he was entitled to recover;[46] that if at the time of the accident the conductor was looking at deceased and knew that he was in the act of alighting and nevertheless gave the signal to proceed, then he was guilty of wanton negligence;[47] that it was the duty of the railroad company to use ordinary care to prevent injury to plaintiff and defining ordinary care;[48] or submitting the question whether there was reasonable ground for leaving the car after it had moved off the railroad track;[49] or directing the jury to find for defendant if they believe that plaintiff went into a place of danger,[50] or had opportunities of ascertaining the defect equal to those of defendant,[51] or if plaintiff was inexperienced in jumping off moving trains and ignorant of the dangers, and if they believed it was no part of his ordinary duty so to do, then, etc.;[52] to find for plaintiff if the jury believe that he received an injury resulting from negligence in providing a seat without any guards,[53] or if the car was stopped for plaintiff to alight and she was not afforded reasonable time and opportunity to alight with safety, and was injured while exercising ordinary care,[54] or if plaintiff's employer knew or by ordinary means could have known that the manway on which plaintiff was injured was unsafe;[55] or if plaintiff was a passenger, and when the train stopped she proceeded promptly to alight, and while alighting the train gave a violent jerk, whereby she was thrown off the steps and injured, plaintiff was not guilty of contributory negligence;[56] or if plaintiff did not know of and comprehend the danger in operating the machine on which he was working, and the danger was not apparent to a person of his age;[57] or if ties in the plight they were then in rendered the premises unsafe;[58] or if a derailment was caused by reason of the dangerous and defective condition of a wheel;[59] or to find for plaintiff under certain circumstances if the jury believe he was exercising ordinary care for his own safety;[60] or to say "I feel confident that you will not be influenced by the fact that the railroad is a rich corporation;"[61] or that it is not to be presumed that a man in his senses will heedlessly imperil his own life;[62] or that a servant "was not informed — it is for you to say whether he was or not — that he must not work in the place where he was" at the time of the accident,[63] or to state in the language of the statute the duty of a railroad company to ring a bell or blow a whistle on approaching a highway crossing,[64] or that if defendant

43. Missouri, etc., R. Co. *v.* Magee, (Tex. Civ. App. 1899) 49 S. W. 928.
44. Beall *v.* Folmar, 122 Ala. 414, 26 So. 1.
45. Illinois Cent. R. Co. *v.* Ashline, 171 Ill. 313, 49 N. E. 521.
46. Louisville, etc., R. Co. *v.* Carter, (Ky. 1908) 112 S. W. 904.
47. Birmingham R., etc., Co. *v.* Enslen, 144 Ala. 343, 39 So. 74.
48. Galveston, etc., R. Co. *v.* Vollrath, 40 Tex. Civ. App. 46, 89 S. W. 279.
49. Galveston, etc., R. Co. *v.* Vollrath, 40 Tex. Civ. App. 46, 89 S. W. 279.
50. St. Louis, etc., R. Co. *v.* Casseday, 92 Tex. 525, 50 S. W. 125.
51. Portner Brewing Co. *v.* Cooper, 120 Ga. 20, 47 S. E. 631.
52. Galveston, etc., R. Co. *v.* Sanchez, (Tex. Civ. App. 1901) 65 S. W. 893.
53. Fitch *v.* Mason City, etc., Traction Co., 124 Iowa 665, 100 N. W. 618.
54. Savannah Electric Co. *v.* Bennett, 130 Ga. 597, 61 S. E. 529.
55. Hotchkiss Mt. Min., etc., Co. *v.* Bruner, 42 Colo. 305, 94 Pac. 331.
56. International, etc., R. Co. *v.* Tasby, 45 Tex. Civ. App. 416, 100 S. W. 1030.
57. Saller *v.* Friedman Bros. Shoe Co., 130 Mo. App. 712, 109 S. W. 794.
58. Texas, etc., R. Co. *v.* Echols, 17 Tex. Civ. App. 677, 41 S. W. 488.
59. Geary *v.* Kansas City, etc., R. Co., 138 Mo. 251, 39 S. W. 774, 60 Am. St. Rep. 555. Opinion of the court delivered by Brace, J.
60. Missouri, etc., R. Co. *v.* Jones, 35 Tex. Civ. App. 584, 80 S. W. 852.
61. Davis *v.* Atlanta, etc., Air Line R. Co., 63 S. C. 370, 577, 41 S. E. 468, 892.
62. Kirby *v.* Southern R. Co., 63 S. C. 494, 41 S. E. 765.
63. Nugent *v.* Breuchard, 91 Hun (N. Y.) 12, 36 N. Y. Suppl. 102 [*affirmed* in 157 N. Y. 687, 51 N. E. 1092].
64. Perkins *v.* Wabash R. Co., 233 Ill. 458, 84 N. E. 677 [*affirming* 137 Ill. App. 514].

assaulted plaintiff wilfully, the jury might give vindictive damages,[65] or if they find for plaintiff they will assess his damages in such sum as they believe from the evidence will compensate for all pain caused him,[66] or that plaintiff if guilty of contributory negligence in using the car as alleged in the petition could not recover,[67] or that he cannot recover if the jury believe from the evidence that certain things happened "which" caused plaintiff's injuries,[68] or that under certain stated circumstances it was the duty of the motorman to use every reasonable effort to stop the car and if he failed to do so his employer was guilty of negligence,[69] or if they found for plaintiff they would consider injuries inflicted, if any, and bodily and mental anguish endured, if any.[70] In other cases instructions in the following form have been held not to be subject to the criticism that they assume a controverted fact: That if certain facts were found in regard to the condition of a sidewalk, and that the officers of the city had passed the place, then the city would be presumed to have notice of the dangerous condition of the sidewalk; [71] that if a lessor had created an obstruction the lessee was not responsible unless it maintained it after demand to abate it, and if the lessee held it as the person who originally constructed it, without any request to remove it, without any increase in the flow of water it was not responsible; [72] that if a remittance by plaintiff to defendant was not a loan, but to make good an overdrawn account, there could be no recovery therefor; [73] that plaintiffs sued defendant on a verbal contract wherein certain things were agreed on, defendant denying the contract, etc.; [74] that the jury may consider all the facts in evidence surrounding the transaction in regard to the releasing of defendant from the obligation to pay the sum claimed to be released; [75] that proof of liability is made out when certain facts are shown; [76] that if the evidence showed that plaintiff and her husband treated certain paper as their joint property, it would authorize a finding that each had a half interest, and that any interest inconsistent therewith was relinquished to the other; [77] that in the contingency of the maker of a note becoming insolvent, an old note and mortgage may be more valuable than a new note and mortgage; [78] that when unsoundness of mind of a permanent nature has been established, the presumption is that that state of unsoundness exists or continues until the contrary is shown;[79] that plaintiffs having the burden of proof they must establish the allegations of their petition by a preponderance of evidence; [80] that the jury are to determine for themselves what allegations of the complaint have been proven by a preponderance of the evidence and what have not,[81] or that if the jury believe certain recited evidence they should find for plaintiff; [82] or that a decedent had a right to give his wife property, without any writing evidencing the gift, and the same would be valid against her heirs.[83]

65. Bailey *v.* McCance, (Va. 1899) 32 S. E. 43.
66. Gayle *v.* Missouri Car, etc., Co., 177 Mo. 427, 76 S. W. 987.
67. Texas, etc., R. Co. *v.* Kelly, 34 Tex. Civ. App. 21, 80 S. W. 1073.
68. St. Louis Southwestern R. Co. *v.* Parks, (Tex. Civ. App. 1903) 73 S. W. 439.
69. Indianapolis Traction, etc., Co. *v.* Smith, 38 Ind. App. 160, 77 N. E. 1140.
70. Longan *v.* Weltmer, 180 Mo. 322, 79 S. W. 655, 103 Am. St. Rep. 573, 64 L. R. A. 969. And see Citizens' St. R. Co. *v.* Hoffbauer, 23 Ind. App. 614, 56 N. E. 54.
71. Blackwell *v.* Hill, 76 Mo. App. 46.
72. Shores *v.* Southern R. Co., 72 S. C. 244, 51 S. E. 699.
73. Ryder *v.* Jacobs, 196 Pa. St. 386, 46 Atl. 667.
74. Blake *v.* Austin, 33 Tex. Civ. App. 112, 75 S. W. 571.
75. Kemmerer *v.* Kokendifer, 65 Ill. App. 31.
76. Elledge *v.* National City, etc., R. Co., 100 Cal. 282, 34 Pac. 720, 852, 38 Am. St. Rep. 290.
77. Owen *v.* Christensen, 106 Iowa 394, 76 N. W. 1003.
78. Dodge *v.* Emerson, 131 Mass. 467.
79. Wallis *v.* Luhring, 134 Ind. 447, 34 N. E. 231.
80. Fitzgerald *v.* Clark, 17 Mont. 100, 42 Pac. 273, 52 Am. St. Rep. 665, 30 L. R. A. 803.
81. Kreag *v.* Anthus, 2 Ind. App. 482, 28 N. E. 773.
82. Hall *v.* Posey, 79 Ala. 84.
83. Hopper *v.* Hopper, 84 Mo. App. 117.

For other decisions in which the instructions were held not erroneous as assuming facts in issue see Emerson *v.* Lowe Mfg. Co., 159 Ala. 350, 49 So. 69; Kress *v.* Lawrence,

b. Uncontroverted Facts.[84] Where the evidence introduced in support of facts is of a conclusive character and is not controverted by other evidence, the court in instructing the jury may assume that such facts are true.[85] It has been held that

158 Ala. 652, 47 So. 574; Danforth *v.* Tennessee, etc., R. Co., 99 Ala. 331, 13 So. 51; Burke *v.* Sharp, 88 Ark. 433, 115 S. W. 145; St. Louis, etc., R. Co. *v.* Price, 83 Ark. 437, 104 S. W. 157; Brock *v.* Wildey, 132 Ga. 19, 63 S. E. 794; Peterson *v.* Elgin, etc., Traction Co., 238 Ill. 403, 87 N. E. 345 [*affirming* 142 Ill. App. 34]; Graham *v.* Rockford, 238 Ill. 214, 87 N. E. 361 [*affirming* 142 Ill. App. 306]; Mann *v.* Illinois Cent. Traction Co., 236 Ill. 30, 86 N. E. 161; Frank Parmelee Co. *v.* Wheelock, 224 Ill. 194, 79 N. E. 652 [*affirming* 127 Ill. App. 500]; Pittsburg, etc., R. Co. *v.* Bovard, 223 Ill. 176, 79 N. E. 128 [*affirming* 121 Ill. App. 49]; Indianapolis St. R. Co. *v.* Ray, 167 Ind. 236, 78 N. E. 978; Whiteley Malleable Castings Co. *v.* Wishon, 42 Ind. App. 288, 85 N. E. 832; Garrett *v.* Winterich, (Ind. App. 1908) 84 N. E. 1006; Indianapolis St. R. Co. *v.* Fearnaught, 40 Ind. App. 333, 82 N. E. 102; Murphy *v.* Chicago Great Western R. Co., 140 Iowa 332, 118 N. W. 390; Hollerbach, etc., Contract Co. *v.* Wilkins, 130 Ky. 51, 112 S. W. 1126; Cumberland Tel., etc., Co. *v.* Overfield, 127 Ky. 548, 106 S. W. 242, 32 Ky. L. Rep. 421; Carmical *v.* Carmical, 104 S. W. 1037, 32 Ky. L. Rep. 171; Louisville R. Co. *v.* Hofgesand, 104 S. W. 361, 31 Ky. L. Rep. 976; Fidelity, etc., Co. *v.* Southern R. News Co., 101 S. W. 900, 31 Ky. L. Rep. 55, 103 S. W. 297, 31 Ky. L. Rep. 725; Kinlen *v.* Metropolitan St. R. Co., 216 Mo. 145, 115 S. W. 523; Brady *v.* Kansas City, etc., R. Co., 206 Mo. 509, 102 S. W. 978, 105 S. W. 1195; Jaffi *v.* Missouri Pac. R. Co., 205 Mo. 450, 103 S. W. 1026; Carp *v.* Queen Ins. Co., 203 Mo. 295, 101 S. W. 78; Elliott *v.* Kansas City, 198 Mo. 593, 96 S. W. 1023, 6 L. R. A. N. S. 1082; Leine *v.* Kellerman Contracting Co., 134 Mo. App. 557, 114 S. W. 1147; Harrod *v.* Hammond Packing Co., 125 Mo. App. 357, 102 S. W. 637; Carmody *v.* St. Louis Transit Co., 122 Mo. App. 338, 99 S. W. 495; Burke *v.* St. Louis Southwestern R. Co., 120 Mo. App. 683, 97 S. W. 981; Troll *v.* St. Louis United R. Co., 120 Mo. App. 569, 97 S. W. 234; Lehane *v.* Butte Electric R. Co., 37 Mont. 564, 97 Pac. 1038; Crosby *v.* Wells, 73 N. J. L. 790, 67 Atl. 295; Chicago, etc., R. Co. *v.* Stibbs, 17 Okla. 97, 87 Pac. 293; Baker County *v.* Huntington, 48 Oreg. 593, 87 Pac. 1036, 89 Pac. 144; Houston, etc., R. Co. *v.* Shapard, (Tex. Civ. App. 1909) 118 S. W. 596; St. Louis Southwestern R. Co. *v.* Browning, (Tex. Civ. App. 1909) 118 S. W. 245; Ft. Worth, etc., R. Co. *v.* Suter, (Tex. Civ. App. 1909) 118 S. W. 215; St. Louis Southwestern R. Co. *v.* Norvell, (Tex. Civ. App. 1909) 115 S. W. 861; Missouri, etc., R. Co. *v.* Snow, (Tex. Civ. App. 1909) 115 S. W. 631; St. Louis Southwestern R. Co. *v.* Stanley, 52 Tex. Civ. App. 185, 114 S. W. 676; Birkman *v.* Fahrenthold, 52 Tex. Civ. App. 335, 114 S. W. 428; St. Louis Southwestern R. Co. *v.* Cleland, 50 Tex. Civ. App. 499, 110 S. W. 122; Southern Kansas R. Co. *v.* Yarbrough, 49 Tex. Civ. App. 407, 109 S. W. 390; Dallas Consol. Electric St. R. Co. *v.* Lytle, 48 Tex. Civ. App. 107, 106 S. W. 900; Missouri, etc., R. Co. *v.* Carter, 47 Tex. Civ. App. 309, 104 S. W. 910; Cleburne *v.* Elder, 46 Tex. Civ. App. 399, 102 S. W. 464; London *v.* Crow, 46 Tex. Civ. App. 190, 102 S. W. 177; International, etc., R. Co. *v.* Tasby, 45 Tex. Civ. App. 416, 100 S. W. 1030; El Paso Electric R. Co. *v.* Furber, 45 Tex. Civ. App. 348, 100 S. W. 1041; Texas Mexican R. Co. *v.* Lewis, (Tex. Civ. App. 1906) 99 S. W. 577; Galveston, etc., R. Co. *v.* Fink, 44 Tex. Civ. App. 544, 99 S. W. 204; International, etc., R. Co. *v.* Hays, 44 Tex. Civ. App. 462, 98 S. W. 911; Ward *v.* Preferred Acc. Ins. Co., 80 Vt. 321, 67 Atl. 821; McCrorey *v.* Thomas, 109 Va. 373, 63 S. E. 1011; Blue Ridge Light, etc., Co. *v.* Price, 108 Va. 652, 62 S. E. 938; Thomas *v.* Fos, 51 Wash. 250, 98 Pac. 663; Redepenning *v.* Rock, 136 Wis. 372, 117 N. W. 805; Banderob *v.* Wisconsin Cent. R. Co., 133 Wis. 249, 113 N. W. 738; Hoagland *v.* Canfield, 160 Fed. 146.

84. In criminal cases see CRIMINAL LAW, 12 Cyc. 601.

85. *Alabama.*— Ham *v.* State, 156 Ala. 645, 47 So. 126; Birmingham R., etc., Co. *v.* Jones, 146 Ala. 277, 41 So. 146; Birmingham R., etc., Co. *v.* Rutledge, 142 Ala. 195, 39 So. 338; Woods *v.* Moten, 129 Ala. 228, 30 So. 324; Edmondson *v.* Anniston City Land Co., 128 Ala. 589, 29 So. 596; Baird Lumber Co. *v.* Devlin, 124 Ala. 245, 27 So. 425; Drennen *v.* Smith, 115 Ala. 396, 22 So. 442; Richmond, etc., R. Co. *v.* Trousdale, 99 Ala. 389, 13 So. 23, 42 Am. St. Rep. 69; Carter *v.* Chambers, 79 Ala. 223; South, etc., R. Co. *v.* McLendon, 63 Ala. 266; Nelms *v.* Williams, 18 Ala. 650; Williams *v.* Shackelford, 16 Ala. 318; Gillespie *v.* Battle, 15 Ala. 276; Henderson *v.* Mabry, 13 Ala. 713.

Arkansas.— McGee *v.* Smitherman, 69 Ark. 632, 65 S. W. 461; Pacific Mut. L. Ins. Co. *v.* Walker, 67 Ark. 147, 53 S. W. 675.

California.— *In re* Spencer, 96 Cal. 448, 31 Pac. 453; Low *v.* Warden, 77 Cal. 94, 19 Pac. 235.

Colorado.— Craig *v.* A. Leschen, etc., Rope Co., 38 Colo. 115, 87 Pac. 1143; Weil *v.* Nevitt, 18 Colo. 10, 31 Pac. 487.

Delaware.— Truxton *v.* Fait, etc., Co., 1 Pennew. 483, 42 Atl. 431, 73 Am. St. Rep. 81.

Georgia.— Greer *v.* Raney, 120 Ga. 290, 47 S. E. 939; Clarke *v.* Havard, 115 Ga. 882, 42 S. E. 264; Smith *v.* Ross, 108 Ga. 198, 33 S. E. 953; Marshall *v.* Morris, 16 Ga. 368; Georgia Southern, etc., R. Co. *v.* Stanley, 1 Ga. App. 487, 57 S. E. 1042.

Illinois.— Shults *v.* Shults, 229 Ill. 420, 82 N. E. 312; Normal *v.* Bright, 223 Ill. 99, 79 N. E. 90 [*affirming* 125 Ill. App. 478]; Compher *v.* Browning, 219 Ill. 429, 76 N. E. 678, 109 Am. St. Rep. 346; Chicago Union Traction Co. *v.* Newmiller, 215 Ill. 383, 74 N. E.

this principle is especially applicable where the evidence introduced is docu-

410 [*affirming* 116 Ill. App. 625]; Chicago City R. Co. *v.* Carroll, 206 Ill. 318, 68 N. E. 1087 [*affirming* 102 Ill. App. 202]; Chicago Screw Co. *v.* Weiss, 203 Ill. 536, 68 N. E. 54 [*affirming* 107 Ill. App. 39]; Chicago, etc., R. Co. *v.* McDonnell, 194 Ill. 82, 62 N. E. 308; Graves *v.* Shoefelt, 60 Ill. 462; Sharp *v.* Parks, 48 Ill. 511, 95 Am. Dec. 565; Cahill *v.* Dellenback, 139 Ill. App. 320; Reed *v.* Manierre, 124 Ill. App. 127; Illinois Cent. R. Co. *v.* Becker, 119 Ill. App. 221; Chicago, etc., R. Co. *v.* Tracey, 109 Ill. App. 563; Brimmer *v.* Illinois Cent. R. Co., 101 Ill. App. 198.

Indiana.— Tomlinson *v.* Briles, 101 Ind. 538, 1 N. E. 63; Pittsburgh, etc., R. Co. *v.* Rogers, (App. 1909) 87 N. E. 28; Sellersburg *v.* Ford, 39 Ind. App. 94, 79 N. E. 220; Indianapolis Traction, etc., Co. *v.* Smith, 38 Ind. App. 160, 77 N. E. 1140; Terre Haute Electric Co. *v.* Kieley, 35 Ind. App. 180, 72 N. E. 658; Hunt *v.* Conner, 26 Ind. App. 41, 59 N. E. 50.

Iowa.— Murphy *v.* Hiltibridle, 132 Iowa 114, 109 N. W. 471; Frank *v.* Davenport, 105 Iowa 588, 75 N. W. 480; Fleming *v.* Stearns, 79 Iowa 256, 44 N. W. 376.

Kentucky.— Henning *v.* Stevenson, 118 Ky. 318, 80 S. W. 1135, 26 Ky. L. Rep. 159; Frankfort *v.* Downey, (1909) 118 S. W. 284; Louisville, etc., R. Co. *v.* Crow, 107 S. W. 807, 32 Wkly. L. Rep. 1145; Cowles *v.* Carrier, 101 S. W. 916, 31 Ky. L. Rep. 229; Anderson *v.* Baird, 40 S. W. 923, 19 Ky. L. Rep. 444.

Maine.— Harvey *v.* Dodge, 73 Me. 316.

Maryland.— Lewis *v.* Kramer, 3 Md. 265.

Massachusetts.— McGuire *v.* Lawrence Mfg. Co., 156 Mass. 324, 31 N. E. 3.

Michigan.— Thomson *v.* Flint, etc., R. Co., 131 Mich. 95, 90 N. W. 1037; Burt *v.* Long, 106 Mich. 210, 64 N. W. 60; Welch *v.* Olmstead, 90 Mich. 492, 51 N. W. 541.

Minnesota.— Johnson *v.* Crookston Lumber Co., 92 Minn. 393, 100 N. W. 225; Lemon *v.* De Wolf, 89 Minn. 465, 95 N. W. 316; Alden *v.* Minneapolis, 24 Minn. 254.

Mississippi.— Hearn *v.* McCaughan, 32 Miss. 17, 66 Am. Dec. 588.

Missouri.— Phelps *v.* Conqueror Zinc Co., 218 Mo. 572, 117 S. W. 705; Orcutt *v.* Century Bldg. Co., 214 Mo. 35, 112 S. W. 532; Dee *v.* Nachbar, 207 Mo. 680, 106 S. W. 35; Cahill *v.* Chicago, etc., R. Co., 205 Mo. 393, 103 S. W. 532; Sotebier *v.* St. Louis Transit Co., 203 Mo. 702, 102 S. W. 651; Deschner *v.* St. Louis, etc., R. Co., 200 Mo. 310, 98 S. W. 737; Parks *v.* St. Louis, etc., R. Co., 178 Mo. 108, 77 S. W. 70, 101 Am. St. Rep. 425; Gayle *v.* Missouri Car, etc., Co., 177 Mo. 427, 76 S. W. 987; Beauvais *v.* St. Louis, 169 Mo. 500, 69 S. W. 1043; Schmidt *v.* St. Louis R. Co., 163 Mo. 645, 63 S. W. 834; Bertram *v.* People's R. Co., 154 Mo. 639, 55 S. W. 1040; McMahon *v.* Welsh, 132 Mo. App. 593, 112 S. W. 43; Roberts *v.* Chicago, etc., R. Co., 119 Mo. App. 372, 94 S. W. 838; McManus *v.* Metropolitan St. R. Co., 116 Mo. App. 110, 92 S. W. 176; Mitchell *v.* St. Louis, etc., R. Co., 116 Mo. App. 81, 92 S. W. 111; Stanley *v.* Chicago, etc., R. Co., 112 Mo. App. 601, 87 S. W. 112; Farmers' Bank *v.* Fudge, 109 Mo. App. 186, 82 S. W. 1112; Sheridan *v.* Forsee, 106 Mo. App. 495, 81 S. W. 494; McLean *v.* Kansas City, 100 Mo. App. 625, 75 S. W. 173; Kingsbury *v.* Joseph, 94 Mo. App. 298, 68 S. W. 93; Breckenridge *v.* White, 93 Mo. App. 681, 67 S. W. 715; Colyer *v.* Missouri Pac. R. Co., 93 Mo. App. 147; Nolan *v.* Bedford, 89 Mo. App. 172; Tyler *v.* Tyler, 78 Mo. App. 240.

Montana.— Hogan *v.* Shuart, 11 Mont. 498, 28 Pac. 969.

Nebraska.— Oelke *v.* Theis, 70 Nebr. 465, 97 N. W. 588; Dodd *v.* Skelton, 65 Nebr. 585, 91 N. W. 543; McDonald *v.* Tootle-Weakley Millinery Co., 64 Nebr. 577, 90 N. W. 547; Callaway Bank *v.* Henry, 3 Nebr. (Unoff.) 629, 92 N. W. 631; Thayer County Bank *v.* Huddleson, 1 Nebr. (Unoff.) 261, 95 N. W. 471.

New York.— Smith *v.* New York Anti-Saloon League, 121 N. Y. App. Div. 600, 106 N. Y. Suppl. 251; Crossman *v.* Lurman, 57 N. Y. App. Div. 393, 68 N. Y. Suppl. 311 [*affirmed* in 171 N. Y. 329, 63 N. E. 1097, 98 Am. St. Rep. 599 (*affirmed* in 192 U. S. 189, 24 S. Ct. 234, 48 L. ed. 401)].

Oklahoma.— Choctaw, etc., R. Co. *v.* Burgess, 21 Okla. 653, 97 Pac. 271.

Pennsylvania.— Devlin *v.* Snellenburg, 132 Pa. St. 186, 18 Atl. 1119; Haines *v.* Stauffer, 13 Pa. St. 541, 53 Am. Dec. 493; Lancaster *v.* Kissinger, 1 Pennyp. 250; Wolf Co. *v.* Western Union Tel. Co., 24 Pa. Super. Ct. 129.

South Carolina.— Black *v.* Atlantic Coast Line R. Co., 82 S. C. 478, 64 S. E. 418; Anderson *v.* South Carolina, etc., R. Co., 81 S. C. 1, 61 S. E. 1096; Murdouch *v.* Tuten, 76 S. C. 502, 57 S. E. 547; Jennings *v.* Edgefield Mfg. Co., 72 S. C. 411, 52 S. E. 113; Turner *v.* Lyles, 68 S. C. 392, 48 S. E. 301; Riser *v.* Southern R. Co., 67 S. C. 419, 46 S. E. 47; Westbury *v.* Simmons, 57 S. C. 467, 35 S. E. 764; McGee *v.* Wells, 37 S. C. 365, 16 S. E. 29.

South Dakota.— Bohl *v.* Dell Rapids, 15 S. D. 619, 91 N. W. 315; Wright *v.* Lee, 10 S. D. 263, 72 N. W. 895.

Tennessee.— Farquhar *v.* Toney, 5 Humphr. 502.

Texas.— McFadden *v.* Schill, 84 Tex. 77, 19 S. W. 368; East Line, etc., R. Co. *v.* Smith, 65 Tex. 167; Hedgepeth *v.* Robertson, 18 Tex. 858; Suderman-Dolson Co. *v.* Hope, (Civ. App. 1909) 118 S. W. 216; Missouri, etc., R. Co. *v.* Rogers, (Civ. App. 1909) 117 S. W. 939; Nagle *v.* Simmank, (Civ. App. 1909) 116 S. W. 862; San Antonio Light Pub. Co. *v.* Lewy, 52 Tex. Civ. App. 22, 113 S. W. 574; Alexander *v.* Brillhart, 51 Tex. Civ. App. 422, 113 S. W. 184; El Paso, etc., R. Co. *v.* Smith, 50 Tex. Civ. App. 10, 108 S. W. 988; Ft. Worth, etc., R. Co. *v.* Hawes, 48 Tex. Civ. App. 487, 107 S. W. 556; Heisig Rice Co. *v.* Fairbanks, 45 Tex. Civ. App. 383, 100 S. W. 959; Texas, etc., R. Co. *v.* Moers, (Civ. App. 1906) 97 S. W. 1064; Northern

mentary,[86] or record, evidence.[87] The court may assume the existence of a fact where only one finding as to such fact would be justified under the evidence,[88] or where under the evidence there is no ground for a difference of opinion as to the existence of the fact,[89] or reasonable men could draw but one conclusion therefrom,[90] or where the evidence is such as to warrant a peremptory instruction.[91] Instructions of this character are not open to the objection of charging in respect of matters of fact [92] or in violation of a statute forbidding a judge to express or intimate his opinion as to what has or has not been proved.[93] However, the court can treat a fact as undisputed only when it is not only unopposed by direct evidence but is not in conflict with proper inferences from other facts in evidence.[94] Nor does it follow that because testimony as to certain facts is uncontradicted it must necessarily be believed, or that the court is authorized to assume the existence of such facts in instructing the jury.[95] The very matter stated by the witness may be too improbable to be believed by an intelligent person, and its mere statement its own refutation, without a word of impeaching or contradictory

Texas Traction Co. *v.* Thompson, 42 Tex. Civ. App. 613, 95 S. W. 708; Pacific Express Co. *v.* Walters, 42 Tex. Civ. App. 355, 93 S. W. 496; Galveston, etc., R. Co. *v.* King, 41 Tex. Civ. App. 433, 91 S. W. 622; San Antonio, etc., R. Co. *v.* Wood, 41 Tex. Civ. App. 226, 92 S. W. 259; De Castillo *v.* Galveston, etc., R. Co., 41 Tex. Civ. App. 108, 95 S. W. 547; Louisiana, etc., Lumber Co. *v.* Meyers, (Civ. App. 1906) 94 S. W. 140; Western Union Tel. Co. *v.* Simmons, (Civ. App. 1906) 93 S. W. 686; Galveston, etc., R. Co. *v.* Roberts, (Civ. App. 1905) 91 S. W. 375; St. Louis, etc., R. Co. *v.* Bussong, 40 Tex. Civ. App. 476, 90 S. W. 73; Houston, etc., R. Co. *v.* Bath, 40 Tex. Civ. App. 270, 90 S. W. 55; Northern Texas Traction Co. *v.* Yates, 39 Tex. Civ. App. 114, 88 S. W. 283; El Paso, etc., R. Co. *v.* McComus, 36 Tex. Civ. App. 170, 81 S. W. 760; Lynch *v.* Burns, (Civ. App. 1904) 79 S. W. 1084; Valentine *v.* Sweatt, 34 Tex. Civ. App. 135, 78 S. W. 385; Cudahy Packing Co. *v.* Dorsey, 33 Tex. Civ. App. 565, 78 S. W. 20; Missouri, etc., R. Co. *v.* Owens, (Civ. App. 1903) 75 S. W. 579; Word *v.* Kennen, (Civ. App. 1903) 75 S. W. 334; International, etc., R. Co. *v.* Locke, (Civ. App. 1902) 67 S. W. 1082; McLane *v.* Maurer, 28 Tex. Civ. App. 75, 66 S. W. 693, 1108; San Antonio, etc., R. Co. *v.* Ilse, (Civ. App. 1900) 59 S. W. 564; Halsell *v.* Neal, 23 Tex. Civ. App. 26, 56 S. W. 137; San Antonio, etc., R. Co. *v.* Grier, 20 Tex. Civ. App. 138, 49 S. W. 148; San Antonio, etc., R. Co. *v.* Wright, 20 Tex. Civ. App. 136, 49 S. W. 147; San Antonio, etc., R. Co. *v.* Griffin, 20 Tex. Civ. App. 91, 48 S. W. 542; Missouri, etc., R. Co. *v.* Warner, 19 Tex. Civ. App. 463, 49 S. W. 254; Hirsch *v.* Jones, (Civ. App. 1897) 42 S. W. 604; Terrell *v.* Russell, 16 Tex. Civ. App. 573, 42 S. W. 129; Missouri, etc., R. Co. *v.* Rogers, (Civ. App. 1897) 40 S. W. 849; Reynolds *v.* Weinman, (Civ. App. 1897) 40 S. W. 560; Texas, etc., R. Co. *v.* Crow, (Civ. App. 1897) 40 S. W. 510; Houston, etc., R. Co. *v.* Berling, 14 Tex. Civ. App. 544, 37 S. W. 1083; Mexia *v.* Lewis, 12 Tex. Civ. App. 102, 34 S. W. 158.

Utah.— Black *v.* Rocky Mountain Bell Tel. Co., 26 Utah, 451, 73 Pac. 514.

Washington.— Lownsdale *v.* Grays Harbor Boom Co., 36 Wash. 198, 78 Pac. 904; Darrow Inv. Co. *v.* Breyman, 32 Wash. 234, 73 Pac. 363.

West Virginia.— Sheff *v.* Huntington, 16 W. Va. 307.

Wisconsin.— Little *v.* Iron River, 102 Wis. 250, 78 N. W. 416; Salladay *v.* Dodgeville, 85 Wis. 318, 55 N. W. 696, 20 L. R. A. 541; Wall *v.* Highland, 72 Wis. 435, 39 N. W. 560; Harriman *v.* Queen Ins. Co., 49 Wis. 71, 5 N. W. 12.

United States.— Texas, etc., R. Co. *v.* Gentry, 163 U. S. 353, 16 S. Ct. 1104, 41 L. ed. 186.

See 46 Cent. Dig. tit. "Trial," §§ 432, 433, 434, 445.

86. Turner *v.* Osgood Art Colortype Co., 223 Ill. 629, 79 N. E. 306; Thorp *v.* Craig, 10 Iowa 461; Potter *v.* Wooster, 10 Iowa 334; Shaffer *v.* Corson, 141 Pa. St. 256, 21 Atl. 647.

87. Ragan *v.* Kansas City, etc., R. Co., 144 Mo. 623, 46 S. W. 602.

88. David City First Nat. Bank *v.* Sargeant, 65 Nebr. 594, 91 N. W. 595, 59 L. R. A. 296; Ord First Nat. Bank *v.* Bower, 5 Nebr. (Unoff.) 375, 98 N. W. 834.

89. St. Louis, etc., R. Co. *v.* Smith, 216 Ill. 339, 74 N. E. 1063; Davis *v.* Collins, 69 S. C. 460, 48 S. E. 469; Shafer *v.* Russell, 28 Utah 444, 79 Pac. 559.

90. Toole *v.* Bearce, 91 Me. 209, 39 Atl. 558; St. Louis Southwestern R. Co. *v.* Hignote, 99 Tex. 23, 86 S. W. 923 [*reversing* (Civ. App. 1904) 84 S. W. 365]; Dallas *v.* Muncton, 37 Tex. Civ. App. 112, 83 S. W. 431; Phelps *v.* Miller, (Tex. Civ. App. 1904) 83 S. W. 218; Holverson *v.* Seattle Electric Co., 35 Wash. 600, 77 Pac. 1058; Northwestern Fuel Co. *v.* Danielson, 57 Fed. 915, 6 C. C. A. 636.

91. Thompson *v.* Brannin, 40 S. W. 914, 19 Ky. L. Rep. 454.

92. McCarty *v.* Piedmont Mut. Ins. Co., 81 S. C. 152, 62 S. E. 1, 18 L. R. A. N. S. 729.

93. Georgia R., etc., Co. *v.* Cole, 1 Ga. App. 33, 57 S. E. 1026.

94. Schulz *v.* Schulz, 113 Mich. 502, 71 N. W. 854.

95. American Oak Extract Co. *v.* Ryan, 112 Ala. 337, 20 So. 644; Callison *v.* Smith,

testimony.[96] Where there are other circumstances shown by the evidence which have a bearing upon the weight and credit to be given to uncontradicted testimony the question as to whether the fact is proved is for the jury.[97] The court cannot assume as proven matters supported only by the uncontradicted testimony of a party or other interested witness.[98] And where the uncontradicted testimony is opinion evidence, the court has no right to assume as proved the matters to which it relates.[99]

c. Admitted Facts.[1] In giving instructions the court may properly assume the existence of facts which are admitted by the pleadings[2] on the trial of the case,[3] or which are in effect admitted[4] or treated by both parties on the trial as existing.[5] Such instructions are not objectionable as being a charge on the facts.[6]

20 Kan. 28; Boyd *v.* McCann, 10 Md. 118; Charleston Ins., etc., Co. *v.* Corner, 2 Gill (Md.) 410; Ragan *v.* Gaither, 11 Gill & J. (Md.) 472; Choctaw, etc., R. Co. *v.* Deperade, 12 Okla. 367, 71 Pac. 629.

96. Choctaw, etc., R. Co. *v.* Deperade, 12 Okla. 367, 71 Pac. 629.

97. Saar *v.* Fuller, 71 Iowa 425, 32 N. W. 405.

98. American Oak Extract Co. *v.* Ryan, 112 Ala. 337, 20 So. 644; Merchants' Exch. Nat. Bank *v.* Wallach, 20 Misc. (N. Y.) 309, 45 N. Y. Suppl. 885 [*affirming* 19 Misc. 711, 43 N. Y. Suppl. 1159]; Choctaw, etc., R. Co. *v.* Deperade, 12 Okla. 367, 71 Pac. 629; Byers *v.* Wallace, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760; Turner *v.* Grobe, 24 Tex. Civ. App. 554, 59 S. W. 583. And see Sonnentheil *v.* Christian Moerlein Brewing Co., 172 U. S. 401, 19 S. Ct. 233, 43 L. ed. 492.

99. Choctaw, etc., R. Co. *v.* Deperade, 12 Okla. 367, 71 Pac. 629.

1. **In criminal cases** see CRIMINAL LAW, 12 Cyc. 601.

2. *Arkansas.*— Driver *v.* St. Francis Levee Dist. Directors, 70 Ark. 358, 68 S. W. 26.

Indiana.— Indianapolis, etc., R. Co. *v.* Stout, 53 Ind. 143.

Iowa.— Ryan *v.* Lone Tree, 122 Iowa 420, 98 N. W. 287; McIntosh *v.* Coulthard, (1902) 88 N. W. 1069; McKenna *v.* Hoy, 76 Iowa 322, 41 N. W. 29.

Kansas.— Wiley *v.* Man-a-to-wah, 6 Kan. 111; Wiley *v.* Keokuk, 6 Kan. 94.

Missouri.— Markey *v.* Louisiana, etc., R. Co., 185 Mo. 348, 84 S. W. 61; Barton *v.* Odessa, 109 Mo. App. 76, 82 S. W. 1119.

South Carolina.— Latour *v.* Southern R. Co., 71 S. C. 532, 51 S. E. 265; Bussey *v.* Charleston, etc., R. Co., 52 S. C. 438, 30 S. E. 477.

Texas.— Missouri, etc., R. Co. *v.* Allen, (Civ. App. 1909) 115 S. W. 1179; Trabue *v.* Wade, (Civ. App. 1906) 95 S. W. 616; Gulf, etc., R. Co. *v.* Wilbanks, 7 Tex. Civ. App. 489, 27 S. W. 302.

Wisconsin.— Bulger *v.* Woods, 3 Pinn. 460.

3. *Alabama.*— Madden *v.* Blythe, 7 Port. 258.

District of Columbia.— Bragg *v.* Bletz, 7 D. C. 105.

Georgia.— Eagle, etc., Mills *v.* Herron, 119 Ga. 389, 46 S. E. 405; Central of Georgia R. Co. *v.* Johnston, 106 Ga. 130, 32 S. E. 78; Lee *v.* O'Quin, 103 Ga. 355, 30 S. E. 356; McCurdy *v.* Binion, 80 Ga. 691, 6 S. E. 275; Weekes *v.* Cottingham, 58 Ga. 559; De Saulles *v.* Leake, 56 Ga. 365; Walker *v.* Wooten, 18 Ga. 119; Cooley *v.* Bergstrom, 3 Ga. App. 496, 60 S. E. 220.

Illinois.— Shults *v.* Shults, 229 Ill. 420, 82 N. E. 312.

Indiana.— Louisville, etc., Consol. R. Co. *v.* Utz, 133 Ind. 265, 32 N. E. 881.

Maine.— McLellan *v.* Wheeler, 70 Me. 285.

Maryland.— Penniman *v.* Winner, 54 Md. 127; Waters *v.* Riggin, 19 Md. 536.

Michigan.— Burt *v.* Long, 106 Mich. 210, 64 N. W. 60.

Missouri.— Flaherty *v.* St. Louis Transit Co., 207 Mo. 318, 106 S. W. 15; Christianson *v.* McDermott, 123 Mo. App. 448, 100 S. W. 63; Brown *v.* Emerson, 66 Mo. App. 63.

New York.— McManus *v.* Woolverton, 19 N. Y. Suppl. 545 [*affirmed* in 138 N. Y. 648, 34 N. E. 513].

South Carolina.— Wylie *v.* Commercial, etc., Bank, 63 S. C. 406, 41 S. E. 504.

Texas.— Brown *v.* Johnson, (Civ. App. 1903) 73 S. W. 49; Texas, etc., R. Co. *v.* Moore, 8 Tex. Civ. App. 289, 27 S. W. 962.

Utah.— Cooper *v.* Denver, etc., R. Co., 11 Utah 46, 39 Pac. 478.

4. Citizens' Ins. Co. *v.* Stoddard, 99 Ill. App. 469 [*affirmed* in 197 Ill. 330, 64 N. E. 355].

5. *Illinois.*— North Chicago St. R. Co. *v.* Rodert, 203 Ill. 413, 67 N. E. 812 [*affirming* 105 Ill. App. 314]; Chicago *v.* Moore, 139 Ill. 201, 28 N. E. 1071.

Kentucky.— Chesapeake, etc., R. Co. *v.* Moats, 50 S. W. 31, 20 Ky. L. Rep. 1757.

Maine.— Brackett *v.* Brewer, 71 Me. 478.

Missouri.— Davidson *v.* St. Louis Transit Co., 211 Mo. 320, 109 S. W. 583; Taylor *v.* Scherpe, etc., Architectural Iron Co., 133 Mo. 349, 34 S. W. 581; Dickson *v.* Missouri Pac. R. Co., 104 Mo. 491, 16 S. W. 381; Knight *v.* Kansas City, 113 Mo. App. 561, 87 S. W. 1192.

New York.— Kaufman *v.* Schoeffel, 46 Hun 571 [*affirmed* in 113 N. Y. 635, 20 N. E. 878].

North Carolina.— Crampton *v.* Ivie, 124 N. C. 591, 32 S. E. 968.

Texas.— A. J. Anderson Electric Co. *v.* Cleburne Water, etc., Co., 23 Tex. Civ. App. 328, 57 S. W. 575.

6. Pickett *v.* Fidelity, etc., Co., 60 S. C. 477, 38 S. E. 160, 629; Moore *v.* Columbia, etc., R. Co., 38 S. C. 1, 16 S. E. 781.

Where facts have been admitted either by the pleading,[7] or by the parties on the trial of the case,[8] the court should assume their existence. A requested instruction which assumes that the existence of such facts is an open question is properly refused,[9] and the giving of such instruction is erroneous.[10]

d. Facts as to Which There Is no Evidence.[11] An instruction which assumes the existence of certain facts, or of evidence tending to prove them, when in fact there is no such evidence, is erroneous and should not be given.[12]

e Facts Shown Not to Exist. An instruction which assumes the existence of facts which the evidence shows do not exist,[13] or which the evidence strongly tends to show do not exist,[14] are erroneous, and the refusal thereof proper.[15]

f. Matters of Common Knowledge. That the court in instructing the jury recognizes and states matters of common knowledge is not available error.[16]

g. Facts Assumed For Purpose of Illustration. Illustrations which are apt and clearly made and are not so extended as to withdraw the attention of the jury from the issue to be determined are not generally erroneous, but may sometimes be beneficial.[17] It is not error for a trial court, in its instructions to a jury, to state so much of the admitted facts as may be necessary to illustrate and apply the law to the case on trial.[18] The assumption of a state of facts not in evidence, merely by way of illustrating and explaining some proposition of law applicable to the case under consideration, and not as having been proved, is not erroneous,[19]

7. Orth *v.* Clutz, 18 B. Mon. (Ky.) 223.

8 Blaul *v.* Tharp, 83 Iowa 665, 49 N. W. 1044.

9. Russell *v.* Gregg, 49 Kan. 89, 30 Pac. 185; Stewart *v.* Nelson, 79 Mo. 522; Alms *v.* Conway, 78 Mo. App. 490; Miles *v.* Walker, 66 Nebr. 728, 92 N. W. 1014. And see Chicago, etc., R. Co. *v.* Morton, 55 Ill. App. 144.

10. *Iowa.*— Blaul *v.* Tharp, 83 Iowa 665, 49 N. W. 1044.

Kentucky.— Orth *v.* Clutz, 18 B. Mon. 223.

Mississippi.— Southern R. Co. *v.* Vaughn, 86 Miss. 367, 38 So. 500.

Nebraska.— Dayton *v.* Lincoln, 39 Nebr. 74, 57 N. W. 754.

North Carolina.— Lehman *v.* Tise, 124 N. C. 443, 32 S. E. 730.

Texas.— Houston, etc., R. Co. *v.* Harvin, (Civ. App. 1899) 54 S. W. 629; Texas Land, etc., Co. *v.* Watson, 3 Tex. Civ. App. 233, 22 S. W. 873.

Limitation of rule.— The submission incidentally of a fact admitted by the pleadings is not prejudicially erroneous where the instructions taken as a whole do not place the existence of that fact before the jury as a controverted issue, and where upon a review of the instructions and evidence it appears that the jury could not have been misled. Violet *v.* Rose, 39 Nebr. 660, 58 N. W. 216 [*distinguishing* Dayton *v.* Lincoln, 39 Nebr. 74, 57 N. W. 754].

11. **In criminal cases** see CRIMINAL LAW, 12 Cyc. 601, 602.

12. *Alabama.*— Elba *v.* Bullard, 152 Ala. 237, 44 So. 412.

Illinois.— Chicago, etc., R. Co. *v.* Harwood, 90 Ill. 425; Illinois Cent. R. Co. *v.* Cragin, 71 Ill. 177; Freeman *v.* Lanark Exch. Bank, 59 Ill. App. 197.

Iowa.— Arnd *v.* Aylesworth, 136 Iowa 297, 111 N. W. 407.

Kentucky.—Baltimore, etc., R. Co. *v.* Sheridan, 101 S. W. 928, 31 Ky. L. Rep. 109.

New York.— Panama R. Co. *v.* Charlier, 4 Silv. Sup. 439, 7 N. Y. Suppl. 528.

North Carolina.— Horton *v.* Seaboard Air Line R. Co., 145 N. C. 132, 58 S. E. 993.

Texas.—Seal *v.* Holcomb, 48 Tex. Civ. App. 330, 107 S. W. 916; Blackwell *v.* Speer, (Civ. App. 1906) 98 S. W. 903.

Vermont.—Redding *v.* Redding, 69 Vt. 500, 38 Atl. 230.

13. Leslie *v.* Smith, 32 Mich 64; Bowman *v.* Roberts, 58 Miss 126; Wise *v.* Wabash R. Co., 135 Mo. App. 230, 115 S. W. 452; Texas Land, etc., Co. *v.* Watson, 3 Tex. Civ. App. 233, 22 S. W 873.

14. Powell *v.* Hannibal, etc., R. Co., 35 Mo. 457.

15. San Antonio, etc., R. Co. *v.* Manning, 20 Tex. Civ. App. 504, 50 S. W. 177.

16. Harris *v.* Shebek, 151 Ill. 287, 37 N. E. 1015; Joliet *v.* Shufeldt, 144 Ill. 403, 32 N. E. 969, 36 Am. St. Rep. 453, 18 L. R. A. 750 [*affirming* 42 Ill. App. 208]; McLellan *v.* Wheeler, 70 Me. 285; Lewis *v.* Bell, 109 Mich. 189, 66 N. W. 1091. And see Spiking *v.* Consolidated R., etc., Co., 33 Utah 313, 93 Pac. 838.

17. Neel *v.* Powell, 130 Ga. 756, 61 S. E. 729.

18. Williams *v.* Alaska Commercial Co., 2 Alaska 43.

19. *Connecticut.*— Masters *v.* Warren, 27 Conn. 293.

Georgia.— Central R., etc., Co. *v.* Smith, 80 Ga. 526, 5 S. E. 772.

Indiana.— Bundy *v.* McKnight, 48 Ind. 502.

Massachusetts.—Whitney *v.* Wellesley, etc., R. Co., 197 Mass. 495, 84 N. E. 95; Melledge *v.* Boston Iron Co., 5 Cush. 158, 51 Am. Dec. 59.

Ohio.— Gage *v.* Payne, Wright 678.

especially where the jury are explicitly informed that the facts are stated merely by way of illustration.[20] This is a matter of common practice, and no intelligent juror can be misled by such illustrations.[21] On the other hand illustrations which are inapt or irrelevant or are so made as to confuse or mislead the jury are to be avoided.[22]

h. Assumption of Non-Existence of Facts. The court may in its charge assume that there was no evidence to establish a certain fact when such is the case.[23] But where there is evidence tending to show certain facts an instruction which assumes their non-existence is erroneous,[24] and this is so, although the evidence be slight.[25] Nor should the court assume that a fact is doubtful where there is no conflict in the testimony and no room to hesitate or doubt as to the existence of such fact.[26]

i. When Improper Assumption Harmless. An improper assumption of fact in an instruction will not operate to reverse where it is apparent that the party complaining was not injured thereby,[27] as where the verdict is manifestly just,[28] or where the instruction assumes the existence of a fact favorable to the case of the party complaining,[29] or which appears to have been established by his evidence.[30]

8. Instructions as to Inferences From Evidence. As shown in another chapter, the inferences to be drawn from the facts in evidence are for the jury.[31] An instruction which denies the right is properly refused,[32] and if given is erroneous.[33]

20. Beecher *v.* Venn, 35 Mich. 466.

21. Masters *v.* Warren, 27 Conn. 293.

22. Neel *v.* Powell, 130 Ga. 756, 61 S. E. 729.

23. Sharp *v.* Parks, 48 Ill. 511, 95 Am. Dec. 565. And see Redman *v.* Roberts, 23 N. C. 479; Horan *v.* Long, 11 Tex. 230.

24. *Illinois.*— Niagara F. Ins. Co. *v.* Bishop, 154 Ill. 9, 39 N. E. 1102, 45 Am. St. Rep. 105; Chicago, etc., R. Co. *v.* Beach, 29 Ill. App. 157.

Michigan.—Wilson *v.* Crosby, 109 Mich. 449, 67 N. W. 693; Koehler *v.* Buhl, 94 Mich. 496, 54 N. W. 157.

Minnesota.— Simpson *v.* Krumdick, 28 Minn. 352, 10 N. W. 18.

Nebraska.— Mutual Hail Ins. Co. *v.* Wilde, 8 Nebr. 427, 1 N. W. 384.

North Carolina.— Powell *v.* Wilmington, etc., R. Co., 68 N. C. 395.

Texas.—Wintz *v.* Morrison, 17 Tex. 372, 67 Am. Dec. 658.

Wisconsin.— Tulmer *v.* Wightman, 87 Wis. 573, 58 N. W. 1106.

See 46 Cent. Dig. tit. "Trial," § 436.

Illustration.— In an action by an employee for injuries caused by a machine, a charge which assumes that plaintiff did not know the machine was dangerous is erroneous where plaintiff had seen the machine in operation for six months. Avery *v.* Meek, 96 Ky. 192, 28 S. W. 337, 16 Ky. L. Rep. 384.

25. Bently *v.* Standard F. Ins. Co., 40 W. Va. 729, 23 S. E. 584.

26. Hauk *v.* Brownell, 120 Ill. 161, 11 N. E. 416; Wintz *v.* Morrison, 17 Tex. 372, 67 Am. Dec. 658.

27. *Illinois.*—Illinois Cent. R. Co. *v.* King, 179 Ill. 91, 53 N. E. 552, 70 Am. St. Rep. 93; Lanark *v.* Dougherty, 45 Ill. App. 266.

Indiana.—Van Camp Hardware, etc., Co. *v.* O'Brien, 28 Ind. App. 152, 62 N. E. 464; Hindman *v.* Timme, 8 Ind. App. 416, 35 N. E. 1046.

Missouri.— Cole *v.* St. Louis Transit Co., 183 Mo. 81, 81 S. W. 1138; Burlington First Nat. Bank *v.* Hatch, 98 Mo. 376, 11 S. W. 739.

West Virginia.— Carrico *v.* West Virginia Cent., etc., R. Co., 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50.

Wisconsin.— Sweain *v.* Donahue, 105 Wis. 142, 81 N. W. 119.

28. Graham *v.* Bradley, 5 Humphr. (Tenn.) 476.

29. Greenway *v.* Turner, 4 Md. 296.

30. Harrison *v.* White, 56 Mo. App. 175; Dimmitt *v.* Hannibal, etc., R. Co., 40 Mo. App. 654.

31. See *supra*, VII, B, 2, d.

32. *Alabama.*— Alabama Great Southern R. Co. *v.* Tapia, 94 Ala. 226, 10 So. 236; King *v.* Pope, 28 Ala. 601.

Illinois.— Momence Stone Co. *v.* Groves, 197 Ill. 88, 64 N. E. 335 [*affirming* 100 Ill. App. 98].

Michigan.— Chisholm *v.* Preferred Bankers' L. Assur. Co., 112 Mich. 50, 70 N. W. 415.

Pennsylvania.— Hershinger *v.* Pennsylvania R. Co., 25 Pa. Super. Ct. 147.

South Carolina.— Weaver *v.* Southern R. Co., 76 S. C. 49, 56 S. E. 657, 121 Am. St. Rep. 934; Earle *v.* Poat, 63 S. C. 439, 41 S. E. 525.

See 46 Cent. Dig. tit. "Trial," § 412.

33. *Alabama.*— Carter *v.* Fulgham, 134 Ala. 238, 32 So. 684.

Arkansas.— Masons' Fraternal Acc. Assoc. *v.* Riley, 65 Ark. 261, 45 S. W. 684.

California.— Castagnino *v.* Balletta, 82 Cal. 250, 23 Pac. 127.

Illinois.— Webster *v.* Yorty, 194 Ill. 408, 62 N. E. 907; Bartholomew *v.* Bartholomew, 18 Ill. 326.

Indiana.— Louisville, etc., R. Co. *v.* Kemper, 153 Ind. 618, 53 N. E. 931.

It is not proper for the court to instruct the jury that one fact may [34] or should be [35] presumed from another fact proved, unless such presumption be one of law,[36] even where there is no conflict in the evidence as to such fact;[37] and it is proper to refuse an instruction that assumes that a certain effect will be produced by certain evidence, unless it has a fixed legal import and no other inference can be drawn therefrom,[38] or to refuse an instruction which directs the jury to the strength or weakness of a presumption of fact,[39] or which directs the jury to consider whether certain inferences should not be drawn if a certain state of facts should be found.[40] The court may, however, properly charge that the jury may find any fact proven which they think rightfully and reasonably inferable from the evidence,[41] but instructions as to inferences should not be given where they would be irrelevant or misleading.[42]

Mississippi.— Coleman *v.* Adair, 75 Miss. 660, 23 So. 369.

Missouri.—Winter *v.* Supreme Lodge K. P., 96 Mo. App. 1, 69 S. W. 662.

North Carolina.— Ruffin *v.* Atlantic, etc., R. Co., 142 N. C. 120, 55 S. E. 86.

Pennsylvania.— Samuel *v.* Knight, 9 Pa. Super. Ct. 352, 43 Wkly. Notes Cas. 392.

Texas.— St. Louis, etc., R. Co. *v.* Burns, 71 Tex. 479, 9 S. W. 467.

See 46 Cent. Dig. tit. "Trial," § 412.

Where the presumption is rebuttable the jury should be so instructed. Atchison, etc., R. Co. *v.* Lloyd, 68 Kan. 369, 75 Pac. 478.

34. *Alabama.*—Easterling *v.* State, 30 Ala. 46.

California.— Stone *v.* Geyser Quicksilver Min. Co., 52 Cal. 315.

Georgia.— Standard Cotton Mills *v.* Cheatham, 125 Ga. 649, 54 S. E. 650; Snowden *v.* Waterman, 105 Ga. 384, 31 S. E. 110.

Illinois.— Preston *v.* Moline Wagon Co., 44 Ill. App. 342; Peters *v.* Bourneau, 22 Ill. App. 177.

Indiana.— Columbus *v.* Strassner, 138 Ind. 301, 34 N. E. 5, 37 N. E. 719; Union Mut. L. Ins. Co. *v.* Buchanan, 100 Ind. 63.

Maryland.— Evans *v.* Davidson, 53 Md. 245, 36 Am. Rep. 400.

Michigan.— Richards *v.* Fuller, 38 Mich. 653.

Missouri.— Moies *v.* Eddy, 28 Mo. 382; Glover *v.* Duhle, 19 Mo. 360; Steinwender *v.* Creath, 44 Mo. App. 356.

Nebraska.— Omaha Fair, etc., Assoc. *v.* Missouri Pac. R. Co., 42 Nebr. 105, 60 N. W. 330.

Pennsylvania.— Wenrich *v.* Heffner, 38 Pa. St. 207.

Texas.— Hammond *v.* Coursey, 2 Tex. Unrep. Cas. 29; Clifford *v.* Lee, (Civ. App. 1893) 23 S. W. 843.

See 46 Cent. Dig. tit. "Trial," § 412.

35. *Alabama.*— Smith *v.* Collins, 94 Ala. 394, 10 So. 334. *Compare* Henderson *v.* Mabry, 13 Ala. 713.

California.— Miller *v.* Stewart, 24 Cal. 502.

Florida.— Southern Pine Co. *v.* Powell, 48 Fla. 154, 37 So. 570; Mayer *v.* Wilkins, 37 Fla. 244, 19 So. 632.

Georgia.— Hayden *v.* Neal, 62 Ga. 365.

Illinois.—Wood *v.* Olson, 117 Ill. App. 128.

Indiana.— Adams *v.* Sater, 19 Ind. 418.

Kansas.— Gross *v.* Shaffer, 29 Kan. 442.

Maryland.— Burt *v.* Gwinn, 4 Harr. & J. 507.

Missouri.— Nixon *v.* Hannibal, etc., R. Co., 141 Mo. 425, 42 S. W. 942.

North Carolina.— Harris *v.* Carrington, 115 N. C. 187, 20 S. E. 452.

South Carolina.— Izlar *v.* Manchester, etc., R. Co., 57 S. C. 332, 35 S. E. 583.

Texas.— Goodbar *v.* Sulphur Springs City Nat. Bank, 78 Tex. 461, 14 S. W. 851; Cleveland *v.* Empire Mills, 6 Tex. Civ. App. 479, 25 S. W. 1055.

Illustrations.— It is error to charge that certain words spoken by one person to another conveyed an authority to sell property (Copeland *v.* Hall, 29 Me. 93), or that a deed conveyed title where the delivery was in issue (Osgood *v.* Eaton, 63 N. H. 355).

Instruction not within rule.—An instruction, in an action by a child for services rendered his deceased foster parents, that the proof of declarations made by the parents, evidencing a purpose to devise to the child their property, was admitted to prove that the parents intended to compensate the child for services rendered to them, was not objectionable as invading the province of the jury, in that it informed them of what the declarations tended to prove. McClure *v.* Lenz, 40 Ind. App. 56, 80 N. E. 988.

36. Documentary evidence.— The court should upon request of the jury instruct them as to what inferences may be drawn from documents in evidence. Ellis *v.* Miller, 72 N. Y. App. Div. 618, 76 N. Y. Suppl. 160.

37. E. N. E. *v.* State, 25 Fla. 268, 6 So. 58; Baker *v.* Chatfield, 23 Fla. 540, 2 So. 822; Wilbur *v.* Stoepel, 82 Mich. 344, 46 N. W. 724, 21 Am. St. Rep. 568; Bryan *v.* Wear, 4 Mo. 106. *Contra*, Lynn *v.* Thompson, 17 S. C. 129.

38. Wise *v.* Wakefield, 118 Cal. 107, 50 Pac. 310; Roots *v.* Tyner, 10 Ind. 87; Wilson *v.* Smith, 10 Md. 67; McQuay *v.* Richmond, etc., R. Co., 109 N. C. 585, 13 S. E. 944.

39. Wilcox *v.* Young, 66 Mich. 687, 33 N. W. 765.

40. Kellogg *v.* Janesville, 34 Minn. 132, 24 N. W. 359.

41. North Chicago St. R. Co. *v.* Rodert, 203 Ill. 413, 67 N. E. 812 [*affirming* 105 Ill. App. 314]. *Contra*, Henry *v.* Colorado Land, etc., Co., 10 Colo. App. 14, 51 Pac. 90.

42. White *v.* Chicago, etc., R. Co., 1 S. D.

9. Comments of Judge on Merits of Cause or Conduct of Parties. It is improper for the court to comment on the cause in such manner as to impress the jury that the punishment of one of the parties for acts done by him ought to be great,[43] and it is error to comment on the nature of the case in a manner likely to unduly influence the jury, as by denouncing as harsh a remedy by attachment in favor of a landlord against his tenant,[44] or to state that it considers the case a very simple one, both as to the law and fact, and that the controversy is over a small amount;[45] that the controversy is a trifling matter and the main question is as to the costs,[46] that plaintiff is justified in bringing the action,[47] that defendant's conduct should be stopped by a verdict against him;[48] or, in a malpractice case, that plaintiff has the court's sympathy, and if entitled to a verdict and the jury does not give it to him recklessness among surgeons would be encouraged;[49] or for the judge to intimate to the jury that he has personal knowledge of the facts favorable to one of the parties;[50] or in submitting special questions by request to state that the questions are gotten up to befuddle and mislead the jury,[51] or that plaintiff has presented a very thin case;[52] in an action for injuries caused by negligence to characterize defendant's conduct as "gross and almost criminal negligence";[53] to intimate that the jury ought to award punitive damages;[54] to make an objectionable reference to the good faith of plaintiff's claim to land in suit;[55] or in an action of trespass to refer to the inconsistency of pleas of not guilty and license;[56] or, in a contested case, to say that plaintiff's theory is the more plausible,[57] that the cross-examination of a witness for defendant developed the theory of plaintiff,[58] or that it was not clear to the court how defendant's counsel work out a proposition contended for;[59] or to comment upon the demands of one of the parties while not upon the stand.[60] A charge that "the contract will be sent to the jury box with you, gentlemen, and you can wrestle with it at your pleasure, I cannot read it in the present light" is not an unfavorable comment on the contract as having been printed in small type.[61]

10. Giving Undue Prominence to Particular Matters[62]— a. Issues, Theories, and Defenses. It is error in instructing the jury to unduly emphasize issues, theories, or defenses, whether by repetition or by singling them out and making them unduly prominent,[63] and such instructions are of course properly

326, 47 N. W. 146, 9 L. R. A. 824; Cate *v.* Fife, 80 Vt. 404, 68 Atl. 1.

43. Southern R. Co. *v.* Scanlon, 92 S. W. 927, 29 Ky. L. Rep. 268.

44. Randolph *v.* McCain, 34 Ark. 696.

45. Skinner *v.* Stifel, 55 Mo. App. 9.

46. Ludden *v.* Clemons, 16 Nebr. 506, 20 N. W. 856.

47. Johnson *v.* Johnson, 71 N. C. 402.

48. Richardson *v.* Van Nostrand, 43 Hun (N. Y.) 299.

49. Byles *v.* Hazlett, 11 Wkly. Notes Cas. (Pa.) 212.

50. Shafer *v.* Eau Claire, 105 Wis. 239, 81 N. W. 409.

51. Cone *v.* Citizens' Bank, 4 Kan. App. 470, 46 Pac. 414.

52. Sieling *v.* Clark, 18 Misc. (N. Y.) 464, 41 N. Y. Suppl. 982.

53. Curtin *v.* Somerset, 140 Pa. St. 70, 21 Atl. 244, 23 Am. St. Rep. 220, 12 L. R. A. 322.

54. Louisville, etc., R. Co. *v.* Cottengim, 104 S. W. 280, 31 Ky. L. Rep. 871, 13 L. R. A. N. S. 624.

55. Rich *v.* Victoria Copper Min. Co., 147 Fed. 380, 77 C. C. A. 558.

56. McCusker *v.* Mitchell, 20 R. I. 13, 36 Atl. 1123.

57. Ludlow *v.* Pearl, 55 Mich. 312, 21 N. W. 315.

58. Graham *v.* Frazier, 49 Nebr. 90, 68 N. W. 367.

59. Mackenzie *v.* Seeberger, 76 Fed. 108, 22 C. C. A. 83.

60. Cridland *v.* Crow, 221 Pa. St. 618, 70 Atl. 888, holding that in an action for an assault it is reversible error for the court to refer to the hysterical outbreak of plaintiff in the court-room at a time when she was not on the witness' stand, as an exhibition to aid the jury in determining whether plaintiff's excitable temperament was not in a measure the cause of the trouble resulting in the assault.

61. Buchanan *v.* Minneapolis Threshing Mach. Co., 17 N. D. 343, 116 N. W. 335.

62. **In criminal cases** see Criminal Law, 12 Cyc. 649.

63. *Florida.*— Jacksonville Electric Co. *v.* Adams, 50 Fla. 429, 39 So. 183.

Georgia.— Leary *v.* Leary, 18 Ga. 696.

Nebraska.— Rising *v.* Nash, 48 Nebr. 597, 67 N. W. 460.

Texas.—Waggoner *v.* Sneed, (Civ. App. 1909) 118 S. W. 547; Huber *v.* Texas, etc., R. Co., (Civ. App. 1908) 113 S. W. 984; Ætna Ins. Co. *v.* Brannon, (Civ. App. 1907) 101

refused.[64] It cannot be inferred, however, from the fact that the contentions of plaintiff were stated more at length than those of defendant that undue stress was laid upon or undue prominence given to plaintiff's contentions.[65] And in submitting issues of fact to the jury the trial judge may state the rules of law pertinent to the case both in the abstract and concrete, without giving undue prominence to the matter in question.[66] So the giving of several instructions on the question of damages has not a tendency to lead the jury to think the court believes that plaintiff should have a verdict; the court cautioning them that they are to make no such deduction, and all but one of the instructions being worded to prevent the giving of excessive damages in the event of a verdict for plaintiff.[67] And the singling out of a certain matter for special consideration if error is harmless where the jury are further instructed that in determining the question all the evidence in relation to it must be considered.[68]

b. Particular Evidence[69]— (i) *STATEMENT AND APPLICATION OF RULE.* It is not the duty of the trial court to deal separately with particular phases or fragments of the testimony, and instruct thereon.[70] On the contrary it is very

S. W. 1020; St. Louis, etc., R. Co. *v.* Terhune, (Civ. App. 1904) 81 S. W. 74; Adams *v.* Weakley, 35 Tex. Civ. App. 371, 80 S. W. 411; Palfrey *v.* Texas Cent. R. Co., 31 Tex. Civ. App. 552, 73 S. W. 411; Kroeger *v.* Texas, etc., R. Co., 30 Tex. Civ. App. 87, 69 S. W. 809; Cross *v.* Kennedy, (Civ. App. 1902) 66 S. W. 318; Highland *v.* Houston, etc., R. Co., (Civ. App. 1901) 65 S. W. 649; International, etc., R. Co. *v.* Newman, (Civ. App. 1897) 40 S. W. 854; Dallas, etc., R. Co. *v.* Harvey, (Civ. App. 1894) 27 S. W. 423.

West Virginia.— Rhoades *v.* Chesapeake, etc., R. Co., 49 W. Va. 494, 39 S. E. 209, 87 Am. St. Rep. 826, 55 L. R. A. 170.

United States.—Weiss *v.* Bethlehem Iron Co., 88 Fed. 23, 31 C. C. A. 363.

Applications of rule.—Where the issue of contributory negligence was sufficiently submitted in one paragraph of the charge, such issue is unnecessarily emphasized by submitting it in another paragraph. Malone *v.* Texas, etc., R. Co., 49 Tex. Civ. App. 398, 109 S. W. 430. In an action for injuries at a railroad crossing, it is error for the court to emphasize the contributory negligence of plaintiff by charging on such negligence in several variant forms. Buchanan *v.* Missouri, etc., R. Co., 48 Tex. Civ. App. 299, 107 S. W. 552.

Instruction held not objectionable to rule. —In an action for injuries to plaintiff's wife in alighting from a car, where defendant pleaded contributory negligence, in that she left the car on the side opposite the depot, and that she attempted to leave it with a lot of bundles and packages in her arms, rendering her unable to use the railings, whereby she was caused to lose her balance and fall, special instructions on the subject of contributory negligence conformable to these phrases, given in addition to a charge in general terms on contributory negligence, were not erroneous as giving undue prominence to the issue. Rambie *v.* San Antonio, etc., R. Co., 45 Tex. Civ. App. 422, 100 S. W. 1022. So the statement of the judge preliminary to his instructions that the parties had agreed on the law of the case and that he would give certain instructions presented by defendant does not give undue prominence to defendant's case. Portland First Nat. Bank *v.* Philadelphia Fire Assoc., 33 Oreg. 172, 50 Pac. 568, 53 Pac. 8.

64. *Georgia.*—Wrightsville, etc., R. Co. *v.* Lattimore, 118 Ga. 581, 45 S. E. 453.

Illinois.— Eckels *v.* Cooper, 136 Ill. App. 60.

Missouri.— Connor *v.* Heman, 44 Mo. App. 346.

New Hampshire.— Fogg *v.* Moulton, 59 N. H. 499; Phœnix Mut. L. Ins. Co. *v.* Clark, 59 N. H. 345.

New York.— Smith *v.* Gray, 19 N. Y. App. Div. 262, 46 N. Y. Suppl. 180 [*affirmed* in 162 N. Y. 643, 57 N. E. 1124].

Texas.— Davis *v.* Bingham, (Civ. App. 1900) 56 S. W. 132.

Wisconsin.— Barndt *v.* Frederick, 78 Wis. 1, 47 N. W. 6, 11 L. R. A. 199.

Where an issue is fully presented in the general charge there is no necessity for repeating it in a special charge. Herring *v.* Galveston, etc., R. Co., (Tex. Civ. App. 1908) 108 S. W. 977 [writ of error *dismissed* in 102 Tex. 100, 113 S. W. 521].

65. Millen, etc., R. Co. *v.* Allen, 130 Ga. 656, 61 S. E. 541; Macon, etc., R. Co. *v.* Joyner, 129 Ga. 683, 684, 59 S. E. 902, in which it was said: "If plaintiff's case requires a full, definite, and affirmative allegation of certain facts, and the defense to the cause of action as stated rests upon a mere denial of the allegations in the petition, and the trial judge sums up the contentions of both parties by a fair statement of the material allegations in the petition, and then states that these allegations are denied by defendant, how can it be said that he has failed to state the contentions of either party?"

66. San Antonio, etc., R. Co. *v.* Martin, 49 Tex. Civ. App. 197, 108 S. W. 981.

67. Johnston *v.* Beadle, 6 Cal. App. 251, 91 Pac. 1011.

68. Wallace *v.* Farmington, 231 Ill. 232, 83 N. E. 180.

69. **In criminal cases** see CRIMINAL LAW, 12 Cyc. 649.

70. Tetreault *v.* Connecticut Co., 81 Conn.

generally held that an instruction should not give undue prominence to facts by singling them out for special consideration.[71] Likewise, undue prominence should not be given by frequent repetition of such facts,[72] or by characterizing them as "important."[73] The giving of instructions faulty in this respect is erroneous,[74]

556, 71 Atl. 786; Herlihy *v.* Little, 200 Mass. 284, 86 N. E. 294; Pierce *v.* O'Brien, 189 Mass. 58, 75 N. E. 61; Drown *v.* New England Tel., etc., Co., 81 Vt. 358, 70 Atl. 599.

71. Birmingham Southern R. Co. *v.* Cuzzart, 133 Ala. 262, 31 So. 979; Illinois Cent. R. Co. *v.* Keegan, 210 Ill. 150, 71 N. E. 321 [*affirming* 112 Ill. App. 28]; Springfield Consol. R. Co. *v.* Gregory, 122 Ill. App. 607; Turner *v.* Righter, 120 Ill. App. 131; Beyer *v.* Martin, 120 Ill. App. 50; Chicago Union Traction Co. *v.* Shedd, 110 Ill. App. 400; Chicago Sanitary Dist. *v.* Joliet Pioneer Stone Co., 109 Ill. App. 283; Bennett *v.* Susser, 191 Mass. 329, 77 N. E. 884; Atwood Lumber Co. *v.* Watkins, 94 Minn. 464, 103 N. W. 332. But see Gunther *v.* Gunther, 181 Mass. 217, 63 N. E. 402; Melvin *v.* Melvin, 130 Pa. St. 6, 18 Atl. 920.

72. Mendes *v.* Kyle, 16 Nev. 369. And see Gulf, etc., R. Co. *v.* Gordon, 70 Tex. 80, 7 S. W. 695.

73. Baker County *v.* Huntington, 48 Oreg. 593, 87 Pac. 1036, 89 Pac. 144, holding, however, that characterizing facts as "important" although improper is not ground for reversal where it has been used a number of times in the instructions for both parties.

74. *Alabama.*— O'Neal *v.* Curry, 134 Ala. 216, 32 So. 697; Postal Tel. Cable Co. *v.* Jones, 133 Ala. 217, 32 So. 500; Williamson *v.* Tyson, 105 Ala. 644, 17 So. 336; Wadsworth *v.* Williams, 101 Ala. 264, 13 So. 755; Steed *v.* Knowles, 97 Ala. 573, 12 So. 75; Jordan *v.* Pickett, 78 Ala. 331.

Arkansas.—Western Coal, etc., Co. *v.* Jones, 75 Ark. 76, 87 S. W. 440.

California.— Still *v.* San Francisco, etc., R. Co., 154 Cal. 559, 98 Pac. 672, 129 Am. St. Rep. 177, 20 L. R. A. N. S. 322.

Connecticut.— Johnson County Sav. Bank *v.* Walker, 82 Conn. 24, 72 Atl. 579.

Georgia.— Flowers *v.* Flowers, 92 Ga. 688, 18 S. E. 1006; Leary *v.* Leary, 18 Ga. 696; Wright *v.* Central R., etc., Co., 16 Ga. 38; Stiles *v.* Shadden, 2 Ga. App. 317, 58 S. E. 515.

Idaho.— Idaho Mercantile Co. *v.* Kalanquin, 8 Ida. 101, 66 Pac. 933.

Illinois.— Chicago Anderson Pressed Brick Co. *v.* Reinneiger, 140 Ill. 334, 29 N. E. 1106, 33 Am. St. Rep. 249; Craig *v.* Miller, 133 Ill. 300, 24 N. E. 431; Steuben County Wine Co. *v.* McNeeley, 113 Ill. App. 488; Chicago Consol. Traction Co. *v.* Gervens, 113 Ill. App. 275; Beyer *v.* Martin, 109 Ill. App. 1; Baltimore, etc., R. Co. *v.* Mullen, 108 Ill. App. 637; Merrill *v.* Merrill, 105 Ill. App. 5; Chicago, etc., R. Co. *v.* Flaharty, 96 Ill. App. 563; Chicago, etc., R. Co. *v.* Gore, 96 Ill. App. 553; Strehmann *v.* Chicago, 93 Ill. App. 206; Wabash R. Co. *v.* Stewart, 87 Ill. App. 446; Illinois Cent. R. Co. *v.* Griffin, 84 Ill. App. 152 [*affirmed* in 184 Ill. 9, 56 N. E. 337]; Fargo *v.* Dixon, 63 Ill. App. 22; Munford *v.* Miller, 7 Ill. App. 62; Anderson *v.* Warner, 5 Ill. App. 416.

Iowa.— Doyle *v.* Burns, 138 Iowa 439, 114 N. W. 1; Kelly *v.* Chicago, etc., R. Co., 138 Iowa 273, 114 N. W. 536, 128 Am. St. Rep. 195; McBride *v.* Des Moines City R. Co., 134 Iowa 398, 109 N. W. 618; *In re* Knox, 123 Iowa 24, 98 N. W. 468.

Kansas.— Honick *v.* Metropolitan St. R. Co., 66 Kan. 124, 71 Pac. 265.

Kentucky.— Stokes *v.* Shippen, 13 Bush 180; Drake *v.* Holbrook, 92 S. W. 297, 28 Ky. L. Rep. 1319; Moran *v.* Higgins, 40 S. W. 928, 19 Ky. L. Rep. 456; Louisville, etc., R. Co. *v.* Banks, 33 S. W. 627, 17 Ky. L. Rep. 1065.

Maryland.— Baltimore Safe Deposit, etc., Co. *v.* Berry, 93 Md. 560, 49 Atl. 401; Higgins *v.* Grace, 59 Md. 365; Folk *v.* Wilson, 21 Md. 538, 83 Am. Dec. 599.

Massachusetts.—Woodbury *v.* Sparrell, 198 Mass. 1, 84 N. E. 441.

Michigan.— McKinnon Boiler, etc., Co. *v.* Central Michigan Land Co., 156 Mich. 11, 120 N. W. 26; Banner *v.* Schlessinger, 109 Mich. 262, 67 N. W. 116.

Minnesota.— Taubert *v.* Taubert, 103 Minn. 247, 114 N. W. 763.

Missouri.— Tibbe *v.* Kamp, 154 Mo. 545, 54 S. W. 879, 55 S. W. 440; Spohn *v.* Missouri Pac. R. Co., 87 Mo. 74; Fine *v.* St. Louis Public Schools, 39 Mo. 59; Gharst *v.* St. Louis Transit Co., 115 Mo. App. 403, 91 S. W. 453; Blackwell *v.* Hill, 76 Mo. App. 46; Chaney *v.* Phœnix Ins. Co., 62 Mo. App. 45; Dobbs *v.* Cates, 60 Mo. App. 658.

Nebraska.— Kleutsch *v.* Security Mut. L. Ins. Co., 72 Nebr. 75, 10 N. W. 139; Markel *v.* Moudy, 11 Nebr. 213, 7 N. W. 853.

North Carolina.— Knight *v.* Albermarle, etc., R. Co., 110 N. C. 58, 14 S. E. 650.

Ohio.— Lake Shore, etc., R. Co. *v.* Whidden, 23 Ohio Cir. Ct. 85.

Oregon.— Stanley *v.* Smith, 15 Oreg. 505, 16 Pac. 174.

Pennsylvania.— Burns *v.* Pennsylvania R. Co., 213 Pa. St. 280, 62 Atl. 845; Young *v.* Merkel, 163 Pa. St. 513, 30 Atl. 196, 35 Wkly. Notes Cas. 303; Parker *v.* Donaldson, 6 Watts & S. 132.

South Carolina.— Pearlstine *v.* Westchester F. Ins. Co., 70 S. C. 75, 49 S. E. 4.

Texas.— Galveston, etc., R. Co. *v.* Kutac, 76 Tex. 473, 13 S. W. 327; Moore *v.* Northern Texas Traction Co., 41 Tex. Civ. App. 583, 95 S. W. 652; Giddings *v.* Thompson, (Civ. App. 1906) 92 S. W. 1043; Missouri, etc., R. Co. *v.* O'Connor, (Civ. App. 1904) 78 S. W. 374; Laferiere *v.* Richards, 28 Tex. Civ. App. 63, 67 S. W. 125; Kershner *v.* Latimer, (Civ. App. 1901) 64 S. W. 237; Texas, etc., R. Co. *v.* Syfan, (Civ. App. 1897) 43 S. W. 551; Missouri, etc., R. Co. *v.* Collins, 15 Tex. Civ. App. 21, 39 S. W. 150; New York, etc., Land

and the refusal thereof is of course proper because prejudicial to the rights of the party against whose case or defense they bear.[75]

Co. *v.* Gardner, (Civ. App. 1894) 25 S. W. 737; St. Louis, etc., R. Co. *v.* Taylor, 5 Tex. Civ. App. 668, 24 S. W. 975.

Virginia.— Douglas Land Co. *v.* T. W. Thayer Co., 107 Va. 292, 58 S. E. 1101; Haney *v.* Breeden, 100 Va. 781, 42 S. E. 916.

West Virginia.— Parkersburg Nat. Co. *v.* Hannaman, 63 W. Va. 358, 60 S. E. 242; Delmar Oil Co. *v.* Bartlett, 62 W. Va. 700, 59 S. E. 634; Robinson *v.* Lowe, 50 W. Va. 75, 40 S. E. 454.

United States.— Minneapolis Gen. Electric Co. *v.* Cronon, 166 Fed. 651, 92 C. C. A. 345, 20 L. R. A. N. S. 816.

See 46 Cent. Dig. tit. "Trial," § 578 *et seq.*

An instruction which lays more stress on the evidence of one side than on that of the other is erroneous. *In re* Townsend, 122 Iowa 246, 97 N. W. 1108; Buswell *v.* Emerson, 64 Mo. App. 669; Hayes *v.* Pennsylvania R. Co., 195 Pa. St. 184, 45 Atl. 925; McCabe *v.* Philadelphia, 12 Pa. Super. Ct. 383; Barton *v.* Stroud-Gibson Grocer Co., (Tex. Civ. App. 1897) 40 S. W. 1050; Coman *v.* Wunderlich, 122 Wis. 138, 99 N. W. 612.

75. *Alabama.*— Western Union Tel. Co. *v.* Benson, 159 Ala. 254, 48 So. 712; Abercrombie *v.* Montgomery Fourth Nat. Bank, (1905) 39 So. 606; Birmingham R., etc., Co. *v.* Mason, 144 Ala. 387, 39 So. 590; Louisville, etc., R. Co. *v.* Perkins, 144 Ala. 325, 39 So. 305; Campbell *v.* Bates, 143 Ala. 338, 39 So. 144; Central of Georgia R. Co. *v.* Larkins, 142 Ala. 375, 37 So. 660; Southern Bell Tel., etc., Co. *v.* Mayo, 134 Ala. 641, 33 So. 16.

Connecticut.— Harris *v.* Ansonia, 73 Conn. 359, 47 Atl. 672.

District of Columbia.— Turner *v.* American Security, etc., Co., 29 App. Cas. 460.

Illinois.— Slack *v.* Harris, 200 Ill. 96, 65 N. E. 669 [*affirming* 101 Ill. App. 527]; Entwistle *v.* Meikle, 180 Ill. 9, 54 N. E. 217; New Ohio Washed Coal Co. *v.* Hindman, 119 Ill. App. 287; Chicago Hydraulic Press Brick Co. *v.* Campbell, 116 Ill. App. 322; Hart *v.* Carsley Mfg. Co., 116 Ill. App. 159; Shickle-Harrison, etc., Iron Co. *v.* Beck, 112 Ill. App. 444 [*affirmed* in 212 Ill. 268, 72 N. E. 423]; Elwood *v.* Chicago City R. Co., 90 Ill. App. 397; Johnston *v.* Hirschberg, 85 Ill. App. 47; Donahue *v.* Egan, 85 Ill. App. 20.

Indiana.— Todd *v.* Danner, 17 Ind. App. 368, 46 N. E. 829.

Iowa.— Swiney *v.* American Express Co., (1908) 115 N. W. 212.

Kansas.— Peterson *v.* Baker, 78 Kan. 337, 97 Pac. 373; Haines *v.* Goodlander, 73 Kan. 183, 84 Pac. 986.

Kentucky.— Travelers' Ins. Co. *v.* Clark, 109 Ky. 350, 59 S. W. 7, 22 Ky. L. Rep. 902, 95 Am. St. Rep. 374; Taulbee *v.* Moore, 106 Ky. 749, 51 S. W. 564, 21 Ky. L. Rep. 378; Louisville, etc., R. Co. *v.* Rayl, 107 S. W. 298, 32 Ky. L. Rep. 870; Louisville R. Co. *v.* Hartmann, 83 S. W. 570, 26 Ky. L. Rep. 1174; Bowling Green Stone Co. *v.* Capshaw, 64 S. W. 507, 23 Ky. L. Rep. 945; Old Times Distillery Co. *v.* Zehnder, 52 S. W. 1051, 21 Ky. L. Rep. 753.

Maine.—Virgie *v.* Stetson, 73 Me. 452.

Maryland.— United R., etc., Co. *v.* Corbin, 109 Md. 442, 72 Atl. 606.

Massachusetts.— Carroll *v.* Boston El. R. Co., 200 Mass. 527, 86 N. E. 793; Williamson *v.* Old Colony St. R. Co., 191 Mass. 144, 77 N. E. 655, 5 L. R. A. 1081; American Tube-Works *v.* Tucker, 185 Mass. 236, 70 N. E. 59; Lufkin *v.* Lufkin, 182 Mass. 476, 65 N. E. 840; Packer *v.* Thomson-Houston Electric Co., 175 Mass. 496, 56 N. E. 704; Moseley *v.* Washburn, 167 Mass. 345, 45 N. E. 753; Peck *v.* Clark, 142 Mass. 436, 8 N. E. 335.

Minnesota.— Froeberg *v.* Smith, 106 Minn. 72, 118 N. W. 57.

Mississippi.— Mississippi Cent. R. Co. *v.* Hardy, 88 Miss. 732, 41 So. 505.

Missouri.— Eckhard *v.* St. Louis Transit Co., 190 Mo. 593, 89 S. W. 602; Hughes *v.* Rader, 182 Mo. 630, 82 S. W. 32; State *v.* Chick, 147 Mo. 645, 48 S. W. 829; Liese *v.* Meyer, 143 Mo. 547, 45 S. W. 282; Landrum *v.* St. Louis, etc., R. Co., 132 Mo. App. 717, 112 S. W. 1000; Shanahan *v.* St. Louis Transit Co., 109 Mo. App. 228, 83 S. W. 783.

Nebraska.— Martens *v.* Pittock, 3 Nebr. (Unoff.) 770, 92 N. W. 1038.

New Hampshire.— Minot *v.* Boston, etc., R. Co., 74 N. H. 230, 66 Atl. 825.

North Carolina.— Findly *v.* Ray, 50 N. C. 125.

Oregon.— Crossen *v.* Oliver, 41 Oreg. 505, 69 Pac. 308.

Rhode Island.— Reynolds *v.* Narragansett Electric Lighting Co., 26 R. I. 457, 59 Atl. 393.

Texas.— Castro *v.* Illies, 22 Tex. 479, 73 Am. Dec. 277; Duffell *v.* Noble, 14 Tex. 640; Galveston, etc., R. Co. *v.* Fitzpatrick, (Civ. App. 1906) 91 S. W. 355; Missouri, etc., R. Co. *v.* Purdy, (Civ. App. 1904) 83 S. W. 37 [*reversed* on other grounds in 98 Tex. 557, 86 S. W. 321].

Utah.— Condie *v.* Rio Grande Western R. Co., 34 Utah 237, 97 Pac. 120.

Virginia.— New York, etc., R. Co. *v.* Thomas, 92 Va. 606, 24 S. E. 264.

Wisconsin.—Watson *v.* Milwaukee, etc., R. Co., 57 Wis. 332, 15 N. W. 468.

United States.— Rio Grande, etc., R. Co. *v.* Leake, 163 U. S. 280, 16 S. Ct. 1020, 41 L. ed. 160; Connecticut Mut. L. Ins. Co. *v.* Hillmon, 107 Fed. 834, 46 C. C. A. 668; Trumbull *v.* Erickson, 97 Fed. 891, 38 C. C. A. 536; Western Coal, etc., Co. *v.* Berberich, 94 Fed. 329, 36 C. C. A. 364.

See 46 Cent. Dig. tit. "Trial," § 678 *et seq.*

Instructions in violation of rule.— In an action by a teamster for injuries caused by a collision with a street car, an instruction that, if the car could have been seen or heard by plaintiff in time to have avoided the collision had he looked or listened, then

(II) *Instructions Held Not in Violation of Rule.* The rule stated in the preceding section applies only where there are several facts tending to prove or disprove a proposition. It has no application where there is only a single undisputed fact constituting plaintiff's entire case; [76] or where the instructions refer to the evidence of a single witness, who is the sole witness as to certain matters, merely for the purpose of identifying that element of the evidence,[77] or refer to items of damages testified to to refresh the jurors' memory; [78] and it has been held that error is not assignable for singling out particular facts where the jury is further instructed to consider all the evidence.[79] So an instruction is not erroneous as singling out and giving undue prominence to particular facts where the facts stated comprise all the facts essential to a determination of the case,[80] or which direct the jury that in determining the credibility of witnesses they may take into consideration relationship to parties to the suit,[81] or the probability or improbability of testimony,[82] or stating that if plaintiff did not receive any of the injuries complained of he could not recover,[83] that mortgages in evidence did not of themselves show a partnership,[84] that certain evidential facts are evi-

the fact that he says he did look and listen, but did not see or hear the car, in the absence of some obstacle to prevent his seeing or hearing, has no probative force to prove that he looked and listened and did not see or hear the car, was improper as singling out and commenting upon plaintiff's testimony. Zander *v.* St. Louis Transit Co., 206 Mo. 445, 103 S. W. 1006. Where plaintiff was injured while passing between two parts of a train which had been opened at a crossing, an instruction that if plaintiff's companion saw the train was about to move and warned plaintiff not to proceed, and thereafter plaintiff persisted in attempting to cross the track ahead of the train, she could not recover, was properly refused as singling out particular facts to the exclusion of others on which the jury was authorized to find a verdict. Boyce *v.* Chicago, etc., R. Co., 120 Mo. App. 168, 96 S. W. 670. In an action against a street railway company for injuries to a passenger while alighting from a car, an instruction which predicates a denial of the right of plaintiff to recover, unless the jury are satisfied that the car stopped more than once on the occasion, is objectionable, as singling out a particular fact in the case, and as forbidding a recovery on the belief of the particular fact, although the jury may find under the pleadings that the carrier is liable, and as seeking to turn the result of the cause on a single fact, whereas the issues are broader. Birmingham R., etc., Co *v.* Wright, 153 Ala. 99, 44 So. 1037. In an action by a town against a county involving the extent of a site dedicated by the town to the county for a courthouse, etc., a charge that in determining the area dedicated the jury should consider the practical construction of the parties of their respective rights by their actions upon the square was properly refused, because it singled out one fact. Victoria *v.* Victoria County, (Tex. Civ. App. 1909) 115 S. W. 67. In an action for damages for delay in the transportation of cattle, an instruction singling out certain facts and stating that the jury could consider them in determining what was a reasonable time for the shipment of the cattle was erroneous in giving too great emphasis to the particular facts. Dupree *v.* Texas, etc., R. Co., (Tex. Civ. App. 1906) 96 S. W. 647. A requested charge that the jury should consider with the other facts and circumstances the fact that plaintiff requested defendant's station agent not to report the accident, and the fact that plaintiff made no claim against defendant on account of her alleged injuries for over a year, etc., was properly refused, as singling out certain facts. Landrum *v.* St. Louis, etc., R. Co., 132 Mo. App. 717, 112 S. W. 1000. An instruction, in an action against a railway company for the death of a pedestrian struck by a train at a public crossing, that it was the duty of the pedestrian in approaching the track to stop, look, and listen, was properly refused because it gave undue prominence to particular facts as constituting contributory negligence. Louisville, etc., R. Co. *v.* Ueltschi, 97 S. W. 14, 29 Ky. L. Rep. 1136.

76. Keyes *v.* Fuller, 9 Ill. App. 528. And see Giacomini *v.* Pacific Lumber Co., 5 Cal. App. 218, 89 Pac. 1059.

77. Hartmann *v.* Louisville, etc., R. Co., 39 Mo. App. 88.

78. Goddard *v.* Mooney, 27 Misc. (N. Y.) 816, 57 N. Y. Suppl. 223.

79. Goldthorp *v.* Goldthorp, 115 Iowa 430, 88 N. W. 944; Gordon *v.* Burris, 153 Mo. 223, 54 S. W. 546.

80. Springfield Consol. R. Co. *v.* Hoeffner, 175 Ill. 634, 51 N. E. 884 [*affirming* 71 Ill. App. 162]; Fletcher *v.* Louisville, etc., R. Co., 102 Tenn. 1, 49 S. W. 739; Houston, etc., R. Co. *v.* Rutland, 45 Tex. Civ. App. 621, 101 S. W. 529; Scott *v.* Childers, 24 Tex. Civ. App. 349, 60 S. W. 775.

81. Chicago, etc., R. Co. *v.* Winters, 175 Ill. 293, 51 N. E. 901 [*affirming* 65 Ill. App. 435].

82. Bowsher *v.* Chicago, etc., R. Co., 113 Iowa 16, 84 N. W. 958.

83. Weeks *v.* Texas Midland R. Co., (Tex. Civ. App. 1902) 67 S. W. 1071.

84. Compton *v.* Smith, 120 Ala. 233, 25 So. 300.

dentiary of an ultimate fact,[85] that stipulated facts are to be taken as true,[86] or, under conflicting evidence, instructs as to the burden of proof, the preponderance of evidence and the inevitable result to plaintiff of the evidence being evenly balanced; [87] or applies the principles of law stated in a previous paragraph; [88] or instructs that if the jury believes defendant plaintiff is entitled to some damages; [89] or submits to the jury the question of an inference that may be drawn from facts in evidence; [90] or calls to their attention material facts proved in order to exhibit the true points in controversy; [91] or specifies the elements of damage that may be considered; [92] or, where stating the testimony for both parties impartially, recites the testimony for plaintiff more fully than that for defendant; [93] or states that the weight to be given to the testimony of an uncontradicted witness is for the jury; [94] that the jury should not accord to certain opinion evidence undue weight as being that of experts or persons especially qualified to testify, but that it was entitled to such consideration as is due the testimony of competent witnesses in ordinary cases; [95] or that, as decedent was deaf, it was his duty to exercise great caution in the use of his remaining senses to avoid danger from the train by which he was killed,[96] however correct they may be as legal propositions.[97] Such instructions are objectionable as being argumentative,[98] and the rule condemning them is especially applicable where the facts singled out are not controlling,[99] or where the court authorizes or directs the jury to reach certain conclusions from the evidence singled out if they believe it.[1] However, where the record is otherwise free from error and the case is not close upon the point emphasized, the judgment will not be reversed for that reason.[2]

85. West *v.* Chicago, etc., R. Co., 77 Iowa 654, 35 N. W. 497, 42 N. W. 512.

86. Galveston, etc., R. Co. *v.* Lynes, (Tex. Civ. App. 1901) 65 S. W. 1119.

87. Simpson *v.* Baxter, 41 Kan. 540, 21 Pac. 634.

88. Jackson *v.* Kansas City, etc., R. Co., 157 Mo. 621, 58 S. W. 32, 80 Am. St. Rep. 650. To the same effect see Houston, etc., R. Co. *v.* Batchler, 37 Tex. Civ. App. 116, 83 S. W. 902.

89. White *v.* Barnes, 112 N. C. 323, 16 S. E. 922, there being no material conflict in the evidence.

90. Marion *v.* State, 20 Nebr. 233, 29 N. W. 911, 57 Am. Rep. 825.

91. Ralston *v.* Groff, 55 Pa. St. 276.

92. Cameron Mill, etc., Co. *v.* Anderson, 98 Tex. 156, 81 S. W. 282, 1 L. R. A. N. S. 198 [*affirming* 34 Tex. Civ. App. 105, 78 S. W. 8].

93. Jamison *v.* Hawkins, 13 Pa. Super. Ct. 372.

94. Davis *v.* Coblens, 12 App. Cas. (D. C.) 51 [*affirmed* in 174 U. S. 719, 19 S. Ct. 832, 43 L. ed. 1147].

95. Oldfather *v.* Ericsson, 79 Nebr. 1, 112 N. W. 356.

96. Hummer *v.* Louisville, etc., R. Co., 128 Ky. 486, 108 S. W. 885, 32 Ky. L. Rep. 1315.

97. *Iowa.*— Hanrahan *v.* O'Toole, 139 Iowa 229, 117 N. W. 675.

Nebraska.— South Omaha *v.* Wrzesinski, 66 Nebr. 790, 92 N. W. 1045.

New Hampshire.— Davis *v.* Concord, etc., R. Co., 68 N. H. 247, 44 Atl. 388.

Texas.— Gray *v.* Burk, 19 Tex. 228.

Wisconsin.— Warden *v.* Miller, 112 Wis. 67, 87 N. W. 828.

98. Martin *v.* Johnson, 89 Ill. 537; Hayes *v.* Moulton, 194 Mass. 157, 80 N. E. 215; Reed *v.* Reed, 56 Vt. 492.

99. McCartney *v.* McMullen, 38 Ill. 237; Chicago City R. Co. *v.* Lowitz, 119 Ill. App. 360 [*affirmed* in 218 Ill. 24, 75 N. E. 755]; Cleveland, etc., R. Co. *v.* Beard, 106 Ill. App. 486; Waverly *v.* Henry, 67 Ill. App. 407; Meachem *v.* Hahn, 46 Ill. App. 144; Lauchheimer *v.* Saunders, 27 Tex. Civ. App. 484, 65 S. W. 500; Bice *v.* Wheeling Electrical Co., 62 W. Va. 685, 59 S. E. 626.

1. *Alabama.*— Alabama, etc., R. Co. *v.* Hill, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65; McPherson *v.* Forest, 81 Ala. 295, 8 So. 193; Adams *v.* Thornton, 78 Ala. 489, 56 Am. Rep. 49.

District of Columbia.— Bradford *v.* National Ben. Assoc., 26 App. Cas. 268.

Illinois.— Grube *v.* Nichols, 36 Ill. 92; Faulkner *v.* Birch, 120 Ill. App. 281.

Missouri.— Spohn *v.* Missouri Pac. R. Co., 87 Mo. 74; Iron Mountain Bank *v.* Murdock, 62 Mo. 70; Meyer *v.* Pacific R. Co., 45 Mo. 137.

Texas.— Farnandes *v.* Schiermann, 23 Tex. Civ. App. 343, 55 S. W. 378.

West Virginia.— Storrs *v.* Feick, 24 W. Va. 606; McMeechen *v.* McMeechen, 17 W. Va. 683, 41 Am. Rep. 682.

See 46 Cent. Dig. tit. "Trial," § 578.

Invasion of province of jury.—An instruction invades the province of the jury which singles out one established fact in the case, and informs the jury that from that fact alone as a matter of law a certain conclusion does not follow. Sangster *v.* Hatch, 134 Ill. App. 340; Atterbury *v.* Chicago, etc., Short Line R. Co., 134 Ill. App. 330.

2. Kankakee, etc., R. Co. *v.* Horan, 23 Ill. App. 259; Maxwell *v.* Kent, 49 W. Va. 542, 39 S. E. 174.

c. Testimony of Designated Witnesses.[3] It is hardly more than a repetition of the principles heretofore laid down to state that it is error for a trial court in its instructions to the jury to single out the testimony of a designated witness or witnesses and lay particular stress on it, thereby obscuring other evidence in the case and minimizing its effect, and requested instructions vicious in this respect are properly refused.[4] The reason of the rule is obvious. Each party to an action is entitled to have all the evidence relevant to the issues considered fairly by the jury, and this right is seriously prejudiced, if not defeated, when the court singles out and isolates the testimony of a particular party or witness and gives to it undue importance.[5]

d. Propositions of Law. As is shown in the following section it is objectionable and sometimes ground for reversal to give undue prominence to a proposition of law by repetition thereof,[6] and a requested instruction which gives undue prominence to propositions of law is properly refused.[7] However, an instruction giving the rule of damages if the jury should find for plaintiff does not so emphasize such a finding as to exclude from the minds of the jury the alternative of

3. **In criminal cases** see CRIMINAL LAW, 12 Cyc. 650.

4. *Alabama.*— Gibson *v.* J. Snow Hardware Co., 94 Ala. 346, 10 So. 304; Alabama, etc., R. Co. *v.* Hill, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65; East Tennessee, etc., R. Co. *v.* Deaver, 79 Ala. 216.

Connecticut.— Hoyt *v.* Sturges, 28 Conn. 538.

Georgia.— Black *v.* Thornton, 30 Ga. 361.

Illinois.— Brown *v.* Monson, 51 Ill. App. 488; Wright *v.* Bell, 5 Ill. App. 352.

Michigan.— Seitz *v.* Starks, 144 Mich. 448, 108 N. W. 354; Richardson *v.* Noble, 143 Mich. 546, 107 N. W. 274; Chase *v.* Buhl Ironworks, 55 Mich. 139, 20 N. W. 827.

Minnesota.— Taubert *v.* Taubert, 103 Minn. 247, 114 N. W. 763.

New York.— Gabel *v.* Brooklyn, etc., R. Co., 112 N. Y. Suppl. 1047.

North Carolina.— Cogdell *v.* Southern R. Co., 129 N. C. 398, 40 S. E. 202.

Pennsylvania.— Reichenbach *v.* Ruddach, 127 Pa. St. 564, 18 Atl. 432; Murphy *v.* Jones, 4 Pa. Cas. 52, 6 Atl. 726.

Texas.— Davidson *v.* Wallingford, 88 Tex. 619, 32 S. W. 1030; Bell *v.* Hutchings, (Civ. App. 1897) 41 S. W. 200.

Washington.— Sexton *v.* Spokane County School Dist. No. 34, 9 Wash. 5, 36 Pac. 1052.

See 46 Cent. Dig. tit. "Trial," § 578.

Instructions in violation of rule.—In ejectment, instructions that the location of the land was a physical fact to be determined by the jury, and that the testimony of certain expert witnesses should not be considered as that of experts, but merely as that of witnesses testifying to such particular physical facts, and that as to physical facts such as the location of streams, or bluffs thereof, and their meanderings, the testimony of those who knew the facts was as worthy of belief as that of experts, were objectionable, as giving needless prominence to certain testimony at the expense of other testimony. Chappelle *v.* Roberts, 150 Ala. 457, 43 So. 489. An instruction that all the statements, made by plaintiff while upon the stand testifying, which were against her interest must be accepted by the jury as absolutely true, and that all statements made by her in her own favor should be given such weight and credence as the jury might deem them entitled to, was erroneous, as singling out and commenting upon plaintiff's testimony. Huff *v.* St. Joseph R., etc., Co., 213 Mo. 495, 111 S. W. 1145.

Instructions held not in violation of rule.— Undue prominence is not given to the testimony of a witness merely by calling attention to him by name, where his version of the transaction is not referred to (West Chicago St. R. Co. *v.* Dougherty, 64 Ill. App. 599); where his name is mentioned but once and that on an issue which was answered as a question of law (Lance *v.* Butler, 135 N. C. 419, 47 S. E. 488); where it is mentioned merely for the purpose of telling the jury that they have no right to disregard his testimony because he is related by marriage to plaintiff (North Chicago St. R. Co. *v.* Wellner, 206 Ill. 272, 69 N. E. 6 [*affirming* 105 Ill. App. 652]); where the president of a corporation testifies in its behalf by telling the jury that his testimony is not conclusive but that they should take into consideration all the evidence (Sanders *v.* North End Bldg., etc., Assoc., 178 Mo. 674, 77 S. W. 833); or to say that plaintiff's own testimony is to be judged by certain proper tests when the jury is directed to subject the testimony of all other witnesses to like tests (Kavanaugh *v.* Wausau, 120 Wis. 611, 98 N. W. 550); or by instructing that the jury might consider any interest which witnesses might feel (Chicago, etc., R. Co. *v.* Anderson, 166 Ill. 572, 46 N. E. 1125); or where there were but two witnesses for plaintiff and the testimony of one of them fully presented plaintiff's claim by charging that if the jury believed that witness they should find for plaintiff (Gregg *v.* Mallett, 111 N. C. 74, 15 S. E. 936).

5. Taubert *v.* Taubert, 103 Minn. 247, 114 N. W. 763.

6. See *infra*, IX, C, 11.

7. McCormick Harvesting Mach. Co. *v.* Sendzikowski, 72 Ill. App. 402.

finding for defendant, and therefore an assignment of error to the giving of such instruction cannot be sustained.[8]

11. REPETITION.[9] The court is not bound to bring forward into each succeeding instruction all that has gone before,[10] and should not reiterate propositions of law in other instructions after once clearly stating them to the jury.[11] Repetition of instructions involving the same principles of law is ordinarily considered improper and to be avoided in charging the jury,[12] unless in order to fairly and intelligibly present all the issues in the case it becomes necessary to repeat a proposition.[13] The repetition of instructions is objectionable on several grounds, one of which is that it has a tendency to give undue prominence to particular features of the case,[14] and may be pursued to such an extent as to amount to a

8. Gulf, etc., R. Co. *v.* Greenlee, 70 Tex. 553, 8 S. W. 129; Missouri, etc., R. Co. *v.* Hagan, 42 Tex. Civ. App. 133, 93 S. W. 1014.

9. For refusal of requests for instructions covered by instructions already given see *infra*, IX, D, 6, e.

10. Chicago City R. Co. *v.* Roach, 76 Ill. App. 496; Surber *v.* Mayfield, 156 Ind. 375, 60 N. E. 7; Eureka Block Coal Co. *v.* Wells, (Ind. App. 1901) 61 N. E. 236.

11. Norton *v.* Sczpurak, 70 Ill. App. 686.

12. *Arkansas.*— Sadler *v.* Sadler, 16 Ark. 628.

Georgia.— Macon *v.* Harris, 75 Ga. 761; Coleman *v.* Slade, 75 Ga. 61.

Illinois.— Grace, etc., Co. *v.* Strong, 224 Ill. 630, 79 N. E. 967 [*affirming* 127 Ill. App. 336]; Field *v.* Crawford, 146 Ill. 136, 34 N. E. 481; Norton *v.* Sczpurak, 70 Ill. App. 686.

Kentucky.— Greene *v.* Louisville R. Co., 119 Ky. 862, 84 S. W. 1154, 27 Ky. L. Rep. 316.

Maryland.— Rosenkovitz *v.* United R., etc., Co., 108 Md. 306, 70 Atl. 108; Pettigrew *v.* Barnum, 11 Md. 434, 69 Am. Dec. 212.

Michigan.— Piette *v.* Bavarian Brewing Co., 91 Mich. 605, 52 N. W. 152. *Compare* Davis *v.* Michigan Cent. R. Co., 147 Mich. 479, 111 N. W. 76.

Nebraska.— Hoskovec *v.* Omaha St. R. Co., 80 Nebr. 784, 115 N. W. 312.

Texas.— Hays *v.* Hays, 66 Tex. 606, 1 S. W. 895; Traylor *v.* Townsend, 61 Tex. 144; Frisby *v.* Withers, 61 Tex. 134; Powell *v.* Messer, 18 Tex. 401; Stringfellow *v.* Braselton, (Civ. App. 1909) 117 S. W. 204; Redmond *v.* Sherman Cotton Mills, (Civ. App. 1907) 100 S. W. 186; Lumsden *v.* Chicago, etc., R. Co., 28 Tex. Civ. App. 225, 67 S. W. 168; Willis *v.* Strickland, (Civ. App. 1899) 50 S. W. 159; Kraus *v.* Haas, 6 Tex. Civ. App. 665, 25 S. W. 1025.

See 46 Cent. Dig. tit. "Trial," § 513.

But see Terry *v.* Davenport, 170 Ind. 74, 83 N. E. 636.

What does not amount to repetition.— Where the general charge states a proposition in general terms, a further instruction stating it in connection with the facts is not repetition within the rule. Anderson *v.* Jefferson Cotton Oil, etc., Co., 32 Tex. Civ. App. 288, 74 S. W. 342. Instructions, each presenting facts to some extent different, are not subject to objection as constituting unnecessary repetition. Central City Loan, etc., Co. *v.* Vincent, (Tex. Civ. App. 1909) 117 S. W. 912. In a suit to set aside certain deeds, the court charged that the undisputed evidence showed that L was the agent of the ultimate grantee in the purchase of the property, and that if L and S, or either of them, knew, before the execution of the deed by plaintiff and her husband and L, that plaintiff was compelled to sign through fear of her husband, or if at the time the deed was signed by her the notary failed to fully explain it, or failed to take her acknowledgment as required by law, the knowledge of such facts by S and L would be binding on the ultimate grantee. It was held that such instruction was not objectionable as involving undue repetition. London *v.* Crow, 46 Tex. Civ. App. 190, 102 S. W. 177. Where the court stated in the general charge that the burden of proof was on plaintiff to establish the material allegations of his petition, the giving of a special charge that, if a passenger is injured while alighting from a train, he cannot recover therefor, unless it is shown by a preponderance of evidence that the injury was caused by the failure of the company to exercise the proper degree of care, was not objectionable as giving due prominence to the rule of law expressed. Ramble *v.* San Antonio, etc., R. Co., 45 Tex. Civ. App. 422, 100 S. W. 1022.

13. Gran *v.* Houston, 45 Nebr. 813, 64 N. W. 245.

Illustration.— It is not erroneous to repeat a proposition of law, in giving instructions to the jury, in proper connection with other facts or principles involved when necessary to fairly and intelligently present all the issues in a case (Grau *v.* Houston, 45 Nebr. 813, 64 N. W. 245); or to state in connection with each issue submitted that it must be established by a preponderance of the evidence (Martin *v.* St. Louis South Western R. Co., (Tex. Civ. App. 1900) 56 S. W. 1011).

14. Kahl *v.* Chicago, etc., R. Co., 125 Ill. App. 294; Meachem *v.* Hahn, 46 Ill. App. 144, 149 (in which it was said: "Counsel may select the strong and salient points appearing, and seek in the argument to direct the thought of the jury to them as being the important and controlling features of the case, but the instructions of the court should not be made the medium for conveying such views to the jury"); Stringfellow *v.* Braselton, (Tex. Civ. App. 1909) 117 S. W. 204; Redmond *v.* Sherman Cotton Mills, (Tex.

charge upon the weight of the evidence.[15] So the repetition of the same propositions may have the effect of embarrassing and confusing the jury.[16] "Instructions are intended to give to the jury a clear and concise statement of the law governing the case. The duplication of instructions has a tendency to mislead or confuse, rather than to guide the jury, and thus to frustrate the very object intended to be accomplished, by their being given at all." [17] While it is proper to refuse to give instructions which are merely repetitions of others given,[18] the repetition of instructions is not ordinarily considered ground for reversal.[19] But where the repetition of instructions gives undue prominence to one phase of the case, and such prominence is calculated to prejudice a party by inducing the jury to believe that the issue presented is the controlling one,[20] or where the instruction is objectionable in form,[21] the judgment will be reversed.[22] And instructions objectionable in this regard, when taken in connection with other instructions, may authorize a reversal.[23] However, as is shown in a subsequent

Civ. App. 1907) 100 S. W. 186; Lumsden *v.* Chicago, etc., R. Co., 28 Tex. Civ. App. 225, 67 S. W. 168; Willis *v.* Strickland, (Tex. Civ. App. 1899) 50 S. W. 159; Chicago, etc., R. Co. *v.* Alexander, 46 Wash. 131, 91 Pac. 626.

15. Willis *v.* Strickland, (Tex. Civ. App. 1899) 50 S. W. 159. And see Frisby *v.* Withers, 61 Tex. 134; Missouri, etc., R. Co. *v.* Dunbar, 49 Tex. Civ. App. 12, 108 S. W. 500.

16 Rosenkovitz *v.* United R., etc., Co., 108 Md. 306, 70 Atl. 108; Baltimore, etc., R. Co. *v.* Resley, 14 Md. 424; Pettigrew *v.* Barnum, 11 Md. 434, 69 Am. Dec. 212; Hampson *v.* Taylor, 15 R. I. 83, 8 Atl. 331, 23 Atl. 732; Powell *v.* Messer, 18 Tex. 401.

17. Storr *v.* James, 84 Md. 282, 290, 35 Atl. 965.

18. Nebraska Mercantile Mut. Ins. Co. *v.* Sasek, 64 Nebr. 17, 89 N. W. 428; St. Louis Southwestern R. Co. *v.* Haney, (Tex. Civ. App. 1906) 94 S. W. 386; International, etc., R. Co. *v.* Glover, (Tex. Civ. App. 1905) 88 S. W. 515; Parlin, etc., Co. *v.* Vawter, 39 Tex. Civ. App. 520, 88 S. W. 407; Texas, etc., R. Co. *v.* Crowley, (Tex. Civ. App. 1905) 86 S. W. 342.

19. *California.*— Murray *v.* White, 82 Cal. 119, 23 Pac. 35.

Illinois.— Gould *v.* Magnolia Metal Co., 207 Ill. 172, 69 N. E. 896 [*affirming* 108 Ill. App. 203]; Norton *v.* Sczpurak, 70 Ill. App. 686.

Indiana.— Coffman *v.* Reeves, 62 Ind. 334.

Iowa.— Buchholtz *v.* Radcliffe, 129 Iowa 27, 105 N. W. 336.

Massachusetts.— Com. *v.* Snelling, 15 Pick. 321.

Missouri.— Huss *v.* Heydt Bakery Co., 210 Mo. 44, 108 S. W. 63.

Nebraska.— Denise *v.* Omaha, 49 Nebr. 750, 69 N. W. 119; Gandy *v.* Bissell, 5 Nebr. (Unoff.) 184, 97 N. W. 632.

North Carolina.— Lewis *v.* Norfolk, etc., R. Co., 132 N. C. 382, 43 S. E. 919.

Ohio.— Smart *v.* North Carolina Lodge No. 2, 27 Ohio Cir. Ct. 273.

Pennsylvania.— Murray *v.* New York, etc., R. Co., 103 Pa. St. 37.

South Carolina.—Keys *v.* Winnsboro Granite Co., 72 S. C. 97, 51 S. E. 549.

Tennessee.— Nashville St. R. Co. *v.* O'Bryan, 104 Tenn. 28, 55 S. W. 300.

Texas.— McAuley *v.* Harris, 71 Tex. 631, 9 S. W. 679; Continental Ins. Co. *v.* Pruitt, 65 Tex. 125; International, etc., R. Co. *v.* Leak, 64 Tex. 654; Traylor *v.* Townsend, 61 Tex. 144; Powell *v.* Messer, 18 Tex. 401; Sonka *v.* Sonka, (Civ. App. 1903) 75 S. W. 325; Smith *v.* Whiteside, (Civ. App. 1896) 39 S. W. 381; Galveston, etc., R. Co. *v.* Tuckett, (Civ. App. 1894) 25 S. W. 150; Maes *v.* Texas, etc., R. Co., (Civ. App. 1893) 23 S. W. 725.

Wisconsin.— Klipstein *v.* Raschein, 117 Wis. 248, 94 N. W. 63.

United States.— Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, 12 S. Ct. 679, 36 L. ed. 485 [*affirming* 35 Fed. 176]; Louisville, etc., R. Co. *v.* Morlay, 86 Fed. 240, 30 C. C. A. 6.

See 46 Cent. Dig. tit. "Trial," § 513.

Where a rule of law has been stated with its qualifications, to repeat the rule without repeating the qualifications will not be sufficient ground for reversal. Hayward *v.* Merrill, 94 Ill. 349, 34 Am. Rep. 229; Saltmarsh *v.* Bow, 56 N. H. 428; Belknap *v.* Wendell, 36 N. H. 250. Especially where the qualification is in fact erroneous. Lloyd *v.* Moore, 38 Ohio St. 97. But see The Scrantonian *v.* Brown, 36 Pa. Super. Ct. 170.

20. Jacksonville Electric Co. *v.* Hellenthal, 56 Fla. 443, 47 So. 812; Lawder *v.* Henderson, 36 Kan. 754, 14 Pac. 164. And see Seebrock *v.* Fedawa, 30 Nebr. 424, 46 N. W. 650; International, etc., R. Co. *v.* Leak, 64 Tex. 654.

Repetition in illustrations of application. —An instruction does not give undue prominence to a rule adopted for computation by repeating it in illustrations of its application. McAuley *v.* Harris, 71 Tex. 631, 9 S. W. 679.

21. McBride *v.* Banguss, 65 Tex. 174.

22. **The repetition in instructions of a vital proposition of law** where apparently harmful is ground for reversal. Kahl *v.* Chicago, etc., R. Co., 125 Ill. App. 294. And see Bartz *v.* Chicago City R. Co., 116 Ill. App. 554.

23. Hoskovec *v.* Omaha St. R. Co., 80 Nebr. 784, 115 N. W. 312.

chapter where the question is considered at length, it is not erroneous to repeat instructions at the request of the jury.[24]

12. Appeals to Sympathy or Prejudice.[25] It is error for the court in its charge to improperly appeal to the sympathies and prejudices of the jury,[26] and requested instructions containing such appeals are properly refused.[27]

13. Basing Belief on Evidence. Although there are some decisions which hold that it is not necessary that the instructions should predicate the belief of the jury as to the existence or non-existence of facts on the evidence, and that this is necessarily implied,[28] there is an equally large number which hold that instructions to the jury should direct them to base their belief on the evidence, and that the giving of instructions which do not contain this requirement is erroneous,[29]

24. See *infra*, X, E, 2, b. And see Lumsden *v.* Chicago, etc., R. Co., 31 Tex. Civ. App. 604, 73 S. W. 428.

25. As ground for new trial see New Trial, 29 Cyc. 788.

In criminal prosecutions see Criminal Law, 12 Cyc. 650 *et seq.*

26. Amend *v.* Smith, 87 Ill. 198; National Council K. L. S. *v.* O'Brien, 112 Ill. App. 40; Robertson *v.* Brown, 56 Nebr. 390, 76 N. W. 891; Muhlig *v.* Rebhan, 55 Misc. (N. Y.) 305, 105 N. Y. Suppl. 110; Northwestern Mut. L. Ins. Co. *v.* Stevens, 71 Fed. 258, 18 C. C. A. 107.

Instruction violative of rule.—An instruction which tells the jury that they should decide the case "in the same manner as if the widow was plaintiff in this case, and not the brother" is improper as making an appeal to sympathy. National Council K. L. S. *v.* O'Brien, 112 Ill. App. 40.

Limitations of rule.—It is not a valid objection to an instruction that the matters therein stated may create sympathy for one of the parties to a suit when such matters are proper for the jury to consider in arriving at a verdict. Lomas *v.* Holbine, 65 Nebr. 270, 90 N. W. 1122.

27. Lynch *v.* Bates, 139 Ind. 206, 38 N. E. 806.

28. *Alabama.*— Birmingham R., etc., Co. *v.* Lee, 153 Ala. 386, 45 So. 164; Duncan *v.* St. Louis, etc., R. Co., 152 Ala. 118, 44 So. 418; Mansfield *v.* Morgan, 140 Ala. 567, 37 So. 393; Hall *v.* Posey, 79 Ala. 84.

Indiana.— Poland *v.* Miller, 95 Ind. 387, 48 Am. Rep. 730; Union Traction Co. *v.* Pfeil, 39 Ind. App. 51, 78 N. E. 1052.

Maryland.— Blumhardt *v.* Rohr, 70 Md. 328, 17 Atl. 266.

Michigan.— Isaacs *v.* McLean, 106 Mich. 79, 64 N. W. 2.

West Virginia.— Bice *v.* Wheeling Electrical Co., 62 W. Va. 685, 59 S. E. 626; Jarrett *v.* Stevens, 36 W. Va. 445, 15 S. E. 177.

And see Burr *v.* McCallum, 59 Nebr. 326, 80 N. W. 1040, 80 Am. St. Rep. 677; Walcott *v.* Brander, 10 Tex. 419.

29. *Colorado.*— Ingols *v.* Plimpton, 10 Colo. 535, 16 Pac. 155; Salmon *v.* Webster, 4 Colo. 353.

Illinois.— Miller *v.* Balthasser, 78 Ill. 302; Mathews *v.* Hamilton, 23 Ill. 470; Maxwell *v.* Chicago, etc., R. Co., 140 Ill. App. 156; Hueni *v.* Freehill, 125 Ill. App. 345; Staninger *v.* Tabor, 103 Ill. App. 330; Boon *v.* Bliss, 98 Ill. App. 341; Pfirshing *v.* Heitner, 91 Ill. App. 407; Champion Iron Fence Co. *v.* Bradley, 10 Ill. App. 328.

Missouri.— McPherson *v.* St. Louis, etc., R. Co., 97 Mo. 253, 10 S. W. 846 (defect but not ground for reversal); Baker *v.* Kansas City, etc., R. Co., 52 Mo. App. 602.

Nebraska.— Kerr *v.* Mangus, 84 Nebr. 1, 120 N. W. 426.

New York.— Schappert *v.* Ringler, 45 N. Y. Super. Ct. 345.

Virginia.— Clinchfield Coal Co. *v.* Wheeler, 108 Va. 448, 62 S. E. 269.

An instruction that if the jury "are the sole judges of all questions of fact in this case" is erroneous for not referring them to the evidence for guidance in finding the facts. Maxwell *v.* Chicago, etc., R. Co., 140 Ill. App. 156.

An instruction that if the jury find certain facts they should find accordingly is erroneous, as the belief upon which a jury is authorized to act must be a belief from the evidence. Chicago, etc., R. Co. *v.* Libey, 68 Ill. App. 144.

An instruction that the belief of the jury, independent of the evidence, might control and warrant a verdict is erroneous. People *v.* Peden, 109 Ill. App. 560.

An instruction requiring the jury to base their belief on the evidence and instructions is erroneous. Kranz *v.* Thieben, 15 Ill. App. 482. But an instruction that does not require the jury to believe any fact from the instructions, but merely informs them that, if under the evidence and instructions, they believe defendant liable and give a verdict for plaintiff, they shall assess his damages is proper. Chicago, etc., R. Co. *v.* Kendall, 49 Ill. App. 398.

"If you find from the preponderance of the evidence."— The use of the phrase "if you find from the evidence" is equivalent to the employment of "if you find from the preponderance of the evidence," and is free from ground of complaint. Illinois Cent. R. Co. *v.* Warriner, 132 Ill. App. 301 [*affirmed* in 229 Ill. 91, 82 N. E. 246]. The expression "if you find from the evidence" means a finding from a consideration of all the evidence, and therefore calls for a finding from the preponderance of the evidence. Donk Bros. Coal, etc., Co. *v.* Thil, 228 Ill. 233, 81 N. E. 857 [*affirming* 128 Ill. App. 249]; Ducharme *v.* St. Peter, 135 Ill. App. 530.

unless the facts are admitted or uncontroverted.[30] An instruction is proper that tells the jury that they have no right to permit anything to influence their minds except the evidence and the law,[31] and the court should, on request, instruct that the jury have no right to indulge in conjecture and speculations not supported by the evidence.[32] But the court is not required to repeat in every clause of an instruction,[33] or in each of a series of instructions,[34] that the jury must "find from the evidence," after the words have once been used in such a way that by reasonable construction they would be applicable to each fact required by the instruction to be found by the jury.[35] An instruction which leaves the jury free to consider facts not proved by the evidence, but of which they have been informed in some other way,[36] or which tells the jury that to determine a fact they must look to the evidence as far as it is clear and unambiguous,[37] is erroneous.

14. Hypothesizing Evidence. Upon the trial of an issue of fact by a jury, where there is a conflict of evidence, it is the duty of the court, in instructing the jury, to charge hypothetically;[38] that is, to propound the law, and direct its

"Circumstances appearing on the trial."— An instruction on the credibility of witnesses should not use the phrase "circumstances appearing on the trial," but the phrase "circumstances appearing in evidence." Illinois Commercial Men's Assoc. *v.* Perrin, 139 Ill. App. 543.

Proper substitutes for phrase.— The phrases, under the evidence and instructions of the court, and, from the preponderance of the evidence in this case and under the instructions of the court, are proper substitutes for the customary term from the evidence. Chicago, etc., R. Co. *v.* Newell, 113 Ill. App. 263 [*affirmed* in 212 Ill. 332, 72 N. E. 416].

30. Schmidt *v.* Pfau, 114 Ill. 494, 2 N. E. 522.

31. Preston *v.* Walker, 26 Iowa 205, 96 Am. Dec. 140.

Preventing attention to arguments of counsel.—An instruction that the jury should arrive at its verdict "solely on the evidence introduced, being governed by the instructions of the court, and to permit nothing else to influence or prejudice its action," is not objectionable in that it precludes the jury from giving its attention to the arguments of counsel. Johnston *v.* Cedar Rapids, etc., R. Co., 141 Iowa 114, 119 N. W. 286.

32. Ramsey *v.* Burns, 27 Mont. 154, 69 Pac. 711.

33. Wear *v.* Duke, 23 Ill. App. 322; Fischer *v.* Coons, 26 Nebr. 400, 42 N. W. 417.

34. Durham *v.* Evans, 56 Ill. App. 513.

35. Miller *v.* Balthasser, 78 Ill. 302; Toledo, etc., R. Co. *v.* Ingraham, 77 Ill. 309; Toledo, etc., R. Co. *v.* Lockhart, 71 Ill. 627; Dodrill *v.* Gregory, 60 W. Va. 118, 53 S. E. 922.

36. Chicago Union Traction Co. *v.* Straud, 114 Ill. App. 479; Chicago Gen. R. Co. *v.* Novaeck, 94 Ill. App. 178; Riggs *v.* Thorpe, 67 Minn. 217, 69 N. W. 891.

37. Coles *v.* Nikirk, (Kan. App. 1899) 57 Pac. 41.

38. *Alabama.*— Westbrook *v.* Fulton, 79 Ala. 510 (holding that a charge asserting facts, instead of stating them hypothetically, is properly refused); Knox *v.* Fair, 17 Ala. 503; Carlisle *v.* Hill, 16 Ala. 398.

Georgia.— Willis *v.* Willis, 18 Ga. 13.

Illinois.— Lord *v.* Wichita Bd. of Trade, 163 Ill. 45, 45 N. E. 205 (holding that where the facts are in dispute, and a party submits propositions containing correct legal principles as applied to a hypothetical condition of facts, statements therein that such principles are applicable to the facts in the case are properly stricken out); Ladd *v.* Pigot, 114 Ill. 647, 2 N. E. 503; Clevenger *v.* Dunaway, 84 Ill. 367.

Indiana.— Fitzpatrick *v.* Papa, 89 Ind. 17.

Kentucky.— Thompson *v.* Thompson, 17 B. Mon. 22; Barclay *v.* Blackburn, 6 J. J. Marsh. 115.

Maryland.— Ricards *v.* Wedemeyer, 75 Md. 10, 22 Atl. 1101.

Michigan.— Wisner *v.* Davenport, 5 Mich. 501.

Minnesota.— Chandler *v.* De Graff, 25 Minn. 88.

Mississippi.— Wilson *v.* Williams, 52 Miss. 487; Young *v.* Power, 41 Miss. 197.

Missouri.— Watson *v.* Musick, 2 Mo. 29.

Pennsylvania.— Bartley *v.* Williams, 66 Pa. St. 329; Delaware, etc., R. Co. *v.* Smith, 1 Walk. 88.

South Carolina.— Sanford *v.* Seaboard Air Line R. Co., 79 S. C. 519, 61 S. E. 74.

Virginia.— Com. L. Ins. Co. *v.* Hairston, 108 Va. 832, 62 S. E. 1057, 128 Am. St. Rep. 989.

See 46 Cent. Dig. tit. "Trial," §§ 442, 471.

The hypothetical statement must present the case shown in evidence fairly to the jury. Com. L. Ins. Co. *v.* Hairston, 108 Va. 832, 62 S. E. 1057, 128 Am. St. Rep. 989. Thus an instruction summing up the facts assumed to be necessary to support the action, with the conclusion that, if the jury find such facts to be established, they should find for plaintiff, is not cause for a reversal, where it omits no material fact necessary to the right of recovery. East St. Louis Connecting R. Co. *v.* Eggmann, 170 Ill. 538, 48 N. E. 981, 62 Am. St. Rep. 400 [*affirming* 65 Ill. App. 345].

application to the facts as they may be found;[39] but where the facts are admitted, or undisputed, and there is no conflict of evidence, the question is one of law, upon which direct instruction ought to be given.[40] A charge stating the legal conclusions which would result from the establishment of certain facts is not subject to objection as a charge on the facts,[41] or as assuming the truth of the

An instruction containing a hypothesis opposed to all the testimony should not be given. Wise *v.* Wabash R. Co., 135 Mo. App. 230, 115 S. W. 452.

In giving to the jury an instruction involving a summary of any of the facts in evidence, the hypothetical is the proper form of presenting them, because it distinctly puts the jury on the inquiry as to those facts. Buttram *v.* Jackson, 32 Ga. 409.

Where many witnesses are examined and the facts detailed by them are numerous, the court commits no error if it charges the jury hypothetically, and refuses to instruct them that there is no testimony tending to prove a particular fact. Knox *v.* Fair, 17 Ala. 503.

A request to a judge to instruct the jury in a particular matter must rest upon undisputed facts, or a hypothetical case. Gardner *v.* Clark, 17 Barb. (N. Y.) 538; Gurney *v.* Smithson, 7 Bosw. (N. Y.) 396.

Where defendant sets up no affirmative defense, but merely traverses the facts necessary for a recovery, an instruction hypothesizing such facts is not objectionable. Price *v.* Barnard, 70 Mo. App. 175.

39. *Illinois.*— Eckels *v.* Hawkinson, 138 Ill. App. 627.

Indiana.— Bundy *v.* McKnight, 48 Ind. 502.

Maine.— Grout *v.* Nichols, 53 Me. 383.

Michigan.— Wisner *v.* Davenport, 5 Mich. 501.

Missouri.— Hamilton *v.* Home Ins. Co., 94 Mo. 353, 7 S. W. 261; Stewart *v.* Sparkman, 75 Mo. App. 106; W. W. Kendall Boot, etc., Co. *v.* Bain, 46 Mo. App. 581.

Nebraska.— Schmuck *v.* Hill, 2 Nebr. (Unoff.) 79, 96 N. W. 158.

Pennsylvania.— Hastings *v.* Eckley, 8 Pa. St. 194; Lilly *v.* Paschal, 2 Serg. & R. 394.

Texas.— Atchison, etc., R. Co. *v.* Worley, (Civ. App. 1894) 25 S. W. 478.

See 46 Cent. Dig. tit. "Trial," § 471.

A trial judge should not be deprived of power to apply the law to the issues of a case and permitted only to give abstract dissertations on the law to be applied by the jury as they may see fit. St. Louis, etc., R. Co. *v.* Lane, (Tex. Civ. App. 1909) 118 S. W. 847.

40. *Alabama.*— Swift *v.* Fitzhugh, 9 Port. 39.

Michigan.— Wisner *v.* Davenport, 5 Mich. 501.

New York.— Powers *v.* Ingraham, 3 Barb. 576.

South Dakota.— Smith *v.* Mutual Cash Guaranty F. Ins. Co., 21 S. D. 433, 113 N. W. 94.

Texas.— Houston, etc., R. Co. *v.* Harvin, (Civ. App. 1899) 54 S. W. 629, holding that it is error to submit to the jury, as hypothetical, an undisputed fact.

Washington.— Peyser *v.* Western Dry Goods Co., 48 Wash. 55, 92 Pac. 886.

There is neither reason nor authority for requiring a court to throw doubt on a certainty in charging a jury; for this would tend to mislead and confuse, rather than to instruct, and multiply what are called the uncertainties of the law. Swift *v.* Fitzhugh, 9 Port. (Ala.) 39; Wisner *v.* Davenport, 5 Mich. 501.

Where but one inference can be drawn from the facts, it is not error to charge the legal effect of such facts. Hollings *v.* Bankers' Union of the World, 63 S. C. 192, 41 S. E. 90. But unless defendant's nonliability followed as a necessary legal conclusion from a given state of facts, it would not be proper for the judge to instruct the jury that, under such a state of facts, there could be no recovery for plaintiff. Augusta Southern R. Co. *v.* McDade, 105 Ga. 134, 31 S. E. 420.

41. *Arkansas.*— Eureka Stone Co. *v.* Knight, 82 Ark. 164, 100 S. W. 878.

Illinois.— Ohio, etc., R. Co. *v.* Kleinsmith, 38 Ill. App. 45 [*following* Toledo, etc., R. Co. *v.* Bray, 57 Ill. 514].

Iowa.— Pritchett *v.* Overman, 3 Greene 531.

Missouri.— Dunn *v.* Henley, 24 Mo. App. 579.

South Carolina.— Mitchell *v.* Cleveland, 76 S. C. 432, 57 S. E. 33; Kean *v.* Landrum, 72 S. C. 556, 52 S. E. 421; Sentell *v.* Southern R. Co., 70 S. C. 183, 49 S. E. 215; Wylie *v.* Commercial, etc., Bank, 63 S. C. 406, 41 S. E. 504; Hollings *v.* Bankers' Union of the World, 63 S. C. 192, 41 S. E. 90; Sims *v.* Southern R. Co., 59 S. C. 246, 37 S. E. 836; Jenkins *v.* Charleston St. R. Co., 58 S. C. 373, 36 S. E. 703; Madden *v.* Port Royal, etc., R. Co., 41 S. C. 440, 19 S. E. 951, 20 S. E. 65.

Texas.— Paris, etc., R. Co. *v.* Calvin, (Civ. App. 1907) 103 S. W. 428 [*affirmed* in 101 Tex. 291, 106 S. W. 879]; Staley *v.* Stone, 41 Tex. Civ. App. 299, 92 S. W. 1017; Ellis *v.* Kirkpatrick, 32 Tex. Civ. App. 243, 74 S. W. 57; Phœnix Ins. Co. *v.* Neal, 23 Tex. Civ. App. 427, 56 S. W. 91; Houston, etc., R. Co. *v.* White, 23 Tex. Civ. App. 280, 56 S. W. 204.

Virginia.— Green *v.* Crain, 12 Gratt. 252.

See 46 Cent. Dig. tit. "Trial," §§ 442, 471.

The words, "If you find a verdict for the plaintiff, you will answer," followed by the questions which must be answered if the verdict is for plaintiff, do not indicate to the jury that the court expects them to find for plaintiff. Smith *v.* Dawley, 92 Iowa 312, 60 N. W. 625.

facts so stated.[42] Neither is such a charge within the rule prohibiting the singling out of particular facts in the chain of proof.[43] If the charge thus given is supposed to influence the mind of the jury in its determination upon the facts, the opposite party should pray the court to state the law as applicable to the converse of the facts supposed.[44] It is not necessary to the giving of an instruction that the evidence should establish conclusively the hypothesis stated in it;[45] if there be any evidence conducing to establish the assumption it is sufficient to authorize the giving of the instruction, and it is for the jury to find whether the facts stated are made out by the evidence.[46]

15. Defining Words and Phrases Used.[47] Where the court is authorized to construe words, it may expound their meaning in the charge.[48] When a word has several meanings, it is not error for the court to direct the jury to inquire in what sense it was used by a witness.[49] The meaning of ordinary words, when used in their usual or conventional sense, need not be explained to the jury,[50] although to do so is not prejudicial error.[51] An intelligent juror understands what they mean, and an attempt to define words of an ordinary accepted meaning tends to mystify rather than enlighten.[52] If, however, the court does define them, it is bound to define them correctly, with reference to the issues of the case.[53] The court need not define such terms as tenant, rented,[54] scope of employment,[55] city,[56] flying switch,[57] riot,[58] market value,[59] unfitness, carelessness,[60] negligence,[61] reasonably,[62] reasonable time,[63] and malice; [64] and failure to define the terms preponderance of evidence,[65] *prima facie*,[66] material fact,[67] con-

42. Low *v.* Warden, 77 Cal. 94, 19 Pac. 235; Ladd *v.* Pigott, 114 Ill. 647, 2 N. E. 503.

43. Stewart *v.* Sparkman, 75 Mo. App. 106.

44. Carlisle *v.* Hill, 16 Ala. 398.

45. Bradford *v.* Pearson, 12 Mo. 71.

46. Bradford *v.* Pearson, 12 Mo. 71.

47. **In criminal prosecutions** see Criminal Law, 12 Cyc. 613.

48. Cobb *v.* Covenant Mut. Ben. Assoc., 153 Mass. 176, 26 N. E. 230, 25 Am. St. Rep. 619, 10 L. R. A. 666; Rodgers *v.* Kline, 56 Miss. 808, 31 Am. Rep. 389.

49. Medlock *v.* Miller, 94 Ga. 652, 19 S. E. 978.

50. *Georgia.*— Barco *v.* Taylor, 5 Ga. App. 372, 63 S. E. 224; Atlanta Baggage, etc., Co. *v.* Mizo, 4 Ga. App. 407, 61 S. E. 844.

Kentucky.— Louisville, etc., R. Co. *v.* Vincent, 96 S. W. 898, 39 Ky. L. Rep. 1049.

Maine.— Berry *v.* Billings, 47 Me. 328.

Missouri.— Cody *v.* Gremmler, 121 Mo. App. 359, 99 S. W. 46; Goldsmith *v.* Wamsganz, 86 Mo. App. 1; Reeds *v.* Lee, 64 Mo. App. 683.

Texas.— Texas Midland R. Co. *v.* Ritchey, 49 Tex. Civ. App. 409, 108 S. W. 732; Raley *v.* State, 47 Tex. Civ. App. 426, 105 S. W. 342.

Washington.—Akin *v.* Bradley Engineering, etc., Co., 51 Wash. 658, 99 Pac. 1038.

51. Houston, etc., R. Co. *v.* Roberts, 50 Tex. Civ. App. 69, 109 S. W. 982.

52. Akin *v.* Bradley Engineering, etc., Co., 51 Wash. 658, 99 Pac. 1038. And see Texas Midland R. Co. *v.* Ritchey, 49 Tex. Civ. App. 409, 108 S. W. 732.

53. Raley *v.* State, 47 Tex. Civ. App. 426, 105 S. W. 342.

54. J. V. Pilcher Mfg. Co. *v.* Teupe, 91 S. W. 1125, 28 Ky. L. Rep. 1350.

55. Maysville, etc., R. Co. *v.* Willis, 104 S. W. 1016, 31 Ky. L. Rep. 1249; Vernon *v.* Cornwell, 104 Mich. 62, 62 N. W. 175.

56. Stotler *v.* Chicago, etc., R. Co., 200 Mo. 107, 98 S. W. 509.

57. Lange *v.* Missouri Pac. R. Co., 115 Mo. App. 582, 91 S. W. 989.

58. Louisville, etc., R. Co. *v.* Vincent, 96 S. W. 898, 29 Ky. L. Rep. 1049.

59. Atlanta Baggage, etc., Co. *v.* Mizo, 4 Ga. App. 407, 61 S. E. 844.

60. Galveston, etc., R. Co. *v.* Arispe, 81 Tex. 517, 17 S. W. 47.

61. Sweeney *v.* Kansas City Cable R. Co., 150 Mo. 385, 51 S. W. 682; Main *v.* Hall, 127 Mo. App. 713, 106 S. W. 1099.

Where the jury are practically told what facts could constitute negligence, it is not necessary to define the term, especially in view of the rule that it is not necessary in all cases to define "negligence," as the jury are supposed to understand its meaning. St. Clair Mineral Springs Co. *v.* St. Clair, 96 Mich. 463, 56 N. W. 18; Landrum *v.* St. Louis, etc., R. Co., 132 Mo. App. 717, 112 S. W. 1000.

62. York *v.* Everton, 121 Mo. App. 640, 97 S. W. 604.

63. Houston, etc., R. Co. *v.* Roberts, 50 Tex. Civ. App. 69, 109 S. W. 982.

64. Louisville Press Co. *v.* Tennelly, 105 Ky. 365, 49 S. W. 15, 20 Ky. L. Rep. 1231.

65. Schornak *v.* St. Paul F. & M. Ins. Co., 96 Minn. 299, 104 N. W. 1087; Kischman *v.* Scott, 166 Mo. 214, 65 S. W. 1031; Endowment Rank K. P. *v.* Steele, 108 Tenn. 624, 69 S. W. 336; Gulf, etc., R. Co. *v.* Reagan, (Tex. Civ. App. 1896) 34 S. W. 796. Unless clearly used in a misleading context. Jones *v.* Durham, 94 Mo. App. 51, 67 S. W. 976.

66. Chicago, etc., R. Co. *v.* Esten, 178 Ill. 192, 52 N. E. 954 [*affirming* 78 Ill. App. 326].

67. In an instruction relative to the credi-

tributed,[68] agent,[69] deceptive and deceptively,[70] common laborer,[71] accrued,[72] substantial and substantially,[73] carelessly,[74] accommodation,[75] not guilty, as used in the pleadings,[76] substantial compliance,[77] presumption,[78] deceit,[79] fraud,[80] fraudulent,[81] onus,[82] ratification, acquiescence, repudiation, and adoption,[83] proximately,[84] risks due to the master,[85] and accident is not assignable as error.[86] On the other hand, the judge should explain to the jury the meaning of legal or technical terms occurring in his instructions,[87] as warranty,[88] requirements of the law,[89] proximate cause,[90] adverse possession,[91] actual possession,[92] conversion,[93] independent contractor,[94] nuisance,[95] actual notice,[96] arbitrary prices,[97] affirmative and negative testimony,[98] ordinary care,[99] ownership,[1] good faith and *bona fide*,[2] probable cause,[3] residence,[4] and remote and speculative damages,[5] and should not use words in a sense different from the popular one.[6] It is error to refuse requests to define technical or legal phrases

bility of witnesses. North Chicago St. R. Co. *v.* Shreve, 171 Ill. 438, 49 N. E. 534 [*affirming* 70 Ill. App. 666].

68. Bunyan *v.* Loftus, 90 Iowa 122, 57 N. W. 685; Wragge *v.* South Carolina, etc., R. Co., 47 S. C. 105, 25 S. E. 76, 58 Am. St. Rep. 870, 33 L. R. A. 191.

69. Harper *v.* Fidler, 105 Mo. App. 680, 78 S. W. 1034; Carthage Marble, etc., Co. *v.* Bauman, 55 Mo. App. 204.

70. Glover *v.* American Hominy Flakes Co., 76 Mo. App. 103.

71. Boettger *v.* Scherpe, etc., Architectural Iron Co., 136 Mo. 531, 38 S. W. 298.

72. McDonnell *v.* Nicholson, 67 Mo. App. 408.

73. Deatherage Lumber Co. *v.* Snyder, 65 Mo. App. 568.

74. Warder *v.* Henry, 117 Mo. 530, 23 S. W. 776.

75. Larimore *v.* Legg, 23 Mo. App. 645.

76. Knoxville, etc., R. Co. *v.* Wyrick, 99 Tenn. 500, 42 S. W. 434.

77. A. J. Anderson Electric Co. *v.* Cleburne Water, etc., Co., 23 Tex. Civ. App. 328, 57 S. W. 575.

78. Barco *v.* Taylor, 5 Ga. App. 372, 63 S. E. 224; Kischman *v.* Scott, 166 Mo. 214, 65 S. W. 1031.

79. Hobart *v.* Young, 63 Vt. 363, 21 Atl. 612, 12 L. R. A. 693.

80. Kischman *v.* Scott, 166 Mo. 214, 65 S. W. 1031.

81. Fearey *v.* O'Neill, 149 Mo. 467, 50 S. W. 918, 73 Am. St. Rep. 440.

82. *In re* Convey, 52 Iowa 197, 2 N. W. 1084.

83. Iowa State Sav. Bank *v.* Black, 91 Iowa 490, 59 N. W. 283.

84. Theissen *v.* Belle Plaine, 81 Iowa 118, 46 N. W. 854; Parkhill *v.* Brighton, 61 Iowa 103, 15 N. W. 853.

85. Eastman *v.* Curtis, 67 Vt. 432, 32 Atl. 232.

86. Larsen *v.* Chicago Union Traction Co., 131 Ill. App. 286.

87. Holmes *v.* Clisby, 121 Ga. 241, 48 S. E. 934, 104 Am. St. Rep. 103; Greene *v.* Louisville R. Co., 119 Ky. 862, 84 S. W. 1154, 27 Ky. L. Rep. 316; Derham *v.* Derham, 125 Mich. 109, 83 N. W. 1005; Watkins *v.* Wallace, 19 Mich. 57; White *v.* Madison, 16 Okla. 212, 83 Pac. 798.

Reason for rule.— The average legal mind does not always carry a correct idea of the various words and phrases which have a technical meaning in the law. Hence it is not to be expected that the unprofessional men of the jury can, without explanation, grasp the meaning of such expressions. It is therefore the better practice in all cases for the judge to explain to the jury the meaning of such expressions when they occur in his instructions. Holmes *v.* Clisby, 121 Ga. 241, 48 S. E. 934, 104 Am. St. Rep. 103.

88. Flint-Walling Mfg. Co. *v.* Ball, 43 Mo. App. 504.

89. Chicago *v.* Fields, 139 Ill. App. 250.

90. Swift *v.* Rennard, 128 Ill. App. 181; Mulderig *v.* St. Louis, etc., R. Co., 116 Mo. App. 655, 94 S. W. 801. *Contra*, Burk *v.* Creamery Package Mfg. Co., 126 Iowa 730, 102 N. W. 793, 106 Am. St. Rep. 377; Miller *v.* Boone County, 95 Iowa 5, 63 N. W. 352.

91. Chambers *v.* Morris, (Ala. 1906) 42 So. 549; Dyer *v.* Brannock, 2 Mo. App. 432 [*reversed* on other grounds in 66 Mo. 391]; Western North Carolina Land Co. *v.* Scaife, 80 Fed. 352, 25 C. C. A. 461.

92. Mayes *v.* Kenton, 64 S. W. 728, 23 Ky. L. Rep. 1052, in a controversy concerning real property.

93. Davis *v.* Hardwick, 43 Tex. Civ. App. 71, 94 S. W. 359. Unless the charge states all the elements constituting it. Houston, etc., R. Co. *v.* Vinson, (Tex. Civ. App. 1896) 38 S. W. 540.

94. Overhouser *v.* American Cereal Co., 128 Iowa 580, 105 N. W. 113.

95. Kirchgraber *v.* Lloyd, 59 Mo. App. 59.

96. Ware *v.* Souders, 120 Ill. App. 209.

97. Kansas City, etc., R. Co. *v.* Dawley, 50 Mo. App. 480.

98. Chicago, etc., R. Co. *v.* Pelligreen, 65 Ill. App. 333.

99. Yerkes *v.* Northern Pac. R. Co., 112 Wis. 184, 88 N. W. 33, 88 Am. St. Rep. 961.

1. McArthur *v.* Dayton, 42 S. W. 343, 19 Ky. L. Rep. 882.

2. Bowles Live Stock Commission Co. *v.* Hunter, 91 Mo. App. 333.

3. Atchison, etc., R. Co. *v.* Woodson, 79 Kan. 567, 100 Pac. 633.

4. Murray *v.* Geiser Mfg. Co., 79 Kan. 326, 99 Pac. 589.

5. Portland First Nat. Bank *v.* Carroll, 35 Mont. 302, 88 Pac. 1012.

6. Mullins *v.* Cottrell, 41 Miss. 291.

such as ordinary care,[7] proportionate to the pecuniary injury,[8] abandonment by tenant,[9] disposal of property with intent to defraud creditors,[10] in instructions given. And the word "agent" is not sufficiently defined as one transacting business for defendant.[11] And where the phrase "burden of proof" is used in an instruction to mean other than the obligation on the party who asserts the affirmative of the issue to prove the same by a preponderance of the evidence, the sense in which such words are used should be clearly indicated.[12] The court may properly refuse requests for instructions containing unexplained technical terms such as burden of proof,[13] preponderance of evidence,[14] reasonable care,[15] estoppel,[16] or good excuse.[17] The use by the court of technical terms in an instruction without explanation of their meaning will not be ground for reversal, where under the circumstances and conditions of the case it could not have been misunderstood,[18] and the use of such terms in instructions given without definition or explanation will not operate to reverse, in the absence of requests to define or explain them.[19] If a party to an action believes that a term used by the court in an instruction should be defined and explained, it should ask for a special instruc-

7. Junction City *v.* Blades, 1 Kan. App. 85, 41 Pac. 677; Denver, etc., R. Co. *v.* Norgate, 141 Fed. 247, 72 C. C. A. 365, 6 L. R. A. N. S. 981.

8. Merchants', etc., Oil Co. *v.* Burns, 96 Tex. 573, 74 S. W. 758 [*reversing* (Civ. App. 1903) 72 S. W. 626], in an instruction relating to the measure of damages.

9. Union Scale Co. *v.* Iowa Mach., etc., Co., 136 Iowa 171, 113 N. W. 762.

10. Matthews *v.* Boydstun, (Tex. Civ. App. 1895) 31 S. W. 814.

11. Equitable Produce, etc., Exch. *v.* Keyes, 67 Ill. App. 460; Skeen *v.* Chambers, 31 Utah 36, 86 Pac. 492.

12. Chicago Union Traction Co. *v.* Myers, 134 Ill. App. 61.

13. Prince *v.* St. Louis Cotton Compress Co., 112 Mo. App. 49, 86 S. W. 873.

14. Mackin *v.* People's St. R., etc., Light, etc., Co., 45 Mo. App. 82; Fletcher *v.* Milburn Mfg. Co., 35 Mo. App. 321.

15. Coney Island Co. *v.* Dennan, 149 Fed. 687, 79 C. C. A. 375, in a person of immature age.

16. Thomas *v.* Presbrey, 5 App. Cas. (D. C.) 217.

17. Sexton *v.* Barrie, 102 Ill. App. 586, used in reference to the non-performance of a contract.

18. Miller *v.* Barnett, 124 Mo. App. 53, 101 S. W. 155; Gano *v.* Samuel, 14 Ohio 592.

19. *Arkansas.*— Western Coal, etc., Co. *v.* Jones, 75 Ark. 76, 87 S. W. 440, ordinary care.

California.— Donati *v.* Righetti, 9 Cal. App. 45, 97 Pac. 1128.

Colorado.— Ramsay *v.* Meade, 37 Colo. 465, 86 Pac. 1018 (probable profits); Colorado, etc., R. Co. *v.* Webb, 36 Colo. 224, 85 Pac. 683.

Georgia.— Cordele Sash, etc., Co. *v.* Wilson Lumber Co., 129 Ga. 290, 58 S. E. 860 (delivery, delivered); Foote *v.* Kelley, 126 Ga. 799, 55 S. E. 1045 ("specie," "in kind," "for consumption"); Georgia Southern, etc., R. Co. *v.* Young Inv. Co., 119 Ga. 513, 46 S. E. 644 (ordinary care and preponderance of evidence).

Illinois.— Malott *v.* Hood, 201 Ill. 202, 66 N. E. 247 [*affirming* 99 Ill. App. 360].

Indiana.— Wiler *v.* Manley, 51 Ind. 169.

Iowa.— Des Moines Sav. Bank *v.* Kennedy, 142 Iowa 272, 120 N. W. 742; Murray *v.* Walker, 83 Iowa 202, 48 N. W. 1075.

Kentucky.— Louisville, etc., R. Co. *v.* Fowler, 123 Ky. 450, 96 S. W. 568, 29 Ky. L. Rep. 905; South Covington, etc., R. Co. *v.* Brown, 104 S. W. 703, 31 Ky. L. Rep. 1072; Bugg *v.* Holt, 97 S. W. 29, 29 Ky. L. Rep. 1208 (itinerant, consideration, fraud); Cincinnati, etc., R. Co. *v.* Richardson, 14 Ky. L. Rep. 367.

Massachusetts.— Cave *v.* Osborne, 193 Mass. 482, 79 N. E. 794, tender.

Minnesota.— Kostuch *v.* St. Paul City R. Co., 78 Minn. 459, 81 N. W. 215.

Missouri.— Quirk *v.* St. Louis United El. Co., 126 Mo. 279, 28 S. W. 1080 (ordinary care); Johnson *v.* Missouri Pac. R. Co., 96 Mo. 340, 9 S. W. 790, 9 Am. St. Rep. 351 (reasonable care and diligence); Rattan *v.* Central Electric R. Co., 120 Mo. App. 270, 96 S. W. 735 (ordinary care).

Ohio.— Cleveland, etc., R. Co. *v.* Richerson, 19 Ohio Cir. Ct. 385, 10 Ohio Cir. Dec. 326.

Oregon.— Carroll *v.* Grande Ronde Electric Co., 52 Oreg. 370, 97 Pac. 552.

South Carolina.— Nohrden *v.* Northeastern R. Co., 59 S. C. 87, 37 S. E. 228, 82 Am. St. Rep. 826.

Tennessee.— Knoxville, etc., R. Co. *v.* Wyrick, 99 Tenn. 500, 42 S. W. 434.

Texas.— Chaddick *v.* Haley, 81 Tex. 617, 17 S. W. 233 (publication used in reference to a will); Galveston, etc., R. Co. *v.* Arispe, 81 Tex. 517, 17 S. W. 47 (gross negligence); Half *v.* Curtis, 68 Tex. 640, 5 S. W. 451; Runnells *v.* Pecos, etc., R. Co., 49 Tex. Civ. App. 150, 107 S. W. 647 (voluntarily, unnecessarily); Collins *v.* Kelsey, (Civ. App. 1906) 97 S. W. 122 (notice); International, etc., R. Co. *v.* Tisdale, 39 Tex. Civ. App. 372, 87 S. W. 1063 (ordinary care); Pacific Mut. L. Ins. Co. *v.* Terry, 37 Tex. Civ. App. 486, 84 S. W. 656 ("use" of liquors in a question in an application for life insurance); Taylor *v.* Houston, etc., R. Co., (Civ. App. 1904) 80 S. W. 260

tion defining the term,[20] and if the court has in its general charge sufficiently defined a term, it may properly refuse an instruction containing substantially the same definition.[21]

16. Length and Number of Instructions. It is necessary to any useful effect they may have on the minds of jurors that instructions should be as few, and short, and pointed as may consist with the object of giving clear ideas to the jury of the main points of law governing the case as applied to the facts.[22] The simpler and plainer instructions can be framed and cover the issues, the better the jury will understand them, and the less liable will they be to run counter to some rule of law.[23] It is very generally held improper therefore for counsel to ask,[24] or for the court to give, long and numerous instructions,[25] because it does not enlighten the minds of the jurors on the issues submitted, but tends rather to introduce confusion.[26] And the practice is further objectionable as increasing the labor of both the trial and reviewing courts.[27] However, the mere fact that instructions given are lengthy will not of itself warrant a reversal.[28] But a reversal is authorized if such a number is given as will confuse the jury and make their verdict mere guess-work.[29] The practice of requesting an unnecessarily large number of instructions is one not to be approved, they being calculated to confuse a jury, cannot be critically examined by the trial judge, and afford unnecessary oppor-

(negligence); Western Union Tel. Co. *v.* James, 31 Tex. Civ. App. 503, 73 S. W. 79 (ordinary care); Texas, etc., R. Co. *v.* Scott, 30 Tex. Civ. App. 496, 71 S. W. 26 (plea of avoidance); American Cotton Co. *v.* Smith, 29 Tex. Civ. App. 425, 69 S. W. 443 (negligence); Galveston, etc., R. Co. *v.* Ford, 22 Tex. Civ. App. 131, 54 S. W. 37 (words of statute); Galveston, etc., R. Co. *v.* Henning, (Civ. App. 1897) 39 S. W. 302 (proper signals); Galveston, etc., R. Co. *v.* Waldo, (Civ. App. 1894) 26 S. W. 1004 (negligence); Robinson *v.* McIver, (Civ. App. 1893) 23 S. W. 915 (adverse possession).

Vermont.— Lynds *v.* Plymouth, 73 Vt. 216, 50 Atl. 1083.

Washington.— Cogswell *v.* West St., etc., R. Co., 5 Wash. 46, 31 Pac. 411, negligence.

West Virginia.— White *v.* Crump, 19 W. Va. 583.

Wisconsin.— Howard *v.* Beldenville Lumber Co., 129 Wis. 98, 108 N. W. 48; Miles *v.* Stanke, 114 Wis. 94, 89 N. W. 833; Brunette *v.* Gagen, 106 Wis. 618, 82 N. W. 564, ordinary care.

United States.— Western North Carolina Land Co. *v.* Scaife, 80 Fed. 352, 25 C. C. A. 461, adverse possession.

See 46 Cent. Dig. tit. "Trial," § 639.

20. Savannah Electric Co. *v.* Bennett, 130 Ga. 597, 61 S. E. 529; Bugg *v.* Holt, 97 S. W. 29, 29 Ky. L. Rep. 1208; Louisville, etc., R. Co. *v.* Vincent, 96 S. W. 898, 29 Ky. L. Rep. 1049; Sherman Gas, etc., Co. *v.* Belden, (Tex. Civ. App. 1909) 115 S. W. 897; Galveston, etc., R. Co. *v.* Sullivan, (Tex. Civ. App. 1909) 115 S. W. 615; Galveston, etc., R. Co. *v.* Harper, (Tex. Civ. App. 1908) 114 S. W. 1168, (Tex. Civ. App. 1909) 114 S. W. 1199; Texas Midland R. Co. *v.* Ritchey, 49 Tex. Civ. App. 409, 108 S. W. 732; Missouri, etc., R. Co. *v.* Hendricks, 49 Tex. Civ. App. 314, 108 S. W. 745. And see cases cited in preceding note.

21. Galveston, etc., R. Co. *v.* Olds, (Tex. Civ. App. 1908) 112 S. W. 787; Goodloe *v.* Goodloe, 47 Tex. Civ. App. 493, 105 S. W. 533.

22. Hanger *v.* Evins, 38 Ark. 334.

23. *In re* Keithley, 134 Cal. 9, 66 Pac. 5; Chicago City R. Co. *v.* Ahler, 107 Ill. App. 397. And see Kimball, etc., Mfg. Co. *v.* Vroman, 35 Mich. 310, 24 Am. Rep. 558, in which it was said that the multiplicity of points and requests in a cause when the issues are not complicated is of injurious tendency and is calculated to confuse both courts and juries in the administration of justice.

24. Ryan *v.* Washington, etc., R. Co., 8 App. Cas. (D. C.) 542; Maryland Steel Co. *v.* Engleman, 101 Md. 661, 61 Atl. 314; Bergeman *v.* Indianapolis, etc., R. Co., 104 Mo. 77, 15 S. W. 992; McCray *v.* Fairmont, 46 W. Va. 442, 33 S. E. 245.

25. *Arkansas.*— Hanger *v.* Evins, 38 Ark. 334; Sadler *v.* Sadler, 16 Ark. 628.

Idaho.— Thatcher *v.* Quirk, 4 Ida. 267, 38 Pac. 652.

Illinois.— Adams *v.* Smith, 58 Ill. 417.

Iowa.— Murphy *v.* Chicago, etc., R. Co., 38 Iowa 539.

Mississippi.— Clarke *v.* Edwards, 44 Miss. 778.

Missouri.— Barrie *v.* St. Louis Transit Co., 119 Mo. App. 38, 96 S. W. 233; McAllister *v.* Barnes, 35 Mo. App. 668.

Ohio.— Mutual Ben. L. Ins. Co. *v.* French, 2 Cinc. Super. Ct. 321.

See 46 Cent. Dig. tit. "Trial," § 647.

When not reversible error.— Where no misstatement of the law is pointed out in an instruction, and, although it is lengthy and complex, it contains no misstatement of legal rules, the giving of the instruction is not reversible error. Coffey *v.* Omaha, etc., St. R. Co., 79 Nebr. 286, 112 N. W. 589.

26. Adams *v.* Smith, 58 Ill. 417.

27. Adams *v.* Smith, 58 Ill. 417.

28. Sharp *v.* Johnson, 22 Ark. 79.

29. Sidway *v.* Missouri Land, etc., Co., 163 Mo. 342, 63 S. W. 705.

tunities for errors.[30] The right to demand instructions has a limit,[31] and the trial judge may place a reasonable limit on the number of instructions he will consider on behalf of either party.[32] But he cannot arbitrarily fix the number of instructions that shall be presented or passed on.[33] Where an unreasonable number of instructions is presented, the court may refuse all of them, and in lieu thereof prepare and give, of its own motion, instructions covering the cause of action or defense,[34] or give such of the instructions with or without modification as suffice to cover the case,[35] or it may require the instructions to be consolidated or condensed within such limits as may be reasonable;[36] but the better view is that the court cannot refuse to instruct at all on the matter covered by the requests merely because of the unreasonableness of the number or length of instructions asked, but should pursue one of the courses outlined in the three preceding paragraphs of text.[37] Error cannot be assigned to the refusal to give any of an unreasonably large number of requested instructions, if the instructions given cover the whole ground of dispute.[38] But if both parties ask an unreasonably large number of instructions, and they are given as requested, neither can complain that the court instructed the jury at such length as to mislead them.[39]

D. Requests For Instructions[40]— **1. Power of Court to Instruct in Absence of Request.** Except in one state where there is a statutory prohibition against so doing,[41] it is permissible for the court to instruct the jury, although no

30. Gracy *v.* Atlantic Coast Line R. Co., 53 Fla. 350, 42 So. 903.

Number of instructions held unreasonable. — Thirty-three instructions is an unreasonable number to ask the judge to consider. La Salle County Carbon Coal Co. *v.* Eastman, 99 Ill. App. 495; Kinney *v.* Springfield, 35 Mo. App. 97. So also is twenty-five (Norton *v.* St. Louis, etc., R. Co., 40 Mo. App. 642), or eleven instructions in a case involving few and simple issues (McAllister *v.* Barnes, 35 Mo. App. 668), or twelve instructions relating to a single issue (Hannibal *v.* Richards, 35 Mo. App. 15).

31. *In re* Keithley, 134 Cal. 9, 66 Pac. 5; Fisher *v.* Stevens, 16 Ill. 397.

32. Chicago, etc., R. Co. *v.* Kelly, 127 Ill. 637, 21 N. E. 203 [*affirming* 25 Ill. App. 17].

33. Crane Co. *v.* Hogan, 228 Ill. 338, 81 N. E. 1032; Chicago Union Traction Co. *v.* Hanthorn, 211 Ill. 367, 71 N. E. 1022; Chicago Union Traction Co. *v.* Olsen, 211 Ill. 255, 71 N. E. 985; Chicago City R. Co. *v.* O'Donnell, 208 Ill. 267, 70 N. E. 294, 477 [*reversing* 108 Ill. App. 385]; Cobb Chocolate Co. *v.* Knudson, 207 Ill. 452, 69 N. E. 816 [*affirming* 107 Ill. App. 668]; Chicago City R. Co. *v.* Sandusky, 198 Ill. 400, 64 N. E. 990; The Fair *v.* Hoffmann, 110 Ill. App. 500 [*affirmed* in 209 Ill. 330, 70 N. E. 622]; Chicago Union Traction Co. *v.* Ludlow, 108 Ill. App. 357; Chicago Union Traction Co. *v.* Mommsen, 107 Ill. App. 353.

Reason for rule.— A hard and fast rule that instructions shall be limited to a given number is unreasonable. It is the prolixity and confusing character of the charge, as a whole, that rules of this character are designed to obviate. Restriction in point of number only of the instructions will not remove the evil. Chicago City R. Co. *v.* Sandusky, 198 Ill. 400, 64 N. E. 990.

It is prejudicial error for the court to compel a party to so limit the number of instructions that in drafting them they are confused and misleading. Daily *v.* Smith-Hippen Co., 111 Ill. App. 319.

When error harmless.— Error in arbitrarily limiting the number of instructions to be given is not ground for reversal unless it operates to exclude an instruction which the party was entitled to have. Chicago Union Traction Co. *v.* Olsen, 211 Ill. 255, 71 N. E. 985; Chicago City R. Co. *v.* Sandusky, 198 Ill. 400, 64 N. E. 990.

34. Chicago Athletic Assoc. *v.* Eddy Electric Mfg. Co., 77 Ill. App. 204.

35. Salem *v.* Webster, 192 Ill. 369, 61 N. E. 323 [*affirming* 95 Ill. App. 120].

36. Chicago City R. Co. *v.* Sandusky, 198 Ill. 400, 64 N. E. 990 [*affirming* 99 Ill. App. 164].

37. Andrews *v.* Runyon, 65 Cal. 629, 4 Pac. 669; Chicago West Div. R. Co. *v.* Haviland, 12 Ill. App. 561; McCaleb *v.* Smith, 22 Iowa 242 (in which it was said that the practice of refusing to give instructions or even to read them because they were unnecessarily lengthy and numerous would be a most dangerous one and ought not to receive the sanction of an appellate tribunal); Lowry *v.* Beckner, 5 B. Mon. (Ky.) 41.

38. Crawshaw *v.* Sumner, 56 Mo. 517; Doan *v.* St. Louis, etc., R. Co., 43 Mo. App. 450; Flynn *v.* St. Louis, etc., R. Co., 43 Mo. App. 424. And see Desberger *v.* Harrington, 28 Mo. App. 632.

39. Hencke *v.* Babcock, 24 Wash. 556, 64 Pac. 755.

40. In actions to set aside fraudulent conveyances see Fraudulent Conveyances, 20 Cyc. 813.

In criminal prosecutions see Criminal Law, 12 Cyc. 658 *et seq.*

Presumptions on appeal as to rulings on requests see Appeal and Error, 3 Cyc. 304, 305.

41. In Mississippi, the court is prohibited

request for instructions is made.[42] "One of the very objects of having a judge is to instruct the jury on the law applicable to the case. Instead of its being error for the court on its own motion to instruct, where it seems to be required by the justice of the case, it is rather the duty of the judge to give such instructions." [43]

2. Necessity For Requests [44]— a. As a Basis For Assigning Error For Failure to Instruct — (I) *Failure to Give Any Instructions* — (A) *View That This Is Permissible in Absence of Request.* It is the rule in a number of states that, in the absence of requests for instructions, the court need not give any instructions at all; [45] and if improper instructions are asked, the court may overrule the motion without giving any instructions.[46] So it has been held that the court need not give any instructions to the jury where the request made is merely that the jury be instructed generally; [47] that the court is only required to give special instructions prepared and presented by the parties; [48] but if without request the court undertakes to do so, it is its duty to see that the instructions given are correct,[49] and if the law is misstated in a material point, to the prejudice of a party to the suit, the court's action becomes the subject of review, as in case of any other misdirection of a jury.[50]

(B) *The Contrary View.* In a number of states the rule is well settled that it is the duty of the court to give the jury appropriate instructions on all the material issues in the case, and that the court is not relieved from this duty by failure of the parties to request instructions.[51] A non-compliance by the court

by statute from charging the jury in the absence of request therefor (Bacon *v.* Bacon, 76 Miss. 458, 24 So. 968; Archer *v.* Sinclair, 49 Miss. 343; Davis *v.* Tiernan, 2 How. 786); and it has been held reversible error to do so even though the matter so charged be legal and applicable to the issue (Williams *v.* State, 32 Miss. 389, 66 Am. Dec. 615); and the judge cannot evade the rule by handing a charge to counsel who returns it requesting that it be given (Watkins *v.* State, 60 Miss. 323).

42. Stumps *v.* Kelley, 22 Ill. 140; Brown *v.* People, 9 Ill. 439; Carey *v.* Callan, 6 B. Mon. (Ky.) 44; McLellan *v.* Wheeler, 70 Me. 285. And see *infra*, IX, D, 2, a, (I), (B).

43. Stumps *v.* Kelley, 22 Ill. 140, 142.

44. **Failure to instruct without request as ground for new trial** see New Trial, 29 Cyc. 790 *et seq.*

In criminal prosecutions see Criminal Law, 12 Cyc. 658 *et seq.*

45. *Arkansas.*— Reasoner *v.* Brown, 19 Ark. 234.

Florida.— See Carter *v.* Bennett, 4 Fla. 283.

Illinois.— Osgood *v.* Skinner, 211 Ill. 229, 71 N. E. 869; McKeown *v.* Dyniewicz, 83 Ill. App. 509.

Kentucky.— South Covington, etc., R. Co. *v.* Core, 96 S. W. 562, 29 Ky. L. Rep. 836; Beavers *v.* Bowen, 93 S. W. 649, 29 Ky. L. Rep. 526; Pilcher Mfg. Co. *v.* Teupe, 91 S. W. 1125, 28 Ky. L. Rep. 1350; Cincinnati, etc., R. Co. *v.* Curd, 60 S. W. 297, 22 Ky. L. Rep. 1222; Young *v.* Stamp, 7 Ky. L. Rep. 605.

Maine.— McLellan *v.* Wheeler, 70 Me. 285.

Maryland.— Rosenkritz *v.* United R., etc., Co., 108 Md. 306, 70 Atl. 108. And see Coates *v.* Sangston, 5 Md. 121.

Missouri.— Morgan *v.* Mulhall, 214 Mo. 451, 114 S. W. 4; Brown *v.* Globe Printing Co., 213 Mo. 611, 112 S. W. 462, 127 Am. St. Rep. 627; Chicago, etc., R. Co. *v.* Randolph Town-Site Co., 103 Mo. 451, 15 S. W. 437; Sowders *v.* St. Louis, etc., R. Co., 127 Mo. App. 119, 104 S. W. 1122; Hall *v.* St. Louis, etc., R. Co., 124 Mo. App. 661, 101 S. W. 1137; Wilson *v.* Kansas City Southern R. Co., 122 Mo. App. 667, 99 S. W. 465; Barnett *v.* Sweringen, 77 Mo. App. 64; Eagle Constr. Co. *v.* Wabash R. Co., 71 Mo. App. 626.

New Mexico.— Palatine Ins. Co. *v.* Santa Fé Mercantile Co., 13 N. M. 241, 82 Pac. 363.

New York.— Haupt *v.* Pohlmann, 1 Rob. 121, 16 Abb. Pr. 301.

Ohio.— See Taft *v.* Wildman, 15 Ohio 123.

Virginia.— Womack *v.* Circle, 29 Gratt. 192.

Wisconsin.— Stuckey *v.* Fritsche, 77 Wis. 329, 46 N. W. 59.

Peremptory instruction.— Where defendant is entitled to a peremptory instruction, but does not request it, the court need not give it. Louisville, etc., R. Co. *v.* Davis, 105 S. W. 455, 32 Ky. L. Rep. 306; Samples *v.* Smythe, 105 S. W. 415, 32 Ky. L. Rep. 187.

46. Owings *v.* Trotter, 1 Bibb (Ky.) 157; Stuckey *v.* Fritsche, 77 Wis. 329, 46 N. W. 59.

47. Womack *v.* Circle, 29 Gratt. (Va.) 192, holding that a party cannot, by asking for a general instruction, devolve upon the court the duty of charging the jury on the law of the case.

48. Reasoner *v.* Brown, 19 Ark. 234.

49. South Covington, etc., R. Co. *v.* Core, 96 S. W. 562, 29 Ky. L. Rep. 836.

50. Reasoner *v.* Brown, 19 Ark. 234.

51. *Georgia.*— Hilton, etc., Lumber Co. *v.* Ingram, 119 Ga. 652, 46 S. E. 895, 100 Am.

with this requirement is prejudicial error and ordinarily ground for reversal.[52] In a few other states a rule similar to that just considered prevails.[53]

St. Rep. 204; Mays *v.* Shields, 117 Ga. 814, 45 S. E. 68; Central R. Co. *v.* Harris, 76 Ga. 501; Pryor *v.* Coggin, 17 Ga. 444; Haigler *v.* Adams, 5 Ga. App. 637, 63 S. E. 715; Evans *v.* Nail, 1 Ga. App. 42, 57 S. E. 1020.

Iowa.— Capital City Brick, etc., Co. *v.* Des Moines, 136 Iowa 243, 113 N. W. 835; Overhouser *v.* American Cereal Co., 128 Iowa 580, 105 N. W. 113; Upton *v.* Paxton, 72 Iowa 295, 33 N. W. 773; Seekel *v.* Norman, 71 Iowa 264, 32 N. W. 334; Owen *v.* Owen, 22 Iowa 270, 274, in which it was said: "It may be said that the counsel did not request instructions, and that therefore it was not obligatory on the court to give any. Such a view does not accord with our conception of the functions and duty of the judge. He should see that every case goes to the jury so that they have clear and intelligent notions of precisely what it is that they are to decide. His charge is their chart and compass."

Michigan.— Barton *v.* Gray, 57 Mich. 622, 24 N. W. 638.

Nebraska.— York Park Bldg. Assoc. *v.* Barnes, 39 Nebr. 834, 58 N. W. 440 (in which it was said that the law imposes upon the court the duty of stating to the jury the law applicable to the case, and an entire failure to state the law to the jury has the effect of submitting to the jury the determination not only of facts but of the law); Aultman *v.* Martin, 37 Nebr. 826, 56 N. W. 622; Sandwich Mfg. Co. *v.* Shiley, 15 Nebr. 109, 17 N. W. 267.

South Dakota.— Wilson *v.* Commercial Union Ins. Co., 15 S. D. 322, 89 N. W. 649.

Vermont.— Rowell *v.* Vershie, 62 Vt. 405, 19 Atl. 990, 8 L. R. A. 708; Buck *v.* Squiers, 23 Vt. 498; Abbott *v.* Kimball, 19 Vt. 551, 47 Am. Dec. 708; Vaughan *v.* Porter, 16 Vt. 266; Briggs *v.* Georgia, 12 Vt. 60.

Washington.— Schwaninger *v.* McNeeley, 44 Wash. 447, 87 Pac. 514.

Application of rule.— Where defendant relies mainly upon one defense, and introduces evidence to sustain it, it is error demanding a new trial for the judge to omit to call the attention of the jury to this defense. This is true whether or not he is requested by counsel to do so. Unless the judge charges upon such defense, and thereby calls the attention of the jury to it, the case is not properly tried, and there is a failure to submit to the jury one of the important issues made. Chattanooga, etc., R. Co. *v.* Voils, 113 Ga. 361, 38 S. E. 819. Where it appeared that the contract sued on was void for want of consideration, a failure to so instruct was error. Rowell *v.* Vershire, 62 Vt. 405, 19 Atl. 990, 8 L. R. A. 708. When the question of notice was in issue, it was error to ignore it, and merely to charge that plaintiff by showing the proofs of loss, etc., had made out a *prima facie* case. Donahue *v.* Windsor County Mut. F. Ins. Co., 56 Vt. 374.

[IX, D, 2, a, (I), (B)]

52. Mays *v.* Shields, 117 Ga. 814, 45 S. E. 68; Chattanooga, etc., R. Co. *v.* Voils, 113 Ga. 361, 38 S. E. 819; Central R. Co. *v.* Harris, 76 Ga. 501; Capital City Brick, etc., Co. *v.* Des Moines, 136 Iowa 243, 113 N. W. 835; Sandwich Mfg. Co. *v.* Shiley, 15 Nebr. 109, 17 N. W. 267.

53. **Kansas.**— In a trial by jury, it is the duty of the court to instruct the jury on questions of law which he deems applicable to the case as made by the pleadings and evidence; and if a party desires other or different instructions, he must make his request in writing for them, as provided by section 275 of the code. If no such request is made, the instructions given stand as the law of the case for that trial. Douglass *v.* Geiler, 32 Kan. 499, 4 Pac. 1039. And see Paola Nat. Bank *v.* Hampson, 4 Kan. App. 217, 45 Pac. 970, holding that where the evidence is conflicting, it is the duty of the court to charge on all questions as to which there is a conflict in the evidence.

North Carolina.— In this state a statute imposes upon judges the duty to state in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon, and it is held that the statute is mandatory and makes it the duty of the court to instruct the jury whether requested or not. Falkner *v.* Pilcher, 137 N. C. 449, 49 S. E. 945; Burton *v.* Rosemary Mfg. Co., 132 N. C. 17, 43 S. E. 480; Tucker *v.* Satterthwaite, 120 N. C. 118, 27 S. E. 45; Bailey *v.* Poole, 35 N. C. 404. While it may be conceded, as a general proposition, that a party cannot complain because a particular issue was not submitted to the jury unless he tendered it, the rule is subject to the qualification that the issues submitted must in themselves be sufficient to dispose of the controversy and to enable the court to proceed to judgment. Falkner *v.* Pilcher, *supra.* A limitation on this rule is that the court need not, in the absence of a request, charge the jury whenever the facts at issue are few and simple and no principle of law is involved. Holly *v.* Holly, 94 N. C. 96.

Texas.— Under Sayles Rev. St. art. 1316, as amended by Laws (1903), p. 55, c. 39 (Sayles' Annot. St. Suppl. p. 154), providing that the court shall charge the law of the case to the jury unless the parties expressly waive it, it is the duty of the trial court to charge the jury generally, although no proper charges are requested by the parties. Wallace *v.* Shapard, 42 Tex. Civ. App. 594, 94 S. W. 151. And see Houston, etc., R. Co. *v.* Buchanan, 38 Tex. Civ. App. 165, 84 S. W. 1073. Under this statute which the court considers to be mandatory it will be sufficient if the charge given covers the substantial issues of the case. It does not require the court to charge on every phase of every issue in a case. San Antonio, etc., R. Co. *v.* Votaw, (Civ. App. 1904) 81 S. W. 130.

(II) *PARTIAL NON-DIRECTION* [54]— (A) *Statement of Rule.* It is a rule of very general application that if instructions given are correct as far as they go, it cannot be assigned as error that the court omitted to instruct on all points involved in the case if the attention of the court has not been directed thereto by special requests for instructions on those points.[55] As was said in an early

54. As ground for new trial see NEW TRIAL, 29 Cyc. 790 *et seq.*

In criminal prosecutions see CRIMINAL LAW, 12 Cyc. 658 *et seq.*

55 *Alabama.*— Birmingham R., etc., Co. *v.* Jones, 146 Ala. 277, 41 So. 146; East Tennessee, etc., R. Co. *v.* Clark, 74 Ala. 443; Rhodes *v.* Sherrod, 9 Ala. 63; Herbert *v.* Huie, 1 Ala. 18, 34 Am. Dec. 755.

Arkansas.— White *v.* McCracken, 60 Ark. 613, 31 S. W. 882.

California.— Weinburg *v.* Somps, (1893) 33 Pac. 341.

Colorado.— Ruby Chief Min., etc., Co. *v.* Prentice, 25 Colo. 4, 52 Pac. 210; Denver Tramway Co. *v.* Crumbaugh, 23 Colo. 363, 48 Pac. 503; Mackey *v.* Briggs, 16 Colo. 143, 26 Pac. 131

Connecticut.— Palmer *v.* Smith, 76 Conn. 210, 56 Atl. 516.

Florida.— Lungren *v.* Brownlie, 22 Fla. 491; Cato *v.* State, 9 Fla. 163.

Georgia.— Southern R. Co. *v.* Loughridge, 114 Ga. 173, 39 S. E. 882; Street *v.* Lynch, 38 Ga 631; Averett *v.* Brady, 20 Ga. 523.

Illinois.— Thode *v.* Peter Schoenhofen Brewing Co., 69 Ill. App. 403.

Indiana.— Price *v.* Huddleston, 167 Ind. 536, 79 N. E. 496; Harness *v.* Steele, 159 Ind. 286, 64 N. E. 875.

Iowa.— Capital City Brick, etc., Co. *v.* Des Moines, 136 Iowa 243, 113 N. W. 835.

Kansas.— Judy *v.* Buck, 72 Kan. 106, 82 Pac. 1104; O'Brien *v.* Foulke, 69 Kan. 475, 77 Pac. 103; Driver *v.* Atchison, etc., R. Co., (1898) 52 Pac. 79.

Kentucky.— Loughridge *v.* Ball, (1909) 118 S. W. 321; Rountree *v.* Glatt, 13 Ky. L. Rep. 462.

Maine.— Webber *v.* Dunn, 71 Me. 331; Rogers *v.* Kennebec, etc., R. Co., 38 Me. 227; Stowell *v.* Goodenow, 31 Me. 538.

Maryland.— Baltimore, etc., R. Co. *v.* State, 81 Md. 371, 32 Atl. 201; Baltimore, etc., R. Co. *v.* Bahrs, 28 Md. 647.

Massachusetts.— Cameron *v.* New England Tel., etc., Co., 182 Mass. 310, 65 N. E. 385; Monson *v.* Palmer, 8 Allen 551; Davis *v.* Elliott, 15 Gray 90.

Michigan.— Miller *v.* Shumway, 135 Mich. 654, 98 N. W. 385; Hovey *v.* Michigan Tel. Co., 124 Mich. 607, 83 N. W. 600; Record Pub. Co. *v.* Merwin, 115 Mich. 10, 72 N. W. 998; Little *v.* Williams, 107 Mich. 652, 65 N. W. 568; Crowell *v.* Truax, 94 Mich. 585, 54 N. W. 384; Rankin *v.* West, 25 Mich. 195.

Minnesota.— Bailey *v.* Grand Forks Lumber Co., 107 Minn. 192, 119 N. W. 786; Ellington *v.* Great Northern R. Co., 92 Minn. 470, 100 N. W. 218.

Missouri.— Wahl *v.* St. Louis Transit Co., 203 Mo. 261, 101 S. W. 1; Mexico First Nat. Bank *v.* Ragsdale, 171 Mo. 168, 71 S. W. 178; Wilson *v.* Kansas City Southern R. Co., 122 Mo. App. 667, 99 S. W. 465.

Nebraska.— Union Pac. R. Co. *v.* Stanwood, 71 Nebr. 150, 91 N. W. 191, 98 N. W. 656; Peterson *v.* State, 63 Nebr. 251, 88 N. W. 549; German Nat. Bank *v.* Leonard, 40 Nebr. 676, 59 N. W. 107.

New Hampshire.— Burnside *v.* Grand Trunk R. Co., 47 N. H. 554, 93 Am. Dec. 474; Moore *v.* Ross, 11 N. H. 547.

New Jersey.— Camden, etc., R. Co. *v.* Williams, 61 N. J. L. 646, 40 Atl. 634; Farrel *v.* Colwell, 30 N. J. L. 123; Cole *v.* Taylor, 22 N. J. L. 59; Folly *v.* Vantuyl, 9 N. J. L. 153.

New York.— Sudlow *v.* Warshing, 108 N. Y. 520, 15 N. E. 532; Graser *v.* Stellwagen, 25 N. Y. 315; Wall *v.* New York Cent., etc., R. Co., 56 N. Y. App. Div. 599, 67 N. Y. Suppl. 519.

North Carolina.— Justice *v.* Gallert, 131 N. C. 393, 42 S. E. 850; Russell *v.* Carolina Cent. R. Co., 118 N. C. 1098, 24 S. E. 512; McKinnon *v.* Morrison, 104 N. C. 354, 10 S. E. 513; Simpson *v.* Blount, 14 N. C. 34.

North Dakota.— Nokken *v.* Avery Mfg. Co., 11 N. D. 399, 92 N. W. 487.

Ohio.— Columbus R. Co. *v.* Ritter, 67 Ohio St. 523, 65 N. E. 613; Steen *v.* Friend, 20 Ohio Cir. Ct. 459, 11 Ohio Cir. Dec. 235; Clark *v.* Clark, 16 Ohio Cir. Ct. 103, 8 Ohio Cir. Dec. 752; Wright *v.* Cincinnati St. R. Co., 9 Ohio Cir. Ct. 503, 6 Ohio Cir. Dec. 159.

Oklahoma.— Chicago Live Stock Commission Co. *v.* Connally, 15 Okla. 45, 78 Pac. 318; Chicago Live Stock Commission Co. *v.* Fix, 15 Okla. 37, 78 Pac. 316.

Oregon.— Page *v.* Finley, 8 Oreg. 45.

Pennsylvania.— Mineral R., etc., Co. *v.* Auten, 188 Pa. St. 568, 41 Atl. 327; Brinser *v.* Longenecker, 169 Pa. St. 51, 32 Atl. 60; Lea *v.* Hopkins, 7 Pa. St. 492.

South Carolina.— Jennings *v.* Edgefield Mfg. Co., 72 S. C. 411, 52 S. E. 113; Millam *v.* Southern R. Co., 58 S. C. 247, 36 S. E. 571; Rutherford *v.* Southern R. Co., 56 S. C. 446, 35 S. E. 136; State *v.* Williams, 18 S. C. 605.

South Dakota.— Winn *v.* Sanborn, 10 S. D. 642, 75 N. W. 201; Frye *v.* Ferguson, 6 S. D. 392, 61 N. W. 161.

Tennessee.— Nashville, etc., R. Co. *v.* Heikens, 112 Tenn. 378, 79 S. W. 1038, 65 L. R. A. 298.

Texas.— Odom *v.* Woodward, 74 Tex. 41, 11 S. W. 925; Turner *v.* Faubion, 36 Tex. Civ. App. 314, 81 S. W. 810; Pace *v.* American Freehold Land, etc., Co., 17 Tex. Civ. App. 506, 43 S. W. 36.

Virginia.— Harvey *v.* Skipworth, 16 Gratt. 393.

Washington.— Lownsdale *v.* Gray's Harbor Boom Co., 21 Wash. 542, 58 Pac. 663.

decision in which Justice Story wrote the opinion, it is sufficient that the court has given no erroneous directions. "If either party deems any point presented by the evidence to be omitted in the charge, such party may require an opinion from the court upon that point; if he do not, it is a waiver of it." [56] If the instructions given are not sufficiently full,[57] or not sufficiently specific,[58]

West Virginia.— Henry C. Werner Co. *v.* Calhoun, 55 W. Va. 246, 46 S. E. 1024.

Wisconsin.— Lueck *v.* Heisler, 87 Wis. 644, 58 N. W. 1101; Austin *v.* Moe, 68 Wis. 458, 32 N. W. 760; Chappell *v.* Cady, 10 Wis. 111.

United States.— Humes *v.* U. S., 170 U. S. 210, 18 S. Ct. 602, 42 L. ed. 1011; Pennock *v.* Dialogue, 2 Pet. 1, 7 L. ed. 327; Frizzell *v.* Omaha St. R. Co., 124 Fed. 176, 59 C. C. A. 382.

See 46 Cent. Dig. tit. "Trial," § 627 *et seq.*

56. Pennock *v.* Dialogue, 2 Pet. (U. S.) 1, 7 L. ed. 327.

57. *Alabama.*— Ewing *v.* Sanford, 19 Ala. 605; Hodges *v.* Montgomery Branch Bank, 13 Ala. 455; Hunt *v.* Toulmin, 1 Stew. & P. 178.

Arkansas.— Brinkley Car Works, etc., Co. *v.* Cooper, 75 Ark. 325, 87 S. W. 645; McGee *v.* Smitherman, 69 Ark. 632, 65 S. W. 461.

California.— Scott *v.* Wood, 81 Cal. 398, 22 Pac. 871.

Colorado.— Hain *v.* Mattes, 34 Colo. 345, 83 Pac. 127; Ruby Chief Min., etc., Co. *v.* Prentice, 25 Colo. 4, 52 Pac. 210; Willard *v.* Williams, 10 Colo. App. 140, 50 Pac. 207.

Connecticut.— Selleck *v.* Sugar Hollow Turnpike Co., 13 Conn. 453.

Georgia.— Holland *v.* Williams, 126 Ga. 617, 55 S. E. 1023; Wheelwright *v.* Aiken, 92 Ga. 394, 17 S. E. 610; Poullain *v.* Poullain, 76 Ga. 420, 4 S. E. 92; Bunn *v.* Hargraves, 3 Ga. App. 518, 60 S. E. 223.

Indiana.—Cincinnati, etc., R. Co. *v.* Smock, 133 Ind. 411, 33 N. E. 108; Bishop *v.* Redmond, 83 Ind. 157; Logansport *v.* Justice, 74 Ind. 378, 39 Am. Rep. 79; Haas *v.* C. B. Cones, etc., Mfg. Co., 25 Ind. App. 469, 58 N. E. 499; Citizens' St. R. Co. *v.* Abright, 14 Ind. App. 433, 42 N. E. 238, 1028.

Iowa.— Mitchell *v.* Chicago, etc., R. Co., 138 Iowa 283, 114 N. W. 622; Vorhes *v.* Buchwald, 137 Iowa 721, 112 N. W. 1105; Halley *v.* Tichenor, 120 Iowa 164, 94 N. W. 472; Wimer *v.* Allbaugh, 78 Iowa 79, 42 N. W. 587, 16 Am. St. Rep. 422; Koehler *v.* Wilson, 40 Iowa 183; Owen *v.* Owen, 22 Iowa 270; Ault *v.* Sloan, 4 Iowa 508.

Kansas.— Belleville Nat. Bank *v.* Ward, (App. 1897) 51 Pac. 58.

Massachusetts.—Baldwin *v.* American Writing Paper Co., 196 Mass. 402, 82 N. E. 1; Caswell *v.* Fellows, 110 Mass. 52.

Michigan.— Logan *v.* Lake Shore, etc., R. Co., 148 Mich. 603, 112 N. W. 506; Miller *v.* Shumway, 135 Mich. 654, 98 N. W. 385; Barton *v.* Gray, 57 Mich. 622, 24 N. W. 638.

Minnesota.— Lyons *v.* Red Wing, 76 Minn. 20, 78 N. W. 868; McCormick Harvesting Mach. Co. *v.* McNicholas, 66 Minn. 384, 69 N. W. 36; Clapp *v.* Minneapolis, etc., R. Co., 36 Minn. 6, 29 N. W. 340, 1 Am. St. Rep. 629; Hunter *r.* Jones, 13 Minn. 307.

Missouri.— Matthews *v.* Missouri Pac. R. Co., 142 Mo. 645, 44 S. W. 802; Moss *v.* Missouri Pac. R. Co., 128 Mo. App. 385, 107 S. W. 422; Ghere *v.* Zey, 128 Mo. App. 362, 107 S. W. 418; Haymaker *v.* Adams, 61 Mo. App. 581.

Nebraska.— Chicago, etc., R. Co. *v.* Oyster, 58 Nebr. 1, 78 N. W. 359; Sioux City, etc., R. Co. *v.* Brown, 13 Nebr. 317, 14 N. W. 407.

New Hampshire.— Hooksett *v.* Amoskeag Mfg. Co., 44 N. H. 105; Wright *v.* Boynton, 37 N. H. 9, 72 Am. Dec. 319.

New York.— Zabriskie *v.* Smith, 13 N. Y. 322, 64 Am. Dec. 551; Woods *v.* Long Island R. Co., 11 N. Y. App. Div. 16, 42 N. Y. Suppl. 140 [*affirmed* in 159 N. Y. 546, 54 N. E. 1095].

North Carolina.— Gay *v.* Mitchell, 146 N. C. 509, 60 S. E. 426; Ives *v.* Atlantic, etc., R. Co., 142 N. C. 131, 55 S. E. 74, 115 Am. St. Rep. 732; Simmons *v.* Davenport, 140 N. C. 407, 53 S. E. 255; Kendrick *v.* Dellinger, 117 N. C. 491, 23 S. E. 438; Morgan *v.* Lewis, 95 N. C. 296.

Ohio.— Pennsylvania Co. *v.* Rossman, 13 Ohio Cir. Ct. 111, 7 Ohio Cir. Dec. 119; Queen Ins. Co. *v.* Leonard, 9 Ohio Cir. Ct. 46, 6 Ohio Cir. Dec. 49.

Pennsylvania.— Kehoe *v.* Allentown, etc., Traction Co., 187 Pa. St. 474, 41 Atl. 310; Serfass *v.* Dreisbach, 141 Pa. St. 142, 21 Atl. 523.

South Carolina.— Bodie *v.* Charleston, etc., R. Co., 66 S. C. 302, 44 S. E. 943; Kirby *v.* Southern R. Co., 63 S. C. 494, 41 S. E. 765; Garrett *v.* Weinberg, 59 S. C. 162, 37 S. E. 51, 225; Congdon *v.* Morgan, 13 S. C. 190.

Tennessee.— Chicago Guaranty Fund Life Soc. *v.* Ford, 104 Tenn. 533, 58 S. W. 239.

Texas.— Burnham *v.* Logan, 88 Tex. 1, 29 S. W. 1067; Neyland *v.* Bendy, 69 Tex. 711, 7 S. W. 497; Missouri, etc., R. Co. *v.* Parrott, 43 Tex. Civ. App. 325, 94 S. W. 1135, 96 S. W. 950.

Washington.— Rush *v.* Spokane Falls, etc., R. Co., 23 Wash. 501, 63 Pac. 500; McQuillan *v.* Seattle, 13 Wash. 600, 43 Pac. 893; Box *v.* Kelso, 5 Wash. 360, 31 Pac. 973.

Wisconsin.— Owen *v.* Long, 97 Wis. 78, 72 N. W. 364; Page *v.* Sumpter, 53 Wis. 652, 11 N. W. 60.

See 46 Cent. Dig. tit. "Trial," § 628 *et seq.*

58. *Alabama.*— Vandiver *v.* Waller, 143 Ala. 411, 39 So. 136; Casky *v.* Haviland, 13 Ala. 314.

Arkansas.— Choctaw, etc., R. Co. *v.* Baskins, 78 Ark. 355, 93 S. W. 757.

Colorado.— Whitehead *v.* Emmerich, 38 Colo. 13, 87 Pac. 790; Willard *v.* Williams, 10 Colo. App. 140, 50 Pac. 207; Goldhammer *v.* Dyer, 7 Colo. App. 29, 42 Pac. 177.

Connecticut.— Hayden *v.* Fair Haven, etc., R. Co., 76 Conn. 355, 56 Atl. 613.

Georgia.— Savannah Electric Co. *v.* Mulli-

it is held to be the duty of the party who considers himself aggrieved thereby to request fuller or more specific instructions from the court. In the absence of such request there is no basis for an assignment of error to the giving of such instructions. Merely saving exceptions thereto will not be sufficient,[59] as it is not equivalent to a request for fuller or more specific instructions.[60] The fact that instructions are too narrow [61] or too broad,[62] or that the court fails to state or charge on all of the issues or defenses,[63] or charge with sufficient fullness on the issues

kin, 126 Ga. 722, 55 S. E. 945; Rutledge *v.* Hudson, 80 Ga. 266, 5 S. E. 93; Atlanta *v.* Brown, 73 Ga. 630.

Illinois.— Plaut *v.* Young, 38 Ill. App. 102.

Indiana.— New Castle Bridge Co. *v.* Doty, 168 Ind. 259, 79 N. E. 485 [*transferred* from appellate court 37 Ind. App. 84, 76 N. E. 557]; Du Souchet *v.* Dutcher, 113 Ind. 249, 15 N. E. 459; Insurance Co. of North America *v.* Brim, 111 Ind. 281, 12 N. E. 315.

Iowa.— Hill *v.* Glenwood, 124 Iowa 479, 100 N. W. 522; Shroeder *v.* Webster, 88 Iowa 627, 55 N. W. 569; Hubbell *v.* Ream, 31 Iowa 289.

Kansas.— Hoyt *v.* Dengler, 54 Kan. 309, 38 Pac. 260; State *v.* Peterson, 38 Kan. 204, 16 Pac. 263; Turner *v.* Tootle, 9 Kan. App. 765, 58 Pac. 562; John V. Farwell Co. *v.* Thomas, 8 Kan. App. 614, 56 Pac. 151; Missouri, etc., R. Co. *v.* Young, 8 Kan. App. 525, 56 Pac. 542.

Kentucky.— Patterson *v.* T. J. Moss Tie Co., 97 S. W. 379, 30 Ky. L. Rep. 9; Lloyd *v.* Knadler, 63 S. W. 442, 23 Ky. L. Rep. 551; Henderson *v.* McGhee, 58 S. W. 525, 22 Ky. L. Rep. 650.

Maine.— Murchie *v.* Gates, 78 Me. 300, 4 Atl. 698; Blackington *v.* Sumner, 69 Me. 136.

Maryland.— Baltimore, etc., R. Co. *v.* State, 81 Md. 371, 32 Atl. 201.

Massachusetts.— Cameron *v.* New England Tel., etc., Co., 182 Mass. 310, 65 N. E. 385.

Michigan.— Hewitt *v.* East Jordan Lumber Co., 136 Mich. 110, 98 N. W. 992.

Minnesota.— De Blois *v.* Great Northern R. Co., 99 Minn. 18, 108 N. W. 293; Germolus *v.* Sausser, 83 Minn. 141, 85 N. W. 946.

Missouri.— Barth *v.* Kansas City El. R. Co., 142 Mo. 535, 44 S. W. 778.

Montana.— Nelson *v.* Boston, etc., Consol. Copper, etc., Min. Co., 35 Mont. 223, 88 Pac. 785; Hardesty *v.* Largey Lumber Co., 34 Mont. 151, 86 Pac. 29.

New Hampshire.— Kent *v.* Tyson, 20 N. H. 121.

New Mexico.— Palatine Ins. Co. *v.* Santa Fé Mercantile Co., 13 N. M. 241, 82 Pac. 363.

New York.— Wall *v.* New York Cent., etc., R. Co., 56 N. Y. App. Div. 599, 67 N. Y. Suppl. 519; Powell *v.* Jones, 42 Barb. 24.

North Carolina.— Boon *v.* Murphy, 108 N. C. 187, 12 S. E. 1032.

Ohio.— Hoppe *v.* Parmalee, 20 Ohio Cir. Ct. 303, 11 Ohio Cir. Dec. 24; Cleveland, etc., R. Co. *v.* Richerson, 19 Ohio Cir. Ct. 385, 10 Ohio Cir. Dec. 326.

Oregon.— Anderson *v.* Aupperle, 51 Oreg. 556, 95 Pac. 330; Schoellhamer *v.* Rometsch, 26 Oreg. 394, 38 Pac. 344; Kearney *v.* Snodgrass, 12 Oreg. 311, 7 Pac. 309.

Pennsylvania.— Dennis *v.* Alexander, 3 Pa. St. 50; Lewin *v.* Pauli, 19 Pa. Super. Ct. 447.

South Carolina.— Easler *v.* Southern R. Co., 59 S. C. 311, 37 S. E. 938; Nohrden *v.* Northeastern R. Co., 59 S. C. 87, 37 S. E. 228, 82 Am. St. Rep. 826.

Tennessee.— Maxwell *v.* Hill, 89 Tenn. 584, 15 S. W. 253; Thompson *v.* Com. Commercial Bank, 3 Coldw. 46.

Texas.— Chicago, etc., R. Co. *v.* Johnson, 101 Tex. 422, 108 S. W. 964; Thompson *v.* Payne, 21 Tex. 621; Peacock *v.* Coltrane, 44 Tex. Civ. App. 530, 99 S. W. 107; Galveston, etc., R. Co. *v.* Stoy, 44 Tex. Civ. App. 448, 99 S. W. 135; De Catur Cotton Seed Oil Mill Co. *v.* Johnson, (Civ. App. 1896) 35 S. W. 951.

Vermont.— Partch *v.* Spooner, 57 Vt. 583.

Wisconsin.— Grotjan *v.* Rice, 124 Wis. 253, 102 N. W. 551.

United States.— Texas, etc., R. Co. *v.* Cody, 67 Fed. 71, 14 C. C. A. 310; Central Vermont R. Co. *v.* Soper, 59 Fed. 879, 8 C. C. A. 341.

See 46 Cent. Dig. tit. "Trial," § 628 *et seq.*

59. Adams *v.* Stringer, 78 Ind. 175; Schryver *v.* Hawkes, 22 Ohio St. 308; Newton *v.* Whitney, 77 Wis. 515, 46 N. W. 882.

60. Dows *v.* Rush, 28 Barb. (N. Y.) 157.

61. Williams *v.* Mineral City Park Assoc., 128 Iowa 32, 102 N. W. 783, 111 Am. St. Rep. 184, 1 L. R. A. N. S. 427; Jossaers *v.* Walker, 24 N. Y. App. Div. 38, 48 N. Y. Suppl. 781; St. Louis, etc., R. Co. *v.* Pope, 43 Tex. Civ. App. 616, 97 S. W. 534; Stubblefield *v.* Stubblefield, (Tex. Civ. App. 1898) 45 S. W. 965; Galveston, etc., R. Co. *v.* Edmunds, (Tex. Civ. App. 1894) 26 S. W. 633.

62. Ray *v.* Jackson, 90 Ala. 513, 7 So. 747; Pepper *v.* Lee, 53 Ala. 33; Hayes *v.* Moulton, 194 Mass. 157, 80 N. E. 215; McKee *v.* Tourtelotte, 167 Mass. 69, 44 N. E. 1071, 48 L. R. A. 542; Bathke *v.* Krassin, 82 Minn. 226, 84 N. W. 796.

63. *Indiana.*— Conrad *v.* Kinzie, 105 Ind. 281, 4 N. E. 863.

Kansas.— Judy *v.* Buck, 72 Kan. 106, 82 Pac. 1104.

Kentucky.— Louisville *v.* Knighton, 100 S. W. 228, 30 Ky. L. Rep. 1037, 8 L. R. A. N. S. 478; Louisville, etc., R. Co. *v.* Bullins, 15 Ky. L. Rep. 752; Brown *v.* Gillespie, 10 Ky. L. Rep. 634.

Michigan.— Flanagan *v.* Flanagan, 122 Mich. 386, 81 N. W. 258.

Minnesota.— Olson *v.* Aubolee, 92 Minn. 312, 99 N. W. 1128; Strong *v.* Knuteson, 91 Minn. 191, 97 N. W. 659; Loudy *v.* Clarke, 45 Minn. 477, 48 N. W. 25.

submitted,[64] or omits to state a proper qualification or limitation of a rule of law given,[65] or to state the qualification or limitation in immediate connection with the rule,[66] or that an instruction given needs qualification or modification,[67] is not available error unless the attention of the court is called thereto by a special request for an instruction remedying the defect.

(B) *Applications of Rule.* Applying the foregoing principles, in the absence of special requests thereof, failure to give merely cautionary instructions,[68] to define words and terms used,[69] or to instruct on the purpose and effect of evidence,[70] the burden of proof,[71] the preponderance of evidence,[72] the contentions and arguments of counsel,[73] the tests of credibility of witnesses,[74] the presumption arising from non-production of evidence,[75] impeachment of witnesses,[76] the credibility of expert testimony,[77] or as to the form of verdict to be rendered; [78] that the jury

Missouri.—Williamson *v.* St. Louis Transit Co., 202 Mo. 345, 100 S. W. 1072; Horgan *v.* Brady, 155 Mo. 659, 56 S. W. 294; Hooper *v.* Metropolitan St. R. Co., 125 Mo. App. 329, 102 S. W. 58; Redmond *v.* Missouri, etc., R. Co., 104 Mo. App. 651, 77 S. W. 768.

Nebraska.— Barr *v.* Omaha, 42 Nebr. 341, 65 N. W. 591; Barney *v.* Pinkham, 37 Nebr. 664, 56 N. W. 323.

New York.— Schwabeland *v.* Holahan, 6 Misc. 623, 26 N. Y. Suppl. 880 [*affirmed* in 10 Misc. 176, 30 N. Y. Suppl. 910].

North Carolina.— Nelson *v.* R. J. Reynolds Tobacco Co., 144 N. C. 418, 57 S. E. 127; Maxwell *v.* McIver, 113 N. C. 288, 18 S. E. 320; Kidder *v.* McIlhenny, 81 N. C. 123.

Pennsylvania.— Fisher *v.* Filbert, 6 Pa. St. 61.

Texas.— Milmo *v.* Adams, 79 Tex. 526, 15 S. W. 690; Blackwell *v.* Hunnicutt, 69 Tex. 273, 9 S. W. 317; International, etc., R. Co. *v.* Garcia, (Civ. App. 1909) 117 S. W. 206; Chicago, etc., R. Co. *v.* Hiltibrand, 44 Tex. Civ. App. 614, 99 S. W. 707; Boyles *v.* Texas, etc., R. Co., (Civ. App. 1905) 86 S. W. 936; International, etc., R. Co. *v.* Haddox, 36 Tex. Civ. App. 385, 81 S. W. 1036; Bell *v.* Beazley, 18 Tex. Civ. App. 639, 45 S. W. 401; Voorheis *v.* Waller, (Civ. App. 1896) 35 S. W. 807; Tempeton *v.* Green, (Civ. App. 1894) 25 S. W. 1073.

Wisconsin.— Newton *v.* Whitney, 77 Wis. 515, 46 N. W. 882. And see Kenyon *v.* Kenyon, 72 Wis. 234, 39 N. W. 361.

United States.— Carter *v.* Carusi, 112 U. S. 478, 5 S. Ct. 281, 28 L. ed. 820; U. S. Express Co. *v.* Kountze, 8 Wall. 342, 19 L. ed. 457.

See 46 Cent. Dig. tit. "Trial," § 630 *et seq.*

Effect of special statutory provisions.— Rev. St. (1895) art. 1316, as amended by Laws (1903), p. 55, c. 39, providing that after the argument of a cause the judge shall in open court, unless the same be expressly waived by the parties, prepare and deliver a written charge of the law of the case, subject to the restrictions thereafter provided, made it the mandatory duty of the court to charge the jury, but did not change the rule precluding a party from complaining of the court's mere failure to submit an issue in the absence of a special request therefor. San Antonio, etc., R. Co. *v.* Votaw, (Tex. Civ. App. 1904) 81 S. W. 130.

64. *Georgia.*— Tuggle *v.* State, 113 Ga. 272, 38 S. E. 830.

Indiana.— Indianapolis St. R. Co. *v.* Johnson, 163 Ind. 518, 72 N. E. 571.

Iowa.— Mitchell *v.* Pinckney, 127 Iowa 696, 104 N. W. 286.

Kentucky.—Adams Express Co. *v.* Singleton, 7 Ky. L. Rep. 296.

Nebraska.—Wittenberg *v.* Mollyneaux, 59 Nebr. 203, 80 N. W. 824.

North Carolina.— Simmons *v.* Davenport, 140 N. C. 407, 53 S. E. 225.

Texas.—Williamson *v.* Gore, (Civ. App. 1903) 73 S. W. 563; Missouri, etc., R. Co. *v.* Felts, (Civ. App. 1899) 50 S. W. 1031.

65. *Florida.*— Post *v.* Bird, 28 Fla. 1, 9 So. 888.

Massachusetts.— Blagge *v.* Ilsley, 127 Mass. 191, 34 Am. Rep. 361.

Michigan.— Merrinane *v.* Miller, 148 Mich. 412, 111 N. W. 1050.

Minnesota.— McKnight *v.* Chicago, etc., R. Co., 44 Minn. 141, 46 N. W. 294.

Pennsylvania.— Mullen *v.* Wilson, 44 Pa. St. 413, 84 Am. Dec. 461.

South Carolina.— Sanders *v.* Aiken Mfg. Co., 71 S. C. 58, 59 S. E. 679; Brasington *v.* South Bound R. Co., 62 S. C. 325, 40 S. E. 665, 89 Am. St. Rep. 905; Simms *v.* South Carolina R. Co., 27 S. C. 268, 3 S. E. 301.

Texas.— Missouri, etc., R. Co. *v.* Williams, (Civ. App. 1909) 117 S. W. 1043.

Wisconsin.— Seivert *v.* Galvin, 133 Wis. 391, 113 N. W. 680.

See 46 Cent. Dig. tit. "Trial," § 628.

66. Atlanta R., etc., Co. *v.* Walker, 112 Ga. 725, 38 S. E. 107.

67. Shumard *v.* Johnson, 66 Tex. 70, 17 S. W. 398.

68. French *v.* Waterbury, 72 Conn. 435, 44 Atl. 740.

69. See *supra*, IX, C, 15.

70. See *infra*, IX, E, 13.

71. See *infra*, IX, E, 11.

72. See *infra*, IX, E, 12, a.

73. See *infra*, IX, E, 14.

74. See *infra*, IX, E, 3.

75. See *infra*, IX, E, 8.

76. See *infra*, IX, E, 3, b, (VII).

77. See *infra*, IX, E, 3, b, (IX).

78. Triggs *v.* McIntyre, 115 Ill. App. 257 [*affirmed* in 215 Ill. 369, 74 N. E. 400]; McCrary *v.* Missouri, etc., R. Co., 99 Mo. App. 518, 74 S. W. 2.

may find different verdicts as to different defendants;[79] to give equal prominence to the contention of the parties;[80] or to state a proposition of law favorable to the complaining party[81] cannot be assigned as error. So, in the absence of a request, error cannot be assigned for failure of the court to construe a written contract in suit,[82] or rules of a railroad company offered in evidence;[83] or to charge in explanation of an agreement in suit,[84] or on the question of a cotenant's authority to bind his cotenant to a contract of sale,[85] the statute of limitations,[86] or as to the sufficiency of the evidence where this practice is permissible;[87] or as to the effect of an admission by either party;[88] or to refer to admissions of one party to the suit put in evidence by his adversary;[89] or as to admissions made by the pleadings;[90] or as to the effect of testimony on points not called to the attention of the court;[91] to specify the issue to which an instruction is applicable;[92] to charge as to the effect of an implied contract in an action on contract,[93] or on the effect of receipts in full,[94] or fraud;[95] or to instruct on the question of fraud in procuring an insurance policy;[96] or to charge that want of consideration may be considered as evidence of fraud;[97] or to instruct as to what constitutes proximate cause,[98] or to enter into the particulars which distinguish remote from proximate cause;[99] or to instruct on the law of fellow servants,[1] or on the issue of assumed risk,[2] or on the duty of a party rescinding a contract to return the property within a reasonable time;[3] to fail to draw a distinction between legal and actual residence;[4] or to limit the amount of defendant's recovery on a counter-claim to the amount claimed by him;[5] or to charge that mere possession of the wife's property

79. Economy Light, etc., Co. *v.* Hiller, 211 Ill. 568, 71 N. E. 1096 [*affirming* 113 Ill. App. 103]; Ream *v.* Harnish, 45 Pa. St. 376; St. Louis Southwestern R. Co. *v.* Lovelady, 36 Tex. Civ. App. 282, 81 S. W. 1040; Shilling *v.* Shilling, (Tex. Civ. App. 1896) 35 S. W. 420.

80. Little *v.* Southern R. Co., 120 Ga. 347, 47 S. E. 953, 102 Am. St. Rep. 104, 66 L. R. A. 509; El Paso Electric R. Co. *v.* Harry, 37 Tex. Civ. App. 90, 83 S. W. 735.

81. Hall-Moody Inst. *v.* Copass, 108 Tenn. 582, 69 S. W. 327; Schaefer *v.* Osterbrink, 67 Wis. 495, 30 N. W. 922, 58 Am. Rep. 875.

82. *Indiana.*— Springfield State Nat. Bank *v.* Bennett, 8 Ind. App. 679, 36 N. E. 551.

Nebraska.— McCormick Harvesting Mach. Co. *v.* Carpenter, 1 Nebr. (Unoff.) 273, 95 N. W. 617.

Ohio.— Cincinnati, etc., R. Co. *v.* Iliff, 13 Ohio St. 235.

Texas.— Letcher *v.* Morrison, 79 Tex. 240, 14 S. W. 1010.

Virginia.— Harvey *v.* Skipwith, 16 Gratt. 393.

83. Seaboard Air-Line R. Co. *v.* Phillips, 117 Ga. 98, 43 S. E. 494.

84. Horne *v.* McRae, 53 S. C. 51, 30 S. E. 701.

85. Lee *v.* Conrad, 140 Iowa 16, 117 N. W. 1096.

86. Lea *v.* Hopkins, 7 Pa. St. 492; Hocker *v.* Day, 80 Tex. 529, 16 S. W. 322; Rackley *v.* Fowlkes, (Tex. Civ. App. 1896) 36 S. W. 75 [*reversed* on other grounds in 89 Tex. 613, 36 S. W. 77]; Robinson *v.* McIver, (Tex. Civ. App. 1893) 23 S. W. 915.

87. J. I. Case Threshing Mach. Co. *v.* Huffman, 86 Minn. 30, 90 N. W. 5; Nokken *v.* Avery Mfg. Co., 11 N. D. 399, 92 N. W. 487.

88. Wrightsville, etc., R. Co. *v.* Lattimore, 118 Ga. 581, 45 S. E. 453.

89. Hawkins *v.* Kermode, 85 Ga. 116, 11 S. E. 560; Howland *v.* Day, 56 Vt. 318.

90. Georgia, etc., R. Co. *v.* Lasseter, 122 Ga. 679, 51 S. E. 15; Cooley *v.* Abbey, 111 Ga. 439, 36 S. E. 786.

91. Purrington *v.* Pierce, 38 Me. 447.

92. Flowers *v.* Flowers, 74 Ark. 212, 85 S. W. 242.

93. Austin *v.* Moe, 68 Wis. 458, 32 N. W. 760.

94. Howland *v.* Bartlett, 86 Ga. 669, 12 S. E. 1068.

95. Graser *v.* Stellwagen, 25 N. Y. 315.

96. New York L. Ins. Co. *v.* Brown, 66 S. W. 613, 23 Ky. L. Rep. 2070.

97. Howard *v.* Turner, 125 N. C. 107, 34 S. E. 229.

98. Rice *v.* Lockhart Mills, 75 S. C. 150, 55 S. E. 160; Western Union Tel. Co. *v.* Giffin, 27 Tex. Civ. App. 306, 65 S. W. 661; Mexican Nat. R. Co. *v.* Musette, 7 Tex. Civ. App. 169, 24 S. W. 520; Miles *v.* Stanke, 114 Wis. 94, 89 N. W. 833. And see Snipes *v.* Atlantic Coast Line R. Co., 76 S. C. 207, 56 S. E. 959.

99. International, etc., R. Co. *v.* Smith, (Tex. 1886) 1 S. W. 565.

1. Turrentine *v.* Wellington, 136 N. C. 308, 48 S. E. 739.

2. Smith *v.* Fordyce, 190 Mo. 1, 88 S. W. 679; Louisiana, etc., Lumber Co. *v.* Meyers, (Tex. Civ. App. 1906) 94 S. W. 140; International, etc., R. Co. *v.* Beasley, 9 Tex. Civ. App. 569, 29 S. W. 1121; Mueller *v.* Northwestern Iron Co., 125 Wis. 326, 104 N. W. 67; Lounsbury *v.* Davis, 124 Wis. 432, 102 N. W. 941.

3. Aultman *v.* York, 71 Tex. 261, 9 S. W. 127.

4. Forlaw *v.* Augusta Naval Stores Co., 124 Ga. 261, 52 S. E. 898.

5. Knoxville Woolen Mills *v.* Wallace, 90 S. W. 563, 28 Ky. L. Rep. 885.

by the husband will not subject it to his debts; [6] or to fully explain the doctrine of "*res ipsa loquitur*"; [7] to instruct as to what constitutes irregularities at an execution sale when an instruction is given as to the effect of such irregularities; [8] to instruct as to what constitutes material allegations, on instructing on necessity of proving material allegations; [9] or to instruct as to permissive possession, or instructing as to adverse possession; [10] or to instruct that possession must be open, actual, notorious, and unequivocal, or instructing that possession is notice,[11] or, the question being one of notice, to fail to instruct as to constructive notice.[12] Nor in the absence of a request can it be objected that the instructions state general propositions of law, instead of applying the law to the facts of the case,[13] or that the propositions of law stated in the instructions, although correct in the abstract, have no application to the case.[14]

b. As a Basis For Assigning Error For Giving Erroneous Instructions. Appellant cannot complain upon appeal of the failure of the trial court to give an instruction which was not asked by him in that court.[15] But if there is a material misdirection in the charge of the court, it is sufficient ground for reversal, although no instructions were asked,[16] unless it is upon a mere abstract proposition, and it is apparent upon the whole case that it could not have misled the jury.[17] If the court gives instructions, either of its own motion or on request, it must give them in such a way as to correctly state the law.[18]

3. Time of Making Requests [19] — a. Statement of Rule. Requests for instructions must be made in proper time, and if not so made, the general rule is that error cannot be assigned to a refusal to give them.[20] This is so whether the request

6. Morgan *v.* Swann, 81 Ga. 207, 7 S. E. 170.

7. Isley *v.* Virginia Bridge, etc., Co., 141 N. C. 220, 53 S. E. 841; Lyles *v.* Brannon Carbonating Co., 140 N. C. 25, 52 S. E. 233.

8. Weaver *v.* Nugent, 72 Tex. 272, 10 S. W. 458, 13 Am. St. Rep. 792.

9. Thorne *v.* Cosand, 160 Ind. 566, 67 N. E. 257; O'Donnell *v.* Chicago, etc., R. Co., 65 Nebr. 613, 91 N. W. 566.

10. Jones *v.* Graham, 80 Ga. 591, 5 S. E. 632.

11. Rapley *v.* Klugh, 40 S. C. 134, 18 S. E. 680.

12. Brotherton *v.* Weathersby, 73 Tex. 471, 11 S. W. 505.

13. *Georgia.*— Georgia, etc., R. Co. *v.* Lasseter, 122 Ga. 679, 51 S. E. 15.

Iowa.— Tuttle *v.* Wood, 115 Iowa 507, 88 N. W. 1056.

Texas.— Tayler *v.* Brown, (Civ. App. 1897) 39 S. W. 312.

Vermont.— Magoon *v.* Before, 73 Vt. 231, 50 Atl. 1070.

Wisconsin.—Van De Bogart *v.* Marinette, etc., Paper Co., 127 Wis. 104, 106 N. W. 805.

14. Pope *v.* Branch County Sav. Bank, 23 Ind. App. 210, 54 N. E. 835.

15. See *supra*, IX, D, 2, a, (I).

16. *Iowa.*— Hall *v.* Cedar Rapids, etc., R. Co., 115 Iowa 18, 87 N. W. 739.

Kentucky.— South Covington, etc., St. R. Co. *v.* Core, 96 S. W. 562, 29 Ky. L. Rep. 836.

New York.— Low *v.* Hall, 47 N. Y. 104; Whittaker *v.* Delaware, etc., Canal Co., 49 Hun 400, 3 N. Y. Suppl. 576; Carnes *v.* Platt, 6 Rob. 270. See also Parsons *v.* Brown, 15 Barb. 590.

North Carolina.— Mitchell *v.* Welborn, 149 N. C. 347, 63 S. E. 113; Hice *v.* Woodard, 34 N. C. 293.

Pennsylvania.—Wilkinson *v.* North East Borough, 215 Pa. St. 486, 64 Atl. 734; Garrett *v.* Gonter, 42 Pa. St. 143; Seigle *v.* Louderbaugh, 5 Pa. St. 490.

South Dakota.— Tosini *v.* Cascade Milling Co., 22 S. D. 377, 117 N. W. 1037.

Texas.— Scott *v.* Texas, etc., R. Co., 93 Tex. 625, 57 S. W. 801; Missouri, etc., R. Co. *v.* Groseclose, 50 Tex. Civ. App. 525, 110 S. W. 477; Johnston *v.* Johnston, (Civ. App. 1902) 67 S. W. 123; Seffel *v.* Western Union Tel. Co., (Tex. Civ. App. 1901) 65 S. W. 897; Missouri, etc., R. Co. *v.* Kirschoffer, (Civ. App. 1893) 24 S. W. 577. See also Ford *v.* McBryde, 45 Tex. 498.

See 46 Cent. Dig. tit. "Trial," § 629.

17. Hice *v.* Woodard, 34 N. C. 293.

18. South Covington, etc., St. R. Co. *v.* Core, 96 S. W. 562, 29 Ky. L. Rep. 836; Bynum *v.* Bynum, 33 N. C. 632.

19. **In criminal prosecutions** see Criminal Law, 12 Cyc. 662.

Requests after submission of cause see *infra*, X, E, 2, b, c.

Rules of court as to time of presenting requests see Courts, 11 Cyc. 741.

Time for requesting written instructions see *infra*, IX, F, 5.

20. *California.*—Waldie *v.* Doll, 29 Cal. 555.

Connecticut.—Arnold *v.* Lane, 71 Conn. 61, 40 Atl. 921.

Illinois.— Illinois Cent. R. Co. *v.* Haskins, 115 Ill. 300, 2 N. E. 654; Pennsylvania Co. *v.* Greso, 102 Ill. App. 252. To the same effect see Chicago City R. Co. *v.* Sullivan, 76 Ill. App. 505.

Indiana.— Phillips *v.* Thorne, 103 Ind. 275, 2 N. E. 747.

Kentucky.— Louisville, etc., R. Co. *v.* Seibert, 55 S. W. 892, 21 Ky. L. Rep. 1603.

for instructions is made too late [21] or is made prematurely.[22] In most jurisdictions the time for presentation of requests is regulated by statute or rules of court, and in many of them the requests must be presented at the close of the evidence and before commencement of the argument in order to lay a basis for assigning error for refusing them.[23] Such a rule, it has been held, is a reasonable one.[24] And where it prevails, requests for instructions may be refused when presented during the argument [25] or after close of the argument,[26] after the court has begun

Minnesota.— Sanborn *v.* Rice County School Dist. No. 10, 12 Minn. 17.

North Carolina.— Nail *v.* Brown, 150 N. C. 533, 64 S. E. 434; Shober *v.* Wheeler, 113 N. C. 370, 18 S. E. 328.

Pennsylvania.— Kiley *v.* Hill, 4 Watts & S. 426.

South Carolina.— Morrison *v.* Chesterfield County Mut. Benev. Assoc., 78 S. C. 398, 59 S. E. 27.

West Virginia.— Tully *v.* Despard, 31 W. Va. 370, 6 S. E. 927.

See 46 Cent. Dig. tit. "Trial," § 642 *et seq.*

But see *dictum* in Billings *v.* McCoy, 5 Nebr. 187, in which it was said: "Where instructions are asked by either party before the jury retire, which are unobjectionable, pertinent to the issue, and necessary for the jury to consider in making up their verdict, they should be given by the court, notwithstanding a rule requiring all instructions to be submitted before the commencement of the argument."

Basing refusal on wrong grounds.— The fact that the judge, in refusing to give instructions which are requested later than the time prescribed by law, bases his refusal on a mistaken impression that he has already given the same instructions in substance, does not make such refusal error. Posey *v.* Patton, 109 N. C. 455, 14 S. E. 64.

Error in ruling that requests were not seasonably made is immaterial where it would have been error to grant the requests. Gardner *v.* Peaslee, 143 Mass. 382, 9 N. E. 833.

21. See cases cited *supra* in note 20.

22. Wood *v.* Skelley, 196 Mass. 114, 81 N. E. 872, 124 Am. St. Rep. 516 (holding that presentation of prayers for rulings and a request that the court pass on them during the midst of the examination of a witness was improper); Plunger El. Co. *v.* Day, 184 Mass. 130, 68 N. E. 16; Cumberland Tel., etc., Co. *v.* Shaw, 102 Tenn. 313, 52 S. W. 163; Cooper *v.* Overton, 102 Tenn. 211, 52 S. W. 183, 73 Am. St. Rep. 864, 45 L. R. A. 591.

23. *Illinois.*— Chicago, etc., R. Co. *v.* Louderback, 125 Ill. App. 323; McMahon *v.* Sankey, 35 Ill. App. 341 [*affirmed* in 133 Ill. 636, 24 N. E. 1027].

Indiana.— Craig *v.* Frazier, 127 Ind. 286, 26 N. E. 842; Evansville, etc., R. Co. *v.* Crist, 116 Ind. 446, 19 N. E. 310, 9 Am. St. Rep. 865, 2 L. R. A. 450; Hege *v.* Newsom, 96 Ind. 426; Terry *v.* Shively, 93 Ind. 413; Puett *v.* Beard, 86 Ind. 104; Anderson *v.* Lake Shore, etc., R. Co., 26 Ind. App. 196, 59 N. E. 396; Lake Erie, etc., R. Co. *v.* Brafford, 15 Ind. App. 655, 43 N. E. 882, 44 N. E. 551; German F. Ins. Co. *v.* Columbia Encaustic Tile Co., 15 Ind. App. 623, 43 N. E. 41.

Kansas.— Firman *v.* Blood, 2 Kan. 496.

Massachusetts.— Quimby *v.* Jay, 196 Mass. 584, 82 N. E. 1084; Ela *v.* Cockshott, 119 Mass. 416.

Minnesota.— Gracz *v.* Anderson, 104 Minn. 476, 116 N. W. 1116.

Missouri.— McPheeters *v.* Hannibal, etc., R. Co., 45 Mo. 22; Payne *v.* Payne, 57 Mo. App. 130.

New Jersey.— Dunne *v.* Jersey City Galvanizing Co., 73 N. J. L. 586, 64 Atl. 1076.

North Carolina.— Craddock *v.* Barnes, 142 N. C. 89, 54 S. E. 1003; Shober *v.* Wheeler, 113 N. C. 370, 18 S. E. 328; Marshall *v.* Stine, 112 N. C. 697, 17 S. E. 495; Luttrell *v.* Martin, 112 N. C. 594, 17 S. E. 573; Ward *v.* Albermarle, etc., R. Co., 112 N. C. 168, 16 S. E. 921; Merrill *v.* Whitmire, 110 N. C. 367, 15 S. E. 3; Blackburn *v.* Fair, 109 N. C. 465, 13 S. E. 911; Posey *v.* Patton, 109 N. C. 455, 14 S. E. 64; Grubbs *v.* North Carolina Home Ins. Co., 108 N. C. 472, 13 S. E. 236, 23 Am. St. Rep. 62; Marsh *v.* Richardson, 106 N. C. 539, 11 S. E. 522; Taylor *v.* Plummer, 105 N. C. 56, 11 S. E. 266.

Ohio.— Cincinnati, etc., R. Co. *v.* Taylor, 27 Ohio Cir. Ct. 757; Toledo, etc., R. Co. *v.* Gilbert, 24 Ohio Cir. Ct. 181.

South Dakota.—White *v.* Amrhein, 14 S. D. 270, 85 N. W. 191.

Vermont.— Cady *v.* Owen, 34 Vt. 598; Vaughan *v.* Porter, 16 Vt. 266.

See 46 Cent. Dig. tit. "Trial," § 643.

If the request is made at any time before argument it will be in time. Craddock *v.* Barnes, 142 N. C. 89, 54 S. E. 1003.

Absence of statute or rule of court.— It is not proper for the trial court to refuse an instruction as not presented in time when no time for presentation is fixed by rule of court or statute. Chicago Anderson Pressed Brick Co. *v.* Sobkowiak, 148 Ill. 573, 36 N. E. 572.

24. Manhattan L. Ins. Co. *v.* Francisco, 17 Wall. (U. S.) 672, 21 L. ed. 698.

25. *Illinois.*— Pittsburg, etc., R. Co. *v.* Hewitt, 102 Ill. App. 428 [*affirmed* in 202 Ill. 28, 66 N. E. 829].

Indiana.— Duckwall *v.* Williams, 29 Ind. App. 650, 63 N. E. 232; Adams *v.* Main, 3 Ind. App. 232, 29 N. E. 792, 50 Am. St. Rep. 266.

Missouri.— Buck *v.* People's St. R., etc., Co., 108 Mo. 179, 18 S. W. 1090.

North Carolina.—Ward *v.* Albermarle, etc., R. Co., 112 N. C. 168, 16 S. E. 921.

Virginia.— Richmond, etc., R. Co. *v.* Humphreys, 90 Va. 425, 18 S. E. 901.

See 46 Cent. Dig. tit. "Trial," § 643.

26. Dole *v.* Thurlow, 12 Metc. (Mass.) 157.

giving instructions [27] or after the jury has been instructed,[28] or after the jury has retired [29] or after verdict.[30] In a number of states the rule requiring requests to be presented at the close of the evidence and before commencement of the argument does not obtain. Thus it has been held in one state that requests for instructions made during the course of the argument are in time.[31] In another the request may be presented at any time before the argument is closed.[32] And in others, it has been held error to refuse a request, although it is not made until after the general charge is given.[33] So, in one state, requests for instructions must be made after the general charge has been given and not previous thereto, or error cannot be assigned to their refusal.[34]

b. Waiver of Requirements of Rule. The court may in the exercise of a sound judicial discretion waive a requirement of a statute or rule of court that requests for instructions be presented at a designated time, and may give an instruction not so presented if it thinks proper to do so.[35] At any stage of the trial the judge should necessarily have the discretion to permit special prayers to be handed up, in order that his instructions to the jury may be made amply sufficient to cover every phase of the case.[36] By receiving requests after the expiration of the time limited by the rule the court, in effect, gives leave to present such instructions at that time.[37] And where the court passes on propositions preferred after argument it is bound to state the law correctly.[38]

27. Noblesville *v.* Vestal, 118 Ind. 80, 20 N. E. 479; Marsh *v.* Richardson, 106 N. C. 539, 11 S. E. 522.

28. *Maryland.*— U. S. Telegraph Co. *v.* Gildersleeve, 29 Md. 232, 96 Am. Dec. 519.

Massachusetts.— Root *v.* Boston El. R. Co., 183 Mass. 418, 67 N. E. 365.

New Jersey.— Dunne *v.* Jersey City Galvanizing Co., 73 N. J. L. 586, 64 Atl. 1076.

New York.— Schuhle *v.* Cunningham, 14 Daly 404, 13 N. Y. St. 81.

North Carolina.— Posey *v.* Patton, 109 N. C. 455, 14 S. E. 64.

Utah.— Flint *v.* Nelson, 10 Utah 261, 37 Pac. 479.

Vermont.—Wilmot *v.* Howard, 39 Vt. 447, 94 Am. Dec. 338.

United States.— Chicago *v.* Le Moyne, 119 Fed. 662, 56 C. C. A. 278.

See 46 Cent. Dig. tit. "Trial," § 645.

29. Garrity *v.* Higgins, 177 Mass. 414, 58 N. E. 1010.

30. Tabler *v.* Tabler, 62 Md. 601; Owens *v.* Phelps, 95 N. C. 286.

31. McCaleb *v.* Smith, 22 Iowa 242, under a statute providing that where the argument has been concluded, either party may request instructions.

32. Sterling Organ Co. *v.* House, 25 W. Va. 64.

33. Wood *v.* McGuire, 17 Ga. 303; Chapman *v.* McCormick, 86 N. Y. 479; Malone *v.* Third Ave. R. Co., 12 N. Y. App. Div. 508, 42 N. Y. Suppl. 694, 4 N. Y. Annot. Cas. 43; Gallagher *v.* McMullin, 7 N. Y. App. Div. 321, 40 N. Y. Suppl. 222; Pfeffele *v.* Second Ave. R. Co., 34 Hun (N. Y.) 497.

34. Myers *v.* Taylor, 107 Tenn. 364, 64 S. W. 719; Chicago Guaranty Fund Life Soc. *v.* Ford, 104 Tenn. 533, 58 S. W. 239; Felton *v.* Clarkson, 103 Tenn. 457, 53 S. W. 733; Cooper *v.* Overton, 102 Tenn. 211, 52 S. W. 183, 73 Am. St. Rep. 864, 45 L. R. A. 591; Chesapeake, etc., R. Co. *v.* Hendricks, 88 Tenn. 710, 13 S. W. 696, 14 S. W. 488; Chesapeake, etc., R. Co. *v.* Foster, 88 Tenn. 671, 13 S. W. 694, 14 S. W. 428.

35. *Illinois.*— Frank Parmelee Co. *v.* Griffin, 136 Ill. App. 307 [*affirmed* in 232 Ill. 503, 83 N. E. 1041]; Lyman *v.* Kline, 128 Ill. App. 497.

Indiana.—See Phillips *v.* Thorne, 103 Ind. 275, 2 N. E. 747.

Kansas.— Kellogg *v.* Lewis, 28 Kan. 535.

Massachusetts.— Robertson *v.* Boston, etc., St. R. Co., 190 Mass. 108, 76 N. E. 513, 112 Am. St. Rep. 314, 3 L. R. A. N. S. 588.

Minnesota.— Sanborn *v.* Rice County School-Dist. No. 10, 12 Minn. 17.

Missouri.— Boggess *v.* Metropolitan St. R. Co., 118 Mo. 328, 23 S. W. 159, 24 S. W. 210; Buck *v.* People's St. R., etc., Co., 108 Mo. 179, 18 S. W. 1090; Bright *v.* Miller, 95 Mo. App. 270, 68 S. W. 1061.

Giving an instruction which could do no harm is not error, although given after argument. Cluskey *v.* St. Louis, 50 Mo. 89.

Misapprehension of rule.— The court may in its discretion despite a rule to the contrary receive propositions submitted after argument where counsel states that he thought the rule requires submission before judgment. Mann *v.* Learned, 195 Ill. 502, 63 N. E. 178.

36. Craddock *v.* Barnes, 142 N. C. 89, 54 S. E. 1003; Willey *v.* Norfolk Southern R. Co., 96 N. C. 408, 1 S. E. 446.

37. Robertson *v.* Boston, etc., St. R. Co., 190 Mass. 108, 76 N. E. 513, 112 Am. St. Rep. 314, 3 L. R. A. N. S. 588.

What does not amount to waiver.— Postponement of consideration of a question raised by the evidence until the argument is not leave to disregard rule requiring instructions to be presented before the close of the argument. *In re* Keohane, 179 Mass. 69, 60 N. E. 406.

38. Firman *v.* Blood, 2 Kan. 496.

c. Exceptions to Rule. While, as stated in a previous section, it is, in general, proper to refuse requests for instructions not presented at the proper time,[39] there are nevertheless some exceptions to the rule. Peculiar circumstances may exist which would render the enforcement of the rule unjust to one of the parties and when this is so the court should disregard it and grant instructions requested if correct, although asked too late under the rule.[40] Thus the rule requiring requests for instructions to be presented before argument does not apply where the occasion for the instruction arises after the argument has commenced, as where the course of argument makes an instruction necessary,[41] nor is the rule operative where the cause is submitted without argument.[42] So it has been held that a party may well assume that, without special requests therefor, the judge will properly instruct the jury on the leading points of the case,[43] and if at the close of the charge it appears that the judge has omitted to refer to important matters that should be explained or has instructed erroneously in regard to them, it is the duty of the court to entertain and grant proper requests for further instructions.[44] Nevertheless, it must appear that such instructions are rendered necessary by the general charge,[45] and the party desiring them must make his request therefor at the close of the charge.[46] A request in an action wherein more than one plea has been filed that the court cause the jury, in the event they find for defendant, to specify on which one or more of the pleas the verdict is rendered, is in time, where made before the verdict has been recorded, and the jury has dispersed.[47]

4. Form and Requisites of Requests[48] — a. In General. In previous chapters the requirements governing instructions as to matters of form and substance have been considered at length.[49] Requested instructions must of course be drafted in conformity with these requirements to entitle the party presenting them to have them given in charge to the jury. A party desiring an instruction must formulate it,[50] and state definitely and unequivocally that he desires it to be given.[51] A mere suggestion to the trial court is not sufficient to require it to

39. See *supra*, IX, D, 3, a.

40. Hill *v.* Wright, 23 Ark. 530; Wills *v.* Tanner, 18 S. W. 166, 13 Ky. L. Rep. 741; Sterling Organ Co. *v.* House, 25 W. Va. 64. And see Lyman *v.* Kline, 128 Ill. App. 497, 505, in which it was said: "In fact it is not at all free from doubt, that in certain circumstances it might not become the court's duty" to waive the rule and receive additional instructions at any time.

41. Standard F. Ins. Co. *v.* Wren, 11 Ill. App. 242. And see Carey *v.* Chicago, etc., R. Co., 61 Wis. 71, 20 N. W. 648.

42. Tinney *v.* Endicott, 5 Cal. 102.

43. Brick *v.* Bosworth, 162 Mass. 334, 39 N. E. 36.

44. Brick *v.* Bosworth, 162 Mass. 334, 338, 39 N. E. 36, in which it was said: "This practice saves the judge from the necessity of dealing with elaborate, complicated prayers for rulings without an opportunity of reflection, and at the same time saves the parties their right to exceptions if the judge neglects and refuses to instruct upon the important questions in the case." Leydecker *v.* Brintnall, 158 Mass. 292, 33 N. E. 399; McMahon *v.* O'Connor, 137 Mass. 216; Ela *v.* Cockshott, 119 Mass. 416; Crippen *v.* Hope, 38 Mich. 344; Hoge *v.* Turner, 96 Va. 624, 32 S. E. 291; Carey *v.* Chicago, etc., R. Co., 61 Wis. 71, 76, 20 N. W. 648, in which it was said: "The rule should be sufficiently elastic to allow additional instructions to be asked for in such cases after argument and charge." And see Allen *v.* Perry, 56 Wis. 178, 14 N. W. 3.

45. Dunne *v.* Jersey City Galvanizing Co., 73 N. J. L. 586, 64 Atl. 1076.

46. Carter *v.* Augusta, 84 Me. 418, 24 Atl. 892; Boone *v.* Miller, 73 Tex. 557, 11 S. W. 551.

47. Crockett *v.* Garrard, 4 Ga. App. 360, 61 S. E. 552. To the same effect see Continental Nat. Bank *v.* Folsom, 67 Ga. 624; Williams *v.* Gunnels, 66 Ga. 521.

48. As affecting right to new trial for refusal of request see New Trial, 29 Cyc. 790 *et seq.*

In criminal prosecutions see Criminal Law, 12 Cyc. 661 *et seq.*

Sufficiency of requests for written instructions see *infra*, IX, F, 5.

49. See *supra*, IX, C.

50. Orient Ins. Co. *v.* Wingfield, 49 Tex. Civ. App. 202, 108 S. W. 788; Hardt *v.* Chicago, etc., R. Co., 130 Wis. 512, 110 N. W. 427.

51. Davis *v.* Stephenson, 149 N. C. 113, 62 S. E. 900 (holding that in an action on an account, a mere contention of plaintiff's counsel during the trial that there was an account stated by reason of defendant's failure to object within reasonable time after it was rendered cannot be regarded as a request for an instruction on such issue); Scherrer *v.* Seattle, 52 Wash. 4, 100 Pac. 144.

submit an issue; but a charge, properly framed, presenting the question desired to be passed on, must be requested,[52] and it is the duty of counsel, if the court misapprehended his meaning in a request to charge, to call its attention to the fact; otherwise, he is concluded by the interpretation put on the request by the court.[53] A plaintiff in framing his instructions need only present the law applicable to his theory of the case as supported by the evidence, and need not anticipate and negative possible defenses [54] or counter-claims.[55]

b. Necessity of Writing.[56] If statutes or rules of court provide that requests for instructions shall be presented in writing, error cannot be assigned to the refusal of oral requests for instructions.[57] And in the absence of such provisions, the reduction of requested instructions to writing is said to be the usual and better practice.[58] It is perfectly competent, however, for the court to waive a requirement of this nature, and when it does so, failure to charge proper requests is ground for new trial.[59] Merely placing a written instruction on the judge's desk without calling his attention to it does not satisfy a statutory requirement that requests for instructions be presented in writing.[60] But the fact that a prayer

52. Orient Ins. Co. *v.* Wingfield, 49 Tex. Civ. App. 202, 108 S. W. 788.

53. Booth *v.* Boston, etc., R. Co., 73 N. Y. 38, 29 Am. Rep. 97; Lancaster County *v.* Burke, 4 Pennyp. (Pa.) 258. *Compare* Overman Wheel Co. *v.* Griffin, 67 Fed. 659, 14 C. C. A. 609.

54. Mt. Olive, etc., Coal Co. *v.* Rademacher, 190 Ill. 538, 60 N. E. 888 [*affirming* 92 Ill. App. 442]; Pennsylvania Co. *v.* Backes, 133 Ill. 255, 24 N. E. 563; Chamberlain *v.* Chamberlain, 116 Ill. 480, 6 N. E. 444; Illinois Cent. R. Co. *v.* Smith, 111 Ill. App. 177 [*reversed* on other grounds in 208 Ill. 608, 70 N. E. 628]; O'Leary *v.* Zindt, 109 Ill. App. 309; Grout *v.* Nichols, 53 Me. 383; Hester *v.* Jacob Dold Packing Co., 84 Mo. App. 451.

55. Turney *v.* Baker, 103 Mo. App. 390, 77 S. W. 479.

56. **In criminal prosecutions** see CRIMINAL LAW, 12 Cyc. 662.

57. *Alabama.*— Southern Industrial Inst. *v.* Hellier, 142 Ala. 686, 39 So. 163; Henderson *v.* State, 137 Ala. 83, 34 So. 828; Ricketts *v.* Birmingham St. R. Co., 85 Ala. 600, 5 So. 353; South, etc., R. Co. *v.* Seale, 59 Ala. 608; Myatts *v.* Bell, 41 Ala. 222.

Colorado.— See Taylor *v.* Burnett, 39 Colo. 469, 90 Pac. 74.

Georgia.— Atlantic Coast Line R. Co. *v.* Jones, 132 Ga. 189, 63 S. E. 834; Millen, etc., R. Co. *v.* Allen, 130 Ga. 656, 61 S. E. 541; Tabor *v.* Macon R., etc., Co., 129 Ga. 417, 59 S. E. 225; Wrightsville, etc., R. Co. *v.* Gornto, 129 Ga. 204, 58 S. E. 769; Brown *v.* McBride, 129 Ga. 92, 58 S. E. 702; Southern R. Co. *v.* Brown, 126 Ga. 1, 54 S. E. 911; Bedgood-Howell Co. *v.* Moore, 123 Ga. 336, 51 S. E. 420; Johnston *v.* Gulledge, 115 Ga. 981, 42 S. E. 354; Atlanta Mach. Works *v.* Pope, 111 Ga. 872, 36 S. E. 950; Sims *v.* James, 62 Ga. 260; Monroe County *v.* Driskell, 3 Ga. App. 583, 60 S. E. 293; Atlantic, etc., R. Co. *v.* Smith, 2 Ga. App. 294, 58 S. E. 542. But see Macon County *v.* Chapman, 74 Ga. 107.

Illinois.— Ohio, etc., R. Co. *v.* Wangelin, 152 Ill. 138, 32 N. E. 760; Chicago, etc., R. Co. *v.* Kelly, 75 Ill. App. 490; Hartford Deposit Co. *v.* Pederson, 67 Ill. App. 142; Swift *v.* Fue, 66 Ill. App. 651; Harding *v.* Sandy, 43 Ill. App. 442.

Indiana.— Molt *v.* Hoover, (App. 1907) 81 N. E. 221.

Kansas.— Cooper *v.* Harvey, 77 Kan. 854, 94 Pac. 213; St. Louis, etc., R. Co. *v.* Noland, 75 Kan. 691, 90 Pac. 273; Morisette *v.* Howard, 62 Kan. 463, 63 Pac. 756; Tays *v.* Carr, 37 Kan. 141, 14 Pac. 456; Smith *v.* Yost, (App. 1899) 59 Pac. 379.

Minnesota.— Mobile Fruit, etc., Co. *v.* Potter, 78 Minn. 487, 81 N. W. 392.

Missouri.— Marion *v.* St. Louis, etc., R. Co., 124 Mo. App. 445, 101 S. W. 688.

Montana.— Helena, etc., Smelting, etc., Co. *v.* Lynch, 25 Mont. 497, 65 Pac. 919.

North Carolina.— Justice *v.* Gallert, 131 N. C. 393, 42 S. E. 850; Marshall *v.* Stine, 112 N. C. 697, 17 S. E. 495.

North Dakota.— Carr *v.* Minneapolis, etc., R. Co., 16 N. D. 217, 112 N. W. 972.

Oklahoma.— Chicago Live Stock Commission Co. *v.* Connally, 15 Okla. 45, 78 Pac. 318; Chicago Live Stock Commission Co. *v.* Fix, 15 Okla. 37, 78 Pac. 316.

Texas.— Jones *v.* Thurmond, 5 Tex. 318.

Wisconsin.—Du Cate *v.* Brighton, 133 Wis. 628, 114 N. W. 103; Hardt *v.* Chicago, etc., R. Co., 130 Wis. 512, 110 N. W. 427.

United States.— Southern R. Co. *v.* Shaw, 86 Fed. 865, 31 C. C. A. 70.

See 46 Cent. Dig. tit. "Trial," § 648.

Where by statute the court may instruct either orally or in writing and the court advises counsel before beginning to instruct the jury that it will charge orally, instructions requested in writing were properly refused. Morton *v.* Pusey, 237 Ill. 26, 86 N. E. 601.

58. Virginia Cedar Works *v.* Dalea, 109 Va. 333, 64 S. E. 41.

59. Willis *v.* Western Union Tel. Co., 69 S. C. 531, 48 S. E. 538, 104 Am. St. Rep. 828; Herskovitz *v.* Baird, 59 S. C. 307, 37 S. E. 922.

60. Bailey *v.* Hartman, (Tex. Civ. App. 1905) 85 S. W. 829.

for an instruction was on the reverse side of the paper on which the prayers were written does not of itself obviate error in failing to give such instruction.[61] Special charges, if intended to be separate requests, must be presented on separate pieces of paper, and where counsel requests several charges, written on one sheet, the court may treat them as a single request.[62]

c. Submission of Requested Instructions to Opposing Counsel. It is not error to permit the attorney of one of the parties to examine the instructions requested by his opponent before submission thereof to the jury,[63] and courts may enact rules to that effect and refuse requested instructions for non-compliance therewith.[64]

5. Argument For and Against Giving Requested Instructions.[65] In requesting an instruction, counsel need not state his reasons therefor,[66] but he has the right to be heard in support of his requests if he so desires; [67] and it is also proper for the court to give the adverse party an opportunity to present an argument against giving the requested instructions.[68]

6. Allowance or Refusal of Requests For Instructions[69] **— a. In General.** Where requests for instructions material to the issues are properly presented, counsel is entitled to a definite answer granting or refusing them;[70] but where the points presented to the court are fully answered by the general charge, it is sufficient without a separate and detached response to each; and when this is done those that are not answered may be considered as negatived by the court.[71] The refusal of an instruction is not equivalent to the assertion of the converse of the proposition contained in it.[72]

b. Correct Requests[73] — (i) *Duty to Give in Charge to Jury.* Within proper limits the parties may demand and the court is required to give instructions to the jury.[74] Where a timely request is made for instructions which correctly propound the law and which are also warranted by the evidence and pleadings in the case, it is the duty of the court to give them,[75] and error to refuse

61. Hodge *v.* Hudson, 139 N. C. 358, 51 S. E. 954.

62. Anniston Electric, etc., Co. *v.* Rosen, 159 Ala. 195, 48 So. 798.

63. Alabama Great Southern R. Co. *v.* Arnold, 80 Ala. 600, 608, 2 So. 337, in which it was said: "An examination was proper, and may have been necessary to enable them to determine whether to waive, except, or ask explanatory or qualifying instruction. And see Kenny *v.* Ipswich, 178 Mass. 368, 59 N. E. 1007 (in which it is said that the general practice requires that every party to a case should know what requests are made by the other party and should have an opportunity to be heard thereon if he so desires); Roehl *v.* Baasen, 8 Minn. 26 (holding that requests to charge should be submitted to opposing counsel).

64. Haines *v.* Stauffer, 13 Pa. St. 541, 53 Am. Dec. 493.

65. **In criminal prosecutions** see Criminal Law, 12 Cyc. 662.

66. Chicago, etc., R. Co. *v.* Martin, 28 Ind. App. 468, 63 N. E. 247.

67. Wildey *v.* Crane, 69 Mich. 17, 36 N. W. 734.

68. Kenney *v.* Ipswich, 178 Mass. 368, 59 N. E. 1007; Sullivan *v.* McManus, 19 N. Y. App. Div. 167, 45 N. Y. Suppl. 1079.

69. **In criminal prosecutions** see Criminal Law, 12 Cyc. 662 *et seq.*

70. Keitt *v.* Spencer, 19 Fla. 748; Sommer *v.* Gilmore, 160 Pa. St. 129, 28 Atl. 654; Kraft *v.* Smith, 117 Pa. St. 183, 11 Atl. 370; Swank *v.* Phillips, 113 Pa. St. 482, 6 Atl. 450; Hood *v.* Hood, 2 Grant (Pa.) 229; Hamilton *v.* Menor, 2 Serg. & R. (Pa.) 70; Smith *v.* Thompson, 2 Serg. & R. (Pa.) 49; Powers *v.* McFerran, 2 Serg. & R. (Pa.) 44. *Compare* Battishill *v.* Humphreys, 64 Mich. 494, 31 N. W. 894 (holding that upon failure of the court to give reasons in the general charge for his refusal to give specific requested charges the jury may infer that such requests are wrong in law); Emerson *v.* Hogg, 8 Fed. Cas. No. 4,400, 2 Blatchf. 1, 1 Fish. Pat. Rep. 77 (holding that requests for instructions made and not complied with are to be considered as refused, and exceptions may be taken for such refusal).

71. Arbuckle *v.* Thompson, 37 Pa. St. 170; Bartle *v.* Saunders, 2 Grant (Pa.) 199.

72. Miles *v.* Davis, 19 Mo. 408.

73. **Refusal of correct requests as ground for new trial** see New Trial, 29 Cyc. 790.

Refusal of correct requests, as ground for reversal in criminal prosecutions see Criminal Law, 12 Cyc. 666.

Refusal of requests covered by other instructions see *infra*, IX, D, 6, e.

Refusal of requests covered by other instructions as ground for new trial see New Trial, 29 Cyc. 790.

74. Brooke *v.* Young, 3 Rand. (Va.) 106.

75. *California.*— Davis *v.* Russell, 52 Cal. 611, 28 Am. Rep. 647.

Connecticut.— Morris *v.* Platt, 32 Conn. 75.

them,[76] unless covered by other instructions given,[77] or by the general charge.[78] This is so, although the evidence is conflicting[79] or slight, as the party asking an instruction is entitled to the benefit of whatever inferences the jury may think proper to draw from the proof, however slight.[80]

(II) *Method of Giving in Charge to Jury* — (A) *View That Charge in Language of Request Unnecessary.*[81] The decisions almost universally hold that a judge is not bound to charge the jury in the exact language of the requests for instructions by counsel. Although the requested instructions be correct as propositions of law and warranted by the evidence, the form of expression may be his own. If he instructs the jury correctly and in substance covers the relevant rules of law proposed to him by counsel, there is no error in refusing to adopt

Georgia.— Pugh *v.* McCarty, 44 Ga. 383; Haigler *v.* Adams, 5 Ga. App. 637, 63 S. E. 715.

Illinois.— Sampsell *v.* Rybcynski, 229 Ill. 75, 82 N. E. 244; Missouri Furnace Co. *v.* Abend, 107 Ill. 44, 47 Am. Rep. 425; Williams *v.* Watson, 71 Ill. App. 130.

Indiana.— Smith *v.* Johnson, 13 Ind. 224.

Indian Territory.—Purcell Cotton Seed Oil Mills *v.* Bell, 7 Indian Terr. 717, 104 S. W. 944.

Iowa.— Muldowney *v.* Illinois Cent. R. Co., 32 Iowa 176.

Kentucky.— Bell *v.* North, 4 Litt. 133; Owings *v.* Trotter, 1 Bibb 157.

Maine.— Anderson *v.* Bath, 42 Me. 346; Lapish *v.* Wells, 6 Me. 175.

Maryland.—Wells *v.* Turner, 16 Md. 133.

Michigan.— Dikeman *v.* Arnold, 71 Mich. 656, 40 N. W. 42.

Missouri.— Ridens *v.* Ridens, 29 Mo. 470.

Nebraska.— Hancock *v.* Stout, 28 Nebr. 301, 44 N. W. 446.

New Jersey.—Franklin *v.* Freihofer Vienna Baking Co., 71 N. J. L. 112, 58 Atl. 82.

New York.— Brockman *v.* Metropolitan St. R. Co., 32 Misc. 728, 66 N. Y. Suppl. 339.

Ohio.— Lytle *v.* Boyer, 33 Ohio St. 506.

Oklahoma.— Dunlap *v.* Flowers, 21 Okla. 600, 96 Pac. 643.

Pennsylvania — Pennsylvania R. Co. *v.* Zebe, 33 Pa. St. 318; Noble *v.* McClintock, 6 Watts & S. 58.

Texas.— Gilkey *v.* Peeler, 22 Tex. 663; Lee *v.* Haile, 51 Tex. Civ. App. 632, 114 S. W. 403; Johnson County Sav. Bank *v.* Kemp Mercantile Co., (Civ. App. 1908) 114 S. W. 402; Bishop *v.* Riddle, 51 Tex. Civ. App. 317, 113 S. W. 151; Love *v.* Perry, (Civ. App. 1908) 111 S. W. 203; St. Louis Southwestern R. Co. *v.* Connally, (Civ. App. 1906) 93 S. W. 206.

Utah.— McKinney *v.* Carson, 35 Utah 180, 99 Pac. 660.

Vermont.— Briggs *v.* Georgia, 12 Vt. 60.

Virginia.— Chesapeake, etc., R. Co. *v.* Stock, 104 Va. 97, 51 S. E. 161; Bertha Zinc Co. *v.* Martin, 93 Va. 791, 22 S. E. 869, 70 L. R. A. 999; Gordon *v.* Richmond, 83 Va. 436, 2 S. E. 727; Rosenbaum *v.* Weeden, 18 Gratt. 785, 98 Am. Dec. 737; Baltimore, etc., R. Co *v.* Laffertys, 14 Gratt. 478.

West Virginia.— Riley *v.* West Virginia Cent., etc., R. Co., 27 W. Va. 145.

Wisconsin.— Borchardt *v.* Wausau Boom Co., 54 Wis. 107, 11 N. W. 440, 41 Am. Rep. 12 (although not in the best form); Rogers *v.* Brightman, 10 Wis. 55.

United States.— Thorwegan *v.* King, 111 U. S. 549, 4 S. Ct. 529, 28 L. ed. 514; Douglass *v.* McAllister, 3 Cranch 298, 2 L. ed. 445.

76. Denver, etc., R. Co. *v.* Burchard, 35 Colo. 539, 86 Pac. 749; Suttle *v.* Finnegan, 86 Ill. App. 423; Kearns *v.* Brooklyn Heights R. Co., 69 N. Y. Suppl. 856.

77. *Alabama.*— Birmingham R., etc., Co. *v.* Clark, (1906) 41 So. 829.

Arkansas.— Frazier *v.* Poindexter, 78 Ark. 241, 95 S. W. 464, 115 Am. St. Rep. 33.

Colorado.— Last Chance Min., etc., Co. *v.* Ames, 23 Colo. 167, 47 Pac. 382; Marsh *v.* Cramer, 16 Colo. 331, 27 Pac. 169.

Illinois.— Hanchett *v.* Kimbark, (1885) 2 N. E. 512; McEwen *v.* Morey, 60 Ill. 32; Hill *v.* Ward, 7 Ill. 285; Stearns *v.* Reidy, 18 Ill. App. 582.

Indiana.— Conaway *v.* Shelton, 3 Ind. 334; Taylor *v.* Hillyer, 3 Blackf. 433, 26 Am. Dec. 430.

Kansas.— St. Louis, etc., R. Co. *v.* Boyce, 5 Kan. App. 678, 48 Pac. 949.

Minnesota.— McCormick Harvesting Mach. Co. *v.* Volkert, 81 Minn. 434, 84 N. W. 325.

Missouri.— Coleman *v.* Roberts, 1 Mo. 97.

Nebraska.— Madison First Nat. Bank *v.* Carson, 30 Nebr. 104, 46 N. W. 276.

North Carolina.—Walton *v.* Stallings, 15 N. C. 56.

Texas.— Consumers' Cotton Oil Co. *v.* Wilkins, (Civ. App. 1904) 80 S. W. 870.

Wisconsin.— Guinard *v.* Knapp-Stout, etc., Co., 95 Wis. 482, 70 N. W. 671.

78. *Georgia.*— Central of Georgia R. Co. *v.* Bond, 111 Ga. 13, 36 S. E. 299.

Michigan.— Carrel *v.* Kalamazoo Cold-Storage Co., 112 Mich. 34, 70 N. W. 323.

Texas.— Hoefling *v.* Dobbin, 91 Tex. 210, 42 S. W. 541, 43 S. W. 262 [*reversing* (Civ. App. 1897) 40 S. W. 58]; Citizens' R. Co. *v.* Ford, 25 Tex. Civ. App. 328, 60 S. W. 680; Houston, etc., R. Co. *v.* Milam, (Civ. App. 1901) 60 S. W. 591; Texas, etc., R. Co. *v.* Short, (Civ. App. 1900) 58 S. W. 56.

Wisconsin.— Messman *v.* Ihlenfeldt, 89 Wis. 585, 62 N. W. 522.

United States.— Denver City Tramway Co. *v.* Norton, 141 Fed. 599, 73 C. C. A. 1.

79. Sperry *v.* Spaulding, 45 Cal. 544.

80. Peoria M. & F. Ins. Co. *v.* Anapow, 45 Ill. 86.

81. In criminal cases see CRIMINAL LAW, 12 Cyc. 665 *et seq.*

the exact words of the request.[82] As to which method of giving instructions is

82. *Alabama.*— Long *v.* Rodgers, 19 Ala. 321 [*overruling* Phillips *v.* Beene, 16 Ala. 720; Hinton *v.* Nelms, 13 Ala. 222; Clealand *v.* Walker, 11 Ala. 1058, 46 Am. Dec. 238; Ivey *v.* Phifer, 11 Ala. 535]. That the rule of these decisions so far as written requests are concerned has since been restored by statute see *infra*, IX, D, 6, b, (II), (B).

Arkansas.— Ft. Smith Lumber Co. *v.* Cathey, 74 Ark. 604, 86 S. W. 806; Viser *v.* Bertrand, 16 Ark. 296.

California.— Jenson *v.* Will, etc., Co., 150 Cal. 398, 89 Pac. 113; Davis *v.* Perley, 30 Cal. 630; Miller *v.* Fireman's Fund Ins. Co., 6 Cal. App. 395, 92 Pac. 332.

Colorado.— Martin *v.* Hazzard Powder Co., 2 Colo. 596.

Connecticut.— Dunham *v.* Cox, 81 Conn. 268, 70 Atl. 1033; Tiesler *v.* Norwich, 73 Conn. 199, 47 Atl. 161; Livingston's Appeal, 63 Conn. 68, 26 Atl. 470.

Florida.— Nickels *v.* Mooring, 16 Fla. 76. But see Florida case cited in the next section.

Georgia.— Southern R. Co. *v.* Reynolds, 126 Ga. 657, 55 S. E. 1039; Southern Cotton Oil Co. *v.* Skipper, 125 Ga. 368, 54 S. E. 110; Western, etc., R. Co. *v.* Clements, 60 Ga. 319; Atlantic Coast Line R. Co. *v.* Odum, 5 Ga. App. 780, 63 S. E. 1126.

Illinois.— Ramey *v.* Baltimore, etc., R. Co., 235 Ill. 502, 85 N. E. 639 [*affirming* 140 Ill. App. 203]; Koshinski *v.* Illinois Steel Co., 231 Ill. 198, 83 N. E. 149; Chicago *v.* Moore, 139 Ill. 201, 28 N. E. 1071 [*affirming* 40 Ill. App. 332]; Birmingham F. Ins. Co. *v.* Pulver, 126 Ill. 329, 18 N. E. 804, 9 Am. St. Rep. 598 [*affirming* 27 Ill. App. 17]; Hanchett *v.* Kimbark, 118 Ill. 121, 7 N. E. 491; Hays *v.* Borders, 6 Ill. 46; Alexander *v.* Mandeville, 33 Ill. App. 589.

Indiana.— Williamson *v.* Yingling, 80 Ind. 379.

Iowa.— State *v.* Gibbons, 10 Iowa 117.

Kansas.— Chicago, etc., R. Co. *v.* Groves, 56 Kan. 601, 44 Pac. 628; Evans *v.* Lafeyth, 29 Kan. 736; Deitz *v.* Regnier, 27 Kan. 94; Topeka *v.* Tuttle, 5 Kan. 311; Rouse *v.* Downs, 5 Kan. App. 549, 47 Pac. 982; St. Louis, etc., R. Co. *v.* Hoover, 3 Kan. App. 577, 43 Pac. 854.

Kentucky.— The Blue Wing *v.* Buckner, 12 B. Mon. 246; Lowry *v.* Beckner, 5 B. Mon. 41; Slusher *v.* Hopkins, 89 S. W. 244, 28 Ky. L. Rep. 347.

Maine.— Godfrey *v.* Haynes, 74 Me. 96; Foye *v.* Southard, 64 Me. 389; Treat *v.* Lord, 42 Me. 552, 66 Am. Dec. 298; Anderson *v.* Bath, 42 Me. 346.

Maryland.— Rosenkovitz *v.* United R., etc., Co., 108 Md. 306, 70 Atl. 108; Philadelphia, etc., R. Co. *v.* Harper, 29 Md. 330; Higgins *v.* Carlton, 28 Md. 115, 92 Am. Dec. 666; Coates *v.* Sangston, 5 Md. 121; Hall *v.* Hall, 6 Gill & J. 386.

Massachusetts.— Lord *v.* Rowse, 195 Mass. 216, 80 N. E. 822; Stubbs *v.* Boston, etc., St. R. Co., 193 Mass. 513, 79 N. E. 795; Graham *v.* Middleby, 185 Mass. 349, 70 N. E. 416; Sullivan *v.* Sheehan, 173 Mass. 361, 53 N. E. 902; Norwood *v.* Somerville, 159 Mass. 105, 33 N. E. 1108; Peterson *v.* Farnum, 121 Mass. 476; Pearson *v.* Mason, 120 Mass. 53; Whitman *v.* Boston, etc., R. Co., 7 Allen 313.

Michigan.— Moore *v.* Kalamazoo, 109 Mich. 176, 66 N. W. 1089; Alton *v.* Meenwenberg, 108 Mich. 629, 66 N. W. 571; Miller *v.* Sharp, 65 Mich. 21, 31 N. W. 608; Lewis *v.* Rice, 61 Mich. 97, 27 N. W. 867; Pound *v.* Port Huron, etc., R. Co., 54 Mich. 13, 19 N. W. 570; Campau *v.* Dubois, 39 Mich. 274.

Minnesota.— Dodge *v.* Rogers, 9 Minn. 223.

Missouri.— Harman *v.* Shotwell, 49 Mo. 423; Grimes *v.* Cole, 133 Mo. App. 522, 113 S. W. 685; Mitchell *v.* Plattsburg, 33 Mo. App. 555.

Nebraska.— Meyer *v.* Shamp, 51 Nebr. 424, 71 N. W. 57; Lau *v.* W. B. Grimes Dry-Goods Co., 38 Nebr. 215, 56 N. W. 954; Jameson *v.* Butler, 1 Nebr. 115.

New Hampshire.— Kasjeta *v.* Nashua Mfg. Co., 73 N. H. 22, 58 Atl. 874; Elwell *v.* Roper, 72 N. H. 585, 58 Atl. 507; Bond *v.* Bean, 72 N. H. 444, 57 Atl. 340, 101 Am. St. Rep. 686; Wheeler *v.* Grand Trunk R. Co., 70 N. H. 607, 50 Atl. 103, 54 L. R. A. 955; Walker *v.* Walker, 64 N. H. 55, 5 Atl. 460; Clark *v.* Wood, 34 N. H. 447.

New York.— Lennon *v.* New York Cent., etc., R. Co., 65 Hun 578, 20 N. Y. Suppl. 557; Sherman *v.* Wakeman, 11 Barb. 254 [*reversed* on other grounds in 9 N. Y. 85]; Williams *v.* Birch, 6 Bosw. 299 [*affirmed* in 36 N. Y. 319, 2 Transcr. App. 133]; Munster *v.* Benoliel, 33 Misc. 586, 67 N. Y. Suppl. 1044 [*reversing* 32 Misc. 630, 66 N. Y. Suppl. 493].

North Carolina.— Graves *v.* Jackson, 150 N. C. 383, 64 S. E. 128; Brown *v.* W. T. Weaver Power Co., 140 N. C. 333, 52 S. E. 954, 3 L. R. A. N. S. 912; Harris *v.* Atlantic Coast Line R. Co., 132 N. C. 160, 43 S. E. 589; Cox *v.* Norfolk, etc., R. Co., 126 N. C. 103, 35 S. E. 237; Mitchell *v.* Corpening, 124 N. C. 472, 32 S. E. 798; Cornelius *v.* Brawley, 109 N. C. 542, 14 S. E. 78; Newby *v.* Harrell, 99 N. C. 149, 5 S. E. 284, 6 Am. St. Rep. 503; Rencher *v.* Wynne, 86 N. C. 268; Burton *v.* March, 51 N. C. 409; Marshall *v.* Flinn, 49 N. C. 199; Newbern *v.* Dawson, 32 N. C. 436.

Ohio.— Rheinheimer *v.* Ætna L. Ins. Co., 77 Ohio St. 360, 83 N. E. 491, 15 L. R. A. N. S. 245; Ashtabula Rapid Transit Co. *v.* Dagenbach, 11 Ohio Cir. Dec. 307.

Oklahoma.— Veseley *v.* Engelkemeier, 10 Okla. 290, 61 Pac. 924.

Pennsylvania.— Geiger *v.* Welsh, 1 Rawle 349; Jones *v.* Greenfield, 25 Pa. Super. Ct. 315.

Rhode Island.— McGowan *v.* Newport Prob. Ct., 27 R. I. 394, 62 Atl. 571, 114 Am. St. Rep. 52.

South Carolina.— Pooler *v.* Smith, 73 S. C. 102, 52 S. E. 967; Edwards *v.* Wessinger, 65 S. C. 161, 43 S. E. 518, 95 Am. St. Rep. 789; Brodie *v.* Carolina Midland R. Co., 46 S. C. 203, 24 S. E. 180; Hay *v.* Carolina Midland R. Co., 41 S. C. 542, 19 S. E. 976.

the more expedient, the decisions are not altogether harmonious. In some decisions it is said that when counsel present to the court correct views of the law, in a clear and distinct form, and so as not to mislead the jury, the better practice is for the court to adopt the instructions thus presented.[83] And, on the other hand, it has been said that the practice of taking the instructions as requested by the respective parties, and therefrom formulating a general charge embracing all the matters of law arising upon the pleadings and the evidence, is always to be commended, because in this way the points in issue may be sufficiently declared, and clearly presented to the jury, without unnecessary repetition and verbose language. The court's duty is to simplify its charge to the jury, and make every effort to render it as free from complexity as possible.[84] When this is done, however, "the law ought to be declared fully and accurately and in terms certain, explicit and intelligible to the jury upon the points raised by counsel." [85] And the court must not alter the sense of the requested instructions,[86] or impair their force.[87]

(B) *View That Court Must Charge in Language of Request.*[88] Under the statutes of Alabama, where written requests for instructions are presented, the instructions, where correct, if given at all must be given in the exact language of the request. The statute is construed to be mandatory and the giving of instructions in other language, although substantially correct, is reversible error.[89]

Texas.— Missouri Pac. R. Co. *v.* Williams, 75 Tex. 4, 12 S. W. 835, 16 Am. St. Rep. 867 [*modifying* Southern Cotton Press, etc., Co. *v.* Bradley, 52 Tex. 587]; St. Louis Southwestern R. Co. *v.* Shipp, 48 Tex. Civ. App. 565, 109 S. W. 286; Gulf, etc., R. Co. *v.* Davis, 35 Tex. Civ. App. 285, 80 S. W. 253.

Utah.— Hickey *v.* Rio Grande Western R. Co., 29 Utah 392, 82 Pac. 29; Scoville *v.* Salt Lake City, 11 Utah 60, 39 Pac. 481; Reddon *v.* Union Pac. R. Co., 5 Utah 344, 15 Pac. 262 [*affirmed* in 145 U. S. 657, 12 S. Ct. 989, 36 L. ed. 848]; Clampitt *v.* Kerr, 1 Utah 246.

Vermont.— Campbell *v.* Day, 16 Vt. 558.

Virginia.— Norfolk, etc., R. Co. *v.* Birchfield, 105 Va. 809, 54 S. E. 879; Home L. Ins. Co. *v.* Sibert, 96 Va. 403, 31 S. E. 519; Proctor *v.* Spratley, 78 Va. 254.

Washington.— Rangenier *v.* Seattle Electric Co., 52 Wash. 401, 100 Pac. 842; Payne *v.* Whatcom County R., etc., Co., 47 Wash. 342, 91 Pac. 1084; Smith *v.* Michigan Lumber Co., 43 Wash. 402, 86 Pac. 652; Seattle *v.* Buzby, 2 Wash. Terr. 25, 3 Pac. 180.

Wisconsin.— Jones *v.* Monson, 137 Wis. 478, 119 N. W. 179, 129 Am. St. Rep. 1082. And see Eldred *v.* Oconto Co., 33 Wis. 133; Andrea *v.* Thatcher, 24 Wis. 471, holding that non-compliance by the court with a former statutory requirement that instructions asked should be given without change or modification would not warrant a reversal unless a substantial right of the party complaining should be affected injuriously thereby.

United States.— Cunningham *v.* Springer, 204 U. S. 647, 27 S. Ct. 301, 51 L. ed. 662; New York, etc., R. Co. *v.* Winter, 143 U. S. 60, 12 S. Ct. 356, 36 L. ed. 71; Continental Imp. Co. *v.* Stead, 95 U. S. 161, 24 L. ed. 403; Clymer *v.* Dawkins, 3 How. 674, 11 L. ed. 778; U. S. Leather Co. *v.* Howell, 151 Fed. 444, 80 L. ed. 674; Mathieson Alkali Works *v.* Mathieson, 150 Fed. 241, 80 C. C. A. 129; Mountain Copper Co. *v.* Van Buren, 133 Fed. 1, 66 C. C. A. 151; Boston, etc., R. Co. *v.* McDuffey, 79 Fed. 934, 25 C. C. A. 247; Southern Bell Tel., etc., Co. *v.* Watts, 66 Fed. 460, 13 C. C. A. 579; Pitts *v.* Whitman, 19 Fed. Cas. No. 11,196, 2 Robb Pat. Cas. 189, 2 Story 609.

See 46 Cent. Dig. tit. "Trial," §§ 664, 665, 668.

83. Cook *v.* Brown, 62 Mich. 473, 29 N. W. 46, 4 Am. St. Rep. 870; Harman *v.* Shotwell, 49 Mo. 423.

84. Mountain Copper Co. *v.* Van Buren, 133 Fed. 1, 66 C. C. A. 151. And see Kinney *v.* Ferguson, 101 Mich. 178, 184, 59 N. W. 401, in which it was said: "It is a very proper practice for the trial court to extract from requests [to charge] (which are admirable reminders) such matters as should be explained to the jury, weaving them into a charge which, from its continuity and harmony, will be better understood than a succession of abstract propositions could be."

85. Rosenkovitz *v.* United R., etc., Co., 108 Md. 306, 316, 70 Atl. 108; Philadelphia, etc., R. Co. *v.* Harper, 29 Md. 330; Hall *v.* Hall, 6 Gill & J. (Md.) 386; Lewis *v.* Rice, 61 Mich. 97, 27 N. W. 867.

86. Jamson *v.* Quivey, 5 Cal. 490; Conrad *v.* Lindley, 2 Cal. 173; Galloway *v.* McLean, 2 Dak. 372, 9 N. W. 98.

87. Mynning *v.* Detroit, etc., R. Co., 59 Mich. 257, 26 N. W. 514.

88. In criminal prosecutions see CRIMINAL LAW, 12 Cyc. 665.

89. East Tennessee, etc., R. Co. *v.* Bayliss, 77 Ala. 429, 54 Am. Rep. 69; Bush *v.* Glover, 47 Ala. 167; Polly *v.* McCall, 37 Ala. 20; Bell *v.* Troy, 35 Ala. 184.

When the requests for instructions are oral the rule has no application. Lyon *v.* Kent, 45 Ala. 656; Milner *v.* Wilson, 45 Ala. 478.

Nevertheless, it is the right and duty of the court, if it thinks it necessary, to give additional explanatory instructions,[90] and if the requested instructions are erroneous, a qualification amounting only to a correction thereof will not be ground for reversal.[91] In North and South Dakota also the court is required by statute to instruct the jury in the language of the request;[92] and if the court materially changes the language and import of the requested instructions, and gives them in charge to the jury as coming from the party making the request, the judgment will be reversed.[93] Under the statute of Florida, an alteration of the instructions is a refusal to give them as proposed and is error if the instruction in either form is material and the jury may be misled to the injury of the party excepting.[94] And in West Virginia, in the absence of any special statutory provision, one offering an instruction is entitled to have it given in his own language if it correctly propounds the law applicable to the case, where there is evidence to support it, and where it is not misleading.[95] Nevertheless a verdict will not be set aside where this is not done, if it can clearly be seen that the instruction as modified is the same in legal effect as the one offered.[96]

c. Requests Wholly or Partially Erroneous[97] — (i) *Statement of Rule.* The form and substance of a requested instruction must be such that the court may properly charge the jury in the terms of the request, without qualification or modification. If a requested instruction is erroneous either wholly or in part it is properly refused,[98] and the same is the case in respect of a series of instruc-

90. Bell *v.* Troy, 35 Ala. 184.

91. Southern R. Co. *v.* Howell, 135 Ala. 639, 34 So. 6; Franke *v.* Riggs, 93 Ala. 252, 9 So. 359.

92. Landis *v.* Fyles, 18 N. D. 587, 120 N. W. 566; Peart *v.* Chicago, etc., R. Co., 8 S. D. 431, 66 N. W. 814.

93. Peart *v.* Chicago, etc., R. Co., 8 S. D. 431, 66 N. W. 814.

94. Pensacola, etc., R. Co. *v.* Atkinson, 20 Fla. 450.

95. Morrison *v.* Fairmount, etc., Traction Co., 60 W. Va. 441, 55 S. E. 669; Jordan *v.* Benwood, 42 W. Va. 312, 26 S. E. 266, 57 Am. St. Rep. 859, 36 L. R. A. 519; State *v.* Irwin, 30 W. Va. 404, 4 S. E. 413.

96. Morrison *v.* Fairmount, etc., Traction Co., 60 W. Va. 441, 55 S. E. 669.

97. **In criminal prosecutions** see Criminal Law, 12 Cyc. 644.

98. *Alabama.*— Louisville, etc., R. Co. *v.* Lile, 154 Ala. 556, 45 So. 699; Birmingham R., etc., Co. *v.* Landrum, 153 Ala. 192, 45 So. 198, 127 Am. St. Rep. 25; Southern Coal, etc., Co. *v.* Swinney, 149 Ala. 405, 42 So. 808; U. S. Life Ins. Co. *v.* Lesser, 126 Ala. 568, 28 So. 646; Alabama State Land Co. *v.* Slaton, 120 Ala. 259, 24 So. 720; Manchester F. Assur. Co. *v.* Feibelman, 118 Ala. 308, 23 So. 759; Kirkland *v.* Trott, 66 Ala. 417; Slater *v.* Carter, 35 Ala. 679; Rolston *v.* Langston, 26 Ala. 660; Long *v.* Rodgers, 19 Ala. 321.

California.—Williamson *v.* Tobey, 86 Cal. 497, 25 Pac. 65; Garlick *v.* Bowers, 66 Cal. 122, 4 Pac. 1138; Smith *v.* Richmond, 19 Cal. 476.

Connecticut.—Allen *v.* Lyness, 81 Conn. 626, 71 Atl. 936; Stern *v.* Simons, 77 Conn. 150, 58 Atl. 696; Charter *v.* Lane, 62 Conn. 121, 25 Atl. 464; Rathbone *v.* City F. Ins. Co., 31 Conn. 193; Marlborough *v.* Sisson, 23 Conn. 44.

Florida.— Jacksonville Electric Co. *v.* Schmetzer, 53 Fla. 370, 43 So. 85; Baker *v.* Chatfield, 23 Fla. 540, 2 So. 822.

Georgia.— McElwaney *v.* McDiarmid, 131 Ga. 97, 62 S. E. 20; Macon, etc., R. Co. *v.* Joyner, 129 Ga. 683, 59 S. E. 902; Roberts *v.* Devane, 129 Ga. 604, 59 S. E. 289; Rome *v.* Sudduth, 121 Ga. 420, 49 S. E. 300; Thompson *v.* O'Connor, 115 Ga. 120, 41 S. E. 242; Urquhart *v.* Leverett, 69 Ga. 92; Lewis *v.* Whidbee, 36 Ga. 371; Carter *v.* Brown, 4 Ga. App. 238, 61 S. E. 142; Bush *v.* Fourcher, 3 Ga. App. 43, 59 S. E. 459.

Illinois.— Indiana, etc., R. Co. *v.* Otstot, 212 Ill. 429, 72 N. E. 387 [*affirming* 113 Ill. App. 37]; Chicago, etc., R. Co. *v.* Burridge, 211 Ill. 9, 71 N. E. 838 [*reversing* 107 Ill. App. 23]; Smythe *v.* Evans, 209 Ill. 376, 70 N. E. 906 [*reversing* 108 Ill. App. 145]; Coney *v.* Pepperdine, 38 Ill. App. 403.

Indiana.— Newcastle *v.* Grubbs, 171 Ind. 482, 86 N. E. 757; Mosier *v.* Stoll, 119 Ind. 244, 20 N. E. 752; Roots *v.* Tyner, 10 Ind. 87; Bird *v.* Lanius, 7 Ind. 615; Lawrenceburgh, etc., R. Co. *v.* Montgomery, 7 Ind. 474; Crumrine *v.* Crumrine, 14 Ind. App. 641, 43 N. E. 322; Keller *v.* Reynolds, 12 Ind. App. 383, 40 N. E. 76, 280; Kluse *v.* Sparks, 10 Ind. App. 444, 36 N. E. 914, 37 N. E. 1047; Christian *v.* State, 7 Ind. App. 417, 34 N. E. 825; Howlett *v.* Dilts, 4 Ind. App. 23, 30 N. E. 313.

Iowa.— Mickey *v.* Indianola, (1908) 114 N. W. 1072; Bevan *v.* Hayden, 13 Iowa 122; Tifield *v.* Adams, 3 Iowa 487.

Kansas.— Kansas Ins. Co. *v.* Berry, 8 Kan. 159; Douglas *v.* Wolf, 6 Kan. 88; Mayberry *v.* Kelly, 1 Kan. 116; Western Union Tel. Co. *v.* Getto McClung Boot, etc., Co., 9 Kan. App. 863, 61 Pac. 504.

Maine.— Tower *v.* Haslam, 84 Me. 86, 24 Atl. 587; Atkinson *v.* Snow, 30 Me. 364.

Maryland.— Blumhardt *v.* Rohr, 70 Md. 328, 17 Atl. 266; Doyle *v.* Baltimore County Com'rs, 12 Gill & J. 484.

tions asked in gross, some of which are correct and others incorrect.[99] Even

Michigan.—Williams *v.* Lansing, 152 Mich. 169, 115 N. W. 961; Courtemanche *v.* Supreme Court I. O. O. F., 136 Mich. 30, 98 N. W. 749, 112 Am. St. Rep. 345, 64 L. R. A. 668; Bedford *v.* Penny, 58 Mich. 424, 25 N. W. 381; Westchester F. Ins. Co. *v.* Earle, 33 Mich. 143.

Minnesota.— Hayward *v.* Knapp, 23 Minn. 430; Simmons *v.* St. Paul, etc., R. Co., 18 Minn. 184; Dodge *v.* Rogers, 9 Minn. 223; Selden *v.* Bank of Commerce, 3 Minn. 166; Castner *v.* The Dr. Franklin, 1 Minn. 73.

Mississippi.— Doe *v.* King, 3 How. 125.

Missouri.— McManus *v.* Metropolitan St. R. Co., 116 Mo. App. 110, 92 S. W. 176; Christian University *v.* Hoffman, 95 Mo. App. 488, 69 S. W. 474; Lail *v.* Pacific Express Co., 81 Mo. App. 232; Barnett *v.* Sweringen, 77 Mo. App. 64.

New Jersey.— Dederick *v.* New Jersey Cent. R. Co., 74 N. J. L. 424, 65 Atl. 833; Consolidated Traction Co. *v.* Chenowith, 58 N. J. L. 416, 34 Atl. 817.

New York.— Bagley *v.* Smith, 10 N. Y. 489, 61 Am. Dec. 756; Keller *v.* New York Cent. R. Co., 2 Abb. Dec. 480, 24 How. Pr. 172; Whittleder *v.* Citizens' Electric Illuminating Co., 47 N. Y. App. Div. 410, 62 N. Y. Suppl. 297; Gardner *v.* Clark, 17 Barb. 538; Vallance *v.* King, 3 Barb. 548; Halsey *v.* Rome, etc., R. Co., 12 N. Y. St. 319.

North Carolina.— Edwards *v.* Western Union Tel. Co., 147 N. C. 126, 60 S. E. 900; Vanderbilt *v.* Brown, 128 N. C. 498, 39 S. E. 36.

Ohio.— Baltimore, etc., R. Co. *v.* Schultz, 43 Ohio St. 270, 1 N. E. 324; Fuller *v.* Coats, 18 Ohio St. 343; French *v.* Millard, 2 Ohio St. 44.

Oklahoma.— Sanders *v.* Cline, 22 Okla. 154, 101 Pac. 267; Friedman *v.* Weisz, 8 Okla. 392, 58 Pac. 613.

Pennsylvania.— Bishop *v.* Goodhart, 135 Pa. St. 374, 19 Atl. 1026.

Rhode Island.— Nichols *v.* Shaw, (1907) 67 Atl. 429.

South Carolina.— Earle *v.* Poat, 63 S. C. 439, 41 S. E. 525; Mitchell *v.* Charleston Light, etc., Co., 45 S. C. 146, 22 S. E. 767, 31 L. R. A. 577; Carter *v.* Columbia, etc., R. Co., 19 S. C. 20, 45 Am. Rep. 754.

Tennessee.— Pennsylvania R. Co. *v.* Naive, 112 Tenn. 239, 79 S. W. 124, 64 L. R. A. 443; Knoxville *v.* Cox, 103 Tenn. 368, 53 S. W. 734.

Texas.— Ratcliff *v.* Baird, 14 Tex. 43; Hardy *v.* De Leon, 5 Tex. 211; Boardman *v.* Woodward, (Civ. App. 1909) 118 S. W. 550; Lyon *v.* Bedgood, (Civ. App. 1909) 117 S. W. 897; San Antonio, etc., R. Co. *v.* McBride, (Civ. App. 1909) 116 S. W. 638; Arthur *v.* Porter, (Civ. App. 1909) 116 S. W. 127; San Antonio Light Pub. Co. *v.* Lewy, 52 Tex. Civ. App. 22, 113 S. W. 574; Missouri, etc., R. Co. *v.* Kennedy, 51 Tex. Civ. App. 466, 112 S. W. 339; Kansas City Southern R. Co. *v.* Williams, (Civ. App. 1908) 111 S. W. 196; Missouri, etc., R. Co. *v.* Wall, (Civ. App. 1908) 110 S. W. 453; Maffi *v.* Stephens, 49 Tex. Civ. App. 354, 108 S. W. 1008; McDonald *v.* McCrabb, 47 Tex. Civ. App. 259, 105 S. W. 238; Galveston, etc., R. Co. *v.* Still, 45 Tex. Civ. App. 169, 100 S. W. 176; St. Louis Southwestern R. Co. *v.* Baer, 39 Tex. Civ. App. 16, 86 S. W. 653; Milmo Nat. Bank *v.* Convery, (Civ. App. 1899) 49 S. W. 926; St. Louis, etc., R. Co. *v.* Casseday, (Civ. App. 1898) 48 S. W. 6 [*reversed* on other grounds in 92 Tex. 525, 50 S. W. 125]; McConnell *v.* Bruggerhoff, 1 Tex. App. Civ. Cas. § 1004.

Vermont.— Terrill *v.* Tillison, 75 Vt. 193, 54 Atl. 187; Boyden *v.* Fitchburg R. Co., 72 Vt. 89, 47 Atl. 409; Amsden *v.* Atwood, 69 Vt. 527, 38 Atl. 263; Underwood *v.* Hart, 23 Vt. 120.

Virginia.— Keen *v.* Monroe, 75 Va. 424; Rosenbaum *v.* Weeden, 18 Gratt. 785, 98 Am. Dec. 737; Kincheloe *v.* Tracewells, 11 Gratt. 587; Brooke *v.* Young, 3 Rand. 106.

Washington.— Howe *v.* West Seattle Land, etc., Co., 21 Wash. 594, 59 Pac. 495.

Wisconsin.— Lynch *v.* Waldwick, 123 Wis. 351, 101 N. W. 925; Lyle *v.* McCormick Harvesting Mach. Co., 108 Wis. 81, 84 N. W. 18, 51 L. R. A. 906; Stucke *v.* Milwaukee, etc., R. Co., 9 Wis. 202.

United States.—Armour *v.* Kollmeyer, 161 Fed. 78, 88 C. C. A. 242, 16 L. R. A. N. S. 1110; Exchange Bank *v.* Moss, 149 Fed. 340, 79 C. C. A. 278; Monarch Cycle Mfg. Co. *v.* Royer Wheel Co., 105 Fed. 324, 44 C. C. A. 523; Mann Boudoir Car Co. *v.* Dupre, 54 Fed. 646, 4 C. C. A. 540, 21 L. R. A. 289.

99. *Alabama.*— Stowers Furniture Co. *v.* Brake, 158 Ala. 639, 48 So. 89; Sloss-Sheffield Steel, etc., Co. *v.* Sampson, 158 Ala. 590, 48 So. 493; McEntyre *v.* Hairston, 152 Ala. 251, 44 So. 417; Southern R. Co. *v.* Bradford, 145 Ala. 684, 40 So. 100; Southern R. Co. *v.* Douglass, 144 Ala. 351, 39 So. 268.

Georgia.— Grace *v.* McKinney, 112 Ga. 425, 37 S. E. 737.

Illinois.— Nelson *v.* Fehd, 203 Ill. 120, 67 N. E. 828 [*affirming* 104 Ill. App. 114]; Springfield Electric Light, etc., Co. *v.* Mott, 120 Ill. App. 39.

Kentucky.— Stringtown, etc., Turnpike Road Co. *v.* Riley, 8 Ky. L. Rep. 267.

Maryland.— Preston *v.* Leighton, 6 Md. 88.

Missouri.— Fisher *v.* St. Louis Transit Co., 198 Mo. 562, 95 S. W. 917; Howerton *v.* Iowa State Ins. Co., 105 Mo. App. 575, 80 S. W. 27.

Nebraska.— Buck *v.* Hogeboom, 2 Nebr. (Unoff.) 853, 90 N. W. 635.

Ohio.— Inglebright *v.* Hammond, 19 Ohio 337, 53 Am. Dec. 430; Holmes *v.* Ashtabula Rapid Transit Co., 10 Ohio Cir. Dec. 638.

Pennsylvania.— Seifred *v.* Pennsylvania R. Co., 206 Pa. St. 399, 55 Atl. 1061.

South Carolina.— Pickens *v.* South Carolina, etc., R. Co., 54 S. C. 498, 32 S. E. 567; Gandy *v.* Orient Ins. Co., 52 S. C. 224, 29 S. E. 655.

Texas.— Dublin Cotton Oil Co. *v.* Jarrard,

though the court has indicated that it would give requested instruction, it may thereafter refuse to do so, on reaching the conclusion that the instruction is erroneous.[1] Subject to some limitations which obtain in a few jurisdictions and which will be subsequently considered,[2] the rule, except in a few states,[3] is that the court is not bound to modify or qualify erroneous requested instructions or give any others in their place,[4] or select from erroneous instructions

91 Tex. 289, 42 S. W. 959 [*affirming* (Civ. App. 1897) 40 S. W. 531]; Gulf, etc., R. Co. *v.* Garrett, (Civ. App. 1906) 98 S. W. 657; Cranfill *v.* Hayden, (Civ. App. 1903) 75 S. W. 573 [*reversed* on other grounds in 97 Tex. 544, 80 S. W. 609]; Riviere *v.* Missouri, etc., R. Co., (Civ. App. 1897) 40 S. W. 1074; International, etc., R. Co. *v.* Sein, (Civ. App. 1894) 26 S. W. 788; International, etc., R. Co. *v.* Neff, (Civ. App. 1894) 26 S. W. 784; Missouri Pac. R. Co. *v.* King, 2 Tex. Civ. App. 122, 20 S. W. 1014, 23 S. W. 917; Sabine, etc., R. Co. *v.* Ewing, 1 Tex. Civ. App. 531, 21 S. W. 700.

United States.— Chicago Great Western R. Co. *v.* Roddy, 131 Fed. 712, 65 C. C. A. 470.

1. Louisville, etc., R. Co. *v.* Hubbard, 116 Ind. 193, 18 N. E. 611.

2. See the following section.

3. **In Iowa** it has been held that although the requested instruction is so defective in form that it cannot be given as asked, yet the court must nevertheless give a proper instruction on the subject. Wise *v.* Outtrim, 139 Iowa 192, 117 N. W. 264, 130 Am. St. Rep. 301; Kinyon *v.* Chicago, etc., R. Co., 118 Iowa 349, 92 N. W. 40, 96 Am. St. Rep. 382.

In Kentucky the rule is well settled that if an instruction is offered by either party which is defective in form or substance, the court should prepare or direct the preparation of a proper instruction on the subject covered thereby. Crane *v.* Congleton, (1909) 116 S. W. 341; Louisville, etc., R. Co. *v.* King, 131 Ky. 347, 115 S. W. 196; Louisville, etc., R. Co. *v.* Harrod, 115 Ky. 877, 75 S. W. 233, 23 Ky. L. Rep. 250; Whitley *v.* Whitley, 108 S. W. 241, 32 Ky. L. Rep. 1211, 109 S. W. 908, 33 Ky. L. Rep. 281; Troutwine *v.* Louisville, etc., R. Co., 105 S. W. 142, 32 Ky. L. Rep. 5; South Covington, etc., St. R. Co. *v.* Core, 96 S. W. 562, 29 Ky. L. Rep. 836; Swope *v.* Schafer, 4 S. W. 300, 9 Ky. L. Rep. 160.

In Wyoming, under the construction given the statutes, it is held that, although a request for an instruction states the law inaccurately, it is nevertheless the duty of the court to instruct the jury in respect of the subject covered by the request. Union Pac. R. Co. *v.* Jarvi, 3 Wyo. 375, 23 Pac. 398.

4. *Alabama.*— Ross *v.* Ross, 20 Ala. 105.

Arkansas.— Horton *v.* Jackson, 87 Ark. 528, 113 S. W. 45 [*overruling* Bruce *v.* State, 71 Ark. 475, 75 S. W. 1080].

California.—Williamson *v.* Tobey, 86 Cal. 497, 25 Pac. 65; Preston *v.* Keys, 23 Cal. 193.

Colorado.— Blackmore *v.* Neale, 15 Colo. App. 49, 60 Pac. 952.

Connecticut.— Rathbone *v.* City F. Ins. Co., 31 Conn. 193; Marlborough *v.* Sisson, 23 Conn. 44.

District of Columbia.— Robinson *v.* Parker, 11 App. Cas. 132.

Georgia.— Carter *v.* Brown, 4 Ga. App. 238, 61 S. E. 142.

Illinois.— Rolfe *v.* Rich, 149 Ill. 436, 35 N. E. 352.

Indiana.— Rogers *v.* Leyden, 127 Ind. 50, 26 N. E. 210; Roots *v.* Tyner, 10 Ind. 87; Lawrenceburgh, etc., R. Co. *v.* Montgomery, 7 Ind. 474.

Indian Territory.— Gulf, etc., R. Co. *v.* Moseley, 6 Indian Terr. 369, 98 S. W. 129.

Kansas.— Kansas Ins. Co. *v.* Berry, 8 Kan. 159; Mayberry *v.* Kelly, 1 Kan. 116.

Maine.—Atkinson *v.* Snow, 30 Me. 364.

Michigan.—Williams *v.* Lansing, 152 Mich. 169, 115 N. W. 961. *Compare dictum* in Dodge *v.* Brown, 22 Mich. 446.

Missouri.— Barth *v.* Kansas City El. R. Co., 142 Mo. 535, 44 S. W. 778; Barnett *v.* Sweringen, 77 Mo. App. 64; Dempsey *v.* Reinsedler, 22 Mo. App. 43.

Montana.—Anderson *v.* Northern Pac. R. Co., 34 Mont. 181, 85 Pac. 884.

New York.— Bagley *v.* Smith, 10 N. Y. 489, 61 Am. Dec. 756; Frank *v.* Metropolitan St. R. Co., 91 N. Y. App. Div. 485, 86 N. Y. Suppl. 1018; Whittleder *v.* Citizens' Electric Illuminating Co., 47 N. Y. App. Div. 410, 62 N. Y. Suppl. 297; Smith *v.* New York Cent., etc., R. Co., 9 N. Y. St. 612 [*reversed* on other grounds in 118 N. Y. 645, 23 N. E. 990].

North Carolina.— Edwards *v.* Western Union Tel. Co., 147 N. C. 126, 60 S. E. 900.

Ohio.— French *v.* Millard, 2 Ohio St. 44.

South Carolina.— Mitchell *v.* Charleston Light, etc., Co., 45 S. C. 146, 22 S. E. 767, 31 L. R. A. 577; Gunter *v.* Graniteville Mfg. Co., 15 S. C. 443.

Tennessee.— Pennsylvania R. Co. *v.* Naive, 112 Tenn. 239, 79 S. W. 124, 64 L. R. A. 443; Knoxville *v.* Cox, 103 Tenn. 368, 53 S. W. 724.

Texas.— San Antonio, etc., R. Co. *v.* McBride, (Civ. App. 1909) 116 S. W. 638; Kansas City Southern R. Co. *v.* Williams, (Civ. App. 1908) 111 S. W. 196; Missouri, etc., R. Co. *v.* Wall, (Civ. App. 1908) 110 S. W. 453; Citizens' Nat. Bank *v.* Cammer, (Civ. App. 1905) 86 S. W. 625; St. Louis Southwestern R. Co. *v.* Kennemore, (Civ. App. 1904) 81 S. W. 802.

Virginia.— Chesapeake, etc., R. Co. *v.* Stock, 104 Va. 97, 51 S. E. 161; Borland *v.* Barrett, 76 Va. 128, 44 Am. Rep. 152; Keen *v.* Monroe, 75 Va. 424; Rosenbaum *v.* Weeden, 18 Gratt. 785, 98 Am. Dec. 737.

Washington.— Ramm *v.* Hewitt-Lea Lumber Co., 49 Wash. 263, 94 Pac. 1081.

West Virginia.— Shrewsbury *v.* Tufts, 41

what is right and reject what is wrong [5] although it is perfectly competent for it to do so if it sees fit.[6]

(II) *Limitations of Rule.* In Texas it has been frequently held that, although a requested instruction is erroneous, yet if it is sufficient to direct the court's attention to the point involved, it is the duty of the court to charge thereon, and this seems to be supported by the weight of authority in that state,[7] although there are decisions, some of which are of very recent date, to the contrary.[8] The rule laid down by the majority of the Texas decisions just considered seems to be sustained by recent decisions of Kansas and Massachusetts.[9] And if an attempt be made by an instruction to submit to the jury the matter defectively covered by the request, it should be sufficiently explicit to cover the field of the request.[10] And in an early Vermont decision it was held that, although a party may not be entitled to the particular charge to the jury which he requests, yet it is the duty of the court to charge as the facts in the case require.[11] So in Virginia and West Virginia there are a number of decisions in which it is said that if the instruction is so equivocal that to give or refuse it might mislead the jury, it would be the duty of the court to modify and give the instruction as corrected.[12] This doctrine has, however, been severely criticized by a recent decision of the court of appeals of Virginia on account of the difficulty of its application.[13]

W. Va. 212, 23 S. E. 692; Wheeling Gas. Co. *v.* Wheeling, 8 W. Va. 320.

Wisconsin.— Lynch *v.* Waldwick, 123 Wis. 351, 101 N. W. 925.

United States.— Exchange Bank *v.* Moss, 149 Fed. 340, 79 C. C. A. 278; Mann Boudoir Car Co. *v.* Dupre, 54 Fed. 646, 4 C. C. A. 540, 21 L. R. A. 289.

5. *California.*—Williamson *v.* Tobey, 86 Cal. 497, 25 Pac. 65.

Connecticut.— Marlborough *v.* Sisson, 23 Conn. 44.

Georgia.— Urquhart *v.* Leverett, 69 Ga. 92; Bush *v.* Fourcher, 3 Ga. App. 43, 59 S. E. 459.

Mississippi.— Dickson *v.* Moody, 2 Sm. & M. 17.

North Carolina.— Harris *v.* Atlantic Coast Line R. Co., 132 N. C. 160, 43 S. E. 589.

South Carolina.— Gunter *v.* Graniteville Mfg. Co., 15 S. C. 443.

Texas.— Rosenthal *v.* Middlebrook, 63 Tex. 333; Patton *v.* Gregory, 21 Tex. 513; McCown *v.* Schrimpf, 21 Tex. 22, 73 Am. Dec. 221; Gulf, etc., R. Co. *v.* Garrett, (Civ. App. 1906) 98 S. W. 657; Waco Artesian Water Co. *v.* Cauble, 19 Tex. Civ. App. 417, 47 S. W. 538.

Washington.—Croft *v.* Northwestern Steamship Co., 20 Wash. 175, 55 Pac. 42, holding that this is so, although the part which is correct might well have been requested as a separate instruction.

United States.— Exchange Bank *v.* Moss, 149 Fed. 340, 79 C. C. A. 278.

6. Marlborough *v.* Sisson, 23 Conn. 44; Bush *v.* Fourcher, 3 Ga. App. 43, 59 S. E. 459; Dickson *v.* Moody, 2 Sm. & M. (Miss.) 17; French *v.* Millard, 2 Ohio St. 44.

7. Gulf, etc., R. Co. *v.* Cusenberry, 86 Tex. 525, 26 S. W. 43; Kirby *v.* Estill, 75 Tex. 484, 12 S. W. 807; Lee *v.* Haile, 51 Tex. Civ. App. 632, 114 S. W. 403; Rushing *v.* Lanier, 51 Tex. Civ. App. 278, 111 S. W. 1089; Dallas Consol. Electric St. R. Co. *v.* Pettit, 47 Tex. Civ. App. 354, 105 S. W. 42; McAdams *v.* Hooks, 47 Tex. Civ. App. 79, 104 S. W. 432; Neville *v.* Mitchell, 28 Tex. Civ. App. 89, 66 S. W. 579; Leeds *v.* Reed, (Tex. Civ. App. 1896) 36 S. W. 347; Carpenter *v.* Dowe, (Tex. Civ. App. 1894) 26 S. W. 1002; Cleveland *v.* Empire Mills, 6 Tex. Civ. App. 479, 25 S. W. 1055; Bexar Bldg., etc., Assoc. *v.* Newman, (Tex. Civ. App. 1893) 25 S. W. 461.

Request held sufficient to direct attention to point.—A request to charge limiting plaintiffs' recovery to fifty cents a day for decedent's diminished capacity to labor, and requiring the exclusion of the time he was sick or incapacitated from other causes, was sufficient to call the court's attention to the defect in the charge allowing a consideration of decedent's diminished capacity to work from the date of his injury to the time of his death. Missouri, etc., R. Co. *v.* Smith, 49 Tex. Civ. App. 610, 108 S. W. 1195.

8. Houston, etc., R. Co. *v.* Oram, 47 Tex. Civ. App. 526, 107 S. W. 74; Missouri, etc., R. Co. *v.* Smith, (Tex. Civ. App. 1907) 100 S. W. 182; Gulf, etc., R. Co. *v.* Minter, 42 Tex. Civ. App. 235, 93 S. W. 516; Creager *v.* Yarborough, (Tex. Civ. App. 1905) 87 S. W. 376; Harris *v.* Springfield First Nat. Bank, (Tex. Civ. App. 1898) 45 S. W. 311.

9. Kansas City, etc., R. Co. *v.* Loosley, 76 Kan. 103, 90 Pac. 990; Black *v.* Buckingham, 174 Mass. 102, 54 N. E. 494.

10. Kansas City, etc., R. Co. *v.* Loosley, 76 Kan. 103, 90 Pac. 990.

11. Hazard *v.* Smith, 21 Vt. 123.

12. Keen *v.* Monroe, 75 Va. 424; Rosenbaum *v.* Weeden, 18 Gratt. (Va.) 785, 98 Am. Dec. 737; Peshine *v.* Shepperson, 17 Gratt. (Va.) 472, 94 Am. Dec. 468; Baltimore, etc., R. Co. *v.* Polly, 14 Gratt. (Va.) 447; Carrico *v.* West Virginia Cent., etc., R. Co., 35 W. Va. 389, 14 S. E. 12.

13. Chesapeake, etc., R. Co. *v.* Stock, 104 Va. 97, 111, 51 S. E. 161, in which it was said: "To say that a jury may be misled by a refusal to give an instruction, and therefore the instruction should be amended and

d. Inconsistent Requests. A party is bound by the theory of the case presented by the instructions given at his instance,[14] and it is proper to refuse instructions requested by him which are inconsistent with other instructions given at his request;[15] and where several instructions are requested, some of which are inconsistent with the others and involve different theories of the case, a party submitting such instructions cannot complain of the trial court in adopting one of the theories of the case and giving the instructions applicable thereto and refusing those which were inconsistent with the ones given.[16] Inconsistency between instructions given at plaintiff's request and those given at defendant's request, arising from the latter being too favorable to defendant, cannot be complained of by him.[17]

e. Requests Covered by Other Instructions Given[18] — (i) *STATEMENT OF RULE.* It is elementary and well settled that the court may properly refuse requested instructions, although they announce correct rules of law, where the propositions therein enunciated are fully and correctly covered by the general charge or by other instructions given on request of either party.[19]

given, is to prescribe a rule so vague and indefinite as to embarrass, rather than to assist trial courts in the performance of their duty. It is the duty of juries to respect the instructions given them. It is not to be supposed that they have any knowledge with respect to those which the court refuses to give; and finally, if it be conceded that the offer of instructions, their discussion, and the judgment of the court upon them, take place in the presence of the jurors, it is an impeachment of their integrity, or of their intelligence, to assume that they were influenced or misled by what has occurred."

14. Tetherow *v.* St. Joseph, etc., R. Co., 98 Mo. 74, 11 S. W. 310, 14 Am. St. Rep. 617.

15. *Colorado.*— Healey *v.* Rupp, 28 Colo. 102, 63 Pac. 319.

Illinois.— Chicago, etc., R. Co. *v.* Taylor, 170 Ill. 49, 48 N. E. 831; U. S. Rolling-Stock Co. *v.* Wilder, 116 Ill. 100, 5 N. E. 92.

Kentucky.— Louisville, etc., R. Co. *v.* Hunter, 10 Ky. L. Rep. 871.

Maryland.— B. F. Sturtevant Co. *v.* Dugan, 106 Md. 587, 68 Atl. 351; Cumberland Coal, etc., Co. *v.* Tilghman, 13 Md. 74.

Massachusetts.— Percival *v.* Chase, 182 Mass. 371, 65 N. E. 800.

Missouri.— St. Louis, etc., R. Co. *v.* Knapp, etc., Co., 160 Mo. 396, 61 S. W. 300; Tetherow *v.* St. Joseph, etc., R. Co., 98 Mo. 74, 11 S. W. 310, 14 Am. St. Rep. 617.

New York.— Ramsey *v.* National Contracting Co., 49 N. Y. App. Div. 11, 63 N. Y. Suppl. 286.

Texas.— Scott *v.* Texas, etc., R. Co., 93 Tex. 625, 57 S. W. 801; Texas, etc., R. Co. *v.* Hassell, 23 Tex. Civ. App. 681, 58 S. W. 54.

Vermont.— Briggs *v.* Georgia, 12 Vt. 60.

Virginia.— Richmond *v.* Pemberton, 108 Va. 220, 61 S. E. 787.

West Virginia.— Baltimore, etc., R. Co. *v.* Lafferty, 2 W. Va. 104; Lazzell *v.* Mapel, 1 W. Va. 43.

See 46 Cent. Dig. tit. "Trial," § 661.

16. Missouri, etc., R. Co. *v.* Fox, 60 Nebr. 531, 83 N. W. 744.

17. McNamara *v.* MacDonough, 102 Cal. 575, 36 Pac. 941.

18. **In criminal prosecutions** see CRIMINAL LAW, 12 Cyc. 662.

Repetition in general see *supra*, IX, C, 11.

19. *Alabama.*— Louisville, etc., R. Co. *v.* Hubbard, 148 Ala. 45, 41 So. 814; Hoyle *v.* Mann, 144 Ala. 516, 41 So. 835; Anglin *v.* Thomas, 142 Ala. 264, 37 So. 784; Tennessee Coal, etc., Co. *v.* Garrett, 140 Ala. 563, 37 So. 355; Stuart *v.* Mitchum, 135 Ala. 546, 33 So. 670; Southern R. Co. *v.* Shirley, 128 Ala. 595, 29 So. 687; Alabama Lumber Co. *v.* Keel, 125 Ala. 603, 28 So. 204; Louisville, etc., R. Co. *v.* Cowherd, 120 Ala. 51, 23 So. 793.

Arizona.— Title Guaranty, etc., Co. *v.* Nichols, (1909) 100 Pac. 825; Greene *v.* Hereford, (1908) 95 Pac. 105.

Arkansas.— St. Louis, etc., R. Co. *v.* Saunders, 78 Ark. 589, 94 S. W. 709; St. Louis, etc., R. Co. *v.* Tomlinson, 78 Ark. 251, 94 S. W. 613; Western Coal, etc., Co. *v.* Jones, 75 Ark. 76, 87 S. W. 440; Jones-Pope Produce Co. *v.* Breedlove, (1904) 83 S. W. 924; Miller *v.* Morton, 73 Ark. 183, 83 S. W. 918; Ringlehaupt *v.* Young, 55 Ark. 128, 17 S. W. 710; Hearn *v.* Coy, (1891) 13 S. W. 596; Haney *v.* Caldwell, 43 Ark. 184.

California.— Davis *v.* Diamond Carriage, etc., Co., 146 Cal. 59, 79 Pac. 596; *In re* McKenna, 143 Cal. 580, 77 Pac. 461; Harrington *v.* Los Angeles R. Co., 140 Cal. 514, 74 Pac. 15, 98 Am. St. Rep. 85, 63 L. R. A. 238; Muller *v.* Hale, 138 Cal. 163, 71 Pac. 81; Cook *v.* Los Angeles, etc., Electric R. Co., 134 Cal. 279, 66 Pac. 306; Trabing *v.* California Nav., etc., Co., (1901) 65 Pac. 478; Wahlgren *v.* Market St. R. Co., 132 Cal. 656, 62 Pac. 308, 64 Pac. 993; Taylor *v.* Ford, 131 Cal. 440, 63 Pac. 770; Thomas *v.* Gates, 126 Cal. 1, 58 Pac. 315; Estrella Vineyard Co. *v.* Butler, 125 Cal. 232, 57 Pac. 980; Los Angeles *v.* Pomeroy, 124 Cal. 597, 57 Pac. 585; Butler *v.* Estrella Raisin Vineyard Co., 124 Cal. 239, 56 Pac. 1040; Gardner *v.* Dennison, 106 Cal. 190, 39 Pac. 526; Kahn *v.* Brilliant, (1893) 35 Pac. 309; Castagnine *v.* Balletta, (1889) 21 Pac. 1097; Bowen *v.* Sierra Lumber Co., 3 Cal. App. 312, 84 Pac. 1010.

Colorado.— Vindicator Consol. Gold Min.

As previously stated in another part of this work repetition of instructions may tend

Co. *v.* Firstbrook, 36 Colo. 498, 86 Pac. 313; Denver Consol. Electric Co. *v.* Lawrence, 31 Colo. 301, 73 Pac. 39; Davis *v.* Shepherd, 31 Colo. 141, 72 Pac. 57; Farmer *v.* Phelps, 18 Colo. 126, 31 Pac. 768; Gaynor *v.* Clements, 16 Colo. 209, 26 Pac. 324; Kansas Pac. R. Co. *v.* Ward, 4 Colo. 30; Catlin Consol. Canal Co. *v.* Euster, 19 Colo. App. 117, 73 Pac. 846; Denver Consol. Tramway Co. *v.* Rush, 19 Colo. App. 70, 73 Pac. 664; Baldwin *v.* Central Sav. Bank, 17 Colo. App. 7, 67 Pac. 179; Beck *v.* Trimble, 14 Colo. App. 195, 59 Pac. 412; A. Westman Mercantile Co. *v.* Park, 2 Colo. App. 545, 31 Pac. 945; Jenkins *v.* Tynon, 1 Colo. App. 133, 27 Pac. 893.

Connecticut.— McGarry *v.* Healey, 78 Conn. 365, 62 Atl. 671; Hayden *v.* Fair Haven, etc., R. Co., 76 Conn. 355, 56 Atl. 613; Hart *v.* Knapp, 76 Conn. 135, 55 Atl. 1021, 100 Am. St. Rep. 989; Ridgefield *v.* Fairfield, 73 Conn. 47, 46 Atl. 245; Kellogg *v.* New Britain, 62 Conn. 232, 24 Atl. 996.

Delaware.— MacFeat *v.* Philadelphia, etc., R. Co., 6 Pennew. 513, 69 Atl. 744.

District of Columbia.— Metropolitan R. Co. *v.* Blick, 22 App. Cas. 194; Gleeson *v.* Virginia Midland R. Co., 1 App. Cas. 185; Presbrey *v.* Thomas, 1 App. Cas. 171; Johnson *v.* Baltimore, etc., R. Co., 6 Mackey 232.

Florida.— Maultsby *v.* Boulware, 47 Fla. 194, 36 So. 713; Higginbotham *v.* State, 42 Fla. 573, 29 So. 410, 89 Am. St. Rep. 237; Jacksonville, etc., R. Co. *v.* Peninsular Land, etc., Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33, 65.

Georgia.— Hannah *v.* Anderson, 125 Ga. 407, 54 S. E. 131; Woodley *v.* Coker, 122 Ga. 832, 50 S. E. 936; Morrison *v.* Dickey, 122 Ga. 417, 50 S. E. 178; Atlanta, etc., R. Co. *v.* Gardner, 122 Ga. 82, 49 S. E. 818; Central of Georgia R. Co. *v.* Castellow, 121 Ga. 772, 49 S. E. 753; City Electric R. Co. *v.* Smith, 121 Ga. 663, 49 S. E. 724; Shedden *v.* Stiles, 121 Ga. 637, 49 S. E. 719; Macon R., etc., Co. *v.* Barnes, 121 Ga. 443, 49 S. E. 282; Atlanta R., etc., Co. *v.* Johnson, 120 Ga. 908, 48 S. E. 389; Atlantic, etc., R. Co. *v.* Rabinowitz, 120 Ga. 864, 48 S. E. 326; Columbus *v.* Anglin, 120 Ga. 785, 48 S. E. 318; Central of Georgia R. Co. *v.* Goodwin, 120 Ga. 83, 47 S. E. 641; Eagle, etc., Mills *v.* Herron, 119 Ga. 389, 46 S. E. 405; Atlanta R., etc., Co. *v.* Monk, 118 Ga. 449, 45 S. E. 494; Central of Georgia R. Co. *v.* Trammell, 114 Ga. 312, 40 S. E. 259; Central of Georgia R. Co. *v.* Grady, 113 Ga. 1045, 39 S. E. 441; Atlanta R., etc., Co. *v.* Walker, 112 Ga. 725, 38 S. E. 107; O'Neal *v.* O'Neal, 112 Ga. 348, 37 S. E. 375; Taylor *v.* Allen, 112 Ga. 330, 37 S. E. 408; Odum *v.* Creighton Min., etc., Co., 111 Ga. 873, 36 S. E. 947; Gramling *v.* Pool, 111 Ga. 93, 36 S. E. 430; Atlanta Consol. St. R. Co. *v.* Bagwell, 107 Ga. 157, 33 S. E. 191; Rodgers *v.* Black, 99 Ga. 139, 25 S. E. 23; Rounsaville *v.* Watters, 94 Ga. 707, 20 S. E. 93; Cheshire *v.* Tappan, 94 Ga. 704, 19 S. E. 992; Savannah St. R. Co. *v.* Ficklin, 94 Ga. 146, 20 S. E. 646; Parker *v.* Georgia Pac. R. Co., 83 Ga. 539, 10 S. E. 233; Richmond, etc., R. Co. *v.* Howard, 79 Ga. 44, 3 S. E. 426; Hoffman *v.* Oates, 77 Ga. 701; Falkner *v.* Behr, 75 Ga. 671; Harris *v.* Collins, 75 Ga. 97; Holdridge *v.* Cubbedge, 71 Ga. 254.

Idaho.— North *v.* Woodland, 12 Ida. 50, 85 Pac. 215, 6 L. R. A. N. S. 921; Hansen *v.* Haley, 11 Ida. 278, 81 Pac. 935.

Illinois.— Schwartz *v.* McQuaid, 214 Ill. 357, 73 N. E. 562, 105 Am. St. Rep. 112; Chicago North Shore St. R. Co. *v.* Strathmann, 213 Ill. 252, 72 N. E. 800; Indiana, etc., R. Co. *v.* Ostot, 212 Ill. 429, 72 N. E. 387 [*affirming* 113 Ill. App. 37]; Chicago, etc., R. Co. *v.* Newell, 212 Ill. 332, 72 N. E. 416; Chicago City R. Co. *v.* Matthieson, 212 Ill. 292, 72 N. E. 443 [*affirming* 113 Ill. App. 246]; Shickle-Harrison, etc., Iron Co. *v.* Beck, 212 Ill. 268, 72 N. E. 423; Chicago Union Traction Co. *v.* Olsen, 211 Ill. 255, 71 N. E. 985 [*affirming* 113 Ill. App. 303]; Masonic Fraternity Temple Assoc. *v.* Collins, 210 Ill. 482, 71 N. E. 396 [*affirming* 110 Ill. App. 504]; Chicago Union Traction Co. *v.* Reuter, 210 Ill. 279, 71 N. E. 323; Illinois, etc., R. Co. *v.* Freeman, 210 Ill. 270, 71 N. E. 444; Illinois Terminal R. Co. *v.* Thompson, 210 Ill. 226, 71 N. E. 328 [*affirming* 112 Ill. App. 463]; Kehl *v.* Abram, 210 Ill. 218, 71 N. E. 347, 102 Am. St. Rep. 158 [*affirming* 112 Ill. App. 77]; Illinois Cent. R. Co. *v.* Keegan, 210 Ill. 150, 71 N. E. 321 [*affirming* 112 Ill. App. 28]; Illinois Cent. R. Co. *v.* Prickett, 210 Ill. 140, 71 N. E. 435; Rock Island Sash, etc., Works *v.* Pohlman, 210 Ill. 133, 71 N. E. 428 [*affirming* 99 Ill. App. 670]; Commonwealth Electric Co. *v.* Melville, 210 Ill. 70, 70 N. E. 1052 [*affirming* 110 Ill. App. 242]; Chicago City R. Co. *v.* Bundy, 210 Ill. 39, 71 N. E. 28 [*affirming* 109 Ill. App. 637]; Wilmette *v.* Brachle, 209 Ill. 621, 71 N. E. 41 [*affirming* 110 Ill. App. 356]; Knights Templars, etc., Life Indemnity Co. *v.* Crayton, 209 Ill. 550, 70 N. E. 1066 [*affirming* 110 Ill. App. 648]; The Fair *v.* Hoffmann, 209 Ill. 330, 70 N. E. 622 [*affirming* 110 Ill. App. 500]; Beidler *v.* King, 209 Ill. 302, 70 N. E. 763; Aledo *v.* Honeyman, 208 Ill. 415, 70 N. E. 338 [*affirming* 108 Ill. App. 536]; Chicago City R. Co. *v.* Leach, 208 Ill. 198, 70 N. E. 222, 100 Am. St. Rep. 216 [*reversing* 104 Ill. App. 30]; Miller *v.* John, 208 Ill. 173, 70 N. E. 27; Mayer *v.* Gersbacher, 207 Ill. 296, 69 N. E. 789 [*affirming* 106 Ill. App. 511]; Macon *v.* Holcomb, 205 Ill. 643, 69 N. E. 79; Ehlen *v.* O'Donnell, 205 Ill. 38, 68 N. E. 766 [*affirming* 102 Ill. App. 141]; James White Memorial Home *v.* Haeg, 204 Ill. 422, 68 N. E. 568; England *v.* Fawbush, 204 Ill. 384, 68 N. E. 526; Chicago City R. Co. *v.* Fennimore, 199 Ill. 9, 64 N. E. 985 [*affirming* 99 Ill. App. 174]; West Chicago St. R. Co. *v.* Lieserowitz, 197 Ill. 607, 64 N. E. 718; Elgin, etc., R. Co. *v.* Duffy, 191 Ill. 489, 61 N. E. 432 [*affirming* 93 Ill. App. 463]; Chicago, etc., R. Co. *v.* Smith, 180 Ill. 453, 54 N. E. 325 [*affirming* 77 Ill. App. 492]; Chicago, etc., R. Co. *v.* Murowski, 179 Ill. 77, 58 N. E. 572 [*affirming* 78 Ill. App. 661]; Omaha Packing Co. *v.* Murray, 112 Ill. App.

to embarrass and confuse the jury. Instructions are intended to give to the jury a

233; Chicago, etc., R. Co. *v.* Pettit, 111 Ill. App. 172 [*affirmed* in 209 Ill. 452, 70 N. E. 591]; Johnson *v.* Larcade, 110 Ill. App. 611; Netcher *v.* Bernstein, 110 Ill. App. 484; Shutt Imp. Co. *v.* Thompson, 109 Ill. App. 540; McLeansboro *v.* Trammel, 109 Ill. App. 524; Lake Erie, etc., R. Co. *v.* Delong, 109 Ill. App. 241; Gaines *v.* Gaines, 109 Ill. App. 226; West Chicago St. R. Co. *v.* Petters, 95 Ill. App. 479 [*affirmed* in 196 Ill. 298, 63 N. E. 662]; Illinois Cent. R. Co. *v.* King, 77 Ill. App. 581.

Indiana.— M. S. Huey Co. *v.* Johnston, 164 Ind. 489, 73 N. E. 996; Barricklow *v.* Stewart, 163 Ind. 438, 72 N. E. 128; Southern Indiana R. Co. *v.* Harrell, 161 Ind. 689, 68 N. E. 262 [*reversing* (App. 1903) 66 N. E. 1016]; Republic Iron, etc., Co. *v.* Ohler, 161 Ind. 393, 68 N. E. 901; Citizens' St. R. Co. *v.* Jolly, 161 Ind. 80, 67 N. E. 935; Indianapolis St. R. Co. *v.* Robinson, 157 Ind. 414, 61 N. E. 936; Everson *v.* Seller, 105 Ind. 266, 4 N. E. 854; Southern Indiana R. Co. *v.* Osborn, 39 Ind. App. 333, 78 N. E. 248, 79 N. E. 1067; Baltimore, etc., R. Co. *v.* Cavanaugh, 35 Ind. App. 32, 71 N. E. 239; Espenlaub *v.* Ellis, 34 Ind. App. 163, 72 N. E. 527; Southern R. Co. *v.* State, (App. 1904) 72 N. E. 174; Cleveland, etc., R. Co. *v.* Potts, 33 Ind. App. 564, 71 N. E. 685; Indianapolis St. R. Co. *v.* Schomberg, (App. 1904) 71 N. E. 237; Southern Indiana R. Co. *v.* Davis, 32 Ind. App. 569, 69 N. E. 550 [*withdrawing* opinion (App. 1903) 68 N. E. 191]; Fritzinger *v.* State, 31 Ind. App. 350, 67 N. E. 1006; Muncie Natural Gas Co. *v.* Allison, 31 Ind. App. 50, 67 N. E. 111; Golibart *v.* Sullivan, 30 Ind. App. 428, 66 N. E. 188; Reynolds *v.* Pierson, 29 Ind. App. 273, 64 N. E. 484; Chicago, etc., R. Co. *v.* Curless, 27 Ind. App. 306, 60 N. E. 467; North British, etc., Ins. Co. *v.* Rudy, 26 Ind. App. 472, 60 N. E. 9; Evansville *v.* Senhenn, 26 Ind. App. 362, 59 N. E. 863; Home Ins. Co. *v.* Sylvester, 25 Ind. App. 207, 57 N. E. 991; Ray *v.* Moore, 24 Ind. App. 480, 56 N. E. 937; Westbrook *v.* Aultman, 3 Ind. App. 83, 28 N. E. 1011; Kreag *v.* Anthus, 2 Ind. App. 482, 28 N. E. 773.

Indian Territory.— Purcell Wholesale Grocery Co. *v.* Bryant, 6 Indian Terr. 78, 89 S. W. 662; Doherty *v.* Arkansas, etc., R. Co., 5 Indian Terr. 537, 82 S. W. 899; Duncan First Nat. Bank *v.* Anderson, 5 Indian Terr. 118, 82 S. W. 693; Perry *v.* Cobb, 4 Indian Terr. 717, 76 S. W. 289; Orr, etc., Shoe Co. *v.* Frankenthal, 4 Indian Terr. 368, 69 S. W. 906; Ward *v.* Bass, 4 Indian Terr. 291, 69 S. W. 879; Hargadine-McKittrick Dry Goods Co. *v.* Bradley, 4 Indian Terr. 242, 69 S. W. 862; Davis *v.* Pryor, 3 Indian Terr. 396, 58 S. W. 660; Shapard Grocery Co. *v.* Hynes, 3 Indian Terr. 74, 53 S. W. 486; Breedlove *v.* Dennie, 2 Indian Terr. 606, 53 S. W. 436; Purcell Mill, etc., Co. *v.* Kirkland, 2 Indian Terr. 169, 47 S. W. 311; Noyes *v.* Tootle, 2 Indian Terr. 144, 48 S. W. 1031; Dorrance *v.* McAlester, 1 Indian Terr. 473, 45 S. W. 141; Noble *v.* Worthy, 1 Indian Terr. 458, 45 S. W. 137.

Iowa.— Heinmiller *v.* Winston, 131 Iowa 32, 107 N. W. 1102; J. H. Cownie Glove Co. *v.* Merchants' Dispatch Transp. Co., 130 Iowa 327, 106 N. W. 749, 4 L. R. A. N. S. 1060; Belken *v.* Iowa Falls, 122 Iowa 430, 98 N. W. 296; Collins *v.* Chicago, etc., R. Co., 122 Iowa 231, 97 N. W. 1103; Kidman *v.* Garrison, 122 Iowa 215, 97 N. W. 1078; Brier *v.* Davis, 122 Iowa 59, 96 N. W. 983; Thayer *v.* Smoky Hollow Coal Co., 121 Iowa 121, 96 N. W. 718; Stanley *v.* Cedar Rapids, etc., R. Co., 119 Iowa 526, 93 N. W. 489; Butterfield *v.* Kirtley, 115 Iowa 207, 88 N. W. 371; Kowalsky *v.* Chicago Great Western R. Co., (1901) 87 N. W. 409; Sanders *v.* O'Callaghan, 111 Iowa 574, 82 N. W. 969; Shambaugh *v.* Current, 111 Iowa 121, 82 N. W. 497; Keyes *v.* Cedar Falls, 107 Iowa 509; 78 N. W. 227.

Kansas.— Electric R., etc., Co. *v.* Brickell, 73 Kan. 274, 85 Pac. 297; Morgan *v.* Bell, 41 Kan. 345, 21 Pac. 255; Haak *v.* Struve, 38 Kan. 326, 16 Pac. 686; Anderson *v.* Canter, 10 Kan. App. 167, 63 Pac. 285; McCormick Harvesting Mach. Co. *v.* Hayes, (App. 1900) 62 Pac. 901; McCormick Harvesting Mach. Co. *v.* Hayes, 7 Kan. App. 141, 53 Pac. 70; Atchison, etc., R. Co. *v.* Guinane, (App. 1897) 51 Pac. 782; Niagara Ins. Co. *v.* Knapp, (App. 1897) 47 Pac. 628; Atchison, etc., R. Co. *v.* Morrow, 4 Kan. App. 199, 45 Pac. 956; St. Louis, etc., R. Co. *v.* Stevens, 3 Kan. App. 176, 43 Pac. 434.

Kentucky.— Bowling Green *v.* Duncan, 122 Ky. 244, 91 S. W. 268, 28 Ky. L. Rep. 1177; Bonte *v.* Postel, 109 Ky. 64, 58 S. W. 536, 22 Ky. L. Rep. 583, 51 L. R. A. 187; Louisville R. Co. *v.* Johnson, 87 S. W. 782, 27 Ky. L. Rep. 1034; Illinois Cent. R. Co. *v.* Colly, 86 S. W. 536, 27 Ky. L. Rep. 730; Vincent *v.* Willis, 82 S. W. 583, 26 Ky. L. Rep. 842; Richmond *v.* Martin, 78 S. W. 219, 25 Ky. L. Rep. 1516; Crabtree Coal Min. Co. *v.* Sample, 72 S. W. 24, 24 Ky. L. Rep. 1703; Louisville, etc., R. Co. *v.* Humbaugh, 68 S. W. 441, 24 Ky. L. Rep. 349; Howe *v.* Miller, 65 S. W. 353, 66 S. W. 184, 23 Ky. L. Rep. 1610; Paducah R., etc., Co. *v.* Ledsinger, 63 S. W. 11, 23 Ky. L. Rep. 441; Dayton *v.* Gardner, 40 S. W. 779, 19 Ky. L. Rep. 302; Louisville, etc., R. Co. *v.* Connelly, 7 S. W. 914, 9 Ky. L. Rep. 993; Louisville, etc., R. Co. *v.* Blair, 12 Ky. L. Rep. 294.

Louisiana.— Wimbish *v.* Hamilton, 47 La. Ann. 246, 16 So. 856.

Maine.— Stone *v.* Lewiston, etc., St. R. Co., 99 Me. 243, 59 Atl. 56; Coombs *v.* Mason, 97 Me. 270, 54 Atl. 728; Bernard *v.* Merrill, 91 Me. 358, 40 Atl. 136; Bunker *v.* Gouldsboro, 81 Me. 188, 16 Atl. 543; State *v.* Knight, 43 Me. 11; Dunn *v.* Moody, 41 Me. 239.

Maryland.— Kernan *v.* Crook, 100 Md. 210, 59 Atl. 753; Serie *v.* Murphy, 99 Md. 545, 58 Atl. 435, 105 Am. St. Rep. 316; West Virginia Cent., etc., R. Co. *v.* State, 96 Md. 652, 54 Atl. 669, 61 L. R. A. 574; Gill *v.* Donovan, 96 Md. 518, 54 Atl. 117; Sellman *v.* Wheeler, 95 Md. 751, 54 Atl. 512; McCarty *v.* Harris, 93 Md. 741, 49 Atl. 414; Gill *v.* Stayler, 93

clear and concise statement of the law governing the case. The duplication of instruc-

Md. 453, 49 Atl. 650; United R., etc., Co. *v.* Seymour, 92 Md. 425, 48 Atl. 850; Jackson *v.* Jackson, 82 Md. 17, 33 Atl. 317, 34 L. R. A. 773; Baltimore, etc., Turnpike Road *v.* State, 71 Md. 573, 18 Atl. 884; Green Ridge R. Co. *v.* Brinkman, 64 Md. 52, 20 Atl. 1024, 54 Am. Rep. 755; Black *v.* Woodrow, 39 Md. 194; Kershner *v.* Kershner, 36 Md. 309; Baltimore, etc., R. Co. *v.* Schumacher, 29 Md. 168, 96 Am. Dec. 510.

Massachusetts.— Rubinovitch *v.* Boston El. R. Co., 192 Mass. 119, 77 N. E. 895; Whitney *v.* Com., 190 Mass. 531, 77 N. E. 516; Parsons *v.* Hecla Iron Works, 186 Mass. 221, 71 N. E. 572; Savage *v.* Marlborough St. R. Co., 186 Mass. 203, 71 N. E. 531; Graham *v.* Middleby, 185 Mass. 349, 70 N. E. 416; Bourbonnais *v.* West Boylston Mfg. Co., 184 Mass. 250, 68 N. E. 232; D'Arcy *v.* Mooshkin, 183 Mass. 382, 67 N. E. 339; Weston *v.* Barnicoat, 175 Mass. 454, 56 N. E. 619, 49 L. R. A. 612; O'Neil *v.* Hanscom, 175 Mass. 313, 56 N. E. 587; Greaney *v.* Holyoke Water Power Co., 174 Mass. 437, 54 N. E. 880; Murray *v.* Rivers, 174 Mass. 46, 54 N. E. 358; Thompson *v.* Holyoke St. R. Co., 170 Mass. 365, 49 N. E. 748; Burgess *v.* Davis Sulphur Ore Co., 165 Mass. 71, 42 N. E. 501; Twomey *v.* Linnehan, 161 Mass. 91, 36 N. E. 590; Parker *v.* Springfield, 147 Mass. 391, 18 N. E. 70; Com. *v.* Ford, 146 Mass. 131, 15 N. E. 153; Selkirk *v.* Cobb, 13 Gray 313.

Michigan.— Ladd *v.* Germain, 145 Mich. 225, 108 N. W. 679; Smith *v.* Hubbell, 142 Mich. 637, 106 N. W. 547; Sweet *v.* Western Union Tel. Co., 139 Mich. 322, 102 N. W. 850; Knickerbocker *v.* Worthing, 138 Mich. 224, 101 N. W. 540; Snyder *v.* East Bay Lumber Co., 135 Mich. 31, 97 N. W. 49; Lincoln *v.* Felt, 132 Mich. 49, 92 N. W. 780; Hart *v.* New Haven, 130 Mich. 181, 89 N. W. 677; Jarvis *v.* Flint, etc., R. Co., 128 Mich. 61, 87 N. W. 136; Dawson *v.* Falls City Boat Club, 125 Mich. 433, 84 N. W. 618; Bates *v.* Kuney, 124 Mich. 596, 83 N. W. 612; Pittsburgh, etc., Dock Co. *v.* Detroit Transp. Co., 122 Mich. 445, 81 N. W. 269; Gordon *v.* Alexander, 122 Mich. 107, 80 N. W. 978; Reilly *v.* Conway, 121 Mich. 682, 80 N. W. 785; Arndt *v.* Bourke, 120 Mich. 263, 79 N. W. 190; Saunders *v.* Closs, 117 Mich. 130, 75 N. W. 295; Breitenwischer *v.* Clough, 116 Mich. 340, 74 N. W. 507; Canfield *v.* Jackson, 112 Mich. 120, 70 N. W. 444; Ellis *v.* Whitehead, 95 Mich. 105, 54 N. W. 752; Stevens *v.* Pendleton, 94 Mich. 405, 53 N. W. 1108; Kendrick *v.* Towle, 60 Mich. 363, 27 N. W. 567, 1 Am. St. Rep. 526; Van den Brooks *v.* Correon, 48 Mich. 283, 12 N. W. 206; Clark *v.* Rice, 46 Mich. 308, 9 N. W. 427; Kehrig *v.* Peters, 41 Mich. 475, 2 N. W. 801; Lott *v.* Sweet, 33 Mich. 308.

Minnesota.— Price *v.* Denison, 95 Minn. 106, 103 N. W. 728; Hebert *v.* Interstate Iron Co., 94 Minn. 257, 102 N. W. 451; Braucht *v.* Graves-May Co., 92 Minn. 116, 99 N. W. 417; Lobdell *v.* Keene, 85 Minn. 90, 88 N. W. 426; Parsons Band Cutter, etc., Co. *v.* Haub, 83 Minn. 180, 86 N. W. 14; Schultz *v.* Bower, 64 Minn. 123, 66 N. W. 139; Barbo *v.* Bassett, 35 Minn. 485, 29 N. W. 198; Ladd *v.* Newell, 34 Minn. 107, 24 N. W. 366; Davidson *v.* St. Paul, etc., R. Co., 34 Minn. 51, 24 N. W. 324; Kolsti *v.* Minneapolis, etc., R. Co., 32 Minn. 133, 19 N. W. 655; Loucks *v.* Chicago, etc., R. Co., 31 Minn. 526, 18 N. W. 651; Sherman *v.* St. Paul, etc., R. Co., 30 Minn. 227, 15 N. W. 239. *Contra*, Selden *v.* Bank of Commerce, 3 Minn. 166.

Mississippi.— Mississippi Cent. R. Co. *v.* Hardy, 88 Miss. 732, 41 So. 505; Bacon *v.* Bacon, 76 Miss. 458, 24 So. 968; Richards *v.* Vaccaro, 67 Miss. 516, 7 So. 506, 19 Am. St. Rep. 322; Fondren *v.* Durfee, 39 Miss. 324; Mary Washington Female College *v.* McIntosh, 37 Miss. 671; Moye *v.* Herndon, 30 Miss. 110.

Missouri.— Woods *v.* Wabash R. Co., 188 Mo. 229, 86 S. W. 1082; Davis *v.* Braswell, 185 Mo. 576, 84 S. W. 870; Logan *v.* Metropolitan St. R. Co., 183 Mo. 582, 82 S. W. 126; Cole *v.* St. Louis Transit Co., 183 Mo. 81, 81 S. W. 1138; Montgomery *v.* Missouri Pac. R. Co., 181 Mo. 477, 79 S. W. 930; Weller *v.* Wagner, 181 Mo. 151, 79 S. W. 941; Kischman *v.* Scott, 166 Mo. 214, 65 S. W. 1031; General Fire Extinguisher Co. *v.* Schwartz Bros. Commission Co., 165 Mo. 171, 65 S. W. 318; McBain *v.* Johnson, 155 Mo. 191, 55 S. W. 1031; State *v.* Branch, 151 Mo. 622, 52 S. W. 390; Turner *v.* Dixon, 150 Mo. 416, 51 S. W. 725; Nayler *v.* Cox, 114 Mo. 232, 21 S. W. 589; Freymark *v.* St. Louis Transit Co., 111 Mo. App. 208, 85 S. W. 606; Stobie *v.* Earp, 110 Mo. App. 73, 83 S. W. 1097; Beatty *v.* Clarkson, 110 Mo. App. 1, 83 S. W. 1033; Kaiser *v.* St. Louis Transit Co., 108 Mo. App. 708, 84 S. W. 199; McKee *v.* St. Louis Transit Co., 108 Mo. App. 470, 83 S. W. 1013; Parker *v.* St. Louis Transit Co., 108 Mo. App. 465, 83 S. W. 1016; Cameron *v.* B. Roth Tool Co., 108 Mo. App. 265, 83 S. W. 279; Nugent *v.* Armour Packing Co., (App. 1904) 81 S. W. 506; Standard Mfg. Co. *v.* Etter, 106 Mo. App. 532, 80 S. W. 968; York *v.* Farmer's Bank, 105 Mo. App. 127, 79 S. W. 968; Baxter *v.* St. Louis Transit Co., 103 Mo. App. 597, 78 S. W. 70; Turney *v.* Baker, 103 Mo. App. 390, 77 S. W. 479; Holliday-Klotz Land, etc., Co. *v.* Markham, 96 Mo. App. 51, 75 S. W. 1121; Baldwin *v.* Boulware, 79 Mo. App. 5; Blett *v.* Heinrich, 33 Mo. App. 243.

Montana.— Gallick *v.* Bordeaux, 31 Mont. 328, 78 Pac. 583; Paxton *v.* Woodward, 31 Mont. 195, 78 Pac. 215, 107 Am. St. Rep. 416; Largey *v.* Mantle, 26 Mont. 264, 67 Pac. 114.

Nebraska.— Davis *v.* Hall, 70 Nebr. 678, 97 N. W. 1023; O'Brien *v.* State, 69 Nebr. 691, 96 N. W. 649; Crete Mut. F. Ins. Co. *v.* Patz, 64 Nebr. 676, 90 N. W. 546; Farmer's Bank *v.* Garrow, 63 Nebr. 64, 88 N. W. 131; Green *v.* Lancaster County, 61 Nebr. 473, 85 N. W. 439; Missouri Pac. R. Co. *v.* Fox, 60 Nebr. 531, 83 N. W. 744; Cardwell *v.* State, 60 Nebr. 480, 83 N. W. 665; Nebraska Sav., etc., Bank *v.* Brewster, 59 Nebr. 535, 81 N. W. 441; State *v.* Superior School Dist., 55 Nebr. 317, 75 N. W. 855; Bryant *v.* Cunningham,

tions has a tendency to mislead or confuse, rather than to guide, the jury, and thus

52 Nebr. 717, 72 N. W. 1054; Bull *v.* Wagner, 33 Nebr. 246, 49 N. W. 1130; Kerkow *v.* Bauer, 15 Nebr. 150, 18 N. W. 27; Nelson *v.* Brisbin, 5 Nebr. (Unoff.) 496, 98 N. W. 1057; Frieden *v.* Conkling, 4 Nebr. (Unoff.) 814, 96 N. W. 615; Marcus *v.* Leake, 4 Nebr. (Unoff.) 354, 94 N. W. 100; Morgan *v.* Stone, 4 Nebr. (Unoff.) 115, 93 N. W. 743; Kennard *v.* Grossman, 2 Nebr. (Unoff.) 743, 89 N. W. 1025; Rath *v.* Rath, 2 Nebr. (Unoff.) 600, 89 N. W. 612; Carlson *v.* Holm, 2 Nebr. (Unoff.) 38, 95 N. W. 1125; Collier *v.* Gavin, 1 Nebr. (Unoff.) 712, 95 N. W. 842; Parsons Band Cutter, etc., Co. *v.* Gadeke, 1 Nebr. (Unoff.) 695, 95 N. W. 850.

Nevada.— Murphy *v.* Southern Pac. R. Co., 31 Nev. 120, 101 Pac. 322.

New Hampshire.— Elwell *v.* Roper, 72 N. H. 585, 57 Atl. 507; Bond *v.* Bean, 72 N. H. 444, 57 Atl. 340, 101 Am. St. Rep. 686; Smith *v.* New England Bank, 70 N. H. 187, 46 Atl. 230; Rublee *v.* Belmont, 62 N. H. 365; Tucker *v.* Peaslee, 36 N. H. 167.

New Jersey.— Herbich *v.* North Jersey St. R. Co., 67 N. J. L. 574, 52 Atl. 357; Christensen *v.* Lambert, 67 N. J. L. 341, 51 Atl. 702 [*affirming* 66 N. J. L. 531, 49 Atl. 577]; Smith *v.* Irwin, 51 N. J. L. 507, 18 Atl. 852, 14 Am. St. Rep. 699.

New Mexico.— Cunningham *v.* Springer, 13 N. M. 259, 82 Pac. 232; Pearce *v.* Strickler, 9 N. M. 467, 54 Pac. 748.

New York.— Dambmann *v.* Metropolitan St. R. Co., 180 N. Y. 384, 73 N. E. 59, 2 L. R. A. N. S. 309; Rigdon *v.* Allegheny Lumber Co., 131 N. Y. 668, 30 N. E. 867 [*affirming* 13 N. Y. Suppl. 871]; Sullivan *v.* New York, etc., Cement Co., 119 N. Y. 348, 23 N. E. 820 [*affirming* 1 N. Y. Suppl. 403, 14 N. Y. Civ. Proc. 365]; Weber *v.* New York Cent., etc., R. Co., 67 N. Y. 587; Beers *v.* Metropolitan St. R. Co., 104 N. Y. App. Div. 96, 93 N. Y. Suppl. 278; Wright *v.* Roberts, 99 N. Y. App. Div. 38, 90 N. Y. Suppl. 752; Diamond *v.* Planet Mills Mfg. Co., 97 N. Y. App. Div. 42, 89 N. Y. Suppl. 635; Keating *v.* Mott, 92 N. Y. App. Div. 156, 86 N. Y. Suppl. 1041; Wagner *v.* Buffalo, etc., Transit Co., 59 N. Y. App. Div. 419, 69 N. Y. Suppl. 113 [*affirmed* in 172 N. Y. 634, 65 N. E. 1123]; Lawson *v.* Metropolitan St. R. Co., 40 N. Y. App. Div. 307, 57 N. Y. Suppl. 997 [*affirmed* in 166 N. Y. 589, 59 N. E. 1124]; Buckley *v.* Westchester Lighting Co., 93 N. Y. App. Div. 436, 87 N. Y. Suppl. 763; Hayden *v.* Wheeler, etc., Co., 20 N. Y. Suppl. 902.

North Carolina.— Lexington Grocery Co. *v.* Southern R. Co., 136 N. C. 396, 48 S. E. 801; Stewart *v.* North Carolina R. Co., 136 N. C. 385, 48 S. E. 793; National Cash Register Co. *v.* Hill, 136 N. C. 272, 48 S. E. 637, 68 L. R. A. 100; Chaffin *v.* Fries Mfg., etc., Co., 135 N. C. 95, 47 S. E. 226, 136 N. C. 364, 48 S. E. 770; Joines *v.* Johnson, 133 N. C. 487, 45 S. E. 828; Belding *v.* Archer, 131 N. C. 287, 42 S. E. 800; Lovick *v.* Atlantic Coast Line R. Co., 129 N. C. 427, 40 S. E. 191; Wilkie *v.* Raleigh, etc., R. Co., 127 N. C. 203, 37 S. E. 204; Bradley *v.* Ohio River, etc., R. Co., 126 N. C. 735, 36 S. E. 181; Cox *v.* Norfolk, etc., R. Co., 126 N. C. 103, 35 S. E. 237; Mitchell *v.* Corpening, 124 N. C. 472, 32 S. E. 798; Slingluff *v.* Hall, 124 N. C. 397, 32 S. E. 739; Kendrick *v.* Mutual Ben. L. Ins. Co., 124 N. C. 315, 32 S. E. 728, 70 Am. St. Rep. 592; Edwards *v.* Phifer, 121 N. C. 388, 28 S. E. 548; Alexander *v.* Richmond, etc., R. Co., 112 N. C. 720, 16 S. E. 896; Luttrell *v.* Martin, 112 N. C. 593, 17 S. E. 573; Hamilton *v.* Buchanan, 112 N. C. 463, 17 S. E. 159; Michael *v.* Foil, 100 N. C. 178, 6 S. E. 264, 6 Am. St. Rep. 577; Ramsey *v.* Wallace, 100 N. C. 75, 6 S. E. 638.

North Dakota.— Daeley *v.* Minneapolis, etc., El. Co., 4 N. D. 269, 60 N. W. 59; State *v.* McGahey, 3 N. D. 293, 55 N. W. 753.

Ohio.— Cleveland, etc., Traction Co. *v.* Ward, 27 Ohio Cir. Ct. 761; Cincinnati, etc., R. Co. *v.* Taylor, 27 Ohio Cir. Ct. 757; Jackson Knife, etc., Co. *v.* Hathaway, 27 Ohio Cir. Ct. 745; Toledo, etc., R. Co. *v.* Gilbert, 24 Ohio Cir. Ct. 181; American Hosiery Co. *v.* Baker, 18 Ohio Cir. Ct. 604, 10 Ohio Cir. Dec. 219; Berdan *v.* J. M. Bour Co., 10 Ohio Cir. Ct. 127, 6 Ohio Cir. Dec. 154; U. S. Home, etc., Assoc. *v.* Kirk, 8 Ohio Dec. (Reprint) 592, 9 Cinc. L. Bul. 48; Bletsch *v.* Robinson, 4 Ohio Dec. (Reprint) 504, 2 Clev. L. Rep. 282.

Oklahoma.— Sovereign Camp W. W. *v.* Welch, 16 Okla. 188, 83 Pac. 547.

Oregon.— Pacific Export Co. *v.* North Pac. Lumber Co., 46 Oreg. 194, 80 Pac. 105; Barnes *v.* Leidigh, 46 Oreg. 43, 79 Pac. 51; Anderson *v.* Oregon R. Co., 45 Oreg. 211, 77 Pac. 119; Boyd *v.* Portland Electric Co., 40 Oreg. 126, 66 Pac. 576, 57 L. R. A. 619; Stamper *v.* Raymond, 38 Oreg. 16, 62 Pac. 20; Lieuallen *v.* Mosgrove, 37 Oreg. 446, 61 Pac. 1022; La Grande Nat. Bank *v.* Blum, 27 Oreg. 215, 41 Pac. 659.

Pennsylvania.— Creachen *v.* Bromley Bros. Carpet Co., 214 Pa. St. 15, 63 Atl. 195; Fleming *v.* Dixon, 194 Pa. St. 67, 44 Atl. 1064; Kroegher *v.* McConway, etc., Co., 149 Pa. St. 444, 23 Atl. 341; Patterson *v.* Kountz, 63 Pa. St. 246; Lycoming Ins. Co. *v.* Schreffler, 42 Pa. St. 188, 82 Am. Dec. 501; Pierce *v.* Cloud, 42 Pa. St. 102, 82 Am. Dec. 496; Deakers *v.* Temple, 41 Pa. St. 234; Arbuckle *v.* Thompson, 37 Pa. St. 170; Groft *v.* Weakland, 34 Pa. St. 304; Ridgeway *v.* Longaker, 18 Pa. St. 215; Lynch *v.* Welsh, 3 Pa. St. 294.

Rhode Island.— Reynolds *v.* Narragansett Electric Lighting Co., 26 R. I. 457, 59 Atl. 393; Havens *v.* Rhode Island Suburban R. Co., 26 R. I. 48, 58 Atl. 247; McGarrity *v.* New York, etc., R. Co., 25 R. I. 269, 55 Atl. 718; MacDonald *v.* New York, etc., R. Co., 25 R. I. 40, 54 Atl. 795; McGar *v.* National, etc., Worsted Mills, 22 R. I. 347, 47 Atl. 1092; Hampson *v.* Taylor, 15 R. I. 83, 8 Atl. 331, 23 Atl. 732.

to frustrate the very object intended to be accomplished by their being given at

South Carolina.— Lampley *v.* Atlantic Coast Line R. Co., 71 S. C. 156, 50 S. E. 773; Edwards *v.* Wessinger, 65 S. C. 161, 43 S. E. 518, 95 Am. St. Rep. 789; Lowrimore *v.* Palmer Mfg. Co., 60 S. C. 153, 38 S. E. 430; Mason *v.* Southern R. Co., 58 S. C. 70, 36 S. E. 440, 79 Am. St. Rep. 826, 53 L. R. A. 913, 58 S. C. 582, 37 S. E. 226; Mew *v.* Charleston, etc., R. Co., 55 S. C. 90, 32 S. E. 828; Kingman *v.* Lancashire Ins. Co., 54 S. C. 599, 32 S. E. 762; Hull *v.* Young, 30 S. C. 121, 8 S. E. 695, 3 L. R. A. 521; Bennett *v.* Mathews, 5 S. C. 478.

South Dakota.—Waterhouse *v.* Jos. Schlitz Brewing Co., 16 S. D. 592, 94 N. W. 587; Blair *v.* Groton, 13 S. D. 211, 83 N. W. 48; Green *v.* Hughitt School Tp., 5 S. D. 452, 59 N. W. 224; Griswold *v.* Sunback, 4 S. D. 441, 57 N. W. 339.

Tennessee.— Memphis St. R. Co. *v.* Haynes, 112 Tenn. 712, 81 S. W. 374; Record *v.* Chickasaw Cooperage Co., 108 Tenn. 657, 69 S. W. 334; Illinois Cent. R. Co. *v.* Kuhn, 107 Tenn. 106, 64 S. W. 202; Stacker *v.* Louisville, etc., R. Co., 106 Tenn. 450, 61 S. W. 766; Arkansas River Packet Co. *v.* Hobbs, 105 Tenn. 29, 58 S. W. 278; Chicago Guaranty Fund Life Soc. *v.* Ford, 104 Tenn. 533, 58 S. W. 239; Brown *v.* Odill, 104 Tenn. 250, 56 S. W. 840, 78 Am. St. Rep. 914, 52 L. R. A. 660; Felton *v.* Clarkson, 103 Tenn. 457, 53 S. W. 733; Citizens' St. R. Co. *v.* Dan, 102 Tenn. 320, 52 S. W. 177; Endowment Rank K. P. *v.* Rosenfeld, 92 Tenn. 508, 22 S. W. 204.

Texas.— Houston, etc., R. Co. *v.* Cluck, 99 Tex. 130, 87 S. W. 817 [*affirming* (Civ. App. 1904) 84 S. W. 852]; St. Louis Southwestern R. Co. *v.* Rea, 99 Tex. 58, 87 S. W. 324 [*reversing* (Civ. App. 1904) 84 S. W. 428]; North Texas Constr. Co. *v.* Bostick, 98 Tex. 239, 83 S. W. 12 [*reversing* (Civ. App. 1904) 80 S. W. 109]; International, etc., R. Co. *v.* Glover, (Civ. App. 1905) 88 S. W. 515; Western Union Tel. Co. *v.* Adams, 39 Tex. Civ. App. 517, 87 S. W. 1060; International, etc., R. Co. *v.* Tisdale, 39 Tex. Civ. App. 372, 87 S. W. 1063; Missouri, etc., R. Co. *v.* Foster, (Civ. App. 1905) 87 S. W. 879; Missouri, etc., R. Co. *v.* Kellerman, 39 Tex. Civ. App. 274, 87 S. W. 401; American Cotton Co. *v.* Simmons, 39 Tex. Civ. App. 189, 87 S. W. 842; Houston, etc., R. Co. *v.* Gray, 38 Tex. Civ. App. 249, 85 S. W. 838; San Antonio Foundry Co. *v.* Drish, 38 Tex. Civ. App. 214, 85 S. W. 440; Houston, etc., R. Co. *v.* Goodman, 38 Tex. Civ. App. 175, 85 S. W. 492; Young *v.* Meredith, 38 Tex. Civ. App. 59, 85 S. W 32; Ft. Worth, etc., R. Co. *v.* Hagler, 38 Tex. Civ. App. 52, 84 S. W. 692; Texas Cent. R. Co. *v.* O'Loughlin, 37 Tex. Civ. App. 640, 84 S. W. 1104; Texas, etc., R. Co. *v.* Slaughter, 37 Tex. Civ. App. 624, 84 S. W. 1085; Galveston, etc., R. Co. *v.* Roth, 37 Tex. Civ. App. 610, 84 S. W. 1112; Citizens' R. Co. *v.* Gossett, 37 Tex. Civ. App. 603, 85 S. W. 35; Galveston, etc., R. Co. *v.* McAdams, 37 Tex. Civ. App. 575, 84 S. W. 1076; Chicago, etc., R. Co. *v.* Cain, 37 Tex. Civ. App. 531, 84 S. W. 682; International, etc., R. Co. *v.* Davis, (Civ. App. 1905) 84 S. W. 669; Texarkana, etc., R. Co. *v.* Toliver, 37 Tex. Civ. App. 437, 84 S. W. 375; Missouri, etc., R. Co. *v.* Keahy, 37 Tex. Civ. App. 330, 83 S. W. 1102; Dallas Consol. Electric St. R. Co. *v.* Ison, 37 Tex. Civ. App. 219, 83 S. W. 408; Houston, etc., R. Co. *v.* Batchler, 37 Tex. Civ. App. 116, 83 S. W. 902; Taylor *v.* San Antonio, etc., R. Co., 36 Tex. Civ. App. 658, 83 S. W. 738; Gipson *v.* Morris, 36 Tex. Civ. App. 593, 83 S. W. 226; International, etc., R. Co. *v.* Villareal, 36 Tex. Civ. App. 532, 82 S. W. 1063; Missouri, etc., R. Co. *v.* Smith, (Civ. App. 1904) 82 S. W. 787.

Utah.— Wilkinson *v.* Anderson-Taylor Co., 28 Utah 346, 79 Pac. 46; Johnson *v.* Union Pac. Coal Co., 28 Utah 46, 76 Pac. 1089, 67 L. R. A. 506; Holland *v.* Oregon Short Line R. Co., 26 Utah 209, 72 Pac. 940; Fritz *v.* Western Union Tel. Co., 25 Utah 263, 71 Pac. 209; Konold *v.* Rio Grande Western R. Co., 21 Utah 379, 60 Pac. 1021, 81 Am. St. Rep. 693; Scoville *v.* Salt Lake City, 11 Utah 60, 39 Pac. 481; Reddon *v.* Union Pac. R. Co., 5 Utah 344, 15 Pac. 262; Cunningham *v.* Union Pac. R. Co., 4 Utah 206, 7 Pac. 795; Martin *v.* Hill, 3 Utah 157, 2 Pac. 62.

Vermont.— Morrisette *v.* Canadian Pac. R. Co., 76 Vt. 267, 56 Atl. 1102; Kilpatrick *v.* Grand Trunk R. Co., 74 Vt. 288, 52 Atl. 531, 93 Am. St. Rep. 887; La Flam *v.* Missisquoi Pulp Co., 74 Vt. 125, 52 Atl. 526.

Virginia.— Virginia Pass., etc., Co. *v.* Patterson, 104 Va. 189, 51 S. E. 157; Richmond Ice Co. *v.* Crystal Ice Co., 103 Va. 465, 49 S. E. 650; American Bonding, etc., Co. *v.* Milstead, 102 Va. 683, 47 S. E. 853; Portsmouth St. R. Co. *v.* Peed, 102 Va. 662, 47 S. E. 850; Richmond Traction Co. *v.* Williams, 102 Va. 253, 46 S. E. 292; American Hide, etc., Co. *v.* Chalkley, 101 Va. 458, 44 S. E. 705; Richmond Traction Co. *v.* Wilkinson, 101 Va. 394, 43 S. E. 622; Atkinson *v.* Smith, (1896) 24 S. E. 901; Ferguson *v.* Wills, 88 Va. 136, 13 S. E. 392; Simmons *v.* McConnell, 86 Va. 494, 10 S. E. 838; Virginia Midland R. Co. *v.* White, 84 Va. 498, 5 S. E. 573, 10 Am. St. Rep. 874; Richmond, etc., R. Co. *v.* Norment, 84 Va. 167, 4 S. E. 211, 10 Am. St. Rep. 827.

Washington.— Go Fun *v.* Fidalgo Island Canning Co., 37 Wash. 238, 79 Pac. 797; Morrison *v.* Northern Pac. R. Co., 34 Wash. 70, 74 Pac. 1064; Towle *v.* Stimson Mill Co., 33 Wash. 305, 74 Pac. 471; Von Tobel *v.* Stetson, etc., Mill Co., 32 Wash. 683, 73 Pac. 788; Seattle, etc., R. Co. *v.* Roeder, 30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 864; Moran Bros. Co. *v.* Snoqualmie Falls Power Co., 29 Wash. 292, 69 Pac. 759; Wolf *v.* Hemrich Bros. Brewing Co., 28 Wash. 187, 68 Pac. 440; Howay *v.* Going-Northrup Co., 24 Wash. 88, 64 Pac. 135, 85 Am. St. Rep. 942, 6 L. R. A. N. S. 49; Cowie *v.* Seattle, 22 Wash. 659, 62 Pac. 121; Einseidler *v.* Whitman County, 22 Wash. 388, 60 Pac.

all.[19a] Especially does the rule apply where the charge given by the court contains a clearer statement of the law than the requested instruction[20] or concretely applies to the facts a principle of law which is stated abstractly in the requested instruction,[21] or where the requested instruction singles out and tries to give undue prominence to particular portions of the evidence.[22] And the fact that the language of the written request is quoted from opinions in reported decisions does not affect the rule.[23] These doctrines have been announced with such frequency by the courts that citation of authority thereof is almost a waste of space. In the notes hereto are set out some decisions which will illustrate the rule stated.[24]

1122; Fleischner *v.* Beaver, 21 Wash. 6, 56 Pac. 840; Carstens *v.* Stetson, etc., Mill Co., 14 Wash. 643, 45 Pac. 313; Curry *v.* Catlin, 12 Wash. 322, 41 Pac. 55; Brown *v.* Porter, 7 Wash. 327, 34 Pac. 1105; Maling *v.* Crummey, 5 Wash. 222, 31 Pac. 600.

West Virginia.— Arthur *v.* Charleston, 51 W. Va. 132, 41 S. E. 171; Davidson *v.* Pittsburg, etc., R. Co., 41 W. Va. 407, 23 S. E. 593; Kerr *v.* Lunsford, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668.

Wisconsin.— Nagle *v.* Hake, 123 Wis. 256, 101 N. W. 409; Lee *v.* Hammond, 114 Wis. 550, 90 N. W. 1073; Collins *v.* Janesville, 111 Wis. 348, 87 N. W. 241, 1087; Clifford *v.* Minneapolis, etc., R. Co., 105 Wis. 618, 81 N. W. 143; Seefeld *v.* Thacker, 93 Wis. 518, 67 N. W. 1142; Winstanley *v.* Chicago, etc., R. Co., 72 Wis. 375, 39 N. W. 856; Urbanek *v.* Chicago, etc., R. Co., 47 Wis. 59, 1 N. W. 464; Sterling *v.* Ripley, 3 Pinn. 155, 3 Chandl. 166.

United States.— Maryland Fidelity, etc., Co. *v.* Courtney, 186 U. S. 342, 22 S. Ct. 833, 46 L. ed. 1193 [*affirming* 103 Fed. 599, 43 C. C. A. 331]; Northern Pac. R. Co. *v.* Babcock, 154 U. S. 190, 14 S. Ct. 978, 38 L. ed. 958; Brown *v.* U. S., 150 U. S. 93, 14 S. Ct. 37, 37 L. ed. 1010; Ayers *v.* Watson, 137 U. S. 584, 11 S. Ct. 201, 34 L. ed. 803; Illinois Cent. R. Co. *v.* Coughlin, 145 Fed. 37, 75 C. C. A. 262; Coulter *v.* B. F. Thompson Lumber Co., 142 Fed. 706, 74 C. C. A. 38; Lynch *v.* U. S., 138 Fed. 535, 71 C. C. A. 59; Texas, etc., R. Co. *v.* Coutourie, 135 Fed. 465, 68 C. C. A. 177; Liverpool, etc., Ins. Co. *v.* N. & M. Friedman Co., 133 Fed. 713, 66 C. C. A. 543; Southern Electric R. Co. *v.* Hageman, 121 Fed. 262, 57 C. C. A. 348; Lesser Cotton Co. *v.* St. Louis, etc., R. Co., 114 Fed. 133, 52 C. C. A. 95; Corbus *v.* Leonhardt, 114 Fed. 10, 51 C. C. A. 636; Swensen *v.* Bender, 114 Fed. 1, 51 C. C. A. 627; Vanarsdale *v.* Hax, 107 Fed. 878, 47 C. C. A. 31; Tribune Assoc. *v.* Follwell, 107 Fed. 646, 46 C. C. A. 526; Western Union Tel. Co. *v.* Morris, 105 Fed. 49, 44 C. C. A. 350; Trumbull *v.* Erickson, 97 Fed. 891, 38 C. C. A. 536; Illinois Cent. R. Co. *v.* Jones, 95 Fed. 370, 37 C. C. A. 106; Texas, etc., R. Co. *v.* Elliott, 71 Fed. 378, 18 C. C. A. 139; Alabama Great Southern R. Co. *v.* O'Brien, 69 Fed. 223, 16 C. C. A. 216; Union Pac. R. Co. *v.* Jarvi, 53 Fed. 65, 3 C. C. A. 433.

See 46 Cent. Dig. tit. "Trial," § 651 *et seq.*

19a. See *supra*, IX, C, 11.

20. MacFeat *v.* Philadelphia, etc., R. Co., 6 Pennew. (Del.) 513, 69 Atl. 744.

21. Condie *v.* Rio Grande Western R. Co., 34 Utah 237, 97 Pac. 120.

22. St. Louis Southwestern R. Co. *v.* Cleland, 50 Tex. Civ. App. 499, 110 S. W. 122.

23. Crotty *v.* Danbury, 79 Conn. 379, 65 Atl. 147; McGarry *v.* Healey, 78 Conn. 365, 62 Atl. 671.

24. A refused instruction as to the law if plaintiff was not intoxicated, yet if, but for the effect of the beverage he had drunk he would not have been injured, was amply covered by the instruction given as to the law, if he was in a state of intoxication, and such state of intoxication, if any, placed him in such a condition that he was unable and failed to exercise the care and caution that a reasonably prudent person would have exercised to avoid injury to himself under similar circumstances. El Paso Electric R. Co. *v.* Ryan, (Tex. Civ. App. 1908) 114 S. W. 906. A requested charge, in an action for injuries sustained by a fall over an obstruction on a sidewalk, that plaintiff is required to exercise ordinary care for his own safety, was covered by an instruction given that, if plaintiff's injury was wholly or in part caused by his negligence "in failing to watch or observe his footsteps," the verdict must be for defendant. Lattimore *v.* Union Electric Light, etc., Co., 128 Mo. App. 37, 106 S. W. 543. A request to charge that plaintiff, in order to recover damages for non-delivery of a telegram, was bound to show that the error was caused by the misconduct, fraud, or want of due care on the part of the telegraph company, its servants or agents, was covered by an instruction that the burden of proof was on plaintiff to establish its case by a preponderance of the evidence, and, unless it had done so, the verdict should be for defendant. Postal Telegraph-Cable Co. *v.* Sunset Constr. Co., (Tex. Civ. App. 1908) 109 S. W. 265 [*reversed* on other grounds in 102 Tex. 148, 114 S. W. 98] Where, in an action against a carrier for injury to a shipment of horses, the court charged that for plaintiff to recover the jury must find that the carrier was negligent and that the horses were injured as the proximate result thereof, the refusal to charge that, unless the jury believed that rough handling of the horses was due to negligence which was the proximate cause of the injury no damages could be awarded on account of rough handling, was not erroneous. Gulf

(II) *Qualifications and Limitations of Rule.* Nevertheless where instructions are asked by either party to a suit, which correctly state the law on the issues presented and the evidence, it is error to refuse them unless the points are fairly covered by other instructions given.[25] The refusal to give a specific instruction clearly applying the law to the facts of the case is not justified by the fact that the law in a general way is covered by the instructions given and is

etc., R. Co. *v.* Cunningham, 51 Tex. Civ. App. 368, 113 S. W. 767. The jury having been charged that, if plaintiff's injuries were wholly or partially caused by his failure to watch and observe his footsteps, he could not recover, the court did not err in refusing to charge that, in order to watch or observe his footsteps, he was bound to use his "God-given senses." Lattimore *v.* Union Electric Light, etc., Co., 128 Mo. App. 37, 106 S. W. 543. In an action by a trustee in bankruptcy against the bankrupt, where the court charged that, if conveyances from a bankrupt to his wife were given to satisfy his debt to her and the property conveyed was no more than was reasonably sufficient to pay the debt, defendant should recover, it was not error to refuse a charge that a conveyance of property made in good faith to pay an honest debt is not fraudulent, although the debtor may be insolvent, and the creditor is aware at the time of sale that it will have the effect of defeating other creditors in the collection of their debts. Maffi *v.* Stephens, 49 Tex. Civ. App. 354, 108 S. W. 1008. Where, in an action for seduction, there was no evidence of loss of wages, an instruction that the jury could not find anything on that score, because there was nothing on which they could compute damages, sufficiently covered a request to charge that plaintiff could not recover for any loss of his daughter's services or earnings after the date of the writ. Thiebault *v.* Prendergast, (R. I. 1908) 69 Atl. 922. A request to charge that if when plaintiff alighted, or attempted to alight, the train was in motion, and that such attempt was negligence which contributed to his injury, the jury should find for defendant, regardless of whether those in charge of the train were negligent, was sufficiently covered by an instruction that if plaintiff attempted to alight while the train was in motion, and in so doing was negligent, the jury should find for defendant, regardless of whether the train was stopped a reasonably sufficient time for plaintiff to alight in safety. Galveston, etc., R. Co. *v.* Berry, 49 Tex. Civ. App. 521, 109 S. W. 393. In an injury action by a passenger, instructions that railroads are not insurers of passengers, and are not liable for accidental injuries, and, if plaintiff was injured by the sudden jerking of the train, but such jerking was the usual movement incident to the running of such trains, he could not recover, were properly refused, as being fully covered by instructions to find for defendant if the injury was accidental, and that passengers assume the ordinary risks incident to the running of trains, including the ordinary swinging and jerking of the train. St. Louis, etc., R. Co. *v.* Richardson, 87 Ark. 602, 113 S. W. 794. Where, in an action for the penalty imposed by Comp. Laws (1897), § 4157, for obstructing a highway, the court charged that, if the jury should find that defendant erected a gate across the highway, as complained of, under the advice and consent of the highway commissioner, defendant was not liable, the refusal to charge that, if defendant was informed by the commissioner that he might erect a gate, and he did so under the advice of the commissioner, there was no obstruction under the statute was not erroneous. La Barre *v.* Bent, 154 Mich. 520, 118 N. W. 6. In an action for rent, etc., aided by an attachment, under which a quantity of corn was taken, in which defendant pleaded a counter-claim for the value of the corn taken under the writ, the court having expressly called attention to the fact that the corn, for the value of which defendant sought to recover, was that seized under the attachment, and in another instruction reminded the jury of that fact, an instruction that the jury's attention be confined to the corn taken under the attachment was properly refused. Beck *v.* Umshler, 139 Iowa 378, 116 N. W. 138. Where, in an action by a broker for commissions for procuring a purchaser, the court charged that the broker could not recover without showing an agreement between the owner and the purchaser for the sale and purchase of the real estate, and that, unless the minds of the owner and the purchaser met on all the terms of the contract, the broker could not recover, a further instruction that it was the duty of the broker to bring a purchaser whose mind and that of the owner would meet on the terms of the contract was properly refused, as covered by the instruction given. Meltzer *v.* Straus, 61 Misc. (N. Y.) 250, 113 N. Y. Suppl. 583.

25. Boswell *v.* Thompson, 160 Ala. 306, 49 So. 73; Strubble *v.* De Witt, 81 Nebr. 504, 116 N. W. 154; Chenoweth *v.* Southern Pac. Co., 53 Oreg. 111, 99 Pac. 86; Booth *v.* Bursey, (Tex. Civ. App. 1909) 117 S. W. 198.

Applications of rule.— Where, in an action for injuries to a passenger due to the failure of the carrier to heat its coach, to furnish reasonably safe means of transfer from one train to another, and to furnish a reasonable opportunity to procure food during the journey, the court in its main charge submitted the combined causes as a ground for recovery, a requested charge, submitting the various causes as distinct grounds of recovery, was not objectionable as being a repetition of the instruction given. Texas, etc., R. Co. *v.* Harrington, 44 Tex. Civ. App. 386, 98 S. W. 653. In an action for the wrongful discharge of an employee under contract to act as gen-

ground for reversal unless the court can see that no prejudice resulted therefrom.[26] Instructions given from which the jury might have inferred the rule to be as laid down in the instructions asked and refused are not the equivalent of nor a sufficient answer to requests in which the propositions of law are specifically applied to the facts;[27] and it has been held that even though the instruction requested is not technically correct, it is the duty of the court to which the instruction is offered to prepare and give a correct instruction on the point.[28] Each party has the right to have the jury instructed so clearly and pointedly as to leave no ground for misapprehension or mistake.[29]

f. Time of Giving Instructions Asked. The court may pass upon requested instructions and give them to the jury before delivering the general charge.[30] Where a statute so provides, requested instructions should be given to the jury before argument.[31]

eral manager of defendant's stores, an instruction that, if the jury found and believed from the evidence that, because of the employee's refusal to change his employment to one materially different from and inferior to that which he had contracted for, the keys of the store in which his headquarters as general manager were located were demanded from and surrendered by him, plaintiff was wrongfully discharged, was not objectionable as being covered by the main charge, where no reference to the surrender of the keys was made in the main charge. Wolf Cigar Stores Co. *v.* Kramer, 50 Tex. Civ. App. 411, 109 S. W. 990. The giving of an instruction which covers only a part of one asked is not sufficient ground for refusing to give the latter. Demens *v.* Le Moyne, 26 Fla. 323, 8 So. 442.

26. *Arkansas.*— Western Coal, etc., Co. *v.* Buchanan, 82 Ark. 499, 102 S. W. 694; Hamilton-Brown Shoe Co. *v.* Choctaw Mercantile Co., 80 Ark. 438, 97 S. W. 284; St. Louis, etc., R. Co. *v.* Hitt, 76 Ark. 227, 88 S. W. 908, 990; St. Louis, etc., R. Co. *v.* Crabtree, 69 Ark. 134, 62 S. W. 64.

Georgia.— Metropolitan St. R. Co. *v.* Johnson, 90 Ga. 500, 16 S. E. 49; Thompson *v.* Thompson, 77 Ga. 692, 3 S. E. 261.

Iowa.— Parkhill *v.* Brighton, 61 Iowa 103, 15 N. W. 853; Manuel *v.* Chicago, etc., R. Co., 56 Iowa 655, 10 N. W. 237; Haines *v.* Illinois Cent. R. Co., 41 Iowa 227; Muldowney *v.* Illinois Cent. R. Co., 32 Iowa 176.

Mississippi.— Gerdine *v.* State, 64 Miss. 798, 2 So. 313, in which it was said that instructions pertinent to the facts should be given in preference to stereotyped and vague generalities. Payne *v.* Green, 10 Sm. & M. 507.

Nebraska.— Crosby *v.* Ritchey, 56 Nebr. 336, 76 N. W. 895.

Texas.— El Paso, etc., R. Co. *v.* Foth, 101 Tex. 133, 100 S. W. 171, 105 S. W. 322; Yellow Pine Oil Co. *v.* Noble, 101 Tex. 125, 105 S. W. 318 [*reversing* (Civ. App. 1907) 101 S. W. 276]; Missouri, etc., R. Co. *v.* Carter, 95 Tex. 461, 68 S. W. 159; St. Louis Southwestern R. Co. *v.* Casseday, 92 Tex. 525, 50 S. W. 125; Missouri, etc., R. Co. *v.* McGlamory, 89 Tex. 635, 35 S. W. 1058; El Paso Electric R. Co. *v.* Bolgiano, (Civ. App. 1908) 109 S. W. 388; Gulf, etc., R. Co. *v.* Walters, 49 Tex. Civ. App. 71, 107 S. W. 369; Southern Constr. Co. *v.* Hinkle, (Civ. App. 1905) 89 S. W. 309.

United States.— Western Union Tel. Co. *v.* Morris, 105 Fed. 49, 44 C. C. A. 350, in which it was said that where a general charge correctly states the law of a case, but does not eliminate and set forth the crucial issues which the jury is to determine, or specifically apply the law to those issues, either party is entitled, upon request, to additional instructions from the court which clearly and tersely state to the jury the very issues which they must determine from the evidence, and the law specifically applicable to those issues.

Application of rule.— Refusal to instruct "that while the law permits the plaintiff in the case to testify in his own behalf, nevertheless the jury have the right, in weighing the evidence, to determine how much credence is to be given to it, and to take into consideration that he is the plaintiff and interested in the result of the suit," is not rendered harmless error by giving its substance in a long, general instruction as to weight of evidence, and credibility of witnesses. Maxwell *v.* Chicago, etc., R. Co., 140 Ill. App. 156.

27. Mallen *v.* Waldowski, 203 Ill. 87, 67 N. E. 409 [*reversing* 101 Ill. App. 367]; Louisville, etc., R. Co. *v.* King, 131 Ky. 347, 115 S. W. 196; Devitt *v.* Pacific R. Co., 50 Mo. 302; Isley *v.* Virginia Bridge, etc., Co., 143 N. C. 51, 55 S. E. 416.

28. Louisville, etc., R. Co. *v.* King, 31 Ky. 347, 115 S. W. 196.

29. Muldowney *v.* Illinois Cent. R. Co., 32 Iowa 176. And see West Chicago, etc. R. Co. *v.* Groshon, 51 Ill. App. 463, in which it was said that the right of a party to a plain and simple instruction upon a materia point does not depend upon the action of the court at the instance of his adversary and that right is not lost by having asked and obtained other instructions which only by a not very obvious train of reasoning refers to the same material point.

30. Walton *v.* Hinnau, 146 Pa. St. 396, 23 Atl. 342.

31. Monroeville *v.* Root, 54 Ohio St. 523, 44 N. E. 237; Lutterbeck *v.* Toledo Consol St. R. Co., 5 Ohio Cir. Dec. 141. *Contra* Duval *v.* Fuhrman, 3 Ohio Cir. Ct. 305, 2 Ohio Cir. Dec. 174.

g. Assigning Reasons For Refusal.[32] If the jury know the contents of the instruction refused, the court should state that it is refused for the reason that it is covered by other instructions given,[33] otherwise the jury may infer that the instruction was refused on its merits, and misunderstanding and prejudice result.[34] If, however, the instruction has not been read in the presence of the jury, and it does not know that the instruction has been refused, it needs no explanation of the reason for the refusal.[35]

7. Modification of Requested Instructions[36] **— a. Power of Court to Modify.** As previously shown, it is the rule in most jurisdictions that no obligation rests on the trial court to modify erroneous requested instructions, and as modified give them in charge to the jury.[37] Nevertheless, unless there is a statute or rule of court prohibiting it,[38] it is proper for the court, if it sees fit, to modify a defective or erroneous instruction requested, and give it in charge to the jury in its modified form.[39] And even though an instruction requested is correct and might well have

32. **In criminal prosecutions** see Criminal Law, 12 Cyc. 666.

33. People *v.* Hurley, 8 Cal. 390; Davis *v.* Richmond, etc., R. Co., 30 S. C. 613, 9 S. E. 105; Gleason *v.* Day, 9 Wis. 498.

34. People *v.* Williams, 17 Cal. 142.

35. State *v.* O'Connor, 11 Nev. 416.

36. **In criminal prosecutions** see Criminal Law, 12 Cyc. 664.

37. See *supra*, IX, D, 6, c.

38. Pensacola, etc., R. Co. *v.* Atkinson, 20 Fla. 450; Galloway *v.* McLean, 2 Dak. 372, 9 N. W. 98. But see Western Union Tel. Co. *v.* Merritt, 55 Fla. 462, 46 So. 1024, 127 Am. St. Rep. 169, which, without referring to the previous decision of this court, holds that a requested instruction leaving out of consideration part of the evidence pertinent thereto is properly refused, and it is not error for the court to correct the defect by an addition thereto.

39. *Arkansas.*— St. Louis, etc., R. Co. *v.* Day, 86 Ark. 104, 110 S. W. 220.

California.— Harrington *v.* Los Angeles R. Co., 140 Cal. 514, 74 Pac. 15, 98 Am. St. Rep. 85, 63 L. R. A. 238; Cook *v.* Los Angeles, etc., Electric R. Co., 134 Cal. 279, 66 Pac. 306; King *v.* Davis, 34 Cal. 100; Boyce *v.* California Stage Co., 25 Cal. 460.

Georgia.— Campbell *v.* Miller, 38 Ga. 304, 95 Am. Dec. 389; Doe *v.* Mattox, 37 Ga. 289.

Illinois.— Pauckner *v.* Wakem, 231 Ill. 276, 83 N. E. 202, 14 L. R. A. N. S. 1118; Koshinski *v.* Illinois Steel Co., 231 Ill. 198, 83 N. E. 149; Chicago, etc., R. Co. *v.* Pollock, 195 Ill. 156, 62 N. E. 831 [*affirming* 93 Ill. App. 483]; Chicago, etc., R. Co. *v.* Yorty, 158 Ill. 321, 42 N. E. 64; Mertins *v.* Southern Coal, etc., Co., 140 Ill. App. 190 [*affirmed* in 235 Ill. 540, 85 N. E. 743]; Illinois Collieries Co. *v.* Haveron, 137 Ill. App. 22; Illinois Collieries Co. *v.* Davis, 137 Ill. App. 15 [*affirmed* in 232 Ill. 284, 83 N. E. 836]; Citizens' Sav., etc., Assoc. *v.* Weaver, 127 Ill. App. 252; Cary *v.* Norton, 35 Ill. App. 365; Terre Haute, etc., R. Co. *v.* Voelker, 31 Ill. App. 314 [*affirmed* in 129 Ill. 540, 22 N. E. 20].

Indiana.— Sherfey *v.* Evansville, etc., R. Co., 121 Ind. 427, 23 N. E. 273; Citizens' St. R. Co. *v.* Hoffbauer, 23 Ind. App. 614, 56 N. E. 54.

Iowa.— Large *v.* Moore, 17 Iowa 258; Hall *v.* Hunter, 4 Greene 539.

Kansas.— St. Joseph, etc., R. Co. *v.* Chase, 11 Kan. 47.

Kentucky.— Theobald *v.* Hare, 8 B. Mon. 39; Pleak *v.* Chambers, 7 B. Mon. 565.

Maryland.— Blackburn *v.* Beall, 21 Md. 208; Snively *v.* Fahnestock, 18 Md. 391.

Massachusetts.— Townsend *v.* Pepperell, 99 Mass. 40.

Michigan.— Sword *v.* Keith, 31 Mich. 247.

Minnesota.— Blackman *v.* Wheaton, 13 Minn. 326; Dodge *v.* Rogers, 9 Minn. 223.

Mississippi.— Louisville, etc., R. Co. *v.* Suddoth, 70 Miss. 265, 12 So. 205; Archer *v.* Sinclair, 49 Miss. 343; Wilson *v.* Kohlheim, 46 Miss. 346.

Missouri.— Fisher *v.* St. Louis Transit Co., 198 Mo. 562, 95 S. W. 917; Dahlstrom *v.* St. Louis, etc., R. Co., 108 Mo. 525, 18 S. W. 919; O'Neil *v.* Capelle, 56 Mo. 296; Stocke *v.* Mueller, 1 Mo. App. 163.

North Carolina.— Overcash *v.* Kitchie, 89 N. C. 384.

Pennsylvania.— Hays *v.* Paul, 51 Pa. St. 134, 88 Am. Dec. 569; Cullum *v.* Wagstaff, 48 Pa. St. 300; Amer *v.* Longstreth, 10 Pa. St. 145; Burgan *v.* Cahoon, 1 Pennyp. 320; Zeok *v.* Hertz, 11 Pa. Super. Ct. 512; Snyder *v.* Loy, 4 Pa. Super. Ct. 201, 40 Wkly. Notes Cas. 333; Huel *v.* Pennsylvania R. Co., 1 Pa. Super. Ct. 651; Columbia Bridge Co. *v.* Kline, Brightly 320.

Texas.— Missouri Pac. R. Co. *v.* Mitchell, 75 Tex. 77, 12 S. W. 810; Willis *v.* Hudson, 72 Tex. 598, 10 N. W. 713; Wells *v.* Barnett, 7 Tex. 584; Industrial Lumber Co. *v.* Bivens, 47 Tex. Civ. App. 396, 105 S. W. 831; St. Louis, etc., R. Co. *v.* Berry, 42 Tex. Civ. App. 470, 93 S. W. 1107.

Utah.— See Clampitt *v.* Kerr, 1 Utah 246 [*affirmed* in 95 U. S. 188, 24 L. ed. 493].

Wisconsin.— Dodge *v.* O'Dell, 106 Wis. 296, 82 N. W. 135; Sterling *v.* Ripley, 3 Pinn. 155, 3 Chandl. 166.

United States.— Illinois Cent. R. Co. *v.* Coughlin, 145 Fed. 37, 75 C. C. A. 262; Fitzpatrick *v.* Graham, 122 Fed. 401, 58 C. C. A. 619; Kansas City, etc., R. Co. *v.* Stoner, 49 Fed. 209, 1 C. C. A. 231.

See 46 Cent. Dig. tit. "Trial," § 668 *et seq.*

been given in the language of such instruction, the party requesting it cannot complain of a modification which merely changes the language and not the meaning thereof.[40] This is scarcely more than a repetition of the well-settled principle elsewhere considered, that the court is not bound to charge in the exact language of the request, although correct, but may use its own forms of expression in charging the jury, provided the subject-matter of the request is thoroughly covered.[41]

b. What Modifications Permissible. This power to modify includes any error or defect of which a requested instruction may be susceptible. Thus the court may modify an instruction which is susceptible of a wrong construction,[42] is obscure and indefinite,[43] or unintelligible;[44] which singles out a particular witness instead of being made applicable to all witnesses;[45] or which withdraws a material issue from the jury.[46] So the court may modify an instruction abstractly correct so as to present the law applicable to the facts more appropriately and intelligibly;[47] or in order to make the requested instruction conform to other instructions asked by the party;[48] or it may strike out matter which contains an independent proposition which should have been prepared as a separate request,[49] or omit words from an instruction that is complete without them.[50] Where, by request of defendant, the court charges that the existence of recited facts would free defendant from liability, the court may, on its own motion, state the converse of the proposition.[51] And a party cannot complain because an instruction submitting this theory of the case was modified so as to present the theory of the other side at the same time.[52] So, where an instruction is asked, and the court gives the instruction, but adds to it some other matter which in no degree modifies the import of that given, and is a matter proper to be called to the attention of the jury, the party asking the instruction has no ground for complaint.[53] Nor

40. *Arkansas.*— St. Louis, etc., R. Co. *v.* Waren, 65 Ark. 619, 48 S. W. 222.

Connecticut.— St. Paul's Episcopal Church *v.* Fields, 81 Conn. 670, 72 Atl. 145.

Illinois.— Iroquois Furnace Co. *v.* McCrea, 191 Ill. 340, 61 N. E. 79; La Salle *v.* Kostka, 190 Ill. 130, 60 N. E. 72; Chicago, etc., R. Co. *v.* Kinnare, 190 Ill. 9, 60 N. E. 57; Chicago, etc., R. Co. *v.* Murowski, 179 Ill. 77, 53 N. E. 572.

Iowa.— Campbell *v.* Ormsby, 65 Iowa 518, 22 N. W. 656; Moore *v.* Chicago, etc., R. Co., 65 Iowa 505, 22 N. W. 650, 54 Am. Rep. 26.

Missouri.— John Deere Plow Co. *v.* Sullivan, 158 Mo. 440, 59 S. W. 1005; Miller *v.* Barnett, 124 Mo. App. 53, 101 S. W. 155.

Washington.— Gottstein *v.* Seattle Lumber, etc., Co., 7 Wash. 424, 35 Pac. 133.

41. See *supra*, IX, D, 6, b, (II), (A).

42. Cohen *v.* Schick, 6 Ill. App. 280; Blackburn *v.* Beall, 21 Md. 208; Harman *v.* Shotwell, 49 Mo. 423. And see Sword *v.* Keith, 31 Mich. 247; Archer *v.* Sinclair, 49 Miss. 343.

43. Cochran *v.* Sess, 49 N. Y. App. Div. 223, 62 N. Y. Suppl. 1088 [*reversed* on other grounds in 168 N. Y. 372, 61 N. E. 639].

44. Dodge *v.* O'Dell, 106 Wis. 296, 82 N. W. 135.

45. Dahlstrom *v.* St. Louis, etc., R. Co., 108 Mo. 525, 18 S. W. 919.

46. Harrington *v.* Los Angeles R. Co., 140 Cal. 514, 74 Pac. 15, 98 Am. St. Rep. 85, 63 L. R. A. 238.

47. *Arkansas.*— Little Rock R., etc., Co. *v.* Dobbins, 78 Ark. 553, 95 S. W. 788.

Illinois.— Crown Coal, etc., Co. *v.* Taylor, 184 Ill. 250, 56 N. E. 328 [*affirming* 81 Ill. App. 66]; Richelieu Hotel Co. *v.* International Military Encampment Co., 140 Ill. 248, 29 N. E. 1044, 33 Am. St. Rep. 234.

Indiana.— Citizens' St. R. Co. *v.* Hoffbauer, 23 Ind. App. 614, 56 N. E. 54.

Iowa.— Hall *v.* Hunter, 4 Greene 539.

Minnesota.— Blackman *v.* Wheaton, 13 Minn. 326.

Missouri.— Fisher *v.* St. Louis Transit Co., 198 Mo. 562, 95 S. W. 917.

Pennsylvania.— Hays *v.* Paul, 51 Pa. St. 134, 88 Am. Dec. 569; Lloyd *v.* Carter, 17 Pa. St. 216.

United States.— Illinois Cent. R. Co. *v.* Coughlin, 145 Fed. 37, 75 C. C. A. 262.

See 46 Cent. Dig. tit. "Trial," § 669.

48. Judy *v.* Sterrett, 153 Ill. 94, 38 N. E. 633; Feary *v.* Metropolitan St. R. Co., 162 Mo. 75, 62 S. W. 452; Connelly *v.* Manhattan R. Co., 142 N. Y. 377, 37 N. E. 462 [*reversing* 68 Hun 456, 23 N. Y. Suppl. 38].

49. Kansas City, etc., R. Co. *v.* Stoner, 49 Fed. 209, 1 C. C. A. 231.

50. Sherfey *v.* Evansville, etc., R. Co., 121 Ind. 427, 23 N. E. 273.

51. Missouri, etc., R. Co. *v.* Evans, 16 Tex. Civ. App. 68, 41 S. W. 80. And see Bennett *v.* Runyon, 4 Dana (Ky.) 422, holding that a modification of an instruction that only amounted to a negation of the principle of law propounded by the court to the jury, at the instance of defendant, provided they came to a conclusion upon the facts different from that supposed in the instructions is not erroneous.

52. Bingham *v.* Lipman, 40 Oreg. 363, 67 Pac. 98.

53. Reed *v.* Golden, 28 Kan. 632, 42 Am.

can error be assigned where the effect of the words added to a request for an instruction is simply to express that which would be implied without them.[54]

c. Method of Making Modification. In modifying instructions, the modification should be so made that the instruction originally asked and the modification thereof can be readily identified so that exceptions may be saved for purposes of review.[55] Otherwise a charge not requested might appear in the record as being given at the request of a party who was prejudiced thereby.[56] If the court modifies an instruction it is error to give it as the charge of the party unless he has consented to the modification.[57] The modification should also be made in such manner that the jury cannot see what the court holds not to be the law.[58] The better way to modify a requested instruction is for the judge to write a new instruction embodying the modification.[59] But when a modification is appended to a requested charge in such a manner as to show the precise charge asked and the precise modification, and the whole is intelligible to the jury, there is no available error.[60] Modification by erasures and interlineations is ordinarily disapproved of and is forbidden by statute in some states; [61] but a modification so made if not prejudicial to the party objecting thereto,[62] or to which the party makes no objection,[63] will not be ground for reversal. And so it has been held that a judgment will not be reversed because of an erasure in an instruction which left the words erased legible, where the matter intended to be stricken out was of no importance whatever.[64] The objectionable portion of a requested instruction may be eliminated by a separation of the paper on which it is written.[65] And the modification of a numbered instruction is properly given in an instruction of a separate number.[66] The instruction as modified should be given in such manner that the jury understand that the request was not refused in its entirety.[67]

d. What Erroneous Modifications Harmless or Prejudicial. Although a modification made is erroneous, the judgment will not be reversed where no prejudice could have resulted.[68] And where a requested instruction is erroneous and should

Rep. 180. And see Morris *v.* Guffey, 188 Pa. St. 534, 41 Atl. 731. In this case plaintiff was entitled to the instructions he asked in these points, and the court concurred. They were all in the alternative, and the court followed the affirmation with the instruction that, if the jury did not find the facts as claimed by plaintiff, the law as stated in them would have no application. The court held that there was no error in this. It was possibly over-caution, but could not prejudice plaintiff.

54. Chicago, etc., R. Co. *v.* Goebel, 119 Ill. 515, 10 N. E. 369.

55. *Indiana.*— Bishop *v.* Welch, 54 Ind. 527.

Iowa.— Ham *v.* Wisconsin, etc., R. Co., 61 Iowa 716, 17 N. W. 157.

Kansas.— Campbell *v.* Fuller, 25 Kan. 723.

Missouri.— State *v.* Estel, 6 Mo. App. 6.

Texas.— Missouri Pac. R. Co. *v.* Williams, 75 Tex. 4, 12 S. W. 835, 16 Am. St. Rep. 867.

56. Missouri Pac. R. Co. *v.* Williams, 75 Tex. 4, 12 S. W. 835, 16 Am. St. Rep. 867.

57. St. Louis, etc., R. Co. *v.* Ball, 28 Tex. Civ. App. 287, 66 S. W. 879. And see Peart *v.* Chicago, etc., R. Co., 8 S. D. 431, 66 N. W. 814.

58. W. B. Conkey Co. *v.* Bueherer, 84 Ill. App. 633.

59. Missouri Pac. R. Co. *v.* Williams, 75 Tex. 4, 12 S. W. 835, 16 Am. St. Rep. 867; Southern Cotton Press, etc., Co. *v.* Bradley, 52 Tex. 587.

60. Missouri Pac. R. Co. *v.* Williams, 75 Tex. 4, 12 S. W. 835, 16 Am. St. Rep. 867.

61. Ham *v.* Wisconsin, etc., R. Co., 61 Iowa 716, 17 N. W. 157; Campbell *v.* Fuller, 25 Kan. 723; Denver, etc., R. Co. *v.* Harris, 3 N. M. 109, 2 Pac. 369.

62. Daly *v.* Bernstein, 6 N. M. 380, 28 Pac. 764; Denver, etc., R. Co. *v.* Harris, 3 N. M. 109, 2 Pac. 369.

63. Campbell *v.* Fuller, 25 Kan. 723; Allison *v.* Hagan, 12 Nev. 38.

64. Union R., etc., Co. *v.* Kallaher, 114 Ill. 325, 2 N. E. 77.

65. Ham *v.* Wisconsin, etc., R. Co., 61 Iowa 716, 17 N. W. 157.

66. Columbia, etc., R. Co. *v.* Hawthorne, 3 Wash. Terr. 353, 19 Pac. 25.

67. Selden *v.* Bank of Commerce, 3 Minn. 166.

68. *California.*— Doolin *v.* Omnibus Cable Co., 140 Cal. 369, 73 Pac. 1060.

Illinois.— Illinois Cent. R. Co. *v.* Prickett, 210 Ill. 140, 71 N. E. 435; Crown Coal, etc., Co. *v.* Taylor, 184 Ill. 250, 56 N. E. 328; Decatur Cereal Mill Co. *v.* Gogerty, 180 Ill. 197, 54 N. E. 231; Jansen *v.* Grimshaw, 125 Ill. 468, 17 N. E. 850; Lake Shore, etc., R. Co. *v.* Brown, 123 Ill. 162, 14 N. E. 197, 5 Am. St. Rep. 510.

Indiana.— Parke County *v.* Sappenfield, 10 Ind. App. 609, 38 N. E. 358.

Kansas.— Luke *v.* Johnnycake, 9 Kan. 511.

Michigan.— Worth *v.* McConnell, 42 Mich. 473, 4 N. W. 198.

have been refused, a modification thereof, although itself wrong, is not a ground for reversal.[69] On the other hand it is prejudicial error to modify a correct instruction on a material point,[70] as for instance, by assuming as in dispute, material facts as to which there is no controversy.[71] So prejudicial error is committed by adding to an instruction upon one point of the case, words directing the jury as to other branches of the case,[72] by practically eliminating the main defense presented thereby; [73] or by submitting other matters of inducement merely, and not of the substance of the charge, and which, if true, would make a different cause of action, especially where there was no proof of such other matter.[74]

8. Withdrawal of Requests. Requests for instructions may be withdrawn before the court has found on them,[75] either at the instance of the party presenting the request,[76] or on his consent at the court's suggestion.[77] But after requests for instructions have been examined by the court, refused, and ordered filed, they are then subject to the control of the court and cannot be withdrawn without the consent of the parties and consent of the court, and are subject to the inspection of the opposite party.[78]

9. Waiver and Correction of Error in Refusing Requests. Error in refusing to give requested instructions is cured where the court subsequently gives them of its own motion,[79] or recalls the jury shortly after they have retired for consultation, and submits such instructions to them.[80] So, where counsel has an

Minnesota.— Smith *v.* St. Paul, etc., R. Co., 51 Minn. 86, 52 N. W. 1068; Bartlett *v.* Hawley, 38 Minn. 308, 37 N. W. 580.

Missouri.— Taylor *v.* Missouri Pac. R. Co., (1891) 16 S. W. 206.

South Carolina.—Bowen *v.* Southern R. Co., 58 S. C. 222, 36 S. E. 590.

Texas.— Dillingham *v.* Fields, (Civ. App. 1894) 29 S. W. 214.

Virginia.— Norfolk, etc., R. Co. *v.* Harman, 104 Va. 501, 52 S. E. 368.

Applications of rule.—A defendant cannot complain of an instruction requested by plaintiffs, and modified by the court so as to be more favorable for defendant than is warranted. King *v.* Rea, 13 Colo. 69, 21 Pac. 1084; Chicago, etc., R. Co. *v.* Goebel, 119 Ill. 515, 10 N. E. 369. Where there was no evidence on which to base an instruction stating a rule of law, its improper modification was without prejudice. Shaw *v.* Camp, 160 Ill. 425, 43 N. E. 608. A modification which does not alter the meaning of the instruction is not assignable as error. Spencer *v.* St. Louis Transit Co., 111 Mo. App. 653, 86 S. W. 593. A requested charge that a railroad company is not bound to anticipate or provide against storms such as have not within practical experience been known in the locality was given with the modification that the company and its servants must exercise the care necessary under those circumstances to prevent accidents from occurring. It was held that substantially the same proposition requested having been contained in prior and subsequent requests which were charged, and the law having been correctly given in the original charge, the error contained in the modification was not ground for reversal. Connelly *v.* Manhattan R. Co., 68 Hun (N. Y.) 456, 23 N. Y. Suppl. 88 [*reversed* on other grounds in 142 N. Y. 327, 37 N. E. 462].

69. Decatur Cereal Mill Co. *v.* Gogerty, 180 Ill. 197, 54 N. E. 231; Simmons *v.* St. Paul, etc., R. Co., 18 Minn. 184; Louisville, etc., R. Co. *v.* Suddoth, 70 Miss. 265, 12 So. 205. But see Morgan *v.* Peet, 32 Ill. 281, in which it was said that a party who asks an erroneous instruction may well complain if it is given with such modification by the court as to prejudice his cause; such modification itself being an incorrect statement of the law.

70. Coleman *v.* Yazoo, etc., R. Co., 90 Miss. 629, 43 So. 473; March *v.* Metropolitan L. Ins. Co., 186 Pa. St. 629, 40 Atl. 1100, 65 Am. St. Rep. 887.

71. March *v.* Metropolitan L. Ins. Co., 186 Pa. St. 629, 40 Atl. 1100, 65 Am. St. Rep. 887.

72. Cohen *v.* Schick, 6 Ill. App. 280.

73. Chicago *v.* Cram, 80 Ill. App. 350.

74. Chicago West Div. R. Co. *v.* Hughes, 69 Ill. 170. And see Little Rock Traction, etc., Co. *v.* Trainer, 68 Ark. 106, 56 S. W. 789.

75. See Smith *v.* Mayfield, 163 Ill. 447, 45 N. E. 157 [*affirming* 60 Ill. App. 266]; Keas *v.* Gordy, 34 Tex. Civ. App. 310, 78 S. W. 385.

What amounts to withdrawal of request.— Where defendant excepts to an instruction that a certain fact has not been established and asks an instruction leaving that question to the jury, and plaintiff consents that the original instruction might be so modified, defendant by withdrawing his request waives the exception, as it will be assumed that the court on plaintiff's consent would have charged as defendant requested. Aker *v.* Brooklyn Daily Eagle, 130 N. Y. App. Div. 412, 114 N. Y. Suppl. 968.

76. Smith *v.* Mayfield, 163 Ill. 447, 45 N. E. 157 [*affirming* 60 Ill. App. 266].

77. Keas *v.* Gordy, 34 Tex. Civ. App. 310, 78 S. W. 385.

78. Houston, etc., R. Co. *v.* Turner, 34 Tex. Civ. App. 397, 78 S. W. 712.

79. Barkman *v.* State, 13 Ark. 705.

80. Phillips *v.* New York Cent., etc., R. Co., 127 N. Y. 657, 27 N. E. 978.

opportunity to have the jury recalled, and his requests charged, but does not avail himself of such offer, he must be deemed to waive whatever right he has with respect thereto.[81] And where a requested instruction is properly refused, but afterward given with the consent of the opposite party, the party making the request cannot complain.[82] An exception to the refusal to give an instruction is not waived by proceeding with the trial after such refusal.[83]

10. Appellate Review of Disposition of Requests. A party is entitled to have the charge set out in the record in full which is given in lieu of instructions requested in order that the reviewing court may see whether it covered the instruction asked;[84] but if he fails to have this done and the record does not contain the instructions given or all of them it will be presumed that instructions refused if correct were covered by the instructions given.[85] If on an examination of the record it appears that instructions refused as having been covered by instructions given were not in fact so covered, the verdict will be set aside without examining as to the technical accuracy of the requested instruction.[86]

E. Cautionary Instructions — 1. Definition or Description. The term "cautionary instruction" is one which the courts have used with great frequency, but, so far, neither courts nor text-writers have attempted to define or describe it. Instructions falling within this designation, do not, strictly speaking, relate to the law of the case, but enunciate the rules prescribed for the conduct and deliberations of the jury, place the burden of proof on the proper party, state the degree of proof required, and announce the rules by which the jury are to be controlled in determining the weight of the evidence, and in testing the credibility of witnesses, irrespective of the particular issues being tried.

2. General Rules For Weighing Evidence.[87] Within certain limits, the judge may propose to the jury rules to aid them in weighing the evidence.[88] Care must be taken, in so doing, not to trench upon the exclusive province of the jury to determine the degree of credit to be given to particular elements of evidence. "He may instruct them as to the rule, but not as to the weight of the evidence."[89] In giving rules for weighing evidence to the jury, the court should state them as general rules, subject to be controlled and modified by the case before them, as made by all the testimony.[90]

3. Credibility of Witnesses[91] **— a. In General.** As previously shown, the jury are the judges of the credibility of witnesses,[92] and it is proper for the court to so instruct them.[93] So, as is shown in the following section, the court may lay

81. Drucklieb *v.* Universal Tobacco Co., 106 N. Y. App. Div. 470, 94 N. Y. Suppl. 777.

82. Kansas City, etc., R. Co. *v.* Phillips, 98 Ala. 159, 13 So. 65.

83. Chessman *v.* Hale, 31 Mont. 577, 79 Pac. 254, 68 L. R. A. 410.

84. Bennett *v.* Western Union Tel. Co., 128 N. C. 103, 38 S. E. 294; Wilson *v.* Winston-Salem R., etc., Co., 120 N. C. 531, 27 S. E. 46.

85. Kennedy *v.* Anderson, 98 Ind. 151; Newcomer *v.* Hutchings, 96 Ind. 119; Myers *v.* Murphy, 60 Ind. 282; Bash *v.* Young, 2 Ind. App. 297, 28 N. E. 344; Sexson *v.* Hoover, 1 Ind. App. 65, 27 N. E. 105; Washington L. Ins. Co. *v.* Haney, 10 Kan. 525; Pacific R. Co. *v.* Nash, 7 Kan. 280; Malcom *v.* Hanson, 32 Nebr. 50, 48 N. W. 883; Texas, etc., R. Co. *v.* Lowry, 61 Tex. 149.

Reason for rule.— The underlying principle which supports the rule is that all the presumptions are in favor of the correctness of the decisions of the court below, and where a party claims in this court that any of those decisions are erroneous he must so save and present the alleged erroneous decision, in the record, as to exclude every reasonable presumption in favor of such decision. Myers *v.* Murphy, 60 Ind. 282.

86. Missouri Pac. R. Co. *v.* Brazzil, 72 Tex. 233, 10 S. W. 403.

87. In criminal prosecutions see Criminal Law, 12 Cyc. 632 *et seq.*

88. 2 Thompson Trials, § 2414.

89. 2 Thompson Trials, § 2420.

90. McLean *v.* Clark, 47 Ga. 24.

91. In criminal prosecutions see Criminal Law, 12 Cyc. 636 *et seq.*

92. See *supra*, VII, A, 3.

93. *Florida.*— Atlantic Coast Line R. Co. *v.* Beazley, 54 Fla. 311, 45 So. 761.

Illinois.— Davis *v.* Northwestern El. R. Co., 170 Ill. 595, 48 N. E. 1058; Chicago, etc., R. Co. *v.* Fisher, 141 Ill. 614, 31 N. E. 406 [*affirming* 38 Ill. App. 33]; Illinois Cent. R. Co. *v.* Smith, 111 Ill. App. 177.

Indiana.— Young *v.* Gentis, 7 Ind. App. 199, 32 N. E. 796.

Iowa.— Lanning *v.* Chicago, etc., R. Co., 68 Iowa 502, 27 N. W. 478.

down general rules for testing the credibility of witnesses;[94] but it is neither required nor permitted to give instructions tending to cast suspicion or doubt on the testimony of any particular witness,[95] or which intimate that certain testimony is worthy or unworthy of belief;[96] which lead the jury to ignore the

Nebraska.— Parkins *v.* Missouri Pac. R. Co., 4 Nebr. (Unoff.) 1, 93 N. W. 197.

Texas.— International, etc., R. Co. *v.* Phillips, 29 Tex. Civ. App. 336, 69 S. W. 107; Ft. Worth, etc., R. Co. *v.* Bunrock, (Civ. App. 1898) 46 S. W. 70; Landrum *v.* Guerra, (Civ. App. 1894) 28 S. W. 358; Galveston, etc., R. Co. *v.* Davis, 4 Tex. Civ. App. 468, 23 S. W. 301.

Utah.— Black *v.* Rocky Mountain Bell Tel. Co., 26 Utah 451, 73 Pac. 514; United States *v.* Peay, 5 Utah 263, 14 Pac. 342.

Compare Denver Tramway Co. *v.* Owens, 20 Colo. 107, 36 Pac. 848; Forman *v.* Com., 86 Ky. 605, 6 S. W. 579, 9 Ky. L. Rep. 759; Transatlantic F. Ins. Co. *v.* Bamberger, 11 S. W. 595, 11 Ky. L. Rep. 101; East Tennessee, etc., R. Co. *v.* Fain, 12 Lea (Tenn.) 35, where it is said that to charge that the jury is the sole judge of the credibility is inaccurate, but not a ground for reversal unless one of the parties is prejudiced.

Use of word "should."—An instruction that the jury should give to each witness such credit as he had shown himself entitled to was not erroneous as permitting the jury to reject the evidence of disinterested and unimpeached witnesses. White *v.* Hatton, (Iowa 1907) 113 N. W. 830.

An instruction that the jury were not obliged to believe the testimony of any witness to be absolutely true in all respects, and that they should not do so if from all the testimony and all the facts proven they believed that he had testified untruthfully, was not erroneous. Vaillancour *v.* Minneapolis, etc., R. Co., 106 Minn. 348, 119 N. W. 53.

94. See *infra*, IX, E, 3, b.

95. McKeon *v.* Chicago, etc., R. Co., 94 Wis. 477, 69 N. W. 175, 59 Am. St. Rep. 910, 35 L. R. A. 252; Valley Lumber Co. *v.* Smith, 71 Wis. 304, 37 N. W. 412, 5 Am. St. Rep. 216; Beaumont *v.* Beaumont, 152 Fed. 55, 81 C. C. A. 251. *Compare* Fineburg *v.* Second St., etc., Pass. R. Co., 182 Pa. St. 97, 37 Atl. 925, where it was decided that it was error not to call to the jury's attention the improbability of the truth of plaintiff's witness.

96. *Alabama.*— Norwood *v.* State, 118 Ala. 134, 24 So. 53; Tait *v.* Murphy, 80 Ala. 440, 2 So. 317; Brooks *v.* Hildreth, 22 Ala. 469; Luff *v.* Cox, 2 Ala. 310.

Connecticut.— Norman Printers' Supply Co. *v.* Ford, 77 Conn. 461, 59 Atl. 499; Bradley *v.* Gorham, 77 Conn. 211, 58 Atl. 698, 66 L. R. A. 934.

Georgia.— Smith *v.* Page, 72 Ga. 539; Minor *v.* State, 63 Ga. 318; Raoul *v.* Newman, 59 Ga. 408.

Illinois.— Johnson *v.* People, 140 Ill. 350, 29 N. E. 895; Phenix *v.* Castner, 108 Ill. 207; Chittenden *v.* Evans, 41 Ill. 251; West Chicago St. R. Co. *v.* Moras, 111 Ill. App. 531; Matthews *v.* Granger, 96 Ill. App. 536 [*affirmed* in 196 Ill. 164, 63 N. E. 658]; Emmons *v.* Hilton, 72 Ill. App. 124; Chicago, etc., R. Co. *v.* Foster, 46 Ill. App. 621; Henderson *v.* Miller, 36 Ill. App. 232.

Indiana.— Finch *v.* Bergins, 89 Ind. 360.

Iowa.— Stewart *v.* Anderson, 111 Iowa 329, 82 N. W. 770.

Kentucky.— Anderson, etc., Distilleries Co. *v.* Hair, 103 Ky. 196, 44 S. W. 658, 19 Ky. L. Rep. 1822.

Maine.— Blackington *v.* Sumner, 69 Me. 136.

Massachusetts.— Coombs *v.* New Bedford Cordage Co., 102 Mass. 572, 3 Am. Rep. 506.

Michigan.— Williams *v.* West Bay, 119 Mich. 395, 78 N. W. 328; Kelly *v.* Emery, 75 Mich. 147, 42 N. W. 795.

Mississippi.— Southern Express Co. *v.* Wolfe, 41 Miss. 79.

Missouri.— Granby Min., etc., Co. *v.* Davis, 156 Mo. 422, 57 S. W. 126; Vaulx *v.* Campbell, 8 Mo. 224; Kansas City, etc., R. Co. *v.* Dawley, 50 Mo. App. 480.

Nebraska.— Boice *v.* Palmer, 55 Nebr. 389, 75 N. W. 849; Omaha Belt R. Co. *v.* McDermott, 25 Nebr. 714, 41 N. W. 648; Long *v.* State, 23 Nebr. 33, 36 N. W. 310.

New Jersey.— Faulkner *v.* Paterson R. Co., 65 N. J. L. 181, 46 Atl. 765.

New York.— Smith *v.* Lehigh Valley R. Co., 170 N. Y. 394, 63 N. E. 338; Weaver *v.* Grant, 56 Hun 103, 9 N. Y. Suppl. 73; Durst *v.* Ernst, 45 Misc. 627, 91 N. Y. Suppl. 13; Segaloff *v.* Interurban St. R. Co., 102 N. Y. Suppl. 509; Copp *v.* Hollins, 9 N. Y. Suppl. 57 [*affirmed* in 132 N. Y. 550, 30 N. E. 866].

North Carolina.— Leak *v.* Covington, 99 N. C. 559, 6 S. E. 241; State *v.* Jenkins, 85 N. C. 544; McRae *v.* Lawrence, 75 N. C. 289; State *v.* Thomas, 29 N. C. 381; Sneed *v.* Creath, 8 N. C. 309.

North Dakota.— King *v.* Hanson, 13 N. D. 85, 99 N. W. 1085.

Oregon.— State *v.* Swayze, 11 Oreg. 357, 3 Pac. 574.

Pennsylvania.— Curry *v.* Curry, 114 Pa. St. 367, 7 Atl. 61; H. B. Claflin Co. *v.* Querns, 15 Pa. Super. Ct. 464; McNeile *v.* Cridland, 6 Pa. Super. Ct. 428. *Contra*, Leibig *v.* Steiner, 94 Pa. St. 466; McClintock *v.* Pennsylvania R. Co., 21 Wkly. Notes Cas. 133.

Texas.— Dwyer *v.* Bassett, 63 Tex. 274; Turner *v.* Grobe, 24 Tex. Civ. App. 554, 59 S. W. 583; Ft. Worth, etc., R. Co. *v.* Osborne, (Civ. App. 1894) 26 S. W. 274.

Washington.— Smith *v.* Seattle, 33 Wash. 481, 74 Pac. 674; Gilmore *v.* Seattle, etc., R. Co., 29 Wash. 150, 69 Pac. 743; Klepsch *v.* Donald, 8 Wash. 162, 35 Pac. 621.

Wisconsin.— Smith *v.* Milwaukee Builders', etc., Exch., 91 Wis. 360, 64 N. W. 1041, 51 Am. St. Rep. 912, 30 L. R. A. 504; Johnson *v.* Superior Rapid Transit R. Co., 91 Wis. 233, 64 N. W. 753; Little *v.* Superior Rapid Transit R. Co., 88 Wis. 402, 60 N. W.

testimony of a witness; [97] which authorize the jury to wholly disregard evidence for speculation and unfounded reasons; [98] which inferentially direct the jury that they may determine what witnesses to believe or disbelieve without restriction; [99] which single out one party and directs the jury with respect to judging of his credibility; [1] which state that there is no preponderance of evidence where two equally credible witnesses have sworn to a contradictory state of facts,[2] or that the testimony of defendant equally balances that of a witness; [3] which permit the jury to pass upon the credibility of witnesses by means of a consideration, among other things, of all "the other circumstances appearing on the trial;" [4] or, without telling the jury that they are the sole judges of the credibility of witnesses, assume that credit must be given to the witness who was best or apparently best supported by corroborative evidence.[5] So an instruction is erroneous which assumes the truth of a witness' testimony,[6] or which expresses an opinion as to whether a disputed fact is sufficiently proven,[7] or states that if the jury cannot say who told the truth they must find the facts not proven; [8] or which is based on metaphysical abstractions which suggest suspicion and invite conjecture.[9] Instructions of this character are vicious as invading the province of the jury. On the other hand it is held that the court may instruct that testimony is not open to censure because the witness is a private detective,[10] or that the credibility of a witness is not affected by the fact that he cannot read or write,[11] or is a negro; [12] or that it is for the jury to determine what weight shall be given to the testimony of a person of unsound mind, but found by the court to be a competent witness; [13] but the court may instruct them that if they believe from the evidence that the witness has not sufficient mental capacity to understand what is going on, they are not at liberty to consider his testimony.[14] So the court may in its discretion tell the jury that they are not bound to believe the testimony of a witness because it is contained in a deposition, any more than they would if he testified from the witness stand.[15]

b. Rules For Testing Credibility [16] — (i) *Power and Duty of Court to State.* The court may, in its instructions, state general rules for the guidance of the jury, in determining the credibility of witnesses.[17] Such instructions are

705; Thomas *v.* Paul, 87 Wis. 607, 58 N. W. 1031; Roberts *v.* State, 84 Wis. 361, 54 N. W. 580; Lampe *v.* Kennedy, 60 Wis. 110, 18 N. W. 730; Connolly *v.* Straw, 53 Wis. 645, 11 N. W. 17.

See 46 Cent. Dig. tit. "Trial," § 414 *et seq.*

To instruct the jury that the testimony of a witness is open to the gravest doubt is erroneous as a charge with respect to matters of fact. Hayes *v.* Moulton, 194 Mass. 157, 80 N. E. 215.

Curing error by other instructions.—A chance expression of opinion by the court as to the credibility of witnesses is cured by a statement that the jury are not bound by such expressions of opinion. Hoffman *v.* New York Cent., etc., R. Co., 87 N. Y. 25, 41 Am. Rep. 337 [*affirming* 46 N. Y. Super. Ct. 526]; Jackson *v.* Packard, 6 Wend. (N. Y.) 415.

Hypothetical criticism of the evidence is not improper. Wright *v.* Mulvaney, 78 Wis. 89, 46 N. W. 1045, 23 Am. St. Rep. 393, 9 L. R. A. 807.

97. Savage *v.* Rhode Island Co., 28 R. I. 391, 67 Atl. 633.

98. Steber *v.* Chicago, etc., R. Co., 139 Wis. 10, 120 N. W. 502.

99. Gibson *v.* Troutman, 9 Ill. App. 94.

1. Taylor *v.* Crowe, 122 Ill. App. 518; Huff *v.* St. Joseph R., etc., Co., 213 Mo. 495, 111 S. W. 1145.

2. De Land *v.* Dixon Nat. Bank, 111 Ill. 323.

3. Canada *v.* Curry, 73 Ind. 246.

4. Ames *v.* Thren, 136 Ill. App. 568.

5. Comstock *v.* Whitworth, 75 Ind. 129.

6. Battles *v.* Tallman, 96 Ala. 403, 11 So. 247; Skeggs *v.* Horton, 82 Ala. 352, 2 So. 110; Rhodes *v.* Lowry, 54 Ala. 4.

7. Woods *v.* Trinity Parish, 21 D. C. 540; Johnson *v.* Whidden, 32 Me. 230; Faulkner *v.* King, 130 N. C. 494, 41 S. E. 885.

8. Kansas City, etc., R. Co. *v.* Crocker, 95 Ala. 412, 11 So. 262.

9. Illinois Cent. R. Co. *v.* Burke, 112 Ill. App. 415.

10. De Long *v.* Giles, 11 Ill. App. 33; Cooney *v.* State, 61 Nebr. 342, 85 N. W. 281.

11. Wilkinson *v.* Williamson, 76 Ala. 163.

12. McDaniel *v.* Monroe, 63 S. C. 307, 41 S. E. 456.

13. Worthington *v.* Mencer, 96 Ala. 310, 11 So. 72, 17 L. R. A. 407.

14. Bowdle *v.* Detroit St. R. Co., 103 Mich. 272, 61 N. W. 529, 50 Am. St. Rep. 366.

15. Johnson County Sav. Bank *v.* Walker, 79 Conn. 348, 65 Atl. 132.

16. **In criminal prosecutions** see Criminal Law, 12 Cyc. 636.

17. La Salle *v.* Kostka, 190 Ill. 130, 60

not in violation of the rule against invading the province of the jury.[18] When a proper request is made, it is the duty of the court to give instructions of this character,[19] but it need not do so in the absence of such request.[20] And none of the methods by which the credibility of witnesses and the preponderance of the evidence are to be determined are essential to an instruction stating what facts will create a liability or constitute a cause of action.[21]

(II) *APPEARANCE AND DEMEANOR OF WITNESS WHILE TESTIFYING.*[22] The court may instruct the jury that they are at liberty to consider the appearance of a witness, and his manner and demeanor while testifying,[23] but should not state that they must do so.[24] And an instruction calculated to lead the jury to believe that they must look alone to the witness' appearance on the stand in determining his credibility is properly refused.[25] And it is not proper in giving instructions of the character under consideration to single out any particular witness as it would necessarily give the impression that the court thought such witness had acted differently from any other witness.[26]

(III) *BIAS OR PREJUDICE.*[27] It is proper to instruct that the jury may consider the bias or prejudice of a witness, if any has been disclosed by the testimony,[28] and error to instruct that a circumstance tending to show bias on the part of a witness has nothing to do with the issues in the case.[29] So an instruction excluding testimony tending to show hostile feeling toward the losing party on the part of an important adverse witness is erroneous.[30] In advising the jury to consider the bias of witnesses it is error to single out a particular witness or set of witnesses.[31]

(IV) *CHARACTER AND ENVIRONMENT.*[32] The court may instruct that the

N. E. 72; Pressed Steel Car Co. *v.* Herath, 110 Ill. App. 596 [*affirmed* in 207 Ill. 576, 69 N. E. 959]; Stanley *v.* Montgomery, 102 Ind. 102, 26 N. E. 213; Young *v.* Gentis, 7 Ind. App. 199, 32 N. E. 796; Dodge *v.* Reynolds, 135 Mich. 692, 98 N. W. 737; Frank *v.* St. Louis Transit Co., 99 Mo. App. 323, 73 S. W. 239. And see subsequent sections in this chapter.

18. Stanley *v.* Montgomery, 102 Ind. 102, 26 N. E. 213; Young *v.* Gentis, 7 Ind. App. 199, 32 N. E. 796.

19. Jones *v.* Alabama Mineral R. Co., 107 Ala. 400, 18 So. 30; Schlesinger *v.* Rogers, 80 Ill. App. 420; Clark *v.* Union Traction Co., 210 Pa. St. 636, 60 Atl. 302.

20. Childs *v.* Ponder, 117 Ga. 553, 43 S. E. 986; Freeman *v.* Coleman, 88 Ga. 421, 14 S. E. 551.

Thus the jury need not be instructed that they might consider the fact of a witness remaining in the room after the court had ordered all witnesses excluded, as affecting the credibility of his testimony in the absence of a request. Parker *v.* U. S., 1 Indian Terr. 592, 43 S. W. 858.

21. Illinois Cent. R. Co. *v.* Warriner, 229 Ill. 91, 82 N. E. 246 [*affirming* 132 Ill. App. 301].

22. **In criminal prosecutions** see CRIMINAL LAW, 12 Cyc. 638.

23. *Arkansas.*—Brown *v.* Stacy, 5 Ark. 403.

Georgia.—Atlantic Coast Line R. Co. *v.* Jones, 132 Ga. 189, 63 S. E. 834; Holston *v.* Southern R. Co., 116 Ga. 656, 43 S. E. 29; Georgia Home Ins. Co. *v.* Campbell, 102 Ga. 106, 29 S. E. 148; Central R., etc., Co. *v.* Attaway, 90 Ga. 656, 16 S. E. 956; Anderson *v.* Tribble, 66 Ga. 584.

Illinois.—North Chicago St. R. Co. *v.* Wellner, 206 Ill. 272, 69 N. E. 6 [*affirming* 105 Ill. App. 652]; La Salle *v.* Kostka, 190 Ill. 130, 60 N. E. 72; Chicago, etc., R. Co. *v.* Winters, 175 Ill. 293, 51 N. E. 901. *Contra,* Purdy *v.* People, 140 Ill. 46, 29 N. E. 700; Mendota First Nat. Bank *v.* Haight, 55 Ill. 191.

Michigan.—Dodge *v.* Reynolds, 135 Mich. 692, 98 N. W. 737.

Missouri.—Kirchner *v.* Collins, 152 Mo. 394, 53 S. W. 1081.

Washington.—Klepsch *v.* Donald, 4 Wash. 436, 30 Pac. 991, 31 Am. St. Rep. 936.

See 46 Cent. Dig. tit. "Trial," §§ 419, 494.

Necessity for request.—An instruction that the jury may take into consideration the manner and appearance of a witness while justifying need not be given unless requested Johnson *v.* People, 140 Ill. 350, 29 N. E. 895

24. Fries *v.* American Lead Pencil Co., 141 Cal. 610, 75 Pac. 164; Heenan *v.* Howard, 81 Ill. App. 629. *Contra,* Strebin *v.* Lavengood 163 Ind. 478, 71 N. E. 494.

25. Peterman *v.* Henderson, (Ala. 1906) 40 So. 756.

26. Helbig *v.* Citizens' Ins. Co., 234 Ill 251, 84 N. E. 897 [*affirming* 138 Ill. App 115].

27. **In criminal prosecutions** see CRIMINAL LAW, 12 Cyc. 607.

28. Macon R., etc., Co. *v.* Barnes, 121 Ga 443, 49 S. E. 282; Central R., etc., Co. *v* Attaway, 90 Ga. 656, 16 S. E. 956. *Contra* Houston, etc., R. Co. *v.* Runnels, 92 Tex 305, 47 S. W. 971.

29. Moore *v.* Nashville, etc., R. Co., 137 Ala. 495, 34 So. 617; Needles *v.* Gregory, 7 Mo. App. 357.

30. McVey *v.* Barker, 92 Mo. App. 498.

31. Parlin *v.* Finfrouck, 65 Ill. App. 174.

32. **In criminal prosecutions** see CRIMINAL LAW, 12 Cyc. 600, 620 *et seq.*

jury may consider the character of the witnesses,[33] and their environment, and the influences to which they may be subject.[34] Where there is evidence on which to base the charge, the court must on request charge that if the jury find from the evidence that a witness is a person of bad moral character,[35] or that he is a hired witness,[36] this should be considered in determining the weight to be given to his testimony, and an instruction that, if a certain witness named is a person of bad reputation for truth and veracity, then as a matter of law that fact tends to discredit his testimony, and the jury may disregard it except as corroborated by other credible testimony or other facts proven, is proper.[37] Where it appears that a witness has been tampered with,[38] or that the agent of one of the parties to the suit was sent to a witness with intent to corrupt or entrap him,[39] it is proper to instruct the jury to inquire how far the parties were connected with the transaction. The court may refuse to instruct that the conviction of a witness of the crime of perjury is a mere nullity, where the judgment of conviction has been reversed on appeal, this being a matter of common knowledge.[40]

(v) *Intelligence and Opportunities For Observation.* Among other tests for determining the credibility of witnesses, the court may instruct the jury that they "may,"[41] "should," or "must"[42] take into consideration the intelligence of the witnesses, and their opportunities for observation and means of knowledge as disclosed by the evidence. The jury is not thereby told that the testimony of one class of witnesses is entitled to greater weight than that of another class. It is, however, an invasion of the province of the jury to instruct them that they should believe the witnesses with the best opportunity for knowing the facts testified to and having the least inducement to swear falsely,[43] or that the testimony of witnesses having superior opportunities for knowing what took place, etc., is entitled to greater weight than those whose opportunities for such knowledge were not so great.[44] While a jury may consider the opportunities of a witness of knowing the facts about which he testifies, and his interest or want of interest in the case, yet there is no rule of law requiring the jury to believe the witness who has least interest in the case and the best opportunity of knowing the facts to which he testifies.[45]

33. Harrison *v.* Lakenan, 189 Mo. 581, 88 S. W. 53.

34. Hatfield *v.* Chicago, etc., R. Co., 61 Iowa 434, 16 N. W. 336; State *v.* Nash, 10 Iowa 81; Norfolk, etc., R. Co. *v.* Poole, 100 Va. 148, 40 S. E. 627.

35. Ohio, etc., R. Co. *v.* Craucher, 132 Ind. 275, 31 N. E. 941.

36. People *v.* Rice, 103 Mich. 350, 61 N. W. 540.

37. Johnson *v.* Johnson, 81 Nebr. 60, 115 N. W. 323.

38. Hitchcock *v.* Moore, 70 Mich. 112, 37 N. W. 914, 14 Am. St. Rep. 474.

39. Savannah, etc., R. Co. *v.* Holland, (Ga. 1889) 9 S. E. 1040.

40. Davis *v.* McNear, 101 Cal. 606, 36 Pac. 105.

41. Central R., etc., Co. *v.* Attaway, 90 Ga. 656, 16 S. E. 956; Indianapolis Northern Traction Co. *v.* Dunn, 37 Ind. App. 248, 76 N. E. 269. But see Hope *v.* West Chicago St. R. Co., 82 Ill. App. 311, which seems to maintain a contrary doctrine.

42. Meyer *v.* Mead, 83 Ill. 19; Toledo, etc., R. Co. *v.* Fenstermaker, 163 Ind. 534, 72 N. E. 561; Fifer *v.* Ritter, 159 Ind. 8, 64 N. E. 463; Robertson *v.* Monroe, 7 Ind. App. 470, 33 N. E. 1002, in which it was said that the use of the word "should" instead of "may" does not cast discredit on any particular witness or class of witnesses. *Contra,* Barron *v.* Burke, 82 Ill. App. 116. And see Eddy *v.* Lowry, (Tex. Civ. App. 1894) 24 S. W. 1076, holding that an instruction that in determining the preponderance of evidence, the jury should consider, among other things, the opportunity of the witnesses of seeing and knowing the facts testified to, should not be given, unless it includes every fact that may possibly be considered in determining the preponderance of evidence, and that the propriety of giving such an instruction is in any event questionable.

43. Southern Mut. Ins. Co. *v.* Hudson, 113 Ga. 434, 38 S. E. 964; Hudson *v.* Best, 104 Ga. 131, 30 S. E. 688.

44. Himrod Coal Co. *v.* Clingan, 114 Ill. App. 568. And see Muncie, etc., R. Co. *v.* Ladd, 37 Ind. App. 90, 76 N. E. 790, in which it was held that an instruction that, when witnesses are otherwise equally credible and their testimony otherwise entitled to equal weight, greater weight and credit should be given to those whose means of information are superior, is erroneous; it being the exclusive right of the jury to determine the conflict.

45. Hudson *v.* Best, 104 Ga. 131, 30 S. E. 688.

(vi) *INTEREST.*[46] It is very generally held proper to instruct the jury that they "may" take into consideration the interest of a party or other witness in determining the credibility of his testimony,[47] and according to the weight of authority the court may instruct the jury that they "should" consider such interest.[48] Instructions of this character are not objectionable as charging the jury with respect to matters of fact,[49] and a refusal of such instructions is error,[50] unless there is no evidence which would warrant the giving of the instruction;[51] and the error is not cured by a general instruction that the jury are the judges of the credibility of the witnesses and the weight to be given to the testimony of each,[52] nor by an instruction that the jury are to use their common sense and experience in regard to the credibility of witnesses.[53] Such instructions should be general, and not single out a particular witness or the witnesses of one party,[54] unless such witness or witnesses are the only ones to whom the instructions can

46. In criminal prosecutions see CRIMINAL LAW, 12 Cyc. 607, 608.

47. *Colorado.*— Stewart *v.* Kindel, 15 Colo. 539, 25 Pac. 990.

Georgia.— Brunswick, etc., R. Co. *v.* Wiggins, 113 Ga. 842, 39 S. E. 551, 61 L. R. A. 513; Davis *v.* Central R. Co., 60 Ga. 329. And see Central of Georgia R. Co. *v.* Mote, 131 Ga. 166, 62 S. E. 164.

Illinois.— Hanchett *v.* Haas, 219 Ill. 546, 76 N. E. 845; North Chicago St. R. Co. *v.* Anderson, 176 Ill. 635, 52 N. E. 21; Eckhardt *v.* People, 116 Ill. App. 408; Chicago, etc., R. Co. *v.* Spurney, 69 Ill. App. 549. But see Barron *v.* Burke, 82 Ill. App. 116.

Michigan.— Lovely *v.* Grand Rapids, etc., R. Co., 137 Mich. 653, 100 N. W. 894; McDonell *v.* Rifle Boom Co., 71 Mich. 61, 38 N. W. 681.

Nebraska.— Harvard *v.* Crouch, 47 Nebr. 133, 66 N. W. 276; Barmby *v.* Wolfe, 44 Nebr. 77, 62 N. W. 318.

New York.— Cullinan *v.* Furthman, 187 N. Y. 160, 79 N. E. 989 [*reversing* 105 N. Y. App. Div. 642, 94 N. Y. Suppl. 1142]; Becker *v.* Woarms, 72 N. Y. App. Div. 196, 76 N. Y. Suppl. 438.

North Carolina.— Hill *v.* Sprinkle, 76 N. C. 253.

Pennsylvania.— Bolton *v.* Central Pennsylvania Traction Co., 219 Pa. St. 83, 67 Atl. 950.

South Carolina.— Oliver *v.* Columbia, etc., R. Co., 65 S. C. 1, 45 S. E. 307.

Washington.— Klepsch *v.* Donald, 4 Wash. 436, 30 Pac. 991, 31 Am. St. Rep. 936.

United States.— Louisville, etc., R. Co. *v.* McClish, 115 Fed. 268, 53 C. C. A. 60.

See 46 Cent. Dig. tit. "Trial," §§ 418, 493.

48. *Colorado.*— Salazar *v.* Taylor, 18 Colo. 538, 33 Pac. 369.

Illinois.— Chicago, etc., R. Co. *v.* Meech, 163 Ill. 305, 45 N. E. 290; West Chicago St. R. Co. *v.* Estep, 162 Ill. 130, 44 N. E. 404 [*affirming* 62 Ill. App. 617]; Meyer *v.* Mead, 83 Ill. 19; Brown *v.* Walker, 32 Ill. App. 199.

Indiana.— Toledo, etc., R. Co. *v.* Fenstermaker, 163 Ind. 534, 72 N. E. 561; Strebin *v.* Lavengood, 163 Ind. 478, 71 N. E. 494; Fifer *v.* Ritter, 159 Ind. 8, 64 N. E. 463 [*overruling* Duvall *v.* Kenton, 127 Ind. 178, 26 N. E. 688; Unruh *v.* State, 105 Ind. 117, 4 N. E. 453; Woollen *v.* Whitacre, 91 Ind. 502]; Young *v.* Gentis, 7 Ind. App. 199, 32 N. E. 796.

New York.— Ney *v.* Troy, 3 N. Y. Suppl. 679 [*affirmed* in 123 N. Y. 628, 25 N. E. 952].

Oklahoma.— Rhea *v.* U. S., 6 Okla. 249, 50 Pac. 992.

See 46 Cent. Dig. tit. "Trial," §§ 418, 493.

Contra.— Willis *v.* Whitsitt, 67 Tex. 673, 4 S. W. 253. And *compare* Eddy *v.* Lowry, (Tex. Civ. App. 1894) 24 S. W. 1076.

Compensation of witness contingent on success of party.— Where it appears that the compensation of witnesses for plaintiff is contingent on plaintiff's success, the jury should be instructed that they should consider, and not that they might consider, such fact in determining the credibility of such witnesses (Southern R. Co. *v.* State, 165 Ind. 613, 75 N. E. 272); but the court may add that such facts are not to be considered for any other purpose (Southern R. Co. *v.* State, *supra*).

49. Klepsch *v.* Donald, 4 Wash. 436, 30 Pac. 991, 31 Am. St. Rep. 936.

50. *Arkansas.*— Lancashire Ins. Co. *v.* Stanley, 70 Ark. 1, 62 S. W. 66.

Illinois.— Chicago, etc., R. Co. *v.* Burridge, 211 Ill. 9, 71 N. E. 838; West Chicago St. R. Co. *v.* Dougherty, 170 Ill. 379, 48 N. E. 1000; Wabash R. Co. *v.* Jensen, 99 Ill. App. 312; Schlesinger *v.* Rogers, 80 Ill. App. 420.

New York.— Becker *v.* Woarms, 72 N. Y. App. Div. 196, 76 N. Y. Suppl. 438.

Wisconsin.— Blankavag *v.* Badger Box, etc., Co., 136 Wis. 380, 117 N. W. 852; Kavanaugh *v.* Wausau, 120 Wis. 611, 98 N. W. 550.

United States.— Denver City Tramway Co. *v.* Norton, 141 Fed. 599, 73 C. C. A. 1.

51. Hazen *v.* Bay City Traction, etc., Co., 152 Mich. 457, 116 N. W. 364. And see Gregory *v.* Detroit United R. Co., 138 Mich. 368, 101 N. W. 546.

52. Denver City Tramway Co. *v.* Norton, 141 Fed. 599, 73 C. C. A. 1.

53. Lancashire Ins. Co. *v.* Stanley, 70 Ark. 1, 62 S. W. 66.

54. Helbig *v.* Citizens' Ins. Co., 234 Ill. 251, 84 N. E. 897 [*affirming* 138 Ill. App. 115]; Sangster *v.* Hatch, 134 Ill. App. 340; Zapel *v.* Ennis, 104 Ill. App. 175; Stetzler *v.* Metropolitan St. R. Co., 210 Mo. 704, 109 S. W. 666; Zander *v.* St. Louis Transit Co., 206 Mo. 445, 103 S. W. 1006; Tompkins *v.* Pacific Mut. L. Ins. Co., 53 W. Va. 479, 44 S. E. 439, 97

apply.[55] Accordingly, instructions that plaintiff's interest may be considered in determining the credibility of his testimony are proper and should ordinarily be given when requested,[56] unless there are other parties or witnesses who have testified in the case to whose testimony the principle is applicable. Under these circumstances if the instruction be limited to plaintiff's testimony, it is objectionable to the rule against singling out particular evidence for comment.[57] Instructions which deny the jury's right to consider the interest of witnesses in determining the credibility of their testimony are of course erroneous.[58] The court may properly charge the jury that it is for them to say whether they will believe an interested witness,[59] and it has been held not improper to modify an instruction that the jury may in weighing the testimony consider the interest of witnesses by adding that the jury had the right to weigh such testimony by the same rules applied to the testimony of all other witnesses.[60] It is erroneous to charge that the testimony of a disinterested witness is entitled to more weight than that of an interested party;[61] that the weight to be given to the testimony of the parties depends on the interest each has in the result of the suit;[62] that it is the duty of the jury to believe the witness who has the least inducement to swear falsely;[63] that the interest of a witness affects his credit;[64] that the jury should disregard the testimony of a witness if they find him interested;[65] that the testimony of an interested witness is entitled to no consideration;[66] that, as a general rule, a witness who is interested will not be as honest, candid, and fair in his testimony as one who is not interested;[67] that the jury should give statements made by a party in his own favor only such weight as they may believe the statements entitled to, considering his interest in the result;[68] or that the jury are bound to believe a witness who was uncontradicted and unimpeached,[69] the reason being that from his connection with the parties or the subject in controversy, and other similar circumstances, they might properly disbelieve him.[70] So it is erroneous to charge that the jury may disregard the testimony of an uncontradicted or unimpeached witness because of interest,[71] since they should not

Am. St. Rep. 1006, 62 L. R. A. 489. *Compare* Schmitt *v.* Murray, 87 Minn. 250, 91 N. W. 1116.

55. Where it does not appear that any witness other than plaintiff is interested in the result, the instruction may be specifically restricted to plaintiff. Chicago City R. Co. *v.* Olis, 192 Ill. 514, 61 N. E. 459 [*affirming* 94 Ill. App. 323].

56. West Chicago St. R. Co. *v.* Dougherty, 170 Ill. 379, 48 N. E. 1000; West Chicago St. R. Co. *v.* Estep, 162 Ill. 130, 44 N. E. 404; Scanlan *v.* Chicago Union Traction Co., 127 Ill. App. 406; Chicago Union Traction Co. *v.* Hansen, 125 Ill. App. 153.

57. Pennsylvania Co. *v.* Versten, 140 Ill. 637, 30 N. E. 540, 15 L. R. A. 798; Phenix Ins. Co. *v.* La Pointe, 118 Ill. 384, 8 N. E. 353; Pennsylvania Co. *v.* Barton, 130 Ill. App. 573; Strasser *v.* Goldberg, 120 Wis. 621, 98 N. W. 554.

58. New Orleans, etc., R. Co. *v.* Allbritton, 38 Miss. 242, 75 Am. Dec. 98.

59. Le Boutillier *v.* Fiske, 47 Hun (N. Y.) 323.

60. Mertens *v.* Southern Coal, etc., Co., 235 Ill. 540, 85 N. E. 743 [*affirming* 140 Ill. App. 190]; Henrietta Coal Co. *v.* Martin, 221 Ill. 460, 77 N. E. 902.

61. *Alabama.*— Louisville, etc., R. Co. *v.* Watson, 90 Ala. 68, 8 So. 249.

District of Columbia.— Metropolitan R. Co. *v.* Jones, 1 App. Cas. 200.

Illinois.— Douglass *v.* Fullerton, 7 Ill. App. 102.

Indiana.— Nelson *v.* Vorce, 55 Ind. 455.

Pennsylvania.— Platz *v.* McKean Tp., 178 Pa. St. 601, 36 Atl. 136.

See 46 Cent. Dig. tit. "Trial," § 418.

Contra.— Bonnell *v.* Smith, 53 Iowa 281, 5 N. W. 128, holding that while such instruction is not erroneous it is apt to mislead the jury, and better withheld.

62. Dodd *v.* Moore, 91 Ind. 522.

63. Southern Mut. Ins. Co. *v.* Hudson, 113 Ga. 434, 38 S. E. 964; Hudson *v.* Best, 104 Ga. 131, 30 S. E. 688.

64. Davis *v.* Central R. Co., 60 Ga. 329.

65. Chouteau *v.* Searcy, 8 Mo. 733.

66. Soltau *v.* Loewenthal, 1 N. Y. Suppl. 168.

67. Muncie, etc., R. Co. *v.* Ladd, 37 Ind. App. 90, 76 N. E. 790.

68. Brown *v.* Quincy, etc., R. Co., 127 Mo. App. 614, 106 S. W. 551.

69. Noland *v.* McCracken, 18 N. C. 594. See also New Orleans, etc., R. Co. *v.* Allbritton, 38 Miss. 242, 75 Am. Dec. 98; Vaulx *v.* Campbell, 8 Mo. 224. *Contra*, Rowland *v.* Plummer, 50 Ala. 182. And *compare* Engmann *v.* Immel, 59 Wis. 249, 18 N. W. 182.

70. Noland *v.* McCracken, 18 N. C. 594.

71. Berzevizy *v.* Delaware, etc., R. Co., 19 N. Y. App. Div. 309, 46 N. Y. Suppl. 27; Tyler *v.* Third Ave. R. Co., 18 Misc. (N. Y.) 165, 41 N. Y. Suppl. 523; Kapiloff *v.* Feist,

disregard such testimony without weighing it and considering it in connection with other evidence.[72] There is no legal presumption against the testimony of a witness merely because he is the employee of one of the parties;[73] and where the credibility of such witness is not assailed, or there is nothing to show bias or prejudice on his part, an instruction that the jury may consider his relationship to the party in determining his credibility,[74] or which suggests that the jury may disregard or discredit the testimony of witnesses merely because they were employees of one of the parties is erroneous and should not be given.[75] And it has been held erroneous to refuse an instruction that the testimony of the employees of a party cannot be arbitrarily disregarded in the absence of anything to discredit it or contradict it.[76] The court, may, however, instruct that if the interest or employment of a witness has impaired or biased his judgment, such fact may be considered in weighing his testimony.[77] An instruction that the jury have no right to disregard the testimony of any witness because he is an employee of one of the parties may be refused where there is nothing to indicate that the jury would disregard the testimony of any witness, and the court has instructed that the testimony of each witness should receive such credit as it seemed to be entitled to.[78]

(VII) *IMPEACHMENT*[79] — (A) *In General.* While the court may instruct the jury as to the law relating to the impeachment of witnesses,[80] it is not bound to do so in the absence of a request for such instruction.[81] The court may charge that a witness can be impeached by showing general bad "moral character"; the use of the word "moral" being neither restrictive nor misleading, and being used in its broadest sense.[82] So it is proper to instruct that if the jury believe that a witness has been successfully impeached, they may consider such impeachment in weighing his testimony;[83] that a party cannot impeach his own witness, but it is error to charge that a party introducing a witness thereby indorses the credibility of such witness;[84] to tell the jury that a witness has been impeached;[85] that the testimony of an impeached witness is of no value unless corroborated;[86] that impeach-

91 N. Y. Suppl. 27. But see Hoes *v.* Third Ave. R. Co., 5 N. Y. App. Div. 151, 39 N. Y. Suppl. 40.

72. Irwin *v.* Metropolitan St. R. Co., 25 Misc. (N. Y.) 187, 54 N. Y. Suppl. 195 [*affirmed* in 38 N. Y. App. Div. 253, 57 N. Y. Suppl. 21].

73. Solomon R. Co. *v.* Jones, 34 Kan. 443, 8 Pac. 730.

74. Schmidt *v.* Denver First Nat. Bank, 10 Colo. App. 261, 50 Pac. 733; Solomon R. Co. *v.* Jones, 34 Kan. 443, 8 Pac. 730; Gregory *v.* Detroit United R. Co., 138 Mich. 368, 101 N. W. 546; Wastl *v.* Montana Union R. Co., 17 Mont. 213, 42 Pac. 772.

75. Illinois Cent. R. Co. *v.* Burke, 112 Ill. App. 415; West Chicago St. R. Co. *v.* Raftery, 85 Ill. App. 319; Illinois Cent. R. Co. *v.* Leggett, 69 Ill. App. 347; St. Louis, etc., R. Co. *v.* Walker, 39 Ill. App. 388; St. Louis, etc., R. Co. *v.* Huggins, 20 Ill. App. 639.

76. Brunswick, etc., R. Co. *v.* Wiggins, 113 Ga. 842, 39 S. E. 551, 61 L. R. A. 513.

77. McDonell *v.* Rifle Boom Co., 71 Mich. 61, 38 N. W. 681.

78. Hintz *v.* Michigan Cent. R. Co., 140 Mich. 565, 104 N. W. 23.

79. In criminal prosecutions see CRIMINAL LAW, 12 Cyc. 607, 631, 637.

80. See cases cited *infra* in subsequent notes in this section.

81. Louisville, etc., R. Co. *v.* Thompson, 113 Ga. 983, 39 S. E. 483; Cole *v.* Byrd, 83 Ga. 207, 9 S. E. 613; Halley *v.* Tichenor, 120 Iowa 164, 94 N. W. 472.

82. Sparks *v.* Bedford, 4 Ga. App. 13, 60 S. E. 809.

83. *Georgia.*— Central R., etc., Co. *v.* Attaway, 90 Ga. 656, 16 S. E. 956.

Illinois.— La Fevre *v.* Du Brule, 71 Ill. App. 263.

Indiana.— Shular *v.* State, 105 Ind. 289, 4 N. E. 870, 55 Am. Rep. 211.

Iowa.— Buchholtz *v.* Ratcliffe, 129 Iowa 27, 105 N. W. 336; State *v.* McClintic, 73 Iowa 663, 35 N. W. 696.

Texas.— Howard *v.* Colquhoun, 28 Tex. 134.

Immaterial matter.— But an instruction which permits the jury to disregard the testimony of a witness on contradiction of immaterial matter is erroneous. Geringer *v.* Novak, 117 Ill. App. 160.

84. Jarnigan *v.* Fleming, 43 Miss. 710, 5 Am. Rep. 514.

85. Huntingburgh *v.* First, 22 Ind. App. 66, 53 N. E. 246; Schmidt *v.* St. Louis R. Co., 149 Mo. 269, 50 S. W. 921, 73 Am. St. Rep. 380; Wendt *v.* Craig, 147 N. Y. 697, 41 N. E. 516 [*reversing* 17 N. Y. Suppl. 748]; Bakeman *v.* Rose, 18 Wend. (N. Y.) 146; Bakeman *v.* Rose, 14 Wend. (N. Y.) 105; East Mt. Laffee Coal Co. *v.* Schuyler, 1 Walk. (Pa.) 342; East Mt. Laffee Coal Co. *v.* Schuyler, 3 Leg. Gaz. (Pa.) 106.

86. Green *v.* Cochran, 43 Iowa 544; Sharp *v.* State, 16 Ohio St. 218. But see White *v.*

ing evidence should weigh heavily against a witness;[87] that a witness cannot be impeached by the testimony of only two witnesses;[88] that impeaching evidence is generally worthless to destroy the witness' evidence;[89] that a witness may be as effectually impeached by a lack of intelligence as by the positive testimony of other witnesses;[90] that the jury may wholly disregard the testimony of a witness whose reputation for truth and veracity is bad, no matter how truthful his testimony may appear to be,[91] or that refers to one method of impeachment only when the evidence tends to show impeachment by several methods.[92] Where the court undertakes to instruct as to the methods whereby a witness may be impeached, it should instruct as to all methods of impeachment so far as such instructions are authorized by the evidence.[93]

(B) *Statements Out of Court in Conflict With Testimony.* The court may instruct that witnesses may be impeached by evidence that they made statements out of court in conflict with their testimony in the case.[94] It may also charge that evidence as to such statements should be carefully scrutinized, as it is easy to mistake a word or expression of a third person,[95] or that it is often very unreliable and likely to be colored by the feelings of the listeners.[96] Such instructions must be general and not single out a particular witness,[97] and to authorize the instruction the contradictory statements must be as to matters material to the issues,[98] and the court should so charge.[99] The party or witness must be given the benefit of any explanation he makes of the discrepancy.[1] It is error for the court to refuse to instruct in a proper case that if the jury believe that a party

New York, etc., R. Co., 142 Ind. 648, 42 N. E. 456.

87. Paul *v.* State, 100 Ala. 136, 14 So. 634.

88. Schuch *v.* McGuire, 20 Colo. App. 248, 77 Pac. 1090.

89. Warder *v.* Fisher, 48 Wis. 338, 4 N. W. 470.

90. Chicago West Div. R. Co. *v.* Bert, 69 Ill. 388; Hansell *v.* Erickson, 28 Ill. 257.

91. McMurrin *v.* Rigby, 80 Iowa 322, 45 N. W. 877; Higgins *v.* Wren, 79 Minn. 462, 82 N. W. 859.

92. Southern Cotton Oil Co. *v.* Skipper, 125 Ga. 368, 54 S. E. 110; Michigan Pipe Co. *v.* North British, etc., Ins. Co., 97 Mich. 493, 56 N. W. 849.

93. Millen, etc., R. Co. *v.* Allen, 130 Ga. 656, 61 S. E. 541, holding, however, that failure to do so will not require a new trial, where no written request was made to charge as to the method of impeachment omitted.

94. Holston *v.* Southern R. Co., 116 Ga. 656, 43 S. E. 29; Atlanta, etc., R. Co. *v.* Hudson, 2 Ga. App. 352, 58 S. E. 500; Treschman *v.* Treschman, 28 Ind. App. 206, 61 N. E. 961. And see Aspy *v.* Botkins, 160 Ind. 170, 66 N. E. 462.

In an action for personal injuries against a street railway company, an instruction on behalf of plaintiff is a proper one, which is to the effect that if the jury should find discrepancies between a statement made by plaintiff at the time of the accident and her testimony at the trial, and they should find that when she made the statement she was suffering from shock and pain, they will consider what effect the shock and pain may have had on her ability to correctly ascribe the true cause of the accident at the time of making it. Columbia R. Co. *v.* Cruit, 20 App. Cas. (D. C.) 521.

"Successfully impeached."—Where the only basis for an instruction on the impeachment of witnesses was in the alleged fact that witnesses who testified for defendant were contradicted by those who testified against it, and that one of defendant's witnesses had made statements regarded by defendant as inconsistent with his sworn testimony, it was improper to charge that, if any witness had been "successfully impeached," or had wilfully sworn falsely to any material matter, the jury, as a matter of law, might disregard his or their entire testimony except in so far as it had been corroborated, etc., without further defining the words "successfully impeached." Chicago City R. Co. *v.* Ryan, 225 Ill. 287, 80 N. E. 116.

95. Hart *v.* New Haven, 130 Mich. 181, 89 N. W. 677.

96. Thorp *v.* Brookfield, 36 Conn. 320.

97. Matthews *v.* Granger, 196 Ill. 164, 63 N. E. 658 [*affirming* 96 Ill. App. 536].

When not reversible error.— Where plaintiff and his wife gave testimony contradictory to their testimony at a former trial, and the only other witness at the second trial who testified at the first trial admitted the correctness of his former testimony, and gave no testimony contrary thereto, there was no reversible error in an instruction that, in determining the weight to be given to the testimony of plaintiff and his wife, the jury might consider the testimony given by them at the former trial, because singling out particular evidence. Mahoney *v.* Dixon, 34 Mont. 454, 87 Pac. 452.

98. Matthews *v.* Granger, 196 Ill. 164, 63 N. E. 658 [*affirming* 96 Ill. App. 536].

99. Holston *v.* Southern R. Co., 116 Ga. 656, 43 S. E. 29.

1. Louisville, etc., R. Co. *v.* Hurt, 101 Ala. 34, 13 So. 130; Marx *v.* Leinkauff, 93 Ala. 453, 9 So. 818.

as made a statement out of court in material conflict with his testimony, they ıay consider it in determining what credit to give to his testimony.[2]

(VIII) *FALSITY OF TESTIMONY — FALSUS IN UNO*[3] — (A) *Power or Duty) Instruct Regarding Maxim.* Instructions in relation to the maxim *falsus in uno ılsus in omnibus* should only be given when warranted by the evidence.[4] In ther words, instructions on the maxim should be given only where the credi- ility of some witness is attacked, or his own testimony is contradictory and onflicting, or where he is an interested party and is contradicted by a number f disinterested witnesses,[5] or where the evidence is of such a character that it nust in the nature of things either be true or knowingly false,[6] and mere conflict n the testimony will not warrant the instruction.[7] There is a conflict of authority ıs to whether, under any circumstances, the court is bound to give an instruction ın the subject, although the facts would render the giving of such instruction ›roper.[8]

(B) *Character and Sufficiency of Instructions Given.* As regards the character ›f the instruction it is very generally held erroneous to charge the jury that they hould or must disregard the whole testimony of any witness who has knowingly ›r wilfully sworn falsely as to any material matter,[9] or who has knowingly sworn alsely to any material matter unless his evidence is corroborated.[10] No inflexible

2. Clammer *v.* Eddy, 41 Colo. 235, 92 Pac. '22; Lennon *v.* New York Cent., etc., R. Co., 5 Hun (N. Y.) 578, 20 N. Y. Suppl. 557.

Discrepancy between complaint and evidence.— Where the complaint was not given n evidence, and plaintiff was not asked any uestions in relation to its contents, it was ıeld that the judge properly refused to charge :he jury that the discrepancy between plain- :iff's sworn complaint, and his evidence and :he testimony, might be taken into considera- :ion in considering his credibility. Fash *v.* Third Ave. R. Co., 1 Daly (N. Y.) 148.

3. **In criminal prosecutions** see CRIMINAL LAW, 12 Cyc. 607.

4. White *v.* Maxcy, 64 Mo. 552; Pacific Gold Co. *v.* Skillicorn, 8 N. M. 8, 41 Pac. 533; Pumorlo *v.* Merrill, 125 Wis. 102, 103 N. W. 464. And see James *v.* Mickey, 26 S. C. 270, 2 S. E. 130.

5. Logan *v.* Metropolitan St. R. Co., 183 Mo. 582, 82 S. W. 126; Hartpence *v.* Rogers, 143 Mo. 623, 45 S. W. 650; Flynn *v.* St. Louis Transit Co., 113 Mo. App. 185, 87 S. W. 560; Brazis *v.* St. Louis Transit Co., 102 Mo. App. 224, 76 S. W. 708; Hansberger *v.* Sedalia Electric R., etc., Co., 82 Mo. App. 566; Pumorlo *v.* Merrill, 125 Wis. 102, 103 N. W. 464.

Impeachment need not be direct. Sanders *v.* Illinois Cent. R. Co., 90 Ill. App. 582.

6. Glenn *v.* Augusta R., etc., Co., 121 Ga. 30, 48 S. E. 684.

7. Carter *v.* Chambers, 79 Ala. 223; Reed *v.* Mexico, 101 Mo. App. 155, 76 S. W. 53. *Contra*, Walker *v.* Haggerty, 30 Nebr. 120, 46 N. W. 221. And *compare* Reilly *v.* Third Ave. R. Co., 16 Misc. (N. Y.) 11, 37 N. Y. Suppl. 593.

8. **That refusal to instruct is error** see Conlin *v.* Chicago Great Western R. Co., 139 Ill. App. 555; Gillett *v.* Wimer, 23 Mo. 77; State *v.* Perry, 41 W. Va. 641, 24 S. E. 634.

That the giving or refusing of such instructions lies largely in the discretion of the trial court see White *v.* Maxcy, 64 Mo. 552; Lloyd *v.* Meservey, 129 Mo. App. 636, 108 S. W. 595; Paddock *v.* Somes, 51 Mo. App. 320.

9. *California.*— Thomas *v.* Gates, 126 Cal. 1, 58 Pac. 315.

Illinois.— Blanchard *v.* Pratt, 37 Ill. 243; Beckerman *v.* Tarter, 115 Ill. App. 278; Szymkus *v.* Eureka F. & M. Ins. Co., 114 Ill. App. 401; Ruddock *v.* Belton, 7 Ill. App. 517.

Iowa.— McCrary *v.* Crandall, 1 Iowa 117.

Kansas.— Shellabarger *v.* Napus, 15 Kan. 547 [*overruling* Campbell *v.* State, 3 Kan. 488 and other cases following it].

Kentucky.— Hall *v.* Renfro, 3 Metc. 51; Letton *v.* Young, 2 Metc. 558.

Maine.— Blackington *v.* Sumner, 69 Me. 136; Lewis *v.* Hodgdon, 17 Me. 267.

Minnesota.— Schuek *v.* Hagar, 24 Minn. 339.

Mississippi.— Finley *v.* Hunt, 56 Miss. 221.

New York.— Warren *v.* Haight, 62 Barb. 490 [*disapproving* Dunlop *v.* Patterson, 5 Cow. 243].

Ohio.— Mead *v.* McGraw, 19 Ohio St. 57 [*overruling* Stoffer *v.* State, 15 Ohio St. 47, 86 Am. Dec. 470].

Pennsylvania.— See East Mt. Laffe Coal Co. *v.* Schuyler, 3 Leg. Gaz. 106.

Tennessee.— Frierson *v.* Galbraith, 12 Lea 129.

Contra.— Robertson *v.* Monroe, 7 Ind. App. 470, 33 N. E. 1002.

Reason for rule.— The maxim, *Falsus in uno, falsus in omnibus*, is not a conclusive presumption of law, but only an advisory suggestion to the jury, which warns them to receive such testimony with caution, and warrants them in rejecting it altogether. It puts such testimony upon the same footing as that of an accomplice, which is to be viewed with suspicion, but, if credited by the jury, will support a verdict. Finley *v.* Hunt, 56 Miss. 221.

10. Reynolds *v.* Greenbaum, 80 Ill. 416; Senter *v.* Carr, 15 N. H. 351.

rule of law should be interposed between the witness and the jury commanding the jury to take all, or exclude all, of his testimony.[11] Within the rule stated, an instruction is not objectionable which states that the jury cannot arbitrarily disregard the evidence of any witness, but that if they believe a witness had testified falsely in part, they should disregard that part and consider the remainder of his testimony believed to be true.[12] It is, according to many decisions, proper to instruct that if the jury believe that any witness has wilfully sworn falsely to any material fact, they are at liberty to disregard the entire testimony of such witness, except in so far as it is corroborated by other credible evidence,[13] or so far as the jury believes it to be false,[14] and some of these decisions hold that the omission of the clause relating to corroboration renders the instruction erroneous.[15] According to other decisions, it is proper to instruct the jury that if any witness has wilfully sworn falsely to any material fact, they may disregard the entire testimony of such witness,[16] and it has even been held erroneous to give an instruc-

11. Shellabarger *v.* Nafus, 15 Kan. 547.

12. Russell *v.* Stewart, (Ark. 1906) 94 S. W. 47.

13. *Georgia.*— Port Royal, etc., R. Co. *v.* Griffin, 86 Ga. 172, 12 S. E. 303; Saul *v.* Bucks, 72 Ga. 254. And see Southern R. Co. *v.* Peck, 6 Ga. App. 43, 64 S. E. 308.

Illinois.— United Breweries Co. *v.* O'Donnell, 221 Ill. 334, 77 N. E. 547; Perkins *v.* Knisely, 204 Ill. 275, 68 N. E. 486 [*reversing* 102 Ill. App. 562]; Cicero, etc., R. Co. *v.* Woodruff, 192 Ill. 544, 61 N. E. 461; Chicago City R. Co. *v.* Olis, 192 Ill. 514, 61 N. E. 459 [*affirming* 94 Ill. App. 323]; Johnson *v.* Johnson, 187 Ill. 86, 58 N. E. 237.

Michigan.— O'Rourke *v.* O'Rourke, 43 Mich. 58, 4 N. W. 531.

Montana.— See Cameron *v.* Wentworth, 23 Mont. 70, 57 Pac. 648.

Nebraska.— Walker *v.* Haggerty, 30 Nebr. 120, 46 N. W. 221.

Oklahoma.— Strickler *v.* Gitchel, 14 Okla. 523, 78 Pac. 94.

Utah.— Rio Grande Western R. Co. *v.* Utah Nursery Co., 25 Utah 187, 70 Pac. 859.

Wisconsin.— Richardson *v.* Babcock, 119 Wis. 141, 96 N. W. 554; Patnode *v.* Westenhaver, 114 Wis. 460, 90 N. W. 467; Allan *v.* Murray, 87 Wis. 41, 57 N. W. 979; Mercer *v.* Wright, 3 Wis. 645. *Contra*, Little *v.* Superior Rapid Transit R. Co., 88 Wis. 402, 60 N. W. 705.

See 46 Cent. Dig. tit. "Trial," §§ 416, 491.

The omission of the word "credible" from the instruction renders it erroneous (Trego *v.* Roosevelt Min. Co., 136 Wis. 315, 117 N. W. 855), and a requested instruction defective in this regard is properly refused (Blankavag *v.* Badger Box, etc., Co., 136 Wis. 380, 117 N. W. 852).

An instruction that a witness false in one part of his testimony is to be distrusted in others is not reversible error because of refusal to instruct more in detail. O'Rourke *v.* Vennekohl, 104 Cal. 254, 37 Pac. 930.

An instruction that the jury cannot reject the testimony of any witness unless they believe he wilfully swore falsely is erroneous as it states a doctrine that is incorrect as to interested witnesses. Biegelson *v.* Kahn, 33 Misc. (N. Y.) 610, 67 N. Y. Suppl. 1112.

14. St. Louis, etc., R. Co. *v.* Rawley, 106 Ill. App. 550.

15. Gerardo *v.* Brush, 120 Mich. 405, 79 N. W. 646; Bratt *v.* Swift, 99 Wis. 579, 75 N. W. 411.

16. *Alabama.*— Kress *v.* Lawrence, 158 Ala. 652, 47 So. 574; Alabama Steel, etc., Co. *v.* Griffin, 149 Ala. 423, 42 So. 1034; Williamson Iron Co. *v.* McQueen, 144 Ala. 265, 40 So. 306. And see Sanders *v.* Davis, 153 Ala. 375, 44 So. 979; Alabama, etc., R. Co. *v.* Frazier, 93 Ala. 45, 9 So. 303, 30 Am. St. Rep. 28.

Colorado.— Denver, etc., R. Co. *v.* Warring, 37 Colo. 122, 86 Pac. 305.

Connecticut.— Gorman *v.* Fitts, 80 Conn. 531, 69 Atl. 357. And see Shupack *v.* Gordon, 79 Conn. 298, 64 Atl. 740, holding that an instruction that, should the jury come to the conclusion that any witness had wilfully sworn falsely in regard to any fact, and that his testimony as to other material facts was "worthy of no credit whatever," they might disregard it all, was not open to the objection that it did not properly apply the maxim "*Falsus in uno, falsus in omnibus.*"

Missouri.— Kirchner *v.* Collins, 152 Mo. 394, 53 S. W. 1081; Brown *v.* Hannibal, etc., R. Co., 66 Mo. 588; Fields *v.* Missouri Pac. R. Co., 113 Mo. App. 642, 88 S. W. 134; Eikenberry *v.* St. Louis Transit Co., 103 Mo. App. 442, 80 S. W. 360; Walker *v.* St. Louis, etc., R. Co., 106 Mo. App. 321, 80 S. W. 282; Hansberger *v.* Sedalia Electric R., etc., Co., 82 Mo. App. 566.

Nebraska.—Atkins *v.* Gladwish, 27 Nebr. 841, 44 N. W. 37.

New York.— Roth *v.* Wells, 29 N. Y. 471; Wilson *v.* Coulter, 29 N. Y. App. Div. 85, 51 N. Y. Suppl. 804; Barrelle *v.* Pennsylvania R. Co., 4 N. Y. Suppl. 127 [*affirmed* in 121 N. Y. 697, 24 N. E. 1099].

Ohio.— Dye *v.* Scott, 35 Ohio St. 194, 35 Am. Rep. 604; Mead *v.* McGraw, 19 Ohio St. 55.

Tennessee.— See Frierson *v.* Galbraith, 12 Lea 129.

Texas.— Bowles *v.* Glasgow, 2 Tex. Unrep. Cas. 714.

West Virginia.— Cobb *v.* Dunlevie, 63 W. Va. 398, 60 S. E. 384.

See 46 Cent. Dig. tit. "Trial," §§ 416, 491.

tion containing the clause relating to corroboration,[17] on the theory that the ju are at liberty to disregard the whole of the witness' evidence as well as tho parts which are corroborated as those which are not corroborated.[18] Corrobor tion may be by a single witness,[19] or any credible evidence,[20] and it is therefo erroneous to instruct that such testimony may be disregarded unless it is co roborated by a plurality of witnesses.[21] It is error to instruct that the jury ma disregard uncorroborated testimony where it is "probable" that the witness h intentionally testified falsely.[22] And any instruction on the subject which omi the qualification that the testimony must be believed to be wilfully or knowingl false,[23] or the element of materiality of the facts testified to,[24] unless all of th

Contra.— Hall *v.* Renfro, 3 Metc. (Ky.) 51.

Under special statutory provisions.—An instruction that if any witness had wilfully testified falsely in regard to any material fact the jury was at liberty to "disregard and discard his entire testimony" was not objectionable because of the use of the words "disregard" and "discard" instead of "distrust"; Code Civ. Proc. § 2061, subd. 3, providing that when a witness is false in one part of his testimony he is to be "distrusted" in the others. Whitaker *v.* California Door Co., 7 Cal. App. 757, 95 Pac. 910.

Where testimony is palpably false, the court may give such instruction on its own motion. Millar *v.* Madison Car Co., 130 Mo. 517, 31 S. W. 574.

17. Brown *v.* Hannibal, etc., R. Co., 66 Mo. 588.

18. Brown *v.* Hannibal, etc., R. Co., 66 Mo. 588.

19. Weddeman *v.* Lehman, 111 Ill. App. 231.

20. F. Dohmen Co. *v.* Niagara F. Ins. Co., 96 Wis. 38, 71 N. W. 69. Corroboration should not be confined to testimony, but when there is no corroborating evidence outside of testimony it is not error to so confine it. Lyts *v.* Keevey, 5 Wash. 606, 32 Pac. 534.

21. Himrod Coal Co. *v.* Clingan, 114 Ill. App. 568; Junction Min. Co. *v.* Goodwin, 109 Ill. App. 144.

22. Cameron *v.* Wentworth, 23 Mont. 70, 57 Pac. 648.

23. *Colorado.*— Ward *v.* Ward, 25 Colo. 33, 52 Pac. 1105; Last Chance Min., etc., Co. *v.* Ames, 23 Colo. 167, 47 Pac. 382.

Georgia.— Central R., etc., Co. *v.* Phinazee, 93 Ga. 488, 21 S. E. 66.

Illinois.— Godair *v.* Ham Nat. Bank, 225 Ill. 572, 80 N. E. 407, 116 Am. St. Rep. 172; Johnson *v.* Farrell, 215 Ill. 542, 74 N. E. 760; Perkins *v.* Knisely, 204 Ill. 275, 68 N. E. 486; Overtoom *v.* Chicago, etc., R. Co., 181 Ill. 323, 54 N. E. 898; McClure *v.* Williams, 65 Ill. 390; Pope *v.* Dodson, 58 Ill. 360; Beck *v.* People, 115 Ill. App. 19; Himrod Coal Co. *v.* Clingan, 114 Ill. App. 568.

Indiana.— Pittsburgh, etc., R. Co. *v.* Haislup, 39 Ind. App. 394, 79 N. E. 1035.

Kansas.— Barney *v.* Dudley, 40 Kan. 247, 19 Pac. 550.

Michigan.— Gerardo *v.* Brush, 120 Mich. 405, 79 N. W. 646; Hillman *v.* Schwenk, 68 Mich. 293, 36 N. W. 77. And see Heddle *v.* City Electric R. Co., 112 Mich. 547, 70 N. W. 1096.

Mississippi.— Sardis, etc., R. Co. *v.* M Coy, 85 Miss. 391, 37 So. 706.

Missouri.— Iron Mountain Bank *v.* Mu dock, 62 Mo. 70; Bordeaux *v.* Hartman Fu niture, etc., Co., 115 Mo. App. 556, 91 S. V 1020; Jackson *v.* Powell, 110 Mo. App. 24 84 S. W. 1132; Smith *v.* Wabash, etc., R. C 19 Mo. App. 120; Fath *v.* Hake, 16 Mo. Ap 537; Evans *v.* St. Louis, etc., R. Co., 16 M App. 522.

New Mexico.— Pacific Gold Co. *v.* Skill corn, 8 N. M. 8, 41 Pac. 533.

New York.— Tucker *v.* Dudley, 127 N. Y App. Div. 403, 111 N. Y. Suppl. 700; Lac *v.* Weber, 61 Misc. 91, 113 N. Y. Suppl. 10 Jennings *v.* Kosmak, 20 Misc. 300, 45 N. Y Suppl. 802. *Compare* Lindheim *v.* Duys, Misc. 16, 31 N. Y. Suppl. 870, holding tha the omission of the word "wilfully" from a instruction given will not be ground for r versal where no request to supply the omi sion was made.

North Dakota.— McPherrin *v.* Jones, N. D. 261, 65 N. W. 685.

Wisconsin.— Steber *v.* Chicago, etc., Co., 139 Wis. 10, 120 N. W. 502; Gehl Milwaukee Produce Co., 116 Wis. 263, N. W. 26; Cahn *v.* Ladd, 94 Wis. 134, N. W. 652.

United States.— Singer Mfg. Co. *v.* Crame 109 Fed. 652, 48 C. C. A. 588.

Harmless error.—An instruction to th jury that they might disregard the eviden of any witness, if they believe that the wi ness had sworn falsely, without also i structing them that they must also belie from the evidence that the witness h sworn falsely, is not ground for revers where they were repeatedly instructed th all their conclusions of fact must be arriv at from a preponderance of the evidenc Chicago, etc., R. Co. *v.* Keely, 103 Ill. Ap 205. And see Beck *v.* People, 115 Ill. Ap 19.

Instruction on this subject held sufficie —An instruction that, if the jury believe th any witness has "knowingly" testifi falsely, they may disregard his entire tes mony, was not subject to the objection th it failed to use the word "wilfully," sin such words are of equivalent meanin Peterson *v.* Pusey, 237 Ill. 204, 86 N. 692.

24. *Illinois.*— Johnson *v.* Farrell, 215 I 542, 74 N. E. 760; Chicago City R. Co. Allen, 169 Ill. 287, 48 N. E. 414; Clark O'Gara Coal Co., 140 Ill. App. 207; Hugh

alleged false testimony given by the witness is material,[25] is erroneous. And an instruction that the jury are the judges of the credibility of the witnesses, and of the weight to be given their statements, and if the jury believe, from all they have "seen and heard at the trial," that a witness has sworn falsely, they may disregard entirely his testimony, while too broad, will not be held to have misled the jury to suppose they could go outside the evidence and the demeanor of the witnesses.[26] The instruction must be general and extend to all the witnesses,[27] whether testifying in person at the trial or by deposition.[28] A proposition of law laying down a rule of evidence should be given in general terms, and not stated as being applicable to one certain witness or one certain class of witnesses.[29] So the instruction should not specify the particulars as to which the false swearing is claimed,[30] or be limited to cases where the swearing was palpably false,[31] and need not include in express terms witnesses who wilfully exaggerate, as there is no difference between wilful exaggeration and wilful false swearing.[32] If the court in its general charge gives a sufficient instruction on the subject, it need not give a further instruction thereon requested by one of the parties.[33]

(IX) *EXPERT WITNESS.*[34] It is proper to instruct the jury that they are the judges of the credit and value to be given the testimony of experts;[35] that where the evidence is conflicting the jury are not bound to accept their statements or conclusions, but should determine the case upon the whole evidence;[36] that where particular elements enter into the question of damages, the jury may disregard the testimony of experts who have admittedly not considered such elements

v. Hughes, 133 Ill. App. 654; Bickerman *v.* Tarter, 115 Ill. App. 278; Himrod Coal Co. *v.* Clingan, 114 Ill. App. 568; Weddemann *v.* Lehman, 111 Ill. App. 231; West Chicago St. R. Co. *v.* Raftery, 85 Ill. App. 319.

Indiana.— Lemmon *v.* Moore, 94 Ind. 40.

Michigan.— Gerardo *v.* Brush, 120 Mich. 405, 79 N. W. 646.

Missouri.— Lloyd *v.* Meservey, 129 Mo. App. 636, 108 S. W. 595; White *v.* Lowenberg, 55 Mo. App. 69; Hart *v.* Hopson, 52 Mo. App. 177.

Wisconsin.— Steber *v.* Chicago, etc., R. Co., 139 Wis. 10, 120 N. W. 502.

United States.— Singer Mfg. Co. *v.* Cramer, 109 Fed. 652, 48 C. C. A. 588 [*reversed* on other grounds in 192 U. S. 265, 24 S. Ct. 291, 48 L. ed. 437].

Words of equivalent import.— Instruction is not erroneous for failure to use word "material," where words employed plainly convey the same meaning. Fargo First Nat. Bank *v.* Minneapolis, etc., El. Co., 11 N. D. 280, 91 N. W. 436.

25. Alabama Great Southern R. Co. *v.* Frazier, 93 Ala. 45, 9 So. 303, 30 Am. St. Rep. 28; People *v.* Ah Sing, 95 Cal. 654, 30 Pac. 796; Butz *v.* Schwartz, 135 Ill. 180, 25 N. E. 1007.

26. Eikenberry *v.* St. Louis Transit Co., 103 Mo. App. 442, 80 S. W. 360.

27. *California.*— Thomas *v.* Gates, 126 Cal. 1, 58 Pac. 315 [*explaining* O'Rourke *v.* Vennekohl, 104 Cal. 252, 37 Pac. 930].

Georgia.— Black *v.* Thornton, 30 Ga. 361.

Illinois.— Phenix Ins. Co. *v.* La Pointe, 118 Ill. 384, 8 N. E. 353; North Chicago St. R. Co. *v.* Dudgeon, 83 Ill. App. 528 [*affirmed* in 184 Ill. 477, 56 N. E. 796]; Chicago, etc., R. Co. *v.* Casazza, 83 Ill. App. 421; Arnold *v.* Pucher, 83 Ill. App. 182; Dixon *v.* Scott, 81 Ill. App. 368; Flaherty *v.* McCormick, 7 Ill. App. 411.

Minnesota.— Goodhue Farmers' Warehouse Co. *v.* Davis, 81 Minn. 210, 83 N. W. 531; Harriett *v.* Holmes, 77 Minn. 245, 79 N. W. 1003.

Montana.— Wastl *v.* Montana Union R. Co., 17 Mont. 213, 42 Pac. 772.

Wisconsin.— Kavanaugh *v.* Wausau, 120 Wis. 611, 98 N. W. 550.

Contra.— Bunce *v.* McMahon, 6 Wyo. 24, 42 Pac. 23.

28. Hansberger *v.* Sedalia Electric R., etc., Co., 82 Mo. App. 566.

29. Thomas *v.* Gates, 126 Cal. 1, 58 Pac. 315.

30. Whitaker *v.* Engle, 111 Mich. 205, 69 N. W. 493; Fraser *v.* Haggerty, 86 Mich. 521, 49 N. W. 616.

31. Cameron *v.* Wentworth, 23 Mont. 70, 57 Pac. 648, in which it was said that the power of the jury would thereby be circumscribed by limiting their right to discard the testimony of a witness to those circumstances only where it is palpable the witness has testified falsely and is not corroborated by other evidence.

32. Grand Rapids, etc., R. Co. *v.* Martin, 41 Mich. 667, 3 N. W. 173.

33. Burger *v.* Omaha, etc., R. Co., 139 Iowa 645, 117 N. W. 35, 130 Am. St. Rep. 343.

34. In criminal prosecutions see CRIMINAL LAW, 12 Cyc. 605, 606.

35. Jameson *v.* Weld, 93 Me. 345, 45 Atl. 299.

36. Sheldon *v.* Wright, 80 Vt. 298, 67 Atl. 807, holding that such instruction is not objectionable as leaving the jury to determine the matter on their own judgment in disregard of such evidence as they saw fit.

in arriving at their conclusion, in so far as such testimony is not based on such elements;[37] that, as to certain questions the testimony of experts is always admissible, that it may be given on facts as proved by other witnesses, and should not be arbitrarily disregarded,[38] and that in considering their testimony they should take into consideration their professional standing and experience.[39] But an instruction that the jury should consider an expert's skill, and value his testimony accordingly, is erroneous.[40] So it is error to instruct that if "the statements of fact, which are accepted as true for the purpose of answering the hypothetical questions, are substantially correct, then you will give to said testimony such weight as you deem it entitled to,"[41] or to give an instruction which criticizes expert testimony,[42] or casts discredit upon it;[43] which tells the jury that it may be rejected merely because it is expert testimony,[44] that expert evidence if in conflict with the positive testimony of credible witnesses must fail,[45] or that the testimony of expert witnesses does not establish a fact as to which they had testified;[46] or which tells the jury they may consider what interest, if any, such witnesses have in the suit.[47] It is error to instruct as to the weight to be given the testimony of experts or other persons who testify as to their opinion,[48] as to instruct that in regard to testamentary capacity the opinion of the testator's neighbors, if persons of good common sense, is worth more than the opinion of medical witnesses,[49] or more than the testimony of other witnesses whose opportunities of observation had been more limited;[50] that the testimony of experts on such issues is usually of very little value;[51] that the testimony of experts who knew and had treated deceased was entitled to greater weight than that of experts who founded their opinions on hypothetical questions;[52] that the opinion of expert witnesses, if opposed to the physical facts, must give way to such facts;[53] that the opinion of persons not experts on insanity is of little weight;[54] that the opinions of a certain class of witnesses are more trustworthy than those of another

37. Prather *v.* Chicago Southern R. Co., 221 Ill. 190, 77 N. E. 430.

38. Pritchett *v.* Moore, 125 Ga. 406, 54 S. E. 131.

39. Morrow *v.* National Masonic Acc. Assoc., 125 Iowa 633, 101 N. W. 468; Cosgrove *v.* Burton, 104 Mo. App. 698, 78 S. W. 667. An instruction that experts who examined plaintiff and treated him for a long time and had opportunities for knowing his condition for a longer period of time might be entitled to greater weight than the opinion of experts who based their opinions on hypothetical questions or less extensive observations or examinations, while sometimes considered justifiable is not commendable. Hefacre *v.* Monticello, 128 Iowa 239, 103 N. W. 488.

40. Blough *v.* Parry, 144 Ind. 463, 40 N. E. 70, 43 N. E. 560.

41. Vannest *v.* Murphy, 135 Iowa 123, 112 N. W. 236, holding that such instruction was objectionable in allowing the jury to say what facts were material in securing the opinion of the expect.

42. Long *v.* Travellers' Ins. Co., 113 Iowa 259, 85 N. W. 24.

43. Brush *v.* Smith, 111 Iowa 217, 82 N. W. 467; Gustafson *v.* Seattle Traction Co., 28 Wash. 227, 68 Pac. 721.

44. St. Louis *v.* Kansas City, 110 Mo. App. 653, 85 S. W. 630; Rosentreter *v.* Brady, 63 Mo. App. 398.

45. Ball *v.* Skinner, 134 Iowa 298, 111 N. W. 1022.

46. Louisville, etc., Traction Co. *v.* Worrell, 44 Ind. App. 480, 86 N. E. 78.

47. Duvall *v.* Kenton, 127 Ind. 178, 26 N. E. 88.

48. *Kansas.*— Kansas City, etc., R. Co. *v.* Ryan, 49 Kan. 1, 30 Pac. 108.

Michigan.— Rivard *v.* Rivard, 109 Mich. 98, 66 N. W. 681, 63 Am. St. Rep. 566; Stone *v.* Chicago, etc., R. Co., 66 Mich. 76, 33 N. W. 24.

Mississippi.— Louisville, etc., R. Co. *v.* Whitehead, 71 Miss. 451, 15 So. 890, 42 Am. St. Rep. 472.

Missouri.—Hampton *v.* Massey, 53 Mo. App. 501; Kansas City, etc., R. Co. *v.* Dawley, 50 Mo. App. 480.

New York.— Corrigan *v.* Funk, 109 N. Y. App. Div. 846, 96 N. Y. Suppl. 910.

Pennsylvania.— Shaver *v.* McCarthy, 110 Pa. St. 339, 5 Atl. 614.

See 46 Cent. Dig. tit. "Trial," § 449.

49. Taylor *v.* Cox, 153 Ill. 220, 38 N. E. 656.

50. Durham *v.* Smith, 120 Ind. 463, 22 N. E. 333; Cline *v.* Lindsey, 110 Ind. 337, 11 N. E. 441.

51. Eggers *v.* Eggers, 57 Ind. 461.

52. Bever *v.* Spangler, 93 Iowa 576, 61 N. W. 1072; Reichenbach *v.* Ruddach, 127 Pa. St. 564, 18 Atl. 432. *Contra*, Kirkwood *v.* Gordon, 7 Rich. (S. C.) 474, 62 Am. Dec. 418.

53. Starett *v.* Chesapeake, etc., R. Co., 110 S. W. 282, 33 Ky. L. Rep. 309.

54. Burney *v.* Torrey, 100 Ala. 157, 14 So. 685, 46 Am. St. Rep. 33.

class;[55] that expert testimony should be received and weighed with caution;[56] or that the testimony of an expert as to value must be accepted as correct where it is the only direct evidence on that point.[57] An instruction that experts are not infallible and that the jury must judge for themselves as to the value of their opinion is not objectionable,[58] and the jury may be instructed to consider the facts and circumstances upon which the opinion of the witness is based as well as the opinion itself.[59] So it has been held that an instruction that, while expert testimony on the genuineness of a signature should be given such weight as the jury find it entitled to, yet testimony of that character is of a low order, and ought not to overthrow the positive and direct evidence of credible witnesses, who testify from their personal knowledge, and is most useful in the case of conflict between witnesses as corroborating testimony, is proper.[60] Error cannot be assigned for failure to instruct on the subject of expert testimony in the absence of a request for such instruction,[61] or to charge fully on the subject in the absence of a request therefor.[62]

4. Conflicting Evidence.[63] Instructions that contradictory testimony should be considered in the light of surrounding circumstances, and credence given where warranted,[64] or, that if the jury cannot reconcile conflicting testimony, they must determine what is true and what is false by the application of the tests given by the court and all other tests within their skill and power,[65] are proper. Where contradictions or discrepancies exist in the testimony, the jury should reconcile them if possible,[66] and while there are some decisions which maintain the contrary doctrine,[67] the weight of authority is that the court may properly charge that, if possible, the jury should reconcile [68] or harmonize [69] conflicting evidence, rather than to reject the testimony of some of the witnesses as wilfully false; and it has been held error to instruct them not to attempt so to do.[70] It is error, however, to instruct the jury that they are not at liberty to reject the testimony of any witness because his statements are in conflict with another witness, since it invades the province of the jury.[71] And when there is an apparent conflict

55. Smith *v.* Chicago, etc., R. Co., 105 Ill. 511; Fulwider *v.* Ingels, 87 Ind. 414.

56. Madden *v.* Saylor Coal Co., 133 Iowa 699, 111 N. W. 57; Atchison, etc., R. Co. *v.* Thul, 32 Kan. 255, 4 Pac. 352, 49 Am. Rep. 484; Weston *v.* Brown, 30 Nebr. 609, 46 N. W. 826.

57. Holloway *v.* Cotten, 33 Ala. 529.

58. Pratt *v.* Rawson, 40 Vt. 183.

59. Conway *v.* Murphy, 135 Iowa 171, 112 N. W. 764.

60. Ayrhart *v.* Wilhelmy, 135 Iowa 290, 112 N. W. 782.

61. Godwin *v.* Atlantic Coast Line R. Co., 120 Ga. 747, 48 S. E. 139.

62. Leitensdorfer *v.* King, 7 Colo. 436, 4 Pac. 37; Bertody *v.* Ison, 69 Ga. 317; Atlanta *v.* Champe, 66 Ga. 659.

63. **In criminal prosecutions** see Criminal Law, 12 Cyc. 599.

64. Taylor *v.* Kelly, 31 Ala. 59, 68 Am. Dec. 150; Chicago, etc., R. Co. *v.* Rains, 203 Ill. 417, 67 N. E. 840; North Chicago City R. Co. *v.* Gastka, 27 Ill. App. 518 [*affirmed* in 128 Ill. 613, 21 N. E. 522, 4 L. R. A. 481]; Lake Erie, etc., R. Co. *v.* Parker, 94 Ind. 91; Sickle *v.* Wolf, 91 Wis. 396, 64 N. W. 1028.

65. Norris *v.* Cargill, 57 Wis. 251, 15 N. W. 148.

66. Indianapolis St. R. Co. *v.* Johnson, 163 Ind. 518, 72 N. E. 571; Hale *v.* Matthews, 118 Ind. 527, 21 N. E. 43; Huntingburgh *v.* First, 22 Ind. App. 66, 53 N. E. 246; Moore *v.* Kendall, 2 Pinn. (Wis.) 99, 1 Chandl. 33, 52 Am. Dec. 145.

67. Hicks *v.* Critcher, 61 N. C. 353; Houston, etc., R. Co. *v.* Bell, 97 Tex. 71, 75 S. W. 484 [*affirming* (Civ. App. 1903) 73 S. W. 56]; Houston, etc., R. Co. *v.* Runnels, 92 Tex. 305, 47 S. W. 971; Western Union Tel. Co. *v.* Stubbs, 43 Tex. Civ. App. 132, 94 S. W. 1083; Williamson *v.* Smith, (Tex. Civ. App. 1904) 79 S. W. 51; Houston, etc., R. Co. *v.* Richards, 20 Tex. Civ. App. 203, 49 S. W. 687.

68. *Alabama.*— Steen *v.* Sanders, 116 Ala. 155, 22 So. 498.

Georgia.— Rogers *v.* King, 12 Ga. 229.

Nebraska.— H. Hirschberg Optical Co. *v.* Michaelson, 1 Nebr. (Unoff.) 137, 95 N. W. 461.

Pennsylvania.— Walters *v.* Philadelphia Traction Co., 161 Pa. St. 36, 28 Atl. 941.

Texas.— Liverpool, etc., Ins. Co. *v.* Ende, 65 Tex. 118; Howe *v.* O'Brien, (Civ. App. 1898) 45 S. W. 813.

United States.— Parulo *v.* Philadelphia, etc., R. Co., 145 Fed. 664.

69. Holdridge *v.* Lee, 3 S. D. 134, 52 N. W. 265.

70. Beers *v.* Metropolitan St. R. Co., 88 N. Y. App. Div. 9, 84 N. Y. Suppl. 785; Moore *v.* Kendall, 2 Pinn. (Wis.) 99, 1 Chandl. 33, 52 Am. Dec. 145.

71. F. Dohmen Co. *v.* Niagara F. Ins. Co., 96 Wis. 38, 71 N. W. 69; Isly *v.* Illinois Cent. R. Co., 88 Wis. 453, 60 N. W. 794.

between the testimony of one witness and two others, it is error to charge that the jury are to consider from the evidence whether the two are not mistaken, thus discriminating against the two, especially when the testimony is of the same character and alike impeached on the record.[72]

5. Circumstantial Evidence.[73] The court may properly define circumstantial evidence as proof of such facts as will naturally lead the mind to the conclusion contended for and will exclude any other reasonable inference.[74] One relying on circumstantial evidence is entitled to a charge, that it may be considered,[75] and a statement as to its force and effect,[76] provided a proper request for an instruction on the subject is made, but not otherwise.[77] The court may instruct that circumstantial evidence when strong and convincing is often the most satisfactory from which to draw conclusions as to the existence or non-existence of a disputed fact.[78] Instructions should not be given which have a tendency to minimize the effect of circumstantial evidence, and prevent the jury from giving it proper consideration.[79] And the court should not instruct that circumstantial evidence is as good as direct evidence,[80] or state that there is no circumstantial evidence on a point when there is,[81] or characterize direct evidence as circumstantial evidence and instruct the jury so to consider it,[82] or say that slight circumstances will carry conviction of the existence of fraud.[83] And a statement that plaintiff had sought to prove his case by circumstantial evidence is reversible error where it is sustained by direct and positive evidence.[84]

6. Positive and Negative Testimony.[85] As is shown in another part of this treatise, courts are prohibited by constitutional or statutory provisions in most jurisdictions from charging upon the weight of the evidence, and in most of the jurisdictions where this rule obtains, it is well settled that the court should not instruct the jury in respect of the relative value of positive and negative testimony, the view being taken that instructions of this character are on the weight of the evidence,[86] and an unnecessary and improper interference with the province

72 Black *v.* Thornton, 30 Ga. 361.

73 **In criminal prosecutions** see Criminal Law, 12 Cyc. 633 *et seq.*

74 Wroth *v.* Norton, 33 Tex. 192.

75 Jones *v.* Hess, (Tex. Civ. App. 1898) 48 S. W. 46. And see Brown *v.* Rice, 76 Va. 629, holding that an instruction that fraud must be clearly proved should inform the jury that they may deduce fraud from the facts and circumstances proved.

76 Culbertson *v.* Hill, 87 Mo. 553; U. S. Express Co. *v.* Jenkins, 64 Wis. 542, 25 N. W. 549. But although there is some circumstantial evidence in the case, the instruction may be refused if the case does not rest on it. Roberts *v.* Port Blakely Mill Co., 30 Wash. 25, 70 Pac. 111.

77 Barnett *v.* Farmers' Mut. F. Ins. Co., 115 Mich. 247, 73 N. W. 372.

78 Wheelan *v.* Chicago, etc., R. Co., 85 Iowa 167, 52 N. W. 119. And see Union Cent. L. Ins. Co. *v.* Skipper, 115 Fed. 69, 52 C. C. A. 663, holding that an instruction that circumstantial evidence "if complete" may be as conclusive and convincing, as direct or positive evidence of eye-witnesses is not so far erroneous or misleading as against the party relying on such evidence as to warrant a reversal of the judgment.

79 Glass *v.* Cook, 30 Ga. 133; Rea *v.* Missouri, 17 Wall. (U. S.) 532, 21 L. ed. 707.

80 Armstrong *v.* Penn, 105 Ga. 229, 31 S. E. 158; Hudson *v.* Best, 104 Ga. 131, 30 S. E. 688, the comparative weight of circumstantial and direct evidence is for the jury.

81 **For an instruction held not faulty in this respect** see Lutton *v.* Vernon, 62 Conn. 1, 23 Atl. 1020, 27 Atl. 589.

82 Bryce *v.* Chicago, etc., R. Co., 129 Iowa 342, 105 N. W. 497.

83 Higginbotham *v.* Campbell, 85 Ga. 638, 11 S. E. 1027, holding that the more correct expression is that slight circumstances may be sufficient to carry conviction of its existence.

84 Sieber *v.* Pettit, 200 Pa. St. 58, 49 Atl. 763.

85 **In criminal prosecutions** see Criminal Law, 12 Cyc. 632.

86 *Alabama.*— Louisville, etc., R. Co. *v.* York, 128 Ala. 305, 30 So. 676.

Arkansas.— Sibley *v.* Ratliffe, 50 Ark. 477, 8 S. W. 686.

Illinois.— Louisville, etc., R. Co. *v.* Shires, 108 Ill. 617; Rockwood *v.* Poundstone, 38 Ill. 199; Preston *v.* Moline Wagon Co., 44 Ill. App. 342. And see Chicago, etc., R. Co. *v.* Dunleavy, 27 Ill. App. 438 [*affirmed* in 129 Ill. 132, 22 N. E. 15]. *Compare* Atchison, etc., R. Co. *v.* Feehan, 149 Ill. 202, 36 N. E. 1036, which contains an intimation that it would not be error to give an instruction on the subject if there was evidence on which to base it.

Indiana.— Muncie Pulp Co. *v.* Keesling, 166 Ind. 479, 76 N. E. 1002; Winklebleck *v.* Winklebleck, 160 Ind. 570, 67 N. E. 451;

of the jury.[87] It has been very properly said that within the limits of their proper range, the jury must be left to decide each for himself what witness or class of witnesses is entitled to the greatest consideration.[88] There are, however, some jurisdictions where the rule also charging on the weight of the evidence prevails in which instructions of this character are held proper,[89] although on what theory, it is not easy to understand. In the federal courts and also in other jurisdictions where it is not improper to charge on the weight of the evidence, instructions as to the relative force of positive and negative testimony may be given.[90] The giving of such instructions is largely within the discretion of the court even where there is evidence on which they may be based,[91] and of course should not be given when there is no evidence to which they are applicable,[92] as for instance when the testimony on both sides is positive.[93] And it would seem that the refusal of such instructions is in no case reversible error,[94] although there is author-

Jones *v.* Casler, 139 Ind. 382, 38 N. E. 812, 47 Am. St. Rep. 274; Ohio, etc., R. Co. *v.* Buck, 130 Ind. 300, 30 N. E. 19; Louisville, etc., R. Co. *v.* Stommel, 126 Ind. 35, 25 N. E. 863.

Mississippi.— Dunlap *v.* Hearn, 37 Miss. 471.

Missouri.— Chubbuck *v.* Hannibal, etc., R. Co., 77 Mo. 591; Milligan *v.* Chicago, etc., R. Co., 79 Mo. App. 393; State *v.* Kansas City, etc., R. Co., 70 Mo. App. 634.

Texas.— Sparks *v.* Dawson, 47 Tex. 138.

See 46 Cent. Dig. tit. "Trial," §§ 447, 545.

87. Sparks *v.* Dawson, 47 Tex. 138. And see cases cited in preceding note.

88 Winklebleck *v.* Winklebleck, 160 Ind. 570, 67 N. E. 451.

89. *Georgia.*— Central of Georgia R. Co. *v.* Orr, 128 Ga. 76, 57 S. E. 89; Southern R. Co. *v.* O'Bryan, 119 Ga. 147, 45 S. E. 1000; Southern R. Co. *v.* O'Bryan, 115 Ga. 659, 42 S. E. 42; Atlanta, etc., R. Co. *v.* Newton, 85 Ga. 517, 11 S. E. 776.

Idaho.—Idaho Mercantile Co. *v.* Kalanquin, 8 Ida. 101, 66 Pac. 933.

Iowa.— *In re* Wharton, 132 Iowa 714, 109 N. W. 492.

Kansas.— St. Louis, etc., R. Co. *v.* Brock, 69 Kan. 448, 77 Pac. 86; Missouri Pac. R. Co. *v.* Moffatt, 56 Kan. 667, 44 Pac. 607.

North Carolina.— Henderson *v.* Crouse, 52 N. C. 623.

90. Urias *v.* Pennsylvania R. Co., 152 Pa. St. 326, 25 Atl. 566; Olsen *v.* Oregon Short Line, etc., R. Co., 9 Utah 129, 33 Pac. 623; Anderson *v.* Horlick's Malted Milk Co., 137 Wis. 569, 119 N. W. 342; Hinton *v.* Cream City R. Co., 65 Wis. 323, 27 N. W. 147; Pennoyer *v.* Allen, 56 Wis. 502, 14 N. W. 609, 43 Am. Rep. 728; Rhodes *v.* U. S., 79 Fed. 740, 25 C. C. A. 186; Cable *v.* Paine, 8 Fed. 788, 3 McCrary 169.

In New Jersey, where a charge on the weight of evidence can be given, an instruction of the character under consideration has been condemned. It was said: "We are unable to see upon what principle a judge is justified in stating to a jury that one piece of evidence, which is legitimate, is not to be treated by the jury the same as other evidence in the cause. It is for the jury to say whether the testimony of a witness, having an equal opportunity to hear and whose hearing is equally good, and who testifies that he did not hear the blowing of a whistle or the ringing of a bell, notwithstanding he listened, shall or shall not be given equal credit with the testimony of a witness, similarly situated, who testifies that he did hear. There was no error in the refusal of the trial judge to charge the request excepted to." McLean *v.* Erie R. Co., 69 N. J. L. 57, 54 Atl. 238.

91. Olsen *v.* Oregon Short Line, etc., R. Co., 9 Utah 129, 33 Pac. 62; Chicago Great Western R. Co. *v.* McDonough, 161 Fed. 657, 88 C. C. A. 517; Denver, etc., R. Co. *v.* Lorentzen, 79 Fed. 291, 24 C. C. A. 592.

92. Atchison, etc., R. Co. *v.* Feehan, 149 Ill. 202, 36 N. E. 1036.

Evidence held not to require charge.— There being no substantial contradictory statement as to the matter of drinking by insured prior to his application for insurance, but the real question being whether, conceding this, he was then intemperate, the testimony of witnesses, based on knowledge and observation as to whether he was temperate, does not call for an instruction on the weight to be given positive and negative testimony. Taylor *v.* Security Life, etc., Co., 145 N. C. 383, 59 S. E. 139, 15 L. R. A. N. S. 583.

93. *District of Columbia.*— Metropolitan R. Co. *v.* Martin, 15 App. Cas. 552.

Iowa.— Selensky *v.* Chicago Great Western R. Co., 120 Iowa 113, 94 N. W. 272.

Michigan.— Lonis *v.* Lake Shore, etc., R. Co., 111 Mich. 458, 69 N. W. 642.

New York.— Cridler *v.* Colegrove, 5 N. Y. St. 232.

Tennessee.—Williams *v.* Kirkman, 3 Lea 510.

Wisconsin.— Kelley *v.* Schupp, 60 Wis. 76, 18 N. W. 725.

See 46 Cent. Dig. tit. "Trial," §§ 447, 545.

As to what is positive and what is negative testimony see EVIDENCE, 17 Cyc. 800.

94. See Stanley *v.* Cedar Rapids, etc., R. Co., 119 Iowa 526, 529, 93 N. W. 489, in which the court held a refusal of such instruction proper, saying: "The proposition involved related simply to matters to be considered in weighing evidence. These would occur to every sensible and reasonable man without any instruction, and courts may well as-

ity directly to the contrary,[95] and in one case it was held not erroneous to refuse the instruction where the court had already instructed the jury that they were judges of the testimony, and should consider it fairly and impartially, and give it the weight they might think it entitled to.[96] Of course if the court has given a sufficient instruction on the subject it may refuse further instructions announcing the same principles.[97] In giving instructions on this head it is error to charge, without qualification, that positive evidence is stronger than negative evidence or to use in a charge language to that effect,[98] because it excludes from the consideration of the jury the credibility of the witnesses,[99] the question of equal opportunity of knowledge of the facts,[1] and the giving of equal attention to the matter testified to.[2] On the other hand the following instructions have been approved: The rule generally is, everything else being equal, that positive testimony is rather to be believed than negative testimony;[3] that positive evidence is stronger than negative evidence if other things are equal and the witnesses are of equal credibility;[4] that, when witnesses are otherwise equally credible and their testimony entitled to equal weight, greater weight and credit should be given to those who swear affirmatively or positively to a fact, rather than to those who swear negatively or to a want of recollection;[5] or that the rule of law is that the positive testimony of one credible witness to a fact is entitled to more weight than the testimony of several witnesses equally credible who testify negatively, or to collateral circumstances merely persuasive in their character from which a negative may be inferred.[6]

7. ADMISSIONS.[7] It is proper to instruct that it is the duty as well as the right of the jury to consider an admission as tending to prove a fact.[8] In perhaps the

sume that jurors are possessed of enough intelligence to understand these truths without having their attention specifically called to them."

95. St. Louis, etc., R. Co. *v.* Brock, 69 Kan. 448, 77 Pac. 86; Missouri Pac. R. Co. *v.* Moffatt, 56 Kan. 667, 44 Pac. 607; Pennoyer *v.* Allen, 56 Wis. 502, 14 N. W. 609, 43 Am. Rep. 728.

Application and extent of rule.—Where plaintiff was injured by falling into an excavation in the street, and witnesses for defendant testified that they saw barriers and lights around the excavation that evening, and those for plaintiff testified that they passed by it and did not see any barriers or lights, it was error to refuse to instruct as to the relative weight to be given positive and negative testimony, although other witnesses for plaintiff testified positively that no barriers or lights were there. Hildman *v.* Phillips, 106 Wis. 611, 82 N. W. 566.

96. Olsen *v.* Oregon Short Line, etc., R. Co., 9 Utah 129, 33 Pac. 623.

97. Roedler *v.* Chicago, etc., R. Co., 129 Wis. 270, 109 N. W. 88.

98. *Georgia.*— Central of Georgia R. Co. *v.* Orr, 128 Ga. 76, 57 S. E. 89; Atlantic Coast Line R. Co. *v.* O'Neill, 127 Ga. 685, 56 S. E. 986; Warrick *v.* State, 125 Ga. 133, 53 S. E. 1027; Atlanta Consol. St. R. Co. *v.* Bigham, 105 Ga. 498, 30 S. E. 934.

Illinois.— Indiana, etc., R. Co. *v.* Otstot, 212 Ill. 429, 72 N. E. 387.

Pennsylvania.— Hess *v.* Williamsport, etc., R. Co., 181 Pa. St. 492, 37 Atl. 568.

Utah.— Haun *v.* Rio Grande Western R. Co., 22 Utah 346, 62 Pac. 908.

United States.— Delaware, etc., R. Co. *v.* Devore, 114 Fed. 155, 52 C. C. A. 77. And see Rhodes *v.* U. S., 79 Fed. 740, 25 C. C. A. 186, holding that it is error to charge the jury that it is for them to consider how much certain testimony of a negative character is worth as against positive testimony, and that ordinarily the evidence of a witness who swears positively that he saw something is more valuable than that of witnesses who say they did not see it.

Contra.— Henderson *v.* Crouse, 52 N. C. 623.

99. Atlantic Coast Line R. Co. *v.* O'Neill, 127 Ga. 685, 56 S. E. 986; Southern R. Co. *v.* O'Bryan, 115 Ga. 659, 42 S. E. 42; Atlanta Consol. St. R. Co. *v.* Bigham, 105 Ga. 498, 30 S. E. 934. "The rule does not mean that the witness must be credited regardless of anything else. If so, hard swearing would necessarily import truth." Warrick *v.* State, 125 Ga. 133, 53 S. E. 1027. See also Central of Georgia R. Co. *v.* Orr, 128 Ga. 76, 57 S. E. 89.

1. Indiana, etc., R. Co. *v.* Otstot, 212 Ill. 429, 72 N. E. 387.

2. Selensky *v.* Chicago Great Western R. Co., 120 Iowa 113, 94 N. W. 272.

3. Atlantic, etc., R. Co. *v.* Newton, 85 Ga. 517, 11 S. E. 776.

4. Southern R. Co. *v.* O'Bryan, 119 Ga. 147, 45 S. E. 1000; Southern R. Co. *v.* O'Bryan, 115 Ga. 659, 42 S. E. 42.

5. Idaho Mercantile Co. *v.* Kalanquin, 8 Ida. 101, 66 Pac. 933.

6. Hinton *v.* Cream City R. Co., 65 Wis. 323, 27 N. W. 147.

7. **Instructions as to confessions in criminal cases** see CRIMINAL LAW, 12 Cyc. 600.

8. Melendy *v.* Bradford, 56 Vt. 148.

greater number of jurisdictions, instructions which admonish the jury to receive evidence of verbal admissions with caution are held to be erroneous as being a charge on the weight of the evidence and an invasion of the province of the jury [9] It is said that the idea expressed in such instructions is proper matter for argument but not otherwise the subject of legal cognizance,[10] and that the evidence of such admissions should be given such weight by the jury as they may think them entitled to without any advice of the court as to their force.[11] There are, however, jurisdictions in which instructions of the character under consideration are upheld,[12] but when given, it is not erroneous to further instruct that it is for the jury to determine the weight of the evidence according to the way in which it affected their own minds.[13] According to what is believed to be the better view, it is erroneous to instruct the jury that the admissions of a party are strong evidence against him,[14] or conclusive against him;[15] that such admissions are legal and

9. *California.*—Goss *v.* Steiger Terra Cotta, etc., Works, 148 Cal. 155, 82 Pac. 681; Kauffman *v.* Maier, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124.

Illinois.— Doerr *v.* Brune, 56 Ill. App. 657; Wickersham *v.* Beers, 20 Ill. App. 243.

Indiana.— Tobin *v.* Young, 124 Ind. 507, 24 N. E. 121; Lewis *v.* Christie, 99 Ind. 377; Finch *v.* Bergins, 89 Ind. 360; Davis *v.* Hardy, 76 Ind. 272.

Iowa.— Scurlock *v.* Boone, 142 Iowa 580, 120 N. W. 313. *Contra*, Allen *v.* Kirke, 81 Iowa 658, 47 N. W. 906.

Massachusetts.— Rumrill *v.* Ash, 169 Mass. 341, 47 N. E. 1017, request for instructions that jury are to receive evidence of verbal admissions with great caution properly refused.

Mississippi.— Johnson *v.* Stone, 69 Miss. 826, 13 So. 858.

Montana.— Knowles *v.* Nixon, 17 Mont. 473, 43 Pac. 628.

Texas.— Castleman *v.* Sherry, 42 Tex. 59.

See 46 Cent. Dig. tit. "Trial," §§ 448, 546.

And see Boswell *v.* Thompson, 160 Ala. 306, 49 So. 73.

Instructions obnoxious to rule.— It is error to instruct that as a general rule the statements of a witness as to verbal admissions of a party should be received with caution as that kind of evidence is subject to much imperfection and mistake (Kauffman *v.* Maier, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124; Doerr *v.* Brune, 56 Ill. App. 657; Wickersham *v.* Beers, 20 Ill. App. 243; Knowles *v.* Nixon, 17 Mont. 473, 43 Pac. 628; Wastl *v.* Montana Union R. Co., 17 Mont. 213, 42 Pac. 772); that evidence of the admissions of a party is dangerous and liable to abuse (Castleman *v.* Sherry, 42 Tex. 59); that evidence of admissions should be received with great caution, care, and allowance (Frizell *v.* Cole, 29 Ill. 465); that casual declarations made in idle conversation do not deserve much consideration (Johnson *v.* Stone, 69 Miss. 826, 13 So. 858); or that such admissions must be closely scrutinized because the party might not have clearly expressed himself and the witness might not have heard and repeated correctly (Newman *v.* Hazelrigg, 96 Ind. 73).

10. Lewis *v.* Christie, 99 Ind. 377; Davis *v.* Hardy, 76 Ind. 272.

11. Shinn *v.* Tucker, 37 Ark. 580.

12. *Georgia.*— McBride *v.* Georgia R., etc., Co., 125 Ga. 515, 54 S. E. 674; Ocean Steamship Co. *v.* McAlpin, 69 Ga. 437; Mims *v.* Brook, 3 Ga. App. 247, 59 S. E. 711.

Minnesota.— Tozer *v.* Hershey, 15 Minn. 257.

Oregon.— See Thompson *v.* Purdy, 45 Oreg. 197, 77 Pac. 113.

South Carolina.— Moore *v.* Dickinson, 39 S. C. 441, 17 S. E. 998.

Wisconsin.— Grotjan *v.* Rice, 124 Wis. 253, 102 N. W. 551; Haven *v.* Markstrum, 67 Wis. 493, 30 N. W. 720; Nash *v.* Hoxie, 59 Wis. 384, 18 N. W. 408.

See 46 Cent. Dig. tit. "Trial," §§ 448, 546.

Instructions held proper under this rule.— That admissions should be scanned with care (Mims *v.* Brook, 3 Ga. App. 247, 59 S. E. 711); that admissions should be scanned with care and the jury should not give them more meaning than they are justly entitled to (De Loach *v.* Stewart, 86 Ga. 729, 12 S. E. 1067); that it is the duty of the jury to scan admissions if proved with care, but that the jury should give them such weight as they thought such admissions entitled to (McBride *v.* Georgia R., etc., Co., 125 Ga. 515, 54 S. E. 674); that statements of witnesses as to verbal admissions should be cautiously received as such evidence is subject to imperfection and mistake (Allen *v.* Kirk, 81 Iowa 658, 47 N. W. 906); that such admissions ought to be received with great caution (Tozer *v.* Hershey, 15 Minn. 257); that admissions are regarded as weak testimony (Nash *v.* Hoxie, 59 Wis. 384, 18 N. W. 408); or that "evidence of casual statements or admissions of a party, made in casual conversations to disinterested persons, is regarded by law as very weak testimony, owing to the liability of the witness to misunderstand or forget what was really stated or intended by the party. It is considered to be the weakest kind of evidence" (Grotjan *v.* Rice, 124 Wis. 253, 262, 102 N. W. 551).

13. Moore *v.* Dickinson, 39 S. C. 441, 17 S. E. 998.

14. Westbrook *v.* Howell, 34 Ill. App. 571; Earp *v.* Edgington, 107 Tenn. 23, 64 S. W. 40.

15. Gardner *v.* Standfield, 12 Heisk. (Tenn.) 150.

sufficient evidence against him but not in his favor;[16] or that admissions, if fully and deliberately made to a disinterested person, are of weight.[17] There are, however, decisions in which it has been held proper to give instructions of this character.[18] With respect to admissions by a party during the trial, it is held erroneous to instruct that statements made by plaintiff which are against his interest may be taken as true, but his statements favorable to himself are only to be given such credit as the jury under all the facts and circumstances deem them entitled.[19] Such instructions, it is said, are vicious as singling out the testimony of a witness, and as a comment on the probative force of his testimony.[20] In the absence of a request, the court need not give any instruction on the subject.[21]

8. Non-Production of Evidence — a. In General. It is well settled that where evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and, without satisfactory explanation, he fails to do so, the jury may draw an inference that it would be unfavorable to him,[22] and it is not improper for the court to instruct the jury to this effect.[23] The most familiar exemplification of this doctrine is in the case of failure of a party to call a witness under his control to a material fact peculiarly within the knowledge of the witness. This, it is generally held, is a subject of just criticism before the jury, and the court in charging the jury may properly direct them that failure to call the witness is a circumstance they may take into consideration as creating a presumption unfavorable to the party who failed to call the witness.[24] Of course in calling attention to the non-production of evi-

16. Baker *v.* Kelly, 41 Miss. 696, 93 Am. Dec. 274.

17. Johnson *v.* Stone, 69 Miss. 826, 13 So. 858.

18. Becker *v.* Crow, 7 Bush (Ky.) 198 (holding it proper to instruct that confessions when established by a number of disinterested witnesses which in their nature appear consistent and reasonable leave but little room for doubt as to their truth); Thompson *v.* Purdy, 45 Oreg. 197, 77 Pac. 113 (holding it proper to instruct that oral admissions and declarations of parties when proved constitute strong testimony); Sullivan *v.* Mauston Milling Co., 123 Wis. 360, 101 N. W. 679 (holding that it is proper to instruct that admissions deliberately made and clearly understood and remembered are considered as strong evidence).

19. Quinn *v.* Metropolitan St. R. Co., 218 Mo. 545, 118 S. W. 46; Huff *v.* St. Joseph R., etc., Co., 213 Mo. 495, 111 S. W. 1145; Stetzler *v.* Metropolitan St. R. Co., 210 Mo. 704, 109 S. W. 666; Zander *v.* St. Louis Transit Co., 206 Mo. 445, 103 S. W. 1006 [*overruling* without mention Feary *v.* Metropolitan St. R. Co., 162 Mo. 75, 62 S. W. 452; Sepetowski *v.* St. Louis Transit Co., 102 Mo. App. 110, 76 S. W. 693, and *approving* Montgomery *v.* Missouri Pac. R. Co., 181 Mo. 477, 79 S. W. 930; Conner *v.* Missouri Pac. R. Co., 181 Mo. 397, 81 S. W. 145; Ephland *v.* Missouri Pac. R. Co., 137 Mo. 187, 37 S. W. 820, 38 S. W. 926, 59 Am. St. Rep. 498, 35 L. R. A. 107]; Brown *v.* Quincy, etc., R. Co., 127 Mo. App. 614, 106 S. W. 551; McGinnis *v.* R. M. Rigby Printing Co., 122 Mo. App. 227, 99 S. W. 4. But see Rankin *v.* Thomas, 50 N. C. 435.

20. Zander *v.* St. Louis Transit Co., 206 Mo. 445, 103 S. W. 1006. See also Huff *v.* Joseph R., etc., Co., 213 Mo. 495, 111 S. W. 1145.

21. Georgia, etc., R. Co. *v.* Lasseter, 122 Ga. 679, 51 S. E. 15; Wrightsville, etc., R. Co. *v.* Lattimore, 118 Ga. 581, 45 S. E. 453. And see Maxwell *v.* Wellington, 138 Wis. 607, 120 N. W. 505.

22. Hall *v.* Vanderpool, 156 Pa. St. 152, 26 Atl. 1069. And see, generally, on this subject Evidence, 16 Cyc. 1062 *et seq.*

23. Ginder *v.* Bachman, 8 Pa. Super. Ct. 405.

24. *Alabama.*—Carter *v.* Chambers, 79 Ala. 223.

Iowa.—Taylor *v.* Chicago, etc., R. Co., 76 Iowa 753, 40 N. E. 84.

Maryland.—See United R., etc., Co. *v.* Cloman, 107 Md. 681, 69 Atl. 379.

Massachusetts.—Murphy *v.* Brooks, 109 Mass. 202.

New York.—Levine *v.* Metropolitan St. R. Co., 78 N. Y. App. Div. 426, 80 N. Y. Suppl. 48 [*affirmed* in 177 N. Y. 523, 69 N. E. 1125]; Ripley *v.* Second Ave. R. Co., 8 Misc. 449, 28 N. Y. Suppl. 683. And see Linsley *v.* New York City R. Co., 54 Misc. 562, 104 N. Y. Suppl. 916.

Pennsylvania.—Hall *v.* Vanderpool, 156 Pa. St. 152, 26 Atl. 1069; Collins *v.* Leafey, 124 Pa. St. 203, 16 Atl. 765; Frick *v.* Barbour, 64 Pa. St. 120; Steininger *v.* Hoch, 42 Pa. St. 432; Hartman *v.* Pittsburg Incline Plane Co., 11 Pa. Super. Ct. 438.

See 46 Cent. Dig. tit. "Trial," § 505.

Compare Statesville Bank *v.* Pinkers, 83 N. C. 377, holding that the court may caution the jury that they must base their verdict upon the evidence, and not upon conjectures arising from a seeming withholding of the testimony of better informed witnesses.

Applications of rule.—Where it is contended

dence, it is in no case proper to give binding instructions as to the effect of its omission,[25] and, in any event, the court is not bound, on its own motion, to give any instruction on the subject;[26] and if counsel is dissatisfied with an instruction given, he should call the attention of the court to the supposed defects by a request to extend and amplify the charge.[27] But when requested the court should, when the facts warrant it, give a cautionary instruction on the subject, and a denial of the request is error.[28] Instructions on this head should not be given in the absence of any showing that the evidence would be relevant,[29] where there was something which defendant might have contradicted or explained by such witnesses;[30] where the evidence would be inadmissible if introduced;[31] where there is nothing to show that the party had any witnesses whom he might produce,[32] or who were

that an accident did not occur at a certain time and place, the court may properly remind the jury that several of defendants' employees who were present at the scene of the accident were not produced to disprove it. Collins *v.* Leafey, 124 Pa. St. 203, 16 Atl. 765. Where the court in the charge referred to the fact that a co-promisor of defendant had not been called as a witness, and instructed the jury that they should take it into consideration in determining the credit they should give to the witnesses, without giving any binding instruction as to the omission, the reference was but a natural deduction from the circumstance, and such instruction was not error. Steininger *v.* Hoch, 42 Pa. St. 432. In an action for injuries sustained in a collision of two street cars, plaintiff testified that a policeman asked if he did not want to go to a hospital; that he said, "No," he preferred to go to G's house; that "they took a cab for us and put us in the cab, and I went up to my friend, Mr. Goldstein's house." On cross-examination he stated that when he first came to, after the accident, he "was in a cab; that is the first time I knew anything about it, when my friend Goldstein and the other fellow, then they started to push me around in the cab." It was held to sustain a charge that plaintiff testified that a policeman took him to G's house, and that the jury could consider why the policeman was not called as a witness. Goodstein *v.* Brooklyn Heights R. Co., 69 N. Y. App. Div. 617, 74 N. Y. Suppl. 1017. The failure of a party to call as a witness in his behalf, his wife, who had knowledge of the facts, raises a presumption that her testimony would have been unfavorable to him, since the wife of a party is not equally available as a witness for the adverse party as for the husband, and the court may so charge on request. Carpenter *v.* Pennsylvania R. Co., 13 N. Y. App. Div. 328, 43 N. Y. Suppl. 203. And see Sesler *v.* Montgomery, (Cal. 1888) 19 Pac. 686.

Sufficiency of charge.— A charge on the effect of failure to produce evidence within the power of a party is sufficiently definite and intelligible when it announces the presumption of law to be that the evidence, if produced, would be prejudicial to the party. If competent for the court to declare in what respect and to what extent such failure would prejudice, attention should be called to these points by a request to extend and amplify the charge. Nicol *v.* Crittenden, 55 Ga. 497.

25. Hall *v.* Vanderpool, 156 Pa. St. 152, 26 Atl. 1069; Hartman *v.* Pittsburg Incline Plane Co., 11 Pa. Super. Ct. 438. And see Steininger *v.* Hoch, 42 Pa. St. 432.

26. Cox *v.* Norfolk, etc., R. Co., 126 N. C. 103, 35 S. E. 237.

27. Nicol *v.* Crittenden, 55 Ga. 497.

28. Werr *v.* Kohles, 86 N. Y. App. Div. 122, 83 N. Y. Suppl. 128. But see Taylor *v.* Chicago, etc., R. Co., 76 Iowa 753, 40 N. W. 84, holding that it is discretionary with the court to give or refuse such instruction.

29. Worthington *v.* Curd, 15 Ark. 491.

30. Miller *v.* Dayton, 57 Iowa 423, 10 N. W. 814 (holding, however, that the law does not require a party to account for his failure to produce any witness, who mistakenly or corruptly might be willing to testify to facts explaining circumstances casting suspicion upon such party. Under such a state of facts an instruction that such failure might be considered by the jury as a circumstance against defendant is erroneous); Flynn *v.* New York El. R. Co., 50 N. Y. Super. Ct. 375 (holding that if, irrespective of the testimony that might be given by the persons not called, defendant has sufficiently met plaintiff's case, there is no reason for defendant calling more witnesses); Fitzpatrick *v.* Woodruff, 47 N. Y. Super. Ct. 436 (holding that the omission to call a witness who has no other or better knowledge of the matter in dispute than those who are produced and give evidence is not a suspicious circumstance entitling the adverse party to any presumption to his prejudice).

31. Carpenter *v.* Bailey, 94 Cal. 406, 29 Pac. 1101; Schapiro *v.* Levy, 101 N. Y. App. Div. 444, 91 N. Y. Suppl. 1044. And see Emory *v.* Smith, 54 Ga. 273.

32. Central of Georgia R. Co. *v.* Bernstein, 113 Ga. 175, 38 S. E. 394; Schnell *v.* Toomer, 56 Ga. 168 (in which it was said: "Where it does not appear that the party holds back evidence within his power to produce, the non-production of more full and definite evidence than he presents raises no presumption against him, and there should be no charge given to the jury on the subject of such a presumption"); Robinson *v.* Metropolitan St. R. Co., 103 N. Y. App. Div. 243, 92 N. Y. Suppl. 1010; Fitzpatrick *v.* Woodruff, 47 N. Y. Super. Ct. 436; Ellison *v.* Rix, 85 N. C. 77.

under his control;[33] where the evidence would be merely cumulative;[34] where the witness' evidence would be competent for both parties, and the witness is equally accessible to both parties,[35] or, where the witness, although called by a party, was withdrawn by him without being examined, and there was nothing to show that he was in any way under the power and control of such party.[36] So it has been held that such instruction is improper where the absent witness cannot be procured by subpœna, that the fact that the party might have secured his testimony by issuing a commission which he is under no obligation to do does not warrant the giving of such instruction.[37] And it is likewise erroneous for the court to use language in its instructions to the jury from which unfavorable inferences may be drawn from a defendant claiming his statutory privilege of objecting to the competency of plaintiff as a witness in an action against the estate of a decedent.[38] It is not improper to instruct that no unfavorable inference is to be drawn from the failure of a party's attorneys to testify.[39] It has been held error to refuse to charge that the jury are not to draw any deductions against either party from objections made and evidence excluded, as the refusal affirms the converse of the proposition.[40]

b. Non-Production of Books and Documents. If a party fails or refuses to produce books or documents when ordered by the court, it is, in general, proper to charge that the jury might presume that the books and documents would operate against his claim.[41] Such instruction should not be given, however, where the order is not served in time to enable the party to produce the books or documents.[42] And an instruction commenting adversely on the non-production thereof should not be given when it is shown that they are not under the control of the party.[43]

c. Failure of Party to Testify or Submit to Physical Examination.[44] Whether or not it is in any case proper for the court in charging the jury, to comment on the failure of a party to testify is a subject about which the courts are not agreed. According to some decisions it is a personal privilege, that a party in a civil suit has, whether he shall testify in his own behalf, and if he fails to avail himself of the right, it is error for the court, in an instruction, to call the attention of the jury to the fact in any way.[45] This view, however, is against the weight of authority, which holds that the failure of a party to attend the trial,[46] or to testify as to material facts within his knowledge,[47] makes it proper for the court in instructing the jury to direct

33. Flynn *v.* New York El. R. Co., 50 N. Y. Super. Ct. 375. And see Scovill *v.* Baldwin, 27 Conn. 316.

34. Carter *v.* Chambers, 79 Ala. 223, in which it was said that a party is not required to produce all the witnesses, no matter how numerous they might be, who knew anything of the transaction in order to prevent the presumption being indulged against him that such witnesses, if produced, would not support his right.

35. Bates *v.* Morris, 101 Ala. 282, 13 So. 138; Cross *v.* Lake Shore, etc., R. Co., 69 Mich. 363, 37 N. W. 361, 13 Am. St. Rep. 399; Flynn *v.* New York El. R. Co., 50 N. Y. Super. Ct. 375.

36. Anderson *v.* Southern R. Co., 107 Ga. 500, 33 S. E. 644.

37. Rooder *v.* Interurban St. R. Co., 48 Misc. (N. Y.) 519, 96 N. Y. Suppl. 255.

38. Ludlow *v.* Pearl, 55 Mich. 312, 21 N. W. 315.

39. Freeman *v.* Fogg, 82 Me. 408, 19 Atl. 907.

40. Scott *v.* Third Ave. R. Co., 59 Hun (N. Y.) 456, 13 N. Y. Suppl. 344.

41. F. R. Patch Mfg. Co. *v.* Protection Lodge No. 215 I. A. M., 77 Vt. 294, 60 Atl. 74.

42. Parlin, etc., Co. *v.* Miller, 25 Tex. Civ. App. 190, 60 S. W. 881.

43. Harrison *v.* Kiser, 79 Ga. 588, 4 S. E. 320.

44. **Failure of accused to testify in criminal cases** see CRIMINAL LAW, 12 Cyc. 638 *et seq.*

45. Moore *v.* Wright, 90 Ill. 470. And see Emory *v.* Smith, 54 Ga. 273, which contains a *dictum* which supports this view.

46. Wilson *v.* Northwestern Nat. L. Ins. Co., 103 Minn. 35, 114 N. W. 251; Brooks *v.* Steen, 6 Hun (N. Y.) 516.

47. Miller *v.* Dayton, 57 Iowa 423, 10 N. W. 814; Union Bank *v.* Stone, 50 Me. 595, 79 Am. Dec. 631; Blackwood *v.* Brown, 29 Mich. 483; Greenville, etc., R. Co. *v.* Partlow, 14 Rich. (S. C.) 237. See also Tufts *v.* Hatheway, 9 N. Brunsw. 62. *Compare* Brady *v.* Cassidy, 145 N. Y. 171, 39 N. E. 814 [*affirming* 9 Misc. 107, 29 N. Y. Suppl. 45].

Application of rule.— Where the evidence

their attention to the fact as a matter that they might consider and give such weight as they think it might deserve. Of course if there is nothing to show that such facts are within the knowledge of the party, the giving of such instruction is erroneous.[48] And it is also erroneous where the adverse party failed to make out his case.[49] The court may instruct that the jury may consider the refusal of plaintiff to submit to a physical examination, and give this circumstance such weight as they think it entitled to.[50]

9. NUMBER OF WITNESSES. It is proper to instruct that the jury may consider the number of witnesses and their concurrence in support of a given statement of fact;[51] that it is their duty to weigh the evidence and not merely count the witnesses on either side;[52] that they should be governed by the quality and not quantity of the evidence;[53] that "by preponderance of the evidence is not necessarily meant a greater number of witnesses, but only such weight of evidence as satisfies the jury of the truth of the allegation to be established";[54] that everything else being equal, the testimony of the greater number of witnesses will outweigh the testimony of the smaller number;[55] that the preponderance of evidence is not necessarily determined by the greater number of witnesses, and that the jury must give weight to that part of the testimony in the veracity of which they have the most confidence;[56] that it is the superior weight of evidence that inclines the minds of jurors to accept one side in preference to the other, regardless of the number of witnesses;[57] that the jury are not to be swayed by the number of witnesses, but by the quality of the testimony;[58] or that the weight of evidence does not depend alone on the number of witnesses, but on the amount of credit the jury gives to one or all of the witnesses, where the court gives further instructions as to the general tests of credibility.[59] So where there was conflict in the evidence on questions of fact, an instruction that testimony of one credible witness is entitled to more weight than the testimony of many others, if the jury

of defendant's participation in the commission of a trespass was altogether circumstantial, and the verdict was for plaintiff, it was held that the judge did not err in charging the jury that, although one or more of the circumstances detached would not authorize the inference that defendant was the trespasser, yet that his direction or consent to the trespass might be deduced from all the circumstances as enumerated in the charge, one of which was that defendant, having the opportunity to take the stand and exculpate himself, had declined to do so. Greenville, etc., R. Co. *v.* Partlow, 14 Rich. (S. C.) 237.

48. Emory *v.* Smith, 54 Ga. 273; Hitchcock *v.* Davis, 87 Mich. 629, 49 N. W. 912, holding that where an action is prosecuted by the assignee of a claim, who has no knowledge whatever of the facts in issue, and who is fully represented by his attorneys in the conduct of the trial, it is error to charge that his absence during the trial should be taken into consideration by the jury.

49. American Underwriters' Assoc. *v.* George, 97 Pa. St. 238.

50. Elfers *v.* Woolley, 116 N. Y. 294, 22 N. E. 548.

51. Hodder *v.* Philadelphia Rapid Transit Co., 217 Pa. St. 110, 66 Atl. 239; Northern Pac. R. Co. *v.* Holmes, 3 Wash. Terr. 543, 18 Pac. 76; Bisewski *v.* Booth, 100 Wis. 383, 76 N. W. 349.

52. Kansas City, etc., R. Co. *v.* Crocker, 95 Ala. 412, 11 So. 262; Mitchell *v.* Hindman, 150 Ill. 538, 37 N. E. 916; Brady *v.* Converse, 45 Ill. App. 297; Crowley *v.* Burlington, etc., R. Co., 65 Iowa 658, 20 N. W. 467, 22 N. W. 918.

53. Belk *v.* Cooper, 34 Ill. App. 649.

54. McVay *v.* Central California Inv. Co., 6 Cal. App. 184, 91 Pac. 745.

55. Dale *v.* Colfax Consol. Coal Co., 131 Iowa 67, 107 N. W. 1096; Spensley *v.* Lancashire Ins. Co., 62 Wis. 443, 22 N. W. 740.

56. McCowan *v.* Northeastern Siberian Co., 41 Wash. 675, 84 Pac. 614.

57. Quiggle *v.* Vining, 125 Ga. 98, 54 S. E. 74.

58. Divver *v.* Hall, 20 Misc. (N. Y.) 677, 46 N. Y. Suppl. 533 [*reversed* on other grounds in 21 Misc. 452, 47 N. Y. Suppl. 630]. *Contra*, Gilmore *v.* Seattle, etc., R. Co., 29 Wash. 150, 69 Pac. 743.

59. Hersperger *v.* Pacific Lumber Co., 4 Cal. App. 460, 88 Pac. 587, 591; Pittsburg, etc., R. Co. *v.* Gates, 137 Ill. App. 309; Model Clothing House *v.* Hirsch, 42 Ind. App. 270, 85 N. E. 719. See also Hardy *v.* Milwaukee St. R. Co., 89 Wis. 183, 61 N. W. 771. But see Tripoli Sav. Bank *v.* Schnadt, 135 Ill. App. 373, holding that an instruction which tells the jury "that the preponderance of evidence in a case is not alone determined by the number of witnesses testifying to a particular fact or state of facts" is erroneous. The instruction should have stated that the preponderance of evidence does not necessarily consist in the number of witnesses testifying to a fact or state of facts.

have reason to believe that such witnesses have knowingly testified untruthfully, is proper if the evidence warrants it,[60] although in the absence of such evidence the giving of the instruction would be reversible error.[61] On the other hand, it is error to charge that the jury should not believe the testimony of any person, however prominent or respectable, in preference to the contradictory testimony of two or more others; [62] that the testimony of a greater number of credible witnesses on one side might be considered more worthy of confidence and trust than the testimony of a lesser number of witnesses of equal credibility; [63] or that the weight of the evidence necessarily consists in the number of witnesses.[64] Instructions which give or have a tendency to give the jury to understand that the preponderance of evidence is to be determined by the number of witnesses on each side; [65] which exclude the element of the number of witnesses; [66] or state that the number of witnesses has nothing to do with the case in the determination of the question of preponderance of the evidence; [67] or state that if the jury believed that the testimony of two contradictory witnesses on opposite sides were entitled to equal credit the testimony of a third created a preponderance of testimony in favor of the party in whose favor he testified unless there was some fact or evidence tending to corroborate the opposite party; [68] or state that where witnesses of equal candor, fairness, and intelligence testify, with equal knowledge, opportunity of knowledge, and memory, and their testimony is in all respects of equal weight and credibility, and there is nevertheless a conflict which cannot be reconciled, a verdict should be rendered in harmony with the testimony of the greater number of witnesses, since it takes from the consideration of the jury all corroborating circumstances,[69] are properly refused. An instruction that preponderance of evidence does not mean the number of witnesses is not strictly accurate and is properly refused.[70] Where plaintiff's case is supported by his testimony alone, and contradicted by defendant, an instruction that the rule requiring plaintiff to prove his case by a preponderance of evidence "does not necessarily mean that plaintiff must have two witnesses to the wrongful act, but that the case in all its facts and circumstances given in evidence must preponderate in their judgment in favor of the plaintiffs," should not be given.[71]

10. Presumptions.[72] In criminal cases, and in civil cases, in which the allegations of plaintiff amount to a charge of crime,[73] defendant is entitled to an instruction as to the presumption of innocence, and in cases charging fraud that fraud is not to be presumed,[74] and in some cases it may be proper for the court to warn

60. Kemp *v.* Slocum, 78 Nebr. 440, 110 N. W. 1024.

61. La Bonty *v.* Lundgren, 31 Nebr. 419, 48 N. W. 65.

62. Phenix *v.* Castner, 108 Ill. 207.

63. Schmitt *v.* Milwaukee St. R. Co., 89 Wis. 195, 61 N. W. 834; Bierbach *v.* Goodyear Rubber Co., 54 Wis. 208, 11 N. W. 514, 41 Am. Rep. 19.

64. Pennsylvania Co. *v.* Hunsley, 23 Ind. App. 37, 54 N. E. 1071; Heald *v.* Western Union Tel. Co., 129 Iowa 326, 105 N. W. 588. Although the word "not" was inadvertently omitted from the instruction. Illinois Cent. R. Co. *v.* Zang, 10 Ill. App. 594.

65. Fritzinger *v.* State, 31 Ind. App. 350, 67 N. E. 1006; Howlett *v.* Dilts, 4 Ind. App. 23, 30 N. E. 313.

66. Chicago Union Traction Co. *v.* Hampe, 228 Ill. 346, 81 N. E. 1027; Illinois Commercial Men's Assoc. *v.* Perrin, 139 Ill. App. 543; Sullivan *v.* Sullivan, 139 Ill. App. 378.

Instruction not objectionable to rule.—An instruction on preponderance of evidence is not bad as excluding the element of number of witnesses, where such instruction is in form as follows: "The jury are instructed that the preponderance of evidence in the cause is not necessarily alone determined by the number of witnesses testifying to a particular fact or state of facts." Elgin, etc., R. Co. *v.* Lawlor, 132 Ill. App. 280 [*affirmed* in 229 Ill. 621, 82 N. E. 407].

67. Depuis *v.* Saginaw Valley Traction Co., 146 Mich. 151, 109 N. W. 413.

68. Ely *v.* Tesch, 17 Wis. 202.

69. Indianapolis, etc., R. Co. *v.* Bennett, 39 Ind. App. 141, 79 N. E. 389.

70. Willcox *v.* Hines, 100 Tenn. 524, 45 S. W. 781, 66 Am. St. Rep. 761, holding that if the instruction had stated that preponderance did not mean the number of witnesses merely, it would have been correct.

71. Ragsdale *v.* Ezell, 99 Ky. 236, 35 S. W. 629, 1130, 18 Ky. L. Rep. 146.

72. In criminal prosecutions see Criminal Law, 12 Cyc. 609 *et seq.*

73. Hale *v.* Matthews, 118 Ind. 527, 21 N. E. 43.

74. Price *v.* Heath, 41 Hun (N. Y.) 585.

the jury against indulging a presumption.[75] An instruction as to a presumption, however, is ground for reversal where it is irrelevant,[76] erroneous,[77] too broad and indefinite,[78] or otherwise misleading;[79] where it is said to be a presumption of law, whereas it is only one of fact;[80] or where confusion may result from failure to distinguish between a *prima facie* and a conclusive presumption;[81] and it is erroneous to instruct that a presumption of negligence from defective machinery or appliances, or the circumstances of an accident operate to shift the burden of proof.[82] But reversal will not be had for instructions as to presumptions that are merely informal,[83] or immaterial,[84] if it clearly appears that no injury resulted.

11. Burden of Proof.[85] In some states it is considered the duty of the court to instruct the jury as to the burden of proof in the particular case,[86] as that the burden is upon plaintiff,[87] or upon the party holding the affirmative,[88] or that as to affirmative defenses the burden is upon defendant,[89] or upon which party the burden of proof rests as to each material issue.[90] On the other hand, in at least one state,[91] it is error for the court to instruct the jury directly that the burden of proof rests upon one of the parties; and, without expressly referring to it, the instructions must be so framed as to indicate which party has the burden of proof on each issue.[92] In still other jurisdictions, an instruction as to the burden of proof is proper in certain cases,[93] but not in others.[94] Such instructions have

75. As that negligence of the master is not to be presumed from injury to servant in the line of his duty. Latremouille *v.* Bennington, etc., R. Co., 63 Vt. 336, 22 Atl. 656.

76. McKay *v.* Ross, 40 Mich. 548.

77. Harrison *v.* Kiser, 79 Ga. 588, 4 S. E. 320; Fulwider *v.* Ingels, 87 Ind. 414; Hinds *v.* Harbou, 58 Ind. 121.

Instruction that failure to impeach witness raises a presumption in favor of the truth of his testimony is error. Dempster *v.* Menge, 160 Fed. 341, 87 C. C. A. 293.

78. Terry *v.* Rodahan, 79 Ga. 278, 5 S. E. 38, 11 Am. St. Rep. 420; Bott *v.* Wood, 56 Miss. 136.

79. Terry *v.* Rodahan, 79 Ga. 278, 5 S. E. 38, 11 Am. St. Rep. 420; Jackson *v.* Jackson, 80 Md. 176, 30 Atl. 752; Reynolds *v.* Weinman, (Tex. Civ. App. 1895) 33 S. W. 302.

80. Ham *v.* Barret, 28 Mo. 388.

81. Garrettson *v.* Pegg, 64 Ill. 111; Brownfield *v.* Phœnix Ins. Co., 26 Mo. App. 390.

Instruction that prima facie presumption is rebuttable is not error. Black *v.* Thornton, 31 Ga. 641.

82. Continental Ins. Co. *v.* New York Gas, etc., Co., 193 N. Y. 186, 85 N. E. 1006; Ludwig *v.* Metropolitan St. R. Co., 174 N. Y. 546, 67 N. E. 1084 [*reversing* 71 N. Y. App. Div. 210, 75 N. Y. Suppl. 667, and adopting dissenting opinion of Mr. Justice McLaughlin]; Kay *v.* Metropolitan St. R. Co., 163 N. Y. 447, 57 N. E. 751 [*reversing* 29 N. Y. App. Div. 466, 51 N. Y. Suppl. 724]; Curran *v.* Warren Chemical, etc., Co., 36 N. Y. 153.

83. Hale *v.* Matthews, 118 Ind. 527, 21 N. E. 43; Rule *v.* Bolles, 27 Oreg. 368, 41 Pac. 691.

84. Hammond *v.* Horton, (Mo. 1887) 6 S. W. 94; Hammond *v.* Gordon, 93 Mo. 223, 6 S. W. 93; Hammond *v.* Johnston, 93 Mo. 198, 6 S. W. 83.

85. In criminal prosecutions see Criminal Law, 12 Cyc. 621.

86. See *infra*, notes 87–90.

87. Harvey *v.* Chicago, etc., R. Co., 221 Ill. 242, 77 N. E. 569 [*affirming* 116 Ill. App. 507]; McMahon *v.* Scott, 132 Ill. App. 582; Leary *v.* Meier, 78 Ind. 393; Tood *v.* Danner, 17 Ind. App. 368, 46 N. E. 829; Donovan-McCormick Co. *v.* Sparr, 34 Mont. 237, 85 Pac. 1029.

88. Berger *v.* St. Louis Storage, etc., Co., 136 Mo. App. 36, 116 S. W. 444.

89. McCook *v.* McAdams, 76 Nebr. 1, 106 N. W. 988, 110 N. W. 1005, 114 N. W. 596; Whipple *v.* Preece, 18 Utah 454, 56 Pac. 296; Stevens *v.* Stephens, 14 Utah 255, 47 Pac. 76.

Instruction that plaintiff is relieved of the burden as to allegations made by him and admitted by defendant is correct. Walker *v.* Dickey, 44 Tex. Civ. App. 110, 98 S. W. 658.

90. Alabama Fertilizer Co. *v.* Reynolds, 79 Ala. 497; Spira *v.* Hornthall, 77 Ala. 137; Hill *v.* Nichols, 50 Ala. 336; Blotcky *v.* Caplan, 91 Iowa 352, 59 N. W. 204; Sayles *v.* Quinn, 196 Mass. 492, 82 N. E. 713; Illinois Steel Co. *v.* Paczocha, 139 Wis. 23, 119 N. W. 550.

As that party alleging fraud must prove it. Mammoth Springs Roller-Mill Co. *v.* Ellston, (Ark. 1893) 22 S. W. 344.

91. Mills *v.* Louisville, etc., R. Co., 116 Ky. 309, 76 S. W. 29, 25 Ky. L. Rep. 488; Macon *v.* Paducah St. R. Co., 110 Ky. 680, 62 S. W. 496, 23 Ky. L. Rep. 46.

92. Mussellam *v.* Cincinnati, etc., R. Co., 126 Ky. 500, 104 S. W. 337, 31 Ky. L. Rep. 908.

93. Chittim *v.* Martinez, 94 Tex. 141, 58 S. W. 948.

94. *In re* Yetter, 55 Minn. 452, 57 N. W. 147; Taylor, etc., R. Co. *v.* Taylor, 79 Tex. 104, 14 S. W. 918, 23 Am. St. Rep. 316; Texas, etc., R. Co. *v.* Geiger, 79 Tex. 13, 15 S. W. 214; Blum *v.* Strong, 71 Tex. 321, 6 S. W. 167; Victoria *v.* Victoria County, (Tex. Civ. App. 1908) 115 S. W. 67; Kerr *v.* Blair, 47 Tex. Civ. App. 406, 105 S. W. 548; Walker *v.* Dickey, 44 Tex. Civ. App. 110, 98 S. W. 658; Milmo Nat. Bank *v.* Convery, (Tex. Civ. App. 1899) 49 S. W. 926; Davis

been sustained on an issue of fraud,[95] an issue as to whether a deed absolute upon its face is a mortgage,[96] and in many other cases in which the burden is clearly upon one or the other party.[97] Regardless of the rule as to the propriety of instructing at all as to the burden of proof, an instruction constitutes reversible error when it places the burden on the wrong party;[98] or places upon one party the burden of proving facts admitted in the pleadings by the other party;[99] or places upon a party the necessity of proving all of certain allegations instead of any one of them,[1] or only some of them;[2] or is otherwise misleading.[3] So instructions as to the burden of proof have been held erroneous when applicable only to the burden of evidence,[4] or when not followed by instructions as to the shifting of the burden of evidence.[5] But an instruction misplacing the burden of proof is not ground for reversal where the party upon whom it should have been placed has clearly proved his contentions,[6] or where the verdict was in favor of the party upon whom it was placed;[7] and all instructions as to the burden of proof should be read together,[8] and no reversal should be had therefor for mere informality or inaccuracy of statement if it clearly appears from the whole case that the jury were not misled thereby.[9] So a failure to give an instruction as to the burden of

v. Davis, 20 Tex. Civ. App. 310, 49 S. W. 726; Texas Loan Agency *v.* Fleming, 18 Tex. Civ. App. 668, 46 S. W. 63; Texas, etc., R. Co. *v.* Syfan, (Tex. Civ. App. 1897) 43 S. W. 551; Houston, etc., R. Co. *v.* Dotson, 15 Tex. Civ. App. 73, 38 S. W. 642.

95. Price *v.* Heath, 41 Hun (N. Y.) 585.

96. Irvin *v.* Johnson, 44 Tex. Civ. App. 436, 98 S. W. 405.

97. *Connecticut.*— Smith *v.* King, 62 Conn. 515, 26 Atl. 1059.

Georgia.— Bell *v.* Windsor, 79 Ga. 193, 4 S. E. 100.

Illinois.— Foos *v.* Sabin, 84 Ill. 564.

Indiana.— Pennsylvania Lines Voluntary Relief Dept. *v.* Spencer, 17 Ind. App. 123, 46 N. E. 477.

Missouri.— Clifton *v.* Sparks, 25 Mo. App. 383.

Texas.— Chittim *v.* Martinez, 94 Tex. 141, 58 S. W. 948; El Paso Electric R. Co. *v.* Kelly, (Tex. Civ. App. 1908) 109 S. W. 415.

See 46 Cent. Dig. tit. "Trial," §§ 413, 496, 513.

98. *Alabama.*— Louisville, etc., R. Co. *v.* Mertz, 149 Ala. 561, 43 So. 7; Alabama Fertilizer Co. *v.* Reynolds, 79 Ala. 497.

Arkansas.— Southern Hotel Co. *v.* Zimmerman, 84 Ark. 373, 105 S. W. 873.

California.— Scott *v.* Wood, 81 Cal. 398, 22 Pac. 871.

Connecticut.—Ashborn *v.* Waterbury, 69 Conn. 217, 37 Atl. 498.

Illinois.— Catlin *v.* Traders' Ins. Co., 83 Ill. App. 40; Nolan *v.* Vosburg, 3 Ill. App. 596.

Kentucky.— Handly *v.* Harrison, 3 Bibb 481.

Massachusetts.— Coleman *v.* New York, etc., R. Co., 106 Mass. 160.

Minnesota.— Bond *v.* Corbett, 2 Minn. 248.

Missouri.— Dawson *v.* Wombles, 123 Mo. App. 340, 100 S. W. 547.

Nebraska.— Fremont, etc., R. Co. *v.* Harlin, 50 Nebr. 698, 70 N. W. 263, 61 Am. St. Rep. 578, 36 L. R. A. 417.

Ohio.— McNutt *v.* Kaufman, 26 Ohio St. 127.

South Carolina.— Strickland *v.* Capitol City Mills, 70 S. C. 211, 49 S. E. 478.

Texas.— Stooksbury *v.* Swan, 85 Tex. 563, 22 S. W. 963; Oak Cliff College *v.* Armstrong, (Civ. App. 1899) 50 S. W. 610.

United States.— Simonton *v.* Winter, 5 Pet. 141, 8 L. ed. 75.

99. Williams *v.* Iowa Cent. R. Co., 121 Iowa 270, 96 N. W. 774; Bond *v.* Corbett, 2 Minn. 248; Thompson *v.* Emerson, 118 Mo. App. 232, 94 S. W. 818.

1. Williamson *v.* Robinson, 134 Iowa 345, 111 N. W. 1012.

2. Kidd *v.* White, 138 Ill. App. 107.

3. *Georgia.*— Phœnix Ins. Co. *v.* Gray, 107 Ga. 110, 32 S. E. 948.

Illinois.— Richelieu Hotel Co. *v.* International Military Encampment Co., 140 Ill. 248, 29 N. E. 1044, 33 Am. St. Rep. 234; Illinois Cent. R. Co. *v.* Becker, 119 Ill. App. 221; Freeman Wire, etc., Co. *v.* Collins, 53 Ill. App. 29.

Montana.— Lawrence *v.* Westlake, 28 Mont. 503, 73 Pac. 119.

New York.— Hellthaler *v.* Teft Weller Co., 50 Misc. 358, 98 N. Y. Suppl. 823, holding erroneous instructions that "the burden of proof is upon the plaintiff to prove his version of the transaction."

Texas.— Western Union Tel. Co. *v.* Bennett, 1 Tex. Civ. App. 558, 21 S. W. 699.

See 46 Cent. Dig. tit. "Trial," §§ 413, 496, 573.

4. Heinemann *v.* Heard, 62 N. Y. 448 [*reversing* 2 Hun 324]; Cox *v.* Aberdeen, etc., R. Co., 149 N. C. 117, 62 S. E. 884; Mears *v.* Mears, 15 Ohio St. 90; Siebrecht *v.* Hogan, 99 Wis. 437, 75 N. W. 71.

5. Freeman *v.* Hamilton, 74 Ga. 317.

6. Ellis *v.* Allen, 80 Ala. 515, 2 So. 676; Moore *v.* Brewer, 94 Ga. 260, 21 S. E. 460.

7. Anderson *v.* Chicago, etc., R. Co., 35 Nebr. 95, 52 N. W. 840.

8. Kepler *v.* Jessup, 11 Ind. App. 241, 37 N. E. 655, 38 N. E. 826; Neeley *v.* Trautwein, 79 Nebr. 751, 113 N. W. 141; Crutcher *v.* Schick, 10 Tex. Civ. App. 676, 32 S. W. 75; Houston, etc., R. Co. *v.* Shirley, (Tex. Civ. App. 1894) 24 S. W. 809 [*reversed* on other grounds in 89 Tex. 91, 31 S. W. 291].

9. Ramsay *v.* Meade, 37 Colo. 465, 86 Pac.

proof is immaterial if the evidence fully justifies a verdict in favor of the party upon whom the burden properly rested,[10] or where the burden has been tacitly assumed by the right party;[11] and in any event the court is not called upon to express its opinion before the conclusion of the evidence.[12] Instructions containing the terms "burden of proof,"[13] or "preponderance of evidence,"[14] without explanation of their meaning, may be refused; but they are not ground for reversal where they do not mislead.[15] Failure to instruct on the burden of proof cannot be assigned as error when no request for such instruction is made.[16]

12. Degree of Proof Required[17] — a. Preponderance of Evidence. Except in one state[18] the court may properly instruct the jury that the burden is on the party having the affirmative of the issue to prove his case by a preponderance of the evidence,[19] and on request his adversary is entitled to have such instruction

1018; Hartman *v.* Ruby, 16 App. Cas. (D. C.) 45; Soebel *v.* Boston El. R. Co., 197 Mass. 46, 83 N. E. 3; Marsalis *v.* Patton, 83 Tex. 521, 18 S. W. 1070; St. Louis Southwestern R. Co. *v.* Johnson, 50 Tex. Civ. App. 147, 109 S. W. 486; Seligmann *v.* Greif, (Tex. Civ. App. 1908) 109 S. W. 214; San Antonio, etc., R. Co. *v.* Waller, 27 Tex. Civ. App. 44, 65 S. W. 210; Texas, etc., R. Co. *v.* Reed, (Tex. Civ. App. 1895) 32 S. W. 118.

10. Howard *v.* Britton, 71 Tex. 286, 9 S. W. 73.

11. Dillard *v.* Louisville, etc., R. Co., 2 Lea (Tenn.) 288.

12. Hovey *v.* Hobson, 55 Me. 256; Mears *v.* Mears, 15 Ohio St. 90.

13. Berger *v.* St. Louis Storage, etc., Co., 136 Mo. App. 36, 116 S. W. 444.

14. Clark *v.* Kitchen, 52 Mo. 316.

15. Berry *v.* Wilson, 64 Mo. 164; Steinwender *v.* Creath, 44 Mo. App. 356; Miller *v.* Woolman-Todd Boot, etc., Co., 26 Mo. App. 57.

16. *Connecticut.*— Miles *v.* Strong, 68 Conn. 273, 36 Atl. 55.

Illinois.— Drury *v.* Connell, 177 Ill. 43, 52 N. E. 368.

Iowa.— Reizenstein *v.* Clark, 104 Iowa 287, 73 N. W. 588; Duncombe *v.* Powers, 75 Iowa 185, 39 N. W. 261.

Kentucky.— Anderson *v.* Baird, 40 S. W. 923, 19 Ky. L. Rep. 444.

Michigan.— Beath *v.* Chapoton, 124 Mich. 508, 83 N. W. 281; *In re* Bromley, 113 Mich. 53, 71 N. W. 523.

Missouri.— Darlington Bank *v.* Powers, 102 Mo. App. 415, 76 S. W. 732; Hunter *v.* McElhaney, 48 Mo. App. 234.

South Dakota.— Frye *v.* Ferguson, 6 S. D. 392, 61 N. W. 161.

Texas.— Gulf, etc., R. Co. *v.* McCarty, 82 Tex. 608, 18 S. W. 716; Wichita Land, etc., Co. *v.* State, 80 Tex. 684, 16 S. W. 649; Louisville, etc., Lumber Co. *v.* Dupuy, 52 Tex. Civ. App. 46, 113 S. W. 973; Yecker *v.* San Antonio Traction Co., 33 Tex. Civ. App. 239, 76 S. W. 780.

Wisconsin.— Coppins *v.* Jefferson, 126 Wis. 578, 105 N. W. 1078.

17. **As to doctrine of reasonable doubt in criminal prosecutions** see Criminal Law, 12 Cyc. 622 *et seq.*

18. **In Alabama** the rule differs from that stated in the second paragraph of the text in this section, and an instruction of that character therein set out is considered erroneous on the ground that a preponderance of evidence may not convince the minds of the jury. In that state the measure or weight of proof, to justify a verdict based on it, is that it shall reasonably convince or satisfy the minds of the jury. Pullman Palace Car Co. *v.* Adams, 120 Ala. 581, 24 So. 931, 74 Am. St. Rep. 53, 45 L. R. A. 767; Vandeventer *v.* Ford, 60 Ala. 610; Acklen *v.* Hickman, 60 Ala. 568; Mays *v.* Williams, 27 Ala. 267. And see Lindsey *v.* Perry, 1 Ala. 203.

19. *Georgia.*— Parker *v.* Georgia Pac. R. Co., 83 Ga. 539, 10 S. E. 233.

Illinois.— U. S. Brewing Co. *v.* Stoltenberg, 211 Ill. 531, 71 N. E. 1081 [*affirming* 113 Ill. App. 435]; Bartlett *v.* Cunningham, 85 Ill. 22.

Indiana.— De Hart *v.* Johnson County, 143 Ind. 363, 41 N. E. 825.

Michigan.— Taylor *v.* Taylor, 138 Mich. 658, 101 N. W. 832.

Nebraska.— Altschuler *v.* Coburn, 38 Nebr. 881, 57 N. W. 836.

South Carolina.— Burns *v.* Goddard, 72 S. C. 355, 51 S. E. 915. And see Fowler *v.* Harrison, 64 S. C. 311, 42 S. E. 159, holding that where, in an action on a contract, plaintiff claims it was for one amount and defendant for another, it is proper to instruct that plaintiff must establish his claim by a preponderance of the evidence and that defendant must do the same.

Tennessee.— Chapman *v.* McAdams, 1 Lea 500.

Texas.— Birkman *v.* Fahrenthold, 52 Tex. Civ. App. 335, 114 S. W. 428; Ft. Worth, etc., R. Co. *v.* Eddleman, 52 Tex. Civ. App. 181, 114 S. W. 425.

Wisconsin.— Kuenster *v.* Woodhouse, 101 Wis. 216, 77 N. W. 165.

See 46 Cent. Dig. tit. "Trial," § 549.

Although some of the allegations of a petition are admitted, such instruction is not reversible error. O'Donnell *v.* Chicago, etc., R. Co., 65 Nebr. 612, 91 N. W. 566.

Immaterial facts.— Such charge does not place upon plaintiff the burden of proving immaterial facts alleged by him. Collins *v.* Clark, 30 Tex. Civ. App. 341, 72 S. W. 97.

"Slight" preponderance.— An instruction that a slight preponderance is sufficient to support a verdict in favor of the party hav-

given,[20] although omission to give an instruction on preponderance of evidence is not a ground for reversal, in the absence of a request for such instruction.[21] Conversely an instruction that the jury must find for plaintiff, if the jury find from the evidence that he has made out his case by a preponderance of the evidence, is correct,[22] and a refusal of such instruction is erroneous.[23] So, except in cases where the affirmative of the issues is in part on plaintiff and in part on defendant [24] it is proper to instruct that if the evidence is evenly balanced plaintiff cannot recover,[25] and defendant is upon request entitled to such instruction,[26] and it is error to instruct that defendant cannot recover unless his evidence preponderates.[27] There is a sharp conflict of authority as to the propriety of using the words "fair" or "clear" in addition to the word "preponderance" in instructing as to the degree of proof required. Some decisions hold that there is nothing misleading in the use of these words and that instructions containing them may with propriety be given.[28] According to other decisions, the addition of these

ing the burden of proof is correct. Hanchett *v.* Haas, 219 Ill. 546, 76 N. E. 845; Chicago Union Traction Co. *v.* Lawrence, 211 Ill. 373, 71 N. E. 1024 [*affirming* 113 Ill. App 269]; Chicago City R. Co. *v.* Bundy, 210 Ill. 39, 71 N. E. 28; Chicago City R. Co. *v.* Fennimore, 199 Ill. 9, 64 N. E. 985; Chicago City R. Co. *v.* Nelson, 116 Ill. App. 609 [*affirmed* in 215 Ill. 436, 74 N. E. 458]; Chicago, etc., R. Co. *v.* Driscoll, 107 Ill. App. 615 [*affirmed* in 207 Ill. 9, 69 N. E. 620]; Donley *v.* Dougherty, 75 Ill. App. 379.

"From the evidence."— It is not error to use in an instruction the words "from the evidence," as such a phrase performs the function of the words "from the preponderance of the evidence." Hall *v.* Ditto, 128 Ill. App. 187; Chicago, etc., R. Co. *v.* Cleminger, 77 Ill. App. 186.

"By a preponderance or a material part of the evidence."— An instruction that the burden of proof was on plaintiff, and that she could not recover until she showed the facts by a preponderance or a material part of the evidence, was error because not the equivalent of a "preponderance." St. Louis, etc., R. Co. *v.* Buckner, 89 Ark. 58, 115 S. W. 923, 20 L. R. A. N. S. 458.

Instruction ignoring qualification as to proof by preponderance of evidence is properly refused. Richardson *v.* Dybedahl, 17 S. D. 629, 98 N. W. 164.

Proof and evidence may be used interchangeably in giving this instruction. Flores *v.* Maverick, (Tex. Civ. App. 1894) 26 S. W. 316.

Weight not equivalent to preponderance.— An instruction that defendant is entitled to a verdict, if, upon the whole evidence, his plea appears to be sustained by the weight of the evidence, should not be given. The word "weight" is not synonymous with preponderance. Shinn *v.* Tucker, 37 Ark. 580. But see McKeon *v.* Chicago, etc., R. Co., 94 Wis. 477, 69 N. W. 175, 59 Am. St. Rep. 910, 35 L. R. A. 252.

20. Tedens *v.* Schumers, 112 Ill. 263; Young *v.* Copple, 52 Ill. App. 547; Ohlendorf *v.* Kanne, 66 Md. 495, 8 Atl. 351. But a refusal is not error where there is no conflict in the testimony. Schlengener *v.* Chicago, etc., R. Co., 61 Iowa 235, 16 N. W. 103.

Repetition unnecessary.— Where the court has sufficiently instructed on the subject, it may properly refuse a requested instruction embodying the same principles. Murphy *v.* Hiltibridle, 132 Iowa 114, 109 N. W. 471; Savage *v.* Rhode Island Co., 28 R. I. 391, 67 Atl. 633; Ellis *v.* Brooks, 101 Tex. 591, 102 S. W. 94, 103 S. W. 1196; Young *v.* Milwaukee Gas Light Co., 133 Wis. 9, 113 N. W. 59.

21. Georgia, etc., R. Co. *v.* Lasseter, 122 Ga. 679, 51 S. E. 15; Smith *v.* South Carolina, etc., R. Co., 62 S. C. 322, 40 S. E. 665.

22. Chicago *v.* Carlson, 138 Ill. App. 582; Springfield Consol. R. Co. *v.* Tarrant, 121 Ill. App. 416; Springfield Consol. R. Co. *v.* Johnson, 120 Ill. App. 100.

23. Kidd *v.* White, 138 Ill. App. 107.

24. John Ainsfield Co. *v.* Rasmussen, 30 Utah 453, 85 Pac. 1002; Hickey *v.* Rio Grande Western R. Co., 29 Utah 392, 82 Pac. 29. And see Schaefer *v.* Metropolitan St. R. Co., 34 Misc. (N. Y.) 554, 69 N. Y. Suppl. 980.

25. Davis *v.* Central R. Co., 60 Ga. 329; Royal Trust Co. *v.* Overstrom, 120 Ill. App. 479; Jones *v.* Angell, 95 Ind. 376; Renard *v.* Grande, 29 Ind. App. 579, 64 N. E. 644.

An instruction that if the evidence is equally balanced as to a fact the jury cannot find that fact specially is correct. Pittsburg, etc., R. Co. *v.* Burton, 139 Ind. 357, 37 N. E. 150, 38 N. E. 594.

26. Streater *v.* Liebendorfer, 71 Ill. App. 625; Brockman *v.* Metropolitan St. R. Co., 32 Misc. (N. Y.) 728, 66 N. Y. Suppl. 339; John Ainsfield Co. *v.* Rasmussen, 30 Utah 453, 85 Pac. 1002.

27. Wall *v.* Hill, 1 B. Mon. (Ky.) 290, 36 Am. Dec. 578.

28. *Indiana.*—Zonker *v.* Cowan, 84 Ind. 395.

Iowa.— Jamison *v.* Jamison, 113 Iowa 720, 84 N. W. 705; Bryan *v.* Chicago, etc., R. Co., 63 Iowa 464, 19 N. W. 295.

Mississippi.— Chambers *v.* Meaut, 66 Miss. 625, 6 So. 465.

Nebraska.— Altschuler *v.* Coburn, 38 Nebr. 881, 57 N. W. 836; Dunbar *v.* Briggs, 18 Nebr. 94, 24 N. W. 449.

Washington.—Carstens *v.* Earles, 26 Wash. 676, 67 Pac. 404.

Wisconsin.— Parker *v.* Fairbanks-Morse Mfg. Co., 130 Wis. 525, 110 N. W. 409.

See 46 Cent. Dig. tit. "Trial," § 549.

words to the word "preponderance" is erroneous and should be avoided because liable to be construed as requiring a higher degree of proof than is furnished by the preponderance alone;[29] but if it is apparent that the jury were not mislead by the use of these words in the instruction, the judgment will not be reversed.[30] It is error to instruct that it is incumbent on a party to make out his case by a preponderance of the evidence so far as he has the affirmative of the issue, without indicating in what respect he has the affirmative;[31] to give an instruction which requires plaintiff to prove every allegation of his petition or fail as to his entire cause of action;[32] or, where there are several defenses each complete in itself, to impose upon defendant the burden of establishing all of such defenses.[33] Where the evidence is conflicting, it is error to refuse to instruct on the mode of determining the preponderance of the evidence.[34] In explaining what is meant by the term "preponderance of evidence," it may properly be defined as meaning the greater weight of the evidence,[35] or the "best evidence,"[36] or such evidence, as when weighed with that which is offered to oppose it, has more convincing power in the minds of the jury,[37] or as evidence in favor of a proposition which is of a little better quality than that opposed to it.[38] On the other hand, an instruction that a preponderance of the evidence means more and better evidence is inaccurate,[39] and so is an instruction that by preponderance of the evidence is meant testimony of such superior weight and convincing force as satisfies the mind of its truth.[40]

29. Nelson *v.* Fehd, 203 Ill. 120, 67 N. E. 828; Mitchell *v.* Hindman, 150 Ill. 538, 37 N. E. 916 [*affirming* 47 Ill. App. 431]; Bitter *v.* Saathoff, 98 Ill. 266; Schofield *v.* Baldwin, 102 Ill. App. 560; Dow *v.* Higgins, 72 Ill. App. 302; Kirchner *v.* Collins, 152 Mo. 394, 53 S. W. 1081; Search *v.* Miller, 9 Nebr. 26, 1 N. W. 975; Prather *v.* Wilkens, 68 Tex. 187, 4 S. W. 252; Cowans *v.* Ft. Worth, etc., R. Co., 49 Tex. Civ. App. 463, 109 S. W. 403; Lantry *v.* Lowrie, (Tex. Civ. App. 1900) 58 S. W. 837; Atkinson *v.* Reed, (Tex. Civ. App. 1898) 49 S. W. 260; Cabell *v.* Menczer, (Tex. Civ. App. 1896) 35 S. W. 206; Adams *v.* Eddy, (Tex. Civ. App. 1894) 29 S. W. 180.

30. Adams *v.* Eddy, (Tex. Civ. App. 1894) 29 S. W. 180. And see Cabell *v.* Menczer, (Tex. Civ. App. 1896) 35 S. W. 206.

31. Gilbert *v.* Bone, 79 Ill. 341.

32. Webster *v.* Sherman, 33 Mont. 7, 84 Pac. 878, 114 Am. St. Rep. 799.

33. Liverpool, etc., Ins. Co. *v.* Joy, 26 Tex. Civ. App. 613, 62 S. W. 546, 64 S. W. 786.

34. Louisville, etc., R. Co. *v.* Ward, 61 Fed. 927, 10 C. C. A. 166.

35. Western Union Tel. Co. *v.* James, 31 Tex. Civ. App. 503, 73 S. W. 79. And see Scott *v.* Brown, 127 Ga. 88, 56 S. E. 130 (holding that a charge that by "preponderance of evidence" is meant that superior weight of evidence upon the issues involved, which, while it may not be sufficient to convince the mind beyond a reasonable doubt, is yet sufficient to incline a fair and impartial mind to one side of the issue rather than to the other," is a substantial definition of "preponderance of evidence," as defined in Civ. Code (1895), § 5145); Thomas *v.* Paul, 87 Wis. 607, 612, 58 N. W. 1031 (in which the following instruction was approved: "Preponderance, of course, means the most weight; but it is an abstract idea to talk about weighing the testimony between two such men as these parties. I can tell you a sure test as to where the weight of testimony is in this case: it is just what you believe to be the truth"). But where evidence is offered but not admitted, it is error for the court to instruct that the preponderance of the evidence means the greater weight of the evidence to be determined after an examination of all the evidence tendered. Hurlbut *v.* Bagley, 99 Iowa 127, 68 N. W. 585.

36. Johnstone *v.* Seattle, etc., R. Co., 45 Wash. 154, 87 Pac. 1125, holding that such instruction is not liable to mislead the jury; the term "best evidence" obviously not having been used in the technical sense.

37. Strand *v.* Chicago, etc., R. Co., 67 Mich. 380, 34 N. W. 712.

38. Stener *v.* Riggs, 128 Mich. 129, 87 N. W. 109. And see Hammond, etc., Electric Co. *v.* Antonio, 41 Ind. App. 335, 83 N. E. 766, holding that it is not error to instruct that the slightest difference in the weight of the evidence is a preponderance sufficient to justify a verdict in favor of the party in whose favor such preponderance exists, for all that the law requires is that the party having the burden of proof shall have a preponderance of the evidence, and this means only that the evidence shall be in some degree more convincing to sustain his contention than that of his adversary, and the term "fair preponderance of the evidence," often used in instructions, is really meaningless.

39. Boyer *v.* Broffey, 109 Ill. App. 94. It is improper to charge that a preponderance of evidence is an expression that may mean considerable, or not much, depending on how the jury understand it, but in the final analysis it means this: What do you think about it having your minds guided by the evidence? Button *v.* Metcalf, 80 Wis. 193, 49 N. W. 809.

40. Bryan *v.* Chicago, etc., R. Co., 63 Iowa 464, 19 N. W. 295.

And it has been held that an instruction is erroneous which tells the jury, among other things, that they are "at liberty to decide that the preponderance of evidence is on the side which in their judgment is sustained by the more intelligent, the better informed, the more credible and the more disinterested witnesses, whether these are the greater or the smaller number," [41] or which states that if, after considering all of the testimony, the jury were inclined to the opinion that under the instruction plaintiff was entitled to recover, then the tendency preponderated in his favor.[42]

b. Instructions Requiring Proof Beyond Reasonable Doubt. In civil cases, a party is not required to prove his case or defense beyond a reasonable doubt. This is a higher degree of proof than the law requires,[43] and the giving of an instruction which requires or in effect requires this degree of proof is of course erroneous,[44] and the refusal thereof proper.[45]

c. Instructions Using Word "Satisfy" in Connection With Proof Required. The use of the word "satisfy" in instructions relating to the degree of proof required is very generally held erroneous. Thus instructions are held erroneous as requiring too high a degree of proof, which require that the jury shall be satisfied from the evidence,[46] unless the charge, when considered as a whole, clearly shows

41. Chicago Union Traction Co. *v.* Wirkus, 131 Ill. App. 485.

42. Eichman *v.* Buchheit, 128 Wis. 385, 107 N. W. 325.

43 Decatur Car Wheel, etc., Co. *v.* Mehaffey, 128 Ala 242, 29 So. 646; Yarbrough *v.* Arnold, 20 Ark. 592; Seymour *v.* Bailey, 76 Ga. 338; Brown *v.* Walker, (Miss. 1892) 11 So. 724.

44. Reynolds *v.* Wray, 135 Ill. App. 527; Stille *v.* McDowell, 2 Kan. 374, 85 Am. Dec. 590.

45. *Alabama.*— Decatur Car Wheel Co. *v.* Mehaffey, 128 Ala. 242, 29 So. 646.

Arkansas.— Yarbrough *v.* Arnold, 20 Ark. 592.

Georgia.— Seymour *v.* Bailey, 76 Ga. 338.

North Carolina.— Neal *v.* Fesperman, 46 N. C. 446.

Wisconsin.— F. Dohmen Co. *v.* Niagara F. Ins. Co., 96 Wis. 38, 71 N. W. 69.

Instructions obnoxious to rule.—If the jury are in doubt, the verdict should be for defendant. Kennealy *v.* Westchester Electric R. Co., 86 N. Y. App. Div. 223, 83 N. Y. Suppl. 823. The jury must find for defendant, unless plaintiff shows by a preponderance of the evidence a state of facts from which but one rational conclusion can be drawn. Pelky *v.* Palmer, 109 Mich. 561, 67 N. W. 561. To establish a fraud the facts must be such that they are not explicable on any other reasonable hypothesis. Phœnix Ins. Co. *v.* Moog, 81 Ala. 335, 1 So. 108. The jury must be satisfied by clear and full evidence of defendant's guilt and that the circumstances relied on by plaintiff ought to be inconsistent with the theory of innocence. Catasauqua Mfg. Co. *v.* Hopkins, 141 Pa. St. 30, 21 Atl. 638. If upon any hypothesis a fact can be accounted for on any other theory than a dishonest one, the jury should so find. Nebraska Mercantile Mut. Ins. Co. *v.* Myers, 76 Nebr. 460, 107 N. W. 747. Where the burden is on plaintiff, the jury must find for defendant if they have any doubt as to any of the facts. Harris *v.* Russell, 93 Ala. 59, 9 So. 541. The jury must find for defendant if their minds are left in doubt and uncertainty. Alabama Great Southern R. Co. *v.* Hill, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65.

If the instruction leaves it uncertain whether proof beyond a reasonable doubt is required it should be refused. Hocum *v.* Weitherick, 22 Minn. 152.

46. *Alabama.*— Hackney *v.* Perry, 152 Ala. 626, 44 So. 1029; Loveman *v.* Birmingham R., etc., Co., 149 Ala. 515, 43 So. 411; Lawrence *v.* Alabama State Land Co., 144 Ala. 524, 41 So. 612; Birmingham R., etc., Co. *v.* Lindsey, 140 Ala. 312, 37 So. 289; Moore *v.* Heineke, 119 Ala. 627, 24 So. 374; Torrey *v.* Burney, 113 Ala. 496, 21 So. 348. *Contra,* Edwards *v.* Whyte, 70 Ala. 365.

Arkansas.—Arkansas Midland R. Co. *v.* Canman, 52 Ark. 517, 13 S. W. 280; Shinn *v.* Tucker, 37 Ark. 580.

Illinois.— Mitchell *v.* Hindman, 150 Ill. 538, 37 N. E. 916 [*affirming* 47 Ill. App. 431]; Protection L. Ins. Co. *v.* Dill, 91 Ill. 174; Fernandes *v.* McGinnis, 25 Ill. App. 165; Ottawa, etc., R. Co. *v.* McMath, 4 Ill. App. 356.

Iowa.— Rosenbaum *v.* Levitt, 109 Iowa 292, 80 N. W. 393. *Compare* Callan *v.* Hanson, 86 Iowa 420, 53 N. W. 282.

Texas.— Willis *v.* Chowning, 90 Tex. 617, 40 S. W. 395, 59 Am. St. Rep. 842; Seligmann *v.* Greif, (Civ. App. 1908) 109 S. W. 214; Western Cottage Piano, etc., Co. *v.* Anderson, 45 Tex. Civ. App. 513, 101 S. W. 1061; Panhandle, etc., R. Co. *v.* Kirby, 42 Tex. Civ. App. 340, 94 S. W. 173; Houston, etc., R. Co. *v.* Buchanan, 38 Tex. Civ. App. 165, 84 S. W. 1073; Short *v.* Kelly, (Civ. App. 1901) 62 S. W. 944; Pierpont Mfg. Co. *v.* Goodman Produce Co., (Civ. App. 1900) 60 S. W. 347; Texas, etc., R. Co. *v.* Ballinger, (Civ. App. 1897) 40 S. W. 822; Finks *v.* Cox, (Civ. App. 1895) 30 S. W. 512; Feist *v.* Boothe, (Civ. App. 1893) 27 S. W. 33; Grigg *v.* Jones, (Civ. App. 1894) 26 S. W. 885; McGill *v.* Hall, (Civ. App. 1894) 26 S. W. 132;

that the court did not intend to require more than a preponderance of the evidence.[47] Before it can be said that the mind is "satisfied" of the truth of a proposition, it must be relieved of all doubt or uncertainty, and this degree of conviction is not required even in criminal cases.[48] So instructions are erroneous which require the jury shall be thoroughly[49] or entirely satisfied;[50] satisfied by a preponderance of the evidence,[51] or reasonably satisfied by a preponderance of the evidence;[52] satisfied or convinced by a preponderance of the evidence;[53] satisfied by clear and convincing proof;[54] satisfied with clearness and certainty,[55] or satisfied by abundant proof;[56] or which require the consciences of the jurors to be satisfied,[57] that plaintiff produce satisfactory or clear and satisfactory evidence,[58] or that he must satisfactorily prove the necessary facts by a preponderance of the evidence,[59] or prove the facts by a preponderance of the evidence so clear that it leaves the mind well satisfied of the truth thereof.[60] But, in Alabama, where the

Fordyce *v.* Chancey, 2 Tex. Civ. App. 24, 21 S. W. 181.

Contra.— Braddy *v.* Kansas City, etc., R. Co., 47 Mo. App. 519; Guinard *v.* Knapp-Stout, etc., Co., 95 Wis. 482, 70 N. W. 671; Pelitier *v.* Chicago, etc., R. Co., 88 Wis. 521, 60 N. W. 250; Louisville, etc., R. Co. *v.* White, 100 Fed. 239, 40 C. C. A. 352. And *compare* Groesbeck *v.* Marshall, 44 S. C. 538, 22 S. E. 743 (holding that it is not misleading to instruct that a party has established his case when he introduces evidence that satisfies the jury that more likely than not a certain state of facts exists); McKone *v.* Metropolitan L. Ins. Co., 131 Wis. 243, 110 N. W. 472 (holding that an instruction relating to a special interrogatory which makes the answer depend on whether the evidence "satisfies" the jury is not erroneous, as the jury could not have misunderstood the instruction because of the use of that word.

When harmless error.— Where it is conceded that the court used the word "satisfy" as meaning to produce a belief, it is not reversible error. Sams Automatic Car Coupler Co. *v.* League, 25 Colo. 129, 54 Pac. 642. So, if the word "satisfied" is used with reference to a fact concerning which there is no dispute, error cannot be predicated thereon. Martin *v.* Missouri Pac. R. Co., 3 Tex. Civ. App. 133, 22 S. W. 195.

47. St. Louis, etc., R. Co. *v.* Sparks, 81 Ark. 187, 99 S. W. 73.

48. Torrey *v.* Burney, 113 Ala. 496, 21 So. 348.

49. O'Donohue *v.* Simmons, 58 Hun (N. Y.) 467, 12 N. Y. Suppl. 843.

50. McEntyre *v.* Hairston, 152 Ala. 251, 44 So. 417.

51. Southern R. Co. *v.* Riddle, 126 Ala. 244, 28 So. 422; Ruff *v.* Jarrett, 94 Ill. 475; Wollf *v.* Van Housen, 55 Ill. App. 295; Anchor Milling Co. *v.* Walsh, 37 Mo. App. 567; Southwestern Tel., etc., Co. *v.* Newman, (Tex. Civ. App. 1896) 34 S. W. 661. *Compare* Baltimore, etc., R. Co. *v.* Walker, 41 Ind. App. 588, 84 N. E. 730 (holding that an instruction in an action for personal injury that the burden is on plaintiff to "satisfy" the jury by a preponderance of the evidence of the truth of the allegations of his complaint before he is entitled to a verdict, and that, where he has failed to so "satisfy" the jury, the verdict must be for defendant, and that, if plaintiff has established to the "satisfaction" of the jury the truth of the allegations of the complaint, the verdict must be for him, is not open to the objection that the words "satisfy" and "satisfaction" are not equivalent to the word "find," since the word "satisfy" in an instruction that the burden of proof is on a party to "satisfy" the jury of a fact is synonymous with the word "believe," and the word "satisfy" as used in the statement that a party must satisfy the jury of a material fact means to relieve the jury from all uncertainty or doubt); Leque *v.* Madison Gas, etc., Co., 133 Wis. 547, 113 N. W. 946 (holding that a charge that "if defendant has satisfied you by a preponderance of evidence" of plaintiff's contributory negligence, etc., was not error as inferring that the jury must be satisfied of the fact by evidence coming from defendant and its witnesses).

Harmless error.— Where the jury found for plaintiff who had the affirmative of the issue, such instruction is harmless error. Dockery *v.* Tyler Car, etc., Co., (Tex. Civ. App. 1896) 34 S. W. 660.

52. Southern R. Co. *v.* Hobbs, 151 Ala. 335, 43 So. 844; Birmingham R., etc., Co. *v.* Martin, 148 Ala. 8, 42 So. 618; Callaway *v.* Gay, 143 Ala. 524, 39 So. 277; Carter *v.* Fulgham, 134 Ala. 238, 32 So. 684; Kansas City, etc., R. Co. *v.* Henson, 132 Ala. 528, 31 So. 590; Green *v.* Kegans, (Tex. Civ. App. 1909) 118 S. W. 173.

53. Gooch *v.* Tobias, 29 Ill. App. 268. And see Grotjan *v.* Rice, 124 Wis. 253, 102 N. W. 551.

54. Gage *v.* Louisville, etc., R. Co., 88 Tenn. 724, 14 S. W. 73.

55. Mixon *v.* Farris, 20 Tex. Civ. App. 253, 48 S. W. 741.

56. Swinney *v.* Booth, 28 Tex. 113.

57. Birmingham R., etc., Co. *v.* Martin, 148 Ala. 8, 42 So. 618 (in which it is said that evidence is addressed to the minds and not to the consciences of the jury); Birmingham R., etc., Co. *v.* Hinton, 141 Ala. 606, 37 So. 635.

58. McBride *v.* Banguss, 65 Tex. 174.

59. Bauchwitz *v.* Tyman, 11 Ill. App. 186.

60. Hutchinson Nat. Bank *v.* Crow, 56 Ill. App. 558.

rule differs from that of all other states as regards the degree of proof required in civil cases,[61] an instruction that plaintiff cannot recover if the jury are "reasonably satisfied" that he ought not to recover is proper, and it has been held that a refusal to give such instruction on request is reversible error.[62]

d. Other Instructions Requiring Too High a Degree of Proof. Any instruction in a civil case which is calculated to impress on the jury that more than a preponderance of the evidence is necessary to establish a fact is erroneous.[63] Instructions impose too high a degree of proof which require that the facts be established by the party having the burden of proof,[64] or that the jury be convinced,[65] or clearly convinced,[66] or clearly and satisfactorily convinced,[67] or convinced from a preponderance of the evidence,[68] or which require that conviction be produced in the minds of the jury,[69] or that they must have an abiding conviction as to the facts,[70] or that the facts must be "conclusively" [71] or absolutely shown,[72] or shown by clear proof,[73] or clear and positive proof,[74] or clear and convincing proof,[75] or clear, convincing, and conclusive proof,[76] or with certainty,[77] or that the facts be clearly and distinctly,[78] or clearly or fairly proven,[79] or shown with reasonable certainty,[80] by evidence that is clear and unequivocal,[81] or by the weight of the evidence by testimony in which the jury have implicit confidence,[82] or that the facts be proved with reasonable certainty by credible testimony,[83] or clearly and with certainty by a preponderance of the evidence,[84] or that the jury must find for defendant if the evidence leaves the jury uncertain.[85] A party cannot complain of an instruction which places too great a degree of proof on his opponent.[86]

e. Instructions Requiring Too Low a Degree of Proof. An instruction is erroneous as requiring too low a degree of proof which contains the requirement "if the jury are reasonably persuaded from the evidence." [87] And it is error to

61. See *supra*, IX, E, 12, a.

62. Birmingham R., etc., Co. *v.* Moore, 148 Ala. 115, 42 So. 1024.

63. U. S. Fidelity, etc., Co. *v.* Charles, 131 Ala. 658, 31 So. 558, 57 L. R. A. 212.

64. Endowment Rank O. K. P. *v.* Steele, 107 Tenn. 1, 8, 63 S. W. 1126 (in which it was said: "It is not necessary in a civil action that any fact should be 'established,' that is, 'settled certainly' or 'fixed permanently,' which may have been uncertain, doubtful or disputed theretofore. It is not required that the evidence shall be clear and plain or that it shall satisfy any reasonable man"); Jones *v.* Monson, 137 Wis. 478, 119 N. W. 179, 129 Am. St. Rep. 1082. And see Eberhardt *v.* Sanger, 51 Wis. 72, 8 N. W. 111.

65. Southern R. Co. *v.* Hobbs, 151 Ala. 335, 43 So. 844; Merchants' L. & T. Co. *v.* Lamson, 90 Ill. App. 18. *Contra*, Davidson *v.* Kolb, 95 Mich. 469, 55 N. W. 373.

66. Wilcox *v.* Henderson, 64 Ala. 535. But not in an equity case where the jury sits merely in an advisory capacity. Sweetser *v.* Dobbins, (Cal. 1884) 3 Pac. 116.

67. Wilkinson *v.* Searcy, 76 Ala. 176.

68. Brady *v.* Mangle, 109 Ill. App. 172.

69. Vandeventer *v.* Ford, 60 Ala. 610; Curran *v.* A. H. Stange Co., 98 Wis. 598, 74 N. W. 377.

70. Battles *v.* Tollman, 96 Ala. 403, 11 So. 247.

71. Holt *v.* Brown, 63 Iowa 319, 19 N. W. 235; Works *v.* Hill, 48 Tex. Civ. App. 631, 107 S. W. 581; Greathouse *v.* Moore, (Tex. Civ. App. 1893) 23 S. W. 226.

72. Bolen-Darnall Coal Co. *v.* Williams, 164 Fed. 665, 90 C. C. A. 481 [*reversing* 7 Indian Terr. 648, 104 S. W. 867].

73. Beach *v.* Clark, 51 Conn. 200; Iglehart *v.* Jernegan, 16 Ill. 513; McLeod *v.* Sharp, 53 Ill. App. 406.

74. Simpson Bank *v.* Smith, 52 Tex. Civ. App. 349, 114 S. W. 445.

75. Evans *v.* Montgomery, 95 Mich. 497, 55 N. W. 362.

76. Roberge *v.* Bonner, 185 N. Y. 265, 77 N. E. 1023 [*affirming* 94 N. Y. App. Div. 342, 88 N. Y. Suppl. 91].

77. Marshall First Nat. Bank *v.* Myer, 23 Tex. Civ. App. 302, 56 S. W. 213.

78. Gehlert *v.* Quinn, 35 Mont. 451, 90 Pac. 168, 119 Am. St. Rep. 864.

79. Hall *v.* Wolff, 61 Iowa 559, 16 N. W. 710; West *v.* Druff, 55 Iowa 335, 7 N. W. 636.

80. Anniston Mfg. Co. *v.* Southern R. Co., 145 Ala. 351, 40 So. 965; Leggett *v.* Illinois Cent. R. Co., 72 Ill. App. 577.

81. McCord-Brady Co. *v.* Moneyhan, 59 Nebr. 593, 81 N. W. 608.

82. Ott *v.* Oyer, 106 Pa. St. 6.

83. Smiley *v.* Hooper, 147 Ala. 646, 41 So. 660.

84. Howard *v.* Zimpelman, (Tex. 1890) 14 S. W. 59.

85. Brown *v.* Master, 104 Ala. 451, 16 So. 443.

86. Jones *v.* Monson, 137 Wis. 478, 119 N. W. 179; Allen *v.* Murray, 87 Wis. 41, 57 N. W. 979.

87. White *v.* Farris, 124 Ala. 461, 27 So. 259.

instruct that the jury may find in favor of the party whose theory they consider the most probable.[88] It is the duty of the jury to determine which theory is supported by a preponderance of the evidence and not which is probably true.[89]

13. LIMITING PURPOSE FOR WHICH EVIDENCE MAY BE CONSIDERED,[90] The court may instruct the jury as to the purpose for which evidence which has been admitted may be considered,[91] and limit the consideration to the purposes.[92] But it is error to give instructions passing on material evidence restricting the jury to a consideration of it to determine one question when it was material to determine other questions, and had been admitted generally for all purposes.[93] Where evidence competent for one purpose merely,[94] or as to one issue,[95] or against one party,[96] is admitted, or evidence in part irrelevant and incompetent is admitted without objection,[97] or evidence is admitted provisionally,[98] the court should charge the jury that it should not be considered for other purposes than those for which it was admitted unless the purpose is so obvious as to render an instruction unnecessary.[99] However, failure to do so is not assignable as error, unless the court is requested so to charge, it being the duty of the party claiming that the effect of the evidence be limited to ask an instruction to that effect.[1] And,

88. *Georgia.*— Parker *v.* Johnson, 25 Ga. 576.

Illinois.—Warner *v.* Crandall, 65 Ill. 195.

Iowa.— Butler *v.* Chicago, etc., R. Co., 71 Iowa 206, 32 N. W. 262.

Massachusetts.— Haskins *v.* Haskins, 9 Gray 390.

Michigan.— Dunbar *v.* McGill, 64 Mich. 676, 31 N. W. 578.

89. Butler *v.* Chicago, etc., R. Co., 71 Iowa 206, 32 N. W. 262.

90. **In criminal prosecutions** see CRIMINAL LAW, 12 Cyc. 631 *et seq.*

91. *In re* Kahs, 136 Iowa 116, 113 N. W. 563; Southern Kansas R. Co. *v.* Morris, (Tex. Civ. App. 1907) 99 S. W. 433 [*affirmed* in 100 Tex. 611, 102 S. W. 396, 123 Am. St. Rep. 834]. And see Stark *v.* Burke, 131 Iowa 684, 109 N. W. 206.

Illustration.— Defendant railroads having introduced evidence over objection that a written rule of the companies applied only to certain trains, and not to the train on which intestate was employed, and thereafter, both parties having introduced evidence on the subject. an instruction that the testimony as to the application of the rule was not admitted to change the rule, but to enable the jury to understand its meaning and application in the same manner as the railroad men understood it, was proper. Cleveland, etc., R. Co. *v.* Gossett, 172 Ind. 525, 87 N. E. 723.

92. Georgia, etc., R. Co. *v.* Shiver, 121 Ga. 708, 49 S. E. 700; Atlantic Consol. St. R. Co. *v.* Bates, 103 Ga. 333, 30 S. E. 41; Brents *v.* Louisville, etc., R. Co., 104 S. W. 961, 31 Ky. L. Rep. 1216; Line *v.* Grand Rapids, etc., R. Co., 143 Mich. 163, 106 N. W. 719; Raapke, etc., Co. *v.* Schmoller, etc., Piano Co., 82 Nebr. 716, 116 N. W. 652.

93. Wilson *v.* Wilson, 130 Ga. 677, 61 S. E. 530.

94. *California.*—Garfield *v.* Knight's Ferry, etc., Co., 14 Cal. 35.

Colorado.— Anson *v.* Evans, 19 Colo. 274, 35 Pac. 47.

Connecticut.— Smith *v.* Phipps, 65 Conn. 302, 32 Atl. 367.

Georgia.— Rome R. Co. *v.* Thompson, 101 Ga. 26, 29 S. E. 429.

Illinois.— Webster *v.* Enfield, 10 Ill. 298.

Iowa.— Hardwick *v.* Hardwick, 130 Iowa 230, 106 N. W. 639; Kircher *v.* Larchwood, 120 Iowa 578, 95 N. W. 184.

Kentucky.—Indian Head Coal Co. *v.* Miller, 110 S. W. 813, 33 Ky. L. Rep. 650; Ditto *v.* Slaughter, 92 S. W. 2, 28 Ky. L. Rep. 1164.

Missouri.— McMorrow *v.* Dowell, 116 Mo. App. 289, 90 S. W. 728; Home Lumber Co. *v.* Hartman, 45 Mo. App. 647.

North Carolina.— Luther *v.* Skeen, 53 N. C. 356; Henson *v.* King, 47 N. C. 385.

Texas.— Yocham *v.* McCurdy, 95 Tex. 336, 67 S. W. 316; Weir *v.* McGee, 25 Tex. Suppl. 20; Red River, etc., R. Co. *v.* Hughes, 36 Tex. Civ. App. 472, 81 S. W. 1235; Houston, etc., R. Co. *v.* Harris, 30 Tex. Civ. App. 179, 70 S. W. 335.

Vermont.— Vail *v.* Strong, 10 Vt. 457.

Virginia.— Cohen *v.* Bellenot, (1899) 32 S. E. 455.

United States.— Connecticut Mut. L. Ins. Co. *v.* Hillmon, 188 U. S. 208, 23 S. Ct. 294, 47 L. ed. 446 [*reversing* 107 Fed. 834, 46 C. C. A. 668].

See 46 Cent. Dig. tit. "Trial," § 498.

95. Hammer *v.* Chicago, etc., R. Co., 70 Iowa 623, 25 N. W. 246; Missouri, etc., R. Co. *v.* Collins, 15 Tex. Civ. App. 21, 39 S. W. 150.

96. Black *v.* Marsh, 31 Ind. App. 53, 67 N. E. 201; Marks *v.* Culmer, 6 Utah 419, 24 Pac. 528.

97. Willard *v.* Goodenough, 30 Vt. 393.

98. McNeill *v.* Reynolds, 9 Ala. 313; Haney *v.* Marshall, 9 Md. 194; Campbell *v.* Moore, 3 Wis. 767.

99. Texas L. & T. Co. *v.* Angel, 39 Tex. Civ. App. 166, 86 S. W. 1056.

1. *Alabama.*— Long Distance Tel., etc., Co. *v.* Schmidt, 157 Ala. 391, 47 So. 731; Scruggs *v.* Bibb, 33 Ala. 481.

Arkansas.— Bodcaw Lumber Co. *v.* Ford, 82 Ark. 555, 102 S. W. 896.

California.— Liebrandt *v.* Sorg, 133 Cal. 571, 65 Pac. 1098.

where the court prohibits counsel from commenting on evidence for purposes other than that for which it was admitted, error cannot be predicated of an omission to limit by instruction the purposes for which the evidence may be considered.[2] If a party neglects to ask for instructions limiting the application of evidence, he cannot afterward take advantage of the court's failure to give such instructions by an exception to the charge, even if it would have been error to refuse to limit the evidence in response to a request to do so.[3] It is error for the judge in his charge to marshal this evidence along with other evidence in the case,[4]

District of Columbia.— Washington Times Co. *v.* Downey, 26 App. Cas. 258.

Georgia.— McCommons *v.* Williams, 131 Ga. 313, 62 S. E. 230.

Illinois.— Bird *v.* Bird, 218 Ill. 158, 75 N. E. 760.

Indiana.— Coddington *v.* Canaday, 157 Ind. 243, 61 N. E. 567; Pittsburgh, etc., R. Co. *v.* Parish, 28 Ind. App. 189, 62 N. E. 514, 91 Am. St. Rep. 120.

Iowa.— Kirsher *v.* Kirsher, 120 Iowa 337, 94 N. W. 846; Puth *v.* Zimbleman, 99 Iowa 641, 68 N. W. 895. *Compare* Clement *v.* Drybread, 108 Iowa 701, 78 N. W. 235.

Kansas.— Cooper *v.* Harvey, 77 Kan. 854, 94 Pac. 213; Sweet *v.* Montpelier Sav. Bank, etc., Co., 73 Kan. 47, 84 Pac. 542.

Maryland.— Pegg *v.* Warford, 7 Md. 582.

Massachusetts.— Pomeroy *v.* Boston, etc., R. Co., 172 Mass. 92, 51 N. E. 523; Crandell *v.* White, 164 Mass. 54, 41 N. E. 204.

Missouri.— Sotebier *v.* St. Louis Transit Co., 203 Mo. 702, 102 S. W. 651; Boggess *v.* Boggess, 127 Mo. 305, 29 S. W. 1018; E. O. Stanard Milling Co. *v.* White Line Cent. Transit Co., 122 Mo. 258, 26 S. W. 704; Garesche *v.* St. Vincent's College, 76 Mo. 332; Rossier *v.* Metropolitan St. R. Co., 125 Mo. App. 159, 101 S. W. 1111.

Nebraska.— Chicago, etc., R. Co. *v.* Holmes, 68 Nebr. 826, 94 N. W. 1007.

New Hampshire.— Lord *v.* Manchester St. R. Co., 74 N. H. 295, 67 Atl. 639; Dow *v.* Merrill, 65 N. H. 107, 18 Atl. 317; Lee *v.* Lamprey, 43 N. H. 13.

New York.—Woolsey *v.* Ellenville, 155 N. Y. 573, 50 N. E. 270 [*affirming* 84 Hun 236, 32 N. Y. Suppl. 543]; Devine *v.* Brooklyn Heights R. Co., 131 N. Y. App. Div. 142, 115 N. Y. Suppl. 263; Harding *v.* Barney, 7 Bosw. 353.

North Carolina.— Stewart *v.* Raleigh, etc., Air Line R. Co., 141 N. C. 253, 53 S. E. 877. And see Liles *v.* Fosburg Lumber Co., 142 N. C. 39, 54 S. E. 795. *Contra*, Burton *v.* Wilmington, etc., R. Co., 84 N. C. 192.

South Carolina.— Smith *v.* Western Union Tel. Co., 77 S. C. 378, 58 S. E. 6.

Texas.— St. Louis, etc., R. Co. *v.* George, 85 Tex. 150, 19 S. W. 1036; Mayer *v.* Walker, 82 Tex. 222, 17 S. W. 505; Walker *v.* Brown, 66 Tex. 556, 1 S. W. 797; Shumard *v.* Johnson, 66 Tex. 70, 17 S. W. 398; Eastland *v.* Maney, 36 Tex. Civ. App. 147, 81 S. W. 574; Triolo *v.* Foster, (Civ. App. 1900) 57 S. W. 698; Halsell *v.* Decatur Cotton Seed Oil Co., (Civ. App. 1896) 36 S. W. 848; New York Mut. L. Ins. Co. *v.* Baker, 10 Tex. Civ. App. 515, 31 S. W. 1072; Roos *v.* Lewyn, 5 Tex. Civ. App. 593, 23 S. W. 450, 24 S. W. 538.

Utah.— McKinney *v.* Carson, 35 Utah 180, 99 Pac. 660.

Washington.— Sproue *v.* Seattle, 17 Wash. 256, 49 Pac. 489.

Wisconsin.— Lind *v.* Uniform Stave, etc., Co., 140 Wis. 183, 120 N. W. 839; Hacker *v.* Heiney, 111 Wis. 313, 87 N. W. 249; Viellesse *v.* Green Bay, 110 Wis. 160, 85 N. W. 665.

See 46 Cent. Dig. tit. "Trial," § 632.

Contra.— Barlow Bros. Co. *v.* Parsons, 73 Conn. 696, 49 Atl. 205; Georgia Home Ins. Co. *v.* Kelley, (Ky. 1908) 113 S. W. 882.

Especially does the rule apply where the court on its admission has, in the hearing of the jury, stated the purpose for which it was admitted. Purcell *v.* Tibbles, 101 Iowa 24, 69 N. W. 1120; D'Arrigo *v.* Texas Produce Co., 18 Tex. Civ. App. 41, 44 S. W. 531; Hacker *v.* Heiney, 111 Wis. 313, 87 N. W. 249.

If the request is refused, error may be assigned. Ropes *v.* Minshew, 51 Fla. 299, 41 So. 538; Chicago City R. Co. *v.* Schuler, 111 Ill. App. 470; Franklin *v.* Hoadley, 126 N. Y. App. Div. 687, 111 N. Y. Suppl. 300; Sprague *v.* Bond, 113 N. C. 551, 18 S. E. 701; Missouri, etc., R. Co. *v.* Cherry, 44 Tex. Civ. App. 232, 97 S. W. 712; Spiars *v.* Dallas Cotton Mills, (Tex. Civ. App. 1895) 32 S. W. 777.

If the request is that the evidence may be disregarded for all purposes and it is competent for some, the request may be ignored. Dallas *v.* McCullough, (Tex. Civ. App. 1906) 95 S. W. 1121; Lazzell *v.* Mapel, 1 W. Va. 43.

Waiver of right to make request.— The fact that, when evidence of a statement by defendant's superintendent, admissible for a particular purpose only, was received, defendant did not insist that the jury be then informed as to the limited purpose for which it could properly be considered, did not result in a waiver of defendant's right to have the jury subsequently charged to that effect. Walsh *v.* Carter-Crume Co., 126 N. Y. App. Div. 229, 110 N. Y. Suppl. 523.

Limitation of rule.— The rule that, where evidence is properly in, because proper evidence in reference to one party, the party it is not admissible to affect should ask the court to limit its application and effect by a charge does not apply, where the question is whether the testimony supports the verdict. Birkman *v.* Fahrenthold, 52 Tex. Civ. App. 335, 114 S. W. 428.

2. Barber *v.* Brace, 3 Conn. 9, 8 Am. Dec. 149.

3. Lord *v.* Manchester St. R. Co., 74 N. H. 295, 67 Atl. 639.

4. Westfeldt *v.* Adams, 135 N. C. 591, 47 S. E. 816.

or to state that it is competent for a purpose for which it is incompetent.[5] And, where improper testimony is inadvertently admitted, it is the duty of the court to withdraw it from the jury.[6] The court need not instruct to disregard hearsay evidence admitted without objection,[7] and it may decline to instruct as to the effect of particular evidence taken alone,[8] and should refuse an instruction pointing out that the testimony of a party was contradicted by two witnesses.[9]

14. CONTENTIONS AND ARGUMENT OF COUNSEL.[10] The court may instruct the jury as to questions of law which are raised by counsel in argument,[11] or instruct them as to what it may believe, perversions of legal positions, assumed by adverse counsel before the jury.[12] The court may also make remarks or suggestions appropriate to the positions of counsel demanded by the circumstances of the case and not calculated to prejudice the right of the complaining party;[13] or may recapitulate fairly such contentions of counsel as illustrate the bearing of the evidence on the issues,[14] or instruct the jury to disregard unsworn statements of counsel made to discredit witnesses;[15] or, where evidence has been admitted for one purpose and counsel undertakes to use it for another purpose, direct the jury to confine it to the purpose for which it was admitted;[16] or, if counsel misstates the evidence, caution the jury to be guided by the evidence and not the statements of counsel,[17] or to disregard such statements,[18] or add to correct instructions that the jury should decide cases mainly upon the ground taken and discussed by counsel in the argument,[19] or caution the jury to ignore legal authorities read to them by counsel,[20] or correct misstatements of law by counsel.[21] It is error for the court to refuse to instruct the jury to disregard improper assertions of counsel on argument,[22] where such assertions are calculated to prejudice the complaining party;[23] but error cannot be assigned for failure to do so in the absence of request.[24] An instruction to consider the evidence without prejudice removes any objection to arguments of counsel, where the court was not requested to interpose during such argument.[25] Where there is warrant for an instruction under the evidence, it is not objectionable because it is broader than the claim made by counsel for the party in whose interest it is given in his closing argument.[26] The court cannot be required, in advance of the argument, to instruct

5. Lundvick *v.* Westchester F. Ins. Co., 128 Iowa 376, 104 N. W. 429; Owensboro *v.* Westinghouse, 165 Fed. 385, 91 C. C. A. 335.

6. Price *v.* Wood, 9 N. M. 397, 54 Pac. 231.

7. Boston Mar. Ins. Co. *v.* Scales, 101 Tenn. 628, 49 S. W. 743.

8. Buck *v.* Hall, 170 Mass. 419, 49 N. E. 658; Wagner *v.* Metropolitan St. R. Co., 79 N. Y. App. Div. 591, 80 N. Y. Suppl. 191 [*affirmed* in 176 N. Y. 610, 68 N. E. 1125].

9. Walter *v.* Mutual City, etc., F. Ins. Co., 120 Mich. 35, 78 N. W. 1011.

10. In criminal prosecutions see CRIMINAL LAW, 12 Cyc. 644.

11. Matthews *v.* Poythress, 4 Ga. 287.

12. Matthews *v.* Poythress, 4 Ga. 287.

13. Nutting *v.* Herbert, 37 N. H. 346.

14. Clark *v.* Wilmington, etc., R. Co., 109 N. C. 430, 14 S. E. 43, 14 L. R. A. 749. But he must not mistake them and lead the jury upon matters of fact. Nash *v.* Morton, 48 N. C. 3.

15. Van Alstine *v.* Kaniecki, 109 Mich. 318, 67 N. W. 502.

16. Manchester *v.* Reserve Tp., 4 Pa. St. 35.

17. North Chicago St. R. Co. *v.* Wellner, 206 Ill. 272, 69 N. E. 6 [*affirming* 105 Ill. App. 652]; Mullen *v.* Reinig, 72 Wis. 388, 39 N. W. 861.

18. Boone *v.* Holder, 87 Ark. 461, 112 S. W. 1081.

19. Blendinger *v.* Souders, 2 Mona. (Pa.) 48; Melvin *v.* Bullard, 35 Vt. 268.

20. Chamberlain *v.* Masterson, 26 Ala. 371; Morehouse *v.* Remson, 59 Conn. 392, 22 Atl. 427.

21. Norton *v.* Galveston, etc., R. Co., (Tex. Civ. App. 1908) 108 S. W. 1044.

22. Illinois Cent. R. Co. *v.* Borders, 61 Ill. App. 55; Blizzard *v.* Applegate, 77 Ind. 516; Conaway *v.* Shelton, 3 Ind. 334; Drumm-Flato Commission Co. *v.* Gerlach Bank, 107 Mo. App. 426, 81 S. W. 503. *Compare* Birmingham R., etc., Co. *v.* Chastain, 158 Ala. 421, 48 So. 85, holding that a party should object and move to exclude improper argument from the jury, and it is not error to refuse an instruction asked solely for the purpose of answering such argument.

23. State *v.* McCartney, 65 Iowa 522, 22 N. W. 658; Missouri, etc., R. Co. *v.* Nordell, 20 Tex. Civ. App. 362, 50 S. W. 601.

24. O'Driscoll *v.* Lynn, etc., R. Co., 180 Mass. 187, 62 N. E. 3.

25. Reavis *v.* Orenshaw, 105 N. C. 369, 10 S. E. 907.

26. Pryor *v.* Morgan, 170 Pa. St. 568, 33 Atl. 98.

on the province of counsel in arguing the case. This conduct cannot be anticipated on the part of counsel.[27]

15. Cautions Against Sympathy or Prejudice.[28] It is not improper to instruct the jury that they are not to be influenced by sympathy or prejudice, if the circumstances warrant it.[29] The giving or refusal of such instructions is, however, ordinarily a matter of discretion with the court.[30] The parties are certainly not entitled to a cautionary instruction of this character in the absence of special circumstances connected with the trial, which would make such instruction essential to a fair trial.[31] But where the court discovers a popular prejudice against a party, it is the duty of the court to state the law so clearly and unequivocally as to leave the jury no escape from their duty.[32]

16. Duties of Jury[33] **— a. In General.** It is proper to tell the jury that it is their duty to determine the facts from the evidence and apply thereto the law as stated in the court's instructions,[34] but erroneous to direct the jury to determine the facts solely from the evidence without stating that the evidence must be considered in the light of the instructions.[35] It is proper to instruct the jury that they must receive the law from the court and be governed thereby.[36] A party is on request entitled to such instruction,[37] and the refusal thereof is

27. Parrish *v.* Parrish, 67 Kan. 323, 72 Pac. 844.

28. **In criminal prosecutions** see Criminal Law, 12 Cyc. 644.

29. *Alabama.*— Lunsford *v.* Walker, 93 Ala. 36, 8 So. 386.

Michigan.— Cornell *v.* Manistee, etc., R. Co., 117 Mich. 238, 75 N. W. 472; Doyle *v.* Dobson, 74 Mich. 562, 42 N. W. 137.

Minnesota.— Bingham *v.* Bernard, 36 Minn. 114, 30 N. W. 404.

New York.— Magee *v.* Troy, 48 Hun 383, 1 N. Y. Suppl. 24 [*affirmed* in 119 N. Y. 640, 23 N. E. 1148].

Pennsylvania.— Bachert *v.* Lehigh Coal, etc., Co., 208 Pa. St. 362, 57 Atl. 765.

Tennessee.— Citizens' St. R. Co. *v.* Dan, 102 Tenn. 320, 52 S. W. 177.

Wisconsin.— Pelitier *v.* Chicago, etc., R. Co., 88 Wis. 521, 60 N. W. 250.

See 46 Cent. Dig. tit. "Trial," § 483.

Compare Johnson *v.* St. Louis, etc., R. Co., 173 Mo. 307, 73 S. W. 173, where it is said that such instruction is improper when nothing has transpired to indicate that the jurors are unmindful of their duty.

Instructions held proper.— It is not improper, in an action where a railroad is a party, to caution the jury against a popular prejudice against railroads, when coupled with an admonition to be impartial and decide justly. Cornell *v.* Manistee, etc., R. Co., 117 Mich. 238, 75 N. W. 472. An instruction that "you have no right to act upon your sympathies without any proof; but if the proof happened to concur with your sympathies, you are not to disregard the proof because of that fact; you are to be governed by the proof in the case," is proper. Sheahan *v.* Barry, 27 Mich. 217, 224.

30. St. Louis, etc., R. Co. *v.* Paup, (Ark. 1893) 22 S. W. 213; St. Louis, etc., R. Co. *v.* Lyman, 57 Ark. 512, 22 S. W. 170; Parker *v.* Otis, 130 Cal. 322, 62 Pac. 571, 927, 92 Am. St. Rep. 56; Birmingham F. Ins. Co. *v.* Pulver, 126 Ill. 329, 18 N. E. 804, 9 Am. St. Rep. 598 [*affirming* 27 Ill. App. 17]; Central Branch Union Pac. R. Co. *v.* Andrews, 41 Kan. 370, 21 Pac. 276.

31. Snedecor *v.* Pope, 143 Ala. 275, 39 So. 318; Central Branch Union Pac. R. Co. *v.* Andrews, 41 Kan. 370, 21 Pac. 276; Johnson *v.* St. Louis, etc., R. Co., 173 Mo. 307, 73 S. W. 173; Union Cent. L. Ins. Co. *v.* Skipper, 115 Fed. 69, 52 C. C. A. 663.

32. Quinby *v.* Chester St. R. Co., 2 Del. Co. (Pa.) 285; Nashville, etc., R. Co. *v.* Smith, 11 Heisk. (Tenn.) 455. And see Jones, etc., Co. *v.* George, 227 Ill. 64, 81 N. E. 4.

33. **In criminal prosecutions** see Criminal Law, 12 Cyc. 610, 643 *et seq.*

34. North Chicago St. R. Co. *v.* Wellner, 206 Ill. 272, 69 N. E. 6 [*affirming* 105 Ill. App. 652]; North Chicago St. R. Co. *v.* Kaspers, 186 Ill. 246, 57 N. E. 849 [*affirming* 85 Ill. App. 316]; Eckels *v.* Hawkinson, 138 Ill. App. 627; International Harvester Co. *v.* Campbell, 43 Tex. Civ. App. 421, 96 S. W. 93.

In an action by an individual against a corporation it is not reversible error to charge that in a suit of this kind it is the duty of the jury to base their verdict solely on the evidence and the instructions. Huss *v.* Heydt Bakery Co., 210 Mo. 44, 108 S. W. 63.

35. West Chicago St. R. Co. *v.* Shannon, 106 Ill. App. 120; Lundon *v.* Chicago, 83 Ill. App. 208.

36. Akridge *v.* Noble, 114 Ga. 949, 41 S. E. 78; Thornton *v.* Lane, 11 Ga. 459; Hart *v.* Menefee, (Tex. Civ. App. 1898) 45 S. W. 854; Hyde *v.* Swanton, 72 Vt. 242, 47 Atl. 790; First Cong. Meeting-House Soc. *v.* Rochester, 66 Vt. 501, 29 Atl. 810; Mobile, etc., R. Co. *v.* Wilson, 76 Fed. 127, 22 C. C. A. 101. And may add the reason therefor. Brown *v.* Atlanta, 66 Ga. 71.

The rule is especially applicable where the jury fail to reach a verdict because one of the jurors refuses to apply the law as given by the courts to the facts of the case. Council *v.* Teal, 122 Ga. 61, 49 S. E. 806.

37. Chicago, etc., R. Co. *v.* Burridge, 211

error.[38] It is not necessary, however, that the jury be told in every instruction that they must be governed thereby.[39] It is not error for the court to instruct the jury that they act as arbitrators to arbitrate the differences between the litigants;[40] or that the privilege of correcting errors of law that the court might make does not rest with the jury;[41] or to direct the jury to say on which of two defenses they found for defendant, if they so found.[42] An instruction is erroneous which gives the jury to understand that they should not base their verdict on an inference or guess,[43] or directs them to find in favor of that party whose theory is more acceptable, more probable, and more consistent with their experience,[44] or that they may use the instruction so far as they find it applicable.[45] The refusal of an instruction which warns the jury against being influenced by a newspaper article is not error, unless it appears that the discretionary power of the court to give or refuse such instruction has been abused.[46] And it has been held that giving an instruction concerning the respective duties of the court and jury lies in the discretion of the court, and its refusal is not prejudicial error.[47]

b. Application of Personal Knowledge, Experience, or Judgment of Jurors.[48] (i) *In General.* Jurors are triers of the facts not upon their own personal knowledge, but upon the evidence adduced in the case.[49] And an instruction which authorizes or directs the jury to take into consideration their own experience and observation regarding the matters at issue in addition to the evidence,[50] or irrespective of the evidence,[51] or under which the whole matter in controversy

Ill. 9, 71 N. E. 838 [*reversing* 107 Ill. App. 23]; Chicago, etc., R. Co. *v.* Stonecipher, 90 Ill. App. 511. But see Chicago, etc., R. Co. *v.* Clark, 134 Ill. App. 161 [*affirmed* in 231 Ill. 548, 83 N. E. 286], holding that such instructions are unnecessary and superfluous.

To say to the jury that if they disobey the instructions they will be guilty of contempt and will be punished is erroneous. There should be nothing in the intercourse of the judge with the jury having the least appearance of duress or coercion. Price *v.* Carter, 39 Fla. 362, 22 So. 715.

38. Illinois Commercial Men's Assoc. *v.* Perrin, 139 Ill. App. 543.

39. Chicago Union Traction Co. *v.* O'Brien, 219 Ill. 303, 76 N. E. 341 [*reversing* 117 Ill. App. 183].

40. Schumpert *v.* Southern R. Co., 65 S. C. 332, 43 S. E. 813, 95 Am. St. Rep. 802.

41. Thornton *v.* Lane, 11 Ga. 459.

42. Phœnix Assur. Co. *v.* Munger Improved Cotton Mach. Mfg. Co., (Tex. Civ. App. 1898) 49 S. W. 271.

43. Spink *v.* New York, etc., R. Co., 26 R. I. 115, 58 Atl. 499, holding that the instruction is too broad as excluding inferences of fact.

44. Rommeney *v.* New York, 49 N. Y. App. Div. 64, 63 N. Y. Suppl. 186.

45. Guinard *v.* Knapp-Stout, etc., Co., 90 Wis. 123, 62 N. W. 625, 48 Am. St. Rep. 901.

46. Beyer *v.* Martin, 120 Ill. App. 50.

47. Pittsburgh, etc., R. Co. *v.* Collins, 168 Ind. 467, 80 N. E. 415. And see Pfaffenback *v.* Lake Shore, etc., R. Co., 142 Ind. 246, 41 N. E. 530.

48. **In criminal prosecutions see** Criminal Law, 12 Cyc. 644.

49. Doggett *v.* Jordan, 2 Fla. 541; Clarke *v.* Robinson, 5 B. Mon. (Ky.) 55; Citizens' St. R. Co. *v.* Burke, 98 Tenn. 650, 40 S. W. 1085.

50. *Georgia.*— Gibson *v.* Carreker, 91 Ga. 617, 17 S. E. 965.

Illinois.— Ottawa Gas Light, etc., Co. *v.* Graham, 28 Ill. 73, 81 Am. Dec. 263.

Kansas.— Chicago, etc., R. Co. *v.* Spring Hill Cemetery Assoc., (App. 1899) 57 Pac. 252; Waite *v.* Teeters, 36 Kan. 604, 14 Pac. 146.

Maine.— Page *v.* Alexander, 84 Me. 83, 24 Atl. 584; Douglass *v.* Trask, 77 Me. 35.

Michigan.— Karrer *v.* Detroit, 142 Iowa 331, 106 N. W. 64; Burrows *v.* Delta Transp. Co., 106 Mich. 582, 64 N. W. 501, 29 L. R. A. 468; Wood *v.* Barker, 49 Mich. 295, 13 N. W. 597.

See 46 Cent. Dig. tit. "Trial," § 624.

51. Clarke *v.* Robinson, 5 B. Mon. (Ky.) 55. And see Barry *v.* McCollom, 81 Conn. 293, 70 Atl. 1035, 129 Am. St. Rep. 215, holding that where plaintiff, in an action for libel, was a witness in her own behalf, and one of the alleged libelous statements was that she had not "even the externals of refinement," an instruction that the possession of the externals of refinement was rather a subject of the jury's own observation was erroneous, as misleading the jury to believe that such observation was the best evidence. But see Reves *v.* Hyde, 14 Daly 431, 13 N. Y. Civ. Proc. 323, 14 N. Y. St. 689, 28 N. Y. Wkly. Dig. 38 [*reversing* 11 N. Y. St. 681].

Reason for rule.— It is better that they should determine the fact upon the testimony of others, delivered under all the guards and sanctions which the law can impose, and subject to all the scrutiny which the parties and the jury themselves can exercise, than that the jury should decide according to the secret results of their own observation, which being unknown until disclosed in the verdict, are free from scrutiny and almost free from responsibility. Clarke *v.* Robinson, 5 B. Mon. (Ky.) 55.

is left to the opinion of the jury without any reference to the testimony,[52] is erroneous, and it is of course proper to refuse instructions of this character.[53] However, the jury may be instructed to weigh the evidence in the light of their general knowledge and experience as applied to the ordinary transactions of life.[54] But the instruction must be confined to such knowledge, observation, and experience as the jurors share in common with men generally,[55] and should not limit this general knowledge to that acquired by persons in any particular line of business.[56] It is error to instruct that matters within the common knowledge of mankind do not require proof, where the attention of the jury is not directed to the particular matters they might consider without evidence thereof.[57]

(II) *In Determining Credibility of Witnesses.* It is proper to instruct the jury to take into account their experience of men and their actions in determining the credibility of witnesses;[58] but it is error to instruct them that they can act upon their private and personal knowledge of the character of the witnesses.[59]

(III) *On Consideration of View.* Impressions made upon jurors by a view of premises examined by them under order of court are not evidence,[60] and therefore to instruct them to use as evidence what they saw or learned on such view is error.[61] When, before a view by the jury, they are cautioned not to consider their own observations, and are properly instructed as to the purpose of the view, an instruction in regard to the same matter need not also be given at the close of the trial.[62] When the jury have been properly permitted to view the premises in dispute, it is not improper to refuse a request which requires the court to instruct the jury that "they are not to take into consideration anything

52. Doggett *v.* Jordan, 2 Fla. 541.

53. Morehead *v.* Anderson, 125 Ky. 77, 100 S. W. 340, 30 Ky. L. Rep. 1137.

54. *Colorado.*— Denver, etc., R. Co. *v.* Warring, 37 Colo. 122, 86 Pac. 305.

Illinois.— Illinois Cent. R. Co. *v.* Warriner, 229 Ill. 91, 82 N. E. 246 [*affirming* 132 Ill. App. 301]; Ottawa Gas Light, etc., Co. *v.* Graham, 28 Ill. 73, 81 Am. Dec. 263.

Kansas.— Sanford *v.* Gates, 38 Kan. 405, 16 Pac. 807.

Minnesota.— Johnson *v.* Hillstrom, 37 Minn. 122, 33 N. W. 547.

Oklahoma.—Waters-Pierce Oil Co. *v.* Deselms, 18 Okla. 107, 89 Pac. 212.

Oregon.—Willis *v.* Lance, 28 Oreg. 371, 43 Pac. 384, 487.

Wisconsin.— Stiles *v.* Neillsville Milling Co., 87 Wis. 266, 58 N. W. 411; Neanow *v.* Uttech, 46 Wis. 581, 1 N. W. 221.

See 46 Cent. Dig. tit. "Trial," § 624.

Opinion evidence.— The jury in weighing opinion evidence should use their common sense and experience, and consider all the evidence fully, and determine from it the matter in issue. Hamilton *v.* Seaboard Air Line R. Co., 150 N. C. 193, 63 S. E. 730.

55. Sloss-Sheffield Steel, etc., Co. *v.* Hutchinson, 145 Ala. 686, 40 So. 114; Chicago, etc., R. Co. *v.* Krayenbuhl, 65 Nebr. 889, 91 N. W. 880, 59 L. R. A. 920.

56. Clark *v.* Ford, 7 Kan. App. 332, 51 Pac. 938, holding that it is error for the court to instruct a jury that, in arriving at a verdict, they may take into consideration such knowledge of the value of this class of property as is common to all of them.

57. Illinois Cent. R. Co. *v.* Greaves, 75 Miss. 360, 22 So. 804.

58. Ottawa Gas Light, etc., Co. *v.* Graham, 28 Ill. 73, 81 Am. Dec. 263; Cincinnati, etc., R. Co. *v.* Cregor, 150 Ind. 625, 50 N. E. 760; Jenney Electric Co. *v.* Branham, 145 Ind. 314, 41 N. E. 448, 33 L. R. A. 395; Renard *v.* Grande, 29 Kan. App. 579, 64 N. E. 644.

59. Pettyjohn *v.* Liebscher, 92 Ga. 149, 17 S. E. 1007; Chattanooga, etc., R. Co. *v.* Owen, 90 Ga. 265, 15 S. E. 853 [*overruling* Howard *v.* State, 73 Ga. 83; Head *v.* Bridges, 67 Ga. 227; Anderson *v.* Tribble, 66 Ga. 584].

60. Heady *v.* Vevay, etc., Turnpike Co., 52 Ind. 117.

61. Heady *v.* Vevay, etc., Turnpike Co., 52 Ind. 117; Morrison *v.* Burlington, etc., R. Co., 84 Iowa 663, 51 N. W. 75; Close *v.* Samm, 27 Iowa 503; Schulz *v.* Bower, 57 Minn. 493, 59 N. W. 631, 47 Am. St. Rep. 630. *Contra,* Clay Center *v.* Jevons, 2 Kan. App. 568, 44 Pac. 745; Junction City *v.* Blades, 1 Kan. App. 85, 41 Pac. 677. And *compare* Ham *v.* Delaware, etc., Canal Co., 155 Pa. St. 548, 26 Atl. 757, 20 L. R. A. 682, holding that an instruction that jurors who have made a view of the premises may have the aid of their own observation is not objectionable as authorizing them to substitute their eyes exclusively for the evidence.

62. Cox *v.* Chicago, etc., R. Co., 95 Iowa 54, 63 N. W. 450.

Remedied defect.— Where the cure of an alleged defect causing an injury is brought to the attention of a jury viewing the place pursuant to the order of the court, the court must direct the jury to disregard the fact that the defect had been remedied. Lydston *v.* Rockingham County Light, etc., Co., 75 N. H. 23, 70 Atl. 385.

they saw, or any impression they received at the view of the premises, in determining the rights of the parties to this suit." [63]

c. Agreeing on Verdict.[64] Instructions which have a tendency to restrain jurors from agreeing on a verdict should not be given.[65] On the other hand, the court may impress upon the jury the propriety and importance of coming to an agreement and harmonizing their views, state the reasons therefor, and tell them it is their duty to try to agree; [66] but should not give instructions having a tendency to coerce the jury into agreeing on a verdict. While the court may reasonably urge an agreement, its discretion does not extend to the limit of coercion.[67] So instructions which direct or sanction a compromise verdict by the jury are erroneous and should not be given.[68] The law does not expect, nor does it tolerate, the agreement by a juror on a verdict, unless he is convinced that he is right.[69] It does not contemplate that the jurors shall compromise, divide, or yield for the mere purpose of agreement.[70] The court may instruct the jury against reaching a verdict by compromise,[71] but the giving of such instruction is discretionary and it may with equal propriety be refused.[72]

63. Fox *v.* Baltimore, etc., R. Co., 34 W. Va. 466, 12 S. E. 757.

64. **In criminal prosecutions** see CRIMINAL LAW, 12 Cyc. 611.

65. Chicago, etc., R. Co. *v.* Rains, 203 Ill. 417, 67 N. E. 840; San Antonio, etc., R. Co. *v.* Choate, 22 Tex. Civ. App. 618, 56 S. W. 214.

Illustration.— It was proper to strike from a requested instruction, as tending to encourage a disagreement, a statement that "no juror should consent to a verdict which does not meet with the approval of his own judgment and conscience, after due deliberation with his fellow-jurors, and after fairly considering all the evidence admitted by the court, and the law as given in the instructions." Evanston *v.* Richards, 224 Ill. 444, 79 N. E. 673.

66. See *infra*, X, E, 3.

67. See *infra*, X, E, 4.

68. *Illinois.*—West Chicago St. R. Co. *v.* Dougherty, 89 Ill. App. 362.

Indiana.— Richardson *v.* Coleman, 131 Ind. 210, 29 N. E. 909, 31 Am. St. Rep. 429.

Kansas.—Kansas City, etc., R. Co. *v.* Ryan, 49 Kan. 1, 30 Pac. 108.

Michigan.— Goodsell *v.* Seely, 46 Mich. 623, 10 N. W. 44, 41 Am. Rep. 183.

Missouri.— Sherwood *v.* Grand Ave. R. Co., 132 Mo. 339, 33 S. W. 774; Fairgrieve *v.* Moberly, 29 Mo. App. 141.

Pennsylvania.— Boden *v.* Irwin, 92 Pa. St. 345.

Texas.— Gulf, etc., R. Co. *v.* Johnson, 99 Tex. 337, 90 S. W. 164; Cornelison *v.* Ft. Worth, etc., R. Co., 46 Tex. Civ. App. 509, 103 S. W. 1186; Wootan *v.* Partridge, 39 Tex. Civ. App. 346, 87 N. W. 356; Sargent *v.* Lawrence, 16 Tex. Civ. App. 540, 40 S. W. 1075.

See 46 Cent. Dig. tit. "Trial," § 485.

Instructions obnoxious to rule.—"The law which requires unanimity on the part of the jury to render a verdict, expects, and will tolerate reasonable compromise and fair concessions." Richardson *v.* Coleman, 131 Ind. 210, 212, 29 N. E. 909, 31 Am. St. Rep. 429. "If you can't each get exactly what you want, get the next best thing to it." Southern Ins. Co. *v.* White, 58 Ark. 277, 282, 24 S. W. 425. "Gentlemen, come back to-morrow morning with a determination to compromise." Edens *v.* Hannibal, etc., R. Co., 72 Mo. 212. That the judge should direct them to retire and agree on some kind of a verdict. Wootan *v.* Partridge, 39 Tex. Civ. App. 346, 87 S. W. 356. So, an instruction which tells the jury that if they find for plaintiff, they must not reach an assessment of damages by adding the amount individual jurors think ought to be awarded, and dividing the amount so obtained by the number of jurors, unless they thereafter believe from the evidence that such amount is warranted by the evidence, and afterward agree upon such amount as a fair and just sum under all the evidence, is erroneous as tending to induce the jury to arrive at a verdict in a manner prohibited by law. West Chicago St. R. Co. *v.* Dougherty, 89 Ill. App. 362. See also an instruction that in determining values the jury may ascertain what the average of the estimates made are, and then decide whether such average is fair value. Kansas City, etc., R. Co. *v.* Ryan, 49 Kan. 1, 30 Pac. 108.

A qualification by the statement that the verdict must be based on the law given by the court and the facts found by the jury does not cure the error. Gulf, etc., R. Co. *v.* Johnson, 99 Tex. 337, 90 S. W. 164 [*reversing* 37 Tex. Civ. App. 99, 82 S. W. 822].

When not ground for reversal.— Stating that it was necessary for some or all of the jurors to make concessions is not a ground for reversal where the jury did not agree until the court had given further instructions. O'Neal *v.* Richardson, 78 Ark. 132, 92 S. W. 1117.

69. Richardson *v.* Coleman, 131 Ind. 210, 29 N. E. 909, 31 Am. St. Rep. 429.

70. Goodsell *v.* Seeley, 46 Mich. 623, 10 N. W. 44, 41 Am. Rep. 183.

71. Sharp *v.* Kansas City Cable R. Co., 114 Mo. 94, 20 S. W. 93, in which it was said that, in general, there is no way to prove that the verdict is the result of a compromise, and hence the propriety of giving instructions on the subject.

72. Benjamin *v.* Metropolitan St. R. Co.,

17. Effect of Verdict. It is well settled that the court is not bound to instruct the jury as to the consequences which will flow from their verdict.[73] But there is a considerable lack of harmony as to the propriety of giving such instructions. Some decisions seem to lay down the rule without qualification that such instructions are erroneous.[74] Many of the decisions relate to the propriety of giving instructions as to the effect of the verdict, in respect of costs. In one jurisdiction it is held without qualification that any instruction on this head is erroneous.[75] In another, such instruction is held proper in cases where punitive damages may be given,[76] but not in actions on contract;[77] and in another, it is proper to give such instruction in actions of tort,[78] but in no other kind of action.[79] As respects other instructions as to the effect of the verdict, it has been held proper to instruct that a verdict and judgment for plaintiff will authorize a body execution against defendant;[80] and it is not a ground for reversal that the court instructs the jury that plaintiff's right to recover in another action would not be precluded by a verdict for defendant in the case on trial,[81] and on the other hand it is reversible error to instruct that if plaintiff is unsuccessful, he may ultimately lose the whole sum which he claims as damages.[82] So it has been held that where the jury have rendered a verdict assessing damages severally against defendants, it is reversible error for the court to send them back to the jury room with the instruction that a satisfaction of the judgment on the smaller assessment of damages would operate to preclude the collection of the larger.[83]

F. Written Instructions[84] **— 1. Necessity.** Although there is less liability

133 Mo. 274, 34 S. W. 590; Sherwood *v.* Grand Ave. R. Co., 132 Mo. 339, 33 S. W. 774; Carson *v.* Southern R. Co., 68 S. C. 55, 86, 46 S. E. 525, in which it was said: "Never suggest evil to a jury."

73. Smith *v.* Ross, 31 App. Cas. (D. C.) 348; Purple *v.* Greenfield, 138 Mass. 1 (holding that the court cannot be compelled to rule on a question that cannot be tried, as for instance whether a third person would be liable over); Keller *v.* Strasburger, 90 N. Y. 379; Waffle *v.* Dillenback, 38 N. Y. 53; Panama R. Co. *v.* Johnson, 17 N. Y. Suppl. 777; Elliott *v.* Brown, 2 Wend. (N. Y.) 497, 20 Am. Dec. 644; Stowe *v.* La Conner Trading, etc., Co., 39 Wash. 28, 80 Pac. 856, 81 Pac. 97 (whether plaintiff had also a cause of action against a third person).

74. Catasauqua Mfg. Co. *v.* Hopkins, 141 Pa. St. 30, 45, 21 Atl. 638 (in which it was said: "The jury should determine questions submitted to them, upon the evidence, and not upon the possible consequences of a given verdict to either party"); Com. *v.* Switzer, 134 Pa. St. 383, 19 Atl. 681.

75. Cleveland, etc., R. Co. *v.* Bartram, 11 Ohio St. 457.

76. Waffle *v.* Dillenback, 38 N. Y. 53, 5 Transcr. App. 241, 4 Abb. Pr. N. S. 457 [*affirming* 39 Barb. 123]; Tucker *v.* Ely, 37 Hun (N. Y.) 565; Nolton *v.* Moses, 3 Barb. (N. Y.) 31.

77. Munson *v.* Curtis, 1 N. Y. Suppl. 828, 15 N. Y. Civ. Proc. 131, in which it was said: "In actions on contract, the amount of the recovery is to be determined on fixed principles applicable to the evidence in the case, and wholly independent of the question of costs. The jury have no discretion in fixing the amount, and they violate their duty if they suffer their judgment to be influenced by extraneous considerations. . . . In actions in which punitive damages may be given, such instruction is proper, since the measure of such damages is in the discretion of the jury, and costs themselves are punitive." *Compare dictum* in Panama R. Co. *v.* Johnson, 17 N. Y. Suppl. 777.

78. Steketee *v.* Kimm, 48 Mich. 322, 12 N. W. 177.

79. Sixma *v.* Montgomery, 98 Mich. 193, 57 N. W. 108, holding that in assumpsit for the value of timber cut by defendant from plaintiff's land, it is error to instruct the jury that if plaintiff recovers less than one hundred dollars, defendant will recover costs, as the only questions to be determined by the jury are the cutting, the quantity cut, and the value; and the costs are fixed by statute and are dependent upon the finding of the jury and the forum.

80. Keller *v.* Strasburger, 90 N. Y. 379 [*affirming* 23 Hun 625]; Reiss *v.* Kienle, 88 N. Y. Suppl. 359.

81. Armstrong *v.* Tait, 8 Ala. 635, 42 Am. Dec. 656, in which it was said that the instruction could not have misled the jury, and that they doubtless sought the information merely to reconcile their consciences to the performance of an imperative duty.

82. Bennett *v.* Watson, 11 N. Y. St. 555.

83. Dougherty *v.* Shown, 1 Heisk. (Tenn.) 302.

84. **Failure to reduce instructions to writing as ground for new trial** see New Trial, 29 Cyc. 790.

In criminal prosecutions see Criminal Law, 12 Cyc. 645 *et seq.*

Necessity for reducing to writing instructions given after retirement of jury see *infra*, X, E, 2, d.

to error when instructions are reduced to writing,[85] the court may instruct the jury orally in the absence of statute providing otherwise.[86] But where oral instructions are given, it is the right of the party who desires to except thereto to have them reduced to writing so that they may be reviewed on appeal.[87] In most jurisdictions it is a matter of statutory regulation whether instructions must be reduced to writing. Some of the statutes require written instructions to be given when requested, and others require instructions to be reduced to writing, although no request is made therefor.[88] These statutes are uniformly held to be mandatory, and a non-compliance therewith erroneous, and a ground for reversal if injury results;[89] and it has been held that this is so even though no injury resulted,[90] although this latter proposition is also denied.[91] If, by the

85. Smith *v.* Crichton, 33 Md. 103. And see Baltimore Mut. L. Ins. Co. *v.* Rain, 108 Md. 353, 70 Atl. 87, in which it was said that it is better practice to reduce all instructions to writing and so submit them, than to refuse all the prayers of both parties, and give oral instructions.

86. Rosenkovitz *v.* United R., etc., Co., 108 Md. 306, 70 Atl. 108; Smith *v.* Crichton, 33 Md. 103. And see Baer *v.* Rooks, 50 Fed. 898, 2 C. C. A. 76.

In civil cases in the Indian Territory the court cannot be required to reduce the general charge to writing. Baer *v.* Rooks, 50 Fed. 898, 2 C. C. A. 76; Gulf, etc., R. Co. *v.* Childs, 49 Fed. 358, 1 C. C. A. 297; Gulf, etc., R. Co. *v.* Campbell, 49 Fed. 354, 1 C. C. A. 293.

87. Smith *v.* Crichton, 33 Md. 103.

88. See statutes of the various states.

89. *Arkansas.*—Arnold *v.* State, 71 Ark. 367, 74 S. W. 513; National Lumber Co. *v.* Snell, 47 Ark. 407, 1 S. W. 708.

Colorado.— Tyler *v.* McKenzie, 43 Colo. 233, 95 Pac. 943; Wettengel *v.* Denver, 20 Colo. 552, 39 Pac. 343; Lee *v.* Stahl, 9 Colo. 208, 11 Pac. 77; Montelius *v.* Atherton, 6 Colo. 224.

Florida.— Doggett *v.* Jordan, 2 Fla. 541.

Georgia.— Bowden *v.* Achor, 95 Ga. 243, 22 S. E. 254; Harris *v.* McArthur, 90 Ga. 216, 15 S. E. 758.

Illinois.— Chicago Hydraulic Press Brick Co. *v.* Campbell, 116 Ill. App. 322; Gardner-Wilmington Coal Co. *v.* Knott, 115 Ill. App. 515.

Indiana.— Bradway *v.* Waddell, 95 Ind. 170; Hardin *v.* Helton, 50 Ind. 319; Gray *v.* Stivers, 38 Ind. 197; Lung *v.* Deal, 16 Ind. 349; Rising-Sun, etc., Turnpike Co. *v.* Conway, 7 Ind. 187; Kenworthy *v.* Williams, 5 Ind. 375; Molt *v.* Hover, 40 Ind. App. 552, 82 N. E. 535.

Iowa.— Parris *v.* State, 2 Greene 449.

Kansas.— Rich *v.* Lappin, 43 Kan. 666, 23 Pac. 1038; Scruton *v.* Hall, 6 Kan. App. 714, 50 Pac. 964; Wheat *v.* Brown, 3 Kan. App. 431, 43 Pac. 807.

Kentucky.— Traders' Deposit Bank *v.* Henry, 105 Ky. 707, 49 S. W. 536, 20 Ky. L. Rep. 1506; Ferguson *v.* Fox, 1 Metc. 83; Louisville, etc., R. Co. *v.* Banks, (1896) 33 S. W. 627, 17 Ky. L. Rep. 1065.

Louisiana.— Kellar *v.* Belleandeau, 5 La. Ann. 609.

Missouri.— Cape Girardeau *v.* Fisher, 61 Mo. App. 509.

Nebraska.— Hartwig *v.* Gordon, 37 Nebr. 657, 56 N. W. 324; Fitzgerald *v.* Fitzgerald, 16 Nebr. 413, 20 N. W. 269.

North Carolina.— Sawyer *v.* Roanoke R., etc., Co., 142 N. C. 162, 55 S. E. 84; Drake *v.* Connelly, 107 N. C. 463, 12 S. E. 251.

Ohio.— Hardy *v.* Turney, 9 Ohio St. 400.

Tennessee.— Columbia Veneer, etc., Co. *v.* Cottonwood Lumber Co., 99 Tenn. 122, 41 S. W. 351; Insurance Co. *v.* Fosterville Cent. Presb. Church, 91 Tenn. 135, 18 S. W. 121.

Texas.— Sharman *v.* Newsome, 46 Tex. Civ. App. 111, 101 S. W. 1020. A previous statute on the subject was held to be merely directory. Boone *v.* Thompson, 17 Tex. 605; Reid *v.* Reid, 11 Tex. 585; Gulf, etc., R. Co. *v.* Holt, 1 Tex. App. Civ. Cas. § 835; Toby *v.* Heidenheimer, 1 Tex. App. Civ. Cas. § 795.

Washington.— McIntosh *v.* Sawmill Phœnix, 49 Wash. 152, 94 Pac. 930.

Wisconsin.— Penberthy *v.* Lee, 51 Wis. 261, 8 N. W. 116.

See 46 Cent. Dig. tit. "Trial," § 514 *et seq.*

In Pennsylvania, while the statute makes it the duty of a judge to reduce to writing the answers to the several points presented and read them to the jury before they retire to consider their verdict, an omission to do so is not assignable as error. Scheuing *v.* Yard, 88 Pa. St. 286; Kerr *v.* O'Connor, 63 Pa. St. 341; Patterson *v.* Kountz, 63 Pa. St. 246; Morberger *v.* Hackenberg, 13 Serg. & R. 26.

90. Jenkins *v.* Levis, 23 Kan. 255; Atchison *v.* Jansen, 21 Kan. 560; Scruton *v.* Hall, 8 Kan. App. 714, 50 Pac. 964; Wheat *v.* Brown, 3 Kan. App. 431, 43 Pac. 807; Insurance Co. *v.* Fosterville Cent. Presb. Church, 91 Tenn. 135, 18 S. W. 121; McIntosh *v.* Sawmill Phœnix, 49 Wash. 152, 94 Pac. 930. And see Vanmeter *v.* True, 16 Ky. L. Rep. 320. *Compare* Sellers *v.* Greencastle, 134 Ind. 645, 34 N. E. 534, holding that the error arising from giving an instruction oral in part is not harmless where the court does not know from the record that the result reached below was correct.

91. Hefling *v.* Van Zandt, 162 Ill. 162, 44 N. E. 424; Moses *v.* Loomis, 55 Ill. App. 342; Greathouse *v.* Summerfield, 25 Ill. App. 296; Walsh *v.* St. Louis Drayage Co., 40 Mo. App. 339; Chapman *v.* Sneed, 17 Tex. 428; Schwartzlose *v.* Mehlitz, (Tex. Civ. App.

provisions of the statute, written instructions must be given on request, the court may instruct orally in the absence of a request to reduce the instructions to writing,[92] the rule being that in the absence of such request the court may instruct either in writing or orally,[93] and in any event if the parties have consented to the giving of oral instructions, they are estopped from objecting.[94] The court, when requested to charge in writing, cannot charge orally, although the party refuses to write out instructions he desires to have given.[95] Nor is it an excuse for failure to give a written charge that it was impracticable to put the whole charge in writing, within the time in which it was necessary to conclude the trial.[96] Notwithstanding a statutory prohibition against instructing orally, yet if oral instructions are given, only the party aggrieved by them can complain.[97]

2. What Are Instructions Within Rule. Instructions proper are directions in regard to the law of the case,[98] statements of rules of law governing the matters in issue.[99] A proposition to which the judge gives his assent in argument is an instruction,[1] as is also the judge's direction as to the duty of the jury to try the case on the testimony,[2] or a communication as to the effect or non-effect, propriety or impropriety, of parts of the evidence,[3] and the oral citing and subsequent reading of a statute.[4] On the other hand, remarks made orally by the presiding judge are no part of the charge unless bearing upon questions of law or fact involved in the issues.[5] Remarks to the jury of a general character as to their duty and power as jurors are not a part of the instructions required to be put in writing.[6]

1904) 81 S. W. 68; Hurst *v.* Benson, 27 Tex. Civ. App. 227, 65 S. W. 76.

Where there is no evidence to support the issue, the case will not be reversed because of a non-compliance with the statutory requirement that instructions be given in writing. French *v.* Wolf, 22 Ill. App. 525.

92. *Connecticut.* — Allen *v.* Rundle, 50 Conn. 9, 47 Am. Rep. 599.

Indiana. — Bottorff *v.* Shelton, 79 Ind. 98; Bosworth *v.* Barker, 65 Ind. 595; Hardin *v.* Helton, 50 Ind. 319; Toledo, etc., R. Co. *v.* Daniels, 21 Ind. 256; Riley *v.* Watson, 18 Ind. 291; Rising Sun, etc., Turnpike Co. *v.* Conway, 7 Ind. 187; Fassnacht *v.* Emsing Gagen Co., 18 Ind. App. 80, 46 N. E. 45, 47 N. E. 480, 63 Am. St. Rep. 322.

Iowa. — Head *v.* Langworthy, 15 Iowa 235; Strattan *v.* Paul, 10 Iowa 139.

Kansas. — Deets *v.* Pittsburg Nat. Bank, 57 Kan. 288, 46 Pac. 306; Atchison *v.* Jansen, 21 Kan. 560.

Kentucky. — Ferguson *v.* Fox, 1 Metc. 83; Risk *v.* Ewing, 60 S. W. 923, 22 Ky. L. Rep. 1485.

Ohio. — Householder *v.* Granby, 40 Ohio St. 430.

Oklahoma. — Hopkins *v.* Dipert, 11 Okla. 630, 69 Pac. 883.

Pennsylvania. — Barnett *v.* Reed, 51 Pa. St. 190, 88 Am. Dec. 574.

See 46 Cent. Dig. tit. "Trial," § 516.

Withdrawal of request. — Plaintiff cannot be heard to complain that the court instructed orally after defendant requested instructions in writing, if defendant withdrew the request, although the counsel for plaintiff did not hear the withdrawal made. Hencke *v.* Babcock, 24 Wash. 556, 64 Pac. 755.

93. Sutherland *v.* Hankins, 56 Ind. 343; Fisher *v.* Allison, 46 Ind. 593; Marden *v.* Wheelock, 1 Mont. 49.

94. Bates *v.* Ball, 72 Ill. 108; Best *v.* Wilson, 48 Ill. App. 352; Chamness *v.* Cox, 131 Ind. 118, 30 N. E. 901; Kuhn *v.* Nelson, 61 Nebr. 224, 85 N. W. 56; Fitzgerald *v.* Fitzgerald, 16 Nebr. 413, 20 N. W. 269; Schwartzlose *v.* Mehlitz, (Tex. Civ. App. 1904) 81 S. W. 68.

95. Jenkins *v.* Levis, 23 Kan. 255.

96. Jenkins *v.* Wilmington, etc., R. Co., 110 N. C. 438, 15 S. E. 193, in which it was said that if there was not time to do so, the court could, in its discretion, have made a mistrial. And see Head *v.* Bridges, 67 Ga. 227, in which it was said that if a written charge is requested the court may adjourn over to prepare it.

97. Hogel *v.* Lindell, 10 Mo. 483.

98. Lawler *v.* McPheeters, 73 Ind. 577.

99. Bradway *v.* Waddell, 95 Ind. 170.

1. Glover *v.* Townsend, 30 Ga. 90.

2. Equitable F. Ins. Co. *v.* Fosterville Cent. Presb. Church, 91 Tenn. 135, 18 S. W. 121.

3. Peck *v.* Springfield Traction Co., 131 Mo. App. 134, 110 S. W. 659.

4. Bottorff *v.* Shelton, 79 Ind. 98.

5. Hasbrouck *v.* Milwaukee, 21 Wis. 217. And see Burns *v.* People, 45 Ill. App. 70; McCallister *v.* Mount, 73 Ind. 559; Hatfield *v.* Chenowith, 24 Ind. App. 343, 56 N. E. 51.

A remark to the jury which does not amount to a positive direction as to the law of the case is not an instruction. Boggs *v.* U. S., 10 Okla. 424, 63 Pac. 969, 65 Pac. 927.

6. Moore *v.* Platteville, 78 Wis. 644, 47 N. W. 1055. And see Krause *v.* Redman, 134 Iowa 629, 112 N. W. 91, in which it was said that the statutes do not require the court to reduce to writing all the admonitions which it may be proper to give a jury while a trial is in progress.

Thus, it is not necessary to reduce to writing explanations to jurors on their *voir dire* examination as to what will or will not disqualify them,[7] remarks cautioning the jury that they have no right to inspect the place where the accident causing the injury occurred,[8] or directions as to the form of the verdict,[9] or to sign or seal the verdict,[10] to abstain from talking with others,[11] to retire and consider the verdict further,[12] to direct them to bring in a verdict covering the issues in a cross complaint,[13] or to answer certain interrogations;[14] or directions to the jury respecting the authority of nine jurors to make a verdict,[15] or as to the importance of agreeing on a verdict if the jury could do so without the sacrifice of their honest convictions.[16] So the court may give his opinion orally on a motion to exclude testimony;[17] the purposes of the opening statement in ruling on an objection thereto,[18] or, in ruling on the admissibility of evidence, explain the rulings;[19] state for what purpose evidence is admitted,[20] limit its application,[21] or direct the jury to disregard it;[22] repeat to the jury, for their information, an admission made by one of the parties;[23] direct the jury to disregard improper remarks of counsel to which objection has been made,[24] or to disregard a mistake made by the judge;[25] recapitulate the evidence,[26] or explain at whose request certain charges were given;[27] confine counsel in their argument to the controlling points in the case and state in the presence of the jury what those points are;[28] remark on the length of the trial and apologize for his impatience during its progress;[29] direct a verdict,[30] or refuse to give further instructions;[31] or, in replying to an exception to the charge, say that he has not attempted to state the facts but merely to state what is claimed,[32] or answer a question asked by a juror;[33] and it is not an instruction within the meaning of the requirement that instructions must be in writing for the court to make a remark not addressed to the jury.[34]

7. Oberbeck *v.* Mayer, 59 Mo. App. 289.
8. Pioneer Fireproof Constr. Co. *v.* Sunderland, 188 Ill. 341, 58 N. E. 928.
9. Economy Light, etc., Co. *v.* Hiller, 211 Ill. 568, 71 N. E. 1096 [*affirming* 113 Ill. App. 103]; Conness *v.* Indiana, etc., R. Co., 193 Ill. 464, 62 N. E. 221; Illinois Cent. R. Co. *v.* Wheeler, 149 Ill. 525, 36 N. E. 1023; Kiernan *v.* Chicago, etc., R. Co., 123 Ill. 188, 14 N. E. 18; Jenkins, etc., Co. *v.* Lundgren, 85 Ill. App. 494; Bradway *v.* Waddell, 95 Ind. 170; Indianapolis, etc., Traction Co. *v.* Henderson, 39 Ind. App. 324, 79 N. E. 539.
10. McCallister *v.* Mount, 73 Ind. 559.
11. McCallister *v.* Mount, 73 Ind. 559.
12. Judge *v.* Jordan, 81 Iowa 519, 46 N. W. 1077.
13. Lehman *v.* Hawks, 121 Ind. 541, 23 N. E. 670.
14. Trentman *v.* Wiley, 85 Ind. 33; McCallister *v.* Mount, 73 Ind. 559; Hatfield *v.* Chenowith, 24 Ind. App. 343, 56 N. E. 51.
15. Baxter *v.* Magill, 127 Mo. App. 392, 105 S. W. 679.
16. Moore *v.* Platteville, 78 Wis. 644, 47 N. W. 1055.
17. Bloomer *v.* Sherrill, 11 Ill. 483.
18. Frick *v.* Kabaker, 116 Iowa 494, 90 N. W. 498.
19. Fruchey *v.* Eagleson, 15 Ind. App. 88, 43 N. E. 146; Tinsley *v.* Western Union Tel. Co., 72 S. C. 350, 51 S. E. 913.
20. Providence Washington Ins. Co. *v.* Wolf, 168 Ind. 690, 80 N. E. 26.
21. Farmer *v.* Thrift, 94 Iowa 374, 62 N. W. 804.
22. Madden *v.* State, 148 Ind. 183, 47 N. E. 220; Bradway *v.* Waddell, 95 Ind. 170; Stanley *v.* Sutherland, 54 Ind. 339; Krause *v.* Radman, 134 Iowa 629, 112 N. W. 91; Consaul *v.* Sheldon, 35 Nebr. 247, 52 N. W. 1104.
23. Hinckley *v.* Horazdowsky, 133 Ill. 359, 24 N. E. 421, 23 Am. St. Rep. 618, 8 L. R. A. 490.
24. Ohio, etc., R. Co. *v.* Wangelin, 152 Ill. 138, 38 N. E. 760 [*affirming* 43 Ill. App. 324].
25. Wall *v.* State, 10 Ind. App. 530, 38 N. E. 190. See also Edwards *v.* Smith, 63 Mo. 119.
26. Sawyer *v.* Roanoke R., etc., Co., 142 N. C. 162, 55 S. E. 84; Phillips *v.* Wilmington, etc., R. Co., 130 N. C. 582, 41 S. E. 805; Jenkins *v.* Wilmington, etc., R. Co., 110 N. C. 438, 15 S. E. 193.
27. Collins *v.* Williams, 21 Ind. App. 227, 52 N. E. 92.
28. O'Hara *v.* King, 52 Ill. 303.
29. Hasbrouck *v.* Milwaukee, 21 Wis. 217.
30. Lacy *v.* Morton, 76 Ark. 603, 89 S. W. 842; Derby *v.* Peterson, 128 Ill. App. 494 (in which it was said that such direction is not an instruction upon a question of law involved); White-Kingsland Mfg. Co. *v.* Herdrich, 98 Ill. App. 607. *Contra*, Harris *v.* McArthur, 90 Ga. 216, 15 S. E. 758.
To give an oral instruction in the nature of an argument on the facts and their duty to agree upon a verdict is erroneous. Abingdon *v.* Meadows, 28 Ill. App. 442.
31. Sullivan *v.* Collins, 18 Iowa 228.
32. Malachi *v.* State, 89 Ala. 134, 8 So. 104.
33. Millard *v.* Lyons, 25 Wis. 516.
34. Hayes *v.* Wagner, 220 Ill. 256, 77 N. E. 211 [*affirming* 113 Ill. App. 299]; Illinois Cent. R. Co. *v.* Souders, 79 Ill. App. 41 [*re-*

3. ORAL MODIFICATIONS OR QUALIFICATIONS.[35] Where instructions are required to be in writing any modification or qualifications thereof must also be in writing,[36] unless oral modifications or qualifications are assented to by the parties.[37]

4. WHAT IS A SUFFICIENT COMPLIANCE WITH STATUTES. Where the charge is required to be in writing, the entire charge must be in writing, and it has been held ground for reversal that the instructions are partly oral and partly written.[38] The requirement that instructions be in writing is complied with when the instructions are written in pencil,[39] or when they are partly in pencil and partly typewritten.[40] If written instructions are substituted for oral instructions previously given, there is a substantial compliance with the requirement that instructions shall be in writing,[41] as is also the case where a written charge containing pencil changes is read to the jury, and, after verdict copied and verified by the stenographer.[42] And, according to some decisions, it will be a sufficient compliance with the requirement if oral instructions are subsequently reduced to writing.[43] The decisions are not uniform on this point, however. Thus it has been held sufficient for the judge to deliver his instructions orally and have them taken down by the stenographer where the statute contains provisions expressly authorizing this procedure.[44] And, on the other hand, there are decisions which hold that in the absence of such authorization such procedure is not permissible.[45] Decisions

versed on other grounds in 178 Ill. 585, 53 N. E. 408].

35. **In criminal prosecutions** see CRIMINAL LAW, 12 Cyc. 646.

36. *Colorado.*—Dorsett *v.* Craw, 1 Colo. 18.

Georgia.— Macon City Bank *v.* Kent, 57 Ga. 283; Campbell *v.* Miller, 38 Ga. 304, 95 Am. Dec. 389.

Illinois.— Daily *v.* Boudreau, 231 Ill. 228, 83 N. E. 218; Ray *v.* Wooters, 19 Ill. 82.

Indiana.— Bottorff *v.* Shelton, 79 Ind. 98; Meredith *v.* Crawford, 34 Ind. 399; Provines *v.* Heaston, 67 Ind. 482; Tenbrook *v.* Brown, 17 Ind. 410; Lung *v.* Deal, 16 Ind. 349; Kenworthy *v.* Williams, 5 Ind. 375; Townsend *v.* Doe, 8 Blackf. 328.

Iowa.— Parris *v.* State, 2 Greene 449.

Nebraska.— Hartwig *v.* Gordon, 37 Nebr. 657, 56 N. W. 324.

Ohio.— Rupp *v.* Shaffer, 21 Ohio Cir. Ct. 643, 12 Ohio Cir. Dec. 154.

See 46 Cent. Dig. tit. "Trial," § 518.

Withdrawal of explanations.— Error in verbally explaining instructions is not cured by a withdrawal of the explanations. Fields *v.* Carlton, 75 Ga. 554; Laselle *v.* Wells, 17 Ind. 33; McClay *v.* State, Smith (Ind.) 215.

If a request for written instructions is necessary, it is not error for the court to give the jury an additional instruction orally, in the absence of a request that it be reduced to writing. O'Neal *v.* Richardson, 78 Ark. 132, 92 S. W. 1117.

In Maryland, where instructions are not required to be in writing, the court may explain orally an instruction which is not clear or which is misunderstood by the jury. Hussey *v.* Ryan, 64 Md. 426, 2 Atl. 729, 54 Am. Rep. 772.

37. Dorsett *v.* Crew, 1 Colo. 18; New York Continental Nat. Bank *v.* Folsom, 67 Ga. 624.

38. Columbia Veneer, etc., Co. *v.* Cottonwood Lumber Co., 99 Tenn. 122, 41 S. W. 351; Insurance Co. *v.* Fosterville Cent. Presb. Church, 91 Tenn. 135, 18 S. W. 121; State *v.* Miles, 15 Wash. 534, 46 Pac. 1047.

In Pennsylvania, the judge is not bound to reduce his whole charge to writing. It is sufficient if he files his opinion on all points of law on which he was prayed to file it. Munderbach *v.* Lutz, 14 Serg. & R. 125; Reigart *v.* Ellmaker, 14 Serg. & R. 121.

39. Harvey *v.* Tama County, 53 Iowa 228, 5 N. W. 130.

40. Kinyon *v.* Chicago, etc., R. Co., 118 Iowa 349, 363, 92 N. W. 40, 96 Am. St. Rep. 382, in which it was said: "It is a matter of everyday occurrence in the trial courts that, after instructions have been put in form upon the type-writer, errors and omissions are discovered, and proper corrections are made in writing with pencil or pen; and it requires considerable ingenuity to discover any prejudice arising from it, unless it be to the patience of the jury in deciphering the manuscript additions."

41. Southern Express Co. *v.* Van Meter, 17 Fla. 783, 35 Am. Rep. 107.

42. Central of Georgia R. Co. *v.* Perkerson, 115 Ga. 547, 41 S. E. 1018.

43. National Lumber Co. *v.* Snell, 47 Ark. 407, 1 S. W. 708; Landt *v.* McCullough, 218 Ill. 607, 75 N. E. 1069. And see Carlyle Canning Co. *v.* Baltimore, etc., R. Co., 77 Ill. App. 396; Powers *v.* Hazelton, etc., R. Co., 33 Ohio St. 429.

44. Schon *v.* Modern Woodmen of America, 51 Wash. 482, 99 Pac. 25; Sturgeon *v.* Tacoma Eastern R. Co., 51 Wash. 124, 98 Pac. 87; Collins *v.* Huffman, 48 Wash. 184, 93 Pac. 220; Penberthy *v.* Lee, 51 Wis. 261, 8 N. W. 116.

Presence of stenographer.— Under Laws (1903), p. 120, c. 81, § 1, subd. 4, providing that, on request of either party, a charge must be in writing, except when a stenographic report is taken, the presence of a stenographer employed by the parties does not justify a refusal by the trial court to instruct in writing. McIntosh *v.* Saw Mill Phœnix, 49 Wash. 152, 94 Pac. 930.

45. Crawford *v.* Brown, 21 Colo. 272, 40

are also conflicting as to whether reading from books or papers as a part of the charge is in violation of the requirement that instructions be in writing. Thus it has been held that statutes may properly be read as a part of the charge,[46] while other decisions maintain the contrary doctrine.[47] The same difference of opinion exists as to the propriety of reading pleadings as a part of the instructions.[48]

5. Time For Requesting Written Instructions and Sufficiency of Requests. If the court is not required to instruct in writing except on request, the request must be made within a reasonable time before the charge is to be given in order that the court may have sufficient time to prepare written instructions.[49] The request should be made at such time that the granting of the request would not delay the business of the court.[50] Such reasonable time is generally at or before the close of the evidence,[51] which, it is said, is the limit of "apt time" as settled by established practice;[52] and, if the request is made at this stage of the trial, it will be sufficient, notwithstanding a rule of court requiring the request to be made before commencement of trial. Such a rule is unreasonable and invalid.[53] However, request for written instructions comes too late if made after the argument,[54] or after the court has begun to instruct orally.[55] The request for written instructions should be made in such a manner as to inform the court clearly of the desire of the party on the subject.[56] If the party wishes to have the entire charge put in writing, and not merely special requested instructions, the request should explicitly so inform the court.[57]

Pac. 692 [*affirming* 2 Colo. App. 235, 29 Pac. 1137]; Bowden *v.* Achor, 95 Ga. 243, 22 S. E. 254; Wheatley *v.* West, 61 Ga. 401; Shafer *v.* Stinson, 76 Ind. 374; Rich *v.* Lappin, 43 Kan. 666, 23 Pac. 1038; Wheat *v.* Brown, 3 Kan. App. 431, 43 Pac. 807. *Compare* Union St. R. Co. *v.* Stone, 54 Kan. 83, 37 Pac. 1012, holding that where the instructions as delivered orally were taken down and transcribed by the stenographer, and signed by the judge, and were then delivered to counsel for defendant at the time they commenced their argument, and were also delivered to the jury, the refusal to instruct in writing was not prejudicial error.

46. Swartwout *v.* Michigan Air Line R. Co., 24 Mich. 389.

47. Sellers *v.* Greencastle, 134 Ind. 645, 34 N. E. 534; Bradway *v.* Waddell, 95 Ind. 170; Bottorff *v.* Shelton, 79 Ind. 98.

48. The fact that the judge read the pleadings to the jury in connection with his charge is not error. Callins *v.* Williams, 21 Ind. App. 227, 52 N. E. 92. *Contra*, Woodruff *v.* Hensley, 26 Ind. App. 592, 60 N. E. 312. And *compare* Hall *v.* Carter, 74 Iowa 364, 37 N. W. 956, holding that if a pleading is read as part of the charge, although not included in it, the error is not prejudicial where the charge contains full instructions as to the issues.

49. Boggs *v.* Clifton, 17 Ind. 217; Cortner *v.* Amick, 13 Ind. 463; Newton *v.* Newton, 12 Ind. 527; Atchison, etc., R. Co. *v.* Franklin, 23 Kan. 74.

Giving part of the instructions orally is not erroneous, where the request is made too late to permit the court to reduce all the instructions to writing. Atchison, etc., R. Co. *v.* Franklin, 23 Kan. 74.

50. Connor *v.* Wilkie, 1 Kan. App. 492, 41 Pac. 71.

51. Manning *v.* Gasharie, 27 Ind. 399; Laselle *v.* Wells, 17 Ind. 33; Atchison, etc., R. Co. *v.* Franklin, 23 Kan. 74; Ward *v.* Albemarle, etc., R. Co., 112 N. C. 168, 16 S. E. 921. And see Monroeville *v.* Root, 54 Ohio St. 523, 44 N. E. 237.

Where the argument to the jury had not commenced when the request was made, it will not be deemed too late because of the mere intervention of an argument by counsel, at the judge's invitation, upon the question as to whether there was any evidence of a particular fact, when the jury had retired from the court room for the recess, and as preliminary to the discussion before them after the recess. Universal Metal Co. *v.* Durham, etc., R. Co., 145 N. C. 293, 59 S. E. 50.

52. Ward *v.* Albemarle, etc., R. Co., 112 N. C. 168, 16 S. E. 921.

53. Laselle *v.* Wells, 17 Ind. 33; Connor *v.* Wilkie, 1 Kan. App. 492, 41 Pac. 71; Patterson *v.* Ball, 19 Wis. 243. See also St. Louis, etc., R. Co. *v.* Dawson, 7 Kan. App. 466, 53 Pac. 892; Wheat *v.* Brown, 3 Kan. App. 431, 43 Pac. 807.

54. Atchison, etc., R. Co. *v.* Franklin, 23 Kan. 74.

Reason for rule. — If counsel may wait until the close of the argument before making the request, it would necessarily cause great delay in the proceedings of the court, and materially increase costs and expenses. Generally, it would require an adjournment of the court to enable the judge to prepare his written instructions. Atchison, etc., R. Co. *v.* Franklin, 23 Kan. 74.

55. Boggs *v.* Clifton, 17 Ind. 217; Newton *v.* Newton, 12 Ind. 527.

56. Ferguson *v.* Fox, 1 Metc. (Ky.) 83.

57. Phillips *v.* Wilmington, etc., R. Co., 130 N. C. 582, 41 S. E. 805.

G. Signing, Sealing, Numbering, and Noting Disposition of Instructions [58] — **1. Signing of Instructions by Court.** In the absence of some statutory provision requiring the court to sign instructions, error cannot be assigned for its failure to do so.[59] But in some jurisdictions, statutes varying somewhat in phraseology have been enacted which provide for the signing of instructions by the court. Failure of the court to sign the instructions is not assignable as error in the absence of an exception based on that ground,[60] and in some jurisdictions has been held not to constitute reversible error in any event,[61] although in another it has been held ground for reversal if a proper exception has been saved.[62] By the statutes of one state, it is provided that all instructions given by the court must be signed by the judge and filed as part of the record. It is held that this statute is mandatory, and unless so signed, or filed, or incorporated in a bill of exceptions properly filed, or filed by order of court, the instructions do not become a part of the record and no question on the subject of instructions is presented to the reviewing court.[63]

2. Signing of Instructions by Counsel or Parties. The statutes of some states provide that requested instructions shall be signed by counsel or parties, and non-compliance with this requirement is uniformly held to justify a refusal thereof.[64] It is immaterial that the requested instructions contain full and accurate statements of the law; [65] and in case of refusal of correct instructions, when questioned by the party requesting them, the opposite party may invoke the failure to sign in defense of the action of the court.[66] However, if the instructions asked state the law correctly, the court may, in its discretion, give them, although not signed and the giving thereof furnishes no ground for reversal.[67]

58. **In criminal prosecutions** see Criminal Law, 12 Cyc. 646 *et seq.*

59. Kennedy *v.* Smith, 99 Ala. 83, 11 So. 665; Hunter *v.* Parsons, 22 Mich. 96. See also Halley *v.* Tichenor, 120 Iowa 164, 94 N. W. 472.

60. Jones *v.* Greeley, 25 Fla. 629, 6 So. 448.

61. Halley *v.* Tichenor, 120 Iowa 164, 94 N. W. 472; Parker *v.* Chancellor, 78 Tex. 524, 15 S. W. 157; International, etc., R. Co. *v.* Lucas, 37 Tex. Civ. App. 404, 84 S. W. 1082; Dillingham *v.* Bryant, (Tex. App. 1889) 14 S. W. 1017.

62. Fridenberg *v.* Robinson, 14 Fla. 130.

63. Hadley *v.* Atkinson, 84 Ind. 64, 66, in which it was said: "Without this safeguard, instructions might get into the record without having been given by the court." And see Dennerline *v.* Gable, 73 Ind. 210; Sibbitt *v.* Stryker, 62 Ind. 41; Etter *v.* Armstrong, 46 Ind. 197.

64. Mason *v.* Sieglitz, 22 Colo. 320, 44 Pac. 588; Orman *v.* Mannix, 17 Colo. 564, 30 Pac. 1037, 31 Am. St. Rep. 340, 17 L. R. A. 602; Schoolfield *v.* Houle, 13 Colo. 394, 22 Pac. 781; Pittsburgh, etc., R. Co. *v.* O'Conner, 171 Ind. 686, 85 N. E. 969; Collett *v.* State, 156 Ind. 64, 59 N. E. 168; Craig *v.* Frazier, 127 Ind. 286, 26 N. E. 842; Howard County *v.* Legg, 110 Ind. 479, 11 N. E. 612; Hutchinson *v.* Lemcke, 107 Ind. 121, 8 N. E. 71; Chicago, etc., R. Co. *v.* Hedges, 105 Ind. 398, 7 N. E. 801; Johnson *v.* Gwinn, 100 Ind. 466; Beatty *v.* Brummett, 94 Ind. 76; McCammack *v.* McCammack, 96 Ind. 387; Sutherland *v.* Hankins, 56 Ind. 343; Lake Erie, etc., R. Co. *v.* Brafford, 15 Ind. App. 655, 43 N. E. 882, 44 N. E. 551; Citizens' St. R. Co. *v.* Hobbs, 15 Ind. App. 610, 43 N. E. 479, 44 N. E. 377; Buchart *v.* Ell, 9 Ind. App. 353, 36 N. E. 762; Springfield State Nat. Bank *v.* Bennett, 8 Ind. App. 679, 36 N. E. 551; Hindman *v.* Timme, 8 Ind. App. 416, 35 N. E. 1046; Lake Erie, etc., R. Co. *v.* Close, 5 Ind. App. 444, 32 N. E. 588; Conduitt *v.* Ryan, 3 Ind. App. 1, 29 N. E. 160; Farrar *v.* McNair, 65 Kan. 147, 69 Pac. 167; Morisette *v.* Howard, 62 Kan. 463, 63 Pac. 756; Smith *v.* Fordyce, (Tex. 1891) 18 S. W. 663; Redus *v.* Burnett, 59 Tex. 576; St. Louis Southwestern R. Co. *v.* Cleland, 50 Tex. Civ. App. 499, 110 S. W. 122; Moore *v.* Brown, 27 Tex. Civ. App. 208, 64 S. W. 946; Texas, etc., R. Co. *v.* Mitchell, (Tex. Civ. App. 1894) 26 S. W. 154.

What is a sufficient compliance with statute.— Where a defendant presented instructions to the trial court, the request reciting the caption of the case, and that defendant therein requested the court to give the jury each of the following instructions, numbered 1 to 32, inclusive, which was signed by defendant's attorneys as attorneys for defendant, and the requested instructions followed, but were not signed at the end thereof by defendant or his counsel, the instructions were sufficiently signed within the statute requiring all instructions to be numbered consecutively, and signed by the party or his counsel. Garrett *v.* Winterich, (Ind. App. 1908) 84 N. E. 1006.

65. Terry *v.* Davenport, 170 Ind. 74, 83 N. E. 636.

66. Terry *v.* Davenport, 170 Ind. 74, 83 N. E. 636; Choen *v.* Porter, 66 Ind. 194.

67. Orman *v.* Mannix, 17 Colo. 564, 30

In the absence of any statutory provision on the subject, it has been said that the practice of submitting to the jury instructions, with signature of counsel attached to them, is not to be commended, but it is not a ground for reversal.[68] Nor is it a ground for reversal that instructions given the jury were written on paper bearing the letter heads of one of the attorneys in the case.[69]

3. Numbering Instructions. Where, as is the case in some jurisdictions, the statutes require parties or counsel to number requested instructions, non-compliance with the requirement justifies a refusal thereof.[70] However, it has been held that the giving of instructions defective in this regard is not reversible error, even though proper exceptions are saved.[71] And, although a statute requires the court to number its instructions, objection for failure to do so is waived if no objection is made or exception taken at the time the charge is given.[72] And in any event, the giving of instructions not numbered as required by statute is not reversible error, if the rights of the parties are not prejudiced thereby.[73]

4. Sealing Instructions. Under the statutes of one state it was formerly necessary for the court to seal instructions, and a failure to do so, if excepted to, constituted reversible error.[74] Because of a change in the statutes of that state, it is no longer necessary for the court to seal the instructions.[75]

5. Noting Disposition of Instructions.[76] The words "given" or "refused" indorsed on the judge's charge sufficiently show the disposition of the charge.[77] Statutes in some jurisdictions provide that instructions given shall be marked "given" and instructions refused shall be marked "refused."[78] These provisons have no application to instructions which show upon their face that they were given by the court of its own motion.[79] In construing them, it has been held a sufficient compliance for the judge to write upon the margin of the first of several sheets of paper fastened together and containing instructions asked, "Instructions, one to seven, all refused."[80] Failure to mark instructions "given"[81] or "refused"[82] in accordance with statutes so providing is not a ground for reversal if the record shows that they were in fact given or refused, or where the defeated party himself noted on the margin an exception to the giving or refusal of the instruction as the case may be, although such exception was accompanied by a special exception to the failure of the court to so mark it,[83]

Pac. 1037, 31 Am. St. Rep. 340, 17 L. R. A. 602; Terry *v.* Davenport, 170 Ind. 74, 83 N. E. 636. And see Galveston, etc., R. Co. *v.* Neel, (Tex. Civ. App. 1894) 26 S. W. 788.

68. Thornton-Thomas Mercantile Co. *v.* Bretherton, 32 Mont. 80, 80 Pac. 10; State *v.* McDonald, 27 Mont. 230, 70 Pac. 724.

69. Anthony *v.* Seed, 146 Ala. 193, 40 So. 577.

70. Mason *v.* Sieglitz, 22 Colo. 320, 44 Pac. 588; Schoolfield *v.* Houle, 13 Colo. 394, 22 Pac. 781; Farrar *v.* McNair, 65 Kan. 147, 69 Pac. 167.

71. Orman *v.* Mannix, 17 Colo. 564, 30 Pac. 1037, 31 Am. St. Rep. 340, 17 L. R. A. 602; Gibbs *v.* Wall, 10 Colo. 153, 14 Pac. 216.

72. Gibson *v.* Sullivan, 18 Nebr. 558, 26 N. W. 368.

Where a statute provides that the court shall number its instructions if requested, failure to do so is not assignable as error in the absence of such request. McIver *v.* Williamson-Halsell-Frasier Co., 19 Okla. 454, 92 Pac. 170, 13 L. R. A. N. S. 696.

73. Miller *v.* Preston, 4 N. M. 314, 17 Pac. 565; Atchison, etc., R. Co. *v.* Calhoun, 18 Okla. 75, 89 Pac. 207. See also *In re* Evans, 114 Iowa 240, 86 N. W. 283.

74. Fridenberg *v.* Robinson, 14 Fla. 130.

75. Denmark *v.* State, 43 Fla. 182, 31 So. 269.

76. **In criminal prosecutions** see Criminal Law, 12 Cyc. 647.

77. Thompson *v.* Chumney, 8 Tex. 389.

78. See statutes of the various states.

79. Gillen *v.* Riley, 27 Nebr. 158, 42 N. W. 1054.

80. Harvey *v.* Tama County, 53 Iowa 228, 5 N. W. 130. And see Lawrenceville Cement Co. *v.* Parker, 15 N. Y. Suppl. 263, 21 N. Y. Civ. Proc. 263 [*affirmed* in 133 N. Y. 622, 30 N. E. 1150], holding that the refusing of all the instructions instead, or marking the refusal against the margin of each instruction singly, is sufficient.

81. McKenzie *v.* Remington, 79 Ill. 388; Cook *v.* Hunt, 24 Ill. 535; World's Columbian Exposition *v.* Bell, 76 Ill. App. 591; Frome *v.* Murphy, 56 Ill. App. 555; St. Louis, etc., R. Co. *v.* Hawkins, 39 Ill. App. 406; Clasen *v.* Pruhs, 69 Nebr. 278, 95 N. W. 640.

82. McDonald *v.* Fairbanks, 161 Ill. 124, 43 N. E. 783; Chicago Union Traction Co. *v.* Olsen, 113 Ill. App. 303 [*affirmed* in 211 Ill. 255, 71 N. E. 985]; Harrigan *v.* Turner, 65 Ill. App. 469.

83. Eickhoff *v.* Eikenbary, 52 Nebr. 332, 72 N. W. 308. *Compare* Inland Steel Co. *v.*

or where no prejudice resulted therefrom,[84] the statutory requirement that instructions shall be marked as "given" or "refused" being merely directory.[85] And, in any event, a non-compliance with the statutory requirement cannot be assigned as error unless objection was duly made in the trial court.[86] The inadvertent action of the court in marking "refused" on a correct instruction on an important branch of the case, and giving it so marked to the jury with other instructions marked "given," is reversible error.[87] And, where of two requested charges, one containing matter which the jury might properly have considered was refused and so marked, but being on the same piece of paper with the one given, was afterward handed to the jury by the court, to take away, with a caution that it had been refused and was not to be considered by them, it was held reversible error, as its effect was a denial of the matter which the jury might properly have considered in the refused charge.[88] Refusal to mark instructions "given" or "refused" after verdict is not error as at that time the court is without power to pass on the instruction.[89]

H. Manner of Delivery or Refusal of Instructions[90] **— 1. In General.** It is the right of a party who has presented written requests for instructions to have them read in the presence of the jury,[91] and this right is not abrogated by a statute which provides that charges moved for by either party must be in writing, and must be given or refused in the terms in which they are written and must be taken by the jury with them in their retirement.[92] According to the weight of authority the instructions should be read by the court itself.[93] In that way, and only in that way, it has been said, can there be any assurance that every principle of law given the jury for their guidance receives its due emphasis.[94] Where this view prevails, the rule is not complied with where the instructions are read by counsel in the presence of the jury and the court states that such instructions are given to the jury,[95] or where they are merely handed to the jury without being read at all.[96] There are, however, some cases which hold that it is sufficient

Smith, (Ind. App. 1905) 75 N. E. 852, holding that under Acts (1903), p. 338, c. 193, § 1, providing that the court shall indicate by memorandum the numbers of requested instructions given and of those refused, and that such memorandum shall be signed by the judge, a written memorandum signed by counsel does not sufficiently establish the fact of refusal.

84. Home F. Ins. Co. *v.* Decker, 55 Nebr. 346, 75 N. W. 841.

85. Cook *v.* Hunt, 24 Ill. 535; Turley *v.* Griffin, 106 Iowa 161, 76 N. W. 660.

86. Barnewall *v.* Murrell, 108 Ala. 366, 18 So. 831; Tyree *v.* Parham, 66 Ala. 424; Knight *v.* Chicago, etc., R. Co., 81 Iowa 310, 46 N. W. 1112; Fish *v.* Chicago, etc., R. Co., 81 Iowa 280, 46 N. W. 998; Chadron *v.* Glover, 43 Nebr. 732, 62 N. W. 62; Omaha, etc., Land, etc., Co. *v.* Hansen, 32 Nebr. 449, 49 N. W. 456; Gibson *v.* Sullivan, 18 Nebr. 558, 26 N. W. 368.

87. Terre Haute, etc., R. Co. *v.* Hybarger, 67 Ill. App. 480.

88. Trinity County Lumber Co. *v.* Denham, 85 Tex. 56, 19 S. W. 1012.

89. Bacon *v.* Bacon, 76 Miss. 458, 24 So. 968.

90. **In criminal prosecutions** see Criminal Law, 12 Cyc. 647, 680, 681.

Signing, sealing, numbering, and marking "given" or "refused" see *supra*, IX, G.

91. Alabama Great Southern R. Co. *v.* Arnold, 80 Ala. 600, 609, 2 So. 337, in which it was said: "Reading the charges is calculated to impress the jury that instructions prepared by counsel and given are entitled to equal consideration with the general charge of the court, and to enable them more thoroughly to comprehend the principles of law applicable to the different aspects of the case, by having their attention thus specially directed to the instructions." And see cases cited in the following note.

92. Alabama, etc., R. Co. *v.* Arnold, 80 Ala. 600, 2 So. 337.

93. Gow *v.* Charlotte, etc., R. Co., 68 Ga. 54; Leaptrot *v.* Robertson, 44 Ga. 46; Tulty *v.* Lusk, 4 Iowa 469; O'Dell *v.* Goff, 153 Mich. 643, 117 N. W. 59; Veneman *v.* McCurtain, 33 Nebr. 643, 50 N. W. 955; McDuffie *v.* Bentley, 27 Nebr. 380, 43 N. W. 123. And see Colquitt *v.* Thomas, 8 Ga. 258.

Waiver of right.— If a party without objection permits the instructions of the court to be handed to the jury in writing, without having been read to them, under the supposition that they will be read by the jury in their retirement, it is too late after verdict to make the objection. Talty *v.* Lusk, 4 Iowa 469.

94. O'Dell *v.* Goff, 153 Mich. 643, 117 N. W. 59.

95. Leaptrot *v.* Robinson, 44 Ga. 46; Talty *v.* Lusk, 4 Iowa 469; O'Dell *v.* Goff, 153 Mich. 643, 117 N. W. 59. And see Gow *v.* Charlotte, etc., R. Co., 68 Ga. 54.

96. Veneman *v.* McCurtain, 33 Nebr. 643, 50 N. W. 955.

if the law is given in charge so plainly that the jury can have no difficulty in understanding it, whether it is repeated in their hearing by the judge himself, or read by another and sanctioned and charged by him as read.[97] On reading requested instructions, the court should make it clear that the matter read is approved by the court and given to the jury for their guidance.[98] It is not sufficient for the court to say that instructions are given subject to be qualified by instructions given for the opposite party without designating the qualification intended,[99] that they may be considered as given as far as they are consistent with the general charge and refused as far as they were inconsistent therewith,[1] or that the jury might use them so far as practicable in arriving at a verdict.[2] And it is improper for a judge to weaken the force of a proper instruction by sarcastic comment, so as to leave the jury in doubt whether the instruction was given or refused,[3] or by intimating that, although the instructions given in behalf of a party are correct, they present a loose and inadequate presentation of the law applicable to the case,[4] or to intimate that his personal opinion is otherwise than the law he charges.[5] And on the other hand, the underscoring of parts of instructions is not a practice to be approved of, since it may cause the jury to give undue weight to such portions, to the undervaluing of other parts of the instructions.[6] However, it is not error for the judge in his charge to characterize the rule of law stated by him as the rule of common sense.[7] Failure of the clerk to send to the jury one of the written instructions which had become accidentally detached is not ground to reverse unless prejudice shown.[8]

2. Necessity For Delivery of Instructions in Open Court and in Presence of Counsel.[9] It is a rule of universal application that instructions to the jury must be delivered in open court,[10] in order that the parties may have an opportunity to know what they are, except to them if desired, and ask other explanatory instructions if deemed necessary.[11] And according to the weight of authority the instructions must be delivered in the presence of counsel or after an attempt has been made to notify them.[12]

3. Tone or Manner in Delivering Charge. According to some decisions, the tone in or emphasis with which the trial judge delivers the charge is not a ground for reversal where there is nothing in the record to indicate that the jury were misled thereby,[13] or unless the effect of the charge is to cause a mis-

97. Dillon *v.* McRae, 40 Ga. 107 (holding that if a principle of law is clearly and distinctly read by counsel in the presence and hearing of the jury and the judge says, "I charge you that the decision just read is law," without repeating it in the hearing of the jury, this is not error); East Tennessee, etc., R. Co. *v.* Fain, 12 Lea (Tenn.) 35.

98. Georgia R., etc., Co. *v.* Flowers, 108 Ga. 795, 33 S. E. 874.

Statement held sufficient.— It will be sufficient to say that I give you these in charge as the law of the case after having slowly read them to the jury. Feagan *v.* Cureton, 19 Ga. 404. So, where the court, before giving a requested charge, said, "Counsel have handed me some requests, as stating propositions of law by which you should be guided in determining your verdict," a contention that the court failing to say that the charge was correct, whereupon the jury failed to understand that the requests read were given, is not well taken Noble *v.* Bessemer Steamship Co., 127 Mich 103, 86 N. W. 520, 89 Am. St. Rep 461, 54 L. R. A. 456.

99. Gregory *v.* Ford, 5 B. Mon. (Ky.) 471.

1 Jones *v.* Seaboard Air Line R. Co., 67 S. C. 181, 45 S. E. 188.

2. Duthie *v.* Washburn, 87 Wis. 231, 58 N. W. 380.

3. Horton *v.* Williams, 21 Minn. 187.

4. Watson *v.* Union Iron, etc., Co., 15 Ill. App. 509.

5. Kennedy *v.* Bebout, 62 Ind. 363; Fitzgerald *v.* St. Paul, etc., R. Co., 29 Minn. 336, 13 N. W. 168, 43 Am. Rep. 212; McFadden *v.* Reynolds, 9 Pa. Cas. 105, 11 Atl. 638. *Compare* Dial *v.* Agnew, 28 S. C. 454, 6 S. E. 295, holding that a remark by the judge that it is his duty to charge the law as declared by the supreme court without reference to his own personal opinion is not error.

6. Wright *v.* Brosseau, 73 Ill. 381.

7. Henry *v.* Klopfer, 147 Pa. St. 178, 23 Atl. 337, 338.

8. North River Boom Co. *v.* Smith, 15 Wash. 138, 45 Pac. 750.

9. In criminal prosecutions see Criminal Law, 12 Cyc. 680, 681.

10. O'Connor *v.* Guthrie, 11 Iowa 80. And see *infra*, X, E, 6, b, (1).

11. O'Connor *v.* Guthrie, 11 Iowa 80.

12. See *infra*, X, E, 7, b.

13. Reiger *v.* Davis, 67 N. C. 185; Page *v.* Sumpter, 53 Wis. 652, 11 N. W. 60.

trial.[14] And the weight of authority is that while the manner or emphasis of the trial judge in delivering the charge may have been prejudicial, yet if the charge contains a correct statement of the law as applied to the facts, the reviewing court cannot relieve against the error, because there is no way by which it can be shown by the record, or its influence estimated.[15]

4. CHARACTERIZING INSTRUCTIONS AS GIVEN ON REQUEST OF ONE PARTY OR THE OTHER. Instructions, when given, are those of the court,[16] and the better practice is to make no distinction between that portion which originates with the judge, and that which originates with either counsel, and to give all proper requested instructions as emanating from the court itself.[17] However the characterizing of instructions as given at the request of one party or the other is not error, or at least not available error.[18]

5. NOTATION OF AUTHORITIES ON INSTRUCTIONS GIVEN. It is improper to give an instruction containing the notation of a decision, but the error will not warrant a reversal,[19] and it has been held error to refuse an instruction defective in this respect, but otherwise proper; that the notation should be erased and the instruction given.[20]

6. STATING REASONS FOR GIVING OR REFUSING INSTRUCTIONS. With the reason for an instruction the jury has nothing to do,[21] and, if an instruction given be correct, it is immaterial that a wrong reason was given therefor.[22] Similarly, if an instruction is properly refused, it makes no difference that the reason assigned for the refusal was erroneous.[23]

7. READING FROM BOOKS.[24] Unless prohibited by statute, in instructing the jury, the court may read to it pertinent sections of the statutes,[25] and even though the sections are not strictly applicable, the error is not reversible if the jury were not mislead thereby.[26] So the court may read extracts from decisions if they

14. Bishop *v.* Journal Newspaper Co., 168 Mass. 327, 47 N. E. 119.

15. Rountree *v.* Gurr, 68 Ga. 292; Anderson *v.* Tribble, 66 Ga. 584; Gibbs *v.* Johnson, 63 Mich. 671, 674, 30 N. W. 343 (in which it was said: "We cannot concern ourselves with the manner of the court in instructing the jury, only so far as we can measure it by the language employed. He may have peculiar methods of emphasis, which may before a jury have a prejudicial effect; but this we cannot reach. If the words used are not prejudicial or misleading, but contain a true statement of the law as applied to the facts in the case, we must be content"); Merchants' Bank of Canada *v.* Ortmann, 48 Mich. 419, 12 N. W. 636; Horton *v.* Chevington, etc., Coal Co., 2 Pennyp. (Pa.) 25; Briffitt *v.* State, 58 Wis. 39, 16 N. W. 39, 46 Am. Rep. 621.

16. Gutzman *v.* Clancy, 114 Wis. 589, 90 N. W. 1081, 58 L. R. A. 744.

17. Stevenson *v.* Chicago, etc., R. Co., 94 Iowa 719, 61 N. W. 964; Gutzman *v.* Clancy, 114 Wis. 589, 90 N. W. 1081, 58 L. R. A. 744.

18. Little Rock Traction, etc., Co. *v.* Morrison, 69 Ark. 289, 62 S. W. 1045; Illinois Cent. R. Co. *v.* Larson, 152 Ill. 326, 38 N. E. 784; Oneals *v.* People, 134 Ill. 401, 25 N. E. 1022; Scott *v.* Chicago, etc., R. Co., 68 Iowa 360, 24 N. W. 584, 27 N. W. 276.

Giving instructions in writing at request of party merely stating that the court has at the request of one of the parties departed from its usual custom by giving instructions in writing instead of orally, if error, is not ground for reversal unless it can be affirmatively shown that prejudice resulted. Wilson *v.* White, 71 Ga. 506, 51 Am. Rep. 269.

19. Springer *v.* Orr, 82 Ill. App. 558; *In re* Goldthorp, 115 Iowa 430, 88 N. W. 944; Herzog *v.* Campbell, 47 Nebr. 370, 66 N. W. 424; Sioux City, etc., R. Co. *v.* Finlayson, 16 Nebr. 578, 20 N. W. 860, 49 Am. Rep. 724.

20. South Omaha *v.* Fennell, 4 Nebr. (Unoff.) 427, 94 N. W. 632.

21. Marion *v.* State, 20 Nebr. 233, 29 N. W. 911, 57 Am. Rep. 825.

22. Dale *v.* Arnold, 2 Bibb (Ky.) 605; Marion *v.* State, 20 Nebr. 233, 29 N. W. 911, 57 Am. Rep. 825; Blodgett *v.* Berlin Mills Co., 52 N. H. 215; Rupp *v.* Orr, 31 Pa. St. 517.

23. Budd *v.* Brooke, 3 Gill (Md.) 198, 43 Am. Dec. 321.

24. In criminal prosecutions see CRIMINAL LAW, 12 Cyc. 614.

25. *Georgia.*— McNatt *v.* McRae, 117 Ga. 898, 45 S. E. 248; Cochran *v.* Jones, 85 Ga. 678, 11 S. E. 811.

Iowa.— Kitteringham *v.* Dance, 58 Iowa 632, 12 N. W. 612.

Michigan.— Johnson *v.* Schultz, 74 Mich. 75, 41 N. W. 865.

Ohio.— Toledo Consol. St. R. Co. *v.* Mammet, 13 Ohio Cir. Ct. 591, 6 Ohio Cir. Dec. 244.

United States.— Sommer *v.* Carbon Hill Coal Co., 107 Fed. 230, 46 C. C. A. 255.

See 46 Cent. Dig. tit. "Trial," § 563.

But see Hollenbeck *v.* Missouri Pac. R. Co., (Mo. 1896) 34 S. W. 494; Lane *v.* Chicago, etc., R. Co., 35 Mo. App. 567.

26. Pope *v.* Pope, 95 Ga. 87, 22 S. E. 245.

state the law correctly and are applicable to the facts of the case.[27] The fact that the decision read from is that of another state,[28] or was rendered on a former appeal taken in the same case, makes no difference,[29] provided nothing contained therein states the result of the previous trial.[30] It is error, however, to read an extract from a decision not applicable to the facts of the case,[31] where such extract, apart from the context, is likely to mislead the jury.[32] It is also erroneous to read the full text of a reported case as an instruction to the jury, as such action tends to confuse and mislead them.[33]

8. Reading Refused Instructions to Jury. It is not necessary to read refused instructions to the jury,[34] or to inform them that requests for such instructions have been made.[35] On the contrary, it is better practice not to read them.[36] It is of no consequence to the jury what is contained in the rejected instruction, as they are not to be governed by it, and have no use for it[37]

I. Instructions on Submission to Jury For Special Verdict, or Special Findings — 1. Special Verdict. It is very generally held that where a case is submitted to the jury for a special verdict,[38] it is unnecessary[39] and improper[40] to instruct the jury generally as to the law of the case,[41] and in some states it is error to instruct them to return also a general verdict.[42] On the other hand it is held that instructions concerning the nature of the action,[43] the issues,[44] the

See also Hollenbeck *v.* Missouri Pac. R. Co., (Mo. 1896) 34 S. W. 494.

27. *Alabama.*— Richmond, etc., R. Co. *v.* Hissong, 97 Ala. 187, 13 So. 209.

California.— *In re* Spencer, 96 Cal. 448, 31 Pac. 453.

District of Columbia.— Johnson *v.* Baltimore, etc., R. Co., 6 Mackey 232.

Georgia.— Riggins *v.* Brown, 12 Ga. 271.

Indiana.— Lett *v.* Horner, 5 Blackf. 296.

New York.— McManus *v.* Woolverton, 19 N. Y. Suppl. 545 [*affirmed* in 138 N. Y. 648, 34 N. E. 513]; Panama R. Co. *v.* Johnson, 17 N. Y. Suppl. 777.

Pennsylvania.— Dimes Sav. Inst. *v.* Allentown Bank, 61 Pa. St. 391.

See 46 Cent. Dig. tit. "Trial," § 562.

Reading authorities in support of a proposition of law which has been correctly stated is not erroneous. Henry *v.* Klopfer, 147 Pa. St. 178, 23 Atl. 337, 338.

28. *In re* Spencer, 96 Cal. 448, 31 Pac. 453. And see Cousins *v.* Partridge, 79 Cal. 224, 21 Pac. 745.

29. Riggins *v.* Brown, 12 Ga. 271; Power *v.* Harlow, 57 Mich. 107, 23 N. W. 606; Panama R. Co. *v.* Johnson, 17 N. Y. Suppl. 777.

30. Panama R. Co. *v.* Johnson, 17 N. Y. Suppl. 777.

31. Stucke *v.* Milwaukee, etc., R. Co., 9 Wis. 202.

32. Talmage *v.* Davenport, 31 N. J. L. 561; Laidlaw *v.* Sage, 80 Hun (N. Y.) 550, 30 N. Y. Suppl. 496.

33. Lendberg *v.* Brotherton Iron Min. Co., 75 Mich. 84, 90, 42 N. W. 675 (in which it was said: "There are in all reports discussions which may include references to facts real or supposed, and law questions in or out of the record, which cannot be taken literally and just as they stand as guides to a jury in some other case, and with different facts"); Stewart *v.* Hunter, 16 Oreg. 62, 16 Pac. 876, 8 Am. St. Rep. 267.

Stating that the facts of the case read from were similar to the one then before the court, and that he adopted the decision in the case read as the law on the subject, accentuates the error. In no more effective way could a judge intimate his opinion as to the effect of evidence before the jury than by saying that it was similar to that of an adjudged case in which the testimony was commented on as being sufficient to sustain a finding thereon. Frank *v.* Williams, 36 Fla. 136, 18 So. 351.

34. Soper Lumber Co. *v.* Halsted, etc., Co., 73 Conn. 547, 48 Atl. 425; Sherman *v.* State, 17 Fla. 888; Woeckner *v.* Erie Electric Motor Co., 187 Pa. St. 206, 41 Atl. 28; Com. *v.* Clark, 3 Pa. Super. Ct. 141; Long *v.* Southern R. Co., 50 S. C. 49, 27 S. E. 531.

35. Soper Lumber Co. *v.* Halsted, etc., Co., 73 Conn. 547, 48 Atl. 425.

36. Ransone *v.* Christian, 56 Ga. 351; Muthersbaugh *v.* McCabe, 22 Pa. Super. Ct. 587.

37. Sherman *v.* State, 17 Fla. 888.

38. **For special verdict** see *infra*, XI, C.

39. Livingston *v.* Taylor, 132 Ga. 1, 63 S. E. 694; Johnson *v.* Culver, 116 Ind. 278, 19 N. E. 129; Cole *v.* Crawford, 69 Tex. 124, 5 S. W. 646; Collins *v.* Mineral Point, etc., R. Co., 136 Wis. 421, 117 N. W. 1014.

40. Stayner *v.* Joyce, 120 Ind. 99, 22 N. E. 89; Boyce *v.* Schroeder, 21 Ind. App. 28, 51 N. E. 376; Schrunk *v.* St. Joseph, 120 Wis. 223, 97 N. W. 946; Mauch *v.* Hartford, 112 Wis. 40, 87 N. W. 816.

41. **But general instructions are not reversible error** where judgment given is justified by the special verdict. Woollen *v.* Wire, 110 Ind. 251, 11 N. E. 236; Toler *v.* Keiher, 81 Ind. 383; Reed *v.* Madison, 85 Wis. 667, 56 N. W. 182; Ward *v.* Cochran, 71 Fed. 127, 18 C. C. A. 1.

42. Toler *v.* Keiher, 81 Ind. 383.

43. Toler *v.* Keiher, 81 Ind. 383.

44. Toler *v.* Keiher, 81 Ind. 383.

rules of evidence,[45] the form of the verdict,[46] and the general duties of the jury[47] are proper.

2. Special Findings. Under a statute authorizing submission for either a general or a special verdict, it is error to instruct the jury to return both a general verdict and answers to special questions,[48] and in submitting special questions, care should be taken in so framing them as to avoid prejudice to either party.[49] It is error to charge the jury to make their special findings conform to their general verdict;[50] or to instruct the jury as to what answers would be consistent or inconsistent with a general verdict in favor of either party;[51] or in any way, either expressly or by necessary implication, to instruct the jury as to the effect of particular answers on the ultimate right or liability of either party;[52] or to

45. Johnson *v.* Culver, 116 Ind. 278, 19 N. E. 129; Woollen *v.* Wire, 110 Ind. 251, 11 N. E. 236.

Instruction that plaintiff must prove the material facts, but that the jury need not consider what facts are material, is not error. Pittsburgh, etc., R. Co. *v.* Burton, 139 Ind. 357, 37 N. E. 150, 38 N. E. 594.

46. Johnson *v.* Culver, 116 Ind. 278, 19 N. E. 129; Woollen *v.* Wire, 110 Ind. 251, 11 N. E. 236; Toler *v.* Keiher, 81 Ind. 383.

On submission of two forms, a statement of the court that the jury would hardly be driven to the labor of modifying either, or of writing one for themselves, did not intimate that they must use one form or the other. Pittsburgh, etc., R. Co. *v.* Burton, 139 Ind. 357, 37 N. E. 150, 38 N. E. 594.

47. Louisville, etc., R. Co. *v.* Hart, 119 Ind. 273, 21 N. E. 753, 4 L. R. A. 549; Toler *v.* Keiher, 81 Ind. 383.

48. Dwyer *v.* Kalteyer, 68 Tex. 554, 5 S. W. 75; Bridgeport Coal Co. *v.* Wise County Coal Co., 44 Tex. Civ. App. 369, 99 S. W. 409.

49. **In submitting the question as to whether defendant's want of ordinary care** was the cause of the injury, an instruction that if the jury find lack of ordinary care on the part of defendant, they must answer "yes," is erroneous, as it withdraws the question as to whether defendant's negligence was the proximate cause of the injury. Guinard *v.* Knapp-Stout, etc., Co., 90 Wis. 123, 62 N. W. 625, 48 Am. St. Rep. 901.

50. Coffeyville Vitrified Brick Co. *v.* Zimmerman, 61 Kan. 750, 60 Pac. 1064; Kilpatrick-Koch Dry-Goods Co. *v.* Kahn, 53 Kan. 274, 36 Pac. 327; Mechanics' Bank *v.* Barnes, 86 Mich. 632, 49 N. W. 475; Cole *v.* Boyd, 47 Mich. 98, 10 N. W. 124; Cleveland, etc., R. Co. *v.* Sivey, 27 Ohio Cir. Ct. 248.

But not that the jury be careful that their answers "are in harmony with and support" their general verdict see Capital City Bank *v.* Wakefield, 83 Iowa 46, 48 N. W. 1059; Des Moines, etc., Land, etc., Co. *v.* Polk County Homestead, etc., Co., 82 Iowa 663, 45 N. W. 773. Nor that "it is very important that the questions that you are asked to answer be answered so that they correspond with your other verdict." Germaine *v.* Muskegon, 105 Mich. 213, 63 N. W. 78.

51. Beecher *v.* Galvin, 71 Mich. 391, 39 N. W. 469; Satterthwaite *v.* Goodyear, 137 N. C. 302, 49 S. E. 205; Bradley *v.* Ohio River, etc., R. Co., 126 N. C. 735, 36 S. E. 181; Morrison *v.* Lee, 13 N. D. 591, 102 N. W. 223; Sheppard *v.* Rosenkrans, 109 Wis. 58, 85 N. W. 199, 83 Am. St. Rep. 886; Musbach *v.* Wisconsin Chair Co., 108 Wis. 57, 84 N. W. 36; Conway *v.* Mitchell, 97 Wis. 290, 72 N. W. 752; Coats *v.* Stanton, 90 Wis. 130, 62 N. W. 619; Ryan *v.* Rockford Ins. Co., 77 Wis. 611, 46 N. W. 885.

Instructions that the jury have nothing to do with the question of recovery (Neanow *v.* Uttech, 46 Wis. 581, 1 N. W. 221), and that their findings have nothing to do with the verdict (McCormack *v.* Phillips, 4 Dak. 506, 34 N. W. 39), are proper when no general verdict is required.

52. Morrison *v.* Lee, 13 N. D. 591, 102 N. W. 223; Banderob *v.* Wisconsin Cent. R. Co., 133 Wis. 249, 113 N. W. 738; Lyttle *v.* Goldberg, 131 Wis. 613, 111 N. W. 718; Howard *v.* Beldenville L. Co., 129 Wis. 98, 108 N. W. 48; Meyer *v.* Home Ins. Co., 127 Wis. 293, 106 N. W. 1087; Van De Bogart *v.* Marinette, etc., Paper Co., 127 Wis. 104, 106 N. W. 805; Lyon *v.* Grand Rapids, 121 Wis. 609, 99 N. W. 311; Gutzman *v.* Clancy, 114 Wis. 589, 90 N. W. 1081, 58 L. R. A. 744; Patnode *v.* Westenhaver, 114 Wis. 460, 90 N. W. 467; Cullen *v.* Hanisch, 114 Wis. 24, 89 N. W. 900; Gerrard *v.* La Crosse City R. Co., 113 Wis. 258, 89 N. W. 125, 57 L. R. A. 465; Byington *v.* Merrill, 112 Wis. 211, 88 N. W. 26; Bartlett *v.* Collins, 109 Wis. 477, 85 N. W. 703; Rhyner *v.* Menasha, 107 Wis. 201, 83 N. W. 303; New Home Sewing Mach. Co. *v.* Simon, 104 Wis. 120, 80 N. W. 71; Schaidler *v.* Chicago, etc., R. Co., 102 Wis. 564, 78 N. W. 732; Ward *v.* Chicago, etc., R. Co., 102 Wis. 215, 78 N. W. 442; Worachek *v.* New Denmark Mut. Home F. Ins. Co., 102 Wis. 81, 78 N. W. 165; Kohler *v.* West Side R. Co., 99 Wis. 33, 74 N. W. 568.

Refusal to give general instructions when a general verdict is not required is not error (Udell *v.* Citizens' St. R. Co., 152 Ind. 507, 52 N. E. 799, 71 Am. St. Rep. 336; Warden *v.* Reser, 38 Kan. 86, 16 Pac. 60; Stickel *v.* Bender, 37 Kan. 457, 15 Pac. 580; Witsell *v.* West Asheville, etc., R. Co., 120 N. C. 557, 27 S. E. 125; Moore *v.* Pierson, (Tex. Civ. App. 1906) 93 S. W. 1007; Goesel *v.* Davis, 100 Wis. 678, 76 N. W. 768; Kohler *v.* West Side R. Co., 99 Wis. 33, 74 N. W. 568; Klatt *v.* N. C. Foster Lumber Co., 97 Wis. 641, 73 N. W. 563), nor a refusal to charge as

give an instruction that would permit the rejection of material testimony in considering a question,[53] or which is not warranted by the evidence;[54] and instructions appropriate to a particular question should be submitted in immediate connection with the question to which they relate;[55] but an instruction that the jury must answer the questions submitted is not error;[56] nor is an instruction that the answers to the several questions shall be consistent with each other;[57] nor is a general instruction erroneous merely because an intelligent juror may infer from it the effect of his answer to the special questions upon the final result;[58] and instructions as to general rules of law should be given so far as they are reasonably necessary to enable the jury to answer the special questions intelligently and in accordance with the law governing the subject;[59] nor will the court reverse for general instructions unless exceptions are preserved to the parts complained of,[60] nor for alleged errors in instructions as to special findings where it can clearly see that no prejudice resulted.[61]

to the effect of special findings on the general result (Sheldon *v.* Western Union Tel. Co., 4 N. Y. Suppl. 526 [*affirmed* in 121 N. Y. 697, 24 N. E. 1099]).

Instruction not objectionable to rule.—An instruction in an action by an employee for injuries caused by being caught by an unguarded shafting, that the law requires the employer to securely guard shaftings so located as to be dangerous to employees, and, if the shafting was so located as to be dangerous to the employee at the time of the injury, the jury should find that the place furnished by the employer to the employee in which to do his work was not reasonably safe, was not objectionable, as stating to the jury the effect of their answer. Walker *v.* Simmons Mfg. Co., 131 Wis. 542, 111 N. W. 694.

53. Roberts *v.* McWatty, 123 Wis. 598, 102 N. W. 18.

54. Lyttle *v.* Goldberg, 131 Wis. 613, 111 N. W. 718.

55. Rhyner *v.* Menasha, 107 Wis. 201, 83 N. W. 303; McDermott *v.* Jackson, 102 Wis. 419, 78 N. W. 598.

Failure to do so has been held to constitute reversible error when it appears to the appellate court that the jury were misled thereby, but not otherwise. Banderob *v.* Wisconsin Cent. R. Co., 133 Wis. 249, 113 N. W. 738.

56. Stevens *v.* Beardsley, 134 Mich. 506, 96 N. W. 571.

57. Hoppe *v.* Chicago, etc., R. Co., 61 Wis. 357, 21 N. W. 227. *Contra*, St. Louis, etc., R. Co. *v.* Burrows, 62 Kan. 89, 61 Pac. 439; Coffeyville Vitrified Brick Co. *v.* Zimmerman, 61 Kan. 750, 60 Pac. 1064.

58. Banderob *v.* Wisconsin Cent. R. Co., 133 Wis. 249, 113 N. W. 738; Alft *v.* Clintonville, 126 Wis. 334, 105 N. W. 561; Walker *v.* Ontario, 118 Wis. 564, 95 N. W. 1086; Baumann *v.* C. Reiss Coal Co., 118 Wis. 330, 95 N. W. 139; Schroeder *v.* Wisconsin Cent. R. Co., 117 Wis. 33, 93 N. W. 837; Lyle *v.* McCormick Harvesting Mach. Co., 108 Wis. 81, 84 N. W. 18, 51 L. R. A. 906; Baxter *v.* Chicago, etc., R. Co., 104 Wis. 307, 80 N. W. 644; Bauer *v.* Richter, 103 Wis. 412, 79 N. W. 404; Reed *v.* Madison, 85 Wis. 667, 56 N. W. 182; Chopin *v.* Badger Paper Co., 83 Wis. 192, 53 N. W. 452.

Instruction that if they answer a certain question one way they need not answer a subsidiary question is not error. Sicard *v.* Albenberg Co., 136 Wis. 622, 118 N. W. 179; Chopin *v.* Badger Paper Co., 83 Wis. 192, 53 N. W. 452.

Instruction to decide a question in plaintiff's favor, if the jury find his contention as to a particular fact right, while subject to criticism, is not ground for reversal, as it does not go so far as to inform the jury of the effect of its answer upon the ultimate right of either party to recover. Wankowski *v.* Crivitz Pulp, etc., Co., 137 Wis. 123, 118 N. W. 643.

Instruction declaring the effect of negligence or contributory negligence on a question of liability for personal injuries is not ground for reversal where jury are told they are not to consider the effect of their answers on the final result. Chopin *v.* Badger Paper Co., 83 Wis. 192, 53 N. W. 452.

59. Udell *v.* Citizens' St. R. Co., 152 Ind. 507, 52 N. E. 799, 71 Am. St. Rep. 336; Kalteyer *v.* Mitchell, (Tex. Civ. App. 1908) 110 S. W. 462; Banderob *v.* Wisconsin Cent. R. Co., 133 Wis. 249, 113 N. W. 738; Van de Bogart *v.* Marinette, etc., Paper Co., 132 Wis. 367, 112 N. W. 443; Bloch *v.* American Ins. Co., 132 Wis. 150, 112 N. W. 45; Walker *v.* Simmons Mfg. Co., 131 Wis. 542, 111 N. W. 694; Horn *v.* La Crosse Box Co., 131 Wis. 384, 111 N. W. 522; J. H. Clark Co. *v.* Rice, 127 Wis. 451, 106 N. W. 231; Mueller *v.* Northwestern Iron Co., 125 Wis. 326, 104 N. W. 67; Lightfoot *v.* Winnebago Traction Co., 123 Wis. 479, 102 N. W. 30; Hughes *v.* Chicago, etc., R. Co., 122 Wis. 258, 99 N. W. 897; Lyon *v.* Grand Rapids, 121 Wis. 609, 99 N. W. 311; Kaiser *v.* Nummerdor, 120 Wis. 234, 97 N. W. 932; Baxter *v.* Chicago, etc., R. Co., 104 Wis. 307, 80 N. W. 644.

60. Brunette *v.* Gagen, 106 Wis. 618, 82 N. W. 564.

61. Fisk *v.* Chicago, etc., R. Co., 83 Iowa 253, 48 N. W. 1081; Wankowski *v.* Crivitz Pulp, etc., Co., 137 Wis. 123, 118 N. W. 643; Lyttle *v.* Goldberg, 131 Wis. 613, 111 N. W. 718.

J. Construction and Operation [62]— **1. General Rules.** The object of an instruction is to convey information to the jury for immediate application to the subject-matter before them.[63] Therefore the language of an instruction must be considered with reference to the issues raised by the pleadings and the evidence; [64] and if a charge, when so construed, is free from error, it will not be ground for reversal, although wrong as an abstract proposition.[65] The words employed must be taken in their ordinary and popular acceptation,[66] and will not be subjected to analytical criticism.[67] They will be construed according to their essential meaning,[68] and refined distinctions will not be indulged in.[69] Where an instruction is susceptible of more than one construction or meaning, the court will adopt that which, in the exercise of ordinary good sense, was evidently given to it by the trial court and jury.[70] Where, however, an instruction is such that

62. **In criminal prosecutions** see Criminal Law, 12 Cyc. 654 *et seq.*

63. Bickel *v.* Martin, 115 Ill. App. 367; Styles *v.* Chesapeake, etc., R. Co., 62 W. Va. 650, 59 S. E. 609.

64. *Alabama.*— Carter *v.* Chambers, 79 Ala. 223; Miller *v.* Jones, 29 Ala. 174; Kirkland *v.* Oates, 25 Ala. 465; Waters *v.* Spencer, 22 Ala. 460; Berry *v.* Hardman, 12 Ala. 604.

Connecticut.— Smith *v.* Carr, 16 Conn. 450.

Georgia.—Adams *v.* Governor, 22 Ga. 417; King *v.* State, 21 Ga. 220.

Iowa.— Wisecarver *v.* Chicago, etc., R. Co., 141 Iowa 121, 119 N. W. 532; Hart *v.* Cedar Rapids, etc., R. Co., 109 Iowa 631, 80 N. W. 662.

Kansas.— Wyandotte *v.* White, 13 Kan. 191.

Maine.— Casco Bank *v.* Keene, 53 Me. 103; Lyman *v.* Redman, 23 Me. 289; Blake *v.* Irish, 21 Me. 450.

Michigan.— Sword *v.* Keith, 31 Mich. 247; Botsford *v.* Kleinhans, 29 Mich. 332.

New Hampshire.— Hooksett *v.* Amoskeag Mfg. Co., 44 N. H. 105; Gerrish *v.* New Market Mfg. Co., 30 N. H. 478.

Tennessee.— Hale *v.* Darter, 10 Humphr. 92.

Texas.— East Line, etc., R. Co. *v.* Smith, 65 Tex. 167; Thompson *v.* Shannon, 9 Tex. 536; Davis *v.* Loftin, 6 Tex. 489; Mitchell *v.* Zimmerman, 4 Tex. 75, 51 Am. Dec. 717; Missouri, etc., R. Co. *v.* Redus, (Civ. App. 1909) 118 S. W. 208.

Virginia.— New York, etc., R. Co. *v.* Thomas, 92 Va. 606, 24 S. E. 264; Richmond Granite Co. *v.* Bailey, 92 Va. 554, 24 S. E. 232.

Wisconsin.— Neumann *v.* La Crosse, 94 Wis. 103, 68 N. W. 654.

United States.— Southern Pac. Co. *v.* Hall, 100 Fed. 760, 41 C. C. A. 50; Asheville Nat. Bank *v.* New York Fidelity, etc., Co., 89 Fed. 819, 32 C. C. A. 355, holding that an expression used in an instruction, or a special issue submitted, although in itself susceptible of two meanings, is not misleading when, as applied to the evidence, its meaning is plain.

See 46 Cent. Dig. tit. "Trial," § 699.

Presumption of correctness where evidence not in record.— Where none of the facts or evidence appear by the record, the instructions given in the case will be presumed to be proper, although not correct as general legal propositions (Gwin *v.* Williams, 27 Miss. 324), unless under no state of evidence that could be conceived, they could be correct legal rules as applicable to such a case. (Gwin *v.* Williams, *supra*). An instruction that would not be warranted in any state of proof is ground for reversal. Robards *v.* Wolfe, 1 Dana (Ky.) 155.

The correctness of a prayer which does not refer to the pleadings and is not affected by any other prayer referring to the pleadings must be determined with reference to the evidence without consideration of the pleadings. Richardson *v.* Anderson, 109 Md. 641, 72 Atl. 485, 130 Am. St. Rep. 543, 25 L. R. A. N. S. 393.

65. *Alabama.*— Carter *v.* Chambers, 79 Ala. 223; Knox *v.* Easton, 38 Ala. 345; Fulton Ins. Co. *v.* Goodman, 32 Ala. 108; Miller *v.* Jones, 29 Ala. 174; McBride *v.* Thompson, 8 Ala. 650.

Illinois.— Spellman *v.* Evans, 17 Ill. App. 488.

Indiana.— Roots *v.* Tyner, 10 Ind. 87; Thompson *v.* Thompson, 9 Ind. 323, 68 Am. Dec. 638.

Maine.— Sidensparker *v.* Sidensparker, 52 Me. 481, 83 Am. Dec. 527.

Michigan.— Sword *v.* Keith, 31 Mich. 247.

Missouri.— Campbell *v.* Allen, 61 Mo. 581; Von Phul *v.* Moffitt, 13 Mo. 286.

Texas.— Thompson *v.* Shannon, 9 Tex. 536.

United States.— Schutz *v.* Jordan, 32 Fed. 55 [*affirmed* in 141 U. S. 213, 11 S. Ct. 906, 35 L. ed. 705]; Willis *v.* Carpenter, 30 Fed. Cas. No. 17,770.

See 46 Cent. Dig. tit. "Trial," § 699.

66. Yazoo, etc., R. Co. *v.* Williams, 87 Miss. 344, 39 So. 489; Mitchell *v.* Zimmerman, 4 Tex. 75, 51 Am. Dec. 717.

67. Green *v.* Lewis, 13 Ill. 642; Galpin *v.* Wilson, 40 Iowa 90; Baltimore, etc., R. Co. *v.* Mackey, 157 U. S. 72, 15 S. Ct. 491, 39 L. ed. 624; U. S. *v.* Conklin, 1 Wall. (U. S.) 644, 17 L. ed. 714.

68. Galpin *v.* Wilson, 40 Iowa 90.

69. Sperry *v.* Union R. Co., 129 N. Y. App. Div. 594, 114 N. Y. Suppl. 286.

70. Massachusetts Mut. L. Ins. Co. *v.* Robinson, 98 Ill. 324; Green *v.* Lewis, 13 Ill. 642; Bickel *v.* Martin, 115 Ill. App. 367; Huntington Bank *v.* Napier, 41 W. Va. 481, 23 S. E. 800.

it might convey to the mind of any man of ordinary capacity an incorrect view of the law applicable to the cause, it will be erroneous.[71]

2. Construction as a Whole. If the instructions given in a case are consistent with each other,[72] they must all be construed together, as a whole,[73] including

71. Sumner *v.* State, 5 Blackf. (Ind.) 579, 36 Am. Dec. 561; Harman *v.* Maddy, 57 W. Va. 66, 49 S. E. 1009.

72. *Idaho.*— Tarr *v.* Oregon Short Line R. Co., 14 Ida. 192, 93 Pac. 957, 125 Am. St. Rep. 151.

Illinois.— Dady *v.* Condit, 209 Ill. 488, 70 N. E. 1088 [*affirming* 104 Ill. App. 507]; Chicago, etc., R. Co. *v.* Reuter, 119 Ill. App. 232 [*affirmed* in 223 Ill. 387, 79 N. E. 166]; Grayville Water Works *v.* Burdick, 109 Ill. App. 520; Thompson *v.* Koperlski, 109 Ill. App. 466; Witte Hardware Co. *v.* Air Line Transfer Co., 109 Ill. App. 428.

Missouri.— Pond *v.* Wyman, 15 Mo. 175; Neale *v.* McKinstry, 7 Mo. 128.

Nebraska.— Williams *v.* Shepherdson, 4 Nebr. (Unoff.) 608, 95 N. W. 827.

Texas.— Meyer Bros. Drug Co. *v.* Durham, 35 Tex. Civ. App. 71, 79 S. W. 860.

73. *Alabama.*— Birmingham R., etc., Co. *v.* King, 149 Ala. 504, 42 So. 612; Richmond, etc., R. Co. *v.* Hissong, 97 Ala. 187, 13 So. 209.

Arkansas.— Rock Island Plow Co. *v.* Rankin, 89 Ark. 24, 115 S. W. 943; St. Louis, etc., R. Co. *v.* Puckett, 88 Ark. 204, 114 S. W. 224; Taylor *v.* McClintock, 87 Ark. 243, 112 S. W. 405.

California.— Anderson *v.* Seropian, 147 Cal. 201, 81 Pac. 521; De Witt *v.* Floriston Pulp, etc., Co., 7 Cal. App. 774, 96 Pac. 397.

Colorado.— Keefer *v.* Amicone, 45 Colo. 110, 100 Pac. 594; Denver City Tramway Co. *v.* Martin, 44 Colo. 324, 98 Pac. 836; Bailey *v.* Carlton, 43 Colo. 4, 95 Pac. 542.

Connecticut.— Reed *v.* Heyman, 80 Conn. 311, 68 Atl. 322.

Florida.— Florala Saw Mill Co. *v.* Smith, 55 Fla. 447, 46 So. 332; Stearns, etc., Lumber Co. *v.* Adams, 55 Fla. 394, 46 So. 156; Cross *v.* Aby, 55 Fla. 311, 45 So. 820; Atlantic Coast Line R. Co. *v.* Beazley, 54 Fla. 311, 45 So. 761; Gracy *v.* Atlantic Coast Line R. Co., 53 Fla. 350, 42 So. 903; Jackson *v.* Citizens' Bank, etc., Co., 53 Fla. 265, 44 So. 516; Jacksonville Electric Co. *v.* Sloan, 52 Fla. 257, 42 So. 516.

Idaho.— Barrow *v.* B. R. Lewis Lumber Co., 14 Ida. 698, 95 Pac. 682; Tarr *v.* Oregon Short Line R. Co., 14 Ida. 192, 93 Pac. 957, 125 Am. St. Rep. 151.

Illinois.— Klofski *v.* Railroad Supply Co., 235 Ill. 146, 85 N. E. 274 [*affirming* 138 Ill. App. 468]; Helbig *v.* Citizens' Ins. Co., 234 Ill. 251, 84 N. E. 897 [*affirming* 138 Ill. App. 115]; Atchison *v.* McKinnie, 233 Ill. 106, 84 N. E. 208; Purcell *v.* Chicago, 231 Ill. 164, 83 N. E. 137; Brew *v.* Seymour, 133 Ill. App. 225; Varney *v.* Taylor, 133 Ill. App. 154; East St. Louis, etc., R. Co. *v.* Zink, 133 Ill. App. 121 [*affirmed* in 229 Ill. 180, 82 N. E. 283]; Chicago Consol. Traction Co. *v.* Mahoney, 131 Ill. App. 591 [*affirmed* in 230 Ill. 562, 82 N. E. 868]; Chicago, etc., R. Co. *v.* Turck, 131 Ill. App. 128; Chicago, etc., R. Co. *v.* Jamison, 112 Ill. App. 69.

Indiana.— Sterling *v.* Frick, 171 Ind. 710, 86 N. E. 65, 87 N. E. 237; Indiana Natural Gas, etc., Co. *v.* Wilhelm, 44 Ind. App. 100, 86 N. E. 86; Pittsburgh, etc., R. Co. *v.* Wood, (App. 1908) 84 N. E. 1009.

Iowa.— McDivitt *v.* Des Moines City R. Co., 141 Iowa 689, 118 N. W. 459; Montrose Sav. Bank *v.* Claussen, 137 Iowa 73, 114 N. W. 547; Brusseau *v.* Lower Brick Co., 133 Iowa 245, 110 N. W. 577; Hart *v.* Cedar Rapids, etc., R. Co., 109 Iowa 631, 80 N. W. 662.

Kansas.— Chicago, etc., R. Co. *v.* Brandon, 77 Kan. 612, 95 Pac. 573.

Massachusetts.— Lockwood *v.* Boston El. R. Co., 200 Mass. 537, 86 N. E. 934, 22 L. R. A. N. S. 488; Plummer *v.* Boston El. R. Co., 198 Mass. 499, 84 N. E. 849; Whitney *v.* Wellesley, etc., St. R. Co., 197 Mass. 495, 84 N. E. 95.

Michigan.— Custard *v.* Hodges, 155 Mich. 361, 119 N. W. 583; Anderson Carriage Co. *v.* Pungs, 153 Mich. 580, 117 N. W. 162; Croze *v.* St. Mary's Canal Mineral Land Co., 153 Mich. 363, 117 N. W. 81.

Mississippi.— Cumberland Tel., etc., Co. *v.* Jackson, 95 Miss. 79, 48 So. 614; Hitt *v.* Terry, 92 Miss. 671, 46 So. 829.

Missouri.— Liese *v.* Meyer, 143 Mo. 547, 45 S. W. 282; Young *v.* Lanznar, 133 Mo. App. 130, 112 S. W. 17; Batten *v.* Modern Woodmen of America, 131 Mo. App. 381, 111 S. W. 513; Bell *v.* Central Electric R. Co., 125 Mo. App. 660, 103 S. W. 144.

Montana.— Harrington *v.* Butte, etc., R. Co., 36 Mont. 478, 93 Pac. 640.

Nebraska.— Morris *v.* Miller, 83 Nebr. 218, 119 N. W. 458, 131 Am. St. Rep. 636, 20 L. R. A. N. S. 907; Zelenka *v.* Union Stock Yards Co., 82 Nebr. 511, 118 N. W. 103; Sheibley *v.* Fales, 81 Nebr. 795, 116 N. W. 1035; Morrow *v.* Barnes, 81 Nebr. 688, 116 N. W. 657; Maxson *v.* J. I. Case Threshing Mach. Co., 81 Nebr. 546, 116 N. W. 281, 16 L. R. A. N. S. 963; Vanderveer *v.* Moran, 79 Nebr. 431, 112 N. W. 581; Lincoln Traction Co. *v.* Brookover, 77 Nebr. 221, 111 N. W. 357.

New York.— Booth *v.* Litchfield, 62 Misc. 279, 114 N. Y. Suppl. 1009.

North Carolina.— Revis *v.* Raleigh, 150 N. C. 348, 63 S. E. 1049; Haines *v.* Smith, 149 N. C. 279, 62 S. E. 1081.

North Dakota.— Buchanan *v.* Minneapolis Threshing Mach. Co., 17 N. D. 343, 116 N. W. 335.

Oregon.— Wadhams *v.* Inman, 38 Oreg. 143, 63 Pac. 11.

South Carolina.— Columbia, etc., R. Co. *v.* Laurens Cotton Mills, 82 S. C. 24, 61 S. E. 1089, 62 S. E. 1119; Cannon *v.* Dean, 80

special charges given at the request of either party;[74] and if, when so construed, they properly state the law, they are not subject to exception,[75] although some particular instruction or portion thereof, standing alone, may be erroneous or misleading.[76] This rule is subject to the qualification that the court in the par-

S. C. 557, 61 S. E. 1012; State *v.* Boyd, 35 S. C. 269, 14 S. E. 620.

Texas.— Morgan *v.* Giddings, (1886) 1 S. W. 369 (holding that the charge of the court should be considered as an entirety, although it consists of different causes, originating with different attorneys, and is applicable to different phases of the evidence); Oliver *v.* Chapman, 15 Tex. 400; Franks *v.* Harkness, (Civ. App. 1909) 117 S. W. 913; Galveston, etc., R. Co. *v.* Olds, (Civ. App. 1908) 112 S. W. 787; Toland *v.* Sutherlin, 49 Tex. Civ. App. 538, 110 S. W. 487; Galveston, etc., R. Co. *v.* Cochran, 49 Tex. Civ. App 591, 109 S. W. 261; Gulf, etc., R. Co *v.* Farmer, (Civ. App. 1908) 108 S. W. 729; Southern Pac. Co. *v.* Allen, 48 Tex. Civ App. 66, 106 S. W. 441; Graham *v.* Edwards, (Civ. App. 1907) 99 S. W. 436; Johns *v.* Brown, 1 Tex. App. Civ. Cas. § 1016.

Virginia.— Virginia Portland Cement Co. *v.* Luck, 103 Va. 427, 49 S. E. 577.

Washington.— Gray *v.* Washington Water Power Co., 30 Wash. 665, 71 Pac. 206; Bell *v.* Spokane, 30 Wash. 508, 71 Pac. 31.

West Virginia.— Styles *v.* Chesapeake, etc., R. Co., 62 W. Va. 650, 59 S. E. 609.

Wisconsin.— Morrison *v.* Superior Water, etc., Co., 134 Wis. 167, 114 N. W. 434.

United States.— Chicago Great Western R. Co. *v.* McDonough, 161 Fed. 657, 88 C. C. A. 517; Denver, etc., R. Co. *v.* Porter, 126 Fed. 288, 61 C. C. A. 168.

See 46 Cent. Dig. tit. "Trial," § 704 *et seq.*

A charge consisting of several paragraphs, consecutively numbered, must be construed as one charge. Hawkins *v.* Hudson, 45 Ala. 482.

Separate clauses of an instruction should not be separated from the context to arrive at its true meaning, but all that is said on the particular subject is to be considered together. Boesen *v.* Omaha St. R. Co., 83 Nebr. 378, 119 N. W. 771.

74. Houston, etc., R. Co. *v.* Finn, (Tex. Civ. App. 1908) 107 S. W. 94 [*affirmed* in 101 Tex. 511, 109 S. W. 918]; Galveston, etc., R. Co. *v.* Berry, 47 Tex. Civ. App. 327, 105 S. W. 1019; Texas, etc., R. Co. *v.* Cotts, (Tex. Civ. App. 1906) 95 S. W. 602.

75. *Arkansas.*— St. Louis Southwestern R. Co. *v.* Leder, 87 Ark. 298, 112 S. W. 744.

California.— *In re* Keithley, 134 Cal. 9, 66 Pac. 5; Hayden *v.* Consolidated Min., etc., Co., 3 Cal. App. 136, 84 Pac. 422.

Colorado.— Coleman *v.* Davis, 13 Colo. 98, 21 Pac. 1018.

Connecticut.— Smith *v.* Carr, 16 Conn. 450.

Florida.— Atlantic Coast Line R. Co. *v.* Peeples, 56 Fla. 145, 47 So. 392.

Illinois.— Thomas *v.* Mosher, 128 Ill. App. 479.

Indiana.— Pittsburgh, etc., R. Co. *v.* Collins, 163 Ind. 569, 71 N. E. 661; Jackson County *v.* Nichols, 139 Ind. 611, 38 N. E. 526; Cowger *v.* Land, 112 Ind. 263, 12 N. E. 96; Atkinson *v.* Dailey, 107 Ind. 117, 7 N. E. 902; Pennsylvania Co. *v.* Rusie, 95 Ind. 236; Wright *v.* Fansler, 90 Ind. 492; Nave *v.* Flack, 90 Ind. 205, 46 Am. Rep. 205; Nesbitt *v.* Nesbitt, 43 Ind. App. 43, 86 N. E. 867.

Iowa.— Pringle *v.* Chicago, etc., R. Co., 64 Iowa 613, 21 N. W. 108; Beazan *v.* Mason City, 58 Iowa 233, 12 N. W. 279.

Kansas.— Central Branch Union Pac. R. Co. *v.* Andrews, 41 Kan. 370, 21 Pac. 276.

Kentucky.— Illinois Cent. R. Co. *v.* France, 130 Ky. 26, 112 S. W. 929.

Michigan.— Hart *v.* Walker, 100 Mich. 406, 59 N. W. 174; Brown *v.* McCord, etc., Furniture Co., 65 Mich. 360, 32 N. W. 441.

Minnesota.— Guerin *v.* Hunt, 6 Minn. 375.

Mississippi.— Mississippi Cent. R. Co. *v.* Hardy, 88 Miss. 732, 41 So. 505; Yazoo, etc., R. Co. *v.* Williams, 87 Miss. 344, 39 So. 489.

Missouri.— Heinzle *v.* Metropolitan St. R. Co., 213 Mo. 102, 111 S. W. 536; Liese *v.* Meyer, 143 Mo. 547, 45 S. W. 282; Burdoin *v.* Trenton, 116 Mo. 358, 22 S. W. 728; Harrington *v.* Sedalia, 98 Mo. 583, 12 S. W. 342; Bell *v.* Central Electric R. Co., 125 Mo. App. 660, 103 S. W. 144.

Nebraska.— Tunnicliff *v.* Fox, 68 Nebr. 811, 94 N. W. 1032; Maynard *v.* Sigman, 65 Nebr. 590, 91 N. W. 576; Stein *v.* Vannice, 44 Nebr. 132, 62 N. W. 464; Campbell *v.* Holland, 22 Nebr. 587, 35 N. W. 871.

New Jersey.— Sullivan *v.* North Hudson County R. Co., 51 N. J. L. 518, 18 Atl. 689.

New York.— Goll *v.* Manhattan R. Co., 57 N. Y. Super. Ct. 74, 5 N. Y. Suppl. 185 [*affirmed* in 125 N. Y. 714, 26 N. E. 756].

North Carolina.— Hice *v.* Cox, 34 N. C. 315.

Oregon.— Ridings *v.* Marion County, 50 Oreg. 30, 91 Pac. 22.

Pennsylvania.— Krause *v.* Plumb, 195 Pa. St. 65, 45 Atl. 648; Carothers *v.* Dunning, 3 Serg. & R. 373; Carman *v.* Clarion River Nav. Co., 2 Wkly. Notes Cas. 720.

Tennessee.— East Tennessee, etc., R. Co. *v.* Humphreys, 12 Lea 200.

Texas.— Moore *v.* Moore, 73 Tex. 383, 11 S. W. 396; Able *v.* Lee, 6 Tex. 427; San Antonio, etc., R. Co. *v.* Corley, (Civ. App. 1894) 26 S. W. 903; Brackett *v.* Hinsdale, 2 Tex. Unrep. Cas. 468.

Washington.— Portland, etc., R. Co. *v.* Clarke County, 48 Wash. 509, 93 Pac. 1083.

United States.— Northern Pac. R. Co. *v.* Babcock, 154 U. S. 190, 14 S. Ct. 978, 38 L. ed. 958; Castle *v.* Bullard, 23 How. 172, 16 L. ed. 424; Rose *v.* Stephens, etc., Transp. Co., 11 Fed. 438, 20 Blatchf. 411; Andrews *v.* Graves, 1 Fed. Cas. No. 376, 1 Dill. 408.

See 46 Cent. Dig. tit. "Trial," § 704 *et seq.*

76. *Alabama.*— Montgomery St. R. Co. *v.* Smith, 146 Ala. 316, 39 So. 757; Southern R. Co. *v.* Lynn, 128 Ala. 297, 29 So. 573;

ticular case on appeal must be satisfied that the jury was not misled by the error

Decatur Car Wheel, etc., Co. *v.* Mehaffey, 128 Ala. 242, 29 So. 646.

Arkansas.— St. Louis Southwestern R. Co. *v.* Johnson, 59 Ark. 122, 26 S. W. 593; Burton *v.* Merrick, 21 Ark. 357.

California.— Thomas *v.* Gates, 126 Cal. 1, 58 Pac. 315; Gray *v.* Eschen, 125 Cal. 1, 57 Pac. 664; Brittan *v.* Oakland Sav. Bank, 124 Cal. 282, 57 Pac. 84, 71 Am. St. Rep. 58.

Colorado.— Simonton *v.* Rohm, 14 Colo. 51, 23 Pac. 86; Dozenback *v.* Raymer, 13 Colo. 451, 22 Pac. 787; Colorado Springs *v.* May, 20 Colo. App. 204, 77 Pac. 1093.

Connecticut.— Benedict *v.* Everard, 73 Conn. 157, 46 Atl. 870; Morehouse *v.* Remson, 59 Conn. 392, 22 Atl. 427; Setchel *v.* Keigwin, 57 Conn. 473, 18 Atl. 594.

Dakota.— McCormack *v.* Phillips, 4 Dak. 506, 34 N. W. 39.

Delaware.— Diamond State Iron Co. *v.* Giles, 7 Houst. 556, 11 Atl. 189.

District of Columbia.—Georgetown, etc., R. Co. *v.* Smith, 25 App. Cas. 259, 5 L. R. A. N. S. 274.

Florida.—Atlantic Coast Line R. Co. *v.* Dees, 56 Fla. 127, 48 So. 28; Clary *v.* Isom, 56 Fla. 236, 47 So. 919; Atlantic Coast Line R. Co. *v.* Beazley, 54 Fla. 311, 45 So. 761.

Georgia.— Carey *v.* Fowler, 127 Ga. 204, 56 S. E. 283; Atlantic Coast Line R. Co. *v.* Taylor, 125 Ga. 454, 54 S. E. 622; Teasley *v.* Bradley, 120 Ga. 373, 47 S. E. 925.

Illinois.— Miller *v.* John, 208 Ill. 173, 70 N. E. 27; Chicago City R. Co. *v.* Mead, 206 Ill. 174, 69 N. E. 19; Page *v.* Smith, 139 Ill. App. 441; Schultz *v.* Reed, 122 Ill. App. 420.

Indiana.— Springer *v.* Bricker, 165 Ind. 532, 76 N. E. 114; Clear Creek Stone Co. *v.* Dearmin, 160 Ind. 162, 66 N. E. 609; Apperson *v.* Lazro, 44 Ind. App. 186, 87 N. E. 97, 88 N. E. 99; Abney *v.* Indiana Union Traction Co., 41 Ind. App. 53, 83 N. E. 387.

Iowa.— Hawkins *v.* Young, 137 Iowa 281, 114 N. W. 1041; Montrose Sav. Bank *v.* Claussen, 137 Iowa 73, 114 N. W. 547; Brusseau *v.* Lower Brick Co., 133 Iowa 245, 110 N. W. 577.

Kansas.— Hays *v.* Farwell, 53 Kan. 78, 35 Pac. 794; Sweeney *v.* Merrill, 38 Kan. 216, 16 Pac. 454, 5 Am. St. Rep. 734; Atchison, etc., R. Co. *v.* Sadler, 38 Kan. 128, 16 Pac. 46, 5 Am. St. Rep. 729.

Kentucky.— Clark *v.* Fox, 9 Dana 193; Illinois Cent. R. Co. *v.* Colly, 86 S. W. 536, 27 Ky. L. Rep. 730; Louisville, etc., R. Co. *v.* Chandler, 72 S. W. 805, 24 Ky. L. Rep. 2035, 70 S. W. 666, 24 Ky. L. Rep. 998.

Maine.— Camden, etc., Water Co. *v.* Ingraham, 85 Me. 179, 27 Atl. 94; Oxnard *v.* Swanton, 39 Me. 125; Lyman *v.* Redman, 23 Me. 289.

Maryland.— Haney *v.* Marshall, 9 Md. 194.

Massachusetts.—Doe *v.* Boston, etc., St. R. Co., 195 Mass. 168, 80 N. E. 814; Lambeth Rope Co. *v.* Brigham, 170 Mass. 518, 49 N. E. 1022; Wesson *v.* Washburn Car-Wheel Co., 154 Mass. 514, 28 N. E. 679.

Michigan.— Beattie *v.* Detroit, 137 Mich. 319, 100 N. W. 574; Padgett *v.* Jacobs, 128 Mich. 632, 87 N. W. 898; Kunst *v.* Ringold, 116 Mich. 88, 74 N. W. 292.

Minnesota.— Holm *v.* Carver, 55 Minn. 199, 56 N. W. 826; Warner *v.* Lockerby, 31 Minn. 421, 18 N. W. 145, 821; Johnson Harvester Co. *v.* Clark, 31 Minn. 165, 17 N. W. 111.

Mississippi.— Warren County *v.* Rand, 88 Miss. 395, 40 So. 481; Childress *v.* Ford, 10 Sm. & M. 25.

Missouri.— Flaherty *v.* St. Louis Transit Co., 207 Mo. 318, 106 S. W. 15; Chambers *v.* Chester, 172 Mo. 461, 72 S. W. 904; Shores *v.* St. Joseph, 134 Mo. App. 9, 114 S. W. 548; Evers *v.* Wiggins Ferry Co., 127 Mo. App. 236, 105 S. W. 306.

Montana.— Hamilton *v.* Great Falls St. R. Co., 17 Mont. 334, 42 Pac. 860, 43 Pac. 713; Johnson *v.* Boston, etc., Consol. Copper, etc., Min. Co., 16 Mont. 164, 40 Pac. 298.

Nebraska.— Allen *v.* Chicago, etc., R. Co., 82 Nebr. 726, 118 N. W. 655; Ault *v.* Nebraska Tel. Co., 82 Nebr. 434, 118 N. W. 73, 130 Am. St. Rep. 686; Lincoln Traction Co. *v.* Brookover, 77 Nebr. 221, 111 N. W. 357.

Nevada.— State *v.* Donovan, 10 Nev. 36.

New Hampshire.— Monroe *v.* Connecticut River Lumber Co., 68 N. H. 89, 39 Atl. 1019; Cooper *v.* Grand Trunk R. Co., 49 N. H. 209; Hoitt *v.* Holcomb, 32 N. H. 185; Gibson *v.* Stevens, 7 N. H. 352.

New York.— Butler *v.* Gazette Co., 119 N. Y. App. Div. 767, 104 N. Y. Suppl. 637; McAffe *v.* Dix, 101 N. Y. App. Div. 69, 91 N. Y. Suppl. 464; Nelson *v.* Young, 91 N. Y. App. Div. 457, 87 N. Y. Suppl. 69 [*affirmed* in 180 N. Y. 523, 72 N. E. 1146]; J. R. Alsing Co. *v.* New England Quartz, etc., Co., 66 N. Y. App. Div. 473, 73 N. Y. Suppl. 347 [*affirmed* in 174 N. Y. 536, 66 N. E. 1110].

North Carolina.— Davis *v.* Western Union Tel. Co., 139 N. C. 79, 51 S. E. 898; Chaffin *v.* Fries Mfg., etc., Co., 135 N. C. 95, 47 S. E. 226, 136 N. C. 364, 48 S. E. 770; Fleming *v.* Southern R. Co., 132 N. C. 714, 44 S. E. 551, 131 N. C. 476, 42 S. E. 905.

North Dakota.— Gagnier *v.* Fargo, 12 N. D. 219, 96 N. W. 841.

Oregon.— Savage *v.* Savage, 36 Oreg. 268, 59 Pac. 461.

Pennsylvania.— Karl *v.* Juniata County, 206 Pa. St. 633, 56 Atl. 78; Sharer *v.* Dobbins, 195 Pa. St. 82, 45 Atl. 660; Kramer *v.* Winslow, 154 Pa. St. 637, 25 Atl. 766.

South Carolina.— Bowick *v.* American Pipe Mfg. Co., 69 S. C. 360, 48 S. E. 276; Montgomery *v.* Delaware Ins. Co., 67 S. C. 399, 45 S. E. 934; McGhee *v.* Wells, 57 S. C. 280, 35 S. E. 529, 76 Am. St. Rep. 567.

Tennessee.— Knoxville, etc., R. Co. *v.* Wyrick, 99 Tenn. 500, 42 S. W. 434.

Texas.— St. Louis, etc., R. Co. *v.* McClain, 80 Tex. 85, 15 S. W. 789; Missouri, etc., R. Co. *v.* Snow, (Civ. App. 1909) 115 S. W. 631; Thompson *v.* Planters' Compress Co., 48 Tex. Civ. App. 235, 106 S. W. 470; In-

in giving the instruction, to the prejudice of the complaining party.[77] It is not essential that a single instruction should embody the entire law of the case,[78] and an omission to state the entire law in one instruction is not error if the omission is reasonably supplied elsewhere, so that the charge as a whole fully and fairly presents the law applicable to the issues.[79] But where the court directs a

dustrial Lumber Co. *v.* Bivens, 47 Tex. Civ. App. 396, 105 S. W. 831.

Utah.— Rogers *v.* Rio Grande Western R. Co., 32 Utah 367, 90 Pac. 1075, 125 Am. St. Rep. 876; Loofbourow *v.* Utah Light, etc., Co., 31 Utah 355, 88 Pac. 19; Morgan *v.* Mammoth Min. Co., 26 Utah 174, 72 Pac. 688.

Vermont.— Bragg *v.* Laraway, 65 Vt. 673, 27 Atl. 492; Manley *v.* Staples, 65 Vt. 370, 26 Atl. 630.

Virginia.—Virginia Portland Cement Co. *v.* Luck, 103 Va. 427, 49 S. E. 577; Southern R. Co. *v.* Oliver, 102 Va. 710, 47 S. E. 862; Miller *v.* Newport News, 101 Va. 432, 44 S. E. 712.

Washington.— Barclay *v.* Puget Sound Lumber Co., 48 Wash. 241, 93 Pac. 430; Starr *v.* Ætna L. Ins. Co., 45 Wash. 128, 87 Pac. 1119; Kirkham *v.* Wheeler-Osgood Co., (1905) 81 Pac. 869.

West Virginia.— Huffman *v.* Alderson, 9 W. Va. 616.

Wisconsin.— Twentieth Century Co. *v.* Quilling, 136 Wis. 481, 117 N. W. 1007; Pelton *v.* Spider Lake Sawmill, etc., Co., 132 Wis. 219, 112 N. W. 29, 122 Am. St. Rep. 963; Eggett *v.* Allen, 119 Wis. 625, 96 N. W. 803.

United States.— Chicago, etc., R. Co. *v.* Whitton, 13 Wall. 270, 20 L. ed. 571; Erie R. Co. *v.* Weinstein, 166 Fed. 271, 92 C. C. A. 189; Guild *v.* Andrews, 137 Fed. 369, 70 C. C. A. 49.

See 46 Cent. Dig. tit. "Trial," § 705.

Where a statement in an instruction which is objected to is a part of a compound sentence, and the other part of the sentence obviates the alleged error, the instruction is not erroneous. Baltimore, etc., R. Co. *v.* Trennepohl, 44 Ind. App. 105, 87 N. E. 1059.

77. Clark *v.* McElvy, 11 Cal. 154; Chicago Union Traction Co. *v.* Hanthorn, 211 Ill. 367, 71 N. E. 1022; Springdale Cemetery Assoc. *v.* Smith, 24 Ill. 480; Citizens' St. R. Co. *v.* Jolly, 161 Ind. 80, 67 N. E. 935.

78. *Florida.*—Atlantic Coast Line R. Co. *v.* Crosby, 53 Fla. 400, 43 So. 318.

Georgia.— Livingston *v.* Taylor, 132 Ga. 1, 63 S. E. 694.

Illinois.— Trubey *v.* Richardson, 224 Ill. 136, 79 N. E. 592; Chicago City R. Co. *v.* Bundy, 210 Ill. 39, 71 N. E. 28; Illinois Iron, etc., Co. *v.* Weber, 196 Ill. 526, 63 N. E. 1008.

Indiana.—American Sheet, etc., Co. *v.* Bucy, 43 Ind. App. 501, 87 N. E. 1051.

Iowa.—Witt *v.* Latimer, 139 Iowa 273, 117 N. W. 680; Breiner *v.* Nugent, 136 Iowa 322, 111 N. W. 446; German Sav. Bank *v.* Fritz, 135 Iowa 44, 109 N. W. 1008.

Missouri.— Orcutt *v.* Century Bldg. Co., 214 Mo. 35, 112 S. W. 532; Brown *v.* Globe Printing Co., 213 Mo. 611, 112 S. W. 462, 127 Am. St. Rep. 627; Bell *v.* Central Electric R. Co., 125 Mo. App. 660, 103 S. W. 144.

Nebraska.— Coffey *v.* Omaha, etc., St. R. Co., 79 Nebr. 286, 112 N. W. 589.

Virginia.— Richmond *v.* Wood, 109 Va. 75, 63 S. E. 449.

Washington.—Wikstrom *v.* Preston Mill Co., 48 Wash. 164, 93 Pac. 213.

Wyoming.—Wallace *v.* Skinner, 15 Wyo. 233, 88 Pac. 221.

79. *California.*—Anderson *v.* Seropian, 147 Cal. 201, 81 Pac. 521; Livermore *v.* Stine, 43 Cal. 274.

Colorado.— Davis *v.* Shepherd, 31 Colo. 141, 72 Pac. 57; Ames *v.* Patridge, 13 Colo. App. 407, 58 Pac. 341; Hindry *v.* McPhee, 11 Colo. App. 398, 53 Pac. 389.

Florida.— Montgomery *v.* Knox, 23 Fla. 595, 3 So. 211.

Georgia.—Western, etc., R. Co. *v.* Tate, 129 Ga. 526, 59 S. E. 266; Atlanta Consol. St. R. Co. *v.* Jones, 116 Ga. 369, 42 S. E. 524.

Illinois.— Peoria, etc., Terminal R. Co. *v.* Schantz, 226 Ill. 506, 80 N. E. 1041; Mobile, etc., R. Co. *v.* Vallowe, 214 Ill. 124, 73 N. E. 416; Illinois Iron, etc., Co. *v.* Weber, 196 Ill. 526, 63 N. E. 1008; Colbeck *v.* Sampsell, 140 Ill. App. 566; McMaster *v.* Spencer, 129 Ill. App. 131; Cable Co. *v.* Elliott, 122 Ill. App. 342; Chicago, etc., R. Co. *v.* Jamieson, 112 Ill. App. 69; O'Leary *v.* Zindt, 109 Ill. App. 309.

Indiana.— Bowman *v.* Bowman, 153 Ind. 498, 55 N. E. 422; Hamilton *v.* Love, 152 Ind. 641, 53 N. E. 181, 54 N. E. 437, 71 Am. St. Rep. 384; White *v.* New York, etc., R. Co., 142 Ind. 648, 42 N. E. 456; Craig *v.* Frazier, 127 Ind. 286, 26 N. E. 842; Cline *v.* Lindsey, 110 Ind. 337, 11 N. E. 441; Western Union Tel. Co. *v.* Buskirk, 107 Ind. 549, 8 N. E. 557; Louisville, etc., R. Co. *v.* Grantham, 104 Ind. 353, 4 N. E. 49; Wright *v.* Nipple, 92 Ind. 310; Wallace *v.* Ransdell, 90 Ind. 173; Pittsburgh, etc., R. Co. *v.* Noftsger, 26 Ind. App. 614, 60 N. E. 372; Maxon *v.* Clark, 24 Ind. App. 620, 57 N. E. 260; Lofland *v.* Goben, 16 Ind. App. 67, 44 N. E. 553, 651.

Iowa.— Mitchell *v.* Pinckney, 127 Iowa 696, 104 N. W. 286; De Goey *v.* Van Wyk, 97 Iowa 491, 66 N. W. 787; Albertson *v.* Keokuk, etc., R. Co., 48 Iowa 292.

Kansas.—Atchison *v.* Acheson, 9 Kan. App. 33, 57 Pac. 248.

Kentucky.— Lexington, etc., Min. Co. *v.* Welburn, 11 Ky. L. Rep. 307.

Minnesota.— Fruit Dispatch Co. *v.* Murphy, 90 Minn. 286, 96 N. W. 83; Peterson *v.* Chicago, etc., R. Co., 38 Minn. 511, 39 N. W. 485.

particular verdict if the jury should find certain facts, the instruction must embrace all the facts and conditions essential to a verdict.[80] And even where instructions may supplement each other, each one must state the law correctly as far as it goes, and they should be in harmony, so that the jury may not be misled.[81]

3. Error Cured by Other Instructions. Ordinarily an erroneous instruction is not cured by the giving of subsequent correct instructions,[82] necessarily incon-

Mississippi.— Olisby *v.* Mobile, etc., R. Co., 78 Miss. 937, 29 So. 913.

Missouri.— Senn *v.* Southern R. Co., 135 Mo. 512, 36 S. W. 367; Spillane *v.* Missouri Pac. R. Co., 111 Mo. 555, 20 S. W. 293; Harrington *v.* Sedalia, 98 Mo. 583, 12 S. W. 342; Dougherty *v.* Missouri R. Co., 97 Mo. 647, 8 S. W. 900, 11 S. W. 251; Mathew *v.* Wabash R. Co., 115 Mo. App. 468, 78 S. W. 271, 81 S. W. 646 [*affirmed* in 199 U. S. 605, 26 S. Ct. 752, 50 L. ed. 329]; Weston *v.* Lackawanna Min. Co., 105 Mo. App. 702, 78 S. W. 1044.

Nebraska.—South Omaha *v.* Burke, 3 Nebr. (Unoff.) 314, 94 N. W. 528.

Ohio.— Ohio, etc., Torpedo Co. *v.* Fishburn, 61 Ohio St. 608, 56 N. E. 457, 76 Am. St. Rep. 437; Price *v.* Coblitz, 21 Ohio Cir. Ct. 732, 12 Ohio Cir Dec. 34.

South Carolina.— Lowrimore *v.* Palmer Mfg. Co., 60 S. C. 153, 38 S. E. 430.

South Dakota.— Hedlun *v.* Holy Terror Min. Co., 16 S. D. 261, 92 N. W. 31.

Texas.— Galveston, etc., R. Co. *v.* Renz, 24 Tex. Civ. App. 335, 59 S. W. 280.

Utah.— McCornick *v.* Queen of Sheba Gold Min., etc., Co., 23 Utah 71, 63 Pac. 820.

Virginia.— Truckers' Mfg., etc., Co. *v.* White, 108 Va. 147, 60 S. E. 630.

West Virginia.— Styles *v.* Chesapeake, etc., R. Co., 62 W. Va. 650, 59 S. E. 609.

Wisconsin.— Gussart *v.* Greenleaf Stone Co., 134 Wis. 418, 114 N. W. 799.

Omission of qualifications or exceptions.— Since it is ordinarily impossible to state all of the law of the case in one instruction, if the various instructions when taken together present the case as a harmonious whole, it is not necessary that each instruction contain the qualifications which are made in the other instructions. Louisiana, etc., R. Co. *v.* Ratcliffe, 88 Ark. 524, 115 S. W. 396; St. Louis Southwestern R. Co. *v.* Graham, 83 Ark. 61, 102 S. W. 700; Brown *v.* Anderson, 90 Ind. 93; Lurssen *v.* Lloyd, 76 Md. 360, 25 Atl. 294; Gordon *v.* Sizer, 39 Miss. 805; Hickenbottom *v.* Delaware, etc., R. Co., 122 N. Y. 91, 25 N. E. 279; Hammock *v.* Tacoma, 44 Wash. 623, 87 Pac. 924; Western Coal, etc., Co. *v.* Ingraham, 70 Fed. 219, 17 C. C. A. 71.

See 46 Cent. Dig. tit. "Trial," § 706. And see *infra*, IX, J, 3.

Failure to charge on the effect of contributory negligence in one instruction is not objectionable, where such charge is given in others. Louisville, etc., Traction Co. *v.* Worrell, 44 Ind. App. 480, 86 N. E. 78; Roth *v.* Buettell Bros. Co., 142 Iowa 212, 119 N. W. 166; Lange *v.* Missouri Pac. R. Co., 208 Mo. 458, 106 S. W. 660; Stephens *v.* Elliott, 36 Mont. 92, 92 Pac. 45; Chicago, etc., R. Co. *v.* Burns, (Tex. Civ. App. 1907) 104 S. W. 1081 [*affirmed* in 101 Tex. 329, 107 S. W. 49]. And see *infra*, IX, J, 3.

Failure to negative defenses.—An instruction containing all the elements necessary to a recovery upon plaintiff's theory is sufficient without negativing defensive matter or theories. Fitzgerald *v.* Benner, 219 Ill. 485, 76 N. E. 709; Chicago Union Traction Co. *v.* Leach, 215 Ill. 184, 74 N. E. 119; Mt. Olive, etc., Coal Co. *v.* Rademacher, 190 Ill. 538, 60 N. E. 888; O'Leary *v.* Zindt, 109 Ill. App. 309.

80. Illinois Iron, etc., Co. *v.* Weber, 196 Ill. 526, 63 N. E. 1008; Bickel *v.* Martin, 115 Ill. App. 367; Flaherty *v.* St. Louis Transit Co., 207 Mo. 318, 106 S. W. 15. And see *infra*, note 98.

81. Ratner *v.* Chicago City R. Co., 233 Ill. 169, 84 N. E. 201 [*reversing* 133 Ill. App. 628]; Funston *v.* Hoffman, 232 Ill. 360, 83 N. E. 917; West Chicago St. R. Co. *v.* Schulz, 217 Ill. 322, 75 N. E. 495; Illinois Iron, etc., Co. *v.* Weber, 196 Ill. 526, 63 N. E. 1008; Chicago Union Traction Co. *v.* Grommes, 110 Ill. App. 113; Mendenhall *v.* Stewart, 18 Ind. App. 262, 47 N. E. 943; Chesapeake, etc., R. Co. *v.* Grigsby, 131 Ky. 363, 115 S. W. 237.

82. *Alabama.*— Alabama City, etc., R. Co. *v.* Bates, 155 Ala. 347, 46 So. 776; Schieffelin *v.* Schieffelin, 127 Ala. 14, 28 So. 687.

Arkansas.— Doyle *v.* Kavanaugh, 87 Ark. 364, 112 S. W. 889; Bayles *v.* Daugherty, 77 Ark. 201, 91 S. W. 304; St. Louis, etc., R. Co. *v.* Beecher, 65 Ark. 64, 44 S. W. 715.

California.— Fogarty *v.* Southern Pac. Co., 151 Cal. 785, 91 Pac. 650; Melone *v.* Sierra R. Co., 151 Cal. 113, 91 Pac. 522; *In re* Calef, 139 Cal. 673, 73 Pac. 539.

Colorado.— Stratton Cripple Creek Min., etc., Co. *v.* Ellison, 42 Colo. 498, 94 Pac. 303; Walsh *v.* Henry, 38 Colo. 373, 88 Pac. 449.

Georgia.— Ft. Valley Knitting Mills *v.* Anderson, 124 Ga. 909, 53 S. E. 686; Morris *v.* Warlick, 118 Ga. 421, 45 S. E. 407; Western, etc., R. Co. *v.* Clark, 117 Ga. 548, 44 S. E. 1.

Illinois.— Ratner *v.* Chicago City R. Co., 233 Ill. 169, 84 N. E. 201 [*reversing* 133 Ill. App. 628]; Chicago, etc., Electric R. Co. *v.* Mawman, 206 Ill. 182, 69 N. E. 66; Sloan *v.* Cleveland, etc., R. Co., 140 Ill. App. 31.

Indiana.— Chicago, etc., R. Co. *v.* Glover, 154 Ind. 584, 57 N. E. 244; Cleveland, etc., R. Co. *v.* Snow, 37 Ind. App. 646, 74 N. E. 908; Evansville, etc., R. Co. *v.* Clements, 32 Ind. App. 659, 70 N. E. 554.

Iowa.— Williams *v.* Clarke County, 143 Iowa 328, 120 N. W. 306; McDivitt *v.* Des

sistent therewith,[83] since it is impossible to tell which charge the jury fol-

Moines City R. Co., 141 Iowa 689, 118 N. W. 459; Rudd *v.* Dewey, 121 Iowa 454, 96 N. W. 973.

Kentucky.— Burton *v.* Cincinnati, etc., R. Co., (1908) 113 S. W. 442; Louisville R. Co. *v.* O'Conner, 101 S. W. 305, 30 Ky. L. Rep. 1329.

Michigan.— Weaver *v.* Richards, 150 Mich. 20, 113 N. W. 867; Sterling *v.* Callahan, 94 Mich. 536, 54 N. W. 495.

Minnesota.— Gorstz *v.* Pinske, 82 Minn. 456, 85 N. W. 215, 83 Am. St. Rep. 441.

Missouri.— Quirk *v.* St. Louis United El. Co., 126 Mo. 279, 28 S. W. 1080; Goetz *v.* Hannibal, etc., R. Co., 50 Mo. 472; Neale *v.* McKinstry, 7 Mo. 128; Baer *v.* Lisman, 85 Mo. App. 317.

Montana.— Smith *v.* Perham, 33 Mont. 309, 83 Pac. 492.

Nebraska.— Standard Distilling, etc., Co. *v.* Harris, 75 Nebr. 480, 106 N. W. 582; Pritchett *v.* Johnson, 5 Nebr. (Unoff.) 49, 97 N. W. 223; Parkins *v.* Missouri Pac. R. Co., 4 Nebr. (Unoff.) 13, 96 N. W. 683.

New York.— Barr *v.* Schefer, 118 N. Y. App. Div. 834, 103 N. Y. Suppl. 733; Sullivan *v.* Brooklyn Heights R. Co., 117 N. Y. App. Div. 784, 102 N. Y. Suppl. 982; Damsky *v.* New York City R. Co., 52 Misc. 175, 101 N. Y. Suppl. 579.

Pennsylvania.— Radcliffe *v.* Hollyfield, 216 Pa. St. 367, 65 Atl. 789; Fitzpatrick *v.* Union Traction Co., 206 Pa. St. 335, 55 Atl. 1050.

South Carolina.— Scarborough *v.* Woodley, 81 S. C. 329, 62 S. E. 405.

Tennessee.— Louisville, etc., R. Co. *v.* Cheatham, 118 Tenn. 160, 100 S. W. 902.

Texas.— Gulf, etc., R. Co. *v.* Garren, 96 Tex. 605, 74 S. W. 897, 97 Am. St. Rep. 939; Bruce *v.* Koch, 94 Tex. 192, 59 S. W. 540; Johnson *v.* Gulf, etc., R. Co., 36 Tex. Civ. App. 487, 81 S. W. 1197.

Virginia.— American Locomotive Co. *v.* Whitlock, 109 Va. 238, 63 S. E. 991.

Washington.— Peyser *v.* Western Dry Goods Co., 48 Wash. 55, 92 Pac. 886.

West Virginia.—Ward *v.* Ward, 47 W. Va. 766, 35 S. E. 873.

Wisconsin.— Steber *v.* Chicago, etc., R. Co., 139 Wis. 10, 120 N. W. 502; Eggett *v.* Allen, 106 Wis. 633, 82 N. W. 556.

United States.— Durant Min. Co. *v.* Percy Consol. Min. Co., 93 Fed. 166, 35 C. C. A. 252.

See 46 Cent. Dig. tit. "Trial," § 705 *et seq.*

Correct general instruction will not cure erroneous specific instruction. Clark *v.* State, 159 Ind. 60, 64 N. E. 589; Pittsburgh, etc., R. Co. *v.* Krouse, 30 Ohio St. 222.

Correct oral charge will not cure erroneous written instruction. Louisville, etc., R. Co. *v.* Christian Moerlein Brewing Co., 150 Ala. 390, 43 So. 723.

83. *Alabama.*— Alabama City, etc., R. Co. *v.* Bullard, 157 Ala. 618, 47 So. 578.

Arkansas.— Merchants' F. Ins. Co. *v.* McAdams, 88 Ark. 550, 115 S. W. 175; St. Louis, etc., R. Co. *v.* Thompson-Hailey Co., 79 Ark. 12, 94 S. W. 707; Truschel *v.* Dean, 77 Ark. 546, 92 S. W. 781; St. Louis, etc., R. Co. *v.* Hitt, 76 Ark. 224, 88 S. W. 911.

California.— Watts *v.* Murphy, 9 Cal. App. 564, 99 Pac. 1104.

Colorado.— Best *v.* Rocky Mountain Nat. Bank, 37 Colo. 149, 85 Pac. 1124.

District of Columbia.— Boswell *v.* District of Columbia, 21 D. C. 526.

Illinois.— Fowler *v.* Chicago, etc., R. Co., 234 Ill. 619, 85 N. E. 298 [*reversing* 138 Ill. App. 352]; Kath *v.* East St. Louis, etc., R. Co., 232 Ill. 126, 83 N. E. 533, 15 L. R. A. N. S. 1109; Swierez *v.* Illinois Steel Co., 231 Ill. 456, 83 N. E. 168; Kankakee Stone, etc., Co. *v.* Kankakee, 128 Ill. 173, 20 N. E. 670; Chicago, etc., R. Co. *v.* Gill, 132 Ill. App. 310; Chicago, etc., R. Co. *v.* Turck, 131 Ill. App. 128; Cleveland, etc., R. Co. *v.* Dukeman, 130 Ill. App. 105, 134 Ill. App. 396.

Indiana.— Monongahela River Consol. Coal, etc., Co. *v.* Hardsaw, 169 Ind. 147, 81 N. E. 492; McCole *v.* Loehr, 79 Ind. 430; Chicago, etc., R. Co. *v.* Lee, 29 Ind. App. 480, 64 N. E. 675.

Iowa.— McDivitt *v.* Des Moines City R. Co., 141 Iowa 689, 118 N. W. 459; Ford *v.* Chicago, etc., R. Co., 106 Iowa 85, 75 N. W. 650.

Kentucky.— Louisville, etc., R. Co. *v.* Murphy, 6 Ky. L. Rep. 662; Eisfelder *v.* Klein, 5 Ky. L. Rep. 138.

Maryland.— Williar *v.* Nagle, 109 Md. 75, 71 Atl. 427; Rosenkovitz *v.* Baltimore City United Ry., etc., Co., 108 Md. 306, 70 Atl. 108; Philadelphia, etc., R. Co. *v.* Hand, 101 Md. 233, 61 Atl. 285.

Michigan.— Sterling *v.* Callahan, 94 Mich. 536, 54 N. W. 495.

Missouri.— Huff *v.* St. Joseph R., etc., Co., 213 Mo. 495, 111 S. W. 1145; Sheperd *v.* St. Louis Transit Co., 189 Mo. 362, 87 S. W. 1007; Butz *v.* Murch Bros. Constr. Co., 137 Mo. App. 222, 117 S. W. 635; Ross *v.* Metropolitan St. R. Co., 132 Mo. App. 472, 112 S. W. 9.

Montana.— Sullivan *v.* Metropolitan L. Ins. Co., 35 Mont. 1, 88 Pac. 401.

Nebraska.— Knight *v.* Denman, 64 Nebr. 814, 90 N. W. 863; Missouri Pac. R. Co. *v.* Fox, 56 Nebr. 746, 77 N. W. 130; Richardson *v.* Halstead, 44 Nebr. 606, 62 N. W. 1077.

New York.— Blumberg *v.* Sterling Bronze Co., 56 Misc. 477, 107 N. Y. Suppl. 142.

Ohio.— Pendleton St. R. Co. *v.* Stallman, 22 Ohio St. 1.

South Carolina.— Love *v.* Turner, 71 S. C. 322, 51 S. E. 101.

Tennessee.— Citizens' St. R. Co. *v.* Shepherd, 107 Tenn. 444, 64 S. W. 710.

Texas.— St. Louis Southwestern R. Co. *v.* Tittle, (Civ. App. 1908) 115 S. W. 640; International, etc., R. Co. *v.* Van Hoesen, (Civ. App. 1906) 91 S. W. 604; Dallas Consol. Electric St. R. Co. *v.* McAllister, 41 Tex. Civ. App. 131, 90 S. W. 933.

Virginia.— Continental Casualty Co. *v.* Peltier, 104 Va. 222, 51 S. E. 209; Virginia, etc., Wheel Co. *v.* Chalkley, 98 Va. 62, 34 S. E. 976.

lowed.[84] A correct instruction will cure the error in another only when the instructions, as a series, state the law correctly,[85] and it is evident that no harm has been done by the erroneous instruction.[86] Otherwise, in order to obviate the effect thereof, the erroneous instruction must be expressly withdrawn from the jury,[87] or corrected by a qualification referring directly to it.[88] On the other hand it has gen-

West Virginia.— Cobb *v.* Dunlevie, 63 W. Va. 398, 60 S. E. 384; McKelvey *v.* Chesapeake, etc., R. Co., 35 W. Va. 500, 14 S. E. 261.

Wisconsin.— Yerkes *v.* Northern Pac. R. Co., 112 Wis. 184, 88 N. W. 33, 88 Am. St. Rep. 961; Imhoff *v.* Chicago, etc., R. Co., 20 Wis. 344.

United States.— Armour *v.* Russell, 144 Fed. 614, 75 C. C. A. 416, 6 L. R. A. N. S. 602.

See 46 Cent. Dig. tit. "Trial," § 705 *et seq.*

84. *Alabama.*— Alabama City, etc., R. Co. *v.* Bullard, 157 Ala. 618, 47 So. 578.

Arkansas.— Merchants' F. Ins. Co. *v.* McAdams, 88 Ark. 550, 115 S. W. 175.

California.— Watts *v.* Murphy, 9 Cal. App. 564, 99 Pac. 1104.

Illinois.— Kath *v.* East St. Louis, etc., R. Co., 232 Ill. 126, 83 N. E. 533, 15 L. R. A. N. S. 1109; Kankakee Stone, etc., Co. *v.* Kankakee, 128 Ill. 173, 20 N. E. 670; Chicago, etc., R. Co. *v.* Gill, 132 Ill. App. 310.

Maryland.— Williar *v.* Nagle, 109 Md. 75, 71 Atl. 427; Rosenkovitz *v.* United R., etc., Co., 108 Md. 306, 70 Atl. 108.

Missouri.— Ross *v.* Metropolitan St. R. Co., 132 Mo. App. 472, 112 S. W. 9.

New York.— Blumberg *v.* Sterling Bronze Co., 56 Misc. 477, 107 N. Y. Suppl. 142.

Ohio.— Pendleton St. R. Co. *v.* Stallman, 22 Ohio St. 1.

85. American Strawboard Co. *v.* Chicago, etc., R. Co., 177 Ill. 513, 53 N. E. 97; Chicago North Shore St. R. Co. *v.* Hebson, 93 Ill. App. 98. And see *supra*, IX, 2, f.

86. *Arkansas.*— Pettus *v.* Kerr, 87 Ark. 396, 112 S. W. 886.

Colorado.— Petterson *v.* Payne, 43 Colo. 184, 95 Pac. 301.

Illinois.— Burt *v.* Garden City Sand Co., 237 Ill. 473, 86 N. E. 1055 [*affirming* 141 Ill. App. 603]; Piner *v.* Cover, 55 Ill. 391; Brady *v.* Mangle, 109 Ill. App. 172; Chicago North Shore St. R. Co. *v.* Hebson, 93 Ill. App. 98; Fick *v.* Mohr, 92 Ill. App. 280.

Indiana.— Indianapolis Tract., etc., Co. *v.* Beckman, 40 Ind. App. 100, 81 N. E. 82.

Kentucky.— Louisville R. Co. *v.* Knocke, (1909) 117 S. W. 271.

Michigan.— Smith *v.* Hubbell, 151 Mich. 59, 114 N. W. 865.

Mississippi.— Cumberland Tel., etc., Co. *v.* Jackson, 95 Miss. 79, 48 So. 614; Hitt *v.* Terry, 92 Miss. 671, 46 So. 829.

Missouri.— Peterson *v.* Metropolitan St. R. Co., 211 Mo. 498, 111 S. W. 37; Cornovski *v.* St. Louis Transit Co., 207 Mo. 263, 106 S. W. 51.

Nebraska.— Cornelius *v.* City Water Co., 84 Nebr. 130, 120 N. W. 944.

New Jersey.—Corkran *v.* Taylor, 77 N. J. L. 195, 71 Atl. 124.

New York.— Kelleher *v.* Interurban St. R. Co., 102 N. Y. Suppl. 466.

South Carolina.— Dempsey *v.* Western Union Tel. Co., 77 S. C. 399, 58 S. E. 9.

Texas.— Atchison, etc., R. Co. *v.* Mills, (Civ. App. 1909) 116 S. W. 852; San Antonio Light Pub. Co. *v.* Lewy, 52 Tex. Civ. App. 22, 113 S. W. 574; Texas, etc., R. Co. *v.* Boleman, (Civ. App. 1908) 112 S. W. 805; St. Louis Southwestern R. Co. *v.* Hawkins, 49 Tex. Civ. App. 545, 108 S. W. 736.

Virginia.— Washington Southern R. Co. *v.* Lacey, 94 Va. 460, 26 S. E. 834.

Washington.— Behling *v.* Seattle Electric Co., 50 Wash. 150, 96 Pac. 954.

Wisconsin.— Eggett *v.* Allen, 106 Wis. 633, 82 N. W. 556.

United States.— Gila Valley, etc., R. Co. *v.* Lyon, 203 U. S. 465, 27 S. Ct. 145, 51 L. ed. 276; Cucciarre *v.* New York Cent., etc., R. Co., 163 Fed. 38, 90 C. C. A. 220; Southern R. Co. *v.* King, 160 Fed. 332, 87 C. C. A. 284 [*affirmed* in 217 U. S. 524, 30 S. Ct. 594].

87. *Arkansas.*— St. Louis, etc., R. Co. *v.* Stamps, 84 Ark. 241, 104 S. W. 1114.

Georgia.— Rowe *v.* Spencer, 132 Ga. 426, 64 S. E. 468.

Indiana.— Roller *v.* Kling, 150 Ind. 159, 49 N. E. 948; Pittsburgh, etc., R. Co. *v.* Noftsger, 148 Ind. 101, 47 N. E. 332; Wenning *v.* Teeple, 144 Ind. 189, 41 N. E. 600; Toledo, etc., R. Co. *v.* Shuckman, 50 Ind. 42; Fuelling *v.* Fuesse, 43 Ind. App. 441, 87 N. E. 700; Evansville, etc., R. Co. *v.* Clements, 32 Ind. App. 659, 70 N. E. 554; Indiana Natural Gas, etc., Co. *v.* Vauble, 31 Ind. App. 370, 68 N. E. 195.

Kentucky.— Clay *v.* Miller, 3 T. B. Mon. 146.

Missouri.— Jones *v.* Talbot, 4 Mo. 279.

Texas.— Missouri, etc., R. Co. *v.* Rodgers, 89 Tex. 675, 36 S. W. 243; Baker *v.* Ashe, 80 Tex. 356, 16 S. W. 36; Missouri, etc., R. Co. *v.* Mills, 27 Tex. Civ. App. 245, 65 S. W. 74.

Washington.— Baxter *v.* Waite, 2 Wash. Terr. 228, 6 Pac. 429.

West Virginia.— McKelvey *v.* Chesapeake, etc., R. Co., 35 W. Va. 500, 14 S. E. 261.

Wisconsin.— Eggett *v.* Allen, 106 Wis. 633, 82 N. W. 556; Imhoff *v.* Chicago, etc., R. Co., 20 Wis. 344.

United States.— Standard L., etc., Ins. Co. *v.* Sale, 121 Fed. 664, 57 C. C. A. 418, 61 L. R. A. 337.

See 46 Cent. Dig. tit. "Trial," § 705 *et seq.*

88. *Arkansas.*— St. Louis, etc., R. Co. *v.* Stamps, 84 Ark. 241, 104 S. W. 1114; St. Louis, etc., R. Co. *v.* Jagerman, 59 Ark. 98, 26 S. W. 591.

Illinois.— Rock Island, etc., R. Co. *v.* Leisy Brewing Co., 174 Ill. 547, 51 N. E. 572.

erally been held that where an instruction is defective merely,[89] or incomplete,[90] too

Maryland.— Adams *v.* Capron, 21 Md. 186, 83 Am. Dec. 566.

Minnesota.— Gorstz *v.* Pinske, 82 Minn. 456, 85 N. W. 215, 83 Am. St. Rep. 441.

Missouri.— McNichols *v.* Nelson, 45 Mo. App. 446.

New York.— Sheridan *v.* Long Island R. Co., 27 N. Y. App. Div. 10, 50 N. Y. Suppl. 215.

North Carolina.— Wilson *v.* Atlantic Coast Line R. Co., 142 N. C. 333, 55 S. E. 257.

Texas.— Baker *v.* Ashe, 80 Tex. 356, 16 S. W. 36; Texas Cent. R. Co. *v.* Waldie, (Civ. App. 1907) 101 S. W. 517; Cleburne *v.* Gutta Percha, etc., Mfg. Co., 39 Tex. Civ. App. 604, 88 S. W. 300; Reed *v.* Western Union Tel. Co., 31 Tex. Civ. App. 116, 71 S. W. 389; International, etc., R. Co. *v.* Anchonda, (Civ. App. 1902) 68 S. W. 743.

United States.— Standard L., etc., Ins. Co. *v.* Sale, 121 Fed. 664, 57 C. C. A. 418, 61 L. R. A. 337.

See 46 Cent. Dig. tit. "Trial," § 705 *et seq.*

89. Arkadelphia Lumber Co. *v.* Posey, 74 Ark. 377, 85 S. W. 1127; Neale *v.* McKinstry, 7 Mo. 128; Schmitt, etc., Co. *v.* Mahoney, 60 Nebr. 20, 82 N. W. 99.

90. *California.*—Anderson *v.* Seropian, 147 Cal. 201, 81 Pac. 521; Powley *v.* Swensen, 146 Cal. 471, 80 Pac. 722.

Colorado.— Stratton Cripple Creek Min., etc., Co. *v.* Ellison, 42 Colo. 498, 94 Pac. 303; Little Dorrit Gold Min. Co. *v.* Arapahoe Gold Min. Co., 30 Colo. 431, 71 Pac. 389; Ames *v.* Patridge, 13 Colo. App. 407, 58 Pac. 341.

Connecticut.—Mack *v.* Starr, 78 Conn. 184, 61 Atl. 472.

Delaware.— Barnesville Mfg. Co. *v.* Love, 3 Pennew. 569, 52 Atl. 267.

Florida.— Montgomery *v.* Knox, 23 Fla. 595, 3 So. 211.

Illinois.— East St. Louis, etc., R. Co. *v.* Zink, 229 Ill. 180, 82 N. E. 283; Day *v.* Porter, 161 Ill. 235, 43 N. E. 1073; Lanark *v.* Dougherty, 153 Ill. 163, 38 N. E. 892; Southern R. Co. *v.* Cullen, 122 Ill. App. 293 [*affirmed* in 221 Ill. 392, 77 N. E. 470]; Elgin, etc., Traction Co. *v.* Wilson, 120 Ill. App. 371 [*affirmed* in 217 Ill. 47, 75 N. E. 436].

Indiana.—Harness *v.* Steele, 159 Ind. 286, 64 N. E. 875; Johnson *v.* Gebhauer, 159 Ind. 271, 64 N. E. 855; Whiteley Malleable Castings Co. *v.* Wishon, 42 Ind. App. 288, 85 N. E. 832; Pittsburgh, etc., R. Co. *v.* Wood, (App. 1908) 84 N. E. 1109.

Indian Territory.— Waples-Painter Co. *v.* Bank of Commerce, 6 Indian Terr. 326, 97 S. W. 1025.

Iowa.— McDivitt *v.* Des Moines City R. Co., 141 Iowa 689, 118 N. W. 459; Mitchell *v.* Pinckney, 127 Iowa 696, 104 N. W. 286; De Goey *v.* Van Wyk, 97 Iowa 491, 66 N. W. 787.

Minnesota.— Peterson *v.* Chicago, etc., R. Co., 38 Minn. 511, 39 N. W. 485.

Mississippi.— Mississippi Cent. R. Co. *v.* Magee, 93 Miss. 196, 46 So. 716.

Missouri.— Gibler *v.* St. Louis Terminal R. Assoc., 203 Mo. 208, 101 S. W. 37; Deschner *v.* St. Louis, etc., R. Co., 200 Mo. 310, 98 S. W. 737; Nephler *v.* Woodward, 200 Mo. 179, 98 S. W. 488; Goetz *v.* Hannibal, etc., R. Co., 50 Mo. 472.

Nebraska.— *In re* Wilson, 78 Nebr. 758, 111 N. W. 788; McCormick Harvesting Mach. Co. *v.* Hiatt, 4 Nebr. (Unoff.) 587, 95 N. W. 627; Canon *v.* Farmer's Bank, 3 Nebr. (Unoff.) 348, 91 N. W. 585.

Nevada.— Caples *v.* Central Pac. R. Co., 6 Nev. 265.

North Carolina.— Crampton *v.* Ivie, 124 N. C. 591, 32 S. E. 968.

Oregon.— Smithson *v.* Southern Pac. Co., 37 Oreg. 74, 60 Pac. 907.

South Carolina.—Bristow *v.* Atlantic Coast Line R. Co., 72 S. C. 43, 51 S. E. 529; Lowrimore *v.* Palmer Mfg. Co., 60 S. C. 153, 38 S. E. 430.

Texas.— Rost *v.* Missouri Pac. R. Co., 76 Tex. 168, 12 S. W. 1131; Missouri, etc., R. Co. *v.* Malone, (Civ. App. 1908) 110 S. W. 958; International, etc., R. Co. *v.* Anchonda, 33 Tex. Civ. App. 24, 75 S. W. 557; Houston, etc., R. Co. *v.* Moss, (Civ. App. 1901) 63 S. W. 894.

Utah.— Gimnich Furniture Mfg. Co. *v.* Sorensen, 34 Utah 109, 96 Pac. 121.

Virginia.— Sun L. Assur. Co. *v.* Bailey, 101 Va. 443, 44 S. E. 692.

See 46 Cent. Dig. tit. "Trial," § 706 *et seq.*

Omission of qualifications or exceptions.— Where an instruction, as far as it goes, states a correct proposition of law, but is defective because it fails to qualify or explain the proposition it lays down in consonance with the facts of the case, such defect is cured if subsequent instructions are given containing the required qualifications or exceptions. Atlantic Coast Line R. Co. *v.* Dees, 56 Fla. 127, 48 So. 28; Atlantic Coast Line R. Co. *v.* Crosby, 53 Fla. 400, 43 So. 318; Southern R. Co. *v.* Dean, 128 Ga. 366, 57 S. E. 702; Mansfield *v.* Moore, 124 Ill. 133, 16 N. E. 246; Christiansen *v.* Chicago, etc., R. Co., 107 Minn. 341, 120 N. W. 300.

Omission of issue of contributory negligence.— In an action for personal injuries, an instruction is not erroneous because it omits the question of plaintiff's contributory negligence, where such issues are fully covered by other instructions. Stephenson *v.* Southern Pac. Co., 102 Cal. 143, 34 Pac. 618, 36 Pac. 407; East St. Louis, etc., R. Co. *v.* Zink, 229 Ill. 180, 82 N. E. 283; Beidler *v.* King, 209 Ill. 302, 70 N. E. 763, 101 Am. St. Rep. 246; West Chicago St. R. Co. *v.* Kromshinsky, 185 Ill. 92, 56 N. E. 1110; Indianapolis Traction, etc., Co. *v.* Smith, 38 Ind. App. 160, 77 N. E. 1140; Taylor *v.* Wootan, 1 Ind. App. 188, 27 N. E. 502, 50 Am. St. Rep. 200; Larkin *v.* Burlington, etc., R. Co., 85 Iowa 492, 52 N. W. 480; Louisville R. Co. *v.* Meglemery, 78 S. W. 217, 25 Ky. L. Rep. 1587; Louisville, etc., R. Co. *v.* Lyon, 58 S. W. 434, 22 Ky. L. Rep. 544; Hughes *v.* Chicago, etc., R. Co., 127

general,[91] argumentative,[92] inaccurate,[93] indefinite,[94] ambiguous,[95] or obscure,[96] or where it leaves room for improper inferences,[97] it may be cured by another

Mo. 447, 30 S. W. 127; Dougherty *v.* Missouri R. Co., 97 Mo. 647, 8 S. W. 900, 11 S. W. 251; Owens *v.* Kansas City, etc., R. Co., 95 Mo. 169, 8 S. W. 350, 6 Am. St. Rep. 39; Campbell *v.* Stanberry, 105 Mo. App. 56, 78 S. W. 292; Hanheide *v.* St. Louis Transit Co., 104 Mo. App. 323, 78 S. W. 820; Sioux City, etc., R. Co. *v.* Finlayson, 16 Nebr. 578, 20 N. W. 860, 49 Am. Rep. 724; Walsh *v.* Yonkers R. Co., 114 N. Y. App. Div. 797, 100 N. Y. Suppl. 278; Lafitte *v.* Southern R. Co., 73 S. C. 467, 53 S. E. 755; Fletcher *v.* South Carolina, etc., R. Co., 57 S. C. 205, 35 S. E. 513; Galveston, etc., R. Co. *v.* Matula, 79 Tex. 577, 15 S. W. 573; International, etc., R. Co. *v.* Walters, (Tex. Civ. App. 1904) 80 S. W. 668; Chicago, etc., R. Co. *v.* Oldridge, 33 Tex. Civ. App. 436, 76 S. W. 581; Citizens' R. Co. *v.* Ford, 25 Tex. Civ. App. 328, 60 S. W. 860. But where the court in a personal injury suit instructed the jury that, if they found certain facts, they would be sufficient to entitle plaintiff to a verdict, the omission to charge in the same connection that plaintiff could not recover if he was guilty of negligence which proximately contributed to his injury is not cured by a subsequent charge of that kind. Nickey *v.* Steuder, 164 Ind. 189, 73 N. E. 117; Texas Cent. R. Co. *v.* Waldie, (Tex. Civ. App. 1907) 101 S. W. 517; McVey *v.* St. Clair Co., 49 W. Va. 412, 38 S. E. 648; McCreery *v.* Ohio River R. Co., 43 W. Va. 110, 27 S. E. 327; New York Transp. Co. *v.* O'Donnell, 159 Fed. 659, 86 C. C. A. 527.

Definition of terms.— Failure to define negligence (Leach *v.* St. Louis, etc., R. Co., 137 Mo. App. 300, 118 S. W. 510), or contributory negligence (Muehlhausen *v.* St. Louis R. Co., 91 Mo. 332, 2 S. W. 315; Waller *v.* Missouri, etc., R. Co., 59 Mo. App. 410), or other technical terms used in an instruction (Chicago, etc., R. Co. *v.* White, 209 Ill. 124, 70 N. E. 588; Rock Island *v.* Starkey, 189 Ill. 515, 59 N. E. 971; Webber *v.* Sullivan, 58 Iowa 260, 12 N. W. 319; Bramel *v.* Bramel, 101 Ky. 64, 39 S. W. 520, 18 Ky. L. Rep. 1074; Moore *v.* McDonald, 68 Md. 321, 12 Atl. 117; Missouri, etc., R. Co. *v.* Wolf, 40 Tex. Civ. App. 381, 89 S. W. 778), is cured by the giving of a correct definition of such term in another instruction. So the giving of a definition not sufficiently full or complete is cured by another instruction giving a complete and satisfactory definition. Hearne *v.* De Young, 132 Cal. 357, 64 Pac. 576; Doherty *v.* Morris, 17 Colo. 105, 28 Pac. 85; Rice *v.* Dewberry, (Tex. Civ. App. 1906) 93 S. W. 715; Fordyce *v.* Chancey, 2 Tex. Civ. App. 24, 21 S. W. 181.

91. Chicago *v.* McDonough, 112 Ill. 85, 1 N. E. 337; Philadelphia, etc., R. Co. *v.* Larkin, 47 Md. 155, 28 Am. Rep. 442; Logan *v.* Metropolitan St. R. Co., 183 Mo. 582, 82 S. W. 126; Johnson *v.* St. Louis, etc., R. Co., 173 Mo. 307, 73 S. W. 173; Buck *v.* People's St. R., etc., Co., 108 Mo. 179, 18 S. W. 1090; Buckman *v.* Missouri, etc., R. Co., 100 Mo. App. 30, 73 S. W. 270; Pronger *v.* Old Nat. Bank, 20 Wash. 618, 56 Pac. 391.

92. McCormick *v.* Parriott, 33 Colo. 382, 80 Pac. 1044.

93. *Colorado.*—Denver *v.* Murray, 18 Colo. App. 142, 70 Pac. 440.

Connecticut.— Foote *v.* Brown, 81 Conn. 218, 70 Atl. 699.

District of Columbia.— Baltimore, etc., R. Co. *v.* Cumberland, 12 App. Cas. 598 [*affirmed* in 176 U. S. 232, 20 S. Ct. 380, 44 L. ed. 447].

Georgia.—Atlantic Coast Line R. Co. *v.* Jones, 132 Ga. 189, 63 S. E. 834; Russell *v.* Brunswick Grocery Co., 120 Ga. 38, 47 S. E. 528.

Illinois.— Richardson *v.* Nelson, 221 Ill. 254, 77 N. E. 583; Harvey *v.* Chicago, etc., R. Co., 221 Ill. 242, 77 N. E. 569 [*affirming* 116 Ill. App. 507]; Mosher *v.* Rogers, 117 Ill. 446, 5 N. E. 583; Kessel *v.* Mayer, 118 Ill. App. 267.

Iowa.— Marcus *v.* Omaha, etc., R., etc., Co., 142 Iowa 84, 120 N. W. 469.

Minnesota.— Doran *v.* Eaton, 40 Minn. 35, 41 N. W. 244.

Mississippi.— Hitt *v.* Terry, 92 Miss. 671, 46 So. 829.

New Jersey.— Redhing *v.* New Jersey Cent. R. Co., 68 N. J. L. 641, 54 Atl. 431.

Pennsylvania.— Stremme *v.* Dyer, 223 Pa. St. 7, 72 Atl. 274; Bailey *v.* Presbyterian Bd., 200 Pa. St. 406, 50 Atl. 160; Adams *v.* Uhler, 2 Walk. 96.

Tennessee.— Malone *v.* Searight, 8 Lea 91.

Texas.— Texas, etc., R. Co. *v.* Reed, (Civ. App. 1909) 116 S. W. 69; Austin *v.* Forbis, (Civ. App. 1906) 99 S. W. 132.

94. Doty *v.* O'Neil, 95 Cal. 244, 30 Pac. 526; Illinois Terminal R. Co. *v.* Thompson, 210 Ill. 226, 71 N. E. 328 [*affirming* 112 Ill. App. 463]; Seltzer *v.* Saxton, 71 Ill. App. 229.

95. *Colorado.*— Stratton Cripple Creek Min., etc., Co. *v.* Ellison, 42 Colo. 498, 94 Pac. 303.

District of Columbia.— O'Dwyer *v.* Northern Market Co., 30 App. Cas. 244.

Georgia.—Wholesale Mercantile Co. *v.* Jackson, 2 Ga. App. 776, 59 S. E. 106.

Illinois.— McCommon *v.* McCommon, 151 428, 38 N. E. 145; Latham *v.* Roach, 72 Ill. 179.

Iowa.— McDivitt *v.* Des Moines City R. Co., 141 Iowa 689, 118 N. W. 459.

Maryland.— Bannon *v.* Warfield, 42 Md. 22.

Missouri.— Goetz *v.* Hannibal, etc., R. Co., 50 Mo. 472; Voegeli *v.* Pickel Marble, etc., Co., 56 Mo. App. 678.

Texas.— International, etc., R. Co. *v.* Von Hoesen, 99 Tex. 646, 92 S. W. 798 [*reversing* (Civ. App. 1906) 91 S. W. 604].

96. Latham *v.* Roach, 72 Ill. 179; Bingham *v.* Hartley, 44 Nebr. 682, 62 N. W. 1089.

97. Anderson *v.* Donaldson, 32 Ill. App. 404.

instruction. An exception exists, however, where an instruction purports to sum up all the facts, the proof of which will warrant a verdict for a party. In such a case the instruction must be correct, and, if erroneous or incomplete, it is not susceptible of cure by any other instructions.[98]

4. Error Cured by Withdrawal or Correction. An error in a charge is cured where the court subsequently withdraws or corrects it.[99] In such a case it will be presumed that the jury accepted the withdrawal or correction, and acted thereon,[1] unless from all the circumstances of the case the contrary appears probable.[2] The withdrawal must be express,[3] and in language so explicit as to preclude the inference that the jury might have been influenced by the erroneous instruction.[4]

98. *Illinois.*— Mooney *v.* Chicago, 239 Ill. 414, 88 N. E. 194; Ball *v.* Evening American Pub. Co., 237 Ill. 592, 86 N. E. 1097 [*reversing* 142 Ill. App. 656]; Illinois Iron, etc., Co. *v.* Weber, 196 Ill. 526, 63 N. E. 1008; Lake Shore, etc., R. Co. *v.* Richards, (1892) 32 N. E. 402; Chicago *v.* Fields, 139 Ill. App. 250; Belvidere City R. Co. *v.* Bute, 128 Ill. App. 620; Baltimore, etc., R. Co. *v.* Schell, 122 Ill. App. 346; Osner *v.* Zadek, 120 Ill. App. 444.

Indiana.— Nickey *v.* Steuder, 164 Ind. 189, 73 N. E. 117.

Iowa.— Romans *v.* Thew, 142 Iowa 89, 120 N. W. 629.

Missouri.— Toncrey *v.* Metropolitan St. R. Co., 129 Mo. App. 596, 107 S. W. 1091.

Nebraska.— McCleneghan *v.* Omaha, etc., R. Co., 25 Nebr. 523, 41 N. W. 350, 13 Am. St. Rep. 508.

99. *Alabama.*— Reiter-Connolly Mfg. Co. *v.* Hamlin, 144 Ala. 192, 40 So. 280; Huckabee *v.* Shepherd, 75 Ala. 342; Donnell *v.* Jones, 17 Ala. 689, 52 Am. Dec. 194; Smith *v.* Maxwell, 1 Stew. & P. 221.

Arkansas.— St. Louis, etc., R. Co. *v.* Stamps, 84 Ark. 241, 104 S. W. 1114.

Georgia.— Howe *v.* Spencer, 132 Ga. 426, 64 S. E. 468; Southern R. Co. *v.* Holbrook, 124 Ga. 679, 53 S. E. 203.

Illinois.— Roberts *v.* Patterson, 77 Ill. App. 394.

Indiana.— Pittsburgh, etc., R. Co. *v.* Noftsger, 148 Ind. 101, 47 N. E. 332; Torr *v.* Torr, 20 Ind. 118; Sloo *v.* Roberts, 7 Ind. 128; Fairfield *v.* Browning, 1 Ind. 322; Gronour *v.* Daniels, 7 Blackf. 108; Fuelling *v.* Fuesse, 43 Ind. App. 441, 87 N. E. 700.

Kentucky.— Scott *v.* Com., 98 S. W. 668, 29 Ky. L. Rep. 571.

Massachusetts.— Rudberg *v.* Bowden Felting Co., 188 Mass. 365, 74 N. E. 590; Com. *v.* Clifford, 145 Mass. 97, 13 N. E. 345.

Michigan.— Chaddock *v.* Tabor, 115 Mich. 27, 72 N. W. 1093; Atherton *v.* Bancroft, 114 Mich. 241, 72 N. W. 208; Wenzel *v.* Johnston, 112 Mich. 243, 70 N. W. 549.

Missouri.— Deckerd *v.* Wabash R. Co., 111 Mo. App. 117, 85 S. W. 982.

New York.— J. R. Alsing Co. *v.* New England Quartz, etc., Co., 174 N. Y. 536, 66 N. E. 1110 [*affirming* 66 N. Y. App. Div. 473, 73 N. Y. Suppl. 347]; Desmond-Dunne Co. *v.* Friedman-Doscher Co., 162 N. Y. 486, 56 N. E. 995 [*affirming* 16 N. Y. App. Div. 141, 45 N. Y. Suppl. 111]; Brandt *v.* Morning Journal Assoc., 81 N. Y. App. Div. 183, 80 N. Y. Suppl. 1002 [*affirmed* in 177 N. Y. 544, 69 N. E. 1120]; Reilly *v.* Brooklyn Heights R. Co., 65 N. Y. App. Div. 453, 72 N. Y. Suppl. 1080; Zingrebe *v.* Union R. Co., 44 N. Y. App. Div. 577, 60 N. Y. Suppl. 913; Hart *v.* Ryan, 3 Silv. Sup. 415, 6 N. Y. Suppl. 921; Coles *v.* Interurban St. R. Co., 49 Misc. 246, 97 N. Y. Suppl. 289; Pollock *v.* Brooklyn, etc., R. Co., 15 N. Y. Suppl. 189; Zent *v.* Watts, 1 N. Y. Suppl. 702.

Ohio.— Columbus R. Co. *v.* Connor, 27 Ohio Cir. Ct. 229.

Pennsylvania.— Stroud *v.* Smith, 194 Pa. St. 502, 45 Atl. 329; Sommer *v.* Gilmore, 168 Pa. St. 117, 31 Atl. 884; Sergeant *v.* Martin, 133 Pa. St. 122, 19 Atl. 568.

Texas.— Ramm *v.* Galveston, etc., R. Co. (Civ. App. 1905) 92 S. W. 426; Yoakum *v.* Mettasch, (Civ. App. 1894) 26 S. W. 129.

Washington.— Lemman *v.* Spokane, 38 Wash. 98, 80 Pac. 280.

Wisconsin.— Neumeister *v.* Goddard, 128 Wis. 82, 103 N. W. 241.

See 46 Cent. Dig. tit. "Trial," § 718.

An erroneous statement of the testimony is harmless error where the court afterward informs the jury that they must rely on their own recollection of the testimony (Larbig *v.* Peck, 69 N. Y. App. Div. 170, 74 N. Y. Suppl. 602 [*affirmed* in 174 N. Y. 513, 66 N. E. 1111]; Coles *v.* Interurban St. R. Co., 49 Misc. (N. Y.) 246, 97 N. Y. Suppl. 289) or says that he will not undertake to state the testimony (American Min., etc., Co. *v.* Converse, 175 Mass. 449, 56 N. E. 594).

1. Rudberg *v.* Bowden Felting Co., 188 Mass. 365, 74 N. E. 590; Goodsell *v.* Taylor, 41 Minn. 207, 42 N. W. 873, 16 Am. St. Rep. 700, 4 L. R. A. 673.

2. Brooks *v.* Rochester R. Co., 156 N. Y. 244, 50 N. E. 945 [*reversing* 35 N. Y. Suppl. 1104]; Sieber *v.* Pettit, 200 Pa. St. 58, 49 Atl. 763.

3. Wenning *v.* Teeple, 144 Ind. 189, 41 N. E. 600; Martin *v.* Forty-Second St., etc., R. Co., 54 Misc. (N. Y.) 645, 104 N. Y. Suppl. 840.

4. Atlanta, etc., Air-Line R. Co. *v.* McManus, 1 Ga. App. 302, 58 S. E. 258; New Albany Woolen Mills *v.* Meyers, 43 Mo. App. 124 (holding that where the withdrawal is made in such manner that the attention of the jury is not specifically directed to it and the verdict shows that the jury did not regard the withdrawal, it is reversible error)

K. Exceptions and Objections [5]— **1. Right to Except — a. In General.** A party has a right to except to the giving and the refusing of instructions,[6] provided he is prejudiced thereby [7] and has not, by his conduct, estopped himself to make objection.[8]

b. Estoppel or Waiver.[9] A party cannot except to an instruction given at his own request,[10] or in harmony with one he requested,[11] or which was

Chapman *v.* Erie R. Co., 55 N. Y. 579; Galino *v.* Fleischmann Realty, etc., Co., 130 N. Y. App. Div. 605, 115 N. Y. Suppl. 334; Ladiew *v.* Sherwood Metal Working Co., 125 N. Y. App. Div. 65, 109 N. Y. Suppl. 477 (holding that the practice of giving the jury facts and instructions at length, which are by a single sentence eliminated at the close of the charge, is prejudicial to the defeated party, and should not be indulged in).

A qualified correction and retraction of an erroneous material statement in a charge does not correct the original error. Orendorf *v.* New York Cent., etc., R. Co., 119 N. Y. App. Div. 638, 104 N. Y. Suppl. 222. Thus, an error in the judge's charge is not cured by a retraction, accompanied by the remark that he had no doubt of the propriety of it. Meyer *v.* Clark, 45 N. Y. 285.

5. **In criminal prosecutions** see Criminal Law, 12 Cyc. 666, 815, 820.

Necessity of exceptions: For purpose of review see Appeal and Error, 2 Cyc. 724 *et seq.* To preserve ground for new trial see New Trial, 29 Cyc. 794.

6. Chicago Union Traction Co. *v.* Hansen, 125 Ill. App. 153; Rochelle *v.* Musson, 3 Mart. (La.) 73, holding that a bill of exceptions lies to the charge of the judge, even on a point on which his opinion was not asked.

7. See cases cited *infra*, this note.

For example, a party against whom an instruction was not directed (Chicago Union Traction Co. *v.* Hansen, 125 Ill. App. 153), or who was not prejudiced thereby (Chicago, etc., R. Co. *v.* Smith, 124 Ill. App. 627 [*affirmed* in 226 Ill. 178, 80 N. E. 716]), cannot complain thereof. On the same principle a party cannot except to the opinion of the court refusing instructions to the jury moved by the adverse party. Bailey *v.* Campbell, 2 Ill. 47.

8. See *infra*, IX, K, 1, b.

9. **Estoppel to complain of instructions given at request of party complaining** see Appeal and Error, 3 Cyc. 247.

10. *Alabama.*— Dunn *v.* Gunn, 149 Ala. 583, 42 So. 686; Louisville, etc., R. Co. *v.* Hurt, 101 Ala. 34, 13 So. 130.

California.— Sierra Union Water, etc., Co. *v.* Baker, 70 Cal. 572, 8 Pac. 305, 11 Pac. 654; Emerson *v.* Santa Clara County, 40 Cal. 543.

Colorado.— Orman *v.* Mannix, 17 Colo. 564, 30 Pac. 1037, 31 Am. St. Rep. 340, 17 L. R. A. 602.

Illinois.— Chicago, etc., R. Co. *v.* Snyder, 128 Ill. 655, 21 N. E. 520; Ives *v.* McHard, 103 Ill. 97.

Indiana.— Blough *v.* Parry, 144 Ind. 463, 40 N. E. 70, 43 N. E. 560.

Maine.— Frye *v.* Hinckley, 18 Me. 320.

Massachusetts.— Copp *v.* Williams, 135 Mass. 401.

Minnesota.— Redmond *v.* St. Paul, etc., R. Co., 39 Minn. 248, 40 N. W. 64.

Missouri.— Kansas City Suburban Belt R. Co. *v.* Kansas City, etc., R. Co., 118 Mo. 599, 24 S. W. 478; Reilly *v.* Hannibal, etc., R. Co., 94 Mo. 600, 7 S. W. 407; Flowers *v.* Helm, 29 Mo. 324.

Nebraska.— Dawson *v.* Williams, 37 Nebr. 1, 55 N. W. 284.

North Carolina.— McLennan *v.* Chisholm, 66 N. C. 100; Buie *v.* Buie, 24 N. C. 87.

Pennsylvania.—Burd *v.* McGregor, 2 Grant 353.

Tennessee.— East Tennessee, etc., R. Co. *v.* Fain, 12 Lea 35.

Texas.— Martin *v.* Missouri Pac. R. Co., 3 Tex. Civ. App. 133, 22 S. W. 195.

Utah.— Beaman *v.* Martha Washington Min. Co., 23 Utah 139, 63 Pac. 631.

See 46 Cent. Dig. tit. "Trial," § 678.

Objection that instructions contradictory. — The fact that an erroneous instruction, given at defendant's request, is inconsistent and conflicting with correct instructions, given at plaintiff's request and of the court's own motion, is not ground for reversal where defendant is the appealing party. Baker *v.* Kansas City, etc., R. Co., 122 Mo. 533, 26 S. W. 20; Reardon *v.* Missouri Pac. R. Co., 114 Mo. 384, 21 S. W. 731; Wilkins *v.* St. Louis, etc., R. Co., 101 Mo. 93, 13 S. W. 893; Lobdell *v.* Hall, 3 Nev. 507.

11. *Arkansas.*— Dunnington *v.* Frick Co., 60 Ark. 250, 30 S. W. 212.

Florida.— Gracy *v.* Atlantic Coast Line R. Co., 53 Fla. 350, 42 So. 903.

Illinois.— Matthews *v.* Granger, 196 Ill. 164, 63 N. E. 658 [*affirming* 96 Ill. App. 536]; Illinois Cent. R. Co. *v.* Harris, 162 Ill. 200, 44 N. E. 498 [*affirming* 63 Ill. App. 172]; Chicago, etc., R. Co. *v.* Sanders, 154 Ill. 531, 39 N. E. 481; Wabash R. Co. *v.* Howard, 57 Ill. App. 66; Solomon *v.* Friend, 42 Ill. App. 407.

Iowa.— Kinney *v.* McFaul, 122 Iowa 452, 98 N. W. 276; Hamilton *v.* Hartinger, 96 Iowa 7, 64 N. W. 592.

Kansas.— Ft. Scott, etc., R. Co. *v.* Fortney, 51 Kan. 287, 32 Pac. 904.

Maryland.— Philadelphia, etc., R. Co. *v.* Harper, 29 Md. 330; Baltimore, etc., R. Co. *v.* Resley, 14 Md. 424.

Michigan.— Alberts *v.* Vernon, 96 Mich. 549, 55 N. W. 1022; Silsby *v.* Michigan Car Co., 95 Mich. 204, 54 N. W. 761; Marquette, etc., R. Co. *v.* Marcott, 41 Mich. 433, 2 N. W. 795.

Mississippi.— Queen City Mfg. Co. *v.* Blalack, (1896) 18 So. 800; Wilson *v.* Zook, 69 Miss. 694, 13 So. 351.

admitted,[12] or consented to,[13] by him. Thus a party, having asked an instruction, will not be permitted to object that there is no evidence to justify it,[14] or another, relating to the same matter,[15] even if his own request was refused.[16] But where a party is unable to induce the court to instruct the jury according to his view of the law, the fact that he asks instructions presenting the most favorable view of the law that the court will entertain does not estop him on appeal to assign error upon the action of the court.[17] No modification of an erroneous instruction can be assigned for error by the party asking the instruction.[18]

Missouri.— Quirk *v.* St. Louis United El. Co., 126 Mo. 279, 28 S. W. 1080; Hazell *v.* Tipton Bank, 95 Mo. 60, 8 S. W. 173, 6 Am. St. Rep. 22; Iron Mountain Bank *v.* Armstrong, 92 Mo. 265, 4 S. W. 720; Thorpe *v.* Missouri Pac. R. Co., 89 Mo. 650, 2 S. W. 3, 58 Am. Rep. 120; Holmes *v.* Braidwood, 82 Mo. 610; McGonigle *v.* Daugherty, 71 Mo. 259; Crutchfield *v.* St. Louis, etc., R. Co., 64 Mo. 255; Farrell *v.* Farmers' Mut. F. Ins. Co., 66 Mo. App. 153; Herman *v.* Owen, 42 Mo. App. 387; Bybee *v.* Irons, 33 Mo. App. 659.

Nebraska.—American F. Ins. Co. *v.* Landfare, 56 Nebr. 482, 76 N. W. 1068; Richards *v.* Borowsky, 39 Nebr. 774, 58 N. W. 277.

Texas.— International, etc., R. Co. *v.* Sein, 89 Tex. 63, 33 S. W. 215, 558; Byrd *v.* Ellis, (Civ. App. 1896) 35 S. W. 1070.

See 46 Cent. Dig. tit. "Trial," § 678.

For example, a party cannot complain of the submission to the jury of a particular issue where by his own instructions tendered, he has requested the court to submit such issue to the jury. Farmington *v.* Wallace, 134 Ill. App. 366 [*affirmed* in 231 Ill. 232, 83 N. E. 180]; Hess *v.* Newcomer, 7 Md. 325; Olfermann *v.* Union Depot R. Co., 125 Mo. 408, 28 S. W. 742, 46 Am. St. Rep. 483; Hall *v.* St. Joseph Water Co., 48 Mo. App. 356; Omaha Fair, etc., Assoc. *v.* Missouri Pac. R. Co., 42 Nebr. 105, 60 N. W. 330. So error in instructing, at plaintiff's request, that he may recover on a *quantum meruit,* although he sues on a special contract, is waived by defendant's requesting instructions based on the same theory. Davis *v.* Brown, 67 Mo. 313; O'Neal *v.* Knippa, (Tex. 1892) 19 S. W. 1020.

Error in modifying a requested instruction cannot be urged where the instruction as modified is the same as another instruction requested and given. Cicero, etc., R. Co. *v.* Meixner, 160 Ill. 320, 43 N. E. 823, 31 L. R. A. 331.

Parties are bound on appeal by the positions taken by them in the trial court, and a party cannot object to an instruction given on an erroneous theory, where his own instructions show that he himself advanced such theory. Harper *v.* Morse, 114 Mo. 317, 21 S. W. 517; State *v.* Koontz, 83 Mo. 323.

12. Finnell *v.* Walker, 48 Ill. App. 331; Mackintosh *v.* Corner, 33 Md. 598; Bedenbaugh *v.* Southern R. Co., 69 S. C. 1, 48 S. E. 53.

13. *Illinois.*— Conness *v.* Indiana, etc., R. Co., 193 Ill. 464, 62 N. E. 221; Boecker *v.* Naperville, 166 Ill. 151, 48 N. E. 1061.

Iowa.— De Wulf *v.* Dix, 110 Iowa 553, 81 N. W. 779.

Missouri.— Evans *v.* Dugan Cut-Stone Co., 81 Mo. App. 60.

South Dakota.— Kirby *v.* Berguin, 15 S. D. 444, 90 N. W. 856.

Texas.— Wiley *v.* Lindley, (Civ. App. 1903) 76 S. W. 208.

Where a party consents to the submission of an issue to the jury, and fails to object to the testimony on it, he cannot complain of its submission to the jury. Lemmon *v.* Sibert, 15 Colo. App. 131, 61 Pac. 202; Dittel *v.* Bowsky, 90 N. Y. Suppl. 365. So the omission of the court to refer in its statement of the issues to a portion of the defense pleaded is not reversible error, where it appears that the statement was submitted to defendants' attorneys, and approved by them, before it was made to the jury. Sprague *v.* Atlee, 81 Iowa 1, 46 N. W. 756.

14. Boyer *v.* Soules, 105 Mich. 31, 62 N. W. 1000; Auburn Bolt, etc., Works *v.* Schultz, 143 Pa. St. 256, 22 Atl. 904; Sherard *v.* Richmond, etc., R. Co., 35 S. C. 467, 14 S. E. 952.

15. *Illinois.*— St. Louis Consol. Coal Co. *v.* Haenni, 48 Ill. App. 115 [*affirmed* in 146 Ill. 614, 35 N. E. 162].

Iowa.— Light *v.* Chicago, etc., R. Co., 93 Iowa 83, 61 N. W. 380; Allison *v.* Jack, 76 Iowa 205, 40 N. W. 811.

Michigan.— McDonald *v.* Minneapolis, etc., R. Co., 105 Mich. 659, 63 N. W. 966.

Missouri.— Hartman *v.* Louisville, etc., R. Co., 48 Mo. App. 619.

Virginia.— Kimball *v.* Friend, 95 Va. 125, 27 S. E. 901, holding that objection to an instruction on the ground that there was no evidence of the facts on which it was based is waived by a party asking that the jury be directed to render a certain verdict in case of certain findings, unless said facts be also found.

United States.— Little Rock, etc., R. Co. *v.* Moseley, 56 Fed. 1009, 6 C. C. A. 225.

See 46 Cent. Dig. tit. "Trial," § 678.

16. Whitham *v.* Dubuque, etc., R. Co., 96 Iowa 737, 65 N. W. 403; Philadelphia, etc., R. Co. *v.* Howard, 13 How. (U. S.) 307, 14 L. ed. 157.

17. North Chicago Electric R. Co. *v.* Peuser, 190 Ill. 67, 60 N. E. 78; Hayden *v.* McCloskey, 161 Ill. 351, 43 N. E. 1091; Behen *v.* St. Louis Transit Co., 186 Mo. 430, 85 S. W. 346.

18. Mississippi Cent. R. Co. *v.* Hardy, 88 Miss. 732, 41 So. 505; Louisville, etc., R. Co. *v.* Suddoth, 70 Miss. 265, 12 So. 205. *Compare* O'Neil *v.* Orr, 5 Ill. 1, holding that

2. Time For Taking Exceptions. The common-law rule, as generally stated, was that exceptions to instructions or refusal to instruct must be taken at the trial in order to be available.[19] This rule has been generally construed to require exceptions to the giving or refusing of instructions to be taken at the time they are given or refused,[20] and before the retirement of the jury.[21]

a party is not precluded from objecting to an erroneous instruction, which operates against him, merely because it is given as a qualification of an illegal instruction which he may have asked for.

19. See Morris *v.* Buckley, 8 Serg. & R. (Pa.) 211; Gehl *v.* Milwaukee Produce Co., 116 Wis. 263, 93 N. W. 26.

20. *Colorado.*— Smith *v.* Cisson, 1 Colo. 29; Jacobs *v.* Mitchell, 2 Colo. App. 456, 31 Pac. 235.

Dakota.— Stamm *v.* Coates, 4 Dak. 69, 22 N. W. 593; Cheatham *v.* Wilber, 1 Dak. 335, 46 N. W. 580.

Illinois.— Illinois Cent. R. Co. *v.* Modglin, 85 Ill. 481; Emory *v.* Addis, 71 Ill. 273; Hill *v.* Ward, 7 Ill. 285; Illinois Cent. R. Co. *v.* Ferrell, 108 Ill. App. 659.

Indiana.— Atkinson *v.* Gwin, 8 Ind. 376.

Iowa.— Havelick *v.* Havelick, 18 Iowa 414; Armstrong *v.* Pierson, 15 Iowa 476; Morse *v.* Close, 11 Iowa 93; State *v.* Hussey, 7 Iowa 409; State *v.* Burge, 7 Iowa 255; Hall *v.* Denise, 6 Iowa 534; Talty *v.* Lusk, 4 Iowa 469; Gover *v.* Dill, 3 Iowa 337; Rawlins *v.* Tucker, 3 Iowa 213.

Kentucky.— Poston *v.* Smith, 8 Bush 589; Letton *v.* Young, 2 Metc. 558; Kennedy *v.* Cunningham, 2 Metc. 538; Carey *v.* Callan, 6 B. Mon. 44; Hughes *v.* Robinson, 1 T. B. Mon. 215, 15 Am. Dec. 104; Hallowell *v.* Hallowell, 1 T. B. Mon. 130. *Contra*, see Gant *v.* Shelton, 3 B. Mon. 420.

Minnesota.— Turrittin *v.* Chicago, etc., R. Co., 95 Minn. 408, 104 N. W. 225.

Mississippi.— Georgia Pac. R. Co. *v.* West, 66 Miss. 310, 6 So. 207.

Missouri.— Waller *v.* Hannibal, etc., R. Co., 83 Mo. 608; Houston *v.* Lane, 39 Mo. 495; Calvert *v.* Alexandria, 33 Mo. 149; Devlin *v.* Clark, 31 Mo. 22; Thompson *v.* Russell, 30 Mo. 498; Dozier *v.* Jerman, 30 Mo. 216; Bradley *v.* Creath, 27 Mo. 415; Powers *v.* Allen, 14 Mo. 367; Randolph *v.* Alsey, 8 Mo. 656; Bompart *v.* Boyer, 8 Mo. 234; Lefkow *v.* Allred, 54 Mo. App. 141; Naughton *v.* Stagg, 4 Mo. App. 271.

Montana.— Griswold *v.* Boley, 1 Mont. 545.

Nebraska.— Smith *v.* Kennard, 54 Nebr. 523, 74 N. W. 859; Glaze *v.* Parcel, 40 Nebr. 732, 59 N. W. 382; Levi *v.* Fred, 38 Nebr. 564, 57 N. W. 386; Roach *v.* Hawkinson, 34 Nebr. 658, 52 N. W. 373; Schroeder *v.* Rinehard, 25 Nebr. 75, 40 N. W. 593; Nyce *v.* Shaffer, 20 Nebr. 507, 30 N. W. 943; Warrick *v.* Rounds, 17 Nebr. 411, 22 N. W. 785; Tagg *v.* Miller, 10 Nebr. 442, 6 N. W. 764; Black *v.* Winterstein, 6 Nebr. 224.

Nevada.— Lobdell *v.* Hall, 3 Nev. 507.

New Hampshire.— Moore *v.* Ross, 11 N. H. 547.

Oklahoma.— Dunham *v.* Holloway, 3 Okla. 244, 41 Pac. 140 [*affirmed* in 170 U. S. 615, 18 S. Ct. 784, 42 L. ed. 1165].

Rhode Island.— Sarle *v.* Arnold, 7 R. I. 582.

South Carolina.— Parks *v.* Laurens Cotton Mills, 75 S. C. 560, 56 S. E. 234; Hatchell *v.* Chandler, 62 S. C. 380, 40 S. E. 777.

Texas.— Owens *v.* Missouri Pac. R. Co., 67 Tex. 679, 4 S. W. 593; Hall *v.* Stancell, 3 Tex. 400; Texas Brewing Co. *v.* Walters, (Civ. App. 1897) 43 S. W. 548.

Washington.— Brown *v.* Forest, 1 Wash. Terr. 201.

Wisconsin.— Borah *v.* Martin, 2 Pinn. 401, 2 Chandl. 56.

United States.— Sutherland *v.* Round, 57 Fed. 467, 6 C. C. A. 428.

See 46 Cent. Dig. tit. "Trial," § 680.

The object of an exception is to call the attention of the circuit judge to the precise point as to which it is supposed he has erred, that he may then and there consider it, and give new and different instructions to the jury, if in his judgment it should be proper to do so. Beaver *v.* Taylor, 93 U. S. 46, 23 L. ed. 797; Mountain Copper Co. *v.* Van Buren, 133 Fed. 1, 66 C. C. A. 151; Park *v.* Bushnell, 60 Fed. 583, 9 C. C. A. 138. Any other rule would enable a party to sit silently by, knowing that some error had been committed against his interest, of which perhaps no other person was aware at the time, and thus take the chance of a verdict in his favor, while having the sure means of setting aside the verdict if it happened to be against him. Denver, etc., R. Co. *v.* Ryan, 17 Colo. 98, 28 Pac. 79; Wray *v.* Carpenter, 16 Colo. 271, 27 Pac. 248, 25 Am. St. Rep. 265; Jacobs *v.* Mitchell, 2 Colo. App. 456, 31 Pac. 235; Sarle *v.* Arnold, 7 R. I. 582.

Presumption as to time.— When a bill of exceptions sets out an instruction given by the court, following it with the words, "to which defendant excepted," it will be presumed that the exception was taken at the trial, and while the jury were at the bar, although there was no explicit statement to that effect. New Orleans, etc., R. Co. *v.* Jopes, 142 U. S. 18, 12 S. Ct. 109, 35 L. ed. 919.

Necessity of written instructions.— An exception to the charge that it is not in writing must be taken at the time it is delivered. Louisville, etc., R. Co. *v.* Hall, 91 Ala. 112, 8 So. 371, 24 Am. St. Rep. 863; Baker *v.* Chatfield, 23 Fla. 540, 2 So. 822; West *v.* Blackshear, 20 Fla. 457; Garton *v.* Union City Nat. Bank, 34 Mich. 279; Gibson *v.* Sullivan, 18 Nebr. 558, 26 N. W. 368.

21. *Alabama.*— Tyree *v.* Parham, 66 Ala. 424; Montgomery City Council *v.* Gilmer, 33 Ala. 116, 70 Am. Dec. 562.

California.—Hicks *v.* Coleman, 25 Cal. 122, 85 Am. Dec. 103.

Colorado.— Taylor *v.* Randall, 3 Colo. 399.

3. Mode of Taking and Noting Exceptions. In the absence of a statute reserv-

Florida.— Jenkins *v.* Lykes, 19 Fla. 148, 45 Am. Rep. 19.

Iowa.— Evans *v.* Burlington, etc., R. Co., 21 Iowa 374.

Louisiana.—Hathcock *v.* Gray, 22 La. Ann. 472; Penn *v.* Collins, 5 Rob. 213; Buel *v.* New York Steamer, 17 La. 541.

Maine.— McKown *v.* Powers, 86 Me. 291, 29 Atl. 1079; Knight *v.* Thomas, (1887) 7 Atl. 538.

Minnesota.— Block *v.* Great Northern R. Co., 106 Minn. 285, 118 N. W. 1019.

Montana.— McKinstry *v.* Clark, 4 Mont. 370, 1 Pac. 759; Griswold *v.* Boley, 1 Mont. 545.

New Hampshire.— Nadeau *v.* Sawyer, 73 N. H. 70, 59 Atl. 369; Pitman *v.* Mauran, 69 N. H. 230, 40 Atl. 392; Gonic First Nat. Bank *v.* Ferguson, 58 N. H. 403.

New York.— Life, etc., Ins. Co. *v.* Mechanics' F. Ins. Co., 7 Wend. 31.

Pennsylvania.— Com. *v.* Haskell, 2 Brewst. 491.

South Carolina.— South Carolina R. Co. *v.* Wilmington, etc., R. Co., 7 S. C. 410; Fox *v.* Savannah, etc., R. Co., 4 S. C. 543.

Wisconsin.— Barstow Stove Co. *v.* Bonnell, 36 Wis. 63.

United States.— U. S. *v.* Carey, 110 U. S. 51, 3 S. Ct. 424, 28 L. ed. 67; Hunnicutt *v.* Peyton, 102 U. S. 333, 26 L. ed. 113; Stanton *v.* Embry, 93 U. S. 548, 23 L. ed. 983; French *v.* Edwards, 13 Wall. 506, 20 L. ed. 702; Barton *v.* Forsyth, 20 How. 532, 15 L. ed. 1012; U. S. *v.* Breitling, 20 How. 252, 15 L. ed. 900; Phelps *v.* Mayer, 15 How. 160, 14 L. ed. 643; St. Louis, etc., R. Co. *v.* Spencer, 71 Fed. 93, 18 C. C. A. 114; Stone *v.* U. S., 64 Fed. 667, 12 C. C. A. 451; Park *v.* Bushnell, 60 Fed. 583, 9 C. C. A. 138; Bracken *v.* Union Pac. R. Co., 56 Fed. 447, 5 C. C. A. 548; Emanuel *v.* Gates, 53 Fed. 772, 3 C. C. A. 663.

See 46 Cent. Dig. tit. "Trial," § 680.

In the federal court, exceptions to the charge are of no avail unless the record shows that they were taken while the jury were at the bar (Hickory *v.* U. S., 151 U. S. 303, 14 S. Ct. 334, 38 L. ed. 170; Klaw *v.* Life Pub. Co., 145 Fed. 184, 76 C. C. A. 154; Mountain Copper Co. *v.* Van Buren, 133 Fed. 1, 66 C. C. A. 151; Erie R. Co. *v.* Littell, 128 Fed. 546, 63 C. C. A. 44; Southern Pac. Co. *v.* Arnett, 126 Fed. 75, 61 C. C. A. 131; Hindman *v.* Louisville First Nat. Bank, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108; Pittsburgh, etc., R. Co. *v.* Thompson, 82 Fed. 720, 27 C. C. A. 333; Commercial Travelers' Mut. Acc. Assoc. of America *v.* Fulton, 79 Fed. 423, 24 C. C. A. 654; New England Furniture, etc., Co. *v.* Catholicon Co., 79 Fed. 294, 24 C. C. A. 595; Merchants' Exch. Bank *v.* McGraw, 76 Fed. 930, 22 C. C. A. 622; Johnson *v.* Garber, 73 Fed. 523, 19 C. C. A. 556; Park *v.* Bushnell, 60 Fed. 583, 9 C. C. A. 138), although the omission to do so was in conformity to a practice prevailing in the trial court, but not embodied in a rule, by which exceptions were permitted to be taken after the close of the trial, and included in the bill of exceptions as if taken at the proper time (Mountain Copper Co. *v.* Van Buren, 133 Fed. 1, 66 C. C. A. 151; Western Union Tel. Co. *v.* Baker, 85 Fed. 690, 29 C. C. A. 392; Johnson *v.* Garber, 73 Fed. 523, 19 C. C. A. 556). But where a case was submitted to the jury but two hours before the expiration of the term by limitation, and the court refused to detain the jury to give a party time to reduce his objections to the instructions to writing, and present the same, but gave him permission to present them within a reasonable time after the jury had retired, which was done, the fact that the objections were not taken before the jury retired was held not to deprive such party of the benefit thereof. Dalton *v.* Moore, 141 Fed. 311, 72 C. C. A. 459.

Exception to additional charge to jury.— An exception to additional instructions to the jury, given by the court on their returning an incomplete verdict, must be taken before the jury retire again, and comes too late after they have brought in their final verdict. Bynum *v.* Southern Pump, etc., Co., 63 Ala. 462.

Further instructions in absence of counsel. — Instructions given to a jury upon their coming into court after they have retired to consider their verdict, and not excepted to at the time, cannot be reviewed on error, although counsel were absent when they were given (Cornish *v.* Graff, 7 N. Y. Civ. Proc. 204 [*affirmed* in 36 Hun 160]; Stewart *v.* Wyoming Cattle Ranche Co., 128 U. S. 383, 9 S. Ct. 101, 32 L. ed. 439. But see Merchants' Exch. Bank *v.* McGraw, 76 Fed. 930, 22 C. C. A. 622), unless permitted by rule of court. Thus, in Massachusetts, the forty-eighth rule of the superior court provides that, when instructions are given in the absence of counsel, the presiding justice may permit exception thereto at any time within twenty-four hours next following. This rule is reasonable, and binding on parties. McCoy *v.* Jordan, 184 Mass. 575, 69 N. E. 358. Rule 58 of the circuit court for the district of Montana, which permits exceptions to the charge of the court or to the refusal of instructions requested to be taken after the jury have retired, but, if practicable, before the verdict has been returned, was intended to permit such course to be followed, where it would be in the interest of justice by avoiding the confusion of the jury or where further instructions were given in the absence of counsel, and not to permit exceptions generally to be taken after the close of the trial contrary to the settled rule of the federal courts; and where the judge, after instructing the jury but before sending them out, retired to his room with counsel and there heard and allowed the exceptions, the rule does not require him to afterward entertain or allow further exceptions. Montana Min. Co. *v.* St. Louis Min., etc., Co., 147 Fed. 897, 78 C. C. A. 33 [*re-*

ing exceptions to instructions as a matter of course,[22] the right to except to the giving or refusal of instructions must be actually exercised.[23] But unless expressly prescribed,[24] the form in which exceptions are saved is of no consequence.[25] They may be taken expressly, or they may be allowed by the court without request, in which case no formal exception by counsel is necessary.[26] Whatever form may be used, if the counsel and the judge both understand that exceptions are saved, the judge may and should allow such exceptions.[27] But if the court seeks to give an exception to a party, it must do it in language clear and definite;[28] and while the ruling of the court may entitle the party to an exception, yet, where the language used by the court is so indefinite that it is not pointed out, the party must, in order to make the question available, point out the objectionable language, and interpose thereto the exception which has been allowed by the court, when the record is made up.[29] As a general rule exceptions to instructions may be reserved either by a bill of exceptions[30] or by notes written upon the instructions,[31]

versed on other grounds in 104 U. S. 204, 27 S. Ct. 254, 51 L. ed. 444].

22 N. C. Code, § 412, subd. 3, provides that if there is error in the instructions of the trial judge it shall be deemed excepted to without the filing of any formal objections. McKinnon *v.* Morrison, 104 N. C. 354, 10 S. E. 513.

23. Coleman *v.* Gilmore, 49 Cal. 340, holding that a statement made by counsel to the official reporter, when the court charges the jury that he wishes it understood he saves an exception to the charge, does not amount to an exception, even if it was assented to at the time by the opposing counsel.

For example a request "to charge the jury in a certain way, and to file the opinion of record" is not equivalent to a bill of exceptions, without which the charge of the court, filed in pursuance of such request, is not a subject for the assignment of error. Bratton *v.* Mitchell, 3 Pa. St. 44. So the mere handing to the judge presiding at the trial of written requests for instructions does not necessarily imply that, if the requests are not granted, an exception is saved. Leyland *v.* Pingree, 134 Mass. 367. And where an instruction was excepted to at the close of the charge, and the court thereupon gave an additional instruction upon the same point for the purpose of curing the difficulty, to which counsel said nothing, it was held that no exception was saved. Muller *v.* Powers, 174 Mass. 555, 55 N. E. 323; McCart *v.* Squire, 150 Mass. 484, 23 N. E. 323.

24 In Montana the statute, section 253, provides: "If any party to the trial desires to except to any instruction given by the court, or to the refusal of the court to give an instruction asked for, or any modification thereof, he shall reduce such exceptions to writing, and file the same with the clerk, before the cause is submitted to the jury." An agreement between counsel that certain instructions granted or refused shall be deemed excepted to, without complying with this statute, is of no effect. Herman *v.* Jeffries, 4 Mont. 513, 1 Pac. 11.

In Nebraska to make exceptions to the charge of the court to the jury available to the party excepting, it is necessary that the exceptions be reduced to writing, together with so much of the evidence as is necessary to explain it. Code, § 309. Monroe *v.* Elburt, 1 Nebr. 174.

25. Leyland *v.* Pingree, 134 Mass. 367.

26. Mitchell *v.* Turner, 149 N. Y. 39, 43 N. E. 403, holding that where the trial court, in modifying requests to charge, states, "I give you an exception to both your requests to charge," a formal exception by counsel is unnecessary.

27. Leyland *v.* Pingree, 134 Mass. 367.

28. Henderson *v.* Bartlett, 32 N. Y. App. Div. 435, 53 N. Y. Suppl. 149, holding that a mere statement by the court that "I understand counsel to except to my failure to charge all the requests not charged, and to all modifications of requests," does not prevent any question; nor does it relieve a party from pointing out with reasonable certainty the particular wherein the ruling or the charge is excepted to. In Columbia Mill Co. *v.* National Bank of Commerce, 52 Minn. 224, 53 N. W. 1061, after the charge of the court, when defendant began to state its exceptions, the court said: "The exceptions will be made so broad that they will cover all requests of either plaintiff or defendant, either as refused or modified by the court." This remark did not dispense with the necessity to take exceptions. At most, it could be taken only as leave to the parties to state their exceptions specifically when they should come to make up the "case" or bill of exceptions; and even as such it is not commendable practice, for the purpose of an exception to the charge is to call the attention of the trial court, before the jury retires, to specific instructions or instructions refused, so that the court may make any proper correction before it is too late, which it is, when the case or bill of exceptions comes on for settlement. The remark did not give leave — the court below could not do so — to make up the exception in the appellate court.

29. Henderson *v.* Bartlett, 32 N. Y. App. Div. 435, 53 N. Y. Suppl. 149.

30. Landers *v.* Beck, 92 Ind. 49; Hersleb *v.* Moss, 28 Ind. 354; Ayres *v.* Blevins, 28 Ind. App. 101, 62 N. E. 305; Baldwin *v.* Shill, 3 Ind. App. 291, 29 N. E. 619.

31. See cases cited *infra*, this note.

which notation must be dated,[32] and signed by the trial judge,[33] and by appellant or his attorney.[34] After a party has once taken a proper exception to the giving or refusal of an instruction, it is not necessary to again except to any matter covered by the exception first taken,[35] or at least before verdict,[36] unless further time has been allowed.[37] An exception first taken after ver-

Manner of making notation.— The exception must be noted either on the margin or at the close of each instruction. Gibbs *v.* Wall, 10 Colo. 153, 14 Pac. 216; Malott *v.* Hawkins, 159 Ind. 127, 63 N. E. 308; Roose *v.* Roose, 145 Ind. 162, 44 N. E. 1; Lower *v.* Franks, 115 Ind. 334, 17 N. E. 630; Landers *v.* Beck, 92 Ind. 49; Baldwin *v.* Shill, 3 Ind. App. 291, 29 N. E. 619; Clement *v.* Drybread, 108 Iowa 701, 78 N. W. 235; Bennett *v.* McDonald, 52 Nebr. 278, 72 N. W. 268; Blumer *v.* Bennett, 44 Nebr. 873, 63 N. W. 14. Where general instructions are given by the court to the jury, embracing several distinct propositions, an exception cannot be taken to the entire series by noting, at the close thereof, an exception, but such exception must be noted at the close of each distinct proposition. Sherlock *v.* Bloomington First Nat. Bank, 53 Ind. 73. Such an indorsement has been held sufficient, although it does not disclose which party excepted. Indiana, etc., R. Co. *v.* Bundy, 152 Ind. 590, 53 N. E. 175.

32. Malott *v.* Hawkins, 159 Ind. 127, 63 N. E. 308; Roose *v.* Roose, 145 Ind. 162, 44 N. E. 1; Behymer *v.* State, 95 Ind. 140; Grand Rapids, etc., R. Co. *v.* King, 41 Ind. App. 701, 83 N. E. 778; Inland Steel Co. *v.* Smith, 39 Ind. App. 636, 75 N. E. 852 [*affirmed* in 168 Ind. 245, 80 N. E. 538].

The date is quite as material as the signature of the judge. (1) Because they are both required by the statute; and (2) because it is the date that shows when the exception was taken. It takes the place of the statement in a bill of exceptions, that the exception was taken at the time. Behymer *v.* State, 95 Ind. 140.

33. Malott *v.* Hawkins, 159 Ind. 127, 63 N. E. 308; Roose *v.* Roose, 145 Ind. 162, 44 N. E. 1; Ayres *v.* Blevins, 28 Ind. App. 101, 62 N. E. 305; Baldwin *v.* Shill, 3 Ind. App. 291, 29 N. E. 619; Central R. Co. *v.* Coleman, 80 Md. 328, 30 Atl. 918. But see Gibbs *v.* Wall, 10 Colo. 153, 14 Pac. 216, holding that the omission of the judge to sign an instruction excepted to cannot prejudice the rights of the appellant.

34. Wade *v.* Guppinger, 60 Ind. 376; Hersleb *v.* Moss, 28 Ind. 354.

35. Evans *v.* Clark, 1 Indian Terr. 216, 40 S. W. 771.

For example, where a party objects to an instruction, and makes the objection the subject of a bill of exceptions, the failure to object to a subsequent instruction embodying the same principle does not impair his right to rely on the exception taken. Baltimore, etc., R. Co. *v.* Lee, 106 Va. 32, 55 S. E. 1. But see Long-Bell Lumber Co. *v.* Webb, 7 Kan. App. 406, 52 Pac. 64. So where a party excepts to the refusal to give a certain instruction, it is not necessary to repeat such exception when the contrary of such request is given in the general charge. Evans *v.* Clark, 1 Indian Terr. 216, 40 S. W. 771; Earle *v.* Thomas, 14 Tex. 583; Connecticut Mut. L. Ins. Co. *v.* Hillmon, 188 U. S. 208, 23 S. Ct. 294, 47 L. ed. 446; Long-Bell Lumber Co. *v.* Stump, 86 Fed. 574, 30 C. C. A. 260. See also Inland Steel Co. *v.* Smith, 39 Ind. App. 636, 75 N. E. 852 [*affirmed* in 168 Ind. 245, 80 N. E. 538]; Allen *v.* Mansfield, 82 Mo. 688. *Contra,* Chicago City R. Co. *v.* Mumford, 97 Ill. 560 (holding that an exception taken to the ruling of the court in refusing to give an instruction asked will not embrace a ruling modifying the instruction; no exception being specially taken to the latter ruling); Brozek *v.* Steinway R. Co., 161 N. Y. 63, 55 N. E. 395 (holding that when a request is refused, either expressly or impliedly, and a modified or independent proposition is charged instead, correct practice requires a party who considers himself aggrieved to except to the refusal to charge as requested, and, by an independent exception, to the charge as made). But where the court, in giving the jury an additional charge at their request, repeated a charge previously given, it was held that an exception to the additional charge did not apply to the one so repeated. Wade *v.* Guppinger, 60 Ind. 376.

36. *Dakota.*— Cheatham *v.* Wilber, 1 Dak. 335, 46 N. W. 580.

Indiana.— Hawley *v.* State, 69 Ind. 98; Vaughn *v.* Ferrall, 57 Ind. 182; Roberts *v.* Higgins, 5 Ind. 542.

Pennsylvania.— Bratton *v.* Mitchell, 3 Pa. St. 44.

Texas.— Jones *v.* Thurmond, 5 Tex. 318.

Utah.— Marks *v.* Tompkins, 7 Utah 421, 27 Pac. 6.

West Virginia.— Carder *v.* State Bank, 34 W. Va. 38, 11 S. E. 716; Wustland *v.* Potterfield, 9 W. Va. 438; Nadenbousch *v.* Sharer, 2 W. Va. 285.

See 46 Cent. Dig. tit. "Trial," §§ 680, 681.

In New York and Pennsylvania a bill of exceptions, tendered after the jury have returned into court with their verdict, but before it is delivered, has been held to be in season as to any charge of the judge, although not as to any question of evidence arising on the trial. Lanuse *v.* Barker, 10 Johns. (N. Y.) 312; Morris *v.* Buckley, 8 Serg. & R. (Pa.) 211; Jones *v.* Insurance of North America, 1 Binn. (Pa.) 38, 4 Dall. 249, 1 L. ed. 820.

In Wisconsin exceptions to refusals to charge fully subserve their purpose, and are in due time, if taken after the retirement of the jury and before verdict. Gehl *v.* Milwaukee Produce Co., 116 Wis. 263, 93 N. W. 26.

37. Cheatham *v.* Wilber, 1 Dak. 335, 46 N. W. 580; Atkinson *v.* Gwin, 8 Ind. 376.

dict,[38] or on a motion for a new trial,[39] is too late and will not be considered. In many jurisdictions the common-law rule in this respect has been changed, and the practice is now regulated by statute.[40]

In section 343 of the Indiana Practice Act, it is provided that "the party objecting to the decision must except at the time the decision is made." 2 Rev. St. (1876) p. 176. The statute is mandatory. On this point the courts have no discretion. They may give time to reduce exceptions to writing, but they cannot allow a party to except, without the consent or over the objections of the adverse party, at any time subsequent to "the time the decision is made." Blacketer *v.* House, 67 Ind. 414.

38. *Colorado.*— Taylor *v.* Randall, 3 Colo. 399.

Dakota.— Cheatham *v.* Wilber, 1 Dak. 335, 46 N. W. 580.

Indiana.— Hawley *v.* State, 69 Ind. 98; Vaughn *v.* Ferrall, 57 Ind. 182; Wood *v.* McClure, 7 Ind. 155; Roberts *v.* Higgins, 5 Ind. 542; Jones *v.* Van Patten, 3 Ind. 107; Molt *v.* Hoover, (App. 1907) 81 N. E. 221.

Iowa.— McKell *v.* Wright, 4 Iowa 504; Langworthy *v.* Myers, 4 Iowa 18; Rawlins *v.* Tucker, 3 Iowa 213.

Louisiana.— Vaughan *v.* Vaughan, 3 Mart. 215.

Massachusetts.— Nixon *v.* Hammond, 12 Cush. 285. *Contra,* Buckland *v.* Charlemont, 3 Pick. 173.

Minnesota.— Barker *v.* Todd, 37 Minn. 370, 34 N. W. 895.

Mississippi.—Anderson *v.* Hill, 12 Sm. & M. 679, 51 Am. Dec. 130.

Missouri.— Mattingly *v.* Moranville, 11 Mo. 604; Randolph *v.* Alsey, 8 Mo. 656.

Nebraska.—Watson *v.* Roode, 30 Nebr. 264, 46 N. W. 491.

New Hampshire.—Willard *v.* Stevens, 24 N. H. 271.

New York.— Koster *v.* Noonan, 8 Daly 231; Banker *v.* Fisher, 3 Silv. Sup. 589, 7 N. Y. Suppl. 732, holding that where, after the cause was given to the jury, a recess was taken, and plaintiff's counsel retired to prepare his exceptions to the charge, but before he returned, and before the expiration of the recess, the jury had come into court, rendered their verdict, and been discharged, it was held that the exceptions were properly disallowed.

Pennsylvania.— Bratton *v.* Mitchell, 3 Pa. St. 44; Holden *v.* Cole, 1 Pa. St. 303; Bratton *v.* Mitchell, 5 Watts 69.

Rhode Island.— Meyers *v.* Briggs, 11 R. I. 180; Sarle *v.* Arnold, 7 R. I. 582.

South Carolina.—Warren *v.* Lagrone, 12 S. C. 45.

Utah.— Farr *v.* Swigart, 13 Utah 150, 44 Pac. 711; U. S. *v.* Gough, 8 Utah 428, 32 Pac. 695.

Virginia.— Collins *v.* George, 102 Va. 509, 46 S. E. 684; Newport News, etc., R., etc., Co. *v.* Bradford, 99 Va. 117, 37 S. E. 807.

West Virginia.— Carder *v.* State Bank, 34 W. Va. 38, 11 S. E. 716; Wustland *v.* Potterfield, 9 W. Va. 438.

Wisconsin.— Thrasher *v.* Postel, 79 Wis. 503, 48 N. W. 600; Nicks *v.* Marshall, 24 Wis. 139.

United States.— Thiede *v.* Utah, 159 U. S. 510, 16 S. Ct. 62, 40 L. ed. 237; Reagan *v.* Aiken, 138 U. S. 109, 11 S. Ct. 283, 34 L. ed. 892.

See 46 Cent. Dig. tit. "Trial," § 681.

Contra.— Camp *v.* Tompkins, 9 Conn. 545.

Where a rule of court requires exceptions to the charge of the judge to be taken before verdict, exceptions taken after verdict will not be reviewed by the appellate court. McAdams *v.* Stilwell, 13 Pa. St. 90.

An exception to additional instructions, given to the jury on their returning an incomplete verdict, comes too late if the jury has brought in its final verdict. Bynum *v.* Southern Pump, etc., Co., 63 Ala. 462.

39. *California.*—Letter *v.* Putney, 7 Cal. 423.

Colorado.— Durango *v.* Luttrell, 18 Colo. 123, 31 Pac. 853.

Illinois.— Illinois Cent. R. Co. *v.* Modglin, 85 Ill. 481.

Indiana.— Ehrisman *v.* Scott, 5 Ind. App. 596, 32 N. E. 867.

Massachusetts.— Nagle *v.* Laxton, 191 Mass. 402, 77 N. E. 719.

Missouri.—Walsh *v.* Allen, 50 Mo. 181; Houston *v.* Lane, 39 Mo. 495; Calvert *v.* Alexandria, 33 Mo. 149; Devlin *v.* Clark, 31 Mo. 22; Dozier *v.* Jerman, 30 Mo. 216; How *v.* Sims, 16 Mo. 431; Powers *v.* Allen, 14 Mo. 367; Lefkow *v.* Allred, 54 Mo. App. 141.

United States.— Lewis *v.* U. S., 146 U. S. 370, 13 S. Ct. 136, 36 L. ed. 1011; Reagan *v.* Aiken, 138 U. S. 109, 11 S. Ct. 283, 34 L. ed. 892.

See 46 Cent. Dig. tit. "Trial," § 681.

Omissions to reserve exceptions to instructions cannot be cured by a motion for a new trial so as to render them reviewable on appeal. Tobias *v.* Treist, 103 Ala. 664, 15 So. 914; Vaughn *v.* Ferrall, 57 Ind. 182.

40. See the statutes of the several states; and the cases cited *infra,* this note.

In Alabama, under Code, § 2758, which permits a party to reserve by bill of exceptions any charge or decision of the court that would not otherwise appear of record, the exception must be taken before the jury retires; and an exception to a portion of the general charge comes too late when taken after the jury has returned and asked for further instructions. Hayes *v.* Solomon, 90 Ala. 520, 7 So. 921; Phœnix Ins. Co. *v.* Moog, 81 Ala. 335, 1 So. 108.

In California, under Code Civ. Proc. § 646, an exception to the giving or refusal of instructions must be taken at the time the ruling is made. Garoutte *v.* Williamson, 108 Cal. 135, 41 Pac. 35, 413; Sharp *v.* Hoffman, 79 Cal. 404, 21 Pac. 846; Sierra Union Water, etc., Co. *v.* Baker, 70 Cal. 572, 8 Pac. 305, 11 Pac. 654; Mallett *v.* Swain, 56 Cal. 171; Robinson *v.* Western Pac. R. Co., 48 Cal. 409.

4. Sufficiency of Exceptions — a. In General. Each exception in a bill of exceptions should be specific, pointed, and explicit, showing specifically and

In Illinois, section 53 of the practice act provides that exceptions to the giving or refusing of any instructions may be entered at any time before the entry of final judgment in the case. Since the enactment of that provision it has not been the custom to take exception in open court at the time instructions are given or refused, but the practice has been to present objections on the motion for a new trial, and to enter the exceptions before final judgment. Collins Ice-Cream Co. *v.* Stephens, 189 Ill. 200, 59 N. E. 524.

In Iowa, under Code (1873), § 2789, exceptions to instructions not taken at the time may be taken within three days after verdict (Rowen *v.* Sommers, 101 Iowa 734, 66 N. W. 897; Maxon *v.* Chicago, etc., R. Co., 67 Iowa 226, 25 N. W. 144; Clark *v.* Reiniger, 66 Iowa 507, 24 N. W. 16; Parker *v.* Middleton, 65 Iowa 200, 21 N. W. 562; Bailey *v.* Anderson, 61 Iowa 749, 16 N. W. 134; Brant *v.* Lyons, 60 Iowa 172, 14 N. W. 227; Harrison *v.* Charlton, 42 Iowa 573), in a motion for a new trial (Patterson *v.* Chicago, etc., R. Co., 70 Iowa 593, 33 N. W. 228; Deere *v.* Needles, 65 Iowa 101, 21 N. W. 203). Likewise under the express provisions of the code, section 3709, it is sufficient if exceptions are taken in the motion for a new trial. Shoemaker *v.* Turner, 117 Iowa 340, 90 N. W. 709. But the giving of time within which to file a motion for a new trial, and in arrest of judgment, does not extend the time for filing exceptions to instructions. Leach *v.* Hill, 97 Iowa 81, 66 N. W. 69; Bush *v.* Nichols, 77 Iowa 171, 41 N. W. 608.

In Massachusetts, under St. (1863) c. 180, § 2, modifying the thirty-fourth rule of the superior court, a party must allege exceptions, either orally or in writing, before the jury retires. Lee *v.* Gibbs, 10 Allen 248. An exception to a charge taken after the jury has commenced to go out is too late, and it is not error to refuse to call them back. Spooner *v.* Handley, 151 Mass. 313, 23 N. E. 840.

In Michigan, under the provisions of Rev. St. (1846) p. 161, § 62, it is competent for a party to allege exceptions to the charge given to the jury at any time before they shall find their verdict, in the absence of any rule to the contrary; but the more general and better practice is that a party should take his exceptions before the jury retires. Doyle *v.* Stevens, 4 Mich. 87.

In New York, Code, § 995, expressly allows an exception to a charge to be taken before the verdict is given. Polykranas *v.* Krausz, 73 N. Y. App. Div. 583, 77 N. Y. Suppl. 46; De Leon *v.* Echeverria, 45 N. Y. Super. Ct. 240; Broadway Trust Co. *v.* Fry, 40 Misc. 680, 83 N. Y. Suppl 103. Under this section an exception may be taken on the bringing in of a sealed verdict, after the jury have been allowed to separate. Panama R. Co. *v.* Johnson, 58 Hun 557, 12 N. Y. Suppl. 499. But it is an exception to the charge as made which can be taken at any time before the jury have rendered their verdict. Walker *v.* Second Ave. R. Co., 57 N. Y. Super. Ct. 141, 6 N. Y. Suppl. 536 [*affirmed* in 126 N. Y. 668, 27 N. E. 854]. An exception to a refusal to give a requested instruction must be taken at the time of such refusal. Walker *v.* Second Ave. R. Co., *supra.*

In North Carolina exceptions to the charge, and for refusing to give special instructions, are in time if taken at or before the stating of the case on appeal (Tillett *v.* Lynchburg, etc., R. Co., 116 N. C. 937, 21 S. E. 698; Blackburn *v.* St. Paul F. & M. Ins. Co., 116 N. C. 821, 21 S. E. 922; Lowe *v.* Elliott, 107 N. C. 718, 12 S. E. 383), although the better practice is to assign all exceptions in making motion for new trial (Lowe *v.* Elliott, *supra*; McKinnon *v.* Morrison, 104 N. C. 354, 10 S. E. 513). But an exception for omission to charge must be made before verdict. State *v.* Harris, 120 N. C. 577, 26 S. E. 774; State *v.* Groves, 119 N. C. 822, 25 S. E. 819; State *v.* Varner, 115 N. C. 744, 20 S. E. 518. An objection to a failure to put a charge in writing is waived by not excepting before verdict, when the mistake, if any, can be corrected. Phillips *v.* Wilmington, etc., R. Co., 130 N. C. 582, 41 S. E. 805. Under the code, section 550, if there is an error in the instructions given, an exception thereto is valid if entered within ten days after adjournment for the term. Williams *v.* Harris, 137 N. C. 460, 49 S. E. 954; State *v.* Harris, *supra.*

In North Dakota, under the code, a party desiring to except to instructions given in an oral charge has twenty days within which to do so under all circumstances. Lindblom *v.* Sonstelie, 10 N. D. 140, 86 N. W. 357. Under the provisions of sections 5298 and 5722, revised codes, a district judge has power to extend the time within which exceptions to a charge may be taken, either before or after such time has elapsed; but such extension should be granted only upon good cause shown, and in furtherance of justice. Lindblom *v.* Sonstelie, *supra.*

In South Dakota, under section 5049, Comp. Laws, "exceptions to the giving or refusing any instruction, or to its modification or change, may be taken at any time before the entry of final judgment in the case." Under this section there is no distinction, in respect to the time within which exceptions may be taken, between instructions given at the request of counsel, and instructions given by the judge of his own motion. Uhe *v.* Chicago, etc., R. Co., 4 S. D. 505, 57 N. W. 484. Section 5079, Comp. Laws, defining exceptions, and providing that they "must be taken at the time the decision is made," does not repeal or qualify section 5049, providing that exceptions to instructions may be

precisely what ruling is claimed to be error.[41] This result may be accomplished either by excepting to so much of the charge as instructs the jury that the law is so and so;[42] or by stating, by way of recital, the part of the charge excepted to;[43] or by calling on the court to charge in a certain way; and if the court refuses so to charge, then by excepting to such refusal.[44] It is not essential, in an exception to a portion of a charge, to repeat the language excepted to, although this is strictly the more accurate practice;[45] it is sufficient if the attention of the court is fairly directed to the error complained of,[46] either by a recital of the language used, or of its very substance.[47] An exception attributing to the court language not contained in the instruction is bad.[48]

b. General Exceptions — (1) *To Instructions Given.* Exceptions to a charge which embraces several legal propositions should be specific, and should call the attention of the court to the error complained of.[49] For reasons which

taken at any time before entry of final judgment. Uhe *v.* Chicago, etc., R. Co., *supra.*

In Wisconsin, Rev. St. (1878) § 2869, permits exceptions to instructions actually given to be taken at any time during the trial term. Gehl *v.* Milwaukee Produce Co., 116 Wis. 263, 93 N. W. 26; Gutzman *v.* Clancy, 114 Wis. 589, 90 N. W. 1081, 58 L. R. A. 744; Firmeis *v.* State, 61 Wis. 140, 20 N. W. 663. But exceptions to the refusal of the court to instruct as requested by either party must still be taken at the trial, or they must be deemed to have been waived. Gehl *v.* Milwaukee Produce Co., *supra.* Statutory permission to take exceptions to the charge after the trial does not include exceptions to refusals to give requested instructions. Gutzman *v.* Clancy, *supra*; Little *v.* Iron River, 102 Wis. 250, 78 N. W. 416; Thrasher *v.* Postel, 79 Wis. 503, 48 N. W. 600; Adams *v.* McKay, 63 Wis. 404, 23 N. W. 575; Firmeis *v.* State, 61 Wis. 140, 20 N. W. 663. Act (1874), c. 194, allows exceptions to "any part of the judge's charge" to be taken at any time before the close of the trial term. Merriam *v.* Field, 39 Wis. 578; Nisbet *v.* Gill, 38 Wis. 657.

41. Kennedy *v.* Falde, 4 Dak. 319, 29 N. W. 667; Cleghorn *v.* Love, 24 Ga. 590; Atkins *v.* Field, 89 Me. 281, 36 Atl. 375, 56 Am. St. Rep. 424; Packard *v.* Bergen Neck R. Co., 54 N. J. L. 553, 25 Atl. 506. See also *infra*, IX, K, 4, f.

42. Packard *v.* Bergen Neck R. Co., 54 N. J. L. 553, 25 Atl. 506; Potts *v.* Clarke, 20 N. J. L. 536.

43. Packard *v.* Bergen Neck R. Co., 54 N. J. L. 553, 25 Atl. 506; Potts *v.* Clarke, 20 N. J. L. 536.

In addition to the quotation from the charge, it is said to be the better practice to state clearly the error complained of. Norris *v.* Clinkscales, 59 S. C. 232, 37 S. E. 821.

The practice of excepting to fractions of a sentence in a judge's charge is not to be commended. It is better to at least give the entire sentence; and an exception to mere disjointed fragments will often be so improper that the appellate court will not deal with it at all. Indiana Fruit Co. *v.* Sandlin, 125 Ga. 222, 54 S. E. 65.

44. Packard *v.* Bergen Neck R. Co., 54 N. J. L. 553, 25 Atl. 506; Potts *v.* Clarke, 20 N. J. L. 536.

45. People *v.* Livingston, 79 N. Y. 279; What Cheer Coal Co. *v.* Johnson, 56 Fed. 810, 6 C. C. A. 148.

46. Rogers *v.* Mahoney, 62 Cal. 611; People *v.* Livingston, 79 N. Y. 279; Scott *v.* Astoria R. Co., 43 Oreg. 26, 72 Pac. 594, 99 Am. St. Rep. 710, 62 L. R. A. 543; What Cheer Coal Co. *v.* Johnson, 56 Fed. 810, 6 C. C. A. 148.

47. Atkins *v.* Field, 89 Me. 281, 36 Atl. 375, 56 Am. St. Rep. 424; Smith *v.* Atlantic City R. Co., 74 N. J. L. 452, 65 Atl. 1000; McGinley *v.* U. S. Life Ins. Co., 77 N. Y. 495; Phœnix Assur. Co. *v.* Lucker, 77 Fed. 243, 23 C. C. A. 139.

48. Anderson *v.* Harper, 30 Wash. 378, 70 Pac. 965.

For example, error in requiring the jury to allow interest in an action for tort cannot be availed of under an exception so worded as to indicate that the instruction merely permitted their awarding interest, in which case the instruction would have been correct. Brush *v.* Long Island R. Co., 10 N. Y. App. Div. 535, 42 N. Y. Suppl. 103 [*affirmed* in 158 N. Y. 742, 53 N. E. 1123].

49. *Alabama.*— South Alabama, etc., R. Co. *v.* McLendon, 63 Ala. 266.

Arkansas.— Fox *v.* Spears, 78 Ark. 71, 93 S. W. 560.

California.— Bernstein *v.* Downs, 112 Cal. 197, 44 Pac. 557; Cavallaro *v.* Texas, etc., R. Co., 110 Cal. 348, 42 Pac. 918, 52 Am. St. Rep. 94; Frost *v.* Grizzly Bluff Creamery Co., 102 Cal. 525, 36 Pac. 929.

Colorado.— Holman *v.* Boston Land, etc., Co., 8 Colo. App. 282, 45 Pac. 519.

Dakota.— McCormack *v.* Phillips, 4 Dak. 506, 34 N. W. 39; Kennedy *v.* Falde, 4 Dak. 319, 29 N. W. 667.

District of Columbia.—District of Columbia *v.* Duryee, 29 App. Cas. 327.

Georgia.— Rogers *v.* Rogers, 74 Ga. 598; Rogers *v.* Tillman, 72 Ga. 479; Thomas *v.* Parker, 69 Ga. 283; Thompson *v.* Feagin, 60 Ga. 82.

Illinois.— Mather Electric Co. *v.* Matthews, 47 Ill. App. 557.

Kansas.— Ryan *v.* Madden, 46 Kan. 245, 26 Pac. 673; Stith *v.* Fullinwider, 40 Kan. 73, 19 Pac. 314.

are perfectly obvious, it has ordinarily been held that a general exception to a

Michigan.—Edgell *v.* Francis, 86 Mich. 232, 48 N. W. 1095; McAllister *v.* Engle, 52 Mich. 56, 17 N. W. 694; Geary *v.* People, 22 Mich. 220.

Montana.—Woods *v.* Berry, 7 Mont. 195, 14 Pac. 758; McKinstry *v.* Clark, 4 Mont. 370, 1 Pac. 759.

Nebraska.—Omaha *v.* McGavock, 47 Nebr. 313, 66 N. W. 415; Hedrick *v.* Strauss, 42 Nebr. 485, 60 N. W. 928; Denver First Nat. Bank *v.* Lowrey, 36 Nebr. 290, 54 N. W. 568; Brooks *v.* Dutcher, 24 Nebr. 300, 38 N. W. 780, holding that a general exception to one sentence in a charge of ten paragraphs to a jury is insufficient to permit an examination of the instructions.

New Hampshire.—Harris *v.* Smith, 71 N. H. 330, 52 Atl. 854; Emery *v.* Boston, etc., R. Co., 67 N. H. 434, 36 Atl. 367; Reynolds *v.* Boston, etc., R. Co., 43 N. H. 580.

New Jersey.—Smith *v.* Atlantic City R. Co., 74 N. J. L. 452, 65 Atl. 1000; Oliver *v.* Phelps, 21 N. J. L. 597; Potts *v.* Clarke, 20 N. J. L. 536.

New York.—Brozek *v.* Steinway R. Co., 161 N. Y. 63, 55 N. E. 395; McGinley *v.* U. S. Life Ins. Co., 77 N. Y. 495; Haas *v.* Brown, 21 Misc. 434, 47 N. Y. Suppl. 606; Rheinfeldt *v.* Dahlman, 19 Misc. 162, 43 N. Y. Suppl. 281.

North Carolina.—Hampton *v.* Norfolk, etc., R. Co., 120 N. C. 534, 27 S. E. 96, 35 L. R. A. 808; Shober *v.* Wheeler, 113 N. C. 370, 18 S. E. 328.

North Dakota.—Pease *v.* Magill, 17 N. D. 166, 115 N. W. 260.

Ohio.—Consolidated Coal, etc., Co. *v.* Clay, 51 Ohio St. 542, 38 N. E. 610, 25 L. R. A. 848; Weber *v.* Wiggins, 11 Ohio Cir. Ct. 18, 5 Ohio Cir. Dec. 84.

Oklahoma.—Dunham *v.* Holloway, 3 Okla. 244, 41 Pac. 140 [*affirmed* in 170 U. S. 615, 18 S. Ct. 784, 42 L. ed. 1165].

Oregon.—McAlister *v.* Long, 33 Oreg. 368, 54 Pac. 194; Nickum *v.* Gaston, 24 Oreg. 380, 33 Pac. 671, 35 Pac. 31; Langford *v.* Jones, 18 Oreg. 307, 22 Pac. 1064.

South Carolina.—Tinsley *v.* Western Union Tel. Co., 72 S. C. 350, 51 S. E. 913; Carter *v.* Kaufman, 67 S. C. 456, 45 S. E. 1017.

Utah.—Nebeker *v.* Harvey, 21 Utah 363, 60 Pac. 1029; Pool *v.* Southern Pac. Co., 20 Utah 210, 58 Pac. 326; Scott *v.* Utah Consol. Min., etc., Co., 18 Utah 486, 56 Pac. 305; Scoville *v.* Salt Lake City, 11 Utah 60, 39 Pac. 481; Marks *v.* Tompkins, 7 Utah 421, 27 Pac. 6.

Vermont.—Goodwin *v.* Perkins, 39 Vt. 598.

Wisconsin.—Dean *v.* Chicago, etc., R. Co., 43 Wis. 305; Hamlin *v.* Haight, 32 Wis. 237.

United States.—Newport News, etc., Co. *v.* Pace, 158 U. S. 36, 15 S. Ct. 743, 39 L. ed. 887; Baltimore, etc., R. Co. *v.* Mackey, 157 U. S. 72, 15 S. Ct. 491, 39 L. ed. 624; Erie R. Co. *v.* Littell, 128 Fed. 546, 63 C. C. A. 44; Pittsburgh, etc., R. Co. *v.* Thompson, 82 Fed. 720, 27 C. C. A. 333; Phœnix Assur. Co. *v.* Lucker, 77 Fed. 243, 23 C. C. A. 139; Thom *v.* Pittard, 62 Fed. 232, 10 C. C. A. 352.

See 46 Cent. Dig. tit. "Trial," § 689.

The office of an exception is to point out, and call the attention of the court to, any proposition of law which is claimed to be erroneous, so that, if the court has inadvertently stated any rule of law erroneously, it may at once correct it. Shull *v.* Raymond, 23 Minn. 66; Packard *v.* Bergen Neck R. Co., 54 N. J. L. 553, 25 Atl. 506; Hindman *v.* Louisville First Nat. Bank, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108; Pittsburgh, etc., R. Co. *v.* Thompson, 82 Fed. 720, 27 C. C. A. 333; What Cheer Coal Co. *v.* Johnson, 56 Fed. 810, 6 C. C. A. 148. The office of an exception is to point out some specific error in law, and the counsel should, by his exception, lay his finger upon the precise request refused, or the error in the charge, not only that the court may, upon the error being pointed out, correct it, but also that the court of review may not be left to spell out and dig up errors which, after they are discovered, may be more apparent than real, and may have arisen from mere inadvertence or misapprehension upon the trial. Kennedy *v.* Falde, 4 Dak. 319, 29 N. W. 667; Galloway *v.* McLean, 2 Dak. 372, 9 N. W. 98; Ayrault *v.* Pacific Bank, 47 N. Y. 570, 7 Am. Rep. 489.

Where the exception is not to a statement of a rule of law, but only to an error in the statement of facts, such as an error in dates or amounts, or in the statement of what the pleadings contain, or to the absence of some qualifying word or phrase in the definition of a rule of law, the exception should point out distinctly the very error or mistake complained of. Philip Schneider Brewing Co. *v.* American Ice-Mach. Co., 77 Fed. 138, 23 C. C. A. 89.

Applications of rule.—An exception "to that part of the charge about probable cause," reciting the first sentence employed by the court in treating of that subject, is sufficiently specific. Rogers *v.* Mahoney, 62 Cal. 611. So an exception "to so much of the charge as related to smooth, level, and slippery ice not being a defect under the conditions named" sufficiently indicates the statement of legal propositions to which objection is made. Adams *v.* Chicopee, 147 Mass. 440, 18 N. E. 231. But an exception to the charge "commencing with the words . . . and from there to the end," is bad, where such portion of the charge contains distinct propositions. Calkins *v.* Seabury-Calkins Consol. Min. Co., 5 S. D. 299, 58 N. W. 797. And an exception, "to so much of" a long and elaborate charge "as requires the evidence should show there was an intention to deceive" is too general, and presents no point which an appellate court can consider. Phœnix Assur. Co. *v.* Lucker, 77 Fed. 243, 23 C. C. A. 139. So likewise an exception taken "to that portion of the court's charge, which defines the effect of the Automobile act of

charge embracing distinct legal propositions is insufficient.[50] For prevention

1903," p. 80, c. 55, when the court laid down numerous propositions as flowing from that act, is so general as to be nugatory. Addis *v.* Rushmore, 74 N. J. L. 649, 65 Atl. 1036. And an exception to the last half of a long charge has been held too general and indefinite to be available in the supreme court. Bigelow *v.* West Wisconsin R. Co., 27 Wis. 478.

50. *Alabama.*—Stevenson *v.* Moody, 83 Ala. 418, 3 So. 695; South, etc., R. Co. *v.* McLendon, 63 Ala. 266.

Arkansas.— Fox *v.* Spears, 78 Ark. 71, 93 S. W. 560; Lambeth *v.* Ponder, 33 Ark. 707.

California.— Love *v.* Anchor Raisin Vineyard Co., (1896) 45 Pac. 1044; Bernstein *v.* Downs, 112 Cal. 197, 44 Pac. 557; Cavallaro *v.* Texas, etc., R. Co., 110 Cal. 348, 42 Pac. 918, 52 Am. St. Rep. 94; Frost *v.* Grizzly Bluff Creamery Co., 102 Cal. 525, 36 Pac. 929; Moore *v.* Moore, (1893) 34 Pac. 90; Gillaspie *v.* Hagans, 90 Cal. 90, 27 Pac. 34; Cockrill *v.* Hall, 76 Cal. 192, 18 Pac. 318; Dixon *v.* Allen, 69 Cal. 527, 11 Pac. 179; Brown *v.* Kentfield, 50 Cal. 129; Sill *v.* Reese, 47 Cal. 294; Shea *v.* Potrero, etc., R. Co., 44 Cal. 414; Hicks *v.* Coleman, 25 Cal. 122, 85 Am. Dec. 103.

Colorado.— Edwards *v.* Smith, 16 Colo. 529, 27 Pac. 809; Wray *v.* Carpenter, 16 Colo. 271, 27 Pac. 248, 25 Am. St. Rep. 265; McFeters *v.* Pierson, 15 Colo. 201, 24 Pac. 1076, 22 Am. St. Rep. 388; Keith *v.* Wells, 14 Colo. 321, 23 Pac. 991; Wooton *v.* Seigel, 5 Colo. 424; Coon *v.* Rigden, 4 Colo. 275; Big Hatchet Consol. Min. Co. *v.* Colvin, 19 Colo. App. 405, 75 Pac. 605; Holman *v.* Boston Land, etc., Co., 8 Colo. App. 282, 45 Pac. 519; Jacobs *v.* Mitchell, 2 Colo. App. 456, 31 Pac. 235; Patrick Red Sandstone Co. *v.* Skoman, 1 Colo. App. 323, 29 Pac. 21.

Dakota.— McCormack *v.* Phillips, 4 Dak. 506, 34 N. W. 39; Kennedy *v.* Falde, 4 Dak. 319, 29 N. W. 667.

District of Columbia.— Ryan *v.* Washington, etc., R. Co., 8 App. Cas. 542.

Georgia.— Rogers *v.* Rogers, 74 Ga. 598; Rogers *v.* Tillman, 72 Ga. 479; Saulsbury *v.* Wimberly, 60 Ga. 78; Harris *v.* Harris, 53 Ga. 678; Smith *v.* Atwood, 14 Ga. 402.

Idaho.— Black *v.* Lewiston, 2 Ida. (Hasb.) 276, 13 Pac. 80.

Illinois.— Razor *v.* Razor, 142 Ill. 375, 31 N. E. 678; Continental Inv., etc., Soc. *v.* Schubnell, 63 Ill. App. 379; Mather Electric Co. *v.* Matthews, 47 Ill. App. 557; Cincinnati, etc., R. Co. *v.* Ducharme, 4 Ill. App. 178.

Indiana.— Baker *v.* McGinniss, 22 Ind. 257; Aurora *v.* Cobb, 21 Ind. 492; Hawk *v.* Crago, 12 Ind. 369; Branham *v.* State, 11 Ind. 553; State *v.* Bartlett, 9 Ind. 569; Baltimore, etc., R. Co. *v.* Spaulding, 21 Ind. App. 323, 52 N. E. 410; Kelly *v.* John, 13 Ind. App. 579, 41 N. E. 1069.

Kansas.— Fleming *v.* Latham, 48 Kan. 773, 30 Pac. 166; Ryan *v.* Madden, 46 Kan. 245, 26 Pac. 679; Young *v.* Youngman, 45 Kan. 65, 25 Pac. 209; Haak *v.* Struve, 38 Kan. 326, 16 Pac. 686; State *v.* Wilgus, 32 Kan. 126, 4 Pac. 218; Bard *v.* Elston, 31 Kan. 274, 1 Pac. 565; Fullenwider *v.* Ewing, 25 Kan. 69; Atchison *v.* King, 9 Kan. 550.

Maine.— State *v.* Pike, 65 Me. 111.

Massachusetts.— Savage *v.* Marlborough St. R. Co., 186 Mass. 203, 71 N. E. 531; Chenery *v.* Fitchburg R. Co., 160 Mass. 211, 35 N. E. 554, 22 L. R. A. 575; Hunting *v.* Downer, 151 Mass. 275, 23 N. E. 832; Rock *v.* Indian Orchard Mills, 142 Mass. 522, 8 N. E. 401; Curry *v.* Porter, 125 Mass. 94.

Michigan.— Edgell *v.* Francis, 86 Mich. 232, 48 N. W. 1095; McAllister *v.* Engle, 52 Mich. 56, 17 N. W. 694; Geary *v.* People, 22 Mich. 220.

Minnesota.— Steffenson *v.* Chicago, etc., R. Co., 51 Minn. 531, 53 N. W. 800; Cole *v.* Curtis, 16 Minn. 182; Foster *v.* Berkey, 8 Minn. 351.

Montana.— McKinstry *v.* Clark, 4 Mont. 370, 1 Pac. 759.

Nebraska.— American F. Ins. Co. *v.* Landfare, 56 Nebr. 482, 76 N. W. 1068; Blue Valley Lumber Co. *v.* Smith, 48 Nebr. 293, 67 N. W. 159; Omaha *v.* Gavock, 47 Nebr. 313, 66 N. W. 415; Hedrick *v.* Strauss, 42 Nebr. 485, 60 N. W. 928; Denver First Nat. Bank *v.* Lowrey, 36 Nebr. 290, 54 N. W. 568; Walker *v.* Turner, 27 Nebr. 103, 42 N. W. 918; Brooks *v.* Dutcher, 24 Nebr. 300, 38 N. W. 780; Omaha Hotel Assoc. *v.* Walter, 23 Nebr. 280, 36 N. W. 561; Brooks *v.* Dutcher, 22 Nebr. 644, 36 N. W. 128.

New Hampshire.— Guertin *v.* Hudson, 71 N. H. 505, 53 Atl. 736; Harris *v.* Smith, 71 N. H. 330, 52 Atl. 854; Edgerly *v.* Union St. R. Co., 67 N. H. 312, 36 Atl. 558; Reynolds *v.* Boston, etc., R. Co., 43 N. H. 580.

New Jersey.— Timlan *v.* Dillworth, 75 N. J. L. 100, 67 Atl. 433; Schneider *v.* Winkler, 74 N. J. L. 71, 70 Atl. 731; Packard *v.* Bergen Neck R. Co., 54 N. J. L. 553, 25 Atl. 506; Oliver *v.* Phelps, 21 N. J. L. 597.

New Mexico.— Probst *v.* Presbyterian Church Gen. Assembly Domestic Missions, 3 N. M. 237, 5 Pac. 702 [*reversed* on other grounds in 129 U. S. 182, 9 S. Ct. 263, 32 L. ed. 642].

New York.— Brozek *v.* Steinway R. Co., 161 N. Y. 63, 55 N. E. 395; Requa *v.* Rochester, 45 N. Y. 129, 6 Am. Rep. 52; Oldfield *v.* New York, etc., R. Co., 14 N. Y. 310; Caldwell *v.* Murphy, 11 N. Y. 416; Jones *v.* Osgood, 6 N. Y. 233; Robinson *v.* New York, etc., R. Co., 27 Barb. 512; McBurney *v.* Cutler, 18 Barb. 203; Carland *v.* Day, 4 E. D. Smith 251; Ebenreiter *v.* Dahlman, 19 Misc. 9, 42 N. Y. Suppl. 867; Mann *v.* Brooklyn, 17 N. Y. Suppl. 643; People *v.* McKenna, 12 N. Y. Suppl. 493; Simpson *v.* Downing, 23 Wend. 316.

North Carolina.— Kendrick *v.* Dellinger, 117 N. C. 491, 23 S. E. 438; Shober *v.* Wheeler, 113 N. C. 370, 18 S. E. 328; Davis *v.* Duval, 112 N. C. 833, 17 S. E. 528; Hemphill *v.* Morrison, 112 N. C. 756, 17 S. E. 535; Ward *v.* Albemarle, etc., R. Co., 112 N. C.

of errors, counsel owe it to the court to be specific in their objec-

168, 16 S. E. 921; Hinson *v.* Powell, 109 N. C. 534, 14 S. E. 301; Bottoms *v.* Seaboard, etc., R. Co., 109 N. C. 72, 13 S. E. 738; State *v.* Howell, 107 N. C. 835, 12 S. E. 569; Everett *v.* Williamson, 107 N. C. 204, 12 S. E. 187; Burwell *v.* Sneed, 104 N. C. 118, 10 S. E. 152; Dugger *v.* McKesson, 100 N. C. 1, 6 S. E. 746; Newby *v.* Harrell, 99 N. C. 149, 5 S. E. 284, 6 Am. St. Rep. 503; Caudle *v.* Fallen, 98 N. C. 411, 4 S. E. 40; Barber *v.* Roseboro, 97 N. C. 192, 1 S. E. 849; Clements *v.* Rogers, 95 N. C. 248; McDonald *v.* Carson, 94 N. C. 497; Bost *v.* Bost, 87 N. C. 477.

North Dakota.— Pease *v.* Magill, 17 N. D. 166, 115 N. W. 260.

Ohio.— Consolidated Coal, etc., Co. *v.* Clay, 51 Ohio St. 542, 38 N. E. 610, 25 L. R. A. 848; Behrens *v.* Behrens, 47 Ohio St. 323, 25 N. E. 209, 21 Am. St. Rep. 820; Everett *v.* Sumner, 32 Ohio St. 562; Western Ins. Co. *v.* Tobin, 32 Ohio St. 77; Pittsburgh, etc., R. Co. *v.* Probst, 30 Ohio St. 104; Marietta, etc., R. Co. *v.* Strader, 29 Ohio St. 448; Butchers' Melting Assoc. *v.* Commercial Bank, 2 Disn. 46; Toledo *v.* Radbone, 23 Ohio Cir. Ct. 268 (holding that a party having filed a general exception to a charge as a whole, without asking the court to charge specifically upon the subject complained of, is bound by the whole charge and that he cannot afterward pick out a single sentence in a paragraph and complain of it); Weber *v.* Wiggins, 11 Ohio Cir. Ct. 18, 5 Ohio Cir. Dec. 84.

Oklahoma.— Higgins *v.* Street, 19 Okla. 45, 92 Pac. 153, 13 L. R. A. N. S. 398.

South Carolina.— St. Andrews Parish Tp. Com'rs *v.* Charleston Min., etc., Co., 76 S. C. 382, 57 S. E. 201; Pearson *v.* Spartanburg County, 57 S. C. 480, 29 S. E. 193; Davis *v.* Elmore, 40 S. C. 533, 19 S. E. 204; Dobson *v.* Cothran, 34 S. C. 518, 13 S. E. 679; Norton *v.* Livingston, 14 S. C. 177.

South Dakota.— Wood *v.* Dodge, 23 S. D. 95, 120 N. W. 774.

Utah.— Farnsworth *v.* Union Pac. Coal Co., 32 Utah 112, 89 Pac. 74.

Vermont.— Luce *v.* Hassam, 76 Vt. 450, 58 Atl. 725; Goodwin *v.* Perkins, 39 Vt. 598.

Washington.— Cunningham *v.* Seattle Electric R., etc., Co., 3 Wash. 471, 28 Pac. 745.

Wisconsin.— Lee *v.* Hammond, 114 Wis. 550, 90 N. W. 1073; Luedtke *v.* Jeffery, 89 Wis. 136, 61 N. W. 292; Smith *v.* Coleman, 77 Wis. 343, 46 N. W. 664; Meno *v.* Hoeffel, 46 Wis. 282, 1 N. W. 31; Sabine *v.* Fisher, 37 Wis. 376; Strachan *v.* Muxlow, 31 Wis. 207; Tomlinson *v.* Wallace, 16 Wis. 224.

United States.— Holder *v.* U. S., 150 U. S. 91, 14 S. Ct. 10, 37 L. ed. 1010; Van Stone *v.* Stilwell, etc., Mfg. Co., 142 U. S. 128, 12 S. Ct. 181, 35 L. ed. 961; Block *v.* Darling, 140 U. S. 234, 11 S. Ct. 832, 35 L. ed. 476; White *v.* Barber, 123 U. S. 392, 8 S. Ct. 221, 31 L. ed. 243; Burton *v.* West Jersey Ferry Co., 114 U. S. 474, 5 S. Ct. 960, 29 L. ed. 215; Washington, etc., R. Co. *v.* Varnell, 98 U. S. 479, 25 L. ed. 233; Stimpson *v.* West Chester R. Co., 4 How. 380, 11 L. ed. 1020; Chicago Great Western R. Co. *v.* McDonough, 161 Fed. 657, 88 C. C. A. 517; Hindman *v.* Louisville First Nat. Bank, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108; Newman *v.* Virginia, etc., Steel, etc., Co., 80 Fed. 228, 25 C. C. A. 382; Thom *v.* Pittard, 62 Fed. 232, 10 C. C. A. 352; Cleveland, etc., R. Co. *v.* Zider, 61 Fed. 908, 10 C. C. A. 151; Park *v.* Bushnell, 60 Fed. 583, 9 C. C. A. 138.

See 46 Cent. Dig. tit. "Trial," § 689.

Notwithstanding a statutory provision that "no reason need be assigned for exceptions," wholesale exceptions, without reference to the specific matter claimed to be objectionable, are not authorized. Nebeker *v.* Harvey, 21 Utah 363, 60 Pac. 1029.

Exceptions to rule.— The rule that exceptions to instructions should be precise and pointed, so as not to require the court to search for errors through long passages, does not apply when it is necessary or useful to cite an entire passage in order to form a just view of the error complained of. Hicks *v.* U. S., 150 U. S. 442, 14 S. Ct. 144, 37 L. ed. 1137.

In Iowa the rule prior to the revision was that a general exception taken to the whole of the judge's charge entitled the excepting party to present for review an erroneous position in any portion of the charge, and this rule governs in all actions begun before the revision took effect. Wilhelmi *v.* Leonard, 13 Iowa 330; Eyser *v.* Weissgerber, 2 Iowa 463. But, under the revision, the rule is recognized that a general exception to several instructions given, some of which are correct, raises no question for review in the supreme court. Carpenter *v.* Parker, 23 Iowa 450; Redman *v.* Malvin, 23 Iowa 296; Eddy *v.* Howard, 23 Iowa 175; Loomis *v.* Simpson, 13 Iowa 532; Davenport Gas Light, etc., Co. *v.* Davenport, 13 Iowa 229. Section 2789 of the code provides that "either party may take and file exceptions to the charge or instruction given, or to the refusal to give any instructions offered, within three days after the verdict, and may include the same in a motion for a new trial, but in either case the exceptions shall specify the part of the charge or instructions objected to (Ludwig *v.* Blackshere, 102 Iowa 366, 71 N. W. 356; Byford *v.* Girton, 90 Iowa 661, 57 N. W. 588; Patterson *v.* Chicago, etc., R. Co., 70 Iowa 593, 33 N. W. 228; Miller *v.* Gardner, 49 Iowa 234; Hale *v.* Gibbs, 43 Iowa 380), and the ground of the objection (see *infra*, IX, K, 5). An exception to instructions after verdict, which specifies them by number, is sufficiently definite as to the part objected to. Miller *v.* Gardner, *supra*.

In Ohio, the amendment of section 5298 of the Revised Statutes, providing for a general exception to the charge of the court to a jury, does not apply to pending actions. Cincinnati *v.* Anderson, 19 Ohio Cir. Ct. 603, 10 Ohio Cir. Dec. 523.

[IX, K, 4, b, (I)]

tions.[50a] A general exception is bad unless the whole charge is wrong.[51] It is insufficient if any one of such propositions is proper,[52] but will suffice if the charge contains

Distinction between oral and written charges.— While a general exception to a charge containing two or more propositions will not be considered on appeal, if the charge is in writing, a more liberal rule will be applied if the charge is oral, and the instructions specially mentioned in the exception will be reviewed. Lichty *v.* Tannatt, 11 Wash. 37, 39 Pac. 260.

Distinction between general charge and requests.— In California, a general exception, although sufficient as to instructions given at the request of the other party, is not so as to those given by the court of its own motion. Williams *v.* Casebeer, 126 Cal. 77, 58 Pac. 380; Cavallaro *v.* Texas, etc., R. Co., 110 Cal. 348, 42 Pac. 918, 52 Am. St. Rep. 94; Sukeforth *v.* Lord, 87 Cal. 399, 25 Pac. 497, (1890) 23 Pac. 296; Rider *v.* Edgar, 54 Cal. 127; Robinson *v.* Western Pac. R. Co., 48 Cal. 409; McCreery *v.* Everding, 44 Cal. 246; Shea *v.* Potrero, etc., R. Co., 44 Cal. 414; Waldteufel *v.* Pacific Vineyard Co., 6 Cal. App. 624, 92 Pac. 747; Miller *v.* Fireman's Fund Ins. Co., 6 Cal. App. 395, 92 Pac. 332.

Discretion of court.— It has been held that a rule of court providing that no general exception to the whole charge shall be allowed may be enforced or relaxed in the discretion of the court below. Collins *v.* Leafey, 124 Pa. St. 203, 16 Atl. 765. Thus, where a general exception has been sealed to the entire charge, bringing it regularly before the supreme court for construction, and afterward the parts excepted to are separately and specifically assigned as error, there is a substantial conformity with the rules of this court relating to assignments of error. Collins *v.* Leafey, *supra*; Mosgrove *v.* Golden, 101 Pa. St. 605. So where it appears that certain exceptions formally taken to instructions, and signed by the judge, have been mislaid, it is proper to allow a general exception to the entire charge. Collins *v.* Leafey, *supra*. But see Eldred *v.* Oconto Co., 33 Wis. 133, holding that the rule that an exception to instructions, to be of any avail in this court, must be specific, calling the attention of the court below to the particular error claimed to exist, is established mainly for the protection of the prevailing party, and is in furtherance of justice, and cannot be abrogated by the practice of any trial court.

The following exceptions have been held too general to require consideration in the appellate court: That a charge to the jury was calculated to produce a certain result (Gable *v.* Rauch, 50 S. C. 95, 27 S. E. 555); that it fails to submit the real issue (Thomas *v.* Parker, 69 Ga. 283); that it was argumentative (Goldstein *v.* Smiley, 168 Ill. 438, 48 N. E. 203; Owen *v.* Brown, 70 Vt. 521, 41 Atl. 1025), misstated the testimony (Keystone Lumber, etc., Mfg. Co. *v.* Dole, 43 Mich. 370, 5 N. W. 412), or was misleading (Gum *v.* Murray, 6 Mont. 10, 9 Pac. 447; Alt *v.* Chicago, etc., R. Co., 5 S. D. 20, 57 N. W. 1126); or that it improperly assumed facts (Emmons *v.* Alvord, 177 Mass. 466, 59 N. E. 126); or expressed an opinion on the facts (Walters *v.* Laurens Cotton Mills, 53 S. C. 155, 31 S. E. 1; Hayes *v.* Sease, 51 S. C. 534, 29 S. E. 259; Carpenter *v.* American Acc. Co., 46 S. C. 541, 24 S. E. 500; Greene *v.* Duncan, 37 S. C. 239, 15 S. E. 956; Strohn *v.* Detroit, etc., R. Co., 23 Wis. 126, 99 Am. Dec. 114).

50a. Fones *v.* Phillips, 30 Ark. 17, 43 Am. Rep. 264.

51. *Arkansas.*— Fones *v.* Phillips, 39 Ark. 17, 43 Am. Rep. 264, holding that if the record shows a general objection to a particular instruction, the objection must prevail, if any material part of the instruction is bad, unless it is divisible into wholly disconnected parts.

Colorado.— Schollay *v.* Moffitt-West Drug Co., 17 Colo. App. 126, 67 Pac. 182.

Georgia.— Boswell *v.* Gillen, 131 Ga. 310, 62 S. E. 187; Thompson *v.* Feagin, 60 Ga. 82.

Indiana.— Sipe *v.* Sipe, 14 Ind. 477.

Iowa.— Eddy *v.* Howard, 23 Iowa 175.

Kansas.— Wheeler *v.* Joy, 15 Kan. 389.

Nebraska.— Omaha *v.* Richards, 49 Nebr. 244, 68 N. W. 528.

New York.— Haggart *v.* Morgan, 5 N. Y. 422, 55 Am. Dec. 350.

Ohio.— Strader *v.* Marietta, etc., R. Co., 2 Cinc. Super. Ct. 268 [*reversed* on other grounds in 29 Ohio St. 448].

Oregon.— Langford *v.* Jones, 18 Oreg. 307, 22 Pac. 1064.

Utah.— Farnsworth *v.* Union Pac. Coal Co., 32 Utah 112, 89 Pac. 74; Haun *v.* Rio Grande Western R. Co., 22 Utah 346, 62 Pac. 908; Wall *v.* Niagara Min., etc., Co., 20 Utah 474, 59 Pac. 399; Scott *v.* Utah Consol. Min., etc., Co., 18 Utah 486, 56 Pac. 305.

Washington.— Maling *v.* Crummey, 5 Wash. 222, 31 Pac. 600.

See 46 Cent. Dig. tit. "Trial," § 694.

For example, where the whole charge proceeds on a false theory, and there is no reason to suppose that the error was inadvertent, a general exception is sufficient. Snyder *v.* Viola Min., etc., Co., 3 Ida. 28, 26 Pac. 127. So, where an instruction deals solely with the question of the measure and elements of damage, and any error in the instruction, in view of its phraseology, will render it erroneous as a whole, an objection and exception to the giving of it as a whole is sufficiently particular to cover any error therein. Denver, etc., R. Co. *v.* Young, 30 Colo. 349, 70 Pac. 688.

52. *Alabama.*— Postal Tel. Cable Co. *v.* Hulsey, 132 Ala. 444, 31 So. 527; Syndicate Ins. Co. *v.* Catchings, 104 Ala. 176, 16 So. 46; Louisville, etc., R. Co. *v.* Hurt, 101 Ala. 34, 13 So. 130; Mobile, etc., R. Co. *v.* George, 94 Ala. 199, 10 So. 145; Adams *v.* State, 87

but a single proposition,[53] or asserts and explains but a single question or prin-

Ala. 89, 6 So. 270; Chapman *v.* Holding, 60 Ala. 522.

Arkansas.— Kansas City Southern R. Co. *v.* Belknap, 80 Ark. 587, 98 S. W. 366; Walnut Ridge Mercantile Co. *v.* Cohn, 79 Ark. 338, 96 S. W. 413; Dunnington *v.* Frick Co., 60 Ark. 250, 30 S. W. 212; Oxley Stave Co. *v.* Staggs, 59 Ark. 370, 27 S. W. 241.

Colorado.— Kansas Pac. R. Co. *v.* Ward, 4 Colo. 30; Adams Express Co. *v.* Aldridge, 20 Colo. App. 74, 77 Pac. 6; Big Hatchet Consol. Min. Co. *v.* Colvin, 19 Colo. App. 405, 75 Pac. 605; Schollay *v.* Moffitt-West Drug Co., 17 Colo. App. 126, 67 Pac. 182.

District of Columbia.— Birmingham *v.* Pettit, 21 D. C. 209; Mackey *v.* Baltimore, etc., R. Co., 19 D. C. 282 [*affirmed* in 157 U. S. 72, 15 S. Ct. 491, 39 L. ed. 624].

Florida.— Post *v.* Bird, 28 Fla. 1, 9 So. 888; Baker *v.* Chatfield, 23 Fla. 540, 2 So. 822.

Georgia.— Foote *v.* Kelley, 126 Ga. 799, 55 S. E. 1045; Collins *v.* Spence, 84 Ga. 503, 11 S. E. 502; Grace *v.* Martin, 83 Ga. 245, 9 S. E. 841; Verdery *v.* Savannah, etc., R. Co., 82 Ga. 675, 9 S. E. 1133.

Illinois.— Hayward *v.* Catton, 1 Ill. App. 577.

Indiana.— Inland Steel Co. *v.* Smith, 168 Ind. 245, 80 N. E. 538 [*affirming* 39 Ind. App. 636, 75 N. E. 852]; State *v.* Ray, 146 Ind. 500, 45 N. E. 693; State *v.* Gregory, 132 Ind. 387, 31 N. E. 952; Elliott *v.* Woodward, 18 Ind. 183; Garrigus *v.* Burnett, 9 Ind. 528.

Indian Territory.— Hall *v.* Needles, 1 Indian Terr. 146, 38 S. W. 671.

Iowa.— Rowen *v.* Sommers, 101 Iowa 734, 66 N. W. 897; Leach *v.* Hill, 97 Iowa 81, 66 N. W. 69; Hallenbeck *v.* Garst, 96 Iowa 509, 65 N. W. 417.

Kansas.— Standard L., etc., Ins. Co. *v.* Davis, 59 Kan. 521, 53 Pac. 856; Crosby *v.* Wilson, 53 Kan. 565, 36 Pac. 985; Fleming *v.* Latham, 48 Kan. 773, 30 Pac. 166; Kansas Pac. R. Co. *v.* Nichols, 9 Kan. 235, 12 Am. Rep. 494.

Maine.— State *v.* Flaherty, (1886) 5 Atl. 563; Webber *v.* Dunn, 71 Me. 331; Crosby *v.* Maine Cent. R. Co., 69 Me. 418.

Michigan.— Prescott *v.* Patterson, 49 Mich. 622, 14 N. W. 571; Wheeler, etc., Mfg. Co. *v.* Walker, 41 Mich. 239, 1 N. W. 1035; Tupper *v.* Kilduff, 26 Mich. 394; Danielson *v.* Dyckman, 26 Mich. 169.

Minnesota.— Main *v.* Oien, 47 Minn. 89, 49 N. W. 523; Russell *v.* St. Paul, etc., R. Co., 33 Minn. 210, 22 N. W. 379; Ferson *v.* Wilcox, 19 Minn. 449.

Montana.— Simonton *v.* Kelly, 1 Mont. 363.

Nebraska.— Mattern *v.* McCarthy, 73 Nebr. 228, 102 N. W. 468; Green *v.* Tierney, 62 Nebr. 561, 87 N. W. 331; Redman *v.* Voss, 46 Nebr. 512, 64 N. W. 1094.

New York.— Brozek *v.* Steinway R. Co., 161 N. Y. 63, 55 N. E. 395; Wells *v.* Higgins, 132 N. Y. 459, 30 N. E. 861 [*affirming* 2 Silv. Sup. 298, 5 N. Y. Suppl. 895]; Ensign *v.* Hooker, 6 N. Y. App. Div. 425, 39 N. Y. Suppl. 543; O'Donnell *v.* New York, etc., R. Co., 8 Daly 409 [*affirmed* in 77 N. Y. 625].

Ohio.— Shaffer *v.* Cincinnati, etc., R. Co., 14 Ohio Cir. Ct. 488, 8 Ohio Cir. Dec. 66.

Oklahoma.— Glaser *v.* Glaser, 13 Okla. 389, 74 Pac. 944.

Oregon.— McAlister *v.* Long, 33 Oreg. 368, 54 Pac. 194; Nickum *v.* Gaston, 24 Oreg. 380, 33 Pac. 671, 35 Pac. 31.

Utah.— Pennington *v.* Redman Van, etc., Co., 34 Utah 223, 97 Pac. 115; Beaman *v.* Martha Washington Min. Co., 23 Utah 139, 63 Pac. 631; Lowe *v.* Salt Lake City, 13 Utah 91, 44 Pac. 1050, 57 Am. St. Rep. 708; Scoville *v.* Salt Lake City, 11 Utah 60, 39 Pac. 481.

Vermont.— Luce *v.* Hassam, 76 Vt. 450, 58 Atl. 725; Cutler *v.* Skeels, 69 Vt. 154, 37 Atl. 228; Jones *v.* Ellis, 68 Vt. 544, 35 Atl. 488; Morrill *v.* Palmer, 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411; Rowell *v.* Fuller, 59 Vt. 688, 10 Atl. 853.

Washington.— Rush *v.* Spokane Falls, etc., R. Co., 23 Wash. 501, 63 Pac. 500; Maling *v.* Crummey, 5 Wash. 222, 31 Pac. 600.

Wisconsin.— Kersten *v.* Weichman, 135 Wis. 1, 114 N. W. 499; Richardson *v.* Babcock, 119 Wis. 141, 96 N. W. 554; Tebo *v.* Augusta, 90 Wis. 405, 63 N. W. 1045; Corcoran *v.* Harran, 55 Wis. 120, 12 N. W. 468; Nisbet *v.* Gill, 38 Wis. 657; Musgat *v.* Wybro, 33 Wis. 515; Morse *v.* Gilman, 18 Wis. 373.

United States.— Holloway *v.* Dunham, 170 U. S. 615, 18 S. Ct. 784, 42 L. ed. 1165; Union Pac. R. Co. *v.* Callaghan, 161 U. S. 91, 16 S. Ct. 493, 40 L. ed. 628; Newport News, etc., Co. *v.* Pace, 158 U. S. 36, 15 S. Ct. 743, 39 L. ed. 887; Hickory *v.* U. S., 151 U. S. 303, 14 S. Ct. 334, 38 L. ed. 170; Mobile, etc., R. Co. *v.* Jurey, 111 U. S. 584, 4 S. Ct. 566, 28 L. ed. 527; Cooper *v.* Schlesinger, 111 U. S. 148, 4 S. Ct. 360, 28 L. ed. 382; Beaver *v.* Taylor, 93 U. S. 46, 23 L. ed. 797; Lincoln *v.* Claflin, 7 Wall. 132, 19 L. ed. 106; Union Pac. R. Co. *v.* Thomas, 152 Fed. 365, 81 C. C. A. 491; Lindblom *v.* Fallett, 145 Fed. 805, 76 C. C. A. 369; Kansas City Southern R. Co. *v.* Prunty, 133 Fed. 13, 66 C. C. A. 163; Erie R. Co. *v.* Littell, 128 Fed. 546, 63 C. C. A. 44; Cunningham *v.* Underwood, 116 Fed. 803, 53 C. C. A. 99; Hindman *v.* Louisville First Nat. Bank, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108; Vider *v.* O'Brien, 62 Fed. 326, 10 C. C. A. 385; Walker *v.* Windsor Nat. Bank, 56 Fed. 76, 5 C. C. A. 421.

See 46 Cent. Dig. tit. "Trial," § 694.

53. *Colorado.*— Schollay *v.* Moffitt-West Drug Co., 17 Colo. App. 126, 67 Pac. 182.

New Jersey.— Packard *v.* Bergen Neck R. Co., 54 N. J. L. 553, 25 Atl. 506; Potts *v.* Clarke, 20 N. J. L. 536.

New York.— Requa *v.* Holmes, 16 N. Y. 193; Green *v.* Hudson River R. Co., 32 Barb. 25 [*reversed* on other grounds in 2 Abb. Pr. 277, 2 Keyes 294]; Robinson *v.* New York, etc., R. Co., 27 Barb. 512; Gilroy *v.* Loftus, 22 Misc. 105, 48 N. Y. Suppl. 532.

ciple.[54] By the weight of authority an exception "to the charge as given," [55] and "to each and every part thereof," [56] raises but a single exception to the entire charge, and will not be considered, if any portion of the charge is correct.[57] Similarly, an exception to instructions, merely referring thereto, or to paragraphs

North Carolina.— Witsell *v.* West Asheville, etc., R. Co., 120 N. C. 557, 27 S. E. 125.

Oregon.— Nickum *v.* Gaston, 24 Oreg. 380, 33 Pac. 671, 35 Pac. 31.

United States.— Hindman *v.* Louisville First Nat. Bank, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108; Felton *v.* Newport, 92 Fed. 470, 34 C. C. A. 470.

Compare Bernstein *v.* Humes, 78 Ala. 134, holding that where a charge consists of a single sentence, containing several connected and dependent clauses, a general exception to the entire clause is sufficient to reach error in any part.

For example, in an action to recover for the death of plaintiff's son, an exception to the portions of the general charge on the measure of damages as contrary to law is sufficiently specific to raise the question of the correctness of the charge on one element of damages, since all the elements together constitute the measure of damages, and, if one element was wrongly stated, the measure was a defective one. Wales *v.* Pacific Electric Motor Co., 130 Cal. 521, 62 Pac. 932, 1120.

54. Potts *v.* Clarke, 20 N. J. L. 536; Robinson *v.* New York, etc., R. Co., 27 Barb. (N. Y.) 512.

55. State *v.* Melton, 120 N. C. 591, 26 S. E. 933; Witsell *v.* West Asheville, etc., R. Co., 120 N. C. 557, 27 S. E. 125; Burnett *v.* Wilmington, etc., R. Co., 120 N. C. 517, 26 S. E. 819; Antietam Paper Co. *v.* Chronicle Pub. Co., 115 N. C. 147, 20 S. E. 367; McKinnon *v.* Morrison, 104 N. C. 354, 10 S. E. 513.

56. *California.*— Cavallaro *v.* Texas, etc., R. Co., 110 Cal. 348, 42 Pac. 918, 52 Am. St. Rep. 94.

Colorado.— Kansas Pac. R. Co. *v.* Ward, 4 Colo. 30.

Dakota.— Kennedy *v.* Falde, 4 Dak. 319, 29 N. W. 667.

Michigan.— Edgell *v.* Francis, 86 Mich. 232, 48 N. W. 1095; McAllister *v.* Engle, 52 Mich. 56, 17 N. W. 694; Mandigo *v.* Mandigo, 26 Mich. 349.

Minnesota.— Steffenson *v.* Chicago, etc., R. Co., 51 Minn. 531, 53 N. W. 800; Shull *v.* Raymond, 23 Minn. 66; Foster *v.* Berkey, 8 Minn. 351. But where several separate and distinct "requests," each containing but a single proposition of law, are given, an exception "to each and all of them" is sufficient. Van Doren *v.* Wright, 65 Minn. 80, 67 N. W. 668, 68 N. W. 22.

Montana.— Woods *v.* Berry, 7 Mont. 195, 14 Pac. 758.

New York.— Walsh *v.* Kelly, 40 N. Y. 556; Caldwell *v.* Murphy, 11 N. Y. 416; Jones *v.* Osgood, 6 N. Y. 233; Dows *v.* Rush, 28 Barb. 157; Rheinfeldt *v.* Dahlman, 19 Misc. 162, 43 N. Y. Suppl. 281; Ebenreiter *v.* Dahlman, 19 Misc. 9, 42 N. Y. Suppl. 867.

South Dakota.— Banbury *v.* Sherin, 4 S. D. 88, 55 N. W. 723.

Utah.— Scoville *v.* Salt Lake City, 11 Utah 60, 39 Pac. 481.

Wisconsin.— Dean *v.* Chicago, etc., R. Co., 43 Wis. 305; Yates *v.* Bachley, 33 Wis. 185; Eldred *v.* Oconto Co., 33 Wis. 133.

United States.— Block *v.* Darling, 140 U. S. 234, 11 S. Ct. 832, 35 L. ed. 476.

A single exception to "each and all" of the instructions does not point out the specific errors complained of, with any greater particularity than would one exception generally to the whole charge. Eldred *v.* Oconto Co., 33 Wis. 133.

Where a charge to the jury covers several printed pages and contains numerous unobjectionable paragraphs, an exception "to said charge and to each and every part thereof" is too general to present for review specific errors therein. Luedtke *v.* Jeffery, 89 Wis. 136, 61 N. W. 292.

A contrary rule prevails in some of the courts of last resort. Dady *v.* Condit, 188 Ill. 234, 58 N. E. 900; Dunham *v.* Holloway, 3 Okla. 244, 41 Pac. 149 [*affirmed* in 170 U. S. 615, 18 S. Ct. 784, 42 L. ed. 1165]. Thus under Iowa Code (1873), § 2787, an exception to instructions reciting "that to the giving of each and every of said instructions the plaintiff at the time duly excepted" is sufficient. Ellis *v.* Leonard, 107 Iowa 487, 78 N. W. 246; Eikenberry *v.* Edwards, 67 Iowa 14, 21 N. W. 570. In Kansas, where the exception is taken to "the giving of [such] instructions, and to each and every portion thereof," the supreme court will presume that exceptions were duly taken to each and every portion of the charge separately. Lorie *v.* Adams, 51 Kan. 692, 33 Pac. 599; Bard *v.* Elston, 31 Kan. 274, 1 Pac. 565; Kansas Pac. R. Co. *v.* Nichols, 9 Kan. 235, 12 Am. Rep. 494.

57. *Michigan.*— Edgell *v.* Francis, 86 Mich. 232, 48 N. W. 1095; Goodsell *v.* Seeley, 46 Mich. 623, 10 N. W. 44, 41 Am. Rep. 183; Danielson *v.* Dyckman, 26 Mich. 169.

New York.— Walsh *v.* Kelly, 40 N. Y. 556; Dows *v.* Rush, 28 Barb. 157.

Utah.— Scoville *v.* Salt Lake City, 11 Utah 60, 39 Pac. 481.

Washington.—Maling *v.* Crummey, 5 Wash. 222, 31 Pac. 600.

Wisconsin.— Hamlin *v.* Haight, 32 Wis. 237.

Where the general charge of the court is divided into sections, an exception thereto that "the defendant then and there severally and separately excepted to each and every section, and each and every paragraph of said charge, as given," is unavailing, unless the charge was erroneous in all of its propositions. Syndicate Ins. Co. *v.* Catchings, 104 Ala. 176, 16 So. 46.

thereof, by number, without specifying the particular matter deemed objectionable, is ordinarily held to be too general,[58] and will not be considered if any portion of the instruction or paragraph objected to is correct.[59]

(II) *To Failure or Refusal to Instruct.* It is the duty of counsel to specify the particular points in the charge,[60] or in the omission or refusal to charge,[61] to which they take exception, and a general exception to a refusal to give several instructions requested collectively will not be considered on appeal,[62]

58. *Alabama.*—Kilpatrick *v.* Pickens County, 66 Ala. 422.

Indiana.—Kelly *v.* John, 13 Ind. App. 579, 41 N. E. 1069.

Montana.—Woods *v.* Berry, 7 Mont. 195, 14 Pac. 758.

South Carolina.—Hampton *v.* Ray, 52 S. C. 74, 29 S. E. 537.

Utah.—Beaman *v.* Martha Washington Min. Co., 23 Utah 139, 63 Pac. 631; Scott *v.* Utah Consol. Min., etc., Co., 18 Utah 486, 56 Pac. 305.

A contrary rule obtains in some jurisdictions. Aultman *v.* Martin, 49 Nebr. 103, 68 N. W. 340; Omaha *v.* Richards, 49 Nebr. 244, 68 N. W. 528 [*overruling* Walker *v.* Turner, 27 Nebr. 103, 42 N. W. 918, and Brooks *v.* Dutcher, 22 Nebr. 644, 36 N. W. 128, in so far as they state a contrary doctrine]; Coley *v.* Statesville, 121 N. C. 301, 28 S. E. 482 (where it is said that the requests to charge being "separately stated and numbered," an exception for giving them is equally specific, and not broadside); Witsell *v.* West Asheville, etc., R. Co., 120 N. C. 557, 27 S. E. 125. But see Blue Valley Lumber Co. *v.* Smith, 48 Nebr. 293, 67 N. W. 159. In Colorado, where the instructions are given in writing, and separately paragraphed and numbered, an exception to the giving of a certain numbered instruction is sufficient. Big Hatchet Consol. Min. Co. *v.* Colvin, 19 Colo. App. 405, 75 Pac. 605. In Ritchey *v.* People, 23 Colo. 314, 47 Pac. 272, 384, it was held that such exceptions to instructions given in writing, and which were separately paragraphed and numbered, were sufficient. The court, however, drew a distinction between the case of written instructions separately paragraphed and numbered and the case of one general charge delivered orally, citing Miller *v.* People, 22 Colo. 530, 45 Pac. 408; Edwards *v.* Smith, 16 Colo. 529, 27 Pac. 809; Keith *v.* Wells, 14 Colo. 321, 23 Pac. 991, in which such exceptions to a charge which was oral and general were adjudged insufficient. See also Willard *v.* Williams, 10 Colo. App. 140, 50 Pac. 207. In Denver *v.* Hyatt, 28 Colo. 129, 63 Pac. 403, it is said that trial courts should require counsel to specify alleged errors in instructions given, when exceptions are taken; but where this is not required, and the instructions are paragraphed, a mere exception to each instruction separately is sufficient, if allowed in that form. In Iowa, an exception to instructions between certain numbers given, and to each of them, is sufficiently specific, when the objection is made at the time the instructions are given. Mann *v.* Sioux City, etc., R. Co., 46 Iowa 637. In Washington, under the act of March 8, 1893 (Laws (1893), p. 112), § 4, exceptions to a charge may be taken by specifying, by numbers or paragraphs or otherwise, the parts of the charge excepted to. McDonough *v.* Great Northern R. Co., 15 Wash. 244, 46 Pac. 334.

59. Kilpatrick *v.* Pickens County, 66 Ala. 422; Birmingham *v.* Rumsey, 63 Ala. 352; Inland Steel Co. *v.* Smith, 168 Ind. 245, 80 N. E. 538; Kelly *v.* John, 13 Ind. App. 579, 41 N. E. 1069; Rheiner *v.* Stillwater St. R., etc., Co., 31 Minn. 193, 17 N. W. 279; Whipple *v.* Preece, 24 Utah 364, 67 Pac. 1072; Haun *v.* Rio Grande Western R. Co., 22 Utah 346, 62 Pac. 908.

60. See *supra*, IX, K, 4, b, (I).

61. Wimbish *v.* Hamilton, 47 La. Ann. 246, 16 So. 856; Omaha *v.* McGavock, 47 Nebr. 313, 66 N. W. 415; Walsh *v.* Kelly, 40 N. Y. 556; Roe *v.* New York, 56 N. Y. Super. Ct. 298, 4 N. Y. Suppl. 298 (holding that when the court in its charge correctly refers to some parts of those requests to charge which it had refused, and had made it unnecessary to charge other parts by the way in which it described the legal liability of the party making the request, an exception without specifying any particular omission is too general to be considered); Luce *v.* Hassam, 76 Vt. 450, 58 Atl. 725.

It is due to a court that it be made aware of the specific ground of exception, to the end that it may correct error and avoid all grounds of misapprehension. Bishop *v.* Goshen, 120 N. Y. 337, 24 N. E. 720.

62. *Alabama.*—Andress *v.* Broughton, 21 Ala. 200, holding that where a bill of exceptions sets out several distinct refusals to charge, and concludes with words, "To which defendant excepted," the exception will be considered as applying only to the refusal contained in the paragraph immediately affected.

Illinois.—Razor *v.* Razor, 142 Ill. 375, 31 N. E. 678.

Indiana.—Baker *v.* McGinniss, 22 Ind. 257; Jolly *v.* Terre Haute Drawbridge Co., 9 Ind. 417.

Kansas.—Fleming *v.* Latham, 48 Kan. 773, 30 Pac. 166; Bailey *v.* Dodge, 28 Kan. 72; Hayes *v.* Farwell, 4 Kan. App. 387, 45 Pac. 910.

Nebraska.—Omaha *v.* McGavock, 47 Nebr. 313, 66 N. W. 415; Hedrick *v.* Strauss, 42 Nebr. 485, 60 N. W. 928.

New York.—Tousey *v.* Roberts, 114 N. Y. 312, 21 N. E. 399, 11 Am. St. Rep. 655; Rehberg *v.* New York, 99 N. Y. 652, 2 N. E. 11; Yale *v.* Curtiss, 71 Hun 436, 24 N. Y. Suppl. 981 [*reversed* in 151 N. Y. 598, 45 N. E. 1125].

if any one of the series is erroneous.[63] And the rule is the same where the exception is to the refusal of "each and all" of the instructions requested,[64] to certain numbered paragraphs of the charge requested,[65] to a refusal to give the instructions requested, "except so far as embraced in the general charge," [66] or to the modi-

South Carolina.— Jones *v.* Swearingen, 42 S. C. 58, 19 S. E. 947.

Vermont.— Goodwin *v.* Perkins, 39 Vt. 598.

Wisconsin.— Harrison *v.* Crocker, 39 Wis. 68, holding that on a single exception to a refusal to give two instructions asked by the appellant, this court can only consider whether both instructions, taken together, are a correct statement of the law.

United States.— Chateaugay Ore, etc., Co. *v.* Blake, 144 U. S. 476, 12 S. Ct. 731, 36 L. ed. 510; Anderson *v.* Avis, 62 Fed. 227, 10 C. C. A. 347.

A contrary rule prevails in some states. Thus in Maryland it is held that where prayers for instructions are presented at the same time, and form a series of consecutive propositions, the ruling of the court thereon is a single act, and one exception thereto is sufficient to embrace the whole. McCosker *v.* Banks, 84 Md. 292, 35 Atl. 935. In such a case, the appellate court will regard the refusal in the same light as if each question raised had been separately determined, and formed the subject of an independent exception. Planters' Bank *v.* Alexandria Bank, 10 Gill & J. (Md.) 346. So, under the Missouri code, a formula often used for saving the exceptions is "which instructions the court refused, to which refusal of the instructions thus prayed, the defendant, by his counsel, then and there excepted at the time." Whittlesey Pr. 482. Such an exception entitles the party to have each refused instruction considered in this court. Weber *v.* Kansas City Cable R. Co., 100 Mo. 194, 12 S. W. 804, 13 S. W. 587, 18 Am. St. Rep. 541, 7 L. R. A. 819. In Iowa, when instructions are asked and refused, and such refusal is excepted to at the time and noted on the margin of each instruction, a general exception presents a question for review upon each instruction so refused. Harvey *v.* Tama County, 53 Iowa 228, 5 N. W. 130; Williamson *v.* Chicago, etc., R. Co., 53 Iowa 126, 4 N. W. 870, 36 Am. Rep. 206; Davenport Gas Light, etc., Co. *v.* Davenport, 13 Iowa 229.

63. *Alabama.*— Pearson *v.* Adams, 129 Ala. 157, 29 So. 977; Milliken *v.* Maund, 110 Ala. 332, 20 So. 310; Nelson *v.* Warren, 93 Ala. 408, 8 So. 413; Adams *v.* State, 87 Ala. 89, 6 So. 270; Black *v.* Pratt Coal, etc., Co., 85 Ala. 504, 5 So. 89; Bedwell *v.* Bedwell, 77 Ala. 587; Stovall *v.* Fowler, 72 Ala. 77; Kilpatrick *v.* Pickens County, 66 Ala. 422; McGehee *v.* State, 52 Ala. 224.

Arkansas.— Young *v.* Stevenson, 75 Ark. 181, 86 S. W. 1000.

Colorado.— Kansas Pac. R. Co. *v.* Ward, 4 Colo. 30.

Indiana.— Rastetter *v.* Reynolds, 160 Ind. 133, 66 N. E. 612; Kluse *v.* Sparks, 10 Ind. App. 444, 36 N. E. 914, 37 N. E. 1047.

Indian Territory.— Hall *v.* Needles, 1 Indian Terr. 146, 38 S. W. 671.

Kansas.— Sumner *v.* Blair, 9 Kan. 521.

Minnesota.— McNamara *v.* Pengrilly, 64 Minn. 543, 67 N. W. 661; Webb *v.* Fisher, 57 Minn. 441, 59 N. W. 537; Ferson *v.* Wilcox, 19 Minn. 449.

Nebraska.— South Omaha *v.* Powell, 50 Nebr. 798, 70 N. W. 391; Omaha *v.* Richards, 49 Nebr. 244, 68 N. W. 528.

New York.— Patton *v.* Royal Baking Powder Co., 114 N. Y. 1, 20 N. E. 621; Willetts *v.* Sun Mut. Ins. Co., 45 N. Y. 45, 6 Am. Rep. 31; Magee *v.* Badger, 34 N. Y. 247, 90 Am. Dec. 691 [*affirming* 30 Barb. 246]; Haggart *v.* Morgan, 5 N. Y. 422, 55 Am. Dec. 350; Barker *v.* Cunard Steamship Co., 91 Hun 495, 36 N. Y. Suppl. 256 [*affirmed* in 157 N. Y. 693, 51 N. E. 1089]; Myers *v.* Dixon, 35 N. Y. Super. Ct. 390, 45 How. Pr. 48.

Ohio.— Hills *v.* Ludwig, 46 Ohio St. 373, 24 N. E. 596; Pittsburgh, etc., R. Co. *v.* Probst, 30 Ohio St. 104; Shaffer *v.* Cincinnati, etc., R. Co., 14 Ohio Cir. Ct. 488, 8 Ohio Cir. Dec. 66; Voelckel *v.* Banner Brewing Co., 9 Ohio Cir. Ct. 318, 6 Ohio Cir. Dec. 80.

Oregon.— Salomon *v.* Cress, 22 Oreg. 177, 29 Pac. 439; Murray *v.* Murray, 6 Oreg. 17.

Utah.— Marks *v.* Tompkins, 7 Utah 421, 27 Pac. 6.

Wisconsin.— Racine Basket Mfg. Co. *v.* Konst, 51 Wis. 156, 7 N. W. 254; Hamlin *v.* Haight, 32 Wis. 237.

United States.— Union Pac. R. Co. *v.* Callaghan, 161 U. S. 91, 16 S. Ct. 493, 40 L. ed. 628; Thiede *v.* Utah, 159 U. S. 510, 16 S. Ct. 62, 40 L. ed. 237; Bogk *v.* Gassert, 149 U. S. 17, 13 S. Ct. 738, 37 L. ed. 631; Union Ins. Co. *v.* Smith, 124 U. S. 405, 8 S. Ct. 534, 31 L. ed. 497; Moulor *v.* American L. Ins. Co., 111 U. S. 335, 4 S. Ct. 466, 28 L. ed. 447; Beaver *v.* Taylor, 93 U. S. 46, 23 L. ed. 797; Harvey *v.* Tyler, 2 Wall. 328, 17 L. ed. 871; Bean-Chamberlain Mfg. Co. *v.* Standard Spoke, etc., Co., 131 Fed. 215, 65 C. C. A. 201; Illinois Car, etc., Co. *v.* Linstroth Wagon Co., 112 Fed. 737, 50 C. C. A. 504; Felton *v.* Newport, 92 Fed. 470, 34 C. C. A. 470; Linehan R. Transfer Co. *v.* Morris, 87 Fed. 127, 30 C. C. A. 575; Waples-Platter Co. *v.* Turner, 83 Fed. 64, 27 C. C. A. 439; Pittsburgh, etc., R. Co. *v.* Thompson, 82 Fed. 720, 27 C. C. A. 333; New England Furniture, etc., Co. *v.* Catholicon Co., 79 Fed. 294, 24 C. C. A. 595.

See 46 Cent. Dig. tit. "Trial," § 696.

64. Cleveland, etc., R. Co. *v.* Zider, 61 Fed. 908, 10 C. C. A. 151.

65. Rosquist *v.* D. M. Gilmore Furniture Co., 50 Minn. 192, 52 N. W. 385; Holman *v.* Herscher, (Tex. 1891) 16 S. W. 984. *Contra*, Bell *v.* Washington Cedar Shingle Co., 8 Wash. 27, 35 Pac. 405.

66. Lane *v.* Minnesota State Agricultural Soc., 67 Minn. 65, 69 N. W. 463; Read *v.*

fication of the requests submitted.[67] Nor will the appellate court consider a general exception to a refusal to charge as requested, when the requests are numerous, and some are fully complied with, while others are in part, or are wholly disregarded.[68] But if all the requested instructions are proper and should have been given,[69] or if all but one are given,[70] a general exception is sufficient. And exceptions are sufficiently specific where it appears that each offer or request was separately made and passed upon, and each ruling excepted to.[71] Any

Nichols, 118 N. Y. 224, 23 N. E. 468, 7 L. R. A. 130; Ayrault *v.* Pacific Bank, 47 N. Y. 570, 7 Am. Rep. 489; Welcome *v.* Mitchell, 81 Wis. 566, 51 N. W. 1080, 29 Am. St. Rep. 913; Walker *v.* Windsor Nat. Bank, 56 Fed. 76, 5 C. C. A. 421.

An exception to such portions of a charge as are variant from the requests made by a party, not pointing out the variances, cannot be sustained. Beaver *v.* Taylor, 93 U. S. 46, 23 L. ed. 797. In Requa *v.* Rochester, 45 N. Y. 129, 6 Am. Rep. 52, ten propositions were submitted to the judge, who proceeded to charge the jury and substantially adopted some of the propositions. At the close of the charge, the counsel excepted to the charge in all the particulars specified in those written requests, "so far as the judge had not charged as requested"; this exception was held not to have pointed out in what the counsel conceives the court has erred, and gave no aid for the correction of any error into which the judge had fallen. In Chamberlain *v.* Pratt, 33 N. Y. 47, 52, defendant excepted to the general charge of the court so far as it differed from his requests. The court said: "This exception is not sufficient to raise any question for our consideration. It is not an exception to any point of the charge as given; nor to any refusal of the judge to charge as requested; but to the whole charge so far as it differed from the six propositions presented. But as the whole charge is not given, it is impossible to see wherein it did differ from such propositions." But in Stubbs *v.* Johnson, 127 Mass. 219, it was held that if defendant asks the judge to rule that, on all the evidence, plaintiff is not entitled to recover, and excepts to the rulings of the judge so far as not in accordance with the instruction asked, all the instructions given on this point are open to him on his exceptions.

67. Bishop *v.* St. Paul City R. Co., 48 Minn. 26, 50 N. W. 927 (holding that the exception should be sufficiently specific to direct the mind of the court to the fact of the change in the language of the requested instruction as given); Heath *v.* Glens Falls, etc., R. Co., 90 Hun (N. Y.) 560, 36 N. Y. Suppl. 22; Thompson *v.* Security Trust, etc., Co., 63 S. C. 290, 41 S. E. 464; Connecticut Mut. L. Ins. Co. *v.* Union Trust Co., 112 U. S. 250, 5 S. Ct. 119, 28 L. ed. 708.

68. *Michigan.*— Edgell *v.* Francis, 86 Mich. 232, 48 N. W. 1095; Danielson *v.* Dyckman, 26 Mich. 169.

Minnesota.— Delude *v.* St. Paul City R. Co., 55 Minn. 63, 56 N. W. 461; Carroll *v.* Williston, 44 Minn. 287, 46 N. W. 352.

New York.— Read *v.* Nichols, 118 N. Y. 224, 23 N. E. 468, 7 L. R. A. 130; Newall *v.* Bartlett, 114 N. Y. 399, 21 N. E. 990; Smedis *v.* Brooklyn, etc., R. Co., 88 N. Y. 13; Piper *v.* New York Cent., etc., R. Co., 89 Hun 75, 34 N. Y. Suppl. 1072 [*reversed* on other grounds in 156 N. Y. 224, 50 N. E. 851, 66 Am. St. Rep. 559, 41 L. R. A. 724]; Dodge *v.* Alger, 53 N. Y. Super. Ct. 107.

Vermont.— White *v.* Lumiere North American Co., 79 Vt. 206, 64 Atl. 1121, 6 L. R. A. N. S. 807; Luce *v.* Hassam, 76 Vt. 450, 58 Atl. 725.

United States.— Jones *v.* East Tennessee, etc., R. Co., 157 U. S. 682, 15 S. Ct. 719, 39 L. ed. 856.

See 46 Cent. Dig. tit. "Trial," § 696.

The exception must be specific and point out the particular request to which it is intended to apply. Smedis *v.* Brooklyn, etc., R. Co., 88 N. Y. 13.

69. Ocheltree *v.* McClung, 7 W. Va. 232.

70. Sellers *v.* Hancock, 42 S. C. 40, 20 S. E. 13.

71. Kansas Pac. R. Co. *v.* Ward, 4 Colo. 30; Dunckel *v.* Wiles, 11 N. Y. 420; O'Donnell *v.* New York, etc., R. Co., 8 Daly (N. Y.) 409 [*affirmed* in 77 N. Y. 625]. See also Consolidated Traction Co. *v.* Chenowith, 61 N. J. L. 554, 35 Atl. 1067.

It is no objection to the exception that it is all contained in one sentence, so long as it shows distinctly that each offer or request was separately made and ruled upon, and each ruling excepted to. Dunckel *v.* Wiles, 11 N. Y. 420.

Where there was but a single request, an exception to the refusal of the judge to charge as requested is sufficiently pointed. Booth *v.* Swezey, 8 N. Y. 276; Farnsworth *v.* Union Pac. Coal Co., 32 Utah 112, 89 Pac. 74.

Illustrations.— When the bill of exceptions states that "the defendants requested the court to give each of the following charges in writing," setting them out, "but the court refused to give either of said charges, and to such refusal the defendants excepted," the exception brings up for revision the refusal of each one of the charges, as if a separate exception had been reserved to each. Lehman *v.* Bibb, 55 Ala. 411. So where five distinct requests to charge, separately numbered, were submitted to the court, who rules upon, denying or modifying, each separately, and counsel "excepted to said refusals and modifications of said instructions, as given," it was held that such exception was sufficiently specific, and would be understood as apply-

reason which the court may have stated for refusing to give the instructions is immaterial, and no exception to this reason stated is required.[72]

5. Statement of Grounds of Objection. In some jurisdictions, an exception to instructions must specify the ground of objection.[73] But when an erroneous proposition of law is asserted, as applied to the case on trial, it is sufficient to except generally, without stating the ground of objection.[74] In others it is held that while an exception to an instruction must point out the part of the instruction that is bad, it need not give any reason why it is bad,[75] that being a matter of argument.[76] The rule is sometimes stated as follows: When the charge, without asserting an erroneous proposition of law, as applied to the case, is ambiguous or deficient in fullness, or does not go far enough, or is not sufficiently explicit, the party excepting should call the attention of the court to the particular grounds upon which he objects, so that it may be corrected.[77]

6. Scope and Questions Raised — a. In General. A general exception challenges merely the correctness of the legal proposition which the charge affirms,[78] and cannot, it has been said, be construed as extending beyond the matter which immediately precedes it.[79] Such an exception to a charge does not bring up

ing to the ruling on each proposition. Schurmeier *v.* Johnson, 10 Minn. 319.

72. Chessman *v.* Hale, 31 Mont. 577, 79 Pac. 254, 68 L. R. A. 410.

73. Aurora *v.* Cobb, 21 Ind. 492; Geary *v.* People, 22 Mich. 220; Douyette *v.* Nashua St. R. Co., 69 N. H. 625, 44 Atl. 104; Behrens *v.* Behrens, 47 Ohio St. 323, 25 N. E. 209, 21 Am. St. Rep. 820; Pittsburgh, etc., R. Co. *v.* Probst, 30 Ohio St. 104.

In Iowa, under Code (1873), § 2787, the grounds for exceptions to instructions need not be stated, where the exceptions are taken at the time the instructions are given. Hawes *v.* Burlington, etc., R. Co., 64 Iowa 315, 20 N. W. 717; Williamson *v.* Chicago, etc., R. Co., 53 Iowa 126, 4 N. W. 870, 36 Am. Rep. 206; Williams *v.* Barrett, 52 Iowa 637, 3 N. W. 690; Johnson *v.* Chicago, etc., R. Co., 51 Iowa 25, 50 N. W. 543; Price *v.* Burlington, etc., R. Co., 42 Iowa 16. But exceptions to instructions not taken when they are given must specify the ground of objection. Ludwig *v.* Blackshere, 102 Iowa 366, 71 N. W. 356; Brantz *v.* Marcus, 73 Iowa 64, 35 N. W. 115; Patterson *v.* Chicago, etc., R. Co., 70 Iowa 593, 33 N. W. 228; Miller *v.* Gardner, 49 Iowa 234; Hale *v.* Gibbs, 43 Iowa 380; Price *v.* Burlington, etc., R. Co., 42 Iowa 16. This requirement is not complied with by a statement that the instructions "are not applicable, and are not the law applicable to this case" (Miller *v.* Gardner, *supra*), or that the court "misdirected the jury in a matter of law" (Benson *v.* Lundy, 52 Iowa 265, 3 N. W. 149). But an exception to an instruction, on the ground that it assumes facts not proved in the case, need not point out specifically wherein it assumes such fact. Davis *v.* Strohm, 17 Iowa 421.

74. Nickum *v.* Gaston, 24 Oreg. 380, 33 Pac. 671, 35 Pac. 31.

75. Denver, etc., R. Co. *v.* Young, 30 Colo. 349, 70 Pac. 688; Bradbury *v.* Alden, 13 Colo. App. 208, 57 Pac. 490; Woods *v.* Berry, 7 Mont. 195, 14 Pac. 758; Requa *v.* Holmes, 16 N. Y. 193; Davenport *v.* Prentice, 126 N. Y. App. Div. 451, 110 N. Y. Suppl. 1056; Goldman *v.* Abrahams, 9 Daly (N. Y.) 223; Freund *v.* Paten, 10 Abb. N. Cas. (N. Y.) 311; Farnsworth *v.* Union Pac. Coal Co., 32 Utah 112, 89 Pac. 74.

In New Jersey, an exception to a single legal proposition in a charge need not point out the grounds on which it is taken unless the trial judge requires it. Smith *v.* Atlantic City R. Co., 74 N. J. L. 452, 65 Atl. 1000; Jansen *v.* Goerke Co., 74 N. J. L. 270, 65 Atl. 856.

In Washington, under Acts (1893), p. 112, providing that exceptions to instructions may be taken by stating that the party excepts, and specifying the instruction excepted to, it is not necessary to specify the grounds. Sexton *v.* Spokane County School Dist. No. 34, 9 Wash. 5, 36 Pac. 1052.

76. Denver, etc., R. Co. *v.* Young, 30 Colo. 349, 70 Pac. 688; Farnsworth *v.* Union Pac. Coal Co., 32 Utah 112, 89 Pac. 74.

77. Haines *v.* Republic F. Ins. Co., 59 N. H. 199; Nickum *v.* Gaston, 24 Oreg. 380, 33 Pac. 671, 35 Pac. 31.

78. Topeka *v.* Heitman, 47 Kan. 739, 28 Pac. 1096; Hentig *v.* Kansas L. & T. Co., 28 Kan. 617; Gilroy *v.* Loftus, 22 Misc. (N. Y.) 105, 48 N. Y. Suppl. 532; Camden, etc., R., etc., Co. *v.* Belknap, 21 Wend. (N. Y.) 354, holding that all that will be done on such an exception is, that the general bearing of the charge will be examined, and if that is not plainly injurious, or if in any legal mode of putting the matter the verdict must necessarily be the same, a new trial will not be granted, although the charge may in some particulars be erroneous.

A bare complaint that "the court erred" in giving a particular instruction brings nothing into question except the soundness, in the abstract, of the proposition or propositions therein announced. Central of Georgia R. Co. *v.* Bond, 111 Ga. 13, 36 S. E. 299.

79. Andress *v.* Broughton, 21 Ala. 200; Leggett *v.* Perkins, 2 N. Y. 297; Labron *v.* Woram, 1 Hill (N. Y.) 91.

any particular remark made by the judge,[80] or any omission in such charge,[81] unless the attention of the judge was directed to the point at the time.[82] In short, a general exception will be insufficient where the special point of the objection insisted upon is such that if it had been specifically pointed out at the trial it might have been obviated,[83] or where the general objection was calculated to divert the attention from the special objection on which the party intended to rely.[84] But where there is some substantial error which misled the jury,[85] or the whole charge is bad,[86] or where a single proposition is charged incorrectly as a statement of law,[87] the noting of a general exception operates to present the error to the court of review; and the excepting party is under no duty to request that the rule, as formulated correctly, be charged,[88] unless the error is the result of a mere inadvertence, and so would have been corrected had the court's attention been called to it.[89] Where the ground of exception is expressly stated, none other than the stated objection can be considered.[90]

b. Applications of Rule. In applying these principles, a general exception is held to be insufficient to raise an objection to the propriety of the charge,[91] or as to the time or circumstances of giving the same; [92] to the use of objectionable language; [93] to merely formal defects; [94] that the court misstated the

80. Foster *v.* Berkey, 8 Minn. 351; Castner *v.* The Dr. Franklin, 1 Minn. 73; Camden, etc., R., etc., Co. *v.* Belknap, 21 Wend. (N. Y.) 354.

81. *Iowa.*—Abbott *v.* Striblen, 6 Iowa 191.
Massachusetts.—Armour *v.* Pecker, 123 Mass. 143.
Minnesota.— Dallemand *v.* Janney, 51 Minn. 514, 53 N. W. 803; Foster *v.* Berkey, 8 Minn. 351; Castner *v.* The Dr. Franklin, 1 Minn. 73.
New York.— Camden, etc., R., etc., Co. *v.* Belknap, 21 Wend. 354.
Vermont.— Morrisette *v.* Canadian Pac. R. Co., 76 Vt. 267, 56 Atl. 1102.
See 46 Cent. Dig. tit. "Trial," § 691.
Failure to define terms.—A general objection to an instruction is not sufficient to raise the objection that the court should have defined a term used. Mt. Nebo Anthracite Coal Co. *v.* Williamson, 73 Ark. 530, 84 S. W. 779; St. Louis, etc., R. Co. *v.* Barnett, 65 Ark. 255, 45 S. W. 550.

82. Foster *v.* Berkey, 8 Minn. 351; Castner *v.* The Dr. Franklin, 1 Minn. 73; Camden, etc., R., etc., Co. *v.* Belknap, 21 Wend. (N. Y.) 354.

83. Brick *v.* Bosworth, 162 Mass. 334, 39 N. E. 36; Foster *v.* Berkey, 8 Minn. 351; Matthews *v.* Clough, 70 N. H. 600, 49 Atl. 637; Haines *v.* Republic F. Ins. Co., 59 N. H. 199; McDermott *v.* Severe, 202 U. S. 600, 26 S. Ct. 709, 50 L. ed. 1162 [*affirming* 25 App. Cas. (D. C.) 276].

84. Matthews *v.* Clough, 70 N. H. 600, 49 Atl. 637.

85. Brick *v.* Bosworth, 162 Mass. 334, 39 N. E. 36.

86. See *supra*, IX, K, 4, b.

87. See *supra*, IX, K, 4, b, (I).

88. Gilroy *v.* Loftus, 22 Misc. (N. Y.) 105, 48 N. Y. Suppl. 532.

89. Gilroy *v.* Loftus, 22 Misc. (N. Y.) 105, 48 N. Y. Suppl. 532.

90. *Alabama.*—Stein *v.* Ashby, 30 Ala. 363.
Arkansas.— St. Louis, etc., R. Co. *v.* Richardson, 87 Ark. 101, 112 S. W. 212.
Iowa.— Patterson *v.* Chicago, etc., R. Co., 70 Iowa 593, 33 N. W. 228; Price *v.* Burlington, etc., R. Co., 42 Iowa 16.
Minnesota.— Carlson *v.* Dow, 47 Minn. 335, 50 N. W. 232.
New Hampshire.— Haines *v.* Republic F. Ins. Co., 59 N. H. 199.
New Jersey.— Packard *v.* Bergen Neck R. Co., 54 N. J. L. 553, 25 Atl. 506.
New York.— Coddington *v.* Brooklyn Crosstown R. Co., 102 N. Y. 66, 5 N. E. 797; Capel *v.* Lyons, 3 Misc. 73, 22 N. Y. Suppl. 378.
Washington.— Edmunds *v.* Black, 15 Wash. 73, 45 Pac. 639.
Wisconsin.— Corcoran *v.* Harran, 55 Wis. 120, 12 N. W. 468.
See 46 Cent. Dig. tit. "Trial," § 691.

91. Smith *v.* Atlantic City R. Co., 74 N. J. L. 452, 65 Atl. 1000.

92. Topeka *v.* Heitman, 47 Kan. 739, 28 Pac. 1096.

93. Sloan *v.* Little Rock R., etc., Co., 89 Ark. 574, 117 S. W. 551; Pettus *v.* Kerr, 87 Ark. 396, 112 S. W. 886; Midland Valley R. Co. *v.* Hamilton, 84 Ark. 81, 104 S. W. 540; McKee *v.* Tourtellotte, 167 Mass. 69, 44 N. E. 1071, 48 L. R. A. 542; Evans *v.* St. Paul, etc., R. Co., 30 Minn. 489, 16 N. W. 271; Stroud *v.* Frith, 11 Barb. (N. Y.) 300.

94. Arkansas Midland R. Co. *v.* Rambo, 90 Ark. 108, 117 S. W. 784; McElvaney *v.* Smith, 76 Ark. 468, 88 S. W. 981; St. Louis, etc., R. Co. *v.* Norton, 71 Ark. 314, 73 S. W. 1095; St. Louis, etc., R. Co. *v.* Pritchett, 66 Ark. 46, 48 S. W. 809; Saugerties Bank *v.* Mack, 35 N. Y. App. Div. 398, 54 N. Y. Suppl. 950; Pilling *v.* Otis, 13 Wis. 495.
Failure to number or mark instructions "given," etc.— While the provisions of a statute requiring instructions to be separately numbered, and marked "given" or "refused," as the case may be, are mandatory, still the failure to observe those requirements presents nothing for review, unless exception is specially taken on that ground. Herzog *v.* Campbell, 47 Nebr. 370,

testimony;[95] that the charge was based on incompetent evidence,[96] or on facts not shown by the evidence;[97] or that it invaded the province of the jury,[98] was ambiguous,[99] misleading,[1] or inconsistent with other instructions given.[2]

7. Effect of Failure to Except. Where no exceptions are taken to the giving or refusing of instructions at the trial, the parties are concluded by their failure to take exceptions, and the appellate court cannot examine them.[3] So also the objection that there was an omission to charge on an essential point must be taken below, and cannot be raised for the first time in the appellate court.[4] Accordingly, failure to except to instructions on the ground that they contradict an instruction already given;[5] that they are not supported by the evidence;[6]

66 N. W. 424; Omaha, etc., Land, etc., Co. *v.* Hansen, 32 Nebr. 449, 49 N. W. 456.

Failure to reduce instructions to writing.— A general exception to the giving of instructions is insufficient to raise the objection that such instructions were oral instead of written. Moses *v.* Loomis, 55 Ill. App. 342; Giddings *v.* McCumber, 51 Ill. App. 373; Gaynor *v.* Pease Furnace Co., 51 Ill. App. 292. But see Sutherland *v.* Venard, 34 Ind. 390.

95. Varnum *v.* Taylor, 10 Bosw. (N. Y.) 148; Walker *v.* Collins, 59 Fed. 70, 8 C. C. A. 1.

96. Frauenthal *v.* Bridgeman, 50 Ark. 348, 7 S. W. 388.

97. *Arkansas.*— Ft. Smith Light, etc., Co. *v.* Carr, 78 Ark. 279, 93 S. W. 990; Quetermous *v.* Hatfield, 54 Ark. 16, 14 S. W. 1096.

Georgia.— Central of Georgia R. Co. *v.* Bond, 111 Ga. 13, 36 S. E. 299.

New Hampshire.— Emery *v.* Boston, etc., R. Co., 67 N. H. 434, 36 Atl. 367.

New York.— Varnum *v.* Taylor, 10 Bosw. 148; Labron *v.* Woram, 1 Hill 91.

Wisconsin.— Hulehan *v.* Green Bay, etc., R. Co., 68 Wis. 520, 32 N. W. 529.

98. Gilroy *v.* Loftus, 22 Misc. (N. Y.) 105, 48 N. Y. Suppl. 532.

99. Aluminum Co. of North America *v.* Ramsey, 89 Ark. 522, 117 S. W. 568; Holm *v.* Sandberg, 32 Minn. 427, 21 N. W. 416.

1. Fairman *v.* Boston, etc., R. Co., 169 Mass. 170, 47 N. E. 613; Larrabee *v.* Minnesota Tribune Co., 36 Minn. 141, 30 N. W. 462.

2. Matthews *v.* Clough, 70 N. H. 600, 49 Atl. 637.

3. *California.*— Los Angeles County *v.* Reyes, (1893) 32 Pac. 233; Wilkinson *v.* Parrott, 32 Cal. 102.

Colorado.— Brewster *v.* Crossland, 2 Colo. App. 446, 31 Pac. 236.

Indiana.— Marks *v.* Jacobs, 76 Ind. 216; Hyatt *v.* Clements, 65 Ind. 12; Parker *v.* Clayton, 51 Ind. 126.

Iowa.— Eldridge *v.* Stewart, 97 Iowa 689, 66 N. W. 891; Fritz *v.* Kansas City, etc., R. Co., 61 Iowa 323, 16 N. W. 144; Kirk *v.* Woodbury County, 55 Iowa 190, 7 N. W. 498; Talty *v.* Lusk, 4 Iowa 469.

Kansas.— Kansas Farmers' F. Ins. Co. *v.* Hawley, 46 Kan. 746, 27 Pac. 176; State *v.* Probasco, 46 Kan. 310, 26 Pac. 749; Walsh Mercantile Co. *v.* Fullam, 43 Kan. 181, 23 Pac. 104; Gafford *v.* Hall, 39 Kan. 166, 17 Pac. 851; Wyandotte *v.* Noble, 8 Kan. 444.

Maryland.—Black *v.* Woodrow, 39 Md. 194.

Massachusetts. — Boutelle *v.* Dean, 148 Mass. 89, 18 N. E. 681.

Minnesota.— Red River Valley Inv. Co. *v.* Cole, 62 Minn. 457, 64 N. W. 1149.

Missouri.— Carlton *v.* Monroe, 135 Mo. App. 172, 115 S. W. 1057.

Montana.— McKinstry *v.* Clark, 4 Mont. 370, 1 Pac. 759.

Nebraska.— Holloway *v.* Schooley, 27 Nebr. 553, 43 N. W. 346; Chicago, etc., R. Co. *v.* Starmer, 26 Nebr. 630, 42 N. W. 706; Schroeder *v.* Rinehard, 25 Nebr. 75, 40 N. W. 593.

New York.— Gillan *v.* O'Leary, 124 N. Y. App. Div. 498, 108 N. Y. Suppl. 1024; Schaff *v.* Miles, 10 Misc. 395, 31 N. Y. Suppl. 134.

North Carolina.— Phifer *v.* Alexander, 97 N. C. 335, 2 S. E. 530; White *v.* Clark, 82 N. C. 6.

Ohio.— Baker *v.* Pendergast, 32 Ohio St. 494, 30 Am. Rep. 620 (holding, however, that a charge not excepted to at the time it was given may be considered in determining the materiality of evidence improperly admitted); Wright *v.* Cincinnati St. R. Co., 9 Ohio Cir. Ct. 503, 6 Ohio Cir. Dec. 159.

Oklahoma.— Carter *v.* Missouri Min., etc., Co., 6 Okla. 11, 41 Pac. 356.

Rhode Island.— Sarle *v.* Arnold, 7 R. I. 582.

South Carolina.— Greene *v.* Duncan, 37 S. C. 239, 15 S. E. 956.

Washington.— Johnson *v.* Tacoma Cedar Lumber Co., 3 Wash. 722, 29 Pac. 451.

Wisconsin.— Thomas *v.* Paul, 87 Wis. 607, 58 N. W. 1031; St. Paul Second Nat. Bank *v.* Larson, 80 Wis. 469, 50 N. W. 499.

United States.—Reagan *v.* Aiken, 138 U. S. 109, 11 S. Ct. 283, 34 L. ed. 892; Cucciarre *v.* New York Cent., etc., R. Co., 163 Fed. 38, 90 C. C. A. 220; Emerson *v.* Hogg, 8 Fed. Cas. No. 4,440, 2 Blatchf. 1, Fish. Pat. Rep. 77.

See 46 Cent. Dig. tit. "Trial," § 683.

4. Hall *v.* Manson, 90 Iowa 585, 58 N. W. 881; Davis *v.* Keen, 142 N. C. 496, 55 S. E. 359; Bennett *v.* Hayden, 145 Pa. St. 586, 23 Atl. 255.

Where special issues are submitted to a jury, a party cannot complain for the first time in the supreme court that an issue raised by him in the pleadings was omitted. De Caussey *v.* Baily, 57 Tex. 665.

5. Williams *v.* Southern Pac. R. Co., 110 Cal. 457, 42 Pac. 974.

6. Stoner *v.* Devilbiss, 70 Md. 144, 16 Atl. 440. *Compare* Asbury *v.* Fair, 111 N. C.

that they improperly assume facts,[7] or misstate the evidence;[8] that the instructions were oral when required to be in writing,[9] or were not indorsed as "given"[10] is a waiver of the objection. But when the verdict of the jury has been made to turn upon an erroneous charge, and the judgment upon the merits is thus founded on error, the judgment will be reversed, although no exception was taken thereto.[11] And where the appellant was misled into omitting to except, the same result will follow, if justice requires it.[12] Although a party may not except to all the rulings in which there is error, he cannot be denied the benefit of the exceptions that he does take.[13] Conversely when specific objections are taken to instructions, any others which might have been urged, but were not, must be deemed to have been waived.[14]

L. Harmless Error[15]— **1. In Giving Instructions — a. In General.** Error in instructions is harmless when it is in favor of appellant,[16] or where his interests

251, 16 S. E. 467, holding that the failure of plaintiff to object when the court stated a conclusion of fact not warranted by the testimony does not supply the want of testimony necessary to sustain defendant's contention.

7. Ryan *v.* Conroy, 85 Hun (N. Y.) 544, 33 N. Y. Suppl. 330.

Under Md. Act (1862), c. 154, objection cannot be raised in the court of appeals, to a prayer, for having assumed a fact, unless such objection appears to have been raised and decided below. Lane *v.* Lantz, 27 Md. 211; Young *v.* Mertens, 27 Md. 114. This act applies as well to an instruction which assumes several facts, as to one in which only one fact is assumed. If there be proof to sustain the facts competent to go to the jury, and the court below in its instruction assumes them, instead of submitting them to the jury, the objection, under the act of 1862, must be taken at the trial, otherwise it cannot be insisted on in the appellate court, as cause for reversal. Morrison *v.* Hammond, 27 Md. 604.

8. Middlebrook *v.* Slocum, 152 Mich. 286, 116 N. W. 422; Naumann *v.* Brewers' Ice Co., 53 N. Y. Super. Ct. 121; Krepps *v.* Carlisle, 157 Pa. St. 358, 27 Atl. 741.

9. *Colorado.*— Doyle *v.* Nesting, 37 Colo. 522, 88 Pac. 862.

Florida.— West *v.* Blackshear, 20 Fla. 457.

Indiana.— Shafer *v.* Stinson, 76 Ind. 374; Heaston *v.* Cincinnati, etc., R. Co., 16 Ind. 275, 79 Am. Dec. 430; Taber *v.* Hutson, 5 Ind. 322, 61 Am. Dec. 96.

Kansas.— Bird, etc., Map Co. *v.* Jones, 27 Kan. 177.

Nebraska.— Gibson *v.* Sullivan, 18 Nebr. 558, 26 N. W. 368.

North Dakota.— Boss *v.* Northern Pac. R. Co., 2 N. D. 128, 49 N. W. 655, 33 Am. St. Rep. 756.

South Dakota.— Frye *v.* Ferguson, 6 S. D. 392, 61 N. W. 161.

See 46 Cent. Dig. tit. "Trial," § 685.

10. Tyree *v.* Parham, 66 Ala. 424.

11. Wyman *v.* Erickson, 35 Minn. 202, 28 N. W. 240; Wright *v.* Cincinnati St. R. Co., 9 Ohio Cir. Ct. 503, 6 Ohio Cir. Dec. 159; Beazley *v.* Denson, 40 Tex. 416; Hollingsworth *v.* Holshousen, 17 Tex. 41; Wetmore *v.* Woodhouse, 10 Tex. 33.

An erroneous instruction on the burden of proof is ground for reversal, although not objected to. Gowdey *v.* Robbins, 3 N. Y. App. Div. 353, 38 N. Y. Suppl. 280.

Where a charge excludes material conclusions to be deduced from the evidence, it is reversible error, although no exceptions are taken thereto. Stude *v.* Saunders, 2 Tex. Unrep. Cas. 122.

12. Gougar *v.* Morse, 66 Fed. 702.

13. Macintosh *v.* Corner, 33 Md. 598.

14. Price *v.* Burlington, etc., R. Co., 42 Iowa 16.

15. For specific applications of principles see *supra*, the various sections in this chapter.

In equitable actions see Equity, 16 Cyc. 422.

16. *Alabama.*— Salmons *v.* Roundtree, 24 Ala. 458.

Arkansas.— St. Louis, etc., R. Co. *v.* Dooley, 77 Ark. 561, 92 S. W. 789; Southern Cotton Oil Co. *v.* Spotts, 77 Ark. 458, 92 S. W. 249.

California.— Baker *v.* Borello, 136 Cal. 160, 68 Pac. 591; George *v.* Los Angeles R. Co., 126 Cal. 357, 58 Pac. 819, 77 Am. St. Rep. 184, 46 L. R. A. 829.

Colorado.— Denver Consol. Electric Co. *v.* Lawrence, 31 Colo. 301, 73 Pac. 39; Colorado Springs *v.* Floyd, 19 Colo. App. 167, 73 Pac. 1092.

Connecticut.— Shmilovitz *v.* Bares, 75 Conn. 714, 55 Atl. 560.

Florida.— Supreme Lodge K. P. *v.* Lipscomb, 50 Fla. 406, 39 So. 637.

Georgia.— Southern R. Co. *v.* Morris, 119 Ga. 234, 46 S. E. 85; Savannah, etc., R. Co. *v.* Grogan, 117 Ga. 461, 43 S. E. 701.

Illinois.— Commonwealth Electric Co. *v.* Rose, 214 Ill. 545, 73 N. E. 780 [*affirming* 114 Ill. App. 181]; Illinois Cent. R. Co. *v.* Byrne, 205 Ill. 9, 68 N. E. 720 [*affirming* 105 Ill. App. 96].

Indiana.— Pennsylvania Co. *v.* Horton, 132 Ind. 189, 31 N. E. 45; Bronnenberg *v.* Coburn, 110 Ind. 169, 11 N. E. 29.

Indian Territory.— Moore *v.* Girten, 5 Indian Terr. 384, 82 S. W. 848; Swofford Bros. Dry-Goods Co. *v.* Smith-McCord Dry-Goods Co., 1 Indian Terr. 314, 37 S. W. 103.

Iowa.— Pierce *v.* Doolittle, 130 Iowa 333, 106 N. W. 751, 6 L. R. A. N. S. 143; De Laval

have not been prejudiced thereby,[17] or where he has recovered all he was entitled

Separator Co. *v.* Sharpless, 129 Iowa 114, 105 N. W. 384.

Kansas.— Kansas City, etc., R. Co. *v.* Lane, 33 Kan. 702, 7 Pac. 587; Smith *v.* Brown, 8 Kan. 608.

Kentucky.— Louisville, etc., Mail Co. *v.* Barnes, 117 Ky. 860, 79 S. W. 261, 25 Ky. L. Rep. 2036, 111 Am. St. Rep. 273, 64 L. R. A. 574; Frankfort *v.* Howard, 74 S. W. 703, 25 Ky. L. Rep. 111.

Maine.— Bartlett *v.* Gilbert, (1886) 4 Atl. 559.

Maryland.— Preston *v.* Leighton, 6 Md. 88; Planters' Bank *v.* Alexandria Bank, 10 Gill & J. 346.

Massachusetts.— Freeman *v.* Travelers' Ins. Co., 144 Mass. 572, 12 N. E. 372; Com. *v.* Wardwell, 136 Mass. 164.

Michigan.— Plymouth *v.* Pere Marquette R. Co., 139 Mich. 347, 102 N. W. 947; Airikainen *v.* Houghton County St. R. Co., 138 Mich. 194, 101 N. W. 264.

Mississippi.— Sparkman *v.* Graham, 79 Miss. 376, 30 So. 713.

Missouri.— Latson *v.* St. Louis Transit Co., 192 Mo. 449, 91 S. W. 109; McHugh *v.* St. Louis Transit Co., 190 Mo. 85, 88 S. W. 853.

Montana.— Hoar *v.* Hennessy, 29 Mont. 253, 74 Pac. 452.

Nebraska.— Darr *v.* Donovan, 73 Nebr. 424, 102 N. W. 1012; Baty *v.* Elrod, 66 Nebr. 735, 92 N. W. 1032, 97 N. W. 343.

Nevada.— Eager *v.* Mathewson, 27 Nev. 220, 74 Pac. 404.

New Hampshire.— Mandigo *v.* Healey, 69 N. H. 94, 45 Atl. 318.

New York.—Wolf *v.* Third Ave. R. Co., 67 N. Y. App. Div. 605, 74 N. Y. Suppl. 336; Heyert *v.* Reubman, 86 N. Y. Suppl. 797.

North Carolina.— Gordon *v.* Seaboard Air Line R. Co., 132 N. C. 565, 44 S. E. 25; Lewis *v.* Norfolk, etc., R. Co., 132 N. C. 382, 43 S. E. 919.

Ohio.—Adams Express Co. *v.* Gordon, 27 Ohio Cir. Ct. 243.

Oklahoma.— Gorman *v.* Hargis, 6 Okla. 360, 50 Pac. 92.

Oregon.— Bingham *v.* Lipman, 40 Oreg. 363, 67 Pac. 98; Wellman *v.* Oregon Short-Line, etc., R. Co., 21 Oreg. 530, 28 Pac. 625.

Pennsylvania.— Lillie *v.* American Car, etc., Co., 209 Pa. St. 161, 58 Atl. 272; Jones *v.* Western Assur. Co., 198 Pa. St. 206, 47 Atl. 948.

South Carolina.— Thompson *v.* Security Trust, etc., Co., 63 S. C. 290, 41 S. E. 464; Hatchell *v.* Chandler, 62 S. C. 380, 40 S. E. 777.

South Dakota.— Blair *v.* Groton, 13 S. D. 211, 83 N. W. 48.

Tennessee.— St. Louis, etc., R. Co. *v.* Hatch, 116 Tenn. 580, 94 S. W. 671; Memphis St. R. Co. *v.* Haynes, 112 Tenn. 712, 81 S. W. 374.

Texas.— Louisiana, etc., Lumber Co. *v.* Meyers, (Civ. App. 1906) 94 S. W. 140; El Paso, etc., R. Co. *v.* Darr, (Civ. App. 1906) 93 S. W. 166.

Virginia.— McMurray *v.* Dixon, 105 Va. 605, 54 S. E. 481.

Washington.— Tham *v.* J. T. Steeb Shipping Co., 39 Wash. 271, 81 Pac. 711; Selby *v.* Vancouver Water Works Co., 32 Wash. 522, 73 Pac. 504.

Wisconsin.— Friedrich *v.* Milwaukee, 118 Wis. 254, 95 N. W. 126; Meyer *v.* Milwaukee Electric R., etc., Co., 116 Wis. 336, 93 N. W. 6.

United States.—Waters-Pierce Oil Co. *v.* Van Elderen, 137 Fed. 557, 70 C. C. A. 255; Easton *v.* Wostenholm, 137 Fed. 524, 70 C. C. A. 108.

17. *Alabama.*— Equitable Mfg. Co. *v.* Howard, (1906) 41 So. 628; Sloss-Sheffield Steel, etc., Co. *v.* Holloway, 144 Ala. 280, 40 So. 211.

Arkansas.— Little Rock R., etc., Co. *v.* Goerner, 80 Ark. 158, 95 S. W. 1007, 7 L. R. A. N. S. 97; Spencer Medicine Co. *v.* Hall, 78 Ark. 336, 93 S. W. 985.

California.— People *v.* Methever, 132 Cal. 326, 64 Pac. 481; *In re* Nelson, 132 Cal. 182, 64 Pac. 294.

Colorado.— Colorado Midland R. Co. *v.* Robbins, 30 Colo. 449, 71 Pac. 371; Denver *v.* Hyatt, 28 Colo. 129, 63 Pac. 403.

Connecticut.— Chany *v.* Hotchkiss, 79 Conn. 104, 63 Atl. 947; Merwin *v.* Morris, 71 Conn. 555, 42 Atl. 855. See also Scholfield Gear, etc., Co. *v.* Scholfield, 71 Conn. 1, 40 Atl. 1046.

District of Columbia.— Mallery *v.* Frye, 21 App. Cas. 105.

Georgia.—Wrightsville Bank *v.* Merchants', etc., Bank, 119 Ga. 288, 46 S. E. 94; Southern Bell Tel., etc., Co. *v.* Earle, 118 Ga. 506, 45 S. E. 319.

Illinois.— Chicago Union Traction Co. *v.* Yarus, 221 Ill. 641, 77 N. E. 1129; Prather *v.* Chicago Southern R. Co., 221 Ill. 190, 77 N. E. 430; Becker *v.* F. O. Erickson Co., 142 Ill. App. 133; Regan *v.* McCarthy, 119 Ill. App. 578.

Indiana.— Pittsburgh, etc., R. Co. *v.* Nicholas, 165 Ind. 679, 76 N. E. 522 [*affirming* (App. 1905) 73 N. E. 195, 74 N. E. 626]; M. S. Huey Co. *v.* Johnston, 164 Ind. 489, 73 N. E. 996; Pittsburgh, etc., R. Co. *v.* Reed, 44 Ind. App. 635, 88 N. E. 1080.

Indian Territory.— Reynolds *v.* Clowdus, 4 Indian Terr. 679, 76 S. W. 277; Hargadine-McKittrick Dry Goods Co. *v.* Bradley, 4 Indian Terr. 242, 69 S. W. 862.

Iowa.— Baker *v.* Oughton, 130 Iowa 35, 106 N. W. 272; Nebraska Bridge Supply, etc., Co. *v.* Conway, 127 Iowa 237, 103 N. W. 122, (1904) 98 N. W. 1024.

Kansas.— Kamm *v.* Sloan, 72 Kan. 459, 83 Pac. 1103; Hackler *v.* Evans, 70 Kan. 896, 79 Pac. 669.

Kentucky.— Swann-Day Lumber Co. *v.* Thomas, 129 Ky. 799, 112 S. W. 907; Scott *v.* Com., 93 S. W. 668, 29 Ky. L. Rep. 571; Louisville *v.* Caron, 90 S. W. 604, 28 Ky. L. Rep. 844.

Maine.— Copeland *v.* Hewett, 96 Me. 525, 53 Atl. 36; Look *v.* Norton, 94 Me. 547, 48 Atl. 117.

to under the undisputed evidence.[18] But the doctrine of harmless error is seldom, if ever, applied to conflicting instructions on a material point, because of the impossibility of saying by which the jury were guided.[19]

b. Error Cured by Verdict or Judgment — (1) *In General.* Where it is apparent from the whole testimony that the verdict is correct on the merits,[20]

Maryland.— McGaw *v.* Acker, etc., Co., 111 Md. 153, 73 Atl. 731, 134 Am. St. Rep. 592.

Massachusetts.— Kerr *v.* Atwood, 188 Mass. 506, 74 N. E. 917; Cummings *v.* Holt, 188 Mass. 69, 74 N. E. 297.

Michigan.— Schultz *v.* Guldenstein, 144 Mich. 636, 108 N. W. 96; Warn *v.* Flint, 140 Mich. 573, 104 N. W. 37.

Minnesota.— Jones *v.* Minnesota, etc., R. Co., 97 Minn. 232, 106 N. W. 1048; Lake Superior Produce, etc., Co. *v.* Concordia F. Ins. Co., 95 Minn. 492, 104 N. W. 560.

Mississippi.—Yazoo, etc., R. Co. *v.* Williams, 87 Miss. 344, 39 So. 489.

Missouri.— Dakan *v.* G. W. Chase, etc., Mercantile Co., 197 Mo. 238, 94 S. W. 944; Magrane *v.* St. Louis, etc., R. Co., 183 Mo. 119, 81 S. W. 1158; Bradford *v.* Chicago, etc., R. Co., 136 Mo. App. 705, 119 S. W. 32.

Montana.—Webster *v.* Sherman, 33 Mont. 448, 84 Pac. 878; Bourke *v.* Butte Electric, etc., Co., 33 Mont. 267, 83 Pac. 470.

Nebraska.— Nicholas, etc., Co. *v.* Steinkraus, 83 Nebr. 1, 119 N. W. 23; Gammel Book Co. *v.* Paine, 75 Nebr. 683, 106 N. W. 777; Link *v.* Campbell, 72 Nebr. 307, 100 N. W. 409, 104 N. W. 939.

New Hampshire.— Union Hosiery Co. *v.* Hodgson, 72 N. H. 427, 57 Atl. 384.

New Jersey.— Enstice *v.* Courtright, 61 N. J. L. 653, 40 Atl. 676.

New Mexico.— Lincoln-Lucky, etc., Min. Co. *v.* Hendry, 9 N. M. 149, 50 Pac. 330.

New York.— Crossman *v.* Lurman, 171 N. Y. 329, 63 N. E. 1097, 98 Am. St. Rep. 599 [*affirming* 57 N. Y. App. Div. 393, 68 N. Y. Suppl. 311, and *affirmed* in 192 U. S. 189, 24 S. Ct. 234, 48 L. ed. 401]; Friedman *v.* Breslin, 51 N. Y. App. Div. 268, 65 N. Y. Suppl. 5 [*affirmed* in 169 N. Y. 574, 61 N. E. 1129].

North Carolina.— Campbell *v.* Everhart, 139 N. C. 503, 52 S. E. 201; McCord *v.* Atlanta, etc., Air Line R. Co., 134 N. C. 53, 45 S. E. 1031.

Ohio.— Cleveland, etc., Traction Co. *v.* Ward, 27 Ohio Cir. Ct. 761; Connecticut F. Ins. Co. *v.* Clark, 24 Ohio Cir. Ct. 33.

Oregon.— La Vie *v.* Crosby, 43 Oreg. 612, 74 Pac. 220; Arthur *v.* Palatine Ins. Co., 35 Oreg. 27, 57 Pac. 62, 76 Am. St. Rep. 450.

Pennsylvania.— Helbling *v.* Allegheny Cemetery Co., 201 Pa. St. 171, 50 Atl. 970; Rondinella *v.* Metropolitan L. Ins. Co., 24 Pa. Super. Ct. 293.

Rhode Island.— Guckian *v.* Newbold, 23 R. I. 594, 51 Atl. 210.

South Carolina.— Lassiter *v.* Okeetee Club, 70 S. C. 102, 49 S. E. 224; Drakeford *v.* Supreme Conclave K. D., 61 S. C. 338, 39 S. E. 523.

South Dakota.— Mettel *v.* Gales, 12 S. D. 632, 82 N. W. 181; Wright *v.* Lee, 10 S. D. 263, 72 N. W. 895.

Tennessee.— Southern R. Co. *v.* Ferguson, 105 Tenn. 552, 59 S. W. 343, 80 Am. St. Rep. 908; Fox *v.* Boyd, 104 Tenn. 357, 58 S. W. 221.

Texas.— Texas, etc., R. Co. *v.* Kelly, 98 Tex. 123, 80 S. W. 79; Houston, etc., R. Co. *v.* Bell, 97 Tex. 71, 75 S. W. 484 [*affirming* (Civ. App. 1903) 73 S. W. 56]; Houston Ice, etc., Co. *v.* Nicolini, (Civ. App. 1906) 96 S. W. 84.

Vermont.— F. R. Patch Mfg. Co. *v.* Protection Lodge No. 215 I. A. M., 77 Vt. 294, 60 Atl. 74, 107 Am. St. Rep. 765.

Virginia.— Homestead F. Ins. Co. *v.* Ison, 110 Va. 18, 65 S. E. 463; Richmond Traction Co. *v.* Wilkinson, 101 Va. 394, 43 S. E. 622.

Washington.— Cole *v.* Seattle, etc., R. Co., 42 Wash. 462, 85 Pac. 3; Hansen *v.* Seattle Lumber Co., 41 Wash. 349, 83 Pac. 102.

West Virginia.— Beaty *v.* Baltimore, etc., R. Co., 6 W. Va. 388.

Wisconsin.—Abbott *v.* Milwaukee Light, etc., Co., 126 Wis. 634, 106 N. W. 523, 4 L. R. A. N. S. 202; Jackman *v.* Eau Claire Nat. Bank, 125 Wis. 465, 104 N. W. 98, 115 Am. St. Rep. 955.

United States.— San Juan *v.* St. John's Gas Co., 195 U. S. 510, 25 S. Ct. 108, 49 L. ed. 299; Guild *v.* Andrews, 137 Fed. 369, 70 C. C. A. 49.

Modification of instruction.—A party cannot complain of a modification of an instruction which was not prejudicial to him. Dooin *v.* Omnibus Cable Co., 140 Cal. 369, 73 Pac. 1060; Baker *v.* Borello, 131 Cal. 615, 63 Pac. 914; Illinois Cent. R. Co. *v.* Prickett, 210 Ill. 140, 71 N. E. 435 [*affirming* 109 Ill. App. 468]; Chicago, etc., Coal Co. *v.* Moran, 210 Ill. 9, 71 N. E. 38 [*affirming* 110 Ill. App. 664]; Espenlaub *v.* Ellis, 34 Ind. App. 103, 72 N. E. 527; Parke County *v.* Sappenfield, 10 Ind. App. 609, 38 N. E. 358; Luke *v.* Johnnycake, 9 Kan. 511; Worth *v.* McConnell, 42 Mich. 473, 4 N. W. 198; Weimer *v.* Bunbury, 30 Mich. 201; Spencer *v.* St. Louis Transit Co., 111 Mo. App. 653, 86 S. W. 593; Spry *v.* Missouri, etc., R. Co., 73 Mo. App. 203; Bowen *v.* Southern R. Co., 58 S. C. 222, 36 S. E. 590; Norfolk, etc., R. Co. *v.* Harman, 104 Va. 501, 52 S. E. 368.

18. Montgomery *v.* Amsler, (Tex. Civ. App. 1909) 122 S. W. 307.

19. McCurry *v.* Hawkins, 83 Ark. 202, 106 S. W. 600; Pulaski Anthracite Coal Co. *v.* Gibboney Sand Bar Co., 110 Va. 444, 66 S. E. 73, 24 L. R. A. N. S. 1185.

20. *Alabama.*— Ray *v.* Jackson, 90 Ala. 513, 7 So. 747; Stephens *v.* Regenstein, 89 Ala. 561, 8 So. 68, 18 Am. St. Rep. 156.

Arkansas.— Kansas City Southern R. Co. *v.* Carl, 91 Ark. 97, 121 S. W. 932, 134 Am.

error committed by the trial court in the giving of instructions is harmless. So

St. Rep. 56; Chicago, etc., R. Co. *v.* Pfeifer, 90 Ark. 524, 119 S. W. 642, 22 L. R. A. N. S. 1107; St. Louis Southwestern R. Co. *v.* Grayson, 89 Ark. 154, 115 S. W. 933.

California.— Lima *v.* San Luis Obispo County Bank, 142 Cal. 245, 75 Pac. 846; Allen *v.* McKay, 139 Cal. 94, 72 Pac. 713.

Colorado.— Fearnley *v.* Fearnley, 44 Colo. 417, 98 Pac. 819; Denver, etc., R. Co. *v.* Pulaski Irr. Ditch Co., 11 Colo. App. 41, 52 Pac. 224.

Connecticut.— Sellick *v.* Sugar Hollow Turnpike Co., 13 Conn. 452.

District of Columbia.— Cunningham Mfg. Co. *v.* Rotograph Co., 30 App. Cas. 524, 15 L. R. A. N. S. 368.

Florida.— May *v.* Seymour, 17 Fla. 725.

Georgia.— Glover *v.* Blakeslee, 115 Ga. 696, 42 S. E. 40; Taylor *v.* Cantrell, 111 Ga. 890, 36 S. E. 968.

Illinois.— Decatur *v.* Besten, 169 Ill. 340, 48 N. E. 186 [*affirming* 69 Ill. App. 410]; Schultz *v.* Babcock, 166 Ill. 398, 46 N. E. 892; Boys *v.* Bernhard Milling Co., 138 Ill. App. 88; Wright *v.* McClintock, 136 Ill. App. 438.

Indiana.— Pittsburgh, etc., R. Co. *v.* Higgs, 165 Ind. 694, 76 N. E. 299, 4 L. R. A. N. S. 1081; Ellis *v.* Hammond, 157 Ind. 267, 61 N. E. 565; Apperson *v.* Lazro, 44 Ind. App. 186, 87 N. E. 97, 88 N. E. 99.

Iowa.— Parrot *v.* Chicago Great Western R. Co., 127 Iowa 419, 103 N. W. 352; Shipley *v.* Reasoner, 87 Iowa 555, 54 N. W. 470.

Kansas.— Peterson *v.* Baker, 78 Kan. 337, 97 Pac. 373; Beard *v.* Nichols, etc., Co., 7 Kan. App. 413, 53 Pac. 275; Gilmore *v.* Gilmore, 6 Kan. App. 453, 50 Pac. 97.

Kentucky.—Overton *v.* Overton, 18 B. Mon. 61; Louisville, etc., R. Co. *v.* Cambron, 10 Ky. L. Rep. 544; Louisville, etc., R. Co. *v.* Connelly, 7 S. W. 914, 9 Ky. L. Rep. 993.

Louisiana.— Regan *v.* Adams Express Co., 49 La. Ann. 1579, 22 So. 835; Starns *v.* Hadnot, 45 La. Ann. 318, 12 So. 561.

Maine.— Moulton *v.* Witherell, 52 Me. 237.

Maryland.— Parker *v.* Wallis, 60 Md. 15, 45 Am. Rep. 703; State *v.* Baltimore, etc., R. Co., 58 Md. 482.

Massachusetts.— Rowley *v.* Ray, 139 Mass. 241, 29 N. E. 663; Train *v.* Collins, 2 Pick. 145; Newhall *v.* Hopkins, 6 Mass. 350.

Michigan.— Stevens *v.* Pantlind, 95 Mich. 145, 54 N. W. 716; Gutta Percha, etc., Mfg. Co. *v.* Wood, 84 Mich. 452, 48 N. W. 28; Morse *v.* Byam, 55 Mich. 594, 22 N. W. 54; Case *v.* Dewey, 55 Mich. 116, 20 N. W. 817, 21 N. W. 911.

Minnesota.— Dunlap *v.* May, 42 Minn. 309, 44 N. W. 119; Beebe *v.* Wilkinson, 30 Minn. 548, 16 N. W. 450.

Mississippi.— Nichols *v.* Gulf, etc., R. Co., 83 Miss. 126, 36 So. 192; Broach *v.* Wortheimer-Swartz Shoe Co., (1897) 21 So. 307.

Missouri.— Quinn *v.* Metropolitan St. R. Co., 218 Mo. 545, 118 S. W. 46; Moore *v.* Lindell R. Co., 176 Mo. 528, 75 S. W. 672; Von De Veld *v.* Judy, 143 Mo. 348, 44 S. W. 1117.

Montana.— Caruthers *v.* Pemberton, 1 Mont. 111.

Nebraska.— Christen *v.* Schreiner, 82 Nebr. 446, 118 N. W. 102; Gatzemeyer *v.* Peterson, 68 Nebr. 832, 94 N. W. 974; Kitzberger *v.* Chicago, etc., R. Co., 4 Nebr. (Unoff.) 324, 93 N. W. 935.

Nevada.— Truckee Lodge No. 14 I. O. O. F. *v.* Wood, 14 Nev. 293; Robinson *v.* Imperial Silver Min. Co., 5 Nev. 44.

New Hampshire.— Parkinson *v.* Nashua, etc., R. Co., 61 N. H. 416; Janvrin *v.* Fogg, 49 N. H. 340.

New Jersey.—Wyckoff *v.* Runyon, 33 N. J. L. 107.

New York.— Fiske *v.* Bailey, 51 N. Y. 150; Isaacs *v.* Terry, etc., Co., 113 N. Y. Suppl. 731 [*reversed* on other grounds in 132 N. Y. App. Div. 657, 117 N. Y. Suppl. 369].

North Carolina.— Mitchell *v.* Hoggard, 108 N. C. 353, 12 S. E. 844; Hobbs *v.* Outlaw, 51 N. C. 174.

North Dakota.— Johnson *v.* Northern Pac. R. Co., 1 N. D. 354, 48 N. W. 227.

Ohio.— Cricket *v.* State, 18 Ohio St. 9; Gurley *v.* Armentraut, 27 Ohio Cir. Ct. 199; Cotton *v.* Ashley, 13 Ohio Cir. Ct. 535, 7 Ohio Cir. Dec. 242.

Oklahoma.— Shawnee Nat. Bank *v.* Wootten, 24 Okla. 425, 103 Pac. 714.

Oregon.— Carroll *v.* Grande Ronde Electric Co., 52 Oreg. 370, 97 Pac. 552; Wellman *v.* Oregon Short-Line, etc., R. Co., 21 Oreg. 530, 28 Pac. 625.

Pennsylvania.— Jones *v.* Western Pennsylvania Natural Gas Co., 146 Pa. St. 204, 23 Atl. 386; Robb *v.* Carnegie, 145 Pa. St. 324, 22 Atl. 649, 27 Am. St. Rep. 694, 14 L. R. A. 329.

South Carolina.— Duckett *v.* Pool, 34 S. C. 311, 13 S. E. 542.

South Dakota.— Kime *v.* Edgemont Bank, 22 S. D. 630, 119 N. W. 1003.

Tennessee.— Rice *v.* Crow, 6 Heisk. 28.

Texas.— Suderman-Dolson Co. *v.* Hope, (Civ. App. 1909) 118 S. W. 216; Caldwell *v.* Houston, etc., R. Co., (Civ. App. 1909) 117 S. W. 488; McCullough *v.* Rucker, (Civ. App. 1908) 115 S. W. 323; Galveston, etc., R. Co. *v.* Paschall, 41 Tex. Civ. App. 357, 92 S. W. 446.

Utah.— Gilberson *v.* Miller Min., etc., Co., 4 Utah 46, 5 Pac. 699.

Vermont.— Burnham *v.* Jenness, 54 Vt. 272; Fletcher *v.* Cole, 26 Vt. 170.

Virginia.— Taylor *v.* Baltimore, etc., R. Co., 108 Va. 817, 62 S. E. 798; Browder *v.* Southern R. Co., 107 Va. 10, 57 S. E. 572; Neal *v.* Taylor, 106 Va. 651, 56 S. E. 590.

Washington.— Hardin *v.* Mullin, 16 Wash. 647, 48 Pac. 349; Kimble *v.* Ford, 7 Wash. 603, 35 Pac. 395.

West Virginia.— Mercer Academy *v.* Rusk, 8 W. Va. 373; Clay *v.* Robinson, 7 W. Va. 348.

Wisconsin.— Shoemaker *v.* Hinze, 53 Wis.

where the verdict returned is the only one justified by the evidence,[21] or where appellant could not have recovered in any event,[22] any error in giving instructions is harmless. Nor can a party complain of the giving of instructions on an issue upon which the jury found in his favor.[23] Of course giving an errone-

116, 10 N. W. 86; Lange *v.* Hook, 51 Wis. 132, 7 N. W. 839.

United States.— Henderson Bridge Co. *v.* McGrath, 134 U. S. 260, 10 S. Ct. 730, 33 L. ed. 934; Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377, 5 S. Ct. 184, 28 L. ed. 787; Barber Asphalt Paving Co. *v.* Odasz, 85 Fed. 754, 29 C. C. A. 631.

21. *Colorado.*— Ingemarson *v.* Coffey, 41 Colo. 407, 92 Pac. 908.

Florida.— Cross *v.* Aby, 55 Fla. 311, 45 So. 820.

Georgia.— Clark *v.* Empire Mercantile Co., 2 Ga. App. 250, 58 S. E. 363.

Illinois.— Maloney *v.* Illinois Cent. R. Co., 131 Ill. App. 568; Pierce *v.* Kellyville Coal Co., 130 Ill. App. 376.

Iowa.— Munier *v.* Zachary, 138 Iowa 219, 114 N. W. 525, 18 L. R. A. N. S. 572.

Missouri.— Beattie Mfg. Co. *v.* Clark, 208 Mo. 89, 106 S. W. 29; Smith *v.* Atchison, etc., R. Co., 122 Mo. App. 85, 97 S. W. 1007.

Nebraska.— Gothenburg State Bank *v.* Carroll, (1908) 116 N. W. 276; Morrow *v.* Laverty, 77 Nebr. 245, 109 N. W. 150; Ramold *v.* Clayton, 77 Nebr. 178, 108 N. W. 980.

Texas.— Baldwin *v.* Riley, 49 Tex. Civ. App. 557, 108 S. W. 1192; Rogers *v.* Frazier, (Civ. App. 1908) 108 S. W. 727; Merchants', etc., Bank *v.* Johnson, 49 Tex. Civ. App. 242, 108 S. W. 491; Currie *v.* Missouri, etc., R. Co., (Civ. App. 1907) 106 S. W. 1149 [*reversed* in 101 Tex. 478, 108 S. W. 1167]; Morris *v.* Jacks, (Civ. App. 1906) 96 S. W. 637.

Virginia.— Hanger *v.* Com., 107 Va. 872, 60 S. E. 67, 14 L. R. A. N. S. 683; Browder *v.* Southern R. Co., 107 Va. 10, 57 S. E. 572; Neal *v.* Taylor, 106 Va. 651, 56 S. E. 590.

Washington.— Haystead *v.* New York Mut. L. Ins. Co., 54 Wash. 695, 103 Pac. 53; Edwall *v.* New York Mut. L. Ins. Co., 54 Wash. 695, 103 Pac. 52; Aris *v.* New York Mut. L. Ins. Co., 54 Wash. 269, 695, 103 Pac. 50, 53; Hoff *v.* Japanese-American Fertilizer, etc., Co., 48 Wash. 581, 94 Pac. 109.

22. *Alabama.*— Griffin *v.* Bass Foundry, etc., Co., 135 Ala. 490, 33 So. 177; Johnston *v.* Philadelphia Mortg., etc., Co., 129 Ala. 515, 30 So. 15, 87 Am. St. Rep. 75.

Arkansas.— Moore *v.* Maxwell, 18 Ark. 469.

California.— McPhail *v.* Buell, 87 Cal. 115, 25 Pac. 266; Greene *v.* Murdock, 1 Cal. App. 136, 81 Pac. 993.

Colorado.— Colorado Springs *v.* Floyd, 19 Colo. App. 167, 73 Pac. 1092; Parsons *v.* Parsons, 17 Colo. App. 154, 67 Pac. 345.

Georgia.— Coffee *v.* Coffee, 119 Ga. 533, 46 S. E. 620; Pferdmenges *v.* Butler, 117 Ga. 400, 43 S. E. 695.

Illinois.— Beardstown *v.* Clark, 204 Ill. 524, 68 N. E. 378 [*affirming* 104 Ill. App. 568]; Swisher *v.* Deering, 204 Ill. 203, 68 N. E. 517 [*affirming* 104 Ill. App. 572].

Indiana.— Pittsburgh, etc., R. Co. *v.* Higgs, 165 Ind. 694, 76 N. E. 299, 4 L. R. A. N. S. 1081; Baxter *v.* Lusher, 159 Ind. 381, 65 N. E. 211.

Iowa.— Ashdown *v.* Ely, 140 Iowa 739, 117 N. W. 976; Gilbertson *v.* Lake Mills, (1903) 94 N. W. 481.

Kansas.— Kansas Grain, etc., Co. *v.* Hartstein, 6 Kan. App. 864, 50 Pac. 510.

Kentucky.— Godfrey *v.* Beattyville Coal Co., 101 Ky. 339, 41 S. W. 10, 19 Ky. L. Rep. 501; Coleman *v.* Pittsburg, etc., R. Co., 63 S. W. 39, 23 Ky. L. Rep. 401.

Michigan.— Raub *v.* Nesbett, 118 Mich. 248, 76 N. W. 393.

Minnesota.— Germolus *v.* Sausser, 83 Minn. 141, 85 N. W. 946.

Missouri.— Carr *v.* Missouri Pac. R. Co., 195 Mo. 214, 92 S. W. 874; Magrane *v.* St. Louis, etc., R. Co., 183 Mo. 119, 81 S. W. 1158.

Nebraska.— Cuatt *v.* Ross, 76 Nebr. 57, 106 N. W. 1044; Fred Krug Brewing Co. *v.* Healey, 71 Nebr. 662, 99 N. W. 489, 101 N. W. 329.

New Jersey.— Leport *v.* Todd, 32 N. J. L. 124.

New York.— Kopper *v.* Yonkers, 188 N. Y. 592, 81 N. E. 1168 [*affirming* 110 N. Y. App. Div. 747, 97 N. Y. Suppl. 425]; Phelps *v.* Erie R. Co., 134 N. Y. App. Div. 729, 119 N. Y. Suppl. 141.

North Carolina.— Kiser *v.* Combs, 114 N. C. 640, 19 S. E. 664.

Ohio.— Elster *v.* Springfield, 49 Ohio St. 82, 30 N. E. 274.

Pennsylvania.— Trego *v.* Pierce, 119 Pa. St. 139, 12 Atl. 864.

Tennessee.— Robinson *v.* Louisville, etc., R. Co., 2 Lea 594.

Texas.— Cranfill *v.* Hayden, 97 Tex. 544, 80 S. W. 609 [*reversing* (Civ. App. 1903) 75 S. W. 573]; Hover *v.* Chicago, etc., R. Co., 40 Tex. Civ. App. 280, 89 S. W. 1084.

Utah.— Pool *v.* Southern Pac. Co., 20 Utah 210, 58 Pac. 326.

Virginia.— Chesapeake, etc., R. Co. *v.* Harris, 103 Va. 635, 49 S. E. 997; Richmond Passenger, etc., Co. *v.* Allen, 103 Va. 532, 49 S. E. 656.

Washington.— Kirkland Land, etc., Co. *v.* Jones, 18 Wash. 407, 51 Pac. 1043.

Wisconsin.— Oliver *v.* Morawetz, 97 Wis. 332, 72 N. W. 877; Laycock *v.* Moon, 97 Wis. 59, 72 N. W. 372.

United States.— Creary *v.* Wefel, 135 Fed. 304, 67 C. C. A. 661.

23. *Alabama.*— Fuqua *v.* Gambill, 140 Ala. 464, 37 So. 235.

California.— Lothrop *v.* Golden, (1899) 57 Pac. 394.

Georgia.— Peterson *v.* Wadley, etc., R. Co., 117 Ga. 390, 43 S. E. 713.

Illinois.— Donk Bros. Coal, etc., Co. *v.* Stroetter, 229 Ill. 134, 82 N. E. 250; Smith

ous instruction is harmless error, where the verdict shows that the jury disregarded it.[24]

(II) *Amount of Recovery or Damages.* Where, in an action for damages, the jury find for defendant,[25] or the amount recovered is not excessive

v. Rountree, 185 Ill. 219, 56 N. E. 1130 [*affirming* 85 Ill. App. 161]; Atlas Furniture Co. *v.* E. S. Higgins Carpet Co., 71 Ill. App. 17.

Indiana.— Clear Creek Stone Co. *v.* Dearmin, 160 Ind. 162, 66 N. E. 609.

Iowa.— Stortenbaker *v.* Pullman, 112 Iowa 569, 84 N. W. 716.

Kentucky.— Sears *v.* Louisville, etc., R. Co., 56 S. W. 725, 22 Ky. L. Rep. 152.

Massachusetts.— Rowley *v.* Ray, 139 Mass. 241, 29 N. E. 663.

Michigan.— Clark *v.* McGraw, 14 Mich. 139.

Missouri.— Logan *v.* Field, 192 Mo. 54, 90 S. W. 127; Edwards *v.* Missouri R. Co., 82 Mo. App. 478.

Montana.—Ashley *v.* Rocky Mountain Bell Tel. Co., 25 Mont. 286, 64 Pac. 765.

Nebraska.— Hankins *v.* Majors, 56 Nebr. 299, 76 N. W. 544.

North Dakota.— International Soc. *v.* Hildreth, 11 N. D. 262, 91 N. W. 70.

Texas.— Hurst *v.* Benson, (Civ. App. 1902) 71 S. W. 417.

Virginia.— Chapman *v.* Virginia Real Estate Ins. Co., 96 Va. 177, 31 S. E. 74.

Washington.— Bay View Brewing Co. *v.* Tecklenberg, 19 Wash. 469, 53 Pac. 724.

Wisconsin.— Lehman *v.* Chicago, etc., R. Co., 140 Wis. 497, 122 N. W. 1059.

United States.— Butte, etc., Consol. Min. Co. *v.* Montana Ore Purchasing Co., 121 Fed. 524, 58 C. C. A. 634.

24. *Arkansas.*— St. Louis, etc., R. Co. *v.* Baker, 67 Ark. 531, 55 S. W. 941.

Illinois.— Dunn *v.* Crichfield, 214 Ill. 292, 73 N. E. 386; Merry *v.* Calvin, 122 Ill. App. 459; Adams *v.* Pease, 113 Ill. App. 356.

Indiana.— Rink *v.* Lowry, 38 Ind. App. 132, 77 N. E. 967; Morgan *v.* Jackson, 32 Ind. App. 169, 69 N. E. 410.

Iowa.— Gevers *v.* Farmer, 109 Iowa 468, 80 N. W. 535.

Kansas.—Whitney *v.* Brown, 75 Kan. 678, 90 Pac. 277.

Missouri.— Sappington *v.* St. Joseph Town Mut. F. Ins. Co., 77 Mo. App. 270.

Nebraska.— Dern *v.* Kellogg, 54 Nebr. 560, 74 N. W. 844; Leidigh *v.* Keever, 5 Nebr. (Unoff.) 207, 97 N. W. 801.

Texas.— Eastland *v.* Maney, 36 Tex. Civ. App. 147, 81 S. W. 574; Baum *v.* Corsicana Nat. Bank, 32 Tex. Civ. App. 531, 75 S. W. 863.

25. *Alabama.*—Suell *v.* Derricott, 161 Ala. 259, 49 So. 895, 23 L. R. A. N. S. 996; Fletcher *v.* Prestwood, 150 Ala. 135, 43 So. 231; Pulliam *v.* Schimpf, 109 Ala. 179, 19 So. 428.

California.—Wilhelm *v.* Donegan, 143 Cal. 50, 76 Pac. 713.

Colorado.— Oppenheimer *v.* Denver, etc., R. Co., 9 Colo. 320, 12 Pac. 217; Zimmerman *v.* Denver Consol. Tramway Co., 18 Colo. App. 480, 72 Pac. 607.

District of Columbia.— Manning *v.* Union Transfer Co., 7 Mackey 214.

Georgia.— Conant *v.* Jones, 120 Ga. 568, 48 S. E. 234; Pulliam *v.* Cantrell, 77 Ga. 563, 3 S. E. 280; Griswold *v.* Macon R., etc., Co., 6 Ga. App. 1, 63 S. E. 1132.

Illinois.— Cox *v.* Chicago, 83 Ill. 540; Catton *v.* Dexter, 70 Ill. App. 586.

Indiana.— Fessler *v.* Crouse, 73 Ind. 64; Richardson *v.* State, 55 Ind. 381.

Iowa.— McMahon *v.* Iowa Ice Co., 137 Iowa 368, 114 N. W. 203; Elbert *v.* Mitchell, 131 Iowa 598, 109 N. W. 181; Douglass *v.* Agne, 125 Iowa 67, 99 N. W. 550; Halley *v.* Tichenor, 120 Iowa 164, 94 N. W. 472.

Kansas.—Wilkes *v.* Wolback, 30 Kan. 375, 2 Pac. 508; McIntosh *v.* Crawford County, 13 Kan. 171; Branner *v.* Stormont, 9 Kan. 51.

Kentucky.—Taulbee *v.* Moore, 106 Ky. 749, 51 S. W. 564, 21 Ky. L. Rep. 378; Corwin *v.* Young, 92 S. W. 930, 29 Ky. L. Rep. 251.

Maine.— Young *v.* Chandler, 104 Me. 184, 71 Atl. 652; Pope *v.* Machias Water Power, etc., Co., 52 Me. 535.

Maryland.—Walker *v.* Rogers, 24 Md. 237.

Massachusetts.— Robinson *v.* Fitchburg, etc., R. Co., 7 Gray 92.

Michigan.— Sterling *v.* Detroit, 134 Mich. 22, 95 N. W. 986.

Mississippi.— Fairfield *v.* Louisville, etc., R. Co., 94 Miss. 887, 48 So. 513, 136 Am. St. Rep. 607.

Missouri.— Feary *v.* Metropolitan St. R. Co., 162 Mo. 75, 62 S. W. 452; Eagle Mill Co. *v.* Caven, 76 Mo. App. 458.

Nebraska.— Lomax *v.* Holbine, 65 Nebr. 270, 90 N. W. 1122; Wiens *v.* Alter, 61 Nebr. 359, 85 N. W. 300.

New York.— Clary-Squire *v.* Press Pub. Co., 58 N. Y. App. Div. 362, 68 N. Y. Suppl. 1028.

North Carolina.— Cherry *v.* Lake Drummond Canal, etc., Co., 140 N. C. 422, 53 S. E. 138, 111 Am. St. Rep. 850; Ginsberg *v.* Leach, 111 N. C. 15, 15 S. E. 882.

Oklahoma.—Martin *v.* Chicago, etc., R. Co., 7 Okla. 452, 54 Pac. 696.

Pennsylvania.— Lautner *v.* Kann, 184 Pa. St. 334, 39 Atl. 55.

South Carolina.— Tucker *v.* Southern R. Co., 75 S. C. 85, 55 S. E. 154; White *v.* Whitney Mfg. Co., 60 S. C. 254, 38 S. E. 456.

Texas.—Wofford *v.* Buchel Power, etc., Co., 35 Tex. Civ. App. 531, 80 S. W. 1078; Pincham *v.* Dick, 30 Tex. Civ. App. 230, 70 S. W. 333.

Vermont.— French *v.* Miller, 82 Vt. 91, 71 Atl. 1047; Smith *v.* Anderson, 70 Vt. 424, 41 Atl. 441.

Washington.— Ott *v.* Press Pub. Co., 40 Wash. 308, 82 Pac. 403.

Wisconsin.— Earley *v.* Winn, 129 Wash. 291, 109 N. W. 633; Gordon *v.* Sullivan, 116

sive,[26] error in instructions on the measure of damages is harmless. Nor is a defendant prejudiced by an instruction authorizing exemplary damages, where compensatory damages only are allowed.[27] Similarly, an instruction that defendant is liable for at least nominal damages, if erroneous, is harmless, where the jury finds actual damages.[28]

(III) *By Special Findings or Finding on One of Several Issues.* Where special findings by the jury,[29] or a finding by them on one of a number of

Wis. 543, 93 N. W. 457; Widman *v.* Gay, 104 Wis. 277, 80 N. W. 450.

26. *Alabama.*— Foster *v.* Johnson, 70 Ala. 249.

Arkansas.— Kendall *v.* J. I. Porter Lumber Co., 69 Ark. 442, 64 S. W. 220.

Georgia.— Georgia R., etc., Co. *v.* Flowers, 108 Ga. 795, 33 S. E. 874; Pettis *v.* Brewster, 94 Ga. 527, 19 S. E. 755.

Illinois.— Franks *v.* Matson, 211 Ill. 338, 71 N. E. 1011; Chicago, etc., Coal Co. *v.* Moran, 210 Ill. 9, 71 N. E. 38 [*affirming* 110 Ill. App. 664]; Suttle *v.* Brown, 137 Ill. App. 438; Toledo, etc., R. Co. *v.* Ferguson, 134 Ill. App. 606.

Indiana.— Cleveland, etc., R. Co. *v.* Newell, 104 Ind. 264, 3 N. E. 836, 54 Am. Rep. 312; Lingle *v.* Kitchen, 69 Ind. 349.

Indian Territory.— Gulf, etc., R. Co. *v.* Moseley, 6 Indian Terr. 369, 98 S. W. 129.

Iowa.— Krejci *v.* Chicago, etc., R. Co., 117 Iowa 344, 90 N. W. 708; Flanagan *v.* Baltimore, etc., R. Co., 83 Iowa 639, 50 N. W. 60.

Kansas.— Simpson *v.* Kimberlin, 12 Kan. 579; Taylor *v.* Clendening, 4 Kan. 524; St. Louis, etc., R. Co. *v.* Vance, 9 Kan. App. 565, 58 Pac. 233.

Kentucky.— Louisville, etc., R. Co. *v.* Farmers', etc., Live-Stock Commission Firm, 107 Ky. 53, 52 S. W. 972, 21 Ky. L. Rep. 708; Weick *v.* Dougherty, 90 S. W. 966, 28 Ky. L. Rep. 930, 3 L. R. A. N. S. 348.

Maryland.— Baltimore, etc., R. Co. *v.* Pumphrey, 59 Md. 390.

Michigan.— Kalembach *v.* Michigan Cent. R. Co., 87 Mich. 509, 49 N. W. 1082.

Missouri.— Lee *v.* Missouri Pac. R. Co., 195 Mo. 400, 92 S. W. 614; Macklin *v.* Kinealy, 141 Mo. 113, 41 S. W. 893.

Montana.— Ball *v.* Gussenhoven, 29 Mont. 321, 74 Pac. 871.

Nebraska.— Chicago, etc., R. Co. *v.* Archer, 46 Nebr. 907, 65 N. W. 1043; Chicago, etc., R. Co. *v.* Sizer, 1 Nebr. (Unoff.) 32, 95 N. W. 498.

Nevada.—Southern Nevada Gold, etc., Min. Co. *v.* Holmes Min. Co., 27 Nev. 107, 73 Pac. 759, 103 Am. St. Rep. 759.

New York.— Weiler *v.* Manhattan R. Co., 53 Hun 372, 6 N. Y. Suppl. 320 [*affirmed* in 127 N. Y. 669, 28 N. E. 255].

South Carolina.— Proctor *v.* Southern R. Co., 61 S. C. 170, 39 S. E. 351.

Texas.—Ash *v.* Beck, (Civ. App. 1902) 68 S. W. 53; Chicago, etc., R. Co. *v.* Erwin, (Civ. App. 1901) 65 S. W. 496.

Washington.— Carroll *v.* Centralia Water Co., 5 Wash. 613, 32 Pac. 609, 33 Pac. 431.

Wisconsin.— Doyn *v.* Ebbesen, 72 Wis. 284, 39 N. W. 535.

27. *Alabama.*— Eufaula *v.* Simmons, 86 Ala. 515, 6 So. 47; Thomason *v.* Gray, 82 Ala. 291, 3 So. 38.

Arkansas.— Fordyce *v.* Nix, 58 Ark. 136, 23 S. W. 967.

Colorado.— Spencer *v.* Murphy, 6 Colo. App. 453, 41 Pac. 841.

Georgia.— Broughton *v.* Winn, 60 Ga. 486.

Illinois.— Davenport *v.* Ryan, 81 Ill. 218; Kennedy *v.* Sullivan, 34 Ill. App. 46.

Iowa.—Wellman Security Sav. Bank *v.* Smith, 144 Iowa 203, 122 N. W. 825, 119 N. W. 726; Meyer *v.* Baird, 120 Iowa 597, 94 N. W. 1129.

Kansas.—W. W. Kendall Boot, etc., Co. *v.* Davenport, (1901) 65 Pac. 688.

Kentucky.— Johnson *v.* Williams, 111 Ky. 289, 63 S. W. 759, 23 Ky. L. Rep. 658, 98 Am. St. Rep. 416, 54 L. R. A. 220; Louisville, etc., R. Co. *v.* Crady, 73 S. W. 1126, 24 Ky. L. Rep. 2339.

Michigan.— Durfee *v.* Newkirk, 83 Mich. 522, 47 N. W. 351.

Mississippi.— Bradford *v.* Taylor, 85 Miss. 409, 37 So. 812.

Missouri.— Marcum *v.* Missouri, etc., R. Co., 139 Mo. App. 217, 122 S. W. 1148; Spengler *v.* St. Louis Transit Co., 108 Mo. App. 329, 83 S. W. 312; Sonnen *v.* St. Louis Transit Co., 102 Mo. App. 271, 76 S. W. 691.

Texas.— Hill *v.* Houser, 51 Tex. Civ. App. 359, 115 S. W. 112; Gulf, etc., R. Co. *v.* Conder, 23 Tex. Civ. App. 488, 58 S. W. 58; Missouri, etc., R. Co. *v.* Burrough, (Civ. App. 1898) 46 S. W. 403.

Wisconsin.— Jones *v.* Monson, 137 Wis. 478, 119 N. W. 179, 129 Am. St. Rep. 1082.

United States.— Butler *v.* Barret, 130 Fed. 944.

28. *Alabama.*— Shannon *v.* Jefferson County, 125 Ala. 384, 27 So. 977.

Colorado.— Durkee *v.* Conklin, 13 Colo. App. 313, 57 Pac. 486.

Illinois.— Dady *v.* Condit, 209 Ill. 488, 70 N. E. 1088 [*affirming* 104 Ill. App. 507].

Maryland.— Regester *v.* Regester, 104 Md. 1, 64 Atl. 286.

Massachusetts.— Cummings *v.* Holt, 188 Mass. 69, 74 N. E. 297.

Minnesota.— Howe *v.* Cochran, 47 Minn. 403, 50 N. W. 368.

Ohio.— Power *v.* Brown, 25 Ohio Cir. Ct. 420.

Oregon.— Crossen *v.* Grandy, 42 Oreg. 282, 70 Pac. 906.

Texas.— Gulf, etc., R. Co. *v.* Batte, (Civ. App. 1906) 94 S. W. 345.

29. *Illinois.*— Godfrey *v.* Phillips, 209 Ill. 584, 71 N. E. 19; Avery *v.* Moore, 133 Ill. 74, 24 N. E. 606.

Indiana.— Southern Indiana R. Co. *v.* Norman, 165 Ind. 126, 74 N. E. 896; Roller *v.*

issues,[30] show that appellant was not injured by an instruction, error therein will be deemed harmless.

2. In Refusing Instructions — a. In General. Appellant cannot complain of the refusal of an instruction, where the court gave an instruction on the issue in question which was more favorable to appellant than the instruction requested,[31] or where no injury resulted from such refusal.[32]

Kling, 150 Ind. 159, 49 N. E. 948; Woolery *v.* Louisville, etc., R. Co., 107 Ind. 381, 8 N. E. 226, 57 Am. Rep. 114; Nichols *v.* Central Trust Co., 43 Ind. App. 64, 86 N. E. 878; Southern Indiana R. Co. *v.* Davis, 32 Ind. App. 569, 69 N. E. 550; Lake Erie, etc., R. Co. *v.* Gould, 18 Ind. App. 275, 47 N. E. 941.

Iowa.— Correll *v.* Cedar Rapids, 110 Iowa 333, 81 N. W. 724; Keairnes *v.* Durst, 110 Iowa 114, 81 N. W. 238; Boals *v.* George, 30 Iowa 601.

Kansas.— St. Louis, etc., R. Co. *v.* Beets, 75 Kan. 295, 89 Pac. 683, 10 L. R. A. N. S. 571; Chicago, etc., R. Co. *v.* Lost Springs Lodge No. 494 I. O. O. F., 74 Kan. 847, 85 Pac. 803; Kansas City, etc., R. Co. *v.* Chamberlain, (1900) 60 Pac. 15; Chicago, etc., R. Co. *v.* Parsons, 51 Kan. 408, 32 Pac. 1083.

Kentucky.— Galbraith *v.* Arlington Mut. L. Ins. Co., 12 Bush 29; Chesapeake, etc., R. Co. *v.* McMannon, 8 S. W. 18, 10 Ky. L. Rep. 248.

Maine.—Webber *v.* Read, 65 Me. 564.

Massachusetts. — Holst *v.* Stewart, 161 Mass. 516, 37 N. E. 755, 42 Am. St. Rep. 442.

Michigan.— Curtiss *v.* Curtiss, 143 Mich. 676, 107 N. W. 323; Calbeck *v.* Ford, 140 Mich. 48, 103 N. W. 516; Cook *v.* Canny, 96 Mich. 398, 55 N. W. 987.

Minnesota. — Kurstelska *v.* Jackson, 93 Minn. 385, 101 N. W. 606.

Nebraska.—Axthelm *v.* Chicago, etc., R. Co., 2 Nebr. (Unoff.) 444, 89 N. W. 313.

North Carolina.— Fishblate *v.* New York Fidelity, etc., Co., 140 N. C. 589, 53 S. E. 354.

Rhode Island.—Blackwell *v.* O'Gorman Co., 22 R. I. 638, 49 Atl. 28.

Washington.— Smith *v.* Union Trunk Line, 18 Wash. 351, 51 Pac. 400, 45 L. R. A. 169.

United States.— Holloway *v.* Dunham, 170 U. S. 615, 18 S. Ct. 784, 42 L. ed. 1165.

Errors in instructions relating to one defense are harmless where special findings of the jury show that the general verdict was based entirely on another defense. Fowler *v.* Phœnix Ins. Co., 35 Oreg. 559, 57 Pac. 421.

30. *Iowa.*— Purcell *v.* Chicago, etc., R. Co., 117 Iowa 667, 91 N. W. 933.

Kansas.— Smith *v.* Brown, 8 Kan. 608.

Kentucky.— Lytle *v.* Newell, 74 S. W. 693, 25 Ky. L. Rep. 120.

Maine.— Campbell *v.* Monmouth Mut. F. Ins. Co., 59 Me. 430.

Maryland.— Hurst *v.* Hill, 8 Md. 399, 63 Am. Dec. 705.

Massachusetts.— Hendrick *v.* Boston, etc., R. Co., 170 Mass. 44, 48 N. E. 835; Walker *v.* Fitchburg, 102 Mass. 407.

Michigan.— Marcott *v.* Marquette, etc., R. Co., 49 Mich. 99, 13 N. W. 374.

Missouri.— Horgan *v.* Brady, 155 Mo. 659, 56 S. W. 294.

New York.— Hayden *v.* Palmer, 7 Hill 385.

Ohio.— McAllister *v.* Hartzell, 60 Ohio St. 69, 53 N. E. 715.

Pennsylvania.— Chase *v.* Hubbard, 99 Pa. St. 226.

Texas.— Cuero First Nat. Bank *v.* San Antonio, etc., R. Co., 97 Tex. 201, 77 S. W. 410; Shifflet *v.* Morelle, 68 Tex. 382, 4 S. W. 843; Texas, etc., R. Co. *v.* Horne, 43 Tex. Civ. App. 490, 95 S. W. 97; Robertson *v.* Texas, etc., R. Co., (Civ. App. 1904) 79 S. W. 96.

Washington.— Anderson *v.* McDonald, 31 Wash. 274, 71 Pac. 1037.

United States.—Washburn-Crosby Co. *v.* Johnston, 125 Fed. 273, 60 C. C. A. 187.

An erroneous instruction on the subject of contributory negligence is harmless where the jury finds that plaintiff was not injured by defendant's negligence. Scheel *v.* Detroit, 130 Mich. 51, 89 N. W. 554, 90 N. W. 274; Cannady *v.* Durham, 137 N. C. 72, 49 S. E. 50.

31. *Colorado.*— Atchison, etc., R. Co. *v.* Cahill, 11 Colo. App. 245, 52 Pac. 1111.

Georgia.— Conant *v.* Jones, 120 Ga. 568, 48 S. E. 234.

Nebraska.— Lincoln *v.* Gillilan, 18 Nebr. 114, 24 N. W. 444.

South Carolina.— Barfield *v.* Coker, 73 S. C. 181, 53 S. E. 170.

Texas.— J. M. Guffey Petroleum Co. *v.* Hooks, 47 Tex. Civ. App. 560, 106 S. W. 690; Western Union Tel. Co. *v.* Wofford, 32 Tex. Civ. App. 427, 72 S. W. 620, 74 S. W. 943.

Utah.— Osborne *v.* Phenix Ins. Co., 23 Utah 428, 64 Pac. 1103.

32. *Alabama.*— Stephens *v.* Regenstein, 89 Ala. 561, 8 So. 68, 18 Am. St. Rep. 156.

Arkansas.— McGee *v.* Smitherman, 69 Ark. 632, 65 S. W. 461.

California.— *In re* Dolbeer, 149 Cal. 227, 86 Pac. 695; Cody *v.* Market St. R. Co., 148 Cal. 90, 82 Pac. 666.

Connecticut.— Mack *v.* Starr, 78 Conn. 184, 61 Atl. 472.

Florida.— May *v.* Seymour, 17 Fla. 725.

Georgia.— Williams *v.* Walden, 124 Ga. 913, 53 S. E. 564.

Illinois.— Policemen's Benev. Assoc. *v.* Ryce, 213 Ill. 9, 72 N. E. 764, 104 Am. St. Rep. 190 [*affirming* 115 Ill. App. 95]; Spring Valley Coal Co. *v.* Patting, 210 Ill. 342, 71 N. E. 371 [*affirming* 112 Ill. App. 4]; Hanchett *v.* Haas, 125 Ill. App. 111 [*affirmed* in 219 Ill. 546, 76 N. E. 845].

Indiana.— Southern R. Co. *v.* State, (App. 1904) 72 N. E. 174; Southern Indiana R. Co. *v.* Moore, (App. 1904) 71 N. E. 516.

Iowa.— Doran *v.* Cedar Rapids, etc., R. Co., 117 Iowa 442, 90 N. W. 815.

b. Error Cured by Verdict or Judgment — (i) *In General.* Refusal to give proper instructions requested is harmless, where the verdict shows that no injury resulted therefrom;[33] where the issue to which the refused instruction related is found in appellant's favor,[34] or specially found to be untrue;[35] where the court

Kansas.— Southern Kansas R. Co. *v.* Pavey, 48 Kan. 452, 29 Pac. 593.

Kentucky.— Kice *v.* Porter, 61 S. W. 266, 22 Ky. L. Rep. 1704; Maysville, etc., R. Co. *v.* Lynch, 14 Ky. L. Rep. 671.

Maine.— Wallace *v.* Freeman, (1886) 6 Atl. 200.

Maryland.— Canby *v.* Frick, 8 Md. 163.

Massachusetts.— Cronin *v.* Holyoke, 162 Mass. 257, 38 N. E. 445.

Michigan.— Lee *v.* Longwell, 136 Mich. 458, 99 N. W. 379; Milliken *v.* St. Clair, 136 Mich. 250, 99 N. W. 7.

Minnesota.— Grant *v.* North American Casualty Co., 88 Minn. 397, 93 N. W. 312.

Mississippi.— Corbin *v.* Cannon, 31 Miss. 570.

Missouri.— Minter *v.* Bradstreet Co., 174 Mo. 444, 73 S. W. 668; Vaughn *v.* Springfield Traction Co., 139 Mo. App. 91, 120 S. W. 683; Bond *v.* Chicago, etc., R. Co., 110 Mo. App. 131, 84 S. W. 124.

Nebraska.— Lau *v.* W. B. Grimes Dry-Goods Co., 38 Nebr. 215, 56 N. W. 954; Sandwich Mfg. Co. *v.* Shiley, 15 Nebr. 109, 17 N. W. 267.

New Jersey.— Humphreys *v.* Woodstown, 48 N. J. L. 588, 7 Atl. 301.

New York.— Roseman *v.* Mahony, 86 N. Y. App. Div. 377, 83 N. Y. Suppl. 749; Deming *v.* Terminal R., 49 N. Y. App. Div. 493, 63 N. Y. Suppl. 615 [*affirmed* in 169 N. Y. 1, 61 N. E. 983, 88 Am. St. Rep. 521].

North Carolina.— McMillan *v.* Baxley, 112 N. C. 578, 16 S. E. 845.

Ohio.— Duhme Jewelry Co. *v.* Hazen, 27 Ohio Cir. Ct. 679; Travelers' Ins. Co. *v.* Rosch, 23 Ohio Cir. Ct. 491.

Pennsylvania.— Shaffer *v.* Cambria Iron Co., 5 Pa. Cas. 104, 8 Atl. 202.

Rhode Island.— Clarke *v.* New York, etc., R. Co., 26 R. I. 59, 58 Atl. 245; Collier *v.* Jencks, 19 R. I. 493, 34 Atl. 998.

South Carolina.— Reeves *v.* Southern R. Co., 68 S. C. 89, 46 S. E. 543.

Texas.— St. Louis, etc., R. Co. *v.* Foster, (Civ. App. 1905) 89 S. W. 450; Missouri, etc., R. Co. *v.* Penny, 39 Tex. Civ. App. 358, 87 S. W. 718.

Vermont.— Lynds *v.* Plymouth, 73 Vt. 216, 50 Atl. 1083.

Virginia.— Bernard *v.* Richmond, etc., R. Co., 85 Va. 792, 8 S. E. 785, 17 Am. St. Rep. 103; Payne *v.* Grant, 81 Va. 164.

Washington.— Goldthorpe *v.* Clark-Nickerson Lumber Co., 31 Wash. 467, 71 Pac. 1091.

West Virginia.— Wheeling Bridge Co. *v.* Wheeling, etc., Bridge Co., 34 W. Va. 155, 11 S. E. 1009 [*affirmed* in 138 U. S. 287, 11 S. Ct. 301, 34 L. ed. 967].

Wisconsin.— Cronin *v.* Delavan, 50 Wis. 375, 7 N. W. 249; Butler *v.* Milwaukee, etc., R. Co., 28 Wis. 487.

United States.—Hartranft *v.* Langfeld, 125 U. S. 128, 8 S. Ct. 732, 31 L. ed. 672; Orient Ins. Co. *v.* Leonard, 120 Fed. 808, 57 C. C. A. 176.

33. *Illinois.*— McDermott *v.* Chicago City R. Co., 83 Ill. App. 307; Royal Ins. Co. *v.* Crowell, 77 Ill. App. 544.

Indiana.— Roush *v.* Roush, 154 Ind. 562, 55 N. E. 1017.

Kansas.— Rouse *v.* Downs, 5 Kan. App. 549, 47 Pac. 982.

Michigan.— Fowles *v.* Rupert, 143 Mich. 246, 106 N. W. 873; Abrey *v.* Detroit, 127 Mich. 374, 86 N. W. 785.

Minnesota.— Erickson *v.* Pomerank, 66 Minn. 376, 69 N. W. 39.

Missouri.— Noll *v.* St. Louis Transit Co., 100 Mo. App. 367, 73 S. W. 907.

North Carolina.— Dale *v.* Southern R. Co., 132 N. C. 705, 44 S. E. 399.

Virginia.— Snouffer *v.* Hansbrough, 79 Va. 166.

West Virginia.— Boggess *v.* Taylor, 47 W. Va. 254, 34 S. E. 739.

Wisconsin.— Brunette *v.* Gagen, 106 Wis. 618, 82 N. W. 564.

34. *Alabama.*— Gates *v.* O'Gara, 145 Ala. 665, 39 So. 729.

Georgia.— Phillips *v.* Bullard, 58 Ga. 256.

Indiana.— Baum *v.* Palmer, 165 Ind. 513, 76 N. E. 108; Louisville, etc., R. Co. *v.* Krinning, 87 Ind. 351.

Kentucky.— Eversole *v.* White, 112 Ky. 193, 65 S. W. 442, 23 Ky. L. Rep. 1435.

Michigan.— Commercial Bank *v.* Chatfield, 127 Mich. 407, 86 N. W. 1015; Schloss *v.* Estey, 114 Mich. 429, 72 N. W. 264.

Nebraska.— Korbel *v.* Skocpol, 70 Nebr. 45, 96 N. W. 1022.

North Carolina.— Edwards *v.* Carolina, etc., R. Co., 140 N. C. 49, 52 S. E. 234; Stewart *v.* North Carolina R. Co., 136 N. C. 385, 48 S. E. 793.

Texas.— Jones *v.* Gammel-Statesman Pub. Co., 100 Tex. 320, 99 S. W. 701, 8 L. R. A. N. S. 1197 [*reversing* (Civ. App. 1906) 94 S. W. 191]; International, etc., R. Co. *v.* Duncan, (Civ. App. 1909) 121 S. W. 362; Halliday *v.* Lambright, 29 Tex. Civ. App. 226, 68 S. W. 712.

Washington.— Harris *v.* Halverson, 23 Wash. 779, 63 Pac. 549.

35. *Illinois.*—Anderson Transfer Co. *v.* Fuller, 174 Ill. 221, 51 N. E. 251 [*affirming* 73 Ill. App. 48]; Chicago Consol. Traction Co. *v.* Gervens, 113 Ill. App. 275.

Indiana.— Baltimore, etc., R. Co. *v.* Harbin, 160 Ind. 441, 67 N. E. 109; Woodward *v.* Begue, 53 Ind. 176; Indianapolis St. R. Co. *v.* Brown, 32 Ind. App. 130, 69 N. E. 407.

Indian Territory.— Brown *v.* McNair, 5 Indian Terr. 67, 82 S. W. 677.

Iowa.— Hess *v.* Lucas, 122 Iowa 517, 98 N. W. 466.

Kansas.— Atchison, etc., R. Co. *v.* Long, 5 Kan. App. 644, 47 Pac. 993; Rouse *v.* Downs, 5 Kan. App. 549, 47 Pac. 982.

should have directed a verdict for appellee;[36] or where appellant would not be entitled to recover in any event.[37]

(II) *As to Amount of Damages.* Where the verdict is for defendant, a refusal to instruct on the subject of damages,[38] or exemplary damages,[39] is harmless error. So, likewise, where it is manifest from the amount of the verdict that the jury did not include exemplary damages, the error, if any, in refusing to give a charge excluding a finding for such damages, is harmless.[40] And where the damages awarded do not exceed the amount claimed in the complaint, the failure to limit the amount of recovery to such sum is harmless error.[41]

X. Attendance, Custody, Conduct, and Deliberations of Jury.[42]

A. Attendance, Custody, and Conduct in General — 1. Presence of Jury During Proceedings.[43]

Questions of law are to be argued exclusively to the

Massachusetts.— Emerson *v.* Metropolitan L. Ins. Co., 185 Mass. 318, 70 N. E. 200.

Michigan.— Germaine *v.* Muskegon, 105 Mich. 213, 63 N. W. 78; Anderson *v.* Thunder Bay River Boom Co., 57 Mich. 216, 23 N. W. 776.

Nebraska.— New Omaha Thomson-Houston Electric Light Co. *v.* Dent, 68 Nebr. 668, 94 N. W. 819, 103 N. W. 1091.

North Carolina.— Joines *v.* Johnson, 133 N. C. 487, 45 S. E. 828.

Rhode Island.— Guckian *v.* Newbold, 23 R. I. 553, 51 Atl. 210.

Texas.— Kobs *v.* New York, etc., Land Co., (Civ. App. 1901) 63 S. W. 1087; Behrends *v.* Crenshaw, (Civ. App. 1899) 53 S. W. 586.

Virginia.— Sulphur Mines Co. *v.* Thompson, 93 Va. 293, 25 S. E. 232.

Wisconsin.— Tesch *v.* Milwaukee Electric R., etc., Co., 108 Wis. 593, 84 N. W. 823, 53 L. R. A. 618.

36. Western Union Tel. Co. *v.* Whitson, 145 Ala. 426, 41 So. 405; Nashville, etc., R. *v.* Walley, (Ala. 1906) 41 So. 134; Bennett *v.* Brooks, 146 Ala. 490, 41 So. 149; Birmingham R., etc., Co. *v.* Rutledge, 142 Ala. 195, 39 So. 338; Polish Roman Catholic Union of America *v.* Warczak, 182 Ill. 27, 55 N. E. 64 [*affirming* 82 Ill. App. 351]; U. P. Steam Baking Co. *v.* Omaha St. R. Co., 4 Nebr. (Unoff.) 396, 94 N. W. 533.

37. *Alabama.*— Doe *v.* Riley, 28 Ala. 164, 65 Am. Dec. 334; Reese *v.* Harris, 27 Ala. 301.

Maine.— Powers *v.* Sawyer, 46 Me. 160.

Missouri.— Newberger *v.* Friede, 23 Mo. App. 631.

New Jersey.— Leport *v.* Todd, 32 N. J. L. 124.

Texas.— Howard *v.* Britton, 71 Tex. 286, 9 S. W. 73; Fisk *v.* Wilson, 15 Tex. 430.

Virginia.— Clark *v.* Richmond, 83 Va. 355, 5 S. E. 369, 5 Am. St. Rep. 281.

38. Montgomery *v.* Willis, 45 Nebr. 434, 63 N. W. 794; Eldred *v.* Hazlett, 38 Pa. St. 16; Moran *v.* Nashville, etc., R. Co., 2 Baxt. (Tenn.) 379; Earley *v.* Winn, 129 Wis. 291, 109 N. W. 633; Palmer *v.* Banfield, 86 Wis. 441, 56 N. W. 1090.

39. Brown *v.* St. Louis, etc., R. Co., 52 Ark. 120, 12 S. W. 203; Myers *v.* Wright, 44 Iowa 38.

40. Cross *v.* Carter, 100 Ga. 632, 28 S. E. 390; Connelly *v.* Adams, 42 S. W. 1133, 19 Ky. L. Rep. 1084; Norton *v.* Third Ave. R. Co., 26 N. Y. App. Div. 60, 49 N. Y. Suppl. 898; Texas, etc., R. Co. *v.* Watts, (Tex. 1891) 18 S. W. 312.

41. McGee *v.* Smitherman, 69 Ark. 632, 65 S. W. 461; Northern Colorado Irrigation Co. *v.* Richards, 22 Colo. 450, 45 Pac. 423; Hall *v.* Cornett, 43 S. W. 706, 19 Ky. L. Rep. 1549; Maysville, etc., R. Co. *v.* Sparks, 14 Ky. L. Rep. 671; Edger *v.* Kupper, 110 Mo. App. 280, 85 S. W. 949; Murphy *v.* St. Louis Transit Co., 96 Mo. App. 272, 70 S. W. 159.

42. **Discharge on Sunday for failure to agree** see Sunday, 37 Cyc. 590.

In criminal cases see Criminal Law, 12 Cyc. 668 *et seq.*

In justice's court see Justices of the Peace, 24 Cyc. 583.

Instructions as to duties of juries see *supra*, IX, E, 16.

Misconduct of jury as ground for arrest of judgment in civil cases see Judgments, 23 Cyc. 832.

In criminal cases see Criminal Law, 12 Cyc. 760.

Misconduct of jury as ground for new trial in civil cases see New Trial, 29 Cyc. 796 *et seq.*

In criminal cases see Criminal Law, 12 Cyc. 748 *et seq.*

Review on appeal in civil cases: As depending on matters appearing of record see Appeal and Error, 3 Cyc. 163. As depending on motion for new trial see New Trial, 29 Cyc. 755. Discretion of lower court see Appeal and Error, 3 Cyc. 335. Presumptions of correctness of proceedings in lower court see Appeal and Error, 3 Cyc. 298.

Review on appeal in criminal prosecutions: As depending on matters appearing of record see Criminal Law, 12 Cyc. 890. As depending on motion for new trial see Criminal Law, 12 Cyc. 822. Harmless error see Criminal Law, 12 Cyc. 933. Presumption as to correctness of proceedings in lower court see Criminal Law, 12 Cyc. 892. Questions presented for review see Criminal Law, 12 Cyc. 867.

43. **During offer of evidence and argument thereon in civil cases** see *supra*, V, A, 2, d.

court, and not to the jury; but there is no rule which requires the jury to be sent out while such an argument is in progress before the court, or which declares that, in the course of an argument to the court, the law shall not be read in the hearing of the jury, but such matters must rest largely in the discretion of the presiding judge,[44] who may have the jury removed,[45] or permit them to remain,[46] when counsel is engaged in reading law-books to the court. It is not error to permit the jury to remain during the discussion of a motion for nonsuit,[47] or of the proper form of verdict.[48] But it is irregular and improper to call on counsel, in the hearing of the jury, to waive any legal right.[49] And complaint that witnesses have been tampered with by a party should not be made in the presence of the jury, but they should be retired, and opportunity given to make the complaint and have it investigated.[50] Juries have no concern with exceptions to rulings, and it is not necessary that they be present when exceptions are taken or allowed.[51]

2. Officer in Charge.[52] Except in cases where they find a verdict without leaving their seats,[53] the jury during their deliberations should be placed in charge of a duly authorized officer of the court,[54] and that too, although they do not leave the court-room, if they are left alone. In such case, the same necessity exists for putting them in charge of an officer as if they had retired from the court.[55] Officers who are interested in the result of a lawsuit should not personally attend the jurors during their deliberations,[56] and where officers are interested, the court may appoint a special officer to attend the jury during trial.[57] While it is proper for the court to administer a special oath to the officer put in charge of the jury,[58] a special oath need not be administered in the absence of some statutory requirement to that effect. The official oath of the officer is sufficient.[59]

3. Separation of Jury[60] **— a. With Consent** — (i) *Before Final Submission.*[61] Before final submission of the cause to the jury, it is very generally held proper for the court to permit the jury to separate during adjournment for rest

During offer of evidence and argument thereon in criminal cases see Criminal Law, 12 Cyc. 553.

44. Slaughter *v.* Heath, 127 Ga. 747, 57 S. E. 69, 27 L. R. A. N. S. 1; Rutledge *v.* Hudson, 80 Ga. 266, 5 S. E. 93.

45. Gulf, etc., R. Co. *v.* Harrison, (Tex. Civ. App. 1907) 104 S. W. 399.

46. Sanborn *v.* Cunningham, (Cal. 1893) 33 Pac. 894.

47. Higgins *v.* Cherokee, etc., R. Co., 73 Ga. 149.

48. Ruffing *v.* Tilton, 12 Ind. 259.

49. Terry *v.* Buffington, 11 Ga. 337, 56 Am. Dec. 423.

50. Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18. *Compare* Atchison, etc., R. Co. *v.* Wagner, 19 Kan. 335, in which it was said that ordinarily such matters should be first investigated privately by the court, but that is largely within the discretion of the court and not a ground for reversal where it does not appear to have been prejudicial.

51. Salomon *v.* Reis, 5 Ohio Cir. Ct. 375, 3 Ohio Cir. Dec. 184.

52. In criminal prosecutions see Criminal Law, 12 Cyc. 669.

Misconduct of officer see *infra*, X, C, 2.

53. Fink *v.* Hall, 8 Johns. (N. Y.) 437. And see Meyer *v.* Foster, 16 Wis. 294.

54. Staley *v.* Barhite, 2 Cai. (N. Y.) 221.

Commissioner.— In a statutory proceeding by a landlord to recover possession of premises, the fact that the jury were shut up in the jury-room by the commissioner instead of by a constable is not prejudicial error especially where no objection was made. Hart *v.* Lindley, 50 Mich. 20, 14 N. W. 682.

55. Douglass *v.* Blackman, 14 Barb. (N. Y.) 381.

56. State *v.* Judge Pointe Coupee Ninth Judicial Dist. Ct., 11 La. Ann. 79. But the mere fact that the court bailiff, a son of defendant, was a brother of plaintiff and a witness for him, did not support a contention that the verdict for plaintiff was the result of prejudice, where plaintiff's abstract showed that he did not have charge of the jury, and it did not appear that any objection was made, or exception taken. McGibbons *v.* McGibbons, 119 Iowa 140, 93 N. W. 55.

57. Harbour *v.* Scott, 12 La. Ann. 152.

58. Boreham *v.* Byrne, 83 Cal. 23, 23 Pac. 212.

59. Boreham *v.* Byrne, 83 Cal. 23, 23 Pac. 212; Deranlieu *v.* Jandt, 37 Nebr. 532, 56 N. W. 299. And see Chapman *v.* Chicago, etc., R. Co., 26 Wis. 295, 7 Am. Rep. 81, holding that the fact that the jury were left in charge of a deputy who was not specially sworn is not ground for reversal, where it does not appear that the parties were prejudiced thereby, and that in any event objection on that ground must be taken at the time or it is waived.

60. As affecting amendment of verdict see *infra*, XI, B, 4.

Directions to separate as dispensing with attendance of jury on reception of verdict see *infra*, XI, B, 2, a.

61. As ground for new trial in civil cases see New Trial, 29 Cyc. 806.

and refreshments,[62] or where the further consideration of the case is postponed for several days,[63] the matter of so doing resting largely in the discretion of the court.[64] Especially is this true when no motion is made against granting permission or cause shown for not allowing the separation.[65] But to give the court authority to permit separation of the jury, the consent of counsel is unnecessary.[66] Permission may be granted over objection of counsel,[67] and the action of the court in this regard will not be ground for reversal when no abuse of discretion is shown.[68] Permitting several of the jurors to go to a closet outside of the court-room, in custody of an officer of the court, is not improper.[69]

(II) *AFTER FINAL SUBMISSION.*[70] A verdict will not be set aside merely because after being charged, the jury were permitted to leave the court and separate before giving their verdict.[71] So, permitting one of the jurors after retirement and before a verdict has been agreed on, to go to another room in charge of an officer and telephone instructions to an employee will not vitiate the verdict.[72] And, according to the weight of authority, it is within the discretion of the court to give the jury permission to separate if they find a verdict during an adjournment, and to return a sealed verdict on the reassembling of the court.[73] Especially is this true where the separation of the jury is by consent of the parties;[74] but the fact that this permission was given without notice to counsel will not vitiate the verdict in the absence of any showing of prejudice.[75] In no event will a judgment be reversed because the jury are permitted to separate after retirement and before agreement, where no injury is shown or attempted to be shown.[76] And a separation after an agreement cannot vitiate a verdict unless there is ground for suspicion that the jury have been improperly tampered with, and the verdict affected by intervening circumstances.[77]

In criminal cases see CRIMINAL LAW, 12 Cyc. 671.

62. Stancell *v.* Kenan, 33 Ga. 56; Wilson *v.* Abrahams, 1 Hill (N. Y.) 207; Welch *v.* Welch, 9 Rich. (S. C.) 133; Noel *v.* Denman, 76 Tex. 306, 13 S. W. 318; San Antonio, etc., R. Co. *v.* Bennett, 76 Tex. 151, 13 S. W. 319 (special statutory authorization); International, etc., R. Co. *v.* McVey, 46 Tex. Civ. App. 181, 102 S. W. 172.

63. Kothman *v.* Faseler, (Tex. Civ. App. 1904) 84 S. W. 390.

64. Stancell *v.* Kenan, 33 Ga. 56; Welch *v.* Welch, 9 Rich. (S. C.) 133.

65. Central of Georgia R. Co. *v.* Hall, 109 Ga. 367, 34 S. E. 605; Stancell *v.* Kenan, 33 Ga. 56.

66. Noel *v.* Denman, 76 Tex. 306, 13 S. W. 318.

67. Noel *v.* Denman, 76 Tex. 306, 13 S. W. 318; International, etc., R. Co. *v.* McVey, 46 Tex. Civ. App. 181, 102 S. W. 172.

68. Noel *v.* Denman, 76 Tex. 306, 13 S. W. 318.

69. Watts *v.* South Bound R. Co., 60 S. C. 67, 38 S. E. 240.

70. **As ground for new trial in civil cases** see NEW TRIAL, 29 Cyc. 806.

In criminal cases see CRIMINAL LAW, 12 Cyc. 673.

71. Vicksburg, etc., R. Co. *v.* Elmore, 46 La. Ann. 1237, 15 So. 701. And see Iowa Sav. Bank *v.* Frink, 1 Nebr. (Unoff.) 14, 26, 92 N. W. 916, holding that separation of the jury after submission of the case and before retirement by consent of counsel will not warrant a reversal where it appeared that neither party was prejudiced by such action.

In Georgia it is held that the jury should not be permitted to separate without consent of counsel after submission of the cause, but where, after submission of the cause and before retirement, the court, in the presence of counsel, gives permission to the jury to separate, and counsel make no objection, their consent will be presumed (Adkins *v.* Williams, 23 Ga. 222; Riggins *v.* Brown, 12 Ga. 271); and if permission is granted in counsel's absence, their failure to make any objection when the jury reassembles will also be held to be an implied consent to the dispersal (Stix *v.* Pump, 37 Ga. 332).

72. West Chicago St. R. Co. *v.* Lundahl, 82 Ill. App. 553 [*affirmed* in 183 Ill. 284, 55 N. E. 667].

73. Crocker *v.* Hoffman, 48 Ind. 207; Scott *v.* Chope, 33 Nebr. 41, 49 N. W. 940; Welch *v.* Welch, 9 Rich. (S. C.) 133.

74. Rogers *v.* Sample, 28 Nebr. 141, 44 N. W. 86.

75. Mains *v.* Cosner, 62 Ill. 465; Walker *v.* Dailey, 87 Iowa 375, 54 N. W. 344. See also cases cited in preceding notes. *Contra*, Prescott *v.* Augusta, 118 Ga. 549, 45 S. E. 431; Barfield *v.* Mullino, 107 Ga. 730, 33 S. E. 647, in both of which cases it was held that where the court, without consent of counsel, gave the jury permission during adjournment to seal their verdict and disperse, and on reconvening of the court, counsel objected to receiving the verdict before it was published, it was error to refuse to declare a mistrial.

76. Lake Erie, etc., R. Co. *v.* Helmerick, 29 Ill. App. 270; Cedar Rapids First Nat. Bank *v.* Hurford, 29 Iowa 579.

77. Welch *v.* Welch, 9 Rich. (S. C.) 133

b. Without Consent.[78] The propriety of keeping a jury together until they have rendered their verdict cannot be too strongly inculcated; but the object is to obtain an unbiased expression of their judgment;[79] and, although the dispersion of the jury without leave may render the members thereof punishable as for a contempt,[80] it is very generally held that separation of the jury without permission of the court after finding their verdict but before rendition thereof, while an irregularity, does not of itself vitiate the verdict, and that the court may nevertheless receive it, when uninfluenced by any intervening cause.[81] So it has been held that the fact that a jury separate, without leave of the court, after a case has been committed to them, and before they have agreed upon their verdict, and afterward come together and agree, will not vitiate the verdict, if the jurors were not tampered with and their verdict affected thereby.[82] Likewise, the temporary absence of a juror from the jury room, without permission of the court, affords no ground for disturbing the verdict, when there is no proof of misconduct on his part with reference to the cause on trial.[83]

c. Asking Counsel if They Object to Separation of Jury. For the court to ask counsel, in the hearing of the jury, if they had any objection to separation of the jury, is not good practice,[84] as his refusal might excite the feelings of the jury against him.[85] Nevertheless, it is not ground for reversal where resulting prejudice is not shown.[86]

4. Admonitions to Jury.[87] When permission is given the jury to separate, the jury should be appropriately instructed not to talk about the case with others nor to permit any person to discuss the case with them.[88] It has been held, however, that this requirement is waived if the parties allow the jury to separate without asking such admonition;[89] and where the jury are so admonished when retiring under direction, that if they have not reached a verdict in a given time they may separate for a definite period, it is not necessary that the admonition be repeated before actual separation.[90] If no other verdict could have been rendered on the evidence, failure to give the jury proper cautions on permitting

78. As ground for new trial see New Trial, 29 Cyc. 806.

79. Sartor *v.* McJunkin, 8 Rich. (S. C.) 451.

80. Horton *v.* Horton, 2 Cow. (N. Y.) 589.

81. *Iowa.*— Heiser *v.* Van Dyke, 27 Iowa 359; Cook *v.* Walters, 4 Iowa 72.

New Hampshire.— Evans *v.* Foss, 49 N. H. 490.

New York.— Horton *v.* Horton, 2 Cow. 589.

North Carolina.— Luttrell *v.* Martin, 112 N. C. 593, 17 S. E. 573; Petty *v.* Rousseau, 94 N. C. 355; Butts *v.* Drake, 3 N. C. 102.

Ohio.— Sutliff *v.* Gilbert, 8 Ohio 405; Wright *v.* Burchfield, 3 Ohio 53.

South Carolina.— Sartor *v.* McJunkin, 8 Rich. 451.

See 46 Cent. Dig. tit. "Trial," § 724.

Two jurors.—A jury agreed on its verdict, and it was signed by the foreman, but the justices not being on the bench at the time, two of the jurors separated from their fellows, and conversed with others, although not on the subject of the cause; when the justices resumed their seats, the verdict was rendered. It was held such separation was no cause for setting aside the verdict. Ragland *v.* Wills, 6 Leigh (Va.) 1.

82. Brandin *v.* Grannis, 1 Conn. 402 note; Downer *v.* Baxter, 30 Vt. 467. And see Abel *v.* Hitt, 30 Nev. 93, 93 Pac. 227, holding that, although the jury without permission of the court, before being placed in the custody of the officer, became separated and were not in the custody of the officer, this will not warrant a reversal where it does not appear that any juror was improperly influenced nor that any effort was made to prejudice the rights of the complaining party, nor that any of his rights were prejudiced by the separation.

Separation after retirement induced by a sudden alarm of fire in the near vicinity of the jury-room is not of itself such misconduct as will vitiate their verdict on reassembling. Armleder *v.* Liberman, 33 Ohio St. 77, 31 Am. Dec. 530.

83. Milo *v.* Gardiner, 41 Me. 549.

84. State *v.* Holedger, 15 Wash. 443, 46 Pac. 652.

85. Rex *v.* Woolf, 1 Chit. 401, 18 E. C. L. 223.

86. State *v.* Holedger, 15 Wash. 443, 46 Pac. 652.

87. In criminal cases see Criminal Law, 12 Cyc. 674.

88. Adkins *v.* Williams, 23 Ga. 222; Crocker *v.* Hoffman, 48 Ind. 207; Noel *v.* Denman, 76 Tex. 306, 13 S. W. 318. And see Kothman *v.* Faseler, (Tex. Civ. App. 1904) 84 S. W. 390.

89. Crocker *v.* Hoffman, 48 Ind. 207.

90. Fields *v.* Dewitt, 71 Kan. 676, 81 Pac. 467.

them to separate cannot be availed of as error.[91] If the court have reason to believe that the jurors have expressed a determination to render a verdict in favor of one of the parties, irrespective of the facts proved, he may before the parties have challenged them admonish them as to their duty to decide the case fairly and impartially on the evidence.[92]

B. Misconduct of Jurors[93]**— 1. In General.** It has been held not improper for the jury to take notes of what is said if too much time is not consumed thereby,[94] or for the jury with the permission of the court to make memoranda of articles in suit and the value placed thereon by the evidence.[95] Nor is the jury guilty of any misconduct in sending one of their number to ask the court to explain its instructions,[96] or in sending out for refreshments while deliberating upon their verdict.[97] On the other hand, it is improper for the foreman of the jury to endeavor to find out how the jury stood upon a former trial of the case.[98] And it is gross misconduct for a jury that has been authorized to make a sealed verdict and disperse, to seal up a piece of paper stating that they could not agree and then to disperse, and the case could not be given to the jury again even if the parties did not object.[99] But every irregularity which would subject the juror to censure should not overturn the verdict, unless there is some reason to suspect that irregularity may have had an influence on the final result.[1] In the absence of prejudice to the party complaining, misconduct of jurors is not a ground for reversal.[2] It is not sufficient to vitiate a verdict that some of the jury during the progress of a trial played cards with one of the attorneys of a party;[3] that a juror pending the trial made statements to persons not interested in the case respecting the effect of the evidence;[4] that a juror during recess of trial conversed with the agent of one of the parties,[5] or with a party,[6] or a witness,[7] on matters not connected with the case. So it is not ground for reversal that a juror cross-examined a witness,[8] or communicated with persons unknown to the officer in charge,[9] or upon counsel's making a statement in his opening address saying

91. Kirby *v.* Western Union Tel. Co., 4 S. D. 105, 55 N. W. 759, 46 Am. St. Rep. 765, 30 L. R. A. 612.

92. Sickler *v.* LaVelle, 65 Wis. 572, 27 N. W. 163.

93. **As ground for arrest of judgment:** In civil cases see JUDGMENTS, 23 Cyc. 832. In criminal cases see CRIMINAL LAW, 12 Cyc. 760.

As ground for new trial: In civil cases see NEW TRIAL, 29 Cyc. 796 *et seq.* In criminal cases see CRIMINAL LAW, 12 Cyc. 748 *et seq.*

Misconduct of jurors and of others affecting them in criminal prosecutions see CRIMINAL LAW, 12 Cyc. 674 *et seq.*

94. Lilly *v.* Griffin, 71 Ga. 535; Tift *v.* Towns, 63 Ga. 237.

Taking of notes by jurors in criminal cases see CRIMINAL LAW, 12 Cyc. 675.

95. Omaha F. Ins. Co. *v.* Crighton, 50 Nebr. 314, 69 N. W. 766.

96. Gratz *v.* Worden, 82 S. W. 395, 26 Ky. L. Rep. 721.

97. Long *v.* Davis, 136 Iowa 734, 114 N. W. 197.

Drinking cider is not misconduct. Tripp *v.* Bristol County Com'rs, 2 Allen (Mass.) 556.

98. Prewitt *v.* Southwestern Tel., etc., Co., 46 Tex. Civ. App. 123, 101 S. W. 812.

99. White *v.* Martin, 3 Ill. 69.

1. Richardson *v.* Jones, 1 Nev. 405.

2. Lake Erie, etc., R. Co. *v.* Helmerick, 29 Ill. App. 270; Truman *v.* Bishop, 83 Iowa 697, 50 N. W. 278; Longworthy *v.* Myers, 4 Iowa 18; Vaughn *v.* Crites, 44 Nebr. 812, 62 N. W. 1098; Armleder *v.* Liberman, 33 Ohio St. 77, 31 Am. Rep. 530. And see De Hart *v.* Etnire, 121 Ind. 242, 23 N. E. 77, holding that to vitiate the verdict it must appear that the misconduct was gross and resulted in a probable injury to the party complaining.

3. Feary *v.* Metropolitan St. R. Co., 162 Mo. 75, 62 S. W. 452.

4. Stockwell *v.* Chicago, etc., R. Co., 43 Iowa 470.

5. Hairgrove *v.* Curtiss, 67 Ill. App. 448.

6. Bonnet *v.* Glattfeldt, 120 Ill. 166, 11 N. E. 250 [*affirming* 24 Ill. App. 533]; Danville Democrat Pub. Co. *v.* McClure, 86 Ill. App. 432; Vowell *v.* Issaquah Coal Co., 31 Wash. 103, 71 Pac. 725.

7. Francis *v.* Philadelphia, etc., Pass. R. Co., 13 Montg. Co. Rep. (Pa.) 176.

8. Chicago, etc., R. Co. *v.* Krueger, 124 Ill. 457, 17 N. E. 52 [*affirming* 23 Ill. App. 639], on the ground that this manifested prejudice.

9. Saltzman *v.* Sunset Tel., etc., Co., 125 Cal. 501, 58 Pac. 169, the conversation being heard by the officer and the party making oath as to the nature of the conversation. *Compare* Robinson *v.* Donehoo, 97 Ga. 702, 25 S. E. 491, holding that where, after a jury had been charged by the court, and sent out to make up their verdict, two or three of them, while separated from their fellows, "remained in conversation with somebody for

"that won't help you a bit, — that will not do you any good." [10] It has been held sufficient to vitiate a verdict that some of the jurors during trial took dinner at a restaurant with the successful party, at his invitation and expense; [11] that a juror went to the house of a person not friendly with plaintiff and who held a pass over defendant's road and spent the night there with defendant's attorney; [12] that a juror conversed with several persons about the cause; [13] that a juror, in an action for injuries alleged to be due in part to a defective switch, without the knowledge of the court, personally examined the switch; [14] that a juror during recess read a medical book bearing on the case; [15] that the remarks of a juror during the trial showed prejudice; [16] or that the jurors took into consideration the fact that plaintiff's son had previously recovered a judgment in his own right for the injuries complained of.[17] In determining whether the misconduct of a juror was prejudicial, the reviewing court is not bound by the opinion of the trial court.[18] By agreeing to excuse a juror, and to proceed with the trial with eleven jurors, a party waives any objection he might have taken to the conduct of such juror.[19]

2. Drinking Intoxicating Liquors.[20] If a juror is rendered incapable of performing his duties by drinking intoxicating liquors,[21] or drinks at the expense of the successful party,[22] it is, of course, a ground for reversal. But the merely drinking of intoxicating liquors, when the drinking is not at the expense of one of the parties, and the jurors are not incapacitated from performing their duties as such furnishes no ground for disturbing the verdict.[23]

3. Disclosure of Verdict.[24] Disclosure of the nature of a sealed verdict by a juror before its announcement is reprehensible conduct on his part,[25] but is not of itself sufficient to invalidate the verdict.[26] A motion to vacate the verdict on that ground is addressed to the judicial discretion of the trial court.[27]

4. Unauthorized View or Inspection.[28] Jurors must render a verdict on

about fifteen minutes," the legal presumption is that the losing party in the case was thereby injured, and, in the absence of any explanation of the matter, there should be a new trial.

10. Chicago, etc., R. Co. *v.* Holland, 122 Ill. 461, 13 N. E. 145.

11. Marshall *v.* Watson, 16 Tex. Civ. App. 127, 40 S. W. 352.

12. Albers *v.* San Antonio, etc., R. Co., 36 Tex. Civ. App. 186, 81 S. W. 828. *Compare* Hardy *v.* Spoule, 32 Me. 594, holding that the fact that the foreman of the jury and one of the defendants lodged in the same room while the cause was on trial was not sufficient to invalidate the verdict, there being no evidence, either direct or inferential, which authorized the belief that the jury were influenced in any way thereby.

13. Bow *v.* Parsons, 1 Root (Conn.) 429.

14. Floody *v.* Great Northern R. Co., 102 Minn. 81, 112 N. W. 875, 1081, 13 L. R. A. N. S. 1196.

15. Force *v.* Scholl, 22 Pa. Co. Ct. 107.

16. Flanders *v.* Mullin, 73 Vt. 276, 50 Atl. 1055. And see Farrington *v.* Cheponis, 82 Conn. 258, 73 Atl. 139.

17. Forsythe *v.* Central Mfg. Co., 103 Tenn. 497, 53 S. W. 731.

18. Albert *v.* Young, 80 Nebr. 677, 114 N. W. 936.

19. Texarkana, etc., R. Co. *v.* Toliver, 37 Tex. Civ. App. 437, 84 S. W. 375.

20. **As ground for new trial in civil cases** see New Trial, 29 Cyc. 802.

On trial of criminal cases see Criminal Law, 12 Cyc. 674.

21. Repath *v.* Walker, 13 Colo. 109, 21 Pac. 917; Rose *v.* Smith, 4 Cow. (N. Y.) 17, 15 Am. Dec. 331.

22. Wilson *v.* Abrahams, 1 Hill (N. Y.) 207. And see Kellogg *v.* Wilder, 15 Johns. (N. Y.) 455, holding that a verdict is vitiated where the court permitted the parties to treat the jurors with spirituous liquors.

23. Hemmi *v.* Chicago Great Western R. Co., 102 Iowa 25, 70 N. W. 746; Ankeny *v.* Rawhouser, 2 Nebr. (Unoff.) 32, 95 N. W. 1053; Richardson *v.* Jones, 1 Nev. 405; Wilson *v.* Abrahams, 1 Hill (N. Y.) 207 [*disapproving* Brant *v.* Fowler, 7 Cow. (N. Y.) 562]. And see New Trial, 29 Cyc. 802. But see Bernier *v.* Anderson, 8 Ida. 675, 70 Pac. 1027, holding that it is error to permit a juror to use intoxicating liquors during trial or during the deliberations of the jury, unless with the permission of the court, upon the prescription of a practising physician.

The fact that a juror took a dose of quinine and whisky for a severe cold is not of itself ground to set aside a verdict. Gorham *v.* Sioux City Stockyards Co., 118 Iowa 749, 92 N. W. 698.

24. **As ground for new trial** see New Trial, 29 Cyc. 200.

25. Ingersoll *v.* Truebody, 40 Cal. 603.

26. Ingersoll *v.* Truebody, 40 Cal. 603.

27. Wiest *v.* Luyendyk, 73 Mich. 661, 41 N. W. 839.

28. **As ground for new trial** see New Trial, 29 Cyc. 801.

evidence introduced on the trial of the cause,[29] and it is not permissible that they should go on a private search for evidence,[30] because such examination may put them in possession of facts which, although incompetent, would have a potential influence upon their decision,[31] and the parties would have no opportunity of meeting, explaining, or rebutting evidence thus obtained.[32] By such conduct the jurors are in effect obtaining evidence, the nature and importance of which it is impossible for the parties to know.[33] While, as heretofore shown, the court may in its discretion allow a view or inspection by the jury,[34] a view or inspection by a juror or jurors without consent of the court,[35] or in disobedience of a ruling refusing it,[36] is misconduct, which may or may not vitiate the verdict according to circumstances. It has been held in a case where the act of the juror was in direct disobedience of a ruling of the court refusing to allow a view, that no inquiry will be made as to whether or not prejudice to a party resulted, but the verdict will be set aside on the broad ground that the misconduct of the juror has a tendency to corrupt and cast suspicion upon the administration of justice,[37] and viewing the premises in company with the witnesses of one of the parties has been held fatal to the verdict.[38] So the verdict is vitiated where it clearly appears,[39] or it can reasonably be inferred [40] that the unauthorized view or inspection influenced the verdict, or where the court cannot determine, with any reasonable certainty, whether the result was affected or not; under these circumstances it will be assumed that it was.[41] And, where some of the jurors make an unauthorized view, the irregularity is not cured by direction of the court to the entire jury to make a view.[42] On the other hand, it has been held that not every unauthorized view or inspection will be sufficient ground to set aside the verdict, and

In criminal prosecutions see CRIMINAL LAW, 12 Cyc. 727.

Power of court to direct view or inspection see *supra*, IV, J, 1.

29. See *infra*, X, D, 1.

30. Winslow *v.* Morrill, 68 Me. 362; Bowler *v.* Washington, 62 Me. 302; Heffron *v.* Gallupe, 55 Me. 563; Pierce *v.* Brennan, 83 Minn. 422, 86 N. W. 417.

31. Buffalo Structural Steel Co. *v.* Dickinson, 98 N. Y. App. Div. 355, 90 N. Y. Suppl. 268.

32. Pierce *v.* Brennan, 83 Minn. 422, 86 N. W. 417; Buffalo Structural Steel Co. *v.* Dickinson, 98 N. Y. App. Div. 355, 90 N. Y. Suppl. 268.

33. Buffalo Structural Steel Co. *v.* Dickinson, 98 N. Y. App. Div. 355, 90 N. Y. Suppl. 268.

34. See *supra*, IV, J.

35. *Illinois.*— Stampofski *v.* Steffens, 79 Ill. 303.

Iowa.— Caldwell *v.* Nashua, 122 Iowa 179, 97 N. W. 1000; Carbon *v.* Ottumwa, 95 Iowa 524, 64 N. W. 413.

Maine.—Winslow *v.* Morrill, 68 Me. 362; Bowler *v.* Washington, 62 Me. 302.

Minnesota.— Pierce *v.* Brennan, 83 Minn. 422, 86 N. W. 417; Rush *v.* St. Paul City R. Co., 70 Minn. 5, 72 N. W. 733; Woodbury *v.* Anoka, 52 Minn. 329, 54 N. W. 187; Koehler *v.* Cleary, 23 Minn. 325.

New Jersey.— Deacon *v.* Shreve, 22 N. J. L. 176.

New York.— Buffalo Structural Steel Co. *v.* Dickinson, 98 N. Y. App. Div. 355, 90 N. Y. Suppl. 268.

Rhode Island.— Garside *v.* Ladd Watch Case Co., 17 R. I. 691, 24 Atl. 470.

Tennessee.—Wade *v.* Ordway, 1 Baxt. 229.

Vermont.— Flanders *v.* Mullin, 73 Vt. 276, 50 Atl. 1055.

Wisconsin.— Peppercorn *v.* Black River Falls, 89 Wis. 38, 61 N. W. 79, 46 Am. St. Rep. 818.

United States.— Ewers *v.* National Imp. Co., 63 Fed. 562; Consolidated Ice-Mach. Co. *v.* Trenton Hygeian Ice Co., 57 Fed. 898.

36. Helme *v.* Kingston, 8 Kulp (Pa.) 221.

37. Helme. *v.* Kingston, 8 Kulp (Pa.) 221.

38. Deacon *v.* Shreve, 22 N. J. L. 176.

39. Bowler *v.* Washington, 62 Me. 302. And see Winslow *v.* Morrill, 68 Me. 362.

Instance.— During the trial of an action for the alleged negligence of defendant therein, in respect to the performance of a surgical operation upon clubbed feet, a juryman sitting in the cause made an examination out of court of his own motion of another case of clubbed feet upon which said defendant had performed a similar operation, and, as remarks made by him at the time showed, was by such examination prejudiced against defendant in the cause on trial. It was held ground for new trial. Flanders *v.* Mullin, 73 Vt. 276, 50 Atl. 1055.

40. Garside *v.* Ladd Watch Case Co., 17 R. I. 691, 24 Atl. 470; Wade *v.* Ordway, 1 Baxt. (Tenn.) 229.

41. Pierce *v.* Brennan, 83 Minn. 422, 86 N. W. 417; Woodbury *v.* Anoka, 52 Minn. 329, 54 N. W. 187; Peppercorn *v.* Black River Falls, 89 Wis. 38, 61 N. W. 79, 46 Am. St. Rep. 818.

42. Buffalo Structural Steel Co. *v.* Dickinson, 98 N. Y. App. Div. 355, 90 N. Y. Suppl. 268.

if it conclusively appears [43] or is reasonably clear that no prejudice resulted to either of the parties,[44] or that there was only a bare possibility that there was a prejudicial result,[45] the verdict must stand. And misconduct of jurors in regard to unauthorized views or inspections may be waived, and is waived, when the unsuccessful party remains silent although aware of it,[46] or, knowing of it, goes on with the trial and does not call the court's attention to it until after the return of the verdict.[47]

C. Misconduct of Others Affecting Jury [48]— **1. Of Parties, Relatives, or Friends.**[49] Misconduct of a party to induce a jury to decide in his favor is dealt with more strictly by the court in its refusal to allow the retention of benefits under a verdict so obtained than similar misconduct of a third party or a juror without the knowledge of either party.[50] Thus it has been held reversible error that the successful party talked to a juror with reference to the case during the progress of the trial; [51] that he supplied jurors with meals, luxuries, and cigars not taxed or taxable as costs,[52] or paid to jurors who were dissatisfied with the regular fees an additional amount which they knew was a gratuity paid them by him; [53] or in an action for personal injuries, where one of the questions litigated was as to the ringing of a gong on a car sufficiently loud enough to warn plaintiff, that the successful party rang a gong, which had been admitted in evidence, in the presence of the jury.[54] So it is sufficient to vitiate the verdict that the successful party and a friend talked with and treated individual jurors during trial; [55] that friends of the prevailing party had conversation with jurors about the case intended to and calculated to influence the verdict; [56] or that the brother of the successful party, who was looking after the case for her, drank with a juror at his invitation and purchased dinner for himself and the juror, although both denied talking about the case.[57] On the other hand, it is not reversible error that the court refused a new trial because plaintiff in a personal injuries case became prostrated and was attended by physicians in the court room during trial, it not appearing that the attack was simulated.[58] And conversation by

43. Haight *v.* Elmira, 42 N. Y. App. Div. 391, 59 N. Y. Suppl. 193.

44. Wood *v.* Moulton, 146 Cal. 317, 80 Pac. 92; Gratz *v.* Worden, 82 S. W. 395, 26 Ky. L. Rep. 721; Lyons *v.* Dee, 88 Minn. 490, 93 N. W. 899; Koehler *v.* Cleary, 23 Minn. 325; Chicago, etc., R. Co. *v.* Oyster, 58 Nebr. 1, 75 N. W. 359.

Where there is nothing to show that a different result could have been reached in the absence of an unauthorized inspection, the misconduct is harmless. Gans *v.* Metropolitan St. R. Co., 84 N. Y. Suppl. 914.

Affidavits to show absence of prejudice.— Where a juror inspects the *locus in quo* but makes no communication to his fellow jurors, and makes affidavit that he was not influenced by the view, the verdict will not be set aside. Caldwell *v.* Nashua, 122 Iowa 179, 97 N. W. 1000; Carbon *v.* Ottumwa, 95 Iowa 524, 64 N. W. 413.

45. Pierce *v.* Brennan, 83 Minn. 422, 86 N. W. 417; Rush *v.* St. Paul City R. Co., 70 Minn. 5, 72 N. W. 733.

46. Stampofski *v.* Steffens, 79 Ill. 303; McMahon *v.* Lynn, etc., R. Co., 191 Mass. 295, 77 N. E. 826. And see Moore *v.* New York El. R. Co., 15 Daly (N. Y.) 506, 8 N. Y. Suppl. 329, 24 Abb. N. Cas. 77.

47. Wood *v.* Moulton, 146 Cal. 317, 89 Pac. 92; Consolidated Ice-Mach. Co. *v.* Trenton Hygeian Ice Co., 57 Fed. 898.

48. As ground for new trial: In civil cases see New Trial, 29 Cyc. 797 *et seq.* In criminal prosecutions see Criminal Law, 12 Cyc. 674 *et seq.*, 717 *et seq.*

49. As ground for new trial see New Trial, 29 Cyc. 798.

50. Crocker *v.* Crocker, 198 Mass. 401, 84 N. E. 476.

51. Snyder *v.* Haas, 18 Pa. Co. Ct. 597. And see Pond *v.* Barton, 8 Kan. App. 601, 56 Pac. 139 (holding that the judgment will be reversed where successful party, against the warnings of the officer in charge of the jury, talked to the jury and pointed out matters favorable to him when the jury were viewing the premises in charge of an officer); Turner *v.* Beardsley, 19 Wend. (N. Y.) 348 (holding that it is reversible error for a party who, forbidden to do so by the court, conversed with the jury while adverse counsel was addressing them).

52. State *v.* Reid, 120 La. 200, 45 So. 103.

53. Matter of Vanderbilt, 127 N. Y. App. Div. 408, 111 N. Y. Suppl. 558.

54. Bronk *v.* Binghamton R. Co., 79 N. Y. App. Div. 269, 79 N. Y. Suppl. 577.

55. Palm *v.* Chernowsky, 28 Tex. Civ. App. 405, 67 S. W. 165.

56. McDaniels *v.* McDaniels, 40 Vt. 363, 94 Am. Dec. 408.

57. Gulf, etc., R. Co. *v.* Matthews, 28 Tex. Civ. App. 92, 66 S. W. 588, 67 S. W. 788.

58. McGloin *v.* Metropolitan St. R. Co., 71 N. Y. App. Div. 72, 75 N. Y. Suppl. 593.

plaintiff's mother with a juror, she being ignorant that he was a juror, will not operate to reverse, where it is apparent that what was said could have had no influence on the jury.[59]

2. Of Officers.[60] Courts should not countenance or tolerate any act or conduct by court officers that might influence the conduct of any member of a jury in favor of either party in reaching conclusions in the case they are considering.[61] Misconduct of an officer in charge of a jury may be of such a character as will vitiate a verdict.[62] He should not speak to the jury while deliberating, except to ask if they have agreed;[63] and it has been held ground for reversal that the sheriff in charge of the jury tells them that unless they speedily agree the judge will take them to another county,[64] or that in his opinion the judge will detain them for a week unless they agree,[65] or that he remained with the jury while deliberating, talked with them concerning the case and threatened a juror who declined to vote without further consideration that he would cause him to be fined for contempt.[66] The fact that the officer was present with the jury during their deliberations is not ground for reversal;[67] and it is not ground for reversal that he asked them whether they were likely to agree, and stated that he was going home in an hour;[68] that he wrote on a piece of paper "it is a clear case" and left it in the jury room;[69] that, in response to a question from a juror, he said that he supposed the judge would call the jury in some time during the following week;[70] or that when the jury were viewing the place of the accident he placed there on the railroad track a small red dress that was worn by the deceased when injured.[71]

3. Of Counsel.[72] It is the duty of counsel to keep away from jurors when out of the court room during trials, and not to converse with them beyond the exchange of the usual salutations. They are bound to the highest honor and integrity and to the utmost good faith in the trial of causes,[73] and it has been held that where one of defendant's counsel played cards with some of the jurors in the case during the time the case was on trial, the verdict for defendant should have been set aside on the ground of public policy, regardless of whether the

59. Meriwether *v.* Knapp, 120 Mo. App. 354, 97 S. W. 257.

60. **In criminal cases** see Criminal Law, 12 Cyc. 675, 728 *et seq.*

61. Matter of Vanderbilt, 127 N. Y. App. Div. 408, 111 N. Y. Suppl. 558.

62. Obear *v.* Gray, 68 Ga. 182; Heston *v.* Neathammer, 180 Ill. 150, 54 N. E. 310.

63. Cole *v.* Swan, 4 Greene (Iowa) 32.

64. Gholston *v.* Gholston, 31 Ga. 625.

65. Obear *v.* Gray, 68 Ga. 182. *Compare* Leach *v.* Wilbur, 9 Allen (Mass.) 212, holding that a verdict will not be vitiated because of a remark by the officer in charge, in reply to an inquiry by one of them, how long the court would keep them together that "he did not know but what they would have to stay till Saturday night," there being no evidence of any design on the part of the officer to favor either party or that any such effect was produced by his reply.

66. Heston *v.* Neathammer, 180 Ill. 150, 54 N. E. 310.

67. White *v.* White, 5 Rawle (Pa.) 61. And see Williams *v.* Chicago, etc., R. Co., 11 S. D. 463, 78 N. W. 949, holding that a verdict is not vitiated by the fact that the officer remained in the jury room four or five hours no vote being taken during that time.

68. Smith *v.* State, 78 Ga. 71.

69. Price *v.* Lambert, 3 N. J. L. 533.

70. Edwards *v.* Murray, 5 Wyo. 153, 38 Pac. 681.

71. Bias *v.* Chesapeake, etc., R. Co., 46 W. Va. 349, 33 S. E. 240.

72. **Argument and conduct of counsel generally** see *supra*, VI.

As ground for new trial see New Trial, 29 Cyc. 796.

73. Austin *v.* Langlois, 81 Vt. 223, 69 Atl. 739.

Waiver of objection.— Refusal to discharge the jury for misconduct of counsel in drinking with a juror at the latter's invitation will not be ground for reversal, where there is no evidence of any improper influence, and counsel for the unsuccessful party expressly waived the right to object. Louisville R. Co. *v.* Masterson, 96 S. W. 534, 29 Ky. L. Rep. 829. So, where a party objects to the misconduct of opposing counsel, and the court does all it can to relieve him from the effects of such misconduct, he waives the misconduct by not moving to set aside the jury or taking other steps to secure a fair trial. Mabin *v.* Webster, 8 Ind. App. 547, 35 N. E. 194, 36 N. E. 373. But, by answering an illegitimate and erroneous argument or procedure on the other side, counsel does not waive the error. Leach *v.* Hill, 97 Iowa 81, 66 N. W. 69.

verdict was affected by the misconduct.[74] This holding, however, is against the weight of authority. Thus it has been held that where there was no conversation about the suit, the verdict will not be vitiated because one of the jurors, in pursuance of a previous invitation, took dinner and supper with an attorney of the appellee during the progress of the trial, and discussed private business with him;[75] that, during a recess, after part of the evidence on both sides had been introduced, the court, over defendant's objection, permitted plaintiff's counsel to have a private consultation with a juror to ascertain the facts to which the juror could testify in the case;[76] that counsel complied with a juror's request, on retiring, to send him certain needed medicines;[77] or that counsel conversed privately with jurors and publicly treated them in a saloon, where it was shown that this had no influence on the verdict.[78]

4. Of Trial Judge.[79] It is improper for the judge to go into the jury room even though he has no speech with them.[80] He has no more right in the jury room while the jury are deliberating than any other person.[81] According to some decisions, this is of itself sufficient ground to reverse the judgment,[82] although there is authority to the contrary.[83]

5. Miscellaneous. It is not improper for the court to send the jury to take a meal at the only hotel in the town where the court sits, although the house be kept by counsel for the successful party in the suit.[84] A verdict is not vitiated by the fact that after submission, and that during separation of the jury by consent of court, bystanders in the presence of jurors, but without knowing them to be present, made remarks about the case;[85] that a witness addressed improper remarks to the jury, it not appearing that such remarks influenced the jury;[86] that a person not a juror was in the jury box and in the jury room when they retired, pending argument of a motion, his presence being due to a mistake on his part and no communications having passed between him and the jurors;[87] or, that during the trial, matter, improper for the jury to know, appeared in the newspapers, it not appearing that such matter reached the jury.[88] But a verdict is incurably vitiated if evidence of the public sentiment as to the case is allowed to reach the jury,[89] or by the fact that a witness, in the hearing of one or more of the jurors, made a statement intended to and which did improperly influence the verdict.[90] Where the court is aware of an attempt to bribe a juror, it is error

74. Austin *v.* Langlois, 81 Vt. 223, 69 Atl. 739.

75. Koester *v.* Ottumwa, 34 Iowa 41.

76. McDowell *v.* Sutlive, 78 Ga. 142, 2 S. E. 937.

77. Carnaghan *v.* Ward, 8 Nev. 30.

78. Pritchard *v.* Henderson, 3 Pennew. (Del.) 128, 50 Atl. 217.

79. **As ground for new trial in civil cases** see New Trial, 29 Cyc. 772.

Coercion of jury in civil cases see *infra*, X, E, 4.

In criminal cases see Criminal Law, 12 Cyc. 675.

Private communications between court and jury in civil cases see *infra*, X, E, 6.

80. Stager *v.* Harrington, 27 Kan. 414; Benson *v.* Clark, 1 Cow. (N. Y.) 258; Gibbons *v.* Van Alstyne, 9 N. Y. Suppl. 156. But see Ayrhart *v.* Wilhelmy, 135 Iowa 290, 112 N. W. 782, holding that neither misconduct of court nor jury can be predicated on the fact that, during the deliberations of the jury, the judge was called to the jury room and questioned by a member of the panel, when the nature of the interrogatories is not disclosed and it appears they were unanswered.

81. Gibbons *v.* Van Alstyne, 9 N. Y. Suppl. 156.

82. Benson *v.* Clark, 1 Cow. (N. Y.) 258; Gibbons *v.* Van Alstyne, 9 N. Y. Suppl. 156.

83. Hart *v.* Lindley, 50 Mich. 20, 14 N. W. 682.

84. Brinson *v.* Faircloth, 82 Ga. 185, 7 S. E. 923.

85. Louisville, etc., R. Co. *v.* Davis, 115 Ky. 270, 71 S. W. 658, 24 Ky. L. Rep. 1415.

86. Chicago Junction R. Co. *v.* McGrath, 203 Ill. 511, 68 N. E. 69 [*affirming* 107 Ill. App. 100].

87. Southern R. Co. *v.* Brown, 126 Ga. 1, 54 S. E. 911. But see Kilgore *v.* Moore, 14 Tex. Civ. App. 20, 36 S. W. 317, holding that it is reversible error to permit a person not a member of the jury to be present during their deliberations, although he took no part in them.

88. Illinois Cent. R. Co. *v.* Souders, 178 Ill. 585, 53 N. E. 408.

89. Churchill *v.* Alpena Cir. Judge, 56 Mich. 536, 23 N. W. 211.

90. Erwin *v.* Bulla, 29 Ind. 95, 92 Am. Dec. 341.

to continue the trial without notifying the parties of that fact, and for this error the judgment will be reversed.[91]

D. Deliberations and Manner of Arriving at Verdict[92]— **1. Deliberations in General.** In making their verdict the jury must determine the facts from the evidence, and must receive the law from the court and be governed by it.[93] They should consider all the evidence introduced which is decided by the court to be admissible,[94] and the verdict must be based on their belief from the evidence.[95] If the evidence is conflicting, the jury should reconcile it if possible,[96] without convicting either of the conflicting witnesses of intentional and deliberate false swearing.[97] If not possible to reconcile the evidence, they should give credence to so much of it as is entitled to belief,[98] and find a verdict for the party in whose favor there is the greatest weight of evidence, considering the character of the witnesses, their means of knowing the facts of which they speak, and their fairness, intelligence, interest, and all other circumstances showing the value of their testimony.[99] It is the duty of the jurors to make every possible effort to agree,[1] and they should deliberate patiently and long, if necessary, on issues submitted to them, and without prejudice, or previously formed bias,[2] to the end that the litigation may be speedily terminated, and the expense of mistrials avoided. But these considerations should not influence them to violate their consciences, by uniting in a verdict, believed by them, upon the law and facts, to be wrong.[3] While the verdict should be the result of sound judgment, dispassionate consideration and conscientious reflection,[4] the law does not prescribe the length of time that a jury shall consider their verdict,[5] and they may render a verdict without retiring [6] or on very brief deliberation after retiring. This alone does not impeach or weaken the verdict.[7]

2. Taking Papers or Articles to Jury Room[8]— **a. Pleadings.** As was shown in a preceding chapter, it is the duty of the court to state the issues made by the

91. West Chicago St. R. Co. *v.* Luka, 72 Ill. App. 60.

92. **As ground for arrest of judgment in civil cases** see Judgments, 23 Cyc. 833.

As ground for new trial: In civil cases see New Trial, 29 Cyc. 808 *et seq.* In criminal prosecutions see Criminal Law, 12 Cyc. 730.

In criminal cases see Criminal Law, 12 Cyc. 675 *et seq.*

93. See *supra*, IX, E, 16, a.

94. Oliver *v.* Pate, 43 Ind. 132.

The jury are not bound by isolated statements of a party to the suit elicited on cross-examination, but are to make all legitimate inferences from all the facts in evidence before them. Ross *v.* Citizens' Ins. Co., 7 Mo. App. 575.

In answering special questions, the jury need not accept the testimony of any one witness, but may deduce the truth from the statements of all. Atchison, etc., R. Co. *v.* Green, 57 Kan. 589, 47 Pac. 514.

95. See *supra*, IX, C, 13.

96. Little *v.* American Tel., etc., Co., 6 Pennew. (Del.) 374, 67 Atl. 169; Coughlan *v.* Philadelphia, etc., R. Co., 6 Pennew. (Del.) 242, 67 Atl. 148; Colbourn *v.* Wilmington, 4 Pennew. (Del.) 443, 56 Atl. 605; Atlantic Coast Line R. Co. *v.* Miller, 53 Fla. 246, 44 So. 247; Ewing *v.* Gass, 41 Mo. 492. And see *supra*, IX, E, 4.

97. Atlantic Coast Line R. Co. *v.* Miller, 53 Fla. 246, 44 So. 247.

98. Colbourn *v.* Wilmington, 4 Pennew. (Del.) 443, 56 Atl. 605.

99. Coughlan *v.* Philadelphia, etc., R. Co., 6 Pennew. (Del.) 242, 67 Atl. 148.

1. Phœnix Ins. Co. *v.* Moog, 81 Ala. 335, 1 So. 108; Doty *v.* Smith, 80 Conn. 245, 67 Atl. 885, in which it was said: "The rule which requires unanimity in the verdict of the jury necessarily involves a duty on the part of each juror to bring his own view of the weight of evidence as to the material facts in issue into accord with that of his fellow jurors, if he can do so consistently with his conscientious convictions." Taylor *v.* Jones, 2 Head (Tenn.) 564.

2. Phœnix Ins. Co. *v.* Moog, 81 Ala. 335, 1 So. 108.

3. Taylor *v.* Jones, 2 Head (Tenn.) 565.

4. Williams *v.* Pressler, 11 Okla. 122, 65 Pac. 934.

5. Gulf, etc., R. Co. *v.* Harrison, (Tex. Civ. App. 1907) 104 S. W. 399.

6. Comer *v.* Jackson, 50 Ala. 384; Bottomley *v.* Goldsmith, 36 Mich. 27; Gulf, etc., R. Co. *v.* Harrison, (Tex. Civ. App. 1907) 104 S. W. 399.

If the record does not show that the jury retired they will be presumed to have found the verdict without leaving their seats. The Milwaukie *v.* Hale, 1 Dougl. (Mich.) 306.

7. Gulf, etc., R. Co. *v.* Harrison, (Tex. Civ. App. 1907) 104 S. W. 399.

8. **As ground for new trial:** In civil cases see New Trial, 29 Cyc. 808. In criminal prosecutions see Criminal Law, 12 Cyc. 727.

In criminal cases see Criminal Law, 12 Cyc. 675 *et seq.*

pleadings and not refer the jury to the pleadings to ascertain the issues.[9] Nevertheless, unless forbidden by statutes,[10] it is not error, or at least not reversible error, to permit the jury to take with them into the jury room the pleadings in the case,[11] the pleadings having been explained by the court to the jury,[12] although it has been said, and very properly, that the practice is, at best, of very doubtful propriety [13] and should not be permitted unless there is some special reason therefor.[14] In any event, the court is under no obligation to permit the jury to take the pleadings to the jury room, and error cannot be assigned to its refusal to do so,[15]

9. See *supra*, IX, C, 3, a.

10. Mt. Terry Min. Co. *v.* White, 10 S. D. 620, 74 N. W. 1060; Harding *v.* Norwich Union F. Ins. Soc., 10 S. D. 64, 71 N. W. 755.

11. *California.*— Powley *v.* Swensen, 146 Cal. 471, 80 Pac. 722; McLean *v.* Crow, 88 Cal. 644, 26 Pac. 596.

Illinois.— Hanchett *v.* Haas, 219 Ill. 546, 76 N. E. 845 [*affirming* 125 Ill. App. 111]; Elgin, etc., Traction Co. *v.* Wilson, 217 Ill. 47, 75 N. E. 436; East Dubuque *v.* Burhyte, 173 Ill. 553, 50 N. E. 1077 [*affirming* 74 Ill. App. 99]; Chicago City R. Co. *v.* Reddick, 139 Ill. App. 160; North Peoria *v.* Rogers, 98 Ill. App. 355.

Indiana.— Shulse *v.* McWilliams, 104 Ind. 512, 3 N. E. 243; Summers *v.* Greathouse, 87 Ind. 205; Snyder *v.* Braden, 58 Ind. 143; Haas *v.* C. B. Cones, etc., Mfg. Co., 25 Ind. App. 469, 58 N. E. 499; Bell *v.* Pavey, 7 Ind. App. 19, 33 N. E. 1011.

Iowa.— Tabor State Bank *v.* Brewer, 100 Iowa 576, 69 N. W. 1011; Dorr *v.* Simerson, 73 Iowa 89, 34 N. W. 752.

Kentucky.— Steele *v.* Swayne, 4 Ky. L. Rep. 721.

Minnesota.— Brazil *v.* Moran, 8 Minn. 236, 83 Am. Dec. 772.

Missouri.— Bluedorn *v.* Missouri Pac. R. Co., 121 Mo. 258, 25 S. W. 943.

New Hampshire.— Felch *v.* Weare, 66 N. H. 582, 27 Atl. 226; Rich *v.* Flanders, 39 N. H. 304.

Pennsylvania.— See Person, etc., Co. *v.* Lipps, 219 Pa. St. 99, 67 Atl. 1081, holding that where the statement of claim is a mere calculation of the amount claimed by plaintiff, it is not reversible error to permit it to go out with the jury.

South Carolina.—Willoughby *v.* Willoughby, 70 S. C. 516, 50 S. E. 208, the parties agreeing thereto.

United States.— Tridell *v.* Munhall, 124 Fed. 802.

See 46 Cent. Dig. tit. "Trial," § 734.

Bill of particulars.—A bill of particulars recognized by the parties as regular may be allowed to be taken by the jury, although not called for by defendant. McCreary *v.* Hood, 5 Blackf. (Ind.) 316. However, it is not error to refuse to allow the jury to take a bill of particulars into the jury room, especially where it contained arguments and extraneous matter. Citizens' Sav., etc., Assoc. *v.* Weaver, 127 Ill. App. 252.

Attaching note to complaint.— In an action upon a promissory note, the court in its discretion may permit such note to be attached to the complaint as an exhibit, and allow the same to be sent to the jury, after they have retired to consult as to their verdict. Snyder *v.* Braden, 58 Ind. 143.

Plaintiff's specification and defendant's offset, when properly filed in an action, become parts of the record, and may be used and referred to on the trial, and may go to the jury in the same manner as the writ and pleadings. Rich *v.* Flanders, 39 N. H. 304.

Where the original complaint was not in issue in the case, it was not error to allow it to be taken by the jury when they retired. Swadling *v.* Barneson, 21 Wash. 699, 59 Pac. 506.

Even though erroneous to permit the jury to take out the pleadings, the judgment will not be reversed for that reason where it is apparent from an inspection of the record that the jury were not confused thereby. Redinger *v.* Jones, 68 Kan. 627, 75 Pac. 997.

12. Alexander *v.* Wheeler, 69 Ala. 332; Mayo *v.* Halley, 124 Iowa 675, 100 N. W. 529; McGinty *v.* Keokuk, 66 Iowa 725, 24 N. W. 506. Error where the explanation is such as to mislead the jury as to the effect of the pleadings. Carroll *v.* Sweet, 128 N. Y. 19, 27 N. E. 763, 13 L. R. A. 43 [*reversing* 57 N. Y. Super. Ct. 100, 5 N. Y. Suppl. 572].

13. Powley *v.* Swensen, 146 Cal. 471, 80 Pac. 722; Chicago City R. Co. *v.* Reddick, 139 Ill. App. 160; Mattson *v.* Minnesota, etc., R. Co., 98 Minn. 296, 108 N. W. 517; Bluedorn *v.* Missouri Pac. R. Co., 121 Mo. 258, 25 S. W. 943.

14. Mattson *v.* Minnesota, etc., R. Co., 98 Minn. 296, 108 N. W. 517.

15. Branham *v.* Berry, 4 Ky. L. Rep. 894; Hitchins *v.* Frostburg, 68 Md. 100, 11 Atl. 826, 6 Am. St. Rep. 422; Blackmore *v.* Missouri Pac. R. Co., 162 Mo. 455, 62 S. W. 993; Hall *v.* Cook, (Tex. Civ. App. 1909) 117 S. W. 449. *Compare* Matthews *v.* Spokane, 50 Wash. 107, 96 Pac. 827 (which impliedly holds that the jury are entitled to take the pleadings to the jury room. In this case the trial court through oversight failed to send the pleadings to the jury room, and the omission being discovered after verdict was reached, but before it was received, the court sent the jury out again with the pleadings and they returned presently with the same verdict, which was received and filed. It was held that there was no error); International, etc., R. Co. *v.* Leak, 64 Tex. 654 (holding that while the jury are entitled to read the pleadings during their retirement, they cannot be compelled to do so).

as the pleadings are addressed to the court and not to the jury.[16] And they should not be permitted to inspect paragraphs of a petition which have been stricken out on motion,[17] or pleadings which have been eliminated by demurrer,[18] or otherwise,[19] or to take with them the pleadings in the cause to be used as evidence of admissions by one of the parties.[20]

b. Instructions.[21] In the absence of statutory provision on the subject there is some conflict of authority as to the propriety of allowing instructions to be taken to the jury room. According to some decisions the instructions may, in the discretion of the court, be taken by the jury to their room when they retire to deliberate,[22] while others hold that it should not be permitted,[23] at least without consent of the parties.[24] In some states the matter is a subject of statutory regulation. Thus under some statutes all written instructions, whether given or refused, and so marked, may be taken by the jury to the jury room,[25] and a refusal to allow them to be so taken is error.[26] Under others, instructions given may be taken by the jury on their retirement,[27] and it is error to refuse a request that instructions given at the instance of a party be given or sent to the jury on retirement.[28] The jury should have all or none of the instructions given, and it has been held prejudicial error that important instructions were omitted, although through inadvertence.[29] However, it has been held that where part of the instructions are inadvertently given to the jury, if the court on discovering the fact recalls the jury, takes the instructions from their possession and instructs them to give all the instructions equal weight, and it does not appear that the jury read the instructions the verdict is not vitiated.[30]

c. Verdicts on Former Trial of Same Case. It is not ground for reversal that the jury were permitted to take with them the complaint on which was indorsed

16. Branham *v.* Berry, 4 Ky. L. Rep. 894.

17. Trumbull *v.* Trumbull, 71 Nebr. 186, 98 N. W. 683.

When harmless error.— Permitting the jury to take with them, when they retire, a declaration containing withdrawn counts is not reversible error, where the negligence in the remaining count is established and the verdict is not excessive. West Chicago St. R. Co. *v.* Buckley, 102 Ill. App. 314 [*affirmed* in 200 Ill. 260, 65 N. E. 708].

18. North Peoria *v.* Rogers, 98 Ill. App. 355.

19. Chicago City R. Co. *v.* Reddick, 139 Ill. App. 160; Hall *v.* Rupley, 10 Pa. St. 231; Swadling *v.* Barneson, 21 Wash. 699, 59 Pac. 506. But where a count in a declaration has been withdrawn in the presence of the jury, it cannot be supposed that they were misled by being permitted to take the whole declaration with them to the jury room. West Chicago St. R. Co. *v.* Buckley, 200 Ill. 260, 65 N. E. 708 [*affirming* 102 Ill. App. 314]. And see Joy *v.* Liverpool, etc., Ins. Co., 32 Tex. Civ. App. 433, 74 S. W. 822.

Harmless error.—A withdrawn declaration and a bill of particulars under it ought not to be taken out by the jury, but the judgment will not be reversed if the declaration was in substance the same as the one on which the case was tried, and the bill is but a statement of a claim of which evidence was given on the trial. Hall *v.* Rupley, 10 Pa. St. 231.

20. Spaulding *v.* Saltiel, 18 Colo. 86, 31 Pac. 486.

21. In criminal cases see CRIMINAL LAW, 12 Cyc. 677.

22. Scoville *v.* Salt Lake City, 11 Utah 60, 39 Pac. 481.

23. Gholston *v.* Gholston, 31 Ga. 625; Hewitt *v.* Flint, etc., R. Co., 67 Mich. 61, 34 N. W. 659. *Compare* Chattahoochee Brick Co. *v.* Sullivan, 86 Ga. 50, 12 S. E. 216, holding that at most this is merely an irregularity which is waived by failure to object.

24. Smith *v.* McMillen, 19 Ind. 391.

25. Beard *v.* Ryan, 78 Ala. 37; Langworthy *v.* Connelly, 14 Nebr. 340, 15 N. W. 737, 45 Am. Rep. 117.

26. Miller *v.* Hampton, 37 Ala. 342.

27. Gaither *v.* Carpenter, 143 N. C. 240, 55 S. E. 625; Foy *v.* Toledo Consol. St. R. Co., 10 Ohio Cir. Ct. 151, 6 Ohio Cir. Dec. 396.

On request of jurors.— Under a statute providing that whenever instructions to the jury shall be put in writing, the judge, at the request of either party to the action, shall allow the jury to take the instructions with them on their retirement. The court may permit the jury to take the written instructions with them on retirement at the request of one of the jurors. Gaither *v.* Carpenter, 143 N. C. 240, 55 S. E. 625.

28. Cone *v.* Bright, 68 Ohio St. 543, 68 N. E. 3.

29. Hammond *v.* Foster, 4 Mont. 421, 1 Pac. 757. *Compare* Gaither *v.* Carpenter, 143 N. C. 240, 55 S. E. 625, which holds that omission by oversight to hand the jury special instructions given for plaintiff is waived by failing to call the court's attention thereto before verdict, or to take an exception.

30. Jones *v.* Austin, 26 Ind. App. 399, 59 N. E. 1082.

the verdict rendered on a former trial of the case, no objection being made thereto, and it not having been done fraudulently or designedly to influence the verdict.[31] So, the taking of such verdict among other papers will not operate to reverse where it is shown that the verdict was not seen by the jurors;[32] where it appears by the affidavit of the jurors that they did not read the verdict until they had agreed on their own;[33] or where the jury were distinctly instructed to treat it as if it did not exist, and to found their verdict upon the evidence before them.[34]

d. Written Evidence[35]— (i) *In General.* It is manifestly improper for the jury without consent of court or counsel to send for and obtain books and papers which had been testified to by witnesses;[36] but the verdict will not be set aside for this reason, unless it appears that the verdict itself may have been influenced or produced by means of the papers thus improperly examined and considered by the jury.[37] There are also some decisions which hold without qualification that it is erroneous to permit the jury to take with them to the jury room books, papers, or documents which have been admitted in evidence,[38] and others holding that to grant such permission is erroneous unless with consent of the parties.[39] But, according to the weight of authority, the jury may properly be permitted to take with them on retiring to consider their verdict, books, papers, or documents admitted in evidence,[40] and that too with or without the consent of par-

31. St. Louis, etc., R. Co. *v.* Sweet, 60 Ark. 550, 31 S. W. 571.

32. Ohio, etc., R. Co. *v.* Hill, 7 Ind. App. 255, 34 N. E. 646.

33. Fulton County *v.* Phillips, 91 Ga. 65, 16 S. E. 260; Georgia Pac. R. Co. *v.* Dooley, 86 Ga. 294, 12 S. E. 923, 12 L. R. A. 342.

34. Dawson *v.* Briscoe, 97 Ga. 408, 24 S. E. 157. And see Fulton County *v.* Phillips, 91 Ga. 65, 16 S. E. 260.

35. As ground for new trial: In civil cases see New Trial, 29 Cyc. 810. In criminal prosecutions see Criminal Law, 12 Cyc. 675.

36. Lott *v.* Macon, 2 Strobh. (S. C.) 178.

37. Sanderson *v.* Bowen, 4 Thomps. & C. (N. Y.) 675.

38. Eden *v.* Lingenfelter, 39 Ind. 19; Watson *v.* Davis, 52 N. C. 178; Outlaw *v.* Hurdle, 46 N. C. 150.

39. Lotz *v.* Briggs, 50 Ind. 346; Chance *v.* Indianapolis, etc., Gravel Road Co., 32 Ind. 472; Moore *v.* McDonald, 68 Md. 321, 12 Atl. 117; Williams *v.* Thomas, 78 N. C. 47. And see Kalamazoo Novelty Mfg. Co. *v.* McAlister, 36 Mich. 327, where it was said that in general permission should not be granted when either party objects.

40. *Alabama.*— Koosa *v.* Warten, 158 Ala. 496, 48 So. 544; Mooney *v.* Hough, 84 Ala. 80, 4 So. 19.

Arkansas.— Hickman *v.* Ford, 43 Ark. 207.

California.— Clark *v.* Phœnix Ins. Co., 36 Cal. 168.

Illinois.— Warth *v.* Loewenstein, 121 Ill. App. 71 [*modified* on other grounds in 219 Ill. 222, 76 N. E. 379]; Standard Starch Co. *v.* McMullen, 100 Ill. App. 82; Williams *v.* Carterville, 97 Ill. App. 160; Hovey *v.* Thompson, 37 Ill. 538.

Indiana.— Collins *v.* Frost, 54 Ind. 242.

Iowa.— Peterson *v.* Hangen, 34 Iowa 395.

Massachusetts.— Phillips *v.* Chase, 201 Mass. 444, 87 N. E. 755, 131 Am. St. Rep. 406; Sibley *v.* Nason, 196 Mass. 125, 81 N. E. 887, 124 Am. St. Rep. 520, 12 L. R. A. N. S. 1173; Krauss *v.* Cope, 180 Mass. 22, 61 N. E. 220; Boston Dairy Co. *v.* Mulliken, 175 Mass. 447, 56 N. E. 711.

Michigan.— Tubbs *v.* Dwelling-House Ins. Co., 84 Mich. 646, 48 N. W. 296.

Missouri.— Hanger *v.* Imboden, 12 Mo. 85.

New York.— Raynolds *v.* Vinier, 125 N. Y. App. Div. 18, 109 N. Y. Suppl. 293; Paige *v.* Chedsey, 4 Misc. 183, 23 N. Y. Suppl. 879.

Pennsylvania.— Alexander *v.* Jameson, 5 Binn. 238.

South Carolina.— Gable *v.* Rauch, 50 S. C. 95, 27 S. E. 555.

Texas.— San Antonio, etc., R. Co. *v.* Barnett, 12 Tex. Civ. App. 321, 34 S. W. 139.

See 46 Cent. Dig. tit. "Trial," § 734 *et seq.*

Applications of rule.— The rule has been applied in the case of letters (Tabor *v.* Judd, 62 N. H. 288), abstracts of title (Frugia *v.* Truehart, 48 Tex. Civ. App. 513, 106 S. W. 736), written instruments sued on (Tubbs *v.* Dwelling-House Ins. Co., 84 Mich. 646, 48 N. W. 296; Bulen *v.* Granger, 63 Mich. 311, 29 N. W. 718), pleadings (Reynolds *v.* Vinier, 125 N. Y. App. Div. 18, 109 N. Y. Suppl. 293), photographs (Barker *v.* Perry, 67 Iowa 146, 25 N. W. 100; Toledo Traction Co. *v.* Cameron, 137 Fed. 48, 69 C. C. A. 28), X-ray photographs (Chicago, etc., Electric R. Co. *v.* Spence, 213 Ill. 220, 72 N. E. 796, 104 Am. St. Rep. 213), the notarial protest of a bill (Mullen *v.* Morris, 2 Pa. St. 85), notes admitted to prove the genuineness of a signature (Robertson *v.* Millar, 1 McMull. (S. C.) 120), a verified written statement, introduced in evidence, of plaintiff's claim in an action against a railroad company for killing stock (Houston, etc., R. Co. *v.* Wilson, 37 Tex. Civ. App. 405, 84 S. W. 274), copies of accounts (Mooney *v.* Hough, 84 Ala. 80, 4 So. 19), or any sealed or unsealed instrument except depositions (Standard Starch Co. *v.* McMullen, 100 Ill. App. 82; Alexander *v.* Jameson, 5 Binn. (Pa.) 238).

After retirement of jury.— The court may recall the jury for the purpose of handing

ties.[41] Whether or not permission shall be given to the jury to take out books, papers, or documents,[42] and the determination as to what papers shall be taken out by the jury,[43] is very generally held to be a matter resting in the sound discretion of the court, which is not reviewable except where there has been an abuse of such discretion,[44] and some decisions even hold that such discretion is absolute and not reviewable in any case,[45] although this doctrine is contrary to the weight of authority.[46] Where a portion of a book, paper, or document is excluded from evidence, the jury should not be permitted to take the paper on retirement unless something is pasted over the excluded portion,[47] or it is separated from the admissible portion,[48] or unless the jury are cautioned to confine themselves strictly to an examination of those parts only which are competent evidence.[49] It is prejudicial error to allow papers to be taken to the jury room which were not admitted

them a paper, which was read in evidence, but accidentally omitted to be given to them (Flanders *v.* Colby, 28 N. H. 34), or may send the paper to them after they have retired (Hudspeth *v.* Mears, 92 Ga. 525, 17 S. E. 837; Kline *v.* Huntingdon First Nat. Bank, (Pa. 1888) 15 Atl. 433).

Evidence not within rule.— It is improper to permit the jury to take into retirement an affidavit admitted for the purpose of impeaching a witness. Fein *v.* Covenant Mut. Ben. Assoc., 60 Ill. App. 274. Papers exhibited on the trial as a means of comparison of handwritings are not evidence in the cause within a statute authorizing the jury to take out papers read in evidence. Cox *v.* Straisser, 62 Ill. 383. After the jury have retired to their room for consultation, they are not entitled to have sent out to them a plot, exhibiting several marked lines, some of which are legal, and were admitted in evidence, and others illegal, and therefore rejected. Way *v.* Arnold, 18 Ga. 181.

The jury are not bound to take out papers in evidence, although permitted to do so. Littlefield *v.* Beamis, 5 Rob. (La.) 145.

41. Tubbs *v.* Dwelling-House Ins. Co., 84 Mich. 646, 48 N. W. 296; Bulen *v.* Granger, 63 Mich. 311, 29 N. W. 718; Raynolds *v.* Vinier, 125 N. Y. App. Div. 18, 109 N. Y. Suppl. 293; Porter *v.* Mount, 45 Barb. (N. Y.) 422, 428 (in which it was said: "If written documents or papers used in evidence on a trial can only be taken to a jury room upon the consent of parties, it is quite apparent that the practice in such cases stands upon a very uncertain footing. Such consent will, many times, be withheld when the papers and documents would materially aid the jury in their deliberations"). And see cases cited in preceding note.

42. *California.*— Powley *v.* Swensen, 146 Cal. 471, 80 Pac. 722; Carty *v.* Boeseke-Dawe Co., 2 Cal. App. 646, 84 Pac. 267.

Illinois.— Williams *v.* Carterville, 97 Ill. App. 160. But see Carthage *v.* Buckner, 8 Ill. App. 152.

Kansas.— Hairgrove *v.* Millington, 8 Kan. 480.

Massachusetts.— Boston Dairy Co. *v.* Mulliken, 175 Mass. 447, 56 N. E. 711; Chase *v.* Perley, 148 Mass. 289, 19 N. E. 398.

Michigan.— Canning *v.* Harlan, 50 Mich. 320, 15 N. W. 492; *In re* Foster, 34 Mich. 21.

New York.— Howland *v.* Willetts, 9 N. Y. 170; Raynolds *v.* Vinier, 125 N. Y. App. Div. 18, 109 N. Y. Suppl. 293; Lycett *v.* Manhattan R. Co., 48 N. Y. App. Div. 624, 62 N. Y. Suppl. 848; Algase *v.* Horse Owners' Mut. Indemnity Assoc., 77 Hun 472, 29 N. Y. Suppl. 101; Porter *v.* Mount, 45 Barb. 422; Sanderson *v.* Bowen, 4 Thomps. & C. 675.

North Carolina.— State *v.* Grizzard, 89 N. C. 115.

Ohio.— Osburn *v.* State, 7 Ohio Pt. II, 212. *Contra,* Post *v.* Gazlay, 1 Cinc. Super. Ct. 105.

Pennsylvania.—Little Schuylkill Nav., etc., R. Co. *v.* Richards, 57 Pa. St. 142, 98 Am. Dec. 209.

South Carolina.— Beaufort First Presbyterian Church *v.* Elliott, 65 S. C. 251, 43 S. E. 674; Means *v.* Means, 7 Rich. 533.

See 46 Cent. Dig. tit. "Trial," § 735.

The Iowa statute, providing that the jury may take with them all books of account and all papers which have been received in evidence, has been held to be permissive, and the court in the first instance need not send them with the jury, but on request of the parties it is error to refuse to permit the jury to take them. McMahon *v.* Iowa Ice Co., 137 Iowa 368, 114 N. W. 203. To the same effect see State *v.* Young, 134 Iowa 63, 110 N. W. 292, 8 L. R. A. N. S. 1032.

43. Baltimore, etc., R. Co. *v.* McCamey, 12 Ohio Cir. Ct. 543, 5 Ohio Cir. Dec. 631.

44. Sawyer *v.* Garcelon, 63 Me. 25; Cavanaugh *v.* Buehler, 120 Pa. St. 441, 14 Atl. 391; Starke *v.* Wolf, 90 Wis. 434, 63 N. W. 755. And see McCully *v.* Barr, 17 Serg. & R. (Pa.) 445.

45. Krauss *v.* Cope, 180 Mass. 22, 61 N. E. 220; Burghardt *v.* Van Deusen, 4 Allen (Mass.) 374; Whithead *v.* Keyes, 3 Allen (Mass.) 495, 81 Am. Dec. 672.

46. Western, etc., R. Co. *v.* Stafford, 99 Ga. 187, 25 S. E. 656; Hendel *v.* Berks, etc., Turnpike Road, 16 Serg. & R. 92.

47. Sargent *v.* Lawrence, 16 Tex. Civ. App. 540, 40 S. W. 1075.

48. Rich *v.* Hayes, 97 Me. 293, 54 Atl. 724.

49. Atlantic Coast Line R. Co. *v.* Taylor, 125 Ga. 454, 54 S. E. 622; Riggins *v.* Brown, 12 Ga. 271; Kalamazoo Novelty Mfg. Co. *v.* McAlister, 36 Mich. 327; Boyer *v.* Shenandoah, 16 Pa. Co. Ct. 75.

in evidence and which contain a statement of material and damaging admissions;[50] but a judgment will not be reversed for permitting papers not in the case to be taken by the jury in their retirement where it could not have prejudiced the party,[51] nor unless objection be made at the time.[52] To constitute error for the court not to send papers in evidence out with the jury, the record must show a request that this be done.[53]

(II) *DEPOSITIONS.*[54] It has been said that by the English practice depositions are never sent to the jury room,[55] and in a number of American states, sometimes because of and sometimes in the absence of statute, it is held erroneous for the court to permit the jury to take to their room depositions read on the trial,[56] the reason assigned being that the party whose case is sustained by depositions would have an improper advantage over the party whose proofs were oral only.[57] On the other hand, in other states, the practice of permitting the jury to take out depositions is permissible,[58] the reason assigned therefor being that it enables the jury to refresh their memory as to the testimony that has been given.[59] Whether or not this permission shall be given is discretionary with the court.[60]

50. Rich *v.* Hayes, 97 Me. 293, 54 Atl. 724.

51. Falvey *v.* Richmond, 87 Ga. 99, 13 S. E. 261; Jaspers *v.* Mallon, 9 Ohio Dec. (Reprint) 184, 11 Cinc. L. Bul. (Ohio) 166; Warden *v.* Warden, 22 Vt. 563.

52. Hudson *v.* Hudson, 90 Ga. 581, 16 S. E. 349; Beeks *v.* Odom, 70 Tex. 183, 7 S. W. 702.

53. Jackson *v.* Pittsburgh Times, 152 Pa. St. 406, 25 Atl. 613, 34 Am. St. Rep. 659.

54. Sending out with jury as ground for new trial see NEW TRIAL, 29 Cyc. 810.

55. See Welch *v.* Franklin Ins. Co., 23 W. Va. 288.

56. *California.*— See Cockrill *v.* Hall, 76 Cal. 192, 18 Pac. 318, under statutory provision.

Illinois.— Rawson *v.* Curtiss, 19 Ill. 456; Standard Starch Co. *v.* McMullen, 100 Ill. App. 82; Pittsburgh, etc., R. Co. *v.* Dahlin, 67 Ill. App. 99.

Iowa.— Shields *v.* Guffey, 9 Iowa 322, under statute forbidding it.

Kentucky.— Louisville, etc., R. Co. *v.* Morgan, 110 Ky. 740, 62 S. W. 736, 23 Ky. L. Rep. 121, especially where it contained several questions and answers to which objections had been sustained. But see Newport News, etc., R. Co. *v.* Mendell, 34 S. W. 1081, 17 Ky. L. Rep. 1400. And *compare* Branham *v.* Berry, 4 Ky. L. Rep. 894, holding that appellant was not prejudiced by the court's refusal to allow the jury to take to their room an account which was made part of a deposition, as the presumption is that it was read to the jury as it was both pleaded and proved.

Maryland.— Jerry, a Negro *v.* Townshend, 9 Md. 145.

Missouri.— See Foster *v.* McO'Blenis, 18 Mo. 88.

Pennsylvania.— Alexander *v.* Jameson, 5 Binn. 238; Shomo *v.* Zeigler, 10 Phila. 611.

Texas.— Chamberlain *v.* Pybas, 81 Tex. 511, 17 S. W. 50; Gulf, etc., R. Co. *v.* Hughes, (Civ. App. 1895) 31 S. W. 411, under statute forbidding it.

West Virginia.— Welch *v.* Franklin Ins. Co., 23 W. Va. 288; State *v.* Cain, 20 W. Va. 679, both holding that a statute which provides that "papers read in evidence though not under seal may be carried from the bar by the jury" refers to documentary evidence and not to depositions and that it is error to permit the jury to take out depositions except by consent of counsel. But see Graham *v.* Citizens' Nat. Bank, 45 W. Va. 701, 32 S. E. 245, holding that depositions read in a trial at law by jury cannot be carried out by the jury except by leave of court.

See 46 Cent. Dig. tit. "Trial," § 736.

An affidavit read in evidence as the testimony of a witness is a deposition within the rule. Green *v.* Gresham, 21 Tex. Civ. App. 601, 53 S. W. 382.

Harmless error.— The taking with them, by the jury, of a deposition on their retirement is not ground for reversal where the complaining party was not prejudiced thereby. Shields *v.* Gaffey, 9 Iowa 322.

57. Alexander *v.* Jameson, 5 Binn. (Pa.) 238; Chamberlain *v.* Pybas, 81 Tex. 511, 17 S. W. 50.

58. *Louisiana.*— Wakeman *v.* Marquand, 5 Mart. N. S. 265.

New Hampshire.— See Kent *v.* Tyson, 20 N. H. 121.

New York.— Howland *v.* Willetts, 9 N. Y. 170 [*affirming* 7 Sandf. 219].

Ohio.— Stites *v.* McKibben, 2 Ohio St. 588; Greene *v.* Davis, 4 Ohio Cir. Ct. 84, 2 Ohio Cir. Dec. 433.

Vermont.— Hopkinson *v.* Steel, 12 Vt. 582.

Virginia.— Hansbrough *v.* Stinnett, 25 Gratt. 495.

See 46 Cent. Dig. tit. "Trial," § 736.

A bill of exceptions taken in a suit relating to the same subject-matter, but not between the same parties, although admitted in evidence by consent, is not thereby so assimilated to a deposition as to render proper a permission for the jury to carry it to their room. O'Neall *v.* Calhoun, 67 Ill. 219.

59. Stites *v.* McKibben, 2 Ohio St. 588.

60. Koosa *v.* Warten, 158 Ala. 496, 48 So. 544; Whithead *v.* Keyes, 3 Allen (Mass.) 495, 81 Am. Dec. 672; Stites *v.* McKibben, 2 Ohio St. 588.

Refusal to permit the depositions to be taken at the request of one juror, the others

Although a deposition be erroneously permitted to go to the jury, the judgment will not be reversed on that account, where it appears that no prejudice could have resulted,[61] or where seasonable objections were not made.[62]

(III) *Papers Attached to Deposition.* Where papers attached to a deposition were admitted in evidence independently of their connection with the deposition, the jury may be permitted to take them to the jury room,[63] but in such case the papers should be detached from the deposition.[64] Papers attached to the deposition which are not introduced independently but as part of the deposition should not be sent to the jury unless by the consent of all the parties.[65] And it is error to permit the jury to take papers detached from the deposition where the effect of such taking is to give them a wrong impression of the facts in controversy.[66] Where certain exhibits, part of the deposition of a witness, had been shown to the jury without objection, it was not error for the court to permit their separation from the deposition and to send them out to the jury.[67]

e. Law Books. It is error for the court to deliver to the jury law books for the purpose of permitting the jury to determine what is law.[68]

f. Calculations, Memoranda, and Documents Not in Evidence.[69] The general rule is that it is prejudicial error and a ground for reversal to permit the jury to take with them to the jury room papers, not in evidence, which would tend to influence the verdict; [70] and it makes no difference that the papers were given to

dissenting, is not error. Lafoon *v.* Shearin, 95 N. C. 391.

61. Morris *v.* Howe, 36 Iowa 490; Foster *v.* McO'Blenis, 18 Mo. 88.

That depositions containing exceptionable matter have gone to the jury without fault of either party is not reversible error, unless this matter appears to have been material. Kittredge *v.* Elliott, 16 N. H. 77, 41 Am. Dec. 717.

62. Kent *v.* Tyson, 20 N. H. 121.

63. Cockrill *v.* Hall, 76 Cal. 192, 18 Pac. 318; Standard Starch Co. *v.* McMullen, 100 Ill. App. 82; McKelvy *v.* De Wolfe, 20 Pa. St. 374; Shomo *v.* Ziegler, 10 Phila. (Pa.) 611; Snow *v.* Starr, 75 Tex. 411, 12 S. W. 673; Davis *v.* Missouri, etc., R. Co., 17 Tex. Civ. App. 199, 43 S. W. 44; Sargent *v.* Lawrence, 16 Tex. Civ. App. 540, 40 S. W. 1075.

Illustration of rule.—Where an abstract of title is introduced in evidence independently of an attached deposition of the county clerk, which is also introduced to show that the abstract was made from the records, the abstract becomes an independent piece of written evidence, and may be taken by the jury in their retirement. Frugia *v.* Trueheart, 48 Tex. Civ. App. 513, 106 S. W. 736. So it has been held that the jury should be allowed to take out an itemized list, in evidence, as an exhibit to a deposition of the reasonable values before and after their injury of forty-two items of goods. Koosa *v.* Warten, 158 Ala. 496, 48 So. 544. And see Foster *v.* Smith, 104 Ala. 248, 16 So. 61.

64. Davis *v.* Missouri, etc., R. Co., 17 Tex. Civ. App. 199, 43 S. W. 44.

65. Oskaloosa College *v.* Western Union Fuel Co., 90 Iowa 380, 54 N. W. 152, 57 N. W. 903.

Harmless error.— The fact that copies of "account sales" which had been attached as exhibits to a deposition were taken by the jury to their room is not ground for reversal of a judgment, where no objection was made at the time, and the facts shown by the exhibits were conclusively established by other evidence. Texas, etc., R. Co. *v.* Robertson, (Tex. Civ. App. 1896) 35 S. W. 505.

66. Chamberlain *v.* Pybas, 81 Tex. 511, 17 S. W. 50.

67. Blackburn *v.* Boston, etc., R. Co., 201 Mass. 186, 87 N. E. 579.

68. Farnum *v.* Pitcher, 151 Mass. 470, 24 N. E. 590; Harrison *v.* Hance, 37 Mo. 185; Barker *v.* Pool, 6 Mo. 260.

69. As ground for new trial: In civil cases see New Trial, 29 Cyc. 808. In criminal prosecutions see Criminal Law, 12 Cyc. 727.

70. *Alabama.*— Stoudenmire *v.* Harper, 81 Ala. 242, 1 So. 857.

Connecticut.— Clark *v.* Whitaker, 18 Conn. 543, 46 Am. Dec. 337.

Georgia.— Golden Georgia *v.* McManus, 113 Ga. 982, 39 S. E. 476, stenographic reports of the evidence of plaintiff in another trial.

Illinois.— Pittsburgh, etc., R. Co. *v.* Dahlin, 67 Ill. App. 99.

Indiana.— Ball *v.* Carley, 3 Ind. 577.

Iowa.— De Wulf *v.* Dix, 110 Iowa 553, 81 N. W. 779.

Montana.— Sweeney *v.* Darcy, 21 Mont. 188, 53 Pac. 540, papers which, although in evidence, bear only on an issue excluded by the court from the jury.

Nebraska.— La Bonty *v.* Lundgren, 41 Nebr. 312, 59 N. W. 904.

New York.— Elliott *v.* Luengene, 17 Misc. 78, 39 N. Y. Suppl. 850.

North Carolina.—Watson *v.* Davis, 52 N. C. 178.

Tennessee.— East Tennessee, etc., R. Co. *v.* Lee, 95 Tenn. 393, 32 S. W. 249.

Texas.— Goar *v.* Thompson, 19 Tex. Civ. App. 330, 47 S. W. 61 (although a witness has been fully examined with reference

the jury by mistake.[71] But the mere fact that such papers were taken to the jury room with the concurrence of the judge is not prejudicial error if it appears that the papers were not read or considered by the jury.[72] Nor will the cause be reversed where the papers taken out by the jury were immaterial in character and could not have any bearing upon the result;[73] where it is clear that they could not have influenced the verdict;[74] or where, although not introduced in evidence, they formed a part of the pleadings and as such were taken out by the jury.[75] Exceptions to the general rule have been recognized in some decisions. Thus it has been held, although not uniformly, that where the jury are informed that such memoranda are not evidence, it is not error to permit them to take into retirement a paper containing a calculation or estimate as to what was due plaintiff,[76] a memorandum referring to the various items of debit and credit in an account,[77] a bill testified to as being correct,[78] or memoranda used by witnesses in giving their testimony.[79] So it has been held that the court may send to the

thereto); Faver *v.* Bowers, (Civ. App. 1895) 33 S. W. 131.

Vermont.— *In re* Barney, 71 Vt. 217, 44 Atl. 75.

United States.—Alaska Commercial Co. *v.* Dinkelspiel, 121 Fed. 318, 57 C. C. A. 14 [*reversed* on other grounds in 126 Fed. 164, 61 C. C. A. 108], writings offered but not admitted in evidence which tend to corroborate plaintiff's claim.

See 46 Cent. Dig. tit. "Trial," § 733.

71. Clark *v.* Whitaker, 18 Conn. 543, 46 Am. Dec. 337; Elliott *v.* Luengene, 17 Misc. (N. Y.) 78, 39 N. Y. Suppl. 850.

Book partly inadmissible.— Error in permitting the whole of a memorandum book to go to the jury, part thereof, not put in evidence, being inadmissible and prejudicial to the party objecting, is not cured by directing the jury not to examine such part. Kalamazoo Novelty Co. *v.* McAlister, 36 Mich. 327; Bates *v.* Preble, 151 U. S. 149, 14 S. Ct. 277, 38 L. ed. 106.

72. Ball *v.* Carley, 3 Ind. 577; Schappner *v.* Second Avenue R. Co., 55 Barb. (N. Y.) 497; Posey *v.* Patton, 109 N. C. 455, 14 S. E. 64.

73. Southern R. Co. *v.* Coursey, 115 Ga. 602, 41 S. E. 1013; Warth *v.* Loewenstein, 121 Ill. App. 71 [*modified* on other grounds in 219 Ill. 222, 76 N. E. 379]; Schappner *v.* Second Ave. R. Co., 55 Barb. (N. Y.) 497; Lewis *v.* Crane, 78 Vt. 216, 62 Atl. 60. And see Flower *v.* Jones, 7 Mart. N. S. (La.) 140.

74. Western Union Tel. Co. *v.* Shaw, (Tex. Civ. App. 1903) 77 S. W. 433. And see Nordsick *v.* Baxter, 64 N. J. L. 530, 45 Atl. 915.

75. Tabor State Bank *v.* Brewer, 100 Iowa 576, 69 N. W. 1011.

76. *Indiana.*—Alexander *v.* Dunn, 5 Ind. 122.

Kentucky.— Moore *v.* Beale, 50 S. W. 850, 20 Ky. L. Rep. 2029.

Michigan.— Harroun *v.* Chicago, etc., R. Co., 68 Mich. 208, 35 N. W. 914; Millar *v.* Cuddy, 43 Mich. 273, 5 N. W. 316, 38 Am. Rep. 181.

New Jersey.— See Rorer *v.* Rorer, 48 N. J. L. 50, 3 Atl. 67.

South Carolina.— Nott *v.* Thomson, 35 S. C. 461, 14 S. E. 940.

Wisconsin.— Rickeman *v.* Williamsburg City F. Ins. Co., 120 Wis. 655, 98 N. W. 960.

See 46 Cent. Dig. tit. "Trial," § 733.

And see Robinson *v.* Allison, 36 Ala. 525. But see Hatfield *v.* Cheaney, 76 Ill. 488; Burton *v.* Wilkes, 66 N. C. 604 (holding that the judge has not the right to hand to the jury a slip of paper containing an abbreviated estimate of plaintiff's claim for damages against the objection of the opposite party); Welliver *v.* Pennsylvania Canal Co., 23 Pa. Super. Ct. 79 (in which it was said that in actions of tort it is not good practice to send a statement of any kind with the jury).

Consent of counsel.—Where counsel has consented that an itemized statement of plaintiff's claim be given the jury, he cannot afterward complain that the court refuses to withdraw it from the jury. Dangerfield Nat. Bank *v.* Ragland, (Tex. Civ. App. 1899) 51 S. W. 661.

When improper to give statement to jury.—A statement of claim should not be permitted to go to the jury where it contains items as to which there is no evidence (Morrison *v.* Moreland, 15 Serg. & R. (Pa.) 61; Frazier *v.* Funk, 15 Serg. & R. (Pa.) 26; Musser *v.* Brabenstadt, 3 Leg. Gaz. (Pa.) 210); or which are not recoverable in the action brought (Himes *v.* Kiehl, 154 Pa. St. 190, 25 Atl. 632).

Memorandum of letter.— Failure of plaintiff's counsel to erase from a letter a memorandum of the date when it was received before giving it to the jury was harmless error, where the evidence as to its receipt was in conformity to the memorandum. Bryant *v.* Booze, 55 Ga. 438.

77. Robinson *v.* Allison, 36 Ala. 525.

78. Waltz *v.* Robertson, 7 Blackf. (Ind.) 499.

79. Mooney *v.* Hough, 84 Ala. 80, 4 So. 19. But not if the memoranda contain other matters which are unintelligible and from which the jury might draw improper inferences. Wiggs *v.* Southwestern Tel., etc., Co., (Tex. Civ. App. 1908) 110 S. W. 179.

jury after retirement a diagram used in the examination of witnesses,[80] or a book concerning which a witness has testified and which contains only entries concerning which he has testified.[81] The court is vested with a sound discretion in allowing papers of the character under consideration to go to the jury and may properly refuse to permit this to be done.[82]

g. Typewritten Copy of Oral Testimony. Where by mistake and inadvertence a typewritten copy of oral testimony given on an examination in chief is improperly given to the jury when retiring to deliberate, and which is referred to freely, the fact that on the following day the testimony given on cross-examination is also furnished them will not cure the error, since the jury is authorized to consider the evidence in its oral form only.[83]

h. Models and Other Articles. The court may permit the jury to take with them, on retirement, models used on the trial to show the situation under which an injury occurred,[84] or models showing locations of mines, although admittedly not facsimiles, but admitted in evidence for the purpose of explaining the testimony.[85] So it has been held that the taking by the jury to their room of tools offered in evidence, even though contrary to the direction of the court, will not render the verdict nugatory where it does not appear in any way that such action was prejudicial to the party complaining,[86] and the taking out of a hat introduced in evidence through mistake is not prejudicial error, where little if any attention was paid to it by the jurors, and was not used for the purpose of influencing the minds of the jurors, and did not influence them.[87]

3. Use of Personal Knowledge by Jurors[88]**— a. In General.** It was undoubtedly the ancient doctrine that jurors were to render their verdict upon facts within their personal knowledge, as well as upon those derived from the testimony of the witnesses duly sworn and testifying in the case.[89] But at the present day it is thought a greater object, and more likely to secure the administration of justice, to submit cases to impartial and unbiased jurors; and that those are less likely to be so who have come from the immediate neighborhood of the parties, and have been either eye-witnesses to the facts, or have had their minds imbued with the popular feeling as to the merits of the controversy.[90] With this change as to the proper qualifications of a juror, it has come to be well settled that a juror cannot give a verdict founded on facts in his own private knowledge, but must disregard such knowledge and arrive at his verdict from evidence regularly produced in the course of the trial proceedings.[91] If a juror

80. Brown *v.* Wiggin, 59 N. H. 327; Wood *v.* Willard, 36 Vt. 82, 84 Am. Dec. 659.

81. Fields *v.* Haley, (Tex. Civ. App. 1899) 52 S. W. 115.

82. Clements *v.* Mutersbaugh, 27 App. Cas. (D. C.) 165; Carman *v.* Montana Cent. R. Co., 32 Mont. 137, 79 Pac. 690; O'Hara *v.* Richardson, 46 Pa. St. 385.

83. Crisman *v.* McMurray, 107 Tenn. 469, 64 S. W. 711.

84. Louisville, etc., R. Co. *v.* Berry, 96 Ky. 604, 29 S. W. 449, 16 Ky. L. Rep. 722; Blazinski *v.* Perkins, 77 Wis. 9, 45 N. W. 947.

85. Illinois Silver Min., etc., Co. *v.* Raff, 7 N. M. 336, 34 Pac. 544.

86. Cudahy Packing Co. *v.* Skoumal, 125 Fed. 470, 60 C. C. A. 306.

87. Morris *v.* Miller, 83 Nebr. 218, 119 N. W. 458, 131 Am. St. Rep. 636, 20 L. R. A. N. S. 907.

88. **As ground for new trial** see New Trial, 29 Cyc. 810.

In criminal prosecutions see Criminal Law, 12 Cyc. 678.

Instructions as to applications of personal knowledge see *supra*, IX, E, 16, b.

89. Schmidt *v.* New York Union Mut. F. Ins. Co., 1 Gray (Mass.) 529 [*citing* 3 Blackstone Comm. 574].

Theory on which practice adopted.— The practice of taking jurors from the vicinage seems to have been adopted under the notion that they might thus be the better qualified from their personal acquaintance with the facts, the parties, and their witnesses, to decide the cases that might be brought before them. Schmidt *v.* New York Union Mut. F. Ins. Co., 1 Gray (Mass.) 529.

90. Schmidt *v.* New York Union Mut. F. Ins. Co., 1 Gray (Mass.) 529.

91. *Georgia.*— Gibson *v.* Carreker, 91 Ga. 617, 17 S. E. 965.

Illinois.— Ottawa Gas Light, etc., Co. *v.* Graham, 28 Ill. 73, 81 Am. Dec. 263.

Iowa.— Griffin *v.* Harriman, 74 Iowa 436, 38 N. W. 139; Close *v.* Samm, 27 Iowa 503; Stewart *v.* Burlington, etc., R. Co., 11 Iowa 62.

Kansas.—Atchison, etc., R. Co. *v.* Bayes,

knows any particular fact material to the proper decision of the case, he ought to be sworn as a witness in open court and be publicly examined,[92] so that the testimony may go to his brethren under the sanction of an oath,[93] and for the further reasons that his evidence like that of any other witness may be first scrutinized as to its competency and bearing upon the issue,[94] that the party against whom it bears be afforded the privilege of cross-examination,[95] and an opportunity to contradict or explain such testimony;[96] and in order that the counsel and the court respectively may be informed of the evidence on which the jury is to act, and make such use of it as their respective duties may require.[97]

42 Kan. 609, 22 Pac. 741; Clark *v.* Ford, 7 Kan. App. 332, 51 Pac. 938.

Kentucky.—Morehead *v.* Anderson, 125 Ky. 77, 100 S. W. 340, 30 Ky. L. Rep. 1137; Clarke *v.* Robinson, 5 B. Mon. 55.

Maine.—Douglass *v.* Trask, 77 Me. 35; Bowler *v.* Washington, 62 Me. 302; Heffron *v.* Gallupe, 55 Me. 563.

Massachusetts.—Schmidt *v.* New York Union Mut. F. Ins. Co., 1 Gray 529; Patterson *v.* Boston, 20 Pick. 159.

Nebraska.—Falls City *v.* Sperry, 68 Nebr. 420, 94 N. W. 529; Wood River Bank *v.* Dodge, 36 Nebr. 708, 55 N. W. 234.

New Jersey.—De Gray *v.* New York, etc., Tel. Co., 68 N. J. L. 454, 53 Atl. 200.

Pennsylvania.—Brunson *v.* Graham, 2 Yeates 166; Bradley *v.* Bradley, 4 Dall. 112; Simpson *v.* Kent, 9 Phila. 30.

South Carolina.—McKain *v.* Love, 2 Hill 506, 27 Am. Dec. 401.

Tennessee.—Jackson, etc., R., etc., Co. *v.* Simmons, 107 Tenn. 392, 64 S. W. 705; Forsythe *v.* Central Mfg. Co., 103 Tenn. 497, 53 S. W. 731; Citizens' St. R. Co. *v.* Burke, 98 Tenn. 650, 40 S. W. 1085.

Texas.—Green *v.* Hill, 4 Tex. 465; Simms *v.* Price, Dall. 554.

Virginia.—Gregory *v.* Baugh, 4 Rand. 611.

Wisconsin.—Sherman *v.* Menominee River Lumber Co., 77 Wis. 14, 45 N. W. 1079.

United States.—Head *v.* Hargrave, 105 U. S. 45, 26 L. ed. 1028; Brown *v.* Piper, 91 U. S. 37, 23 L. ed. 200; U. S. *v.* Fourteen Packages of Pins, 25 Fed. Cas. No. 15,151, Gilp. 235.

England.—Manley *v.* Shaw, C. & M. 361, 41 E. C. L. 200; Bennet *v.* Hartford, Style 233, 82 Eng. Reprint 671.

See 46 Cent. Dig. tit. "Trial," § 739; 1 Greenleaf Ev. (10th ed.) 17.

Illustrations.—The jury may not resort to any knowledge which they may have by reason of their familiarity with any special business or occupation. Union Pac. R. Co. *v.* Shannon, 33 Kan. 446, 6 Pac. 564; Craver *v.* Hornburg, 26 Kan. 94. And personal knowledge of individual jurors as to the character of witnesses is not to be taken into consideration by the jury in making up their verdict. Schmidt *v.* New York Union Mut. F. Ins. Co., 1 Gray (Mass.) 529. In the absence of evidence as to whether or not defendant knew of plaintiff's inexperience with the machinery at which he was set to work, and of his ignorance of the dangers to which he was exposed, the jury, in deciding this question, cannot be permitted to rely on their own personal knowledge of the fact that an experienced employer is able to determine whether or not a stranger seeking employment knows anything about the machinery at which he is set to work. Sherman *v.* Menominee River Lumber Co., 77 Wis. 14, 45 N. W. 1079. So matters of general history must be given in evidence, as well as all other facts, and the jury are not left to their own information as to such things. Gregory *v.* Baugh, 4 Rand. (Va.) 611.

92. *Georgia.*—Chattanooga, etc., R. Co. *v.* Owen, 90 Ga. 265, 15 S. E. 853.

Iowa.—Close *v.* Samm, 27 Iowa 503; Hall *v.* Robison, 25 Iowa 91.

Kansas.—Union Pac. R. Co. *v.* Shannon, 33 Kan. 446, 6 Pac. 564.

Massachusetts.—Schmidt *v.* New York Union Mut. F. Ins. Co., 1 Gray 529; Parks *v.* Boston, 15 Pick. 198.

Michigan.—Detroit, etc., R. Co. *v.* Van Steinburg, 17 Mich. 99.

Nebraska.—Falls City *v.* Sperry, 68 Nebr. 420, 94 N. W. 529; Ewing *v.* Hoffine, 55 Nebr. 131, 75 N. W. 537; Wood River Bank *v.* Dodge, 36 Nebr. 708, 55 N. W. 234.

England.—Manley *v.* Shaw, C. & M. 361, 41 E. C. L. 200; Wright *v.* Crump, 7 Mod. 1, 87 Eng. Reprint 1053; Anonymous, 1 Salk. 405, 91 Eng. Reprint 352; Bennet *v.* Hartford, Style 233, 82 Eng. Reprint 671.

93. Patterson *v.* Boston, 20 Pick. (Mass.) 159; Jackson, etc., R., etc., Co. *v.* Simmons, 107 Tenn. 392, 64 S. W. 705.

94. Schmidt *v.* New York Union Mut. F. Ins. Co., 1 Gray (Mass.) 529; De Gray *v.* New York, etc., Tel. Co., 68 N. J. L. 454, 53 Atl. 200.

95. Patterson *v.* Boston, 20 Pick. (Mass.) 159.

96. Simpson *v.* Kent, 9 Phila. (Pa.) 30; McKain *v.* Love, 2 Hill (S. C.) 506, 27 Am. Dec. 401; Jackson, etc., St. R., etc., Co. *v.* Simmons, 107 Tenn. 392, 64 S. W. 705.

97. Schmidt *v.* New York Union Mut. F. Ins. Co., 1 Gray (Mass.) 529; Patterson *v.* Boston, 20 Pick. (Mass.) 159; De Gray *v.* New York, etc., Tel. Co., 68 N. J. L. 454, 53 Atl. 200. And see Close *v.* Samm, 27 Iowa 503, 508 (in which it was said: "If they are thus permitted to include their personal examination, how could a court ever properly set aside their verdict as being against the evidence, or even refuse to set it aside without knowing the facts ascertained by such personal examination by the

Where a juror or jurors base the verdict on material matters within his or their personal knowledge, and not given in evidence, or where a juror communicates to the other jurors his personal knowledge of material facts bearing on the case and not given in evidence, the verdict is generally held to be fatally defective.[98] However, it has been held that in order to warrant a reversal it must appear that the statements made by the juror were of positive facts within the knowledge, or asserted to be within the knowledge, of the juror making them, and such as the jury might receive as evidence of the fact asserted, and not as the mere expression of opinion of the juror;[99] and that misconduct of a juror in stating matters of his own personal knowledge not testified to will not operate to reverse if the verdict was correct.[1]

b. Application of General Knowledge to Matters Under Consideration. To the general rule that facts in issue must be found by the jury on the evidence adduced at the trial and on the evidence alone, there is a distinct and well-defined exception, namely, that the jury have the right in making up their verdict to use their general knowledge and experience such as any man may bring to the subject,[2] and may and should take into account all the presumptions which, according

jury"); Clarke *v.* Robinson, 5 B. Mon. (Ky.) 55.

98. *Iowa.*— Griffin *v.* Harriman, 74 Iowa 436, 38 N. W. 139; Darrance *v.* Preston, 18 Iowa 396.

Kansas.— Atchison, etc., R. Co. *v.* Bayes, 42 Kan. 609, 22 Pac. 741.

Maine.— Bowler *v.* Washington, 62 Me. 302.

Nebraska.— Falls City *v.* Sperry, 68 Nebr. 420, 94 N. W. 529.

Tennessee.— Jackson, etc., St. R., etc., Co. *v.* Simmons, 107 Tenn. 392, 64 S. W. 705; Forsythe *v.* Central Mfg. Co., 103 Tenn. 497, 53 S. W. 731; Citizens' St. R. Co. *v.* Burke, 98 Tenn. 650, 40 S. W. 1085.

Applications of rule.—Where it appears by an undisputed showing in an action for damages for the change of a street grade that one of the jurors had prior knowledge of the premises involved in the controversy, that he based his own conclusion partly thereon, and used it to influence his fellow jurors in arriving at their verdict, the latter must be set aside. Falls City *v.* Sperry, 68 Nebr. 420, 94 N. W. 529. Where one of the principal questions involved in a case is as to the amount of damage done to a hedge by fire caused by defendant, and the evidence upon the subject is conflicting, and one of the jurors during the deliberations of the jury, and before they have fully agreed upon their verdict, states to the other members of the jury in substance that he had had about the same amount and kind of hedge burned by defendant that plaintiff had, and that defendant had paid him one dollar and fifty cents a rod as damages therefor, and this amount is greater than the amount of plaintiff's damages as shown by the evidence of the witnesses, and the verdict of the jury is in favor of plaintiff, and assesses his damages at two hundred and thirty dollars, it is held that the statement of the juror may have influenced the verdict of the jury, and is sufficient under the circumstances to require the granting of a new trial in favor of defendant. Atchison, etc., R. Co. *v.* Bayes, 42 Kan. 609, 22 Pac. 741. So where, in the deliberation of the jury in an action by a widow to recover for loss of services of her minor son arising from personal injuries received by him through the negligence of defendant, some of the jurors call attention to the fact that the son, in an action in his own right, has previously recovered a judgment against defendant for said injuries, a verdict for defendant, rendered on account of such previous judgment, should be set aside on the ground of misconduct of the jury. Forsythe *v.* Central Mfg. Co., 103 Tenn. 497, 53 S. W. 731.

99. Hulett *v.* Hancock, 66 Kan. 519, 72 Pac. 224.

1. Hathaway *v.* Burlington, etc., R. Co., 97 Iowa 747, 66 N. W. 892. But see Jackson, etc., St. R., etc., Co. *v.* Simmons, 107 Tenn. 392, 64 S. W. 705, holding that where statements of evidence were improperly made by a juror during the deliberations of the jury, the trial court cannot determine whether the evidence adduced at the trial was sufficient to have supported the verdict independent of such statements.

2. *Alabama.*— Louisville, etc., R. Co. *v.* Morgan, 114 Ala. 449, 22 So. 20; Smith *v.* Jernigan, 83 Ala. 256, 3 So. 515.

Georgia.— White *v.* Hammond, 79 Ga. 182, 4 S. E. 102; Anderson *v.* Tribble, 66 Ga. 584.

Illinois.— Louisville, etc., R. Co. *v.* Wallace, 136 Ill. 87, 26 N. E. 493, 11 L. R. A. 787; Kitzinger *v.* Sanborn, 70 Ill. 146; Ottawa Gas Light, etc., Co. *v.* Graham, 28 Ill. 73, 81 Am. Dec. 263.

Iowa.— Purcell *v.* Tibbles, 101 Iowa 24, 69 N. W. 1120.

Kansas.— Metropolitan St. R. Co. *v.* Summers, 75 Kan. 342, 89 Pac. 652; Craver *v.* Hornburg, 26 Kan. 94; Missouri River R. Co. *v.* Richards, 8 Kan. 101; Anthony *v.* Stinson, 4 Kan. 211.

Kentucky.— Morehead *v.* Anderson, 125 Ky. 77, 100 S. W. 340, 30 Ky. L. Rep. 1137.

Maine.— State *v.* Maine Cent. R. Co., 86

to the ordinary course of events or according to the ordinary experience of mankind, arise out of the facts proved,[3] and conclusions may be reached that lie quite beyond the mere letter of the evidence.[4] While a jury are not to use their own judgment in making up a verdict upon a subject calling for particular knowledge or experience not within the general knowledge they have in common with the rest of mankind;[5] and while they cannot act in any case upon particular facts material to its disposition resting in their private knowledge, but should be governed by the evidence adduced, they may, and to act intelligently they must,

Me. 309, 29 Atl. 1086; White *v.* Phœnix Ins. Co., 83 Me. 279, 22 Atl. 167; Douglass *v.* Trask, 77 Me. 35.

Massachusetts.—McGarrahan *v.* New York, etc., R. Co., 171 Mass. 211, 50 N. E. 610; Bradford *v.* Cunard Steamship Co., 147 Mass. 55, 16 N. E. 719; Schmidt *v.* New York Union Mut. F. Ins. Co., 1 Gray 529; Murdock *v.* Sumner, 22 Pick. 156; Patterson *v.* Boston, 20 Pick. 159; Parks *v.* Boston, 15 Pick. 198.

Michigan.— Lillibridge *v.* McCann, 117 Mich. 84, 75 N. W. 288, 72 Am. St. Rep. 553, 41 L. R. A. 381.

Minnesota.— Johnson *v.* Hillstrom, 37 Minn. 122, 33 N. W. 547.

Mississippi.— Spengler *v.* Williams, 67 Miss. 1, 6 So. 613.

North Carolina.— Jenkins *v.* Southern R. Co., 146 N. C. 178, 59 S. E. 663; Deans *v.* Wilmington, etc., R. Co., 107 N. C. 686, 12 S. E. 77, 22 Am. St. Rep. 902.

Oklahoma.— Waters-Pierce Oil Co. *v.* Deselms, 18 Okla. 107, 89 Pac. 212.

Texas.— Galveston, etc., R. Co. *v.* Davis, (Civ. App. 1898) 45 S. W. 956 [*reversed* on other grounds in 92 Tex. 372, 48 S. W. 570].

United States.— The Conqueror, 166 U. S. 110, 17 S. Ct. 510, 41 L. ed. 937; Head *v.* Hargrave, 105 U. S. 45, 26 L. ed. 1028; Chicago, etc., R. Co. *v.* Moore, 166 Fed. 663, 92 C. C. A. 357, 23 L. R. A. N. S. 962.

See 46 Cent. Dig. tit. "Trial," § 739.

Courts and juries acting within their special provinces must take notice of matters of general knowledge and use their common sense, when the evidence makes the issue of law or fact depend upon their exercise. Deans *v.* Wilmington, etc., R. Co., 107 N. C. 686, 12 S. E. 77, 22 Am. St. Rep. 902. Juries would be very little fit for the high and responsible office to which they are called if they might not avail themselves of these powers of their minds when they are most necessary to the performance of their duties. Patterson *v.* Boston, 20 Pick. (Mass.) 159.

Analogy to judicial notice.—As the jury is bound to keep within the restrictions imposed upon courts by the principles of judicial notice, so also it has the liberty which that principle allows to the courts. Thayer Ev. 296. So far as the matter in question is one upon which men in general have a common fund of knowledge and experience the analogy of judicial notice obtains to some extent and the jury are allowed to resort to this possession in making up their minds. 1 Greenleaf Ev. (16th ed.) 17; Murdock *v.* Sumner, 22 Pick. (Mass.) 156; Johnson *v.* Hillstrom, 37 Minn. 122, 33 N. W. 547.

What are matters of common knowledge. —The following are matters of common knowledge within the rule stated in the text: The fact that horses are liable to be frightened by locomotive engines and moving trains of cars, and that collisions at highway crossings are often caused thereby (State *v.* Maine Cent. R. Co., 86 Me. 309, 29 Atl. 1086), or that a person habitually intemperate is incompetent and unfit to have charge of a railroad train (Galveston, etc., R. Co. *v.* Davis, (Tex. Civ. App. 1898) 45 S. W. 956 [*reversed* on other grounds in 92 Tex. 372, 48 S. W. 570]. So in an action for death by wrongful act, the jurors' common knowledge as to life expectancy is sufficient for the admeasurement of damage on proof of deceased's age, habits, and earning capacity, and the disposition of his earnings. Louisville, etc., R. Co. *v.* Morgan, 114 Ala. 449, 22 So. 20. And it has been held, in an action for injuries by collision with a street car, that the jury may, without evidence, take notice in a general way of the character of traffic on the street on which the collision occurred. Metropolitan St. R. Co. *v.* Summers, 75 Kan. 342, 89 Pac. 652.

What are not matters of common knowledge.— On the other hand, it is not within the general knowledge of persons in what space an engine or train can be stopped going at the speed of forty-five miles an hour and equipped with the appliances as the one operated by the company at the time of the accident. Union Pac. R. Co. *v.* Shannon, 33 Kan. 446, 6 Pac. 564. The jury in an action for the value of surgical services has no right to find malpractice without testimony from persons who are qualified to give opinions on the methods of treatment. Wood *v.* Barker, 49 Mich. 295, 13 N. W. 597.

Testing credibility of witnesses.—A juror is entitled of course to use his general knowledge and experience on a subject for the purpose of testing the credibility of the witnesses, as on a question of value. Patterson *v.* Boston, 20 Pick. (Mass.) 159; Falls City *v.* Sperry, 68 Nebr. 420, 94 N. W. 529. But see McKain *v.* Love, 2 Hill (S. C.) 506, 27 Am. Dec. 401.

3. Gunn *v.* Ohio River R. Co., 36 W. Va. 165, 14 S. E. 465, 32 Am. St. Rep. 842.

4. Smith *v.* Jernigan, 83 Ala. 256, 3 So. 515; White *v.* Hammond, 79 Ga. 182, 4 S. E. 102.

5. Union Pac. R. Co. *v.* Shannon, 33 Kan. 446, 6 Pac. 564; Wood *v.* Barker, 49 Mich. 295, 13 N. W. 597.

judge of the weight and force of that evidence by their own general knowledge of the subject of inquiry.[6]

c. Knowledge Derived From View or Inspection.[7] The power of the courts in respect of granting a view or an inspection, and the mode of conducting it has been elsewhere considered.[8] The purpose of this section is a consideration of the operation and effect of a view, and on this branch of the subject decisions relating to view in criminal prosecutions,[9] and in condemnation proceedings[10] are excluded because elsewhere considered in this work. There is considerable lack of harmony in the decisions. The rule which prevails in many jurisdictions is that when a view or inspection is permitted to the jury, what they may observe cannot under any circumstances become evidence; and that while they are entitled to use the results of their observation for the purpose of enabling them to better understand the matter in controversy between the parties, and to better understand and apply the evidence given in the case, this is the sole use to which the results of such observation can be put.[11] They are not authorized to consider any fact bearing upon the merits of the controversy derived from such view,[12] nor does it authorize them to ignore physical facts or disregard settled rules of law.[13] The reasons assigned are usually those given for the general rule that jurors must disregard all personal knowledge of the case and give a verdict based on evidence regularly produced in the course of the proceedings.[14] Where this doctrine prevails instructions which authorize or direct the jury to consider as evidence their own observations derived from the view are of course erroneous.[15]

6. Head *v.* Hargrave, 105 U. S. 45, 26 L. ed. 1028.

7. In criminal cases see CRIMINAL LAW, 12 Cyc. 677.

Unauthorized view or inspection in civil cases see *supra*, X, B, 4.

8. See *supra*, IV, J.

9. See CRIMINAL LAW, 12 Cyc. 537.

10. See EMINENT DOMAIN, 15 Cyc. 880, 881.

11. *California.*— Wright *v.* Carpenter, 49 Cal. 607.

Illinois.— Dady *v.* Condit, 188 Ill. 234, 58 N. E. 900 [*reversing* 87 Ill. App. 250]; Rich *v.* Chicago, 187 Ill. 396, 58 N. E. 306; Vane *v.* Evanston, 150 Ill. 616, 37 N. E. 901; Cram *v.* Chicago, 94 Ill. App. 199.

Indiana.— Pittsburgh, etc., R. Co. *v.* Swinney, 59 Ind. 100; Heady *v.* Vevay, etc., Turnpike Co., 52 Ind. 117; Jeffersonville, etc., R. Co. *v.* Bowen, 40 Ind. 545 [*overruling* Evansville, etc., R. Co. *v.* Cochran, 10 Ind. 560].

Iowa.— Morrison *v.* Burlington, etc., R. Co., 84 Iowa 663, 51 N. W. 75; Thompson *v.* Keokuk, 61 Iowa 187, 16 N. W. 82; Close *v.* Samm, 27 Iowa 503, in which it was said that the object of statutes, which provide for the inspection of the premises in certain cases by the jury, was to enable them the better to apply the testimony disclosed on the trial, and not to base their verdict in any degree upon such examination itself, or become silent witnesses as to facts in relation to which neither party has an opportunity to cross-examine.

Minnesota.— Northwestern Mut L. Ins. Co. *v.* Sun Ins. Office, 85 Minn. 65, 88 N. W. 272; Schultz *v.* Bower, 57 Minn. 493, 89 N. W. 631, 47 Am. St. Rep. 630; Brakken *v.* Minneapolis, etc., R. Co., 29 Minn. 41, 11 N. W. 124; Chute *v.* State, 19 Minn. 271.

Ohio.— Machader *v.* Williams, 54 Ohio St. 344, 43 N. E. 324; Lake Shore, etc., R. Co. *v.* Gaffney, 9 Ohio Cir. Ct. 32, 6 Ohio Cir. Dec. 94; Columbus *v.* Bidlingmeier, 7 Ohio Cir. Ct. 136, 3 Ohio Cir. Dec. 698.

West Virginia.— Fox *v.* Baltimore, etc., R. Co., 34 W. Va. 466, 12 S. E. 757.

United States.— Laflin *v.* Chicago, etc., R. Co., 33 Fed. 415.

See 46 Cent. Dig. tit. "Trial," § 738.

12. Rich *v.* Chicago, 187 Ill. 396, 58 N. E. 306.

13. Cunningham *v.* Frankfort, 104 Me. 208, 70 Atl. 441.

14. See *supra*, X, D, 3, a. And see Wright *v.* Carpenter, 49 Cal. 607, 610, in which it was said: "If the rule were otherwise, the jury might base its verdict wholly on its own inspection of the premises, regardless of an overwhelming weight of evidence to the contrary, and the losing party would be without a remedy by motion for a new trial. It would be impossible to determine how much weight was due to the inspection by the jury as contrasted with the opposing evidence, or (treating the inspection as in the nature of evidence) whether it was sufficient to raise a substantial conflict in the evidence. The cause would be determined not upon evidence given in Court, to be discussed by counsel and considered by the Court in deciding a motion for a new trial, but upon the opinions of the jurors founded on a personal inspection, the value or the accuracy of which there would be no method of ascertaining."

15. Pittsburgh, etc., R. Co. *v.* Swinney, 59 Ind. 100; Heady *v.* Vevay, etc., Turnpike Co., 52 Ind. 117; Morrison *v.* Burlington, etc., R. Co., 84 Iowa 663, 51 N. W. 75; Northwestern Mut. L. Ins. Co. *v.* Sun Ins. Office, 85 Minn. 65, 88 N. W. 272; Schultz *v.* Bower, 57 Minn. 493, 59 N. W. 631, 47 Am. St. Rep. 630;

But it is proper to instruct the jury to consider the evidence in the light of the knowledge obtained by their inspection.[16] And a request for an instruction directing the jury to disregard everything they saw and every impression they received from the view is properly refused.[17] In a number of states the view prevails, and it is perhaps the one more consonant with reason, that the result of the juror's observation on a view is evidence which in making up their verdict they may consider in connection with evidence regularly produced before them in court.[18] Where this view prevails, it is proper to give the jury instructions

Brakken *v.* Minneapolis, etc., R. Co., 29 Minn. 41, 11 N. W. 124; Columbus *v.* Bidlingmeier, 7 Ohio Cir. Ct. 136, 3 Ohio Cir. Dec. 698.

Particular instructions condemned.—An instruction that the only purpose of the examination was to aid the jury "in determining the issue, with the other evidence in the case, as to whether or not the material . . . was defective." Morrison *v.* Burlington, etc., R. Co., 84 Iowa 663, 51 N. W. 75. An instruction that the sworn testimony given upon the stand, bearing upon the subject in controversy, and such reasonable deductions as were legitimately to be drawn from it, in connection with such facts as presented themselves in viewing the premises, constituted the only proper basis on which to rest their verdict, and afforded the only test and criterion by which they were to fashion and fix it. Pittsburgh, etc., R. Co. *v.* Swinney, 59 Ind. 100. An instruction, in an action for damages for defendant's refusal to convey land, that the jury might take into consideration the value of other lands which they viewed as throwing light on the value of the premises in question. Dady *v.* Condit, 188 Ill. 234, 58 N. E. 900 [*reversing* 87 Ill. App. 250]. An instruction that in determining whether or not there was a total loss they might take into consideration the knowledge gained and derived from the view. Northwestern Mut. L. Ins. Co. *v.* Sun Ins. Office, 85 Minn. 65, 88 N. W. 272.

16. Thompson *v.* Keokuk, 61 Iowa 187, 16 N. W. 82; Laflin *v.* Chicago, etc., R. Co., 33 Fed. 415.

17. Fox *v.* Baltimore, etc., R. Co., 34 W. Va. 466, 480, 12 S. E. 757, in which it was said: "It is apparent that the view would be absolutely useless, and would not conduce to a 'just decision,' if both sight and apprehension were to be closed against the results naturally to be derived from an inspection of the premises."

18. *Arkansas.*— Fitzgerald *v.* La Porte, 67 Ark. 263, 54 S. W. 342.

Kansas.— Chicago, etc., R. Co. *v.* Parsons, 51 Kan. 408, 32 Pac. 1083; Chicago, etc., R. Co. *v.* Willits, 45 Kan. 110, 25 Pac. 576; Topeka *v.* Martineau, 42 Kan. 387, 22 Pac. 419, 5 L. R. A. 775; Wellington Waterworks Co. *v.* Brown, 6 Kan. App. 725, 50 Pac. 966. *Contra*, Junction City *v.* Blades, 1 Kan. App. 85, 41 Pac. 677.

Massachusetts.— Norcross Bros. Co. *v.* Vose, 199 Mass. 81, 85 N. E. 468; McMahon *v.* Lynn, etc., R. Co., 191 Mass. 295, 77 N. E. 826; Smith *v.* Morse, 148 Mass. 407, 19 N. E. 393; Hanks *v.* Boston, etc., R. Co., 147 Mass. 495, 18 N. E. 218; Tully *v.* Fitchburg R. Co., 134 Mass. 499; Parks *v.* Boston, 15 Pick. 198.

Nebraska.— Chicago, etc., R. Co. *v.* Farwell, 60 Nebr. 322, 83 N. W. 71; Lincoln *v.* Sager, 2 Nebr. (Unoff.) 598, 89 N. W. 617.

Wisconsin.— Groundwater *v.* Washington, 92 Wis. 56, 65 N. W. 871; Washburn *v.* Milwaukee, etc., R. Co., 59 Wis. 364, 18 N. W. 328.

Reason for rule.— Perhaps the strongest reason in support of this view is the difficulty, if not impossibility, of eradicating from the mind the impression made by the view so as to render a verdict without reference thereto. See Fitzgerald *v.* La Porte, 67 Ark. 263, 54 S. W. 342. The folly of the rule that impressions derived from a view are not evidence, it is said, is apparent from the constitution of the human mind, and the well understood processes by which juries arrive at conclusions, and the following state of facts is given by way of illustration. If a dozen witnesses should testify that there was no window on the north side of the house from which one man had sworn that he viewed the affray, and the jurors on view should see the window, all lawyers would know that it would be futile, on the argument, to insist to the jury that their verdict must be based on the non-existence of the window, since the point had been sustained by a vast preponderance in the number of witnesses. Denver, etc., R. Co. *v.* Pulaski Irr. Ditch Co., 11 Colo. App. 41, 52 Pac. 224. On this subject an eminent commentator on Trial has expressed his views as follows: "There is no sense in the conclusion that the knowledge which the jurors acquire by the view is not evidence in the case. The conception that what a body of jurors see themselves, relevant to the issue to be decided by them, is not evidence, but something to be considered by them in weighing oral evidence, is nonsense. What they see is evidence in a primary sense, and what is detailed to them concerning the same subject-matter by witnesses, is evidence in merely a secondary sense. An objective lesson always impresses itself more vividly upon the mind than an oral lesson. Such a conclusion is tantamount to saying that they are to take the trouble of going in a body to inspect land, or other material object, out of court, and that when they come to make up their verdict they must resolutely forget the impressions acquired from such inspection." 1 Thompson Trials, § 893.

Applications of rule.—Where, in an action

to this effect,[19] and erroneous to instruct the jury to disregard evidence obtained by the view.[20] Nevertheless the jury cannot arbitrarily disregard evidence regularly admitted in the trial of the cause and base their verdict solely on the result of their observations. The verdict must be supported by other evidence than that derived by the jurors from the view;[21] and instructions which inform the jury that they may reach a verdict on the result of their observations, without regard to the testimony or in opposition thereto, are fatally erroneous.[22]

4. Experiments by Jury.[23] Jurors are not allowed to make private experiments or investigations for the purpose of determining essential controverted points,[24] and for them to do so constitutes such misconduct as will ordinarily vitiate the verdict.[25]

5. Manner of Arriving at Verdict[26]**— a. Chance Verdicts**[27]— (I) *In General.* Every verdict should be the result of the exercise of judgment and reflection and conscientious conviction on the part of the jury, and whenever it is made to appear to the court, by satisfactory proof, to have been the effect of chance or lot, it should be set aside.[28]

(II) *Quotient Verdicts*[29] — (A) *In General.* In accordance with this doc-

to recover a balance due on a building contract, the jury viewed the premises, what they saw as to the condition of the surface of the concrete floors and general character of the work was evidence of its value to be considered with other testimony. Norcross Bros. Co. *v.* Vose, 199 Mass. 81, 85 N. E. 468.

19. Wellington Waterworks *v.* Brown, 6 Kan. App. 725, 50 Pac. 966. See also cases cited in preceding note; and Denver, etc., R. Co. *v.* Pulaski Irr. Ditch Co., 11 Colo. App. 41, 52 Pac. 224, in which case it was held not reversible error to instruct a jury that they could consider what they had observed on their view of the *locus in quo* as they did testimony produced of witnesses before them, where there is sufficient evidence *aliunde* to sustain the verdict. The opinion in this case contains an argument strongly in favor of the rule stated in the preceding paragraph of text, but it was held unnecessary to hold in accordance therewith, as the verdict could be upheld on other grounds.

20. Chicago, etc., R. Co. *v.* Farwell, 60 Nebr. 322, 83 N. W. 71; Lincoln *v.* Sager, 2 Nebr. (Unoff.) 598, 89 N. W. 617.

21. Chicago, etc., R. Co. *v.* Parsons, 51 Kan. 408, 32 Pac. 1083; Topeka *v.* Martineau, 42 Kan. 387, 22 Pac. 419, 5 L. R. A. 775; Groundwater *v.* Washington, 92 Wis. 56, 65 N. W. 871; Washburn *v.* Milwaukee, etc., R. Co., 59 Wis. 364, 18 N. W. 328.

Unless it is supported by substantial evidence given by sworn witnesses, the reviewing court may set aside the verdict. Chicago, etc., R. Co. *v.* Parsons, 51 Kan. 408, 32 Pac. 1083.

22. Washburn *v.* Milwaukee, etc., R. Co., 59 Wis. 364, 18 N. W. 328.

23. **Experiments before jury as evidence** see *supra*, IV, I.

In criminal cases see Criminal Law, 12 Cyc. 678.

24. Wooldridge *v.* White, 105 Ky. 247, 48 S. W. 1081, 20 Ky. L. Rep. 1144; Wilson *v.* U. S., 116 Fed. 484, 53 C. C. A. 652. Consolidated Ice-Mach. Co. *v.* Trenton Hygeian Ice Co., 57 Fed. 898.

25. Wooldridge *v.* White, 105 Ky. 247, 48 S. W. 1081, 20 Ky. L. Rep. 1144, holding that in an action for injuries sustained by a bite from a dog, where the defense was that plaintiff knew of the dog's vicious nature and voluntarily placed himself in a position where it could bite him, the action of the jurors in going on the premises with defendant who took hold of the chain which held the dog at the time of the injury and stretched it to show how far it would reach was such misconduct as necessitated a new trial.

26. **As ground for new trial:** In civil cases see New Trial, 29 Cyc. 812. In criminal prosecutions see Criminal Law, 12 Cyc. 679 *et seq.*, 730.

Instructions as to manner of arriving at verdict see *supra*, IX, E, 16.

27. **As ground for arrest of judgment in civil cases** see Judgments, 23 Cyc. 833.

28. *California.*— Levy *v.* Brannan, 39 Cal. 485.

Georgia.— Obear *v.* Gray, 68 Ga. 182.

Iowa.— Merseve *v.* Cherie, 37 Iowa 253.

Kansas.—Ottawa *v.* Gilliland, 63 Kan. 165, 65 Pac. 252, 88 Am. St. Rep. 232.

Nevada.— Lee *v.* Clute, 10 Nev. 149.

New Jersey.— Kennedy *v.* Kennedy, 18 N. J. L. 450.

New York.— Mitchell *v.* Ehle, 10 Wend. 595.

Oklahoma.—Williams *v.* Pressler, 11 Okla. 122, 65 Pac. 934.

South Dakota.— Long *v.* Collins, 12 S. D. 621, 82 N. W. 95.

Washington.— Goodman *v.* Cody, 1 Wash. Terr. 329, 34 Am. Rep. 808.

Wisconsin.— Birchard *v.* Booth, 4 Wis. 67. See 46 Cent. Dig. tit. "Trial," § 740.

Compare Boydston *v.* Giltner, 3 Oreg. 118.

Mathematical calculation.—Where a verdict is shown beyond question to have been the result of a mathematical calculation rather than the deliberate judgment of the jury, it cannot stand. Clark *v.* Ford, (Kan. App. 1900) 62 Pac. 543.

29. **As ground for new trial:** In civil cases

trine it is almost universally held that if the jury, for the purpose of arriving at a verdict, agree that each member should set down a sum according to his own judgment, that the aggregate should be divided by twelve, that they will be bound by the result whatever it may be, and that the quotient should be returned as the verdict, such agreement will vitiate the verdict and it should be set aside whenever the fact is made to appear by proper evidence.[30] Such verdicts are regarded in the same light by the courts as gambling verdicts, as much so as if the jury had thrown dice, or resorted to any other species of gaming, to determine the amount.[31] The reason for this rule is obvious. Such a method of procedure substitutes the fluctuating and uncertain hazards of a lottery for the deliberate

see NEW TRIAL, 29 Cyc. 812. In criminal prosecutions see CRIMINAL LAW, 12 Cyc. 679.

30. *Alabama.*— Birmingham R., etc., Co. *v.* Clemons, 142 Ala. 160, 37 So. 925; Southern R. Co. *v.* Williams, 113 Ala. 620, 21 So. 328.

California.—Dixon *v.* Pluns, (1893) 31 Pac. 931; Turner *v.* Tuolumne County Water Co., 25 Cal. 397.

Colorado.— Schoolfield *v.* Brunton, 20 Colo. 139, 36 Pac. 1103; Pawnee Ditch, etc., Co. *v.* Adams, 1 Colo. App. 250, 28 Pac. 662.

Connecticut.— Haight *v.* Hoyt, 50 Conn. 583; Warner *v.* Robinson, 1 Root 194, 1 Am. Dec. 38; Henshaw *v.* Thompson, [*cited* in Warner *v.* Robinson, *supra*].

Idaho.— Flood *v.* McCheve, 3 Ida. 587, 32 Pac. 254.

Illinois.— Illinois Cent. R. Co. *v.* Able, 59 Ill. 131.

Indiana.— Chicago, etc., R. Co. *v.* McDaniels, 134 Ind. 166, 32 N. E. 728, 33 N. E. 769.

Iowa.— Williams *v.* Dean, 134 Iowa 216, 111 N. W. 931, 11 L. R. A. N. S. 410; Sylvester *v.* Casey, 110 Iowa 256, 81 N. W. 455; Barton *v.* Holmes, 16 Iowa 252; Denton *v.* Lewis, 15 Iowa 301; Schanler *v.* Porter, 7 Iowa 482; Manix *v.* Malony, 7 Iowa 81.

Kansas.— Ottawa *v.* Gilliland, 63 Kan. 165, 65 Pac. 252, 88 Am. St. Rep. 232; Werner *v.* Edmiston, 24 Kan. 147; Johnson *v.* Husband, 22 Kan. 277.

Minnesota.— St. Martin *v.* Desnoyer, 1 Minn. 156, 61 Am. Dec. 494.

Mississippi.— Parham *v.* Harney, 6 Sm. & M. 55.

Missouri.— Sharp *v.* Kansas City Cable R. Co., 114 Mo. 94, 20 S. W. 93; Sawyer *v.* Hannibal, etc., R. Co., 37 Mo. 240, 90 Am. Dec. 382; Milbourne *v.* Robison, 132 Mo. App. 198, 110 S. W. 598; Hagan *v.* Gibson Min. Co., 131 Mo. App. 386, 111 S. W. 608; State *v.* Cowell, 125 Mo. App. 348, 102 S. W. 573.

Nebraska.— Burke *v.* Magee, 27 Nebr. 156, 42 N. W. 890.

Nevada.— Lee *v.* Clute, 10 Nev. 149.

New York.— Dana *v.* Tucker, 4 Johns. 487; Smith *v.* Cheatham, 3 Cai. 57.

Rhode Island.— Forbes *v.* Howard, 4 R. I. 364.

South Dakota.— Long *v.* Collins, 12 S. D. 621, 82 N. W. 95.

Tennessee.— East Tennessee, etc., R. Co. *v.* Winters, 85 Tenn. 240, 1 S. W. 790; Bennett *v.* Baker, 1 Humphr. 399, 34 Am. Dec. 655; Elledge *v.* Todd, 1 Humphr. 43, 34 Am. Dec. 616.

Utah.— Lambourne *v.* Halfin, 23 Utah 489, 65 Pac. 206; Wright *v.* Union Pac. R. Co., 22 Utah 338, 62 Pac. 317.

Washington.— Goodman *v.* Cody, 1 Wash. Terr. 329, 34 Am. Rep. 808.

See 46 Cent. Dig. tit. "Trial," § 740.

Contra.— Heath *v.* Conway, 1 Bibb (Ky.) 398, 399 (in which it was said: "To add the several sums which each juror thinks in conscience ought to be given, and divide the amount so produced without fraud or chicanery, (which ought never to be presumed of jurors) by the whole number of jurors, as the centre of mutual concession, seems to be the most convenient practical mode of forming a verdict in such cases. In some of the books it is said, that if the jurors previously agree to abide by the sum so produced, the verdict is bad, but if after the result is known they do agree to it, the verdict is good. This seems very much like a distinction where no difference in practice can exist: for after the result is known, and the jurors are called upon in the words of the ancient and yet prevailing form to answer to the verdict pronounced by their foreman, 'so say you all;' and when the verdict so delivered and thus interrogated, passes without dissent, it seems strange that the court should set it aside because the jurors had not agreed to it"); Cowperthwaite *v.* Jones, 2 Dall. (Pa.) 55, 1 L. ed. 287. And *compare* Cleland *v.* Carlisle Borough, 186 Pa. St. 110, 40 Atl. 288, holding that, although a verdict is reached by adopting in accordance with a previous agreement the amount arising by dividing by twelve the amounts fixed by each juror, still, none of the jurors having expressed dissatisfaction with it, although they were together twenty minutes after agreeing on it, and it not being manifestly wrong or unjust, it will not be disturbed.

Curing error by remittitur.— Where all the jury agreed that plaintiff was entitled to recover nine hundred dollars but disagreed as to the exact amount between that sum and one thousand dollars, any irregularity in arriving by lot at a verdict for nine hundred and fifty dollars was cured by a remittitur of anything in excess of nine hundred dollars. St. Louis Southwestern R. Co. *v.* Gentry, (Tex. Civ. App. 1906) 98 S. W. 226.

31. Wilson *v.* Berryman, 5 Cal. 44, 63 Am. Dec. 78.

conclusions of their reflections and interchange of views.[32] It would also enable one juror, by marking down a very large or small sum, to produce an average and procure a verdict for an amount which would be unreasonable and at utter variance with the judgment of the other jurors.[33] Nor is it necessary that every member of the jury was a party to the agreement to be bound. It is enough to vitiate the verdict if the greater number so agreed;[34] and even though there was in fact no agreement to abide the result, if some of the jurors considered themselves so bound and acted accordingly, the verdict is vitiated.[35] Nevertheless, in order to render a verdict objectionable on the ground that it was a quotient verdict, it must affirmatively appear that the jurors bound themselves in advance to arrive at a verdict in that manner,[36] and that they in fact did so,[37] and the burden of proving such agreement is on the party assailing the verdict.[38] If a prearrangement of the character under consideration does not affirmatively appear, the presumption of law is that it has not been made; such a presumption, as a general rule, exists in all instances in favor of right acting.[39] So it has been held that a verdict illegal because of a previous agreement to be bound by the result of averaging the amounts which each juror thinks should be awarded may be repudiated and a valid verdict found as a result of proper deliberation;[40] and where they in fact repudiate the agreement and agree on an amount different from that found under the illegal agreement the verdict is good.[41] But it has been held that a mere subsequent assent to the verdict illegally found is not alone sufficient to purge it of illegality.[42]

32. Parham *v.* Harney, 6 Sm. & M. (Miss.) 59; Graham Pr. 315.

33. Southern R. Co. *v.* Williams, 113 Ala. 620, 21 So. 328; Lee *v.* Clute, 10 Nev. 149; Long *v.* Collins, 12 S. D. 621, 82 N. W. 95; Bennett *v.* Baker, 1 Humphr. (Tenn.) 399, 34 Am. Dec. 655.

34. Sylvester *v.* Casey, 110 Iowa 256, 81 N. W. 455.

35. Ruble *v.* McDonald, 7 Iowa 90; Johnson *v.* Husband, 22 Kan. 277; Gordon *v.* Trevarthan, 13 Mont. 387, 34 Pac. 185, 40 Am. St. Rep. 452.

36. *Alabama.*— Birmingham R., etc., Co. *v.* Moore, 148 Ala. 115, 42 So. 1024; Eufala *v.* Speight, 121 Ala. 613, 25 So. 1009.

Georgia.—Columbus *v.* Ogletree, 102 Ga. 293, 29 S. E. 749.

Illinois.— Roy *v.* Goings, 112 Ill. 656.

Missouri.— State *v.* Cowell, 125 Mo. App. 348, 102 S. W. 573.

Wisconsin.— Giese *v.* Schultz, 69 Wis. 521, 34 N. W. 913.

See 46 Cent. Dig. tit. "Trial," § 740.

And see Chandler *v.* Barker, 2 Harr. (Del.) 387.

Evidence insufficient to show quotient verdict.— It has been held that there is no presumption that individual jurors have compromised their opinions in arriving at the amount of a verdict in an action for libel where there is no evidence as to damages, from the mere fact that the verdict is for a certain number of dollars and cents. Eufala *v.* Speight, 120 Ala. 613, 25 So. 1009; Meyer *v.* Press Pub. Co., 46 N. Y. Super. Ct. 127. So it has been held that a verdict for two thousand one hundred and forty-four dollars will not be set aside as being a gambling verdict, upon consideration of its amount alone, without other evidence appearing on the record. Giese *v.* Schultz, 69 Wis. 521, 34 N. W. 913. And where a party averred in his affidavit that the adverse verdict was a quotient verdict, four jurors denied it, and stated the manner of reaching the amount awarded, and the bailiff averred that the party was not in a position to hear what was said in the jury room, it was held that it was not error to refuse a new trial. Model Clothing House *v.* Hirsch, 42 Ind. App. 270, 85 N. E. 719.

Evidence held sufficient to show quotient verdict.— Where, on the back of a paper containing instructions taken into the jury room and returned with the verdict, there appears a memorandum showing twelve different amounts in a column, the total thereof, and its division by twelve, the verdict, which corresponds with the quotient so obtained, will be set aside, on the presumption that it is the result of an agreement by the jurors, in advance, to average their separate assessments. Southern R. Co. *v.* Williams, 113 Ala. 620, 21 So. 328.

37. Columbus *v.* Ogletree, 102 Ga. 293, 29 S. E. 749.

38. Birmingham R., etc., Co. *v.* Moore, 148 Ala. 115, 42 So. 1024.

39. State *v.* Cowell, 125 Mo. App. 348, 102 S. W. 573; Giese *v.* Schultz, 69 Wis. 521, 34 N. W. 913.

40. Davis *v.* Pryor, 3 Indian Terr. 396, 58 S. W. 660; Thompson *v.* Perkins, 26 Iowa 486; Shobe *v.* Bell, 1 Rand. (Va.) 39.

41. Shobe *v.* Bell, 1 Rand. (Va.) 39.

42. Thompson *v.* Perkins, 26 Iowa 486. *Compare* Davis *v.* Pryor, 3 Indian Terr. 396, 58 S. W. 660. In this case the jury agreed to divide the sum total of what each thought plaintiff should recover by twelve, and render a verdict for the result, which gave nine thousand eight hundred and fifty dollars, when one juror refused to render so large a

(B) *Absence of Agreement That Average Estimate Shall Be Binding.*[43] While as shown in the preceding section a verdict obtained by averaging the estimates of the individual jurors, in pursuance of an agreement to be bound by the result, is fatally defective,[44] yet if the averaging of the estimates is adopted merely for the sake of arriving at a reasonable measure of damages, and the jurors are left free to accept or reject the result, as they see fit, a verdict for a sum which is the average of the amounts fixed by the individual jurors, and to which they agree,[45] or for a different amount,[46] is not objectionable. The vitiating fact is in the agreement in advance to abide by the result.[47] Verdicts, it has been said, are often and properly the result of mutual concessions. Without something of this kind twelve men can hardly be expected to come to a unanimous conclusion upon any computation of unliquidated damages.[48] Where, as is usually the case, there is a diversity of opinion as to the amount which ought to be given, the verdict must necessarily be the result of mutual concession, and the jury are

verdict, and insisted that five thousand dollars was sufficient, but after argument consented to a verdict of nine thousand five hundred dollars. It was held that such verdict was not invalid as obtained by lot.

43. As affecting right to new trial see NEW TRIAL, 29 Cyc. 812.

In criminal cases see CRIMINAL LAW, 12 Cyc. 679.

44. See *supra*, X, D, 5, a, (II), (A).

45. *California.*— McDonnell *v.* Pescadero, etc., Stage Co., 120 Cal. 476, 52 Pac. 725; Hunt *v.* Elliott, 77 Cal. 588, 20 Pac. 132; Turner *v.* Tuolumne County Water Co., 25 Cal. 397; Wilson *v.* Berryman, 5 Cal. 44, 63 Am. Dec. 78.

Colorado.— Knight *v.* Fisher, 15 Colo. 176, 25 Pac. 78.

Connecticut.— Scholfield Gear, etc., Co. *v.* Scholfield, 71 Conn. 1, 40 Atl. 1046.

Delaware.— Chandler *v.* Barker, 2 Harr. 387.

Florida.— Orange Belt R. Co. *v.* Craver, 32 Fla. 28, 13 So. 444.

Georgia.— Columbus *v.* Ogletree, 102 Ga. 293, 29 S. E. 749.

Illinois.— Groves, etc., R. Co. *v.* Herman, 206 Ill. 34, 69 N. E. 36; Pekin *v.* Winkel, 77 Ill. 56; Illinois Cent. R. Co. *v.* Able, 59 Ill. 131.

Indiana.— St. Louis, etc., R. Co. *v.* Myrtle, 51 Ind. 566; Guard *v.* Risk, 11 Ind. 156; Dunn *v.* Hall, 8 Blackf. 32.

Iowa.— McElhone *v.* Wilkinson, 121 Iowa 429, 96 N. W. 868; Owen *v.* Christensen, 106 Iowa 394, 76 N. W. 1003; Sullens *v.* Chicago, etc., R. Co., 74 Iowa 659, 38 N. W. 545, 7 Am. St. Rep. 501; Deppe *v.* Chicago, etc., R. Co., 38 Iowa 592; Hamilton *v.* Des Moines Valley R. Co., 36 Iowa 31; Barton *v.* Holmes, 16 Iowa 252.

Kansas.— Kinsley *v.* Morse, 40 Kan. 588, 20 Pac. 222; Bailey *v.* Beck, 21 Kan. 462.

Massachusetts.— Dorr *v.* Fenno, 12 Pick. 521; Grinnell *v.* Phillips, 1 Mass. 530.

Minnesota.— St. Martin *v.* Desnoyer, 1 Minn. 156, 61 Am. Dec. 494.

Missouri.— Hagan *v.* Gibson Min. Co., 131 Mo. App. 386, 111 S. W. 608; State *v.* Cowell, 125 Mo. App. 348, 102 S. W. 573; McMurdock *v.* Kimberlin, 23 Mo. App. 523.

Nebraska.— Cortelyou *v.* McCarthy, 37 Nebr. 742, 56 N. W. 620; Ponca *v.* Crawford, 23 Nebr. 662, 37 N. W. 609, 8 Am. St. Rep. 144.

Nevada.— Lee *v.* Clute, 10 Nev. 149.

New Hampshire.— Dodge *v.* Carroll, 59 N. H. 237.

New Jersey.— Kennedy *v.* Kennedy, 18 N. J. L. 450.

New York.— Hamilton *v.* Owego Water Works, 22 N. Y. App. Div. 573, 48 N. Y. Suppl. 106 [*affirmed* in 163 N. Y. 562, 57 N. E. 1111]; Harvey *v.* Rickett, 15 Johns. 87; Dana *v.* Tucker, 4 Johns. 487.

Pennsylvania.— White *v.* White, 5 Rawle 61.

Rhode Island.— Luft *v.* Linganie, 17 R. I. 420, 22 Atl. 942; Forbes *v.* Howard, 4 R. I. 364.

Tennessee.— Harvey *v.* Jones, 3 Humphr. 157.

Texas.— Handley *v.* Leigh, 8 Tex. 129; Chicago, etc., R. Co. *v.* Trippett, 50 Tex. Civ. App. 279, 111 S. W. 761.

Utah.— Pence *v.* California Min. Co., 27 Utah 378, 75 Pac. 934; Archibald *v.* Kolitz, 26 Utah 226, 72 Pac. 935.

Vermont.— Cheney *v.* Holgate, Brayt. 171.

Washington.— Bell *v.* Butler, 34 Wash. 131, 75 Pac. 130; Stanley *v.* Stanley, 32 Wash. 489, 73 Pac. 596; Watson *v.* Reed, 15 Wash. 440, 46 Pac. 647, 55 Am. St. Rep. 899; Goodman *v.* Cody, 1 Wash. Terr. 329, 34 Am. Rep. 808.

United States.— Consolidated Ice-Mach. Co. *v.* Trenton Hygeian Ice Co., 57 Fed. 898; Johnson *v.* Northern Pac. R. Co., 46 Fed. 347.

See 46 Cent. Dig. tit. "Trial," § 740.

46. Bailey *v.* Beck, 21 Kan. 462; Moore *v.* Southwest Missouri Electric R. Co., 100 Mo. App. 665, 75 S. W. 176; Birchard *v.* Booth, 4 Wis. 67.

47. 2 Thompson Trials, § 2602.

48. *Connecticut.*— Scholfield Gear, etc., Co. *v.* Scholfield, 71 Conn. 1, 40 Atl. 1046.

Georgia.— Harrison *v.* Powell, 24 Ga. 530.

Massachusetts.— Dorr *v.* Fenno, 12 Pick. 521.

Missouri.— Huff *v.* Thurman, 78 Mo. App. 635.

Texas.— Owens *v.* Missouri Pac. R. Co., 67 Tex. 679, 4 S. W. 593.

bound to seek for a medium sum upon which their conflicting views may harmonize.[49]

(III) *AVERAGING ESTIMATES OF WITNESSES.* A jury need not fix the amount of damages at the exact sum testified to by any one witness or by any two, but may find an intermediate sum.[50] While there is authority to the contrary,[51] it has been held not improper for the jury in estimating the damages to which plaintiff is entitled to average the amounts testified to by the witnesses.[52] Nevertheless, the ordinary rules of weighing testimony, such as honesty, disinterestedness, opportunity for knowledge, and intelligence, should be resorted to, before attempting to reach a satisfactory result by averaging the values sworn to.[53]

(IV) *OTHER VERDICTS DEPENDENT ON ELEMENT OF CHANCE.* The drawing of lots to determine whether the verdict shall be for plaintiff or defendant;[54] or to induce a part of the jurors to assent to a larger verdict than in their judgment should be given;[55] or an agreement by the jury to render a verdict for an amount fixed by three of the jurors;[56] or an agreement by the jurors that a certain number of ballots should be taken and the verdict should be rendered for the party receiving the majority of ballots;[57] or an agreement by three of the jurors who are for defendant to join the other jurors in rendering a verdict for plaintiff if the other jurors sign a statement to the effect that they believe defendant had wilfully testified falsely;[58] or an agreement by some of the jurors who are for defendant to join the other jurors in a verdict for plaintiff, provided the damages awarded do not exceed a certain amount;[59] such agreements, being executed, vitiate the verdict.

b. Compromise Verdicts.[60] Where the liability of defendant is established, and the compensation to which plaintiff is entitled is measured by a fixed and uncontroverted sum,[61] or where the damages are fixed or liquidated,[62] the verdict should either be for the amount sued for, or in favor of defendant. The jury have no right to give a compromise verdict for less than the amount in suit, and if they do so, the verdict should be set aside as being without evidence to support it, or the jury sent back with directions to find for the full amount in case they found for plaintiff.[63] A jury should not be permitted under the forms of law to

49. Turner *v.* Tuolumne County Water Co., 25 Cal. 397. And see White *v.* White, 5 Rawle (Pa.) 61, 63, in which it was said: "Every assessment of value necessarily involves a compromise of opinion, and a juror may therefore yield his judgment to that of the majority without compromising his principles.

50. Jeffersonville, etc., R. Co. *v.* Tull, 37 Ind. 341.

51. Illinois, etc., R. Co. *v.* Freeman, 210 Ill. 270, 71 N. E. 444.

52. Roth's Succession, 33 La. Ann. 540; Jones *v.* Jones, 4 Gill (Md.) 87. And see Western, etc., R. Co. *v.* Brown, 58 Ga. 534.

53. Harvey *v.* Boswell, 65 Ga. 550. And see Jones *v.* Jones, 4 Gill (Md.) 87.

54. Merseve *v.* Shine, 37 Iowa 253; Mitchell *v.* Ehle, 10 Wend. (N. Y.) 595.

55. Levy *v.* Brannan, 39 Cal. 485.

56. Ryerson *v.* Kitchell, 3 N. J. L. 998. And see Curry *v.* J. V. Brinkman Co. Bank, 7 Kan. App. 807, 54 Pac. 1, holding that where the answers to special questions are dictated by less than the whole number of jurors, to which dictation the remainder have promised to accept before they knew what it would be, there has not been such a cool, deliberate judgment exercised by all the jurors as the law requires.

57. Houk *v.* Allen, 126 Ind. 568, 25 N. E. 897, 11 L. R. A. 706.

58. Williams *v.* Pressler, 11 Okla. 122, 65 Pac. 934.

59. Wiegand *v.* Fee Bros. Co., 73 N. Y. App. Div. 139, 76 N. Y. Suppl. 872.

60. As a ground for new trial: In civil cases see NEW TRIAL, 29 Cyc. 812. In criminal prosecutions see CRIMINAL LAW, 12 Cyc. 730.

In criminal prosecutions see CRIMINAL LAW, 12 Cyc. 679.

Instructions relating to compromise verdict see *supra*, IX, E, 16, a.

61. Hamilton *v.* Owego Water Works, 22 N. Y. App. Div. 573, 48 N. Y. Suppl. 106.

62. St. Louis Brewery Co. *v.* Bodemann, 12 Mo. App. 573; Hatch *v.* Attrill, 118 N. Y. 383, 23 N. E. 549; Myers *v.* Myers, 86 N. Y. App. Div. 73, 83 N. Y. Suppl. 236; Cowles *v.* Watson, 14 Hun (N. Y.) 41; Powers *v.* Gouraud, 19 Misc. (N. Y.) 268, 44 N. Y. Suppl. 249; Lawson *v.* Fargo, 113 N. Y. Suppl. 647; Meyers *v.* Zucker, 91 N. Y. Suppl. 358; Bigelow *v.* Garwitz, 15 N. Y. Suppl. 940; Oliver *v.* Moore, 12 N. Y. Suppl. 343. But see Benedict *v.* Michigan Beef, etc., Co., 115 Mich. 527, 73 N. W. 802.

63. Hatch *v.* Attrill, 118 N. Y. 383, 23

do what is palpably unjust.[64] However, the prohibition against compromise verdicts has no application where the damages sought to be recovered are unliquidated,[65] for it is obvious that where this is the case a unanimous conclusion would be almost impossible except as the result of mutual concessions.[66] Where a verdict was warranted by the testimony of one witness in the case, it is not necessarily a compromise verdict.[67] So a verdict is not necessarily objectionable as being a compromise verdict because it does not include interest on the notes in suit.[68] And where the court instructed the jury that they could fix under the evidence what they thought was fair and right, the fact that plaintiff was allowed less than he sought, and more than defendant claimed he should have received, was insufficient to show that the verdict was by way of compromise.[69] Where, in an action on an order drawn on funds due a contractor, a verdict is rendered for the only amount for which it could be rightfully rendered, a contention that it is a compromise verdict, which is based merely on the coincidence of the amount with the remainder after certain credits are deducted from the contract price, is unavailing.[70]

E. Assisting, Urging, or Coercing Agreement[71] — **1. Re-Reading or Recapitulating Evidence.**[72] It has been stated in an early English abridgment that "when the jury are retired, under the charge of the officer, they may come back into court to hear the evidence of a thing of which they are in doubt," [73] and this practice was approved in an early New York case in which it was assigned as a reason that "the law allows the jury all reasonable opportunity, before their verdict is put upon record and they are discharged, to discover and to declare the truth according to their judgment." [74] It is of course obvious that, if at the request of the jury and of both parties the stenographer reads such portions of the testimony as the jury desired to hear, neither party can afterward be heard to complain.[75] And, on the other hand, it has been held that where the foreman, after the retirement of the jury, informed the judge that they could not agree as to what the testimony of certain witnesses was, it was error for the court, over the objection of counsel for both parties, to recall the jury and allow the stenographer to read to them his notes of the evidence of such witnesses.[76] While there is authority to the contrary,[77] it is held proper, in the absence of any statutory provisions on the subject, for the jury, after retirement, to return into court and

N. E. 549; Powers *v.* Gouraud, 19 Misc. (N. Y.) 268, 44 N. Y. Suppl. 249.

64. Cowles *v.* Watson, 14 Hun (N. Y.) 41.

65. Godwin *v.* Albany Fertilizer Co., 99 Ga. 180, 25 S. E. 181; St. Louis, etc., R. Co. *v.* Myrtle, 51 Ind. 566; Bryson *v.* Chicago, etc., R. Co., 89 Iowa 677, 57 N. W. 430. And see *supra*, X, D, 5, a, (II), (B); and New Trial, 29 Cyc. 812.

66. See *supra*, X, D, 5, a, (II).

67. Alexander *v.* Mud Lake Lumber Co., 153 Mich. 70, 116 N. W. 539.

68. Big Rapids Nat. Bank *v.* Peters, 120 Mich. 518, 79 N. W. 891.

69. Hart *v.* Denise, 75 N. J. L. 82, 66 Atl. 1085.

70. Foley *v.* Houston Co-op., etc., Co., (Tex. Civ. App. 1907) 106 S. W. 160.

71. As ground for new trial in civil cases see New Trial, 29 Cyc. 811.

In criminal prosecutions see Criminal Law, 12 Cyc. 679 *et seq.*

72. In criminal cases see Criminal Law, 12 Cyc. 681.

Necessity for presence of counsel see *infra*, X, E, 7, a.

Reopening case for further evidence see *supra*, V, B.

73. 2 Rolle Abr. 676 [*cited* in Blackley *v.* Sheldon, 7 Johns. (N. Y.) 32, 34].

74. Blackley *v.* Sheldon, 7 Johns. (N. Y.) 32, 34.

75. Hahn *v.* Miller, 60 Iowa 96, 14 N. W. 119.

Reading part of evidence under agreement that all be read.— Where counsel agreed to permit a witness's testimony to be read in the jury room if all of it was read, and the stenographer read part of it to the jury, when they told him that they had heard enough and excluded him from the jury room, his failure to read the rest of it was not prejudicial error; it not appearing that the jury knew of the agreement that all of the testimony should be read. Quinn *v.* Metropolitan St. R. Co., 218 Mo. 545, 118 S. W. 46.

76. Padgitt *v.* Moll, 159 Mo. 143, 60 S. W. 121, 81 Am. St. Rep. 347, 52 L. R. A. 854.

77. See Hersey *v.* Tully, 8 Colo. App. 110, 44 Pac. 854, 855, in which it was said: "Without regard to any question of the legal effect of this testimony, it was serious error to permit it to be read to the jury after the case had been submitted to them. They thus heard a portion of the plaintiff's testimony

with the permission of the court to question a witness as to certain facts of the evidence given by him on the stand,[78] or to have the evidence of a witness or witnesses read to them by the stenographer,[79] or for the court at the request of the jury to recapitulate parts of the testimony;[80] and it has been held error for the court to refuse the request of counsel for defendant, made in the presence of plaintiff's counsel, to bring in the jury and state the evidence to them as requested by them.[81] In some states the matter of reading or recapitulating evidence to the jury on their return into court after retirement is a subject of statutory regulation. Thus in construing the various statutes it has been held proper or at least not available error for the court on request of the jury to have the stengrapher read the testimony of certain witnesses,[82] or for the court to read the testimony from the stenographer's notes,[83] or to give his recollection as to the testimony on a point in dispute.[84] So it has been held that where the jury at their request and that of counsel are brought into court to hear the evidence of certain witnesses read, and after the evidence of one of the witnesses had been read the court stated the substance of the evidence given by the others, there was not such an abuse of discretion as warranted a reversal.[85] Where the trial court, in response to a request by the jury that certain portions of the evidence be read to them, read more evidence than was requested, but such additional evidence, so read, was in favor of the losing party, he cannot be said to have been prejudiced.[86]

twice, and the last time disconnected from all the other evidence, so that they went back to their room with their memories refreshed as to this; and having listened to it out of its connection, they would be liable to give it an importance to which it was not entitled, and which they would not have given it otherwise." And see Westgate *v.* Aschenbrenner, 39 Ill. App. 263, 264, holding that "it was correct for the court to refuse to allow the stenographer's notes to be read to the jury as a part of the evidence to refresh the jury's mind as to what the evidence was."

78. Fulton Towboat Co. *v.* Pendergrass, 15 Ky. L. Rep. 208.

79. Roberts *v.* Atlanta Consol. St. R. Co., 104 Ga. 805, 806, 30 S. E. 966 (in which it was said: "If the jury, after retiring to consider a case, should differ as to the testimony on a material point, we see nothing improper in their requesting the court that their recollection be refreshed by having the testimony, if taken down, read to them. On the contrary, it indicates a commendable purpose and desire to ascertain the truth of the case before rendering their verdict"); Cannon *v.* Griffith, 3 Kan. App. 506, 43 Pac. 829; Westerfield *v.* Baldwin, 16 Ky. L. Rep. 318.

80. Wallrath *v.* Bohnenkamp, 97 Mo. App. 242, 70 S. W. 1112. And see Smith *v.* Ross, 31 App. Cas. (D. C.) 348, holding that the objection by the losing party in a trial that the court, in responding to the request by the jury that a portion of the evidence be stated to them, substituted his version or recollection of the evidence for the recollection of the jury, cannot avail such party on appeal, where it appears that there is no variance between the evidence as stated by the court to the jury and the evidence appearing in the record on appeal.

81. Drew *v.* Andrews, 8 Hun (N. Y.) 23. *Compare* Byrnes *v.* New York, etc., R. Co., 14 N. Y. St. 554 [*reversed* on other grounds in 113 N. Y. 251, 21 N. E. 50, 4 L. R. A. 151], in which it was held that where the jury requested to be furnished with certain testimony, and the request was denied, and there was no request for further instruction and neither of the counsel requested to have the jury called back for any purpose, the failure therefore to furnish the testimony was not error.

82. Merritt *v.* New York, etc., R. Co., 164 Mass. 440, 41 N. E. 667 (under a statute providing that, when a jury, after due consideration on a case, returns into court, without having agreed, the judge may state anew the evidence, or any part of it, and explain to them anew the law, etc.); Jameson *v.* State, 25 Nebr. 185, 41 N. W. 138.

In Nebraska, notwithstanding the statutory authorization, the practice under consideration is looked on with disfavor and is not considered to be one which should be encouraged. Jameson *v.* State, 25 Nebr. 185, 41 N. W. 138; Bonawitz *v.* De Kalb, 2 Nebr. (Unoff.) 534, 89 N. W. 379.

83. Freezer *v.* Sweeney, 8 Mont. 508, 21 Pac. 20, under a statute providing that if the jury, after retiring for deliberation, disagree as to any part of the testimony, they may require the officer to conduct them into court, where the information shall be given them, in the presence of or after notice to the parties or counsel.

84. Darner *v.* Daggett, 35 Nebr. 695, 53 N. W. 608; Bonawitz *v.* De Kalb, 2 Nebr. (Unoff.) 534, 89 N. W. 379.

85. Salladay *v.* Dodgeville, 85 Wis. 318, 55 N. W. 696, 20 L. R. A. 541.

86. Smith *v.* Ross, 31 App. Cas. (D. C.) 348.

2. Giving Further Instructions [87] — a. On Court's Own Motion.[88] The court may exercise a wide discretion in the matter of charging the jury, and may of its own motion recall the jury and give them additional instructions, or give such instructions when they return to court and report that they are unable to reach an agreement.[89] It has been held that the court may exercise this power, even though the jury say that they do not want any further instructions;[90] and after the jury has announced that they have agreed upon a verdict, the judge may send them out again with further instructions before receiving the verdict.[91] So, where no instructions are offered by either party and the jury returns a verdict without fixing the amount of damages, the court may instruct the jury orally that they must find the amount of damages, and send them back to the jury room for that purpose.[92] It is only in cases of abuse of the discretion of the court resulting in injury that the exercise of this discretion will be reviewed,[93] and where the court might have directed a verdict in favor of the party who prevailed at the trial, any error committed in exercising its power to recall the jury and give further instructions is harmless.[94]

b. On Request of Jury.[95] Unless prohibited by statute from so doing,[96] the

87. See also New Trial, 29 Cyc. 811.
Giving additional instructions in criminal cases see Criminal Law, 12 Cyc. 679.

88. In criminal cases see Criminal Law, 12 Cyc. 679.

89. *Arkansas.*— McDaniel *v.* Crosby, 19 Ark. 533.
Colorado.— Hayes *v.* Williams, 17 Colo. 465, 30 Pac. 352.
Connecticut.— See West *v.* Anderson, 9 Conn. 107, 21 Am. Dec. 737.
Georgia.— Maddox *v.* Morris, 110 Ga. 309, 35 S. E. 170; Wood *v.* Isom, 68 Ga. 417; Daniel *v.* Frost, 62 Ga. 697.
Illinois.— Joliet *v.* Looney, 159 Ill. 471, 42 N. E. 854.
Indiana.— Harman *v.* Flaherty, 80 Ind. 472.
Kentucky.— See Kirby *v.* Bunch, 15 Ky. L. Rep. 238. *Compare* Sears *v.* Louisville, etc., R. Co., 56 S. W. 725, 22 Ky. L. Rep. 152, in which it was said that the practice is to be avoided as far as possible as tending to confusion.
Maine.— Edmunds *v.* Wiggin, 24 Me. 505.
Massachusetts.— Rainger *v.* Boston Mut. L. Assoc., 167 Mass. 109, 44 N. E. 1088; Nichols *v.* Munsel, 115 Mass. 567.
Minnesota.— Holland *v.* Sheehan, 106 Minn. 545, 119 N. W. 217.
Missouri.— Willmott *v.* Corrigan Consol. St. R. Co., 106 Mo. 535, 17 S. W. 490; Chouteau *v.* Jupiter Iron-Works, 94 Mo. 388, 7 S. W. 467; Dowzelot *v.* Rawlings, 58 Mo. 75; Pace *v.* Roberts, etc., Shoe Co., 103 Mo. App. 662, 78 S. W. 52; Pierce *v.* Michel, 60 Mo. App. 187; Scott *v.* Haynes, 12 Mo. App. 597.
Nebraska.— McClary *v.* Stull, 44 Nebr. 175, 62 N. W. 501; Jessen *v.* Donahue, 4 Nebr. (Unoff.) 838, 96 N. W. 639; Bonawitz *v.* De Kalb, 2 Nebr. (Unoff.) 534, 89 N. W. 379.
New Hampshire.— Rizzoli *v.* Kelley, 68 N. H. 3, 44 Atl. 64.
New York.— Douglas *v.* Metropolitan St. R. Co., 119 N. Y. App. Div. 203, 104 N. Y. Suppl. 452.
Ohio.— Salomon *v.* Reis, 5 Ohio Cir. Ct. 375, 3 Ohio Cir. Dec. 184.
South Carolina.— Jones *v.* Swearingen, 42 S. C. 58, 19 S. E. 947.
South Dakota.— Williams *v.* Chicago, etc., R. Co., 11 S. D. 463, 78 N. W. 949.
Texas.— Turner *v.* Lambeth, 2 Tex. 365. But see Bailey *v.* Hartman, (Civ. App. 1905) 85 S. W. 829, holding that under Rev. St. (1895) art. 1321, providing that additional instructions may be given the jury on the application of the jury therefor in open court, it was error for the court to recall the jury, after it had been in deliberation half an hour, and give them an additional instruction.
Wisconsin.— Seivert *v.* Galvin, 133 Wis. 391, 113 N. W. 680; Dresser *v.* Lemma, 122 Wis. 387, 100 N. W. 844.
United States.— Charlton *v.* Kelly, 156 Fed. 433, 84 C. C. A. 295; St. Louis, etc., R. Co. *v.* Bishard, 147 Fed. 496, 78 C. C. A. 62.
See 46 Cent. Dig. tit. "Trial," § 744.

90. Nichols *v.* Munsel, 115 Mass. 567. But see Granberry *v.* Frierson, 2 Baxt. (Tenn.) 326, holding that it was error to recall the jury and repeat to it a portion of the charge, the jury not asking, and defendant objecting to it.

91. Florence Sewing Mach. Co. *v.* Grover, etc., Sewing Mach. Co., 110 Mass. 70, 14 Am. Rep. 579 [*affirmed* in 18 Wall. (U. S.) 553, 21 L. ed. 914]; Douglas *v.* Metropolitan St. R. Co., 119 N. Y. App. Div. 203, 104 N. Y. Suppl. 452; Williams *v.* Chicago, etc., R. Co., 11 S. D. 463, 78 N. W. 949; Cockrell *v.* Egger, (Tex. Civ. App. 1907) 99 S. W. 568. *Compare* West *v.* Anderson, 9 Conn. 107, 21 Am. Dec. 737.

92. Chapman *v.* Salfisberg, 104 Ill. App. 445.

93. Carter *v.* Becker, 69 Kan. 524, 77 Pac. 264.

94. Cowen *v.* Eartherly Hardware Co., 95 Ala. 324, 11 So. 195.

95. In criminal cases see Criminal Law, 12 Cyc. 680.

96. In Arizona the statute provides that

court may, at the request of the jury, give them further instructions after they have retired.[97] This practice, it is said, is commendable as tending to a correct and despatchful administration of justice.[98] And when the jury ask for further instructions, the power of the court is not limited to the explanation of such questions of law only as should be voluntarily proposed by the jury.[99] Whether or not the court is bound to give the jury further instructions when they request them does not seem to be well settled. There are rulings both ways on the question.[1] But the correct doctrine, it is apprehended, is that the court is vested with a wide discretion in the matter, which discretion will not be reviewed except in cases of palpable abuse thereof resulting in injury.

c. On Request of Counsel — (i) *In General.* As was shown in a preceding chapter, unless timely requests are made for instructions, error cannot ordinarily be assigned to their refusal, and requests are not in time when made after the jury have retired.[2] And while the court may recall the jury and give them further instructions at the request of counsel,[3] the decided weight of authority is to the effect that it may in its discretion refuse to do so,[4] especially where the jury has

no further instructions shall be given to the jury after the argument begins. Under this statute it has been held that error cannot be assigned to a refusal to give additional instructions at the request of a juror. Southern Pac. Co. *v.* Wilson, 10 Ariz. 162, 85 Pac. 401.

In Mississippi the provisions of the statute are restrictive of the common-law powers of judges in the matter of charging juries. Where a case has been submitted to a jury and they have retired to consider of their verdict, it will be error for the court, without the consent of the parties, to explain at the request of the jury a matter of law to them bearing upon the case upon which they notified him that they had doubts. This has been held ground for reversal. Taylor *v.* Manley, 6 Sm. & M. 305. However, in a later case it was held that while it is irregular for the judge in the court below, after the jury have retired, to instruct them upon any point involved in the case, yet if the instruction be in conformity with the law and pertinent to the facts, the irregularity will not be sufficient to reverse the judgment below, although excepted to, at the time, by the party objecting to it. Randolph *v.* Govan, 14 Sm. & M. 9.

97. *Georgia.*— Parker *v.* Georgia Pac. R. Co., 83 Ga. 539, 10 S. E. 233.

Illinois.— Shaw *v.* Camp, 160 Ill. 425, 43 N. E. 608; Lee *v.* Quirk, 20 Ill. 392.

Indiana.— Sage *v.* Evansville, etc., R. Co., 134 Ind. 100, 33 N. E. 771.

Kentucky.— Com. Bank *v.* McWilliams, 2 J. J. Marsh. 256; Covington *v.* Bostwick, 82 S. W. 569, 26 Ky. L. Rep. 780.

Missouri.— Wilkinson *v.* St. Louis Sectional Dock Co., 102 Mo. 130, 14 S. W. 177.

New York.— White *v.* Calder, 35 N. Y. 183.

Pennsylvania.— See Miller *v.* Royal Flint Glass Works, 172 Pa. St. 70, 33 Atl. 350.

Wisconsin.— Gibbons *v.* Wisconsin Valley R. Co., 66 Wis. 161, 28 N. W. 170; Woodruff *v.* King, 47 Wis. 261, 2 N. W. 452.

See 46 Cent. Dig. tit. "Trial," § 744.

98. Com. Bank *v.* McWilliams, 2 J. J. Marsh. (Ky.) 256.

99. Edmunds *v.* Wiggin, 24 Me. 505.

1. That court need not comply with request see Pierce *v.* Michel, 60 Mo. App. 187.

That court must comply with request see Com. Bank *v.* McWilliams, 2 J. J. Marsh. (Ky.) 256; Willmott *v.* Corrigan Consol. St. R. Co., 106 Mo. 535, 12 S. W. 490; Dowzelot *v.* Rawlings, 58 Mo. 75.

2. See *supra*, IX, D, 2.

3. Choctaw, etc., R. Co. *v.* Craig, 79 Ark. 53, 58, 95 S. W. 168 (in which it was said: "The discretion of the trial judge must determine when additional instructions are needed to facilitate the jury in arriving at a proper verdict; and unless an abuse of such discretion, manifestly working prejudice, is shown, there is no cause for reversal"); *In re* Phillips, 132 Mass. 233; Buck *v.* Buck, 4 Baxt. (Tenn.) 392. And see *dictum* in Young *v.* Hahn, (Tex. Civ. App. 1902) 69 S. W. 203 [*reversed* on other grounds in 96 Tex. 99, 70 S. W. 950].

4. *Massachusetts.*— *In re* Phillips, 132 Mass. 233; Nelson *v.* Dodge, 116 Mass. 367.

New Hampshire.— Harvey *v.* Graham, 46 N. H. 175.

New York.— Tinkham *v.* Thomas, 34 N. Y. Super. Ct. 236.

North Carolina.— Lafoon *v.* Shearin, 95 N. C. 391.

Tennessee.— Bowling *v.* Memphis, etc., R. Co., 15 Lea 122.

Texas.— Young *v.* Hahn, (Civ. App. 1902) 69 S. W. 203 [*reversed* on other grounds in 96 Tex. 99, 70 S. W. 950]; Luke *v.* El Paso, (Civ. App. 1900) 60 S. W. 363.

West Virginia.— Jarrett *v.* Stevens, 36 W. Va. 445, 15 S. E. 177; Tully *v.* Despard, 31 W. Va. 370, 6 S. E. 927.

United States.— Marande *v.* Texas, etc., R. Co., 124 Fed. 42, 59 C. C. A. 562; Forrest *v.* Hanson, 9 Fed. Cas. No. 4,943, 1 Cranch C. C. 63; Turner *v.* Foxall, 24 Fed. Cas. No. 14,255, 2 Cranch C. C. 324.

See 46 Cent. Dig. tit. "Trial," § 744.

But see Clarke *v.* Pierce, 82 Miss. 462, 465, 34 So. 4, holding that under Rev. Code (1892), § 732, requiring the judge, on request of either party in writing, to instruct the jury

already received all instructions necessary to aid it in reaching a verdict.[5] It is said that after the case had been submitted to the jury the question of reopening the case for further and new instructions to the jury as to matters of law is as much addressed to the discretion of the court as the question of reopening it for further and new evidence as to matters of fact.[6] The discretion possessed by the court is a broad one, and unless it clearly appears that there has been an abuse thereof, the judgment will not be reversed.[7]

(II) *After Additional Instructions Given on Request of Jury.* A different question is presented when the court has given additional instructions at the request of the jury. Under these circumstances it is very generally declared, either directly or inferentially, that after the jury has been given additional instructions at the request of the jury, additional, explanatory, or qualifying instructions should be given at the request of counsel if the ends of justice so require.[8] Yet if it can be clearly seen that no injury has been done to the party complaining by the further instructions given, the judgment will not be reversed.[9] And if the court merely repeats the instructions already given, the rule has no application and counsel are not entitled to additional instructions.[10]

d. Nature, Requisites, and Sufficiency of Instructions.[11] The court may re-read the charge to the jury on learning that it is not understood by them,[12] or

on the principles of law applicable to the case, where a proper additional charge in writing was requested by plaintiff on the jury's requesting additional instructions after submission of the cause, it was error to refuse such instruction on the ground that it was not asked until after the jury had retired. In this case it was said: "It is not only the right, but the duty, of the court, where the ends of justice so require, to give the jury, at any time before the verdict is received, any further instructions, which correctly state the law, that may be requested by either party in writing."

Reasons assigned for rule.— In the nature of things, the line should be drawn somewhere, else either party might continue to request additional instruction, thus interrupting the labors of the jury from time to time until their verdict was made. Such a practice would also interfere with the trial judge in the disposition of other business taken up after the disposition of the case. Young *v.* Hahn, (Tex. Civ. App. 1902) 69 S. W. 203 [*reversed* on other grounds in 96 Tex. 99, 70 S. W. 950]. It would be dangerous to allow the recall of a jury for a further or additional charge upon the bare request of counsel without grounds. Under such a rule the ingenious lawyer would always have it in his power to have emphasized to the jury by the court any proposition he might choose to submit, and have the jury believe the court attached great weight to the matter about which it had been recalled for instructions. Bowling *v.* Memphis, etc., R. Co., 15 Lea (Tenn.) 122.

A requested instruction not supported by the evidence is of course properly refused. Ivey *v.* Brooklyn Heights R. Co., 63 N. Y. App. Div. 311, 71 N. Y. Suppl. 633.

Where the court improperly refuses requested instructions, and after the retirement of the jury they come into court for further instructions, and counsel renews his request for the instructions previously refused, error may be assigned to their refusal. Yeldell *v.* Shinholster, 15 Ga. 189.

5. Norton *v.* McNutt, 55 Ark. 59, 17 S. W. 362.

6. Harvey *v.* Graham, 46 N. H. 175.

7. Jarrett *v.* Stevens, 36 W. Va. 445, 15 S. E. 177; Tully *v.* Despard, 31 W. Va. 370, 6 S. E. 927. And see Young *v.* Hahn, (Tex. Civ. App. 1902) 69 S. W. 203, 206 [*reversed* on other grounds in 96 Tex. 99, 70 S. W. 950], in which it was said: "We do not doubt that the jury should be recalled in order to correct some fatal error or omission in the charge which would otherwise render the trial nugatory, but in matters of mere abstract or technical right the exercise of discretion on the part of the trial judge in refusing to recall the jury and give the additional instructions will not be revised by this court."

8. *Alabama.*— Feibelman *v.* Manchester F. Assur. Co., 108 Ala. 180, 19 So. 540; Kuhl *v.* Long, 102 Ala. 563, 15 So. 267; Prosser *v.* Henderson, 11 Ala. 484.

Illinois.— Shaw *v.* Camp, 160 Ill. 425, 43 N. E. 608; Joliet *v.* Looney, 159 Ill. 471, 42 N. E. 854; Lee *v.* Quirk, 20 Ill. 392.

Iowa.— O'Connor *v.* Guthrie, 11 Iowa 80.

Mississippi.—Clarke *v.* Pierce, 82 Miss. 462, 34 So. 4.

Missouri.—Chouteau *v.* Jupiter Iron-Works, 94 Mo. 388, 7 S. W. 467; Skinner *v.* Stifel, 55 Mo. App. 9.

Tennessee.— Wade *v.* Ordway, 1 Baxt. 229.

See 46 Cent. Dig. tit. "Trial," § 744.

But see Kellogg *v.* French, 15 Gray (Mass.) 354, in which it is held that a refusal to give such instructions cannot be excepted to.

9. Wade *v.* Ordway, 1 Baxt. (Tenn.) 229.

10. Prosser *v.* Henderson, 11 Ala. 484.

11. **In criminal** cases see CRIMINAL LAW, 12 Cyc. 680.

12. Gaff *v.* Greer, 88 Ind. 122, 45 Am. Rep. 449.

in order to satisfy one or all of them as to the true state of the law upon the issues before them.[13] A more difficult question is presented when a request is made for the re-reading of one or more instructions of the entire charge. Instructions must be taken as an entirety;[14] and while it is no doubt proper to re-read or state orally the substance of an individual instruction the meaning of which the jury fail to understand, without repeating the whole charge,[15] under any other circumstances, it is apprehended it will be error to re-read an isolated instruction because it unduly emphasizes the matters therein covered[16] and tends to give the jury to understand that the matter thus disjointedly charged upon is controlling in the case;[17] and in any event the judge should caution them that all the law of the case is not given in that one, but that it only covers that particular phase of the case.[18] The court may of its own motion or at request of counsel recall the jury after they have retired to give instructions improperly refused,[19] to correct or modify instructions given,[20] or to amplify its charge[21] and give additional instructions on material issues not covered by the original charge.[22] It may instruct the jury as to the number of jurors required to render a verdict,[23] and may, in answer to a question if the court had given the jury an instruction of a certain tenor, state that it had.[24] The court also has power to instruct the jury to reconsider their determination as to the amount of a verdict whether the action be for liquidated or unliquidated damage.[25] Any additional instructions or explanations of instructions given should come from the court and no one else.[26] And care should be taken to clearly define the scope and object of such additional instructions.[27] And as is the case with instructions originally given,[28] further

13. Woodruff *v.* King, 47 Wis. 261, 2 N. W. 452.

14. St. Louis, etc., R. Co. *v.* Reed, 88 Ark. 458, 115 S. W. 150.

15. St. Louis, etc., R. Co. *v.* Reed, 88 Ark. 458, 115 S. W. 150; Standard Oil Co. *v.* Doyle, 118 Ky. 662, 82 S. W. 271, 26 Ky. L. Rep. 544, 111 Am. St. Rep. 331; Swaggerty *v.* Caton, 1 Heisk. (Tenn.) 199.

16. St. Louis, etc., R. Co. *v.* Reed, 88 Ark. 458, 115 S. W. 150. And see Cockrill *v.* Hall, 76 Cal. 192, 18 Pac. 318. In this case, after retiring for deliberation, the jury returned into court and asked instructions upon a particular point. The court directed them to follow the instructions already given. Plaintiff thereupon requested the court to read the particular instruction covering the matter. The court refused so to do, but expressed a willingness to read the entire instructions if the jury so desired. The foreman of the jury thereupon stated that they had no such desire. It was held that the failure to read the particular instruction was not assignable as error.

17. Swaggerty *v.* Caton, 1 Heisk. (Tenn.) 199.

18. St. Louis, etc., R. Co. *v.* Reed, 88 Ark. 458, 115 S. W. 150.

19. Phillips *v.* New York Cent., etc., R. Co., 127 N. Y. 657, 27 N. E. 978.

20. *Georgia.*— Daniel *v.* Frost, 62 Ga. 697.

Indiana.— Sage *v.* Evansville, etc., R. Co., 134 Ind. 100, 33 N. E. 771; Hartman *v.* Flaherty, 80 Ind. 472.

Kentucky.— Kirby *v.* Bunch, 15 Ky. L. Rep. 238.

Minnesota.— Holland *v.* Sheehan, 106 Minn. 545, 119 N. W. 217.

Missouri.— Glenn *v.* Hunt, 120 Mo. 330, 25 S. W. 181; Scott *v.* Haynes, 12 Mo. App. 597.

New York.— Phillips *v.* New York Cent., etc., R. Co., 127 N. Y. 657, 27 N. E. 978.

Wisconsin.— Dresser *v.* Lemma, 122 Wis. 387, 100 N. W. 844.

See 46 Cent. Dig. tit. "Trial," § 744.

Withdrawal of instruction.— The correction may consist in the withdrawal of part of an instruction given. Sage *v.* Evansville, etc., R. Co., 134 Ind. 100, 33 N. E. 771; McClelland *v.* Louisville, etc., R. Co., 94 Ind. 276.

21. Carter *v.* Becker, 69 Kan. 524, 77 Pac. 264; Jones *v.* Swearingen, 42 S. C. 58, 19 S. E. 947.

22. Joliet *v.* Looney, 159 Ill. 471, 42 N. E. 854; Glenn *v.* Hunt, 120 Mo. 330, 25 S. W. 181; Cockrell *v.* Egger, (Tex. Civ. App. 1907) 99 S. W. 568.

23. Williams *v.* Chicago, etc., R. Co., 11 S. D. 463, 78 N. W. 949.

24. Marande *v.* Texas, etc., R. Co., 124 Fed. 42, 59 C. C. A. 562.

25. Douglas *v.* Metropolitan St. R. Co., 119 N. Y. App. Div. 203, 104 N. Y. Suppl. 452, holding, however, that if this is done the court should not intimate to the jury that the amount of damages was not for them to determine, or give any instructions which indicate the amount to which plaintiff is entitled.

26. Missouri, etc., R. Co. *v.* Moore, 47 Tex. Civ. App. 531, 105 S. W. 532, holding that it was error for the court, after refusing to give any further instruction, to permit plaintiff's attorney to state to them his construction of the charge.

27. Willmott *v.* Corrigan Consol. St. R. Co., 106 Mo. 535, 17 S. W. 490.

28. See *supra*, IX, C, 3, d.

instructions should not ignore or exclude from the consideration of the jury material issues covered by the instructions originally given;[29] nor should a full, complete, and different charge upon any of the material facts involved in the issues of the case be given.[30] So where instructions are given in answer to questions asked by the jury they should of course be responsive to the questions,[31] but this does not mean that the court is limited to giving categorical answers to the questions asked.[32] On the contrary, if it appears that more than a categorical answer is necessary to keep the issues to be decided correctly before the minds of the jury, it is the duty of the court to give such further instructions as would be necessary to that end.[33] Where instructions are required to be given in writing, and further instructions are given, these instructions must also be in writing,[34] unless, as may be done, this requirement is waived.[35] Where, in response to a request for further instructions, the court adequately instructs the jury on the only material point in the case, and the record does not show that the court failed to make clear any matter called to its attention, an objection that the request for further instructions was not fully answered cannot be sustained.[36]

3. Urging Jurors to Agree.[37] Where the jury announce their inability to agree on a verdict, it is well within the discretion of the trial court to urge on them earnest effort to agree,[38] especially in cases where, from the character of

29. Wiggins *v.* Snow, 89 Mich. 476, 50 N. W. 991.

30. Foster *v.* Turner, 31 Kan. 58, 1 Pac. 145; St. Louis, etc., R. Co. *v.* Vance, 9 Kan. App. 565, 58 Pac. 233, holding, however, that this error will not operate to reverse where the verdict was for a much smaller amount than might have been awarded under the testimony in the light of the original instructions.

31. See Standard Oil Co. *v.* Doyle, 118 Ky. 662, 82 S. W. 271, 26 Ky. L. Rep. 544, 111 Am. St. Rep. 331.

32. Edmunds *v.* Wiggin, 24 Me. 505; Paine *v.* Hutchins, 49 Vt. 314; Charlton *v.* Kelly, 156 Fed. 433, 84 C. C. A. 295.

33. Paine *v.* Hutchins, 49 Vt. 314.

34. Bowden *v.* Achor, 95 Ga. 243, 22 S. E. 254; Ohio, etc., R. Co. *v.* Rowland, 51 Ind. 285.

35. McMahon *v.* Eau Claire Water Works Co., 95 Wis. 640, 70 N. W. 829.

What constitutes waiver.— Where one of counsel for a defendant was present when the jury returned to the court room, and asked further instructions, and said nothing when the court stated that oral instructions could not be given except by consent of the parties, his silence will be deemed a consent, which waived a written charge. McMahon *v.* Eau Claire Water Works Co., 95 Wis. 640, 70 N. W. 829. And see Stringham *v.* Cook, 75 Wis. 589, 44 N. W. 777, holding that complaint cannot be made that the judge, on the jury's return to the court room, gave them additional oral instructions in the absence of the official stenographer, especially where appellant's counsel knew of such absence and the judge did not, and counsel intended to take advantage of the error.

36. Herbstreit *v.* Beckwith, 35 Mich. 93.

37. **In criminal prosecutions** see Criminal Law, 12 Cyc. 682.

As ground for new trial in civil cases see New Trial, 29 Cyc. 811.

Resubmission of cause on disagreement of jury see *infra*, XI, B, 2, d, (IV).

38. *Alabama.*— Phœnix Ins. Co. *v.* Moog, 81 Ala. 335, 1 So. 108.

Colorado.— Strepey *v.* Stark, 7 Colo. 614, 5 Pac. 111.

Connecticut.— Doty *v.* Smith, 80 Conn. 245, 67 Atl. 885; Wheeler *v.* Thomas, 67 Conn. 577, 25 Atl. 499; Clinton *v.* Howard, 42 Conn. 294.

Georgia.— Austin *v.* Appling, 88 Ga. 54, 13 S. E. 955; Parker *v.* Georgia Pac. R. Co., 83 Ga. 539, 10 S. E. 233; Allen *v.* Woodson, 50 Ga. 53.

Illinois.— Brown *v.* Walker, 32 Ill. App. 199.

Iowa.— Delmonica Hotel Co. *v.* Smith, 112 Iowa 659, 84 N. W. 906; Niles *v.* Sprague, 13 Iowa 198.

Kansas.— Moore *v.* Cass, 10 Kan. 288; Pacific R. Co. *v.* Nash, 7 Kan. 280.

Kentucky.—Covington *v.* Bostwick, 82 S. W. 569, 26 Ky. L. Rep. 780; Monroe *v.* Brann, 14 Ky. L. Rep. 764.

Maine.— Cowan *v.* Umbagog Pulp Co., 91 Me. 26, 39 Atl. 340; Emery *v.* Estes, 31 Me. 155.

Michigan.— Pierce *v.* Rehfuss, 35 Mich. 53.

Minnesota.— Watson *v.* Minneapolis St. R. Co., 53 Minn. 551, 55 N. W. 742.

Missouri.— Fairgrieve *v.* Moberly, 29 Mo. App. 141.

New York.— White *v.* Calder, 35 N. Y. 183; Wilson *v.* Manhattan R. Co., 2 Misc. 127, 20 N. Y. Suppl. 852; Green *v.* Telfair, 11 How. Pr. 260.

North Carolina.— Warlick *v.* Plonk, 103 N. C. 81, 9 S. E. 190.

South Carolina.— Nickles *v.* Seaboard Air Line R. Co., 74 S. C. 102, 54 S. E. 255.

Texas.— Owens *v.* Missouri Pac. R. Co., 67 Tex. 679, 4 S. W. 593; Houston, etc., R. Co. *v.* Darwin, 47 Tex. Civ. App. 219, 105 S. W. 825.

Wisconsin.— Seivert *v.* Galvin, 133 Wis.

the issue and the evidence, there can be little toleration of obvious, unreasonable obstruction to an agreement.[39] This is entirely fit and proper as tending to bring about unanimity of opinion after a full and free interchange of views among the jurors and to prevent unnecessary mistrials.[40] As reasons for agreeing, the court may properly remind the jury of the expense to the state or county,[41] or to the parties,[42] the number of times the case has been on trial,[43] the length of time consumed in the trial, or in previous trials of the same case,[44] the importance of the case,[45] the necessity for a decision of the case by some jury,[46] and the probability of their being able to decide the case as well as any other jury.[47] So it has been held not improper to refer to the records of the previous juries as to agreements,[48] or to state that there had been no mistrials since the beginning of the trial judge's administration.[49] So the court may properly advise the jury that while they should not surrender any conscientious opinion founded on the evidence,[50] they should lay aside all pride of judgment,[51] that each juror should reëxamine for himself the grounds of his opinion,[52] and that they should consider their differences in a spirit of fairness and candor,[53] with an honest desire to arrive at the truth and with the view of arriving at a verdict.[54]

4. Coercing Agreement by Jury[55]— a. In General. In the beginning of the

391, 113 N. W. 680; Giese *v.* Schultz, 69 Wis. 521, 34 N. W. 913.

See 46 Cent. Dig. tit. "Trial," § 747.

Refusal of instructions already covered.— After telling them to discuss the case and reach a verdict if they could, such as would satisfy their individual consciences, the court need not instruct that it was the duty of the jury to reconcile their opinions if able to do so, but that none of them were required to surrender their individual opinions. Shaller *v.* Detroit United R. Co., 139 Mich. 171, 102 N. W. 632. It is not error to refuse a requested instruction that the verdict rendered must meet the approval of the individual conscience of each juror, where its equivalent is given. Chicago, etc., R. Co. *v.* Thomas, (Ind. 1900) 55 N. E. 861.

39. Fairgrieve *v.* Moberly, 29 Mo. App. 141.

40. Warlick *v.* Plonk, 103 N. C. 81, 9 S. E. 190.

41. *Connecticut.*— Clinton *v.* Howard, 42 Conn. 294.

Kentucky.— Covington *v.* Bostwick, 82 S. W. 569, 26 Ky. L. Rep. 780.

Michigan.— Kelly *v.* Emery, 75 Mich. 147, 42 N. W. 795.

Minnesota.— Watson *v.* Minneapolis St. R. Co., 53 Minn. 551, 55 N. W. 742.

South Carolina.— Nickles *v.* Seaboard Air Line R. Co., 74 S. C. 102, 54 S. E. 255.

42. *Alabama.*— Phœnix Ins. Co. *v.* Moog, 81 Ala. 335, 1 So. 108.

Illinois.—Brown *v.* Walker, 32 Ill. App. 199.

Iowa.— Burton *v.* Neill, 140 Iowa 141, 118 N. W. 302; Delmonica Hotel Co. *v.* Smith, 112 Iowa 659, 84 N. W. 906.

Kentucky.— Covington *v.* Bostwick, 82 S. W. 569, 26 Ky. L. Rep. 780.

Michigan.— Kelly *v.* Emery, 75 Mich. 147, 42 N. W. 795; Pierce *v.* Rehfuss, 35 Mich. 53.

Minnesota.— Watson *v.* Minneapolis St. R. Co., 53 Minn. 551, 55 N. W. 742.

Missouri.— Fairgrieve *v.* Moberly, 29 Mo. App. 141.

New York.— Green *v.* Telfair, 11 How. Pr. 260.

See 46 Cent. Dig. tit. "Trial," § 747.

Where liability is admitted, it is not improper for the court to state, on disagreement of the jury, that plaintiff must have a verdict, that the only question was as to amount, and that the only effect of a mistrial would be to put defendant to additional costs. Conners *v.* Walsh, 131 N. Y. 590, 30 N. E. 59.

43. Niles *v.* Sprague, 13 Iowa 198; Kelly *v.* Emery, 75 Mich. 147, 42 N. W. 795; Owens *v.* Missouri Pac. R. Co., 67 Tex. 679, 4 S. W. 593.

44. Phœnix Ins. Co. *v.* Moog, 81 Ala. 335, 1 So. 108; Shely *v.* Shely, 47 S. W. 1071, 20 Ky. L. Rep. 1021; Kelly *v.* Emery, 75 Mich. 147, 42 N. W. 795.

45. Allen *v.* Woodson, 50 Ga. 53.

46. Delmonica Hotel Co. *v.* Smith, 112 Iowa 659, 84 N. W. 906; Covington *v.* Bostwick, 82 S. W. 569, 26 Ky. L. Rep. 780; Nickles *v.* Seaboard Air Line R. Co., 74 S. C. 102, 54 S. E. 255.

47. Austin *v.* Appling, 88 Ga. 54, 13 S. E. 955; Parker *v.* Georgia Pac. R. Co., 83 Ga. 539, 10 S. E. 233; Shely *v.* Shely, 47 S. W. 1071, 20 Ky. L. Rep. 1021.

48. Doty *v.* Smith, 80 Conn. 245, 67 Atl. 885.

49. White *v.* Fulton, 68 Ga. 511.

50. Covington *v.* Bostwick, 82 S. W. 569, 26 Ky. L. Rep. 780; Warlick *v.* Plonk, 103 N. C. 81, 9 S. E. 190.

51. Burton *v.* Neill, 140 Iowa 141, 118 N. W. 302; Warlick *v.* Plonk, 103 N. C. 81, 9 S. E. 190.

52. Fransden *v.* Chicago, etc., R. Co., 36 Iowa 372.

53. Burton *v.* Neill, 140 Iowa 141, 118 N. W. 302.

54. Covington *v.* Bostwick, 82 S. W. 569, 26 Ky. L. Rep. 780; Warlick *v.* Plonk, 103 N. C. 81, 9 S. E. 190.

55. **As ground for new trial in civil cases** see New Trial, 29 Cyc. 811.

In criminal prosecutions see Criminal Law, 12 Cyc. 682

modern jury trial the enforcement of the duty of jurors was sought through harsh coercive measures.[56] But whatever views on the subject may have formerly obtained, it is now universally held to be erroneous for the court by words or acts to threaten or attempt to coerce the jurors for the purpose of compelling them to render a verdict.[57] While as shown in another section all proper motives to induce them to agree upon a common result may be repeatedly and earnestly urged upon them,[58] they should be left free to act without any real or seeming coercion on the part of the court,[59] and should be left to feel that, should they continue to disagree, they are not to be exposed to unreasonable inconvenience, nor to receive the animadversion of the court.[60] However, where remarks which might be construed as of a coercive nature are explicitly withdrawn, there is no available error.[61]

b. Length of Time Jury May Be Kept Together to Reach Agreement. All who are familiar with jury trials know that juries are prone to report to the court their inability to agree, but, not being discharged, often render a verdict in a reasonable time thereafter.[62] Accordingly, it is the duty of the court to keep the jurors together until it is satisfied that they have made an honest effort to agree, and that their inability to do so is due to a conscientious difference of judgment.[63] How long the jury should be kept together, before discharging them for inability to agree on a verdict, is a matter depending upon the circumstances of each case,[64] and resting in the sound discretion of the court,[65] which

56. See 3 Blackstone Comm. 375, in which it was said that "the jury . . . in order to avoid intemperance and causeless delay, are to be kept without meat, drink, fire, or candle, unless by permission of the judge, till they are unanimously agreed. . . . If the jurors do not agree in their verdict before the judges are about to leave the town, though they are not to be threatened or imprisoned, the judges are not bound to wait for them, but may carry them round the circuit from town to town in a cart."

57. *Alabama.*— Phœnix Ins. Co. *v.* Moog, 81 Ala. 335, 1 So. 108.

Arkansas.— O'Neal *v.* Richardson, 78 Ark. 132, 92 S. W. 1117.

California.— Mahoney *v.* San Francisco, etc., R. Co., 110 Cal. 471, 42 Pac. 968.

Colorado.— Fairbanks *v.* Weeber, 15 Colo. App. 268, 62 Pac. 368.

Georgia.— Spearman *v.* Wilson, 44 Ga. 473.

Illinois.— Lively *v.* Sexton, 35 Ill. App. 417.

Indiana.— Terre Haute, etc., R. Co. *v.* Jackson, 81 Ind. 19.

Kentucky.— Randolph *v.* Lampkin, 90 Ky. 551, 14 S. W. 538, 10 L. R. A. 87.

Massachusetts.— Highland Foundry Co. *v.* New York, etc., R. Co., 199 Mass. 403, 85 N. E. 437.

Michigan.— Stoudt *v.* Shepherd, 73 Mich. 588, 41 N. W. 696; Goodsell *v.* Seeley, 46 Mich. 623, 10 N. W. 44, 41 Am. Rep. 183.

Mississippi.— Vicksburg Bank *v.* Moss, 63 Miss. 74.

Missouri.— McPeak *v.* Missouri Pac. R. Co., 128 Mo. 617, 30 S. W. 170; Brooks *v.* Barth, 98 Mo. App. 89, 71 S. W. 1098; Fox *v.* Union Depot Co., 7 Mo. App. 593.

New Hampshire.— Ahearn *v.* Mann, 60 N. H. 472.

New York.— Cranston *v.* New York Cent., etc., R. Co., 103 N. Y. 614, 9 N. E. 500; Hagen *v.* New York Cent., etc., R. Co., 79 N. Y. App. Div. 519, 80 N. Y. Suppl. 580; Twiss *v.* Lehigh Valley R. Co., 61 N. Y. App. Div. 286, 70 N. Y. Suppl. 241; Dominick *v.* Hill, 6 N. Y. St. 329.

Pennsylvania.— Miller *v.* Miller, 187 Pa. St. 572, 41 Atl. 277.

Tennessee.— Hancock *v.* Elam, 3 Baxt. 33; Taylor *v.* Jones, 2 Head 565.

Texas.— Houston, etc., R. Co. *v.* Darwin, 47 Tex. Civ. App. 219, 105 S. W. 825; Sargent *v.* Lawrence, 16 Tex. Civ. App. 540, 40 S. W. 1075.

Virginia.— Buntin *v.* Danville, 93 Va. 200, 24 S. E. 830.

Wisconsin.— Hodges *v.* O'Brien, 113 Wis. 97, 88 N. W. 901.

See 46 Cent. Dig. tit. "Trial," § 747. And see the following sections.

58. See *supra*, X, E, 3.

59. White *v.* Fulton, 68 Ga. 511. To the same effect see Green *v.* Telfair, 11 How. Pr. (N. Y.) 260.

60. Green *v.* Telfair, 11 How. Pr. (N. Y.) 260.

61. Prince *v.* Lowell Electric Light Corp., 201 Mass. 276, 87 N. E. 558.

62. Buntin *v.* Danville, 93 Va. 200, 24 S. E. 830.

63. Buntin *v.* Danville, 93 Va. 200, 24 S. E. 830.

As long as there is any reasonable prospect of their being able to agree the judge may keep the jury together, but beyond this he is not at liberty to go. Green *v.* Telfair, 11 How. Pr. (N. Y.) 260.

64. Buntin *v.* Danville, 93 Va. 200, 24 S. E. 830.

65. *Arkansas.*— Southern Ins. Co. *v.* White, 58 Ark. 277, 24 S. W. 425.

Illinois.— Chicago City R. Co. *v.* Shreve,

discretion will not be interfered with by a reviewing court except on a clear showing of abuse.[66]

c. Statement by Court as to Length of Time Jury Will Be Kept Together — (I) *PROPRIETY OF SO DOING.* While there are decisions to the contrary,[67] the rule supported by the weight of authority is that the court should not allude to its own purpose as to the length of time the jury are to be kept together for the purpose of reaching an agreement.[68] It is improper to tell the jury, in case of disagreement, that they will be confined for a specified length of time,[69] or until they reach an agreement.[70]

128 Ill. App. 462 [*affirmed* in 226 Ill. 530, 80 N. E. 1049]; Jeffery *v.* Robbins, 73 Ill. App. 353.

Kentucky.— Randolph *v.* Lampkin, 90 Ky. 551, 14 S. W. 538, 10 L. R. A. 87.

Maine.— Cowan *v.* Umbagog Pulp Co., 91 Me. 26, 39 Atl. 340.

Minnesota.— Scarlotta *v.* Ash, 95 Minn. 240, 103 N. W. 1025; Coit *v.* Waples, 1 Minn. 134.

New York.— White *v.* Calder, 35 N. Y. 183; Erwin *v.* Hamilton, 50 How. Pr. 32; Green *v.* Telfair, 11 How. Pr. 260.

North Carolina.— Hannon *v.* Grizzard, 89 N. C. 115.

Texas.— North Dallas Cir. R. Co. *v.* McCue, (Civ. App. 1896) 35 S. W. 1080.

Virginia.— Buntin *v.* Danville, 93 Va. 200, 24 S. E. 830.

Wisconsin.— Giese *v.* Schultz, 69 Wis. 521, 34 N. W. 913.

See 46 Cent. Dig. tit. "Trial," § 739.

66. Buntin *v.* Danville, 93 Va. 200, 24 S. E. 830. And see Chesapeake, etc., R. Co. *v.* Cowherd, 96 Ky. 113, 27 S. W. 990, 16 Ky. L. Rep. 373.

Sending jurors out several times.— It is not an abuse of discretion for the court to hold the jury together after they have declared a number of times that they cannot agree, in the absence of any statutory provision to the contrary. Chesapeake, etc., R. Co. *v.* Cowherd, 96 Ky. 113, 27 S. W. 990, 16 Ky. L. Rep. 373. The Maine statute (Rev. St. (1903) c. 84, § 100) provides that when a jury, not having agreed, return into court, stating the fact, the court may explain any questions of fact or restate any particular testimony and send them out for further consideration, but they shall not be sent out a third time in consequence of their disagreement, unless on account of disagreements not stated when they first came into court. Under this statute exceptions will not be sustained when it does not appear that they were sent out a third time in consequence of their disagreement, nor when it does not appear that they were sent out at all after the first time on account of difficulties not stated when they first came into court. Cowan *v.* Umbagog Pulp Co., 91 Me. 26, 39 Atl. 340.

Keeping jurors confined twenty hours.— In a case which was on hearing for ten days, and in which the evidence was conflicting, a confinement of the jury for twenty hours does not constitute an abuse of the power of the trial judge. Chicago City R. Co. *v.* Shreve, 128 Ill. App. 462 [*affirmed* in 226 Ill. 530, 80 N. E. 1049].

Keeping the jury together until the end of the term is not an abuse of discretion. North Dallas Cir. R. Co. *v.* McCue, (Tex. Civ. App. 1896) 35 S. W. 1080.

67. Pacific R. Co. *v.* Nash, 7 Kan. 280; Hannon *v.* Grizzard, 89 N. C. 115. And see Erwin *v.* Hamilton, 50 How. Pr. (N. Y.) 32; Osborne *v.* Wilkes, 108 N. C. 651, 13 S. E. 285.

68. De Jarnette *v.* Cox, 128 Ala. 518, 29 So. 618; Phœnix Ins. Co. *v.* Moog, 81 Ala. 335, 1 So. 108; Fairbanks *v.* Weeber, 15 Colo. App. 268, 62 Pac. 368; Green *v.* Telfair, 11 How. Pr. (N. Y.) 260. And see cases cited in subsequent notes in this section.

69. *Alabama.*— De Jarnette *v.* Cox, 128 Ala. 518, 29 So. 618 (that jury will be kept together two months); Phœnix Ins. Co. *v.* Moog, 81 Ala. 335, 1 So. 108 (that jury will be kept together until end of term).

Colorado.— Fairbanks *v.* Weeber, 15 Colo. App. 268, 62 Pac. 368.

Indiana.— Terre Haute, etc., R. Co. *v.* Jackson, 81 Ind. 19, that jury will be kept together four days.

Michigan.— Pierce *v.* Pierce, 38 Mich 412.

Missouri.— McCombs *v.* Foster, 64 Mo. App. 613, that jury will be kept together all night.

New York.— Twiss *v.* Lehigh Valley R. Co., 61 N. Y. App. Div. 286, 70 N. Y. Suppl. 241.

Pennsylvania.— Miller *v.* Miller, 187 Pa. St. 572, 41 Atl. 277.

Tennessee.— Chesapeake, etc., R. Co. *v.* Barlow, 86 Tenn. 537, 8 S. W. 147.

Texas.— North Dallas Cir. R. Co. *v.* McCue, (Civ. App. 1896) 35 S. W. 1080 (till end of term); Burgess *v.* Singer Mfg. Co., (Civ. App. 1895) 30 S. W. 1110.

See 46 Cent. Dig. tit. "Trial," § 747.

Contra.— Hannon *v.* Grizzard, 89 N. C. 115. And *compare* Osborne *v.* Wilkes, 108 N. C. 651, 13 S. E. 285, holding that where the jury came into court on Saturday of the first week of the term, and announced that they could not agree as to the facts, it was not error for the judge to say that there were two more weeks of the term, and he would give them plenty of time to consider, and then to direct the sheriff to provide comfortable accommodations for them.

70. *Mississippi.*— Vicksburg Bank *v.* Moss, 63 Miss. 74.

(II) *Whether Verdict Vitiated by Statement.*[71] While as shown in the preceding section, it is very generally held to be improper for the court to state the length of time the jury will be kept together, there is a difference of opinion as to whether the verdict is thereby vitiated. Some decisions lay down the rule apparently without qualification that while improper it is not ground for reversal.[72] While others take the extreme view that the judgment will be reversed without inquiry as to whether the jury were in fact improperly influenced; that it is enough for the court to see that improper influence was brought to bear on the jury, which might have interfered with the free, unbiased, and deliberate exercise of their judgment.[73] Other decisions in which it was unnecessary to go so far hold that where it reasonably and satisfactorily appears that the jury were influenced by the improper statements of the court, as for instance where the jury almost immediately thereafter return a verdict,[74] or where there was any doubt as to whether the jury were improperly influenced,[75] the verdict is thereby vitiated; and on the other hand, it has been held that if it appears that the jury did not act hastily, but with due deliberation, the verdict must stand.[76] The verdict is of course vitiated if the court, in addition to stating that

Missouri.— Fox *v.* Union Depot Co., 7 Mo. App. 593.

New York.— Slater *v.* Mead, 53 How. Pr. 57; Green *v.* Telfair, 11 How. Pr. 260.

Tennessee.— Hancock *v.* Elam, 3 Baxt. 33; Taylor *v.* Jones, 2 Head 565.

Wisconsin.— Hodges *v.* O'Brien, 113 Wis. 97, 88 N. W. 901.

See 46 Cent. Dig. tit. "Trial," § 747.

Contra.— Pacific R. Co. *v.* Nash, 7 Kan. 280.

Telling the jury by implication that they will be kept together until agreement is erroneous. Green *v.* Telfair, 11 How. Pr. (N. Y.) 260. Accordingly, it has been held that a statement by the judge to the jury emphasizing the cost of the trial to the county for each day the court was in session, impressing on them their duty to settle the case, and asking them to struggle with the case until they came to an agreement, being calculated to leave the impression that the court was obliged to keep them until they reached a verdict is prejudicial. Hodges *v.* O'Brien, 113 Wis. 97, 88 N. W. 901. On the other hand, it has been held that where, at a late hour, the court instructed the jury that, if they agreed "before the incoming of the court in the morning," they would be discharged by the sheriff, and if they did not agree, they were to stay until they did agree, such instruction merely meant that they were to keep together until morning unless they agreed before, and not that they were to be kept indefinitely unless they agreed, and did not constitute ground for reversal. Knapp *v.* Chicago, etc., R. Co., 114 Mich. 199, 72 N. W. 200. This latter case seems to contain a stronger implication than the former.

Failure to make provision for discharge on adjournment.— Where the judge on adjourning court for several days makes no provision for discharging the jury during his absence from the county, unless they agreed, the verdict should be set aside. Ingersoll *v.* Lansing, 51 Hun (N. Y.) 101, 5 N. Y. Suppl. 288. To the same effect is McCormick *v.* Cox, 8 Colo. App. 17, 44 Pac. 768, which holds that to adjourn court for two days, leaving the jury with instructions that, if they should reach a verdict before the court reconvened, they should seal it, and deliver it to the clerk invalidates the verdict so coerced. But see Stevenson *v.* Detroit, etc., R. Co., 118 Mich. 651, 77 N. W. 247, in which it was held on a very similar state of facts that the verdict would not be set aside as obtained by coercion and restraint.

71. And see generally New Trial, 29 Cyc. 811.

72. Burgess *v.* Singer Mfg. Co., (Tex. Civ. App. 1895) 30 S. W. 1110 (in which it was said that an instruction that the jury would be kept together two months could not possibly have influenced any sensible person to render a verdict contrary to his conclusions of what was right); Buntin *v.* Danville, 93 Va. 200, 24 S. E. 830. A later case in Texas (North Dallas Cir. R. Co. *v.* McCue, (Tex. Civ. App. 1896) 35 S. W. 1080) attempts to explain and distinguish Burgess *v.* Singer Mfg. Co., *supra*, as having been decided on the ground that no other verdict could have been legitimately returned, but there is nothing in the opinion of that case to warrant such construction by the later decision, in which the court appears to be receding from an untenable position as gracefully as possible.

73. Terre Haute, etc., R. Co. *v.* Jackson, 81 Ind. 19; Chesapeake, etc., R. Co. *v.* Barlow, 86 Tenn. 537, 8 S. W. 147; Hancock *v.* Elam, 3 Baxt. (Tenn.) 33; Taylor *v.* Jones, 2 Head (Tenn.) 565, in which it was said that the danger that the improper remarks would influence the verdict, whether in fact it did so or not, is sufficient to vitiate the verdict.

74. De Jarnette *v.* Cox, 128 Ala. 518, 29 So. 618; Pierce *v.* Pierce, 38 Mich. 412; McCombs *v.* Foster, 64 Mo. App. 613; Fox *v.* Union Depot Co., 7 Mo. App. 593; Slater *v.* Mead, 53 How. Pr. (N. Y.) 57.

75. North Dallas Cir. R. Co. *v.* McCue, (Tex. Civ. App. 1896) 35 S. W. 1080.

76. Vicksburg Bank *v.* Moss, 63 Miss. 74.

the jury will be kept together for a specified time or until they agree, states that they will be kept without food or not furnished with sufficient food.[77]

d. Threatening to Keep Jury Without Food. While in the beginning of the modern jury trial, the court might keep the jury together without food or drink until they agreed,[78] this practice has long since been repudiated, and it is now improper for the court to do so, or to threaten that it will have the jury confined without food or on insufficient food,[79] or to state that they can have no food except at their own expense.[80]

e. Directing or Intimating That Minority Should Yield Their Opinion. Instructions in respect to the duty of the jury to agree if possible should be carefully guarded so as not to unduly press such duty upon the minority;[81] nor should the majority be censured,[82] ridiculed,[83] or threatened with punishment,[84] for not yielding their opinion to the minority.[85] Where it appears probable that the

And see Madison Coal Co. *v.* Beam, 63 Ill. App. 178.

77. Fairbanks *v.* Weeber, 15 Colo. App. 268, 62 Pac. 368; Hancock *v.* Elam, 3 Baxt. (Tenn.) 33.

78. 3 Blackstone Comm. 375.

79. Fairbanks *v.* Weeber, 15 Colo. App. 268, 62 Pac. 368; Hancock *v.* Elam, 3 Baxt. (Tenn.) 33.

80. Henderson *v.* Reynolds, 84 Ga. 159, 10 S. E. 734, 7 L. R. A. 327; Physioc *v.* Shea, 75 Ga. 466, in which it was said that "the old idea of starving juries to coerce a verdict has past away."

81. *California.*— Mahoney *v.* San Francisco, etc., R. Co., 110 Cal. 471, 42 Pac. 968, 43 Pac. 518.

Michigan.— Goodsell *v.* Seeley, 46 Mich. 623, 10 N. W. 44, 41 Am. Rep. 183.

Missouri.— McPeak *v.* Missouri R. Co., 128 Mo. 617, 30 S. W. 170.

New York.— Cranston *v.* New York Cent., etc., R. Co., 103 N. Y. 614, 8 N. E. 500; Dominick *v.* Hill, 6 N. Y. St. 329.

Pennsylvania.— Miller *v.* Miller, 187 Pa. St. 572, 41 Atl. 277.

Texas.— Sargent *v.* Lawrence, 16 Tex. Civ. App. 540, 40 S. W. 1075.

United States.— St. Louis, etc., R. Co. *v.* Bishard, 147 Fed. 496, 78 C. C. A. 62.

See 46 Cent. Dig. tit "Trial," § 747.

82. Stoudt *v.* Shepherd, 73 Mich. 588, 41 N. W. 696; Hagen *v.* New York Cent. R. Co., 79 N. Y. App. Div. 519, 80 N. Y. Suppl. 580.

83. Twiss *v.* Lehigh Valley R. Co., 61 N. Y. App. Div. 286, 70 N. Y. Suppl. 241.

84. Lively *v.* Sexton, 35 Ill. App. 417.

85. Particular instructions or remarks held erroneous.— The following instructions have been held erroneous: That sometimes the minority must yield their judgment in order to get a verdict (Miller *v.* Miller, 187 Pa. St. 572, 41 Atl. 277); that if there was a large majority of the jury on one side and a small minority on the other side, perhaps the minority would yield to the will of the majority and by further consideration reach a verdict (Sargent *v.* Lawrence, 16 Tex. Civ. App. 540, 40 S. W. 1075); that if ten men were one way and two another, there was something wrong in the intelligence or in the conscientious action of some jurymen (Hagen *v.* New York Cent., etc., R. Co., 79 N. Y. App. Div. 519, 80 N. Y. Suppl. 580); that "if I were a juror, and quite a large proportion of my fellows were against me, and I was standing out, and I thought that they were honest and fair, the first thing I would do would be to get before a large looking-glass and look at myself and see if I could find out what was the matter with me" (Twiss *v.* Lehigh Valley R. Co., 61 N. Y. App. Div. 286, 70 N. Y. Suppl. 241); that "no juror ought to remain entirely firm in his own conviction one way or another, until he has made up his mind beyond all question, that he is necessarily right and the others are necessarily wrong" (Cranston *v.* New York Cent., etc., R. Co., 103 N. Y. 614, 617, 9 N. E. 500); that "if there is a mistrial in this case I shall inquire into it, and if I find that any juror has stubbornly refused to do his duty or wilfully tried to bring about a disagreement so as to interfere with the administration of justice, I will send him to jail for contempt of court" (Lively *v.* Sexton, 35 Ill. App. 417, 419); that "no juror should make up his mind that he will stand by his opinion forever, that he will listen to no suggestion of his fellows, but simply stand in his traces and remain there stalwart and stolid" (Dominick *v.* Hill, 6 N. Y. St. 329, 333); so in a case where one of the jurors told the court that "there's eleven of us that could get together in about a minute," it was held error for the court to say "I trust and presume that every juror is acting rationally in this matter and that nobody is acting from a dogmatic spirit merely for the purpose of asserting his opinion" (McPeak *v.* Missouri Pac. R. Co., 128 Mo. 617, 627, 30 S. W. 170).

Particular instructions or remarks held not erroneous.— It has been held not improper to instruct the jury that if one or two of the jury differed in their views of the evidence from the others they should be thereby induced, although not required to surrender conscientious convictions, to doubt the correctness of their own judgments, and should be led to inquire whether they were not mistaken (Gibson *v.* Minneapolis, etc., R. Co., 55 Minn. 177, 56 N. W. 686, 43 Am. St. Rep. 482); or that "the fact that a juror finds his judgment opposed to the judgment of a majority of the panel ought to induce him,

jury were influenced by the instructions, as for instance where they almost immediately afterward return a verdict, the verdict will not be permitted to stand.[86] But it is not reversible error for the court to direct a juror to agree with his fellows, when the evidence is of such a character that the court may take the case from the jury and direct a verdict.[87]

f. Miscellaneous Instances of Coercion. On disagreement of the jury, it is error for the court to state that he will take them to the next county;[88] that the court had no use for juries that could not agree and that at times men mistake stubbornness for firmness;[89] that if they did not agree, the public might suspect them of corruption, and if the disagreement was due to stubbornness a proper penalty would be the disgrace of exclusion from jury service;[90] that the case "has become an incubus upon the business of the court. . . . You must decide it. . . . It is no credit to a man merely because he has an opinion to stubbornly stick to it, but he should be open to argument and reason and conviction";[91] or that the amount was small, and that it cost the county more to try the case than was involved to either of the litigants.[92] On the other hand, it is not improper for the court to inquire of the jury the reasons for their failure to agree,[93] and if there is a probability of their agreeing,[94] to ask them in what proportion they are divided;[95] or to express regrets at their failure to agree and state that he will send them back to the jury room to see if they could reach a verdict,[96] as there is nothing in this that can be construed as coercion. So it has been held that a direction to the jury "to go back to their room and figure it out, and not allow the lawyers to tangle them,"[97] or to consider the case "in as mechanical a way as you can fairly and conscientiously, and we will hope to hear from you again more favorably,"[98] if error, does not vitiate the verdict.

5. Urging Jury to Hasten Verdict. The action of a court in directing a jury to hasten their verdict is within the court's discretion, and is not ground for reversal, unless it otherwise appears that probably such conduct was prejudicial to the complaining party.[99]

6. Necessity For Communications Between Court and Jury After Retirement Being Made in Open Court[1] — a. Statement of Rule. It is almost universally

as a reasonable man, so far to doubt the correctness of his own views as to weigh carefully the opinions of his associates, and the arguments and reasons upon which they are founded; and if, upon due consideration, he is convinced that they are probably right and he is in error, it is his duty to agree with them" (Ahearn *v.* Mann, 60 N. H. 472, 473).

86. *California.*— Mahoney *v.* San Francisco, etc., R. Co., 110 Cal. 471, 42 Pac. 968, 43 Pac. 518.

Illinois.— Lively *v.* Sexton, 35 Ill. App. 417.

Missouri.— McPeak *v.* Missouri R. Co., 128 Mo. 617, 30 S. W. 170.

New York.— Hagen *v.* New York Cent., etc., R. Co., 79 N. Y. App. Div. 519, 80 N. Y. Suppl. 580.

Pennsylvania.— Miller *v.* Miller, 187 Pa. St. 572, 41 Atl. 277.

Texas.— Sargent *v.* Lawrence, 16 Tex. Civ. App. 540, 40 S. W. 1075.

See 46 Cent. Dig. tit. "Trial," § 747.

87. W. B. Grimes Dry-Goods Co. *v.* Malcolm, 58 Fed. 670, 7 C. C. A. 426 [*affirmed* in 164 U. S. 483, 17 S. Ct. 158, 41 L. ed. 524].

88. Spearman *v.* Wilson, 44 Ga. 473.

89. Brooks *v.* Barth, 98 Mo. App. 89, 71 S. W. 1098.

90. Miller *v.* Miller, 187 Pa. St. 572, 41 Atl. 277.

91. Randolph *v.* Lampkin, 90 Ky. 551, 558, 14 S. W. 538, 12 Ky. L. Rep. 517, 10 L. R. A. 87.

92. Little Rock R., etc., Co. *v.* Newman, 77 Ark. 599, 92 S. W. 864.

93. Houston *v.* Ladies' Union Branch Assoc., 87 Ga. 203, 13 S. E. 634; Rawlings *v.* Anheuser-Busch Brewing Assoc., 1 Nebr. (Unoff.) 555, 95 N. W. 792; St. Louis, etc., R. Co. *v.* Bishard, 147 Fed. 496, 78 C. C. A. 62.

94. Central R., etc., Co. *v.* Neighbors, 83 Ga. 444, 10 S. E. 115.

95. Winn *v.* Ingram, 2 Ga. App. 757, 59 S. E. 7. *Contra*, St. Louis, etc., R. Co. *v.* Bishard, 147 Fed. 496, 78 C. C. A. 62.

96. Southern R. Co. *v.* Fleming, 128 Ga. 241, 57 S. E. 481. And see Winn *v.* Ingram, 2 Ga. App. 757, 59 S. E. 7.

97. Asher Lumber Co. *v.* Lunsford, 32 S. W. 166, 17 Ky. L. Rep. 559.

98. Scarlotta *v.* Ash, 95 Minn. 240, 243, 103 N. W. 1025.

99. Roach *v.* T. J. Moss Tie Co., 71 S. W. 2, 24 Ky. L. Rep. 1222.

1. Communications between judge and jury not in open court as a ground for new trial see New Trial, 29 Cyc. 811.

held that no communication ought to take place between the judge and the jury after the cause has been committed to them by the charge of the judge, unless in open court.[2] One of the principal reasons assigned, and it is in itself amply sufficient, is that the proceedings should all be open, notorious, and in the presence of the parties, so that they may except to them in the manner provided by law, and that the toleration of a practice to the contrary would deprive the parties of a substantial right.[3] But aside from this, the rule is founded upon considerations of sound public policy,[4] which, among other things, requires that the jury, in deliberating upon their verdict, should be untrammeled by extraneous influences, and this can

In criminal cases see CRIMINAL LAW, 12 Cyc. 675.

2. *Illinois.*— Crabtree *v.* Hagenbaugh, 23 Ill. 349, 76 Am. Dec. 694.

Indiana.— Jones *v.* Johnson, 61 Ind. 257; Smith *v.* McMillen, 19 Ind. 391; Danes *v.* Pearson, 6 Ind. App. 465, 33 N. E. 976.

Iowa.— O'Connor *v.* Guthrie, 11 Iowa 80.

Kansas.— Stager *v.* Harrington, 27 Kan. 414.

Maine.— Greeley *v.* Weaver, (1886) 5 Atl. 267.

Massachusetts.— Sargent *v.* Roberts, 1 Pick. 337, 11 Am. Dec. 185.

Michigan.— Fox *v.* Peninsular White Lead, etc., Works, 84 Mich. 676, 48 N. W. 203; Galloway *v.* Corbitt, 52 Mich. 460, 18 N. W. 218.

Missouri.— Glenn *v.* Hunt, 120 Mo. 330, 25 S. W. 181; Chouteau *v.* Jupiter Iron-Works, 94 Mo. 388, 7 S. W. 467.

Nebraska.—Martin *v.* Martin, 76 Nebr. 335, 107 N. W. 580, 124 Am. St. Rep. 815.

New York.— Watertown Bank, etc., Co. *v.* Mix, 51 N. Y. 558; Kehrley *v.* Shafer, 92 Hun 196, 36 N. Y. Suppl. 510; Seeley *v.* Bisgrove, 83 Hun 293, 31 N. Y. Suppl. 914; Valentine *v.* Kelley, 54 Hun 78, 7 N. Y. Suppl. 184; Wiggins *v.* Downer, 67 How. Pr. 65; Plunkett *v.* Appleton, 51 How. Pr. 469 [*affirmed* in 41 N. Y. Super. Ct. 159]; Neil *v.* Abel, 24 Wend. 185; Taylor *v.* Betsford, 13 Johns. 487; Bunn *v.* Croul, 10 Johns. 239.

North Dakota.— State *v.* Murphy, 17 N. D. 48, 115 N. W. 84, 17 L. R. A. N. S. 609.

Ohio.— Campbell *v.* Beckett, 8 Ohio St. 210.

Pennsylvania.— Sommer *v.* Huber, 183 Pa. St. 162, 38 Atl. 595.

Texas.— Texas Midland R. Co. *v.* Byrd, 102 Tex. 263, 115 S. W. 1163, 20 L. R. A. N. S. 429 [*reversing* (Civ. App. 1908) 110 S. W. 199]; Holliday *v.* Sampson, 42 Tex. Civ. App. 364, 95 S. W. 643; Lester *v.* Hays, 14 Tex. Civ. App. 643, 38 S. W. 52. *Contra*, Martin *v.* Petty, (Civ. App. 1904) 79 S. W. 878, holding that it is not error for the court to enter the jury room and withdraw an improper instruction.

Wisconsin.— Du Cate *v.* Brighton, 133 Wis. 628, 114 N. W. 103; Hurst *v.* Webster Mfg. Co., 128 Wis. 342, 107 N. W. 666.

See 46 Cent. Dig. tit. "Trial," §§ 730, 746.

And see Ruckersville Bank *v.* Hemphill, 7 Ga. 396.

The contrary doctrine.— The rule stated in the text does not obtain in South Carolina. The court may hold communications with the jury without disclosing their nature to counsel. It was said: "The intercourse between the jury and the bench is, in many respects, very confidential. Often the communications from the jury are of that kind which ought not to be communicated to the bar." Goldsmith *v.* Solomons, 2 Strobh. (S. C.) 296, 300 [*disapproving* Sargent *v.* Roberts, 1 Pick. (Mass.) 337, 11 Am. Dec. 185]. It was said, however, in a later decision by the same court that "there is no doubt that the safer and better practice is that all instructions should be given in open court to the full panel, and not to the foreman or any other member." Nevertheless as the remark to the foreman on his return to court did not amount to a new instruction and did not qualify or modify any previous instruction, it was held that there was no ground for a new trial. McCord *v.* Blackwell, 31 S. C. 125, 140, 9 S. E. 777. In New Hampshire, it is held that after adjournment of court, the judge may in the absence of and without giving counsel an opportunity to be present instruct the jury on questions of law. Bassett *v.* Salisbury Mfg. Co., 28 N. H. 438; Milton School Dist. No. 1 *v.* Bragdon, 23 N. H. 507; Shapley *v.* White, 6 N. H. 172. Such communications after being returned into court by the jury can be excepted to in the same manner as if they had been given in open court. Allen *v.* Aldrich, 29 N. H. 63; Shapley *v.* White, *supra*. In New Jersey if, after a jury has retired, they require further explanation from the court, and the court, after calling upon the counsel of defendant to go with him, who refuses, and after seeking for defendant, who cannot be found, goes into the jury room and gives them the explanation they require, this is not error. Cook *v.* Green, 6 N. J. L. 109.

3. Crabtree *v.* Hagenbaugh, 23 Ill. 349, 76 Am. Dec. 694; Fish *v.* Smith, 12 Ind. 563 (in which it was said that this is sufficient reason to condemn the practice used aside from its intrinsic impropriety); Glenn *v.* Hunt, 120 Mo. 330, 25 S. W. 181; Chouteau *v.* Jupiter Iron-Works, 94 Mo. 388, 7 S. W. 467; Sommer *v.* Huber, 183 Pa. St. 162, 38 Atl. 595.

4. Danes *v.* Pearson, 6 Ind. App. 465, 33 N. E. 976; Sargent *v.* Roberts, 1 Pick. (Mass.) 337, 11 Am. Dec. 185; Abbott *v.* Hockenberger, 31 Misc. (N. Y.) 587, 65 N. Y. Suppl. 566; State *v.* Murphy, 17 N. D. 48, 115 N. W. 84, 17 L. R. A. N. S. 609.

only be secured by a rigid adherence to the safeguards thrown around them.[5] Private communications between court and jury naturally tend to create suspicion and distrust,[6] and the public interest requires that litigating parties should have nothing to complain of or suspect in the administration of justice.[7] While it is conceded that a strict adherence to this rule may at times be attended with inconvenience, it is said that it is better so than to permit a practice so liable to abuse and so much in conflict with the rights of the parties.[8] While, as already stated, the courts are practically unanimous in holding private communications between court and jury improper, a more difficult question arises in this connection on which the courts are far from harmonious; and that is whether such communications as a matter of law nullify the verdict. Thus one line of decisions, and they probably constitute the weight of authority, holds that any private communication between the judge and jury is such misconduct as will work a reversal without reference to the question whether such misconduct affected the verdict,[9] or was committed without any purpose or intention of influencing the jury.[10] According to these decisions the defeated party should not be required to show that the action of the court was prejudicial.[11] It is said that "the principle upon which the rule rests is that such communications are so dangerous and impolitic that they will be conclusively presumed to have influenced the jury improperly," [12] and that the policy of the law forbids any inquiry into the fact whether or not harm resulted.[13] There are, however, decisions which, although they concede the impropriety of private communications between court and jury, have refused to reverse on the ground that the error could not have been prejudicial in that particular case.[14]

b. Application of Rule — (i) *INSTRUCTIONS.*[15] In accordance with the general rule that all communications between court and jury must be made

5. Danes *v.* Pearson, 6 Ind. App. 465, 33 N. E. 976.

6. Danes *v.* Pearson, 6 Ind. App. 465, 33 N. E. 976; Sargent *v.* Roberts, 1 Pick. (Mass.) 337, 11 Am. Dec. 185; Sommer *v.* Huber, 183 Pa. St. 162, 38 Atl. 595; Texas Midland R. Co. *v.* Byrd, 102 Tex. 263, 115 S. W. 1163, 20 L. R. A. N. S. 429 [*reversing* (Civ. App. 1908) 110 S. W. 199].

7. Sargent *v.* Roberts, 1 Pick. (Mass.) 337, 11 Am. Dec. 185; Watertown Bank, etc., Co. *v.* Mix, 51 N. Y. 558.

8. O'Connor *v.* Guthrie, 11 Iowa 80. And see Sargent *v.* Roberts, 1 Pick. (Mass.) 337, 11 Am. Dec. 185.

9. *Illinois.*— Crabtree *v.* Hagenbaugh, 23 Ill. 349, 76 Am. Dec. 694.

Indiana.— Fish *v.* Smith, 12 Ind. 563; Danes *v.* Pearson, 6 Ind. App. 465, 33 N. E. 976, 979, in which it was said: "Repeated infractions of this salutary rule in exceptional instances, varied in accordance with the exigencies of each particular case, would gradually fritter away, and ultimately effect its complete abrogation. It should be permanent and immutable."

Maine.— Greely *v.* Weaver, (1886) 5 Atl. 267.

Massachusetts.— Read *v.* Cambridge, 124 Mass. 567, 26 Am. Rep. 690; Sargent *v.* Roberts, 1 Pick. 337, 11 Am. Dec. 185.

New York.—Watertown Bank, etc., Co. *v.* Mix, 51 N. Y. 558; Kehrley *v.* Shafer, 92 Hun 196, 36 N. Y. Suppl. 510; Abbott *v.* Hockenberger, 31 Misc. 587, 65 N. Y. Suppl. 566; Hudson *v.* Stearns, 75 N. Y. Suppl. 735; Taylor *v.* Betsford, 13 Johns. 487.

North Dakota.— State *v.* Murphy, 17 N. D. 48, 115 N. W. 84, 17 L. R. A. N. S. 609.

Texas.— Texas Midland R. Co. *v.* Byrd, 102 Tex. 263, 115 S. W. 1163, 20 L. R. A. N. S. 429 [*reversing* (Civ. App. 1908) 110 S. W. 199]; Holliday *v.* Sampson, 42 Tex. Civ. App. 364, 95 S. W. 643; Lester *v.* Hays, 14 Tex. Civ. App. 643, 38 S. W. 52.

Wisconsin.— Du Cate *v.* Brighton, 133 Wis. 628, 114 N. W. 103; Hurst *v.* Webster Mfg. Co., 128 Wis. 342, 107 N. W. 666.

See 46 Cent. Dig. tit. "Trial," §§ 730, 746.

10. Holliday *v.* Sampson, 42 Tex. Civ. App. 364, 95 S. W. 643.

11. Crabtree *v.* Hagenbaugh, 23 Ill. 349, 76 Am. Dec. 694; Hurst *v.* Webster Mfg. Co., 128 Wis. 342, 107 N. W. 666.

12. Wiggins *v.* Downer, 67 How. Pr. (N. Y.) 65, 68.

13. Danes *v.* Pearson, 6 Ind. App. 465, 33 N. E. 976.

14. *Alabama.*— McCutchen *v.* Loggins, 109 Ala. 457, 19 So. 810.

Massachusetts.—Whitney *v.* Com., 190 Mass. 531, 77 N. E. 516; Moseley *v.* Washburn, 165 Mass. 417, 43 N. E. 182.

Michigan.— Galloway *v.* Corbitt, 52 Mich. 460, 18 N. W. 218.

Missouri.— Glenn *v.* Hunt, 120 Mo. 330, 25 S. W. 181; Chinn *v.* Davis, 21 Mo. App. 363.

New York.— Kerr *v.* Hammer, 15 N. Y. Suppl. 605; Zust *v.* Smitheimer, 11 N. Y. Suppl. 727, 19 N. Y. Civ. Proc. 370; Thayer *v.* Van Vleet, 5 Johns. 111.

15. Giving instructions out of court as ground for new trial see NEW TRIAL, 29 Cyc. 811.

in open court, it is held erroneous for the judge to go into the jury room and give further instructions,[16] or to send further instructions to the jury room,[17] unless, as may be done, counsel assent thereto.[18] In jurisdictions where any private communications between judge and jury nullify the verdict as matter of law, the giving of such instructions is of course reversible error, irrespective of prejudice.[19] But in jurisdictions where such communications must be prejudicial to warrant a reversal, if it is apparent that no harm could have resulted from the giving of such instructions, the judgment will not be reversed.[20] In any event, where instructions have been privately communicated to the jury, and it is impossible to ascertain with any certainty what they were, there is ground for reversal.[21]

(II) *Other Communications.*[22] In respect of other communications, it has been held, where the view prevails that any private communications between court and jury constitute reversible error, that the judgment should be reversed where the court privately communicates to the jury the amount claimed by plaintiff,[23] or what the effect of the verdict will be;[24] reads the answer of defendant to them;[25] answers a question as to whether any evidence had been given on a certain point,[26] or an inquiry relating to the evidence of a designated witness;[27] or cautions the jury with reference to conduct while going to, remaining at, or returning from a meal,[28] or communicate with them in reference to ordering supper if they were not likely to agree before meal time.[29] There are, however, decisions which adopt a less stringent rule. Thus it has been held that where the communication is limited to a collateral direction as to the manner of using the papers supplied for the reception of the verdict, the verdict will not be set aside.[30] So it has been

16. *Illinois.*— Crabtree *v.* Hagenbaugh, 23 Ill. 349, 76 Am. Dec. 694.
Indiana.— Jones *v.* Johnson, 61 Ind. 257; Fish *v.* Smith, 12 Ind. 563.
Kansas.— Stager *v.* Harrington, 27 Kan. 414.
Massachusetts.— Read *v.* Cambridge, 124 Mass. 567, 26 Am. Rep. 690.
Michigan.— Fox *v.* Peninsular White Lead, etc., Works, 84 Mich. 676, 48 N. W. 203; Galloway *v.* Corbitt, 52 Mich. 460, 18 N. W. 218.
Missouri.— Glenn *v.* Hunt, 120 Mo. 330, 25 S. W. 181.
New York.— High *v.* Chick, 81 Hun 100, 30 N. Y. Suppl. 652; Valentine *v.* Kelley, 54 Hun 78, 7 N. Y. Suppl. 184; Hudson *v.* Stearns, 75 N. Y. Suppl. 735; Moody *v.* Pomeroy, 4 Den. 115; Taylor *v.* Betsford, 13 Johns. 487; Bunn *v.* Croul, 10 Johns. 239.
Texas.— Lester *v.* Hays, 14 Tex. Civ. App. 643, 38 S. W. 52.
See 46 Cent. Dig. tit. "Trial," § 744.

17. *Illinois.*— Chicago, etc., R. Co. *v.* Robbins, 159 Ill. 598, 43 N. E. 332.
Indiana.— Low *v.* Freeman, 117 Ind. 341, 20 N. E. 242.
Iowa.— O'Connor *v.* Guthrie, 11 Iowa 80.
Kentucky.— Goode *v.* Campbell, 14 Bush 75.
Maine.— Greely *v.* Weaver, (1886) 5 Atl. 267.
Michigan.— Hopkins *v.* Bishop, 91 Mich. 328, 51 N. W. 902, 30 Am. St. Rep. 480.
Missouri.— Chouteau *v.* Jupiter Iron-Works, 94 Mo. 388, 7 S. W. 467.
Nebraska.— Martin *v.* Martin, 76 Nebr. 335, 107 N. W. 580, 124 Am. St. Rep. 815.
New York.—Watertown Bank, etc., Co. *v.* Mix, 51 N. Y. 558; Kehrley *v.* Shafer, 92 Hun 196, 36 N. Y. Suppl. 510.
Pennsylvania.— Sommer *v.* Huber, 183 Pa. St. 162, 38 Atl. 595.

18. See *infra*, X, E, 6, c.

19. See *supra*, X, E, 6, a.

20. See *supra*, X, E, 6, a; and Moseley *v.* Washburn, 165 Mass. 417, 43 N. E. 182 (this decision is a departure from the earlier Massachusetts cases which held that any private communication between the court and jury, although harmless, constituted reversible error); Galloway *v.* Corbitt, 52 Mich. 460, 18 N. W. 218; Glenn *v.* Hunt, 120 Mo. 330, 25 S. W. 181; Martin *v.* Martin, 76 Nebr. 335, 107 N. W. 580, 124 Am. St. Rep. 815.

21. Sommer *v.* Huber, 183 Pa. St. 162, 38 Atl. 595.

22. See also New Trial, 29 Cyc. 811.

23. Kehrley *v.* Shafer, 92 Hun (N. Y.) 196, 36 N. Y. Suppl. 510; Hurst *v.* Webster Mfg. Co., 128 Wis. 342, 107 N. W. 666.

24. High *v.* Chick, 81 Hun (N. Y.) 100, 30 N. Y. Suppl. 652; Abbott *v.* Hockenberger, 31 Misc. (N. Y.) 587, 65 N. Y. Suppl. 566.

25. Seeley *v.* Bisgrove, 83 Hun (N. Y.) 293, 31 N. Y. Suppl. 914.

26. Bunn *v.* Croul, 10 Johns. (N. Y.) 239.

27. Watertown Bank, etc., Co. *v.* Mix, 51 N. Y. 558.

28. Du Cate *v.* Brighton, 133 Wis. 628, 114 N. W. 103.

29. Danes *v.* Pearson, 6 Ind. App. 465, 33 N. E. 976.

30. Whitney *v.* Com., 190 Mass. 531, 77 N. E. 516. According to earlier Massachusetts decisions, Sargent *v.* Roberts, 1 Pick. 337, 11 Am. Dec. 185, the leading case on the

held not a ground for reversal that the court privately answered a question as to whether it was necessary for all the jurors to sign the verdict,[31] or told the jury, while standing at the door of the jury room, that he could answer no questions unless the parties were present and agreed,[32] or went to the jury room and told the jury, in response to a question asked by them, that they could not add anything to plaintiff's demand.[33]

c. Consent of Counsel to Infraction of Rule. Counsel may consent to communications between the court and jury not made in open court,[34] and of course if they do so they cannot afterward object.[35] According to some decisions, this consent must be express;[36] and it has been held that it cannot be inferred from their silence, but must be made to appear affirmatively, otherwise the judgment will not be reversed.[37] There are decisions, however, which hold that consent may be implied, and that if counsel are present and make no objection the error will be waived;[38] and that error is also waived where, after objection is made and overruled, counsel fail to except to the action of the court.[39]

7. Necessity For Presence of Counsel — a. Where Evidence Re-Read or Recapitulated. If the evidence is read or recapitulated to the jury, either by authority of or in the absence of statutory provisions, counsel for both parties should be present,[40] or notice and an opportunity to be present given them.[41] and a non-compliance with this requirement is reversible error,[42] unless it is clear that a correct verdict was rendered.[43] But in the absence of anything to the contrary in the record, it will be presumed that the trial judge followed the proper practice in this regard.[44] Where, at the jury's request, the court undertakes to state anew the evidence on a given point, the better practice is that all the evidence on that point should be given.[45] It has been held, however, that the court has some discretion as to how fully the evidence should be stated, and that a failure to state all of the evidence is not a ground for new trial,[46] especially if the omission to state

subject, and Read *v.* Cambridge, 124 Mass. 567, 26 Am. Rep. 690, this would have been reversible error, irrespective of prejudice.

31. McCutchen *v.* Loggins, 109 Ala. 457, 19 So. 810.

32. Kerr *v.* Hammer, 15 N. Y. Suppl. 605.

33. Thayer *v.* Van Vleet, 5 Johns. (N. Y.) 111. This and the cases cited in the preceding note are not in harmony with the weight of authority in this state.

34. *Illinois.*— Joliet *v.* Looney, 159 Ill. 471, 42 N. E. 854.

Indiana.— Low *v.* Freeman, 117 Ind. 341, 20 N. E. 242; Parmlee *v.* Sloan, 37 Ind. 469.

Michigan.— Snyder *v.* Wilson, 65 Mich. 336, 32 N. W. 642; Smoke *v.* Jones, 35 Mich. 409.

Nebraska.— Martin *v.* Martin, 76 Nebr. 335, 107 N. W. 580, 124 Am. St. Rep. 815.

New York.— Hancock *v.* Salmon, 8 Barb. 564; Whitney *v.* Crim, 1 Hill 61; Rogers *v.* Moulthrop, 13 Wend. 274; Taylor *v.* Betsford, 13 Johns. 487; Bunn *v.* Croul, 10 Johns. 239.

35. Smoke *v.* Jones, 35 Mich. 409.

36. Danes *v.* Pearson, 6 Ind. App. 465, 33 N. E. 976; Glenn *v.* Hunt, 120 Mo. 330, 25 S. W. 181; Watertown Bank, etc., Co. *v.* Mix, 51 N. Y. 558; Plunkett *v.* Appleton, 51 How. Pr. (N. Y.) 469; Moody *v.* Pomeroy, 4 Den. (N. Y.) 115.

37. Benson *v.* Clark, 1 Cow. (N. Y.) 258; Taylor *v.* Betsford, 13 Johns. (N. Y.) 487; Bunn *v.* Croul, 10 Johns. (N. Y.) 239.

Application of rule.— The fact that counsel is present and is advised of the action of the judge, unless he expressly consents thereto, does not give sufficient ground for disregarding the rule. Glenn *v.* Hunt, 120 Mo. 330, 25 S. W. 181.

38. Joliet *v.* Looney, 159 Ill. 471, 42 N. E. 854; Parmlee *v.* Sloan, 37 Ind. 469; Barnett *v.* Saloman, 118 Mich. 460, 76 N. W. 1035; Thorp *v.* Riley, 57 N. Y. Super. Ct. 589, 8 N. Y. Suppl. 493.

39. Zust *v.* Linthicum, 58 N. Y. Super. Ct. 478, 11 N. Y. Suppl. 727.

40. Roberts *v.* Atlanta Consol. St. R. Co., 104 Ga. 805, 30 S. E. 966; Bartell *v.* State, 40 Nebr. 232, 58 N. W. 716; Bonawitz *v.* De Kalb, 2 Nebr. (Unoff.) 534, 89 N. W. 379. And see Cannon *v.* Griffith, 3 Kan. App. 506, 43 Pac. 829; Westerfield *v.* Baldwin, 16 Ky. L. Rep. 318; Fulton Towboat Co. *v.* Pendergrass, 15 Ky. L. Rep. 208.

41. Bonawitz *v.* De Kalb, 2 Nebr. (Unoff.) 534, 89 N. W. 379.

42. Bartell *v.* State, 40 Nebr. 232, 58 N. W. 716.

43. Slack *v.* Stephens, 19 Colo. App. 538, 76 Pac. 741.

44. Roberts *v.* Atlanta Consol. St. R. Co., 104 Ga. 805, 30 S. E. 966.

45. Byrne *v.* Smith, 24 Wis. 68.

46. Salladay *v.* Dodgeville, 85 Wis. 318, 55 N. W. 696, 20 L. R. A. 541; Byrne *v.* Smith, 24 Wis. 68. See also Miller *v.* Royal Flint Glass Works, 172 Pa. St. 70, 33 Atl. 350, holding that a party cannot complain that, in answering a request by the jury for further instructions, the court directed the

all the evidence happens through inadvertence, and the court afterward recalls the jury and reads the omitted portion.[47]

b. Where Additional Instructions Given.[48] There is a conflict of authority as to the propriety of giving the jury further instructions after they have retired to consider their verdict, in the absence of counsel. The rule enunciated by one line of decisions is that the court may give further instructions after the retirement of the jury either at the request of the jury or of its own motion, although counsel are not present, and although no attempt is made to secure their presence, provided the instructions are given in open court.[49] The theory on which these decisions proceed is, that it is the duty of counsel to be present while the court is open until the trial is concluded;[50] and that the absence of counsel while the

reading of only a portion of certain testimony, unless he at the time asked for the reading of such other part as he thought relevant and material. But see Welsh *v.* Metropolitan St. R. Co., 58 Mo. App. 528, holding that where, on the jury's request to have certain testimony read to them, the court reads only a portion thereof, the inference is that the court considered the portion not read of no importance, and when such is not the case it is ground for reversal.

47. Coit *v.* Waples, 1 Minn. 134.

48. **Giving instructions in absence of counsel as ground for new trial** see NEW TRIAL, 29 Cyc. 811.

Necessity for exceptions and objections as a basis for assigning error see *supra*, IX, K, 3, note 23.

49. *Illinois.*— Illinois Cent. R. Co. *v.* Ferrell, 108 Ill. App. 659; Heenan *v.* Howard, 81 Ill. App. 629; Chicago R. Co. *v.* Robbins, 54 Ill. App. 611. *Compare* Kizer *v.* Walden, 96 Ill. App. 593 [*reversed* on other grounds in 198 Ill. 274, 65 N. E. 116], holding that it is not reversible error in absence of showing of prejudice.

Massachusetts.—Kullberg *v.* O'Donnell, 158 Mass. 405, 33 N. E. 528, 35 Am. St. Rep. 507. And see Whitney *v.* Com., 190 Mass. 531, 77 N. E. 516.

Michigan.— National L., etc., Co. *v.* Omans, 137 Mich. 365, 100 N. W. 595.

Minnesota.— Holland *v.* Sheehan, 106 Minn. 545, 191 N. W. 217; Hudson *v.* Minneapolis, etc., R. Co., 44 Minn. 52, 46 N. W. 314.

New Hampshire.— Rizzoli *v.* Kelley, 68 N. H. 3, 44 Atl. 64.

New Jersey.— Cooper *v.* Morris, 48 N. J. L. 607, 7 Atl. 427.

Ohio.— Milius *v.* Marsh, 12 Ohio Dec. (Reprint) 765, 1 Disn. 512; Chambers *v.* Ohio L. Ins., etc., Co., 12 Ohio Dec. (Reprint) 650, 1 Disn. 327. But see Ohio cases cited *infra*, note 53.

Rhode Island.—Alexander *v.* Gardiner, 14 R. I. 15.

South Carolina.— Goldsmith *v.* Solomons, 2 Strobh. 296.

Virginia.— Buntin *v.* Danville, 93 Va. 200, 24 S. E. 830.

Wisconsin.— Meir *v.* Morgan, 82 Wis. 289, 52 N. W. 174, 33 Am. St. Rep. 39; Chapman *v.* Chicago, etc., R. Co., 26 Wis. 295, 7 Am. Rep. 81.

United States.— Stewart *v.* Wyoming Cattle Ranche Co., 128 U. S. 383, 9 S. Ct. 101, 32 L. ed. 439; Fournier *v.* Pike, 128 Fed. 991; Aerheart *v.* St. Louis, etc., R. Co., 99 Fed. 907, 40 C. C. A. 171.

See 46 Cent. Dig. tit. "Trial," § 745.

On legal holiday.— Under a statute providing that courts shall always be open except on Sundays or legal holidays, but permitting the entering or continuance of cases and instruction or discharge of the jury on such days, the court may instruct the jury on a legal holiday, and in the absence of counsel. McCoy *v.* Jordan, 184 Mass. 575, 69 N. E. 358.

Failure to notify court where counsel may be found.—Counsel who leave the place where the court is held without notifying the court where they may be conveniently found, and without making any arrangement for their being called when the jury shall return their verdict, or if they shall come before the court and request further instructions, are to be deemed to have waived their right to be present. Reilly *v.* Bader, 46 Minn. 212, 48 N. W. 909.

In Arizona it is held that, if the parties are present, error is not assignable to the giving of further instructions after the jury retire, although counsel be absent. Torque *v.* Carillo, 1 Ariz. 336, 25 Pac. 526. The court does not point out what advantage there is in the fact of the parties being present.

In New Hampshire it is the well settled practice that written instructions may be sent to the jury without notice to counsel when the court is not in session, to be returned and filed with the verdict. Rizzoli *v.* Kelley, 68 N. H. 3, 44 Atl. 64; Allen *v.* Aldrich, 29 N. H. 63; Bassett *v.* Salisbury Mfg. Co., 28 N. H. 438; Milton School Dist. No. 1 *v.* Bragdon, 23 N. H. 507; Shapley *v.* White, 6 N. H. 172. The communications are in the nature of new instructions and should be in writing, and returned by the jury, on their coming into court, with the papers of the case. Milton School Dist. No. 1 *v.* Bragdon, *supra*; Shapley *v.* White, *supra*. If there is any error in the new instructions, the parties have their remedy by exception, in the same manner as if they had been given in open court. By this course cases are often terminated that otherwise would not be, and injustice is done to no one. Milton School Dist. No. 1 *v.* Bragdon, 23 N. H. 507.

50. Kullberg *v.* O'Donnell, 158 Mass. 405, 33 N. E. 528, 35 Am. St. Rep. 507; Rizzoli *v.*

court is in session, at any time between the impaneling of the jury and the return of the verdict, cannot limit the power and duty of the judge to instruct the jury in open court on the law of the case as occasion may require.[51] Many of the decisions under consideration concede that it is desirable and the better practice to attempt to procure the attendance of counsel when further instructions are given, but hold that the court is under no obligation to do so.[52] On the other hand, in a number of states the rule is well settled that the giving of further instructions to the jury in the absence of counsel and without a reasonable attempt being made to notify them is reversible error,[53] the reason usually assigned being, that the right to accept and the right to ask counter or explanatory instructions and to except to their refusal is taken away.[54] Presence of the unsuccessful party's agent, who was not his legal counsel, does not obviate the error;[55] nor is it cured by an offer of the court to give the unsuccessful party an exception after verdict rendered and a discharge of the jury.[56] Where, however, a reasonable

Kelley, 68 N. H. 3, 44 Atl. 64, in which it was further said: "To hold otherwise would put it in the power of a party or his counsel, by absenting himself, to obstruct the business of the court, and would increase the risk of a verdict founded on an imperfect understanding of the principles of law applicable to the case."

51. Alexander *v.* Gardiner, 14 R. I. 15; Stewart *v.* Wyoming Cattle Ranche Co., 128 U. S. 383, 9 S. Ct. 101, 32 L. ed. 439; Aerheart *v.* St. Louis, etc., R. Co., 99 Fed. 907, 40 C C. A. 171.

52. *Arizona.*— Torque *v.* Carrillo, 1 Ariz. 336, 25 Pac. 526.

Illinois.— Illinois Cent. R. Co. *v.* Ferrell, 108 Ill. App. 659.

Massachusetts.— Kullberg *v.* O'Donnell, 158 Mass. 405, 33 N. E. 528, 35 Am. St. Rep. 507.

Minnesota.— Hudson *v.* Minneapolis, etc., R. Co., 44 Minn. 52, 46 N. W. 314.

Virginia.— See Traders', etc., Bank *v.* Black, 108 Va. 59, 60 S. E. 743.

Wisconsin.— Meier *v.* Morgan, 82 Wis. 289, 52 N. W. 174, 33 Am. St. Rep. 39.

United States.—Aerheart *v.* St. Louis, etc., R. Co., 99 Fed. 907, 40 C. C. A. 171.

See 46 Cent. Dig. tit. "Trial," § 745.

53. *Alabama.*— Feibelman *v.* Manchester F. Assur. Co., 108 Ala. 180, 19 So. 540 (in which it was said that the action of the court will be conclusively presumed to be prejudicial); Kuhl *v.* Long, 102 Ala. 563, 15 So. 267.

California.— Redman *v.* Gulnac, 5 Cal. 148.

Georgia.— Bryant *v.* Simmons, 74 Ga. 405.

Iowa.— Burton *v.* Neill, 140 Iowa 141, 118 N. W. 302 (under statute so providing); Davis *v.* Fish, 1 Greene 406, 48 Am. Dec. 387.

Kentucky.— Goode *v.* Campbell, 14 Bush 75 (under special statutory provision); Rouss *v.* Reid, 12 Ky. L. Rep. 843.

Missouri.— Chouteau *v.* Jupiter Iron-Works, 94 Mo. 388, 7 S. W. 467; Norton *v.* Dorsey, 65 Mo. 376; Welsh *v.* Metropolitan St. R. Co., 58 Mo. App. 528; Skinner *v.* Stifel, 55 Mo. App. 9.

New York.—Wheeler *v.* Sweet, 137 N. Y. 435, 33 N. E. 483. And see Watertown Bank, etc., Co. *v.* Mix, 51 N. Y. 558; Wiggins *v.* Downer, 67 How. Pr. 65.

Ohio.— Campbell *v.* Beckett, 8 Ohio St. 210 (under special statutory provision); Seagrave *v.* Hall, 10 Ohio Cir. Ct. 395, 6 Ohio Cir. Dec. 497; Moravec *v.* Buckley, 9 Ohio Dec. (Reprint) 226, 11 Cinc. L. Bul. 225.

Tennessee.—Wade *v.* Ordway, 1 Baxt. 229.

See 46 Cent. Dig. tit. "Trial," § 745.

Limitation of rule.—Where the instructions given are upon a matter which whether it existed as a fact in the case or not could have made no difference in the verdict, the fact that such instructions were given in the absence of counsel cannot be assigned as error. Hughes *v.* Wheeler, 76 Cal. 230, 18 Pac. 386. So it has been held that where the instruction is merely as to the form of the verdict, and does not involve the giving of information on any point of law arising in the case, it is not reversible error to give the instruction in the absence of counsel. Tilley *v.* Montelius Piano Co., 15 Colo. App. 204, 61 Pac. 483. And see Wade *v.* Ordway, 1 Baxt. (Tenn.) 229, holding that while it is erroneous to instruct the jury in the absence of a party's counsel, yet if it can clearly be seen that no injury has been done to the party by the instruction given no reversal can be had.

Presumptions on appeal.—Where the record does not show that counsel were present during the giving of further instructions it will be presumed that they were present. Knapp *v.* Gamsby, 47 Mich. 375, 11 N. W. 204.

Additional instructions urging agreement.—An additional instruction to a jury, after they have reported a disagreement, urging them to agree, may be given in a party's and his counsel's absence, and without any effort to advise them that the instruction is to be given, such instruction not being within Code, § 3720, requiring additional instructions, "on any point of law arising in the case," to be given in the presence of, or after notice to, the parties or their counsel. Burton *v.* Neill, 140 Iowa 141, 118 N. W. 302.

54. Feibelman *v.* Manchester F. Assur. Co., 108 Ala. 180, 19 So. 540; Skinner *v.* Stifel, 55 Mo. App. 9.

55. Feibelman *v.* Manchester F. Assur. Co., 108 Ala. 180, 19 So. 540.

56. Feibelman *v.* Manchester F. Assur. Co., 108 Ala. 180, 19 So. 540.

effort has been made to notify counsel and procure their attendance, the court may properly give further instructions to the jury in their absence.[57]

c. Where Papers Sent Out to Jury Room. Submitting to the jury the contract in suit after their retirement, in the absence of parties and counsel or notice to them, if erroneous, will not operate to reverse in the absence of any showing of prejudice.[58]

F. Discharge For Failure to Agree.[59] As was shown in a preceding section, it is the duty of the court to keep the jury together so long as there is any probability of their agreeing, and that it is vested with a large discretion as to the time the jury should be kept together, which discretion is not reviewable except where there is an abuse thereof.[60] This power to determine when a jury shall be discharged on disagreement is judicial,[61] and cannot be delegated to a clerk of the court.[62] When, under direction of the court, a jury is discharged and permitted to separate for inability to agree upon a verdict in a case committed to them, they no longer have charge of the case;[63] and cannot reassemble and agree upon a verdict.[64] And although the verdict is affirmed, when the facts are brought before the court on motion, it will be set aside.[65] But so long as the jury have not separated and left the court room, and their discharge has not been recorded, the verdict is valid and may be received.[66]

G. Objections and Exceptions.[67] A party having knowledge of facts, during the trial of a cause, which he claims constitute misconduct on the part of jurors, or other persons affecting jurors, must make the same known to the court at once, and have the matter promptly disposed of.[68] This he must do as a matter

57. McPherson *v.* St. Louis, etc., R. Co., 97 Mo. 253, 10 S. W. 846; Cook *v.* Green, 6 N. J. L. 109; Cornish *v.* Graff, 36 Hun 160 [*affirming* 7 N. Y. Civ. Proc. 204]; Preston *v.* Bowers, 13 Ohio St. 1, 82 Am. Dec. 430.

Reasons for rule.— There are grave objections of public policy against arresting judgments in such instances, upon the mere absence of counsel, after proper attempts by the court to secure their attendance, for this would enable counsel, by neglecting to attend court, or by voluntary and unreasonable absence, to interfere unreasonably with the business of the court and further progress of the cause. McPherson *v.* St. Louis, etc., R. Co., 97 Mo. 253, 10 S. W. 846.

58. Fibus *v.* St. Louis, etc., R. Co., 7 Indian Terr. 139, 145, 104 S. W. 568, in which it was said: "It must be presumed that the jury was composed of men of ordinary intelligence and honesty, and that it would not intrude on the province of the court to pass on the legal effect of the said document; and the most that could be presumed would be that it was obtained for the purpose of refreshing the recollection of the several jurors as to its contents."

59. **Discharge of jury on Sunday** see SUNDAY, 37 Cyc. 535.

In criminal cases see CRIMINAL LAW, 12 Cyc. 683 *et seq.*

60. See *supra*, X, E, 4, b.

61. Ingersoll *v.* Lansing, 51 Hun (N. Y.) 101, 5 N. Y. Suppl. 288.

62. Ingersoll *v.* Lansing, 51 Hun (N. Y.) 101, 5 N. Y. Suppl. 288.

63. Richards *v.* Page, 81 Me. 563, 18 Atl. 289; Richards *v.* Page, (Me. 1888) 14 Atl. 933.

64. Richards *v.* Page, 81 Me. 563, 18 Atl. 289; Richards *v.* Page, (Me. 1888) 14 Atl. 933.

65. Richards *v.* Page, (Me. 1888) 14 Atl. 933.

66. Koontz *v.* Hammond, 62 Pa. St. 177.

For example, where the court directed an officer to discharge the jury at a certain hour if they had not then agreed, and the officer did not discharge them, but the jury continued their deliberations, and arrived at a verdict some hours later, which was afterward returned into and accepted by the court, the failure on the part of the officer to observe the directions of the court did not avoid the verdict. Hopkins *v.* Sawyer, 84 Me. 321, 24 Atl. 872; Hansen *v.* Ludlow Mfg. Co., 167 Mass. 112, 44 N. E. 1091.

67. **Failure to object as affecting right to new trial** see NEW TRIAL, 29 Cyc. 813.

68. *Georgia.*— Bass *v.* Winfry, 20 Ga. 631.

Nebraska.— Nye, etc., Co. *v.* Snyder, 56 Nebr. 754, 77 N. W. 118; Peterson *v.* Skjelver, 43 Nebr. 663, 62 N. W. 43; Parkins *v.* Missouri Pac. R. Co., 4 Nebr. (Unoff.) 1, 93 N. W. 197.

New York.—Werner *v.* Interurban St. R. Co., 99 N. Y. App. Div. 592, 91 N. Y. Suppl. 111, holding that a motion to set aside a verdict on the ground of misconduct on the part of jurors should be made by application to the special term.

Ohio.— Gable *v.* Toledo, 16 Ohio Cir. Ct. 515, 9 Ohio Cir. Dec. 63.

Pennsylvania.— Francis *v.* Philadelphia, etc., Pass. R. Co., 13 Montg. Co. Rep. 176.

See 46 Cent. Dig. tit. "Trial," § 751.

Sufficiency of exceptions.—It has been held that an exception to the court's instructions in which he stated his intention to send the pleadings to the jury was an exception to the

of good faith and fair dealing toward the court and his opponent, and he will not be permitted to withhold such knowledge from the court during the trial, or allow the case to be submitted to a jury, and thus speculate upon the verdict.[69] By such conduct he will be held to have waived his right to have the verdict set aside on that ground,[70] unless he satisfy the court that such jurors, as a matter of fact, were prejudiced against him thereby, and could not render a fair and impartial verdict in the case.[71] Thus it has been held that improper communication by or with jurors;[72] the taking of improper books and papers to the jury room;[73]

act of sending them. It will be presumed that he did send out the pleadings. Kansas City, etc., R. Co. *v.* Eagan, 64 Kan. 421, 67 Pac. 887. On the other hand, it has been held that where the court told the jury that they had a right to take a certain account in evidence with them for consideration, and the bill of exceptions did not show that the jury actually took the account to their room, there was no available error. Everything must be presumed in favor of the correctness of the court's action, until the contrary is made to appear. Porter County First Nat. Bank *v.* Williams, 4 Ind. App. 501, 31 N. E. 370. Where all that a bill of exceptions shows is that, as the jury were about to retire, plaintiff's counsel handed them an affidavit which they should not have taken to the jury room, and that counsel for defendant remarked to the court that he did not consent, and the jury took the affidavit to their room, this is not equivalent to a ruling of the court that they might take it, and to an exception to such ruling. Wilson *v.* Genseal, 113 Ill. 403, 1 N. E. 905.

69. *Georgia.*— Sizer *v.* Melton, 129 Ga. 143, 58 S. E. 1055; Cogswell *v.* State, 49 Ga. 103.

Michigan.— Le Beau *v.* Telephone, etc., Constr. Co., 109 Mich. 302, 67 N. W. 339.

Nebraska.— Parkins *v.* Missouri Pac. R. Co., 4 Nebr. (Unoff.) 1, 93 N. W. 197.

New York.— Lippus *v.* Columbus Watch Co., 13 N. Y. Suppl. 319.

Oregon.— Osmun *v.* Winters, 30 Oreg. 177, 46 Pac. 780.

70. *Georgia.*— Sizer *v.* Melton, 129 Ga. 143, 58 S. E. 1055.

Indiana.— Ellis *v.* Hammond, 157 Ind. 267, 61 N. E. 565.

Iowa.— Foedisch *v.* Chicago, etc., R. Co., 100 Iowa 728, 69 N. W. 1055.

Maine.— Belcher *v.* Estes, 99 Me. 314, 59 Atl. 439; Hussey *v.* Allen, 59 Me. 269.

Michigan.— Le Beau *v.* Telephone, etc., Constr. Co., 109 Mich. 302, 67 N. W. 339.

Nebraska.— Nye, etc., Co. *v.* Snyder, 56 Nebr. 754, 77 N. W. 118; Parkins *v.* Missouri Pac. R. Co., 4 Nebr. (Unoff.) 1, 93 N. W. 197.

New Hampshire.— Lyman *v.* Brown, 73 N. H. 411, 62 Atl. 650.

New York.—Werner *v.* Interurban St. R. Co., 99 N. Y. App. Div. 592, 91 N. Y. Suppl. 111; Bruswitz *v.* Netherlands Steam Nav. Co., 64 Hun 262, 19 N. Y. Suppl. 75.

North Carolina.— Gaither *v.* Carpenter, 143 N. C. 240, 55 S. E. 625.

Ohio.— Gable *v.* Toledo, 16 Ohio Cir. Ct. 515, 9 Ohio Cir. Dec. 63.

Oregon.— Osmun *v.* Winters, 30 Oreg. 177, 46 Pac. 780.

United States.— Consolidated Ice-Mach. Co. *v.* Trenton Hygeian Ice Co., 57 Fed. 898; Berry *v.* De Witt, 27 Fed. 723, 23 Blatchf. 544.

See 46 Cent. Dig. tit. "Trial," § 751.

71. Parkins *v.* Missouri Pac. R. Co., 4 Nebr. (Unoff.) 1, 93 N. W. 197.

72. Werner *v.* Interurban St. R. Co., 99 N. Y. App. Div. 592, 91 N. Y. Suppl. 111; McKinstry *v.* Collins, 74 Vt. 147, 52 Atl. 438.

73. Chadwick *v.* Chadwick, 52 Mich. 545, 18 N. W. 350; Davis *v.* McCabe, (Tex. Civ. App. 1898) 46 S. W. 837.

For example, the objection that the jury took with them into retirement papers not in evidence (Bass *v.* Winfry, 20 Ga. 631; Clapp *v.* Norton, 106 Mass. 33), or which had been underscored by counsel (Lippus *v.* Columbus Watch Co., 13 N. Y. Suppl. 319), cannot be raised after verdict. So, while it is improper to permit a jury to take the attorney's notes of evidence without the consent of the parties or their attorneys, where such consent is given, the circumstances cannot be afterward urged as an objection to the verdict. Baker *v.* Rice, 52 Mo. 23. And if the fact that one of the jurors takes notes of the evidence which he carried into the jury room with him is a valid ground of complaint, it is waived by failure to seasonably object thereto. Randolph *v.* O'Riordon, 155 Mass. 331, 29 N. E. 583.

Presumption of knowledge by counsel.— It is to be presumed that the attorneys conducting the trial knew of the delivery of the papers to the jury. State *v.* Nichols, 29 Minn. 357, 13 N. W. 153. It is not enough in such case for the moving party to show that he was "ignorant of the actual character of the papers." The statement does not reach the fact which alone is material in this connection, viz.: Was the attorney ignorant of the fact that the papers in respect to which error is alleged were delivered to the jury? If the attorney knew, as it must be presumed he did, in the absence of showing to the contrary, that the court delivered to the jury the papers referred to, although he was ignorant of their actual character, it was incumbent upon him to see that papers not proper to go to the jury should be withheld, and, by objection or otherwise, to call the attention of the court to what is now complained of as error. State *v.* Nichols, *supra.*

Time for making objection.— Objection that papers should not be allowed to go out with the jury should be made before the papers

the rendering of a verdict by less than a full jury;[74] permitting a jury to separate after agreeing on a verdict, but before it is announced,[75] or without being admonished by the court not to talk about the case;[76] sending instructions to the jury room after retirement instead of calling the jury into court and instructing them;[77] and the asking of improper questions by the court of the jury,[78] or by a juror of a witness,[79] is waived by failure to object thereto until after verdict. But the rule requiring exceptions to proceedings to be taken at the time applies only to proceedings in open court, and not to proceedings out of court.[80] So where the complaining party had no opportunity to interpose a formal exception, he may raise the question on appeal, although no exception was taken at the time.[81]

XI. VERDICT.[81a]

A. Definitions — 1. VERDICT. A verdict is the answer of the jury concerning any matter of fact, in any cause committed to them for trial,[82] its object being to announce to the court the judgment of the jury, as to how far the facts, established by the evidence, conform to those which are alleged, and put in issue by the pleadings,[83] and also for which party and in what amount to render judgment.[84] The facts declared by it constitute the basis of the judgment.[85]

are allowed to go out (Shomo *v.* Zeigler, 31 Leg. Int. (Pa.) 205), although they were objected to at the time they were introduced in evidence (Groesbeck *v.* Marshall, 44 S. C. 538, 22 S. E. 743).

74. Wilson Sewing Mach. Co. *v.* Bull, 52 Iowa 554, 3 N. W. 564.

75. Union Pac. R. Co. *v.* Connolly, 77 Nebr. 254, 109 N. W. 368; Bradwell *v.* Pittsburgh, etc., R. Co., 139 Pa. St. 404, 20 Atl. 1046.

76. Musselman *v.* Pratt, 44 Ind. 126; Johnson *v.* Matthews, 9 Ohio Dec. (Reprint) 339, 12 Cinc. L. Bul. 197.

77. Joliet *v.* Looney, 159 Ill. 471, 42 N. E. 854.

78. State *v.* Hale, 91 Iowa 367, 59 N. W. 281.

79. Kelly *v.* Commonwealth Ins. Co., 10 Bosw. (N. Y.) 82.

80. Danes *v.* Pearson, 6 Ind. App. 465, 33 N. E. 976, holding that the objection that the judge misconducted himself in entering the jury room may be made for the first time on motion for new trial, although counsel was aware of the misconduct at the time.

81. Wheeler *v.* Sweet, 137 N. Y. 435, 33 N. E. 483 [*reversing* 16 N. Y. Suppl. 836].

For example, the giving of instructions to the jury after their retirement, and in the absence of the complaining party, may be attacked for the first time on appeal (Wheeler *v.* Sweet, 137 N. Y. 435, 33 N. E. 483 [*reversing* 16 N. Y. Suppl. 836]), unless counsel was advised of the fact before verdict rendered (Le Beau *v.* Telephone, etc., Constr. Co., 109 Mich. 302, 67 N. W. 339). In Massachusetts, under superior court rule 48, when instructions are given, in the absence of counsel, after retirement of the jury, exceptions may be permitted at any time within twenty-four hours next following. Goodrum *v.* Grimes, 185 Mass. 80, 69 N. E. 1053; McCoy *v.* Jordan, 184 Mass. 575, 69 N. E. 358.

81a. Amount found by jury as affecting costs see COSTS, 11 Cyc. 39 *et seq.*

Conformity of judgment to verdict and findings see JUDGMENTS, 23 Cyc. 775, 776, and the various titles in this work.

Defects in verdict as ground for arrest of judgment see CRIMINAL LAW, 12 Cyc. 766 *et seq.*; JUDGMENTS, 23 Cyc. 832 *et seq.*

In criminal prosecutions see CRIMINAL LAW, 12 Cyc. 686 *et seq.*, and the various criminal law titles in this work.

In equity cases on issues submitted to jury see EQUITY, 16 Cyc. 422 *et seq.*

In justice's court see JUSTICES OF THE PEACE, 24 Cyc. 585 *et seq.*

In particular civil actions or proceedings see Particular Titles Referred to *supra*, p. 357 note 86.

On trial de novo on appeal from justice's court see JUSTICES OF THE PEACE, 24 Cyc. 743.

82. Withee *v.* Rowe, 45 Me. 571, 586. To the same effect see Union Pac. R. Co. *v.* Connolly, 77 Nebr. 254, 259, 109 N. W. 368.

Other definitions are: "The answer of the jury to the questions of fact contained in the issue formed by the pleadings of the parties." Day *v.* Webb, 28 Conn. 140, 144.

"The ascertained truth, to which effect is given by the judgment of the court." Vaughan *v.* Cade, 2 Rich. (S. C.) 49, 52.

"A declaration of the truth as to the matters of fact submitted to the jury." Shenners *v.* West Side St. R. Co., 78 Wis. 382, 387, 47 N. W. 622.

"The compound result of the legal instructions given to the jury by the court and of their findings of fact applied to the legal principles laid down for their guidance." Bonham *v.* Bishop, 23 S. C. 96, 105.

A mere statement by the foreman of the jury in open court that the jury have agreed, without stating the nature of the decision, is not a verdict. Union Pac. R. Co. *v.* Connolly, 77 Nebr. 254, 109 N. W. 368.

83. Darden *v.* Mathews, 22 Tex. 320, 325.

84. Gray *v.* Phillips, Morr. (Iowa) 430.

85. Clendenning *v.* Mathems, 1 Tex. App. Civ. Cas. § 904.

Verdicts are general,[86] or special.[87] These two classes of verdicts will be considered at length in the following chapters.

2. General Verdict. A general verdict is that by which the jury pronounce generally upon all or any of the issues, either in favor of plaintiff or defendant.[88] It is a finding in favor of the prevailing party of every material fact properly submitted to the consideration of the jury.[89] Simple responses of "yes" or "no" to issues submitted constitute general verdicts.[90]

3. Special Verdict. A special verdict is where the jury finds the facts particularly, and then submits to the court the questions of law arising on them.[91] The jury finds the facts of a case, leaving the ultimate decision of the case upon those facts to the court, concluding conditionally that if, upon the whole matter thus found, the court should be of opinion that plaintiff has a good cause of action, they then find for plaintiff, and assess his damages; if otherwise, then for defendant.[92] This proceeding is entirely anomalous. It is unknown and unrecognized by the common law, or by practice prior to the statute of Westminster II,[93] which

Judgment is erroneous if rendered on an imperfect verdict. Holman *v.* Kingsbury, 4 N. H. 104.

86. See *infra*, XI, A, 2.

87. See *infra*, XI, A, 3.

88. McCormack *v.* Phillips, 4 Dak. 506, 34 N. W. 39, 55. To the same effect see Egan *v.* Estrada, 6 Ariz. 248, 252, 56 Pac. 721; Settle *v.* Alison, 8 Ga. 201, 208, 52 Am. Dec. 393; Atchison, etc., R. Co. *v.* Osburn, 79 Kan. 348, 350, 100 Pac. 473; Smith *v.* Ireland, 4 Utah 187, 188, 7 Pac. 749; Glenn *v.* Sumner, 132 U. S. 152, 156, 10 S. Ct. 41, 33 L. ed. 301.

Separate findings on separate causes of action are general verdicts. Robinson *v.* Berkey, 100 Iowa 136, 143, 69 N. W. 434, 62 Am. St. Rep. 549.

89. *California.*— Plyler *v.* Pacific Portland Cement Co., 152 Cal. 125, 92 Pac. 56; Larsen *v.* Leonardt, 8 Cal. App. 226, 228, 96 Pac. 395.

Indiana.— Foster *v.* Bemis Indianapolis Bag Co., 163 Ind. 351, 71 N. E. 953; Garrett *v.* State, 149 Ind. 264, 49 N. E. 33; Mitchell *v.* Tell City, 41 Ind. App. 294, 83 N. E. 735; Cincinnati, etc., Electric St. R. Co. *v.* Klump, 37 Ind. App. 660, 77 N. E. 869.

Iowa.— Flower *v.* Continental Casualty Co., 140 Iowa 510, 118 N. W. 761.

Kansas.— Barrett *v.* Dessy, 78 Kan. 642, 97 Pac. 786; Frayer *v.* Holton, 8 Kan. App. 718, 54 Pac. 918.

Minnesota.— Krumdick *v.* Chicago, etc., R. Co., 90 Minn. 260, 95 N. W. 1122.

New Hampshire.— Busher *v.* New York L. Ins. Co., 72 N. H. 551, 58 Atl. 41; Wheeler *v.* Metropolitan Stock Exch., 72 N. H. 315, 56 Atl. 754.

New York.— New York Produce Exchange Bank *v.* Twelfth Ward Bank, 62 Misc. 69, 115 N. Y. Suppl. 998.

Pennsylvania.— Smith *v.* Shields, 194 Pa. St. 635, 45 Atl. 417.

Texas.— Harris *v.* Jackson, (Civ. App. 1907) 106 S. W. 1144; Fontaine *v.* Nuse, 38 Tex. Civ. App. 358, 85 S. W. 852; Peoples *v.* Terry, (Civ. App. 1898) 43 S. W. 846.

Washington.—State *v.* Pierce County Super. Ct., 21 Wash. 33, 56 Pac. 932.

Contributory negligence.— Under a statute requiring all defenses except the general denial to be specially pleaded, the burden of establishing contributory negligence is on defendant, and a general verdict in favor of plaintiff, in an action against a street railway company for injuries to a pedestrian struck by a car at a crossing, is a finding of freedom from contributory negligence. Grass *v.* Ft. Wayne, etc., Traction Co., 42 Ind. App. 395, 81 N. E. 514.

90. Porter *v.* Western North Carolina R. Co., 97 N. C. 66, 2 S. E. 581, 2 Am. St. Rep. 272.

91. Day *v.* Webb, 28 Conn. 140, 144. To the same effect see Egan *v.* Estrada, 6 Ariz. 248, 252, 56 Pac. 721; Little Rock, etc., R. Co. *v.* Miles, 40 Ark. 298, 326, 48 Am. Rep. 10; Montgomery *v.* Sayre, (Cal. 1891) 25 Pac. 552, 554; *In re* Keithley, 134 Cal. 9, 11, 66 Pac. 5; Conner *v.* Citizens' St. R. Co., 105 Ind. 62, 65, 4 N. E. 441, 55 Am. Rep. 177; Pittsburgh, etc., R. Co. *v.* Spencer, 98 Ind. 186, 188; Robinson *v.* Berkey, 100 Iowa 136, 143, 69 N. W. 434, 62 Am. St. Rep. 549; Sturgis First Nat. Bank *v.* Peck, 8 Kan. 660, 666; Shipp *v.* Snyder, 121 Mo. 155, 161, 25 S. W. 900; People *v.* McClure, 148 N. Y. 95, 99, 42 N. E. 523; Sparrowhawk *v.* Sparrowhawk, 11 Hun (N. Y.) 528, 530; People *v.* Board of Police, 35 Barb. (N. Y.) 644, 648, 14 Abb. Pr. 151 [*reversed* on other grounds in 26 N. Y. 316]; Sweigard *v.* Wilson, 106 Pa. St. 207, 214; Bigelow *v.* Danielson, 102 Wis. 470, 78 N. W. 599; Davis *v.* Chicago, etc., R. Co., 93 Wis. 470, 482, 67 N. W. 16, 57 Am. St. Rep. 935, 33 L. R. A. 654; Statler *v.* U. S., 157 U. S. 277, 278, 15 S. Ct. 616, 39 L. ed. 700.

Finding in answer to interrogatories distinguished see Morbey *v.* Chicago, etc., R. Co., 116 Iowa 84, 89 N. W. 105.

Answers to special questions not disposed of by the issues in a case do not thereafter constitute a special verdict. Montgomery *v.* Sayre, (Cal. 1891) 25 Pac. 552, 554.

Separate findings on separate causes of actions are not special, but general, verdicts. Robinson *v.* Berkey, 100 Iowa 136, 143, 69 N. W. 434, 62 Am. St. Rep. 549.

92. Wallingford *v.* Dunlap, 14 Pa. St. 31.

93. St. 13 Edw. 1, c. 30.

in fact originated the special verdict as it now exists.[94] There also exists another species of special verdict, as where the jury return a general verdict for plaintiff, subject nevertheless to the opinion of the court on a special case stated by counsel on both sides, as a matter of law.[95] But this proceeding has gone out of practice.[96] The object of a special verdict is solely to obtain a decision of the issues of fact raised by the pleadings, not to decide disputes between witnesses as to minor facts even if such minor facts are essential to establish, by inference or otherwise, the main fact.[97]

B. General Verdict — 1. Preparation and Formulation — a. In General. Ordinarily, a trial judge is not obliged to prepare forms of verdict,[98] but may do so if a party is not prejudiced thereby;[99] but if he does so, the forms should be complete as the case requires.[1] And where the issues are different between plaintiff and several defendants, it is error for the court to decline to give a form of verdict whereby the jury might find for plaintiff against one defendant and in favor of the other defendants.[2] A party may be permitted to prepare proper blank forms of verdict and send them to the jury for their use,[3] and the jury having found for plaintiff for the amount or quantity of his claim the court may direct plaintiff's attorney to formulate the verdict.[4] But the judge cannot, as the jury's clerk, even at the request of the jury, draw up their verdict.[5] The court may decline to allow the jury to frame their verdict so as to affect the interest of a stranger to the suit.[6]

b. Necessity of Reducing to Writing. In some jurisdictions an oral verdict is sufficient.[7] In other jurisdictions under statutory or constitutional provisions, the verdict must be in writing and signed by the foreman.[8] Where a verdict is directed the better practice is held to be to return a formal verdict in writing, but the absence of such verdict is not fatal to the validity of the judgment;[9] but if a general verdict is in writing and signed, it is immaterial that the answer to a special interrogatory is not in writing at the time, and it may afterward be received, as it is to be inferred that they agreed on an answer to the question before arriving at a verdict.[10]

c. Signature. Since a verdict is not required to be in writing, in the absence of statutory or constitutional provision,[11] a verdict is not, in the absence of statute, required to be signed.[12] Where, however, the verdict is signed a signature by

94. Wallingford *v.* Dunlap, 14 Pa. St. 31, 32.

95. Wallingford *v.* Dunlap, 14 Pa. St. 31, 32.

96. Wallingford *v.* Dunlap, 14 Pa. St. 31, 32, holding also that the practice probably never prevailed in Pennsylvania.

97. Baxter *v.* Chicago, etc., R. Co., 104 Wis. 307, 80 N. W. 644.

98. Merrill *v.* Lindemann, 86 Ill. App. 75.

The court may refuse to give to the jury forms of verdict, although suitable, requested by counsel. Birdsall *v.* Carter, 11 Nebr. 143, 7 N. W. 751.

99. Seidel *v.* Quincy, etc., R. Co., 109 Mo. App. 160, 83 S. W. 77.

1. Merrill *v.* Lindemann, 86 Ill. App. 75.

2. Lewin *v.* Barry, 15 Colo. 461, 63 Pac. 121.

3. Snyder *v.* Braden, 58 Ind. 143; Huff *v.* Crawford, (Tex. Civ. App. 1895) 32 S. W. 592; Newton *v.* Brown, 1 Utah 287.

4. Goebel *v.* Pugh, 88 Ky. 34, 10 S. W. 1, 10 Ky. L. Rep. 661.

5. Gove *v.* Breedlove, 5 Rob. (La.) 78.

6. Whitman *v.* Bolling, 47 Ga. 125.

7. Gary *v.* Woodham, 103 Ala. 421, 15 So. 840; Russell *v.* McGirr, 134 Ill. App. 428.

After the jury have rendered an oral verdict at the bar, which has been recorded by the court, any written paper handed in by the jury as containing its verdict is a mere nullity. Pennsylvania Knitting Co. *v.* Bibb Mfg. Co., 21 Pa. Co. Ct. 537.

8. See the constitutions and statutes of the several states. And see McCaskey Register Co. *v.* Keena, 81 Conn. 656, 71 Atl. 898; Dubertrand *v.* Laville, 8 La. 274; Union Pac. R. Co. *v.* Connolly, 77 Nebr. 254, 109 N. W. 368.

If the jury do not write the English language, the verdict may be translated into English under the direction of the court, read to them as translated and, upon being assented to by them, signed by the foreman. Walsh *v.* Barrow, 3 La. Ann. 265.

9. Moore *v.* Petty, 135 Fed. 668, 68 C. C. A. 306.

10. Spencer *v.* Williams, 160 Mass. 17, 35 N. E. 88.

11. See *supra*, XI, A, B, 1, b.

12. Harrison *v.* Singleton, 3 Ill. 21; Morrison *v.* Overton, 20 Iowa 465; Miller *v.*

one of the jurors as foreman in behalf of himself and his fellow jurors is sufficient;[13] but failure of the foreman to sign will not invalidate a judgment entered upon the verdict, in the absence of an appeal or motion in arrest.[14] Under some statutes, the verdict must be signed by the foreman.[15] Statutes or rules requiring signature of all jurors under certain circumstances have no application to a case where the cause is tried by less than the regular number of jurors by consent.[16] Where one of the jurors cannot sign the verdict because unable to sign his name, it is proper for the trial judge to write the juror's name and cause him to make his mark.[17]

d. Sealing — (i) *DIRECTION.* The court may, without regard to the consent or objection of parties,[18] direct the jury, in case they should agree, to sign the verdict, place it in an envelope, and return it into open court,[19] or may direct the baliff to permit the jury, upon agreement, to sign and seal their verdict and return it into court the following morning,[20] or, upon the jury's coming into court to report agreement, counsel being absent, may instruct the jury to seal their verdict and return it into court on the following day.[21]

(ii) *OPENING SEALED VERDICT.* While the court may under stipulation of the parties open a sealed verdict in the absence of the jury and if necessary reduce it to proper form,[22] it may be opened at any time by the court, notwithstanding parties have agreed that it shall be opened on a particular day.[23] And the accidental unsealing of the verdict by the foreman does not vitiate it,[24] nor does the fact that counsel, out of curiosity, opened it.[25] Where a sealed verdict is directed, it is error to receive an open verdict.[26] The reception of a sealed verdict in the absence of some of the jury is illegal,[27] unless consented to by the

Maben, 6 Iowa 456; Berry *v.* Pusey, 80 Ky. 166.

Statute requiring signature held merely directory see Morrison *v.* Overton, 20 Iowa 465; Gurley *v.* O'Dwyer, 61 Mo. App. 348.

13. Davidson *v.* Carter, 9 Ga. 501; Southern Express Co. *v.* Maddox, 3 Ga. App. 223, 59 S. E. 821 (holding that, although properly a verdict should be written on the initial pleading and be dated and signed by one of the jurors as foreman, still an unsigned verdict is not illegal, and the presiding judge may cause it to be signed by one of the jurors as foreman and designate the foreman of the jury); Chicago City R. Co. *v.* Cooney, 196 Ill. 466, 63 N. E. 1029; Peterson *v.* St. Louis Transit Co., 199 Mo. 331, 97 S. W. 860.

A verdict in consolidated actions finding separately for each plaintiff is sufficiently authenticated by the signature of the foreman appearing at its conclusion. Rapid Transit R. Co. *v.* Miller, (Tex. Civ. App. 1905) 85 S. W. 439.

The omission of the foreman to sign his name in full to the verdict is not ground of error, the parties being present and not objecting. Malony *v.* Harkey, Ga. Dec. Pt. II 159.

14. Harris *v.* Barden, 24 Ga. 72.

15. See the statutes of the several states. And see McCaskey Register Co. *v.* Keena, 81 Conn. 656, 71 Atl. 898; Union Pac. R. Co. *v.* Connolly, 77 Nebr. 254, 109 N. W. 368.

The letters "F. M." following the signature of a juror are sufficient; the statute not expressly requiring that the word "Foreman" shall be attached. St. Louis Southwestern R. Co. *v.* Hawkins, 49 Tex. Civ. App. 545, 108 S. W. 736.

16. Gray *v.* Freeman, 37 Tex. Civ. App. 556, 84 S. W. 1105; Bluefields Banana Co. *v.* Wollfe, (Tex. Civ. App. 1893) 22 S. W. 269.

In Kentucky, nine, or any greater number, of the jury may make a verdict, but if less than the whole number make the verdict, it must be signed by all who make it. If the whole jury concur in the verdict, it may be signed by the foreman. Louisville, etc., R. Co. *v.* Lucas, 98 S. W. 308, 30 Ky. L. Rep. 359, 99 S. W. 959, 30 Ky. L. Rep. 539.

17. Moore *v.* Woodson, 44 Tex. Civ. App. 503, 99 S. W. 116.

18. Green *v.* Bliss, 12 How. Pr. (N. Y.) 428; Rudisill *v.* Robert, 14 York Leg. Rec. (Pa.) 121; Bunker Hill, etc., Min., etc., Co. *v.* Oberder, 79 Fed. 726, 25 C. C. A. 171; Bunker Hill, etc., Min., etc., Co. *v.* Schnelling, 79 Fed. 263, 24 C. C. A. 564.

19. Mt. Vernon *v.* Cockrum, 59 Ill. App. 540; Dale *v.* Downs, 7 Mart. N. S. (La.) 224; Willard *v.* Shaffer, 6 Phila. (Pa.) 520.

Parties not objecting at the time the direction is given are deemed to have consented. High *v.* Johnson, 28 Wis. 72.

20. Chicago *v.* Langlass, 66 Ill. 361.

21. Leas *v.* Cool, 68 Ind. 166.

22. Koon *v.* Phœnix Mut. L. Ins. Co., 104 U. S. 106, 26 L. ed. 670.

23. Pierce *v.* Hasbrouck, 49 Ill. 23.

24. Bass *v.* Hanson, 9 Iowa 563.

25. Smoots *v.* Foster, 16 Ohio Cir. Ct. 612, 9 Ohio Cir. Dec. 218.

26. Chicago *v.* Rogers, 61 Ill. 188.

27. Bishop *v.* Mugler, 33 Kan. 145, 5 Pac. 756, 34 Kan. 254, 8 Pac. 103; Campbell *v.* Linton, 27 U. C. Q. B. 563.

Where one juror is sick the court may adjourn to the house of the sick juror to re-

parties. If, however, they give such consent, they thereby waive all exceptions because of such separation.[28]

e. Unanimity. In most jurisdictions, all the jurors must agree upon the verdict,[29] unless the express consent of both parties be shown to the entry of judgment thereon,[30] and a verdict is invalid if it is reached by agreement of the jurors to abide by a decision of less than all of their number.[31] In some jurisdictions a unanimous verdict is not required by statute, it being sufficient if a specified number of jurors agree upon the verdict.[32] Where the law authorizes a verdict where three fourths of the jurors concur, a verdict signed by seven jurors only is a nullity;[33] but a verdict unanimous on its face is good, although the judgment recites that three fourths, of the jurors, although not all, concurred therein.[34]

2. Rendition and Reception[34a]—a. When Received; Adjournments. A verdict cannot be received and entered during a period of adjournment,[35] in the absence of agreement,[36] or statutory authority.[37] Under some statutes, a jury cannot bring in a sealed verdict at a term other then the one at which the cause was submitted to them,[38] but under other statutes the rule is otherwise.[39] A verdict is not void because it is not written on the original petition.[40]

ceive the verdict. King *v.* Faber, 51 Pa. St. 387.

28. Woods *v.* Van Buren County, Morr. (Iowa) 441.

29. *Alabama.*— Alabama Great Southern R. Co. *v.* McWhorter, 156 Ala. 269, 47 So. 84.

Colorado.— People *v.* Croot, 33 Colo. 426, 80 Pac. 1065; Star Loan Co. *v.* Duffy Van, etc., Co., 20 Colo. App. 250, 77 Pac. 1092.

Kansas.— Maduska *v.* Thomas, 6 Kan. 153.

Nebraska.— Lincoln Traction Co. *v.* Heller, 72 Nebr. 127, 100 N. W. 197, 102 N. W. 262.

United States.— Curtiss *v.* Georgetown, etc., Turnpike Co., 6 Fed. Cas. No. 3,506, 2 Cranch C. C. 81.

See 46 Cent. Dig. tit. "Trial," § 742.

30. Snow *v.* Hardy, 3 Minn. 77.

But if one party knows that the jury stand in his favor and the other does not, consent of that other to accept a majority verdict is not binding. Snow *v.* Hardy, 3 Minn. 77.

31. Ryerson *v.* Kitchell, 3 N. J. L. 998; Memphis, etc., R. Co. *v.* Pillow, 9 Heisk. (Tenn.) 248. See also Campbell *v.* Wooldredge, Ga. Dec. Pt. II 132.

This taint is not removed by the jury answering and returning with the verdict interrogatories which had been submitted to them. Houk *v.* Allen, 126 Ind. 568, 25 N. E. 897, 11 L. R. A. 706.

32. McClure *v.* Feldmann, 184 Mo. 710, 84 S. W. 16; Shaw *v.* Goldman, 183 Mo. 461, 81 S. W. 1223; Pratt *v.* Parsons, 13 Utah 31, 43 Pac. 620.

That such verdict is good if signed by the foreman see Kelly-Goodfellow Shoe Co. *v.* Sally, 114 Mo. App. 222, 89 S. W. 889.

Constitutionality of statutes authorizing concurrence of less than whole number see Juries, 24 Cyc. 185.

33. Marshall *v.* Armstrong, 105 Mo. App. 234, 79 S. W. 1161.

34. Reed *v.* Mexico, 101 Mo. App. 155, 76 S. W. 53.

34a. Irregularities constituting ground for new trial see New Trial, 29 Cyc. 815.

Rendition on Sunday see Sunday, 37 Cyc. 589.

35. Johnson *v.* Depuy, 2 N. J. L. 165; Shamokin Coal, etc., Co. *v.* Mitman, 3 Pa. St. 379; Peart *v.* Chicago, etc., R. Co., 5 S. D. 337, 58 N. W. 806.

In Illinois it is held that the receipt by the court of the verdict is a mere ministerial act, and that therefore the reception of a verdict during adjournment, if not prejudicial, is not error. East St. Louis Connecting R. Co. *v.* Eggmann, 71 Ill. App. 32 [*affirmed* in 170 Ill. 538, 48 N. E. 981, 62 Am. St. Rep. 400]. See also Weske *v.* Chicago Union Traction Co., 117 Ill. App. 298.

Where the record does not show adjournment the court may receive verdict in absence of party. Stone *v.* Scherzer, 3 Walk. (Pa.) 145. And although adjournment has been proclaimed, judges and counsel remaining in the court room, the order for adjournment may be recalled and verdict received. Person *v.* Neigh, 52 Pa. St. 199.

Where prior to adjournment it was announced that the verdict would be received during adjournment if the jury came to an agreement, and the verdict was so received, the verdict was upheld, the court having offered to recall the jury so that it might be polled, which offer was refused by counsel. McCormick Harvesting Mach. Co. *v.* Lauber, 7 Kan. App. 730, 52 Pac. 577.

36. Kennedy *v.* Raught, 6 Minn. 235; McMurray *v.* Oneal, 1 Call (Va.) 246.

37. Tim *v.* Rosenfeld, 168 Mass. 393, 47 N. E. 106; Cranmer *v.* Kohn, 11 S. D. 245, 76 N. W. 937.

38. Anderson *v.* Hulet, 4 Colo. App. 448, 36 Pac. 309.

39. Weske *v.* Chicago Union Traction Co., 117 Ill. App. 298.

40. Sapp *v.* Parrish, 3 Ga. App. 234, 59 S. E. 821, in which it was said that no law requires the verdict to be written on any particular paper.

b. Where and by Whom Received. A verdict must be returned into court,[41] and is not final until pronounced and recorded in open court.[42] In the absence of statutory warrant, the court cannot authorize another person to receive the verdict, although the parties consent thereto;[43] but it is often held that by consent of the parties the clerk may receive a verdict in the absence of the judge,[44] and where the parties are present and consent to the reception of the verdict, it is not rendered illegal by the absence of one of the assistant judges,[45] and where the judge who tried the case is called away before verdict rendered, it is proper for the court to receive and enter the verdict.[46]

c. Necessity of Presence of Party or Counsel. A verdict may be received by the court in the absence of the parties to the suit,[47] and in the absence of their counsel,[48] where such absence is voluntary and while the court is in regular session,[49] especially where they were called into court and did not respond,[50] or where the cause of the complaining party is without merit.[51] It is the duty of counsel to remain in the court room until the final disposition of the case, and if they leave, it is no part of the judge's duty to send for them to be present at the return of the verdict.[52] To sustain an objection to a verdict received in the absence of counsel or party, it must affirmatively appear that they were not notified.[53]

d. Poll of Jurors — (I) *RIGHT* — (A) *In General.* To poll a jury is to call the names of the persons who compose a jury and require each juror to declare what his verdict is, before it is recorded.[54] The judge may, on request of either party, allow the jury to be polled,[55] and in some jurisdictions it is the absolute

41. Tuhe *v.* Eber, 19 Ind. 126; Rosser *v.* McColly, 9 Ind. 587; Whitlow *v.* Moore, 1 Tex. App. Civ. Cas. § 1052.

42. Crotty *v.* Wyatt, 3 Ill. App. 388; Withee *v.* Rowe, 45 Me. 571; Goodwin *v.* Appleton, 22 Me. 453. See also Hary *v.* Speer, 120 Mo. App. 556, 97 S. W. 228.

But it may be received in a different room from that in which the trial was had. Christie *v.* Bowne, 76 Hun (N. Y.) 42, 27 N. Y. Suppl. 657.

In Ohio it has been held that under the practice there a verdict may be delivered to the judge at chambers. Palmer *v.* Harper, Wright (Ohio) 383.

43. Willett *v.* Porter, 42 Ind. 250; Britton *v.* Fox, 39 Ind. 369; Morris *v.* Harburger, 100 N. Y. App. Div. 357, 91 N. Y. Suppl. 409; Baltimore, etc., R. Co. *v.* Polly, 14 Gratt. (Va.) 447.

44. Bedal *v.* Spurr, 33 Minn. 207, 22 N. W. 390; Dubuc *v.* Lazell, 182 N. Y. 482, 75 N. E. 401 [*reversing* 105 N. Y. App. Div. 533, 94 N. Y. Suppl. 1144, and *distinguishing* Morris *v.* Harburger, 100 N. Y. App. Div. 357, 91 N. Y. Suppl. 409; French *v.* Merrill, 27 N. Y. App. Div. 612, 50 N. Y. Suppl. 776; Ingersoll *v.* Lansing, 51 Hun (N. Y.) 101, 5 N. Y. Suppl. 288, upon the ground that while these decisions are apparently at variance with the view therein taken, each was based upon special and peculiar circumstances]; Ferrell *v.* Hales, 119 N. C. 199, 25 S. E. 821; Chichester *v.* Winton Motor Carriage Co., 110 N. Y. App. Div. 78, 96 N. Y. Suppl. 1006, 17 N. Y. Annot. Cas. 450.

45. Wathan *v.* Penebaker, 3 Bibb (Ky.) 99.

46. Chicago, etc., R. Co. *v.* Merriman, 86 Ill. App. 454; State *v.* Allen, 69 Miss. 508, 10 So. 473, 30 Am. St. Rep. 563; Terriberry *v.* Mathot, 111 N. Y. App. Div. 235, 97 N. Y. Suppl. 21, 18 N. Y. Annot. Cas. 32.

47. Stiles *v.* Ford, 2 Colo. 128; Merwin *v.* Wheeler, 41 Conn. 14; Gould *v.* Magee, 3 N. J. L. 475. *Contra*, People *v.* Albany Mayor's Ct., 1 Wend. (N. Y.) 36; Graham *v.* Tate, 77 N. C. 120.

48. Perry *v.* Mulligan, 58 Ga. 479; Kuhl *v.* Supreme Lodge S. K. L., 18 Okla. 383, 89 Pac. 1126. But see Kennedy *v.* Raught, 6 Minn. 235.

Sealed verdict.— The court has power, notwithstanding the absence of counsel, to authorize the jury to return a sealed verdict and to separate. Grace, etc., Co. *v.* Sanborn, 124 Ill. App. 472 [*affirmed* in 225 Ill. 138, 80 N. E. 88].

49. Strowger *v.* Sample, 44 Kan. 298, 24 Pac. 425.

50. Perry *v.* Mulligan, 58 Ga. 479.

51. Jones *v.* Bullard, 52 Ga. 145.

52. Seaton *v.* Smith, 45 Kan. 43, 25 Pac. 222, so holding, although the court had permitted counsel to go, under an arrangement with the judge that counsel would be called. But see Gale *v.* Hoysradt, 1 How. Pr. (N. Y.) 72, holding that a verdict is irregular unless plaintiff was called, before taking verdict, and appearance or default entered.

53. Welch *v.* Stiles, 47 Iowa 171.

54. State L. Ins. Co. *v.* Postal, 43 Ind. App. 144, 84 N. E. 156, 1093.

55. Scott *v.* Scott, 110 Pa. St. 387, 2 Atl. 531.

The object of polling a jury is to give the juror an opportunity to declare his present judgment in open court and to obtain the sense of each individual juror as to the correctness of the verdict rendered. State L. Ins. Co. *v.* Postal, 43 Ind. App. 144, 84 N. E. 156, 1093.

right of either party to have the jury polled on request,[56] whether the verdict is sealed or declared by the foreman,[57] and in these jurisdictions, a refusal by the court to poll the jury on request is error,[58] although the denial of the right does not render the verdict a nullity.[59] In other jurisdictions it is discretionary with the court whether it will poll the jury; [60] but if there is a good reason, a request by either party to test the unanimity of the jury by a poll should be allowed.[61] The right to poll does not exist in case of a directed verdict.[62] An objection that the jury were not polled comes too late after judgment.[63]

(B) *Waiver.* The right to poll the jury is waived by a stipulation that the officer in charge of the jury may receive the verdict.[64] Upon the question whether an agreement of counsel that the jury may bring in a sealed verdict affects the right to poll, the cases are not in accord, some holding that it waives the right,[65] the majority, however, holding otherwise,[66] and where the bill of exceptions shows that the sealed verdict was opened and read by consent of counsel, they cannot object that it was read in the absence of the jury, so as to deprive them of an opportunity to poll the jury.[67]

(II) *When Request Must Be Made.* It is too late to make a request for the poll of the jury after the verdict has been received and recorded,[68] or where the jury has dispersed after handing the verdict to the clerk,[69] or after the jury have been discharged.[70] A request that the jury be polled upon their bringing in a special verdict in which the answers to interrogatories are inconsistent, before the jury further deliberate under the order of the court, is premature.[71]

56. *Illinois.*— Johnson *v.* Howe, 7 Ill. 342.
Indiana.— State L. Ins. Co. *v.* Postal, 43 Ind. App. 144, 84 N. E. 156, 1093.
Kansas.—Thornburgh *v.* Cole, 27 Kan. 490.
Missouri.— Poulson *v.* Collier, 18 Mo. App. 583.
Nebraska.— See Union Pac. R. Co. *v.* Connolly, 77 Nebr. 254, 109 N. W. 368.
New York.— Labar *v.* Koplin, 4 N. Y. 547.
North Carolina.— Smith *v.* Paul, 133 N. C. 66, 45 S. E. 348.
Pennsylvania.—White *v.* Archbald School Dist., 2 Pa. Co. Ct. 1, 3 C. Pl. 118.
See 46 Cent. Dig. tit. "Trial," § 765.

57 District of Columbia *v.* Humphries, 11 App. Cas. (D. C.) 68; Martin *v.* Morelock, 32 Ill. 485; Rigg *v.* Cook, 9 Ill. 336, 46 Am. Dec. 462; Crotty *v.* Wyatt, 3 Ill. App. 388; Jackson *v.* Hawks, 2 Wend. (N. Y.) 619; Fox *v.* Smith, 3 Cow. (N. Y.) 23.

A party who does not object to a sealed verdict cannot later be heard to complain that the jury were permitted to separate without being polled. Baltimore, etc., R. Co. *v.* Keck, 185 Ill. 400, 57 N. E. 197 [*affirming* 84 Ill. App. 159].

58. James *v.* State, 55 Miss. 57, 30 Am. Rep. 496; Hubble *v.* Patterson, 1 Mo. 392.

59. Humphries *v.* District of Columbia, 174 U. S. 190, 19 S. Ct. 637, 43 L. ed. 944.

60. *California.*— Blum *v.* Pate, 20 Cal. 69.
Georgia.—Rutland *v.* Hathorn, 36 Ga. 380; Beale *v.* Hall, 22 Ga. 431; Smith *v.* Mitchell, 6 Ga. 458.
New Hampshire.— Milton School Dist. No. 1 *v.* Bragdon, 23 N. H. 507.
Ohio.— Landis *v.* Dayton, Wright 659.
South Carolina.— Martin *v.* Maverick, 1 McCord 24.
United States.— Dunlop *v.* Munroe, 8 Fed. Cas. No. 4,167, 1 Cranch C. C. 536 [*affirmed* in 7 Cranch 242, 3 L. ed. 329].
See 46 Cent. Dig. tit. "Trial," § 765.

61. Hindrey *v.* Williams, 9 Colo. 371, 12 Pac. 436.

62. Kinser *v.* Calumet Fire-Clay Co., 165 Ill. 505, 46 N. E. 372 [*affirming* 64 Ill. App. 437]; Halladay *v.* Underwood, 90 Ill. App. 130; Ritchie *v.* Arnold, 79 Ill. App. 406; Winn *v.* Neville, 79 Kan. 29, 98 Pac. 272; Bowman *v.* Wheaton, 2 Kan. App. 581, 44 Pac. 750; Donoghue *v.* Indiana, etc., R. Co., 87 Mich. 13, 49 N. W. 512; Jameson *v.* Officer, 15 Tex. Civ. App. 212, 39 S. W. 190.

63. Powell *v.* Feeley, 49 Ill. 143.

64. Koon *v.* Phœnix Mut. L. Ins. Co., 104 U. S. 106, 26 L. ed. 670.

65. Whitner *v.* Hamlin, 12 Fla. 18; Miller *v.* Mabon, 6 Iowa 456. See also Hancock *v.* Winans, 20 Tex. 320.

66. Kohn *v.* Kennedy, 6 Colo. App. 388, 41 Pac. 510; Rigg *v.* Bias, 44 Kan. 148, 24 Pac. 56; Steele *v.* Etheridge, 15 Minn. 501; Root *v.* Sherwood, 6 Johns. (N. Y.) 68, 5 Am. Dec. 191.

67. Butterworth *v.* Pfeiffer, 80 Ill. App. 240.

68. Steele *v.* Etheridge, 15 Minn. 501; Peart *v.* Chicago, etc., R. Co., 5 S. D. 337, 58 N. W. 806; High *v.* Johnson, 28 Wis. 72.

Contradicting record.— Record showing recording of verdict before request to poll made cannot be contradicted by affidavits. Steele *v.* Etheridge, 15 Minn. 501.

69. Smith *v.* Mitchell, 6 Ga. 458.

70. Macon City Bank *v.* Kent, 57 Ga. 283; Springfield Consol. R. Co. *v.* Welsch, 155 Ill. 511, 40 N. E. 1034; Rigg *v.* Cook, 9 Ill. 336, 46 Am. Dec. 462; Zimmerman *v.* Detroit Sulphite Fibre Co., 113 Mich. 1, 71 N. W. 321.

71. Wightman *v.* Chicago, etc., R. Co., 73

(III) *Mode of Poll* — (A) *Questions.* Where the jury has been polled as to a general verdict, it is discretionary with the judge whether he poll the jury as to special issues,[72] or they may be polled *en masse* as to special findings.[73] On poll a juror should be asked "Is this your verdict?" or words to that effect,[74] but no objection lies to the form "Do you find for the plaintiffs or for the defendant?" [75] It is improper to ask the juror "Is this your verdict and are you still satisfied with it?" [76]

(B) *Answers.* No particular form of answer is essential in the polling of a jury,[77] it being sufficient that the answer of each juror clearly showed that the verdict was when signed, and was likewise at the time of polling, the verdict of such juror.[78] If the juror answers "It is not my verdict," no further inquiry can be made of him.[79] In the absence of objection at the time it is a sufficient answer for a juror to say "I assented to it," or "I agreed to it," [80] or "It is my verdict as far as it goes." [81] A verdict is not vitiated by the fact that a juror hesitated to agree to it,[82] or where, in answer to the inquiry, he says it is not his verdict but he consented to it, and subsequently answers that it is his verdict,[83] or says he consented to it under protest.[84]

(IV) *Dissent or Disagreement of Jurors and Resubmission of Cause.* A juror may disagree to the verdict after it is received and upon his examination on poll,[85] whether the verdict be a sealed verdict or not,[86] or he may express his dissent when the verdict is about to be delivered.[87] To make the verdict good, the poll of the jury must show unanimity,[88] and if the verdict is in writing it should be read to the jury, and they must assent to it as read,[89] and such assent must be given in open court.[90] Assent may be presumed, if the

Wis. 169, 40 N. W. 689, 9 Am. St. Rep. 778, 2 L. R. A. 185.

72. Bell *v.* Hutchings, 86 Ga. 562, 12 S. E. 974.

73. Norman *v.* Hopper, 38 Wash. 415, 80 Pac. 551.

74. Black *v.* Thornton, 31 Ga. 641; Bowen *v.* Bowen, 74 Ind. 470.

The court cannot be required to have the question put, Is this your verdict against each and both of defendants? Labar *v.* Koplin, 4 N. Y. 547.

75. Black *v.* Thornton, 31 Ga. 641.

76. Bowen *v.* Bowen, 74 Ind. 470.

77. Chicago City R. Co. *v.* Shreve, 128 Ill. App. 462 [*affirmed* in 226 Ill. 530, 80 N. E. 1049].

78. Chicago City R. Co. *v.* Shreve, 128 Ill. App. 462 [*affirmed* in 226 Ill. 530, 80 N. E. 1049].

79. Poulson *v.* Collier, 18 Mo. App. 583.

80. Green *v.* Bliss, 12 How. Pr. (N. Y.) 428.

81. Rankin *v.* Harper, 23 Mo. 579.

82. Coners *v.* Kirk, 78 Ga. 480, 3 S. E. 442.

83. Mitchell *v.* Parks, 26 Ind. 354.

84. Wyley *v.* Bull, 41 Kan. 206, 20 Pac. 855.

85. Adkins *v.* Blake, 2 J. J. Marsh. (Ky.) 40; Lawrence *v.* Stearns, 11 Pick. (Mass.) 501; Blackley *v.* Sheldon, 7 Johns. (N. Y.) 32.

86. *Illinois.*— Martin *v.* Morelock, 32 Ill. 485.

Iowa.— Jessup *v.* Chicago, etc., R. Co., 82 Iowa 243, 48 N. W. 77.

Kansas.— Morgan *v.* Bell, 41 Kan. 345, 21 Pac. 255.

New York.— Bunn *v.* Hoyt, 3 Johns. 255.

North Carolina.— Owens *v.* Southern R. Co., 123 N. C. 183, 31 S. E. 383, 68 Am. St. Rep. 821.

South Carolina.— Devereux *v.* Champion Cotton Press Co., 14 S. C. 396.

In Iowa, this is allowed only where such course has been agreed upon and entered of record. Dunbauld *v.* Thompson, 109 Iowa 199, 80 N. W. 324; Miller *v.* Mabon, 6 Iowa 456.

The jury should be discharged under such circumstances. Kramer *v.* Kister, 187 Pa. St. 227, 40 Atl. 1008, 44 L. R. A. 432.

87. Perry *v.* Mays, 2 Bailey (S. C.) 354.

88. Bond *v.* State, 69 Miss. 648, 9 So. 353; Scott *v.* Scott, 110 Pa. St. 387, 2 Atl. 531.

Where by inadvertence only eleven jurors are polled and the jury is then discharged, the remaining juror may be polled before the jury have left the jury box. Chicago, etc., R. Co. *v.* Downey, 85 Ill. App. 175.

89. Watertown Ecclesiastical Soc.'s Appeal, 46 Conn. 230; Catholic Order of Foresters *v.* Fitz, 181 Ill. 206, 54 N. E. 952 [*affirming* 81 Ill. App. 389]; Ellsworth *v.* Varnum, 105 Ill. App. 487. See also Lyle *v.* Light, 58 Wis. 248, 16 N. W. 630. *Compare* Magoohan *v.* Curran, 71 Conn. 551, 42 Atl. 656.

The mere fact that a juror tried to address the court, after he had twice assented to the verdict, it not appearing that the court saw or heard him or that the juror wanted to attack the verdict, is not ground for new trial. Hughes *v.* Detroit, etc., R. Co., 78 Mich. 399, 44 N. W. 396.

90. Young *v.* Seymour, 4 Nebr. 86. But see Paige *v.* O'Neal, 12 Cal. 483.

verdict is read by the judge in court and accepted without objection at the time,[91] or if assented to by the foreman without disagreement being expressed by other jurors.[92] Where it appears on the jury's coming in with a verdict that their agreement is only apparent, they may be sent out to reconsider the verdict;[93] and, similarly, where the poll shows that a juror consented to the verdict merely in order to prevent a hung jury, although not satisfied that the successful party had established his case,[94] that the verdict is the result of compromise,[95] or that a juror's assent is qualified,[96] the verdict should not be received. More than one poll may be taken, where the court believes a mistake has been made, or is informed by a juror that he desires to change his vote,[97] and the verdict will stand if he thereafter agrees to it upon its being read to him.[98] If the disagreement is merely as to costs, it will not invalidate the verdict,[99] nor will dissatisfaction with the legal effect of a verdict.[1]

(v) *Disclosing Grounds of Verdict.* The court may inquire of the jury respecting their verdict and the grounds upon which they proceeded, for the purpose of ascertaining whether the case has been properly tried,[2] in the absence of and without the consent of counsel,[3] and the inquiry may be made after the jury have been discharged and have separated.[4] But such a proceeding is discretionary with the court,[5] and a refusal to instruct the jury after their discharge to deliver to counsel the calculations on which their verdict is based is not error,[6] and the judge may refuse to hear the grounds of the verdict, although the jury may desire to state them,[7] or may decline, after the jury has separated, to make an inquiry as to their finding as to a particular fact.[8]

3. Form and Language — a. Necessity and Sufficiency of General Finding. A general verdict is proper when it will ascertain and fix the rights of the parties,[9] and under some statutes in a case tried by jury as of right, a general verdict must be rendered,[10] and the court cannot render a judgment on findings of particular

91. Raymond *v.* Bell, 18 Conn. 81.

92. Blum *v.* Pate, 20 Cal. 69; Cross *v.* Grant, 62 N. H. 675, 13 Am. St. Rep. 607; Walker *v.* Sawyer, 13 N. H. 191.

93. Campbell *v.* Murray, 62 Ga. 86; Lagrone *v.* Timmerman, 46 S. C. 372, 24 S. E. 290.

94. Frick *v.* Reynolds, 6 Okla. 638, 52 Pac. 391.

95. Ostrander *v.* Lansing, 111 Mich. 693, 70 N. W. 332.

96. Weeks *v.* Hart, 24 Hun (N. Y.) 181; Owens *v.* Southern R. Co., 123 N. C. 183, 31 S. E. 383, 68 Am. St. Rep. 821. But see Black *v.* Thornton, 31 Ga. 641.

97. Rice Fisheries Co. *v.* Pacific Realty Co., 35 Wash. 535, 77 Pac. 839.

98. Lowe *v.* Dorsett, 125 N. C. 301, 34 S. E. 442.

99. Webster *v.* McKinster, 1 Pinn. (Wis.) 644.

1. Fitzpatrick *v.* Himmelmann, 48 Cal. 588.

2. State L. Ins. Co. *v.* Postal, 43 Ind. App. 144, 84 N. E. 156, 1093; Walker *v.* Bailey, 65 Me. 354; Hart *v.* Brierley, 189 Mass. 598, 76 N. E. 286; Spurr *v.* Shelburne, 131 Mass. 429; Norris *v.* Haverhill, 65 N. H. 89, 18 Atl. 85; Dearborn *v.* Newhall, 63 N. H. 301; Walker *v.* Sawyer, 13 N. H. 191. But see Mitchell *v.* Parks, 26 Ind. 354; Pack *v.* Snyder, 13 Mich. 21.

The manner in which the jury computed interest may be inquired into. Dorr *v.* Fenno, 12 Pick. (Mass.) 521.

Where there are several grounds of claim or defense the court may inquire of the jury upon what facts their verdict was found. Spoor *v.* Spooner, 12 Metc. (Mass.) 281.

The former answer to inquiries by the court as to what the jury intended to include in their verdict made without objection to any juror and in presence of the whole panel may be taken as the answer of the jurymen. South Hampton *v.* Fowler, 54 N. H. 197.

3. Lawler *v.* Earle, 5 Allen (Mass.) 22.

4. Dearborn *v.* Newhall, 63 N. H. 301; Germond *v.* Central Vermont R. Co., 65 Vt. 126, 26 Atl. 401.

5. Snelling *v.* Darrell, 17 Ga. 141.

This power should be exercised cautiously. Walker *v.* Bailey, 65 Me. 354.

6. Snelling *v.* Darrell, 17 Ga. 141; Green *v.* Clay, 10 Allen (Mass.) 90, 87 Am. Dec. 622; Houston Electric Co. *v.* Robinson, (Tex. Civ. App. 1903) 76 S. W. 209.

The answers may be made part of the record and will have the effect of special findings of the facts stated by them. Spurr *v.* Shelburne, 131 Mass. 429.

7. Horner *v.* Watson, 6 C. & P. 680, 25 E. C. L. 636.

8. Green *v.* Clay, 10 Allen (Mass.) 90, 87 Am. Dec. 622.

9. Johnson *v.* Higgins, 53 Conn. 236, 1 Atl. 616.

10. Taft *v.* Baker, 2 Kan. App. 600, 42 Pac. 502; Bell *v.* Coffin, 2 Kan. App. 337, 43 Pac. 861.

questions of fact, in the absence of a general verdict, or unless the special finding has all the elements of, and is in legal effect, a special verdict;[11] but when a general verdict is required, it is discretionary with the court to direct the jury to find upon particular questions of fact.[12] Where, however, under the statute, it is discretionary with the jury to render a general or special verdict, it is error for the court to direct a special verdict against the objections of one of the parties.[13] The submission of special issues, decided in favor of defendant, and a general verdict for defendant is not ground for reversal, the judgment being sustained by the general finding.[14]

b. Certainty and Definiteness; Informality — (I) *In General.* A verdict will not generally be held invalid for mere informality if its meaning is sufficiently intelligible to be the basis of a legal judgment,[15] or if it can be made definite and

11. Hopkins *v.* Shull, 2 Ohio Dec. (Reprint) 541, 3 West. L. Month. 609.

12. Schatz *v.* Pfeil, 56 Wis. 429, 14 N. W. 628.

13. Pickett *v.* Handy, 5 Colo. App. 295, 38 Pac. 606; Heffner *v.* Brownell, 78 Iowa 648, 43 N. W. 468; Schultz *v.* Cremer, 59 Iowa 182, 13 N. W. 59.

14. Heflin *v.* Burns, 70 Tex. 347, 8 S. W. 48.

15. *Alabama.*—Wiggins *v.* Witherington, 96 Ala. 535, 11 So. 539.

Colorado.— Davis *v.* Shepherd, 31 Colo. 141, 75 Pac. 57.

Georgia.— Flannery *v.* Harley, 117 Ga. 483, 43 S. E. 765; Atlanta St. R. Co. *v.* Atlanta, 66 Ga. 104; Beckwith *v.* Carleton, 14 Ga. 691; Cameron *v.* American Soda Fountain Co., 3 Ga. App. 425, 60 S. E. 109.

Illinois.—Atlantic Ins. Co. *v.* Wright, 22 Ill. 462; Knefel *v.* Daly, 91 Ill. App. 321; Independent Order Mut. Aid *v.* Stahl, 64 Ill. App. 314; Metzger *v.* Huntington, 51 Ill. App. 377.

Indiana.— Garrett *v.* State, 149 Ind. 264, 49 N. E. 33; Balue *v.* Taylor, 136 Ind. 368, 36 N. E. 269; Thames L. & T. Co. *v.* Beville, 100 Ind. 309; Early *v.* Hamilton, 75 Ind. 376.

Iowa.— Kocher *v.* Palmetier, 112 Iowa 84, 83 N. W. 816; McGinty *v.* Keokuk, 66 Iowa 725, 24 N. W. 506; Cane *v.* Watson, Morr. 52; Harrell *v.* Springfield, Morr. 18.

Kentucky.— Riggs *v.* Maltby, 2 Metc. 88; Young *v.* Chandler, 13 B. Mon. 252; Noel *v.* Hudson, 13 B. Mon. 204; Denny *v.* Bocker, 2 Bibb 427; Crozier *v.* Gano, 1 Bibb 257.

Louisiana.—Wichtrecht *v.* Fasnacht, 17 La. Ann. 166; New Orleans City Bank *v.* Foucher, 9 La. 405.

Maine.— Guilford M. E. Parish *v.* Clarke, 74 Me. 110; Pejepscot Proprietors *v.* Nichols, 10 Me. 256.

Massachusetts.— Miller *v.* Morgan, 143 Mass. 25, 8 N. E. 644.

Minnesota.— Cohues *v.* Finholt, 101 Minn. 180, 112 N. W. 12.

Mississippi.— De Ford *v.* Furniss, 43 Miss. 132.

Missouri.— Muller *v.* St. Louis Hospital Assoc., 73 Mo. 242; Carter *v.* Blankenship, 3 Mo. 583; Beiler *v.* Devoll, 40 Mo. App. 251; Ryors *v.* Prior, 31 Mo. App. 555.

Nebraska.— Parrish *v.* McNeal, 36 Nebr. 727, 55 N. W. 222.

New Hampshire.— Litchfield *v.* Londonderry, 39 N. H. 247; Pettes *v.* Bingham, 10 N. H. 514.

New Jersey.— Delaware, etc., R. Co. *v.* Toffey, 38 N. J. L. 525.

New York.— Stevens *v.* Sonto, 2 N. Y. Suppl. 484; Wilson *v.* Larmouth, 3 Johns. 433; Felter *v.* Mulliner, 2 Johns. 181.

Ohio.—White *v.* Francis, 5 Ohio Dec. (Reprint) 323, 4 Am. L. Rec. 501.

Pennsylvania.— Miller *v.* Miller, 187 Pa. St. 572, 41 Atl. 277; Thompson *v.* Musser, 1 Dall. 457, 1 L. ed. 222.

Texas.—Yoe *v.* Montgomery, 68 Tex. 338, 4 S. W. 622; Wells *v.* Barnett, 7 Tex. 584; Rushing *v.* Lanier, 51 Tex. Civ. App. 278, 111 S. W. 1089; Rapid Transit R. Co. *v.* Miller, (Civ. App. 1905) 85 S. W. 439; Meyer *v.* Hill, (Civ. App. 1898) 45 S. W. 333; San Antonio, etc., R. Co. *v.* Long, (Civ. App. 1894) 28 S. W. 214.

Virginia.— Grayson *v.* Buchanan, 88 Va. 251, 13 S. E. 457.

Wisconsin.— Harran *v.* Klaus, 79 Wis. 383, 48 N. W. 479; Wausau Boom Co. *v.* Plumer, 49 Wis. 118, 5 N. W. 53.

United States.— Parks *v.* Turner, 12 How. 39, 13 L. ed. 883.

See 46 Cent. Dig. tit. "Trial," § 786 *et seq.*

Thus a verdict is not invalid merely because it states the reason for the finding (Trimble *v.* Isbell, 51 Ala. 356; Hunter *v.* Burlington, etc., R. Co., 84 Iowa 605, 51 N. W. 64); uses the word "believe" instead of the word "find" (Patton *v.* Gregory, 21 Tex. 513); speaks of "evaluating" instead of "valuing" (Snyder *v.* U. S., 112 U. S. 216, 5 S. Ct. 118, 28 L. ed. 697); in speaking of the damages uses the word "estimate" instead of "assess" (Roddy *v.* McGetrick, 49 Ala. 159); omits the *similiter* after the verdict (Brewer *v.* Tarpley, 1 Wash. (Va.) 363); or fails to show whether the damages assessed are actual or exemplary, the jury not being charged to specify which they find (Heiligmann *v.* Rose, 81 Tex. 222, 16 S. W. 931, 26 Am. St. Rep. 804, 13 L. R. A. 272); or which does not state a legal conclusion, the facts authorizing the conclusion being found (Orr *v.* Miller, 98 Ind. 436); or because amounts are stated in figures (Stout *v.* Hopping, 6 N. J. L. 125; Mayson *v.* Sheppard, 12 Rich. (S. C.) 254).

certain without resorting to facts *aliunde*,[16] as by a reference to the pleadings,[17] evidence,[18] or record.[19] If possible a construction will be given to the verdict which will make it effective rather than void, *ut res magis valeat quam pereat*;[20] but a verdict is bad where it is so uncertain that it cannot be clearly ascertained what, if any, issues were passed on by the jury,[21] or where it is not certain in itself, and does not find facts from which certainty can be attained,[22] or which cannot be made certain without looking out of the record,[23] or which is otherwise so uncertain or indefinite as not to enable the court to base a legal judgment thereon,[24] or is inconsistent or illogical.[25] Where the verdict does not clearly

Although the spelling, grammar, and punctuation is incorrect, if the meaning is plain in view of the surrounding circumstances, the verdict will stand. Gurley *v.* O'Dwyer, 61 Mo. App. 348; Ryors *v.* Prior, 31 Mo. App. 555; Pepper *v.* Harris, 78 N. C. 71.

A verdict, written by a German-American, finding for plaintiff, and reciting that the jury "fix the blame on the P. Railroad Company," is not rendered uncertain by the fact that the word "blame" is written "plame." Pittsburg, etc., R. Co. *v.* Darlington, 129 Ky. 266, 111 S. W. 360, 33 Ky. L. Rep. 818.

Although a verdict in ejectment is not in the form required by statute, but is generally "for the plaintiff," the judgment will not be reversed on that ground, where no substantial right of the adverse party was affected by it. Allard *v.* Lamirande, 29 Wis. 502.

16. McCormick *v.* Hickey, 24 Mo. App. 362.

A finding that all the allegations of the complaint are true is sufficiently definite and certain. Young *v.* Clark, 7 Cal. App. 194, 93 Pac. 1056.

17. *California.*—Hutchinson *v.* Inyo County Super. Ct., 61 Cal. 119.

Georgia.— Small *v.* Hicks, 81 Ga. 691, 8 S. E. 628; Heinkin *v.* Barbrey, 40 Ga. 249.

Minnesota.— Leftwich *v.* Day, 32 Minn. 512, 21 N. W. 731.

Texas.— Munn *v.* Martin, (1890) 15 S. W. 195; Newcomb *v.* Walton, 41 Tex. 318; Galbreath *v.* Atkinson, 15 Tex. 21.

Virginia.— Boatright *v.* Meggs, 4 Munf. 145. But see Richards *v.* Tabb, 4 Call 522.

Wisconsin.— Bartlett *v.* Clough, 94 Wis. 196, 68 N. W. 875.

See 46 Cent. Dig. tit. "Trial," § 783.

18. Harvey *v.* Head, 68 Ga. 247; Vanvalkenberg *v.* Vanvalkenberg, 90 Ind. 433; Cohues *v.* Finholt, 101 Minn. 180, 112 N. W. 12; Ward *v.* Busack, 46 Wis. 407, 1 N. W. 107.

In Texas, a verdict which can be made certain only by reference to the evidence is held void. Smith *v.* Tucker, 25 Tex. 594; Bennett *v.* Seabright, (Civ. App. 1895) 32 S. W. 1048.

19. Westphal *v.* Sipe, 62 Ill. App. 111; Buckeye Engine Co. *v.* Buckwalter, 61 S. W. 263, 22 Ky. L. Rep. 1706; Cohues *v.* Finholt, 101 Minn. 180, 112 N. W. 12; Secrest *v.* Jones, 30 Tex. 596; Smith *v.* Johnson, 8 Tex. 418; Rushing *v.* Lanier, 51 Tex. Civ. App. 278, 111 S. W. 1089.

20. Carr *v.* Stevenson, 5 Humphr. (Tenn.) 559; Manwell *v.* Manwell, 14 Vt. 14.

A verdict must receive a reasonable construction, and the test of its validity is whether or not it is an intelligible answer to the issue submitted to the jury. Spofford *v.* Rhode Island Suburban R. Co., 29 R. I. 34, 69 Atl. 2.

21. *Connecticut.*— Day *v.* Webb, 28 Conn. 140.

Louisiana.—Wall *v.* Hampton, 4 Mart. N. S. 310.

Minnesota.— Moriarty *v.* McDevitt, 46 Minn. 136, 48 N. W. 684.

Nebraska.— Lamb *v.* Briggs, 22 Nebr. 138, 34 N. W. 217.

New Hampshire.— Cheswell *v.* Chapman, 42 N. H. 47; Allen *v.* Aldrich, 29 N. H. 63.

Pennsylvania.—Ashbridge *v.* Kenyon, 15 Leg. Int. 158.

Texas.— Gulf, etc., R. Co. *v.* Hathaway, 75 Tex. 557, 12 S. W. 999; Walston *v.* Walston, (Civ. App. 1894) 24 S. W. 951.

Virginia.— Blank *v.* Foushee, 4 Munf. 61.

See 46 Cent. Dig. tit. "Trial," § 783.

22. Lee *v.* English, 107 Ga. 152, 33 S. E. 39; Jackson *v.* Jackson, 40 Ga. 150; Murray *v.* King, 30 N. C. 528; Bradshaw *v.* Mayfield, 24 Tex. 481; Bennett *v.* Seabright, (Tex. Civ. App. 1895) 32 S. W. 1048; Smith *v.* Roberts, (Tex. App. 1890) 15 S. W. 126; Clendenning *v.* Mathews, 1 Tex. App. Civ. Cas. § 904; Burnett *v.* Harrington, 58 Tex. 359; Jones *v.* Leath, 32 Tex. 329; Grays Harbor Boom Co. *v.* Lytle Logging, etc., Co., 38 Wash. 88, 80 Pac. 271.

23. Cincinnati, etc., R. Co. *v.* Ward, 5 Ohio Dec. (Reprint) 391, 5 Am. L. Rec. 372; Smith *v.* Tucker, 25 Tex. 594; Hawkins *v.* Lee, 22 Tex. 544; Goggan *v.* Evans, 12 Tex. Civ. App. 256, 33 S. W. 891.

24. *Illinois.*— Knox *v.* Breed, 12 Ill. 61.

Louisiana.— Hampton *v.* Watterston, 14 La. Ann. 239.

Maine.— Nicholson *v.* Maine Cent. R. Co., 100 Me. 342, 61 Atl. 834.

Missouri.— Kenney *v.* Kansas City, etc., R. Co., 79 Mo. App. 204.

New York.— Conrey *v.* Metropolitan St. R. Co., 73 N. Y. App. Div. 518, 77 N. Y. Suppl. 222.

Pennsylvania.— Diehl *v.* Evans, 1 Serg. & R. 367.

South Carolina.— Heyward *v.* Bennett, 3 Brev. 113.

Virginia.— Rogers *v.* Chandler, 3 Munf. 64.

See 46 Cent. Dig. tit. "Trial," § 783.

An argumentative verdict is bad. Gerrish *v.* Train, 3 Pick. (Mass.) 124.

25. Conley *v.* Arnold, 93 Ga. 823, 20 S. E. 762; Stevens *v.* Walkerf, 99 Me. 43, 58 Atl.

find the matter in issue it cannot be helped by intendment,[26] or be corrected or cured by the judgment.[27]

(II) *AMOUNT OF RECOVERY.* In an action in which a money judgment is sought, the jury must find the amount due as well as the right of recovery,[28] this rule being statutory in some states,[29] and a general verdict for either party does not authorize judgment for any amount.[30] The rules above stated as to the certainty and definiteness required in a verdict [31] apply to the finding of the amount due, and a verdict not finding such amount with sufficient definiteness to authorize a judgment to be entered thereon for any definite sum is bad and will be set aside;[32] but strict technical accuracy is not required in the statement of the amount,[33] it being sufficient if that can be ascertained by mere mathematical calculation,[34]

53; Johnson *v.* Labarge, 46 Mo. App. 433; Metz *v.* Campbell Printing Press, etc., Co., 11 Misc. (N. Y.) 284, 32 N. Y. Suppl. 155; Levy *v.* Beekman Pub. Co., 19 N. Y. Suppl. 751.

26. Jewett *v.* Davis, 6 N. H. 518.

27. Bashford *v.* Kendall, 2 Ariz. 6, 7 Pac. 176; Cohues *v.* Finholt, 101 Minn. 180, 112 N. W. 12.

28. *Kentucky.*— Williams *v.* Preston, 3 J. J. Marsh. 600, 20 Am. Dec. 179.

Mississippi.— Gilleylen *v.* Stewart, 72 Miss. 262, 16 So. 495.

Missouri.— Ryors *v.* Prior, 31 Mo. App. 555.

Nebraska.— Bowers *v.* Rice, 19 Nebr. 576, 27 N. W. 646.

Nevada.— Knickerbocker, etc., Silver Min. Co. *v.* Hall, 3 Nev. 194.

Pennsylvania.— Pulhamus *v.* Pursel, 2 Pa. L. J. Rep. 147.

Tennessee.— Neville *v.* Northcutt, 7 Coldw. 294.

See 46 Cent. Dig. tit. "Trial," § 784.

29. See the statutes of the several states. And see Buzanes *v.* Frost, 19 Colo. App. 388, 75 Pac. 594; Gilleylen *v.* Stewart, 72 Miss. 262, 16 So. 495; Lamb *v.* Briggs, 22 Nebr. 138, 34 N. W. 217; Bowers *v.* Rice, 19 Nebr. 576, 27 N. W. 646.

For verdicts held sufficient under such a statute see Davenport *v.* Fulkerson, 70 Mo. 417; Ryors *v.* Prior, 31 Mo. App. 555.

30. Clendenning *v.* Mathews, 1 Tex. App. Civ. Cas. § 904.

A general verdict for plaintiff in an action for unliquidated damages will not support a judgment for any particular amount (Washington *v.* Calhoun, 102 Ga. 675, 30 S. E. 434; Chesapeake, etc., R. Co. *v.* Maddox, 42 S. W. 1124, 19 Ky. L. Rep. 966) nor in such case will a verdict for nominal damages (Sellers *v.* Mann, 113 Ga. 643, 39 S. E. 11).

31. See *supra*, XI, B, 3, b, (I).

32. *California.*—Watson *v.* Damon, 54 Cal. 278.

Georgia.— Lake *v.* Hardee, 57 Ga. 459; Jackson *v.* Jackson, 40 Ga. 150.

Minnesota.— Fryberger *v.* Carney, 26 Minn. 84, 1 N. W. 807.

North Carolina.— Crews *v.* Crews, 64 N. C. 536.

Pennsylvania.— Pulhamus *v.* Pursel, 2 Pa. L. J. Rep. 141.

Tennessee.— Neville *v.* Northcutt, 7 Coldw. 294.

Texas.— Bradshaw *v.* Mayfield, 24 Tex. 481; Mays *v.* Lewis, 4 Tex. 38; Slayden *v.* Palmo, (Civ. App. 1909) 117 S. W. 1054; Smith *v.* Roberts, (App. 1890) 15 S. W. 126.

See 46 Cent. Dig. tit. "Trial," § 784.

Where money is tendered and brought into court, and plaintiff takes it out, but proceeds for more, and the jury find the sum tendered insufficient, their proper course is to return a verdict for the whole sum due, without regard to the sum deposited with the clerk, which latter sum the court will deduct, and render judgment for the residue. Dresser *v.* Witherle, 9 Me. 111.

33. *Colorado.*— Knight *v.* Fisher, 15 Colo. 176, 25 Pac. 78.

Georgia.— Giles *v.* Spinks, 64 Ga. 205; Telfair County *v.* Clements, 1 Ga. App. 437, 57 S. E. 1059.

Minnesota.— Leftwich *v.* Day, 32 Minn. 512, 21 N. W. 731.

Mississippi.— De Ford *v.* Furniss, 43 Miss. 132.

Missouri.— Davenport *v.* Fulkerson, 70 Mo. 417.

South Carolina.— Fields *v.* Lancaster Cotton Mills, 77 S. C. 546, 58 S. E. 608, 122 Am. St. Rep. 593, 11 L. R. A. N. S. 822.

See 46 Cent. Dig. tit. "Trial," § 784.

Omission of "dollars," or dollar sign.— In actions for the recovery of money, the omission of the word "dollars" (Cox *v.* High Point, etc., R. Co., 149 N. C. 86, 62 S. E. 761; Bluestein *v.* Collins, (Tex. Civ. App. 1907) 103 S. W. 687; Hopkins *v.* Orr, 124 U. S. 510, 8 S. Ct. 590, 31 L. ed. 523), or of the dollar sign (Montgomery *v.* Shirley, 159 Ala. 239, 48 So. 679; Central of Georgia R. Co. *v.* Mote, 131 Ga. 166, 62 S. E. 164; Provo Mfg. Co. *v.* Severance, 51 Mo. App. 260; Gulf, etc., R. Co. *v.* Fink, 4 Tex. Civ. App. 269, 23 S. W. 330), will not vitiate the verdict. There is no substantial difference between a verdict for "1,000 dollars" and a verdict for "dollars 1,000," and a verdict in the latter form is not open to the objection of uncertainty and indefiniteness. South Chicago City R. Co. *v.* Atton, 137 Ill. App. 364.

34. *Colorado.*— Knight *v.* Fisher, 15 Colo. 176, 25 Pac. 78.

Georgia.— Beckwith *v.* Carleton, 14 Ga. 691.

Kentucky.— Logan County Nat. Bank *v.* Townsend, 3 S. W. 122, 8 Ky. L. Rep. 694.

and a verdict is good, although the amount of recovery is stated merely by reference to the amount claimed in the petition, or can be ascertained by a reference thereto.[35] Nor will a verdict be set aside for manifest mistake in the statement of the amount recovered, the amount intended to be stated being clear.[36] A verdict in excess of the amount claimed is not necessarily void,[37] but will be set aside unless plaintiff consents to a reduction of the verdict to the amount claimed,[38] unless the excess is slight, when it may be referred to interest.[39] Where the amount due is not in issue, a verdict generally in favor of either party is sufficient, without assessing damages,[40] even under a statute requiring the jury to assess the amount of recovery, such a provision not applying where the amount is not in issue,[41] and such a statute does not relate to cases where the amount can be computed from the record or from the admitted evidence.[42] Where the jury are not charged separately as to actual and exemplary damages, their failure to specify in their verdict which they find is not reversible error.[43] Where words and figures in the verdict conflict as to the amount, the words will control.[44]

(III) *INTEREST*. If the jury allow interest, their finding must not be so ambiguous or incomplete as to render the amount or rate uncertain,[45] and where

Mississippi.— De Ford *v.* Furniss, 43 Miss. 132.

Ohio.— Mack *v.* Fries, 5 Ohio Dec. (Reprint) 174, 3 Am. L. Rec. 385.

Texas.— Irvin *v.* Garner, 50 Tex. 48; Secrest *v.* Jones, 30 Tex. 596.

See 46 Cent. Dig. tit. "Trial," § 784.

35. *Alabama.*— Taylor *v.* Rogers, Minor 197.

Georgia.— West *v.* Americus Bank, 63 Ga. 230; Jackson *v.* Jackson, 47 Ga. 99; Phillips *v.* Behn, 19 Ga. 298.

Iowa.— McGregor *v.* Armill, 2 Iowa 30.

Kentucky.— Brannin *v.* Foree, 12 B. Mon. 506.

Louisiana.— McClellan Dry-Dock Co. *v.* Farmers' Alliance Steam-Boat Line, 43 La. Ann. 258, 9 So. 630; Newton *v.* Ker, 14 La. Ann 704; Wooter *v.* Turner, 6 Mart. N. S. 442.

Minnesota.— Jones *v.* King, 30 Minn. 368, 15 N. W. 670.

Mississippi.— De Ford *v.* Furniss, 43 Miss. 132; Maulding *v.* Rigby, 1 How. 579.

New York.— Sullivan *v.* New York City R. Co., 94 N. Y. Suppl. 370.

Ohio.— Mack *v.* Fries, 5 Ohio Dec. (Reprint) 174, 3 Am. L. Rec. 385.

Texas.— Newcomb *v.* Walton, 41 Tex. 318; Galbreath *v.* Atkinson, 15 Tex. 21; James *v.* Wilson, 7 Tex. 230; Carothers *v.* Lange, (Civ. App. 1900) 55 S. W. 580; Alamo F. Ins. Co. *v.* Lancaster, 7 Tex. Civ. App. 677, 28 S. W. 126; Holden *v.* Meyer, 1 Tex. App. Civ. Cas. § 829.

See 46 Cent. Dig. tit. "Trial," § 784.

36. Heinkin *v.* Barbrey, 40 Ga. 249.

37. Wilson *v.* Larmouth, 3 Johns. (N. Y.) 433; Wausau Boom Co. *v.* Plumer, 49 Wis. 118, 5 N. W. 53.

38. Dick *v.* Biddle, 105 Md. 308, 66 Atl. 21; Branower *v.* Independent Match Co., 83 N. Y. App. Div. 370, 82 N. Y. Suppl. 224.

39. Southern R. Co. *v.* Webb, (Ala. 1906) 41 So. 420.

40. *Arkansas.*— Bell *v.* Old, 88 Ark. 99, 113 S. W. 1023.

California.— Redmond *v.* Weismann, 77 Cal. 423, 20 Pac. 544.

Illinois.—Hall *v.* Emporia First Nat. Bank, 133 Ill. 234, 24 N. E. 546.

Kentucky.— Cooper *v.* Poston, 1 Duv. 92, 85 Am. Dec. 610.

Louisiana.—Wooter *v.* Turner, 6 Mart. N. S. 442.

Montana.— Josephi *v.* Mady Clothing Co., 13 Mont. 195, 33 Pac. 1.

New York.— Bulkley *v.* Marks, 15 Abb. Pr. 454, 24 How. Pr. 455.

North Carolina.— Merrimon *v.* Norton, 67 N. C. 115.

North Dakota.— English *v.* Goodman, 3 N. D. 129, 54 N. W. 540.

Texas.— Warren *v.* Smith, 24 Tex. 484, 76 Am. Dec. 115.

See 46 Cent. Dig. tit. "Trial," § 784.

41. Louisville, etc., R. Co. *v.* Hartwell, 99 Ky. 436, 36 S. W. 183, 38 S. W. 1041, 18 Ky. L. Rep. 745; Cooper *v.* Poston, 1 Duv. (Ky.) 92, 85 Am. Dec. 610.

42. Mack *v.* Fries, 5 Ohio Dec. (Reprint) 174, 3 Am. L. Rec. 385.

43. Heligmann *v.* Rose, 81 Tex. 222, 16 S. W. 931, 26 Am. St. Rep. 804, 13 L. R. A. 272.

44. Shaefer *v.* Missouri Pac. R. Co., 98 Mo. App. 445, 72 S. W. 154.

45. *Georgia.*— Buice *v.* McCrary, 94 Ga. 418, 20 S. E. 632, holding that in an action on an account, a verdict for plaintiff for "forty-one dollars and four cents principal and interest," will be set aside as ambiguous, as it does not disclose whether the interest referred to was interest to be computed, or was interest already computed and included in that sum.

Illinois.— Minnesota Mut. L. Ins. Co. *v.* Link, 230 Ill. 273, 82 N. E. 637; Parker *v.* Fisher, 39 Ill. 164.

Minnesota.— Fryberger *v.* Carney, 26 Minn. 84, 1 N. W. 807.

North Carolina.— Crews *v.* Crews, 64 N. C. 536; Murray *v.* King, 30 N. C. 528.

Texas.— Mays *v.* Lewis, 4 Tex. 38.

Washington.— Meeker *v.* Gardella, 1 Wash. 139, 23 Pac. 837.

See 46 Cent. Dig. tit. "Trial," § 785.

the verdict for plaintiff includes principal and interest, and fails to specify separately the amount of each, a new trial should be granted, unless plaintiff renounces future interest on the judgment.[46] But if a verdict is sufficiently definite to be rendered certain by mere mathematical calculation or reference to the pleadings it is sufficient,[47] as in the case of a verdict finding the amount on which interest is to be calculated, and the date from which, or period for which, it is to run,[48] and the computation of interest may be made by the court,[49] and a judgment will not be reversed because the judge computed interest, instead of allowing the jury to do it, no objection having been made at the time.[50] But the verdict is insufficient if the term is not fixed,[51] and the court cannot render judgment on a verdict entirely insufficient and insensible.[52] Where the jury renders a verdict for a certain sum "and interest," although such verdict is defective, it being the duty of the jury to compute the interest or give the grounds of computation, plaintiff may take judgment for principal alone,[53] and a verdict, although including interest in the damages and thus informal, may be allowed to stand.[54] Where

A verdict for a specified sum, "with interest," is not subject to accurate computation, in the absence of something to indicate from what date interest is to be computed; that the complaint claims interest from a certain day not warranting the inference that the jury had that date in mind. Delafield *v.* J. K. Armsby Co., 124 N. Y. App. Div. 621, 109 N. Y. Suppl. 314.

46. Hubbard *v.* McRae, 95 Ga. 705, 22 S. E. 714.

47. *California.*— Meyer *v.* Parsons, 129 Cal. 653, 62 Pac. 216.

Indiana.— Gaff *v.* Hutchinson, 38 Ind. 341.

New York.— Page *v.* Cady, 1 Cow. 115.

South Carolina.— State Bank *v.* Bowie, 1 McMull. 429.

Texas.— Buchanan *v.* Townsend, 80 Tex. 534, 16 S. W. 315; Darden *v.* Mathews, 22 Tex. 320; B. C. Evans Co. *v.* Reeves, 6 Tex. Civ. App. 254, 26 S. W. 219.

United States.— New Orleans, etc., R. Co. *v.* Schneider, 60 Fed. 210, 8 C. C. A. 571.

See 46 Cent. Dig. tit. "Trial," § 785.

The petition and verdict should be read together, in case of uncertainty in the verdict, to determine the time from which interest is to be calculated. Griffin *v.* Chadwick, 44 Tex. 406; Brown *v.* Gillett, 39 Wash. 495, 81 Pac. 1002.

48. *Illinois.*— McKinney *v.* Armstrong, 97 Ill. App. 208; Lauman *v.* Clark, 73 Ill. App. 659.

Indiana.— Gaff *v.* Hutchinson, 38 Ind. 341.

Iowa.— Hattenback *v.* Hoskins, 12 Iowa 109.

Kansas.— Christian Churches Educational Assoc. *v.* Hitchcock, 4 Kan. 36.

Missouri.— N. O. Nelson Mfg. Co. *v.* Shreve, 104 Mo. App. 474, 79 S. W. 488.

New Jersey.— Hunt *v.* Price, 68 N. J. L. 238, 52 Atl. 304.

New York.— Page *v.* Cady, 1 Cow. 115.

North Carolina.— Greenleaf *v.* Norfolk Southern R. Co., 91 N. C. 33.

South Carolina.— State Bank *v.* Bowie, 1 McMull. 429.

Texas.— Buchanan *v.* Townsend, 80 Tex. 534, 16 S. W. 315; Irvin *v.* Garner, 50 Tex. 48; Darden *v.* Mathews, 22 Tex. 320; Parker *v.* Leman, 10 Tex. 116; Burton *v.* Anderson, 1 Tex. 93; International, etc., R. Co. *v.* McGehee, (Civ. App. 1904) 81 S. W. 804; Alamo F. Ins. Co. *v.* Lancaster, 7 Tex. Civ. App. 677, 28 S. W. 126; B. C. Evans Co. *v.* Reeves, 6 Tex. Civ. App. 254, 26 S. W. 219; Holden *v.* Meyer, 1 Tex. App. Civ. Cas. § 829.

See 46 Cent. Dig. tit. "Trial," § 785.

If the date from which interest is to be calculated is uncertain recourse may be had to the petition. Griffin *v.* Chadwick, 44 Tex. 406.

Where, by the contract and a consent of record, interest is to be calculated from a certain date for a sum certain, a verdict finding a certain sum, with interest, will be presumed to refer thereto, and judgment will be entered accordingly. Overton *v.* Gervais, 5 Mart. N. S. (La.) 682.

A verdict which gives interest from judicial demand is sufficiently certain, as the date may be ascertained from the record. Gay *v.* Ardry, 14 La. 288; New Orleans, etc., R. Co. *v.* Schneider, 60 Fed. 210, 8 C. C. A. 571.

A verdict for the full amount of plaintiff's claim on a quantum meruit for work and materials should be construed by the court and entered by the clerk as including interest from the date of the demand for payment thereof. Fleming *v.* Jacob, 57 Misc. (N. Y.) 372, 103 N. Y. Suppl. 209.

49. Meyer *v.* Johnson, 122 Ill. App. 87; Gaff *v.* Hutchinson, 38 Ind. 341; Page *v.* Cady, 1 Cow. (N. Y.) 115; Buchanan *v.* Townsend, 80 Tex. 534, 16 S. W. 315; Darden *v.* Mathews, 22 Tex. 320.

50. Brady *v.* Clark, 12 Lea (Tenn.) 323.

51. Watson *v.* Damon, 54 Cal. 278; Musselman *v.* Williams, 54 S. W. 3, 21 Ky. L. Rep. 1077; Lashue *v.* Markham, 21 R. I. 492, 44 Atl. 804.

Where a statute fixes the time from which interest runs, a verdict is not insufficient for not specifying the term. Corcoran *v.* Halloran, 20 S. D. 384, 107 N. W. 210.

52. Murray *v.* King, 30 N. C. 528.

53. Parker *v.* Fisher, 39 Ill. 164.

54. Young *v.* Chandler, 13 B. Mon. (Ky.) 252.

the verdict, in a case in which plaintiff is not entitled to interest, shows on its face that it is made up in part of interest, it cannot be sustained, as to such part, although the total amount is less than the jury could have awarded, without including any interest.[55]

c. Designation of Parties — (i) *In General.* An informality or inaccuracy in the naming of parties for or against whom a verdict is rendered is not fatal, if the intention of the jury is otherwise sufficiently shown,[56] particularly where the mistake in the name or designation of a party is clearly a clerical error.[57] There being but one party plaintiff and one defendant, a finding of the amount due plaintiff is sufficient without a finding that it is due from defendant,[58] but it is not sufficient to find a verdict against a party by name without designating him as a party.[59] Where there are several defendants, a general verdict for or against defendant, or defendants, without specifying which, the interests of defendants being identical, is a verdict for or against all defendants,[60] unless the evidence is insufficient to support the verdict as to one;[61] and where there are several defendants, a general verdict for plaintiff is sufficient,[62] a separate verdict

55. Denike *v.* Denike, 8 Misc. (N. Y.) 604, 29 N. Y. Suppl. 320 [*affirmed* in 155 N. Y. 671, 49 N. E. 1096].

56. Alexandria Min., etc., Co. *v.* Painter, 1 Ind. App. 587, 28 N. E. 113; Knox *v.* Gregorious, 43 Kan. 26, 22 Pac. 981; Desnoyer *v.* McDonald, 4 Minn. 515; French *v.* Cresswell, 13 Oreg. 418, 11 Pac. 62.

"United States."—A verdict is sufficient if the United States of America are therein designated the United States. Sears *v.* U. S., 21 Fed. Cas. No. 12,592, 1 Call 257; Smith *v.* U. S., 22 Fed. Cas. No. 13,122, 1 Call 261.

A defendant corporation is sufficiently designated by the initials of its corporate name (Kelsey *v.* Chicago, etc., R. Co., 1 S. D. 80, 45 N. W. 204; Missouri, etc., R. Co. *v.* Cardwell, 30 Tex. Civ. App. 164, 70 S. W. 103; Missouri Pac. R. Co. *v.* Kingsbury, (Tex. Civ. App. 1894) 25 S. W. 322), or by the name by which it is designated throughout the trial by its counsel (Frankel *v.* Michigan Mut. L. Ins. Co., 158 Ind. 304, 62 N. E. 703; Pittsburg, etc., R. Co. *v.* Darlington, 129 Ky. 266, 111 S. W. 360, 33 Ky. L. Rep. 818; Austin Water, etc., Co. *v.* Makemson, (Tex. Civ. App. 1894) 27 S. W. 588).

The omission of the surname of defendant is not necessarily fatal. Hall *v.* Dargan, 4 Ala. 696.

57. *Indian Territory.*— Missouri, etc., R. Co. *v.* Turley, 1 Indian Terr. 275, 37 S. W. 52.

Iowa.— Lee *v.* Bradway, 25 Iowa 216.

Kansas.— Edmondson *v.* Beals, 27 Kan. 656.

Minnesota.— Red River, etc., R. Co. *v.* Sture, 32 Minn. 95, 20 N. W. 229.

Missouri.— Holmes *v.* Braidwood, 82 Mo. 610.

Texas.— Braun, etc., Co. *v.* Paulson, (Civ. App. 1906) 95 S. W. 617; Colorado Canal Co. *v.* Sims, 42 Tex. Civ. App. 442, 94 S. W. 365; American Cotton Co. *v.* Smith, 29 Tex. Civ. App. 425, 69 S. W. 443.

See 46 Cent. Dig. tit. "Trial," § 768½.

58. Smith *v.* Mohn, 87 Cal. 489, 25 Pac. 696; Galveston, etc., R. Co. *v.* Holyfield, (Tex. Civ. App. 1902) 70 S. W. 221; Houston, etc., R. Co. *v.* Berling, 14 Tex. Civ. App. 544, 37 S. W. 1083.

59. Great Western Ins. Co. *v.* Pierce, 1 Wyo. 45.

60. *Alabama.*— Steed *v.* Barnhill, 71 Ala. 157; Porter *v.* Cotney, 3 Ala. 314.

California.—Willard *v.* Archer, 63 Cal. 33.

Colorado.—Waddingham *v.* Dickson, 17 Colo. 223, 29 Pac. 177; Cowell *v.* Colorado Springs Co., 3 Colo. 82.

Illinois.— Bacon *v.* Schepflin, 185 Ill. 122, 56 N. E. 1123 [*affirming* 85 Ill. App. 553]. But see Lambert *v.* Borden, 10 Ill. App. 648, holding that, where in an action of forcible detainer there are two defendants and a verdict is recorded against "the defendant," it is insufficient to support a judgment against either.

Indiana.— Davis *v.* Shuah, 136 Ind. 237, 36 N. E. 122, a joint action against partners.

Texas.— Roy *v.* Missouri, etc., R. Co., (Civ. App. 1895) 32 S. W. 72.

United States.— Shattuck *v.* North British, etc., Ins. Co., 58 Fed. 609, 7 C. C. A. 386, where merely formal defendants never appeared, and the case proceeded against the only real defendant, and the verdict was for "defendants."

See 46 Cent. Dig. tit. "Trial," § 768½.

But see Richards *v.* Sperry, 7 Wis. 219, holding that in an action of tort against several defendants, a verdict which only finds the verdict as to one, not naming him, is too uncertain.

61. Loomis *v.* Perkins, 70 Conn. 444, 39 Atl. 797.

62. *California.*— McMahon *v.* Hetchhetchy, etc., R. Co., 2 Cal. App. 400, 84 Pac. 350.

Connecticut.— Pelton *v.* Goldberg, 81 Conn. 280, 70 Atl. 1020.

Georgia.—Houston *v.* Ladies' Union Branch Assoc., 87 Ga. 203, 13 S. E. 634.

Kansas.—Wilson *v.* Means, 25 Kan. 83.

Missouri.— Jones *v.* St. Louis, etc., R. Co., 89 Mo. App. 653.

Nebraska.— Morrissey *v.* Schindler, 18 Nebr. 672, 26 N. W. 476.

South Dakota.— Jeansch *v.* Lewis, 1 S. D. 609, 48 N. W. 128.

See 46 Cent. Dig. tit. "Trial," § 768½.

not having been demanded by defendants.[63] A verdict for "plaintiffs," there being but one plaintiff,[64] or for "plaintiff," there being several plaintiffs,[65] or the same party being plaintiff in two capacities,[66] is sufficient, if the intention of the jury drawn from the whole verdict is plain; and the same rule applies to a verdict in a joint action, for one of two plaintiffs by name,[67] or where both plaintiffs claim in the same right.[68] A general verdict is good as to the parties before the court, although one of the parties has not been served or has not appeared,[69] or is dead,[70] or although rendered in the name of a former plaintiff who is represented by his heirs,[71] and upon dismissal or disclaimer as to some of the defendants, a general verdict for plaintiff is valid as to the remaining parties,[72] and the same is true where there has been a substitution of parties plaintiff.[73]

(II) *SEVERANCE.* Where there are two plaintiffs claiming in joint right, the jury cannot find in favor of one and against the other,[74] unless the defense is personal to one of the plaintiffs as the statute of limitations.[75] Conversely, in actions on a joint contract there cannot be a verdict in favor of one and against other defendants,[76] unless on a plea of the statute of limitations,[77] infancy,[78] or bankruptcy.[79] In actions for tort, however, the jury may find in favor of one and against other defendants; [80] and in such actions it is error for the court to refuse

63. Winans *v.* Christy, 4 Cal. 70, 60 Am. Dec. 597.

64. McGill *v.* Rothgeb, 45 Ill. App. 511.

65. Daft *v.* Drew, 40 Ill. App. 266; Hartford County *v.* Wise, 71 Md. 43, 18 Atl. 31; Henry *v.* Halsey, 5 Sm. & M. (Miss.) 573; Shannon *v.* Jones, 76 Tex. 141, 13 S. W. 477; Missouri, etc., R. Co. *v.* Jamison, 12 Tex. Civ. App. 689, 34 S. W. 674; Reed *v.* Phillips, (Tex. Civ. App. 1896) 33 S. W. 986.

Counter-claim.—Where, in an action against three persons, there was but one counter-claim and one counter-claimant, a verdict in favor of the "counter-claimants" was a verdict in favor of the counter-claimant, and a judgment in his favor followed the verdict. Cleveland, etc., R. Co. *v.* Rudy, (Ind. App. 1909) 87 N. E. 555.

66. Texas, etc., R. Co. *v.* Watkins, (Tex. Civ. App. 1894) 26 S. W. 760 [*affirmed* in 88 Tex. 20, 29 S. W. 232].

67. Chicago, etc., R. Co. *v.* Henderson, (Tex. Civ. App. 1903) 73 S. W. 36.

68. Tom *v.* Sayers, 64 Tex. 339.

69. Quimby *v.* Boyd, 8 Colo. 194, 6 Pac. 462.

70. Sanders *v.* Etcherson, 36 Ga. 404.

71. Gaines *v.* National Exch. Bank, 64 Tex. 18.

72. *Georgia.*— Baker *v.* Thompson, 89 Ga. 486, 15 S. E. 644.

Illinois.— Hubner *v.* Feige, 90 Ill. 208.

Nebraska.— Morrissey *v.* Schindler, 18 Nebr. 672, 26 N. W. 476.

South Carolina.— Columbia Phosphate Co. *v.* Farmers' Alliance Store, 47 S. C. 358, 25 S. E. 116.

South Dakota.— Jeansch *v.* Lewis, 1 S. D. 609, 48 N. W. 128.

See 46 Cent. Dig. tit. "Trial," § 770.

73. Gibson *v.* Swofford, 122 Mo. App. 126, 97 S. W. 1007.

74. Buckhanan *v.* Gamble, Ga. Dec. 156; Bailey *v.* Hickman, 12 La. 415.

But where two cases have been joined, the respective rights of plaintiffs are separate and distinct, and there must be separate findings and separate recovery. Silliman *v.* Gano, 90 Tex. 637, 39 S. W. 559, 40 S. W. 391.

75. Settle *v.* Alison, 8 Ga. 201, 52 Am. Dec. 393.

76. Merchant *v.* Manion, 97 Ill. App. 43; Hartley *v.* Lybarger, 3 Ill. App. 524; Dilworth *v.* Hirst, 1 Phila. (Pa.) 206. But see Schee *v.* Shore, 6 Kan. App. 136, 50 Pac. 903.

A separate verdict against each defendant in such a case is bad. Day *v.* Brawley, 1 Pa. St. 429.

By statute the practice may be allowed. Horner *v.* Plumley, 97 Md. 271, 54 Atl. 971.

It is improper to require a jury to render more than one verdict in a single cause, or to direct a verdict and have the jury return a verdict as to one defendant before the conclusion of the case as to the other. Lehigh Valley Transp. Co. *v.* Post Sugar Co., 128 Ill. App. 600 [*affirmed* in 228 Ill. 121, 81 N. E. 819].

77. Ivey *v.* Gamble, 7 Port. (Ala.) 545.

78. Cutts *v.* Gordon, 13 Me. 474, 29 Am. Dec. 520; Dilworth *v.* Hirst, 1 Phila. (Pa.) 206.

79. Dilworth *v.* Hirst, 1 Phila. (Pa.) 206; Miner *v.* Downer, 20 Vt. 461.

80. *Georgia.*— Chambless *v.* Melton, 127 Ga. 414, 56 S. E. 414.

Illinois.— Cleveland, etc., R. Co. *v.* Eggmann, 71 Ill. App. 42.

Kentucky.— See Illinois Cent. R. Co. *v.* Murphy, 123 Ky. 787, 97 S. W. 729, 30 Ky. L. Rep. 93, 11 L. R. A. N. S. 352.

Maryland.— Vonderhorst Brewing Co. *v.* Amrhine, 98 Md. 406, 56 Atl. 833.

New Jersey.— Matthews *v.* Delaware, etc., R. Co., 56 N. J. L. 34, 27 Atl. 919, 22 L. R. A. 261.

New York.— Lockwood *v.* Bartlett, 130 N. Y. 340, 29 N. E. 257 [*reversing* 7 N. Y. Suppl. 481].

Texas.— Texas, etc., R. Co. *v.* Huber, (Civ. App. 1906) 95 S. W. 568; Galveston, etc., R. Co. *v.* Burnett, (Civ. App. 1896) 37 S. W. 779.

to submit a form of verdict in favor of one defendant and against another;[81] and where joint tort-feasors are sued in the same action, separate verdicts for different amounts may be awarded against them, and punitive damages allowed against one, and not against the other.[82] Where defendants are severally liable, a verdict against one not taking into account the other is good,[83] in the absence of statutory provision to the contrary,[84] and silence as to the other defendant is held to raise a necessary implication of a finding in favor of the defendant not named,[85] particularly where the relation of defendants to plaintiff are different,[86] where the defendant as to whom there is no finding in the verdict was not served,[87] or where the jury's answers to special interrogatories show that such defendant was not liable.[88] If under the pleadings and proof, the verdict, if any, against defendants must be joint, a verdict against "defendant" will be so understood.[89] Separate verdicts should be found in cases tried together.[90]

d. Responsiveness to Issues and Evidence. As regards responsiveness, it is a well settled rule that the verdict must respond to the issues,[91] as raised

United States.— James *v.* Evans, 149 Fed. 136, 80 C. C. A. 240.

See 46 Cent. Dig. tit. "Trial," § 772.

81. Lower *v.* Franks, 115 Ind. 334, 14 N. E. 885, 17 N. E. 630.

82. Louisville, etc., R. Co. *v.* Roth, 130 Ky. 759, 114 S. W. 264.

83. Kaufman *v.* People's Cold-Storage, etc., Co., 10 Misc. (N. Y.) 53, 30 N. Y. Suppl. 813.

84. Crow *v.* Crow, 124 Mo. App. 120, 100 S. W. 1123.

85. Handley *v.* Lawley, 90 Ala. 527, 8 So. 101 [*overruling* Traun *v.* Wittick, 27 Ala. 570; Wittick *v.* Traun, 27 Ala. 562, 62 Am. Dec. 778]; Howard *v.* Johnson, 91 Ga. 319, 18 S. E. 132; Maynard *v.* Ponder, 75 Ga. 664. *Contra*, Gulf, etc., R. Co. *v.* James, 73 Tex. 12, 10 S. W. 744, 15 Am. St. Rep. 743; Jones *v.* Grimmet, 4 W. Va. 104; James *v.* Evans, 149 Fed. 136, 80 C. C. A. 240. And see Rankin *v.* Central Pac. R. Co., 73 Cal. 93, 15 Pac. 57.

86. Taylor *v.* Houston, etc., R. Co., (Tex. Civ. App. 1904) 80 S. W. 260; Missouri Pac. R. Co. *v.* Kingsbury, (Tex. Civ. App. 1894) 25 S. W. 322.

87. Thomas *v.* Clarkson, 125 Ga. 72, 54 S. E. 77; Sternberger *v.* Bernheimer, 121 N. Y. 194, 24 N. E. 311 [*affirming* 56 N. Y. Super. Ct. 323, 4 N. Y. Suppl. 546].

88. Cleveland, etc., R. Co. *v.* Eggmann, 71 Ill. App. 42; Lawson *v.* Robinson, 68 Kan. 737, 75 Pac. 1012.

89. Kluse *v.* Sparks, 10 Ind. App. 444, 36 N. E. 914, 37 N. E. 1047. But see Schweickhardt *v.* St Louis, 2 Mo App. 571.

90. Miller *v.* Hoc, 1 Fla. 189.

91. *Alabama.*— *Ex p.* Henry, 24 Ala. 638; Moody *v.* Keener, 7 Port. 218; Oliver *v.* Judge, 2 Stew. 483; Grice *v.* Ferguson, 1 Stew. 36; Hawkins *v.* Rapier, Minor 113.

California.— Muller *v.* Jewell, 66 Cal. 216, 5 Pac. 84.

Connecticut.—Kilbourn *v.* Waterous, Kirby 424.

Georgia.— Burdette *v.* Crawford, 125 Ga. 577, 54 S. E. 677; Maples *v.* Hoggard, 58 Ga. 315; Wood *v.* McGuire, 17 Ga. 361, 63 Am. Dec. 246; Tompkins *v.* Corry, 14 Ga. 118.

Illinois.— Litchfield Min., etc., Co. *v.* Beanblossom, 138 Ill. App. 122; Hackett *v.* Jones, 34 Ill. App. 562.

Indiana.— National Cash Register Co. *v.* Price, 41 Ind. App. 274, 83 N. E. 776; Cincinnati Barbed-Wire Fence Co. *v.* Chenoweth, 22 Ind. App. 685, 54 N. E. 403.

Iowa.— Kerr *v.* Topping, 109 Iowa 150, 80 N. W. 321; Morss *v.* Johnson, 38 Iowa 430.

Kentucky.— Deering *v.* Halbert, 2 Litt. 290.

Louisiana.— Bowman *v.* Flower, 3 Mart. N. S. 641.

Massachusetts.— Holmes *v.* Wood, 6 Mass. 1; Brown *v.* Chase, 4 Mass. 436.

Mississippi.—Adams *v.* Yazoo, etc., R. Co., 77 Miss. 194, 24 So. 200, 317, 28 So. 956, 60 L. R. A. 33; Groves *v.* Bailey, 24 Miss. 588.

Missouri.— Parker *v.* Moore, 29 Mo. 218; Allison *v.* Darton, 24 Mo. 343; Dailey *v.* Columbia, 122 Mo. App. 21, 97 S. W. 954.

Nebraska.— Wiruth *v.* Lashmett, 82 Nebr. 375, 117 N. W. 887; Cannon *v.* Smith, 47 Nebr. 917, 66 N. W. 999.

New Hampshire.—Wendall *v.* Safford, 12 N. H. 171.

New Jersey.— Middleton *v.* Quigley, 12 N. J. L. 352.

New York.— Gould *v.* Segee, 5 Duer 260; Anderson *v.* Wood, 50 Misc. 595, 99 N. Y. Suppl. 474; Brockway *v.* Kinney, 2 Johns. 210.

North Carolina.— Vines *v.* Brownrigg, 13 N. C. 537; Watts *v.* Greenlee, 13 N. C. 87.

Pennsylvania.— Bruck *v.* Mausbury, 102 Pa. St. 35.

Tennessee.— Kirkpatrick *v.* Southwestern R. Bank, 6 Humphr. 45; Marr *v.* Johnson, 9 Yerg. 1.

Texas.— Dodd *v.* Gaines, 82 Tex. 429, 18 S. W. 618; Adams *v.* Cook, 55 Tex. 161; Neal *v.* Birdseye, 39 Tex. 604; Hall *v.* York, 16 Tex. 18; Colorado Canal Co. *v.* McFarland, (Civ. App. 1906) 94 S. W. 400; Beatty *v.* Bulger, 28 Tex. Civ. App 117, 66 S. W. 893; Hurt *v.* Wallace, (Civ. App. 1899) 49 S. W. 675; Walter A. Wood Mowing, etc., Mach. Co. *v.* Hancock, 4 Tex. Civ. App. 302, 23 S. W. 384.

Vermont.— French *v.* Thompson, 6 Vt. 54.

Virginia.— Barnett *v.* Watson, 1 Wash. 372.

Wisconsin.— Ronge *v.* Dawson, 9 Wis. 246.

by the pleadings [92] and evidence.[93] The jury need not find on an issue as to which there is no evidence,[94] or dispose of matters not within the issues made by the pleadings,[95] nor need the verdict be in the words of the issue,[96] or technically embrace all the issues,[97] it being sufficient if in sense or legal effect it substantially responds to the pleadings and covers the issues,[98] and it cannot be objected to a verdict that it is too broad if every essential matter put in issue is concluded by it,[99] nor is it an objection that it contains surplusage.[1] The same rules will be applied in equitable as in legal actions to determine the sufficiency of the verdict.[2]

e. Several Counts or Issues — (I) *In General.* A general verdict on two or more issues is good where the finding necessarily shows that the subject-matter of all the issues was determined by the verdict,[3] and where several issues are left

United States.— Bennett *v.* Butterworth, 11 How. 669, 13 L. ed. 859; Garland *v.* Davis, 4 How. 131, 11 L. ed. 907; Patterson *v.* U. S., 2 Wheat. 221, 4 L. ed. 224; Phœnix Assur. Co. *v.* Maryland Gold Min., etc., Co., 146 Fed. 501, 77 C. C. A. 15; U. S. *v.* One Case Stereoscopic Slides, 27 Fed. Cas. No. 15,927, 1 Sprague 467.

See 46 Cent. Dig. tit. "Trial," § 774 *et seq.*

But the verdict need not find an amount due either in accordance with claims of plaintiff or defendant. Tobin *v.* South, 135 Mich. 291, 36 S. W. 1039, 18 Ky. L. Rep. 350; Lee *v.* Huron Indemnity Union, 97 N. W. 709.

A verdict without an issue is a nullity. Mayfield *v.* Beech, 2 Sneed (Tenn.) 443.

92. Sanders *v.* Davis, 153 Ala. 375, 44 So. 979; Martin *v.* Nichols, 127 Ga. 705, 56 S. E. 995; La Rosa *v.* Wilner, 51 Misc. (N. Y.) 580, 101 N. Y. Suppl. 193; Johnson *v.* Glasper, 16 N. D. 335, 113 N. W. 602.

93. *California.*— Foote *v.* Hayes, (1895) 39 Pac. 601.

Georgia.— Burdell *v.* Blain, 66 Ga. 169; Hall *v.* Spivey, 65 Ga. 693.

Illinois.— Gordon *v.* Crooks, 11 Ill. 142; Gross *v.* Sloan, 54 Ill. App. 202.

Missouri.— Holt *v.* Morton, 53 Mo. App. 187.

New York.— Wait *v.* Borne, 123 N. Y. 592, 25 N. E. 1053.

North Dakota.— Johnson *v.* Glasper, 16 N. D. 335, 113 N. W. 602.

See 46 Cent. Dig. tit. "Trial," § 774.

94. Burdell *v.* Blain, 66 Ga. 169; Jones *v.* Brooklyn L. Ins. Co., 61 N. Y. 79.

95. Price *v.* Bell, 88 Ga. 740, 15 S. E. 810; Belt *v.* Farrow, 83 Ga. 695, 10 S. E. 357; H. G. Olds Wagon-Works *v.* Coombs, 124 Ind. 62, 24 N. E. 589.

The admissions of the pleadings are binding on the jury. Coffman *v.* Brown, 7 Colo. 147, 2 Pac. 905; Watts *v.* Greenlee, 13 N. C. 87; Brown *v.* Hillegas, 2 Hill (S. C.) 447.

The jury are limited to the amounts claimed in the pleadings. Satterfield *v.* Green, 3 Ky. L. Rep. 398.

96. Patterson *v.* Cook, 8 Port. (Ala.) 66; Illinois Cent. R. Co. *v.* Reardon, 157 Ill. 372, 41 N. E. 871; Parmelee *v.* Smith, 21 Ill. 620; Peters *v.* Johnson, 50 W. Va. 644, 41 S. E. 190, 88 Am. St. Rep. 909, 57 L. R. A. 428.

97. Anderson *v.* Dinn, 17 La. 168.

98. *Arkansas.*— Vaden *v.* Ellis, 18 Ark. 355.

Georgia.— Lyons *v.* Planters' Loan, etc., Bank, 86 Ga. 485, 12 S. E. 882, 12 L. R. A. 155.

Indiana.— Purner *v.* Koontz, 138 Ind. 252, 36 N. E. 1094; Lamb *v.* Lamb, 105 Ind. 456, 5 N. E. 171.

Kentucky.— Picket *v.* Richet, 2 Bibb 178.

Massachusetts.— Harding *v.* Brooks, 5 Pick. 244.

Missouri.— Dailey *v.* Columbia, 122 Mo. App. 21, 97 S. W. 954.

New Hampshire.— Chase *v.* Deming, 42 N. H. 274.

North Carolina.—Atlantic, etc., R. Co. *v.* Purifoy, 95 N. C. 302.

Ohio.— Markward *v.* Doriat, 21 Ohio St. 637; Martin *v.* Clinton Bank, 14 Ohio 187.

South Carolina.— Jones *v.* Cathcart Co., 17 S. C. 592.

Tennessee.— Robb *v.* Parker, 4 Heisk. 58; Lowrey *v.* Brown, 3 Sneed 17.

Texas.— Patterson *v.* Allen, 50 Tex. 23; Robinson *v.* Moore, 1 Tex. Civ. App. 93, 20 S. W. 994.

See 46 Cent. Dig. tit. "Trial," § 774.

99. McRae *v.* Colclough, 2 Ala. 74.

1. Lassiter *v.* Thompson, 85 Ala. 223, 6 So. 33.

2. Wells *v.* Barnett, 7 Tex. 584.

3. *Alabama.*— Bessemer Liquor Co. *v.* Tillman, 139 Ala. 462, 36 So. 40; Tippin *v.* Petty, 7 Port. 441; Dade *v.* Buchannon, Minor 415.

Arkansas.— Wilson *v.* Bushnell, 1 Ark. 465.

California.— Crosett *v.* Whelan, 44 Cal. 200.

Illinois.— Coal Valley Min. Co. *v.* Haywood, 98 Ill. App. 258.

Maryland.— Browne *v.* Browne, 22 Md. 103.

Missouri.— Stout *v.* Calver, 6 Mo. 254, 35 Am. Dec. 438.

New Hampshire.— Cheswell *v.* Chapman, 42 N. H. 47.

New Jersey.— Stewart *v.* Fitch, 31 N. J. L. 17; Browning *v.* Skillman, 24 N. J. L. 351.

Rhode Island.— Burdick *v.* Burdick, 15 R. I. 165, 1 Atl. 289.

Texas.— Pearce *v.* Bell, 21 Tex. 688.

West Virginia.— Black *v.* Thomas, 21 W. Va. 709.

See 46 Cent. Dig. tit. "Trial," § 779.

to the jury, if one found by them necessarily negatives others which they have failed to find, the judgment will stand.[4] Similarly, a general verdict is not objectionable, where the petition, although containing two or more counts, states substantially only one cause of action,[5] or where plaintiff might have included all that the petition sets up in one count instead of two,[6] and a recovery on either count would bar a suit on the other count.[7] But generally where different counts contain different causes of action, the jury should find a separate verdict as to each cause,[8] although it is held that a general verdict by the jury without stating upon which of several counts the verdict was rendered is not reversible error,[9] particularly a verdict in damages substantially responsive to all the issues,[10] or where at the trial all the counts but the one found on were ignored,[11] or withdrawn from the consideration of the jury by instruction;[12] and a general verdict on a petition containing two counts, on only one of which evidence was introduced, will be presumed to be based on that count.[13] Similarly, where a verdict for

The court may interrogate the jurors to specialize the verdict, and state on which issue or issues it is based, where several issues are submitted and a general verdict returned. Rockefeller *v.* Wedge, 149 Fed. 130, 79 C. C. A. 26. This is held to be the common practice. Freedman *v.* New York, etc., R. Co., 81 Conn. 601, 71 Atl. 901. See also Johnson *v.* Higgins, 53 Conn. 236, 1 Atl. 616.

Setting aside verdict not responsive to issues see NEW TRIAL, 29 Cyc. 815 *et seq.*

4. White *v.* Bailey, 10 Mich. 155; Hanna *v.* Mills, 21 Wend. (N. Y.) 90, 34 Am. Dec. 216; Daniels *v.* Hallenbeck, 19 Wend. (N. Y.) 408.

5. Central Union Tel. Co. *v.* Fehring, 146 Ind. 189, 45 N. E. 64; Toledo, etc., R. Co. *v.* Mylott, 6 Ind. App. 438, 33 N. E. 135; State *v.* Henslee, 54 Mo. 518; Brady *v.* Connelly, 52 Mo. 19; Ranney *v.* Bader, 48 Mo. 539; Moseley *v.* Missouri Pac. R. Co., 132 Mo. App. 642, 112 S. W. 1010; Shearer *v.* Hill, 125 Mo. App. 375, 102 S. W. 673; Long *v.* J. K. Armsby Co., 43 Mo. App. 253; Mize *v.* Rocky Mountain Bell Tel. Co., 38 Mont. 521, 100 Pac. 971, 129 Am. St. Rep. 659; Illinois Car, etc., Co. *v.* Linstroth Wagon Co., 112 Fed. 737, 50 C. C. A. 504. See also Noel *v.* Hudson, 13 B. Mon. (Ky.) 204; West *v.* Platt, 127 Mass. 367.

6. Leu *v.* St. Louis Transit Co., 110 Mo. App. 458, 85 S. W. 137; Taylor *v.* Springfield, 61 Mo. App. 263.

7. Silcox *v.* McKinney, 64 Mo. App. 330; Akers *v.* Ray County Sav. Bank, 63 Mo. App. 316.

8. *Connecticut.*— Johnson *v.* Higgins, 53 Conn. 236, 1 Atl. 616.

Iowa.— Robinson *v.* Berkey, 100 Iowa 136, 69 N. W. 434, 62 Am. St. Rep. 549.

Mississippi.— Cock *v.* Weatherby, 5 Sm. & M. 333.

Missouri.— Flowers *v.* Smith, 214 Mo. 98, 112 S. W. 499; Marquis *v.* Clark, 64 Mo. 601; Seibert *v.* Allen, 61 Mo. 482; Brownell *v.* Pacific R. Co., 47 Mo. 239; Boyce *v.* Christy, 47 Mo 70; Clark *v.* Hannibal, etc., R. Co., 36 Mo. 202; Mooney *v.* Kennett, 19 Mo. 551, 61 Am. Dec. 576; Talbot *v.* Jones, 5 Mo. 217.

New Jersey.—Westbrook *v.* Van Auken, 5 N. J. L. 478; Sayrs *v.* Ward, 3 N. J. L. 1007.

South Carolina.— Barfield *v.* Coker, 73 S. C. 181, 53 S. E. 170.

Washington.— Chase *v.* Knabel, 46 Wash. 484, 90 Pac. 642, 12 L. R. A. N. S. 1155.

See 46 Cent. Dig. tit. "Trial," § 779.

A verdict which states the amount awarded for the separate causes of action alleged in the separate counts in the petition, and which states the gross amount, is a separate verdict on each count, and is valid. Graves *v.* St. Louis, etc., R. Co., 133 Mo. App. 91, 112 S. W. 736.

9. Smith *v.* Ralston, Morris (Iowa) 87; Talbot *v.* Jones, 5 Mo. 217.

Verdict aided by pleadings.— There being two causes of action set out in a petition and issues being joined upon each, a verdict in such form as not to advise the court of the findings on the separate causes, although irregular, will not be set aside, when the meaning of the jury is clear when read in connection with the pleadings. Michigan Mut. L. Ins. Co. *v.* Whittaker, 29 Ohio Cir. Ct. 362.

10. *Kentucky.*— Hatcher *v.* Fowler, 1 Bibb 337; Worford *v.* Isbel, 1 Bibb 247, 4 Am. Dec. 633.

Missouri.— Stout *v.* Calver, 6 Mo. 254, 35 Am. Dec. 438 [*distinguishing* Jones *v.* Snedecor, 3 Mo. 390].

Texas.— Hardy *v.* De Leon, 5 Tex. 211.

Virginia.—Hansbrough *v.* Neal, 94 Va. 722, 27 S. E. 593.

West Virginia.—Snyder *v.* Snyder, 9 W. Va. 415.

Wisconsin.— Krause *v.* Cutting, 28 Wis. 655.

See 46 Cent. Dig. tit. "Trial," § 779.

11. Dougherty *v.* St. Louis, etc., R. Co., 62 Mo. 554. But see Shaw *v.* Pope, 80 Conn. 206, 67 Atl. 495, holding that where a complaint was in two counts, the first on an express contract and the second on a *quantum meruit*, and the court charged that plaintiff could not recover on the first count, a general verdict in favor of plaintiff was uncertain as a matter of record whether the issues under the first count were not in fact found in plaintiff's favor.

12. Mitchell *v.* St. Louis, etc., R. Co., 116 Mo. App. 81, 92 S. W. 111.

13. Bays *v.* Herring, 51 Iowa 286, 1 N. W.

plaintiff states the items on which the jury found, defendant is not prejudiced by the jury's failure to specify in the verdict the counts on which the verdict was based.[14] It has been held that a general verdict in the absence of a showing to the contrary may be applied to all causes of action,[15] and a verdict capable of a construction in which it may be understood as comprehending all the issues is good.[16] If a special verdict on each issue is desired, it should be demanded.[17] Where there are two counts in a declaration, and evidence given on both and a general charge by the court on the facts applying to each count, a general verdict on both counts is not erroneous,[18] and a general verdict is an answer to all the counts of a declaration where the general issue was pleaded to all;[19] but a verdict on the general issue only is erroneous, where the general issue and special pleas are pleaded,[20] and a general verdict cannot be sustained where there are two counts in the petition, one good and one bad, and the court has erroneously submitted the bad count as well as the good one to the consideration of the jury.[21] Where, however, the jury finds for plaintiff on both of two independent paragraphs of the complaint, the judgment will not be reversed for error in the finding on the second paragraph if that on the first paragraph is proper,[22] and a verdict may be for defendant on one count and for plaintiff on other counts;[23] and where the jury specifies the counts on which a finding for plaintiff is based, it is in effect a finding for defendant on all other counts.[24] A verdict for defendant upon all pleas will not be set aside where there is evidence sufficient to sustain one of such pleas.[25] Separate verdicts may be required where separate actions have been consolidated.[26]

(II) *Several Issues Presented in One Count or Several Counts Covering the Same Transaction.* Where defendant interposes several pleas to a single count, or to several counts founded on the same transaction, a general verdict for plaintiff is a finding against defendant on all the issues and is sufficient.[27] And, although it is sometimes required by statute that a verdict in defendant's favor should show on which of the several pleas it was rendered,[28]

558. But see Weirick *v.* Hoover, 8 Blackf. (Ind.) 379.

14. Donk Bros. Coal, etc., Co. *v.* Stroetter, 229 Ill. 134, 82 N. E. 250.

15. Harper, etc., Co. *v.* Mountain Water Co., 65 N. J. Eq. 479, 56 Atl. 297; Connecticut Gen. L. Ins. Co. *v.* McMurdy, 89 Pa. St. 363.

16. Porter *v.* Rummery, 10 Mass. 64.

17. Connecticut Gen. L. Ins. Co. *v.* McMurdy, 89 Pa. St. 363.

18. Morehead *v.* Brown, 51 N. C. 367.

19. Parker *v.* Fisher, 39 Ill. 164.

20. Powell *v.* Harter, 5 Ohio 259; Tibbs *v.* Brown, 2 Grant (Pa.) 39.

21. Seaboard Air-Line R. Co. *v.* Smith, 3 Ga. App. 1, 59 S. E. 199; Flowers *v.* Smith, 214 Mo. 98, 112 S. W. 499.

22. Baltimore, etc., R. Co. *v.* Roberts, 161 Ind. 1, 67 N. E. 530.

23. Hanger *v.* Dodge, 24 Ark. 205; Miller *v.* Brown, (Iowa 1889) 42 N. W. 561.

24. Marianna Mfg. Co. *v.* Boone, 55 Fla. 289, 45 So. 754; Wabash R. Co. *v.* Smillie, 97 Ill. App. 7; Phillips *v.* Geiser Mfg. Co., 129 Mo. App. 396, 107 S. W. 471. But see Hamilton *v.* Rice, 15 Tex. 382, holding that a verdict generally for defendant, although expressed to be on account of one of the main issues of the case, includes the finding in his favor of every material fact well pleaded.

25. Macon City Bank *v.* Macon, 76 Ga. 93.

26. Union Pac. R. Co. *v.* Jones, 49 Fed. 343, 1 C. C. A. 282. But see Crane *v.* Lipscomb, 24 S. C. 430.

27. *Alabama.*— Goyne *v.* Howell, Minor 62.
Arkansas.— Dillard *v.* Noel, 2 Ark. 449.
Georgia.—Wells *v.* Daniel, 89 Ga. 330, 15 S. E. 463; Gunn *v.* Barrett, 69 Ga. 689; Jernigan *v.* Carter, 60 Ga. 131.
Illinois.— Hawkins *v.* Albright, 70 Ill. 87.
Kentucky.— Hocker *v.* Davis, 2 T. B. Mon. 118.
Tennessee.— Pointer *v.* Rust, 7 Humphr. 532; Carter *v.* Graves, 9 Yerg. 446.
Virginia.— Buster *v.* Ruffner, 5 Munf. 27.
Wisconsin.— Hartwig *v.* Chicago, etc., R. Co., 49 Wis. 358, 5 N. W. 865.
See 46 Cent. Dig. tit. "Trial," § 779.

28. Central R. Co. *v.* Freeman, 75 Ga. 331; Williams *v.* Gunnels, 66 Ga. 521; Ball *v.* Powers, 62 Ga. 757; Crockett *v.* Garrard, 4 Ga. App. 360, 61 S. E. 552, holding that under Civ. Code (1895), § 5330, providing that, on several pleas filed, a verdict for defendant must show on which of the pleas the verdict is rendered, where more than one plea is filed, the court should on timely request from plaintiff cause the jury, in the event they find for defendant, to specify on which one or more of the pleas the verdict is rendered, and that plaintiff is entitled to demand that the jury specify on which a verdict is rendered for defendant, notwithstanding the proof may wholly fail to support one of them.

a general finding for defendant will usually be sustained if the evidence is sufficient to support any of the defenses,[29] but not if error is committed in the admission of evidence on any issue.[30] A special verdict for plaintiff on one of such issues, ignoring the others, is bad.[31] The jury should be required to make a separate finding on a plea of venue.[32]

(III) *Defective, Immaterial, or Inconsistent Counts or Issues.* Where two counts are inconsistent, a general verdict for plaintiff will be set aside,[33] as will be also a verdict inconsistent with either of the two issues in an action;[34] but a special verdict on one of the counts will support a judgment, where the two counts are inconsistent only in stating the nature and origin of plaintiff's rights.[35] In some cases, particularly those decided under statutes specially so providing, a general verdict rendered on several counts, some of which are defective, will stand,[36] even though there is but one good count,[37] the general verdict being referred to the good count,[38] unless a good and defective cause of action are so commingled that it is impossible to tell for which alleged injury the jury found the verdict.[39] In other cases, such a verdict has been held to be subject to be set aside, it not appearing that the verdict was not based upon the defective count,[40] unless the evidence adduced at the trial is applicable only to the good counts.[41] A general verdict cannot be sustained where there are some bad counts and the special findings are that plaintiff has sustained each count,[42] and a verdict

In determining whether the defense presented consists of several pleas or of only a single plea within a statute providing that, where several pleas are filed, a verdict for defendant must show on which of the pleas the verdict is rendered, the court should look to its substance, and not merely to its form. In an action for breach of contract a denial of the paragraphs wherein the breach and damages are alleged constitutes a distinct defense equivalent to a plea of the general issue, but a simple denial of a paragraph of a petition, alleging that defendant is a partnership, is not equivalent to a plea of no partnership whether considered as a plea in abatement or in bar, and is therefore not to be considered as a distinct defense. Crockett *v.* Garrard, 4 Ga. App. 360, 61 S. E. 552.

29. *Arkansas.*— State Bank *v.* Cason, 10 Ark. 479.

Delaware.— Thomas *v.* Black, 8 Houst. 507, 18 Atl. 771.

Illinois.—Holmes *v.* Tarble, 77 Ill. App. 114.

Ohio.— Jarmusch *v.* Otis Iron, etc., Co., 23 Ohio Cir. Ct. 122.

South Carolina.—Walker *v.* Taliaferro, 2 Brev. 390.

Where there are pleas in abatement and in bar, a general verdict is sufficient if the finding be in favor of the same party as to both sets of pleas, otherwise the verdict should be special finding separately as to each. Hawkins *v.* Albright, 70 Ill. 87; Cincinnati, etc., R. Co. *v.* McCollum, 105 Tenn. 623, 59 S. W. 136.

30. Maryland *v.* Baldwin, 112 U. S. 490, 5 S. Ct. 278, 28 L. ed. 822.

31. Wright *v.* State, 8 Blackf. (Ind.) 385; Armstrong *v.* Hinds, 9 Minn. 356; Meighen *v.* Strong, 6 Minn. 177, 80 Am. Dec. 441; Boon *v.* Planters' Bank, 3 Humphr. (Tenn.) 84; Anderson *v.* Anderson, 4 Hayw. (Tenn.) 255. But see Carroll *v.* Graham, 8 R. I. 242.

32. Merchants,' etc., Oil Co. *v.* Burow, (Tex. Civ. App. 1902) 69 S. W. 435.

33. Schofield *v.* Miltimore, 74 Wis. 194, 42 N. W. 212.

34. Burns-Moore Min., etc., Co. *v.* Watson, 45 Colo. 91, 101 Pac. 335.

35. Spencer *v.* New York, etc., R. Co., 62 Conn. 242, 25 Atl. 350.

36. Shreffler *v.* Nadelhoffer, 133 Ill. 536, 25 N. E. 630, 23 Am. St. Rep. 626; Gebbie *v.* Mooney, 121 Ill. 255, 12 N. E. 472 [*affirming* 22 Ill. App. 369]; Peoria M. & F. Ins. Co. *v.* Whitehill, 25 Ill. 466; Anderson *v.* Semple, 7 Ill. 455; Bishop *v.* Hamilton, 4 J. J. Marsh. (Ky.) 548; Condren *v.* Gardner, 1 J. J. Marsh. (Ky.) 589; Richardson *v.* Mellish, 3 Bing. 334, 4 L. J. C. P. O. S. 68, 11 Moore C. P. 104, 11 E. C. L. 167.

37. Ventress *v.* Rosser, 73 Ga. 534; Shreffler *v.* Nadelhoffer, 133 Ill. 536, 25 N. E. 630, 23 Am. St. Rep. 626; Clemens *v.* Collins, 14 Mo. 604; Akers *v.* Ray County Sav. Bank, 63 Mo. App. 316; Campbell *v.* King, 32 Mo. App. 38.

Defendant should ask for an instruction that the jury disregard bad counts. Peoria M. & F. Ins. Co. *v.* Whitehill, 25 Ill. 466.

38. Taylor *v.* Sturgingger, 2 Mill (S. C.) 367; Ray *v.* Chesapeake, etc., R. Co., 57 W. Va. 333, 50 S. E. 413.

39. Ottawa Gaslight, etc., Co. *v.* Thompson, 39 Ill. 598.

40. Hershman *v.* Pascal, 4 Ind. App. 330, 30 N. E. 932; Fry *v.* Bennett, 28 N. Y. 324; Nelson *v.* Ford, 5 Ohio 473; Stuart *v.* Blum, 28 Pa. St. 225; Kline *v.* Wood, 9 Serg. & R. (Pa.) 294; Stewart *v.* McBride, 1 Serg. & R. (Pa.) 202.

41. Small *v.* Rogers, 46 N. H. 176; Porter *v.* Porter, 14 Ohio 220; Goodman *v.* Gay, 15 Pa. St. 188, 53 Am. Dec. 589.

42. Greenwood *v.* Cobbey, 30 Nebr. 579, 46 N. W. 711.

founded wholly upon an immaterial issue will be set aside;[43] but where issue is taken on several pleas, some of which are material and others immaterial, the verdict will stand,[44] unless the evidence sustains only the immaterial issue, in which case, if there are other issues, defendant is held to be not entitled to a general verdict.[45]

(IV) *COUNTER-CLAIM, SET-OFF, AND PAYMENT.* Where there is a set-off or counter-claim, the verdict need not name the amounts found due plaintiff and defendant respectively, but only the difference;[46] and where the allegations of a complaint and those of a counter-claim are of such a nature that the finding rendered for defendant upon the counter-claim necessarily involves a finding against plaintiff upon the complaint, an express finding on the complaint is unnecessary;[47] but if the jury find specially on the cause of action and the counter-claim, the verdict must clearly show in whose favor the balance rests and the amount thereof.[48] Where there is a notice of set-off under the general issue, a finding that plaintiff is indebted to defendant in a stated amount is good, being by necessary inferences a verdict for defendant.[49] Conversely, in such a case a general verdict for plaintiff is a valid finding by the jury, the set-off being in effect a part of the issue.[50] Upon a plea of payment, a general verdict may be found for plaintiff, for the amount found due after deducting all payments

43. Hughes *v.* McCutchen, Morris (Iowa) 154; Carson *v.* Osborn, 10 B. Mon. (Ky.) 155; Tuttle *v.* Brown, 10 Cush. (Mass.) 262.

44. De Gottardi *v.* Donati, 155 Cal. 109, 99 Pac. 492; State *v.* Hood, 7 Blackf. (Ind.) 127; Wallace *v.* Barlow, 3 Bibb (Ky.) 168; Hughes *v.* Waring, Litt. Sel. Cas. (Ky.) 402; Graves *v.* Hillyer, (Tex. Civ. App. 1899) 48 S. W. 889.

45. Agee *v.* Medlock, 25 Ala. 281; Cullum *v.* Mobile Branch Bank, 4 Ala. 21, 37 Am. Dec. 725.

46. Clemmons *v.* Clemmons, 68 Vt. 77, 34 Atl. 34; Edleman *v.* Kidd, 65 Wis. 18, 26 N. W. 116. But see Buchanan *v.* Smith, 1 Baxt. (Tenn.) 350, holding that defendant is entitled where the plea of set-off is relied upon to a judgment for the excess of his claim, which excess must be ascertained by the jury, and to do this they must find in their verdict that something is due plaintiff.

In Missouri it is held that the verdict should make separate findings on the cause of action and counter-claim. Marshall *v.* Armstrong, 105 Mo. App. 234, 79 S. W. 1161. But in an action on rent notes in which a counter-claim was interposed, the verdict that the value of the claim relied on to establish a counter-claim was equal to the amount of the notes, and finding the issues for the tenant, was sufficient as against the objection that it did not make separate findings on the petition and counter-claim. Lauderdale *v.* King, 130 Mo. App. 236, 109 S. W. 852.

Effect of stipulation.—Where, in an action on a note, the parties stipulate that if the jury find for defendant their verdict shall be for a certain amount on a counter-claim interposed by him, a verdict for defendant for such amount is, by necessary implication, a finding adverse to plaintiff, and covers both causes of action. Taylor *v.* Short, 38 Mo. App. 21.

If accounts are equally balanced, the verdict should be for defendant, unless a statute provides that in that event neither party shall recover costs when the verdict should be nothing due either party. Morgan *v.* Hefler, 68 Me. 131.

When the amount claimed by plaintiff is admitted, the jury may in assessing damages on the counter-claim deduct this amount, showing the deduction in the verdict. If the verdict fails to show the deduction it will be made by the court. Brainard *v.* Lane, 26 Ohio St. 632.

In reconvention, the verdict must respond to the issues made by the pleadings, and unless special should pronounce upon the respective rights or actions of both parties. Morgan *v.* Driggs, 17 La. 176 [*following* Johnston *v.* Bagley, 4 La. 333]. But where the claim in reconvention grows out of the very matter upon which plaintiff's right of action is based, two judgments are held unnecessary, because sustaining one necessarily rejects the other. Kelly *v.* Caldwell, 4 La. 38. See also Erwin *v.* Bissell, 17 La. 92.

Matters in mitigation in a breach of promise case cannot be considered as a set-off or counter-claim, and the court properly refuses to interrogate the jury as to the amount allowed by them in mitigation upon the verdict for plaintiff. Maybin *v.* Webster, 8 Ind. App. 547, 35 N. E. 194, 36 N. E. 373.

47. Beers *v.* Flock, 2 Ind. App. 567, 28 N. E. 1011.

A verdict "for the defendant" simply is sufficient to defeat plaintiff's claim (Phillips *v.* Lewis, 12 N. Y. App. Div. 460, 42 N. Y. Suppl. 707), but it is not sufficient as a basis of a decree in favor of defendant upon a cross bill (Anderson *v.* Webb, 44 Tex. 147).

48. Kornegay *v.* Kornegay, 109 N. C. 188, 13 S. E. 770; Morrison *v.* Few, 3 Tex. App. Civ. Cas. § 384.

49. Pledger *v.* Glover, 2 Port. (Ala.) 174.

50. Harris *v.* Tiffany, 8 B. Mon. (Ky.) 225.

admitted or proved;[51] and in assumpsit, upon a plea of *non assumpsit* and payment, a finding that defendant did assume and promise, without any express finding as to the plea of payment, is a good verdict;[52] but where there were pleas of payment and set-off, a finding simply that defendant had not paid is not sufficiently responsive and will be set aside.[53] Upon a general denial and counterclaim pleaded, a general verdict for plaintiff is sufficient to dispose of both issues.[54] Where no set-off is pleaded a verdict in favor of defendant for a certain sum cannot stand.[55]

f. Surplusage. Verdicts are to have reasonable intendment, and surplusage or immaterial findings may be rejected in construing them. Thus, if the verdict finds the issue and something more, the latter part of the finding will be rejected as surplusage, and judgment rendered independently of the unnecessary matter, there being nothing to show that the jury reasoned falsely.[56] And a verdict will not be invalidated merely because the jury, through their foreman, immediately after the rendition of the verdict expressed their opinion as to the merits of the case, such opinion not being at variance with the verdict,[57] or made an award concerning costs,[58] or, the cause being submitted to the jury on special issues alone, they return a general verdict therewith,[59] and so much of the verdict as

51. Rohr *v.* Anderson, 51 Md. 205.

52. Chewning *v.* Cox, 1 How. (Miss.) 130; Hanna *v.* Mills, 21 Wend. (N. Y.) 90, 34 Am. Dec. 216.

53. Anderson *v.* Anderson, 4 Hayw. (Tenn.) 255.

54. Guthrie *v.* Brown, 42 Nebr. 652, 60 N. W. 939; Everson *v.* Graves, 26 Nebr. 262, 41 N. W. 994.

55. Glass *v.* Blair, 4 Pa. St. 196; Ransing *v.* Bender, 3 Lanc. L. Rev. (Pa.) 193.

56. *California.*— Pierce *v.* Schaden, 62 Cal. 283; Marquard *v.* Wheeler, 52 Cal. 445.
Georgia.— Strickland *v.* Hutchinson, 123 Ga. 396, 51 S. E. 348; North, etc., St. R. Co. *v.* Crayton, 86 Ga. 499, 12 S. E. 877; Hudson *v.* Hawkins, 79 Ga. 274, 4 S. E. 682; Knapp *v.* Harris, 60 Ga. 398; Geer *v.* Thompson, 4 Ga. App. 756, 62 S. E. 500; Tifton, etc., R. Co. *v.* Butler, 4 Ga. App. 191, 60 S. E. 1087.
Illinois.— Warfield *v.* Patterson, 135 Ill. App. 307.
Indiana.— Dunlop *v.* Hayden, 29 Ind. 303, where to a verdict for a specific sum a finding was added that defendant did not act with an improper motive, motive not being an issue in the case.
Indian Territory.—Wilson *v.* Durant, 1 Indian Terr. 532, 42 S. W. 282.
Kentucky.— Louisville, etc., R. Co. *v.* Chandler, 70 S. W. 666, 24 Ky. L. Rep. 998, 72 S. W. 805, 24 Ky. L. Rep. 2035; Tuley *v.* Mauzey, 4 B. Mon. 5.
Maryland.— Gover *v.* Turner, 28 Md. 600.
Massachusetts.— Bacon *v.* Callender, 6 Mass. 303.
Michigan.— Rawson *v.* McElvaine, 49 Mich. 194, 13 N. W. 513.
Mississippi.— Thornton *v.* Lucas, (1901) 29 So. 400; Windham *v.* Williams, 27 Miss. 313; Longacre *v.* State, 2 How. 637.
Missouri.— Lafferty *v.* Hilliker, 109 Mo. App. 56, 81 S. W. 910; Poulson *v.* Collier, 18 Mo. App. 583.
Montana.— Frank *v.* Symons, 35 Mont. 56, 88 Pac. 561.
Nebraska.— McEldon *v.* Patton, 4 Nebr. (Unoff.) 259, 93 N. W. 938.
Nevada.— Gregory *v.* Frothingham, 1 Nev. 253.
New York.— Briggs *v.* Hilton, 99 N. Y. 517, 3 N. E. 51, 52 Am. Rep. 63 [*affirming* 11 Daly 335].
Pennsylvania.—Pittsburgh *v.* McKnight, 91 Pa. St. 202; Bickham *v.* Smith, 62 Pa. St. 45; Leineweaver *v.* Stoever, 17 Serg. & R. 297; Duane *v.* Simmons, 4 Yeates 441; Miner *v.* Booz, 6 Kulp 373.
South Carolina.— Massey *v.* Duren, 7 S. C. 310.
Virginia.— Roane *v.* Drummond, 6 Rand. 182; Wells *v.* Garland, 2 Va. Cas. 471.
West Virginia.— Martin *v.* Ohio River R. Co., 37 W. Va. 349, 16 S. E. 589.
Wisconsin.— Parkinson *v.* McQuaid, 54 Wis. 473, 11 N. W. 682.
United States.— Patterson *v.* U. S., 2 Wheat. 221, 4 L. ed. 224.
Canada.— Sheridan *v.* Pigeon, 10 Ont. 632.
See 46 Cent. Dig. tit. "Trial," § 789.
Mistake in caption.— It is immaterial that the jury made a mistake in the caption to a verdict. People *v.* Ah Kim, 34 Cal. 189; Rogers *v.* Overton, 87 Ind. 410.

57. Wallis *v.* Bazet, 34 La. Ann. 131.

58. *Georgia.*— Southern R. Co. *v.* Oliver, 1 Ga. App. 734, 58 S. E. 244.
Massachusetts.— Lincoln *v.* Hapgood, 11 Mass. 350.
Minnesota.— Coit *v.* Waples, 1 Minn. 134.
Missouri.— Hancock *v.* Buckley, 18 Mo. App. 459; State *v.* Knight, 46 Mo. 83.
Nebraska.— State *v.* Beall, 48 Nebr. 817, 67 N. W. 868.
New Hampshire.— Tucker *v.* Cochran, 47 N. H. 54.
See 46 Cent. Dig. tit. "Trial," § 789.
A verdict for defendant for six cents damages and six cents costs will be considered a general verdict for defendant. Goodenow *v.* Travis, 3 Johns. (N. Y.) 427.

59. Dunlap *v.* Raywood Rice Canal, etc., Co., 43 Tex. Civ. App. 269, 95 S. W. 43.

relates to facts admitted by the pleadings may be stricken out.[60] All these matters will be treated as surplusage, and judgment rendered on the valid part of the verdict, and it is not fatal that the verdict is not technically accurate if the court can see how it should be corrected.[61] But no part of the verdict, no matter how erroneous on its face, which is essential to make the finding responsive to the issues can be stricken out as surplusage,[62] nor can part of the verdict be so stricken out if the verdict is ambiguous.[63]

g. Disregard of Instructions.[64] The instructions to the jury constitute the law of the case, and the jury are bound to follow them in making up their verdict.[65] If they fail to conform to this rule prescribed by law for their conduct, the court may refuse to receive the verdict,[66] and where the verdict is clearly contrary to the instructions given it may be set aside,[67] whether the instructions did or did not correctly state the law,[68] particularly where the evidence is undisputed.[69] On the other hand, it is held that the mere fact that the jury disregarded an incorrect instruction is not a ground for reversing a judgment thereon,[70]

60. Coit *v.* Waples, 1 Minn. 134.

61. Ashton *v.* Touhey, 131 Mass. 26.

62. McNairy *v.* Gathings, 57 Miss. 215.

63. Richardson *v.* Noble, 143 Mich. 546, 107 N. W. 274; Donahue *v.* Wippert, 7 Misc. (N. Y.) 506, 28 N. Y. Suppl. 495.

64. As ground for new trial see NEW TRIAL, 29 Cyc. 818.

65. *Illinois.*— Dickson *v.* George B. Swift Co., 238 Ill. 62, 87 N. E. 59.

Iowa.— Kimball Bros. Co. *v.* Citizens' Gas, etc., Co., 141 Iowa 632, 118 N. W. 891; Eggert *v.* Templeton, 113 Iowa 266, 85 N. W. 19; Reynolds *v.* Keokuk, 72 Iowa 371, 34 N. W. 167.

Missouri.— Connelly *v.* Illinois Cent. R. Co., 120 Mo. App. 652, 97 S. W. 616.

Nebraska.— Union State Bank *v.* Hutton, 62 Nebr. 664, 87 N. W. 533; World Mut. Ben. Assoc. *v.* Worthing, 59 Nebr. 587, 81 N. W. 620.

New Jersey.— Fritz *v.* Sayre, etc., Co., 77 N. J. L. 236, 72 Atl. 425.

New York.— Bluemner *v.* Garvin, 120 N. Y. App. Div. 29, 104 N. Y. Suppl. 1009; Van Alstine *v.* Standard Light, etc., Co., 116 N. Y. App. Div. 100, 101 N. Y. Suppl. 696; Paine *v.* Geneva, etc., Traction Co., 115 N. Y. App. Div. 729, 101 N. Y. Suppl. 204; Hesselgrave *v.* Butler Bros. Constr. Co., 101 N. Y. Suppl. 103.

See 46 Cent. Dig. tit. "Trial," § 790.

But see Meyers *v.* Syndicate Heat, etc., Co., 47 Wash. 48, 91 Pac. 549.

Where an instruction is given embodying only a part of the facts and charging that, if such facts existed, plaintiff could not recover, a verdict for plaintiff is not erroneous as against the law. O'Neill *v.* Thomas Day Co., 152 Cal. 357, 92 Pac. 856.

66. Atchison, etc., R. Co. *v.* Schroll, 76 Kan. 572, 92 Pac. 596; Newell *v.* Wilgus, 8 Pa. Cas. 535, 11 Atl. 365.

67. *Illinois.*— Dickson *v.* George B. Swift Co., 238 Ill. 62, 87 N. E. 59; Boske *v.* Collopy, 86 Ill. App. 268.

Iowa.— Kimball Bros. Co. *v.* Citizens' Gas, etc., Co., 141 Iowa 632, 118 N. W. 891; Smouse *v.* Iowa State Traveling Men's Assoc., 118 Iowa 436, 92 N. W. 53; Bokemper *v.* Hazen, 96 Iowa 221, 64 N. W. 773; Limburg *v.* German F. Ins. Co., 90 Iowa 709, 57 N. W. 626, 48 Am. St. Rep. 468, 23 L. R. A. 99; Musser *v.* Maynard, 59 Iowa 11, 12 N. W. 750; Savery *v.* Busick, 11 Iowa 487.

Kansas.— Union Pac. R. Co. *v.* Hutchinson, 40 Kan. 51, 19 Pac. 312; Ryan *v.* Tudor, 31 Kan. 366, 2 Pac. 797; Frankhouser *v.* Neally, 8 Kan. App. 822, 57 Pac. 980.

Missouri.— Champ Spring Co. *v.* B. Roth Tool Co., 103 Mo. App. 103, 77 S. W. 344; Wehringer *v.* Ahlemeyer, 23 Mo. App. 277.

Montana.— King *v.* Lincoln, 26 Mont. 157, 66 Pac. 836.

Nebraska.— Strong *v.* Eggert, 71 Nebr. 813, 99 N. W. 647.

New Jersey.— Fritz *v.* Sayre, etc., Co., 77 N. J. L. 236, 72 Atl. 425.

New York.— Benjamin *v.* Tupper Lake, 110 N. Y. App. Div. 426, 97 N. Y. Suppl. 512.

Ohio.— Howard *v.* Brower, 37 Ohio St. 402.

South Dakota.— Drew *v.* Watertown Ins. Co., 6 S. D. 335, 61 N. W. 34.

Texas.— Wilkinson *v.* Wallis, 1 Tex. App. Civ. Cas. § 688.

See 46 Cent. Dig. tit. "Trial," § 790.

But see Floyd *v.* Ricks, 11 Ark. 451.

68. *Iowa.*— Kimball Bros. Co. *v.* Citizens' Gas, etc., Co., 141 Iowa 632, 118 N. W. 891; Way *v.* Chicago, etc., R. Co., 73 Iowa 463, 35 N. W. 525; Reynolds *v.* Keokuk, 72 Iowa 371, 34 N. W. 167; Mast *v.* Pearce, 58 Iowa 579, 8 N. W. 632, 12 N. W. 597, 43 Am. Rep. 125; Jewett *v.* Smart, 11 Iowa 505.

Kansas.— Kansas City, etc., R. Co. *v.* Furst, 3 Kan. App. 265, 45 Pac. 128.

Montana.— McAllister *v.* Rocky Fork Coal Co., 31 Mont. 359, 78 Pac. 595; King *v.* Lincoln, 26 Mont. 157, 66 Pac. 836.

Nebraska.— Haslam *v.* Barge, 69 Nebr. 644, 96 N. W. 245; Barton *v.* Shull, 62 Nebr. 570, 87 N. W. 322; Boyesen *v.* Heidelbrecht, 56 Nebr. 570, 76 N. W. 1089; Westinghouse Co. *v.* Tilden, 56 Nebr. 129, 76 N. W. 416.

New Jersey.— Fritz *v.* Sayre, etc., Co., 77 N. J. L. 236, 72 Atl. 425.

Utah.— Bentley *v.* Brossard, 33 Utah 396, 94 Pac. 736.

See 46 Cent. Dig. tit. "Trial," § 790.

69. Dutton *v.* Wabash, etc., R. Co., 66 Iowa 352, 23 N. W. 739.

70. McNulta *v.* Enoch, 134 Ill. 46, 24 N. E.

particularly where the verdict is plainly justified by the evidence,[71] and it is manifest to the appellate court that justice has been done,[72] the complaining party not having been injuriously affected by the disobedience of the jury; [73] and the fact that a verdict is against the evidence and instructions is no ground for reversal where the evidence and instructions relate altogether to an issue not made by the pleadings.[74] It is held not to be error to disregard an instruction to state in the verdict upon which of several counts the verdict is based,[75] and a verdict will not be set aside because contrary to instructions which were inapplicable,[76] or conflicting,[77] or where under all the circumstances it is more reasonable to assume that the jury forgot the instruction rather than that they purposely disobeyed it,[78] or where the disregard was merely technical.[79] A verdict is not contrary to the instructions where there is evidence on which under the instructions given the jury is authorized to find the verdict returned.[80] Disregard by the jury of an instruction as to the amount of recovery is cured by a remittitur.[81]

4. Amendment — a. By Jury — (i) *General Rules.* A verdict is not final until pronounced and recorded,[82] and the jury may amend their verdict so as to put it in proper form before they have separated, and until it has been entered of record or they have been discharged,[83] and a change made in the form by the foreman of the jury in open court, in the presence and by consent of the jurors,

631; Morier *v.* Moran, 58 Ill. App. 235; Dubinski Electric Works *v.* J. Lang Electric Co., (Tex. Civ. App. 1908) 111 S. W. 169; Johnston *v.* Kleinsmith, 33 Tex. Civ. App. 236, 77 S. W. 36; Texas Cent. R. Co. *v.* Andrews, 28 Tex. Civ. App. 477, 67 S. W. 923; Daggett *v.* Lee, (Tex. Civ. App. 1894) 29 S. W. 89. See also Ætna Indem. Co. *v.* J. R. Crowe Coal, etc., Co., 154 Fed. 545, 83 C. C. A. 431.

71. Butler *v.* Rhode Island Co., (R. I. 1907) 68 Atl. 425; Collins *v.* George, 102 Va. 509, 46 S. E. 684; Hinton *v.* Coleman, 76 Wis. 221, 45 N. W. 26; Lazier Gas Engine Co. *v.* Du Bois, 130 Fed. 834, 65 C. C. A. 172.

Effect of misunderstanding instructions.— The judgment will not be reversed because the jury possibly did not understand the instructions, where it is manifest that they understood the evidence. Waldenmeyer *v.* Meyer, 4 Ky. L. Rep. 361.

72. Bancroft *v.* Godwin, 41 Wash. 253, 83 Pac. 189.

73. Kaplan *v.* Shapiro, 53 Misc. (N. Y.) 606, 103 N. Y. Suppl. 922.

74. Scott *v.* Morse, 54 Iowa 732, 6 N. W. 68, 7 N. W. 15.

75. Arnold *v.* Penn, 11 Tex. Civ. App. 325, 32 S. W. 353.

76. Babcock *v.* Maxwell, 29 Mont. 31, 74 Pac. 64; Smith *v.* Tate, 82 Va. 657.

77. Cotter *v.* Butte, etc., Smelting Co., 31 Mont. 129, 77 Pac. 509.

78. Hart *v.* Godkin, 122 Wis. 646, 100 N. W. 1057.

79. Wallerich *v.* Puget Sound Warehouse Co., 38 Wash. 501, 80 Pac. 763.

Where the verdict is responsive to issues it will be sustained. Houssels *v.* Pitts, (Tex. Civ. App. 1899) 52 S. W. 588.

80. *Arkansas.*— Britt *v.* Aylett, 11 Ark. 475, 52 Am. Dec. 282.

Iowa.— Hablichtel *v.* Yambert, 75 Iowa 539, 39 N. W. 877.

Nebraska.— Brennan-Love Co. *v.* McIntosh, 62 Nebr. 522, 87 N. W. 327; Bonawitz *v.* De Kalb, 2 Nebr. (Unoff.) 534, 89 N. W. 379.

Texas.— Evansich *v.* Gulf, etc., R. Co., 61 Tex. 24.

Wyoming.— Stoner *v.* Mau, 11 Wyo. 366, 72 Pac. 193, 73 Pac. 548.

Verdict held not contrary to instructions see Portland Cracker Co. *v.* Murphy, 130 Cal. 649, 63 Pac. 70.

81. Robison *v.* Bailey, 113 Ill. App. 123.

82. Blackley *v.* Sheldon, 7 Johns. (N. Y.) 32; Root *v.* Sherwood, 6 Johns. (N. Y.) 68, 5 Am. Dec. 191.

83. *Alabama.*— Comer *v.* Jackson, 50 Ala. 384.

Florida.— Coffee *v.* Groover, 20 Fla. 64.

Illinois.— Griffin *v.* Larned, 111 Ill. 432; Arnold *v.* Kilchmann, 80 Ill. App. 229; Kirk *v.* Senzig, 79 Ill. App. 251.

Iowa.— Higley *v.* Newell, 28 Iowa 516; Tifield *v.* Adams, 3 Iowa 487; Wright *v.* Phillips, 2 Greene 191.

Louisiana.— Broussard *v.* Nolan, 4 La. Ann. 55.

Maine.— Beal *v.* Cunningham, 42 Me. 362; Doe *v.* Scribner, 36 Me. 168.

Michigan.— Olcott *v.* Hanson, 12 Mich. 452.

New York.— Warner *v.* New York Cent. R. Co., 52 N. Y. 437, 11 Am. Rep. 724; Blackley *v.* Sheldon, 7 Johns. 32; Root *v.* Sherwood, 6 Johns. 68, 5 Am. Dec. 191.

North Carolina.—Bond *v.* Wilson, 131 N. C. 505, 42 S. E. 956.

Pennsylvania.— Pepper *v.* Philadelphia, 114 Pa. St. 96, 6 Atl. 899; Scott *v.* Galbraith [*cited* in Burrows *v.* Heysham, 1 Dall. 133, 134, 1 L. ed. 69].

South Carolina.—Harley *v.* Neilson, 1 Rich. 483; Hobson *v.* Humphries, 2 Mill 371.

Texas.— Thomae *v.* Zushlag, 25 Tex. Suppl. 225.

See 46 Cent. Dig. tit. "Trial," § 791.

In the case of a sealed verdict the same rule applies. Higley *v.* Newell, 28 Iowa 516; Tifield *v.* Adams, 3 Iowa 487.

is not improper,[84] or the jury may retire and correct it.[85] And it is error to refuse a jury permission to retire and reconsider their verdict, where on hearing it read by the clerk they state to the court that it is not their verdict.[86] The amendment may be made even though the jurors have separated, where the object of the amendment is only to express the legal meaning of the finding.[87] But the verdict cannot be amended by the jury after it has been entered of record and they have been dismissed.[88]

(II) *Under Direction of Court.* The rule is well settled that the court may, with proper instructions, recommit a verdict to the jury for their reconsideration, where the verdict which they have rendered is not in the proper form,[89]

Where a written memorandum inconsistent with the verdict was recorded by mistake, it may be replaced by the verdict in proper form. Com. *v.* George, 12 Pa. Super. Ct. 1.

84. Denham *v.* Kirkpatrick, 64 Ga. 71; Kessel *v.* O'Sullivan, 60 Ill. App. 548; Twomey *v.* Linnehan, 161 Mass. 91, 36 N. E. 590; International, etc., R. Co. *v.* Lister, (Tex. Civ. App. 1902) 72 S. W. 107.

85. Wright *v.* Wright, 114 Iowa 748, 87 N. W. 709, 55 L. R. A. 261; Tarlton *v.* Briscoe, 1 A. K. Marsh. (Ky.) 67; Urbanek *v.* Chicago, etc., R. Co., 47 Wis. 59, 1 N. W. 464.

86. Saxon *v.* Foster, 69 Ark. 626, 65 S. W. 425.

87. *Georgia.*— Jones *v.* Smith, 64 Ga. 711; Collins *v.* Bullard, 57 Ga. 333; Barnes *v.* Strohecker, 17 Ga. 340.

Maine.— Childs *v.* Carpenter, 87 Me. 114, 32 Atl. 780; Blake *v.* Blossom, 15 Me. 394.

Mississippi.— Prussel *v.* Knowles, 4 How. 90.

North Carolina.— Robeson *v.* Lewis, 73 N. C. 107; Curtis *v.* Smart, 32 N. C. 97.

Pennsylvania.— Thomas *v.* Upper Merion Tp., 10 Pa. Co. Ct. 414.

Vermont.— Montgomery *v.* Maynard, 33 Vt. 450.

See 46 Cent. Dig. tit. "Trial," § 791 *et seq.*

But see Bradley *v.* Rogers, 33 Kan. 120, 5 Pac. 374.

88. *Georgia.*— Shelton *v.* O'Brien, 76 Ga. 820; Settle *v.* Alison, 8 Ga. 201, 52 Am. Dec. 393.

Minnesota.— Dana *v.* Farrington, 4 Minn. 433.

North Carolina.— Mitchell *v.* Mitchell, 122 N. C. 332, 29 S. E. 367.

Ohio.— Wertz *v.* Cincinnati, etc., R. Co., 11 Ohio Dec. (Reprint) 872, 30 Cinc. L. Bul. 280.

Pennsylvania.— Walters *v.* Junkins, 16 Serg. & R. 414, 16 Am. Dec. 585.

United States.— Snowden *v.* McGuire, 22 Fed. Cas. No. 13,150, 2 Cranch C. C. 6.

See 46 Cent. Dig. tit. "Trial," § 791 *et seq.*

An amendment made three days after the verdict was returned is void. St. Clair *v.* Caldwell, 72 Ala. 527. In such case the original verdict remains good. State *v.* Yancey, 1 Treadw. (S. C.) 237.

A jury summoned to assess damages for land sought to be condemned having signed their verdict and delivered it to a messenger for delivery to the proper custodian have no further control thereof and cannot amend it. West *v.* West, etc., R. Co., 61 Miss. 536.

89. *California.*— Truebody *v.* Jacobson, 2 Cal. 269.

Colorado.— Lacey *v.* Bentley, 39 Colo. 449, 89 Pac. 789; Schoolfield *v.* Brunton, 20 Colo. 139, 36 Pac. 1103.

Connecticut.— Black *v.* Griggs, 74 Conn. 582, 51 Atl. 523.

Georgia.— Moore *v.* Penn, 115 Ga. 796, 42 S. E. 57; Johnson *v.* Oakes, 80 Ga. 722, 6 S. E. 274; Beale *v.* Hall, 22 Ga. 431.

Illinois.— Martin *v.* Morelock, 32 Ill. 485; Osgood *v.* McConnell, 32 Ill. 74; Smith *v.* Williams, 22 Ill. 357; Cook *v.* Scott, 6 Ill. 333; Wells *v.* Ipperson, 48 Ill. App. 580.

Indiana.— Crocker *v.* Hoffman, 48 Ind. 207; Harrison *v.* Jaquess, 29 Ind. 208; Jones *v.* Julian, 12 Ind. 274; State L. Ins. Co. *v.* Postal, 43 Ind. App. 144, 84 N. E. 156, 1093; Ft. Wayne *v.* Duryee, 9 Ind. App. 620, 37 N. E. 299.

Iowa.— Cohen *v.* Sioux City Traction Co., 141 Iowa 469, 119 N. W. 964 (holding that it is proper practice to recall the jury to correct informal or defective verdicts, where it can be done promptly or within a reasonable time, and such verdicts should be permitted to stand, in the absence of a showing of prejudice to the losing party); Kinkead *v.* Peet, 136 Iowa 590, 111 N. W. 48; Oxford Junction Sav. Bank *v.* Cook, 134 Iowa 185, 111 N. W. 805 (holding that the court may recall and send back a jury to correct a manifest error in form or supply an omission of some matter necessary to the verdict as found).

Kentucky.— Bergen, etc., Co. *v.* Sears, 67 S. W. 1002, 24 Ky. L. Rep. 80.

Louisiana.— State *v.* Underwood, 44 La. Ann. 1114, 11 So. 823; McIntosh *v.* Smith, 2 La. Ann. 756.

Maine.— Ward *v.* Bailey, 23 Me. 316; Hobart *v.* Hagget, 12 Me. 67, 28 Am. Dec. 159.

Massachusetts.— Produce Exch. Trust Co. *v.* Bieberbach, 176 Mass. 577, 58 N. E. 162; Fuller *v.* Chamberlain, 11 Metc. 503; Ropps *v.* Barker, 4 Pick. 239. But see Kenney *v.* Habich, 137 Mass. 421.

Minnesota.— Nininger *v.* Knox, 8 Minn. 140.

Missouri.— Kreibohm *v.* Yancey, 154 Mo. 67, 55 S. W. 260; Ver Steeg *v.* Becker-Moore Paint Co., 106 Mo. App. 257, 80 S. W. 346; Fathman *v.* Tumilty, 34 Mo. App. 236, where

where it is insufficient in substance,[90] not responsive to or covering the issues [91] or instructions,[92] or is otherwise defective,[93] as where the jury return a ver-

an undisputed credit was inadvertently omitted from the verdict.

Nebraska.— Keeling *v.* Pommer, 83 Nebr. 510, 120 N. W. 155.

New Hampshire.— Jenness *v.* Jones, 68 N. H. 475, 44 Atl. 607.

New York.— Jacob *v.* Watkins, 10 N. Y. App. Div. 475, 42 N. Y. Suppl. 6; Hegeman *v.* Cantrell, 40 N. Y. Super. Ct. 381; Salemon *v.* New York City R. Co., 56 Misc. 502, 107 N. Y. Suppl. 58 (holding that, until the jury is discharged, they may correct their verdict, either at their own instance or that of the court, and for that purpose may be sent back, before their verdict is recorded, not only to correct a mistake in form, or to remedy obscurity, but to alter it in substance); Blackley *v.* Sheldon, 7 Johns. 32.

North Carolina.— Willoughby *v.* Threadgill, 72 N. C. 438.

South Carolina.— King *v.* Lane, 68 S. C. 430, 47 S. E. 704; Devore *v.* Geiger, 41 S. C. 138, 19 S. E. 288; State *v.* Baldwin, 14 S. C. 135; Smith *v.* Keels, 15 Rich. 318; Gatewood *v.* Moses, 5 Rich. 244; Bell *v.* Hutchinson, 2 McCord 409.

Texas.— Floege *v.* Wiedner, 77 Tex. 311, 14 S. W. 132; International, etc., R. Co. *v.* Locke, (Civ. App. 1902) 67 S. W. 1082; Houston, etc., R. Co. *v.* Hubbard, (Civ. App. 1896) 37 S. W. 25; Utley *v.* Smith, (Civ. App. 1895) 32 S. W. 906.

Wisconsin.— S. C. Herbst Importing Co. *v.* Burnham, 81 Wis. 408, 51 N. W. 262; Doran *v.* Ryan, 81 Wis. 63, 51 N. W. 259; Victor Sewing Mach. Co. *v.* Heller, 44 Wis. 265.

United States.— Burlingame *v.* Minnesota Cent. R. Co., 23 Fed. 706, 23 Blatchf. 142.

Canada.— Moore *v.* Boyd, 15 U. C. C. P. 513.

See 46 Cent. Dig. tit. "Trial," § 792 *et seq.*

A misdescription in the verdict may be corrected in this manner. Sigal *v.* Miller, (Tex. Civ. App. 1894) 25 S. W. 1012.

The word "defendant" may be changed to "plaintiff" to make the verdict conform to the finding. Blalock *v.* Waldrup, 84 Ga. 145, 10 S. E. 622, 20 Am. St. Rep. 350.

Where the jury express their dissatisfaction with a verdict to which they may have ignorantly or inadvertently agreed, it may be recommitted for correction. Martin *v.* Morelock, 32 Ill. 485; Brown *v.* Dean, 123 Mass. 254.

Supplying the word "dollars."— On the jury, in an action for a money recovery, returning in open court a verdict defective because of the omission of the word "dollars," the judge should call the omission to the attention of the jury. Cox *v.* High Point, etc., R. Co., 149 N. C. 86, 62 S. E. 761.

90. *Alabama.*— Higginbotham *v.* Clayton, 80 Ala. 194.

Georgia.— Wright *v.* Harris, 24 Ga. 415.

Illinois.— Flinn *v.* Barlow, 16 Ill. 39.

Indiana.— Reed *v.* Thayer, 9 Ind. 157.

Iowa.— Bass *v.* Hanson, 9 Iowa 563.

Maine.— Grotton *v.* Glidden, 84 Me. 589, 24 Atl. 1008, 30 Am. St. Rep. 413.

Missouri.— Cattell *v.* Dispatch Pub. Co., 88 Mo. 356.

Nebraska.— Scott *v.* Chope, 33 Nebr. 41, 49 N. W. 940; Rogers *v.* Sample, 28 Nebr. 141, 44 N. W. 86.

New York.— Herzberg *v.* Murray, 40 N. Y. Super. Ct. 271. But see Manning *v.* Port Henry Iron Co., 91 N. Y. 664 [*reversing* 27 Hun 219].

North Carolina.—Alley *v.* Hampton, 13 N. C. 11.

Pennsylvania.— Fisher *v.* Farley, 23 Pa. St. 501.

South Carolina.— Sanders *v.* Bagwell, 37 S. C. 145, 15 S. E. 714, 16 S. E. 770.

Texas.— Floege *v.* Wiedner, 77 Tex. 311, 14 S. W. 132.

See 46 Cent. Dig. tit. "Trial," § 793.

91. *Georgia.*— Vance *v.* Roberts, 86 Ga. 457, 12 S. E. 653.

Maine.— Goodwin *v.* Appleton, 22 Me. 453.

Maryland.— Edelen *v.* Thompson, 2 Harr. & G. 31.

Michigan.— Kearney *v.* Clutton, 101 Mich. 106, 59 N. W. 419, 45 Am. St. Rep. 394.

Minnesota.—Aldrich *v.* Grand Rapids Cycle Co., 61 Minn. 531, 63 N. W. 1115.

North Carolina.— Towe *v.* Towe, 67 N. C. 298.

Pennsylvania.— Fisher *v.* Farley, 23 Pa. St. 501.

Texas.— Missouri, etc., R. Co. *v.* Burrough, (Civ. App. 1898) 46 S. W. 403.

Wisconsin.— Olwell *v.* Milwaukee St. R. Co., 92 Wis. 330, 66 N. W. 362.

See 46 Cent. Dig. tit. "Trial," § 792 *et seq.*

Where the verdict does not show on which of several pleas it is based, the jury may be remanded. Clark *v.* Cassidy, 64 Ga. 662.

92. Hines *v.* Royce, 127 Mo. App. 718, 106 S. W. 1091 (holding that where the court charged that if they found for plaintiff the verdict should be for a certain amount, and the jury returned a verdict for plaintiff in a less amount, the court properly refused to receive the verdict and ordered the jury to return to their room and further consider the case); Ramage *v.* Peterman, 25 Pa. St. 349; Roche *v.* Dale, 43 Tex. Civ. App. 287, 95 S. W. 1100.

Where the jury are directed to find a special verdict but fail to do so, it is proper for the court to require the jury to retire and return a proper verdict. St. Louis Consolidated Coal Co. *v.* Maehl, 130 Ill. 551, 22 N. E. 715 [*affirming* 31 Ill. App. 252].

93. Strickland Wine Co. *v.* Hayes, 94 Ill. App. 476; Jaspers *v.* Lano, 17 Minn. 296; Smith *v.* Chadron First Nat. Bank, 45 Nebr. 444, 63 N. W. 796; McKean *v.* Paschal, 15 Tex. 37.

As for instance, where it appears that it was arrived at by chance or lot (Roy *v.* Goings, 112 Ill. 656. But see Harrington *v.* Butte, etc., R. Co., 36 Mont. 478, 93 Pac. 640); is greater in amount than the juris-

dict for plaintiff without assessing the damages in a case where damages should be assessed by them,[94] or award inadequate damages;[95] and it is error to decline to permit the jury to retire to amend the verdict.[96] This may be done even after the jury have been discharged, where the amendment goes to formal matters only but does not materially alter the sense of the verdict,[97] and although the verdict has been sealed,[98] and although counsel be absent.[99] But

diction of the court (Street *v.* Stuart, 38 Ark. 159); awards costs (Simonds *v.* Shields, 72 Conn. 141, 44 Atl. 29; Cooper *v.* Pegg, 16 C. B. 264, 454, 24 L. J. C. P. 167, 3 Wkly. Rep. 456, 81 E. C. L. 264); incorrectly states the amount of recovery (Hockett *v.* Alston, 3 Indian Terr. 432, 58 S. W. 675; Lee *v.* Bradway, 25 Iowa 216; Canon *v.* Farmers Bank, 3 Nebr. (Unoff.) 348, 91 N. W. 585; Hatch *v.* Attrill, 118 N. Y. 383, 23 N. E. 549; Pugh Printing Co. *v.* Dexter, 8 Ohio S. & C. Pl. Dec. 557, 5 Ohio N. P. 332; Sanders *v.* Bagwell, 37 S. C. 145, 15 S. E. 714, 16 S. E. 770; Knights of Pythias *v.* Allen, 104 Tenn. 623, 58 S. W. 241); names an amount in excess of the amount claimed in the petition (Patrick Red Sandstone Co. *v.* Skoman, 1 Colo. App. 323, 29 Pac. 21); or finds separate amounts against joint defendants (Hanley *v.* Brooklyn Heights R. Co., 127 N. Y. App. Div. 355, 111 N. Y. Suppl. 575).

Where there was no dispute as to the amount plaintiff was entitled to recover, if at all, and the jury had been properly instructed, there was no error in declining to receive a verdict for half the amount, reinstructing them on this point, and directing their further consideration of the case, but without attempting to direct them as to how the main issue should be resolved. Chandler *v.* Hinds, 135 Wis. 43, 115 N. W. 339.

Interest.— The jury may be remanded or permitted to amend, under instruction from the court, a verdict, which fails to include interest, in a case in which it should be awarded (Johnson *v.* Ridir, 84 Iowa 50, 50 N. W. 36; Bolster *v.* Cummings, 6 Me. 85; Strobridge Lithographing Co. *v.* Randall, 78 Mich. 195, 44 N. W. 134; Bennett *v.* Edison Electric Illuminating Co., 26 N. Y. App. Div. 363, 49 N. Y. Suppl. 833; Rafel *v.* McDermott, 30 Misc. (N. Y.) 208, 62 N. Y. Suppl. 245; Barber Asphalt-Pav. Co. *v.* New York Postgraduate Medical School, etc., 62 N. Y. Suppl. 392); which incorrectly computes the interest due (Shaw *v.* Wood, 8 Ind. 518); or does not compute it at all (Crane Lumber Co. *v.* Otter Creek Lumber Co., 79 Mich. 307, 44 N. W. 788; Sutliff *v.* Gilbert, 8 Ohio 405); or which, by its form, shows that interest was intended to be but was not added (Mark *v.* Hudson River Bridge Co., 56 How. Pr. (N. Y.) 108). But a clerk has no right, after a trial terminated, to change the verdict for plaintiffs as recorded in his minutes by adding the words "with interest," although they were contained in the verdict as announced by the foreman, where the jurors assented to the verdict as originally recorded. Delafield *v.* J. K. Armsby Co., 124 N. Y. App. Div. 621, 109 N. Y. Suppl. 314.

94. *Connecticut.*— Woodbury *v.* Winestine, 79 Conn. 721, 64 Atl. 221.

Georgia.— Doster *v.* Brown, 52 Ga. 543.

Massachusetts.— Chapman *v.* Coffin, 14 Gray 454.

Mississippi.— Maclin *v.* Bloom, 54 Miss. 365.

Missouri.— Hill *v.* Seneca Bank, 100 Mo. App. 230, 73 S. W. 307.

United States.— Clark *v.* Sidway, 142 U. S. 682, 12 S. Ct. 327, 35 L. ed. 1157.

See 46 Cent. Dig. tit. "Trial," § 792 *et seq.*

But to direct the jury to fix the amount from the pleadings is error. Drew *v.* Andrews, 8 Hun (N. Y.) 23.

95. Douglas *v.* Metropolitan St. R. Co., 119 N. Y. App. Div. 203, 104 N. Y. Suppl. 452, holding that where the jury, in an action for personal injuries, finds for plaintiff, and awards damages which are inadequate, the court may refuse to receive the verdict and direct the jury to reconsider the amount of damages under proper instructions.

But the amount to be found must be left to the jury. Paff *v.* Union R. Co., 125 N. Y. App. Div. 773, 110 N. Y. Suppl. 145.

96. Clark *v.* Lude, 63 Hun (N. Y.) 363, 18 N. Y. Suppl. 271; State *v.* Rousseau, 94 N. C. 355; Wright *v.* Hemphill, 81 N. C. 33.

97. Schoolfield *v.* Brunton, 20 Colo. 139, 36 Pac. 1103; Patrick Red Sandstone Co. *v.* Skoman, 1 Colo. App. 323, 29 Pac. 21; Riley *v.* Williams, 123 Mass. 506; Mason *v.* Massa, 122 Mass. 477; Pritchard *v.* Hennessey, 1 Gray (Mass.) 294; Clark *v.* Lude, 63 Hun (N. Y.) 363, 18 N. Y. Suppl. 271; Howard *v.* Kopperl, 74 Tex. 494, 5 S. W. 627.

98. *Illinois.*— Moore *v.* Merchants' L. & T. Co., 70 Ill. App. 210.

Iowa.— Hamilton *v.* Barton, 20 Iowa 505.

Louisiana.— Rousseau *v.* Daysson, 8 Mart. N. S. 273.

Minnesota.— Loudy *v.* Clarke, 45 Minn. 477, 48 N. W. 25.

Pennsylvania.— Reitenbaugh *v.* Ludwick, 31 Pa. St. 131.

See 46 Cent. Dig. tit. "Trial," § 794.

Correction of obvious error.— The court has power to reconvene a jury after they have returned their verdict, to correct an obvious error therein which the foreman called to the attention of the court immediately after they had taken their seats in the court room, although the verdict had been sealed, and although the jury since signing the same had separated for the night. Nolan *v.* East, 132 Ill. App. 634.

99. Traylor *v.* Hughes, 88 Ala. 617, 7 So. 159; Cole *v.* Laws, 104 N. C. 651, 10 S. E. 172.

a jury cannot be reassembled for the purpose of amending or reconsidering a verdict after they have separated and mingled in other affairs or other cases;[1] and after a verdict has been recorded, it cannot be reconsidered by the jury even by order of the court;[2] and it is error for the court to send out the jury to make special findings harmonize with the general verdict.[3]

b. By Court. It is the court's duty to see to it that the verdict is in proper form to carry into effect the findings of the jury, and to that end, where the intention of the jury is ascertainable, the court may amend the verdict, and by correcting manifest errors of form or substance make it conform to the intention of the jury,[4] if the matter of amendment can in no way affect the questions sub-

1. Warfield *v.* Patterson, 135 Ill. App. 307; Independent Order Mut. Aid *v.* Stahl, 64 Ill. App. 314; Denison, etc., R. Co. *v.* Giersa, (Tex. Civ. App. 1899) 50 S. W. 1039.

2. Snell *v.* Bangor Steam Nav. Co., 30 Me. 337. But see Dearborn *v.* Newhall, 63 N. H. 301.

3. Southwestern Mineral R. Co. *v.* Kennedy, 8 Kan. App. 490, 55 Pac. 516.

4. *California.*— Perkins *v.* Wilson, 3 Cal. 137.

Colorado.— Davis *v.* Shepherd, 31 Colo. 141, 72 Pac. 57.

Georgia.— Knowles *v.* Williams, 62 Ga. 316; Hardin *v.* Johnston, 58 Ga. 522; Erskine *v.* Wiggins, 58 Ga. 187; Corbett *v.* Gilbert, 24 Ga. 454; Wood *v.* McGuire, 17 Ga. 361, 63 Am. Dec. 246.

Illinois.— Italian-Swiss Agricultural Colony *v.* Pease, 194 Ill. 98, 62 N. E. 317; Chittenden *v.* Evans, 48 Ill. 52; Parmelee *v.* Smith, 21 Ill. 620; Malott *v.* Howell, 111 Ill. App. 233; McKinney *v.* Armstrong, 97 Ill. App. 208; Clapp *v.* Martin, 33 Ill. App. 438.

Indian Territory.— Swofford Bros. Dry-Goods Co. *v.* Smith-McCord Dry-Goods Co., 1 Indian Terr. 314, 37 S. W. 103.

Iowa.— Armstrong *v.* Pierson, 15 Iowa 476; Fromme *v.* Jones, 13 Iowa 474.

Kentucky.— Craig *v.* Taylor, 10 B. Mon. 53.

Louisiana.— Beal *v.* McKiernan, 8 La. 569.

Maine.— Sawyer *v.* Hopkins, 22 Me. 268; Little *v.* Larrabee, 2 Me. 37, 11 Am. Dec. 43.

Massachusetts.— Cobb *v.* Boston, 201 Mass. 15, 86 N. E. 785; Minot *v.* Boston, 201 Mass. 10, 86 N. E. 783, 25 L. R. A. N. S. 311; Lovejoy *v.* Whitcomb, 174 Mass. 586, 55 N. E. 322; Lincoln *v.* Lincoln, 12 Gray 45; Porter *v.* Rummery, 10 Mass. 64.

Michigan.— Sleight *v.* Henning, 12 Mich. 371.

Mississippi.— Patrick *v.* Carr, 50 Miss. 199; Montgomery *v.* Tillotson, 1 How. 215.

Missouri.— Cox *v.* Bright, 65 Mo. App. 417; Fay *v.* Richmond, 18 Mo. App. 355; Acton *v.* Dooley, 16 Mo. App. 441.

New Hampshire.— Tucker *v.* Cochran, 47 N. H. 54.

New Jersey.— Humphreys *v.* Woodstown, 48 N. J. L. 588, 7 Atl. 301; State St. Methodist Church *v.* Gordon, 31 N. J. L. 264.

New York.— Hodgkins *v.* Mead, 119 N. Y. 166, 23 N. E. 559 [*affirming* 5 N. Y. Suppl. 433, 16 N. Y. Civ. Proc. 434]; Dalrymple *v.* Williams, 63 N. Y. 361, 20 Am. Rep. 544; Wells *v.* Cox, 1 Daly 515; Burhans *v.* Tibbits, 7 How. Pr. 21; Rockfeller *v.* Donnelly, 8 Cow. 623.

North Carolina.— Cox *v.* High Point, etc., R. Co., 149 N. C. 86, 62 S. E. 761; Grist *v.* Hodges, 14 N. C. 198; Dowell *v.* Vannoy, 14 N. C. 43. But see Shields *v.* Whitaker, 82 N. C. 516.

Ohio.— Hay *v.* Ousterout, 3 Ohio 384.

Pennsylvania.— Jackson *v.* Tozer, 154 Pa. St. 223, 26 Atl. 226; Haycock *v.* Greup, 57 Pa. St. 438; Keen *v.* Hopkins, 48 Pa. St. 445; Henry *v.* Raiman, 25 Pa. St. 354, 64 Am. Dec. 703; Pedan *v.* Hopkins, 13 Serg. & R. 45; Chapman *v.* Erwin, 2 Lanc. L. Rev. 233.

South Carolina.— Segars *v.* Segars, 82 S. C. 196, 63 S. E. 891 (holding that where a verdict in claim and delivery was irregular, in that it did not specify in whose possession the property was, or against which of two defendants not jointly liable the verdict was rendered, defendant's remedy was by motion to make the verdict more definite and certain); Pearce *v.* McClenaghan, 5 Rich. 178, 55 Am. Dec. 710; Commonwealth Bank *v.* Condy, 1 Hill 209.

Tennessee.— Fox *v.* Boyd, 104 Tenn. 357, 58 S. W. 221.

Texas.— Chimene *v.* Baker, 32 Tex. Civ. App. 520, 75 S. W. 330; International, etc., R. Co. *v.* Branch, 29 Tex. Civ. App. 144, 68 S. W. 338, (Civ. App. 1900) 56 S. W. 542.

Virginia.—Pendleton *v.* Vandevier, 1 Wash. 381.

Washington.— Richardson *v.* Agnew, 46 Wash. 117, 89 Pac. 404.

Wisconsin.— Hurst *v.* Webster Mfg. Co., 128 Wis. 342, 107 N. W. 666.

United States.— Koon *v.* Phœnix Mut. L. Ins. Co., 104 U. S. 106, 26 L. ed. 670; Lincoln Tp. *v.* Cambria Iron Co., 103 U. S. 412, 26 L. ed. 518; Parks *v.* Turner, 12 How. 39, 13 L. ed. 883; Osborne *v.* Altschul, 93 Fed. 381, 35 C. C. A. 354; Swofford Bros. Dry-Goods Co. *v.* Smith-McCord Dry-Goods Co., 85 Fed. 417, 29 C. C. A. 239; Gay *v.* Joplin, 13 Fed. 650, 4 McCrary 459.

England.—Ernest *v.* Brown, Arn. 2, 4 Bing. N. Cas. 162, 2 Jur. 34, 7 L. J. C. P. 145, 5 Scott 491, 13 E. C. L. 449.

See 46 Cent. Dig. tit. "Trial," § 795 *et seq.*

Such amendments have been made where the jury apportioned the costs between the parties (Nation *v.* Littler, (Kan. 1898) 52 Pac. 96; Foote *v.* Woodworth, 66 Vt. 216, 28 Atl. 1034), or made an error in computation

mitted to the jury.[5] The amendment may be made with the consent of the jury,[6] or without such consent and after the jury have separated,[7] and have been discharged,[8] and at any time before final judgment,[9] and after the trial of another cause;[10] and the appellate court may make the amendment when the case comes before it.[11] The amendment may be made upon the judge's notes at the trial, or on other clear evidence,[12] but to warrant amendment the data for amendment

(Gould *v.* Hartwig, 71 Kan. 438, 80 Pac. 976; How *v.* How, 48 Me. 428), or failed to include an undisputed item (Fischer *v.* Reilly, 3 N. Y. Suppl. 757).

A verdict for plaintiff without stating damages may be amended by the court by adding nominal damages. Coit *v.* Waples, 1 Minn. 134.

A verdict incorrectly recorded may be amended by the court. Grist *v.* Hodges, 14 N. C. 198; Dowell *v.* Vannoy, 14 N. C. 43; Ivens' Appeal, 33 Pa. St. 237; Baker *v.* Lawrence, 22 L. T. Rep. N. S. 608, 18 Wkly. Rep. 835; Marianski *v.* Cairns, 1 Macq. H. L. 766.

Directed verdict.— The court may amend a verdict so as to conform to instructions where under a peremptory instruction to find for plaintiff the jury returned a verdict for defendant (Christopher *v.* White, 42 Mo. App. 428); or find for plaintiff in less than the directed amount (Mouat *v.* Wells, 76 Minn. 438, 79 N. W. 499; Hilburn *v.* Harrell, (Tex. Civ. App. 1895) 29 S. W. 925). But where smaller verdict is by direction of counsel received by court it is proper for the court thereafter to refuse to reform the verdict to correspond with the instructions. Fay Fruit Co. *v.* Talerico, (Tex. Civ. App. 1902) 69 S. W. 196. A directed verdict for one party cannot be changed into verdict for the opposite party. Brush *v.* Kohn, 9 Bosw. (N. Y.) 589.

Where a court might have directed a verdict to include a specified item, such as attorney's fees, it may add the item to the amount returned by the jury. Yakima Nat. Bank *v.* Knipe, 6 Wash. 348, 33 Pac. 834. Similarly, where upon admitted facts the court might have directed a verdict for a specified amount and the jury contrary to instructions find a less amount the court may increase the damages to the proper amount. Schweitzer *v.* Connor, 57 Wis. 177, 14 N. W. 922. But see Morris *v.* Burke, 15 Mont. 214, 38 Pac. 1065, holding that a court has no right to refuse to receive a verdict for plaintiff for fifty dollars on the ground that if plaintiff is entitled to recover he is entitled to recover one hundred dollars.

Adding name of party.— Where a suit is brought in the name of a father to recover damages for the death of an infant son, and the jury returned a verdict in a lump sum for the parents as "total damages for the death of their son," the record may subsequently be amended by the court by adding the name of the mother of the deceased. Waltz *v.* Pennsylvania R. Co., 31 Pa. Super. Ct. 286 [*affirmed* in 216 Pa. St. 165, 65 Atl. 401].

Mere irregularities by the court in performing this duty is not ground for new trial. Brown *v.* Rounsavell, 78 Ill. 589.

The amendment may be made by an attorney at the direction of the court. Washington *v.* Denton First Nat. Bank, 64 Tex. 4.

Substituting one verdict for another.— Where a jury, by mistake of the foreman in the use of blank forms of verdict submitted, returned two complete verdicts into court, one for defendant and the other for plaintiff, their intention being to render a verdict for plaintiff, according to plaintiff's verdict so returned, it was proper for the court, after receiving the verdict for defendant, and then discovering the other verdict, to substitute the one for the other, according to the jury's intention, under the court's power to amend the verdict to conform to the facts. Hary *v.* Speer, 120 Mo. App. 556, 97 S. W. 228.

5. Browning *v.* Chicago, 155 Ill. 314, 40 N. E. 565; Whittier *v.* Varney, 10 N. H. 291.

6. Clough *v.* Clough, 26 N. H. 24; Marine Sav. Bank *v.* Young, 5 Wash. 394, 31 Pac. 864; Jordan *v.* Marr, 4 U. C. Q. B. 53.

7. Gordon *v.* Higley, Morr. (Iowa) 13; Osborne *v.* Morris, 21 Oreg. 367, 28 Pac. 70.

8. Italian-Swiss Agricultural Colony *v.* Pease, 194 Ill. 98, 62 N. E. 317 [*affirming* 96 Ill. App. 45]; Cobb *v.* Boston, 201 Mass. 15, 86 N. E. 785; Minot *v.* Boston, 201 Mass. 10, 86 N. E. 783, 25 L. R. A. N. S. 311; Schnaufer *v.* Ahr, 53 Misc. (N. Y.) 299, 103 N. Y. Suppl. 195 (holding that the court, although the jury has been discharged, has power to correct the verdict, so as to make it conform to the real determination of the jury, if the motion is made at the same term); Foster *v.* Caldwell, 18 Vt. 176.

Under the Nebraska code of civil procedure, a county judge cannot order the amendment of a verdict after the same has been returned and the jury discharged. Luft *v.* Hall, 5 Nebr. (Unoff.) 551, 99 N. W. 494.

9. Cane *v.* Watson, Morr. (Iowa) 52.

A too long delay may induce the court to refuse to amend. Thus after six years had elapsed the court declined to amend the verdict. Jackson *v.* Galloway, 1 C. B. 280, 2 D. & L. 839, 9 Jur. 373, 14 L. J. C. P. 141, 50 E. C. L. 280. An amendment will not be made, more than twenty years after verdict, unless fact of mistake is clear. Christ *v.* Schell, 31 Fed. 550.

10. Arguelles *v.* Wood, 1 Fed. Cas. No. 520, 2 Cranch C. C. 579.

11. Woodruff *v.* Webb, 32 Ark. 612.

12. Evans *v.* Rogers, 1 Ga. 463; Van Rens-

must be certain and unmistakable,[13] and must appear in the record.[14] The court has no right, without the consent of the jury, so to revise or amend the verdict in a substantial part as to change the sense of their verdict, thus invading the exclusive province of the jury, and substituting its verdict for theirs,[15] although the court directed what the verdict should be,[16] particularly after the jury disperse and the verdict is recorded.[17] After a verdict is recorded, a motion to correct the verdict must be made in the court in which it was recorded.[18] A verdict incomplete at the term at which it was rendered may be set aside by the court at any subsequent term for the purpose of perfecting it.[19]

c. Several Counts or Issues. Where there are several counts for the same cause of action, and a general verdict is returned, it may be altered so as to apply to any one count supported by the evidence.[20] But a general verdict upon a declaration, one of the counts of which is bad, cannot be amended after it is recorded

selaer *v.* Platner, 2 Johns. Cas. (N. Y.) 17; Roulain *v.* McDowall, 1 Bay (S. C.) 490; Murphy *v.* Stewart, 2 How. (U. S.) 263, 11 L. ed. 261; Miller *v.* Steele, 153 Fed. 714, 82 C. C. A. 572.

Stenographer's notes.— It has been held that a verdict cannot be corrected by reference to the phonographic reporter's notes. Stewart *v.* Taylor, 68 Cal. 5, 8 Pac. 605.

13. Edwards *v.* McCaddon, 20 Iowa 520; Girard *v.* Stiles, 4 Yeates (Pa.) 1.

14. Forrest *v.* Wallace, 4 Leg. Gaz. (Pa.) 245; Brown *v.* Hillegas, 2 Hill (S. C.) 447.

No amendment from memory.— An appellate court has refused to amend the record from the memory of the judge who tried the case. Reg. *v.* Virrier, 12 A. & E. 317, 4 Jur. 628, 9 L. J. M. C. 120, 4 P. & D. 161, 40 E. C. L. 163, 113 Eng. Reprint 833.

15. *Georgia.*— Glore *v.* Akin, 131 Ga. 481, 62 S. E. 580 (holding that the illegality of a verdict for plaintiff for a certain amount against two defendants, to be equally divided between them, could not be cured by writing off one half of the finding and entering up judgment for the other half jointly against both defendants); Farmers' L. & T. Co. *v.* Candler, 92 Ga. 249, 18 S. E. 540.

Illinois.— Electric Vehicle Co. *v.* Price, 138 Ill. App. 594 (holding that the trial court has no power after the lapse of the term at which a verdict is returned to amend the same by adding thereto material words); Kankakee Stone, etc., Co. *v.* Cogan, 74 Ill. App. 78.

Indian Territory.— Brooks *v.* Collier, 3 Indian Terr. 468, 58 S. W. 559.

Kansas.— Ft. Scott, etc., R. Co. *v.* Kinney, 7 Kan. App. 650, 53 Pac. 880.

Maine.— Bucknam *v.* Greenleaf, 48 Me. 394; Little *v.* Larrabee, 2 Me. 37, 11 Am. Dec. 43.

Maryland.— Gaither *v.* Wilmer, 71 Md. 361, 18 Atl. 590, 17 Am. St. Rep. 542, 5 L. R. A. 756.

Massachusetts.— Cobb *v.* Boston, 201 Mass. 15, 86 N. E. 785; Minot *v.* Boston, 201 Mass. 10, 86 N. E. 783, 25 L. R. A. N. S. 311; Morrissey *v.* Morrissey, 180 Mass. 480, 62 N. E. 972; Shapleigh *v.* Wentworth, 13 Mete. 358.

Michigan.— Parker *v.* Lake Shore, etc., R. Co., 93 Mich. 607, 53 N. W. 834.

Minnesota.— Miller *v.* Hogan, 81 Minn. 312, 84 N. W. 40; Coit *v.* Waples, 1 Minn. 134.

Mississippi.— Walker *v.* Sinking Fund Com'rs, 1 Sm. & M. 372.

Missouri.— Henley *v.* Arbuckle, 13 Mo. 209; Dyer *v.* Combs, 65 Mo. App. 148; Poulson *v.* Collier, 18 Mo. App. 583.

New Jersey.— Gerhab *v.* White, 40 N. J. L. 242.

New York.— Duerr *v.* New York Consol. Gas Co., 104 N. Y. App. Div. 465, 93 N. Y. Suppl. 766; Shayne *v.* White, 81 N. Y. App. Div. 600, 81 N. Y. Suppl. 372.

Oregon.— Parlin, etc., Co. *v.* Barnett, 35 Oreg. 568, 57 Pac. 625; Fiore *v.* Ladd, 29 Oreg. 528, 46 Pac. 144.

Pennsylvania.— Clouser *v.* Patterson, 122 Pa. St. 372, 15 Atl. 444; Charles *v.* Bishoff, 1 Pa. Cas. 260, 1 Atl. 572.

Tennessee.— Barnard *v.* Young, 5 Humphr. 100.

Wisconsin.—Wallace *v.* Hilliard, 7 Wis. 627.

United States.— Pressed Steel Car Co. *v.* Steel Car Forge Co., 149 Fed. 182, 79 C. C. A. 130.

See 46 Cent. Dig. tit. "Trial," § 795 *et seq.*

16. McCrary *v.* Gano, 115 Ga. 295, 41 S. E. 580.

The court cannot reduce a verdict without the consent of the party in whose favor it was rendered, but may set it aside, if injustice has been done. Isley *v.* Virginia Bridge, etc., Co., 143 N. C. 51, 55 S. E. 416.

Where the damages were unliquidated and the verdict for plaintiff failed to state any amount, the court had no power to correct the verdict by inserting as damages the entire amount claimed by plaintiff. Amory *v.* Washington Steamboat Co., 120 N. Y. App. Div. 818, 105 N. Y. Suppl. 999.

17. Mullins *v.* Christopher, 36 Ga. 584.

18. Roberts *v.* Rockbottom Co., 7 Metc. (Mass.) 46; Dean *v.* City of New York, 29 N. Y. App. Div. 350, 51 N. Y. Suppl. 586.

19. Christ *v.* Schell, 31 Fed. 550.

20. *Massachusetts.*— Cornwall *v.* Gould, 4 Pick. 446; Baker *v.* Sanderson, 3 Pick. 348; Patten *v.* Gurney, 17 Mass. 182, 9 Am. Dec. 141; Sullivan *v.* Holker, 15 Mass. 374; Barns *v.* Hurd, 11 Mass. 57; Barnard *v.* Whiting, 7 Mass. 358.

New York.—Sayre *v.* Jewett, 12 Wend. 135; Norris *v.* Dunham, 9 Cow. 151; Cooper

by applying it to the good count only, unless the evidence was applicable to that count;[21] and where some of the counts in the declaration are bad, the record cannot be amended, if it appears that there was any evidence exclusively applicable to one of the bad counts;[22] nor can it be amended so as to apply to one count where the counts are inconsistent, although the evidence was applicable to all the counts, and would have warranted a verdict upon the counts to which it is sought to be applied.[23] A joint verdict against several defendants on several counts cannot be amended by limiting it to a particular defendant or particular count.[24] The verdict as amended must show a disposition of all the counts.[25]

d. Amendment as to Amount of Recovery; Interest — (I) *In General.* In an action for the recovery of a money judgment, it is the exclusive province of the jury to find the amount due as well as the right of recovery,[26] and the court cannot under ordinary circumstances increase the sum found,[27] or add interest thereto;[28] and where the jury has failed to find the amount due, the court cannot find it and amend the verdict accordingly, it being impossible to definitely ascertain the amount intended to be allowed.[29] But if the intention of the jury is plain, the court may amend the statement of the amount of recovery so as to put it in proper form to express that intent;[30] and may require a defendant to consent to an increase in the amount of the judgment to the amount indis-

v. Bissell, 15 Johns. 318; Highland Turnpike Co. *v.* McKean, 11 Johns. 98; Union Turnpike Road *v.* Jenkins, 1 Cai. 381.

North Carolina.— Smith *v.* Norman, 13 N. C. 496.

Pennsylvania.— Perry *v.* Boileau, 10 Serg. & R. 208; Paul *v.* Harden, 9 Serg. & R. 23.

United States.—Stockton *v.* Bishop, 4 How. 155, 11 L. ed. 918.

See 46 Cent. Dig. tit. "Trial," § 798.

21. Fenwick *v.* Grimes, 8 Fed. Cas. No. 4,733, 5 Cranch C. C. 439. And see cases cited *supra*, note 20.

22. Postley *v.* Mott, 3 Den. (N. Y.) 353.

23. Lusk *v.* Hastings, 19 Wend. (N. Y.) 627.

24. Carpenter *v.* Shelden, 5 Sandf. (N. Y.) 77.

25. Lovejoy *v.* Whitcomb, 174 Mass. 586, 55 N. E. 322.

26. McClain *v.* Esham, 17 B. Mon. (Ky.) 146; Thompson *v.* Shea, 11 Fed. 847, 4 C. C. A. 93.

27. Clouser *v.* Patterson, 122 Pa. St. 372, 15 Atl. 444; Thompson *v.* Shea, 11 Fed. 847, 4 McCrary 93.

Where the right to recover a stated sum is admitted of record, a verdict for a less sum will be disregarded. Wentworth *v.* King, (Tex. Civ. App. 1899) 49 S. W. 696.

28. Hallum *v.* Dickinson, 47 Ark. 120, 14 S. W. 477; Parker *v.* Lake Shore, etc., R. Co., 93 Mich. 607, 53 N. W. 834; Dyer *v.* Combs, 65 Mo. App. 148.

29. Fromme *v.* Jones, 13 Iowa 474; Gaither *v.* Wilmer, 71 Md. 361, 18 Atl. 590, 17 Am. St. Rep. 542, 5 L. R. A. 756; Poulson *v.* Collier, 18 Mo. App. 583.

The court cannot amend a verdict in gross on a trial of right of property in specified articles by assessing the value of each article separately. Walker *v.* Sinking Fund Com'rs, 1 Sm. & M. (Miss.) 372.

Where one amount is claimed in a bill of particulars and another on trial a verdict "we find the full amount of the plaintiff's claim" is invalid and cannot be amended by the court. Gerhab *v.* White, 40 N. J. L. 242.

In Pennsylvania, an error committed by a jury in computing a verdict cannot be corrected in the supreme court. Charles *v.* Bishoff, 1 Pa. Cas. 260, 1 Atl. 572.

30. *Georgia.*— Hardin *v.* Johnston, 58 Ga. 522.

Illinois.— Boynton *v.* Phelps, 52 Ill. 210.

Iowa.— Fromme *v.* Jones, 13 Iowa 474.

Maine.— How *v.* How, 48 Me. 428.

Pennsylvania.— Chapman *v.* Erwin, 2 Lanc. L. Rev. 233.

See 46 Cent. Dig. tit. "Trial," § 799.

A verdict for plaintiff giving no damages may be amended by the court by adding nominal damages. Coit *v.* Waples, 1 Minn. 134.

Where in a written verdict the amount of damages was left blank, it was proper for the court to fill it in from an oral statement by the foreman of the jury to which all the jurors assented. Kessel *v.* O'Sullivan, 60 Ill. App. 548.

Reducing sum to United States currency.— When a verdict is given in sterling money the rate of which in United States currency is established by law, the court must reduce the sum to and record the verdict in United States money. Beal *v.* McKiernan, 8 La. 569.

The facts upon which amendment is sought must be clear and convincing. Lee *v.* McLaughlin, 4 N. Y. Suppl. 742.

In an action on a note providing for an attorney's fee where no evidence is introduced by defendant and none but the note itself by plaintiff, the construction of the note is for the court, and defendant is not injured by the fact that the court, instead of estimating the attorney's fee, and instructing the jury to include it in their verdict, adds it to the verdict itself. Yakima Nat. Bank *v.* Knipe, 6 Wash. 348, 33 Pac. 834.

An undisputed item of plaintiff's claim having been overlooked by both parties and a general verdict for defendant having been

putably due, on pain of granting plaintiff's motion for a new trial;[31] and the court in the exercise of its discretion to conform the verdict to the intention of the jury and to the pleadings may reduce the amount,[32] as for instance where the jury render a verdict for double the amount claimed by plaintiff;[33] and a verdict may be amended by the court by the computation and addition of interest, if it appears that it was the intention of the jury that it should be added and if sufficient data is at hand upon which to compute it.[34] But there being nothing to show for what time the jury intended to allow interest, the addition of such amount in the verdict returned is erroneous.[35]

(II) *Remission or Reduction of Amount of Recovery.* A verdict may be amended as to the amount of recovery by the entry of a remittitur of the excess of the verdict over the amount claimed or proved;[36] by remitting an excess

returned, plaintiff cannot complain of the amendment of the verdict and a rendition of judgment for him for such item under defendant's stipulation and an order of the court. Fischer *v.* Reilly, 3 N. Y. Suppl. 757.

Where upon admitted facts the court might have directed a verdict for a certain sum and the jury not following the instructions of the court found a less sum, the court did not err in increasing the amount of the verdict by applying the correct rule of damages. Schweitzer *v.* Connor, 57 Wis. 177, 14 N. W. 922. See also Wells *v.* Cox, 1 Daly (N. Y.) 515.

Where there was no dispute as to the amount plaintiff was entitled to recover, the action of the court in reassembling the jury, after its discharge from further consideration of the case, for the purpose of correcting its verdict as to the amount thereof, is not such error as requires a reversal. Fearnley *v.* Fearnley, 44 Colo. 417, 98 Pac. 819.

31. James *v.* Morey, 44 Ill. 352.

32. Harrison *v.* Peabody, 34 Cal. 178; Federspiel *v.* Johnstone, 87 Mich. 303, 49 N. W. 581, holding that the fact that the trial judge reduced a verdict rendered in plaintiff's favor for more than his demand, to an amount less than his demand, will not entitle defendant to a reversal of the judgment, where no injustice appears in the correction.

33. Harrison *v.* Peabody, 34 Cal. 178.

34. *District of Columbia.*— Baltimore, etc., R. Co. *v.* Dougherty, 7 App. Cas. 378.

Illinois.— Meyer *v.* Johnson, 122 Ill. App. 87; Clapp *v.* Martin, 33 Ill. App. 438.

Mississippi.— Patrick *v.* Carr, 50 Miss. 199.

New York.— Lowenstein *v.* Lombard, 2 N. Y. App. Div. 610, 38 N. Y. Suppl. 33; Peetsch *v.* Quinn, 7 Misc. 6, 27 N. Y. Suppl. 323.

United States.— Miller *v.* Steele, 153 Fed. 714, 82 C. C. A. 572; Elliott *v.* Gilmore, 145 Fed. 964.

See 46 Cent. Dig. tit. "Trial," § 799.

In New York the court at special term, although all of the justices presided at the trial term which has ended, has no authority to amend a verdict for the full amount of plaintiff's claim on a *quantum meruit* by allowing him interest from the date of his demand for payment. Fleming *v.* Jacob, 57 Misc. 372, 103 N. Y. Suppl. 209. See also Isbell-Porter Co. *v.* Braker, 105 N. Y. Suppl. 1103. And where at the trial no notice of the question of interest on plaintiff's claim was taken until after verdict was rendered and the jury discharged, and the verdict was found for the full amount of plaintiff's claim, the court could not on a motion after the term at which the case was tried correct the entry of the verdict by making an order including the interest on plaintiff's claim in such verdict. Fleming *v.* Jacob, 57 Misc. 375, 109 N. Y. Suppl. 658.

Where the jury omit interest by mistake although directed by the court to find interest it may be added by the court. Lowenstein *v.* Lombard, 2 N. Y. App. Div. 610, 38 N. Y. Suppl. 33.

35. Schnaufer *v.* Ahr, 53 Misc. (N. Y.) 299, 103 N. Y. Suppl. 195.

36. *California.*— Harrison *v.* Peabody, 34 Cal. 178.

Colorado.— Perkins *v.* Marrs, 15 Colo. 262, 25 Pac. 168; Blum *v.* Edelstein, 20 Colo. App. 408, 79 Pac. 301. See also Patrick Red Sandstone Co. *v.* Skoman, 1 Colo. App. 323, 29 Pac. 21.

Georgia.— Dove *v.* Stewart, 118 Ga. 872, 45 S. E. 688.

Illinois.— Wahl *v.* Laubersheimer, 174 Ill. 338, 51 N. E. 860; Independent Order Mut. Aid *v.* Stahl, 64 Ill. App. 314.

Iowa.— Barber *v.* Maden, 126 Iowa 402, 102 N. W. 120; Newbury *v.* Getchel, etc., Lumber, etc., Co., 100 Iowa 441, 69 N. W. 743, 62 Am. St. Rep. 582.

Maryland.— Harris *v.* Jaffray, 3 Harr. & J. 543.

Michigan.— Federspiel *v.* Johnstone, 87 Mich. 303, 49 N. W. 581.

New Hampshire.— Hoit *v.* Molony, 2 N. H. 322.

North Carolina.— Grist *v.* Hodges, 14 N. C. 198.

Virginia.— Bartley *v.* McKinney, 28 Gratt. 750; Tennant *v.* Gray, 5 Munf. 494.

Wisconsin.— Mowatt *v.* Wilkinson, 110 Wis. 176, 85 N. W. 661.

United States.— Paige *v.* Loring, 18 Fed. Cas. No. 10,672, 1 Holmes 275.

England.— Pickwood *v.* Wright, 1 H. Bl. 643; Usher *v.* Dansey, 4 M. & S. 94, 105 Eng. Reprint 770.

See 46 Cent. Dig. tit. "Trial," § 801.

of interest found in the verdict,[37] or interest improperly found;[38] by releasing a party's claim as to a right not passed on by the verdict;[39] or by remitting amounts included in the verdict due to parties who have not joined in the suit.[40] But where a verdict is too large to meet the approval of the trial court, it is error for the court to reduce it and enter judgment for the reduced amount, without giving plaintiff an option to accept that amount or submit to a new trial.[41]

5. Construction, Operation, and Effect — a. Construction and Operation — (i) *In General.* General verdicts are to be very liberally construed with a view to effectuating the intent of the jury,[42] and all presumptions are indulged in in their favor,[43] and as against answers to special interrogatories, in conflict therewith.[44] But no fact that a party would not have been allowed to prove can be invoked under such presumption,[45] and nothing is presumed to have been proved by the verdict but what is expressly stated in the pleadings or is necessarily implied from the facts so stated,[46] and where the attention of the jury is directed to but one of two counts, a general verdict will be presumed to be on that count.[47] The verdict must be construed with reference to the instructions and pleadings

The remission may be made upon appeal. King *v.* McKinstry, 32 Pa. Super. Ct. 34.

37. Paige *v.* Loring, 18 Fed. Cas. No. 10,672, 1 Holmes 275.

38. Connor *v.* Meany, 8 App. Cas. (D. C.) 1; Western, etc., R. Co. *v.* Brown, 102 Ga. 13, 29 S. E. 130.

39. Allen *v.* Flock, 2 Penr. & W. (Pa.) 159.

40. Stanford *v.* Murphy, 60 Ga. 154.

41. Barber *v.* Maden, 126 Iowa 402, 102 N. W. 120.

42. *California.*— Larsen *v.* Leonardt, 8 Cal. App. 226, 96 Pac. 395.

Connecticut.— Huntington *v.* Ripley, 1 Root 321.

Georgia.— Simmons *v.* Rarden, 9 Ga. 543.

Indiana.— Union Traction Co. *v.* Vandercook, 32 Ind. App. 621, 69 N. E. 486; Vaught *v.* Barnes, 29 Ind. App. 387, 62 N. E. 93, 63 N. E. 864, 64 N. E. 623.

Kentucky.— Pittsburg, etc., R. Co. *v.* Darlington, 129 Ky. 266, 111 S. W. 360, 33 Ky. L. Rep. 818.

Michigan.— Sandler *v.* Bresnaham, 53 Mich. 567, 19 N. W. 188.

Nebraska.— Storey *v.* Kerr, 2 Nebr. (Unoff.) 568, 89 N. W. 601.

New York.— Spencer *v.* Hall, 30 Misc. 75, 62 N. Y. Suppl. 826 [*affirmed* in 51 N. Y. App. Div. 623, 64 N. Y. Suppl. 1149].

Tennessee.— Kelton *v.* Bevins, Cooke 90, 5 Am. Dec. 670.

See 46 Cent. Dig. tit. "Trial," § 809 *et seq.*

Errors clearly clerical should be disregarded. Lake Shore Cattle Co. *v.* Modoc Land, etc., Co., 130 Cal. 669, 63 Pac. 72.

But a void verdict will not support a judgment. Warfield *v.* Patterson, 135 Ill. App. 307.

43. *Alabama.*— Gary *v.* Wood, 4 Ala. 296.

California.— Larsen *v.* Leonardt, 8 Cal. App. 226, 96 Pac. 395.

Indiana.— Mitchell *v.* Tell City, 41 Ind. App. 294, 83 N. E. 735; Lauter *v.* Simpson, 2 Ind. App. 293, 28 N. E. 324.

Kentucky.— Pittsburg, etc., R. Co. *v.* Darlington, 129 Ky. 266, 111 S. W. 360, 33 Ky. L. Rep. 818.

New York.— Card *v.* Duryee, 66 N. Y. 651; Parmenter *v.* Fitzpatrick, 14 N. Y. Suppl. 748.

Oregon.— Torrence *v.* Strong, 4 Oreg. 39; Bybee *v.* Burbank, 2 Oreg. 295.

See 46 Cent. Dig. tit. "Trial," § 811.

It will be presumed to be as broad as the issues of fact on which it was found. Reed *v.* Gentry, 7 Oreg. 497.

Where some of the issues conclude to the court and others to the jury, and verdict and judgment are given, it will be presumed that the issues were properly tried. Baxter *v.* Graham, 5 Watts (Pa.) 418.

A jury cannot be supposed to have been influenced by agreements of counsel of which they were not aware. Clark *v.* Sargeant, 112 Pa. St. 16, 5 Atl. 44.

44. Wabash R. Co. *v.* Keister, 163 Ind. 609, 67 N. E. 521; Wright *v.* Chicago, etc., R. Co., 160 Ind. 583, 66 N. E. 454; Johnson *v.* Gebhauer, 159 Ind. 271, 64 N. E. 855; Morford *v.* Chicago, etc., R. Co., 158 Ind. 494, 63 N. E. 857; Louisville, etc., R. Co. *v.* Kemper, 153 Ind. 618, 53 N. E. 931; Cincinnati, etc., R. Co. *v.* Clifford, 113 Ind. 460, 15 N. E. 524; Greenfield *v.* State, 113 Ind. 597, 15 N. E. 241; Union Traction Co. *v.* Vandercook, 32 Ind. App. 621, 69 N. E. 486; Mishawaka *v.* Kirby, 32 Ind. App. 233, 69 N. E. 481; Gould Steel Co. *v.* Richards, 30 Ind. App. 348, 66 N. E. 68; Indiana Bituminous Coal Co. *v.* Buffey, 28 Ind. App. 108, 62 N. E. 279; Flutter *v.* New York, etc., R. Co., 27 Ind. App. 511, 59 N. E. 337; Warner *v.* Mier Carriage, etc., Co., 26 Ind. App. 350, 58 N. E. 554, 59 N. E. 873; Schaffner *v.* Kober, 2 Ind. App. 409, 28 N. E. 871. See also Larsen *v.* Leonardt, 8 Cal. App. 226, 96 Pac. 395.

An answer of "doubtful" to special interrogatories cannot be held to contradict the general verdict. J. Wooley Coal Co. *v.* Bracken, 30 Ind. App. 624, 66 N. E. 775.

45. Lake Shore, etc., R. Co. *v.* Graham, 162 Ind. 374, 70 N. E. 484.

46. Farrington *v.* Blish, 14 Me. 423.

47. Jones *v.* Cooke, 14 N. C. 112.

and in the light of the issues made by them,[48] and in connection with the entire record.[49] Where two different amounts are given as damages the presumption is that the lesser amount was the one intended.[50]

(II) *VERDICT BY CONSENT.* A verdict is not vitiated by the fact that it was agreed on between the parties,[51] and such verdict is subject to impeachment by a third party only upon showing that he has been injured, or that he has opposing rights that cannot be concluded by it.[52] Such a verdict, covering the whole litigation, is a verdict upon the merits,[53] and the presumption is that everything that could have legally been found for the party in whose favor the verdict was taken has been so found.[54] As between the parties it must be deemed at least as favorable to the party in whose favor it was rendered on the facts in issue as it would if the verdict had been found on a submission;[55] and where there is an agreed verdict and agreed special findings, it cannot be claimed that the evidence did not warrant the verdict except in so far as it may be controlled by the special findings.[56]

b. Conclusiveness. The court will not inquire into the facts after a verdict founded upon conflicting evidence.[57] But a verdict without judgment is not evidence of the facts found by it.[58] Where a separate verdict has not been demanded, a joint verdict against defendant who has made default and defendants answering is conclusive against all defendants;[59] but a verdict against but one defendant imports a finding in favor of a co-defendant.[60]

c. Evidence Affecting Verdict[61] — (I) *AFFIDAVITS AND TESTIMONY OF JURORS TO SUSTAIN, IMPEACH, OR EXPLAIN.* Jurors will not be heard to impeach a verdict duly rendered by them and recorded, and their affidavits introduced for such purpose will be disregarded,[62] as will be also the affidavits of others

48. *Georgia.*— Cameron *v.* American Soda Fountain Co., 3 Ga. App. 425, 60 S. E. 109.
Indiana.— Chicago, etc., R. Co. *v.* Cunningham, 33 Ind. App. 145, 69 N. E. 304.
Kentucky.— Pittsburg, etc., R. Co. *v.* Darlington, 129 Ky. 266, 111 S. W. 360, 33 Ky. L. Rep. 818.
Louisiana.— Downs *v.* Scott, 3 Rob. 84; Harrison *v.* Faulk, 3 La. 68; Trepagnier *v.* Durnford, 5 Mart. 451.
Minnesota.— Cohues *v.* Finholt, 101 Minn. 180, 112 N. W. 12.
Texas.— Missouri, etc., R. Co. *v.* Lightfoot, 48 Tex. Civ. App. 120, 106 S. W. 395; Ellis *v.* Littlefield, 41 Tex. Civ. App. 318, 93 S. W. 171; Rountree *v.* Haynes, (Civ. App. 1903) 73 S. W. 435.
See 46 Cent. Dig. tit. "Trial," § 809.

49. Pittsburg, etc., R. Co. *v.* Darlington, 129 Ky. 266, 111 S. W. 360, 33 Ky. L. Rep. 818; Cohues *v.* Finholt, 101 Minn. 180, 112 N. W. 12.
Although the evidence is not made a part of the record in the manner pointed out by statute, the court may consult its own recollection of the evidence, as well as the files of the court, in order to understand what the jury meant by its verdict. Pittsburg, etc., R. Co. *v.* Darlington, 129 Ky. 266, 111 S. W. 360, 33 Ky. L. Rep. 818. But see Cohues *v.* Finholt, 101 Minn. 180, 112 N. W. 12.

50. Chicago, etc., R. Co. *v.* Finnan, 84 Ill. App. 383.

51. Jackson *v.* Stewart, 20 Ga. 120.

52. Jackson *v.* Stewart, 20 Ga. 120.

53. Webster *v.* Dundee Mortg., etc., Co., 93 Ga. 278, 20 S. E. 310.

54. Hill *v.* Pine River Bank, 45 N. H. 300.

55. Sharp *v.* Whipple, 3 Bosw. (N. Y.) 474.

56. Sharp *v.* Whipple, 3 Bosw. (N. Y.) 474.

57. Drummond *v.* Romme, 1 N. J. L. 88; VanPelt *v.* Otter, 2 Sweeny (N. Y.) 202.
In West Virginia by statute no fact tried by a jury can be otherwise reëxamined than according to the rules of the common law. Ensign Mfg. Co. *v.* Carroll, 30 W. Va. 532, 4 S. E. 782.
The verdict of a jury on trial of a plea to the jurisdiction of the court conclusively establishes jurisdiction if the facts found do so, and the verdict cannot be reached by a mere motion to set aside on the ground of want of jurisdiction. The question should be raised in the usual way by a motion for a new trial. McCrary *v.* Perry, 40 Ga. 254.

58. Donaldson *v.* Jude, 2 Bibb (Ky.) 57; Hart *v.* Brierley, 189 Mass. 598, 76 N. E. 286; Fowler *v.* Stonum, 6 Tex. 60.

59. Anderson *v.* Parker, 6 Cal. 197.

60. Pittsburg, etc., R. Co. *v.* Darlington, 129 Ky. 266, 111 S. W. 360, 33 Ky. L. Rep. 818.
In an action on the case for personal injuries, a verdict which is against one of defendants and which is silent as to other defendant is in effect a verdict in favor of the defendant not mentioned. Wabash R. Co. *v.* Humphrey, 127 Ill. App. 334; Wabash R. Co. *v.* Keeler, 127 Ill. App. 265.

61. Misconduct of jurors as ground for new trial see NEW TRIAL, 29 Cyc. 796 *et seq.*

62. *Georgia.*— Cable Co. *v.* Walker, 127 Ga. 65, 56 S. E. 108.

setting forth the hearsay statements of jurors.[63] Thus jurors cannot impeach their verdict by affidavits that the verdict was the result of misapprehension,[64] or was arrived at by lot, or by averaging estimates,[65] or that improper matters were considered by the jury.[66] But affidavits of jurors are admissible to show that the verdict, as received and entered of record, by reason of a mistake does not embody the true finding of the jury,[67] or to correct an erroneous statement of the verdict to the court or entry by its clerk;[68] and affidavits of jurors are admissible when made in support of[69] or to explain a verdict, as for instance by showing whether interest was computed on plaintiff's claim,[70] or where a sealed verdict is returned without specifying the amount of the recovery to show what they intended to be understood as their verdict.[71]

(II) *AFFIDAVITS AND TESTIMONY OF THIRD PERSONS.* Affidavits of

Illinois.— Klofski *v.* Railroad Supply Co., 235 Ill. 146, 85 N. E. 274; Wyckoff *v.* Chicago City R. Co., 234 Ill. 613, 85 N. E. 237; Chicago *v.* Saldman, 225 Ill. 625, 80 N. E. 349.

Iowa.— Porter *v.* Whitlock, 142 Iowa 66, 120 N. W. 649; Wright *v.* Dudgeon, 138 Iowa 510, 116 N. W. 598.

Kentucky.—Eversole *v.* White, 112 Ky. 193, 65 S. W. 442, 23 Ky. L. Rep. 1435; Shacklett *v.* Henderson County Sav. Bank, 100 S. W. 241, 30 Ky. L. Rep. 1128.

Minnesota.— Holland *v.* Sheehan, 106 Minn. 545, 119 N. W. 217.

Missouri.— Milbourne *v.* Robison, 132 Mo. App. 198, 110 S. W. 598; Leahy *v.* Tesson, 108 Mo. App. 372, 83 S. W. 781.

Montana.— Spencer *v.* Spencer, 31 Mont. 631, 79 Pac. 320.

New Hampshire.— Curtis *v.* Laconia Car Co. Works, 74 N. H. 600, 67 Atl. 220; Winslow *v.* Smith, 74 N. H. 65, 65 Atl. 108; Nichols *v.* Suncook Mfg. Co., 24 N. H. 437.

North Carolina.— Coxe *v.* Singleton, 139 N. C. 361, 51 S. E. 1019.

North Dakota.— State *v.* Forrester, 14 N. D. 335, 103 N. W. 625.

Oregon.— Underwood *v.* French, 6 Oreg. 66, 25 Am. Rep. 500.

Texas.— St. Louis Southwestern R. Co. *v.* Gentry, (Civ. App. 1906) 98 S. W. 226; Flynt *v.* Taylor, (Civ. App. 1906) 91 S. W. 864 [*reversed* on other grounds in 100 Tex. 60, 93 S. W. 423]; Galloway *v.* Floyd, 36 Tex. Civ. App. 379, 81 S. W. 805; Dennis *v.* Neal, (Civ. App. 1902) 71 S. W. 387; Moore *v.* Missouri, etc., R. Co., 30 Tex. Civ. App. 266, 69 S. W. 997.

Vermont.— Marcy *v.* Parker, 78 Vt. 73, 62 Atl. 19.

Wisconsin.— Gallaway *v.* Massee, 133 Wis. 638, 113 N. W. 1098; Butteris *v.* Mifflin, etc., Min. Co., 133 Wis. 343, 113 N. W. 642.

See 46 Cent. Dig. tit. "Trial," § 813.

Waiver of objection.— The rule that the evidence of a juror will not be received to impeach the verdict is founded on the assumption that the adverse party objects to the introduction thereof. Failure to object waives the right to complain, on appeal, of the impropriety. Milbourne *v.* Robison, 132 Mo. App. 198, 110 S. W. 598.

63. Klofski *v.* Railroad Supply Co., 235 Ill. 146, 85 N. E. 274.

64. Porter *v.* Whitlock, 142 Iowa 66, 120 N. W. 649; Holland *v.* Sheehan, 106 Minn. 545, 119 N. W. 217; New York Store Mercantile Co. *v.* Chapman, 89 Mo. App. 554; Murray *v.* New York L. Ins. Co., 96 N. Y. 614, 48 Am. Rep. 658.

65. St. Martin *v.* Desnoyer, 1 Minn. 156, 61 Am. Dec. 494; Southern Nevada Gold, etc., Min. Co. *v.* Holmes Min. Co., 27 Nev. 107, 73 Pac. 759, 103 Am. St. Rep. 759; Missouri, etc., R. Co. *v.* Hawk, 30 Tex. Civ. App. 142, 69 S. W. 1037; Gallaway *v.* Massee, 133 Wis. 638, 113 N. W. 1098. See also Groves, etc., R. Co. *v.* Herman, 206 Ill. 34, 69 N. E. 36; Roy *v.* Goings, 112 Ill. 656.

In Idaho, by virtue of special statutory provisions, the affidavit of a juror may be received to impeach a verdict upon the ground that it was the result of a determination by chance. Bernier *v.* Anderson, 8 Ida. 675, 70 Pac. 1027.

An affidavit by a juror, which he subsequently repudiates, to the effect that the verdict was so reached, does not overcome the presumption that an honest jury reached a conclusion based upon the evidence. Bedtkey *v.* Bedtkey, 15 S. D. 310, 89 N. W. 479.

66. Weil *v.* Stone, 33 Ind. App. 112, 69 N. E. 698, 104 Am. St. Rep. 243.

67. Wertz *v.* Cincinnati, etc., R. Co., 11 Ohio Dec. (Reprint) 872, 30 Cinc. L. Bul. 280.

68. Peters *v.* Fogarty, 55 N. J. L. 386, 26 Atl. 855; Dalrymple *v.* Williams, 63 N. Y. 361, 20 Am. Rep. 544; Dayton *v.* Church, 7 Abb. N. Cas. (N. Y.) 367.

Changing "defendant" to "plaintiff."— The court may refuse to permit jurors to prove that their verdict was for plaintiff and that the word "defendant" was written by mistake. Chevallier *v.* Dyas, 28 La. Ann. 359.

69. Birmingham R., etc., Co. *v.* Clemons, 142 Ala. 160, 37 So. 925; Layman *v.* Graybill, 14 Ind. 166; Douglass *v.* Agne, 125 Iowa 67, 99 N. W. 550; Davis *v.* Huber Mfg. Co., 119 Iowa 56, 93 N. W. 78; Hix *v.* Drury, 5 Pick. (Mass.) 296.

70. Swails *v.* Cissna, 61 Iowa 693, 17 N. W. 39.

71. Hodgkins *v.* Mead, 5 N. Y. Suppl. 433, 16 N. Y. Civ. Proc. 434 [*affirmed* in 119 N. Y. 166, 23 N. E. 559].

officers in charge of the jury which show the violation on their part of their sworn duties,[72] or affidavits of third parties on information and belief that a verdict was arrived at by chance, the verdict having been affirmed by each juror on poll,[73] are not sufficient to overcome the verdict. Parol evidence is admissible to show a mistake in the verdict of a jury.[74]

6. Objections and Exceptions — a. Right and Time to Object; Grounds. Objection to irregularity or informality in a verdict must be taken at its rendition,[75] at the term at which the verdict is returned,[76] and before the jury is discharged,[77] otherwise the objection will be deemed to have been waived. The objection of irregularity should be taken by motion to set aside on that ground,[78] and comes too late upon a motion for a new trial,[79] or on appeal.[80] A party who is not injured thereby cannot complain of the uncertainty of the verdict or of defects therein.[81]

72. Green *v.* Bliss, 12 How. Pr. (N. Y.) 428.

73. Pekin *v.* Winkel, 77 Ill. 56.

74. Cohen *v.* Dubose, Harp. Eq. (S. C.) 102, 14 Am. Dec. 709.

75. *California.*— Algier *v.* The Maria, 14 Cal. 167.

Georgia.— Little *v.* Rogers, 99 Ga. 95, 24 S. E. 856; Dalton *v.* Drake, 75 Ga. 115; Evans *v.* Rogers, 1 Ga. 463.

Illinois.— Davis *v.* People, 50 Ill. 199.

Iowa.— McGregor *v.* Armill, 2 Iowa 30.

Missouri.— Berkson *v.* Kansas City Cable R. Co., 144 Mo. 211, 45 S. W. 1119; Milbourne *v.* Robison, 132 Mo. App. 198, 110 S. W. 598.

Nebraska.— Brumback *v.* German Nat. Bank, 46 Nebr. 540, 65 N. W. 198; Roggenkamp *v.* Hargreaves, 39 Nebr. 540, 58 N. W. 162; Whiting *v.* Carpenter, 4 Nebr. (Unoff.) 342, 93 N. W. 926; Parsons Band Cutter, etc., Co. *v.* Gadeke, 1 Nebr. (Unoff.) 605, 95 N. W. 850.

New York.— Soria *v.* Davidson, 53 N. Y. Super. Ct. 52.

Utah.— Jones *v.* McQueen, 13 Utah 178, 45 Pac. 202.

Washington.— Mounts *v.* Goranson, 29 Wash. 261, 69 Pac. 740.

See 46 Cent. Dig. tit. "Trial," § 819.

As for instance: Want of signature (McCaskey Register Co. *v.* Keena, 81 Conn. 656, 71 Atl. 898; Green *v.* Bliss, 12 How. Pr. (N. Y.) 428; Dunlap *v.* Raywood Rice Canal, etc., Co., 43 Tex. Civ. App. 269, 95 S. W. 43; Northern Pac. R. Co. *v.* Urlin, 158 U. S. 271, 15 S. Ct. 840, 39 L. ed. 977), or improper signature (Malony *v.* Harkey, Ga. Dec. Pt. II, 159), or the addition of interest to the amount of the verdict (Rheinfeldt *v.* Dahlman, 19 Misc. (N. Y.) 162, 43 N. Y. Suppl. 281).

Irregularity in recording a verdict before it is announced must be objected to at the time. Blum *v.* Pate, 20 Cal. 69.

Error in the amount of a verdict should be called to the attention of the court at the time of its return, in order that it may be referred back to the jury for correction; and a failure to do so must be considered as a waiver of the error. Nichols, etc., Co. *v.* Steinkraus, 83 Nebr. 1, 119 N. W. 23.

A party who, after demanding a special verdict, allows a general verdict to be received and published in open court, without objection or motion to have the jury retire with a direction to find a special verdict, waives the same. Livingston *v.* Taylor, 132 Ga. 1, 63 S. E. 694.

Grounds for new trial see New Trial, 29 Cyc. 815 *et seq.*

76. Pease *v.* Whitney, 4 Mass. 507.

77. *Colorado.*— Cowell *v.* Colorado Springs Co., 3 Colo. 82.

Connecticut.— Goodale *v.* Rohan, 76 Conn. 680, 58 Atl. 4.

Florida.— Marianna Mfg. Co. *v.* Boone, 55 Fla. 289, 45 So. 754.

Indiana.— Thomas *v.* Felt, 21 Ind. App. 265, 52 N. E. 171.

Kansas.— Copeland *v.* Majors, 9 Kan. 104.

Oklahoma.— Kuhl *v.* Supreme Lodge S. K. & L., 18 Okla. 383, 89 Pac. 1126; Guthrie *v.* Thistle, 5 Okla. 517, 49 Pac. 1003.

See 46 Cent. Dig. tit. "Trial," § 819.

Where the court directs a verdict for one defendant and submits the cause to the jury as to the other defendant, and the jury return a directed verdict for one defendant and another against the other defendants, the verdicts will be considered as one where no objection is made to their form until after the discharge of the jury. Olmsted *v.* Noll, 82 Nebr. 147, 117 N. W. 102.

Where the verdict in an action of claim and delivery fails to award the property alleged to be in defendant's possession, he should move to have the jury make a more complete verdict, and he cannot wait until the jury is dismissed, and then avail himself of the error. Gambrell *v.* Gambrell, 130 Ky. 714, 113 S. W. 885.

78. Schappner *v.* Second Ave. R. Co., 55 Barb. (N. Y.) 497.

79. Kingman Implement Co. *v.* Strong, 2 Nebr. (Unoff.) 729, 89 N. W. 993.

80. Johnson *v.* Visher, 96 Cal. 310, 31 Pac. 106; Kuhl *v.* Supreme Lodge S. K. & L., 18 Okla. 383, 89 Pac. 1126. See, generally, Appeal and Error, 2 Cyc. 702.

Objections to the action of the court in furnishing the jury with a form of verdict come too late on motion for new trial or appeal. Newton *v.* Brown, 1 Utah 287.

81. *Alabama.*— Terrell Coal Co. *v.* Lacey, (1901) 31 So. 109; Gager *v.* Doe, 29 Ala. 341.

Indiana.— Compton *v.* Jones, 65 Ind. 117.

b. Sufficiency and Scope of Exception. An objection to a verdict must specify the particulars in which the defect lies.[82] An exception that the verdict is contrary to law,[83] to instructions,[84] or to the evidence [85] is too vague and general, and will not be considered. But an objection that the verdict is not sustained by the evidence is sufficient if it designates some particular material fact and avers that such fact is not sustained by the evidence.[86]

7. Entry and Record — a. In General. The court should record the verdict as it is rendered by the jury,[87] the recorded verdict being the only verdict to be

Iowa.— Citizens' State Bank *v.* Rowley, 100 Iowa 636, 69 N. W. 1017; Harrell *v.* Stringfield, Morr. 18.

Kentucky.— Slack *v.* Greenville First Nat. Bank, 44 S. W. 354, 19 Ky. L. Rep. 1684.

Massachusetts.— Phillips *v.* Cornell, 133 Mass 546.

Michigan.— Moffet *v.* Sebastian, 149 Mich. 451, 112 N. W. 1120.

Missouri.— Berkson *v.* Kansas City Cable R. Co., 144 Mo. 211, 45 S. W. 1119; Bacon *v.* Perry, 25 Mo. App. 73.

Montana.— Brazell *v.* Colm, 32 Mont. 556, 81 Pac 339.

New York.— Rosenthal *v.* Forman, 115 N. Y Suppl. 282.

Texas.— Arlington First Nat. Bank *v.* Lynch, 6 Tex. Civ App. 590, 25 S. W. 1042; Samples *v.* Wever, (Civ. App. 1909) 121 S. W. 1129.

Virginia.— Briggs *v.* Cook, 99 Va. 273, 38 S. E. 148.

Wisconsin.— Shaw *v.* Allen, 24 Wis. 563.

Wyoming.— Gregory *v.* Morris, 1 Wyo. 213.

But see Burns-Moore Min., etc., Co. *v.* Watson, 45 Colo. 91, 101 Pac. 335.

Informality in a verdict rendered in accordance with a peremptory instruction is not prejudicial, if the judgment is such as would have been rendered if the error had not been committed. Heagney *v.* J. I. Case Threshing Mach. Co., 4 Nebr. (Unoff.) 753, 99 N. W 260.

Failure to find for co-defendant.—A defendant against whom a verdict is rendered cannot complain that the jury failed to embrace in its verdict a finding in favor of a co-defendant. Pittsburg, etc., R. Co. *v.* Darlington, 129 Ky. 266, 111 S. W. 360, 33 Ky. L. Rep. 818. Conversely a finding in favor of one of defendants in an action against several carriers for injury to a shipment of cattle cannot be complained of by other defendants against whom there was judgment; no recovery against them having been authorized under the charge, except for their own negligence. Southern Kansas R. Co. *v.* Yarbrough, 49 Tex. Civ. App 407, 109 S. W. 390.

Apportionment of damages.— If the total amount of damages awarded in a death action is not excessive, defendant cannot complain that the amounts awarded to the different plaintiffs in the apportionment of the damages are excessive. Missouri, etc., R. Co. *v.* McDuffey, 50 Tex. Civ. App. 202, 109 S. W. 1104; Jefferson, etc., R. Co *v.* Woods, (Tex. Civ. App. 1901) 64 S. W 830.

Joint verdict.—Where, in an action to recover land, persons whose possessions are separate are joined as defendants, and no damages are claimed in the action, no injury can result from a joint verdict. Hicks *v.* Coleman, 25 Cal. 122, 85 Am. Dec. 103.

The fact that nothing was said in the verdict as to the cross action by defendant did not prejudice plaintiff. Frankel *v.* Michigan Mut. L. Ins. Co., 158 Ind. 304, 62 N. E. 703.

82. Mahoney *v.* Van Winkle, 21 Cal. 552; Benefiel *v.* Aughe, 93 Ind. 401.

Objection that the verdict exceeds the ad damnum is not raised by an objection that the verdict is excessive. Prairie State Loan, etc., Assoc. *v.* Gorrie, 167 Ill. 414, 47 N. E. 739.

A motion "to have the verdict made more specific" is too indefinite. Thomas *v.* Felt, 21 Ind. App. 265, 52 N. E. 171.

83. Jones *v.* Wocher, 90 Ky. 230, 13 S. W. 911, 12 Ky. L. Rep. 105; Snowden *v.* Norfolk Southern R. Co., 95 N. C. 93.

The question that the amount of the verdict is too large is not raised by such an objection. Sheeks *v.* Fillion, 3 Ind. App. 262, 29 N. E. 786.

84. Britt *v.* Aylett, 11 Ark. 475, 52 Am. Dec. 282; Chambers *v.* Walker, 80 Ga. 642, 6 S. E. 165.

85. *California.*— Tate *v.* Fratt, 112 Cal. 613, 44 Pac. 1061.

Dakota.— Henry *v.* Dean, 6 Dak. 78, 50 N. W. 487.

Pennsylvania.— Carnivan *v.* Repplier, 1 Phila. 70.

South Carolina.— Paris *v.* Du Pre, 17 S. C. 282.

South Dakota.— Holcomb *v.* Keliher, 3 S. D. 497, 54 N. W. 535; Gaines *v.* White, 1 S. D. 434, 47 N. W. 524.

Tennessee.— Cherokee Packet Co. *v.* Hilson, 95 Tenn. 1, 31 S. W. 737.

See 46 Cent. Dig. tit. "Trial," § 820.

86. Bernier *v.* Anderson, 8 Ida. 675, 70 Pac. 1027.

87. Moody *v.* McDonald, 4 Cal. 297.

No record before rendition.— It is irregular to record a verdict before it has been either declared by the foreman, or, if sealed, read by the clerk. Blum *v.* Pate, 20 Cal. 69.

The court may enter a verdict nunc pro tunc at any time during the term at which it was rendered. O'Keefe *v.* Kellogg, 15 Ill. 347.

Where several causes are by agreement submitted together to one jury, there must be a separate record of the finding in each case Kitter *v.* People, 25 Ill. 42.

considered,[88] and the only one that can be looked to by the appellate court,[89] and the form of the verdict as recorded must control in case of variance between it and the written verdict brought into court by the jury.[90] It is not necessary that the record of entry of a verdict should show that the jury were sworn.[91]

b. Amendment or Correction of Record.[92] The record of a verdict in case of clerical mistake may be amended to conform to the verdict as rendered,[93] although the term has expired,[94] and the court may after the expiration of the term direct the recording of a verdict which was not recorded when returned.[95] Where, in order to arrive at the meaning of the jury in its verdict, it is necessary to consider the evidence which has not been made a part of the record, the court may require the record to be completed by bill of exceptions or bill of evidence.[96]

8. Verdict Subject to Opinion. In some jurisdictions the jury may bring in a verdict for either party subject to the opinion of the court upon a point of law.[97] This is a general and not a special verdict.[98] The facts on which it arises must either be admitted on the record or found by the jury.[99] A verdict conditioned upon and subject to the court's opinion upon a demurrer to the evidence remains conditional until the court acts upon the demurrer and gives judgment or sets it aside,[1] and it is error to render judgment on the verdict without determining the demurrer.[2]

9. Conditional Verdict. It is generally held that the jury cannot render a conditional verdict in an action at law.[3] In some states, however, this practice is permitted.[4]

88. Garrett *v.* John V. Farwell Co., 102 Ill. App. 31 [*reversed* on other grounds in 199 Ill. 436, 65 N. E. 361]; Lambert *v.* Borden, 10 Ill. App. 648; Dornick *v.* Reichenback, 10 Serg. & R. (Pa.) 84.

89. Watertown Ecclesiastical Soc.'s Appeal, 46 Conn. 230; Sheeler *v.* Fallon, 107 Ill. App. 497; Illinois Steel Co. *v.* Ostrowski, 93 Ill. App. 57; Brewer, etc., Brewing Co. *v.* Hermann, 88 Ill. App. 285 [*affirmed* in 187 Ill. 40, 58 N. E. 397]; Jemison *v.* Chicago Contract. Constr. Co., 64 Ill. App. 436; Lambert *v.* Borden, 10 Ill. App. 648; Leftwich *v.* Day, 32 Minn. 512, 21 N. W. 731; Com. *v.* Houghton, 22 Pa. Super. Ct. 52.

90. Watertown Ecclesiastical Soc.'s Appeal, 46 Conn. 230; Lambert *v.* Borden, 10 Ill. App. 648; Leftwich *v.* Day, 32 Minn. 512, 21 N. W. 731. But see Catholic Order of Foresters *v.* Fitz, 81 Ill. App. 389.

91. Waddell *v.* Magee, 53 Miss. 687.

92. Amendment of record in criminal cases see Criminal Law, 12 Cyc. 787.

93. Tomes *v.* Redfield, 24 Fed. Cas. No. 14,085, 7 Blatchf. 139. But see Easton *v.* Collier, 1 Mo. 421.

94. Reynolds *v.* Cavanagh, 139 Mich. 387, 102 N. W. 986; Freeman *v.* Morris, 44 N. C. 287.

But where several weeks have elapsed since trial, it is proper for the court to decline to amend the record to conform to the written verdict. Kirk *v.* Senzig, 79 Ill. App. 251.

95. Gross *v.* Sloan, 58 Ill. App. 302.

96. Pittsburg, etc., R. Co. *v.* Darlington, 129 Ky. 266, 111 S. W. 360, 33 Ky. L. Rep. 818.

97. See cases cited *infra*, this and the following notes.

In New York where, upon the trial of an issue by a jury, the case presents only questions of law, the judge may direct the jury to render a verdict, subject to the opinion of the court. Notwithstanding that such a verdict has been rendered, the judge holding the trial term may, at the same term, set aside the verdict, and direct judgment to be entered for either party, with like effect and in like manner as if such a direction had been given at the trial. An exception to such a direction may be taken as prescribed in section 994 of this act. Code Civ. Proc. § 1185. See Byrnes *v.* Cohoes, 67 N. Y. 204; Purchase *v.* Matteson, 25 N. Y. 211; Brooklyn City Bank *v.* McChesney, 20 N. Y. 240.

98. Dejarnette *v.* Allen, 5 Gratt. (Va.) 499.

A verdict generally for either party, dependent upon a single point of law presented to the court, is good. McMicher *v.* Amos, 4 Rand. (Va.) 134.

99. Watsontown Car Mfg. Co. *v.* Elmsport Lumber Co., 99 Pa. St. 605; Witman *v.* Smeltzer, 16 Pa. Super. Ct. 285.

Whether there is any evidence that would entitle plaintiff to recover is a proper reservation. Watsontown Car Mfg. Co. *v.* Elmsport Lumber Co., 99 Pa. St. 605; Suter *v.* Findlay, 6 Pa. Dist. 253, 19 Pa. Co. Ct. 10, 13 Mont. Co. Rep. 73.

1. Green *v.* Pittsburgh, etc., R. Co., 11 W. Va. 685.

2. Green *v.* Pittsburgh, etc., R. Co., 11 W. Va. 685.

3. Davis *v.* Searcy, 79 Miss. 292, 30 So. 823; Cox *v.* Bright, 65 Mo. App. 417.

4. See Jones *v.* Backus, 114 Pa. St. 120, 6 Atl. 335; Thompson *v.* Rogers, 67 Pa. St. 39; Green *v.* Pittsburgh, etc., R. Co., 11 W. Va. 685.

C. Special Interrogatories, Verdict, or Findings[4a] — 1. Power to Find Specially or to Require Special Findings — a. Rules Stated. At common law the jury can find either a general or special verdict, and it may decline to find other than a general verdict,[5] and the judge cannot compel it to find either a general or special verdict or to give reasons for a general verdict.[6] The form of verdict which may be rendered is now in the large majority of jurisdictions regulated by statutes, which provide that the jury may in actions for the recovery of money or specific property find generally or specially;[7] and in many jurisdictions it is within the discretion of the court to submit special findings or special interrogatories to the jury,[8] without having been requested so to do by either

4a. **In actions for libel and slander** see Libel and Slander, 25 Cyc. 554.

In mandamus proceedings see Mandamus, 26 Cyc. 482.

On trial by court see *infra*, XII, A, 1, c.

Right of state to appeal from judgment on special verdict in criminal prosecutions see Criminal Law, 12 Cyc. 805.

Special verdict in criminal prosecutions see Criminal Law, 12 Cyc. 690.

Special verdict on trial of issues between plaintiff and garnishee see Garnishment, 20 Cyc. 1105.

5. Fuller *v.* Kennebec Mut. Ins. Co., 31 Me. 325; Devizes *v.* Clark, 3 A. & E. 506, 30 E. C. L. 240, 111 Eng. Reprint 506.

6. Foster *v.* Johnson, 70 Ala. 249; Peck *v.* Snyder, 13 Mich. 21.

7. See the statutes of the several states. And see the following cases:

California.— Hunt *v.* Elliott, 77 Cal. 588, 20 Pac. 132.

Colorado.— Thompson *v.* Gregor, 11 Colo. 531, 19 Pac. 461; Meyers *v.* Hart, 3 Colo. App. 392, 33 Pac. 647.

Idaho.— C. R. Shaw Lumber Co. *v.* Manville, 4 Ida. 369, 39 Pac. 559.

Indiana.— Rufling *v.* Tilton, 12 Ind. 259.

Iowa.— Hall *v.* Carter, 74 Iowa 364, 37 N. W. 956.

Michigan.— Peck *v.* Snyder, 13 Mich. 21.

South Dakota.— Ewing *v.* Lunn, 22 S. D. 95, 115 N. W. 527.

See 46 Cent. Dig. tit. "Trial," § 821 *et seq.*

This power is not taken away by a statute authorizing special questions to be submitted to the jury. Hendrickson *v.* Walker, 32 Mich 68.

It is error to instruct the jury not to return a general verdict. Washington Nat. Bank *v.* Woodrum, (Kan. 1900) 62 Pac. 672.

The rendition of a general verdict in addition to a special verdict is not error (Hoppe *v.* Chicago, etc., R. Co., 61 Wis. 357, 21 N. W. 227), especially where it is merely a correct legal conclusion from the special findings (Ault *v.* Wheeler, etc., Mfg. Co., 54 Wis. 300, 11 N. W. 545).

8. *Arizona.*— Gila Valley, etc., R. Co. *v.* Lyon, 9 Ariz. 218, 80 Pac. 337.

Arkansas.— St. Louis, etc., R. Co. *v.* Jones, 59 Ark. 105, 26 S. W. 595.

California.— Cleghorn *v.* Cleghorn, 66 Cal. 309, 5 Pac. 516; American Co. *v.* Bradford, 27 Cal. 360; Burritt *v.* Gibson, 3 Cal. 396.

Colorado.— Saint *v.* Guerrerrio, 17 Colo. 448, 30 Pac. 335, 31 Am. St. Rep. 320.

Dakota.— Moline Plow Co. *v.* Gilbert, 3 Dak. 239, 15 N. W. 1.

Idaho.— Lufkins *v.* Collins, 2 Ida. (Hasb.) 256, 10 Pac. 300.

Kansas.— Missouri Pac. R. Co. *v.* Reynolds, 31 Kan. 132, 1 Pac. 150; Foster *v.* Turner, 31 Kan. 58, 1 Pac. 145.

Maine.— Dyer *v.* Greene, 23 Me. 464.

Massachusetts.— Hill *v.* Hayes, 199 Mass. 411, 85 N. E. 434; Boston Dairy Co. *v.* Mulliken, 175 Mass. 447, 56 N. E. 711.

Minnesota.— Morrow *v.* St. Paul City R. Co., 77 Minn. 480, 77 N. W. 303; Stensgaard *v.* St. Paul Real Estate Title Ins. Co., 50 Minn. 429, 52 N. W. 910, 17 L. R. A. 575; Iltis *v.* Chicago, etc., R. Co., 40 Minn. 273, 41 N. W. 1040; McLean *v.* Burbank, 12 Minn. 530.

Nebraska.— Maxson *v.* J. I. Case Threshing Mach. Co., 81 Nebr. 546, 116 N. W. 281, 16 L. R. A. N. S. 963; Chicago, etc., R. Co. *v.* Lagerkrans, 65 Nebr. 566, 91 N. W. 358, 95 N. W. 2; American F. Ins. Co. *v.* Landfare, 56 Nebr. 482, 76 N. W. 1068; Hedrick *v.* Strauss, 42 Nebr. 485, 60 N. W. 928; Union Pac. R. Co. *v.* Cobb, 41 Nebr. 120, 59 N. W. 355; Murphy *v.* Gould, 40 Nebr. 728, 59 N. W. 383; Atchison, etc., R. Co. *v.* Lawler, 40 Nebr. 356, 58 N. W. 968; Marx *v.* Kilpatrick, 25 Nebr. 107, 41 N. W. 111; Floaten *v.* Ferrell, 24 Nebr. 347, 38 N. W. 732; Johnson *v.* Heath, 5 Nebr. (Unoff.) 369, 98 N. W. 832; Crete *v.* Hendricks, 2 Nebr. (Unoff.) 847, 90 N. W. 215.

New Hampshire.— Elwell *v.* Roper, 72 N. H. 585, 58 Atl. 507.

New Mexico.— Robinson *v.* Palatine Ins. Co., 11 N. M. 162, 66 Pac. 535.

North Carolina.— Young *v.* Fosburg Lumber Co., 147 N. C. 26, 60 S. E. 654, 16 L. R. A. N. S. 255.

Ohio.— Cleveland, etc., R. Co. *v.* Terry, 8 Ohio St. 570.

Oregon.—Wild *v.* Oregon Short-Line, etc., R. Co., 21 Oreg. 159, 27 Pac. 954; Knahtla *v.* Oregon Short-Line, etc., R. Co., 21 Oreg. 136, 27 Pac. 91; Swift *v.* Mulkey, 14 Oreg. 59, 12 Pac. 76.

South Carolina.— Farr *v.* Thompson, 1 Speers 93.

South Dakota.— Ewing *v.* Lunn, 22 S. D. 95, 115 N. W. 527; Enos *v.* St. Paul F. & M. Ins. Co., 4 S. D. 639, 57 N. W. 919, 46 Am. St. Rep. 796; National Refining Co. *v.* Miller, 1 S. D. 548, 47 N. W. 962.

Texas.— Cole *v.* Crawford, 69 Tex. 124, 5 S. W. 646; Neill *v.* Cody, 26 Tex. 286; Kamp-

party,[9] and even over the objection of the parties,[10] or may on its own motion propound special interrogatories to be returned with the general verdict,[11] or where special interrogatories have been requested by the parties may submit additional interrogatories of its own motion.[12] Some statutes make it mandatory on request for the court to require special findings, or to submit properly framed special interrogatories.[13] But a court cannot delegate to the jury a question

mann *v.* Rothwell, (Civ. App. 1908) 107 S. W. 120; Ross *v.* Moskowitz, (Civ. App. 1906) 95 S. W. 86; Home Circle Soc. No. 2 *v.* Shelton, (Civ. App. 1905) 85 S. W. 320; Woodmen of World *v.* Locklin, 28 Tex. Civ. App. 486, 67 S. W. 331; Nixon *v.* Jacobs, 22 Tex. Civ. App. 97, 53 S. W. 595; LaRue *v.* Bower, 1 Tex. App. Civ. Cas. § 1284.

Utah.— Genter *v.* Conglomerate Min. Co., 23 Utah 165, 64 Pac. 362; Mangum *v.* Bullion, etc., Min. Co., 15 Utah 534, 50 Pac. 834; Webb *v.* Denver, etc., R. Co., 7 Utah 17, 24 Pac. 616; Smith *v.* Ireland, 4 Utah 187, 7 Pac. 749.

Vermont.— Hogle *v.* Clark, 46 Vt. 418; Spaulding *v.* Robbins, 42 Vt. 90.

Washington.— Morrison *v.* Northern Pac. R. Co., 34 Wash. 70, 74 Pac. 1064; Walker *v.* McNeill, 17 Wash. 582, 50 Pac. 518; Pencil *v.* Home Ins. Co., 3 Wash. 485, 28 Pac. 1031; Columbia, etc., R. Co. *v.* Hawthorne, 3 Wash. Terr. 353, 19 Pac. 25.

Wisconsin.— Steber *v.* Chicago, etc., R. Co., 139 Wis. 10, 120 N. W. 502; Schumaker *v.* Heinemann, 99 Wis. 251, 74 N. W. 785; McDougall *v.* Ashland Sulphite-Fibre Co., 97 Wis. 382, 73 N. W. 327; McGrath *v.* Bloomer, 73 Wis. 29, 40 N. W. 585.

United States.— Elizabeth *v.* Fitzgerald, 114 Fed. 547, 52 C. C. A. 321; Gulf, etc., R. Co. *v.* Washington, 49 Fed. 347, 1 C. C. A. 286; British Columbia Bank *v.* Marshall, 11 Fed. 19, 8 Sawy. 29.

Waiver of a general charge to the jury is not essential to authorize submission of case on special issues. York *v.* Hilger, (Tex. Civ. App. 1905) 84 S. W. 1117.

Where the parties agree that there is only one issue in the case, the court need not submit special issues. Johnson *v.* Scrimshire, 42 Tex. Civ. App. 611, 93 S. W. 712.

When the issues are not complicated the court need not submit special interrogatories. Giffen *v.* Lewiston, 6 Ida. 231, 55 Pac. 545.

It is error to refuse to submit a material issue where the statute requires submission on special issues. Allen *v.* Frost, 31 Tex. Civ. App. 232, 71 S. W. 767.

Special questions should be such that the court can make judgment upon answers thereto. Texas, etc., R. Co. *v.* Miller, 79 Tex. 78, 15 S. W. 264, 23 Am. St. Rep. 308, 11 L. R. A. 395.

The action of the court is subject to review for abuse of discretion. Olmstead *v.* Dauphiny, 104 Cal. 635, 38 Pac. 565; American F. Ins. Co. *v.* Landfare, 56 Nebr. 482, 76 N. W. 1068.

9. Weatherly *v.* Higgins, 6 Ind. 73; Lauter *v.* Duckworth, 19 Ind. App. 535, 48 N. E. 864; Hammond, etc., Electric R. Co. *v.* Spyzchalski, 17 Ind. App. 7, 46 N. E. 47; Miles *v.* Schrunk, 139 Iowa 563, 117 N. W. 971; Waggoner *v.* Oursler, 54 Kan. 141, 37 Pac. 973; Mannen *v.* Stebbins, 1 Kan. App. 261, 40 Pac. 1085; Holler *v.* Western Union Tel. Co., 149 N. C. 336, 63 S. E. 92, 19 L. R. A. N. S. 475; Young *v.* Fosburg Lumber Co., 147 N. C. 26, 60 S. E. 654, 16 L. R. A. N. S. 255.

10. Freedman *v.* New York, etc., R. Co., 81 Conn. 601, 71 Atl. 901; Barstow *v.* Sprague, 40 N. H. 27; Johnson *v.* Haverhill, 35 N. H. 74. And see Walker *v.* Sawyer, 13 N. H. 191, holding that where the case is tried upon the general issue, the court cannot submit a particular question of fact to the jury except by consent of parties.

Consent of parties is presumed unless they object before the jury retire. Allen *v.* Aldrich, 29 N. H. 63.

11. Senhenn *v.* Evansville, 140 Ind. 675, 40 N. E. 69; Waggoner *v.* Oursler, 54 Kan. 141, 37 Pac. 973; Mannen *v.* Stebbins, 1 Kan. App. 261, 40 Pac. 1085.

12. Norton *v.* Volzke, 158 Ill. 402, 41 N. E. 1085, 49 Am. St. Rep. 167.

13. *California.* — Larsen *v.* Leonardt, 8 Cal. App. 226, 96 Pac. 395.

Illinois.— Toledo, etc., R. Co. *v.* Maxfield, 72 Ill. 95; Bryan *v.* Lamson, 88 Ill. App. 261; Cleveland, etc., R. Co. *v.* Eggmann, 71 Ill. App. 42.

Indiana.— Bower *v.* Bower, 142 Ind. 194, 41 N. E. 523; Noble *v.* Enos, 19 Ind. 72; Michigan Southern, etc., R. Co. *v.* Bivens, 13 Ind. 263; Helton *v.* Wells, 12 Ind. App. 605, 40 N. E. 930.

Iowa.— Decatur *v.* Simpson, 115 Iowa 348, 88 N. W. 839; Trumble *v.* Happy, 114 Iowa 624, 87 N. W. 678; McCoy *v.* Iowa State Ins. Co., 107 Iowa 80, 77 N. W. 529.

Kansas.— Jones *v.* Annis, 47 Kan. 478, 28 Pac. 156; Bush *v.* Peake, 14 Kan. 290; Stephens *v.* Gardner Creamery Co., (App. 1899) 57 Pac. 1058; Weir *v.* Herbert, 6 Kan. App. 596, 51 Pac. 582; Rouse *v.* Osborne, 3 Kan. App. 139, 42 Pac. 843.

Maryland.— Baltimore, etc., R. Co. *v.* Cain, 81 Md. 87, 31 Atl. 801, 28 L. R. A. 688.

Michigan.— Zucker *v.* Karpeles, 88 Mich. 413, 50 N. W. 373; Harbaugh *v.* People, 33 Mich. 241.

Missouri.— Benton *v.* St. Louis, etc., R. Co., 25 Mo. App. 155; Gourley *v.* St. Louis, etc., R. Co., 25 Mo. App. 144.

North Carolina.—Holler *v.* Western Union Tel. Co., 149 N. C. 336, 63 S. E. 92, 19 L. R. A. N. S. 475.

Ohio.—Cleveland, etc., R. Co. *v.* St. Bernard, 19 Ohio Cir. Ct. 299, 10 Ohio Cir. Dec. 415.

Oklahoma.— Stanard *v.* Sampson, 23 Okla. 13, 99 Pac. 796; Oklahoma City *v.* Hill, 4 Okla. 521, 46 Pac. 568.

wholly within the province of the court, or by interrogatories take the opinion of the jury on matters of law.[14]

b. Special Findings Accompanying General Verdict. At the request of parties, the jury may express an opinion distinct from their verdict,[15] and under some statutes may be required to return both a general verdict and special findings,[16] and the court cannot in the absence of a general verdict render judgment on findings in answer to interrogatories,[17] unless the conduct of the parties has been such as to justify the presumption that they have waived a general verdict.[18] Other statutes contemplate either a general or special verdict, but not both.[19] Special findings accompanying a verdict rendered on direction of court are immaterial.[20]

2. Questions Submitted — a. In General. Special interrogatories bearing directly upon the issues and calling for findings of ultimate facts essential to the determination of such issues are proper and should be submitted upon request,[21]

West Virginia.— Peninsular Land Transp., etc., Co. *v.* Franklin Ins. Co., 35 W. Va. 666, 14 S. E. 237.

Wisconsin.—Olwell *v.* Skobis, 126 Wis. 308, 105 N. W. 777; Pearson *v.* Kelly, 122 Wis. 660, 100 N. W. 1064; Gatzow *v.* Buening, 106 Wis. 1, 81 N. W. 1003, 49 L. R. A. 475; F. Dohmen Co. *v.* Niagara F. Ins. Co., 96 Wis. 38, 71 N. W. 69; Steinke *v.* Diamond Match Co., 87 Wis. 477, 58 N. W. 842.

See 46 Cent. Dig. tit. "Trial," § 823 *et seq.*

Construction of California statute.— Code Civ. Proc. § 625, providing that the court on the request of any of the parties must direct the jury to find a special verdict, requires the court on proper request of either party to direct the jury, if they return a general verdict, to give answers to any material question, which will enable the court to apply the law to the facts actually found. The term "special verdict" in the code does not mean a finding on every material issue, but the object of the statute is to determine whether a general verdict is or is not against the law. The court in determining whether a party has a right to special findings must determine whether a question will admit of a direct answer, or whether an answer favorable to the party preferring the request will be inconsistent with a general verdict for the adverse party, and, where these conditions are satisfied, the request should be granted, whether an issue is called a question of fact or a question of fact is called an issue, or whether the request relates to one or several questions. Plyler *v.* Pacific Portland Cement Co., 152 Cal. 125, 92 Pac. 56.

The right is complied with by submission of a sufficient number of questions to cover singly every material fact in controversy under the pleadings and evidence. Baxter *v.* Chicago, etc., R. Co., 104 Wis. 307, 80 N. W. 644.

When the issues are of a complicated nature the court must submit special questions. Burke *v.* McDonald, 2 Ida. (Hasb.) 679, 33 Pac. 49.

Where a jury trial is not a matter of right it is discretionary with the court whether it will submit special questions. Banning *v.* Hall, 70 Minn. 89, 72 N. W. 817.

14. Erie Crawford Oil Co. *v.* Meeks, 40 Ind. App. 156, 81 N. E. 518.

15. Hartshorn *v.* Wright, 11 Fed. Cas. No. 6,169, Pet. C. C. 64.

16. Bryan *v.* Lamson, 88 Ill. App. 261; Witty *v.* Chesapeake, etc., R. Co., 83 Ky. 21; Empire Coal, etc., Co. *v.* McIntosh, 82 Ky. 554.

A general verdict accompanied by answers to special questions is not a special verdict. Gale *v.* Priddy, 66 Ohio St. 400, 64 N. E. 437; McDougall *v.* Ashland Sulphite-Fibre Co., 97 Wis. 382, 73 N. W. 327.

Under the Pennsylvania practice, a special verdict must place on record all the essential facts of the case, disputed or undisputed, upon which facts alone without inferences of further facts the judgment is to be rendered, and where a case is submitted generally the fact that certain disputed questions of fact were also submitted for findings thereon does not render the verdict a special one. Elliott *v.* Miller, 158 Fed. 868.

A refusal of defendant's request to require the jury to find a separate general verdict was not prejudicial error where the finding under the instructions was necessarily an unfavorable answer to the question propounded by defendant. Modern Woodmen of America *v.* Neeley, 111 S. W. 282, 33 Ky. L. Rep. 758.

17. Eudaly *v.* Eudaly, 37 Ind. 440.

18. Crassen *v.* Swoveland, 22 Ind. 427.

19. See Bower *v.* Bower, 146 Ind. 393, 45 N. E. 595; Louisville, etc., R. Co. *v.* Balch, 105 Ind. 93, 4 N. E. 288; Cole *v.* Estell, (Tex. 1887) 6 S. W. 175; Dwyer *v.* Kalteyer, 68 Tex. 554, 5 S. W. 75; Belknap *v.* Groover, (Tex. Civ. App. 1900) 56 S. W. 249; Southern Cotton Oil Co. *v.* Wallace, 23 Tex. Civ. App. 12, 54 S. W. 638; Mauch *v.* Hartford, 112 Wis. 40, 87 N. W. 816; Daube *v.* Philadelphia, etc., Coal, etc., Co., 77 Fed. 713, 23 C. C. A. 420.

Where the special verdict disposes of all controverted issues it is not error to permit a general verdict in connection therewith. Cooper *v.* Pennsylvania Ins. Co., 96 Wis. 362, 71 N. W. 606.

20. Missouri, etc., R. Co. *v.* L. A. Watkins Merchandise Co., 76 Kan. 813, 92 Pac. 1102.

21. Brown Land Co. *v.* Lehman, 134 Iowa 712, 112 N. W. 185, 12 L. R. A. N. S. 88;

this rule including all material matters alleged on the one side and denied on the other.[22] But it is only pertinent, properly framed questions which can be intelligently answered from the testimony that the court will compel an answer to;[23] and the court will refuse to submit immaterial questions,[24] or questions that cannot

Mitchell *v.* Boston, etc., Consol. Copper, etc., Min. Co., 37 Mont. 575, 97 Pac. 1033; Hairston *v.* U. S. Leather Co., 143 N. C. 512, 55 S. E. 847; Kimberly *v.* Howland, 143 N. C. 398, 55 S. E. 778, 7 L. R. A. N. S. 545; John Schroeder Lumber Co. *v.* Chicago, etc., R. Co., 135 Wis. 575, 116 N. W. 179, 128 Am. St. Rep. 1039.

22. W. F. Main Co. *v.* Fields, 144 N. C. 307, 56 S. E. 943.

Where specific acts of negligence are charged and denied, a special verdict should contain specific questions covering the alleged negligent acts. Rowley *v.* Chicago, etc., R. Co., 135 Wis. 208, 115 N. W. 865. See also Larsen *v.* Leonardt, 8 Cal. App. 226, 96 Pac. 395.

23. Atchison, etc., R. Co. *v.* Shaw, 56 Kan. 519, 43 Pac. 1129.

Where the answer will involve a recitation of a large part of the testimony the interrogatory will be refused. Jenkins *v.* Beachy, 71 Kan. 857, 80 Pac. 947.

If there is no evidence from which an intelligent answer could be made the interrogatory is improper. Leroy, etc., R. Co. *v.* Anderson, 41 Kan. 528, 21 Pac. 588.

Interrogatories requiring the jury to construe a written instrument will be refused. Reed *v.* Light, 170 Ind. 550, 85 N. E. 9.

24. *California.*— Powell *v.* Lemoore Bank, 125 Cal. 468, 58 Pac. 83.

Colorado.— Denver *v.* Teeter, 31 Colo. 486, 74 Pac. 459.

Florida.— Savannah, etc., R. Co. *v.* Tiedeman, 39 Fla. 196, 22 So. 658.

Illinois.— Illinois Cent. R. Co. *v.* Scheffner, 209 Ill. 9, 70 N. E. 619; Wolff Mfg. Co. *v.* Wilson, 152 Ill. 9, 38 N. E. 694, 26 L. R. A. 229; Penn Mut. L. Ins. Co. *v.* Keach, 134 Ill. 583, 26 N. E. 106; St. Louis Consol. Coal Co. *v.* Maehl, 130 Ill. 551, 22 N. E. 715.

Indiana.— Reed *v.* Light, 170 Ind. 550, 85 N. E. 9; Balue *v.* Taylor, 136 Ind. 368, 36 N. E. 269; Schreiber *v.* Butler, 84 Ind. 576; Woodburn Sarven Wheel Co. *v.* Philbrook, 76 Ind. 516; Maxwell *v.* Boyne, 36 Ind. 120; Morse *v.* Morse, 25 Ind. 156; People's State Bank *v.* Ruxer, 38 Ind. App. 420, 78 N. E. 337; Green *v.* Eden, 24 Ind. App. 583, 56 N. E. 240; Lukin *v.* Halderson, 24 Ind. App. 645, 57 N. E. 254; Aurelius *v.* Lake Erie, etc., R. Co., 19 Ind. App. 584, 49 N. E. 857; Wabash R. Co. *v.* Miller, 18 Ind. App. 549, 48 N. E. 663; McCullough *v.* Martin, 12 Ind. App. 165, 39 N. E. 905, (App. 1893) 35 N. E. 719; Ohio, etc., R. Co. *v.* Trapp, 4 Ind. App. 69, 30 N. E. 812.

Iowa.— Boddy *v.* Henry, 126 Iowa 31, 101 N. W. 447; German Sav. Bank *v.* Citizens' Nat. Bank, 101 Iowa 530, 70 N. W. 769, 63 Am. St. Rep. 399; O'Leary *v.* German American Ins. Co., 100 Iowa 390, 69 N. W. 686; Banning *v.* Chicago, etc., R. Co., 89 Iowa 74, 56 N. W. 277; Seagel *v.* Chicago, etc., R. Co., 83 Iowa 380, 49 N. W. 990; White *v.* Adams, 77 Iowa 295, 42 N. W. 199; Liston *v.* Central Iowa R. Co., 70 Iowa 714, 29 N. W. 445; Bellows *v.* West Fork Dist. Tp., 70 Iowa 320, 30 N. W. 582; Bonham *v.* Iowa Cent. Ins. Co., 25 Iowa 328.

Kansas.— Lawrence *v.* Davis, 8 Kan. App. 225, 55 Pac. 492; Missouri Pac. R. Co. *v.* Brown, (App. 1897) 47 Pac. 553; Atchison, etc., R. Co. *v.* Dickerson, 4 Kan. App. 345, 45 Pac. 975.

Maryland.— Caledonian F. Ins. Co. *v.* Traub, 86 Md. 86, 37 Atl. 782; Walter *v.* Alexander, 2 Gill 204.

Michigan.— Darrah *v.* Gow, 77 Mich. 16, 43 N. W. 851; Daniel *v.* Robinson, 66 Mich. 299, 42 N. W. 61; Henry C. Hart Mfg. Co. *v.* Mann's Boudoir Car Co., 65 Mich. 564, 32 N. W. 820; Pigott *v.* Engle, 60 Mich. 221, 27 N. W. 3; Daniells *v.* Aldrich, 42 Mich. 58, 3 N. W. 253.

Minnesota.— Pierce *v.* Brennan, 88 Minn. 50, 92 N. W. 507.

New Mexico.— Solomon *v.* Yrisarri, 9 N. M. 480, 54 Pac. 752.

North Carolina.— Clark *v.* Patapsco Guano Co., 144 N. C. 64, 56 S. E. 858; Tew *v.* Young, 134 N. C. 493, 47 S. E. 23.

Oklahoma.— Drumm-Flato Commission Co. *v.* Edmisson, 17 Okla. 344, 87 Pac. 311; Stillwater *v.* Swisher, 16 Okla. 585, 85 Pac. 1110; Root *v.* Coyle, 15 Okla. 574, 82 Pac. 648.

Tennessee.— Continental Nat. Bank *v.* Nashville First Nat. Bank, 108 Tenn. 374, 68 S. W. 497.

Texas.— Parker *v.* Citizens' R. Co., 43 Tex. Civ. App. 168, 95 S. W. 38; Gulf, etc., R. Co. *v.* White, (Civ. App. 1904) 80 S. W. 533; Milmo Nat. Bank *v.* Convery, (Civ. App. 1899) 49 S. W. 926; Wentworth *v.* King, (Civ. App. 1899) 49 S. W. 696; Sullivan *v.* Thurmond, (Civ. App. 1898) 45 S. W. 393; Kahler *v.* Carruthers, 18 Tex. Civ. App. 216, 45 S. W. 160; Waters-Pierce Oil Co. *v.* Cook, 6 Tex. Civ. App. 573, 26 S. W. 96.

West Virginia.— Bentley *v.* Standard F. Ins. Co., 40 W. Va. 729, 23 S. E. 584; Andrews *v.* Mundy, 36 W. Va. 22, 14 S. E. 414; Peninsular Land Transp., etc., Co. *v.* Franklin Ins. Co., 35 W. Va. 666, 14 S. E. 237.

Wisconsin.— Lowe *v.* Ring, 115 Wis. 575, 92 N. W. 238; Rudiger *v.* Chicago, etc., R. Co., 101 Wis. 292, 77 N. W. 169; Reed *v.* Madison, 85 Wis. 667, 56 N. W. 182; Bush *v.* Maxwell, 79 Wis. 114, 48 N. W. 250; Meese *v.* Fond du Lac, 48 Wis. 323, 4 N. W. 406.

See 46 Cent. Dig. tit. "Trial," § 828 *et seq.*

Questions are immaterial where their determination one way or the other would not serve any useful or important purpose. Miner *v.* Vedder, 66 Mich. 101, 33 N. W. 47.

Special questions requiring the jury to speculate as to what might have happened will be refused. Atchison, etc., R. Co. *v.* Lannigan, 56 Kan. 109, 42 Pac. 343

control or affect the general verdict,[25] and an interrogatory which relates to an evidentiary as distinguished from an ultimate fact is properly refused by the court,[26] unless an ultimate fact may be inferred therefrom as a matter of

25 *Connecticut.*— Freedman *v.* New York, etc., R. Co., 81 Conn. 601, 71 Atl. 901.

Illinois. — Springfield Coal Min. Co. *v.* Gedutis, 227 Ill. 9, 81 N. E. 9; Norton *v.* Volzke, 158 Ill. 402, 41 N. E. 1085, 49 Am. St Rep. 167 [*affirming* 54 Ill. App. 545]; Chicago Anderson Pressed Brick Co. *v.* Reineiger, 140 Ill. 334, 29 N. E. 1106, 33 Am. St. Rep. 249 [*affirming* 41 Ill. App. 324]; Jacksonville Southeastern R. Co. *v.* Southworth, 135 Ill. 250, 25 N. E. 1093; Chicago, etc., R. Co. *v.* Dunleavy, 129 Ill. 132, 22 N. E. 15; Chicago, etc., R. Co. *v.* Seevers, 122 Ill. App. 558; St Louis, etc., R. Co. *v.* Winkelmann, 47 Ill. App. 276; Fortune *v.* Jones, 30 Ill. App. 116.

Indiana.— Indianapolis *v.* Keeley, 167 Ind. 516, 79 N. E. 499; North Western Mut. L. Ins. Co. *v.* Heimann, 93 Ind. 24; Huston *v.* McCloskey, 76 Ind. 38; New Albany Second Nat. Bank *v.* Gibboney, 43 Ind. App. 492, 87 N. E. 1064; Ohio, etc., R. Co. *v.* Trapp, 4 Ind. App. 69, 30 N. E. 812.

Iowa.— Morrow *v.* National Masonic Acc. Assoc., 125 Iowa 633, 101 N. W. 468; Spaulding *v.* Chicago, etc., R. Co., 98 Iowa 205, 67 N. W. 227; Barnes *v.* Marcus, 96 Iowa 675, 65 N. W. 984; Sage *v.* Haines, 76 Iowa 581, 41 N. W. 366; Hablichtel *v.* Yambert, 75 Iowa 539, 39 N. W. 877; Van Horn *v.* Overman, 75 Iowa 421, 39 N. W. 679.

Kansas.—Atchison, etc., R. Co. *v.* Ayers, 56 Kan. 176, 42 Pac. 722.

Michigan. — Germaine *v.* Muskegon, 105 Mich. 213, 63 N. W. 78; Cousins *v.* Lake Shore, etc., R. Co., 96 Mich. 386, 56 N. W. 14; Castner *v.* Farmers' Mut. F. Ins. Co., 50 Mich. 273, 15 N. W. 452; Swift *v.* Plessner, 39 Mich. 178; Michigan Paneling Mach., etc., Co. *v.* Parsell, 38 Mich. 475; Harbaugh *v.* People, 33 Mich. 241; Frankenberg *v.* Decatur First Nat. Bank, 33 Mich. 46; Sheahan *v.* Barry, 27 Mich. 217.

Minnesota.— Morbey *v.* Chicago, etc., R. Co., 116 Iowa 84, 89 N. W. 105; Gorman *v.* Minneapolis, etc., R. Co., 78 Iowa 509, 43 N. W. 303.

Nebraska.— North Bend First Nat. Bank *v.* Miltonberger, 33 Nebr. 847, 51 N. W. 232.

Ohio.— Schweinfurth *v.* Cleveland, etc., R. Co., 60 Ohio St. 215, 54 N. E. 89; Lake Shore, etc., R. Co. *v.* Andrews, 21 Ohio Cir. Ct. 267, 11 Ohio Cir. Dec. 475.

West Virginia.— Peninsular Land Transp., etc., Co. *v.* Franklin Ins. Co., 35 W. Va. 666, 14 S. E. 237.

Wisconsin.— McKone *v.* Metropolitan L. Ins. Co., 131 Wis. 243, 110 N. W. 472; Byington *v.* Merrill, 112 Wis. 211, 88 N. W. 26; Goesel *v.* Davis, 100 Wis. 678, 76 N. W. 768; Cummings *v.* National Furnace Co., 60 Wis. 603, 18 N. W. 742, 20 N. W. 665.

See 46 Cent. Dig. tit. "Trial," § 828.

26. *Connecticut.*— Freedman *v.* New York, etc., R. Co., 81 Conn. 601, 71 Atl. 901.

Illinois. — Springfield Coal Min. Co. *v.* Gedutis, 227 Ill. 9, 81 N. E. 9; Chicago City R. Co. *v.* Foster, 226 Ill. 288, 80 N. E. 762; Leighton, etc., Steel Co. *v.* Snell, 217 Ill. 152, 75 N. E. 462 [*affirming* 119 Ill. App. 199]; Illinois Cent. R. Co. *v.* Scheffner, 209 Ill. 1, 70 N. E. 619; Beardstown *v.* Clark, 204 Ill. 524, 68 N. E. 378 [*affirming* 104 Ill. App. 568]; Nelson *v.* Fehd, 203 Ill. 120, 67 N. E. 828 [*affirming* 104 Ill. App. 114]; Chicago, etc., R. Co. *v.* Gore, 202 Ill. 188, 66 N. E. 1063; Springfield Consol. R. Co. *v.* Puntenney, 200 Ill. 9, 65 N. E. 442 [*affirming* 101 Ill. App. 95]; Chicago Exch. Bldg. Co. *v.* Nelson, 197 Ill. 334, 64 N. E. 369; Illinois Steel Co. *v.* Mann, 197 Ill. 186, 64 N. E. 328 [*affirming* 100 Ill. App. 367]; Chicago City R. Co. *v.* Olis, 192 Ill. 514, 61 N. E. 459 [*affirming* 94 Ill. App. 323]; Gundlach *v.* Schott, 192 Ill. 509, 61 N. E. 332, 85 Am. St. Rep. 348; Chicago, etc., R. Co. *v.* Harrington, 192 Ill. 9, 61 N. E. 622; Chicago, etc., R. Co. *v.* Winters, 175 Ill. 293, 51 N. E. 901; Chicago City R. Co. *v.* Taylor, 170 Ill. 49, 48 N. E. 831 [*affirming* 68 Ill. App. 613]; Brink's Chicago City Express Co. *v.* Kinnare, 168 Ill. 643, 48 N. E. 446; Taylor *v.* Felsing, 164 Ill. 331, 45 N. E. 161 [*affirming* 63 Ill. App. 624]; St. Louis, etc., R. Co. *v.* Eggmann, 161 Ill. 155, 43 N. E. 620 [*affirming* 60 Ill. App. 291]; Ingalls *v.* Allen, 144 Ill. 535, 33 N. E. 203; Lake Erie, etc., R. Co. *v.* Morain, 140 Ill. 117, 29 N. E. 869 [*affirming* 36 Ill. App. 632]; Chicago, etc., R. Co. *v.* Clough, 134 Ill. 586, 25 N. E. 664, 29 N. E. 184; Chicago, etc., R. Co. *v.* Dunleavy, 129 Ill. 132, 22 N. E. 15; Gronlund *v.* Forsman, 124 Ill. App. 362; Chicago, etc., R. Co. *v.* Brooks, 115 Ill. App. 5; Chicago, etc., R. Co. *v.* Bell, 111 Ill. App. 280; Nelson *v.* Richardson, 108 Ill. App. 121; John S. Metcalf Co. *v.* Nystedt, 102 Ill. App. 71 [*affirmed* in 203 Ill. 333, 67 N. E. 764]; Graver Tank Works *v.* O'Donnell, 91 Ill. App. 524; John Mathews Apparatus Co. *v.* Neal, 71 Ill. App. 363; Louisville, etc., R. Co. *v.* Pirschbacher, 63 Ill. App. 144; Chicago, etc., R. Co. *v.* Greenfield, 53 Ill. App. 424; Cleveland, etc., R. Co. *v.* Monks, 52 Ill. App. 627; Lloyd *v.* Kelly, 48 Ill. App. 554.

Indiana.— Ft. Wayne Cooperage Co. *v.* Page, 170 Ind. 585, 84 N. E. 145, 23 L. R. A. N. S. 946; O. M. Cockrum Co. *v.* Klein, 165 Ind. 627, 74 N. E. 529; Huntington County *v.* Bonebrake, 146 Ind. 311, 45 N. E. 470; Lake Shore, etc., R. Co. *v.* Stupak, 123 Ind. 210, 23 N. E. 246; Schnurr *v.* Stults, 119 Ind. 429, 21 N. E. 1089; Louisville, etc., R. Co. *v.* Cauley, 119 Ind. 142, 21 N. E. 546; Louisville, etc., R. Co. *v.* Hubbard, 116 Ind. 193, 18 N. E. 611; Louisville, etc., R. Co. *v.* Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; American Bonding Co. *v.* State, 40 Ind. App. 559, 82 N. E. 548; Heiney *v.* Garretson, 1 Ind. App. 548, 27 N. E. 989.

Iowa.— Kletzing *v.* Armstrong, 119 Iowa 505, 93 N. W. 500; Haney-Campbell Co. *v.*

law;[27] as is also a special interrogatory calling for findings on specific items of damages,[28] for a statement showing on which paragraph of the petition the verdict is based,[29] or for the mere cross-examination of the jury.[30] An interrogatory will not be submitted which calls for conclusions of law.[31] The submission by

Preston Creamery Assoc., 119 Iowa 188, 93 N. W. 297; Nodle *v.* Hawthorn, 107 Iowa 380, 77 N. W. 1062; Thompson *v.* Brown, 106 Iowa 367, 76 N. W. 819; Runkle *v.* Hartford Ins. Co., 99 Iowa 414, 68 N. W. 712; Clough *v.* Bennett, 99 Iowa 69, 68 N. W. 578; Aultman, etc., Co. *v.* Shelton, 90 Iowa 288, 57 N. W. 857; Clifton *v.* Granger, 86 Iowa 573, 53 N. W. 316; Thomas *v.* Schee, 80 Iowa 237, 45 N. W. 539.

Kansas.— Riley *v.* Wolfley, (1898) 55 Pac. 461; Burr *v.* Honeywell, 6 Kan. App. 783, 51 Pac. 235; Weir *v.* Herbert, 6 Kan. App. 596, 51 Pac. 582.

Michigan.— Davis *v.* Teachout, 136 Mich. 135, 85 N. W. 475, 86 Am. St. Rep. 531.

Missouri.— Jackson *v.* German Ins. Co., 27 Mo. App. 62.

North Carolina.—Vanstory Clothing Co. *v.* Stadiem, 149 N. C. 6, 62 S. E. 778; Elizabethton Shoe Co. *v.* Hughes, 122 N. C. 296, 29 S. E. 339.

North Dakota.— Russell *v.* Meyer, 7 N. D. 335, 75 N. W. 262, 47 L. R. A. 637.

Ohio.— Cleveland, etc., Electric R. Co. *v.* Hawkins, 64 Ohio St. 391, 60 N. E. 558; Lake Shore, etc., R. Co. *v.* Andrews, 21 Ohio Cir. Ct. 267, 11 Ohio Cir. Dec. 475; Hauk *v.* Norwood, 9 Ohio S. & C. Pl. Dec. 820.

Oregon.—White *v.* White, 34 Oreg. 141, 50 Pac. 801, 55 Pac. 645.

Texas.— Silliman *v.* Gano, 90 Tex. 637, 39 S. W. 559, 40 S. W. 391; Cushman *v.* Masterson, (Civ. App. 1901) 64 S. W. 1031; Finley *v.* Lewis, (Civ. App. 1897) 39 S. W. 974.

Wisconsin.— Palmer *v.* Schultz, 138 Wis 455, 120 N. W. 348; Blankavag *v.* Badger Box, etc., Co., 136 Wis. 380, 117 N. W. 852; Anderson *v.* Chicago Brass Co., 127 Wis. 273, 106 N. W. 1077; Montanye *v.* Northern Electrical Mfg. Co., 127 Wis. 22, 105 N. W. 1043; Baxter *v.* Krainik, 126 Wis. 421, 105 N. W. 803; Zimmer *v.* Fox River Valley Electric R. Co., 118 Wis. 614, 95 N. W. 957; Nix *v.* C. Reiss Coal Co., 114 Wis. 493, 90 N. W. 437; Cullen *v.* Hanisch, 114 Wis. 24, 89 N. W. 900; Baxter *v.* Chicago, etc., R. Co., 104 Wis. 307, 80 N. W. 644; Ward *v.* Chicago, etc., R. Co., 102 Wis. 215, 78 N. W. 442; McKeon *v.* Chicago, etc., R. Co., 94 Wis. 477, 69 N. W. 175, 59 Am. St. Rep. 910, 35 L. R. A. 252; Pier *v.* Chicago, etc., R. Co., 94 Wis. 357, 68 N. W. 464; Ohlweiler *v.* Lohmann, 88 Wis. 75, 59 N. W. 678; McCoy *v.* Milwaukee St. R. Co., 88 Wis. 56, 59 N. W. 453; Cummings *v.* National Furnace Co., 60 Wis. 603, 18 N. W. 742, 20 N. W. 665.

United States.— Drumm-Flato Commission Co. *v.* Edmisson, 208 U. S. 534, 28 S. Ct. 367, 52 L. ed. 606.

See 46 Cent. Dig. tit. "Trial," § 832.

Interrogatory held to relate to ultimate facts see Lake St. El. R. Co. *v.* Fitzgerald, 112 Ill. App. 312.

27. Gale *v.* Priddy, 66 Ohio St. 400, 64 N. E. 437.

28. Southern Indiana R. Co. *v.* Moore, 34 Ind. App. 154, 72 N. E. 479; Keller *v.* Gaskill, 20 Ind. App. 502, 50 N. E. 353; Brier *v.* Davis, 122 Iowa 59, 96 N. W. 983.

All forms of injury shown may be included in a single issue as to the amount of damages. Pinnix *v.* Lake Drummond Canal, etc., Co., 132 N. C. 124, 43 S. E. 578.

29. Farmers' Ins. Assoc. *v.* Reavis, 163 Ind. 321, 70 N. E. 518, 71 N. E. 905; Consolidated Stone Co. *v.* Morgan, 160 Ind. 241, 66 N. E. 696; Clear Creek Stone Co. *v.* Dearmin, 160 Ind. 162, 66 N. E. 609.

30. Greenlee *v.* Mosnat, 126 Iowa 330, 101 N. W. 1122; Horr *v.* C. W. Howard Paper Co., 126 Wis. 160, 105 N. W. 668.

31. *Connecticut.*— Freedman *v.* New York, etc., R. Co., 81 Conn. 601, 71 Atl. 901.

Illinois.— Tomlin *v.* Hilyard, 43 Ill. 300, 92 Am. Dec. 118.

Indiana.— Huntington County *v.* Bonebrake, 146 Ind. 311, 45 N. E. 470; Ohio, etc., R. Co. *v.* Stansberry, 132 Ind. 533, 32 N. E. 218; Korrady *v.* Lake Shore, etc., R. Co., 131 Ind. 261, 29 N. E. 1069; Louisville, etc., R. Co. *v.* Pedigo, 108 Ind. 481, 8 N. E. 627; Louisville, etc., R. Co. *v.* Worley, 107 Ind. 320, 7 N. E. 215; Toledo, etc., R. Co. *v.* Goddard, 25 Ind. 185; Richmond St., etc., R. Co. *v.* Beverley, 43 Ind. App. 105, 84 N. E. 558, 85 N. E. 721; Indianapolis *v.* Mullally, 38 Ind. App. 125, 77 N. E. 1132; Insurance Co. of North America *v.* Osborn, 26 Ind. App. 88, 59 N. E. 181; Aurelius *v.* Lake Erie, etc., R. Co., 19 Ind. App. 584, 49 N. E. 857; New York, etc., R. Co. *v.* Grossman, 17 Ind. App. 652, 46 N. E. 546.

Iowa.— McGuire *v.* Chicago, etc., R. Co., 138 Iowa 664, 116 N. W. 801; Toledo Sav. Bank *v.* Rathmann, 78 Iowa 288, 43 N. W. 193; Lewis *v.* Chicago, etc., R. Co., 57 Iowa 127, 10 N. W. 336; Hatfield *v.* Lockwood, 18 Iowa 296.

Michigan.— Banner Tobacco Co. *v.* Jenison, 48 Mich. 459, 12 N. W. 655.

Wisconsin.— Howard *v.* Beldenville Lumber Co., 129 Wis. 98, 108 N. W. 48.

See 46 Cent. Dig. tit. "Trial," § 832.

Whether a person fraudulently induced plaintiff to sign the release does not call for a conclusion of law. Wallace *v.* Skinner, 15 Wyo. 233, 88 Pac. 221.

Mixed questions of law and fact should not be submitted to the jury directly. New Castle *v.* Grubbs, 171 Ind. 482, 86 N. E. 757.

Question of law improperly submitted as question of fact.— In an action by a shipper against a carrier on an express contract to transport stock, where the question whether it was plaintiff's duty to accompany the stock was improperly submitted to the jury as a question of fact, their answer that there was no evidence showing such a duty was

the court of improper interrogatories to be reversible error must be prejudicial to the party objecting thereto.[32] It is not essential that each question submitted shall cover all the issues in the case.[33]

b. Admitted or Uncontroverted Facts; Assuming Controverted Facts. The court may properly refuse to submit questions for special findings as to facts not in dispute,[34] or which are established by undisputed evidence,[35] or questions which under the evidence could be answered only one way.[36] But the court cannot refuse to submit interrogatories on the ground that the parties have agreed on the facts unless such agreement is made matter of record.[37] Questions presented for special findings, which assume as true material facts in issue and not admitted, are properly excluded.[38]

c. Questions Already Submitted. The court may refuse a special interrogatory which merely repeats, in form or substance, one already given.[39] But in

not prejudicial to defendant. Chicago, etc., R. Co. *v.* Morris, 16 Wyo. 308, 93 Pac. 664.

32. Wayne *v.* Blun, 92 Ga. 338, 17 S. E. 288; Manatt *v.* Scott, 106 Iowa 203, 76 N. W. 717, 68 Am. St. Rep. 293; Andrews *v.* Postal Tel. Co., 119 N. C. 403, 25 S. E. 955; Twentieth Century Co. *v.* Quilling, 136 Wis. 481, 117 N. W. 1007; Baumann *v.* C. Reiss Coal Co., 118 Wis. 330, 95 N. W. 139.

Where answers to interrogatories submitting questions of law are not conclusive and others support the verdict it is not reversible error. Chicago, etc., R. Co. *v.* Ostrander, 116 Ind. 259, 15 N. E. 227, 19 N. E. 110.

33. Oriental Inv. Co. *v.* Barclay, 25 Tex. Civ. App. 543, 64 S. W. 80; Carroll *v.* Chicago, etc., R. Co., 99 Wis. 399, 75 N. W. 176, 67 Am. St. Rep. 872.

34. Freedman *v.* New York, etc., R. Co., 81 Conn. 601, 71 Atl. 901; Citizens' State Bank *v.* Council Bluffs Fuel Co., 89 Iowa 618, 57 N. W. 441; Powell *v.* Chittick, 89 Iowa 513, 56 N. W. 652; Schrubbe *v.* Connell, 69 Wis. 476, 34 N. W. 503; Ault *v.* Wheeler, etc., Mfg. Co., 54 Wis. 300, 11 N. W. 545.

35. Wilkie *v.* Chandon, 1 Wash. 355, 25 Pac. 464; Bereiter *v.* Abbotsford, 131 Wis. 28, 110 N. W. 821; Hallum *v.* Omro, 122 Wis. 337, 99 N. W. 1051; Crouse *v.* Chicago, etc., R. Co., 104 Wis. 473, 80 N. W. 752.

36. Stringham *v.* Cook, 75 Wis. 589, 44 N. W. 777.

37. Durfee *v.* Abbott, 50 Mich. 479, 15 N. W. 559; Harbaugh *v.* People, 33 Mich. 241.

38. Gundlech *v.* Schott, 192 Ill. 509, 61 N. E. 332, 85 Am. St. Rep. 348; Chicago, etc., R. Co. *v.* Harrington, 192 Ill. 9, 61 N. E. 622; Gronlund *v.* Forsman, 124 Ill. App. 362; Toledo, etc., R. Co. *v.* Goddard, 25 Ind. 185; Elliott *v.* Reynolds, 38 Kan. 274, 16 Pac. 698; Houston, etc., R. Co. *v.* Hartnett, (Tex. Civ. App. 1898) 48 S. W. 773; Thomas *v.* Salmons, (Tex. Civ. App. 1897) 39 S. W. 1094. See also Davis *v.* Southern R. Co., 147 N. C. 68, 60 S. E. 722; Dorwin *v.* Hagerty, 137 Wis. 161, 118 N. W. 799.

39. *California.*— Irrgang *v.* Ott, 9 Cal. App. 440, 99 Pac. 528.

Georgia.—Ruffin *v.* Paris, 75 Ga. 653; Harris *v.* Collins, 75 Ga. 97.

Illinois.— Norton *v.* Volzke, 158 Ill. 402, 41 N. E. 1085, 49 Am. St. Rep. 167 [*affirming* 54 Ill. App. 545]; Lake Shore, etc., R. Co. *v.* Johnson, 135 Ill. 641, 26 N. E. 510.

Indiana.— Terry *v.* Shively, 93 Ind. 413; Sheible *v.* Slagle, 89 Ind. 323; Langsdale *v.* Bonton, 12 Ind. 467; Ft. Wayne Cooperage Co. *v.* Page, (App. 1907) 82 N. E. 83; Jackson County *v.* Nichols, 12 Ind. App. 315, 40 N. E. 277, 54 Am. St. Rep. 528.

Iowa.— Strand *v.* Grinnell Automobile Garage Co., 136 Iowa 68, 113 N. W. 488; Hanousek *v.* Marshalltown, 130 Iowa 550, 107 N. W. 603; Buchholtz *v.* Radcliffe, 129 Iowa 27, 105 N. W. 336; Wilson *v.* Onstott, 121 Iowa 263, 96 N. W. 779; Powell *v.* Chittick, 89 Iowa 513, 56 N. W. 652; Cawker City State Bank *v.* Jennings, 89 Iowa 230, 56 N. W. 494.

Kansas.— Russell *v.* Gregg, 49 Kan. 89, 30 Pac. 185; Warden *v.* Reser, 38 Kan. 86, 16 Pac. 60; Dull *v.* Dumbauld, 7 Kan. App. 376, 51 Pac. 936.

New Mexico.— Green *v.* Brown, etc., Co., 11 N. M. 658, 72 Pac. 17.

North Carolina.— Tuttle *v.* Tuttle, 146 N. C. 484, 59 S. E. 1008, 125 Am. St. Rep. 481; Clark *v.* Patapsco Guano Co., 144 N. C. 64, 56 S. E. 858; Pretzfelder *v.* Merchants' Ins. Co., 123 N. C. 164, 31 S. E. 470, 44 L. R. A. 424; Coley *v.* Statesville, 121 N. C. 301, 28 S. E. 482.

Oklahoma.— Lawton *v.* McAdams, 15 Okla. 412, 83 Pac. 429.

West Virginia.— Bice *v.* Wheeling Electrical Co., 62 W. Va. 685, 59 S. E. 626.

Wisconsin.— Redepenning *v.* Rock, 136 Wis. 372, 117 N. W. 805; Rowley *v.* Chicago, etc., R. Co., 135 Wis. 208, 115 N. W. 865; Hemmingsen *v.* Chicago, etc., R. Co., 134 Wis. 412, 114 N. W. 785; Hocking *v.* Windsor Spring Co., 131 Wis. 532, 111 N. W. 685; Baxter *v.* Krainik, 126 Wis. 421, 105 N. W. 803; Boyce *v.* Wilbur Lumber Co., 119 Wis. 642, 97 N. W. 563; Zimmer *v.* Fox River Valley Electric R. Co., 118 Wis. 614, 95 N. W. 957; Byington *v.* Merrill, 112 Wis. 211, 88 N. W. 26; Bullen *v.* Milwaukee Trading Co., 109 Wis. 41, 85 N. W. 115; Crouse *v.* Chicago, etc., R. Co., 102 Wis. 196, 78 N. W. 446, 778; Kenyon *v.* Mondovi, 98 Wis. 50, 73 N. W. 314; Wilber *v.* Follansbee, 97 Wis. 577, 72 N. W. 741, 73 N. W. 559; Reed *v.* Madison, 85 Wis. 667, 56 N. W. 182; Wright *v.* Mul-

order to justify the refusal, the interrogatories requested must have been fully covered by those given,[40] and where the interrogatory refused requires a more specific answer than the one submitted, the refusal is error.[41]

d. Questions Disposed of by General Verdict. The court need not submit for special findings questions necessarily disposed of by the general verdict,[42] or the answers to which would be decisive of the sole issue and equivalent to a special verdict.[43] Thus where the issues as framed are sufficient to present to the jury every defense that was made in the case, the refusal to submit issues in the form presented by defendant is not error.[44]

3. Requests For Special Findings — a. Necessity and Sufficiency. A party desiring a special verdict or answers to special interrogatories must request the submission of such interrogatories or the finding of such special verdict,[45] and no error can be predicated on a failure to submit a particular question in a special verdict which was not requested, but merely an exception taken to the verdict

vanoy, 78 Wis. 89, 46 N. W. 1045, 23 Am. St. Rep. 393, 9 L. R. A. 807; Kalbus *v.* Abbott, 77 Wis. 621, 46 N. W. 810; Watson *v.* Milwaukee, etc., R. Co., 57 Wis. 332, 15 N. W. 468. But see Curkeet *v.* Steinhoff, 130 Wis. 146, 109 N. W. 975, where under the circumstances it was held proper for the court to take the jury's specific finding on a fact, although such finding was involved in the issue covered by another question.

See 46 Cent. Dig. tit. "Trial," § 834.

Interrogatories dependent on other interrogatories which the court has properly refused to submit as unnecessary to a decision will not be submitted. Pier *v.* Chicago, etc., R. Co., 94 Wis. 357, 68 N. W. 464.

40. Clegg *v.* Waterbury, 88 Ind. 21.

41. American Cent. Ins. Co. *v.* Hathaway, 43 Kan. 399, 23 Pac. 428.

42. *Colorado.*— Denver Consol. Electric Co. *v.* Simpson, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566; Denver, etc., R. Co. *v.* Nye, 9 Colo. App. 94, 47 Pac. 654.

Indiana.— McCullough *v.* Martin, 12 Ind. App. 165, 39 N. E. 905.

Iowa.— Haase *v.* Morton, 138 Iowa 205, 115 N. W. 921; Conway *v.* Murphy, 135 Iowa 171, 112 N. W. 764; Morrow *v.* National Masonic Acc. Assoc., 125 Iowa 633, 101 N. W. 468; German Sav. Bank *v.* Citizens' Nat. Bank, 101 Iowa 530, 70 N. W. 769, 63 Am. St. Rep. 399; O'Leary *v.* German American Ins. Co., 100 Iowa 390, 69 N. W. 686; Whalen *v.* Chicago, etc., R. Co., 75 Iowa 563, 39 N. W. 894.

Kansas.— Missouri Pac. R. Co. *v.* Brown, (App. 1897) 47 Pac. 553; Atchison, etc., R. Co. *v.* Dickerson, 4 Kan. App. 345, 45 Pac. 975.

Kentucky.— Jones *v.* Moore, 99 S. W. 286, 30 Ky. L. Rep. 603; Holcomb-Lobb Co. *v.* Kaufman, 96 S. W. 813, 29 Ky. L. Rep. 1006.

Massachusetts.— Riley *v.* Williams, 123 Mass. 506.

North Carolina.— Dortch *v.* Atlantic Coast Line R. Co., 148 N. C. 575, 62 S. E. 616.

Rhode Island.— St. Jean *v.* Lippitt Woolen Co., (1908) 69 Atl. 604.

Texas.—Walker *v.* Dickey, 44 Tex. Civ. App. 110, 98 S. W. 658; Sun Ins. Co. Office *v.* Beneke, (Civ. App. 1899) 53 S. W. 98.

Utah.— Prye *v.* Kalbaugh, 34 Utah 306, 97 Pac. 331.

Wisconsin.— McGowan *v.* Watertown, 130 Wis. 555, 110 N. W. 402.

See 46 Cent. Dig. tit. "Trial," § 835.

In Louisiana, under Acts (1817), No. 9, § 10, a party has a right to submit to a jury all questions of fact pertinent to the issue, but not questions of law, nor, for a special verdict, a question the answer to which would be equivalent to a general verdict. Barry *v.* Louisiana Ins. Co., 1 Mart. 69; Fonteneau *v.* Perot, 5 Mart. 202.

43. White *v.* Adams, 77 Iowa 295, 42 N. W. 199.

44. Dortch *v.* Atlantic Coast Line, 148 N. C. 575, 62 S. E. 616.

45. *Illinois.*— Triggs *v.* McIntyre, 215 Ill. 369, 74 N. E. 400 [*affirming* 115 Ill. App. 257]; Chicago, etc., R. Co. *v.* Elmore, 32 Ill. App. 418.

Indiana.— Louisville, etc., R. Co. *v.* Kane, 120 Ind. 140, 22 N. E. 80; Woollen *v.* Whitacre, 91 Ind. 502; Adams *v.* Holmes, 48 Ind. 299; Bradley *v.* Bradley, 45 Ind. 67; Atkinson *v.* Saltsman, 3 Ind. App. 139, 29 N. E. 435.

Iowa.— Kassing *v.* Walter, (1896) 65 N. W. 832.

Minnesota.— Dakota County *v.* Parker, 7 Minn. 267.

Nebraska.— Town *v.* Missouri Pac. R. Co., 50 Nebr. 768, 70 N. W. 402.

New Mexico.— Upton *v.* Santa Rita Min. Co., 14 N. M. 96, 89 Pac. 275.

New York.— Flandreau *v.* Elsworth, 151 N. Y. 473, 45 N. E. 853; Kneeland *v.* Arnold, 88 N. Y. Suppl. 367.

Texas.— Rice *v.* Ward, (1900) 56 S. W. 747; Connor *v.* Blaisdell, Jr., Co., (Civ. App. 1901) 60 S. W. 890.

Virginia.— Syme *v.* Butler, 1 Call 105.

Washington.— Stangair *v.* Roads, 46 Wash. 613, 91 Pac. 1.

Wisconsin.— Bratz *v.* Stark, 138 Wis. 599, 120 N. W. 396; Kohl *v.* Bradley, 130 Wis. 301, 110 N. W. 265; Johnson *v.* St. Paul, etc., Coal Co., 126 Wis. 492, 105 N. W. 1048; Olwell *v.* Skobis, 126 Wis. 308, 105 N. W. 777; Milwaukee First Nat. Bank *v.* Finck, 100 Wis. 446, 76 N. W. 608; Darling *v.* Neumeister, 99 Wis. 426, 75 N. W. 175; Conti-

because it did not contain it.[46] The request must be unconditional,[47] and must be accompanied by a request to submit particular findings.[48] A mere request by one party that certain specific questions and no others be submitted is not sufficient.[49] Under some statutes the request must be in writing,[50] and entered on the minutes of the court.[51]

b. Time For Presenting. The time for filing requests for special findings is largely in the discretion of the trial court,[52] but they should not be submitted at such a stage as to work surprise or be manifestly unfair to the other side.[53] They may be presented before the issues are closed,[54] and before argument begun,[55] and after arguments on requested instructions.[56] They need not be received after argument commenced [57] or closed,[58] after the court has intimated the character of the instructions it will give,[59] or after the main charge has been given,[60] and it is too late to submit requests for special findings after general verdict,[61] after verdict directed,[62] or after the discharge of the jury.[63] Requests for special findings are premature if made before any evidence has been introduced in the cause.[64] Exception to the court's refusal to submit special interrogatories must show when the interrogatories were presented to the court.[65]

c. Submission to Opposing Counsel. Under some statutes special interrogatories to the jury must be submitted to counsel for the opposite side,[66] before

nental Nat. Bank *v.* McGeoch, 92 Wis. 286, 66 N. W. 606; Fenelon *v.* Butts, 53 Wis. 344, 10 N. W. 501.

See 46 Cent. Dig. tit. "Trial," § 837.

46. Bucher *v.* Wisconsin Cent. R. Co., 139 Wis. 597, 120 N. W. 518.

47. Noble *v.* Enos, 19 Ind. 72.

48. Prosser *v.* Montana Cent. R. Co., 17 Mont. 372, 43 Pac. 81, 30 L. R. A. 814; Johnston *v.* Fraser, (Tex. Civ. App. 1906) 92 S. W. 49.

49. Fenelson *v.* Butts, 53 Wis. 344, 10 N. W. 501.

50. Pittsburg, etc., R. Co. *v.* Smith, 207 Ill. 486, 69 N. E. 873; Bryan *v.* Lamson, 88 Ill. App. 261; Gans, etc., Inv. Co. *v.* Sanford, 35 Mont. 295, 88 Pac. 955; Moore *v.* Pierson, 100 Tex. 113, 94 S. W. 1132; Edelstein *v.* Brown, (Tex. Civ. App. 1906) 95 S. W. 1126; Holly *v.* Simmons, 38 Tex. Civ. App. 124, 85 S. W. 325; Yeager *v.* Neil, 26 Tex. Civ. App. 414, 64 S. W. 701.

51. Gaus, etc., Inv. Co. *v.* Sanford, 35 Mont. 295, 88 Pac. 955.

52. Kopelke *v.* Kopelke, 112 Ind. 435, 13 N. E. 695; Peninsular Land Transp., etc., Co. *v.* Franklin Ins. Co., 35 W. Va. 666, 14 S. E. 237.

53. Peninsular Land Transp., etc., Co. *v.* Franklin Ins. Co., 35 W. Va. 666, 14 S. E. 237.

54. Sherman *v.* Hogland, 73 Ind. 472.

55. Plyler *v.* Pacific Portland Cement Co., 152 Cal. 125, 92 Pac. 56; Kopelke *v.* Kopelke, 112 Ind. 435, 13 N. E. 695; Topeka *v.* Boutwell, 53 Kan. 20, 35 Pac. 819, 27 L. R. A. 593.

56. Lowman *v.* Sheets, 124 Ind. 416, 24 N. E. 351, 7 L. R. A. 784; Sandford Tool, etc., Co. *v.* Mullen, 1 Ind. App. 204, 27 N. E. 448.

57. McMahon *v.* Sankey, 133 Ill. 636, 24 N. E. 1027 [*affirming* 35 Ill. App. 341]; Glasgow *v.* Hobbs, 52 Ind. 239; Hamline *v.* Engle, 14 Ind. App. 685, 42 N. E. 760, 43 N. E. 463; Cleveland Stone Co. *v.* Monroe County Oolitic Stone Co., 11 Ind. App. 423, 39 N. E. 172; Hopper *v.* Moore, 42 Iowa 563; U. S. Express Co. *v.* Jenkins, 73 Wis. 471, 41 N. W. 957; Lockhart *v.* Fessenich, 58 Wis. 588, 17 N. W. 302; Pool *v.* Chicago, etc., R. Co., 56 Wis. 227, 14 N. W. 46.

A mere formal phrase addressed to the court and jury is not the beginning of argument so as to prevent a party from presenting interrogatories. Wilson *v.* Wappello County, 129 Iowa 77, 105 N. W. 363.

58. Malady *v.* McEnary, 30 Ind. 273; Baltimore Traction Co. *v.* Appel, 80 Md. 603, 31 Atl. 964.

59. Ohio, etc., R. Co. *v.* Wrape, 4 Ind. App. 100, 30 N. E. 428; McWilliams *v.* Smith, 1 Call (Va.) 123.

60. Galveston, etc., R. Co. *v.* Cody, 92 Tex. 632, 51 S. W. 329.

61. Rogers *v.* Hanson, 35 Iowa 283; Lambert *v.* McFarland, 7 Nev. 159; Burleson *v.* Burleson, 28 Tex. 383. See also Freedman *v.* New York, etc., R. Co., 81 Conn. 601, 71 Atl. 901.

62. Robbins *v.* Springfield F. & M. Ins. Co., 79 Hun (N. Y.) 117, 29 N. Y. Suppl. 513 [*affirmed* in 149 N. Y. 477, 44 N. E. 159].

63. Smyser *v.* Fair, 73 Kan. 773, 85 Pac. 408.

64. Woodward *v.* Woodson, 6 Munf. (Va.) 227.

65. American F. Ins. Co. *v.* Sisk, 9 Ind. App. 305, 36 N. E. 659.

66. Pittsburg, etc., R. Co. *v.* Smith, 207 Ill. 486, 69 N. E. 873; Bryan *v.* Lamson, 83 Ill. App. 261; Sarchfield *v.* Hayes, (Iowa 1907) 112 N. W. 1100; Humbert *v.* Larson, 89 Iowa 258, 56 N. W. 454.

In California, under Code Civ. Proc. § 625, requiring the court on request to direct the jury to find a special verdict, a request for a special verdict need not be submitted to the adverse party, although the court may do so. Plyler *v.* Pacific Portland Cement Co., 152 Cal. 125, 92 Pac. 56.

arguments begun,[67] and if not so submitted may be properly refused by the court.[68] But the court is not bound to submit to counsel special interrogatories given on its own motion,[69] nor special interrogatories submitted by counsel during argument, it being within the discretion of the court whether to submit interrogatories presented at that late stage of the trial.[70]

4. Preparation and Form of Interrogatory — a. In General. In the absence of statute no particular form is required in the submission of special interrogatories, it being sufficient if they substantially present the issues, and, when answered, determine the rights of the parties,[71] and the form of questions and manner of propounding them is largely in the discretion of the trial court.[72] Each question should be clear and concise, and presented in such form that the jury can give a direct answer thereto,[73] which will support the judgment,[74] and should call for a finding on one single, distinct, material proposition, and should not be double,[75] and should neither narrow nor enlarge the issue as presented by the

67. Crosby *v.* Hungerford, 59 Iowa 712, 12 N. W. 582.

68. McMahon *v.* Sankey, 133 Ill. 636, 24 N. E. 1027 [*affirming* 35 Ill. App. 341]; St. Louis, etc., R. Co. *v.* Ellis, 58 Ill. App. 110; Wabash, etc., R. Co. *v.* Tretts, 96 Ind. 450; Barnes *v.* Marcus, 96 Iowa 675, 65 N. W. 984.

69. Harp *v.* Parr, 168 Ill. 459, 48 N. E. 113; Pittsburg, etc., R. Co. *v.* Smith, 110 Ill. App. 154; Miles *v.* Schrunk, 139 Iowa 563, 117 N. W. 971; Briggs *v.* McEwen, 77 Iowa 303, 42 N. W. 303; Clark *v.* Ralls, 71 Iowa 189, 32 N. W. 327. But see Chicago City R. Co. *v.* Jordan, 215 Ill. 390, 74 N. E. 452 [*reversing* 116 Ill. App. 650].

70. Sherfey *v.* Evansville, etc., R. Co., 121 Ind. 427, 23 N. E. 273.

71. Tuttle *v.* Tuttle, 146 N. C. 484, 59 S. E. 1008, 125 Am. St. Rep. 481 (holding that the exact form of the issues submitted is immaterial, if under them each party has an opportunity to present evidence of the facts relied on, and the privilege of having the same applied fairly); Ormond *v.* Connecticut Mut. L. Ins. Co., 145 N. C. 140, 58 S. E. 997; Clark *v.* Patapsco Guano Co., 144 N. C. 64, 56 S. E. 858; Uecker *v.* Zuercher, (Tex. Civ. App. 1909) 118 S. W. 149; Van de Bogart *v.* Marinette, etc., Paper Co., 132 Wis. 367, 112 N. W. 443.

Findings need not be in the identical language of the pleadings, but are sufficient if all the material issues are substantially covered. Aydelotte *v.* Billing, 8 Cal. App. 673, 97 Pac. 698.

72. *Arizona.*—W. H. Taggart Mercantile Co. *v.* Clack, 8 Ariz. 295, 71 Pac. 925.

Indiana.—Allen *v.* Davison, 16 Ind. 416.

New York.—Partridge *v.* Gilbert, 3 Duer 184.

North Carolina.—Rich *v.* Morisey, 149 N. C. 37, 62 S. E. 762; Ormond *v.* Connecticut Mut. L. Ins. Co., 145 N. C. 140, 58 S. E. 997; Clark *v.* Patapsco Guano Co., 144 N. C. 64, 56 S. E. 858.

Wisconsin.—Rowley *v.* Chicago, etc., R. Co., 135 Wis. 208, 115 N. W. 865; Van de Bogart *v.* Marinette, etc., Paper Co., 132 Wis. 367, 112 N. W. 443; Hebbe *v.* Maple Creek, 121 Wis. 668, 99 N. W. 442; Lindner *v.* St. Paul F. & M. Ins. Co., 93 Wis. 526, 67 N. W. 1125; Hoppe *v.* Chicago, etc., R. Co., 61 Wis. 357, 21 N. W. 227.

See 46 Cent. Dig. tit. "Trial," § 841.

How general or special the questions should be is largely in the discretion of the trial court. Southern Kansas R. Co. *v.* Walsh, 45 Kan. 653, 26 Pac. 45.

73. Marshall *v.* Blackshire, 44 Iowa 475; Drumm-Flato Commission Co. *v.* Edmisson, 17 Okla. 344, 87 Pac. 311; Guthrie *v.* Shaffer, 7 Okla. 459, 54 Pac. 698; Wilkie *v.* Chandon, 1 Wash. 355, 25 Pac. 464.

It is not error to submit interrogatories not distinct in themselves if made distinct by the manner in which the question is treated at the trial. Esterly *v.* Eppelsheimer, 73 Iowa 260, 34 N. W. 846.

Question held not uncertain because referring to the release set out in the "amended" answer, although the case was tried on the second amended answer, the same release being set out in both. See Wallace *v.* Skinner, 15 Wyo. 233, 88 Pac. 221.

A categorical answer should, if practicable, be called for by the interrogatory. Freedman *v.* New York, etc., R. Co., 81 Conn. 601, 71 Atl. 901.

74. Holler *v.* Western Union Tel. Co., 149 N. C. 336, 63 S. E. 92, 19 L. R. A. N. S. 475.

75. *California.*—Phœnix Water Co. *v.* Fletcher, 23 Cal. 481.

Connecticut.—Freedman *v.* New York, etc., R. Co., 81 Conn. 601, 71 Atl. 901.

Illinois.—Illinois Steel Co. *v.* Mann, 197 Ill. 186, 64 N. E. 328 [*affirming* 100 Ill. App. 367]; Gronlund *v.* Forsman, 124 Ill. App. 362.

Indiana.—Huntington County *v.* Bonebrake, 146 Ind. 311, 45 N. E. 470; Rosser *v.* Barnes, 16 Ind. 502; Wabash R. Co. *v.* Schultz, 30 Ind. App. 495, 64 N. E. 481; Pope *v.* Branch County Sav. Bank, 23 Ind. App. 210, 54 N. E. 835; Union Cent Life Ins. Co. *v.* Hollowell, 20 Ind. App. 150, 50 N. E. 399; New York, etc., R. Co. *v.* Grossman, 17 Ind. App. 652, 46 N. E. 546.

Iowa.—Jones *v.* Shelby County, 124 Iowa 551, 100 N. W. 520; Brier *v.* Davis, 122 Iowa 59, 96 N. W. 983; Powell *v.* Chittick, 89 Iowa 513, 56 N. W. 652.

Kansas.—Atchison, etc., R. Co *v.* Aderhold, 58 Kan. 293, 49 Pac. 83.

evidence.[76] Special interrogatories are properly refused, where misleading or confusing,[77] or ambiguous,[78] as where they are in the alternative; [79] and questions must be confined wholly to facts and not embody law applicable thereto.[80] The duty of preparing a form of special verdict devolves on counsel; [81] but the jury may make alterations therein or frame a special verdict themselves,[82] and the court is not obliged to require interrogatories to be answered in the form prepared by counsel.[83]

b. Leading or Suggestive Interrogatories. It is no objection to a special interrogatory that it is leading,[84] or that it is so framed that no other answer than yes or no can be given thereto.[85] But the interrogatory should not be suggestive of the answer desired,[86] and should not be so worded or marked that an inference prejudicial to either party may be drawn therefrom.[87]

5. Amendment or Modification of Interrogatories. The court may amend

Wisconsin.— Howard *v.* Beldenville Lumber Co., 134 Wis. 644, 114 N. W. 1114 (holding that where two distinct issues of fact are embodied in one question of a special verdict, and are expressed in the disjunctive, and the error is not rendered harmless by instructions, the defect is fatal); Odegard *v.* North Wisconsin Lumber Co., 130 Wis. 659, 110 N. W. 809; Mauch *v.* Hartford, 112 Wis. 40, 87 N. W. 816; Dugal *v.* Chippewa Falls, 101 Wis. 533, 77 N. W. 878.

But if an interrogatory submits a single proposition, it is not objectionable because it relates to the acts of several persons. Scagel *v.* Chicago, etc., R. Co., 83 Iowa 380, 49 N. W. 990; Jeffrey *v.* Keokuk, etc., R. Co., 56 Iowa 546, 9 N. W. 884.

Where duplicity is not prejudicial there is no reversible error. Shaw *v.* Gilbert, 111 Wis. 165, 86 N. W. 188.

Single issues should not be subdivided and covered by several questions, nor should they be submitted in various forms. Byington *v.* Merrill, 112 Wis. 211, 88 N. W. 26; Mauch *v.* Hartford, 112 Wis. 40, 87 N. W. 816.

All elements of proximate cause may be submitted to the jury in a single issue of fact. Howard *v.* Beldenville Lumber Co., 134 Wis. 644, 114 N. W. 1114.

Interrogatories held not subject to the objection of being double see Indianapolis Coal Traction Co. *v.* Dalton, 43 Ind. App. 330, 87 N. E. 552; Wankowski *v.* Crivitz Pulp, etc., Co., 137 Wis. 123, 118 N. W. 643.

Special verdict held not objectionable as covering two separate issuable facts see Payne *v.* Payne, 129 Wis. 450, 109 N. W. 105.

76. Jones *v.* Shelby County, 124 Iowa 551, 100 N. W. 520; Mosbey *v.* Chicago, etc., R. Co., 116 Iowa 84, 89 N. W. 105.

77. *Connecticut.*— Freedman *v.* New York, etc., R. Co., 81 Conn. 601, 71 Atl. 901.

Illinois.— Gronlund *v.* Forsman, 124 Ill. App. 362.

Iowa.— Brier *v.* Davis, 122 Iowa 59, 96 N. W. 983.

Maryland.— Caledonia F. Ins. Co. *v.* Traub, 86 Md. 86, 37 Atl. 782.

North Carolina.— Hatcher *v.* Dabbs, 133 N. C. 239, 45 S. E. 562.

Oklahoma.— Drumm-Flato Commission Co. *v.* Edmisson, 17 Okla. 344, 87 Pac. 311; Lawton *v.* McAdams, 15 Okla. 412, 83 Pac. 429.

The submission of an unnecessarily large number of interrogatories, tending to confuse the jury, is error (Oaks *v.* West, (Tex. Civ. App. 1901) 64 S. W. 1033; Hartford F. Ins. Co. *v.* Post, 25 Tex. Civ. App. 428, 62 S. W. 140; Eberhardt *v.* Sanger, 51 Wis. 72, 8 N. W. 111), and is not rendered unobjectionable by the fact that the adverse party requested an even larger number and more objectionable interrogatories (Fromer *v.* Stanley, 95 Wis. 56, 69 N. W. 820).

78. Morrow *v.* National Masonic Acc. Assoc., 125 Iowa 633, 101 N. W. 468; Odegard *v.* North Wisconsin Lumber Co., 130 Wis. 659, 110 N. W. 809.

79. Gay *v.* Milwaukee Electric R., etc., Co., 138 Wis. 348, 120 N. W. 283.

80. Lyon *v.* Grand Rapids, 121 Wis. 609, 99 N. W. 311.

81. Hopkins *v.* Stanley, 43 Ind. 553; Pittsburgh, etc., R. Co. *v.* Ruby, 38 Ind. 294, 10 Am. Rep. 111; Johnston *v.* Fraser, (Tex. Civ. App. 1906) 92 S. W. 49.

82. Hopkins *v.* Stanley, 43 Ind. 553; Pittsburgh, etc., R. Co. *v.* Ruby, 38 Ind. 294, 10 Am. Rep. 111.

83. Allen *v.* Davison, 16 Ind. 416. But see Case *v.* Ellis, 4 Ind. App. 224, 30 N. E. 907.

84. Denver, etc., R. Co. *v.* Sipes, 26 Colo. 17, 55 Pac. 1093; Chicago City R. Co. *v.* Bucholz, 90 Ill. App. 440; Rice *v.* Rice, 6 Ind. 100. See also Louisville, etc., R. Co. *v.* Mitchell, 87 Ky. 327, 8 S. W. 706, 10 Ky. L. Rep. 211.

85. Denver, etc., R. Co. *v.* Sipes, 26 Colo. 17, 55 Pac. 1093. But see Pearce *v.* Fisher, 133 N. C. 333, 45 S. E. 638.

86. Chicago, etc., R. Co. *v.* Lost Springs Lodge No. 494 I. O. O. F., 74 Kan. 847, 85 Pac. 803; Riley *v.* Wolfley, (Kan. 1898) 55 Pac. 461; Atchison, etc., R. Co. *v.* Butler, 56 Kan. 433, 43 Pac. 767; Anderson *v.* McPike, 41 Mo. App. 328; Oaks *v.* West, (Tex. Civ. App. 1901) 64 S. W. 1033.

Special interrogatories, introduced with the phrase "Is it not a fact?" are objectionable as plainly indicating the answer desired. The word "not" should be omitted. Romans *v.* Thew, 142 Iowa 89, 120 N. W. 629.

87. Conway *v.* Mitchell, 97 Wis. 290, 72 N. W. 752.

interrogatories submitted,[88] so as to make them relate to ultimate instead of evidentiary facts,[89] or make them proper in form or pertinent to the issues,[90] or may prepare others in its discretion, where those submitted are not adequate or in proper form.[91]

6. Withdrawal. It is held that the court cannot, over the objection of the party at whose instance they were submitted, withdraw from the jury pertinent interrogatories submitted by request,[92] particularly after the jury have deliberated upon them,[93] although the jury cannot agree on the answers thereto, where the right of recovery is based upon the answers to the interrogatories;[94] nor can it after general verdict permit the withdrawal of special questions at the instance of the party who submitted them and over the objection of the opposite party.[95] On the other hand, it is held that it is discretionary with the court to withdraw questions not yet passed upon,[96] where such action is not prejudicial to either party,[97] and the court may withdraw special questions, the answers to which are embodied in other findings,[98] or questions which were submitted by the court;[99] and where it is discretionary with the court to require the jury to make special findings, the court may withdraw one or all questions submitted upon which the jury cannot agree.[1] Failure to compel answers to special questions is in effect a withdrawal of such questions.[2]

7. Authentication or Signature of Findings. Answers to interrogatories are not effective for any purpose where they are not signed by the jury as a whole or by the foreman, as required by statute,[3] and are not read to them by the clerk as

88. *Illinois.*— Chicago, etc., R. Co. *v.* Harrington, 192 Ill. 9, 61 N. E. 622; Chicago, etc., R. Co. *v.* Pearson, 184 Ill. 386, 56 N. E. 633; Gardner *v.* Meeker, 169 Ill. 40, 48 N. E. 307.

Indiana.— Hammond, etc., R. Co. *v.* Spyschalski, 17 Ind. App. 7, 46 N. E. 47.

Iowa.—Wilson *v.* Onstott, 121 Iowa 263, 96 N. W. 779; Butterfield *v.* Kirtley, 115 Iowa 207, 88 N. W. 371; Pratt *v.* Chicago, etc., R. Co., 107 Iowa 287, 77 N. W. 1064.

Kansas.— Missouri Pac. R. Co. *v.* Holley, 30 Kan. 465, 474, 1 Pac. 130, 554.

North Carolina.— Belding *v.* Archer, 131 N. C. 287, 42 S. E. 800; Redmond *v.* Chandley, 119 N. C. 575, 26 S. E. 255.

Wisconsin.— Bannon *v.* Insurance Co. of North America, 115 Wis. 250, 91 N. W. 666; Mauch *v.* City of Hartford, 112 Wis. 40, 87 N. W. 816; Werner *v.* Chicago, etc., R. Co., 105 Wis. 300, 81 N. W. 416; John R. Davis Lumber Co. *v.* Home Ins. Co., 95 Wis. 542, 70 N. W. 59.

89. Terre Haute, etc., R. Co. *v.* Voelker, 129 Ill. 540, 22 N. E. 20 [*affirming* 31 Ill. App. 314]; Chicago, etc., Co. *v.* Dunleavy, 129 Ill. 132, 22 N. E. 15.

90. Maxwell *v.* Boyne, 36 Ind. 120; Taylor *v.* Wootan, 1 Ind. App. 188, 27 N. E. 502, 50 Am. St. Rep. 200; Dunning *v.* VanBuren, 46 Iowa 492; Neumeister *v.* Goddard, 133 Wis. 405, 113 N. W. 733.

91. Maxwell *v.* Boyne, 36 Ind. 120; Louisville City R. Co. *v.* Weams, 80 Ky. 420.

Questions submitted must fully cover the issues presented by questions refused. Rudiger *v.* Chicago, etc., R. Co., 101 Wis. 292, 77 N. W. 169.

92. Summers *v.* Greathouse, 87 Ind. 205; Otter Creek Block Coal Co. *v.* Raney, 34 Ind. 329.

93. Otter Creek Block Coal Co. *v.* Raney, 34 Ind. 329; McKelvey *v.* Chesapeake, etc., R. Co., 35 W. Va. 500, 14 S. E. 261.

94. Sun Mut. Ins. Co. *v.* Dudley, 65 Ark. 240, 45 S. W. 539; Ermentraut *v.* Providence Washington Ins. Co., 67 Minn. 451, 70 N. W. 572.

95. Duesterberg *v.* State, 116 Ind. 144, 17 N. E. 624.

96. Taylor *v.* Ketchum, 5 Rob. (N. Y.) 507, 35 How. Pr. 289.

97. Missouri Pac. R. Co. *v.* Moffatt, 60 Kan. 113, 55 Pac. 837, 72 Am. St. Rep. 343.

Where a purely hypothetical question is submitted, such as none but skilled men can answer and they notify the court of their inability to answer it, there is no abuse of discretion in withdrawing it of the court's own motion. Continental L. Ins. Co. *v.* Yung, 113 Ind. 159, 15 N. E. 220, 3 Am. St. Rep. 630.

98. Smith *v.* Wilson, 5 Kan. App. 379, 48 Pac. 436.

99. Furlong *v.* Carroll, 7 Ont. App. 145.

1. New York County Nat. Bank *v.* American Surety Co., 69 N. Y. App. Div. 153, 74 N. Y. Suppl. 692 [*affirmed* in 174 N. Y. 544, 67 N. E. 1086].

2. Wyandotte *v.* Gibson, 25 Kan. 236; Burr *v.* Honeywell, 6 Kan. App. 783, 51 Pac. 235.

3. Greenberg *v.* Hoff, 80 Cal. 81, 22 Pac. 69; Kingfisher *v.* Altizer, 13 Okla. 121, 74 Pac. 107.

Each answer need not be signed by foreman, but that is the better practice. Louisville, etc., R. Co. *v.* Kemper, 153 Ind. 618, 53 N. E. 931.

Signature after discharge.— The fact that the foreman of a jury failed to sign a special finding until after the jury was discharged is not an error affecting any substantial right of the party complaining. Cincinnati *v.*

their verdict,[4] and a failure of the foreman to sign the same is ground for new trial.[5] But if signed by the foreman as shown by his signature to the general verdict, it is immaterial that he does not sign as foreman,[6] or, where the verdict contains a number of findings, that the foreman signs each of them;[7] nor is the general verdict necessarily vitiated by the failure of the foreman to sign written answers of the jury to special interrogatories submitted to them.[8] Like a general verdict, they must be announced in open court.[9]

8 SUFFICIENCY OF VERDICT OR FINDINGS — a. In General. A special verdict finds facts and concludes that, if upon the facts found plaintiff should recover, then the jury find for plaintiff, but if otherwise then they find for defendant,[10] and if it fails to do so is imperfect.[11] A special verdict must find all the facts essential to judgment and necessary to entitle the party having the burden of proof to recover, and cannot be aided by intendment or by extrinsic facts,[12] and

Johnson, 28 Ohio Cir. Ct. 377 [*affirmed* in 76 Ohio St. 567, 81 N. E. 1182].

4. Rose *v.* Harvey, 18 R. I. 527, 30 Atl. 459.

5. Sage *v.* Brown, 34 Ind. 464.

6. Norwich Union F. Ins. Soc. *v.* Girton, 124 Ind. 217, 24 N. E. 984.

7. Seibert *v.* Allen, 61 Mo. 482.

8. Menne *v.* Neumeister, 25 Mo. App. 300.

9. Egmann *v.* East St. Louis Connecting R. Co., 65 Ill. App. 345; Rose *v.* Harvey, 18 R. I. 527, 30 Atl. 459.

10. Mumford *v.* Wardwell, 6 Wall. (U. S.) 423, 18 L. ed. 756.

Paper held not a special verdict see Suydam *v.* Williamson, 20 How. (U. S.) 427, 15 L. ed. 978.

11. State *v.* Wallace, 25 N. C. 195.

12. *Alabama.*— Sewall *v.* Glidden, 1 Ala. 52; Lee *v.* Campbell, 4 Port. 198.

California.— Montgomery *v.* Sayre, (1891) 25 Pac. 552; Garfield *v.* Knight's Ferry, etc., Water Co., 17 Cal. 510.

Indiana.— Freedom *v.* Norris, 128 Ind. 377, 27 N. E. 869; Lake Shore, etc., R. Co. *v.* Stupak, 123 Ind. 210, 23 N. E. 246; Waymire *v.* Lank, 121 Ind. 1, 22 N. E. 735; Kealing *v.* Voss, 61 Ind. 466; Housworth *v.* Bloomhuff, 54 Ind. 487; Goldsby *v.* Robertson, 1 Blackf. 247; Elwood State Bank *v.* Mock, 40 Ind. App. 685, 82 N. E. 1003; Louisville, etc., R. Co. *v.* Carmon, 20 Ind. App. 471, 48 N. E. 1047, 50 N. E. 893; Pacific Mut. L. Ins. Co. *v.* Turner, 17 Ind. App. 644, 47 N. E. 231; Schellenbeck *v.* Studebaker, 13 Ind. App. 437, 41 N. E. 845, 55 Am. St. Rep. 240; Goben *v.* Phillips, 12 Ind. App. 629, 40 N. E. 929; Louisville, etc., R. Co. *v.* Costello, 9 Ind. App. 462, 36 N. E. 299.

Kentucky.— Louisville, etc., R. Co. *v.* Brice, 84 Ky. 298, 1 S. W. 483, 8 Ky. L. Rep. 271.

Maine.— Nicholson *v.* Maine Cent. R. Co., 100 Me. 342, 61 Atl. 834.

Michigan.— Harbaugh *v.* People, 33 Mich. 241; Crane *v.* Reeder, 25 Mich. 303; People *v.* Doesburg, 17 Mich. 135.

Minnesota.— Meighen *v.* Strong, 6 Minn. 177, 80 Am. Dec. 441.

Nebraska.— Sandwich Enterprise Co. *v.* West, 42 Nebr. 722, 60 N. W. 1012.

New York.— Eisemann *v.* Swan, 6 Bosw. 668; Brush *v.* Batten, 15 N. Y. St. 548 [*affirmed* in 134 N. Y. 617, 32 N. E. 648].

North Carolina.— Hilliard *v.* Outlaw, 92 N. C. 266.

Ohio.— Leach *v.* Church, 10 Ohio St. 148.

Pennsylvania.— Vansyckel *v.* Stewart, 77 Pa. St. 124; Loew *v.* Stocker, 61 Pa. St. 347; Pittsburgh, etc., R. Co. *v.* Evans, 53 Pa. St. 250; Thayer *v.* Society of United Brethren, 20 Pa. St. 60; Wallingford *v.* Dunlap, 14 Pa. St. 31; Crousillat *v.* Ball, 3 Yeates 375, 2 Am. Dec. 375.

South Carolina.— Allen *v.* Fogler, 6 Rich. 54; Lawrence *v.* Beaubien, Bailey 623, 23 Am. Dec. 155.

Texas.— Newbolt *v.* Lancaster, 83 Tex. 271, 18 S. W. 740; Moore *v.* Moore, 67 Tex. 293, 3 S. W. 284; Houston, etc., R. Co. *v.* Snelling, 59 Tex. 116; Raines *v.* Calloway, 27 Tex. 678; Ledyard *v.* Brown, 27 Tex. 393; Paschal *v.* Acklin, 27 Tex. 173; Paschal *v.* Cushman, 26 Tex. 74; Claiborne *v.* Tanner, 18 Tex. 68; Stinnett *v.* Sherman, (Civ. App. 1897) 43 S. W. 847; Mulcahy *v.* State, (Civ. App. 1896) 36 S. W. 1014; Kilgore *v.* Moore, 14 Tex. Civ. App. 20, 36 S. W. 317; Texas, etc., R. Co. *v.* Watson, 13 Tex. Civ. App. 535, 36 S. W. 290; Stephenson *v.* Chappell, 12 Tex. Civ. App. 296, 33 S. W. 880, 36 S. W. 482; Mitchell *v.* Western Union Tel. Co., 12 Tex. Civ. App. 262, 33 S. W. 1016.

Virginia.— Tunnell *v.* Watson, 2 Munf. 283.

Wisconsin.— Reffke *v.* Patten Paper Co., 136 Wis. 535, 117 N. W. 1004; Strasser *v.* Goldberg, 120 Wis. 621, 98 N. W. 554; Leeman *v.* McGrath, 116 Wis. 49, 92 N. W. 425; Davis *v.* Chicago, etc., R. Co., 93 Wis. 470, 67 N. W. 16, 1132, 57 Am. St. Rep. 935, 33 L. R. A. 654; Murphey *v.* Weil, 89 Wis. 146, 61 N. W. 315; Pratt *v.* Peck, 65 Wis. 463, 27 N. W. 180; Ward *v.* Busack, 46 Wis. 407, 1 N. W. 107.

See 46 Cent. Dig. tit. "Trial," § 846 *et seq.*

The court should decline to receive the general verdict until the questions are answered, if the jury fails to answer all questions submitted for special findings. Redford *v.* Spokane St. R. Co., 9 Wash. 55, 36 Pac. 1085.

Plaintiff's cause of action need not be affirmatively established by the jury's answers

nothing must remain for the court to do but to draw conclusions of law,[13] or to make a mathematical calculation to ascertain the damages.[14] Special verdicts need not find either way as to facts alleged, but not supported by evidence,[15] or as to facts in evidence, but not embraced within the issues made by the pleadings,[16] and a finding cannot be upheld unless based on some competent evidence.[17] The verdict is sufficient if it be good in substance,[18] considered in the light of the facts of the case,[19] although unskilfully framed,[20] and it is not necessary that a finding be made as to every allegation of the complaint, if sufficient facts are found to constitute a cause of action within the allegations.[21] Where an answer to an interrogatory is fully covered by answers to other interrogatories, it is not error to refuse to require the jury to make the former more specific,[22] and a finding necessarily decisive of the case dispenses with the necessity of answering other questions.[23] Where the special findings show that the jury found for plaintiff on

to defendant's interrogatories. Inland Steel Co. *v.* Smith, 39 Ind. App. 636, 75 N. E. 852.

Findings of fact should cover singly and in concise language the pleaded facts, without addition by way of argument or recitation of evidence. Fanning *v.* Murphy, 126 Wis. 538, 105 N. W. 1056, 110 Am. St. Rep. 946, 4 L. R. A. N. S. 666.

A direct answer should be given to each special question submitted, where the question is so framed that it will admit of a direct answer. Salem-Bedford Stone Co. *v.* Hilt, 26 Ind. App. 543, 59 N. E. 97; Winfield Nat. Bank *v.* McWilliams, 9 Okla. 493, 60 Pac. 229.

13. *Montana.*— Coburn Cattle Co. *v.* Small, 35 Mont. 288, 88 Pac. 953.

Nevada.— Knickerbocker, etc., Silver Min. Co. *v.* Hall, 3 Nev. 194.

New York.— Casey *v.* Dwyre, 15 Hun 153.

South Carolina.— State *v.* Duncan, 2 McCord 129.

Virginia.— Hall *v.* Ratliff, 93 Va. 327, 24 S. E. 1011.

Wisconsin.— Cotzhausen *v.* Simon, 47 Wis. 103, 1 N. W. 473.

England.— Tancred *v.* Christy, 12 M. & W. 316.

See 46 Cent. Dig. tit. "Trial," § 846.

Inferences of law from the facts found may be made by the court. Louisville, etc., R. Co. *v.* Miller, 141 Ind. 533, 37 N. E. 343; Teegarden *v.* Lewis, (Ind. 1893) 35 N. E. 24. And if a conclusion is so self-evident that no one could question it, the court may draw the conclusion from the facts found. Brown *v.* Ricketts, 27 Ohio Cir. Ct. 269; Jones *v.* Foster, 67 Wis. 296, 30 N. W. 697.

14. Hoppes *v.* Chapin, 15 Ind. App. 258, 43 N. E. 1014.

15. Jones *v.* Baird, 76 Ind. 164; Ft. Scott, etc., R. Co. *v.* Karracker, 46 Kan. 511, 26 Pac. 1027.

16. Blacker *v.* Slown, 114 Ind. 322, 16 N. E. 621; Henderson *v.* Dickey, 76 Ind. 264; Merwan *v.* Ingersol, 3 Cow. (N. Y.) 367.

17. Pennington *v.* Redman Van, etc., Co., 34 Utah 223, 97 Pac. 115.

18. Aydelotte *v.* Belling, 8 Cal. App. 673, 97 Pac. 698; Merritt *v.* Temple, 155 Ind. 497, 58 N. E. 699; Fenn *v.* Blanchard, 2 Yeates (Pa.) 543.

Findings substantially conforming to allegations of the complaint admitted by the answer are sufficient. Barton *v.* Koon, 20 S. D. 7, 104 N. W. 521.

The code makes no change in the requisites of a special verdict. Eisemann *v.* Swan, 6 Bosw. (N. Y.) 668.

19. Ferguson *v.* Truax, 136 Wis. 637, 118 N. W. 251.

Facts found held sufficient to sustain judgment see Wetzel *v.* Kellar, 12 Ind. App. 75, 39 N. E. 895.

20. Larson *v.* Foss, 137 Wis. 304, 118 N. W. 804.

Certainty is not required as to immaterial facts. Alexandria Min., etc., Co. *v.* Irish, 16 Ind. App. 534, 44 N. E. 680.

A finding is sufficient, although informal, if its meaning and intent can be gathered with certainty from the words used, and if it disposes of the issues submitted. Damon *v.* Quinn, 143 Cal. 75, 76 Pac. 818; Helwig *v.* Beckner, 149 Ind. 131, 46 N. E. 644, 48 N. E. 788; Bower *v.* Bower, 146 Ind. 393, 45 N. E. 595; Morrison *v.* Ross, 113 Ind. 186, 14 N. E. 479; Carthage Turnpike Co. *v.* Overman, 19 Ind. App. 309, 48 N. E. 874; Charman *v.* Tatum, 166 N. Y. 605, 59 N. E. 1120; Hatchett *v.* Hatchett, 28 Tex. Civ. App. 33, 67 S. W. 163; Shaw *v.* Gilbert, 111 Wis. 165, 86 N. W. 188.

21. Fairmount Union Joint Stock Agricultural Assoc. *v.* Downey, 146 Ind. 503, 45 N. E. 696; Bower *v.* Bower, 146 Ind. 393, 45 N. E. 595.

Negligence.— The rule is settled that if it appears from the facts stated that the injury resulted from the negligence of defendant, and without the contributory negligence of plaintiff, a direct averment or finding to that effect is unnecessary. Duffy *v.* Howard, 77 Ind. 182; Tien *v.* Louisville, etc., R. Co., 15 Ind. App. 304, 44 N. E. 45; Pittsburgh, etc., Railroad Co. *v.* Welch, 12 Ind. App. 433, 40 N. E. 650.

22. Indianapolis St. R. Co. *v.* Taylor, 39 Ind. App. 592, 80 N. E. 436.

23. *Indiana.*— Johnson *v.* Breedlove, 104 Ind. 521, 6 N. E. 906.

Massachusetts.— French *v.* Hanchett, 12 Pick. 15.

Minnesota.— Tew *v.* Webster, 103 Minn. 110, 114 N. W. 647.

a sufficient paragraph of the complaint, the fact that it also found for plaintiff on an insufficient paragraph does not vitiate the verdict,[24] and, although a special finding of the jury is not warranted by the evidence, the judgment will not be disturbed if the general verdict is sustained by the evidence.[25]

b. Definiteness and Certainty. The findings must be definite and certain,[26] and equivocal expressions are insufficient,[27] "yes" or "no" being the preferable answers where possible;[28] and where, instead, the jury give answers from which it cannot be determined whether they accord or conflict with the general verdict, the verdict is bad.[29] But the facts need not be found with greater minuteness in the verdict than they are stated in the pleadings,[30] and where the findings of a special verdict are evasive, but cannot prejudice the party alleging error, they will not be disturbed upon appeal.[31] Where a verdict is uncertain by reason of inconsistent findings it cannot be cured by disregarding the uncertain portions, although the verdict is sufficient without them.[32]

c. Ultimate or Evidentiary Facts or Conclusions. To sustain a judgment rendered thereon, special verdicts or findings must contain statements of ultimate and not evidentiary facts;[33] and a special verdict is defective which instead of

South Carolina.— See Columbia, etc., R. Co. *v.* Laurens Cotton Mills, 82 S. C. 24, 61 S. E. 1089, 62 S. E. 1119.

Texas.— Poole *v.* Dulaney, 19 Tex. Civ. App. 117, 46 S. W. 276.

Wisconsin.— Larson *v.* Foss, 137 Wis. 304, 118 N. W. 804.

If there is also a general verdict finding upon all the issues, the special verdict need not find upon the whole case. Hershman *v.* Hershman, 63 Ind. 451; Indiana Natural, etc., Gas Co. *v.* McMath, 26 Ind. App. 154, 57 N. E. 593, 59 N. E. 287; Vaughn *v.* St. Louis Southwestern R. Co., 34 Tex. Civ. App. 445, 79 S. W. 345.

24. Pittsburgh, etc., R. Co. *v.* Sudhoff, (Ind. App. 1909) 88 N. E. 702.

25. Amidon *v.* Gaff, 24 Ind. 128; Odell *v.* Brown, 18 Ind. 288; Phœnix *v.* Lamb, 29 Iowa 352.

26. Worth *v.* McConnell, 42 Mich. 473, 4 N. W. 198; Stoker *v.* Fugitt, (Tex. Civ. App. 1907) 102 S. W. 743.

Where a special interrogatory should not have been given it is not error to overrule a motion for a more specific answer thereto. Chicago, etc., R. Co. *v.* Lawrence, 169 Ind. 319, 79 N. E. 363, 82 N. E. 768.

Answers sufficiently definite see Ft. Wayne Cooperage Co. *v.* Page, 170 Ind. 585, 84 N. E. 145, 23 L. R. A. N. S. 946; Ferguson *v.* Truax, 136 Wis. 637, 118 N. W. 251.

27. Hopkins *v.* Stanley, 43 Ind. 553.

"We think" has been held sufficiently definite and certain under some circumstances (Martin *v.* Central Iowa R. Co., 59 Iowa 411, 13 N. W. 424), and insufficient under others (Hopkins *v.* Stanley, 43 Ind. 553).

"We, the jury, believe," has been held sufficient. McGuire *v.* Missouri Pac. R. Co., 23 Mo. App. 325.

"In our judgment."— The fact that an answer otherwise certain and direct is preceded by the phrase "in our judgment" does not render it uncertain. Peters *v.* Lane, 55 Ind. 391.

"Under all the circumstances" is evasive and renders the verdict bad. Davis *v.* Farmington, 42 Wis. 425.

"Don't know."— Where interrogatories are submitted relating to matters of an evidential nature rather than to ultimate facts, no prejudicial error can be based on the verdict in which some of the answers are merely the words "don't know." Pullman Co. *v.* Washington, 30 Ohio Cir. Ct. 17.

28. Union Traction Co. *v.* Howard, (Ind. App. 1909) 87 N. E. 1103.

"Not sufficient evidence" is not a good answer, since, if the evidence was not sufficient to sustain a finding for the party affirming the subject-matter of the interrogatory, the jury should answer "no." Union Traction Co. *v.* Howard, (Ind. App. 1909) 87 N. E. 1103. But where there is no evidence on a point covered by a special interrogatory the jury may so answer. Louisville, etc., R. Co. *v.* Thompson, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120.

29. Fisk *v.* Chicago, etc., R. Co., 74 Iowa 424, 38 N. W. 132; Withee *v.* Rowe, 45 Me. 571.

30. Sturgis First Nat. Bank *v.* Peck, 8 Kan. 660.

31. Atchison, etc., R. Co. *v.* Johnson, 3 Okla. 41, 41 Pac. 641; Nelson *v.* Chicago, etc., R. Co., 60 Wis. 320, 19 N. W. 52.

32. Becknell *v.* Hosier, 10 Ind. App. 5, 37 N. E. 580.

33. *Arkansas.*— Lanagin *v.* Nowland, 44 Ark. 84.

Illinois.— Vincent *v.* Morrison, 1 Ill. 227.

Indiana.— Boyer *v.* Robertson, 144 Ind. 604, 43 N. E. 879; Louisville, etc., R. Co. *v.* Miller, 141 Ind. 533, 37 N. E. 343; Locke *v.* Merchants' Nat. Bank, 66 Ind. 353; Whitworth *v.* Ballard, 56 Ind. 279; Voris *v.* Star City Bldg., etc., Assoc., 20 Ind. App. 630, 50 N. E. 779; Cleveland, etc., R. Co. *v.* Davis, 20 Ind. App. 459, 50 N. E. 886; Bluffton Christian Church *v.* Shoemaker, 20 Ind. App. 319, 50 N. E. 594; Beasley *v.* Phillips, 20 Ind. App. 182, 50 N. E. 488; Germania F. Ins. Co. *v.* Columbia Encaustic Tile Co., 11 Ind. App. 385, 39 N. E. 304.

stating facts states inferences or conclusions of law,[34] or presents no other question than the relevancy of testimony adduced on trial.[35] But a finding of probative facts is generally held sufficient if the ultimate facts necessarily result therefrom,[36] and a special verdict finding what the law has made conclusive evidence of a fact is tantamount to a finding of such fact,[37] and where the facts properly found are sufficient to sustain the special verdict, it is not rendered insufficient because another special finding consists merely of conclusions of law [38] or contains evidentiary facts.[39] A finding that plaintiff was free from negligence,[40] or that persons converted money to their own use,[41] or, the issue being whether a party had sufficient mental capacity to make a gift *inter vivos*, a finding that the donor was of unsound mind,[42] are conclusions, and not findings of fact, and usury is a conclusion of law from the facts found.[43] On the other hand it has been held, and very prop-

Iowa.— Morbey *v.* Chicago, etc., R. Co., 116 Iowa 84, 89 N. W. 105.

Kansas.— Sturgis First Nat. Bank *v.* Peck, 8 Kan. 660.

Kentucky.— Hann *v.* Field, Litt. Sel. Cas. 376.

New York.— Langley *v.* Warner, 3 N. Y. 327; Hill *v.* Covell, 1 N. Y. 522; La Frombois *v.* Jackson, 8 Cow. 589, 18 Am. Dec. 463; Seward *v.* Jackson, 8 Cow. 406.

North Carolina.— State *v.* Watts, 32 N. C. 369; Cherry *v.* Slade, 7 N. C. 82.

Ohio.— Blake *v.* Davis, 20 Ohio 231; Hambleton *v.* Dempsey, 20 Ohio 168; Brown *v.* Ricketts, 27 Ohio Cir. Ct. 269.

Pennsylvania.— Kinsley *v.* Coyle, 58 Pa. St. 461; Clark *v.* Halberstadt, 1 Miles 26.

South Carolina.— Farr *v.* Thompson, 1 Speers 93.

Virginia.— Brown *v.* Ralston, 4 Rand. 504; Henderson *v.* Allen, 1 Hen. & M. 235.

Wisconsin.— Winchell *v.* Abbot, 77 Wis. 371, 46 N. W. 665.

United States.— Suydam *v.* Williamson, 20 How. 427, 15 L. ed. 978; Barnes *v.* Williams, 11 Wheat. 415, 6 L. ed. 508; Monticello Bank *v.* Bostwick, 77 Fed. 123, 23 C. C. A. 73.

England.— Fryer *v.* Roe, 12 C. B. 437, 74 E. C. L. 437; Hubbard *v.* Johnstone, 3 Taunt. 177.

See 46 Cent. Dig. tit. "Trial," § 848.

Finding held not a finding of an evidentiary fact see Mellette *v.* Indianapolis Northern Traction Co., (Ind. App. 1908) 86 N. E. 432.

34. Chicago, etc., R. Co. *v.* Burger, 124 Ind. 275, 24 N. E. 981; Louisville, etc., R. Co. *v.* Worley, 107 Ind. 320, 7 N. E. 215; Louisville, etc., R. Co. *v.* Balch, 105 Ind. 93, 4 N. E. 288; Conner *v.* Citizens' St. R. Co., 105 Ind. 62, 4 N. E. 441, 55 Am. Rep. 177; Pittsburgh, etc., R. Co. *v.* Spencer, 98 Ind. 186; Hankey *v.* Downey, 3 Ind. App. 325, 29 N. E. 606; Erwin *v.* Clark, 13 Mich. 10.

The court will not consider special findings which are conclusions of law in determining the sufficiency of the verdict. Louisville, etc., R. Co. *v.* Carmon, 20 Ind. App. 471, 48 N. E. 1047, 50 N. E. 893; Peirce *v.* Oliver, 18 Ind. App. 87, 47 N. E. 485. A finding that a note was paid before action brought (Wipperman *v.* Hardy, 17 Ind. App. 142, 46 N. E. 537), or that defendant was a principal on a note (Devine *v.* U. S. Mortgage Co., (Tex. Civ. App. 1898) 48 S. W. 585), is not objectionable as a conclusion of law.

35. Welland Canal Co. *v.* Hathaway, 8 Wend. (N. Y.) 480, 24 Am. Dec. 51.

36. *California.*— Alhambra Addition Water Co. *v.* Richardson, 72 Cal. 598, 14 Pac. 379.

Illinois.— Lake Shore, etc., R. Co. *v.* Johnsen, 135 Ill. 641, 26 N. E. 510.

Indiana.— Smith *v.* Wells Mfg. Co., 148 Ind. 333, 46 N. E. 1000; Terre Haute, etc., R. Co. *v.* Brunker, 128 Ind. 542, 26 N. E. 178; Indiana, etc., R. Co. *v.* Finnell, 116 Ind. 414, 19 N. E. 204; Wabash R. Co. *v.* Ferris, 6 Ind. App. 30, 32 N. E. 112.

Iowa.— Pennypacker *v.* Capital Ins. Co., 80 Iowa 56, 45 N. W. 408, 20 Am. St. Rep. 395, 8 L. R. A. 236.

Oklahoma.— Severy *v.* Chicago, etc., R. Co., 6 Okla. 153, 50 Pac. 162.

Wisconsin.— Limited Inv. Assoc. *v.* Glendale Inv. Assoc., 99 Wis. 54, 74 N. W. 633.

See 46 Cent. Dig. tit. "Trial," §§ 847, 848.

Read in connection with the pleadings. — Tien *v.* Louisville, etc., R. Co., 15 Ind. App. 304, 44 N. E. 45.

But it is not sufficient that a fact in issue may be presumed from facts found. John H. Hibben Dry Goods Co. *v.* Hicks, 26 Ind. App. 646, 59 N. E. 938.

37. John *v.* Bates, Litt. Sel. Cas. (Ky.) 106.

No finding is required as to a fact implied by law. Aydelotte *v.* Billing, 8 Cal. App. 673, 97 Pac. 698.

38. Pittsburgh, etc., R. Co. *v.* Burton, 139 Ind. 357, 37 N. E. 150, 38 N. E. 594; Louisville, etc., R. Co. *v.* Berkey, 136 Ind. 181, 35 N. E. 3.

39. Buscher *v.* Lafayette, 8 Ind. App. 590, 36 N. E. 371.

40. Gaston *v.* Bailey, 14 Ind. App. 581, 43 N. E. 254; Cleveland, etc., R. Co. *v.* Hadley, 12 Ind. App. 516, 40 N. E. 760.

A finding that a traveler walked slowly and carefully along and that the dangerous condition of the walk was the sole cause of his fall are findings of fact. Lyon *v.* Logansport, 9 Ind. App. 21, 35 N. E. 128.

41. Teegarden *v.* Lewis, 145 Ind. 98, 40 N. E. 1047, 44 N. E. 9.

42. Teegarden *v.* Lewis, 145 Ind. 98, 40 N. E. 1047, 44 N. E. 9.

43. Brummel *v.* Enders, 18 Gratt. (Va.) 873; Whitworth *v.* Adams, 5 Rand. (Va.)

erly, that a finding that acts were done with a certain intent is a finding of fact.[44]

d. Failure to Answer Interrogatories or to Make Findings — (I) *In General.* It is the duty of the jury to find the special issues submitted,[45] and where the verdict is incomplete on account of a failure to embrace a finding on material issues, the court may call the attention of the jury to the fact and require them to return to their room and complete the verdict,[46] and it is error for the court to refuse to require the jury to answer interrogatories.[47] But the general verdict is not invalidated by failure to answer special questions, where answers to such questions favorable to the party against whom judgment is rendered would not necessarily render the judgment erroneous;[48] and a judgment will be reversed for the refusal of the court to require answers to special interrogatories only where the answers to such interrogatories would control the verdict;[49] and, generally, neither party being harmed, failure to answer special interrogatories will not authorize a new trial where the general verdict is in proper form.[50] And error cannot be predicated on the failure of the jury to answer special interrogatories which the court did not call upon them to answer,[51] where neither party requested an answer,[52] or where the question is too general to require an answer;[53] and failure to definitely answer a special interrogatory is not prejudicial where the matters covered thereby are concluded by answers to other interrogatories,[54] and the court need not require more definite answers, where the intention of the jury is plain,[55] or where the legal effect of the answers would remain the same.[56] The failure of the jury to answer some of the questions submitted is harmless, where the trial court in its findings resolves the questions in appellant's favor;[57] nor is the omission of the jury to find one of the issues joined prejudicial to plaintiff whose declaration was so defective that no judgment could be rendered thereon in his favor.[58]

333; Stribbling *v.* Valley Bank, 5 Rand. (Va.) 132.

44. Belshaw *v.* Chitwood, 141 Ind. 377, 40 N. E. 908.

45. See *supra*, XI, C, 8, a.

46. Saterlee *v.* Saterlee, 28 Colo. 290, 64 Pac. 189; Lee *v.* Humphries, 124 Ga. 539, 52 S. E. 1007; Judge *v.* Jordan, 81 Iowa 519, 46 N. W. 1077.

Even where they have returned a sealed verdict and have been allowed to separate this may be done. Chicago, etc., R. Co. *v.* Reilly, 75 Ill. App. 125.

47. Chicago, etc., R. Co. *v.* Greenfield, 53 Ill. App. 424; Maxwell *v.* Boyne, 36 Ind. 120. But see South Shore Gas, etc., Co. *v.* Ambre, 44 Ind. App. 435, 87 N. E. 246, holding that the jury having returned an improper answer to the interrogatory, and, being required to reanswer, returned the answer that the evidence was not sufficient to warrant an answer, it was not reversible error not to require them again to reanswer.

48. Western Union Tel. Co. *v.* Stratemeier, 11 Ind. App. 601, 39 N. E. 527; Taylor *v.* Wootan, 1 Ind. App. 188, 27 N. E. 502, 50 Am. St. Rep. 200; Hawley *v.* Bond, 20 S. D. 215, 105 N. W. 464; Bush *v.* Maxwell, 79 Wis. 114, 48 N. W. 250. See also Connell *v.* Keokuk Electric R., etc., Co., 131 Iowa 622, 109 N. W. 177.

49. Williamson *v.* Yingling, 80 Ind. 379.

50. *Indiana.*—Bedford, etc., R. Co. *v.* Rainbolt, 99 Ind. 551; Louisville, etc., R. Co. *v.* Head, 80 Ind. 117.

Massachusetts.—Cronin *v.* Holyoke, 162 Mass. 257, 38 N. E. 445.

Michigan.—Brooks *v.* Delrymple, 1 Mich. 145.

New Mexico.—Robinson *v.* Palatine Ins. Co., 11 N. M. 162, 66 Pac. 535.

New York.—New York County Nat. Bank *v.* American Surety Co., 69 N. Y. App. Div. 153, 74 N. Y. Suppl. 692 [*affirmed* in 174 N. Y. 544, 67 N. E. 1086].

Wisconsin.—Lindemann *v.* Rusk, 125 Wis. 210, 104 N. W. 119.

See 46 Cent. Dig. tit. "Trial," § 849.

The general verdict is controlling as to any issue of fact properly submitted to the jury and not covered by the special findings. Connell *v.* Keokuk Electric R., etc., Co., 131 Iowa 622, 109 N. W. 177.

51. Fleming *v.* Potter, 14 Ind. 486.

52. Cronin *v.* Holyoke, 162 Mass. 257, 38 N. E. 445.

53. Ft. Wayne *v.* Patterson, 25 Ind. App. 547, 58 N. E. 747.

54. Lake Shore, etc., R. Co. *v.* Johnsen, 135 Ill. 641, 26 N. E. 510; Menominee River Sash, etc., Co. *v.* Milwaukee, etc., R. Co., 91 Wis. 447, 65 N. W. 176.

55. Green *v.* Tower, 49 Kan. 302, 30 Pac. 468.

56. McAdoo *v.* Richmond, etc., R. Co., 105 N. C. 140, 11 S. E. 316.

57 Mabry *v.* Citizens' Lumber Co., 47 Tex. Civ. App. 443, 105 S. W. 1156.

58. Chapman *v.* Dixon, 4 Harr. & J. (Md.) 527.

(II) *Immaterial, Inconclusive, and Uncontroverted Facts or Issues.* The jury need not find on undisputed facts or facts conclusively established,[59] or on facts admitted by the pleading,[60] nor is it necessary to find on immaterial issues.[61] And where a fact, if found, is immaterial, it is not error to refuse to require a jury to make more specific answer to an interrogatory as to the existence of that fact,[62] and insufficient answers to special interrogatories are not ground for reversal, where the interrogatories were such that no answers which could have been made would have controlled the general verdict.[63] Where the answers to interrogatories cover all material questions, the judgment is not invalidated because the jury answered some immaterial questions in addition thereto.[64] Errors in findings upon a defense are immaterial where the verdict, taken in connection with the charge, shows that it was not based upon such findings.[65]

(III) *Adverse or Negative Findings and Disagreement of Jury.* Where special findings fail to find a fact in issue, such silence will be regarded as equivalent to an express finding against the party having the burden of proof on such issue.[66] The jury should not be permitted to answer pertinent inter-

59. Beale *v.* Johnson, 45 Tex. Civ. App. 119, 99 S. W. 1045; Brown *v.* Sovereign Camp W. W., 20 Tex. Civ. App. 373, 49 S. W. 893; Salzer *v.* Milwaukee, 97 Wis. 471, 73 N. W. 20; Cooper *v.* Insurance Co. of Pennsylvania, 96 Wis. 362, 71 N. W. 606; Murphey *v.* Weil, 89 Wis. 146, 61 N. W. 315. But see Hodges *v.* Easton, 106 U. S. 408, 1 S. Ct. 307, 27 L. ed. 169.

60. Fenske *v.* Nelson, 74 Minn. 1, 76 N. W. 785; Hawkes *v.* Dodge County Mut. Ins. Co., 11 Wis. 188.

Where some issues are admitted on the trial, and only one is submitted on which the jury find for plaintiff, the verdict is not a special verdict, but may be treated as in the nature of a special verdict, or a special finding on a particular issue. Williams *v.* Willis, 7 Abb. Pr. (N. Y.) 90.

61. *Iowa.*— Seekel *v.* Norman, 78 Iowa 254, 43 N. W. 190; Dreher *v.* Iowa Southwestern R. Co., 59 Iowa 599, 13 N. W. 754.

Michigan.— Toulman *v.* Swain, 47 Mich. 82, 10 N. W. 117; Fish *v.* Morse, 8 Mich. 34.

Minnesota.— See Tew *v.* Webster, 103 Minn. 110, 114 N. W. 647.

Missouri.— Henderson *v.* Henderson, 21 Mo. 379; Jones *v.* Snedecor, 3 Mo. 390.

Nebraska.— Doane *v.* Smith Bros. L. & T. Co., 51 Nebr. 280, 70 N. W. 909; Missouri Pac. R. Co. *v.* Vandeventer, 26 Nebr. 222, 41 N. W. 998, 3 L. R. A. 129.

Ohio.— Thornton *v.* Sprague, Wright 645.

Rhode Island.— Reid *v.* Rhode Island Co., 28 R. I. 321, 67 Atl. 328.

Texas.— Missouri, etc., R. Co. *v.* Ferch, 18 Tex. Civ. App. 46, 44 S. W. 317.

Virginia.— Ray *v.* Clemens, 6 Leigh 600.

62. Indianapolis *v.* Kelley, 167 Ind. 516, 79 N. E. 499.

63. *Arkansas.*— Dyer *v.* Taylor, 50 Ark. 314, 7 S. W. 258.

California.— Goldman *v.* Rogers, 85 Cal. 574, 24 Pac. 782.

Connecticut.— White *v.* Bailey, 14 Conn. 271.

Georgia.— Central R. Co. *v.* Freeman, 75 Ga. 331.

Illinois.— Elgin, etc., R. Co. *v.* Raymond, 148 Ill. 241, 35 N. E. 729; Ohio, etc., R. Co. *v.* Ramey, 139 Ill. 9, 28 N. E. 1087, 32 Am. St. Rep. 176 [*affirming* 39 Ill. App. 409]; Chicago, etc., R. Co. *v.* Goyette, 133 Ill. 21, 24 N. E. 549; Chicago, etc., R. Co. *v.* Dunleavy, 129 Ill. 132, 22 N. E. 15.

Indiana.— Graham *v.* Payne, 122 Ind. 403, 24 N. E. 216; Chicago, etc., R. Co. *v.* Hedges, 105 Ind. 398, 7 N. E. 801; Indianapolis, etc., R. Co. *v.* Stout, 53 Ind. 143; Supreme Lodge K. P. W. *v.* Edwards, 15 Ind. App. 524, 41 N. E. 850; Indiana Stone Co. *v.* Stewart, 7 Ind. App. 563, 34 N. E. 1019.

Iowa.— Patterson *v.* Omaha, etc., R., etc., Co., 90 Iowa 247, 57 N. W. 880; Sutherland *v.* Standard L., etc., Ins. Co., 87 Iowa 505, 54 N. W. 453; Buetzier *v.* Jones, 85 Iowa 721, 51 N. W. 242; Lavering *v.* Chicago, etc., R. Co., 56 Iowa 689, 10 N. W. 268.

Kentucky.— Berry *v.* Pusey, 80 Ky. 166; Osborne *v.* Pennsylvania R. Co., 11 S. W. 207, 10 Ky. L. Rep. 970.

Michigan.— Pettibone *v.* Maclem, 45 Mich. 381, 8 N. W. 84; Johnson *v.* Continental Ins. Co., 39 Mich. 33.

Minnesota.— Schneider *v.* Chicago, etc., R. Co., 42 Minn. 68, 43 N. W. 783.

Nebraska.— McClary *v.* Stull, 44 Nebr. 175, 62 N. W. 501.

New York.— Garfield *v.* Blair, 10 N. Y. Suppl. 340.

North Carolina.— Pioneer Mfg. Co. *v.* Phœnix Assur. Co., 110 N. C. 176, 14 S. E. 731, 28 Am. St. Rep. 673.

Rhode Island.— Reid *v.* Rhode Island Co., 28 R. I. 321, 67 Atl. 328.

Texas.— O'Brien *v.* Hilburn, 22 Tex. 616. See 46 Cent. Dig. tit. "Trial," § 852.

64. Coxe *v.* Singleton, 139 N. C. 361, 51 S. E. 1019; Kelley *v.* Ward, 94 Tex. 289, 60 S. W. 311.

65. De Hoyes *v.* Galveston, 52 Tex. Civ. App. 543, 115 S. W. 75.

66. *Arkansas.*—Arkansas Midland R. Co. *v.* Canman, 52 Ark. 517, 13 S. W. 280.

Indiana.— Citizens' State Bank *v.* Julian, (1899) 54 N. E. 390; Brunson *v.* Henry, (1897) 47 N. E. 1063; Boyer *v.* Robertson, 144 Ind. 604, 43 N. E. 879; Archibald *v.*

rogatories that they "do not know," such an answer being equivalent to no answer at all,[67] unless the evidence does not warrant any other finding,[68] and the same applies where the jury report an inability to agree.[69] A finding that a certain fact probably does not exist,[70] or that the weight of the evidence justifies the jury in answering "no," [71] sufficiently finds that the facts do not exist.

e. Responsiveness to Issues. Findings must be responsive to the issues made by the pleadings,[72] and portions thereof that are not may be stricken out,[73] and a judgment cannot be founded on findings not responsive to the issues,[74]

Long, 144 Ind. 451, 43 N. E. 439; Mitchell *v.* Bain, 142 Ind. 604, 42 N. E. 230; Fowler *v.* Linquist, 138 Ind. 566, 37 N. E. 133; Evansville, etc., R. Co. *v.* Maddux, 134 Ind. 571, 33 N. E. 345, 34 N. E. 511; Louisville, etc., R. Co. *v.* Hart, 119 Ind. 273, 21 N. E. 753, 4 L. R. A. 549; Dennis *v.* Louisville, etc., R. Co., 116 Ind. 42, 18 N. E. 179, 1 L. R. A. 448; Glantz *v.* South Bend, 106 Ind. 305, 6 N. E. 632; Parmater *v.* State, 102 Ind. 90, 3 N. E. 382; Johnson *v.* Putnam, 95 Ind. 57; Dodge *v.* Pope, 93 Ind. 480; Henderson *v.* Dickey, 76 Ind. 264; Jones *v.* Baird, 76 Ind. 164; Louisville, etc., R. Co. *v.* Whitesell, 68 Ind. 297; Fireman's Fund Ins. Co. *v.* Dunn, 22 Ind. App. 332, 53 N. E. 251; Ballard *v.* Citizens' St. R. Co., 18 Ind. App. 522, 47 N. E. 643; Louisville, etc., R. Co. *v.* Quinn, 14 Ind. App. 554, 43 N. E. 240; Cooper *v.* Forgey, 14 Ind. App. 151, 42 N. E. 651; Louisville, etc., R. Co. *v.* Costello, 9 Ind. App. 462, 36 N. E. 299; Western Union Tel. Co. *v.* Newhouse, 6 Ind. App. 422, 33 N. E. 800; Davis *v.* Schmidt, (App. 1892) 31 N. E. 840.

Kansas.— Kalina *v.* Union Pac. R. Co., 69 Kan. 172, 76 Pac. 438; Atchison, etc., R. Co. *v.* Lannigan, 56 Kan. 109, 42 Pac. 343; Kansas Pac. R. Co. *v.* Peavey, 34 Kan. 472, 8 Pac. 780; Atchison, etc., R. Co. *v.* McCandliss, 33 Kan. 366, 6 Pac. 587; Morrow *v.* Saline County, 21 Kan. 484; Heyman *v.* Simmons, 4 Kan. App. 1, 45 Pac. 728.

Michigan.— Crane *v.* Reeder, 25 Mich. 303.

Minnesota.— Nichols *v.* Wadsworth, 40 Minn. 547, 42 N. W. 541.

Ohio.— Hayes *v.* Smith, 15 Ohio Cir. Ct. 300, 8 Ohio Cir. Dec. 92.

Oklahoma.—Atchison, etc., R. Co. *v.* Johnson, 3 Okla. 41, 41 Pac. 641. But see Logan County Bank *v.* Beyer, 17 Okla. 156, 87 Pac. 607.

Pennsylvania.— Vansyckel *v.* Stewart, 77 Pa. St. 124; Loew *v.* Stocker, 61 Pa. St. 347; Pittsburgh, etc., R. Co. *v.* Evans, 53 Pa. St. 250; Berks County *v.* Jones, 21 Pa. St. 413; Thayer *v.* Society of United Brethren, 20 Pa. St. 60.

South Carolina.— Lawrence *v.* Beaubien, 2 Bailey 623, 23 Am. Dec. 155.

See 46 Cent. Dig. tit. "Trial," § 853.

Equivocal answers are equivalent to findings against the party whose case needs the support of the alleged facts. Allen *v.* Lizer, 9 Kan. App. 548, 58 Pac. 238; Topeka *v.* Noble, 9 Kan. App. 171, 58 Pac. 1015.

A finding that there is no evidence on the subject is a finding against the party having the affirmative of the issue. Watson *v.* Chicago, etc., R. Co., 46 Minn. 321, 48 N. W. 1129; Sherman *v.* Menominee River Lumber Co., 77 Wis. 14, 45 N. W. 1079.

67. Perry, etc., Stone Co. *v.* Wilson, 160 Ind. 435, 67 N. E. 183; Buntin *v.* Rose, 16 Ind. 209; Life Assur. Co. of America *v.* Haughton, 31 Ind. App. 626, 67 N. E. 950; Hawley *v.* Atlantic, 92 Iowa 172, 60 N. W. 519; Darling *v.* West, 51 Iowa 259, 1 N. W. 531; Hallwood Cash Register Co. *v.* Dailey, 70 Kan. 620, 79 Pac. 158; Atchison, etc., R. Co. *v.* Hale, 64 Kan. 751, 68 Pac. 612 [*distinguishing* Union Pac. R. Co. *v.* Shannon, 38 Kan. 476, 16 Pac. 836; Morrow *v.* Saline County, 21 Kan. 484]; Wilson *v.* Pontiac, etc., R. Co., 57 Mich. 155, 23 N. W. 627.

"Unable to determine" is not a sufficient answer to a special question. Larsen *v.* Leonardt, 8 Cal. App. 226, 96 Pac. 395.

68. Terre Haute, etc., R. Co. *v.* Barr, 31 Ill. App. 57; Guernsey *v.* Fulmer, 66 Kan. 767, 71 Pac. 578.

69. Hardin *v.* Branner, 25 Iowa 364.

70. Davis *v.* Guarnieri, 45 Ohio St. 470, 15 N. E. 350, 4 Am. St. Rep. 548.

71. Mutual Ben. L. Ins. Co. *v.* Cannon, 48 Ind. 264.

72. *Indiana.*— Ft. Wayne *v.* Durnell, (App. 1895) 39 N. E. 1049.

Iowa.— Thompson *v.* Leuth, 94 Iowa 455, 62 N. W. 842.

Kansas.—Atchison, etc., R. Co. *v.* Owens, 6 Kan. App. 515, 50 Pac. 962.

Texas.— Thompson *v.* Tinnin, 25 Tex. Suppl. 56; Riske *v.* Rotan Grocery Co., 37 Tex. Civ. App. 494, 84 S. W. 243.

Vermont.— Probate Ct. *v.* Enright, 79 Vt. 416, 65 Atl. 530.

See 46 Cent. Dig. tit. "Trial," § 855.

Substantial responsiveness is sufficient. Burritt *v.* Gibson, 3 Cal. 396; Teegarden *v.* Lewis, (Ind. 1893) 35 N. E. 24; Henderson *v.* Dickey, 76 Ind. 264; Griffin *v.* Reis, 68 Ind. 9; Ft. Wayne Cooperage Co. *v.* Page, (Ind. App. 1907) 82 N. E. 83; May *v.* Anderson, 14 Ind. App. 251, 42 N. E. 946; Cleveland, etc., R. Co. *v.* Hadley, 12 Ind. App. 516, 40 N. E. 760; La Porte County *v.* Ellsworth, 9 Ind. App. 566, 37 N. E. 22; Valparaiso *v.* Cartwright, 8 Ind. App. 429, 35 N. E. 1051; Chicago, etc., R. Co. *v.* Brandon, 77 Kan. 612, 95 Pac. 573; Hahl *v.* Southland Immigration Assoc., (Tex. Civ. App. 1909) 116 S. W. 831; Elmendorf *v.* Schuh, (Tex. Civ. App. 1901) 62 S. W. 797; Travelers' Ins. Co. *v.* Melick, 65 Fed. 178, 12 C. C. A. 544, 27 L. R. A. 629.

73. San Jose *v.* Freyschlag, 56 Cal. 8.

74. Equitable Acc. Ins. Co. *v.* Stout, 135 Ind. 444, 33 N. E. 623; Chicago, etc., R. Co. *v.* Burger, 124 Ind. 275, 24 N. E. 981; In-

unless supported by evidence to the admission of which no objection was made.[75] A finding on an immaterial special issue may be ignored.[76]

f. Inconsistent Findings — (i) *In General.* Answers to special interrogatories submitted to the jury, which are inconsistent with each other or so uncertain that their meaning cannot be ascertained, neutralize each other, and cannot affect or control a general verdict,[77] which will stand if the other special findings are not in conflict with it.[78] But a judgment cannot be based solely upon special findings inconsistent with each other or repugnant in matters material to the issues involved in the case,[79] and where answers to special interrogatories

dianapolis *v.* Kollman, 79 Ind. 504; Barker *v.* Brink, 5 Iowa 481; Aultman, etc., Mach. Co. *v.* Wier, 67 Kan. 674, 74 Pac. 227.

75. Abbott *v.* Morrissette, 46 Minn. 10, 48 N. W. 416.

76. De Gottardi *v.* Donati, 155 Cal. 109, 99 Pac. 492.

77. *Indiana.*— New Castle *v.* Grubbs, 171 Ind. 482, 86 N. E. 757; Pittsburgh, etc., R. Co. *v.* Lightheiser, 168 Ind. 438, 78 N. E. 1033; Inland Steel Co. *v.* Smith, 168 Ind. 245, 80 N. E. 538; McCoy *v.* Kokomo R., etc., Co., 158 Ind. 662, 64 N. E. 92; Parke County *v.* Wagner, 138 Ind. 609, 38 N. E. 171; Heltonville Mfg. Co. *v.* Fields, 138 Ind. 58, 36 N. E. 529; Keesling *v.* Ryan, 84 Ind. 89; Chambers *v.* Butcher, 82 Ind. 508; Indianapolis Coal Traction Co. *v.* Dalton, 43 Ind. App. 330, 87 N. E. 552; Richmond St., etc., R. Co. *v.* Beverley, 43 Ind. App. 105, 84 N. E. 558, 85 N. E. 721; Haughton *v.* Ætna L. Ins. Co., 42 Ind. App. 527, 85 N. E. 125, 1050; Ft. Wayne Cooperage Co. *v.* Page, (App. 1907) 82 N. E. 83; Merchants' Nat. Bank *v.* McClellan, 40 Ind. App. 1, 80 N. E. 854; Inland Steel Co. *v.* Smith, (App. 1905) 75 N. E. 852; Flickner *v.* Lambert, 36 Ind. App. 524, 74 N. E. 263; American Car, etc., Co. *v.* Clark, 32 Ind. App. 644, 70 N. E. 828; Union Traction Co. *v.* Vandercook, 32 Ind. App. 621, 69 N. E. 486; Wabash R. Co. *v.* Biddle, 27 Ind. App. 161, 59 N. E. 284, 60 N. E. 12; Warner *v.* Mier Carriage Co., 26 Ind. App. 350, 58 N. E. 554, 59 N. E. 873; Sloan *v.* Lowder, 23 Ind. App. 118, 54 N. E. 135; Chicago, etc., R. Co. *v.* Kreig, 22 Ind. App. 393, 53 N. E. 1033; Huntington *v.* McClurg, 22 Ind. App. 261, 53 N. E. 658; Citizens' St. R. Co. *v.* Hoop, 22 Ind. App. 78, 53 N. E. 244.

Iowa.— Fishbaugh *v.* Spunaugle, 118 Iowa 337, 92 N. W. 58.

Kansas.— German Ins. Co. *v.* Smelker, 38 Kan. 285, 16 Pac. 735; Missouri Pac. R. Co. *v.* Holley, 30 Kan. 465, 474, 1 Pac. 130, 554.

Montana.— Capital Lumber Co. *v.* Barth, 33 Mont. 94, 81 Pac. 994.

Texas.— Featherstone *v.* Brown, (Civ. App. 1905) 88 S. W. 470.

Wyoming.— Cramer *v.* Munkres, 14 Wyo. 234, 83 Pac. 374.

Construction of conflicting answers.— Presumptions and intendments arising in support of a general verdict cannot be also indulged to establish a contradiction in the answers to special interrogatories, but, except in cases of doubt, that construction should be adopted which probably sustains the conflict. New York, etc., R. Co. *v.* Hamlin, 170 Ind. 20, 79 N. E. 1040, 83 N. E. 343, 10 L. R. A. N. S. 881.

In an action for personal injuries, conflict in the answers of a special verdict relative to the defense of contributory negligence is harmless error on plaintiff's objection, where the special verdict shows no liability of defendant. Deisenrieter *v.* Kraus-Merkel Malting Co., 92 Wis. 164, 66 N. W. 112.

Answers held not fatally inconsistent or irreconcilable see Burke *v.* Bay City Traction, etc., Co., 147 Mich. 172, 110 N. W. 524; Foot *v.* Seaboard Air Line R. Co., 142 N. C. 52, 54 S. E. 843.

78. Oölitic Stone Co. *v.* Ridge, (Ind. App. 1907) 80 N. E. 441; Indianapolis St. R. Co. *v.* Taylor, 39 Ind. App. 592, 80 N. E. 436; Indianapolis St. R. Co. *v.* Fearnaught, 39 Ind. App. 75, 79 N. E. 217. And see cases cited, *supra*, note 77.

79. *Indiana.*— Fireman's Fund Ins. Co. *v.* Dunn, 22 Ind. App. 332, 53 N. E. 251; Tulley *v.* Citizens' State Bank, 18 Ind. App. 240, 47 N. E. 850.

Kansas.— Morse *v.* Ryland, (1899) 57 Pac. 104; Union Pac. R. Co. *v.* Sternbergh, 54 Kan. 410, 38 Pac. 486; Latshaw *v.* Moore, 53 Kan. 234, 36 Pac. 342; Deatherage *v.* Henderson, 43 Kan. 684, 23 Pac. 1052; Aultman *v.* Mickey, 41 Kan. 348, 21 Pac. 254; Ellsworth, etc., R. Co. *v.* Maxwell, 39 Kan. 651, 18 Pac. 819; Atchison, etc., R. Co. *v.* Brown, 33 Kan. 757, 7 Pac. 571; Shoemaker *v.* St. Louis, etc., R. Co., 30 Kan. 359, 2 Pac. 517; Minneapolis Harvester Works Co. *v.* Cummings, 26 Kan. 367; Chase *v.* Horton Bank, 9 Kan. App. 186, 59 Pac. 39.

North Carolina.— Johnson *v.* Townsend, 122 N. C. 442, 29 S. E. 419; Creekmore *v.* Baxter, 121 N. C. 31, 27 S. E. 994.

Oklahoma.— Dickerson *v.* Waldo, 13 Okla. 189, 74 Pac. 505.

Texas.— Stoker *v.* Fugitt, (Civ. App. 1907) 102 S. W. 743; Commerce Milling, etc., Co. *v.* Morris, (Civ. App. 1905) 86 S. W. 73; Taylor *v.* Flynt, 33 Tex. Civ. App. 664, 77 S. W. 964; Cushman *v.* Masterson, (Civ. App. 1901) 64 S. W. 1031.

Washington.— Mitchell *v.* Matheson, 23 Wash. 723, 63 Pac. 564.

Wisconsin.— Fehrman *v.* Pine River, 118 Wis. 150, 95 N. W. 105.

United States.— Stearns *v.* Barrett, 22 Fed. Cas. No. 13,337, 1 Mason 153, 1 Robb Pat. Cas. 97.

See 46 Cent. Dig. tit. "Trial," § 856.

Reasonable care and negligence.— Find-

are inconsistent with each other, the court should call attention to such inconsistencies and return the verdict for further consideration.[80] A verdict for both plaintiff and defendant is not necessarily inconsistent, if the separate findings are on causes of action severally pleaded by them respectively.[81]

(II) *Findings Inconsistent With General Verdict.* Special findings are inconsistent with the general verdict when they as matter of law authorize a different judgment from that which the verdict will authorize.[82] Special findings so inconsistent with and antagonistic to the general verdict as to be absolutely irreconcilable with it control the general verdict, and a judgment *non obstante* must be given according to the special findings,[83] and the jury may be

ings that defendant exercised reasonable care and that it was guilty of negligence are inconsistent. Manhattan, etc., R. Co. *v.* Keeler, 32 Kan. 163, 4 Pac. 143.

80. Oriental Inv. Co. *v.* Barclay, 25 Tex. Civ. App. 543, 64 S. W. 80; Peuchen *v.* Imperial Bank, 20 Ont. 325.

81. Hauss *v.* Koehler, 17 Ohio Cir. Ct. 536, 9 Ohio Cir. Dec. 684.

82. Seeds *v.* American Bridge Co., 68 Kan. 522, 75 Pac. 480; Loewenberg *v.* Rosenthal, 18 Oreg. 178, 22 Pac. 601.

83. *California.*— Plyler *v.* Pacific Portland Cement Co., 152 Cal. 125, 92 Pac. 56; Haas *v.* Whittier, 97 Cal. 411, 32 Pac. 449; Leese *v.* Clark, 20 Cal. 387.

Colorado.— Drake *v.* Justice Gold Min. Co., 32 Colo. 259, 75 Pac. 912; Rio Grande Southern R. Co. *v.* Deasey, 3 Colo. App. 196, 32 Pac. 725.

Idaho.— Bradbury *v.* Idaho, etc., Land Imp. Co., 2 Ida. (Hasb.) 239, 10 Pac. 620.

Illinois.— Court of Honor *v.* Dinger, 221 Ill. 176, 77 N. E. 557; Ebsary *v.* Chicago City R. Co., 164 Ill. 518, 45 N. E. 1017 [*affirming* 61 Ill. App. 265]; St. Louis, etc., R. Co. *v.* Britz, 72 Ill. 256; Paxton *v.* Boyer, 67 Ill. 132, 16 Am. Rep. 615; Miller *v.* Chicago City R. Co., 110 Ill. App 195; Toledo, etc., R. Co. *v.* Valodin, 109 Ill. App. 132; Legnard *v.* Rhoades, 60 Ill. App. 315.

Indiana.— P. H. & F. M. Roots Co. *v.* Meeker, 165 Ind. 132, 73 N. E. 253; Foster *v.* Bemis Indianapolis Bag Co., 163 Ind. 351, 71 N. E. 953; Ohio, etc., R. Co. *v.* Heaton, 137 Ind. 1, 35 N. E. 687; Chicago, etc., R. Co. *v.* Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218; McKinley *v.* Crawfordsville First Nat. Bank, 118 Ind. 375, 21 N. E. 36; McClure *v.* McClure, 74 Ind. 108; Bremmerman *v.* Jennings, 61 Ind. 334; Apperson *v.* Lazro, 44 Ind. App. 186, 87 N. E. 97, 88 N. E. 99; Southern R. Co. *v.* Roach, (App. 1906) 77 N. E. 606; Catterson *v.* Hall, 37 Ind. App. 341, 76 N. E. 889; Bedford Quarries Co. *v.* Turner, (App. 1905) 75 N. E. 25; Lake Erie, etc., R. Co. *v.* Fike, 35 Ind. App. 554, 74 N. E. 636; Southern R. Co. *v.* Davis, 34 Ind. App. 377, 72 N. E. 1053; Cleveland, etc., R. Co. *v.* Griffin, 26 Ind. App. 368, 58 N. E. 503; Bower *v.* Thomas, 22 Ind. App. 505, 54 N. E. 142.

Iowa.— Fishbaugh *v.* Spunaugle, 118 Iowa 337, 92 N. W. 58; Davis *v.* Campbell, 93 Iowa 524, 61 N. W. 1053; Martin *v.* Widner, 91 Iowa 459, 59 N. W. 345; Krauskopf *v* Krauskopf, 82 Iowa 535, 48 N. W. 932; Donahue *v.* Lannan, 70 Iowa 73, 30 N. W. 8; Aldrich *v.* Price, 57 Iowa 151, 9 N. W. 376, 10 N. W. 339.

Kansas.— Stanley *v.* Atchison, etc., R. Co., 78 Kan. 87, 96 Pac. 34; Emory *v.* Eggan, 75 Kan. 82, 88 Pac. 740; American Smelting, etc., Co. *v.* Hoke, 74 Kan. 844, 85 Pac. 804; Chicago, etc., R. Co. *v.* Laughlin, 74 Kan. 567, 87 Pac. 749; National Brass Mfg. Co. *v.* Rawlings, 71 Kan. 246, 80 Pac. 628; Missouri, etc., R. Co. *v.* Bussey, 66 Kan. 735, 71 Pac. 261; St. Louis, etc., R. Co. *v.* McAuliff, 43 Kan. 185, 23 Pac. 102; Bevens *v.* Smith, 42 Kan. 250, 21 Pac. 1064; Waterman *v.* Smith, 8 Kan. App. 464, 54 Pac. 506; Atchison, etc., R. Co. *v.* Guinane, (App. 1897) 51 Pac. 782; Rouse *v.* Youard, 1 Kan. App. 270, 41 Pac. 426.

Kentucky.—Adams *v.* Louisville, etc., R. Co., 82 Ky. 603.

Massachusetts.— Stiles *v.* Granville, 6 Cush. 458.

Michigan.— Trevor *v.* Hawley, 99 Mich. 504, 58 N. W. 466; Cortland Mfg. Co. *v.* Platt, 83 Mich. 419, 47 N. W. 330; Harbaugh *v.* People, 33 Mich. 241.

Minnesota.—Awde *v.* Cole, 99 Minn. 357, 109 N. W. 812; Roe *v.* Winston, 86 Minn. 77, 90 N. W. 122; Vogt *v.* Honstain, 85 Minn. 160, 88 N. W. 443.

Montana.— Mitchell *v.* Boston, etc., Consol. Copper, etc., Min. Co., 37 Mont. 575, 97 Pac. 1033; Martin *v.* Butte, 34 Mont. 281, 86 Pac. 264; Neimick *v.* American Ins. Co., 16 Mont. 318, 40 Pac. 597.

Nebraska.— Norfolk Beet-Sugar Co. *v.* Preuner, 55 Nebr. 656, 75 N. W. 1097; Ogg *v.* Shehan, 17 Nebr. 323, 22 N. W. 556.

Nevada.— Berry *v.* Equitable Gold Min. Co., 29 Nev. 451, 91 Pac. 537.

New Hampshire.— Hewett *v.* Woman's Hospital Aid Assoc., 73 N. H. 556, 64 Atl. 190, 7 L. R. A. N. S. 496; Richardson *v.* Weare, 62 N. H. 80.

New York.— Dempsey *v.* New York, 10 Daly 417.

North Carolina.— Baker *v.* Wilmington, etc., R. Co., 118 N. C. 1015, 24 S. E. 415.

Ohio.— Troy *v.* Brady, 67 Ohio St. 65, 65 N. E. 616; Middleport *v.* Taylor, 2 Ohio Cir. Ct. 366, 1 Ohio Cir. Dec. 534; Gessel *v.* Republic L. Ins. Co., 7 Ohio Dec. (Reprint) 159, 1 Cinc. L. Bul. 189.

Washington.— Boucher *v.* Oregon R., etc., Co., 50 Wash. 627, 97 Pac. 661; Stratton *v.* C. H. Nichols Lumber Co., 39 Wash. 323, 81 Pac. 831, 109 Am. St. Rep. 881; Hobert *v.*

instructed to reconsider the case,[84] and a party to whom the general verdict is adverse may first move for judgment on the special findings, and if his motion is refused may file a motion for new trial.[85] To control the general verdict, the special findings must be upon a substantial material issue,[86] must be consistent with each other,[87] and must in all other ways be sufficient to authorize a judgment thereon,[88] when taken together with the facts admitted by the pleadings;[89] and notwithstanding the jury find a special verdict for one party on certain questions, judgment may be rendered for the other party on a general verdict found in his favor, when there is any issue in the case not covered by the special findings.[90] No presumption will be indulged in favor of answers of the jury to special interrogatories as against the general verdict;[91] but on the contrary, every reasonable intendment in favor of the general verdict should be indulged,[92] and all parts of

Seattle, 32 Wash. 330, 73 Pac. 383; Mitchell *v.* Matheson, 23 Wash. 723, 63 Pac. 564; Pepperall *v.* City Park Transit Co., 15 Wash. 176, 45 Pac. 743, 46 Pac. 407.

Wisconsin.—Anderson *v.* Chicago Brass Co., 127 Wis. 273, 106 N. W. 1077; Hogan *v.* Chicago, etc., R. Co., 59 Wis. 139, 17 N. W. 632; Ryan *v.* Springfield F. & M. Ins. Co., 46 Wis 671, 1 N. W. 426.

Wyoming.— Chicago, etc., R. Co. *v.* Morris, 16 Wyo. 308, 93 Pac. 664; Cramer *v.* Munkres, 14 Wyo 234, 83 Pac. 374.

United States.— U. S. *v.* Pinover, 3 Fed. 305.

See 46 Cent. Dig. tit. "Trial," § 857.

84. Kennedy *v.* Ball, etc., Co., 91 Hun (N Y.) 197, 36 N. Y. Suppl. 325.

85 Davis *v.* Turner, 69 Ohio St. 101, 68 N. E. 819.

86. Donohue *v.* Dyer, 23 Ind. 521; Topeka *v.* Noble, 9 Kan. App. 171, 58 Pac. 1015.

87. Winters *v* Coons, 162 Ind. 26, 69 N. E. 458; Indianapolis Abattoir Co. *v.* Temperly, 159 Ind. 651, 64 N. E 906, 95 Am. St. Rep. 330; Byram *v.* Galbraith, 75 Ind. 134; Indiana Natural, etc., Gas Co. *v.* Anthony, 26 Ind. App. 307, 58 N. E. 868; Foster *v.* Gaffield, 34 Mich. 356. And see *supra*, XI, C, 8, f, (I).

Obscurity and inconsistency are to be given weight in favor of, rather than against, a general verdict. Jones *v.* Austin, 26 Ind. App. 399, 59 N. E. 1082

88. *Illinois.*— Fitzgerald *v.* Hedstrom, 98 Ill. App. 109.

Indiana.— Citizens' St. R. Co. *v.* Batley, 159 Ind. 368, 65 N. E. 2; McCoy *v.* Kokomo R., etc., Co., 158 Ind. 662, 64 N. E. 92; Hamilton County *v* Newlin, 132 Ind. 27, 31 N. E. 465; Rice *v.* Manford, 110 Ind. 596, 11 N. E. 283; Campbell *v.* Dutch, 36 Ind. 504; Delawter *v.* Sand Creek Ditching Co., 26 Ind. 407; Chicago, etc., R. Co. *v.* Lee, 29 Ind. App. 480, 64 N. E. 675; Chicago, etc., R. Co. *v.* Cummings, 24 Ind. App. 192, 53 N. E. 1026.

Iowa.— Fishbaugh *v.* Spunaugle, 118 Iowa 337, 92 N. W 58; Schulte *v.* Chicago, etc., R. Co., 114 Iowa 89, 86 N. W. 63; Kerr *v.* Keokuk Waterworks Co., 95 Iowa 509, 64 N. W. 596.

Kansas.— Missouri, etc., R. Co *v.* Bussey, 66 Kan 735, 71 Pac. 261.

Massachusetts.— Roche *v.* Ladd, 1 Allen 436.

Missouri.— Clay *v.* Chicago, etc., R. Co., 24 Mo. App. 39.

Nebraska.—Williams *v.* Eikenberry, 22 Nebr. 210, 34 N. W. 373.

New York.— U. S. Trust Co. *v.* Harris, 2 Bosw. 75.

Ohio.— Fairbanks *v.* Cincinnati, etc., R. Co., 66 Fed. 471.

See 46 Cent. Dig. tit. "Trial," § 857.

89. Hardin *v.* Branner, 25 Iowa 364; Lamb *v.* Marshalltown First Presb. Soc., 20 Iowa 127.

90. McDermott *v.* Higby, 23 Cal. 489; Toledo, etc., R. Co. *v.* Milligan, 52 Ind. 505; Atchison, etc., R. Co. *v.* Allen, 75 Kan. 190, 88 Pac. 966, 10 L. R. A. N. S. 576; Awde *v.* Cole, 99 Minn. 357, 109 N. W. 812.

91. Henrietta Coal Co. *v.* Campbell, 211 Ill. 216, 71 N. E. 863 [*affirming* 112 Ill. App. 452]; Starrett *v.* Gault, 62 Ill. App. 209; Inland Steel Co. *v.* Smith, 168 Ind. 245, 80 N. E. 538; Indianapolis St. R. Co. *v.* Johnson, 163 Ind. 518, 72 N. E. 571; Mitchell *v.* Tell City, 41 Ind. App. 294, 83 N. E. 735; Masterson *v.* Southern R. Co., (Ind. App. 1907) 82 N. E. 1021; Indianapolis Traction, etc., Co. *v.* Holtzclaw, 40 Ind. App. 311, 81 N. E. 1084; Bluffton *v.* McAfee, 23 Ind. App. 112, 53 N. E. 1058; Conwell *v.* Tri-City R. Co., 135 Iowa 190, 112 N. W. 546; Samson *v.* Zimmerman, 73 Kan. 654, 85 Pac. 757.

92. *Indiana.*— Indianapolis St. R. Co. *v.* Johnson, 163 Ind. 518, 72 N. E. 571; Wright *v.* Chicago, etc., R. Co., 160 Ind. 583, 66 N. E. 454; Indiana R. Co. *v.* Maurer, 160 Ind. 25, 66 N. E. 156; Citizens' St. R. Co. *v.* Batley, 159 Ind. 368, 65 N. E. 2; Grand Rapids, etc., R. Co. *v.* Ellison, (1888) 18 N. E. 507; Cook *v.* Howe, 77 Ind. 442; Salander *v.* Lockwood, 66 Ind. 285; Masterson *v.* Southern R. Co., (App. 1907) 82 N. E. 1021; Indianapolis Traction, etc., Co. *v.* Holtzclaw, 40 Ind. App. 311, 81 N. E. 1084; Erie Crawford Oil Co. *v.* Meeks, 40 Ind. App. 156, 81 N. E. 518; Huntington *v.* McClurg, 22 Ind. App. 261, 53 N. E. 658.

Iowa.— Conwell *v.* Tri-City R. Co., 135 Iowa 190, 112 N. W. 546; Mitchell *v.* Joyce, 76 Iowa 449, 34 N. W. 455, 41 N. W. 161.

Kansas.— Missouri, etc., R. Co. *v.* Bussey, 66 Kan. 735, 71 Pac. 261; Stevens *v.* Matthewson, 45 Kan 594, 26 Pac. 38.

Michigan.— Rajnowski *v.* Detroit, etc., R. Co., 78 Mich. 681, 44 N. W. 335.

the verdict are to be reconciled in support thereof if it can reasonably be done.[93] Hence, the general verdict will stand unless the facts found by the jury in answer to special interrogatories are so clearly antagonistic to it as to be absolutely irreconcilable, the conflict being such as to be beyond the possibility of being removed by any evidence admissible under the issues,[94] so that both the general

Minnesota.— Ready *v.* Peavy El. Co., 89 Minn. 154, 94 N. W. 442.

Texas.— International, etc., R. Co. *v.* Nicholson, 61 Tex. 550.

See 46 Cent. Dig. tit. "Trial," § 857.

93. *Illinois.*— Chicago, etc., R. Co. *v.* Goyette, 133 Ill. 21, 24 N. E. 549 [*affirming* 32 Ill. App. 574]; Gall *v.* Beckstein, 66 Ill. App. 478.

Indiana.— Grand Rapids, etc., R. Co. *v.* Ellison, 117 Ind. 234, 20 N. E. 135.

Kansas.— McElree *v.* Wolfersberger, 59 Kan. 105, 52 Pac. 69.

Minnesota.—Awde *v.* Cole, 99 Minn. 357, 109 N. W. 812.

Texas.— Texas Cent. R. Co. *v.* Bender, 32 Tex. Civ. App. 568, 75 S. W. 561.

See 46 Cent. Dig. tit. "Trial," § 857.

94. *California.*— Warren *v.* Southern California R. Co., (1901) 67 Pac. 1; Portland Cracker Co. *v.* Murphy, 130 Cal. 649, 63 Pac. 70; Alhambra Addition Water Co. *v.* Richardson, 72 Cal. 598, 14 Pac. 379.

Georgia.— Ruffin *v.* Paris, 75 Ga. 653.

Illinois.— Court of Honor *v.* Dinger, 221 Ill. 176, 77 N. E. 557; Provident Sav. L. Assur. Soc. *v.* King, 216 Ill. 416, 75 N. E. 166 [*affirming* 117 Ill. App. 556]; Rockford Ins. Co. *v.* Storig, 137 Ill. 646, 24 N. E. 674 [*affirming* 31 Ill. App. 486]; Chicago City R. Co. *v.* White, 110 Ill. App. 23; Starrett *v.* Gault, 62 Ill. App. 209; Independent Dryer Co. *v.* Livermore Foundry, etc., Co., 60 Ill. App. 390; Stein *v.* Chicago, etc., R. Co., 41 Ill. App. 38.

Indiana.— Indianapolis Traction, etc., Co. *v.* Kidd, 167 Ind. 402, 79 N. E. 347, 7 L. R. A. N. S. 143; Ft. Wayne Traction Co. *v.* Hardendorf, 164 Ind. 403, 72 N. E. 593; Princeton Coal, etc., Co. *v.* Roll, 162 Ind. 115, 66 N. E. 169; Indianapolis St. R. Co. *v.* Hockett, 161 Ind. 196, 67 N. E. 106; Wright *v.* Chicago, etc., R. Co., 160 Ind. 583, 66 N. E. 454; Citizens' St. R. Co. *v.* Batley, 159 Ind. 368, 65 N. E. 2; Mitchell Lime Co. *v.* Nickless, 44 Ind. App. 197, 85 N. E. 728; New Albany Second Nat. Bank *v.* Gibboney, 43 Ind. App. 492, 87 N. E. 1064; Indianapolis Coal Traction Co. *v.* Dalton, 43 Ind. App. 330, 87 N. E. 552; Richmond St., etc., R. Co. *v.* Beverley, 43 Ind. App. 105, 84 N. E. 558, 85 N. E. 721; Cincinnati, etc., R. Co. *v.* Miller, 36 Ind. App. 26, 72 N. E. 827, 73 N. E. 1001; Vincennes *v.* Spees, 35 Ind. App. 389, 74 N. E. 277 [*reversing* (App. 1904) 72 N. E. 531]; Chicago, etc., R. Co. *v.* Stephenson, 33 Ind. App. 95, 69 N. E. 270; Indianapolis St. R. Co. *v.* Tenner, 32 Ind. App. 311, 67 N. E. 1044; Jarvis *v.* Hitch, (App. 1902) 65 N. E. 608; Union Traction Co. *v.* Barnett, 31 Ind. App. 467, 67 N. E. 205; American Tinplate Co. *v.* Williams, 30 Ind. App. 46, 65 N. E. 304.

Iowa.— Tarashousky *v.* Illinois Cent. R. Co., 139 Iowa 709, 117 N. W. 1074; Wilson *v.* Onstott, 121 Iowa 263, 96 N. W. 779, Saar *v.* Chicago, etc., R. Co., 119 Iowa 60, 93 N. W. 66; Crynes *v.* Independence, 115 Iowa 448, 88 N. W. 937; McMarshall *v.* Chicago, etc., R. Co., 80 Iowa 757, 45 N. W. 1065, 20 Am. St. Rep. 445; Miles *v.* Wikel, 74 Iowa 712, 39 N. W. 95; Acton *v.* Coffman, 74 Iowa 17, 36 N. W. 774; Tilford *v.* Fairfield Mfg. Co., 72 Iowa 60, 33 N. W. 364; Butler *v.* Chicago, etc., R. Co., 71 Iowa 206, 32 N. W. 262; Close *v.* Atkins, 39 Iowa 521.

Kansas.— Osburn *v.* Atchison, etc., R. Co., 75 Kan. 746, 90 Pac. 289; Chicago, etc., R. Co. *v.* Wimmer, 72 Kan. 566, 84 Pac. 378, 4 L. R. A. N. S. 140; Eureka *v.* Neville, 71 Kan. 842, 80 Pac. 39; Moeser *v.* Lewis, 68 Kan. 485, 75 Pac. 512; Smith *v.* Beeler, 48 Kan. 669, 29 Pac. 1087; Missouri Pac. R. Co. *v.* Holley, 30 Kan. 465, 474, 1 Pac. 130, 554.

Michigan.— Martin *v.* Fisher, 143 Mich. 462, 107 N. W. 86; Baker *v.* Flint, etc., R. Co., 68 Mich. 90, 35 N. W. 836.

Minnesota.—Awde *v.* Cole, 99 Minn. 357, 109 N. W. 812; Krumdick *v.* Chicago, etc., R. Co., 90 Minn. 260, 95 N. W. 1122; McAlpine *v.* Resch, 82 Minn. 523, 85 N. W. 545; Goltz *v.* Winona, etc., R. Co., 22 Minn. 55.

Montana.— Butte First Nat. Bank *v.* Pardee, 16 Mont. 390, 41 Pac. 77.

Nebraska.— Kafka *v.* Union Stockyards Co., 78 Nebr. 140, 110 N. W. 672.

New Mexico.— Roswell *v.* Davenport, 14 N. M. 91, 89 Pac. 256.

Ohio.— Wicker *v.* Messinger, 22 Ohio Cir. Ct. 712, 12 Ohio Cir. Dec. 425; Davis *v.* Turner, 69 Ohio St. 101, 68 N. E. 819; Reber *v.* Columbus Mach. Mfg. Co., 12 Ohio St. 175.

Oklahoma.— Goodwin *v.* Greenwood, 16 Okla. 489, 85 Pac. 1115; White *v.* Madison, 16 Okla. 212, 83 Pac. 798.

Texas.— San Antonio *v.* Marshall, (Civ. App. 1905) 85 S. W. 315.

Wisconsin.— Piano Mfg. Co. *v.* Bergmann, 102 Wis. 21, 78 N. W. 157.

England.— Kerry *v.* England, [1898] A. C. 742, 67 L. J. P. C. 150.

Canada.— Newton *v.* Gore Dist. Mut. F. Ins. Co., 33 U. C. Q. B. 92.

But where as a conclusion of law from the special verdict, the general verdict is unwarranted, judgment upon it is erroneous. Aguirre *v.* Alexander, 58 Cal. 21.

If on any count of the petition the general verdict can be made to stand consistently with the special findings, it will not be set aside. Jemmison *v.* Gray, 29 Iowa 537.

Erroneous instruction.—A motion for judgment on special findings, notwithstanding the general verdict, the jury having failed

verdict and special findings cannot stand.[95] In determining the force of the interrogatories, nothing but the pleadings, the verdict, and the answers can be considered,[96] and no regard will be paid to answers of the jury with reference to matters not submitted to them,[97] or immaterial matters,[98] or mere conclusions.[99]

9. Construction and Operation — a. Construction. Special verdicts must be construed liberally with a view of ascertaining the intention of the jury,[1] and answers returned by a jury to interrogatories addressed to them are to be taken together and not separately,[2] and if possible are to be so construed as to harmonize them and uphold the general verdict,[3] and special findings will not be disturbed unless flagrantly against the evidence.[4] A special verdict will be construed most strongly against the party upon whom rests the burden of proof,[5] and a special finding received without objection most strongly against the party in whose favor it is found.[6] If the jury in a special verdict find facts only, the court must

to reach the conclusion in the general verdict made necessary by applying to its special findings the law as laid down in the instructions, will not be granted, the law having been erroneously given and, in fact, authorizing the general verdict. Connell *v.* Keokuk Electric R., etc., Co., 131 Iowa 622, 109 N W. 177. See also Denver, etc., R. Co. *v.* Bedell, 11 Colo. App. 139, 54 Pac. 280.

The special findings and general verdict must be so inconsistent as to show that the jury gave no intelligent attention to the evidence or questions, or that there was a mistrial. Missouri Pac. R. Co. *v.* Holley, 30 Kan. 465, 474, 1 Pac. 130, 554.

95. Pittsburgh, etc., R. Co. *v.* Lightheiser, 168 Ind. 438, 78 N. E. 1033; Chicago, etc., R. Co. *v.* Leachman, 161 Ind. 512, 69 N. E. 253; Union Traction Co. *v.* Vandercook, 32 Ind. App. 621, 69 N. E. 486; Evansville, etc., R. Co. *v.* Kyte, 6 Ind. App. 52, 32 N. E. 1134; Reeves *v.* Moore, 4 Ind. App. 492, 31 N. E. 44; Block *v.* Haseltine, 3 Ind. App. 491, 29 N. E. 937; Baldwin *v.* Shill, 3 Ind. App. 291, 29 N. E. 619.

The incompatibility must be clearly made out by the party alleging it. Shakspeare *v.* The Maggie Cain, 4 Leg. Gaz. (Pa.) 84.

96. Indiana R. Co. *v.* Maurer, 160 Ind. 25, 66 N. E. 156; Louisville, etc., Traction Co. *v.* Warrell, 44 Ind. App. 480, 86 N. E. 78; Grass *v.* Ft. Wayne, etc., Traction Co., 42 Ind App. 395, 81 N. E. 514; Lowden *v.* Pennsylvania Co., 41 Ind. App. 614, 82 N. E. 941; Robbins *v.* Ft. Wayne Iron, etc., Co., 41 Ind App. 557, 84 N. E. 514.

The court cannot consider the sufficiency of the evidence to support the general verdict. Lowden *v.* Pennsylvania Co., 41 Ind. App. 614, 82 N. E. 941.

97. McGeehan *v.* Gaar, 122 Wis. 630, 100 N. W. 1072.

98. John Mathews Apparatus Co. *v.* Neal, 71 Ill. App. 363; Frank Bird Transfer Co. *v.* Krug, 30 Ind. App. 602, 65 N. E. 309; Insurance Co. of North America *v.* Osborn, (Ind. App. 1901) 59 N. E. 181; American Tin-Plate Co. *v.* Guy, 25 Ind. App. 588, 58 N. E. 738; Toledo Electric St. R. Co. *v.* Bateman, 16 Ohio Cir. Ct. 162, 8 Ohio Cir. Dec. 220.

The special interrogatory must be of controlling importance. Indianapolis Abattoir Co. *v.* Temperly, 159 Ind. 651, 64 N. E. 906, 95 Am. St. Rep. 330.

99. Wabash R. Co. *v.* Keister, 163 Ind. 609, 67 N. E. 521.

1. Miller *v.* Shackleford, 4 Dana (Ky.) 264.

The verdict must be construed as a whole and not by reference to isolated parts. Voris *v.* Star City Bldg., etc., Assoc., 20 Ind. App. 630, 50 N. E. 779.

2. Strecker *v.* Conn, 90 Ind. 469; Innis *v.* Crummin, 1 Mart. N. S. (La.) 560; Bell *v.* Washington Cedar-Shingle Co., 8 Wash. 27, 35 Pac. 405.

Special findings construed see Corea *v.* Higuera, 153 Cal. 451, 95 Pac. 882, 17 L. R. A. N. S. 1018; Western Union Tel. Co. *v.* Visalia, 149 Cal. 744, 87 Pac. 1023; Chicago, etc., R. Co. *v.* Gallion, 39 Ind. App. 604, 80 N. E. 547; Connell *v.* Keokuk Electric R., etc., Co., 131 Iowa 622, 109 N. W. 177; Nicholls *v.* American Steel, etc., Co., 191 N. Y. 554, 85 N. E. 1113; Cincinnati *v.* Johnson, 76 Ohio St. 567, 81 N. E. 1182; Carnegie Pub. Library Assoc. *v.* Harris, 43 Tex. Civ. App. 165, 97 S. W. 520; Probate Ct. *v.* Enright, 79 Vt. 416, 65 Atl. 530; Inland Empire R. Co. *v.* McKinley, 48 Wash. 675, 94 Pac. 644; Dorwin *v.* Hagerty, 137 Wis. 161, 118 N. W. 799; Metcalf *v.* Mut. Fire Ins. Co., 132 Wis. 67, 112 N. W. 22.

3. Kansas City *v.* Slangstrom, 53 Kan. 431, 36 Pac. 706; Nicholls *v.* American Steel, etc., Co., 117 N. Y. App. Div. 21, 102 N. Y. Suppl. 227; Warner *v.* U. S. Mutual Aid Assoc., 8 Utah 431, 32 Pac. 696.

Where a special verdict is susceptible of two constructions, one of which will support the general verdict and the other will not, that construction will be given to the special verdict which will support the general verdict. Grant *v.* Spokane Traction Co., 47 Wash. 112, 91 Pac. 553.

The general verdict may be aided and irregularities cured by special findings. Schillinger Bros. Co. *v.* Smith, 128 Ill. App. 30 [*affirmed* in 225 Ill. 74, 80 N. E. 65].

4. Louisville, etc., R. Co. *v.* Brice, 84 Ky. 298, 1 S. W. 483, 8 Ky. L. Rep. 271.

5. Brunson *v.* Henry, 152 Ind. 310, 52 N. E. 407; Louisville, etc., R. Co. *v.* Costello, 9 Ind. App. 462, 36 N. E. 299.

6. Kansas Pac. R. Co. *v.* Pointer, 14 Kan. 37.

draw the legal conclusions from them,[7] and if they draw conclusions against the law upon the face of them, the court will reject the conclusion and judge upon the facts.[8] But where all the facts are not found and a conclusion is drawn which might have been warranted by the facts not found, the court will not reject the conclusion,[9] and where facts are found warranting either of two conclusions, the court will adopt the conclusions arrived at by the jury.[10] An admission of fact in a pleading will prevail over a special finding of the jury to the contrary.[11]

b. Conclusiveness and Effect as Evidence. A party, at whose instance or with whose consent, a particular question has been submitted to the jury, is bound by their answer thereto so far as the trial is concerned,[12] and such finding is evidence against other parties who have agreed to be bound thereby.[13] But a special verdict not received by the court and forming no part of the record is not evidence of any fact found by it.[14]

c. Effect as General Verdict. The court cannot treat, as a general verdict, a verdict that shows that the jury did not intend it as such.[15] But where the law authorizes only a general verdict, a verdict, although in form special, will be regarded as a general verdict.[16]

10. Amendment or Correction of Special Verdict or Finding — a. In General. The jury may change its verdict or special findings at any time before they are received.[17] The court may also amend a special verdict or finding in matters of form and may remedy defects resulting from inadvertence, the intention of the jury being clear,[18] and the court may compute and insert, during the term at which the special verdict is returned, the amount of damages to which plaintiff is entitled under the verdict.[19] But the court cannot without the consent or over the objection of the parties amend a special verdict or finding in matters of substance,[20] unless the finding is so contrary to the undisputed credible evidence

7. Butler *v.* Hopper, 4 Fed. Cas. No. 2,241, 1 Wash. 499.

8. Dull *v.* Cleveland, etc., R. Co., 21 Ind. App. 571, 52 N. E. 1013; Butler *v.* Hopper, 4 Fed. Cas. No. 2,241, 1 Wash. 499.

9. Cincinnati *v.* Hamilton County Com'rs, 7 Ohio 88; Butler *v.* Hopper, 4 Fed. Cas. No. 2,241, 1 Wash. 499.

10. Illinois Cent. R. Co. *v.* Cheek, 152 Ind. 663, 53 N. E. 641.

11. Cincinnati *v.* Johnson, 26 Ohio St. 567, 81 N. E. 1182.

12. Stevens *v.* Rose, 69 Mich. 259, 37 N. W. 205; Walker *v.* Sawyer, 13 N. H. 191; St. Paul Second Nat. Bank *v.* Larson, 80 Wis. 469, 50 N. W. 499.

13. Patton *v.* Caldwell, 1 Dall. (Pa.) 419, 1 L. ed. 204.

14. U. S. *v.* Addison, 6 Wall. (U. S.) 291, 18 L. ed. 919.

15. Dray *v.* Crich, 3 Oreg. 298.

A finding for plaintiff for damages, appended to answers to questions for a special verdict, does not constitute a general verdict for plaintiff. Kelley *v.* Chicago, etc., R. Co., 53 Wis. 74, 9 N. W. 816.

16. Kelley *v.* Bell, 172 Ind. 590, 88 N. E. 58.

17. Saterlee *v.* Saterlee, 28 Colo. 290, 64 Pac. 180.

18. Cruikshank *v.* Cruikshank, 38 N. Y. App. Div. 580, 56 N. Y. Suppl. 699; Rew *v.* Barker, 2 Cow. (N. Y.) 408, 14 Am. Dec. 515; Sleght *v.* Hartshorne, 1 Johns. (N. Y.) 149.

Incorporating undisputed facts.— The court may amend the special verdict by incorporating undisputed facts (Wallingford *v.* Dunlap, 14 Pa. St. 31), or facts impliedly admitted by the parties on the trial (Sleght *v.* Hartshorne, 1 Johns. (N. Y.) 149).

19. Ellison *v.* Branstrator, 153 Ind. 146, 54 N. E. 433.

20. *Indiana.*— Pollard *v.* First Ave. Coal Min. Co., 27 Ind. App. 196, 61 N. E. 9.

Massachusetts.— Walker *v.* Dewing, 8 Pick. 520.

New York.— Kennedy *v.* Ball, etc., Co., 91 Hun 197, 36 N. Y. Suppl. 325.

South Carolina.— State *v.* Duncan, 2 McCord 129; U. S. *v.* Bird, 2 Brev. 85.

Wisconsin.— Maxon *v.* Gates, 136 Wis. 270, 116 N. W. 758; Sheehy *v.* Duffy, 89 Wis. 6, 61 N. W. 295; Ohlweiler *v.* Lehmann, 82 Wis. 198, 52 N. W. 172; Dahl *v.* Milwaukee City R. Co., 65 Wis. 371, 27 N. W. 185.

See 46 Cent. Dig. tit. "Trial," § 865 *et seq.*

The court should not influence the jury to change the special findings so as to make them consistent with the general verdict. Usher *v.* Hiatt, 18 Kan. 195. And the court has no power to instruct the jury that if the general verdict is for the party submitting interrogatories, the interrogatories need not be answered. Pitzer *v.* Indianapolis, etc., R. Co., 80 Ind. 569. See also Crane *v.* Reeder, 25 Mich. 303.

The court cannot strike a portion of the findings and render judgment on the residue. Noakes *v.* Morey, 30 Ind. 103; Conover *v.* Knight, 91 Wis. 569, 65 N. W. 371; Mc-

as to justify the court in directing a verdict or changing an answer.[21] The proper remedy, where facts are not sufficiently found, or are contrary to law, or are not sufficiently sustained by the evidence, or where additional facts should have been found, is by motion for new trial,[22] and not by motion to make the special findings more specific.[23] But the judge may set aside a special finding and let the general verdict stand,[24] and where the issues not passed on are entirely distinct from those that are, the court may order a retrial as to these issues not passed on only.[25]

b. Remanding Jury or Resubmission of Interrogatory. Where the jury have not completed their answers to special interrogatories,[26] have given improper, irregular, or insufficient answers thereto,[27] have failed to answer the interrogatories,[28] or where the special verdict is informal,[29] as where it is not signed,[30] the jury may be sent out to remedy the defect, although they have separated.[31] But an interrogatory will not be resubmitted to the jury on the ground that their finding is against the evidence.[32] The proper remedy for failure of the special verdict to find material facts within the issue is by motion for new trial.[33]

11. Objections and Exceptions; Waiver. Objections to interrogatories to be availing must be made before the same are answered by the jury,[34] as must be

Fetridge *v.* American F. Ins. Co., 90 Wis. 138, 62 N. W. 938.

The court may refuse a request for amended findings of fact that are immaterial or call for a statement of the evidence. Coggins *v.* Higbie, 83 Minn. 83, 85 N. W. 930.

21. St. Paul Boom Co. *v.* Kemp, 125 Wis. 138, 103 N. W. 259; Blohowak *v.* Grochoski, 119 Wis. 189, 96 N. W. 551.

22. Tyler *v.* Davis, 37 Ind. App. 557, 75 N. E. 3.

23. Smith *v.* Barber, 153 Ind. 322, 53 N. E. 1014; Petty *v.* Petty, 42 Ind. App. 443, 85 N. E. 995.

The judge cannot hear evidence on issues covered by the findings of the jury and make judgment in face of such findings. Montgomery *v.* Sayre, 91 Cal. 206, 27 Pac. 648.

Where the answers of the jury are not responsive to the interrogatories, the remedy is by motion to make such answers more direct or to have them set aside. Noble *v.* Enos, 19 Ind. 72.

24. Monies *v.* Lynn, 119 Mass. 273.

25. Crich *v.* Williamsburg City F. Ins. Co., 45 Minn. 441, 48 N. W. 198.

26. St. Louis Consol. Coal Co. *v.* Maehl, 130 Ill. 551, 22 N. E. 715 [*affirming* 31 Ill. App. 252]; North Western Mut. L. Ins. Co. *v.* Heimann, 93 Ind. 24.

27. *Illinois.*— Cleveland, etc., R. Co. *v.* Doerr, 41 Ill. App. 530.

Indiana.— Cleveland, etc., R. Co. *v.* Asbury, 120 Ind. 289, 22 N. E. 140; Summers *v.* Greathouse, 87 Ind. 205; Peters *v.* Lane, 55 Ind. 391; Bowman *v.* Phillips, 47 Ind. 341; Reeves *v.* Plough, 41 Ind. 204.

Kansas.— McPheeters *v.* Birk, 48 Kan. 784, 30 Pac. 127; American Cent. Ins. Co. *v.* Hathaway, 43 Kan. 399, 23 Pac. 428; Leavenworth, etc., R. Co. *v.* Jacobs, 39 Kan. 204, 17 Pac. 791; Atchison, etc., R. Co. *v.* Cone, 37 Kan. 567, 15 Pac. 499; Union Pac. R. Co. *v.* Fray, 35 Kan. 700, 12 Pac. 98; Kansas Pac. R. Co. *v.* Peavey, 34 Kan. 472, 8 Pac. 780; Wyandotte *v.* Gibson, 25 Kan. 236; Atchison, etc., R. Co. *v.* Campbell, 16 Kan. 200; Kansas Pac. R. Co. *v.* Pointer, 14 Kan. 37.

Nebraska.— Doom *v.* Walker, 15 Nebr. 339, 18 N. W. 138.

New Hampshire.— Winslow *v.* Smith, 74 N. H. 65, 65 Atl. 108.

Wisconsin.— Klatt *v.* N. C. Foster Lumber Co., 92 Wis. 622, 66 N. W. 791; Coats *v.* Stanton, 90 Wis. 130, 62 N. W. 619.

See 46 Cent. Dig. tit. "Trial," § 867.

28. Rush *v.* Pedigo, 63 Ind. 479.

29. Toler *v.* Keiher, 81 Ind. 383; Hirsch *v.* Jones, (Tex. Civ. App. 1897) 42 S. W. 604.

30. Grace, etc., Co. *v.* Sanborn, 124 Ill. App. 472 [*affirmed* in 225 Ill. 138, 80 N. E. 88].

31. St. Louis Consol. Coal Co. *v.* Maehl, 130 Ill. 551, 22 N. E. 715 [*affirming* 31 Ill. App. 252]; Grace, etc., Co. *v.* Sanborn, 124 Ill. App. 472 [*affirmed* in 225 Ill. 138, 80 N. E. 88]; Roberts *v.* Roberts, 91 Iowa 228, 59 N. W. 25; Dailey *v.* Douglass, 40 Mich. 557; Winslow *v.* Smith, 74 N. H. 65, 65 Atl. 108. But see Price *v.* Lewis, 132 Ill. App. 179.

32. Jackson County *v.* Nichols, 139 Ind. 611, 38 N. E. 526.

Where the jury say they are unable to answer the interrogatory, the court need not send them out for that purpose. Grannis *v.* Chicago, etc., R. Co., 81 Iowa 444, 46 N. W. 1067.

33. Pittsburgh, etc., R. Co. *v.* Montgomery, 152 Ind. 1, 49 N. E. 582, 71 Am. St. Rep. 301; Brazil Block Coal Co. *v.* Hoodlet, 129 Ind. 327, 27 N. E. 741.

34. Freedman *v.* New York, etc., R. Co., 81 Conn. 601, 71 Atl. 901; Lake Shore, etc., R. Co. *v.* Stupak, 123 Ind. 210, 23 N. E. 246; Brooker *v.* Weber, 41 Ind. 426; Aiken *v.* Bruen, 21 Ind. 137; Dupont *v.* Starring, 42 Mich. 492, 4 N. W. 190; Richardson *v.* Weare, 62 N. H. 80. But see Winslow *v.* Smith, 74 N. H. 65, 65 Atl. 108.

A party who has consented to the jury finding a special verdict (Kenton Ins. Co. *v.* Adkins, 12 Ky. L. Rep. 291), or who has made no objection to a special verdict, but moves for judgment thereon (Kessler *v.* Citizens' St. R. Co., 20 Ind. App. 427, 50 N. E.

also an objection that the question submitted was not the only one in the case,[35] or that the court received a special verdict without requiring a general verdict.[36] In the absence of a motion to have them sent back for fuller answer, it is no ground for new trial that special findings do not respond sufficiently to requests therefor,[37] or that the jury failed to answer them,[38] directly and definitely,[39] and these objections not having been taken before the jury are discharged are deemed waived and cannot be taken advantage of on appeal.[40] But a special verdict may be attacked at any time for failure to pass on all material and controverted questions, there being no general verdict.[41] Where special issues are submitted to the jury at a party's request he cannot complain that there was not evidence sufficient to make a finding on such issues.[42] A general objection to the submission of certain questions does not raise the objection that the discretion of the jury to render a general or special verdict has been interfered with.[43]

XII. TRIAL BY COURT.[44]

A. Hearing and Determination of Cause — 1. In General — a. Power and Duty of Court in General. Where a trial is held to the court, the court occupies the same relation to the facts in the case that a jury would have if the case had been tried by a jury.[45] His powers as a judge remain the same as before, both as to rulings, orders, and allowance of costs;[46] but he has no other or addi-

891; Seybold *v.* Terre Haute, etc., R. Co. 18 Ind. App. 367, 46 N. E. 1054) cannot, on appeal, object to the verdict as being a special verdict. But consent of a party that the jury may return an affirmative answer to one of the questions submitted is not an acquiescence in the sufficiency of the special verdict. Standard Sewing Mach. Co. *v.* Royal Ins. Co., 201 Pa. St. 645, 51 Atl. 354.

35. Schultz *v.* Chicago, etc., R. Co., 48 Wis. 375, 4 N. W. 399.

36. National Horse Importing Co. *v.* Novak, 95 Iowa 596, 64 N. W. 616.

37. Algier *v.* The Maria, 14 Cal. 167; Chicago, etc., R. Co. *v.* Johnson, 27 Ill. App. 351; Timins *v.* Chicago, etc., R. Co., 72 Iowa 94, 33 N. W. 379; Herring *v.* Corder, 49 Mo. App. 378.

38. *California.*— Brown *v.* Central Pac. R. Co., (1887) 12 Pac. 512.

Dakota.— McCormack *v.* Phillips, 4 Dak. 506, 34 N. W. 39.

Illinois.— Ingalls *v.* Allen, 144 Ill. 535, 33 N. E. 203 [*affirming* 43 Ill. App. 624].

Indiana.— Jones *v.* Angell, 95 Ind. 376.

Iowa.— Mack *v.* Leedle, 78 Iowa 164, 42 N. W. 636.

New York.— Moss *v.* Priest, 1 Rob. 632, 19 Abb. Pr. 314.

Ohio.— Miller *v.* Southworth, 10 Ohio Cir. Ct. 572, 5 Ohio Cir. Dec. 101; Caldwell *v.* Brown, 9 Ohio Cir. Ct. 691, 6 Ohio Cir. Dec. 694.

West Virginia.— Carrico *v.* West Virginia Cent., etc., R. Co., 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50.

See 46 Cent. Dig. tit. "Trial," § 875 *et seq.*

39. Elgin, etc., R. Co. *v.* Raymond, 148 Ill. 241, 35 N. E. 729; Cook *v.* McNaughton, 128 Ind. 410, 24 N. E. 361, 28 N. E. 74; Varco *v.* Chicago, etc., R. Co., 30 Minn. 18, 13 N. W. 921; Manny *v.* Griswold, 21 Minn. 506.

40. *California.*— Algier *v.* The Maria, 14 Cal. 167.

Connecticut.— Freedman *v.* New York, etc., R. Co., 81 Conn. 601, 71 Atl. 901.

Indiana.— Deatty *v.* Shirley, 83 Ind. 218.

Iowa.— Timins *v.* Chicago, etc., R. Co., 72 Iowa 94, 33 N. W. 379.

Missouri.— Evans, etc., Fire Brick Co. *v.* St. Louis, etc., R. Co., 21 Mo. App. 648.

New York.— Jones *v.* Brooklyn L. Ins. Co., 61 N. Y. 79.

Oklahoma.— Stanard *v.* Sampson, 23 Okla. 13, 99 Pac. 796.

See 46 Cent. Dig. tit. "Trial," § 875.

Failure to sign answers.— Where no objection was made to the foreman's failure to sign answers to special interrogatories before the jury was dismissed, such objection could not thereafter be made on appeal. Perry, etc., Stone Co. *v.* Smith, 42 Ind. App. 413, 85 N. E. 784.

41. Crich *v.* Williamsburg City F. Ins. Co., 45 Minn. 441, 48 N. W. 198; Sherman *v.* Menominee River Lumber Co., 77 Wis. 14, 45 N. W. 1079.

42. Gale *v.* State Ins. Co., 33 Mo. App. 664.

43. Jones *v.* Brooklyn L. Ins. Co., 61 N. Y. 79.

44. **In actions for divorce** see DIVORCE, 14 Cyc. 703.

On appeal from justice of the peace see JUSTICES OF THE PEACE, 24 Cyc. 743.

Review of actions tried by court see APPEAL AND ERROR, 3 Cyc. 357 *et seq.*

Trial by justice of the peace without jury see JUSTICES OF THE PEACE, 24 Cyc. 585.

Voluntary dismissal after submission of cause to court see DISMISSAL AND NONSUIT, 14 Cyc. 402.

Waiver of jury trial see JURIES, 24 Cyc. 149 *et seq.*

45. East Tennessee, etc., R. Co. *v.* Adams, 14 Ky. L. Rep. 862; Vail *v.* Goodman, (N. J. Sup. 1902) 53 Atl. 692; Griffie *v.* McCoy, 8 W. Va. 201.

46. Fowler *v.* Towle, 49 N. H. 507.

tional powers in such case, except such as belong to the judge and the jury, in an ordinary case.[47] Where a question of fact is submitted to a jury, a party has a right to be heard by counsel in argument thereon, but, where the case is tried to the court, the matter of argument is within the sound discretion of the court.[48] It is error for the court to invite another judge, who had not heard the testimony, to sit with him during the argument of a case, and to consult with such judge in regard to the same.[49]

b. Submission of Cause on Agreed Statement of Facts or Stipulation — (I) *On Agreed Statement of Facts* — (A) *In General.* Parties may submit a case to the court, without a jury, on an agreed statement of facts,[50] and in such case, the parties are estopped to deny the truth, competency, or sufficiency of any admission contained therein.[51] As in a special verdict, the facts must be distinctly and expressly agreed upon and set forth as admitted;[52] and all questions as to the formal pleadings are understood to be waived,[53] unless directly reserved.[54] It is essential to a case stated that there be a pending action to support it; if there be no action there can be no judgment,[55] and to sustain judgment for plaintiff, the statement must show all the facts necessary to his recovery.[56] The decision is to be made upon the facts actually stated,[57] and in the absence of any provision to that effect,[58] no inferences of fact can be drawn,[59] unless, as matter of law, they

47. Fowler *v.* Towle, 49 N. H. 507.

48. Barnes *v.* Benham, 14 Okla. 582, 75 Pac. 1130; Godfrey *v.* Wright, 8 Okla. 151, 56 Pac. 1051, holding that where no controverted question of fact is involved, but only the construction and determination of the scope and effect of a plain, unambiguous statute are to be determined, it is not an abuse of discretion to refuse to hear argument of counsel.

49. Schwartz *v.* Stock, 26 Nev. 128, 65 Pac. 351.

50. Gage *v.* Gates, 62 Mo. 412; Munford *v.* Wilson, 15 Mo. 540.

What constitutes agreed statement of facts.— When the parties to an action agree to admit all the facts upon which they desire to have the case submitted to the court, they have agreed upon what the facts in the case are; and when such facts are communicated to the court for the purpose of having it draw conclusions of law therefrom, and to render judgment thereon, they become an agreed statement of facts. Noble *v.* Harter, 6 Kan. App. 823, 49 Pac. 794.

51. Hinkle *v.* Kerr, 148 Mo. 43, 49 S. W. 864.

52. Gage *v.* Gates, 62 Mo. 412; Williamsport *v.* Lycoming County, 34 Pa. Super. Ct. 221.

Contradiction of agreed statement by instrument annexed.— The provisions of a copy of an instrument annexed to an agreed statement of facts, which contradict the agreed facts, control. Hollywood *v.* Brockton First Parish, 192 Mass. 269, 78 N. E. 124.

53. Brettun *v.* Fox, 100 Mass. 234; Miner *v.* Coburn, 4 Allen (Mass.) 136; Scudder *v.* Worster, 11 Cush. (Mass.) 573; Ellsworth *v.* Brewer, 11 Pick. (Mass.) 316.

54. Com. *v.* Worcester, etc., R. Co., 124 Mass. 561; Scudder *v.* Worster, 11 Cush. (Mass.) 573.

55. Smith *v.* Eline, 4 Pa. Dist. 490; Bedford Lodge I. O. O. F., No. 202 *v.* Lentz, 20 Pa. Co. Ct. 269.

56. Appleman *v.* American Sporting Goods Co., 64 Mo. App. 71; South Missouri Land Co. *v.* Combs, 53 Mo. App. 298; Meiser *v.* Donehoo, 22 Pa. Co. Ct. 54.

The burden is upon the party seeking to recover to show his right of recovery from the facts as stipulated. State *v.* Hudson, 86 Mo. App. 501; South Missouri Land Co. *v.* Combs, 53 Mo. App. 298. Plaintiff cannot recover unless the matters stated entitle him to a judgment against defendant as a matter of law. Coffin *v.* Artesian Water Co., 193 Mass. 274, 79 N. E. 262. Where the agreed statement does not contain facts sufficient to warrant a finding for plaintiff, the judgment must of necessity be for defendant. Boston *v.* Brooks, 187 Mass. 286, 73 N. E. 206; Ozark Plateau Land Co. *v.* Hays, 105 Mo. 143, 16 S. W. 957; Gage *v.* Gates, 62 Mo. 412; Appleman *v.* American Sporting Goods Co., 64 Mo. App. 71; South Missouri Land Co. *v.* Combs, 53 Mo. App. 298. If it fails to ascertain any element of fact necessary to plaintiff's recovery, and yet the obvious inference from the facts stated be sufficient to deny judgment to defendant, it is the duty of the court to strike the case stated from the record and order the cause to be proceeded in before a jury as if the same had not been submitted. Klopp *v.* Bernville Live Stock Ins. Co., 1 Woodw. (Pa.) 445.

57. Koppel *v.* Massachusetts Brick Co., 192 Mass. 223, 78 N. E. 128.

58. Koppel *v.* Massachusetts Brick Co., 192 Mass. 223, 78 N. E. 128; Morse *v.* Fraternal Acc. Assoc., 190 Mass. 417, 77 N. E. 491, 112 Am. St. Rep. 337.

Where the right to show further facts is reserved, such further facts may be shown as well by inference from the facts admitted as by independent evidence. McKim *v.* Glover, 161 Mass. 418, 37 N. E. 443.

59. Coffin *v.* Artesian Water Co., 193 Mass. 274, 79 N. E. 262; Koppel *v.* Massachusetts Brick Co., 192 Mass. 223, 78 N. E. 128; Boston *v.* Brooks, 187 Mass. 286, 73 N. E. 206;

are necessary inferences.[60] The agreed statement of facts is equivalent to a special verdict,[61] and the proper judgment thereon is a mere conclusion of law,[62] the judgment to be pronounced precisely as if a jury had found a verdict in that form.[63]

(B) *Discharge or Vacation.* An agreed statement of facts is not conclusively binding on the parties.[64] The stipulation of facts made by the parties may, under some circumstances, in the exercise of a wise discretion, be vacated, and additional evidence be received.[65] Thus if a case is defective in setting forth the facts,[66] or if there has been any material mistake or omission in making up the same,[67] it may be discharged. If parties desire the case to be amended or discharged, or the facts to be varied, steps must be taken to effect these objects before the decision is announced.[68]

(II) *On Stipulation.* Issues of fact in civil cases may be tried and determined without a jury, whenever the parties or their attorneys of record file a stipulation in writing, consenting to that mode of trial.[69] Ordinarily, the judge will accede to the wishes of the parties where they waive a jury and try the issues of fact himself.[70] But he is not bound to do so, and may refuse without giving any reasons therefor.[71] A submission of an action to the court for trial clothes it with all the functions of a jury in determining the facts and rendering a judgment based thereon.[72] It is equivalent to a request by both parties for a direction of a verdict,[73] and constitutes an admission that only questions of law are involved,

Gallagher *v.* Hathaway Mfg. Corp., 169 Mass. 578, 48 N. E. 844; Collins *v.* Waltham, 151 Mass. 196, 24 N. E. 327; Schwarz *v.* Boston, 151 Mass. 226, 24 N. E. 41; Mayhew *v.* Durfee, 138 Mass. 584; Ozark Plateau Land Co. *v.* Hays, 105 Mo. 143, 16 S. W. 957; Williamsport *v.* Lycoming County, 34 Pa. Super. Ct. 221, holding that whatever is not so set forth will be taken not to exist.

60. Morse *v.* Fraternal Acc. Assoc., 190 Mass. 417, 77 N. E. 491, 112 Am. St. Rep. 337; Mayhew *v.* Durfee, 138 Mass. 584.

61. Hinkle *v.* Kerr, 148 Mo. 43, 49 S. W. 864; Ozark Plateau Land Co. *v.* Hays, 105 Mo. 143, 16 S. W. 957; Gage *v.* Gates, 62 Mo. 412; Munford *v.* Wilson, 15 Mo. 540; State *v.* Hudson, 86 Mo. App. 501; Jackson *v.* Kansas City, etc., R. Co., 66 Mo. App. 506; Cook *v.* Shrauder, 25 Pa. St. 312, holding that when it is lost or destroyed, if the parties cannot agree upon a new one, the cause goes to a jury as if none had ever been made.

62. Jackson *v.* Kansas City, etc., R. Co., 66 Mo. App. 506; Appleman *v.* American Sporting Goods Co., 64 Mo. App. 71. And see Bridgeport Wooden-Ware Mfg. Co. *v.* Louisville, etc., R. Co., 103 Tenn. 490, 53 S. W. 739, holding that it is not proper practice to submit a case to a jury where the parties have agreed upon the facts and amount of plaintiff's recovery should one be awarded. There remains no question, in such case, except one of law for the court.

A conclusion of law contradictory of the agreed statement is sufficient to vitiate the judgment. Birney *v.* Warren, 28 Mont. 64, 72 Pac. 293.

A demurrer to evidence is not proper practice when the parties have agreed upon the facts. In such cases, the only proper and correct practice is to invoke the judgment of the court as to the law upon the facts thus agreed upon. The office and function of a demurrer to evidence is to test the strength of plaintiff's case upon his own testimony, and not upon the testimony of both parties, nor upon facts agreed to by both parties. Bridgeport Wooden-Ware Mfg. Co. *v.* Louisville, etc., R. Co., 103 Tenn. 490, 53 S. W. 739.

63. Hinkle *v.* Kerr, 148 Mo. 43, 49 S. W. 864; Gage *v.* Gates, 62 Mo. 412; State *v.* Hudson, 86 Mo. App. 501.

64. Cook *v.* Shrauder, 25 Pa. St. 312.

65. Adams *v.* Hartzell, 18 N. D. 221, 119 N. W. 635.

66. Linnehan *v.* Matthews, 149 Mass. 29, 20 N. E. 453 (where a motion to discharge an agreed statement of facts was overruled, on the grounds that the material facts were not obscure and contradictory, as alleged, and that there was no competent evidence of fraud such as was set up); Cook *v.* Shrauder, 25 Pa. St. 312.

67. Gregory *v.* Pierce, 4 Metc. (Mass.) 478.

68. Goodrich *v.* Eastern R. Co., 38 N. H. 390.

69. Judson *v.* Bradford, 14 Fed. Cas. No. 7,564, 16 Off. Gaz. 171.

70. McCarthy *v.* Missouri R. Co., 15 Mo. App. 385.

71. Bullock *v.* Consumers' Lumber Co., (Cal. 1892) 31 Pac. 367; Doll *v.* Anderson, 27 Cal. 248; McCarthy *v.* Missouri Pac. R. Co., 15 Mo. App. 385.

72. E. T., etc., R. Co. *v.* Adams, 14 Ky. L. Rep. 862; Griffie *v.* McCoy, 8 W. Va. 201.

The decision of the court stands as the verdict of a jury, and is not reviewable on error or appeal, unless clearly contrary to the evidence. Jaques *v.* Horton, 76 Ala. 238.

The court may draw any inference from the evidence that a jury might have drawn. Henderson *v.* Barbee, 6 Blackf. (Ind.) 26; Dearing *v.* Rucker, 18 Gratt. (Va.) 426.

73. Williamsburgh Sav. Bank *v.* Solon, 65 Hun (N. Y.) 166, 20 N. Y. Suppl. 27 [*modi-*

and that there are no disputed or controverted questions of fact in the case.[74] The stipulation and pleadings are substitutes for findings of fact and if they support the judgment, it will not be disturbed.[75] Where by stipulation of parties all issues of law and fact are referred to the court, it is error for the court to pass on some of the issues of fact and refer others to a jury.[76]

c. Submission of Special Issues to Jury[77] — (I) *IN GENERAL.* In the cases triable by the court without a jury, the court may, on application of either party, or upon its own motion,[78] submit one or more questions of fact to the jury for its information.[79] Whether it will do so seems to be a question for the exercise of a sound discretion on its part, which exercise of discretion will not be reviewed on appeal, except in manifest cases of abuse.[80] The refusal of an application to have the issues of fact sent to a jury is not error,[81] although based to some extent on the condition of the jury calendar.[82]

(II) *FRAMING AND SETTLEMENT OF ISSUES.* Issues must be framed in a trial without, as with, a jury.[83] The issues to be tried should be plainly and distinctly stated,[84] by way of interrogatories which may be prepared by the court, or counsel under the direction of the court, or which may be submitted by counsel to the court.[85] When an issue is directed, the court should indicate who are to

fied on other grounds in 136 N. Y. 465, 32 N. E. 1058].

74. Golis *v.* His Creditors, 2 Mart. N. S. (La.) 108; Williamsburgh Sav. Bank *v.* Solon, 65 Hun (N. Y.) 166, 20 N. Y. Suppl. 27 [*modified* on other grounds in 136 N. Y. 463, 32 N. E. 1058].

75. Brown *v.* Brown, 12 S. D. 506, 81 N. W. 883.

76. Dumas *v.* Robinson, 40 Ga. 349. When, on the hearing of a motion involving several issues of fact, the parties agreed to submit all the issues, both of law and fact, to the judge, who thereupon enters upon the investigation and hears the evidence, it is error in the judge to pass judgment upon some of the issues of fact and refer the others to a jury. Dumas *v.* Robinson, *supra.*

77. **In actions:** Against personal representatives for accounting see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1175. For divorce see DIVORCE, 14 Cyc. 705 *et seq.* For infringement of patents see PATENTS, 30 Cyc. 1046. For injunctions see INJUNCTIONS, 22 Cyc. 955. For partition see PARTITION, 30 Cyc. 247. For specific performance see SPECIFIC PERFORMANCE, 36 Cyc. 788. To enforce mechanics' liens see MECHANICS' LIENS, 27 Cyc. 421. To foreclose mortgages see MORTGAGES, 27 Cyc. 1640. To quiet title see QUIETING TITLE, 32 Cyc. 1374. To set aside fraudulent conveyances see FRAUDULENT CONVEYANCES, 20 Cyc. 802.

In equitable actions see EQUITY, 16 Cyc. 413 *et seq.*

In mandamus proceedings see MANDAMUS, 26 Cyc. 482.

In proceedings for probate establishment or annulment of wills see WILLS.

78. Berkey *v.* Judd, 14 Minn. 394.

79. *Indiana.*— Reddick *v.* Keesling, 129 Ind. 128, 28 N. E. 316; Fayette County *v.* Chitwood, 8 Ind. 504.

Kansas.— Hunt *v.* Spencer, 20 Kan. 126.

Maine.— Gordon *v.* Wilkins, 20 Me. 134; Hatch *v.* Kimball, 16 Me. 146.

Minnesota.— Berkey *v.* Judd, 14 Minn. 394.

Missouri.— Cockrell *v.* McIntyre, 161 Mo. 59, 61 S. W. 648; McAllister *v.* Mullanphy, 3 Mo. 38, holding that to submit a case to a jury after it has been submitted to a court is not error, but at most only an irregularity.

New York.— Carr *v.* Carr, 52 N. Y. 251; Borowsky *v.* Gallin, 126 N. Y. App. Div. 364, 110 N. Y. Suppl. 818.

See 46 Cent. Dig. tit. "Trial," § 881.

The orphans' court has power to direct an issue for the trial of disputed facts by a jury. Yohe *v.* Barnet, 1 Binn. (Pa.) 358.

80. Pence *v.* Garrison, 93 Ind. 345; McCarthy *v.* Missouri R. Co., 15 Mo. App. 385; Borowsky *v.* Gallin, 126 N. Y. App. Div. 364, 110 N. Y. Suppl. 818.

The court should exercise discrimination, and only submit questions to a jury where it appears that needed information may be more certainly gained through a jury. Pence *v.* Garrison, 93 Ind. 345.

Cases held proper for exercise of discretionary power of court.— See Georgia Penitentiary Co. *v.* Nelms, 65 Ga. 67; Moore *v.* Jacobs, 182 Mass. 482, 65 N. E. 847; Mosher *v.* Davis, 41 N. Y. App. Div. 622, 58 N. Y. Suppl. 529; Matter of Leonard, 3 How. Pr. (N. Y.) 312.

81. Pence *v.* Garrison, 93 Ind. 345.

82. Borowsky *v.* Gallin, 126 N. Y. App. Div. 364, 110 N. Y. Suppl. 818.

83. Carson *v.* Earlywine, 10 Ind. 423.

84. Berkey *v.* Judd, 14 Minn. 394; Whitney *v.* Whitney, 76 Hun (N. Y.) 585, 28 N. Y. Suppl. 214; Burton *v.* Farmers' Bldg., etc., Assoc., 104 Tenn. 414, 58 S. W. 230.

An issue to "try the right to money" in court, without specifying any particular fact in dispute, is irregular. Russel *v.* Reed, 27 Pa. St. 166.

85. Pence *v.* Garrison, 93 Ind. 345.

Under Shannon Code Tenn. § 6285, pro-

be the parties plaintiff and defendant, and the cause put in form by filing a declaration, plea, and joinder in issue.[86]

(III) *INSTRUCTIONS.*[87] If, in an action triable by the court either with or without a jury, only certain specific questions of fact are required to be answered by the jury, subject to the power of the court to accept or reject the answers in whole or in part, it is not error for the court to refuse to instruct the jury.[88]

(IV) *VERDICT AND FINDINGS.* Where a trial by jury is not a constitutional or statutory right, but the court seeks the aid of the jury in the determination of one or more questions of fact, it may adopt the findings of the jury, modify them, or render a decision as though the trial had taken place without a jury.[89] The verdict at most is but evidence for the information of the court,[90] and while the finding of a jury upon controverted questions of fact will have great weight with the court,[91] it is in no wise bound thereby, for the responsibility of determining

viding that special issues shall be made up by the parties under the direction of the court, and setting forth briefly and clearly the true questions of fact to be tried, where both parties formulated issues to be submitted to the jury, some of which were immaterial, it was not error for the trial court, in making up the issues, to submit portions of those formulated by each party, omitting those deemed immaterial. Burton *v.* Farmers' Bldg., etc., Assoc., 104 Tenn. 414, 58 S. W. 230. A proper construction of this statute requires the court to see that proper and material issues are submitted, and such as are determinative of the question involved; and while, on the one hand, the court may not arbitrarily frame these issues without regard to the pleadings, yet it may at the same time, and it is its duty to, so mold them after they are submitted by the parties as to reach the merits of the controversy. Upon the one hand, parties cannot require the court to undertake the task of framing the issues; upon the other, they may not restrain it from so shaping them as in its sound judgment may be necessary to test the material and determinative questions of fact in the case. Burton *v.* Farmers' Bldg., etc., Assoc., 104 Tenn. 414, 58 S. W. 230.

If the issues are not prepared by counsel, it is the duty of the judge who tries the case to do so. Bowen *v.* Whitaker, 92 N. C. 367.

Time for application.—A motion to frame issues for trial by jury will be denied if not made within the time prescribed by the general rules of practice, unless some special reasons for the delay exist. New York L. Ins., etc., Co. *v.* Cuthbert, 41 N. Y. Suppl. 225, 25 N. Y. Civ. Proc. 377 [*affirmed* in 9 N. Y. App. Div. 634, 44 N. Y. Suppl. 1126]. Thus, although Gen. Rules Pr. No. 31 provide that notice of an application to frame issues must be made within ten days after issue is joined, the court has power to open a default and allow the application to be made after the ten days; but facts must be shown to excuse the neglect to apply within the prescribed time. Ellensohn *v.* Keyes, 6 N. Y. App. Div. 601, 39 N. Y. Suppl. 774.

Submission in writing.— N. C. Code, § 395, requiring issues to be reduced to writing for submission to the jury is held mandatory, and, if not complied with, a new trial should be granted. Bowen *v.* Whitaker, 92 N. C. 367. The old rules prescribed by the supreme court for the preparation of issues in the trial of causes were construed to be merely directory unless insisted upon in apt time. Wittkowski *v.* Watkins, 84 N. C. 456.

86. Muhlenberg *v.* Brock, 25 Pa. St. 517.

87. In equitable actions see EQUITY, 16 Cyc. 421.

88. Saint *v.* Guerrerio, 17 Colo. 448, 30 Pac. 335, 31 Am. St. Rep. 320.

89. Hornbrook *v.* Powell, 146 Ind. 39, 44 N. E. 802; Pence *v.* Garrison, 93 Ind. 345; McClave *v.* Gibb, 157 N. Y. 413, 52 N. E. 186; De Forest *v.* Walters, 153 N. Y. 229, 47 N. E. 294 [*affirming* 78 Hun 611, 28 N. Y. Suppl. 831]; Kelly *v.* Home Sav. Bank, 103 N. Y. App. Div. 141, 92 N. Y. Suppl. 578 [*reversing* 44 Misc. 102, 89 N. Y. Suppl. 776]; Jones *v.* Stewart, 7 N. Y. Civ. Proc. 164; Tobin *v.* O'Brieter, 16 Okla. 500, 85 Pac. 1121.

Analogy to chancery practice.— Findings of a jury upon special issues submitted to them by the court are not to be regarded in the light of a verdict, but should be treated as in chancery practice. Adkins *v.* Ware, 35 Tex. 577.

Sufficiency of verdict.—A verdict, on exceptions to an auditor's report submitted by the court to a jury, that "we, the jury, sustain the auditor in regard to exceptions 7, 8, 9, 11, and 14," is a compliance with the requirements that the jury shall find on the exceptions *seriatim.* Cutliff *v.* Boyd, 72 Ga. 302.

Certification of verdict.— Where the issues in a case which has been placed on the special term calendar and notices for trial are sent to the trial term, to be tried as provided by Code Civ. Proc. § 970, a verdict rendered on the issues, whether framed by the trial court or by the special term, must be certified by the clerk of the trial term to the special term. Southack *v.* Central Trust Co., 62 N. Y. App. Div. 260, 70 N. Y. Suppl. 1122.

90. McClave *v.* Gibb, 157 N. Y. 413, 52 N. E. 186; Kelly *v.* Home Sav. Bank, 103 N. Y. App. Div. 141, 92 N. Y. Suppl. 578.

91. Reddick *v.* Keesling, 129 Ind. 128, 28 N. E. 316.

the facts rests upon the trial judge.[92] Where only part of the material issues made by the pleadings are submitted to a jury, the court should, if requested, hear testimony and make findings as to the remaining issues.[93]

2. Reception of Evidence[94] — a. In General. In trials by the court, the same rigid rules as to the admission of evidence should not be enforced as in trials before a jury.[95] In such trials, it is usually the better practice to admit all evidence not clearly inadmissible,[96] even though the court may afterward exclude it,[97] to the end that any difference of opinion between the trial and appellate courts regarding it may not necessitate the delay and expense of a new trial. In recognition of this principle, it is better for the trial court, in cases where the evidence offered is of doubtful competency, to admit the evidence, as the reviewing court could then make a final disposition of the case, whereas, if competent evidence be excluded, it would necessitate remanding the case for a further hearing.[98]

b. Order of Proof — (I) *In General.* The court trying a cause without a jury has a broad discretion in regard to the order of admitting testimony.[99] It may permit the introduction of additional evidence after the close of the evidence,[1] or after argument,[2] or may permit a witness to be recalled after the trial has been adjourned if an opportunity is given to rebut his testimony.[3]

(II) *Reception After Submission of Cause.* In trials by the court, it is discretionary with the court to reopen the cause after it has been submitted

92. Reddick *v.* Keesling, 129 Ind. 128, 28 N. E. 316; McClave *v.* Gibb, 157 N. Y. 413, 52 N. E. 186.

93. Sanders *v.* Simcich, 65 Cal. 50, 2 Pac. 741.

94. **In actions tried by jury** see *supra*, V.

In equity see Equity, 16 Cyc. 411 *et seq.*

95. Shelley *v.* Wescott, 23 App. Cas. (D. C.) 135; Small *v.* Harrington, 10 Ida. 499, 79 Pac. 461; Moffitt *v.* Hereford, 132 Mo. 513, 34 S. W. 252; Trorlicht, etc., Carpet Co. *v.* Hatton, 55 Mo. App. 320; Hellman *v.* Bick, 55 Mo. App. 168; Smith *v.* Hughes, 23 Tex. 248.

The court may receive technically inadmissible evidence not pertinent to the issues to aid it in exercising its discretion. Ferguson *v.* Stamford, 60 Conn. 432, 22 Atl. 782.

The fact that a deed offered in evidence was not read in evidence does not prevent the court from acting thereon. Webb *v.* Archibald, (Mo. 1894) 28 S. W. 80.

96. Powell *v.* Adams, 98 Mo. 598, 12 S. W. 295; Degginger *v.* Martin, 48 Wash. 1, 92 Pac. 674.

97. Powell *v.* Adams, 98 Mo. 598, 12 S. W. 295.

98. Powell *v.* Adams, 98 Mo. 598, 12 S. W. 295. While in a trial to the court all evidence clearly incompetent and immaterial should be rejected, a liberal practice should be adopted in admitting evidence, so that the supreme court, in case of an appeal, will on a trial *de novo* have all material facts before it for consideration, and thus avoid the necessity of remanding the cause for the admission of material evidence erroneously rejected. Degginger *v.* Martin, 48 Wash. 1, 92 Pac. 674; Hastings *v.* Anacortes Packing Co., 29 Wash. 224, 69 Pac. 776.

In North Dakota, in trials under section 5630 of the revised codes, where an appeal is taken, all evidence offered must be brought upon the record in the district court, in order that it may furnish the basis for a decision in the appellate court. If, against objection, improper evidence is introduced below, the error can be corrected by excluding such evidence in considering the record. Otto Gas Engine Works *v.* Knerr, 7 N. D. 195, 73 N. W. 87.

99. Taylor *v.* Cayce, 97 Mo. 242, 10 S. W. 832; Gage *v.* Averill, 57 Mo. App. 111; Hopkinton *v.* Waite, 6 R. I. 374 (holding that it is no improper exercise of that discretion to permit evidence to be offered which was necessary to plaintiff's case, and which he had prepared, but which he failed to offer in the proper stage of cause, only because he understood that the fact proposed to be proved was admitted by the other party); Wright *v.* Rambo, 21 Gratt. (Va.) 158.

Illustrations.— The admission in the course of a trial of evidence whose relevancy depends upon facts alleged but not proved is not necessarily erroneous (Gage *v.* Averill, 57 Mo. App. 111); but, when the relevancy of a transaction is dependent upon the existence of an agency or notice, the safer course is not to receive evidence of it until such agency or notice has been first established (Gage *v.* Averill, *supra*). And evidence affecting the competency of a witness should be heard before the witness is examined. Arnold *v.* Chesebrough, 30 Fed. 145.

1. Taylor *v.* Cayce, 97 Mo. 242, 10 S. W. 832.

2. Meyers *v.* Maverick, (Tex. Civ. App. 1894) 28 S. W. 716; Winn *v.* Itzel, 125 Wis. 19, 103 N. W. 220.

3. Reed *v.* Liston, 8 Tex. Civ. App. 118, 27 S. W. 913.

to permit the introduction of additional evidence,[4] unless it appears that it subjects one of the parties to surprise or prejudice;[5] and unless the discretion has been harshly exercised, an appellate court will not interfere.[6] But the court cannot thus reopen the case and let in additional testimony without notice to the opposite party,[7] so as to give him an opportunity to meet the new testimony,[8] and to be present and cross-examine witnesses.[9]

c. Effect of Error in Admission of Evidence — (i) *In General.* In a suit in equity,[10] or in any case tried by the court without a jury,[11] error in the admission of evidence is not a ground for reversal, if there is sufficient legal evidence to

4. *California.*— Haines *v.* Young, 132 Cal. 512, 64 Pac. 1079; Lee *v.* Murphy, 119 Cal. 364, 51 Pac. 549, 955; Miller *v.* Sharp, 49 Cal. 233.

Indiana.— Frederick *v.* Devol, 15 Ind. 357.

Iowa.— Burke *v.* Burke, 142 Iowa 206, 119 N. W. 129; Sickles *v.* Dallas Center Bank, 81 Iowa 408, 46 N. W. 1089; Pitts *v.* Lewis, 81 Iowa 51, 46 N. W. 739.

Kansas.— West *v.* Cameron, 39 Kan. 736, 18 Pac. 894.

Louisiana.— Monroe Grocer Co. *v.* Perdue, 123 La. 375, 48 So. 1002.

Maine.— Burnham *v.* Howe, 23 Me. 489.

Michigan.— Lee *v.* Hardgrave, 3 Mich. 77.

Missouri.— Taylor *v.* Cayce, 97 Mo. 242, 10 S. W. 832.

Nebraska.— Cochran *v.* Moriarty, 78 Nebr. 669, 111 N. W. 588.

New York.— Butler *v.* Clark, 66 Hun 444, 21 N. Y. Suppl. 415, 29 Abb. N. Cas. 413 [*affirmed* in 142 N. Y. 636, 37 N. E. 566].

Wisconsin.— Emerson *v.* McDonnell, 129 Wis. 67, 107 N. W. 1037.

See 46 Cent. Dig. tit. "Trial," § 889.

Until the court has made its findings of fact and conclusions of law, it is within its discretion to open the case for further hearing. Chicago, etc., R. Co. *v.* Fifth Nat. Bank, 26 Ind. App. 600, 59 N. E. 43.

5. Gleason *v.* Chicago, etc., R. Co., (Iowa 1889) 43 N. W. 517; Van Studdiford *v.* Hazlett, 56 Mo. 322.

6. *California.*— Haines *v.* Young, 132 Cal. 512, 64 Pac. 1079.

Indiana.— Chicago, etc., R. Co. *v.* Fifth Nat. Bank, 26 Ind. App. 600, 59 N. E. 43.

Iowa.— *In re* Cummings, 120 Iowa 421, 94 N. W. 1117.

Missouri.— Houston *v.* Thompson, 87 Mo. App. 63.

New York.— Brookman *v.* Milbank, 50 N. Y. 378.

Wisconsin.— Emerson *v.* McDonnell, 129 Wis. 67, 107 N. W. 1037.

Refusal to reopen case held proper exercise of discretion.— Davis *v.* Lamb, (Cal. 1893) 35 Pac. 305; Byington *v.* Moore, 62 Iowa 470, 17 N. W. 644; Commercial Bank *v.* Brinkerhoff, 110 Mo. App. 429, 85 S. W. 121; McCloud-Love Live Stock Commission Co. *v.* Doud, 56 Nebr. 270, 76 N. W. 569.

Cumulative evidence.—A motion to reopen a case for further evidence is properly refused, where the alleged new evidence is merely cumulative. Kataoka *v.* Hanselman, 150 Cal. 673, 89 Pac. 1082; *In re* Walker, 148 Cal. 162, 82 Pac. 770.

7. Stein *v.* Roeller, 66 Minn. 283, 68 N. W. 1087, holding that, under Gen. St. (1894) § 5213, notice in writing was necessary.

8. Burke *v.* Burke, 142 Iowa 206, 119 N. W. 129.

9. Hurd *v.* Lill, 26 Ill. 496.

Evidence called for ex officio by the judge, after the case is submitted and under advisement, is unauthorized, and will be disregarded on appeal. Sowers *v.* Shiff, 15 La. Ann. 300.

10. *Illinois.*— Way *v.* Harriman, 126 Ill. 132, 18 N. E. 206.

Iowa.— Hasner *v.* Patterson, 70 Iowa 681, 28 N. W. 493.

Missouri.— Kleimann *v.* Gieselmann, 114 Mo. 437, 21 S. W. 796, 35 Am. St. Rep. 761.

Nebraska.— Blazer *v.* Rogner, 45 Nebr. 588, 63 N. W. 846.

New York.— *In re* New York Cent., etc., R. Co., 90 N. Y. 342; Prime *v.* Yonkers, 131 N. Y. App. Div. 110, 115 N. Y. Suppl. 305 [*affirmed* in 199 N. Y. 542, 93 N. E. 1129]; Matter of McGee, 5 N. Y. App. Div. 527, 38 N. Y. Suppl. 1062; McSorley *v.* Hughes, 58 Hun 360, 12 N. Y. Suppl. 179 [*affirmed* in 129 N. Y. 659, 30 N. E. 65]; McCarthy *v.* Gallagher, 4 Misc. 188, 23 N. Y. Suppl. 884.

11. *Alabama.*— Little *v.* Smith, 119 Ala. 461, 24 So. 427.

Arizona.— California Development Co. *v.* Yuma Valley Union Land, etc., Co., 9 Ariz. 366, 84 Pac. 88; Abernathy *v.* Reynolds, 8 Ariz. 173, 71 Pac. 914.

Arkansas.— Covington *v.* St. Francis County, 77 Ark. 258, 91 S. W. 186.

California.— Falk *v.* Wittram, 120 Cal. 479, 52 Pac. 707, 65 Am. St. Rep. 184; Union Transp. Co. *v.* Bassett, (1896) 46 Pac. 907.

Colorado.— Crocker *v.* Burns, 13 Colo. App. 54, 56 Pac. 199; Washburn *v.* Williams, 10 Colo. App. 153, 50 Pac. 223; Standard Acc. Ins. Co. *v.* Friedenthal, 1 Colo. App. 5, 27 Pac. 88.

Georgia.— Baker *v.* State, 90 Ga. 153, 15 S. E. 788.

Illinois.— Illinois Steel Co. *v.* Preble Mach. Works Co., 219 Ill. 403, 76 N. E. 574 [*affirming* 116 Ill. App. 268]; Podolski *v.* Stone, 186 Ill. 540, 58 N. E. 340 [*affirming* 86 Ill. App. 62]; Coffey *v.* Coffey, 179 Ill. 283, 53 N. E. 590.

Iowa.— Bowman *v.* Sedgwick, (1900) 82 N. W. 491.

Kansas.— Hastings *v.* Roll, (1901) 64 Pac. 1114 [*affirming* (App. 1899) 57 Pac. 1048]; Reagle *v.* Dennis, 8 Kan. App. 151, 55 Pac. 469.

Kentucky.— Lambert *v.* Lambert, 63 S. W. 614, 23 Ky. L. Rep. 592.

support the judgment or finding,[12] since it will be presumed, if nothing appears

Michigan.— Reed *v.* Whipple, 140 Mich. 7, 103 N. W. 548.

Minnesota.— Johnson *v.* Stillwater, 62 Minn. 60, 64 N. W. 95.

Missouri.— Williams *v.* Stroub, 168 Mo. 346, 67 S. W. 875; Southern Commercial Sav. Bank *v.* Slattery, 166 Mo. 620, 66 S. W. 1066; Kostuba *v.* Miller, 137 Mo. 161, 38 S. W. 946; Taylor *v.* Cayce, 97 Mo. 242, 10 S. W. 832; Waters *v.* Boone County School Dist. No. 4, 59 Mo. App. 580.

Montana.— Lane *v.* Bailey, 29 Mont. 548, 75 Pac. 191; King *v.* Pony Gold Min. Co., 28 Mont. 74, 72 Pac. 309.

Nebraska.— Flanagan *v.* Mathiesen, 70 Nebr. 223, 97 N. W. 287; Sheibley *v.* Dixon County, 61 Nebr. 409, 85 N. W. 399; Stover *v.* Hough, 47 Nebr. 789, 66 N. W. 825; Scroggin *v.* Johnston, 45 Nebr. 714, 64 N. W. 236; Pearce *v.* McKay, 45 Nebr. 296, 63 N. W. 851; Tolerton, etc., Co. *v.* McClure, 45 Nebr. 368, 63 N. W. 791; Sharmer *v.* McIntosh, 43 Nebr. 509, 61 N. W. 727; Whipple *v.* Fowler, 41 Nebr. 675, 60 N. W. 15; Liverpool, etc., Ins. Co. *v.* Buckstaff, 38 Nebr. 144, 56 N. W. 695, 41 Am. St. Rep. 724; Stabler *v.* Gund, 35 Nebr. 648, 53 N. W. 570; Ward *v.* Parlin, 30 Nebr. 376, 46 N. W. 529; Bilby *v.* Townsend, 29 Nebr. 220, 45 N. W. 619; Willard *v.* Foster, 24 Nebr. 205, 38 N. W. 786; Metcalf *v.* Bockoven, 1 Nebr. (Unoff.) 822, 96 N. W. 406.

New York.— Olmstead *v.* Rawson, 188 N. Y. 517, 81 N. E. 456 [*modifying* 110 N. Y. App. Div. 809, 97 N. Y. Suppl. 239]; Newman *v.* Lee, 87 N. Y. App. Div. 116, 84 N. Y. Suppl. 106; Waldie *v.* Brooklyn El. R. Co., 89 Hun 608, 35 N. Y. Suppl. 40 [*affirmed* in 158 N. Y. 679, 52 N. E. 1126].

Ohio.— Terry *v.* State, 24 Ohio Cir. Ct. 111.

Oklahoma.— Tobin *v.* O'Brieter, 16 Okla. 500, 85 Pac. 1121.

Pennsylvania.— Huntley *v.* Goodyear, 182 Pa. St. 613, 38 Atl. 507; Roberts' Appeal, 126 Pa. St. 102, 17 Atl. 538.

South Dakota.— *In re* McClellan, 21 S. D. 209, 111 N. W. 540, 20 S. D. 498, 107 N. W. 681; Bowdle *v.* Jencks, 18 S. D. 80, 99 N. W. 98.

Texas.— Dreeben *v.* McKinney First Nat. Bank, (1907) 99 S. W. 850 [*reversing* (Civ. App. 1906) 93 S. W. 510; Jamison *v.* Dooley, 98 Tex. 206, 82 S. W. 780 [*affirming* 34 Tex. Civ. App. 428, 79 S. W. 91]; Smith *v.* Lee, 82 Tex. 124, 17 S. W. 598; Andrews *v.* Key, 77 Tex. 35, 13 S. W. 640; Haley *v.* Johnson, (Civ. App. 1894) 28 S. W. 382; Knippa *v.* Umlang, (Civ. App. 1894) 27 S. W. 915; Hill *v.* Smith, 6 Tex. Civ. App. 312, 25 S. W. 1079; Brown *v.* Lazarus, 5 Tex. Civ. App. 81, 25 S. W. 71.

Utah.— Victoria Copper Min. Co. *v.* Haws, 7 Utah 515, 27 Pac. 695 [*affirmed* in 160 U. S. 303, 16 S. Ct. 282, 40 L. ed. 436].

Washington.— Ekstrand *v.* Barth, 41 Wash. 321, 83 Pac. 305; Rohrer *v.* Snyder, 29 Wash. 199, 69 Pac. 748.

West Virginia.— State *v.* Thacker Coal, etc., Co., 49 W. Va. 140, 38 S. E. 539; Wells-Stone Mercantile Co. *v.* Truax, 44 W. Va. 531, 29 S. E. 1006; State *v.* Seabright, 15 W. Va. 590; Nutter *v.* Sydenstricker, 11 W. Va. 535.

Wisconsin.— Duncan *v.* Duncan, 111 Wis. 75, 86 N. W. 562; Merriman *v.* McCormack Harvesting Mach. Co., 101 Wis. 619, 77 N. W. 880; Frisk *v.* Reigelman, 75 Wis. 499, 43 N. W. 1117, 44 N. W. 766, 17 Am. St. Rep. 198; Eureka Steam-Heating Co. *v.* Sloteman, 69 Wis. 398, 34 N. W. 387.

United States.— U. S. *v.* King, 7 How. 833, 12 L. ed. 934; Streeter *v.* Chicago Sanitary Dist., 133 Fed. 124, 66 C. C. A. 190; West *v.* East Coast Cedar Co., 113 Fed. 737, 51 C. C. A. 411 [*affirming* 110 Fed. 725].

See 46 Cent. Dig. tit. "Trial," § 892.

12. *Alabama.*— Wood *v.* Potts, 140 Ala. 425, 37 So. 253; Smith *v.* Elrod, 122 Ala. 269, 24 So. 994; Scarbrough *v.* Borders, 115 Ala. 436, 22 So. 180; Ramey *v.* W. O. Peeples Grocery Co., 108 Ala. 476, 18 So. 805; Holmes *v.* State, 108 Ala. 24, 18 So. 529; Nelms *v.* Kennon, 88 Ala. 329, 6 So. 744. This rule seems to be repudiated in several cases where it is held that the admission of illegal evidence in a case tried to the court without a jury is reversible error unless the legal evidence is sufficient to support the judgment, and is also without conflict. Lallande *v.* Brown, 121 Ala. 513, 25 So. 997; Talladega First Nat. Bank *v.* Chaffin, 118 Ala. 246, 24 So. 80; Harwood *v.* Harper, 54 Ala. 659.

Arizona.— Boston, etc., Smelting, etc., Co. *v.* Lewis, (1889) 73 Pac. 448.

Arkansas.— Waters *v.* Merit Pants Co., 76 Ark. 252, 88 S. W. 879.

California.— Whitney *v.* Buckman, 13 Cal. 536.

Colorado.— Casserleigh *v.* Green, 28 Colo. 392, 65 Pac. 32 [*affirming* 12 Colo. App. 515, 56 Pac. 189]; Hunter *v.* Guth, 19 Colo. App. 135, 73 Pac. 1089; Bartleson *v.* Clark, 8 Colo. App. 234, 45 Pac. 509; Markell *v.* Matthews, 3 Colo. App. 49, 32 Pac. 176; Standard Acc. Ins. Co. *v.* Friedenthal, 1 Colo. App. 5, 27 Pac. 88.

Illinois.— Grand Pac. Hotel Co. *v.* Pinkerton, 217 Ill. 61, 75 N. E. 427 [*affirming* 118 Ill. App. 89]; Kreiling *v.* Nortrup, 215 Ill. 195, 74 N. E. 123 [*affirming* 116 Ill. App. 448]; Dowie *v.* Driscoll, 203 Ill. 480, 68 N. E. 56; A. B. Dick Co. *v.* Sherwood Letter File Co., 157 Ill. 325, 42 N. E. 440; Pardridge *v.* Ryan, 134 Ill. 247, 25 N. E. 627; Richardson *v.* Eveland, 126 Ill. 37, 18 N. E. 308, 1 L. R. A. 203; Hicks *v.* Stevens, 121 Ill. 186, 11 N. E. 241; Jefferson *v.* Jefferson, 96 Ill. 551; Merchants' Despatch Transp. Co. *v.* Joesting, 89 Ill. 152; Schroeder *v.* Harvey, 75 Ill. 638; Foltz *v.* People, 118 Ill. App. 557; Kittler *v.* Studabaker, 113 Ill. App. 342, 352.

Indiana.— Adams *v.* Dale, 38 Ind. 105; Bowers *v.* Headen, 4 Ind. 318.

Iowa.— Grumme *v.* Firminich Mfg. Co., 110 Iowa 505, 81 N. W. 791; Jaffray *v.* Thompson, 65 Iowa 323, 21 N. W. 659.

to the contrary, that the judge disregarded such evidence and tried the case on proper testimony only;[13] and especially is this true where the judge states

Kansas.— Robbins *v.* Sackett, 23 Kan. 301.
Kentucky.— Parker *v.* Catron, 120 Ky. 145, 85 S. W. 740, 27 Ky. L. Rep. 536, 117 Am. St. Rep. 575; Andrews *v.* Hayden, 88 Ky. 455, 11 S. W. 428, 10 Ky. L. Rep. 1049; Curd *v.* Lewis, 1 Dana 351.
Louisiana.— Taylor *v.* Felps, 10 La. 114.
Michigan.— Bird *v.* Pope, 73 Mich. 483, 41 N. W. 514; Michie *v.* Ellair, 54 Mich. 518, 20 N. W. 564.
Minnesota.— Lloyd *v.* Simons, 97 Minn. 315, 105 N. W. 902; Cochran *v.* Cochran, 96 Minn. 523, 105 N. W. 183.
Mississippi.— Rule *v.* Rule, (1906) 39 So. 782.
Missouri.— Dobbins *v.* Humphreys, 171 Mo. 198, 70 S. W. 815; Crook *v.* Tull, 111 Mo. 283, 20 S. W. 8; Laumeier *v.* Gehner, 110 Mo. 122, 19 S. W. 82; Wald *v.* Wald, 119 Mo. App. 341, 96 S. W. 302.
Montana.— Way *v.* Sherman, 30 Mont. 410, 76 Pac. 942; Cobban *v.* Hecklen, 27 Mont. 245, 70 Pac. 805.
Nebraska.— Byrnes *v.* Eley, 70 Nebr. 283, 97 N. W. 298; Bowman *v.* Wright, 65 Nebr. 661, 91 N. W. 580, 92 N. W. 580; Monroe *v.* Reid, 46 Nebr. 316, 64 N. W. 983; Bilby *v.* Townsend, 29 Nebr. 220, 45 N. W. 619; Richardson *v.* Doty, 25 Nebr. 420, 41 N. W. 282; McConahey *v.* McConahey, 21 Nebr. 463, 32 N. W. 300; O'Brien *v.* Kluever, 4 Nebr. (Unoff.) 571, 95 N. W. 595.
New York.—Whitman *v.* Foley, 125 N. Y. 651, 26 N. E. 725; Fox *v.* Erbe, 100 N. Y. App. Div. 343, 91 N. Y. Suppl. 832 [*affirmed* in 184 N. Y. 542, 76 N. E. 1095]; Hey *v.* Collman, 78 N. Y. App. Div. 584, 79 N. Y. Suppl. 778 [*affirmed* in 180 N. Y. 560, 73 N. E. 1125]; Colwell *v.* Colwell, 14 N. Y. App. Div. 80, 43 N. Y. Suppl. 439 (holding, however, that the rule that, where incompetent evidence is before the court, the error may be disregarded if there is ample evidence to sustain the finding does not apply where the errors in the admission and exclusion of evidence are so numerous and critical that they possibly affected the result of the case); Lowery *v.* Steward, 3 Bosw. 505 [*affirmed* in 25 N. Y. 239, 82 Am. Dec. 346]; Belmont *v.* Coleman, 1 Bosw. 188 [*affirmed* in 21 N. Y. 96]; Quincey *v.* Young, 5 Daly 327 [*modified* on other grounds in 63 N. Y. 370]. But see Jefferson *v.* New York El. R. Co., 132 N. Y. 483, 30 N. E. 981, holding that error is not rendered harmless by the fact that there is other evidence in the case sufficient to support the judgment, where such other evidence is not sufficient to compel such judgment.
North Dakota.— State *v.* Harris, 14 N. D. 501, 105 N. W. 621.
Pennsylvania.— Robbins *v.* Farwell, 193 Pa. St. 37, 44 Atl. 260; Harbison's Estate, 145 Pa. St. 456, 22 Atl. 991.
South Dakota.— Godfrey *v.* Faust, 20 S. D. 203, 105 N. W. 460, 18 S. D. 567, 101 N. W. 718; Kirby *v.* Citizens' Tel. Co., 20 S. D. 154, 105 N. W. 95.
Tennessee.— Montague *v.* Thomason, 91 Tenn. 168, 18 S. W. 264; Fogg *v.* Gibbs, 8 Baxt. 464.
Texas.— Chicago, etc., R. Co. *v.* Halsell, 98 Tex. 244, 83 S. W. 15 [*affirming* 35 Tex. Civ. App. 126, 80 S. W. 140]; International, etc., R. Co. *v.* Startz, 97 Tex. 167, 77 S. W. 1 [*reversing* (Civ. App. 1903) 74 S. W. 1118]; Smith *v.* Lee, 82 Tex. 124, 17 S. W. 598; Melton *v.* Cobb, 21 Tex. 539; Lutcher *v.* Allen, 43 Tex. Civ. App. 102, 95 S. W. 572; New York, etc., Land Co. *v.* Hyland, 8 Tex. Civ. App. 601, 28 S. W. 206; Evans *v.* Martin, 6 Tex. Civ. App. 331, 25 S. W. 688.
Utah.— Schettler *v.* Lynch, 23 Utah 305, 64 Pac. 955; Wells *v.* Davis, 22 Utah 322, 62 Pac. 3; Victoria Copper Min. Co. *v.* Haws, 7 Utah 515, 27 Pac. 695 [*affirmed* in 160 U. S. 303, 16 S. Ct. 282, 40 L. ed. 436].
Vermont.— Abbott *v.* Cobb, 17 Vt. 593.
Virginia.— Steptoe *v.* Pollard, 30 Gratt. 689.
Washington.— Davies *v.* Cheadle, 31 Wash. 168, 71 Pac. 728; Hastings *v.* Anacortes Packing Co., 29 Wash. 224, 69 Pac. 776.
West Virginia.— Poling *v.* Condon-Lane Boom, etc., Co., 55 W. Va. 529, 47 S. E. 279; State *v.* Denoon, 34 W. Va. 139, 11 S. E. 1003; Kimmel *v.* Shroyer, 28 W. Va. 505; Abrahams *v.* Swann, 18 W. Va. 274, 41 Am. Rep. 692.
Wisconsin.— Currie *v.* Michie, 123 Wis. 120, 101 N. W. 370; Wolf *v.* Theresa Village Mut. F. Ins. Co., 115 Wis. 402, 91 N. W. 1014; Hooker *v.* Brandon, 75 Wis. 8, 43 N. W. 741; Leary *v.* Leary, 68 Wis. 662, 32 N. W. 623; Dumke *v.* Puhlman, 62 Wis. 18, 21 N. W. 820; Sutton *v.* Hasey, 58 Wis. 556, 17 N. W. 416.
United States.— Mammoth Min. Co. *v.* Salt Lake Foundry, etc., Co., 151 U. S. 447, 14 S. Ct. 384, 38 L. ed. 229; Hinckley *v.* Pittsburgh Bessemer Steel Co., 121 U. S. 264, 7 S. Ct. 875, 30 L. ed. 967; Migeon *v.* Montana Cent. R. Co., 77 Fed. 249, 23 C. C. A. 156; Miller *v.* Houston City St. R. Co., 55 Fed. 366, 5 C. C. A. 134.

See 46 Cent. Dig. tit. "Trial," § 895.

In determining whether the judgment was based on sufficient evidence, the appellate court will merely exclude from consideration improper evidence erroneously admitted. Ratliffe *v.* Wayne County Ct., 36 W. Va. 202, 14 S. E. 1004.

The case must be clearly and indisputably made out by the legal evidence, or the admission of incompetent evidence will necessitate a reversal. Allen *v.* Way, 7 Barb. (N. Y.) 585, 3 Code Rep. 243; Baugh *v.* Geiselman, 23 Tex. Civ. App. 143, 55 S. W. 615.

13. *Alabama.*— Nelms *v.* Kennon, 88 Ala. 329, 6 So. 744.
Arkansas.— Niagara F. Ins. Co. *v.* Boon, 76 Ark. 153, 88 S. W. 915.
Colorado.— Standard Acc. Ins. Co. *v.* Friedenthal, 1 Colo. App. 5, 27 Pac. 88.

or the findings show that he did not consider it in arriving at his decision.[14] It is only when the competent evidence fails to support the findings of fact made by the trial court,[15] or where it appears that the court was influenced by the improper

Illinois.— Springer *v.* Borden, 210 Ill. 518, 71 N. E. 345; Dowie *v.* Driscoll, 203 Ill. 480, 68 N. E. 56; Hicks *v.* Stevens, 121 Ill. 186, 11 N. E. 241; Merchants' Despatch Transp. Co. *v.* Joesting, 89 Ill. 152; Kittler *v.* Studabaker, 113 Ill. App. 342, 352.

Iowa.— Foster *v.* Hinson, 76 Iowa 714, 39 N. W. 682; Hunt *v.* Higman, 70 Iowa 406, 30 N. W. 769.

Nebraska.— Bilby *v.* Townsend, 29 Nebr. 220, 45 N. W. 619.

New Mexico.— Lynch *v.* Grayson, 5 N. M. 487, 25 Pac. 992 [*affirmed* in 163 U. S. 468, 16 S. Ct. 1064, 41 L. ed. 230].

South Carolina.— Ross *v.* Jones, 58 S. C. 1, 35 S. E. 402, 36 S. E. 1.

Texas.— Evans *v.* Martin, 6 Tex. Civ. App. 331, 25 S. W. 688.

Utah.— Victoria Copper Min. Co. *v.* Haws, 7 Utah 515, 27 Pac. 695 [*affirmed* in 160 U. S. 303, 16 S. Ct. 282, 40 L. ed. 436]; Salt Lake Foundry, etc., Co. *v.* Mammoth Min. Co., 6 Utah 351, 23 Pac. 760 [*affirmed* in 151 U. S. 447, 14 S. Ct. 384, 38 L. ed. 229].

Virginia.— Engleman *v.* Engleman, 97 Va. 487, 34 S. E. 50.

West Virginia.— Poling *v.* Condon-Lane Boom, etc., Co., 55 W. Va. 529, 47 S. E. 279.

But see *In re* James, 124 Cal. 653, 57 Pac. 578, 1008, holding that it will not be presumed that the admission of improper evidence, duly objected to, tending on its face in any degree to influence the findings of fact of the court below did not have that effect.

Even if no ruling against it is made, the court will be presumed to have acted upon the competent testimony in the record. Coffey *v.* Coffey, 179 Ill. 283, 53 N. E. 590; Hunt *v.* Higman, 70 Iowa 406, 30 N. W. 769; Evans *v.* Martin, 6 Tex. Civ. App. 331, 25 S. W. 688.

But if the court expressly rules that the evidence is admissible, it will be presumed, as a matter of course, that it was considered, and weight given to it in the determination of the case. Hunt *v.* Higman, 70 Iowa 406, 30 N. W. 769.

A letter admissible in evidence for a single purpose, and received in an action tried to the court without a jury, will be presumed to have been considered for that purpose only. Dunlap *v.* Hopkins, 95 Fed. 231, 37 C. C. A. 52.

14. *California.*—Tuffree *v.* Stearns Ranchos Co., (1898) 54 Pac. 826.

Georgia.— Lampkin *v.* Garwood, 122 Ga. 407, 50 S. E. 171.

Illinois.— Chicago First Nat. Bank *v.* Pease, 168 Ill. 40, 48 N. E. 160 [*affirming* 68 Ill. App. 562].

Indiana.— McGlennan *v.* Margowski, 90 Ind. 150; Adams *v.* Dale, 38 Ind. 105.

Iowa.— Amsden *v.* Dubuque, etc., R. Co., 13 Iowa 132.

Maryland.— Williams *v.* Higgins, 30 Md. 404.

Michigan.— Dimmock *v.* Cole, 130 Mich. 601, 90 N. W. 333; Turner *v.* Grand Rapids, 20 Mich. 390.

Missouri.— Moore *v.* Mountcastle, 72 Mo. 605; Hoyt *v.* Davis, 30 Mo. App. 309.

Nevada.— Leport *v.* Sweeney, 11 Nev. 387.

New York.— Hiler *v.* Hetterick, 5 Daly 33; Nette *v.* New York El. R. Co., 13 Misc. 218, 34 N. Y. Suppl. 233; Gould *v.* Chicago, etc., R. Co., 15 N. Y. Suppl. 895. *Compare* Allen *v.* Way, 7 Barb. (N. Y.) 585, 3 Code Rep. 243. *Contra,* Robinson *v.* New York El. R. Co., 175 N. Y. 219, 67 N. E. 431, holding that error in admitting incompetent evidence is not cured by a statement by the trial judge in his decision and in the judgment entered thereon that in deciding the case he disregarded such error.

Ohio.— Thayer *v.* Luce, 22 Ohio St. 63.

Pennsylvania.— Llewellyn *v.* Cauffiel, 215 Pa. St. 23, 64 Atl. 388.

Texas.— Smith *v.* Lee, 82 Tex. 124, 17 S. W. 598; Barth *v.* Green, 78 Tex. 678, 15 S. W. 112; Hornberger *v.* Giddings, 31 Tex. Civ. App. 283, 71 S. W. 989; Burgher *v.* Henderson, 9 Tex. Civ. App. 521, 29 S. W. 522; Eckford *v.* Berry, (Civ. App. 1894) 27 S. W. 840; Loomis *v.* Stuart, (Civ. App. 1893) 24 S. W. 1078; St. Louis, etc., R. Co. *v.* Turner, 1 Tex. Civ. App. 625, 20 S. W. 1008.

Vermont.— Foster *v.* Burton, 62 Vt. 239, 20 Atl. 326.

Washington.— Main *v.* Johnson, 7 Wash. 321, 35 Pac. 67.

Wisconsin.— Taylor *v.* Collins, 51 Wis. 123, 8 N. W. 22.

See 46 Cent. Dig. tit. "Trial," § 894.

Compare Peck *v.* Pierce, 63 Conn. 310, 28 Atl. 524 (holding that, although the court expressly states that certain entries in an account-book which were not in evidence, but which were seen by him, did not influence him in his finding, such statements will not be regarded as conclusive, and a new trial will be granted, unless it appears that such entries could not have prejudiced appellant); Farmers' Union El. Co. *v.* Syndicate Ins. Co., 40 Minn. 152, 41 N. W. 547.

Although evidence is incompetent for a certain matter, its admission is harmless so far as that matter is concerned, the case showing that the court did not consider it on that point. Young *v.* Milan, 73 N. H. 552, 64 Atl. 16.

15. Dolan *v.* Dolan, 89 Ala. 256, 7 So. 425; Cook *v.* Penrhyn Slate Co., 36 Ohio St. 135, 38 Am. Rep. 568; Hastings *v.* Anacortes Packing Co., 29 Wash. 224, 69 Pac. 776; Kimmel *v.* Shroyer, 28 W. Va. 505.

A judgment appearing to be against the weight of evidence will be considered to have been affected by testimony improperly admitted. Trammell *v.* J. M. Guffey Petroleum Co., 42 Tex. Civ. App. 455, 94 S. W. 104.

evidence,[16] or that appellant was harmed by the error,[17] that the judgment will be reversed.

(II) *Issue Found in Favor of Objecting Party or Not Determined.* In trials without a jury, the admission of evidence as to an issue found in appellant's favor,[18] or where there is no finding on the issue covered by such evidence,[19] is not ground for reversal.

d. Effect of Error in Exclusion of Evidence. In trials without a jury, error in the exclusion of evidence is ground for reversal,[20] except where the judgment would have been the same had the evidence been admitted,[21] or where

16. *California.*— Rulofson *v.* Billings, 140 Cal. 452, 74 Pac. 35; White *v.* White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799; Mitchell *v.* Beckman, 64 Cal. 117, 28 Pac. 110.

Montana.— Anaconda Copper Min. Co. *v.* Heinze, 27 Mont. 161, 69 Pac. 909.

New Mexico.— Lynch *v.* Grayson, 5 N. M. 487, 25 Pac. 992 [*affirmed* in 163 U. S. 468, 16 S. Ct. 1064, 41 L. ed. 230].

Ohio.— Cook *v.* Penrhyn Slate Co., 36 Ohio St. 135, 38 Am. Rep. 568.

Oklahoma.— Barnett *v.* Ruyle, 9 Okla. 635, 60 Pac. 243; Jackson *v.* Thornton, 8 Okla. 331, 58 Pac. 951.

Pennsylvania.— Roberts' Appeal, 126 Pa. St. 102, 17 Atl. 538.

Tennessee.— Smith *v.* Hubbard, 85 Tenn. 306, 2 S. W. 569.

Texas.— Douglass *v.* Duncan, 66 Tex. 122, 18 S. W. 343; Texas, etc., R. Co. *v.* Brashears, (Civ. App. 1906) 91 S. W. 594; Gaither *v.* Lindsey, 37 Tex. Civ. App. 149, 83 S. W. 225; Neitch *v.* Hillman, 29 Tex. Civ. App. 544, 69 S. W. 494; Mullaly *v.* Noyes, (Civ. App. 1894) 26 S. W. 145.

Vermont.— Pictorial League *v.* Nelson, 69 Vt. 162, 37 Atl. 247.

See 46 Cent. Dig. tit. "Trial," § 893.

Where it appears that the incompetent evidence is the sole basis of the findings and judgment assailed, the judgment will be reversed. Merchants' Nat. Bank *v.* McDonald, 63 Nebr. 363, 88 N. W. 492, 89 N. W. 770.

Where the issues are close, and it is apparent from the record that the evidence improperly admitted might have influenced the judgment, it is ground for reversal. D'Arrigo *v.* Texas Produce Co., (Tex. Civ. App. 1895) 31 S. W. 713.

If a correct result is reached the admission of improper evidence in a case tried to the court is no ground for reversal. *In re* New York Cent., etc., R. Co., 90 N. Y. 342; Frisk *v.* Reigelman, 75 Wis. 499, 43 N. W. 1117, 44 N. W. 766, 17 Am. St. Rep. 198.

If the same conclusion should have been reached had there been no error in its rulings upon these questions, the appellate court will not reverse. Berlin Mach. Works *v.* Alabama City Furniture Co., 112 Ala. 488, 20 So. 418.

In some cases the rule is stated to be, that error in the admission of incompetent evidence, even though cumulative, is fatal to a judgment on appeal, unless it is clear beyond a rational doubt that the result was not and could not have been affected thereby. Holmes *v.* Farris, 97 Mo. App. 305, 71 S. W. 116; Jefferson *v.* New York El. R. Co., 132 N. Y. 483, 30 N. E. 981; Foote *v.* Beecher, 78 N. Y. 155; Gambee *v.* Gambee, 24 N. Y. App. Div. 446, 48 N. Y. Suppl. 501; Doty *v.* Stanton, 50 Hun (N. Y.) 600, 2 N. Y. Suppl. 417; Nussbaum *v.* Jordan, 26 Misc. (N. Y.) 187, 56 N. Y. Suppl. 862; Cunard *v.* Manhattan R. Co., 1 Misc. (N. Y.) 151, 20 N. Y. Suppl. 724; Osgood *v.* Manhattan Co., 3 Cow. (N. Y.) 612, 15 Am. Dec. 304; Marquand *v.* Webb, 16 Johns. (N. Y.) 89. Even in nonjury cases, the admission of improper testimony over objection will be ground for reversal, unless it is reasonably certain that the result would have been the same had the testimony complained of been excluded. Erwin *v.* Archenhold Co., 34 Tex. Civ. App. 55, 77 S. W. 823; Gordon *v.* McCall, 20 Tex. Civ. App. 283, 48 S. W. 1111.

17. Granger *v.* Brooks, 3 N. Y. App. Div. 129, 39 N. Y. Suppl. 355.

18. Yager *v.* Heimer, (Tex. Civ. App. 1894) 28 S. W. 1026.

19. Cassin *v.* La Salle County, 1 Tex. Civ. App. 127, 21 S. W. 122; Carl *v.* West Aberdeen Land, etc., Co., 13 Wash. 616, 43 Pac. 890.

20. Roberts *v.* Greig, 15 Colo. App. 378, 62 Pac. 574; Hopkins *v.* Forsyth, 14 Pa. St. 34, 53 Am. Dec. 513; Arthurs *v.* Hart, 17 How. (U. S.) 6, 15 L. ed. 30; Missouri-American Electric Co. *v.* Hamilton-Brown Shoe Co., 165 Fed. 283, 91 C. C. A. 251, holding that it is error, on a hearing of a controversy in which it is taking testimony, for a court to refuse to consider evidence which the losing party desires to offer, and to close the hearing before such evidence is presented.

21. *Colorado.*— Casserleigh *v.* Green, 12 Colo. App. 515, 56 Pac. 189 [*affirmed* in 28 Colo. 392, 65 Pac. 32]; Champion Empire Min. Co. *v.* Bird, 7 Colo. App. 523, 44 Pac. 764.

Kentucky.— Le Compte *v.* Pitcher, 11 Ky. L. Rep. 362.

Maine.— Hall *v.* Otis, 77 Me. 122.

Michigan.— Merson *v.* Merson, 101 Mich. 55, 59 N. W. 441.

New York.— Matter of Cameron, 47 N. Y. App. Div. 120, 62 N. Y. Suppl. 187 [*affirmed* in 166 N. Y. 610, 59 N. E. 1120].

Washington.— Bringgold *v.* Bringgold, 40 Wash. 121, 82 Pac. 179.

West Virginia.— Beach *v.* O'Riley, 14 W. Va. 55.

Wisconsin.— Frisk *v.* Reigelman, 75 Wis. 499, 43 N. W. 1117, 44 N. W. 766, 17 Am. St. Rep. 198; Orton *v.* McCord, 33 Wis. 205.

See 46 Cent. Dig. tit. "Trial," § 897.

the evidence rejected is merely cumulative and the exclusion clearly not prejudicial.[22]

e. Opinion Evidence. When a case is tried to the court, the extent to which expert testimony may be received rests largely in its discretion.[23] But the unsworn statements of an expert are not admissible as evidence, and a finding of facts based thereon cannot be sustained.[24]

f. Objections and Exceptions and Rulings Thereon. In some jurisdictions, particularly in the federal courts, where a cause is tried to the court without a jury, the objection to the admission of evidence is not properly the subject of a bill of exceptions,[25] unless the right to except is reserved.[26] In other jurisdictions the rule is that exceptions not only may be taken to the admission or rejection of evidence;[27] but that to enable the appellant to avail himself of the errors of the trial court in this respect, the bill of exceptions must show that he excepted to the action of the court in admitting or rejecting the evidence at the time.[28] The court may receive evidence subject to objection, and reserve its ruling on such objection.[29] While a party has the right to have his objection passed on before the case is decided, he must specifically demand that this be done,[30] and a mere general objection to the reception of testimony "subject to objection" is not sufficient to preserve the point for review.[31]

3. Rulings on Weight and Sufficiency of Evidence — a. In General. On a trial by the court without a jury, it is the province of the judge to determine

22. Arthurs *v.* Hart, 17 How. (U. S.) 6, 15 L. ed. 30.

23. Wabash R. Co. *v.* Defiance, 52 Ohio St. 262, 40 N. E. 89.

Comparison of handwriting.— When a case is tried before the judge, and the execution of a writing is put in issue under the plea of *non est factum*, it is the province of the judge, just as it is the province of the jury when the trial is by jury, to examine and compare all papers in evidence bearing upon the issue; and from such comparisons, and from the other evidence before him, to draw his conclusions as to whether the writing is genuine or spurious. Millington *v.* Millington, (Tex. Civ. App. 1894) 25 S. W. 320. The judge is not precluded from making himself a comparison of the handwritings because experts have testified in the case. He is not compelled to adopt their opinions. Millington *v.* Millington, *supra*.

24. State *v.* Pacific Guano Co., 26 S. C. 610, 2 S. E. 265.

25. Enyeart *v.* Davis, 17 Nebr. 228, 22 N. W. 449; Selby *v.* Brinkley, (Tenn. 1875) 17 S. W. 479; Arthurs *v.* Hart, 17 How. (U. S.) 6, 15 L. ed. 30; Weems *v.* George, 13 How. (U. S.) 190, 14 L. ed. 108; U. S. *v.* King, 7 How. (U. S.) 833, 12 L. ed. 934; Field *v.* U. S., 9 Pet. (U. S.) 182, 9 L. ed. 94.

Federal practice.— If evidence appears to have been improperly admitted, the appellate court will reject it, and proceed to decide the cause as if it was not in the record. U. S. *v.* King, 7 How. (U. S.) 833, 12 L. ed. 934. It is, however, proper, where evidence supposed not to be legal is received by the court, to enter on the record that it was objected to. U. S. *v.* King, *supra*. But this is done to show that it was not received by consent, and a formal bill of exceptions is not required to bring it to the notice of the appellate court. U. S. *v.* King, *supra*. It may, however, be done in that form, if the parties and the court think proper to adopt it. U. S. *v.* King, *supra*.

26. Hersey *v.* Verrill, 39 Me. 271.

27. Williams *v.* Soutter, 7 Iowa 435.

28. Travelers' Ins. Co. *v.* Murray, 16 Colo. 296, 26 Pac. 774, 25 Am. St. Rep. 267; De Reamer *v.* Pacific Express Co., 84 Mo. 529; Smith *v.* Dunklin County, 83 Mo. 195; Hill *v.* Alexander, 77 Mo. 296; Einstein *v.* Holladay-Klotz Land, etc., Co., 118 Mo. App. 184, 94 S. W. 296 (holding that objections to certain deeds read in evidence were too late, where not made until long after the deeds had been introduced and read, and after the close of all the evidence, and after the court had held the case under advisement for several months); Gerker's Estate, 8 Pa. Co. Ct. 583.

Grounds of objections.— The rule requiring the grounds of objections to testimony to be specifically stated applies alike to legal and equitable actions, and objections, the grounds of which are not specifically stated, are properly disregarded by the court. Primm *v.* Raboteau, 56 Mo. 407; Jones *v.* Gammans, 11 Nev. 249, holding that all objections to the competency of testimony except the one stated are waived.

29. Gaar *v.* Nichols, 115 Iowa 223, 88 N. W. 382; Taylor *v.* Cayce, 97 Mo. 242, 10 S. W. 832.

30. Gaar *v.* Nichols, 115 Iowa 223, 88 N. W. 382; Taylor *v.* Cayce, 97 Mo. 242, 10 S. W. 832.

In Arkansas, under the express provisions of Kirby Dig. §§ 2743, 3190, exceptions to depositions and documentary evidence are to be determined before final submission. Boynton *v.* Ashabranner, 75 Ark. 415, 88 S. W. 566, 1011, 91 S. W. 20.

31. Taylor *v.* Cayce, 97 Mo. 242, 10 S. W. 832.

the credibility of the witnesses,[32] and the weight to be attached to their testimony,[33] and the appellate court will not disturb or set aside the finding, unless it is apparent that the court misunderstood or disregarded material evidence introduced on the trial.[34] The court is at liberty to discredit any witness or multitude of witnesses,[35] and may disregard any testimony which it deems unworthy of belief,[36] although it is uncontradicted.[37]

b. Demurrer to Evidence.[38] In a trial before the court, where a jury trial is not a matter of right, a demurrer to evidence is an anomalous practice, and should not be entertained.[39] But where the cause is one properly triable before a jury, but a jury is waived, a demurrer to the evidence may be entertained,[40] at any

32. *Connecticut.*—Allis *v.* Hall, 76 Conn. 322, 56 Atl. 637.

Illinois.— Loudon *v.* Mullins, 52 Ill. App. 410.

Michigan.— Edwards *v.* Nelson, 51 Mich. 121, 16 N. W. 261.

Missouri.— Lorts *v.* Wash, 175 Mo. 487, 75 S. W. 95; Tipton *v.* Christopher, 135 Mo. App. 619, 116 S. W. 1125; Johnson *v.* Simmons, 61 Mo. App. 395; Goldstein *v.* Royal Cigar Co., 51 Mo. App. 584.

North Carolina.— Lawrence *v.* Rayner, 44 N. C. 113, holding that a court, when called on to determine facts on testimony, is, like a jury, bound to take into consideration all that a party may have said, at the same time; but it will scrutinize the statement, and if it believes a part of it to be improbable, or at variance with other established facts, it will reject that part until other proof is offered to sustain it.

Pennsylvania.— Miller *v.* Piatt, 33 Pa. Super. Ct. 547.

See 46 Cent. Dig. tit. "Trial," § 898.

33. *Illinois.*— Loudon *v.* Mullins, 52 Ill. App. 410.

Iowa.—Alpha Checkrower Co. *v.* Bradley, 105 Iowa 537, 75 N. W. 369.

Kansas.— Case *v.* Hannahs, 2 Kan. 490.

Massachusetts.— McLauthlin *v.* Wilder, 138 Mass. 393.

Michigan.— Edwards *v.* Nelson, 51 Mich. 121, 16 N. W. 261.

Missouri.— Lorts *v.* Wash, 175 Mo. 487, 75 S. W. 95; Hahn *v.* Cotton, 136 Mo. 216, 37 S. W. 919; Henry *v.* Beers, 48 Mo. 366; McKee *v.* Verdin, 96 Mo. App. 268, 70 S. W. 154; Billings *v.* Cal. Hirsch, etc., Iron, etc., Co., 86 Mo. App. 228.

North Carolina.—Pridgen *v.* Bannerman, 53 N. C. 53.

Oklahoma.—Wass *v.* Tennent-Stribbling Shoe Co., 3 Okla. 152, 41 Pac. 339.

Pennsylvania.— Miller *v.* Piatt, 33 Pa. Super. Ct. 547.

South Carolina.— Smith *v.* Steen, 38 S. C. 361, 16 S. E. 1003.

Vermont.— Nash *v.* Harrington, 1 Aik. 39.

See 46 Cent. Dig. tit. "Trial," § 898.

In the absence of evidence to support an allegation necessary to be proved, the finding upon the issue raised thereby should be against the person making and failing to prove the allegation. Lindley *v.* Blumberg, 7 Cal. App. 140, 93 Pac. 894.

Duty to reconcile conflicting evidence.— It is the province of the trial court to determine the meaning and effect of uncertain and ambiguous evidence, and to reconcile apparent contradictions and inconsistencies, if reasonably possible. Collins *v.* Gray, 154 Cal. 131, 97 Pac. 142; Dufour *v.* Delacroix, 11 Mart. (La.) 719.

The court may draw all inferences from the evidence that a jury might draw. Feurt *v.* Brown, 23 Mo. App. 332; Fisher *v.* Missouri Pac. R. Co., 23 Mo. App. 201.

A judge trying the facts is not bound by the testimony of experts as to their opinions of value. Kingsbury *v.* Joseph, 94 Mo. App. 298, 68 S. W. 93.

34. Loudon *v.* Mullins, 52 Ill. App. 410.

35. Allis *v.* Hall, 76 Conn. 322, 56 Atl. 637.

36. *Colorado.*—Andrews *v.* Johnston, 7 Colo. App. 551, 44 Pac. 73.

Louisiana.— Howe *v.* Manning, 13 La. 412.

Minnesota.— Esty *v.* Cummings, 75 Minn. 549, 78 N. W. 242.

Missouri.— Tipton *v.* Christopher, 135 Mo. App. 619, 116 S. W. 1125.

New York.— Donohue *v.* Henry, 4 E. D. Smith 162.

37. Lewis *v.* Lewis, 76 Conn. 586, 57 Atl. 735; Kingsbury *v.* Joseph, 94 Mo. App. 298, 68 S. W. 93. *Compare* Lussee *v.* Hays, 22 La. Ann. 307, holding that it is error for the court to discredit the testimony of several witnesses, where there is nothing in the case either contradicting their statements or impeaching their credibility.

Absence of direct contradiction by the mouth of a witness does not make a fact undisputed. Lewis *v.* Lewis, 76 Conn. 586, 57 Atl. 735; Allis *v.* Hall, 76 Conn. 322, 56 Atl. 637.

Interested witness.— The trier of the facts is at liberty to find against the party having the burden of proof, when his evidence, although uncontradicted, consists only of the testimony of parties in interest. Johnson *v.* Simmons, 61 Mo. App. 395.

38. **In trials before jury** see *supra*, VIII, B.

39. **In equity,** where issues of fact are tried by the chancellor, a demurrer to the evidence of complainant should not be considered. Hiss *v.* Hiss, 228 Ill. 414, 81 N. E. 1056.

40. Chicago Lumber Co. *v.* Merrimack River Sav. Bank, 52 Kan. 410, 34 Pac. 1045.

In Kansas, the practice of allowing demurrers to evidence in cases tried to the court, the same as in jury cases, has been recognized. Wehe *v.* Mood, 68 Kan. 373, 75

time before judgment;[41] but defendant by introducing evidence in his own behalf after the overruling of a demurrer interposed by him to plaintiff's evidence takes the risk of supplying defects in plaintiff's proof.[42] A motion at the close of the evidence that the court find the issues for defendant is in effect a demurrer to the evidence,[43] and raises the question of law whether the evidence tends to show any right of recovery in plaintiff.[44] In considering and deciding a demurrer to plaintiff's evidence in a case tried to the court, the same rule obtains as in cases tried to a jury.[45] The court cannot weigh conflicting evidence, nor regard the case as though submitted by defendant upon plaintiff's showing, but must consider, as true, all portions of the evidence which tend to prove the allegations of the petition.[46]

c. Dismissal or Nonsuit.[47] Under the practice in some states, in the trial of a cause without a jury, it is error to grant a motion for nonsuit.[48] But, as a general rule, the submission of a cause to the court for trial, where the judge acts both as court and jury, does not deprive plaintiff of his right to a nonsuit.[49] In some jurisdictions, the court upon a trial without a jury may grant a nonsuit

Pac. 476; Chicago Lumber Co. *v.* Merrimack River Sav. Bank, 52 Kan. 410, 34 Pac. 1045.

Where a case is tried on an agreed statement of facts, a demurrer to the evidence is improper, as the function of such a demurrer is to test the strength of plaintiff's case on his own evidence, and not upon the evidence of both parties. Bridgeport Wooden-Ware Mfg. Co. *v.* Louisville, etc., R. Co., 103 Tenn. 490, 53 S. W. 739.

41. Moore *v.* Nason, 48 Mich. 300, 12 N. W. 162.

42. Felix *v.* Bevington, 52 Mo. App. 403.

43. Crerar *v.* Daniels, 209 Ill. 296, 70 N. E. 569; Chicago First Nat. Bank *v.* Northwestern Nat. Bank, 152 Ill. 296, 38 N. E. 739, 43 Am. St. Rep. 247, 26 L. R. A. 289; Gillie *v.* Bingham, 84 Ill. App. 180; Vincent *v.* Means, 184 Mo. 327, 82 S. W. 96; Butler County *v.* Boatmen's Bank, 143 Mo. 13, 44 S. W. 1047; Rosenbaum *v.* Gilliam, 101 Mo. App. 126, 74 S. W. 507. But see Stone *v.* Spencer, 77 Mo. 356; Kansas City *v.* Askew, 105 Mo. App. 84, 79 S. W. 483.

44. Chicago First Nat. Bank *v.* Northwestern Nat. Bank, 152 Ill. 296, 38 N. E. 739, 43 Am. St. Rep. 247, 26 L. R. A. 289.

Such a motion admits all the facts the evidence tends to prove and every inference that can reasonably be drawn therefrom. Butler County *v.* Boatmen's Bank, 143 Mo. 13, 44 S. W. 1047.

45. Wehe *v.* Mood, 68 Kan. 373, 75 Pac. 476; Farnsworth *v.* Clarke, 62 Kan. 264, 62 Pac. 655.

46. Wehe *v.* Mood, 68 Kan. 373, 75 Pac. 476; Farnsworth *v.* Clarke, 62 Kan. 264, 62 Pac. 655; Wolf *v.* Washer, 32 Kan. 533, 537, 4 Pac. 1036, where it is said: "In order to sustain a demurrer to the evidence, the court must be able to say, as a matter of law, that the party introducing the evidence has not proved his case; and the court cannot, upon conflicting and contradictory evidence, say that as a matter of fact the preponderance of the evidence shows that the party introducing it has not proved his case."

When the evidence is conflicting, an instruction in the nature of a demurrer to the evidence is unwarranted. Blanke *v.* Dunnermann, 67 Mo. App. 591 [*overruling* Hess *v.* Clark, 11 Mo. App. 492].

47. **In actions tried by jury** see *supra*, VIII, C.

48. **Under Wis. Rev. St. (1898) § 2863,** requiring the judge, upon the trial of a question of fact by the court, to state separately the facts found by him, and his conclusions of law thereon, a motion for a nonsuit at the conclusion of plaintiff's testimony, and the award of judgment dismissing the complaint is not proper practice in an action tried to the court. Sliter *v.* Carpenter, 123 Wis. 578, 102 N. W. 27; Barlass *v.* Kargus, 111 Wis. 611, 87 N. W. 800; Yahr *v.* Princeton, etc., Joint School Dist. No. 2, 99 Wis. 281, 74 N. W. 779.

In equitable proceedings, strictly speaking, there is no such thing as a motion for a nonsuit. Stevens *v.* Trafton, 36 Mont. 520, 93 Pac. 810; Streicher *v.* Murray, 36 Mont. 45, 92 Pac. 36. In a suit in equity the proper practice upon a motion to dismiss at the close of plaintiff's evidence is to make findings and render judgment on the merits; not, as in a suit at law, to enter judgment of compulsory nonsuit. Spuhr *v.* Kolb, 111 Wis. 119, 86 N. W. 562. A motion to dismiss a bill on the ground that there was no testimony tending to sustain the allegations thereof was, in effect, a motion for nonsuit, which cannot properly be made in an equitable action. Garner *v.* Garner, 72 S. C. 437, 52 S. E. 194.

49. Hall *v.* Schuchardt, 34 Md. 15, holding that care should be taken to so conduct the trial as to afford him the same opportunity of exercising it, as if a jury were sworn.

In Illinois, a party is entitled to take a nonsuit at any time before the entry of the finding. Plaintiff may take a nonsuit after the court has stated its finding but before a minute of record has been made. Howe *v.* Harroun, 17 Ill. 494; Paepcke-Leicht Lumber Co. *v.* Berkowsky, 73 Ill. App. 400; Mundhenke *v.* Mundhenke, 64 Ill. App. 122; Turnock *v.* Walker, 54 Ill. App. 374. The court cannot deprive a plaintiff of this right by first making the minute and then announcing its opinion. Mundhenke *v.* Mundhenke, *supra*.

at the close of plaintiff's evidence, on the ground that a fair preponderance of the proof established facts preventing recovery by plaintiff,[50] although there is evidence tending to sustain plaintiff's claim.[51] In others, it is said that the rules as to nonsuit are the same whether the trial is by court or by a jury,[52] and that a nonsuit should not be granted when the evidence is sufficient to support a verdict for plaintiff, whether the trial is by the court or by a jury.[53] Nor can a trial court rightly dismiss the action, without a verdict or findings of fact, on the ground that plaintiff has failed to establish a cause of action, unless the evidence is such that it would not sustain a verdict or finding for plaintiff.[54] But where the court is satisfied, at the close of plaintiff's case in an action tried without a jury, that he cannot recover, it may dismiss the complaint on the merits without hearing the evidence of defendant.[55]

4. Declarations of Law and Decision[56] — a. In General — (i) *Declarations of Law* **— (a)** *In General.* In equity cases, it is not proper practice for courts to give instructions on the law, and a refusal to give requested instructions is not error.[57] But in actions at law, although there is no jury to be charged,

50. Hayward *v.* Jackman, 96 Iowa 77, 64 N. W. 667; O'Neile *v.* Ternes, 32 Wash. 528, 73 Pac. 692; Lambuth *v.* Stetson, etc., Mill Co., 14 Wash. 187, 44 Pac. 148.

The rule applicable to a trial by jury does not obtain where there is a trial of a law action by the court. In such a trial the court weighs the facts, and determines them by a preponderance of the evidence; and when plaintiff's evidence was all introduced, and defendant offered no evidence, the question for the court to determine was whether, by a preponderance of the evidence, plaintiff was entitled to a judgment. Hayward *v.* Jackman, 96 Iowa 77, 64 N. W. 667.

51. Lambuth *v.* Stetson, etc., Mill Co., 14 Wash. 187, 190, 44 Pac. 148, where the court said: "Where the entire trial is before the court which must finally pass upon the law and facts of the case, there is no good reason why it should not be allowed to determine the facts necessary to a proper application of the law at any time during the trial. It would be worse than useless for the court, after its attention had been called to the insufficiency of the evidence offered by plaintiff to establish the facts necessary to enable him to recover, and after being satisfied that such was the nature of the evidence introduced by plaintiff, to require defendant to put in evidence to disprove that which had been already sufficiently disproved."

52. Freese *v.* Hibernia Sav., etc., Soc., 139 Cal. 392, 73 Pac. 172.

53. Freese *v.* Hibernia Sav., etc., Soc., 139 Cal. 392, 73 Pac. 172; Schlesinger *v.* Jud, 61 N. Y. App. Div. 453, 70 N. Y. Suppl. 616. Where there was a conflict of evidence sufficient, had there been a jury, to require submission of the case, a judge has no power to grant a nonsuit, notwithstanding the fact that the case is tried before him without a jury. Weisberger *v.* Martin, 86 N. Y. Suppl. 115..

54. Ness *v.* March, 95 Minn. 301, 104 N. W. 242; Hamm Realty Co. *v.* New Hampshire F. Ins. Co., 80 Minn. 139, 83 N. W. 41; Herrick *v.* Barnes, 78 Minn. 475, 81 N. W. 526; Tharalson *v.* Wyman, 58 Minn. 233, 59 N. W. 1009; Cnickering *v.* White, 42 Minn. 457, 44 N. W. 988; Sloan *v.* Becker, 31 Minn. 414, 18 N. W. 143.

When the evidence is sufficient to raise a question of fact requiring a decision on the merits, the dismissal of a law action tried to the court on defendant's motion at the close of plaintiff's case is reversible error, since such dismissal is equivalent to a nonsuit. Vincent *v.* Means, 184 Mo. 327, 82 S. W. 96; Tapley *v.* Herman, 95 Mo. App. 537, 69 S. W. 482; Kauffman-Wilkinson Lumber Co. *v.* Christophel, 62 Mo. App. 98; Place *v.* Hayward, 117 N. Y. 487, 23 N. E. 25; Schlesinger *v.* Jud, 61 N. Y. App. Div. 453, 70 N. Y. Suppl. 616; Globe Lith. Co. *v.* Bimberg, 92 N. Y. Suppl. 768. It is the duty of the court, in such case, to give its decision in writing, stating the facts found and the conclusions of law separately. Ness *v.* March, 95 Minn. 301, 104 N. W. 242; Hamm Realty Co. *v.* New Hampshire F. Ins. Co., 80 Minn. 139, 83 N. W. 41; Tharalson *v.* Wyman, 58 Minn. 233, 59 N. W. 1009.

55. Woodbridge *v.* Saratoga Springs First Nat. Bank, 166 N. Y. 238, 59 N. E. 836 [*affirming* 45 N. Y. App. Div. 166, 61 N. Y. Suppl. 258]; Bliven *v.* Robinson, 152 N. Y. 333, 46 N. E. 615 [*affirming* 83 Hun 208, 31 N. Y. Suppl. 662]; Neuberger *v.* Keim, 134 N. Y. 35, 31 N. E. 268 [*affirming* 53 Hun 60, 5 N. Y. Suppl. 941]; Van Derlip *v.* Keyser, 68 N. Y. 443.

56. Findings of fact and conclusions of law see *infra*, XII, B.

57. Harbison *v.* Scott County School-Dist. No. 1, 89 Mo. 184, 1 S. W. 30; Richardson *v.* Pitts, 71 Mo. 128; Gill *v.* Clark, 54 Mo. 415; Hunter *v.* Miller, 36 Mo. 143; Conran *v.* Sellew, 28 Mo. 320; White *v.* Black, 115 Mo. App. 28, 90 S. W. 1153; Ozark Land, etc., Co. *v.* Robertson, 89 Mo. App. 480; Adams *v.* Harper, 20 Mo. App. 684; Downing *v.* McHugh, 3 Mo. App. 594.

Where an action at law is converted into an equitable proceeding by the answer, it is improper for the trial court to give declarations of law (Freeman *v.* Wilkerson, 50 Mo. 554); and it is not error in the court below, on the trial of such action, to refuse in-

a party has the right to demand that the principles of law involved in the case shall be given by the court as distinctly as in instructions to the jury,[58] so as to enable the appellate court to determine the theory of law adopted by the trial court;[59] and if they show that the court adopted the wrong theory and came to a wrong conclusion, the judgment should be reversed.[60] So where requested declarations of law announce correct principles, and are supported by the evidence, their refusal constitutes reversible error,[61] unless they are covered by other declarations given,[62] or unless by exceptions to the rulings of the court during the trial,

structions, and error cannot be assigned for such refusal (Freeman *v.* Wilkerson, *supra*).

58. *Illinois.*— Hutchison *v.* Sullivan, 87 Ill. App. 664.

Indiana.— Huntington First Nat. Bank *v.* Arnold, 156 Ind. 487, 60 N. E. 134.

Maryland.— Richardson *v.* Anderson, 109 Md. 641, 72 Atl. 485, 130 Am. St. Rep. 543, 25 L. R. A. N. S. 393; Hobbs *v.* Batory, 86 Md. 68, 37 Atl. 713. But see Dronenburg *v.* Harris, 108 Md. 597, 71 Atl. 81.

Massachusetts.— Jaquith *v.* Davenport, 191 Mass. 415, 78 N. E. 93.

Missouri.— Butler County *v.* Boatmen's Bank, 143 Mo. 13, 44 S. W. 1047; Kostuba *v.* Miller, 137 Mo. 161, 38 S. W. 946; Hahn *v.* Cotton, 136 Mo. 216, 37 S. W. 919; Dollarhide *v.* Mabary, 125 Mo. 197, 28 S. W. 332; Suddarth *v.* Robertson, 118 Mo. 286, 24 S. W. 151; Harbison *v.* Scott County School Dist. No. 1, 89 Mo. 184, 1 S. W. 30; Conran *v.* Sellew, 28 Mo. 320; White *v.* Black, 115 Mo. App. 28, 90 S. W. 1153; E. E. Souther Iron Co. *v.* Laclede Power Co., 109 Mo. App. 353, 84 S. W. 450; Vogelsanger *v.* Russell, 92 Mo. App. 682; Watson *v.* Race, 46 Mo. App. 546; St. Louis Bolt, etc., Co. *v.* Buell, 8 Mo. App. 594. But see Clouse *v.* McGuire, 17 Mo. 158; Gobin *v.* Hudgens, 15 Mo. 400.

See 46 Cent. Dig. tit. "Trial," § 901.

In Illinois, under Pr. Act, § 41, it is only where the parties to a cause are entitled to trial by jury, and by agreement have submitted the same to the court for trial without a jury, that the presentation of propositions of law is proper. Schofield *v.* Thomas, 236 Ill. 417, 86 N. E. 122; Martin *v.* Martin, 170 Ill. 18, 48 N. E. 694 [*reversing* 68 Ill. App. 169]; Hermann *v.* Pardridge, 79 Ill. 471; Kempton *v.* Funk, 139 Ill. App. 387; Sampson *v.* Chestnut Tp. Highway Com'rs, 115 Ill. App. 443; Clifford *v.* Gridley, 113 Ill. App. 164; Garrison *v.* Little, 75 Ill. App. 402. It does not govern any case which is to be tried by the court without the intervention of a jury in the absence of agreement or consent of parties. Martin *v.* Martin, 170 Ill. 18, 48 N. E. 694; Kempton *v.* Funk, *supra*; Clifford *v.* Cridley, *supra*. This section applies, although the case is submitted to the court on agreed facts. Grabbs *v.* Danville, 166 Ill. 441, 46 N. E. 1116 [*affirming* 63 Ill. App. 590]. It is not a presentation of propositions of law, within the meaning of the statute, to offer in evidence the bill of exceptions showing the propositions of law which were passed upon at a previous hearing of the cause. Kempton *v.* Funk, *supra*.

In Missouri, in the trial of actions at law by the court without a jury, the court may either give or refuse instructions the same as when trying the case before a jury, or pursue the course pointed out by Rev. St. (1889) § 2135, and state its conclusions of fact separately from the conclusions of law, but the court should not pursue both courses, because they are inconsistent. Kostuba *v.* Miller, 137 Mo. 161, 38 S. W. 946; Suddarth *v.* Robertson, 118 Mo. 286, 24 S. W. 151; German-American Ins. Co. *v.* Tribble, 86 Mo. App. 546; Deal *v.* Mississippi County Bank, 79 Mo. App. 262.

When not essential.—Where a cause is disposed of without a trial (Rhodes *v.* Rhodes, 115 Ill. App. 335), or where the party having the burden of proof offers no testimony and the court finds against him (Hannibal, etc., R. Co. *v.* Miller, 115 Mo. 158, 21 S. W. 915), declarations of law are not essential.

59. Baumhoff *v.* St. Louis, etc., R. Co., 171 Mo. 120, 71 S. W. 156, 94 Am. St. Rep. 770; Dollarhide *v.* Mabary, 125 Mo. 197, 28 S. W. 332; Stone *v.* Spencer, 77 Mo. 356; Butts *v.* Bunby, 135 Mo. App. 28, 115 S. W. 493; Fulbright *v.* Wabash R. Co., 118 Mo. App. 482, 94 S. W. 992; E. E. Souther Iron Co. *v.* Laclede Power Co., 109 Mo. App. 353, 84 S. W. 450; Rosenbaum *v.* Gilliam, 101 Mo. App. 126, 74 S. W. 507; Vogelsanger *v.* Russell, 92 Mo. App. 682; German-American Ins. Co. *v.* Tribble, 86 Mo. App. 546; Gage *v.* Averill, 57 Mo. App. 111; McClure *v.* Ritchey, 30 Mo. App. 445; St. Louis Bolt, etc., Co. *v.* Buell, 8 Mo. App. 594.

The purpose to be subserved by propositions of law is to determine whether the trial judge entertains correct views of the principles of law involved in the proceedings. Chicago Union Traction Co. *v.* Chicago, 202 Ill. 576, 67 N. E. 383; E. E. Souther Iron Co. *v.* Laclede Power Co., 109 Mo. App. 353, 84 S. W. 450.

60. Kimball *v.* Doggett, 62 Ill. App. 528; Siemens-Lungren Gas Illuminating Co. *v.* Francis, 27 Ill. App. 303; E. E. Souther Iron Co. *v.* Laclede Power Co., 109 Mo. App. 353, 84 S. W. 450; Bissell *v.* Couchaine, 15 Ohio 58.

61. Chicago Union Traction Co. *v.* Chicago, 202 Ill. 576, 67 N. E. 383; Murphy *v.* Smith, 112 Ill. App. 404; Hisey *v.* Goodwin, 90 Mo. 366, 2 S. W. 566; Cunningham *v.* Snow, 82 Mo. 587; Edwards *v.* Carondelet Milling Co., 108 Mo. App. 275, 83 S. W. 764; Gage *v.* Averill, 57 Mo. App. 111.

62. Smith *v.* Van Gilder, 27 Ark. 592; Field *v.* Crawford, 146 Ill. 136, 34 N. E. 481;

the same questions are preserved for review as would be preserved by the declarations of law.[63] When it appears from the whole record that substantial justice has been done, a judgment will not be reversed because of error in holding or refusing to hold propositions of law.[64] Nor will a judgment be reversed because the court fails to declare the law as fully as it might have done,[65] especially if the declarations given announce correct rules of law applicable to the facts and the evidence justifies the finding.[66] But if the declarations given show that a material issue was not considered, a reversal will be directed.[67]

(B) *Form, Requisites, and Sufficiency.* In testing the soundness of declarations of law submitted to be held, the same rules of law are to be observed as in the case of instructions asked for the guidance of a jury.[68] They should be framed in like manner as on trial before a jury,[69] should state the law only,[70] should not assume the existence of disputed facts,[71] and should be predicated on a hypothetical statement of the contested facts.[72] Declarations of law, it has been held, are properly refused where they pertain purely to questions of fact;[73] submit, as propositions of law, mixed questions of law and fact;[74] assume facts as to which the evidence is conflicting,[75] or which are inapplicable to the issue,[76] or to the facts in

American Hardwood Lumber Co. *v.* Dent, 121 Mo. App. 108, 98 S. W. 814; McClure *v.* Ritchey, 30 Mo. App. 445.

63. Chicago Union Traction Co. *v.* Chicago, 202 Ill. 576, 67 N. E. 383.

64. *Arkansas.*— Keith *v.* Freeman, 43 Ark. 296.

Connecticut.— Contaldi *v.* Errichetti, 79 Conn. 273, 64 Atl. 211.

Illinois.— North Chicago City R. Co. *v.* Lake View, 105 Ill. 207, 44 Am. Rep. 788; Moffitt-West Drug Co. *v.* Aldrich, 87 Ill. App. 184; Famous Mfg. Co. *v.* Wilcox, 80 Ill. App. 54 [*affirmed* in 180 Ill. 246, 54 N. E. 211].

Indiana.—White *v.* Chicago, etc., R. Co., 122 Ind. 317, 23 N. E. 782, 7 L. R. A. 257; Chicago, etc., R. Co. *v.* Barnes, 116 Ind. 126, 18 N. E. 459.

Michigan.— Gillam *v.* Boynton, 36 Mich. 236; Nelson *v.* Ferris, 30 Mich. 497; Macomber *v.* Saxton, 28 Mich. 516; Easton School Dist. No. 4 *v.* Snell, 24 Mich. 350.

Missouri.— Berthold *v.* St. Louis Electric Constr. Co., 165 Mo. 280, 65 S. W. 784; Redman *v.* Adams, 165 Mo. 60, 65 S. W. 300; Fox *v.* Windes, 127 Mo. 502, 30 S. W. 323, 48 Am. St. Rep. 648; Richardson *v.* Pitts, 71 Mo. 128; Hunter *v.* Miller, 36 Mo. 143; Missouri, etc., Coal Co. *v.* Consolidated Coal Co., 127 Mo. App. 320, 105 S. W. 682; Fulbright *v.* Wabash R. Co., 118 Mo. App. 482, 94 S. W. 992; Sedalia Nat. Bank *v.* Cassidy Bros. Live Stock Commission Co., 109 Mo. App. 249, 84 S. W. 142; Exchange Real Estate, etc., Co. *v.* Schuchmann Realty Co., 103 Mo. App. 24, 78 S. W. 75; Oyster *v.* Oyster, 32 Mo. App. 270; McClure *v.* Ritchey, 30 Mo. App. 445; Adams *v.* Harper, 20 Mo. App. 684; Heine *v.* Morrison, 13 Mo App. 577.

Nebraska.— Rosso *v.* Milwaukee Harvester Co., 2 Nebr. (Unoff.) 212, 96 N. W. 213.

New Jersey.— Monmouth Park Assoc. *v.* Warren, 55 N. J. L. 598, 27 Atl. 932.

New York.— Knoch *v.* Von Bernuth, 145 N. Y. 643, 40 N. E. 398.

Texas.— Smith *v.* Seymore, (Civ. App. 1900) 59 S. W. 816; Missouri, etc., R. Co. *v.* Batsell, (Civ. App. 1896) 34 S. W. 1047.

If the findings of fact do not entitle plaintiff to relief, he cannot be injured by rulings on questions of law. Kane *v.* Stowe, 50 Mich. 317, 15 N. W. 490; Hamblin *v.* Warner, 30 Mich. 95.

65. Hall *v.* Hall, 107 Mo. 101, 17 S. W. 811; Myers *v.* Miller, 55 Mo. App. 338.

66. Myers *v.* Miller, 55 Mo. App. 338.

67. Hall *v.* Hall, 107 Mo. 101, 17 S. W. 811.

68. Hahn *v.* Hull, (Md. 1886) 4 Atl. 407; Cape Girardeau County *v.* Harbison, 58 Mo. 90.

69. Springfield Grocer Co. *v.* Shackelford, 65 Mo. App. 364.

70. Crerar *v.* Daniels, 209 Ill. 296, 70 N. E. 569 [*affirming* 109 Ill. App. 654]; Lesh, etc., Lumber Co. *v.* Sedlaceck, 104 Ill. App. 153.

71. O'Bannon *v.* Vigus, 32 Ill. App. 473; United R., etc., Co. *v.* Wehr, 103 Md. 323, 63 Atl. 475.

72. Patterson *v.* Kansas City, etc., R. Co., 47 Mo. App. 570.

73. Crerar *v.* Daniels, 209 Ill. 296, 70 N. E. 569 [*affirming* 109 Ill. App. 654]; Mackin *v.* Haven, 187 Ill. 480, 58 N. E. 448; Field *v.* Crawford, 146 Ill. 136, 34 N. E. 481; Raftery *v.* Easley, 111 Ill. App. 413; Hummer *v.* Brenneman, 89 Ill. App. 460; Gillie *v.* Bingham, 84 Ill. App. 180; German-American Bank *v.* Manning, 133 Mo. App. 294, 113 S. W. 251.

74. Illinois Cent. R. Co. *v.* Seitz, 214 Ill. 350, 73 N. E. 585, 105 Am. St. Rep. 108 [*affirming* 117 Ill. App. 154]; Schell *v.* Weaver, 128 Ill. App. 106 [*affirmed* in 225 Ill. 159, 80 N. E. 95]; Whipple *v.* Tucker, 123 Ill. App. 223.

75. Whipple *v.* Tucker, 123 Ill. App. 223; United R., etc., Co. *v.* Wehr, 103 Md. 323, 63 Atl. 475; Worley *v.* Hicks, 161 Mo. 340, 61 S. W. 818; Seehorn *v.* American Nat. Bank, 148 Mo. 256, 49 S. W. 886; Grafeman Dairy Co. *v.* St. Louis Dairy Co., 96 Mo. App. 495, 70 S. W. 390.

76. Sloan *v.* Smith, (Conn. 1904) 58 Atl. 712; Saffer *v.* Lambert, 111 Ill. App. 410; Chicago, etc., R. Co. *v.* Hoeffner, 44 Ill. App. 137; Easton School Dist. No. 4 *v.* Snell, 24

evidence;[77] where they ignore material evidence,[78] comment on the weight and probative force of the evidence,[79] or ignore the separate functions of court and jury.[80] But it is said that declarations of law are not subject to the rule against generality and abstraction applicable to instructions to juries.[81]

(c) *Time For Requesting.* Declarations of law should be submitted to the court before argument,[82] or before the cause is submitted to the court,[83] or at least before the decision of the case is announced;[84] and, when seasonably presented, it is reversible error for the court to refuse to consider such propositions.[85] But propositions of law submitted after decisions rendered,[86] or on the hearing of a motion for a new trial,[87] are properly refused.

(d) *Withdrawal.* It is not error in the trial court to permit a party to withdraw his propositions of law even after the court has announced its findings in the case;[88] and if the adverse party desires to raise the same questions and have them passed upon by the court, he should present them himself.[89]

(ii) *DECISION* — (a) *In General.* In cases tried by the court without a jury, whether in equity or at law, there must be a decision of the court.[90] Such

Mich 350; Otis Co. *v.* Missouri Pac. R. Co., 112 Mo. 622, 20 S. W. 676.

77. *Arkansas.*— Little Rock, etc., R. Co. *v.* Chapman, 39 Ark. 463, 43 Am. Rep. 280.

Illinois.— Mackin *v.* Haven, 187 Ill. 480, 58 N. E. 448 [*affirming* 88 Ill. App. 434]; Gray *v.* Callender, 181 Ill. 173, 54 N. E. 910; Webster *v.* Fleming, 178 Ill. 140, 52 N. E. 975 [*affirming* 73 Ill. App. 234]; Schell *v.* Weaver, 128 Ill. App. 106 [*affirmed* in 225 Ill. 159, 80 N. E. 95].

Massachusetts.— Morse *v.* Ellis, 172 Mass. 378, 52 N E. 540; Marschall *v.* Aiken, 170 Mass 3, 48 N. E. 845; Butrick *v.* Tilton, 155 Mass. 461, 29 N. E. 1088.

Missouri.— Dobyns *v.* Bay State Beneficiary Assoc., 144 Mo. 95, 45 S. W. 1107; Beck *v.* Pollard, 55 Mo. 26.

New York.— Hayes *v.* Metropolitan St. R. Co., 84 N. Y. Suppl. 271.

78. Gray *v.* Callender, 181 Ill. 173, 54 N. E. 910; Stocker *v.* Green, 94 Mo. 280, 7 S. W. 279, 4 Am. St Rep. 382; Grafeman Dairy Co. *v.* St. Louis Dairy Co., 96 Mo. App. 495, 70 S. W. 390.

79. King *v.* Allemania F. Ins. Co., 37 Mo. App. 102.

80. Hobbs *v.* Batory, 86 Md. 68, 37 Atl. 713.

81. Vigus *v.* O'Bannon, 118 Ill. 334, 8 N. E. 778. See also Welge *v.* Weiss, 3 Mo. App 604.

82. Stauffer *v.* Volentine, 104 Ill. App. 382.

83. Watson *v.* Race, 46 Mo. App. 546.

84. Carlyle Water, etc. Co. *v.* Carlyle, 31 Ill. App. 325.

85. Western Valve Co. *v.* Wells, 127 Ill. App. 655. In Mann *v.* Learned, 195 Ill. 502, 63 N. E. 178, it was held reversible error for the court to refuse to consider propositions of law submitted after the case had been argued, and the court had made some remarks pertaining to his final decision in the case, but before the final decision or any intimation as to how it would be decided.

After the court has orally announced its decision, but has not filed its findings, it cannot be required to pass upon propositions submitted to it as proposed findings of law. Wheatland Mill Co. *v.* Pirrie, 89 Cal. 459, 26 Pac. 964.

The court may limit the time within which propositions should be submitted, but in the absence of any limitation, plaintiff might present his propositions at any time before the decision in the case (Western Valve Co. *v.* Wells, 127 Ill. App. 655), even six months after the hearing (Western Valve Co. *v.* Wells, *supra*).

86. Allmann *v.* Lumsden, 159 Ill. 219, 42 N. E. 797 [*affirming* 55 Ill. App. 21]; American Cent. Ins. Co. *v.* Henninger, 87 Ill. App. 440; Kraemer *v.* Leister, 35 Ill. App. 391; Morehouse *v.* Ware, 78 Mo. 100, holding that in the absence of evidence in the record showing that counsel was surprised, this court will not consider declarations of law offered after the announcement of the decision of the trial court.

A statutory provision that propositions of law may be submitted "within such time as the court may require" does not authorize an order of court giving leave to submit them after the court has rendered final decision. Allman *v.* Lumsden, 159 Ill. 219, 42 N. E. 797; Stauffer *v.* Volentine, 104 Ill. App. 382.

87. Loudon *v.* Mullins, 52 Ill. App. 410.

88. Highway Com'rs *v.* Kline, 96 Ill. App. 318.

89. Highway Com'rs *v.* Kline, 96 Ill. App. 318.

90. Wise *v.* Cohen, 113 N. Y. App. Div. 859, 99 N. Y. Suppl. 663, 37 N. Y. Civ. Proc. 152; Wise *v.* Cohen, 113 N. Y. App. Div. 865, 99 N. Y. Suppl. 667; Electric Boat Co. *v.* Howey, 96 N. Y. App. Div. 410, 89 N. Y. Suppl. 210; Sommer *v.* Sommer, 87 N. Y. App. Div. 434, 84 N. Y. Suppl. 444; Lentschner *v.* Lentschner, 80 N. Y. App. Div. 43, 80 N. Y. Suppl. 146.

The decision of the court is the basis of the judgment to be entered. Wise *v.* Cohen, 113 N. Y. App. Div. 859, 99 N. Y. Suppl. 663, 37 N. Y. Civ. Proc. 152.

Neither the entry in the clerk's minutes nor the opinion of the court can take the place of the formal decision required by the code of civil procedure. Electric Boat Co. *v.*

decision is usually required to be in writing,[91] signed by the judge,[92] and filed with the clerk,[93] and must direct the entry of judgment thereon.[94] Furthermore, the decision is usually required either to state separately the facts found and the conclusions of law,[95] or to state concisely the grounds upon which the issues have been decided.[96]

(B) *Time For Rendition and Filing.* In the absence of statutory provision on the subject, the matter of the time when a judge may decide a case submitted to him for decision is as much a matter of judicial discretion and judgment as the matter of how he may decide it.[97] Statutes, however, frequently require that the decision, in case of trial without a jury, shall be rendered and filed within a certain time after the cause is submitted. But such statutes are directory merely,[98]

Howey, 96 N. Y. App. Div. 410, 89 N. Y. Suppl. 210.

A formal verdict is not necessary where a cause is submitted to the court. Gray *v.* Phillips, Morr. (Iowa) 430; Bearce *v.* Bowker, 115 Mass. 129. The decision of the judge will have the force and effect of the verdict of a jury. Kelly *v.* Miller, 39 Miss. 17. Where the facts material to the judgment are agreed on, a recital that the court finds the issues of the case with defendant should be construed to refer to the issues of law. Anderson *v.* Messinger, 146 Fed. 929, 77 C. C. A. 179, 7 L. R. A. N. S. 1094.

Trial not complete until decision made.—A trial by a court is not complete until the case is submitted to the court (Kaysen *v.* Steele, 13 Utah 260, 44 Pac. 1042), and a decision is made (Clement *v.* Phœnix Ins. Co., 5 Fed. Cas. No. 2,882, 7 Blatchf. 51).

91. *California.*— Hastings *v.* Hastings, 31 Cal. 95.

Minnesota.— Ness *v.* March, 95 Minn. 301, 104 N. W. 242.

New York.—Wise *v.* Cohen, 113 N. Y. App. Div. 859, 99 N. Y. Suppl. 663, 37 N. Y. Civ. Proc. 152; Benjamin *v.* Allen, 35 Hun 115; People *v.* Ranson, 2 N. Y. St. 78.

Washington.— Russell *v.* B. Schade Brewing Co., 49 Wash. 362, 95 Pac. 327.

Wisconsin.— Sliter *v.* Carpenter, 123 Wis. 578, 102 N. W. 27; Yahr *v.* Princeton, etc., Joint School Dist. No. 2, 99 Wis. 281, 74 N. W. 779; Ogden *v.* Glidden, 9 Wis. 46.

See 46 Cent. Dig. tit. "Trial," § 903.

The mere announcement of an oral opinion does not constitute a formal decision sufficient to support a judgment. Hastings *v.* Hastings, 31 Cal. 95; Bascombe *v.* Marshall, 129 N. Y. App. Div. 518, 113 N. Y. Suppl. 993; Dobbs *v.* Brinkerhoff, 98 N. Y. App. Div. 258, 90 N. Y. Suppl. 480; Russell *v.* B. Schade Brewing Co., 49 Wash. 362, 95 Pac. 327.

Statutes requiring the court to make its decision in writing are mandatory. Lemien *v.* Lemien, 16 N. Y. App. Div. 264, 44 N. Y. Suppl. 674; Ogden *v.* Glidden, 9 Wis. 46.

92. Hastings *v.* Hastings, 31 Cal. 95; Wise *v.* Cohen, 113 N. Y. App. Div. 859, 99 N. Y. Suppl. 663, 37 N. Y. Civ. Proc. 152; Benjamin *v.* Allen, 35 Hun (N. Y.) 115.

93. Hastings *v.* Hastings, 31 Cal. 95; Wise *v.* Cohen, 113 N. Y. App. Div. 859, 99 N. Y. Suppl. 663, 37 N. Y. Civ. Proc. 152; Lemien *v.* Lemien, 16 N. Y. App. Div. 264, 44 N. Y. Suppl. 674; Benjamin *v.* Allen, 35 Hun (N. Y.) 115; People *v.* Ranson, 2 N. Y. St. 78.

94. Wise *v.* Cohen, 113 N. Y. App. Div. 859, 99 N. Y. Suppl. 663, 37 N. Y. Civ. Proc. 152; People *v.* Ranson, 2 N. Y. St. 78.

Compromise judgment.—A judgment simply "for defendant," finding no amount due either party, in an action in which there is a counter-claim of several items, none of which could be set off without leaving some money due one party or the other, is a compromise judgment, which cannot stand. Jacobs *v.* Cohen, 116 N. Y. Suppl. 566.

95. See *infra*, XII, B, 2, a.

96. Gein *v.* Little, 86 N. Y. App. Div. 503, 83 N. Y. Suppl. 685; McManus *v.* Palmer, 13 N. Y. App. Div. 443, 43 N. Y. Suppl. 601.

97. Wyatt *v.* Arnot, 7 Cal. App. 221, 94 Pac. 86.

Taking case under advisement.— Unless inhibited by statute, a judge has discretionary power, after hearing the evidence and arguments of counsel in a case tried without a jury, to take the case under advisement until the next term. Hastings *v.* Hastings, 31 Cal. 95; Gates *v.* Ransom, 28 Kan. 670; Tarpenning *v.* Cannon, 28 Kan. 665; Barnes *v.* Benham, 13 Okla. 582, 75 Pac. 1130. But when the trial court, at the close of the testimony, sets a day for his decision, a decision for defendant, rendered before such a day, in the absence of plaintiff and without notice to him, constitutes reversible error as it deprives plaintiff of his right to take a nonsuit. Paepcke-Leicht Lumber Co. *v.* Berkowsky, 73 Ill. App. 400.

Where defendant's attorney was given until a certain date in which to file his brief, the justice was not compelled to wait until that time before giving his decision, provided defendant filed his brief prior thereto. Collins *v.* Davis, 114 N. Y. Suppl. 792.

Penalty for failure to decide within time limited.— Cal. Const. art. 6, § 24, providing that no judge of the superior court shall be allowed to draw any monthly salary unless he shall subscribe an affidavit that no cause in his court remains undecided that has been submitted for decision for ninety days imposes a penalty on a judge for a failure to decide causes within the time limited, but does not require him to decide a cause within the specified time after its submission to him. Wyatt *v.* Arnot, 7 Cal. App. 221, 94 Pac. 86.

98. *California.*— McLennan *v.* State Bank,

and it has accordingly been held that such decision may be made and filed thereafter.[99]

(c) *Matters to Be Determined.* It is error for the trial court to refuse to pass on an issue made by the pleadings, when evidence is offered tending to prove it.[1] Every issue of law or fact raised by the pleadings requires a finding;[2] but the court should not find and decide questions upon which neither side have invoked judicial action,[3] and which are not in issue.[4]

b. Objections and Exceptions. On the trial of a cause by the court without a jury, exceptions lie to the opinion or rulings of the court upon questions of law only.[5] Exceptions must be saved to each specific ruling as it occurs during the

87 Cal. 569, 25 Pac. 760; McQuillan *v.* Donahue, 49 Cal. 157; Broad *v.* Murray, 44 Cal. 228.

Michigan.— Rawson *v.* Parsons, 6 Mich. 401.

Minnesota.— Vogle *v.* Grace, 5 Minn. 294.

Nevada.— Schwartz *v.* Stock, 26 Nev. 128, 65 Pac. 351.

New York.— Burger *v.* Baker, 4 Abb. Pr. 11; People *v.* Dodge, 5 How. Pr. 47.

South Dakota.— Roblin *v.* Palmer, 9 S. D. 36, 67 N. W. 949, holding that the failure of the court to file its written decision within thirty days after the submission of the cause, as required by Comp. Laws, § 5066, as amended by Laws (1893), c. 72, is not ground for reversal, in the absence of injury to the unsuccessful litigant.

Wisconsin.— Klatt *v.* Mallon, 61 Wis. 542, 21 N. W. 532; Cramer *v.* Hanaford, 53 Wis. 85, 10 N. W. 15; Body *v.* Jewsen, 33 Wis. 402; Ottillie *v.* Wæchter, 33 Wis. 252.

See 46 Cent. Dig. tit. "Trial," § 904.

Presumption as to delay.— Under Ind. Rev. St. (1881) § 551, limiting the time during which the judge shall hold, under advisement, an issue submitted, where the judge exceeds the time without objection, the presumption is that there was lawful excuse for the delay. McCray *v.* Humes, 116 Ind. 103, 18 N. E. 500.

A memorandum of decision forms no part of the record unless so made by the trial judge. Phœnix Ins. Co. *v.* Carey, 80 Conn. 426, 68 Atl. 993; Cummings *v.* Hartford, 70 Conn. 115, 38 Atl. 916; Kertson *v.* Great Northern Express Co., 72 Minn. 378, 75 N. W. 600.

99. Griffith *v.* Cromley, 58 S. C. 448, 36 S. E. 738 (if the delay be caused by act of the court, and not by the laches of the party); McCrady *v.* Jones, 36 S. C. 136, 15 S. E. 430; Klatt *v.* Mallon, 61 Wis. 542, 21 N. W. 532; Cramer *v.* Hanaford, 53 Wis. 85, 10 N. W. 15.

Waiver.— The failure of the trial judge to render judgment at least two days before the end of the trial term, as expressly required by rule 66, may be waived by the parties litigant, and defendant could not object to a judgment rendered on the day preceding the close of the term, where he stood by at the time and made no protest. Rowe *v.* Gohlman, 44 Tex. Civ. App. 315, 98 S. W. 1077.

1. Cincinnati *v.* Kemper, 9 Ohio Dec. (Reprint) 742, 17 Cinc. L. Bul. 116.

2. Dalton *v.* Rentaria, 2 Ariz. 275, 15 Pac. 37; Vail *v.* Goodman, (N. J. Sup. 1902) 53 Atl. 692; Burger *v.* Baker, 4 Abb. Pr. (N. Y.) 11.

If parties on going to trial agree on certain facts, and to investigate before a jury those on which they disagree, it is the duty of the court, when the verdict has established the contested facts, to take the whole of them together, and pronounce its judgment on the case. Golis *v.* His Creditors, 2 Mart. N. S. (La.) 108.

3. Dalton *v.* Rentaria, 2 Ariz. 275, 15 Pac. 37.

4. Finley *v.* Boehme, 3 Gill & J. (Md.) 42.

Abandoned plea.—Where defendant, having filed a plea in reconvention, after announcing ready for trial and waiving a jury refused to submit or read his pleadings to the court, he thereby abandoned his plea and relieved the court from the duty of disposing of the same. Hill *v.* Lyles, (Tex. Civ. App. 1904) 81 S. W. 559.

Fact not in issue but important to have determined.—Where the insolvency of a corporation is not one of the issues made by the pleadings, but it is important to have the question passed on, a request should be made on the trial before the decision, or by a motion afterward to have the same inserted, or at the settlement, when the opposite party can be present. Heroy *v.* Kerr, 8 Bosw. (N. Y.) 194, 21 How. Pr. 409 [*affirmed* in 2 Abb. Dec. 359, 2 Keyes 582]. Where the court refuses to pass on a fact not in issue by the pleadings, but important for a party to the case to have determined, the remedy of the party is by appeal from such denial as from an order on a motion, not by exception to it as to a decision on a trial so as to send the whole case for a new trial. Heroy *v.* Kerr, *supra.*

5. Kettell *v.* Foote, 3 Allen (Mass.) 212; Nash *v.* Harrington, 1 Aik. (Vt.) 39, holding that a bill of exceptions may be tendered, where the issue of fact is tried by the court, provided the exception is taken to the opinion of the court, upon a question of law, decided on the trial, and not to their opinion, upon the weight of evidence.

In Maine, under Rev. St. (1871) c. 77, § 49, no exceptions lie to the rulings of the presiding justice in matters of law when an action is submitted to him, unless there is an express reservation of the right to accept. Frank *v.* Mallett, 92 Me. 77, 42 Atl.

progress of the cause,[6] and a general exception will not be considered.[7] The right to except for supposed errors of decision cannot be affected by the absence of a written finding.[8]

B. Findings of Fact and Conclusions of Law [9] — **1. Nature and Purpose.** The making of findings of fact and conclusions of law is for the protection of both court and parties,[10] the purpose of such findings and conclusions being to dispose of the issues raised by the pleadings,[11] and to make the case easily reviewable by exhibiting the exact grounds upon which the judgment rests.[12] When made, findings of fact are analogous to, and have the force and effect of, a special verdict,[13] and are so considered when passed upon by a reviewing court.[14]

238; Reed *v.* Reed, 70 Me. 504; Mason *v.* Currier, 43 Me. 355; Dunn *v.* Hutchinson, 39 Me. 367; Roxbury *v.* Huston, 39 Me. 312.

6. Barnes *v.* McMullins, 78 Mo. 260 (holding that where the bill of exceptions shows that the appellant declined further to appear or participate in the trial, this court cannot consider objections which purport to have been subsequently taken at the trial); St. Joseph *v.* Ensworth, 65 Mo. 628; Harrison *v.* Bartlett, 51 Mo. 170.

Exceptions after decision made.— In New York, the 268th section of the code alone provides for taking exceptions after the decision is made, and they must be written and filed, not taken orally. McKeon *v.* See, 4 Rob. (N. Y.) 449 [*affirmed* in 51 N. Y. 300, 10 Am. Rep. 659].

7. Pennsylvania Co. *v.* Rossett, 116 Ill. App. 342; Harrison *v.* Bartlett, 51 Mo. 170.

The withholding of assent cannot be treated as a specific exception to the whole judgment. Battle *v.* Mayo, 102 N. C. 413, 9 S. E. 384.

8. People *v.* Littlejohn, 11 Mich. 60.

9. **Conclusion defined** see Conclusion, 8 Cyc. 551.

Findings: As part of record on appeal or error see Appeal and Error, 2 Cyc. 1069. Assignment of errors on see Appeal and Error, 2 Cyc. 983, 995. By particular courts or officers see Appeal and Error, 3 Cyc. 409; Justices of the Peace, 24 Cyc. 586 note 62 *et seq.*; References, 34 Cyc. 838 *et seq.* Definition of see Finding, 19 Cyc. 534. In particular actions or proceedings see Accounts and Accounting, 1 Cyc. 448; Ejectment, 15 Cyc. 166 *et seq.*; Eminent Domain, 15 Cyc. 1011; Forcible Entry and Detainer, 19 Cyc. 1172; Landlord and Tenant, 24 Cyc. 1450; Partition, 30 Cyc. 248; Reformation of Instruments, 34 Cyc. 991; Replevin, 34 Cyc. 1523 *et seq.*; Sales, 35 Cyc. 485, 578, 601, 651; Sheriffs and Constables, 35 Cyc. 1850, 1958; Vendor and Purchaser. Relating to particular matters see Fraud, 20 Cyc. 146; Frauds, Statute of, 20 Cyc. 322; Fraudulent Conveyances, 20 Cyc. 814; Limitations of Actions, 25 Cyc. 1439; Party-Walls, 30 Cyc. 798 text and note 43; Release, 34 Cyc. 1108 note 41; Trusts; Wills.

Necessity of findings of fact and conclusions of law appearing in record on appeal see Appeal and Error, 2 Cyc. 1037.

Special findings of jury see *supra*, XI, C.

10. Bard *v.* Kleeb, 1 Wash. 370, 25 Pac. 467, 27 Pac. 273.

Object not to uphold unjust judgments.— It is not the main object of findings to afford a cover under which the prevailing party may successfully hold an unjust judgment. Savings, etc., Soc. *v.* Burnett, 106 Cal. 514, 39 Pac. 922; Millard *v.* Supreme Council A. L. H., 81 Cal. 340, 22 Pac. 864.

11. Dam *v.* Zink, 112 Cal. 91, 44 Pac. 331; Collins *v.* Gray, 3 Cal. App. 723, 86 Pac. 983; Rauer's Law, etc., Co. *v.* Bradbury, 3 Cal. App. 256, 84 Pac. 1007; Maynard *v.* Locomotive Engineers' Mut. L., etc., Ins. Assoc., 14 Utah 458, 47 Pac. 1030.

12. *California.*— Savings, etc., Soc. *v.* Burnett, 106 Cal. 514, 39 Pac. 922; Chatfield *v.* Continental Bldg., etc., Assoc., 6 Cal. App. 665, 92 Pac. 1040.

Minnesota.—Abrahamson *v.* Lamberson, 68 Minn. 454, 71 N. W. 676.

Missouri.— Burgess *v.* Mercantile Town Mut. Ins. Co., 114 Mo. App. 169, 89 S. W. 568.

Oregon.—Washington County Drainage Dist. No. 4 *v.* Crow, 20 Oreg. 535, 26 Pac. 845.

Washington.— Bard *v.* Kleeb, 1 Wash. 370, 25 Pac. 467, 27 Pac. 273.

Wisconsin.— Fogo *v.* Boyle, 130 Wis. 154, 109 N. W. 977.

13. *Arkansas.*—Woodruff *v.* McDonald, 33 Ark. 97.

Colorado.— Johnson *v.* Bailey, 17 Colo. 59, 28 Pac. 81.

Iowa.— Hill *v.* Clarinda, 103 Iowa 409, 72 N. W. 542.

Kentucky.— Cooper *v.* Cunningham, 8 Ky. L. Rep. 879; Beall *v.* Bethel, 3 Ky. L. Rep. 693.

Missouri.— Leavitt *v.* Taylor, 163 Mo. 158, 63 S. W. 385.

New York.— Hanschell *v.* Swan, 23 Misc. 304, 51 N. Y. Suppl. 42.

Oklahoma.— Smith *v.* Spencer, 8 Okla. 459, 58 Pac. 638.

Oregon.— McClung *v.* McPherson, 47 Oreg. 73, 81 Pac. 567, 82 Pac. 13; Kyle *v.* Rippy, 19 Oreg. 186, 25 Pac. 141.

Texas.— Texas, etc., R. Co. *v.* Hoskins, 2 Tex. App. Civ. Cas. § 66.

Washington.— Bard *v.* Kleeb, 1 Wash. 370, 25 Pac. 467, 27 Pac. 273.

Wisconsin.— Heeron *v.* Beckwith, 1 Wis. 17.

See 46 Cent. Dig. tit. "Trial," § 962.

14. See Appeal and Error, 3 Cyc. 358 text and note 10.

2. When Authorized or Required[15] **— a. Necessity of, in General.** It is a common provision in the code and practice acts of the various states that, upon the trial of a case by the court without a jury, the court shall, as a basis of its judgment, state findings of fact and conclusions of law separately and in writing, and a failure to state such findings and conclusions is ground for reversal,[16] provided, in several jurisdictions, that proper requests to find be made by one of the parties,[17] and that exceptions be taken to the failure to find.[18] Although the want of findings renders a judgment subject to vacation or reversal on proper proceedings being taken therefor, it does not make the judgment void[19] or subject to collateral

15. In proceedings for probate establishment or annulment of will see Wills.

16. *California.*— Haffenegger *v.* Bruce, 54 Cal. 416; Watson *v.* Cornell, 52 Cal. 91; McKeon *v.* McDermott, 22 Cal. 667, 83 Am. Dec. 86; Hoagland *v.* Clary, 2 Cal. 474 [*following* Russell *v.* Armador, 2 Cal. 305].

Connecticut.— Sturdevant *v.* Stanton, 47 Conn. 579.

Indiana.—Addleman *v.* Erwin, 6 Ind. 494; Tevis *v.* Hammersmith, (App. 1907) 81 N. E. 614; Shroyer *v.* Campbell, 31 Ind. App. 83, 67 N. E. 193.

Kansas.— Shuler *v.* Lashhorn, 67 Kan. 694, 74 Pac. 264; Johnson *v.* Clark, 18 Kan. 157.

Michigan.— Howertoer *v.* Kelly, 23 Mich. 337; Stansell *v.* Corning, 21 Mich. 242 (holding that a judgment entered upon a trial by a judge without a jury, without a finding of facts, when one has been duly demanded, has no greater validity than a judgment rendered upon a jury trial without a verdict); Lee *v.* Marsh, 19 Mich. 11.

Missouri.— Mitchell *v.* Williams, 29 Mo. 132; Bailey *v.* Wilson, 29 Mo. 21; Chick *v.* Parker, 27 Mo. 418; Parsons *v.* Curry, 26 Mo. 189; Ragan *v.* McCoy, 26 Mo. 166; Derrick *v.* Jewett, 21 Mo. 444; Jamison *v.* Hughes, 20 Mo. 133; Davidson *v.* Rozier, 20 Mo. 132; Phelps *v.* Relfe, 18 Mo. 479; Sloan *v.* Sloan, 18 Mo. 474; Barbarick *v.* Reed, 18 Mo. 473; Bates *v.* Bower, 17 Mo. 550; German-American Ins. Co. *v.* Tribble, 86 Mo. App. 546. And see Shipp *v.* Snyder, 121 Mo. 155, 25 S. W. 900. At various times there has been no statute or code provision in force in Missouri requiring specific findings of fact (Ervin *v.* Brady, 48 Mo. 560; Kurlbaum *v.* Roepke, 27 Mo. 161; Johnson *v.* White, 2 Mo. 223); and the code of 1849 requiring such findings did not apply to cases tried by the circuit court on appeal from a justice of the peace (Glasby *v.* Prewitt, 26 Mo. 121).

New York.— Newman *v.* Mayer, 52 N. Y. App. Div. 209, 65 N. Y. Suppl. 294, 7 N. Y. Annot. Cas. 497 [*following* Shaffer *v.* Martin, 20 N. Y. App. Div. 304, 46 N. Y. Suppl. 992]; Osborne *v.* Heyward, 40 N. Y. App. Div. 78, 57 N. Y. Suppl. 542, 29 N. Y. Civ. Proc. 215.

North Dakota.— Gull River Lumber Co. *v.* Barnes County School Dist. No. 39, 1 N. D. 500, 48 N. W. 427.

Ohio.— Hubble *v.* Renick, 1 Ohio St. 171.

Oklahoma.— Rogers *v.* Bonnett, 2 Okla. 553, 37 Pac. 1078.

Oregon.— Jennings *v.* Frazier, 46 Oreg. 470, 80 Pac. 1011; Hicklin *v.* McClear, 18 Oreg. 126, 22 Pac. 1057.

South Dakota.— Thomas *v.* Issenhuth, 18 S. D. 303, 100 N. W. 436.

Tennessee.— McHale *v.* Wellman, 101 Tenn. 150, 46 S. W. 448; Stanley *v.* Donoho, 16 Lea 492.

Texas.— Parker *v.* Stephens, (Civ. App. 1897) 39 S. W. 164.

Utah.— Blumenthal *v.* Asay, 3 Utah 507, 24 Pac. 1056.

Washington.— Potwin *v.* Blasher, 9 Wash. 460, 37 Pac. 710.

Wisconsin.— Kinn *v.* Mineral Point First Nat. Bank, 118 Wis. 537, 95 N. W. 969, 99 Am. St. Rep. 1012.

See 46 Cent. Dig. tit. "Trial," § 908. And see Judgments, 23 Cyc. 822.

Partial requirement.— Under Ill. Rev. St. (1893) c. 10, § 42, which allows parties to actions at law tried before the court without a jury to submit to the court written propositions to be held as law in the decision of the case, a litigant cannot require the court to make special findings of fact. High Ct. I. O. F. *v.* Schweitzer, 171 Ill. 325, 49 N. E. 506 [*affirming* 70 Ill. App. 139]; Chicago First Nat. Bank *v.* Northwestern Nat. Bank, 152 Ill. 296, 38 N. E. 739, 43 Am. St. Rep. 247, 26 L. R. A. 289; Traders' Ins. Co. *v.* Catlin, 71 Ill. App. 569. Also in the Massachusetts and United States circuit courts, while the court may, in its discretion, make special findings (Joline *v.* Metropolitan Securities Co., 164 Fed. 650), it cannot be compelled, even upon request, to make any other than general findings (Lowell *v.* Bickford, 201 Mass. 543, 88 N. E. 1; Mercantile Mut. Ins. Co. *v.* Folsom, 18 Wall. (U. S.) 237, 21 L. ed. 827 [*affirming* 9 Fed. Cas. No. 4,903, 9 Blatchf. 201]; Ætna L. Ins. Co. *v.* Hamilton County, 79 Fed. 575, 25 C. C. A. 94; Key West *v.* Baer, 66 Fed. 440, 13 C. C. A. 572; Marye *v.* Strouse, 5 Fed. 494. And see Brooklyn L. Ins. Co. *v.* Miller, 12 Wall. (U. S.) 285, 20 L. ed. 398; Archer *v.* Morehouse, 30 Fed. Cas. No. 18,225, Hempst. 184).

As to whether findings should be general or special see *infra*, XII, B, 3, a; XII, B, 5, b, (II).

Sufficiency of findings to support judgment see *infra*, XII, B, 5, a, (I).

17. See *infra*, XII, B, 3.

18. See Appeal and Error, 2 Cyc. 729.

19. Carbon County School Dist. No. 3 *v.* Western Tube Co., 13 Wyo. 304, 80 Pac. 155. And see Judgments, 23 Cyc. 822.

attack;[20] and, in some cases, the courts have refused to reverse where no prejudicial error was shown,[21] as where the facts otherwise appeared of record.[22]

b. Applicability of Code Provisions. Findings of fact are obviously unnecessary and are not required where the action is dismissed, or plaintiff is nonsuited, either in an action tried by the court,[23] or by a jury;[24] where the case is submitted on an agreed statement or stipulation of facts;[25] or where no issuable fact is presented by the pleadings and evidence;[26] and, in some jurisdictions, the require-

20. Cizek *v.* Cizek, 69 Nebr. 797, 96 N. W. 657, 99 N. W. 28; State *v.* Duncan, 37 Nebr. 631, 56 N. W. 214. And see JUDGMENTS, 23 Cyc. 1095.

21. Swick *v.* Sheridan, 107 Minn. 130, 119 N. W. 791; Miller *v.* McCaleb, 208 Mo. 562, 106 S. W. 655; Umscheid *v.* Scholz, 84 Tex. 265, 16 S. W. 1065 (no conflict in the evidence); Crocker *v.* Crocker, 19 Tex. Civ. App. 296, 46 S. W. 870; Settegast *v.* Blount, (Tex. Civ. App. 1898) 46 S. W. 268; *In re* Callahan, 102 Wis. 557, 78 N. W. 750; Schmitz *v.* Schmitz, 19 Wis. 207, 88 Am. Dec. 681. And see *In re* Taylor, 5 Indian Terr. 219, 82 S. W. 727 [*reversed* on other grounds in 145 Fed. 169].

Lack of time to prepare findings before the close of the term has been held to excuse the making of findings and the refusal to do so is not error (Davis *v.* State, 75 Tex. 420, 12 S. W. 957; Jordan *v.* Lynch, (Tex. Civ. App. 1900) 54 S. W. 1058); but a mere press of other business does not constitute such a lack of time as will excuse (Love *v.* Rempe, (Tex. Civ. App. 1898) 44 S. W. 681; Osborne *v.* Ayers, (Tex. Civ. App. 1895) 32 S. W. 73).

22. Sutherlin *v.* Bloomer, 50 Oreg. 398, 93 Pac. 135; Sullivan *v.* Fant, 51 Tex. Civ. App. 6, 110 S. W. 507; Haywood *v.* Scarborough, (Tex. Civ. App. 1907) 102 S. W. 469; Crocker *v.* Crocker, 19 Tex. Civ. App. 296, 46 S. W. 870; Huffman Implement Co. *v.* Templeton, (Tex. App. 1889) 14 S. W. 1015.

23. Gilson Quartz Min. Co. *v.* Gilson, 47 Cal. 597; Miller *v.* Miller, 47 Minn. 546, 50 N. W. 612; Thompson *v.* Myrick, 24 Minn. 4; Fleming Cut Sole Co. *v.* Garretson, 1 Silv. Sup. (N. Y.) 384, 5 N. Y. Suppl. 344; Rosseau *v.* Bleau, 8 N. Y. Suppl. 823 [*reversed* on other grounds in 131 N. Y. 177, 30 N. E. 52, 27 Am. St. Rep. 578]. *Contra,* Barlass *v.* Kargus, 111 Wis. 611, 87 N. W. 800.

The rule is limited to mean that it is not sufficient to excuse the making of findings that the evidence would sustain a verdict or finding for defendant, but it must be such as to require, as a matter of law, a verdict or finding against plaintiff. Du Breuille *v.* Ripley, 106 Minn. 510, 119 N. W. 244; Ness *v.* March, 95 Minn. 301, 104 N. W. 242; Heim *v.* Heim, 90 Minn. 497, 97 N. W. 379; Herrick *v.* Barnes, 78 Minn. 475, 81 N. W. 526; Tharalson *v.* Wyman, 58 Minn. 233, 59 N. W. 1009.

In Washington the rule that findings are not required on dismissal has been applied to equitable actions (Noyes *v.* King County, 18 Wash. 417, 51 Pac. 1052. And see Thorne *v.* Joy, 15 Wash. 83, 45 Pac. 642); but it has been held inapplicable to actions at law tried by the court (Slayton *v.* Felt, 40 Wash. 1, 82 Pac. 173).

Where one defendant is dismissed from the action, no finding is necessary as to him. Pacific Paving Co. *v.* Vizelich, 1 Cal. App. 281, 82 Pac. 82.

Where a demurrer to plaintiff's evidence has been sustained, special findings made by the court thereafter are superfluous; but when not antagonistic to the ruling in the demurrer they may be regarded as stating the reasons for upholding it. Darlington *v.* Cloud County, 75 Kan. 810, 88 Pac. 529.

24. Toulouse *v.* Pare, 103 Cal. 251, 37 Pac. 146; Barkley *v.* Barton, 15 Wash. 33, 45 Pac. 654.

The making of special findings by the court, after withdrawing the case from the jury and practically granting a nonsuit, is harmless error which does not call for a reversal. *In re* Morey, 147 Cal. 495, 82 Pac. 57.

25. Work *v.* United Globe Mines, (Ariz. 1909) 100 Pac. 813; McMenomy *v.* White, 115 Cal. 339, 47 Pac. 109; Muller *v.* Rowell, 110 Cal. 318, 42 Pac. 804; Gregory *v.* Gregory, 102 Cal. 50, 36 Pac. 364; Hamill *v.* Littner, (Cal. 1885) 7 Pac. 707; Frush *v.* East Portland, 6 Oreg. 281; Cable Co. *v.* Rathgeber, 21 S. D. 418, 113 N. W. 88; Brown *v.* Brown, 12 S. D. 506, 81 N. W. 883. And see Rannells *v.* Isgrigg, 99 Mo. 19, 12 S. W. 343. *Contra,* State Mut. F. Ins. Co. *v.* Keefer, 9 Pa. Super. Ct. 186.

The court may nevertheless make findings and does not commit reversible error in so doing, unless it departs materially from the facts agreed upon. Los Angeles *v.* Los Angeles Farming, etc., Co., 152 Cal. 645, 93 Pac. 869, 1135; Towle *v.* Sweeney, 2 Cal. App. 29, 83 Pac. 74. And see Knight *v.* Cohen, 7 Cal. App. 43, 93 Pac. 396.

Where the agreed statement embraces only detailed facts and does not include an ultimate fact in issue, it is the duty of the court to find such fact if it may be inferred from the stipulated facts. Crisman *v.* Lanterman, 149 Cal. 647, 87 Pac. 89, 117 Am. St. Rep. 167; Gull River Lumber Co. *v.* Barnes County School Dist. No. 39, 1 N. D. 500, 48 N. W. 427; Packer *v.* Whittier, 91 Fed. 511, 33 C. C. A. 658, 1 Am. Bankr. Rep. 621 [*reversing* 81 Fed. 335].

26. *Oregon.*— Sutherlin *v.* Bloomer, 50 Oreg. 398, 93 Pac. 135.

South Carolina.— Briggs *v.* Winsmith, 10 S. C. 133, 30 Am. Rep. 46.

South Dakota.— Cole *v.* Custer County Agricultural, etc., Assoc., 3 S. D. 272, 52 N. W. 1086.

Utah.— Dickert *v.* Weise, 2 Utah 350.

ment that findings of fact and law be stated is held not applicable to orders not amounting to judgments,[27] or to equitable actions,[28] although, as to the latter, the weight of authority is to the contrary.[29] Under the codes of some states, the right to findings may be waived by the parties,[30] but a waiver will not be presumed;[31] and the court may, of its own motion and without any request by the parties, make written findings.[32]

3. Requests For — a. Necessity and Sufficiency. Under the court rules and

Wisconsin.— Potter *v.* Brown County, 56 Wis. 272, 14 N. W. 375; Downer *v.* Sexton, 17 Wis. 29.

See 46 Cent. Dig. tit. "Trial," § 911.

Necessity of findings on particular matters admitted or not denied see *infra*, XII, B, 5, a, (IV).

27. Minneapolis Trust Co. *v.* Menage, 86 Minn. 1, 90 N. W. 3; Williams *v.* Planters', etc., Nat. Bank, 91 Tex. 651, 45 S. W. 690; *In re* Gibbs, 4 Utah 97, 6 Pac. 525. *Compare* Semple *v.* Burkey, 2 Cal. 321, where a finding of fact was held necessary on the overruling of a motion, involving an issue of fact, and the entering of a judgment *pro forma*.

Wisconsin statute not applicable to special proceedings.— Gill *v.* Milwaukee, etc., R. Co., 76 Wis. 293, 45 N. W. 23.

28. Schlossmacher *v.* Beacon Place Co., 52 Wash. 588, 100 Pac. 1013; Clambey *v.* Copland, 52 Wash. 580, 100 Pac. 1031; White Crest Canning Co. *v.* Sims, 30 Wash. 374, 70 Pac. 1003; Knowles *v.* Rogers, 27 Wash. 211, 67 Pac. 572; Wintermute *v.* Carner, 8 Wash. 585, 36 Pac. 490.

29. Marmaduke *v.* McMasters, 24 Mo. 51; Putzel *v.* Schulhoff, 57 N. Y. Super. Ct. 505, 8 N. Y. Suppl. 651; Thompson *v.* Russell, 1 Okla. 225, 32 Pac. 56; Dietz *v.* Neenah, 91 Wis. 422, 64 N. W. 299, 65 N. W. 500. But see White *v.* Magann, 65 Wis. 86, 26 N. W. 260.

Recital of findings of fact in decree see Equity, 16 Cyc. 476.

In California the rule which prevailed at one time (Walker *v.* Sedgwick, 5 Cal. 192) that findings were unnecessary in equity suits was changed by the act of 1861 (Lyons *v.* Lyons, 18 Cal. 447).

Where a case is tried partly by the court and partly by a jury, the court may adopt the findings of the jury (Hoyt *v.* Hart, 149 Cal. 722, 87 Pac. 569; Gordon *v.* Lemp, 7 Ida. 677, 65 Pac. 444; Sylvester *v.* Guernsey, 22 Wis. 569); and supplement them with findings of its own (Gordon *v.* Lemp, *supra*; Drinkwater *v.* Sauble, 46 Kan. 170, 26 Pac. 433; Merchants' Nat. Bank *v.* Tracy, 77 Hun (N. Y.) 443, 29 N. Y. Suppl. 77 [*affirmed* in 150 N. Y. 565, 44 N. E. 1126]); but where the case is of a wholly equitable nature, although the court may direct any or all of the questions of fact to be tried by jury, and although the court may adopt or modify the findings of the jury, it is not relieved of the duty of stating findings in writing (Mandeville *v.* Avery, 3 N. Y. Suppl. 745); and, on the other hand, where an action was tried on the theory that it was solely one at law for damages and the judgment given was one for damages only, the objection that the judgment was based wholly on the verdict and that no findings of fact were made by the court is unavailable (Cushing-Wetmore Co. *v.* Gray, 152 Cal. 118, 92 Pac. 70, 125 Am. St. Rep. 47). Also where the main issue in a case is one triable by jury and the granting of an injunction is but ancillary to the main issue, it is sufficient if the facts warranting the injunction appear in the decree, without a separate finding being made. Reiner *v.* Schroeder, 146 Cal. 411, 80 Pac. 517.

30. Castle *v.* Smith, (Cal. 1894) 36 Pac. 859 (waiver of equitable relief); Shroyer *v.* Campbell, 31 Ind. App. 83, 67 N. E. 193 (waiver of special findings); Salls *v.* Barons, 40 Kan. 697, 20 Pac. 485.

Failure to appear at the trial amounts to a waiver under Cal. Code Civ. Proc. § 634 (Hibernia Sav., etc., Soc. *v.* Clarke, 110 Cal. 27, 42 Pac. 425; Fincher *v.* Malcolmson, 96 Cal. 38, 30 Pac. 835); and such a failure to appear exists where defendant, by attorney, appeared specially to move for a continuance of the case, and on the motion being denied withdrew from the trial (Eltzroth *v.* Ryan, 91 Cal. 584, 27 Pac. 932).

Giving notice of motion for a new trial does not amount to a waiver of findings. Savings, etc., Soc. *v.* Thorne, 67 Cal. 53, 7 Pac. 36.

31. Bard *v.* Kleeb, 1 Wash. 370, 25 Pac. 467, 27 Pac. 273. *Contra*, in California, where it must affirmatively appear that findings were not waived, before their absence in the record constitutes a fatal defect. Richardson *v.* Eureka, 110 Cal. 441, 42 Pac. 965.

Presumption of waiver of express findings see Appeal and Error, 3 Cyc. 313.

32. Gay *v.* Moss, 34 Cal. 125; Jennings *v.* Jennings, 56 Iowa 288, 9 N. W. 222; Ryan *v.* Ryan, (Tex. Civ. App. 1908) 114 S. W. 464. But see Union Carpet Lining Co. *v.* Miller, 38 Tex. Civ. App. 575, 86 S. W. 651, holding that Rev. St. (1895) art. 1331, authorizing appellate courts to deem an issue not submitted and not requested by a party as found by the court applies only to cases submitted on special issues by the court, and does not authorize the lower court to make a finding of its own motion on a plea in reconvention in the nature of a cross action, where the only issues specially submitted relate to the main action, and not to the plea in reconvention.

The court is not limited, in making its findings, to those requested. Pell *v.* Baur, 16 N. Y. Suppl. 258 [*affirmed* in 133 N. Y. 377, 31 N. E. 224].

code practice of most states, a request by one of the parties to the case is necessary in order to make it the duty of the court to state specific, rather than general, findings;[33] and it has been held in some cases that it is not a ground for reversal for the court to fail to make any findings of fact, in the absence of a request therefor,[34] and of an exception to the court's refusal or non-compliance with the request.[35] It is also the rule that a party cannot complain of the failure of the court to find on any one particular issue or question in the absence of a request on his part to so find.[36] To be of any avail, a request for a finding must be made by one of the

33. *Colorado.*— Larimer, etc., Irr. Co. *v.* Wyatt, 23 Colo. 480, 48 Pac. 528.

Indiana.— Singer *v.* Tormoehlen, 150 Ind. 287, 49 N. E. 1055; Pence *v.* Garrison, 93 Ind. 345.

Kansas.— Kellogg *v.* Bissantz, 51 Kan. 418, 32 Pac. 1090; Green *v.* Williams, 21 Kan. 64; Typer *v.* Sooy, 19 Kan. 593; Bainter *v.* Fults, 15 Kan. 323; Major *v.* Major, 2 Kan. 337.

Michigan.— Hedges *v.* Hibbard, 46 Mich. 551, 9 N. W. 849; People *v.* Littlejohn, 11 Mich. 60, holding that written requests for findings are necessary only where a detailed finding on the facts as well as on the law is desired.

Minnesota.— Bradbury *v.* Bedbury, 31 Minn. 163, 16 N. W. 854.

Missouri.— McKenzie *v.* Donnell, 208 Mo. 46, 106 S. W. 40; Singer Mfg. Co. *v.* Stephens, 169 Mo. 1, 68 S. W. 903.

New Mexico.— Bank of Commerce *v.* Baird Min. Co., 13 N. M. 424, 85 Pac. 970.

New York.— Smith *v.* Coe, 29 N. Y. 666; Heroy *v.* Kerr, 8 Bosw. 194, 21 How. Pr. 409 [*affirmed* in 2 Abb. Dec. 359, 2 Keyes 582].

North Carolina.— Carter *v.* Rountree, 109 N. C. 29, 13 S. E. 716.

Oregon.— Tatum *v.* Massie, 29 Oreg. 140, 44 Pac. 494.

South Dakota.— State *v.* Coughran, 19 S. D. 271, 103 N. W. 31.

Texas.— Tackaberry *v.* City Nat. Bank, 85 Tex. 488, 22 S. W. 151, 299; Diffie *v.* Thompson, (Civ. App. 1905) 90 S. W. 193; Alcott *v.* Spencer Optical Mfg. Co., (Civ. App. 1894) 31 S. W. 833.

Wisconsin.— Williams *v.* Stevens Point Lumber Co., 72 Wis. 487, 40 N. W. 154; Wrigglesworth *v.* Wrigglesworth, 45 Wis. 255.

See 46 Cent. Dig. tit. "Trial," § 916.

Facts on which estimate of damages based. —Where no requests for rulings on the question of damages were made, complaint cannot be made that the judge failed to state the facts upon which he based his estimate of damages. Chatham Furnace Co. *v.* Moffatt, 147 Mass. 403, 18 N. E. 168, 9 Am. St. Rep. 727.

Whether findings not requested are general or specific see *infra*, XII, B, 5, b, (II).

34. Serfass *v.* Serfass, 190 Pa. St. 484, 42 Atl. 888; Western Union Tel. Co. *v.* Trice, (Tex. Civ. App. 1898) 48 S. W. 770; Scurry *v.* Fromer, (Tex. Civ. App. 1894) 26 S. W. 461; State *v.* Corgiat, 50 Wash. 95, 96 Pac. 689; Remington *v.* Price, 13 Wash. 76, 42 Pac. 527; Wheeler *v.* Johnson, 10 Wash. 445, 39 Pac. 115.

Request as predicate for assignment of error.— Tex. Sup. Ct. Rule No. 27, requiring that an appellant shall "as a predicate for specific assignment of errors, request the judge to state in writing the conclusions of fact found by him separately from the conclusions of law" has been held not to be mandatory. Watters *v.* Parker, (Tex. 1892) 19 S. W. 1022. And see Hardin *v.* Abbey, 57 Tex. 582.

A request for findings is dispensed with when the court states that it will make findings of fact. Quinlan *v.* Calvert, 31 Mont. 115, 77 Pac. 428.

35. See APPEAL AND ERROR, 2 Cyc. 729.

Necessity of: Motion for new trial see NEW TRIAL, 29 Cyc. 757. Request and refusal appearing in record see APPEAL AND ERROR, 2 Cyc. 1047.

36. *Missouri.*— Redmond *v.* Missouri, etc., R. Co., 104 Mo. App. 651, 77 S. W. 768.

Montana.— Bordeaux *v.* Bordeaux, 32 Mont. 159, 80 Pac. 6.

North Carolina.— Silver Valley Min. Co. *v.* Baltimore Gold, etc., Min., etc., Co., 99 N. C. 445, 6 S. E. 735.

Oregon.— Jennings *v.* Frazier, 46 Oreg. 470, 80 Pac. 1011 (holding that where either party desires findings on issues made by the evidence outside the pleadings, but deemed important for a presentation of the question involved, the proper practice is to request the court to make such findings; and, without such a request, error cannot be predicated on its failure to do so); Reade *v.* Pacific Supply Assoc., 40 Oreg. 60, 66 Pac. 443 (immaterial and subordinate issue); Noland *v.* Bull, 24 Oreg. 479, 33 Pac. 983; Hicklin *v.* McClear, 18 Oreg. 126, 22 Pac. 1057. *Compare* Moody *v.* Richards, 29 Oreg. 282, 45 Pac. 777.

South Dakota.— State *v.* Coughran, 19 S. D. 271, 103 N. W. 31.

Texas.— Lanier *v.* Foust, 81 Tex. 186, 16 S. W. 994; Diffie *v.* Thompson, (Civ. App. 1905) 90 S. W. 193, (Civ. App. 1905) 88 S. W. 381; Tenzler *v.* Tyrrell, 32 Tex. Civ. App. 443, 75 S. W. 57; Connor *v.* Blaisdell, (Civ. App. 1901) 60 S. W. 890.

Wisconsin.— Maxon *v.* Gates, 136 Wis. 270, 116 N. W. 758; Wetzler *v.* Duffy, 78 Wis. 170, 47 N. W. 184, 12 L. R. A. 178; Wilkinson *v.* Wilkinson, 59 Wis. 557, 18 N. W. 527; Barry *v.* Schmidt, 57 Wis. 172, 15 N. W. 24, 46 Am. Rep. 35.

See 46 Cent. Dig. tit. "Trial," § 916.

And see California Bank *v.* Dyer, 14 Wash. 279, 44 Pac. 534.

In California it seems that it is the duty of the court to find upon all the material

parties,[37] and should not be in the form of a finding, but should point out the propositions on which a finding is desired,[38] with special particularity in regard to any particular issue or fact on which a finding is sought.[39] Although the practice of presenting unnecessarily numerous requests is condemned by the courts,[40] and although a request need not be accompanied by a statement that it is presented with a view of taking an exception,[41] requests for conclusions of fact and of law should be separated,[42] and a request must be applicable to and supported by the evidence,[43] in the whole and not merely in part.[44] It is also necessary in some jurisdictions that the request be entered on the minutes of the court.[45]

b. Time For Making.[46] Some statutes impliedly, if not expressly, require a

issues regardless of any request of the parties. Haight *v.* Tryon, 112 Cal. 4, 44 Pac. 318; Davies *v.* Angelo, 8 Cal. App. 305, 96 Pac. 909.

In New York, although it has been asserted that it is the duty of plaintiff, not only to prove his cause of action, but to procure findings by the court which will sustain the judgment rendered in his favor (Triest *v.* New York, 193 N. Y. 525, 86 N. E. 549 [*reversing* 126 N. Y. App. Div. 934, 110 N. Y. Suppl. 1148 (*affirming* 55 Misc. 459, 105 N. Y. Suppl. 571)], it has been held that defendant must make requests in order to be in a position to have the findings reviewed on the ground that they are against the weight of evidence (Crouch *v.* Moll, 3 Silv. Sup. 601, 8 N. Y. Suppl. 183), and that an omission to find facts claimed by the unsuccessful party to be warranted by the evidence can only be taken advantage of, by the making of a request to so find and the taking of an exception to the refusal of the court to grant the request, as provided by Code Civ. Proc. §§ 992, 993, 1023 (Ostrander *v.* Hart, 130 N. Y. 406, 29 N. E. 744 [*affirming* 8 N. Y. Suppl. 809]; Lyons *v.* Cahill, 55 N. Y. Super. Ct. 553).

Necessity of request for additional findings see *infra*, XII, B, 6, b.

37. Jones *v.* Hall, 9 Ind. App. 458, 35 N. E. 923, 37 N. E. 25.

38. Edgar *v.* Stevenson, 70 Cal. 286, 11 Pac. 704; Miller *v.* Steen, 30 Cal. 402, 89 Am. Dec. 124. But see Quinlan *v.* Calvert, 31 Mont. 115, 77 Pac. 428, where the court stated that it would make findings of fact and gave defendant ten days "to submit in writing his findings," and it was held that, under such circumstances, the submission of written findings by defendant had the effect of requesting findings in writing.

Under the Connecticut statutes, requests for a finding and for the incorporation of facts in a finding must be so framed as to be distinguishable (Beckwith *v.* Ryan, 66 Conn. 589, 34 Atl. 488; Schlegal *v.* Allerton, 65 Conn. 260, 32 Atl. 363); but it is competent for the court to waive any informality in the requests (Scholfield Gear, etc., Co. *v.* Scholfield, 70 Conn. 500, 40 Atl. 182).

39. Waterson *v.* Kirkwood, 17 Kan. 9; Wrigglesworth *v.* Wrigglesworth, 45 Wis. 255.

Implied request.— It has been held, in an action for damages caused by the construction of an elevated railroad, that while defendant did not ask the trial court to find from the evidence that there were any benefits to the premises, yet a claim in the request to find that allowances should be made for benefits in the estimate of damages implies that on the evidence benefits were apparent. Nette *v.* New York El. R. Co., 2 Misc. (N. Y.) 62, 20 N. Y. Suppl. 844.

40. Bates *v.* Bates, 7 Misc. (N. Y.) 547, 27 N. Y. Suppl. 872; Skelly *v.* New York El. R. Co., 7 Misc. (N. Y.) 88, 27 N. Y. Suppl. 304 [*affirmed* in 148 N. Y. 747, 43 N. E. 989]; Schnugg *v.* New York El. R. Co., 6 Misc. (N. Y.) 325, 26 N. Y. Suppl. 798; Myersdale, etc., St. R. Co. *v.* Pennsylvania, etc., St. R. Co., 219 Pa. St. 558, 69 Atl. 92.

41. Western Union Tel. Co. *v.* Trissal, 98 Ind. 566; Trentman *v.* Eldridge, 98 Ind. 525.

42. Sniffen *v.* Koechling, 45 N. Y. Super. Ct. 61 [*affirmed* in 84 N. Y. 677].

Alternative request.— It is improper to request that a certain proposition be found as a conclusion of law, and, if not so found, that it be found as a finding of fact. Wilson *v.* New York El. R. Co., 9 Misc. (N. Y.) 657, 30 N. Y. Suppl. 547 [*affirmed* in 150 N. Y. 576, 44 N. E. 1129].

43. Cook *v.* Gill, 83 Md. 177, 34 Atl. 248; Schlatter *v.* Young, 197 Mass. 36, 83 N. E. 2; Murphy *v.* Com., 187 Mass. 361, 73 N. E. 524; Cunningham *v.* Davis, 175 Mass. 213, 56 N. E. 2; Reed *v.* Whipple, 140 Mich. 7, 103 N. W. 548; Peterson *v.* Johnson, 20 Wash. 497, 55 Pac. 932, holding also that it is proper for the court to refuse to make a finding of fact which is not disputed in the pleadings.

Frivolous requests, as well as requests for findings of immaterial and unimportant facts, need not be ruled on. Myersdale, etc., St. R. Co. *v.* Pennsylvania, etc., St. R. Co., 219 Pa. St. 558, 69 Atl. 92.

44. Koehler *v.* Hughes, 148 N. Y. 507, 42 N. E. 1051; Schierloh *v.* Schierloh, 72 Hun (N. Y.) 150, 25 N. Y. Suppl. 676 [*affirmed* in 148 N. Y. 103, 42 N. E. 409]; Spore *v.* Vaughn, 20 N. Y. Suppl. 152.

The leaving out of material facts, and asking for a finding on an isolated fact, renders the request bad. Coffin *v.* Grace, 198 Mass. 104, 84 N. E. 105.

45. San Jose *v.* Shaw, 45 Cal. 178.

46. **Time for requesting amended or additional findings** see *supra*, XII, B, 3, a; XII, B, 5, b, (II).

request for findings to be made before a final submission of the case;[47] and, although no time limit is prescribed by statute, a request, to be entitled to compliance, must be made a reasonable time[48] before judgment,[49] it being the rule in one jurisdiction that it must be made before trial and that, when made afterward, the court may, in its discretion, recognize or ignore it.[50]

c. Ruling on. Statutory requirements that the court respond to each request for findings and note, in the margin, the disposition made thereof[51]

47. Schilling *v.* Curran, 30 Mont. 370, 76 Pac. 998; Wainman *v.* Hampton, 110 N. Y. 429, 18 N. E. 234; Hartmann *v.* Schnugg, 113 N. Y. App. Div. 254, 99 N. Y. Suppl. 33 [*affirmed* in 188 N. Y. 617, 81 N. E. 1165]; Stephens *v.* Mason, 99 Tenn. 512, 42 S. W. 143; Parham *v.* Gibbs, 16 Lea (Tenn.) 296. And see *In re* Chauncey, 32 Hun (N. Y.) 429.

Under the Connecticut statutes a request to set forth the facts in the judgment should precede the judgment, while a motion to find the facts should follow the judgment. Morris *v.* Winchester Repeating Arms Co., 73 Conn. 680, 49 Atl. 180. After the statutory limitation has expired without any request being made, the right to make one is not revived by a motion to reopen the judgment. *In re* Deland, 81 Conn. 249, 70 Atl. 449.

48. City Nat. Bank *v.* Stout, 61 Tex. 567.

A request made on the last day of the term, and on the day during which judgment was rendered, is properly declined. Davis *v.* State, 75 Tex. 420, 12 S. W. 957; Pacific Express Co. *v.* Williams, 2 Tex. App. Civ. Cas. § 810.

The prevailing practice has been said to be for the parties to request the court, either just before, or at the close of the argument made in the case, to state its findings in writing. Wilcox *v.* Byington, 36 Kan. 212, 12 Pac. 826.

49. Allen *v.* Dodson, 39 Kan. 220, 17 Pac. 667; Smythe *v.* Parsons, 37 Kan. 79, 14 Pac. 444; Wilcox *v.* Byington, 36 Kan. 212, 12 Pac. 826; Hamilton *v.* Armstrong, (Mo. 1892) 20 S. W. 1054; Butts *v.* Ruby, 85 Mo. App. 405; Young *v.* Stephens, 66 Mo. App. 222; Schwartz *v.* Stock, 26 Nev. 128, 65 Pac. 351; Glass *v.* Wiles, (Tex. 1890) 14 S. W. 225; Bailey *v.* Fly, 35 Tex. Civ. App. 410, 80 S. W. 675; Texarkana, etc., R. Co. *v.* Hartford Ins. Co., 17 Tex. Civ. App. 498, 44 S. W. 533. But see Stotts City Bank *v.* Miller Lumber Co., 102 Mo. App. 75, 74 S. W. 472, holding that, although a finding for plaintiff is not requested until after the court has announced its finding for defendant, the court may properly make and file such requested finding on the same day.

That it is so required by court rule in Michigan see Stafford *v.* Crawford, 118 Mich. 285, 76 N. W. 496; Brown *v.* Haak, 48 Mich. 229, 12 N. W. 219.

50. Stumph *v.* Miller, 142 Ind. 442, 41 N. E. 812; Hartlep *v.* Cole, 120 Ind. 247, 22 N. E. 130.

The discretion is properly exercised by refusing to grant a request to state special findings made after the court has begun to render judgment and state its general findings (Turpie *v.* Lowe, 158 Ind. 47, 62 N. E. 628; Moore *v.* Barnett, 17 Ind. 349; Miller *v.* Lively, 1 Ind. App. 6, 27 N. E. 437), or after such general findings have been filed (Brundage *v.* Deschler, 131 Ind. 174, 29 N. E. 921). Neither does the judge abuse his discretion in refusing plaintiff's request for a special finding made the day set for entering a finding, although defendants had made a request for special findings and later withdrawn it. Tevis *v.* Hammersmith, 170 Ind. 286, 84 N. E. 337 [*affirming* (App. 1907) 81 N. E. 614].

51. Bremer *v.* Manhattan R. Co., 191 N. Y. 333, 84 N. E. 59 [*modifying* 113 N. Y. App. Div. 905, 99 N. Y. Suppl. 1135, and *disapproving* Elterman *v.* Hyman, 117 N. Y. App. Div. 519, 102 N. Y. Suppl. 613] (holding that, under Code Civ. Proc. §§ 1022, 1023, the court is only required to note in the margin the manner of disposing of each proposition, and to file or return the statement to the attorney presenting it, and is not required to incorporate in its decision requested findings so far as they are granted); Goetting *v.* Biehler, 33 Hun (N. Y.) 500 (holding that Code Civ. Proc. § 1023, gives no right to refuse to pass on requests on the ground that they are unnecessary). However, N. Y. Code Civ. Proc. § 1023, requiring the court to note on the margin of requests the manner in which they have been disposed of was repealed by Laws (1894), c. 688, p. 1719 (Mutual Milk, etc., Co. *v.* Tietjen, 89 N. Y. Suppl. 391), but was subsequently restored (Bremer *v.* Manhattan R. Co., *supra*).

The writing of the word "proven" on requests to find has the same effect as if the matter stated in such requests were incorporated in the findings made. Arthur *v.* Norfield Parish Cong. Church Soc., 73 Conn. 718, 49 Atl. 241.

The word "refused," when written on the margin of requested findings, means nothing more than a refusal to make the findings (Helena *v.* Hale, 38 Mont. 481, 100 Pac. 611), and is not equivalent to a finding to the contrary (Lawrenceville Cement Co. *v.* Parker, 15 N. Y. Suppl. 577, 21 N. Y. Civ. Proc. 263 [*affirmed* in 133 N. Y. 622, 30 N. E. 1150]).

The Pennsylvania equity rule, providing that a judge sitting as a chancellor may adopt or affirm requested findings, or any of them, or state his findings of fact or of law in his own language, applies to each request and makes it the duty of the judge to make a separate and distinct answer to each request. Lehigh Valley Coal Co. *v.* Everhart, 206 Pa. St. 118, 55 Atl. 864; Hoyt *v.*

are liberally construed, and a failure to respond to each specific request is not assignable as error where the parties are not prejudiced thereby,[52] or the ruling on such requests otherwise appears of record.[53] Although the court, after consenting or refusing to give requested findings, is at liberty to change its mind before the decision of the case,[54] where the court fails to pass on requests at or before the decision, it is not sufficient to do so on the settlement of the case,[55] or on overruling a motion for a new trial.[56]

4. Preparation, Form, and Filing — a. In General. Findings of fact and conclusions of law are required to be in writing,[57] signed by the judge,[58] and to be in such form as to be distinguishable from an opinion, as an opinion will not

Kingston Coal Co., 203 Pa. St. 509, 53 Atl. 348. If the judge feels that, in the findings "in his own language," he has answered a request, he should say so by indicating in connection with the request itself what he regards as his answer to be found in his own independent findings. Hoyt *v.* Kingston Coal Co., *supra*. However, on the trial of a quo warranto suit by the court without a jury, under the provision of the act of April 22, 1874, no further answers to requests for findings of fact are required than the statement of facts found by the court. Com. *v.* Monongahela Bridge Co., 216 Pa. St. 108, 64 Atl. 909.

52. Hazard Powder Co. *v.* Somersville Mfg. Co., 78 Conn. 171, 61 Atl. 519, 112 Am. St. Rep. 144; Babcock *v.* Beaver Creek Tp., 65 Mich. 479, 32 N. W. 653.

Withdrawal of request.—As such statutory requirements are for the benefit of the party presenting requests, the rights conferred by them may be waived by the party withdrawing his requests with the consent of the court and before the latter has passed upon them. Smith *v.* Mayfield, 163 Ill. 447, 45 N. E. 157 [*affirming* 60 Ill. App. 266]; Highway Com'rs *v.* Kline, 96 Ill. App. 318.

53. Vestal *v.* Young, 147 Cal. 715, 82 Pac. 381; Atwater *v.* Morning News Co., 67 Conn. 504, 34 Atl. 865; Schuler *v.* Eckert, 90 Mich. 165, 51 N. W. 198, holding it not to be error in the court to refuse to find on questions of fact, where some of them presented immaterial issues and the others were sufficiently answered in the general findings.

General refusal.—Where several requests to find are refused, it is not error to refuse to mark the refusal on each request separately (Lawrenceville Cement Co. *v.* Parker, 15 N. Y. Suppl. 577, 21 N. Y. Civ. Proc. 263 [*affirmed* in 133 N. Y. 622, 30 N. E. 1150]); nor, where the proposed findings are not material, is it reversible error to rule that "each of the within requests is to be marked 'Refused,' except so far as covered by the findings of facts and conclusions of law settled and signed by me" (Hunter *v.* Manhattan R. Co., 61 N. Y. Super. Ct. 312, 19 N. Y. Suppl. 703 [*affirmed* in 141 N. Y. 281, 56 N. E. 400]; Uhlenhaut *v.* Manhattan R. Co., 60 N. Y. Super. Ct. 501, 18 N. Y. Suppl. 797).

54. Salls *v.* Barons, 40 Kan. 697, 20 Pac. 485. And see Beard *v.* Becker, 69 Ind. 498.

55. Masterson *v.* Cranitch, 66 How. Pr. (N. Y.) 171. *Compare* People *v.* Church, 2 Lans. (N. Y.) 459, 57 Barb. 204 [*affirmed* in 57 N. Y. 161].

56. Wiley *v.* Shars, 21 Nebr. 712, 33 N. W. 418.

57. Wood *v.* Boyd, 28 Ark. 75; Peoria M. & F. Ins. Co. *v.* Walser, 22 Ind. 73; Griffith *v.* Kansas City Material, etc., Co., 46 Mo. App. 539. The rule is otherwise under the Iowa code, unless so requested by one of the parties. Houston *v.* Trimble, 3 Greene (Iowa) 574.

The requirement is satisfied by a reduction of the findings to writing after rendition of judgment (Nathan *v.* Sloan, 34 Ark. 524; Randolph *v.* Campbell, (Kan. App. 1897) 47 Pac. 560; S. C. Forsaith Mach. Co. *v.* Hope Mills Lumber Co., 109 N. C. 576, 13 S. E. 869), as well as having an announcement of findings in open court entered on the record (Ætna L. Ins. Co. *v.* Hamilton County, 79 Fed. 575, 25 C. C. A. 94); and it has been held that, so far as a general finding is concerned, the signing of the judgment by the judge who tried the cause is equivalent to a written finding (Cleveland *v.* Stein, 14 Mich. 338).

58. Winstandley *v.* Breyfogle, 148 Ind. 618, 48 N. E. 224; Sackett *v.* Price County, 130 Wis. 637, 110 N. W. 821.

What signing sufficient.—Where the conclusions of law immediately follow the findings of fact, the signature of the court, after the conclusions of law, is a sufficient signing of the findings of fact. O'Neal *v.* Hines, 145 Ind. 32, 43 N. E. 946; Ferris *v.* Udell, 139 Ind. 579, 38 N. E. 180; Van Valkenburgh *v.* Dean, 15 Ind. App. 693, 44 N. E. 652. To like effect see National Tube-Works Co. *v.* Chamberlain, 5 Dak. 54, 37 N. W. 761. It has also been held that where the findings of the trial court were in five separate volumes, each of which was in the judgment-roll, each identified by the signature of the clerk, and the language at the end of each volume and the beginning of the next showed they were one continuous document, the failure of the judge to sign any but the last volume was not error. Rose *v.* Mesmer, 142 Cal. 322, 75 Pac. 905.

The signature may be dispensed with when the finding is brought into the record by a bill of exceptions or order of court, as the only object of the signature is to identify the findings. Coffinberry *v.* McClellam, 164 Ind. 131, 73 N. E. 97.

Necessity of record on appeal or error disclosing signature see Appeal and Error, 2

be construed to be a finding.[59] It is not imperatively necessary, however, that the court prepare its own findings, but it may adopt, after examination, findings prepared, at its direction, by the successful party or his attorney,[60] or those prepared by a referee [61] or another judge,[62] and while findings, which follow the pleadings, are sufficient,[63] it is not necessary that they do so,[64] or that the findings be in any particular form,[65] except that the findings of fact and conclusions of

Cyc. 1037 text and note 41; 1069 text and note 49.

59. *California.*— McClory *v.* McClory, 38 Cal. 575; Hidden *v.* Jordan, 28 Cal. 301.

Michigan.— Rice *v.* Muskegon, 150 Mich. 679, 114 N. W. 661, holding that a statement made by the court in deciding a case tried without a jury and taken down by the reporter is not the written finding of fact and law required by Michigan circuit court rule 26, of a party desiring to have the court's action reviewed.

New York.— Kent *v.* Binghamton, 90 N. Y. App. Div. 553, 86 N. Y. Suppl. 411.

Ohio.— Gray *v.* Field, 10 Ohio Dec. (Reprint) 170, 19 Cinc. L. Bul. 121.

Utah.—Victor Gold, etc., Min. Co. *v.* National Bank of Republic, 18 Utah 87, 55 Pac. 72, 72 Am. St. Rep. 767.

United States.— U. S. *v.* Sioux City Stock Yards Co., 167 Fed. 126, 92 C. C. A. 578 [*affirming* 162 Fed. 556]; York *v.* Washburn, 129 Fed. 564, 64 C. C. A. 132 [*affirming* 118 Fed. 316]; St. Louis Consol. Coal Co. *v.* Polar Wave Ice Co., 106 Fed. 798, 45 C. C. A. 638.

See 46 Cent. Dig. tit. "Trial," § 920. And see APPEAL AND ERROR, 2 Cyc. 1038 text and note 45.

Compare Duncan *v.* Duncan, 111 Wis. 75, 86 N. W. 562.

Embodiment of findings in decree is permissible (Locke *v.* Klunker, 123 Cal. 231, 55 Pac. 993; Bodkin *v.* Merit, 102 Ind. 293, 1 N. E. 625; Hector *v.* Hector, 51 Wash. 434, 99 Pac. 13. And see Hopkins *v.* Warner, 109 Cal. 133, 41 Pac. 868), as is also the inclusion of conclusions of law in a judgment (Gainsley *v.* Gainsley, (Cal. 1896) 44 Pac. 456).

Finding contained in "case" for appeal.— It has been held that upon a trial of a cause by a court without a jury, the proper place for inserting the findings of the court upon matters pertinent to the issues, but not contained in its "decision," is in the "case" prepared for hearing the appeal. McKeon *v.* See, 4 Rob. (N. Y.) 449 [*affirmed* in 51 N. Y. 300, 10 Am. Rep. 659].

Findings distinguished from judgment see JUDGMENTS, 23 Cyc. 667.

Necessity of incorporation of findings in judgment see JUDGMENTS, 23 Cyc. 789.

60. English *v.* English, 53 Kan. 173, 35 Pac. 1107; Howard *v.* Howard, 52 Kan. 469, 34 Pac. 1114; Bateman *v.* Blaisdell, 83 Mich. 357, 47 N. W. 223; People *v.* Church, 2 Lans. (N. Y.) 459, 57 Barb. 204 [*affirmed* in 57 N. Y. 161]; Bernheim *v.* Bloch, 45 Misc. (N. Y.) 581, 91 N. Y. Suppl. 40; Dennis *v.* Walsh, 16 N. Y. Suppl. 257; Victoria First Nat. Bank *v.* Skidmore, (Tex. Civ. App. 1895) 30 S. W. 564. See also Benjamin *v.* Allen, 35 Hun (N. Y.) 115.

A submission to the adverse party of findings prepared by the attorney of the successful party, or otherwise giving notice to him, before they are settled and filed by the court, is not necessary. Hathaway *v.* Ryan, 35 Cal. 188; People *v.* Church, 2 Lans. (N. Y.) 459, 57 Barb. 204 [*affirmed* in 57 N. Y. 161].

The court is not bound to adopt findings prepared at its direction, but may disregard them and prepare its own findings. Porter *v.* Woodward, 57 Cal. 535. And see Morris *v.* Winchester Repeating Arms Co., 73 Conn. 680, 49 Atl. 180.

61. Matter of Bettman, 65 N. Y. App. Div. 229, 72 N. Y. Suppl. 728; Silver Valley Min. Co. *v.* Baltimore Gold, etc., Min., etc., Co., 99 N. C. 445, 6 S. E. 735.

62. Taylor *v.* Pope, 106 N. C. 267, 11 S. E. 257, 19 Am. St. Rep. 530.

Change of judges during trial.—Where, after the taking of evidence in an action for an accounting, and after the judge had found that plaintiff was entitled to an accounting and ordered defendant to account on a future day, another judge was authorized to further try the case, the substitute judge may make findings on the whole case. Everett *v.* Jones, 32 Utah 489, 91 Pac. 360.

63. Murdock *v.* Clarke, 90 Cal. 427, 24 Pac. 272, 27 Pac. 275; Pacific Paving Co. *v.* Diggins, 4 Cal. App. 240, 87 Pac. 415; Rauer's Law, etc., Co. *v.* Bradbury, 3 Cal. App. 256, 84 Pac. 1007.

64. Ready *v.* McDonald, 128 Cal. 663, 61 Pac. 272, 79 Am. St. Rep. 76; Mott *v.* Ewing, 90 Cal. 231, 27 Pac. 194; Millard *v.* Supreme Council A. L. H., 81 Cal. 340, 22 Pac. 864.

65. Ready *v.* McDonald, 128 Cal. 663, 61 Pac. 272, 79 Am. St. Rep. 76; Millard *v.* Supreme Council A. L. H., 81 Cal. 340, 22 Pac. 864; Smith *v.* Harris, 43 Mo. 557 (holding that the findings and judgment are not invalidated by informality in the order of statement of the facts and conclusions of law); Gettysburg Borough *v.* Gettysburg Transit Co., 36 Pa. Super. Ct. 598 (holding that the fact that the judge's discussion of the pertinent legal principles and authorities does not follow but precedes his statement of the final conclusion or conclusions of law is not ground for valid objection to the form of the decision).

Where the form of the findings originated with plaintiff's attorney, he cannot be heard to complain of its insufficiency. Olson *v.* Martin, 38 Iowa 346.

The usual and better practice is for the court to express its findings in separate and numbered clauses so as to present each one independently and distinctly. Pittsburg

law must be separated.[66] Although findings must be filed,[67] and a filing after judgment is of no avail in some jurisdictions,[68] statutes relating to the time within which findings should be made and filed are generally construed as directory, and a mere delay is not fatal, when not prejudicial.[69]

b. Separate Statement of Law and Facts. The statutes and codes of civil procedure of the different states require that, in trials by the court without a jury, the findings of fact and conclusions of law shall be separately stated,[70] upon the condition, in most states, that such separate statement be requested by one of the parties,[71] and a failure to comply with this requirement is error calling for

Stove, etc., Co. *v.* Pennsylvania Stove Co., 208 Pa. St. 37, 57 Atl. 77; Schmidt *v.* Baizley, 184 Pa. St. 527, 39 Atl. 406.

Sufficiency as to substance see *infra*, XII, B, 5.

66. See *infra*, XII, B, 4, b.

67. Peoria M. & F. Ins. Co. *v.* Walser, 22 Ind. 73.

What constitutes filing.— Where the court leaves findings with the clerk to be filed, they are effectually filled on that day, although the file-mark is not placed on them by the clerk until a later day. Billings *v.* Parsons, 17 Utah 22, 53 Pac. 730; Fisher *v.* Emerson, 15 Utah 517, 50 Pac. 619. But the date of the findings does not prevail over the date of the indorsement of the clerk and, in the absence of sufficient evidence to the contrary, it will be presumed that the date of indorsement by the clerk is the date of filing. State *v.* Reesa, 57 Wis. 422, 15 N. W. 383.

68. Hodges *v.* Goetzman, 76 Iowa 476, 41 N. W. 195; Loewen *v.* Forsee, 137 Mo. 29, 38 S. W. 712, 59 Am. St. Rep. 489; Hamilton *v.* Armstrong, 120 Mo. 597, 25 S. W. 545. And see Stafford *v.* Crawford, 118 Mich. 285, 76 N. W. 496, holding that a finding of facts or of law can be made after the entry of judgment, only where the trial court vacates the judgment on a party making a request for findings on a proper showing.

Extension of time by agreement of parties invalid see Hodges *v.* Goetzman, 76 Iowa 476, 41 N. W. 195; Maverick *v.* Burney, (Tex. Civ. App. 1895) 30 S. W. 566.

69. *Alabama.*— Pappot *v.* Howard, 154 Ala. 306, 45 So. 581, holding that special findings are not required to be simultaneous with the rendition of a judgment, but it is sufficient if they are found and made a part of the record before the judgment becomes final.

California.— Broad *v.* Murray, 44 Cal. 228; Vermule *v.* Shaw, 4 Cal. 214.

Indiana.— Quill *v.* Gallivan, 108 Ind. 235, 9 N. E. 99.

Minnesota.— Vogle *v.* Grace, 5 Minn. 294.

South Dakota.— Edmonds *v.* Riley, 15 S. D. 470, 90 N. W. 139

Texas.— Anderson *v.* Horn, 75 Tex. 675, 13 S. W. 24, holding that where the court orally stated the findings at the time of rendering judgment, and filed them during the term, appellant cannot complain that they were not, on his request, filed in time to enable him to base a motion for a new trial thereon. And see Morrison *v.* Faulkner, 80 Tex. 128, 15 S. W. 797.

Utah.— Lynch *v.* Coviglio, 17 Utah 106, 53 Pac. 983. *Contra*, Reich *v.* Rebellion Silver Min. Co., 3 Utah 254, 2 Pac. 703, decided under an earlier statute.

See 46 Cent. Dig. tit. "Trial," §§ 913, 955.

A nunc pro tunc entry is proper where the findings were duly made and filed, but the clerk omitted to enter them in the minutes (Pappot *v.* Howard, 154 Ala. 306, 45 So. 581), or in the journal (Carbon County School Dist. No. 3 *v.* Western Tube Co., 13 Wyo. 304, 80 Pac. 155); and in such case the bill of exceptions reciting the rendering of the decision and the filing of conclusions of fact upon the date as of which the *nunc pro tunc* entry was sought to be made is competent evidence that the findings were in fact made on that date (Carbon County School Dist. No. 3 *v.* Western Tube Co., *supra*). Also when a party dies after the submission of a case but before its decision, the court has authority to order the findings to be filed *nunc pro tuno* as of the date of submission. Fox *v.* Hale, etc., Silver Min. Co., 108 Cal. 478, 41 Pac. 328.

70. *Arkansas.*— Wood *v.* Boyd, 28 Ark. 75.

California.— Brown *v.* Brown, 3 Cal. 111.

Pennsylvania.— Carpenter *v.* Yeadon Borough, 208 Pa. St. 396, 57 Atl. 837.

Utah.— Chadwick *v.* Arnold, 34 Utah 48, 95 Pac. 527.

Wisconsin.— Sliter *v.* Carpenter, 123 Wis. 578, 102 N. W. 27; Yahr *v.* Princeton, etc., School Dist. No. 2, 99 Wis. 281, 74 N. W. 779; Sayre *v.* Langton, 7 Wis. 214.

See 46 Cent. Dig. tit. "Trial," § 924. And see APPEAL AND ERROR, 2 Cyc. 1037; and the civil codes of the various states.

In New York there was, in 1858, no law or practice requiring a judge trying a case without a jury to make separate findings of law and fact (Sharp *v.* Wright, 35 Barb. 236), and Code Civ. Proc. § 1022, requiring the decision to state separately the facts found and the conclusions of law (People *v.* Ranson, 2 N. Y. St. 78) was amended in 1894 so as to authorize the court to file a short decision without stating separately the findings of fact and of law (Jefferson County Nat. Bank *v.* Dewey, 181 N. Y. 98, 73 N. E. 569 [*reversing* 90 N. Y. App. Div. 443, 86 N. Y. Suppl. 350]; Brown *v.* Ontario Talc Co., 81 N. Y. App. Div. 273, 80 N. Y. Suppl. 837; Bowen *v.* Webster, 3 N. Y. App. Div. 86, 38 N. Y. Suppl. 917); but a later amendment (Laws (1903), p. 237, c. 85, restored the requirement (Wander *v.* Wander, 111 N. Y. App. Div. 189, 97 N. Y. Suppl. 586).

71. *Indiana.*— Montmorency Gravel Road

reversal,[72] unless it is not prejudicial to the parties,[73] or unless the jurisdiction is one in which the requirement is treated as being merely directory.[74] The requirement is not applicable to equity or chancery cases,[75] to probate proceedings,[76] or to cases submitted upon an agreed statement of facts;[77] and when applicable, it means that the facts must be found separately, unmixed with the conclusions of law.[78] However, the putting of the conclusions of fact and law on the same page does not render them irregular, where they are separately stated and

Co. *v.* Rock, 41 Ind. 263; W. B. Barry Saw, etc., Co. *v.* Campbell, 13 Ind. App. 455, 41 N. E. 955.

Iowa.— Evans *v.* Kappes, 10 Iowa 586.

Kansas.— Atchison, etc., R. Co. *v.* Ferry, 28 Kan. 686; Seward *v.* Rheiner, 2 Kan. App. 95, 43 Pac. 423.

Missouri.— Cochran *v.* Thomas, 131 Mo. 258, 33 S. W. 6.

Nebraska.— Wiley *v.* Shars, 21 Nebr. 712, 33 N. W. 418; Axthelm *v.* Chicago, etc., R. Co., 2 Nebr. (Unoff.) 444, 89 N. W. 313.

Ohio.— Cleveland, etc., R. Co. *v.* Johnson, 10 Ohio St. 591; Reid *v.* Mathers, 4 Ohio S. & C. Pl. Dec. 81, 3 Ohio N. P. 13.

Texas.— Ward *v.* League, (Civ. App. 1894) 24 S. W. 986.

See 46 Cent. Dig. tit. "Trial," §§ 924, 925.

Request as condition precedent to making of any findings see *supra*, XII, B, 3, a.

Time for making request.— A request for a separate statement of findings or conclusions of law and facts has been held to come too late when made after the final submission of the cause (Ross *v.* Barker, 58 Nebr. 402, 78 N. W. 730), or after a general finding has been announced (Allen *v.* Dodson, 39 Kan. 220, 17 Pac. 667) and judgment rendered thereon (Smythe *v.* Parsons, 37 Kan. 79, 14 Pac. 444), or after judgment has been rendered and motion for new trial overruled (Wilcox *v.* Byington, 36 Kan. 212, 12 Pac. 826; New York Mut. L. Ins. Co. *v.* Gividen, 13 Ky. L. Rep. 970; Haacke *v.* Conrad, 12 Ky. L. Rep. 797; Moberly *v.* Trenton, 181 Mo. 637, 81 S. W. 169), or five months after the decision of the case (Sheridan First Nat. Bank *v.* Citizens' State Bank, 11 Wyo. 32, 70 Pac. 726, 100 Am. St. Rep. 925). In Kentucky, on the other hand, the request need not be made until after judgment, but must be made within the time allowed for the making of a motion for a new trial (Albin Co. *v.* Ellinger, 103 Ky. 240, 44 S. W. 655, 19 Ky. L. Rep. 1886), and in Texas a request made two days after the rendition of judgment is within a reasonable time, and must be complied with (Barnett *v.* Abernathy, 2 Tex. App. Civ. Cas. § 775).

72. *Kansas.*— Vickers *v.* Bucks Stove, etc., Co., 70 Kan. 584, 79 Pac. 160; Briggs *v.* Eggan, 17 Kan. 589.

Minnesota.— Baldwin *v.* Allison, 3 Minn. 83; Bazille *v.* Ullman, 2 Minn. 134.

Nebraska.— Lyman *v.* Waterman, 51 Nebr. 283, 70 N. W. 921.

North Carolina.— Foushee *v.* Pattershall, 67 N. C. 453.

Oklahoma.— Rogers *v.* Bonnett, 2 Okla. 553, 27 Pac. 1078.

Pennsylvania.— Carpenter *v.* Yeadon Borough, 208 Pa. St. 396, 57 Atl. 837.

Texas.— Callaghan *v.* Grenet, 66 Tex. 236, 18 S. W. 507; Seymour Opera-House Co. *v.* Wooldridge, (Civ. App. 1895) 31 S. W. 234.

See 46 Cent. Dig. tit. "Trial," § 924.

73. Oxford Tp. *v.* Columbia, 38 Ohio St. 87; State *v.* Nance, 42 S. C. 421, 20 S. E. 279; Aultman *v.* Utsey, 41 S. C. 304, 19 S. E. 617; Monaghan Bay Co. *v.* Dickson, 39 S. C. 146, 17 S. E. 696, 39 Am. St. Rep. 704; State *v.* Columbia, 12 S. C. 370; Joplin *v.* Carrier, 11 S. C. 327.

Setting out facts in bill of exceptions.— It has been held that where the evidence fully warranted the findings of the court in appropriation proceedings, the court is not obliged to state in writing its conclusions of fact found separately from its conclusions of law, where it sets out in the bill of exceptions all the evidence on which its findings are based. Toledo Consol. St. R. Co. *v.* Toledo Electric St. R. Co., 6 Ohio Cir. Ct. 362, 3 Ohio Cir. Dec. 493.

74. *In re* Bullard, (Cal. 1892) 31 Pac. 1119; Butler *v.* Agnew, 9 Cal. App. 327, 99 Pac. 395; Stepp *v.* National Life, etc., Assoc., 37 S. C. 417, 16 S. E. 134; May *v.* Cavender, 29 S. C. 598, 7 S. E. 489.

75. Walker *v.* Sedgwick, 5 Cal. 192; Peirce *v.* Wheeler, 44 Wash. 326, 87 Pac. 361; Knowles *v.* Rogers, 27 Wash. 211, 67 Pac. 572.

When no findings necessary see *supra*, XII, B, 2, b.

76. *In re* Farnham, 41 Wash. 570, 84 Pac. 602.

Applicability of Kentucky statute to special proceedings.— Although Code, § 332, which provides for the separation of conclusions of law from conclusions of fact has been held applicable to special proceedings (Byrd *v.* Pettit, 8 Ky. L. Rep. 613), it has been held, on the contrary, that it does not apply to a motion to vacate an order of arrest (Rasco *v.* Sheet, 8 Ky. L. Rep. 703), nor to any other than ordinary actions (Hartford F. Ins. Co. *v.* Haas, 8 Ky. L. Rep. 610).

77. Cincinnati, etc., R. Co. *v.* Hansford, 125 Ky. 37, 100 S. W. 251, 30 Ky. L. Rep. 1105; Owensboro *v.* Weir, 95 Ky. 158, 24 S. W. 115, 15 Ky. L. Rep. 506.

Where the facts found lead to but one conclusion, the conclusions of law need not be separated therefrom. Gaffney *v.* Megrath, 11 Wash. 456, 39 Pac. 973.

78. Emeric *v.* Alvarado, 64 Cal. 529, 2 Pac. 418; Lewars *v.* Weaver, 121 Pa. St. 268, 15 Atl. 514. And see Kostuba *v.* Miller, 137 Mo. 161, 38 S. W. 946; Piercifield *v.* Snyder,

paragraphed;[79] nor are the findings invalidated by the improper classification of one finding of fact as a conclusion of law or *vice versa*, as the reviewing court will transpose such finding into its proper place for the purpose of either upholding or reversing the judgment.[80]

5. Scope, Sufficiency, and Fact — a. Matters to Be Found — (i) *Facts to Sustain Judgment.* Not only must findings of fact and conclusions of law be followed by judgment in order to be of any conclusive effect,[81] or to be reviewable,[82] but they must be sufficient to sustain the judgment, and this is the test commonly resorted to in determining their sufficiency.[83] In general, a reversal

14 Mo. 583; Minchen *v.* Hart, 72 Fed. 294, 18 C. C. A. 570. *Compare* Haller *v.* Blaco, 14 Nebr. 195, 15 N. W. 348, holding that Code Civ. Proc. § 297, which provides that a party shall be entitled to a statement in writing of "the conclusions of fact found separately from the conclusions of law" does not entitle a party to separate "findings" of fact.

79. Gainsley *v.* Gainsley, (Cal. 1896) 44 Pac. 456; Peirce *v.* Wheeler, 44 Wash. 326, 87 Pac. 361.

Findings and conclusions need not be under separate covers. Shephard *v.* Gove, 26 Wash. 452, 67 Pac. 256.

80. *California.*— Burton *v.* Burton, 79 Cal. 490, 21 Pac. 847; Butler *v.* Agnew, 9 Cal. App. 327, 99 Pac. 395; Towle *v.* Sweeney, 2 Cal. App. 29, 83 Pac. 74. And see Knowlton *v.* Mackenzie, 110 Cal. 183, 42 Pac. 580.

Michigan.— Taylor *v.* Gladwin, 40 Mich. 232.

Minnesota.— Cushing *v.* Cable, 54 Minn. 6, 55 N. W. 736.

New York.— Whalen *v.* Stuart, 194 N. Y. 495, 87 N. E. 819 [*reversing* 123 N. Y. App. Div. 446, 108 N. Y. Suppl. 355]; Buffalo *v.* Delaware, etc., R. Co., 190 N. Y. 84, 82 N. E. 513; Christopher, etc., St. R. Co. *v.* Twenty-Third St. R. Co., 149 N. Y. 51, 43 N. E. 538; Berger *v.* Varrelmann, 127 N. Y. 281, 27 N. E. 1065, 12 L. R. A. 808; Adams *v.* Fitzpatrick, 125 N. Y. 124, 26 N. E. 143.

South Dakota.— Dodson *v.* Crocker, 20 S. D. 312, 105 N. W. 929.

Texas.— Wells *v.* Yarbrough, 84 Tex. 660, 19 S. W. 865; Ryon *v.* Rust, 65 Tex. 529; Paris Transit Co. *v.* Alexander, (Civ. App. 1905) 90 S. W. 1119; Robertson *v.* Kirby, 25 Tex. Civ. App. 472, 61 S. W. 967; Canadian-American Mortg., etc., Co. *v.* McCarty, (Civ. App. 1895) 34 S. W. 306.

Washington.— Coolidge *v.* Pierce County, 28 Wash. 95, 68 Pac. 391.

See 46 Cent. Dig. tit. "Trial," § 926.

Contra.— Old Nat. Bank *v.* Heckman, 148 Ind. 490, 47 N. E. 953; Craig *v.* Bennett, 146 Ind. 574, 45 N. E. 792; Stalcup *v.* Dixon, 136 Ind. 9, 35 N. E. 987; Braden *v.* Lemmon, 127 Ind. 9, 26 N. E. 476; Kealing *v.* Vansickle, 74 Ind. 529, 39 Am. Rep. 101; Wysong *v.* Nealis, 13 Ind. App. 165, 41 N. E. 388; Johnson *v.* Bucklen, 9 Ind. App. 154, 36 N. E. 176; Minnich *v.* Darling, 8 Ind. App. 539, 36 N. E. 173. However, it is held in this jurisdiction that conclusions based on findings of fact made by the court trying a case without a jury do not invalidate the facts properly stated, although they more properly belong to the conclusions of law (Baldwin *v.* Heil, 155 Ind. 682, 58 N. E. 200; Durflinger *v.* Baker, 149 Ind. 375, 49 N. E. 276; Knox *v.* Trafalet, 94 Ind. 346; Western Union Tel. Co. *v.* Troth, 43 Ind. App. 7, 84 N. E. 727), and that where findings of fact are recited in the conclusions of law, they will be disregarded and not allowed to affect the findings properly stated and classified, or the conclusions of law (Hammann *v.* Mink, 99 Ind. 279).

The repetition of a conclusion of law, properly placed with the other conclusions of law, in the findings of fact is immaterial, as it may be struck from the findings of fact and leave the latter complete. St. Paul, etc., R. Co. *v.* Howard, 23 S. D. 34, 119 N. W. 1032.

81. See Judgments, 23 Cyc. 1227.

82. See Appeal and Error, 2 Cyc. 616.

83. *California.*— Judson *v.* Gage, 91 Cal. 304, 27 Pac. 676; Stover *v.* Baker, (1889) 21 Pac. 428; Societa Di Mutuo Socorso *v.* Mantel, 1 Cal. App. 107, 81 Pac. 659.

Idaho.— Later *v.* Haywood, 14 Ida. 45, 93 Pac. 374.

Indiana.— Mitchell *v.* Brawley, 140 Ind. 216, 39 N. E. 497; Collins *v.* Dresslar, 133 Ind. 290, 32 N. E. 883; Buchanan *v.* Milligan, 108 Ind. 433, 9 N. E. 385; Frisbee *v.* Lindley, 23 Ind. 511; Stout *v.* Gaar, 26 Ind. App. 582, 60 N. E. 357; Sweetser *v.* Snodgrass, 7 Ind. App. 609, 34 N. E. 842.

Kansas.— Lowry *v.* Stewart, 5 Kan. 663.

Michigan.— Sawyer *v.* Van Housen, 39 Mich. 89; Gray *v.* Pike, 38 Mich. 650, holding that, in a suit on a guaranty of collection, a finding that shows an apparent exhaustion of legal remedies, but does not describe or identify the note, or show that plaintiff is still holder amounts to a mistrial.

Minnesota.— Little *v.* Lee, 53 Minn. 511, 55 N. W. 737 (holding that where a complaint shows that a contract was joint, and alleges that the liability thereon had been assumed by one of the obligees, a finding by the court simply that there was a joint obligation, and the amount due thereon, will not justify a judgment against the party named as sole defendant); Dunn *v.* Barton, 40 Minn. 415, 42 N. W. 289; Bradbury *v.* Bedbury, 31 Minn. 163, 16 N. W. 854.

Missouri.— Sutter *v.* Streit, 21 Mo. 157.

Nebraska.— Foster *v.* Devinney, 28 Nebr. 416, 44 N. W. 479.

will not be had for errors and defects which are not prejudicial and a correction of which would not lead to a different judgment,[84] or, as sometimes stated, where

New Hampshire.— Crowley *v.* Crowley, 72 N. H. 241, 56 Atl. 190, holding that, in a suit to establish a resulting trust, the findings as to the facts necessary to constitute such a trust must be made at the trial term, and cannot be determined by the supreme court, however strong the evidence recited in the reserved case may be, and although all the evidence is reported.

New York.— Cornell *v.* New York El. R. Co., 13 N. Y. Suppl. 511.

Ohio.— Union Cent. L. Ins. Co. *v.* Sutphin, 35 Ohio St. 360.

Oregon.— Freeman *v.* Trummer, 50 Oreg. 287, 91 Pac. 1077; Washington County Drainage Dist. No. 4 *v.* Crow, 20 Oreg. 535, 26 Pac. 845 [*overruling* McFadden *v.* Friendly, 9 Oreg. 222].

Utah.— Maynard *v.* Locomotive Engineers' Mut. L., etc., Ins. Assoc., 14 Utah 458, 47 Pac. 1030.

United States.— Evans *v.* Kister, 92 Fed. 828, 35 C. C. A. 28; U. S. *v.* Harris, 77 Fed. 821, 23 C. C. A. 483; Marion Phosphate Co. *v.* Cummer, 60 Fed. 873, 9 C. C. A. 279.

See 46 Cent. Dig. tit. "Trial," § 941. And see JUDGMENTS, 23 Cyc. 822 text and note 80.

As findings are analogous to a special verdict, they must contain a statement of all the facts necessary to be stated in such a verdict, or they will not support a judgment. Adams *v.* Champion, 31 Mich. 233; Wood *v.* La Rue, 9 Mich. 158; Sisson *v.* Barrett, 2 N. Y. 406; Bates *v.* Wilbur, 10 Wis. 415.

Where the findings are clearly correct, but a wrong judgment or decree has been rendered thereon, the appellate court may itself modify the judgment or decree so as to conform to the findings (see APPEAL AND ERROR, 3 Cyc. 428), or direct the lower court to enter the proper judgment on the findings made (see APPEAL AND ERROR, 3 Cyc. 451).

Collateral impeachment of judgment based on defective findings see JUDGMENTS, 23 Cyc. 1095.

84. *California.*— Summerville *v.* Kelliher, 144 Cal. 155, 77 Pac. 889; Boothe *v.* Squaw Springs Water Co., 142 Cal. 573, 76 Pac. 385; Roeblings Sons Co. *v.* Gray, 139 Cal. 607, 73 Pac. 422; Wagoner *v.* Silva, 139 Cal. 559, 73 Pac. 433; Carpy *v.* Dowdell, 131 Cal. 495, 63 Pac. 778; Hamilton *v.* Smith, 125 Cal. 530, 58 Pac. 130; Tuohy *v.* Woods, 122 Cal. 665, 55 Pac. 683; De la Guerra *v.* Santa Barbara, 117 Cal. 528, 49 Pac. 733; Dougherty *v.* Coffin, 69 Cal. 454, 10 Pac. 672; Schroeder *v.* Jahns, 27 Cal. 274; Butler *v.* Delafield, 1 Cal. App. 367, 82 Pac. 260.

Colorado.— Lockhaven Trust, etc., Co. *v.* U. S. Mortgage, etc., Co., 34 Colo. 30, 81 Pac. 804.

Connecticut.— Metcalf *v.* Central Vermont R. Co., 78 Conn. 614, 63 Atl. 633; Clark *v.* Henry G. Thompson, etc., Co., 75 Conn. 161, 52 Atl. 720; Hoadley *v.* Danbury Sav. Bank, 71 Conn. 599, 42 Atl. 667, 44 L. R. A. 321.

Indiana.— Marion Mfg. Co. *v.* Harding, 155 Ind. 648, 58 N. E. 194; White *v.* Chicago, etc., R. Co., 122 Ind. 317, 23 N. E. 782, 7 L. R. A. 257; Schmidt *v.* Archer, 113 Ind. 365, 14 N. E. 543; Kratz *v.* Cook, 32 Ind. App. 469, 68 N. E. 689; Montpelier Light, etc., Co. *v.* Stephenson, 22 Ind. App. 175, 53 N. E. 444.

Iowa.— Bader *v.* Dyer, 106 Iowa 715, 77 N. W. 469, 68 Am. St. Rep. 332.

Kansas.— Yeamans *v.* James, 29 Kan. 373.

Minnesota.— Quinn *v.* Olson, 34 Minn. 422, 26 N. W. 230; Leonard *v.* Green, 34 Minn. 137, 24 N. W. 915.

Missouri.— Henderson *v.* Henderson, 21 Mo. 379.

Montana.— Grogan *v.* Valley Trading Co., 30 Mont. 229, 76 Pac. 211.

Nebraska.— Mayhew *v.* Knittle, 64 Nebr. 395, 89 N. W. 1037.

Nevada.— Boskowitz *v.* Davis, 12 Nev. 446.

New York.— Ments *v.* Both, 36 N. Y. App. Div. 348, 55 N. Y. Suppl. 234 [*affirmed* in 166 N. Y. 609, 59 N. E. 1123]; Dunn *v.* O'Connor, 25 N. Y. App. Div. 73, 49 N. Y. Suppl. 270; Mullenneaux *v.* Terwilliger, 50 Hun 526, 3 N. Y. Suppl. 442; Ludington *v.* Taft, 10 Barb. 447.

South Carolina.— Sullivan *v.* Ball, 55 S. C. 343, 33 S. E. 486.

South Dakota.— McPherson *v.* Swift, 22 S. D. 165, 116 N. W. 76, 133 Am. St. Rep. 907; Naddy *v.* Dietze, 15 S. D. 26, 86 N. W. 753.

Tennessee.— McQuade *v.* Williams, 101 Tenn. 334, 47 S. W. 427; Overall *v.* Parker, (Ch. App. 1899) 58 S. W. 905.

Texas.— Tripis *v.* Weslow, (1892) 18 S. W. 684; Gulf, etc., R. Co. *v.* Provo, (Civ. App. 1904) 84 S. W. 275; Lochridge *v.* Corbett, 31 Tex. Civ. App. 676, 73 S. W. 96; Day *v.* Dalziel, (Civ. App. 1895) 32 S. W. 377.

Washington.— Townsend Gas, etc., Co. *v.* Hill, 24 Wash. 469, 64 Pac. 778; Washington Mill Co. *v.* Sprague Lumber Co., 19 Wash. 165, 52 Pac. 1067.

Wisconsin.— Hege *v.* Thorsgaard, 98 Wis. 11, 73 N. W. 567; Hart *v.* Red Cedar, 63 Wis. 634, 24 N. W. 410; Cornell *v.* Barnes, 26 Wis. 473.

A party in whose favor findings are made cannot be heard to complain of their insufficiency, as he is not prejudiced. Louisville, etc., R. Co. *v.* Craycraft, 12 Ind. App. 203, 39 N. E. 523; Morison *v.* New York El. R. Co., 26 N. Y. Suppl. 640. Thus, where no personal judgment is rendered against an administrator who is sued in both his official and individual capacity, he is not injured by the failure of the court to pass on his personal plea of limitations. Casey *v.* Gibbons, 136 Cal. 368, 68 Pac. 1032. Where the record does not show that any evidence in favor of a counter-claim was introduced, defendant cannot complain of a finding for a less sum than he claimed. Cutting Fruit Packing Co. *v.* Canty, 141 Cal. 692, 75 Pac. 564.

the corrected findings would necessarily be against appellant,[85] and, with this rule in view, the findings will be construed so as to uphold rather than defeat the judgment,[86] especially when their sufficiency is being reviewed by an appellate court,[87] and will be construed together, when there is any doubt as to the sufficiency of any one.[88] Thus, where the judgment is supported by the findings made, the reviewing court will not reverse on account of the failure of the trial court to find on particular matters which would not change or affect the judgment rendered,[89] or which would invalidate the judgment if supported by evidence but which was not so supported,[90] nor will judgment be reversed because erroneous findings are made, where no relief is based thereon.[91]

85. Krasky *v.* Wollpert, 134 Cal. 338, 66 Pac. 309; Frantz *v.* Harper, (Cal. 1900) 62 Pac. 603; Peiser *v.* Griffin, 125 Cal. 9, 57 Pac. 690 (holding that where plaintiff could not possibly recover, he cannot complain of absence of findings on an issue raised by an intervener); O'Conor *v.* Clarke, (Cal. 1896) 44 Pac. 482; Richter *v.* Henningsan, 110 Cal. 530, 42 Pac. 1077; Hutchings *v.* Castle, 48 Cal. 152; Callanan *v.* Gilman, 107 N. Y. 360, 14 N. E. 264, 1 Am. St. Rep. 831; Hague *v.* Nephi Irr. Co., 16 Utah 421, 52 Pac. 765, 67 Am. St. Rep. 634, 41 L. R. A. 311.

The setting aside of a finding is not reversible error where appellant would have been in no better position had the finding remained unchanged. Wray *v.* Hill, 85 Ind. 546.

86. Lomita Land, etc., Co. *v.* Robinson, 154 Cal. 36, 97 Pac. 10, 18 L. R. A. N. S. 1106; People's Home Sav. Bank *v.* Rickard, 139 Cal. 285, 73 Pac. 858; Breeze *v.* Brooks, 97 Cal. 72, 31 Pac. 742, 22 L. R. A. 257; Murphy *v.* Stelling, 8 Cal. App. 702, 97 Pac. 672; Needham *v.* Chandler, 8 Cal. App. 124, 96 Pac. 325; Leist *v.* Dierssen, 4 Cal. App. 634, 88 Pac. 812; Crow *v.* Carver, 133 Ind. 260, 32 N. E. 569; Simpson *v.* Greeley, 8 Kan. 586, holding that where one of the findings of fact by the court is capable of two constructions, that one will be given it that brings it within the issues of the case.

Construction in connection with the pleadings has been held permissible in some cases. Edwards *v.* Nelson, 51 Mich. 121, 16 N. W. 261; Fenske *v.* Nelson, 74 Minn. 1, 76 N. W. 785; Mack *v.* Bensley, 74 Wis. 112, 42 N. W. 215.

Duty of court to reconcile conflicting findings see *infra*, XII, B, 5, b, (VIII).

87. See APPEAL AND ERROR, 3 Cyc. 310 *et seq.*

88. Haight *v.* Haight, 151 Cal. 90, 90 Pac. 197; Leist *v.* Dierssen, 4 Cal. App. 634, 88 Pac. 812; Kedey *v.* Petty, 153 Ind. 179, 54 N. E. 798; Cleveland, etc., R. Co. *v.* Closser, 126 Ind. 348, 26 N. E. 159, 22 Am. St. Rep. 593, 9 L. R. A. 754; El Reno Electric Light, etc., Co. *v.* Jennison, 5 Okla. 759, 50 Pac. 144.

Illustration.—Although a finding that the value of the property in question is the sum of $—— will not support a judgment for plaintiff "for the sum of $786.45 damages, the value of said personal property," the defect is obviated by another finding that all the allegations of the complaint are true, one of which was that the value of the goods was one thousand dollars. Morris *v.* Bekin's Van, etc., Co., 6 Cal. App. 429, 92 Pac. 362.

89. *California.*— Hoyt *v.* Hart, 149 Cal. 722, 87 Pac. 569; Blochman *v.* Spreckels, 135 Cal. 662, 67 Pac. 1061, 57 L. R. A. 213; Moore *v.* Copp, 119 Cal. 429, 51 Pac. 630; Malone *v.* Bosch, 104 Cal. 680, 38 Pac. 516; Posachane Water Co. *v.* Standart, 97 Cal. 476, 32 Pac. 532; Pereira *v.* Smith, 79 Cal. 232, 21 Pac. 739 (holding that where the findings made are sufficient, the refusal to make certain findings as requested is not error); Malone *v.* Del Norte County, 77 Cal. 217, 19 Pac. 422.

Idaho.— Tage *v.* Alberts, 2 Ida. (Hasb.) 271, 13 Pac. 19.

Indiana.— Hohn *v.* Shideler, 164 Ind. 242, 72 N. E. 575; Elliott *v.* Pontius, 136 Ind. 641, 35 N. E. 562, 36 N. E. 421; Borror *v.* Carrier, 34 Ind. App. 353, 73 N. E. 123.

Kansas.— McCandliss *v.* Kelsey, 16 Kan. 557.

Michigan.— Wiley *v.* Lovely, 46 Mich. 83, 8 N. W. 716.

North Dakota.— Joslyn *v.* Smith, 2 N. D. 53, 49 N. W. 382.

Ohio.— Cook *v.* Niehaus, 8 Ohio Dec. (Reprint) 505, 8 Cinc. L. Bul. 259.

Texas.— Walters *v.* Bray, (Civ. App. 1902) 70 S. W. 443.

Washington.— Carstens *v.* Hine, 39 Wash. 498, 81 Pac. 1004.

Wisconsin.— Disch *v.* Timm, 101 Wis. 179, 77 N. W. 196.

See 46 Cent. Dig. tit. "Trial," §§ 940, 941.

90. Giletti *v.* Saracco, 110 Cal. 428, 42 Pac. 918; Rogers *v.* Duff, 97 Cal. 66, 31 Pac. 836; Newman *v.* Maldonado, (Cal. 1892) 30 Pac. 833; Dolliver *v.* Dolliver, 94 Cal. 642, 30 Pac. 4; Spargur *v.* Heard, 90 Cal. 221, 27 Pac. 198; Dedmon *v.* Moffitt, 89 Cal. 211, 26 Pac. 800; Hawes *v.* Clark, 84 Cal. 272, 24 Pac. 116; Himmelman *v.* Henry, 84 Cal. 104, 23 Pac. 1098; Moneta Canning, etc., Co. *v.* Martin, (App. 1906) 88 Pac. 369.

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(II) *FACTS SUPPORTED BY EVIDENCE.* It is essential to the sufficiency of findings of fact that they be sustained by the evidence;[92] but where, as a matter of law, there is any competent evidence in their favor, the reviewing courts of most jurisdictions will not review or disturb them on the ground of insufficiency of evidence;[93] nor, even though there is a total insufficiency of evidence to support some of the findings, will they reverse, where the error is not prejudicial.[94] Where

same); Patrons' Mut. Aid Soc. *v.* Hall, 19 Ind. App. 118, 49 N. E. 279; Dunckel *v.* Dunckel, 141 N. Y. 427, 36 N. E. 405; Woolsey *v.* New York El. R. Co., 9 N. Y. Suppl. 133 [*modified* on other grounds in 134 N. Y. 323, 30 N. E. 387, 31 N. E. 891].

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Wisconsin.— Oconto City Water Supply Co. *v.* Oconto, 105 Wis. 76, 80 N. W. 1113.

See 46 Cent. Dig. tit. "Trial," § 935 *et seq.*

Necessity of motion for new trial to prevent objection that findings are not supported by evidence see NEW TRIAL, 29 Cyc. 748, 756.

Incompetent or rejected evidence.—Although a party should object to the admission of evidence if he does not wish a finding based thereon (McDougald *v.* Hulet, 132 Cal. 154, 64 Pac. 278; Boyd *v.* Miller, 22 Tex. Civ. App. 165, 54 S. W. 411), it is not error for the court to refuse to make findings which would have to derive their support from incompetent evidence (Peoria, etc., R. Co. *v.* Attica, etc., R. Co., 154 Ind. 218, 56 N. E. 210; Ullman *v.* Jacobs, 86 Hun (N. Y.) 186, 33 N. Y. Suppl. 248), especially when such evidence has been admitted over objection (Martin *v.* Minnekahta State Bank, 7 S. D. 263, 64 N. W. 127. But see Leman *v.* Borden, 83 Tex. 620, 19 S. W. 160). It is error for the court to base a finding on excluded evidence (Thompson *v.* Johnson, 92 Tex. 358, 51 S. W. 23 [*reversing* (Civ. App. 1898) 50 S. W. 1055]) or on a deposition which was objected to when offered, and with respect to which objection the court did not decide at the time but reserved its ruling, as no opportunity to offer rebutting testimony is given (Tripp *v.* Duane, (Cal. 1887) 13 Pac. 860).

Findings based on observation.—A judgment cannot be sustained where the findings appear to be based in part on facts discovered by the judge on inspection of the premises (Stanford *v.* Felt, 71 Cal. 249, 16 Pac. 900); nor, in an election contest where the only evidence offered as to the age of a voter was that he was past twenty-one, has the judge a right to disregard the testimony and decide the issue on information gained by some other method, whether by observation or otherwise (Bigham *v.* Clubb, 42 Tex. Civ. App. 312, 95 S. W. 675).

Findings based on estimate of counsel.— In an action at law by a state for the value of rock removed from the bed of creeks belonging to the state, it is error for the judge, in reaching a conclusion as to the quality of rock removed, to average the estimates of counsel on the ground that the testimony submitted was so unintelligible and confused that a true estimate could not be made therefrom. State *v.* Pacific Guano Co., 26 S. C. 610, 2 S. E. 265.

93. See APPEAL AND ERROR, 3 Cyc. 358 *et seq.*

94. *California.*—Ambrose *v.* Drew, 139 Cal. 665, 73 Pac. 543. And see Barry *v.* Beamer, 8 Cal. App. 200, 96 Pac. 373, holding that while it is improper and unnecessary for the court to find probative facts without evidence to sustain the findings, such error is immaterial where the court's finding of the ultimate fact is sufficiently supported by the evidence.

Indiana.— Martin *v.* Marks, 154 Ind. 549, 57 N. E. 249.

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Findings on immaterial matters.— If there are findings which support the judgment, and these findings are supported by the evidence, it is immaterial that there are other findings which the evidence does not support. McKibbin *v.* McKibbin, 139 Cal. 448, 73 Pac. 143;

the corrected findings would necessarily be against appellant,[85] and, with this rule in view, the findings will be construed so as to uphold rather than defeat the judgment,[86] especially when their sufficiency is being reviewed by an appellate court,[87] and will be construed together, when there is any doubt as to the sufficiency of any one.[88] Thus, where the judgment is supported by the findings made, the reviewing court will not reverse on account of the failure of the trial court to find on particular matters which would not change or affect the judgment rendered,[89] or which would invalidate the judgment if supported by evidence but which was not so supported,[90] nor will judgment be reversed because erroneous findings are made, where no relief is based thereon.[91]

85. Krasky *v.* Wollpert, 134 Cal. 338, 66 Pac. 309; Frantz *v.* Harper, (Cal. 1900) 62 Pac. 603; Peiser *v.* Griffin, 125 Cal. 9, 57 Pac. 690 (holding that where plaintiff could not possibly recover, he cannot complain of absence of findings on an issue raised by an intervener); O'Conor *v.* Clarke, (Cal. 1896) 44 Pac. 482; Richter *v.* Henningsan, 110 Cal. 530, 42 Pac. 1077; Hutchings *v.* Castle, 48 Cal. 152; Callanan *v.* Gilman, 107 N. Y. 360, 14 N. E. 264, 1 Am. St. Rep. 831; Hague *v.* Nephi Irr. Co., 16 Utah 421, 52 Pac. 765, 67 Am. St. Rep. 634, 41 L. R. A. 311.

The setting aside of a finding is not reversible error where appellant would have been in no better position had the finding remained unchanged. Wray *v.* Hill, 85 Ind. 546.

86. Lomita Land, etc., Co. *v.* Robinson, 154 Cal. 36, 97 Pac. 10, 18 L. R. A. N. S. 1106; People's Home Sav. Bank *v.* Rickard, 139 Cal. 285, 73 Pac. 858; Breeze *v.* Brooks, 97 Cal. 72, 31 Pac. 742, 22 L. R. A. 257; Murphy *v.* Stelling, 8 Cal. App. 702, 97 Pac. 672; Needham *v.* Chandler, 8 Cal. App. 124, 96 Pac. 325; Leist *v.* Dierssen, 4 Cal. App. 634, 88 Pac. 812; Crow *v.* Carver, 133 Ind. 260, 32 N. E. 569; Simpson *v.* Greeley, 8 Kan. 586, holding that where one of the findings of fact by the court is capable of two constructions, that one will be given it that brings it within the issues of the case.

Construction in connection with the pleadings has been held permissible in some cases. Edwards *v.* Nelson, 51 Mich. 121, 16 N. W. 261; Fenske *v.* Nelson, 74 Minn. 1, 76 N. W. 785; Mack *v.* Bensley, 74 Wis. 112, 42 N. W. 215.

Duty of court to reconcile conflicting findings see *infra*, XII, B, 5, b, (VIII).

87. See APPEAL AND ERROR, 3 Cyc. 310 *et seq.*

88. Haight *v.* Haight, 151 Cal. 90, 90 Pac. 197; Leist *v.* Dierssen, 4 Cal. App. 634, 88 Pac. 812; Kedey *v.* Petty, 153 Ind. 179, 54 N. E. 798; Cleveland, etc., R. Co. *v.* Closser, 126 Ind. 348, 26 N. E. 159, 22 Am. St. Rep. 593, 9 L. R. A. 754; El Reno Electric Light, etc., Co. *v.* Jennison, 5 Okla. 759, 50 Pac. 144.

Illustration.—Although a finding that the value of the property in question is the sum of $—— will not support a judgment for plaintiff "for the sum of $786.45 damages, the value of said personal property," the defect is obviated by another finding that all the allegations of the complaint are true, one of which was that the value of the goods was one thousand dollars. Morris *v.* Bekin's Van, etc., Co., 6 Cal. App. 429, 92 Pac. 362.

89. *California.*— Hoyt *v.* Hart, 149 Cal. 722, 87 Pac. 569; Blochman *v.* Spreckels, 135 Cal. 662, 67 Pac. 1061, 57 L. R. A. 213; Moore *v.* Copp, 119 Cal. 429, 51 Pac. 630; Malone *v.* Bosch, 104 Cal. 680, 38 Pac. 516; Posachane Water Co. *v.* Standart, 97 Cal. 476, 32 Pac. 532; Pereira *v.* Smith, 79 Cal. 232, 21 Pac. 739 (holding that where the findings made are sufficient, the refusal to make certain findings as requested is not error); Malone *v.* Del Norte County, 77 Cal. 217, 19 Pac. 422.

Idaho.— Tage *v.* Alberts, 2 Ida. (Hasb.) 271, 13 Pac. 19.

Indiana.— Hohn *v.* Shideler, 164 Ind. 242, 72 N. E. 575; Elliott *v.* Pontius, 136 Ind. 641, 35 N. E. 562, 36 N. E. 421; Borror *v.* Carrier, 34 Ind. App. 353, 73 N. E. 123.

Kansas.— McCandliss *v.* Kelsey, 16 Kan. 557.

Michigan.— Wiley *v.* Lovely, 46 Mich. 83, 8 N. W. 716.

North Dakota.— Joslyn *v.* Smith, 2 N. D. 53, 49 N. W. 382.

Ohio.— Cook *v.* Niehaus, 8 Ohio Dec. (Reprint) 505, 8 Cinc. L. Bul. 259.

Texas.— Walters *v.* Bray, (Civ. App. 1902) 70 S. W. 443.

Washington.— Carstens *v.* Hine, 39 Wash. 498, 81 Pac. 1004.

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there is no testimony supporting a defense, a finding against defendant on that issue is proper;[95] and where the evidence is conflicting and unsatisfactory as to a certain fact, the refusal of the court to find the existence of that fact is not error.[96]

(III) *Material and Immaterial Issues* — (A) *In General.* It is essential to the sufficiency of findings of fact that they be responsive to and cover all the material issues of the case,[97] or at least sufficient of the issues raised by the plead-

Gage *v.* Gunther, 136 Cal. 338, 68 Pac. 710, 89 Am. St. Rep. 141; Dalton *v.* Pacific Electric R. Co., 7 Cal. App. 510, 94 Pac. 868; Woronieki *v.* Pariskiego, 74 Conn. 224, 50 Atl. 562; Kent *v.* Richardson, 8 Ida. 750, 71 Pac. 117; McCaslin *v.* Advance Mfg. Co., 155 Ind. 298, 58 N. E. 67; McMurray *v.* Hughes, 82 Iowa 47, 47 N. W. 883; Finn *v.* Krut, 13 Tex. Civ. App. 36, 34 S. W. 1013.

Evidence sufficient to sustain any one of several counts supports a general finding for plaintiff where there are several counts for the same cause of action. Pelton *v.* Nichols, 180 Mass. 245, 62 N. E. 1. Likewise, where a general finding that all the allegations of the complaint are untrue is justified by the evidence as to one allegation, which, alone and independently of the others, would justify the conclusion of law in favor of defendant, the fact that the finding as to some other allegation is unsupported by the evidence is error without prejudice. New York Fidelity, etc., Co. *v.* Crays, 76 Minn. 450, 79 N. W. 531.

Where a finding of waiver of demand is warranted by the evidence, but not a finding that demand has been made, the making of the latter finding is harmless error. Stanford *v.* Coram, 26 Mont. 285, 67 Pac. 1005.

95. Vanderslice *v.* Matthews, 79 Cal. 273, 21 Pac. 748.

96. Koehler *v.* Hughes, 148 N. Y. 507, 42 N. E. 1051; Butler *v.* Oswego, 56 Hun (N. Y.) 358, 10 N. Y. Suppl. 768.

97. *California.*— Banning *v.* Kreiter, 153 Cal. 33, 94 Pac. 246 (plea of estoppel supported by strong evidence); Bell *v.* Adams, 150 Cal. 772, 90 Pac. 118; Senior *v.* Anderson, 138 Cal. 716, 72 Pac. 349; Ricks *v.* Lindsay, (1892) 31 Pac. 262; Casey *v.* Jordan, (1885) 9 Pac. 99; Conklin *v.* Stone, (1885) 6 Pac. 378; Porter *v.* Muller, 65 Cal. 512, 4 Pac. 531; Ross *v.* Evans, 65 Cal. 439, 4 Pac. 443; Hawes *v.* Green, (1884) 3 Pac. 496; Duane *v.* Neumann, (Cal. 1884) 2 Pac. 274, 410; Roeding *v.* Perasso, 62 Cal. 515; Du Prat *v.* James, 61 Cal. 361; Pacific Bridge Co. *v.* Kirkham, 54 Cal. 558; Byrnes *v.* Claffey, 54 Cal. 155; Paulson *v.* Numan, 54 Cal. 123; Shaw *v.* Wanderforde, 53 Cal. 300; Baggs *v.* Smith, 53 Cal. 88; Kennedy *v.* Berry, 52 Cal. 87; Speegle *v.* Leese, 51 Cal. 415; Campbell *v.* Buckman, 49 Cal. 362.

Idaho.— Later *v.* Haywood, 14 Ida. 45, 93 Pac. 374; State *v.* Baird, 13 Ida. 29, 126, 89 Pac. 233, 298; Wood *v.* Broderson, 12 Ida. 190, 85 Pac. 490; Standley *v.* Flint, 10 Ida. 629, 79 Pac. 815; Wilson *v.* Wilson, 6 Ida. 597, 57 Pac. 708; Bowman *v.* Ayers, 2 Ida. (Hasb.) 305, 13 Pac. 346.

Illinois.— Semple *v.* Hailman, 8 Ill. 131.

Indiana.— Light *v.* Schneck, (App. 1908) 86 N. E. 442.

Michigan.— Hudson *v.* Roos, 72 Mich. 363, 40 N. W. 467.

Minnesota.— Turner *v.* Fryberger, 99 Ind. 236, 108 N. W. 1118, 109 N. W. 299; Roussain *v.* Patten, 46 Minn. 308, 48 N. W. 1122; Lowell *v.* North, 4 Minn. 32.

Missouri.— Downing *v.* Bourlier, 21 Mo. 149; Pratt *v.* Rogers, 5 Mo. 51, holding that if the court fails to find a material issue, the error is not cured by the statute of jeofails, although no exception is taken below.

Montana.— Helena *v.* Hale, 38 Mont. 481, 100 Pac. 611; Estill *v.* Irvine, 10 Mont. 509, 26 Pac. 1005.

Nebraska.— Clark *v.* Neumann, 56 Nebr. 374, 76 N. W. 892.

New York.— Schmitz *v.* Brooklyn Union El. R. Co., 111 N. Y. App. Div. 308, 97 N. Y. Suppl. 791; Sixth Ave. R. Co. *v.* Gilbert El. R. Co., 43 N. Y. Super. Ct. 292, 3 Abb. N. Cas. 372 [*affirmed* in 71 N. Y. 430].

Oregon.— Freeman *v.* Trummer, 50 Oreg. 287, 91 Pac. 1077.

South Dakota.— Missouri River Tel. Co. *v.* Mitchell, 22 S. D. 191, 116 N. W. 67; Taylor *v.* Vandenberg, 15 S. D. 480, 90 N. W. 142; Cassill *v.* Morrow, 13 S. D. 109, 82 N. W. 418; McKenna *v.* Whittaker, 9 S. D. 442, 69 N. W. 587.

Utah.— Everett *v.* Jones, 32 Utah 489, 91 Pac. 360; Dillon Implement Co. *v.* Cleaveland, 32 Utah 1, 88 Pac. 670; Mitchell *v.* Jensen, 29 Utah 346, 81 Pac. 165; Victor Gold, etc., Min. Co. *v.* National Bank, 15 Utah 391, 49 Pac. 826.

Wisconsin.— Galusha *v.* Sherman, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417.

United States.— Towle *v.* Boston First Nat. Bank, 153 Fed. 566, 82 C. C. A. 520; Anglo-American Land, etc., Co. *v.* Lombard, 132 Fed. 721, 68 C. C. A. 89.

See 46 Cent. Dig. tit. "Trial," § 935.

Facts pertinent to issue.— In making a special finding, where there is any evidence on a point pertinent to an issue in the cause, the court is required to find either the existence or non-existence of the fact. Gulick *v.* Connely, 42 Ind. 134. Also where there is found by the trior to be a probability so strong as to induce a reasonable belief in an impartial mind, as to the existence of a fact material to the issue, the parties are entitled to a finding of the existence of such fact. Hoyt *v.* Danbury, 69 Conn. 341, 37 Atl. 1051.

Finding on bar of action by limitation.— Where the statute of limitations is pleaded, failure to find on such issue is ground for reversal of the judgment (Porteous *v.* Reed, (Cal. 1886) 12 Pac. 117), except where the admitted facts establish the conclusion that the statute of limitations has not run against

ings to sustain the judgment; [98] but where they do embrace all such issues, their sufficiency is not affected by an omission to find on immaterial issues,[99] or on matters not made issues by the pleadings,[1] or on matters made issues by the pleadings but not by the evidence,[2] nor is it affected by findings on immaterial points or issues or on issues outside the pleadings, even though erroneous, as such find-

the claim (Bell *v.* Adams, 150 Cal. 772, 90 Pac. 118). However, a finding that the action was not barred by the statute is sufficient to support a judgment for plaintiff, although the date on which plaintiff demanded the money in question of defendant is not found. Spencer *v.* Duncan, 107 Cal. 423, 40 Pac. 549. And generally see LIMITATIONS OF ACTIONS, 25 Cyc. 1439.

Failure to find on material issue as ground for new trial see NEW TRIAL, 29 Cyc. 816.

98. Cochise County *v.* Copper Queen Consol. Min. Co., 8 Ariz. 221, 71 Pac. 946.

99. *California.*— Great Western Gold Co. *v.* Chambers, 155 Cal. 364, 101 Pac. 6; Fogg *v.* Perris Irr. Dist., 154 Cal. 209, 97 Pac. 316; Puckhaber *v.* Henry, 152 Cal. 419, 93 Pac. 114, 125 Am. St. Rep. 75; Garvey *v.* Lashells, 151 Cal. 526, 91 Pac. 498; Power *v.* Fairbanks, 146 Cal. 611, 80 Pac. 1075; Boyd *v.* Liefer, 144 Cal. 336, 77 Pac. 953; Adams *v.* Hopkins, 144 Cal. 19, 77 Pac. 712; O'Toole *v.* Dolan, 129 Cal. 471, 62 Pac. 30; Southern Pac. R. Co. *v.* Dufour, 95 Cal. 615, 30 Pac. 783, 19 L. R. A. 92; Miller *v.* Hicken, 92 Cal. 229, 28 Pac. 339; Brison *v.* Brison, 90 Cal. 323, 27 Pac. 186; Graham *v.* Larimer, 83 Cal. 173, 23 Pac. 286; Evans *v.* De Lay, 81 Cal. 103, 22 Pac. 408; Daly *v.* Soroco, 80 Cal. 367, 22 Pac. 211; Snyder *v.* Tunitas Petroleum Co., 72 Cal. 194, 13 Pac. 479; Louvall *v.* Gridley, 70 Cal. 507, 11 Pac. 777; Thompson *v.* Lyon, 14 Cal. 39; Gish *v.* Ferrea, 10 Cal. App. 53, 101 Pac. 27; Prince *v.* Kennedy, 3 Cal. App. 404, 85 Pac. 859; Meek *v.* De Latour, 2 Cal. App. 261, 83 Pac. 300.

Colorado.— Buckers Irr., etc., Co. *v.* Farmers' Independent Ditch Co., 31 Colo. 62, 72 Pac. 49; St. Vrain Stone Co. *v.* Denver, etc., R. Co., 18 Colo. 211, 32 Pac. 827.

Connecticut.— Contaldi *v.* Errichetti, 79 Conn. 273, 64 Atl. 211.

Kansas.— Boynton *v.* Hardin, 9 Kan. App. 166, 58 Pac. 1007.

Michigan.— Darling Milling Co. *v.* Chapman, 131 Mich. 684, 92 N. W. 352; Slocomb *v.* Thatcher, 20 Mich. 52.

Minnesota.— Lowell *v.* North, 4 Minn. 32.

New York.— Keegan *v.* Smith, 60 N. Y. App. Div. 168, 70 N. Y. Suppl. 260 [*affirmed* in 172 N. Y. 624, 65 N. E. 1118]. And see Smith *v.* Coe, 29 N. Y. 666.

Oregon.— Lewis *v.* Portland First Nat. Bank, 46 Oreg. 182, 78 Pac. 990; Reade *v.* Pacific Supply Assoc., 40 Oreg. 60, 66 Pac. 443.

Texas.— Goode *v.* Lowery, 70 Tex. 150, 8 S. W. 73; Daugherty *v.* Templeton, 50 Tex. Civ. App. 304, 110 S. W. 553.

Utah.— Maynard *v.* Locomotive Engineers' Mut. L., etc., Ins. Assoc., 16 Utah 145, 51 Pac. 259, 67 Am. St. Rep. 602.

Washington.— Scott *v.* Bourn, 13 Wash. 471, 43 Pac. 372, holding that where the consideration for a note sued on is alleged to be the settlement of an account between the parties involving numerous transactions, the court is not required to find what items entered into the account.

See 46 Cent. Dig. tit. "Trial," §§ 937, 944.

And see Baldwin *v.* Threlkeld, 8 Ind. App. 312, 34 N. E. 851, 35 N. E. 841.

1. *California.*—Ward *v.* Sherman, 155 Cal. 287, 100 Pac. 864; Glassell *v.* Glassell, 147 Cal. 510, 82 Pac. 42; Burton *v.* Mullenary, 147 Cal. 259, 81 Pac. 544; Anderson *v.* Black, 70 Cal. 226, 11 Pac. 700.

Idaho.— Kent *v.* Richardson, 8 Ida. 750, 71 Pac. 117.

Indiana.— Fletcher *v.* Martin, 126 Ind. 55, 25 N. E. 886; Gardner *v.* Case, 111 Ind. 494, 13 N. E. 36; Gowdy Gas Well, etc., Co. *v.* Patterson, 29 Ind. App. 261, 64 N. E. 485.

Oregon.— Boothe *v.* Farmers', etc., Nat. Bank, 53 Oreg. 576, 98 Pac. 509, 101 Pac. 390.

South Carolina.— Columbia, etc., R. Co. *v.* Laurens Cotton Mills, 82 S. C. 24, 61 S. E. 1089, 62 S. E. 1119.

South Dakota.—Wolfinger *v.* Thomas, 22 S. D. 57, 115 N. W. 100, 133 Am. St. Rep. 900.

See 46 Cent. Dig. tit. "Trial," § 942.

Matters improperly in pleadings.— It is not the duty of the court to make findings upon the matters which, although controverted in the pleadings, are foreign to the issue between the parties, and which, upon motion, would have been stricken out of the pleadings as irrelevant and redundant. McCandliss *v.* Kelsey, 16 Kan. 557.

2. Ropes *v.* Rosenfeld, 145 Cal. 671, 79 Pac. 354; Macomber *v.* Bigelow, 126 Cal. 9, 58 Pac. 312; Wise *v.* Burton, 73 Cal. 174, 14 Pac. 683; Craig *v.* Gray, 1 Cal. App. 598, 82 Pac. 699; Burgess *v.* Mercantile Town Mut. Ins. Co., 114 Mo. App. 169, 89 S. W. 568; German-American Ins. Co. *v.* Tribble, 86 Mo. App. 546; Gallatin Canal Co. *v.* Lay, 10 Mont. 528, 26 Pac. 1001; Roblin *v.* Palmer, 9 S. D. 36, 67 N. W. 949. *Compare* Campbell *v.* Buckman, 49 Cal. 362, holding that a statement in the findings of fact that no testimony was offered by either party upon an issue made in the pleadings is not a finding in the negative on such issue.

Waiver of cause of action.— It is proper for the findings to show that plaintiff at the trial waived one of the alleged causes of action. Wm. Barie Dry Goods Co. *v.* Casler, 138 Mich. 172, 101 N. W. 215.

Where there is no conflict in the evidence, and a statement of facts is preserved, no prejudicial error results from the failure of the judge to include it in his findings. Ikard *v.* Thompson, 81 Tex. 285, 16 S. W. 1019.

Affirmative defense.—Where an affirmative

therein,[9] although it need not be responsive to all the allegations, provided findings on part of them are sufficient to sustain the judgment.[10] Issues, however, on which findings may or must be based may be made by the answer or counter-claim and reply, as well as by petition and answer,[11] and in determining what issues require findings, all the pleadings must be taken together.[12] Also issues which at first

Nebraska.— Lipp *v.* Horbach, 12 Nebr. 371, 11 N. W. 431.

See 46 Cent. Dig. tit. "Trial," § 935.

And see Kley *v.* Healy, 9 Misc. (N. Y.) 93, 29 N. Y. Suppl. 3 [*affirmed* in 149 N. Y. 346, 44 N. E. 150].

Defective complaint.—Where the facts as found relate to a paragraph of the complaint, which was bad, the judgment must be reversed. Kehr *v.* Hall, 117 Ind. 405, 20 N. E. 279.

Findings broader than the complaint are not erroneous, provided the additional facts are found connected with the main issue tendered by the complaint, and do not establish a distinct and independent cause of action. Cleveland, etc., R. Co. *v.* Closser, 126 Ind. 348, 26 N. E. 159, 22 Am. St. Rep. 593, 9 L. R. A. 754.

Findings held sufficiently responsive to complaint see Goldschmidt *v.* Maier, (Cal. 1903) 73 Pac. 984; Howlin *v.* Castro, 136 Cal. 605, 69 Pac. 432; Fanny Rawlings Min. Co. *v.* Tribe, 29 Colo. 302, 68 Pac. 284; Palmer *v.* Hartford Dredging Co., 73 Conn. 182, 47 Atl. 125; Sichel *v.* Baron, 96 N. Y. Suppl. 186.

9. Hohenshell *v.* South Riverside Land, etc., Co., 128 Cal. 627, 61 Pac. 371, holding that the fact that a judgment is based on findings at variance with the theory of the complaint is not ground for a reversal, where the findings made are based on the allegations of the complaint, since the theory of a pleading is immaterial, providing the facts which entitle the party to relief are alleged.

10. Haines *v.* Stilwell, (Cal. 1895) 40 Pac. 332; Adams *v.* De Boom, (Cal. 1895) 39 Pac. 858; Hooker *v.* Thomas, 86 Cal. 176, 24 Pac. 941; Tage *v.* Alberts, 2 Ida. (Hasb.) 271, 13 Pac. 19.

11. *California.*— Lackmann *v.* Kearney, 142 Cal. 112, 75 Pac. 668; Samuel *v.* Allen, 98 Cal. 406, 33 Pac. 273; Phipps *v.* Harlan, 53 Cal. 87; Swift *v.* Canavan, 52 Cal. 417; Le Clert *v.* Cullahan, 52 Cal. 252; People *v.* Forbes, 51 Cal. 628; Mushet *v.* Fox, 6 Cal. App. 77, 91 Pac. 534.

Indiana.— Lowe *v.* Turpie, 147 Ind. 652, 44 N. E. 25, 47 N. E. 150, 37 L. R. A. 233; Mauzy *v.* Flint, 42 Ind. App. 386, 83 N. E. 757.

Minnesota.— Bahnsen *v.* Gilbert, 55 Minn. 334, 56 N. W. 1117.

Missouri.— Farrar *v.* Lyon, 19 Mo. 122.

Montana.— Quinlan *v.* Calvert, 31 Mont. 115, 77 Pac. 428.

New York.— Morehouse *v.* Brooklyn Heights R. Co., 185 N. Y. 520, 78 N. E. 179 [*reversing* 102 N. Y. App. Div. 627, 92 N. Y. Suppl. 1134].

South Carolina.— Hankinson *v.* Hankinson, 61 S. C. 193, 39 S. E. 385; Holler *v.* Rock Hill School Dist., 60 S. C. 41, 38 S. E. 220.

Utah.— Everett *v.* Jones, 32 Utah 489, 91 Pac. 360.

See 46 Cent. Dig. tit. "Trial," § 935.

Contra, where answer constitutes no valid counter-claim.— Reed *v.* Johnson, 127 Cal. 538, 59 Pac. 986.

Where no reply is necessary under a code provision that the statement of any new matter in the answer is deemed controverted by plaintiff, whether facts establish an affirmative defense pleaded in the answer is an issue raised by the law on the answer, and a finding of such facts is within the issues (Peck *v.* Noes, 154 Cal. 351, 97 Pac. 865; Craigo *v.* Craigo, 22 S. D. 417, 118 N. W. 712), and must be made (Lyon *v.* Plankinton Bank, 15 S. D. 400, 89 N. W. 1017). Thus where a finding is *verbatim* the same as new matter alleged in the answer, it is not outside the issues. Snyder *v.* Emerson, 19 Utah 319, 57 Pac. 300.

Answer and cross complaint.—A judgment rendered upon a finding of the truth of the allegations of a cross complaint, without any findings on the issues raised by the answer to the original complaint in the action, will not be sustained, when the allegations of the cross complaint do not cover the issues thus raised. Demick *v.* Cuddihy, 72 Cal. 110, 12 Pac. 287, 13 Pac. 166.

Separate defense covered by general issue.—Where an alleged separate defense simply sets up matters contained in a general issue of ownership framed on the other pleadings, a failure to make specific findings thereon is not error. Black *v.* Black, 74 Cal. 520, 16 Pac. 311.

Waiver by decision on motion.—Where the trial court properly found, on motion to set aside a stipulation for judgment filed on behalf of a defendant, that the attorneys filing the stipulation had authority from him and that the stipulation was binding, it was not necessary to make findings on issues raised by pleadings filed by him. Pacific Paving Co. *v.* Vizelich, 2 Cal. App. 515, 83 Pac. 459. It is also held that on a motion for judgment based on a confession of the allegations of a counter-claim, the court need not find facts which are not a part of the counter-claim. Daggs *v.* Phœnix Nat. Bank, 177 U. S. 549, 20 S. Ct. 732, 44 L. ed. 882 [*affirming* 5 Ariz. 409, 53 Pac. 201].

Findings held sufficiently responsive to answer or counter-claim see Spaulding *v.* Dow, 118 Cal. 424, 50 Pac. 543; Smith *v.* Mohn, 87 Cal. 489, 25 Pac. 696; Iowa, etc., Bank *v.* Price, 12 S. D. 184, 80 N. W. 195; Ruzeoski *v.* Wilrodt, (Tex. Civ. App. 1906) 94 S. W. 142.

12. Boynton *v.* Hardin, 9 Kan. App. 166, 58 Pac. 1007.

appear to be material become immaterial and require no findings, where a finding on another issue is determinative of the case,[13] an application of this principle being the lack of necessity of finding on all the defenses, where a finding on one issue necessarily determines the case against plaintiff.[14]

(IV) *MATTERS ADMITTED OR NOT DENIED.* The court is justified in finding facts as they are admitted in the pleadings;[15] but it is not necessary for it to make findings as to matters admitted or not denied in the pleadings,[16] or otherwise agreed upon,[17] and findings made which are inconsistent with those admitted or agreed will be disregarded or set aside,[18] unless judgment is based thereon, in which event a reversal must be had.[19]

b. Manner of Finding — (I) *IN GENERAL.* In making up its findings of fact the court should be governed by the code or statutory provision under which it is proceeding,[20] and not attempt to find expressly on the issues, but rather to make a complete finding of all the ultimate[21] and constitutive facts within the issues,[22]

13. Roberts *v.* Ball, (Cal. 1894) 38 Pac. 949; Trope *v.* Kerns, (Cal. 1888) 20 Pac. 82; Quinn *v.* Anderson, 70 Cal. 454, 11 Pac. 746; Boyer *v.* Richardson, 52 Nebr. 156, 71 N. W. 981; Henry McShane Co. *v.* Padian, 1 Misc. (N. Y.) 332, 20 N. Y. Suppl. 679; Chambers *v.* Emery, 13 Utah 374, 45 Pac. 192.

Where two replications are filed to one plea, and there is a finding for plaintiff on one which is an answer to the plea, it is no objection that an issue to the other was not disposed of. Taylor *v.* Ricards, 9 Ark. 378.

14. Smith *v.* Dubost, 148 Cal. 622, 84 Pac. 38; Spaulding *v.* Dow, 118 Cal. 424, 50 Pac. 543; Paden *v.* Goldbaum, (Cal. 1894) 37 Pac. 759; Bradley *v.* Parker, (Cal. 1893) 34 Pac. 234; Murphy *v.* Bennett, 68 Cal. 528, 9 Pac. 738; Sanguinetti *v.* Pelligrini, 2 Cal. App. 294, 83 Pac. 293; Krohn *v.* Heyn, 77 Tex. 319, 14 S. W. 130.

15. Binghamton Opera House Co. *v.* Binghamton, 156 N. Y. 651, 51 N. E. 315 [*affirming* 88 Hun 620, 34 N. Y. Suppl. 421]; Lellyett *v.* Brooks, (Tenn. Ch. App. 1901) 62 S. W. 596, holding that where facts are agreed on in the pleadings, the court will not find facts in opposition thereto, although testified to by any number of witnesses.

16. *California.*— Goodyear Rubber Co. *v.* Eureka, 135 Cal. 613, 67 Pac. 1043; Murphy *v.* Pacific Bank, 130 Cal. 542, 62 Pac. 1059; Grossini *v.* Perazzo, 66 Cal. 545, 6 Pac. 450; Roussin *v.* Kirkpatrick, 8 Cal. App. 7, 95 Pac. 1123.

Indiana.—Allen *v.* Hollingshead, 155 Ind. 178, 57 N. E. 917.

Missouri.— Carlisle *v.* Mulhern, 19 Mo. 56.

Montana.— State *v.* Rocky Mountain Bell Tel. Co., 27 Mont. 394, 71 Pac. 311.

South Dakota.—Anderson *v.* Alseth, 8 S. D. 240, 66 N. W. 320.

Washington.— Peterson *v.* Johnson, 20 Wash. 497, 55 Pac. 932.

Wisconsin.— Hawkes *v.* Dodge County Mut. Ins. Co., 11 Wis. 188.

See 46 Cent. Dig. tit. "Trial," § 938.

It is not error to do so, where neither party is prejudiced thereby. Higgins *v.* San Diego Sav. Bank, 129 Cal. 184, 61 Pac. 943.

Necessity of making findings when all facts are admitted or agreed see *supra*, XII, B, 2, b.

17. Boyd *v.* Liefer, 144 Cal. 336, 77 Pac. 953; Webb *v.* Archibald, (Mo. 1894) 28 S. W. 80; O'Rourke *v.* Clopper, 22 Tex. Civ. App. 377, 54 S. W. 930.

18. Chapman *v.* Hughes, 134 Cal. 641, 58 Pac. 298, 60 Pac. 974, 66 Pac. 982; Gamache *v.* San Joaquin County South School Dist., 133 Cal. 145, 65 Pac. 301; Ortega *v.* Cordero, 88 Cal. 221, 26 Pac. 80; Brenner *v.* Bigelow, 8 Kan. 496; Seward *v.* Rheiner, 2 Kan. App. 95, 43 Pac. 423; O'Brien *v.* Buffalo Traction Co., 31 N. Y. App. Div. 632, 52 N. Y. Suppl. 322 [*affirmed* in 165 N. Y. 637, 59 N. E. 1128]; Trimmer *v.* Gorman, 129 N. C. 161, 39 S. E. 804. And see Fish *v.* Benson, 71 Cal. 428, 12 Pac. 454; Myers *v.* Holton, 9 Cal. App. 114, 98 Pac. 197.

When consistent.—A finding that the property traded by defendant to plaintiff would have been worth thirty thousand dollars if his representations had been true is not inconsistent with the admission of the answer that it would have been worth forty-eight thousand dollars if the representations alleged in the complaint had been true; one of these, that its market value was forty-eight thousand dollars, not being found to have been made, and, if made, not being a representation of fact. Barbour *v.* Flick, 126 Cal. 628, 59 Pac. 122. It has also been held that a finding that all the allegations of the complaint are true except as to damages, that all the allegations of the answer are untrue, that all the allegations of the cross complaint are untrue, and that all the allegations of the answer to the cross complaint are true, is not against the pleadings and evidence, merely because plaintiff admitted some of the allegations of defendant's answer on uncontroverted matters. Continental Bldg., etc., Assoc. *v.* Wilson, 144 Cal. 776, 78 Pac. 254.

19. Walker *v.* Brem, 67 Cal. 599, 8 Pac. 320; Silvey *v.* Neary, 59 Cal. 97; Brown *v.* Evans, 15 Kan. 88. And see Bridgewater Borough *v.* Beaver Valley Traction Co., 214 Pa. St. 343, 63 Atl. 796.

20. Skinner *v.* Thompson, 19 Mo. 528.

21. See *infra*, XII, B, 5, b, (IV).

22. *California.*— Paulson *v.* Nunan, 64 Cal. 290, 30 Pac. 845.

Indiana.— Kepler *v.* Conkling, 89 Ind. 392.

with such definiteness and certainty that no doubt as to the meaning, and the sufficiency of the findings to support the judgment, exist,[23] it being held that the same precision and particularity is required as in a special verdict,[24]

Missouri.— Brant *v.* Robertson, 16 Mo. 129; Bailey *v.* Emerson, 87 Mo. App. 220; Hamill *v.* Talbott, 72 Mo. App. 22.

Nebraska.— Foster *v.* Devinney, 28 Nebr. 416, 44 N. W. 479.

North Carolina.— Parks *v.* Davis, 98 N. C. 481, 4 S. E. 202, holding, however, that when issues have been settled, it is sufficient, if no exception is taken, for the court to respond formally to each, without stating a summary of the facts found, or stating them in detail.

See 46 Cent. Dig. tit. "Trial," § 927.

The view of the court as to what are the issues must be shown in the findings. Johnson *v.* Squires, 53 Cal. 37.

Rulings of court.— It is not the province of a special finding of facts to state and exhibit as a part of the record, rulings, in making up the issues, or in denying or permitting amendments to pleadings. Pavey *v.* Braddock, 170 Ind. 178, 84 N. E. 5; Steele *v.* Matteson, 50 Mich. 313, 15 N. W. 488.

23. Sharp *v.* Frank, (Cal. 1895) 41 Pac. 860; Duff *v.* Duff, 71 Cal. 513, 12 Pac. 570; Mitchell *v.* Brawley, 140 Ind. 216, 39 N. E. 497; Union Inv. Co. *v.* McKinney, 35 Ind. App. 594, 74 N. E. 1001; Johnson *v.* Bucklen, 9 Ind. App. 154, 36 N. E. 176 (where the findings were so indefinite and imperfect that it was difficult to determine whether they were in favor of either party); Nephi Irr. Co. *v.* Jenkins, 8 Utah 369, 31 Pac. 986; Demming *v.* Weston, 15 Wis. 236. And see Chouteau *v.* Nuckolls, 20 Mo. 442.

As that is certain which can be made certain, a reference in a finding to a specified number of inches of water is not indefinite, as it is to be construed according to the customary kind of water measurement in that locality. Collins *v.* Gray, 3 Cal. App. 723, 86 Pac. 983. Also a finding "that the law of said states is the same as the law of this state" is a sufficient finding as to the law of other states. Tolman *v.* Smith, 85 Cal. 280, 24 Pac. 743.

Recurrence of same subject-matter in finding.—Where the finding of the court gives the words of an assignment, which has been previously decided to be "by its very terms, fraudulent in law and in fact," the invalidity of the assignment will afterward be taken sufficiently to appear, when its terms appear, without stating it to be the same assignment previously decided upon. Keep *v.* Sanderson, 12 Wis. 352.

Brevity and conciseness are not valid objections to findings, where elaboration would not have made them more clear. Krauskopf *v.* Pennypack Yarn Finishing Co., 26 Pa. Super. Ct. 506.

Findings held sufficiently definite and certain.—A finding that at the time of the alleged contract "plaintiff's mind was in an abnormal condition, superinduced by drunkenness" is sufficient to show that he was then mentally incapable of making a contract (Franks *v.* Jones, 39 Kan. 236, 17 Pac. 663); and, in an action for the possession of land, with damages for its detention, a statement in the judgment, following the general statement of facts, that "the rental value of said land was $40 or $50" is a sufficient finding of such rental value (Gibson *v.* Barbour, 100 N. C. 192, 6 S. E. 766). A finding is not rendered indefinite and uncertain by its employment of the term "continuing contract" (*In re* Myer, 14 N. M. 45, 89 Pac. 246); nor by its reference to the only two deeds in evidence as the "short deed" and "long deed," where the findings, evidence, and decree clearly show what property was described in the one known as the "short deed," and that the other one, called the long deed, contained a description of the residue of the property in controversy (Boyd *v.* Slayback, (Cal. 1884) 5 Pac. 161); and, similarly, where it is alleged that defendant released the "mare named 'Mollie' and the mare named 'Pat,'" the property is sufficiently described by the finding that "those two certain horses named 'Molly' and 'Pat' were released" (Troxler *v.* Buckner, 126 Cal. 288, 58 Pac. 691). For other illustrations of findings held sufficiently definite and certain see Hick *v.* Thomas, 90 Cal. 289, 27 Pac. 208, 376; *In re* Abbott, 74 Cal. 381, 16 Pac. 21; Taylor *v.* Bulmetto, 18 N. Y. App. Div. 623, 45 N. Y. Suppl. 383; Hart *v.* Blum, 76 Tex. 113, 13 S. W. 181; Missouri, etc., R. Co. *v.* Wallis, (Tex. Civ. App. 1896) 38 S. W. 357.

Findings held indefinite and uncertain: Uncertainty and indefiniteness has been held to exist in a finding that "divers of the plaintiffs" assisted defendant in the construction of a canal. Stockman *v.* Riverside Land, etc., Co., 64 Cal. 57, 28 Pac. 116. A finding that moneys "were probably part of the proceeds" of a forgery, but that "this is not, on the evidence, absolutely clear." Mechanics' Bank *v.* Woodward, 73 Conn. 470, 47 Atl. 762. A general finding that plaintiff failed to make out his case by a preponderance of evidence, and that defendant is the owner of the property in question. McHale *v.* Wellman, 101 Tenn. 150, 46 S. W. 448. For other cases in which the findings were held insufficient see Southern Pac. R. Co. *v.* Dufour, 95 Cal. 615, 30 Pac. 783, 19 L. R. A. 92; Duff *v.* Duff, 71 Cal. 513, 12 Pac. 570; Warlick *v.* Plonk, 103 N. C. 81, 9 S. E. 190; Bartholomew *v.* Fayette Irr. Co., 31 Utah 1, 86 Pac. 481, 120 Am. St. Rep. 912, 31 Utah 220, 87 Pac. 707.

24. Ellis *v.* Lane, 85 Pa. St. 265; Briere *v.* Taylor, 126 Wis. 347, 105 N. W. 817 (holding that while findings of fact should respond in detail to all pleaded facts in issue essential to the cause of action or defense, they need not be any clearer or more specific than a special verdict or good pleading is required to be); U. S. *v.* Sioux City

although not the same as is necessary in a special pleading.[25] It is also necessary that the findings be direct and positive,[26] leaving nothing to be found by implication,[27] and that there be distinct and separate findings on each material issue or count.[28] It is no objection, however, to a finding that it is based on presumption or inference, as it is the duty of a trier of facts to draw inferences and deductions from facts in evidence for the purpose of arriving at other facts.[29] Neither are findings rendered insufficient by slight and inadvertent errors in the recital of facts or conclusions,[30] such as the recital of an erroneous date,[31] where no harm

Stock Yards Co., 167 Fed. 126, 92 C. C. A. 578; Anglo-American Land, etc., Co. *v.* Lombard, 132 Fed. 721, 68 C. C. A. 89.

Requisites of special verdict see *supra*, XI, C, 8.

25. Andrews *v.* Key, 77 Tex. 35, 13 S. W. 640; O'Reilly *v.* Campbell, 116 U. S. 418, 6 S. Ct. 421, 29 L. ed. 669. *Contra*, Van Riper *v.* Baker, 44 Iowa 450.

Favorable construction.—Uncertainty in the findings is to be construed so as to support the judgment rather than to defeat it. Krasky *v.* Wollpert, 134 Cal. 338, 66 Pac. 309; Warren *v.* Hopkins, 110 Cal. 506, 42 Pac. 986; Murphy *v.* Stelling, 8 Cal. App. 702, 97 Pac. 672.

26. Hibernia Sav., etc., Soc. *v.* Moore, 68 Cal. 156, 8 Pac. 824 (holding that a finding that one assumed and claimed to act for another is an equivocal finding as to authority to do the acts which were done upon that assumption); Laithe *v.* McDonald, 7 Kan. 254; Patterson *v.* Lamson, 44 Ohio St. 487, 8 N. E. 869.

27. Kelly *v.* Riggs, 2 Root (Conn.) 13; Woodworth *v.* Clark, 1 Root (Conn.) 542; Humes *v.* Day, 1 Root (Conn.) 466; Cook *v.* Atwater, 1 Root (Conn.) 435; Allen *v.* Vining, 1 Root (Conn.) 313; Foot *v.* Cady, 1 Root (Conn.) 173. But see Mason Stable Co. *v.* Lewis, 16 Misc. (N. Y.) 359, 38 N. Y. Suppl. 82.

Implied and negative findings see *infra*, XII, B, 5, b, (VII).

28. Perkins *v.* West Coast Lumber Co., 120 Cal. 27, 52 Pac. 118; German-American Ins. Co. *v.* Tribble, 86 Mo. App. 546 (which was an action to recover premiums collected by an insurance agent, and it was held that the court should state an account between the parties, showing the items allowed and disallowed); Grimes *v.* Sprague, 86 Mo. App. 245 (holding that where distinct accounts are filed in one suit, there should be a separate finding of the amount due on each account); McDougal *v.* New Richmond Roller Mills Co., 125 Wis. 121, 103 N. W. 244. *Contra*, State *v.* Grover, 47 Wash. 39, 91 Pac. 564.

Contradictory counts.—Where plaintiff cannot recover on both counts in his declaration because they are contradictory, so that success upon one count would involve a defeat on the other, the facts found must, to warrant a recovery, sustain one or the other of the counts without any support from the other, and must be such as to enable the court clearly to determine which count the findings supported. Capen *v.* Stevens, 29 Mich. 496.

Only one cause of action.—Where a single cause of action is made the subject of two or more counts for the purpose of meeting different phases of proof, a single finding on all of the counts is sufficient. Sain *v.* Rooney, 125 Mo. App. 176, 101 S. W. 1127; Hess *v.* Gansz, 90 Mo. App. 443; Hazell *v.* Clark, 89 Mo. App. 78.

Consolidation of actions.—Where a number of proceedings to enforce mechanics' liens against the same property are consolidated, all facts in issue may be embodied in a single set of findings and there is no impropriety in making a finding that all of the land on which the building was situated was necessary for its convenient use and occupation, although some of the complaints contain no allegation upon this issue. Union Lumber Co. *v.* Simon, 150 Cal. 751, 89 Pac. 1077, 1081.

Separate findings as to different parties.—The court cannot be required to make separate findings of fact as to each separate plaintiff or defendant or group of plaintiffs or defendants. Turpie *v.* Lowe, 158 Ind. 47, 62 N. E. 628.

29. Metcalf *v.* Central Vermont R. Co., 78 Conn. 614, 63 Atl. 633; Prescott *v.* Leonard, 32 Kan. 142, 4 Pac. 172; Bateman *v.* Blaisdell, 83 Mich. 357, 47 N. W. 223; Neumann *v.* Calumet, etc., Min. Co., 57 Mich. 97, 23 N. W. 600; Home Inv. Co. *v.* Clarson, 21 S. D. 72, 109 N. W. 507.

30. Pearsall *v.* Henry, 153 Cal. 314, 95 Pac. 154, 159 (holding that where the ultimate question was how much a party had expended in purchasing land, and the court found on sufficient evidence the amount expended, an error in a finding as to the price per acre is immaterial); Field *v.* Burr, 129 Cal. 44, 61 Pac. 665 (use of word "plaintiff" for "intervener"); Doolan *v.* Cunningham, (Cal. 1884) 4 Pac. 1193 (designation of defendants in singular instead of plural); Boies *v.* Vincent, 24 Iowa 387 (finding that there was a sale, instead of an executory agreement to sell and deliver); Sherrid *v.* Southwick, 43 Mich. 515, 5 N. W. 1027; James *v.* Turner, 78 Tex. 241, 14 S. W. 574 (reference to the instrument made the basis of the action as a note instead of a contract); Moore *v.* Lee, 37 Tex. Civ. App. 127, 83 S. W. 420.

31. Thomas *v.* Jameson, 77 Cal. 91, 19 Pac. 177; Morris *v.* Bekin's Van, etc., Co., 6 Cal. App. 429, 92 Pac. 362; Ward *v.* Berkshire L. Ins. Co., 108 Ind. 301, 9 N. E. 361; Leonard *v.* Green, 34 Minn. 137, 24 N. W. 915; Morgan *v.* Morgan, 45 S. C. 323, 23 S. E. 64.

results therefrom;[32] and findings which do not expressly state the required facts are often held to state the legal equivalent.[33]

(II) *General or Specific Findings.* A general finding is sufficient to support a judgment or decree,[34] especially where the judgment or decree is one of nonsuit or for defendant,[35] and when made need not show the facts supporting

32. Schroeder *v.* Jahns, 27 Cal. 274; Morgan *v.* Morgan, 45 S. C. 323, 23 S. E. 64.

33. *California.*—Stonesifer *v.* Kilburn, 122 Cal. 659, 55 Pac. 587 (holding that a finding that grantees had notice of the possession and equitable title of one in possession of the premises must be construed as finding that they had actual notice of such person's rights); Rebman *v.* San Gabriel Valley Land, etc., Co., 95 Cal. 390, 30 Pac. 564 (holding that a finding that a written contract was void was equivalent to finding that there was no written contract); Hamil *v.* McIlroy, 76 Cal. 312, 18 Pac. 377.

Indiana.— Mount *v.* Montgomery County, 168 Ind. 661, 80 N. E. 629, 14 L. R. A. N. S. 483 (where the word "understood" was held to be used in the finding in the sense of "agreed"); Schaefer *v.* Purviance, 160 Ind. 63, 66 N. E. 154; Faurote *v.* State, 123 Ind. 6, 23 N. E. 971; Hammann *v.* Mink, 99 Ind. 279; Smallwood *v.* Dunham, 42 Ind. App. 612, 86 N. E. 489.

Massachusetts.— Kendrick *v.* Kendrick, 188 Mass. 550, 75 N. E. 151, 74 N. E. 598 (holding that a finding that a woman named "Bethiah," against whom a judgment of divorce was rendered under the name of "Bertha," "was addressed as Bertha by her husband, and that she was known by that name to some extent, although it did not appear that she was so known outside the family," was a finding that she was known by both names); Glidden *v.* Nason, 186 Mass. 140, 71 N. E. 304.

Michigan.— Tower *v.* Detroit, etc., R. Co., 34 Mich. 328, holding that a finding that the condition of the contract in suit was performed "as the parties should be understood to have intended," and that the condition "ought to be held performed" is equivalent to a finding that it was performed according to the intent of the parties, or according to its legal effect.

Minnesota.— Bellevue *v.* Hunter, 105 Minn. 343, 117 N. W. 445.

New York.— Macy *v.* Metropolitan El. R. Co., 59 Hun 365, 12 N. Y. Suppl. 804 [*affirmed* in 128 N. Y. 624, 28 N. E. 485].

South Dakota.— Felker *v.* Grant, 10 S. D. 141, 72 N. W. 81.

See 46 Cent. Dig. tit. "Trial," §§ 927, 957.

Finding as to indebtedness.— In findings of indebtedness on promissory notes, the terms "due," "owing," and "unpaid" are generally construed to be equivalent in meaning. Ward *v.* Clay, 82 Cal. 502, 23 Pac. 50, 227; Myers *v.* McDonald, 68 Cal. 162, 8 Pac. 809; Turner *v.* Mahoney, 56 Cal. 215.

Findings held not equivalent.—A finding that a certain clearing-house rule had not been established by a universal, uniform, and general custom is not a finding that no such custom existed as a fact. Atlas Nat. Bank *v.* National Exch. Bank, 178 Mass. 531, 60 N. E. 121. In an action to recover an assessment for grading a street, a finding upon the fact of dedication does not arise out of findings that the supervisors "had no authority or jurisdiction" to order the work done; that the superintendent of highways, etc., "did not legally make, sign, or issue any assessments" therefor; that the land was not "lawfully assessed" for any sum. Spaulding *v.* Wesson, 84 Cal. 141, 24 Pac. 377. Neither is a statement in one of the conclusions of fact, that the sum paid for a stock of goods "was an inadequate consideration" equivalent to a finding that the sale was fraudulent (State *v.* Purcell, 131 Mo. 312, 33 S. W. 13); nor is a finding that a note and mortgage purport to be executed in the name of the principal by her attorney in fact, who in executing them assumed to be authorized, equivalent to a finding that such attorney in fact was authorized to execute the note and mortgage (Hibernia Sav., etc., Soc. *v.* Moore, 68 Cal. 156, 8 Pac. 824).

34. *Kansas.*— Bainter *v.* Fults, 15 Kan. 323.

Missouri.— Jordan *v.* Buschmeyer, 97 Mo. 94, 10 S. W. 616.

South Dakota.— Custer County Bank *v.* Custer County, 18 S. D. 274, 100 N. W. 424.

Wisconsin.— Badger *v.* Daenieke, 56 Wis. 678, 14 N. W. 821. *Compare* Farmer *v.* St. Croix Power Co., 117 Wis. 76, 93 N. W. 830, 98 Am. St. Rep. 914, holding that specific findings are essential, but that a failure to make them is not an error which will operate to reverse.

United States.— Dakota County School Dist. No. 11 *v.* Chapman, 152 Fed. 887, 82 C. C. A. 35; Ætna L. Ins. Co. *v.* Hamilton County, 79 Fed. 575, 25 C. C. A. 94; Clement *v.* Phœnix Ins. Co., 5 Fed. Cas. No. 2,882, 7 Blatchf. 51.

See 46 Cent. Dig. tit. "Trials," § 929.

Under statutes requiring special findings upon request, it is error for the court to deny a request and make only general findings. Ross *v.* Miner, 64 Mich. 204, 31 N. W. 185.

Where extended mathematical computations are involved, specific findings of fact should be made in order that the appellate court may intelligently review the evidence. Hottel *v.* Poudre Valley Reservoir Co., 41 Colo. 370, 92 Pac. 918.

35. Newhall *v.* Porter, 7 Ariz. 160, 62 Pac. 689; Main *v.* Main, 7 Ariz. 149, 60 Pac. 888; McGowan *v.* Sullivan, 5 Ariz. 334, 52 Pac. 986; Daggs *v.* Hoskins, 5 Ariz. 300, 52 Pac. 357; Noyes *v.* Morris, 56 Hun (N. Y.) 501, 10 N. Y. Suppl. 561; Noyes *v.* King County, 18 Wash. 417, 51 Pac. 1052; Thorne *v.* Joy, 15 Wash. 83, 45 Pac. 642.

it,[36] as it will be deemed to cover all special matters necessary to support the judgment.[37] As has been shown, under the statutes of most jurisdictions, special findings need not be made unless requested,[38] and in one jurisdiction there is no authority for making them, in the absence of a request. When so made, they will be treated as a general finding,[39] as will also alleged special findings which are not signed by the judge,[40] or are not followed by conclusions of law.[41] Although frequently done, the making of both general and special findings in the same case is irregular,[42] and when the general finding is first made, it is not superseded by the later special finding;[43] but when made at the same time, special

Contra, when defendant seeks affirmative relief.—Shattuck *v.* Costello, 8 Ariz. 22, 68 Pac. 529.

Necessity of making any findings on dismissal or nonsuit see *supra*, XII, B, 2, b.

36. Barton *v.* McWhinney, 85 Ind. 481; Union Pac. R. Co. *v.* Horney, 5 Kan. 340.

Reference in general findings to pleadings see *infra*, XII, B, 5, b, (v).

37. Martin *v.* Hoffman, 77 Kan. 185, 93 Pac. 625; Mushrush *v.* Zarker, 48 Kan. 382, 29 Pac. 681; Stout *v.* Townsend, 32 Kan. 423, 4 Pac. 805; Winstead *v.* Standeford, 21 Kan. 270; Sweedlund *v.* Hutchinson, (Kan. App. 1896) 47 Pac. 163; German American Nat. Bank *v.* Thomson, 5 Kan. App. 192, 47 Pac. 169; Kirwan *v.* U. S. National Bank, 2 Kan. App. 687, 43 Pac. 796; Combination Steel, etc., Co. *v.* St. Paul City R. Co., 52 Minn. 203, 53 N. W. 1144 (holding that where an allegation in a complaint that the contract price of certain goods had not been paid was not put in issue by the answer, a general finding that the allegations of the complaint are true necessarily includes a finding on the question of payment); Kostuba *v.* Miller, 137 Mo. 161, 38 S. W. 946; White *v.* Hines, 114 Mo. App. 122, 89 S. W. 349; Gardenhire *v.* Gardenhire, 2 Okla. 484, 37 Pac. 813.

Where special findings are also made, the general finding includes any fact necessary to support the judgment not in conflict with the special findings. Christisen *v.* Bartlett, 78 Kan. 118, 95 Pac. 1130. Thus, a general finding that certain parties are the owners in fee of the interest claimed settles all questions of title not negatived by the special findings. Adams *v.* Hopkins, 144 Cal. 79, 77 Pac. 712.

38. See *supra*, XII, B, 3, a.

39. Kelley *v.* Bell, 172 Ind. 590, 88 N. E. 58 [*affirming* (App. 1908) 83 N. E. 773]; Jacobs *v.* State, 127 Ind. 77, 26 N. E. 675; Sheets *v.* Bray, 125 Ind. 33, 24 N. E. 357; Prilliman *v.* Mendenhall, 120 Ind. 279, 22 N. E. 247; Wallace *v.* Kirtley, 98 Ind. 485; Bake *v.* Smiley, 84 Ind. 212; Benthall *v.* Seifert, 77 Ind. 302; Downey *v.* State, 77 Ind. 87; Haynie *v.* Johnson, 71 Ind. 394; Geisendorff *v.* Eagles, 70 Ind. 418; Smith *v.* Johnson, 69 Ind. 55; Caress *v.* Foster, 62 Ind. 145; Holmes *v.* Phœnix Mut. L. Ins. Co., 49 Ind. 356; Grover, etc., Sewing Mach. Co. *v.* Barnes, 49 Ind. 136; Weston *v.* Johnson, 48 Ind. 1; Richardson *v.* Howk, 45 Ind. 451; Nash *v.* Caywood, 39 Ind. 457.

A recital in the finding that a request was made makes it sufficiently appear that the findings were made upon request of one of the parties. Jones *v.* Hall, 9 Ind. App. 458, 35 N. E. 923, 37 N. E. 25.

40. Kelley *v.* Bell, 172 Ind. 590, 88 N. E. 58 [*affirming* (App. 1908) 83 N. E. 773]; Bake *v.* Smiley, 84 Ind. 212; Haynie *v.* Johnson, 71 Ind. 394; Smith *v.* Johnson, 69 Ind. 55; Shane *v.* Lowry, 48 Ind. 205; Tippecanoe County *v.* Reynolds, 44 Ind. 509, 15 Am. Rep. 245; Stabno *v.* Leeds, 27 Ind. App. 289, 701, 60 N. E. 1101; Stout *v.* Gaar, 26 Ind. App. 582, 60 N. E. 357; Vigo Real Estate Co. *v.* Reese, 21 Ind. App. 20, 51 N. E. 350.

Signature by wrong judge.—Where a finding is not signed by the judge presiding, but by another before whom the cause was commenced, and is not made a part of the record, it must be considered only as a general finding. McCray *v.* Humes, 116 Ind. 103, 18 N. E. 500.

Necessity of signature see *supra*, XII, B, 4, a.

41. Tippecanoe County *v.* Reynolds, 44 Ind. 509, 15 Am. Rep. 245; Stabno *v.* Leeds, 27 Ind. App. 289, 701, 60 N. E. 1101; Vigo Real Estate Co. *v.* Reese, 21 Ind. App. 20, 51 N. E. 350.

42. Wright *v.* Bragg, 96 Fed. 729, 37 C. C. A. 574; State Nat. Bank *v.* Smith, 94 Fed. 605, 36 C. C. A. 412; Austin *v.* Hamilton County, 76 Fed. 208, 22 C. C. A. 128.

The statement of facts in a general finding does not transform it into a special finding (Lawson *v.* Hilgenberg, 77 Ind. 221; Over *v.* Dehne, 38 Ind. App. 427, 75 N. E. 664, 76 N. E. 883); nor is it error for the court to embody in its general finding the exact ground upon which its decision is based (Evans *v.* Schafer, 86 Ind. 135).

43. Martindale *v.* Palmer, 52 Ind. 411; British Queen Min. Co. *v.* Baker Silver Min. Co., 139 U. S. 222, 11 S. Ct. 523, 35 L. ed. 147; U. S. *v.* Cleage, 161 Fed. 85, 88 C. C. A. 249; Corliss *v.* Pulaski County, 116 Fed. 289, 53 C. C. A. 567. And see Chatfield *v.* Continental Bldg., etc., Assoc., 6 Cal. App. 665, 92 Pac. 1040.

Where a special finding has been requested and made, a general finding will be disregarded. Stephenson *v.* Boody, 139 Ind. 60, 38 N. E. 331. However, where a special finding is preceded by what appears to be a general finding, which forms part of the same entry as that in which the special finding is incorporated, it will not be regarded as an independent general finding, but as a mere

findings will control the general finding, in the event of inconsistency.[44] In construing a special finding, a reviewing court will not supply facts by intendment.[45]

(III) *Conclusions of Law or Findings of Fact.*[46] The conclusions of law necessary to be stated are the conclusions which, under the facts found, are required by the law,[47] and while correct practice requires that conclusions be stated on every issue of fact formed by the pleadings and tried by the court,[48] it is not necessary that this be done or that they be in any particular form, a general conclusion that plaintiff or defendant recover or have judgment being held sufficient.[49] The conclusions must be based upon and sustained by the

preface to the special finding. Clark *v.* Deutsch, 101 Ind. 491.

Error cannot be predicated on the insufficiency of special findings, unnecessarily made in addition to the general finding (Moody *v.* Arthur, 16 Kan. 419; Meath *v.* Mississippi Levee Com'rs, 109 U. S. 268, 3 S. Ct. 284, 27 L. ed. 930), as such special findings may be treated as surplusage (Damon *v.* Quinn, 143 Cal. 75, 76 Pac. 818).

44. *Arkansas.*— Gebhart *v.* Merchant, 84 Ark. 359, 105 S. W. 1034.

California.—McCormick *v.* National Surety Co., 134 Cal. 510, 66 Pac. 741; Oroville Bank *v.* Lawrence, (1894) 37 Pac. 936; Warder *v.* Enslen, 73 Cal. 291, 14 Pac. 874; Hidden *v.* Jordan, 28 Cal. 301.

Nebraska.— Citizens' Bank *v.* Stockslager, 1 Nebr. (Unoff.) 799, 96 N. W. 591.

New York.— Paisley *v.* Casey, 18 N. Y. Suppl. 102.

Wyoming.— Cramer *v.* Munkres, 14 Wyo. 234, 83 Pac. 374.

See 46 Cent. Dig. tit. "Trial," §§ 929, 960.

But see Smith *v.* Smith, 75 Kan. 847, 89 Pac. 896, holding that special findings made by the court, stating that certain allegations of plaintiff's petition are not sustained by the evidence, do not warrant a reversal of the judgment for plaintiff, where there are allegations of fraud in plaintiff's petition, not negatived by the special findings which are found to be true.

Inconsistency between specific findings see *infra*, XII, B, 5, b, (VIII).

45. Sellers *v.* Hayes, 163 Ind. 422, 72 N. E. 119; Bradway *v.* Groenendyke, 153 Ind. 508, 55 N. E. 434; Craig *v.* Bennett, 146 Ind. 574, 45 N. E. 792; Dinius *v.* Lahr, 36 Ind. App. 425, 74 N. E. 1033.

Findings held sufficiently specific.—Where defendant pleads that the action is barred by certain specified sections of the code of civil procedure, a finding that plaintiff, at the time of commencing the action, was under the age of twenty-three years, and that his cause of action is not barred by either of the sections pleaded is sufficiently specific. Ybarra *v.* Sylvany, (Cal. 1893) 31 Pac. 1114. Also a finding in condemnation proceedings "that all the facts alleged in the complaint are true, except as to those hereinafter otherwise specified, and as to those allegations the court finds as follows," the court then finding specifically as to certain facts, does not mean that all the facts so excepted are necessarily untrue, but that they are as found specially. Alameda County *v.* Crocker, 125 Cal. 101, 57 Pac. 766.

46. Declarations or propositions of law see *supra*, XII, A, 4.

47. Working *v.* Garn, 148 Ind. 546, 47 N. E. 951. And see California Iron Constr. Co. *v.* Bradbury, 138 Cal. 528, 71 Pac. 346, 617, in which it was held that where the evidence introduced shows the existence of a contract, that fact together with the facts bearing on its validity, should be found as such, relegating to the conclusions of law the legal conclusion that it is or is not void.

Conclusion defined see Conclusion, 8 Cyc. 551.

Where facts stated admit of but one conclusion, the deduction therefrom is a conclusion of law, and not an ultimate fact (De Pauw Plate Glass Co. *v.* Alexandria, 152 Ind. 443, 52 N. E. 608), but where such conclusion necessarily follows, it is not error to fail to state in express terms a "conclusion of law" (Miller *v.* Hicken, 92 Cal. 229, 28 Pac. 339).

Proper and improper conclusions.—Where findings of fact showed that plaintiffs had contracted to build a church for defendant, and that there was due on said contract, and for extra work, a certain sum, together with attorney's fees, less certain payments and deductions which were found for defendant, conclusions of law correctly stating the aggregate of such amounts, as the amount plaintiff was entitled to recover and defendant was to be credited with, were proper (Bird *v.* St. John's Episcopal Church, 154 Ind. 138, 56 N. E. 129); and where, in proceedings to establish a claim against the estate of a decedent for labor performed under a special contract, the controversy depended on whether the contract had been made, and the court found the existence of a contract between claimant and a corporation of which decedent was president, and for which he had acted in making the contract, but did not find that the contract sued on was made, the conclusion rejecting the claim was proper (Light *v.* Schneck, (Ind. App. 1908) 86 N. E. 442). On the other hand it is improper to find, as a conclusion of law, a matter of fact, such as payment (Braden *v.* Lemmon, 127 Ind. 9, 26 N. E. 476), or negligence (Texas Midland R. Co. *v.* Johnson, (Tex. Civ. App. 1901) 65 S. W. 388).

Necessity of motion for new trial to correct error in conclusions of law see New Trial, 29 Cyc. 757.

48. Huntington First Nat. Bank *v.* Arnold, 156 Ind. 487, 60 N. E. 134.

49. *California.*— Rea *v.* Haffenden, 116

findings of fact,[50] and cannot be employed to supply defects or omissions in the findings of fact,[51] unless they contain misplaced findings.[52] Neither can a judgment stand when based on purported findings of fact which are in effect mere legal conclusions;[53] but it is often difficult to distinguish between the two, as it fre-

Cal. 596, 48 Pac. 716; Spencer *v.* Duncan, 107 Cal. 423, 40 Pac. 549; Dougherty *v.* Ward, 89 Cal. 81, 26 Pac. 638; Murphy *v.* Snyder, 67 Cal. 451, 8 Pac. 2.

Indiana.— Huntington First Nat. Bank *v.* Arnold, 156 Ind. 487, 60 N. E. 134; Western Union Tel. Co. *v.* Sanders, 39 Ind. App. 146, 79 N. E. 406.

Minnesota.— Von Glahn *v.* Sommer, 11 Minn. 203.

South Dakota.— McVay *v.* Bridgman, 21 S. D. 374, 112 N. W. 1138.

Texas.— Ikard *v.* Thompson, 81 Tex. 285, 16 S. W. 1019; Fidelity, etc., Co. *v.* National Bank of Commerce of Dallas, 48 Tex. Civ. App. 301, 106 S. W. 782.

Utah.— Blish *v.* McCornick, 15 Utah 188, 49 Pac. 529.

See 46 Cent. Dig. tit. "Trial," § 933.

Contra.— Clark *v.* Falmouth Turnpike Co., 7 Ky. L. Rep. 605; Carpenter *v.* Yeadon Borough, 208 Pa. St. 396, 57 Atl. 837.

50. *California.*— Niles *v.* Los Angeles, 125 Cal. 572, 58 Pac. 190.

Idaho.— Hailey *v.* Riley, 14 Ida. 481, 95 Pac. 686.

Indiana.— Lowe *v.* Turpie, 147 Ind. 652, 44 N. E. 25, 47 N. E. 150, 37 L. R. A. 233; Miller *v.* Stephenson, 27 Ind. App. 271, 59 N. E. 398, 61 N. E. 22.

Michigan.— Fairfield *v.* Hart, 139 Mich. 136, 102 N. W. 641.

New York.— Dougherty *v.* Lion Fire Ins. Co., 183 N. Y. 302, 76 N. E. 4 [*reversing* 95 N. Y. App. Div. 618, 88 N. Y. Suppl. 1096].

Oregon.— Grant *v.* Paddock, 30 Oreg. 312, 47 Pac. 712.

Texas.— Amber Petroleum Co. *v.* Breech, (Civ. App. 1908) 111 S. W. 668; Fordtran *v.* South End Land Co., 47 Tex. Civ. App. 322, 105 S. W. 323, holding that on findings that a certain sum is due to plaintiff from defendant, but that plaintiff is indebted to defendant in a larger sum, as shown by his petition, a conclusion of law that plaintiff is not entitled to recover is correct.

United States.— French *v.* Edwards, 21 Wall. 147, 22 L. ed. 534.

See 46 Cent. Dig. tit. "Trial," § 933.

Where the facts found support the conclusions of law and a correct conclusion is reached, it is immaterial that an improper reason is given therefor. Austin City *v.* Emanuel, 74 Tex. 621, 12 S. W. 318.

The right of the party to prove the facts or of the court to find them is not presented by, or involved in, a conclusion of law, as such conclusion is based on the facts as found. Braden *v.* Graves, 85 Ind. 92.

51. Lupton *v.* Taylor, 39 Ind. App. 412, 78 N. E. 689, 79 N. E. 523; Zachariae *v.* Swanson, 34 Tex. Civ. App. 1, 77 S. W. 627, holding that a conclusion of law does not take the place of a finding of fact, except where the law gives a conclusive effect to the fact established, or where the evidence is of such a conclusive character that the minds of men of ordinary intelligence will not differ as to its effect.

52. See *supra*, XII, B, 4, b.

53. *Nebraska.*— Ganow *v.* Denny, 68 Nebr. 706, 94 N. W. 959.

New York.— Smith *v.* Smith, 7 N. Y. Suppl. 193, 18 N. Y. Civ. Proc. 28.

Oregon.— Kane *v.* Rippey, 22 Oreg. 299, 29 Pac. 1005.

Utah.— Houtz *v.* Union Pac. R. Co., 33 Utah 175, 93 Pac. 439, 17 L. R. A. N. S. 628.

Washington.— Kennedy *v.* Derrickson, 5 Wash. 289, 31 Pac. 766.

See 46 Cent. Dig. tit. "Trial," §§ 933, 958.

Finding of bar of action as fact.— It is proper to find as a fact, and not as a conclusion of law, that the interest of the assignee of a recorded mortgage in the mortgaged premises is barred by the statute of limitations (Spaulding *v.* Howard, 121 Cal. 194, 53 Pac. 563), and a finding that the action is barred by the statute will be treated as one of an ultimate fact, although contained in or stating conclusions of law (Adams *v.* Hopkins, 144 Cal. 19, 77 Pac. 712; Luco *v.* Toro, (Cal. 1888) 18 Pac. 866).

Ownership is regarded as a question of ultimate fact in one jurisdiction (Curtis *v.* Boquillas Land, etc., Co., 9 Ariz. 62, 76 Pac. 612, 8 Ariz. 258, 71 Pac. 924 [*affirmed* in 200 U. S. 96, 26 S. Ct. 192, 50 L. ed. 388]), while, in another jurisdiction, it may be found either as an ultimate fact or as a conclusion of law (Savings, etc., Soc. *v.* Burnett, 106 Cal. 514, 39 Pac. 922; Levins *v.* Rovegno, 71 Cal. 273, 12 Pac. 161; Gardner *v.* San Gabriel Valley Bank, 7 Cal. App. 106, 93 Pac. 900), and the question as to which it is in a particular case depends on the issues tried (Gardner *v.* San Gabriel Valley Bank, *supra*). A finding that a certain conveyance passed title will be construed to be a conclusion of law (Levins *v.* Rovegno, 71 Cal. 273, 12 Pac. 161), as will also a finding that a certain party was the owner of property, when it follows findings showing the details of the transactions claimed to have made him owner (Insurance Co. of North America *v.* East Tennessee, etc., R. Co., 97 Tenn. 326, 37 S. W. 225), and a finding that the title to lots of which defendants were in possession passed to innocent purchasers at a sheriff's sale in a proceeding to which defendants were not parties (Lowe *v.* Turpie, 147 Ind. 652, 44 N. E. 25, 47 N. E. 150, 37 L. R. A. 233); but a finding that plaintiff is the owner in fee and entitled to the possession of the described parcel of land is a finding of an ultimate fact (Ybarra *v.* Sylvany, (Cal. 1893) 31 Pac. 1114).

quently happens that a statement of fact cannot be made without including a conclusion, and as often a conclusion, although one of law, must be stated in the form of a statement of fact.[54] The insertion in a conclusion of law of a statement which is only surplusage does not constitute reversible error.[55]

(IV) *ULTIMATE OR EVIDENTIARY FACTS.* The setting out of matters of evidence and subordinate facts in the findings is neither necessary,[56] nor

54. Roemheld *v.* Chicago, 231 Ill. 467, 83 N. E. 291; Working *v.* Garn, 148 Ind. 546, 47 N. E. 951; McKenna *v.* Whittaker, 9 S. D. 442, 69 N. W. 587. And see Haskell *v.* Merrill, 179 Mass. 120, 60 N. E. 485.

Statements held to be conclusions of law. — The following matters have been held to be conclusions of law, rather than findings of fact: A statement that "a deed was duly issued according to the statutes." Essex *v.* Meyers, 27 Ind. App. 639, 62 N. E. 96. A conclusion that plaintiff was using the door of defendant's store under an implied invitation. Rooney *v.* Woolworth, 74 Conn. 720, 52 Atl. 411. A finding in substance that plaintiff is without any adequate remedy except the one it seeks. New Albany Gas Light, etc., Co. *v.* New Albany, 139 Ind. 660, 39 N. E. 462. A finding that a right of way across a railroad track exists either as an exception in a deed or by prescription, and is appurtenant to the entire premises. Knowlton *v.* New York, etc., R. Co., 72 Conn. 188, 44 Atl. 8. A conclusion that an executor omitted certain stock from returns of the property for taxation with intent to evade payment, and that such returns were false. Phipps *v.* Ratterman, 10 Ohio Cir. Ct. 205, 6 Ohio Cir. Dec. 488. A finding that money was "paid by plaintiffs to defendant as a legatee." Scott *v.* Ford, 45 Oreg. 531, 78 Pac. 742, 80 Pac. 899, 68 L. R. A. 469. A finding that a certain course of conduct was negligent. Warren *v.* Robison, 25 Utah 205, 70 Pac. 989. For other illustrative cases see Dow *v.* Swain, 125 Cal. 674, 58 Pac. 271; Los Angeles County *v.* Lankershim, 100 Cal. 525, 35 Pac. 153, 556; Kansas City Wholesale Grocery Co. *v.* McDonald, 118 Mo. App. 471, 95 S. W. 279; Brauer *v.* Portland, 35 Oreg. 471, 58 Pac. 861, 59 Pac. 117, 60 Pac. 378; Dillon Implement Co. *v.* Cleaveland, 32 Utah 1, 88 Pac. 670; Hartford School Dist. *v.* Hartford School Dist. No. 13, 69 Vt. 147, 37 Atl. 252.

Statements held to be findings of fact. — The following statements, findings, or conclusions have been held to be findings of fact, instead of conclusions of law: A finding that a certain sum consisted of illegal and excessive fees collected and taxed in violation of law, and in excess of fees taxable and chargeable by law. State *v.* Williams, 39 Ind. App. 376, 77 N. E. 1137. A finding that a board of supervisors passed each and every resolution with reference to the work mentioned in the complaint. Pacific Paving Co. *v.* Diggins, 4 Cal. App. 240, 87 Pac. 415. A finding that the statements complained of were made maliciously. May *v.* Anderson, 14 Ind. App. 251, 42 N. E. 946. Findings that a drain will benefit several highways, and will benefit and promote the public health. Perkins *v.* Hayward, 124 Ind. 445, 24 N. E. 1033. A finding that plaintiff did not rescind certain sales to defendant. Hollenbach *v.* Schnabel, 101 Cal. 312, 35 Pac. 872, 40 Am. St. Rep. 57. A special finding that testator was not of "sound mind." Clements *v.* McGinn, (Cal. 1893) 33 Pac. 920. A finding that one was "duly" appointed to an office. Snyder *v.* Emerson, 19 Utah 319, 57 Pac. 300. A finding that the president and secretary of a corporation had authority to sign a note for the company. Reade *v.* Pacific Supply Assoc., 40 Oreg. 60, 66 Pac. 443. For other illustrative cases see Anderson *v.* Southern Pac. R. Co., (Cal. 1902) 67 Pac. 1124, (1901) 65 Pac. 950; Weidenmuller *v.* Stearns Ranchos Co., 128 Cal. 623, 61 Pac. 374; Spencer *v.* Merwin, 80 Conn. 330, 68 Atl. 370; McCarthy *v.* Consolidated R. Co., 79 Conn. 73, 63 Atl. 725; Minnich *v.* Darling, 8 Ind. App. 539, 36 N. E. 173; Canadian-American Mortg., etc., Co. *v.* McCarty, (Tex. Civ. App. 1895) 34 S. W. 306; Egan *v.* Clasbey, 137 U. S. 654, 11 S. Ct. 231, 34 L. ed. 822 [*affirming* 5 Utah 154, 13 Pac. 430].

55. Thompson *v.* Hays, 24 Utah 275, 67 Pac. 670.

56. *California.* — Spaulding *v.* Dow, 118 Cal. 424, 50 Pac. 543; Moody *v.* Peirano, (App. 1906) 84 Pac. 783. And see Turner *v.* Reynolds, 81 Cal. 214, 22 Pac. 546.

Connecticut. — Freeman's Appeal, 74 Conn. 247, 50 Atl. 748.

Indiana. — Taylor *v.* Canaday, 155 Ind. 671, 57 N. E. 524, 59 N. E. 20; Weaver *v.* Apple, 147 Ind. 304, 46 N. E. 642 (holding that the court is not bound to include in its findings a statement of its conclusion on the weight of evidence adduced to sustain the incidental allegations, where it finds the material facts in issue); Scanlin *v.* Stewart, 138 Ind. 574, 37 N. E. 401, 38 N. E. 401.

Iowa. — Houston *v.* Trimble, 3 Greene 574.

Maine. — Kneeland *v.* Webb, 68 Me. 540.

Michigan. — Robson *v.* Price, 134 Mich. 371, 96 N. W. 433.

New York. — Adler *v.* Metropolitan El. R. Co., 138 N. Y. 173, 33 N. E. 935 [*distinguishing* Bohm *v.* Metropolitan El. R. Co., 129 N. Y. 576, 29 N. E. 802, 14 L. R. A. 344]; Spore *v.* Vaughn, 20 N. Y. Suppl. 152; Conkling *v.* Manhattan R. Co., 12 N. Y. Suppl. 846.

Tennessee. — Rhodes *v.* Turpin, (Ch. App. 1899) 57 S. W. 351.

Texas. — Haring *v.* Shelton, (Civ. App. 1908) 114 S. W. 389; Thompson *v.* Mills, 45 Tex. Civ. App. 642, 101 S. W. 560; Gordon *v.* McCall, 20 Tex. Civ. App. 283, 48 S. W. 1111.

United States. — Merchants' Mut. Ins. Co.

proper,[57] as a finding of ultimate facts necessarily includes all the probative facts, together with the inferences therefrom,[58] and it is the province and duty of the court to state ultimate, rather than evidentiary or probative, facts in its findings.[59]

v. Allen, 121 U. S. 67, 7 S. Ct. 821, 30 L. ed. 858.

See 46 Cent. Dig. tit. "Trial," § 923.

Evidence tending toward opposite finding.— Where the court finds in favor of one party, its omission to find various incidental evidentiary facts, tending toward an opposite finding, is not ground for reversal. Collins *v.* Hydorn, 12 N. Y. Suppl. 581 [*affirmed* in 124 N. Y. 641, 27 N. E. 412]; Mulford *v.* Yager, 7 N. Y. Suppl. 88, 17 N. Y. Civ. Proc. 371 [*affirmed* in 125 N. Y. 726, 26 N. E. 757].

57. McDonald *v.* Burton, 68 Cal. 445, 9 Pac. 714; Davis *v.* Franklin, 25 Ind. 407; Ramsey *v.* Johnson, 7 Wyo. 392, 52 Pac. 1084.

58. Adams *v.* Crawford, 116 Cal. 495, 48 Pac. 488; Leggat *v.* Blomberg, 15 Ida. 496, 98 Pac. 723; Later *v.* Haywood, 14 Ida. 45, 93 Pac. 374; Pavey *v.* Braddock, 170 Ind. 178, 84 N. E. 5 (holding that where the ultimate fact that a city was incorporated and had been, since a specified date is found, it is unnecessary to find and state evidentiary matter as to the incorporation or as to annexation of territory); Ramsey *v.* Johnson, 7 Wyo. 392, 52 Pac. 1084. And see Insurance Co. of North America *v.* International Trust Co., 71 Fed. 88, 17 C. C. A. 616.

A finding of mental competency necessarily involves the inference that the person named was not entirely without understanding (Ripperdan *v.* Weldy, 149 Cal. 667, 87 Pac. 276); and need not be accompanied by a finding as to the donor's physical condition or other facts stated in the complaint as inducement to the ultimate facts (Wheelock *v.* Godfrey, (Cal. 1893) 35 Pac. 320).

A finding of the execution of a conveyance necessarily includes a finding of every fact essential to such conveyance. Joseph *v.* Dougherty, 60 Cal. 358; Lewis *v.* Kelton, 58 Cal. 303; Pool *v.* Davis, 135 Ind. 323, 34 N. E. 1130. Thus, a finding that an assignment for benefit of creditors was made necessarily means a valid assignment, acknowledged in accordance with the statute. Benner *v.* Kilpatrick, 54 N. Y. Super. Ct. 532.

Identity of evidentiary and inferential facts.— Where the evidentiary fact and the inferential fact are one and the same thing, although the evidentiary fact is itself the evidence, it is more than that, and not only may, but must be stated in the findings. Brunson *v.* Henry, 152 Ind. 310, 52 N. E. 407; Rowley *v.* Sanns, 141 Ind. 179, 40 N. E. 674. Thus, it is proper to incorporate in the findings a copy of a bond which is the foundation of the action. King *v.* Downey, 24 Ind. App. 262, 56 N. E. 680.

The court's reasons for the decision need not and should not be embodied in the findings. Mathews *v.* Kinsell, 41 Cal. 512; Hamilton *v.* Spokane, etc., R. Co., 3 Ida. 164, 28 Pac. 408; Conlan *v.* Grace, 36 Minn. 276, 30 N. W. 880.

59. *California.*— Jacobs *v.* Ludemann, 137 Cal. 176, 69 Pac. 965 (holding it sufficient for the court to find the ultimate fact of the amount due from plaintiff to defendant, without finding the items of debt and credit); City St. Imp. Co. *v.* Babcock, (1902) 68 Pac. 584; Mathews *v.* Kinsell, 41 Cal. 512.

Idaho.— Leggat *v.* Blomberg, 15 Ida. 496, 98 Pac. 723.

Indiana.— Woodfill *v.* Patton, 76 Ind. 575, 40 Am. Rep. 269.

Iowa.— Van Riper *v.* Baker, 44 Iowa 450.

Michigan.— Fairfield *v.* Hart, 139 Mich. 136, 102 N. W. 641; Downey *v.* Andrus, 43 Mich. 65, 4 N. W. 628; Yelverton *v.* Stelle, 40 Mich. 538; Trudo *v.* Anderson, 10 Mich. 357, 81 Am. Dec. 795.

Minnesota.— Newman *v.* Newman, 68 Minn. 1, 70 N. W. 776; Conlan *v.* Grace, 36 Minn. 276, 30 N. W. 880; Butler *v.* Bohn, 31 Minn. 325, 17 N. W. 862.

Missouri.— Singer Mfg. Co. *v.* Stephens, 169 Mo. 1, 68 S. W. 903; Sutter *v.* Streit, 21 Mo. 157; Murdoch *v.* Finney, 21 Mo. 138; Javens *v.* Harris, 20 Mo. 262.

Ohio.—Albright *v.* Hawk, 52 Ohio St. 362, 39 N. E. 1044.

South Dakota.— McKenna *v.* Whittaker, 9 S. D. 442, 69 N. W. 587.

Tennessee.— McHale *v.* Wellman, 101 Tenn. 150, 46 S. W. 448; Madisonville Bank *v.* McCoy, (Ch. App. 1897) 42 S. W. 814.

Wisconsin.— McKenzie *v.* Haines, 123 Wis. 557, 102 N. W. 33.

United States.—American Nat. Bank *v.* Watkins, 119 Fed. 545, 56 C. C. A. 111; Ft. Worth State Nat. Bank *v.* Smith, 94 Fed. 605, 36 C. C. A. 412. And see U. S. *v.* Pugh, 99 U. S. 265, 25 L. ed. 322.

See 46 Cent. Dig. tit. "Trial," § 931.

Compare Clark *v.* Bundy, 29 Oreg. 190, 44 Pac. 282.

Fraud is a question of fact which must be expressly found as such, it not being sufficient to find mere evidence or badges of fraud. Farmers' L. & T. Co. *v.* Canada, etc., R. Co., 127 Ind. 250, 28 N. E. 784, 11 L. R. A. 740; Phelps *v.* Smith, 116 Ind. 387, 17 N. E. 602, 19 N. E. 156; Caldwell *v.* Boyd, 109 Ind. 447, 9 N. E. 912; Stix *v.* Sadler, 109 Ind. 254, 9 N. E. 905; Pearce *v.* Burns, 22 Mo. 577 [*followed* in Pearce *v.* Roberts, 22 Mo. 582]. Thus, in an action to recover land by one claiming as grantee of the heirs of a former owner, against the latter's son, to whom such former owner had orally agreed to convey it, a special finding that the son was indebted, and that the father retained the title to the land to prevent the son's creditors from seizing it does not show fraud (Wilson *v.* Campbell, 119 Ind. 286, 21 N. E. 893); nor does a finding that, before plaintiff accepted defendant's proposition for a settlement in full, for services rendered by plaintiff pursuant to a contract, defendant

It follows that a statement of evidentiary facts alone is insufficient,[60] unless they are of such a nature and are so stated that the ultimate facts necessarily result therefrom.[61] However, where the ultimate facts are properly found and stated, an additional statement of evidentiary facts is not cause for reversal,[62] as such statement will be deemed surplusage and disregarded,[63] especially in case of any inconsistency between it and the ultimate facts found.[64]

(v) *Reference to Pleadings and Evidence.* In making up its findings, it is competent for the court to merely refer to exhibits or documents given in evidence [65] or to the pleadings, provided the reference is sufficiently distinct

made statements to plaintiff as to the amount due, which were not true, that plaintiff relied on such statements, and was ignorant of the actual facts (Spier *v.* Hyde, 78 N. Y. App. Div. 151, 79 N. Y. Suppl. 699). However, the absence of the word "fraud" does not impair the force of the facts stated by the court in arriving at a conclusion of fraud. Slauter *v.* Favorite, 107 Ind. 291, 4 N. E. 880, 57 Am. Rep. 106.

Finding held to be of ultimate facts.—A finding that a deed was given as security is a finding of an ultimate fact. Clambey *v.* Copland, 52 Wash. 580, 100 Pac. 1031. It has also been held, in an action on a forfeited recognizance, that a finding of the making of a *nunc pro tunc* entry, showing the rendition of a judgment of forefeiture before the action was brought, accompanied by the order book entry, was not a finding of evidentiary facts only. Axtell *v.* State, 43 Ind. App. 735, 86 N. E. 999, 1000.

60. *Alabama.*— Brock *v.* Louisville, etc., R. Co., 114 Ala. 431, 21 So. 994.

California.— Heredink *v.* Holton, 16 Cal. 103.

Indiana.— Parker *v.* Hubble, 75 Ind. 580; Light *v.* Schneck, (App. 1908) 86 N. E. 442.

Michigan.— Steele *v.* Matteson, 50 Mich. 313, 15 N. W. 488; Feller *v.* Green, 26 Mich. 70; Thomas *v.* Sprague, 12 Mich. 120.

Minnesota.— Schneider *v.* Ashworth, 34 Minn. 426, 26 N. W. 233; Wagner *v.* Nagel, 33 Minn. 348, 23 N. W. 308.

United States.— Powers *v.* U. S., 119 Fed. 562, 56 C. C. A. 128.

See 46 Cent. Dig. tit. "Trial," § 931.

Finding as to testimony of witness.—A finding that, according to the testimony of a certain witness, the assets of a firm at the time of intestate's death were a certain sum is not a finding of fact, as it amounts to nothing more than a statement that the witness testified as therein set forth. Campbell *v.* Campbell, 16 N. Y. Suppl. 165.

Findings held to be of evidentiary matters.—In a suit against a sheriff for failure to levy an execution, a finding that the sheriff made a certain return which was set forth is a finding of evidence. Hessong *v.* Pressley, 86 Ind. 555. Where, in an action to foreclose a materialman's lien, it appears that the contractor, who was to furnish all materials, purchased lumber, and had it charged to defendant, a finding that such purchase was not authorized by defendant; that, after part of it was so purchased, plaintiff showed defendant the account to that date; that the latter made no objection to the account, but requested plaintiff to present him with an itemized account at a future time stated; that afterward plaintiff sold the balance of such material; and that he did not know of the contract between defendant and such contractor until all the material was sold, is a finding of evidential facts. Minnich *v.* Darling, 8 Ind. App. 539, 36 N. E. 173.

61. Reavis *v.* Gardner, (Cal. 1900) 60 Pac. 964; Miller *v.* Luco, 80 Cal. 257, 22 Pac. 195; Alhambra Addition Water Co. *v.* Richardson, 72 Cal. 598, 14 Pac. 379; Glascock *v.* Ashman, 52 Cal. 420 (holding that the finding of a probative fact which might tend to prove or which *prima facie* did prove a certain amount of damages is not a finding that damages were sustained); People *v.* Hagar, 52 Cal. 171; Coveny *v.* Hale, 49 Cal. 552; O'Neill *v.* Quarnstrom, 6 Cal. App. 469, 92 Pac. 391; Later *v.* Haywood, 14 Ida. 45, 93 Pac. 374; Mount *v.* Montgomery County, 168 Ind. 661, 80 N. E. 629; Cochran *v.* Cochran, 62 Nebr. 450, 87 N. W. 152. And see *In re* Wickersham, 153 Cal. 603, 96 Pac. 311; Salisbury First Nat. Bank *v.* Swink, 129 N. C. 255, 39 S. E. 962.

The consideration of a contract need not be expressly found, where the facts found disclose that there was a consideration. Keller *v.* Orr, 106 Ind. 406, 7 N. E. 195; Barnett *v.* Franklin College, 10 Ind. App. 103, 37 N. E. 427.

62. Moore *v.* Copp, 119 Cal. 429, 51 Pac. 630; Whitcomb *v.* Smith, 123 Ind. 329, 24 N. E. 109; Faurote *v.* State, 123 Ind. 6, 23 N. E. 971. See also Butler *v.* Agnew, 9 Cal. App. 327, 99 Pac. 395.

63. Coffinberry *v.* McClellan, 164 Ind. 131, 73 N. E. 97; Talbott *v.* English, 156 Ind. 299, 59 N. E. 857; Relender *v.* State, 149 Ind. 283, 49 N. E. 30; Bartholomew *v.* Pierson, 112 Ind. 430, 14 N. E. 249; Oliphant *v.* Atchison County Com'rs, 18 Kan. 386.

64. Smith *v.* Acker, 52 Cal. 217; Smith *v.* James, 131 Ind. 131, 30 N. E. 902; Whitcomb *v.* Smith, 123 Ind. 329, 24 N. E. 109.

65. Woodruff *v.* Butler, 75 Conn. 679, 55 Atl. 167; Johnson *v.* Sherwood, 34 Ind. App. 490, 73 N. E. 180.

Answers of the jury to interrogatories upon which a special finding by the court is based may be incorporated into the finding by reference. Anderson *v.* Hubble, 93 Ind. 570, 47 Am. Rep. 394.

Inadequate reference.—A finding "that the evidence does not show that the plaintiff is entitled to the relief prayed for in his bill, to wit, to an account," followed by a decree

to make it intelligible and the facts are sufficiently stated in the pleadings;[66] but the practice is regarded unfavorably by reviewing courts, as it imposes additional labor on them,[67] and is not permitted in some jurisdictions.[68] Portions or paragraphs of a pleading may be thus referred to,[69] and the most common application of the rule is, where there is a general finding that all the facts or allegations contained in the complaint are true and such finding is held to be sufficient,[70]

dismissing the bill with costs, is not a sufficient finding of fact (Fitzsimmons *v.* Robb, 173 Pa. St. 645, 34 Atl. 233); nor is a finding which is uncertain in its reference to the evidence (Lang *v.* Specht, 62 Cal. 145).

66. Johnson *v.* Klein, 70 Cal. 186, 11 Pac. 606; Breeze *v.* Doyle, 19 Cal. 101; McEwen *v.* Johnson, 7 Cal. 258.

Reference to an answer is permissible (Davis *v.* Drew, 58 Cal. 152); and a finding is sufficient when it states that the allegations of defendant's answer or affirmative defense are true (Wilkinson *v.* Bethel, 13 Ida. 746, 93 Pac. 27) or untrue (McLennan *v.* Wilcox, 126 Cal. 51, 58 Pac. 305; Paden *v.* Goldbaum, (Cal. 1894) 37 Pac. 759), or when it employs similar terms (Brown *v.* Roberts, 90 Minn. 314, 96 S. W. 793; Catlin *v.* Henton, 9 Wis. 476). Thus a finding "that the matters and facts alleged in defendant's special defense and cross complaint, on file herein, except the allegations of plaintiff's employment and agreements under such employment, are untrue in substance and in fact" supports a judgment for plaintiff. Heintz *v.* Cooper, (Cal. 1896) 47 Pac. 360. On the other hand, findings are insufficient when their reference to the answer creates uncertainty. Uncertainty is created, within the meaning of this rule, by a general finding that all the material denials and averments of the answer are true, and that all material averments of the amended complaint in intervention are true (Holt Mfg. Co. *v.* Collins, 154 Cal. 265, 97 Pac. 516); by a general finding that all the material allegations of the answer are supported by the evidence and true, and that all the material allegations of the complaint in conflict therewith are unsupported by the evidence and untrue (Sterrett *v.* Sweeney, 15 Ida. 416, 98 Pac. 418, 20 L. R. A. N. S. 963); by a finding "that all the issues of fact raised by the pleadings in this case are hereby found and decided in favor of the defendant and against plaintiff" (Wood *v.* Broderson, 12 Ida. 190, 85 Pac. 490); by a finding that all the allegations of the complaint are true, and all the allegations of the answer, "so far as they are inconsistent with the allegations of said complaint." (Krug *v.* F. A. Lux Brewing Co., 129 Cal. 322, 61 Pac. 1125 [*distinguished* in Continental Bldg., etc., Assoc. *v.* Wilson, 144 Cal. 776, 78 Pac. 254]); or by a finding that all the allegations of the answer are untrue, except only in so far as they accord with the foregoing facts (Harlan *v.* Ely, 55 Cal. 340). Where all the findings of fact as to issues made by a cross complaint are that the court finds that there is no competent evidence to sustain the facts stated in the allegation, giving its number as it appears in the cross complaint, and following that with the allegation, there is no sufficient finding of fact. Pittock *v.* Pittock, 15 Ida. 426, 98 Pac. 719.

67. Davis *v.* Drew, 58 Cal. 152; Greve *v.* Echo Oil Co., 8 Cal. App. 275, 96 Pac. 904; Moody *v.* Tschabold, 52 Minn. 51, 53 N. W. 1023.

68. Bailey *v.* Wilson, 29 Mo. 21; Drainage Dist. No. 4 *v.* Crow, 20 Oreg. 535, 26 Pac. 845 [*overruling* McFadden *v.* Friendly, 9 Oreg. 222]; Bard *v.* Kleeb, 1 Wash. 370, 25 Pac. 467, 27 Pac. 273. And see King County *v.* Hill, 1 Wash. 404, 25 Pac. 451.

69. Homeseekers' Loan Assoc. *v.* Gleeson, 133 Cal. 312, 65 Pac. 617 (holding that a finding that certain paragraphs of the complaint are true is equivalent to a finding that the averments of the paragraphs are true); Kennedy, etc., Lumber Co. *v.* S. S. Constr. Co., 123 Cal. 584, 56 Pac. 457; Mulcahy *v.* Buckley, 100 Cal. 484, 35 Pac. 144; Heinrich *v.* Heinrich, 2 Cal. App. 479, 84 Pac. 326; Knox *v.* Trafalet, 94 Ind. 346.

70. Cohn *v.* Kelly, 132 Cal. 468, 64 Pac. 709; Sutter County *v.* McGriff, 130 Cal. 124, 62 Pac. 412; Wolfskill *v.* Douglas, (Cal. 1900) 59 Pac. 987; Gale *v.* Bradbury, 116 Cal. 39, 47 Pac. 778; Healey *v.* Norton, (Cal. 1895) 41 Pac. 1080; Wheelock *v.* Godfrey, (Cal. 1893) 35 Pac. 320 (holding that a finding that all the averments of a complaint, down to and including a certain averment, are true is sufficiently explicit); Williams *v.* Hall, 79 Cal. 606, 21 Pac. 965; Moore *v.* Clear Lake Water-Works, 68 Cal. 146, 8 Pac. 816; Carey *v.* Brown, 58 Cal. 180 [*following* Pralus *v.* Pacific Gold, etc., Min. Co., 35 Cal. 30]; Williams *v.* Hill, 54 Cal. 390; Parke *v.* Hinds, 14 Cal. 415; McEwen *v.* Johnson, 7 Cal. 258; Bailey *v.* Ætna Indem. Co., 5 Cal. App. 740, 91 Pac. 416 (holding that a finding that each and every allegation contained in plaintiff's complaint is true is but the express finding of that which is impliedly found by judgment for plaintiff on the headings); Bitter *v.* Mouat Lumber, etc., Co., 10 Colo. App. 307, 51 Pac. 519 [*affirmed* in 27 Colo. 120, 59 Pac. 403]; Norton *v.* Wilkes, 93 Minn. 411, 101 N. W. 619; Combination Steel, etc., Co. *v.* St. Paul City R. Co., 52 Minn. 203, 53 N. W. 1144; Scott County School-dist. No. 73 *v.* Wrabeck, 31 Minn. 77, 16 N. W. 493; Downer *v.* Sexton, 17 Wis. 29.

Insufficient reference.—Findings of fact are insufficient when by their reference to the complaint they introduce uncertainty. Thus, a finding that all the material allegations of the complaint are true, or are sustained by the testimony, is insufficient, as it leaves uncertain what allegations were deemed mate-

provided the complaint states a cause of action,[71] and the answer consists of denials only;[72] but in a majority of the cases sanctioning such a practice, the general finding was accompanied by specific findings or another general finding that the allegations of the answer were untrue.[73]

(VI) *EXTRINSIC FACTS AND PAPERS.* Findings of fact are required to be complete in themselves, unaided by extrinsic facts or papers,[74] unless they be documents set out in the pleadings or otherwise in the record,[75] or deeds, maps, or other public records.[76]

(VII) *IMPLIED AND NEGATIVE FINDINGS* — (A) *In General.* Findings need not expressly negative every possible exception or qualification of the facts found,[77] as an implied negation necessarily exists, where the facts found are inconsistent with those not found.[78] Thus, where plaintiff's affirmative case is wholly incon-

rial by the court. Musselman *v.* Musselman, 140 Cal. 197, 73 Pac. 824; Warren *v.* Robinson, 71 Cal. 380, 12 Pac. 265; Ladd *v.* Tully, 51 Cal. 277 [*followed* in Hardenberg *v.* Hardenberg, 54 Cal. 591]; Breeze *v.* Doyle, 19 Cal. 101; Abrahamson *v.* Lamberson, 68 Minn. 454, 71 N. W. 676. Likewise a finding that "the several allegations of the complaint not in conflict with the foregoing findings are true" is insufficient (Goodnow *v.* Griswold, 68 Cal. 599, 9 Pac. 837), as is also one that "plaintiff had wholly failed to substantiate his allegations by a preponderance of the evidence" (Milwaukee Nat. Bank *v.* Gallun, 116 Wis. 74, 92 N. W. 567).

71. Knudson *v.* Curley, 30 Minn. 433, 15 N. W. 873.

72. Lewis *v.* Adams, (Cal. 1885) 7 Pac. 779 (holding that where the statute of limitations is set up as a defense, a finding that "all the allegations of plaintiff's complaint are true" is not a finding as to the issue of the statute of limitations); Chatfield *v.* Continental Bldg., etc., Assoc., 6 Cal. App. 665, 92 Pac. 1040; Bahnsen *v.* Gilbert, 55 Minn. 334, 56 N. W. 1117.

73. See the cases cited in the preceding notes.

When general finding superfluous.— A concluding finding that "all other averments in the pleadings herein and in issue, not comprised and passed upon in these findings, are not true," is improper, but is not reversible error, where the preceding findings are so full and specific, and so clearly cover all the material issues, as to rebut the suggestion of uncertainty. Perkins *v.* West Coast Lumber Co., 120 Cal. 27, 52 Pac. 118, (1897) 48 Pac. 982. Similarly, where findings covering all the issues in a cause are made, an additional finding that all the allegations in the complaint are true and denials of the answer untrue, except as "hereinbefore otherwise found," is surplusage and may be disregarded. Hopkins *v.* Warner, 109 Cal. 133, 41 Pac. 868. However, a general finding that all the allegations of the complaint are true, in an action wherein the answer consists of denials only, loses none of its certainty because there are, in addition to the general finding, certain specific findings of facts covered by the general finding. Chatfield *v.* Continental Bldg., etc., Assoc., 6 Cal. App. 665, 92 Pac. 1040.

74. Murry *v.* Nixon, 10 Ida. 608, 79 Pac. 643; Hodge *v.* Ludlum, 45 Minn. 290, 47 N. W. 805; Corliss *v.* Pulaski County, 116 Fed. 289, 53 C. C. A. 567 (holding that they cannot be aided by the bill of exceptions); Olcott *v.* Ennis-Calvert Compress Co., 114 Fed. 907, 52 C. C. A. 527 (holding that findings of fact which state that the facts are the same as those in a certain case are insufficient, where the case cited contains no specific findings of ultimate facts); Burnham *v.* North Chicago St. R. Co., 78 Fed. 101, 23 C. C. A. 677 (holding that where the only finding is that the facts are as set forth in the agreed statement of facts, which is mainly a statement of evidence and not of ultimate facts, a judgment rendered thereon is invalid). But see Biddle *v.* Pierce, 13 Ind. App. 239, 41 N. E. 475, holding that in a suit for distributive shares of an estate, the court need not, in its conclusions of law, state the exact amount due each party, but it is sufficient if data are given from which the exact amount can be calculated.

A written acknowledgment must be set out in the findings of fact in order to support a conclusion of law that such acknowledgment removes the bar of the statute of limitations on the note sued on. Park *v.* Park, 32 Ind. App. 642, 70 N. E. 493.

Where an agreement is the sole basis of a judgment, either it or the substance of it must be set out in the findings of fact. Citizens' Bank *v.* Farwell, 56 Fed. 570, 6 C. C. A. 24.

75. Corliss *v.* Pulaski County, 116 Fed. 289, 53 C. C. A. 567.

Incorporation, by reference, of exhibits in findings see *supra*, XII, B, 5, b, (V).

76. Murry *v.* Nixon, 10 Ida. 608, 79 Pac. 643.

77. Schelske *v.* Orange Tp., 147 Mich. 135, 110 N. W. 506. But see Tracy *v.* Colby, 55 Cal. 67, holding that a finding that one person conveyed land to another upon a contract and agreement made on the day of the sale, and not in pursuance of any fraudulent contract made prior thereto, is defective, as it does not negative the allegation that there was such a prior contract, but simply expresses the opinion of the court that it was not fraudulent.

78. Tehama County Bank *v.* Crumley, 74 Cal. 461, 16 Pac. 207; Graham *v.* Kibble, 9 Nebr. 182, 2 N. W. 455; Milwaukee Nat. Bank

sistent with the truth of defendant's case, the conclusive establishment of the former is necessarily a complete negative of the latter.[79]

(B) *Effect of Burden of Proof.* Where no evidence is introduced in regard to an issue, or the evidence introduced is insufficient to support it, the finding thereon should be against the party having the burden of proof,[80] and an omission of the findings to cover a particular fact or issue is to be deemed a finding, on that fact or issue, against the party having the burden of proof.[81]

v. Gallun, 116 Wis. 74, 92 N. W. 567. And see Atkins *v.* Little, 17 Minn. 342, holding that a finding of fact to the effect that a person "sold" his interest in a mill implies that he received value therefor, when there is nothing to indicate the contrary.

Sufficient negation.— A finding that damages sought to be recovered accrued within a period covered by limitations immediately prior to the commencement of the action, when such statute is made a defense, is a sufficient finding on such defense and negatives it. Shurtliff *v.* Extension Ditch Co., 14 Ida. 416, 94 Pac. 574. Also, a finding that the agent who transacted all of a certain business for a corporation had no knowledge that a mortgage had been paid is a sufficient finding that the corporation had no notion of such facts and negatives the idea that the corporation had notice. Connecticut Mut. L. Ins. Co. *v.* Talbot, 113 Ind. 373, 14 N. E. 586, 3 Am. St. Rep. 655. Where the court found that plaintiff had rendered services worth a stated amount, and that he had been paid a named sum, the finding sufficiently made it appear that only the amount named had been paid, and defendant could not object that it did not support a judgment for the difference. Tyler *v.* Davis, (Cal. 1892) 31 Pac. 1125.

When no implication exists.— No findings will be implied where the findings made state that the "foregoing are all the facts in the case." Schwartz *v.* Skinner, 47 Cal. 3. A finding that words in a contract were attempted to be erased does not imply that they were erased (Sullivan *v.* California Realty Co., 142 Cal. 201, 75 Pac. 767); nor does a finding that defendant did not collect a note in gold coin imply a collection in other moneys, where it also stated that defendant did not collect the sum in gold coin "or in any manner or sums or at all" (Hardin *v.* Dickey, 123 Cal. 513, 56 Pac. 258).

79. Bowers *v.* Cottrell, 15 Ida. 221, 96 Pac. 936; Snelgrove *v.* Earl, 17 Utah 321, 53 Pac. 1017; Fox *v.* Haarstick, 156 U. S. 674, 15 S. Ct. 457, 39 L. ed. 576 [*affirming* 9 Utah 110, 33 Pac. 251].

80. Monterey County *v.* Cushing, 83 Cal. 507, 23 Pac. 700; Dillon Implement Co. *v.* Cleaveland, 32 Utah 1, 88 Pac. 670.

The omission to make any findings cannot be taken advantage of by a party having the burden of proof, where he has offered no evidence. Demartin *v.* Demartin, 85 Cal. 71, 24 Pac. 594.

A finding that defendant introduced no evidence on an issue tendered by him is sufficient to support a judgment for plaintiff. Kiesel *v.* Bybee, 14 Ida. 670, 95 Pac. 20.

81. Donaldson *v.* State, 167 Ind. 553, 78 N. E. 182, (1903) 67 N. E. 1029; Coffinberry *v.* McClellan, 164 Ind. 131, 73 N. E. 97; Citizens' State Bank *v.* Julian, (Ind. 1899) 54 N. E. 390; Brunson *v.* Henry, 152 Ind. 310, 52 N. E. 407, (1897) 47 N. E. 1063; Durflinger *v.* Baker, 149 Ind. 375, 49 N. E. 276; Central Union Tel. Co. *v.* Fehring, 146 Ind. 189, 45 N. E. 64; Banner Cigar Co. *v.* Kamm, etc., Brewing Co., 145 Ind. 266, 44 N. E. 455; Crawfordsville First Nat. Bank *v.* Dovetail Body, etc., Co., 143 Ind. 550, 40 N. E. 810, 52 Am. St. Rep. 435; Bruner *v.* Brown, 139 Ind. 600, 38 N. E. 318; Menor *v.* Jay County, 137 Ind. 367, 34 N. E. 959, 36 N. E. 1101; Lemster *v.* Warner, 137 Ind. 79, 36 N. E. 900; Elliott *v.* Pontius, 136 Ind. 641, 35 N. E. 562, 36 N. E. 421; Bell *v.* Corbin, 136 Ind. 269, 36 N. E. 23; Parke County Coal Co. *v.* Terre Haute Paper Co., 129 Ind. 73, 26 N. E. 884; Sinker *v.* Green, 113 Ind. 264, 15 N. E. 266; Meeker *v.* Shanks, 112 Ind. 207, 13 N. E. 712; Western Union Tel. Co. *v.* Brown, 108 Ind. 538, 8 N. E. 171; Cincinnati, etc., R. Co. *v.* Gaines, 104 Ind. 526, 4 N. E. 34, 5 N. E. 746, 54 Am. Rep. 334; Griffin *v.* Rochester, 96 Ind. 545; Davis *v.* Watts, 90 Ind. 372; Crawfordsville First Nat. Bank *v.* Carter, 89 Ind. 317; Hunt *v.* Blanton, 89 Ind. 38; Studabaker *v.* Langard, 79 Ind. 320; Vannoy *v.* Duprez, 72 Ind. 26; Light *v.* Schneck, (App. 1908) 86 N. E. 442; Hamrick *v.* Hoover, 41 Ind. App. 411, 84 N. E. 28; Pittinger *v.* Ramage, 40 Ind. App. 486, 82 N. E. 478; Union Inv. Co. *v.* McKinney, 35 Ind. App. 594, 74 N. E. 1001; Miller *v.* Stephenson, 27 Ind. App. 271, 59 N. E. 398, 61 N. E. 22; Metropolitan L. Ins. Co. *v.* Bowser, 20 Ind. App. 557, 50 N. E. 86; Levi *v.* Allen, 15 Ind. App. 38, 43 N. E. 571; Baldwin *v.* Threlkeld, 8 Ind. App. 312, 34 N. E. 851, 35 N. E. 841; Stotts City Bank *v.* Miller Lumber Co., 102 Mo. App. 75, 74 S. W. 472; Farrell *v.* Bouck, 61 Nebr. 874, 86 N. W. 907, 60 Nebr. 771, 84 N. W. 260. And see Willard *v.* Carrigan, 8 Ariz. 70, 68 Pac. 538; Soule *v.* Soule, 4 Cal. App. 97, 87 Pac. 205; Kilgore *v.* Emmitt, 33 Ohio St. 410, holding that where a special finding has been given on part of the issues, in the absence of any showing to the contrary, the general finding and judgment will be presumed to include all issues made in the case not specifically passed on. But see Messerly *v.* Mercer, 45 Mo. App. 327, holding that where special findings ignore undisputed important points and important controverted points for defendant, it will be held that his theory of the case had not received consideration by the court and that the judgment should therefore be reversed.

(VIII) *INCONSISTENT FINDINGS AND CONCLUSIONS.* A judgment cannot stand when it is based on findings of fact which are antagonistic, inconsistent, or contradictory as to material matters,[82] or when it is based on conclusions of law which are at variance with the findings of fact;[83] but the courts endeavor to reconcile findings which appear to be contradictory,[84] and in a majority of the cases wherein inconsistency has been claimed, the contention has been denied by the courts.[85] In the event of conflict, a finding of ultimate facts will control over a recital of probative facts in the finding or opinion, unless such recital purports to cover all the probative facts of the case;[86] findings of fact will prevail

Silence as to facts warranting larger judgment.— Where a special finding is silent as to facts which would entitle a party to the action to a larger amount than was awarded him under the judgment, the presumption is that such facts did not exist. Evansville, etc., R. Co. *v.* Charlton, 6 Ind. App. 56, 33 N. E. 129.

82. Langan *v.* Langan, 89 Cal. 186, 26 Pac. 764; Learned *v.* Castle, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11; Carman *v.* Ross, 64 Cal. 249, 29 Pac. 510; Sloss *v.* Allman, 64 Cal. 47, 30 Pac. 574; Reese *v.* Corcoran, 52 Cal. 495; Authors *v.* Bryant, 22 Nev. 242, 38 Pac. 439.

Inconsistency of findings as ground for new trial see NEW TRIAL, 29 Cyc. 817.

Another statement of the rule is that an appellant who seeks to reverse a judgment based upon inconsistent and irreconcilable findings is entitled to the benefit of those that are most favorable to him. Whalen *v.* Stuart, 194 N. Y. 495, 87 N. E. 819 [*reversing* 123 N. Y. App. Div. 446, 108 N. Y. Suppl. 355]; Buffalo *v.* Delaware, etc., R. Co., 190 N. Y. 84, 82 N. E. 513; Nickell *v.* Tracy, 184 N. Y. 386, 77 N. E. 391 [*reversing* 100 N. Y. App. Div. 80, 91 N. Y. Suppl. 287]; Israel *v.* Manhattan R. Co., 158 N. Y. 624, 53 N. E. 517; Bonnell *v.* Griswold, 89 N. Y. 122.

A finding referring to contradictory pleadings is repugnant to itself and cannot be sustained. Norton *v.* Metropolitan L. Ins. Co., 74 Minn. 484, 77 N. W. 298, 539.

Findings held inconsistent see Compton *v.* Carr, 126 Cal. 579, 59 Pac. 29; Richards *v.* Dower, 64 Cal. 62, 28 Pac. 113; Hamilton *v.* Fleckenstein, 118 N. Y. App. Div. 579, 103 N. Y. Suppl. 631 [*reversing* 107 N. Y. Suppl. 1119]; Smyth *v.* Marsich, 4 N. Y. App. Div. 171, 38 N. Y. Suppl. 932.

83. Whalen *v.* Stuart, 194 N. Y. 495, 87 N. E. 819 [*reversing* 123 N. Y. App. Div. 446, 108 N. Y. Suppl. 355]; Bissell *v.* Couchaine, 15 Ohio 58. And see Brown *v.* Clark, 80 Conn. 419, 68 Atl. 1001.

A conclusion of law contradictory of an agreed statement is sufficient to vitiate the judgment, under Mont. Code Civ. Proc. § 1117, which provides that an agreed statement of facts has the effect of special findings. Birney *v.* Warren, 28 Mont. 64, 72 Pac. 293.

84. Stohr *v.* Stohr, 148 Cal. 180, 82 Pac. 777; Heaton-Hobson Associated Law Offices *v.* Arper, 145 Cal. 282, 78 Pac. 721; Alhambra Addition Water Co. *v.* Richardson, 72 Cal. 598, 14 Pac. 379.

A finding will not be implied when such implied finding will conflict with an express finding. Beaverhead Canal Co. *v.* Dillon Electric Light, etc., Co., 34 Mont. 135, 85 Pac. 880.

85. *California.*— Reavis *v.* Gardner, (1900) 60 Pac. 964; Ames *v.* San Diego, 101 Cal. 390, 35 Pac. 1005; Grimmer *v.* Carlton, 93 Cal. 189, 28 Pac. 1043, 27 Am. St. Rep. 171; Coffey *v.* Quint, 92 Cal. 475, 28 Pac. 494; San Bernardino Nat. Bank *v.* Colton Land, etc., Co., 91 Cal. 124, 27 Pac. 538; Hope *v.* Barnett, 78 Cal. 9, 20 Pac. 245; Allen *v.* Haley, 77 Cal. 575, 20 Pac. 90; Osment *v.* McElrath, 68 Cal. 466, 9 Pac. 731, 58 Am. Rep. 17; Gish *v.* Ferrea, 10 Cal. App. 53, 101 Pac. 27. And see Steele *v.* Guaranty Realty Co., 8 Cal. App. 95, 96 Pac. 105.

Connecticut.— Ætna Nat. Bank *v.* Hollister, 55 Conn. 188, 10 Atl. 550.

Minnesota.— Bates *v.* A. E. Johnson Co., 79 Minn. 354, 82 N. E. 649; Dixon *v.* Merritt, 6 Minn. 160.

New York.— Naser *v.* New York First Nat. Bank, 116 N. Y. 492, 22 N. E. 1077; Redfield *v.* Redfield, 110 N. Y. 671, 18 N. E. 373; Barry *v.* Coville, 53 Hun 620, 7 N. Y. Suppl. 36 [*affirmed* in 129 N. Y. 302, 29 N. E. 307]; Bleistein *v.* Studer, 3 N. Y. Suppl. 1.

Texas.— Terry *v.* French, 5 Tex. Civ. App. 120, 23 S. W. 911.

Washington.— Cantwell *v.* Nunn, 45 Wash. 536, 88 Pac. 1023.

Wyoming.— White *v.* Hinton, 3 Wyo. 753, 30 Pac. 953, 17 L. R. A. 66.

United States.— Egan *v.* Clasbey, 137 U. S. 654, 11 S. Ct. 231, 34 L. ed. 822 [*affirming* 5 Utah 154, 13 Pac. 430].

See 46 Cent. Dig. tit. "Trial," § 946.

Specific statements in a special finding are not to be controlled or modified by inferences suggested by uncertain or equivocal expressions. Sneed *v.* Sabinal Min., etc., Co., 73 Fed. 925, 20 C. C. A. 230.

86. People *v.* McCue, 150 Cal. 195, 88 Pac. 899; Forsythe *v.* Los Angeles R. Co., 149 Cal. 569, 87 Pac. 24; Madera Commercial Bank *v.* Redfield, 122 Cal. 405, 55 Pac. 160; Fairbanks *v.* Rollins, (Cal. 1898) 54 Pac. 79; Perry *v.* Quackenbush, 105 Cal. 299, 38 Pac. 740; Wood *v.* Pendola, 78 Cal. 287, 20 Pac. 678; Smith *v.* Acker, 52 Cal. 217; Smith *v.* Blair, 133 Ind. 367, 32 N. E. 1123; Webb *v.* National Bank of Republic, 146 Fed. 717, 77 C. C. A. 143. *Contra*, in Indiana, when the primary facts stated lead to but one conclusion. Smith *v.* Wells Mfg. Co., 148 Ind. 333, 46 N. E. 1000; Richmond Natural Gas Co. *v.* Enterprise Natural Gas Co., 31 Ind. App. 222, 66 N. E. 782.

over conclusions of law;[87] and if one of two conflicting findings or conclusions support the judgment, it will control.[88] Where special issues are submitted to a jury, the findings of the jury are subordinate to and controlled by the findings of the court, in case of conflict.[89]

c. Conclusiveness.[90] When authorized at all,[91] and when followed by judgment,[92] findings of fact are conclusive upon the rights of the parties as to the issues necessarily involved and passed upon,[93] until formally set aside by the trial or appellate court.[94]

6. Amended or Additional Findings and Venire De Novo — a. Amendment or Correction. Except in a few jurisdictions, where there is no authorized procedure for the modification or correction of findings once made except by motion for a new trial,[95] a trial court has authority to change, modify, or correct its find-

87. Sanders *v.* Scott, 68 Ind. 130 (holding that a judgment for the proper amount, under special findings by the court, will not be disturbed on appeal, because of error in the amount stated in the conclusion of law); Wyandotte County *v.* Arnold, 49 Kan. 279, 30 Pac. 486; U. S. *v.* Harris, 77 Fed. 821, 23 C. C. A. 483.

Conflict between general and special findings see *supra*, XII, B, 5, b, (II).

88. Cramer *v.* Munkres, 14 Wyo. 234, 83 Pac. 374. But see Priewe *v.* Fitzsimons, etc., Co., 117 Wis. 497, 94 N. W. 317, holding that where there is a finding inconsistent with the judgment, and other findings sufficient to warrant the judgment, it should be reversed, unless clearly right on the evidence.

Correct judgment.— A judgment will not be reversed because of inconsistent conclusions of law, when the judgment directed to be entered is in accordance with the correct conclusion of law on the facts found. Knox *v.* Metropolitan El. R. Co., 58 Hun (N. Y.) 517, 12 N. Y. Suppl. 848 [*affirmed* in 128 N. Y. 625, 28 N. E. 485]; Welsh *v.* Metropolitan El. R. Co., 57 N. Y. Super. Ct. 408, 8 N. Y. Suppl. 492.

89. Freeman *v.* Stephenson, 63 Cal. 499; Franks *v.* Jones, 39 Kan. 236, 17 Pac. 663. *Compare* Bateman *v.* Raymond, 15 Mont. 439, 39 Pac. 520, holding that where, in an action by a grantor to have a deed declared a mortgage, the jury finds that it was intended as a mortgage, and such finding is not attacked, a subsequent finding by the court, on an accounting between the parties, that the grantee believed it was a deed, and under such belief made improvements while in possession must be set aside as inconsistent with the admitted facts.

90. Conclusiveness of verdict and findings on appeal see Appeal and Error, 3 Cyc. 377.

91. Martin *v.* Heckman, 1 Alaska 165.

92. See Judgments, 23 Cyc. 1227.

93. Latham *v.* Harby, 50 S. C. 428, 27 S. E. 862.

Items.—A finding that certain services have been wholly paid for is conclusive as to each item of such services. Broadbent *v.* Brumback, 2 Ida. (Hasb.) 366, 16 Pac. 555.

Conclusiveness of findings as to jurisdictional questions see Judgments, 23 Cyc. 1089 text and note 79.

94. Miller *v.* St. Louis, etc., R. Co., 162 Mo. 424, 63 S. W. 85; Fisher *v.* Emerson, 15 Utah 517, 50 Pac. 619.

Recital as to basis of findings.— An objection that the court erred in rendering a decree without proof of any of the material allegations in the complaint denied by the answer is untenable where the findings of fact recite that they were made from "the admission of the pleadings and the evidence taken," since such recital imports verity. Martin *v.* Eagle Development Co., 41 Oreg. 448, 69 Pac. 216.

Effect of oral statement of judge.— When the testimony is not in the record, a finding for plaintiff is not impaired by showing that at the time of announcing its decision the court stated that he believed defendant's testimony, as there is nothing to indicate but what the finding was based, in whole or in part, upon plaintiff's testimony. Fisk *v.* Casey, 119 Cal. 643, 51 Pac. 1077.

95. Beard *v.* American Type Founders Co., 123 Ill. App. 50; Pittsburgh, etc., R. Co. *v.* Taber, 168 Ind. 419, 77 N. E. 741; Conner *v.* Andrews Land, etc., Co., 162 Ind. 338, 70 N. E. 376; Chicago, etc., R. Co. *v.* State, 159 Ind. 237, 64 N. E. 860; Allen *v.* Hollingshead, 155 Ind. 178, 57 N. E. 917; Windfall Natural Gas, etc., Co. *v.* Terwilliger, 152 Ind. 364, 53 N. E. 284; Tewksbury *v.* Howard, 138 Ind. 103, 37 N. E. 355; Bunch *v.* Hart, 138 Ind. 1, 37 N. E. 537; Williams *v.* Freshour, 136 Ind. 361, 36 N. E. 280; Radabaugh *v.* Silvers, 135 Ind. 605, 35 N. E. 694; Barner *v.* Bayless, 134 Ind. 600, 33 N. E. 907, 34 N. E. 502; Hilgenberg *v.* Northup, 134 Ind. 92, 33 N. E. 786; Hartlepp *v.* Whitely, 131 Ind. 543, 28 N. E. 535, 31 N. E. 203; Hartlepp *v.* Whiteley, 129 Ind. 576, 28 N. E. 535, 31 N. E. 203; La Follette *v.* Higgins, 129 Ind. 412, 28 N. E. 768; Clark *v.* State, 125 Ind. 1, 24 N. E. 744; Sharp *v.* Malia, 124 Ind. 407, 25 N. E. 9; Levy *v.* Chittenden, 120 Ind. 37, 22 N. E. 92; Maynard *v.* Shorb, 85 Ind. 501; Meridian Life, etc., Co. *v.* Eaton, 41 Ind. App. 118, 81 N. E. 667, 82 N. E. 480; Halstead *v.* Sigler, 35 Ind. App. 419, 74 N. E. 257; Leedy *v.* Capital Nat. Bank, 35 Ind. App. 247, 73 N. E. 1000; Chappell *v.* Jasper County Oil, etc., Co., 31 Ind. App. 170, 66 N. E. 515; Apple *v.* Smith, 26 Ind. App. 659, 60 N. E. 456. There are several contrary decisions in Indiana, which hold that an amendment may be properly made at any time during the

ings of fact and conclusions of law, without ordering a new trial,[96] so as to make them conform to the decision actually made [97] or to the facts as stipulated by the parties.[98] This may be done before entry of judgment,[99] and in some jurisdictions and under some statutes may be done thereafter,[1] on or while a motion for new trial is pending,[2] or at any time before the cause is removed from the court by appeal.[3] The proper remedy of a party aggrieved at defective findings is to apply to the trial court by motion for their correction,[4] and it is held that

term and before final judgment. Whitcomb *v.* Stringer, 160 Ind. 82, 66 N. E. 443; Royse *v.* Bourne, 149 Ind. 187, 47 N. E. 827; Thompson *v.* Connecticut Mut. L. Ins. Co., 139 Ind. 325, 38 N. E. 796 [*overruling* Wray *v.* Hill, 85 Ind. 546]; Dowell *v.* Talbot Paving Co., 138 Ind. 675, 38 N. E. 389; Mitchell *v.* Friedley, 126 Ind. 545, 26 N. E. 391; Gulick *v.* Connely, 42 Ind. 134; Whitcomb *v.* Stringer, (Ind. App. 1902) 63 N. E. 582; Roane Iron Co. *v.* Bell-Armstead Mfg. Co., 24 Ind. App. 250, 56 N. E. 696; McCloy *v.* Cox, 12 Ind. App. 27, 39 N. E. 901. And see Knox *v.* Trafalet, 94 Ind. 346.

A motion to strike out parts of a special finding is not authorized by any rule of the Indiana practice. Tewksbury *v.* Howard, 138 Ind. 103, 37 N. E. 355; Sharp *v.* Melia, 124 Ind. 407, 25 N. E. 9; Peterson *v.* Struby, 25 Ind. App. 19, 56 N. E. 733, 57 N. E. 599; Van Valkenburgh *v.* Dean, 15 Ind. App. 693, 44 N. E. 652.

96. Mitchell *v.* Patterson, 120 Cal. 286, 52 Pac. 589; Morris *v.* Winchester Repeating Arms Co., 73 Conn. 680, 49 Atl. 180; Merrill *v.* Miller, 28 Mont. 134, 72 Pac. 423; Deutermann *v.* Pollock, 30 N. Y. App. Div. 378, 51 N. Y. Suppl. 928.

Notice to parties should be given. Wunderlin *v.* Cadogan, 75 Cal. 617, 17 Pac. 713.

Informal amendment.— Where the judge has made a memorandum, on a motion to amend the findings, containing a statement of fact which should have been included in the formal findings, the appellate court will read it as though there included. Waters *v.* White, 75 Conn. 88, 52 Atl. 401.

Setting aside of findings.— That what purported to be the findings of the court in a case, but were not in fact the findings, were inadvertently entered of record does not preclude the court from setting them aside when the error was discovered, or deprive it of jurisdiction to proceed with the consideration of the case as though they had not been entered. Syracuse Tp. *v.* Rollins, 104 Fed. 958, 44 C. C. A. 277.

97. State Sash, etc., Mfg. Co. *v.* Adams, 47 Minn. 399, 50 N. W. 360.

Questions not litigated at trial.— The court has no authority to amend its conclusions of law so as to order mortgaged property to be sold in the inverse order of alienation, where no such question was litigated or suggested on the trial. Norton *v.* Metropolitan L. Ins. Co., 74 Minn. 484, 77 N. W. 298, 539.

98. Burgi *v.* Rudgers, 20 S. D. 646, 108 N. W. 253.

99. Spaulding *v.* Howard, 121 Cal. 194, 53 Pac. 563; Condee *v.* Barton, 62 Cal. 1; Curtis *v.* Walling, 2 Ida. (Hasb.) 416, 18 Pac. 54; Seibert *v.* Minneapolis, etc., R. Co., 58 Minn. 72, 59 N. W. 828; Jones *v.* Wilder, 28 Minn. 238, 9 N. W. 707; Calhoun *v.* Gilliland, 2 Wash. Terr. 174, 2 Pac. 355.

1. Sweetzer *v.* Mead, 5 Mich. 33; Bohlen *v.* Metropolitan El. R. Co., 121 N. Y. 546, 24 N. E. 932 [*reversing* 58 N. Y. Super. Ct. 558, 9 N. Y. Suppl. 424]; Costello *v.* Grant County Mut. F., etc., Ins. Co., 133 Wis. 361, 113 N. W. 639; Hansen *v.* Allen, 117 Wis. 61, 93 N. W. 805.

Contra, in California.— Hawxhurst *v.* Rathgeb, 119 Cal. 531, 51 Pac. 846, 63 Am. St. Rep. 142; Pico *v.* Sepulveda, 66 Cal. 336, 5 Pac. 515; Bate *v.* Miller, 63 Cal. 233; Carpentier *v.* Gardiner, 29 Cal. 160.

2. Lumbermen's Ins. Co. *v.* St. Paul, 82 Minn. 497, 85 N. W. 525; Starbuck *v.* Starbuck, 62 N. Y. App. Div. 437, 71 N. Y. Suppl. 104 [*reversed* on other grounds in 173 N. Y. 503, 66 N. E. 193, 93 Am. St. Rep. 631]; Hayes *v.* Lavagnino, 17 Utah 185, 53 Pac. 1029; Jaeger *v.* U. S., 33 Ct. Cl. 214.

3. Hurley *v.* West St. Paul, 83 Minn. 401, 86 N. W. 427; State Sash, etc., Mfg. Co. *v.* Adams, 47 Minn. 399, 50 N. W. 360; U. S. *v.* St. Louis, etc., Transp. Co., 184 U. S. 247, 22 S. Ct. 350, 46 L. ed. 520 [*affirming* 33 Ct. Cl. 251].

4. Pralus *v.* Jefferson Gold, etc., Min. Co., 34 Cal. 558; Williams *v.* Schembri, 44 Minn. 250, 46 N. W. 403; Conklin *v.* Hinds, 16 Minn. 457; People *v.* Albright, 14 Abb. Pr. (N. Y.) 305, 23 How. Pr. 306.

Conformity to admitted facts.—A failure of the trial court to comply with a request to amend its findings so as to conform to the facts admitted constitutes error, unless the finding as made could not have been detrimental to the party requesting the modification. Boothe *v.* Farmers', etc., Bank, 53 Oreg. 576, 98 Pac. 509, 101 Pac. 390.

Motion sufficient in substance.—A motion for more specific findings, which recites that the only issue involved was the true location of the division line between the parties, and that the court did not find upon that issue, nor determine where the line was located, wherefore plaintiff moved the court to state in writing the conclusion of fact and the law as found by him, governing such issues is not objectionable as being too general to require specific findings. Parker *v.* Thomas, (Tex. Civ. App. 1903) 72 S. W. 229.

A request for corrected findings is properly refused where the finding made contains all the facts proved material to the proper presentation of the questions of law raised by an appeal (Swain *v.* O'Loughlin, 80 Conn. 200, 67 Atl. 480); where the proposed amendments are recitals of proof rather than state-

he waives his right to complain when he fails to make such application to the trial court.[5]

b. Additional Findings. Where the findings of fact and conclusions of law do not pass on all the material issues or are otherwise incomplete, the remedy of an aggrieved party is to apply by motion to the trial court for additional findings,[6] as the court has power, at least during the term and before entry of final judgment, to supplement its findings with further or additional findings,[7] upon proper notice being given to the parties.[8] The denial of such a motion is error,[9]

ments of ultimate facts (Fairfield *v.* Hart, 139 Mich. 136, 102 N. W. 641), or where the findings objected to are immaterial and the refusal to strike them out is not prejudicial (Whalen *v.* Gleeson, 81 Conn. 638, 71 Atl. 908). Also, where deeds were referred to as exhibits in a court's finding of facts, and made a part thereof, there is no error in a refusal to change the finding regarding land conveyed by the deeds so as to conform to the descriptions therein, the statement complained of not being intended to be an accurate description. Waterbury Clock Co. *v.* Irion, 71 Conn. 254, 41 Atl. 827.

Irregularities and defects in findings as ground for new trial see NEW TRIAL, 29 Cyc. 815 *et seq.*

5. Merrill *v.* Newton, 99 Mich. 226, 58 N. W. 69; Hewitt *v.* Blumenkranz, 33 Minn. 417, 23 N. W. 858; Smith *v.* Pendergast, 26 Minn. 318, 3 N. W. 978; Queen *v.* Bell, 2 Misc. (N. Y.) 575, 22 N. Y. Suppl. 398; Gulf, etc., R. Co. *v.* Fossett, 66 Tex. 338, 1 S. W. 259. And see Sneed *v.* Sabinal Min., etc., Co., 73 Fed. 925, 20 C. C. A. 230.

In Indiana one who excepts to conclusions of law thereby admits that the facts were fully and correctly found, but after the disposal of such exceptions, the correctness of the facts specially found, or the failure of the court to find certain facts may be questioned either by a motion for a new trial or by a motion for a venire de novo. Fairbanks *v.* Meyers, 98 Ind. 92.

6. *Kansas.*— Cowling *v.* Greenlead, 33 Kan. 570, 6 Pac. 907.

Minnesota.— Turner *v.* Fryberger, 99 Minn. 236, 108 N. W. 1118, 109 N. W. 229; Warner *v.* Foote, 40 Minn. 176, 41 N. W. 935; Cummings *v.* Rogers, 36 Minn. 317, 30 N. W. 892.

Nevada.— Welland *v.* Williams, 21 Nev. 230, 29 Pac. 403.

Oregon.— Umatilla Irr. Co. *v.* Barnhart, 22 Oreg. 389, 30 Pac. 37.

Tennessee.— Rogers *v.* Ayers, 119 Tenn. 340, 104 S. W. 521, 123 Am. St. Rep. 725.

See 46 Cent. Dig. tit. "Trial," § 952.

Contra.— Scott *v.* Collier, 166 Ind. 644, 78 N. E. 184 [*affirming* (App. 1906) 77 N. E. 666]; Muncie Natural Gas Co. *v.* Muncie, 160 Ind. 97, 66 N. E. 436, 60 L. R. A. 822; Scott *v.* Shirk, 60 Ind. 160.

Where such a motion or request is not made, the party complaining waives his right to object to the incompleteness of the findings (Cannon *v.* McIntyre, 140 Mich. 24, 103 N. W. 530; Monroe Water Co. *v.* Frenchtown Tp., 98 Mich. 431, 57 N. W. 268; Eakin *v.* McCraith, 2 Wash. Terr. 112, 3 Pac. 838. And see Dutertre *v.* Shallenberger, 21 Nev. 507, 34 Pac. 449), and the findings made will not be reviewed on appeal when, without additional findings, they are not sufficiently specific to form the basis of assignments of error (Alcott *v.* Spencer Optical Mfg. Co., (Tex. Civ. App. 1899) 31 S. W. 833). However, no request is necessary as to additional findings on points on which the court has previously declined to pass. State *v.* Germania Bank, 103 Minn. 129, 114 N. W. 651.

Motion made before judgment is in time. McClung *v.* McPherson, 47 Oreg. 73, 81 Pac. 567, 82 Pac. 13.

7. *California.*— Smith *v.* Taylor, 82 Cal. 533, 23 Pac. 217; Hayes *v.* Wetherbee, 60 Cal. 396.

New York.— Commercial Bank *v.* Catto, 13 N. Y. App. Div. 608, 43 N. Y. Suppl. 777.

South Dakota.— Martin *v.* Minnekahta State Bank, 7 S. D. 263, 64 N. W. 127.

Texas.— Bitter *v.* Calhoun, (1888) 8 S. W. 523.

United States.— North *v.* Peters, 138 U. S. 271, 11 S. Ct. 346, 34 L. ed. 936, holding that the trial court may, in denying a motion for a new trial, make such additional findings responsive to the issues presented as will cure omissions. *Contra,* Lang *v.* Baxter, 69 Fed. 905.

See 46 Cent. Dig. tit. "Trial," § 951.

After judgment, authority to make additional findings has been denied in several cases. Los Angeles County *v.* Lankershim, 100 Cal. 525, 35 Pac. 153, 556; Wachsmuth *v.* Orient Ins. Co., 49 Nebr. 590, 68 N. W. 935; Klopenstine *v.* Hays, 20 Utah 45, 57 Pac. 712; Clawson *v.* Wallace, 16 Utah 300, 52 Pac. 9; Kahn *v.* Central Smelting Co., 2 Utah 371; Marye *v.* Strouse, 5 Fed. 494.

The making of findings supplementary to those of a jury is not error (Schmitt *v.* Schmitt, 31 Minn. 106, 16 N. W. 543; Matula *v.* Lane, 22 Tex. Civ. App. 391, 55 S. W. 504), and cannot be complained of by the party who requested them (Round Lake Assoc. *v.* Kellogg, 11 N. Y. Suppl. 859).

The additional findings will be construed in connection with the original findings and are not required to be complete and sufficient in themselves. Barber *v.* Mexico International Co., 73 Conn. 587, 48 Atl. 758.

8. Wachsmuth *v.* Orient Ins. Co., 49 Nebr. 590, 68 N. W. 935; Kahn *v.* Central Smelting Co., 102 U. S. 641, 26 L. ed. 266.

9. Turner *v.* Fryberger, 99 Minn. 236, 108 N. W. 1118, 109 N. W. 229; Wells *v.* McGeoch, 71 Wis. 196, 35 N. W. 769.

unless the findings already made fully protect the rights of the parties,[10] or the additional requested findings are inconsistent with those made.[11]

c. Venire De Novo. Although, technically speaking, the remedy of venire de novo is applicable only to jury trials, the Indiana courts have, by common usage, employed the term in designating the remedy available when the finding of a court is defective in form.[12] This, however, is the sole instance in which the remedy may be invoked,[13] it being considered not available when the ground of complaint is that the finding does not cover all the material facts,[14] or that it embraces more than is necessary,[15] or that the conclusions of law are not sustained by the facts found.[16] A motion for a venire de novo may properly be made at any time before final judgment on the finding.[17]

7. Objections and Exceptions. The proper method of attacking the lack or insufficiency of findings and conclusions, and the failure of the court to correct the same upon request, is by objecting and excepting to the error[18] at the time

10. Goodman *v.* Malcolm, (Kan. App. 1899) 58 Pac. 564; St. Paul, etc., R. Co. *v.* Howard, 23 S. D. 34, 119 N. W. 1032, holding that requests for additional findings of fact and conclusions of law which are equivalent to findings and conclusions already made by the court are properly refused.

Where the requested findings are inapplicable to the facts in the case, their refusal is proper. Downing *v.* Ernest, 40 Colo. 137, 92 Pac. 230.

Where no prejudicial error results, on account of the transcript being accompanied by a statement of facts, the failure of the court to file additional conclusions of fact and law does not call for a reversal. Hoffman *v.* Buchanan, (Tex. Civ. App. 1909) 123 S. W. 168.

11. Banning *v.* Hall, 70 Minn. 89, 72 N. W. 817.

Where additional inconsistent findings are made they will be disregarded on appeal (O'Brien *v.* Buffalo Traction Co., 31 N. Y. App. Div. 632, 52 N. Y. Suppl. 322 [*affirmed* in 165 N. Y. 637, 59 N. E. 1128]), or else the case will be remanded for the preparation of proper findings (Nobis *v.* Pollock, 53 Hun (N. Y.) 441, 6 N. Y. Suppl. 273, 17 N. Y. Civ. Proc. 243, 23 Abb. N. Cas. 279).

12. Perkins *v.* Hayward, 124 Ind. 445, 24 N. E. 1033; Johnson *v.* Horsford, 110 Ind. 572, 10 N. E. 407; Cottrell *v.* Nixon, 109 Ind. 378, 10 N. E. 122 (indefiniteness and uncertainty); Wray *v.* Hill, 85 Ind. 546; Gauntt *v.* State, 81 Ind. 137. And see Bohr *v.* Neuenschwander, 120 Ind. 449, 22 N. E. 416.

The failure of the judge to sign special findings was at one time held to be a ground for awarding a venire de novo (Ferris *v.* Udell, 139 Ind. 579, 38 N. E. 180), but was subsequently held not to be, on the ground that, in the absence of the signature of the judge, the finding would be treated as a general one (Martin *v.* Marks, 154 Ind. 549, 57 N. E. 249).

13. Mitchell *v.* Friedley, 126 Ind. 545, 26 N. E. 391; Citizens' Bank *v.* Bolen, 121 Ind. 301, 23 N. E. 146; Bowell *v.* Dewald, 2 Ind. App. 303, 28 N. E. 430, 50 Am. St. Rep. 240.

14. Deeter *v.* Sellers, 102 Ind. 458, 1 N. E. 854; Crawfordsville First Nat. Bank *v.* Carter, 89 Ind. 317; *Ex p.* Walls, 73 Ind. 95. But see Barton *v.* McWhinney, 85 Ind. 481.

15. Dehority *v.* Nelson, 56 Ind. 414.

Uncertainty in an unnecessary finding is not ground for a venire de novo, where the findings on material matters are sufficiently certain. Huntington First Nat. Bank *v.* Henry, 156 Ind. 1, 58 N. E. 1057.

16. Hamilton *v.* Byram, 122 Ind. 283, 23 N. E. 795; Holmes *v.* Phœnix Mut. L. Ins. Co., 49 Ind. 356.

17. Parker *v.* Hubble, 75 Ind. 580.

18. Walters *v.* Walters, 168 Ind. 45, 79 N. E. 1037; Adams *v.* Pittsburgh, etc., R. Co., 165 Ind. 648, 74 N. E. 991; Maynard *v.* Waidlich, 156 Ind. 562, 60 N. E. 348; McFadden *v.* Owens, 150 Ind. 213, 49 N. E. 1058; Radabaugh *v.* Silvers, 135 Ind. 605, 35 N. E. 694; Peden *v.* King, 30 Ind. 181; Shirley City School Town *v.* Maumee School Tp., 28 Ind. App. 120, 62 N. E. 282; Sweitzer *v.* Heasley, 13 Ind. App. 567, 41 N. E. 1064. *Compare* State *v.* Intoxicating Liquors, 102 Me. 385, 67 Atl. 312, holding that exceptions are not allowable unless the right to take exceptions is expressly reserved before the hearing.

The exceptions provided for by the California statute relate, not to errors, but only to defects in the findings. Carroll *v.* Benicia, 40 Cal. 386.

Under the Indiana practice the exception must be taken to the conclusion of law upon the facts found, and not to the finding (Grimes *v.* Duzan, 32 Ind. 361); and it is also held that it is only where special findings are made in pursuance of a request, and conclusions of law stated therein, and signed by the court, that an exception is available (State *v.* Kamp, (Ind. 1886) 8 N. E. 714). An exception to a conclusion of law that contractors were entitled to a mechanic's lien against a church on the ground that the contract was that of individuals who signed it on behalf of a church, and not that of the church, is unavailing, where the court has expressly found the contract to have been that of the church. Bird *v.* St. John's Episcopal Church, 154 Ind. 138, 56 N. E. 129.

A motion for judgment, notwithstanding the findings, is not the proper remedy of the

of the decision,[19] or within such other time as is allowed by statute,[20] and no review of such lack or insufficiency can be had unless objection is made thereto in the trial court,[21] and exceptions taken.[22] Although no particular form or mode of making and saving exceptions to findings of fact and conclusions of law is required,[23] and although, on account of there being no need of exceptions being more specific than the findings objected to, general exceptions are sometimes held sufficient.[24] Ordinarily, exceptions should not be general but should specifi-

party against whom the findings are made. Walters *v.* Walters, 168 Ind. 45, 79 N. E. 1037; Smith *v.* State, 140 Ind. 343, 39 N. E. 1060; Robertson *v.* Huffman, 101 Ind. 474; Bibbler *v.* Walker, 69 Ind. 362; Smith *v.* Jeffries, 25 Ind. 376; Hughes *v.* Meehan, 84 Minn. 226, 87 N. W. 768.

19. Climax Tag Co. *v.* American Tag Co., 234 Ill. 179, 84 N. E. 873; Chicago, etc., R. Co. *v.* State, 159 Ind. 237, 64 N. E. 860; State Medical College *v.* Cummingore, 140 Ind. 296, 39 N. E. 744 (holding that exceptions to the conclusions of law must be taken at the time they are filed, and not at the time judgment is rendered thereon); Roeder *v.* Keller, 135 Ind. 692, 35 N. E. 1014; Radabaugh *v.* Silvers, 135 Ind. 605, 35 N. E. 694; Barner *v.* Bayless, 134 Ind. 600, 33 N. E. 907, 34 N. E. 502; Hull *v.* Lough, 109 Ind. 315, 10 N. E. 270, 58 Am. Rep. 405; Dickson *v.* Rose, 87 Ind. 103 (holding that exceptions to conclusions of law on the facts specially found must be taken before a motion for a new trial is made); Matthews *v.* Fry, 143 N. C. 384, 55 S. E. 787; Thomson-Houston Electric Light Co. *v.* Henderson Electric, etc., Light Co., 116 N. C. 112, 21 S. E. 951 (holding that exceptions to findings of fact must be filed before the court adjourns for the term). And see Winstandley *v.* Breyfogle, 148 Ind. 618, 48 N. E. 224 (holding that after conclusions of law have been made, exceptions thereto should be taken by the party before he takes any further steps in the case); Cox *v.* Leviston, 66 N. H. 167, 20 Atl. 246 (holding that an objection that a finding is contrary to evidence should be taken advantage of before judgment).

20. Schwarz *v.* Weber, 103 N. Y. 658, 8 N. E. 728, within ten days after service upon appellant's attorney of a copy of the decision of the court, and written notice of the entry of judgment thereupon.

Under the Washington statute, providing that exceptions may be taken either by stating to the judge when the decision is signed that the party excepts thereto, or by filing written exceptions within five days after the filing of the decision, where findings and conclusions purport to have been signed on one day, and the exceptions appear not to have been noted by the court until the following day, in the absence of anything in the record to the contrary, the exceptions will be presumed to have been properly stated to the judge at the time the decision was signed. Burrows *v.* Kinsley, 27 Wash. 694, 68 Pac. 332. However, the filing of exceptions by appellant to the findings of fact, within five days of the service of the findings on him, instead of within five days of the filing of the findings is not sufficient. Mann *v.* Provident L., etc., Co., 42 Wash. 581, 85 Pac. 56.

An extension of the statutory time by the court is not permissible (National Bank of Commerce *v.* Seattle Pickle, etc., Works, 15 Wash. 126, 45 Pac. 731), even in favor of plaintiff, where defendant has filed exceptions within the prescribed time, and judgment has not been entered (Harris *v.* Mercur, 202 Pa. St. 313, 51 Atl. 969).

21. See APPEAL AND ERROR, 2 Cyc. 703.

Acquiescence in an adverse finding either by entering into a stipulation that it shall be taken as true (Staffeldt *v.* Granger, 106 Ill. App. 297), or by making it the basis of a subsequent proceeding in the cause, precludes a party from having it reviewed on appeal (Walsh *v.* Walsh, 1 Nebr. (Unoff.) 719, 95 N. W. 1024).

22. See APPEAL AND ERROR, 2 Cyc. 728 *et seq.*

Necessity of case or bill of exceptions to review findings or lack of findings see APPEAL AND ERROR, 2 Cyc. 1079, 1087 text and note 65.

Necessity of embodiment of exceptions to findings in record on appeal see APPEAL AND ERROR, 2 Cyc. 1050.

23. Climax Tag Co. *v.* American Tag Co., 234 Ill. 179, 84 N. E. 873 (holding, however, that the mere announcement by counsel that he disagrees with the court is not equivalent to an exception, as it must appear from the bill of exceptions that what counsel did at the time was intended to preserve the question for review by a higher court); Leavenworth *v.* Mills, 6 Kan. 288; Spaulding *v.* Strang, 38 N. Y. 9 (holding that matter of law is sufficiently excepted to, if pointed out with certainty in the exceptions, although in language different from that in which it is stated by the court).

An exception to the judgment is unnecessary where an exception is taken to the conclusion of law on which the judgment is based (Barnhart *v.* Farr, 55 Iowa 366, 7 N. W. 644), and it has been held immaterial that no exception was taken to the findings of the court, when an exception is taken to the judgment, and the record discloses that the findings of fact do not support the judgment (Voight *v.* Mackle, 71 Tex. 78, 8 S. W. 623).

24. Boyce *v.* Wabash R. Co., 63 Iowa 70, 18 N. W. 673, 50 Am. Rep. 730 (holding sufficiently specific a general exception to a conclusion of law that, as the right was based on the statute of another state, there could be no recovery); McCorn *v.* McCorn, 100 N. Y. 511, 3 N. E. 480; Pratt *v.* Foote,

cally point out the error complained of,[25] it being the rule that a general exception is of no avail where any of the findings or conclusions are correct,[26] and that an exception to the conclusions of law admits the correctness of the findings of fact.[27] The sustaining of exceptions generally has the same effect as it would have upon a verdict.[28]

TRIAL BY JURY. See JURIES, 24 Cyc. 82; TRIAL, *ante*, p. 1238.

TRIAL DE NOVO. See ADMIRALTY, 1 Cyc. 904; APPEAL AND ERROR, 3 Cyc. 260; CERTIORARI, 6 Cyc. 833; JUSTICES OF THE PEACE, 24 Cyc. 721.

TRIAL FEE. See COSTS, 11 Cyc. 109.

TRIAL OF RIGHT OF PROPERTY. See RIGHT OF PROPERTY, TRIAL OF, 34 Cyc. 1766.

9 N. Y. 463; Collyer *v.* Collins, 17 Abb. Pr. (N. Y.) 467; Milwaukee County *v.* Pabst, 70 Wis. 352, 35 N. W. 337; Wittmann *v.* Watry, 37 Wis. 238 (holding that where no evidence was introduced, and the findings were based upon the pleadings alone, an exception to the finding that the allegations in the complaint were true is sufficient).

25. *Arkansas.*— Myers *v.* Anspach, 17 Ark. 467.

California.— Madera Commercial Bank *v.* Redfield, 122 Cal. 405, 55 Pac. 160.

Indiana.— Benefiel *v.* Aughe, 93 Ind. 401; Barnhill *v.* Mill Spring, etc., Gravel Road Co., 51 Ind. 354.

Kansas.— Major *v.* Major, 2 Kan. 337.

Michigan.— Schmidt *v.* Miller, 22 Mich. 278.

Montana.— Collier *v.* Ervin, 2 Mont. 335.

Nebraska.— Townsend *v.* J. I. Case Threshing-Mach. Co., 31 Nebr. 836, 48 N. W. 899.

New York.— Ostrander *v.* State, 192 N. Y. 415, 85 N. E. 668 [*affirming* 126 N. Y. App. Div. 938, 110 N. Y. Suppl. 1139]; Drake *v.* New York Iron Mine, 156 N. Y. 90, 50 N. E. 785; Hunter *v.* Manhattan R. Co., 141 N. Y. 281, 36 N. E. 400.

South Carolina.— Bomar *v.* Means, 53 S. C. 232, 31 S. E. 234.

Texas.— Sickles *v.* Epps, (1888) 8 S. W. 124; Cassin *v.* La Salle County, 1 Tex. Civ. App. 127, 21 S. W. 122.

Washington.— Horrell *v.* California, etc., Homebuilders' Assoc., 40 Wash. 531, 82 Pac. 889; Smith *v.* Glenn, 40 Wash. 262, 82 Pac. 605; Bringgold *v.* Bringgold, 40 Wash. 121, 82 Pac. 179; Peters *v.* Lewis, 33 Wash. 617, 74 Pac. 815; Ballard *v.* Keane, 13 Wash. 201, 43 Pac. 27; Moyer *v.* Van De Vanter, 12 Wash. 377, 41 Pac. 60, 50 Am. St. Rep. 900, 29 L. R. A. 670; Hannegan *v.* Roth, 12 Wash. 65, 40 Pac. 636.

Wisconsin.— Paggeot *v.* Sexton, 23 Wis. 195; Gilman *v.* Thiess, 18 Wis. 528; Knox *v.* Webster, 18 Wis. 406, 86 Am. Dec. 779.

See 46 Cent. Dig. tit. "Trial," § 965.

An exception designating the finding or conclusion by number is sufficiently specific. Burrows *v.* Kinsley, 27 Wash. 694, 68 Pac. 332; Ranahan *v.* Gibbons, 23 Wash. 255, 62 Pac. 773; Reinke *v.* Wright, 93 Wis. 368, 67 N. W. 737.

26. Turpie *v.* Lowe, 158 Ind. 47, 62 N. E. 628; Baldwin *v.* Heil, 155 Ind. 682, 58 N. E. 200; Taylor *v.* Canaday, 155 Ind. 671, 57 N. E. 524, 59 N. E. 20; Hatfield *v.* Cummings, 152 Ind. 537, 53 N. E. 761; Baker *v.* Cravens, 150 Ind. 199, 49 N. E. 1054; Royse *v.* Bourne, 149 Ind. 187, 47 N. E. 827; Collier *v.* Ervin, 2 Mont. 335; Simms *v.* Voght, 94 N. Y. 654; Magie *v.* Baker, 14 N. Y. 435; Murray *v.* Babbitt, 10 Misc. (N. Y.) 365, 31 N. Y. Suppl. 17; Washington Liquor Co. *v.* Northwest Live Stock Co., 18 Wash. 71, 50 Pac. 569; Neeley *v.* Democratic Pub. Co., 12 Wash. 659, 41 Pac. 173; Irwin *v.* Olympia Water Works, 12 Wash. 112, 40 Pac. 637.

Conversely, when all the conclusions of law are erroneous, a general exception is sufficient. Ludlow *v.* Gilman, 18 Wis. 552. Also, an exception to a finding of fact, designated by number, without stating the grounds of exception, is sufficient, although the finding joins several propositions, if the finding as to all the propositions is wrong. Reinke *v.* Wright, 93 Wis. 368, 67 N. W. 737.

27. Conner *v.* Andrews Land, etc., Co., 162 Ind. 338, 70 N. E. 376; National State Bank *v.* Sandford Fork, etc., Co., 157 Ind. 10, 60 N. E. 699; Fulp *v.* Beaver, 136 Ind. 319, 36 N. E. 250; Bell *v.* Corbin, 136 Ind. 269, 36 N. E. 23; Blair *v.* Blair, 131 Ind. 194, 30 N. E. 1076; State *v.* Vogel, 117 Ind. 188, 19 N. E. 773; Braden *v.* Graves, 85 Ind. 92; Wharton *v.* Wilson, 60 Ind. 591; Dehority *v.* Nelson, 56 Ind. 414; Hamrick *v.* Hoover, 41 Ind. App. 411, 84 N. E. 28; Eisman *v.* Whalen, 39 Ind. App. 350, 79 N. E. 514, 1072; Indianapolis Northern Traction Co. *v.* Harbaugh, 38 Ind. App. 115, 78 N. E. 80; Halstead *v.* Sigler, 35 Ind. App. 419, 74 N. E. 257; Johnson *v.* Bedwell, 15 Ind. App. 236, 43 N. E. 246. *Compare* Bird *v.* St. John's Episcopal Church, 154 Ind. 138, 56 N. E. 129 (holding that a party by an exception to a conclusion of law does not thereby admit that the facts found were within the issues); Lockwood *v.* Dills, 74 Ind. 56 (holding that the admission is not conclusive, but that on the exception overruled, the party may still, by motion for a new trial, present the question of the correctness of the finding of facts).

An exception to a finding of fact, it seems, simply presents the question whether there is any evidence to sustain it. Sherman *v.* Foster, 158 N. Y. 587, 53 N. E. 504 [*affirming* 91 Hun 637, 36 N. Y. Suppl. 1133].

28. Robinson *v.* Trofitter, 106 Mass. 51.

TRIAL TERM. A term at which a cause may for the first time be called for trial.[1]

TRIATIO IBI SEMPER DEBET FIERI, UBI JURATORES MELIOREM POSSUNT HABERE NOTITIAM. A maxim meaning "Trial ought always to be had where the jury can have the best knowledge."[2]

TRIBE. See INDIANS, 22 Cyc. 117.

TRIBORD. A French word for "starboard."[3]

TRIBUNAL. The seat of a judge; the place where he administers justice; a judicial court; the bench of judges.[4] (Tribunal: In General, see COURTS, 11 Cyc. 633. Arbitrators, see ARBITRATION AND AWARD, 3 Cyc. 568. Church, see RELIGIOUS SOCIETIES, 34 Cyc. 1182. De Facto, Unauthorized or Illegal, see COURTS, 11 Cyc. 724. For Removal of Municipal Officer, Discretion Vested in, see MUNICIPAL CORPORATIONS, 28 Cyc. 520. International, see INTERNATIONAL LAW, 22 Cyc. 1756.)

TRIBUTARY. A running natural stream which empties into another stream;[5] in ordinary language, a stream running into another stream.[6] (See, generally, NAVIGABLE WATERS, 29 Cyc. 285; WATERS.)

TRICK. As a noun, a sly, dexterous, ingenuous procedure fitted to puzzle or amuse;[7] classed as a synonym with strategy, wile, fraud, cheat, deception, delusion.[8] As a verb, to deceive by cunning or to impose on, to defraud, to cheat.[9] (Trick: Entry of House by, see BURGLARY, 6 Cyc. 178, 179. Larceny by, see LARCENY, 25 Cyc. 40. Obtaining Money or Property by as Criminal Offense, see FALSE PRETENSES, 19 Cyc. 391 note 30. See also, generally, FRAUD, 20 Cyc. 1; GAMING, 20 Cyc. 878.)

TRICYCLE. A three-wheeled vehicle.[10] (Tricycle: Use on Sidewalk, see MUNICIPAL CORPORATIONS, 28 Cyc. 912 note 3. See also BICYCLE, 5 Cyc. 686.)

1. Murray *v.* Holden, 2 Fed. 740, 741, 1 McCrary 341.

2. Bouvier L. Dict. [*citing* Bulwer's Case, 7 Coke 1*a*, 1*b*, 77 Eng. Reprint 411].

3. The Charles Tiberghien, 143 Fed. 676.

4. Black L. Dict.

A board of county supervisors exercising a judicial function may properly enough be called a tribunal. Scott *v.* Lasell, 71 Iowa 180, 182, 32 N. W. 322.

Construction of term in statute relating to commitments to insane hospital see Foster *v.* Worcester, 16 Pick. (Mass.) 71, 81.

5. Ogilvy Irr., etc., Co. *v.* Insinger, 19 Colo. App. 380, 75 Pac. 598, 599, where it is held that "this limited definition" of the term cannot be adopted as applicable to the rule, under irrigation laws, entitling one who has appropriated water from a river, to prevent the diversion of water from a tributary thereof.

6. Harbottle *v.* Terry, 10 Q. B. D. 131, 137, 47 J. P. 186, 52 L. J. M. C. 31, 48 L. T. Rep. N. S. 219, 31 Wkly. Rep. 289, where it is said: "The word has no technical meaning, and its popular meaning is not very indefinite."

A pond formed by obtaining a flow of water from a stream — the water being afterwards returned to the stream — is not a "tributary" of the stream (Harbottle *v.* Terry, 10 Q. B. D. 131, 137, 47 J. P. 186, 52 L. J. M. C. 31, 48 L. T. Rep. N. S. 219, 31 Wkly. Rep. 289. See also Moses *v.* Iggo, [1906] 1 K. B. 516, 519, 21 Cox C. C. 136, 70 J. P. 251, 75 L. J. K. B. 331, 94 L. T. Rep. N. S. 548); but where the water of a brook flows in its natural channel, the only alteration being that the damming up of the brook has enlarged the channel into what is called a pond, the waters still going down the same channel and ultimately issuing out of this old channel into a river, the damming up of the water in the brook does not prevent the water so dammed up from being a tributary (Cook *v.* Clarebrough, 94 L. T. Rep. N. S. 550 note).

As used in a policy of insurance giving the insured permission to navigate the Mississippi and tributaries, except the Missouri and Arkansas rivers, the term was held to include navigable waters which did not empty directly into the Mississippi, but which emptied into the Red river, which empties into the Mississippi. Miller *v.* Citizens' F., etc., Ins. Co., 12 W. Va. 116, 131, 29 Am. Rep. 452.

7. Meriwether *v.* Knapp, 120 Mo. App. 354, 388, 97 S. W. 257; Webster Dict. [*quoted* in State *v.* Smith, 82 Minn. 342, 345, 85 N. W. 12].

8. State *v.* Smith, 82 Minn. 342, 345, 85 N. W. 12; Meriwether *v.* Knapp, 120 Mo. App. 354, 388, 97 S. W. 257.

9. Webster Dict. [*quoted* in Meriwether *v.* Knapp, 120 Mo. App. 354, 388, 97 S. W. 257].

10. Century Dict.

It is not a bicycle, nor is it known by the general term "bicycle," hence it is not within a city ordinance prohibiting the use on its sidewalks of "all varieties of vehicles known by the general term 'bicycles.'" Wheeler *v.* Boone, 108 Iowa 235, 237, 78 N. W. 909, 44 L. R. A. 821.

TRIED. Properly used in reference to a chancery suit, in which the court called a jury to decide special issues, when the verdict has been "sanctioned and established" by the chancellor.[11]

TRIENNALIS PACIFICUS POSSESSOR BENEFICII EST INDE SECURUS. A maxim meaning "The undisturbed possessor of a benefice for three years is thereafter secure from challenge." [12]

TRIENNIAL COHABITATION. See MARRIAGE, 26 Cyc. 915.

TRIFLING SUM. As in the definition of nominal damages, a phrase said to mean such a sum as a penny, one cent, six and a quarter cents.[13]

TRIMMING. In reference to loading or unloading of boats at grain elevators, work performed by longshoremen with hand-scoops or shovels, on the vessel unloading or receiving the grain.[14] In the plural, that which serves to trim, make complete, ornament, or the like.[15]

TRINITARIANS. Those who believe in the trinity or tri-unity of God.[16]

TRINKET. Ornaments of dress; superfluities of decoration;[17] any small piece of ornament or decoration; of more ornament than use;[18] a small ornament, as a jewel, a ring, or the like.[19] (See JEWEL, 23 Cyc. 374; ORNAMENT, 29 Cyc. 1530.)

TRINODA NECESSITAS. In Saxon law, a three-fold necessity or burden. A term used to denote the three things from contributing to the performance of which no lands were exempted, namely, *pontis reparatio*, (the repair of bridges,) *arcis constructio*, (the building of castles,) *et expeditio contra hostem*, (military service against an enemy).[20]

11. Duffy *v.* Moran, 12 Nev. 94, 98.

12. Morgan Leg. Max. [*citing* Trayner Leg. Max. 587].

13. Maher *v.* Wilson, 139 Cal. 514, 520, 73 Pac. 418 [*citing* Bouvier L. Dict.].

14. Budd *v.* New York, 143 U. S. 517, 552, 12 S. Ct. 468, 36 L. ed. 247.

15. Webster New Int. Dict.

In specification for patent see Wright *v.* Hitchcock, L. R. 5 Exch. 37, 46, 39 L. J. Exch. 97.

In tariff acts.— In a long enumeration including "galloons," "braids," and "trimmings" the term is not used in a descriptive sense, and the *eo nomine* designation should be given the meaning it has in trade and commerce. Naday *v.* U. S., 164 Fed. 44, 90 C. C. A. 462. Trimmings for hats, bonnets, etc. see Hartranft *v.* Meyer, 149 U. S. 544, 546, 13 S. Ct. 982, 983, 37 L. ed. 840; Robertson *v.* Edelhoff, 132 U. S. 614, 617, 10 S. Ct. 186, 33 L. ed. 477; Marsh *v.* Seeberger, 30 Fed. 422, 423.

It includes so-called mourning crapes, consisting of all silk fabrics in the piece, of the width known as 4/4. Robinson *v.* U. S., 122 Fed. 970, 971.

It does not include ornaments, loops, and medallions made of silk and imported in pieces six yards in length, which, when imported, are sewed together for convenience in packing, but on arrival are cut apart, mounted on cards, and thus marketed (U. S. *v.* Hilbert, 171 Fed. 69, 70, 96 C. C. A. 173); goods wholly woven from silk from four to twelve inches wide, used directly in these widths, either exclusively or chiefly for trimming women's hats (Robinson *v.* U. S., 121 Fed. 204, 205, where it is said "that they are used for making trimmings does not make them such," referring to certain goods woven wholly from silk).

16. Hale *v.* Everett, 53 N. H. 9, 92, 16 Am. Rep. 82.

"Trinitarians" and "Unitarians" are embraced equally in the general meaning of the term "Congregational" see Atty.-Gen. *v.* Dublin, 38 N. H. 459, 552.

17. Johnson Dict. [*quoted* in Ocean Steamship Co. *v.* Way, 90 Ga. 747, 752, 17 S. E. 57, 20 L. R. A. 123].

18. Richardson Dict. [*quoted* in Ocean Steamship Co. *v.* Way, 90 Ga. 747, 752, 17 S. E. 57, 20 L. R. A. 123].

19. Webster Dict. [*quoted* in Ocean Steamship Co. *v.* Way, 90 Ga. 747, 752, 17 S. E. 57, 20 L. R. A. 123].

"There is a distinction between some of the articles, which are more especially articles of ornament with reference to dress, and others which, though of a somewhat ornamental character, do not constitute ornaments of dress, but are only occasionally produced. As to the former,— bracelets, shirtpins, rings, and brooches,— they are clearly articles of personal decoration and adornment, and literally fall within the description of 'trinkets.' It is said, that, inasmuch as they are also articles of utility, they cease to be trinkets. But I do not agree to that. Their main and principal object plainly is that of ornament. It is true they may also be applied to some useful purpose; yet, inasmuch as they are essentially ornamental, I do not think the fact of their being capable of being turned to some use raises any difficulty." Per Cockburn, C. J., in Bernstein *v.* Baxendale, 6 C. B. N. S. 251, 258, 5 Jur. N. S. 1056, 28 L. J. C. P. 265, 7 Wkly. Rep. 396, 95 E. C. L. 251 [*quoted* in Ocean Steamship Co. *v.* Way, 90 Ga. 747, 752, 17 S. E. 57, 20 L. R. A. 123].

20. Black L. Dict. [*citing* 1 Blackstone Comm. 263, 357].

TRIORS. In practice, persons who are appointed to try challenges to jurors, that is, to hear and determine whether a juror challenged for favor is or is not qualified to serve.[21] (Triors: In General, see JURORS, 24 Cyc. 348. Of Proceedings For Removal of Municipal Officers, see MUNICIPAL CORPORATIONS, 28 Cyc. 440.)

TRIP. In its ordinary signification, a journey, a jaunt or excursion by some person.[22] In relation to transportation, the performance of service one way over a route.[23] (See CONTINUOUS TRIP, 9 Cyc. 212; ROUND TRIP, 34 Cyc. 1816.)

TRIPLICATE. See DUPLICATE, 14 Cyc. 1122.

TRIPPING. In mechanics, releasing or setting free some mechanism.[24]

TRISTIBUS ET TACITIS NON FIDUNTUR. A maxim meaning "Melancholy and secretive persons are not to be trusted."[25]

TRIVIAL. Trifling; inconsiderable; of small worth or importance.[26] (Trivial: Errors as Ground For Reversal, see APPEAL AND ERROR, 3 Cyc. 443. Matters, Exercise of Equity Jurisdiction in, see EQUITY, 16 Cyc. 124.)

TROLL. A long rope extended on the water for many fathoms, with baited hooks attached to it, about three or four feet apart.[27]

TROLLEY SYSTEM. As used in reference to street railroads, a term said to imply the use of a stationary engine and overhead wires strung on poles.[28] (See, generally, STREET RAILROADS, 36 Cyc. 1338.)

TROOPER. A term said to include only persons regularly enrolled in some troop of cavalry.[29]

TROOPS. A term which conveys to the mind the idea of an armed body of soldiers, whose sole occupation is war or service, answering to the regular army.[30] (See, generally, ARMY AND NAVY, 3 Cyc. 812; MILITIA, 27 Cyc. 489.)

TROTTING. See RACING, 32 Cyc. 1469 note 13.

TROUBLE. That which causes disturbance, annoyance, or the like.[31]

The old system of working roads by conscription of labor was a part of the *trinoda necessitas*, and this system was handed down to us by our British forefathers. State *v.* Holloman, 139 N. C. 642, 647, 52 S. E. 408.

21. Black L. Dict., adding: "The lords chosen to try a peer, when indicted for felony, in the court of the lord high steward, are also called 'triors.'"

22. Pier *v.* Finch, 24 Barb. (N. Y.) 514, 516.

23. Century Dict. [*quoted* in Kelly *v.* New York City R. Co., 119 N. Y. App. Div. 223, 229, 104 N. Y. Suppl. 561].

"Good this trip only" see Pier *v.* Finch, 24 Barb. (N. Y.) 514, 516, 517.

It ordinarily conveys the idea of transportation in one direction. Unless connected with some other expression, it does not carry the idea of a return. A "continuous trip" does not add to the import. Kelly *v.* New York City R. Co., 192 N. Y. 97, 102, 103, 84 N. E. 569.

24. Duff Mfg. Co. *v.* Forgie, 78 Fed. 626, 631.

"Tripping plate" is a plate which performs the function known as "tripping." Duff Mfg. Co. *v.* Forgie, 78 Fed. 626, 631.

25. Morgan Leg. Max. [*citing* Taylor L. Gloss. 457].

26. Black L. Dict.

"Trivial breach of the peace" see State *v.* McCory, 2 Blackf. (Ind.) 5.

"Trivial imperfection" under California mechanic's lien law, providing that such imperfection shall not prevent the filing of a lien claim see Schindler *v.* Green, 149 Cal. 752, 754, 87 Pac. 626; Bianchi *v.* Hughes, 124 Cal. 24, 26, 56 Pac. 610; Coss *v.* MacDonough, 111 Cal. 662, 666, 44 Pac. 325; Lippert *v.* Lasar, (Cal. 1893) 33 Pac. 797; Schallert-Ganahl Lumber Co. *v.* Sheldon, (Cal. 1893) 32 Pac. 235; Santa Clara Valley Mill, etc., Co. *v.* Williams, (Cal. 1892) 31 Pac. 1128, 1129; Willamette Steam Mills Lumbering, etc., Co. *v.* Los Angeles College Co., 94 Cal. 229, 238, 29 Pac. 629.

27. The Lucy Anne, 15 Fed. Cas. No. 8,596, 3 Ware 253, where it is said: "This is sunk in the water and occasionally drawn up with the fish on the hooks."

28. Hooper *v.* Baltimore City Pass. R. Co., 85 Md. 509, 514, 37 Atl. 359, 38 L. R. A. 509.

29. Southwell *v.* Harley, 3 Rich. (S. C.) 180, 181.

A "troop horse of each trooper," within the meaning of a statute making a sheriff liable to a penalty for levying on and selling such horse, is a horse duly entered and registered as such, with the captain of the troop. Southwell *v.* Harley, 3 Rich. (S. C.) 180, 181.

30. Dunne *v.* People, 94 Ill. 120, 138, 34 Am. Rep. 213, holding that the organization of the active militia of the state is not in violation of the United States constitution withholding from the states the power to keep "troops" in time of peace.

31. Webster New Int. Dict.

In reference to indemnity allowed by statute for the "trouble and expense" to which a landowner has been put by proceedings to lay out a street, it refers to trouble from which some material or pecuniary injury results, involving labor and the expenditure of

TROUT. A fresh water fish, a fish which at least breeds and ordinarily lives in the fresh water.[32] (See, generally, FISH AND GAME, 19 Cyc. 986.)

time, or occasioning inconvenience to the owner in the use and occupation of the land, but does not refer to mental troubles. Whitney *v.* Lynn, 122 Mass. 338, 343.

"Trouble shooter" is one whose duty it is to discover and repair minor troubles attending the telephone service, defective telephones, fallen wires, weakness of batteries, and grounding of wires (Dow *v.* Sunset Tel., etc., Co., 157 Cal. 182, 183, 106 Pac. 587); the name given to a workman who locates trouble on wires (Combs *v.* Delaware, etc., Tel., etc., Co., 15 Pa. Dist. 323). Also designated "trouble hunter" see Judge *v.* Narragansett Electric Lighting Co., 21 R. I. 128, 129, 42 Atl. 507.

32. State *v.* Lewis, 87 Me. 498, 499, 33 Atl. 10, although it may sometimes escape to the salt water when it has an opportunity.

Zoologically the term may be more inclusive. State *v.* Lewis, 87 Me. 498, 500, 33 Atl. 10.

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TROVER AND CONVERSION

By William Winchester Keysor
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Waiver of Conversion and Suit in Assumpsit, see ASSUMPSIT, 4 Cyc. 332.

I. DEFINITION, NATURE, AND ELEMENTS.

A. Definition. Conversion is "an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." [1] The legal wrong denominated "conversion" is any unauthorized act of dominion or ownership exercised by one person over personal property belonging to another; [2]

1. Bouvier L. Dict. [*quoted* in Industrial, etc., Trust *v.* Tod, 170 N. Y. 233, 245, 63 N. E. 285; Laverty *v.* Snethen, 68 N. Y. 522, 524, 23 Am. Rep. 184; Thorp *v.* Robbins, 68 Vt. 53, 56, 33 Atl. 896].

A similar definition is "either in the appropriation of the thing to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it 'in exclusion or defiance' of the plaintiff's right, or in withholding the possession from the plaintiff, 'under a claim of title inconsistent with his own.'" 2 Greenleaf Ev. § 642 [*quoted* in King *v.* Franklin, 132 Ala. 559, 566, 31 So. 467; Hunter *v.* Cronkhite, 9 Ind. App. 470, 36 N. E. 924, 925; Allen *v.* Bicknell, 36 Me. 436, 439; Ferguson *v.* Clifford, 37 N. H. 86, 101; Mahaney *v.* Walsh, 16 N. Y. App. Div. 601, 604, 44 N. Y. Suppl. 969; State University *v.* State Nat. Bank, 96 N. C. 280, 284, 3 S. E. 359; Roach *v.* Turk, 9 Heisk. (Tenn.) 708, 715, 24 Am. Rep. 360; Tinker *v.* Morrill, 39 Vt. 477, 480, 94 Am. Dec. 345; Tracy *v.* Cloyd, 10 W. Va. 19, 23].

Other definitions are: "An assuming upon one's self the property and right of disposing another's goods." Per Lord Holt in Baldwin *v.* Cole, 6 Mod. 212, 87 Eng. Reprint 964 [*quoted* in Covell *v.* Hill, 6 N. Y. 374, 383; Murray *v.* Burling, 10 Johns. (N. Y.) 172, 175; Tinker *v.* Morrill, 39 Vt. 477, 480, 94 Am. Dec. 345; McCombie *v.* Davies, 6 East 540, 2 Smith K. B. 557, 8 Rev. Rep. 534, 102 Eng. Reprint 1393].

"The assertion of a title to, or an act of dominion over personal property, inconsistent with the right of the owner." Bigelow Torts 428 [*quoted* in Rainsby *v.* Beezley, 11 Oreg. 49, 51, 8 Pac. 288].

"Any distinct act of dominion wrongfully exerted over one's property, in denial of his right, or inconsistent with it." Cooley Torts 448 [*quoted* in Hossfeldt *v.* Dill, 28 Minn. 469, 475, 10 N. W. 781; Budd *v.* Multnomah R. Co., 12 Oreg. 271, 274, 7 Pac. 99, 53 Am. Rep. 355].

"A wrong done by an unauthorized act which deprives another of his property permanently or for an indefinite time." Webb's Pollock Torts 432 [*citing* Hiort *v.* Bott, L. R. 9 Exch. 86, 43 L. J. Exch. 81, 30 L. T. Rep. N. S. 25, 22 Wkly. Rep. 414].

2. *Alabama.*— Boutwell *v.* Parker, 124 Ala. 341, 27 So. 309; Beall *v.* Folmar, 122 Ala. 414, 26 So. 1; Mitchell *v.* Thomas, 114 Ala. 459, 21 So. 991; Penny *v.* State, 88 Ala. 105, 7 So. 50; Thweat *v.* Stamps, 67 Ala. 96; Booker *v.* Jones, 55 Ala. 266; Conner *v.* Allen, 33 Ala. 515; St. John *v.* O'Connell, 7 Port. 466; Glaze *v.* McMillion, 7 Port. 279.

California.— Hill *v.* Finigan, 77 Cal. 267, 19 Pac. 494, 11 Am. St. Rep. 279; Wood *v.* McDonald, 66 Cal. 546, 6 Pac. 452; Dodge *v.* Meyer, 61 Cal. 405.

Colorado.— Omaha, etc., Smelting, etc., Co. *v.* Tabor, 13 Colo. 41, 21 Pac. 925, 16 Am. St. Rep. 185, 5 L. R. A. 236; Murphy *v.* Hobbs, 8 Colo. 17, 5 Pac. 637; Crosby *v.* Stratton, 17 Colo. App. 212, 68 Pac. 130.

Connecticut.— Metropolis Mfg. Co. *v.* Lynch, 68 Conn. 459, 36 Atl. 832; Gilbert *v.* Walker, 64 Conn. 390, 30 Atl. 132; Clark *v.* Whitaker, 19 Conn. 319, 48 Am. Dec. 160.

Georgia.— Southern Express Co. *v.* Sinclair, 130 Ga. 372, 60 S. E. 849; Merchants' Transp. Co. *v.* Moore, 124 Ga. 482, 52 S. E. 802; Liptrot *v.* Holmes, 1 Ga. 381.

Illinois.— Union Stockyard, etc., Co. *v.* Mallory, etc., Co., 157 Ill. 554, 41 N. E. 888, 48 Am. St. Rep. 341 [*reversing* 54 Ill. App. 170]; Sprague's Collecting Agency *v.* Spiegel, 107 Ill. App. 508; Newlin *v.* Prevo, 90 Ill. App. 515; Follett *v.* Edwards, 30 Ill. App. 386.

Indiana.— Gordon *v.* Stockdale, 89 Ind. 240.

Iowa.— Cutter *v.* Fanning, 2 Iowa 580.

Kansas.— Brown *v.* Campbell Co., 44 Kan. 237, 24 Pac. 492, 21 Am. St. Rep. 274.

Kentucky.— Louisville, etc., R. Co. *v.* Lawson, 88 Ky. 496, 11 S. W. 511, 11 Ky. L. Rep. 38; Newcomb-Buchanan Co. *v.* Baskett, 14 Bush 658; United Shakers Soc. *v.* Underwood, 9 Bush 609, 15 Am. Rep. 731; Pharis *v.* Carver, 13 B. Mon. 236; Hale *v.* Ames, 2 T. B. Mon. 143, 15 Am. Dec. 150; Bell *v.* Layman, 1 T. B. Mon. 39, 15 Am. Dec. 83.

and "'trover" is the technical name of the common-law action provided for the redress thereof.[3]

Maine.— Badger *v.* Hatch, 71 Me. 562; Fuller *v.* Tabor, 39 Me. 519; Fernald *v.* Chase, 37 Me. 289.

Maryland.— Merchants' Nat. Bank *v.* Williams, 110 Md. 334, 72 Atl. 1114; Bonaparte *v.* Clagett, 78 Md. 87, 27 Atl. 619; Harker *v.* Dement, 9 Gill 7, 52 Am. Dec. 670.

Massachusetts.— McGonigle *v.* Victor H. J. Belleisle Co., 186 Mass. 310, 71 N. E. 569; Robinson *v.* Way, 163 Mass. 212, 39 N. E. 1009; Spooner *v.* Manchester, 133 Mass. 270, 43 Am. Rep. 514; Goell *v.* Smith, 128 Mass. 238; Coughlin *v.* Ball, 4 Allen 334.

Minnesota.— Johnson *v.* Dun, 75 Minn. 533, 78 N. W. 98. See also Merz *v.* Croxen, 102 Minn. 69, 112 N. W. 890.

Missouri.— Allen *v.* McMonagle, 77 Mo. 478; State *v.* Berning, 74 Mo. 87; Williams *v.* Wall, 60 Mo. 318; Koch *v.* Branch, 44 Mo. 542, 100 Am. Dec. 324; National Bank of Commerce *v.* Southern R. Co., 135 Mo. App. 74, 115 S. W. 517; Miller *v.* Lange, 84 Mo. App. 219; Walsh *v.* Sichler, 20 Mo. App. 374.

Montana.— Tuttle *v.* Hardenberg, 15 Mont. 219, 38 Pac. 1070.

Nebraska.— Herrick *v.* Humphrey Hardware Co., 73 Nebr. 809, 103 N. W. 685; Stough *v.* Stefani, 19 Nebr. 468, 27 N. W. 445.

New Hampshire.— Western Union Tel. Co. *v.* Franklin Constr. Co., 70 N. H. 37, 47 Atl. 616; Baker *v.* Beers, 64 N. H. 102, 6 Atl. 35; Stackpole *v.* Eastern R. Co., 62 N. H. 493; Gilman *v.* Hill, 36 N. H. 311.

New York.— Field *v.* Sibley, 174 N. Y. 514, 66 N. E. 1108; Miller *v.* Miles, 171 N. Y. 675, 64 N. E. 1123 [*affirming* 58 N. Y. App. Div. 103, 68 N. Y. Suppl. 565]; Hill *v.* Haas, 170 N. Y. 566, 62 N. E. 1096 [*affirming* 46 N. Y. App. Div. 360, 61 N. Y. Suppl. 515]; Sage *v.* Shepard, etc., Lumber Co., 158 N. Y. 672. 52 N. E. 1126 [*affirming* 4 N. Y. App. Div. 290, 39 N. Y. Suppl. 449]; Kilmer *v.* Hutton, 131 N. Y. App. Div. 625, 116 N. Y. Suppl. 127; Felts *v.* Collins, 67 N. Y. App. Div. 430, 73 N. Y. Suppl. 796; Pawson *v.* Miller, 66 N. Y. App. Div. 12, 72 N. Y. Suppl. 1011; Bahr *v.* Boley, 50 N. Y. App. Div. 577, 64 N. Y. Suppl. 200; Miller *v.* Hennessy, 47 Misc. 403, 94 N. Y. Suppl. 563; Schechter *v.* Watson, 35 Misc. 43, 70 N. Y. Suppl. 1; Smusch *v.* Ravitch, 33 Misc. 766, 67 N. Y. Suppl. 900; Van Brunt *v.* Oestreicher, 29 Misc. 340, 60 N. Y. Suppl. 505; Pepper *v.* Price, 107 N. Y. Suppl. 559.

North Carolina.— Gossler *v.* Wood, 120 N. C. 69, 27 S. E. 33; Carraway *v.* Burbank, 12 N. C. 306.

North Dakota.—Willard *v.* Monarch El. Co., 10 N. D. 400, 87 N. W. 996.

Ohio.— Baltimore, etc., R. Co. *v.* O'Donnell, 49 Ohio St. 489, 32 N. E. 476, 34 Am. St. Rep. 579, 21 L. R. A. 117.

Oklahoma.—Aylesbury Mercantile Co. *v.* Fitch, 22 Okla. 475, 99 Pac. 1089, 23 L. R. A. N. S. 573.

Oregon.—Walker *v.* Athena First Nat. Bank, 43 Oreg. 102, 72 Pac. 635; Velsian *v.* Lewis, 15 Oreg. 539, 16 Pac. 631, 3 Am. St. Rep. 184; Budd *v.* Multnomah R. Co., 12 Oreg. 271, 7 Pac. 99, 53 Am. Rep. 355; Ramsby *v.* Beezley, 11 Oreg. 49, 8 Pac. 288.

Rhode Island.— Smith *v.* Hurley, 29 R. I. 489, 72 Atl. 705; Donahue *v.* Shippee, 15 R. I. 453, 8 Atl. 541.

South Carolina.—Abrahams *v.* Southwestern R. Bank, 1 S. C. 441, 7 Am. Rep. 33; Reid *v.* Colcock, 1 Nott & M. 592, 9 Am. Dec. 729; Harris *v.* Saunders, 2 Strobh. Eq. 370 note.

Tennessee.— Union, etc., Bank *v.* Farrington, 13 Lea 333; Scruggs *v.* Davis, 5 Sneed 261; Angus *v.* Dickerson, Meigs 459.

Texas.— Crawford *v.* Thomason, (Civ. App. 1909) 117 S. W. 181; France *v.* Gibson, (Civ. App. 1907) 101 S. W. 536.

Vermont.— Rice *v.* Clark, 8 Vt. 109.

Washington.— Phillipos *v.* Mihran, 38 Wash. 402, 80 Pac. 527; Kinkead *v.* Holmes, etc., Furniture Co., 24 Wash. 216, 64 Pac. 157.

Wisconsin.— Cernahan *v.* Chrisler, 107 Wis. 645, 83 N. W. 778; Aschermann *v.* Philip Best Brewing Co., 45 Wis. 262.

United States.— Eureka County Bank *v.* Clarke, 130 Fed. 325, 64 C. C. A. 571.

England.— Hollins *v.* Fowler, L. R. 7 H. L. 757, 44 L. J. Q. B. 169, 33 L. T. Rep. N. S. 73 [*affirming* L. R. 7 Q. B. 616, 41 L. J. Q. B. 277, 27 L. T. Rep. N. S. 168, 20 Wkly. Rep. 868]; Burroughes *v.* Bayne, 5 H. & N. 296, 29 L. J. Exch. 185, 2 L. T. Rep. N. S. 16; National Mercantile Bank *v.* Rymill, 44 L. T. Rep. N. S. 767.

Canada.— Francis *v.* Turner, 25 Can. Sup. Ct. 110; Winchester *v.* Busby, 9 Can. L. T. Occ. Notes 217; McIntosh *v.* Port Huron Petrified Brick Co., 27 Ont. App. 262; Ashfield *v.* Edgell, 21 Ont. 195; Stimson *v.* Block, 11 Ont. 96; Driffill *v.* McFall, 41 U. C. Q. B. 313.

See 47 Cent. Dig. tit. "Trover and Conversion," § 1.

3. *California.*— Rogers *v.* Huie, 2 Cal. 571, 56 Am. Dec. 363.

Illinois.— Grand Pac. Hotel Co. *v.* Rowland, 88 Ill. App. 519.

Massachusetts.— Crocker *v.* Atwood, 144 Mass. 588, 12 N. E. 421.

Pennsylvania.— Forster *v.* Juniata Bridge Co., 16 Pa. St. 393, 55 Am. Dec. 506.

South Carolina.—Warren *v.* Lagrone, 12 S. C. 45.

Vermont.— Sibley *v.* Story, 8 Vt. 15.

England.— Cooper *v.* Chitty, 1 Burr. 20, 97 Eng. Reprint 166.

See 47 Cent. Dig. tit. "Trover and Conversion," § 103.

"Trover" is the remedy to recover the value of personal property wrongfully converted by another to his own use. Boulden *v.* Gough, 4 Pennew. (Del.) 48, 54 Atl. 693; Carey *v.* Dazey, 5 Harr. (Del.) 445; Spell-

B. Nature and Elements — 1. In General. The essence of conversion is not acquisition of property by the wrong-doer, but a wrongful deprivation of it

man *v.* Richmond, etc., R. Co., 35 S. C. 475, 14 S. E. 947, 28 Am. St. Rep. 858. It is an action *ex delicto*. Finch *v.* Clarke, 61 N. C. 335. But in Hambly *v.* Trott, Cowp. 371, 98 Eng. Reprint 1136, Lord Mansfield said that, although technically and strictly an action of trover was an action *ex delicto*, yet that substantially and really it was, as he termed it, an action of property. During the last argument of the case he is reported to have said: "An action of trover is not now an action *ex maleficio*, though it is so in form;" and also, "in substance, trover is an action of property. If a man receives the property of another, his fortune ought to answer it." Chase *v.* Fitz, 132 Mass. 359, 365. Conversion is the gist of the action. Central R., etc., Co. *v.* Lampley, 76 Ala. 357, 52 Am. Rep. 334; Conner *v.* Allen, 33 Ala. 515; Jones *v.* Buzzard, 2 Ark. 415; Rogers *v.* Huie, 2 Cal. 571, 56 Am. Dec. 363; Parker *v.* Middlebrook, 24 Conn. 207; Coffin *v.* Anderson, 4 Blackf. (Ind.) 395; Traylor *v.* Horrall, 4 Blackf. (Ind.) 317; Graham *v.* Warner, 3 Dana (Ky.) 146, 28 Am. Dec. 65; Dietus *v.* Fuss, 8 Md. 148; Barron *v.* Davis, 4 N. H. 338; Murr *v.* Western Assur. Co., 24 N. Y. App. Div. 390, 48 N. Y. Suppl. 757; Beggar Students' Pleasure Soc. *v.* Eichel, 25 Misc. (N. Y.) 177, 54 N. Y. Suppl. 128; Everett *v.* Coffin, 6 Wend. (N. Y.) 603, 22 Am. Dec. 551; Barwick *v.* Barwick, 33 N. C. 80; Waring *v.* Pennsylvania R. Co., 76 Pa. St. 491; Johnson *v.* Barker, 1 Tex. App. Civ. Cas. § 283; Isaack *v.* Clark, 2 Bulstr. 306, 80 Eng. Reprint 1143; Golightly *v.* Reynolds, Lofft 88, 98 Eng. Reprint 547. The tort is waived (Buford *v.* Fannen, 1 Bay (S. C.) 273, 1 Am. Dec. 615), and the only relief afforded thereby is damages for the value of the property converted (Millspaugh Laundry *v.* Sioux City First Nat. Bank, 120 Iowa 1, 94 N. W. 262; Ballard *v.* Beveridge, 6 N. Y. App. Div. 349, 39 N. Y. Suppl. 566; North American Ins. Co. *v.* Levy, 5 Pa. L. J. Rep. 223; Norris *v.* Beckley, 2 Mill (S. C.) 228). Trover is equitable in its nature (Fields *v.* Brice, 108 Ala. 632, 18 So. 742), but unavailable for the enforcement or protection of equitable rights (Draper *v.* Walker, 98 Ala. 310, 13 So. 595; Rees *v.* Coats, 65 Ala. 256; Cooper *v.* Davis, 15 Conn. 556; White *v.* Woodward, 8 B. Mon. (Ky.) 484; Adams *v.* Castle, 64 Minn. 505, 67 N. W. 637; White *v.* Blankenbeckler, 115 Mo. App. 722, 92 S. W. 503; Altman *v.* Weyand, 66 N. Y. App. Div. 353, 72 N. Y. Suppl. 715; Easterly *v.* Auburn Nat. Exch. Bank, 3 Thomps. & C. (N. Y.) 366).

History of action.— "The action of trover or conversion was, in its origin, an action of trespass on the case for the recovery of damages against a person who had found goods, and refused to deliver them on demand to the owner, but converted them to his own use, from which word, finding, the remedy is called an action of trover. By a fiction of law actions of trover were at length permitted to be brought against any person who had in his possession, by any means whatever, the personal property of another, and sold or used the same without the consent of the owner, or refused to deliver the same when demanded. The injury lies in the conversion and deprivation of the plaintiff's property, which is the gist of the action, and the statement of the finding of trover is now immaterial and not traversable; and the fact of conversion does not necessarily import an acquisition of property in the defendant. It is an action for the recovery of damages to the extent of the value of the thing converted. The object and the result of the suit are not the recovery of the thing itself, which can only be recovered by an action of detinue or replevin." 1 Chitty Pl. (14th Am. ed.) p. 146 [*quoted* in Burnham *v.* Pidcock, 33 Misc. (N. Y.) 65, 67, 66 N. Y. Suppl. 806 (*affirmed* in 58 N. Y. App. Div. 273, 68 N. Y. Suppl. 1007)]. See also McIntire *v.* Blakeley, 7 Pa. Cas. 227, 12 Atl. 325; Blakey *v.* Douglas, 3 Pa. Cas. 495, 6 Atl. 398; Peterson *v.* Kier, 2 Pittsb. (Pa.) 191; Cooper *v.* Chitty, 1 Burr. 20, 97 Eng. Reprint 166; Burroughes *v.* Bayne, 5 H. & N. 296, 29 L. J. Exch. 185, 2 L. T. Rep. N. S. 16; Cooley Torts (2d ed.), p. 516. See Converted, 9 Cyc. 858.

Distinguished from detinue see Detinue, 14 Cyc. 242.

Distinguished from replevin see Replevin, 34 Cyc. 1355. One who has been deprived of his goods either by a wrongful taking or detention may institute either replevin or trover therefor. Baumann *v.* Jefferson, 4 Misc. (N. Y.) 147, 23 N. Y. Suppl. 685; Connah *v.* Hale, 23 Wend. (N. Y.) 462; Velsian *v.* Lewis, 15 Oreg. 539, 16 Pac. 631, 3 Am. St. Rep. 184; Spry *v.* McKenzie, 18 U. C. Q. B. 161. See, generally, Election of Remedies, 15 Cyc. 251.

Distinguished from trespass.— There are two principal differences between actions of trespass and trover for personalty appropriated by defendant, the first of which is that in trespass there is always either an original wrongful taking, or a taking made wrongful *ab initio* by subsequent misconduct, while in trover the original taking is supposed or assumed to be lawful, and often the only wrong consists in a refusal to surrender a possession which was originally rightful, but the right to which has terminated. Burnham *v.* Pidcock, 33 Misc. (N. Y.) 65, 66 N. Y. Suppl. 806 [*affirmed* in 58 N. Y. App. Div. 273, 68 N. Y. Suppl. 1007]. See also Bever *v.* Swecker, 138 Iowa 721, 116 N. W. 704; May *v.* Georger, 21 Misc. (N. Y.) 622, 47 N. Y. Suppl. 1057; Hall *v.* Moor, Add. (Pa.) 376; Montgomery Water Power Co. *v.* Chapman, 126 Fed. 68, 61 C. C. A. 124 [*affirmed* in 126 Fed. 372, 61 C. C. A. 347]. See, generally, Trespass, *ante*, p. ——. Whenever trespass will lie for the taking of a chattel, trover may be maintained. Gaines

to the owner;[4] and consequently neither manucaption[5] nor asportation[6] are essential elements thereof. The act alleged to be a conversion must be positive and tortious,[7] but not necessarily wilful or corrupt;[8] for neither negligence, active or passive,[9] nor a breach of contract, even though it result in a loss of specific

v. Briggs, 9 Ark. 46; Smith *v.* Kershaw, 1 Ga. 259; Christopher *v.* Covington, 2 B. Mon. (Ky.) 357; Stanley *v.* Gaylord, 1 Cush. (Mass.) 536, 48 Am. Dec. 643; Pierce *v.* Benjamin, 14 Pick. (Mass.) 356, 25 Am. Dec. 396; Prescott *v.* Wright, 6 Mass. 20; Ireland *v.* Horseman, 65 Mo. 511; Glenn *v.* Garrison, 17 N. J. L. 1; Connah *v.* Hale, 23 Wend. (N. Y.) 462. The taking, however, must amount to more than a mere removal; there must be a conversion. Burgess *v.* Graffam, 18 Fed. 251. Action for trespass and conversion is identical with action for conversion where no damage to land is claimed. U. S. *v.* Ute Coal, etc., Co., 158 Fed. 20, 85 C. C. A. 302.

4. *Maine.*— McPheters *v.* Page, 83 Me. 234, 22 Atl. 101, 23 Am. St. Rep. 772.

Nebraska.— State *v.* Omaha Nat. Bank, 59 Nebr. 483, 81 N. W. 319.

New Hampshire.— Evans *v.* Mason, 64 N. H. 98, 5 Atl. 766; Flanders *v.* Colby, 28 N. H. 34.

North Carolina.— Simmons *v.* Sikes, 24 N. C. 98.

Pennsylvania.— Dixon *v.* Owens, 21 Pa. Super. Ct. 376.

England.— Keyworth *v.* Hill, 3 B. & Ald. 685, 5 E. C. C. L. 394, 106 Eng. Reprint 811.

See 47 Cent. Dig. tit. "Trover and Conversion," § 1; and cases cited *infra*, notes 5–7.

A wrongful deprivation is a conversion notwithstanding it was only temporary. Gray *v.* Crocheron, 8 Port. (Ala.) 191; Daggett *v.* Davis, 53 Mich. 35, 18 N. W. 548, 51 Am. Rep. 91; Harris *v.* Saunders, 2 Strobh. Eq. (S. C.) 370 note.

5. *Alabama.*— Bolling *v.* Kirby, 90 Ala. 215, 7 So. 914, 24 Am. St. Rep. 789; Freeman *v.* Scurlock, 27 Ala. 407.

California.— Horton *v.* Jack, 126 Cal. 521, 58 Pac. 1051; Dodge *v.* Meyer, 61 Cal. 405.

Kansas.— Brown *v.* Campbell Co., 44 Kan. 237, 24 Pac. 492, 21 Am. St. Rep. 274.

Kentucky.— Newcomb-Buchanan Co. *v.* Baskett, 14 Bush 658.

Massachusetts.— Goell *v.* Smith, 128 Mass. 238.

Minnesota.— McDonald *v.* Bayha, 93 Minn. 139, 100 N. W 679.

Missouri.—Withers *v.* Lafayette County Bank, 67 Mo. App. 115.

Montana.— Tuttle *v.* Hardenberg, 15 Mont. 219, 38 Pac. 1070.

New Hampshire.— Brown *v.* Ela, 67 N. H. 110, 30 Atl. 412.

New York.— Mahaney *v.* Walsh, 16 N. Y. App. Div. 601, 44 N. Y. Suppl. 969; Reynolds *v.* Shuler, 5 Cow. 323; Bristol *v.* Burt, 7 Johns. 254, 5 Am. Dec. 264.

Oregon.— Budd *v.* Multnomah R. Co., 12 Oreg. 271, 7 Pac. 99, 53 Am. Rep. 355.

Pennsylvania.— McIntire *v.* Blakeley, 9 Pa. Cas. 227, 12 Atl. 325.

Rhode Island.— Donahue *v.* Shippee, 15 R. I. 453, 8 Atl. 541.

Wisconsin.— Cernahan *v.* Chrisler, 107 Wis. 645, 83 N. W. 778.

See 47 Cent. Dig. tit. "Trover and Conversion," § 25.

6. Allen *v.* Bicknell, 36 Me. 436; Hammond *v.* Sullivan, 112 N. Y. App. Div. 788, 99 N. Y. Suppl. 472; Simon *v.* Simon, 38 N. Y. App. Div. 85, 55 N. Y. Suppl. 915; Meyer *v.* Doherty, 133 Wis. 398, 113 N. W. 671, 126 Am. St. Rep. 967, 13 L. R. A. N. S. 247.

"Conversion" and "carrying away" are not synonymous terms. Spivey *v.* State, 26 Ala. 90, 101.

Removal of a chattel to a foreign country deprives the owner of the power of enforcing his rights in the courts of his own country and is therefore a conversion. Allens *v.* Peyton, 21 Wkly. Rep. 108; McIntosh *v.* Port Huron Petrified Brick Co., 27 Ont. App. Rep. 262. The rule is otherwise, as to removal from one state to another. Pattee *v.* Gilmore, 18 N. H. 460, 45 Am. Dec. 385.

7. *California.*— Steele *v.* Marsicano, 102 Cal. 666, 36 Pac. 920.

Connecticut.— Parker *v.* Middlebrook, 24 Conn. 207.

Illinois.— Union Stockyard, etc., Co. *v.* Mallory, etc., Co., 157 Ill. 554, 41 N. E. 888, 48 Am. St. Rep. 341 [*reversing* 54 Ill. App. 170]; Sturges *v.* Keith, 57 Ill. 451, 11 Am. Rep. 28; Newlin *v.* Prevo, 90 Ill. App. 515.

Maine.— Boobier *v.* Boobier, 39 Me. 406.

Massachusetts.—Way *v.* Dennie, 174 Mass. 43, 54 N. E. 347; Spooner *v.* Manchester, 133 Mass. 270, 43 Am. Rep. 514; McPartland *v.* Read, 11 Allen 231; Polley *v.* Lenox Iron Works, 2 Allen 182; Leonard *v.* Tidd, 3 Metc. 6.

Mississippi.— Phillips *v.* Lane, 4 How. 122.

Missouri.—Walsh *v.* Sichler, 20 Mo. App. 374.

New York.— Salt Springs Nat. Bank *v.* Wheeler, 48 N. Y. 492, 8 Am. Rep. 564; Biel *v.* Horner, 9 Misc. 492, 30 N. Y. Suppl. 227.

Tennessee.— Jones *v.* Allen, 1 Head 626.

England.— Mills *v.* East India, etc., Dock Co., 7 App. Cas. 591, 4 Aspin. 580, 52 L. J. Q. B. 146, 47 L. T. Rep. N. S. 309, 31 Wkly. Rep. 201 [*commenting* on Fearon *v.* Bowers, 1 H. Bl. 364 note]; London, etc., R. Co. *v.* Hughes, L. R. 26 Ir. 165; Severin *v.* Keppell, 4 Esp. 156.

See 47 Cent. Dig. tit. "Trover and Conversion," § 1.

8. Haddix *v.* Einstman, 14 Ill. App. 443.

9. *California.*— Rogers *v.* Huie, 2 Cal. 571, 56 Am. Dec. 363.

Connecticut.— Berman *v.* Kling, 81 Conn. 403, 71 Atl. 507.

Georgia.— Forehand *v.* Jones, 84 Ga. 508, 10 S. E. 1090.

property,[10] constitutes the wrong under consideration. Acts of conversion have been classified as follows:[11] (1) A taking from the owner without his consent;[12] (2) an unwarranted assumption of ownership;[13] (3) an illegal use or abuse of the chattel;[14] and (4) a wrongful detention after demand.[15] It is a well settled rule that if the owner expressly or impliedly assents to, or ratifies, the taking, use, or disposition of his property, he cannot recover for a conversion thereof,[16] and it is

Illinois.— Sturges *v.* Keith, 57 Ill. 451, 11 Am. Rep. 28.

New York.— Cohen *v.* Koster, 133 N. Y. App. Div. 570, 118 N. Y. Suppl. 142; Hawkins *v.* Hoffman, 6 Hill 586, 41 Am. Dec. 767; McMorris *v.* Simpson, 21 Wend. 610.

Vermont.— Buck *v.* Ashley, 37 Vt. 475; Nutt *v.* Wheeler, 30 Vt. 436, 73 Am. Dec. 316.

England.— Ross *v.* Johnson, 5 Burr. 2825, 98 Eng. Reprint 483.

Canada.— Lovekin *v.* Podger, 26 U. C. Q. B. 156.

See 47 Cent. Dig. tit. "Trover and Conversion," § 1.

Negligence of an owner which contributes to a conversion of his goods will not bar trover against a *bona fide* purchaser thereof, unless the negligence was gross enough to justify an inference of the owner's assent to the wrongful act. Pease *v.* Smith, 61 N. Y. 477; Morrison *v.* Buchanan, 6 C. & P. 18, 25 E. C. L. 299.

10. *Alabama.*— Kinney *v.* South Alabama, etc., R. Co., 82 Ala. 368, 3 So. 113.

Georgia.— Reid *v.* Caldwell, 110 Ga. 481, 35 S. E. 684; Camp *v.* Casey, 110 Ga. 262, 34 S. E. 277; Forehand *v.* Jones, 84 Ga. 508, 10 S. E. 1090.

Illinois.— Newlin *v.* Prevo, 90 Ill. App. 515.

New Jersey.— Mercantile Co-operative Bank *v.* Frost, 62 N. J. L. 476, 41 Atl. 685.

New York.— Industrial, etc., Trust *v.* Tod, 170 N. Y. 233, 63 N. E. 285 [*reversing* 64 N. Y. Suppl. 1093]; Stoneman *v.* Van Vechten, 165 N. Y. 666, 59 N. E. 1131 [*affirming* 46 N. Y. App. Div. 370, 61 N. Y. Suppl. 513]; Lawatsch *v.* Cooney, 86 Hun 546, 33 N. Y. Suppl. 775; Hunt *v.* Kane, 40 Barb. 638; Stone *v.* Rabinowitz, 45 Misc. 405, 90 N. Y. Suppl. 301; Starr *v.* Silverman, 23 Misc. 151, 50 N. Y. Suppl. 657; Powell *v.* Powell, 3 Hun 413, 6 Thomps. & C. 51 [*reversed* on other grounds in 71 N. Y. 71].

Oklahoma.—Aylesbury Mercantile Co. *v.* Fitch, 22 Okla. 475, 99 Pac. 1089, 23 L. R. A. N. S. 573.

Pennsylvania.— Davis *v.* Thompson, 10 Pa. Cas. 563, 14 Atl. 169.

Vermont.— Farrar *v.* Rollins, 37 Vt. 295.

See 47 Cent. Dig. tit. "Trover and Conversion," § 1.

If defendant's failure to perform his contract prevents plaintiff from obtaining possession of his property, then an action for conversion will lie. Ford *v.* Roberts, 14 Colo. 291, 23 Pac. 322; Berney *v.* Marks, 34 Misc. (N. Y.) 527, 69 N. Y. Suppl. 993. And one who purchases property from a person to whom it was sold for the latter's exclusive use may be held liable in trover to the original vendor. Southern R. Co. *v.* Attalia, 147 Ala. 653, 41 So. 664.

When the relation of the parties is that of debtor and creditor trover will not lie. Jordan *v.* Lindsay, 132 Ala. 567, 31 So. 484 [*overruling* Ragsdale *v.* Kinney, 119 Ala. 454, 24 So. 443; Gardner *v.* Head, 108 Ala. 619, 18 So. 551]; Muskegon Booming Co. *v.* Hendricks, 89 Mich. 172, 50 N. W. 799; Carlson *v.* Jordan, 4 Nebr. (Unoff.) 359, 93 N. W. 1130; Borland *v.* Stokes, 120 Pa. St. 278, 14 Atl. 61; Hurst *v.* Mellinger, 73 Tex. 188, 11 S. W. 184; Moore *v.* Sibbald, 29 U. C. Q. B. 487.

11. *Alabama.*— Davis *v.* Hurt, 114 Ala. 146, 21 So. 468; Bolling *v.* Kirby, 90 Ala. 215, 7 So. 914, 24 Am. St. Rep. 789; Thweat *v.* Stamps, 67 Ala. 96; Conner *v.* Allen, 33 Ala. 515.

Arkansas.— Ray *v.* Light, 34 Ark. 421.

Kentucky.— Kennet *v.* Robinson, 2 J. J. Marsh. 84; Abernathey *v.* Wheeler, 13 Ky. L. Rep. 730.

Missouri.— German American Bank *v.* Brunswig, 107 Mo. App. 401, 81 S. W. 461.

North Carolina.— Glover *v.* Riddick, 33 N. C. 582.

Tennessee.— Roach *v.* Turk, 9 Heisk. 708, 24 Am. Rep. 360; Jordan *v.* Greer, 5 Sneed 165.

Vermont.— Tinker *v.* Morrill, 39 Vt. 477, 94 Am. Dec. 345.

United States.— Maine *v.* Haley, 16 Fed. Cas. No. 8,977, 2 Hask. 354.

See 47 Cent. Dig. tit. "Trover and Conversion," § 1.

12. See *infra*, III, C, D.

13. See *infra*, III, B.

14. See *infra*, III, A, E.

15. See *infra*, III, F, G.

16. *Alabama.*— Locke *v.* Reeves, 116 Ala. 590, 22 So. 850; Booker *v.* Jones, 55 Ala. 266.

Colorado.— Sigel-Campion Live Stock Co. *v.* Holly, 44 Colo. 580, 101 Pac. 68.

Florida.— Robinson *v.* Hartridge, 13 Fla. 501.

Idaho.— Haynes *v.* Kettenbach Co., 11 Ida. 73, 81 Pac. 114.

Indiana.—Austin *v.* McMains, 14 Ind. App. 514, 43 N. E. 141.

Iowa.— Doyle *v.* Burns, 123 Iowa 488, 99 N. W. 195.

Kentucky.—Wood *v.* Worthington, 4 J. J. Marsh. 174.

Louisiana.— Laciano *v.* Flaspoller, 35 La. Ann. 1191; Lowery *v.* Lavillebeuvre, 14 La. 55.

Massachusetts.— Hills *v.* Snell, 104 Mass. 173, 6 Am. Rep. 216; Leonard *v.* Tidd, 3 Metc. 6.

Minnesota.— Mann *v.* Lamb, 83 Minn. 14, 85 N. W. 827; Griffin *v.* Bristle, 39 Minn.

equally well settled that this is true notwithstanding defendant exceeded the power given him.[17]

2. Intent as an Element of Conversion — a. In General. Intent to convert property will not alone sustain an action of trover;[18] the intent must be accompanied by a positive act.[19] If such act was unauthorized by the owner of the property, an intent to convert it will be conclusively presumed, or rather defendant's intent will be regarded as immaterial.[20] But if the act which deprived plaintiff of his goods was authorized by him,[21] or was performed for his benefit or the benefit of some interested third person,[22] or was otherwise lawful on the part of defendant, the latter cannot be held liable in trover without proof of an intent to convert the property to his own use.[23]

456, 40 N. W. 523; Tousley *v.* Board of Education, 39 Minn. 419, 40 N. W. 509; Freeman *v.* Etter, 21 Minn. 2; Chase *v.* Blaisdell, 4 Minn. 90.

Montana.— Powers *v.* Klenzie, 15 Mont. 177, 38 Pac. 833.

Nebraska.— Carlson *v.* Jordan, 4 Nebr. (Unoff.) 359, 93 N. W. 1130.

New York.— Hill *v.* Covell, 1 N. Y. 522; Ransom *v.* Wetmore, 39 Barb. 104; Gruard *v.* O'Reilly, 32 Misc. 710, 65 N. Y. Suppl. 511.

Pennsylvania.— Martin *v.* Megargee, 212 Pa. St. 558, 61 Atl. 1023.

Tennessee.— Parker *v.* Oakley, (Ch. App. 1900) 57 S. W. 426.

Texas.— Houston, etc., R. Co. *v.* Garrison, (Civ. App. 1896) 37 S. W. 971.

Vermont.— Downer *v.* Rowell, 24 Vt. 343; Knapp *v.* Winchester, 11 Vt. 351.

Washington.— S. A. Woods Mach. Co. *v.* Woodcock, 43 Wash. 317, 86 Pac. 570.

Canada.—Wilson *v.* MacNab, 21 U. C. Q. B. 493.

See 47 Cent. Dig. tit. "Trover and Conversion," § 2.

Submission to the demands of a marshal who professes to act officially and under color of a warrant issued in bankruptcy proceedings is not such an assent to his taking possession of property thereby as will preclude an action against him for conversion. Mathews *v.* Stewart, 44 Mich. 209, 6 N. W. 633.

17. Loveless *v.* Fowler, 79 Ga. 134, 4 S. E. 103, 11 Am. St. Rep. 407; Stoneman *v.* Van Vechten, 46 N. Y. App. Div. 370, 61 N. Y. Suppl. 513 [*affirmed* in 165 N. Y. 666, 59 N. E. 1131 (*distinguishing* Baker *v.* New York Nat. Exch. Bank, 100 N. Y. 31, 2 N. E. 452, 53 Am. Rep. 150)]; Dickinson *v.* Dudley, 17 Hun (N. Y.) 569; Sarjeant *v.* Blunt, 16 Johns. (N. Y.) 74.

18. Penny *v.* State, 88 Ala. 105, 7 So. 50; Smith *v.* Young, 1 Campb. 439; Gates *v.* Bent, 31 Nova Scotia 544.

19. State University *v.* State Nat. Bank, 96 N. C. 280, 3 S. E. 359. See also *supra*, I, B.

20. *Arkansas.*— McCarroll *v.* Stafford, 24 Ark. 224.

California.— Rogers *v.* Huie, 2 Cal. 571, 56 Am. Dec. 363.

Georgia.— Branch *v.* Planters' Loan, etc., Bank, 75 Ga. 342.

Kentucky.— Louisville, etc., R. Co. *v.* Lawson, 88 Ky. 496, 11 S. W. 511, 11 Ky. L. Rep. 38.

Maryland.— Bonaparte *v.* Clagett, 78 Md. 87, 27 Atl. 619.

Michigan.— Hubbell *v.* Blandy, 87 Mich. 209, 49 N. W. 502, 24 Am. St. Rep. 154; Gibbons *v.* Farwell, 63 Mich. 344, 29 N. W. 855, 6 Am. St. Rep. 301; Allen *v.* Kinyon, 41 Mich. 281, 1 N. W. 863.

Missouri.— Mohr *v.* Langan, 162 Mo. 474, 63 S. W. 409, 85 Am. St. Rep. 503; Hamlin *v.* Carruthers, 19 Mo. App. 567.

Nebraska.— Hill *v.* Campbell Commission Co., 54 Nebr. 59, 74 N. W. 388.

New Hampshire.— Sinclair *v.* Tarbox, 2 N. H. 135.

New York.— Industrial, etc., Trust *v.* Tod, 170 N. Y. 233, 63 N. E. 285; Pease *v.* Smith, 61 N. Y. 477; Douglass *v.* Scott, 130 N. Y. App. Div. 322, 114 N. Y. Suppl. 470; Casey *v.* Pilkington, 83 N. Y. App. Div. 91, 82 N. Y. Suppl. 525; Smith *v.* Hartog, 23 Misc. 353, 51 N. Y. Suppl. 257.

Ohio.— Baltimore, etc., R. Co. *v.* O'Donnell, 49 Ohio St. 489, 32 N. E. 476, 34 Am. St. Rep. 579, 21 L. R. A. 117.

Oregon.— Ferrera *v.* Parke, 19 Oreg. 141, 23 Pac. 883; Velsian *v.* Lewis, 15 Oreg. 539, 16 Pac. 631, 3 Am. St. Rep. 184.

United States.— Savary *v.* Germania Bank, 21 Fed. Cas. No. 12,387, 7 Reporter 615, 19 Alb. L. J. (N. Y.) 521.

England.— Hiort *v.* Bott, L. R. 9 Exch. 86, 43 L. J. Exch. 81, 30 L. T. Rep. N. S. 25, 22 Wkly. Rep. 414.

See 47 Cent. Dig. tit. "Trover and Conversion," § 21.

21. Sigel-Campion Live Stock Co. *v.* Holly, 44 Colo. 580, 101 Pac. 68; State *v.* Omaha Nat. Bank, 66 Nebr. 857, 93 N. W. 319, 59 Nebr. 483, 81 N. W. 319.

22. Kennet *v.* Robinson, 2 J. J. Marsh. (Ky.) 84; Sharp *v.* Nesmith, 6 Rich. (S. C.) 31; Drake *v.* Shorter, 4 Esp. 165.

23. *Connecticut.*— Berman *v.* Kling, 81 Conn. 403, 71 Atl. 507.

Iowa.— Himmelman *v.* Des Moines Ins. Co., 132 Iowa 668, 110 N. W. 155.

Maryland.— Manning *v.* Brown, 47 Md. 506.

Massachusetts.— Spooner *v.* Manchester, 133 Mass. 270, 43 Am. Rep. 514.

Minnesota.— Merz *v.* Croxen, 102 Minn. 69, 112 N. W. 890.

New Hampshire.— Evans *v.* Mason, 64 N. H. 98, 5 Atl. 766.

b. Knowledge of Owner's Rights. That one acted in good faith and in ignorance of who was the actual owner, or what his rights were, is not a defense.[24]

c. Property Taken by Mistake. A mistake, however innocently and honestly made, that one was taking or disposing of his own goods instead of those of another is no defense.[25]

d. Delivery by Mistake to a Person Other Than Owner. A delivery of property by mistake to a person other than the owner, whereby it is lost to the latter, constitutes a conversion.[26]

II. PROPERTY SUBJECT OF CONVERSION.

A. In General. Every species of tangible personal property, which is the subject of private ownership,[27] and likewise an undivided part of a chat-

New Jersey.— New York, etc., Steamboat Co. *v.* New Jersey Produce Co., 75 N. J. L. 298, 68 Atl. 209.

Tennessee.— Jordan *v.* Greer, 5 Sneed 165.

Utah.— Bowe *v.* Palmer, (1909) 102 Pac. 1007.

England.— Simmons *v.* Lillystone, 8 Exch. 431, 22 L. J. Exch. 217, 1 Wkly. Rep. 198; Bird *v.* Astcock, 2 Bulstr. 280, 80 Eng. Reprint 1122.

Canada.—Wallace *v.* Swift, 28 U. C. Q. B. 563 [*reversed* on other grounds in 31 U. C. Q. B. 523].

See 47 Cent. Dig. tit. "Trover and Conversion," § 21.

24. *Florida.*— Robinson *v.* Hartridge, 13 Fla. 501.

Georgia.— Farmers', etc., Bank *v.* Bennett, 120 Ga. 1012, 48 S. E. 398.

Iowa.— Farmer *v.* Graettinger Bank, 130 Iowa 469, 107 N. W. 170.

Maine.— Hotchkiss *v.* Hunt, 49 Me. 213.

Massachusetts.— Stanley *v.* Gaylord, 1 Cush. 536, 48 Am. Dec. 643.

Missouri.— Koch *v.* Branch, 44 Mo. 542, 100 Am. Dec. 324.

Nebraska.— Cook *v.* Monroe, 45 Nebr. 349, 63 N. W. 800.

New Jersey.—West Jersey R. Co. *v.* Trenton Car Works Co., 32 N. J. L. 517.

New York.— Boyce *v.* Brockway, 31 N. Y. 490; Everett *v.* Coffin, 6 Wend. 603, 22 Am. Dec. 551.

Pennsylvania.— Forsyth *v.* Wells, 41 Pa. St. 291, 80 Am. Dec. 617.

Rhode Island.— Donahue *v.* Shippee, 15 R. I. 453, 8 Atl. 541.

South Carolina.— Harris *v.* Saunders, 2 Strobh. Eq. 370 note.

Vermont.—Morrill *v.* Moulton, 40 Vt. 242; Deering *v.* Austin, 34 Vt. 330.

England.— Hollins *v.* Fowler, L. R. 7 H. L. 757, 44 L. J. Q. B. 169, 33 L. T. Rep. N. S. 73 [*affirming* L. R. 7 Q. B. 616, 41 L. J. Q. B. 277, 27 L. T. Rep. N. S. 168, 20 Wkly. Rep. 868].

See 47 Cent. Dig. tit. "Trover and Conversion," § 22; and *infra*, III, D, 2.

The courts do not apply this rule in cases where defendant, in good faith and without notice, received the proceeds of the goods which had previously been converted and sold by other parties (Walker *v.* Athena First Nat. Bank, 43 Oreg. 102, 72 Pac. 635), nor in cases where it was the duty of plaintiff to give notice of his ownership or right to possession (Gurley *v.* Armstead, 148 Mass. 267, 19 N. E. 389, 12 Am. St. Rep. 555, 2 L. R. A. 80; Knowlton *v.* Johnson, 37 Mich. 47 [*distinguishing* Crippen *v.* Morrison, 13 Mich. 23]; Geirke *v.* Schwartz, 20 Misc. (N. Y.) 361, 45 N. Y. Suppl. 928; La Crosse Boot, etc., Mfg. Co. *v.* Mons Anderson Co., 13 S. D. 301, 83 N. W. 331).

25. *Alabama.*—White *v.* Yawkey, 108 Ala. 270, 19 So. 360, 54 Am. St. Rep. 159, 32 L. R. A. 199.

Colorado.— Murphy *v.* Hobbs, 8 Colo. 17, 5 Pac. 637.

Illinois.— Lahner *v.* Hertzog, 23 Ill. App. 308.

Iowa.— Edwards *v.* American Express Co., 121 Iowa 744, 96 N. W. 740, 63 L. R. A. 467.

Maine.— Smith *v.* Colby, 67 Me. 169.

Michigan.— Kenney *v.* Ranney, 96 Mich. 617, 55 N. W. 982.

Missouri.—Waverly Timber, etc., Co. *v.* St. Louis Cooperage Co., 112 Mo. 383, 20 S. W. 566.

Nebraska.— Stough *v.* Stefani, 19 Nebr. 468, 27 N. W. 445.

Pennsylvania.— Forsyth *v.* Wells, 41 Pa. St. 291, 80 Am. Dec. 617.

Rhode Island.— Donohue *v.* Shippee, 15 R. I. 453, 8 Atl. 541.

Texas.—Williams *v.* Deen, 5 Tex. Civ. App. 575, 24 S. W. 536..

See 47 Cent. Dig. tit. "Trover and Conversion," § 23.

If the mistake was mutual, no recovery can be had for the loss caused thereby. Richardson *v.* Stevens, 6 N. Y. Suppl. 361.

26. Louisville, etc., R. Co. *v.* Barkhouse, 100 Ala. 543, 13 So. 534; Cerkel *v.* Waterman, 63 Cal. 34; Coykendall *v.* Eaton, 55 Barb. (N. Y.) 188, 37 How. Pr. 438; Muller *v.* Ryan, 2 N. Y. Suppl. 736; Devereux *v.* Barclay, 2 B. & Ald. 702, 21 Rev. Rep. 45, 106 Eng. Reprint 521.

As to misdelivery by: Bailee in general see BAILMENTS, 5 Cyc. 202. Carrier see CARRIERS, 6 Cyc. 472.

27. State *v.* Omaha Nat. Bank, 59 Nebr. 483, 81 N. W. 319. See, generally, PROPERTY, 32 Cyc. 666.

Intangible property — trade secret. — An action in the nature of trover does not lie for the betrayal of a trade secret, confided to defendant upon his promise to keep the secret. Roystone *v.* John H. Woodbury Der-

tel[28] may be wrongfully converted. However, trover lies only for specific chattels wrongfully converted, and not for money had and received for payment of debts.[29]

B. Written Instruments. Written instruments are as a general rule subject to conversion, and trover will lie for their value.[30]

C. Corporate Stock. A certificate of stock is a subject of conversion,[31] and shares of stock, as contradistinguished from certificates of stock, are also subjects of conversion.[32]

D. Negotiable Instruments — 1. In General. As choses in action represented by written instruments[33] or something capable of seizure and possession[34] are subjects of conversion,[35] trover will lie for bills of exchange,[36] promissory notes,[37]

matological Inst., 67 Misc. (N. Y.) 265, 122 N. Y. Suppl. 444.

28. Watson *v.* King, 4 Campb. 272, 1 Stark. 121, 16 Rev. Rep. 790, 2 E. C. L. 54.

29. Kerwin *v.* Balhatchett, 147 Ill. App. 561.

Trover does not operate on chattels generally, but specifically, such as money in coin on bills, animals, or other property capable of identification as being the actual property or thing wrongfully taken and converted. Kerwin *v.* Balhatchett, 147 Ill. App. 561. See *infra*, II, H.

30. *Connecticut.* — Griswold *v.* Judd, 1 Root 221.

Illinois.— Hayes *v.* Massachusetts Mut. L. Ins. Co., 125 Ill. 626, 18 N. E. 322, 1 L. R. A. 303; Olds *v.* Chicago Open Bd. of Trade, 33 Ill. App. 445.

Indiana.—Comparet *v.* Burr, 5 Blackf. 419.

Missouri.— O'Donoghue *v.* Corby, 22 Mo. 393.

New York.—Vroom *v.* Sage, 100 N. Y. App. Div. 285, 91 N. Y. Suppl. 456 [*affirmed* in 184 N. Y. 542, 76 N. E. 1095]; Luckey *v.* Gannon, 6 Abb. Pr. N. S. 209, 37 How. Pr. 134.

England.— Fine Art Soc. *v.* Union Bank, 17 Q. B. D. 705, 51 J. P. 69, 56 L. J. Q. B. 70, 55 L. T. Rep. N. S. 536, 35 Wkly. Rep. 114; Rummens *v.* Hare, 1 Ex. D. 169, 46 L. J. Exch. 30, 34 L. T. Rep. N. S. 407, 24 Wkly. Rep. 385; Scott *v.* Jones, 4 Taunt. 865, 14 Rev. Rep. 686.

Canada.— Upper Canada Bank *v.* Widmer, 2 U. C. Q. B. O. S. 256.

See 47 Cent. Dig. tit. "Trover and Conversion," § 3.

As to conversion of: Insurance policy see Life Insurance, 25 Cyc. 777, 795. Written instruments of no value see *infra*, II, Q.

31. Stewart *v.* Bright, 6 Houst. (Del.) 344; Daggett *v.* Davis, 53 Mich. 35, 18 N. W. 548, 51 Am. Rep. 91; Neiler *v.* Kelley, 69 Pa. St. 403.

Conversion of corporate stock by refusal to transfer on books of corporation see Corporations, 10 Cyc. 609.

32. *California.*— Payne *v.* Elliott, 54 Cal. 339, 35 Am. Rep. 80.

Connecticut.— Ayres *v.* French, 41 Conn. 142.

Maine.— Freeman *v.* Harwood, 49 Me. 195.

Maryland.— Maryland F. Ins. Co. *v.* Dalrymple, 25 Md. 242, 89 Am. Dec. 779.

Massachusetts.— Bond *v.* Mt. Hope Iron Co., 99 Mass. 505, 97 Am. Dec. 49; Jarvis *v.* Rogers, 15 Mass. 389.

Michigan.— Hine *v.* Bay City Commercial Bank, 119 Mich. 448, 78 N. W. 471; Smith *v.* Thompson, 94 Mich. 381, 54 N. W. 168; McDonald *v.* McKinnon, 92 Mich. 254, 52 N. W. 303; Morton *v.* Preston, 18 Mich. 60, 100 Am. Dec. 146.

Missouri.— Newman *v.* Mercantile Trust Co., 189 Mo. 423, 88 S. W. 6; Withers *v.* Lafayette County Bank, 67 Mo. App. 115.

Nebraska.— Herrick *v.* Humphrey Hardware Co., 73 Nebr. 809, 103 N. W. 685.

Nevada.— Boylan *v.* Huguet, 8 Nev. 345.

New York.—Miller *v.* Miles, 171 N. Y. 675, 64 N. E. 1123 [*affirming* 58 N. Y. App. Div. 103, 68 N. Y. Suppl. 565]; Anderson *v.* Nicholas, 28 N. Y. 600; Mahaney *v.* Walsh, 16 N. Y. App. Div. 601, 44 N. Y. Suppl. 969; Cousland *v.* Davis, 4 Bosw. 619.

Oregon.— Budd *v.* Multnomah R. Co., 12 Oreg. 271, 7 Pac. 99, 53 Am. Rep. 355.

Pennsylvania.— Trover will not lie for a "share of stock." Neiler *v.* Kelley, 69 Pa. St. 403; Sewall *v.* Lancaster Bank, 17 Serg. & R. 285.

South Carolina. — Connor *v.* Hillier, 11 Rich. 193, 73 Am. Dec. 105.

Utah.— Kuhn *v.* McAllister, 1 Utah 273 [*affirmed* in 96 U. S. 87, 24 L. ed. 615].

Washington.— Kahaley *v.* Haley, 15 Wash. 678, 47 Pac. 23.

See 47 Cent. Dig. tit. "Trover and Conversion," § 4.

Trover for corporate stock purchased see Corporations, 10 Cyc. 610.

33. See *supra*, II, B.

34. See *supra*, II, C.

35. Story *v.* Gammell, 68 Nebr. 709, 94 N. W. 982; Vogedes *v.* Beakes, 38 N. Y. App. Div. 380, 56 N. Y. Suppl. 662.

36. Lawatsch *v.* Cooney, 86 Hun (N. Y.) 546, 33 N. Y. Suppl. 775; Hornblower *v.* Proud, 2 B. & Ald. 327, 20 Rev. Rep. 456, 106 Eng. Reprint 386; Jones *v.* Fort, 9 B. & C. 764, 17 E. C. L. 340, 109 Eng. Reprint 284; Alsager *v.* Close, 12 L. J. Exch. 50, 10 M. & W. 576.

37. *Alabama.*— Lowremore *v.* Berry, 19 Ala. 130, 54 Am. Dec. 183.

Connecticut.— Tucker *v.* Jewett, 32 Conn. 563.

Georgia.— Merchants', etc., Nat. Bank *v.* Masonic Hall, 62 Ga. 271.

Iowa.— Tuttle *v.* Becker, 47 Iowa 486.

Maine.— Neal *v.* Henson, 60 Me. 84.

and other forms of negotiable instruments or commercial paper[38] which have been wrongfully converted.

2. PAYMENT OR DISCHARGE AS AFFECTING RIGHT OF ACTION. Payment or other discharge of a note is not a bar to an action for conversion brought by the maker

Massachusetts. — Kingman *v.* Pierce, 17 Mass. 247.

Michigan. — Hicks *v.* Lyle, 46 Mich. 488, 9 N. W. 529.

New York. — Decker *v.* Mathews, 12 N. Y. 313 [*affirming* 5 Sandf. 439]; Campbell *v.* Parker, 9 Bosw. 322; Ingalls *v.* Lord, 1 Cow. 240; Murray *v.* Burling, 10 Johns. 172.

North Carolina. — Brickhouse *v.* Brickhouse, 33 N. C. 404.

Pennsylvania. — Davis *v.* Funk, 39 Pa. St. 243, 80 Am. Dec. 519.

Tennessee. — Seals *v.* Cummings, 8 Humphr. 442.

Vermont. — Buck *v.* Kent, 3 Vt. 99 21 Am. Dec. 576.

England. — Johnson *v.* Windle, 3 Bing. N. Cas. 225, 2 Hodges 202, 6 L. J. C. P. 5, 3 Scott 608, 32 E. C. L. 112.

See 47 Cent. Dig. tit. "Trover and Conversion," § 5.

Proceeds of discount. — If a party, authorized by a holder of a note or bill of exchange to get it discounted, and to apply the proceeds in a particular way, does get it discounted but misapplies any part of the proceeds, he cannot be sued in trover for the bill, but must be sued for money had and received. Forbes *v.* Jason, 6 Ill. App. 395; Shrimpton *v.* Culver, 109 Mich. 577, 67 N. W. 907; Palmer *v.* Jarmain, 2 M. & W. 282.

38. *Indiana.* — Comparet *v.* Burr, 5 Blackf. 419.

Maryland. — Thomson *v.* Gortner, 73 Md. 474, 21 Atl. 371.

New York. — Vroom *v.* Sage, 184 N. Y. 542, 76 N. E. 1111 [*affirming* 100 N. Y. App. Div. 285, 91 N. Y. Suppl. 456]; Pawson *v.* Miller, 66 N. Y. App. Div. 12, 72 N. Y. Suppl. 1011.

North Carolina. — Fairly *v.* McLean, 33 N. C. 158.

Vermont. — Tilden *v.* Brown, 14 Vt. 164.

See 47 Cent. Dig. tit. "Trover and Conversion," § 5.

Illustrations. — Trover may be maintained by the maker of a negotiable note against one who obtained it without legal delivery and wrongfully negotiated it to a *bona fide* holder (Decker *v.* Mathews, 12 N. Y. 313; Murray *v.* Burling, 10 Johns. (N. Y.) 172), by an accommodation maker against the party accommodated, who has taken up the note and claims it to be a valid obligation (Park *v.* McDaniels, 37 Vt. 594), by an accommodation accepter for an acceptance fraudulently obtained by the drawer and pledged to one having notice of the fraud (Evans *v.* Kymer, 1 B. & Ad. 528, 9 L. J. K. B. O. S. 92, 20 E. C. L. 586, 109 Eng. Reprint 883), or by a payee or accepter against a holder to whom the bill has been transferred by plaintiff's agent without even apparent authority (Cranch *v.* White, 1 Bing. N. Cas. 414, 27 E. C. L. 700, 6 C. & P. 767, 25 E. C. L. 679, 4 L. J. C. P. 113). So too trover lies against one who purchased, after maturity, a bill which had been fraudulently negotiated to him by an agent (Wood *v.* McKean, 64 Iowa 16, 19 N. W. 817; Weathered *v.* Smith, 9 Tex. 622, 60 Am. Dec. 186; Vermilye *v.* Adams Express Co., 21 Wall. (U. S.) 138, 22 L. ed. 609), against one who obtained a note under a blank indorsement, but without valuable consideration (Fancourt *v.* Bull, 1 Bing. N. Cas. 681, 27 E. C. L. 816), against one who took a note without permission after refusal of the consideration offered (Vancleave *v.* Beach, 110 Ind. 269, 11 N. E. 228), against a wrongful holder who has collected the note by suit (Rushing *v.* Tharpe, 88 Ga. 779, 15 S. E. 830), against one who has diverted a negotiable instrument, whether made or indorsed by plaintiff, to a purpose other than that for which it was delivered (Kidder *v.* Biddle, 13 Ind. App. 653, 42 N. E. 293; Hynes *v.* Patterson, 95 N. Y. 1 [*affirming* 28 Hun 528]; Comstock *v.* Hier, 73 N. Y. 269, 29 Am. Rep. 142; Powell *v.* Powell, 71 N. Y. 71 [*reversing* 3 Hun 413]; Develin *v.* Coleman, 50 N. Y. 531; Decker *v.* Mathews, 12 N. Y. 313; Atkins *v.* Owen, 4 A. & E. 819, 2 Harr. & W. 59, 6 L. J. K. B. 267, 6 N. & M. 309, 31 E. C. L. 360, 111 Eng. Reprint 992; Evans *v.* Kymer, 1 B. & Ad. 528, 2 L. J. K. B. O. S. 92, 20 E. C. L. 586, 109 Eng. Reprint 883; Cranch *v.* White, 1 Bing. N. Cas. 414, 27 E. C. L. 700, 6 C. & P. 767, 25 E. C. L. 679, 4 L. J. C. P. 113; Goggerley *v.* Cuthbert, 2 B. & P. N. R. 170, 9 Rev. Rep. 632; Treuttel *v.* Barandon, 1 Moore C. P. 543, 8 Taunt. 100, 4 E. C. L. 59), against one who has negotiated a note before the happening of an event on which the use of the note was made contingent (Thompson *v.* Carter, 6 Ga. App. 604, 65 S. E. 599; Brown *v.* St. Charles, 66 Mich. 71, 32 N. W. 926; Boyer *v.* Fenn, 19 Misc. (N. Y.) 128, 43 N. Y. Suppl. 533 [*affirming* 18 Misc. 607, 43 N. Y. Suppl. 506]), against one who took a note as security for a usurious loan (Keutgen *v.* Parks, 2 Sandf. (N. Y.) 60) or under a strict indorsement "for account of" plaintiff (Treuttel *v.* Barandon, 1 Moore C. P. 543, 8 Taunt. 100, 4 E. C. L. 59), or against one who cashed a bill or draft according to the tenor of a forged indorsement (Kleinwort *v.* Comptoir Nat. d'Escompte, [1894] 2 Q. B. 157, 63 L. J. Q. B. 674, 10 Reports 259) or of an indorsement prohibited by a gambling act (Williams *v.* Wall, 60 Mo. 318); but not against a third party who has taken the instrument in good faith and due course, without notice, and for value (Goodwin *v.* Robarts, 1 App. Cas. 476, 45 L. J. Exch. 748, 35 L. T. Rep. N. S. 179, 24 Wkly. Rep. 987; Wookey *v.* Pole, 4 B. & Ald. 1, 22 Rev. Rep. 594, 6 E. C. L. 365, 106 Eng. Reprint 839; Gorgier *v.* Mieville, 3 B. & C. 45, 4 D. & R. 641, 10 E. C. L. 30, 107 Eng. Reprint 651;

against the payee or holder who refuses to surrender it,[39] even though the fact of payment is denied.[40] But trover will not lie for the conversion of a note on which judgment has been rendered.[41]

3. Void Instruments. No recovery can be had for the conversion of an instrument which is void in the hands of the holder.[42]

E. Muniments of Title. Title deeds,[43] land contracts,[44] abstracts of title,[45] and leases [46] are subjects of conversion.

F. Judgments. As trover will not lie for a record,[47] it will not for a judgment.[48]

G. Copies of Account-Book Entries. A debtor who has copies of his creditor's account may, if the creditor obtain possession of and refuse to return them, maintain trover against him therefor.[49]

H. Coin, Bank-Notes, and Money Generally. Gold coin,[50] bank-notes,[51] and money of any kind [52] may be converted. Money, however, is a

Chichester *v.* Hill, 15 Cox C. C. 258, 47 J. P. 324, 52 L. J. Q. B. 160, 48 L. T. Rep. N. S. 364, 31 Wkly. Rep. 245). And see Jarson *v.* Potruch, 62 Misc. (N. Y.) 459, 115 N. Y. Suppl. 111, holding that trover does not lie for checks deposited as security and afterward cashed unless defendant was under obligation to return the identical instruments.

39. *Maine.*— Otisfield *v.* Mayberry, 63 Me. 197, where the court said that in the hands of plaintiff it (the note) is evidence of payment; in the hands of a stranger it is *prima facie* evidence of indebtedness which would give plaintiff trouble and costs to defend against.

New Hampshire.— Stone *v.* Clough, 41 N. H. 290.

Pennsylvania.— Brunner *v.* Griffith, 4 Pa. Dist. 640.

Vermont.— Stewart *v.* Martin, 49 Vt. 266; Buck *v.* Kent, 3 Vt. 99, 21 Am. Dec. 576.

Canada.— Walsh *v.* Brown, 18 U. C. C. P. 60.

See 47 Cent. Dig. tit. "Trover and Conversion," § 6.

Contra.— Lowremore *v.* Berry, 19 Ala. 130, 54 Am. Dec. 183; Besherer *v.* Swisher, 3 N. J. L. 748.

40. Spencer *v.* Dearth, 43 Vt. 98 [*overruling* Pierce *v.* Gilson, 9 Vt. 216].

41. Platt *v.* Potts, 33 N. C. 266, 53 Am. Dec. 412.

42. Miller *v.* Lamery, 62 Vt. 116, 20 Atl. 199; Hollehan *v.* Roughan, 62 Wis. 64, 22 N. W. 163; Wills *v.* Wells, 2 Moore C. P. 247, 8 Taunt. 264, 4 E. C. L. 139.

Illegality of consideration.— Trover will not lie for a note given for an illegal consideration. Morrill *v.* Goodenow, 65 Me. 178.

If a void note be given in exchange for personal property, an action for the conversion of the property will lie, although the person giving the note acted in good faith and without knowledge of its true character. Loeschigh *v.* Blun, 1 Daly (N. Y.) 49.

43. Weiser *v.* Zeisinger, 2 Yeates (Pa.) 537; Esdale *v.* Oxenham, 3 B. & C. 225, 5 D. & R. 49, 27 Rev. Rep. 331, 10 E. C. L. 110, 107 Eng. Reprint 717; Hooper *v.* Ramsbottom, 1 Marsh. 414, 6 Taunt. 12, 1 E. C. L. 485; Anderson *v.* Hamilton, 4 U. C. Q. B. 372; Burr *v.* Munro, 6 U. C. Q. B. O. S. 57.

Dispute as to delivery.— Trover cannot be maintained for the conversion of a deed where a dispute as to its delivery involves a determination of title to land. Hooker *v.* Latham, 118 N. C. 179, 23 S. E. 1004.

44. Hazewell *v.* Coursen, 45 N. Y. Super. Ct. 22 [*reversed* on other grounds in 81 N. Y. 630].

45. Roberts *v.* Wyatt, 2 Taunt. 268, 11 Rev. Rep. 566.

46. Parry *v.* Frame, 2 B. & P. 451, 5 Rev. Rep. 651; Smith *v.* Young, 1 Campb. 439; Hall *v.* Ball, 10 L. J. C. P. 285, 3 M. & G. 242, 3 Scott N. R. 577, 42 E. C. L. 133.

47. Keeler *v.* Fassett, 21 Vt. 539, 52 Am. Dec. 71; Jones *v.* Winckworth, Hardres 111.

Limitations of rule.— This rule applies to the record, strictly so called, which is made and preserved by public authority, and not to such papers as have relation to the record but are not a parcel of it. Therefore trover may be brought for the conversion of an execution, although the execution may have expired previously to the commencement of the action. Keeler *v.* Fassett, 21 Vt. 539, 52 Am. Dec. 71. But in Little *v.* Gibbs, 4 N. J. L. 244, a constable was not permitted to recover for the conversion of an execution which had been satisfied.

48. Platt *v.* Potts, 33 N. C. 266, 53 Am. Dec. 412; Cobb *v.* Cornegay, 28 N. C. 358, 45 Am. Dec. 497 [*overruling* Hudspeth *v.* Wilson, 13 N. C. 372, 21 Am. Dec. 344].

49. Fullam *v.* Cummings, 16 Vt. 697.

50. Cullen *v.* O'Hara, 4 Mich. 132; McNaughton *v.* Cameron, 44 Barb. (N. Y.) 406; Jackson *v.* Anderson, 4 Taunt. 24. See also Chapman *v.* Cole, 12 Gray (Mass.) 141, 71 Am. Dec. 739.

51. Grand Trunk R. Co. *v.* Edwards, 56 Barb. (N. Y.) 408; Abrahams *v.* Southwestern R. Bank, 1 S. C. 441, 7 Am. Rep. 33; Burn *v.* Morris, 2 Cromp. & M. 579, 3 L. J. Exch. 193, 4 Tyrw. 485; Anonymous, 1 Salk. 126, 91 Eng. Reprint 118.

52. *Connecticut.*— Dunham *v.* Cox, 81 Conn. 268, 70 Atl. 1033.

Illinois.— Hinckley *v.* Lewis, 45 Ill. 327.

Maine.— Hazelton *v.* Locke, 104 Me. 164, 71 Atl. 661, 20 L. R. A. N. S. 35.

Massachusetts.— Morrin *v.* Manning, 205 Mass. 205, 91 N. E. 308.

subject of conversion only when it can be described or identified as a specific chattel.[53]

I. Buildings and Building Materials. All kinds of buildings which are personal property [54] are subject to conversion, and the owner or possessor of the land who wrongfully prevents their removal may be compelled to respond in trover for their value.[55] Trover will likewise lie for the material out of which a house was built, if the house was subject to conversion at the time it was wrecked.[56]

J. Fixtures. Trover will not lie for fixtures so long as they are attached

Nebraska.— Murphey *v.* Virgin, 47 Nebr. 692, 66 N. W. 652.

New York.— Gordon *v.* Hostetter, 37 N. Y. 99, 4 Transcr. App. 375, 4 Abb. Pr. N. S. 263.

Vermont.— Lamb *v.* Clark, 30 Vt. 347.

Wisconsin.— Meyer *v.* Doherty, 133 Wis. 398, 113 N. W. 671, 126 Am. St. Rep. 969, 13 L. R. A. N. S. 247.

But see Ansley *v.* Anderson, 35 Ga. 8, where it was held that a deposit of confederate notes in one's account at a bank, and checking on the account in the transactions for one's daily business, was not a conversion of the notes, the person entitled thereto having been notified that the notes were subject to his order.

Stolen money.— The English courts permit a recovery in trover against one who, without exercising due care, receives stolen money. Easley *v.* Crockford, 10 Bing. 243, 3 L. J. C. P. 22, 25 E. C. L. 119; Snow *v.* Peacock, 3 Bing. 406, 11 E. C. L. 201; Miller *v.* Race, 1 Burr. 452, 97 Eng. Reprint 398; Snow *v.* Leatham, 2 C. & P. 314, 12 E. C. L. 591. And trover will lie for the proceeds of a stolen bank-note in the hands of a third person, after conviction of the thief. Golightly *v.* Reynolds, Lofft 88, 98 Eng. Reprint 547.

An obligation to pay money cannot be enforced by an action for conversion, and trover therefore will not lie for a sum agreed upon in a settlement where it does not appear that there ever was any specific sum of money, in bills, coin, or other currency which plaintiff was able to identify as the particular fund set aside in the settlement. Cooke *v.* Bryant, 103 Ga. 727, 30 S. E. 435.

53. *Alabama.*— Hunnicutt *v.* Higginbotham, 138 Ala. 472, 35 So. 469, 100 Am. St. Rep. 45; Moody *v.* Keener, 7 Port. 218.

Colorado.— Benson *v.* Eli, 16 Colo. App. 494, 66 Pac. 450.

Illinois.— Kerwin *v.* Bulhabchett, 147 Ill. App. 561.

Indiana.— Coffin *v.* Anderson, 4 Blackf. 395.

Maine.— Hazelton *v.* Locke, 104 Me. 164, 71 Atl. 661, 20 L. R. A. N. S. 35.

New Jersey.— Little *v.* Gibbs, 4 N. J. L. 244.

New York.— Money need not be specifically ear-marked. Gordon *v.* Hostetter, 37 N. Y. 99, 4 Transcr. App. 375, 4 Abb. Pr. N. S. 263; Kelsey *v.* Mansfield Bank, 85 N. Y. App. Div. 334, 83 N. Y. Suppl. 281.

Oregon.— See Salem Tract. Co. *v.* Anson, 41 Oreg. 562, 67 Pac. 1015, 69 Pac. 675.

Rhode Island.— Larson *v.* Dawson, 24 R. I. 317, 53 Atl. 93, 96 Am. St. Rep. 716; Royce *v.* Oakes, 20 R. I. 252, 38 Atl. 371.

England.— Orton *v.* Butler, 5 B. & Ald. 652, 7 E. C. L. 356, 106 Eng. Reprint 1329, 2 Chitty 343, 18 E. C. L. 668; Draycot *v.* Piot, Cro. Eliz. 818, 78 Eng. Reprint 1045.

Canada.—Walsh *v.* Brown, 18 U. C. C. P. 60.

See 47 Cent. Dig. tit. "Trover and Conversion," § 9.

One who converts to his own use a sum of money which was intrusted to him for a certain purpose is liable in trover therefor. Bunger *v.* Roddy, 70 Ind. 26.

Stock dividend.— Trover lies against one who, without any authority, has drawn and converted a stock dividend to his own use. Cook *v.* Monroe, 45 Nebr. 349, 63 N. W. 800.

54. See, generally, FIXTURES, 19 Cyc. 1033; PROPERTY, 32 Cyc. 639.

55. *Maine.*—Adams *v.* Goddard, 48 Me. 212; Pullen *v.* Bell, 40 Me. 314; Fuller *v.* Tabor, 39 Me. 519; Hilborne *v.* Brown, 12 Me. 162; Russell *v.* Richards, 11 Me. 371, 26 Am. Dec. 532, 10 Me. 429, 25 Am. Dec. 254; Osgood *v.* Howard, 6 Me. 452, 20 Am. Dec. 322.

Massachusetts.— Korbe *v.* Barbour, 130 Mass. 255; Hinckley *v.* Baxter, 13 Allen 139.

Michigan.— Osborn *v.* Potter, 101 Mich. 300, 59 N. W. 606.

New Hampshire.— Dame *v.* Dame, 38 N. H. 429, 75 Am. Dec. 195.

New York.— Smith *v.* Benson, 1 Hill 176.

Oregon.—Wheeler *v.* McFerron, 33 Oreg. 22, 52 Pac. 993.

See 47 Cent. Dig. tit. "Trover and Conversion," § 13.

Refusal by a reversioner to permit a lifetenant to remove a barn which stood on posts is a conversion. Wansbrough *v.* Maton, 4 A. & E. 884, 2 Harr. & W. 37, 5 L. J. K. B. 150, 6 N. & M. 367, 31 E. C. L. 386, 111 Eng. Reprint 1016. So an owner who has contracted to sell certain land may expose himself to an action in trover by a conveyance which carries the house as part of the realty. Dolliver *v.* Ela, 128 Mass. 557. But one who has built a house on land which he had previously contracted to purchase, and rented the house, cannot treat the house as personalty and maintain trover against a third party for conversion thereof. Bracelin *v.* McLaren, 59 Mich. 327, 26 N. W. 533.

56. Powers *v.* Harris, 68 Ala. 409, 57 Ala. 139. But see Peirce *v.* Goddard, 22 Pick. 559, 33 Am. Dec. 764.

to the freehold,[57] unless they were attached under an agreement that they should remain the personal property of plaintiff either permanently or until some contingent event which has not yet happened.[58] The law is clear, however, that severance and asportation of a fixture is a conversion,[59] even though the article be reattached to another freehold.[60]

K. Earth, Sand, and Gravel. Sand and gravel, while remaining in its original bed, is a part of the realty, and cannot be a subject of conversion,[61] but may be after separation or removal from such bed.[62]

L. Crops, Timber, and Sap Extracted From Trees. The value of standing timber [63] and growing crops,[64] including fruit [65] which has been cut and removed unlawfully from plaintiff's premises may be recovered in an action for conversion

57. *Alabama.*— Thweat *v.* Stamps, 67 Ala. 96.

Connecticut.—Woodruff, etc., Iron Works *v.* Adams, 37 Conn. 233.

Illinois.— Dewitz *v.* Shoeneman, 82 Ill. App. 378; Leman *v.* Best, 30 Ill. App. 323; Donnelly *v.* Thieben, 9 Ill. App. 495.

Maine.— Stockwell *v.* Marks, 17 Me. 455, 35 Am. Dec. 266.

Massachusetts.— Bliss *v.* Whitney, 9 Allen 114, 85 Am. Dec. 745.

Nevada.— Prescott *v.* Wells, 3 Nev. 82.

New Hampshire.— Burnside *v.* Twitchell, 43 N. H. 390.

Pennsylvania.— Darrah *v.* Baird, 101 Pa. St. 265; Overton *v.* Williston, 31 Pa. St. 155.

Vermont.— Straw *v.* Straw, 70 Vt. 240, 39 Atl. 1095.

England.— Colegrave *v.* Dias Santos, 2 B. & C. 76, 3 D. & R. 255, 1 L. J. K. B. O. S. 239, 9 E. C. L. 42, 107 Eng. Reprint 311; Wilde *v.* Waters, 16 C. B. 637, 1 Jur. N. S. 1021, 24 L. J. C. P. 193, 3 Wkly. Rep. 570, 81 E. C. L. 637; Sheen *v.* Rickie, 7 Dowl. P. C. 335, 3 Jur. 607, 8 L. J. Exch. 217, 5 M. & W. 175; Minshall *v.* Lloyd, 6 L. J. Exch. 115, 2 M. & W. 450.

Canada.— Oates *v.* Cameron, 7 U. C. Q. B. 228.

See 47 Cent. Dig. tit. "Trover and Conversion," § 14; and FIXTURES, 19 Cyc. 1074.

A lessee cannot, even during his term, maintain trover for fixtures attached to the freehold. McKintosh *v.* Trotter, 7 L. J. Exch. 65, 3 M. & W. 184.

58. Walker *v.* Schindel, 58 Md. 360; Ingersoll *v.* Barnes, 47 Mich. 104, 10 N. W. 127; Crippen *v.* Morrison, 13 Mich. 23. See also FIXTURES, 19 Cyc. 1074.

59. Whidden *v.* Seelye, 40 Me. 247, 63 Am. Dec. 661; Morgan *v.* Negley, 3 Pittsb. (Pa.) 33. See also FIXTURES, 19 Cyc. 1074.

The refusal of a rightful demand for permission to sever and carry a fixture away is a conversion. Thweat *v.* Stamps, 67 Ala. 96; Farrar *v.* Chauffetete, 5 Den. (N. Y.) 527; Straw *v.* Straw, 70 Vt. 240, 39 Atl. 1095. See also FIXTURES, 19 Cyc. 1074.

60. Woods *v.* McCall, 67 Ga. 506. See also FIXTURES, 19 Cyc. 1074.

61. Glencoe Land, etc., Co. *v.* Hudson Bros. Commission Co., 138 Mo. 439, 40 S. W. 93, 60 Am. St. Rep. 560, 36 L. R. A. 804; Mather *v.* Trinity Church, 3 Serg. & R. (Pa.) 509, 8 Am. Dec. 663.

Conversion of ore see MINES AND MINERALS, 27 Cyc. 649.

62. Nashville, etc., R. Co. *v.* Karthaus, 150 Ala. 633, 43 So. 791; Riley *v.* Boston Water Power Co., 11 Cush. (Mass.) 11; Graham *v.* Purcell, 126 N. Y. App. Div. 407, 110 N. Y. Suppl. 813; Radway *v.* Duffy, 79 N. Y. App. Div. 116, 80 N. Y. Suppl. 334; Mather *v.* Trinity Church, 3 Serg. & R. (Pa.) 509, 8 Am. Dec. 663.

Sand and gravel taken from a gravel and clay pit, and necessary in the construction and repair of roads, includes stones two feet in diameter, if they are suitable for the purpose. Hatch *v.* Hawkes, 126 Mass. 177.

63. Sampson *v.* Hammond, 4 Cal. 184; Sanderson *v.* Haverstick, 8 Pa. St. 294; Eardley *v.* Granville, 3 Ch. D. 826, 45 L. J. Ch. 669, 34 L. T. Rep. N. S. 609, 24 Wkly. Rep. 528; Fleming *v.* Simpson, 6 L. J. K. B. O. S. 207, 2 M. & R. 169; Hedley *v.* Scissons, 33 U. C. Q. B. 215. See also LOGGING, 25 Cyc. 1600. But see Bynum *v.* Gay, 161 Ala. 140, 49 So. 757, 135 Am. St. Rep. 121, holding that trover will not lie if timber from the trees has been used in defendant's building before defendant had knowledge that it came from plaintiff's land.

64. *Indiana.*— Dale *v.* Jones, 15 Ind. App. 420, 44 N. E. 316.

Massachusetts.— Nelson *v.* Burt, 15 Mass. 204.

Minnesota.— Mueller *v.* Olson, 90 Minn. 416, 97 N. W. 115; Ambuehl *v.* Matthews, 41 Minn. 537, 43 N. W. 477; Whitney *v.* Huntington, 37 Minn. 197, 33 N. W. 561; Hinman *v.* Heyderstadt, 32 Minn. 250, 20 N. W. 155.

Missouri.— Davis *v.* Barnes, 3 Mo. 137; Leidy *v.* Carson, 115 Mo. App. 1, 90 S. W. 754.

Pennsylvania.— Backenstoss *v.* Stahler, 33 Pa. St. 251, 75 Am. Dec. 592; Stafford *v.* Ames, 9 Pa. St. 343; McKay *v.* Pearson, 6 Pa. Super. Ct. 529.

Rhode Island.— Donahue *v.* Shippee, 15 R. I. 453, 8 Atl. 541, holding that cutting grass without taking it away is a conversion.

See 47 Cent. Dig. tit. "Trover and Conversion," § 17.

Contra.— Platner *v.* Johnson, 26 Miss. 142.

Including crops removed from land held adversely.— Pacific Live Stock Co. *v.* Isaacs, 52 Oreg. 54, 96 Pac. 460.

65. Taylor *v.* Nugent, 6 U. C. Q. B. O. S. 549.

Turpentine collected in cavities made in the trees which supply it is personal property for which trover may be maintained.[66]

M. Animals.[67] Trover is maintainable for wild animals which have strayed away without gaining their natural liberty,[68] for dogs wrongfully retained,[69] and for domestic animals unlawfully impounded or seized on execution.[70]

N. Manure. Manure, although lying on the ground, if not incorporated with the soil is property for the conversion of which trover is a proper remedy.[71]

O. Repairs Added to a Chattel. Ordinarily materials used in the repair of a chattel become a part of it and are therefore incapable of conversion, but the rule is otherwise when repairs are made under a stipulation that title to the parts added to the chattel shall not pass until they are paid for.[72]

P. Mail Matter. A wrongful detention of mail matter by a postmaster will subject him to an action for conversion.[73]

Q. Property of no Value. Trover cannot be maintained for any kind of personal property, unless it be shown that it was of some value.[74]

III. Acts Constituting Conversion and Liability Therefor.

A. Destruction of or Injury to Property — 1. In General. It may be stated as a general rule that the tortious destruction of goods or personalty,[75] or the serious maltreatment of a chattel[76] is a conversion. But destruction or loss of property will not be regarded as tortious when it was necessary for the protection either of defendant or his property,[77] or when it resulted from accident,[78] negligence,[79]

66. Branch *v.* Morrison, 50 N. C. 16, 69 Am. Dec. 770.

67. Departure from terms of bailment as conversion of animal see Animals, 2 Cyc. 312.

Use of animal by agistor as conversion see Animals, 2 Cyc. 322.

68. Amory *v.* Flyn, 10 Johns. (N. Y.) 102, 6 Am. Dec. 316; Grymes *v.* Shack, Cro. Jac. 262, 79 Eng. Reprint 226. See, generally, Animals, 2 Cyc. 306.

69. Cummings *v.* Perham, 1 Metc. (Mass.) 555; Binstead *v.* Buck, W. Bl. 1117, 96 Eng. Reprint 660. See, generally, Animals, 2 Cyc. 305.

70. Norton *v.* Rockey, 46 Mich. 460, 9 N. W. 492; Drew *v.* Spaulding, 45 N. H. 472; Pardee *v.* Glass, 11 Ont. 275. See also Animals, 2 Cyc. 450.

71. Pinkham *v.* Gear, 3 N. H. 484; French *v.* Freeman, 43 Vt. 93; Stone *v.* Proctor, 2 D. Chipm. (Vt.) 108. See, generally, Property, 32 Cyc. 672.

72. Clark *v.* Wells, 45 Vt. 4, 12 Am. Rep. 187.

73. Teall *v.* Felton, 1 N. Y. 537, 49 Am. Dec. 352 [*affirmed* in 12 How. (U. S.) 284, 13 L. ed. 990]. See also Post-Office, 31 Cyc. 979.

74. *Iowa.*— Edwards *v.* American Express Co., 121 Iowa 744, 96 N. W. 740, 63 L. R. A. 467.

Maine.— Barnes *v.* Taylor, 31 Me. 329.

New York.— Donohue *v.* Henry, 4 E. D. Smith 162; Rosen *v.* Voorhis, 45 Misc. 605, 91 N. Y. Suppl. 126.

South Carolina.— Miller *v.* Reigne, 2 Hill 592.

England.— Mathew *v.* Sherwell, 2 Taunt. 439.

See 47 Cent. Dig. tit. "Trover and Conversion," § 20.

75. *Alabama.*— Barrett *v.* Mobile, 129 Ala. 179, 30 So. 36, 87 Am. St. Rep. 54.

Colorado.—Atchison, etc., R. Co. *v.* Tanner, 19 Colo. 559, 36 Pac. 541.

Kentucky.— Duff *v.* Bailey, 96 S. W. 577, 29 Ky. L. Rep. 919.

Massachusetts.— Nelson *v.* Nelson, 6 Gray 385.

North Carolina.— Simmons *v.* Sikes, 24 N. C. 98.

Wisconsin.—Aschermann *v.* Philip Best Brewing Co., 45 Wis. 262.

England.— Standring *v.* Grundy, 6 L. J. Exch. 181.

See 47 Cent. Dig. tit. "Trover and Conversion," § 99.

Consequences of act.—Whenever loss or destruction of property by a third person is the natural consequence of defendant's act, he will be liable in trover to the owner thereof. Hicks *v.* Lyle, 46 Mich. 488, 9 N. W. 529. But defendant's act must be unauthorized, otherwise no liability will attach to him. Turnbull *v.* Widner, 103 Mich. 509, 61 N. W. 784; Scarborough *v.* Webb, 59 Miss. 449. Defendant wrongfully separated a number of rails from their sleeper and converted the rails. An unknown person carried away the sleepers. Defendant was held liable for conversion of the sleepers, for their abstraction was a natural consequence of the separation. Harley *v.* Waihi Gold Min. Co., 21 N. Zealand L. Rep. 79.

76. Wentworth *v.* McDuffie, 48 N. H. 402.

77. Harrington *v.* Edwards, 17 Wis. 586, 86 Am. Dec. 768; McKeesport Sawmill Co. *v.* Pennsylvania Co., 122 Fed. 184.

78. Salt Springs Nat. Bank *v.* Wheeler, 48 N. Y. 492, 8 Am. Rep. 564; Meise *v.* Wachtel, 54 Misc. (N. Y.) 549, 104 N. Y. Suppl. 915.

79. Central R., etc., Co. *v.* Lampley, 76

or omission to act.[80] Similarly, it is held, that destruction or loss occasioned by act of public authorities will not support an action of trover.[81]

2. Crops Destroyed by Live Stock. The value of crops eaten or destroyed by live stock cannot be recovered in trover, even though defendant knew that his stock were habituated to such depredations.[82]

3. Cancellation of Board of Trade Certificate. Canceling a certificate of membership in a board of trade is a conversion of such certificate.[83]

4. Cutting Wires. The cutting and carrying away of electric wires without first offering the owner a reasonable opportunity for reclaiming them is a conversion.[84]

B. Assertion of Ownership or Control of Property — 1. In General. Verbal assertions of ownership or right of possession do not amount to a conversion,[85] unless they are uttered in proximity to the property, in a manner indicating a determination to control it, and coupled with an apparent ability to do so.[86] And an asportation of goods is not in itself a sufficient assertion of ownership to constitute a conversion,[87] unless prompted by an intent to deprive the owner either of his property or possession.[88] Nor is an interference with a chattel under circumstances which show the owner's right to be unquestioned, although such interference be accompanied by consequences injurious to him.[89]

2. Possession by Defendant. A defendant cannot be charged with a conversion of goods unless he had an actual or constructive possession of them at the

Ala. 357, 52 Am. Rep. 334; Dearbourn *v.* Union Nat. Bank, 58 Me. 273; Tinker *v.* Morrill, 39 Vt. 477, 94 Am. Dec. 345; Spokane Grain Co. *v.* Great Northern Express Co., 55 Wash. 545, 104 Pac. 794.

80. Lexington, etc., R. Co. *v.* Kidd, 7 Dana (Ky.) 245; Kearney *v.* Clutton, 101 Mich. 106, 59 N. W. 419, 45 Am. St. Rep. 394.

81. Traylor *v.* Hughes, 88 Ala. 617, 7 So. 159; Weakley *v.* Pearce, 5 Heisk. (Tenn.) 401.

82. Smith *v.* Archer, 53 Ill. 241. See, generally, Animals, 2 Cyc. 367.

83. Olds *v.* Chicago Open Bd. of Trade, 33 Ill. App. 445. See, generally, Exchanges, 17 Cyc. 848.

84. Electric Power Co. *v.* New York, 36 N. Y. App. Div. 383, 55 N. Y. Suppl. 460; Electric Power Co. *v.* Metropolitan Tel., etc., Co., 75 Hun (N. Y.) 68, 27 N. Y. Suppl. 93 [*affirmed* in 148 N. Y. 746, 43 N. E. 986].

85. Radigan *v.* Johnson, 176 Mass. 433, 57 N. E. 691; Bishop *v.* Hendrick, 82 Hun (N. Y.) 323, 31 N. Y. Suppl. 502 [*affirmed* in 146 N. Y. 398, 42 N. E. 542]; Andrews *v.* Shattuck, 32 Barb. (N. Y.) 396; Irish *v.* Cloyes, 8 Vt. 30, 30 Am. Dec. 446; Amadon *v.* Myers, 6 Vt. 308.

The common forms of this class of conversions are a sale or an attempted sale of the property (see *infra*, III, E, 3), a tortious pledge of securities intrusted to one for sale (New Orleans Draining Co. *v.* De Lizardi, 2 La. Ann. 281), using and treating chattels as if they were one's own (Clark *v.* Whitaker, 19 Conn. 319, 48 Am. Dec. 160; Hoffman *v.* Wilson, 130 Fed. 694, 65 C. C. A. 14 [*reversing* 123 Fed. 984]), and wrongfully entering another's premises and taking property left thereon for a third person (Boutwell *v.* Harriman, 58 Vt. 516, 2 Atl. 159).

The continuation of a business at the same place, but under a different name, by a mortgagee who bought the machinery, wagons, and signs thereof at foreclosure sale is not a conversion of the good-will of said business. Millspaugh Laundry *v.* Sioux City First Nat. Bank, 120 Iowa 1, 94 N. W. 262. And trover will not lie against a corporation for blocks delivered to the lessee of its shingle mill, although it was so run by him as to cause people doing business with him to believe that the mill was being operated by said corporation. Fox *v.* Burlington Mfg. Co., 7 Wash. 391, 35 Pac. 126.

86. Gillet *v.* Roberts, 57 N. Y. 28.

87. State *v.* Staed, 72 Mo. App. 581; Niemetz *v.* St. Louis Agricultural, etc., Assoc., 5 Mo. App. 59; O. J. Gude Co. *v.* Farley, 25 Misc. (N. Y.) 502, 54 N. Y. Suppl. 998; Houghton *v.* Butler, 4 T. R. 364, 2 Rev. Rep. 411, 100 Eng. Reprint 1066.

As to necessity of asportation see *supra*, I, B, 1.

88. Strickland *v.* Barrett, 20 Pick. (Mass.) 415; Sparks *v.* Purdy, 11 Mo. 219; Foulds *v.* Willoughby, 1 Dowl. P. C. N. S. 86, 5 Jur. 534, 10 L. J. Exch. 364, 8 M. & W. 540.

89. *Connecticut.*— Berman *v.* Kling, 81 Conn. 403, 71 Atl. 507.

Minnesota.— Port Huron Engine, etc., Co. *v.* Otto Gas Engine Works, 89 Minn. 393, 94 N. W. 1088.

New York.— Osborn *v.* Schenck, 18 Hun 202 [*affirmed* in 83 N. Y. 201].

North Carolina.— Glover *v.* Riddick, 33 N. C. 582.

South Carolina.— Nelson *v.* Whetmore, 1 Rich. 318.

Wisconsin.— Verona School Dist. *v.* Zink, 25 Wis. 636.

England.— Thimblethorp's Case [*cited* in Bristol *v.* Burt, 7 Johns. (N. Y.) 254; Isaack *v.* Clark, 2 Bulstr. 306, 310, 80 Eng. Reprint 1143].

See 47 Cent. Dig. tit. "Trover and Conversion," § 25.

time of the conversion alleged,[90] notwithstanding he may have forcibly interposed obstacles in order to prevent the owner from obtaining the possession sought.[91]

3. Pretense of Title. An unfounded assertion of ownership or title to a chattel, made by one who is in possession thereof, is an actionable conversion.[92]

4. Forbidding Sale of Property Seized Under Process. Merely forbidding an officer to sell property on execution against another person is not a conversion.[93]

5. Conversion of Part as Conversion of Whole. Conversion of a part amounts to conversion of the whole of a chattel when the circumstances evince a purpose to control or dispose of the whole of it,[94] or whenever the remaining part is thereby impaired in value or utility.[95]

6. Unauthorized Collection of Money. Receiving payment under a claim of right upon a security which belongs to another but which is in the wrong-doer's possession is an assertion of ownership which constitutes actionable conversion.[96]

7. Receiving Proceeds of Wrongful Sale. A receipt of the proceeds, or a part thereof, of goods which have been wrongfully converted by a third person is not a conversion,[97] unless defendant participated in the wrongful act,[98] or took

90. *Georgia.*— Merchants', etc., Bank *v.* Seaboard Air-Line R. Co., 130 Ga. 224, 60 S. E. 571.

Illinois.— Forth *v.* Pursley, 82 Ill. 152; Presley *v.* Powers, 82 Ill. 125.

Indiana.— Traylor *v.* Horrall, 4 Blackf. 317.

Kentucky.— Hall *v.* Amos, 5 T. B. Mon. 89, 17 Am. Dec. 42.

Maine.— Fernald *v.* Chase, 37 Me. 289.

Michigan.— Heighes *v.* Dollarville Lumber Co., 113 Mich. 518, 71 N. W. 870.

Minnesota.— Bennett *v.* Gillette, 3 Minn. 423, 74 Am. Dec. 774.

New York.— O'Dwyer *v.* Verdon, 115 N. Y. App. Div. 37, 100 N. Y. Suppl. 588 [*affirmed* in 190 N. Y. 505, 83 N. E. 1128]; Huntington *v.* Herrman, 111 N. Y. App. Div. 875, 98 N. Y. Suppl. 48 [*affirmed* in 188 N. Y. 622, 81 N. E. 1166]; Cushman *v.* Oothout, 88 Hun 54, 34 N. Y. Suppl. 516; Peck *v.* Knox, 1 Sweeny 311; Wilson *v.* Cummings, 4 Misc. 429, 24 N. Y. Suppl. 115.

Pennsylvania.— Tufts *v.* Park, 194 Pa. St. 79, 44 Atl. 1079.

Texas.— Dozier *v.* Pillot, 79 Tex. 224, 14 S. W. 1027.

Wisconsin.— Williams *v.* Fethers, 115 Wis. 314, 91 N. W. 676.

Canada.— Smalley *v.* Gallagher, 26 U. C. C. P. 531.

See 47 Cent. Dig. tit. "Trover and Conversion," § 26.

Neither the taking of a chattel mortgage nor the foreclosure thereof is a conversion if the possession of the property is not interfered with by either the mortgagee or the purchaser. Burnside *v.* Twitchell, 43 N. H. 390; Thorp *v.* Robbins, 68 Vt. 53, 33 Atl. 896.

A continuance of possession by defendant until the beginning of an action against him is not necessary. Chambless *v.* Livingston, 123 Ga. 257, 51 S. E. 314; Wilkin *v.* Boykin, 56 Ga. 45; Easley *v.* Easley, 18 B. Mon. (Ky.) 86; Stalker *v.* Wier, 2 Nova Scotia 248. *Contra*, Hathaway *v.* Quimby, 1 Thomps. & C. (N. Y.) 386.

91. Boobier *v.* Boobier, 39 Me. 406.

92. Hartford Ice Co. *v.* Greenwoods Co., 61 Conn. 166, 23 Atl. 91, 29 Am. St. Rep. 189; Adams *v.* Mizell, 11 Ga. 106; Oakley *v.* Randolph, 54 Kan. 779, 39 Pac. 699; Meixell *v.* Kirkpatrick, 33 Kan. 282, 6 Pac. 241; Dowd *v.* Wadsworth, 13 N. C. 130, 18 Am. Dec. 567.

But an assertion by a plaintiff, in an action to recover on a note, that he has a title to the property that was pledged as security for the debt and which he purchased at a conceded illegal sale does not show a conversion of such property, there being no showing of injury to defendant by this assertion. Winchester *v.* Joslyn, 31 Colo. 220, 72 Pac. 1079, 102 Am. St. Rep. 30.

93. Lowry *v.* Walker, 4 Vt. 76.

94. Gentry *v.* Madden, 3 Ark. 127; Thompson *v.* Moesta, 27 Mich. 182; Brown *v.* Ela, 67 N. H. 110, 30 Atl. 412; Corotinsky *v.* Cooper, 26 Misc. (N. Y.) 138, 55 N. Y. Suppl. 970.

The acceptance from his agent by defendant of the proceeds of a sale of part of an entire stock of goods, conveyed to him fraudulently as to said agent's creditors, was held not to be a conversion of the unsold portion thereof. Davis *v.* Winona Wagon Co., 120 Cal. 244, 52 Pac. 487.

95. Bowen *v.* Fenner, 40 Barb. (N. Y.) 383.

96. Donnell *v.* Thompson, 13 Ala. 440; Schroeppel *v.* Corning, 5 Den. (N. Y.) 236.

97. Leuthold *v.* Fairchild, 35 Minn. 99, 27 N. W. 503, 28 N. W. 218; Walker *v.* Athena First Nat. Bank, 43 Oreg. 102, 72 Pac. 635; Blalock *v.* Joseph Bowling Co., (Tex. Civ. App. 1898) 44 S. W. 305; Pierce *v.* O'Keefe, 11 Wis. 180.

98. Polley *v.* Lenox Iron Works, 2 Allen (Mass.) 182 (in which it was held that one who, knowing that property is under an attachment, suffers it to be sent away and sold by the owner, and receives the avails arising from the sale in pursuance of a previous arrangement to that effect, is not thereby guilty of a conversion, the reason of the decision being that defendant neither took nor sold the property); Stevens *v.* Pen-

such proceeds in accordance with a prior agreement which related to the act of conversion as well as to the sharing in the proceeds.[99]

8. Attachment of Property Not Owned by Debtor. An attachment of property not owned by defendant in the attachment suit is a conversion.[1]

9. Sale of Realty Containing Personalty. A conveyance of premises is not a conversion of chattels thereon belonging to the tenant or to a third person not in possession.[2]

10. Transfer of Warehouse Receipt as Conversion of Stored Property. A consignee who duly transfers an elevator receipt is guilty of a conversion of the grain represented thereby, as against the holder of a draft with the bill of lading attached.[3]

11. Duress Compelling Owner to Dispose of Property. It is a conversion to obtain chattel property by duress,[4] if the duress be of such character that it would avoid a contract or sustain trespass *de bonis asportatis*.[5]

12. Mixing Goods With Those of Another. If chattels of unequal value, belonging to different owners, be fraudulently mixed by one of the owners so that neither chattel is distinguishable, the other owner may maintain trover for the entire mixture, even against a *bona fide* purchaser.[6]

C. Taking of Property — 1. In General. An unauthorized taking of goods out of the possession of the owner with intent to appropriate them to the taker's use is a conversion;[7] but there is no conversion for which trover will lie

nock, 30 U. C. Q. B. 51; Scott *v.* Kelly, 17 U. C. Q. B. 306.

99. Johnson *v.* Powers, 40 Vt. 611.

1. Molm *v.* Barton, 27 Minn. 530, 8 N. W. 765; Davidson *v.* Oberthier, 42 Tex. Civ. App. 337, 93 S. W. 478. See also Attachment, 4 Cyc. 735; and *infra*, III, B, 8.

A disclaimer of interest in property wrongfully attached is of no avail if actual conversion had previously taken place. Bailey *v.* Adams, 14 Wend. (N. Y.) 201.

2. Davis *v.* Buffum, 51 Me. 160; Walsh *v.* Sichler, 20 Mo. App. 374; Huntington *v.* Herrman, 111 N. Y. App. Div. 875, 98 N. Y. Suppl. 48 [*affirmed* in 188 N. Y. 622, 81 N. E. 1166]; Crawford *v.* Hartzell, 7 Ohio Dec. (Reprint) 63, 1 Cinc. L. Bul. 94.

If timber was a part of the realty when conveyed, its conveyance could not be a conversion thereof. Berry *v.* Hindman, (Tex. Civ. App. 1910) 129 S. W. 1181.

3. Hamlin *v.* Carruthers, 19 Mo. App. 567.

4. Murphy *v.* Hobbs, 8 Colo. 17, 5 Pac. 637; Stewart *v.* Byrne, 6 U. C. Q. B. O. S. 146.

5. Powell *v.* Hoyland, 6 Exch. 67, 20 L. J. Exch. 82.

6. Hesseltine *v.* Stockwell, 30 Me. 237, 50 Am. Dec. 627; Brush *v.* Batten, 15 N. Y. St. 548. See, generally, Confusion of Goods, 8 Cyc. 570.

7. *Alabama.*— Marlowe *v.* Rogers, 102 Ala. 510, 14 So. 790.

Connecticut.— Clark *v.* Whitaker, 19 Conn. 319, 48 Am. Dec. 160.

Illinois.— Bartley *v.* Rogers, 104 Ill. App. 164.

Indiana.— Crystal Ice, etc., Co. *v.* Marion Gas Co., 35 Ind. App. 295, 74 N. E. 15, holding that trover lies for drawing natural gas from a pipe line without the owner's consent.

Kentucky.— Munford *v.* Taylor, 2 Metc. 599.

Massachusetts.— Noyes *v.* Stone, 163 Mass. 490, 40 N. E. 856; Bray *v.* Bates, 9 Metc. 237; Peters *v.* Ballistier, 3 Pick. 495; Kingman *v.* Pierce, 17 Mass. 247.

Michigan.— Carroll *v.* McCleary, 19 Mich. 93. See also Wilcox *v.* Morton, 132 Mich. 63, 92 N. W. 777.

Missouri.— Baker *v.* Kansas City, etc., R. Co., 52 Mo. App. 602.

Nebraska.— Johnson *v.* Walker, 23 Nebr. 736, 37 N. W. 639.

New York.— Lawatsch *v.* Cooney, 86 Hun 546, 33 N. Y. Suppl. 775; Cook *v.* Kelly, 9 Bosw. 358.

England.— Acraman *v.* Morrice, 8 C. B. 449, 14 Jur. 69, 19 L. J. C. P. 57, 65 E. C. L. 449; McCombie *v.* Davies, 6 East 538, 2 Smith K. B. 557, 8 Rev. Rep. 534, 102 Eng. Reprint 1393.

See 47 Cent. Dig. tit. "Trover and Conversion," § 38.

The borrowing of money which the borrower knows does not belong to the lender is a conversion for which both are liable. State *v.* Omaha Nat. Bank, 59 Nebr. 483, 81 N. W. 319; Kramer *v.* Wood, (Tenn. Ch. App. 1899) 52 S. W. 1113.

Taking property by fraud and undue influence from one mentally incompetent is a good cause of action in trover. Hagar *v.* Norton, 188 Mass. 47, 73 N. E. 1073.

The taking up of an estray and delivering it to a third person on the order of a county commissioner was held not to be a conversion. Johnson *v.* Barker, 1 Tex. App. Civ. Cas. § 283.

Plaintiff, a passenger, was prevented by defendant from taking her trunk with her into the boat in which she was landed. Defendant told her that her trunk must go in another boat, and she therefore had it put on such other boat, and it was lost. Defendant was held not liable in trover for the

where one takes what he is entitled to possess, even though he obtain it by force [8] or constructive trespass.[9]

2. Retaking of Goods by Seller. A vendor of goods sold and delivered on credit is liable in trover for their value if he retakes possession of them without due process of law or the buyer's assent.[10] It is also a conversion to retake goods the title of which passed on a condition which the vendee stands ready and willing to fulfil.[11]

3. Obtaining Property by Fraud or Misrepresentations. He who obtains the goods or money of another by false representations or fraudulent devices of any kind is liable in trover for their full value whether title of the same was vested in him or not.[12] If possession only and not title to the goods is obtained by the fraudulent vendee or assignee, a subvendee or second assignee, having received and converted the same, is liable to the owner thereof for conversion.[13]

4. Mingling of Flocks and Herds. The mingling of defendant's flock or herd

trunk and contents. Tolano *v.* National Steam Nav. Co., 5 Rob. (N. Y.) 318, 4 Abb. Pr. N. S. 316, 35 How. Pr. 496.

8. Conlan *v.* Latting, 3 E. D. Smith (N. Y.) 353; Longstaff *v.* Meagoe, 2 A. & E. 167, 4 L. J. K. B. 28, 4 N. & M. 211, 29 E. C. L. 94, 111 Eng. Reprint 65.

9. Connah *v.* Hale, 23 Wend. (N. Y.) 462.

10. Huelet *v.* Reyns, 1 Abb. Pr. N. S. (N. Y.) 27. See, generally, Sales, 35 Cyc. 1.

A vendor is not liable in trover for retaking possession of his goods when the contract of sale provides that he may do so on deeming himself insecure (McClelland *v.* Nichols, 24 Minn. 176), where he, having possession of the goods, which were sold conditionally, sells his interest therein to a third party to whom he stated that the buyer had forfeited his rights (Dunning *v.* Northup, 6 N. Y. St. 326), or where he has made a conditional sale, reserving title in himself until fully paid, and the buyer is in default (Owens *v.* Weedman, 82 Ill. 409; Fitch *v.* Beach, 15 Wend. (N. Y.) 221). But trover lies where a vendor of goods sold conditionally retakes and sells them at private sale if the statute requires a public sale in such case. Smith *v.* Wood, 63 Vt. 534, 22 Atl. 575; Roberts *v.* Hunt, 61 Vt. 612, 17 Atl. 1006. And see, generally, Sales, 35 Cyc. 1.

11. Washburn *v.* Cordis, 1 Misc. (N. Y.) 427, 21 N. Y. Suppl. 422. See, generally, Sales, 35 Cyc. 1.

12. *Connecticut.*— Lovell *v.* Hammond Co., 66 Conn. 500, 34 Atl. 511.

Maryland.— Thomson *v.* Gortner, 73 Md. 474, 21 Atl. 371.

Massachusetts.— Devlin *v.* Houghton, 202 Mass. 75, 88 N. E. 580.

Michigan.— Heineman *v.* Steiger, 54 Mich. 232, 19 N. W. 965.

Minnesota.— Norman *v.* Eckern, 60 Minn. 531, 63 N. W. 170; Holland *v.* Bishop, 60 Minn. 23, 61 N. W. 681.

Missouri.— Smith *v.* Zink, 81 Mo. App. 347.

New York.— Stahl *v.* Dohrman, 23 Misc. 461, 51 N. Y. Suppl. 396; Brady *v.* Smith, 9 Misc. 716, 29 N. Y. Suppl. 607; Harris *v.* Lyon, 1 N. Y. City Ct. 450; Woodworth *v.* Kissam, 15 Johns. 186.

England.— Sheppard *v.* Shoolbred, C. & M. 61, 41 E. C. L. 39.

See 47 Cent. Dig. tit. "Trover and Conversion," § 40.

Obtaining possession of property by purchase of owner, knowing that he is incapable because of intoxication, to make a contract, and retaining possession to the exclusion of the rights of the owner, constitutes conversion. Baird *v.* Howard, 51 Ohio St. 57, 36 N. E. 732, 46 Am. St. Rep. 550, 22 L. R. A. 846.

13. *Illinois.*— Fawcett *v.* Osborn, 32 Ill. 411, 83 Am. Dec. 278.

Indiana.— Alexander *v.* Swackhamer, 105 Ind. 81, 4 N. E. 433, 5 N. E. 908, 55 Am. Rep. 180.

Massachusetts.— Moody *v.* Blake, 117 Mass. 23, 19 Am. Rep. 394.

New Jersey.— Ashton *v.* Allen, 70 N. J. L. 117, 56 Ala. 165.

New York.— Saltus *v.* Everett, 20 Wend. 267, 32 Am. Dec. 541.

Ohio.— Hamet *v.* Letcher, 37 Ohio St. 356, 41 Am. Rep. 519; Block *v.* Peebles, 10 Ohio Dec. (Reprint) 3, 18 Cinc. L. Bul. 36.

Pennsylvania.— Barker *v.* Dinsmore, 72 Pa. St. 427, 13 Am. St. Rep. 697.

England.— Lindsay *v.* Cundy, 2 Q. B. D. 96, 46 L. J. Q. B. 233, 36 L. T. Rep. N. S. 345, 25 Wkly. Rep. 417 [*reversing* 1 Q. B. D. 348, 45 L. J. Q. B. 381, 34 L. T. Rep. N. S. 31, 24 Wkly. Rep. 730]; Fowler *v.* Hollins, L. R. 7 Q. B. 616, 41 L. J. Q. B. 277, 27 L. T. Rep. N. S. 168, 20 Wkly. Rep. 868 [*affirmed* in 7 H. L. 757, 44 L. J. Q. B. 169, 33 L. T. Rep. N. S. 73]; Hardman *v.* Booth, 1 H. & C. 803, 9 Jur. N. S. 81, 32 L. J. Exch. 105, 7 L. T. Rep. N. S. 638, 11 Wkly. Rep. 239; Kingsford *v.* Merry, 1 H. & N. 503, 3 Jur. N. S. 68, 26 L. J. Exch. 83, 5 Wkly. Rep. 151; Higgons *v.* Burton, 26 L. J. Exch. 342, 5 Wkly. Rep. 683; Boyson *v.* Coles, 6 M. & S. 14, 18 Rev. Rep. 284, 105 Eng. Reprint 1148.

See 47 Cent. Dig. tit. "T[redacted] and Conversion," § 40.

If both title and right to possession passed to the fraudulent vendee or assignee, a third person who took the goods from him and converted them would not be liable in trover, unless he took them without consider-

with that of plaintiff will not constitute a conversion, if it occurred without the fault or knowledge of defendant, and if he separated and released plaintiff's stock at the first seasonable opportunity after learning of such mixture.[14]

5. Taking Under Chattel Mortgage. It is a conversion to take property under a chattel mortgage which is void,[15] or in violation of the terms of the mortgage,[16] or after extinguishment of the debt,[17] or under one where the property had been attached and sold on execution in the attachment suit without compliance with the requirements of the statute.[18]

6. Taking Under Legal Process or Proceedings. A seizure of goods under process of a court, which belong to any person other than the one against whom the process runs, is a conversion.[19] And so is the taking of property by virtue of a void writ.[20]

7. Forcible Taking of Money From Debtor by Creditor. Money taken forcibly

ation, or with notice of the fraud. Hudson *v.* Bauer Grocery Co., 105 Ala. 200, 16 So. 693; Scheuer *v.* Goetter, 102 Ala. 313, 14 So. 774; Traywick *v.* Keeble, 93 Ala. 498, 8 So. 573; Gage *v.* Epperson, 2 Head (Tenn.) 669; Morrow Shoe Mfg. Co. *v.* New England Shoe Co., 57 Fed. 685, 6 C. C. A. 508, 24 L. R. A. 417; Stoeser *v.* Springer, 7 Ont. App. 497.

14. Cutter *v.* Fanning, 2 Iowa 580; Van Valkenburgh *v.* Thayer, 57 Barb. (N. Y.) 196.

15. Miller *v.* Hannan, 29 N. Y. App. Div. 178, 51 N. Y. Suppl. 816; Killick *v.* Hooker, 19 N. Y. Suppl. 485. See, generally, Chattel Mortgages, 7 Cyc. 1.

One may safely take property under a defective chattel mortgage with the verbal assent of the mortgagor. Sherman *v.* Matthews, 15 Gray (Mass.) 508.

Property not covered by mortgage.— It is a conversion to take property not included in the mortgage, unless plaintiff in trover is guilty of an estoppel *in pais*. Meyer *v.* Orynski, (Tex. Civ. App. 1894) 25 S. W. 655, where an assignee, knowing that the brewery and machinery of his insolvent assignor was subject to a mortgage, neglected to separate therefrom other chattels not covered thereby. The purchaser at the foreclosure sale, supposing that he had bought these chattels, took them away. The assignee was denied a recovery in trover.

16. Aylesbury Mercantile Co. *v.* Fitch, 22 Okl. 475, 99 Pac. 1089, 23 L. R. A. N. S. 573.

17. Aylesbury Mercantile Co. *v.* Fitch, 22 Okl. 475, 99 Pac. 1089, 23 L. R. A. N. S. 573.

18. Sullivan *v.* Lamb, 110 Mass. 167. See, generally, Chattel Mortgages, 7 Cyc. 1.

19. *Massachusetts.*— Westheimer *v.* State Loan Co., 195 Mass. 570, 81 N. E. 289; Clark *v.* Dean, 143 Mass. 292, 9 N. E. 651; Davis *v.* Rhoades, 124 Mass. 291; Hubbard *v.* Lyman, 8 Allen 520.

Missouri.— Tipton *v.* Burton, 58 Mo. 435.

Nebraska.— Butts *v.* Kingman, 60 Nebr. 224, 82 N. W. 854; Beagle *v.* Smith, 50 Nebr. 446, 69 [redacted] 956; Norwegian Plow Co. *v.* Haines, 21 Nebr. 689, 33 N. W. 475.

New Hampshire.— Closson *v.* Morrison, 47 N. H. 482, 93 Am. Dec. 459.

New York.— Rogers *v.* Wier, 34 N. Y. 463; Walsh *v.* Adams, 3 Den. 125; Tompkins *v.* Haile, 3 Wend. 406.

North Carolina.— Whit *v.* Ray, 26 N. C. 14; Burgin *v.* Burgin, 23 N. C. 453.

South Dakota.— Feury *v.* McCormick Harvesting Mach. Co., 6 S. D. 396, 61 N. W. 162.

Wisconsin.— Seivert *v.* Galvin, 133 Wis. 391, 113 N. W. 680.

England.— Glasspoole *v.* Young, 7 L. J. K. B. O. S. 305.

Canada.— McLean *v.* Hannon, 3 Can. Sup. Ct. 706; Temple *v.* Nicholson, 1 Can. L. T. 262.

See 47 Cent. Dig. tit. "Trover and Conversion," § 43.

This is true even though there be no manual taking or removal by the officer. Hale *v.* Ames, 2 T. B. Mon. (Ky.) 143, 15 Am. Dec. 150; Johnson *v.* Farr, 60 N. H. 426; Zion *v.* De Jonge, 39 Misc. (N. Y.) 839, 81 N. Y. Suppl. 491; Mallalieu *v.* Laugher, 3 C. & P. 551, 14 E. C. L. 709. But see Sammis *v.* Sly, 54 Ohio St. 511, 44 N. E. 508, 56 Am. St. Rep. 731.

A wrongful levy followed by a sale ordered by the court renders the officer liable. McLean *v.* Bradley, 2 Can. Sup. Ct. 535.

A plaintiff who dismisses a garnishment of goods claimed by the garnishee under a mortgage given by defendant, and subsequently attaches the goods in the mortgagee's hands, is not liable for conversion. Toledo Sav. Bank *v.* Johnston, 94 Iowa 212, 62 N. W. 748.

Trover will not lie when possession of goods is obtained by legal process (Nelson *v.* Schmoller, 77 Nebr. 717, 110 N. W. 658; Jenner *v.* Joliffe, 9 Johns. (N. Y.) 381), although the action be afterward dismissed (Smith *v.* Kershaw, 1 Ga. 259), when the levy has been withdrawn (Bailey *v.* Adams, 14 Wend. (N. Y.) 201), or the title of the goods be in plaintiff (Silliman *v.* Gammage, 2 Tex. App. Civ. Cas. § 499). And a wrongful levy on books of account is not a conversion of the accounts. Vogedes *v.* Beakes, 38 N. Y. App. Div. 380, 56 N. Y. Suppl. 662.

Seizure in known disregard of rights of prior mortgagee may be a conversion. Dethoff *v.* Gattie, 103 N. Y. Suppl. 589.

20. *Arkansas.*— Jones *v.* Buzzard, 2 Ark. 415.

Maine.— Baldwin *v.* Whittier, 16 Me. 33.

Michigan.— Rolfe *v.* Dudley, 58 Mich. 208, 24 N. W. 657.

from a debtor by his creditor may be recovered in trover, although the indebtedness equaled the sum taken.[21]

8 PURCHASE AT INVALID PUBLIC SALE. The appropriation to one's use of property purchased at an invalid public sale is a conversion, even if the purchase was made in good faith.[22]

9. PROPERTY ACQUIRED UNDER INVALID CONTRACT. A refusal to permit an owner to take possession of or handle chattels which defendant holds under an invalid contract,[23] or a contract that has been rescinded,[24] constitutes a conversion; but trover will not lie against one who obtains by a void contract possession of goods that he is entitled to hold.[25]

10. CONFISCATION BY PUBLIC AUTHORITIES. An officer who wrongfully confiscates the property of a private person for public or other use is guilty of conversion.[26]

11. INDUCING DELIVERY BY AFFIDAVIT OF OWNERSHIP. Where the ownership of property is in dispute it is not an unlawful conversion to induce the other party by means of an affidavit of ownership to surrender possession thereof.[27]

12. TAKING UNDER COLOR OF LICENSE. Taking property under a license which has been revoked is a conversion.[28]

13. APPROPRIATION OF PROCEEDS OF SALE. An appropriation of the proceeds of the sale of a chattel which was authorized by its owner will not justify an action for conversion of the chattel;[29] but an appropriation or unauthorized diversion of the proceeds by the purchaser will sustain an action in conversion for the amount.[30]

14. INTERFERING WITH DECEDENT'S PROPERTY. An unauthorized interference with a decedent's personal estate will render the wrong-doer liable in trover for whatever loss occurs.[31]

D. Purchase or Other Taking of Property From Person Other Than the Owner — 1. IN GENERAL. One who takes possession of and claims rights

Ohio.— Benster *v.* Powell, 9 Ohio Cir. Ct. 177, 4 Ohio Cir. Dec. 4.

Texas.— Crawford *v.* Thomason, (Civ. App.) 117 S. W. 181.

England.— Goode *v.* Langley, 7 B. & C. 26, 9 D. & R. 791, 5 L. J. K. B. O. S. 353, 14 E. C. L. 22, 108 Eng. Reprint 634.

Canada.— Spry *v.* McKenzie, 18 U. C. Q. B. 161.

See 47 Cent. Dig. tit. "Trover and Conversion," § 43.

21. Murphey *v.* Virgin, 47 Nebr. 692, 66 N. W. 652.

22. Harrell *v.* Harrel, 75 Ga. 697; Ward *v.* Carson River Wood Co., 13 Nev. 44; Ross *v.* McGuffin, 2 Tex. App. Civ. Cas. § 458.

23. Tomlinson *v.* Bennett, 145 N. C. 279, 59 S. E. 37; Uvdale Nat. Bank *v.* Dockery, (Tex. Civ. App. 1904) 83 S. W. 29; Hargreaves *v.* Hutchinson, 2 A. & E. 12, 29 E. C. L. 28, 111 Eng. Reprint 5; Tregoning *v.* Attenborough, 7 Bing. 96, 20 E. C. L. 52.

24. Hellerman *v.* Schantz, 112 N. Y. Suppl. 1083.

But purchaser is entitled to retain goods until purchase-price has been repaid. C. L. Flaccus Glass Co. *v.* Alvey-Ferguson Co., 102 S. W. 870, 31 Ky. L. Rep. 552.

25. Bewick *v.* Fletcher, 41 Mich. 625, 3 N. W. 162, 32 Am. Rep. 170.

26. Davidson *v.* Manlove, 2 Coldw. (Tenn.) 346; Tinkler *v.* Poole, 5 Burr. 2657, 98 Eng. Reprint 396.

He who receives and enjoys the property so taken is also liable. Eastern Lunatic Asylum *v.* Garrett, 27 Gratt. (Va.) 163; Moran *v.* Smell, 5 W. Va. 26.

A warehouseman from whom confiscating officers take goods is not liable in trover therefor (Niagara F. Ins. Co. *v.* Campbell Stores, 101 N. Y. App. Div. 400, 92 N. Y. Suppl. 208 [*affirmed* in 184 N. Y. 582, 77 N. E. 1192]) unless he were negligent (Abraham *v.* Nunn, 42 Ala. 51).

That copartners had run mules from Missouri into Texas in violation of a proclamation of the president of the United States and that the mules might have been confiscated therefor is no defense to a conversion by one of the partners of all the mules to his own use. Charles *v.* McCune, 57 Mo. 166.

27. Finch *v.* Clarke, 61 N. C. 335.

28. Holland *v.* Osgood, 8 Vt. 276.

29. Lewis *v.* Metcalf, 53 Kan. 217, 36 Pac. 345; Neale *v.* Weare Bank, 3 Allen (Mass.) 202; Bostwick *v.* Dry Goods Bank, 67 Barb. (N. Y.) 449; Herrmann Furniture, etc., Cabinet Works *v.* Hyman, 28 Misc. (N. Y.) 567, 59 N. Y. Suppl. 526.

If the proceeds be in money the wrongdoer will be liable for so much money had and received, or if the proceeds are other property, trover will lie for the value thereof. Chase *v.* Blaisdell, 4 Minn. 90.

30. Gaertner *v.* Western El. Co., 104 Minn. 467, 116 N. W. 945.

31. Goldstein *v.* Susholtz, 46 Tex. Civ. App. 582, 105 S. W. 219; Bear *v.* Soper, 2 Ld. Ken. 441, 96 Eng. Reprint 1238.

in a chattel through a purchase or other means, from a person who had no power from the owner so to dispose of it, is guilty of a conversion of the chattel and liable in trover for the value thereof.[32] If, however, the person from whom defendant obtained the property had possession of it under circumstances known or assented to by the owner, that justified an inference of apparent authority to make the disposition complained of, trover will not lie.[33]

2. Knowledge of Owner's Title and Good Faith of Person Taking. It is well established by numerous authorities that it constitutes a conversion to receive property from one who has no right to part with or dispose of it, and thereafter to use, sell, or exercise dominion over it, whether with knowledge of the owner's rights[34]

32. *Alabama.*— Scott *v.* Hodges, 62 Ala. 337.

Georgia.—Ware *v.* Simmons, 55 Ga. 94. See also Sims *v.* James, 62 Ga. 260.

Illinois.— St. Louis, etc., R. Co. *v.* Kaulbrumer, 59 Ill. 152.

Indiana.— Schindler *v.* Westover, 99 Ind. 395; Harlan *v.* Brown, 4 Ind. App. 319, 30 N. E. 928.

Massachusetts.— Blum *v.* Whipple, 194 Mass. 253, 80 N. E. 501, 13 L. R. A. N. S. 211; Gilmore *v.* Newton, 9 Allen 171, 85 Am. Dec. 749; Champney *v.* Smith, 15 Gray 512; Billings *v.* Tucker, 6 Gray 368.

Michigan.— Kaufman *v.* State Sav. Bank, 151 Mich. 65, 114 N. W. 863, 123 Am. St. Rep. 259, 18 L. R. A. N. S. 630.

Minnesota.— Jones *v.* Minnesota, etc., R. Co., 97 Minn. 232, 106 N. W. 1048.

Missouri.— Koch *v.* Branch, 44 Mo. 542, 100 Am. Dec. 324; Vansandt *v.* Hobbs, 84 Mo. App. 628.

Nebraska.— Stevenson *v.* Valentine, 27 Nebr. 338, 43 N. W. 107; McCormick *v.* Stevenson, 13 Nebr. 70, 12 N. W. 828.

New Hampshire.— Cooper *v.* Newman, 45 N. H. 339; Hyde *v.* Noble, 13 N. H. 494, 38 Am. Dec. 508.

New York.— People *v.* Bank of North America, 75 N. Y. 547; Dyckman *v.* Valiente, 42 N. Y. 549; Anderson *v.* Nicholas, 28 N. Y. 600; Pierrepont *v.* Barnard, 5 Barb. 364 [*overruled* on the facts in 6 N. Y. 279]; Thomson *v.* Bank of British North America, 45 N. Y. Super. Ct. 1; Rosenkranz *v.* Saberski, 40 Misc. 650, 83 N. Y. Suppl. 257; Prescott *v.* De Forest, 16 Johns. 159.

North Carolina.— Black *v.* Jones, 64 N. C. 318.

Ohio.— Lake Shore, etc., R. Co. *v.* Hutchins, 37 Ohio St. 282.

Oregon.— Velsian *v.* Lewis, 15 Oreg. 539, 16 Pac. 631, 3 Am. St. Rep. 184.

Pennsylvania.— Croft *v.* Jennings, 173 Pa. St. 216, 33 Atl. 1026; Carey *v.* Bright, 58 Pa. St. 70; Striker *v.* McMichael, 1 Phila. 89.

Texas.— Kempner *v.* Thompson, 45 Tex. Civ. App. 267, 100 S. W. 351; Shilling *v.* Shilling, (Civ. App. 1896) 35 S. W. 420.

Vermont.— Buckmaster *v.* Mower, 21 Vt. 204; Riford *v.* Montgomery, 7 Vt. 411.

Washington.— Tebbetts *v.* Northern Commercial Co., 36 Wash. 599, 79 Pac. 203; Graton, etc., Mfg. Co. *v.* Redelsheimer, 28 Wash. 370, 68 Pac. 879; Rector *v.* Thompson, 26 Wash. 400, 67 Pac. 86.

Wisconsin.— Meyer *v.* Doherty, 133 Wis. 398, 113 N. W. 671, 126 Am. St. Rep. 967, 13 L. R. A. N. S. 247, holding that trover lies in right of drawer against one who obtained money from a bank by a check fraudulently obtained from a depositor.

United States.— U. S. *v.* Ute Coal, etc., Co., 158 Fed. 20, 85 C. C. A. 302; Mann *v.* Arkansas Valley Land, etc., Co., 24 Fed. 261.

England.— Cooper *v.* Willomatt, 1 C. B. 672, 9 Jur. 598, 14 L. J. C. P. 219, 50 E. C. L. 672; Metcalfe *v.* Lumsden, 1 C. & K. 309, 47 E. C. L. 309; Shaw *v.* Tunbridge, W. Bl. 1064, 96 Eng. Reprint 626.

See 47 Cent. Dig. tit. "Trover and Conversion," § 95.

Defeated plaintiff in replevin.—An action for conversion may be maintained against a defeated plaintiff in replevin who fails to restore the property replevied notwithstanding an action is pending against him on his replevin bond. Wyman *v.* Bowman, 71 Me. 121.

The transmission of a coin worth ten dollars, from hand to hand, by mistake as a fifty-cent piece, entitles the first one so passing it to maintain trover against any of the others who so received it. Chapman *v.* Cole, 12 Gray (Mass.) 141, 71 Am. Dec. 739.

33. Johnson *v.* Donnell, 47 N. Y. Super. Ct. 187 [*affirmed* in 90 N. Y. 1]; Smith *v.* Armour Packing Co., 158 Fed. 86, 85 C. C. A. 416; Stoeser *v.* Springer, 7 Ont. App. 497.

Where plaintiff agreed to purchase a launch from defendant's agent, who agreed to sell plaintiff's motor boat and apply the proceeds on the launch, and such agent afterward sold plaintiff's boat, and that purchased by him was not delivered as agreed, plaintiff could not maintain an action for the conversion of his boat, its sale being contemplated by the agreement, although an action for money received, or, after demand, for conversion, might lie. Wanier *v.* Truscott Boat Mfg. Co., 136 N. Y. App. Div. 866, 122 N. Y. Suppl. 60.

34. *Alabama.*— Donnell *v.* Thompson, 13 Ala. 440.

California.—Herron *v.* Hughes, 25 Cal. 555; Scriber *v.* Masten, 11 Cal. 303.

Iowa.—Allison *v.* King, 25 Iowa 56.

Maine.— Kimball *v.* Billings, 55 Me. 147, 92 Am. Dec. 581.

Michigan.— Tuttle *v.* Campbell, 74 Mich. 652, 42 N. W. 384, 16 Am. St. Rep. 652.

Nebraska.— McCormick *v.* Stevenson, 13 Nebr. 70, 12 N. W. 828.

with respect to such property or in good faith without any notice whatever of the rights of the owner.[35]

3. Receiving Property From Persons Representing Owner. Liability for conversion attaches to whomsoever receives and converts to his own use, or otherwise disposes of, property which was delivered to him by one to whom the property had been intrusted by the owner for another and specific purpose.[36]

4. Redelivery of Property. One is not liable in trover for redelivering a chattel to the person from whom he received it,[37] notwithstanding he knew that such person's possession was wrongful,[38] unless the owner had previously given notice of his ownership and demanded his property.[39]

E. Use or Disposition of Property — 1. In General. Any use or dis-

New Hampshire.— Fisk *v.* Ewen, 46 N. H. 173.

New York.— Brownson *v.* Chapman, 63 N. Y. 625; Taft *v.* Chapman, 50 N. Y. 445; Graham *v.* Purcell, 126 N. Y. App. Div. 407, 110 N. Y. Suppl. 813; Spencer *v.* Blackman, 9 Wend. 167; Babcock *v.* Gill, 10 Johns. 287.

Tennessee.— Childress *v.* Ford, 1 Heisk. 463.

Texas.— Focke *v.* Blum, 82 Tex. 436, 17 S. W. 770.

Vermont.— Rice *v.* Clark, 8 Vt. 109.

See 47 Cent. Dig. tit. "Trover and Conversion," § 96; and *supra*, 32.

Good grounds for believing that an agent is exceeding his authority in making a sale is sufficient to render the purchaser liable in trover. White Sewing Mach. Co. *v.* Betting, 46 Mo. App. 417.

35. *Alabama.*— Blackman *v.* Lehman, 63 Ala. 547, 35 Am. Rep. 57.

Colorado.— Omaha, etc., Smelting, etc., Co. *v.* Tabor, 13 Colo. 41, 21 Pac. 925, 16 Am. St. Rep. 185, 5 L. R. A. 236.

Florida.—Wright *v.* Skinner, 34 Fla. 453, 16 So. 335.

Maine.— Hotchkiss *v.* Hunt, 49 Me. 213; Crocker *v.* Gullifer, 44 Me. 491, 69 Am. Dec. 118.

Massachusetts.— Riley *v.* Boston Water Power Co., 11 Cush. 11.

Missouri.—Loeffel *v.* Pohlman, 47 Mo. App. 574; Kramer *v.* Faulkner, 9 Mo. App. 34.

New York.— Roe *v.* Campbell, 40 Hun 49; Collins *v.* Ralli, 20 Hun 246 [*affirmed* in 85 N. Y. 637 (*overruling* Craig *v.* Marsh, 2 Daly 61)]; Dudley *v.* Hawley, 40 Barb. 397 [*affirmed* in 39 N. Y. 441, 100 Am. Dec. 452, 7 Transcr. App. 14]; Cobb *v.* Dows, 9 Barb. 230 [*reversed* on other grounds in 10 N. Y. 335]; Anderson *v.* Nicholas, 5 Bosw. 121 [*affirmed* in 28 N. Y. 600].

North Carolina.— Lee *v.* McKay, 25 N. C. 29.

Pennsylvania.— Biddle *v.* Bayard, 13 Pa. St. 150.

South Carolina.— Crosland *v.* Graham, 83 S. C. 228, 65 S. E. 233; Harris *v.* Saunders, 2 Strobh. Eq. 370 note.

Tennessee.— McDaniel *v.* Adams, 87 Tenn. 756, 11 S. W. 939.

Vermont.— Benton *v.* Beattie, 63 Vt. 186, 22 Atl. 422; Deering *v.* Austin, 34 Vt. 330.

Virginia.—Wilson *v.* Rucker, 1 Call 500.

See 47 Cent. Dig. tit. "Trover and Conversion," § 96; and *supra*, I, B, 2, c.

Merely taking a chattel mortgage on property in the possession of one who falsely or mistakenly claims to own it is not a conversion. Matteawan Co. *v.* Bentley, 13 Barb. (N. Y.) 641. So too a replevin of attached property, without notice of the real ownership thereof, is not a conversion so long as plaintiff in replevin does no act inconsistent with his duty as such. Morris *v.* Hall, 41 Ala. 510.

Statute imposing liability on purchaser with notice does not apply to purchasers without notice. Joseph Dessert Lumber Co. *v.* Wadleigh, 103 Wis. 318, 79 N. W. 237.

36. *California.*— Horton *v.* Jack, 126 Cal. 521, 58 Pac. 1051.

Georgia.— Seago *v.* Pomeroy, 46 Ga. 227.

Maine.— Hotchkiss *v.* Hunt, 49 Me. 213.

Maryland.— Ricards *v.* Wedemeyer, 75 Md. 10, 22 Atl. 1101.

Massachusetts.— Kingman *v.* Pierce, 17 Mass. 247.

New York.— Sage *v.* Shepard, etc., Lumber Co., 4 N. Y. App. Div. 290, 39 N. Y. Suppl. 449 [*affirmed* in 158 N. Y. 672, 52 N. E. 1126].

Pennsylvania.— Rice *v.* Yocum, 155 Pa. St. 538, 26 Atl. 698.

Tennessee.— Merchants' Nat. Bank *v.* Trenholm, 12 Heisk. 520.

Texas.— Bridges *v.* Williams, 28 Tex. Civ. App. 38, 66 S. W. 120, 484.

England.— Monk *v.* Graham, 8 Mod. 9, 88 Eng. Reprint 8.

See 47 Cent. Dig. tit. "Trover and Conversion," § 97.

37. Frome *v.* Dennis, 45 N. J. L. 515; Scofield *v.* Kreiser, 3 N. Y. Suppl. 803.

38. Loring *v.* Mulcahy, 3 Allen (Mass.) 575; Rembaugh *v.* Phipps, 75 Mo. 422.

39. Winter *v.* Bancks, 19 Cox C. C. 687, 65 J. P. 468, 84 L. T. Rep. N. S. 504, 17 T. L. R. 446, 44 Wkly. Rep. 574 [*following* Hollins *v.* Fowler, L. R. 7 H. L. 757, 44 L. J. Q. B. 169, 33 L. T. Rep. N. S. 73; Stephens *v.* Elwall, 4 M. & S. 259, 105 Eng. Reprint 830].

Notwithstanding the owner's notice and demand, goods may be safely delivered to the one from whom they were received, if the latter had a lien upon them or right to

position of a thing without the consent of the owner, or any misuse or abuse of a possession obtained with his consent, is an actionable conversion.[40]

2. Change in Nature of Property. One who effects a substantial change in the form or nature of property without the knowledge or consent of the owner is liable for a conversion,[41] and trover will lie for the new product if the owner has not lost title thereto under the doctrine of accession.[42]

3. Sale of Another's Property — a. In General. Any sale unauthorized by law or the consent of the owner which deprives him of personal property is an actionable conversion.[43]

possession. Whitworth *v.* Smith, 5 C. & P. 250, 1 M. & Rob. 193, 24 E. C. L. 550.

40. *California.*—Allsopp *v.* Joshua Hendy Mach. Works, 5 Cal. App. 228, 90 Pac. 39.

Connecticut.— Dunham *v.* Cox, 81 Conn. 268, 70 Atl. 1033; Clark *v.* Whitaker, 19 Conn. 319, 48 Am. Dec. 160.

Delaware.— Maguyer *v.* Hawthorn, 2 Harr. 71.

Georgia.— Phillips *v.* Taber, 83 Ga. 565, 10 S. E. 270; Thompson *v.* Carter, 6 Ga. App. 604, 65 S. E. 599.

Maine.—Neal *v.* Hanson, 60 Me. 84; Hotchkiss *v.* Hunt, 49 Me. 213; Ripley *v.* Dolbier, 18 Me. 382.

Maryland.—Winner *v.* Penniman, 35 Md. 163, 6 Am. Rep. 385.

Michigan.— Great Western Smelting, etc., Co. *v.* Evening News Assoc., 139 Mich. 55, 102 N. W. 286.

Missouri.— Southwestern Port Huron Co. *v.* Cobble, 124 Mo. App. 647, 102 S. W. 9.

New York.— Griggs *v.* Day, 136 N. Y. 152, 32 N. E. 612, 32 Am. St. Rep. 704, 18 L. R. A. 120, 137 N. Y. 542, 32 N. E. 1001 [*reversing* 58 N. Y. Super. Ct. 385, 11 N. Y. Suppl. 885]; Kilmer *v.* Hutton, 131 N. Y. App. Div. 625, 116 N. Y. Suppl. 127; Wood *v.* Proudman, 122 N. Y. App. Div. 826, 107 N. Y. Suppl. 757; Medina Gas, etc., Co. *v.* Buffalo Loan, etc., Co., 119 N. Y. App. Div. 245, 104 N. Y. Suppl. 625; Pease Piano Co. *v.* Waterloo Organ Co., 36 N. Y. App. Div. 627, 54 N. Y. Suppl. 838; Putnam *v.* Mathewson, 50 Hun 600, 2 N. Y. Suppl. 579; Straight *v.* Shaw, 56 Misc. 426, 107 N. Y. Suppl. 1036; Davis *v.* Chautauqua Lake Sunday School Assembly, 2 N. Y. St. 365; Murray *v.* Burling, 10 Johns. 172.

South Carolina.— Hutchinson *v.* Bobo, 1 Bailey 546; Reid *v.* Colcock, 1 Nott & M. 592, 9 Am. Dec. 729.

Vermont.— Thrall *v.* Lathrop, 30 Vt. 307, 73 Am. Dec. 306.

See 47 Cent. Dig. tit. "Trover and Conversion," § 84.

Defendant's acts inconsistent with a continued recognition of plaintiff's title amount to a conversion. Joyce *v.* Sage Bros. Co., 206 Mass. 9, 91 N. E. 996.

But the use defendant has a right to make under contract with plaintiff cannot constitute conversion. Dockstader *v.* Young Men's Christian Assoc., (Iowa 1906) 109 N. W. 906.

If a fund is to be turned over to one on the happening of a contingency on or before a certain day, it is not a conversion to otherwise dispose of the fund after said day, if said contingency did not happen. Halliday *v.* Nicholas, 13 Misc. (N. Y.) 111, 34 N. Y. Suppl. 104.

A moderate use of property did not constitute conversion where a vendee of a slave allowed her to work, the vendor having refused to receive her back on rescission of the sale. Rand *v.* Oxford, 34 Ala. 474. Nor when an innkeeper, believing that a guest had abandoned a horse, used it to pay the expense of keeping it. Alvord *v.* Davenport, 43 Vt. 30. It is not a conversion to use property of a decedent under a contract of hiring entered into with his widow, no administrator having been appointed. Williams *v.* Crum, 27 Ala. 468. Nor is it a conversion to use an article which was converted and made part of real estate by defendant's vendor. Woodruff, etc., Iron Works *v.* Adams, 37 Conn. 233.

Storing lessor's property by lessee after expiration of lease is not a conversion. Adams *v.* Weir, (Tex. Civ. App. 1907) 99 S. W. 726.

Where defendant acts under full authority. — Trover does not lie if it appears that the money in question was voluntarily given by plaintiff to defendant to do certain things with, namely, to pay himself a debt which plaintiff owed him and then to discharge other specified indebtedness of plaintiff and to account to plaintiff for the balance. Kerwin *v.* Balhatchett, 147 Ill. App. 561.

Use or disposition of property by bailee as conversion see Bailments, 5 Cyc. 214.

41. Atkins *v.* Gamble, 42 Cal. 86, 10 Am. Rep. 282; Dench *v.* Walker, 14 Mass. 500; Richardson *v.* Atkinson, Str. 576, 93 Eng. Reprint 710. See, generally, Accession, 1 Cyc. 222.

Castrating a hog is not such a change of property as to be proof of conversion. Byrne *v.* Stout, 15 Ill. 180.

42. Riddle *v.* Driver, 12 Ala. 590; Eaton *v.* Lynde, 15 Mass. 242; Silsbury *v.* McCoon, 4 Den. (N. Y.) 332, 6 Hill 425, 41 Am. Dec. 753 [*reversed* in 3 N. Y. 379, 53 Am. Dec. 307]; Brown *v.* Sax, 7 Cow. (N. Y.) 95; Curtis *v.* Groat, 6 Johns. (N. Y.) 168, 5 Am. Dec. 204; Betts *v.* Lee, 5 Johns. (N. Y.) 348, 4 Am. Dec. 368. See, generally, Accession, 1 Cyc. 222.

Annexation to realty.— Trover will not lie for a chattel which has been made a part of another's real estate. Fryatt *v.* Sullivan Co., 7 Hill (N. Y.) 529 [*affirming* 5 Hill 116].

43. *Alabama.*— Barwick *v.* Rackley, 46 Ala. 402; McConeghy *v.* McCaw, 31 Ala. 447;

b. Property Previously Sold. A vendor who by sale or otherwise deprives a vendee of property previously sold to him is guilty of conversion,[44] and the second vendee is also liable where he has sold the goods and converted the proceeds to his own use.[45]

c. By Conditional Purchaser. A sale, gift, or mortgage of chattels by a conditional purchaser before he has fully paid the purchase-price is a conversion.[46]

d. Invalid Sale to Satisfy Lien. The satisfaction of a lien by an invalid sale of chattels is a conversion.[47]

Whitlock *v.* Heard, 13 Ala. 776, 48 Am. Dec. 73

Illinois.— Roush *v.* Washburn, 88 Ill. 215.

Indiana.— Bishplinghoff *v.* Bauer, 52 Ind. 519; Stull *v.* Howard, 26 Ind. 456; Moore *v.* Winstead, 24 Ind. App. 56, 55 N. E. 777; Nickey *v.* Zonker, 22 Ind. App. 211, 53 N. E. 478; Fort *v.* Wells, 14 Ind. App. 531, 43 N. E. 155, 56 Am. St. Rep. 316.

Iowa.— Colby *v.* W. W. Kimball Co., 99 Iowa 321, 68 N. W. 786.

Maine.— Ivers, etc., Piano Co. *v.* Allen, 101 Me. 218, 63 Atl. 735, 115 Am. St. Rep. 307; Eames *v.* Trickey, 62 Me. 126.

Maryland.— Thomas *v.* Sternheimer, 29 Md. 268.

Massachusetts.— Joyce *v.* Sage Bros. Co., 206 Mass. 9, 91 N. E. 996; Geneva Wagon Co. *v.* Smith, 188 Mass. 202, 74 N. E. 299.

Michigan.— Bryant *v.* Kenyon, 123 Mich. 151, 81 N. W. 1093; Baylis *v.* Cronkite, 39 Mich. 413.

Missouri.— Caldwell *v.* Ryan, 210 Mo. 17, 108 S. W. 533; Thomas Mfg. Co. *v.* Huff, 62 Mo. App. 124.

New Hampshire.— Sanborn *v.* Colman, 6 N. H. 14, 23 Am. Dec. 703.

New York.— Boyce *v.* Brockway, 31 N. Y. 490; McEchron *v.* Martine, 111 N. Y. App. Div. 805, 97 N. Y. Suppl. 951; Electric Power Co. *v.* New York, 29 Misc. 48, 60 N. Y. Suppl. 590; Kruse *v.* Seeger, etc., Co., 16 N. Y. Suppl. 529 [*affirming* 15 N. Y. Suppl. 825]; Rightmyer *v.* Raymond, 12 Wend. 51; Williams *v.* Merle, 11 Wend. 80, 25 Am. Dec. 604.

North Carolina.— Carraway *v.* Burbank, 12 N. C. 306.

Pennsylvania.— Barley *v.* Beegle, 29 Pa. Super. Ct. 635.

South Carolina.— Gregg *v.* Columbia Bank, 72 S. C. 458, 52 S. E. 195, 110 Am. St. Rep. 633.

Tennessee.—Barnhill *v.* Phillips, 4 Coldw. 1.

Texas.— Sandford *v.* Wilson, 2 Tex. App. Civ. Cas. § 247.

Vermont.— Church *v.* McLeod, 58 Vt. 541, 3 Atl. 490; Burnham *v.* Marshall, 56 Vt. 365.

Washington.— Howard *v.* Seattle Nat. Bank, 10 Wash. 280, 38 Pac. 1040, 39 Pac. 100.

Wisconsin.— Lyle *v.* McCormick Harvesting Mach. Co., 108 Wis. 81, 84 N. W. 18, 51 L. R. A. 906; Owen *v.* Long, 97 Wis. 78, 72 N. W. 364.

United States.— Hutchins *v.* King, 1 Wall. 53, 17 L. ed. 544.

England.— Delaney *v.* Wallis, L. R. 14 Ir. 31, 15 Cox C. C. 525; Pigot *v.* Cubley, 15 C. B. N. S. 701, 10 Jur. N. S. 318, 33 L. J. C. P. 134, 9 L. T. Rep. N. S. 804, 12 Wkly. Rep. 467, 109 E. C. L. 701; Brown *v.* Hickinbotham, 50 L. J. Q. B. 426.

Canada.— McLean *v.* Bradley, 2 Can. Sup. Ct. 535; Lewis *v.* Denton, 7 Can. L. T. Occ. Notes 323, 19 Nova Scotia 235; Benedict *v.* Ker, 29 U. C. C. P. 410; Heffernan *v.* Berry, 32 U. C. Q. B. 518; Moffatt *v.* Grand Trunk R. W. Co., 15 U. C. C. P. 392; Morrison *v.* Carrall, 1 U. C. C. P. 226; Marsh *v.* Boulton, 4 U. C. Q. B. 354; Priestman *v.* Kendrick, 3 U. C. Q. B. O. S. 66; Rathwell *v.* Rathwell, 26 U. C. Q. B. 179; Sibley *v.* Sibley, 8 Nova Scotia 325.

See 47 Cent. Dig. tit. "Trover and Conversion," § 86.

An agent is guilty of conversion who, being authorized to sell for the owner, sells the property as that of another person. Covell *v.* Hill, 6 N. Y. 374.

Delivery.—A sale, in order to constitute a conversion, must be consummated by a delivery. Dietus *v.* Fuss, 8 Md. 148; Jones *v.* Goodwillie, 143 Mass. 281, 9 N. E. 639; Mills *v.* Van Camp, 41 Mich. 645, 2 N. W. 938; San Antonio Irr. Co. *v.* Deutschmann, 102 Tex. 201, 105 S. W. 486, 114 S. W. 1174; Thorp *v.* Robbins, 68 Vt. 53, 33 Atl. 896; Lancashire Wagon Co. *v.* Fitzhugh, 6 H. & N. 502, 30 L. J. Exch. 231, 3 L. T. Rep. N. S. 703; Cuckson *v.* Winter, 2 M. & R. 313, 17 E. C. L. 713; Dickey *v.* McCaul, 14 Ont. App. 166. *Compare* Ivers, etc., Piano Co. *v.* Allen, 101 Me. 218, 63 Atl. 735; Webber *v.* Davis, 44 Me. 147, 69 Am. Dec. 87.

44. Green *v.* Bennett, 23 Mich. 464; Caywood *v.* Van Ness, 74 Hun (N. Y.) 28, 26 N. Y. Suppl. 379 [*affirmed* in 145 N. Y. 600, 40 N. E. 163]; Koon *v.* Brinkerhoff, 39 Hun (N. Y.) 130. See, generally, SALES, 35 Cyc. 1.

A resale by a vendor who has retained title until the purchase-price is paid is not a conversion even though the vendee be not in default. Woodcock *v.* Farrell, 1 Metc. (Ky.) 437; Beggs *v.* Eidlitz, 33 Misc. (N. Y.) 763, 67 N. Y. Suppl. 917. But see Martindale *v.* Smith, 1 Q. B. 389, 1 G. & D. 1, 5 Jur. 932, 10 L. J. Q. B. 155, 41 E. C. L. 592, 113 Eng. Reprint 1181, in which the rule is held to be inapplicable unless time was of the essence of the contract.

45. Northwestern State Bank *v.* Silberman, 154 Fed. 809, 83 C. C. A. 525.

46. Wesoloski *v.* Wysoski, 186 Mass. 495, 71 N. E. 982; Johnston *v.* Whittemore, 27 Mich. 463; Fisk *v.* Ewen, 46 N. H. 173; Rodney Hunt Mach. Co. *v.* Stewart, 57 Hun (N. Y.) 545, 11 N. Y. Suppl. 448. See also SALES, 35 Cyc. 697.

47. Briggs *v.* Boston, etc., Co., 6 Allen

e. Sale of Property in Which Another Has a Part Interest or Lien. A wrongful sale of goods whereby a person who has a part interest therein, or a lien thereon, is deprived of the same, is a conversion whether the wrong-doer be an owner of another part or a lien-holder,[48] or a stranger to the property.[49]

4. Transfer of Corporate Stock on Company's Books. It is a conversion to cause a certificate of shares of stock to be transferred on the company's books to a person other than the owner, notwithstanding the wrong-doer sent to the owner another certificate for the same number of shares, which the latter returned.[50]

5. Transfer of Paid Note. If the holder of a note which has been paid transfers it to a third person who thereafter obtains judgment against the maker, the latter may recover the amount of the judgment in trover from the holder.[51]

6. Property Purchased For Another's Benefit. One who bids in property at a judicial sale for the benefit of another, and at his request, and then appropriates it to his own use, is liable in trover therefor.[52]

7. Removal by Person on Whose Premises Property Has Been Left. It is not a conversion for one to move from his premises, or from one part of his premises to another, chattels which the owner has left there either with or without license therefor.[53]

F. Detention of Property — 1. In General. A mere detention of another's chattels which rightfully came into one's possession is not an actionable con-

(Mass.) 246, 83 Am. Dec. 626; Thompson *v.* Currier, 24 N. H. 237.

An invalid chattel mortgage foreclosure sale where the mortgagee buys in the property is not a conversion. Brown *v.* Mynard, 107 Mich. 401, 65 N. W. 293; Powell *v.* Gagnon, 52 Minn. 232, 53 N. W. 1148; Cushing *v.* Seymour, 30 Minn. 301, 15 N. W. 249.

Where a deposit of school land certificates amounted not to a pledge but to a mortgage of the depositor's equitable interest in the land, a sale of the certificates at public auction by the holder, although void, was not a conversion. Mowry *v.* Wood, 12 Wis. 413.

48. *California.*— Fette *v.* Lane, (1894) 37 Pac. 914.

Dakota.— Lloyd *v.* Powers, 4 Dak. 62, 22 N. W. 492.

Kentucky.— Coffey *v.* Wilkerson, 1 Metc. 101.

Maryland.— Weems *v.* Stallings, 2 Harr. & J. 365.

Vermont.— Holden *v.* Gilfeather, 78 Vt. 405, 63 Atl. 144; Turner *v.* Waldo, 40 Vt. 51; Vickery *v.* Taft, 1 D. Chipm. 241.

United States.— Terry *v.* Bamberger, 23 Fed. Cas. No. 13,837, 14 Blatchf. 234, 44 Conn. 558.

England.— Fenn *v.* Bittleston, 7 Exch. 152, 21 L. J. Exch. 41.

See 47 Cent. Dig. tit. "Trover and Conversion," § 90.

The assignment of a chose in action subject to a lien does not constitute a conversion as to the lien-holder, if the assignee take with notice of the lien. Comfort *v.* Creelman, 52 Minn. 280, 53 N. W. 1157.

A sale of property by one of two joint owners does not constitute a conversion of the interest of the other owner (Worsham *v.* Vignal, 14 Tex. Civ. App. 324, 37 S. W. 17; Ecclestone *v.* Jarvis, 1 U. C. Q. B. 370) unless the latter's interest is totally lost to him thereby (Rourke *v.* Union Ins. Co., 23 Can. Sup. Ct. 344). So a sale by process of law of a thing in possession of one part owner for his debt is not a conversion of the other part-owner's share. Bell *v.* Layman, 1 T. B. Mon. (Ky.) 39, 15 Am. Dec. 83.

Sale of land upon which is a building not a fixture.— Where defendant purchased mortgaged property at the trustee's sale, but acquired no interest or title in a building on the land, it not being a fixture, either as a lien-holder or innocent purchaser, his vendee could not stand on any such right through or under him, hence, as the owner of the building had the right to remove it, defendant could not be liable for its conversion because of the sale of the premises by him. Shelton *v.* Piner, (Tex. Civ. App. 1910) 126 S. W. 65.

49. Collins *v.* Ayers, 57 Ind. 239.

Judicial sale of interest of one partner is not conversion of interest of the other. Ritchie *v.* Law, 37 N. Brunsw. 36.

50. Parsons *v.* Martin, 11 Gray (Mass.) 111. *Contra*, Thompson *v.* Toland, 48 Cal. 99; Atkins *v.* Gamble, 42 Cal. 86, 10 Am. Rep. 282.

51. Buck *v.* Kent, 3 Vt. 99, 21 Am. Dec. 576.

52. Fitchett *v.* Canary, 59 N. Y. Super. Ct. 383, 14 N. Y. Suppl. 479.

53. *California.*— Steele *v.* Marsicano, 102 Cal. 666, 36 Pac. 920.

Massachusetts.— Shea *v.* Milford, 145 Mass. 525, 14 N. E. 769.

New York.— Selver *v.* Lyons, 110 N. Y. Suppl. 1050; Centlivre *v.* Ryder, Edm. Sel. Cas. 273.

Washington.— Browder *v.* Phinney, 37 Wash. 70, 79 Pac. 598.

Canada.— Seaman *v.* Cutter, 8 Nova Scotia 455.

See 47 Cent. Dig. tit. "Trover and Conversion," § 94.

version.[54] If, however, the detention be based on a negation of the owner's rights, or be accompanied by an intent to convert the property to the holder's own use, a right of action for conversion will arise.[55]

2. Detention to Permit Investigation of Title or Right to Possession. A *bona fide* reasonable detention of goods by one who has assumed some duty respecting them,[56] for the purpose of ascertaining their true ownership, or of determining the right of demandant to receive them, will not sustain an action for conversion.[57]

3. Preventing Removal of Property — a. In General. A wrongful prevention of the removal of chattels by an owner who has the right of immediate possession

54. *Massachusetts.*— Dean *v.* Lindsey, 16 Gray 264.

Nebraska.— Cummins *v.* People's Bldg., etc., Assoc., 61 Nebr. 728, 86 N. W. 474.

New York.— Geisler *v.* David Stevenson Brewing Co., 126 N. Y. App. Div. 715, 111 N. Y. Suppl. 56; Krakower *v.* Krakower, 79 N. Y. App. Div. 633, 79 N. Y. Suppl. 619; County Armagh Ladies' Social, etc., Assoc. *v.* Lemson, 102 N. Y. Suppl. 522.

South Carolina.— Steele *v.* Williams, Dudley 16, 31 Am. Dec. 546.

England.— England *v.* Cowley, L. R. 8 Exch. 126, 42 L. J. Exch. 80, 28 L. T. Rep. N. S. 67, 21 Wkly. Rep. 337; Gunton *v.* Nurse, 2 B. & B. 447, 5 Moore C. P. 259, 6 E. C. L. 222.

Canada.— Keith *v.* McMurray, 27 U. C. C. P. 428.

See 47 Cent. Dig. tit. "Trover and Conversion," § 51.

Detention by bailee see Bailments, 5 Cyc. 214.

The levy of an attachment on property in one's possession is a legal excuse for refusing to deliver it to the owner. Fletcher *v.* Fletcher, 7 N. H. 452, 28 Am. Dec. 359. So held where the attachment suit was against a third party. Verrall *v.* Robinson, 2 C. M. & R. 495, 4 Dowl. P. C. 242, 1 Gale 244, 5 Tyrw. 1069.

Where there are adverse claimants a refusal to deliver even to the true owner property in which one claims no interest whatever is at most a technical conversion only. Stroup *v.* Bridger, 124 Iowa 401, 100 N. W. 113.

55. *Arkansas.*— Estes *v.* Boothe, 20 Ark. 583; Boothe *v.* Estes, 16 Ark. 104.

California.— People *v.* Van Ness, 79 Cal. 84, 21 Pac. 554, 12 Am. St. Rep. 134.

Georgia.— Wilson Coal, etc., Co. *v.* Hall, etc., Woodworking Mach. Co., 97 Ga. 330, 22 S. E. 530.

Indiana.— Coffin *v.* Anderson, 4 Blackf. 395.

Maryland.— Hay *v.* Conner, 2 Harr. & J. 347.

Michigan.— Weldon *v.* Lytle, 53 Mich. 1, 18 N. W. 533.

Missouri.— Dusky *v.* Rudder, 80 Mo. 400; Banking House *v.* Brooks, 52 Mo. App. 364; Allgear *v.* Walsh, 24 Mo. App. 134.

New York.— Smith *v.* Frost, 70 N. Y. 65 [*affirming* 42 N. Y. Super. Ct. 87]; Chankalian *v.* Powers, 89 N. Y. App. Div. 395, 85 N. Y. Suppl. 753; Coykendall *v.* Eaton, 55 Barb. 188, 37 How. Pr. 438; Carroll *v.* Mix, 51 Barb. 212; Moore *v.* Prentiss Tool, etc., Co., 59 N. Y. Super. Ct. 516, 15 N. Y. Suppl. 150 [*affirmed* in 133 N. Y. 144, 30 N. E. 736]; Richmond *v.* Soportos, 18 N. Y. Suppl. 433; Bristol *v.* Burt, 7 Johns. 254, 5 Am. Dec. 264.

North Carolina.— Setzar *v.* Butler, 27 N. C. 212.

South Carolina.— Abrahams *v.* Southwestern R. Bank, 1 S. C. 441, 7 Am. Rep. 33.

Texas.— Young *v.* Lewis, 9 Tex. 73; Gaw *v.* Bingham, (Civ. App. 1908) 107 S. W. 931.

Vermont.— Dohorty *v.* Madgett, 58 Vt. 323, 2 Atl. 115; Sibley *v.* Story, 8 Vt. 15.

England.— Clendon *v.* Dinneford, 5 C. & P. 18, 24 E. C. L. 429; Sharp *v.* Pratt, 3 C. & P. 34, 14 E. C. L. 437.

Canada.— Winchester *v.* Busby, 9 Can. L. T. Occ. Notes 217.

See 47 Cent. Dig. tit. "Trover and Conversion," § 51.

56. Sherman *v.* Commercial Printing Co., 29 Mo. App. 31.

57. *Alabama.*— Bolling *v.* Kirby, 90 Ala. 215, 7 So. 914, 24 Am. St. Rep. 789.

Michigan.— Felcher *v.* McMillan, 103 Mich. 494, 61 N. W. 791; Flannery *v.* Brewer, 66 Mich. 509, 33 N. W. 522; Wood *v.* Pierson, 45 Mich. 313, 7 N. W. 888.

Missouri.— Sartin *v.* Saling, 21 Mo. 387.

New Hampshire.— Stahl *v.* Boston, etc., R. Co., 71 N. H. 57, 51 Atl. 176; Robinson *v.* Burleigh, 5 N. H. 225.

New York.— Ball *v.* Liney, 48 N. Y. 6, 8 Am. Rep. 511 [*reversing* 44 Barb. 505]; Rogers *v.* Weir, 34 N. Y. 463; Carroll *v.* Mix, 51 Barb. 212.

North Carolina.— Dowd *v.* Wadsworth, 13 N. C. 130, 18 Am. Dec. 567.

Texas.— Blankenship *v.* Berry, 28 Tex. 448.

England.— Tyler *v.* London, etc., R. Co., Cab. & E. 285.

See 47 Cent. Dig. tit. "Trover and Conversion," § 52.

Such a defense will be of no avail if plaintiff's title be admitted (Doty *v.* Hawkins, 6 N. H. 247, 25 Am. Dec. 459) or any other reason be advanced for the detention alleged (Ingalls *v.* Bulkley, 15 Ill. 224; Smith *v.* Texas, etc., R. Co., 101 Tex. 405, 108 S. W. 819; Watt *v.* Potter, 29 Fed. Cas. No. 17,291, 2 Mason 77).

Detaining goods during the pendency of an action which adjudicates their ownership is not unreasonable. Mills *v.* Britton, 64 Conn. 4, 29 Atl. 231, 24 L. R. A. 536.

Exhibit of title.— Plaintiff on making a demand for his goods is not bound to exhibit

thereof is a conversion, whether accomplished by merely forbidding it,[58] threats,[59] injunction,[60] locking up the goods,[61] or requiring the performance of a condition which is not enforceable at law.[62]

b. Refusal of Landlord to Permit Tenant to Remove Property. A landlord will be held guilty of a conversion if he refuses to permit an outgoing tenant to remove his trade fixtures or other personal property,[63] unless the refusal was by means of an injunction sued out by the former,[64] or the latter failed to exercise his right of removal prior to his surrender of the premises or abandonment of his term.[65]

4. Holding Property For Expenses Incurred. The right to retain property until repayment of expenses incurred in relation thereto depends upon the character of one's possession. If that possession be wrongful, the right does not obtain and trover will lie.[66] If rightful, and the expenses were incurred in the performance of a duty pertaining to the property, the right does obtain and trover will not lie,[67] if a legal tender of the amount thereof does not accompany the demand.[68]

5. Retention of Collateral After Payment of Debt. It is a conversion to

his title thereto unless defendant refuses to deliver on the ground of his ignorance of plaintiff's rights. Ratcliff *v.* Vance, 2 Mill (S. C.) 239.

58. Collins *v.* Manning, 1 N. Y. St. 204; Gow *v.* Bingham, (Tex. Civ. App. 1908) 107 S. W. 931; Leonard *v.* Belknap, 47 Vt. 602; Dixon *v.* Dalby, 11 U. C. Q. B. 79.

It is a conversion to prohibit an owner from going on one's premises to carry away property which has been duly demanded (Nichols *v.* Newsom, 6 N. C. 302), and unquestionably so if the prohibition be coupled with a claim of control or ownership (Montague *v.* Peters, 7 Ky. L. Rep. 442; Erskine *v.* Savage, 96 Me. 57, 51 Atl. 242; Woodis *v.* Jordan, 62 Me. 490; Town *v.* Hazen, 51 N. H. 596; Sherman *v.* Way, 56 Barb. (N. Y.) 188).

59. Hare *v.* Pearson, 26 N. C. 76; Crocket *v.* Beaty, 8 Humphr. (Tenn.) 20.

60. McGowen *v.* Young, 2 Stew. (Ala.) 276.

61. Hughes *v.* Coors, 3 Colo. App. 303, 33 Pac. 77.

62. Hearn *v.* Bitterman, (Tex. Civ. App. 1894) 27 S. W. 158.

63. *Illinois.*— Hipple *v.* De Puie, 51 Ill. 528.

Indiana.— Dale *v.* Jones, 15 Ind. App. 420, 44 N. E. 316.

Minnesota.— Stout *v.* Stoppel, 30 Minn. 56, 14 N. W. 268.

New York.— Lewis *v.* Ocean Nav., etc., Co., 125 N. Y. 341, 26 N. E. 301 [*affirming* 51 Hun 644, 3 N. Y. Suppl. 911]; Marder *v.* Heinemann, 114 N. Y. App. Div. 794, 100 N. Y. Suppl. 250; Moore *v.* Wood, 12 Abb. Pr. 393.

Pennsylvania.— Watts *v.* Lehman, 107 Pa. St. 106.

Wisconsin.— Vilas *v.* Mason, 25 Wis. 310.

England.— Davis *v.* Jones, 2 B. & Ald. 165, 20 Rev. Rep. 396, 106 Eng. Reprint 327; Fairburn *v.* Eastwood, 9 L. J. Exch. 226, 6 M. & W. 679.

See 47 Cent. Dig. tit. "Trover and Conversion," § 54; and Landlord and Tenant, 24 Cyc. 1113.

A tenant removed, before the expiration of his term, some of his goods from the premises and began business in another place. The landlord took forcible possession of the premises and locked them up. Several days afterward the tenant demanded possession of the premises, but not of his goods. No objection to taking his goods was made by the landlord. This seizure of the premises was held not to be a conversion of the tenant's property. Mattice *v.* Brinkman, 74 Mich. 705, 42 N. W. 172. See also Thorogood *v.* Robinson, 6 Q. B. 769, 9 Jur. 274, 14 L. J. Q. B. 87, 51 E. C. L. 769.

64. Lacey *v.* Beaudry, 53 Cal. 693; Felcher *v.* McMillan, 103 Mich. 494, 61 N. W. 791.

65. Rosenau *v.* Syring, 25 Oreg. 386, 35 Pac. 844; Darrah *v.* Baird, 101 Pa. St. 265; Roffey *v.* Henderson, 17 Q. B. 574, 16 Jur. 84, 21 L. J. Q. B. 49, 79 E. C. L. 574. See also Landlord and Tenant, 24 Cyc. 1113.

66. Lempriere *v.* Pasley, 2 T. R. 485, 100 Eng. Reprint 262.

What law governs.— Defendant's right to detain property under a claim of lien is governed by the law at the time of the demand. Robinson *v.* Kaplan, 21 Misc. (N. Y.) 686, 47 N. Y. Suppl. 1083.

67. *Arkansas.*— Martin *v.* Houck Music Co., 79 Ark. 95, 94 S. W. 932.

Massachusetts.— Plumer *v.* Brown, 8 Metc. 578.

New Hampshire.— Nutter *v.* Varney, 64 N. H. 611, 5 Atl. 457.

New York.— Jackson *v.* Fuller, 97 N. Y. Suppl. 975; Bissell *v.* Pearse, 21 How. Pr. 130.

South Carolina.— Parkerson *v.* Simons, 2 McMull. 188.

United States.— Commercial Nat. Bank *v.* Pirie, 82 Fed. 799, 27 C. C. A. 171.

England.— Isaack *v.* Clark, 2 Bulstr. 306, 80 Eng. Reprint 1143.

Canada.— Webber *v.* Cogswell, 11 Nova Scotia 47.

See 47 Cent. Dig. tit. "Trover and Conversion," § 55.

68. Winchester *v.* Busby, 16 Can. Sup. Ct. 336.

detain notes or other property held as collateral after the payment of the debt secured thereby.[69]

6. Detention of Property After Demand. Non-delivery of a chattel, without legal excuse, after demand therefor made by the owner, or his duly authorized agent, on him who has it in his possession or under his control, constitutes a conversion.[70]

G. Demand and Refusal — 1. As Constituting Conversion. A refusal to deliver a chattel to the owner on proper demand therefor is not a conversion, but only evidence of it,[71] *prima facie* and usually sufficient in the first instance.[72]

The claim for reimbursement must be communicated when demand is made or an action for conversion will be maintainable without a tender of the amount due. Boardman *v.* Sill, 1 Campb. 410 note; Llado *v.* Morgan, 23 U. C. C. P. 517.

69. Long *v.* McIntosh, 129 Ga. 660, 59 S. E. 779, 16 L. R. A. N. S. 1043; Kelsey *v.* Griswold, 6 Barb. (N. Y.) 436; Lincoln Sav. Bank, etc., Co. *v.* Allen, 82 Fed. 148, 27 C. C. A. 87.

70. *Alabama.*— Fryer *v.* McRae, 8 Port. 187.

Connecticut.— Thompson *v.* Rose, 16 Conn. 71, 41 Am. Dec. 121.

Delaware.—Vaughan *v.* Webster, 5 Harr. 256.

Georgia.— Chambless *v.* Livingston, 123 Ga. 257, 51 S. E. 314.

Kentucky.— Brown *v.* Noel, 52 S. W. 849, 21 Ky. L. Rep. 648.

Maryland.— Miller *v.* Grove, 18 Md. 242.

Massachusetts.— Kinder *v.* Shaw, 2 Mass. 398.

Michigan.— Donlin *v.* McQuade, 61 Mich. 275, 28 N. W. 114.

Minnesota.— Boxell *v.* Robinson, 82 Minn. 26, 84 N. W. 635; Latusek *v.* Davies, 79 Minn. 279, 82 N. W. 587; Fletcher *v.* Neudeck, 30 Minn. 125, 14 N. W. 513.

Missouri.— Foster Woolen Co. *v.* Wollman, 87 Mo. App. 658; State *v.* Staed, 65 Mo. App. 487; Sherman *v.* Commercial Printing Co., 29 Mo. App. 31.

New Jersey. — Wykoff *v.* Stevenson, 46 N. J. L. 326.

New York.— Salomon *v.* Sternfield, 102 N. Y. 665, 7 N. E. 47; Pacific Coast Borax Co. *v.* Waring, 128 N. Y. App. Div. 66, 112 N. Y. Suppl. 458; Jackson *v.* Moore, 94 N. Y. App. Div. 504, 87 N. Y. Suppl. 1101; Heine *v.* Anderson, 2 Duer 318; Bassett *v.* Spofford, 2 Daly 432; Smith *v.* Hart, 34 Misc. 214, 68 N. Y. Suppl. 1127; Halbren *v.* Gray, 25 Misc. 693, 55 N. Y. Suppl. 501 [*reversing* 23 Misc. 771, 51 N. Y. Suppl. 1142]; Goodsell Fruit Co. *v.* Greco, 24 Misc. 403, 53 N. Y. Suppl. 405; Lopard *v.* Symons, 85 N. Y. Suppl. 1025; Montanye *v.* Montgomery, 19 N. Y. Suppl. 655.

North Dakota.— Henney Buggy Co. *v.* Higham, 7 N. D. 45, 72 N. W. 911.

Oklahoma.— Oklahoma City *v.* T. M. Richardson Lumber Co., 3 Okla. 5, 39 Pac. 386.

Pennsylvania.— Jacoby *v.* Laussatt, 6 Serg. & R. 300; Alexander *v.* Goldstein, 13 Pa. Super. Ct. 518.

South Carolina.— Dealy *v.* Lance, 2 Speers 487.

Vermont.—Alvord *v.* Davenport, 43 Vt. 30.

England.— Caunce *v.* Spanton, 7 M. & G. 903, 49 E. C. L. 903.

Canada.— Polson *v.* Degeer, 12 Ont. 275; White *v.* Batty, 23 U. C. Q. B. 487.

See 47 Cent. Dig. tit. "Trover and Conversion," § 51.

71. *California.*—Ashton *v.* Heydenfeldt, 124 Cal. 14, 56 Pac. 624.

Illinois.—Rosenbaum *v.* Dawes, 77 Ill. App. 295; Race *v.* Chandler, 15 Ill. App. 532; Kime *v.* Dale, 14 Ill. App. 308.

Indiana.— Cumberland Tel., etc., Co. *v.* Taylor, 44 Ind. App. 27, 88 N. E. 631.

Kentucky.— Kennet *v.* Robinson, 2 J. J. Marsh. 84.

Michigan.— Felcher *v.* McMillan, 103 Mich. 494, 61 N. W. 791.

Missouri.— Newman *v.* Mercantile Trust Co., 189 Mo. 423, 88 S. W. 6; Huxley *v.* Hartzell, 44 Mo. 370; O'Donoghue *v.* Corby, 22 Mo. 393.

New Hampshire.— Hett *v.* Boston, etc., R. Co., 69 N. H. 139, 44 Atl. 910; Edgerly *v.* Emerson, 23 N. H. 555, 55 Am. Dec. 207.

North Carolina.— McDaniel *v.* Nethercut, 53 N. C. 97.

Ohio.— Baltimore, etc., R. Co. *v.* O'Donnell, 49 Ohio St. 489, 32 N. E. 476, 34 Am. St. Rep. 579, 21 L. R. A. 117.

Vermont.— Irish *v.* Cloyes, 8 Vt. 30, 30 Am. Dec. 446.

Wisconsin.— Lander *v.* Bechtel, 55 Wis. 593, 13 N. W. 483.

United States.—Allen *v.* Ogden, 1 Fed. Cas. No. 233, 1 Wash. C. C. 174.

England.— Cannee *v.* Spanton, 8 Jur. 1008, 14 L. J. C. P. 23, 7 M. & G. 903, 8 Scott N. R. 714, 49 E. C. L. 903.

See 47 Cent. Dig. tit. "Trover and Conversion," § 58.

Contra.—An absolute, unqualified refusal to deliver chattels rightfully demanded is an actual conversion, not merely evidence of it. Dent *v.* Chiles, 5 Stew. & P. (Ala.) 383, 26 Am. Dec. 350; McKay *v.* Pearson, 6 Pa. Super. Ct. 529, 41 Wkly. Notes Cas. 516; Baldwin *v.* Cole, 6 Mod. 212, 87 Eng. Reprint 964.

72. *Arkansas.*— Ray *v.* Light, 34 Ark. 421.

Connecticut.— Thompson *v.* Rose, 16 Conn. 71, 41 Am. Dec. 121.

Illinois.— Sturges *v.* Keith, 57 Ill. 451, 11 Am. Rep. 28; Sprague's Collecting Agency *v.* Spiegel, 107 Ill. App. 508.

Maine.—Weston *v.* Carr, 71 Me. 356.

Massachusetts.— Folsom *v.* Manchester, 11 Cush. 334.

However, proof of a refusal to deliver the chattel to the owner upon proper demand for the same becomes conclusive, if not rebutted or explained.[73]

2. As Fixing Time of Conversion. Ordinarily the date of demand and refusal is the date of the conversion [74]

3. Necessity of Demand and Refusal — a. In General. Trover will not lie against one rightfully in possession. Such a possession must first be transformed into a wrongful one by a refusal to surrender the property. Hence demand and refusal are necessary for the maintenance of trover in all cases in which defendant was rightfully in possession.[75] Demand and refusal are superfluous, however, whenever a conversion can be otherwise shown, and evidence thereof may be omitted when any one of the following circumstances is proved: Unavaila-

New York.— Boyle *v.* Roche, 2 E. D. Smith 335; Delaware Bank *v.* Smith, 1 Edm. Sel. Cas. 351; Lockwood *v.* Bull, 1 Cow. 322, 13 Am. Dec. 539.

Rhode Island.— Singer Mfg. Co. *v.* King, 14 R. I. 511.

Wyoming.— De Clark *v.* Bell, 10 Wyo. 1, 65 Pac. 852.

England.— Isaack *v.* Clark, 2 Bulstr. 306, 80 Eng. Reprint 1143; Golightly *v.* Reynolds, Lofft 88, 98 Eng. Reprint 547.

See 47 Cent. Dig. tit. "Trover and Conversion," § 58.

73. *Florida.*— Hickox *v.* Anderson, 19 Fla. 615.

Maryland.— Dietus *v.* Fuss, 8 Md. 148.

Massachusetts.— Magee *v.* Scott, 9 Cush. 148, 55 Am. Dec. 49.

New York.— Osgoodby *v.* Liemberner, 22 Alb. L. J. 114; Feltman *v.* Gulf Brewery, 42 How. Pr. 488.

Tennessee.—Garvin *v.* Luttrell, 10 Humphr. 16.

See 47 Cent. Dig. tit. "Trover and Conversion," § 58.

Plaintiff's assignor delivered certain typewriters to defendants, to be used as samples in furthering typewriter sales in France during the term of a sales contract, and after the expiration thereof, plaintiff's assignor made various requests for their return, without result. It was held that defendants' refusal to return constituted a conversion. Beardsley *v.* Benders, 123 N. Y. Suppl. 35.

74. Smith *v.* Jones, 8 Ark. 109; Buel *v.* Pumphrey, 2 Md. 261, 56 Am. Dec. 714; Dahl *v.* Fuller, 50 Wis. 501, 7 N. W. 440; Logan County Nat. Bank *v.* Townsend, 139 U. S. 67, 11 S. Ct. 496, 35 L. ed. 107 [*affirming* (Ky. 1887) 3 S. W. 122].

If an actual conversion has previously occurred, demand and refusal as evidence of the time of conversion relates back to that event. Dealy *v.* Lance, 2 Speers (S. C.) 487; Talbird *v.* Baynard, 2 Hill (S. C.) 597.

75. *Alabama.*—Wilson *v.* Curry, 149 Ala. 368, 42 So. 753; Louisville, etc., R. Co. *v.* Kauffman & Co., 141 Ala. 671, 37 So. 659; King *v.* Franklin, 132 Ala. 559, 31 So. 467; Moore *v.* Monroe Refrigerator Co., 128 Ala. 621, 29 So. 447; Glaze *v.* McMillion, 7 Port. 279.

Arkansas.— McLain *v.* Huffman, 30 Ark. 428.

Colorado.— Salida Bldg., etc., Assoc. *v.* Davis, 16 Colo. App. 294, 64 Pac. 1046; Moynahan *v.* Prentiss, 10 Colo. App. 295, 51 Pac. 94.

Connecticut.— Semon *v.* Adams, 79 Conn. 81, 63 Atl. 661.

Georgia.— If defendant be in possession when an action in the nature of trover is brought, it is unnecessary under section 3028 of the code to prove a demand and refusal. Wall *v.* Johnson, 88 Ga. 524, 15 S. E. 15.

Illinois.— Songer *v.* Lynch, 72 Ill. 498.

Indiana.— Jones *v.* Gregg, 17 Ind. 84.

Iowa.— Bever *v.* Swecker, 138 Iowa 721, 116 N. W. 704.

Kansas.—Auld *v.* Butcher, 22 Kan. 400.

Kentucky.— Kennet *v.* Robinson, 2 J. J. Marsh. 84.

Maine.— Carleton *v.* Lovejoy, 54 Me. 445.

Massachusetts.— Fairbank *v.* Phelps, 22 Pick. 535.

Missouri.— Polk *v.* Allen, 19 Mo. 467; Southwestern Port Huron Co. *v.* Cobble, 124 Mo. App. 647, 102 S. W. 9.

New Jersey.— Temple Co. *v.* Penn Mut. L. Ins. Co., 69 N. J. L. 36, 54 Atl. 295.

New York.— MacDonnell *v.* Buffalo Loan, etc., Co., 193 N. Y. 92, 85 N. E. 801 [*affirming* 119 N. Y. App. Div. 245, 104 N. Y. Suppl. 625]; Hartford Nat. Life Assoc. *v.* Thompson, 38 N. Y. App. Div. 445, 56 N. Y. Suppl. 401; Moran *v.* Abbott, 26 N. Y. App. Div. 570, 50 N. Y. Suppl. 337; Williamson *v.* Seeley, 22 N. Y. App. Div. 389, 48 N. Y. Suppl. 196; Rosenkranz *v.* Jacobowitz, 50 Misc. 580, 99 N. Y. Suppl. 469; J. L. Mott Iron Works *v.* Reilly, 39 Misc. 833, 81 N. Y. Suppl. 323; Simon *v.* Seide, 24 Misc. 186, 52 N. Y. Suppl. 629; Smith *v.* Hartog, 23 Misc. 353, 51 N. Y. Suppl. 257; Baruch *v.* Platt, 114 N. Y. Suppl. 26; Besson *v.* Levey, 110 N. Y. Suppl. 230; Spinell *v.* Philipson, 93 N. Y. Suppl. 432; Case *v.* Duffy, 86 N. Y. Suppl. 778.

North Carolina.— Finch *v.* Clarke, 61 N. C. 335; Ragsdale *v.* Williams, 30 N. C. 498, 49 Am. Dec. 406.

Ohio.— Morris *v.* Bills, Wright 343.

Pennsylvania.— Taylor *v.* Hanlon, 103 Pa. St. 504; Waring *v.* Pennsylvania R. Co., 76 Pa. St. 491; Yeager *v.* Wallace, 57 Pa. St. 365; Korpa *v.* Dumora, 9 Kulp 375.

Tennessee.— Moore *v.* Fitzpatrick, 7 Baxt. 350; Duckworth *v.* Overton, 1 Swan 381.

Wisconsin.— Nay *v.* Crook, 1 Pinn. 546.

United States.— Blakely *v.* Ruddell, 30 Fed. Cas. No. 18,241, Hempst. 18.

bility of a demand,[76] a possession maintained in violation of one's contract,[77] a tortious taking,[78] a tortious levy or attachment,[79] acts of ownership,[80] retention of money which it was defendant's duty to pay to plaintiff,[81] diversion of property from the special purpose for which it was received,[82] an unfulfilled promise to return the goods,[83] or any distinct act of conversion in general.[84]

England.— Thorogood *v.* Robinson, 6 Q. B. 769, 9 Jur. 274, 14 L. J. Q. B. 87, 51 E. C. L. 769; Severin *v.* Keppell, 4 Esp. 156.

Canada.— Dowling *v.* Miller, 9 U. C. Q. B. 227.

See 47 Cent. Dig. tit. "Trover and Conversion," § 60.

76. *California.*— Hand *v.* Scodeletti, 128 Cal. 674, 61 Pac. 373; Wood *v.* McDonald, 66 Cal. 546, 6 Pac. 452, holding that no evidence of demand is necessary where defendant's answer admits that a demand would not have been complied with.

Colorado.— Gottlieb *v.* Hartman, 3 Colo. 53.

Illinois.— Freehill *v.* Hueni, 103 Ill. App. 118; Kime *v.* Dale, 14 Ill. App. 308.

Louisiana.— Rosenthral *v.* Baer, 18 La. Ann. 573.

Missouri.— Swinney *v.* Gouty, 83 Mo. App. 549.

New York.— Kavanaugh *v.* McIntyre, 128 N. Y. App. Div. 722, 112 N. Y. Suppl. 937; Turner *v.* Cedar, 91 N. Y. Suppl. 758.

North Dakota.— More *v.* Burger, 15 N. D. 345, 107 N. W. 200.

South Dakota.— Hahn *v.* Sleepy Eye Milling Co., 21 S. D. 324, 112 N. W. 843.

Wisconsin.— Smith *v.* Schulenberg, 34 Wis. 41.

See 47 Cent. Dig. tit. "Trover and Conversion," § 60.

77. Piazzek *v.* Harmon, 79 Kan. 855, 98 Pac. 771; Wagner *v.* Marple, 10 Tex. Civ. App. 505, 31 S. W. 691.

78. McConnell *v.* Stamp, 147 Ill. App. 56.

79. *Colorado.*— Fairbanks *v.* Kent, 16 Colo. App. 35, 63 Pac. 707.

Georgia.— Robinson *v.* McDonald, 2 Ga. 116.

Iowa.—Zimmerman *v.* Winterset Nat. Bank, 56 Iowa 133, 8 N. W. 807.

Kansas.— Johnson *v.* Anderson, 60 Kan. 578, 57 Pac. 513.

Massachusetts.— Robinson *v.* Way, 163 Mass. 212, 39 N. E. 1009; Woodbury *v.* Long, 8 Pick. 543, 19 Am. Dec. 345.

New York.— Smith *v.* Smalley, 19 N. Y. App. Div. 519, 46 N. Y. Suppl. 277; Lux *v.* Davidson, 56 Hun 345, 9 N. Y. Suppl. 816.

See 47 Cent. Dig. tit. "Trover and Conversion," § 60.

80. *Alabama.*— Dixie *v.* Harrison, 163 Ala. 304, 50 So. 284.

Illinois.— Badger *v.* Batavia Paper Mfg. Co., 70 Ill. 302; Follett *v.* Edwards, 30 Ill. App. 386.

Indian Territory.— Purcell Cotton Seed Oil Mills *v.* Bell, 7 Indian Terr. 717, 104 S. W. 944.

Maine.— Porter *v.* Foster, 20 Me. 391, 37 Am. Dec. 59.

Massachusetts.— Gilmore *v.* Newton, 9 Allen 171, 85 Am. Dec. 749.

New York.— Andrews *v.* Shattuck, 32 Barb. 396; Graham *v.* Purcell, 126 N. Y. App. Div. 407, 110 N. Y. Suppl. 813; Schechter *v.* Watson, 35 Misc. 43, 70 N. Y. Suppl. 1; Corotinsky *v.* Cooper, 26 Misc. 138, 55 N. Y. Suppl. 970.

Vermont.— Riford *v.* Montgomery, 7 Vt. 411.

See 47 Cent. Dig. tit. "Trover and Conversion," § 60.

81. *Alabama.*— Bradley *v.* Harden, 73 Ala. 70.

California.— Becker *v.* Feigenbaum, (1896) 45 Pac. 837.

Michigan.— Pierce *v.* Underwood, 112 Mich. 186, 70 N. W. 419.

Minnesota.— Farrand *v.* Hurlbut, 7 Minn. 477.

New York.— Wood *v.* Young, 141 N. Y. 211, 36 N. E. 193; Stacy *v.* Graham, 14 N. Y. 492; Hickok *v.* Hickok, 13 Barb. 632.

See 47 Cent. Dig. tit. "Trover and Conversion," § 60.

82. *Indiana.*— Bunger *v.* Roddy, 70 Ind. 26.

Maine.— Rodick *v.* Coburn, 68 Me. 170; Hotchkiss *v.* Hunt, 49 Me. 213.

Missouri.— Richardson *v.* Ashby, 132 Mo. 238, 33 S. W. 806.

New York.— Thompson *v.* Vroman, 66 Hun 245, 21 N. Y. Suppl. 179; Hynes *v.* Patterson, 28 Hun 528 [*affirmed* in 95 N. Y. 1]; Mott *v.* Cook, 10 N. Y. St. 590.

Texas.— Gregory *v.* Montgomery, 23 Tex. Civ. App. 68, 56 S. W. 231.

See 47 Cent. Dig. tit. "Trover and Conversion," § 60.

83. Durell *v.* Mosher, 8 Johns. (N. Y.) 445.

84. *Alabama.*—Ensley Lumber Co. *v.* Lewis, 121 Ala. 94, 25 So. 729; Haas *v.* Taylor, 80 Ala. 459, 2 So. 633; Hill *v.* Kennedy, 32 Ala. 523.

Colorado.— Carper *v.* Ridson, 19 Colo. App. 530, 76 Pac. 744.

Florida.— Anderson *v.* Agnew, 38 Fla. 30, 20 So. 766.

Georgia.— Merchants', etc., Transp. Co. *v.* Moore, 124 Ga. 482, 52 S. E. 802; Baston *v.* Rabun, 115 Ga. 378, 41 S. E. 568; Miller *v.* Wilson, 98 Ga. 567, 25 S. E. 578, 58 Am. St. Rep. 319; Rushin *v.* Tharpe, 88 Ga. 779, 15 S. E. 830; Dunn *v.* Cox, 85 Ga. 141, 11 S. E. 582; Loveless *v.* Fowler, 79 Ga. 134, 4 S. E. 103, 11 Am. St. Rep. 407; Seago *v.* Pomeroy, 46 Ga. 227; Robinson *v.* McDonald, 2 Ga. 116.

Illinois.— Union Stockyard, etc., Co. *v.* Mallory, etc., Co., 157 Ill. 554, 41 N. E. 888, 48 Am. St. Rep. 341 [*reversing* 54 Ill. App. 170]; McConnell *v.* Hamp, 147 Ill. App. 56; Sehnert *v.* Koenig, 99 Ill. App. 513; Haddix *v.* Einstman, 14 Ill. App. 443.

b. Control or Possession of Property. In order that a demand and refusal may suffice to establish a conversion it must affirmatively appear that at the time thereof the property was in existence,[85] and was in defendant's possession or so far under his control as to permit a compliance with the demand.[86]

Indiana.— Armacost *v.* Lindley, 116 Ind. 295, 19 N. E. 138; Cox *v.* Albert, 78 Ind. 241; Hon *v.* Hon, 70 Ind. 135; Stewart *v.* Long, 16 Ind. App. 164, 44 N. E. 63; Koehring *v.* Aultman, 7 Ind. App. 475, 34 N. E. 30, 35 N. E. 30.

Maryland.— Bonaparte *v.* Clagett, 78 Md. 87, 27 Atl. 619.

Minnesota.— Hogan *v.* Atlantic El. Co., 66 Minn. 344, 69 N. W. 1; Adams *v.* Castle, 64 Minn. 505, 67 N. W. 637.

Missouri.—Himes *v.* McKinney, 3 Mo. 382; Ward *v.* D. A. Morr Transfer, etc., Co., 119 Mo. App. 83, 95 S. W. 964; Mohr *v.* Langan, 77 Mo. App. 481; Wimberly *v.* Pitner, 66 Mo. App. 633.

Nebraska.— Gross *v.* Scheel, 67 Nebr. 223, 93 N. W. 418.

New Hampshire.—Giles *v.* Merritt, 59 N. H. 325.

New Jersey.— Earle *v.* Vanburen, 7 N. J. L. 344.

New York.— Mullen *v.* Quinlon, 195 N. Y. 109, 87 N. E. 1078, 24 L. R. A. N. S. 511 [*affirming* 124 N. Y. App. Div. 916, 108 N. Y. Suppl. 1141]; MacDonnell *v.* Buffalo Loan, etc., Co., 193 N. Y. 92, 85 N. E. 801 [*affirming* 119 N. Y. App. Div. 245, 104 N. Y. Suppl. 625]; Johnston *v.* Ross, 22 N. Y. App. Div. 651, 48 N. Y. Suppl. 6; Matter of Pierson, 19 N. Y. App. Div. 478, 46 N. Y. Suppl. 557; Baker *v.* Moore, 4 N. Y. App. Div. 234, 38 N. Y. Suppl. 559; Fulton *v.* Lydecker, 17 N. Y. Suppl. 451; Clark *v.* Miller, 14 N. Y. Suppl. 53; Gilbert *v.* Manchester Iron Mfg. Co., 11 Wend. 625; Everett *v.* Coffin, 6 Wend. 603, 22 Am. Dec. 551.

Tennessee.—Garvin *v.* Luttrell, 10 Humphr. 16.

United States.— Bell *v.* Carter, 164 Fed. 417, 90 C. C. A. 555, 19 L. R. A. N. S. 833; Peru Plow, etc., Co. *v.* Harker, 144 Fed. 673, 75 C. C. A. 475.

See 47 Cent. Dig. tit. "Trover and Conversion," § 60.

A demand made after an act of conversion is not a waiver thereof; and, if followed by a refusal, does not constitute another or a new conversion. Ward *v.* Carson River Wood Co., 13 Nev. 44; Manwell *v.* Briggs, 17 Vt. 176.

85. Southern Express Co. *v.* Sinclair, 130 Ga. 372, 60 S. E. 849; Salt Springs Nat. Bank *v.* Wheeler, 48 N. Y. 492, 8 Am. Rep. 564; Dexter *v.* Dexter, 56 N. Y. Super. Ct. 568, 4 N. Y. Suppl. 712.

Belief that property was destroyed.—A refusal to deliver on demand property which one honestly but erroneously believes to have been destroyed by fire is not a conversion thereof. McDonald *v.* McKinnon, 104 Mich. 428, 62 N. W. 560.

86. *California.*— Steele *v.* Marsicano, 102 Cal. 666, 36 Pac. 920; Beckman *v.* McKay, 14 Cal. 250.

Florida.— Robinson *v.* Hartridge, 13 Fla. 501.

Georgia.— Hare *v.* Atlanta City Brewing Co., 65 Ga. 348.

Idaho.— Coombs *v.* Collins, 6 Ida. 536, 57 Pac. 310.

Illinois.— Newlin *v.* Prevo, 90 Ill. App. 515; Rosenbaum *v.* Dawes, 77 Ill. App. 295; Hill *v.* Belasco, 17 Ill. App. 194.

Kansas.— Topeka Bank *v.* Miller, 59 Kan. 743, 54 Pac. 1070.

Maine.— Hagar *v.* Randall, 62 Me. 439; Dearbourn *v.* Union Nat. Bank, 58 Me. 273; Davis *v.* Buffum, 51 Me. 160.

Massachusetts.— Gilmore *v.* Newton, 9 Allen 171, 85 Am. Dec. 749; Johnson *v.* Couillard, 4 Allen 446.

Missouri.— German-American Bank *v.* Brunswig, 107 Mo. App. 401, 81 S. W. 461.

New Hampshire.— Hett *v.* Boston, etc., R. Co., 69 N. H. 139, 44 Atl. 910; Carr *v.* Clough, 26 N. H. 280, 59 Am. Dec. 345.

New Jersey.— Frome *v.* Dennis, 45 N. J. L. 515.

New York.— Sternberg *v.* Schein, 63 N. Y. App. Div. 417, 71 N. Y. Suppl. 511; Temerson *v.* Grau, 33 Misc. 471, 67 N. Y. Suppl. 847; Carter *v.* Eighth Ward Bank, 33 Misc. 128, 67 N. Y. Suppl. 300; Gregory *v.* Fichtner, 14 N. Y. Suppl. 891, 21 N. Y. Civ. Proc. 1, 27 Abb. N. Cas. 86 [*reversing* 13 N. Y. Suppl. 593]; McClellan *v.* Wyatt, 11 N. Y. Suppl. 686, 26 Abb. N. Cas. 144.

Oklahoma.— Phelps, etc., Co. *v.* Halsell, 11 Okla. 1, 65 Pac. 340.

Oregon.— Ferrera *v.* Parke, 19 Oreg. 141, 23 Pac. 883.

Pennsylvania.— Taylor *v.* Lyon, 10 Pa. Cas. 175, 13 Atl. 739; Shaw *v.* Swope, 8 Pa. Super. Ct. 491, 43 Wkly. Notes Cas. 167; Spear *v.* Alexander, 2 Phila. 89.

Rhode Island.— Canning *v.* Owen, 22 R. I. 624, 48 Atl. 1033, 84 Am. St. Rep. 808.

South Carolina.— Morris *v.* Thomson, 1 Rich. 65; Barber *v.* Anderson, 1 Bailey 358.

Vermont.— Buck *v.* Ashley, 37 Vt. 475; Nutt *v.* Wheeler, 30 Vt. 436, 73 Am. Dec. 316; Abbott *v.* Kimball, 19 Vt. 551, 47 Am. Dec. 708; Yale *v.* Saunders, 16 Vt. 243; Knapp *v.* Winchester, 11 Vt. 351; Rice *v.* Clark, 8 Vt. 109.

England.— Smith *v.* Young, 1 Campb. 439; Edwards *v.* Hooper, 7 Jur. 378, 12 L. J. Exch. 304, 11 M. & W. 363; Hinchcliffe *v.* Sharpe, 77 L. T. Rep. N. S. 714.

Canada.— Wells *v.* Crew, 5 U. C. Q. B. O. S. 209.

See 47 Cent. Dig. tit. "Trover and Conversion," § 61.

Plaintiffs held tickets for wheat, a large portion of which the warehouseman had converted. A demand for the whole amount of wheat due on the tickets was held sufficient in an action of conversion. Leuthold *v.* Fairchild, 35 Minn. 99, 27 N. W. 503, 28 N. W. 218.

c. Nature of Taking of Property. Where possession of a chattel was taken wrongfully a demand therefor is not indispensable to the maintenance of an action for conversion.[87]

d. Claiming Adversely to Title or Rights of Plaintiff. Demand is not essential to the maintenance of trover when it appears that defendant claims title adversely to plaintiff,[88] or took the property into his possession with notice of plaintiff's rights.[89]

An unqualified refusal by one having control of property is a conversion, even though he was unable at the time to make an immediate delivery. Clark *v.* Hale, 34 Conn. 398; Ferguson *v.* Clifford, 37 N. H. 86.

87. *Alabama.*— Boutwell *v.* Parker, 124 Ala. 341, 27 So. 309; Haas *v.* Taylor, 80 Ala. 459, 2 So. 633; Scott *v.* Hodges, 62 Ala. 337; Nelson *v.* Beck, 54 Ala. 329; Rhodes *v.* Lowry, 54 Ala. 4; Conner *v.* Allen, 33 Ala. 515; Brown *v.* Beason, 24 Ala. 466; Glaze *v.* McMillion, 7 Port. 279.

Arkansas.— Dunnahoe *v.* Williams, 24 Ark. 264; Gentry *v.* Madden, 3 Ark. 127.

California.— Paige *v.* O'Neal, 12 Cal. 483.

Colorado.— Rhoades *v.* Drummond, 3 Colo. 374.

Georgia.— Braswell *v.* McDaniel, 74 Ga. 319.

Illinois.— Hayes *v.* Massachusetts Mut. L. Ins. Co., 125 Ill. 626, 18 N. E. 322, 1 L. R. A. 303; Howitt *v.* Estelle, 92 Ill. 218; Hardy *v.* Keeler, 56 Ill. 152; Morley *v.* Roach, 116 Ill. App. 534; Zorger *v.* Selicovitz, 115 Ill. App. 37; Camp *v.* Unger, 54 Ill. App. 653.

Maine.— State *v.* Patten, 49 Me. 383; Jewett *v.* Patridge, 12 Me. 243, 27 Am. Dec. 173.

Massachusetts.— Hunt *v.* Boston, 183 Mass. 303, 67 N. E. 244; Baker *v.* Lothrop, 155 Mass. 376, 29 N. E. 643; Pine *v.* Morrison, 121 Mass. 296; Riley *v.* Boston Water Power Co., 11 Cush. 11; Thurston *v.* Blanchard, 22 Pick. 18, 33 Am. Dec. 700; Pierce *v.* Benjamin, 14 Pick. 356, 25 Am. Dec. 396; Hunt *v.* Holton, 13 Pick. 216; Woodbury *v.* Long, 8 Pick. 543, 19 Am. Dec. 345.

Michigan.— Crane Lumber Co. *v.* Bellows, 116 Mich. 304, 74 N. W. 481.

Minnesota.— Kenrick *v.* Rogers, 26 Minn. 344, 4 N. W. 46; Kronschnable *v.* Knoblauch, 21 Minn. 56.

Missouri.— Ray *v.* Davison, 24 Mo. 280.

Montana.— Reynolds *v.* Fitzpatrick, 23 Mont. 52, 57 Pac. 452.

New Hampshire.— Porell *v.* Cavanaugh, 69 N. H. 364, 41 Atl. 860; Fisk *v.* Ewen, 46 N. H. 173; Walcott *v.* Keith, 22 N. H. 196; Hyde *v.* Noble, 13 N. H. 494, 38 Am. Dec. 508.

New York.— Powell *v.* Powell, 71 N. Y. 71 [*reversing* 3 Hun 413, 6 Thomps. & C. 51]; Friedman *v.* Phillips, 84 N. Y. App. Div. 179, 82 N. Y. Suppl. 96; Buckingham *v.* Vincent, 23 N. Y. App. Div. 238, 48 N. Y. Suppl. 747; Adams *v.* Loomis, 54 Hun 638, 8 N. Y. Suppl. 17; Moses *v.* Walker, 2 Hilt. 536; Davison *v.* Donadi, 2 E. D. Smith 121; Schechter *v.* Watson, 35 Misc. 43, 70 N. Y. Suppl. 1; Heyert *v.* Reubman, 86 N. Y. Suppl. 797.

Pennsylvania.— Springer *v.* Groom, 9 Pa. Cas. 123, 12 Atl. 446.

South Carolina.— McPherson *v.* Neuffer, 11 Rich. 267; Jones *v.* Dugan, 1 McCord 428; Davis *v.* Duncan, 1 McCord 213.

Tennessee.— Hunt *v.* Walker, 12 Heisk. 551; Merchants' Nat. Bank *v.* Trenholm, 12 Heisk. 520.

Utah.— Warren *v.* Smith, 35 Utah 455, 100 Pac. 1069.

Vermont.— Loomis *v.* Lincoln, 24 Vt. 153.

Virginia.— Newsum *v.* Newsum, 1 Leigh 86, 19 Am. Dec. 739.

Wisconsin.— Meyer *v.* Doherty, 133 Wis. 398, 113 N. W. 671, 13 L. R. A. N. S. 247.

United States.— Carr *v.* Gale, 5 Fed. Cas. No. 2,434, 2 Ware 330.

England.— Grainger *v.* Hill, Arn. 42, 4 Bing. N. Cas. 212, 2 Jur. 235, 7 L. J. C. P. 85, 5 Scott 561, 33 E. C. L. 675; Beckwith *v.* Corral, 3 Bing. 444, 11 E. C. L. 220, 2 C. & P. 261, 12 E. C. L. 561, 4 L. J. C. P. O. S. 139, 11 Moore C. P. 335; Forsdick *v.* Collins, 1 Stark. 173, 18 Rev. Rep. 757, 2 E. C. L. 73.

See 47 Cent. Dig. tit. "Trover and Conversion," § 62.

88. *Alabama.*— Powell *v.* Olds, 9 Ala. 861.

Arkansas.— Sadler *v.* Sadler, 16 Ark. 628.

California.— Davis *v.* Winona Wagon Co., 120 Cal. 244, 52 Pac. 487.

Georgia.— Grant *v.* Miller, 107 Ga. 804, 33 S. E. 671.

Michigan.— Iler *v.* Baker, 82 Mich. 226, 46 N. W. 377.

New York.— Bahr *v.* Boley, 50 N. Y. App. Div. 577, 64 N. Y. Suppl. 200; Heald *v.* MacGowan, 15 Daly 233, 5 N. Y. Suppl. 450 [*affirmed* in 117 N. Y. 643, 22 N. E. 1131]; McSwegan *v.* Hankinson, 95 N. Y. Suppl. 548.

South Dakota.— Consolidated Land, etc., Co. *v.* Hawley, 7 S. D. 229, 63 N. W. 904.

Wisconsin.— Stevens Point First Nat. Bank *v.* Kickbusch, 78 Wis. 218, 47 N. W. 267.

Canada.— Blackley *v.* Dooley, 18 Ont. 381.

See 47 Cent. Dig. tit. "Trover and Conversion," § 63.

89. *California.*— Scriber *v.* Masten, 11 Cal. 303.

Indiana.— Buntin *v.* Pritchett, 85 Ind. 247.

Maryland.— Bonaparte *v.* Clagett, 78 Md. 87, 27 Atl. 619.

Michigan.— Tuttle *v.* Campbell, 74 Mich. 652, 42 N. W. 384, 16 Am. St. Rep. 652.

Missouri.— Withers *v.* Lafayette County Bank, 67 Mo. App. 115.

New York.— Castle *v.* Corn Exch. Bank, 75 Hun 89, 26 N. Y. Suppl. 1035 [*affirmed* in 148 N. Y. 122, 42 N. E. 518]; Hallett *v.* Carter, 19 Hun 629.

e. Refusal Before Demand. Trover may be maintained without a previous demand where there has been a refusal to give up the chattel.[90]

f. Demand Against Persons Purchasing From Wrong-Doer. Demand and refusal need not be proved in trover against a third person either where, with knowledge of the owner's rights, he received property by purchase or otherwise from one unauthorized so to dispose of it;[91] or where he, whether a *bona fide* purchaser or not, has sold such property or otherwise converted it to his own use.[92] But proof of demand and refusal may be omitted in trover against third persons who took as *bona fide* purchasers and still retain the property.[93]

g. Transfer of Property by Person Having no Title or Right. An action for conversion without a prior demand and refusal is justified by a transfer of property by one having no right or title thereto, irrespective of the character of his possession.[94]

North Carolina.— Waller *v.* Bowling, 108 N. C. 289, 12 S. E. 990, 12 L. R. A. 261; State University *v.* State Nat. Bank, 96 N. C. 280, 3 S. E. 359.

South Carolina.— Hutchinson *v.* Bobo, 1 Bailey 546.

Wisconsin.—Anderson *v.* Sutherland, 91 Wis. 585, 65 N. W. 365.

England.— Lovell *v.* Martin, 4 Taunt. 799, 14 Rev. Rep. 668.

Canada.— Haren *v.* Lyon, Taylor (U. C.) 370.

See 47 Cent. Dig. tit. "Trover and Conversion," § 63.

90. Claflin *v.* Gurney, 17 R. I. 185, 20 Atl. 932. See also Stevens Point First Nat. Bank *v.* Kickbusch, 78 Wis. 218, 47 N. W. 267.

This is true even though the action therefor be brought by a subsequent owner of the property. Delano *v.* Curtis, 7 Allen (Mass.) 470; Robinson *v.* Kaplan, 21 Misc. (N. Y.) 686, 47 N. Y. Suppl. 1083.

91. Lowry *v.* Beckner, 5 B. Mon. (Ky.) 41; White Sewing Mach. Co. *v.* Betting, 46 Mo. App. 417; Dunham *v.* Converse, 28 Wis. 306.

92. Porter *v.* Foster, 20 Me. 391, 37 Am. Dec. 59; Pease *v.* Smith, 61 N. Y. 477 [*affirming* (1871) 3 Lans. 428]; Wooster *v.* Sherwood, 25 N. Y. 278; Seneca Nation of Indians *v.* Hammond, 3 Thomps. & C. (N. Y.) 347; Berney *v.* Drexel, 63 How. Pr. (N. Y.) 471 [*affirmed* in 33 Hun 34 (*affirmed* in 33 Hun 419)]; Rice *v.* Yocum, 155 Pa. St. 538, 26 Atl. 698.

93. *California.*— Harpending *v.* Meyer, 55 Cal. 555.

Indiana.— Sherry *v.* Picken, 10 Ind. 375; Valentine *v.* Duff, 7 Ind. App. 196, 33 N. E. 529, 34 N. E. 453.

Maine.— Rodick *v.* Coburn, 68 Me. 170; Freeman *v.* Underwood, 66 Me. 229; Hotchkiss *v.* Hunt, 49 Me. 213; Whipple *v.* Gilpatrick, 19 Me. 427.

Massachusetts.— Riley *v.* Boston Water Power Co., 11 Cush. 11; Stanley *v.* Gaylord, 1 Cush. 536, 48 Am. Dec. 643.

Michigan.— Hake *v.* Buell, 50 Mich. 89, 14 N. W. 710. But see Rodgers *v.* Brittain, 39 Mich. 477.

Nevada.— Whitman Gold, etc., Min. Co. *v.* Tritle, 4 Nev. 494.

New Hampshire.— Lovejoy *v.* Jones, 30 N. H. 164; Hyde *v.* Noble, 13 N. H. 494, 38 Am. Dec. 508.

Oregon.— Velsian *v.* Lewis, 15 Oreg. 539, 16 Pac. 631, 3 Am. St. Rep. 184.

Pennsylvania.— Brisben *v.* Wilson, 60 Pa. St. 452.

South Dakota.— Rosum *v.* Hodges, 1 S. D. 308, 47 N. W. 140, 9 L. R. A. 817.

Vermont.— Bucklin *v.* Beals, 38 Vt. 653; Deering *v.* Austin, 34 Vt. 330; Courtis *v.* Cane, 32 Vt. 232, 76 Am. Dec. 174; Grant *v.* King, 14 Vt. 367.

United States.— Blakely *v.* Ruddell, 30 Fed. Cas. No. 18,241, Hempst. 18.

England.— Yates *v.* Carnsew, 3 C. & P. 99, 14 E. C. L. 470; Hurst *v.* Gwennap, 2 Stark. 306, 3 E. C. L. 420.

Canada.— Bligh *v.* Darling, 15 Nova Scotia 248.

See 47 Cent. Dig. tit. "Trover and Conversion," § 65.

Contra.— *Connecticut.*— Parker *v.* Middlebrook, 24 Conn. 207.

Illinois.— Metcalfe *v.* Dickman, 43 Ill. App. 284.

Maryland.— Stewart *v.* Spedden, 5 Md. 433.

Minnesota.— Plano Mfg. Co. *v.* Northern Pacific El. Co., 51 Minn. 167, 53 N. W. 202.

New York.— Pease *v.* Smith, 61 N. Y. 477; Gillet *v.* Roberts, 57 N. Y. 28; Stephens *v.* Meriden Britannia Co., 13 N. Y. App. Div. 268, 43 N. Y. Suppl. 226; Hovey *v.* Bromley, 85 Hun 540, 33 N. Y. Suppl. 400; Goodwin *v.* Goldsmith, 49 N. Y. Super. Ct. 101 [*affirmed* in 99 N. Y. 149, 1 N. E. 404]; Gurney *v.* Kenny, 2 E. D. Smith 132; Jackson *v.* Chapman, 29 Misc. 129, 60 N. Y. Suppl. 270; Storm *v.* Livingston, 6 Johns. 44.

South Carolina.— Ladson *v.* Mostowitz, 45 S. C. 388, 23 S. E. 49.

A joint action of trover cannot be maintained against a seller who is a tort-feasor, and a *bona fide* purchaser of a chattel from him. Larkins *v.* Eckwurzel, 42 Ala. 322, 94 Am. Dec. 651.

94. *Alabama.*— May *v.* O'Neal, 125 Ala. 620, 28 So. 12; Kyle *v.* Gray, 11 Ala. 233.

Georgia.— Branch *v.* Planters' Loan, etc., Bank, 75 Ga. 342.

Illinois.— Bane *v.* Detrick, 52 Ill. 19.

Indiana.— Robinson *v.* Skipworth, 23 Ind. 311.

Iowa.— Haas *v.* Damon, 9 Iowa 589.

Maine.— Badger *v.* Hatch, 71 Me. 562.

h. Property Taken by Trespasser. In trover for property taken by a trespasser evidence of demand on him therefor is unnecessary.[95]

i. Property Taken by Mistake. That defendant carried away or otherwise converted the property in controversy by mistake does not entitle him to a demand.[96]

j. Property Obtained by Fraud. One from whom chattels have been obtained by fraud can maintain trover against the person so obtaining them without a prior demand.[97]

k. Property Obtained by Void Contract. Demand and refusal need not be proved in an action for conversion against a defendant who obtained the property in question through a void contract.[98]

l. Conversion by Agent or Servant. Trover will lie without previous demand and refusal against a servant or agent who has converted his principal's or master's goods;[99] but mere refusal of agent to pay over upon demand money collected for his principal is not sufficient to sustain trover.[1]

m. Mixing of Goods or Flocks. In the case of an intermingling of flocks or goods a demand must be made.[2]

4. Waiver of Demand. A subsequent demand is not a waiver of a prior demand for the same chattels.[3]

5. Sufficiency of Demand — a. In General. A demand must be sufficiently

Maryland.— Levi *v.* Booth, 58 Md. 305, 42 Am. Rep. 332; Dietus *v.* Fuss, 8 Md. 148.

Massachusetts.— Philbrook *v.* Eaton, 134 Mass. 398.

Michigan.— Yeisley *v.* Bennett, 121 Mich. 422, 80 N. W. 114.

Missouri.— Knipper *v.* Blumenthal, 107 Mo. 665, 18 S. W. 23; Withers *v.* Lafayette County Bank, 67 Mo. App. 115; La Fayette County Bank *v.* Metcalf, 40 Mo. App. 494.

Nebraska.— Gore *v.* Izer, 64 Nebr. 843, 90 N. W. 758.

New Hampshire.— Dudley *v.* Sawyer, 41 N. H. 326; Gilman *v.* Hill, 36 N. H. 311.

New York.— Buffalo Mar. Bank *v.* Fiske, 71 N. Y. 353 [*affirming* 9 Hun 363]; Pease *v.* Smith, 61 N. Y. 477; Rodney Hunt Mach. Co. *v.* Stewart, 57 Hun 545, 11 N. Y. Suppl. 448; Esmay *v.* Fanning, 9 Barb. 176, 5 How. Pr. 228; Ranous *v.* Hughes, 19 Misc. 46, 42 N. Y. Suppl. 519.

South Carolina.— Girardeau *v.* Southern Express Co., 48 S. C. 421, 26 S. E. 711; Ladson *v.* Mostowitz, 45 S. C. 388, 23 S. E. 49.

Vermont.— Courtis *v.* Cane, 32 Vt. 232, 76 Am. Dec. 174.

Washington.— Rector *v.* Thompson, 26 Wash. 400, 67 Pac. 86.

Wisconsin.— Couillard *v.* Johnson, 24 Wis. 533.

See 47 Cent. Dig. tit. "Trover and Conversion," § 66.

An attempt to mortgage or sell the property of another obviates demand for it and a refusal to deliver it. Follett *v.* Edwards, 30 Ill. App. 386.

Where goods came into possession of defendant's assignors for account of plaintiff, it was not necessary to make a demand on them before bringing an action against defendant for the value of the goods. Altman *v.* McCall, 35 Misc. (N. Y.) 790, 72 N. Y. Suppl. 1094 [*affirming* 33 Misc. 804, 67 N. Y. Suppl. 959].

95. Clink *v.* Gunn, 90 Mich. 135, 51 N. W. 193; Matheny *v.* Johnson, 9 Mo. 232.

96. Bartlett *v.* Hoyt, 33 N. H. 151; Purves *v.* Moltz, 5 Rob. (N. Y.) 653, 2 Abb. Pr. N. S. 409, 32 How. Pr. 478.

97. *Arkansas.*— Strayhorn *v.* Giles, 22 Ark. 517.

Connecticut.— Luckey *v.* Roberts, 25 Conn. 486.

Illinois.— Ryan *v.* Brant, 42 Ill. 78; Bruner *v.* Dyball, 42 Ill. 34.

Massachusetts.— Stevens *v.* Austin, 1 Metc. 557; Thurston *v.* Blanchard, 22 Pick. 18, 33 Am. Dec. 700.

New Hampshire.— Moody *v.* Drown, 58 N. H. 45.

Rhode Island.— Warner *v.* Vallily, 13 R. I. 483.

See 47 Cent. Dig. tit. "Trover and Conversion," § 69.

98. Miller *v.* Hannan, 29 N. Y. App. Div. 178, 51 N. Y. Suppl. 816; Stephens *v.* Meriden Britannia Co., 13 N. Y. App. Div. 268, 43 N. Y. Suppl. 226 [*reversed* on other grounds in 160 N. Y. 178, 54 N. E. 781, 73 Am. St. Rep. 678]; Schroeppel *v.* Corning, 5 Den. (N. Y.) 236.

99. Haas *v.* Damon, 9 Iowa 589; Pilsbury *v.* Webb, 33 Barb. (N. Y.) 213; Shamburg *v.* Moorehead, 4 Brewst. (Pa.) 92.

1. Hazelton *v.* Locke, 104 Me. 164, 71 Atl. 661, 20 L. R. A. N. S. 35. See, generally, Principal and Agent, 31 Cyc. 1608.

2. Bond *v.* Ward, 7 Mass. 123, 5 Am. Dec. 28; Burnham *v.* Marshall, 56 Vt. 365.

If after notice of an intermingling of plaintiff's property with defendant's the latter makes no reasonable effort to separate and return the former's part, trover will lie without demand and refusal. Cutter *v.* Fanning, 2 Iowa 580.

3. Winterbottom *v.* Morehouse, 4 Gray (Mass.) 332. But see Hagar *v.* Randall, 62 Me. 439.

explicit and complete to apprise defendant of what particular property is claimed,[4] and must be clothed in absolute, unequivocal terms.[5]

b. By Whom Demand Made. A demand may be made only by him who has the right of immediate possession,[6] his attorney, whose authority will be presumed,[7] or by some other agent,[8] who must exhibit his authority if requested to do so by the person in possession of the property.[9]

c. On Whom Demand Made. A demand should be made on the person who has the actual possession or control of the goods claimed.[10]

4. Harris *v.* Hackley, 127 Mich. 46, 86 N. W. 389; Kewaunee County *v.* Decker, 30 Wis. 624.

Demand of key to building in order to get property is sufficient demand for the property itself. Swartz *v.* Gottlieb-Bauernschmidt-Straus Brewing Co., 109 Md. 393, 71 Atl. 854.

Property embraced.—A demand must not embrace more property than the owner is entitled to recover. Forth *v.* Pursley, 82 Ill. 152; Swartwout *v.* Evans, 37 Ill. 442; Abington *v.* Lipscomb, 1 Q. B. 776, 1 G. & D. 230, 6 Jur. 257, 10 L. J. Q. B. 330, 41 E. C. L. 772. But a demand covering more than one is entitled to does not justify a refusal of what he may rightfully claim, unless he decline to accept anything less than the full quantity demanded. Gragg *v.* Hull, 41 Vt. 217.

A demand by letter is insufficient (Teeple *v.* Hawkeye Gold Dredging Co., 137 Iowa 206, 114 N. W. 906; White *v.* Demary, 2 N. H. 546; Miller *v.* Smith, 1 Phila. (Pa.) 173. *Contra*, Logan *v.* Houlditch, 1 Esp. 22), unless defendant acknowledge the receipt of it and refuse to deliver the goods, or deny having possession of them (Pattee *v.* Gilmore, 18 N. H. 460, 45 Am. Dec. 385; Rice *v.* Yocum, 155 Pa. St. 538, 26 Atl. 698). A conversion is not to be inferred from the neglect of defendant to answer a letter containing a demand. Miller *v.* Smith, 1 Phila. (Pa.) 173. And if a verbal demand and a demand in writing are made at the same time, and neither contains a reference to the other, evidence of the verbal demand will suffice. Smith *v.* Young, 1 Campb. 439.

Demand of officer.—Where the statutes do not require his official designation a demand addressed to a public officer in his private name is sufficient. Duggan *v.* Wright, 157 Mass. 228, 32 N. E. 159. But a demand on an officer who has seized personal property will not bind plaintiff in execution when sued for a conversion thereof. Mulheisen *v.* Lane, 82 Ill. 117.

A demand of payment for converted goods will sustain trover. La Place *v.* Aupoix, 1 Johns. Cas. (N. Y.) 406; Thompson *v.* Shirley, 1 Esp. 31. But a demand of payment for goods destroyed will not support an action for conversion of others which were saved. Barrett *v.* Suttis, 17 Nova Scotia 262.

Immediate removal of property.—To constitute a valid demand it is not necessary that the owner be prepared to remove his property immediately. Edmundson *v.* Bric, 136 Mass. 189.

Demand by part-owner for settlement, followed by sale by other part-owner in possession and appropriation of the proceeds, is sufficient. Gaw *v.* Bingham, (Tex. Civ. App. 1908) 107 S. W. 931.

5. Cumberland Tel., etc., Co. *v.* Taylor, 44 Ind. App. 27, 88 N. E. 631; Castle *v.* Corn Exch. Bank, 148 N. Y. 122, 42 N. E. 518 [*affirming* 75 Hun 89, 26 N. Y. Suppl. 1035]; Monnot *v.* Ibert, 33 Barb. (N. Y.) 24; Rushworth *v.* Taylor, 3 Q. B. 699, 3 G. & D. 3, 6 Jur. 945, 12 L. J. Q. B. 80, 43 E. C. L. 932; Philpott *v.* Kelley, 3 A. & E. 106, 1 Harr. & W. 134, 4 L. J. K. B. 139, 4 N. & M. 611, 30 E. C. L. 70, 111 Eng. Reprint 353.

6. Carr *v.* Farley, 12 Me. 328, holding that where one of two receiptors of attached property sold it, a demand on the purchaser made by the other for its return was sufficient.

Demand by prior owner.—A demand made by an owner of property prior to his sale of it will not entitle his vendee to maintain trover therefor. Buel *v.* Pumphrey, 2 Md. 261, 56 Am. Dec. 714; Hall *v.* Robinson, 2 N. Y. 293; Howell *v.* Kroose, 4 E. D. Smith (N. Y.) 357, 2 Abb. Pr. 167.

7. Jesse French Piano, etc., Co. *v.* Johnston, 142 Ala. 419, 37 So. 924; Lovejoy *v.* Jones, 30 N. H. 164.

The authority of an attorney to make a demand will not be presumed where by agreement defendant's right to possession is to cease only when he shall be presented with a writing to that effect duly signed by the owner of the property. Tingley *v.* Parshall, 11 Nebr. 443, 9 N. W. 571.

8. Kendrick *v.* Beard, 90 Mich. 589, 51 N. W. 645.

9. St. John *v.* O'Connel, 7 Port. (Ala.) 466; Griffin *v.* Alsop, 4 Cal. 406; Beckley *v.* Howard, 2 Brev. (S. C.) 94; Solomons *v.* Dawes, 1 Esp. 83.

If the authority of an agent is not questioned when he makes a demand, that issue cannot be raised at the trial. Robertson *v.* Crane, 27 Miss. 362, 61 Am. Dec. 520; Watt *v.* Potter, 29 Fed. Cas. No. 17,291, 2 Mason 77.

10. Wooster *v.* Sherwood, 25 N. Y. 278, holding that a demand on a carrier will bind the shipper.

As to demand on agent or servant see *infra*, III, G, 7, d.

A demand on one partner after a dissolution of the partnership will not charge another partner with a conversion of goods delivered to the firm. Pattee *v.* Gilmore, 18 N. H. 460, 45 Am. Dec. 385.

d. Time of Demand. A demand should be made after plaintiff's right of possession has accrued [11] and while right of possession is in him,[12] and before an action is commenced. But evidence of demand and refusal after issuance, or service, of summons may be submitted to the jury as proof of a prior conversion.[13]

e. Place of Demand. A personal demand for the possession of chattels may be made on the one who has them under his control, although they be at a distance from the place of demand; [14] but he is not bound to deliver them where demanded.[15]

6. Compliance With Demand. Compliance with a demand before an action is instituted bars a recovery in trover, if defendant was lawfully in possession of the property.[16]

7. What Constitutes Refusal — a. In General. An actionable refusal to deliver property must be, if oral, positive and unambiguous.[17]

b. Qualified Refusal.[18] A refusal given in recognition of the owner's rights but qualified by certain conditions will not serve as a cause of action for conversion.[19]

Demand against part of several wrongdoers.— In order to maintain trover against two or more who are wrongfully in joint possession of another's chattels, a demand must be made on each of them. Mitchell *v.* Williams, 4 Hill (N. Y.) 13. But this rule does not apply when the joint wrongful possessors are partners. Ball *v.* Larkin, 3 E. D. Smith (N. Y.) 555.

In trover against a corporation and four individuals to recover notes, defendants did not set up separate defenses, but pleaded jointly. In their answers they admitted possession, but denied conversion, and that the notes belonged to plaintiff. They pleaded in abatement that there had never been a demand upon any of them for the notes and that the action was premature, but there was no separate trial on that plea. There was evidence to show that the four individual defendants were brothers and controlled the corporation, and that written demand had been made on the company for the notes. It was held that the failure to show demand on each defendant was not ground for setting aside a verdict against all the defendants. Garbutt Lumber Co. *v.* Prescott, 134 Ga. 382, 67 S. E. 1127.

11. *Alabama.*—Haas *v.* Taylor, 80 Ala. 459, 2 So. 633.

Georgia.— Hudson *v.* Goff, 77 Ga. 281, 3 S. E. 152.

Maine.— Hagar *v.* Randall, 62 Me. 439.

New York.— Butts *v.* Burnett, 6 Abb. Pr. N. S. 302.

North Carolina.— Finch *v.* Clarke, 61 N. C. 335.

Texas.— Young *v.* Lewis, 9 Tex. 73.

See 47 Cent. Dig. tit. "Trover and Conversion," § 75.

12. Poppers *v.* Peterson, 33 Ill. App. 384.

13. Robinson *v.* Burleigh, 5 N. H. 225; Jessop *v.* Miller, 2 Abb. Dec. (N. Y.) 449; Morris *v.* Pugh, 3 Burr. 1241, 97 Eng. Reprint 811. And see Storm *v.* Livingston, 6 Johns. (N. Y.) 44.

14. Clark *v.* Hale, 34 Conn. 398.

Demand by writing see *supra*, notes 4, 5.

15. Dunlap *v.* Hunting, 2 Den. (N. Y.) 643, 43 Am. Dec. 763.

16. Thomson *v.* Sixpenny Sav. Bank, 5 Bosw. (N. Y.) 293; Quay *v.* McNinch, 2 Mill (S. C.) 78; Chandler *v.* Partin, 2 Mill (S. C.) 72.

17. *Illinois.*— Race *v.* Chandler, 15 Ill. App. 532.

Indiana.— Cumberland Tel., etc., Co. *v.* Taylor, 44 Ind. App. 27, 88 N. E. 631.

Maryland.— Buel *v.* Pumphrey, 2 Md. 261, 56 Am. Dec. 714.

Massachusetts.— Lorain Steel Co. *v.* Norfolk St. R. Co., 187 Mass. 500, 73 N. E. 646.

Tennessee.— Weakley *v.* Evans, (Ch. App. 1897) 46 S. W. 1070.

Vermont.— Stearns *v.* Houghton, 38 Vt. 583.

See 47 Cent. Dig. tit. "Trover and Conversion," § 78.

Ignorance of owner.— A refusal to deliver goods by a person ignorant of the real owner, or in doubt as to the identity of the party making the demand, does not amount to a conversion. Sandford *v.* Wilson, 2 Tex. App. Civ. Cas. § 247; Green *v.* Dunn, 3 Campb. 215 note; Solomons *v.* Dawes, 1 Esp. 83.

Silence or neglect to answer will not constitute a sufficient refusal (Richards *v.* Pitts Agricultural Works, 37 Hun (N. Y.) 1; McLean *v.* Graham, 5 U. C. Q. B. O. S. 741), unless defendant took time to consider and promised to answer (Ryerson *v.* Ryerson, 8 N. Y. Suppl. 738; Weeks *v.* Goode, 6 C. B. N. S. 367, 95 E. C. L. 367).

Presumption of refusal.— A sufficient refusal will be presumed when evasion or delay justifies an inference that defendant does not intend to comply with the demand. Ingersoll *v.* Barnes, 47 Mich. 104, 10 N. W. 127; Kyle *v.* Hoyle, 6 Mo. 526; Sargent *v.* Gile, 8 N. H. 325; McDonell *v.* Upper Canada Bank, 7 U. C. Q. B. 252.

Commingling of plaintiff's goods with defendant's own so that neither he nor plaintiff can identify them is equivalent to refusal. Robe *v.* Jourdan, 46 Tex. Civ. App. 456, 102 S. W. 1167.

18. **Refusal pending investigation of title** see *infra*, III, G, 8.

19. *Alabama.*— Butler *v.* Jones, 80 Ala. 436, 2 So. 300.

c. Refusal by Person Having Only Part of Property. A general refusal to deliver over a number of articles upon the demand of their owner is evidence of a conversion, although the party making the refusal has only a portion of the articles demanded under his control.[20]

d. Refusal by Agent or Servant. The refusal by a servant or agent to deliver to a stranger goods intrusted to him by his master or principal is not evidence of conversion in trover against the latter,[21] unless it was the duty of the servant or agent, in obedience to instructions from the master or principal, or by virtue of the nature of his business, to act touching a demand for the property.[22]

8. Time For Complying or Refusing. The law grants a reasonable time for investigation, consideration, and compliance with demand or refusal to deliver.[23]

9. Grounds of Refusal. Grounds of refusal, if stated at all, must be truly stated, and all that are not mentioned, if any at all are mentioned, will be deemed to be waived.[24]

IV. ACTIONS.

A. Right of Action and Defenses — 1. Nature and Scope of Remedy and Right to Sue in General — a. Title to Land Involved. Trover will not lie when title to land is an issue.[25]

b. Buyer Refusing to Pay For Goods. When delivery of and payment for goods were to be concurrent acts, a vendee who receives and refuses to pay for the goods obtains a wrongful possession, and may be sued in trover by the vendor;[26]

Minnesota.— Sutton *v.* Great Northern R. Co., 99 Minn. 376, 109 N. W. 815.

New York.— McEntee *v.* New Jersey Steamboat Co., 45 N. Y. 34, 6 Am. Rep. 28.

Pennsylvania.— Williams *v.* Smith, 153 Pa. St. 462, 25 Atl. 1122.

Rhode Island.— Buffington *v.* Clarke, 15 R. I. 437, 8 Atl. 247.

England.— Alexander *v.* Southey, 5 B. & Ald. 247, 24 Rev. Rep. 348, 7 E. C. L. 141, 106 Eng. Reprint 1183.

Canada.— Annand *v.* Merchants' Bank, 12 Nova Scotia 329; Walker *v.* Cunningham, 12 Nova Scotia 1.

See 47 Cent. Dig. tit. "Trover and Conversion," § 79.

The conditions must have a legal foundation, or rest on a reasonable doubt as to plaintiff's title or defendant's duty under the circumstances. Dent *v.* Chiles, 5 Stew. & P. (Ala.) 383, 26 Am. Dec. 360; Zachary *v.* Pace, 9 Ark. 212, 47 Am. Dec. 744; Jonsson *v.* Lindstrom, 114 Ind. 152, 16 N. E. 400; Cutter *v.* Fanning, 2 Iowa 580; Huxley *v.* Hartzell, 44 Mo. 370; Hett *v.* Boston, etc., R. Co., 69 N. H. 139, 44 Atl. 910; Robinson *v.* Burleigh, 5 N. H. 225; Carroll *v.* Mix, 51 Barb. (N. Y.) 212; Arsene *v.* La Fermina, 38 Misc. (N. Y.) 776, 78 N. Y. Suppl. 829; Roberts *v.* Yarboro, 41 Tex. 449; Davies *v.* Nicholas, 7 C. & P. 339, 32 E. C. L. 645; Atkinson *v.* Marshall, 12 L. J. Exch. 117. See 47 Cent. Dig. tit. "Trover and Conversion," § 79.

For the refusal to deliver up documents unless a receipt is given for the same, trover will lie. Cobbett *v.* Clutton, 2 C. & P. 471, 12 E. C. L. 682.

20. Ray *v.* Light, 34 Ark. 421; Carper *v.* Risdon, 19 Colo. App. 530, 76 Pac. 744; Buffalo Mar. Bank *v.* Fiske, 71 N. Y. 353 [*affirming* 9 Hun 363].

21. Amberg *v.* Philbrick, 33 Ill. App. 200; Mount *v.* Derick, 5 Hill (N. Y.) 455; Pothonier *v.* Dawson, Holt N. P. 383, 17 Rev. Rep. 647, 3 E. C. L. 154.

22. Ward *v.* Moffett, 38 Mo. App. 395.

An agent in charge of a warehouse or grain elevator is authorized by the nature of his business to respond to a rightful demand for property in his possession as such (Jackson *v.* Sevatson, 79 Minn. 275, 82 N. W. 634; Baumann *v.* Jefferson, 4 Misc. (N. Y.) 147, 23 N. Y. Suppl. 685), and his authority in that behalf rests on requirements of public policy and cannot be affected by any agreement with, or instructions from, his principal (Seymour *v.* Cargill El. Co., 6 N. D. 444, 71 N. W. 132).

23. Wellington *v.* Wentworth, 8 Metc. (Mass.) 548; Felcher *v.* McMillan, 103 Mich. 494, 61 N. W. 791; Flannery *v.* Brewer, 66 Mich. 509, 33 N. W. 522; Sargent *v.* Gile, 8 N. H. 325; Dowd *v.* Wadsworth, 13 N. C. 130, 18 Am. Dec. 567.

24. Spence *v.* Mitchell, 9 Ala. 744; Briggs *v.* Haycock, 63 Cal. 343; Ingalls *v.* Bulkley, 15 Ill. 224.

25. Lehigh Zinc, etc., Co. *v.* New Jersey Zinc, etc., Co., 55 N. J. L. 350, 26 Atl. 920, (N. J. 1893) 28 Atl. 79; Hooker *v.* Latham, 118 N. C. 179, 23 S. E. 1004; Mather *v.* Trinity Church, 3 Serg. & R. (Pa.) 509, 8 Am. Dec. 663.

But trover will lie against a defendant claiming under a void tax deed when it appears that his holding was fugitive and solely for the purpose of cutting timber. Moret *v.* Mason, 106 Mich. 340, 64 N. W. 193 [*following* Cook *v.* Cook, 106 Mich. 164, 64 N. W. 12].

26. Jowers *v.* Blandy, 58 Ga. 379; Canadian Bank of Commerce *v.* McCrea, 106 Ill. 281; Lamb *v.* Utley, 146 Mich. 654, 110 N. W.

but this is not the case, it has been held, where the goods are sold by the vendor to the vendee on credit.[27]

c. Property Wrongfully Replevied. A defendant in replevin who recovers judgment may bring trover against the plaintiff on the latter's failure to return the property replevied.[28]

d. Stolen Goods. Pending an indictment for larceny, defendant may be sued in trover by the owner of the goods.[29]

e. Wrongful Seizure Under Process. An action for conversion may be maintained for a wrongful seizure and disposition of property under an attachment,[30] execution,[31] or distress,[32] but not for goods taken out of plaintiff's possession under a search warrant.[33]

f. Sale Induced by Fraud. A sale of goods procured by fraud entitles the vendor to bring trover for their value against the defrauding vendee.[34]

g. Property Procured Under Illegal Contract. Trover will lie for property not paid for, which defendant obtained under an illegal contract.[35]

h. Refusal to Pay Over Money Received For Another. Trover will lie whenever plaintiff's money has come into defendant's possession, and has been converted by him, without any assent on plaintiff's part, express or implied, that the relation of debtor and creditor should thereby arise.[36]

50; Bishop *v.* Shillito, 2 B. & Ald. 329 note, 20 Rev. Rep. 457 note, 106 Eng. Reprint 387; Godts *v.* Rose, 17 C. B. 229, 1 Jur. N. S. 1173, 25 L. J. C. P. 61, 4 Wkly. Rep. 129, 84 E. C. L. 229. See, generally, SALES, 35 Cyc. 506.

27. Sutton *v.* McCoy, 2 Ga. App. 758, 59 S. E. 21.

28. Asher *v.* Reizenstein, 105 N. C. 213, 10 S. E. 889; Woody *v.* Jordan, 69 N. C. 189. See, generally, REPLEVIN, 35 Cyc. 1342.

The remedy on the bond is not exclusive. Dawson *v.* Sparks, 77 Ind. 88; Wyman *v.* Bowman, 71 Me. 121; Smith *v.* Demarrais, 39 Mich. 14. But see Rockey *v.* Burkhalter, 68 Pa. St. 221, where the court held that the giving of a claim property bond in replevin extinguishes plaintiff's title, and would therefore bar an action for conversion. See, generally, REPLEVIN, 35 Cyc. 1572.

29. Keyser *v.* Rodgers, 50 Pa. St. 275; Nickling *v.* Heaps, 21 L. T. Rep. N. S. 754. See also ABATEMENT AND REVIVAL, 1 Cyc. 32.

30. Hannan *v.* Connett, 10 Colo. App. 171, 50 Pac. 214; Thompson *v.* Rose, 16 Conn. 71, 41 Am. Dec. 121; Davlin *v.* Stone, 4 Cush. (Mass.) 359; Seivert *v.* Galvin, 133 Wis. 391, 113 N. W. 680. See, generally, ATTACHMENT, 4 Cyc. 831.

31. *Georgia.*— Riley *v.* Martin, 35 Ga. 136.

South Carolina.— Bennett *v.* Sims, Rice 421.

Tennessee.—Hawkins *v.* Pearce, 11 Humphr. 44.

Texas.— House *v.* Phelan, 83 Tex. 595, 19 S. W. 140.

England.— Turner *v.* Ford, 15 L. J. Exch. 215, 15 M. & W. 212.

See 47 Cent. Dig. tit. "Trover and Conversion," § 110; and EXECUTIONS, 17 Cyc. 1574.

32. Connah *v.* Hale, 23 Wend. (N. Y.) 462; Clowes *v.* Hughes, L. R. 5 Exch. 160, 39 L. J. Exch. 62, 22 L. T. Rep. N. S. 103, 18 Wkly. Rep. 459. See also LANDLORD AND TENANT, 24 Cyc. 1325.

33. Pettigru *v.* Sanders, 2 Bailey (S. C.) 549. See also SEARCHES AND SEIZURES, 35 Cyc. 1276.

34. Thurston *v.* Blanchard, 22 Pick. (Mass.) 18, 33 Am. Dec. 700; McCrillis *v.* Allen, 57 Vt. 505; Kingsford *v.* Merry, 1 H. & N. 503, 3 Jur. N. S. 68, 26 L. J. Exch. 83, 5 Wkly. Rep. 151; Noble *v.* Adams, Holt N. P. 248, 3 E. C. L. 105, 2 Marsh. 366, 7 Taunt. 59, 2 E. C. L. 259, 17 Rev. Rep. 445. See, generally, SALES, 35 Cyc. 512.

35. Strauss *v.* Schwab, 104 Ala. 669, 16 So. 692; Morris *v.* Hall, 41 Ala. 510; Dodson *v.* Harris, 10 Ala. 566; Harris *v.* Staples, (Tex. Civ. App. 1905) 89 S. W. 801; Smith *v.* Plomer, 15 East 607, 104 Eng. Reprint 972.

Pendency of another action.— Trover cannot be maintained for goods obtained under an invalid contract while an action founded on the contract is pending. Peters *v.* Ballistier, 3 Pick. (Mass.) 495; Kimball *v.* Cunningham, 4 Mass. 502, 3 Am. Dec. 230.

36. *Illinois.*— Loomis *v.* Stave, 72 Ill. 623; Hinckley *v.* Lewis, 45 Ill. 327.

Michigan.— Shrimpton *v.* Culver, 109 Mich. 577, 67 N. W. 907.

New York.— De Fino *v.* Stern, 5 N. Y. App. Div. 56, 38 N. Y. Suppl. 616; Precker *v.* London, 36 Misc. 197, 73 N. Y. Suppl. 145; Moore *v.* Craig, 4 N. Y. Suppl. 339.

Pennsylvania.— Davis *v.* Thompson, 10 Pa. Cas. 563, 14 Atl. 169.

Rhode Island.— Larson *v.* Dawson, 24 R. I. 317, 53 Atl. 93.

England.— Holiday *v.* Hicks, Cro. Eliz. 638, 661, 78 Eng. Reprint 878, 900; Anonymous, 1 Salk. 126, 91 Eng. Reprint 118.

See 47 Cent. Dig. tit. "Trover and Conversion," § 111½.

In Donohue *v.* Henry, 4 E. D. Smith (N. Y.) 162, the court says that if one receive money for a third party, that party may insist on receiving that identical money, and

i. Attachment of Converted Property as Affecting Right of Action. A defendant guilty of a conversion cannot defeat plaintiff in trover by suing out an attachment on the goods in controversy.[37]

j. Successive Actions. Trover will lie against different persons for successive conversions of the same property.[38]

k. Identification of Property. Trover lies only for specific chattels, and if the thing alleged to have been converted cannot be identified as plaintiff's, he must fail.[39]

l. Waiver and Estoppel. The right to sue in trover may be defeated by any act or conduct which amounts to an estoppel.[40] And the right may be waived by acts indicating a continued claim of ownership,[41] by ratification of the tortious act,[42] by taking back the property as if no tort had been committed,[43] by the

may bring trover therefor on refusal. See Salem Tract. Co. *v.* Anson, 41 Oreg. 562, 69 Pac. 675.

Finder of money.— Trover lies against the finder of money, but not against his assignee. Anonymous, 1 Salk. 126, 91 Eng. Reprint 118. See also FINDING LOST GOODS, 19 Cyc. 541.

37. Guest *v.* Heinly, 93 Iowa 183, 61 N. W. 404.

38. Matthews *v.* Menedger, 16 Fed. Cas. No. 9,289, 2 McLean 145.

39. *Alabama.*— Riddle *v.* Driver, 12 Ala. 590.

California.— Hall *v.* Susskind, 120 Cal. 559, 53 Pac. 46.

Louisiana.— Fisk *v.* Germania Nat. Bank, 40 La. Ann. 820, 5 So. 532.

Maryland.— Wilson *v.* Wilson, 37 Md. 1, 11 Am. Rep. 518.

Massachusetts.— Levyeau *v.* Clements, 175 Mass. 376, 56 N. E. 735, 50 L. R. A. 397.

Michigan.— Hance *v.* Tittabawassee Boom Co., 70 Mich. 227, 38 N. W. 228.

New Jersey.— Shephard *v.* Leverson, 2 N. J. L. 369.

New York.— Brush *v.* Batten, 15 N. Y. St. 548 [*affirmed* in 134 N. Y. 617, 32 N. E. 648].

Texas.— Williams *v.* Deen, 5 Tex. Civ. App. 575, 24 S. W. 536.

Wisconsin.— Brown *v.* Pratt, 4 Wis. 513, 65 Am. Dec. 330.

See 47 Cent. Dig. tit. "Trover and Conversion," § 115.

The reason in cases of sales why the vendee who cannot identify the goods purchased must fail in an action for conversion is that he is unable to show any title in himself. Browning *v.* Hamilton, 42 Ala. 484; Jones *v.* Morris, 29 N. C. 570.

40. *Colorado.*— Atkins *v.* Boyle, 33 Colo. 434, 80 Pac. 1067.

Michigan.— Detroit, etc., R. Co. *v.* Busch, 43 Mich. 571, 6 N. W. 90.

South Carolina.— Rice *v.* Parham, Dudley 373.

Wisconsin.— Lauder *v.* Bechtel, 55 Wis. 593, 13 N. W. 483.

England.— Gregg *v.* Wells, 10 A. & E. 90, 8 L. J. Q. B. 193, 2 P. & D. 296, 37 E. C. L. 71, 113 Eng. Reprint 35; Armstrong *v.* Allen, 7 Aspin. 293, 67 L. T. Rep. N. S. 738, 4 Reports 107.

Canada.— Barker *v.* Tabor, 5 U. C. Q. B. O. S. 570.

See 47 Cent. Dig. tit. "Trover and Conversion," § 116.

Facts not constituting estoppel.— In the following cases the facts were held not to constitute an estoppel. Dudley *v.* Abner, 52 Ala. 572; Rushin *v.* Tharpe, 88 Ga. 779, 15 S. E. 830; Doyle *v.* Burns, 123 Iowa 488, 99 N. W. 195; Buck *v.* Rich, 78 Me. 431, 6 Atl. 871; Bonaparte *v.* Clagett, 78 Md. 87, 27 Atl. 619; Rogers *v.* Dutton, 182 Mass. 187, 65 N. E. 56; Oliver Ditson Co. *v.* Bates, 181 Mass. 455, 63 N. E. 908, 92 Am. St. Rep. 424, 57 L. R. A. 289; Grenier *v.* Hild, 124 Mich. 222, 82 N. W. 1052; Carson *v.* Smith, 133 Mo. 606, 34 S. W. 855; White *v.* Phelps, 12 N. H. 382; Benjamin *v.* Elmira, etc., R. Co., 49 Barb. (N. Y.) 441; Huffman *v.* Hughlett, 11 Lea (Tenn.) 549; Burn *v.* Morris, 2 Cromp. & M. 579, 3 L. J. Exch. 193, 4 Tyrw. 485; Walker *v.* Hyman, 1 Ont. Rep. 345; Cayley *v.* McDonell, 8 U. C. Q. B. 454. See 47 Cent. Dig. tit. "Trover and Conversion," § 116.

41. Stout *v.* Fultz, 117 Mo. App. 573, 93 S. W. 919; Bell *v.* Cummings, 3 Sneed (Tenn.) 275; Weakley *v.* Evans, (Tenn. Ch. App. 1897) 46 S. W. 1070.

The release of a maker of a note which has been converted will not discharge the person guilty of the conversion. Allison *v.* King, 25 Iowa 56.

42. Hewes *v.* Parkman, 20 Pick. (Mass.) 90.

Payment by plaintiff under protest in order to get possession of property held under a mortgage alleged to be invalid does not constitute ratification of the mortgage. Berry *v.* Ingalls, 199 Mass. 77, 85 N. E. 191.

43. Farnum *v.* Hefner, 79 Cal. 575, 21 Pac. 955, 12 Am. St. Rep. 174; Carnes *v.* Nichols, 10 Gray (Mass.) 369. *Contra*, Merrill *v.* How, 24 Me. 126. See also Hotchkiss *v.* Hunt, 49 Me. 213; Sibley *v.* Ives, 21 Barb. (N. Y.) 284; Traynor *v.* Johnson, 1 Head (Tenn.) 51, which cases hold that waiver is mainly a question of intention, and the receipt of his property by the owner is not necessarily a waiver of conversion.

Taking back a part of property which has been lost or stolen is not a waiver of the conversion of the other part. Burn *v.* Morris, 2 Cromp. & M. 579, 3 L. J. Exch. 193, 4

receipt of the proceeds of defendant's wrongful act,[44] by accepting the hire agreed upon for the use of the thing converted,[45] or by bringing an action for damages or assumpsit for the proceeds of the wrongful disposition of the property.[46] But neither a demand for payment for the goods,[47] nor for their possession,[48] nor for the proceeds of a wrongful sale of them,[49] will operate as a waiver of the tort.

2. Statutory Provisions and Remedies — a. In General. Code provisions substituting procedure for the common-law action of detinue do not abolish the substance of the common-law action of trover and conversion.[50] But a statute may grant relief by trover in cases where such form of action was not recognized by the common law,[51] and may create an enlarged measure of damages.[52] The statutory form of action for conversion may be limited to the conversion of "plaintiff's goods."[53]

b. What Law Governs. The law which governs in an action of trover is that of the place where the conversion occurred,[54] and which was in force at the time thereof.[55]

Tyrw. 485. So acceptance of a part of the value of goods from one who has wrongfully sold them is not a waiver of trover against his vendee for the remaining part of the value of said goods. Rice *v.* Reed, [1900] 1 Q. B. 54, 69 L. J. Q. B. 33, 81 L. T. Rep. N. S. 410.

If plaintiff's refusal to give a receipt for property prevents a return according to an agreement between him and defendant, the former cannot maintain trover for a prior conversion of the property. Lander *v.* Bechtel, 55 Wis. 593, 13 N. W. 483.

The waiver of a conversion by a receipt of the property carries with it a waiver of the damages resulting therefrom. Collins *v.* Lowery, 78 Wis. 329, 47 N. W. 612.

44. Bullard *v.* Madison Bank, 107 Ga. 772, 33 S. E. 684; Hulst *v.* Flanders, 45 Wis. 185; Smith *v.* Baker, L. R. 8 C. P. 350, 42 L. J. C. P. 155, 28 L. T. Rep. N. S. 637; Brewer *v.* Sparrow, 7 B. & C. 310, 6 L. J. K. B. O. S. 1, 1 M. & R. 2, 14 E. C. L. 144, 108 Eng. Reprint 739; Lythgoe *v.* Vernon, 5 H. & N. 180, 29 L. J. Exch. 164; Appleby *v.* Withal, 8 U. C. C. P. 397.

The taking of a bond from defendant to pay for the property if it should finally be decided to be plaintiff's is a waiver of the conversion. Briggs Iron Co. *v.* North Adams Iron Co., 12 Cush. (Mass.) 114.

B seized cotton and sold it to D. Plaintiff, a mortgagee, sued D in trover, and afterward received part payment from B. This was not as to D a waiver of the conversion. Boyles *v.* Knight, 123 Ala. 289, 26 So. 939. See also Farmer *v.* Graettinger Bank, 130 Iowa 469, 107 N. W. 170.

45. Brooks *v.* Rogers, 101 Ala. 111, 13 So. 386; Hail *v.* McArthur, 31 Ala. 26; Wilkinson *v.* Moseley, 30 Ala. 562; Moseley *v.* Wilkinson, 24 Ala. 411; Rotch *v.* Hawes, 12 Pick. (Mass.) 136, 22 Am. Dec. 414.

Receipt of the hire is not conclusive, it is still a question for the jury as to whether the tort was waived. Lucas *v.* Trumbull, 15 Gray (Mass.) 306 [*distinguishing* Rotch *v.* Hawes, 12 Pick. (Mass.) 136, 22 Am. Dec. 414]; Moore *v.* Hill, 62 Vt. 424, 19 Atl. 997.

Pendency of an action of trover prevents the receipt of hire from amounting to a waiver. Harvey *v.* Epes, 12 Gratt. (Va.) 153.

46. Firemen's Ins. Co. *v.* Cochran, 27 Ala. 228; Kimball *v.* Cunningham, 4 Mass. 502, 3 Am. Dec. 230; Bowker Fertilizer Co. *v.* Cox, 106 N. Y. 555, 13 N. E. 943.

Assumpsit for the price of a part of goods sold is not a waiver of a subsequent conversion of another part thereof. Bryant *v.* Kenyon, 123 Mich. 151, 81 N. W. 1093.

Trover for money collected is a waiver of the wrongful collection, but not of the wrongful disposition of the funds. Knowlton *v.* Logansport School City, 75 Ind. 303.

47. Dixie *v.* Harrison, 163 Ala. 304, 50 So. 284.

48. Freeman *v.* Peckham, 47 Ind. 147; Cobb *v.* Wallace, 5 Coldw. (Tenn.) 539, 98 Am. Dec. 435; Manwell *v.* Briggs, 17 Vt. 176.

49. Morris *v.* Robinson, 3 B. & C. 196, 5 D. & R. 34, 27 Rev. Rep. 322, 10 E. C. L. 97, 107 Eng. Reprint 707; Valpy *v.* Sanders, 5 C. B. 886, 12 Jur. 483, 17 L. J. C. P. 249, 57 E. C. L. 886.

50. Dennis *v.* Strunk, 108 S. W. 957, 32 Ky. L. Rep. 1230.

51. Boyle *v.* Levings, 28 Ill. 314, holding that an action of trover for the conversion of a promissory note or bank bills received upon it may, under Rev. St. c. 56, § 2, be maintained, although plaintiff and defendant were jointly interested in the note.

52. Berg *v.* Baldwin, 31 Minn. 541, 18 N. W. 821.

Statutes which enlarge the common-law measure of damages are penal in their nature and should be strictly construed. Berg *v.* Baldwin, 31 Minn. 541, 18 N. W. 821.

53. Dekle *v.* Calhoun, (Fla. 1910) 53 So. 14.

54. Holbrook *v.* Bowman, 62 N. H. 313; Torrance *v.* Buffalo Third Nat. Bank, 70 Hun (N. Y.) 44, 23 N. Y. Suppl. 1073.

55. Rogers *v.* Moore, Rice (S. C.) 60. And see Tulley *v.* Tranor, 53 Cal. 274, holding that the amendment which took effect in 1874, to Civ. Code, § 3336, relating to the recovery of damages for the conversion of personal property, operated on the trial, although the action was commenced prior to the taking effect of such amendment.

3. Title and Right to Possession of Plaintiff — a. Necessity of Title or Right to Possession — (1) *In General.* An unbroken line of authorities establishes the rule that trover cannot be maintained by one who has neither title nor right of possession.[56] It has been stated in some decisions that trover will not lie unless at the time of conversion plaintiff had a property right, general or special, in the chattel converted, or was in possession or had a right to the immediate possession thereof.[57] Numerous other authorities declare the rule to be that a plaintiff in trover must have had property, either general or special, and possession or the right of immediate possession.[58] A rule more accurate and universal, and under which all of the cases apparently conflicting may be harmonized, may be stated thus: He who seeks to recover in trover must prove that he was in actual possession of the chattel converted at the time of conversion, or

56. *Alabama.*— Union Iron Works Co. *v.* Union Naval Stores Co., 157 Ala. 645, 47 So. 652; Glaze *v.* McMillion, 7 Port. 279.

California.— Triscony *v.* Orr, 49 Cal. 612.

Colorado.— Murphy *v.* Hobbs, 8 Colo. 130, 11 Pac. 55.

Connecticut.— Wilson *v.* Griswold, 80 Conn. 14, 66 Atl. 783.

Delaware.— Gam *v.* Cordrey, 4 Pennew. 143, 53 Atl. 334.

Georgia.— Hall *v.* Simmons, 125 Ga. 801, 54 S. E. 751; Prater *v.* Painter, 6 Ga. App. 292, 64 S. E. 1003; Groover *v.* Iler, 1 Ga. App. 77, 57 S. E. 906.

Illinois.— Union Stockyard, etc., Co. *v.* Mallory, etc., Co., 157 Ill. 554, 41 N. E. 888, 43 N. E. 979, 48 Am. St. Rep. 341 [*reversing* 54 Ill. App. 170].

Indiana.— Grady *v.* Newby, 6 Blackf. 442; Traylor *v.* Horrall, 4 Blackf. 371.

Iowa.— Munier *v.* Zachary, 138 Iowa 219, 114 N. W. 525; Frick *v.* Kabaker, 116 Iowa 494, 90 N. W. 498.

Massachusetts.— Hall *v.* Burgess, 5 Gray 12.

Michigan.— Henry *v.* Manistique Iron Co., 147 Mich. 509, 111 N. W. 79.

Missouri.— Newman *v.* Mercantile Trust Co., 189 Mo. 423, 88 S. W. 6; Barbee *v.* Crawford, 132 Mo. App. 1, 111 S. W. 614.

Montana.— Kipp *v.* Silverman, 25 Mont. 296, 64 Pac. 884.

New York.— Knight *v.* Sackett, etc., Lith. Co., 141 N. Y. 404, 36 N. E. 392 [*affirming* 61 N. Y. Super. Ct. 219, 19 N. Y. Suppl. 712]; Drew *v.* Salmon, 85 N. Y. App. Div. 615, 82 N. Y. Suppl. 922; Whitcomb *v.* Hungerford, 42 Barb. 177; Davis *v.* Hoppock, 6 Duer 254; Van Leeuwen *v.* Fish, 28 Misc. 443, 59 N. Y. Suppl. 183; Caldwell *v.* Bodine, 18 N. Y. Suppl. 627.

North Carolina.— Lewis *v.* Mobley, 20 N. C. 467, 34 Am. Dec. 379.

North Dakota.— Simmons *v.* McConville, (1910) 125 N. W. 304.

Pennsylvania.—Winlack *v.* Geist, 107 Pa. St. 297, 52 Am. Rep. 473; Castor *v.* McShaffery, 48 Pa. St. 437; Purdy *v.* McCullough, 3 Pa. St. 466; Sylvester *v.* Girard, 4 Rawle 185; Yoner *v.* Neidig, 1 Yeates 19.

Rhode Island.— Rexroth *v.* Coon, 15 R. I. 35, 23 Atl. 37, 2 Am. St. Rep. 863.

Texas.— Mershon *v.* Bosley, (Civ. App. 1901) 62 S. W. 799; Shaw *v.* Adams, 2 Tex. App. Civ. Cas. § 177.

Vermont.— Standlick *v.* Downing, 77 Vt. 382, 60 Atl. 657; Gale *v.* Gale, 70 Vt. 540, 41 Atl. 969.

United States.— Louisville Trust Co. *v.* Stockton, 75 Fed. 62, 21 C. C. A. 225; Eiseman *v.* Maul, 8 Fed. Cas. No. 4,322.

Canada.— St. John *v.* Bullivant, 1 Can. L. T. 206; Land *v.* Woodward, 5 U. C. Q. B. 190.

See 47 Cent. Dig. tit. "Trover and Consion," § 119.

Loss or waiver of title or right of possession.— The bringing of trover will be precluded by the extinguishment of plaintiff's title by the giving of a claim property bond in replevin (Rockey *v.* Burkhalter, 68 Pa. St. 221), or by a waiver of the right of immediate possession (Smith *v.* Maberry, 61 Ark. 515, 33 S. W. 1068; McNair *v.* Wilcox, 121 Pa. St. 437, 15 Atl. 575, 6 Am. St. Rep. 799; Batchelder *v.* Warren, 19 Vt. 371).

57. *Georgia.*— Mitchell *v.* Georgia, etc., R. Co., 111 Ga. 760, 36 S. E. 971, 51 L. R. A. 622; Painter *v.* McGaba, 6 Ga. App. 54, 64 S. E. 129; Grooner *v.* Iler, 1 Ga. App. 77, 57 S. E. 906.

Indiana.— Baker *v.* Born, 17 Ind. App. 422, 46 N. E. 930.

Massachusetts.— Vincent *v.* Cornell, 13 Pick. 294, 23 Am. Dec. 683.

New York.— Johnson *v.* Blaney, 198 N. Y. 312, 91 N. E. 721; Innovation Trunk Co. *v.* Platt, 56 Misc. 645, 107 N. Y. Suppl. 816; Erlanger *v.* Sprung, 113 N. Y. Suppl. 16; Berney *v.* Drexel, 63 How. Pr. 471 [*affirmed* in 33 Hun 34 (*affirmed* in 33 Hun 419)].

Pennsylvania.— Pennsylvania R. Co. *v.* Hughes, 39 Pa. St. 521.

United States.— Joseph Dixon Crucible Co. *v.* Paul, 167 Fed. 784, 93 C. C. A. 204.

England.— De Lizardi *v.* Pennell, 6 E. & B. 742, 2 Jur. N. S. 1227, 25 L. J. Q. B. 387, 88 E. C. L. 742; Wills *v.* Wells, 2 Moore C. P. 247, 8 Taunt. 264, 4 E. C. L. 139.

See 47 Cent. Dig. tit. "Trover and Conversion," § 119.

58. *Alabama.*— Tallassee Falls Mfg. Co. *v.* Alexander City First Nat. Bank, 159 Ala. 315, 49 So. 246; Holman *v.* Ketchum, 153 Ala. 360, 45 So. 206; Southern R. Co. *v.* Attalla, 147 Ala. 653, 41 So. 664; Thornton *v.* Dwight Mfg. Co., 137 Ala. 211, 34 So. 187; Kansas City, etc., R. Co. *v.* Wagand, 134 Ala. 388, 32 So. 744; Henderson *v.* Pilley, 131 Ala. 548, 32 So. 490; Beall *v.* Folmar, 122 Ala.

that he had the right of immediate possession thereof, and if such right of immediate possession depends on a property in the chattel, either general or special, he must also prove such property in himself as a fact.[59]

(II) *TITLE WITHOUT POSSESSION.* Title to, or a right of property in, a chattel will not alone support an action in trover, it must be united with actual possession or a right of immediate possession.[60]

414, 26 So. 1; Kemp *v.* Thompson, 17 Ala. 9; Nations *v.* Hawkins, 11 Ala. 859.

Arkansas.— Danley *v.* Rector, 10 Ark. 211, 50 Am. Dec. 242.

Delaware.— Layman *v.* Slocomb, (1909) 76 Atl. 1094.

Florida.— Dekle *v.* Calhoun, (1910) 53 So. 14.

Georgia.— Tribble *v.* Laird, 92 Ga. 686, 19 S. E. 26; Liptrot *v.* Holmes, 1 Ga. 381.

Illinois.— Owens *v.* Weedman, 82 Ill. 409; Bertholf *v.* Quinlan, 68 Ill. 297; Kreider *v.* Fanning, 74 Ill. App. 230; Poppers *v.* Peterson, 33 Ill. App. 384.

Indiana.—Redman *v.* Gould, 7 Blackf. 361; Picquet *v.* McKay, 2 Blackf. 465; Hunter *v.* Cronkhite, 9 Ind. App. 470, 36 N. E. 924.

Maine.— Martin *v.* Johnson, 105 Me. 156, 73 Atl. 963; Ames *v.* Palmer, 42 Me. 197, 66 Am. Dec. 271.

Massachusetts.— Clark *v.* Dean, 143 Mass. 292, 9 N. E. 651; Ring *v.* Neale, 114 Mass. 111, 19 Am. Rep. 316; Winship *v.* Neale, 10 Gray 382.

Michigan.— Stevenson *v.* Fitzgerald, 47 Mich. 166, 10 N. W. 185.

Minnesota.— Hodge *v.* Eastern R. Co., 70 Minn. 193, 72 N. W. 1074; Vanderburgh *v.* Bassett, 4 Minn. 242.

Missouri.— See Central Mfg. Co. *v.* Montgomery, (App. 1910) 129 S. W. 460.

Montana.— Glass *v.* Basin, etc., Min. Co., 31 Mont. 21, 77 Pac. 302.

New Hampshire.— Odiorne *v.* Colley, 2 N. H. 66, 9 Am. Dec. 39.

North Carolina.— Herring *v.* Tilghman, 35 N. C. 392.

North Dakota.— Fargo First Nat. Bank *v.* Minneapolis, etc., El. Co., 11 N. D. 280, 91 N. W. 436; Clendening *v.* Hawk, 8 N. D. 419, 79 N. W. 878; Parker *v.* Lisbon First Nat. Bank, 3 N. D. 87, 54 N. W. 313.

Pennsylvania.— Blakey *v.* Douglass, 3 Pa. Cas. 495, 6 Atl. 398.

Wyoming.— De Clark *v.* Bell, 10 Wyo. 1, 65 Pac. 852.

United States.— King *v.* Fearson, 14 Fed. Cas. No. 7,789, 3 Cranch C. C. 255.

England.— Bloxam *v.* Sanders, 4 B. & C. 941, 7 D. & R. 396, 28 Rev. Rep. 519, 10 E. C. L. 868, 107 Eng. Reprint 1309; Owen *v.* Knight, 4 Bing. N. Cas. 54, 6 Dowl. P. C. 245, 7 L. J. C. P. 27, 5 Scott 307, 33 E. C. L. 593; Gordon *v.* Harper, 2 Esp. 465, 7 T. R. 9, 4 Rev. Rep. 369, 10 Eng. Reprint 828; Makepeace *v.* Jackson, 4 Taunt. 770, 14 Rev. Rep. 664.

See 47 Cent. Dig. tit. "Trover and Conversion," § 119.

At the common law the action of trover and conversion can be maintained only by one who had at the conversion a general or special ownership or interest in the property, with the present right of possession. Dekle *v.* Calhoun, (Fla. 1910) 53 So. 14.

In trover for conversion of a stock of goods plaintiff's right to possession is established by a judgment rendered for him in a replevin suit wherein issues were joined on the pleas *non cepit, non detinet* and property in defendant, and that he was entitled to possession. Roush *v.* Washburn, 88 Ill. 215.

59. See cases cited *infra*, this note and notes 60–65.

Time of acquiring title.— Whenever proof of title is necessary to sustain plaintiff's case, it must appear that he held title to, or had a general or special interest in, the property in controversy at the time of the alleged conversion thereof. Milligan *v.* MacKinlay, 108 Ill. App. 609 [*affirmed* in 209 Ill. 358, 70 N. E. 685]; Grady *v.* Newby, 6 Blackf. (Ind.) 442; Barton *v.* Dunning, 6 Blackf. (Ind.) 209; Sherman *v.* Elder, 1 Hilt. (N. Y.) 178; Duell *v.* Cudlipp, 1 Hilt. (N. Y.) 166; Overton *v.* Williston, 31 Pa. St. 155; Deering *v.* Austin, 34 Vt. 330. *Contra*, Gulf, etc., R. Co. *v.* Humphries, 4 Tex. Civ. App. 333, 23 S. W. 556.

A continuance of such title or interest to the beginning of the action need not be shown. Barton *v.* Dunning, 6 Blackf. (Ind.) 209. But see Brady *v.* Whitney, 24 Mich. 154, wherein it was held that a plaintiff who transferred his title after conversion could recover only nominal damages. And see Clapp *v.* Glidden, 39 Me. 448, wherein a plaintiff who had no title to the goods at the commencement of the action was not allowed to maintain trover.

Plaintiff in ejectment who has recovered possession may maintain trover for the cutting and removal of trees by defendant while in possession of the premises under a *bona fide* claim of title. Wilson *v.* Hoffman, 93 Mich. 72, 52 N. W. 1037, 32 Am. St. Rep. 485.

60. *Illinois.*— Forth *v.* Pursley, 82 Ill. 162; Newlin *v.* Prevo, 90 Ill. App. 515; Langhenry *v.* Chicago Trust, etc., Bank, 70 Ill. App. 200; Blain *v.* Foster, 33 Ill. App. 297.

Indiana.— Easter *v.* Fleming, 78 Ind. 116.

Kentucky.— Lexington, etc., R. Co. *v.* Kidd, 7 Dana 245.

Massachusetts.— Raymond Syndicate *v.* Guttentag, 177 Mass. 562, 59 N. E. 446; Hardy *v.* Munroe, 127 Mass. 64; Winship *v.* Neale, 10 Gray 382; Hardy *v.* Reed, 6 Cush. 252; Fairbank *v.* Phelps, 22 Pick. 535; Vincent *v.* Cornell, 13 Pick. 294, 23 Am. Dec. 683.

Michigan.— Baehr *v.* Downey, 133 Mich. 163, 94 N. W. 750, 103 Am. St. Rep. 444.

(III) *POSSESSION WITHOUT TITLE.* Actual possession of a chattel at the time of a conversion thereof will sustain trover,[61] except as to the true owner, or

New Hampshire.— Clark *v.* Draper, 19 N. H. 419.

New York.— Byrne *v.* Weidenfeld, 113 N. Y. App. Div. 451, 99 N. Y. Suppl. 412; Liebowitz *v.* Brinn, 113 N. Y. Suppl. 685.

North Carolina.— Rooks *v.* Moore, 44 N. C. 1, 57 Am. Dec. 569; Lewis *v.* Mobley, 20 N. C. 467, 34 Am. Dec. 379; Andrews *v.* Shaw, 15 N. C. 70.

Oregon.— Pacific Live Stock Co. *v.* Isaacs, 52 Oreg. 54, 96 Pac. 460.

Pennsylvania.— Farmers' Bank *v.* McKee, 2 Pa. St. 318; Caldcleugh *v.* Hollingsworth, 8 Watts & S. 302.

South Carolina.— Steele *v.* Williams, Dudley 16, 31 Am. Dec. 546.

England.— Lord *v.* Price, L. R. 9 Exch. 54, 43 L. J. Exch. 49, 30 L. T. Rep. N. S. 271, 22 Wkly. Rep. 318; Bloxam *v.* Sanders, 4 B. & C. 941, 7 D. & R. 396, 28 Rev. Rep. 519, 10 E. C. L. 868, 107 Eng. Reprint 1309; Bradley *v.* Copley, 1 C. B. 685, 9 Jur. 599, 14 L. J. C. P. 222, 50 E. C. L. 685; Hunter *v.* Westbrook, 2 C. & P. 578, 12 E. C. L. 742; Brind *v.* Hampshire, 5 L. J. Exch. 197, 1 M. & W. 365, Tyrw. & G. 790.

Canada.— Butters *v.* Stanley, 21 U. C. C. P. 402; Doupe *v.* Stewart, 28 U. C. Q. B. 192.

See 47 Cent. Dig. tit. "Trover and Conversion," § 120.

Acquisition of title is accompanied prima facie by the right of immediate possession and therefore warrants suing in trover. Powers *v.* Hatter, 152 Ala. 636, 44 So. 859; Collins *v.* Bowen, 8 Blackf. (Ind.) 262; Van Houten *v.* Pye, 87 Hun (N. Y.) 19, 33 N. Y. Suppl. 838; Hyde *v.* Cookson, 21 Barb. (N. Y.) 92; Dimond *v.* McDowell, 7 Watts (Pa.) 510; Simmons *v.* Anderson, 7 Rich. (S. C.) 67; Miller *v.* Koger, 9 Humphr. (Tenn.) 231; Murray *v.* Bourgeois, 1 Can. L. T. Occ. Notes 117.

The owner of the freehold cannot maintain a personal or transitory action to recover a part of the freehold, or damages for conversion thereof which has been converted into personalty by a severance from the freehold, if at the time of the severance he has not actual or constructive possession of the land, since titles to land cannot be inquired into in purely personal actions. Aldrich Min. Co. *v.* Pearce, (Ala. 1910) 52 So. 911.

Even if an owner be not entitled to possession at the time of conversion, still if the wrongful act totally destroy the property he may bring trover therefor. Cox *v.* Patten, (Tex. Civ. App. 1902) 66 S. W. 64.

Third person having lien.— The owner of a chattel may bring trover for the conversion thereof even though a third person may have a lien thereon. Duff *v.* Venters, 107 S. W. 238, 32 Ky. L. Rep. 924; Moulton *v.* Witherell, 52 Me. 237; Cooke *v.* Woodrow, 6 Fed. Cas. No. 3,181, 1 Cranch C. C. 437 [*affirmed* in 5 Cranch 13, 3 L. ed. 22]; Longfellow *v.* Lewis, 15 Fed. Cas. No. 8,487, 2 Hask. 256.

An owner out of possession may maintain trover for timber cut by another who was not in actual possession of the premises. Wright *v.* Guier, 9 Watts (Pa.) 172, 36 Am. Dec. 108.

Landlord may bring trover against his tenant, during the tenancy, for the value of trees wrongfully severed from the premises. Brooks *v.* Rogers, 101 Ala. 111, 13 So. 386.

One committing a trespass on the land of another by placing sand thereon may still maintain trover for the conversion of the sand. Graham *v.* Purcell, 126 N. Y. App. Div. 407, 110 N. Y. Suppl. 813.

Owner of a non-transferable railway mileage book in the name of another may bring trover against one to whom he has loaned it, although as against the company he is not entitled to use it. Bartlett *v.* Cook, 115 N. Y. App. Div. 836, 100 N. Y. Suppl. 1036.

61. *Alabama.*—Wolf *v.* Shepherd, 103 Ala. 241, 15 So. 519; Cook *v.* Patterson, 35 Ala. 102; Lowremore *v.* Berry, 19 Ala. 130, 54 Am. Dec. 183.

California.— Goodwin *v.* Garr, 8 Cal. 615.

Connecticut.— Barker *v.* S. A. Lewis Storage, etc., Co., 79 Conn. 342, 65 Atl. 143; Haslem *v.* Lockwood, 37 Conn. 500, 9 Am. Rep. 350.

Georgia.— Mitchell *v.* Georgia, etc., R. Co., 111 Ga. 760, 36 S. E. 971, 51 L. R. A. 622; Gillespie *v.* Chastain, 57 Ga. 218.

Indiana.— Coffin *v.* Anderson, 4 Blackf. 395.

Maine.—Vining *v.* Baker, 53 Me. 544.

Michigan.—Van Lessler *v.* Ann Arbor R. Co., 133 Mich. 664, 95 N. W. 710 [*distinguishing* Montreal Bank *v.* J. E. Potts Salt, etc., Co., 91 Mich. 342, 51 N. W. 890]; Cullen *v.* O'Hara, 4 Mich. 132.

Minnesota.— Stitt *v.* Namakan Lumber Co., 95 Minn. 91, 103 N. W. 707.

Missouri.— Rosencranz *v.* Swofford Bros. Dry Goods Co., 175 Mo. 518, 75 S. W. 445.

New Hampshire.— Rochester Lumber Co. *v.* Locke, 72 N. H. 22, 54 Atl. 705; Pinkham *v.* Gear, 3 N. H. 484.

New York.— Columbia Bank *v.* American Surety Co., 178 N. Y. 628, 71 N. E. 1129 [*affirming* 84 N. Y. App. Div. 487, 82 N. Y. Suppl. 1054]; Burt *v.* Dutcher, 34 N. Y. 493; Smith *v.* Holt, 37 N. Y. App. Div. 24, 55 N. Y. Suppl. 731; People *v.* Sherwin, 2 Thomps. & C. 528; Paddock *v.* Wing, 16 How. Pr. 547; Daniels *v.* Ball, 11 Wend. 57 note.

South Carolina.— McNeil *v.* Philip, 1 McCord 392.

Texas.— Colorado First Nat. Bank *v.* Brown, 85 Tex. 80, 23 S. W. 862; Stockbridge *v.* Crockett, 15 Tex. Civ. App. 69, 38 S. W. 401.

Vermont.— Marcy *v.* Parker, 78 Vt. 73, 62 Atl. 19; Lamb *v.* Clark, 30 Vt. 347; Knapp *v.* Winchester, 11 Vt. 351.

one claiming under him,[62] even though the title be conceded to be in a third person,[63] and the rule is the same in case of immediate right of possession of one not previously possessed of the property in controversy; [64] but title or right of property, general or special, must also be proved to be in plaintiff whenever his right of immediate possession cannot be otherwise shown.[65]

Washington.— Standard Furniture Co. *v.* Van Alstine, 31 Wash. 499, 72 Pac. 119.

England.— Jefferies *v.* Great Western R. Co., 5 E. & B. 802, 2 Jur. N. S. 230, 25 L. J. Q. B. 107, 4 Wkly. Rep. 201, 85 E. C. L. 802; Northam *v.* Bowden, 11 Exch. 70, 24 L. J. Exch. 237; Wilbraham *v.* Snow, 2 Saund. 47, 85 Eng. Reprint 624; Armory *v.* Delamirie, Str. 505, 93 Eng. Reprint 664; Webb *v.* Fox, 7 T. R. 391, 4 Rev. Rep. 472, 101 Eng. Reprint 1037.

Canada.— Clarke *v.* Fullerton, 8 Nova Scotia 348; Sanford *v.* Bowles, 3 Nova Scotia Dec. 304.

See 47 Cent. Dig. tit. "Trover and Conversion," § 121.

Illustrations.— Trover lies in favor of a plaintiff whose possession was obtained under a void execution (Duncan *v* Spear, 11 Wend. (N. Y.) 54) under a transfer of a ship void for non-compliance with the registry act (Sutton *v.* Buck, 2 Taunt. 302) and under a transfer by an insolvent which was void as to his assignee in bankruptcy (Jefferies *v.* Great Western R. Co., 5 E. & B. 802, 4 Jur. N. S. 230, 25 L. J. Q. B. 107, 4 Wkly. Rep. 201, 85 E. C. L. 802).

62. Wheeler *v.* Lawson, 103 N. Y. 40, 8 N. E. 360; McEchron *v.* Martine, 111 App. Div. 805, 97 N. Y. Suppl. 951; Adelberg *v.* Horowitz, 32 N. Y. App. Div. 408, 52 N. Y. Suppl. 1125.

63. *Alabama.*— Carpenter *v.* Lewis, 6 Ala. 682.

Florida.— Skinner *v.* Pinney, 19 Fla. 42, 45 Am. Rep. 1.

New Hampshire.— McKeen *v.* Converse, 68 N. H. 173, 39 Atl. 435.

North Carolina.— Branch *v.* Morrison, 50 N. C. 16, 69 Am. Dec. 770; Craig *v.* Miller, 34 N. C. 375.

England.— Basset *v.* Maynard, Cro. Eliz. 819, 78 Eng. Reprint 1046; Roberts *v.* Wyatt, 2 Taunt. 268, 11 Rev. Rep. 566; Rackham *v.* Jesup, 3 Wils. C. P. 332, 338, 95 Eng. Reprint 1084, 1088.

See 47 Cent. Dig. tit. "Trover and Conversion," § 121.

64. *Alabama.*— Cook *v.* Thornton, 109 Ala. 523, 20 So. 14.

Michigan.—Vanosdall *v.* Hamilton, 118 Mich. 533, 77 N. W. 9.

Missouri.— Swinney *v.* Gouty, 83 Mo. App. 549.

Nebraska.— Locke *v.* Shreck, 54 Nebr. 472, 74 N. W. 970.

New Hampshire.— Jones *v.* Sinclair, 2 N. H. 319, 9 Am. Dec. 75, holding that if there were several conversions of the property alleged, it is sufficient if plaintiff had the right of possession at the time of any one of them.

New York.— Simon *v.* Simon, 38 N. Y. App. Div. 85, 55 N. Y. Suppl. 915; Smith *v.* Smalley, 19 N. Y. App. Div. 519, 46 N. Y. Suppl. 277.

See 47 Cent. Dig. tit. "Trover and Conversion," § 121.

The right of possession need not exist prior to the conversion; it may spring from the very act of conversion. Johnston *v.* Whittemore, 27 Mich. 463. And see Terry *v.* Bamberger, 23 Fed. Cas. No. 13,837, 14 Blatchf. 234, 44 Conn. 558, holding that the fact that plaintiff was not entitled to possession at the time of the conversion will not defeat his action, if before it was commenced he became so entitled.

65. *Alabama.*— Patterson *v.* Irvin, 132 Ala. 557, 31 So. 474; Henderson *v.* Pilley, 131 Ala. 548, 32 So. 490; McNutt *v.* King, 59 Ala. 597; Block *v.* McNeil, 46 Ala. 288; Hopper *v.* McWhorter, 18 Ala. 229.

California.— Green *v.* Burr, 131 Cal. 236, 63 Pac. 360; Middlesworth *v.* Sedgwick, 10 Cal. 392.

Georgia.— Burch *v.* Pedigo, 113 Ga. 1157, 39 S. E. 493, 54 L. R. A. 808; Jaques *v.* Stewart, 81 Ga. 81, 6 S. E. 815; Wallis *v.* Osteen, 38 Ga. 250.

Illinois.— Newlin *v.* Prevo, 90 Ill. App. 515.

Indiana.— Noblett *v.* Dillinger, 23 Ind. 505; Burton *v.* Tannehill, 6 Blackf. 470; Grady *v.* Newby, 6 Blackf. 442.

Kentucky.— Fightmaster *v.* Beasly, 7 J. J. Marsh. 410.

Maine.— Cleaves *v.* Washburn, (1888) 12 Atl. 734; Perley *v.* Dole, 40 Me. 139.

Massachusetts.— Rogers *v.* Dutton, 182 Mass. 187, 65 N. E. 56; Morgan *v.* Ide, 8 Cush. 420; Fairbank *v.* Phelps, 22 Pick. 535.

Michigan.— Haynes *v.* Hobbs, 136 Mich. 117, 98 N. W. 978; Harris *v.* Cable, 104 Mich. 365, 62 N. W. 582; Gates *v.* Rifle Boom Co., 70 Mich. 309, 38 N. W. 245; Ribble *v.* Lawrence, 51 Mich. 569, 17 N. W. 60; Ortmann *v.* Sovereign, 42 Mich. 1, 3 N. W. 223; Mills *v.* Van Camp, 41 Mich. 645, 2 N. W. 938; Stephenson *v.* Little, 10 Mich. 433.

Minnesota.—Vanderburgh *v.* Bassett, 4 Minn. 242.

Mississippi.— Baldwin *v.* McKay, 41 Miss. 358.

Missouri.— Southworth Co. *v.* Lamb, 82 Mo. 242; Webster *v.* Heylman, 11 Mo. 428; Chouteau *v.* Hope, 7 Mo. 428.

New Hampshire.— Colby *v.* Cressy, 5 N. H. 237.

New Jersey.— Gaskill *v.* Barbour, 62 N. J. L. 530, 41 Atl. 700.

New York.— Friedman *v.* Phillips, 84 N. Y. App. Div. 179, 82 N. Y. Suppl. 96; Bromley *v.* Miles, 51 N. Y. App. Div. 95, 64 N. Y. Suppl. 353; Blanck *v.* Nelson, 39

b. Nature and Sufficiency of Title or Right to Possession — (I) *IN GENERAL.* A vested legal interest, if acquired prior to the conversion alleged,[66] is sufficient to support trover.[67] Such an interest may be either general or special,[68] and may be founded on a possession warranted by law,[69] consented to by the owner,[70] or obtained by a wilful trespass.[71]

(II) *WEAKNESS OF DEFENDANT'S TITLE.* Plaintiff must recover on the strength of his own title, and not on the weakness of that of his adversary.[72]

N. Y. App. Div. 21, 56 N. Y. Suppl. 867; Schryer *v.* Fenton, 15 N. Y. App. Div. 158, 44 N. Y. Suppl. 203; Hodges *v.* Lathrop, 1 Sandf. 46; Jacquemin *v.* Finnegan, 39 Misc. 628, 80 N. Y. Suppl. 207; Jackson *v.* Klinger, 33 Misc. 758, 67 N. Y. Suppl. 850; Feist *v.* Prince, 22 Misc. 358, 49 N. Y. Suppl. 280; Green *v.* Clark, 5 Den. 497; Fitch *v.* Beach, 15 Wend. 221; Thorp *v.* Burling, 11 Johns. 285.

North Carolina.—Vinson *v.* Knight, 137 N. C. 408, 49 S. E. 891; Francis *v.* Welch, 33 N. C. 215; Brazier *v.* Ansley, 33 N. C. 12, 51 Am. Dec. 408.

Rhode Island.— Davis *v.* National Eagle Bank, 23 R. I. 243, 49 Atl. 1135, (1901) 50 Atl. 530.

South Carolina.— Slack *v.* Littlefield, Harp. 298.

South Dakota.— Smith *v.* Donahoe, 13 S. D. 334, 83 N. W. 264.

Tennessee.— Caldwell *v.* Cowan, 9 Yerg. 262.

Texas.— Epstein *v.* Meyer Bros. Drug Co., 82 Tex. 572, 18 S. W. 592.

Vermont.— Hyde Park Lumber Co. *v.* Shepardson, 72 Vt. 188, 47 Atl. 826.

Wisconsin.—Walworth County Bank *v.* Farmers' L. & T. Co., 14 Wis. 325.

United States.— Eiseman *v.* Maul, 8 Fed. Cas. No. 4,322.

England.— Buckley *v.* Gross, 3 B. & S. 566, 9 Jur. N. S. 986, 32 L. J. Q. B. 129, 7 L. T. Rep. N. S. 743, 11 Wkly. Rep. 465, 113 E. C. L. 566; Martin *v.* Reid, 11 C. B. N. S. 730, 31 L. J. C. P. 126, 5 L. T. Rep. N. S. 727, 103 E. C. L. 730; Tripp *v.* Armitage, 1 H. & H. 442, 3 Jur. 249, 8 L. J. Exch. 107, 4 M. & W. 687; Felthouse *v.* Bindley, 7 L. T. Rep. N. S. 835, 11 Wkly. Rep. 429 [*affirming* 11 C. B. N. S. 869, 31 L. J. C. P. 204, 6 L. T. Rep. N. S. 157, 10 Wkly. Rep. 423, 103 E. C. L. 869].

Canada.— Buck *v.* Knowlton, 21 Can. Sup. Ct. 371; Troop *v.* Hart, 7 Can. Sup. Ct. 512, 2 Can. L. T. Occ. Notes 251; Temple *v.* Close, 1 Can. L. T. Occ. Notes 195; McLachlan *v.* Kennedy, 21 Nova Scotia 271; Wilson *v.* Bockus, 20 U. C. C. P. 467; McDonald *v.* Bonfield, 20 U. C. C. P. 73; Childs *v.* Northern R. Co., 25 U. C. Q. B. 165.

See 47 Cent. Dig. tit. "Trover and Conversion," § 121.

66 Farrow *v.* Willey, 149 Ala. 373, 43 So. 144; Phillips *v.* Lane, 4 How. (Miss.) 122; Kollock *v.* Emmert, 43 Mo. App. 566; Gaskill *v.* Barbour, 62 N. J. L. 530, 41 Atl. 700.

67. *Alabama.*— Thomason *v.* Lewis, 103 Ala. 426, 15 So. 830.

Connecticut.— Rix *v.* Strong, 1 Root 55.

Georgia.— Pope *v.* Tucker, 23 Ga. 484.

Illinois.— Union Stock Yard, etc., Co. *v.* Mallory, 54 Ill. App. 170.

Indiana.—Worley *v.* Moore, 97 Ind. 15.

New Hampshire.— Batchelder *v.* Lake, 11 N. H. 359; Boynton *v.* Emerson, Smith 298.

New York.— Johnson *v.* Clark, 23 Misc. 346, 51 N. Y. Suppl. 238; Mayer *v.* Kilpatrick, 7 Misc. 689, 28 N. Y. Suppl. 145; Dyer *v.* Vandenbergh, 11 Johns. 149.

North Carolina.— Creach *v.* McRae, 50 N. C. 122.

See 47 Cent. Dig. tit. "Trover and Conversion," § 122.

68. *Alabama.*— Baker *v.* Troy Compress Co., 114 Ala. 415, 21 So. 496.

Illinois.— Eisendrath *v.* Knauer, 64 Ill. 396.

Massachusetts.— Forbes *v.* Boston, etc., R. Co., 133 Mass. 154.

Michigan.— Edwards *v.* Frank, 40 Mich. 616; Smith *v.* Mitchell, 12 Mich. 180.

Montana.— Swenson *v.* Kleinschmidt, 10 Mont. 473, 26 Pac. 198.

New York.— Edwards *v.* Dooley, 120 N. Y. 540, 24 N. E. 827; Blanck *v.* Nelson, 39 N. Y. App. Div. 21, 56 N. Y. Suppl. 867; Simon *v.* Simon, 38 N. Y. App. Div. 85, 55 N. Y. Suppl. 915; Lane *v.* Rosenberg, 56 N. Y. Super. Ct. 604, 7 N. Y. Suppl. 906 [*affirmed* in 121 N. Y. 696, 24 N. E. 1099]; Smith *v.* James, 7 Cow. 328.

North Carolina.— Hughes *v.* Giles, 2 N. C. 26.

Rhode Island.— F. A. Thomas Mach. Co. *v.* Voelker, 23 R. I. 441, 50 Atl. 838.

South Carolina.— Norwood *v.* Mazyck, 3 Rich. 296.

Vermont.— Lord *v.* Bishop, 18 Vt. 141.

See 47 Cent. Dig. tit. "Trover and Conversion," § 122.

Part-owners may maintain trover for conversion of their interest. C. W. Zimmerman Mfg. Co. *v.* Dunn, 151 Ala. 435, 44 So. 533.

Where there is an outstanding special interest, the general owner cannot maintain trover. Morgan *v.* Negley, 3 Pittsb. (Pa.) 33.

69. Witherspoon *v.* Clegg, 42 Mich. 484, 4 N. W. 209.

70. Farrow *v.* Wooley, 149 Ala. 373, 43 So. 144; Smith *v.* Maberry, 61 Ark. 515, 33 S. W. 1068; Berly *v.* Taylor, 5 Hill (N. Y.) 577; Fish *v.* Clifford, 54 Vt. 344; Evans *v.* Nichol, 11 L. J. C. P. 6, 3 M. & G. 614, 4 Scott N. R. 43, 42 E. C. L. 321.

71. See *infra*, IV, A, 3, c, (I).

72. *Alabama.*— Moore *v.* Walker, 124 Ala. 199, 26 So. 984; Kennington *v.* Williams, 30 Ala. 361.

(III) *EQUITABLE TITLE.* An equitable title or right will not suffice for the maintenance of trover.[73]

(IV) *CLAIM UNDER INVALID TITLE.* A plaintiff in trover who, when proof of title is essential, relies upon one which is fraudulent or void, cannot recover.[74]

(V) *PROPERTY TAKEN FROM LAND.* For the value of property taken from land and converted to the taker's use, trover may be brought by one holding the legal title to the land and entitled to the immediate possession of the property so taken,[75] or who was in actual possession of the land at the time.[76] So one who

Illinois.— Union Stockyards Co. *v.* Mallory, etc., Co., 157 Ill. 554, 41 N. E. 888, 48 Am. St. Rep. 341 [*reversing* 54 Ill. App. 170]; Davidson *v.* Waldron, 31 Ill. 120, 83 Am. Dec. 206.

Indiana.— Easter *v.* Fleming, 78 Ind. 116.

Kansas.—Van Zandt *v.* Schuyler, 2 Kan. App. 118, 43 Pac. 295.

Maine.— Ekstrom *v.* Hall, 90 Me. 186, 38 Atl. 106.

Nebraska.— Holmes *v.* Bailey, 16 Nebr. 300, 20 N. W. 304; Zunkle *v.* Cunningham, 10 Nebr. 162, 4 N. W. 951.

See 47 Cent. Dig. tit. "Trover and Conversion," § 123.

73. *Alabama.*— Farrow *v.* Wooley & Jordan, 149 Ala. 373, 43 So. 144; Draper *v.* Walker, 98 Ala. 310, 13 So. 595; Marks *v.* Robinson, 82 Ala. 69, 2 So. 292.

Georgia.— Gilmore *v.* Watson, 23 Ga. 63.

Illinois.—Alexander *v.* Meyenberg, 112 Ill. App. 223.

Massachusetts.—Baker *v.* Seavey, 163 Mass. 522, 40 N. E. 863, 47 Am. St. Rep. 475; Ring *v.* Neale, 114 Mass. 111, 19 Am. Rep. 316.

New York.— McNeil *v.* Hall, 107 N. Y. App. Div. 36, 94 N. Y. Suppl. 920 [*affirmed* in 187 N. Y. 549, 80 N. E. 1113]; Fulton *v.* Fulton, 48 Barb. 581.

See 47 Cent. Dig. tit. "Trover and Conversion," § 124.

74. *Alabama.*— Hartshorn *v.* Williams, 31 Ala. 149.

Georgia.— Mulligan *v.* Bailey, 28 Ga. 507.

Indiana.— Coffin *v.* Anderson, 4 Blackf. 395; Swope *v.* Paul, 4 Ind. App. 463, 31 N. E. 42.

Iowa.— Tuttle *v.* Cone, 108 Iowa 468, 79 N. W. 267.

Maryland.— Pocock *v.* Hendricks, 8 Gill & J. 421.

Michigan.—Whittle *v.* Bailes, 65 Mich. 640, 32 N. W. 874.

New York.— Schidlower *v.* McCafferty, 85 N. Y. App. Div. 493, 83 N. Y. Suppl. 391; Allen *v.* Bridgers, 52 Barb. 604.

Texas.— Geo. R. Dickinson Paper Co. *v.* Mail Pub. Co., (Civ. App. 1895) 31 S. W. 1083.

Washington.— Herman *v.* Northern Pac. R. Co., 43 Wash. 624, 86 Pac. 1068.

See 47 Cent. Dig. tit. "Trover and Conversion," § 125.

The rule stated in the text was held not to apply where the property was taken under a void execution (Grenier *v.* Hild, 124 Mich. 222, 82 N. W. 1052) or where an attaching officer, contrary to statute, sells attached property at private sale or suffers it to be removed from the jurisdiction of the court (Terry *v.* Metevier, 104 Mich. 50, 62 N. W. 164).

He who transfers his property with intent to hinder, delay, and defraud his creditors cannot maintain trover therefor against his transferee. Stewart *v.* Kearney, 6 Watts (Pa.) 453, 31 Am. Dec. 482.

A person in possession of property in another state under a sale from an insolvent debtor who has since been put into insolvency in the state may maintain an action for conversion against a creditor attaching such property, although the sale was in fraud of creditors, such attaching creditor being a citizen of the state. Pomroy *v.* Lyman, 10 Allen (Mass.) 468.

75. *Alabama.*—White *v.* Yawkey, 108 Ala. 270, 19 So. 360, 54 Am. St. Rep. 159, 32 L. R. A. 199.

Arkansas.— Thornton *v.* St. Louis Refrigerator, etc., Co., 69 Ark. 424, 65 S. W. 113.

Illinois.— Simpkins *v.* Rogers, 15 Ill. 397.

Maine.— Thomas *v.* Moody, 11 Me. 139.

Michigan.— Smith *v.* Reyerson, 98 Mich. 588, 57 N. W. 816; Wilson *v.* Hoffman, 93 Mich. 72, 52 N. W. 1037, 32 Am. St. Rep. 485; Haven *v.* Beidler Mfg. Co., 40 Mich. 286.

Missouri.— Garesche *v.* Boyce, 8 Mo. 228.

Pennsylvania.— Kier *v.* Peterson, 41 Pa. St. 357; Wright *v.* Guier, 9 Watts 172, 36 Am. Dec. 108.

England.— Eardley *v.* Granville, 3 Ch. D. 826, 45 L. J. Ch. 669, 34 L. T. Rep. N. S. 609, 24 Wkly. Rep. 528; Fleming *v.* Simpson, 6 L. J. K. B. O. S. 207, 2 M. & R. 169, 17 E. C. L. 706.

See 47 Cent. Dig. tit. "Trover and Conversion," § 128.

A possession which is merely transitory, for the purpose of making the trespass or severing a part of the freehold, is not sufficient to defeat a recovery by the owner of the freehold who has either actual or constructive possession of the land. Aldrich Min. Co. *v.* Pearce, (Ala. 1910) 52 So. 911.

The earth and stones dug up in making a canal belong to the state, and the owner of the land through which the canal passes cannot bring trover for them. Baker *v.* Johnson, 2 Hill (N. Y.) 342.

76. Skinner *v.* Pinney, 19 Fla. 42, 45 Am. Rep. 1; Woods *v.* Banks, 14 N. H. 101; Ray *v.* Gardner, 82 N. C. 454; Walton *v.* Jordan, 65 N. C. 170; Branch *v.* Morrison, 51 N. C. 16; Brothers *v.* Hurdle, 32 N. C. 490, 51 Am. Dec. 400; Martin *v.* Schofield, 41 Wis. 167.

felled timber or raised a crop on unoccupied or wild land has been permitted to maintain trover against another who took the timber or the crop and converted it to his own use.[77]

c. Nature and Sufficiency of Possession — (I) *POSSESSION UNDER CLAIM OF TITLE.* Possession under a claim of title or right is sufficient to sustain an action for conversion against one who does not show a better right or title.[78]

(II) *CONSTRUCTIVE POSSESSION.* A constructive possession founded on a valid title [79] is sufficient for the maintenance of trover.[80]

d. Persons Entitled to Sue — (I) *IN GENERAL.* Trover may be brought by any one whose ownership of, or special interest in, the property involved entitles him to the right of immediate possession thereof at the time of its conversion,[81] and, according to the common law relating to the assignment of choses in action, no other person can maintain the action.[82] But it is now held in many jurisdictions that under special statutes or general codes of procedure an assignment of property previously converted empowers the assignee to sue for the conversion in his own name.[83]

77. Searles *v.* Oden, 13 Nebr. 344, 14 N. W. 420; Lyon *v.* Sellew, 34 Hun (N. Y.) 124.

78. Putnam *v.* Lewis, 133 Mass. 264; Burke *v.* Savage, 13 Allen (Mass.) 408; Hoffman *v.* Harrington, 44 Mich. 183, 6 N. W. 225; Mather *v.* Trinity Church, 3 Serg. & R. (Pa.) 509, 8 Am. Dec. 663.

Possession wrongfully acquired.—Possession, although wrongfully acquired, is sufficient for the maintenance of trover against a stranger or wrong-doer. Carter *v.* Bennett, 4 Fla. 283; Anderson *v.* Gouldberg, 51 Minn. 294, 53 N. W. 636; Knapp *v.* Winchester, 11 Vt. 351; Buckley *v.* Gross, 3 B. & S. 564, 9 Jur. N. S. 986, 32 L. J. Q. B. 129, 7 L. T. Rep. N. S. 743, 11 Wkly. Rep. 465, 113 E. C. L. 566. *Contra*, Coffin *v.* Anderson, 4 Blackf. (Ind.) 395; Turley *v.* Tucker, 6 Mo. 583, 35 Am. Dec. 449 [*overruling* James *v.* Snelson, 3 Mo. 393]; McDonald *v.* Mangold, 61 Mo. App. 291; Rexroth *v.* Coon, 15 R. I. 35, 23 Atl. 37, 2 Am. St. Rep. 863.

79. Clements *v.* Yturria, 81 N. Y. 285.

80. *Illinois.*— Koob *v.* Ammann, 6 Ill. App. 160.

New York.— Terwilliger *v.* Wheeler, 35 Barb. 620.

South Carolina.— Sahlman *v.* Mills, 3 Strobh. 384, 51 Am. Dec. 630; Williams *v.* Belthany, 2 Mill 415.

Vermont.— Steward *v.* Heflin, 20 Vt. 144.

Virginia.— McCoy *v.* Herbert, 9 Leigh 548, 33 Am. Dec. 256.

See 47 Cent. Dig. tit. "Trover and Conversion," § 147.

81. *Georgia.*— McElmurray *v.* Harris, 117 Ga. 919, 43 S. E. 987.

Maine.—Weeks *v.* Hackett, 104 Me. 264, 71 Atl. 858, 129 Am. St. Rep. 390, 19 L. R. A. N. S. 1201.

Massachusetts.— Sudbury First Parish *v.* Stearns, 21 Pick. 148.

New York.— Smith *v.* Van Ostrand, 64 N. Y. 278 [*reversing* 3 Hun 450, 5 Thomps. & C. 664]; American Exch. *v.* Robertson, 52 N. Y. Super. Ct. 44.

Canada.— Dickey *v.* McCaul, 14 Ont. App. 166; Filschie *v.* Hogg, 35 U. C. Q. B. 94.

See also *supra*, IV, A, 3, a, (I).

A feme covert may sue in trover in her own name for the conversion of her separate property. McConeghy *v.* McCaw, 31 Ala. 447. See, generally, HUSBAND AND WIFE, 21 Cyc. 1538.

A surviving partner may bring trover against the administrator of his deceased copartner for the detention of notes taken in the latter's name in payment for partnership property. Stearns *v.* Houghton, 38 Vt. 583. See, generally, PARTNERSHIP, 30 Cyc. 648.

A vendor who warrants the title of goods may, after a rescission of the sale by him and the vendee, maintain trover against one who took them from the vendee under a claim of paramount title. Williamson *v.* Sammons, 34 Ala. 691.

A remainder-man may bring trover against any person who has the chattel in his possession, or who has had possession of it since the death of the life-tenant, or who in any way damaged it in the continuance of the life-estate. Coffey *v.* Wilkerson, 1 Metc. (Ky.) 101. See, generally, ESTATES, 16 Cyc. 657.

A creditor without a judgment lien cannot maintain trover against one who took goods from the debtor with fraudulent intent. Cranmer *v.* Blood, 57 Barb. (N. Y.) 155 [*affirmed* in 48 N. Y. 684].

Sale pending action.—Where an owner brings trover, and pending the action sells the property, and without objection amends his petition, making it a suit for the use of the vendee, the sale of the property does not defeat his right to recovery. McElmurray *v.* Harris, 117 Ga. 919, 43 S. E. 987. See, generally, ABATEMENT AND REVIVAL, 1 Cyc. 116.

82. Dunklin *v.* Wilkins, 5 Ala. 199; Young *v* Ferguson, 1 Litt. (Ky.) 298; Stogdel *v.* Fugate, 2 A. K. Marsh. (Ky.) 136. See, generally, ASSIGNMENTS, 4 Cyc. 92.

83. *California.*— New Liverpool Salt Co. *v.* Western Salt Co., 151 Cal. 479, 91 Pac. 152; Lazard *v.* Wheeler, 22 Cal. 139.

Michigan.— Smith *v.* Thompson, 94 Mich. 381, 54 N. W. 168; Grant *v.* Smith, 26 Mich. 201; Brady *v.* Whitney, 24 Mich. 154; Final *v.* Backus, 18 Mich. 218.

(II) *ASSIGNEE FOR CREDITORS.* An assignment by a bankrupt confers on his assignee a right of immediate possession which will support an action for conversion.[84]

(III) *INDORSEE OR OTHER HOLDER OF NOTE OR BOND.* The holder of a note or bond may sue for a conversion thereof, even if he cannot maintain an action thereon in his own name,[85] although he may be neither the payee nor an indorser,[86] and even if the note has never been delivered to him.[87] Likewise an indorsee in blank of a note held as collateral security may maintain trover for a conversion of it.[88]

(IV) *CONSIGNOR OR CONSIGNEE OF GOODS.* A consignor of goods may bring trover for the conversion of them, if he have the right of immediate possession;[89] and so may a consignee who has accepted a consignment,[90] or made advances thereon.[91]

(V) *EXECUTORS AND ADMINISTRATORS.* A conversion of a decedent's goods will subject the wrong-doer to an action in trover by the executor or administrator,[92] provided the latter has title to the goods or right to the immediate possession thereof.[93]

(VI) *PERSONS OTHER THAN PERSONAL REPRESENTATIVES FOR CONVERSION OF DECEDENT'S ESTATE.* He who wrongly converts personal prop-

Missouri.— Dickson *v.* Merchants' El. Co., 44 Mo. App. 498.

New Hampshire.— Jordan *v.* Gillen, 44 N. H. 424.

New York.— Richtmeyer *v.* Remsen, 38 N. Y. 206; McKee *v.* Judd, 12 N. Y. 622, 64 Am. Dec. 515; Drake *v.* Smith, 12 Hun 532; Alt *v.* Weidenberg, 6 Bosw. 176; Ward *v.* Benson, 31 How. Pr. 411; Kellogg *v.* Church, 3 Code Rep. 53; Clowes *v.* Hawley, 12 Johns. 484.

North Carolina.— Robertson *v.* Stuart, 2 N. C. 159.

Wisconsin.— McArthur *v.* Green Bay, etc., Canal Co., 34 Wis. 139; Tyson *v.* McGuineas, 25 Wis. 656.

See, generally, ASSIGNMENTS, 4 Cyc. 96.

The assignment of a bill of sale of personal property will enable the assignee to maintain trover against a subsequent purchaser from the assignor, without notice of the assignment. Southworth *v.* Sebring, 2 Hill (S. C.) 587.

84. Grimes *v.* Briggs, 110 Mass. 446; Bowdish *v.* Page, 153 N. Y. 104, 47 N. E. 44 [*affirming* 81 Hun 170, 30 N. Y. Suppl. 691]. See, generally, ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 234.

Where a creditor levied an execution on an insolvent's goods after an act of bankruptcy, but before a commission was issued to the assignee, and sold them thereafter, the latter may maintain trover for the goods. Cooper *v.* Chitty, 1 Burr. 20, 31, 97 Eng. Reprint 166, 172. But the rule seems to be otherwise where the creditor's levy of execution and sale thereunder occurred prior to the appointment of an assignee. Young *v.* Billiter, 8 H. L. Cas. 682, 7 Jur. N. S. 269, 30 L. J. Q. B. 153, 3 L. T. Rep. N. S. 196, 11 Eng. Reprint 596 [*reversing* 6 E. & B. 1, 4 Wkly. Rep. 369, 88 E. C. L. 1].

85. Lowremore *v.* Berry, 19 Ala. 130, 54 Am. Dec. 183; Donnell *v.* Thompson, 13 Ala. 440; White *v.* Bonney, 110 Va. 864, 68 S. E. 273.

In North Carolina it has been held that the owner of a note or bond cannot recover for a conversion of it, unless it has been legally indorsed to him. Killian *v.* Carrol, 35 N. C. 431; Herring *v.* Tilghman, 35 N. C. 392; Fairly *v.* McLean, 33 N. C. 158.

The assignee of a promissory note which has been converted may bring trover therefor in the name of his assignor. Day *v.* Whitney, 1 Pick. (Mass.) 503.

86. White *v.* Bonney, 110 Va. 864, 68 S. E. 273.

87. Nininger *v.* Banning, 7 Minn. 274.

88. Carter *v.* Lehman, 90 Ala. 126, 7 So. 735.

89. Hardy *v.* Munroe, 127 Mass. 64; Everett *v.* Saltus, 15 Wend. (N. Y.) 474 [*affirmed* in 20 Wend. 267, 32 Am. Dec. 541]; Susquehanna Boom Co. *v.* Rogers, 3 Wkly. Notes Cas. (Pa.) 478.

90. Gibbons *v.* Farwell, 58 Mich. 233, 24 N. W. 868; Brown *v.* Bowe, 7 N. Y. St. 387.

91. Fitzhugh *v.* Wiman, 9 N. Y. 559.

92. *Alabama.*— Jenkins *v.* McConico, 26 Ala. 213.

California.— Jahns *v.* Nolting, 29 Cal. 507.

Massachusetts.— Stanley *v.* Gaylord, 1 Cush. 536, 48 Am. Dec. 643; Wilson *v.* Shearer, 9 Metc. 504; Badlam *v.* Tucker, 1 Pick. 389, 11 Am. Dec. 202.

Michigan.— Cullen *v.* O'Hara, 4 Mich. 132.

New York.— Sheldon *v.* Hoy, 11 How. Pr. 11.

North Carolina.— Allen *v.* Watson, 5 N. C. 189.

Pennsylvania.— Stewart *v.* Kearney, 6 Watts 453, 31 Am. Dec. 482.

South Carolina.— Dealy *v.* Lance, 2 Speers 487; Hill *v.* Brennan, Rice 285; Kerby *v.* Quinn, Rice 264; Miller *v.* Reigne, 2 Hill 592.

Vermont.— Manwell *v.* Briggs, 17 Vt. 176.

Canada.— Robinson *v.* Ferguson, 4 Can. L. T. Occ. Notes 551; Maher *v.* Hubby, 17 Nova Scotia 295.

See, generally, EXECUTORS AND ADMINISTRATORS, 18 Cyc. 878.

93. Massachusetts Mut. L. Ins. Co. *v.* Hayes, 16 Ill. App. 233; McCrary *v.* Mc-

erty of a decedent's estate may be sued in trover by the surviving widow, if the property were in her possession at the time,[94] or if exempted to her by statute,[95] or by a son, where there has been no administration and he is entitled to succeed to the estate,[96] or by a subvendee from the next of kin.[97]

(VII) *JOINT OWNERS.* Joint owners of a chattel may unite in an action for a conversion of it,[98] without showing the exact interest of each in it.[99] It is not so clear, however, that all of the owners of a chattel must be joined as plaintiffs in trover. Some cases assert the necessity of such a joinder.[1] Others hold that trover may be brought by one joint owner, if he have the right of immediate possession, or be duly authorized by his coöwners so to do.[2]

(VIII) *OWNER OF STOLEN PROPERTY.* The owner of a stolen chattel may recover for a conversion thereof, even if defendant be a *bona fide* purchaser for value, without notice of the theft, unless the chattel were a negotiable instrument.[3]

(IX) *OFFICER CLAIMING UNDER LEVY.* An officer may bring trover against one who has wrongfully converted goods which the former was claiming under a valid levy [4] of an execution,[5] attachment,[6] or distress.[7]

Crary, 22 U. C. Q. B. 520; Ralph *v.* Link, 5 U. C. Q. B. 145.

94. Meyer *v.* Hearst, 75 Ala. 390; Brown *v.* Beason, 24 Ala. 466; Harpes *v.* Harpes, 62 Ga. 394.

95. Singleton *v.* McQuerry, 84 Ky. 41, 2 S. W. 652, 8 Ky. L. Rep. 710.

96. Hyde *v.* Stone, 7 Wend. (N. Y.) 354, 22 Am. Dec. 582.

97. Craig *v.* Miller, 34 N. C. 375.

A widower cannot recover in trover for the conversion of chattels taken on execution against him, on the ground that they belonged to his deceased wife's estate. Chamberlain *v.* Darrow, 46 Hun (N. Y.) 48, 11 N. Y. St. 100.

98. Parker *v.* Parker, 1 Allen (Mass.) 245; Spencer *v.* Dearth, 43 Vt. 98.

Plaintiffs suing jointly must fail if one of them has disposed of his interest in the property. Adsit *v.* Ehmke, 47 N. Y. App. Div. 223, 62 N. Y. Suppl. 702.

Two constables levying different executions on the same goods have not such a joint right as will entitle them to join in an action for the conversion thereof. Warne *v.* Rose, 5 N. J. L. 809.

99. Robertson *v.* Gourley, 84 Tex. 575, 19 S. W. 1006.

1. Little *v.* Harrington, 71 Mo. 390; Harper *v.* Godsell, L. R. 5 Q. B. 422, 39 L. J. Q. B. 185, 18 Wkly. Rep. 954; May *v.* Harvey, 13 East 197, 12 Rev. Rep. 322, 104 Eng. Reprint 345; Nathan *v.* Buckland, 2 Moore C. P. 153, 4 E. C. L. 526.

The exclusive possession of a chattel by one of two joint owners does not authorize the other to maintain trover. Cole *v.* Terry, 19 N. C. 252.

2. *Alabama.*— Hopper *v.* McWhorter, 18 Ala. 229.

Pennsylvania.— Payne *v.* Davis, 2 Phila. 364.

Wisconsin.—Arpin *v.* Burch, 68 Wis. 619, 32 N. W. 681.

England.— Nyberg *v.* Handelaar, [1892] 2 Q. B. 202, 56 J. P. 694, 61 L. J. Q. B. 709, 67 L. T. Rep. N. S. 361, 40 Wkly. Rep. 545; Bleaden *v.* Hancock, 4 C. & P. 152, M. & M. 465, 19 E. C. L. 452; Farrar *v.* Beswick, 5 L. J. Exch. 225, 1 M. & W. 682, Tyrw. & G. 1053.

Canada.— McLellan *v.* McDougall, 28 Nova Scotia 237.

See 47 Cent. Dig. tit. "Trover and Conversion," § 132.

3. State *v.* Omaha Nat. Bank, 59 Nebr. 483, 81 N. W. 319; Robinson *v.* Hodgson, 30 Leg. Int. (Pa.) 176.

4. Dennie *v.* Harris, 9 Pick. (Mass.) 364; Tuttle *v.* Jackson, 4 N. J. L. 115; Hotchkiss *v.* McVickar, 12 Johns. (N. Y.) 403; Brian *v.* Strait, Dudley (S. C.) 19. See, generally, EXECUTIONS, 17 Cyc. 1082 *et seq.*

A right to levy gives the officer no interest in the goods of the debtor which will sustain trover. Mulheisen *v.* Lane, 82 Ill. 117.

A vendor replevied goods from a constable who held them under an attachment against the vendee. The landlord of the latter forcibly took the goods. It was held that the vendor and not the officer who served the writ of replevin was the proper person to sue the landlord in trover. Hatch *v.* Kenny, 141 Mass. 171, 5 N. E. 527.

5. *Kentucky.*—Williams *v.* Herndon, 12 B. Mon. 484, 54 Am. Dec. 551.

New Hampshire.— Lathrop *v.* Blake, 23 N. H. 46.

New Jersey.—Brink *v.* Decker, 3 N. J. L. 902.

New York.— Hankins *v.* Kingsland, 2 Hall 459; Lockwood *v.* Bull, 1 Cow. 322, 13 Am. Dec. 539; Alexander *v.* Mahon, 11 Johns. 185; Barker *v.* Miller, 6 Johns. 195.

North Carolina.— Mangum *v.* Hamlet, 30 N. C. 44; Douglas *v.* Mitchell, 7 N. C. 239.

Pennsylvania.—Weidensaul *v.* Reynolds, 49 Pa. St. 73.

Vermont.— Lyman *v.* Dow, 25 Vt. 405; Pettes *v.* Marsh, 15 Vt. 454, 40 Am. Dec. 689.

See 47 Cent. Dig. tit. "Trover and Conversion," § 127; and EXECUTIONS, 17 Cyc. 1122.

6. Clow *v.* Gilbert, 54 Ill. App. 134. See, generally, ATTACHMENT, 4 Cyc. 659.

The officer must have been in actual possession, or have had the immediate right thereto. Dubois *v.* Harcourt, 20 Wend. (N. Y.) 41; Cool *v.* Mulligan, 13 U. C. Q. B. 613.

7. Van Rensselaer *v.* Quackenboss, 17

(x) *AGISTOR.* An agistor has sufficient interest to sustain trover for cattle taken from his possession.[8]

(xi) *PERSONS IN POSSESSION OF MATERIALS TO BE MANUFACTURED.* One in possession of materials which he has agreed to manufacture for another may bring trover against any one who wrongfully converts them,[9] except a *bona fide* purchaser from the owner, who had, by agreement, retained the title.[10]

(xii) *FINDER OF PROPERTY.* The finder of a chattel may maintain trover for it against everybody but the true owner.[11]

(xiii) *LESSOR AND LESSEE.*[12] A lessor entitled to the immediate possession may maintain trover for the wrongful conversion of leased chattels,[13] fixtures,[14] or crops.[15] And a lessee may bring trover for goods taken under a wrongful distress,[16] for wrongful refusal of a mortgagee to permit the removal of shop fixtures,[17] for wrongful removal by a landlord of furniture rented with the premises,[18] and for coal mined by a stranger on land which the tenant leased for mining purposes.[19]

(xiv) *MORTGAGOR, MORTGAGEE, OR PLEDGEE.*[20] A mortgagor of personalty may sue for a conversion thereof, if the right of immediate possession is in him,[21] even though the mortgage purport to be an absolute conveyance.[22] A

Wend. (N. Y.) 34; King *v.* Fearson, 14 Fed. Cas. No. 7,789, 3 Cranch C. C. 255.

8. McKeen *v.* Converse, 68 N. H. 173, 39 Atl. 435; Betts *v.* Mouser, Wright (Ohio) 744. See also ANIMALS, 2 Cyc. 321.

9. Shaw *v.* Kaler, 106 Mass. 448; Eaton *v.* Lynde, 15 Mass. 242.

10. Knight *v.* Sackett, etc., Lith. Co., 61 N. Y. Super. Ct. 219, 19 N. Y. Suppl. 712, 31 Abb. N. Cas. 373 [*affirmed* in 141 N. Y. 404, 36 N. E. 392].

Trover will lie in behalf of an owner against a workman who, having agreed to manufacture on shares, disposes of the whole product. Rightmyer *v.* Raymond, 12 Wend. (N. Y.) 51.

11. *Delaware.*—Clark *v.* Maloney, 3 Harr. 68.

Massachusetts. — McAvoy *v.* Medina, 11 Allen 548, 87 Am. Dec. 733.

Missouri.— Hoagland *v.* Forest Park Highlands Amusement Co., 170 Mo. 335, 70 S. W. 878, 94 Am. St. Rep. 740.

New Hampshire. — Fisher *v.* Steward, Smith 60.

Oregon.— Danielson *v.* Roberts, 44 Oreg. 108, 74 Pa. St. 913, 102 Am. St. Rep. 627, 65 L. R. A. 526.

England.— South Staffordshire Water Co. *v.* Sharman, [1896] 2 Q. B. 44, 65 L. J. Q. B. 460, 74 L. T. Rep. N. S. 761, 44 Wkly. Rep. 653; Armory *v.* Delamirie, Str. 505, 93 Eng. Reprint 664.

See, generally, FINDING LOST GOODS, 19 Cyc. 541.

The place of finding furnishes no exception to the rule. Mathews *v.* Harsell, 1 E. D. Smith (N. Y.) 393; Bridges *v.* Hawkesworth, 15 Jur. 1079, 21 L. J. Q. B. 75.

12. **Action by lien-holder** in general see *infra*, IV, A, 3, d, (xv).

13. *Alabama.*— Brooks *v.* Rogers, 101 Ala. 111, 13 So. 386.

Connecticut.— Forbes *v.* Marsh, 15 Conn. 384.

Missouri.— Garesche *v.* Boyce, 8 Mo. 228.

Texas.—Wagner *v.* Marple, 10 Tex. Civ. App. 505, 31 S. W. 691.

England.— Gordon *v.* Harper, 2 Esp. 465, 7 T. R. 9, 4 Rev. Rep. 369, 101 Eng. Reprint 828.

Canada.— Burnham *v.* Waddell, 28 U. C. C. P. 263 [*affirmed* in 3 Ont. App. 288].

14. Farrant *v.* Thompson, 5 B. & Ald. 826, 7 E. C. L. 449, 106 Eng. Reprint 1392, 2 D. & R. 1, 16 E. C. L. 61, 24 Rev. Rep. 571. See, generally, FIXTURES, 19 Cyc. 1074.

15. Davis *v.* Connop, 1 Price 53, 15 Rev. Rep. 693. See, generally, LANDLORD AND TENANT, 24 Cyc. 1473.

An incoming tenant cannot bring trover for a crop taken after the expiration of the year by a tenant who was holding as a tenant from year to year after the end of his original lease, when said lease gave him the right of such removal. Boraston *v.* Green, 16 East 71, 14 Rev. Rep. 297, 104 Eng. Reprint 1016.

16. Shipwick *v.* Blanchard, 6 T. R. 298, 3 Rev. Rep. 175, 101 Eng. Reprint 563; Huskinson *v.* Lawrence, 26 U. C. Q. B. 570. See, generally, LANDLORD AND TENANT, 24 Cyc. 1325.

A lodger may maintain an action if his goods are taken on an excessive distress by the landlord of the party under whom he occupies. Fisher *v.* Algar, 2 C. & P. 374, 12 E. C. L. 625.

17. Denholm *v.* Commercial Bank, 1 U. C. Q. B. 369. See, generally, CHATTEL MORTGAGES, 7 Cyc. 14.

18. Chamberlain *v.* Neale, 9 Allen (Mass.) 410.

19. Hartford Iron Min. Co. *v.* Cambria Min. Co., 93 Mich. 90, 53 N. W. 4, 32 Am. St. Rep. 488. See, generally, MINES AND MINERALS, 27 Cyc. 630.

20. **Action by lien-holder** in general see *infra*, IV, A, 3, d, (xv).

21. Wells *v.* Connable, 138 Mass. 513; Brickley *v.* Walker, 68 Wis. 563, 32 N. W. 773. See, generally, CHATTEL MORTGAGES, 7 Cyc. 14.

22. Stossel *v.* Van Devanter, 16 Wash. 9, 47 Pac. 221.

mortgagee who is in possession or has the immediate right thereof may bring trover for a conversion of the mortgaged property,[23] and the same is true of a pledgee.[24]

(xv) *Lien-Holders in General.*[25] A mere lien has no element of property in it and will not support trover,[26] unless the lien-holder had the right of immediate possession at the time of the conversion alleged.[27] A lien-holder with possession may maintain an action for the conversion of property.[28]

(xvi) *Purchasers After Conversion.* An owner of personal property that has been tortiously converted may sell it without taking possession, and his vendee may maintain trover for it, after demand and refusal.[29]

4. Persons Who May Be Sued — a. In General. Every person is liable in trover who personally or by agent commits an act of conversion,[30] or who partic-

The receiver of a mortgagor may recover in trover against a mortgagee who has taken the property under a void instrument. Stephens *v.* Meriden Britannia Co., 13 N. Y. App. Div. 268, 43 N. Y. Suppl. 226.

23. *New Hampshire.*—White *v.* Phelps, 12 N. H. 382

New York.— Smith *v.* Smalley, 19 N. Y. App. Div. 519, 46 N. Y. Suppl. 277.

North Carolina.— Burgin *v.* Burgin, 23 N. C. 160.

Texas.—Willis *v.* Daingerfield Bank, (Civ. App. 1895) 30 S. W. 81.

England.— London, etc., Loan, etc., Co. *v.* Drake, 6 C. B. N. S. 798, 5 Jur. N. S. 1407, 28 L. J. C. P. 297, 7 Wkly. Rep. 611, 95 E. C. L. 798.

Canada.— St. John *v.* Bullivant, 1 Can. L. T. Occ. Notes 206; Mann *v.* English, 38 U. C. Q. B. 240.

. See, generally, Chattel Mortgages, 7 Cyc. 19

24. Way *v.* Davidson, 12 Gray (Mass.) 465, 74 Am. Dec. 604. See, generally, Pledges, 31 Cyc. 839.

25. **Action by:** Agistor see *supra*, IV, A, 3, d, (x). Landlord see *supra*, IV, A, 3, d, (xiii). Manufacturer see *supra*, IV, A, 3, d, (xi). Mortgagee or pledgee see *supra*, IV, A, 3, d, (xiv).

26. *Alabama.*— Street *v.* Nelson, 80 Ala. 230; Corbitt *v.* Reynolds, 68 Ala. 378; Evington *v.* Smith, 66 Ala. 398; Folmar *v.* Copeland, 57 Ala. 588.

Arkansas.— Anderson *v.* Bowles, 44 Ark. 108

Florida.— Dekle *v.* Calhoun, (1910) 53 So. 14

Illinois.— Frink *v.* Pratt, 26 Ill. App. 222 [*affirmed* in 130 Ill. 327, 22 N. E. 819].

South Carolina.— Lyons *v.* Rogers, 1 Brev. 5.

England.—Scott *v.* Newington, 1 M. & Rob. 252

See, generally, Liens, 25 Cyc. 681.

Contra, where purchaser bought with notice of the lien. Hahn *v* Sleepy Eye Milling Co., 21 S. D. 324, 112 N. W. 843.

A landlord cannot maintain trover for the conversion of agricultural products, by reason only of his statutory lien on them for rent. Dekle *v.* Calhoun, (Fla. 1910) 53 So. 14.

Effect of notice of lien.— One having a contract lien on a crop to secure advances would have a right of action for conversion against one who purchased and removed it with knowledge of such lien. Rew *v.* Maynes, (Iowa 1910) 125 N. W. 804.

Loss of lien.— Trover will lie if the complaint contain an averment that the lien has been lost or impaired by the conversion alleged. Scarbrough *v.* Rowan, 125 Ala. 509, 27 So. 919.

27. Beall *v.* Folmar, 122 Ala. 414, 26 So. 1; Steinhardt *v.* Bell, 80 Ala. 208; Beebe *v.* Latimer, 59 Nebr. 305, 80 N. W. 904; Hill *v.* Larro, 53 Vt. 629. See, generally, Liens, 25 Cyc. 681.

Right of immediate possession need not be shown in an action for conversion of crops brought by a landlord who had a lien thereon. Taylor *v.* Felder, 5 Tex. Civ. App. 417, 23 S. W. 480, 24 S. W. 313. See, generally, Landlord and Tenant, 24 Cyc. 1474.

28. Dekle *v.* Calhoun, (Fla. 1910) 53 So. 14.

29. Jewett *v.* Patridge, 12 Me. 243, 27 Am. Dec. 173; Smith *v.* Kennett, 18 Mo. 154; Serat *v.* Utica, etc., R. Co., 102 N. Y. 681, 6 N. E. 795 [*affirming* 19 N. Y. Wkly. Dig. 196]; Lawrence *v.* Wilson, 64 N. Y. App. Div. 562, 72 N. Y. Suppl. 289; Cass *v.* New York, etc., R. Co., 1 E. D. Smith (N. Y.) 522; Robinson *v.* Weeks, 6 How. Pr. (N. Y.) 161, Code Rep. N. S. 311; Tome *v.* Dubois, 6 Wall. (U. S.) 548, 18 L. ed. 943.

30. *Alabama.*— May *v.* O'Neal, 125 Ala. 620, 28 So. 12.

Colorado.— Gottlieb *v.* Barton, 13 Colo. App. 147, 57 Pac. 754.

Indiana.—Valentine *v.* Duff, 7 Ind. App. 196, 33 N. E. 529, 34 N. E. 453.

Iowa.— Horak *v.* Thompson, (1900) 83 N. W. 889.

Nebraska.— Peckinbaugh *v.* Quillin, 12 Nebr. 586, 12 N. W. 104.

New York.— Christopher *v.* Langdon, etc., Brewing Co., 29 N. Y. App. Div. 337, 51 N. Y. Suppl. 570; Thayer *v.* Wright, 4 Den. 180; Lockwood *v.* Bull, 1 Cow. 322, 13 Am. Dec. 539.

Wisconsin.— Kalckhoff *v.* Zœhrlaud, 40 Wis. 427.

United States.— The Quantico Cotton, 24 Fed. 325.

See 47 Cent. Dig. tit. "Trover and Conversion," § 173.

Estoppel of joint owner.— A purchaser of chattels may bring trover against one who is estopped to show that he is a joint owner with the seller. Garber *v.* Doersom, 117 Pa. St. 162, 11 Atl. 777.

ipates by instigating, aiding, or assisting another,[31] or who benefits by its proceeds in whole or in part.[32]

b. Joint Tort-Feasors. A joint conversion is the single concerted act of several persons, or the result of the acts of several persons which, although separately committed, all tend to the same end.[33] Persons guilty of a conversion

A husband is liable in trover for the value of stolen goods received by his wife in the course of her separate business. Muser *v.* Lewis, 14 Abb. N. Cas. (N. Y.) 333 [*modifying* 12 Abb. N. Cas. 305 note]. See, generally, HUSBAND AND WIFE, 21 Cyc. 1544.

Receiver.— Trover will not lie against a receiver without permission of the court wherein the receivership is pending. Montgomery *v.* Enslen, 126 Ala. 654, 28 So. 626. See, generally, RECEIVERS, 34 Cyc. 411.

31. *Alabama.*— Stallings *v.* Gilbreath, 146 Ala. 483, 41 So. 423; Bolling *v.* Kirby, 90 Ala. 215, 7 So. 914, 24 Am. St. Rep. 789; Thweat *v.* Stamps, 67 Ala. 96.

Connecticut.— Clark *v.* Whitaker, 19 Conn. 319, 48 Am. Dec. 160.

Georgia.— Brooks *v.* Ashburn, 9 Ga. 297.

Illinois.— Hardy *v.* Keeler, 56 Ill. 152.

Kentucky.— Ballentine *v.* Joplin, 105 Ky. 70, 48 S. W. 417, 20 Ky. L. Rep. 1062.

Missouri.— Thompson *v.* Irwin, 76 Mo. App. 418; Laughlin *v.* Barnes, 76 Mo. App. 258; Dickson *v.* Merchants' El. Co., 44 Mo. App. 498.

Nebraska.— Hill *v.* Campbell Commission Co., 54 Nebr. 59, 74 N. W. 388; D. M. Osborne Co. *v.* Plano Mfg. Co., 51 Nebr. 502, 70 N. W. 1124; Heater *v.* Penrod, 2 Nebr. (Unoff.) 711, 89 N. W. 762.

New Hampshire.—Maloon *v.* Read, 73 N. H. 153, 59 Atl. 946; Fisk *v.* Ewen, 46 N. H. 173.

New York.— Jennie Clarkson Home for Children *v.* Union Pac. R. Co., 182 N. Y. 508, 74 N. E. 1118 [*affirming* 92 N. Y. App. Div. 618, 87 N. Y. Suppl. 1137]; Coats *v.* Darby, 2 N. Y. 517; Jennie Clarkson Home for Children *v.* Missouri, etc., R. Co., 92 N. Y. App. Div. 617, 87 N. Y. Suppl. 1138 [*affirmed* in 182 N. Y. 47, 74 N. E. 571, 70 L. R. A. 787]; Felts *v.* Collins, 67 N. Y. App. Div. 430, 73 N. Y. Suppl. 796; Fierro *v.* Schnurmacher, 47 Misc. 601, 94 N. Y. Suppl. 365; Jennie Clarkson Home for Children *v.* Chesapeake, etc., R. Co., 41 Misc. 214, 83 N. Y. Suppl. 913 [*affirmed* in 92 N. Y. App. Div. 491, 87 N. Y. Suppl. 348]; Spencer *v.* Blackman, 9 Wend. 167; Morgan *v.* Varick, 8 Wend. 587; Bishop *v.* Ely, 9 Johns. 294.

Oregon.— Perkins *v.* McCullough, 36 Oreg. 146, 59 Pac. 182.

Texas.— Middleton *v.* Pipkin, (Civ. App. 1900) 56 S. W. 240.

Vermont.— Dohorty *v.* Madgett, 58 Vt. 323, 2 Atl. 115; Moore *v.* Eldred, 42 Vt. 13.

Wyoming.— Cone *v.* Ivinson, 4 Wyo. 203, 33 Pac. 31, 35 Pac. 933.

United States.— Longfellow *v.* Lewis, 15 Fed. Cas. No. 8,487, 2 Hask. 256.

See 47 Cent. Dig. tit. "Trover and Conversion," § 173

But a mortgagee is not liable for conversion by his assignee of property not included in the mortgage or assignment. Smith *v.* Texas, etc., R. Co., 101 Tex. 405, 108 S. W. 819.

A creditor is not liable in trover for legally procuring the appointment of a receiver and assisting him in conducting the sale under an order of court of property to which plaintiff claims title under an execution sale against a common debtor. Walling *v.* Miller, 108 N. Y. 173, 15 N. E. 65, 2 Am. St. Rep. 400.

A payee who indorses and transfers in due course a promissory note and with it other notes pledged as security is not liable in trover for a conversion of the collateral notes by his indorsee. Goss *v.* Emerson, 23 N. H. 38.

A warehouseman from whom property has been taken by a public board of health because of the offensive condition of the property is not liable for a conversion, it not being due to any fault of defendant. Niagara F. Ins. Co. *v.* Campbell Stores, 101 N. Y. App. Div. 400, 92 N. Y. Suppl. 208.

There cannot be a conversion to the use of a wife during coverture, and therefore trover will not lie against husband and wife for a conversion to her use only. Hollenback *v.* Miller, 12 Fed. Cas. No. 6,609, 3 Cranch C. C. 176.

32. Western Union Tel. Co. *v.* Franklin Constr. Co., 70 N. H. 37, 47 Atl. 616; The Quantico Cotton, 24 Fed. 325; Snider *v.* Frontenac County Corp., 30 U. C. Q. B. 275.

A mortgagee having wrongfully sold household goods in his hands, his wife is not jointly liable in trover, although he took a note held against her in part payment, and consulted her as to which of the goods he should let the payee have. Iler *v.* Baker, 82 Mich. 226, 46 N. W. 377.

33. *Alabama.*— Pippin *v.* Farmers' Warehouse Co., (1910) 51 So. 882.

Connecticut.— McNamara *v.* McDonald, 69 Conn. 484, 38 Atl. 54, 61 Am. St. Rep. 48; Calkins *v.* Lockwood, 17 Conn. 154, 42 Am. Dec. 729.

Indiana.— Terrell *v.* Butterfield, 92 Ind. 1; Stephenson *v.* Feezer, 55 Ind. 416; Kavanaugh *v.* Taylor, 2 Ind. App. 502, 28 N. E. 553.

Maine.—White *v.* Wall, 40 Me. 574; Cram *v.* Thissell, 25 Me. 86.

Massachusetts.— Chamberlin *v.* Shaw, 18 Pick. 278, 29 Am. Dec. 586.

Michigan.— Banner *v.* Schlessinger, 109 Mich. 262, 67 N. W. 116; Wildey *v.* Cox, 25 Mich. 116.

Missouri.— Ess *v.* Griffith, 128 Mo. 50, 30 S. W. 343.

New York.— Petrie *v.* Williams, 68 Hun 589, 23 N. Y. Suppl. 237; Underhill *v.* Reinor, 2 Hilt. 319; Thorn *v.* Sutherland, 16 N. Y. Suppl. 831 [*affirmed* in 131 N. Y. 622, 30 N. E. 864]; Wehle *v.* Butler, 12 Abb. Pr.

may be sued jointly or severally,[34] but they cannot be held jointly liable unless the conversion was joint.[35] If sued jointly, damages will be assessed against all jointly, even though all were not equally guilty.[36]

c. Liability of Principal For Acts of Agent. A principal is liable for an act of conversion committed by his agent while proceeding within the scope of his authority.[37]

d. Agents and Servants. That defendant was acting as agent or servant of another when he wrongfully detained or disposed of plaintiff's goods is no defense, and it is immaterial whether he did so in ignorance of the owner's rights or in obedience to the command of his master or principal.[38]

N. S. 139, 43 How. Pr. 5; Thorp *v.* Burling, 11 Johns. 285.

South Carolina.— Rowell *v.* Keefe, 6 Rich. 521; Guerry *v.* Kerton, 2 Rich. 507.

Texas.— Robertson *v.* Hunt, 77 Tex. 321, 14 S. W. 68; Blalock *v.* Joseph Bowling Co., (Civ. App. 1898) 44 S. W. 305.

Wisconsin.—Smith *v.* Morgan, 68 Wis. 358, 32 N. W. 135; Smith *v.* Briggs, 64 Wis. 497, 25 N. W. 558.

Canada.— Mason *v.* Bickle, 2 Ont. App. 291; Edwards *v.* Kerr, 13 U. C. C. P. 24; Kirby *v.* Cahill, 6 U. C. Q. B. O. S. 510.

See 47 Cent. Dig. tit. "Trover and Conversion," § 173.

Conversion by one and delivery to another will sustain trover against both. Kilmer *v.* Hutton, 131 N. Y. App. Div. 625, 116 N. Y. Suppl. 127.

Notice of plaintiff's rights.— If cotton, in which a third person had rights, was converted by the wrongful act of one coöperating with another who had notice of the third person's rights, such third person could sue them jointly. Pippin *v.* Farmers' Warehouse Co., (Ala. 1910) 51 So. 882.

34. McAvoy *v.* Wright, 137 Mass. 207; Mohr *v.* Langan, 77 Mo. App. 481; Pattee *v.* Gilmore, 18 N. H. 460, 45 Am. Dec. 385; Russell *v.* McCall, 141 N. Y. 437, 36 N. E. 498, 38 Am. St. Rep. 807. See also Pippin *v.* Farmers' Warehouse Co., (Ala. 1910) 51 So. 882.

35. *Alabama.*— Ensley Lumber Co. *v.* Lewis, 121 Ala. 94, 25 So. 729; Powell *v.* Thompson, 80 Ala. 51; Larkins *v.* Eckwurzel, 42 Ala. 322, 94 Am. Dec. 651.

Illinois.— Morrow *v.* Langan, 16 Ill. App. 505.

Massachusetts.— Strickland *v.* Barrett, 20 Pick. 415.

Michigan.— Bringard *v.* Stellwagen, 41 Mich. 54, 1 N. W. 909.

England.— Nicoll *v.* Glennie, 1 M. & S. 588, 105 Eng. Reprint 220.

Canada.— Menton *v.* Lee, 30 U. C. Q. B. 281.

See 47 Cent. Dig. tit. "Trover and Conversion," § 173.

A demand and refusal of one is not evidence of a joint conversion. White *v.* Demary, 2 N. H. 546.

36. Everroad *v.* Gabbert, 83 Ind. 489.

Where pending the trial plaintiff received partial satisfaction from one of the two joint defendants, he was allowed to dismiss the case as to him and take default and judgment against the other for the value of the goods converted less the amount already received. Heyer *v.* Carr, 6 R. I. 45.

37. *Indiana.*— Cox *v.* Reynolds, 7 Ind. 257.

Iowa.— Farmers', etc., Bank *v.* Wood, 143 Iowa 635, 118 N. W. 282, 120 N. W. 625.

Nevada.— Ward *v.* Carson River Wood Co., 13 Nev. 44.

New Hampshire.— Arthur *v.* Balch, 23 N. H. 157.

New York.—Shotwell *v.* Few, 7 Johns. 302.

South Carolina.— Miller *v.* Reigne, 2 Hill 592.

South Dakota.— Feury *v.* McCormick Harvesting Mach. Co., 6 S. D. 396, 61 N. W. 162.

England.— Hilbery *v.* Hatton, 2 H. & C. 822, 33 L. J. Exch. 190, 10 L. T. Rep. N. S. 39.

Canada.—O'Rorke *v.* Great Western R. Co., 23 U. C. Q. B. 427.

See 47 Cent. Dig. tit. "Trover and Conversion," § 176; and PRINCIPAL AND AGENT, 31 Cyc. 1582.

The subsequent approval by a master of his servant's refusal to deliver goods because of the latter's lack of authority will not render the former liable in trover. Mount *v.* Derick, 5 Hill (N. Y.) 455.

38. *Alabama.*—Perminter *v.* Kelly, 18 Ala. 716, 54 Am. Dec. 177; Lee *v.* Mathews, 10 Ala. 682, 44 Am. Dec. 498.

Arkansas.— Gaines *v.* Briggs, 9 Ark. 46.

Georgia.— Miller *v.* Wilson, 98 Ga. 567, 25 S. E. 578, 58 Am. St. Rep. 319; Porter *v.* Thomas, 23 Ga. 467. But see Wando Phosphate Co. *v.* Parker, 93 Ga. 414, 21 S. E. 53.

Indiana.— Shearer *v.* Evans, 89 Ind. 400; Coffin *v.* Anderson, 4 Blackf. 395.

Iowa.— Warder-Bushnell, etc., Co. *v.* Harris, 81 Iowa 153, 46 N. W. 859.

Maine.— Wing *v.* Milliken, 91 Me. 387, 40 Atl. 138, 64 Am. St. Rep. 238; Kimball *v.* Billings, 55 Me. 147, 92 Am. Dec. 581 [*distinguishing* Burditt *v.* Hunt, 25 Me. 419, 43 Am. Dec. 289].

Massachusetts.— McPartland *v.* Read, 11 Allen 231. But the rule does not apply to an agent who collected negotiable coupons (Spooner *v.* Holmes, 102 Mass. 503, 3 Am. Rep. 491), or to a servant who took up an estray for his master and then turned it into the highway again at his master's bidding (Wilson *v.* McLaughlin, 107 Mass. 587).

Michigan.— McDonald *v.* McKinnon, 92 Mich. 254, 52 N. W. 303.

Missouri.— La Fayette County Bank *v.* Metcalf, 40 Mo. App. 494.

Nebraska.— Starr *v.* Bankers' Union of the World, 81 Nebr. 377, 116 N. W. 61, 129

e. Persons Directing Levy by Officer. A judgment creditor, attachment plaintiff, or a stranger, who advises, directs or assists an officer to seize property not belonging to the debtor, or who ratifies the sale thereof by the officer, is liable to the owner for a conversion.[39]

f. Executors and Administrators. At common law trover will not lie against an administrator or executor in his representative capacity either for a conversion by himself or by the decedent whom he represents;[40] but it will lie against him personally for the conversion of a legacy,[41] or the wrongful disposition of a stranger's property as a part of the decedent's estate.[42]

g. Assignees For Creditors. An assignee for the benefit of creditors may be sued in trover for goods fraudulently obtained by his assignor,[43] provided plaintiff can show not only a taking of the goods into possession by the assignee, but also a demand and refusal, or a wrongful disposition of them.[44]

5. Conditions Precedent — a. In General. As a general rule a plaintiff's failure to perform a condition precedent will defeat his action for a wrongful conversion.[45]

Am. St. Rep. 684; Hill *v.* Campbell Commission Co., 54 Nebr. 59, 74 N. W. 388; D. M. Osborne Co. *v.* Plano Mfg. Co., 51 Nebr. 502, 70 N. W. 1124; Cook *v.* Monroe, 45 Nebr. 349, 63 N. W. 800; Stevenson *v.* Valentine, 27 Nebr. 338, 43 N. W. 107; McCormick *v.* Stevenson, 13 Nebr. 70, 12 N. W. 828; Peckinbaugh *v.* Quillin, 12 Nebr. 586, 12 N. W. 104.

Nevada.— Bercich *v.* Marye, 9 Nev. 312.

New Hampshire.— Gage *v.* Whittier, 17 N. H. 312.

New York.— Mayer *v.* Kilpatrick, 7 Misc. 689, 28 N. Y. Suppl. 145.

Pennsylvania.— Barton *v.* Willey, 2 Wkly. Notes Cas. 157. But see Carey *v.* Bright, 58 Pa. St. 70; Berry *v.* Vantries, 12 Serg. & R. 89.

Rhode Island.— Singer Mfg. Co. *v.* King, 14 R. I. 511.

Tennessee.— Caulkins *v.* Gas-Light Co., 85 Tenn. 683, 4 S. W. 287, 4 Am. St. Rep. 786; Elmore *v.* Brooks, 6 Heisk. 45.

England.— Davies *v.* Vernon, 6 Q. B. 443, 14 L. J. Q. B. 30, 51 E. C. L. 443; Pearson *v.* Graham, 6 A. & E. 899, 7 L. J. Q. B. 247, 2 N. & P. 636, W. W. & D. 691, 33 E. C. L. 468, 112 Eng. Reprint 344; Powell *v.* Hoyland, 6 Exch. 67, 20 L. J. Exch. 82; Perkins *v.* Smith, 1 Wils. C. P. 328, 95 Eng. Reprint 644.

See 47 Cent. Dig. tit. "Trover and Conversion," § 177; and Principal and Agent, 31 Cyc. 1560.

Compare Shilling *v.* Shilling, (Tex. Civ. App. 1896) 35 S. W. 420.

Contra.— Hodgson *v.* St. Paul Plow Co., 78 Minn. 172, 80 N. W. 956, 50 L. R. A. 644; McLennan *v.* Minneapolis, etc., El. Co., 57 Minn. 317, 59 N. W. 628; Leuthold *v.* Fairchild, 35 Minn. 99, 27 N. W. 503, 28 N. W. 218.

Principal and agent may be jointly liable. Pearne *v.* Coyne, 79 Conn. 570, 65 Atl. 973.

An agent who buys for his principal, but has no property in, or control over, the goods cannot be held liable in trover by one having a better right than the seller. Jackson *v.* Klinger, 33 Misc. (N. Y.) 758, 67 N. Y. Suppl. 850.

A husband is not liable in trover for detaining notes which he held as agent for his wife, and which she had a right to hold. Hunt *v.* Kane, 40 Barb. (N. Y.) 638.

39. Youngs *v.* Moore, 7 J. J. Marsh. (Ky.) 646; Libby *v.* Soule, 13 Me. 310; Phelps *v.* Delmore, 69 Hun (N. Y.) 18, 23 N. Y. Suppl. 229; Averill *v.* Williams, 1 Den. (N. Y.) 501; Draper *v.* Buxton, 90 N. C. 182.

Merely pointing out to an officer property on which to levy will not in the event of a wrongful levy render a creditor guilty of a conversion. Adams *v.* Abbot, 2 Vt. 383.

Property destroyed pending attachment.— A plaintiff in attachment is not liable in trover for the value of property which without fault on the officer's part was destroyed pending the attachment. Jenner *v.* Joliffe, 6 Johns. (N. Y.) 9.

40. Daily *v.* Daily, 66 Ala. 266; Cherry *v.* Hardin, 4 Heisk. (Tenn.) 199. See, generally, Executors and Administrators, 18 Cyc. 296.

Remedy by statute.— The right to bring trover against administrators and executors is given by the statutes of some states. Gilbreath *v.* Jones, 66 Ala. 129; Nations *v.* Hawkins, 11 Ala. 859; Brummett *v.* Golden, 9 Gill 95; State *v.* Berning, 74 Mo. 87; Middleton *v.* Pipkin, (Civ. App. 1900) 56 S. W. 240; Ferrill *v.* Brewis, 25 Gratt. 765. See Executors and Administrators, 18 Cyc. 296.

41. Nelson *v.* Corwin, 59 Ind. 489. See, generally, Executors and Administrators, 18 Cyc. 296.

42. Walter *v.* Miller, 1 Harr. (Del.) 7; Yeldell *v.* Shinholster, 15 Ga. 189; Scollard *v.* Brooks, 170 Mass. 445, 49 N. E. 741. See, generally, Executors and Administrators, 18 Cyc. 296.

43. Artman *v.* Walton, 34 Leg. Int. (Pa.) 13. See, generally, Assignments For Benefit of Creditors, 4 Cyc. 241.

44. Dexter *v.* Dexter, 122 N. Y. 540, 30 N. E. 68 [*affirming* 56 N. Y. Super. Ct. 568, 4 N. Y. Suppl. 712]; Goodwin *v.* Goldsmith, 49 N. Y. Super. Ct. 101 [*affirmed* in 99 N. Y. 149, 1 N. E. 404]. See also *supra*, III, G, 3.

45. Tucker *v.* Henderson, 63 Ala. 280;

b. Payment or Tender of Amount of Lien or Indebtedness. Where a lien on, or an indebtedness for, goods exist in favor of one in possession of them, a tender of the amount of such lien or indebtedness must be made before trover will lie,[46] unless he previously disposed of the property or otherwise terminated his lien;[47] neglected to claim a lien and state the amount thereof,[48] coupled the lien with another claim,[49] based his refusal to deliver on another ground,[50] or failed to perform the contract which would have entitled him to a lien.[51]

c. Return of Consideration on Rescission of Contract. Where title has passed in a sale or exchange of goods procured by defendant's fraud, plaintiff cannot recover for a conversion thereof without proof of a rescission of the contract and of a return or tender of the consideration received,[52] unless the consideration was money only.[53]

d. Institution of Criminal Proceedings. The institution of a criminal prosecution against one who has feloniously obtained goods and converted them is a condition precedent to the bringing of trover against him,[54] but not to the bringing

Jackson *v.* Appleton, 2 N. Y. Suppl. 787; Williams *v.* Smith, 28 R. I. 531, 68 Atl. 306; Wilson *v.* Hoffman, 130 Fed. 694, 65 C. C. A. 14 [*reversing* 123 Fed. 984, 134 Fed. 844, 67 C. C. A. 434].

46. *Georgia.*— Perdue *v.* Powell, 63 Ga. 159.

Illinois.— Robison *v.* Hardy, 22 Ill. App. 512.

Indiana.— Picquet *v.* McKay, 2 Blackf. 465.

Michigan.— McDonough *v.* Sutton, 35 Mich. 1.

New York.— Gunning *v.* Quinn, 81 Hun 522, 30 N. Y. Suppl. 1015 [*affirmed* in 153 N. Y. 659, 48 N. E. 1104]; Genin *v.* Schwenk, 62 Hun 574, 17 N. Y. Suppl. 34; Coller *v.* Shepard, 19 Barb. 305; Conway *v.* Bush, 4 Barb. 564.

Pennsylvania.—Wagenblast *v.* McKean, 2 Grant 393.

Vermont.— Benoir *v.* Paquin, 40 Vt. 199.

England.— Broadbent *v.* Varley, 12 C. B. N. S. 214, 104 E. C. L. 214.

See 47 Cent. Dig. tit. "Trover and Conversion," § 149.

A tender of the amount actually due need not be shown where defendant claimed a lien for a larger sum than he was entitled to collect. Murr *v.* Western Assur. Co., 50 N. Y. App. Div. 4, 64 N. Y. Suppl. 12. So proof of tender of the exact amount due is not necessary where the owner offered to pay all just charges. Stickney *v.* Allen, 10 Gray (Mass.) 352; Klinck *v.* Kelly, 63 Barb. (N. Y.) 622; Aborn *v.* Mason, 1 Fed. Cas. No. 19, 14 Blatchf. 405.

Lien in third person.—A defendant in trover cannot set up a right of lien in a third person. Banks *v.* Wilks, 1 Humphr. (Tenn.) 279.

A claim of lien for storage will not avail where defendant held the goods adversely. Allen *v.* Ogden, 1 Fed. Cas. No. 233, 1 Wash. C. C. 174.

47. Whipple *v.* Tucker, 123 Ill. App. 223; Galvin *v.* Galvin Brass, etc., Works, 81 Mich. 16, 45 N. W. 654; Sistare *v.* Olcott, 15 N. Y. St. 248; Saltus *v.* Everett, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541; Austin *v.* Vanderbilt, 48 Oreg. 206, 85 Pac. 519.

48. Alling *v.* Weissmann, 77 Conn. 394, 59 Atl. 419; Wagenblast *v.* McKean, 2 Grant (Pa.) 393.

49. Bowden *v.* Dugan, 91 Me. 141, 39 Atl. 467; Jones *v.* Tarlton, 1 Dowl. P. C. N. S. 625, 6 Jur. 348, 11 L. J. Exch. 267, 9 M. & W. 675.

50. Murray *v.* Roosevelt, Anth. N. P. (N. Y.) 138; Corbet Buggy Co. *v.* Dukes, 140 N. C. 393, 52 S. E. 931; West *v.* Tupper, 1 Bailey (S. C.) 193.

51. Reeve *v.* Fox, 40 Ill. App. 127; Phillips *v.* McNab, 16 Daly (N. Y.) 150, 9 N. Y. Suppl. 526.

52. Kimball *v.* Cunningham, 4 Mass. 502, 3 Am. Dec. 230; Rogers *v.* Miller, 62 N. H. 131; Pinckney *v.* Darling, 158 N. Y. 728, 53 N. E. 1130 [*affirming* 3 N. Y. App. Div. 553, 38 N. Y. Suppl. 411]; Tripp *v.* Pulver, 2 Hun (N. Y.) 511, 5 Thomps. & C. 30. See also EXCHANGE OF PROPERTY, 17 Cyc. 841; SALES, 35 Cyc. 513.

If, however, title has not passed to the holder of the goods, and he converts them, the owner may bring trover without tendering or paying back anything received as hire or part payment therefor. Vansandt *v.* Hobbs, 84 Mo. App. 628; Ham *v.* Sanborn, 68 N. H. 19, 40 Atl. 395; Hynes *v.* Patterson, 95 N. Y. 1 [*affirming* 28 Hun 523]; Douglass *v.* Scott, 130 N. Y. App. Div. 322, 114 N. Y. Suppl. 470; Disbrow *v.* Tenbroeck, 4 E. D. Smith (N. Y.) 397; Baird *v.* Howard, 51 Ohio St. 57, 36 N. E. 732, 46 Am. St. Rep. 550, 22 L. R. A. 846. See also SALES, 35 Cyc. 514.

A return or tender at the trial of notes received in payment from a fraudulent vendee will suffice as complying with the condition precedent to the maintenance of the action. Ryan *v.* Brant, 42 Ill. 78; Ladd *v.* Moore, 3 Sandf. (N. Y.) 589.

53. See *infra*, IV, A, 6.

54. Martin *v.* Martin, 25 Ala. 201; Keyser *v.* Rodgers, 50 Pa. St. 275. *Contra*, Rogers *v.* Huie, 1 Cal. 429, 54 Am. Dec. 300; McBain *v.* Smith, 13 Ga. 315.

In Rhode Island the rule obtains by virtue of Gen. Laws, c. 233, § 16. McNeal *v.* Macomber, 25 R. I. 475, 56 Atl. 683; Struthers *v.* Peckham, 22 R. I. 8, 45 Atl. 742; Crowley

of trover against an innocent purchaser from the wrong-doer,[55] or against a receiver of goods stolen in another state.[56]

6. Defenses — a. In General. In general, any defense may be set up which disproves a right of recovery in plaintiff,[57] or negatives liability on the part of defendant.[58] And no defense will avail as a bar which goes, not to the gist of the action, but to incidental matters, of excuse, benefits, and damages.[59]

v. Burke, 20 R. I. 793, 38 Atl. 895; Royce *v.* Oakes, 20 R. I. 252, 38 Atl. 371.

In England, under St. 24 & 25 Vict. c. 96, § 100, an owner of stolen goods may not bring trover therefor against the thief, or any one taking the goods from him with notice, until he has prosecuted the thief to conviction. Scattergood *v.* Sylvester, 15 Q. B. 506, 14 Jur. 977, 19 L. J. Q. B. 447, 69 E. C. L. 506. Nor can he recover in trover against a purchaser from a thief, if the purchaser, even with notice of plaintiff's claim, disposed of the goods prior to conviction of the thief. Moyce *v.* Newington, 4 Q. B. D. 32, 14 Cox C. C. 182, 48 L. J. Q. B. 125, 39 L. T. Rep. N. S. 535, 27 Wkly. Rep. 319; Horwood *v.* Smith, Leach C. C. 586 note, 2 T. R. 750, 1 Rev. Rep. 613, 100 Eng. Reprint 404. But see Bentley *v.* Vilmont, 12 App. Cas. 471, 52 J. P. 68, 57 L. J. Q. B. 18, 57 L. T. Rep. N. S. 854, 36 Wkly. Rep. 481.

55. Lee *v.* Bayes, 18 C. B. 599, 2 Jur. N. S. 1093, 25 L. J. C. P. 249, 86 E. C. L. 599; White *v.* Spettigue, 1 C. & K. 673, 9 Jur. 70, 14 L. J. Exch. 99, 13 M. & W. 603, 47 E. C. L. 673 [*overruling* Peer *v.* Humphrey, 2 A. & E. 495, 1 Harr. & W. 28, 4 L. J. K. B. 100, 4 N. & M. 430, 29 E. C. L. 236, 111 Eng. Reprint 191; Gimson *v.* Woodfull, 2 C. & P. 41, 12 E. C. L. 439].

56. Johnson *v.* Kaas, 28 Leg. Int. (Pa.) 30.

57. **Such as** want of title and right of possession of plaintiff (Gray *v.* Eschen, 125 Cal. 1, 57 Pac. 664), no damages suffered (Waring *v.* Pennsylvania R. Co., 76 Pa. St. 491; Wylly *v.* Grigsby, 10 S. D. 13, 70 N. W. 1049), or title obtained for the purpose of defrauding creditors (Pettibone *v.* Phelps, 13 Conn. 445, 35 Am. Dec. 88).

Where the liability of defendants is several as well as joint, a valid defense set up by one will be available for the others. Story, etc., Commercial Co. *v.* Story, 100 Cal. 30, 34 Pac. 671.

58. **As that** he had never had possession (Morish *v.* Mountain, 22 Minn. 564; Chandler *v.* Holland, 61 N. C. 598; Plano Mfg. Co. *v.* Jones, 8 N. D. 315, 79 N. W. 338; Hinchcliffe *v.* Sharpe, 77 L. T. Rep. N. S. 714), that he had delivered the goods or made due tender thereof (Trammell *v.* Mallory, 115 Ga. 748, 42 S. E. 62; Colby *v.* W. W. Kimball Co., 99 Iowa 321, 68 N. W. 786; McDonald *v.* McKinnon, 104 Mich. 428, 62 N. W. 560; Dishneau *v.* Newton, 96 Wis. 531, 71 N. W. 807), or that he had right of property and possession of the goods in question (Brown *v.* Bowen, 90 Mo. 184, 2 S. W. 398; T. J. Moss Tie Co. *v.* Kreilich, 80 Mo. App. 304); but not damages sustained by defendant and growing out of the same contract under which plaintiff claims the property. Bell *v.* G. Ober, etc., Co., 111 Ga. 668, 36 S. E. 904.

59. **Such as** unreasonable excuse for withholding plaintiff's goods (Kendall *v.* J. I. Porter Lumber Co., 69 Ark. 442, 64 S. W. 220; Baker *v.* Lothrop, 155 Mass. 376, 29 N. E. 643; Barker *v.* Archer, 49 N. Y. App. Div. 80, 63 N. Y. Suppl. 298; Smith *v.* Hartog, 23 Misc. (N. Y.) 353, 51 N. Y. Suppl. 257; Oxsheer *v.* Tandy, 11 Tex. Civ. App. 142, 32 S. W. 372), good faith of defendant (Crawford *v.* Thomason, (Tex. Civ. App. 1909) 117 S. W. 181), theft of property since the conversion (Lopard *v.* Symons, 85 N. Y. Suppl. 1025), property received as special deposit (Coffin *v.* Anderson, 4 Blackf. (Ind.) 395), partial failure of consideration (Penniman *v.* Winner, 54 Md. 127; Capps *v.* Vesey Bros., 23 Okla. 554, 101 Pac. 1043), defendant a *bona fide* purchaser without notice (Milner, etc., Co. *v.* Deloach Mill Mfg. Co., 139 Ala. 645, 36 So. 765, 101 Am. St. Rep. 63; Robinson *v.* Hodgson, 73 Pa. St. 202), maturing of promissory note after trover brought but before trial (Thayer *v.* Manley, 73 N. Y. 305), proper sale of part of the goods (Huntington *v.* Bonds, 68 Ga. 23), acting under a license or agency, which had been revoked or terminated (Newlove *v.* Pond, 130 Cal. 342, 62 Pac. 561; Putney *v.* Day, 6 N. H. 430, 25 Am. Dec. 470), benefit of plaintiff or a third person (Heyert *v.* Raubman, 86 N. Y. Suppl. 797; Frank *v.* Tatum, (Tex. Civ. App. 1894) 26 S. W. 900), payment, set-off, or fraudulent representations in trover for a note (Fry *v.* Baxter, 10 Mo. 302), delay of payee in notifying indorsees of checks that indorsements were without authority where no loss resulted from the delay (Blum *v.* Whipple, 194 Mass. 253, 80 N. E. 501, 13 L. R. A. N. S. 211), a settlement, which was not fully carried out (Pierrepont *v.* Shepard, etc., Lumber Co., 11 N. Y. App. Div. 383, 42 N. Y. Suppl. 498), plaintiff's neglect to record conditional sale, of which defendant had actual notice (Rodney Hunt Mach. Co. *v.* Stewart, 57 Hun (N. Y.) 545, 11 N. Y. Suppl. 448), that defendant obtained possession under a Sunday contract (Doolittle *v.* Shaw, 92 Iowa 348, 60 N. W. 621, 54 Am. St. Rep. 562, 26 L. R. A. 366; Hall *v.* Corcoran, 107 Mass. 251, 9 Am. Rep. 30), that plaintiff was only part-owner of the property (Powers *v.* Hatter, 152 Ala. 636, 44 So. 859), property *in custodia legis* at time of conversion (Caldwell *v.* Ryan, (Mo. App. 1904) 79 S. W. 743), value of goods converted not ascer-

b. Restoration or Offer to Restore Property or Proceeds. After an act of conversion a return of the property by the wrong-doer, or an offer to return it, although provable in mitigation of damages,[60] will not bar the cause of action in trover.[61]

c. Destruction of Property After Conversion. One who wrongfully converts property to his own use cannot defeat trover by pleading a subsequent destruction of the property whether by a public enemy, act of God, or emancipation proclamation.[62]

d. Advice of Counsel. Legal advice will not shield a defendant in trover who has unlawfully detained plaintiff's property.[63]

e. Assertion of Right Other Than That Under Which Property Was Taken or Detained. Assertion of a right other than that under which property was wrongfully taken or detained will not be allowed as a defense.[64]

tainable (Electric Power Co. *v.* New York, 36 N. Y. App. Div. 383, 55 N. Y. Suppl. 460), counter-claim for storage of property converted (Thomas P. Beale Furniture Co. *v.* McGrorty, 53 Misc. (N. Y.) 643, 103 N. Y. Suppl. 221), failure of bailor in replevin suit prior to trial of trover brought by the bailee (Pratt *v.* Boston Heel, etc., Co., 134 Mass. 300), and that checks alleged to have been converted were not received by plaintiff in payment of any debts due him (Carter *v.* Eighth Ward Bank, 33 Misc. (N. Y.) 128, 67 N. Y. Suppl. 300).

A stranger who replevies property attached must be held to have done so for defendant in the suit, and when sued in trover for a conversion of the property can make all defenses which defendant could have made if he had been sued. Morris *v.* Hall, 41 Ala. 510.

60. See cases cited *infra*, note 61.

61. *Alabama.*— Gray *v.* Crocheron, 8 Port. 191.

Arkansas.— Kelly *v.* McDonald, 39 Ark. 387; Warner *v.* Capps, 37 Ark. 32; Norman *v.* Rogers, 29 Ark. 365.

Colorado.— Murphy *v.* Hobbs, 8 Colo. 17, 5 Pac. 637.

Connecticut.— Shelton *v.* French, 33 Conn. 489.

District of Columbia.—Whittingham *v.* Owen, 19 D. C. 277.

Georgia.— Bodega *v.* Perkerson, 60 Ga. 516; Tharp *v.* Anderson, 31 Ga. 293.

Illinois.— Barrelett *v.* Bellgard, 71 Ill. 280. But see Young Men's Christian Assoc. *v.* Harmon, 61 Ill. App. 639.

Indiana.— Cardwill *v.* Gilmore, 86 Ind. 428; Smith *v.* Downing, 6 Ind. 374.

Iowa.— Munier *v.* Zachary, 138 Iowa 219, 114 N. W. 525, 18 L. R. A. N. S. 572.

Massachusetts.— Greenfield Bank *v.* Leavitt, 17 Pick. 1, 28 Am. Dec. 268; Wheelock *v.* Wheelwright, 5 Mass. 104.

Minnesota.— Carpenter *v.* American Bldg., etc., Assoc., 54 Minn. 403, 56 N. W. 95, 40 Am. St. Rep. 345; Oleson *v.* Newell, 12 Minn. 186.

Missouri.— Sparks *v.* Purdy, 11 Mo. 219; Easton *v.* Woods, 1 Mo. 506.

Nebraska.— Coburn *v.* Watson, 48 Nebr. 257, 67 N. W. 171; Watson *v.* Coburn, 35 Nebr. 492, 53 N. W. 477; Stough *v.* Stefani, 19 Nebr. 468, 27 N. W. 445.

New York.— Pinckney *v.* Darling, 158 N. Y. 728, 53 N. E. 1130 [*affirming* 3 N. Y. App. Div. 553, 38 N. Y. Suppl. 411]; Kelly *v.* Mesier, 21 N. Y. App. Div. 253, 47 N. Y. Suppl. 675; Sherman *v.* Way, 56 Barb. 188; Smith *v.* Hartog, 23 Misc. 353, 51 N. Y. Suppl. 257; Robinson *v.* Lewis, 6 Misc. 37, 25 N. Y. Suppl. 1004 [*affirmed* in 7 Misc. 536, 27 N. Y. Suppl. 989]; Smith *v.* Hoose, 22 How. Pr. 402; Murray *v.* Burling, 10 Johns. 172.

North Carolina.— See Waller *v.* Bowling, 108 N. C. 289, 12 S. E. 990, 12 L. R. A. 261.

Ohio.— Baltimore, etc., R. Co. *v.* O'Donnell, 49 Ohio St. 489, 32 N. E. 476, 34 Am. St. Rep. 579, 21 L. R. A. 117.

Pennsylvania.—Whitaker *v.* Houghton, 86 Pa. St. 48; Tracey *v.* Good, 3 Pa. L. J. 136.

Texas.— Baldwin *v.* Davidson, (Civ. App. 1910) 127 S. W. 562; Crawford *v.* Thomason, (Civ. App. 1909) 117 S. W. 181; Hofschulte *v.* Panhandle Hardware Co., (Civ. App. 1899) 50 S. W. 608.

Vermont.— Park *v.* McDaniels, 37 Vt. 594; Yale *v.* Saunders, 16 Vt. 243.

West Virginia.—Arnold *v.* Kelly, 4 W. Va. 642.

Wisconsin.— Thomas *v.* Wiesmann, 44 Wis. 339.

United States.—Western Land, etc., Co. *v.* Hall, 33 Fed. 236.

England.— Clendon *v.* Dinneford, 5 Car. & P. 13, 24 E. C. L. 429. But see Hayward *v.* Seaward, 1 Moore & S. 459, 28 E. C. L. 490.

Canada.— See Gauhan *v.* St. Lawrence, etc., R. Co., 3 Ont. App. 392.

See 47 Cent. Dig. tit. "Trover and Conversion," § 153.

62. Scott *v.* Rogers, 56 Ill. App. 571; Mason *v.* O'Brien, 42 Miss. 420; Craufurd *v.* Smith, 93 Va. 623, 23 S. E. 235, 25 S. E. 657.

63. Rushville First Nat. Bank *v.* Slack, 19 Ill. App. 330.

64. *Connecticut.*— Thompson *v.* Rose, 16 Conn. 71, 41 Am. Dec. 121.

Michigan.— Galvin *v.* Galvin Brass, etc., Works, 81 Mich. 16, 45 N. W. 654.

f. Failure of Wrong-Doer to Receive Benefits of Conversion. Defendant cannot escape liability for a conversion on the ground that it resulted in no profit or benefit to him.[65]

g. Prior Conversion. A conversion by defendant or a third person prior to the conversion alleged is no defense.[66]

h. Order of Superior. Acting under orders of a superior officer will justify a conversion only when the orders and surrounding circumstances amount to duress.[67]

i. Prior Adjudication. In trover for unlawful conversion of different items of personal property it is a valid defense *pro tanto* to plead a former adjudication as to any such item.[68]

j. Taking Property From Defendant by Legal Process. Conversion is not excused by the subsequent taking of the property from the wrong-doer by virtue of legal process,[69] unless it be further shown that the owner or person entitled to the possession has received it or the proceeds of any disposition which may have been made of it.[70]

k. Title or Right to Possession — (i) *Of Defendant.* It is competent and proper for defendant in an action of trover to allege in himself as a defense either title to the property in controversy,[71] a right of possession[72] or a rightful posses-

New Hampshire.— Clark *v.* Rideout, 39 N. H. 238.

Pennsylvania.—Andrews *v.* Wade, 3 Pa. Cas. 133, 6 Atl. 48.

Texas.— Logan *v.* Robertson, (Civ. App. 1904) 83 S. W. 395; White *v.* Sterzing, 11 Tex. Civ. App. 553, 32 S. W. 909.

England.— Lord *v.* Wardle, 3 Bing. N. Cas. 680, 4 Scott 402, 32 E. C. L. 314.

See 47 Cent. Dig. tit. "Trover and Conversion," § 157.

One sued in his individual capacity for a conversion may show that he detained the property for a lunatic for whom he has since been appointed guardian. Elliott *v.* Keith, 102 Ga. 117, 29 S. E. 155.

65. Platt *v.* Tuttle, 23 Conn. 233; McPheters *v.* Page, 83 Me. 234, 22 Atl. 101, 23 Am. St. Rep. 772; Flagg *v.* Mann, 9 Fed. Cas. No. 4,848, 3 Sumn. 84.

66. Warren *v.* Barnett, 83 Ala. 208, 3 So. 609; Kruse *v.* Seeger, etc., Co., 16 N. Y. Suppl. 529 [*affirming* 15 N. Y. Suppl. 825].

67. Hardage *v.* Coffman, 24 Ark. 256; Weatherspoon *v.* Woodey, 5 Coldw. (Tenn.) 149; Witherspoon *v.* Woody, 4 Coldw. (Tenn.) 605.

68. Switzer *v.* Miller, 58 Ind. 561; Dover *v.* Child, 1 Ex. D. 172, 45 L. J. Exch. 462, 34 L. T. Rep. N. S. 737, 24 Wkly. Rep. 537. See, generally, JUDGMENTS, 23 Cyc. 1341.

But a judgment in trespass is not a bar to trover for the same goods. Putt *v.* Rawstern, 3 Mod. 1, 87 Eng. Reprint 1. See, generally, JUDGMENTS, 23 Cyc. 1340.

69. Erie Preserving Co. *v.* Witherspoon, 49 Mich. 377, 13 N. W. 781; Pinckney *v.* Darling, 158 N. Y. 728, 53 N. E. 1130 [*affirming* 3 N. Y. App. Div. 553, 38 N. Y. Suppl. 411]; Irish *v.* Cloyes, 8 Vt. 30, 30 Am. Dec. 446.

70. Coburn *v.* Watson, 48 Nebr. 257, 67 N. W. 171, 35 Nebr. 492, 53 N. W. 477.

71. *Illinois.*— Hughes *v.* Lumsden, 8 Ill. App. 185.

Kentucky.— Young *v.* Ferguson, 1 Litt. 298.

Michigan.— Fifield *v.* Elmer, 25 Mich. 48.

New Jersey.— Hampton *v.* Swisher, 4 N. J. L. 66.

New York.— Voltz *v.* Blackmar, 64 N. Y. 646; Woodworth *v.* Morris, 56 Barb. 97.

Pennsylvania.— Smith *v.* McNeal, 68 Pa. St. 164.

See 47 Cent. Dig. tit. "Trover and Conversion," §§ 164, 165.

A claim of title under a tax deed which defendant procured merely for the purpose of cutting timber is no defense to an action of trover therefor. Moret *v.* Mason, 106 Mich. 340, 64 N. W. 193.

Purchase under an execution issued subsequently to defendant's conversion of the property cannot be pleaded as a defense to trover. Otis *v.* Jones, 21 Wend. (N. Y.) 394.

A resulting trust in favor of defendant will not avail as a defense against a plaintiff holding the legal title. Guphill *v.* Isbell, 8 Rich. (S. C.) 463.

Title in co-defendant.—A defendant is entitled to the benefit of evidence which establishes title in a co-defendant. Trammell *v.* J. M. Guffey Petroleum Co., 42 Tex. Civ. App. 455, 94 S. W. 104.

A defendant's title will not shield him when sued for a conversion of goods while they were in the custody of the law. Weidensaul *v.* Reynolds, 49 Pa. St. 73. Nor in trover for conversion of a vessel can a defendant interpose a lien which has not been perfected by attachment or judgment. Clapp *v.* Glidden, 39 Me. 448.

A defendant cannot escape liability for a conversion by subsequently discharging and taking an assignment to himself of a mortgage on the goods involved in the action. Gaines *v.* Briggs, 9 Ark. 46. But he may defeat plaintiff, a second mortgagee, by buying in before the commencement of the action a first mortgage on which default had been made. Draper *v.* Walker, 98 Ala. 310, 13 So. 595.

72. *Alabama.*— Steiner *v.* Tranum, 98 Ala. 315, 13 So. 365.

sion subsequent to plaintiff's possession, until the latter shows title in himself to the property alleged to have been converted.[73]

(II) *Of Third Person.* The cases relating to title in a third person as a defense may be divided into three groups, from the first of which may be formulated the rule that such a defense is not allowable. In the majority of these cases, however, defendant made no effort to connect himself with the title of such person, or he was estopped from making such a defense.[74] The second group establishes the rule that is sustained by a preponderance of authority, viz.: that such defense is allowable if defendant is in privity with the third person or can in some way connect himself with the latter's title.[75] The cases in the third group assert the

Georgia.— Clark *v.* Fleming, 78 Ga. 782, 4 S. E. 12; Geer *v.* Thompson, 4 Ga. App. 756, 62 S. E. 500.

Massachusetts.— Haynes *v.* Temple, 198 Mass. 372, 84 N. E. 467.

New Hampshire.— Greene *v.* Mead, 18 N. H. 505.

New York.— Longenecker *v.* Kuhn, 126 N. Y. App. Div. 254, 110 N. Y. Suppl. 517; Button *v.* Kinnetz, 88 Hun 35, 34 N. Y. Suppl. 522; Clark *v.* Costello, 79 Hun 588, 29 N. Y. Suppl. 937; Hall *v.* Dagget, 6 Cow. 653; Canfield *v.* Monger, 12 Johns. 347.

Texas.— See Baldwin *v.* Davidson, (Civ. App. 1910) 127 S. W. 562.

United States.— Tinker *v.* U. S. Fidelity, etc., Co., 169 Fed. 211.

One who takes possession of property abandoned by the owner is not guilty of conversion. Longenecker *v.* Kuhn, 126 N. Y. App. Div. 254, 110 N. Y. Suppl. 517; Huggins *v.* Reynolds, 51 Tex. Civ. App. 504, 112 S. W. 116.

Right to possession as poundmaster.— In an action to recover the value of mares and colts converted by defendant, where defendant answered that he was poundmaster of the village which had passed an ordinance providing for the impounding and selling horses running at large, and acting under such ordinance and in his official capacity had taken up the horses and colts which were afterward sold and purchased by him and set out the ordinance as a part of the answer, the answer was a complete defense. Best *v.* Broadhead, 18 Ida. 11, 108 Pac. 333.

73. Baker *v.* Kansas City, etc., R. Co., 52 Mo. App. 602; Smoot *v.* Cook, 3 W. Va. 172, 100 Am. Dec. 741.

A building contract which permits the owner on specified grounds to enter on the premises and take possession thereof and all the materials and machinery, etc., after "sending written notice to the address of the contractor," only requires the owner to send notice, and where he mails a notice he may take possession without waiting until the notice had been in fact received by the contractor, or after it could have been received by the use of reasonable diligence. Baldwin *v.* Davidson, (Tex. Civ. App. 1910) 127 S. W. 562.

74. *Arkansas.*— Gaines *v.* Briggs, 9 Ark. 46.

Massachusetts.— Stearns *v.* Dean, 129 Mass. 139.

Michigan.— Carpenter *v.* Carpenter, 154 Mich. 100, 117 N. W. 598.

New Hampshire.— Harris *v.* Smith, 71 N. H. 330, 52 Atl. 854; Harrington *v.* Tremblay, 61 N. H. 413.

Pennsylvania.—Solliday *v.* Johnson, 38 Pa. St. 380; Wright *v.* Guier, 9 Watts 172, 36 Am. Dec. 108; Elder *v.* Corr, 9 Pa. Super. Ct. 228, 43 Wkly. Notes Cas. 464.

Texas.— Moore *v.* Aldrich, 25 Tex. Suppl. 276; R. C. Stuart Drug Co. *v.* Hirsch, (Civ. App. 1899) 50 S. W. 583.

Wisconsin.— Gauche *v.* Milbrath, 94 Wis. 674, 69 N. W. 999. But see Terry *v.* Allis, 20 Wis. 32; Weymouth *v.* Chicago, etc., R. Co., 17 Wis. 550, 84 Am. Dec. 763.

United States.— Peru Plow, etc., Co. *v.* Harker, 144 Fed. 673, 75 C. C. A. 475.

England.— Barker *v.* Furlong, [1891] 2 Ch. 172, 60 L. J. Ch. 368, 64 L. T. Rep. N. S. 411, 39 Wkly. Rep. 621; Haggan *v.* Pasley, L. R. 2 Ir. 573; Jefferies *v.* Great Western R. Co., 5 E. & B. 802, 2 Jur. N. S. 230, 25 L. J. Q. B. 107, 4 Wkly. Rep. 201, 85 E. C. L. 802.

See 47 Cent. Dig. tit. "Trover and Conversion," § 166.

The defense under consideration is admissible only when plaintiff must prove title in order to establish his right of possession. See *supra*, IV, A, 3, a.

The application of this rule is restricted in some states to cases where defendant obtained possession from the owner tortiously. Jones *v.* Sinclair, 2 N. H. 319, 9 Am. Dec. 75; King *v.* Orser, 4 Duer (N. Y.) 431; Williams *v.* Thomas, 25 Ont. 536 [*following* Hoare *v.* Lee, 5 C. B. 754, 5 D. & L. 765, 12 Jur. 356, 17 L. J. C. P. 196, 57 E. C. L. 754]; McDougall *v.* Smith, 30 U. C. Q. B. 607.

Plaintiff may dispute the title which defendant sets up in a third person. Parks *v.* Loomis, 6 Gray (Mass.) 467.

75. *Alabama.*— Pruitt *v.* Sunn, 151 Ala. 651, 44 So. 569; Mitchell *v.* Thomas, 114 Ala. 459, 21 So. 991; Thorn *v.* Kemp, 98 Ala. 417, 13 So. 749; Draper *v.* Walker, 98 Ala. 310, 13 So. 595; Marks *v.* Robinson, 82 Ala. 69, 2 So. 292. But see Brandon *v.* Planters', etc., Bank, 1 Stew. 320, 18 Am. Dec. 48.

California.— George *v.* Pierce, 123 Cal. 172, 55 Pac. 775, 56 Pac. 53.

Colorado.— Omaha, etc., Smelting, etc., Co. *v.* Tabor, 13 Colo. 41, 21 Pac. 925, 16 Am. St. Rep. 185, 5 L. R. A. 236.

right of defendant to set up title in a third person as a defense without claiming under, or being in privity, with him.[76] A defendant in trover whose possession was rightful may always show that he delivered the property to the true owner.[77]

l. Equitable Defenses. Equitable defenses are admissible in trover,[78] but not where defendant obtained possession of the goods tortiously.[79]

m. Waiver of Defenses and Estoppel. Defendant in trover will not be permitted to set up a defense inconsistent with his silence, language, or conduct whereby he induced plaintiff to act to his prejudice.[80]

B. Jurisdiction, Venue, Parties, and Limitations — 1. JURISDICTION. Trover does not affect the possession or custody of the property and it may therefore be brought in a court of law, although the custody of the property is in a court of chancery.[81]

2. VENUE. Trover is a transitory action and may be maintained for a conversion of property in another state or country.[82]

Florida.— Skinner *v.* Pinney, 19 Fla. 42, 45 Am. Rep. 1.

Kansas.—Huffman *v.* Parsons, 21 Kan. 467.

Maine.— Stevens *v.* Gordon, 87 Me. 564, 33 Atl. 27. But see Clapp *v.* Glidden, 39 Me. 448.

Maryland.— Harker *v.* Dement, 9 Gill 7, 52 Am. Dec. 670.

Minnesota.— Brown *v.* Shaw, 51 Minn. 266, 53 N. W. 633.

Montana.— Reynolds *v.* Fitzpatrick, 28 Mont. 170, 72 Pac. 510, 23 Mont. 52, 57 Pac. 452.

Nevada.—Ward *v.* Carson River Wood Co., 13 Nev. 44.

New York.— Wheeler *v.* Lawson, 103 N. Y. 40, 8 N. E. 360; Daniels *v.* Ball, 11 Wend. 57 note; Duncan *v.* Spear, 11 Wend. 54.

Texas.— O'Brien *v.* Hilburn, 22 Tex. 616.

Vermont.— Marcy *v.* Parker, 78 Vt. 73, 62 Atl. 19. But see Lowry *v.* Walker, 4 Vt. 76.

See 47 Cent. Dig. tit. "Trover and Conversion," § 166.

The fact that plaintiff was tenant in common with others of the property converted constitutes no defense, being available only in abatement or apportionment of damage. Wing *v.* Milliken, 91 Me. 387, 40 Atl. 138, 64 Am. St. Rep. 238.

76. *Connecticut.*— Morey *v.* Hoyt, 65 Conn. 516, 33 Atl. 496.

Michigan.— Laird *v.* Coach, 112 Mich. 628, 71 N. W. 160; Wessels *v.* Beeman, 87 Mich. 481, 49 N. W. 483; Seymour *v.* Peters, 67 Mich. 415, 35 N. W. 62; Ribble *v.* Lawrence, 51 Mich. 569, 17 N. W. 60; Stearns *v.* Vincent, 50 Mich. 209, 15 N. W. 86, 45 Am. Rep. 37; Stephenson *v.* Little, 10 Mich. 433.

New Jersey.— Glenn *v.* Garrison, 17 N. J. L. 1; Legrand *v.* Swayze, 4 N. J. L. 287.

New York.— Schryer *v.* Fenton, 15 N. Y. App. Div. 158, 44 N. Y. Suppl. 203; Davis *v.* Hoppock, 6 Duer 254; Rotan *v.* Fletcher, 15 Johns. 207; Schermerhorn *v.* Van Volkenburgh, 11 Johns. 529.

North Carolina.— See Vinson *v.* Knight, 137 N. C. 408, 49 S. E. 891; Boyce *v.* Williams, 84 N. C. 275, 37 Am. Rep. 618; Rose *v.* Coble, 61 N. C. 517; Barwick *v.* Wood, 48 N. C. 306; Barwick *v.* Barwick, 33 N. C. 80; Hostler *v.* Skull, 3 N. C. 179; Hostler *v.* Skull, 1 N. C. 152, 1 Am. Dec. 583.

Oregon.—Krewson *v.* Purdom, 13 Oreg. 563, 11 Pac. 281.

West Virginia.— Smoot *v.* Cook, 3 W. Va. 172, 100 Am. Dec. 741.

United States.— Eiseman *v.* Maul, 8 Fed. Cas. No. 4,322.

Canada.— Ruttan *v.* Beamish, 10 U. C. C. P. 90.

See 47 Cent. Dig. tit. "Trover and Conversion," § 166.

77. Thompson *v.* Andrews, 53 N. C. 125; Steele *v.* Schricker, 55 Wis. 134, 12 N. W. 396.

78. Gorden *v.* Hilliboe, 17 N. D. 281, 115 N. W. 843.

79. Folmar *v.* Copeland, 57 Ala. 588; East *v.* Pace, 57 Ala. 521.

80. Warren *v.* Milliken, 57 Me. 97; Tradesmen's Nat. Bank *v.* Indiana Bicycle Co., 166 Pa. St. 554, 31 Atl. 337; Albee *v.* Cole, 39 Vt. 319; Troop *v.* Hart, 7 Can. Sup. Ct. 512, 2 Can. L. T. Occ. Notes 251 [*affirming* 2 Can. L. T. Occ. Notes 95, 14 Nova Scotia 351]; McKay *v.* Bonnett, 14 Nova Scotia 96; Adams *v.* Corcoran, 25 U. C. C. P. 524.

One who on demand admitted being in possession of goods and refused to give them up is not estopped when sued in trover to allege that he did not have them at such time. Topeka Bank *v.* Miller, 59 Kan. 743, 54 Pac. 1070 [*reversing* 7 Kan. App. 55, 51 Pac. 964]; Jackson *v.* Pixley, 9 Cush. (Mass.) 490, 57 Am. Dec. 64. *Contra,* Cadwell *v.* Pray, 86 Mich. 266, 49 N. W. 150; McNeil *v.* Hall, 107 N. Y. App. Div. 36, 94 N. Y. Suppl. 920 [*affirmed* in 187 N. Y. 549, 80 N. E. 1113].

81. Garabaldi *v.* Wright, 52 Ark. 416, 12 S. W. 875.

As to jurisdiction of justice see JUSTICES OF THE PEACE, 24 Cyc. 449.

82. *Kentucky.*—Dennis *v.* Strunk, 108 S. W. 957, 32 Ky. L. Rep. 1230.

Maine.— Whidden *v.* Seelye, 40 Me. 247, 63 Am. Dec. 661; Robinson *v.* Armstrong, 34 Me. 145.

New Jersey.— Kryn *v.* Kahn, (Sup. 1903) 54 Atl. 870.

3. Joinder of Parties. He who has the title and right of possession need not join with himself as plaintiff another who has a beneficial interest in the property, whether the latter has also a right of immediate possession and enjoyment or not.[83]

4. Time to Sue and Limitations — a. Accrual of Cause of Action. A right of action for a conversion accrues on the completion of the wrongful act.[84]

b. Running of Statute of Limitations. In case of tortious taking the statute runs from the time of such taking,[85] in case of lawful possession and unlawful

New York.— Hoy *v.* Smith, 49 Barb. 360. But see Brice *v.* Vanderheyden, 9 Wend. 472.

Texas.— Liles *v.* Woods, 58 Tex. 416.

Wisconsin.— Tyson *v.* McGuineas, 25 Wis. 656.

Canada.— Gesner *v.* Gas Co., 2 Nova Scotia 72.

See 47 Cent. Dig. tit. "Trover and Conversion," § 182.

In case of a joint conversion plaintiff may bring his action against all of defendants in any county in which any of them resides. Williamson *v.* Howell, 17 Ala. 830.

In Texas the action must be brought either in the county where the cause of action arose or the county where defendant resides. Floyd *v.* Gibbs, (Civ. App. 1895) 34 S. W. 154.

Change of venue.—A defendant in trover may have a change of venue to the county in which he resides (Yore *v.* Murphy, 10 Mont. 304, 25 Pac. 1039) or to the county where the cause of action arose (Duryee *v.* Orcott, 9 Johns. (N. Y.) 248), provided he have witnesses in such county and will stipulate that the testimony of plaintiff's witnesses in the county where the action was brought may be taken by deposition (Dunham *v.* Parmenter, 74 Hun (N. Y.) 559, 26 N. Y. Suppl. 955). But a defendant in an action for damages for conversion of oysters wrongfully taken from plaintiff's oyster beds cannot have a change of venue to the county in which the beds are situated on the ground that the action was one in reality for injury to the land. Makely *v.* A. Boothe Co., 129 N. C. 11, 39 S. E. 582.

83. Janauschek *v.* Eddy, 108 Mich. 190, 65 N. W. 752; Chamberlain *v.* Woolsey, 66 Nebr. 141, 92 N. W. 181, 95 N. W. 38; Wyckoff *v.* Anthony, 90 N. Y. 442; Schaeffer *v.* Marienthal, 17 Ohio St. 183.

Co-lessee as plaintiff.— One who sues for the conversion of his own goods need not join as plaintiff his co-lessee of the premises where the goods were when converted. Updegraff *v.* Lesem, 15 Colo. App. 297, 62 Pac. 342.

The name of the usee as a co-plaintiff will be treated as surplusage when the other co-plaintiff was the owner of the goods at the time of their conversion. McElmurray *v.* Harris, 117 Ga. 919, 43 S. E. 987.

Parties who need not be joined as defendants.— The other partners need not be joined as defendants with one partner who converted goods bailed to the firm (Pattee *v.* Gilmore, 18 N. H. 460, 45 Am. Dec. 385; Wood *v.* Proudman, 122 N. Y. App. Div. 826, 107 N. Y. Suppl. 757), nor are the insolvent vendee and beneficiaries of a trust deed made by him necessary defendants in trover brought by the vendor against the grantee of said deed (Harrison *v.* Hawley, 7 Tex. Civ. App. 308, 26 S. W. 765), nor is the lessor of premises on which goods were when converted (Updegraff *v.* Lesem, 15 Colo. App. 297, 62 Pac. 342).

Unnecessary parties.— Plaintiff may dismiss his action at any time as to unnecessary parties. Weisiger *v.* McDonald, 116 Ky. 862, 76 S. W. 1080, 25 Ky. L. Rep. 1053, 81 S. W. 687, 26 Ky. L. Rep. 416. A failure to prove a conversion against an unnecessary party defendant is no ground for a nonsuit as to other defendant or defendants. Howard *v.* Snelling, 28 Ga. 469.

84. *Alabama.*— May *v.* O'Neal, 125 Ala. 620, 28 So. 12.

California.— Harpending *v.* Meyer, 55 Cal. 555.

Illinois.— Elgin *v.* Goff, 38 Ill. App. 362.

Missouri.— Hopper *v.* Hays, 82 Mo. App. 494.

Tennessee.— Million *v.* Medaris, 6 Baxt. 132; Horsely *v.* Branch, 1 Humphr. 199.

Texas.— Mason First Nat. Bank *v.* Bernard, (Civ. App. 1895) 30 S. W. 580.

See 47 Cent. Dig. tit. "Trover and Conversion," § 186.

Property seized under process.— A cause of action for the conversion of goods seized under a writ of replevin wrongfully sued out does not accrue until the replevin suit has been determined. Osgood *v.* Carver, 43 Conn. 24. So an action of trover for the proceeds of attached property cannot be brought until the attachment suit has ended in a final judgment as to who is entitled to such proceeds. People *v.* Kendall, 14 Colo. App. 175, 59 Pac. 409.

85. *Florida.*— Bennett *v.* Herring, 1 Fla. 434.

Iowa.— Dean *v.* Nichols, etc., Co., 95 Iowa 89, 63 N. W. 582.

New York.— Wood *v.* Young, 141 N. Y. 211, 36 N. E. 193; Kelsey *v.* Griswold, 6 Barb. 436; Schroeppel *v.* Corning, 5 Den. 236.

Oregon.— Eldridge *v.* Hoefer, 45 Oreg. 239, 77 Pac. 874.

Pennsylvania.— Sattler *v.* Opperman, 14 Pa. Super. Ct. 32.

Tennessee.— Wells *v.* Ragland, 1 Swan 501.

Vermont.— Merrill *v.* Bullard, 59 Vt. 389, 8 Atl. 157.

Washington.— Kinkead *v.* Holmes, etc., Furniture Co., 24 Wash. 216, 64 Pac. 157.

Wisconsin.— Grunert *v.* Brown, 119 Wis. 126, 95 N. W. 959.

See 47 Cent. Dig. tit. "Trover and Conversion," § 187.

disposition, from the date of the latter,[86] in case of lawful possession without an unlawful disposition of the goods the statute will not begin to run until the time of demand and refusal.[87] It is immaterial whether plaintiff knew of the conversion or not, unless it was fraudulently concealed from him or he was chargeable with notice of the wrongful act.[88] The period necessary to create a bar to the action is prescribed by statute,[89] and may be lengthened by death of party entitled to sue and delay in appointment of administrator.[90]

C. Pleading and Evidence — 1. Pleading — a. Declaration, Complaint, or Petition — (I) *In General.* A declaration at common law, or a complaint, or

Amendment of complaint.— Statute of limitations runs against an amended complaint in trover only from the beginning of the action, if the amendment introduces no new matter. Williams *v.* McKissick, 125 Ala. 544, 27 So. 922.

Assignment.— The statute begins to run from the date of assignment in case of the assignment by a married woman of a claim against her husband for the conversion of her money to his own use. Simmerson *v.* Tennery, 37 Ohio St. 390.

Bailment.— A widow's claim of property which her husband held as bailee starts the running of the statute of limitations against the bailor. Morris *v.* Lowe, 97 Tenn. 243, 36 S. W. 1098.

The bar of the statute of limitations is not avoided by a second demand and refusal, or subsequent intermeddling with the property, even though it would give a cause of action in itself. Kinsely *v.* Stein, 52 Mich. 380, 18 N. W. 115; Grunert *v.* Brown, 119 Wis. 126, 95 N. W. 959. And see Philpott *v.* Kelley, 3 A. & E. 106, 1 Harr. & W. 134, 4 L. J. K. B. 139, 4 N. & M. 611, 30 E. C. L. 70, 111 Eng. Reprint 353.

86. *Arkansas.*— Chapman *v.* Hudson, 46 Ark. 489.

California.— Bell *v.* State Bank, 153 Cal. 234, 94 Pac. 889; Wright *v.* Ward, 65 Cal. 525, 4 Pac. 534.

Indiana.— Bishplinghoff *v.* Bauer, 52 Ind. 519.

Iowa.— Reizenstein *v.* Marquardt, 75 Iowa 294, 39 N. W. 506, 9 Am. St. Rep. 477, 1 L. R. A. 318.

Kentucky.— Coffey *v.* Wilkerson, 1 Metc. 101; Mims *v.* Mims, 3 J. J. Marsh. 103.

Mississippi.— Crump *v.* Mitchell, 34 Miss. 449.

New York.— Burt *v.* Myers, 37 Hun 277.

Ohio.— Brush *v.* Herlihy, 8 Ohio Dec. (Reprint) 104, 5 Cinc. L. Bul. 647.

Texas.— New York Mut. L. Ins. Co. *v.* Garland, 23 Tex. Civ. App. 380, 56 S. W. 551.

West Virginia.— Thompson *v.* Whitaker Iron Co., 41 W. Va. 574, 23 S. E. 795.

Canada.— Scott *v.* McAlpine, 6 U. C. C. P. 302.

See 47 Cent. Dig. tit. "Trover and Conversion," § 187.

87. *Colorado.*— Austin *v.* Van Loon, 36 Colo. 196, 85 Pac. 183.

District of Columbia.— Moses *v.* Taylor, 6 Mackey 255.

Kansas.— Auld *v.* Butcher, 22 Kan. 400.

Nebraska.— Reeves *v.* Nye, 28 Nebr. 571, 44 N. W. 736.

New York.— Roberts *v.* Berdell, 61 Barb. 37 [*affirmed* in 52 N. Y. 644]; Gregory *v.* Fichtner, 14 N. Y. Suppl. 891, 21 N. Y. Civ. Proc. 1, 27 Abb. N. Cas. 86 [*reversing* 13 N. Y. Suppl. 593].

North Carolina.— Koonce *v.* Perry, 53 N. C. 58; Weeks *v.* Weeks, 40 N. C. 111, 47 Am. Dec. 358.

South Carolina.— Crawley *v.* Littlefield, 3 Strobh. 154.

Vermont.— Andrews *v.* Carl, 77 Vt. 172, 59 Atl. 167.

England.— Philpott *v.* Kelley, 3 A. & E. 106, 1 Harr. & W. 134, 4 L. J. K. B. 139, 4 N. & M. 611, 30 E. C. L. 70, 111 Eng. Reprint 353.

See 47 Cent. Dig. tit. "Trover and Conversion," § 187.

Where a gift of personalty is void and the donee holds only as bailee, the statute of limitations will begin to run on his death in favor of his next of kin to whom the property descended and was delivered. Powell *v.* Powell, 21 N. C. 379.

88. *Maryland.*— Belt *v.* Marriott, 9 Gill 331.

Mississippi.— Hall *v.* Dickey, 32 Miss. 208; Johnson *v.* White, 13 Sm. & M. 584.

Montana.— Yore *v.* Murphy, 18 Mont. 342, 45 Pac. 217.

North Carolina.— State University *v.* State Nat. Bank, 96 N. C. 280, 3 S. E. 359.

Tennessee.— Million *v.* Medaris, 6 Baxt. 132.

Texas.— Gregory *v.* Montgomery, 23 Tex. Civ. App. 68, 56 S. W. 231; Gulf, etc., R. Co. *v.* Humphries, 4 Tex. Civ. App. 333, 23 S. W. 556.

Utah.— Dee *v.* Hyland, 3 Utah 308, 3 Pac. 388.

England.— Wilkinson *v.* Verity, L. R. 6 C. P. 206, 40 L. J. C. P. 141, 24 L. T. Rep. N. S. 32, 19 Wkly. Rep. 604.

See 47 Cent. Dig. tit. "Trover and Conversion," § 187.

Where property came rightfully into the possession of one who afterward held it adversely, the statute of limitations did not begin to run in his favor until he notified the owner of his adverse holding. Cooper *v.* Cooper, 132 Ill. 80, 23 N. E. 246.

89. Williams *v.* Smith, 28 R. I. 531, 68 Atl. 306.

Bar to action for conversion is not bar to action in contract for value of property converted. McCombs *v.* Guild, 9 Lea (Tenn.) 81.

90. Palmer *v.* O'Rourke, 130 Wis. 507, 110 N. W. 389.

petition under the codes, which alleges formally or in substance that plaintiff is the owner of and entitled to the possession of the property therein described,[91] and that defendant wrongfully converted [92] the same to his own use to plaintiff's damage [93] in a sum named, states all that is necessary to sustain an action for conversion.[94]

91. See *infra*, IV, C, 1, a, (VI).
92. See *infra*, IV, C, 1, a (VII).
93. See *infra*, IV, C, 1, a, (X).
94. *Alabama.*— Taylor *v.* Dwyer, 129 Ala. 325, 29 So. 692; Wilkinson *v.* Moseley, 30 Ala. 562; Nations *v.* Hawkins, 11 Ala. 859.
California.— Wendling Lumber Co. *v.* Glenwood Lumber Co., 153 Cal. 411, 95 Pac. 1029; Florence *v.* Helms, 136 Cal. 613, 69 Pac. 429; Woodham *v.* Cline, 130 Cal. 497, 62 Pac. 822; Hoowe *v.* Kreling, 93 Cal. 136, 28 Pac. 1042.
Colorado.— Updegraff *v.* Lesem, 15 Colo. App. 297, 62 Pac. 342.
Florida.— Leon *v.* Kerrison, 47 Fla. 178, 36 So. 173.
Georgia.— Phelan *v.* Vestner, 125 Ga. 825, 54 S. E. 697; Broughton *v.* Winn, 60 Ga. 486; Columbus *v.* Howard, 6 Ga. 213; Sparta Bank *v.* Butts, 1 Ga. App. 771, 57 S. E. 1061.
Idaho.— Crews *v.* Baird, 2 Ida. (Hasb.) 103, 6 Pac. 116.
Illinois.— Pearce *v.* Foote, 113 Ill. 228, 55 Am. Rep. 414.
Kansas.— Hindman *v.* Askew Saddlery Co., 9 Kan. App. 98, 57 Pac. 1050, (App. 1898) 52 Pac. 908.
Maryland.— Meixel *v.* Carr, 25 Md. 46; Richardson *v.* Hall, 21 Md. 399.
Massachusetts.— Duggan *v.* Wright, 157 Mass. 228, 32 N. E. 159.
Michigan.— Heineman *v.* Steiger, 54 Mich. 232, 19 N. W. 965; Ward *v.* Carp River Iron Co., 47 Mich. 65, 10 N. W. 109.
Minnesota.— St. Paul, etc., R. Co. *v.* Gardner, 19 Minn. 132, 18 Am. Rep. 334; Jones *v.* Rahilly, 16 Minn. 320.
Mississippi.— Barclay *v.* Smith, (1904) 36 So. 449.
Missouri.— Beattie Mfg. Co. *v.* Gerardi, 166 Mo. 142, 65 S. W. 1035; Knipper *v.* Blumenthal, 107 Mo. 665, 18 S. W. 23; Redpath *v.* Lawrence, 42 Mo. App. 101.
Montana.— Carpenter *v.* Nelson, 41 Mont. 392, 109 Pac. 857; Reynolds *v.* Fitzpatrick, 23 Mont. 52, 57 Pac. 452.
Nebraska.— Miller *v.* Waite, 60 Nebr. 431, 83 N. W. 355, 59 Nebr. 319, 80 N. W. 907; Butts *v.* Kingman, 60 Nebr. 224, 82 N. W. 854; Cortelyou *v.* Hiatt, 36 Nebr. 584, 54 N. W. 964.
New Jersey.— Mercantile Co-operative Bank *v.* Frost, 62 N. J. L. 476, 41 Atl. 685; Lippman *v.* Myers, 53 N. J. L. 21, 20 Atl. 1079; Mount *v.* Cubberly, 19 N. J. L. 124; Vanauken *v.* Wickham, 5 N. J. L. 509.
New York.— Rockwell *v.* Day, 84 N. Y. App. Div. 437, 82 N. Y. Suppl. 993; Rogers *v.* Condé, 67 N. Y. App. Div. 130, 74 N. Y. Suppl. 390; Thomas Mfg. Co. *v.* Symonds, 27 N. Y. App. Div. 316, 50 N. Y. Suppl. 695; O'Connor *v.* Jones, 65 Hun 48, 19 N. Y. Suppl. 725; Bostwick *v.* Dry Goods Bank, 67 Barb. 449; Carter *v.* Eighth Ward Bank, 33 Misc. 128, 67 N. Y. Suppl. 300; Gregory *v.* Fichtner, 14 N. Y. Suppl. 891, 21 N. Y. Civ. Proc. 1, 27 Abb. N. Cas. 86 [*reversing* 13 N. Y. Suppl. 593].
North Carolina.— Paalzow *v.* North Carolina Estate Co., 104 N. C. 437, 10 S. E. 527; Womble *v.* Leach, 83 N. C. 84.
Oklahoma.— Capps *v.* Vasey, 23 Okla. 554, 101 Pac. 1043; Robinson *v.* Peru Plow, etc., Co., 1 Okla. 140, 31 Pac. 988.
Oregon.— Austin *v.* Vanderbilt, 48 Oreg. 206, 85 Pac. 519, 6 L. R. A. N. S. 298.
South Carolina.— Nance *v.* Georgia, etc., R. Co., 35 S. C. 307, 14 S. E. 629.
South Dakota.— Humpfner *v.* Osborne, 2 S. D. 310, 50 N. W. 88.
Texas.— Field *v.* Davis, (Civ. App. 1895) 32 S. W. 71.
Washington.— Phillipos *v.* Mihran, 38 Wash. 402, 80 Pac. 527.
Wyoming.— Cone *v.* Ivinson, 4 Wyo. 203, 33 Pac. 31, 35 Pac. 933.
See 47 Cent. Dig. tit. "Trover and Conversion," § 191.
An allegation of fraud or deceit is not essential to a cause of action for conversion. Benson *v.* Eli, 16 Colo. App. 494, 66 Pac. 450.
Allegations which are neither irrelevant, redundant, nor frivolous will not be stricken out, even though not essential to the cause of action, if they serve a collateral purpose such as connecting defendant with the property or justifying an execution. Benson *v.* Eli, 16 Colo. App. 494, 66 Pac. 450; Davenport Glucose Mfg. Co. *v.* Taussig, 31 Hun (N. Y.) 563; Elton *v.* Markham, 20 Barb. (N. Y.) 343.
One good count in trover, although the others are bad, will sustain a general verdict. Estill *v.* Fort, 2 Dana (Ky.) 237.
If the wrongful acts alleged in two or more counts of a declaration constitute but one conversion, a demurrer will not lie as to any one count (Oakley *v.* West, 1 Sandf. (N. Y.) 96), and plaintiff will not be required to elect (Johnson *v.* Wabash, etc., R. Co., 22 Mo. App. 597).
Amendments.—A petition which alleges a conversion of goods may be changed by amendment into one for the conversion of the proceeds of the sale thereof. Emporia Nat. Bank *v.* Layfeth, 63 Kan. 17, 64 Pac. 973. And a petition based on the taking of chattels under claim of a pretended landlord's lien may be amended so as to become one for conversion. France *v.* Orvis, (Iowa 1898) 75 N. W. 660.
Declaration that contains one count in replevin and others in trover is bad on general demurrer. King *v.* Morris, 73 N. J. L. 279, 62 Atl. 1006.
Form of declaration, complaint, or petition in whole, in part, or in substance is set out in Kyle *v.* Caravello, 103 Ala. 150, 15 So.

(II) *FICTION OF LOSS AND FINDING.* It is not necessary to allege a loss by plaintiff or a finding by defendant.[95]

(III) *DESCRIPTION OF PARTIES.* In trover for goods taken from his possession and converted an officer need not sue as such or name himself as such in his declaration.[96]

(IV) *DESCRIPTION OF PROPERTY.* As plaintiff in trover does not seek the recovery of a specific chattel or chattels, a general description [97] which states the nature or kind of goods alleged to have been converted, and also the quantity,[98]

527; Ayres *v.* French, 41 Conn. 142; Gerard *v.* Jones, 78 Ind. 378; Duggan *v.* Wright, 157 Mass. 228, 32 N. E. 159; Robinson *v.* Peru Plow, etc., Co., 1 Okla. 140, 31 Pac. 988; Humpfner *v.* Osborne, 2 S. D. 310, 50 N. W. 88; Burroughes *v.* Bayne, 5 H. & N. 296, 29 L. J. Exch. 185, 2 L. T. Rep. N. S. 16, 2 Chitty Pl. (16th Am. ed.) 620; Taylor *v.* Adams, 8 Ont. Pr. 66 [*overruling* Bain *v.* McKay, 5 Ont. Pr. 471].

Although the distinction between different forms of action is abolished by the code, a complaint for conversion must still contain all the material allegations that were essential to the sufficiency of a declaration at common law. Sigel-Campion Live Stock Co. *v.* Holly, 44 Colo. 580, 101 Pac. 68.

Allegations that defendant hired three horses of plaintiff and had returned two, but had neglected to return the third after demand, constitute a complaint for breach of contract of bailment, but not for conversion. Tichenor-Grand Co. *v.* Weingarten, 116 N. Y. Suppl. 634.

Allegations as to manner of acquiring the property are surplusage. Wigs *v.* Ringemann, 155 Ala. 189, 45 So. 153.

95. *Alabama.*— Peters *v.* Johnson, Minor 100.

Connecticut.—Ayres *v.* French, 41 Conn. 142.

New Jersey.— See Glenn *v.* Garrison, 17 N. J. L. 1.

Rhode Island.— Royce *v.* Oakes, 20 R. I. 252, 38 Atl. 371.

South Dakota.— Humpfner *v.* Osborne, 2 S. D. 310, 50 N. W. 88.

Wisconsin.— See Enos *v.* Bemis, 61 Wis. 656, 21 N. W. 812.

See 47 Cent. Dig. tit. "Trover and Conversion," § 191.

Sufficient averment to sustain common-law fiction.—A count in trover, which alleges that plaintiff lost the money in question and that the same came to the possession of defendant by finding, is a sufficient averment to sustain the action of the common law to support an action of trover. Kerwin *v.* Balhatchett, 147 Ill. App. 561.

96. Brewster *v.* Vail, 20 N. J. L. 56, 38 Am. Dec. 547.

97. Hazelton *v.* Locke, 104 Me. 164, 71 Atl. 661, 20 L. R. A. N. S. 35; Eastern Mfg. Co. *v.* Camden Lumber Co., 96 Me. 537, 53 Atl. 40; Bryden *v.* Croft, (Tex. Civ. App. 1898) 46 S. W. 853; Ball *v.* Patterson, 2 Fed. Cas. No. 814, 1 Cranch C. C. 607.

Illustrations.— In trover for a bond it is unnecessary to recite any part of the instrument or give its date. Pierson *v.* Townsend, 2 Hill (N. Y.) 550. So in trover for promissory notes, neither their dates nor times of payment need be alleged. New Brunswick Bank *v.* Neilson, 15 N. J. L. 337, 19 Am. Dec. 691. And in trover for a deed it is unnecessary to state the names of the parties thereto or the nature or boundaries of the estate conveyed thereby. Weiser *v.* Zeisinger, 2 Yeates (Pa.) 537. In trover for bank-notes the following description was held sufficient: "Divers promissory notes against sundry persons, and in various amounts of great value, to wit: of the value of four thousand dollars." Burrows *v.* Keays, 37 Mich. 430. Similar descriptions were sustained in Moody *v.* Keener, 7 Port. (Ala.) 218; Benson *v.* Eli, 16 Colo. App. 494, 66 Pac. 450; Dows *v.* Bignall, Lalor (N. Y.) 407. But the following description: "That on the same day and year the plaintiff was lawfully possessed of $25 of bank notes on different banks," was held insufficient in that there were no names, numbers, or marks whereby to identify the notes. Little *v.* Gibbs, 4 N. J. L. 244.

Defendant will not be entitled as a matter of right to a particular one. Blackie *v.* Neilson, 6 Bosw. (N. Y.) 681.

98. *Georgia.*— Farmers' Alliance Warehouse, etc., Co. *v.* McElhannon, 98 Ga. 394, 25 S. E. 558.

Maryland.— Crocker *v.* Hopps, 78 Md. 260, 28 Atl. 99.

Massachusetts.— Iasigi *v.* Shea, 148 Mass. 538, 20 N. E. 110.

New Jersey.— New Brunswick Bank *v.* Neilson, 15 N. J. L. 337, 19 Am. Dec. 691.

Oregon.— Salem Tract. Co. *v.* Anson, 41 Oreg. 562, 67 Pac. 1015, 69 Pac. 675.

Pennsylvania.— Neiler *v.* Kelley, 69 Pa. St. 403.

England.— Jackson *v.* Anderson, 4 Taunt. 24.

Canada.— Richardson *v.* Gray, 29 U. C. Q. B. 360.

See 47 Cent. Dig. tit. "Trover and Conversion," § 194.

Illustrations.—A declaration for the conversion of ten chests and coffers need not specify the number of each. Draycot *v.* Piot, Cro. Eliz. 818, 78 Eng. Reprint 1045. A complaint for the conversion of "$1,850 in cash" (Durham *v.* Cox, 81 Conn. 268, 70 Atl. 1033), for the value of 5,950 "Mexican dollars" (Ramirez *v.* Main, 11 Ariz. 43, 89 Pac. 508), or for "all the saloon fixtures

value,[99] or location,[1] will suffice; but a declaration which contains no description of specific property is fatally defective.[2]

(v) *VALUE OF PROPERTY.* In some states allegations of value are held to be material,[3] and in others immaterial.[4]

(vi) *TITLE AND RIGHT TO POSSESSION.* A complaint or declaration in trover is fatally defective unless it alleges either that at the time of conversion plaintiff had title, general or special, and the right of immediate possession,[5] or that he was at that time in the actual possession of the property and was wrong-

on the premises No. 424 M. street" giving city and county (Greenebaum *v.* Taylor, 102 Cal. 624, 36 Pac. 957) is sufficient. But "certain goods, to wit: a lot of goods in a certain store in A." is not a sufficient description, being uncertain both as to kind and quantity. Edgerley *v.* Emerson, 23 N. H. 555, 55 Am. Dec. 207. And a declaration for "three thousand five hundred dollars lawful money in the United States" is too indefinite a description. McElhannon *v.* Farmers' Alliance Warehouse, etc., Co., 95 Ga. 670, 22 S. E. 686.

Annexing to a declaration in trover a schedule containing a specification and valuation of the goods claimed to have been converted is proper practice. Stinchfield *v.* Twaddle, 81 Me. 273, 17 Atl. 66.

99. Harper *v.* Richards, 120 Ga. 379, 47 S. E. 899; Heddy *v.* Fullen, 1 Blackf. (Ind.) 51; Phillipos *v.* Mihran, 38 Wash. 402, 80 Pac. 527.

1. Leitner *v.* Strickland, 89 Ga. 363, 15 S. E. 469; Phillipos *v.* Mihran, 38 Wash. 402, 80 Pac. 527; Stanley *v.* Sierra Nevada Silver Min. Co., 118 Fed. 931.

2. McLennon *v.* Livingston, 108 Ga. 342, 33 S. E. 974; Thayer *v.* Kitchen, 200 Mass. 382, 86 N. E. 952.

3. Troxler *v.* Buckner, 126 Cal. 288, 58 Pac. 691; Herrlich *v.* McDonald, 80 Cal. 460, 22 Pac. 298; Recht *v.* Glickstein, 162 Ind. 32, 69 N. E. 667; Harlan *v.* Brown, 4 Ind. App. 319, 30 N. E. 928; Hixon *v.* Pixley, 15 Nev. 475; Shaw *v.* Adams, 2 Tex. App. Civ. Cas. § 177.

The true rule seems to be that such an averment is indispensable unless the declaration allege damage and the amount thereof. Ryan *v.* Hurley, 119 Ind. 115, 21 N. E. 463; Humphreys *v.* Minnesota Clay Co., 94 Minn. 469, 103 N. W. 338; Brunswick-Balke-Collender Co. *v.* Brackett, 37 Minn. 58, 33 N. W. 214; Dakin *v.* Elmore, 127 N. Y. App. Div. 457, 111 N. Y. Suppl. 519; Cohnfeld *v.* Walsh, 2 N. Y. App. Div. 190, 37 N. Y. Suppl. 833; Saratoga Gas, etc., Co. *v.* Hazard, 55 Hun (N. Y.) 251, 7 N. Y. Suppl. 844 [*affirmed* in 121 N. Y. 677, 24 N. E. 1095]; Connoss *v.* Meir, 2 E. D. Smith (N. Y.) 314; Gleason *v.* Morrison, 20 Misc. (N. Y.) 320, 45 N. Y. Suppl. 684 [*affirming* 20 Misc. 4, 44 N. Y. Suppl. 909].

In trover for a note, an omission to allege its value can be reached only by special demurrer to the declaration. Fry *v.* Baxter, 10 Mo. 302.

Complaint not defective for allegation of value at time it was lost and not at time demand was made therefor. Ramirez *v.* Wain, 11 Ariz. 43, 89 Pac. 508.

4. Pearpoint *v.* Henry, 2 Wash. (Va.) 192.

5. *Alabama.*— Weil *v.* Ponder, 127 Ala. 296, 28 So. 656; Dearman *v.* Dearman, 5 Ala. 202.

California.— Lowe *v.* Ozmun, 137 Cal. 257, 70 Pac. 87.

Indiana.— The decisions sustain the text as to the requirement of title (Recht *v.* Glickstein, 162 Ind. 32, 69 N. E. 667; Day *v.* Watts, 92 Ind. 442; McCreery *v.* Nordyke, 23 Ind. App. 630, 53 N. E. 849, 55 N. E. 967), but not as to the necessity of the right of possession (Baals *v.* Stewart, 109 Ind. 371, 9 N. E. 403; Crystal Ice, etc., Co. *v.* Marion Gas Co., 35 Ind. App. 295, 74 N. E. 15; Lafara *v.* Teal, 27 Ind. App. 580, 61 N. E. 794).

Indian Territory.— Shapard Grocery Co. *v.* Hynes, 3 Indian Terr. 74, 53 S. W. 486.

Iowa.— Sturman *v.* Stone, 31 Iowa 115.

Massachusetts.— Thayer *v.* Kitchen, 200 Mass. 382, 86 N. E. 952.

Michigan.— Hasceig *v.* Tripp, 20 Mich. 216.

Missouri.—Warwick *v.* Baker, 42 Mo. App. 439.

Montana.— Paine *v.* British-Butte Min. Co., 41 Mont. 28, 108 Pac. 12; Raymond *v.* Blancgrass, 36 Mont. 449, 93 Pac. 648, 15 L. R. A. N. S. 976; Babcock *v.* Caldwell, 22 Mont. 460, 56 Pac. 1081; Sawyer *v.* Robertson, 11 Mont. 416, 28 Pac. 456.

Nebraska.— Fred Krug Brewing Co. *v.* Healey, 71 Nebr. 662, 99 N. W. 489, 101 N. W. 329.

New York.— Savage *v.* Buffalo, 50 N. Y. App. Div. 136, 63 N. Y. Suppl. 941; Yardum *v.* Wolf, 33 N. Y. App. Div. 247, 54 N. Y. Suppl. 192; Berney *v.* Drexel, 33 Hun 34; Wright *v.* Field, 64 How. Pr. 117; Sheldon *v.* Hoy, 11 How. Pr. 11.

North Carolina.— Russell *v.* Hill, 125 N. C. 470, 34 S. E. 640.

North Dakota.— Omlie *v.* Farmers' State Bank, 8 N. D. 570, 80 N. W. 689.

Oregon.— Johnson *v.* Oregon Steam Nav. Co., 8 Oreg. 35.

South Dakota.— Irving *v.* Hubbard, 12 S. D. 67, 80 N. W. 156.

Wisconsin.— Swift *v.* James, 50 Wis. 540, 7 N. W. 656.

United States.— Stanley *v.* Sierra Nevada Silver Min. Co., 118 Fed. 931; Sevier *v.* Holliday, 21 Fed. Cas. No. 12,680*a*, Hempst. 160.

England.— Orton *v.* Butler, 5 B. & Ald. 652, 7 E. C. L. 356, 106 Eng. Reprint 1329.

See 47 Cent. Dig. tit. "Trover and Conversion," § 197.

fully deprived thereof by defendant.[6] But a general allegation of ownership is sufficient,[7] and it is not necessary for plaintiff to set forth the origin, evidence, or precise nature of his title.[8] Nor is it necessary for plaintiff to negative title in defendant.[9]

(VII) *CONVERSION OR DETENTION.* A complaint or declaration in trover which does not allege a conversion by defendant is demurrable.[10] The allegation

Allegation in the present tense.—A complaint for conversion which alleges ownership in the present tense instead of the time of the conversion is defective. Northness *v.* Hillestad, 87 Minn. 304, 91 N. W. 1112; Smith *v.* Force, 31 Minn. 119, 16 N. W. 764.

Title in plaintiff at the commencement of the action need not be averred. Hunt *v.* Hammel, 142 Cal. 456, 76 Pac. 378. But see Clapp *v.* Glidden, 39 Me. 448, which holds otherwise.

Answer in reconvention.—A defendant who alleges a conversion in his answer in reconvention must show that he was the owner of the property or entitled to the possession thereof. Beckham *v.* Burney, (Tex. Civ. App. 1897) 42 S. W. 1041.

Where right to sue is dependent upon a statute, plaintiff must bring himself within terms of statute. Lindale Brick Co. *v.* Smith, (Tex. Civ. App. 1909) 118 S. W. 568.

6. *California.*— Rosenthal *v.* McMann, 93 Cal. 505, 29 Pac. 121.

Indiana.— Kehr *v.* Hall, 117 Ind. 405, 20 N. E. 279.

Kansas.— Kennett *v.* Peters, 54 Kan. 119, 37 Pac. 999, 45 Am. St. Rep. 274.

Missouri.— Citizens' Bank *v.* Tiger Tail Mill, etc., Co., 152 Mo. 145, 53 S. W. 902; Golden *v.* Moore, 126 Mo. App. 518, 104 S. W. 481; Little Rock Bank *v.* Fisher, 55 Mo. App. 51.

New York.— Wheeler *v.* Lawson, 103 N. Y. 40, 8 N. E. 360; Frost *v.* Mott, 34 N. Y. 253; Griffith *v.* Friendly, 30 Misc. 393, 62 N. Y. Suppl. 391; Kerner *v.* Boardman, 14 N. Y. Suppl. 787 [*affirmed* in 133 N. Y. 539, 30 N. E. 1148].

Rhode Island.—Williams *v.* Smith, 28 R. I. 531, 68 Atl. 306.

South Dakota.— Jones *v.* Winsor, 22 S. D. 480, 118 N. W. 716.

Canada.— Morgan *v.* Rice, 16 Nova Scotia 368.

See 47 Cent. Dig. tit. "Trover and Conversion," § 197.

Use of term "assignee" after name of plaintiff does not of itself authorize the conclusion that the declaration purports to be for a cause of action that accrued to the assignors before assignment to plaintiff. Bloom *v.* Sexton, 33 Mich. 181.

7. Harvey *v.* Lidvall, 48 Oreg. 558, 87 Pac. 895.

Allegation that plaintiff's intestate was "seized and possessed" of the property is sufficient. Grant *v.* Hathaway, 118 Mo. App. 604, 96 S. W. 417.

In conversion for turpentine, collected in boxes cut from pine trees, it is sufficient to allege ownership of the turpentine; the ownership of the trees or land being immaterial. Melrose Mfg. Co. *v.* Kennedy, 59 Fla. 312, 51 So. 595.

8. *Alabama.*— Southern R. Co. *v.* Attalla, 147 Ala. 653, 41 So. 664.

Georgia.— Sparta Bank *v.* Butts, 1 Ga. App. 771, 57 S. E. 1061.

Indiana.— Stewart *v.* Long, 16 Ind. App. 164, 44 N. E. 63; Swope *v.* Paul, 4 Ind. App. 463, 31 N. E. 42.

Michigan.—Warren *v.* Dwyer, 91 Mich. 414, 51 N. W. 1062; Harvey *v.* McAdams, 32 Mich. 472.

Montana.—Paine *v.* British-Butte Min. Co., 41 Mont. 28, 108 Pac. 12, holding that plaintiff may plead that at the time of the conversion he was the owner and entitled to the immediate possession of the property, or he may set forth the facts showing his title and right of possession, but the averments of such facts must be clear and precise and certain to common intent.

Nebraska.— Fike *v.* Ott, 76 Nebr. 439, 107 N. W. 774; Reed *v.* McRill, 41 Nebr. 206, 59 N. W. 775. But a chattel mortgagee who sues a stranger for conversion must plead the facts which constitute his special ownership. Raymond *v.* Miller, 50 Nebr. 506, 70 N. W. 22. But see Kavanaugh *v.* Oberfelder, 37 Nebr. 647, 56 N. W. 316, in which a mortgagee recovered under a general allegation of ownership.

New York.— Heine *v.* Anderson, 2 Duer 318.

Tennessee.—Hawkins *v.* Pearce, 11 Humphr. 44.

Texas.— Shaw *v.* Adams, 2 Tex. App. Civ. Cas. § 177.

See 47 Cent. Dig. tit. "Trover and Conversion," § 197.

If he undertakes to do so he must plead sufficient facts for the purpose. Anoka First Nat. Bank *v.* St. Croix Boom Corp., 41 Minn. 141, 42 N. W. 861; Paine *v.* British-Butte Min. Co., 41 Mont. 28, 108 Pac. 12.

As against a special demurrer for ambiguity and uncertainty, a complaint in an action for conversion is not sufficient which merely alleges facts from which title in plaintiff may be inferable, and where no direct allegation of ownership is made, title in plaintiff, as distinguished from any one else, must be the inevitable inference from the facts stated. Paine *v.* British-Butte Min. Co., 41 Mont. 28, 108 Pac. 12.

9. Richmond First Nat. Bank *v.* Gibbons, 7 Ind. App. 629, 35 N. E. 31; Paalzow *v.* North Carolina Estate Co., 104 N. C. 437, 10 S. E. 527.

10. *Alabama.*— Baker *v.* Malone, 126 Ala. 510, 28 So. 631.

of conversion may be general in character and without recital of evidentiary facts,[11] in the absence of a special demurrer,[12] or it may consist merely of a statement of facts which constitute a conversion.[13]

(VIII) *TIME OF CONVERSION.* It is not necessary to allege the precise minute or hour of the day when the goods were converted,[14] or the day of the month;[15]

Massachusetts.— Cumnock *v.* Newburyport Sav. Inst., 142 Mass. 342, 7 N. E. 869, 56 Am. Rep. 679; Wells *v.* Connable, 138 Mass. 513.

Missouri.— McDonald *v.* Mangold, 61 Mo. App. 291.

New York.— Cohnfeld *v.* Walsh, 2 N. Y. App. Div. 190, 37 N. Y. Suppl. 833; Bernstein *v.* Warland, 33 Misc. 280, 67 N. Y. Suppl. 444.

Texas.— Bryden *v.* Croft, (Civ. App. 1898) 46 S. W. 853; Field *v.* Davis, (Civ. App. 1895) 32 S. W. 71.

Wisconsin.— Palmer *v.* O'Rourke, 130 Wis. 507, 110 N. W. 389.

See 47 Cent. Dig. tit. "Trover and Conversion," § 198.

Illustrations.—An averment that defendant unlawfully, fraudulently, wilfully, and maliciously took the property is not an averment of a conversion. Triscony *v.* Orr, 49 Cal. 612. So an allegation that defendants, who had rightfully caused an attachment to be levied on property, did, "by and through" the officer, convert it to their own use, is demurrable as stating a mere conclusion of law. Burt *v.* Decker, 64 Iowa 106, 19 N. W. 873. "That the defendants took and converted goods to their own use, etc.," may constitute a count in trover, for the taking and converting may have been the same act. Hatch *v.* Holland, 28 U. C. Q. B. 213.

11. *California.*— Hutchings *v.* Castle, 48 Cal. 152.

Louisiana.— Clay *v.* Fisher, 2 La. Ann. 997.

Maryland.— Richardson *v.* Hall, 21 Md. 399.

Michigan.— Smith *v.* Thompson, 94 Mich. 381, 54 N. W. 168.

Minnesota.— Cordill *v.* Minnesota El. Co., 89 Minn. 442, 95 N. W. 306; Anoka First Nat. Bank *v.* St. Croix Boom Corp., 41 Minn. 141, 42 N. W. 861.

Nebraska.— Sanford *v.* Jensen, 49 Nebr. 766, 69 N. W. 108.

New York.— Decker *v.* Mathews, 12 N. Y. 313; Schmidt *v.* Garfield Nat. Bank, 64 Hun 298, 19 N. Y. Suppl. 252 [*affirmed* in 138 N. Y. 631, 33 N. E. 1084]; Bartlett *v.* Sutorius, 57 Hun 587, 10 N. Y. Suppl. 800; Berney *v.* Drexel, 63 How. Pr. 471 [*affirmed* in 33 Hun 34 (*affirmed* in 33 Hun 419)].

Oregon.— Miller *v.* Hirschberg, 27 Oreg. 522, 40 Pac. 506.

Wisconsin.— Meyer *v.* Doherty, 133 Wis. 398, 113 N. W. 671, 13 L. R. A. N. S. 247; Kalckhoff *v.* Zœhrlaut, 40 Wis. 427.

England.— Keyworth *v.* Hill, 3 B. & Ald. 687, 5 E. C. L. 394, 106 Eng. Reprint 811.

See 47 Cent. Dig. tit. "Trover and Conversion," § 198.

The word "converted" contains a concise notice to defendant that plaintiff will offer evidence of whatever is essential to the proof of a conversion. Thayer *v.* Gile, 42 Hun (N. Y.) 268.

The word "detained" in a declaration means an adverse detention, and it is unnecessary to plead leave and license specially. Bain *v.* McDonald, 32 U. C. Q. B. 190 [*citing* Whitmore *v.* Greene, 13 M. & W. 104].

Express promise to pay need not be alleged. Hitson *v.* Hurt, 45 Tex. Civ. App. 360, 101 S. W. 292.

Allegation that defendant converted the assets mentioned to his own use does not necessarily constitute a complaint in trover and conversion. Brayton *v.* Sherman, 1 Silv. Sup. (N. Y.) 420, 5 N. Y. Suppl. 602 [*reversed* on other grounds in 119 N. Y. 623, 23 N. E. 471].

12. Lowe *v.* Ozmun, 137 Cal. 257, 70 Pac. 87; Stevens *v.* Curran, 28 Mont. 366, 72 Pac. 753.

13. *Alabama.*— May *v.* O'Neal, 125 Ala. 620, 28 So. 12; Williams *v.* Brassell, 51 Ala. 397.

California.—Ashton *v.* Heydenfeldt, 124 Cal. 14, 56 Pac. 624; Edwards *v.* Sonoma Valley Bank, 59 Cal. 136; Hutchings *v.* Castle, 48 Cal. 152.

Indiana.— Louisville, etc., R. Co. *v.* Balch, 105 Ind. 93, 4 N. E. 288.

Kansas.— Williams *v.* Stowell, (App. 1897) 48 Pac. 894.

Kentucky.— Pharis *v.* Carver, 13 B. Mon. 236.

Missouri.— Perry *v.* Musser, 68 Mo. 477; Battel *v.* Crawford, 59 Mo. 215; Warnick *v.* Baker, 42 Mo. App. 439.

New York.— Gladke *v.* Maschke, 35 Hun 476; Chapin *v.* Merchants' Nat. Bank, 31 Hun 529; Loomis *v.* Mowry, 8 Hun 311.

Washington.— Lyen *v.* Bond, 3 Wash. Terr. 407, 19 Pac. 35.

Wyoming.— Cone *v.* Ivinson, 4 Wyo. 203, 33 Pac. 31, 35 Pac. 933.

See 47 Cent. Dig. tit. "Trover and Conversion," § 198.

Joint conversion.— In trover, where two counts showed a single trespass, and one a single conversion, alleged to have been the act of defendants, the wrong complained of was charged as the joint act of defendants. Mattingly *v.* Houston, (Ala. 1909) 52 So. 78.

14. Hunt *v.* Hammel, 142 Cal. 456, 76 Pac. 378.

The day, when stated, is immaterial. Dietus *v.* Fuss, 8 Md. 148. But see Williams *v.* McKissack, 125 Ala. 544, 27 So. 922, holding that if the time of conversion be alleged it must be proved with certainty.

15. Peacock *v.* Feaster, 51 Fla. 269, 40 So.

but the complaint must comply with the terms of a statute prescribing allegations as to time.[16]

(IX) *DEMAND AND REFUSAL.* Where an actual conversion is alleged an averment of demand and refusal is not required.[17]

(X) *DAMAGES.* A declaration or complaint which alleges the value of the property converted will not be adjudged bad because it lacks an averment of damage,[18] or contains a prayer for possession instead of damages,[19] or for a valuation fixed by agreement instead of general damages.[20]

(XI) *CURE OR WAIVER OF DEFECTS.* Insufficiencies of a petition or declaration may be supplied by defendant's plea or answer,[21] or may be waived by defendant's failure to demur,[22] or to object to the admission of evidence under the defective or wanting allegation.[23]

b. Plea or Answer — (I) *IN GENERAL.* Under the common-law system of pleading, pleas in trover are either general or special. The general pleas are:

74; Leon *v.* Kerrison, 47 Fla. 178, 36 So. 173.

Allegations of time of conversion are not essential, for the statute of limitations is defensive matter. Hixon *v.* Pixley, 15 Nev. 475; Young *v.* Wall, 1 Phila. (Pa.) 69; George *v.* Graham, 1 Phila. (Pa.) 69. *Contra*, Mount *v.* Cubberly, 19 N. J. L. 124; Glenn *v.* Garrison, 17 N. J. L. 1.

16. Tallassee Falls Mfg. Co. *v.* Alexander City First Nat. Bank, 159 Ala. 315, 49 So. 246.

17. *California.*— Daggett *v.* Gray, 110 Cal. 169, 42 Pac. 568.

Indiana.— Buntin *v.* Pritchett, 85 Ind. 247; Knowlton *v.* Logansport School City, 75 Ind. 103; Hon *v.* Hon, 70 Ind. 135; Reish *v.* Reynolds, 68 Ind. 561; Proctor *v.* Cole, 66 Ind. 576; Nelson *v.* Corwin, 59 Ind. 489; Stewart *v.* Long, 16 Ind. App. 164, 44, N. E. 63; Koehring *v.* Aultman, 7 Ind. App. 475, 34 N. E. 30, 35 N. E. 30; Sloan *v.* Lick Creek, etc., Gravel Road Co., 6 Ind. App. 584, 33 N. E. 997.

Minnesota.— Kendall *v.* Duluth, 64 Minn. 295, 66 N. W. 1150.

Missouri.— Norman *v.* Horn, 36 Mo. App. 419.

New York.— Cohnfeld *v.* Walsh, 2 N. Y. App. Div. 190, 37 N. Y. Suppl. 833; Schmidt *v.* Garfield Nat. Bank, 64 Hun 298, 19 N. Y. Suppl. 252 [*affirmed* in 138 N. Y. 631, 33 N. E. 1084]; Saratoga Gas, etc., Co. *v.* Hazard, 55 Hun 251, 7 N. Y. Suppl. 844 [*affirmed* in 121 N. Y. 677, 24 N. E. 1095]; Bernstein *v.* Warland, 33 Misc. 280, 67 N. Y. Suppl. 444.

Ohio.— Baltimore, etc., R. Co. *v.* O'Donnell, 49 Ohio St. 489, 32 N. E. 476, 34 Am. St. Rep. 579, 21 L. R. A. 117.

Wisconsin.— Johnson *v.* Ashland Lumber Co., 45 Wis. 119.

See 47 Cent. Dig. tit. "Trover and Conversion," § 200.

A complaint may allege an unlawful taking and conversion of personal property in one paragraph, and in another plead that, if it should appear that the taking was lawful, then the conversion occurred through a refusal to surrender the property. Bryden *v.* Croft, (Tex. Civ. App. 1898) 46 S. W. 853.

Failure to allege demand and refusal is cured by an answer setting up ownership of the property in defendant. Daggett *v.* Gray, 110 Cal. 169, 42 Pac. 568; Rosenau *v.* Syring, 25 Oreg. 386, 35 Pac. 844.

Allegation of wilful and malicious taking of property and refusal to return after repeated demands is sufficient to warrant exemplary damages for maliciously retaining property after demand. Shandy *v.* McDonald, 38 Mont. 393, 100 Pac. 203.

18. *Illinois.*— Mattingly *v.* Darwin, 23 Ill. 618.

Indiana.— Ryan *v.* Hurley, 119 Ind. 115, 21 N. E. 463; Frederick *v.* Koons, 40 Ind. App. 421, 81 N. E. 1155; Allen *v.* Toner, 24 Ind. App. 121, 56 N. E. 250.

Maryland.— Richardson *v.* Hall, 21 Md. 399; Stirling *v.* Garritee, 18 Md. 468.

Missouri.— De la Vergne *v.* Richardson, 198 Mo. 189, 95 S. W. 898; Richardson *v.* Busch, 198 Mo. 174, 95 S. W. 894, 115 Am. St. Rep. 472.

New York.— Gleason *v.* Morrison, 20 Misc. 320, 45 N. Y. Suppl. 684.

See 47 Cent. Dig. tit. "Trover and Conversion," § 201.

Pleading specially.— Special damages and the facts to sustain them must be pleaded. Smith *v.* Connor, (Tex. Civ. App. 1898) 46 S. W. 267; Bodley *v.* Reynolds, 8 Q. B. 779, 10 Jur. 310, 15 L. J. Q. B. 219, 55 E. C. L. 779. Likewise that plaintiff is proceeding under a statute providing for double damages. Springer *v.* Jenkins, 47 Oreg. 502, 84 Pac. 479.

19. Howard *v.* Barton, 28 Minn. 116, 9 N. W. 584.

20. Yardum *v.* Wolf, 33 N. Y. App. Div. 247, 54 N. Y. Suppl. 192.

21. Salida Bldg., etc., Assoc. *v.* Davis, 16 Colo. App. 294, 64 Pac. 1046; Ferrera *v.* Parke, 19 Oreg. 141, 23 Pac. 883; Ramsey *v.* Hurley, 72 Tex. 194, 12 S. W. 56.

22. Brickley *v.* Walker, 68 Wis. 563, 32 N. W. 773.

23. Smith *v.* Force, 31 Minn. 119, 16 N. W. 704. But see Greenthal *v.* Lincoln, 67 Conn. 372, 35 Atl. 266, where it was held that where defendant's answer set up no title in him, failure to demur thereto, or to object

(1) "Not guilty," [24] which denies plaintiff's title, right of possession, and the wrongful conversion alleged; and (2) "Not possessed," which denies plaintiff's right of immediate possession, or actual possession at the time of the alleged conversion.[25] A special plea admits plaintiff's right and confesses that he once had a cause of action against defendant for the act alleged to be wrongful, but avoids plaintiff's right of recovery by setting up the statute of limitations or matters of discharge.[26] The answer in an action for conversion under the code system of pleading is governed by the general principles of pleading; [27] but it is

to evidence of title, was not a waiver of an objection to a finding of title in defendant, based on such evidence.

24. **In this country "not guilty"** has been very commonly employed because it admits all defenses except statutes of limitation, releases, and other matters of discharge. Vaden *v.* Ellis, 18 Ark. 355; 2 Greenleaf Ev. § 648.

In England prior to the adoption of the Hilary rules "not guilty" was a common plea. But by virtue of St. 3 & 4 Wm. IV, c. 42, § 1, which provided that the judges of the superior courts of law at Westminster might alter the system of pleading, the following rule relating to trover was adopted: "In actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defence than such denial shall be admissible under that plea." Reg. Gen. Hilary Term, 4 Wm. IV, Pleadings in Particular Actions, IV, par. 1. Under this rule the plea of "not guilty" operates as a denial of the conversion only, and not of plaintiff's title. 1 Chitty Pl. 530.

25. Owen *v.* Knight, 4 Bing. N. Cas. 54, 6 Dowl. P. C. 245, 7 L. J. C. P. 27, 5 Scott 307, 33 E. C. L. 593; Nicolls *v.* Bastard, 2 C. M. & R. 659, 1 Gale 295, 5 L. J. Exch. 7, Tyrw. & G. 156; Isaacs *v.* Belcher, 8 C. & P. 714, 7 Dowl. P. C. 516, 5 M. & W. 139, 34 E. C. L. 979; 1 Chitty Pl. (16th Am. ed.) 530; 2 Chitty Pl. (16th Am. ed.) 621.

Denial of the conversion alleged is equivalent to plea of general issue. Fenlason *v.* Rackliff, 50 Me. 362.

26. *Indiana.*— Coffin *v.* Anderson, 4 Blackf. 395.

Iowa.— Howes *v.* Carver, 7 Iowa 491.

Michigan.— The general issue of "not guilty" and a notice that special defenses will be offered is sufficient foundation for the introduction of the proof thereof. Grenier *v.* Hild, 124 Mich. 222, 82 N. W. 1050; Hine *v.* Commercial Bank, 119 Mich. 448, 78 N. W. 471; Eureka Iron, etc., Works *v.* Bresnahan, 66 Mich. 489, 33 N. W. 834; Adams *v.* Kellogg, 63 Mich. 105, 29 N. W. 679; Frankel *v.* Coots, 41 Mich. 75, 1 N. W. 940; Fry *v.* Soper, 39 Mich. 727. Notice of special defenses under the general issue is not required in justice of the peace courts. McLaughlin *v.* Smith, 45 Mich. 277, 7 N. W. 908.

Missouri.— Fry *v.* Baxter, 10 Mo. 302.

New York.— Hurst *v.* Cook, 19 Wend. 463.

England.— Hartford *v.* Jones, 1 Ld. Raym. 393, 91 Eng. Reprint 1161.

Canada.— Millard *v.* Kirkpatrick, 4 U. C. Q. B. 248.

See 47 Cent. Dig. tit. "Trover and Conversion," § 203.

By special plea or answer defendant may set up anything which confesses and avoids plaintiff's right of action, as an estoppel (Norwegian Plow Co. *v.* Haines, 21 Nebr. 689, 33 N. W. 475), ratification (Steinhardt *v.* Bell, 80 Ala. 208), accord and satisfaction (McFadden *v.* Schroeder, 4 Ind. App. 305, 29 N. E. 491, 30 N. E. 711), "taken damage feasant" (Carey *v.* Dazey, 5 Harr. (Del.) 445), that the property was purchased by defendant from plaintiff (Gunn *v.* Gillespie, 2 U. C. Q. B. 124), redelivery of the goods to plaintiff (Johnson *v.* Lamb, 13 U. C. Q. B. 508), subsequent sale of the goods on execution in favor of defendant and against plaintiff (Wehle *v.* Butler, 35 N. Y. Super. Ct. 1, 12 Abb. Pr. N. S. 139, 43 How. Pr. 5), and plaintiff's own illegal act or fraud in obtaining the property in controversy (Miller *v.* Hirschberg, 27 Oreg. 522, 40 Pac. 506; Keating Implement, etc., Co. *v.* Terre Haute Carriage, etc., Co., 11 Tex. Civ. App. 216, 32 S. W. 556; Boucher *v.* Shewan, 14 U. C. C. P. 419). But no evidence of a fact which tends to show a confession and avoidance will be admitted unless a foundation therefor has been laid by appropriate averments in the plea or answer. Blum *v.* Langfeld, 37 N. Y. App. Div. 590, 56 N. Y. Suppl. 298; Boyle *v.* Williams, 1 Misc. (N. Y.) 112, 20 N. Y. Suppl. 727; Luckey *v.* Gannon, 6 Abb. Pr. N. S. (N. Y.) 209, 37 How. Pr. 134; Geo. R. Dickinson Paper Co. *v.* Mail Pub. Co., (Tex. Civ. App. 1895) 31 S. W. 1083; Wells *v.* Abrahams, L. R. 7 Q. B. 554, 41 L. J. Q. B. 306, 26 L. T. Rep. N. S. 326, 20 Wkly. Rep. 659.

A special plea is bad in form if it amounts only to the general issue (Briggs *v.* Brown, 3 Hill (N. Y.) 87; Kennedy *v.* Strong, 10 Johns. (N. Y.) 289; Turner *v.* Waldo, 40 Vt. 51), or if the case can be tried on a general traverse (Beall *v.* Folmar, 122 Ala. 414, 26 So. 1; Webb *v.* Fox, 7 T. R. 391, 101 Eng. Reprint 1037; Monaghan *v.* Hayes, 4 U. C. C. P. 1).

27. See PLEADING, 31 Cyc. 126.

Illustrations.— It is not error to overrule a demurrer to an answer in trover which amounts to an argumentative denial (Leary *v.* Moran, 106 Ind. 560, 7 N. E. 236), which tenders the property, disclaims title, and alleges that the property was worth nothing for hire (Trammell *v.* Mallory, 115 Ga. 748,

broader in its scope than the common-law pleas in trover, for it may contain all the defenses which defendant may have, if they are not inconsistent, whether they be in abatement or bar, whole or partial, legal or equitable, or, under some circumstances, a counter-claim.[28]

(II) *ALLEGATIONS AS TO TITLE OR RIGHT TO POSSESSION.* Defendant in trover may deny plaintiff's title or right of possession,[29] or may plead title in himself to the property alleged to have been converted,[30] or to the land from which he severed and removed it.[31]

(III) *DUPLICITY.* At common law a plea setting up more than one defense is bad for duplicity.[32] This rule of pleading was abrogated in England by the statute of Anne,[33] which has been adopted substantially in many of the states of the United States.[34]

c. Replication or Reply. Inasmuch as there is no legal excuse or justification for a wrongful conversion, a replication is superfluous and improper where the plea is either "not guilty" or "not possessed," but it is proper where the plea is a special one of limitations or discharge.[35]

42 S. E. 62), or which refers to the property described in the second paragraph in plaintiff's second cause of action (Spalding *v.* Allred, 23 Utah 354, 64 Pac. 1100). A denial that defendant took the goods wrongfully or unlawfully is an admission of the conversion (Proctor *v.* Irvin, 22 Mont. 547, 57 Pac. 183; Podlech *v.* Phelan, 13 Utah 333, 44 Pac. 838); but an admission of a demand and non-compliance therewith is not an admission of a refusal to deliver (Halbran *v.* Gray, 25 Misc. (N. Y.) 693, 55 N. Y. Suppl. 501).

Pleas and answers were held to be bad in Tallassee Falls Mfg. Co. *v.* Alexander City First Nat. Bank, 159 Ala. 315, 49 So. 246; Southern R. Co. *v.* Attalla, 147 Ala. 653, 41 So. 664; Kuhland *v.* Sedgwick, 17 Cal. 123; Baker *v.* Flint, 63 Ind. 137; Carter *v.* Eighth Ward Bank, 33 Misc. (N. Y.) 128, 67 N. Y. Suppl. 300; Hamm *v.* Drew, 83 Tex. 77, 18 S. W. 434; Sargeant *v.* Downey, 49 Wis. 524, 5 N. W. 903.

28. Glencoe First Nat. Bank *v.* Lincoln, 36 Minn. 132, 30 N. W. 449; Zimmerman *v.* Lamb, 7 Minn. 421; Derby *v.* Gallup, 5 Minn. 119; Carpenter *v.* Manhattan L. Ins. Co., 22 Hun (N. Y.) 47.

The statute authorizing equitable defenses in trover does not authorize pleading matters which are merely evidence under a legal plea. Mackenzie *v.* Davidson, 27 U. C. C. P. 188.

When facts are relied on as a partial defense, or in mitigation of damages, the answer must so state, as required by N. Y. Code Civ. Proc. § 508. Thompson *v.* Halbert, 109 N. Y. 329, 16 N. E. 675.

29. Chandler *v.* De Graff, 27 Minn. 208, 6 N. W. 611; Brown *v.* Miles, 219 Pa. St. 410, 68 Atl. 969.

Other allegations may be treated as surplusage where proper denial of plaintiff's ownership is made. Laughlin *v.* Thompson, 76 Cal. 287, 18 Pac. 330.

If defendant deny plaintiff's title only as to certain particulars, the latter need not offer evidence as to other particulars. Sonnentheil *v.* Texas Guaranty, etc., Co., 10 Tex. Civ. App. 274, 30 S. W. 945.

If plaintiff was out of possession at the time of the alleged conversion, defendant may attack his title by setting up title in a third person. Krewson *v.* Purdom, 13 Oreg. 563, 11 Pac. 281; Campbell *v.* Yeadon, 17 Nova Scotia 212.

Sufficiency of denial.—An answer which denies that on the day specified plaintiff "was the owner, and lawfully in possession of the property," raises no material or relevant issue. Kuhland *v.* Sedgwick, 17 Cal. 123.

30. Bryant *v.* Bryant, 2 Rob. (N. Y.) 612; Mynatt *v.* Hudson, 66 Tex. 66, 17 S. W. 396.

A plea that defendant took back property which he had given to plaintiff but which plaintiff threw away saying that she would not have it, and that she relinquished all ownership in it, was held bad in that it did not aver that he took back the property as owner. Brevoort *v.* Brevoort, 40 N. Y. Super. Ct. 211.

31. Vanness *v.* Nafie, 5 N. J. L. 800.

32. Kennedy *v.* Strong, 10 Johns. (N. Y.) 289; 3 Blackstone Comm. 311; 1 Chitty Pl. (16th Am. ed.) 249, 558; Coke Litt. 303*a*. See also PLEADING, 31 Cyc. 143.

33. 4 Anne, c. 16, §§ 4, 5, providing that it may be lawful for the "Defendant or Tenant in any Action or Suit, or for any Plaintiff in Replevin, in any Court of Record, with the Leave of the same Court, to plead as many several Matters thereto, as he shall think necessary for his defence."

Under this statute pleas manifestly inconsistent could not be joined; but, the statute being regarded as remedial, the rule was relaxed to permit the pleading of several defenses, even though they appear to be contradictory or inconsistent. 1 Tidd Pr. 655.

34. Gould Pl. c. viii, § 18.

Code states.—It has been abrogated entirely by those states which have adopted the system of code pleading. See the code provisions of the several states.

35. Haas *v.* Taylor, 80 Ala. 459, 2 So. 633 (where to a plea in trover of a former judgment in bar in which a set-off was claimed, plaintiff replied that the set-off was dis-

d. Amendments. Amendments are liberally allowed in actions for conversion.[36] Thus an amendment may be made alleging that goods claimed to have been converted were wilfully and maliciously taken,[37] inserting an allegation of demand,[38] averring a new time and place when the goods were received by defendant,[39] or stating more specifically the acts of conversion.[40] But amendments will not be allowed that state a new cause of action,[41] or unless they are tendered at the proper time.[42]

2. Issues, Proof, and Variance — a. Evidence Admissible Under Declaration, Petition, or Complaint. Under an averment of ownership plaintiff may show any kind or quantity of interest in the goods converted which will sustain trover;[43] and under the name of an article converted it is competent to prove that other things essential to its use were taken with it.[44] A general allegation of conversion will permit proof of successive conversions;[45] and under the averment that defendant wrongfully took, carried away, and converted to his own use, evidence may be admitted to show that he obtained possession of plaintiff's property by fraud, forgery, or under a usurious contract.[46] But an allegation of demand of the proceeds of a sale will not support proof of a demand for the property itself;[47] under a general averment of damage plaintiff cannot prove special losses or a greater loss than the amount stated;[48] and in trover for stock converted by a

allowed, the replication was held to be sufficient); Nicolls *v.* Duncan, 11 U. C. Q. B. 332 (holding that a replication of *de injuria* to a plea of lien in trover is proper). See also Conger *v.* Hutchinson, 6 U. C. Q. B. O. S. 644.

In the code states the right to reply in an action for conversion has never been questioned. Colorado Fuel, etc., Co. *v.* Chappell, 12 Colo. App. 385, 55 Pac. 606; McFadden *v.* Schroeder, 4 Ind. App. 305, 29 N. E. 491, 30 N. E. 711; Bissell *v.* Pearse, 21 How. Pr. (N. Y.) 130; Dunning *v.* Choate, 8 Ohio Dec. (Reprint) 316, 7 Cinc. L. Bul. 77.

Matters which must be pleaded in reply.— Any affirmative matter of defense in the plea or answer, if not denied by plaintiff, must be confessed and avoided in the reply if plaintiff desires to offer evidence in avoidance thereof. Foster Lumber Co. *v.* Kelly, 9 Kan. App. 377, 58 Pac. 124; Mulliner *v.* Shumake, (Tex. Civ. App. 1900) 55 S. W. 983; Geo. R. Dickinson Paper Co. *v.* Mail Pub. Co., (Tex. Civ. App. 1895) 32 S. W. 378.

36. Frederick *v.* Gibson, 37 N. Brunsw. 126.

37. Wilde *v.* Hexter, 50 Barb. (N. Y.) 448.

38. Hulbert *v.* Brackett, 8 Wash. 438, 36 Pac. 264.

39. Nash *v.* Adams, 24 Conn. 33.

40. Lord *v.* Pierce, 33 Me. 350; Hunter *v.* Hatler, 1 Tex. App. Civ. Cas. § 1055.

41. Parker *v.* Rodes, 79 Mo. 88; Winder *v.* Northampton Bank, 2 Pa. St. 446.

42. Keasby *v.* Donaldson, 2 Browne (Pa.) 103.

43. *Michigan.*— Harvey *v.* McAdams, 32 Mich. 472.

Minnesota.— Jones *v.* Rahilly, 16 Minn. 320.

Montana.— Reynolds *v.* Fitzpatrick, 40 Mont. 593, 107 Pac. 902, right to possession under a verbal mortgage.

New York.— Heine *v.* Anderson, 2 Duer 318.

Texas.— R. F. Scott Grocer Co. *v.* Carter, (Civ. App. 1896) 34 S. W. 375.

Wisconsin.— Millard *v.* McDonald Lumber Co., 64 Wis. 626, 25 N. W. 656.

See 47 Cent. Dig. tit. "Trover and Conversion," § 209.

A chattel mortgage is not admissible as evidence under an allegation of "absolute and unqualified ownership." Kern *v.* Wilson, 73 Iowa 490, 35 N. W. 594. But alleging generally in a count for conversion that plaintiff was the owner, in possession of, and entitled to possession of the property claimed to have been converted, is sufficient to admit proof that he at the time of conversion asserted a right thereto by virtue of a verbal mortgage, so that there was no variance. Reynolds *v.* Fitzpatrick, 40 Mont. 593, 107 Pac. 902.

44. Patterson *v.* Dudley, 12 Gray (Mass.) 375.

Qualification of rule.— But in trover for boots plaintiff cannot prove articles which are stock for boots in various stages of manufacture. Fitzgerald *v.* Jordan, 11 Allen (Mass.) 128. Nor will trover for a "trunk containing sundry clothes" admit evidence of the value of the clothes. Ball *v.* Patterson, 2 Fed. Cas. No. 813, 1 Cranch C. C. 604.

45. Bacon *v.* Hooker, 173 Mass. 554, 54 N. E. 253; Barron *v.* Davis, 4 N. H. 338; Kinney *v.* Rock Springs First Nat. Bank, 10 Wyo. 115, 67 Pac. 471, 98 Am. St. Rep. 972; Wilson *v.* Hoffman, 123 Fed. 984.

46. Omaha Auction, etc., Co. *v.* Rogers, 35 Nebr. 61, 52 N. W. 826; Schmidt *v.* Garfield Nat. Bank, 138 N. Y. 631, 33 N. E. 1084 [*affirming* 64 Hun 298, 19 N. Y. Suppl. 252]; Rosenberg *v.* Cohen, 1 N. Y. City Ct. 434.

47. Hereford *v.* Pusch, 8 Ariz. 76, 68 Pac. 547.

48. Ross *v.* Malone, 97 Ala. 529, 12 So. 182; Moomaugh *v.* Everett, 88 Ga. 67, 13 S. E. 837; Inman *v.* Ball, 65 Iowa 543, 22 N. W. 666.

broker, with whom plaintiff has previously settled in full, the latter cannot introduce evidence of the incorrectness of the former's account.[49]

b. Matters of Defense That Must Be Proved. Limitations, release, ratification, and all matters of discharge are affirmative defenses and must be established by defendant.[50]

c. Evidence Admissible Under General Issue. All defenses in bar are admissible under the general issue except matters of confession and avoidance;[51] and defendant, having tendered such an issue, may offer evidence of any fact which tends to negative either the act of conversion,[52] the wrongfulness of the conversion alleged,[53] plaintiff's ownership,[54] or his right of possession.[55] And whenever a defendant may show title either in himself or a stranger he may do so under a general traverse.[56] So, under the general issue, defendant may show a taking

49. Gould *v.* Trask, 57 Hun (N. Y.) 589, 10 N. Y. Suppl. 619.

50. Moody *v.* Keener, 7 Port. (Ala.) 218; Murphy *v.* Hobbs, 8 Colo. 17, 5 Pac. 637; Garvin *v.* Luttrell, 10 Humphr. (Tenn.) 16.

51. Morris *v.* Hall, 41 Ala. 510; Wood *v.* Proudman, 122 N. Y. App. Div. 826, 107 N. Y. Suppl. 757; Pemberton *v.* Smith, 3 Head (Tenn.) 18; Turner *v.* Waldo, 40 Vt. 51.

Statute of limitations is not admissible. Jones *v.* Dugan, 1 McCord (S. C.) 428.

In trover against two defendants, as copartners, under a plea of not guilty interposed by both, either defendant can introduce any competent evidence tending to show his non-liability. Peacock *v.* Feaster, 51 Fla. 269, 40 So. 74.

Subsequent ratification by plaintiff of acts constituting the conversion cannot be shown unless specially pleaded. Southern Car Mfg., etc., Co. *v.* Wagner, 14 N. M. 195, 89 Pac. 259.

52. Bell *v.* G. Ober, etc., Co., 111 Ga. 668, 36 S. E. 904; Nichols, etc., Co. *v.* Minnesota Thresher Mfg. Co., 70 Minn. 528, 73 N. W. 415; Morrison *v.* Fishwick, 13 Nova Scotia 59; Dowling *v.* Miller, 9 U. C. Q. B. 227.

53. *Alabama.*— Gandy *v.* Cowart, 163 Ala. 295, 50 So. 355; Ryan *v.* Young, 147 Ala. 660, 41 So. 954; Barrett *v.* Mobile, 129 Ala. 179, 30 So. 36, 87 Am. St. Rep. 54.

Arkansas.— Jones *v.* Buzzard, 2 Ark. 415.

Idaho.— Haynes *v.* Kettenbach Co., 11 Ida. 73, 81 Pac. 114.

Kentucky.—Arthur *v.* Wilson, Litt. Sel. Cas. 76.

New Hampshire.— Drew *v.* Spaulding, 45 N. H. 472.

New York.— Wilder *v.* New York Bank Note Co., 16 Misc. 355, 38 N. Y. Suppl. 75 [*affirming* 15 Misc. 459, 37 N. Y. Suppl. 203].

Pennsylvania.— Knapp *v.* Miller, 133 Pa. St. 275, 19 Atl. 555.

Texas.— Hamm *v.* Drew, 83 Tex. 77, 18 S. W. 434.

Wisconsin.— Phœnix Mut. L. Ins. Co. *v.* Walrath, 53 Wis. 669, 10 N. W. 151; Willard *v.* Giles, 24 Wis. 319.

United States.— Coolidge *v.* Guthrie, 6 Fed. Cas. No. 3,185, 1 Flipp. 97.

See 47 Cent. Dig. tit. "Trover and Conversion," § 212.

54. *California.*— Pico *v.* Kalisher, 55 Cal. 153.

Indiana.— Coffin *v.* Anderson, 4 Blackf. 395; Swope *v.* Paul, 4 Ind. App. 463, 31 N. E. 42.

Mississippi.— Alliance Trust Co. *v.* Nettleton Hardwood Co., 74 Miss. 584, 21 So. 396, 69 Am. St. Rep. 531, 36 L. R. A. 155.

Missouri.— Kirk *v.* Kane, 87 Mo. App. 274.

New Mexico.— Southern Car Mfg., etc., Co. *v.* Wagner, 14 N. M. 195, 89 Pac. 259.

New York.— Robinson *v.* Frost, 14 Barb. 536.

Oklahoma.— Hopkins *v.* Dipert, 11 Okla. 630, 69 Pac. 883.

See 47 Cent. Dig. tit. "Trover and Conversion," § 212.

Contra.— Anderson *v.* Agnew, 38 Fla. 30, 20 So. 766; Stewart *v.* Mills, 18 Fla. 57; Robinson *v.* Hartridge, 13 Fla. 501; Prescott *v.* Moore, 29 N. Brunsw. 295.

55. Fields *v.* Brice, 108 Ala. 632, 18 So. 742; McClelland *v.* Nichols, 24 Minn. 176.

56. *Maine.*— Willet *v.* Clark, 103 Me. 22, 67 Atl. 566.

Michigan.— Eureka Iron, etc., Works *v.* Bresnahan, 66 Mich. 489, 33 N. W. 834; Hart *v.* Hart, 48 Mich. 175, 12 N. W. 33; Stephenson *v.* Little, 10 Mich. 433.

New York.— Simar *v.* Shea, 180 N. Y. 558, 73 N. E. 1132 [*affirming* 89 N. Y. App. Div. 84, 85 N. Y. Suppl. 457]; Byrne *v.* Weidenfeld, 113 N. Y. App. Div. 451, 99 N. Y. Suppl. 412; Ten Eyck *v.* Denison, 99 N. Y. App. Div. 106, 91 N. Y. Suppl. 169; Schoenrock *v.* Farley, 49 N. Y. Super. Ct. 302; Brevoort *v.* Brevoort, 40 N. Y. Super. Ct. 211; Davis *v.* Hoppock, 6 Duer 254; McLaughlin *v.* Harriot, 14 Misc. 343, 35 N. Y. Suppl. 684. But see Vogel *v.* Banks, 60 N. Y. App. Div. 459, 70 N. Y. Suppl. 1010; Edgerly *v.* Bush, 16 Hun 80 [*affirmed* in 81 N. Y. 199].

North Carolina.— Vinson *v.* Knight, 137 N. C. 408, 49 S. E. 891.

Oklahoma.— Robinson *v.* Peru Plow, etc., Co., 1 Okla. 140, 31 Pac. 988.

Texas.— Crane *v.* McGuire, (Civ. App. 1901) 64 S. W. 942; Parlin, etc., Co. *v.* Hanson, 21 Tex. Civ. App. 401, 53 S. W. 62.

See 47 Cent. Dig. tit. "Trover and Conversion," § 212.

Contra.— Omaha, etc., Smelting, etc., Co. *v.* Tabor, 13 Colo. 41, 21 Pac. 925, 16 Am.

of animals *damage feasant*;[57] the judgment and execution under which the property was seized;[58] failure of plaintiff to make demand before the beginning of the suit;[59] plaintiff's waiver of conversion by the institution of a prior action in assumpsit;[60] that plaintiff obtained the property in controversy by fraud or usurious contract;[61] that defendant's vendor of timber was not a wilful trespasser;[62] and any fact which relates to the amount of damages.[63]

d. Variance. A recovery in trover must be *secundum allegata et probata*, and proof of a different cause of action,[64] of an act which does not constitute a conversion,[65] of a right of detention different from the one pleaded,[66] of a conversion other than the one alleged[67] or on a different date than the one alleged,[68] or of a

St. Rep. 185, 5 L. R. A. 236; Beebe *v.* Wilkinson, 30 Minn. 548, 16 N. W. 450.

A lien may be given in evidence under a plea denying plaintiff's property. Eureka Iron, etc., Works *v.* Bresnahan, 66 Mich. 489, 33 N. W. 834; Jones *v.* Rahilly, 16 Minn. 320; Schoenrock *v.* Farley, 49 N. Y. Super. Ct. 302. *Contra*, Stephens *v.* Cousins, 16 U. C. Q. B. 329.

57. Carey *v.* Dazey, 5 Harr. (Del.) 445; Drew *v.* Spaulding, 45 N. H. 472.

58. *Indiana.*— Cleveland, etc., R. Co. *v.* Wright, 25 Ind. App. 525, 58 N. E. 559.

Massachusetts.— Savage *v.* Darling, 151 Mass. 5, 23 N. E. 234.

New York.— Miller *v.* Manice, 6 Hill 114. But see Beaty *v.* Swarthout, 32 Barb. 293; Graham *v.* Harrower, 18 How. Pr. 144.

Tennessee.— Pemberton *v.* Smith, 3 Head 18.

Canada.— McLean *v.* Hannon, 3 Can. Sup. Ct. 706; Moore *v.* Prescott, 10 Can. L. T. Occ. Notes 195; Corbett *v.* Shepard, 4 U. C. C. P. 59. But see Brent *v.* Perry, 7 U. C. Q. B. 24.

See 47 Cent. Dig. tit. "Trover and Conversion," § 212.

Contra.— National Steamship Co. *v.* Tugman, 143 U. S. 28, 12 S. Ct. 361, 27 L. ed. 87.

Under a plea of "not guilty" it can be shown that the property was seized under a distress warrant for rent (Hatch *v.* Holland, 28 U. C. Q. B. 213), but not under an attachment (Hine *v.* Commercial Bank, 119 Mich. 448, 78 N. W. 471; Crenshaw *v.* Smith, 10 Heisk. (Tenn.) 1); nor can it be shown that sheep were seized in a subdivision where a stock law was in force unless that fact be specially pleaded (Houchin *v.* McClaugherty, (Tex. Civ. App. 1894) 27 S. W. 774).

59. Nanson *v.* Jacob, 93 Mo. 331, 6 S. W. 246, 3 Am. St. Rep. 531 [*overruling* Battel *v.* Crawford, 59 Mo. 215; Raithel *v.* Dezetter, 43 Mo. 145; Engel *v.* Dressel, 26 Mo. App. 39]; Carter *v.* Eighth Ward Bank, 33 Misc. (N. Y.) 128, 67 N. Y. Suppl. 300.

60. Thomas *v.* Watt, 104 Mich. 201, 62 N. W. 345; Carroll *v.* Fethers, 102 Wis. 436, 79 N. W. 604.

61. *Georgia.*— Jacques *v.* Stewart, 81 Ga. 81, 6 S. E. 815.

Kansas.— Kerwood *v.* Ayres, 59 Kan. 343, 53 Pac. 134; Campbell *v.* Meyer Bros. Drug Co., 7 Kan. App. 501, 54 Pac. 287.

Kentucky.— Graham *v.* Warner, 3 Dana 146, 28 Am. Dec. 65.

Michigan.— Eureka Iron, etc., Works *v.* Bresnahan, 66 Mich. 489, 33 N. W. 834.

Minnesota.— Johnson *v.* Oswald, 38 Minn. 550, 38 N. W. 630, 8 Am. St. Rep. 698.

Missouri.— Hardwick *v.* Cox, 50 Mo. App. 509; Thomas *v.* Ramsey, 47 Mo. App. 84.

New York.— Raymond *v.* Richmond, 78 N. Y. 351; Tum Suden *v.* Jurgens, 32 Misc. 660, 66 N. Y. Suppl. 452. See also Jackson *v.* Brown, 76 Hun 41, 27 N. Y. Suppl. 583. But a vendor when sued in trover by the vendee must plead his right of rescission if he intends to rely on it as a defense. McLeod *v.* Maloney, 3 N. Y. Suppl. 617 [*affirmed* in 121 N. Y. 698, 24 N. E. 1099].

See 47 Cent. Dig. tit. "Trover and Conversion," § 212.

In Iowa the rule stated does not apply to plaintiff. If he desires to impeach as fraudulent a title set up in the answer as a defense, he must state in his reply the facts which constitute the fraud. Kervick *v.* Mitchell, 68 Iowa 273, 24 N. W. 151, 26 N. W. 434.

62. Hoxsie *v.* Empire Lumber Co., 41 Minn. 548, 43 N. W. 476.

63. Thew *v.* Miller, 73 Iowa 742, 36 N. W. 771; Booth *v.* Powers, 56 N. Y. 22.

64. Huntington *v.* Herrman, 111 N. Y. App. Div. 875, 98 N. Y. Suppl. 48 [*affirmed* in 188 N. Y. 622, 81 N. E. 1166]; Harris *v.* Hobbs, 22 Tex. Civ. App. 367, 54 S. W. 1035; S. A. Woods Mach. Co. *v.* Woodcock, 43 Wash. 317, 86 Pac. 570.

65. Middle Div. El. Co. *v.* Hawthorne, 89 Ill. App. 596; Duncan *v.* Fisher, 18 Mo. 403; Kirwin *v.* Malone, 45 N. Y. App. Div. 93, 61 N. Y. Suppl. 844.

66. Hubbard First Nat. Bank *v.* Cleland, 36 Tex. Civ. App. 478, 82 S. W. 337.

67. *California.*— Payne *v.* Elliot, 54 Cal. 339, 35 Am. Rep. 80.

Connecticut.— Forbes *v.* Marsh, 15 Conn. 384.

Missouri.— Priest *v.* Way, 87 Mo. 16.

New York.— Lewis *v.* Mott, 36 N. Y. 395; Bowman *v.* Eaton, 24 Barb. 528.

Oregon.— Cooper *v.* Blair, 14 Oreg. 255, 12 Pac. 370; Dahms *v.* Sears, 13 Oreg. 47, 11 Pac. 891.

Texas.— Lewis *v.* Hatton, 86 Tex. 533, 26 S. W. 50; Bitterman *v.* Hearn, (Civ. App. 1895) 32 S. W. 341.

See 47 Cent. Dig. tit. "Trover and Conversion," § 214.

68. Mobile, etc., R. Co. *v.* Bay Shore Lumber Co., 158 Ala. 622, 48 So. 377.

conversion of a thing different from the one described [69] is a fatal variance. It is also a fatal variance if the evidence shows that plaintiff, who has pleaded general ownership, is a nominal, joint, or equitable owner.[70] If, however, the evidence tends to prove the very conversion alleged, in substance rather than in form, a variance of proof of matters merely incidental or unnecessarily pleaded will not be fatal.[71]

3. Evidence [72] — a. Presumptions and Burden of Proof — (i) *Presumptions.* Possession is *prima facie* evidence of title,[73] and conversion may be inferred from the taking of property and neglect to return it.[74] And an instrument enti-

69. *Arizona.*— Hereford *v.* Pusch, 8 Ariz. 76, 68 Pac. 547.

Illinois.— Harper *v.* Scott, 63 Ill. App. 401.

Indiana.— Bixel *v.* Bixel, 107 Ind. 534, 8 N. E. 614.

Mississippi.— Barclay *v.* Smith, (1904) 36 So. 449.

Missouri.— Ensworth *v.* Barton, 60 Mo. 511.

Nebraska.— Worth *v.* Buck, 34 Nebr. 703, 52 N. W. 566.

New York.— Walter *v.* Bennett, 16 N. Y. 250.

North Carolina.— Ward *v.* Smith, 30 N. C. 296.

South Dakota.— Smith *v.* Donahoe, 13 S. D. 334, 83 N. W. 264.

England.— Shannon *v.* Owen, 6 L. J. K. B. O. S. 61, 1 M. & R. 392, 17 E. C. L. 674.

See 47 Cent. Dig. tit. "Trover and Conversion," § 214.

70. *Illinois.*— Gates *v.* Thede, 91 Ill. App. 603.

Minnesota.— Derby *v.* Gallup, 5 Minn. 119.

Missouri.— Johnson *v.* St. Joseph Stock Yards Bank, 102 Mo. App. 395, 76 S. W. 699.

Texas.— Gooch *v.* Isbell, (Civ. App. 1903) 77 S. W. 973; South Bend Ironworks *v.* Wagner, (Civ. App. 1903) 74 S. W. 601.

Canada.— Christie *v.* Thomas, 15 Nova Scotia 203.

See 47 Cent. Dig. tit. "Trover and Conversion," § 214.

Plaintiff must prove the title which he has chosen to plead (Gregory Point Mar. R. Co. *v.* Selleck, 43 Conn. 320), but not necessarily to the extent of perfection alleged if a less interest will sustain a verdict (Smith *v.* Konst, 50 Wis. 360, 7 N. W. 293).

71. Gulf City Shingle Mfg. Co. *v.* Boyles, 129 Ala. 192, 29 So. 800; Ewell *v.* Gillis, 14 Me. 72; Aschermann *v.* Philip Best Brewing Co., 45 Wis. 262.

Illustrations.— Variances have been held immaterial as to place (Colorado First Nat. Bank *v.* Brown, 85 Tex. 80, 23 S. W. 862), and time of conversion, if shown to have been before the commencement of the action (Bancroft Co. *v.* Haslett, 106 Cal. 151, 39 Pac. 602; Aldrich *v.* Higgins, 77 Conn. 370, 59 Atl. 498; Meyer *v.* Doherty, 133 Wis. 398, 113 N. W. 671, 126 Am. St. Rep. 967, 13 L. R. A. N. S. 247). Conversion of a mare may be shown under the allegation "horse" (Drexel *v.* Levan, 2 Woodw. (Pa.) 59), of a due-bill described as a promissory note (Taylor *v.* Morgan, 3 Watts (Pa.) 333), and of a city warrant, No. 893, alleged as No. 896 (Roe *v.* Cutter, 4 Wash. 611, 30 Pac. 663). An allegation of ownership will be sustained by proof of a mortgage title. Duggan *v.* Wright, 157 Mass. 228, 32 N. E. 159. A conversion alleged to have been committed by defendants and others is sustained by proof that defendants alone committed it. Barron *v.* Davis, 4 N. H. 338. And under the code of procedure, abolishing forms of action, when a plaintiff in his complaint alleged and set out a case in trover, and the proof showed that it should have been in the nature of assumpsit for money had and received, plaintiff was entitled to recover, notwithstanding the variance. Oates *v.* Kendall, 67 N. C. 241. Where the controversy is only as to the amount of property converted it is not necessary to prove that the taking was tortious, although so alleged. Foster Lumber Co. *v.* Kelly, 9 Kan. App. 377, 58 Pac. 124.

72. **Evidence** generally see 16 Cyc. 821.

73. Derby *v.* Gallup, 5 Minn. 119.

It will be presumed that ownership and right to possession continue until shown to have been parted with (Laubenheimer *v.* Bach, 19 Mont. 177, 47 Pac. 803), that a consignee is the owner of the goods shipped (Benjamin *v.* Levy, 39 Minn. 11, 38 N. W. 702), and that a father, instead of his unmarried son who lives with him, is the owner of chattels on the premises (Reid *v.* Butt, 25 Ga. 28).

A possession in defendant nearly a year after he sold and boxed goods for shipment will not be presumed in him in the absence of evidence as to what became of them. Whitney *v.* Slauson, 30 Barb. (N. Y.) 276. Nor will a bare possession of a chattel be presumed to be tortious (Glaze *v.* McMillion, 7 Port. (Ala.) 279), or be evidence of title unless held adversely (Willis *v.* Snelling, 6 Rich. (S. C.) 280). Defendant's possession is not presumptive evidence of ownership as against the recent previous possession of plaintiff (Weston *v.* Higgins, 40 Me. 102) and an unexplained possession will be deemed to be held under him who next before had possession of the chattel (Barnes *v.* Mobley, 21 Ala. 232).

Where title in plaintiff's ancestor is admitted, recovery can be defeated only by proof that such title has been divested. Powers *v.* Hatter, 152 Ala. 636, 44 So. 859.

74. Stickney *v.* Smith, 5 Minn. 486. See also Spencer *v.* Morgan, 5 Ind. 146, holding that a conversion may be inferred from a failure of a bailee to deposit in a bank

tling the holder to the payment of money will be deemed to be worth its face value.[75]

(II) *BURDEN OF PROOF.*[76] In trover the burden of proof is on plaintiff, and it remains with him throughout as to traversed material averments of his declaration, petition, or complaint.[77] Where, however, plaintiff has made out a *prima facie* case, the burden of evidence shifts to defendant to prove title in himself or a third person,[78] that he is a *bona fide* purchaser or holder,[79] that he has enhanced the value of the article converted,[80] that plaintiff's title is fraudulent,[81] and facts that are within defendant's own knowledge or control.[82]

b. Admissibility — (I) *IN GENERAL.* Evidence is admissible if it tends to prove or disprove a material allegation or denial of either party's pleading;[83]

money which was given to him for that purpose.

Presumption of license.— A tenant of timber land who cut trees on adjoining land will be presumed to have had license or authority therefor from the owner of the latter tract (Winlack *v.* Geist, 107 Pa. St. 297, 52 Am. Rep. 473); but where such a trespasser cuts timber under the license of one not the owner, the latter will not be presumed to have any authority from the owner of the land to grant such license (Millard *v.* McDonald Lumber Co., 64 Wis. 626, 25 N. W. 656).

Where one having possession of property, and knowing that he has no claim to it, withholds it from the true owner, he may be presumed to have assented to the wrongful act of another by which such possession was obtained. Anderson *v.* Kincheloe, 30 Mo. 520.

75. Menkens *v.* Menkens, 23 Mo. 252; Blumenthal *v.* Lewy, 82 N. Y. App. Div. 535, 81 N. Y. Suppl. 528.

In the absence of other evidence property converted by a wrongful sale will be presumed to be worth the price received for it. Sun Mut. L. Ins. Co. *v.* Talmadge, 4 Daly (N. Y.) 539.

76. Evidence generally see 16 Cyc. 926.

77. *Connecticut.*— Berman *v.* Kling, 81 Conn. 403, 71 Atl. 507.

Georgia.— McLean *v.* Hattan, 127 Ga. 579, 56 S. E. 643; Anderson *v.* Baker, 60 Ga. 599.

Kentucky.— Dennis *v.* Strunk, 108 S. W. 957, 32 Ky. L. Rep. 1230.

Missouri.— Dickey *v.* Adler, 143 Mo. App. 326, 127 S. W. 593; Watson *v.* Gross, 112 Mo. App. 615, 87 S. W. 104.

New Hampshire.— McKeen *v.* Converse, 68 N. H. 173, 39 Atl. 435.

Vermont.— H. C. Jaquith Co. *v.* Shumway, 80 Vt. 556, 69 Atl. 157.

Washington.— Rice *v.* Knostman, 45 Wash. 282, 88 Pac. 194.

Canada.— Guild *v.* Dodd, 31 Nova Scotia 193.

See 47 Cent. Dig. tit. "Trover and Conversion," § 216.

Allegations admitted need not be proved. Johnson *v.* Kelley, 106 S. W. 864, 32 Ky. L. Rep. 701.

78. Mosteller *v.* Holborn, 20 S. D. 545, 108 N. W. 13; Marcy *v.* Parker, 78 Vt. 73, 62 Atl. 19.

79. *Alabama.*— Nashville, etc., R. Co. *v.* Walley, (1906) 41 So. 134.

Georgia.— Milltown Lumber Co. *v.* Carter, 5 Ga. App. 344, 63 S. E. 270.

Iowa.— Warder, etc., Co. *v.* Cuthbert, 99 Iowa 681, 68 N. W. 917.

Minnesota.— Jones *v.* Minnesota, etc., R. Co., 97 Minn. 232, 106 N. W. 1048.

New York.— Cormier *v.* Batty, 41 N. Y. Super. Ct. 70.

Pennsylvania.— Robinson *v.* Hodgson, 30 Leg. Int. 176.

Texas.— Young *v.* Pine Ridge Lumber Co., (Civ. App. 1907) 100 S. W. 784.

Vermont.— Hassam *v.* J. E. Safford Lumber Co., 82 Vt. 444, 74 Atl. 197; Gale *v.* Gale, 70 Vt. 540, 41 Atl. 969.

United States.— U. S. *v.* Ute Coal, etc., Co., 158 Fed. 20, 85 C. C. A. 302.

See 47 Cent. Dig. tit. "Trover and Conversion," § 216.

But *compare* Dickey *v.* Adler, 143 Mo. App. 326, 127 S. W. 593.

Burden of proof is on defendant in an action for conversion of a stolen negotiable bond to show that he purchased it before maturity and paid value therefor. Northampton Nat. Bank *v.* Kidder, 13 Abb. N. Cas. (N. Y.) 376. But in an action for conversion of a certificate of deposit, it was held to be incumbent on plaintiff to show that defendants, who received the certificate from their co-defendant, had actual notice of the infirmity of the latter's title. Dickey *v.* Adler, 143 Mo. App. 326, 127 S. W. 593.

80. Milltown Lumber Co. *v.* Carter, 5 Ga. App. 344, 63 S. E. 270.

81. Freedman *v.* Campfield, 92 Mich. 118, 52 N. W. 630; Derby *v.* Gallup, 5 Minn. 119. See also Vinson *v.* Knight, 137 N. C. 408, 49 S. E. 891.

Worthlessness of property.— On defendant rests the burden of showing that promissory notes alleged to have been converted were worthless. Burrows *v.* Keays, 37 Mich. 430.

82. Mouat *v.* Wood, 4 Colo. App. 118, 35 Pac. 58; Kavanaugh *v.* Taylor, 2 Ind. App. 502, 28 N. E. 553; Brown *v.* Waterman, 10 Cush. (Mass.) 117; Bassett *v.* Spofford, 2 Daly (N. Y.) 432; Kruse *v.* Seeger, etc., Co., 15 N. Y. Suppl. 825 [*affirmed* in 16 N. Y. Suppl. 529].

83. *Alabama.*— Southern R. Co. *v.* Attalla, 147 Ala. 653, 41 So. 664; King *v.* Franklin,

and is inadmissible if it does not in some degree sustain or defeat one or more of the issues presented for decision.[84]

(II) *FRAUD.* Evidence is admissible to show that defendant obtained the property by fraud, as bearing on the character of his alleged act of conversion.[85]

(III) *SIMILAR ACTS BY DEFENDANT.* Evidence that defendant had either before or subsequent to the alleged conversion obtained goods from plaintiff or others is admissible on the question of intent.[86]

(IV) *ACTS AND DECLARATIONS OF PARTIES.* It is proper to put in evi-

132 Ala. 559, 31 So. 467; Gimon *v.* Terrell, 38 Ala. 208.

Connecticut.— Clark *v.* Hale, 34 Conn. 398; Calhoun *v.* Richardson, 30 Conn. 210; Avery *v.* Clemons, 18 Conn. 306, 46 Am. Dec. 323.

Idaho.— Best *v.* Broadhead, 18 Ida. 11, 108 Pac. 333.

Indiana.— Hogue *v.* McClintock, 76 Ind. 205.

Iowa.— Doyle *v.* Burns, 123 Iowa 488, 99 N. W. 195; McNamara *v.* New Malleray Corp., 88 Iowa 502, 55 N. W. 322.

Kentucky.— Williams *v.* Herndon, 12 B. Mon. 484, 54 Am. Dec. 551.

Michigan.—Adams *v.* Elseffer, 132 Mich. 100, 92 N. W. 772; Cook *v.* Hopper, 23 Mich. 511.

Mississippi.— Johnson *v.* Stone, 69 Miss. 826, 13 So. 858.

New Jersey.— Demund *v.* French, 5 N. J. L. 974.

New York.— Caswell *v.* Putnam, 120 N. Y. 153, 24 N. E. 287; Reich *v.* Cochran, 114 N. Y. App. Div. 141, 99 N. Y. Suppl. 755; Flynn *v.* Smith, 111 N. Y. App. Div. 870, 98 N. Y. Suppl. 56; Cohen *v.* Ross, 95 N. Y. App. Div. 96, 88 N. Y. Suppl. 515.

North Carolina.— Taylor *v.* Brewer, 127 N. C. 75, 37 S. E. 88.

Oregon.— Frame *v.* Oregon Liquor Co., 48 Oreg. 272, 85 Pac. 1009, 86 Pac. 791.

Pennsylvania.— Dolan *v.* Briggs, 4 Binn. 496

Texas.— Trammell *v.* J. M. Guffey Petroleum Co., 42 Tex. Civ. App. 455, 94 S. W. 104; Huey *v.* Hammett, (Civ. App. 1906) 93 S. W. 531.

Vermont.— Brooks *v.* Guyer, 67 Vt. 669, 32 Atl. 722.

Washington.— Rector *v.* Thompson, 26 Wash. 400, 67 Pac. 86.

See 47 Cent. Dig. tit. "Trover and Conversion," § 217.

84. *Alabama.*— Wood *v.* West Pratt Coal Co., 146 Ala. 479, 40 So. 959; Jones *v.* Fort, 36 Ala. 449.

California.—Arnold *v.* Producers' Fruit Co., 128 Cal. 637, 61 Pac. 283.

Colorado.— Updegraff *v.* Lesem, 15 Colo. App. 297, 62 Pac. 342.

Georgia.— Harris Loan Co. *v.* Elliott, etc., Book-Typewriter Co., 110 Ga. 302, 34 S. E. 1003; Jowers *v.* Blandy, 58 Ga. 379; Sutton *v.* McCoy, 2 Ga. App. 758, 59 S. E. 21.

Indiana.— Lindsay *v.* Glass, 119 Ind. 301, 21 N. E. 897.

Indian Territory.— Gentry *v.* Singleton, 3 Indian Terr. 516, 61 S. W. 990, 4 Indian Terr. 346, 69 S. W. 898.

Iowa.— Frick *v.* Kabaker, 116 Iowa 494, 90 N. W. 498.

Maine.— Hotchkiss *v.* Hunt, 49 Me. 213.

Maryland.— Penniman *v.* Winner, 54 Md. 127.

Massachusetts.— Berry *v.* Ingalls, 199 Mass. 77, 85 N. E. 191; Barrett *v.* Bruffee, 182 Mass. 229, 65 N. E. 44.

Michigan.— Little *v.* Williams, 107 Mich. 652, 65 N. W. 568; McDonald *v.* McKinnon, 104 Mich. 428, 62 N. W. 560; Wright *v.* Starks, 77 Mich. 221, 43 N. W. 868.

Montana.— Proctor *v.* Irvin, 22 Mont. 547, 57 Pac. 183.

New York.— Byrne *v.* Weidenfeld, 113 N. Y. App. Div. 451, 99 N. Y. Suppl. 412; Rosellen *v.* Herzog, 19 N. Y. Suppl. 314; Collins *v.* Manning, 8 N. Y. Suppl. 927.

South Dakota.— Comeau *v.* Hurley, 22 S. D. 79, 115 N. W. 521; Mossteller *v.* Holborn, 20 S. D. 545, 108 N. W. 13.

Texas.— Crawford *v.* Thomson, (Civ. App. 1909) 117 S. W. 181; Geo. R. Dickinson Paper Co. *v.* Mail Pub. Co., (Civ. App. 1895) 32 S. W. 378.

Vermont.— H. C. Jaquith Co. *v.* Shumway, 80 Vt. 556, 69 Atl. 157; Cate *v.* Fife, 80 Vt. 404, 68 Atl. 1.

Washington.— Greenwood *v.* Corbin, 48 Wash. 357, 93 Pac. 433.

Wisconsin.— Taylor *v.* Tigerton Lumber Co., 134 Wis. 24, 114 N. W. 122.

See 47 Cent. Dig. tit. "Trover and Conversion," § 217.

Disposition of other property.— Evidence will not be received for the purpose of showing what disposition defendant made of other goods which are not embraced in plaintiff's action. Steiner *v.* Tranum, 98 Ala. 315, 13 So. 365; Baylis *v.* Cronkite, 39 Mich. 413; Steinhart *v.* Gross, 18 N. Y. Suppl. 489.

85. Lowry *v.* Walker, 5 Vt. 181; Meyer *v.* Doherty, 133 Wis. 398, 113 N. W. 671, 126 Am. St. Rep. 967, 13 L. R. A. N. S. 247.

A fraudulent contract by an agent, although his principal, the defendant, was not privy to it may be admissible. Irving *v.* Motly, 7 Bing. 543, 9 L. J. C. P. O. S. 161, 5 M. & P. 380, 20 E. C. L. 244.

A fraudulent representation *dehors* a written statement may be shown. Heineman *v.* Steiger, 54 Mich. 232, 19 N. W. 965.

Evidence of failure of consideration is inadmissible in trover when no issue of fraud is raised. Leavitt *v.* Stansell, 44 Mich. 424, 6 N. W. 855. And see Virginia Timber, etc., Co. *v.* Glenwood Lumber Co., 5 Colo. App. 256, 90 Pac. 48, holding that fraud must be pleaded before it can be proved.

86. Hall *v.* Brown, 30 Conn. 551; Adams

dence any act, declaration, or admission of plaintiff which tends to contradict a material averment of his pleading or disclose his consent to the act of conversion; [87] or of defendant which admits his liability or disproves his defense.[88]

(v) *Motive and Good Faith of Defendant.*[89] Evidence of defendant's good faith is admissible when material as to whether his act constituted a conversion,[90] or when it relates to the measure of damages;[91] but, intent not being essential to conversion, such evidence is usually not admissible.[92]

(vi) *Indictment of Defendant For Larceny.* Evidence of a prior indictment and conviction [93] of the thief is admissible in trover against a purchaser of stolen goods; but in trover against the thief evidence of his acquittal is inadmissible.[94]

(vii) *Existence, Identity, and Description of Property.* Evidence of any fact which relates to the existence or non-existence,[95] to the identity,[96]

v. Elseffer, 132 Mich. 100, 92 N. W. 772; Allison *v.* Matthieu, 3 Johns. (N. Y.) 235; Striker *v.* McMichael, 1 Phila. (Pa.) 89.

87. Robison *v.* Hardy, 22 Ill. App. 512; Hill *v.* Wiley, 202 Mass. 243, 88 N. E. 838; Glenn *v.* Garrison, 17 N. J. L. 1; Gilpin *v.* Royal Canadian Bank, 27 U. C. Q. B. 310 (holding that testimony is competent that plaintiffs, who had insured the wheat sued for in trover, had collected the insurance thereon, the fire having occurred two days after the conversion).

Evidence that an owner requested an officer to levy on one article rather than another is inadmissible since it does not tend to show consent to the seizure and conversion thereby. Marks *v.* Wright, 81 Wis. 572, 51 N. W. 882.

88. *Delaware.*— Layman *v.* Slocomb, (1909) 76 Atl. 1094.

Indiana.— Lindsay *v.* Glass, 119 Ind. 301, 21 N. E. 897.

Michigan.— Carpenter *v.* Carpenter, 154 Mich. 100, 117 N. W. 598; Adams *v.* Kellogg, 63 Mich. 105, 29 N. W. 679.

Pennsylvania.— Pugis *v.* Temko, 33 Pa. Super. Ct. 526.

Vermont.— Cate *v.* Fife, 80 Vt. 404, 68 Atl. 1; Moore *v.* Hill, 62 Vt. 424, 19 Atl. 997.

A mere declaration of ownership, unevinced by any act thereof, is not admissible as evidence of a conversion. Irish *v.* Cloyes, 8 Vt. 30, 30 Am. Dec. 446.

Evidence of an acknowledgment made by defendant after the conversion was barred by the statute is inadmissible. Goodwyn *v.* Goodwyn, 16 Ga. 114. See, generally, Limitations of Actions, 25 Cyc. 1325.

Defendant may introduce his own declarations in order to show his attitude toward plaintiff or explain his refusal to deliver property on demand. Dent *v.* Chiles, 5 Stew. & P. (Ala.) 383, 26 Am. Dec. 350; National L. Assoc. *v.* Thompson, 38 N. Y. App. Div. 445, 56 N. Y. Suppl. 401. Plaintiff, by examining a witness to prove a demand and refusal, does not make the declarations of defendant, in reply to the demand, evidence in defendant's favor. Barber *v.* Anderson, 1 Bailey (S. C.) 358.

Overtures by defendant's agent with reference to purchase of timber on the lands mentioned are not admissible in action for subsequent conversion. C. W. Zimmerman Mfg. Co. *v.* Dunn, 151 Ala. 435, 44 So. 533.

89. **Intent as element of conversion** see *supra*, I, B, 2.

90. *Connecticut.*— Hannon *v.* Bramley, 65 Conn. 193, 32 Atl. 336.

Georgia.— Brooke *v.* Lowe, 122 Ga. 358, 50 S. E. 146.

New Hampshire.— Walker *v.* Wetherbee, 65 N. H. 656, 23 Atl. 621.

New York.— Purves *v.* Moltz, 5 Rob. 653, 2 Abb. Pr. N. S. 409, 32 How. Pr. 478; Huntington *v.* Douglass, 24 Rob. 204.

Vermont.— Coolidge *v.* Ayres, 77 Vt. 448, 61 Atl. 40, 76 Vt. 405, 57 Atl. 970.

See 47 Cent. Dig. tit. "Trover and Conversion," § 222.

91. Grant *v.* Smith, 26 Mich. 201; Shandy *v.* McDonald, 38 Mont. 393, 100 Pac. 203; Miller *v.* Winfree, (Tex. Civ. App. 1891) 15 S. W. 918.

92. Anderson *v.* Besser, 131 Mich. 481, 91 N. W. 737; Imhoff *v.* Richards, 48 Nebr. 590, 67 N. W. 483; Douglass *v.* Scott, 130 N. Y. App. Div. 322, 114 N. Y. Suppl. 470.

93. Pease *v.* Smith, 5 Lans. (N. Y.) 519 [*affirmed* in 61 N. Y. 477], holding that such evidence accounts for the absence of a witness and strengthens the proof of conversion.

As to necessity of prior indictment of thief see *supra*, IV, A, 5, d.

In Georgia under the code, section 2970, which provides that the owner of stolen goods must prosecute the thief for the felony before bringing trover, evidence of the prior indictment of the taker for larceny is competent. Broughton *v.* Winn, 60 Ga. 486.

94. Parker *v.* Kenyon, 112 Mass. 264.

95. Nunnally *v.* Becker, 52 Ark. 550, 13 S. W. 79; McNamara *v.* New Melleray Corp., 88 Iowa 502, 55 N. W. 322; Aldrich Banking Co. *v.* Gann, 75 Mo. App. 584.

96. *Maryland.*— Gittings *v.* Winter, 101 Md. 194, 60 Atl. 630.

Minnesota.— Carver *v.* Crookston Lumber Co., 84 Minn. 79, 86 N. W. 871.

Mississippi.— Barclay *v.* Smith, (1904) 36 So. 449.

New Jersey.— Hitt *v.* Alberts, 75 N. J. L. 537, 68 Atl. 237.

New York.— Howard *v.* McDonough, 8 Daly 365.

See 47 Cent. Dig. tit. "Trover and Conversion," § 224.

Where plaintiff has offered no evidence touching the identity of the thing converted

to the description,[97] or to the quantity[98] of property in controversy, which is alleged to have been wrongfully converted, is admissible.

(VIII) *TITLE AND RIGHT TO POSSESSION* — (A) *Of Plaintiff.* Evidence, oral or written, which tends in any degree to prove[99] or to disprove[1] plaintiff's title or possession is admissible even though it be statements made by plaintiff himself,[2] a lease, or record of an action, to which defendant was not a party,[3] or a sale to defraud creditors, defendant not being one of them.[4]

(B) *Of Defendant.* The right of defendant to the admission of evidence in support of title or right of possession in himself is as broad as that of plaintiff,[5]

evidence offered by defendant in that regard will not be admitted. Whistler *v.* Teague, 66 Ind. 565.

97. Bugbee *v.* Allen, 56 Conn. 167, 14 Atl. 778; Casey *v.* Ballou Banking Co., 98 Iowa 107, 67 N. W. 98.

98. Mouat *v.* Wood, 4 Colo. App. 118, 35 Pac. 58; Gregory *v.* Rosenkrans, 78 Wis. 451, 47 N. W. 832.

99. *Alabama.*— Farrow *v.* Wooley, 149 Ala. 373, 43 So. 144.

Georgia.— Dickinson *v.* Solomons, 26 Ga. 684.

Indian Territory.— Purcell Cotton Seed Oil Mills *v.* Bell, 7 Indian Terr. 717, 104 S. W. 944.

Kentucky.— Dennis *v.* Strunk, 108 S. W. 957, 32 Ky. L. Rep. 1230.

Maine.— Stevens *v.* Gordon, 87 Me. 564, 33 Atl. 27.

Massachusetts.— Fennessy *v.* Spofford, 144 Mass. 22, 10 N. E. 463; Clark *v.* Houghton, 12 Gray 38.

Michigan.— Monroe *v.* Moloney, 67 Mich. 83, 34 N. W. 412; Adams *v.* Kellogg, 63 Mich. 105, 29 N. W. 679.

Montana.— Laubenheimer *v.* Bach, 19 Mont. 177, 47 Pac. 803.

Oregon.— Goltra *v.* Penland, 42 Oreg. 18, 69 Pac. 925.

Texas.— Boardman *v.* Woodward, (Civ. App. 1909) 118 S. W. 550.

Vermont.— H. C. Jaquith Co. *v.* Shumway, 80 Vt. 556, 69 Atl. 157.

Washington.— Greenwood *v.* Corbin, 48 Wash. 357, 93 Pac. 433; Groveland Imp. Co. *v.* Farmers' Supply Co., 25 Wash. 344, 65 Pac. 529, 87 Am. St. Rep. 755.

United States.— Hance *v.* McCormick, 11 Fed. Cas. No. 6,009, 1 Cranch C. C. 522.

See 47 Cent. Dig. tit. "Trover and Conversion," § 226.

Evidence of possession and use by plaintiff is admissible. H. C. Jaquith Co. *v.* Shumway, 80 Vt. 556, 69 Atl. 157.

In trover for trees, plaintiff's title to land in another county, on which they were cut, cannot be given in evidence, where the action might have been brought in that county. Gardiner *v.* Purrington, Quincy (Mass.) 59.

A will does not prove title in the testator, but it is admissible as proof that whatever title he had passed to plaintiff, a legatee. Terrell *v.* McKinny, 26 Ga. 447.

1. *Maryland.*— Scott *v.* Burch, 6 Harr. & J. 67.

Massachusetts.— Baker *v.* Seavey, 163 Mass. 522, 40 N. E. 863, 47 Am. St. Rep. 475; Bond *v.* Endicott, 149 Mass. 282, 21 N. E. 361.

Missouri.— Kirk *v.* Kane, 87 Mo. App. 274.

Nebraska.— Welton *v.* De Yarman, 26 Nebr. 59, 42 N. W. 338.

Pennsylvania.— Reynolds *v.* Cridge, 131 Pa. St. 189, 18 Atl. 1010.

Rhode Island.— F. A. Thomas Mach. Co. *v.* Voelker, 23 R. I. 441, 50 Atl. 838.

South Carolina.— Bogan *v.* Wilburn, 1 Speers 179.

See 47 Cent. Dig. tit. "Trover and Conversion," § 226.

In an action for taking personal property from plaintiff's possession, when he claimed to be owner, evidence that the title was in a third party is not to be received merely for the purpose of showing that plaintiff is not the real party in interest. Paddock *v.* Wing, 16 How. Pr. (N. Y.) 547.

2. Donnell *v.* Thompson, 13 Ala. 440; Miller *v.* Hennessy, 47 Misc. (N. Y.) 403, 94 N. Y. Suppl. 563.

Letters of plaintiff ordering goods shipped to his agent and duplicate bills sent to himself do not tend to show title in himself in trover for a seizure of the goods as the agent's property. Kipp *v.* Silverman, 25 Mont. 296, 64 Pac. 884.

In trover by a landlord for goods distrained against persons in possession claiming as prior purchasers, evidence that plaintiff had agreed to receive goods in payment of rent is irrelevant, the tenant not having exercised his option. Betz *v.* Hummel, 10 Pa. Cas. 313, 13 Atl. 938.

3. Oliver Ditson Co. *v.* Bates, 181 Mass. 455, 63 N. E. 908, 92 Am. St. Rep. 424, 57 L. R. A. 289; Grenier *v.* Hild, 124 Mich. 222, 82 N. W. 1052; Hammond *v.* Darlington, 109 Mo. App. 333, 84 S. W. 446; Kipp *v.* Silverman, 25 Mont. 296, 64 Pac. 884.

4. Shoup *v.* Marks, 128 Fed. 32, 62 C. C. A. 540.

5. *Alabama.*— Baker *v.* Cotney, 150 Ala. 506, 43 So. 786.

Georgia.— Byrne *v.* Attaway, 44 Ga. 302.

Indiana.— Stull *v.* Howard, 26 Ind. 456.

Michigan.— Wright *v.* Starks, 77 Mich. 221, 43 N. W. 868; Van Aukin *v.* O'Connor, 50 Mich. 374, 15 N. W. 516.

New York.— Kilpatrick *v.* Ludwig Carved Moulding Co., 11 Misc. 639, 32 N. Y. Suppl. 922.

Texas.— Land *v.* Klein, (Civ. App. 1895) 29 S. W. 657.

See 47 Cent. Dig. tit. "Trover and Conversion," § 227; and *supra*, IV, C, 3, b, (VIII), (A).

and is, on the other hand, similarly subject to the same limitations as to its admissibility and as to its weight and sufficiency.[6]

(IX) *ACTS CONSTITUTING CONVERSION.* Evidence of any unauthorized act of dominion over plaintiff's property, or participation therein, by defendant either on behalf of himself or another is relevant to the issue of conversion, and therefore admissible.[7]

(X) *NATURE AND EXTENT OF INJURY* — (A) *In General.* Plaintiff is entitled to the admission in evidence of any facts and circumstances which pertain to the extent of his loss, or measure of damages.[8] Defendant may likewise avail himself of any evidence which tends to negative or mitigate the damages alleged.[9]

(B) *Insolvency of Maker of Converted Note.* Evidence of the insolvency of the

The possession of a father for a minor child does not explain his possession before acquisition of title of the minor. Goodwyn *v.* Goodwyn, 20 Ga. 600.

6. *Alabama.*— Baker *v.* Cotney, 150 Ala. 506, 43 So. 786.

Mississippi.— Harris *v.* Newman, 5 How. 654.

Missouri.— Allen *v.* St. Louis, etc., R. Co., 72 Mo. 386.

Nebraska.— Fred Krug Brewing Co. *v.* Healey, 71 Nebr. 662, 99 N. W. 489, 101 N. W. 329.

New York.— Martin *v.* Hillen, 142 N. Y. 140, 36 N. E. 803 [*affirming* 21 N. Y. Suppl. 309]; Booth *v.* Powers, 56 N. Y. 22.

Pennsylvania.— Betz *v.* Hummel, 10 Pa. Cas. 313, 13 Atl. 938.

Texas.— Irion *v.* Bexar County, 26 Tex. Civ. App. 527, 63 S. W. 550.

Canada.— Mills *v.* McLean, 10 Nova Scotia 379.

See 47 Cent. Dig. tit. "Trover and Conversion," § 227; and *supra*, IV, C, 3, b, (VIII), (A).

7. *Alabama.*— Haas *v.* Taylor, 80 Ala. 459, 2 So. 633.

Colorado.— Carper *v.* Risdon, 19 Colo. App. 530, 76 Pac. 744.

Connecticut.— Barker *v.* Lewis Storage, etc., Co., 78 Conn. 198, 61 Atl. 363.

Delaware.— Layman *v.* Slocomb, (1909) 76 Atl. 1094.

Indiana.— Coffin *v.* Anderson, 4 Blackf. 395.

Missouri.— Meyer *v.* Phœnix Ins. Co., 95 Mo. App. 721, 69 S. W. 639.

New Hampshire.— Gilman *v.* Hill, 36 N. H. 311; Lathrop *v.* Blake, 23 N. H. 46.

Vermont.— Stillwell *v.* Farwell, 64 Vt. 286, 24 Atl. 243; Stewart *v.* Martin, 49 Vt. 266.

Wisconsin.— Taylor *v.* Tigerton Lumber Co., 134 Wis. 24, 114 N. W. 122; Seymour *v.* Seymour, 56 Wis. 314, 14 N. W. 371.

Canada.— Morrison *v.* Thompson, 11 Nova Scotia 411.

See 47 Cent. Dig. tit. "Trover and Conversion," § 228.

Evidence of an actual conversion is admissible after proof of a demand and refusal, for it is only cumulative. Aldrich *v.* Higgins, 77 Conn. 370, 59 Atl. 498; Clark *v.* Hale, 34 Conn. 398.

Evidence of demand is not necessary, upon proof of conversion. Purcell Cotton Seed Oil Mills *v.* Bell, 7 Indian Terr. 717, 104 S. W. 944.

8. *Alabama.*— Baker *v.* Cotney, 150 Ala. 506, 43 So. 786.

California.— Levy *v.* Scott, 115 Cal. 39, 46 Pac. 892.

Indiana.— Walling *v.* Lewis, 119 Ind. 496, 21 N. E. 1108.

Massachusetts.—Munro *v.* Stowe, 175 Mass. 169, 55 N. E. 992.

Michigan.— Adams *v.* Elseffer, 132 Mich. 100, 92 N. W. 772.

Montana.— Proctor *v.* Irvin, 22 Mont. 547, 57 Pac. 183.

New York.— Prior *v.* Morton Boarding Stables, 43 N. Y. App. Div. 140, 59 N. Y. Suppl. 287; Genet *v.* Delaware, etc., Canal Co., 14 N. Y. App. Div. 177, 43 N. Y. Suppl. 589 [*modified* on other grounds in 163 N. Y. 173, 57 N. E. 297]; Ebenreitter *v.* Dahlman, 18 Misc. 351, 41 N. Y. Suppl. 559 [*affirmed* in 19 Misc. 9, 42 N. Y. Suppl. 867].

Vermont.— Lowry *v.* Walker, 5 Vt. 181.

England.— McGrath *v.* Bourne, Ir. R. 10 C. L. 160.

See 47 Cent. Dig. tit. "Trover and Conversion," § 229.

9. *Arkansas.*— Cocke *v.* Cross, 57 Ark. 87, 20 S. W. 913.

Connecticut.— Baldwin *v.* Porter, 12 Conn. 473.

Georgia.— Bigelow *v.* Young, 30 Ga. 121.

Iowa.— Johnson *v.* Tantlinger, 31 Iowa 500.

Michigan.— Smith *v.* Mitchell, 12 Mich. 180.

Montana.— Proctor *v.* Irvin, 22 Mont. 547, 57 Pac. 183.

Nebraska.— Plummer *v.* Green, 49 Nebr. 316, 68 N. W. 500.

New York.— Merchant *v.* Jordan, 3 N. Y. Suppl. 468 [*affirmed* in 125 N. Y. 682, 26 N. E. 750].

Pennsylvania.— Reynolds *v.* Cridge, 131 Pa. St. 189, 18 Atl. 1010.

See 47 Cent. Dig. tit. "Trover and Conversion," § 229.

In trover, after a default, matter which shows that plaintiff had no right to recover, and which might have been given in evidence under the general issue, may avail defendant in mitigation of damages. Collins *v.* Smith, 16 Vt. 9.

maker of a note which has been converted is admissible in mitigation of damages, or rather for the purpose of showing its actual value.[10]

(c) *Value of Converted Property.* After identification of the property in controversy,[11] and proof of conversion thereof by defendant,[12] either party may offer in evidence any facts or circumstances which will fairly inform the jury of the character and condition of the property, and thereby enable them by their experience and the aid of expert testimony, if any be offered, to determine the value,[13]

10. *Alabama.*— McPeters *v.* Phillips, 46 Ala. 496; Mobile Bank *v.* Marston, 7 Ala. 108.

California.— Zeigler *v.* Wells, 23 Cal. 179, 83 Am. Dec. 87.

Dakota.— Los Angeles First Nat. Bank *v.* Dickson, 5 Dak. 286, 40 N. W. 351.

Illinois.— Turner *v.* Retter, 58 Ill. 264.

Indiana.— Harlan *v.* Brown, 4 Ind. App. 319, 30 N. E. 928.

Iowa.— Callanan *v.* Brown, 31 Iowa 333; Latham *v.* Brown, 16 Iowa 118.

New York.— Western R. Co. *v.* Bayne, 75 N. Y. 1 [*affirming* 11 Hun 166]; Booth *v.* Powers, 56 N. Y. 22; Potter *v.* Merchants' Bank, 28 N. Y. 641, 86 Am. Dec. 273; Cothran *v.* Hanover Nat. Bank, 40 N. Y. Super. Ct 401.

Utah.— Walley *v.* Deseret Nat. Bank, 14 Utah 305, 47 Pac. 147.

Vermont.— Robbins *v.* Packard, 31 Vt. 570, 76 Am. Dec. 134.

See 47 Cent. Dig. tit. "Trover and Conversion," § 230.

The rule applies to a bank which has issued certificates of deposit. Los Angeles First Nat. Bank *v.* Dickson, 5 Dak. 286, 40 N. W. 351.

Insolvency of maker cannot be shown where he is defendant in the action (Stephenson *v.* Thayer, 63 Me. 143; Ackerman *v.* Green, 195 Mo. 124, 93 S. W. 255), nor where the action for conversion is brought several months before the maturity of the note (Kellogg *v.* Tompson, 142 Mass. 76, 6 N. E. 860).

When a party places his defense on the insolvency of a third person, it is incumbent on him to prove it (Walrod *v.* Ball, 9 Barb. (N. Y.) 271), for the ability of the maker to pay the note will be presumed until the contrary is proved (Neff *v.* Clute, 12 Barb. (N. Y.) 466). And as the value of commercial paper must depend largely upon the integrity and business habits of those who issue it, the mere fact that the maker of a note, which has been wrongfully converted, has not sufficient property liable to execution to pay it cannot of itself be regarded as a good defense in an action of trover for its wrongful conversion. Rose *v.* Lewis, 10 Mich. 483.

11. Ellis *v.* Thomas, 84 N. Y App. Div. 626, 82 N. Y. Suppl. 1064. See also *supra*, IV, C, 3, b, (VII).

12. Barclay *v.* Smith, (Miss. 1904) 36 So. 449.

13. *California.*— Lehmann *v.* Schmidt, 87 Cal. 15, 25 Pac. 161.

Connecticut.— Barker *v.* S. A. Lewis Storage, etc., Co., 78 Conn. 198, 61 Atl. 363.

Maryland.— Gittings *v.* Winter, 101 Md. 194, 60 Atl. 630.

Massachusetts.— Hallwood Cash Register Co. *v.* Prouty, 196 Mass. 313, 82 N. E. 6.

New Hampshire.— Harvey *v.* Morse, 69 N. H. 475, 45 Atl. 239.

New York.— Booth *v.* Powers, 56 N. Y. 22; Campbell *v.* Campbell, 6 N. Y. St. 806.

Rhode Island.— Woods *v.* Nichols, 21 R. I. 537, 45 Atl. 548, 48 L. R. A. 773.

Tennessee.— Bateman *v.* Ryder, 106 Tenn. 712, 64 S. W. 48, 82 Am. St. Rep. 910.

Texas.— Crawford *v.* Thomason, (Civ. App. 1909) 117 S. W. 181; Crouch Hardware Co. *v.* Walker, 51 Tex. Civ. App. 571, 113 S. W. 163; Consolidated Kansas City Smelting, etc., Co. *v.* Gonzales, 50 Tex. Civ. App. 79, 109 S. W. 946; Puckett *v.* Irick, 27 Tex. Civ. App. 466, 66 S. W. 62; Ellis *v.* Stine, (Civ. App. 1900) 55 S. W. 758.

Vermont.— Hassom *v.* J. E. Safford Lumber Co., 82 Vt. 444, 74 Atl. 197; H. C. Jaquith Co. *v.* Shumway, 80 Vt. 556, 69 Atl. 157.

Wisconsin.— Gauche *v.* Milbrath, 94 Wis. 674, 69 N. W. 999.

See 47 Cent. Dig. tit. "Trover and Conversion," § 231.

General knowledge of witness.— In an action to recover the value of a horse, the jury cannot find its value upon a description of the animal given by witnesses, and from their own general knowledge of the value of horses, without additional evidence. Harrow *v.* St. Paul, etc., R. Co., 43 Minn. 71, 44 N. W. 881.

Facts material to issue of value: Price obtained at an auction sale (Steiner *v.* Tranum, 98 Ala. 315, 13 So. 365; Swartz *v.* Gottliebbouern-Schmidt-Straus Brewing Co., 109 Md. 393, 71 Atl. 851; Baker *v.* Seavey, 163 Mass. 522, 40 N. E. 863, 47 Am. St. Rep. 475; Hutchinson *v.* Poyer, 78 Mich. 337, 44 N. W. 327; Dyer *v.* Rosenthal, 45 Mich. 588, 8 N. W. 560; Davis *v.* Zimmerman, 40 Mich. 24; Parmenter *v.* Fitzpatrick, 48 N. Y. St. 80), but not what was said about the quality of the goods by the bidders (Wessels *v.* Beeman, 87 Mich. 481, 49 N. W. 483). Price for which defendant or his vendee sold the property. Norton *v.* Willis, 73 Me. 580; Flannagan *v.* Maddin, 81 N. Y. 623; Bowdish *v.* Page, 81 Hun (N. Y.) 170, 30 N. Y. Suppl. 691 [*affirmed* in 153 N. Y. 104, 47 N. E. 44]; Shoup *v.* Marks, 128 Fed. 32, 62 C. C. A. 540. Market price of the nearest market place. Scott *v.* Rogers, 31 N. Y. 676; Nauman *v.* Caldwell, 2 Sweeny (N. Y.) 212; Hill *v.* Canfield, 56 Pa. St. 454. That converted bonds were payable in gold. Simpkins *v.* Low, 54 N. Y. 179. Cost of property as a

of the property as of the particular time of the wrongful conversion thereof, as well as at the particular place of its conversion.[14]

c. Weight and Sufficiency[15] — (i) *Degree of Proof Required.* A preponderance of the evidence relating to any material issue in trover is sufficient to sustain it,[16] even when the act of conversion alleged constitutes a crime.[17] Very slight evidence will suffice when not excepted to on the trial.[18]

(ii) *Existence, Identity, and Description of Property.* A general description of the property in controversy, given by witnesses, will suffice, if it enables the jury to identify the property with reasonable certainty and will justify them in returning a verdict for actual damages in some amount.[19]

circumstance (Greenebaum *v.* Taylor, 102 Cal. 624, 36 Pac. 957; Angell *v.* Hopkins, 79 Cal. 181, 21 Pac. 729), but not the cost of goods as the sole basis of their value (Carper *v.* Risdon, 19 Colo. App. 530, 76 Pac. 744). Aggregate value of a number of articles both when all (Illingworth *v.* Greenleaf, 11 Minn. 235) and when a part have been converted (Norton *v.* Willis, 73 Me. 580). Particular value to plaintiff, there being no market value. Burr *v.* Woodrow, 1 Bush (Ky.) 602; Allen *v.* Kinyon, 41 Mich. 281, 1 N. W. 863; Heald *v.* MacGowan, 15 Daly (N. Y.) 233, 5 N. Y. Suppl. 450 [*affirmed* in 117 N. Y. 643, 22 N. E. 1131]. An inventory or appraisal made by defendant (Robinson *v.* Peru Plow, etc., Co., 1 Okla. 140, 31 Pac. 988), but not if made by plaintiff (McGraw *v.* Patterson, 47 Ill. App. 87; Campbell *v.* Campbell, 6 N. Y. St. 806). That the goods were appraised on basis of a forced sale, and would be worth more to one going into business. Dalton *v.* Stiles, 74 Mich. 726, 42 N. W. 169. That the vendee and co-defendant of the wrongdoer paid more than the goods were worth because of very favorable terms given (Stewart *v.* Long, 16 Ind. App. 164, 44 N. E. 63); and the character of a boarding-house and rates paid by the boarders, as to the value of the furniture used therein, which defendant converted (Wilson *v.* Hoffman, 123 Fed. 984 [*reversed* on other grounds in 130 Fed. 694, 65 C. C. A. 14]), but not the reason why plaintiff had ceased to manufacture the article converted (Hallwood Cash Register Co. *v.* Prouty, 196 Mass. 313, 82 N. E. 6).

Evidence was held inadmissible in Storrs *v.* Robinson, 74 Conn. 443, 51 Atl. 135; Tuttle *v.* White, 49 Mich. 407, 13 N. W. 796; Dyer *v.* Rosenthal, 45 Mich. 588, 8 N. W. 560; Bissell *v.* Starr, 32 Mich. 297; Doll *v.* Hennessy Mercantile Co., 33 Mont. 80, 81 Pac. 625; Clements *v.* Eiseley, 63 Nebr. 651, 88 N. W. 871; Wells *v.* Kelsey, 38 Barb. (N. Y.) 242; Puckett *v.* Irick, 27 Tex. Civ. App. 466, 66 S. W. 62; Walley *v.* Deseret Nat. Bank, 14 Utah 305, 47 Pac. 147.

14. Peterson *v.* Gresham, 25 Ark. 380; Hannan *v.* Connett, 10 Colo. App. 171, 50 Pac. 214; Newman *v.* Goddard, 5 Thomps. & C. (N. Y.) 299; Stillwell *v.* Farewell, 64 Vt. 286, 24 Atl. 243; Waters *v.* Langdon, 16 Vt. 570.

Where plaintiff's evidence in trover as to the value of the property converted was confined to the time the property was taken, defendant cannot show that afterward the condition of the property was altered, or its value decreased. Boutwell *v.* Parker, 124 Ala. 341, 27 So. 309.

15. **Evidence** generally see 17 Cyc. 753.

16. Kruse *v.* Seeger, etc., Co., 16 N. Y. Suppl. 529 [*affirming* 15 N. Y. Suppl. 825]; La Crosse Boot, etc., Mfg. Co. *v.* Mons Anderson Co., 13 S. D. 301, 83 N. W. 331; Kinney *v.* Rock Springs First Nat. Bank, 10 Wyo. 115, 67 Pac. 471, 98 Am. St. Rep. 972.

The evidence in the following cases was considered sufficient to sustain judgments in trover: Hunnicutt *v.* Higginbotham, 138 Ala. 472, 35 So. 469, 100 Am. St. Rep. 45; Gray *v.* Eschen, 125 Cal. 1, 57 Pac. 664; Layman *v.* Slocomb, (Del. 1909) 76 Atl. 1094; O'Neill Mfg. Co. *v.* Woodley, 118 Ga. 114, 44 S. E. 980; O'Neill *v.* Everham, 123 Iowa 709, 99 N. W. 580; Parker *v.* Taylor, 180 Mass. 258, 62 N. E. 370; Minneapolis Threshing Mach. Co. *v.* Burton, 94 Minn. 467, 103 N. W. 335; Tillman *v.* International Harvester Co. of America, 93 Minn. 197, 101 N. W. 71; Flour City Nat. Bank *v.* Bayer, 89 Minn. 180, 94 N. W. 557; Woods *v.* Wulf, 84 Minn. 299, 87 N. W. 840; Mann *v.* Lamb, 83 Minn. 14, 85 N. W. 827; Latusek *v.* Davies, 79 Minn. 279, 82 N. W. 587; Dickey *v.* Adler, 143 Mo. App. 326, 127 S. W. 593; Bagwill *v.* Wroughton, 73 Nebr. 298, 102 N. W. 609; Lamkin *v.* Johnson, 72 N. H. 344, 56 Atl. 750; Cohen *v.* Ross, 95 N. Y. App. Div. 96, 88 N. Y. Suppl. 515; Blumenthal *v.* Lewy, 82 N. Y. App. Div. 535, 81 N. Y. Suppl. 528; Arsene *v.* La Fermina, 38 Misc. (N. Y.) 776, 78 N. Y. Suppl. 829; Richman *v.* Blum, 123 N. Y. Suppl. 793; Edmisson *v.* Drumm-Flato Commission Co., 13 Okla. 440, 73 Pac. 958; Burke *v.* Holmes, (Tex. Civ. App. 1904) 80 S. W. 564; Jordan *v.* Coulter, 30 Wash. 116, 70 Pac. 257.

Evidence sufficient to warrant exemplary damages.— Crawford *v.* Thomason, (Tex. Civ. App. 1909) 117 S. W. 181.

17. Bissell *v.* Wert, 35 Ind. 54.

18. Vandercook *v.* O'Connor, 172 Mass. 301, 52 N. E. 444.

Positive testimony is not required where the circumstances adduced will support an inference of the truth of the matter alleged. Vidovich *v.* Scott, (Cal. 1901) 66 Pac. 489; Freedman *v.* Campfield, 92 Mich. 118, 52 N. W. 630; Pease *v.* Smith, 61 N. Y. 477.

19. *California.*— Arnaz *v.* Gassen, 73 Cal. 618, 15 Pac. 316.

(III) *TITLE AND RIGHT TO POSSESSION* — (A) *In General.* Proof of title will suffice as proof of possession until the presumption created thereby is overcome by other evidence.[20] And evidence which raises a necessary implication of ownership will, if not restricted or rebutted, sustain a verdict for plaintiff.[21]

(B) *Possession as Evidence of Ownership.* Actual possession of a chattel, even by one's servant,[22] at the time of the conversion thereof, is sufficient evidence of title in trover against one who shows no title;[23] and possession of land, either

Colorado.— Fairbanks *v.* Kent, 16 Colo. App. 35, 63 Pac. 707.

Massachusetts.— Hall *v.* Burgess, 5 Gray 12.

New York.—American Medicine Co. *v.* Kessler, 66 N. Y. 637 [*reversing* 38 N. Y. Super. Ct. 407]; Connor *v.* Lithauer, 30 Misc. 437, 62 N. Y. Suppl. 594; Schleicher *v.* Wirth, 86 N. Y. Suppl. 265.

Texas.— Barker *v.* Merchants' Nat. Bank, (Civ. App. 1897) 40 S. W. 171.

See 47 Cent. Dig. tit. "Trover and Conversion," § 233.

A more ample and accurate description will be required of a plaintiff who has, or by reasonable diligence might have, the evidence therefor. Maben *v.* Scott, 12 Colo. App. 119, 54 Pac. 800; Syck *v.* Bossingham, 120 Iowa 363, 94 N. W. 920; Uvalde Nat. Bank *v.* Dockery, (Tex. Civ. App. 1904) 83 S. W. 29; Marshall First Nat. Bank *v.* Myer, 23 Tex. Civ. App. 302, 56 S. W. 213.

Very slight evidence in kind and quantity will be sufficient where defendant is shown to have received plaintiff's goods and failed to produce them. Great Western R. Co. *v.* Gurton, 1 F. & F. 359.

A stock certificate may be identified by a description of the transactions of which it was the subject-matter. Phelan *v.* Vestner, 125 Ga. 825, 54 S. E. 697.

Evidence of identity of property insufficient. Monroe County *v.* Driskell, 3 Ga. App. 583, 60 S. E. 293.

20. Guernsey *v.* Fulmer, 66 Kan. 767, 71 Pac. 578; Ricards *v.* Wedemeyer, 75 Md. 10, 22 Atl. 1101; Kerner *v.* Boardman, 14 N. Y. Suppl. 787 [*affirmed* in 133 N. Y. 539, 30 N. E. 1148].

21. **Evidence sufficient** to sustain a finding of title and right of possession in plaintiff. Hall *v.* Cole, (Cal. 1894) 38 Pac. 894; Mortimer *v.* Marder, 93 Cal. 172, 28 Pac. 814; Wilson *v.* Griswold, 79 Conn. 18, 63 Atl. 659; Abercrombie *v.* Norris, 130 Ga. 680, 61 S. E. 532; Johnson *v.* Truitt, 122 Ga. 327, 50 S. E. 135; Ewell *v.* Gillis, 14 Me. 72; Westheimer *v.* State Loan Co., 195 Mass. 510, 81 N. E. 289; Minnesota Security Bank *v.* Fogg, 148 Mass. 273, 19 N. E. 378; Cheney *v.* Pierce, 7 Allen (Mass.) 485; Bibb *v.* Roth, 101 Minn. 111, 111 N. W. 919; Linde *v.* Gaffke, 81 Minn. 304, 84 N. W. 41; Bradley *v.* Spofford, 23 N. H. 444, 55 Am. Dec. 205; Merchant *v.* Jordan, 125 N. Y. 682, 26 N. E. 750 [*affirmed* in 3 N. Y. Suppl. 468]; Enggren *v.* Prinz, 15 N. Y. Suppl. 477; Andrews *v.* Rigsbee, 104 N. C. 156, 10 S. E. 251; Slattery *v.* Donnelly, 1 N. D. 264, 47 N. W. 375; Miles *v.* North Pac. Lumber Co., 38 Oreg. 556, 64 Pac. 303; Comeau *v.* Hurley, 22 S. D. 79, 115 N. W. 521; Bateman *v.* Ryder, 106 Tenn. 712, 64 S. W. 48, 82 Am. St. Rep. 910; Cooper *v.* Hiner, (Tex. Civ. App. 1896) 36 S. W. 915; Warshowsky *v.* Rosengarten, 134 Wis. 288, 114 N. W. 497; Burrowes *v.* Cairns, 2 U. C. Q. B. 288.

Evidence of title and right of possession insufficient.— Patterson *v.* Irvin, 132 Ala. 557, 31 So. 474; Maudlin *v.* Clark, 79 Cal. 51, 21 Pac. 361; Mitchell *v.* Reed, 16 Colo. 109, 26 Pac. 342; Raines *v.* Perryman, 29 Ga. 529; Gilmore *v.* Watson, 23 Ga. 63; Wisner *v.* Bias, 43 Kan. 458, 23 Pac. 586; Stewart *v.* Spedden, 5 Md. 433; Solomon *v.* Widner, 117 Mich. 524, 76 N. W. 5; Patrick *v.* Howard, 47 Mich. 40, 10 N. W. 71; Goss *v.* Meehan, 83 Minn. 178, 85 N. W. 1010; Freck *v.* Hughes, 90 Hun (N. Y.) 16, 35 N. Y. Suppl. 460; Price *v.* Murray, 10 Bosw. (N. Y.) 243; Clark *v.* Levine, 33 Misc. (N. Y.) 598, 67 N. Y. Suppl. 968; McLaughlin *v.* Harriot, 14 Misc. (N. Y.) 343, 35 N. Y. Suppl. 684; Erlanger *v.* Sprung, 113 N. Y. Suppl. 16; Tankins *v.* Berger, 107 N. Y. Suppl. 873; Lustbader *v.* George A. Fuller Co., 90 N. Y. Suppl. 297; Walker *v.* Farrell, 84 N. Y. Suppl. 182; Pacific Live Stock Co. *v.* Isaacs, 52 Oreg. 54, 96 Pac. 460; Lewis *v.* Davidson, (Tex. Civ. App. 1895) 29 S. W. 403; Johnson *v.* Ashland Lumber Co., 47 Wis. 326, 2 N. W. 552; Melling *v.* Kelshaw, 1 Cromp. & J. 184, 9 L. J. Exch. O. S. 45, 1 Tyrw. 109; Royston *v.* Hankey, 3 Moore & S. 381, 30 E. C. L. 518. See 47 Cent. Dig. tit. "Trover and Conversion," § 234.

Proof of seizure under an execution is sufficient evidence of title in the officer (Blackley *v.* Sheldon, 7 Johns. (N. Y.) 32), and the officer's return on his writ is *prima facie* evidence of a levy (Williams *v.* Herndon, 12 B. Mon. (Ky.) 484, 54 Am. Dec. 551); but a vendee under the execution, in trover against a stranger, must support the execution and return thereon by the judgment on which it was issued (Yates *v.* St. John, 12 Wend. (N. Y.) 74; Park *v.* Humphrey, 14 U. C. C. P. 209).

22. Goodwin *v.* Garr, 8 Cal. 615.

23. *Alabama.*— Donnell *v.* Thompson, 13 Ala. 440.

Massachusetts.— Simpson *v.* Carleton, 14 Gray 506.

New Hampshire.—Pinkham *v.* Gear, 3 N. H. 484; Jones *v.* Sinclair, 2 N. H. 319, 9 Am. Dec. 75.

New York.— Oney *v.* Pomfrey, 54 Misc. 171, 105 N. Y. Suppl. 860.

Oregon.— Harvey *v.* Lidvall, 48 Oreg. 558, 87 Pac. 895.

under a title or a claim of title, is sufficient proof of ownership in an action for the conversion of crops or timber asported therefrom.[24]

(IV) *CONVERSION* — (A) *In General.* Any evidence of an act of ownership or control wrongfully exercised over plaintiff's property will suffice as proof of a conversion.[25] Where a defendant continues to hold the property after the action

United States.— Eiseman *v.* Maul, 8 Fed. Cas. No. 4,322.

See 47 Cent. Dig. tit. "Trover and Conversion," § 235.

A brief possession of property, accompanied by acts of dominion over it, will not justify a jury in finding a transfer of property, where no acquiescence of the former owner in such possession is shown. Tompkins *v.* Haile, 3 Wend. (N. Y.) 406.

24. Dorcey *v.* Patterson, 7 Iowa 420; Watson *v.* Gross, 112 Mo. App. 615, 87 S. W. 104; Russell *v.* Willette, 80 Hun (N. Y.) 497, 30 N. Y. Suppl. 490.

25. *Alabama.*— Freeman *v.* Scurlock, 27 Ala. 407.

Arkansas.— Sunny South Lumber Co. *v.* Neimeyer Lumber Co., 63 Ark. 268, 38 S. W. 902.

California.— Hall *v.* Susskind, 120 Cal. 559, 53 Pac. 46.

Connecticut.— Semon *v.* Adams, 79 Conn. 81, 63 Atl. 661.

Delaware.— Layman *v.* Slocomb, (1909) 76 Atl. 1094.

Georgia.— Mercier *v.* Mercier, 43 Ga. 323; Maxwell *v.* Harrison, 8 Ga. 61, 52 Am. Dec. 385.

Illinois.— Brownback *v.* Vandeveer, 40 Ill. App. 149.

Indian Territory.—Purcell Cotton Seed Oil Mills *v.* Bell, 7 Indian Terr. 717, 104 S. W. 944.

Iowa.— Krager *v.* Pierce, 73 Iowa 359, 35 N. W. 477.

Kansas.— Rainer *v.* Cooper, 44 Kan. 762, 25 Pac. 186.

Kentucky.— Marcum *v.* Beime, 6 J. J. Marsh. 603.

Maine.— Dickey *v.* Franklin Bank, 32 Me. 572.

Massachusetts.— Devlin *v.* Houghton, 202 Mass. 75, 88 N. E. 580; Philbrook *v.* Eaton, 134 Mass. 398; Korbe *v.* Barbour, 130 Mass. 255; Polley *v.* Lenox Iron Works, 4 Allen 329.

Michigan.—Witherspoon *v.* Clegg, 42 Mich. 484, 4 N. W. 209; Bissell *v.* Starr, 32 Mich. 297.

Minnesota.— Danvers Farmers' El. Co. *v.* Johnson, 96 Minn. 272, 104 N. W. 899; Brown *v.* Bayer, 95 Minn. 472, 104 N. W. 225, 91 Minn. 140, 97 N. W. 736; Hodge *v.* Eastern R. Co., 70 Minn. 193, 72 N. W. 1074; Pound *v.* Pound, 64 Minn. 428, 67 N. W. 200; Clark *v.* C. N. Nelson Lumber Co., 34 Minn. 289, 25 N. W. 628.

Missouri.— Ireland *v.* Horseman, 65 Mo. 511; Fackler *v.* Chapman, 20 Mo. 249; Speed *v.* Herrin, 4 Mo. 356; Moran Bolt, etc., Mfg. Co. *v.* Midland Valley R. Co., 120 Mo. App. 626, 97 S. W. 628. See also Dickey *v.* Adler, 143 Mo. App. 326, 127 S. W. 593.

Nebraska.— Fike *v.* Ott, 76 Nebr. 439, 107 N. W. 774.

New York.—Vroom *v.* Sage, 184 N. Y. 542, 76 N. E. 1111 [*affirming* 100 N. Y. App. Div. 285, 91 N. Y. Suppl. 456]; Kilmer *v.* Hutton, 131 N. Y. App. Div. 625, 116 N. Y. Suppl. 127; Frishberg *v.* Wissner, 125 N. Y. App. Div. 627, 110 N. Y. Suppl. 4; Pashinska *v.* Selt, 20 Misc. 665, 46 N. Y. Suppl. 253; Boyle *v.* Williams, 1 Misc. 112, 20 N. Y. Suppl. 727; Suesskind-Schatz Co. *v.* Loria, 99 N. Y. Suppl. 427; Haas *v.* Altieri, 19 N. Y. Suppl. 687 [*affirmed* in 2 Misc. 252, 21 N. Y. Suppl. 950].

North Dakota.— McFadden *v.* Thorpe El. Co., (1908) 118 N. W. 242.

Oregon.— Goltra *v.* Penland, 42 Oreg. 18, 69 Pac. 925; Ferrera *v.* Parke, 19 Oreg. 141, 23 Pac. 883.

South Carolina.—West *v.* Tupper, 1 Bailey 193.

South Dakota.— Mossteller *v.* Holborn, 20 S. D. 545, 108 N. W. 13.

Texas.— Ripy *v.* Less, (Civ. App. 1909) 118 S. W. 1084; Allen *v.* Tyson-Jones Buggy Co., (Civ. App. 1897) 40 S. W. 740.

Utah.— Rich *v.* Utah Commercial, etc., Bank, 30 Utah 334, 84 Pac. 1105.

Vermont.— Seward *v.* Heflin, 20 Vt. 144.

Washington.— Guggenheime *v.* Youell, 53 Wash. 163, 101 Pac. 711.

Wisconsin.— Steele *v.* Schricker, 55 Wis. 134, 12 N. W. 396; Kimball *v.* Post, 44 Wis. 471.

England.— Needham *v.* Rawbone, 6 Q. B. 771 note, 9 Jur. 274, 51 E. C. L. 771; Burroughes *v.* Bayne, 5 H. & N. 296, 29 L. J. Exch. 185, 2 L. T. Rep. N. S. 16.

See 47 Cent. Dig. tit. "Trover and Conversion," § 236.

Illustrations.— An officer's return showing that he took possession of chattels and sold them before the trial of an action to determine the title sustains trover against plaintiff in the action in which the writ of attachment was issued. Schluter *v.* Jacobs, 10 Colo. 449, 15 Pac. 813. A warehouseman's sale of grain, without notice to the owner, is sufficient proof of a conversion, notwithstanding defendant's allegation that the sale was made necessary by the inroads of insects. Jordan *v.* Shireman, 28 Ind. 136. An admission by defendant that he has lost the goods is sufficient evidence of a conversion, without demand and refusal. La Place *v.* Aupoix, 1 Johns. Cas. (N. Y.) 407. A public officer, upon being required to make a report of the receipts of his office and to pay the same into the state treasury, replied that he had received no money belonging to the state. This reply was sufficient evidence of a conversion of all of the money of the state which had come into his hands, as fast as received. People *v.* Van Ness, 79 Cal. 84, 21 Pac. 554, 12 Am. St. Rep. 134. That wood was one day in plaintiff's possession and two days

has been commenced, very slight evidence of conversion will suffice.[26] But the proffered evidence of a conversion will be insufficient if it would not sustain a verdict, or if the jury find that the acts and conduct of defendant do not amount to a denial of plaintiff's ownership or a deprivation to him of his property.[27]

(B) *Time of Conversion. Prima facie* the date of conversion is the day when the goods were wrongfully taken.[28] Evidence which discloses a conversion after the institution of the action, or within a period which began prior to, and terminated after, that event, is insufficient.[29]

(C) *Connection of Defendant With Act of Conversion.* The connection of defendant with a conversion will be sufficiently shown by proof of any facts or circumstances which will justify an inference that he assisted in wrongfully taking the goods, shared in the proceeds thereof with guilty knowledge, or participated in some act which in law amounted to a conversion.[30]

afterward in the unexplained possession of defendant is sufficient to sustain a finding of a conversion. Thomas *v.* Steele, 22 Wis. 207.

26. Fowler *v.* Stuart, 1 McCord (S. C.) 504.

In Georgia, under Code, § 2974, if it appears that defendant was in possession of the property when the action was commenced no evidence of conversion is necessary. Mercier *v.* Mercier, 43 Ga. 323.

Demand and refusal are *prima facie* proof of conversion. Layman *v.* Slocomb, (Del. 1909) 76 Atl. 1094.

27. *Alabama.*— Louisville, etc., R. Co. *v.* Scheinert, 156 Ala. 411, 47 So. 293.

California.—Martin *v.* Barry, 145 Cal. 540, 79 Pac. 66; Gray *v.* Eschen, 125 Cal. 1, 57 Pac. 664.

Colorado.— Beaton *v.* Wade, 14 Colo. 4, 22 Pac. 1093.

Georgia.— Sawyer *v.* Kenan, 95 Ga. 552, 22 S. E. 324.

Indiana.— Sloan *v.* Lick Creek, etc., Gravel Road Co., 6 Ind. App. 584, 33 N. E. 997.

Kentucky.— Litell *v.* Pettit, 81 S. W. 237, 26 Ky. L. Rep. 323.

Minnesota.— Pound *v.* Pound, 64 Minn. 428, 67 N. W. 200.

Missouri.— Southwestern Port Huron Co. *v.* Cobble, 124 Mo. App. 647, 102 S. W. 9.

Nebraska.— Cather *v.* Damerell, 5 Nebr. (Unoff.) 175, 97 N. W. 623.

New York.— Race *v.* Moore, 34 Misc. 170, 68 N. Y. Suppl. 792; Fertitta *v.* Schnurmacher, 117 N. Y. Suppl. 161; Siegel *v.* Aiken, 104 N. Y. Suppl. 778; Hartman *v.* Hicks, 28 Misc. 527, 59 N. Y. Suppl. 529; Flanagan *v.* O'Brien, 19 N. Y. Suppl. 738; Panama R. Co. *v.* Johnson, 17 N. Y. Suppl. 777; Marvin Safe Co. *v.* Foss, 17 N. Y. Suppl. 517; Goldberg *v.* Wolff, 10 N. Y. Suppl. 544.

Oregon.—Willis *v.* Holmes, 28 Oreg. 583, 42 Pac. 988.

Pennsylvania.— Sefler *v.* Union Furniture Co., 36 Pa. Super. Ct. 636.

South Carolina.— Hoover *v.* Alexander, 1 Bailey 510.

Tennessee.— Trousdale *v.* Thomas, 3 Lea 715.

Texas.—Houston Transfer Co. *v.* Lee, (Civ. App. 1906) 97 S. W. 842; Mississippi Mills *v.* Bauman, 12 Tex. Civ. App. 312, 34 S. W. 681.

Vermont.— Nutt *v.* Wheeler, 30 Vt. 436, 73 Am. Dec. 316.

Wisconsin.— Thomas *v.* Seely, 40 Wis. 468.

England.— Attersol *v.* Briant, 1 Campb. 409; Glover *v.* London, etc., R. Co., 5 Exch. 66, 19 L. J. Exch. 172.

Canada.—Barrett *v.* Suttis, 17 Nova Scotia 262; Brown *v.* Allen, 3 U. C. Q. B. 57.

See 47 Cent. Dig. tit. "Trover and Conversion," § 236.

Evidence showing plaintiff's ratification of defendant's acts is sufficient to defeat recovery. Reynolds Banking Co. *v.* Neisler, 130 Ga. 789, 61 S. E. 828.

A refusal to take property back to plaintiff is insufficient proof of a conversion where plaintiff had permission to remove it himself. Brown *v.* Boyce, 68 Ill. 294; Hewett *v.* Sessions, 119 Mass. 221; O'Connell *v.* Jacobs, 115 Mass. 21; Poor *v.* Oakman, 104 Mass. 309.

28. Parker *v.* Harden, 121 N. C. 57, 28 S. E. 20.

29. Plott *v.* Robertson, (Ala. 1905) 39 So. 771; Hawkins Lumber Co. *v.* Bray, 105 Ala. 655, 17 So. 96; Storm *v.* Livingston, 6 Johns. (N. Y.) 44; Cory *v.* Barnes, 63 Vt. 456, 21 Atl. 384.

30. *Indiana.*— Hogue *v.* McClintock, 76 Ind. 205.

Michigan.—Moret *v.* Mason, 106 Mich. 340, 64 N. W. 193.

New Hampshire.— Stevens *v.* Eames, 22 N. H. 568; Walcott *v.* Keith, 22 N. H. 196.

New York.—Friedman *v.* Phillips, 84 N. Y. App. Div. 179, 82 N. Y. Suppl. 96.

Tennessee.— Huffman *v.* Hughlett, 11 Lea 549.

See 47 Cent. Dig. tit. "Trover and Conversion," § 237.

Evidence of conversion by defendant's agent is sufficient. Three States Lumber Co. *v.* Blanks, 118 Tenn. 627, 102 S. W. 79.

Evidence held insufficient to connect defendant with the conversion complained of see Paden *v.* Bellenger, 87 Ala. 575, 6 So. 351; Fike *v.* Davis, 5 Ind. App. 1, 31 N. E. 553; Mead *v.* Chase, 89 Hun (N. Y.) 607, 34 N. Y. Suppl. 1062; Cobb *v.* Dows, 9 Barb. (N. Y.) 230 [*reversed* in 10 N. Y. 335]; Wilmot *v.* Richardson, 7 Bosw. (N. Y.) 570; Smith *v.* Carr, 1 Heisk. (Tenn.) 173; Lay *v.* Huddleston, 1 Heisk. (Tenn.) 167; Le Veaux *v.* Trader, (Tex. Civ. App. 1895) 31 S. W.

(v) *Value of Converted Property.* A verdict for nominal damages will be sustained, if an actual conversion has been proved, even though evidence as to the value of the property converted be entirely wanting;[31] but a verdict for more than nominal damages will be reversed if there be no evidence of value, or the evidence be too indefinite, uncertain, or weak to sustain a judgment.[32]

D. Damages — 1. Grounds and Elements of Compensatory Damages — a. In General — (i) *Measure of Damages in General.* The actual loss or injury suffered by plaintiff is in general the measure of damages in an action for a conversion.[33] If the conversion be a technical one, or if no actual loss be shown, defendant will nevertheless be liable for nominal damages.[34] Double damages,

435; Everest *v.* Wood, 1 C. & P. 75, 12 E. C. L. 53.

31. Bowers *v.* Bradley, 112 Iowa 537, 84 N. W. 534; Douglass *v.* Hobe, 36 N. Y. App. Div. 638, 55 N. Y. Suppl. 849; Connoss *v.* Meir, 2 E. D. Smith (N. Y.) 314. See also Miller *v.* Reigne, 2 Hill (S. C.) 592.

An allegation of value is not a traversable fact, and plaintiff must therefore put in evidence of value, even in a default case. Duffus *v.* Bangs, 61 Hun (N. Y.) 23, 15 N. Y. Suppl. 444.

A description of the property which will enable the jury to determine its value from their own knowledge will suffice as proof of value. Pharis *v.* Carver, 13 B. Mon. (Ky.) 236.

32. *Alabama.*— Electric Lighting Co. *v.* Rust, 131 Ala. 484, 31 So. 486.

Colorado.— Sigel-Campion Live Stock Co. *v.* Holly, 44 Colo. 580, 101 Pac. 68, holding that the amount of proceeds of the sale of cattle by defendant could not be taken as the market value thereof in support of a verdict for plaintiff for such amount.

Georgia.— Bell *v.* G. Ober, etc., Co., 96 Ga. 214, 23 S. E. 7; Brock *v.* Garrett, 16 Ga. 487.

Mississippi.— Greenville First Nat. Bank *v.* Montgomery, 70 Miss. 550, 13 So. 242.

Montana.— Kipp *v.* Silverman, 25 Mont. 296, 64 Pac. 884.

New York.— Kramer *v.* Haeger Storage Warehouse Co., 123 N. Y. App. Div. 316, 108 N. Y. Suppl. 1; Willets *v.* Curth, 102 N. Y. App. Div. 616, 92 N. Y. Suppl. 174; Cohnfeld *v.* Walsh, 2 N. Y. App. Div. 190, 37 N. Y. Suppl. 833; Starr *v.* Cragin, 24 Hun 177; Imhorst *v.* Burke, 7 Daly 54; Connoss *v.* Meir, 2 E. D. Smith 314; J. L. Mott Iron Works *v.* Reilly, 39 Misc. 833, 81 N. Y. Suppl. 323; Liebman *v.* Abramson, 38 Misc. 807, 78 N. Y. Suppl. 881; O'Neill *v.* Patterson, 26 Misc. 3, 55 N. Y. Suppl. 617; Sinnette *v.* Hoddick, 10 Misc. 586, 31 N. Y. Suppl. 453; Swartz *v.* Rosseau, 112 N. Y. Suppl. 1065.

Rhode Island.— Canning *v.* Owen, 22 R. I. 624, 48 Atl. 1033, 84 Am. St. Rep. 858.

Texas.— Lincoln *v.* Packard, 25 Tex. Civ. App. 22, 60 S. W. 682.

See 47 Cent. Dig. tit. "Trover and Conversion," § 242.

Evidence of value of converted property was held to be sufficient in Baker *v.* Hutchinson, 147 Ala. 636, 41 So. 809; Mortimer *v.* Marder, 93 Cal. 172, 28 Pac. 814; Fairbanks *v.* Kent, 16 Colo. App. 35, 63 Pac. 707; Beatty *v.* Randall, 5 Allen (Mass.) 441; Cunningham *v.* O'Connor, 136 Mich. 293, 99 N. W. 25; Humphreys *v.* Minnesota Clay Co., 94 Minn. 469, 103 N. W. 338; American Express Co. *v.* Piatt, 51 Minn. 568, 53 N. W. 877; Brown *v.* Lawton, 2 Silv. Sup. (N. Y.) 37, 6 N. Y. Suppl. 137 [*affirmed* in 127 N. Y. 680, 28 N. E. 256]; Gillett *v.* Gillett, 54 N. Y. Super. Ct. 525 [*affirmed* in 118 N. Y. 672, 23 N. E. 1145]; Oney *v.* Pomfrey, 54 Misc. (N. Y.) 171, 105 N. Y. Suppl. 860; Rosenkranz *v.* Jacobowitz, 50 Misc. (N. Y.) 580, 99 N. Y. Suppl. 469; Muller *v.* Ryan, 2 N. Y. Suppl. 736; Bateman *v.* Ryder, 106 Tenn. 712, 64 S. W. 48, 82 Am. St. Rep. 910; Rabe *v.* Jourdan, 46 Tex. Civ. App. 456, 102 S. W. 1167; Messenger *v.* Murphy, 33 Wash. 353, 74 Pac. 480; Lines *v.* Alaska Commercial Co., 29 Wash. 133, 69 Pac. 642.

Evidence insufficient in New Liverpool Salt Co. *v.* Western Salt Co., 151 Cal. 479, 91 Pac. 152; Catlett *v.* Stokes, 21 S. D. 108, 110 N. W. 84.

33. *Alabama.*— Strong *v.* Strong, 6 Ala. 345; Gray *v.* Crocheron, 8 Port. 191.

Connecticut.— Curtis *v.* Ward, 20 Conn. 204.

Maryland.— Harker *v.* Dement, 9 Gill 7, 52 Am. Dec. 670.

Michigan.— Dalton *v.* Laudahn, 27 Mich. 529.

Minnesota.— Sutton *v.* Great Northern R. Co., 99 Minn. 376, 109 N. W. 815.

New Jersey.— Hopple *v.* Higbee, 23 N. J. L. 342.

New York.— Felts *v.* Collins, 67 N. Y. App. Div. 430, 73 N. Y. Suppl. 796; Newman *v.* Munk, 36 Misc. 639, 74 N. Y. Suppl. 467.

Rhode Island.— Woods *v.* Nichols, 22 R. I. 225, 47 Atl. 211. See also Woods *v.* Nichols, 21 R. I. 537, 45 Atl. 548, 48 L. R. A. 773.

Texas.— Hanaway *v.* Wiseman, 39 Tex. Civ. App. 642, 88 S. W. 437.

England.— Sowell *v.* Champion, 6 A. & E. 407, 7 L. J. Q. B. 197, 2 N. & P. 627, W. W. & D. 667, 33 E. C. L. 226, 112 Eng. Reprint 156; Chinery *v.* Viall, 5 H. & N. 288, 29 L. J. Exch. 180, 8 Wkly. Rep. 629.

Canada.— Boucher *v.* Shewan, 14 U. C. C. P. 419.

See 47 Cent. Dig. tit. "Trover and Conversion," § 246; and Damages, 13 Cyc. 170.

Where an action of replevin has been changed to trover the same rule of damages must prevail as in all actions of trover. McGavock *v.* Chamberlain, 20 Ill. 219.

34. Stroup *v.* Bridger, 124 Iowa 401, 100 N. W. 113; Douglass *v.* Hobe, 36 N. Y. App. Div. 638, 55 N. Y. Suppl. 849; Hiort *v.* London, etc., R. Co., 4 Ex. D. 188, 48 L. J.

which are purely statutory, are allowed only when defendant acted in bad faith.[35]

(II) *As Affecting Liability For Costs.* Damages in trover are given as a compensation for property converted, and should not be affected in amount by the right of one party to receive, or the liability of the other to pay, costs.[36]

(III) *Amount Received by Defendant.* The measure of damages in case of the conversion of money or its equivalent is the amount thereof with interest.[37] In the case of the conversion of property which has been reduced to money by defendant the measure of damages is also the amount received with interest.[38]

(IV) *Special Property or Qualified Right of Plaintiff.* A plaintiff who had only a special property or qualified interest in goods which have been converted can recover only the value of such property or interest, not exceeding, however, the value of the goods, against a defendant who held the title to, or was entitled to the remaining interest in, the goods;[39] but as against a stranger

Exch. 545, 40 L. T. Rep. N. S. 674, 27 Wkly. Rep. 778; Johnson *v.* Stear, 15 C. B. N. S. 330, 10 Jur. N. S. 99, 33 L. J. C. P. 130, 9 L. T. Rep. N. S. 538, 12 Wkly. Rep. 347, 109 E. C. L. 330; Shipman *v.* Shipman, 5 U. C. C. P. 358. See, generally, Damages, 13 Cyc. 14.

35. Springer *v.* Jenkins, 47 Oreg. 502, 84 Pac. 479.

36. McConnell *v.* Linton, 4 Watts (Pa.) 357.

37. Hayes *v.* Massachusetts Mut. L. Ins. Co., 125 Ill. 626, 18 N. E. 322, 1 L. R. A. 303; McShane *v.* Howard Bank, 73 Md. 135, 20 Atl. 776, 10 L. R. A. 552.

Interest as element of damage see *infra*, IV, D, 1, a, (IX).

If defendant made profits greater than the legal rate of interest, plaintiff may recover such profits. State Bank *v.* Burton, 27 Ind. 426; Black *v.* Black, (Tex. Civ. App. 1902) 67 S. W. 928 [*reversed* on other grounds in 95 Tex. 627, 69 S. W. 65].

38. *Georgia.*— Wyly *v.* Burnett, 43 Ga. 438.

Massachusetts.— Kennedy *v.* Whitwell, 4 Pick. 466.

Minnesota.—Chase *v.* Blaisdell, 4 Minn. 90.

Nebraska.— McCready *v.* Phillips, 44 Nebr. 790, 63 N. W. 7.

New York.— Keiley *v.* Mechanics', etc., Bank, 72 Hun 168, 25 N. Y. Suppl. 556 [*affirmed* in 144 N. Y. 702, 39 N. E. 857].

Pennsylvania.—Jacoby *v.* Laussatt, 6 Serg. & R. 300.

South Carolina.—Ewart *v.* Kerr, 2 McMull. 141.

Wisconsin.— Ingram *v.* Rankin, 47 Wis. 406, 2 N. W. 755, 32 Am. Rep. 762.

New Zealand.— *In re* Waters, *Ex parte* Hodgins, 5 New Zealand L. Rep. 431.

See 47 Cent. Dig. tit. "Trover and Conversion," § 247.

The reduction to money must be by the act of conversion itself, for if defendant convert the property and afterward dispose of it the value at time of conversion will govern. See *infra*, IV, D, 1, b.

Where defendant's dealing with property under an erroneous construction of a contract constitutes a conversion, the damages cannot be adjusted independently of the rights of the parties under the contract. Story, etc., Commercial Co. *v.* Story, 100 Cal. 30, 34 Pac. 671.

39. *Alabama.*— Ryan *v.* Young, 147 Ala. 660, 41 So. 954; Karter *v.* Fields, 130 Ala. 430, 30 So. 504; McGowen *v.* Young, 2 Stew. 276.

Colorado.— Cramer *v.* Marsh, 5 Colo. App. 302, 38 Pac. 612.

Georgia.— Horne *v.* Guiser Mfg. Co., 74 Ga. 790; Guilford *v.* McKinley, 61 Ga. 230; Clark *v.* Bell, 61 Ga. 147; Russell *v.* Kearney, 27 Ga. 96.

Kentucky.— Linville *v.* Black, 5 Dana 176.

Maine.— Bradley Land, etc., Co. *v.* Eastern Mfg. Co., 104 Me. 203, 71 Atl. 710; Tower *v.* Haslam, 84 Me. 86, 24 Atl. 587.

Maryland.— Penniman *v.* Winner, 54 Md. 127.

Massachusetts.—White *v.* Allen, 133 Mass. 423; Chamberlin *v.* Shaw, 18 Pick. 278, 29 Am. Dec. 586.

Michigan.—Wright *v.* Starks, 77 Mich. 221, 43 N. W. 868.

Nebraska.— Lusch *v.* Huber Mfg. Co., 79 Nebr. 45, 112 N. W. 284.

New Hampshire.— Harvey *v.* Morse, 69 N. H. 475, 45 Atl. 239.

New York.— Fowler *v.* Haynes, 91 N. Y. 346 [*overruling* in effect Buck *v.* Remsen, 34 N. Y. 383]; Van Schaick *v.* Ramsey, 90 Hun 550, 35 N. Y. Suppl. 1006; Einstein *v.* Dunn, 61 N. Y. App. Div. 195, 70 N. Y. Suppl. 520 [*affirmed* in 171 N. Y. 648, 63 N. E. 1116]; Frost *v.* Willard, 9 Barb. 440; Roberts *v.* Kain, 6 Rob. 354; Spoor *v.* Holland, 8 Wend. 445, 24 Am. Dec. 37. *Compare* Ingersoll *v.* Van Bokkelin, 7 Cow. 670 [*reversed* in 5 Wend. 315].

Rhode Island.— Canning *v.* Owen, 22 R. I. 624, 48 Atl. 1033, 84 Am. St. Rep. 858; Woods *v.* Nichols, 22 R. I. 225, 47 Atl. 211; Warner *v.* Vallily, 13 R. I. 483. See also Woods *v.* Nichols, 21 R. I. 537, 45 Atl. 548, 48 L. R. A. 773.

Wisconsin.—Wheeler *v.* Pereles, 40 Wis. 424.

United States.— Benjamin *v.* Kennedy, 142 Fed. 1027.

who had neither title nor right of possession plaintiff may recover the full value of the converted property.[40]

(v) *Depreciation of Property.* The depreciation and deterioration of property between the dates of its conversion and return to plaintiff are proper elements of damages.[41]

(vi) *Wrongful Use of Converted Property.* No damages are recoverable for any wrongful or injurious use made of converted property by defendant after the conversion alleged.[42]

(vii) *Cost of Replacing Property.* The cost of replacing property is not a proper measure of damages,[43] except in cases of conversion of shares of stock,[44] of property having no market value,[45] or where plaintiff was compelled to procure other goods to fill a previously made contract or supply an immediate need of an article specially manufactured.[46]

(viii) *Value of Use of Property.* As a general rule the value of the use of the property which has been converted and not returned is neither a proper measure nor a proper item of damages.[47] But the lessee of a chattel who has been deprived of it by the wrongful act of the lessor may recover in trover the value of the use of the chattel for the remainder of the term.[48] And an owner may recover the value of the use of a chattel during the period intervening between its conversion and return to him,[49] or between an original wrongful and a subsequent rightful detention or taking.[50]

(ix) *Interest.*[51] Interest is recoverable upon the value of the property from the time of conversion to the rendition of the verdict.[52] In some states

England.—Brierly *v.* Kendall, 17 Q. B. 937, 79 E. C. L. 937; Cameron *v.* Wynch, 2 C. & K. 264, 61 E. C. L. 264; Chinery *v.* Viall, 5 H. & N. 288, 29 L. J. Exch. 180, 8 Wkly. Rep. 629.

See 47 Cent. Dig. tit. "Trover and Conversion," § 248.

A conditional vendor who has the right of reclaiming the goods may recover the full value thereof from a third person who has converted them, although the vendee under whom defendant claims had made partial payments. Brown *v.* Haynes, 52 Me. 578; Angier *v.* Tauton Paper Mfg. Co., 1 Gray (Mass.) 621, 61 Am. Dec. 436. See, generally, Sales, 35 Cyc. 696.

40. Colcord *v.* McDonald, 128 Mass. 470; Ullman *v.* Barnard, 7 Gray (Mass.) 554; Chamberlin *v.* Shaw, 18 Pick. (Mass.) 278, 29 Am. Dec. 586; Einstein *v.* Dunn, 171 N. Y. 648, 63 N. E. 1116 [*affirming* 61 N. Y. App. Div. 195, 70 N. Y. Suppl. 520]; Guttner *v.* Pacific Steam Whaling Co., 96 Fed. 617; Johnson *v.* Lancashire, etc., R. Co., 3 C. P. D. 499, 39 L. T. Rep. N. S. 448, 27 Wkly. Rep. 459; Turner *v.* Hardcastle, 11 C. B. N. S. 683, 31 L. J. C. P. 193, 5 L. T. Rep. N. S. 748, 103 E. C. L. 683.

41. Shotwell *v.* Wendover, 1 Johns. (N. Y.) 65; Aylesbury Mercantile Co. *v.* Fitch, 22 Okla. 475, 99 Pac. 1089, 23 L. R. A. N. S. 573; Muenster *v.* Fields, 89 Tex. 102, 33 S. W. 852 [*overruling* Schoolher *v.* Hutchins, 66 Tex. 324, 1 S. W. 266; Casey *v.* Chaytor, 5 Tex. Civ. App. 385, 23 S. W. 1114]; Field *v.* Munster, 11 Tex. Civ. App. 341, 32 S. W. 417; Western Land, etc., Co. *v.* Hall, 33 Fed. 236.

42. Moffatt *v.* Pratt, 12 How. Pr. (N. Y.) 48.

43. Burchinell *v.* Butters, 7 Colo. App. 294, 43 Pac. 459. See also *infra*, notes 44–46.

44. See *infra*, IV, D, 1, b, (IV), (B).

45. Leoncini *v.* Post, 13 N. Y. Suppl. 825.

46. Beall *v.* Rust, 68 Ga. 774; Scattergood *v.* Wood, 14 Hun (N. Y.) 269 [*affirmed* in 79 N. Y. 263, 35 Am. Rep. 515].

47. Ford *v.* Roberts, 14 Colo. 291, 23 Pac. 322; Dalton *v.* Laudahn, 27 Mich. 529; Texarkana Water Co. *v.* Kiser, (Tex. Civ. App. 1901) 63 S. W. 913. See also *infra*, IV, D, 1, b, c.

48. Hickok *v.* Buck, 22 Vt. 149.

49. *Alabama.*—Electric Lighting Co. *v.* Rust, 131 Ala. 484, 31 So. 486; Ewing *v.* Blount, 20 Ala. 694.

Arkansas.—Sunny South Lumber Co. *v.* Neimeyer Lumber Co., 63 Ark. 268, 38 S. W. 902.

New York.—Flagler *v.* Hearst, 91 N. Y. App. Div. 12, 86 N. Y. Suppl. 308.

North Carolina.—Bowen *v.* King, 146 N. C. 385, 59 S. E. 1044, holding, however, that plaintiff could not recover both for loss of profits resulting from the conversion of his property and also the value of its use.

Oregon.—Eldridge *v.* Hoefer, 45 Oreg. 239, 77 Pac. 874.

See 47 Cent. Dig. tit. "Trover and Conversion," § 253.

50. Lazarus *v.* Ely, 45 Conn. 504; Stimson *v.* Block, 11 Ont. 96.

51. Interest generally see Interest, 22 Cyc. 1500.

52. *Alabama.*—Ryan *v.* Young, 147 Ala. 660, 41 So. 954; Milner, etc., Co. *v.* Deloach Mill Mfg. Co., 139 Ala. 645, 36 So. 765, 101 Am. St. Rep. 63; Brooks *v.* Rogers, 101 Ala. 111, 13 So. 386; Bradley *v.* Harden, 73 Ala. 70; Jenkins *v.* McConico, 26 Ala. 213.

Arkansas.—Ryburn *v.* Pryor, 14 Ark. 505.

interest is allowed as a matter of right and as a part of a complete indem-

California.—Lynch *v.* McGham, 7 Cal. App. 132, 93 Pac. 1044.

Colorado.— Sigel-Campion Live Stock Co. *v.* Holly, 44 Colo. 580, 101 Pac. 68; Woodworth *v.* Gorsline, 30 Colo. 186, 69 Pac. 705, 58 L. R. A. 417.

Connecticut.— Cook *v.* Loomis, 26 Conn. 483; Hurd *v.* Hubbell, 26 Conn. 389; Lewis *v.* Morse, 20 Conn. 211; Curtis *v.* Ward, 20 Conn. 204; Clark *v.* Whitaker, 19 Conn. 319, 48 Am. Dec. 160.

Delaware.—Vaughan *v.* Webster, 5 Harr. 256.

Florida.— Skinner *v.* Pinney, 19 Fla. 42, 45 Am. Rep. 1; Moody *v.* Caulk, 14 Fla. 50; Robinson *v.* Hartridge, 13 Fla. 501.

Georgia.— Dorsett *v.* Frith, 25 Ga. 537; Huff *v.* McDonald, 22 Ga. 131, 68 Am. Dec. 487. But see Martin *v.* Oslin, 94 Ga. 658, 19 S. E. 988.

Illinois.— Schwitters *v.* Springer, 236 Ill. 271, 86 N. E. 102 [*affirming* 137 Ill. App. 103]; Janeway *v.* Burton, 201 Ill. 78, 66 N. E. 337 [*affirming* 102 Ill. App. 403]; Sturges *v.* Keith, 57 Ill. 451, 11 Am. Rep. 28; Northern Transp. Co. *v.* Sellick, 52 Ill. 249; Robinson *v.* Alexander, 141 Ill. App. 192; Wenham *v.* Wilson, 129 Ill. App. 553; Cassidy *v.* Elk Grove Land, etc., Co., 58 Ill. App. 39.

Indiana.— Kavanaugh *v.* Taylor, 2 Ind. App. 502, 28 N. E. 553.

Iowa.— Hubbard *v.* Indiana State L. Ins. Co., 129 Iowa 13, 105 N. W. 332; Crawford *v.* Nolan, 72 Iowa 673, 34 N. W. 754.

Kansas.— Simpson *v.* Alexander, 35 Kan. 225, 11 Pac. 171; Shepard *v.* Pratt, 16 Kan. 209.

Kentucky.—Winstead *v.* Hicks, 135 Ky. 154, 121 S. W. 1018, 135 Am. St. Rep. 446; Dennis Bros. *v.* Strunk, 32 Ky. L. Rep. 1230, 108 S. W. 957; Sanders *v.* Vance, 7 T. B. Mon. 209, 18 Am. Dec. 167; Lillard *v.* Whitaker, 3 Bibb 92.

Maine.—Wing *v.* Milliken, 91 Me. 387, 40 Atl. 138, 64 Am. St. Rep. 238; Robinson *v.* Barrows, 48 Me. 186.

Maryland.— Merchants' Nat. Bank *v.* Williams, 110 Md. 334, 72 Atl. 1114; Swartz *v.* Gottlieb-Bauernschmidt Straus Brewing Co., 109 Md. 393, 71 Atl. 854; Seaboard Air Line R. Co. *v.* Phillips, 108 Md. 285, 70 Atl. 232; Heinekamp *v.* Beaty, 74 Md. 388, 21 Atl. 1098, 22 Atl. 67; McShane *v.* Howard Bank, 73 Md. 135, 20 Atl. 776, 10 L. R. A. 552; Thomas *v.* Sternheimer, 29 Md. 268.

Massachusetts.— Scollans *v.* Rollins, 179 Mass. 346, 60 N. E. 983, 88 Am. St. Rep. 386; King *v.* Ham, 6 Allen 298; Johnson *v.* Sumner, 1 Metc. 172; Greenfield Bank *v.* Leavitt, 17 Pick. 1, 28 Am. Dec. 268; Kennedy *v.* Whitwell, 4 Pick. 466.

Michigan.— Allen *v.* Kinyon, 41 Mich. 281, 1 N. W. 863; Ripley *v.* Davis, 15 Mich. 75, 90 Am. Dec. 262.

Minnesota.— Nesbitt *v.* St. Paul Lumber Co., 21 Minn. 491; Zimmerman *v.* Lamb, 7 Minn. 421; Derby *v.* Gallup, 5 Minn. 119.

Missouri.— Lack *v.* Brecht, 166 Mo. 242, 65 S. W. 976; Watson *v.* Harmon, 85 Mo. 443; Neiswanger *v.* Squier, 73 Mo. 192; Spencer *v.* Vance, 57 Mo. 427; Funk *v.* Dillon, 21 Mo. 294; Polk *v.* Allen, 19 Mo. 467; Thomas Mfg. Co. *v.* Huff, 62 Mo. App. 124.

Nevada.— Boylan *v.* Huguet, 8 Nev. 345; Carlyon *v.* Lannan, 4 Nev. 156.

New Hampshire.— Chauncy *v.* Yeaton, 1 N. H. 151.

New York.— Einstein *v.* Dunn, 171 N. Y. 648, 63 N. E. 1116 [*affirming* 61 N. Y. App. Div. 195, 70 N. Y. Suppl. 520]; Wehle *v.* Haviland, 69 N. Y. 448; Booth *v.* Powers, 56 N. Y. 22; McCormick *v.* Pennsylvania Cent. R. Co., 49 N. Y. 303; Dakin *v.* Elmore, 127 N. Y. App. Div. 457, 111 N. Y. Suppl. 519; Corn Exch. Bank *v.* Peabody, 111 N. Y. App. Div. 553, 98 N. Y. Suppl. 78; Seaman *v.* Glegner, 3 Hun 119, 5 Thomps. & C. 273; Devlin *v.* Pike, 5 Daly 85; Ryan *v.* Doyle, 40 How. Pr. 215.

Oregon.— Durham *v.* Commercial Nat. Bank, 45 Oreg. 385, 77 Pac. 902.

Pennsylvania.— Garrison *v.* Bryant, 30 Leg. Int. 77.

Rhode Island.— Heyer *v.* Carr, 6 R. I. 45.

South Carolina.— Burney *v.* Pledger, 3 Rich. 191; Cloud *v.* Sledge, Harp. 367.

Texas.— Masterson *v.* Goodlett, 46 Tex. 402; Commercial, etc., Bank *v.* Jones, 18 Tex. 811; Baldwin *v.* Davidson, (Civ. App. 1910) 127 S. W. 562; Houghton *v.* Puryear, 10 Tex. Civ. App. 383, 30 S. W. 583; Smith *v.* Bates, (Civ. App. 1894) 27 S. W. 1044; Muse *v.* Burns, 3 Tex. App. Civ. Cas. § 73; Anderson *v.* Larremore, 1 Tex. App. Civ. Cas. § 947.

Vermont.— Crumb *v.* Oaks, 38 Vt. 566; Thrall *v.* Lathrop, 30 Vt. 307, 73 Am. Dec. 306; Grant *v.* King, 14 Vt. 367.

West Virginia.— Cecil *v.* Clark, 49 W. Va. 459, 39 S. E. 202.

Wisconsin.—Arpin *v.* Burch, 68 Wis. 619, 32 N. W. 681.

United States.— Harrison *v.* Perea, 168 U. S. 311, 18 S. Ct. 129, 42 L. ed. 478 [*affirming* 7 N. M. 666, 41 Pac. 529]; Pacific Ins. Co. *v.* Conard, 18 Fed. Cas. No. 10,647, Baldw. 138 [*affirmed* in 6 Pet. 262, 8 L. ed. 392].

See 47 Cent. Dig. tit. "Trover and Conversion," § 254; and DAMAGES, 13 Cyc. 170; INTEREST, 22 Cyc. 1500.

Compare Palmer *v.* Murray, 8 Mont. 312, 21 Pac. 126; Black *v.* Black, 5 Mont. 15, 2 Pac. 317; Randall *v.* Greenhood, 3 Mont. 506.

Interest will not be computed where none is prayed for in the petition. Texarkana Water Co. *v.* Kizer, (Tex. Civ. App. 1901) 63 S. W. 913. But where the damages prayed for largely exceeded the amount recovered, interest may be recovered, although it was not specifically prayed for. New Dunderberg Min. Co. *v.* Old, 97 Fed. 150, 38 C. C. A. 89. So where plaintiff is permitted to recover the highest proved value of the property between the conversion and the trial, interest thereon

nity;[53] in others it is allowed as damages,[54] and is within the discretion of the jury.[55]

b. Value of Property — (i) *In General.* In trover the measure of damages is the fair, reasonable value of the property converted,[56] which will be presumed to be either what it was worth on the market, irrespective of the price

is not allowed. Tuller *v.* Carter, 59 Ga. 395; Barnett *v.* Thompson, 37 Ga. 335; Thornton-Thomas Mercantile Co. *v.* Bretherton, 32 Mont. 80, 80 Pac. 10; Smith *v.* Morgan, 73 Wis. 375, 41 N. W. 532.

53. Hamer *v.* Hathaway, 33 Cal. 117; McCormick *v.* Pennsylvania Cent. R. Co., 49 N. Y. 303; Wehle *v.* Butler, 35 N. Y. Super. Ct. 1, 12 Abb. Pr. N. S. 139, 43 How. Pr. 5 [*affirmed* in 61 N. Y. 245]; Drum-Flato Commission Co. *v.* Edmisson, 17 Okla. 344, 87 Pac. 311 [*affirmed* in 208 U. S. 534, 28 Sup. Ct. 367, 52 L. ed. 606].

54. Perkins *v.* Marrs, 15 Colo. 262, 25 Pac. 168; Updegraff *v.* Lesem, 15 Colo. App. 297, 62 Pac. 342; Newcomb-Buchanan Co. *v.* Baskett, 14 Bush (Ky.) 658; Watson *v.* Harmon, 85 Mo. 443; Meyer *v.* Phœnix Ins. Co., 95 Mo. App. 721, 69 S. W. 639; Wheeler *v.* McDonald, 77 Mo. App. 213; Thomas Mfg. Co. *v.* Huff, 62 Mo. App. 124; Kamerick *v.* Castleman, 29 Mo. App. 658; Morris *v.* Smith, 51 Tex. Civ. App. 357, 112 S. W. 130 (holding that interest will not be allowed unless it is claimed in the petition); New Dunderberg Min. Co. *v.* Old, 97 Fed. 150, 38 C. C. A. 89. See, generally, Interest, 22 Cyc. 1500.

Rate of interest.—When interest is allowed as damages the rate should be that of the place where the action was brought. Carson *v.* Smith, 133 Mo. 606, 34 S. W. 855. See, generally, Interest, 22 Cyc. 1524.

55. Bigler *v.* Leonori, 103 Mo. App. 131, 77 S. W. 324; Vermillion *v.* Le Clare, 89 Mo. App. 55; Lance *v.* Butler, 135 N. C. 419, 47 S. E. 488.

56. *Alabama.*— Gray *v.* Crocheron, 8 Port. 191.

Arkansas.—American Soda Fountain Co. *v.* Futrall, 73 Ark. 464, 84 S. W. 505, 108 Am. St. Rep. 64; Fordyce *v.* Dempsey, 72 Ark. 471, 82 S. W. 493; Central Coal, etc., Co. *v.* John Henry Shoe Co., 69 Ark. 302, 63 S. W. 49.

California.— Hand *v.* Scodeletti, 128 Cal. 674, 61 Pac. 373; Lynch *v.* McGhan, 7 Cal. App. 132, 93 Pac. 1044.

Colorado.— Sylvester *v.* Craig, 18 Colo. 44, 31 Pac. 387; Updegraff *v.* Lesem, 15 Colo. App. 297, 62 Pac. 342; Hannan *v.* Connett, 10 Colo. App. 171, 50 Pac. 214; Mouat *v.* Wood, 4 Colo. App. 118, 35 Pac. 58.

Delaware.—Vaughan *v.* Webster, 5 Harr. 256.

Georgia.— Foster *v.* Brooks, 6 Ga. 287.

Illinois.— Head *v.* Becklenberg, 116 Ill. App. 576; Morley *v.* Roach, 116 Ill. App. 534.

Kentucky.—Winstead *v.* Hicks, 135 Ky. 154, 121 S. W. 1018, 135 Am. St. Rep. 446; Rogers *v.* Twyman, 56 S. W. 665, 22 Ky. L. Rep. 40.

Maine.—Wing *v.* Milliken, 91 Me. 387, 40 Atl. 138, 64 Am. St. Rep. 238; Robinson *v.* Barrows, 48 Me. 186; Boobier *v.* Boobier, 39 Me. 406; Winslow *v.* Norton, 29 Me. 419, 50 Am. Dec. 601.

Maryland.—Walker *v.* Schindel, 58 Md. 360; Thomas *v.* Sternheimer, 29 Md. 268.

Massachusetts.— Lorain Steel Co. *v.* Norfolk, etc., R. Co., 187 Mass. 500, 73 N. E. 646; Hunt *v.* Boston, 183 Mass. 303, 67 N. E. 244; Forbes *v.* Boston, etc., R. Co., 133 Mass. 154; Johnson *v.* Sumner, 1 Metc. 172; Greenfield Bank *v.* Leavitt, 17 Pick. 1, 28 Am. Dec. 268.

Michigan.— Saltmarsh *v.* Chicago, etc., R. Co., 122 Mich. 103, 80 N. W. 981; Van Werden *v.* Winslow, 117 Mich. 564, 76 N. W. 87.

Mississippi.— Illinois Cent. R. Co. *v.* Le Blanc, 74 Miss. 626, 21 So. 748.

Missouri.— Baker *v.* Kansas City, etc., R. Co., 52 Mo. App. 602; Flynt *v.* Chicago, etc., R. Co., 38 Mo. App. 94.

Nevada.—Ward *v.* Carson River Wood Co., 13 Nev. 44; Carlyon *v.* Lannan, 4 Nev. 156.

New York.— Russell *v.* McCall, 141 N. Y. 437, 36 N. E. 498, 38 Am. St. Rep. 807; Anderson *v.* Nicholas, 28 N. Y. 600; Dakin *v.* Elmore, 127 N. Y. App. Div. 457, 111 N. Y. Suppl. 519; Corn Exch. Bank *v.* Peabody, 111 N. Y. App. Div. 553, 98 N. Y. Suppl. 78; Starr *v.* Winegar, 3 Hun 491, 6 Thomps. & C. 33; Kelly *v.* Archer, 48 Barb. 68; Hendricks *v.* Decker, 35 Barb. 298; Suydam *v.* Jenkins, 3 Sandf. 614. See also McIntyre *v.* Whitney, 139 N. Y. App. Div. 557, 124 N. Y. Suppl. 234.

North Carolina.— Little *v.* Ratliff, 126 N. C. 262, 35 S. E. 469.

Ohio.— Baltimore, etc., R. Co. *v.* O'Donnell, 49 Ohio St. 489, 32 N. E. 476, 34 Am. St. Rep. 579, 21 L. R. A. 117.

Oklahoma.— Oklahoma *v.* T. M. Richardson Lumber Co., 3 Okla. 5, 39 Pac. 386.

Oregon.— Goltra *v.* Penland, 42 Oreg. 18, 69 Pac. 925.

Pennsylvania.— Drennen *v.* Charles, 12 Pa. Super. Ct. 476.

South Carolina.— Connor *v.* Hillier, 11 Rich. 193, 73 Am. Dec. 105.

Tennessee.— Traynor *v.* Johnson, 3 Head 44; Jones *v.* Allen, 1 Head 626.

Texas.— Hillebrant *v.* Brewer, 6 Tex. 45, 55 Am. Dec. 757; Hitson *v.* Hunt, 45 Tex. Civ. App. 360, 101 S. W. 292; Davidson *v.* Oberthier, 42 Tex. Civ. App. 337, 93 S. W. 478; National Cotton Oil Co. *v.* Ray, (Civ. App. 1905) 91 S. W. 522; Scott *v.* Childers, 24 Tex. Civ. App. 349, 60 S. W. 775.

Vermont.— Delano *v.* Blanchard, 52 Vt. 578.

West Virginia.— Cecil *v.* Clark, 49 W. Va. 459, 39 S. E. 202.

United States.— Mann *v.* Arkansas Valley

paid for it, or the amount it was subsequently sold for,[57] or what it was actually worth if it had no market value.[58]

(II) *SPECIAL VALUE TO OWNER.* Where an article has little or no market value, and is of special value to the owner, he may recover that.[59]

Land, etc., Co., 24 Fed. 261; Long *v.* Conner, 15 Fed. Cas. No. 8,479 [*reversed* on other grounds in 104 U. S. 228, 26 L. ed. 723].

England.— Finch *v.* Blount, 7 C. & P. 478, 32 E. C. L. 716; Davis *v.* Northwestern R. Co., 4 Jur. N. S. 1303, 7 Wkly. Rep. 105; McGregor *v.* High, 21 L. T. Rep. N. S. 803.

Canada.—Worden *v.* Canadian Pac. R. Co., 13 Ont. 652; Leslie *v.* Canada Cent. R. Co., 44 U. C. Q. B. 21.

See 47 Cent. Dig. tit. "Trover and Conversion," § 260; and DAMAGES, 13 Cyc. 170.

The general rule that damages for a conversion is the value of the thing converted at the time and place of the conversion, together with interest thereon from the time of the conversion, should be adopted in determining the measure of damages for a conversion in the absence of special circumstances whereby it wil not afford complete indemnity to the injured party. McIntyre *v.* Whitney, 139 N. Y. App. Div. 557, 124 N. Y. Suppl. 234.

The measure of damages for the conversion of carpets is the value of the labor in cutting, making, and putting them down, in addition to their worth on the market. Starkey *v.* Kelly, 50 N. Y. 676.

57. *Colorado.*— Beaman *v.* Stewart, 19 Colo. App. 222, 74 Pac. 342.

Idaho.— Sears *v.* Lydon, 5 Ida. 358, 49 Pac. 122.

Indiana.— Nickey *v.* Zonker, 22 Ind. App. 211, 53 N. E. 478.

Iowa.— Gensburg *v.* Field, 104 Iowa 599, 74 N. W. 3.

Kentucky.— Comingor *v.* Louisville Trust Co., 128 Ky. 697, 108 S. W. 950, 111 S. W. 681, 33 Ky. L. Rep. 53, 884, 129 Am. St. Rep. 322.

Louisiana.— Patterson *v.* Behan, 12 La. 227.

Massachusetts.— Glaspy *v.* Cabot, 135 Mass. 435.

Michigan.— Iler *v.* Baker, 82 Mich. 226, 46 N. W. 377.

Minnesota.— Dolliff *v.* Robbins, 83 Minn. 498, 86 N. W. 772, 85 Am. St. Rep. 466; Beebe *v.* Wilkinson, 30 Minn. 548, 16 N. W. 450; Chase *v.* Blaisdell, 4 Minn. 90.

Missouri.—Horine *v.* Bone, 69 Mo. App. 481.

Nebraska.— Clements *v.* Eiseley, 63 Nebr. 651, 88 N. W. 871; Bennett *v.* McDonald, 59 Nebr. 234, 80 N. W. 826; Watson *v.* Coburn, 35 Nebr. 492, 53 N. W. 477; Peckinbaugh *v.* Quillin, 12 Nebr. 586, 12 N. W. 104.

New Jersey.—Wyckoff *v.* Bodine, 65 N. J. L. 95, 47 Atl. 23.

New York.—Wehle *v.* Haviland, 69 N. Y. 448; Wehle *v.* Butler, 61 N. Y. 245; Griswold *v.* Haven, 25 N. Y. 595, 82 Am. Dec. 380; King *v.* Orser, 4 Duer 431; Rosenkranz *v.* Jacobowitz, 50 Misc. 580, 99 N. Y. Suppl. 469.

Tennessee.— McGill *v.* Chilhowee Lumber Co., 111 Tenn. 552, 82 S. W. 210; Cole *v.* Sands, 1 Overt. 106.

Texas.— Tucker *v.* Hamlin, 60 Tex. 171; Gulf, etc., R. Co. *v.* Cleburne Ice, etc., Co., (Civ. App. 1904) 79 S. W. 836; Texas, etc., R. Co. *v.* White, 25 Tex. Civ. App. 278, 62 S. W. 133; Lincoln *v.* Packard, 25 Tex. Civ. App. 22, 60 S. W. 682; Temple Grocery Co. *v.* Sullivan, 18 Tex. Civ. App. 281, 44 S. W. 401; Reynolds *v.* Weinman, (Civ. App. 1897) 40 S. W. 560; White *v.* Sterzing, 11 Tex. Civ. App. 553, 32 S. W. 909.

West Virginia.—Arnold *v.* Kelly, 4 W. Va. 642, sustaining the text as to the measure of damages, but holding that the jury might determine the value of a horse from the price paid for him a short time before the conversion.

Wisconsin.— La Chapelle *v.* Warehouse, etc., Supply Co., 95 Wis. 518, 70 N. W. 589.

See 47 Cent. Dig. tit. "Trover and Conversion," § 260; and DAMAGES, 13 Cyc. 170.

58. *Iowa.*— Gensburg *v.* Field, 104 Iowa 599, 74 N. W. 3.

Kentucky.— Clore *v.* Johnson, 42 S. W. 101, 19 Ky. L. Rep. 810.

Minnesota.—Walker *v.* Johnson, 28 Minn. 147, 9 N. W. 632.

Mississippi.— Illinois Cent. R. Co. *v.* Le Blanc, 74 Miss. 626, 21 So. 748.

Missouri.— Hammond *v.* Darlington, 109 Mo. App. 333, 84 S. W. 446.

New York.— Johnston *v.* Albany Dry-Goods Co., 12 N. Y. App. Div. 608, 43 N. Y. Suppl. 164.

England.— France *v.* Gaudet, L. R. 6 Q. B. 199, 40 L. J. Q. B. 121, 19 Wkly. Rep. 622.

See 47 Cent. Dig. tit. "Trover and Conversion," § 260; and DAMAGES, 13 Cyc. 170.

59. *Illinois.*— Sell *v.* Ward, 81 Ill. App. 675.

Iowa.— Gensburg *v.* Field, 104 Iowa 599, 74 N. W. 3.

Massachusetts.— Stickney *v.* Allen, 10 Gray 352.

New York.—Lovell *v.* Shea, 60 N. Y. Super. Ct. 412, 18 N. Y. Suppl. 193.

Canada.— Doyle *v.* Eccles, 17 U. C. C. P. 644.

See 47 Cent. Dig. tit. "Trover and Conversion," § 261.

Special or peculiar circumstances may justify the jury in awarding a larger sum than either market or actual value. Chamberlain *v.* Worrell, 38 La. Ann. 347; Drennen *v.* Charles, 12 Pa. Super. Ct. 476; Jones *v.* Allen, 1 Head (Tenn.) 626; Pridgin *v.* Strickland, 8 Tex. 427, 58 Am. Dec. 124; Moore *v.* Aldrich, 25 Tex. Suppl. 276; Pen-

(III) *PLACE.* The value of the property which may be proved is that of the place of conversion.[60]

(IV) *TIME* — (A) *In General.* The value which property has at the time of the conversion, whether market or actual, is the basis of damages in trover.[61]

nington *v.* Redman Van, etc., Co., 34 Utah 223, 97 Pac. 115. See also McIntyre *v.* Whitney, 139 N. Y. App. Div. 557, 124 N. Y. Suppl. 234.

Rule that plaintiff may recover value of goods to him, based on the actual money loss resulting from his being deprived of them, excluding sentimental value, applies to books kept for personal use. Barker *v.* S. A. Lewis Storage, etc., Co., 79 Conn. 342, 65 Atl. 143.

60. *California.*— Hamer *v.* Hathaway, 33 Cal. 117.

Florida.—Wright *v.* Skinner, 34 Fla. 453, 16 So. 335; Skinner *v.* Pinney, 19 Fla. 42, 45 Am. Rep. 1; Robinson *v.* Hartridge, 13 Fla. 501.

Iowa.— Gensburg *v.* Field, 104 Iowa 599, 74 N. W. 3; Kemper *v* Burlington, 81 Iowa 354, 47 N. W. 72.

Kansas.— Gentry *v.* Kelley, 49 Kan. 82, 30 Pac. 186.

Kentucky.— T. J. Moss Tie Co. *v.* Myers, (1909) 116 S. W. 255.

Massachusetts.— United Shoe Mach. Co. *v.* Holt, 185 Mass. 97, 69 N. E. 1056.

Michigan.— Davidson *v.* Kolb, 95 Mich. 469, 55 N. W. 373; Tuttle *v.* White, 46 Mich. 485, 9 N. W. 528, 41 Am. Rep. 175; Baylis *v.* Cronkite, 39 Mich. 413.

Missouri.— Coffey *v.* State Nat. Bank, 46 Mo. 140, 2 Am. Rep. 488.

New York.— Fleischmann *v.* Samuel, 18 N. Y. App. Div. 97, 45 N. Y. Suppl. 404; Adams *v.* Loomis, 7 N. Y. St. 592. See also McIntyre *v.* Whitney, 139 N. Y. App. Div. 557, 124 N. Y. Suppl. 234.

Pennsylvania.— Hill *v.* Canfield, 56 Pa. St. 454.

Texas.— Tucker *v.* Hamlin, 60 Tex. 171; Blum *v.* Merchant, 58 Tex. 400.

Vermont.— Hassam *v.* J. E. Safford Lumber Co., 82 Vt. 444, 74 Atl. 197.

See 47 Cent. Dig. tit. "Trover and Conversion," § 262.

The place of the wrongful taking is to be deemed the place of conversion, and not that of a subsequent demand and refusal. Ward *v.* Carson River Wood Co., 13 Nev. 44. But where plaintiff's logs were removed from his land to S and there manufactured into lumber, he may recover their value at S, even though he might have treated the removal as a conversion, as he could have brought replevin at S (Final *v.* Backus, 18 Mich. 218); and in trover against one who removed sand from plaintiff's land and sold it, the measure of damages was the value of the sand, with interest, at the place of sale (Nashville, etc., R. Co. *v.* Karthaus, 150 Ala. 633, 43 So. 79).

If the goods have no market value at the place of conversion, their value at such place may be shown in other ways (Marsh *v.* Union Pac. R. Co., 9 Fed. 873, 3 McCrary 236), and resort may be had to evidence of market value at the nearest place where there is a market (Wallingford *v.* Kaiser, 191 N. Y. 392, 84 N. E. 295, 123 Am. St. Rep. 600, 15 L. R. A. N. S. 1126 [*affirming* 110 N. Y. App. Div. 503, 96 N. Y. Suppl. 981]).

If the conversion occurs while the goods are in transit, or at a forwarding point, their value at destination is recoverable, otherwise the owner would be forced to sell in a market not of his own choosing. Farwell *v.* Price, 30 Mo. 587; Blackmer *v.* Cleveland, etc., R. Co., 101 Mo. App. 557, 73 S. W. 913; Wallingford *v.* Kaiser, 110 N. Y. App. Div. 503, 96 N. Y. Suppl. 981 [*affirmed* in 191 N. Y. 392, 84 N. E. 295, 123 Am. St. Rep. 600, 15 L. R. A. N. S. 1126]; Hallett *v.* Novion, 14 Johns. (N. Y.) 273.

61. *Alabama.*— Ryan *v.* Young, 147 Ala. 660, 41 So. 954; Brooks *v.* Rogers, 101 Ala. 111, 13 So. 386; Burks *v.* Hubbard, 69 Ala. 379; Linam *v.* Reeves, 68 Ala. 89; Street *v.* Nelson, 67 Ala. 504; Loeb *v.* Flash, 65 Ala. 526. See also Mattingly *v.* Houston, (1909) 52 So. 78.

Arkansas:— Jefferson *v.* Hale, 31 Ark. 286; Peterson *v.* Gresham, 25 Ark. 380; Ryburn *v.* Pryor, 14 Ark. 505.

California.—Allsopp *v.* Joshua Hendy Mach. Works, 5 Cal. App. 228, 90 Pac. 39.

Colorado.— Sigel-Campion Live Stock Co. *v.* Holly, 44 Colo. 580, 101 Pac. 68.

Connecticut.— Cook *v.* Loomis, 26 Conn. 483; Hurd *v.* Hubbell, 26 Conn. 389; Lewis *v.* Morse, 20 Conn. 211; Curtis *v.* Ward, 20 Conn. 204; Clark *v.* Whitaker, 19 Conn. 319, 48 Am. Dec. 160.

Delaware.—Vaughan *v.* Webster, 5 Harr. 256.

Florida.—Wright *v.* Skinner, 34 Fla. 453, 16 So. 335; Skinner *v.* Pinney, 19 Fla. 42, 45 Am. Rep. 1; Moody *v.* Caulk, 14 Fla. 50; Robinson *v.* Hartridge, 13 Fla. 501.

Georgia.— Milltown Lumber Co. *v.* Carter, 5 Ga. App. 344, 63 S. E. 270.

Illinois.— Schwitters *v.* Springer, 233 Ill. 271, 86 N. E. 102 [*affirming* 137 Ill. App. 103]; Sturges *v.* Keith, 57 Ill. 451, 11 Am. Rep. 28; Otter *v.* Williams, 21 Ill. 118; Robinson *v.* Alexander, 141 Ill. App. 192; Wenham *v.* Wilson, 129 Ill. App. 553; Smyth *v.* Stoddard, 105 Ill. App. 510 [*modified* in 203 Ill. 424, 67 N. E. 980, 96 Am. St. Rep. 314]; Cassidy *v.* Elk Grove Land, etc., Co., 58 Ill. App. 39.

Indiana.— Ellis *v.* Wire, 33 Ind. 127, 5 Am. Rep. 189; Yater *v.* Mullen, 24 Ind. 277.

Iowa.— Doyle *v.* Burns, 123 Iowa 488, 99 N. W. 195; Thew *v.* Miller, 73 Iowa 742, 36 N. W. 771; Crawford *v.* Nolan, 72 Iowa 673, 34 N. W. 754.

Kansas.— Prinz *v.* Moses, (1901) 66 Pac.

The rule is not affected by either an increase or a decrease in its value subsequent to the conversion of it.[62]

1009; Simpson *v.* Alexander, 35 Kan. 225, 11 Pac. 171; Shepard *v.* Pratt, 16 Kan. 209.

Kentucky.—White Sewing Mach. Co. *v.* Conner, 111 Ky. 827, 64 S. W. 841, 23 Ky. L. Rep. 1125; Greer *v.* Powell, 1 Bush 489; Sanders *v.* Vance, 7 T. B. Mon. 209, 18 Am. Dec. 167; Lillard *v.* Whitaker, 3 Bibb 92; T. J. Moss Tie Co. *v.* Myers, (1909) 116 S. W. 255.

Maine.—Wing *v.* Milliken, 91 Me. 387, 40 Atl. 138, 64 Am. St. Rep. 238; Robinson *v.* Barrows, 48 Me. 186; Head *v.* Goodwin, 37 Me. 181.

Maryland.—Merchants' Nat. Bank *v.* Williams, 110 Md. 334, 72 Atl. 1114; Swartz *v.* Gottlieb-Bauernschmidt-Straus Brewing Co., 109 Md. 393, 71 Atl. 854; Seaboard Air Line R. Co. *v.* Phillips, 108 Md. 285, 70 Atl. 232; Heinekamp *v.* Beaty, 74 Md. 388, 21 Atl. 1098, 22 Atl. 67; Stirling *v.* Garritee, 18 Md. 468.

Massachusetts.—Hart *v.* Brierley, 189 Mass. 598, 76 N. E. 286; Hunt *v.* Boston, 183 Mass. 303, 67 N. E. 244; King *v.* Ham, 6 Allen 298; Selkirk *v.* Cobb, 13 Gray 313; Parsons *v.* Martin, 11 Gray 111; Johnson *v.* Sumner, 1 Metc. 172; Weld *v.* Oliver, 21 Pick. 559; Greenfield Bank *v.* Leavitt, 17 Pick. 1, 28 Am. Dec. 268.

Michigan.—Davidson *v.* Kolb, 95 Mich. 469, 55 N. W. 373; Spoon *v.* Chicago, etc., R. Co., 86 Mich. 309, 49 N. W. 35; Allen *v.* Kinyon, 41 Mich. 281, 1 N. W. 863; Baylis *v.* Cronkite, 39 Mich. 413; Ripley *v.* Davis, 15 Mich. 75, 90 Am. Dec. 262.

Minnesota.—Nesbitt *v.* St. Paul Lumber Co., 21 Minn. 491; Zimmerman *v.* Lamb, 7 Minn. 421; Derby *v.* Gallup, 5 Minn. 119.

Missouri.—Richardson *v.* Ashby, 132 Mo. 238, 33 S. W. 806; Neiswanger *v.* Squier, 73 Mo. 192; Coffey *v.* State Nat. Bank, 46 Mo. 140, 2 Am. Rep. 488; Funk *v.* Dillon, 21 Mo. 294; Thomas Mfg. Co. *v.* Huff, 62 Mo. App. 124; Hanlon *v.* O'Keefe, 55 Mo. App. 528; Green *v.* Stephens, 37 Mo. App. 641.

Nevada.—Boylan *v.* Huguet, 8 Nev. 345; Carlyon *v.* Lannan, 4 Nev. 156.

New Hampshire.—Meloon *v.* Read, 73 N. H. 153, 59 Atl. 946.

New York.—Wehle *v.* Haviland, 69 N. Y. 448 [*limiting* Wehle *v.* Butler, 61 N. Y. 245]; Andrews *v.* Durant, 18 N. Y. 496; Heald *v.* Macgowan, 15 Daly 233, 5 N. Y. Suppl. 450 [*affirmed* in 117 N. Y. 643, 22 N. E. 1131]; Disbrow *v.* Tenbroeck, 4 E. D. Smith 397; Lamb *v.* O'Reilly, 13 Misc. 212, 34 N. Y. Suppl. 235; Sonneberg *v.* Levy, 12 Misc. 154, 32 N. Y. Suppl. 1130; Prior *v.* Morton Boarding Stables, 43 N. Y. App. Div. 140, 59 N. Y. Suppl. 287. See also McIntyre *v.* Whitney, 139 N. Y. App. Div. 557, 124 N. Y. Suppl. 234.

North Carolina.—Waller *v.* Bowling, 108 N. C. 289, 12 S. E. 990, 12 L. R. A. 261.

North Dakota.—Towne *v.* St. Anthony, etc., El. Co., 8 N. D. 200, 77 N. W. 608.

Oregon.—Fleckenstein *v.* Inman, 27 Oreg. 328, 40 Pac. 87.

Pennsylvania.—*In re* Jamison, 163 Pa. St. 143, 29 Atl. 1001 [*reversing* 3 Pa. Dist. 217]; Hill *v.* Canfield, 56 Pa. St. 454.

South Carolina.—Reynolds *v.* Witte, 13 S. C. 5, 36 Am. Rep. 678.

Tennessee.—Merchants' Nat. Bank *v.* Trenholm, 12 Heisk. 520.

Texas.—Tucker *v.* Hamlin, 60 Tex. 171; Grimes *v.* Watkins, 59 Tex. 133; Hatcher *v.* Pelham, 31 Tex. 201; Daugherty *v.* Lady, (Civ. App. 1903) 73 S. W. 837; Lynch *v.* White, (Civ. App. 1903) 73 S. W. 834; Houghton *v.* Puryear, 10 Tex. Civ. App. 383, 30 S. W. 583; Smith *v.* Bates, (Civ. App. 1894) 27 S. W. 1044; Hull *v.* Davidson, 6 Tex. Civ. App. 588, 25 S. W. 1047; Anderson *v.* Larremore, 1 Tex. App. Civ. Cas. § 947.

Vermont.—Hassam *v.* J. E. Safford Lumber Co., 82 Vt. 444, 74 Atl. 197; Davis *v.* Bowers Granite Co., 75 Vt. 286, 54 Atl. 1084; Boutwell *v.* Harriman, 58 Vt. 516, 2 Atl. 159; Pond *v.* Baker, 58 Vt. 293, 2 Atl. 164; Thrall *v.* Lathrop, 30 Vt. 307, 73 Am. Dec. 306; Grant *v.* King, 14 Vt. 367.

Washington.—Zindorf *v.* Western American Co., 26 Wash. 695, 67 Pac. 355.

Wisconsin.—Ingram *v.* Rankin, 47 Wis. 406, 2 N. W. 755, 32 Am. Rep. 762.

United States.—Edmunds *v.* Nolan, 86 Fed. 564; Watt *v.* Potter, 29 Fed. Cas. No. 17,291, 2 Mason 77.

Canada.—Scott *v.* McAlpine, 6 U. C. C. P. 302; Macklem *v.* Durrant, 32 U. C. Q. B. 98.

See 47 Cent. Dig. tit. "Trover and Conversion," § 263; and DAMAGES, 13 Cyc. 170.

The measure of damages is the value of the property at the time of the conversion or at any time subsequent thereto with interest. Mattingly *v.* Houston, (Ala. 1909) 52 So. 78.

Conversion of building materials.—The measure of damages for the conversion of building materials is the value thereof and legal interest from the date of the conversion. Baldwin *v.* Davidson, (Tex. Civ. App. 1910) 127 S. W. 562.

Where defendant took possession under an agreement with plaintiff giving him the right to continue in possession until he had disposed of enough of the goods to satisfy his claim against plaintiff, or until it had been paid in other ways, and according to his testimony and pleading he dates his hostile claim from the time he obtained possession, although he announced his claim of ownership several months later, it was proper to allow plaintiff the market value of the goods at the time of delivery less the debt due to defendant, and debts assumed by defendant, for plaintiff. Payne *v.* Lindsley, (Tex. Civ. App. 1910) 126 S. W. 329.

62. *Maryland.*—Hepburn *v.* Sewell, 5 Harr. & J. 211, 9 Am. Dec. 512.

Michigan.—Bates *v.* Stansell, 19 Mich. 91.

(B) *Property of Fluctuating Value* — (1) IN GENERAL. If the property converted was of fluctuating value, the owner may recover, according to some authorities, the highest market value within a reasonable time after conversion;[63] according to others, the highest value attained between the time of conversion and the bringing of the action, with interest;[64] but by the weight of authority, the highest value between conversion and the day of trial.[65]

(2) SHARES OF STOCK. The courts are not agreed as to the correct measure of damages for the conversion of shares of stock. There are three recognized rules: (1) The value of the stock at the time of conversion;[66] (2) the highest

Missouri.— Carter *v.* Feland, 17 Mo. 383; Hendricks *v.* Evans, 46 Mo. App. 313.

New York.— Baldwin *v.* Harvey, Anth. N. P. 214.

South Carolina.—Burney *v.* Pledger, 3 Rich. 191.

See 47 Cent. Dig. tit. "Trover and Conversion," § 263.

63. Price *v.* Keyes, 1 Hun (N. Y.) 177 [*reversed* on other grounds in 62 N. Y. 378].

64. Fish *v.* Nethercutt, 14 Wash. 582, 45 Pac. 44, 53 Am. St. Rep. 892. See also DAMAGES, 17 Cyc. 171.

65. *Alabama.*— McGowan *v.* Lynch, 151 Ala. 458, 44 So. 573 (applying rule to conversion of a horse); Ryan *v.* Young, 147 Ala. 660, 41 So. 954; Posey *v.* Gamble, (1906) 41 So. 416; Mobile Electric Lighting Co. *v.* Rust, 131 Ala. 484, 31 So. 486; Boutwell *v.* Parker, 124 Ala. 341, 27 So. 309; Sharpe *v.* Barney, 114 Ala. 361, 21 So. 490; Burks *v.* Hubbard, 69 Ala. 379; Linam *v.* Reeves, 68 Ala. 89; Street *v.* Nelson, 67 Ala. 504; Loeb *v.* Flash, 65 Ala. 526; Curry *v.* Wilson, 48 Ala. 638; Williams *v.* Crum, 27 Ala. 468; Jenkins *v.* McConico, 26 Ala. 213; Ewing *v.* Blount, 20 Ala. 694; Lee *v.* Mathews, 10 Ala. 682, 44 Am. Dec. 498; Tatum *v.* Manning, 9 Ala. 144.

California.— Fromm *v.* Sierra Nevada Silver Min. Co., 61 Cal. 629; Barrante *v.* Garratt, 50 Cal. 112; Hamer *v.* Hathaway, 33 Cal. 117; Douglass *v.* Kraft, 9 Cal. 562; Lynch *v.* McGhan, 7 Cal. App. 132, 93 Pac. 1044.

Dakota.— Straw *v.* Jenks, 6 Dak. 414, 43 N. W. 941.

Georgia.— O'Neill Mfg. Co. *v.* Woodley, 118 Ga. 114, 44 S. E. 980; Oxford *v.* Ellis, 117 Ga. 817, 45 S. E. 67; Mashburn *v.* Dannenberg Co., 117 Ga. 567, 44 S. E. 97; Midville, etc., R. Co. *v.* Bruhl, 117 Ga. 329, 43 S. E. 717; Dorsett *v.* Frith, 25 Ga. 537; Bell *v.* Bell, 20 Ga. 250; Schley *v.* Lyon, 6 Ga. 530; Thompson *v.* Carter, 6 Ga. App. 604, 65 S. E. 599; Milltown Lumber Co. *v.* Carter, 5 Ga. App. 344, 63 S. E. 270; Walton *v.* Henderson, 4 Ga. App. 173, 61 S. E. 28.

Louisiana.— Gragard's Succession, 106 La. 305, 30 So. 888; Gragard's Succession, 106 La. 298, 30 So. 885.

New York.— Burt *v.* Dutcher, 34 N. Y. 493; Matthews *v.* Coe, 56 Barb. 430 [*reversed* on other grounds in 49 N. Y. 57]; Morgan *v.* Gregg, 46 Barb. 183; Wilson *v.* Mathews, 24 Barb. 295; Nauman *v.* Caldwell, 2 Sweeny 212; Taylor *v.* Ketchum, 5 Rob. 507, 35 How. Pr. 289.

North Dakota.— The measure of damages is fixed by statute. Subd. 2 of § 4603 of the Compiled Laws, or § 5000, subd. 2, of the Rev. Codes, provides: "The detriment caused by the wrongful conversion of personal property is presumed to be: (1) The value of the property at the time of the conversion with the interest from that time; or (2) when the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party." Fargo First Nat. Bank *v.* Red River Valley Nat. Bank, 9 N. D. 319, 83 N. W. 221; Fargo First Nat. Bank *v.* Minneapolis, etc., El. Co., 8 N. D. 430, 79 N. W. 874; Pickert *v.* Rugg, 1 N. D. 230, 46 N. W. 446.

South Carolina.— Gregg *v.* Columbia Bank, 72 S. C. 458, 52 S. E. 195, 110 Am. St. Rep. 633; Carter *v.* Du Pre, 18 S. C. 179; Kid *v.* Mitchell, 1 Nott & M. 334, 9 Am. Dec. 702.

South Dakota.— The rule is statutory. Rosum *v.* Hodges, 1 S. D. 308, 47 N. W. 140, 9 L. R. A. 817; Comp. Laws, § 4603.

Wyoming.— Hilliard Flume, etc., Co. *v.* Woods, 1 Wyo. 396.

England.— In the earlier cases the measure of damages for the conversion of property of fluctuating value was announced to be the full value of the property on the day of conversion. Mercer *v.* Jones, 3 Campb. 477; Edmondson *v.* Nuttall, 17 C. B. N. S. 280, 34 L. J. C. P. 102, 13 Wkly. Rep. 53, 12 E. C. L. 280. Later cases hold that the measure of damages is not restricted to the date of conversion. Johnson *v.* Hook, Cab. & E. 89, 31 Wkly. Rep. 812; Greening *v.* Wilkinson, 1 C. & P. 625, 28 Rev. Rep. 790, 12 E. C. L. 355.

See 47 Cent. Dig. tit. "Trover and Conversion," § 264; and DAMAGES, 13 Cyc. 171.

A verdict for the highest value between conversion and trial should contain a finding that the suit was prosecuted with reasonable diligence. Niles *v.* Edwards, 90 Cal. 10, 27 Pac. 159, 296.

Agent who converts money intrusted to him for purchase of a particular article is liable for enhanced value of article. Short *v.* Skipwith, 22 Fed. Cas. No. 12,809, 1 Brock. 103.

66. *Colorado.*— Continental Divide Min. Inv. Co. *v.* Bliley, 23 Colo. 160, 46 Pac. 633.

Connecticut.— Seymour *v.* Ives, 46 Conn. 109.

Delaware.— Layman *v.* Slocomb, (1909) 76 Atl. 1094; Stewart *v.* Bright, 6 Houst. 344.

value intermediate conversion and trial;[67] and (3) the highest value between conversion and the expiration of a reasonable time within which plaintiff might have procured other like stock in the market.[68]

(v) *GOLD OR SILVER.* A judgment for the conversion of gold or silver, whether coin or bullion, should be based on its value in currency, and not on its arbitrary standard value.[69]

(vi) *CHOSES IN ACTION.* The measure of damages for the conversion of promissory notes, bonds, and other evidences of indebtedness is their actual, not their face, value;[70] but in the absence of proof of actual value they will be deemed to be worth their face value, or such sum as plaintiff might have recovered on them.[71]

Illinois.— Brewster *v.* Van Liew, 119 Ill. 554, 8 N. E. 842; Loomis *v.* Stave, 72 Ill. 623; Sturges *v.* Keith, 57 Ill. 451, 11 Am. Rep. 28; Monmouth First Nat. Bank *v.* Strang, 28 Ill. App. 325; Ennor *v.* Galena, etc., R. Co., 23 Ill. App. 124 [*affirmed* in 123 Ill. 505, 14 N. E. 673].

Iowa.— Dooley *v.* Gladiator Consol. Gold Mines, etc., Co., 134 Iowa 468, 109 N. W. 864.

Maryland.—Andrews *v.* Clark, 72 Md. 396, 20 Atl. 429.

Massachusetts.— Hagar *v.* Norton, 188 Mass. 47, 73 N. E. 1073; Sargent *v.* Franklin Ins. Co., 8 Pick. 90, 19 Am. Dec. 306.

Michigan.— Hubbell *v.* Blandy, 87 Mich. 209, 49 N. W. 502, 24 Am. St. Rep. 154.

See 47 Cent. Dig. tit. "Trover and Conversion," § 264; and DAMAGES, 13 Cyc. 172.

If the converted stock has no market value its actual value may be shown. Brinkerhoff-Farris Trust, etc., Co. *v.* Home Lumber Co., 118 Mo. 447, 24 S. W. 129.

Certificates of stock see Seymour *v.* Ives, 46 Conn. 109; McDonald *v.* Danahy, 96 Ill. App. 380 [*affirmed* in 196 Ill. 133, 63 N. E. 648]; Feige *v.* Burt, 124 Mich. 565, 83 N. W. 367; Daggett *v.* Davis, 53 Mich. 35, 18 N. W. 548, 51 Am. Rep. 91; Morton *v.* Preston, 18 Mich. 60, 100 Am. Dec. 146.

Damages for conversion of stock by broker see FACTORS AND BROKERS, 19 Cyc. 214.

67. Boylan *v.* Huguet, 8 Nev. 345; O'Meara *v.* North America Min. Co., 2 Nev. 112; Learock *v.* Paxson, 208 Pa. St. 602, 57 Atl. 1097; Pennsylvania L. Ins., etc., Co. *v.* Philadelphia, etc., R. Co., 153 Pa. St. 160, 25 Atl. 1043 [*affirming* 11 Pa. Co. Ct. 482]; Neiler *v.* Kelley, 69 Pa. St. 403; Jamison's Assigned Estate, 3 Pa. Dist. 217.

68. *Indiana.*— Citizens' St. R. Co. *v.* Robbins, 144 Ind. 671, 42 N. E. 916, 43 N. E. 649.

Iowa.— Doyle *v.* Burns, 123 Iowa 488, 99 N. W. 195.

New Jersey.— Dimock *v.* U. S. National Bank, 55 N. J. L. 296, 25 Atl. 926, 39 Am. St. Rep. 643.

New York.— Price *v.* Keyes, 1 Hun 177 [*reversed* on other grounds in 62 N. Y. 378]; Devlin *v.* Pike, 5 Daly 85; Randall *v.* Albany City Nat. Bank, 1 N. Y. St. 592. But see Romaine *v.* Van Allen, 26 N. Y. 309; Nauman *v.* Caldwell, 2 Sweeny 212.

Tennessee.— Morris *v.* Wood, (Ch. App. 1896) 55 S. W. 1013.

United States.— McKinley *v.* Williams, 74 Fed. 94, 20 C. C. A. 312 [*following* Galigher *v.* Jones, 129 U. S. 193, 9 S. Ct. 335, 32 L. ed. 658].

See 47 Cent. Dig. tit. "Trover and Conversion," § 264; and DAMAGES, 13 Cyc. 172.

69. Fox *v.* Hale, etc., Silver Min. Co., 108 Cal. 369, 41 Pac. 308; Huff *v.* McDonald, 22 Ga. 131, 68 Am. Dec. 487; Greentree *v.* Rosenstock, 61 N. Y. 583; Taylor *v.* Ketchum, 5 Rob. (N. Y.) 507, 35 How. Pr. 289.

70. *Georgia.*— Citizens' Bank *v.* Shaw, 132 Ga. 771, 65 S. E. 81.

Illinois.— Turner *v.* Retter, 58 Ill. 264; Olds *v.* Chicago Open Bd. of Trade, 33 Ill. App. 445.

Iowa.— Griffith *v.* Burden, 35 Iowa 138; Callanan *v.* Brown, 31 Iowa 333.

Kansas.— Meizell *v.* Kirkpatrick, 33 Kan. 282, 6 Pac. 241.

Nebraska.—Woodworth *v.* Hascall, 59 Nebr. 124, 80 N. W. 483; Halbert *v.* Rosenbalm, 49 Nebr. 498, 68 N. W. 622.

New York.— Griggs *v.* Day, 136 N. Y. 152, 32 N. E. 612, 32 Am. St. Rep. 704, 18 L. R. A. 120 [*reversing* 58 N. Y. Super. Ct. 385, 11 N. Y. Suppl. 885], 137 N. Y. 542, 32 N. E. 1001.

Oklahoma.— Capps *v.* Vasey, 23 Okla. 554, 101 Pac. 1043.

Pennsylvania.— Romig *v.* Romig, 2 Rawle 241; Robinson *v.* Hodgson, 30 Leg. Int. 176; Delany *v.* Hill, 1 Pittsb. 28.

Texas.— Brightman *v.* Reeves, 21 Tex. 70.

United States.— Logan County Nat. Bank *v.* Townsend, 139 U. S. 67, 11 S. Ct. 496, 35 L. ed. 107; Hurst *v.* Coley, 15 Fed. 645.

England.— McLeod *v.* McGhie, 2 M. & G. 326, 2 Scott N. R. 604, 40 E. C. L. 624.

See 47 Cent. Dig. tit. "Trover and Conversion," § 266.

Evidence of cash market value of notes is competent on an issue of their actual value. Walley *v.* Deseret Nat. Bank, 14 Utah 305, 47 Pac. 147.

Part-owner of a note who converts it to his own use is liable to coöwner. Morris *v.* Smith, 51 Tex. Civ. App. 357, 112 S. W. 130.

Actual value may be more than market value. Morris *v.* Smith, 51 Tex. Civ. App. 357, 112 S. W. 130.

71. *Arkansas.*— Ray *v.* Light, 34 Ark. 421.

California.— Zeigler *v.* Wells, 23 Cal. 179, 83 Am. Dec. 87.

Georgia.— Citizens' Bank *v.* Shaw, 132 Ga. 771, 65 S. E. 81; Bell *v.* G. Ober, etc., Co., 96 Ga. 214, 23 S. E. 7.

The insolvency of the parties liable thereon may be shown in mitigation of damages,[72] and so of any other fact tending directly to reduce its value.[73]

(VII) *TITLE DEEDS AND OTHER DOCUMENTS.* The measure of damages for the conversion of title deeds,[74] leases,[75] warehouse receipts,[76] certificates of

Indiana.— Hazzard *v.* Duke, 64 Ind. 220.

Iowa.— Hubbard *v.* State Life Ins. Co., 129 Iowa 13, 105 N. W. 332; Dean *v.* Nichols, etc., Co., 95 Iowa 89, 63 N. W. 582; Callanan *v.* Brown, 31 Iowa 333; Latham *v.* Brown, 16 Iowa 118.

Kansas.— Davies *v.* Stevenson, 59 Kan. 648, 54 Pac. 679; Meixell *v.* Kirkpatrick, 29 Kan. 679, 33 Kan. 282, 6 Pac. 241.

Louisiana.— New Orleans Draining Co. *v.* De Lizardi, 2 La. Ann. 281.

Massachusetts.— King *v.* Ham, 6 Allen 298; Greenfield Bank *v.* Leavitt, 17 Pick. 1, 28 Am. Dec. 268.

Michigan.— Rose *v.* Lewis, 10 Mich. 483.

Minnesota.— Hersey *v.* Walsh, 38 Minn. 521, 38 N. W. 613, 8 Am. St. Rep. 686; Winona *v.* Minnesota R. Constr. Co., 29 Minn. 68, 11 N. W. 228; Nininger *v.* Banning, 7 Minn. 274.

Missouri.— Richardson *v.* Ashby, 132 Mo. 238, 33 S. W. 806; State *v.* Berning, 74 Mo. 87; Bredow *v.* Mutual Sav. Inst., 28 Mo. 181; Menkens *v.* Menkens, 23 Mo. 252; O'Donoghue *v.* Corby, 22 Mo. 393; Kyle *v.* Hoyle, 6 Mo. 526.

New York.— Griggs *v.* Day, 136 N. Y. 152, 32 N. E. 612, 32 Am. St. Rep. 704, 18 L. R. A. 120; Davis Sewing Mach. Co. *v.* Best, 105 N. Y. 59, 11 N. E. 146; Thayer *v.* Manley, 73 N. Y. 305; Booth *v.* Powers, 56 N. Y. 22; Potter *v.* Merchants' Bank, 28 N. Y. 641, 86 Am. Dec. 273; Decker *v.* Mathews, 12 N. Y. 313 [*affirming* 5 Sandf. 439]; Pawson *v.* Miller, 66 N. Y. App. Div. 12, 72 N. Y. Suppl. 1011; Outhouse *v.* Outhouse, 13 Hun 130; Neff *v.* Clute, 12 Barb. 466; Cothran *v.* Hanover Nat. Bank, 40 N. Y. Super. Ct. 401; Greer *v.* Mayer, 3 Rob. 406; Ingalls *v.* Lord, 1 Cow. 240.

Rhode Island.— Stafford *v.* Lang, 25 R. I. 488, 56 Atl. 684.

South Carolina.— Connor *v.* Hillier, 11 Rich. 193, 73 Am. Dec. 105.

South Dakota.— Grigsby *v.* Day, 9 S. D. 585, 70 N. W. 881.

Tennessee.— Clark *v.* Cullen, (Ch. App. 1897) 44 S. W. 204.

Vermont.— Robbins *v.* Packard, 31 Vt. 570, 76 Am. Dec. 134.

Wisconsin.— Merchants' State Bank *v.* Phillips State Bank, 94 Wis. 444, 69 N. W. 170; H. S. Benjamin Wagon, etc., Co. *v.* Merchants' Exch. Bank, 63 Wis. 470, 23 N. W. 592; Kalckhoff *v.* Zoehrlaut, 43 Wis. 373; Terry *v.* Allis, 20 Wis. 32.

England.— Bavins *v.* London, etc., Bank, [1900] 1 Q. B. 270, 5 Com. Cas. 1, 69 L. J. Q. B. 164, 81 L. T. Rep. N. S. 655, 16 T. L. R. 61, 48 Wkly. Rep. 210; Delegal *v.* Naylor, 7 Bing. 460, 9 L. J. C. P. O. S. 167, 5 M. & P. 443, 20 E. C. L. 208; Mercer *v.* Jones, 3 Campb. 477; Paine *v.* Pritchard, 2 C. & P. 558, 12 E. C. L. 731; Alsager *v.* Close, 12 L. J. Exch. 50, 10 M. & W. 576.

See 47 Cent. Dig. tit. "Trover and Conversion," § 266.

If the instrument has a special value by reason of any stipulation or security known to defendant, it seems that plaintiff may recover the increased or special value, even if it be usurious interest. Griffith *v.* Burden, 35 Iowa 138; Allison *v.* King, 25 Iowa 56.

Where bonds wrongfully sold at a discount were used at par in payment for the corporation's property bought at a foreclosure sale, the purchaser was held liable for their par value. Collins *v.* Smith, 158 Fed. 872.

Where an accommodation maker recovers in trover against the payee for a fraudulent diversion of the note from its original purpose after satisfying the note in the hands of a *bona fide* holder by a transfer of land, his damages will be measured by the value of the land so transferred. Hynes *v.* Patterson, 95 N. Y. 1 [*affirming* 28 Hun 528].

72. See *supra*, IV, C, 3, b, (X), (B).

The actual value of evidences of indebtedness is not conclusively determined by insolvency of the makers (Pratt *v.* Boyd, 17 Ind. 232; Rivinus *v.* Langford, 75 Fed. 959, 21 C. C. A. 581, 33 L. R. A. 250), amount of their property which is subject to execution (Rose *v.* Lewis, 10 Mich. 483), or the price obtained at a sale of such instruments (Industrial, etc., Trust *v.* Tod, 52 N. Y. App. Div. 195, 64 N. Y. Suppl. 1093 [*reversed* on other grounds in 170 N. Y. 233, 63 N. E. 285]).

73. *Alabama.*— McPeters *v.* Phillips, 46 Ala. 496.

California.— Zeigler *v.* Wells, etc., Co., 23 Cal. 179, 83 Am. Dec. 87.

Georgia.— Citizens' Bank *v.* Shaw, 132 Ga. 771, 65 S. E. 81.

New York.— Thayer *v.* Manley, 73 N. Y. 305; Booth *v.* Powers, 56 N. Y. 22 [*reversing* 59 Barb. 319].

Oklahoma.— Capps *v.* Vasey, 23 Okla. 554, 101 Pac. 1043.

See 47 Cent. Dig. tit. "Trover and Conversion," § 266.

74. Clowes *v.* Hawley, 12 Johns. (N. Y.) 484; Burr *v.* Munro, 6 U. C. Q. B. O. S. 57.

In Wisconsin plaintiff may recover only such sum as will recompense him for the trouble and expense of perpetuating his title by legal proceedings, unless defendant's act was wanton or malicious, in which event punitive damages may be awarded; or unless defendant vexatiously refuses to surrender the instrument, in which case the full value of the property may be given. Mowry *v.* Wood, 12 Wis. 413.

75. Parry *v.* Frame, 2 B. & P. 451, 5 Rev. Rep. 651; Anderson *v.* Hamilton, 4 U. C. Q. B. 372.

76. Canadian Bank of Commerce *v.* McCrea, 106 Ill. 281.

membership in a board of trade,[77] and other documents[78] is the value of the property conveyed or represented thereby.

(VIII) *INCREASE OF, OR DIVIDENDS ON, CONVERTED PROPERTY.* In an action for conversion of chattels or shares of stock the measure of damages does not permit proof of the increase of said chattels, or dividends accruing on said stock, since the wrong alleged was committed.[79]

(IX) *INCREASE OF VALUE BY ACT OR EXPENDITURE OF DEFENDANT* — (A) *In General.* The value added to a chattel by the labor or expenditure of defendant will not be recoverable, unless he enhanced the value with knowledge of the owner's rights and in defiance thereof.[80]

(B) *Cutting Logs or Harvesting Crops.* The amount recoverable in trover for logs or crops wrongfully converted depends upon the innocency of defendant, be he the original wrong-doer or his vendee. If defendant acted under a mistake or a *bona fide* claim of right, he will be liable, in some states, for the value of the crops or trees as they stood immediately prior to the cutting;[81] in other states for the value immediately after the cutting, when the conversion is deemed to be complete;[82]

77. Olds *v.* Chicago Open Bd. of Trade, 33 Ill. App. 445.

78. Rogers *v.* Crombie, 4 Me. 274; Moody *v.* Drown, 58 N. H. 45 (holding that in trover for a receipt of an account between the parties, the measure of damages is the value of the document, and not of the account); Thurston *v.* Charles, 21 T. L. R. 659 (where defendant wrongfully communicated to another person a letter which had been written by a third person to plaintiff, and it was held that plaintiff could recover substantial damages, and not merely the value of the thing converted).

79. Lee *v.* Mathews, 10 Ala. 682, 44 Am. Dec. 498; Citizens' St. R. Co. *v.* Robbins, 144 Ind. 671, 42 N. E. 916, 43 N. E. 649; Teague *v.* Maxwell, 1 Nott & M. (S. C.) 200; Arkansas Valley Land, etc., Co. *v.* Mann, 130 U. S. 69, 9 S. Ct. 458, 32 L. ed. 854 [*affirming* 24 Fed. 261].

80. *Colorado.*—Omaha, etc., Smelting, etc., Co. *v.* Tabor, 13 Colo. 41, 21 Pac. 925, 16 Am. St. Rep. 185, 5 L. R. A. 236.

Delaware.— Green *v.* Hall, 1 Houst. 506.

Florida.— Peacock *v.* Feaster, 51 Fla. 269, 40 So. 74.

Georgia.—Milltown Lumber Co. *v.* Carter, 5 Ga. App. 344, 63 S. E. 270.

Illinois.—McLean County Coal Co. *v.* Long, 81 Ill. 359; Robertson *v.* Jones, 71 Ill. 405.

Indiana.— Ayers *v.* Hobbs, 41 Ind. App. 576, 84 N. E. 554.

Iowa.— Clement *v.* Duffy, 54 Iowa 632, 7 N. W. 85.

Massachusetts.— Dresser Mfg. Co. *v.* Waterston, 3 Metc. 9.

Nebraska.— Carpenter *v.* Lingenfelter, 42 Nebr. 728, 60 N. W. 1022, 32 L. R. A. 422.

New York.— Hyde *v.* Cookson, 21 Barb. 92; Walther *v.* Wetmore, 1 E. D. Smith 7.

Pennsylvania. — Garrison *v.* Bryant, 10 Phila. 474.

Vermont.— Jackson *v.* Walton, 28 Vt. 43.

United States.— United States *v.* Ute Coal, etc., Co., 158 Fed. 20, 85 C. C. A. 302; Ghen *v.* Rich, 8 Fed. 159; Aborn *v.* Mason, 1 Fed. Cas. No. 19, 14 Blatchf. 405.

See 47 Cent. Dig. tit. "Trover and Conversion," § 269.

81. *Arkansas.*— Central Coal, etc., Co. *v.* John Henry Shoe Co., 69 Ark. 302, 63 S. W. 49.

Michigan.— Anderson *v.* Besser, 131 Mich. 481, 91 N. W. 737; Ayres *v.* Hubbard, 71 Mich. 594, 40 N. W. 10, 57 Mich. 322, 23 N. W. 829, 58 Am. Rep. 381.

Minnesota.—State *v.* Shevlin-Carpenter Co., 62 Minn. 99, 64 N. W. 81; King *v.* Merriman, 38 Minn. 47, 35 N. W. 570; Whitney *v.* Huntington, 37 Minn. 197, 33 N. W. 561; Hinman *v.* Heyderstadt, 32 Minn. 250, 20 N. W. 155 [*distinguishing* Nesbitt *v.* St. Paul Lumber Co., 21 Minn. 491].

Missouri.— Hosli *v.* Yokel, 57 Mo. App. 622.

Pennsylvania.— Forsyth *v.* Wells, 41 Pa. St. 291, 80 Am. Dec. 617.

Washington.—Chappell *v.* Puget Sound Reduction Co., 27 Wash. 63, 67 Pac. 391.

United States.— Dartmouth College *v.* International Paper Co., 132 Fed. 92.

See 47 Cent. Dig. tit. "Trover and Conversion," § 270.

The burden of proving that the trespass was unintentional rests upon defendant. Dartmouth College *v.* International Paper Co., 132 Fed. 92.

In trover the value of the crops removed, and not the rental value of the land, is the measure of damages. Hatch *v.* Luckman, 64 Misc. (N. Y.) 508, 118 N. Y. Suppl. 689.

82. *Alabama.*— C. W. Zimmerman Mfg. Co. *v.* Dunn, 151 Ala. 435, 44 So. 533.

Florida.— Wright *v.* Skinner, 34 Fla. 453, 16 So. 335.

Kentucky.— Dennis *v.* Strunk, 108 S. W. 957, 32 Ky. L. Rep. 1230.

Maine.— Moody *v.* Whitney, 38 Me. 174, 61 Am. Dec. 239.

Mississippi.— Heard *v.* James, 49 Miss. 236.

New Hampshire.— Beede *v.* Lamprey, 64 N. H. 510, 15 Atl. 133, 10 Am. St. Rep. 426.

New York.— Firmin *v.* Firmin, 9 Hun 571.

Ohio.— Lake Shore, etc., R. Co. *v.* Hutchins, 32 Ohio St. 571, 30 Am. Rep. 629.

Texas.— Messer *v.* Walton, 42 Tex. Civ. App. 488, 92 S. W. 1037.

and in still other states for the enhanced value.[83] But if the trespass was a wilful one no deduction will be made for the value of defendant's labor or expenditures.[84] If defendant be an innocent purchaser from an innocent trespasser, he is liable for the value of the property when it was taken by the latter;[85] if from a wilful trespasser, the value at the time of his purchase;[86] and if he purchase with notice of the owner's rights, he must pay the value borne by the property at the time of the latter's demand therefor.[87]

(x) *Amount For Which Property Was Sold or Agreed to Be Sold.* The measure of damages is not what the converted property was sold for at an auction or attachment sale,[88] was sold for by plaintiff or others to defendant or his debtor,[89] the price paid for it by plaintiff,[90] or what defendant had agreed to sell it for.[91]

c. Special Damages Additional to Value of Property — (i) *In General.* A palpable injury beyond the value of the property converted may be a ground for recovery in trover,[92] if it be specially pleaded.[93]

(ii) *Damages From Detention.* It is proper to award as damages not only the value of the property converted, but also compensation for the wrongful detention thereof, such compensation being either interest on the value[94] or a greater sum if interest will not fully compensate the owner.[95]

Wisconsin.— Weymouth *v.* Chicago R. Co., 17 Wis. 550, 84 Am. Dec. 763.

See 47 Cent. Dig. tit. "Trover and Conversion," § 270.

83. Gaskins *v.* Davis, 115 N. C. 85, 20 S. E. 188, 44 Am. St. Rep. 439, 25 L. R. A. 813.

84. *Arkansas.*— Central Coal, etc., Co. *v.* John Henry Shoe Co., 69 Ark. 302, 63 S. W. 49.

Delaware.— Harris *v.* Goslin, 3 Harr. 340.

Indiana.— Ellis *v.* Wire, 33 Ind. 127, 5 Am. Rep. 189. See also Everson *v.* Seller, 105 Ind. 266, 4 N. E. 854; Ayers *v.* Hobbs, 41 Ind. App. 576, 84 N. E. 554.

Iowa.— Stuart *v.* Phelps, 39 Iowa 14.

Michigan.—Moret *v.* Mason, 106 Mich. 340, 64 N. W. 193; Grant *v.* Smith, 26 Mich. 201.

Mississippi.— Heard *v.* James, 49 Miss. 236.

New York.— Rice *v.* Hollenbeck, 19 Barb. 664.

Wisconsin.— Underwood *v.* Paine Lumber Co., 79 Wis. 592, 48 N. W. 673; Brown *v.* Bosworth, 58 Wis. 379, 17 N. W. 241.

United States.— U. S. *v.* Mills, 9 Fed. 684.

See 47 Cent. Dig. tit. "Trover and Conversion," § 270.

85. Birmingham Mineral R. Co. *v.* Tennessee Coal, etc., Co., 127 Ala. 137, 28 So. 679; White *v.* Yawkey, 108 Ala. 270, 19 So. 360, 54 Am. St. Rep. 159, 32 L. R. A. 199; Lake Shore, etc., R. Co. *v.* Hutchins, 37 Ohio St. 282; Texas, etc., R. Co. *v.* Jones, 34 Tex. Civ. App. 94, 77 S. W. 955.

86. *Maine.*— Powers *v.* Tilley, 87 Me. 34, 32 Atl. 714, 47 Am. St. Rep. 304. See also Wing *v.* Milliken, 91 Me. 387, 40 Atl. 138, 64 Am. St. Rep. 238.

Michigan.— Tuttle *v.* White, 46 Mich. 485, 9 N. W. 528, 41 Am. Rep. 175.

Minnesota.— Hoxsie *v.* Empire Lumber Co., 41 Minn. 548, 43 N. W. 476; Nesbitt *v.* St. Paul Lumber Co., 21 Minn. 491.

New York.— Silsbury *v.* McCoon, 3 N. Y. 379, 53 Am. Dec. 307.

Tennessee.— Godwin *v.* Taenzer, 122 Tenn. 101, 119 S. W. 1133.

United States.— Bolles Wooden-Ware Co. *v.* U. S., 106 U. S. 432, 27 L. ed. 230; Potter *v.* U. S., 122 Fed. 49, 58 C. C. A. 231.

See 47 Cent. Dig. tit. "Trover and Conversion," § 270.

87. Hastay *v.* Bonness, 84 Minn. 120, 86 N. W. 896; Pine River Logging, etc., Co. *v.* U. S., 186 U. S. 279, 22 S. Ct. 920, 46 L. ed. 1164; Smith *v.* Baechler, 18 Ont. 293.

88. Peckinbaugh *v.* Quillin, 12 Nebr. 586, 12 N. W. 104; Philbrook *v.* Kellogg, 18 Hun (N. Y.) 399.

89. Buckmaster *v.* Smith, 22 Vt. 203; Murray *v.* Okanogan Live Stock, etc., Co., 12 Wash. 259, 40 Pac. 942.

In trover for property sold by plaintiff to defendant at a fixed price, evidenced by a note, where plaintiff retained title to the property to secure the price, the recovery should be for the amount of the note with interest, and not the highest proven value of the property from the date of the note to the time of trial. Bradley *v.* Burkett, 82 Ga. 255, 11 S. E. 492.

90. Kingsbury *v.* Smith, 13 N. H. 109.

91. Sinnette *v.* Hoddick, 10 Misc. (N. Y.) 586, 31 N. Y. Suppl. 453.

92. Jamison *v.* Hendricks, 2 Blackf. (Ind.) 94, 18 Am. Dec. 131; Garrison *v.* Bryant, 10 Phila. (Pa.) 474; Warder *v.* Baldwin, 51 Wis. 450, 8 N. W. 257; Bodley *v.* Reynolds, 8 Q. B. 779, 10 Jur. 310, 15 L. J. Q. B. 219, 55 E. C. L. 779; Davis *v.* Oswell, 7 C. & P. 804, 32 E. C. L. 882. *Contra*, Lott *v.* French, 10 U. C. Q. B. 385.

93. Gove *v.* Watson, 61 N. H. 136; Park *v.* McDaniels, 37 Vt. 594; Bodley *v.* Reynolds, 8 Q. B. 779, 10 Jur. 310, 15 L. J. Q. B. 219, 55 E. C. L. 778; Davis *v.* Oswell, 7 C. & P. 804, 32 E. C. L. 882.

94. See *supra*, IV, D, 1, a, (IX).

95. Bowen *v.* Harris, 146 N. C. 385, 59 S. E. 1044; Moore *v.* King, 4 Tex. Civ. App. 397, 23 S. W. 484.

(III) *EXPENSE OF RECOVERING PROPERTY.* As a general rule, reasonable and necessary expenses incurred in recovering the property converted are a proper element of damage;[96] but such expenses are not recoverable against a purchaser in good faith of the converted property,[97] nor where the expenditures have not resulted in its recovery.[98]

(IV) *COSTS AND EXPENSES OF SUIT.* A plaintiff is not entitled to recover attorney's fees, or any expenses of the prosecution of an action for conversion beyond taxable costs, except as provided for by statute.[99]

2. MITIGATION OF DAMAGES — a. In General. Strictly speaking, mitigating circumstances are admissible only under the issue of exemplary damages, for not even the motive and intent of defendant in converting property are allowed to affect the owner's right to recover his actual loss.[1] But trover is to some extent an equitable action,[2] and it very often happens that justice to defendant demands the admission in evidence of certain facts or circumstances, not by way of excuse,

Plaintiff will not be allowed damages for detention which are remote and speculative, such as profits that might have been derived from the use of the thing converted. Sledge *v.* Reid, 73 N. C. 440; Farmers' Bank *v.* McKee, 2 Pa. St. 318. In Read *v.* Fairbanks, 13 C. B. 692, 1 C. L. R. 787, 17 Jur. 918, 22 L. J. C. P. 206, 76 E. C. L. 692, it was held that freight which might have been earned by a ship which defendant converted is not a proper element of damages. But in Cockburn *v.* Muskoka Mill, etc., Co., 13 Ont. 343, it was held that plaintiff, being unable to procure other logs to saw, was entitled to the loss of profits caused by defendant's conversion of his logs. See, generally, DAMAGES, 13 Cyc. 29.

Damages for interruption of business by detention of property are recoverable only upon proof that such interruption was the necessary result of defendant's wrong under the conditions existing at the time. Bowen *v.* King, 146 N. C. 385, 59 S. E. 1044.

96. *Alabama.*— Ewing *v.* Blount, 20 Ala. 694.

Maine.— Hunt *v.* Haskell, 24 Me. 339, 41 Am. Dec. 387; Merrill *v.* How, 24 Me. 126.

Massachusetts.— Berry *v.* Ingalls, 199 Mass. 77, 85 N. E. 191, allowing recovery of money paid for attorney's services in securing return of property.

Missouri.— Laughlin *v.* Barnes, 76 Mo. App. 258.

New York.— Ford *v.* Williams, 24 N. Y. 359; McDonald *v.* North, 47 Barb. 530.

North Dakota.— Aronson *v.* Oppegard, 16 N. D. 595, 114 N. W. 377.

United States.— Kansas City First Nat. Bank *v.* Rush, 85 Fed. 539, 29 C. C. A. 333; Western Land, etc., Co. *v.* Hall, 33 Fed. 236; Pacific Ins. Co. *v.* Conard, 18 Fed. Cas. No. 10,647, Baldw. 138 [*affirmed* in 6 Pet. (U. S.) 262, 8 L. ed. 392].

See 47 Cent. Dig. tit. "Trover and Conversion," § 252.

But see Williams *v.* Deen, 5 Tex. Civ. App. 575, 24 S. W. 536, holding such expenses not recoverable where the property was taken by defendant through mistake for which the plaintiff was as much responsible as defendant.

Under statute entitling plaintiff to "a fair compensation for the time and money properly expended in pursuit of the property," in an action for conversion of wheat by a tenant, expenses incurred by the landlord in paying the lien of a farm laborer for wages are not proper elements of damage. Aronson *v.* Oppegard, 16 N. D. 595, 114 N. W. 377.

97. Renfro *v.* Hughes, 69 Ala. 581; Wirt *v.* Schuman, 67 Mo. App. 163.

98. Hall *v.* Younts, 87 N. C. 285; U. S. *v.* Pine River Logging, etc., Co., 89 Fed. 907, 32 C. C. A. 406. *Contra,* Parroski *v.* Goldberg, 80 Wis. 339, 50 N. W. 191.

99. *California.*— Spooner *v.* Cady, (1896) 44 Pac. 1018; Nicholls *v.* Mapes, 1 Cal. App. 349, 82 Pac. 265.

Connecticut.— Hurd *v.* Hubbell, 26 Conn. 389.

Indiana.— Taylor *v.* Blount, 7 Blackf. 38.

Louisiana.— Fox *v.* Jones, 39 La. Ann. 929, 3 So. 95.

Massachusetts.— Berry *v.* Ingalls, 199 Mass. 77, 85 N. E. 191.

New York.— Wilson *v.* Vallin, 32 Misc. 739, 66 N. Y. Suppl. 499.

Texas.— Lee *v.* McDonnell, 31 Tex. Civ. App. 468, 72 S. W. 612; Webb *v.* Harris, 1 Tex. App. Civ. Cas. § 1035.

Vermont.— Park *v.* McDaniels, 37 Vt. 594.

United States.— Pacific Ins. Co. *v.* Conard, 18 Fed. Cas. No. 10,647, Baldw. 138 [*affirmed* in Conard *v.* Pacific Ins. Co., 6 Pet. 262, 8 L. ed. 392].

England.— Moon *v.* Raphael, 2 Bing. N. Cas. 310, 1 Hodges 289, 5 L. J. C. P. 46, 2 Scott 489, 29 E. C. L. 550.

See 47 Cent. Dig. tit. "Trover and Conversion," § 258; and, generally, COSTS, 7 Cyc. 100.

1. Hart *v.* Brierley, 189 Mass. 598, 76 N. E. 286; Wallingford *v.* Kaiser, 191 N. Y. 392, 84 N. E. 295, 123 Am. St. Rep. 600, 15 L. R. A. N. S. 1126; Alexander *v.* Bowers, (Tex. Civ. App. 1904) 79 S. W. 342.

Assertion of right other than that under which the property was taken is not admissible in mitigation of damages. Backenstoss *v.* Stahler, 33 Pa. St. 251, 75 Am. Dec. 592.

2. Loeb *v.* Flash, 65 Ala. 526; Taylor *v.* Felder, 5 Tex. Civ. App. 417, 23 S. W. 480, 24 S. W. 313.

but for the purpose of determining and ascertaining plaintiff's real loss, or that portion thereof caused by defendant.[3]

b. Expenses Incurred in Caring For Property. Expenses, such as freight, storage, insurance, and feeding of animals, incurred by defendant in protecting and preserving the property in controversy, should be allowed in mitigation of damages;[4] but no allowance should be made for expenses of the very act of conversion,[5] nor for services or expenditures included in the consideration of a contract made with a third party.[6]

c. Attachment of Property While in Hands of Defendant. An attachment by plaintiff in trover of goods while in defendant's possession affords no ground for mitigation of damages where it appears that said goods were returned to and retained by defendant.[7]

d. Return of Property to Plaintiff. As a general rule, an offer to return property converted is not admissible even in mitigation of damages;[8] but where the conversion is technical, inadvertent, or the result of a mistake, and the property is still *in statu quo*, an offer to return it may be shown in mitigation of damages.[9] Acceptance of an offer to return followed by a reassumption of control by plaintiff will not bar an action for conversion,[10] but it will mitigate the damages,[11]

3. Williams *v.* Crum, 27 Ala. 468; Sharpe *v.* Graydon, 90 Ind. 232.

4. Dahil *v.* Booker, 140 Mass. 308, 5 N. E. 496, 54 Am. Rep. 465; Whitney *v.* Beckford, 105 Mass. 267; Covell *v.* Hill, 6 N. Y. 374; Sun Mut. Ins. Co. *v.* Talmadge, 4 Daly (N. Y.) 539; Hallett *v.* Novion, 14 Johns. (N. Y.) 273; Luce *v.* Hoisington, 56 Vt. 436. *Contra*, Walther *v.* Wetmore, 1 E. D. Smith (N. Y.) 7, in which it was held that one who wrongfully detains goods with notice of the owner's claims acts at his peril and cannot recover commissions, storage, or insurance.

5. Burlington, etc., R. Co. *v.* Chicago Lumber Co., 15 Nebr. 390, 19 N. W. 451.

6. Deverell *v.* Bauer, 41 N. Y. App. Div. 53, 58 N. Y. Suppl. 413.

7. Luckey *v.* Roberts, 25 Conn. 486.

8. *Arkansas.*— Norman *v.* Rogers, 29 Ark. 365.

Connecticut.— Greenthal *v.* Lincoln, 68 Conn. 384, 36 Atl. 813.

Massachusetts.— Russell *v.* Cole, 167 Mass. 6, 44 N. E. 1057, 57 Am. St. Rep. 432; Stickney *v.* Allen, 10 Gray 352.

Missouri.—Gilbert *v.* Peck, 43 Mo. App. 577.

New Jersey.— McFadden *v.* Whitney, 51 N. J. L. 391, 18 Atl. 62.

New York.— People *v.* Bank of North America, 75 N. Y. 547; Carpenter *v.* Manhattan L. Ins. Co., 22 Hun 47; Lyon *v.* Yates, 52 Barb. 237; Smith *v.* Hartog, 23 Misc. 353, 51 N. Y. Suppl. 257; Rhinelander *v.* Barrow, 17 Johns. 538; Barrow *v.* Rhinelander, 3 Johns. Ch. 614.

Pennsylvania.— Tracey *v.* Good, 3 Pa. L. J. 125.

Texas.— Hofschulte *v.* Panhandle Hardware Co., (Civ. App. 1899) 50 S. W. 608; Bitterman *v.* Hearn, (Civ. App. 1895) 32 S. W. 341.

See 47 Cent. Dig. tit. "Trover and Conversion," § 277.

9. Delano *v.* Curtis, 7 Allen (Mass.) 470; Gilbert *v.* Peck, 43 Mo. App. 577; Ward *v.* Moffett, 38 Mo. App. 395.

Tender is not available where it does not embrace all the property claimed by plaintiff (Walton *v.* Henderson, 4 Ga. App. 173, 61 S. E. 28); nor where made after refusal to return the goods on demand (Walton *v.* Henderson, *supra*; Gilbert *v.* Peck, 43 Mo. App. 577).

10. Plummer *v.* Reeves, 83 Ark. 10, 102 S. W. 376; Barrelett *v.* Bellgard, 71 Ill. 280; Seaboard Air Line R. Co. *v.* Phillips, 108 Md. 285, 70 Atl. 232.

11. *Alabama.*— King *v.* Franklin, 132 Ala. 559, 31 So. 467; Stephenson *v.* Wright, 111 Ala. 579, 20 So. 622; Renfro *v.* Hughes, 69 Ala. 581; St. John *v.* O'Connel, 7 Port. 466.

Arkansas.— Norman *v.* Rogers, 29 Ark. 365.

Colorado.— Owen *v.* Williams, 38 Colo. 79, 89 Pac. 778; Murphy *v.* Hobbs, 8 Colo. 17, 5 Pac. 637.

Connecticut.—Storrs *v.* Robinson, 74 Conn. 443, 51 Atl. 135; Cook *v.* Loomis, 26 Conn. 483.

Georgia.— Bodega *v.* Perkerson, 60 Ga. 516.

Illinois.—Barrelett *v.* Bellgard, 71 Ill. 280.

Indiana.— Smith *v.* Downing, 6 Ind. 374.

Kansas.— Prinz *v.* Moses, (1901) 66 Pac. 1009.

Louisiana.— Seelig *v.* Dumas, 48 La. Ann. 1494, 21 So. 91.

Maine.— Merrill *v.* How, 24 Me. 126.

Maryland.— Seaboard Air Line R. Co. *v.* Phillips, 108 Md. 285, 70 Atl. 232.

Massachusetts.— Greenfield Bank *v.* Leavitt, 17 Pick. 1, 28 Am. Dec. 268; Gibbs *v.* Chase, 10 Mass. 125; Wheelock *v.* Wheelwright, 5 Mass. 104.

Michigan.— McGraw *v.* Sampliner, 107 Mich. 141, 64 N. W. 1060.

Missouri.— Easton *v.* Woods, 1 Mo. 506.

Nebraska.— Watson *v.* Coburn, 35 Nebr. 492, 53 N. W. 477.

New York.— Brewster *v.* Silliman, 38 N. Y. 423; Kerr *v.* Mount, 28 N. Y. 659; Hibbard *v.* Stewart, 1 Hilt. 207; Simon *v.* Seide, 24 Misc. 186, 52 N. Y. Suppl. 629; Muser *v.*

and fix the measure thereof at the difference between the value of the property at the time of its conversion and its value at the time of its return.[12]

e. Appropriation of Property or Proceeds to Use of Plaintiff. By the weight of authority, a tortious possessor cannot mitigate damages by showing an application of the property or its proceeds, either by himself or others, to plaintiff's use or benefit;[13] but in some jurisdictions such application is allowed in mitigation of damages.[14]

f. Deduction of Sums Received. A defendant in trover is entitled to a deduction from the value of the converted property, of all sums received by the owner thereof from defendant or defendant's vendor on account of the same.[15]

g. Deduction of Liens or Other Claims Against Property. Damages may be mitigated by the deduction of any lien on the property in controversy, or of any

Lewis, 14 Abb. N. Cas. 333; Hanmer *v.* Wilsey, 17 Wend. 91; Hallett *v.* Novion, 14 Johns. 273.

Oklahoma.— Aylesbury Mercantile Co. *v.* Fitch, 22 Okla. 475, 99 Pac. 1089, 23 L. R. A. N. S. 573.

Oregon.— Eldridge *v.* Hoefer, 45 Oreg. 239, 77 Pac. 874.

Wisconsin.— Cernahan *v.* Chrisler, 107 Wis. 645, 83 N. W. 778; Collins *v.* Lowry, 78 Wis. 329, 47 N. W. 612; Churchill *v.* Welsh, 47 Wis. 39, 1 N. W. 398.

United States.— Western Land, etc., Co. *v.* Hall, 33 Fed. 236.

England.—Evans *v.* Kyner, 1 B. & Ad. 528, 9 L. J. K. B. O. S. 92, 20 E. C. L. 586, 109 Eng. Reprint 883; Earle *v.* Holderness, 4 Bing. 462, 6 L. J. C. P. O. S. 68, 1 M. & P. 254, 13 E. C. L. 589; Moon *v.* Raphael, 2 Bing. N. Cas. 310, 1 Hodges 289, 5 L. J. C. P 46, 2 Scott 489, 29 E. C. L. 550; Burn *v.* Morris, 2 Cromp. & M. 579, 3 L. J. Exch. 193, 4 Tyrw. 485; Cook *v.* Hartle, 8 C. & P. 568, 34 E. C. L. 896.

Canada.— Brown *v.* Canada Port Huron Co., 15 Manitoba 638; Driffill *v.* McFall, 41 U. C. Q. B. 313.

See 47 Cent. Dig. tit. "Trover and Conversion," § 277.

12. *Arkansas.*— Plummer *v.* Reeves, 83 Ark. 10, 102 S. W. 376.

Massachusetts.— Lucas *v.* Trumbull, 15 Gray 306.

Missouri.— Green *v.* Stevens, 37 Mo. App. 641.

New Hampshire.— Gove *v.* Watson, 61 N. H. 136.

Pennsylvania.— Rank *v.* Rank, 5 Pa. St. 211.

Vermont.— Stillwell *v.* Farewell, 64 Vt. 286, 24 Atl. 243; Bucklin *v.* Beals, 38 Vt. 653.

See 47 Cent. Dig. tit. "Trover and Conversion," § 277.

Damages for detention are allowed in some cases (Cook *v.* Loomis, 26 Conn. 483), and the amount has been fixed at legal interest on the value of the property during the period of detention (Davidson *v.* Oberthier, 42 Tex. Civ. App. 337, 93 S. W. 478). The measure of damages for the conversion of machinery for a specified period, after which it was tendered and received back by the owner, is the rental value for the period together with interest thereon after the expiration of the period. Baldwin *v.* Davidson, (Tex. Civ. App. 1910) 127 S. W. 562.

That plaintiff received goods back against his will does not entitle him to recover more than nominal damages for technical conversion where the goods have not been injured. Sutton *v.* Great Northern R. Co., 99 Minn. 376, 109 N. W. 815.

13. *Alabama.*— East *v.* Pace, 57 Ala. 521; Carpenter *v.* Going, 20 Ala. 587.

Louisiana.— Marin *v.* Satterfield, 41 La. Ann. 742, 6 So. 551.

Michigan.— Bringard *v.* Stellwagen, 41 Mich. 54, 1 N. W. 909; Northrup *v.* McGill, 27 Mich. 234.

New York.— Sprague *v.* McKinzie, 63 Barb. 60; Lyon *v.* Yates, 52 Barb. 237; Sherry *v.* Schuyler, 2 Hill 204; Hanmer *v.* Wilsey, 17 Wend. 91.

Texas.— Mississippi Mills *v.* Meyer, 83 Tex. 433, 18 S. W. 748.

England.— Edmondson *v.* Nuttall, 17 C. B. N. S. 280, 34 L. J. C. P. 102, 13 Wkly. Rep. 53, 112 E. C. L. 280.

See 47 Cent. Dig. tit. "Trover and Conversion," § 278.

The rule is subject to two exceptions: (1) When defendant sells the property under a subsequent valid writ (Curtis *v.* Ward, 20 Conn. 204; Hopple *v.* Higbee, 23 N. J. L. 342; Mississippi Mills *v.* Meyer, 83 Tex. 433, 18 S. W. 748); (2) when the property has been taken from him under legal process sued out by a third person (Irish *v.* Cloyes, 8 Vt. 30, 30 Am. Dec. 446); but here the seizure must be at the instance of a third person, and not at the instance of the wrong-doer (Ball *v.* Liney, 48 N. Y. 6, 8 Am. Rep. 511 [*affirming* 44 Barb. 505]; Higgins *v.* Whitney, 24 Wend. (N. Y.) 379).

14. Stow *v.* Yarwood, 14 Ill. 424; Ball *v.* Campbell, 30 Kan. 177, 2 Pac. 165; Dahill *v.* Booker, 140 Mass. 308, 5 N. E. 496, 54 Am. Rep. 465; Pierce *v.* Benjamin, 14 Pick. (Mass.) 356, 25 Am. Dec. 396; Prescott *v.* Wright, 6 Mass. 20; Caldwell *v.* Eaton, 5 Mass. 399; Doolittle *v.* McCullough, 7 Ohio St. 299.

15. *Georgia.*—Ross *v.* McDuffie, 91 Ga. 120, 16 S. E. 648 [*following* Bradley *v.* Burkett, 82 Ga. 255, 11 S. E. 492]; Sheldon *v.* Southern Express Co., 48 Ga. 625. See also Morton *v.* Frick Co., 87 Ga. 230, 13 S. E. 463, in which defendant failed to receive credit for

claim against plaintiff connected therewith, which defendant held at the time of the conversion alleged.[16]

h. Retention Acquiesced in by Plaintiff. Long-continued acquiescence in another's possession with knowledge of his claim of right will, in an action of trover, bar plaintiff's right to damages that would not have been suffered but for such acquiescence.[17]

3. Exemplary Damages. Exemplary damages may be recovered whenever it appears that defendant's taking of the property was characterized by malice, oppression, or a wanton disregard of the owner's rights;[18] but not against one taking under a *bona fide* claim of right.[19]

4. Inadequate or Excessive Damages. The trial court may require a remittitur or grant a new trial whenever the verdict is plainly excessive or inadequate, and the court should do so if necessary to meet the ends of justice.[20]

E. Trial, Judgment, and Review — 1. In General — a. Dismissal, Nonsuit, and Stay of Proceedings. A nonsuit in an action of trover will be justified

amount paid because he had pleaded the general issue instead of the facts.

New York.— Meeks *v.* Simon, 2 Misc. 241, 21 N. Y. Suppl. 1004.

North Dakota.— State *v.* Robb-Lawrence Co., 17 N. D. 257, 115 N. W. 846, 16 L. R. A. N. S. 227, holding that such reception, however, is not a waiver of the conversion.

Ohio.— Baird *v.* Howard, 51 Ohio St. 57, 36 N. E. 732, 46 Am. St. Rep. 550, 22 L. R. A. 846.

Rhode Island.—Warner *v.* Vallily, 13 R. I. 483; Tillinghast *v.* Holbrook, 7 R. I. 230; Heyer *v.* Carr, 6 R. I. 45, holding that where a claim against two for joint conversion is compromised as to one, the amount received from him must be deducted in assessing damages against the other.

See 47 Cent. Dig. tit. "Trover and Conversion," § 278½.

16. *Arkansas.*— Cocke *v.* Cross, 57 Ark. 87, 20 S. W. 913; Jones *v.* Horn, 51 Ark. 19, 9 S. W. 309, 14 Am. St. Rep. 17.

Dakota.— Straw *v.* Jenks, 6 Dak. 414, 43 N. W. 941.

Kansas.— Barney *v.* Dudley, 42 Kan. 212, 21 Pac. 1079, 16 Am. St. Rep. 476.

Massachusetts.— Briggs *v.* Boston, etc., R. Co., 6 Allen 246, 83 Am. Dec. 626; Fowler *v.* Gilman, 13 Metc. 267; Pierce *v.* Benjamin, 14 Pick. 356, 25 Am. Dec. 396.

Michigan.— Rall *v.* Cook, 77 Mich. 681, 43 N. W. 1069.

Missouri.— Blackmer *v.* Cleveland, etc., R. Co., 101 Mo. App. 557, 73 S. W. 913.

New Hampshire.— Cooper *v.* Newman, 45 N. H. 339.

New York.— Baker *v.* Drake, 66 N. Y. 518, 23 Am. Rep. 80; Washburn *v.* Cordis, 1 Misc. 427, 21 N. Y. Suppl. 422; Leslie *v.* Hoffman, 1 Edm. Sel. Cas. 475.

Wisconsin.— Wheeler *v.* Pereles, 43 Wis. 332.

See 47 Cent. Dig. tit. "Trover and Conversion," § 279.

Part performance of an entire contract does not entitle one to a deduction of the value of his labor when sued for a conversion of the property intrusted to him. Pierce *v.* Schenck, 3 Hill (N. Y.) 28.

17. Rodgers *v.* Brittain, 39 Mich. 477.

18. *California.*— Lothrop *v.* Golden, (1899) 57 Pac. 394.

Iowa.— Gensburg *v.* Field, 104 Iowa 599, 74 N. W. 3; Casey *v.* Ballou Banking Co., 98 Iowa 107, 67 N. W. 98; Carpenter *v.* Scott, 86 Iowa 563, 53 N. W. 328.

Mississippi.—Heard *v.* James, 49 Miss. 236.

Missouri.— Carson *v.* Smith, 133 Mo. 606, 34 S. W. 855; Blackmar *v.* Cleveland, etc., R. Co., 101 Mo. App. 557, 73 S. W. 913; Reamer *v.* Morrison Express Co., 93 Mo. App. 501, 67 S. W. 718.

New York.— Bahr *v.* Boley, 50 N. Y. App. Div. 577, 64 N. Y. Suppl. 200; Wilde *v.* Hexter, 50 Barb. 448.

Pennsylvania.— Carey *v.* Bright, 58 Pa. St. 70; Backenstoss *v.* Stahler, 33 Pa. St. 251, 75 Am. Dec. 592; Harger *v.* McMains, 4 Watts 418; Taylor *v.* Morgan, 3 Watts 333. *Contra,* Garrison *v.* Bryant, 10 Phila. 474, holding exemplary damages recoverable in trespass, but not in trover.

South Carolina.—Walters *v.* Laurens Cotton Mills, 53 S. C. 155, 31 S. E. 1.

Texas.— Werkheiser-Polk Mill Co. *v.* Langford, 51 Tex. Civ. App. 224, 115 S. W. 89; Jackson *v.* Poteet, (Civ. App. 1905) 89 S. W. 980; Gulf, etc., R. Co. *v.* Cleburne Ice, etc., Co., (Civ. App. 1904) 79 S. W. 836.

United States.— Downing *v.* Outerbridge, 79 Fed. 931, 25 C. C. A. 244; Nevett *v.* Berry, 18 Fed. Cas. No. 10,135, 5 Cranch C. C. 291.

See 47 Cent. Dig. tit. "Trover and Conversion," § 281.

Under statute imposing double damages for conversion of property of an estate before granting of letters testamentary or of administration, such damages are not recoverable for conversion after appointment of special administrator. Dixon *v.* Sheridan, 125 Wis. 60, 103 N. W. 239.

19. Silverman *v.* McGrath, 10 Ill. App. 413; Vine *v.* Casmey, 86 Minn. 74, 90 N. W. 158; Jones *v.* Rahilly, 16 Minn. 320; Carey *v.* Bright, 58 Pa. St. 70; Pennington *v.* Redman Van, etc., Co., 34 Utah 223, 97 Pac. 115.

20. Lawrence *v.* Wilson, 107 N. Y. App. Div. 365, 95 N. Y. Suppl. 147; Scharndorf *v.* Alten, 49 Misc. (N. Y.) 123, 96 N. Y.

by plaintiff's failure to offer evidence tending to prove a material allegation of his declaration or complaint, such as a wrongful conversion or the value of the property taken;[21] but not by a failure to prove a matter immaterial to the case, such as malice, or demand when the taking was tortious, or a material matter against an unnecessary party.[22] So it is error to dismiss some of plaintiffs when defendant asks for affirmative relief;[23] but it is not error to stay the action on defendant's paying the costs and redelivering the property to plaintiff, where it is unchanged in condition, and plaintiff makes no claim for special damages.[24]

b. Scope of Inquiry and Power of Court. Questions of title may be tried in trover;[25] but they must relate to the legal title,[26] and it is not competent for the court to attempt to adjust equities between the parties.[27]

c. Leave to Tender Property Into Court. Defendant may bring the specific chattel involved in an action of conversion into court and make a tender thereof in mitigation of damages,[28] having first obtained leave so to do by a motion addressed to the discretion of the judge, whose decision is final.[29]

d. Reception of Evidence. The court has large discretion as to the form in which evidence shall be submitted,[30] and as to the order of its introduction,[31] including the admission or rejection of evidence in rebuttal or surrebuttal which should have been introduced in chief,[32] and permission to a plaintiff who has rested his case to reopen it and make further proof.[33]

e. Reference. It is the duty of the court, when an action for conversion has been referred, to see that the measure of damages adopted conforms to the rule applicable in such trials by juries.[34]

2. Questions For Jury — a. Title and Right to Possession. Whenever in an action of trover claim of title and right of possession at the time of the conversion is controverted, the issue should be submitted to the jury both when the testimony pertinent thereto is conflicting and when reasonable minds might draw different conclusions from an undisputed state of facts;[35] but it is error to submit such

Suppl. 452; Pennington *v.* Redman Van, etc., Co., 34 Utah 223, 97 Pac. 115.

Amounts were held not excessive in T. J. Moss Tie Co. *v.* Myers, (Ky. 1909) 116 S. W. 255; Norris *v.* St. Joseph, etc., R. Co., 124 Mo. App. 16, 101 S. W. 159; Shandy *v.* McDonald, 38 Mont. 393, 100 Pac. 203.

21. Brooke *v.* Lowe, 122 Ga. 358, 50 S. E. 146; Ransom *v.* Wetmore, 39 Barb. (N. Y.) 104; Rakestraw *v.* Floyd, 54 S. C. 288, 32 S. E. 419.

22. Scarboro *v.* Goethe, 118 Ga. 543, 45 S. E. 413; Howard *v.* Snelling, 28 Ga. 469; Rakestraw *v.* Floyd, 54 S. C. 288, 32 S. E. 419.

23. Gooch *v.* Isbell, (Tex. Civ. App. 1903) 77 S. W. 973.

24. Tracey *v.* Good, 3 Pa. L. J. 135; Earle *v.* Holderness, 4 Bing. 462, 6 L. J. C. P. O. S. 68, 1 M. & P. 254, 13 E. C. L. 589; Tucker *v.* Wright, 3 Bing. 601, 4 L. J. C. P. O. S. 190, 11 Moore C. P. 500, 11 E. C. L. 293; Gibson *v.* Humphrey, 1 Cromp. & M. 544, 2 L. J. Exch. 234, 2 Tyrw. 588; Whitten *v.* Fuller, W. Bl. 902, 96 Eng. Reprint 533.

25. Heber *v.* Heber, 139 Wis. 472, 121 N. W. 328.

Where the facts do not authorize trover, the court may nevertheless try the case as one of conversion, if no objection is made. Parisi *v.* Guardian Sav., etc., Co., 30 Misc. (N. Y.) 743, 62 N. Y. Suppl. 1094.

26. Alter *v.* Stockham Bank, 51 Nebr. 797, 71 N. W. 715.

27. Womble *v.* Leach, 83 N. C. 84.

28. Churchill *v.* Welsh, 47 Wis. 39, 1 N. W. 398; Watts *v.* Phipps, Buller N. P. 49; Fisher *v.* Prince, 3 Burr. 1363, 97 Eng. Reprint 876.

29. Rogers *v.* Crombie, 4 Me. 274.

In Vermont such tender is permitted only when defendant is not a wilful wrong-doer. Rutland, etc., R. Co. *v.* Middlebury Bank, 32 Vt. 639; Hart *v.* Skinner, 16 Vt. 138, 42 Am. Dec. 500.

30. New York L. Ins. Co. *v.* Allison, 107 Fed. 179, 46 C. C. A. 229; Snarr *v.* Smith, 45 U. C. Q. B. 156.

31. See *infra*, notes 32, 33.

32. Dodge *v.* Goodell, 16 R. I. 48, 12 Atl. 236.

33. Dexter *v.* Dexter, 56 N. Y. Super. Ct. 568, 4 N. Y. Suppl. 712 [*affirmed* in 132 N. Y. 540, 30 N. E. 68].

34. Garrison *v.* Bryant, 10 Phila. (Pa.) 474.

35. *Alabama.*— Posey *v.* Gamble, 157 Ala. 655, 47 So. 569; Powers *v.* Hatter, 152 Ala. 636, 44 So. 859; Mahone *v.* Reeves, 11 Ala. 345.

Georgia.— Grier *v.* North, etc., R. Co., 120 Ga. 353, 47 S. E. 898; Knox *v.* Cook, 119 Ga. 689, 46 S. E. 868; Wallace *v.* Mallary, 117 Ga. 161, 43 S. E. 424; Holcombe *v.* Richmond, etc., R. Co., 78 Ga. 776, 3 S. E. 755.

Illinois.— Crerar *v.* Daniels, 209 Ill. 296, 70 N. E. 569 [*affirming* 109 Ill. App. 654].

questions to the jury where there is no evidence of plaintiff's title or right to possession,[36] or where such title or right is not controverted.[37]

b. What Constitutes Conversion. Whether or not the evidence admitted amounts to proof of a conversion,[38] or shows conversion by defendant,[39] are questions to be decided by the jury under proper instructions as to what constitutes an unlawful conversion.[40]

c. Motive and Good Faith of Defendant. Whenever the motive and good

Maine.— Beedy *v.* Macomber, 47 Me. 451.

Massachusetts.— Rogers *v.* Dutton, 182 Mass. 187, 65 N. E. 56; Scollans *v.* Rollins, 179 Mass. 346, 60 N. E. 983, 88 Am. St. Rep. 386.

Minnesota.— Mueller *v.* Olson, 90 Minn. 416, 97 N. W. 115.

Missouri.— Blackmer *v.* Cleveland, etc., R. Co., 101 Mo. App. 557, 73 S. W. 913; Kirk *v.* Kane, 87 Mo. App. 274; Holladay-Klotz Land, etc., Co. *v.* T. J. Moss Tie Co., 87 Mo. App. 167.

New York.— Lawrence *v.* Wilson, 64 N. Y. App. Div. 562, 72 N. Y. Suppl. 289; Hakes *v.* Thornton, 59 N. Y. App. Div. 464, 69 N. Y. Suppl. 234; Simar *v.* Paris, 52 N. Y. App. Div. 439, 65 N. Y. Suppl. 133.

North Carolina.—Thompson *v.* Andrews, 53 N. C. 453.

North Dakota.— Simmons *v.* McConville, (1910) 125 N. W. 304.

South Carolina.—Prater *v.* Wilson, 55 S. C. 468, 33 S. E. 561.

Washington.— Galler *v.* McMahon, 51 Wash. 473, 99 Pac. 309.

Canada.— McLean *v.* Hannon, 3 Can. Sup. Ct. 706 [*reversing* 12 Nova Scotia 101].

See 47 Cent. Dig. tit. "Trover and Conversion," § 288.

Terms of contract.— In conversion for part of a crop raised on land belonging to defendant under an oral contract, the terms of which were disputed, the question was for the jury. Simmons *v.* McConville, (N. D. 1910) 125 N. W. 304.

36. Stewart *v.* Spedden, 5 Md. 433.

37. Fullam *v.* Cummings, 16 Vt. 697.

38. *Alabama.*—Alabama Cotton Products Co. *v.* Myrick, 151 Ala. 626, 44 So. 587; Conner *v.* Allen, 33 Ala. 515; Freeman *v.* Scurlock, 27 Ala. 407.

Kentucky.— Johnson *v.* Kelley, 106 S. W. 864, 32 Ky. L. Rep. 701.

Massachusetts.— Scollard *v.* Brooks, 170 Mass. 445, 49 N. E. 741.

Michigan.— Burgess *v.* Isherwood, 101 Mich. 319, 59 N. W. 602.

Missouri.— Smith *v.* Jefferson Bank, 120 Mo. App. 527, 97 S. W. 247.

New York.— Duffus *v.* Bangs, 122 N. Y. 423, 25 N. E. 980; Fuller Buggy Co. *v.* Waldron, 114 N. Y. App. Div. 365, 99 N. Y. Suppl. 920; Reich *v.* Cochran, 114 N. Y. App. Div. 141, 99 N. Y. Suppl. 755; Sinclair *v.* Higgins, 111 N. Y. App. Div. 206, 97 N. Y. Suppl 415 [*reversing* 46 Misc. 136, 93 N. Y. Suppl. 195]; Lawrence *v.* Wilson, 64 N. Y. App. Div. 562, 72 N. Y. Suppl. 289; Wamsley *v.* Atlas Steamship Co., 37 N. Y. App. Div. 553, 56 N. Y. Suppl. 284; Adams *v.* Loomis, 4 Silv. Sup. 558, 8 N. Y. Suppl. 17; Pepper *v.* Price, 107 N. Y. Suppl. 559.

North Carolina.— Nichols *v.* Newsom, 6 N. C. 302.

Pennsylvania.—Aull *v.* Colket, 2 Wkly. Notes Cas. 322.

Texas.— Hitson *v.* Hurb, 45 Tex. Civ. App. 360, 101 S. W. 292.

Utah.— Bowe *v.* Palmer, (1909) 102 Pac. 1007.

West Virginia.— Barker *v.* Stephenson, (1910) 68 S. E. 113.

Wisconsin.— Schultz *v.* Becker, 131 Wis. 235, 110 N. W. 214.

England.— Philpot *v.* Kelley, 3 A. & E. 106, 1 H. & W. 134, 4 L. J. K. B. 139, 4 N. & M. 611, 30 E. C. L. 70, 111 Eng. Reprint 353; Atkin *v.* Slater, 1 C. & K. 356, 47 E. C. L. 356; Wilkinson *v.* Whalley, 1 D. & L. 9, 7 Jur. 468, 12 L. J. C. P. 270, 5 M. & G. 590, 6 Scott N. R. 631, 44 E. C. L. 311; McKewen *v.* Cotching, 27 L. J. Exch. 41, 6 Wkly. Rep. 16.

See 47 Cent. Dig. tit. "Trover and Conversion," § 289.

The propriety of submitting the issue of conversion to the jury is illustrated in McCormick *v.* Pennsylvania Cent. R. Co., 49 N. Y. 303, in which it was held as a matter of law by Church, C. J., and Rapallo, J., that there was no conversion, and by Grover and Peckham, JJ., that there was.

A qualified refusal to deliver goods to the owner may or may not constitute a conversion, and the question should be submitted to the jury under proper instructions. Kime *v.* Dale, 14 Ill. App. 308; Delano *v.* Curtis, 7 Allen (Mass.) 470; Galvin *v.* Galvin Brass, etc., Works, 81 Mich. 16, 45 N. W. 654; Sutton *v.* Great Northern R. Co., 99 Minn. 376, 109 N. W. 815; McEntee *v.* New Jersey Steamboat Co., 45 N. Y. 34, 6 Am. Rep. 28; Thomson *v.* Sixpenny Sav. Bank, 5 Bosw. (N. Y.) 293; Plunkett Plumbing, etc., Co. *v.* Bassford Realty Co., 52 Misc. (N. Y.) 479, 102 N. Y. Suppl. 483; Pillott *v.* Wilkinson, 3 H. & C. 345, 34 L. J. Exch. 22, 12 Wkly. Rep. 1084.

39. Alabama Cotton Oil Co. *v.* Weeden, 150 Ala. 587, 43 So. 926; Woodworth El. Co. *v.* Theis, 109 Minn. 4, 122 N. W. 310; Goodwin *v.* Sommer, 49 Misc. (N. Y.) 552, 97 N. Y. Suppl. 960; Morris *v.* Springfield Third Nat. Bank, 142 Fed. 25, 73 C. C. A. 211.

40. Speak *v.* Ely, etc., Dry Goods Co., 22 Mo. App. 122.

Where the testimony was undisputed, that defendant claimed to own the property absolutely, it was unnecessary to submit the issue of conversion to the jury if they found

faith of defendant in trover are material issues they must be passed on by the jury, and not by the court.[41]

d. Demand. Whether or not a demand has been made upon defendant for the property is ordinarily a question of fact to be determined by the jury;[42] but the question of a demand need not be submitted to the jury where plaintiff fails to make out even a *prima facie* case of conversion,[43] nor where the evidence conclusively shows a demand.[44]

e. Waiver of Conversion. Whether certain acts or conduct of plaintiff amount to a waiver of the conversion alleged is a mixed question of law and fact to be passed on by the jury under instructions of the court.[45]

f. Damages. In trover the rule of damages is a question of law for the court,[46] and the amount thereof, under the rule given by the court, a question of fact for the jury,[47] even in a default case.[48]

3. Instructions — a. In General. The court should instruct the jury fully as to the law applicable under the evidence of the particular case.[49] An instruction is properly refused where it does not state the law correctly,[50] or the evidence does not warrant it,[51] or renders it superfluous,[52] or the point has already been covered by other instructions.[53] An instruction is erroneous which submits an issue not in controversy,[54] submits a question of exemplary damages when plaintiff has proved no right to actual damages,[55] gives plaintiff a right of election as to the measure of damages where defendant asks for and is entitled to affirmative relief,[56] fails to separate law and fact,[57] provides for relief not prayed for and not proper under the facts,[58] prescribes an erroneous rule of damages,[59] or is otherwise

he held the goods as security only. Payne *v.* Lindsley, (Tex. Civ. App. 1910) 126 S. W. 329.

41. Conner *v.* Allen, 33 Ala. 515; Walker *v.* Wetherbee, 65 N. H. 656, 23 Atl. 621; Closson *v.* Morrison, 47 N. H. 482, 93 Am. Dec. 459; Andrews *v.* New Jersey Steamboat Co., 23 Hun (N. Y.) 545; Woodworth *v.* Kissam, 15 Johns. (N. Y.) 186; Gilpin *v.* Royal Canadian Bank, 27 U. C. Q. B. 310.

42. Delahunty *v.* Hake, 20 N. Y. App. Div. 430, 46 N. Y. Suppl. 929.

43. Knapp *v.* Sioux Falls Nat. Bank, 5 Dak. 378, 40 N. W. 587.

44. Gaw *v.* Bingham, (Tex. Civ. App. 1908) 107 S. W. 931.

45. Williams *v.* Ward, 1 Phila. (Pa.) 29; Traynor *v.* Johnson, 1 Head (Tenn.) 51.

46. Baker *v.* Wheeler, 8 Wend. (N. Y.) 505, 24 Am. Dec. 66.

47. Hitchcock *v.* McElrath, 72 Cal. 565, 14 Pac. 305; Pedroni *v.* Eppstein, 17 Colo. App. 424, 68 Pac. 794; Moore *v.* Batten, 5 Misc. (N. Y.) 20, 25 N. Y. Suppl. 141; Reynolds *v.* Waddell, 12 U. C. Q. B. 9.

Especially where the conversion is characterized by fraud, malice, oppression, or wrong, the measure of damages should always be left to the discretion of the jury. Jamison *v.* Moon, 43 Miss. 598; Briscoe *v.* McElween, 43 Miss. 556.

48. Abraham *v.* Alford, 64 Ala. 281.

49. See cases cited *infra*, this note, and notes 50–62.

Although only one witness testifies to an issue, it should be covered by instructions. Lee *v.* McDonnell, 31 Tex. Civ. App. 468, 72 S. W. 612; Chappell *v.* Puget Sound Reduction Co., 27 Wash. 63, 67 Pac. 391, 91 Am. St. Rep. 820.

That defendant might have been guilty of negligence does not relieve of necessity of charge on the law of conversion. Wamsley *v.* Atlas Steamship Co., 168 N. Y. 533, 61 N. E. 896, 85 Am. St. Rep. 699.

For approved instructions see Bynum *v.* Gay, 161 Ala. 140, 49 So. 757, 135 Am. St. Rep. 121; Farrow *v.* Wooley, 149 Ala. 373, 43 So. 144; Young *v.* Pine Ridge Lumber Co., (Tex. Civ. App. 1907) 100 S. W. 784.

50. Farrow *v.* Wooley, 149 Ala. 373, 43 So. 144.

51. *California.*— Gray *v.* Eschen, 125 Cal. 1, 57 Pac. 664; Lothrop *v.* Golden, (1899) 57 Pac. 394.

Georgia.— Knox *v.* Cook, 119 Ga. 689, 46 S. E. 868.

Illinois.— Bennet *v.* Gilbert, 194 Ill. 403, 62 N. E. 847 [*affirming* 94 Ill. App. 505].

Minnesota.— Boxell *v.* Robinson, 82 Minn. 26, 84 N. W. 635.

Texas.— Burke *v.* Holmes, (Civ. App. 1904) 80 S. W. 564; Lee *v.* McDonnell, 31 Tex. Civ. App. 468, 72 S. W. 612.

52. Puzis *v.* Temko, 33 Pa. Super. Ct. 526.

53. Spaulding *v.* Jennings, 173 Mass. 65, 53 N. E. 204; Smith *v.* Hawley, 14 S. D. 638, 86 N. W. 652; France *v.* Gibson, (Tex. Civ. App. 1907) 101 S. W. 536.

54. Yoder *v.* Reynolds, 28 Mont. 183, 72 Pac. 417.

55. Mulliner *v.* Shumake, (Tex. Civ. App. 1900) 55 S. W. 983.

56. Malsby *v.* Young, 104 Ga. 205, 30 S. E. 854.

57. Gragg *v.* Hull, 41 Vt. 217.

58. Harris *v.* Staples, (Tex. Civ. App. 1905) 89 S. W. 801.

59. Banner Lumber Co. *v.* McDermott, 128 Mo. App. 89, 106 S. W. 583.

misleading.[60] A defective instruction, however, will often be no ground for a reversal, if there was no request for a more accurate one,[61] or if the defect is one of form rather than substance.[62]

b. Invading Province of Jury. An instruction invades the province of the jury, and the giving of it is reversible error, when it assumes a fact as proved where the evidence only tends to prove it,[63] or the evidence in regard to it is contradictory;[64] when it takes from the jury a case in which there is sufficient evidence to sustain a finding;[65] when it ignores the sole issue on which the case was tried;[66] passes on the sufficiency of the evidence;[67] directs the jury to consider a particular part of the evidence as of greater weight;[68] withdraws other issues from the jury;[69] directs the jury to find for plaintiff in a particular event when they might find from other testimony that there was no right of recovery;[70] directs the allowance of a given rate of interest where the allowing of interest is discretionary with the jury;[71] or directs a verdict on the testimony of one witness when other witnesses have testified to the same matter.[72]

c. Title and Right to Property. Where title or right to property alleged to have been wrongfully converted by defendant is in issue, a general instruction that plaintiff must prove it will suffice;[73] and such an instruction should be given even though plaintiff's testimony as to his title is uncontradicted.[74] And defendant is entitled to an instruction in his favor as to title, if the evidence warrants it.[75]

An instruction, authorizing exemplary damages if defendant seized the property "willfully or maliciously and with intent to vex" plaintiff, was erroneous because of the use of the word "or" instead of the word "and," for every act intentionally done is done wilfully. Baldwin *v.* Davidson, (Tex. Civ. App. 1910) 127 S. W. 562.

60. *California.*— Lothrop *v.* Golden, (1899) 57 Pac. 394.

Connecticut.— Barker *v.* S. A. Lewis Storage, etc., Co., 78 Conn. 198, 61 Atl. 363.

Georgia.— Klassing *v.* Pavlovski, 134 Ga. 815, 68 S. E. 614.

Kentucky.— Lowry *v.* Beckner, 5 B. Mon. 41.

New York.— Johnson *v.* Blaney, 198 N. Y. 312, 91 N. E. 721.

Texas.— Baldwin *v.* Davidson, (Civ. App. 1910) 127 S. W. 562.

61. Burke *v.* Holmes, (Tex. Civ. App. 1904) 80 S. W. 564.

62. Taylor *v.* Lyon, 10 Pa. Cas. 175, 13 Atl. 739; Breeland *v.* Ritter, 65 S. C. 480, 43 S. E. 960; Crow *v.* Ball, (Tex. Civ. App. 1907) 99 S. W. 583; Hanaway *v.* Wiseman, 39 Tex. Civ. App. 642, 88 S. W. 437.

63. Hudson *v.* Bauer Grocery Co., 105 Ala. 200, 16 So. 693; Jones *v.* Fort, 36 Ala. 449; Bower *v.* Bower, 97 Mo. App. 674, 71 S. W. 739.

64. Posey *v.* Gamble, 157 Ala. 655, 47 So. 569; Bower *v.* Bower, 97 Mo. App. 674, 71 S. W. 739.

65. Kellogg *v.* Hamilton, (Miss. 1891) 10 So. 479; Goodwin *v.* Sommer, 49 Misc. (N. Y.) 552, 97 N. Y. Suppl. 960.

66. Reed *v.* Gould, 93 Mich. 359, 53 N. W. 356.

67. Doyle *v.* Burns, 123 Iowa 488, 99 N. W. 195.

68. Doll *v.* Hennessy Mercantile Co., 33 Mont. 80, 81 Pac. 625.

69. Benson *v.* Eli, 16 Colo. App. 494, 66 Pac. 450; Snell *v.* Weir, 59 Ill. 494; Schmittdiel *v.* Moore, 101 Mich. 590, 60 N. W. 279; Dyer *v.* Rosenthal, 45 Mich. 588, 8 N. W. 560.

70. Dakin *v.* Elmore, 127 N. Y. App. Div. 457, 111 N. Y. Suppl. 519; Browder *v.* Phinney, 37 Wash. 70, 79 Pac. 598.

71. Carson *v.* Smith, 133 Mo. 606, 34 S. W. 855.

72. Weisenfield *v.* McLean, 96 N. C. 248, 2 S. E. 56.

73. Hoffman *v.* Harrington, 44 Mich. 183, 6 N. W. 225; Jacobs *v.* Totty, 76 Tex. 343, 13 S. W. 372.

Subsequently stating law incorrectly.— Where, in an action for the conversion of property, there was evidence that a third person owned the property as trustee, and the court correctly charged that plaintiff to recover must show that he was, at the time of the taking, the owner of the property or entitled to the possession thereof, and then incorrectly stated in effect that the fact that the third person owned the property as trustee at the time of the taking was no defense, the instructions were irreconcilable, necessitating a new trial after verdict for plaintiff. Johnson *v.* Blaney, 198 N. Y. 312, 91 N. E. 721 [*reversing* 132 N. Y. App. Div. 925, 116 N. Y. Suppl. 1139].

74. Palmer *v.* McMaster, 10 Mont. 390, 25 Pac. 1056.

75. Nashville, etc., R. Co. *v.* Walley, (Ala. 1906) 41 So. 134; Wilson *v.* Griswold, 79 Conn. 18, 63 Atl. 659.

Misleading instruction.— Where, in an action for conversion of building materials and machinery, defendant showed that under a building contract he had a right to take possession of a part of the materials and machinery, an instruction that one accused of conversion could not question plaintiff's title or right of possession by showing that the taking was in good faith or under a mistake, was misleading on the question of recovery of actual damages. Baldwin *v.* Davidson, (Tex. Civ. App. 1910) 127 S. W. 562.

An instruction as to title of the property alleged to have been converted, not based upon evidence, is reversible error.[76]

d. Acts Constituting Conversion. The court should instruct as to whether acts of which evidence has been admitted are sufficient, if proved, to constitute conversion;[77] and such instructions, if erroneous,[78] are ground for reversal.

e. Identity of Property. If the identity of the property alleged to have been converted is an issue, the court should instruct that plaintiff cannot recover unless he establishes such identity,[79] and an instruction which assumes the identity of the property converted with that of plaintiff is erroneous.[80]

f. Demand and Refusal. Where under the pleadings and evidence of the particular case proof of demand and refusal are essential to conversion,[81] or may constitute one mode of conversion,[82] the jury should be so instructed; but otherwise no instruction as to demand and refusal need be given.[83]

g. Motive and Good Faith of Defendant. Where the motive or good faith of defendant are material to the issue of a recovery or of the measure of damages the jury should be so instructed;[84] but otherwise no instruction need be given as to these matters.[85]

h. Degree of Proof Required. Preponderance of evidence is all that is required to sustain an issue,[86] and an instruction which casts upon a party the burden of proving his contention beyond a doubt is erroneous.[87]

i. Measure of Damages. It is the duty of the court to give the jury a statement of the general rules as to the measure of damages applicable to the particular case.[88]

Turpentine privileges.— In an action for conversion of crude turpentine, where defendant had turpentine privileges on the land to Jan. 1, 1908, and timber or sawmill privileges thereon to Jan. 1, 1910, it was not error to charge that defendant had the timber rights "from January 1, 1910, subject to plaintiff's right to turpentine therein from the 1st day of January, 1908, until such time as timber shall be cut" by defendant. Melrose Mfg. Co. *v.* Kennedy, 59 Fla. 312, 51 So. 595.

Where plaintiff and defendant claim through different chains of title, there is no error in giving an instruction that plaintiff cannot recover if defendant's vendor owned the property when he transferred it to defendant. Burdick *v.* Michael, 32 Mich. 246.

76. Darden *v.* Callaghan, (Cal. 1892) 31 Pac. 263; Lantz *v.* Drum, 44 Ill. App. 607; Thomas *v.* Ramsey, 47 Mo. App. 84; Rhea *v.* Deaver, 85 N. C. 337.

77. *Connecticut.*— Hill *v.* Hayes, 38 Conn. 532.

Maine.— Scott *v.* Perkins, 28 Me. 22, 48 Am. Dec. 470.

New York.— Roe *v.* Campbell, 40 Hun 49.

Utah.— Neder *v.* Jennings, 28 Utah 271, 78 Pac. 432.

Wisconsin.— Brickley *v.* Walker, 68 Wis. 563, 32 N. W. 773.

Instruction that refusal to surrender goods to owner is a conversion may be proper (Mitchell *v.* Williams, 4 Hill (N. Y.) 13), or not (Leman *v.* Best, 30 Ill. App. 323; Robinson *v.* Way, 163 Mass. 212, 39 N. E. 1009), according to the nature of the case and of the evidence.

May instruct that if a sale be a conversion both parties thereto are liable. Pecha *v.* Kastl, 64 Nebr. 380, 89 N. W. 1047.

78. Thompson *v.* Moesta, 27 Mich. 182; Columbia Mill Co. *v.* National Bank of Commerce, 52 Minn. 224, 53 N. W. 1061.

79. Long *v.* Hall, 97 N. C. 286, 2 S. E. 229.

80. Benson *v.* Eli, 16 Colo. App. 494, 16 Pac. 450.

81. Blakely *v.* Ruddell, 30 Fed. Cas. No. 18,241, Hempst. 18.

82. Salisbury *v.* Gourgas, 10 Metc. (Mass.) 442; Walcott *v.* Keith, 22 N. H. 196.

83. Williams *v.* McKissack, 117 Ala. 441, 22 So. 489; Dunham *v.* Converse, 28 Wis. 306.

84. Freeman *v.* Etter, 21 Minn. 2; Goodwin *v.* Sommer, 49 Misc. (N. Y.) 552, 97 N. Y. Suppl. 960.

85. See *supra*, note 84.

86. See *infra*, note 87.

87. Foo Long *v.* Chu Fong, 6 N. Y. Suppl. 406.

88. Downing *v.* Outerbridge, 79 Fed. 931, 25 C. C. A. 244.

Including rules as to exemplary damages in a proper case. Downing *v.* Outerbridge, 79 Fed. 931, 25 C. C. A. 244.

Instructions as to time at which damages assessed.— It is not error to charge that the measure of damages must be assessed as value of property at a time it was alleged to have been converted, and at which its value was proved, although there was evidence tending to show the conversion occurred at another time (Rogers *v.* Twyman, 56 S. W. 665, 22 Ky. L. Rep. 40); but a verdict for plaintiff must be set aside where the court excluded all evidence of value at date of conversion and then limited the jury to assessment of damages at value on said date (Thompson *v.* Schaetzel, 6 Dak. 284, 42 N. W. 765).

4. Verdict and Findings, Judgment and Enforcement — a. Verdict and Findings — (I) *In General.* In addition to the formal parts, a verdict for plaintiff need contain only a finding for plaintiff and the amount of damages recoverable; [89] and a verdict for defendant only a finding for him, without assessment of damages.[90] A verdict is void which is contrary to,[91] or inconsistent with,[92] the evidence; [93] or which fails to fix the value of the property or assess the damages; [94] or is not responsive to the issues.[95]

(II) *Special Verdict or Findings.* A special verdict to sustain judgment for plaintiff should find either a conversion or such facts as will render the conversion a question of law; [96] and may find such facts as will sustain a verdict for defendant.[97]

(III) *In Action Against Several Defendants.* A verdict may be found against one or more defendants and in favor of the others.[98]

89. *California.*— Troy *v.* Clarke, 30 Cal. 419.

Georgia.— O'Neil Mfg. Co. *v.* Woodley, 118 Ga. 114, 44 S. E. 980; Kaplan *v.* Glover, 108 Ga. 301, 33 S. E. 967; Horne *v.* Guiser Mfg. Co., 74 Ga. 790.

New York.— Ferrier *v.* Manning, 25 Misc. 531, 54 N. Y. Suppl. 1019.

Oklahoma.— Hopkins *v.* Dipert, 11 Okla. 630, 69 Pac. 883.

United States.— U. S. *v.* Yukers, 60 Fed. 641, 9 C. C. A. 171.

It may be read in connection with complaint. Phillipos *v.* Mihran, 38 Wash. 402, 80 Pac. 527.

Should comply with agreement by parties in open court. Herring *v.* Rogers, 30 Ga. 615.

Mere surplusage should be disregarded. McGowan *v.* Lynch, 151 Ala. 458, 44 So. 573; Swan *v.* Smith, 13 Nev. 257; Hodge *v.* Montgomery, Speers Eq. (S. C.) 268.

May be amended so as to express meaning of jury in proper form. Hoey *v.* Cardage, 61 Me. 257.

Verdict written on bail affidavit may be transferred to declaration. Erskine *v.* Wiggins, 58 Ga. 187.

90. Diefendorff *v.* Hopkins, 95 Cal. 343, 28 Pac. 265, 30 Pac. 549.

91. Gardner *v.* Baer, 26 Misc. (N. Y.) 181, 56 N. Y. Suppl. 1096; Crawford *v.* Hartzell, 7 Ohio Dec. (Reprint) 63, 1 Cinc. L. Bul. 94.

92. Bernstein *v.* Walker, 25 Ill. App. 224.

93. **Although in accord with instructions of the court** (Felts *v.* Collins, 67 N. Y. App. Div. 430, 73 N. Y. Suppl. 796) and the presumption is that the jury followed instructions (Wilson *v.* Hoffman, 123 Fed. 984 [*reversed* on other grounds in 130 Fed. 694, 65 C. C. A. 14]).

94. Ferrier *v.* Manning, 25 Misc. (N. Y.) 531, 54 N. Y. Suppl. 1019.

95. Toulmin *v.* Lesesne, 2 Ala. 359; Taylor *v.* Bowen, 52 N. Y. App. Div. 126, 65 N. Y. Suppl. 36; Zeitlin *v.* Arkaway, 25 Misc. (N. Y.) 186, 54 N. Y. Suppl. 139.

Presumption in case of doubt is that the verdict responds to the issues. Swartwout *v.* Evans, 37 Ill. 442; Sheen *v.* Rickie, 7 Dowl. P. C. 335, 3 Jur. 607, 8 L. J. Exch. 217, 5 M. & W. 175.

Where the verdict is for defendant, there need be no finding as to value or damage. Diefendorff *v.* Hopkins, 95 Cal. 343, 28 Pac. 265, 30 Pac. 549.

96. McCray *v.* Burr, 125 Cal. 636, 58 Pac. 203; Kehr *v.* Hall, 117 Ind. 405, 20 N. E. 279; Gordon *v.* Stockdale, 89 Ind. 240; Hill *v.* Covell, 1 N. Y. 522; Mires *v.* Solebay, 2 Mod. 242, 86 Eng. Reprint 1050.

A finding that defendant converted the property in question includes findings that he had possession and acted in defiance of the owner's rights. Eureka County Bank *v.* Clarke, 130 Fed. 325, 64 C. C. A. 571 [*affirming* 123 Fed. 922].

Express finding of title or other essential fact is not essential, where clearly implied. Mathew *v.* Mathew, 138 Cal. 334, 71 Pac. 344; Newlove *v.* Pond, 130 Cal. 342, 62 Pac. 561.

Where plaintiff recovers for only part of property claimed, verdict should be entered distributively. Nicholls *v.* Bastard, 2 C. M. & R. 659, 1 Gale 295, 5 L. J. Exch. 7, Tyrw. & G. 156; Williams *v.* Great Northern R. Co., 1 Dowl. P. C. N. S. 16, 10 L. J. Exch. 472, 8 M. & W. 856.

A finding that plaintiff had not satisfied the jury by a fair balance of the evidence that defendant acted in bad faith is not tantamount to a finding that he acted in good faith. Hassam *v.* J. E. Safford Lumber Co., 82 Vt. 444, 74 Atl. 197.

What issues proper.—Where one not the owner of goods gave a mortgage thereon, and the true owner sued the mortgagee in conversion, a request for an issue as to whether plaintiff was damaged by the sale, and if so, how much, was proper. Lance *v.* Butler, 135 N. C. 419, 47 S. E. 488.

97. Rice *v.* Knostman, 45 Wash. 282, 88 Pac. 194.

98. *Arkansas.*— Ray *v.* Light, 34 Ark. 421.

Florida.— Peacock *v.* Feaster, 51 Fla. 269, 40 So. 74.

Indiana.—Walling *v.* Lewis, 119 Ind. 496, 21 N. E. 1108.

Maine.— Powers *v.* Sawyer, 46 Me. 160.

New York.— Lockwood *v.* Bull, 1 Cow. 322, 13 Am. Dec. 539.

West Virginia.— Tracy *v.* Cloyd, 10 W. Va. 19.

Upon a joint verdict of guilty against more than one defendant and an assessment of several damages, plaintiff may have a venire

(IV) *ALTERNATIVE VERDICT.* In Georgia plaintiff is entitled, at his option, to elect between: (1) An alternative verdict for the property or its value; (2) a verdict for damages alone; and (3) a verdict for the property alone, and its hire, if any; [99] and where plaintiff has given bond and taken the property and is then cast in the suit, defendant is entitled to a like election.[1]

(V) *SUFFICIENCY OF FINDINGS OF REFEREE.* The findings of a referee have been held sufficient even as to facts that are not expressly stated, where they are clearly implied.[2]

b. Judgment[3]—(I) *IN GENERAL.* A judgment in trover is properly one for damages only and not for the recovery of the property converted.[4] A judgment will not be set aside merely because the property is loosely described in the petition,[5] because the prayer of the petition is for possession instead of damages,[6] nor because the verdict is defective where it is not void;[7] but in an action of trover it is error to render judgment on account as for value of property purchased.[8] A judgment rendered on a verdict against two or more defendants for a joint conversion must be joint in form;[9] but a joint judgment for several conversions is erroneous.[10] An unsatisfied judgment against one joint tort-feasor is not a bar to a judgment against another,[11] and a plaintiff may elect as to which one of several judgments against joint tort-feasors he will enforce;[12] but satisfaction of one such judgment operates as a discharge of all,[13] and an election by plaintiff to enforce one estops him from thereafter claiming a higher amount of damages in a suit against another joint tort-feasor.[14]

(II) *ALTERNATIVE JUDGMENT.*[15] In some states an alternative judgment may be rendered for the property or its value;[16] but in others an alternative judgment is not authorized and the judgment must be for money only.[17]

de novo or cure the irregularity by dismissing as to all but one of defendants. Everroad *v.* Gabbert, 83 Ind. 489.

99. Mallory *v.* Moon, 130 Ga. 591, 61 S. E. 401; Commercial Pub. Co. *v.* Campbell Printing Press, etc., Co., 111 Ga. 388, 36 S. E. 756; Ross *v.* McDuffie, 91 Ga. 120, 16 S. E. 648; Hays *v.* Jordan, 85 Ga. 741, 11 S. E. 833, 9 L. R. A. 373; Bradley *v.* Burkett, 82 Ga. 255, 11 S. E. 492; Foster *v.* Brooks, 6 Ga. 287.

Retaking possession of the property under bond does not deprive plaintiff of his right to elect a money verdict (Hudson *v.* Goff, 77 Ga. 281, 3 S. E. 152); but disposition of the property beyond his power to produce it does so deprive him (Mallory *v.* Moon, 130 Ga. 591, 61 S. E. 401).

Under verdict for slaves or their value, defendant had not the privilege of delivering some of the slaves and retaining others, but must deliver all the slaves or pay all the money. Evans *v.* Lipscomb, 31 Ga. 71.

1. Marshall *v.* Livingston, 77 Ga. 21.

2. Thompson *v.* Vroman, 66 Hun (N. Y.) 245, 21 N. Y. Suppl. 179; Durfee *v.* Bump, 3 N. Y. Suppl. 505.

3. See, generally, JUDGMENTS, 23 Cyc. 623.

4. Kyle *v.* Caravello, 103 Ala. 150, 15 So. 527; Schwartz *v.* Marks, 52 Misc. (N. Y.) 109, 101 N. Y. Suppl. 792.

Under the Alabama statute judgment for costs may not be for a sum larger than the damages where the damages do not exceed twenty dollars. Tecumseh Iron Co. *v.* Mangum, 67 Ala. 246.

For alternative judgment see *infra,* IV, E, 4, c, (II).

5. Wolf *v.* Kennedy, 93 Ga. 219, 18 S. E. 433.

6. Faulkner *v.* Santa Barbara First Nat. Bank, 130 Cal. 258, 62 Pac. 463; Morish *v.* Mountain, 22 Minn. 564; Washburn *v.* Mendenhall, 21 Minn. 332.

7. Hogue *v.* Fanning, 73 Cal. 54, 14 Pac. 560.

8. Palmour *v.* Durham Fertilizer Co., 97 Ga. 244, 22 S. E. 931.

9. Gerrish *v.* Cummings, 4 Cush. (Mass.) 391.

10. Crenshaw *v.* Smith, 10 Heisk. (Tenn.) 1.

11. United Shakers Soc. *v.* Underwood, 11 Bush (Ky.) 265, 21 Am. Rep. 214.

Judgment partly satisfied is not a bar. Lovejoy *v.* Murray, 3 Wall. (U. S.) 1, 18 L. ed. 129.

12. United Shakers Soc. *v.* Underwood, 11 Bush (Ky.) 265, 21 Am. Rep. 214.

13. United Shakers Soc. *v.* Underwood, 11 Bush (Ky.) 265, 21 Am. Rep. 214.

14. United Shakers Soc. *v.* Underwood, 11 Bush (Ky.) 265, 21 Am. Rep. 214.

15. **Alternative verdict** see *supra,* IV, E, 4, a, (IV).

16. Copewood *v.* Taylor, 7 Port. (Ala.) 33; Marshall *v.* Livingston, 77 Ga. 21.

Where election is allowed defendant, he must choose within a reasonable time. Vauters *v.* Elders, 2 Mill (S. C.) 184.

17. Kern *v.* Woolsey, 34 Ill. App. 551; Stephens *v.* Koonce, 103 N. C. 266, 9 S. E. 315.

In New York, the form of the judgment, whether for the property or for damages, is dependent upon the substantial nature of the action. Wilsey *v.* Rooney, 16 N. Y. Suppl.

(III) *Conformity to Findings.* A judgment is void where it does not conform to the findings of the court or jury,[18] but an immaterial departure from the verdict is not ground for reversal.[19]

(IV) *Against Defendant and Sureties.* The bail of a defendant who has given bond is bound by the judgment equally with defendant,[20] and where plaintiff recovers a verdict, he may have judgment rendered thereon against defendant and his sureties jointly, without scire facias or other proceedings.[21]

(V) *Offer of Judgment.* An offer of judgment in trover is sufficient, although it does not include an offer of judgment for costs.[22]

c. Satisfaction of Judgment. An alternative judgment in trover can be satisfied only by restoring the whole of the property or paying the entire amount of damages, and restoration of part of the property and payment for the remainder is not sufficient.[23]

d. Effect of Judgment or Satisfaction on Title to Property. In several jurisdictions title to property involved in an action for conversion is held to be transferred to defendant by the entry of judgment in plaintiff's favor.[24] But the prevailing doctrine is that title is vested in defendant only upon the full satisfaction of the judgment.[25] Defendant's title, whether vested in him by the judgment or by the satisfaction thereof, relates back to the date of the conversion.[26]

471; Seymour *v.* Van Curen, 18 How. Pr. 94.

18. Hews *v.* Wall, 27 Ill. App. 445; Cohen *v.* Salet, 2 Misc. (N. Y.) 51, 21 N. Y. Suppl. 585; Roenm *v.* Blanchard, 9 N. Y. Suppl. 396.

19. Mitchell *v.* Printup, 19 Ga. 579.

20. Jackson *v.* Guilmartin, 61 Ga. 544.

21. Mourning *v.* Hodges, 33 Ga. Suppl. 104.

22. Brown *v.* Bosworth, 58 Wis. 379, 17 N. W. 241.

23. Evans *v.* Lipscomb, 31 Ga. 71; Willis *v.* Willis, 22 Ga. 290; Mitchell *v.* Printup, 19 Ga. 579.

24. Carlisle *v.* Burley, 3 Me. 250; Hawkins *v.* Collins, 61 S. C. 537, 39 S. E. 768; Bogan *v.* Wilburn, 1 Speers (S. C.) 179; Rogers *v.* Moore, Rice (S. C.) 60; Norrill *v.* Corley, 2 Rich. Eq. (S. C.) 288 note; Foreman *v.* Neilson, 2 Rich. Eq. (S. C.) 287; Brinsmead *v.* Harrison, L. R. 7 C. P. 547, 41 L. J. C. P. 190, 27 L. T. Rep. N. S. 99, 20 Wkly. Rep. 784; Adams *v.* Broughton, Andr. 18, 95 Eng. Reprint 278, Str. 1078, 93 Eng. Reprint 1043; Broome *v.* Wooton, Yelv. 67, 80 Eng. Reprint 47. And see *In re* Merrick, 5 Watts & S. (Pa.) 9, an equity case in which the court says that since Floyd *v.* Browne, 1 Rawle (Pa.) 121, 18 Am. Dec. 602, an action for trespass, a judgment in trover is on the same footing as satisfaction thereof.

25. *California.*— Thompson *v.* Toland, 48 Cal. 99.

Connecticut.—Atwater *v.* Tupper, 45 Conn. 144, 29 Am. Rep. 674.

Georgia.— Frick *v.* Davis, 80 Ga. 482, 5 S. E. 498.

Kentucky.— United Shakers Soc. *v.* Underwood, 11 Bush 265, 21 Am. Rep. 214.

Louisiana.—Story *v.* Luzenberg, 4 Rob. 240; Jourdan *v.* Patton, 5 Mart. 615.

Maryland.—Hepburn *v.* Sewell, 5 Harr. & J. 211, 9 Am. Dec. 512.

Michigan.— John A. Tolman Co. *v.* Waite, 119 Mich. 341, 78 N. W. 124, 75 Am. St. Rep. 400; Kenyon *v.* Woodruff, 33 Mich. 310; Brady *v.* Whitney, 24 Mich. 154.

Minnesota.— Haas *v.* Sackett, 40 Minn. 53, 41 N. W. 237, 2 L. R. A. 449.

New Jersey.— Singer Mfg. Co. *v.* Skillman, 52 N. J. L. 263, 19 Atl. 260; Fox *v.* Prickett, 34 N. J. L. 13.

New Mexico.— Pryor *v.* Portsmouth Cattle Co., 6 N. M. 44, 27 Pac. 327.

New York.— Kelly *v.* Forty-Second St., etc., R. Co., 37 N. Y. App. Div. 500, 55 N. Y. Suppl. 1096; Deitz *v.* Field, 10 N. Y. App. Div. 425, 41 N. Y. Suppl. 1087; Osterhout *v.* Roberts, 8 Cow. 43; Curtis *v.* Groat, 6 Johns. 168, 5 Am. Dec. 204.

Ohio.— Acheson *v.* Miller, 2 Ohio St. 203, 59 Am. Dec. 663.

Tennessee.— Smith *v.* Alexander, 4 Sneed 482; Clark *v.* Cullen, (Ch. App. 1897) 44 S. W. 204.

Texas.— St. Louis, etc., R. Co. *v.* McKinsey, 78 Tex. 298, 14 S. W. 645, 22 Am. St. Rep. 54.

United States.— Union Pac. R. Co. *v.* Schiff, 78 Fed. 216.

England.— *Ex p.* Drake, 5 Ch. D. 866, 46 L. J. Bankr. 105, 36 L. T. Rep. N. S. 677, 25 Wkly. Rep. 641; Cooper *v.* Shepherd, 3 C. B. 266, 4 D. & L. 214, 10 Jur. 758, 15 L. J. C. P. 237, 54 E. C. L. 266; Marston *v.* Phillips, 9 L. T. Rep. N. S. 289, 12 Wkly. Rep. 8.

See 47 Cent. Dig. tit. "Trover and Conversion," § 314.

Judgment for nominal damages will not vest title to the goods in defendant (Barb *v.* Fish, 8 Blackf. (Ind.) 481), even if the judgment is satisfied, where the value of the chattel was not the real basis of the amount of the verdict (Dearth *v.* Spencer, 52 N. H. 213).

Imprisonment of defendant under a judgment in trover is not such satisfaction of the judgment as will transfer the title in the converted goods to him. Goff *v.* Craven, 34 Hun (N. Y.) 150.

26. *Alabama.*— Griel *v.* Pollak, 105 Ala.

5. APPEAL AND ERROR — a. Record.[27] A reversal may not be had on appeal where the record does not show material error in the court below[28] to which objection was properly made,[29] or does not show by which party erroneous evidence was offered,[30] nor will an appeal be allowed for an error that can be corrected without prejudice to appellant.[31]

b. Questions of Fact, Verdict, and Findings. An appeal will not lie on a question of fact which was submitted to the jury on conflicting evidence,[32] or on an issue which the jury must have passed on in arriving at their verdict,[33] or from a finding based on the owner's estimate of value where the market value of the property was not clearly ascertainable.[34]

c. Harmless Error. A judgment will not be reversed or a new trial be granted unless the error complained of was materially prejudicial to the appellant.[35]

d. Determination and Disposition of Cause. A reversal should be had on appeal where the record discloses a variance,[36] contains no evidence, or insufficient evidence, of the value of the chattels converted;[37] fails to show that the property was ever in the possession or under the control of defendant;[38] or whenever it appears that the damages given are manifestly inadequate[39] or compensate plaintiff for a greater interest in the property than he owned.[40]

249, 16 So. 704; Smith *v.* Hooks, 19 Ala. 101.

Maryland.— Hepburn *v.* Sewell, 5 Harr. & J. 211, 9 Am. Dec. 512.

New Hampshire.— Smith *v.* Smith, 50 N. H. 212.

Ohio.—Acheson *v.* Miller, 2 Ohio St. 203, 59 Am. Dec. 663.

Texas.— Greer *v.* Lafayette County Bank, (Civ. App. 1898) 47 S. W. 737.

United States.— St. Louis Third Nat. Bank *v.* Rice, 161 Fed. 822, 88 C. C. A. 640, 23 L. R. A. N. S. 1167.

England.— Buckland *v.* Johnson, 15 C. B. 145, 2 C. L. R. 784, 18 Jur. 775, 23 L. J. C. P. 204, 80 E. C. L. 145.

See 47 Cent. Dig. tit. "Trover and Conversion," § 314.

Judgment need not declare transfer of title. St. Louis, etc., R. Co. *v.* McKinsey, 78 Tex. 298, 14 S. W. 645, 22 Am. St. Rep. 54; Smith *v.* So Rill, (Tex. Civ. App. 1899) 54 S. W. 38.

The court is without jurisdiction to stay execution against defendant on condition that plaintiff shall do some act to make title to defendant the subject-matter of the action. Butts *v.* Bilke, 4 Price 291.

As against a third party to whom defendant voluntarily surrendered the property after its conversion, and before judgment, title does not pass to defendant from date of conversion by him. St. Louis Third Nat. Bank *v.* Rice, 161 Fed. 822, 88 C. C. A. 640, 23 L. R. A. N. S. 1167.

27. See, generally, APPEAL AND ERROR, 2 Cyc. 474.

28. See *infra*, notes, 29, 30.

29. Folden *v.* Hendrick, 25 Mo. 411; Reading *v.* Lamphier, 9 N. Y. Suppl. 596; Mitchell *v.* Mitchell, 4 N. Y. Suppl. 72; Rank *v.* Rank, 5 Pa. St. 211.

Judgment for face value of a check will be affirmed where there was no request for a finding of actual value. Lovell *v.* Hammond Co., 66 Conn. 500, 34 Atl. 511.

30. Hagar *v.* Norton, 188 Mass. 47, 73 N. E. 1073.

31. Lovell *v.* Hammond Co., 66 Conn. 500, 34 Atl. 511; Lance *v.* Butler, 135 N. C. 419, 47 S. E. 488.

32. Sutton *v.* Greene, 51 Mich. 118, 16 N. W. 259.

33. Montgomery *v.* Brush, 121 Ill. 513, 13 N. E. 230.

34. Frankinstein *v.* Thomas, 4 Daly (N. Y.) 256.

35. *California.*— Mortimer *v.* Marder, 93 Cal. 172, 28 Pac. 814; Angell *v.* Hopkins, 79 Cal. 181, 21 Pac. 729.

Georgia.— Bryant *v.* Pugh, 86 Ga. 525, 12 S. E. 927.

Iowa.— Luce *v.* Moorehead, 73 Iowa 498, 35 N. W. 598, 5 Am. St. Rep. 695.

Michigan.— Blaisdell *v.* Scally, 84 Mich. 149, 47 N. W. 585; Wood *v.* Elliot, 51 Mich. 320, 16 N. W. 666; Grant *v.* Smith, 26 Mich. 201.

Minnesota.— Nininger *v.* Banning, 7 Minn. 274.

New Hampshire.— Walcott *v.* Keith, 22 N. H. 196.

New York.— De Graaf *v.* Wycoff, 118 N. Y. 1, 22 N. E. 1118; Kilpatrick *v.* Dean, 15 Daly 182, 4 N. Y. Suppl. 708 [*affirming* 3 N. Y. Suppl. 60]; Saunders *v.* Payne, 12 N. Y. Suppl. 735.

Oregon.— Krewson *v.* Purdon, 15 Oreg. 589, 16 Pac. 480.

Texas.— Land *v.* Klein, 21 Tex. Civ. App. 3, 50 S. W. 638; Kean *v.* Zundelowitz, 9 Tex. Civ. App. 350, 29 S. W. 930.

36. Wilkinson *v.* King, 81 Ala. 156, 8 So. 189.

37. New Jersey Adamant Mfg. Co. *v.* Barth, 33 Misc. (N. Y.) 784, 67 N. Y. Suppl. 1078; Barnhill *v.* Phillips, 4 Coldw. (Tenn.) 1; Sabine Land, etc., Co. *v.* Perry, (Tex. Civ. App. 1899) 54 S. W. 327.

38. Goldberg *v.* Shapiro, 32 Misc. (N. Y.) 724, 66 N. Y. Suppl. 313.

39. Watson *v.* Harmon, 85 Mo. 443.

40. Morris *v.* Thomson, 1 Rich. (S. C.) 65.

TRUANT. See INFANTS, 22 Cyc. 522 note 88; SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 1123.

TRUCE. See WAR.

TRUCK ACT. In English law, the name of a statute[1] passed to abolish what is commonly called the "Truck System," under which employers were in the practice of paying wages of their work people in goods, or of requiring them to purchase goods at certain shops.[2] (See MASTER AND SERVANT, 26 Cyc. 1028.)

TRUCK WAGON. As used in an exemption statute a term held not to apply to one of those movable stores that traverse the State on wheels or runners, covered it may be with the meretricious adornments of carving and gilding, as well as paint and varnish, but rather to one of those vehicles used most commonly for farm work or heavy hauling, with horses or mules, as a "cart" is with oxen.[3]

TRUE. Conformable to fact; in accordance with the actual state of things; correct; not false, erroneous, inaccurate or the like; right, to precision; conformable to a rule or pattern; exact; accurate;[4] that which is frank and natural, rather than that which is precise and technical;[5] just;[6] honest, sincere, not fraudulent.[7]

1. St. 1 & 2 Wm. IV, c. 37.

2. Black L. Dict. [*quoted* in State *v.* Peel Splint Coal Co., 36 W. Va. 802, 832, 15 S. E. 1000, 17 L. R. A. 385]. See Archer *v.* James, 2 B. & S. 61, 66, 8 Jur. N. S. 166, 31 L. J. Q. B. 153, 6 L. T. Rep. N. S. 167, 10 Wkly. Rep. 489, 110 E. C. L. 61; Wilson *v.* Cookson, 13 C. B. N. S. 496, 503, 9 Jur. N. S. 177, 32 L. J. M. C. 177, 8 L. T. Rep. N. S. 53, 11 Wkly. Rep. 426, 106 E. C. L. 496; Athersmith *v.* Drury, 1 E. & E. 46, 5 Jur. N. S. 433, 28 L. J. M. C. 5, 7 Wkly. Rep. 14, 102 E. C. L. 46.

Truck amendment act see Lamb *v.* Great Northern R. Co., [1891] 2 Q. B. 281, 282, 56 J. P. 22, 60 L. J. Q. B. 489, 65 L. T. Rep. N. S. 225, 39 Wkly. Rep. 475; 50 & 51 Vict. c. 46, § 6.

3. Smith *v.* Chase, 71 Me. 164, 166.

4. Webster Dict. [*quoted* in Johnson *v.* Des Moines L. Ins. Co., 105 Iowa 273, 276, 75 N. W. 101].

"**In one sense,** that only is true which is conformable to the actual state of things. In that sense, a statement is untrue which does not express things exactly as they are." Moulor *v.* American L. Ins. Co., 111 U. S. 335, 345, 4 S. Ct. 466, 28 L. ed. 447 [*quoted* in Globe Mut. L. Ins. Assoc. *v.* Wagner, 188 Ill. 133, 138, 58 N. E. 970, 80 Am. St. Rep. 169, 52 L. R. A. 649; Weil *v.* New York L. Ins. Co., 47 La. Ann. 1405, 1416, 17 So. 853; Ames *v.* Manhattan L. Ins. Co., 40 N. Y. App. Div. 465, 471, 58 N. Y. Suppl. 244; Logan *v.* Provident Sav. L. Assur. Soc., 57 W. Va. 384, 393, 50 S. E. 529].

5. Smith *v.* Weaver, 75 N. J. L. 31, 34, 66 Atl. 941, where such is said to be the meaning of the term as used in a statute providing that an affidavit for confession of judgment shall state the true consideration of the bond.

6. Landauer *v.* Conklin, 3 S. D. 462, 472, 54 N. W. 322; Fairhaven Land Co. *v.* Jordan, 5 Wash. 729, 735, 32 Pac. 729.

7. Metropolitan L. Ins. Co. *v.* Moravec, 116 Ill. App. 271, 276; Moulor *v.* American L. Ins. Co., 111 U. S. 335, 345, 4 S. Ct. 466, 28 L. ed. 447 [*quoted* in Globe Mut. L. Ins. Assoc. *v.* Wagner, 188 Ill. 133, 138, 58 N. E. 970, 80 Am. St. Rep. 169, 52 L. R. A. 649; Weil *v.* New York L. Ins. Co., 47 La. Ann. 1405, 1416, 17 So. 853; Ames *v.* Manhattan L. Ins. Co., 40 N. Y. App. Div. 465, 471, 58 N. Y. Suppl. 244; Logan *v.* Provident Sav. L. Assur. Soc., 57 W. Va. 384, 393, 50 S. E. 529].

"**A true account of the sum due**" see Cushing *v.* Ayer, 25 Me. 383, 388.

"**True and complete**" see Collier *v.* Collier, 150 Ind. 276, 278, 49 N. E. 1063; Bailey *v.* Martin, 119 Ind. 103, 108, 21 N. E. 346; Walker *v.* Hill, 111 Ind. 223, 225, 12 N. E. 387; Anderson *v.* Ackerman, 88 Ind. 481, 490.

"**True and correct transcript**" see Butler *v.* Owen, 7 Ark. 369, 372.

"**True and just**" as synonymous with "correct" see New Boston Presb. Church *v.* Emerson, 66 Ill. 269, 271.

"**True and punctual payment**" see Norris *v.* Beaty, 6 W. Va. 477, 480.

"**True bill**" see INDICTMENTS AND INFORMATIONS, 22 Cyc. 254.

"**True copy**" see Johnson *v.* Des Moines L. Ins. Co., 105 Iowa 273, 276, 75 N. W. 101; Central Nat. Bank *v.* Brecheisen, 65 Kan. 807, 810, 70 Pac. 895; Com. *v.* Quigley, 170 Mass. 14, 15, 48 N. E. 782; Edmiston *v.* Schwartz, 13 Serg. & R. (Pa.) 135.

"**True line**" see Lillis *v.* Urrutia, 9 Cal. App. 557, 561, 99 Pac. 992.

"**True owner**" see *In re* Sarl, [1892] 2 Q. B. 591, 592, 67 L. T. Rep. N. S. 597, 9 Morr. Bankr. Cas. 263 (Bills of Sale Act); *In re* Mills, [1895] 2 Ch. 564, 569, 64 L. J. Ch. 708, 73 L. T. Rep. N. S. 229, 2 Manson 479, 12 Reports 568, 44 Wkly. Rep. 21 (Bankruptcy Act); *Re* Crouch, 83 L. T. Rep. N. S. 746, 747.

"**True question of fact to be tried**" see Crisman *v.* McMurray, 107 Tenn. 469, 471, 64 S. W. 711.

"**True sun time**" distinguished from "standard time" see *Ex p.* Parker, 35 Tex. Cr. 12, 15, 29 S. W. 480, 790.

"**True titles**" see Coal Creek Consol. Coal Co. *v.* East Tennessee Iron, etc., Co., 105 Tenn. 563, 578, 59 S. W. 634.

"**True value**" see CUSTOMS DUTIES, 12 Cyc. 1141 note 42; TAXATION, 37 Cyc. 1009; State *v.* Pierce, 52 Kan. 521, 526, 35 Pac. 19; U. S.

TRUE BILL. See INDICTMENTS AND INFORMATIONS, 22 Cyc. 254.

TRUE VERDICT. The voluntary conclusion of the jury after deliberate consideration.[8]

TRUNK. A receptacle with stiff sides and a hinged cover or upper part, used especially for carrying clothes, toilet articles, etc., for a journey.[9]

TRUNK RAILWAY. A commercial railway, whose main line, whether operated by steam, electricity, or any other motive power, connects towns, cities, counties, or other points within the state or in different states, and which railroad company, under its charter, or under the general law, has the legal capacity of constructing, purchasing, and operating branch lines or feeders connecting with its main stem or trunk, the main or trunk line bearing the same relation to its branches that the trunk of a tree bears to its branches, or the main stream of a river bears to its tributaries.[10]

TRUSSED ROOFS. Roofs packed or bound closely.[11]

TRUSS PLATE. A piece of flat metal, with two holes to secure the ends of the so-called truss rod.[12]

TRUSS ROD. An elongated U-bolt, made to conform to the parts of the car around which it is looped or bolted.[13]

TRUSS SEAT. A hook projecting from a plate of which the hook is a part.[14]

TRUST. A contract, combination, confederation, or understanding, express or implied, between two or more persons to control the price of a commodity or service, for the benefit of the parties thereto, and to the injury of the public, and which tends to create a monopoly;[15] a species of combination organized by individuals or corporations for the purpose of monopolizing the manufacture of or traffic in various articles and commodities, which was well known and fully understood when the anti-trust act was approved;[16] in mercantile law, an organization of persons or corporations, formed mainly for the purpose of regulating the supply

v. Tappan, 11 Wheat. (U. S.) 419, 420, 6 L. ed. 509.

"**True verdict**" see *post*, this page.

"**True vote**" see State *v.* McLin, 16 Fla. 17, 45.

"**Truly**" **distinguished from** "**fairly**" see FAIRLY, 19 Cyc. 310 note 43.

8. Southern R. Co. *v.* Williams, 113 Ala. 620, 625, 21 So. 328, where it is said: "And it is none the less a true verdict, because the respective jurors may have been liberal in concessions to each other, if conscientiously and freely made. A verdict is not a true verdict, the result of any arbitrary rule, or order, whether imposed by themselves or by the court, or officer in charge. If a jury should agree in advance that their verdict should be the result of quotient of a division by twelve of the sum total of all the jurors' separate assessment, a verdict brought about by such an agreement, ought to be set aside."

9. Century Dict.

The specification "**trunk**" is equivalent to mention of its contents, under the customs act providing that if a passenger's baggage contains any dutiable article it shall be mentioned. U. S. *v.* One Trunk, 171 Fed. 772, 774.

"**Chest**" **distinguished** see Potter *v.* State, 39 Tex. 388, 389.

10. Diebold *v.* Kentucky Traction Co., 117 Ky. 146, 158, 77 S. W. 674, 25 Ky. L. Rep. 1275, 111 Am. St. Rep. 230, 63 L. R. A. 637.

11. Diamond State Iron Co. *v.* Giles, 7 Houst. (Del.) 556, 568, 11 Atl. 189, where it is said: "They are necessarily very heavy roofs; and although they are sometimes said to be self-supporting, this is said only in respect to their being packed or bound closely but not otherwise; for their weight when supported either by walls or pilasters is uncommonly heavy in comparison to the weight of other kinds of roofs."

12. Thomas *v.* St. Louis, etc., R. Co., 149 Fed. 753, 755, 79 C. C. A. 89.

13. Thomas *v.* St. Louis, etc., R. Co., 149 Fed. 753, 755, 79 C. C. A. 89.

14. Thomas *v.* St. Louis, etc., R. Co., 149 Fed. 753, 755, 79 C. C. A. 89, where it is said to be familiar to every one who suspends his hammock on his porch, and has been in use from time immemorial.

15. State *v.* Firemen's Fund Ins. Co., 152 Mo. 1, 43, 52 S. W. 595, 45 L. R. A. 363.

"**In the olden times such practices were called contracts in restraint of trade.**—Now-a-days they are called trusts. There is no difference in the principle. There is a difference in the extent and methods. Those the courts condemned long ago were as mere saplings compared to the mammoth oaks, when considered alongside of those of to-day." State *v.* Firemen's Fund Ins. Co., 152 Mo. 1, 44, 52 S. W. 595, 45 L. R. A. 363.

A contract providing that the purchaser shall handle only beer named in the contract, and that the manufacturer shall sell to no other dealer in the town or vicinity, creates a "trust" within the meaning of a statute prohibiting trusts and conspiracies against trade. Fuqua *v.* Pabst Brewing Co., 90 Tex. 298, 301, 38 S. W. 29, 750, 35 L. R. A. 241.

16. U. S. *v.* Northern Securities Co., 120 Fed. 721, 724.

and price of commodities, etc.[17] (Trust: As an Estate, see TRUSTS. As a Monopoly, see MONOPOLIES, 27 Cyc. 901.)

TRUST COMPANY. As defined by statute,[18] any domestic corporation formed for the purpose of taking, accepting, and executing such trusts as may be lawfully committed to it and acting as trustee in the cases prescribed by law, and receiving deposits of moneys and other personal property, and issuing its obligations therefor, and of loaning money on real or personal securities.[19] (Trust Company: In General, see BANKS AND BANKING, 5 Cyc. 612. As Guardian of — Incompetent, see INSANE PERSONS, 22 Cyc. 1140 note 96; Infant, see GUARDIAN AND WARD, 21 Cyc. 37. Taxation of, see TAXATION, 37 Cyc. 825.)

TRUST DEED. See CHATTEL MORTGAGES, 6 Cyc. 996; MORTGAGES, 27 Cyc. 966; RAILROADS, 33 Cyc. 483; TRUSTS.

TRUSTEE. In the widest meaning of the term, a person in whom some estate, interest, or power in or affecting property of any description is vested for the benefit of another.[20] (Trustee: In General, see TRUSTS. Act Granting Right to Accounting From as Impairing Vested Right, see CONSTITUTIONAL LAW, 8 Cyc. 896. Action on Case Against For Wrongful Conveyance of Property, see CASE, ACTION ON, 6 Cyc. 689 note 22. Admissions by, see EVIDENCE, 16 Cyc. 984, 1036. Agreements by as Fraudulent, see CONTRACTS, 9 Cyc. 470.

The term is not employed in a technical legal sense, in the title of "An act to define trusts, and to provide for penalties," etc. "By very recent commercial usage this meaning of the word has been extended so as to comprehend combinations of corporations or capitalists for the purpose of controlling the price of articles of prime necessity, or the charges of transportation for the public." Queen Ins. Co. *v.* State, 86 Tex. 250, 266, 24 S. W. 397, 22 L. R. A. 483.

A trust may or may not be endowed with corporate powers; if not, then it is a mere aggregation of individuals or partnerships. State *v.* Haun, 61 Kan. 146, 152, 59 Pac. 340, 47 L. R. A. 369.

17. Black L. Dict. [*quoted* in Mollyneaux *v.* Wittenberg, 39 Nebr. 547, 557, 58 N. W. 205].

"In order to constitute a trust within the meaning of the statute [making contracts void where a combination of capital, skill or acts is formed to create or carry out restrictions in trade or to prevent competition in the sale or purchase of commodities] there must be a 'combination of capital, skill, or acts by two or more.' 'Combination' as here used means union or association. If there be no union or association by two or more of their 'capital, skill or acts' there can be no 'combination' and hence no 'trust.' When we consider the purposes for which the 'combination' must be formed to come within the statute, the essential meaning of the word 'combination,' and the fact that a punishment is prescribed for each day that the trust continues in existence, we are led to the conclusion that the union or association of 'capital, skill or acts' denounced is where the parties in the particular case designed the united co-operation of such agencies, which might have been otherwise independent and competing, for the accomplishment of one or more of such purposes." Gates *v.* Hooper, 90 Tex. 563, 565, 39 S. W. 1079 [*quoted* in State *v.* Continental Tobacco Co., 177 Mo. 1, 36, 75 S. W. 737].

18. N. Y. Laws (1892), c. 689, § 2.

19. Venner *v.* Farmers' L. & T. Co., 54 N. Y. App. Div. 271, 273, 66 N. Y. Suppl. 773.

Functions.— "A trust company accepts and executes all trusts of every description committed to it by any person or corporation, or any courts of record, receives the title to real or personal estate on trusts created in accordance with the laws of the state and executes such trusts, acts as agent for corporations in reference to the issuing, registering and transferring certificates of stock and bonds and other evidence of debt, accepts and executes trusts for married women in respect to their separate property, and acts as guardian for the estates of infants." Jenkins *v.* Neff, 163 N. Y. 320, 330, 57 N. E. 408.

In any proper sense they are not banking institutions. Mercantile Nat. Bank *v.* New York, 121 U. S. 138, 159, 7 S. Ct. 826, 30 L. ed. 895.

20. Hill Trustees [*quoted* in Haggerty *v.* Badkin, 72 N. J. Eq. 473, 477, 66 Atl. 420; Jones *v.* Byrne, 149 Fed. 457, 463].

"The word . . . is one of significance. It is constantly made use of, not only in legal phraseology, but in common speech, to indicate that one holds the title to property, not in his own absolute right, but for the benefit of some other party or parties." Welles *v.* Larrabee, 36 Fed. 866, 870, 2 L. R. A. 471.

It is often used loosely in application to persons not coming within the strict legal meaning of the term. Burchinell *v.* Koon, 8 Colo. App. 463, 46 Pac. 932, 933 [*citing* Knox *v.* Gye, L. R. 5 H. L. 656, 675, 42 L. J. Ch. 234].

Construed as including the board of directors of a corporation see People *v.* Turnbull, 93 Cal. 630, 631, 29 Pac. 224.

In a general broad sense the term includes assignees, guardians, and receivers. McNeill *v.* Hagerty, 51 Ohio St. 255, 266, 37 N. E. 526, 23 L. R. A. 628; Cross *v.* Brown, 19 R. I. 220, 248, 33 Atl. 147.

"Trustees of the poor" see Taylor *v.* New Castle County Trustees of Poor, 1 Pennew. (Del.) 247, 248, 40 Atl. 116.

Appointment to Wind Up Corporation, see CORPORATIONS, 10 Cyc. 1272. As Defendant in Creditors' Suit, see CREDITORS' SUITS, 12 Cyc. 38. As Payee of Negotiable Instrument, see COMMERCIAL PAPER, 7 Cyc. 563. As Plaintiff in Action on Negotiable Instrument, see COMMERCIAL PAPER, 8 Cyc. 82. Authority to Subject Property to Mechanics' Lien, see MECHANICS' LIENS, 27 Cyc. 54. Chargeability in Equity of Creditors as, Unlawfully Preferred, in Assignment, by Corporation, see CORPORATIONS, 10 Cyc. 1264. Composition Through, see COMPOSITIONS WITH CREDITORS, 8 Cyc. 484. Constitutionality of Act—Appointing and Removing, see CONSTITUTIONAL LAW, 8 Cyc. 812; Authorizing Sale of Property by, see CONSTITUTIONAL LAW, 8 Cyc. 817; Validating Acts of, see CONSTITUTIONAL LAW, 8 Cyc. 1023. Debt of as Supporting Lien of Corporation on Its Shares, see CORPORATIONS, 10 Cyc. 583. Director Purchasing Corporate Property as, see CORPORATIONS, 10 Cyc. 815. Embezzlement by, see EMBEZZLEMENT, 15 Cyc. 501. Equitable Aid to, see EQUITY, 16 Cyc. 101. For Benefit of Creditors, Assent of as Affecting Validity of Assignment For Benefit of Creditors by Corporation, see CORPORATIONS, 10 Cyc. 1242. For Shareholders, Corporation as, see CORPORATIONS, 10 Cyc. 376. In Bankruptcy — In General, see BANKRUPTCY, 5 Cyc. 334; As Person Entitled to Copyright, see COPYRIGHT, 9 Cyc. 916; Right of Action For Negligence of Directors of Corporation, see CORPORATIONS, 10 Cyc. 837; Right to Impeach Void Corporate Mortgage, see CORPORATIONS, 10 Cyc. 1197. In Insolvency, see INSOLVENCY, 22 Cyc. 1277. Insurable Interest, see FIRE INSURANCE, 19 Cyc. 588 note 39; MARINE INSURANCE, 26 Cyc. 560. In Trust Deed, see MORTGAGES, 27 Cyc. 1046. Joint Dismissal or Discontinuance of Action as to, see DISMISSAL AND NONSUIT, 14 Cyc. 414. Liability of Bank For Wrongful Transfer of Stock by, see BANKS AND BANKING, 5 Cyc. 439. Limitation of Liability For Collision by Transfer of Interest in Vessel to For Benefit of Claimants, see COLLISION, 7 Cyc. 386. Of Charitable Trust, see CHARITIES, 6 Cyc. 931. Of College or University, Suit Against in Corporate Title, see COLLEGES AND UNIVERSITIES, 7 Cyc. 291 note 46. Of Corporation — In General, see CORPORATIONS, 10 Cyc. 318; Ratification of Corporate Acts by, see CORPORATIONS, 10 Cyc. 1072; Validity of Deeds Signed by, see CORPORATIONS, 10 Cyc. 1015. Of Town or Township, see TOWNS, 38 Cyc. 618. Of Town Site, see PUBLIC LANDS, 32 Cyc. 851. Payment of Negotiable Instrument to, see COMMERCIAL PAPER, 7 Cyc. 1034. Personal Liability to Creditors of Corporation, see CORPORATIONS, 10 Cyc. 697. Power of Corporation to Act as, see CORPORATIONS, 10 Cyc. 1140. Punishment For Contempt, see CONTEMPT, 9 Cyc. 10 note 28. Recovery of Secret Preference by in Composition Agreement, see COMPOSITIONS WITH CREDITORS, 8 Cyc. 474. Revival of Action Brought by, see ABATEMENT AND REVIVAL, 1 Cyc. 93. Rights of as Vested Rights, see CONSTITUTIONAL LAW, 8 Cyc. 914. Right to — Foreclose Mortgage, see MORTGAGES, 27 Cyc. 1546; Maintain Detinue, see DETINUE, 14 Cyc. 246; Vote at Corporate Meeting, see CORPORATIONS, 10 Cyc. 334. Transfer of Corporate Shares by, see CORPORATIONS, 10 Cyc. 623. Undue Influence Affecting, see CONTRACTS, 9 Cyc. 457.)

TRUSTEE COMPANY. A company incorporated by statute and authorized by its special act to undertake the duties of executors, administrators, and trustees for pecuniary reward.[21] (See TRUST COMPANY, *ante*.)

TRUSTEE PROCESS. See GARNISHMENT, 20 Cyc. 978.

TRUST EXECUTED. A trust in which the party is given complete directions for settling his estate, with perfect limitations.[22] (See TRUSTS.)

TRUST EX MALEFICIO. See TRUSTS.

TRUST FUND DOCTRINE. See CORPORATIONS, 10 Cyc. 653.

TRUSTOR. The person whose confidence creates a trust.[23]

21. Perpetual Executors, etc., Assoc. *v.* Swan, [1898] A. C. 763, 764, 67 L. J. P. C. 141, 79 L. T. Rep. N. S. 148, 14 T. L. R. 557.

22. Morris *v.* Linton, 74 Nebr. 411, 416, 104 N. W. 927.

23. Colton *v.* Stanford, 82 Cal. 351, 374, 23 Pac. 16, 16 Am. St. Rep. 137.

Applied to a person giving a trust deed see Stephens *v.* Clay, 17 Colo. 489, 491, 30 Pac. 43, 31 Am. St. Rep. 328.